NINETEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

28 MARCH – 3 APRIL 2022

HONG KONG

THE CHINESE UNIVERSITY OF HONG KONG

MEMORANDUM FOR CLAIMANT

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**

SAMUEL CHAN • ATTA CHIU • BERTHA CHUI
JANICE FUNG • CECILIA LI • CHRISTOPHER LI • CHARLOTTE LO
HOLY NG • ELAINE REN • ALAN SHAM • IAN SUN

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INDEX OF ABBREVIATIONS

ABBREVIATION	CITATION
%	Per cent
Arbitration	This arbitration proceeding between CLAIMANT and RESPONDENT to be held from 28 March to 3 April 2022
Arbitration Agreement	Art.9 of the General Conditions of Sale
Art. / Arts.	Article / Articles
c. / cc.	Clause / Clauses
CE	CLAIMANT'S Exhibit
Contract	The agreement entered into whereby the CLAIMANT was to supply RSPO-certified fully segregated palm oil to RESPONDENT for the years 2021 to 2025
CLAIMANT	ElGuP plc
ed / eds	Editor / Editors
Ed.	Edition
GCoS	General Conditions of Sale incorporated in the Contract
Infra	See below
Ltd.	Limited
Mr. / Ms.	Mister / Miss
NA	CLAIMANT's Notice of Arbitration dated 14 July 2021
No. / Nos.	Number / Numbers
p. / pp.	Page / Pages
§ / §§	Paragraph / Paragraphs
Parties	CLAIMANT and RESPONDENT
PO1	Procedural Order No.1 dated 8 October 2021
PO2	Procedural Order No.2 dated 8 November 2021
r. / rr.	Rule / Rules
RE	RESPONDENT'S Exhibit
RESPONDENT	JAJA Biofuel Ltd
RNA	RESPONDENT's Response to the Notice of Arbitration dated 14 August 2021
s. / ss.	Section / Sections
Summit	Palm Oil Summit
Supra	See above

Tribunal	The arbitral tribunal constituted as at 17 September 2021
UNICITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	*Versus* (against)
Vol.	Volume

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Carter	*Diana Carter v. Flavia Gugliuzzi, et al. and Synergy Group, Inc.* U.S. Supreme Court of Vermont No. 97-094. 22 May 1998 Cited in §59
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ABBREVIATION	CITATION
INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE	
ICC 6162	*ICC Case No. 6162* Final Award ICC International Court of Arbitration Bulletin Vol. 3 No. 1 [1992] Cited in §87
ICC 7331	*ICC Case No. 7331* Final Award ICC International Court of Arbitration Bulletin Vol. 6 No. 2 [1995] Cited in §33
ICC 9771	*ICC Case No. 9771* Final Award ICC International Court of Arbitration Bulletin, 2005 Special Supplement, pp. 76-77 Cited in §87

SWISS CHAMBERS ARBITRATION INSTITUTION

HKZ 12171	*Parties Not Indicated*
	Award on Third Person Notice
	HKZ Case No.12171
	ASA Bulletin
	Kluwer Law International, 2005, Volume 23, Issue 2
	7 April 2014
	Cited in §89

VIENNA INTERNATIONAL ARBITRAL CENTRE OF THE AUSTRIAN FEDERAL ECONOMIC CHAMBER

VIAC Case No. SCH-5176	C 33 – VIAC Case No. SCH-5176
	Final Award
	Selected Arbitral Awards, Vol 1
	January 2015
	Cited in §87

STATUTES, RULES AND TREATIES

ABBREVIATION	CITATION
AIAC Rules	The Asian International Arbitration Center (Malaysia) Arbitration Rules 2021
AIAC Rules 2018	The Asian International Arbitration Center (Malaysia) Arbitration Rules 2018
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
New York Convention	United Nations Commission on International Trade Law Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
PICC	UNIDROIT Principles of International Commercial Contracts 2016
Rome I Regulations	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations 2009
Swedish Arbitration Act	The Swedish Arbitration Act (SFS. 1999:116)
Scotland Arbitration Act	Arbitration (Scotland) Act 2010
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014

STATEMENT OF FACTS

1. **ElGuP plc** (CLAIMANT) based in Mediterraneo is one of the largest producers of RSPO-certified palm oil and palm kernel oil. Mr Chandra is the CLAIMANT's COO.

2. **JAJA Biofuel plc** (RESPONDENT) based in Equatoriana is a producer of sustainable biofuel. It was acquired by Southern Commodities in late 2018. Ms Bupati is the Head of Purchasing for RESPONDENT. She previously worked for Southern Commodities.

3. CLAIMANT and Southern Commodities concluded over forty contracts between 2010-2018 with General Conditions of Sale (GCoS) incorporated. The GCoS was sent to Southern Commodities in **October 2011**. CLAIMANT and Ms. Bupati established a practice whereby Ms. Bupati would make objection within a week if she wished not to accept the offer. There were five cases where there was no signed contract but the contracts were nonetheless performed.

4. In **2014**, Ms Bupati had a closer look at the GCoS in the context of an arbitration which had been initiated by CLAIMANT against Southern Commodities.

5. The content of the GCoS remained unchanged, with the exception of the arbitration clause in Article 9. In **2016**, CLAIMANT replaced the original arbitration clauses from the FORFA/PORAM 81 to the AIAC model clause and made Danubian law the choice of law for all aspects of contracts. Ms. Bupati was told about the change when negotiating a contract in 2016. CLAIMANT and Southern Commodities concluded eight contracts afterwards.

6. From **late 2018**, RESPONDENT has become a 100% subsidiary of Southern Commodities. Ms. Bupati was promoted as RESPONDENT's Head of Purchasing.

7. On **28 March 2020**, Mr. Chandra met Ms. Bupati at the Summit. They discussed a contract from 2021 onwards, for five years and settled all commercial terms during their negotiations.

8. On **1 April 2020**, Ms. Bupati sent an email to Mr. Chandra confirming an order for 20,000t of RSPO-certified palm oil per annum from 2021-2025 with first delivery starting in January 2021. The price was agreed to be at USD 900/t for first year, thereafter market price – 5 %. In the same email, Ms. Bupati agreed to change the governing law of the sale contract to Mediterranean law and suggested submitting the arbitration to a non-industry related arbitration institution.

9. On **9 April 2020**, Mr. Chandra's assistant, Mr. Rain sent the contract inserting all agreed terms and an accompanying letter to Ms. Fauconnier, Ms Bupati's assistant, who was responsible for the contract performance. In the accompanying letter, Mr. Rain pointed out the change of the sale contract's governing law to Mediterranean law and the application of the GCoS to the Contract.

10. In **early May 2020**, Ms. Fauconnier Mr. Rain had a detailed discussion on the letter of credit, including topics of acceptable banks and requested documents. They resolved all the concerns and agreed that the UNCITRAL Transparency Rules were not suitable for the contract.

11. On **29 October 2020**, Commodities News published an article reporting that pressure from the general public and environmentalists caused a serious drop in RESPONDENT's share price. It also reported that RESPONDENT wanted to stop further negotiations with CLAIMANT.

12. On **30 October 2020**, RESPONDENT's CEO, Mr. Lever sent a letter to Mr. Chandra terminating negotiations and avoiding any contract concluded.

13. In **November 2020**, the Parties took the matter to mediation under AIAC Mediation Rules. The mediation failed. The Parties were unable to agree on the jurisdiction of the Tribunal and RESPONDENT considered taking the matter to trial before Equatoriana's courts.

14. On **14 July 2021**, CLAIMANT served a Notice of Arbitration. CLAIMANT sought a declaration that the Tribunal has jurisdiction to hear the case and declare that the Contract was concluded with a valid incorporation of the GCoS. In the accompanying letter, CLAIMANT nominated Ms. Tenera Nigrescens as the arbitrator.

15. On **14 August 2021**, RESPONDENT filed the Response to the Notice of Arbitration and rejected all claims made. In the letter accompanying the Response to the Notice of Arbitration, RESPONDENT nominated Mr. Georges Chavanne as the arbitrator.

16. On **8 October 2021**, PO1 was issued.

17. On **8 November 2021**, PO2 was issued.

SUMMARY OF ARGUMENTS

18. It takes two to tango and so does the contract conclusion. Prior to Ms. Bupati's current role, CLAIMANT and her had eight years of successful business relationship with an established practice. By agreeing to adhere to such practice, RESPONDENT had accepted CLAIMANT's offer by silence and by conduct. RESPONDENT had even begun performing their contractual duties. However, due to pressure from environmentalists and CLAIMANT's previous mishap on RSPO certificates which was duly resolved, RESPONDENT now refuses to recognise the existence of the Contract. Regardless of RESPONDENT's assertion, the Contract was concluded [**Issue 1**].

19. CLAIMANT has made numerous explicit references, and has inserted an express provision referencing the GCoS in the Contract. All was well until RESPONDENT received rumours of CLAIMANT's alleged infringement of RSPO standards. Despite having had full knowledge of the content of the GCoS, RESPONDENT now attempts to rely on an immaterial technicality that the text of the GCoS was never provided. This however, is solely a concealed effort to deprive CLAIMANT's right to remedy problems resulting from its supply chain. This shot of truth in RESPONDENT's denial cocktail means RESPONDENT's claim must fail. Accordingly, the GCoS were validly incorporated into the Contract [**Issue 2**].

20. The Parties entered into the Arbitration Agreement and clearly intended for Danubian law to govern it. Danubian law had always been the only law that governs all aspects of arbitration agreements from 2016 onwards. During the Parties' negotiation, they never showed intent to change the law for the Arbitration Agreement. Though they agreed to change the sale contract's governing law to Mediterranean law, the Parties intentionally left the remainder part of the Contract untouched. However, when the dispute arose, RESPONDENT misinterpreted that change by alleging that Mediterranean law also applies to the Arbitration Agreement. This is because Mediterranean law imposes a higher standard for incorporating standard terms, which gives RESPONDENT an opening to argue that the Arbitration Agreement was not properly included into the Contract. For the same reason, RESPONDENT attempt to apply the "*overly burdensome*" CISG to the Arbitration Agreement even if CISG only applies to sales contracts. RESPONDENT attempts to defeat the Arbitration Agreement so that the dispute can end up in a trial before the courts of Equatoriana, which is its home turf and more favourable to RESPONDENT. The Parties validly concluded the arbitration agreement under Danubian law. Even if Mediterranean law governs the arbitration agreement, the Parties validly concluded the arbitration agreement under Mediterraneo's general contract law, PICC. Therefore, RESPONDENT cannot reject the Tribunal's jurisdiction to adjudicate the case [**Issue 3**].

MERITS ARGUMENTS

ISSUE 1: THE PARTIES CONCLUDED A CONTRACT

21. The Parties concluded a contract. The Parties agreed that the Contract's governing law is Mediterranean law [*PO2, p.52, §33*]. As Mediterraneo is a CISG Contracting State, CISG applies to the Contract [*PO1, p.46, §3*]. Under CISG, the two essential elements for contract formation are offer and acceptance [*Lookofsky I, p.50; Morrissey, p.101; Schroeter I, p.224; Schulze, p.220*]. Under Art.23 CISG, a contract is concluded when an acceptance of an offer becomes effective. Under Art.19 CISG, if an acceptance materially alters the terms of an offer, it rejects the original offer and constitutes a counter-offer. The other party must accept the counter-offer for a contract to be concluded [*Brunner/Gottlieb, p.144; Morrissey, p.117; Schroeter IV, p.360*]. Further, a signature is not necessary for a contract to be concluded because such contract is not subject to any form requirement under Art.11 CISG [*CLOUT 330; Golden Valley Grape Juice*]. RESPONDENT made an offer to CLAIMANT ON 1 April 2020 [**I**]. This was rejected by CLAIMANT's counter-offer which incorporated the GCoS [**II**]. As RESPONDENT accepted CLAIMANT's counter-offer [**III**], a contract was concluded.

I. RESPONDENT MADE AN OFFER TO CLAIMANT ON 1 APRIL 2020

22. RESPONDENT made an offer to CLAIMANT on 1 April 2020. A proposal must indicate an intention to be bound and be sufficiently definite to constitute an offer under Art.14(1) CISG. RESPONDENT's proposal indicated an intent to be bound [**A**] and was sufficiently definite [**B**].

A. RESPONDENT'S PROPOSAL INDICATED AN INTENTION TO BE BOUND

23. RESPONDENT's proposal indicated an intention to be bound. A proposal is only binding if it indicates the offeror's intention to be bound [*Morrissey, p.105; Schroeter II, p.282*]. Such intention is determined by the understanding of a reasonable person under Arts.8(2) and 8(3) CISG [*CLOUT 334; Lookofsky I, p.51; Schroeter II, p.282*]. The usage of the word "*offer*" conveys the offeror's intent to be bound if the offeree accepts the offer [*CLOUT 330*].

24. Before sending the proposal email dated 1 April 2020, Ms. Bupati and Mr. Chandra negotiated and preliminarily agreed to the essential terms of the Contract at the Summit on 28 March 2020 [*PO2, p.49, §13*]. Ms. Bupati then promised to get back to CLAIMANT with a definite offer after getting the management's approval [*RNA, p.26, §8*]. Shortly after, Ms. Bupati came back to CLAIMANT with an email titled "*Purchase Offer",* placing an order on the exact same commercial terms agreed between the Parties at the Summit. First, if Ms. Bupati did not intend for the proposal to be a binding offer, she would not have taken the extra step to obtain the

management's approval to place an order [*RNA, p.26, §9*]. Secondly, Ms. Bupati would not have placed a purchase order on the same agreed terms if she wanted to walk away from the Contract or if the Parties were still negotiating. Thirdly, the word "*offer*" in the email title conveyed a clear intent to be bound based on a reasonable person's understanding [*CE2, p.12, §3*]. Therefore, RESPONDENT's proposal indicated an intent to be bound.

B. RESPONDENT'S PROPOSAL WAS SUFFICIENTLY DEFINITE

25. RESPONDENT's proposal was sufficiently definite. Under Art.14(1) CISG, a proposal is sufficiently definite if it specifies "*a specific product, at a specific price and for a specific quantity*" [*AGB Contemporary; Hanwha Corp; Lookofsky I, p.51; Morrissey, p.104; Schroeter II, p.270*]. Even if the parties have not agreed on a fixed price, a contract can still be concluded if the parties intended for a flexible mechanism to determine the price [*CLOUT 106; Lookofsky I, p.53; Schulze, p.221*]. If the parties intended to not be bound by a fixed price, such intention should prevail [*CLOUT 106; Looksofsky, p.53*].

26. Ms. Bupati's email indicated the goods and their quantity specifically, i.e., "*20,000t RSPO-certified segregated palm oil per annum for the years 2021 – 2025"* [*CE2, p.12, §3*]. She also set out the first-year price and the mechanism for determining the price in the following year, i.e., "*at USD 900/t for first year; thereafter market price – 5%*" [*CE2, p.12, §3*]. The market price in Mediterraneo fluctuates between USD1,000/t and 1,200/t [*RNA, p.26, §7*]. Even though the price term in the following year is not fixed at a specific number, the proposal is sufficiently definite. First, the proposal provided a clear pricing mechanism, which was to discount 5% from the market price. The price was determinable based on the Mediterranean market price. Secondly, CLAIMANT intended to provide a "*very competitive price*" to RESPONDENT by adopting a flexible pricing mechanism [*CE1, p.10, §§7,11*], which RESPONDENT was also "*very happy"* about [*RNA, p. 26, §4*]. Therefore, it was both Parties' intent to set the price under a flexible mechanism. As the Parties intended to be bound by this flexible pricing mechanism, the Parties' intent prevails over the fixed price requirement of Art.14(1). Accordingly, the proposal consisted of all the essential elements required to find the terms sufficiently definite. Since RESPONDENT's proposal indicated an intention to be bound and provided sufficiently definite contract terms, RESPONDENT's email dated 1 April 2020 was a valid offer to CLAIMANT.

II. CLAIMANT'S COUNTER-OFFER REJECTED RESPONDENT'S OFFER

27. CLAIMANT's counter-offer rejected RESPONDENT's offer. Arts.19(1) and 19(2) CISG provide that if an acceptance materially alters an offer, it is a rejection of the offer and constitutes a

counter-offer. Under Art.19(3), an alteration of the dispute settlement provision is considered material. As an arbitration clause relates to the dispute settlement mechanism, incorporation of an arbitration clause is always a material alteration from the original offer [*Secretariat Commentary, p.24*]. The offer made in RESPONDENT's email dated 1 April 2020 only specified the essential terms of the Contract and did not include CLAIMANT's GCoS. However, CLAIMANT's reply dated 9 April 2020 incorporated its GCoS [*Infra §45*]. As Art.9 of GCoS includes the arbitration clause [*RE4, p.32*], incorporation of GCoS incorporates the arbitration clause. Accordingly, CLAIMANT's incorporation of GCoS amounted to a material alteration to RESPONDENT's offer, which rejected the original offer and constituted a counter-offer.

III. RESPONDENT ACCEPTED CLAIMANT'S COUNTER-OFFER

28. RESPONDENT accepted CLAIMANT's counter-offer dated 9 April 2020. Art.11 CISG provides that the contract conclusion is not subject to any form requirements [*Schmidt-Kessel III, p.205*]. Art.18(1) defines acceptance as "*[a] statement made by or other conduct of the offeree indicating assent to an offer*". Silence or inactivity can amount to acceptance when coupled with practice established between the offeror and offeree [*Schroeter III, p.339; CLOUT 313*]. Art.18(2) provides that an acceptance becomes effective once the indication of assent reaches the offeror. The Parties' contract conclusion is not subject to any form requirements under CISG [**A**]. RESPONDENT accepted CLAIMANT's offer by silence [**B**] and conduct [**C**]. RESPONDENT's reply did not constitute a counter-offer [**D**]. Therefore, the contract was concluded.

A. THE PARTIES' CONTRACT CONCLUSION IS NOT SUBJECT TO ANY FORM REQUIREMENTS UNDER ART.11

29. The Parties' contract conclusion is not subject to any form requirements under Art.11 CISG. Under Art.11, offer and acceptance are not bound by any form requirements. Contrary to RESPONDENT's claim, signature is not necessary for an acceptance under Art.18(1) [*CLOUT 330; Golden Valley Grape Juice; Kröll, p.193*]. The Parties did not agree on any form requirements for acceptance of the offer in their correspondence. In the past practice between CLAIMANT and Ms. Bupati, they did not agree on any form requirements for acceptance. Ms. Bupati admitted that there were "*five cases [Ms. Bupati] did not return a signed version of the respective contract but [Southern Commodities and CLAIMANT] nevertheless performed all of them*" [*RE3, p.31, §3*]. Whether a contract is concluded does not depend on the return of a signed contract. As there was no agreed requirement, the Parties were free from any form requirements when concluding their Contract.

B. RESPONDENT ACCEPTED CLAIMANT'S COUNTER-OFFER BY SILENCE

30. RESPONDENT accepted CLAIMANT's counter-offer by silence. Under Art.18(3) CISG, silence or inactivity coupled with agreements made in pre-contractual negotiations can constitute acceptance [*Hispafruit BV; Schroeter, pp.339,340; Secretariat's Commentary, p.23*]. First, Ms. Bupati and Mr. Chandra formed a practice for acceptance in past contracts [**1**]. Secondly, during negotiations, both Parties indicated their intent to adopt such practice [**2**]. Thus, coupled with the Parties' pre-contractual negotiation, RESPONDENT's silence constituted an acceptance [**3**].

1. Ms. Bupati and Mr. Chandra formed a practice for acceptance in past contracts

31. Ms. Bupati and Mr. Chandra formed a practice for acceptance in past contracts. Practice involves the specific behaviour arising from the business relationships and bargains executed by the parties [*Industrial Equipment*]. A "*practice*" is established if the parties' relationship has lasted for some time and the conduct giving rise to the practice occurred in a number of transactions [*Footwear case; Schmidt-Kessel II, p.182*].

32. The business relationship between Ms. Bupati and Mr. Chandra lasted for eight years, from 2010 to 2018. Over those years, Ms. Bupati and Mr. Chandra concluded around forty contracts on behalf of Southern Commodities and CLAIMANT respectively [*CE1, p.9, §2; RE3, p.31, §2*]. In the all forty contracts concluded, there were only three cases where Ms. Bupati raised objections to the contractual documents. These objections were raised within one week of obtaining the documents [*PO2, p.49, §9*]. Further, the contracts' conclusion never depended on return of the signed contractual documents. Ms. Bupati might return the contractual documents within a week or over a month or even not return them at all [*PO2, p.49, §9; RE3, p.31, §3*]. The contracts were nevertheless concluded, were subsequently performed and bound Bupati's then company [*CE5, p.18, §7*]. These repeated occurrences established the practice that "*unless [Ms. Bupati] objected to the terms of the contract documents* ***within a week*** *she accepted them*" regardless of whether the contract was signed or not [*CE1, p.11, §14; CE5, p.18, §7*]. This understanding of the established practice was further confirmed by Ms. Fauconnier, Ms. Bupati's assistant [*CE1, p.11, §14*]. This practice in essence placed the burden on Ms. Bupati to reject any offers from Mr. Chandra if she wished not to accept.

2. The Parties indicated their intent to adopt Mr. Chandra and Ms. Bupati's practice in their negotiations

33. The Parties indicated their intent to adopt Mr. Chandra and Ms. Bupati's practice in their negotiations. In determining the intent of the parties, Art.8(1) looks to the parties' subjective intent but is rarely used due to practical difficulty [*ICC 7331; Schmidt-Kessel I, pp.149,152*]. Art.8(2) looks to the parties' intent objectively [*Roland; Schmidt-Kessel I, p.153*]. Art.8(3) allows a tribunal to consider all relevant circumstances to ascertain the parties' intent [*CLOUT 215; Schmidt-Kessel I, p.158*].

34. Both Parties made statements indicating their intent. Ms. Bupati stated to Mr. Chandra that she wanted to "*re-establish our long-lasting and successful business relationship in [her] new function*" [*CE2, p.12, §1*]. This indicated RESPONDENT's intent to establish an identical business relationship without extra encumbrances, including the adoption of their previous practice, in her new position. The intention to adopt the practice was also known to and agreed by CLAIMANT. CLAIMANT interpreted Ms. Bupati's behaviour in light of their past practice. When RESPONDENT did not return the Contract, Mr. Chandra told his assistant not to worry as "*[i]n the past, Ms Bupati had on several other occasions forgotten to send back the signed copy of the contract*", as long as she did not object to the terms of the contract within a week she accepted them [*CE1, p.11, §14; CE5, p.18, §7*]. The only reason for Mr. Chandra to make this statement and to act accordingly with the practice on behalf of CLAIMANT was that he was aware of and intended the adoption. CLAIMANT and RESPONDENT both indicated their mutual intent to adopt Mr. Chandra and Ms. Bupati's practice in their negotiations.

3. When coupled with the Parties' negotiations, RESPONDENT's silence constituted acceptance

35. When coupled with the Parties' negotiations, RESPONDENT's silence constituted acceptance. Under Art.18(1) CISG, silence "*does not in itself amount to acceptance*". However, the wording "*in itself*" indicates that "*additional factors*" could arise to enable silence or inactivity to be acceptance [*Hispafruit BV; Schroeter, p.339*]. One of the "additional factors" include negotiations between the parties and the agreements made from such [*Hispafruit BV*].

36. During the Parties' negotiations, both Parties intended to follow Mr. Chandra and Ms. Bupati's past practice in the current Contract. Although Mr. Chandra and Ms. Bupati did not explicitly make an agreement, their mutual intent to adopt the relevant practice is a sufficient factor to enable silent acceptance. The Parties are bound by such practice: regardless of whether the

signed contractual documents were returned, if Ms. Bupati did not raise any objection within a week, she accepted them [*Supra §§31,32*]. Ms. Bupati had the burden to reject any offers from Mr. Chandra within one week if she wished not to accept.

37. After receiving CLAIMANT's counter-offer, Ms. Bupati never objected to any of the Contract's terms. CLAIMANT made the counter-offer to RESPONDENT on 9 April 2020 [*Supra §28*]. She remained silent and raised no objections within a week. If Ms. Bupati's three-week holiday from 5 April 2020 prevented her from receiving and objecting to the counter-offer, she should have received the counter-offer when her holiday ended on 26 April 2020 [*PO2, p.51, §21*]. However, she did not make any objections within the week from 26 April 2020 to 2 May 2020. After not hearing back from RESPONDENT one week following Ms. Bupati's silence, the acceptance was made. Therefore, when coupled with the Parties' negotiations, RESPONDENT's silence indicated their intent to accept and constituted acceptance of the counter-offer.

C. RESPONDENT ACCEPTED THE COUNTER-OFFER BY CONDUCT

38. RESPONDENT accepted the counter-offer by conduct. Art.18(1) CISG states that offeree can indicate acceptance by conduct, for example, by beginning with the performance of contractual obligation [*Conveyor Belts*]. Whether a declaration amounts to an acceptance must be determined through interpretation by Art.8 [*Ferrari II, pp.269,270*]. In a typical letter of credit transaction, the buyer would establish the arrangement with its bank after a sales contract is concluded [*Morrissey, p.39*]. Therefore, opening a letter of credit for the purchase price amounts to acceptance [*Hanwha Corp; Magellan Int'l Corp*]. Further, the acceptance must reach the offeror under Art.18(2).

39. Ms. Bupati empowered Ms. Fauconnier to take care of further discussion on the contract performance [*CE2, p.12, §4*]. Under Clause 7a of the Contract, RESPONDENT is obliged to open a letter of credit after contract conclusion [*CE3, pp.14,15*]. Accordingly, on 3 May 2020, Ms. Fauconnier asked for a list of "*recognised banks*" to open the required letter of credit [*CE5, p.18, §4; RE2, p.30, §2*]. She subsequently "*contacted several of the acceptable banks to get quotations as to the terms for the letter of credit*" on 30 May 2020 [*PO2, p.51, §23*]. These two actions indicated that RESPONDENT understood its obligations under the Contract and began performing its contractual obligations. They should indicate to any reasonable third party that RESPONDENT intended to accept CLAIMANT's counter-offer under Art.8(2).

40. Further, taking into account RESPONDENT's knowledge of Ms. Bupati's past practice with CLAIMANT, RESPONDENT's conduct indicated their intent to be bound. According to the past practice between Ms. Bupati and CLAIMANT, five contracts were concluded without being signed, and a letter of credit was opened in all of these cases [*PO2, p.49, §10*]. Actual shipment always followed the opening of a letter of credit in accordance with their past practice and RESPONDENT had knowledge of this practice. The only reason for RESPONDENT to open a letter of credit was because they have accepted the offer [*PO2, p.49, §10*]. If the Parties were still at the negotiation stage as asserted by RESPONDENT [*RNA, p.27, §16*], Ms. Fauconnier had no reason to ask for the details for opening a letter of credit and obtaining quotations from acceptable banks. Moreover, as mentioned by Ms. Fauconnier, she wanted to "*avoid comparable problem [happened in other contracts]"* from reoccurring in the Contract [*PO2, p.51, §22*]. Ms. Fauconnier's attempt to resolve the *"comparable problem"* indicated her desire to commence contract performance as well as RESPONDENT's intent to accept. As the inquiry which indicated RESPONDENT's intent to accept reached CLAIMANT by the email dated 3 May 2020, the acceptance became effective on that day, and the Contract was concluded accordingly.

D. RESPONDENT'S REPLY ON 3 MAY 2020 DID NOT CONSTITUTE A COUNTER-OFFER

41. RESPONDENT's reply dated 3 May 2020 did not constitute a counter-offer. Material alteration to the terms amounts to a rejection of the original offer and constitutes a counter-offer [*Supra §11*]. A declaration of acceptance which does not materially add to the offer remains an acceptance [*Schroeter IV, p.362*]. Whether an alteration is material depends on the circumstances of individual cases, including the content of a contract and the significance which particular modifications have for a contract and the parties [*Belcher-Robinson; Secretariat Commentary, p.24; Schroeter IV, p.358*].

42. In the email dated 3 May 2020, RESPONDENT tried to suggest changes to the existing terms to alleviate their transparency concern [*PO2, p.51, §22; RE2, p.30, §3*]. The suggestions were to ensure that the RSPO certificate was recognised by the Equatorinean authority and to add a reference to the UNICITRAL Transparency Rules [*PO2, p.51, §23*; *CE5, p.18, §5*]. Ms. Bupati stated in the email dated 1 April 2020 that the Parties should "*provide some sort of transparency, for example applying UNCITRAL's Transparency Rules*" [*CE2, p.10, §6*]. Ms. Fauconnier then "*suggest[ed] changes to the existing terms of the contractual documents*" in her email dated 3 May 2020 [*RE2, p.30, §3*]. RESPONDENT was merely providing suggestions for the Parties to consider, but not the RESPONDENT's conditions to accept the offer.

43. Both these suggestions were immaterial to the Contract terms. First, Ms. Fauconnier's proposal that the RSPO certificate should be issued by an independent third party certified by the Equatorinean ministry of environment would not change CLAIMANT's existing obligation to provide "*RSPO-certified fully segregated palm oil*" [*CE3, p.13*]. Therefore, this suggestion of change is not significant to the content of the Contract. Secondly, RESPONDENT's proposed addition of UNCITRAL Transparency Rules was not a material alteration as they were inapplicable to the Contract. UNCITRAL Transparency Rules applies only to disputes arising out of treaty-based investor-State arbitration [*UNCITRAL Rules*]. As the Parties are business entities, the Rules were inapplicable to the Contract. Thus, the proposal would not have resulted in any alteration at all. Thirdly, the two changes did not carry much significance to the Parties and the Contract. After suggesting changes to the Contract, Ms Fauconnier contacted Mr. Chandra's assistant, Mr. Rain. During the phone call, Mr. Rain explained the changes were unnecessary. After listening to Mr. Rain's explanation, Ms. Fauconnier preliminarily agreed that the two changes to the terms were not needed [*RE5, p.18, §§4-5*]. If the changes were significant to RESPONDENT, RESPONDENT would have insisted on such changes instead of accepting CLAIMANT's position during the phone call. The changes suggested by RESPONDENT did not materially alter the offer.

44. **Issue 1 Conclusion:** CLAIMANT made a valid offer to RESPONDENT on 9 April. Since there is no form requirement for contract conclusion under CISG, RESPONDENT effectively accepted the offer by conduct and silence. RESPONDENT's acceptance did not make any material alteration to the original counter-offer. Therefore, a contract was effectively concluded.

ISSUE 2: THE GCOS WERE VALIDLY INCORPORATED INTO THE CONTRACT

45. The GCoS were validly incorporated into the Contract. The incorporation of the GCoS is governed by the rules for the contract formation and interpretation under Arts.14 and 8 CISG [*CISG-AC Opinion No.13, p.6; Kruisinga, p.349; Schmidt-Kessel I, p.172*].

46. On the issue of the incorporation of general conditions, whether the user has a duty to transmit the general conditions to the other party is disputed. There are two different approaches: The "*German Approach*" developed by the German Supreme Court requires a transmission of general conditions from the user to the other party for the incorporation of general conditions into the contract [*German Machinery; Ferrari III, p.240; Huber, p.13*]. However, if the other party has reasonable notice of the general conditions, such a duty to transmit the text of the general conditions is negated [*German Machinery; CISG-AC Opinion No.13, p.10; Magnus,*

p.300; Schmidt-Kessel I, p.173]. The "*German Approach*" is questionable as the sending of general conditions hampers international trade [*Berger II, p.3; Kindler, p.225; Magnus, p.299*], and in the modern era of online communication it is not difficult for a party to request a copy of general conditions [*Eiselen, p.13*]. This is why a different approach was adopted by the Austrian Supreme Court and the Commercial Court of Nivelles, which only requires a reference to general conditions in the offeror's offer for the incorporation of general conditions [*Austrian Propane; SA Gantry*]. This is more favourable for the openness of Art.8 [*Schmidt-Kessel I, p. 174*]. Under both approaches, the GCoS were validly incorporated into the Contract.

47. Subject to CISG, the GCoS were validly incorporated into the Contract as CLAIMANT made clear references to the GCoS to RESPONDENT [**I**], and RESPONDENT had reasonable opportunities to take notice of the GCoS [**II**]. Specifically, the negotiated governing law clause does not affect the incorporation of the GCoS [**III**].

I. CLAIMANT MADE CLEAR REFERENCES TO THE GCOS TO RESPONDENT

48. CLAIMANT made clear references to the GCoS to RESPONDENT. Under Art.14 CISG, incorporation of general conditions first requires a reference to the general conditions by the offeror, indicating a clear intent for the general conditions to form part of the offer [*Car Trim; Schroeter, p.292*]. Such a reference can be in writing or communicated orally [*Austrian Propane; Tantalum Powder; Vine Wax; Magnus, p.299*]. The decisive factor is whether the reference is clear enough that a reasonable person "*in the shoes of the recipient*" would comprehend the incorporation of general conditions into the contract [*Schuhe; Tantalum Powder; Vine Wax; Schroeter , p.293*]. In particular, a clear incorporation clause referencing the general conditions would suffice [*Eiselen, p.8*]. Further, the reference must occur before or at the same time as the conclusion of the contract [*Magnus, p.300*].

49. An oral reference that the GCoS would apply was first made by CLAIMANT to RESPONDENT at the Summit when RESPONDENT approached CLAIMANT for the supply of palm oil [*RNA, p.26, §10; PO2, p.49, §13*]. Knowing that the GCoS would apply, RESPONDENT followed up with CLAIMANT to confirm the purchase order [*CE2, p.12*]. At this point, if RESPONDENT had any doubt to the incorporation of the GCoS in the sense of a reasonable person, RESPONDENT would have enquired about the incorporation or opposed it. However, no enquiry was made of the GCoS by RESPONDENT at any subsequent time [*PO2, p.50, §18*]. Instead, the only thing that troubled RESPONDENT was the submission to an arbitral institution which exclusively deals with palm oil, given the political environment in Equatoriana [*CE2, p.12, §§5,6*].

50. Three references to the GCoS were made in CLAIMANT's counter-offer email to RESPONDENT [*CE3, p.16; CE4, p.17*]. First, Mr. Rain's email dated 9 April 2020 clearly stipulated that CLAIMANT's GCoS apply to issues not regulated in the Contract [*CE4, p.17, §3*]. Secondly, in the Contract attached to Mr. Rain's email, there was an obvious incorporation clause under the heading "*Special Conditions*" in italics and regular font size as other undisputed clauses on the first page [*CE3, p.13*]. Thirdly, CLAIMANT'S GCoS were also referred to in Clause 3 of the Contract that *"the price [of the contract] shall be subject to adjustment based on the arrival analysis ascertained in accordance with the provisions of... contained in the General Conditions of Sale"* [*CE3, p.14*]. With these readable and explicit references appearing three times in a single package of documents, a reasonable person would comprehend that the GCoS apply to the Contract. Further, the incorporation clause in the Contract would be a sufficient reference in itself, allowing a reasonable person in the shoes of RESPONDENT to comprehend the incorporation of the GCoS into the Contract. More importantly, all four references were valid as they were made before the time of conclusion of the Contract. This is the case regardless of the Tribunal's finding concerning the mode of RESPONDENT'S acceptance of the Contract. As CLAIMANT made clear references, the first step for the incorporation of the GCoS is satisfied.

II. RESPONDENT HAD REASONABLE OPPORTUNITIES TO TAKE NOTICE OF THE GCOS

51. RESPONDENT had reasonable opportunities to take notice of the GCoS. After clear references are made by the offeror, there must be reasonable opportunities for the offeree to take notice of general conditions [*CISG-AC Opinion No.13, pp.8-12; Schroeter, p.292*]. Mere references to the GCoS were sufficient to provide RESPONDENT with reasonable opportunities to take notice of the GCoS [**A**]. Alternatively, RESPONDENT had existing knowledge of the GCoS [**B**].

A. MERE REFERENCES TO THE GCOS WERE SUFFICIENT TO PROVIDE RESPONDENT WITH REASONABLE OPPORTUNITIES TO TAKE NOTICE OF THE GCOS

52. Mere references to the GCoS were sufficient to provide RESPONDENT with reasonable opportunities to take notice of the GCoS. As long as the general conditions were made part of the offer according to the offeror's intent, references made by the offeror would be sufficient to bring general conditions to the offeree's attention [*Austrian Propane; CISG-AC Opinion No.13, p.10*]. The offeror has no duty to transmit general conditions to the offeree [*Berger II, pp.3-20; Schmidt-Kessel I, p.174*]. This is the case even when the content of general conditions referred to were unknown to the offeree [*SA Gantry*]. Moreover, any indication that general conditions will apply, especially in writing, passes the burden to the recipient to exercise due diligence and

make enquiry about the general conditions [*Zeller, p.206*]. This is particularly the case when it is easily possible for the offeree, through exchanges by email, to become reasonably familiar with the content of general conditions [*Eiselen, pp.12,14*].

53. CLAIMANT made references to the GCoS, indicating a clear intent for the GCoS to form part of CLAIMANT'S offer [*Supra §§48-50*]. These references were sufficient to provide RESPONDENT with a reasonable opportunity to take notice of the GCoS. The fact that CLAIMANT'S GCoS "*was [never] sent to JAJA Biofuel"* is irrelevant for the purpose of valid incorporation of the GCoS [*RNA, p.27, §13*].

54. There were three references in writing and one oral reference by CLAIMANT that their GCoS would apply to the Contract [*Supra §§49,50*]. Therefore, the burden was on Ms. Bupati and Ms. Fauconnier to make enquiry about the content of the GCoS. However, Ms. Bupati "*had never asked for a copy of the new GCoS or enquired about their content after the email from 9 April 2020"* [*PO2, p.50, §18*]. She had ample opportunities to do so when references to the GCoS were first made by CLAIMANT at the Summit or later through email correspondences. Equally, Ms. Fauconnier made no enquiry in her reply to CLAIMANT'S counter-offer email [*RE2, p.30*], despite CLAIMANT'S counter-offer email and the Contract attached to it contained three references to the GCoS [*Supra §50*]. Since contractual negotiations were mainly conducted through email [*CE2, p.12; CE4, p.17; RE2, p.30*], it was not difficult for RESPONDENT to send another email to CLAIMANT for a clarification of the content of the GCoS. Equally, while the GCoS is accessible on CLAIMANT's website though "*... not easily accessible"* [*PO2, p.50, §18*], RESPONDENT should have made reasonable effort to retrieve them. Even if RESPONDENT argue they have no knowledge of CLAIMANT'S GCoS [*PO2, p.50, §18; RNA, p.27, §13*], it would not preclude the valid incorporation of the GCoS. Mere references to the GCoS were sufficient to provide RESPONDENT with reasonable opportunities to take notice of the GCoS.

B. ALTERNATIVELY, RESPONDENT HAD EXISTING KNOWLEDGE OF THE GCOS

55. Alternatively, RESPONDENT had existing knowledge of the GCoS. If the Tribunal decides to apply the German Supreme Court approach, finding mere reference insufficient for the incorporation of the GCoS, the GCoS were still validly incorporated. The German Supreme Court approach imposes an obligation on the offeror to "*transmit the text or make it available*" to the offeree [*German Machinery; Ferrari III, p.240; Huber, p.13; Supra §46*]. The rationale behind the "*make available*" requirement is based on Art.8(1) CISG, in particular whether the offeree knew or could not have been unaware of offeror's intention to incorporate the general

conditions [*German Machinery; Tantalum Power; CISG-AC Opinion No.13, pp.8-9; Geißler, p.8; Schroeter II, p.296*]. However, the "*make available*" requirement is exempted when the offeree has existing knowledge of the general conditions [*German Machinery; CISG-AC Opinion No.13, p.10; Magnus, p.300; Schmidt-Kessel I, p.173*]. This exception aligns with Arts.8(2) and 8(3) CISG, where the perceived understanding of general conditions is considered under a reasonable person standard in the position of the offeree taking into account all relevant circumstances [*Alpha Prime; German Machinery; CISG-AC Opinion No. 13. pp. 8-9; Schroeter II, p.292*]. Ms. Bupati had existing knowledge of the GCoS [**1**], and Ms. Bupati's knowledge of the content of the GCoS was imputed to RESPONDENT [**2**]**.** The GCoS were validly incorporated even if the Contract was concluded by Ms. Fauconnier [**3**].

1. Ms. Bupati had existing knowledge of the GCoS

56. Ms. Bupati had existing knowledge of the GCoS. Reasonable notice is obtained through the "*make available*" test as developed by the German Supreme Court [*Supra §§46,55*]. If the offeree had prior knowledge of the content of the general conditions, such "*make available*" requirement is exempted [*Spacers for Insulation Glass Case; CISG-AC Opinion No.13, p. 10; Magnus, p.320; Schwenzer/Hachem/Kee, p.30; Schmidt-Kessel I, p.173*]. Under this exception, the tribunal can assume an offeree's knowledge of general conditions being incorporated into later contracts without transmission from the offeror [*Schroeter II, p.301*].

57. In 2014, Ms. Bupati had a "*closer look*" at the original version of the GCoS which were sent to Ms. Bupati's then company in 2011 [*RNA, p.27, §11*]. It shows that Ms. Bupati had knowledge of the content of the original version of the GCoS before the arbitration clause was amended. Then Mr. Chandra informed her of the amendment to the arbitration clause in 2016 [*RNA, p.27, §12*], which created the current written version of the GCoS. Further, Ms. Bupati acknowledged that the documents in her previous contracts with Southern Commodities were "*largely comparable*" with this current Contract [*CE2, p.12, §5*]. This is consistent with the fact that the clause used in 2016 to 2018 was identical to this current version with a minor exception irrelevant to the substantive content of GCoS [*PO2, p.52, §26*]. This shows her knowledge of not only the original version of the GCoS but also the current updated written version of the GCoS. Therefore, Ms. Bupati had existing knowledge of the GCoS.

2. Ms. Bupati's knowledge of the content of the GCoS was imputed to RESPONDENT

58. Ms. Bupati's knowledge of the content of the GCoS was imputed to RESPONDENT. Knowledge can be imputed from the agent to principal by the law of agency. CISG has no provision regarding the law of agency [*Kröll, p.42*]. Instead, the domestic agency law of the principal's place of business should be applied [*Schwenzer/Hachem/Kee, p.38*]. As RESPONDENT's place of business is in Equatoriana, which is a common law jurisdiction [*PO2, p.53, §36*], common law agency law principles must be applied.

59. An agent is a person whose act directly affects the legal relations of the principal by or with respect to a contract with a third party [*Brödermann, p.67; Official Comment Art 2.2.1*]. An agent's knowledge depends on what he "*knows or has reason to know on the basis of an inference reasonably to be drawn from the facts*" [*DeMott, p.300*]. Under common law, an agent's acquired knowledge during the agency relationship will be imputed to the principal when he acts within the scope of his authority [*New York Marine; Scordato, p.131; Macgregor, p.203*]. Knowledge acquired before the agency relationship can still be imputed to the principal under two conditions. First, such knowledge must be objectively material to the agent's duties to the principal and to the principal's legal relations with third parties from a reasonable person's standpoint [*Carter; DeMott, p.304; Macgregor, p.203*]. Secondly, the duties that require such knowledge must be delegated entirely to the agent [*Jessett Properties; Waller; Watts, p.313*].

60. When the Contract was negotiated between CLAIMANT and RESPONDENT, Ms. Bupati was acting as RESPONDENT's Head of Purchasing and was authorized to bind RESPONDENT [*RE3, p.31, §4; PO2, p.49, §12*]. Ms. Bupati can directly affect the RESPONDENT's legal relationships by entering into contracts on behalf of RESPONDENT. Therefore, she acted as RESPONDENT's agent and her acquired knowledge during the agency relationship was imputed to RESPONDENT.

61. Ms. Bupati's acquired knowledge before her agency relationship was also imputed to RESPONDENT. Ms. Bupati led the palm oil unit and her duties included discussing and contracting with RSPO-certified palm oil suppliers at the Summit [*PO2, p.48, §5; CE2, p.12, §§1-3*]. Knowledge of the content of the GCoS was material to Ms. Bupati's duties as it was important to know the risk and obligations when contracting with suppliers. Possessing knowledge of the content of the GCoS enabled Ms. Bupati to make informed decisions since the terms were already known and clarifications were less needed. Ms. Bupati was also new to

the purchase of RSPO-certified palm oil because "*Southern Commodities had always bought the non-certified palm kernel oil*" [*RNA, p.26, §6*]. Knowledge of the Arbitration Clause included in GCoS ensured Ms. Bupati knew the appropriate dispute resolution mechanism when issues arise since palm oil was required to be "*RSPO-certified*" this time [*RNA, p.26, §§2,5*]. Further, the RSPO-certified palm oil had "*limited availability*" [*RNA, p.26, §4*], and the Contract involved "*purchasing the entire available production … for five years*" [*NA, p.5, §5*]. The Contract was also the first contract between the Parties [*PO2, p.48, §3*], Ms. Bupati's knowledge was important in ensuring RESPONDENT's legal position was protected before entering into such "*long-term commitment*" [*NA, p.5, §5*]. Since purchasing power was entirely delegated to Ms. Bupati who led the palm oil unit [*PO2, pp.48,49, §§5,12*], and Ms. Bupati's knowledge of the content of the previous GCoS was objectively material to her duties, Ms. Bupati's acquired knowledge before her agency relationship was imputed to RESPONDENT.

3. The GCoS were invalidity incorporated even if the Contract was concluded by Ms. Fauconnier

62. The GCoS were validly incorporated even if the Contract was concluded by Ms. Fauconnier. Provided Ms. Bupati's knowledge of the content of the GCoS was imputed to RESPONDENT, the GCoS was incorporated into the Contract when Ms. Bupati accepted CLAIMANT 's counter-offer through silence [*Supra §§35-37*]. Alternatively if the Tribunal finds that Ms. Fauconnier accepted CLAIMANT's counter-offer by conduct instead [*Supra §§38-40*], Ms. Bupati's knowledge was already imputed to RESPONDENT.

63. Moreover, in the "*Contract Documents*" email dated 9 April 2020, Ms. Fauconnier was notified that there was a "*previous practice established between Ms. Bupati and Mr. Chandra"* [*CE4, p.17, §3*], and that "*CLAIMANT'S GCoS apply*" [*CE4, p.17, §4*]. Ms. Fauconnier was also aware of the terms in the contractual documents since she suggested two issues [*RE2, p.30, §3*]. Although "*Ms. Fauconnier had not seen CLAIMANT's GCoS*" [*PO2, p.52, §25*], Ms. Fauconnier acting as a "*responsible person*" who had been delegated with the power to "*take the necessary actions for the conclusion of the contract*" would have reasonably taken the initiative to seek clarification of the content of the GCoS [*PO2, p.51, § 23*; *CE1, p.11, §15; PO2, p.52, §12*]. Given the Contract was of "*considerable size*" and it was a "*long-term commitment*" [*NA, p.5, §5*], Ms. Fauconnier as a newly promoted assistant in 2019 must have asked Ms. Bupati the details of the unseen GCoS that had been developed during Ms. Chandra and Ms. Bupati's "*long lasting relationship*" [*CE4, p.17, §3*].

64. Similarly, Ms. Bupati scheduled three weeks holiday and delegated the power of contracting to Ms. Fauconnier [*PO2, p.51, §21-22*; *CE1, p.11, §15*]. Ms. Bupati further indicated her assumption on the similarity of this Contract to their previous contracts [*CE2, p.12, §5*]. Given Ms. Bupati and Ms. Fauconnier's "*close cooperation*" and Ms. Bupati's willingness in explaining details [*CE2, p.49, §12; PO2, p.51, §23*], it is only reasonable that Ms. Bupati must have explained and passed on all important and relevant contracting information to Ms. Fauconnier, including the content of the GCoS.

III. THE NEGOTIATED GOVERNING LAW CLAUSE DOES NOT AFFECT THE INCORPORATION OF THE GCOS

65. The negotiated governing law clause does not affect the incorporation of the GCoS. Whenever the parties specifically negotiate and agree on particular provisions of their contract, such provisions will prevail over ***conflicting provisions*** contained in the general conditions [*CISG-AC Opinion No.13, p.18*]. Art.8(3) CISG considers all extrinsic evidence including previous negotiations to determine the subjective intentions of the parties [*Filanto; Marble*]. Further, extrinsic evidence is admissible to construe the terms of the parties' agreement, even if it contradicts the terms of a written agreement [*Claudia*]. When a term construed using the extrinsic evidence is in conflict with the a term in the incorporated general conditions, the former will take precedence. This is because the primary importance of the parties' intent presumes individually agreed-upon terms are more likely to reflect parties' intent than what is stated in general conditions [*Schmidt-Kessel I, p.178; CISG-AC Opinion No.13, p.18*].

66. The original governing law of the Contract is Danubian law [*Infra §78*]. CLAIMANT then communicated to Ms. Bupati that the Contract will be governed by Mediterranean law instead of Danubian law at the Summit [*CE1, p.10, §13*]. This change was then acknowledged by Ms. Bupati who stated that "*the submission of the sales contract to Mediterranean law…is less a problem for us*" [*CE2, p.12, §5*]. It was again pointed out in CLAIMANT's counter-offer email to RESPONDENT that the sale would be governed by Mediterranean law [*CE4, p.17, §2*]. With the change of governing law in mind, RESPONDENT accepted the counter-offer [*Supra §§30-40*]. More importantly, RESPONDENT asserted that the Contract is governed by Mediterranean law [*RNA, pp. 27-28, §§14,19*], and that the Parties agreed [*PO2, p.52, §33*]. This shows both Parties intended the governing law of the Contract to be Mediterranean law save for the arbitration agreement, despite the governing law clause in the GCoS [*RE4, p.32*]. Therefore, the individually agreed-upon choice of law prevails only over the conflicting provision in the GCoS, and does not affect the overall incorporation of the GCoS.

67. **Issue 2 conclusion**: The GCoS were validly incorporated into the contract as CLAIMANT made clear references to the GCoS to RESPONDENT, and RESPONDENT had reasonable opportunities to take notice of the GCoS. Specifically, the negotiated governing law clause does not affect the incorporation of the GCoS.

JURISDICTION ARGUMENTS

ISSUE 3: THE PARTIES VALIDLY AGREED ON THE TRIBUNAL'S JURISDICTION

68. The Parties validly agreed on the Tribunal's jurisdiction. RESPONDENT challenged the Tribunal's jurisdiction by alleging that the Arbitration Agreement was not validly concluded [*RNA, p.27, §14*]. A tribunal's jurisdiction is derived from the parties' arbitration agreement [*Janssen/Spilker, p.153; Redfern/Hunter, p.335*]. An arbitration agreement's governing law determines the conclusion of the arbitration agreement [*Berger I, p.305; Redfern/Hunter, p.158*].

69. The Arbitration Agreement in Art.9 GCoS subjects the arbitration to AIAC Rules [*RE4, p.32*]. The arbitral seat is Danubia [*RE4, p.32*]. Danubia and Mediterraneo are New York Convention's members, and their national arbitration laws are a verbatim adoption of the Model Law [*PO1, p.47, §III.3*]. Under Art.16(1) Model Law and Rule 20.1 AIAC Rules, a tribunal is competent to rule on its own jurisdiction [*Holtzmann/Neuhaus, p.480*; *Rajoo/Klötzel, §191*].

70. Under the separability doctrine, an arbitration agreement is separate from the contract containing it [*Ashford, p.295; Lew/Mistelis/Kröll, p.104; Waincymer, p.135; Arts. II and V(1)(a) New York Convention*]. Art.16(1) Model Law and Rule 20.1 AIAC Rules provide that a tribunal shall treat an arbitration agreement as an agreement independent from other terms of the contract [*Bremer; Westacre; Ets Raymond; Born, pp.376,738,792; Lew/Mistelis/Kröll, p.103*]. The non-existence or invalidity of the underlying contract does not affect the existence or validity of the arbitration agreement [*Berger I, p.320; Born, p.423; Holtzmann/Neuhaus, p.481*]. Disputes regarding the conclusion of the Contract do not affect the validity of the Arbitration Agreement [*RNA, p.27, §14; PO1, p.46, §III.1*]. Therefore, the Tribunal should decide the governing law of the main contract and the Arbitration Agreement separately.

71. Danubian law governs the Arbitration Agreement [**I**]. If the Arbitration Agreement is governed by Mediterranean law, CISG is inapplicable to the conclusion of the Arbitration Agreement [**II**]. Instead, PICC as the non-harmonised contract principles of Mediterranean law would apply. The Parties validly concluded the Arbitration Agreement pursuant to PICC. If CISG applies,

the Parties concluded the Arbitration Agreement pursuant to CISG [**III**]. Therefore, the Tribunal has jurisdiction under the Arbitration Agreement.

I. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT

72. Danubian law governs the Arbitration Agreement. In deciding an arbitration agreement's governing law, a tribunal is not bound to apply any specific conflict of laws rules [*Berger I, pp.305,306; Holtzmann/Neuhaus, p.764; Lew, p.450; Lew/Mistelis/Kröll, p.111*]. Instead, the tribunal should develop its own conflict of laws rules by inference from domestic laws and international uniform law instruments, including New York Convention and Model Law [*Berger I, p.306*]. As such, a tribunal may adopt a cumulative approach which simultaneously applies the conflict of laws rules of all legal systems with the disputes, provided they lead to the same result [*Born, p.522; Galliard/Savage, p.872 ; Lew, pp.450,451*]. Under the cumulative approach, a tribunal may refer to the two-prong test under Art.V(1)(a) New York Convention and Arts.34(2)(a)(i) and 36(a)(i) Model Law [*Born, p.3784*]. In the two-prong test, a tribunal must first consider whether the parties have agreed on a choice of law governing an arbitration agreement. Second, in the absence of a choice of law, Art.V(1)(a) New York Convention provides that the law of the seat by default governs an arbitration agreement [*Born, p.531; Choi, p.108; Hope/Johansson, p.153; Miles/Goh, p.386; Wolff, pp.287-289*]. The cumulative approach also allows the tribunal to consider the common law approach [*Galliard/Savage, p.872 ; Lew, pp.450,451*]. The common law test, in the absence of an express or implied choice, is to apply a law with the closest and most real connection to the arbitration agreement to govern it [*BCY v BCZ; Enka; Sulamérica; Abraham/Chuen, p.11*].

73. The Parties chose Danubian law to govern the Arbitration Agreement [**A**]. In the absence of a choice of law, Danubian law still governs the Arbitration Agreement [**B**]. The Parties validly concluded the Arbitration Agreement under Danubian law [**C**].

A. THE PARTIES CHOSE DANUBIAN LAW TO GOVERN THE ARBITRATION AGREEMENT

74. The Parties chose Danubian law to govern the Arbitration Agreement. A tribunal must respect party autonomy in selecting an arbitration agreement's governing law [*Born, p.525; Holtzmann/Neuhaus, pp.768,769; Lew/Mistelis/Kröll p.124; Redfern/Hunter, p.187; Wortmann, p.98*]. The choice for an arbitration agreement's governing law can be either express or implied [*BCY v. BCZ; Enka; Sulamérica*; *Ashford, p.295; Miles/Goh, p.387*]. The Parties did not make an express choice of the Arbitration Agreement's governing law [**1**]. The Parties made an implied choice of Danubian law as the Arbitration Agreement's governing law [**2**].

1. The Parties did not make an express choice of the Arbitration Agreement's governing law

75. The Parties did not make an express choice of the Arbitration Agreement's governing law. The parties must clearly and explicitly state the governing law of an arbitration agreement to constitute an express choice [*Ashford*, p.292; *Glick/Venkatesan, p.144*]. A tribunal must give effect to such choice and take it as conclusive [*Enka; Sulamérica; Ashford, p.293; Chan/Yang, p.636*]. Art.9 GCoS only expressly stated the seat and the law governing the substantive contract but contains no explicit clause on which law governs the Arbitration Agreement [*RE4, p.32*]. Thus, the Parties did not make an express choice of the Arbitration Agreement's governing law.

2. The Parties made an implied choice of Danubian law as the Arbitration Agreement's governing law

76. In the absence of an express choice, the Parties made an implied choice of Danubian law as the Arbitration Agreement's governing law. Danubian law is the implied choice according to the Parties' intention [**a**]. Danubia as the seat is the implied choice of the law governing the Arbitration Agreement [**b**]. The presumption of Mediterranean law being the Arbitration Agreement's governing law is rebutted [**c**]. Under the validation principle, Danubian law is the Arbitration Agreement's governing law [**d**].

a. Danubian law is the Parties' implied choice according to their intention

77. Danubian law is the Parties' implied choice according to their intention. A tribunal can find an implied choice based on parties' intention [*BCY v BCZ; Ashford, p.292; Choi, pp.107,108*]. Under Art.4.2(1) and 4.2(2) PICC, an agreement should be interpreted according to the parties' subjective intent at the time of contracting or the understanding of a reasonable person in the same circumstances [*Brödermann, p.112; Official Comment, Art.4.2*]. Art.4.3 allows a tribunal to refer to relevant circumstances such as precontractual negotiations and practices which parties have established between themselves [*Brödermann, pp.113-114; Official Comment, Art.4.3*]. The Model Arbitration Clause of the AIAC Rule 2018 only includes a recommended addition providing for the law of the seat and the law of the substantive contract [*Rajoo/Klötzel, §29*]. It does not include a recommended addition for the arbitration agreement's governing law. Parties are only required to expressly state the arbitration agreement's governing law when the law of the seat is different from the contract's governing law [*Rajoo/Klötzel, §40*].

78. The Arbitration Agreement was amended in 2016 separately from the Contract [*CE1, p.9, §4*]. In the post-2016 version of Art.9 GCoS, Danubian law was both the Contract's governing law

and the law of the seat [*RE4, p.32*]. As there were no laws other than Danubian laws mentioned in the Arbitration Agreement, CLAIMANT could not have objectively intended any law other than Danubian law to govern the Arbitration Agreement. On 9 April 2020, CLAIMANT changed the Contract's governing law from Danubia to Mediterraneo [*NA, p.5, §7*]. Before the conclusion of the Contract, CLAIMANT clearly stated for multiple times the change of Contract's governing law only applied to "***the sales contract"*** [*CE2, p.12. §5; CE4, p.17, §2; CE5, p.18, §2*]. This shows that CLAIMANT's intention to only change the sales part and leave the Arbitration Agreement governed by Danubian law [*PO2, p.50, §15*]. Furthermore, the purpose for CLAIMANT to change the Contract's governing law was because the sales contract would be more favorable to CLAIMANT in the context of unjustified termination in relation to the supply chain [*CE1, p.10, §13*]. As this purpose does not concern the Arbitration Agreement, the CLAIMANT could not have intended to change the Arbitration Agreement's governing law.

79. Before this Contract came into existence, Mr Chandra and Ms Bupati had concluded eight contracts, all of which applied Danubian law to the whole Contract, including the Arbitration Agreement [*PO2, p.48, §7*]. During precontractual negotiations of this Contract, Mr. Chandra and Ms. Bupati intended to "*re-establish their long-lasting and successful business relationship*" even with Ms Bupati now working for RESPONDENT [*CE2, p.12, §1*]. Furthermore, both Ms. Bupati and Mr. Chandra expressed intent to use a "*largely comparable contract*", only changing the governing law of the sales part of the contract [*CE2, p.12, §4; Supra §78*]. Therefore, Ms. Bupati and Mr. Chandra must be aware that Danubian law governs the Arbitration Agreement. Since Ms. Bupati was RESPONDENT'S agent, her knowledge was imputed to RESPONDENT [*Supra §59*]. As such, RESPONDENT must have the same knowledge and intention as Ms. Bupati. Danubian law is the Parties' implied choice according to their intention.

b. Danubian law is the implied choice as the law of the seat

80. The Parties impliedly chose Danubian law to govern the Arbitration Agreement by designating it as the law of the seat. The law of the seat is a strong presumption for it being the implied choice of law of the arbitration agreement [*C v. D; XL Insurance*]. This is because the law of the seat governs many aspects of an arbitration agreement, including internal arbitration proceedings and the external relationship between the tribunal and national courts [*Hamlyn; Ashford, pp.315,316; Glick/Venkatesan, p.144; Hope/Johansson, p.145*].

81. In 2016, CLAIMANT modified Art.9 GCoS to specifically state Danubia as the seat [*NA, p.5, §7; RE4, p.32*]. On 9 April 2020, the governing law of the substantive Contract has been changed

to Mediterranean law, while the seat remains unchanged as Danubia [*NA, p.5, §7; CE4, p.17, §2*; *RE4, p.32*]. The seat is particularly unchanged because of the arbitration friendly environment in Danubia and the supportive attitude by the Danubian courts [*PO2, p.50, §15*]. Leaving the seat unchanged was suggested by Mr. Langweiler, CLAIMANT's lawyer [*PO2, p.50, §15*]. Therefore, it is clear that CLAIMANT's decision to keep the seat as Danubia was a well-considered decision, and is consistent with the presumption. RESPONDENT was also aware of Danubia being the seat, and never objected it [*PO2, p.48, §7*]. Hence, the Parties impliedly chose Danubian law to govern the Arbitration Agreement by designating Danubia as the seat.

c. The presumption of Mediterranean law being the Arbitration Agreement's governing law is rebutted

82. The presumption of Mediterranean law being the Arbitration Agreement's governing law is rebutted. Common law upholds a rebuttable presumption of parties intending the arbitration agreement to be governed by the main contract's governing law [*BCY v. BCZ; Enka; Sulamérica*]. The presumption is rebutted when the parties are aware that a contract's governing law does not directly govern an arbitration agreement [*Choi, p.108*].

83. Mediterranean law was rebutted because the Parties are aware that the governing law does not directly govern the Arbitration Agreement. First, CLAIMANT stated several times the change to Mediterranean laws only applied to the *"the sales contract"* [*Supra §78*]. "*The remainder … [of the Arbitration Agreement is] untouched*" because of the arbitration friendly environment in Danubia and the supportive attitude by the Danubian courts [*PO2, p.50, §15*]. Secondly, RESPONDENT knew about the change in the Contract's governing law only covers "*the sale"* [*CE2, p.17, §2*]. Although Ms. Bupati has no access to the post-2016 version of Art.9 GCoS, she cannot exclude that it has been sent to her, and she had discussed the change with Mr. Chandra [*PO2, p.50, §18*]. Ms. Bupati has knowledge of the change, knowing the Contract's governing law does not automatically govern the non-sales part of the Contract [*PO2, p.48, §7*]. Both Parties know the Contract's governing law does not directly govern to the Arbitration Agreement. The presumption of Mediterranean law being the Arbitration Agreement's governing is rebutted.

d. Under the validation principle, Danubian Law is the Arbitration Agreement's governing law

84. Under the validation principle, Danubian law is the Arbitration Agreement's governing law. The validation principle is enshrined in Art.V(1)(a) New York Convention and gives effect to

parties' express or implied choice [*Enka; Born, p.529; Scherer, p.644*]. The validation principle provides that an interpretation upholding the validity of a transaction is preferred over an interpretation rendering it invalid [*Enka*]. Since a rational commercial party would not intend to have the arbitration agreement to be defeated, a tribunal should avoid an interpretation that would lead to invalidity by assessing the risk of ineffectiveness of an arbitration agreement [*Calissendorff/Schöldström, p.153; Miles/Goh, p.387; Scherer, p.644*].

85. The Parties are commercial parties and they would not intend to have their Arbitration Agreement defeated. Mediterranean lower courts have conflicting decisions on whether CISG applies to arbitration agreements in general [*PO1, p.47, §III.4*]. If Mediterranean courts find that CISG applies to the Arbitration Agreement, the risk of invalidation would be higher. Whereas Danubian Courts have a consistent jurisprudence in rejecting CISG to arbitration agreements even if the law governing the arbitration agreement was the law of a contracting state [*PO1, p.47, §III.4*]. The risk of invalidation would be lower if Danubian law applies. Furthermore, Mediterranean law is "*overly burdensome*" for the inclusion of standard terms under CISG, while the contract formation rules are more relaxed under Danubian law [*PO2, p.50, §16; PO2, p.53, §35*]. There is a risk that the Arbitration Agreement would be invalid if the GCoS were not incorporated into the Contract under Mediterranean law. Meanwhile, Danubian law has a more relaxed requirement in the inclusion of standard terms, because it does not need to be made available to the other party [*PO1, p.47, §III.3*]. Considering the lower risk of invalidity in Danubia, and the higher risk of invalidity in Mediterraneo, the Tribunal should apply Danubian law over Mediterranean law. Therefore, under the validation principle, Danubian law is the Arbitration Agreement's governing law.

B. IN THE ABSENCE OF A CHOICE OF LAW, DANUBIAN LAW STILL GOVERNS THE ARBITRATION AGREEMENT

86. In the absence of a choice of law, Danubian law still governs the Arbitration Agreement. Rule 13.5(a) AIAC gives a tribunal power to decide the law governing the arbitration agreement in the absence of any agreement by the parties. In exercising such discretion, a tribunal may refer to different conflict of laws rules from different jurisdictions as it finds appropriate [*Supra §72*]. In the absence of a choice, Danubian law governs the Arbitration Agreement by default under the conflict of laws rules [**1**]. Alternatively Danubian law shares the closest and most real connection with the Arbitration Agreement [**2**].

1. Danubian law governs the Arbitration Agreement by default under the conflict of laws rules

87. Danubian law governs the Arbitration Agreement by default under the conflict of laws rules. The default position is to apply the law of the seat to govern the arbitration agreement [*ICC 9771; Thai Lao; Dicey/Collins/Morris/Briggs, §16-016; Miles/Goh, p.389; Chan/Yang, p.635*]. Art 34(2)(a) Model Law and Art V(1)(a) New York Convention states that in the absence of parties' choice, the arbitration agreement must be valid "*under the law of the country where the award was made"* which means the seat [*Born, p.529*]. Although the provisions relate to an award's enforcement, they implicitly provide for a conflict of laws rule to apply the law of the seat by default [*Berger I, pp.305,306; Holtzmann/Neuhaus, p.1098; Hope/Johansson, p.160; Miles/Goh, p.389; Lew/Mistelis/Kröll, pp.110, 119; Lin, p.78; NYC Record, p.10*]. The default position is consistent with the conflict of laws rules and practices across civil and common law jurisdictions [*ICC 6162; Klöckner; Thai Lao; VIAC Case No. SCH-5176; Art.16 PRC Interpretation; s.48 Swedish Arbitration Act; s6 Scotland Arbitration Act*]. The rationale is that the law of the seat determines the validity [*Choi, p.107; Born, p.3784; Miles/Goh, p.389; Wolff, pp.287,288*], and various aspects of an arbitration agreement [*Supra §80*]. The Parties agreed that "*[t]he seat of arbitration shall be Danubia*" under Art.9 GCoS [*RE4, p.32*]. Considering Danubia is the place where the award will be made, Danubian law governs the Arbitration Agreement in the absence of choice of law by the Parties.

2. Alternatively, Danubian law shares the closest and most real connection with the Arbitration Agreement

88. Alternatively, Danubian law shares the closest and most real connection with the Arbitration Agreement. If a tribunal finds no parties' choice of law to govern their arbitration agreements, the law most closely connected to the arbitration agreement, not to the contract, governs it [*Enka; Harnam Singh; Nargolwala; Rome I Regulations; Born, p.518; Lin, p.79; Rajoo/Klötzel, §210*]. A tribunal must consider connecting factors which are assessed and weighed differently on a factual case-by-case basis [*Ashford, p.295; Siwy, p.169; Blessing, p.411*].

89. First, the main factor is the law of the seat. The parties' selection of the seat creates a strong presumption to apply it to the arbitration agreement [*C v D; Enka; Union of India; Lew/Mistelis/Kröll, p.107*]. Secondly, another significant factor is the place of performance. The place of performance is the seat because it is considered the legal forum for performing the arbitration agreement [*C v D; Ashford, p.297; Berger I, pp 315,316; Hope/Johansson, p.143; Siwy, p.169*]. Thirdly, another factor is the selection of a neutral seat. If parties chose the law

of a party's home to govern the contract, but they "deliberately" chose a neutral arbitral seat, the law of the seat would be mostly connected to the arbitration agreement [*C v D; Galliard v Savage; Born, p.518*]. Fourthly, a tribunal should also consider the origins of the presiding arbitrator in deciding the law governing the arbitration agreement [*HKZ 12171*].

90. Danubian law as the law of the seat shares the closest and most real connection to the Arbitration Agreement. Since Danubian law is the law of the seat, the Tribunal must give this factor great weight in support of choosing Danubian law as the Arbitration Agreement's governing law [*NA, p.5, §7; NA, p.6, §14; RE4, p.32*]. Danubia is the legal forum and place of performance for the Arbitration Agreement [*NA, p.6 §14; RE4, p.32*]. CLAIMANT and RESPONDENT are from Mediterraneo and Equatoriana respectively. Danubia is a neutral seat with no connection to the states of the Parties. The Parties deliberately chose Danubia because it is arbitration-friendly and supportive of arbitration [*PO2, p.50, §15*]. Prof. Nikloaus von Jacquin, the presiding arbitrator, is from Danubia [*Letter to von Jacquin, p.41; Letter by von Jacquin, p.45*]. Thus, Danubian law as the law of the seat shares the closest and most real connection with the Arbitration Agreement.

C. THE ARBITRATION AGREEMENT WAS VALIDLY CONCLUDED UNDER DANUBIAN LAW

91. The Arbitration Agreement was validly concluded under Danubian law. An arbitration agreement can still be valid even if the main contract is void [*Rule 20.1(a)(b) AIAC; Art.16(1) Model Law*]. To be validly concluded, the Arbitration Agreement needs to satisfy two requirements. First, the form requirements. Art.7 Option 1 Model Law requires an arbitration agreement must be "*in writing*" [*Model Law Explanatory Note, pp.27,28; Redfern/Hunter, p.75*]. An arbitration agreement is in writing if its contents is recorded in any form regardless of how the arbitration agreement or contract is concluded [*Art. 7(3) Option 1 Model Law; Liebscher, p.164*; *Redfern/Hunter, p.77*]. The writing requirement is satisfied by reference in a contract to a separate document such as general conditions containing an arbitration clause [*Art. 7(6) Option 1 Model Law; Born, p.739; Landau, p.30*]. Art.II(2) New York Convention requires an arbitration agreement "*in writing*" to be in "*a signed contract or contained in exchanges of letters or telegrams*". However, Art.VII permits that recourse may be made to a less demanding form rule to recognise an award even if Art.II(2) is not met [*Article VII(1), New York Convention; UN Recommendations; Choi, p.133*]. Model Law form requirement prevails [*German Payment; UN Secretariat, p.6*]. Secondly, an Arbitration Agreement was concluded under Danubian contract law. Danubian contract law only requires a "*clear statement*" to

include the standards conditions into an existing contract and not that they are "*made available*" to the other party [*PO1, p.47, §III.3*].

92. Danubia subscribes to Art.7 Option 1 Model Law [*PO1, p.47, §III.3*]. The Contract contained an explicit written reference, *"Seller's General Conditions of Sale apply"* [*CE3, p.13; RE4. p.32*]. Moreover, both the Oil Summit negotiations [*RNA, p.26, §10*] and Mr. Rain's email [*CE4, p.17, §4*] made reference to CLAIMANT's GCoS. The Arbitration Agreement satisfies the writing requirement in Art.7 Option 1 Model Law. The written reference in the contract is a "clear statement" to include the GCoS into the Contract [*NA, p.6, §14; RE4, p.32*]. Making available the GCoS to RESPONDENT was not necessary for concluding a valid Arbitration Agreement. [*RNA, p.27, §14; PO1, p.47, §III.3*]. Hence, the Arbitration Agreement was validly incorporated into the Contract under Danubian contract law. Danubian contract formation rule is based on PICC [*PO2, p.53, §35*]. The Arbitration Agreement as a standard term was validly incorporated into the Contract under PICC [*Infra §§105-109*]. The conclusion of the Contract entails the Parties' agreement to arbitrate [*Supra §44*]. Consequently, the Arbitration Agreement was validly concluded.

II. CISG IS NOT APPLICABLE TO THE CONCLUSION OF THE ARBITRATION AGREEMENT IF MEDITERRANEAN LAW GOVERNS THE ARBITRATION AGREEMENT

93. CISG is not applicable to the conclusion of the Arbitration Agreement if Mediterranean law governs the Arbitration Agreement. If Mediterranean law governs the Arbitration Agreement, Mediterranean substantive contract law decides whether the Arbitration Agreement was validly concluded. Mediterranean substantive contract law consists of CISG and the general non-harmonised contract law which is a verbatim adoption of PICC [*PO1, p.47, §III.3*]. Although CISG applies to the Contract, under separability principle, its application does not extend to the Arbitration Agreement [**A**]. The Arbitration Agreement falls outside CISG's sphere of application [**B**]. The Parties impliedly excluded CISG's application to the Arbitration Agreement [**C**]. Instead, PICC is applicable to the conclusion of the Arbitration Agreement. The Parties concluded a valid Arbitration Agreement pursuant to PICC [**D**].

A. THE APPLICATION OF CISG TO THE CONTRACT DOES NOT EXTEND TO THE ARBITRATION AGREEMENT UNDER SEPARABILITY DOCTRINE

94. The application of CISG to the Contract does not extend to the Arbitration Agreement. Under the separability doctrine, an arbitration agreement is categorised as a different type of agreement than the main contract [*Supra §70; Born, p.376; Lew/Mistelis/Kröll p.103*]. Given the

difference in nature, an arbitration agreement may be submitted to a different law than the main contract [*Born, p.499; Lew/Mistelis/Kröll p.102; Kröll, pp.39,44*]. The fact that an arbitration agreement is incorporated into a contract does not change its independent nature [*Kröll, p.45*]. Even if the main contract is governed by CISG, it does not automatically mean the arbitration clause contained within the main contract is also subject to CISG [*XL Insurance; Kröll, p.44; Vorobey, p.138*]. Although it is agreed that all other provisions than the Arbitration Agreement was governed by Mediterranean law including CISG [*PO2, p.52, §33*], the Tribunal should not automatically subject the Arbitration Agreement to the same law. CLAIMANT removed the Arbitration Agreement from the FOSFA/PORAM contract form and only put it on a separate document [*CE1, p.9, §4*]. It indicates CLAIMANT's intention not to subject the Arbitration Agreement and the main contract to a single set of law. The application of CISG to the Contract does not extend to the Arbitration Agreement.

B. THE ARBITRATION AGREEMENT FALLS OUTSIDE CISG'S SPHERE OF APPLICATION

95. The Arbitration Agreement falls outside CISG's sphere of application. CISG autonomously decides if CISG is applicable to a contract by the terms and concepts listed in CISG [*CLOUT 447; CISG-Online 2013; CISG-Online 2438; Schwenzer/Tebel, p.747*]. The Tribunal should apply CISG to decide if the Arbitration Agreement falls within CISG's sphere of application. Art.1 CISG does not include the Arbitration Agreement within its sphere of application [**1**]. Art.4 CISG excludes its application to the Arbitration Agreement [**2**]. CISG is not intended to govern the Arbitration Agreement [**3**].

1. Art.1 CISG does not include the Arbitration Agreement within its sphere of application

96. Art.1 CISG does not include the Arbitration Agreement within its sphere of application. Art.1 sets out the basic rules for CISG's application: (1) The contracting parties' places of business are in different states; (2) both states are CISG contracting states or the contracting state's law is applicable; and (3) it is a *"sale of goods contract"*. An arbitration agreement does not qualify as a contract of sale [*Kröll, p.45; Koch, p.285*].

97. CLAIMANT'S and RESPONDENT'S places of business are in Mediterraneo and Equatoriana respectively [*NA, p3, §§1,2*]. Both are the Contracting States of CISG [*PO1, p.46, §III.3*]. Requirements (1) and (2) are satisfied. However, the Arbitration Agreement does not deal with goods. The Arbitration Agreement contains the Parties' prescription of institutional rules,

manner of proceedings and related applicable laws [*RE4, p.32*]. The Arbitration Agreement's objective is to grant the Tribunal jurisdiction to solve disputes and oust courts' jurisdiction. It contains no sale of goods element and does not create a sale relationship. Therefore, Art.1 CISG does not include the Arbitration Agreement within its sphere of application.

2. Art.4 CISG excludes its application to the Arbitration Agreement

98. Art.4 CISG excludes its application to the Arbitration Agreement. Art.4 CISG sets out the matters governed by CISG. It provides that CISG governs only: (1) the formation of the sales contract; and (2) the "*rights and obligations of the seller and the buyer*" arising from the sales contract [*Lookofsky II, p.24*]. Matters not covered by Art.4 are excluded from CISG and dealt with by domestic law determined by applicable conflict of laws rules [*Schlechtriem, p.788*].

99. The matters set out in Art.4 do not cover the valid conclusion of the Arbitration Agreement. First, an arbitration agreement does not qualify as a sale contract [*Kröll, p.45*]. As the Arbitration Agreement contains no sale elements [*Supra §97*], CISG does not govern the formation of the Arbitration Agreement. Secondly, the rights and obligations arising out of arbitration agreements are different in nature from that of sales contracts [*Koch, p.285*]. The rights and obligations arising from an arbitration agreement are that: the parties have the right to submit any dispute relating to the main contract to arbitration; the parties are obliged to co-operate in the arbitration proceedings [*Andersen/Schroeter, p.283*]. The Arbitration Agreement only provides the Parties' rights and obligation concerning dispute settlement as a "*CLAIMANT*" and "*RESPONDENT*", but not as a "*seller*" and "*buyer*" under the Contract [*NA, p.6, §14; RE4, p.32*]. Thirdly, CISG provisions on rights and obligations are inapplicable to arbitration agreements because CISG does not apply to enforcement of rights arising from arbitration agreements [*Aleksandrs, p.688*]. Danubian Arbitration Law and New York Convention govern the enforcement of rights under the Arbitration Agreement. If CISG applies to the conclusion of the Arbitration Agreement, its provisions on rights and obligations would also apply, which collides with Danubian Arbitration Law and New York Convention. Art.4 does not cover the conclusion of the Arbitration Agreement, hence the issue is excluded from CISG and to be dealt by domestic contract law.

3. CISG is not intended to govern the Arbitration Agreement

100. CISG is not intended to govern the Arbitration Agreement. First, none of CISG provisions except Arts.19 and 81 mention arbitration agreements. Although Arts.19 and 81 refer to

disputes settlement, they do not extend CISG's application to the Arbitration Agreements [**a**]; Second, the contract formation rules of CISG are incompatible with the Arbitration Agreement [**b**].

a. Arts.19 and 81 CISG do not extend its application to the Arbitration Agreement

101. Arts.19 and 81 CISG do not extend its application to the Arbitration Agreement. Under Art.19(3), the addition of a dispute settlement clause in a reply to an offer constitutes a material alteration of an offer. Art.19(3) only suggests the importance of an arbitration clause to the conclusion of the sales contract, but does not imply that an arbitration clause becomes part of a sales contract as it violates the separability doctrine [*Aleksandrs, p.682; Huber/Mullis, p.49; Mistelis, p.394*]. CISG drafting history shows that the drafters did not intend Art.19(3) to expand CISG's application to arbitration agreements [*Summary Records, p.33*]. Proposals to introduce an article on dispute settlement were rejected as "o*utside the competence of the [UN Conference on the Convention]*" [*Official Records, p.228*]. Under Art.81(1), avoidance of the contract does not affect any provision of the contract for the dispute settlement. Art.81(1) merely reinforces the separability doctrine by recognising an arbitration clause's autonomy, and that it can be subject to a different applicable law than the main contract [*Garro, pp.237-238; Secretariat Commentary, Art.81*]. Arts.19 and 81 do not extend its application to the Arbitration Agreement.

b. CISG's contract formation rule is incompatible with the Arbitration Agreement

102. CISG's contract formation rule is incompatible with the Arbitration Agreement. The conclusion of an arbitration agreement requires a valid offer and acceptance like any other contracts under ordinary contract principles [*Tyco Bldg Servs; Born, p.782; Moses, p.35*]. Pursuant to Art.14 CISG, an offer must be definite to form a valid agreement. Art.14 further provides that an offer is only sufficiently definite if "*it indicates the goods and expressly or implicitly fixes*" or "*makes provision for determining the quantity and the price*". If the Tribunal applies CISG's rule on offer to the Arbitration Agreement's conclusion, it can never find a valid offer as there are no "*goods*", "*quantity*" or "*price*" elements in the Arbitration Agreement. CISG's contract formation rule is incompatible with the Arbitration Agreement. The incompatibility shows that CISG is not intended to govern the Arbitration Agreement.

C. THE PARTIES IMPLIEDLY EXCLUDED CISG'S APPLICATION TO THE ARBITRATION AGREEMENT

103. The Parties impliedly excluded CISG's application to the Arbitration Agreement. Art.6 CISG provides that even if the law of a Contracting State governs the contract, parties can still exercise party autonomy to exclude the application of CISG [*UNCITRAL Digest on CISG, p.33; Schlechtriem, p.35*]. The exclusion can be express or implied [*Automobile Case; Rheinland; Ferrari I, p.21*]. The Tribunal must determine the Parties' intention pursuant to Art.8 CISG [*Automobile Case; CISG-AC Opinion No.16, §3; Supra §33*]. Art.8(3) allows a tribunal to consider all relevant circumstances in determining the parties' intention, including negotiations, established practice and usages. The intention can be manifested at the time of conclusion of the contract [*CISG-AC Opinion No.16, §3*]. An implied exclusion can be established if parties subject the contract to the law of a non-CISG jurisdiction [*Automobile Case; CLOUT 574; Schlechtriem/Ferrari, Art. 6; Ferrari I, p.23*].

104. In previous transaction between Ms. Bupati and CLAIMANT, they subjected contracts solely to the law of Danubia, which is a non-CISG jurisdiction [*PO2, p.49, §11; PO1, p.47, §III.3*]. By doing this, they impliedly excluded CISG's application to their arbitration agreements. It suggests that excluding CISG's application to arbitration agreements is an established practice between Ms. Bupati and CLAIMANT. During the negotiation, Ms. Bupati stated that she wanted to "*re-establish the long-lasting and successful business relationship*" with CLAIMANT and made no objection to that practice [*CE2, p.12, §1*]. Ms. Bupati carried that knowledge into this transaction between RESPONDENT and CLAIMANT [*Supra §55*]. The later change to Mediterranean law only concerns "*the sale contract*" [*CE2, p.12. §5; CE4, p.17, §2; CE5, p.18, §2*]. Therefore, the Parties impliedly excluded CISG's application to the Arbitration Agreement.

D. THE PARTIES CONCLUDED A VALID ARBITRATION AGREEMENT PURSUANT TO PICC

105. The Parties concluded a valid Arbitration Agreement pursuant to PICC. General contract law principles are applied to consider whether the parties have formed a arbitration agreement [*Fiona Trust; Kresock*; *Born, p.784*]. The general contract law of Mediterraneo is a verbatim adoption of the PICC [*PO1, p.47, III.3*], therefore PICC is applicable to the conclusion of the Arbitration Agreement. The Arbitration Agreement was concluded under PICC by valid incorporation of the GCoS into the Contract [**1**]. Alternatively, the Arbitration Agreement was concluded by an independent agreement [**2**].

1. The Arbitration Agreement was concluded by valid incorporation of the GCoS into the Contract

106. The Arbitration Agreement was concluded by valid incorporation of the GCoS into the Contract. The Arbitration Agreement as part of the GCoS is a standard term [**a**]. The Arbitration Agreement as a standard term was incorporated into the Contract by express reference [**b**].

a. The Arbitration Agreement as part of the GCoS is a standard term

107. The Arbitration Agreement as part of the GCoS is a standard term. Art.2.1.19 PICC specifically addresses contracting under standard terms. Under Art.2.1.19 PICC, standard terms must satisfy three requirements. First, it must be prepared in advance. Second, it is intended for general and repeated use by the user of the standard terms, regardless of whether it has been used before [*Naudé, p.385*]. Third, it is used by a party without negotiation with the other party [*Art.2.1.19(2) PICC; Brödermann, p.62*]. CLAIMANT prepared the GCoS in advance and repeatedly used it in previous negotiations with Southern Commodities [*PO2, p.50, §18*] and with CLAIMANT's previous customers [*PO2, p.49, §14*]. The GCoS has always been included in the contract template for the prior dealings since 2011 and known to Ms. Bupati [*CE1, p.9, §4; CE3, p.13; RNA, p.27, §11; PO2, p.50, §18*]. Although it is the first time that CLAIMANT and RESPONDENT use it, it is still a standard term in nature as CLAIMANT intended the GCoS to be repeatedly used. Therefore, the Arbitration Agreement as part of the GCoS is a standard term.

b. The Arbitration Agreement as a standard term was incorporated into the Contract by express reference

108. The Arbitration Agreement as a standard term was incorporated into the Contract by express reference. Standard terms can be contained in a separate document or even only contained in an electronic file [*Official Comment, Art.2.1.1(2)*]. Art.2.1.19 contains no requirement for the standard terms to be presented or made available for the other party [*Official Comment, Art.2.1.1(3)*]. Standard terms on a separate document can be incorporated if the party intending to use it expressly refers to it [*Brödermann, p.63; Official Comment, Art.2.1.1(3)*].

109. The Arbitration Agreement as a standard term was incorporated by express reference. CLAIMANT informed RESPONDENT that "*the same contract template*" in sales to Southern Commodities would be used and "*the GCoS were supposed to be the same*" [*RNA, p.26, §.10*]. In CLAIMANT's email, Mr. Rain expressly said "*CLAIMANT'S General Conditions of Sale apply*" [*CE4, p.17, §3*]. These facts evidenced that the Parties made express reference to the GCoS containing the Arbitration Agreement throughout their negotiations and RESPONDENT was fully

aware of its existence. The fact that CLAIMANT did not present the Arbitration Agreement to RESPONDENT does not affect the incorporation of the Arbitration Agreement. The Arbitration Agreement as a standard term was incorporated by express reference.

2. The Arbitration Agreement was concluded by an independent agreement

110. Apart from incorporating the GCoS into the Contract, the Parties also validly concluded the Arbitration Agreement by an independent agreement. Under the separability doctrine, an arbitration agreement can be concluded separately [*Supra §70*]. Art.7 Option 2 Model Law does not impose a writing requirement for "*an agreement by the parties to submit dispute to arbitration*" [*Holtzmann/Neuhaus, pp.44,45*]. The form requirement in Art.II(2) New York Convention is prevailed by Model Law [*Supra §91*]. To validly conclude an arbitration agreement, contract formation rules regarding offer and acceptance shall apply [*Born, p.782; Paulsson, p.81*]. Art. 2.1.1 PICC allows for a contract to be formed by express acceptance, or conducts that are sufficient to show agreement [*Bonell, p.107; Brödermann, p.39; Official Comment, Art.2.1.1, §2*]. An offer is valid if it is sufficiently definite and indicates the intention to be bound [*PICC, Art.2.1.2*]. Acceptance can be a statement or conduct indicating assent [*PICC, Art.2.1.6*]. Under Art.4.2, a tribunal must interpret parties' statements and conducts according to their intention or a reasonable person's understanding if an intention cannot be established. Under Art.4.3, a tribunal should consider relevant circumstances, such as preliminary negotiations, established practice, conduct subsequent to the conclusion of contract and usages.

111. During the Parties' negotiation at the Summit, RESPONDENT indicated that some previously used "*legal*" terms should be adopted, in particular the dispute resolution mechanism [*CE1, p.10, §11; CE2, p.12, §§5-6*]. CLAIMANT's previous contracts with Ms. Bupati contained an arbitration clause in the GCoS [*CE1, p.9, §4; CE3, p.13; RNA, p.27, §11; PO2, p.50, §18*]. CLAIMANT informed RESPONDENT at the Summit that "*the GCoS were supposed to be the same"*[*RNA, p.26, §10*]. RESPONDENT made an offer to CLAIMANT via email [*CE2, p.12*]. In this offer, RESPONDENT also expressed consent to CLAIMANT's choice of law and proposed to submit the dispute to a non-industry related arbitration institution [*CE2, p.12*]. RESPONDENT indicated a clear intention to submit disputes to arbitration. By stating that the GCoS containing an arbitration clause would apply to transaction via email [*CE4, p.17*], CLAIMANT indicated assent to RESPONDENT's proposal and an intention to arbitrate. Mr. Rain and Ms. Fauconnier's later phone call further confirmed the Parties' intention to arbitrate, where they agreed on the

inapplicability of UNCITRAL Transparency Rules to the arbitration [*CE5, p.18, §5*]. RESPONDENT's offer and CLAIMANT's acceptance formed the Arbitration Agreement. Therefore, the Parties validly concluded the Arbitration Agreement by an independent agreement.

III. EVEN IF CISG APPLIES, THE PARTIES CONCLUDED A VALID ARBITRATION AGREEMENT

112. Even if CISG applies, the Parties concluded a valid Arbitration Agreement. Under Art.9 CISG, parties are bound by usages and practices established between them. "Usage" in Art.9(2) CISG is construed widely as including all actions or behaviours [*Ferrari I, p.334*]. Usages explicitly apply to the formation of the contract [*Schlechtriem, p.40*]. The agreement on usages may be express or implied [*Secretariat Commentary, Art.9*]. Art.9(2) provides two conditions to establish an implied agreement on usages: (1) The parties knew or ought to have known. (2) In international trade, the usage is widely known and observed by parties to the particular type of contracts. The actual knowledge of parties is of minimal importance [*Schmidt-Kessel II, p.191*]. Given the words "*ought to have known*", parties can still be bound by usages they are not aware of but should have known due to it being widely used in the industry [*Bout, p.187; Jokela, p.88*]. The usages are automatically incorporated into the contract unless the parties have expressly excluded their application [*CLOUT 597; Graffi, p.106; UNCITRAL Digest, p.64*].

113. The Arbitration Agreement was validly concluded by usage. It is a common business practice in the palm oil industry to include arbitration agreement in general conditions [*PO2, p.49, §11*]. As Ms. Bupati has rich experience in the palm kernel oil market [*RE3, p.31, §4*], she ought to know such practice. Ms. Bupati and CLAIMANT followed the practice that an arbitration agreement would be included in contracts by the GCoS [*CE1, p.10, §13; PO2, p.48, §7*]. Ms. Bupati expressed that she would "assume" the documents to be comparable with their previous transactions and discussed the arbitration clause in her email [*CE2, p.12, §5*]. In the previous 2014 arbitration between CLAIMANT and Southern Commodities, the dispute also arose from a contract with the GCoS [*PO2, p.51, §24*]. Though Ms. Bupati did not sign that contract, the Parties observed the arbitration clause in the GCoS [*PO2, p.51, §24*]. Therefore, RESPONDENT knew and ought to have known the usage of concluding the Arbitration Agreement through the GCoS. Hence, the Parties concluded the Arbitration Agreement by usage.

114. **Issue 3 Conclusion:** CLAIMANT and RESPONDENT validly agreed on the jurisdiction of the Tribunal, and chose Danubian law as the Arbitration Agreement's governing law. In the absence of a choice, Danubian law still applies under the conflict of laws rules. The Arbitration Agreement was validly concluded under Danubian law. Even if the Tribunal adopts

Mediterranean law as the governing law of the Arbitration Agreement, CISG's application does not extend from the Contract to the Arbitration Agreement under the separability doctrine. Also, CISG's sphere of application does not include the Arbitration Agreement. PICC is the applicable law and parties have validly concluded the Arbitration Agreement under PICC. Even if CISG applies, the Arbitration Agreement was validly concluded by usages and practices.

REQUEST FOR RELIEF

For the above reasons, Counsel for CLAIMANT respectfully request the Tribunal to:

(a) DECLARE that the Tribunal has jurisdiction to hear the case under Danubian law;

(b) DECLARE that the Parties have concluded a contract in 2020;

(c) DECLARE that CLAIMANT'S General Conditions of Sales were validly included into the Contract;

(d) DECLARE that RESPONDENT has not validly avoided the Contract;

(e) ORDER RESPONDENT to compensate CLAIMANT for the damages incurred for the failure to accept the 2021 deliveries in the amount of USD 200,000 plus interest;

(f) ORDER RESPONDENT to perform the Contract from the years 2022 – 2025; and

(g) ORDER RESPONDENT to bear the costs of this Arbitration.

Respectfully signed and submitted by Counsel on behalf of ElGuP plc on 9 December 2021:

/s/ Samuel CHAN	/s/ Atta CHIU	/s/ Bertha CHUI	/s/ Janice FUNG
/s/ Cecilia LI	/s/ Christopher LI	/s/ Charlotte LO	/s/ Holy NG
/s/ Elaine REN	/s/ Alan SHAM	/s/ Ian SUN	