

MEMORANDUM FOR RESPONDENT



UNIVERSITY OF SCIENCE & CULTURE

ON BEHALF OF:

Wright Ltd.
232 Garrincha Street
Oceanside
Equatoriana

-CLAIMANT-

AGAINST:

SantosD KG.
77 Avenida O Rei
Cafucopa
Mediterraneo

-RESPONDENT-

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TABLE OF ABBREVIATIONS

art.	Article(s)
CAM-CCBC	the Center for Arbitration and Mediation of the Chamber of Commerce Brazil Canada
CISG	United Nations Convention on Contracts for the International Sale of Goods
Corp	Corporation
Co	Company
COO	Chief Operating Officer
CL Ex	Claimant's Exhibit
CL memo	Royal University for Women's Claimant Memorandum
DSA	Development and Sales Agreement
Ed	Publisher
ed	Editor
GMP	Guarantied Maximum Price
Govt.	Government
infra.	Below
ML	Money Laundering
Mr.	Mister
Mrs.	Mistress



Ms.	Miss
no.	Number(s)
p.	Page(s)
par.	Paragraph(s)
PO. no. 1	Procedural Order Number 1
PO. no. 2	Procedural Order Number 2
RE Ex	Respondent's Exhibit
Sec.	Section
SOC	Notice of Arbitration/Statement of Claim of Claimant, filed on 31 May 2016
SOD	Response to the Notice of Arbitration and Statement of Defense of Respondent, filed on 24 Jun 2016
supra	Above
ToR	Terms of References
UML	UNCITRAL Model Law
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	US Dollar
v.	against (versus)
i.e.	that is (id est)



e.g.

for example (exempli gratia)



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STATEMENT OF FACTS

- 1 Both Wright Ltd (hereinafter **Claimant**) and SantosD KG (hereinafter **Respondent**) were subsidiaries of Engineering International SA until 2010.
- 2 It is in favor of Respondent that there had been considerable coverage in the Equatorianian press that the govt. was implementing extensive legislation based on the UML on International Commercial Arbitration. Definitely, Claimant could not have been unaware of such provision. [PO2, p. 55, par. 7]
- 3 Claimant was aware from money laundering provisions in mid **Jun 2010**. [PO2, p. 55, par. 8]
- 4 When Respondent was drafting the Terms of Reference, it had no knowledge about the Claimant's financial details on production of TRF-350. [PO no. 2, no. 27]
- 5 Claimant's financial statement has not been established before preparing the Request for security for costs. [PO2, p. 58, par. 28]
- 6 Respondent's payment on **15 Jan 2015**, was used primarily to pay back short term bank loans which had become due and to pay for the development of the TRF-350. [PO2, p.59, par. 28]
- 7 Respondent has fulfilled all payments obligations under the contracts. [SoF, Re no.2]
- 8 In **Jan 2010**, Earhart SP, sent a notice to Respondent about its plan to initiate the new signature line 100 executive jet and was looking for quotes for the engine for the jet.
- 9 In spring 2010, when both parties were still subsidiaries of one parent company, they discussed on the joint development project of a new fan blade, which has been on the basis of Claimant's newest model TRF 192, provided that the new fan blade was to be included into Respondent's new jet engine to be developed for the Earhart jet. [SOD, par. 7]
- 10 On **1 May 2010**, the parties agreed on the basic principles considering that they had two earlier cooperation.
- 11 In **Sep 2010**, regarding to Earhart SP's requirement for signing the contract for the engine, during their negotiation, the parties agree on a price range with different costs and profit elements and a maximum price which could be used as the basis for Respondent's calculation of its offer to Earhart. [RE Ex, no. 5]
- 12 In the previous parties' cooperation, as they belonged to the same group of companies, they never stipulated the exchange rate explicitly and in the end, the exchange rate at the time of contracting had been used.



- 13 Fixed exchange rate for reducing the currency risk in existing contracts had been mentioned in the discussions of **Nov 2009** due to respondent should be “de-risked” and it was obvious for Respondent that for the oncoming contracts, it should apply it at the time of conclusion of the contract. [RE Ex, no. 1]
- 14 Respondent had been sold to SpeedRun on **3 Aug 2010**. [PO no. 2, no. 1]
- 15 On **26 Oct 2010**, when Respondent stated that the fixed exchange rate regulated in the addendum governing to the whole contract [RE Ex, no. 2], Claimant did not raise any objections to such provision. [RE Ex, no. 4]
- 16 Despite the parties’ agreement for initiating the arbitral proceeding within sixty days after that they cannot amicably settle their disputes [RE Ex, no. 3], Claimant complied its documents on **7 Jun 2016** while the time limit for initiating the arbitral proceeding had expired. [SoF, Re, no. 11-14]
- 17 Claimants’ production costs amount to EQD 19,586 per fan blade; based on the fixed exchange rate that each USD 1 is equal to EQD 2.01, the final price with adding the agreed profit was USD 9,744.28 per fan blade. Respondent had to pay the USD 20,438,560 for the fan blades to Claimant’s bank account.
- 18 In respect of ML regulation, there is no comparable rule in Mediterraneo or any other country known to Respondent. Following the enquiries, revealed that on at least two previous occasions where payments had been made to Claimant, the levy has been charged by the central Bank.
- 19 The parties signed Terms of reference on **22 Aug 2016**.
- 20 On **6 Sep 2016**, Respondent submitted the request for security for its costs.
- 21 In **Jan 2016**, claimant has been ordered by another tribunal acting under the CAM-CCBC Rules to pay to one of its suppliers USD 2,500,000; Claimant has neither challenged the award nor has it complied with it. [RE Ex, no. 6]
- 22 In the Development and Sales Agreement, Claimant suggested to include the bank charges provision. [PO no. 2, no. 6]
- 23 On **10 Feb 2010**, Claimant, who was not aware of the levy, enquired from Central Bank to be informed why the full amount had not been credited. [PO no.2, no. 11]
- 24 On **1 Aug 2010**, the time of conclusion of the contract, the exchange rate was EQD 2.00 per USD 1. At the time of delivery the goods, the exchange rate was per USD 1 was equal to EQD 1.79 [PO no.2, no. 12]



SUMMARY OF ARGUMENTS

ISSUE I: Tribunal's jurisdiction on issue security for costs in the world is broad. Also, based on art. 17 UML as *lex arbitri* and art. 8 CAM-CCBC Rules as the applicable arbitral rule, disqualification from Tribunal on granting for provisional measure requires that parties explicitly announced this disqualification in their arbitration clause or in Terms of Reference. Also, in case of parties' negligence, the Tribunal's decision should protect interests of the parties, and Claimant itself confirmed the jurisdiction of Tribunal in granting interim measure. Additionally, as the popular international arbitral practice in the world, tribunals usually order such provisional measure. Consider to provisions of UML and CAM-CCBC Rules, if the parties wanted to disqualify Tribunal, they should agree and announced expressly in the arbitration clause or Terms of Reference.

In respect of necessary conditions for granting security for costs, according to art. 17A UML and art. 8(2) CAM-CCBC Rules including irreparable harm, urgency matter and reasonable prospect of success on the merits and in confirmation of such conditions with Claimant's financial difficulties, ordering security for costs are necessary. Further, regarding to specific requirements for grant security for costs based on International Arbitration Practice Guideline, these conditions are existence which include existence of serious risk that Claimant will not enforce the final award, consider to its precedent financial judicial, further, insolvency, insufficiency or unavailability of assets have been considered situations where security for costs should be ordered.

ISSUE II: The request for arbitration submitted on 31 May 2016, did not comply with the requirements of the CAM-CCBC Rules for commencement of arbitration and the other argument as Claimant tries to give an accurate analysis of the provisions of the art. 4.1 and 4.2 CAM-CCBC Rules in a great detail. But it brings no ground for establishing the allegation that it did comply with the mentioned provisions, except for attaching the proof of payment of the registration fee to its notice to the CAM-CCBC Failure to pay the full registration fee and Mr. Fasttrack's lack of power of attorney invalidates Claimant's request for arbitration and also the power of attorney granted by the Claimant's parent company could not provide for adequate representation on behalf of Claimant according to art. 4.1(b). For forth argument Claimant failed to pay the registration fee fully means Claimant failed to complete registration to the CAM-CCBC. On 31



May 2016 Claimant emphasizes as the date it initiated the arbitration. But the request for arbitration became amended and valid on 07 June 2016, when the claims were belated that means Claimant failed to validly initiate the arbitration within the agreed time limit and its claims are not admissible. Claimant shall prove that negotiation is failed on a particular date, as it serves as Claimant to this arbitration according to sec. 21 of the parties' development and sale agreement, each party has the right to initiate to arbitration only after the failure of the negotiations. If the negotiations have not been failed yet, Claimant did not have the right to initiate the arbitration in accordance with sec. 21 of the Development and Sales Agreement. Its claims would not be admissible, because Claimant did not have the right to initiate the arbitration while the negotiations have not been definitely failed yet.

ISSUE III: The exchange rate fixed for the whole contract and accepted by both parties.

Exchange rate was an omitted term in contract and it was necessary for the parties to supply it in their contract. The parties modified the contract and applied a fixed exchange rate to the whole contract by signing the addendum. Calculation of the price has been done correctly and Respondent performed its obligation of paying the price. Respondent treated responsibly in all matters. It relied on the concluded contract that indicates its payment obligation. Since Claimant revealed its major changes, Respondent was not aware of the local money laundering regulation. In addition, Claimant did not obey the cooperation principle that is common in international trade. Therefore, Claimant must undergo the extra ordinary bank charges that is domestic regulation with national aims



I. TRIBUNAL HAS JURISDICTION TO ORDER SECURITY FOR RESPONDENT'S COSTS AND SHOULD DO SO

1 In 6 Sep 2016 Respondent requested the Tribunal to order Claimant to provide security for costs, in accordance with wide tribunal's jurisdiction in granting such order in the world and existence of necessary conditions in the present case.

A. Tribunal Has the Power to Order Security for Costs.

2 Tribunal has the power to order security for cost in this case. Regarding to parties' autonomy principle, the parties never agreed that tribunal did not have the power to grant interim measure, expressly **(1)**. In both CAM-CCBC Rules as an applicable rule and UML as the *lex arbitri*, Tribunal have the power for granting interim measure **(2)**. As the international practice, having such jurisdiction to order provisional measure has been accepted **(3)**.

1. Regarding to parties' autonomy principle, the parties never disqualified Tribunal form granting interim measures

3 As stated at the first sentences in art. 8(1) CAM-CCBC Rules, "Unless the parties have otherwise agreed" and art. 17 UML, "Unless otherwise agreed [...]" show us that the tribunal has the power to grant interim measure in current procedures unless the parties expressly agree contrary to this procedure. In the case in hand, the parties never disqualified the Tribunal neither in the arbitration clause nor in Terms of References. So, when the parties wanted to disqualified Tribunal, they should agree expressly in their arbitration clause or in Terms of Reference and if they forget to state this term, Tribunal's decision should not be harmed to them **(a)**, CAM-CCBC Rules as an applicable arbitral rule, explicitly provide that unless otherwise agreed, Tribunal has power to grant such order **(b)**, According to choice of the seat of arbitration, the parties impliedly empowering Tribunal in respect of issue this order **(c)**, Claimant itself, confirm in its memorandum, that Tribunal has jurisdiction **(d)**.

a. Tribunal should not decide to the detriment of the parties in case of their negligence

4 Also the parties have failed to specify the Tribunal's jurisdiction for granting interim measure, but Tribunal's decision should not harm to the parties in any circumstances. This action shows us the parties' negligence in their arbitration clause and Terms of Reference [*Gu, p. 171*]. Therefore, in this situation, Tribunal should decide in the interest of the both the parties. [*Bank Mellat V. Helliniki Techniki S.A.*] In the present case as regards the parties did not



specify the CAM-CCBC, Tribunal's jurisdiction in Terms of Reference or arbitration clause but the arbitrator should grant security for Respondent's cost due to protect its right.

b. Choosing of CAM-CCBC Rules, impliedly empower Tribunal to grant such order

5 The parties chose the CAM-CCBC Rules as an applicable arbitral rule on their dispute. There is not any specific provision for granting security for costs in it. In art. 8(1) CAM-CCBC Rules Tribunal has the jurisdiction to grant provisional measure. Although the CAM-CCBC Rules provide the jurisdiction for granting anticipatory and injunctive; but, **by even greater force of logic** this article consists of the security for costs. Accordingly, in their agreement the parties must have known this rule in the CAM-CCBC Rules and if they wanted to disqualify the Tribunal, they should agree and announced expressly in the arbitration clause or Terms of Reference. [*Straube/Finkelstein, p. 144; see also: Guideline, par. 3(d)*]

c. According to choice of seat of arbitration, the parties impliedly empowering Tribunal in respect of this order

6 As the parties' agreement [*CL Ex no. 2, sec. 21; ToR, par. 6.2*], they chose Vindobona as the seat of arbitration, Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. [*PO. no. 1, par. 4*]. As Respondent states in gap of explicitly agreement and gap in the CAM-CCBC Rules, UML empower the Tribunal to grant interim measure.

d. Claimant itself confirmed the jurisdiction of Tribunal in granting interim measure

7 As Claimant stated in its memorandum, it asked Tribunal to grant security for its costs by virtue of art. 17E UML [*CL memo, par. 18*], this proves that Claimant recognized the jurisdiction of Tribunal in granting security for costs. Accordingly, this stated shows the intention of Claimant and its agreement to empowering Tribunal to granting security for costs.

8 Claimant states that the parties never agree on granting interim measure [*CL memo, par. 9*]; thus, as we discussed above [*see supra, par. 3*] their disagreement for specifying the express Tribunal's jurisdiction is a negligence; and the other actions of the parties in this case display that the parties impliedly agree on the power of Tribunal to order interim measures.

9 Although the parties have the negligence but Tribunal should exercise reasonable care to protect Respondent's right. [*Asian Agricultural Products*]
Accordingly, in this case arbitrator has act in "principle of equity".



2. In both UML and CAM-CCBC Rules, Tribunal have the power for granting interim measure

10 regarding to art. 17, 17A and 17E **(b)**, and infer from art. 8 CAM-CCBC Rules, in the absence of agreement between the parties, Tribunal should order interim measure at the request of the party.

(c)

a. Tribunal can decide on its jurisdiction regarding to art. 16 UML

11 In the gap of explicitly agreement of the parties, Tribunal can decide on its jurisdiction regarding to art. 16 UML. [*teleMates*] In the present case, the arbitrator decides on disagreement between the parties on gap of their arbitration agreement regarding to art. 16 UML that stated: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. [...]”

12 Accordingly, in this dispute, in the gap of arbitration agreement including arbitration clause and Terms of Reference, Tribunal has the power to decide on its jurisdiction and given that the international practice and the principle of equity, Tribunal should recognize its jurisdiction to order for security for Respondent’s costs.

13 Signing the Terms of Reference does not prove that the scope of Tribunal decision is limited on the provisional matter [*Louis Dreyfus*]. In this case Tribunal decided on its jurisdiction in the absence of agreement between the parties and in the other case [*China Ocean*] arbitral tribunal did not emphasize on the parties’ argument on delay of posing the claim.

b. Art. 17, 17A and 17E UML expressly empower Tribunal to order interim measure.

14 In art. 17 UML and art. 17 sec. 1 UML, Tribunal should grant interim measure at the request of the party. And the requirement of this article, and art. 17A UML are available. So Tribunal should grant security for cost regarding to this articles.

c. Art. 8 CAM-CCBC Rules, empower Tribunal to granting interim measure.

15 Regard art. 8 CAM-CCBC Rules, arbitrators should grant interim measure when they faced with a request for urgent matter [*Straube/Finkelstein, p. 143*]. As we argued in the following, Respondent is in the urgent matter, so this request should be done. In the commentary of CAM-CCBC Rules, author acknowledges that Tribunal should not grant interim measure, when this action causes a negative effect in the arbitration process [*Straube/Finkelstein, p. 147*]. Like the provision forecasted in art. 17A(1)(a) UML, which we argued about this matter. And granting interim measure must



be in the condition that the parties never agree otherwise. So as we discussed above, the parties never agree unlike the article.

3. As the international practice, having such jurisdiction on issue the provisional measure has been accepted.

- 16 Researching the various legal system in the world, show us the acceptance issue provisional relief, most of the domestic laws have accepted this jurisdiction. In a comparative study between countries and their legal systems **(a)** and we found out that: granting interim measure never means prejudice on the merit of dispute **(b)**.

a. In most legal system in the international practice, the countries empower the courts to sustain party rights.

- 17 Researching on the various legal system, show us that the national legal system mostly accepted the jurisdiction of the courts and arbitral tribunal to granting security for costs, because of protecting the party rights. Also in international arbitration which no one is a national It may be assumed that this situation, arbitration at a higher level than a national community of law. So as we argued above the most important principle in international arbitration is party autonomy, which is not paid much attention in domestic legal system because of the power of judiciary. But the various legal doctrine and legal system in the international practice, accepted these jurisdiction regard requirements we have explained [*Karrer/Desax*]

b. granting interim measure never means prejudice on the merits of the dispute.

- 18 This claim is not true that the granting interim measure causes prejudice for arbitrators and direct the dispute in favor of the ordered party. Despite the Claimant's sight, ordering security for costs may require a more nuanced balance to be struck between the efficacy of arbitration and safeguards to ensure due process. [*PT Pukunafu Indah and Others v. Newmont Indonesia Ltd. and Another*]. This was the historical rational for the hostility towards granting arbitral tribunal the power to order interim measures. [*Born (2009), p. 1949-1958*].

B. The Requirements for Granting Security for Respondent's Costs, Present

- 19 According to Respondent's request for security for costs from Tribunal, the requirements which are necessary for granting such measure especially in respect of "ordering security for costs" present. At first, regarding to art. 17A UML, its requirements are present **(1)** Second, based on art. 8(2) CAM-CCBC Rules, the important conditions which are necessary for order security for



costs, present **(2)**. Additionally, necessary prerequisites according to International Arbitration Practice Guideline, exist **(3)**.

1. Under art. 17A UML, the necessary requirements are met

20 Pursuant to UML provision, as Claimant argued, the essential requirements for granting such order are met; including irreparable harm **(a)**, urgency matter **(b)**, Reasonable prospect of success on the merits **(c)**

a. If security for costs is not ordered, Respondent's harm will remain irreparable

21 Regarding to the Claimant's financial precedents, there is a risk that if Tribunal do not order security for costs, Respondent's costs of arbitration will not be compensated and covered. As one award stated: "Harm is irreparable when it could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form" [Sino-Belgian Treaty].
22 "Tribunals frequently require that a party seeking provisional measures demonstrate that it may suffer either "irreparable" or "serious" injury, unless provisional relief is granted." [Born, Gary, 2015, p.214] Sometimes, there is no need to result of irreparable harm. Claimant used to not comply the final award which was against it. [RE Ex, no. 6] Therefore, exactly in the present case, there is no need for Respondent that prove the ultimate result of irreparable harm is occurred and merely, the capability of danger to the Respondent's rights is sufficient.

23 In response to Claimant, regard to nonexistence of risk for nonperformance of the final award which is against Claimant [CL memo, p. 8, par. 25], should be noted that due to the Claimant's financial difficulties which lead to Claimant's use of its parent company's loan that provided for the necessary liquidity for the final stages of production of the TRF-305 fan [PO no. 2, no. 29], there is a risk that if security for costs is not granted, may be Claimant's assets will not sufficient for covering and repair Respondent's costs of arbitration in situation that the final award is rendered against Claimant. Also, Claimant's practice in the precedent final awards against it, was enforced them either by appeal of the award or enforced them with delay [PO no. 2, no. 30].

24 As the tribunal in an often-cited ICSID award observed, "provisional measure is necessary where the actions of a party are capable of causing or of threatening irreparable prejudice to the rights invoked" [Tokios Tokeles v. Ukraine, p.8]. Some authorities require only a showing of "serious" or "substantial" harm, without requiring that the injury be irreparable, Art. 17A(1)(a) defined. "In reality, most decisions which state that damage must be "irreparable" do not appear to apply this formula, but instead require that there be a material risk of serious damage to the plaintiff." [Born,



2015, p. 214] Consequently, regardless of real occurrence of irreparable harm, Tribunal should grant security for Respondent's costs.

b. Claimant's financial difficulties, is an urgent matter which requires that Tribunal order security for Respondent's costs

25 The urgent matter is that, the tribunal must be persuaded that immediate (or at least prompt) action is necessary in order to prevent serious damage to the requesting party. These requirements have been formulated as follows: "The Arbitral Tribunal agrees that the criterion of urgency is satisfied when a question cannot await the outcome of the award on the merits. This is in line with ICJ practice." [*Burlington Res. Ic. v. Repub. Of Ecuador*, p. 73]

26 As one award explained, "a measure is urgent where action prejudicial to the rights of either party is likely to be taken before such decision is taken." [*Tokios Tokeles v. Ukraine*, p.8; *See also, Case Concerning Passage Through the Great Belt*] Regarding to likelihood of the risk of bankruptcy for Claimant, if Respondent pay its cost of arbitration and finally, the award is in favor of Respondent, consider to Claimant's financial situation, the action may prejudicial to Respondent's right. [*PO no. 2, no. 28*]

27 In addition, "If the Respondent defends the action, this will be expansive. Without security for costs, the costs of defending the action may be not recoverable; further, a claimant on the brink of bankruptcy my wish to sue in arbitration, and possibly, capitalize its claim against the respondent as an asset on its balance sheet to prevent having to deposit its balance sheet. There is an in-built incentive for the claimant to commence an arbitration." [*Gu*, p. 168]

28 In reply to Claimant regard to enforceable of final award since both Equatoriana and Danubia are signatories to the New York Convention [*CL memo, p. 10, par. 32-34*], consider to Claimant's financial statements which are published by itself [*PO no.2, no, 28*] it is very likely that Claimant is on the brink of bankruptcy regarding to the Claimant's financial statements, and would not be able to comply the final award, in this situation, whether they were member of New York Convention or not, does not matter; since the property for enforcement of final award will not enough.

29 The security may be, for example, a bank guarantee or a payment into an escrow account. [*Fouchard/Gaillard p. 1256*]. Hence, there is no apprehensiveness for Claimant that granting security for costs by Tribunal conflicts the principle of due process [*CL memo, p. 11, para. 36-38*]; since, even Respondent do no entitle such order, consider to escrow account method of payment,



the sum of security will remain side of escrow account until rendering the final and binding award, and if Respondent do not entitle this security, it will return to the Claimant's account [*Casting mould machine*]

30 Also, regard to the escrow account method, providing security for Respondent's costs, would not basically have a similar consequence of a binding award [*CL memo, p.11, para. 39-40*]; since as noted in preceding paragraph, the nature of escrow method is basically different from final and binding award.

c. There is reasonable prospect of success on the merits which requires Tribunal should order security for costs

31 A key factor that arbitral tribunal will take into account when allocating costs is the extent of a party's success on the merits. However, other factors may also be taken into account, such as the conduct of the parties. As regards which costs may be allowed and in what amounts, parties will generally have to show that the costs incurred were necessary and reasonable [*Redfern/Hunter, p. 8-96*].

32 A respondent might seek an order for security for costs when, for instance, a claim without merit has been raised against it by an impecunious claimant [*Fouchard/Gaillard, p. 1256*]

33 As will state, in respect of the merits, Respondent did its obligation about payment completely, and Claimant did not present good ground to justify Tribunal that Respondent did not success on the merits.

2. Based on Art. 8 CAM-CCBC Rules, the Important Conditions Which Are Necessary for Order Security for Costs, Present

34 Accordance with art.8 CAM-CCBC Rules, Tribunal can grant both injunctive and anticipatory provisional measures. Even a final injunction does not require proof that damage will certainly occur. It is enough that what is going on is calculated to infringe the Plaintiff's rights in future. [*Marks and Spencer plc v One in a million*]. Therefore, in the present case, security for costs is an injunction order that may protect Respondent's right against Claimant's action.

3. Necessary Prerequisites According to International Arbitration Practice Guideline, Exist

35 As Claimant stated that granting security for costs needs to existence of special circumstances [*CL memo, p. 8, par. 22*], these special conditions in the present case, are provided. at first, with regard to International Arbitration Practice Guideline, art. 3 states that: "Arbitrators



should consider whether there are reasonable grounds for concluding that there is a serious risk that the applicant will not be able to enforce a costs award in its favor because: i) the claimant will not have the funds to pay the costs awarded, and; ii) the claimants' assets will not be readily available for an effective enforcement against them." For balancing the parties' interests, is submitted that the Tribunal should make an order for security for costs. Therefore, Claimant's financial problems is reason to believe that it will not be able to pay for costs if its claim is unsuccessful; and even if able to pay, Claimant may be unwilling to do so.

36 Also, regardless to newspaper article which Claimant argued that upon hearsay rule, this is not admissible as an evidence for Claimant's financial difficulties [CL memo, p. 9, par. 28], upon other factual evidences such as excerpts of Claimant's financial statements and its request from third party funding to resolve its difficulties on liquidity, are admissible evidence to prove the Claimant's bad financial situation.

37 Secondly, insolvency, insufficiency or unavailability of assets have been considered situations where security for costs may be ordered. [*Pey Casado v. Chile*, par. 88; see also *RSM v. Grenada*, par. 5.25] As we see, these conditions are existence in respect of Claimant's financial situation, such as Claimants' request for providing liquidity from Wright Holding PLC and third party funder [PO no. 2, no. 29]

38 Additionally, if the arbitrators are satisfied that an order for security is justified because enforcing a costs award would be more difficult or uncertain than would normally be expected, the location of the assets of a party may be a legitimate consideration. [*Guideline art. 3, p. 9*] Considering to the existence of especial ML regulations in the Claimant's country which deducted from the sum that was paid to its account. This is a permissible consideration because it is based on the risk of unenforceability of a costs award in the foreign location of the assets.

39 "If the claimant has not paid its share of an advance on costs, this is a matter the arbitrators may take into account in granting security." [*Guideline art. 4, p. 9*]. In the present case, Claimant got loan from its parent company to initiate the arbitral proceeding [PO no. 2, no. 29].

40 When Respondent drafted the Terms of Reference, it had no knowledge about the Claimant's financial details [PO no. 2, no. 27]; accordingly, Claimant's argument on each party shall bear its fees during the proceedings [CL memo, p. 8, par. 24], is rejected; otherwise, if Respondent had knowledge the financial situation, surely, it mentioned in Terms of Reference.



- 41 Tribunal should consider to Terms of Reference in respect of responsibility related to the payment of costs of arbitration. “If parties have come to an agreement on costs, unless there is a cogent to do so, e.g., the agreement conflicts with mandatory rules of the seat of the arbitration, arbitral tribunals will usually apply the parties’ agreement.” [*Gotanda, p. 174*]
- 42 Based on this provision, in Terms of Reference, the parties agreed that : “the Arbitral award shall establish the responsibility related to the payment of administrative costs and fees,[.....] and tribunal shall also fix the amount or the proportion of refund of one party to the other .” at the end of this section , is stated that “ the Arbitrators will consider the behavior of the parties in order to reduce the amount of cost refund.” consider to this term, Respondent upon the “mitigation principle” that is mentioned in art. 17A(1)(a) UML , by request for security for costs, try to implement reduce the amount which Claimant should refund it at the end of arbitral proceeding.

CONCLUSION OF FIRST ISSUE

- 43 Despite of necessity of express agreement for disqualifying from Tribunal in this subject, there is no express disqualification on Tribunal’s jurisdiction by the parties in their arbitral clause nor in Terms of Reference. According to the broad Tribunal’s authority on granting security for Respondent’s costs, the parties impliedly empowering Tribunal by choosing of Vindonaba as the seat of arbitration which is adopted UML as an applicable arbitral law, in art.17 UML and CAM-CCBC Rules as an applicable arbitral rule, in art. 8 CAM-CCBC Rules to order security for costs. According to art. 16 UML, in case of lack of explicit agreement on such jurisdiction, Tribunal itself may rule on its jurisdiction to issue security for costs.
- 44 In accordance with Claimant’s financial difficulties and art. 17 UNCITRAL Model Law, if security for costs is not ordered, Respondent’s harm will remain irreparable and this order is urgent. Regard to art. 8 CAM-CCBC Rules, Tribunal may issue injunctive and anticipatory measure, security for costs is an injunction order that may protect Respondent’s right against Claimant’s action. In addition, according to International Arbitration Practice Guideline, there is a serious risk that Claimant will not be able to enforce a costs award which is against it because Claimant will not have the funds to pay the costs award regarding to its bad financial situation; also these financial difficulties are sufficient reasons that Claimant is on the brink of bankruptcy, and would



not be able to comply the final award. Due to escrow account method, there is no apprehensiveness for Claimant that granting security for costs by Tribunal conflicts the principle of due process. Therefore, Tribunal should order security for Respondent's costs.

II. CLAIMANT'S CLAIMS HAVE BEEN SUBMITTED OUT OF TIME

45 In response to Claimant's allegations, Respondent hereby submits that the request for arbitration submitted on 31 May 2016, did not comply with the requirements of the CAM-CCBC Rules for commencement of arbitration **(1)**.

46 The mentioned argument is supported by two sub arguments: Claimant to pay the full registration fee and Mr. Fasttrack's lack of power of attorney invalidates Claimant's request for arbitration. **(a)** And the power of attorney granted by the Claimant's parent company could not provide for adequate representation on behalf of Claimant according to art.4.1(b) **(b)**

47 As Claimant brought justifications for its incomplete payment of the registration fee, Respondent explains that failed to pay the registration fee fully means Claimant failed to complete registration to the CAM-CCBC. **(2)**

48 Claimant emphasizes that its claims have not been submitted out of time, but Respondent clarifies that the request for arbitration became amended and valid on 07 Jun 2016, when the claims were belated. **(3)**

49 Claimant has alleged that Respondent should prove that the dead line for negotiation has been finished, which is not consistent with the general principles of the arbitration and Claimant shall prove that negotiation is failed on a particular date, as it serves as Claimant to this arbitration. **(4)**

50 Finally, it is notable that if the Claimant could not prove that it did comply with the governing rules to commence the arbitration and if the negotiations have not been failed yet, Claimant did not have the right to initiate the arbitration in accordance with section 21 of the Development and Sales Agreement. **(5)**

1. The request for arbitration submitted on 31 May 2016, did not comply with the requirements of the CAM-CCBC Rules for commencement of arbitration

51 Requirements to commence an arbitration under the CAM-CCBC Rules are set forth in art. 4.1. As Respondent has stated before in its answer to request for arbitration, on 31 May, Claimant initiated to arbitration by filing a request for arbitration with two major impediments. First; Mr. Fasttrack's power of attorney was not granted by Claimant and second; the registration fee was



not paid in full. Therefore, Claimant did not commence the arbitration in compliance with the requirements of the CAM-CCBC Rules.

52 As a response to the mentioned impediments, Claimant alleges that a power of attorney granted by the parent company is admissible to be used by the subsidiary. And an incomplete payment of the registration fee is an excusable mistake. Respondent hereby submit that The power of attorney granted by the Claimant's parent company could not provide for adequate representation on behalf of Claimant according to art. 4.1 (b). **(A)** Failure to pay the registration fee means Claimant failed to complete registration to the CAM-CCBC. **(B)**

a. Failure to pay the full registration fee and Mr. Fasttrack's lack of power of attorney invalidates Claimant's request for arbitration.

53 One of the Claimant's main arguments is "The Request for Arbitration Satisfied the Criteria Set Out in art. 4.1 and art. 4.2 CAM-CCBC Rules". Claimant tries to give an accurate analysis of the provisions of the article. 4.1 and 4.2 of the CAM-CCBC rules in a great detail. But it brings no ground for establishing the allegation that it did comply with the mentioned provisions, except for attaching the proof of payment of the registration fee to its notice to the CAM-CCBC. As if Claimant forgets that its first payment was incomplete and it paid the rest amount when its moratorium to do so was finished, according to the agreed time limitation for a valid initiation of arbitration. [*Takacs, see also, De Meulemeester and Versyter; Gutierrez v. Autowest, Inc.*] It also forgets to explain about Mr. Fasttrack's power of attorney while it was necessary for establishing such an argument as Respondent had challenge its validity. [*Nanfito v. Superior Court; Swab Financial, LLC v. E Trade Securities*]

b. The power of attorney granted by the Claimant's parent company could not provide for adequate representation on behalf of Claimant according to art. 4.1(b)

54 Under the art. 4.1(b) of the CAM-CCBC, Claimant must enclose "a power of attorney for any lawyers providing for adequate representation" to its request for arbitration. The power of attorney Claimant enclosed to its request for arbitration on 31 May 2016, was not granted by Claimant, but by its parent company, Wright holding PLC. Therefore, it cannot provide for adequate representation as art. 4.1(b) requires. Claimant has alleged that its parent company holds 88% of its shares and makes its important decisions. But this is not ground for its admissibility. Because, this fact is not stated and could not be understood from the context of the power of attorney. In conclusion, regardless of the relationship of Claimant with its parent company, as the



power of attorney could not provide for adequate representation, it is not valid to be used before Tribunal and Respondent. [*American Bar web team*]

2. Failure to pay the registration fee means Claimant failed to complete registration

55 Despite the requirement of the CAM-CCBC Rules art. 4.2, Claimant failed to pay the registration fee in full. Consequently, the Secretariat of the CAM-CCBC gave a moratorium to it to comply with the requirements of the CAM-CCBC rules so that the Secretariat could inform Respondent of Claimant's notice. Claimant describes its incomplete payment minor, but does not cite the basis for its allegation. In better words, it is not clear that what is the criterion for regarding a minor mistake. Claimant argues that as it paid the outstanding amount on 07 Jun 2016, its noncompliance with the requirement of art. 4.2 is remedied and excusable. But the notable fact is the date Claimant amended its request for arbitration and completed the payment of the registration fee was out of the time limitation agreed in sec. 21 of the parties' development and sale agreement. Therefore, as the any amendment has taken place after the time limitation has finished, it is regarded as null and void.

3. The request for arbitration became amended and valid on when the claims were belated

56 Claimant emphasizes on 31 May 2016 as the date it initiated the arbitration. There are two major facts and evidences that prove Claimant's initiation on the mentioned date was not valid. First, on 01 Jun 2016, the President of the CAM-CCBC ordered Claimant to pay the outstanding amount of the registration fee and amend its request for arbitration and provide evidence that the requirements of art. 4.1 CAM-CCBC have been complied with. Claimant might likely argue that the mentioned non compliances were not substantial and Tribunal has excused them, as it gave a moratorium for amendment. It is obvious that if the Claimant's request for arbitration was valid to commence the arbitration, by the time of the ordering Claimant to amend the request for arbitration, the Secretariat could also inform Respondent of the request and commence the arbitration proceedings. Because, minor and excusable mistakes and inconsistencies shall not prevent the proceedings to commence. Second, the date Claimant amended its request for arbitration, the agreed sixty- day time limit had been finished. Therefore, as the first request for arbitration was invalid and the amended one was submitted out of time, Claimant failed to validly initiate the arbitration within the agreed time limit and its claims are not admissible.



4. The burden of proof for negotiation failure is on Claimant

57 According to sec. 21 of the parties' development and sale agreement, each party has the right to initiate to arbitration only after the failure of the negotiations. Therefore, Claimant, the party who brings claims to arbitration must first prove that parties have already had a negotiation and it has been failed, as the burden of proof shall be held by the party brings a claim. [*Brown; see also Calisi; Kliuchkovskiy p. 12-14*] Nonetheless, it is wondering that Claimant first relies to art. 27(1) UNCITRAL Arbitration Rules, that is not applicable to this arbitration and might likely be mistaken for UML, which is the *lex arbitri* in the present case. Furthermore, Claimant alleges that Respondent holds the burden to prove that the negotiations have been failed on a particular date, which is totally in opposition with the principle it relies on to support its claim. [*Carreteiro p. 84-96; Redfern/Reymond p. 317*].

5. If the negotiations have not been failed yet, Claimant did not have the right to initiate the arbitration in accordance with sec. 21 of the DSA

58 Claimant considers its last letter to Respondent on 01 Apr 2016 as a direct notice of commencement of the arbitration. It is obvious from the arbitration clause contained in parties' agreement that parties have agreed to have an institutional arbitration and explicitly administered the CAM-CCBC to their arbitration. Therefore, a simple statement that they will take "necessary steps to initiate arbitration proceedings, would not be a notice for the arbitration commencement, as the institution shall inform parties of the commencement of the arbitration. At last, as explained in previous arguments, Claimant must prove that the negotiations have been failed on a particular date [*Blavi/Vial; see also Bond p. 315-316; O'Malley, par. 201; Green Tree Financial Corp.-Ala. v. Randolph; The Bremen v. Zapata Off-Shore Co.*], so that it has the right to initiate the arbitration according to sec. 21 of the parties' development and sale agreement. Otherwise, its claims would not be admissible, because Claimant did not have the right to initiate the arbitration while the negotiations have not been definitely failed yet. [*Draguiev; see also, Yukos Capital v. Tomskneft*]

Conclusion of arguments on procedure

59 From the arguments explained above, it becomes clear that Claimant failed to respect the dead line agreed in the arbitration clause contained in parties' development and sale agreement. also its request for arbitration was not in compliance with the requirements of the governing procedural



rules to this arbitration. Therefore, Claimant's claims are not admissible and Tribunal should declare them time barred.

III. CLAIMANT IS NOT ENTITLED TO THE ADDITIONAL PAYMENTS FROM RESPONDENT

A. Fixed Exchange Rate Is Applied to The Whole Contract

- i. According to art. 8 CISG is provided that the fixed exchange rate is applicable to the whole contract **(1)**, if the fixed exchange rate is not applied, Respondent will be getting exposed to the hardship conditions **(2)**, The exchange rate was an omitted terms which is supplied by the addendum that is modification **(3)**, the requirements of *contra proferentem* principle does not exist to make interpretation of the contract against Respondent **(4)**, Consider to *pacta sunt servanda* principle and general principle estoppel , the fixed exchange rate is applicable **(5)**

1. Based on art. 8 CISG, the fixed exchange rate is applicable

- 60 Based on art. 8(1) CISG, Claimant could not have been unaware of Respondent's intention **(a)**, and, regarding to art. 8(2) CISG, the reasonable person's interpretation from the literature of the addendum is provided that the fixed exchange rate extent to the main agreement **(b)**.

a. Claimant could not have been unaware of Respondent's intention

- 61 At first, Claimant's intent should be interpreted according to art. 8(1) CISG **(i)**; second, based on due diligence principle, Claimant could not deviate from what it has accepted **(ii)**

i. Claimant's intent should be interpreted according to art. 8(1) CISG

- 62 Art. 8(1) CISG governs that when the parties knew or could not have been unaware of the counter-party 's intention, the statements made by and others conducts of the parties are to be interpreted according to their intent.

- 63 Based on Claimant's argument, it did not know and there was no reason that it knew the Respondent's intent [*CL memo., par. 79*]. Despite such claim, on 1 May 2010 meeting, the parties discussed about details of their transaction and agreed on some basic principles for their cooperation in regard to DSA. Due to the fact that one of these principles were the exchange rate which it should be around EQD 2-1. Furthermore, they agreed that their expenses in EQD will have to be converted to US\$ but no major risk involved [*CL Ex. no. 1*]. Indeed, Claimant knew about the Respondent's intent and could not have been unaware that due to the currency



fluctuations, Respondent intended to protect their previous agreed principles by fixing the exchange rate to the whole contract [*Huber/Mullis*, p. 12].

ii. Based on due diligence principle, Claimant could not deviate from what it has accepted

64 As the Ms. Amelia Beinhorn, the COO of Claimant, is actually the authentic agent of Claimant, had the obligation of duty of care when she signed the addendum [*Rush/Ottley*, p. 327]. Duty of care requires directors to make business decisions after taking all available information into account [*Smith v. Van Gorkom; Amgen Inc. v. Harris*], and then act in a sensible manner Directors are required to exercise their maximum care in making business decisions in order to fulfill their authentic duty.

65 Moreover, a director may not simply accept the information presented. Rather, the director must assess the information with a “critical eye,” so as to protect the interests of the corporations [*Lutz v. Boas; Guth v. Loft, Doyle v. Union Insurance Company*] It is obvious that “in the international context, diligence is the first duty of all involved” [*Dat-Schaub International a/s v. Kipco Damaco N.V.*]. Claimant sent an acceptance to Respondent on 24 Oct 2010 [*RE Ex, no. 4*], only two days after receiving the e-mail including the offer [*RE Ex, no. 2*], the parties did not make any negotiations regarding to the provision.

66 Due diligence is an obligation of the companies for a reasonable investigation focusing on material future matters. [*Gillman*] Lack of due diligence of one party shall not reasonably amount to the others detriment.

67 The allegation of Claimant regarding that it never intended what Respondent offered, shall be disregarded simply because one party shall not deviate from what it has accepted due to the fact that it could not understand the offer at that time. The provision in dispute never changed. The vagueness of the provision accused by Claimant, even if existed, were available and Claimant before accepting it should have examined it with more care and also diligence.

b. The reasonable person’s interpretation extends fixed exchange rate to the main agreement

68 Art. 8(2) CISG and art. 4.1 of the UNIDROIT principles, provides that statements and conducts of the parties are to be interpreted according to understanding that a reasonable person would have had in the same circumstances.



69 Despite the Claimant's allegation, reasonable person would interpret the fixed exchange rate clause in the addendum to be applicable for the main contract [*CL Memo, par. 83*] Respondent suggested the addendum to Claimant which includes two different terms; first, on clamps' agreement and second, fixed exchange rate which would be added to the main agreement [*RE Ex. no. 2*]. Claimant, by signing the whole addendum, has accepted both of these terms separately [*RE Ex. no. 4*].

70 Furthermore, in the addendum, Respondent expressly finished the suggestion of clamps by using this sentence that stated: "other terms as per main Agreement." and then suggested the fixed exchange rate. In addition, Respondent propounded the addendum by using the sentence "I would suggest the following terms to be added by hand to the agreement."; and then suggested the fixed exchange rate by using the sentence that stated: "The exchange rate for the agreement is fixed to US\$ 1= EQD 2.01." which the form of writing the word "the agreement" in both sentences is the same and clearly referred to main agreement. Therefore, it is obvious that the parties fixed the exchange rate for the whole contract. [*Schlechtriem/Schwenzler, p. 152, par. 13, Staudinger art.8 par. 11*]

c. Considering to all circumstances, the parties agreed to avoid of concluding the separate contract

71 According to art. 8(3) CISG, all the relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conducts of the parties, should be considered in determining the intent of a party or the understanding of a reasonable person in that same situation.

72 The parties agreed to regulate the purchase of the clamps by signing the addendum to avoid of concluding a separate contract for the clamps [*RE Ex. no. 2*]. Therefore, the addendum cannot be considered as a separate contract.

2. If the fixed exchange rate is not applied, Respondent will get exposed to the hardship conditions

73 Claimant is asserting on its own wrongly interpreted version of the provision. Claimant in its memorandum is trying to take the advantage of the section 4 DSA. It is stated in the provision that "should the production costs per fan blade exceed US\$ 13,125 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 the



- parties.” [CL Ex, no. 2] Claimant in its memorandum omitted the first part which insist that this provision is only applicable where the price per fan blade exceed US\$ 13,125. [Cl memo, p. 19, par.70]
- 74 Claimant never tolerated any unbearable hardship at any point as the price of the contract is anticipated in the interval agreed by both of the parties when they used a maximum and a minimum for their pricing formula. The price of US\$ 9,774.28 paid by Respondent is included between the minimum and maximum. This clearly wrong allegation of Claimant shall be ignored by Tribunal due to the mere fact that the fan blade prices never exceeded US\$ 13,125 [SOF, Cl, no. 6]
- 75 Respondent on the other hand, in contrast of what Claimant directly outsmarted, would not revoke the section 4 of DSA. Hardship is reflected in art 6.2 UNIDROIT, the rule is applicable when the balance between the two sides of the contract has become out of proportion because of severe changes in the market after the conclusion of the contract that fundamentally have altered the balance of the contract.
- 76 In case of hardship, before any of the parties invoke to the rule, they shall render their obligation; even though a change in the market has caused the contract to become more difficult for one of the parties. [Case no. 8486]. Respondent paid the amount due to Claimant’s account and fulfilled its obligation. [CL Ex, no.3]
- 77 The fluctuation of the exchange rate is a normal economic risk that both of the parties always considered these fluctuations. The rule can be incorporated due to the fact that in the case in hand, it is obvious that this time the fluctuation was developed in the market that lay far beyond the normal economic development. [Maskow, par.7]
- 78 Even though Claimant cannot allege that the risk was assumed merely, because with a maximum and a minimum for the contract to be flexible, the parties tried to foresee the fluctuations that may cause due to the uncertainty over the production cost of the fan blades [SOF, par. 5]. The flexible pricing of the contract was never meant for the exchange rate fluctuations.
- 79 At last, Claimant believes that the hardship rule can only be beneficial to the party who is to perform the non-monetary obligation. This opinion of the Claimant is wildly wrong. In practice, a fundamental alteration in the balance of the contract may manifest itself in two different but related ways. The first is characterized by a substantial increase in the cost for one party of performing its obligation.



80 Respondent after fulfilling what it rightfully believes to be its obligation, specifically crediting of
the amount of US\$ 20,438,560, entered into an abortive negotiation with Claimant. By the clear
articulation of UNIDROIT Principle now is the time for Tribunal to clarify the status of
Respondent as the party who will suffer hardship in case of Claimant's interpretation.

3. The exchange rate was an omitted term in contract that is modified by the addendum

81 The exchange rate was an omitted term in contract and it was necessary for the parties to supply
it in their contract. The parties modified the contract and applied a fixed exchange rate to the
whole contract by signing the addendum.

82 According to art. 4.8 UNIDROIT "Where the parties to a contract have not agreed with respect
to the term which is important for a determination of their rights and duties, a term which is
appropriate in the circumstances shall be supplied." Supplying of omitted terms happens when
the parties have not regulated an important and necessary term in their contract at all, either
because they preferred not to discuss about it or simply because it was not foreseeable for them
[*Case no. 8261*]

83 In addition, supplying an appropriate term in contract, require the other factors including
conforming to the parties' intention, the nature of the contract, good faith and fair dealing and
the reasonableness [*Vogenauer.p. 615-616*].

84 Claimant in its memorandum claims that according to art. 53 and 62 CISG, price for fan blades
should be calculated according to section 4 DSA [*CL Memo, p.18, par. 68*]. The price calculation
has been done according to section 4 DSA considering that the parties did not expressed the
exchange rate in section 4 DSA. Before signing the addendum, the parties did not discuss about
the exchange rate at all and only mentioned in their 1 May 2010 meeting that the exchange rate
should be around 2-1 and the point that exchange rate had been very stable over the recent years
[*CL Ex. no. 1*].

85 Furthermore, the price clause which the parties had used for their previous co-operations had no
expression about the applicable exchange rate [RE Ex. no. 5], and in the light of this fact that in
the time of conclusion of the contract, the fluctuations of the exchange rate were not noticeable
and effective, and the parties did not agree on a fixed exchange rate before signing the addendum
[*Case no. 8908*]



86 However, after concluding the contract both of the parties had been sold to different owners, moreover the exchange rate fluctuation increased which made the exchange rate to become a major issue and lack of clarity about it could be caused misgiving about who should bear the currency risk [*Case no. 11295*].

87 Therefore, the parties didn't fix the exchange rate at the time of the conclusion of the contract; and after the concluding the contract due to circumstances and unforeseeable exchange rate fluctuations, it was necessary for the both the parties to supplying a term that expressly fixing the exchange rate to avoid any unreasonable currency risk [*Case no. 9797*].

88 Art. 29 CISG governs that contract can be modified by the agreement of the parties after the time of the conclusion; whether a contract is in writing or orally agreed upon [*Charmes Wines Ltd. v. Sabaté USA Inc.*]

89 Contract's modification occurs when the parties agree to change any of the terms in the original agreement [*Schlechtriem/Schwenzer p. 473, par. 4*].

90 The parties depending on their needs can modify the contract in whole or in part and modifying the contract by an addendum, deletion, correction, or similar changes. [*Comerica Bank et al. v. Whitehall Specialties, Inc.*]

91 If a contract requires extensive changes, it is more practical that parties conclude an entirely new agreement or restate the contract [*Schlechtriem/Shwenzer p. 474, par. 7*].

92 In the case in hand, the parties modified the contract by an addendum to avoid concluding a separate contract [*RE Ex. no. 2*]. Furthermore in regarding the exchange rate fluctuation it was necessary for the parties to fix the exchange rate for the whole contract [*NV A.R. v. NV I; see also, English company v. American firm*].

93 Thus Respondent suggested two different terms to be added to the main contract including the clamps agreement and fixed exchange rate. Claimant signed the addendum and accepted the terms separately [*RE Ex. no. 4*]. Therefore, the exchange rate was an omitted term in contract which parties supplied it by signing the addendum and the addendum modified the whole contract about fixing the exchange rate [*desulfurization*].

4. The requirements of *contra proferentem* principle does not exist to make interpretation of the contract against Respondent

94 Given that Respondent drafted the addendum that was ultimately inserted in the contract, Claimant is seeking to rely on the *contra proferentem* principle. *Contra proferentem* principle is a



subsidiary principle of interpretation of contract which suggests that unclear contract terms supplied by one party should be interpreted against that party [UNIDROIT 4.6]. However, the sources of this principle make it clear that this principle is “not to be construed in a strict and literal sense but in the light of the purposes and rationale underlying the individual provisions” [Bonell p. 83]. For this reason, Tribunal would not be justified in applying this principle of *contra proferentem* to interpret the addendum against the drafter.

- 95 First, Respondent was not the only author of the provision in this dispute. The addendum is only drafted by Respondent and it is subject to the pre-contractual negotiations and the usages well-known to the parties. The context of the addendum has been negotiated and had to be known to Claimant, because of the parties’ previous relations and course of dealing, it is uncontested that the parties always used a fixed exchange rate in their prior contracts [PO no. 2 sec. .5]. In other words, Claimant should have known the intent of Respondent. The principle of *contra proferentem* should not be engaged because there are two requirements. First, it only applies to the terms which are unilaterally included, and second, it will not apply if the term has been the subject matter of the negotiations by the both parties which helps that party to know the drafters’ intent [Huber/Mullis p. 15]. Accordingly, the principle of *contra proferentem* is not applicable.
- 96 Second, the rationale underlying of this principle is not served. The substantive purpose of this principle is to mitigate an imbalance in bargaining power. It is enough to allow one party to dictate the wording of a contract to their relative advantage. [Bond, p. 156-157] In this case, there is no unbalanced bargaining power between the parties to be mitigated by this principle both of the parties, had enough opportunity to negotiate the provisions added to the main agreement by the means of an addendum. According to one judgment, the ground for application of the *contra proferentem* is where “there is ambiguity in the meaning of a contract, which one of the parties as the author of the document, offers to the other, with no opportunity to modify its wording”
- 97 Therefore, there is no purpose can be considered for the principle to be applied. Furthermore, the current clause was not part of a standard form or contract of adhesion, typical evidence of an imbalance. Rather, it is the outcome of the negotiations between the parties which took place on 1 May 2010 [CL Ex, no. 1]. Given to the negotiations and the communications between the parties, the addendum should be regarded as fairly negotiated and not unilaterally imposed. This principle cannot be applied because there is no preference. [Levison p.209]



5. Consider to *pacta sunt servanda* principle and general principle estoppel, the fixed exchange rate is applicable

- 98 The principle of *pacta sunt servanda* which Claimant had been mentioned in its memorandum [*CL Memo., par. 65*], means that contracts and clauses has binding force for the parties to a transaction [*Liu*].
- 99 The contracting parties must keep their agreements and fulfill their obligations [*Herman, p. 9-11*].
- 100 In present case parties agreed on a fixed exchange rate which is suggested by an addendum to whole contract [*CL Ex no. 2*]. Thus the price of the fan blades should be calculated according to the exchange rate US\$ 1= EQD 2.01.
- 101 Though the parties agreed to apply the fixed exchange for whole contract. In addition, in the first invoice of payment, the price of the fan blades calculated with the accepted exchange rate between the parties.
- 102 Moreover one of the general principles of CISG is stopple which binds the parties to act according to their conducts; [*Lookofsky*] and negotiations due to their agreement and avoid them to act against what they have been already agreed on [*Swiss company v. Russian company*]. Thus the parties should calculated the price with the exchange rate which is fixed in the addendum for the whole contract [*Honnold*].

B. RESPONDENT DID ITS CONTRACTUAL OBLIGATION COMPLETALY

- 103 By Respondent's fast payment, Claimant asserts the absence of good faith from Respondent side. [*CL memo, par. 73*]. Claimant seeks excuses to disrate Respondent's timely payment through explaining its accounting department mistake in calculation, but what Respondent has done its contractual obligation and made the payment upon the receipt of invoice.
- 104 Contrary to Claimant allegation regarding bad faith, it is important to notice that the payment had been made before the second invoice was issued. [*CL Ex no. 3*] Accordingly, it cannot lead to this argument that Respondent made the payment with no good faith.
- 105 Moreover, Claimant's accountant, in the position of a reliable accountant [*CL Ex no.4*] who shall understand the contract, made the calculation with the fixed exchange rate and had the same point of view in calculating the price of the contract as Respondent has [*CL Ex no.4*]. This shows that any reasonable person who deals with the contract, shall find that the exchange rate mentioned in the addendum has to be used for fan blades and the clamps.



106 Finally, Claimant may want to bring up the issue that subject to art. 48 CISG, it had a right to cure the invoice and had done so by the way of a second invoice sent to Respondent. Claimant's offer states that it will bear all the additional costs which may result from the additional transfer [CL Ex no.5]. Before the expiration of the curing period, Respondent, impliedly, rejected the Claimant's request by its payment, despite that Claimant granted Respondent some extra time till 4 Mar 2015, but it made payment on 2 Feb 2015. Respondent's rejection of the offer shall be deemed as the Respondent's right not to accept any cure of obligation by Claimant. This right for not accepting the cure is clearly manifested in art. 48 CISG. In fact, Respondent's conduct can also show that it never accepted the cure and Claimant's referring the dispute to tribunal means that it accepted the Respondent's answer. Respondent paid the price in accordance with the first invoice. This conduct of Respondent is a clear way of showing its intent.

C. Claimant Has the Obligation to Take All the Bank Charges

107 Respondent made all the payments properly as agreed in the contract and adhered to all the ordinary formalities to pay fan blades price and clamps. Therefore, Respondent exercised all its commercial responsibilities and requirement based on their agreement.

108 As Claimant suggested the bank charges provision in the DSA, it has to be aware of administrative regulation that entered into force in Equatoriana [PO no. 2 par. 6, p. 55]. On 1 Jan 2010, ML/2010C entered into force and Equatorianian press coverage. The National government aimed to Prevent measures and proceeds of Crime by 2010, ML/2010C that is enforceable in broad of Claimant's country and the fees will preserve in the Equatoriana Central Bank. Eventually the profit of preserved fee will transfer to the Minister of Finance [PO no. 2 par. 7, p. 55]. The levy is known administrative regulation and based on very specific public law regulation in Equatoriana where Claimant has its place of business [SOC, par. 18, p. 26].

109 Claimant alleged that it has the right to receive the reimbursement of the inspection fees deducted by the bank, however these fees are extra ordinary bank charges that is only well-known in particular regions. In addition, only six countries approved this regulation. Antecedent transactions indicate that Claimant has always made payments regarding the levy [PO no. 2 par.7, p. 55]. Not only Claimant should notify existence of ML/2010C regulation **(A)**, but also the nature of extra ordinary bank charges should be considered **(B)**.

D. Claimant should notify the existence of ML/2010C regulation



110 Claimant has the obligation to notify the regulation because it is related to its place of business. Because of necessity of the action, Respondent has to be informed about it. Otherwise Claimant should bear the bank charges. Therefore, Claimant was supposed to obey corporation principle **(1)**, According to analogy of art. 35 CISG, Claimant must undergo payment of bank charge **(2)**, ML/2010C regulation is not known as famous commercial practice **(3)**.

1. Claimant was supposed to obey co-operation principle

111 From initiation of negotiation to termination of the transaction parties must present their best effort to cooperate and accompany each other to gain mutual benefit and achieve desired result. In sense of corporation principle, Claimant had not strived to acknowledge and manifest changes in its place of business.

112 Pursuant to art. 54 CISG, 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 obligation also includes whatever steps and costs that are necessary to ensure that the payment is actually made as Respondent conducted. Furthermore, Claimant and Respondent were subsidiaries of Engineering International SA, Respondent was aware of that Claimant always bears payment of levy. Accordingly, Respondent did not feel the requirement to notify and was completely sure that claimant is in the know about the bank charges.

113 Respondent observed the well-known regulation that has effect on the payment. Claimant is under obligation to cooperate with Respondent and be informative on the applicable rules. This duty to inform is an application of general duty to cooperate and inform. It is accepted that Claimant has to provide information, which are required.

114 Claimant failed to obey co-operation principle and ignored its obligation. The parties have to give each other required information. These obligations are obligations to give notice of some events occurred in their area.

115 Each party is under a good faith obligation to notify the other party of any required information that are necessary to perform the contract, provided that such information can reasonably be expected from that party.

116 Under art. 7(2) principle of co-operation is applicable. Each party is under a good faith obligation to cooperate with the other party, when such cooperation can reasonably be expected for the performance of that party's obligations.



117 In conclusion, as the obligation imposed on Claimant by general principle that is termed Co-Operation, Claimant was under obligation to inform administrative regulation.

2. According to analogy of art. 35 CISG Claimant must undergo payment of the bank charge

118 As Respondent stated that Claimant is not entitled to receive the bank charge, Claimant must be able to consider its duty. The duty can be inferred from analogy between art. 35(2) CISG and obligation of notice.

119 The admissibility of analogy is directly addressed in art. 7(2) CISG. For the article to be interpreted, it is possible to go beyond the wording of the law which is expressly approved by the Convention's text. Under the Convention, there is possibility to make decisions based on the principles, which the Convention itself formulates. Therefore, it's possible to use analogy principle to infer Claimant's obligation which is notification. The application of analogy occurs when two cases are only similar, if they have something in common and therefore can be combined in a common generic term.

120 In the present case, the Claimant's obligation to inform Respondent, is basically in common with art. 35(2) that requires a seller to deliver the goods and considers the public law regulations at buyer's place of business. It can be analogized that parties have to inform each other any rules and regulation that is ratified in their palace of business.

121 In conclusion, making an analogy between art. 35(2) and obligation of Claimant to notify Respondent, simply enables resolving the issue, because Claimant ignored its duty and it should undergo the payment.

3. ML/2010C regulation is not known as famous commercial practice

122 Payment of the 0.5% levy, under section 12 Regulation ML/2010C has to be borne by Claimant. [SOR, no. 18 p. 26] The reason is due because the domestic regulation is approved by specific countries.

123 Claimant has asserted that its essential expectations under the contract were not fulfilled and Respondent must bear the expenses of financial investigation [CL memo, par. 112 p. 30].

124 Claimant has approved UN-Model and treated the rule based on its domestic law. In addition, FATF recommendation rule is known as international rule, which every country can perform the rules in sense of its domestic law. Substantially, Respondent could not anticipate Claimant decisions. [The FATF recommendations p. 7, 11, 12; PO no. 2 par. 7 p. 55]



- 125 In response, Respondent argues that Claimant is not entitled to request payment of the levy. Because the rules have not been ratified in place of business of Respondent. Thus, there has been no obligation for Respondent about bank charges. [SOR. No. 18 p. 26; FATF Recommendations p. 7,11]
- 126 Respondent was substantially deprived of its expectations under the contract. There is no requirement for Respondent to take the unforeseen obligations. The issue was unpredictable. For the issue of the levy, which is now a contested matter between the parties, Claimant misunderstood the provision in DSA so the interpretation it is providing cannot be right. In section 4.3 of the contract, it is mentioned that the buyer shall bear the costs of the money transfer. Respondent has done its obligation fully according to the accurate interpretation of this provision. It is widely known in international trade that every party shall bear the cost of their obligation [*Machines case*], but it is also known that this rule is applicable to the Respondent country. Reasonably, Claimant was able to anticipate of the possible cost.
- 127 The levy could not be enforced to Respondent, firstly, because of the fact that Claimant suggested the provision, if Claimant had any specific bank charges in mind that it could not reasonably be anticipated by Respondent, it should have mentioned it. yet Claimant never mentioned its domestic rule of money laundering; specifically, the ML/2010C. The fact that Claimant suggested the provision can also lead the tribunal to apply the principle of *Contra Proferentem*, which can be applicable due to the fact that Claimant had the advantage of knowledge about the ML/2010C. Claimant's financial department had a look at the provision of the rule in mid-June 2010 when they found that the levy had been deducted from the payment from another company [PO no. 2 par. 8].
- 128 Claimant is responsible for the vagueness it incorporated in the provision. Secondly, even Claimant had no idea about the rule of their own domestic law. The persons were negotiating DSA on Claimant's side, had no knowledge about the specific provisions of ML/2010C at the time of negotiations [PO no. 2, no. 2 par. 8]. Claimant expects Respondent to be aware of the rule, which has been implemented in their country based on the UN- Model Provisions on Money Laundering, but it is not considering the fact that this model is only known by 6 countries as the way it is accepted by Claimant [PO no. 2 par. 7].
- 129 Considering that the rule is not accepted globally, Respondent could not reasonably have knowledge about the levy. This tribunal shall exclude Respondent to be expected to observe



special public law requirements of Claimant's state because there has to be different approaches towards commercial and administrative requirements to effect payment. Commercial requirements are what is made to parties in regard with their contract and mutual obligations but administrative requirements are those where the buyer must comply with something ordered in a statute, or with a governmental or administrative ordinance, such as transferring funds abroad. The levy is a part of administrative requirement of payment that Claimant has to bear.

130 As a consequence, with respect to foreign regulation rules of Claimant's country, it should notify all applicable rules [*Bonell Case, p. 397; Schlechtriem/Schwenzler, p. 812. par. 4*]

E. The nature of bank charges should be considered

131 As previously established, levy is not supposed to be paid by Respondent. According to sec. 4.3 of DSA, Claimant had the duty to consider the levy **(1)**, In this case, paying the levy is the obligation of Claimant from a reasonable person perspective **(2)**, furthermore, In Cost-plus contracts, all charges must be paid by seller **(3)**.

1. According to Section 4.3 of DSA, Claimant had the duty to consider the levy

132 Respondent was obligated under 4.3 of DSA to pay the bank charges, any specific bank charges had to be divulged. The inclusion circle of bank charges is limited on ordinary bank charges. At issue here is the extended interpretation of bank charges by Claimant. The best guide is parties' agreement that they don't have to go beyond explicit text of agreement.

133 It was Claimant's duty to clearly express its intent to incorporate the alleged extra ordinary bank charges into the contract. At least, Claimant must transmit them or make them available in another way to Respondent during the negotiations. It would be contrary to the principle of good faith in international trade, as well as to the general obligations of cooperation and information of the parties if Respondent were to be bound by standard terms, whose content it could not be aware of when concluding the contract. Contrary to Claimant's allegation, Respondent has no duty to actively inquire Claimant's local bank charges.

134 In international practice of financial transmit, well-known banks had not included levy as bank charges. It demonstrates that payment request of levy cannot be considered proper to make the payment.



135 In conclusion, sec. 4.3 of DSA did not become part of the extra ordinary bank charges, since Claimant did not make them available to Respondent and the Parties did not subsequently include them into their contract.

2. Paying the levy is the obligation of Claimant from a reasonable person perspective

136 This is a fair judgment that the prior case is considered by reasonable person prospective. The first encounter of reasonable person with contract indicates that all extra bank charges could not be included.

137 According to art. 8(2) CISG, a reasonable person of the same kind and in the same circumstance as the offeror would have had the same understanding as the offeree's words. When section 4.3 of DSA was written, Claimant had the obligation to write it to make it easy for a reasonable person of the same kind as the other party in the same circumstances to recognize alleged extra ordinary payments. The risk that the alleged extra ordinary bank charges has to be borne by Claimant [Café inventory case]. In order to determine whether the Respondent had a reasonable opportunity to gain knowledge of local regulation of payment, the hypothetical understanding of a reasonable person in the same conditions can help to infer that it was Claimant's duty to inform local regulation.

138 In conclusion, Claimant does not have the right to enforce Respondent to pay alleged extra bank charges that was not agreed.

3. In Cost-plus contracts, all charges must be paid by seller

139 According to nature of cost-plus contract, Claimant could not allege that Respondent had obligation to pay extraordinary bank charges. Nature of the contract explicitly demonstrate seller obligation. If Claimant shrinks from the obligation, this reaction will reveal its bad faith. Therefore, it must obey the real intention of DSA.

140 The specific nature of contract can be one of the means of inferring parties' obligation. In the case at hand, cost-plus contract would manifest seller's obligation. Under section 4.3 DSA, [*CL Ex no. 2; Green Tree Financial Corp.-Alabama Et Al. V. Randolph*] Claimant did not impose Respondent to make bank charges payment. Silence of Respondent does not mean acceptance, according to art. 2 CISG [*CL Ex no. 2*] Buyer is not obliged to reimburse seller for cost incurred and fee in excess of the estimated cost and fee specified in contract. There is limitation of funds that is incorporated by parties. This is known as international practice in real occasion. For



instance, the leading Aircraft manufacturer, Boeing company follows the mentioned practice. The cost-plus contract is the most frequent type of their contracts. In aircraft manufacturing industry, the manufacturer would not undergo charges that are not measured or imposed by contract [*Boeing cost reimbursement*]. Accordingly, this is well-built in international aerospace trade.

141 In conclusion, contrary to claimant's allegation, Respondent respects the nature of contract and paid all costs.

CONCLUSION OF THE THIRD ISSUE

142 According to art. 8 CISG, and based on the interpretation of the contract and parties' intention the exchange rate fixed for the whole contract and accepted by both parties. According to art. 4.8 UNIDROIT, exchange rate was an omitted term in contract. The parties modified the contract and applied a fixed exchange rate to the whole contract by signing the addendum based on art. 29 CISG. Regarding art. 48 CISG, calculation of the price has been done correctly and Respondent paid the price. Therefore, Respondent performed its obligation The desired result of art. 54 is fulfilled by Respondent, Claimant is not entitled to request for levy. Because not only payment of levy is not acceptable based on the nature of contract and parties' agreement but also it's a levy on domestic rules.

REQUEST FOR RELIEF

Respondent respectfully requests the Arbitral Tribunal:

- 1) To reject the undue delay in commencement of arbitration;
- 2) To dismiss Claimants' allegation for payment;
- 3) To mandate Claimant to pay Respondent's costs incurred in the arbitration.



Mohammad Javad Nasrinia

J. Nasrinia

Ali Asgari

Ali. Asgari

Naimeh Sabaghi

Naimeh. Sabbaqi

Fatemeh Haji Hosseini

~~Fatemeh~~

Houman Golmohammad

H. Golmohammad

Fateme Shabani

Fateme Shabani

Ahmad Nazeri

A. Nazeri

Behnaz Garshasbi

by: October 2, 2016 1:12 PM

Behnaz Garshasbi

Negar Pasebani

N. Pasebani

Newsha Sarami

Newsha Sarami