NINETEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG – 28 MARCH TO 3 APRIL 2022

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF ZURICH

CASE REFERENCE: AIAC/INT/ADM-123-2021

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

DANIEL MOLINO • GABRIEL ADAL • HADJAR SBAIH • JOËL DONZÉ • JONATHAN BENZ • LARA LANGER

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Index of Abbreviations

%	per cent
AB	Aktiebolag (Swedish limited company)
Art.	Article
Artt.	Articles
Arbitr Int.	Arbitration International
AIAC	Asian International Arbitration Center
AIAC Rules	AIAC Arbitration Rules 2021
Arbitration Clause	Art. 9 of CLAIMANT's General Conditions of Sale
AS	Anonim şirket (Turkish joint stock company)
AUT	Austria
BEL	Belgium
BECKOK	Beck'sch Online Commentary
BGB	Bürgerliches Gesetzbuch (German Civil Law)
BGH	Bundesgerichtshof (German Federal Court)
BM	Bermuda
BV/B.V.	Besloten Vennootschap (Private limited company in the Netherlands)
BVBA	Besloten Vennootschap met Beperkte Aansprakelijkheid (Private company with limited liability)
Chap.	Chapter
CISG-AC	CISG Advisory Council
CLAIMANT	ElGuP plc
CEO	Chief Executive Officer
cf.	confer (compare)
Co	Compagnie
CONF.	Conference
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
CMR	Übereinkommen über den Beförderungsvertrag im internationalen Strassengüterverkehr (Convention on the Contract for the International Carriage of Goods by Road)
COO	Chief Operating Officer

CHN	China
DAL	Danubian Arbitration Law, a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (Vienna, 21 June 1985 with the 2006 amendments with Option 1 of Article 7)
DCL	Danubian General Contract Law, a verbatim adoption of the UNI-DROIT Principles on International Commercial Contracts, 2016
Diss.	Dissertation
EC	European Commission
ed.	edition
Ed(s).	Editor(s)
essentialia negotii	*key business characteristics*
et seq.	et sequens (and the following one)
et seqq.	et sequentes (and the following ones)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FactÜ	UNIDROIT-Abkommen über das internationale Factoring (German for UNIDROIT Convention on international Factoring, (Ottawa 1988))
FRA	France
FIN	Finland
fn.	footnote
FOSFA	Federation of Oils, Seeds and Fats Associations Ltd
GCoS	General Conditions of Sale of ElGup plc/ *CLAIMANT*
GER	Germany
GmbH	Gesellschaft mit beschränkter Haftung (private limited company)
HG	Handelsgericht Zürich (Commercial Court Canton of Zurich)
ibid.	ibidem (in the same source)
ICC	International Court of Arbitration
ICCA	International Council for Commercial Arbitration
i.e.	*id est* (that is)

IHR	Internationales Handelsrecht, Zeitschrift für das Recht des internationalen Warenkaufs und Warenvertriebs (International Commercial Law, Journal for the Law of the International Sale and Distribution of Goods)
in extenso	in all detail, completely
Inc.	Incorporated
Int'l	International
IPRAX	Praxis des Internationalen Privat- und Verfahrensrechts (Practice of Private international Law and Procedural Law)
KLRC	Kuala Lumpur Regional Centre
lex arbitri	law of the seat of arbitration
Ltd	Limited company
Ltée	Limited company
Model Contract	CLAIMANT's individualised version of the FOSFA/PORAM Model Contract, Contract for Palm and Palm Kernel Oil Products in Bulk CIF Terms, Reference Nos 81
UML	UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments
MAL	Mediterraneon Arbitration Law, a verbatim adoption of the Uncitral Model Law on International Commercial Arbitration (Vienna, 21 June 1985 with the 2006 amendments with Option 2 of Article 7)
MCL	Mediterraneon Contract Law, a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts, 2016
Model Contract	ElGup plc. individualised version of the FOSFA/PORAM Model Contract
Mr	Mister
Ms	Miss
No.	Number
NDL	Netherlands
NoA	Notice of Arbitration
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Ob	Decision of the Austrian Federal Supreme Court

OGH	Oberster Gerichtshof (Autrian supreme court)
OOO	Obchtchestvo Ogranitschennoy Otvetstvennostuy (Russian limited liability company)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
per annum	per year
PICC	UNIDROIT Principles of International Commercial Contracts 2016
plc	Public limited Company
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
PORAM	Palm Oil Refiners Association of Malaysia
pre.	Introduction to
quod non	which is not the case
RESPONDENT	JAJA Biofuel Ltd
RNoA	Response to the Notice of Arbitration
Rom I-VO	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
RSPO	Roundtable on Sustainable Palm Oil
Sales Contract	disputed Sales Contract between Claimant and Respondent about the supply of RSPO-certified palm oil for the years 2021 to 2025
SGHC	Singapore High Court
S.A./SA	Sociedad anonima/Société anonyme (limited liability company)
SG	Singapore
Sdn Bhd.	Sendirian Berhad (private limited company in Malaysia)
SUI	Switzerland
Summit	Palm Oil Summit on 28 March 2020
t	metric ton
Tribunal	Arbitral Tribunal consisting of Nickolaus v. Jacquin, Presiding Arbitrator, Georges Chavanne and Tenera Nigrescens
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations Organisation

UNKaufRÜ	Übereinkommen der Vereinigten Nationen über Verträge über den internationalen Warenkauf
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
USD	United States Dollars
v.	versus
Vol.	Volume
Vor.	Vorbemerkung (German for preliminary note)
ZR	Aktenzeichen des BGH für: Revisionen, Beschwerden gegen die Nichtzulassung der Revision, Anträge auf Zulassung der Sprungrevision, Berufungen in Patentsachen

Index of Authorities

Cited as	Reference
A/CN.9/264	UN Secretary-General **Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary-General** United Nations, Vienna 1985 A/CN.9/264 Available at https://digitallibrary.un.org/record/85728?ln=en Accessed on 8 December 2021 *in para. [176]*
A/CN.9/592	UN Commission on International Trade Law. Working Group II (Arbitration) (44th session) **Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006)** United Nations, Vienna 2006 A/CN.9/592 Available at: https://undocs.org/en/A/CN.9/592 Accessed on 8 December 2021 *in para. [173]*

Cited as	Reference
A/CONF.97/19	United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. **Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees** A/CONF.97/19 United Nations, New York 1981 *in para. [189]*
AIAC website, About	Asian International Arbitration Centre **About AIAC** Available at: https://www.aiac.world/About-AIAC- Accessed on 9 December 2021 *in para. [154]*
BANTEKAS	BANTEKAS ILIAS **Art. 7 UNCITRAL Model Law** in BANTEKAS ILIAS/ORTOLANI PIETRO/ALI SHAHLA/ GÓMEZ MANUEL A./POLKINGHORNE MICHAEL (Eds.), UNCITRAL Model Law on International Commercial Arbitration, a Commentary Cambridge 2020 *in para. [176]*

Cited as	Reference
BERGER	BERGER KLAUS PETER **Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?** in VAN DEN BERG ALBERT JAN (Ed.), International Arbitration 2006: Back to Basics? ICCA Congress Series, Vol. 13 (Kluwer Law International; 2007) pp. 301 -334 *in paras. [114, 131, 140, 146, 167]*
BORN	BORN GARY B. **International Commercial Arbitration** 3th ed., The Hague 2020 *in paras. [113, 173]*
BRÖDERMANN	BRÖDERMANN ECKART **UNIDROIT Principles of International Commercial Contracts: an Article-by-Article Commentary** Baden-Baden 2018 *in paras. [194, 202]*

Cited as	Reference
BRUNNER/BALOGH	BRUNNER CHRISTOPH/BALOGH KRISZTINA **Article 11 [Inapplicability of Domestic Requirement that Contract be in Writing and of other Domestic Requirements as to form]** in BRUNNER CHRISTOPH/GOTTLIEB BENJAMIN (Eds.), Commentary on the UN Sales Law (CISG) Alphen upon Rhine 2019 *in para. [53]*
BRUNNER/HURNI	BRUNNER CHRISTOPH/HURNI CHRISTOPH **Art. 14 [Angebot]** in BRUNNER CHRISTOPH (Ed.), UN-Kaufrecht – CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980, Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht 2nd ed., Berne 2014 *in para. [66]*
BRUNNER/PFISTERER/KÖSTER	BRUNNER CHRISTOPH/PFISTERER STEFANIE/KÖSTER PASCALE **Article 14 [Requirements for an offer] and Article 19 ["Acceptance" with Modifications]** in BRUNNER CHRISTOPH/GOTTLIEB BENJAMIN (Eds.), Commentary on the UN Sales Law (CISG) Alphen upon Rhine, 2019 *in paras. [3, 19]*

Cited as	Reference
CHAN/YANG	CHAN DARIUS/YANG TEO JIM **Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention when there is none** Journal of International Arbitration Vol. 37, Issue 5 (2020) pp. 635-648 *in paras. [129, 143]*
DJORDJEVIC, Art. X para. Y	DJORDJEVIC MILENA **Article 4** in KRÖLL/MISTELIS/PERALES VISCASILLAS (Eds), UN Convention on Contracts for the International Sale of Goods (CISG), Commentary 2nd ed., Munich 2018 *in para. [59]*
DORNIS, Art. X para. Y	DORNIS TIM W. **Vorbem. Artt. 14- 24, Art. 19 CISG [Ergänzungen, Einschränkungen und sonstige Änderungen zum Angebot]** in HONSELL HEINRICH (Ed.), Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG), 2nd ed., Heidelberg 2010 *in paras. [23, 60, 97]*

Cited as	Reference
DRASCH	DRASCH WOLFGANG **Einbeziehungs- und Inhaltskontrolle vorformulierter Geschäftsbedingungen im Anwendungsbereich des UN-Kaufrechts** Zürich 1999 *in para. [106]*
ENDERLEIN/MASKOW	ENDERLEIN FRITZ/MASKOW DIETRICH **Article 8** in ENDERLEIN FRITZ/MASKOW DIETRICH (Eds.), International Sales Law, United Nations Convention on Contracts for the International Sale of Goods, Convention on the limitation Period in the International Sale of Goods, Commentary New York 1992 *in para. [80]*
EPPING	EPPING MANJA **Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts** München 1999 *in paras. [163, 194, 199]*

Cited as	Reference
Explanatory Note	UNCITRAL secretariat **Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006** in UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 United Nations, Vienna 2008 pp. 23-38 Available from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf Accessed on 8 December 2021 *in paras. [123, 185, 202]*
FERRARI/KRÖLL, Art. X para. Y	FERRARI FRANCO **Introduction to Articles 14-24, Article 14, Article 18, Article 19** in KRÖLL STEFAN/MISTELIS LOUKAS/PERALES VISCASILLAS PILAR (Eds.), UN Convention on Contracts for the International Sale of Goods (CISG), Commentary 2nd ed., Munich 2018 *in paras. [7, 23, 37, 84]*

Cited as	Reference
FERRARI, MüKoHGB, Art. X para. Y	FERRARI FRANCO **Art. 14 [Angebot]** in GRUNEWALD BARBARA (Ed.), Münchener Kommentar zum Handelsgesetzbuch, Band 5, Viertes Buch. Handelsgeschäfte, Erster Abschnitt. Allgemeine Vorschriften, Zweiter Abschnitt. Handelskauf, Dritter Abschnitt. Kommissiongeschäfte, §§ 343 - 406, CISG 5th ed. Munich 2021 *in para. [60]*
FERRARI, Plures leges	FERRARI FRANCO **Plures leges faciunt arbitrum** Arbitration International Vol. 37, Issue 3 (2021) pp. 579-597 *in para. [167]*
FILLERS	FILLERS ALEKSANDERS **Application of the CISG to Arbitration Agreements** European Business Law Review Vol. 30, Issue 4 pp. 663-694 *in paras. [184, 188]*

Cited as	Reference
FOUNTOULAKIS, Art. X para. Y	FOUNTOULAKIS CHRISTIANA **Art. 81 [Erlöschen der Leistungspflichten; Rückgabe des Geleisteten]** in SCHLECHTRIEM PETER/SCHWENZER INGEBORG/SCHROETER ULRICH GERD, Kommentar zum UN-Kaufrecht (CISG), Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf 7th ed., Munich, Basel, Vienna 2019 *in para. [184]*
GIRSBERGER/VOSER	GIRSBERG DANIEL/VOSER NATHALIE **International Arbitration, Comparative and Swiss Perspectives** 4th ed., Zurich 2021 *in paras. [146, 198]*
GRUBER, Art. X para. Y	GRUBER URS PETER **Art. 14 [Angebot] und Art. 19 [Ablehnung des Angebots; Gegenangebot]** in WESTERMANN HARM PETER (Ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 4, Schuldrecht – Besonderer Teil I §§ 433-534, Finanzierungsleasing, CISG 8th ed., Munich 2019 *in paras. [27, 74, 84]*

Cited as	Reference
HUBER	HUBER PETER **Art. 4 [Sachlicher Geltungsbereich]** in SÄCKER FRANZ JÜRGEN/RIXECKER ROLAND/OETKER HARTMUT/LIMPEG BETTINA (Eds.), Münchener Kommentar zum BGB: Kommentierung der Art. 1-6, 45-101 CISG, VertragsG CISG 8th ed. Munich 2019 *in paras. [188, 189, 190]*
HUBER/KRÖLL	HUBER PETER/KRÖLL STEFAN **Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren 2001/2002** in HENRICH DIETER/ HESS BURKHARD/ JAYME ERIK/ KRONKE HERBERT/ MANSEL HEINZ-PETER/ THORN KARSTEN (Eds.), Praxis des Internationalen Privat- und Verfahrensrechts IPRAX, Issue 4 (2003) pp. 309 - 400 *in para. [96]*
HUBER/MULLIS	HUBER PETER/MULLIS ALASTAIR **The CISG, A new textbook for students and practitioners** Sellier – European Law publishers Munich 2007 *in paras. [3, 7, 37, 61]*

Cited as	Reference
HUßLEIN-STICH	HUßLEIN-STICH GABRIELE **Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit** Köln, Berlin, Bonn, Munich 1990 *in para. [176]*
KRÖLL, Scope	KRÖLL STEFAN **Selected Problems Concerning the CISG's Scope of Application** Journal of Law and Commerce Vol. 25 (06, 2005) pp. 39 - 57 *in para. [188]*
KRÖLL, Schiedsklauseln	KRÖLL STEFAN, **Schiedsklauseln in internationalen Kaufverträgen. Fragen des anwendbaren Rechts, Internationales Handelsrecht** Zeitschrift für das Recht des internationalen Warenkaufs und Warenvertriebs IHR 5/2021 pp. 177 - 186 *in paras. [118, 122, 126, 129, 130, 131, 140, 176, 188]*

Cited as	Reference
LANDBRECHT	LANDBRECHT JOHANNES **Conflict of laws and arbitral jurisdicition – a structural and comparative analysis** Indian Journal of Arbitration Law Vol. 10, Issue 1, 2021 pp. 46 - 71 *in para. [116]*
LEW/MISTELIS/KRÖLL	LEW JULIAN D. M./MISTELIS LOUKAS A./KRÖLL STEFAN M. **Comparative international commercial arbitration** The Hague/New York 2003 *in paras. [114, 118, 122, 140, 185]*
MA	MA WINNIE JO-MEI **Conflicting Conflict of Laws in International Arbitration?, Choice of Law for Arbitration Agreement in Absence of Parties' Choice** in FARRAR JOHN H./VAI IO LO/GOH BEE CHEN, Scholarship, Practice and Education in Comparative Law, A Festschrift in Honour of Mary Hiscock Singapore 2019 *in paras. [140, 143]*

Cited as	Reference
MAGNUS, Art. X para. Y	MAGNUS ULRICH **Art. 14 [Angebot]** in VON STAUDINGER JULIUS, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG) 13th ed., Berlin 2018 *in paras. [61, 84]*
MAGNUS, Standard	MAGNUS ULRICH **Incorporation of Standard Terms** in DIMATTEO LARRY A./JANSSEN ANDRÉ/MAGNUS ULRICH/SCHULZE REINER. International Sales Law. A Handbook 2nd ed., Baden-Baden, Oxford, New York 2021 pp. 295-321 *in paras. [59, 60]*
MANKOWSKI, Vor. Artt. X para. Y	MANKOWSKI PETER **Vor. Artt. 14 - 24 CISG** in FERRARI FRANCO/ KIENINGER EVA-MARIA/ MANKOWSKI PETER/ OTTE KARSTEN/ SAENGER INGO/SCHULZE GÖTZ/STAUDINGER ANSGAR (Eds.), Internationales Vertragsrecht, Rom I-VO CISG CSMR FactÜ, Kommentar 3nd ed, Munich 2018 *in paras. [60, 61, 74]*

Cited as	Reference
MELIS, Art. 9	MELIS WERNER **Art. 9 [Gebräuche und Gepflogenheiten]** in HONSELL HEINRICH (Ed.), Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG), 2nd ed., Heidelberg 2010 *in para. [44]*
MÜNCH,	MÜNCH JOACHIM **§ 1031 ZPO** in KRÜGER WOLFGANG/RAUSCHER THOMAS (Eds.), Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen, Band 3, § 946 -1120 6th ed. Munich 2022 *in para. [44]*
NAUDÉ	NAUDÉ TJAKE Art. 2.1.19, Art 2.1.20 in VOGENAUER STEFAN (Ed.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) 2nd ed., Oxford 2015 *in paras. [108, 159, 194]*

Cited as	Reference
NAZZINI	NAZZINI RENATO **The Law Applicable to the Arbitration Agreement: Towards Transnational Principles** International and Comparative Law Quarterly Vol. 65, (July 2016) pp. 681-783 *in para. [122]*
Official Comment	International Institute for the Unification of Private Law **UNIDROIT Principles of International Commercial Contracts 2016, Official Comments** 4th ed., Rome 2016 Available at: https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf Accessed on 3 December 2021 *in para. [150]*
Opinion No. 13	SIEG EISELEN COLLEGE OF LAW, UNIVERSITY OF SOUTH AFRICA, PRETORIA, SOUTH AFRICA (Rapporteur) **CISG Advisory Council Opinion No. 13 Inclusion of Standard Terms under the CISG** Adopted by the CISG AC following its 17th meeting in Villanova, Pennsylvania, USA (20 January 2013) Accessed on 3 December 2021 *in paras. [6061, 65, 89]*

Cited as	Reference
PERALES VISCASILLAS, Art. X para. Y	PERALES VISCASILLAS PILAR **Article 9** in KRÖLL STEFAN/MISTELIS LOUKAS/PERALES VISCASILLAS PILAR (Eds.), UN Convention on Contracts for the International Sales of Goods (CISG), a commentary 2nd ed. Munich, Baden-Baden, Oxford, Portland 2018 *in paras. [3740]*
PIKA	PIKA MAXIMILIAN **The Choice of Law for Arbitration Agreements** in HENRICH DIETER/ HESS BURKHARD/ JAYME ERIK/ KRONKE HERBERT/ MANSEL HEINZ-PETER/ THORN KARSTEN (Eds.), Praxis des Internationalen Privat- und Verfahrensrechts IPRAX, Issue 6 (2021) pp. 508 - 512 *in para. [129]*
PILTZ	PILTZ BURGHARD **Standard Terms in the UN-Contracts of Sale** Vindobona Journal of International Commercial Law and Arbitration Vol. 8 Issue 2 (2004) pp. 233 - 244 *in paras. [5989, 97]*

Cited as	Reference
PLAVEC	PLAVEC KATHARINA **The Law Applicable to the Interpretation of Arbitration Agreements Revisited** University of Vienna Law Review Vol. 4 (2020) pp. 82-127 *in paras. [122, 131, 140]*
REDFERN/HUNTER	BLACKABY NIGEL/PARTASIDES QC CONSTANTINE/REDFERN ALAN/HUNTER MARTIN **Redfern and Hunter on International Arbitration** 6th ed., Oxford 2015 *in paras. [122, 167]*
ROUILLER	ROUILLER NICOLAS **International Business Law. An introduction to the legal instruments and to the legal environment of business from an international perspective** Zurich, Basel, Geneva, Wanchai, Hong Kong 2015 *in para. [86]*

Cited as	Reference
SAENGER, Beck, Art. 19 para. 4	SAENGER INGO **CISG Art. 19 (Ergänzungen, Einschränkungen und sonstige Änderungen zum Angebot)** in HAU WOLFGANG/POSECK ROMAN (Eds.), BECKOK BGB, CISG Übereinkommen der Vereinigten Nationen über Verträge über den internationalen Warenkauf (UNKaufRÜ) 60th ed. Accessed on 1 November 2021 *in para. [27]*
SCHERER/JENSEN, Harmonized Theory	SCHERER MAXI/JENSEN OLE **Towards a Harmonized Theory of the Law Governing the Arbitration Agreement** Indian Journal of Arbitration Law Vol. 10, Issue 1 (2021) *in para. [122]*
SCHERER/JENSEN, Close connections	SCHERER MAXI/JENSEN OLE **Of implied choices and close connections: two pervasive issues concerning the law governing the arbitration agreement** in BEDARD JULIE/ PEARSALL PATRICK W. (Eds.), State of arbitration – Essays in honour of Professor George Bermann (2022) pp. 667-680 *in para. [126, 131, 140, 143]*

Cited as	Reference
SCHMIDT-KESSEL, Art. X para. Y	SCHMIDT-KESSEL MARTIN **Art. 8 [Auslegung von Erklärungen und Verhalten]** **Art. 9 [Handelsbräuche und Gepflogenheiten]** **Art. 11 [Formfreiheit]** in SCHLECHTRIEM PETER/SCHWENZER INGEBORG/SCHROETER ULRICH GERD (Eds.), Kommentar zum UN-Kaufrecht (CISG), Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf 7th ed., Munich, Basel, Vienna 2019 *in para. [4044, 53, 61, 202]*
SCHROETER, engl., Art. X para. Y	SCHROETER ULRICH GERD **Article 18** in SCHWENZER INGEBORG (Ed.), Commentary on the UN Convention on the International Sale of Goods (CISG) 4th ed., Oxford 2016 *in para. [19]*

Cited as	Reference
SCHROETER, Art. X para. Y	SCHROETER ULRICH GERD **Art. 14 [Begriff des Angebots]** **Art. 19 [Ergänzungen, Einschränkungen und sonstige Änderungen zum Angebot]** in SCHLECHTRIEM PETER/SCHWENZER INGEBORG/ SCHROETER ULRICH GERD, Kommentar zum UN-Kaufrecht (CISG), Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf 7nded., Munich, Basel, Vienna 2019 *in paras. [7, 16, 23, 40, 60, 61, 65, 71, 84, 93, 96]*
Secretariat Commentary, Art. X para. Y	UNCITRAL Secretariat **Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat** UN DOC. A/CONF. 97/5 United Nations 1978 Available at: http://www.cisg-online.ch/index.cfm?pageID=644 Accessed on 1 December 2021 *in para. [27]*
STADLER	STADLER HANS-JÖRG **Allgemeine Geschäftsbedingungen im internationalen Handel** Heidelberg 2003 *in para. [106]*

Cited as	Reference
STEINGRUBER	STEINGRUBER ANDREA MARCO **Consent in International Arbitration** Oxford 2012 *in paras. [118, 167]*
STÜRNER/WENDELSTEIN	STÜRNER MICHAEL/WENDELSTEIN CHRISTOPH **Das Schiedsvereinbarungsstatut bei vertraglichen Streitigkeiten** in HENRICH DIETER/ HESS BURKHARD/ JAYME ERIK/ KRONKE HERBERT/ MANSEL HEINZ-PETER/ THORN KARSTEN (Eds.), Praxis des Internationalen Privat- und Verfahrensrechts IPRAX, Issue 6 (2014) pp. 473 - 480 *in para. [114]*
VOROBEY	VOROBEY DMYTRO V. **CISG and Arbitration Clauses: Issues of Intent and Validity** Journal of Law & Commerce Vol. 31 (2013) pp. 135 - 161 *in paras. [122184]*

Cited as	Reference
WALKER	WALKER JANET **Agreeing to Disagree: Can we just have words?, CISG Article 11 and the Model Law writing requirement** Journal of Law and Commerce Vol. 25 (2006) pp. 153 - 165 *in para. [184]*

Index of Legal Acts and Rules

Cited as	Reference
AIAC Rules	AIAC Arbitration Rules 2021
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DAL	Danubian Arbitration Law, a verbatim adoption of the Uncitral Model Law on International Commercial Arbitration (Vienna, 21 June 1985 with the 2006 amendments with Option 1 of Article 7)
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MCL	Mediterraneon contract law, a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts, 2016
Model Law	UNCITRAL Model Law on International Commercial Arbitration (Vienna, 21 June 1985, with the 2006 amendments)
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PICC	UNIDROIT Principles of International Commercial Contracts, 2016
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014

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CISG-Online 269	Monoammonium phosphate case
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	Austria, 20 March 1997
	Case No. 2 Ob 58/97m
	CISG-Online No. 269
	in para. [23]
CISG-Online 642	Tombstones Case II
[AUT, 2000]	Oberster Gerichtshof [OGH] (Austrian Supreme Court)
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	Case No. 8 Ob 22/00v
	CISG-Online No. 642
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Cited as	Reference
CISG-Online 644	Insolvent wholesaler case
[AUT, 2001]	Oberster Gerichtshof [OGH] (Austrian Supreme Court) Austria, 13 September 2001 Case No. 6 Ob 73/01f CISG-Online No. 644 *in para. [97]*
CISG-Online 828	Tantalum powder case
[AUT, 2003]	Oberster Gerichtshof [OGH] (Austrian Supreme Court) Austria, 17. December 2003 Case No. 7 Ob 275/03x CISG-Online No. 828 *in paras. [44, 65, 66]*
CISG-Online 1093	Tantalum powder case II
[AUT, 2005]	Oberster Gerichtshof [OGH] (Austrian Supreme Court) Austria, 31. August 2005 Case No. 7 Ob 175/05v CISG-Online No. 1093 *in para.[40, 44]*

Cited as	Reference
Belgium	
CISG-Online 1106	Scafom International BV & Orion Metal BVBA v. Exma CPI SA
[BEL, 2005]	Rechtbank van Koophandel Tongeren (Commercial Court ofTongeren) Belgium, 25 January 2005 Case No. A.R. A/04/01960 CISG-Online No. 1106 *in para. [32]*
Bermuda	
CLOUT Case No. 127	Skandia International Insurance Company and Mercantile & General Reinsurance Company and various others
[BM, 1994]	The Supreme Court of Bermuda (Meerabux J.) Bermuda, 21 January 1994 CLOUT Case No. 127 *in para. [176]*
Canada	
Achilles Case	Achilles (USA) c. Plastics Dura Plastics (1977) Ltée/Ltd. Cour d'appel du Québec (Court of Appeal of Quebec) Canada, 23 November 2006 Case No. 500-09-016734-063 *in para. [173]*

Cited as	Reference
France	
CISG-Online 138 *[FRA, 1995]*	Fauba France FDIS GC Electronique v. Fujitsu Mikroelektronik GmbH Cour de Cassation (French Court of Cassation) France, 04 January 1995 Case No. 92-16.993 CISG-Online No. 138 *in para. [7]*
Germany	
BGH, VII ZR 128/91	Bundesgerichtshof (German Federal Court) Germany, 25 June 1992 Case No. VII ZR 128/91 *in para. [159]*
CISG-Online 162 *[GER, 1995]*	Italian knitwear case I Amtsgericht Kehl (Local Court of Kehl) Germany, 6 October 1995 Case No. 3 C 925/93 CISG-Online No. 162 *in para. [23]*

Cited as	Reference
CISG-online 617	Machinery case
[GER, 2001]	Bundesgerichtshof (German Federal Court)
	Germany, 31. October 2001
	Case No. VII ZR60/01
	CISG-online No. 617
	in para. [59, 60]
CISG-online 659	Pizza boxes case
[GER, 2000]	Amtsgericht Duisburg (Local Court of Duisburg)
	Germany, 13 April 2000
	Case No. 49 C 502/00
	CISG-Online No. 659
	in para. [40]
CISG-online 919	Rubber sealing member case
[GER, 2003]	Oberlandesgericht Düsseldorf (Court of Appeal of Düsseldorf
	Germany, 25 July 2003
	Case No. I-17 U 22/03
	CISG-Online No. 919
	in para. [60]
CISG-Online 1376	Conveyor belts case
[GER, 2005]	Oberlandesgericht Linz (Court of Appeal of Linz)
	Austria, 23 March 2005
	Case No. 6 R 200/04f
	CISG-Online No. 1376
	in para. [32]

Cited as	Reference
CISG-Online 2588	Replacement parts for ships case
[GER, 2015]	Bundesgerichtshof (German Federal Court) Germany, 25 March 2015 Case No. VIII ZR 125/14 CISG-Online No. 2588 *in para. [189]*
CISG-Online 5441	Fish canning machine case
[GER, 2020]	Oberlandesgericht Frankfurt am Main (Court of Appeal of Frankfurt am Main) Germany, 7 September 2020 Case No. 26 Sch 2/20 CISG-Online No. 5441 *in para. [188]*
CISG-Online 5488	Ground mace case
[GER, 2020]	Bundesgerichtshof (German Federal Court) Germany 26 November 2020 Case No. I ZR 245/19 CISG-Online No. 5488 *in para. [59]*

Cited as	Reference
Netherlands	
Petrasol Case	*Petrasol BV v. Stolt Spur Inc.*
[NLD, 1997]	Decision of the Court of First Instance of Rotterdam
	28 September 1995
	in: ALBERT JAN VAN DEN BERG, Yearbook Commercial Arbitration 2004, Vol. XXIX
	pp. 798 - 804
	in para. [140]
CISG online 1455	Hibro Compensatoren B.V. v. Trelleborg Industri AB
[NLD, 2007]	Rechtbank Arnhem (District Court of Arnhem)
	Netherlands, 17. January 2007
	Case No. 146453/ HA ZA 06-1789
	CISG-Online No. 1455
	in para. [40]
Singapore	
BCY v BCZ Case	BCY v BCZ
[SG, 2016]	Singapore High Court
	Singapore, 9 November 2016
	Case No. SGHC 249
	in para. [140]

Cited as	Reference
Switzerland	
CISG-Online 227	Plastic chips case
[SUI, 1996]	Handelsgericht des Kantons Zürich (Commercial Court Canton of Zurich) Switzerland, 10 July 1996 Case No. HG 940513 CISG-Online No. 227 *in para. [37]*
CISG-Online 329	Cutlery case
[SUI, 1997]	Handelsgericht des Kantons Aargau (Commercial Court Canton of Aargau) Switzerland, 26 September 1997 Case No. OR.9600013 CISG-Online No. 329 *in para. [40]*
CISG-Online 346	Bulgarian white urea case
[SUI, 1997]	Zivilgericht Basel-Stadt (Court of First Instance Canton of Basel-City) Switzerland, 03 December 1997 - P4 1996/00448 CISG-Online No. 346 *in para. [40]*

Cited as	Reference
CISG-Online 857	Matresses case II
[SUI, 2003]	Handelsgericht des Kantons Zürich (Commercial Court Canton of Zurich) Switzerland, 24 October 2003 Case No. HG010395/U/zs CISG-Online No. 857 *in para. [44]*
CISG-Online 2159	StencilMaster 1621 case
[SUI, 2010]	Handelsgericht des Kantons St. Gallen (Commercial Court Canton of Saint Gall) Switzerland, 15 June 2010 Case No. HG.2009.164 CISG-Online 2159 *in para. [32]*
CISG-Online 2026	Spinning plant case
[SUI, 2009]	Kantonsgericht Zug (Court of First Instance of Canton Zug) Switzerland, 14 December 2009 Case No. A2 2001 105 CISG-Online No. 2026 *in para. [53]*

Cited as	Reference
CISG-Online 2427	Bhushan Steel Ltd. v. Severstal Export GmbH
[SUI, 2010]	Cour de Justice de Genève (Court of Appeal Canton of Geneva)
	Switzerland, 15 January 2010
	Case No. C/13920/2006/ACJC/44/2010
	CISG-Online No. 2427
	in para. [53]
United Kingdom of Great Britain and Nothern Ireland	
XL Insurance Case	XL Insurance Ltd v Owens Corning, in: Yearbook Commercial
[UK, 2000]	Arbitration 2001 - Volume XXVI (Van den Berg (ed.); Jan 2001)
	Queen's Bench Division (Commercial Court)
	28 July 2000
	in para. [140]
Sulamérica Case	Sulamérica cia nacional de Seguros S.A. et al. v. Enesa
[UK, 2012]	Engenharia S.A. et al.
	Decision of the Court of Appeal
	16 May 2012
	in paras. [140]
Enka Case	Enka Insaat VeSamayi AS v. OOO Insurance Company Chubb
[UK, 2020]	Decision of the UK Supreme Court
	9 October 2020
	in para. [126]

Cited as	Reference
United States of America	
CISG-Online 45 *[USA, 1992]*	Filanto S.p.A. v. Chilewich Int'l Corp. U.S. District Court for the Southern District of New York USA, 14 April 1992 Case No. 91 CIV 3253 (CLB) CISG-Online No. 45 *in para. [185]*
CISG-Online 2490 *[USA, 2013]*	Roser Technologies, Inc. v. Carl Schreiber GmbH U.S. Dstrict Court for the Western District of Pennsylvania USA, 10 September 2013 Case No. 11cv302 ERIE CISG-Online No. 2490 *in para. [66]*
CISG-Online 2948 *[USA, 2017]*	Meduri Farms, Inc. v. DutchTecSource B.V. U.S. District Court for the District of Oregon USA, 5 December 2017 Case No. 3:17-cv-906-SI CISG-Online No. 2948 *in para. [23]*

Cited as	Reference
CISG-Online 4660	Laktapol Int'l, Sp. z o.o. et al. v. Bassett & Walker Int'l, Inc.
[USA, 2013]	U.S. District Court for the Western District of Texas
	USA, 10 January 2013
	Case No. EP-12-CA-16-FM
	CISG-Online No. 4660
	in para. [32]

Index of Arbitral Awards

Cited as	Reference
China	
CISG-Online 1528	Rapeseed dregs case
[CHN, 2002]	China International Economic & Trade Arbitration Commission (CIETAC) China, 10 June 2002 Case No. CISG/2002/02 CISG Online No. 1528 *in para. [27]*

Statement of Facts

The parties to this arbitration (**"Arbitration"**) with seat in Danubia are ElGuP plc (**"CLAIMANT"**) and JAJA Biofuel Ltd (**"RESPONDENT"**; together **"the Parties"**). CLAIMANT, registered in Mediterraneo, is one of the largest producers of RSPO-certified palm oil and palm kernel oil. RESPONDENT, registered in Equatoriana, is a well-established producer of biofuel and a 100% subsidiary of Southern Commodities, which is headquartered in Ruritania and is a multinational conglomerate engaging in various commodities and their derivates.

Between 2010 and 2018, **Mr Chandra**, for CLAIMANT, and **Ms Bupati**, for Southern Commodities, concluded around forty contracts. Those contracts were always based on CLAIMANT'S contract FOSFA/PORAM Model Contract (**"Model Contract"**), which always referred to CLAIMANT'S General Conditions of Sale (**"GCoS"**). Until 2016, Art. 9 GCoS provided for arbitration at a commodity arbitration institution.

In 2016, CLAIMANT adopted the model arbitration clause of the Kuala Lumpur Regional Centre (**"KLRC"** renamed to Asian International Arbitration Centre; **"AIAC"**) in Art. 9 GCoS (**"Arbitration Clause"**). Ever since, the seat of Arbitration is Danubia.

In 2018, Southern Commodities acquired RESPONDENT and centralized its entire palm oil business under the roof of RESPONDENT.

In June 2019, Ms Bupati was promoted to Head of Purchase of RESPONDENT for all types of oil products due to her experience in the palm kernel oil market and the resulting connection to the palm oil producers.

In January 2020, CLAIMANT decided to submit its future sales contracts to the law of Mediterraneo.

On 28 March 2020, at the Palm Oil Summit (**"Summit"**), the Parties negotiated the commercial terms for a long-term contract (**"Sales Contract"**) and discussed that the remaining terms would be those of the previous contracts, including CLAIMANT'S GCoS.

On 1 April 2020, RESPONDENT placed an order for RSPO-certified palm oil with CLAIMANT.

On 9 April 2020, CLAIMANT sent the corresponding Model Contract to RESPONDENT, which, as usual, referred to its GCoS.

On 30 October 2020, RESPONDENT terminated the Sales Contract.

On 14 July 2021, CLAIMANT served the Notice of Arbitration (**"NoA"**) on RESPONDENT.

On 14 August 2021, RESPONDENT served a Response to the NoA (**"RNoA"**) on CLAIMANT.

On 7 October 2021, the Parties agreed to conduct the Arbitration under the AIAC Rules 2021.

Summary of Argument

Issue A: The Parties have concluded a Sales Contract for the supply of palm oil. RESPONDENT made a definite purchase offer by placing an order on 1 April 2020. CLAIMANT accepted RESPONDENT's offer by sending the contractual documents. Even if the sending of the contractual documents does not constitute an acceptance but rather a counteroffer, the Parties nevertheless concluded a contract. RESPONDENT accepted the counteroffer by enquiring for a list of acceptable banks from CLAIMANT in order to open a letter of credit as foreseen in the Sales Contract. In the alternative, RESPONDENT accepted the counteroffer in line with the attributable trade practice between the Parties.

Issue B: CLAIMANT's GCoS were validly included in the Sales Contract. RESPONDENT's offer, which CLAIMANT accepted, referred to CLAIMANT's GCoS. Thus, neither Party had to transmit the GCoS to the other. Alternatively, CLAIMANT's GCoS were included in the Sales Contract by a reference in the counteroffer, which RESPONDENT accepted. CLAIMANT's intent to include its GCoS in the Sales Contract was apparent to RESPONDENT. CLAIMANT did not have to transmit its GCoS to RESPONDENT because RESPONDENT had prior knowledge of their content. In any event, CLAIMANT's GCoS were included in the Sales Contract through the attributable trading practice between the Parties. CLAIMANT's GCoS are valid under MCL.

Issue C: The Parties have validly agreed on the jurisdiction of the Tribunal. The Parties' choice of the law of Mediterraneo for the Sales Contract neither automatically extends to the Arbitration Agreement nor is an implied choice for the Arbitration Agreement. Rather, the substantive validity of the Arbitration Agreement is governed by the rules of DCL because the Parties have impliedly chosen the rules of DCL or alternatively because DCL is the law at the seat. Under the rules of DCL, the Arbitration Agreement is substantively valid because the Parties concluded it by conduct or alternatively by reference. Furthermore, the Arbitration Agreement is formally valid under DAL, which governs the Arbitration Agreement as the arbitration law at the seat. Even if Mediterranean law governed the Arbitration Agreement *(quod non)*, it would be substantively and formally valid. As the CISG is not applicable to the Arbitration Agreement, MCL governs the substantive validity of the Arbitration Agreement, which is valid thereunder. Even if the Arbitration Agreement were governed by the CISG, it would be substantively valid. Finally, the Arbitration Agreement would be formally valid under MAL, MCL and the CISG.

A. THE PARTIES CONCLUDED A SALES CONTRACT IN 2020

1 At the Palm Oil Summit (**"Summit"**) on 28 March 2020, Mr Chandra, CLAIMANT's COO, and Ms Bupati, RESPONDENT's Head of Contracting, negotiated commercial terms for the future supply of RSPO-certified palm oil by CLAIMANT *(NoA, p. 5 para. 5; RNoA, p. 26 para. 8; PO 2, p. 49 para. 13)*. On 1 April 2020, RESPONDENT ordered palm oil from CLAIMANT under the conditions discussed at the Summit and asked CLAIMANT to prepare the contractual documents *(Exh. C 1, p. 10 para. 12; Exh. C 2, p. 12 paras. 3 et seq.)*. As requested, CLAIMANT sent the contractual documents to RESPONDENT on 9 April 2020 *(Exh. C 1, p. 10 para. 13; Exh. C 3, pp. 13 et seqq.)*.

2 Under the circumstances of the present case, it is patently clear that the Parties entered a binding contract ("**Sales Contract**"). Surprisingly, RESPONDENT alleges that the Parties have never left the negotiation stage *(RNoA, p. 27 para. 16)*. Therefore, CLAIMANT had to initiate this Arbitration and requests this Tribunal to find that the Parties concluded a Sales Contract in 2020.

3 To conclude a contract under the CISG, there must be an offer (Art. 14 CISG) and an acceptance (Art. 18 CISG). Pursuant to Art. 8(1) CISG, statements and other conduct of a party are to be interpreted according to its intent if the other party knew or could not have been unaware of that intent *(HUBER/MULLIS, p. 12)*. Alternatively, pursuant to Art. 8(2) CISG, the party's statements and conduct are to be interpreted according to the understanding of a reasonable third person of the same kind as the other party would have had in the same circumstances. Art. 8(3) CISG identifies elements, such as the negotiations parties' conduct after contract conclusion that should be considered in determining the parties' intent *(HUBER/MULLIS, pp. 12 et seq.; BRUNNER/PFISTERER/KÖSTER, Art. 14 para. 5)*.

4 The Parties have concluded a Sales Contract. RESPONDENT made an offer by ordering palm oil that CLAIMANT accepted by sending the contractual documents [**I**]. Should the Tribunal find that CLAIMANT thereby made a counteroffer *(quod non)*, RESPONDENT accepted such counteroffer [**II**].

I. CLAIMANT accepted RESPONDENT's offer

5 RESPONDENT made an offer by ordering RSPO-certified palm oil [**1**]. CLAIMANT accepted the offer by sending the contractual documents [**2**].

1. RESPONDENT made an offer

6 By e-mail dated 1 April 2020, RESPONDENT placed an order with CLAIMANT for RSPO-certified palm oil *(Exh. C 2, p. 12 para. 3)*. RESPONDENT's order constitutes an offer.

7 Pursuant to Art. 14(1) CISG, a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal

is sufficiently definite if it contains the *essentialia negotii (FERRARI/KRÖLL, pre. Artt. 14-24 para. 7)*. These are the parties, the goods and quantities to be sold and their price *(HUBER/MULLIS, p. 72; SCHROETER, Art. 14 para. 40)*. The price must be determinable, whereby a reference to market price is sufficient *(HUBER/MULLIS, p. 74; CISG-Online 138 [FRA, 1995], paras. 12 et seq.)*. An offer including the *essentialia negotii* shows the offeror's intent to be bound *(FERRARI/KRÖLL, Art. 14, para. 12)*.

8 In the present case, RESPONDENT's order constitutes an offer according to Art. 14 CISG as it is sufficiently definite, and RESPONDENT had the intent to be bound.

9 First, RESPONDENT's order encompasses the *essentialia negotii* of a purchase contract. RESPONDENT ordered "20,000t RSPO-certified segregated palm oil per annum" for the years 2021 to 2025, at a price of USD 900/t in 2021 and 5 % below the market price for the subsequent years from CLAIMANT *(Exh. C 2, p. 12 para. 3)*. The order, thus, specifies the parties involved, goods, quantities, and price.

10 Second, RESPONDENT's conduct after the negotiations at the Summit is evidence of its intention to be bound at the moment it made the offer on 1 April 2020.

11 During the negotiations at the Summit, Mr Chandra and Ms Bupati agreed on all commercial terms of the Sales Contract *(NoA, p. 5 para. 5; RNoA, p. 26 para. 8)*. They agreed that Ms Bupati would return with a "firm offer", after the approval of RESPONDENT's management *(ibid.)*. On 1 April 2020, she sent an e-mail with the subject "Purchase offer" *(Exh. C 2, p. 12)*, which shows that RESPONDENT's management had approved the transaction *(RNoA, p. 26 para. 9)*. By sending this e-mail, which contained all *essentialia negotii*, RESPONDENT showed its intent to be bound.

12 Moreover, Ms Bupati affirmed RESPONDENT's interest in "securing a long-term supply" of palm oil *(Exh. C 2, p. 12 para. 2)*. Furthermore, Ms Bupati informed CLAIMANT that her assistant, Ms Fauconnier, would be responsible for "the implementation of the Contract" *(ibid., para. 4)*. Had RESPONDENT not wanted to enter a binding contract it would not have made such statements.

13 Finally, RESPONDENT denies it had the intent to be bound at the time it made the offer merely for political and financial reasons. Even before entering negotiations with CLAIMANT, RESPONDENT faced criticism against its palm oil biofuel production. In December 2019, RESPONDENT attempted to alleviate the criticism and declared to only use RSPO-certified palm oil. However, its endeavours were effectless *(Exh. R 1, p. 29)*. Despite that, RESPONDENT made the purchase offer for RSPO-certified palm oil on 1 April 2020. After its share price plummeted *(Exh. C 6, p. 19 para. 4)*, on 30 October 2020, RESPONDENT unexpectedly denied the existence of Sales Contract *(Exh. C 7, p. 20)*.

14 In conclusion, RESPONDENT's order constitutes an offer as it is sufficiently definite, and RESPONDENT had the intent to be bound at the time it made the offer.

2. CLAIMANT accepted RESPONDENT's offer by sending the contractual documents

15 On 9 April 2020, Mr Rain, Mr Chandra's assistant, sent the contractual documents with the terms of RESPONDENT's offer *(Exh. C 3, pp. 13 et seqq.; Exh. C 4, p. 17)*. In his cover e-mail, Mr Rain expressly accepted RESPONDENT's offer *(ibid., para. 1)* and pointed out that CLAIMANT's GCoS apply *(ibid., para. 3)*. RESPONDENT now alleges that CLAIMANT's reply altered the terms of RESPONDENT's offer and constituted a counteroffer because of the reference to the GCoS *(RNoA, p. 28. para. 17)*.

16 Pursuant to Art. 19(2) CISG, a reply to an offer that contains additional or different terms which do not materially alter the offer is an acceptance *(SCHROETER, Art. 19 para. 57)*.

17 First and foremost, CLAIMANT's reply did not alter the terms of RESPONDENT's offer [**a**]. Alternatively, if CLAIMANT's reply altered the terms of the offer, these alterations were immaterial, and RESPONDENT did not object in a timely manner [**b**].

a) CLAIMANT's acceptance did not deviate from RESPONDENT's offer

18 The reference to CLAIMANT's GCoS in CLAIMANT's reply did not alter RESPONDENT's offer. Rather, CLAIMANT's whole reply only mirrored what was anyway already the content of RESPONDENT's offer.

19 The wording of the offer and the acceptance does not have to be identical *(SCHROETER, engl., Art. 18 para. 5 et seq.)*. An interpretation of the offer based on Art. 8 CISG can reveal that the offer included terms that were not expressly formulated *(BRUNNER/PFISTERER/KÖSTER, Art. 19 para. 2)*.

20 It will be shown below in detail that CLAIMANT's GCoS were impliedly part of RESPONDENT's offer *(cf. paras. 62 et. seqq.)*. In summary, RESPONDENT's offer referred to the "conditions […] discussed at the Summit" *(Exh. C 2, p. 12 para. 2)*. The GCoS were part of these discussed conditions. At the Summit, Mr Chandra indicated that the GCoS were supposed to be the same *(RNoA, p. 26 para. 10)*. Furthermore, RESPONDENT knew that the Sales Contract would be based on CLAIMANT's Model Contract *(Exh. C 2, p. 12 para. 5)* and that the GCoS were part of the Model Contract *(PO 2, p. 48 para. 7)*. Thus, the GCoS were impliedly part of RESPONDENT's offer.

21 In conclusion, CLAIMANT's reply constituted an acceptance to RESPONDENT's offer.

b) Alternatively, any changes to RESPONDENT's offer were immaterial and RESPONDENT did not object to them in a timely manner

22 Should the Tribunal find that CLAIMANT's GCoS were not part of RESPONDENT's offer, any changes to RESPONDENT's offer were immaterial [**i**] and RESPONDENT did not object to them in due time [**ii**].

i. Any changes to RESPONDENT's offer were immaterial

23 Under Art. 19(2) CISG, the incorporation of standard terms in a reply to an offer might be a material change *(CISG-Online 162 [GER, 1995], para. 23)*. This must be evaluated on a case-by-case basis *(CISG-Online 2948 [USA, 2017], paras. 53 et seqq.; SCHROETER, Art. 19 para. 35)*. If the counter-party benefits from a change, it is deemed to be immaterial. *(CISG-Online 269 [AUT, 1997], p. 4; DORNIS, Art. 19 para. 15; FERRARI/KRÖLL, Art. 19 para. 13)*.

24 In the present case, the reference to the GCoS would be an immaterial change to RESPONDENT's offer. As shown above, the Parties not only discussed the application of the GCoS but they also discussed the application of the Model Contract which always referred to the GCoS *(cf. para. 20 above)*.

25 Furthermore, RESPONDENT benefits from the Arbitration Clause in Art. 9 GCoS. Originally, the old version of the GCoS provided for arbitration under the rules of a commodity arbitration institution *(Exh. R 4, p. 32)*. In 2016, CLAIMANT changed it to arbitration under the KLRCA, which has been renamed AIAC *(Exh. C 1, p. 9 para. 4; RNoA, p. 27 para. 11 et seq.)*. RESPONDENT requested to select a non-industry related arbitration institution *(Exh. C 2, p. 12 para. 7)*. The current Arbitration Clause provides for arbitration at the AIAC *(Exh. R 4, p. 32)* which is a neutral institution *(AIAC website, About)*. Thus, RESPONDENT only benefits from Art. 9 GCoS.

26 In conclusion, any changes in CLAIMANT's acceptance to RESPONDENT's offer would be immaterial.

ii. RESPONDENT did not object to such immaterial changes in due time

27 If an acceptance contains immaterial changes to the offer, a contract is concluded with the terms of the acceptance unless the offeror objects without undue delay (cf. Art. 19(2) CISG*; SAENGER, Beck, Art. 19 para. 4; cf. Secretariat Commentary, Art. 17 paras. 9 et seq.)*, *i.e.*, within three working days *(GRUBER, Art. 19 para. 16; cf. CISG-Online 1528 [CHN, 2002], para. 3.2)*.

28 After CLAIMANT's reply on 9 April 2020, RESPONDENT did not contact CLAIMANT until 3 May 2020 *(NoA, p. 5 para. 8)*. Even then, Ms Fauconnier did not object to the reference to CLAIMANT's GCoS *(Exh. C 5, p. 18 paras. 4 et seq.)*. Rather, she suggested changes to the "existing terms" *(Exh. R 2, p. 30 para. 3),* namely the documents for the letter of credit and the Arbitration Clause *(Exh. C 5, p. 18 paras. 4 et seq.)*. This was not an objection to the GCoS. First, the wording "the existing terms" indicates that a contract was already concluded also from RESPONDENT's point of view. Second, all concerns were eventually resolved *(ibid., para. 4)*. Ms Fauconnier was convinced that there was no need to change the contractual terms *(ibid.)*. Thus, RESPONDENT did not object in due time to any immaterial changes. Consequently, the Parties concluded the Sales Contract.

II. Even if sending the contractual documents amounts to a counteroffer, RESPONDENT accepted it

29 Should the Tribunal find that adding CLAIMANT's GCoS was a material change to RESPONDENT's offer and that CLAIMANT made a counteroffer, RESPONDENT accepted such counteroffer.

30 RESPONDENT accepted the counteroffer by informing CLAIMANT about its preparation for performance [**1**]. Alternatively, RESPONDENT accepted the counteroffer in line with the trading practice established between CLAIMANT and Southern Commodities, which applies between the Parties [**2**].

1. RESPONDENT's conduct amounts to acceptance of the counteroffer

31 RESPONDENT's conduct following CLAIMANT's counteroffer on 9 April 2020 amounts to acceptance of such counteroffer.

32 The offeree can express his assent to the offer with any statement or other conduct (cf. Art. 18(1) CISG; *CISG-Online 4660 [USA, 2013], p. 9 para. 31)*. Conduct counts as acceptance if it constitutes an act of performance or preparation for performance *(CISG-Online 1106 [BEL, 2005], p. 7; CISG-Online 1376 [AUT, 2005], paras. 5.1 et. seqq.)*. If a purchase contract sets forth that the buyer is obliged to open a letter of credit, the opening of the latter amounts to performance *(CISG-Online 2159 [SUI, 2010], para. 5e; cf. CISG-Online 224 [AUT, 1996], para. 38)*.

33 To fulfil its payment obligation under the Sales Contract, RESPONDENT must open a letter of credit *(Exh. C 3, pp. 14 et. seq.)*. On 3 May 2020, RESPONDENT asked for a list of acceptable banks *(Exh. R 2, p. 30 para. 2)*. This was the first act to perform its payment obligation. A reasonable person of the same kind as CLAIMANT could only understand RESPONDENT's conduct as an acceptance of the counteroffer. Thus, CLAIMANT was entitled to interpret RESPONDENT's conduct as an acceptance.

34 In addition, the silence between the Parties from May to October 2020 does not affect the interpretation of RESPONDENT's conduct as an acceptance. Since the first shipment of palm oil should not have happened before January 2021 *(PO 2, p. 51 para. 23)* and since all concerns were solved *(Exh. C 5, p. 18 paras. 4 et seq.)*, there was no need for communication between the Parties before shipment.

35 In conclusion, RESPONDENT accepted the counteroffer by informing CLAIMANT about its preparation for contract performance.

2. Alternatively, RESPONDENT accepted the counteroffer by practice

36 On 9 April 2020, CLAIMANT sent the contractual documents to RESPONDENT, asking for the return of a signed version thereof *(Exh. C 4, p. 17 para. 5)*. Even though, RESPONDENT did not return them *(Exh. C 1, p. 11 para. 14)*, RESPONDENT accepted the counteroffer due to applicable trading practice.

37 Silence or inactivity does not in itself amount to acceptance (Art. 18(1) CISG). However, if there is additional evidence of the offeree's intent to accept the offer, silence is an acceptance *(HUBER/MULLIS, p. 85; FERRARI/KRÖLL, Art. 18 para. 10)*. Such evidence can be deduced from practices between the parties *(CISG-Online 227 [SUI, 1996]; HUBER/MULLIS, p. 86; PERALES VISCASILLAS, Art. 9 para. 10)*.

38 CLAIMANT and Southern Commodities developed a trading practice on contract formation [**a**]. In accordance with this trading practice, which is attributable to RESPONDENT [**b**], RESPONDENT has accepted the counteroffer [**c**]. The Parties did not to stipulate a form requirement [**d**].

a) CLAIMANT and Southern Commodities developed a practice regarding contract formation

39 Southern Commodities, RESPONDENT's parent firm, and CLAIMANT established a practice for contract formation during their business relationship *(cf. Exh. C 1, p. 9 para. 3, Exh. R 3, p. 31 para. 3)*.

40 To establish a practice, it is required that a particular conduct occurs frequently during a certain time between parties on which they can rely in good faith *(SCHROETER, Art. 14 para. 16; PERALES VISCASILLAS, Art. 9 paras. 8 and 11; CISG-Online 1093 [AUT, 2005], para. 15; CISG-Online 329 [SUI, 1997], p. 22 para. 4b)*. A long business relationship with a plurality of contracts is required *(CISG-Online 346 [SUI, 1997], para. c.cc*). Additionally, a specific conduct must have been followed in at least three previous dealings *(CISG-Online 659 [GER, 2000], para. 3a*). Parties must recognize their conduct as a practice by expecting that it will be followed in the future *(SCHMIDT-KESSEL, Art. 9 para. 8a; CISG-Online 1093 [AUT, 2005], para. 15; CISG-Online 1455 [NLD, 2007], para. 11)*.

41 CLAIMANT and Southern Commodities had established a practice, pursuant to which a contract is concluded if the contractual documents are not rejected within one week after receipt. CLAIMANT and Southern Commodities concluded "around 40 contracts" during their business relationship from 2010 to 2018 *(Exh. R 3, p. 31 para. 2)*. They always adhered to the following procedure. First, Southern Commodities would make an offer *(ibid.)*. Then, CLAIMANT would incorporate the details of this offer in its Model Contract *(ibid., para. 3)*. The filled-out Model Contract, *i.e.*, the contractual documents, would be sent to Southern Commodities. If the contractual documents were not acceptable, Southern Commodities would reject them within a week *(PO 2, p. 49 para. 9; Exh. C 1, p. 11 para. 14)*. Otherwise, a contract would be concluded. Finally, CLAIMANT and Southern Commodities expected that they would follow this procedure in the future, as all contracts were successfully performed *(Exh. C 1, p. 10 para. 4; Exh. R 3, p. 31 para. 3)*.

42 Therefore, CLAIMANT and Southern Commodities established a trading practice that unless Southern Commodities objected to the contractual documents within a week, a contract was concluded.

b) The trading practice is attributable to the relationship between the Parties

43 The trading practice that CLAIMANT and Southern Commodities had established is attributable to the relationship between CLAIMANT and RESPONDENT.

44 Art. 9(1) CISG reflects the principle of good faith and binds parties to practices that they have established between themselves *(MELIS, Art. 9 para. 4; SCHMIDT-KESSEL, Art. 9 para. 8a; CISG-Online 857 [SUI, 2003], para. 3b.bb.)*. Conduct and knowledge of a representative is attributable to the party he represents and encompasses practices that had been established between the representative and third parties *(CISG-Online 828 [AUT, 2003]; CISG-Online 1093 [AUT, 2005])*.

45 First, the trading practice is attributable to RESPONDENT. The practice was established while Ms Bupati was working for Southern Commodities. Southern Commodities centralized its palm oil business in RESPONDENT *(Exh. R 1, p. 29)*. RESPONDENT employed Ms Bupati as Head of Contracting for all types of palm oil *(Exh. R 3, p. 31 para. 4; PO 2, p. 48 para. 5)* in order to benefit from her experience in the palm oil market and connection to the palm oil producers *(Exh. R 3, p. 31 para. 4; PO 2, para. 5)*. Ms Bupati's experience could only be beneficial to RESPONDENT if the practices with palm oil producers, including CLAIMANT, continued. Therefore, the practice that Ms Bupati had established at Southern Commodities is attributable to RESPONDENT.

46 Second, even RESPONDENT expected that the trading practice would continue. Ms Bupati said it was "good to see [Mr Chandra] at the Summit […] to re-establish [their] long-lasting and successful business relationship in [her] new function" *(Exh. C 2, p. 12 para. 1)*. Since it was the first contract between the Parties, Ms Bupati could only refer to the business relationship between CLAIMANT and Southern Commodities. Ms Bupati, emphasising this previous business relationship and its continuance in her new function, indicates RESPONDENT's intent to maintain the trading practice.

47 Third, CLAIMANT could expect that the trading practice applies. Ms Bupati and Mr Chandra adhered to the same procedure as in 2018. Ms Bupati did not depart from it. Indeed, Ms Bupati requested to use the same Model Contract they used for the contracts between CLAIMANT and Southern Commodities *(Exh. C 2, p. 12 para. 5)*. By following the exact same procedure, RESPONDENT created the impression that the practice shall apply. Thus, CLAIMANT could expect that the trading practice applies.

48 In conclusion, the trading practice of CLAIMANT and Southern Commodities applies to the business relationship between CLAIMANT and RESPONDENT.

c) RESPONDENT has accepted the counteroffer in line with the applicable practice

49 As shown above, the trading practice between CLAIMANT and Southern Commodities is applicable to the Parties *(cf. paras. 43 et seqq.)*. According to this practice, a contract is concluded with the terms

of the contractual documents if they are not objected to within a week *(cf. para. 41 above)*. The Sales Contract was concluded in line with this trading practice.

50 On 1 April 2020, Ms Bupati sent an offer and asked CLAIMANT to prepare the contractual documents by using the Model Contract *(cf. Exh. C 2, p. 12 para. 5; Exh. C 1, p. 10 para. 12)*. On 9 April 2020, CLAIMANT sent the contractual documents to RESPONDENT *(Exh. C 4, p. 17)*. Neither on 3 May 2020 *(cf. paras. 27 et seqq. above)* nor at an earlier point in time did RESPONDENT object to the contractual documents *(cf. Exh. R 2, p. 30)*. Thus, the Parties followed the exact same procedure which Ms Bupati and Mr Chandra used to follow while Ms Bupati was working for Southern Commodities. Thus, RESPONDENT accepted the contractual documents, and the Sales Contract was concluded.

51 In conclusion, RESPONDENT accepted the counteroffer in line with the applicable trading practice.

d) Due to the applicable practice, no signature is required

52 RESPONDENT alleges that the Sales Contract was not concluded because it lacked the Parties' signature *(RNoA, p. 28 para. 17)*. However, in line with the trading practice, there is no signature requirement for the Sales Contract.

53 Under the CISG, a contract is subject to no form requirement (cf. Art. 11 CISG; *SCHMIDT-KESSEL, Art. 11 para. 5)*. Parties may stipulate a form requirement for their contract *(CISG-Online 2026 [SUI, 2009], para. 100)*. If parties choose a specific form, they can agree on what it entails, for instance whether a handwritten signature of both parties is necessary *(SCHMIDT-KESSEL, Art. 11, para. 16)*. The parties can agree on a specific form expressly or through practice *(CISG-Online 2427 [SUI, 2010], para. 3.1; BRUNNER/BALOGH, Art. 11 para. 4)*.

54 Under CLAIMANT's and Southern Commodities' practice, the conclusion of a contract was not subject to a signature requirement. In five cases, Southern Commodities did not return a signed version of the contract to CLAIMANT. Nevertheless, these contracts were performed *(Exh. R 3, p. 31 para. 3)*. These five incidences suffice to establish the practice which requires no signature to conclude a contract.

55 In the present case, the Parties adhered to this previous practice. CLAIMANT only asked for the return of a signed copy of the contractual documents to facilitate the paperwork for the shipment *(Exh. C 4, p. 18, para. 5)*. Although RESPONDENT did not return a signed version, RESPONDENT prepared for performance of its payment obligation *(cf. paras. 31 et seqq. above)*. Had RESPONDENT deemed a signature to be necessary it would not have taken preparatory steps for performance.

56 In conclusion, in line with the trading practice there is no signature requirement for the Sales Contract.

Conclusion: The Parties concluded a Sales Contract for the supply of RSPO-certified segregated palm oil under the CISG. RESPONDENT made an offer by ordering palm oil from CLAIMANT. CLAIMANT accepted RESPONDENT's offer. The acceptance did not deviate from RESPONDENT's offer. Even if it did, the discrepancy was immaterial, and RESPONDENT did not object within due time. Even if the changes to RESPONDENT's offer were material, a contract was concluded. CLAIMANT made a counteroffer, which RESPONDENT accepted by conduct when it informed CLAIMANT about its preparation for contract performance. In any event, RESPONDENT accepted the counteroffer by refraining to object to it within a week in line with the applicable trading practice.

B. CLAIMANT'S GCOS WERE INCLUDED IN THE SALES CONTRACT

57 Contrary to RESPONDENT's allegations *(RNoA, p. 28 para. 20)*, CLAIMANT's GCoS were validly included in the Sales Contract.

58 In line with the legal test under the CISG for the inclusion of standard terms [**I**], CLAIMANT's GCoS were included in the Sales Contract. RESPONDENT's offer, which was accepted by CLAIMANT, impliedly referred to the GCoS [**II**]. Alternatively, the GCoS were included in the Sales Contract, as RESPONDENT accepted CLAIMANT's counteroffer, which includes a reference to the GCoS [**III**]. In any event, the GCoS were included in the Sales Contract in accordance with the Parties' practice [**IV**]. Furthermore, the GCoS are substantively valid under MCL [**V**].

I. The relevant legal test for the inclusion of standard terms under the CISG

59 The inclusion of standard terms is governed by the CISG, in particular by the rules on contract formation (Artt. 14 to 24 CISG) and interpretation (Artt. 8 and 9 CISG; *A/CN.9/142, p. 81 paras. 276 et seqq.; CISG-Online 5488 [GER, 2020] para. 41; CISG-Online 617 [GER, 2001], p. 8 para. 1; MAGNUS, Standard, p. 298 para. 10; DJORDJEVIC, Art. 4 para. 24; PILTZ, pp. 233 et seq.)*.

60 Standard terms are included in a contract if they are part of the accepted offer *(SCHROETER, Art. 14, para. 120)*. Standard terms are part of the offer if the offeror intended to include them in the contract and if his intent is apparent to the offeree *(MANKOWSKI, Vor. Artt. 14-24, para. 26; DORNIS, Vor. Artt. 14-24 para. 7)*. It must be determined according to Art. 8 CISG whether the offeror had such an intent and whether it was apparent *(FERRARI/MüKoHGB, Art. 14 para. 39; MANKOWSKI, Vor Artt. 14-24 para. 26; cf. para. 3 above)*. In principle, there must be a reference to the standard terms in oral or written communication between the parties *(Opinion No. 13, para. A/4; MANKOWSKI, Vor Artt. 14 to 24 para. 26; SCHROETER, Art. 14 para. 121; MAGNUS, Standard, p. 299 para. 11)*. Additionally, the

recipient must have a reasonable opportunity to take notice of them before the contract is concluded *(CISG-Online 919 [GER, 2003], p. 8 para. aaa.)*. This requires that the standard terms are transmitted to the offeree *(CISG-Online 617 [GER, 2001], pp. 8 et seqq. para. 2; MAGNUS, Standard, p. 299 para. 11; MANKOWSKI,Vor Artt. 14 to 24 para. 28)*.

61 However, the transmission of the standard terms is not always required *(Opinion No. 13, para. B/2.6; SCHMIDT-KESSEL, Art. 8 para. 53a)*. It is legally redundant to transmit the standard terms if the buyer asks for the inclusion of the seller's standard terms *(MANKOWSKI, Vor. Artt. 14-24 para. 41),* if the counterparty had prior knowledge of their content (*Opinion No. 13, para. B/2.6; SCHROETER, Art. 14 para. 125; MAGNUS, Art. 14, para. 41)*, or if the parties have established a practice, pursuant to which the standard terms do not need to be transmitted for their inclusion in the contract *(HUBER/MULLIS, p. 32; MAGNUS, Art. 14, para. 41; CLOUT Case No. 1202 [NL, 2009])*.

II. RESPONDENT's offer, which CLAIMANT accepted, referred to the GCoS

62 At the Summit on 28 March 2020, Mr Chandra, CLAIMANT's COO, and Ms Bupati, RESPONDENT's Head of Contracting, discussed the application of CLAIMANT's GCoS *(PO 2, p. 49 para. 13; RNoA, p. 26 para. 10; Exh. C1, p. 10 para. 11)*. On 1 April 2020, RESPONDENT made an offer *(cf. paras. 6 et seqq. above)* that referred to the conditions discussed at the Summit *(Exh. C 2, p. 12 para. 2)*.

63 The interpretation of RESPONDENT's offer shows that its intent was to include CLAIMANT's GCoS in the Sales Contract [**1**]. RESPONDENT was not under the duty to transmit the GCoS to CLAIMANT, since the GCoS are CLAIMANT's. Likewise, CLAIMANT was not obliged to transmit the GCoS to RESPONDENT, because RESPONDENT requested the inclusion of the GCoS in the Sales Contract [**2**].

1. RESPONDENT intended to include the GCoS into its offer

64 RESPONDENT intended to include the GCoS in the offer sent to CLAIMANT on 1 April 2020.

65 A party may express its intent to include standard terms in oral or written communication through an express or implied reference to such terms *(CISG-Online 828 [AUT, 2003], para. 41; Opinion No. 13, para. A/4; SAENGER/FERRARI, Art. 8 para. 6; SCHROETER, Art. 14 p. 394 para. 121)*. There are no form requirements for the reference to standard terms *(SCHROETER, Art. 14 p. 394 para. 121)*.

66 Due consideration must be given to all relevant circumstances of the case in order to determine whether standard terms were intended to be part of the offer (cf. Art. 8(3) CISG). The wording of the parties' statements, the negotiations, any usages, practice, and subsequent conduct of the parties must be taken into account *(BRUNNER/HURNI, para. 14)*. The offeror intends to include the standards terms

if their inclusion has been part of the negotiations between the parties *(CISG-Online 2490 [USA, 2013], para. 37; CISG-Online 828 [AUT, 2003], p. 13 para. 41)*.

67 First, the wording of the offer demonstrates RESPONDENT'S intent to include the GCoS in its offer. RESPONDENT's offer impliedly includes the GCoS with the reference to "the conditions discussed at the Palm Oil Summit" *(Exh. C 2, p. 12 para.2)*. At the Summit, Mr Chandra and Ms Bupati, discussed the inclusion of the GCoS *(RNoA, p. 26 para. 10)*. Mr Chandra mentioned that "the remaining terms would be those of the previous contracts, including CLAIMANT's [GCoS]" *(PO 2, p. 49 para. 13)*. Even RESPONDENT confirmed *(RNoA, p. 26 para. 10)* that Mr Chandra informed Ms Bupati that "[…] the General Conditions of Sale were supposed to be the same" *(ibid.)*. Thus, the wording of the offer is evidence that RESPONDENT wanted to include CLAIMANT's GCoS.

68 Furthermore, Ms Bupati's attempt to negotiate the Arbitration Clause contained in the GCoS *(Exh. C 1, p. 10 para. 11)* indicates that RESPONDENT considered the GCoS to be part of the discussed conditions of the Sales Contract. At the Summit, Ms. Bupati indicated that "it could […] be necessary to adapt some of the legal terms which had been used in the previous contracts […] in particular the dispute solution mechanism […]" *(ibid.)*. Accordingly, Ms Bupati requested in RESPONDENT's offer of 1 April 2020 to amend the Arbitration Clause by adding UNCITRAL Transparency Rules *(Exh. C 2, p. 12 para. 6)*. The GCoS always contained an arbitration clause as dispute solution mechanism *(Exh. R 4, p. 32)*. Thus, "legal terms" refer to the GCoS, since all contracts that Ms Bupati and Mr Chandra negotiated in the past included CLAIMANT's GCoS *(cf. PO 2, p. 48 para. 7)*.

69 The Parties' negotiations and the wording of RESPONDENT's offer could only be understood to the effect that RESPONDENT's offer included the GCoS.

70 Second, RESPONDENT's assumption that CLAIMANT would use its Model Contract also reveals RESPONDENT's intent to include the GCoS into its offer. The Model Contract, which declared the GCoS applicable *(PO 2, p. 48 para. 7)*, was used in all contracts concluded between CLAIMANT and Southern Commodities since 2010. Ms Bupati referred in her e-mail to CLAIMANT'S Model Contract *(Exh. C 2, p. 12 para. 5)*. Therefore, it was reasonable for CLAIMANT pursuant to Art. 8(1) and Art. 8(3) CISG that RESPONDENT intended to apply the GCoS to the Sales Contract.

71 Finally, the fact that the Parties did not discuss the GCoS in detail is irrelevant. Merchants concentrate on the essentials of the transaction like the quality of the goods and their price, and do not negotiate the content of standard terms in detail *(SCHROETER, Art. 14 para. 114)*. RESPONDENT had difficulties to acquire RSPO-certified palm oil *(RNoA, p. 26 para. 4; Exh. R 3, p. 31 para. 6)* and CLAIMANT searched for a customer for 2/3 of its palm oil production *(Exh. R 3, p. 31 para. 6; Exh. C 1, p. 10*

para. 7; NoA, p. 5 para. 3). Ms Bupati and Mr Chandra tacitly relied on their previous business relationship to conclude a mutually beneficial contract. They willingly avoided to negotiate every clause and based their negotiation on the GCoS to focus on the commercial terms. That the Parties did not negotiate the GCoS *in extenso* does not alter the interpretation of RESPONDENT'S offer.

72 In conclusion, the interpretation of RESPONDENT's offer in its e-mail of 1 April 2020 pursuant to Art. 8 CISG shows RESPONDENT's intent to include the GCoS in the Sales Contract.

2. There was no need for CLAIMANT to transmit the GCoS to RESPONDENT

73 RESPONDENT was not obliged to transmit the GCoS to CLAIMANT, since RESPONDENT included CLAIMANT's GCoS in its offer. Likewise, CLAIMANT must not transmit them to RESPONDENT.

74 The standard terms do not need to be transmitted if the buyer includes the seller's standard terms in its offer *(MANKOWSKI, Vor. Artt. 14-24 para. 41)*. In such a case, the buyer waives its right to receive the standard terms *(GRUBER, Art. 14 para. 33; MANKOWSKI, Vor. Artt. 14-24 para. 41)*.

75 In the present case, as shown above *(cf. paras. 64 et seqq.)*, RESPONDENT intended to include the GCoS in the Sales Contract and it therefore waived its right to obtain a copy of CLAIMANT's GCoS.

76 In conclusion, CLAIMANT must not transmit the GCoS to RESPONDENT. The GCoS were included in the Sales Contract with CLAIMANT's acceptance of RESPONDENT's offer.

III. Alternatively, the GCoS were included in the Sales Contract, as RESPONDENT accepted CLAIMANT's counteroffer, which encompasses the GCoS

77 Should the Tribunal find that the contractual documents sent by CLAIMANT constituted a counteroffer *(quod non, cf. paras. 18 et seqq above)*, CLAIMANT's GCoS were still validly included in the Sales Contract.

78 It was apparent to RESPONDENT that CLAIMANT intended to include the GCoS in the counteroffer [**1**]. CLAIMANT did not have to transmit the GCoS to RESPONDENT since RESPONDENT had a reasonable opportunity to take notice of them [**2**]. As shown above *(cf. paras. 15 et seqq.)*, RESPONDENT accepted the offer and thereby the inclusion of the GCoS [**3**].

1. It has been apparent to RESPONDENT that CLAIMANT intended to include the GCoS

79 CLAIMANT's intent to include the GCoS was apparent to RESPONDENT.

80 The intent of the offeror to include standard terms must be apparent to the offeree *(cf. para. 60 above)*. If one party clearly expresses that intent, the recipient cannot purport to have insufficient knowledge of it *(ENDERLEIN/MASKOW, Art. 8 para. 3.1)*.

81 It has been apparent to RESPONDENT that CLAIMANT intended to include its GCoS. First, the contractual documents set forth that "Seller's General Conditions of Sale apply" *(Exh. C 3, p. 13, table)*. Second, CLAIMANT affirmed in its e-mail of 9 April 2020 that "Seller's General Conditions of Sale apply to issues not regulated in the [Sales Contract]" *(Exh. C 4, p. 17 para. 3)*. RESPONDENT could not have understood these references to the GCoS other than that CLAIMANT intended to apply them.

82 Thus, it was apparent to RESPONDENT that CLAIMANT intended to include its GCoS in its counteroffer.

2. RESPONDENT had a reasonable opportunity to take notice of the GCoS

83 RESPONDENT was aware of the content of the GCoS since Ms Bupati knew their content. Thus, CLAIMANT had no duty to send the GCoS to RESPONDENT.

84 If both parties know about the content of standard terms, it is not necessary that the standard terms are transmitted to the recipient to make them part of the offer *(SCHROETER, Art. 14 paras. 120 and 125; FERRARI/KRÖLL, Art. 14 para. 40; MAGNUS, Art. 14 para. 41)*. The level of knowledge of the recipient is decisive *(GRUBER, Art. 14 para. 32)*. Knowledge can be assumed if it there is proof that they have been made available to the other party at an earlier point in time *(ibid.)*.

85 Ms Bupati was aware of the content of CLAIMANT's GCoS. The GCoS were sent to Southern Commodities in 2011 *(RNoA, p. 27 para. 11)*, when Ms Bupati was employed there *(Exh. R 3, p. 31 para. 2)*. She had a closer look at the GCoS during an arbitration proceeding against CLAIMANT in 2014 *(RNoA, p. 27 para 11; Opinion No. 13, para. B/2.6; PO 2, p. 50 para. 18)*. The GCoS remained the same since 2011 except for the amendment of the Arbitration Clause *(Exh. C 1, p. 9 para. 4)*. CLAIMANT informed her about the change of the Arbitration Clause in 2016 *(RNoA, p. 27 para. 12)*. Therefore, Ms Bupati knew about the content of the GCoS.

86 The knowledge of Ms Bupati must be attributed to RESPONDENT. The knowledge of a representative in relation with a particular transaction is imputed to the principal *(ROUILLER, p. 260)*. Since 2018, Ms Bupati has been RESPONDENT's Head of Contracting *(Exh. R 3, p. 31 para. 4)*. RESPONDENT employed her to benefit from her relations to palm oil producers *(ibid.)*. Hence, Ms Bupati's knowledge is attributed to RESPONDENT. Thus, RESPONDENT is deemed to have knowledge of the GCoS. Hence, it had a reasonable opportunity to take notice through Ms Bupati.

87 In conclusion, it was not necessary for CLAIMANT to transmit its GCoS to RESPONDENT.

3. The GCoS were included in the Sales Contract with RESPONDENT's acceptance

88 As shown above *(cf. paras. 29 et seqq.)*, CLAIMANT's counteroffer was accepted by RESPONDENT. Since the GCoS were part of the counteroffer, the GCoS were included in the Sales Contract.

89 Standard terms are included in a contract if the offeree accepts the offer which refers to the standard terms, provided that there was a reasonable opportunity to take notice of them *(Opinion No. 13, para. B 2.13, cf. PILTZ, p. 238)*. That the counterparty reads the standard terms or even specifically confirms their inclusion is not necessary *(ibid.)*. It is decisive whether it can be assumed that the other party was aware that the standard terms would apply to the contract *(ibid.)*.

90 The counteroffer unequivocally refers to CLAIMANT's GCoS. As shown above *(paras. 73 et seqq)*, there was no need to transmit the GCoS for RESPONDENT to have a reasonable opportunity to take notice of their content.

91 Therefore, the GCoS were included in the contract because RESPONDENT accepted the counteroffer.

IV. In any event, the GCoS were included in the Sales Contract by practice

92 In any event, the Tribunal should consider that the Parties included the GCoS by practice.

93 According to Art. 9(1) CISG, Parties are bound by any established practices *(cf. para. 40 above)*. These must be considered for the inclusion of standard terms *(SCHROETER, Art. 14 para. 76)*.

94 CLAIMANT and Southern Commodities established a trading practice *(cf. paras. 39 et seqq. above),* which is transferrable to CLAIMANT and RESPONDENT *(cf. paras. 43 et seqq. above)*. According to this practice, it is not necessary to transmit the GCoS to the other party [**1**]. In line with this practice, the GCoS were included in the Sales Contract without their transmission to RESPONDENT [**2**].

1. CLAIMANT and Southern Commodities established a practice to include the GCoS without transmission

95 CLAIMANT and Southern Commodities established a practice to include the GCoS in their contracts without their transmission.

96 The inclusion of standard terms without transmission can only become a practice if the standard terms have been included in past contracts *(SCHROETER, Art. 14 para. 162)*. It is sufficient that they were sent once *(HUBER/KRÖLL, p. 310)*.

97 A practice can be that standard terms are included by reference if the other party does not object to them *(CISG-Online 644 [AUT, 2001], p. 5; cf. PILTZ, p. 235)*. In such cases, if the standard terms change, the user must inform the recipient *(DORNIS, Vor. Artt. 14-24 para. 13)*.

98 CLAIMANT's GCoS had been included in a contract with Southern Commodities in October 2011. The GCoS were transmitted to Southern Commodities and the contractual documents referred to them *(RNoA, p. 27 para. 11; PO 2, p. 48 para. 7)*. Between 2011 and 2018, CLAIMANT provided for the

application of the GCoS in the contractual documents and in the accompanying e-mail in all forty contracts *(Exh. C1 p. 9 para. 4; PO 2, p. 48 para. 7)*. Southern Commodities never rejected their inclusion. CLAIMANT and Southern Commodities both considered that the GCoS were included in their contracts without transmitting them. In 2016 only the Arbitration Clause was changed *(Exh. C1, p. 9 para. 4)*. CLAIMANT informed Ms Bupati about this change *(ibid.; RNoA, p. 27 para. 12)*. Thus, the practice to include the GCoS into their contracts without transmission continued after 2016.

99 In conclusion CLAIMANT and Southern Commodities established a trading practice for the inclusion of the GCoS into their contracts by a mere reference and without transmitting them.

2. The GCoS have been included in the Sales Contract without transmission

100 As shown above *(cf. paras. 43 et seqq.)*, the practice developed between Southern Commodities and CLAIMANT is applicable between the Parties. Hence, the GCoS were included in the Sales Contract without transmission.

101 Under the applicable practice *(cf. paras. 95 et seqq. above)*, the GCoS must not be transmitted to become part of a contract. A reference to the GCoS is sufficient for their inclusion.

102 In the present case, the GCoS were included without transmission pursuant to the practice. The Parties used the same Model Contract that referred to the GCoS *(Exh. C 3, p. 13, table)* and adhered to the same procedure as CLAIMANT and Southern Commodities. Thus, the GCoS were included when RESPONDENT accepted the counteroffer, which referred to the GCoS *(cf. paras. 79 et seqq. above)*.

103 In conclusion, the GCoS were included in the Sales Contract without their transmission.

V. All terms of the GCoS are valid under MCL

104 Clause 4 of CLAIMANT's GCoS is not a surprising term and thus all terms of the GCoS are valid under Mediterranean Contract Law (**"MCL"**).

105 Clause 4 gives the seller two months to remedy any breach of contract *(PO 2, p. 52 para. 31)*. Only if such remedy is unsuccessful may the buyer terminate the contract *(ibid.)*.

106 The validity of the contract and of its provisions is not governed by the CISG (Art. 4(a) CISG) but by the applicable domestic law *(CISG-Online 1376 [AUT, 2005] para. 9.1; CISG-Online 642 [AUT, 2000] p. 4; STADLER, pp. 89 et seq.; DRASCH, p. 34 et seq.; MAGNUS, Art. 14 para. 42)*.

107 In the case at hand, the domestic law governing the substantive validity of the GCoS is MCL through the Parties' choice of law *(PO 2, p. 52 para. 33)*.

108 Pursuant to Art. 2.1.20(1) MCL, surprising terms are not effective, unless they were expressly accepted. A term is surprising if a reasonable third person would not have expected it *(NAUDÉ, Art. 2.1.20 para. 6)*, but not if it is common in a particular trade *(ibid., para. 11)*.

109 In Equatoriana, where RESPONDENT is seated, Clause 4 is not unusual *(PO 2, p. 52 para. 31)*. A reasonable third person that trades with palm oil in that region would have expected such a clause. Thus, RESPONDENT would and could have expected a such a clause as Clause 4 GCoS. Therefore, CLAIMANT's GCoS entail no surprising terms and are valid under MCL.

110 In conclusion, all terms of CLAIMANT's GCoS are valid under MCL.

Conclusion: The interpretation of RESPONDENT'S offer of 1 April 2020 shows that RESPONDENT's intent was to include the GCoS in the Sales Contract. For the GCoS to be included in the Sales Contract, it is superfluous that CLAIMANT transmits them to RESPONDENT because RESPONDENT asked for their inclusion. Should the Tribunal find that the sending of the contractual documents by CLAIMANT on 9 April 2020 constitutes a counteroffer *(quod non)*, this counteroffer included the GCoS. CLAIMANT's intent to include the GCoS was apparent to RESPONDENT, who accepted the alleged counteroffer and thus the inclusion of the GCoS in the Sales Contract. CLAIMANT did not have to transmit the GCoS to RESPONDENT because RESPONDENT had prior knowledge of their content. In any event, the GCoS were included in the Sales Contract through the Parties' practice regarding the inclusion of the GCoS without their transmission. Lastly, all terms of CLAIMANT's GCOS are valid under MCL.

C. THE PARTIES HAVE VALIDLY AGREED ON THE JURISDICTION OF THE TRIBUNAL

111 The Parties concluded a Sales Contract [**A**], which includes CLAIMANT's GCoS [**B**]. In CLAIMANT's GCoS, the Parties agreed that "[a]ny dispute, controversy or claim arising out of or relating to [the Sales Contract] […] shall be settled by arbitration in accordance with the AIAC Arbitration Rules *(Exh. R 4, p. 32, Art. 9 GCoS after changes in 2016)*. Thus, the Parties have agreed that a dispute such as in the present case is submitted to arbitration.

112 RESPONDENT challenges the jurisdiction of this Tribunal, alleging that the Parties' arbitration agreement (**"Arbitration Agreement"**) would be invalid. RESPONDENT suggests that Mediterranean law governs the validity of the Arbitration Agreement and that thereunder, CLAIMANT'S GCoS would not have been included in the Sales Contract *(RNoA, p. 27 paras. 14 et seq.)*. However, it is Danubian law that governs the validity of the Arbitration Agreement, and thereunder, the Arbitration Agreement

is valid. In any event, the Arbitration Agreement would also be valid under the law of Mediterraneo. Thus, the Tribunal has jurisdiction.

113 The Parties agreed to apply the 2021 AIAC Rules (**"AIAC Rules"**) *(PO 1, p. 46 para. II)*. Pursuant to Rule 20.1 AIAC Rules, the tribunal is empowered to rule on its jurisdiction including objections regarding the existence or validity of the arbitration agreement. Hence, the Tribunal is granted competence-competence *(cf. BORN, pp. 1139 et seqq.)*.

114 If the validity of an arbitration agreement is challenged, the tribunal should first determine the laws applicable to the arbitration agreement by conducting a conflict of laws analysis. Second, it should examine its validity thereunder *(BERGER, pp. 305 et seq.; STÜRNER/WENDELSTEIN, p. 475; cf. LEW/MISTELIS/KRÖLL, para. 6-33)*. The tribunal should determine separately the laws governing the substantive and formal validity *(BERGER, pp. 303 et seq.)*.

115 The rules of Danubian Contract Law (**"DCL"**) govern the substantive validity of the Arbitration Agreement [**I**]. Thereunder, the Arbitration Agreement is substantively valid [**II**]. The Arbitration Agreement is formally valid under Danubian Arbitration Law (**"DAL"**) [**III**]. Even if Mediterranean law, with or without the CISG, governed the Arbitration Agreement *(quod non)*, the Arbitration Agreement would be substantively and formally valid thereunder [**IV**].

I. The rules of DCL govern the substantive validity of the Arbitration Agreement

116 Rule 13.5(a) AIAC Rules is the starting point of the Tribunal's conflict of laws analysis. According to this provision, in absence of any agreement by the parties, the tribunal is empowered to determine the law governing the arbitration agreement. When applying this rule, the tribunal should take into account the conflict of laws rules used by state courts at the seat of arbitration to avoid annulment of the award *(cf. LANDBRECHT, pp. 70 et seq.)*.

117 The seat of this Arbitration is Danubia *(Exh. R 4, p. 32)*. Danubia is a contracting State to the New York Convention (**"NYC")** and DAL is a verbatim adoption of the UNCITRAL Model Law (**"UML"**) with Option 1 for Art. 7 *(PO 1, p. 47 para. III.3)*.

118 Art. V(1)(a) NYC contains a conflict of laws rule for evaluating the validity of arbitration agreements in enforcement proceedings. This rule is applicable also at the pre-award stage as divergent decisions could result from applying different criteria at the pre- and post-award stage *(CISG-Online 5488 [GER, 2020], paras. 48 et seqq.; STEINGRUBER, para. 6.16; KRÖLL, Schiedsklauseln, para. 34; LEW/MISTELIS/KRÖLL, para. 6-55)*. According to Art. V(1)(a) NYC, the express or implied choice of

the parties determines the law applicable to the substantive validity of the arbitration agreement. Absent such choice, the decisive objective factor is the seat of arbitration *(cf. KRÖLL, Schiedsklauseln, paras. 32, 38)*.

119 Thus, the Tribunal should assess, based on Rule 13.5(a) AIAC Rules and Art. V(1)(a) NYC, whether there is an express or implied choice of law for the Arbitration Agreement made by the Parties. If no such choice was made, the law at the seat of arbitration applies.

120 The Parties have agreed that Mediterranean law governs the Sales Contract *(PO 2, p. 52 para. 33)*. However, the rules of DCL govern the substantive validity of the Arbitration Agreement because first, the law governing the Sales Contract does not automatically extend to the Arbitration Agreement [**1**]. Second, the Parties have not impliedly chosen the law of Mediterraneo to govern the Arbitration Agreement [**2**]. Third, the Parties' choice of the seat in Danubia is an implied choice for the law governing the substantive validity of the Arbitration Agreement [**3**]. Fourth, even if the Parties had not impliedly chosen a law, the substantive validity of the Arbitration Agreement would still be governed by the rules of DCL as the law at the seat of arbitration [**4**].

1. The express choice of Mediterranean law for the Sales Contract does not automatically extend to the Arbitration Agreement

121 CLAIMANT submits that there is no automatic extension of the law governing the Sales Contract to the Arbitration Agreement due to the doctrine of separability.

122 The doctrine of separability provides that the arbitration agreement is an agreement distinct from the main contract *(KRÖLL, Schiedsklauseln, para. 13; cf. REDFERN/HUNTER, para. 3.25; LEW/MISTELIS/KRÖLL, para. 6-9; NAZZINI, p. 684; PLAVEC, p. 100)*. Thus, an express choice of law for the main contract does not automatically extend nor comprise the arbitration agreement *(SCHERER/JENSEN, Harmonized Theory, p. 9; PLAVEC, p. 100; VOROBEY, p. 138; KRÖLL, Schiedsklauseln, para. 28)*. Thus, a different law may apply to the Arbitration Agreement.

123 The doctrine of separability is enshrined in the applicable AIAC Rules. The "arbitration agreement […] shall be treated as an agreement independent of the other terms of the contract" (Rule 20.1(a) AIAC Rules). Furthermore, the " […] law applicable to the substance of the dispute and the law governing the arbitration agreement […]" need to be distinguished (Rule 13.5(a) AIAC Rules). Also, Art. 16 DAL adopts the doctrine of separability *(Explanatory Note, p. 30 para. 25)*. Thus, the Sales Contract and the Arbitration Agreement have to be treated separately.

124 In the case at hand, the Parties expressly chose that the Sales Contract is governed by Mediterranean law but have not agreed that it would also govern the Arbitration Agreement. Ms Bupati, RESPONDENT's Head of Contracting, when discussing the choice of law clause, referred to the "sales contract" *(Exh. C 2, p. 12 para. 5)*. Similarly, Mr Rain, assistant of Mr Chandra, CLAIMANT's COO, mentioned "the sale" *(Exh. C 4, p. 17 para. 2)*. Thus, the Parties expressly chose Mediterranean law to apply only to the substance of the Sales Contract and not to the Arbitration Agreement.

125 In conclusion, the Parties expressly chose Mediterranean law only for the Sales Contract. This express choice does not automatically extend to the Arbitration Agreement due to the doctrine of separability.

2. The Parties have not impliedly chosen the law of Mediterraneo to govern the Arbitration Agreement

126 It has been suggested that commercial parties likely do not know about the doctrine of separability. Accordingly, the parties would not expect that the arbitration agreement is governed by a different law than the main contract. Thus, it has been proposed that, as a general rule of interpretation, a choice of law for the main contract is an implied choice of law for the arbitration agreement *(cf. Enka Case, para. 53[iv]; SCHERER/JENSEN, Close Connections, p. 675; cf. KRÖLL, Schiedsklauseln, paras. 17 et seqq., 43)*.

127 However, this opinion should not be followed. It cannot be presumed that parties intend that the law chosen for the main contract also governs the arbitration agreement [**a**]. In any event, the facts of the case refute such a presumption [**b**].

a) It cannot be presumed that parties intend that the law chosen for the main contract also governs the arbitration agreement

128 CLAIMANT submits that it cannot be presumed that the parties' choice for the main contract is also applicable to the arbitration agreement.

129 First, it cannot be presumed that commercial parties do not know about the doctrine of separability. Such a presumption is too general. It does not do justice to the broad range of cases in international commercial arbitration. In complex transactions, usually several lawyers are involved. Their knowledge of the doctrine of separability and the effects of choosing the seat of arbitration is a given *(cf. PIKA, p. 511; KRÖLL, Schiedsklauseln, para. 44)*. Furthermore, in order to respect the primacy of party autonomy, courts and tribunals should refrain from relying on the presumption that commercial parties do not know about the doctrine of separability *(CHAN/YANG, p. 645)*. Thus, the Tribunal should refrain from presuming that parties do not know about the doctrine of separability.

130 Second, the reasoning behind the abovementioned general rule of interpretation *(cf. para. 126)* is flawed. Should parties not know about the doctrine of separability, they would not be aware that the arbitration agreement may be governed by a different law. Correspondingly, as they cannot know that they can choose a law for the arbitration agreement, they cannot intend that the law chosen for the main contract also governs the arbitration agreement. Thus, parties who do not know about the separability doctrine cannot make an implied choice of law for the arbitration agreement *(KRÖLL, Schiedsklauseln, para. 46)*.

131 Third, parties rarely, if ever, give consideration to the arbitration clause in their negotiations on the choice of law for the main contract *(BERGER, p. 320; SCHERER/JENSEN, Close connections, p. 675)*. The explanation for this is that the arbitration agreement is not a normal contractual provision *(PLAVEC, p. 99)*. As arbitration clauses are procedural contracts, they have a different legal nature than other contractual clauses *(KRÖLL, Schiedsklauseln, para. 22)*. Thus, parties cannot intend that the law chosen for the main contract also governs the arbitration agreement.

132 In conclusion, the Tribunal should not follow the presumption that parties intend that the law chosen for the main contract also governs the arbitration agreement.

b) In any event, the facts of the present case refute such a presumption

133 Even if there were such a presumption, it is refuted by the facts of the case.

134 The Parties must have known about the doctrine of separability, and they did not intend that the choice of law for the Sales Contract has any effect on the Arbitration Agreement.

135 Ms Bupati, RESPONDENT's Head of Contracting, had sufficient knowledge about arbitration to know about the doctrine of separability. She had a "closer look" *(RNoA, p. 27 para. 11)* at CLAIMANT's GCoS before changes in 2016 "in the context of an arbitration" *(ibid.)* in 2014 between CLAIMANT and Southern Commodities. This version of the GCoS had differentiated between multiple applicable laws. On one hand, the law applicable to arbitration was the "Arbitration Act of Malaysia 1952" *(Exh. R 4, p. 32)*. On the other hand, the law applicable to the main contract was the "law of Danubia" *(PO 2, p. 51 para. 24)*. Ms Bupati's knowledge about the application of different laws to the main contract and the arbitration agreement is a strong indication that she also knew that the Sales Contract and the Arbitration Agreement may be governed by different laws.

136 Furthermore, both Parties must have known about the doctrine of separability as they were advised by multiple lawyers. Mr Chandra, COO of CLAIMANT, testified that "one of our lawyers" gave the advice to change the applicable law for CLAIMANT's contracts *(Exh. C 1, p. 10 para. 13)*. Also,

Ms Fauconnier, Ms Bupati's assistant, expressed that "she would have to check […] with their lawyers" if a change of contractual terms would be necessary *(Exh. C 5, p. 18 para. 4)*. Thus, the Parties were accompanied by several lawyers, who had to know about the separability doctrine. As the lawyers' knowledge must be attributed to CLAIMANT and RESPONDENT respectively, the Parties must have known about the doctrine of separability. Thus, had it been the Parties' intention that the law of Mediterraneo should govern the Arbitration Agreement, they could and should have expressly stated so.

137 Lastly, the Parties did not intend the choice of law for the Sales Contract to have any effect on the Arbitration Agreement. In January 2020, CLAIMANT changed the law applicable to its future contracts from the law of Danubia to the law of Mediterraneo *(Exh. C 1, p. 10 para. 13)*. This change was provoked by an unjustified contract termination by a long-term customer *(RNoA, p. 26 para. 4)*. It is harder for the buyer, under the law of Mediterraneo, to terminate the contract when problems with the supply chain occur *(cf. Exh. C 1, p. 10 para. 13)*. This implies that when CLAIMANT decided to change the law applicable to its future contracts, it did not foresee the possible effects of this change on arbitration agreements. Mr Chandra communicated this change to Ms Bupati at the Summit. He explained to her that CLAIMANT had initiated arbitration proceedings against that customer in reaction to the unjustified contract termination *(RNoA, p. 26 para. 4)*. Thus, it must have been clear for RESPONDENT that CLAIMANT changed the law for its future contracts because of the unjustified termination and that the law of Mediterraneo should apply only to substantive contractual terms.

138 In conclusion, the Parties did not impliedly choose the law of Mediterraneo to apply to the Arbitration Agreement.

3. The Parties' choice of the seat in Danubia is an implied choice for the law governing the substantive validity of Arbitration Agreement

139 By selecting the seat of arbitration in Danubia, the Parties had impliedly chosen DCL as the law governing the substantive validity of the Arbitration Agreement.

140 In absence of an express choice of law for the arbitration agreement, an implied choice of law should be inferred from the seat rather than from the law chosen for the main contract. This implied choice of law is better aligned with Art. V(1)(a) NYC and the equivalent provisions in the UML *(MA, p. 149)*. Also, the law at the seat "is […] more compatible with, and complementary to, the supportive and supervisory powers of the courts at the seat" *(MA, p. 150)*. Moreover, the law of the seat would be the "overwhelming" *(Sulamérica Case, para. 26)* or "most likely" *(BCY v BCZ Case, para. 67)* choice for free-standing arbitration agreements. In consideration of interests of certainty and simplicity, the same approach should be applied for all types of arbitration agreements *(MA, p. 151)*. Furthermore,

commercial parties consider the selection of the seat of arbitration to be decisive for every issue regarding the arbitration agreement. Thus, the selection of the seat functions as an implied choice of law for the arbitration agreement *(Petrasol Case, p. 800; XL Insurance Case, p. 883 para. 42; PLAVEC, p. 105; LEW/MISTELIS/KRÖLL, paras. 6-62 fn. 73; BERGER, pp. 315 et seq.; KRÖLL, Schiedsklauseln, para. 45; cf. SCHERER/JENSEN, Close connections, p. 675)*.

141 In the present case, the Parties deliberately selected the seat of Arbitration in Danubia in Art. 9 GCoS *(Exh. R 4, p. 32)*. Thus, they intended the seat to be decisive for all arbitration-related issues. As shown above *(paras. 137 et seqq.)*, RESPONDENT was aware of CLAIMANT's decision to change the applicable law to its future contracts. This decision had been taken in January 2020, following the advice of one of CLAIMANT's lawyers *(Exh. C 1, p. 10 para. 13)*, Mr Langweiler *(PO 2, p. 50 para. 15)*. Mr Langweiler had given "clear advice […] to merely change the choice of law part in Art. 9 GCoS but leave the remainder and in particular the seat of arbitration untouched", "[d]ue to the arbitration friendly environment in Danubia and the supportive attitude and experience of Danubian courts" *(PO 2, p. 50 para. 15)*. Moreover, it is uncontested that Mr Chandra informed Ms Bupati that the Arbitration Clause provides for the seat of the arbitration in Danubia *(PO 2, p. 48 para. 7)*. RESPONDENT has not objected to the seat at any time, and thus must have impliedly accepted it.

142 In conclusion, the Parties have impliedly chosen the rules of DCL as the law governing the substantive validity of the Arbitration Agreement by selecting the seat of Arbitration in Danubia.

4. Even if the Parties had not impliedly chosen a law, the substantive validity of the Arbitration Agreement would still be governed by the rules of DCL as the law at the seat of arbitration

143 In accordance with Art. V(1)(a) NYC, absent a clear and real intent of the parties to choose a law governing an arbitration agreement, the law governing the substantive validity is the law at the seat *(CHAN/YANG, p. 645; SCHERER/JENSEN, Close connections, p. 676; MA, p. 150)*.

144 In the present case, the seat of the Arbitration is Danubia *(Exh. R 4, p. 32)*. Thus, the law applicable to the substantive validity of arbitration agreements are the rules of DCL *(PO 2, p. 53 para. 35)*.

145 Therefore, the rules of DCL governs the substantive validity of the Arbitration Agreement.

II. The Arbitration Agreement is substantively valid under the rules of DCL

146 An arbitration agreement is substantively valid if there is a valid meeting of the minds of the parties to submit their dispute to arbitration *(BERGER, p. 303; GIRSBERGER/VOSER, p. 79 para. 283)*.

147 In the present case, there is a valid meeting of the minds. The Parties concluded the Arbitration Agreement by conduct [**1**]. Alternatively, the Parties concluded the Arbitration Agreement by reference to CLAIMANT's GCoS, which contain the Arbitration Clause [**2**].

1. The Parties concluded the Arbitration Agreement by conduct

148 At the Summit *(Exh. C 1, p. 10 para. 11)*, through e-mail *(Exh. C 2, p. 12)* and phone communications *(cf. Exh. R 2, p. 30; Exh. C 5, p. 18 paras. 4 et seq.)*, the Parties negotiated the dispute resolution mechanism. The basis of their negotiations was the Arbitration Clause in Art. 9 of CLAIMANT's GCoS *(cf. Exh. C 1, p. 10 para. 11)*. The Parties resolved all possible points of disagreement. Thus, they concluded the Arbitration Agreement by conduct conforming with Art. 9 of CLAIMANT's GCoS.

149 The Parties' conduct shows consent to arbitration [**a**]. The conclusion of the Arbitration Agreement by conduct does not depend on the inclusion of CLAIMANT's GCoS in the Sales Contract [**b**].

a) The Parties' conduct shows consent to arbitration

150 The rules on contract formation in DCL are based on the PICC *(PO 2, p. 53 para. 35)*. Pursuant to Art. 2.1.1 PICC, a contract may be concluded by conduct. Even if the moment of the formation of a contract cannot be determined, a contract may be deemed to be concluded provided that the conduct of the parties is sufficient to show agreement *(Official Comment, Art. 2.1.1, p. 34)*. The statements or other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention (Art. 4.2(1) PICC). Regard shall be had to all circumstances, in particular preliminary negotiations between the parties and practices which the parties have established between themselves (cf. Art. 4.3(a, b) PICC).

151 In the case at hand, the conduct of the Parties shows consent to arbitration in line with Art. 9 GCoS.

152 The starting point of the Parties' negotiations regarding the Arbitration Agreement was Art. 9 GCoS. At the Summit, Ms Bupati indicated to Mr Chandra "[…] that it could eventually be necessary to adapt some of the legal terms which had been used in the previous contracts between [them], in particular the dispute resolution mechanism given the wide-spread hostility to arbitration in Equatoriana" *(Exh. C 1, p. 10 para. 11)*. In response to Ms Bupati's statement, Mr Chandra stressed that "for [CLAIMANT] agreeing on anything but arbitration would be very difficult" *(Exh. C 1, p. 10 para. 11)*. In the past, Mr Chandra and Ms Bupati had negotiated around forty contracts *(Exh. R 3, p. 31 para. 2; RNoA, p. 28 para. 18; cf. Exh. C 4, p. 17)*. These contracts always declared CLAIMANT's GCoS to be applicable *(PO 2, p. 48 para. 7)*, and thus referred any potential dispute to arbitration *(cf. Exh. R 4, p. 32)*. Ms Bupati's statement implies that the Arbitration Clause in Art. 9 GCoS formed the basis of the Parties' negotiations regarding the Arbitration Agreement.

153 Following the Summit, on 1 April 2020, Ms Bupati sent an e-mail to Mr Chandra, placing a purchase order for palm oil. In this e-mail, she asked Mr Chandra to "at least […] select a non-industry related arbitration institution and provide for some sort of transparency, for example applying UNCITRAL's Transparency Rules" *(Exh. C 2, p. 12 para. 6)*. Thus, Ms Bupati pointed out two conditions to reach agreement to arbitration: first, the selection of a non-industry related arbitration institution, and second, the addition of the UNCITRAL Transparency Rules (**"Transparency Rules"**).

154 The first condition is met. Since 2016, CLAIMANT's GCoS have selected the AIAC *(cf. Exh. R 4, p. 32)*. The AIAC is "a neutral and independent venue for the conduct of […] international arbitration" *(AIAC website, About)*. Thus, the AIAC is not related to any industry.

155 The second condition was later waived by RESPONDENT. Art. 1(1) Transparency Rules provides that these rules are only applicable to "investor-State arbitration". The present Arbitration cannot fall under the scope of the Transparency Rules, as neither of the Parties is a state. Accordingly, Mr Rain (assistant of Mr Chandra) explained to Ms Fauconnier (assistant of Ms Bupati) that the Transparency Rules had a different scope of application and were thus not suited. Ms Fauconnier agreed *(Exh. C 5, p. 18 paras. 4 et seq.)*. Both Mr Rain and Ms Fauconnier were empowered by CLAIMANT and RESPONDENT respectively *(PO 2, p. 49 para. 12)*. Consequently, the Parties are legally bound by their actions. Therefore, RESPONDENT understood that adding the Transparency Rules to the Arbitration Clause is not possible and waived its second condition.

156 In any event, RESPONDENT's initial condition to "provide for some sort of transparency" *(Exh. C 2, p. 12 para. 6)* would be met. Rule 44.6 AIAC Rules permits the AIAC to publish awards with the parties' consent, which reflects best practices *(Letter to Fasttrack by AIAC, p. 34(ix))* and is a major feature of transparency. If RESPONDENT insisted on transparency, CLAIMANT would agree to publish the award. Therefore, RESPONDENT's condition for transparency is met.

157 Therefore, the Parties agreed by conduct that any dispute arising out of the Sales Contract would be referred to arbitration in accordance with the Arbitration Clause in Art. 9 of CLAIMANT's GCoS.

b) The conclusion of the Arbitration Agreement by conduct does not depend on the inclusion of CLAIMANT's GCoS in the Sales Contract

158 RESPONDENT argues that CLAIMANT's GCoS, containing the Arbitration Clause, have not been validly included in the Sales Contract *(RNoA, p. 27 para. 14)*. However, the Arbitration Agreement was validly concluded independent of the inclusion of CLAIMANT'S GCOS in the Sales Contract.

159 According to Art. 2.1.19(2) PICC, standard terms are provisions prepared in advance for general and repeated use by one party and used without negotiation with the other party. A negotiated term is a

term whose content the other party has a reasonable opportunity to influence *(NAUDÉ, Art. 2.1.19 para. 3 with reference to BGH, VII ZR 128/91, para. II.2.b.aa)*. Furthermore, under DCL negotiated clauses always prevail over standard terms *(PO 2, p. 53 para. 35)*.

160 Although the Arbitration Clause is contained in CLAIMANT's GCoS, it is not a standard term in the sense of Art. 2.1.19(2) PICC. As shown above *(cf. para. 152)*, the Parties negotiated the Arbitration Agreement based on Art. 9 GCoS. RESPONDENT made two conditions that would have to be met to reach agreement to arbitration. These conditions were met *(cf. paras. 153 et seqq.)*. Thus, RESPONDENT had a reasonable opportunity to influence the content of Art. 9 GCoS. It is irrelevant that the Parties did not amend the clause. Therefore, the Arbitration Clause is not a standard term.

161 In conclusion, the Parties have concluded the Arbitration Agreement independently of the inclusion of CLAIMANT's GCoS in the Sales Contract.

2. In the alternative, the Parties concluded a valid Arbitration Agreement by reference

162 Should the Tribunal find that the Parties did not conclude the Arbitration Agreement by conduct, the Parties nevertheless concluded a substantively valid Arbitration Agreement by including in the Sales Contract CLAIMANT's GCoS, which contain the Arbitration Clause.

163 An arbitration agreement is concluded where the standard terms, which contain an arbitration clause, are included in the main contract *(CISG-Online 5488 [GER, 2020], para. 60; EPPING, p. 136)*. Under DCL, the inclusion of standard conditions in an existing contract only requires a clear statement that such conditions apply but not that they are provided to the other party *(PO 1, p. 47 para. III.3)*.

164 In the case at hand, CLAIMANT stated twice that its GCoS apply. The "Special Conditions" of the Sales Contract itself provide that "Seller's General Conditions of Sale apply" *(Exh. C 3, p. 13 table)*. Additionally, CLAIMANT emphasised in the e-mail accompanying the contractual documents that issues not regulated by the Sales Contract would be governed by CLAIMANT's GCoS *(Exh. C 4, p. 7 para. 3)*. The fact that CLAIMANT did not provide its GCoS to RESPONDENT is irrelevant under DCL. Thus, the GCoS became part of the Sales Contract, and the Arbitration Agreement was concluded by reference.

165 In conclusion, the Parties concluded a substantively valid Arbitration Agreement in accordance with the rules of DCL.

III. The Arbitration Agreement is formally valid under DAL

166 The formal validity of the Arbitration Agreement is governed by DAL [**1**]. The Arbitration Agreement is formally valid thereunder [**2**].

1. The formal validity of the Arbitration Agreement is governed by DAL

167 The Tribunal should apply the mandatory formal validity rule of the *lex arbitri* when assessing the formal validity of the arbitration agreement. The *lex arbitri* is the national arbitration law at the seat of the arbitration *(BERGER, p. 324; FERRARI, Plures leges, p. 587 et seq.; REDFERN/HUNTER, paras. 3.38, 3.46; cf. STEINGRUBER, para. 6.12)*.

168 Since the seat of arbitration is Danubia *(see above, para. 117)*, DAL governs the formal validity of the Arbitration Agreement.

2. The Arbitration Agreement is formally valid thereunder

169 The Arbitration Agreement meets the writing requirement of Art. 7 DAL and is thus formally valid.

170 Pursuant to Art. 7(2) DAL, the arbitration agreement shall be in writing. This writing requirement is met if the content of the arbitration agreement is recorded in any form, whether the arbitration agreement or contract has been concluded orally, by conduct, or by other means (Art. 7(3) DAL). Furthermore, the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract (Art. 7(6) DAL).

171 The Arbitration Agreement meets the writing requirement. The content of the Arbitration Agreement concluded by conduct is recorded in writing [**a**]. Alternatively, the Arbitration Agreement is in writing because the Sales Contract contains a reference to the Arbitration Clause [**b**].

a) The content of the Arbitration Agreement is recorded in writing

172 The content of the Arbitration Agreement concluded by conduct is recorded in writing according to Art. 7(2) in conjunction with Art. 7(3) DAL.

173 Under Art. 7(3) DAL, the content of the arbitration agreement but not the consent of the parties must be recorded *(cf. A/CN.9/592, para. 59; cf. BORN, p. 741; cf. Achilles Case, paras. 20 et seqq.)*.

174 As shown above *(cf. paras. 148 et seqq.)*, the Parties concluded the Arbitration Agreement by conduct. The content of this Arbitration Agreement is reflected in Art. 9 GCoS and is thus recorded in writing *(cf. Exh. R 4, p. 32)*. Thus, it is formally valid under Art. 7(2) in conjunction with Art. 7(3) DAL.

b) Alternatively, the reference to CLAIMANT's GCoS constitutes an arbitration agreement in writing

175 Should the Tribunal find that the Parties did not conclude the Arbitration Agreement by conduct, the Arbitration Agreement concluded by reference to CLAIMANT's GCoS would be formally valid. The

writing requirement of Art. 7(2) in conjunction with Art. 7(6) DAL has been satisfied through reference to the GCoS, which contain the Arbitration Clause.

176 To be formally valid, an arbitration agreement by reference must meet two requirements set forth by Art. 7(6) DAL. First, the reference must be in writing. No specific reference is required. A global reference to an arbitration clause contained in standard terms is sufficient *(A/CN.9/264, p. 23, Art. 7 para. 8; BANTEKAS, p. 138; CLOUT Case No. 127 [BM, 1994], p. 7 para. 6)*. Second, the reference must be such as to make the arbitration clause part of the contract *(cf. MÜNCH, § 1031 ZPO para. 40 et seqq.)*. It is generally accepted that the requirements of Art. 7(6) DAL for the reference to be "such as to make that clause part of the contract" depend on the applicable national substantive law of the state *(cf. HUßLEIN-STICH, p. 42; CISG-online 5488 [GER 2020], para. 31, MÜNCH, § 1031 ZPO para. 41)*. If the compliance of national formal validity requirements depends on the arbitration clause having become part of the main contract, the substantive requirements should be based on the substantive law of that nation *(cf. KRÖLL, Schiedsklauseln, para. 51)*.

177 The first requirement of Art. 7(6) DAL is met. The Sales Contract globally refers to the Arbitration Clause by stipulating in writing that "Seller's General Conditions of Sale Apply" *(Exh. C 3, p. 13, table)*. Further, this reference was confirmed by Mr Rain's e-mail on 9 April 2020 *(Exh. C 4, p. 17 para. 3)*. Art. 9 of CLAIMANT's GCoS contains the Arbitration Clause *(Exh. R 4, p. 32)*.

178 The second requirement of Art. 7(6) DAL is met as well. As shown above *(cf. para. 170),* under national substantive law, *i.e.* DCL, the reference to CLAIMANT's GCoS, which contain the Arbitration Clause, was such as to make the Arbitration Clause part of the Sales Contract.

179 Therefore, the writing requirement of Art. 7(2) in conjunction with Art. 7(6) DAL is fulfilled. In conclusion, the Arbitration Agreement by reference is formally valid.

IV. Even if Mediterranean law governed the Arbitration Agreement *(quod non)*, it would be substantively and formally valid thereunder irrespective of the application of the CISG

180 Should the Tribunal find that Mediterranean law governs the Arbitration Agreement, three laws might apply: Mediterranean Arbitration Law (**"MAL"**), which is a verbatim adoption of the UML including Option 2 for Article 7 *(PO 1, p. 47 para. III.3)*, the CISG *(cf. PO 1, p. 46 para. III.3)* or Mediterranean Contract Law (**"MCL"**), which is a verbatim adoption of the PICC *(PO 1, p. 47 para. III.3)*.

181 Even if Mediterranean law governed the Arbitration Agreement *(quod non)*, it would be substantively and formally valid thereunder. First, the CISG is not applicable to the Arbitration Agreement [**1**].

Second, the Arbitration Agreement would be substantively valid under MCL [**2**]. Third, even if the Arbitration Agreement was governed by the CISG *(quod non)*, the Arbitration Agreement would be substantively valid thereunder [**3**]. Finally, the Arbitration Agreement would be formally valid under MAL, MCL and the CISG [**4**].

1. The CISG is not applicable to the Arbitration Agreement

182 Mediterranean law, including the CISG, governs the Sales Contract *(cf. PO 2, p. 52 para. 33)*. However, due to the doctrine of separability, the application of the CISG to the Sales Contract does not automatically extend to the Arbitration Agreement [**a**]. Furthermore, the scope of the CISG is limited to contracts of sale and arbitration agreements do not qualify as such [**b**].

a) Due to the doctrine of separability, the application of the CISG to the Sales Contract does not automatically extend to the Arbitration Agreement

183 As shown above *(cf. paras. 121 et seqq.)*, due to the doctrine of separability, the Arbitration Agreement must be distinguished from the Sales Contract. Thus, the application of the CISG to the Sales Contract does not automatically extend to the Arbitration Agreement.

184 According to a minority opinion, the doctrine of separability does not apply to the stage of contract formation *(FILLERS, pp. 675 et seq., p. 679; WALKER, p. 163; VOROBEY, p. 139)*. This opinion relies on Art. 81(1) CISG which stipulates that in cases of avoidance of a contract, the provision on dispute settlement mechanism remains unaffected *(FOUNTOULAKIS, Art. 81 para. 12)*. This minority opinion restricts the doctrine of separability to the limits of Art. 81(1) CISG, alleging that this provision does not apply to the formation of arbitration agreements. Consequently, this opinion suggests that the CISG also governs the substantive validity of the arbitration agreement *(FILLERS, pp. 675 et seq., p. 679; WALKER, p. 163; VOROBEY, p. 139)*.

185 The Tribunal should not follow this minority opinion. First, the doctrine of separability applies because of Art. 16 DAL or alternatively Art. 16 MAL as well as Rule 20.1(a) AIAC Rules, not due to the CISG *(cf. Explanatory Note, p. 32)*. Second, Art. 81(1) CISG does not restrict the doctrine of separability, rather it only reiterates this internationally accepted doctrine *(CISG-Online 45 [USA, 1992], para. 34; CISG-Online 5488 [GER, 2020], para. 38; SCHROETER, Vor Artt. 14-24, para. 53)*. Third, the doctrine of separability provides for the autonomy of the arbitration agreement from the main contract not only after the main contract has been concluded but at all times *(cf. LEW/MISTELIS/KRÖLL, para. 6-11)*. It would be inconsistent to follow the understanding that the main contract and the arbitration agreement are to be considered as one single contract at the time of for-

mation but two separate contracts when the main contract is avoided. Finally, the doctrine of separability guarantees that the intention of the parties to submit their dispute to arbitration is observed *(LEW/MISTELIS/KRÖLL, para. 6-10)*. If the scope of the doctrine of separability was limited to cases of avoidance, the existence of the arbitration agreement would rely on the existence of the main contract. Consequently, a party, although it had agreed to arbitration initially, could contend in state court proceedings that the main contract was never concluded, and thereby evade the arbitration agreement. Thus, the parties' initial agreement to arbitrate would not be observed.

186 In conclusion, the Tribunal should apply to the doctrine of separability and do so consistently. Due to the doctrine of separability, the application of the CISG to the Sales Contract does not automatically extend to the Arbitration Agreement.

b) Arbitration agreements do not fall under the scope of the CISG

187 The CISG is not applicable because arbitration agreements do not fall under the CISG's scope.

188 The CISG does not contain any provision addressing its applicability to arbitration agreements *(FILLERS, p. 668)*. Artt. 1-3 CISG limit the CISG's scope of application to contracts of sale – these provisions do not mention arbitration agreements *(KRÖLL, Scope, p. 45)*. Furthermore, Art. 4 CISG restricts the scope of the CISG providing that the convention "only governs contracts of sale and the rights and obligations of the seller and the buyer arising from such a contract". The terms "only", "contracts of sale" and "from such a contract" indicate that the scope of the CISG does not include arbitration agreements *(CISG-Online 5441 [GER, 2020], para. 27; HUBER, Art. 4 para. 43)*. Accordingly, doctrine rightly asserts that arbitration agreements are procedural contracts and as such lie outside the scope of the CISG *(KRÖLL, Schiedsklauseln, para. 54; HUBER, Art. 4 para. 43)*.

189 The fact that Art. 19(3) and Art. 81(1) CISG mention dispute settlement clauses does not affect the CISG's scope *(CISG-Online 2588[GER, 2015], para. 56; HUBER, Art. 4 para. 43)*. These two provisions only govern the relationship between the sales contract and the dispute settlement clause but do not determine when arbitration agreements are substantively valid *(CISG-Online 2588 [GER, 2015], para. 56; HUBER, Art. 4 para. 43)*. Indeed, the *travaux préparatoires* reveal that Art. 81(1) CISG should not "[…] make valid an arbitration clause […] if such a clause was not otherwise valid under the applicable national law" *(A/CONF.97/19, p. 57 para. 5)*. Thus, the drafters of the CISG assumed that the substantive validity of an arbitration agreement is governed by national law other than the CISG. Therefore, they did not intend that the CISG would govern the substantive validity of an arbitration agreement.

190 In any event, little would be achieved if the CISG were applicable to arbitration agreements. For the substantive validity of the contract, Art. 4(a) CISG refers to the national law of the Contracting State. Moreover, the CISG does not deal with agency and legal capacity. Thus, only the technical provisions on contract formation (Artt. 14-24 CISG) would remain. Hence, all other questions concerning the substantive validity of the arbitration agreement would still be governed by a different law *(HUBER, Art. 4 para. 43)*. Therefore, the application of the CISG to the Arbitration Agreement in this present case would contradict the view that the contract as a whole should be governed by one law only.

191 In conclusion, the CISG is not applicable to the Arbitration Agreement.

2. The Arbitration Agreement would be substantively valid under MCL

192 Due to the inapplicability of the CISG to the Arbitration Agreement, the Arbitration Agreement would be governed by MCL and would be substantively valid thereunder.

193 Since DCL is based on the PICC *(PO 2, p. 53 para. 35)* and MCL is a verbatim adoption of the PICC *(PO 1, pp. 46 et seq. para. III.3)*, paras. 146 et seqq. apply *mutatis mutandis.* Thus, the Parties concluded a valid Arbitration Agreement by conduct also under MCL.

194 Alternatively, if the Tribunal were to ascertain that the Parties did not conclude the Arbitration Agreement by conduct, they validly concluded the Arbitration Agreement by reference to CLAIMANT's GCoS. If standard terms contain an arbitration clause, the inclusion of these standard terms in the main contract leads to the conclusion of the Arbitration Agreement *(cf. CISG-Online 5488 [GER, 2020], para. 60; cf. EPPING, p. 136)*. Under the PICC, if a separate document contains standard terms, an express reference is required unless there is no different usage or practice *(BRÖDERMANN, Art. 2.1.19 para. 3; NAUDÉ, Art. 2.1.19 para. 12)*. Moreover, the user of standard terms is required to take reasonable measures to bring them to the attention of the other party *(BRÖDERMANN, Art. 2.1.19 para. 3; NAUDÉ, Art. 2.1.19 paras. 19 et seqq.; Official Comment, Art. 2.1.19 p. 68)*.

195 The Sales Contract *(Exh. C 3, p. 13, table)* as well as Mr Rain's e-mail *(Exh. C 4, p. 17 para. 3)* contain an express reference to the CLAIMANT's GCoS. Furthermore, Ms Bupati knew their content and Mr Chandra informed her about the changes in 2016 *(PO 2, p. 48 para. 7)*. Thus, CLAIMANT took reasonable steps to bring the GCoS to the attention of RESPONDENT. Moreover, as shown above *(cf. paras. 57 et seqq.)*, CLAIMANT's GCoS were validly included by reference under the stricter requirements of the CISG. Hence, they must have been included in the contract under MCL as well.

196 Therefore, under MCL, the Arbitration Agreement would have been validly concluded by reference.

3. Even if the Arbitration Agreement was governed by the CISG, the Arbitration Agreement would be substantively valid thereunder

197 Even if the Arbitration Agreement was governed by the CISG, the Arbitration Agreement would be substantively valid thereunder.

198 First, the Parties concluded the Arbitration Agreement by agreeing to arbitration during their negotiations. According to the prevailing opinion, a contract can be concluded under the CISG not only by offer and acceptance but also by the parties' consensus on the *essentialia negotii (SCHROETER, Vor Artt. 14-24 para. 85; MAGNUS, Vor. Artt. 14 para. 5; PERALES VISCASILLAS, pre. Artt. 14-24, para. 7)*. The *essentialia negotii* of an arbitration agreement are (i) consent to refer the dispute to arbitration and (ii) the designation of the legal relationship *(GIRSBERGER/VOSER, paras. 284 et seqq.)*. Thus, the CISG's requirements do not diverge from those of the PICC. Therefore, paras. 146 et seqq. apply *mutatis mutandis*.

199 Second and alternatively, the Parties concluded the Arbitration Agreement by including CLAIMANT's GCoS in the Sales Contract. Where standard terms contain an arbitration clause, an arbitration agreement is concluded through inclusion of these standard terms in the main contract *(CISG-Online 5488 [GER, 2020], para. 60; EPPING, p. 136)*. As shown above *(cf. paras. 57 et seqq.)*, CLAIMANT's GCoS, which contain the Arbitration Clause, were included in the Sales Contract in accordance with the CISG. Thus, the Parties concluded a valid Arbitration Agreement by reference.

200 Therefore, even if the Tribunal were to find that the conclusion of the Arbitration Agreement was governed by the CISG, it would be substantively valid thereunder.

4. The Arbitration Agreement would be formally valid under MAL, MCL and the CISG

201 As shown above, as Arbitration is seated in Danubia, the formal validity of the Arbitration Agreement is governed by Art. 7 DAL and is formally valid thereunder *(cf. paras. 166 et seqq.)*. Even if MAL, MCL or the CISG governed the formal validity of the Arbitration Agreement *(quod non)*, the Arbitration Agreement would be formally valid thereunder.

202 Art. 7 MAL does not provide for any form requirement *(Explanatory Note, p. 28)*. The MCL is a verbatim adoption of the PICC *(cf. para. 180 above)* and Art. 1.2 PICC establishes the principle of freedom from form unless the parties otherwise agree *(BRÖDERMANN, Art. 1.2 para. 1)*. Equally, Art. 11 CISG stipulates the principle of freedom from form unless otherwise agreed by the parties *(SCHMIDT-KESSEL, Art. 11 paras. 5 et seq., 16; MAGNUS, Art. 11 para. 4)*.

203 As shown above *(cf. paras. 52 et seqq.)*, the Parties did not agree on any form requirement.

204 Therefore, the Arbitration Agreement is formally valid under MAL, MCL and the CISG.

Conclusion: The Parties have validly agreed on the jurisdiction of the Tribunal. The substantive validity of the Arbitration Agreement is governed by the rules of DCL. The Parties' choice of the law of Mediterraneo for the Sales Contract neither automatically extends to the Arbitration Agreement nor is an implied choice for the Arbitration Agreement. There can be no presumption that parties have the intention that the law chosen for the main contract also applies to the arbitration agreement. In any event, such a presumption would be refuted by the facts of the present case. Rather, the substantive validity of the Arbitration Agreement is governed by the rules of DCL because the Parties have impliedly chosen the rules of DCL or alternatively because DCL is the law at the seat. Under the rules of DCL, the Arbitration Agreement is substantively valid because the Parties concluded the Arbitration Agreement by conduct or alternatively by reference. Furthermore, the Arbitration Agreement is formally valid under DAL which governs the Arbitration Agreement as the arbitration law at the seat. Even if Mediterranean law governed the Arbitration Agreement *(quod non)*, it would be substantively and formally valid, whether the CISG applies or not. As the CISG is not applicable to the Arbitration Agreement, it is MCL that governs the substantive validity of the Arbitration Agreement. Thereunder, the Arbitration Agreement is substantively valid. Even if the Arbitration Agreement were governed by the CISG, it would be substantively valid thereunder. Finally, the Arbitration Agreement would be formally valid under MAL, MCL and CISG.

Requests

In light of the submissions above, on behalf of CLAIMANT, we herewith respectfully request the Tribunal:

a. to confirm that CLAIMANT and RESPONDENT have validly concluded an Arbitration Agreement, and that thereby, the Tribunal has jurisdiction;

b. to find that Danubian Contract Law governs the substantive validity of the Arbitration Agreement and that Danubian Arbitration Law governs its formal validity;

c. to determine that the CISG is not applicable to the conclusion of the Arbitration Agreement in the event it were governed by the law of Mediterraneo;

d. to uphold the substantive and formal validity of the Arbitration Agreement under Mediterranean laws in the event these laws were applicable;

e. to confirm that CLAIMANT and RESPONDENT have concluded a Sales Contract for the delivery of 20,000t RSPO-certified palm oil *per annum* for the years 2021-2025;

f. to order RESPONDENT to perform the Sales Contract for the years 2022-2025;

g. to find that CLAIMANT's General Conditions of Sale were validly included in the Sales Contract;

h. to order RESPONDENT to bear the costs of this Arbitration.

Respectfully submitted on 9 December 2021 by

DANIEL MOLINO

GABRIEL ADAL

HADJAR SBAIH

JOËL DONZÉ

JONATHAN BENZ

LARA LANGER

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