NINETEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

27 MARCH TO 3 APRIL 2022

MEMORANDUM FOR CLAIMANT

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

On Behalf of:	**Against:**
ElGuP plc	JAJA Biofuel Ltd
156 Dendé Avenue	9601 Rudolf Diesel Street
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL:

Serafin Engeser · Dawit Frick · David Pham ·

Moritz Rotter · Paula Seidel · Helene Steiner

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LIST OF ABBREVIATIONS

§(§)	paragraph(s)
%	per cent
AC	Advisory Council
AG	Amtsgericht
AIAC	Asian International Arbitration Centre
AP	Audiencia Provincial
Art(s).	Article(s)
BGer	Bundesgericht
BGH	Bundesgerichtshof
CdA	Cour d'appel
CdC	Cour de Cassation
CdJ	Cour de Justice
cf.	confer
CIETAC	China International Economic & Trade Arbitration Commission
cif	Cost, Insurance, Freight
CISG	United Nations Convention on the International Sale of Goods
Cl.	Claimant
COO	Chief Operating Officer
DAL	Danubian Arbitration Law
Doc.	Document
ed.	edition
et al.	et alia/et aliae/et alii
et. seq(q).	et sequentia/sequentes
Exh.	Exhibit
FOSFA	Federation of Oils, Seeds and Fats Associations
FS	Festschrift
GCoS	General Conditions of Sales
GH	Gerechtshof
HGer	Handelsgericht
i.e.	id est

ibid.	ibidem
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Dispute
Iss.	Issue
LG	Landgericht
LoA	Letter of Acceptance
Mr	Mister
Ms	Miss
NAI	Nederlands Arbitrage Instiuut
No.	Number
NoA	Notice of Arbitration
NYC	New York Convention
OGH	Oberster Gerichtshof
OLG	Oberlandesgericht
p(p).	page(s)
PCA	Permanent Court of Arbitration
PO	Procedural Order
PORAM	Palm Oil Refiners Association of Malaysia
RB	Rechtbank
Resp.	Respondent
RNoA	Response to the Notice of Arbitration
RSPO	Roundtable on Sustainable Palm Oil
t	tons
TC	Tribunal Commercial
TdA	Tribunal de Apelaciones
TdJ	Tribunal de Justiça
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts

USA	United States of America
USD	US-Dollar
v	versus
VIAC	Vienna International Arbitral Centre
Vol.	Volume
ZGer	Zivilgericht
HR	Hoge Raad

STATEMENT OF FACTS

ElGuP plc. (hereinafter "**CLAIMANT**") and JAJA Biofuel Ltd (hereinafter "**RESPONDENT**") are the parties to these arbitral proceedings (hereinafter "**the Parties**").

CLAIMANT, with headquarters located in Mediterraneo, sells RSPO-certified palm oil and palm kernel oil.

RESPONDENT, situated in Equatoriana, is a producer of biofuel. It was acquired by Southern Commodities; a Ruritanian multinational conglomerate specialized in commodities and their derivatives.

2010-2018	Ms Bupati and Mr Chandra concluded forty contracts by following the same pattern. Over the course of this long-lasting business relationship, Ms Bupati was in charge of the purchase of palm oil for Southern Commodities while Mr Chandra worked for CLAIMANT as Head of Sales.	*Resp. Exh. R 3, §§ 2 et seq.; Cl. Exh. C 1, § 2 et seq.*
October 2011	CLAIMANT sent its General Conditions of Sale (hereinafter "**GCoS**") to Southern Commodities.	*RNoA, § 11*
2014	Southern Commodities and CLAIMANT were opposing parties in arbitral proceedings. In the course of these proceedings, Ms Bupati reviewed CLAIMANT's GCoS, including the therein contained Arbitration Clause.	*RNoA, § 11*
2016	Mr Chandra expressly informed Ms Bupati that CLAIMANT had replaced its arbitration clause with the AIAC model clause.	*PO 2, § 7*
2018	Southern Commodities shifted its entire palm oil unit to its 100% subsidiary RESPONDENT.	*Resp. Exh. R 1*
2019	Southern Commodities promoted Ms Bupati, an experienced business woman with a vast network in the palm oil industry, as RESPONDENT's Head of Purchase.	*Resp. Exh. R 3, § 4*

28 March 2020	Ms Bupati and Mr Chandra re-established their long-lasting business relationship at the 2020 Palm Oil Summit by negotiating their forty-first contract. Mr Chandra declared the previously used template and GCoS to be applicable. Ms Bupati promised to approach CLAIMANT with a firm offer.	*RNoA, §§ 8 et seqq.; Cl. Exh. C 2*
1 April 2020	Ms Bupati sent CLAIMANT a purchase offer in line with the terms negotiated at the Summit to CLAIMANT.	*Cl. Exh. C 2*
9 April 2020	Ms Fauconnier, Ms Bupati's assistant, received the signed contract and the accompanying letter from CLAIMANT. CLAIMANT pointed out the applicability of its GCoS once again.	*Cl. Exh. C 3; Cl. Exh. C 4*
3 May 2020	RESPONDENT asked for clarification regarding acceptable banks for the letter of credit.	*Resp. Exh. R 2*
30 May 2020	Following a call between Mr Rain and Ms Fauconnier, RESPONDENT contacted acceptable banks to get quotations as to the terms for the letter of credit.	*PO 2, § 23*
June 2020	RESPONDENT faced increasing protests against its biofuel production from palm oil after the release of the movie "Saving Lucy" in Equatoriana.	*Cl. Exh. C 6*
30 October 2020	RESPONDENT declared to suspend the "negotiations" or, alternatively, to terminate the contract.	*Cl. Exh. C 7*
15 July 2021	CLAIMANT initiates arbitral proceedings against RESPONDENT since previous attempts to solve the issue by mediation failed.	*Letter by Langweiler*

SUMMARY OF ARGUMENT

Climate change has become a pressing issue for consumers and companies alike. To align its public image to the market's demands, Southern Commodities acquired all shares of RESPONDENT, which provides a bridge technology in the fight against global warming. For its biofuel production, RESPONDENT requires RSPO-certified palm oil that only a few suppliers, prominently CLAIMANT, produce. Since CLAIMANT had concluded forty contracts with Southern Commodities before, it seemed like a natural progression to now continue this long-term business relationship with RESPONDENT, Southern Commodities' 100% subsidiary.
However, after the acquisition of RESPONDENT by Southern Commodities, its reputation suffered significantly. The ties of Southern Commodities to corrupt politicians and especially the climate change denying government of Ruritania caused a public uproar. Not only were their premises blocked by their previous supporters who demanded their production to be stopped immediately, but even their share price crashed. In an attempt to pour oil on troubled water, RESPONDENT declared at a press conference that it would discontinue the expansion of their palm-oil based biofuel production. As part of this policy change, RESPONDENT announced that it had broken the link to CLAIMANT.

Such a declaration outright disregarded that the Parties were still bound to their contract. During the email correspondence or in any case, due to the established practices, a contract was concluded. Therefore, CLAIMANT could rightfully rely on RESPONDENT fulfilling its contractual obligations, especially as it had already begun performing them (**Issue II**).

The contract concluded between the Parties provided for the application of CLAIMANT's GCoS. These GCoS provide a solid foundation by regulating the contracts' performance as well as the submission to arbitration. Having disputes settled in arbitral proceedings was of utmost importance for CLAIMANT. RESPONDENT was aware of this as the GCoS had been expressly agreed on and were applied to all previous contracts (**Issue III**).

RESPONDENT disregards the Parties' explicit agreement on dispute resolution under the AIAC Rules. By denying the existence of an arbitration agreement, RESPONDENT attempts to take advantage of litigating in the familiar courts of its home-turf Equatoriana (**Issue I**).

ARGUMENT

1 CLAIMANT is aware that questions regarding the jurisdiction of the Arbitral Tribunal are traditionally addressed prior to any submission on the merits. However, in the present case, the jurisdiction of the Arbitral Tribunal heavily depends on the valid inclusion of the AIAC Arbitration Clause, contained in Clause 9 of CLAIMANT's GCoS (hereinafter "**Arbitration Clause**"). The incorporation of this Arbitration Clause as part of the GCoS in turn requires that the Parties concluded a contract of which the GCoS and the Arbitration Clause contained therein could become part of.

2 Thus, to address the issues raised by the Arbitral Tribunal as coherent as possible, CLAIMANT will make use of the opportunity granted by the Tribunal to present the issues in an alternative order: First, CLAIMANT will demonstrate that the Parties concluded a contract in 2020 (hereinafter "**Contract**") (**Issue II**). Second, it will show that CLAIMANT's GCoS were validly included into this Contract (**Issue III**). Third, it will establish that the Parties have validly agreed on the jurisdiction of the Arbitral Tribunal by virtue of the Arbitration Clause contained in the GCoS (**Issue I**).

ISSUE II: IN 2020, THE PARTIES CONCLUDED A CONTRACT

3 The Parties concluded the Contract regarding the sale of 100,000 tons of RSPO-certified palm oil in 2020.

4 Since 2010, Mr Chandra (CLAIMANT's COO) and Ms Bupati (RESPONDENT's Head of Purchasing) entered into forty contracts concerning the sale of palm oil (*Resp. Exh. R 3, ∫ 2; Cl. Exh. C 1, ∫ 2*). Following negotiations at the 2020 Palm Oil Summit, their successful and long-lasting business relationship was re-established (*Cl. Exh. C 2*).

5 During these negotiations, all commercial terms of the Contract were settled, resulting in the purchase offer sent by Ms Bupati on 1 April 2020, which CLAIMANT accepted on 9 April 2020 (**A.**). In any case, the Parties concluded the Contract on 16 April 2020 (**B.**).

A. THE PARTIES CONCLUDED THE CONTRACT ON 9 APRIL 2020

6 On 9 April 2020, CLAIMANT and RESPONDENT entered into the Contract.

7 As agreed upon by the Parties, the Contract is subject to the law of Mediterraneo (*PO 2,* ∫ 33), which is a Contracting State of the CISG. Thus, the provisions of the CISG apply (*PO 1, ∫ III.3*).

8 Under the CISG, the conclusion of a contract requires an offer and a corresponding acceptance in accordance with Arts. 14 *et seqq.* CISG. RESPONDENT's email on 1 April 2020

constitutes an offer including the GCoS (**1.**) and was accepted by CLAIMANT on 9 April 2020 pursuant to Art. 18(1) CISG (**2.**). Even if the Tribunal were to find that RESPONDENT did not include the GCoS, CLAIMANT accepted RESPONDENT's offer according to Art. 19(2) CISG (**3.**).

1. On 1 April 2020, RESPONDENT made CLAIMANT an offer via email

9 RESPONDENT's email dated 1 April 2020 constitutes an offer for the conclusion of a contract.

10 The requirements for a valid offer are set out in Art. 14(1) CISG (*SCHROETER in: Schlechtriem/Schwenzer/Schroeter, Art. 14 § 19; Allied Dynamics Corp. v Kennametal, Inc. (USA); BGer, 28 May 2019 (Switzerland)*). Moreover, additional terms included in an offer become binding to the contracting parties upon acceptance (*SCHROETER in: Schlechtriem/Schwenzer/Schroeter, Art. 14 § 20; cf. FERRARI in: Kroell et al., Art. 14 §§ 17, 19; Cherry Stix v Canada Borders (Canada)*).

11 In the case at hand, it is not only disputed, whether RESPONDENT's offer fulfilled the minimum contents of Art. 14(1) CISG, but also which additional terms became part of it (*RNoA, § 16*). In order to determine if CLAIMANT's acceptance corresponds with that offer, its terms must be assessed extensively.

12 The email of RESPONDENT constitutes an offer under Art. 14(1) CISG (**a**). Additionally, it provides for certain additional terms, regulating the contractual details (**b**).

(a) RESPONDENT's offer fulfils the legal requirements set out in Art. 14(1) CISG

13 As RESPONDENT's email dated 1 April 2020 meets the legal requirements set out in Art. 14(1) CISG, it constitutes a binding offer.

14 According to Art. 14(1) CISG an offer is binding for the offeree if it is sufficiently definite: It must indicate the goods, the quantity and the price. Additionally, the offeror must have the intention to be bound in case of acceptance. Whether an offer fulfils these requirements is subject to the interpretation standard set out in Art. 8 CISG. According to Art. 8(1) CISG statements and conduct must be interpreted according to the offeror's intent if the offeree knew or could not have been unaware of such. If no such intent can be determined, the understanding of a reasonable business person is decisive, Art. 8(2) CISG. For this interpretation, all relevant circumstances, especially negotiations, practices established between the parties, usages and any subsequent conduct must be considered, Art. 8(3) CISG.

15 In particular, terms such as "offer" and "order" generally indicate the parties' intent to be bound (*cf. HGer St. Gallen, 5 December 1995 (Switzerland); LORENZ in: Witz/Salger/Lorenz, Art. 14 § 22*).

16 In its email from 1 April 2020 with the subject "purchase offer", RESPONDENT declared:

> "We would like to place the following **order** with you as agreed at the Summit: 20,000 tons of RSPO-certified segregated palm oil per annum for the years 2021-2025, cif Oceanside – delivery in up to 6 instalments; at USD 900/t for first year; thereafter market price – 5%." (*Cl. Exh. C 2 – emphasis added*)

17 Ms Bupati placed this order labelled "purchase offer" following the negotiations at the Palm Oil Summit (*Cl. Exh. C 2.*). There, the Parties had already agreed on all commercial terms of the Contract (*PO 2, ∫ 13*). During these negotiations, Ms Bupati stated that she wanted to get approval from RESPONDENT's management before making a "firm offer" (*RNoA, ∫ 8*).

18 Thus, when Ms Bupati sent an email to CLAIMANT only four days after the negotiations at the Summit, CLAIMANT as well as any reasonable business person, could only understand this email as a binding offer.

19 Even RESPONDENT itself considers this email to constitute a binding offer, as it states that "Ms Bupati sent an email to Mr Chandra making an **offer**" (*RNoA, ∫ 9 – emphasis added*).

20 In conclusion, Ms Bupati's email on 1 April 2020 is sufficiently definite and indicates RESPONDENT's clear intention to be bound. Thus, it constitutes a valid offer.

(b) RESPONDENT's offer provides for additional terms

21 RESPONDENT's offer contains further terms specifying the contractual details regarding the performance of the Contract, *i.e.* CLAIMANT's GCoS and its customised contract template.

22 Additional contractual details are to be interpreted in accordance with Art. 8 CISG (*see supra ∫ 14*).

23 During the contract negotiations at the Summit, Mr Chandra insisted on the application of CLAIMANT's GCoS (*RNoA, ∫ 10; PO 2, ∫ 13*). This was acknowledged by RESPONDENT and in line with every contract negotiated in the past (*Cl. Exh. C 2; PO 2, ∫ 7*). In its offer on 1 April 2020, RESPONDENT explicitly referred to the prior discussion at the Palm Oil Summit by stating that it: "would like to place the following order […] **as agreed at the Summit**" (*Cl. Exh. C 2 – emphasis added*). Therefore, the offer by RESPONDENT contained CLAIMANT's GCoS.

24 Accordingly, RESPONDENT's offer was based on CLAIMANT's customised version of the FOSFA/PORAM No. 81 Model Contract (hereinafter "**the Contract Template**" (*RNoA, ∫ 10; Cl. Exh. C 2; Cl. Exh. C 1, ∫ 4; Cl. Exh. C 3*). This Contract Template has been used by Mr Chandra and Ms Bupati since 2010 and explicitly stipulates the application of CLAIMANT's GCoS (*PO 2, ∫ 7*). While the original FOSFA/PORAM No. 81 Model Contract encompasses

thirty-two clauses (*FOSFA 81*), CLAIMANT's customised version only consists of eight clauses. Provisions for major contractual issues like arrival quality-adjustments, termination and dispute resolution are not regulated in the Contract Template (*Cl. Exh. C 3*). Rather, the Parties have explicitly provided for these issues in CLAIMANT's GCoS (*Cl. Exh. C 3, Clauses 3, 4, 7; PO 2, § 31; Resp. Exh. R 4*). Thus, without CLAIMANT's GCoS, the Contract Template is severely incomplete. As a result and contrary to what RESPONDENT submits (*RNoA, § 14*), any reasonable business person in the position of CLAIMANT could only understand RESPONDENT's offer to include CLAIMANT's GCoS.

25 In particular, the Arbitration Clause was part of RESPONDENT's offer. This clause was amended in 2016 (*PO 2, § 7*). Ms Bupati had been duly informed about this change by Mr Chandra (*RNoA, § 12; Cl. Exh. C 1, § 4; PO 2, § 18*). Accordingly, the new clause became part of the recent eight contracts (*PO 2, § 7*). Therefore, its inclusion in RESPONDENT's offer is in line with RESPONDENT anticipating the contractual documents to be comparable to the ones used in previous contracts (*Cl. Exh. C 2*) as well as its request for a non-industry related arbitration institution (*Cl. Exh. C 2; PO 2, § 22*). In consequence, RESPONDENT's offer contained the Arbitration Clause.

26 Further, RESPONDENT asked to "provide for some sort of transparency, for example applying the UNCITRAL Transparency Rules" (*Cl. Exh. C 2*). CLAIMANT could only understand this as a mere suggestion, not affecting RESPONDENT's clear indication to be bound by the offer. RESPONDENT's understanding of "some sort of transparency" was only specified by the mention of the UNCITRAL Transparency Rules. However, no potential dispute between the Parties falls within the scope of the UNCITRAL Transparency Rules (*Art. 1.1 UNCITRAL Transparency Rules; Cl. Exh. C 5, § 5*). Therefore, they cannot supply any "sort of transparency" to a possibly arising arbitration. This was even acknowledged by RESPONDENT (*Cl. Exh. C 5, § 5*). Such subsequent conduct is in line with CLAIMANT's understanding of RESPONDENT's suggestion.

27 To conclude, the Contract Template and the GCoS providing for arbitration under the AIAC were part of the offer by RESPONDENT.

2. CLAIMANT accepted this offer on 9 April 2020 pursuant to Art. 18(1) CISG

28 CLAIMANT assented to all terms offered by RESPONDENT.

29 An acceptance must indicate assent to and be in line with the offer made pursuant to Art. 18(1) CISG (*HUBER/MULLIS, p. 88*; *SCHROETER in: Schlechtriem/Schwenzer/Schroeter, Art. 18 § 1; DORNIS in: Honsell, Art. 18 § 4*). In concordance with the interpretation of an offer, an acceptance must be interpreted by the standards set out in Art. 8 CISG (*see supra § 14*).

30 CLAIMANT declared that it accepted the terms of RESPONDENT's offer in its email on 9 April 2020 (*Cl. Exh. C 4*). Accordingly, it inserted the commercial terms into the Contract Template (*Cl. Exh. C 3; Cl. Exh. C 4*). Both the Contract Template and the accompanying email provide for the applicability of the GCoS, including the AIAC Arbitration Clause (*Cl. Exh. C 3; Cl. Exh. C 4*).

31 As a result, CLAIMANT accepted all terms of RESPONDENT's offer.

3. In any case, CLAIMANT accepted RESPONDENT's offer pursuant to Art. 19(2) CISG

32 Even if the Tribunal were to find that RESPONDENT's offer did not include the GCoS, but that CLAIMANT first introduced them, the offer was accepted in accordance with Art. 19(2) CISG.

33 According to this provision, a reply to an offer containing non-material alterations constitutes an acceptance (*FERRARI in: Drescher/Fleischer/Schmidt, Art. 19 § 2; DORNIS in: Honsell, Art. 19 § 1; MAGNUS in: Staudinger, Art. 19 § 7*). Only if an addition amounts to a material alteration or if the counterparty objects to it no contract is concluded (*CIETAC Case No. CISG/2002/02; FERRARI in: Kroell et al., Art. 19 §§ 20 et seq.; GRUBER in: Saecker et al., Art. 19 § 14*).

34 CLAIMANT accepted RESPONDENT's offer on 9 April 2020 (*see supra §§ 28 et seqq.*). By introducing its GCoS, CLAIMANT did neither materially alter the terms of the offer (**a**) nor was the addition objected to by RESPONDENT (**b**).

(a) The incorporation of CLAIMANT's GCoS did not constitute a material alteration to RESPONDENT's offer

35 The inclusion of CLAIMANT's GCoS does not amount to a material alteration of the offer made by RESPONDENT.

36 Whether an addition is deemed to materially alter the offer depends on the circumstances of the individual case (*DORNIS in: Honsell, Art. 19 § 15*; *HLAWON in: Martinek et al., Art. 19 § 9; SCHROETER in: Schlechtriem/Schwenzer, Art. 19 § 17*). Attention must be paid especially to any previous negotiations between the parties (*PILTZ, CISG, § 3-99; SCHLECHTRIEM, p. 55; cf. OLG Koblenz, 4 October 2002 (Germany)*).

37 Generally, Art. 19(3) CISG declares certain alterations, such as the settlement of disputes, to be materially altering. However, this only constitutes a presumption that can be rebutted depending on the circumstances of the individual case (*CdC, 27 May 2014 (France); BGer, 5 April 2005 (Switzerland); OGH, 20 March 1997 (Austria); GH 's-Hertogenbosch, 25 February 2003 (Netherlands)*; *PILTZ, CISG, § 3-99; DORNIS in: Honsell, Art. 19 § 1; MAGNUS in: Staudinger, Art. 19 § 16)*. The same applies to the inclusion of standard terms (*ICC Award No. 8611;*

BUCHWITZ in: Gsell et al., Art. 19 § 34; cf. HELLER in: Šarčević, pp. 341 et seq.; FERRARI in: Drescher/Fleischer/Schmidt, Art. 19 § 15; SAENGER in: Hau/Poseck, Art. 19 § 5; SCHROETER in: Schlechtriem/Schwenzer/Schroeter, Art. 19 § 67).

38 The Arbitration Clause included in CLAIMANT's GCoS falls under the scope of Art. 19(3) CISG. However, with respect to the underlying circumstances, the incorporation of the Arbitration Clause does not alter the offer materially. It was neither surprising nor uncommon for the Parties that the Contract provided for arbitration as the dispute resolution mechanism. Instead, this is in line with the contractual history of the Parties as all previous contracts contained an arbitration clause (*cf. PO 2, § 7*). The eight most recent contracts – just as the present Contract – even provided for arbitration under the AIAC, a non-palm oil specific arbitration institution (*PO 2, § 7*). Not only was RESPONDENT aware of the existence of such a clause (*see supra §§ 24 et seq.*), but the submission to the AIAC further mirrors the preferences of RESPONDENT itself (*Cl. Exh. C 2*).

39 All remaining clauses included in CLAIMANT's GCoS do not amount to a material alteration but instead are in line with the established practices and previous negotiations. For a decade, the GCoS governed all contracts (*PO 2, § 7*). Their applicability was never contested and the contracts were performed in accordance with the regulations set out in the GCoS (*ibid.*). Being aware of the GCoS' importance, CLAIMANT explicitly informed RESPONDENT of their applicability even before the Contract was concluded (*RNoA, § 10; PO 2, § 13*). As it was unsurprising for RESPONDENT that CLAIMANT – as in all previous contracts – intended to apply its GCoS, the Parties did not even see the need to further discuss these terms (*PO 2, § 13*).

40 In conclusion, the GCoS and the Arbitration Clause contained therein do not amount to a material alteration of the offer.

(b) RESPONDENT did not object to the inclusion of CLAIMANT's GCoS

41 Further, RESPONDENT did not object to the inclusion of CLAIMANT's GCoS.

42 Pursuant to Art. 19(2) CISG, the offeror is required to object to a non-material alteration to its offer with undue delay. An objection has to be raised within three to five working days (*GRUBER in: Saecker et al., Art. 19 § 16*; *SCHROETER in: Schlechtriem/Schwenzer, Art. 19 § 28; cf. CIETAC Case No. CISG/2002/02*). The objection period begins on the day after the offeror could have reasonably become aware of the terms altering the offer (*cf. DORNIS in: Honsell, Art. 19 § 28; SCHROETER in: Schlechtriem/Schwenzer, Art. 19 § 28; CIETAC Case No. CISG/2002/02*).

43 CLAIMANT sent the email referencing its GCoS on 9 April 2020 (*Cl. Exh. C 4*). Accordingly, RESPONDENT could have become aware of the GCoS' inclusion on the same day, marking the

10 April 2020 as the start of the objection period. After this date, RESPONDENT only contacted CLAIMANT again on 3 May 2020 (*PO 2, § 21*). Even if RESPONDENT had opposed the incorporation of the GCoS on said day – which it did not – the maximum period of five days was greatly exceeded. Ms Bupati being on holiday at that time does not lead to a different result (*PO 2, § 21*). Businesses cannot circumvent a statutory time period by befalling themselves to vacation without appointing a competent representative. In accordance, Ms Bupati empowered her assistant Ms Fauconnier to take care of any potentially arising issues (*PO 2, § 12; Cl. Exh. C 2*). Further, if necessary, Ms Bupati could be contacted during her holidays (*PO 2, § 21*). While Ms Fauconnier could have objected to the inclusion of CLAIMANT's GCoS, she never did so.

44 In conclusion, RESPONDENT had the opportunity to object to the GCoS' incorporation from 9 April 2020 onwards. However, it failed to do so. Therefore, even if the Tribunal were to find that the GCoS were first introduced by CLAIMANT, its email from 9 April 2020 constitutes an acceptance pursuant to Art. 19(2) CISG. In any case, the Parties concluded the Contract for the delivery of 20,000 tons of RSPO-certified palm oil over the course of five years on 9 April 2020.

B. ALTERNATIVELY, THE CONTRACT WAS CONCLUDED ON 16 APRIL 2020

45 Even if the Tribunal were to find that CLAIMANT did not accept RESPONDENT's offer according to Art. 19(2) CISG, the Parties concluded the Contract on 16 April 2020.

46 CLAIMANT's email on 9 April 2020 constitutes a counteroffer pursuant to Art. 19(1) CISG (**1.**). This offer was accepted by RESPONDENT on 16 April 2020 (**2.**).

1. On 9 April 2020, CLAIMANT submitted a counteroffer to RESPONDENT

47 CLAIMANT submitted a counteroffer to RESPONDENT on 9 April 2020 pursuant to Art. 19(1) CISG.

48 According to this provision, a reply to an offer that purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer if it fulfils the requirements set out in Art. 14(1) CISG (*SCHROETER in: Schlechtriem/Schwenzer, Art. 19 § 20; BGH, 4 March 1994 (Germany); SPAGNOLO in: Mankowski, Art. 19 § 20*).

49 Should the GCoS' inclusion amount to a material alteration of RESPONDENT's offer, CLAIMANT's email on 9 April 2020 constitutes a counteroffer. This counteroffer contains the commercial terms of the Contract, the Contract Template and the GCoS (*Cl. Exh. C 3; Cl. Exh C 4*). The offer was sufficiently definite and indicated CLAIMANT's intention to be bound.

50 Thus, CLAIMANT submitted a counteroffer to RESPONDENT on 9 April 2020.

2. On 16 April 2020, RESPONDENT accepted CLAIMANT's counteroffer

51 CLAIMANT's counteroffer was accepted by RESPONDENT not objecting to it in accordance with the practise established between the Parties.

52 Inactivity in itself is not sufficient to declare assent (*Tribunale di Roverto, 24 August 2006 (Italy); DORNIS in: Honsell, Art. 18 § 8; SCHROETER in: Schlechtriem/Schwenzer, Art. 18 § 18*). However, in exceptional cases, silence may constitute an acceptance (*It's Intoxicating, Inc. v Maritim (USA); BGer, 5 April 2005 (Switzerland); NAI Case No. n/p Dutch-Italian sales contracts case; AP de Palencia, 9 September 2014 (Spain)*). This holds especially true if the parties establish a practice of accepting offers through inactivity (*Filanto v Chilewich International (USA); LG Moenchengladbach, 22 May 1992 (Germany); CdA de Grenoble, 21 October 1999 (France)*).

53 Mr Chandra and Ms Bupati established such a practice (**a**) which applies to the conclusion of the Contract (**b**). In accordance with this practice, the Contract was concluded on 16 April 2020 (**c**).

(a) Mr Chandra and Ms Bupati established a practise to conclude contracts by Mr Chandra making an offer and Ms Bupati not objecting to it

54 Mr Chandra and Ms Bupati established a practice of concluding contracts by Mr Chandra making an offer and Ms Bupati not objecting to that offer within a week.

55 A practice is a unique business relationship between two parties (*TORSELLO, p. 143*; *WITZ in: Witz/Salger/Lorenz, Art. 9 § 8*; *OGH, 31 August 2005 (Austria)*). It mirrors the consistent behaviour established between the parties (*OGH, 31 August 2005 (Austria); GRAFFI, p. 107*; *SCHLECHTRIEM/BUTLER, p. 59; cf. TdA en lo Civil de Segundo Turno, 26 February 2020 (Uruguay); TdJ do Estado do Rio Grande do Sul, 14 February 2017 (Brazil); RB van Koophandel Tongeren, 25 January 2005 (Belgium)*). Whether a practice is binding must be determined in consideration of the frequency and duration the behaviour occurred in (*SCHLECHTRIEM/BUTLER, p. 59*; *SCHLECHTRIEM/SCHROETER, p. 223*; *WITZ in: Witz/Salger/Lorenz, Art. 9 § 17*). Acting in a particular way three to four times is generally considered sufficient to form a business practice (*OGH, 6 February 1996 (Austria)*; *HGer Aargau, 26 September 1997 (Switzerland); AG Duisburg, 13 April 2000 (Germany)*; *ZGer Basel-Stadt, 3 December 1997 (Switzerland)*).

56 Between 2010 and 2018, Mr Chandra and Ms Bupati concluded forty contracts for the sale of palm oil (*Cl. Exh. C 1, §§ 2 et seqq.; Resp. Exh. R 3, §§ 2 et seqq.*). Both the negotiations and the conclusion of these contracts always followed the same pattern (*ibid.*): First, Ms Bupati contacts Mr Chandra and enquires about the current conditions for the sale of palm oil (*ibid.*). Second, she places an order that sometimes diverges from Mr Chandra's initial quotation (*ibid.*). Third, if

Mr Chandra agrees with the offered terms, he prepares the contractual documents and sends them to Ms Bupati (*ibid.*). However, in case the new terms are not acceptable, Mr Chandra sends Ms Bupati contractual documents including the originally proposed conditions (*cf. Cl. Exh. C 1, § 3*). Ms Bupati always expressly objected to the offer within a week if she considered the proposed terms to be unacceptable (*Cl. Exh. C 1, § 14; PO 2, § 9; cf. Resp. Exh. R 3, § 3*). In the event Ms Bupati accepted the contract, she either sent back a signed version of CLAIMANT's Contract Template or remained silent for a week (*PO 2, § 9; Resp. Exh. R 3, § 3*). Between 2010 and 2018, the latter occurred five times, making it an established business practice (*cf. Cl. Exh. C 1, § 3; Resp. Exh. R 3, § 3; PO 2, § 10; Cl. Exh. C 5, § 7*). Irrespective of the mode of acceptance, Ms Bupati performed the concluded contracts (*ibid.*).

57 Thus, regarding the frequency and duration of their behaviour, Ms Bupati and Mr Chandra established a practice of concluding contracts by Mr Chandra making an offer and Ms Bupati not objecting to that offer within a week.

(b) This practice is applicable to the conclusion of the Contract

58 This practice, previously established between Ms Bupati and Mr Chandra, applies to the conclusion of the Contract.

59 A practice generally applies if the parties can expect it to (*OGH, 31 August 2005 (Austria); cf. CIETAC Case No. SHG20190146; Supreme Court of the People's Republic of China, 29 September 2019 (China)*). As a practice is linked to the circumstances in which it was established, it is applicable in comparable circumstances (*OGH, 31 August 2005 (Austria)*; *BONELL in: Bianca/Bonell, Art. 9 § 2.2.1, cf. GRAFFI, p. 109*).

60 The circumstances of the Contract's conclusion are comparable to those of previous contracts (*i*). Furthermore, the Parties intended to make the previously established practice applicable to the conclusion of the Contract (*ii*).

(i) The circumstances underlying the Contract's conclusion are equivalent to those of previous contracts

61 The previous contracts were concluded under circumstances similar to those in the present case.

62 All forty prior contracts concerned the purchase of palm oil (*see supra § 56*). They were based on the Contract Template and concluded between Mr Chandra and Ms Bupati (*ibid.*). Likewise, the Contract concerns the purchase of palm oil, is based on the Contract Template (*see supra §§ 24 et seq., 47 et seqq.*) and was concluded between Mr Chandra and Ms Bupati (*cf. RNoA, §§ 4 et seqq.; Resp. Exh. R 3, § 6; Cl. Exh. C 2; PO 2, § 13*).

63 Ms Bupati's transfer from Southern Commodities to its 100% subsidiary RESPONDENT (*PO 2, § 4*) is non-detrimental to the applicability of the established business practice as it is merely a formal change: The entire business unit, including most of its employees, was transferred from Southern Commodities to RESPONDENT within this restructuring measure (*PO 2, §§ 4 et seq.*). Moreover, all tasks and relations were maintained (*cf. PO 2, §§ 3 et seqq.*). This is further underlined by the fact that in the latest contracts between CLAIMANT and Southern Commodities, the goods were delivered to RESPONDENT's subsidiary (*PO 2, § 3*).

64 Thus, the circumstances of the previous contracts are equivalent to those of the Contract.

(ii) It was the Parties' intention to apply the previously established practice to the conclusion of the Contract

65 The Parties intended to apply the practice, previously established by Ms Bupati and Mr Chandra, to the conclusion of the Contract.

66 As part of Southern Commodities expansion strategy, its palm kernel oil unit was transferred to its 100% subsidiary RESPONDENT (*Cl. Exh. C 2; PO 2, § 4*), which was supposed to build upon Southern Commodities' previous relations. In order to facilitate that transition, Ms Bupati was promoted from Southern Commodities to RESPONDENT as its new Head of Purchase precisely due to her experience and wide network in the palm oil sector (*Resp. Exh. R 3, § 4*). In her previous function and as a result of her extensive experience in the palm-oil sector, Ms Bupati established business practices to simplify and accelerate the conclusion of contracts (*see supra § 54 et seqq.*). Despite this experience being the main reason for Ms Bupati's move from Southern Commodities to RESPONDENT, the latter now refuses to acknowledge the very practices she had established with CLAIMANT.

67 Such cherry-picking also contradicts Ms Bupati's own perception, who intended to "re-establish [Mr Chandra's and her] long-lasting and successful business relationship" (*Cl. Exh. C 2*) and thereby continue their "established […] practice" (*cf. Resp. Exh. R 3, § 3*). Additionally, Ms Bupati explicitly anticipated the practice of "deviating from the time frame for opening a letter of credit as stated in Clause 7a of the contract template" to apply (*PO 2, § 23*). She even instructed Ms Fauconnier to act in accordance with this practice (*ibid.*).

68 The intention of continuing the previous practices was shared by Mr Chandra. He declared that the method of the Contract's conclusion compiles precisely with the procedure he and Ms Bupati had established. (*Cl. Exh. C 1, § 13*). In line with this, Mr Chandra's intention to stick to the previously established practice was displayed by Mr Chandra assuring Mr Rain "not to worry" after Ms Bupati did not send back a signed copy of the Contract Template (*Cl. Exh. C 5, § 7; Cl. Exh. C 1, § 14*). Even the Contract was labelled as "Contract No.: *41*" (*Cl. Exh. C 3*).

69 Therefore, Ms Bupati and Mr Chandra had the common intention to apply their previously established practice.

70 Due to the comparable circumstances and the common intention of the Parties, the established practice applied to the conclusion of the Contract.

(c) On 16 April 2020, the Parties entered into the Contract on the basis of the established practice

71 The Parties acted in line with the applicable practice and concluded the Contract (*i*). Pursuant to the principle of the prohibition on contractionary behaviour, RESPONDENT is prevented from disregarding this practice (*ii*).

(i) The Parties concluded the Contract seven days after the offer was made

72 The Parties acted in line with the applicable practice and entered into the Contract on 16 April 2020.

73 Following CLAIMANT's offer on 9 April 2020, RESPONDENT did not contact CLAIMANT until 3 May 2020. Thus, RESPONDENT remained silent for considerably more than a week, *i.e.* sixteen working days. According to the business practice, this constitutes an acceptance of CLAIMANT's offer on 16 April 2020. Consequently, any subsequent suggestions from RESPONDENT regarding the terms of the sales contract (*Resp. Exh. R 2; Cl. Exh. C 5, §§ 4 et seq.*) could only be considered as a request to modify the already concluded Contract pursuant to Art. 29(1) CISG.

74 Therefore, the Parties concluded the Contract on 16 April 2020.

(ii) The practice could not be disregarded by RESPONDENT

75 By disregarding the application of the practice to the conclusion of the Contract (*cf. RNoA, § 18*), RESPONDENT violates the prohibition of contradictory behaviour.

76 The prohibition of contradictory behaviour (*venire contra factum proprium*) resulting from Art. 16(2)(b) CISG is a fundamental principle underlying the CISG (*FOGT, p. 387; cf. VIAC Case No. SCH-4318; MATHER, p. 48*). According to this principle, a party cannot act inconsistently with an understanding it has caused the other party to have and upon which the other party reasonably has acted in reliance to its detriment (*Art. 1.8 UPICC; BRUNNER/PFISTERER/KOESTER in: Brunner/Gottlieb., Art. 16 § 4*; *WINSHIP, pp. 8 et seq.*). The circumstances of the individual case are decisive in determining if a party acted inconsistently to an understanding it has caused (*cf. FERRARI in: Kroell et al., Art. 16 § 21*; *DORNIS in: Honsell, Art. 16 § 21*; *HLAWON in: Martinek et al., Art. 16 § 30*). The arising detriment does not have to result in an

actual loss (*Geneva v Barr Laboratories (USA); DORNIS in: Honsell, Art. 16 § 22; GRUBER in: Saecker et al., Art. 16 § 17*). Instead, it is adequate if the other party inquired shipment quotations or refrained from contacting other potential business partners (*cf. SCHROETER in: Schlechtriem/Schwenzer, Art. 16 § 11; DORNIS in: Honsell, Art. 16 § 22; WITZ in: Witz/Salger/Lorenz, Art. 16 § 14; FERRARI in: Drescher/Fleischer/Schmidt, Art. 16 § 22*).

77 In early 2020, CLAIMANT was keen to find a new buyer for two-thirds of its annual palm oil production after its previous long-term supply contract had been suddenly terminated (*NoA, § 3*). In line with this, Mr Chandra approached Ms Bupati at the Palm Oil Summit (*Cl. Exh. C 1, § 7*). Following their previously established practice (*see supra §§ 54 et seqq.),* the Contract was concluded after RESPONDENT had not objected to CLAIMANT's offer until 16 April 2020 (*see supra §§ 72 et seqq.*). CLAIMANT could only understand this behaviour of RESPONDENT to entirely correspond with the established practice (*see supra §§ 65 et seqq.*). f

78 This understanding is highlighted by RESPONDENT initiating the performance of the Contract. According to Clause 7a of the Contract Template, the payment shall be conducted by letter of credit (*Cl. Exh. C 3*). Accordingly, RESPONDENT approached CLAIMANT on 3 May 2020 to inquire about banks acceptable for such a letter of credit (*Resp. Exh. R 2*). Afterwards, RESPONDENT contacted several acceptable banks to obtain quotations as to the terms for the letter of credit (*PO 2, § 23*). Since no questions remained between the Parties, RESPONDENT not contacting CLAIMANT again was in line with the established practice (*PO 2, § 23*).

79 RESPONDENT caused the understanding that it considered the Contract to already be concluded. CLAIMANT could reasonably rely on this understanding and needed to do so to fulfil its own contractual obligations: Not only did it inquire quotations for the first shipment with several companies but refrained from contacting other potential business partners (*PO 2, § 23*).

80 Thus, the application of the established practice cannot be disregarded by RESPONDENT since it would constitute a violation of the fundamental principle of *venire contra factum proprium*.

Conclusion to Issue II

The Parties concluded the Contract as RESPONDENT made an offer on 1 April 2020 which was accepted by CLAIMANT on 9 April 2020. Even if the Tribunal were to find that the Parties did not enter into the Contract at that time, the Parties established practice led to the conclusion of the Contract on 16 April 2020.

ISSUE III: CLAIMANT'S GCOS WERE VALIDLY INCLUDED IN THE CONTRACT

81 Since 2010, CLAIMANT's GCoS had been the foundation for all forty contracts CLAIMANT concluded with Ms Bupati – first as Southern Commodities' main purchase manager and later as RESPONDENT's Head of Purchase. While this has been the *modus operandi* for years, RESPONDENT now claims the GCoS to be inapplicable in an attempt to avoid its contractual obligations (*RNoA, § 14*). The Tribunal is respectfully requested to find that the GCoS were validly incorporated into the Contract as it has been the case in all previous contracts (*PO 2, § 7*).

82 RESPONDENT's offer dated 1 April 2020 included the GCoS and was accepted by CLAIMANT on 9 April 2020 (**A.**). In any case, CLAIMANT introduced its GCoS on 9 April 2020, which were validly incorporated no later than 16 April 2020 (**B.**).

A. RESPONDENT'S OFFER INCLUDED THE GCOS WHICH CLAIMANT ACCEPTED ON 9 APRIL 2020

83 On 9 April 2020, CLAIMANT accepted RESPONDENT's offer which contained the GCoS.

84 The CISG does not specifically address the inclusion of standard terms (*OGH, 17 December 2003 (Austria); DJORDJEVIC in: Kroell, Art. 4 § 24; LOOS/SCHELHAAS, p. 111; KROELL, p. 46*). The historic legislator intentionally refrained from stipulating further provisions governing the inclusion of standard terms (*UN Doc. A/CN.9/SER.A/1978, p. 81; LOHMANN, p. 209; CISG-AC Opinion No. 13, p. 4*; *KRUISINGA, CISG, p. 60*). Rather, the general principles regarding the conclusion of contracts in Arts. 14 *et seqq.* CISG are to be applied (*cf. OGH, 17 December 2003 (Austria); CANZLER p. 3; KOEHLER, p. 89; MAGNUS in: Staudinger, Art. 40 § 40).* Following Arts. 14 *et seqq.* CISG, a valid inclusion of standard terms requires an agreement by the parties (*KRUISINGA in: Schwenzer/Spagnolo, p. 71; CISG-AC Opinion No. 13, p. 2; PILTZ, standard terms, p. 235*). Whether two parties agreed on the inclusion of standard terms is to be determined by interpreting their statements according to Art. 8 CISG (*see supra § 14*). Moreover, there has to be a reasonable opportunity for the recipient to take notice of the standard terms (*BGH, 31 October 2001 (Germany); CISG-AC Opinion No. 13, p. 12; Nucap Industries, Inc. v Robert Bosch LLC (USA); RB Rotterdam, 2 December 2015 (Netherlands)*).

85 When the Parties discussed the terms of the Contract at the Palm Oil Summit, the application of CLAIMANT's GCoS was acknowledged (*RNoA, § 10; PO 2, § 13*). Thus, when RESPONDENT in its offer referred to the terms "as agreed at the Summit" (*Cl. Exh. C 2*) it contained CLAIMANT's GCoS. This offer was accepted by CLAIMANT on 9 April 2020 (*see supra*

§§ 28 et seqq.). As CLAIMANT is aware of its own GCoS, any obligation to give CLAIMANT a reasonable opportunity to take notice is null and void.

86 In consequence, CLAIMANT's GCoS, were validly incorporated into the Contract.

B. IN ANY CASE, THE GCOS WERE VALIDLY INCORPORATED BY CLAIMANT ON 9 APRIL 2020

87 In any case, CLAIMANT's GCoS were incorporated by the explicit reference in CLAIMANT's email dated 9 April 2020 and subsequently accepted by RESPONDENT.

88 An agreement by the parties is necessary to incorporate standard terms into a contract (*see supra § 84*). Additionally, a reasonable opportunity to take notice of the standard terms is to be given to the receiving party (*ibid.*).

89 CLAIMANT provided for the application of its GCoS within the contractual documents submitted via email on 9 April 2020 (*Cl. Exh. C 3; Cl. Exh. C 4*). Irrespective of whether the Contract was concluded according to Art. 18(1) or Art. 19(2) CISG, the GCoS were agreed upon by the Parties (*see supra §§ 28 et seqq., 72 et seqq.*).

90 Moreover, the explicit reference to the GCoS by CLAIMANT in its email of 9 April 2020 suffices to fulfil the requirement of giving RESPONDENT a reasonable opportunity to take notice of the GCoS (**1.**). Contrary to RESPONDENT's submission (*RNoA, § 14*), it was not CLAIMANT's duty to transmit its GCoS to RESPONDENT again (**2.**).

1. Through the explicit reference in the Contract RESPONDENT was given a reasonable opportunity to take notice of the GCoS

91 As the Contract contained an explicit and prominent reference to the GCoS, CLAIMANT fulfilled the requirement of giving RESPONDENT a reasonable opportunity to take notice of the GCoS.

92 The requirement to give the recipient a reasonable opportunity to take notice of the standard terms is met if – as a result of a clear and understandable reference -– the suppliers' intent to incorporate the standard terms becomes evident (*BGH, 31 October 2001 (Germany); BERGER in: FS Horn, p. 3, 8; SCHMIDT-KESSEL/MEYER, p. 177 et seq.*; *KRUISINGA, p. 350; PILTZ, standard terms, p. 235; HUBER, pp. 127 et seq.; OGH, 17 December 2003 (Austria); cf. AP de Navarra, 27 December 2007* (*Spain); OGH, 14 January 2002(Austria)*).

93 In its email on 9 April 2020, CLAIMANT pointed out that its GCoS were to be applicable (*Cl. Exh. C 4*). Further, the Contract Template submitted along with this email explicitly provides for the "Seller's General Conditions of Sale [to] apply" *(Cl. Exh. C 3; Cl. Exh. C 4).* Based on these

explicit references, RESPONDENT could not have been unaware of CLAIMANT's intent to incorporate its GCoS.

94 To conclude, CLAIMANT made a clear and understandable reference to its GCoS and thus, gave RESPONDENT a reasonable opportunity to take notice.

2. CLAIMANT was not obliged to transmit its GCoS to RESPONDENT again

95 Contrary to RESPONDENT's submission (*RNoA, § 14*), CLAIMANT had no duty to transmit its GCoS to RESPONDENT again as RESPONDENT already had positive knowledge of CLAIMANT's GCoS (**a**). Even if the Tribunal were to find that RESPONDENT did not have such knowledge, any additional prerequisite requiring CLAIMANT to transmit the GCoS to RESPONDENT is not applicable in the present case (**b**).

(a) RESPONDENT had positive knowledge of CLAIMANT's GCoS

96 CLAIMANT was not obliged to transmit its GCoS to RESPONDENT as it already had positive knowledge of the GCoS when concluding the Contract.

97 While some authorities demand the offeror to transmit standard terms to the recipient; this requirement does not apply in case the recipient already has positive knowledge of the standard terms (*RB Overijssel, 23 March 2016 (Netherlands); OLG Hamm, 19 May 2015 (Germany); ZARTH, p. 347; MAGNUS in: FS Kritzer, p. 322*). Requiring the supplier to resend the standard terms in such a case would be a pure formality as the very purpose of the making available requirement – informing the recipient of the standard terms' content – is already fulfilled (*HUBER/KROELL, p. 311; GRUBER in: Saeker et al., Art. 14 § 32; OGH, 29 November 2005 (Austria)*). In particular, such knowledge can be gained during a long-term business relationship (*ibid.*).

98 In the case at hand, RESPONDENT gained knowledge of CLAIMANT's GCoS from both its Head of Purchase Ms Bupati (*i*) and its parent company Southern Commodities (*ii*).

(i) Ms Bupati's knowledge of CLAIMANT's GCoS is to be attributed to RESPONDENT

99 Ms Bupati gained knowledge of CLAIMANT's GCoS as Southern Commodities' main purchase manager, which must be attributed to RESPONDENT.

100 Art. 79(2) CISG encompasses a general principle of knowledge attribution (*HUBER in: Saecker et al., Art. 79 CISG § 5; ICC Case No. 9187; CIETAC Case No. CISG/1995/04; MAGNUS in: Honsell, Art. 40 § 7; ATAMER in: Kroell et al., Art. 79 § 60*). By applying this principle, the positive knowledge of an individual acting on behalf of the recipient is decisive (*cf. OGH, 31 August 2005 (Austria)*).

101 While being the main purchase manager at Southern Commodities, Ms Bupati concluded forty contracts with CLAIMANT. In each case, CLAIMANT's GCoS provided for the legal framework of the contracts (*Resp. Exh. R 3, § 4*). Ms Bupati was informed about the replacement of the old arbitration clause with the AIAC Model Clause (*Cl. Exh. C 1, § 4; RNoA, § 12*). Additionally, it was clarified that the seat of arbitration was Danubia and that the law applicable to the contract would be the Danubian contract law (*PO 2, § 7*).

102 Ms Bupati's profound experience and network in the palm oil industry, especially with CLAIMANT, were the main reasons for Southern Commodities to promote her as Head of Purchase of RESPONDENT (*see supra § 66*). Thus, RESPONDENT may not now deny the attribution of that knowledge as it conveniently suits its case.

103 Therefore, Ms Bupati's knowledge of CLAIMANT's GCoS and the adaption made to it in 2016 must be attributed to RESPONDENT.

(ii) Southern Commodities' knowledge of CLAIMANT's GCoS is to be attributed to RESPONDENT

104 Pursuant to the principle of knowledge governance, Southern Commodities' knowledge of CLAIMANT's GCoS must be attributed to RESPONDENT.

105 A company must ensure that all relevant information received by its employees is stored and accessible for other personnel, according to the principle of knowledge governance (*BGH, 2 February 1996 (Germany); CHOPRA/WHITE, p. 1179; TAUPITZ, p. 735; BGH, 13 October 2000 (Germany); ABEGGLEN, p. 133; KATAN, p. 300; cf. Commercial Union v Beard and Ors (Australia)*). In particular, contractual documents are deemed relevant information (*cf. BGH, 2 February 1996 (Germany); SCHUELER, p. 80; WATTER in: FS Kleiner, p. 139*). A company is required to store such information for at least as long as the contractual relationship continues (*cf. BGH, 15 April 1997 (Germany); RACK, p. 59*). An outer time limit can be derived from Art. 39(2) CISG which treats a transaction to be finished after two years have passed since the delivery. This general rationale in the present context means that a company must store relevant information for at least two years after the delivery (*SCHROETER in: Schlechtriem/Schwenzer, Art. 14 § 59*).

106 The attribution of such knowledge does not occur automatically within a corporate group. However, in certain scenarios, an attribution of knowledge from the parent company to its subsidiaries is acknowledged: Either as a result of an established situation of trust or if the parent company has actual influence on its subsidiary (*cf. ABEGGLEN, pp. 233; BGH, 14 July 1993 (Germany); ZENS, p. 22; KATAN, p. 305; BORK, p. 261; Hoge Raad, 3 February 2012 (Netherlands)*). Further, in cases where the parent company is reaching its corporate goal by outsourcing part of its business into a subsidiary, knowledge attribution is assumed (*BGH, 13 October 2000 (Germany);*

SCHUBER in: Saecker et al., Art. 166, § 93; OLG Düsseldorf, 1 December 2003 (Germany); ABEGGLEN, p. 270).

107 CLAIMANT's GCoS are part of the contractual documents and fulfil an essential gap-filling function (*see supra §§ 24 et seq.*). Therefore, as they are considered relevant information Southern Commodities is obliged to store. Especially the change of the Arbitration Clause had to be stored by Southern Commodities since its employee Ms Bupati – who was in charge of concluding contracts with CLAIMANT – was informed about it (*see supra §§ 99 et seq.*). Irrespective of Southern Commodities complying with its storage obligation, CLAIMANT could rely on it. Further, since the last delivery was made to RESPONDENT after the end of 2018 (*PO 2, § 3*), the required storage period of two years after the last delivery (earliest end of 2020) had not elapsed in April 2020 when the Parties concluded the Contract. Thus, CLAIMANT was entitled to treat Southern Commodities as if it had positive knowledge of the GCoS. As a former business unit of Southern Commodities was fully shifted to its 100% subsidiary RESPONDENT (*PO 2, § 4*), all stored documents – in particular the ones concerning ongoing business relationships – were transferred to RESPONDENT. This is further underlined by the fact that already the deliveries of the last two concluded contracts between CLAIMANT and Southern Commodities have been made to RESPONDENT's subsidiary (*PO 2, § 3*). Consequently, RESPONDENT must have access to those documents or at least is to be treated as if it had. Therefore, CLAIMANT could assume that RESPONDENT had knowledge of the GCoS.

108 Further, Southern Commodities has substantial influence over RESPONDENT. Since its acquisition in late 2018, RESPONDENT has been a 100% subsidiary of Southern Commodities (*PO 2, § 4*). Consequently, it was completely restructured, and its management was chosen by Southern Commodities (*Resp. Exh. R 3 §§ 4, 5; Resp. Exh. R 6; RNoA, § 3; PO 2, §§ 4, 5*). RESPONDENT was now supposed to "play a crucial role in [the] expansion strategy of Southern Commodities" (*Resp. Exh. R 1; Cl. Exh. C 2; Cl. Exh. C 6*). The information obtained by Southern Commodities about the palm oil market must – due to this substantial influence – be attributed to RESPONDENT.

109 To conclude, all scenarios under which knowledge can be attributed to subsidiaries are fulfilled. Therefore, Southern Commodities' knowledge of CLAIMANT's GCoS must be attributed to RESPONDENT.

(b) Even if RESPONDENT had no positive knowledge of CLAIMANT's GCoS, CLAIMANT had no obligation to – once more – transmit its GCoS to RESPONDENT

110 Even if the Tribunal were to find that RESPONDENT did not have positive knowledge of the GCoS, CLAIMANT was not obliged to send its GCoS to RESPONDENT again.

111 Whether the requirement of providing the recipient with a reasonable opportunity to take notice of standard terms is fulfilled must be interpreted pursuant to Art. 8 CISG (*see supra § 14*). In accordance with the principle of good faith derived from Art 7(1) CISG and by taking into consideration the complexities of international trade, the prerequisite of providing a reasonable opportunity to take notice may require the supplier to transmit its standard terms to the other party. This interpretation was first established in 2001 by the German Federal Court in its *Machinery Case* and soon adopted by other authorities (*BGH, 31 October 2001 (Germany); cf. SCHWENZER/MOHS, p. 241; NAI Case No. n/p Dutch-Italian sales contracts case*). However, it is possible to rebut such a strict understanding of Art. 8 CISG based on the circumstances of the individual case (*TC de Nivelles, 19 September 1995 (Belgium); OGH, 31 August 2005 (Austria); DORNIS in: Honsell, Art. 14 § 8*).

112 The reasoning behind the supplier's obligation to transmit the standard terms to the recipient are not applicable in the present situation (*i*). In any case, CLAIMANT would have fulfilled such requirement by making the GCoS available to RESPONDENT (*ii*).

(i) The making-available-test is not to be applied considering the underlying circumstances of the case

113 Due to the specific circumstances of the case, the making-available-test is not applicable. CLAIMANT was not obliged to transmit its GCoS to RESPONDENT.

114 The reasons for the strict understanding of Art. 8 CISG are derived from Art. 7(1) CISG. Applying the principle of good faith in international trade may lead to the making-available-requirement obliging the supplier to send its standard terms to the recipient. In consideration of the different legal backgrounds in international trade, the recipient of standard terms may be surprised by the terms it agrees to. In consequence, the recipient would have to inquire about the content of the standard terms. This could possibly lead to delays in the conclusion of contracts. In addition, in case of "unequal" parties contracting the weaker party requires "special protection" (*BGH, 31 October 2001 (Germany); GH Den Haag, 22 April 2014 (Netherlands); OGH, 29 June 2017 (Austria); OLG Naumburg, 13 February 2013 (Germany); Roser v Carl Schreiber*).

115 This reasoning is not applicable in the present case: First, RESPONDENT is not endangered by possibly surprising provisions in CLAIMANT's GCoS (*aa*). Second, RESPONDENT inquiring about the GCoS would not have caused any delay in the contract conclusion (*bb*). Third, as both,

CLAIMANT and RESPONDENT are equally experienced parties in international trade, RESPONDENT is in no need for "special protection" (*cc*).

(aa) RESPONDENT is not endangered by any surprising clauses within CLAIMANT's GCoS

116 CLAIMANT's GCoS do not contain surprising provisions. Regardless of that, RESPONDENT would be protected by a validity control resulting from the applicable national law. Therefore, there is no basis for a strict interpretation of Art. 8 CISG.

117 Terms are considered surprising if a reasonable person of the same kind as the recipient would not have anticipated them to be part of the standard terms (*BROEDERMANN, p. 91; UNIDROIT Official Commentary, Art. 2.1.10 § 2*). As the recipient of such surprising terms is in danger of misunderstanding them, they will either not become part of the contract in the first place (*SCHMIDT-KESSEL in: Schlechtriem/Schwenzer/Schroeter, Art. 8 § 57; SCHWENZER/MOHS, p. 241*) or subsequently will be declared ineffective in the course of a validity control (*Art. 2.1.20 UPICC; UNIDROIT Official Comment, Art. 2.1.20 § 1*). Through Art. 4 lit a CISG, the control of the material validity of standard terms is explicitly excluded from the scope of the CISG. This external gap must be filled with the regulations of the applicable national law (*LOHMANN, p. 221; CANZLER, p. 43; HENNEMANN, p. 106*).

118 As CLAIMANT and RESPONDENT are professionals in the palm oil industry (*cf. NoA, §§ 1 et seq.*), they are familiar with the existing practices and commonly used terms in this industrial sector. Especially the provisions regarding remedies in case of a breach of contract (Clause 4 GCoS) and the submission to arbitration (Clause 9 GCoS) are usual standards within the palm-oil industry (*PO 2, § 11; PO 2, § 31*). This holds especially true in regard to Clause 9 GCoS, which is the arbitration model clause provided for by a well-known arbitration institution (*PO 2, § 24; cf. AIAC Arbitration Rules, p. 2*). RESPONDENT challenges these clauses of CLAIMANT's GCoS, although a reasonable businessperson in the shoes of RESPONDENT could not have been surprised by either clause.

119 Nevertheless, any surprising clauses would not become part of the Contract pursuant to Art. 8 CISG. Alternatively, the validity control resulting from Art. 2.1.20 UPICC as the applicable national law (*PO 1, § III.3*) would declare such clauses ineffective. Pursuant to the latter provision, surprising clauses are rendered ineffective unless explicitly accepted by the recipient. Accordingly, even if CLAIMANT's GCOS contained surprising terms – despite their common character – they would not be included in the Contract. Thus, RESPONDENT is sufficiently protected against surprising terms.

120 In conclusion, CLAIMANT's GCoS do not contain surprising provisions. In any case, RESPONDENT is protected from being bound to potentially surprising terms by either Art. 8 CISG or Art. 2.1.20 UPICC. Thus, this reason in favour of a strict understanding of Art. 8 CISG is not applicable in the present case.

(bb) RESPONDENT inquiring about CLAIMANT's GCoS would not have caused any delays

121 The contract conclusion would not have been delayed by RESPONDENT inquiring about CLAIMANT's GCoS. Consequently, this reason does not justify a strict understanding of Art. 8 CISG.

122 The general principle of good faith pursuant to Art. 7(1) CISG can constitute an obligation to submit standard terms to the recipient. In accordance with this principle, contractual duties are to be performed in good faith (*LANDO in: FS Schwenzer, p. 1002; PERALES VISCASILLAS in: Kroell et al., Art. 7, § 6; TdJ do Estado do Rio Grande do Sul, 30 March 2017 (Brazil)*). Therefore, it cannot be in the interest of either party to cause delays when acting in good faith (*BGH, 31 October 2001 (Germany); GH Den Haag, 22 April 2014 (Netherlands); OLG Naumburg, 13 February 2013 (Germany)*).

123 In the present case, the Contract was concluded by exclusively communicating via email and telephone (*Resp. Exh. R 2; Cl. Exh. C 2; Cl. Exh. C 4*). These means of communication do not cause any transmission delay. Ms Bupati could have easily requested CLAIMANT to send its GCoS via email in case she wanted to take another "closer look".

124 Additionally, the inapplicability of this reasoning is further underlined by the fact that it was established by the German Federal Court back in 2001. Already in 2002, the decision was criticised for being "antic" as it was common between business people to exchange documents remotely (*POETTER/HUEBNER, p. 340*). This holds even more true in this modern age since communicating via email is daily business in all relevant sectors. Consequently, transmission delays caused by former communication methods cannot justify a supplier's obligation to transmit its standard terms to the recipient.

125 In conclusion, no delay would have been caused by RESPONDENT inquiring about the GCoS. Hence, this strict understanding of Art. 8 CISG should not be followed as the reasoning is outdated.

(cc) RESPONDENT should not be favoured by special protection

126 There is no justification for RESPONDENT being privileged by "special protection" as both CLAIMANT and RESPONDENT are equal parties. Therefore, requiring CLAIMANT to make its

GCoS available to RESPONDENT again would construe an unnecessary burden for CLAIMANT without benefits for RESPONDENT.

127 The rules of the CISG generally provide for equality between the parties due to the principle of good faith in the sense of Art. 7(2) CISG (*SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 7 § 34; cf. Art. 74 CISG; Zapata v Hearthside (USA)*). The supplier will usually intend to incorporate standard terms beneficial for itself (*BGH, 31 October 2001 (Germany); cf. MITTMANN, p. 104*). This could lead to a disadvantage on the recipient's side, causing an imbalance between the parties (*GRUBER in: Saecker et al., cf. Art. 14 § 29*). This is especially relevant in cases where the scope of the CISG extends to consumers with less know-how and experience in international trade (Art. 1(3) CISG). In this context, protecting the "weaker" party becomes even more significant (*BGH, 31 October 2001 (Germany); cf. Art. 2(a) CISG; LORENZ, in: Witz/Salger/Lorenz, Art. 2 § 2*).

128 RESPONDENT is not a consumer. Rather, both CLAIMANT (a producer of palm oil) and RESPONDENT (a producer of biofuel) are highly experienced and professional companies on the international market (*NoA, §§ 1 et seq.*). Consequently, it can be expected that they are equal due to their similar background.

129 Moreover, CLAIMANT's GCoS are commonly used in the palm-oil market (*see supra §§ 118 et seq.*). This is, for instance, underlined by Clause 4 GCoS, which merely reflects the legal evaluation of Art. 49 CISG (*RNoA, § 20*). Under Art. 49 CISG, the buyer may declare the contract avoided in case of non-delivery if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with Art. 47(1) CISG. Clause 4 of CLAIMANT's GCoS – comparable to Art. 49 CISG – grants CLAIMANT a second chance to oblige with its contractual duties within an additional period of time. Therefore, considering this term to be disadvantageous for RESPONDENT, although both Parties agreed on its application, would fail to appreciate the legal evaluation of Art. 49 CISG (*see supra § 7*).

130 Therefore, both Parties are to be considered equally strong. RESPONDENT is not to be favoured by "special protection".

131 To conclude, the Tribunal is respectfully requested to reject a strict understanding of Art. 8 CISG: CLAIMANT's GCoS are commonly used within the palm-oil sector and not surprising to RESPONDENT. Further, RESPONDENT inquiring about CLAIMANT's GCoS would not have caused any delay. As both Parties are equal, no party is in need of any "special protection". In consequence, the reasons for a strict understanding of Art. 8 CISG – requiring the supplier of standard terms to send them to the recipient – are not applicable in the present case.

(ii) In any case, CLAIMANT met the making-available-test

132 Even if the making-available-test applies to the case at hand, CLAIMANT fulfilled its obligation by making the GCoS otherwise available to RESPONDENT.

133 The making-available-test differentiates between two alternatives: Sending the full text of the standard terms or making it otherwise available (*BGH, 31 October 2001 (Germany)*). Both alternatives are sufficient to ensure the recipient's awareness (*BGH, 31 October 2001 (Germany); SCHROETER in: Schlechtriem/Schwenzer, Art. 14 § 50; PILTZ, CISG, § 3-81; cf. HENNEMANN, p. 73*). Standard terms are made otherwise available in case they have been validly incorporated into previous contracts within a business relationship (*HUBER, p. 128; SCHROETER in: Schlechtriem/Schwenzer, Art. 14 § 58*). A party's awareness of such terms can be assumed for two years after the last delivery has been made under the prior contracts in accordance with Art. 39(2) CISG (*SCHROETER in: Schlechtriem/Schwenzer, Art. 14 § 59*).

134 By concluding forty contracts subject to CLAIMANT's GCoS, Ms Bupati and Mr Chandra established a constant business relationship which is applicable to the Contract between the Parties (*see supra §§ 54 et seqq.*). Within this business relationship, Ms Bupati – RESPONDENT's Head of Purchase – became aware of CLAIMANT's GCoS during a different arbitration between CLAIMANT and Southern Commodities (*RNoA, § 11; PO 2, § 24*). Moreover, the last eight contracts concluded between 2016 and 2018 were already subject to the adjusted arbitration clause (*see supra § 38*). Since the last delivery had been made after the end of 2018 (*PO 2, § 3*), the two-year time limit did not elapse.

135 In conclusion, CLAIMANT made its GCoS otherwise available to RESPONDENT by transmitting them to Ms Bupati in 2011. Thus, CLAIMANT fulfilled the making-available-test.

Conclusion to Issue III

The Parties validly agreed on the incorporation of CLAIMANT's GCoS into the Contract. Even if the Tribunal were to find otherwise, the GCoS would have been incorporated by explicit reference. Furthermore, CLAIMANT was not required to send its GCoS again since RESPONDENT had positive knowledge of their content. Any additional prerequisite to transmit the GCoS to RESPONDENT, as required by the making available test, is not justified in the present case. Even if the Tribunal were to follow this approach, CLAIMANT fulfilled the making-available-test.

ISSUE I: THE PARTIES HAVE VALIDLY AGREED ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL

136 RESPONDENT questions the valid inclusion of the Arbitration Clause and consequently the Tribunal's jurisdiction. (*RNoA, § 14*). However, the Parties agreed on the incorporation of CLAIMANT's GCoS and the Arbitration Clause contained therein into the Contract (*see supra §§ 81 et seqq.*). Thus, the Tribunal is respectfully requested to find that is has jurisdiction in the present case.

137 Arbitration is based on party autonomy (*BORN, p. 226; FRANZ/KEUNE, p. 12; BLACKABY ET AL., §§ 5.91, 1.58*). To enter into arbitration, the parties need to expressly conclude an agreement to settle potential disputes by arbitration (*Dell v Union des consommateurs (Canada); BERGER in: Berg, p. 301; LEW in: Berg, pp. 114, 119; FILLERS, p. 665*).

138 In the case at hand, the Parties provided for arbitration not by concluding a separate agreement but by the incorporation of the Arbitration Clause into the Contract. For an arbitration clause contained in standard terms to be valid, it must have been included in the contract (*CdC, 9 November 1993 (France); SCHRAMM/GEISINGER/PINSOLLE in Kronke/et al., p. 52; CdJ, 16 December 1988 (Switzerland)*) and meet the respective formal requirements (*Bothell v Hitachi Zosen Corp (USA)*; *LEW in: Berg, p. 119*; *FILLERS*, *p. 665*; *MISTELIS in: Janssen/Meyer, p. 392*).

139 The Parties have validly included the Arbitration Clause in the Contract (**A.**). Further, it is formally valid (**B.**).

A. THE ARBITRATION CLAUSE WAS VALIDLY INCLUDED IN THE CONTRACT

140 Contrary to what Respondent has brought forward (*RNoA, § 14*), the Arbitration Clause has been validly incorporated into the Contract.

141 The law applicable to the arbitration agreement governs the incorporation of an arbitration clause into a contract (*BERGER in: Berg, pp. 322 et seq.; EMANUELE/MOLFA, p. 21*).

142 In the present case, the law governing the Arbitration Clause – to be determined by application of Art. V(1)(a) NYC – is the law of Danubia. Under this law, the Arbitration Clause was validly incorporated into the Contract (**1.**). Even if the Tribunal would arrive at the conclusion that the law of Mediterraneo applies, the Arbitration Clause would have been validly included in the Contract (**2.**).

1. The Parties validly incorporated the Arbitration Clause into the Contract under the law of Danubia

143 Under the applicable law of Danubia, the Parties have validly included the Arbitration Clause in the Contract.

144 The conflicts of laws rule stipulated in Art. V(1)(a) NYC must be applied to determine the law applicable to the Arbitration Clause (**a.**). Due to the choice of the Parties and the fallback rule stipulated in Art. V(1)(a) NYC, the Danubian contract law is determined as the law applicable to the Arbitration Clause (**b.**). Under this law, the Arbitration Clause was validly included in the Contract (**c.**).

(a) The law governing the Arbitration Clause must be determined pursuant to the two-step examination set out in Art. V(1)(a) NYC

145 The conflict of laws rule set out by Art. V(1)(a) NYC must be applied to determine the law governing the Arbitration Clause.

146 The determination of the law applicable to the arbitration agreement has caused "extensive confusion" in the past (*BORN, p. 508; NAZZINI, p. 687; SCHERER/JENSEN, comparative analysis, p. 187*). Thus far, "no single consistent approach" has been established globally (*ibid.*).

147 Absent a practical and consistent approach to determine the law applicable to an arbitration agreement (*i*) the Tribunal is invited to apply the straightforward and efficient conflict of laws rule in Art. V(1)(a) NYC (*ii*).

(i) The different approaches established by numerous jurisdictions should not be applied

148 The interests of the Parties are not sufficiently served by the approaches established by various jurisdictions to determine the law applicable to the arbitration agreement. Therefore, these approaches should be disregarded by the Tribunal.

149 As many as nine different approaches have been identified to determine the law applicable to the arbitration agreement of which "four main conflict rules" have sustained a significant following (*MASSER in: Arroyo, p. 2773; LEW in: van den Berg, p. 141; LIEBSCHER, p. 71; SCHWARZ/KONRAD, p. 75*). Some jurisdictions argue in favour of the validation principle (*GIRSBERGER/VOSER, § 362; PEARSON, pp. 124 et seq.; BORN, pp. 609 et seq.*; *WAINCYMER, p. 140; CdC, 20 December 1993 (France); Dallah v Pakistan (UK); PCA Case No. 2010-7*) while others take recourse to international recognised legal principles (*ibid.*).

150 However, the main conflict has arisen between the proponents of two further approaches: One side favours the law at the seat of arbitration while the other side advocates for the

extension of the law of the substantive contract to the arbitration agreement. Both approaches base their argumentation on a purported implicit choice of law by the parties (*SCHWARZ/KONRAD, pp. 604, 617; cf. SCHERER/JENSEN, harmonized theory, p. 4; ICC Case No. 5505; FirstLink v GTPayment (Singapore); Sulamérica v Enesa (UK)*).

151 These approaches have been criticised for the same reason: instead of deriving the parties' intentions from the factual circumstances of the respective case, they feign an implicit will on abstract principles (*ibid.*). Since these approaches have only found such an abstract implied will to apply in favour of their own preferred law, their effectiveness is questionable (*PHUA, p. 352; OGH, 8 March 1961 (Austria)*).

152 Such an abstract "strong presumption" in favour of the law governing the contract to apply to the arbitration agreement was recently found by the English Supreme Court (*Enka v Chubb (UK)*). According to the English Supreme Court, this presumption could only be negated in two exceptional cases: First, if the provisions of the law of the seat provide for the extension of its law to the arbitration agreement or, second, if the law governing the main contract renders the risk of invalidating the arbitration agreement (*ibid.*).

153 In order to properly assess if one of these exceptions apply, the competent body requires detailed knowledge of the law at the seat and has to conduct a thorough preliminary examination of the law of the main contract. Since this would require more money, effort and time to be invested only to find the law applicable to the arbitration agreement, the approach was criticised for diminishing some of the biggest advantages of arbitration (*HOPE/JOHANSSON in: Calissendorf/Schoeldstroem, p. 158; KOEPP/TURNER, p. 385; SCHERER/JENSEN, comparative analysis, p. 181*). Moreover, the international enforceability and legal security resulting from the finality of arbitral awards – as key reasons for businesses to refer to arbitration in the first place – are compromised by the complexity of this system (*AKRAM, p. 6; ROSENTHAL in: Arroyo, pp. 1125, 1128; MOURRE/RADICATI DI BROZOLO, p. 171*).

154 Due to the aforementioned reasons, the Tribunal should disregard the approaches established by various jurisdictions. Rather, it is respectfully requested to apply the effective and solution-oriented conflict of laws rule in Art. V(1)(a) NYC to determine the law applicable to the Arbitration Clause.

(ii) The law applicable to the Arbitration Clause should be determined by the conflict of laws rule in Art. V(1)(a) NYC

155 The conflict of laws rule contained in Art. V(1)(a) NYC is the most efficient and practical approach to determine the law applicable to the Arbitration Clause and should, thus, be applied by the Tribunal in the present case.

156 Pursuant to Art. V(1)(a) NYC, recognition and enforcement of an already existing award may be refused if a party proofs that the "agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." However, Art. V(1)(a) NYC is also to be applied analogously at the beginning of the arbitral proceedings to ensure a coherent conflict of laws regime for the entire proceedings. This ensures the enforceability of the final award and promotes the consistency of the arbitral proceedings by avoiding contradicting court decisions (*cf. BGH, 26 November 2020 (Germany); TARAWALDI/GERADY, pp. 212 et seq.; BORN, p. 532; GEIMER, § 3790b; KOENIG, pp. 130 et seqq.; SCHAEUBLE in: Hausmann/Odersky, § 16.203*).

157 The conflict of laws rule contained in Art. V(1)(a) NYC consists of a two-step examination: The first step is an assessment of the parties' intentions and requires that the parties have indicated the law applicable to the arbitration agreement (*VAN DEN BERG, p. 294; WILSKE/FOX in: Wolff, Art. 5 §§ 113 et seq.*). Only if the parties did not indicate the law that should govern the arbitration agreement, then, as a second step, a clear and unequivocal fallback rule is provided. According to this rule, the law of the country where the award shall be made is applicable to the arbitration agreement, *i.e.* the law at the seat of arbitration (*BGH, 26 November 2020 (Germany); EHLE in: Wolff, Art. 1 § 99; Enka v Chubb (UK); HENIN/DIGÓN in: Shore/Cheng, p. 559; EMANUELE/MOLFA, p. 49; BENEDETTELLI, p. 470*).

158 One of the key benefits of this two-step approach in Art. V(1)(a) NYC is its simplicity. Firstly, it is not necessary for the tribunal to conduct a substantive assessment of all the laws potentially applicable to the arbitration agreement.

159 Moreover, transparency and particularly reproducibility are enhanced by the simple structure of this approach. The previous arbitral proceedings between CLAIMANT and RESPONDENT's parent company, alongside the current proceedings, indicate the possibility of further disputes arising in the future. To set a precedent for efficient proceedings, it is in the interest of both Parties to decisively determine the law applicable to their Arbitration Clause and, thus, the jurisdiction of the Tribunal. By harmonising the rules of the award enforcement and the arbitral proceedings, the likelihood of a potential future arbitral award to be set aside is decreased.

Therefore, the approach of Art. V(1)(a) NYC ensures enforcement-friendly arbitration and provides for legal safety.

160 Additionally, since the Arbitral Tribunal is not required to substantially assess the law of the seat, as would be required by the approach taken in the *Enka Case* (*see supra § 153*), the proceedings can be conducted more efficiently. This pragmatic approach aligns with the interest of the Parties: Since the disputed Contract involves millions of USD of both Parties and two-thirds of CLAIMANT's total production of palm oil over the next five years, the present proceedings are of great importance for both Parties. Accordingly, they are interested in a quick and decisive determination of the Tribunal's jurisdiction.

161 Consequently, the Tribunal is respectfully requested to apply the two-step examination stipulated in Art. V(1)(a) NYC to determine the law governing the Arbitration Clause.

(b) The Law of Danubia governs the Arbitration Clause

162 Applying the conflict of laws rule contained in Art. V(1)(a) NYC, the Arbitration Clause is governed by the law of Danubia. The Parties indicated that they subjected the Arbitration Clause to the law of Danubia (*i*). Even if the Tribunal were to find that no such indication was made, due to the fallback rule in Art. V(1)(a) NYC, the Arbitration Clause is governed by Danubian law as the law at the seat of arbitration (*ii*).

(i) The Parties indicated that they subjected the Arbitration Clause to the law of Danubia

163 The Parties indicated that the law of Danubia should govern the Arbitration Clause.

164 As the first step of examination, the conflict of laws rule in Art. V(1)(a) NYC rightfully prioritises the autonomy of the parties (*WAINCYMER in: FS Kritzer, p. 585; VAN DEN BERG, p. 294*; *WILSKE/FOX in: Wolff, Art. 5 §§ 113 et seq.*; *CIRLIG, pp. 47 et seq.*). The term "indication" means „something less than an express and specific agreement" (*Kabab-Ji v KFG (UK)*).

165 CLAIMANT and RESPONDENT's Head of Contracting, Ms Bupati, had concluded multiple contracts since 2010 (*Cl. Exh. C 1, § 2*). Before her transfer to RESPONDENT, Ms Bupati was the main purchase manager at Southern Commodities, RESPONDENT's parent company (*Resp. Exh. R 3, § 2*).

166 These contracts had provided for a general choice of law clause in CLAIMANT's GCoS, which stipulated that the contracts were "governed by the substantive law of Danubia" (*PO 2, § 24*). Therefore, the law governing both the arbitration agreement and the merits was the law of Danubia. In 2016, this general choice of law clause was included verbatim in the Arbitration

Clause (*PO 2, § 24*). Undisputedly, Ms Bupati was notified about this rearrangement and was given a chance to discuss it with CLAIMANT (*PO 2, §§ 7, 18*).

167 A total of forty contracts were concluded by Southern Commodities and CLAIMANT under the application of this general choice of law clause (*Resp. Exh. R 3, § 2*). Even during the arbitral proceedings in 2014, which had been initiated by CLAIMANT against Southern Commodities concerning the payment for a delivery, the Clause and its application were not contested (*RNoA, § 11; PO 2, § 7, 24*). Thus, it was uncontested that from 2010 to 2018, the law applicable to the Arbitration Clause was the Danubian Law.

168 When the Parties entered into contract negotiations in 2020, they agreed to use the same Contract Template and GCoS (*see supra §§ 81 et seqq.*). However, meanwhile, CLAIMANT had become aware that courts applying the Danubian contract law generally allowed for contracts to be terminated due to a seller's supply chain problems. Hence, it insisted that all future sales contracts were to be governed by the law of Mediterraneo (*PO 2, § 14; RNoA, § 10; Cl. Exh, C 1, § 13*). However, as the reason for this modification concerned only substantive matters, the law governing the Arbitration Clause remained unchanged.

169 It was clearly communicated with RESPONDENT that this policy change was only affecting the law applicable to the "sales contract" or the "sale" (*Cl. Exh. C 1, § 13; Cl. Exh. C 2; Cl. Exh. C 4; Cl. Exh. C 5, § 2*). RESPONDENT acknowledged this by expressly stating that the "submission of the **sales contract** to Mediterranean law […] is less a problem for" it (*Cl. Exh. C 2 – emphasis added*). From this phrasing, it was evident to CLAIMANT and even the Presiding Arbitrator that RESPONDENT recognised that the change of the law applicable to the sales contract did not affect the law applicable to the Arbitration Clause (*LoA, p. 38*). Hence, the Parties strongly indicated that they intended to continuously subject the Arbitration Clause to the law of Danubia.

170 Thus, the Parties subjected the Arbitration Clause to the law of Danubia.

(ii) In any case, the fallback rule of Art. V(1)(a) NYC provides for the application of the Danubian law

171 Even if the Tribunal were to find that the Parties did not sufficiently indicate the law applicable to the Arbitration Clause, the fallback rule established in Art. V(1)(a) NYC would lead to the application of Danubian law.

172 With its second step, the analogous application of Art. V(1)(a) NYC provides that the law of the seat governs the validity of the arbitration agreement (*see supra § 157*).

173 As stated in the Arbitration Clause and undisputed by RESPONDENT, the seat of arbitration is Danubia (*PO 2, §§ 7, 15, 24; Resp. Exh. R 4; LoA, p. 38*). Thus, the fallback rule of Art. V(1)(a) NYC provides for the application of the law of Danubia to the Arbitration Clause.

174 To conclude, the Parties strongly indicated that they subjected the Arbitration Clause to the law of Danubia. Even if the Tribunal were not to follow this conclusion, the law of Danubia applies to the Arbitration Clause due to the fallback rule in Art. V(1)(a) NYC.

(c) The Arbitration Clause was validly incorporated under the substantive law of Danubia

175 The Arbitration Clause contained in CLAIMANT's GCoS was validly included in the Contract pursuant to the general contract law of Danubia.

176 Under Danubian law, the inclusion of standard conditions in an existing contract requires a clear statement that such conditions are to be applied but not that they are made available to the other party (*PO 1, § III.3*).

177 CLAIMANT made a clear reference to its GCoS providing for their application to the Contract (*Cl. Exh. C 3*). Furthermore, the accompanying email expressly stated that "Seller's General Conditions of Sale apply to issues not regulated in the attached documents" (*Cl. Exh. C 4*).

178 Due to these explicit references, the Arbitration Clause – contained in CLAIMANT's GCoS – was validly included in the Contract under the applicable law of Danubia.

2. Even if the law governing the arbitration agreement was the law of Mediterraneo, the Arbitration Clause was validly incorporated into the Contract

179 Even if the law of Mediterraneo applies, the Arbitration Clause was validly included in the Contract.

180 The law applicable to the arbitration agreement sets out the prerequisites for the incorporation of the Arbitration Clause (*see supra § 141*).

181 Although Mediterraneo is a member state of the CISG (*PO 1, § III.3*), the CISG is not applicable to the Arbitration Clause (**a**). Instead, the Arbitration Clause was validly included under the substantive law of Mediterraneo (**b**). Even if the CISG is applicable, the Arbitration Clause would have been validly incorporated into the Contract (**c**).

(a) The CISG is not applicable to the Arbitration Clause

182 The inclusion of the Arbitration Clause in the Contract is not governed by the CISG.

183 The scope of the CISG is determined in Arts. 1 et seqq. CISG. Pursuant to these articles and underlined by the name of the Convention ("Convention on Contracts for the International Sale of Goods"), it only governs the sales of goods (*WAINCYMER in FS Kritzer, p. 587; KROELL, p. 45; BGer, 11 July 2000 (Switzerland)*). Additionally, it is explicitly stated in Art. 4(1) CISG that the

CISG only governs the formation of sales contracts. Thus, an arbitration agreement does not fall into the scope of the CISG (*MISTELIS in: Janssen/Meyer, p. 394; KROELL in: Schwenzer/Atamer/Butler, p. 81*; *Inta v MCS Officina Meccanica (Argentina)*). For the same reasons, other dispute resolution clauses like court clauses have been found to not fall within the scope of the CISG (*GARRO, p. 237*; *Inta v MCS Officina Meccanica (Argentina)*; *BGer, 11 July 2000 (Switzerland)*).

184 Additionally, the CISG does not contain the term "arbitration". While in Art. 19(3) CISG it is stated that "terms relating […] to […] the settlement of disputes are considered to alter the terms of the offer materially", this only refers to the settlement of disputes clauses as far as their ability to materially alter the contract (*PILTZ, CISG, § 3-99; DORNIS in: Honsell, Art. 19 § 1; MAGNUS in: Staudinger, Art. 19 § 16*). Further, Art. 81(1) CISG stipulates that "avoidance […] does not affect any provisions of the contract for the settlement of disputes". In neither of those articles, the applicability of the CISG to arbitration agreements is mentioned. Rather, Art. 81(1) CISG provides for the doctrine of separability under which the arbitration agreement constitutes a separate contract even if this agreement is included within the main contract (*WAINCYMER in: FS Kritzer, pp. 586 et seq.*; *GARRO, p. 238 Filanto v Chilewich International (USA)*). By recognising this doctrine, the CISG itself emphasises that its scope of application for sales contracts is conclusive and does not extend to separate arbitration agreements (*WAINCYMER in: FS Kritzer, p. 586*; *LEW/MISTELIS/KROELL, §§ 6-38 et seq., 7–5 et seq.*; *HUBER in: Saecker et al., Art. 4 § 43; MOSES, p. 19*).

185 Consequently, the CISG does not apply to the Arbitration Clause. Instead, the substantive law of Mediterraneo must be applied.

(b) The Arbitration Clause is validly incorporated under the substantive law of Mediterraneo

186 The Arbitration Clause has been validly included in the Contract under the general contract law of Mediterraneo.

187 The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles of international commercial contracts (hereinafter "**UPICC**") (*PO 1, § III.3*). In order to become part of a contract, standard terms need to be expressly referred to (*UNIDROIT Official Commentary, Art. 2.1.19 § 3; BROEDERMANN, p. 90*). Moreover, the contract laws of Mediterraneo and Danubia are comparable since they are both based on the UPICC (*PO 2, § 35*). Under Danubian general contract law, the inclusion of standard terms in an existing contract requires a clear statement that such conditions are to be applied but not that they are made available to the other party (*PO 1, § III.3; NoA, § 16*). Except if their content is surprising or unexpected, the

parties are bound by standard terms upon their acceptance (*UNIDROIT Official Commentary, Art. 2.1.20 § 1; BROEDERMANN, p. 91*). The GCoS, which contain the Arbitration Clause, are standard terms under the law of Mediterraneo (*Art. 2.1.21 UPICC*). Their application was explicitly referred to at the Palm Oil Summit and in the correspondence between the Parties, as well as the contractual documents (*see supra §§ 2378 et seq.*). RESPONDENT was aware of the contents of the GCoS and the Arbitration Clause (*see supra §§ 96 et seqq.*). Consequently, their contents were neither surprising nor unexpected (*see supra §§ 116 et seqq.*).

188 To conclude, CLAIMANT's GCoS containing the GCoS became part of the Contract under the general contract law of Mediterraneo.

(c) Even if the CISG does apply to the Arbitration Clause, it would have been validly incorporated into the Contract

189 Even if the Tribunal were to find that the Arbitration Clause does fall within the scope of the CISG, it still would have been validly incorporated into the Contract.

190 Under the CISG, the GCoS – containing the Arbitration Clause – became part of the Contract by CLAIMANT's explicit reference on 9 April 2020 (*see supra §§ 87 et seqq.*).

191 Hence, the Arbitration Clause was validly incorporated into the Contract under the CISG.

B. THE ARBITRATION CLAUSE IS FORMALLY VALID

192 Even though not contested by RESPONDENT but in light of a comprehensive argument, CLAIMANT submits that the Arbitration Clause is also formally valid.

193 The formal validity of an arbitration agreement is determined pursuant to the *lex loci arbitri* (*BERGER in: Berg, pp. 302, 324*; *FILLERS*, *pp. 665 et seq.*; *MISTELIS in: Janssen/Meyer, p. 392*; *MOSES*, *p. 68*).

194 Undisputedly, the Parties chose Danubia to be the seat of arbitration (*see supra § 173*). Danubia's *lex loci arbitri* is a verbatim adoption of the UNCITRAL Model Law, of which it specifically adopted Option 1(*PO 1, III. § 3*). Art. 7 of the Danubian Arbitration Law (hereinafter "**DAL**") stipulates the formal requirements for an arbitration agreement. According to Art. 7(2) DAL, such an agreement shall be in writing. An arbitration agreement is in writing if "the reference in a contract to any document containing an arbitration clause […] is such as to make that clause part of the contract.", Art. 7(6) DAL. Hence, the DAL requires an arbitration agreement to be validly incorporated into the main contract in order to meet its formal requirements (*AMPATZI*, *pp. 170 et seq.; BERGER in: Berg, pp. 322 et seq.*).

195 In the present case, the Arbitration Clause has been validly incorporated into the Contract (*see supra §§ 140 et seqq.*).

196 Thus, the Arbitration Clause is also formally valid.

Conclusion to Issue I

The Parties' Arbitration Clause – providing for the jurisdiction of this Arbitral Tribunal – is governed by the law of Danubia under which it was validly incorporated into the Contract. Even if the law of Mediterraneo was applicable, the Arbitration Clause would not fall within the scope of the CISG. In any case, the Arbitration Clause was validly incorporated into the Contract under the substantive law of Mediterraneo as well as the CISG.

REQUEST FOR RELIEF

In light of the above submissions, CLAIMANT respectfully requests the Tribunal to find:

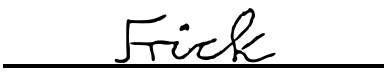
I. The Parties concluded a contract in 2020.

II. CLAIMANT's General Conditions of Sale were validly included into that contract.

III. The Parties validly agreed on the jurisdiction of the Arbitral Tribunal.

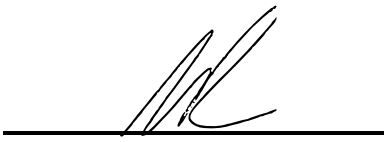
We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person who is not a member of this team.

Serafin Engeser



Dawit Frick

David Pham



Moritz Rotter

Paula Seidel

Helene Steiner