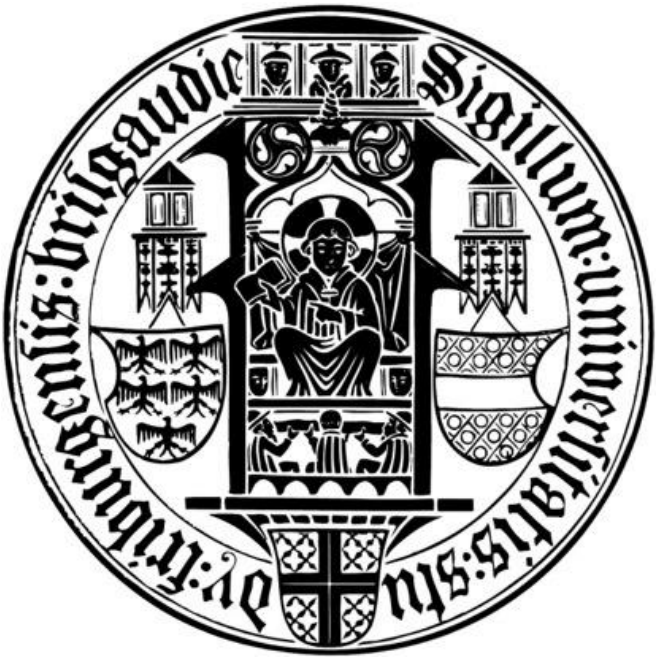
ALBERT LUDWIG
UNIVERSITY OF FREIBURG



Memorandum for
RESPONDENT

On Behalf Of	**Against**
JAJA Biofuel Ltd 9601 Rudolf Diesel Street Oceanside Equatoriana	ElGuP plc 156 Dendé Avenue Capital City Mediterraneao
– RESPONDENT –	– CLAIMANT –

Anissa Tchakounte • Paula Schröder • Clara Schreiter • Lorenz Adiprasito
Jens Scheuerbrandt • Stella Ujma • Florian Illner • Simon Hermes

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AC	Advisory Council
Add	Added
AG	Amtsgericht
AGB	Allgemeine Geschäftsbedingungen (see GTC)
AI	Arbitration International
AIAC	Asian International Arbitration Center
Apr	April
ARIA	American Review of International Arbitration
Art	Article
Artt	Articles
ASA	Swiss Arbitration Association
Aug	August
AYIA	Austrian Yearbook on International Arbitration
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BLR	Belgrade Law Review
BuLR	Buffalo Law Review
C	Claimant
C.	Claimant
CCITA	Corte Cubana de Arbitraje Comercial Internacional
CEO	Chief Executive Officer

Cf	Confer
CISG	United Nations Convention on the International Sale of Goods
Civ	Civil
Co	Company
Co.	Compagnie
Comm	Commercial
COO	Chief Operating Officer
Corp	Corporation
D.	Defendant
Dec	December
e.g.	Exempli gratia
EAG	Europäische Atomgemeinschaft
EBLR	European Business Law Review
Ed	Edition
EKG	Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen
ElGup	Elaeis Guineensis Products
Emph	Emphasis
et al	et alii
Et seq	Et sequens
et.	And
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
Exhibit C	Claimant Exhibit
Exhibit R	Respondent Exhibit

Feb	February
FS	Festschrift
GmbH	Gesellschaft mit beschränkter Haftung
GTC	General Conditions of Sale
H.K.	HongKong
HG	Handelsgericht
HGB	Handelsgesetzbuch
I ZR	Erster Zivilrechtssenat
i.e.	id est
IA	International Arbitration
Ibid	Ibidem
IBLJ	International Business Law Journal
ICA	International Commercial Arbitration
ICC	International Chambre of Commerce
ICCA	International Council for Commercial Arbitration
ICLQ	International and Comparative Law Quarterly
IERJ	International Education & Research Journal
IHR	Internationales Handelsrecht Zeitschrift für das Recht des internationalen Warenkaufs und Warenvertriebs
IJA	The International Journal of Arbitration
IJAL	Indian Journal of Arbitration Law
IJAMDM	The International Journal of Arbitration, Mediation and Dispute Management

IJMAM	The International Journal of Arbitration Mediation and Dispute Management
inc	Incorporated
Indus.	Industries
int.	International
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IWRZ	Zeitschrift für Internationales Wirtschaftsrecht
JAL	Journal of Arbitration Law
Jan	January
JIA	Journal of International Arbitration
JLC	Journal of Law and Commerce
JSS	Journal of Social Sciences
KG	Kommanditgesellschaft
Lando	Principles of European Contract Law
lex loci arbitri	Law of the Seat of Arbitration
LG	Landesgericht
LLC	Limited Liability Company
LM	Lindenmaier-Möhring
Ltd	Limited Company
Mar	March
Memo	Memoranda
MKAC	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry

MüKo	Münchner Kommentar
NJCL	Nordic Journal of Commercial Law
NJW	Neue Juristische Wochenschrift
No	Number
NoA	Notice of Arbitration
Nov	November
NYC	New York Convention
NZ	New Zealand
Oct	October
OGH	Oberster Gerichtshof
OK	Online Kommentar
OLG	Oberlandesgericht
ors.	Others
P	Page
p.a.	Per annum
Para	Paragraph
Paras	Paragraphs
PICC	Principles of International Commercial Contracts
Plc	Public Limited Company
plc.	public limited companz
PO	Procedural Order
Pp	Pages
Pty	Proprietary limited
R	Respondent

RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der Internationalen Wirtschaft
RNoA	Response to Notice of Arbitration
RSPO	Roundtable on Sustainable Palm Oil
S.p.A.	Società per azioni
SAR	Spain Arbitration Review
SchiedsVZ	Zeitschrift für Schiedsverfahren
Sep	September
SG	Singapore
SGHC	Singapore High Court
U.S.	United States of America
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCITRAL	United Nations Commission On International Trade Law
UNIDROIT	Institut international pour l'unification du droit privé
US	United States of America
UVLA	University of Vienna Law Review
UVLR	University of Vienna Law Review
v	Versus
Vol	Volume
VUWLR	Victoria University of Wellington Law Review

W.S.	William Sydney
ZEuP	Zeitschrift für europäisches Privatrecht

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STATEMENT OF FACTS

The parties to this arbitration (hereafter: the Parties) are *ElGuP plc* (hereafter: CLAIMANT) and *JaJa Biofuel Ltd* (hereafter: RESPONDENT). CLAIMANT is one of the largest producers of palm oil in Mediterraneo with an annual production of around 30,000t. RESPONDENT is one of the pioneers in the production of sustainable biofuels in Equatoriana.

2010-2018	Mr Chandra, CLAIMANT's Head of Purchasing, and Ms Bupati, responsible for the purchase of palm kernel oil at Southern Commodities, conclude 40 contracts between CLAIMANT and Southern Commodities.	*EXHIBIT R3, p. 31 para. 2* *EXHIBIT C1, p. 9 para. 2*
Oct 2011	CLAIMANT sends its General Conditions of Sale (hereafter: CLAIMANT's GTC) to Southern Commodities. They contain an arbitration clause providing for arbitration under the PORAM Rules.	*RNOA, p. 27, para. 11*
2016	CLAIMANT replaces the PORAM arbitration clause (hereafter: Arbitration Clause) with a Model Clause of the Asian International Arbitration Centre (hereafter: AIAC). Mr Chandra informs Ms Bupati about the change during a phone call. It remains unclear whether Southern Commodities received a copy of the revised General Conditions of Sale.	*EXHIBIT C1, p. 9 para. 4* *PO NO. 2, p. 48 para. 7*
Late 2018	Southern Commodities acquires RESPONDENT.	*NOA, p. 4, para. 2*
19th Dec 2019	RESPONDENT's CEO, Ms Lever, ensures in a public statement that RESPONDENT will only use RSPO-certified palm oil.	*EXHIBIT R1, p. 29 para. 3*
Jan 2020	CLAIMANT's customer, to whom it sold 2/3 of its annual production, terminates the long-term contract. CLAIMANT initiates arbitration proceedings against this customer.	*EXHIBIT C1, p. 9 para. 6, p. 10 para. 7*
Jan 2020	CLAIMANT changes its policy regarding the law applicable to its contracts to the Law of Mediterraneo.	*EXHIBIT C1, p. 10 para. 13*

28th Mar 2020	Mr Chandra and Ms Bupati, now RESPONDENT's Head of Purchase, meet at the Palm Oil Summit in Mediterraneo. They discuss a potential long-term supply for 2/3 of CLAIMANT's annual production. Ms Bupati addresses concerns regarding the dispute resolution mechanism due to widespread hostility to arbitration in Equatoriana.	*EXHIBIT C1, p. 10 paras. 7, 11*
1st Apr 2020	Ms Bupati sends an email to Mr Chandra containing the discussed commercial terms.	*EXHIBIT C2, p. 12*
9th Apr 2020	Mr Rain, Mr Chandra's assistant, sends an email to Ms Bupati. The email is accompanied by contractual documents.	*EXHIBIT C3, p. 13-16* *EXHIBIT C4, p. 17*
3rd May 2020	Ms Fauconnier, Ms Bupati's assistant, sends an email to Mr Rain suggesting changes to the contractual terms.	*EXHIBIT R2, p. 30*
June 2020	The film "Saving Lucy" is released in Equatoriana. It reveals that one of CLAIMANT's employees gave out RSPO-certificates against payment of a bribe to products that did not meet the necessary requirements.	*EXHIBIT C6, p. 19 paras. 1, 5*
3rd Oct 2021	CLAIMANT loses the arbitration against its previous customer. The tribunal considered the termination to be justified due to problems with CLAIMANT's RSPO-certificates.	*PO NO. 2, p. 49 para. 14*
28th Oct 2020	Ms Lever announces publicly that RESPONDENT stopped negotiations with CLAIMANT for a long-term supply contract.	*EXHIBIT C6, p. 19 para. 5*
14th July 2021	Several rounds of mediation between CLAIMANT and RESPONDENT are unsuccessful. CLAIMANT submits a notice for arbitration against RESPONDENT.	*NOA p.4*
8th Oct 2021	The arbitral tribunal (hereafter: the Arbitral Tribunal) issues the Procedural Order NO. 1.	*PO NO. 1, p. 46*

INTRODUCTION

"Lasting change is a series of compromises. And compromise is alright, as long your values don't change" – Jane Goodall

1 The palm oil industry is a business sector with an undeniable impact on the environment. Therefore, it is crucial to conduct business in a conscious and responsible manner. As a pioneer in the production of sustainable biofuels, RESPONDENT is well aware of its responsibility towards the environment. Therefore, RESPONDENT aimed to comply with its own high sustainability standards when entering the palm oil market. In order to fulfil these standards, RESPONDENT is dependent on the reliability of its suppliers. Any compromise in this respect would seriously contravene against RESPONDENT's fundamental values.

2 As the availability of RSPO-certified palm oil is limited, RESPONDENT was very pleased when CLAIMANT offered a long-term supply at the Palm Oil Summit in 2020. On this occasion, RESPONDENT informed CLAIMANT of its strict sustainability standards and that compliance with these standards would be crucial to conclude a long-term contract. CLAIMANT assured that its palm oil would be of highest quality and fulfil all sustainability requirements. RESPONDENT relied on these affirmations and was content with the thought of having found a business partner with the same values. Before the Parties could enter into a binding contract, RESPONDENT found out that CLAIMANT was at the center of one of the biggest greenwashing scandals in the palm oil industry. In 2018, CLAIMANT failed to monitor its supply chain and supervisors had falsely confirmed RSPO-conformity against bribes. Deeply concerned by these revelations, RESPONDENT immediately withdrew from all negotiations with CLAIMANT.

3 CLAIMANT now desperately tries to chain RESPONDENT to a contract it did not enter into, as the Parties never left the stage of negotiations [**Issue 2**]. It is important to note that due to CLAIMANT's previous behaviour, any compromises on this matter would be an abandonment of RESPONDENT's fundamental values and therefore not acceptable. Even if a contract had been concluded, RESPONDENT would be entitled to terminate the contract due to CLAIMANT's involvement in the scandal. In an attempt to avoid termination, CLAIMANT refers to Clause 4 of its GTC, which would grant CLAIMANT a period of two months to remedy the breach of contract. However, CLAIMANT's GTC were not validly included into a possible contract [**Issue 3**]. As a last resort, fearing severe repercussions of a public hearing, CLAIMANT now tries to submit this dispute to the Arbitral Tribunal. However, the Parties did not conclude a valid arbitration agreement. Thus, the Arbitral Tribunal has no jurisdiction to hear this case [**Issue 1**].

ARGUMENTS ON THE PROCEDURE

ISSUE 1: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION

4 The Arbitral Tribunal has no jurisdiction to hear this case, as the Parties did not conclude an arbitration agreement. CLAIMANT asserts that the Arbitration Clause contained in CLAIMANT's GTC was validly incorporated into the alleged contract (hereafter: the Contract). Thus, the Arbitral Tribunal has to decide on the validity of the alleged arbitration agreement (hereafter: Arbitration Agreement) and thereby rule on its own jurisdiction. It has the power to do so due to the principle of *Kompetenz-Kompetenz* which follows from Rule 20.1. AIAC Arbitration Rules 2021 – Global Solutions (hereafter: AIAC Rules), on which the Parties agreed upon to conduct the arbitration [*PO NO. 1, p. 46 II bullet point 1*].

5 As will be established, the Parties did not conclude a contract [***see Issue 2***]. Nevertheless, it is undisputed that due to the doctrine of separability an arbitration agreement can remain valid even if the underlying contract is void [*WAINCYMER, p. 979; Premium Nafta v. Fili Shipping, HOUSE OF LORDS, 17th Oct 2007; Prima Paint v. Flood & Conklin, US SUPREME COURT, 12th June 1967; BORN, Cases and Materials, p. 190; REDFERN/HUNTER, para. 2.103; FOUCHARD/GAILLARD/GOLDMAN, pp. 198 et seq.; DICEY/MORRIS/COLLINS, para. 16-011; MUSTILL/BOYD, p. 62*]. Further, it follows from the doctrine of separability that the law governing the underlying contract and the law governing the conclusion of the arbitration agreement have to be identified separately [*BRAVO ABOLAFIA, in ASA Bulletin 2019, p. 65; SCHWEBEL, p. 5; JURATOWITCH/MCNEILL, in AI 2008, p. 481; BCY v. BCZ, SINGAPORE HIGH COURT, 9th Nov 2016; ICC No. 20686/RD; SCHERER/JENSEN, in Indian JAL 2021, p. 8*].

6 Thus, when determining whether the Arbitration Agreement was validly concluded, the Arbitral Tribunal must answer the question which law governs the Arbitration Agreement. However, the framing of this question is inherently unclear, as there is no such thing as 'the law' applicable to the Arbitration Agreement. Instead, there are various aspects to an arbitration agreement, e.g. the capacity of the parties, the means of enforcement, the interpretation, the termination, the formation etc., which in turn can be governed by different laws. As a matter of fact, at least thirteen sub questions have been identified which could be governed by differing laws [*BORN, ICA, p. 489*]. The Parties in the case at hand are in dispute whether the Arbitration Agreement was validly concluded. Thus, the Arbitral Tribunal must identify the law applicable to the formation of the Arbitration Agreement.

7 The Arbitral Tribunal will have to approach this question in two increments. First, the Arbitral Tribunal must determine which national law applies to the formation of the Arbitration Agreement. For this purpose, CLAIMANT attempts to apply the Law of Danubia as it is the law of the seat. While it is undisputed that the law of the seat as *lex loci arbitri* may apply to certain aspects of the Arbitration Agreement, the circumstances of the case reveal that the Parties intended Mediterranean Law to apply to the formation of the Arbitration Agreement [**A**].

8 Second, under the premise that Mediterranean Law was chosen, the Arbitral Tribunal must identify, which national statute of Mediterranean Law applies to the formation of the Arbitration Agreement. In the case at hand, the United Nations Convention on Contracts for the International Sale of Goods (hereafter: CISG) applies due to its own scope of application. This is further reflected by the intent of the Parties [**B**]. The Arbitration Clause was not validly incorporated under the CISG. Thus, in lack of a valid arbitration agreement, the Arbitral Tribunal has no jurisdiction to hear this case.

A. The Arbitration Agreement Is Governed by Mediterranean Law

9 The formation of the Arbitration Agreement is governed by Mediterranean Law. In order to determine the law applicable to the formation of the Arbitration Agreement, the Arbitral Tribunal should follow Rule 13.5 (a) of the AIAC Rules. Pursuant to Rule 13.5 (a), the arbitral tribunal is entitled to determine the law governing the arbitration agreement in the absence of any agreement by the parties. Hence, the Arbitral Tribunal shall first consider any intention of the Parties regarding the applicable law to the Arbitration Agreement. Only if the Parties did not agree on the law governing the Arbitration Agreement, the Arbitral Tribunal is empowered to apply the law which it considers the most appropriate. This is in line with the approach established by the Court in *Sulamérica v. Enesa* (hereafter: *Sulamérica*). According to *Sulamérica* one should follow three steps in order to determine the law applicable to the arbitration agreement:

> 1. one shall recognize and give effect to the parties' express choice of law
>
> 2. absent an express choice the parties' implied choice of law shall apply
>
> 3. only in absence of any choice, the system of law with which the contract has the closest and most real connection is applicable
>
> [*Sulamérica v. Enesa, UK COURT OF APPEAL, 16th May 2012*].

10 This three-step-method is generally acknowledged in international commercial arbitration regarding the determination of the law applicable to the arbitration agreement [*QIU, in IJAMDM 2020, p. 53; BMO v. BMP, SINGAPORE HIGH COURT, 26th May 2017; Kundan Singh Construction v. Tanzania National Roads Agency, KENYA HIGH COURT, 18th Dec 2012; Enka v. Chubb, UK SUPREME COURT, 9th Oct 2020; Carpatsky Petroleum v. PJSC Ukrnafta UK HIGH COURT 31st Mar 2020*]. CLAIMANT ignores the second step of this method and only refers to the first and third step. Contrary to CLAIMANT's allegation [*MEMO CLAIMANT, p. 6 para. 14*], the Parties did not make an express choice of law regarding the law applicable to the Arbitration Agreement [**I**]. Instead, the Arbitral Tribunal must respect the Parties' implied choice that Mediterranean Law should govern the Arbitration Agreement [**II**]. Therefore, contrary to CLAIMANT's allegations [*MEMO CLAIMANT, p. 6 paras. 15 et seq.*] the closest connection test does not apply in the case at hand.

I. The Parties Did Not Expressly Choose Danubian Law to Govern the Formation of the Arbitration Agreement

11 The Parties did not expressly choose Danubian Law to govern the formation of the Arbitration Agreement. The Arbitration Clause contains a choice of law clause referring to the Law of Danubia. CLAIMANT alleges that this choice constitutes an express choice of law for the Arbitration Agreement [*MEMO CLAIMANT, p. 6 para. 14*]. However, an express choice of law requires that a specific stipulation of the law governing the arbitration agreement is made [*BOSE, in SAR 2020, p. 63; ASHFORD, in IJAMDM 2019, p. 292; cf. Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation S, UK HOUSE OF LORDS, 14th July 1971*]. Thus, an express choice of law for the arbitration agreement requires explicit phrases such as "*this arbitration agreement*". An example can for instance be found in the recommendations for the Model Clause contained in the 2021 AIAC Rules which state, "*the law governing the arbitration clause shall be …*". By contrast, phrases referring to "*this contract*" or "*this agreement*" constitute a general choice of law for the whole contract [*BORN, ICA, p. 526*]. Art. 9 of CLAIMANT's GTC stipulates that "*[t]his contract shall be governed by the substantive law of Danubia*". Hence, as the wording does not specifically refer to the Arbitration Clause, this clause does not constitute an express choice for the law governing the formation Arbitration Agreement in favour of Danubian Law.

12 It is important to note that the Parties chose to overrule the choice of law contained in CLAIMANT's GTC, by individually agreeing that Mediterranean Law would govern the Contract

[*NOA, p. 5 para. 7; EXHIBIT C1, p. 10 para. 13; EXHIBIT C2, p. 12 para. 5; EXHIBIT C4 p. 17 para. 2; EXHIBIT C5, p. 18 para. 2; RNOA, p. 26 para. 10*]. Thus, the choice of law in Art. 9 of CLAIMANT's GTC does not apply in the case at hand.

II. The Parties Impliedly Chose Mediterranean Law to Govern the Arbitration Agreement

13 The individual agreement of the Parties that Mediterranean Law would govern the Contract extends to the Arbitration Agreement. CLAIMANT argues that the Arbitral Tribunal should disregard the Parties' implied intent regarding the law applicable to the Arbitration Agreement [*MEMO CLAIMANT, p. 6 para. 16*]. However, as party autonomy is a central principle in international arbitration the Arbitral Tribunal has to acknowledge any implied choice made by the Parties [*Enka v. Chubb, UK SUPREME COURT, 9th Oct 2020; Sulamérica v. Enesa, UK COURT OF APPEAL, 16th May 2012; Kabab-Ji SAL v. Kout Food Group, UK SUPREME COURT, 27th Oct 2021; QIU, in IJAMDM 2020, p. 62*].

14 CLAIMANT refers to Art. V(1)(a) of the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter: NYC) to justify the application of the law of the Seat of Arbitration to the Arbitration Agreement as default rule [*MEMO CLAIMANT, p. 6 para. 16*]. However, Art. V (1)(a) NYC, which is the relevant conflict-of-law provision a court would apply at the stage of enforcement [*WILSKE/FOX, in Wolff NYC, Art. 5 para. 113*], supports that one must first regard the implied choice of the parties when determining the law applicable to the arbitration agreement. Art. V (1)(a) NYC states that only if the parties fail to make "*any indication*" to the law applicable to the arbitration agreement, the law of the seat applies by default. Hence, both an arbitral tribunal and a court would consider an implied choice for the law applicable to the arbitration agreement before applying the law of the seat.

15 In general, when identifying the implied will of the parties regarding the law applicable to the arbitration agreement, both scholars and courts will have a closer look at whether the parties expressly chose the law governing the underlying contract and the choice of the seat of arbitration [*Enka v. Chubb, UK SUPREME COURT, 9th Oct 2020; FirstLink Investments v GT Payment, SINGAPORE HIGH COURT, 19th June 2014; GLICK/VENKATESAN, in FS-Pryles 2016, p. 133; CHARLES, in IJAMDM 2014, p. 56; ASHFORD, in IJAMDM 2019, p. 280; PLAVEC, in UVLA 2020, p. 97*].

16 An analysis of the choice of law for the contract reveals that the Parties intended Mediterranean Law to also apply to the Arbitration Agreement [**1**]. By contrast, in the case at hand the choice

of the Seat of Arbitration does not contain any indication of the Parties' will to the law applicable to the formation of the Arbitration Agreement [**2**].

1. The Parties' Choice of Law in Favour of Mediterranean Law for the Contract Extends to the Arbitration Agreement

17 The Parties' choice of law that Mediterranean Law would govern the contract also applies to the Arbitration Agreement. It is well established in international arbitration that the implied choice of law for the arbitration agreement will in many cases be found in the choice of law for the main contract [*BCY v. BCZ, SINGAPORE HIGH COURT, 9th Nov 2016; Arsanovia v. Cruz City 1 Mauritius Holdings, UK HIGH COURT, 20th Dec 2012; Habas Sinai v. VSC Steel, UK HIGH COURT, 19th Dec 2013; DICEY/MORRIS/COLLINS, para. 16–017; BOSE, in SAR 2020, p. 58; M/S. Indtel Technical Services v. W.S. Atkins Plc, INDIAN SUPREME COURT, 25th Aug 2008; Nat'l Thermal Power v. Singer, INDIAN SUPREME COURT, 7th May 1992; ICC No. 3572; ICC No 6379; ICC No 6850; ICC No 6840; GERECHTSHOF'S GRAVENHAGE, 4th Aug 1993; BGH, 12th Feb 1976; OLG MÜNCHEN, 7th Apr 1989*]. This is in line with the fundamental decisions made by courts in the past few years. In *Sulamérica* the Court decided that "*in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law*" [*Sulamérica v. Enesa, UK COURT OF APPEAL, 16th May 2012*], e.g. the law of the underlying contract. This assumption has recently been reinforced in the cases *Enka v. Chubb* in 2020 [*Enka v. Chubb, UK SUPREME COURT, 9th Oct 2020*] and *Kabab-Ji SAL v. Kout Food Group* in 2021 [*Kabab-Ji SAL v. Kout Food Group, UK SUPREME COURT, 27th Oct 2021*]. Thus, the general assumption is that where the parties made an express choice of law for the main contract, they intend the arbitration agreement to be governed by the same law.

18 This assumption does not contradict the doctrine of separability. The doctrine of separability as a concept of legal theory demands that the law applicable to the contract and the law applicable to arbitration agreement must be determined separately [*RUKHANA/BACHA, IJAL 2021, p. 123; OGH, 15th May 2019; BORN, in ICA, p. 498, KUPARADZE, in JSS 2015, p. 71; ICC No. 20686/RD; CZERNICH, in SchiedsVZ 2015, pp. 182, 184; PLAVEC, in UVLR 2020, p. 101; NAZZINI, in ICLQ 2016, p. 684; CZERNICH, in AYIA 2015, p. 79; LIEBSCHER/OBERHAMMER/RECHBERGER, p. 52 para. 21*]. However, as legal theory and commercial reality can fall apart, the Arbitral Tribunal should not uphold legal theory where this would disregard the actual intent of the Parties. Therefore, when determining the Parties'

intent regarding the law applicable to the arbitration agreement, it is crucial to consider that in commercial reality the parties themselves are regularly not aware of the doctrine of separability. Under this premise it poses no contradiction to the doctrine of separability to consider the law applicable to the contract when determining the law applicable to the arbitration agreement.

19 In the case at hand, the potential issues regarding the Arbitration Clause were discussed several times during the negotiations for the potential contract [*EXHIBIT C1, p. 10 para. 11; EXHIBIT C2, p. 12 paras. 6 et seq.; EXHIBIT C5, p. 18 para. 5; RNOA, p. 27 para. 12*]. Hence, the Parties knew that certain aspects in arbitration need regulation exceeding the determinations for the Contract. However, the idea that a separate law could be chosen for the Arbitration Agreement was never even considered. By contrast, the Parties extensively discussed and defined the law applicable to the Contract [*NOA, p. 5 para. 7; EXHIBIT C1, p. 10 para. 13; EXHIBIT C2, p. 12 para. 5; EXHIBIT C4, p. 17 para. 2; EXHIBIT C5, p. 18 para. 2; RNOA, p. 26 para. 10*]. This displays that the Parties did not assume that the law applicable to the Arbitration Clause was a separate matter.

20 Further, the structure of CLAIMANT's Arbitration Clause reveals that CLAIMANT itself was not aware of the doctrine of separability when it drafted the Clause. If the choice of law clause for the underlying contract is contained in the arbitration clause itself, the parties intend the whole contract to be governed by this law including the arbitration agreement [*PARISH, in IJAMDM 2010, p. 667*]. CLAIMANT's Arbitration Clause contained a choice of law clause for the Contract [***see Issue 1, p. 6 para. 11***], but no explicit regulation for the law applicable to the formation of the Arbitration Clause itself. Thus, placing the choice of law clause in the Arbitration Clause without making an explicit choice for the Arbitration Clause itself reveals that CLAIMANT was not aware of the doctrine of separability when drafting the clause.

21 In conclusion, the Parties did not assume that the law applicable to the Arbitration Clause was a separate matter. Instead, they regarded the Arbitration Clause as just one of many clauses of the Contract. Thus, it follows from the general assumption that by choosing the law applicable to the Contract, the parties impliedly intended to also apply Mediterranean Law to the formation of the Arbitration Agreement.

2. The Choice of the Seat of Arbitration Does Not Provide Any Indication to the Parties' Intention Regarding the Law Applicable to the Arbitration Agreement

22 By contrast, the choice of the Seat of Arbitration provides no indication for the intention of the Parties regarding the law applicable to the Arbitration Agreement. If the parties place the seat

of arbitration in a different country from the country of the law applicable to the main contract, the law of the seat itself does not supersede the law of the main contract [*Kabab-JI SAL v. Kout Food Group, UK SUPREME COURT, 27th Oct 2021; FOUCHARD/GAILLARD/GOLDMAN, p. 788*]. This is only the case if there are circumstances that demonstrate that the seat of arbitration was supposed to constitute an implied choice for the applicable law to the arbitration agreement [*ibid.*]. In any case, an implied choice can only be derived from the seat of arbitration, if the seat was chosen by both parties [*cf. STÜRNER/WENDELSTEIN, in IPrax 2014, p. 479*].

23 The Seat of Arbitration is stipulated in the Arbitration Clause. As the Arbitration Clause is part of CLAIMANT's GTC, the Seat was not negotiated by the Parties, but was instead dictated by CLAIMANT. Hence, one should not refer to it as the mutual intention of the Parties regarding the applicable law to the Arbitration Agreement but rather as a unilateral provision on the venue of the arbitration proceedings. Further, it is undisputed that the Arbitration Clause was never sent to RESPONDENT [*RNOA, p. 27 para. 13*]. Therefore, no intent for the Parties' choice of law for the Arbitration Agreement can be derived from the choice of the Seat of Arbitration.

24 CLAIMANT argues that the seat of arbitration indicates the law applicable to the Arbitration Agreement as the seat is usually chosen as a neutral forum [*MEMO CLAIMANT, p. 7 para. 28; MEMO CLAIMANT, p. 5 et seq., para. 13*]. By the submission to arbitration, parties ensure that their dispute is decided by a neutral forum, the arbitral tribunal. However, a law by its own nature is meant to be neutral. There is no indication that Danubian Law would be more neutral than the Law of Mediterraneo. In fact, the Law of Mediterraneo was mutually agreed upon by both Parties [*NOA, p. 5 para. 7; EXHIBIT C1, p. 10 para. 13; EXHIBIT C2, p. 12 para. 5; EXHIBIT C4, p. 17 para. 2; EXHIBIT C5, p. 18 para. 2*]. Further, CLAIMANT itself proposed the application of Mediterranean Law deviating to the choice of law clause in its GTC [*EXHIBIT C1, p. 10, para. 13; EXHIBIT C2, p. 12, para. 5*]. Thus, the fact that the Parties wanted a neutral forum has no implication to which law should apply to the Arbitration Agreement.

25 In conclusion, the Parties neither expressly nor impliedly chose Danubian Law as law applicable to the formation of the Arbitration Agreement. To the contrary, the circumstances and the intentions of the Parties demonstrate that they wanted Mediterranean Law to also apply to formation of the Arbitration Agreement. Therefore, the formation of the Arbitration Agreement is governed by the Law of Mediterraneo.

B. The Arbitration Agreement Was Not Validly Concluded Under the Law of Mediterraneo

26 Under Mediterranean Law, the Arbitration Agreement was not validly concluded. In Mediterraneo, there are two legal sources which could be applied to the Arbitration Agreement: Mediterranean General Contract Law, which is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts (hereafter: UNIDROIT Principles) [*PO NO. 1, p. 47 III 3 bullet point 2*] and, as Mediterraneo is a contracting state, the CISG [*PO NO. 1, p. 46 III 3 bullet point 1*]. CLAIMANT argues that if Mediterranean Law governs the Arbitration Agreement, the UNIDROIT Principles must apply [*NOA, p. 7 para. 17*]. Further, CLAIMANT states that regardless of whether the UNIDROIT Principles or the CISG apply, the Arbitration Agreement was validly concluded [*NOA, p. 7 para. 17*]. However, not the UNIDROIT Principles but the CISG applies to the Arbitration Agreement [**I**]. Under the CISG the Arbitration Agreement was not validly concluded [**II**]. Even if the UNIDROIT Principles governed the Arbitration Agreement, it would still not have been validly concluded [**III**].

I. The CISG Is Applicable to the Conclusion of the Arbitration Agreement

27 The CISG is applicable to the formation of the Arbitration Agreement. This is the case as the Arbitration Agreement falls within the scope of application defined by the CISG [**1**]. Even if the scope does not extend to the Arbitration Agreement, the CISG would nevertheless be applicable as the Parties chose the CISG to apply to the Arbitration Agreement [**2**].

1. The Scope of Application of the CISG Extends to Arbitration Agreements

28 Contrary to CLAIMANT's assessment [*MEMO CLAIMANT, p. 8 para. 32*] the scope of the CISG is not limited to sales contracts, but also extends to arbitration agreements. It has been argued that the CISG is not applicable to arbitration agreements due to the doctrine of separability [*KRÖLL, in JLC 2005, p. 45*]. According to the doctrine of separability the law for the main contract and the law governing the arbitration agreement have to be determined separately [*Sonatrach Petroleum v. Ferrell International, UK HIGH COURT, 4th Oct 2001*]. However, the doctrine does not require that the laws have to differ [*SCHROETER, in Schlechtriem/Schwenzer, Pre. Artt. 14-24 para. 53*]. In fact, the majority of courts and scholars have held that the CISG is applicable to govern both the conclusion of an arbitration agreement and the underlying contract [*BGH, 26th Nov 2020*; *MAGNUS, in Staudinger Pre. Artt. 14 et seq. para. 8*; *Chateau de Charmes Wines v. Sabaté USA, U.S. COURT OF APPEALS (9TH CIRCUIT), 5th May 2003; PILTZ, in NJW 2007,*

p. 2160; Filanto v. Chilewich, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 14th Apr 1992; SCHMIDT-AHRENDTS, in BLR 2011, p. 217; BRUNNER/MURMANN/STUCKI, in Brunner/Gottlieb, p. 63 para. 36; SCHWENZER/BEIMEL, in IWRZ 2021, p. 56].

29 In any case, it is widely acknowledged that the CISG autonomously decides whether a matter is covered by its scope [*MANKOWSKI, in MüKo HGB, Art. 4 para. 1; SCHWENZER/TEBEL, in ASA Bulletin 2013, p. 747; ZELLER, in NJCL 2004, p. 7; FILLERS, in EBLR 2019, p. 679*]. Thus, when determining the scope of the CISG only the internal reasoning of the CISG should be taken into consideration [*ibid.*]. References to principles outside of the CISG, such as the doctrine of separability, are of no help when identifying the scope of application of the CISG [*FILLERS, in EBLR 2019, p. 679*]. Instead, it is only for the CISG itself to decide what clauses fall within its scope. An interpretation of the Art. 81 (1) CISG [**a**] and Art. 19 (3) CISG [**b**] shows that the CISG governs the formation of the Arbitration Agreement. Further, the procedural nature of the Arbitration Agreement does not preclude the applicability of the CISG to the formation of the Arbitration Agreement [**c**]. Last, the Parties did not exclude the applicability of the CISG [**d**].

a) Art. 81 (1) CISG Indicates That the Formation of the Arbitration Agreement Is Governed by the CISG

30 An analysis of Art. 81 (1) CISG reveals that the formation of the Arbitration Agreement is governed by the CISG. The second sentence of Art. 81 (1) CISG states that avoidance of the contract of sale does not affect any provision of the contract for the settlement of disputes, i.e. arbitration agreements. Under the premise that the CISG applies to both the sales contract and the arbitration agreement, Art. 81 (1) CISG ensures that the validity of the arbitration agreement is determined separately under the CISG. By contrast, if the validity of the arbitration agreement were to be governed by domestic law, the invalidity of the contract under the CISG would not affect the arbitration agreement in any case. Thus, Art. 81 (1) CISG would merely be an unnecessary clarification [*SCHLECHTRIEM/SCHROETER, p. 99 para. 208; WINSHIP, in FS-Neumayer 1997, p. 234; SCHROETER, § 6 para. 37*; *FILLERS, in EBLR 2019, p. 683*]. Hence, Art. 81 (1) CISG suggests that the CISG applies to the formation of the Arbitration Agreement.

b) Art. 19 (3) CISG Reveals That the Scope of the CISG Applies to the Arbitration Agreement

31 Further, Art. 19 (3) CISG supports the application of the CISG to the formation of the Arbitration Agreement. Pursuant to Art. 19 (3) CISG additional or different terms relating,

among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. The wording "*among others*" implies that Art. 19 (3) CISG is not limited to additions or alterations that only fall within the scope of the CISG [*FILLERS, in EBLR 2019, p. 681*]. However, all of the terms mentioned in Art. 19 (3) CISG except for the settlement of disputes are explicitly regulated by the CISG. This indicates that as the settlement of disputes is mentioned in this context, the CISG intends to also apply to the formation of the arbitration agreement. Therefore, the mentioning of the settlement of disputes in Art. 19 (3) CISG reveals that the formation of the Arbitration Agreement falls within the scope of the CISG.

c) The Procedural Nature of the Arbitration Agreement Does Not Preclude the Applicability of the CISG to the Formation of the Arbitration Agreement

32 Further, the procedural nature of the Arbitration Agreement does not preclude the applicability of the CISG to its formation. CLAIMANT might have argued that arbitration agreements are of a procedural nature, while the CISG is concerned with substantive matters [*KRÖLL, in JLC 2005, pp. 42 et seq.*]. RESPONDENT does not deny that concerning its procedural nature the specific provisions regarding arbitration have to be considered [*SCHWENZER/TEBEL, in ASA Bulletin 2013, p. 747*]. Nevertheless, even though arbitration agreements are often regarded to be of a procedural nature [*KRÖLL, in JLC 2005, pp. 42 et seq.*], the formation of the agreement itself is a question of substantive law as the provisions concerning the procedural elements of arbitration agreements do not contain mechanisms on contract formation [*VISCHER/HUBER/OSER, p. 619 para. 1354; FOGT, in ARIA 2015, p. 381; JANSSEN/SPILKER, in RabelsZ 2013, p. 153; BGH, 3rd May 2011; SCHWENZER/TEBEL, in ASA Bulletin 2013, p. 747; VOROBEY, in JLC 2012, p. 138*]. Thus, the procedural nature of the Arbitration Agreement does not preclude the applicability of the CISG to its formation.

d) The Parties Did Not Exclude the Application of the CISG to the Formation of the Arbitration Agreement

33 Finally, contrary to CLAIMANT's allegation [*MEMO CLAIMANT, p. 8 para. 34*], the Parties did not exclude the applicability of the CISG to the Arbitration Agreement. In accordance with Art. 6 CISG, parties may either explicitly or impliedly exclude the application of the CISG [*OGH, 2nd Apr 2009; FERRARI, in Schlechtriem/Schwenzer, Art. 6 paras. 15 et seq.*].

When parties choose the law of a non-contracting state of the CISG, the CISG is excluded impliedly [*FERRARI, in Schlechtriem/Schwenzer, Art. 6 para. 20*]. However, opposite to CLAIMANT's assumption [*MEMO CLAIMANT, p. 8 para. 34*], the Parties agreed that the Contract is not governed by the substantive Law of Danubia, which is a non-contracting state of the CISG, but by Mediterranean Law. Further, contrary to the common usage in the palm oil industry, CLAIMANT's contract template does not explicitly exclude the application of the CISG [*PO NO. 2, p. 49 para. 11*]. Hence, the Parties did not exclude the applicability of the CISG to the formation of the Arbitration Agreement.

2. Even if the CISG Does Not Apply by Its Own Scope, the CISG Governs the Arbitration Agreement Due to the Choice of the Parties

34 As the Parties submitted the formation of the Arbitration Agreement to the CISG, the Convention applies regardless of its own scope. As set out in Rule 13.5. (a) of the AIAC Rules, the parties are free to choose the law governing the arbitration agreement. Due to the non-exhaustive scope of the CISG, the fundamental principle of party autonomy allows parties to extend the application of the CISG [*ICC No. 11849; TRIBUNALE DI PADOVA, 11th Jan 2005; XIAMEN INTERMEDIATES PEOPLE'S COURT, 5th Sep 1994; SCHLECHTRIEM, in VUWLR 2005, pp. 784 et seq.; MANKOWSKI, in MüKo HGB, Art. 6 paras. 16 et seq.; MAGNUS, in JLC 2019, p. 378; AGARWAL, in IERJ 2020, p. 37*]. Whether the parties chose a law is to be decided by applying the law that would govern the agreement if it were valid [*Kabab-Ji SAL v. Kout Food Group, UK SUPREME COURT, 27th Oct 2021*]. Therefore, the question whether the Parties agreed on the applicability of the CISG to the formation of the Arbitration Agreement has to be determined by applying the provision of the CISG itself. Pursuant to Art. 8 (2) CISG, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. The conduct of the Parties while negotiating the Contract shows that they wanted the CISG to apply to the Arbitration Agreement:

35 The Parties chose the CISG to govern all clauses of the Contract including the Arbitration Agreement. When Parties choose the law of a contracting state of the CISG the Convention is applicable prior to domestic law [*MKAC No. 54/1999; KOCH, in IHR 2015, p. 53; CCICA No. 21/2014; JOHNSON, in BuLR 2011, p. 285; SUPREME COURT OF POLAND, 25th June 2015*]. It can be expected of Parties engaged in the field of international sales transactions to know about the applicability of the CISG when choosing the law of a contracting state [*FOGT, in ARIA 2015,*

p. 372]. This choice can be seen as an implied consent to the applicability of the Convention to all the terms in the sales contract including an arbitration agreement [*FOGT, in ARIA 2015, p. 373*]. As a matter of fact, CLAIMANT's counsel assumed that the reference to the Law of Mediterraneo would include the CISG and that thus the CISG would be the applicable law [*PO NO. 2, p. 50 para. 16*]. During the contractual negotiations the Parties regarded the Arbitration Clause as part of the potential Contract [***see Issue 1, p. 9 paras. 19 et seqq.***]. Consequently, when the Parties chose Mediterranean Law, they intended the CISG to apply to all clauses of the Contract, in particular also the Arbitration Clause.

II. Under the CISG the Arbitration Agreement Was Not Validly Concluded

36 As the Arbitration Clause was contained in CLAIMANT's GTC [*EXHIBIT R4, p. 32 (after changes in 2016)*], the valid formation of the Arbitration Agreement depends on the incorporation of the clause as a standard term into the Contract under the CISG. The question of the incorporation of CLAIMANT's GTC will be addressed below [***see Issue 3***]. It will be demonstrated that the Arbitration Clause was not validly incorporated into the Contract. Thus, as the Arbitration Agreement is invalid under the CISG, the Arbitral Tribunal has no jurisdiction to hear this case.

III. Even if the Mediterranean General Contract Law Were Applicable to the Arbitration Clause, It Would Still Not Have Been Incorporated

37 Even if the Mediterranean General Contract Law, which is a verbatim adoption of the UNIDROIT Principles, were applicable to the formation of the Arbitration Agreement, the latter would not have been validly concluded. CLAIMANT argues that under these principles the Arbitration Clause would have been validly incorporated [*NOA, p. 7 para. 17*]. In principle, the incorporation of standard terms under the UNIDROIT Principles has the same requirements as under the CISG [*SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 120; NAUDÉ, in Vogenauer, Art. 2.1.19 paras. 7 et seq.*]. As will be shown [***see Issue 3***], the requirements for an incorporation of the Arbitration Clause were not fulfilled under the CISG by CLAIMANT.

38 Further, CLAIMANT cannot argue that the Arbitration Clause was incorporated by way of written confirmation. In contrast to the CISG, the UNIDROIT Principles expressly provide for the concept of a 'written confirmation' in Art. 2.1.12 UNIDROIT Principles. According to Art. 2.1.12 UNIDROIT Principles, if a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional […] terms, such terms become part of the contract, unless they materially alter the

contract or the recipient, without undue delay, objects to the discrepancy. As the Parties did not conclude a contract [***see Issue 2***], the Arbitration Clause could not be incorporated by means of 'written confirmation'.

39 Even if a contract had been concluded, the Arbitration Clause would not have been incorporated, as its inclusion would constitute a material alteration. Under the UNIDROIT Principles, alterations are material if the offeror could not reasonably expect the offeree to agree to them [*ANDERSON, in Vogenauer, Art. 2.1.11 para. 9*]. The reasonable expectations of the offeror must be determined in accordance with Art. 4.2 (2) UNIDROIT Principles. Pursuant to Art. 4.2 (2) UNIDROIT Principles, statements and other conduct shall be interpreted according to the understanding of a reasonable person of the same kind as the other party.

40 Ms Bupati expressed her concerns regarding the arbitration critical atmosphere in Equatoriana to CLAIMANT. In her email, Ms Bupati stated: "*At least, we should select a non-industry related arbitration institution* […]" [*EXHIBIT C2, p. 12 para. 7 emph. add.*]. By the wording "*at least*", it had to be apparent to CLAIMANT that RESPONDENT had further requirements concerning the choice of the arbitration institution. Furthermore, the wording "*we*" indicates that RESPONDENT wanted to be involved in the process of drafting the content of the Arbitration Clause. Hence, CLAIMANT could not reasonably expect that RESPONDENT would agree to the addition of the Post-2016 Arbitration Clause without further discussion. Therefore, the addition of the Arbitration Clause constitutes a material alteration.

41 As the incorporation of standard terms under the UNIDROIT Principles has the same requirements as under the CISG, the Arbitration Clause was not incorporated as a standard term. Further, it was not incorporated by means of 'written confirmation', as the Parties did not conclude a contract and the inclusion of the Arbitration Clause would in any case constitute a material alteration. Hence, even if the Tribunal were to apply the UNIDROIT Principles to the incorporation of the Arbitration Clause, no Arbitration Agreement was concluded.

42 **Conclusion of the First Issue:** The Parties impliedly chose Mediterranean law to govern the formation of the Arbitration Agreement. Under Mediterranean Law the CISG applies both by its own scope and by will of the Parties. The Arbitration Agreement was not validly concluded under the CISG. Even if the UNIDROIT Principles were to govern the Arbitration Agreement, it would not have been validly concluded. Consequently, the Arbitral Tribunal has no jurisdiction to hear the case, as the Parties did not conclude a valid Arbitration Agreement.

ARGUMENTS ON THE MERITS

43 At the Palm Oil Summit on 28th March 2020 in Mediterraneo, CLAIMANT's COO, Mr Chandra approached RESPONDENT's Head of Purchase, Ms Bupati and gave her a quotation for a long-term supply of RSPO-certified palm oil at a favourable price [*NOA, p. 5 paras. 4 et seq.*]. Ms Bupati and Mr Chandra were familiar with each other from previous business relations, where Ms Bupati had concluded numerous contracts with CLAIMANT in her function at Southern Commodities, RESPONDENT's parent company [*EXHIBIT R3, p. 31 para. 2; EXHIBIT C1, p. 9 para. 2*]. At the Palm Oil Summit, Ms Bupati informed Mr Chandra that in contrast to Southern Commodities, RESPONDENT had higher sustainability standards which would have to be met in order for RESPONDENT and CLAIMANT to enter into a contract [*EXHIBIT C1, p. 10 para. 10; RNOA, p. 26 para. 5*].

44 As CLAIMANT had just lost a major customer, Mr Chandra seemed eager to secure a long-term contract with RESPONDENT and assured Ms Bupati the possibility of a long-term supply of RSPO-certified palm oil [*NOA, p. 4 paras. 3 et seq.; EXHIBIT R3, p. 31 para. 6*]. In light of the limited supply of RSPO-certified palm oil [*EXHIBIT R3, p. 31 para. 5*], Ms Bupati was pleased with this opportunity [*EXHIBIT R3, p. 31 para. 6*]. Nevertheless, Ms Bupati wanted to get approval from RESPONDENT's management before entering into such a long-term commitment for palm oil [*NOA, p. 5 para. 5*].

45 However, before making a final decision on whether or not RESPONDENT wanted to enter into a long-term contract, the movie "Saving Lucy" was released in Equatoriana in June 2020 [*EXHIBIT C6, p. 19 para. 1*], which uncovered suppliers of CLAIMANT breaching their sustainability requirements [*EXHIBIT C1, p. 9 para. 5*]. Subsequently, RESPONDENT stopped all negotiations with CLAIMANT. Thus, no contract was concluded between the Parties [**Issue 2**].

46 Further, even if a contract between the Parties had been concluded, RESPONDENT would have rightfully terminated the Contract due to a fundamental breach. CLAIMANT alleges that clause 4 of its GTC prevents a termination without further remedial actions [*NOA, p. 7 para. 28*]. However, CLAIMANT's GTC would not have been validly incorporated into the Contract [**Issue 3**].

ISSUE 2: THE PARTIES DID NOT CONCLUDE A LEGALLY BINDING CONTRACT

47 Following the negotiations at the Palm Oil Summit, the Parties exchanged emails regarding the conclusion of a contract, however, the Parties never left the stage of negotiations. In determining whether a contract was concluded, the Arbitral Tribunal must apply the law agreed upon by the parties to the substance of the dispute pursuant to Rule 13.5. (a) of the AIAC Rules. In the present case, the Parties agreed that the formation of a contract would be governed by Mediterranean Law, including the CISG [*PO NO. 2, p. 52 para. 33*]. Following Artt. 14 et seq. CISG, the conclusion of a contract requires an offer and an acceptance. Both an offer and an acceptance presuppose an intention to be bound [*Welch v. Jess, NZ DISTRICT COURT, 1976*]. CLAIMANT argues that RESPONDENT displayed such an intention to be bound. For this purpose, CLAIMANT specifically points out the Palm Oil Summit [*MEMO CLAIMANT, p. 12 para. 52*] and the email sent by RESPONDENT's Head of Purchase, Ms Bupati, on 1st April 2020 [*MEMO CLAIMANT, p. 16 para. 73*]. Further, CLAIMANT asserts that RESPONDENT accepted CLAIMANT's offer, yet again showing an intention to be bound [*MEMO CLAIMANT, p. 12 para. 49*]. However, RESPONDENT at no point in time showed an intention to be bound or entered into a legally binding contract.

48 First, RESPONDENT did not display an intention to be bound at the Palm Oil Summit [**A**]. Second, the email sent by Ms Bupati on 1st April 2020 does not constitute a binding offer [**B**]. Even if the Arbitral Tribunal were to classify the email by RESPONDENT as a legally binding offer, CLAIMANT's reply would not have been an acceptance but rather constituted a counter-offer [**C**]. Regardless of whether or not CLAIMANT's reply constituted an offer or a counter-offer, neither would have been accepted by RESPONDENT [**D**].

A. RESPONDENT Showed No Intention to Be Bound at the Palm Oil Summit

49 RESPONDENT did not show an intention to be bound at the Palm Oil Summit on 28th March 2020. By contrast, CLAIMANT argues that RESPONDENT displayed an intention to be bound at the Palm Oil Summit by showing great interest in a quotation given by CLAIMANT's COO Mr Chandra concerning a five-year supply of RSPO-certified palm oil [*MEMO CLAIMANT, p. 12 para. 52*; *EXHIBIT C1, p. 10 para. 11*]. However, mere interest alone does not indicate an intention to be bound, as an intention to be bound draws the distinguishing line between contract negotiations and the will to enter a legally binding contract [*SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 91*]. Whether or not a party intended to enter into a

legally binding contract has to be determined in line with Art. 8 CISG [*SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 7*; *GRUBER, in MüKo BGB, Art. 14 para. 6; BGH, 25th Mar 2015; OLG FRANKFURT, 30th Aug 2000*]. According to Art. 8 (1) CISG statements made by and other conduct of a party are to be interpreted according to its intent where the other party knew or could not have been unaware what that intent was. CLAIMANT itself recognises that Ms Bupati insisted on further discussions as she wanted "*to get approval from Respondent's management first, before entering into such a long-term commitment of a considerable size*" [*NOA, p. 5 para. 5*]. Thus, Ms Bupati clearly communicated to CLAIMANT that RESPONDENT did not intend to enter into a legally binding contract at this point in time. Consequently, CLAIMANT could not have been unaware of RESPONDENT's lack of an intention to be bound at the Palm Oil Summit.

B. RESPONDENT's Email on 1st April 2020 Was Not a Binding Offer

50 Contrary to CLAIMANT's understanding [*EXHIBIT C4, p. 17 para. 2*] the email sent by Ms Bupati [*EXHIBIT C2, p. 12*] was not a binding offer. Instead, the email in question rather constituted a non-binding letter of intent. According to Art. 14 (1) CISG an offer is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. By contrast, a letter of intent constitutes a mere fixation of an interim result achieved in the course of the contract negotiations, which does not oblige the parties to conclude a final contract [*BRUNNER/PFISTERER/KÖSTER, in Brunner/Gottlieb, Art. 14 para. 7; SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 97*]. While a letter of intent can be as sufficiently definite as an offer regarding the description of goods, quantity, delivery terms and price [*FERRARI, in Kröll/Mistelis/Perales Viscasillas, Art. 14 para. 14; SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 97*], the distinguishing characteristic between the two options is whether the party had an intention to be bound [*BONELL, in RIW 1990, p. 696 et seq.; MAGNUS, in Staudinger, Art. 14 para. 15; BRUNNER/PFISTERER/KÖSTER, in Brunner/Gottlieb, Art. 14 para. 7; RUDOLPH, Art. 14 para. 2; ACHILLES, Art. 14 para. 3; LUTTER, p. 18 et seq.*]. Such an intention to be bound has to be determined according to Art. 8 (2) (3) CISG [*FERRARI, in Kröll/Mistelis/Perales Viscasillas, Art. 14 para. 12*]. In her email Ms Bupati addressed that the Parties still had topics open for debate [*EXHIBIT C2, p. 12*]. Herein she stated that "*the submission of the sales contract to Mediterranean law […] is less a problem for us than the submission to arbitration, in particular if we submit to an institution which exclusively deals with palm oil*" [*EXHIBIT C2, p. 12 para. 6*]. Even CLAIMANT acknowledges [*EXHIBIT C1, p. 10 para. 11*] that RESPONDENT

had concerns regarding the submission to arbitration. The importance of dispute resolution settlement for the conclusion of contracts is also emphasised in Art. 19 (3) CISG, wherein dispute resolution clauses are listed as terms which alter an offer materially. Thus, taking the significant size and the long duration of the Contract into account, a reasonable person would have concluded that RESPONDENT would not want to enter into a long-term contract without having agreed upon any form of dispute resolution.

51 Further, Ms Bupati informed CLAIMANT that her assistant, Ms Fauconnier, would "*take care of the further discussions, if any*" [*EXHIBIT C2, p. 12 para. 5*]. This shows that RESPONDENT anticipated that issues might arise which would have to be resolved before a contract could be concluded. Therefore, a reasonable person would have concluded that Ms Bupati merely wanted to reassure the fixation of the commercial terms agreed upon at the Summit. Thus, the email in lack of an intention to be bound does not constitute an offer, but rather can only be seen as a letter of intent.

C. Even if the Arbitral Tribunal Were to Find the Email by RESPONDENT to Be a Legally Binding Offer, CLAIMANT's Reply Constituted a Counter-Offer

52 Even if the email sent by Ms Bupati [*EXHIBIT C2, p. 12*] constitutes a legally binding offer, CLAIMANT's reply [*EXHIBIT C3, p. 13; EXHIBIT C4, p. 17*] containing the contractual documents would be a counter-offer. Contrary to CLAIMANT's perception [*EXHIBIT C4, p. 17 para. 2*] due to its insistence on the application of its GTC, CLAIMANT did not accept the terms set out in Ms Bupati's email. According to Art. 19 (1) CISG a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. This is restricted by Art. 19 (2) CISG, which states that a reply containing immaterial additions or alterations still constitutes an acceptance if the offeror does not object to these. To determine whether an alteration is material or not, Art. 19 (3) CISG provides a list of terms which are considered material alterations of an offer.

53 In its reply, CLAIMANT incorporated a clause which stated that CLAIMANT's GTC would apply [*EXHIBIT C3, p. 13; EXHIBIT C4, p. 17 para. 4*]. By contrast, the email written by Ms Bupati [*EXHIBIT C2, p. 12*] did not contain any reference to GTC. Thus, the incorporation of CLAIMANT's GTC would constitute an alteration to RESPONDENT's offer.

54 This alteration is also material in terms of Art. 19 (2), (3) CISG for the following reasons:

55 First, the alteration is material as CLAIMANT's GTC include an arbitration clause. Pursuant to Art. 19 (3) CISG an additional term relating to the settlement of disputes is considered to alter the terms of the offer materially. CLAIMANT might argue that Art. 19 (3) CISG merely constitutes a rebuttable presumption. However, the presumption that the terms listed in Art. 19 (3) CISG materially alter the offer can only be rebutted, if the amendments are favourable to the opposing party [*SCHROETER, in Schlechtriem/Schwenzer, Art. 19 para. 37; GRUBER, in MüKo BGB, Art. 19 para. 8; SAENGER, in BeckOK BGB, Art. 19 para. 5; OGH, 20th Mar 1997; OLG NAUMBURG, 27th Apr 1999*] or if the opposing party was familiar with them due to previous negotiations [*SCHROETER, in Schlechtriem/Schwenzer Art. 19 para. 35; FERRARI, in Kröll/Mistelis/Perales Viscasillas, Art. 19 para. 10; HLAWON, in jurisPK BGB, Art. 19 para. 24*]. As the Arbitration Clause in CLAIMANT's GTC relates to the settlement of disputes, it falls within the scope of Art. 19 (3) CISG. The Arbitration Clause was neither favourable for RESPONDENT nor was RESPONDENT familiar with it, as can be seen in the email sent by Ms Bupati [*EXHIBIT C2, p. 12 para. 6*]. In her email Ms Bupati stated that the Parties should select a non-industry related arbitration institution [*EXHIBIT C2, p. 12 para. 6*], thus demonstrating that she was not aware of CLAIMANT's revised non-industry related AIAC Arbitration Clause. Therefore, the presumption that CLAIMANT's attempt to incorporate its Arbitration Clause constitutes a material alteration is not rebutted.

56 Second, the alteration is material as CLAIMANT's GTC include a clause that impacts RESPONDENT's right to terminate the contract in the event of fundamental breach on the basis of Art. 49 (a) CISG. The partial exclusion or amendment of provisions of the CISG are also to be regarded as material [*GRUBER, in MüKo BGB, Art. 19 para. 9; OLG KOBLENZ, 4th Oct 2002*]. Clause 4 of CLAIMANT's GTC states that "*[i]n case of any breach of contract, in particular concerning the conformity of the goods, the seller is given two months after being notified by the buyer to remedy such breach. Only if the remedial actions were not successful may the buyer terminate the contract*." [*PO NO. 2, p. 52 para. 31*]. This restricts RESPONDENT's right to avoid a contract in case of a fundamental breach pursuant to Art. 49 (a) CISG. Thus, the attempt of the inclusion of this clause would also constitute a material alteration to RESPONDENT's offer in terms of Art. 19 CISG.

57 Therefore, even if the email sent by Ms Bupati constitutes an offer, CLAIMANT's reply cannot be considered an acceptance but would rather constitute a counter-offer, as it materially altered the terms of RESPONDENT's email.

D. RESPONDENT Did Not Accept Any Offer Made by CLAIMANT

58 RESPONDENT did not accept an offer made by CLAIMANT regardless of whether the Arbitral Tribunal interprets CLAIMANT's reply to the email [*EXHIBIT C3, p. 13; EXHIBIT C4, p. 17*] as an offer or a counter-offer. According to Art. 18 (1) CISG a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. In the case at hand CLAIMANT argues that silence can be sufficient to constitute a legally binding acceptance due to either the previous record [*MEMO CLAIMANT, p. 16 para. 73*] or an established practice between the Parties [*MEMO CLAIMANT, p. 12 paras. 52 et seq., p. 16 para. 73, MEMO CLAIMANT, p. 17 paras. 77 et seq.*]. However, silence neither constitutes an acceptance due to the previous record [**I**] nor due to a business practice [**II**]. Further, contrary to CLAIMANT's assertion [*MEMO CLAIMANT, p. 12 para. 49*], RESPONDENT did not accept CLAIMANT's offer by conduct [**III**].

I. RESPONDENT Did Not Accept CLAIMANT's Offer Due to a Previous Record

59 RESPONDENT did not accept CLAIMANT's offer due to a previous record. As CLAIMANT points out [*MEMO CLAIMANT, p. 12 para. 52*] RESPONDENT remained silent after Ms Bupati's assistant, Ms Fauconnier, stated she had to revise with RESPONDENT's lawyers before agreeing on the discussed terms [*EXHIBIT C5, p. 18 para. 4*]. CLAIMANT acknowledges that in general silence is not sufficient to show assent to an offer [*MEMO CLAIMANT, p. 12 para. 52*]. However, CLAIMANT brings forward that in the case *Lease America. v. Rowe International* the court had ruled that even though both parties had not actually signed the agreement, the previous record proved an agreement, and the contract was considered to be concluded [*MEMO CLAIMANT, p. 16 para. 73*]. However, in the cited case the mentioned record did not constitute contract negotiations but rather already a performance of the contract, namely payments and transactions [*Lease America. v. Rowe International, US DISTRICT COURT WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, 26th Sep 2016*]. Hence, in the case *Lease America v. Rowe International* the conduct and performance indicated assent, not silence. Therefore, CLAIMANT cannot rely on the ruling of the case to allege that RESPONDENT accepted the offer by remaining silent.

II. RESPONDENT Did Not Accept CLAIMANT's Offer Due to a Business Practice

60 RESPONDENT did not accept the offer due to a business practice. According to Art. 9 (1) CISG, parties are bound by any practice which they have established between themselves. The basic concept of practices in terms of Art. 9 (1) CISG is that they are established by a number of

repeated transactions carried out over a period of time between the parties [*MAGNUS, in Staudinger BGB, Art. 9 para. 13; PILTZ, p. 98 para. 2-193; GRAFFI, in JLC 2011, p. 279; FERRARI, in IBLJ 2003, p. 572*; *PAMBOUKIS, in JLC 2005, p. 116; OVIEDO-ALBÁN, in Vniversitas 2017, p. 262; SCHMIDT-KESSEL, in Schlechtriem/Schwenzer, Art. 9 para. 8; HG AARGAU, 26th Sep 1997*; *LG FRANKENTHAL, 17th Apr 1997*; *AG DUISBURG, 13th Apr 2000*]. In the case at hand, CLAIMANT and RESPONDENT have had no previous commercial relationship [*PO NO. 2, p. 48 para. 3*]. Thus, the Parties did not establish a practice themselves in terms of Art. 9 (1) CISG.

61 CLAIMANT alleges that RESPONDENT is bound to a business practice established between CLAIMANT and RESPONDENT's parent company, Southern Commodities [*MEMO CLAIMANT, p. 17 paras. 77 et seq.*]. The transfer of a practice established between other parties would in itself already constitute an unusual occurrence. CLAIMANT argues that it could nonetheless trust in the application of the business practice in accordance with Art. 9 CISG due to various contracts concluded between Ms Bupati and Mr Chandra, when Ms Bupati was still working for Southern Commodities [*MEMO CLAIMANT, p. 10 paras. 40 et seq.; MEMO CLAIMANT, p. 15 para. 70*]. However, a business practice established between CLAIMANT and Southern Commodities cannot be applied to the conclusion of a contract between CLAIMANT and RESPONDENT [**1**]. Even if the Tribunal were to find a practice applicable to the formation of a contract between the Parties, silence would not result in the conclusion of a contract [**2**].

1. The Practice Between CLAIMANT and Southern Commodities Is Not Applicable to the Case at Hand

62 The practice between CLAIMANT and Southern Commodities cannot be applied to the conclusion of a contract between CLAIMANT and RESPONDENT. The practice is not transferable due to the corporate structure of RESPONDENT and Southern Commodities [**a**]. CLAIMANT could not legitimately rely on the application of the practice based on the previous business relationship between Mr Chandra and Ms Bupati [**b**].

a) As RESPONDENT Is a Separate Legal Entity the Practice Cannot Be Transferred

63 The practice is not transferable due to the corporate structure of RESPONDENT and Southern Commodities. CLAIMANT states that as RESPONDENT is Southern Commodities subsidiary the business practice established between CLAIMANT and Southern Commodities would create legal obligations for RESPONDENT [*MEMO CLAIMANT, p. 17 para. 78*]. However, if companies

of the same corporation constitute a separate legal entity they have to be treated as individual companies with separate legal rights and liabilities [*Adams v. Cape Indus., UK COURT OF APPEAL, 1990; cf. Salomon v. Salomon & Co. Ltd., HOUSE OF LORDS, 16th Nov 1897; cf. ARS v. Art and another, SG HIGH COURT, 8th Apr 2015; cf. FERRARIO, in JIA 2009, p. 653*]. In the case at hand, RESPONDENT is a subsidiary of Southern Commodities, however, it remained a separate legal entity [*PO NO. 2, p. 48 para. 4*]. As RESPONDENT and Southern Commodities have to be treated as individual companies, the practice cannot simply be transferred from one company to the other. Therefore, CLAIMANT could not rely on the application of the business practice due to the corporate structure of RESPONDENT and Southern Commodities.

b) CLAIMANT Cannot Legitimately Rely on the Application of the Practice Due to Previous Business Relationships Between Mr Chandra and Ms Bupati

64 CLAIMANT could not legitimately rely on the application of the practice based on the previous business relationship between Mr Chandra and Ms Bupati. CLAIMANT argues that due to the long-lasting business relationship between the two agents involved in the previous contracts RESPONDENT evoked CLAIMANT's legitimate expectation to apply the practice to the case at hand [*MEMO CLAIMANT, p. 17 para. 78*]. Whether or not RESPONDENT evoked the legitimate expectation to apply a practice in terms of Art. 9 (1) CISG has to be determined according to Art. 8 CISG [*SCHROETER, in Schlechtriem/Schwenzer, Art. 8 para. 44*].

65 CLAIMANT might argue such legitimate expectations arose from the email sent by Ms Bupati on 1st April 2020. However, the wording of Ms Bupati's email does not indicate the will to apply the practice established between CLAIMANT and Southern Commodities. In her email, Ms Bupati stated that "*[i]t was good to see [Mr Chandra] at the Palm Oil Summit […], to catch up and to re-establish [a] long lasting and successful business-relationship*" [*EXHIBIT C2, p. 12 para. 2*]. Taking the long-lasting business relationship between the two agents into account, a reasonable person in terms of Art. 8 (2) CISG would have interpreted this statement as an expression of content to conduct business with each other. CLAIMANT could not have interpreted this statement as a legally binding request to transfer a previous business practice as this statement was merely a courtesy phrase to set a friendly tone for the following negotiations. Thus, the wording of Ms Bupati's email does not display RESPONDENT's intention to apply a practice that was established in an individual business relationship between CLAIMANT and Southern Commodities. Therefore, a reasonable person in terms of Art. 8 (2) CISG would not find legitimate expectations arising from the wording of Ms Bupati's email.

66 This understanding is reinforced when considering the different circumstances between the present case and the contracts between CLAIMANT and Southern Commodities. Pursuant to Art. 8 (3) CISG when determining the understanding of a reasonable person, all relevant circumstances of the case have to be considered. Further, in the context of Art. 9 (1) CISG the binding character of a practice can be omitted when the underlying circumstances change [*WITZ, in Witz/Salger/Lorenz, Art. 9 Rn. 17; SCHROETER, in Schlechtriem/Schwenzer, Art. 9 para. 9; MAGNUS, in Staudinger, Art. 9 para. 14*]. Thus, it is coherent that legitimate expectations can only arise if the underlying circumstances are comparable.

67 First, the contracts between CLAIMANT and Southern Commodities were governed by Danubian Law [*EXHIBIT C1, p. 10 para. 13; RNOA, p. 26 para. 10*]. In the present case the Parties agreed that a contract would be subject to Mediterranean Law, including the CISG [*MEMO CLAIMANT, p. 5 para. 15; PO NO. 2 p. 52 para. 33*]. This results in a different legal basis being applicable to the Contract at hand. Second, Southern Commodities has its headquarters in Ruritania [*NOA, p. 4 para. 2*]. RESPONDENT by contrast is based in Equatoriana, where environmental issues and sustainability have always played a major role in public discussions [*NOA, p. 4 para. 2; RNOA, p. 25 para. 3*]. Thus, the conclusion of contracts in controversial areas of business such as the sale of palm oil has to be conducted with great caution. Ms Bupati herself clearly communicated this understanding to CLAIMANT, when she stated that she "*had been very surprised about the role played by environmental topics in Equatoriana, both in the general public, but also within JAJA Biofuel.*" [*EXHIBIT C1, p. 10 para. 10*]. She further pointed out, that "*[t]hat was in stark contrast to the attitude she had experienced both in Ruritania […] and also within Southern Commodities, where environmental concerns also played a minor role.*" [*EXHIBIT C1, p. 10 para. 10*]. Therefore, the circumstances in the case at hand widely differ from the circumstances between CLAIMANT and Southern Commodities.

68 In conclusion, a reasonable person in terms of Art. 8 CISG would not have assumed that RESPONDENT intended to be bound by a practice established between CLAIMANT and Southern Commodities. Thus, CLAIMANT could not legitimately rely on the application of the practice. Therefore, the alleged practice between CLAIMANT and Southern Commodities is not binding to the formation of a contract between CLAIMANT and RESPONDENT.

2. Even if the Practice Were Applicable, No Contract Was Concluded

69 Even if the Arbitral Tribunal were to consider the practice applicable to the conclusion of a contract between CLAIMANT and RESPONDENT, this practice would only entail an acceptance by

signature or performance, not silence. CLAIMANT argues that CLAIMANT and Southern Commodities had established a practice which enabled the conclusion of a contract by remaining silent if Southern Commodities would not object within a week [*EXHIBIT C1, p.11 para. 14*]. Next to an express acceptance in terms of Art. 18 (1) CISG, Art. 18 (3) CISG states that as a result of practices, the offeree may also indicate assent by performing the contract, e.g. by payment of the price. The Parties agree that in the majority of the contracts between CLAIMANT and Southern Commodities "*the acceptance occurred via [Southern Commodities] sending back a signed version of the contract*" [*EXHIBIT C1, p. 9 para. 3*]. Thus, a practice where silence constitutes an acceptance could only be derived from the remaining five cases in which Southern Commodities did not sign the contract. In all of these five cases Southern Commodities had performed the contract and thereby showed assent in terms of Art. 18 (3) CISG. Therefore, as all contracts were either expressly accepted by signature or performed in terms of Art. 18 (3) CISG, there is no indication that silence alone constituted an acceptance. In the case at hand RESPONDENT neither sent back a signed version of the contractual documents, nor did it perform the Contract, thus, no contract was concluded.

III. RESPONDENT Did Not Accept CLAIMANT's Offer by Conduct

70 Contrary to CLAIMANT's submission [*MEMO CLAIMANT, p. 12 para. 49*], RESPONDENT did not accept the offer by subsequent conduct. Art. 18 (1) CISG states that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Whether or not conduct can be seen as an acceptance has to be determined based on the understanding of a reasonable person within the meaning of Art. 8 (2), (3) CISG [*SCHROETER, in Schlechtriem/Schwenzer, Art. 18 para. 30; OGH, 13th Dec 2012*]. On 3rd May 2020, RESPONDENT requested information on suitable banks concerning a possible letter of credit [*EXHIBIT C1, p. 11 para. 15; EXHIBIT C5, p. 18 para. 4; EXHIBIT R2, p. 30 para. 3; PO NO. 2, p. 51 para. 23*]. On this occasion, Ms Fauconnier drew attention to "*problems [RESPONDENT] had with the payment terms in another contract recently*" [*EXHIBIT R2, p. 30 para. 3*]. This showed that RESPONDENT merely wanted to be aware of future options and anticipate potential problems. Subsequently, Ms Fauconnier had told Mr Rain that she felt it would be necessary to consult with RESPONDENT's lawyers before agreeing upon any of the terms mentioned by Mr Rain [*EXHIBIT C5, p. 18 para. 4*]. As RESPONDENT had not actually opened a letter of credit and clearly communicated the need for legal advice before agreeing upon any terms, a

reasonable person would have deduced that RESPONDENT did not show assent by conduct. Therefore, RESPONDENT did not accept CLAIMANT's offer by subsequent conduct.

71 **Conclusion of the Second Issue:** RESPONDENT did not have an intention to be bound at the Palm Oil Summit. Further, by sending its email from 1st April 2020 RESPONDENT did not make binding offer. Even if the Arbitral Tribunal were to find the email to be a binding offer, CLAIMANT made a counter-offer by including CLAIMANT's General Conditions of Sale in its reply. In any case, CLAIMANT's (counter-)offer was neither accepted by RESPONDENT silence due to a business practice nor by conduct. In conclusion, the Parties at no point in time entered into a legally binding contract, but rather were still at the stage of contract negotiations.

ISSUE 3: CLAIMANT'S GENERAL CONDITIONS OF SALE WOULD NOT HAVE BEEN INCLUDED INTO THE ALLEGED CONTRACT

72 Even if the Arbitral Tribunal were to find that a contract was concluded between the Parties, CLAIMANT's GTC would not have been validly incorporated into the Contract.

73 The inclusion of CLAIMANT's GTC is crucial for CLAIMANT for two reasons. First, the alleged Arbitration Agreement on which CLAIMANT tries to rely on can only be derived from an inclusion of CLAIMANT's Arbitration Clause contained in CLAIMANT's GTC [***see Issue 1, p. 15 para. 36***]. Second, as CLAIMANT fundamentally breached the alleged Contract RESPONDENT would be entitled to terminate the Contract in accordance with Art. 49 (a) CISG. In order to avoid this termination, CLAIMANT tries to refer to clause 4 of its GTC which states that "*[i]n case of any breach of contract, […] the seller is given two months after being notified by the buyer to remedy such breach. Only if remedial actions were not successful may the buyer terminate the contract*" [*PO NO. 2, p. 52 para. 31*]. However, CLAIMANT can neither rely on the Arbitration Clause nor on clause 4 of its GTC, as they were not validly incorporated into the Contract.

74 It is undisputed that the CISG applies to the inclusion of standard terms [*HOGE RAAD, 28th Jan 2005; COUR D'APPEL DE PARIS, 13th Dec 1995; GERECHTHOF'S-HERTOGENBOSCH, 24th Feb 2015; OLG WIEN, 27th Feb 2017; US DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, 31st Jan 2007; OLG CELLE, 24th July 2009; OLG MÜNCHEN, 17th Nov 2006*]. As the CISG does not have specific provisions for the incorporation of standard terms, the prerequisites for a valid incorporation are derived of Artt. 8, 14 et seq. [*Golden Valley Grape Juice v. Centrisys, US DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, 21st Jan 2012; RECHTBANK MIDDEN-NEDERLAND, 20th Jan 2016; OLG NAUMBURG, 13th Feb 2013;*

GERECHTHOF'S HERTOGENBOSCH, 29th Sep 2015; RECHTBANK UTRECHT, 21st Jan 2009; RECHTBANK ROTTERDAM, 29th June 2016; SCHMIDT-KESSEL, in ZeuP 2008, p. 608; DRASCH, p. 3 para. 1; SCHLECHTRIEM, in von Caemmerer/Schlechtriem, Art. 14 para. 16; MAGNUS, in Staudinger, Art. 14 paras. 40 et seq.]. Thus, in order for standard terms to be incorporated into a contract they have to be offered and then accepted.

75 CLAIMANT's GTC were not validly offered to RESPONDENT [**A**]. Even if the Arbitral Tribunal were to rule that CLAIMANT's GTC were validly offered, RESPONDENT would not have accepted them [**B**].

A. CLAIMANT Did Not Validly Offer Its General Conditions of Sale

76 CLAIMANT did not validly offer its GTC to RESPONDENT. In order for standard terms to be offered, the offeror has to make a clear reference to their application [*FERRARI, in MüKo HGB, Art. 14 para. 39; GRUBER, in MüKo BGB, Art. 14 para. 28; SAMBUGARO, in IBLJ 2009, p. 71*]. It is undisputed between the Parties that CLAIMANT made a clear reference to its GTC by stating that *"Seller's General Conditions of Sale apply"* [*MEMO CLAIMANT, p. 20 para. 96; EXHIBIT C3, p. 13 cf. Special Conditions; EXHIBIT C4, p. 17 para. 4*].

77 Further, it is widely acknowledged that a valid offer of standard terms requires the offeror to ensure the offerees knowledge of their content [*BGH, 31st Oct 2001; OLG DÜSSELDORF, 25th July 2003; OLG Hamburg, 19th Dec 2012; OGH, 29th June 2017; OGH, 17th Dec 2003; GERECHTSHOF DEN HAAG, 22nd Apr 2014; Roser Technologies v. Carl Schreiber, US DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, 10th Sep 2013; VAN ALSTINE, p. 194; JANSSEN, in IHR 2004, p. 195 et seq.; VENTSCH/KLUTH, in IHR 2003, p. 62*]. This requirement is based on the duty of the contractual parties to cooperate and inform each other about significant contract matters [*BGH, 31st Oct 2001; OLG KÖLN, 21st Dec 2005; LG NEUBRANDENBURG, 3rd Aug 2005; FERRARI, in Kröll/Mistelis/Perales Viscasillas, Art. 14 para. 138; SAMBUGARO, in IBLJ 2009, p. 72; LUDWIG. pp. 411 et seq.; TEKLOTE, p. 114; HENNEMANN, p. 74*]. In addition to that, due to the differences between legal systems in international trade the content of standard terms is often not predictable for the other party [*ibid.*]. This also leads an obligation where the offeror has to transmit the standard terms to the other party.

78 Others have argued that the offeror has to at least provide a reasonable opportunity for the offeree to take notice of the content of the standard terms [*EISELEN, in CISG-AC Opinion No. 13,*

para. 2.2; SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 40; FERRARI, in Kröll/Mistelis/Perales Viscasillas Art. 14 para. 39].

79 CLAIMANT's obligation to ensure RESPONDENT's knowledge of the content of its GTC was neither fulfilled nor dispensable [**I**]. Even if CLAIMANT were only obliged to provide RESPONDENT with a reasonable opportunity to take notice of its GTC, CLAIMANT would not have fulfilled this obligation [**II**].

I. CLAIMANT Did Not Fulfil Its Obligation to Ensure RESPONDENT'S Knowledge of CLAIMANT's General Conditions of Sale

80 CLAIMANT did not fulfil its obligation to ensure RESPONDENT's knowledge of CLAIMANT's GTC, as it conveyed neither the GTC in their entirety nor the Arbitration Clause alone to RESPONDENT. The offeror of the standard terms may fulfil its obligation by e.g. attaching the standard terms to the contractual terms and sending them via email or post to the offeree [*BGH, 31st Oct 2001; EISELEN, in CISG-AC Opinion No. 13, para. 3.2; MAGNUS, in Staudinger, Art. 14 para. 41a; TeeVee Toons v. Gerhard Schubert GmbH, US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 23rd Aug 2006*]. It is also possible for the offeror to provide the contracting party with a copy of its standard terms if the parties conclude the contract in person [*SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 135; MAGNUS, in Staudinger, Art. 14 para. 41b*]. CLAIMANT neither attached its GTC to the contractual documents nor to the accompanying email [*NOA, p. 5 para. 7*]. Further, CLAIMANT did not grasp the opportunity to provide RESPONDENT with a copy of its GTC at the Palm Oil Summit. Therefore, as CLAIMANT did not provide RESPONDENT with the content of its GTC, CLAIMANT did not fulfil its obligation to ensure RESPONDENT's knowledge of the content. As the Arbitration Clause is contained in CLAIMANT's GTC and it was also not transmitted separately to RESPONDENT, this also applies to the Arbitration Clause.

81 The obligation to ensure RESPONDENT's knowledge is not dispensable. It has been argued, a party does not necessarily have to provide the other party with the content of its standard terms if the other party already has prior knowledge of the content [*GRUBER, in MüKo BGB, Art. 14 para. 32; OGH, 29th Nov 2005; WITZ, in Witz/Salger/Lorenz, vor Artt. 14-24 para. 12; MAGNUS, in FS-Kritzer 2008, p. 332; SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 125; TEKLOTE, p. 114*]. Neither CLAIMANT's GTC nor its Arbitration Clause individually was ever sent to RESPONDENT [*RNOA, p. 27 para. 13*].

82 However, CLAIMANT argues that RESPONDENT had prior knowledge of the content of CLAIMANT's GTC and that therefore sending them over would be a pure formality [*MEMO CLAIMANT, p. 18 para. 83; NOA, p. 7 para. 20*]. For this assessment, CLAIMANT refers to Ms Bupati's prior dealings with CLAIMANT as representative for Southern Commodities and submits that her knowledge of CLAIMANT's GTC must be imputed to RESPONDENT [*MEMO CLAIMANT, p. 17 para. 81; MEMO CLAIMANT, p. 18 paras. 84 et seq.; NOA, p. 7 para. 20*]. However, CLAIMANT's obligation to convey its GTC was not dispensable, as CLAIMANT could not assume that Ms Bupati still had knowledge of its GTC [**1**]. Even if Ms Bupati knew of the content of CLAIMANT's GTC, this knowledge cannot be imputed to RESPONDENT [**2**].

1. CLAIMANT Could Not Have Assumed That Ms Bupati Still Had Knowledge of CLAIMANT's General Conditions of Sale

83 CLAIMANT could not reasonably expect that RESPONDENT's Head of Sales, Ms Bupati, was still aware of the content of CLAIMANT's GTC. CLAIMANT alleges that Ms Bupati must have been aware of CLAIMANT's GTC [*MEMO CLAIMANT, p. 19 para. 94*]. Whether or not a party can legitimately rely on another party's knowledge must be determined in line with Art. 8 (2) CISG. Here CLAIMANT could not rely on Ms Bupati having knowledge of CLAIMANT's GTC for the following reasons:

84 First, in her position at Southern Commodities Ms Bupati not only stood in contact with CLAIMANT but also with several other suppliers [*EXHIBIT R3, p. 31 para. 2*]. Apart from concluding contracts subject to CLAIMANT's GTC, Ms Bupati also concluded contracts subject to other standard terms. Thus, as CLAIMANT was merely one of several suppliers for Southern Commodities, a reasonable person in terms of Art. 8 (2) CISG would not assume that Ms Bupati still had knowledge of everything she had read during her employment at Southern Commodities.

85 Second, as stated by CLAIMANT [*NOA, p. 7 para. 20*] Ms Bupati was only provided with a copy of CLAIMANT's GTC "*in her function as main purchase manager of Southern Commodities*". Subsequently, Ms Bupati left Southern Commodities and started working for RESPONDENT [*EXHIBIT C1, p. 10 para. 8; EXHIBIT R3, p. 31 para. 4*]. For this purpose, she relocated from Southern Commodities' offices in Ruritania to RESPONDENT's headquarters in Equatoriana [*PO NO. 2, p. 48 para. 5*]. Thus, a reasonable third person in terms of Art. 8 (2) CISG would not infer that she still had access to the copy sent to her in her function at Southern Commodities.

86 Therefore, CLAIMANT could not reasonably assume that Ms Bupati was still familiar with the content of CLAIMANT's GTC.

87 With regard to the Arbitration Clause, it would be even more unreasonable of CLAIMANT to assume that Ms Bupati had knowledge of the content of the clause. While the Pre-2016 version was read by Ms Bupati in the context of an arbitration between CLAIMANT and Southern Commodities in 2014, Mr Chandra merely informed Ms Bupati of the current Arbitration Clause via phone call [*EXHIBIT C1, p. 9 para. 4*]. CLAIMANT cannot present evidence that it sent its Post-2016 Arbitration Clause to Southern Commodities [*EXHIBIT C1, p. 9 para. 4; RNOA, p. 27 para. 13; PO NO. 2, p. 50 para. 18*]. Further, four years have passed since Mr Chandra mentioned the changed Arbitration Clause to Ms Bupati. Therefore, CLAIMANT could not reasonably assume that Ms Bupati was aware of CLAIMANT's Arbitration Clause.

88 Moreover, CLAIMANT must have been aware that Ms Bupati had no knowledge of the content of the Arbitration Clause. In her email sent to CLAIMANT, Ms Bupati stated that if the Parties decide to submit to arbitration, they "*should [at least] select a non-industry related arbitration institution*" [*EXHIBIT C2, p. 12 para. 7*]. As CLAIMANT's current Arbitration Clause provides for a non-industry related arbitration institution, it must have been apparent to CLAIMANT that Ms Bupati was not aware of the content of CLAIMANT's new Arbitration Clause. Hence, it would be all the more unreasonable of CLAIMANT to assume that Ms Bupati had knowledge of its Arbitration Clause.

89 Consequently, CLAIMANT could not reasonably assume that Ms Bupati had knowledge of the content of CLAIMANT's GTC or CLAIMANT's Arbitration Clause.

2. Even if Ms Bupati Still Had Knowledge of CLAIMANT's General Conditions of Sale, This Knowledge Cannot Be Imputed to RESPONDENT

90 Even if Ms Bupati was aware of the content of CLAIMANT's GTC, this would not exempt CLAIMANT from its obligation to transmit its GTC and consequently the Arbitration Clause to RESPONDENT as her knowledge cannot be imputed to RESPONDENT. It is recognized that knowledge acquired by an employee while working for its current employer can be imputed under the CISG [*GARRO, in CISG-AC Opinion No. 7, para. 17; MAGNUS, in RabelsZ 1995, p. 487*]. However, the CISG does not specify to what extent knowledge is imputed to the employer. In order to answer this question, regard is to be had to the Conventions' international character and to the need to promote uniformity in its application in accordance with Art. 7 (1) CISG. Therefore, international uniform law rules must be taken into consideration.

91 It is widely recognized internationally that only knowledge or information which is expected to be typically documented or communicated is imputed to the employer [*BGH, 2nd Feb 1996; BGH, 15th Apr 1997; Blackburn, Low & Co. v. Vigors, HOUSE OF LORDS, 9th Aug 1887; Ayrey v. British Legal and United Provident Assurance Company, KING'S BENCH DIVISON, 23rd Nov 1917; Harrington v. United States, US SUPREME COURT, 1870; Carter v. Gugliuzzi, SUPREME COURT OF VERMONT, 22nd May 1998*]. Nine years have passed between Ms Bupati being made aware of the content of the GTC and the dispute at hand. Thus, due to the time difference CLAIMANT could not assume that at the beginning of her new employment, Ms Bupati would have disclosed the content of CLAIMANT's GTC to her new employer. The same applies to the Arbitration Clause, which was only communicated to her six years prior to the contractual negotiations. Further, the content of the standard terms of a supplier of a previous employer cannot be deemed as information that is typically documented or shared when starting a new employment. Therefore, CLAIMANT could not rely on Ms Bupati's knowledge being imputed to RESPONDENT. Consequently, CLAIMANT was not exempt from its obligation to ensure RESPONDENT's knowledge of the content of CLAIMANT's GTC.

II. CLAIMANT Did Not Provide RESPONDENT With the Reasonable Opportunity to Take Notice of Its General Conditions of Sale

92 Even if it was sufficient for CLAIMANT to provide RESPONDENT with a reasonable opportunity to take notice of CLAIMANT's GTC, CLAIMANT would not have fulfilled this obligation. It has been argued that the offeror can also make its standard terms available to the offeree by making them easily accessible on its website [*GRUBER, in MüKo BGB, Art. 14 para. 30 et seq.; EISELEN, in CISG-AC Opinion No. 13, para. (comments) 3.4*]. When the contract is formed via email, a hyperlink attached to the email leading to the standard terms on the website meets the standard of easy accessibility. [*SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 138; EISELEN, in CISG-AC Opinion 13, para. 3.5; RECHTBANK MIDDEN-NEDERLAND, 16th Nov 2016; MURMANN/STUCKI, in Brunner, Art. 4 para. 42*]. However, the mere possibility of the offeree being able to find the standard terms on a website does not suffice, as this would place the responsibility of gaining knowledge of the content of the standard terms on the offeree [*SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 138*]. CLAIMANT's GTC were neither easily accessible on its website [*PO NO. 2, p. 50 para. 18*] nor did CLAIMANT provide a hyperlink to the GTC [*cf. EXHIBIT C2, p. 12; cf. EXHIBIT C3, p. 13 et seq.*]. CLAIMANT could have argued that the copy sent to Southern Commodities in 2011 provides RESPONDENT with a

reasonable opportunity to take notice of the content of its GTC. However, similar to having to search for standard terms on a website, this would leave with RESPONDENT with the responsibility of gaining knowledge of the content as it would have to enquire about the copy itself. In addition to that, the copy Southern Commodities was provided with in 2011 does not contain CLAIMANT's current Arbitration Clause. CLAIMANT cannot prove that a copy of the revised GTC was ever sent to Southern Commodities [*PO NO. 2, p. 48 para.7*]. In conclusion, CLAIMANT did not provide RESPONDENT with a reasonable opportunity to take notice of CLAIMANT's GTC nor the Arbitration Clause contained therein.

B. Even if CLAIMANT Offered Its General Conditions of Sale Validly, RESPONDENT Did Not Accept Them

93 Even if the Arbitral Tribunal were to determine that CLAIMANT validly offered its GTC, RESPONDENT did not accept the offer. The acceptance of an offer concerning standard terms follows the rules of Artt. 18 et seq. CISG [*SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 165; TRIBUNALE DI ROVERETO, 24th Aug 2006*]. Pursuant to Art. 18 (1) CISG, a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. However, according to Art. 9 (1) CISG, parties are bound by any practice which they have established between themselves. CLAIMANT argues that Southern Commodities and CLAIMANT established a practice according to which silence constitutes an acceptance [*NOA, p. 7 para. 19*], which extends to the acceptance of CLAIMANT's GTC [*NOA, p. 7 para. 20*]. Allegedly, RESPONDENT is also bound by that practice [*NOA, p. 7 para. 19*]. As argued above, CLAIMANT and Southern Commodities did not establish a practice entailing a silent acceptance but rather an acceptance by signing or performing the contract [***see Issue 2, pp. 25-26 para. 69***]. As RESPONDENT neither signed nor performed the Contract, it did not accept the applicability of CLAIMANT's GTC.

94 Even if the practice between CLAIMANT and Southern Commodities entailed a silent acceptance, its extension to CLAIMANT's GTC could not be transferred to the business relationship between CLAIMANT and RESPONDENT. The basis for establishing a practice concerning standard terms in the sense of Art. 9 (1) CISG requires that they were validly included into the first contract at the beginning of a business relationship [*ICC No. 8611/HV/JK; OGH, 31st Aug 2005; OGH 6th Feb 1996; OLG LINZ, 8th Aug 2005; KRAMER, in FS-Welser, p. 551; SCHROETER, in Schlechtriem/Schwenzer, Art. 14 para. 162*]. The text of the standard terms must therefore have been brought to the attention of the other contracting party [*BGH, 31st Oct 2001; SCHROETER,*

in Schlechtriem/Schwenzer, Art. 14 para. 130]. CLAIMANT did provide Southern Commodities with a copy of its GTC the first time they concluded a contract [*RNOA, p. 27 para. 11*]. Thus, it would be possible for the two parties to establish a practice concerning CLAIMANT's GTC.

95 However, it is undisputed that "*neither the current version nor any previous version of CLAIMANT's General Conditions was ever sent to RESPONDENT*" [*RNOA, p. 27 para. 13*]. As this is the first interaction between the Parties, CLAIMANT's GTC were not incorporated into any contract between them. Thus, there is no basis for a practice between CLAIMANT and RESPONDENT concerning CLAIMANT's GTC. Hence, the extension of the practice to CLAIMANT's GTC cannot be applied to RESPONDENT. Consequently, RESPONDENT did not accept the incorporation of CLAIMANT's post-2016 GTC via an established practice.

96 **Conclusion of the Third Issue:** CLAIMANT neither ensured RESPONDENT's knowledge of the content of CLAIMANT's GTC nor did CLAIMANT provide RESPONDENT with a reasonable opportunity to take notice of them. Thus, CLAIMANT did not validly offer its GTC to RESPONDENT. Even if CLAIMANT's GTC were validly offered, RESPONDENT would not have accepted the incorporation of CLAIMANT's GTC. Consequently, CLAIMANT's GTC were not incorporated into the alleged Contract.

97 As the Arbitration Clause is part of CLAIMANT's GTC it was also not validly incorporated under the CISG. Hence, the Parties did not conclude a valid Arbitration Agreement. Therefore, the Arbitral Tribunal has no jurisdiction to hear this case.

REQUEST FOR RELIEF

In response to the Arbitral Tribunals Procedural Orders, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to declare that:

- The Arbitral Tribunal has no Jurisdiction to hear the case [**First Issue**]
- The Parties did not conclude a contract [**Second Issue**]
- In any case, CLAIMANT's GTC were not validly incorporated into the alleged contract [**Third Issue**]

On these grounds, the Arbitral Tribunal is respectfully requested to

- reject all claims made
- order CLAIMANT to bear the cost of this arbitration, including any legal cost

Freiburg im Breisgau, 27th January 2022

Anissa Tchakounte • Jens Scheuerbrandt

Stella Ujma • Simon Hermes • Florian Illner

Paula Schröder • Clara Schreiter • Lorenz Adiprasito

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.

Lorenz Adiprasito

Simon Hermes

Florian Illner

Jens Scheuerbrandt

Clara Schreiter

Paula Schröder

Anissa Tchakounte

Stella Ujma