TWENTY-NINTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, AUSTRIA — 9 APRIL TO 14 APRIL 2022

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF INNSBRUCK

Ref.: AIAC / INT / ADM-123-2021

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

FABIAN ABFALTER - KATHARINA GÄCHTER - LUKAS JÄGER - MATTHIAS L. KRIVDIĆ
ALEKSANDRA MARKOVIĆ - KATHARINA STÖBICH

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Index of Abbreviations

AIAC	Asian International Arbitration Centre
Art / Arts	Article / Articles
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
COO	Chef Operating Officer
DAL	Danubian Arbitration Law
e.g.	exempli gratia (for example)
ed. / eds.	edition / Editor / Editors
et al.	et alii (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
GC	General Conditions of Sale
ICC	International Chamber of Commerce
ICJ	International Court of Justice
i.e.	id est (that is to say)
Inc.	Incorporated
Ltd	Limited Company
MAL	Mediterranean Arbitration Law
MfC	Memorandum for CLAIMANT
Mr	Mister
Ms	Miss
No. / N°	Number
NoA	Notice of Arbitration
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention")
para / paras	paragraph / paragraphs
para / paras	paragraph in Memorandum
PICC	UNIDROIT Principles for International Commercial Contracts, 2016

plc	public limited company
p. / pp.	Page(s)
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
RNoA	Response to Notice of Arbitration
SoF	Statement of Facts
tribunal	The Tribunal of the Arbitration case Ref. AIAC / INT / ADM-123-2021; respectively Prof. Nikolaus von Jacquin as Presiding Arbitrator, Ms Tenera Nigrescens as First Arbitrator and Mr Georges Chavanne as Second Arbitrator
U.S.	United States of America
UK	United Kingdom of Great Britain and Ireland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL ML on International Commercial Arbitration 2006
UNIDROIT	International Institute for the Unification of Private Law
v.	versus

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STATEMENT OF FACTS

1 The parties to this arbitration ("**arbitration**") are ElGup plc ("**CLAIMANT**"), a company engaged in the production and sale of RSPO-certified palm oil and palm kernel oil, registered in Mediterraneo and JAJA Biofuel Ltd ("**RESPONDENT**"), a producer of biofuel registered in Equatoriana. Since acquisition in late 2018, RESPONDENT has been a 100% subsidiary of Southern Commodities.

2 In **October 2011**, CLAIMANT submits its General Conditions of Sale ("**GC**") to Southern Commodities, as applicable to their business transaction, containing an arbitration clause in Art 9 ("**original clause**") according to the model of the FOSFA / PORAM Contract Form 81.

3 In **2014**, Ms Bupati acting as purchase manager for palm kernel oil at Southern Commodities examined CLAIMANT's arbitration clause as applicable pre-2016 in due process of arbitration proceedings initiated by CLAIMANT against Southern Commodities.

4 In **2016**, Mr Chandra acting as COO for CLAIMANT informed Ms Bupati in a phone call that CLAIMANT had changed the wording and content of Art 9 to the AIAC Model Clause and that the arbitration agreement would be removed from the contract template but would still be applicable to CLAIMANT's transactional business activities via its GC.

5 In **March 2019**, Ms Bupati was appointed as RESPONDENT's Head of Purchasing following its acquisition as a 100% subsidiary by Southern Commodities in 2018.

6 In **January 2020**, CLAIMANT decided to change the law applicable to its contracts to be the law of Mediterraneo, a signatory state of the CISG, but was yet to amend its GC.

7 On **28 March 2020**, on the occasion of a meeting at the Palm Oil Summit, Ms Bupati and Mr Chandra deliberated and agreed on a sales contract for the period of 2021-2025 for RESPO-certified palm oil at a price of 900 USD/t for the first and 5% inferior to the market price for the subsequent years ("**offer**"), but for which Ms Bupati would seek RESPONDENT's management's approval due to alleged controversies regarding CLAIMANT's palm oil business within three days. Mr Chandra mentioned that the contract was supposed to be governed by to the law of Mediterraneo.

8 On **1 April 2020**, Ms Bupati acting as representative of RESPONDENT, placed an order of delivery of 20,000 t of RSPO-certified palm oil per annum starting in January 2021 ("**order**") via email, including the commercial terms as discussed at the Palm Oil Summit.

9 On **9 April 2020**, the unilaterally signed contract containing the details as previously agreed was transmitted to RESPONDENT. The accompanying email highlighted the submission to the law of Mediterraneo and the fact that the contract form used is a customised and shortened version of the FOSFA / PORAM 81 form as was the basis in the previous 40 or so contracts concluded by Mr Chandra and Ms Bupati. The extended applicability of CLAIMANT's GC to any issues not regulated in the contract was declared.

10 On **3 May 2020**, Mr Rain acting for CLAIMANT as assistant to Mr Chandra, was contacted by Ms Fauconnier acting for RESPONDENT as assistant to Ms Bupati, to discuss details pertaining to the letter of credit as provided in the contract via phone call and promised to look into the fact that the contract had not been signed yet.

11 On **29 October 2020**, an article published by Commodities News annunciated that all negotiations between RESPONDENT and CLAIMANT regarding the contract had been discontinued.

12 On **30 October 2020**, Ms Lever acting as CEO for RESPONDENT declared all negotiations regarding the contract to be terminated and renounced all presupposed contractual relations.

13 In **November 2020**, after several rounds of negotiations and attempted mediation had proved unfruitful, it became clear that an agreement between the parties was impossible.

14 On **15 July 2021**, CLAIMANT submitted its Commencement Request and Notice of Arbitration ("**NoA**") to the Asian International Arbitration Centre ("**AIAC**") against RESPONDENT and requested a declaration of RESPONDENT's obligation for contractual performance.

15 On **14 August 2021**, RESPONDENT submitted its Response to NoA ("**RNoA**") to the AIAC requesting the rejection of all claims and to order CLAIMANT to bear the costs of arbitration and legal representation.

16 On **7 October 2021**, the parties consensually agreed in a telephone conference that the 2021 AIAC rules should be applicable to the proceedings.

Summary of Arguments

17 Public Opinion affects a company's value and success in numerous dimensions and it is of course legitimate for RESPONDENT to be mindful of how the public perceives its business activities. What is not acceptable, however, is to try and evade clear contractual obligations that RESPONDENT had already entered into just because it now deems them inconvenient in light of untrue allegations that have been ventilated against CLAIMANT in the public's sphere. RESPONDENT tries to evade its obligations on every imaginable level: it denies that it entered into a valid contractual agreement in the first place and it also tries to derail these proceedings by denying that this tribunal has jurisdiction to decide this dispute. Both these attempts go against the parties' clear contemporaneous agreement, and both must thus fail.

18 PART I **ISSUE I:** In order to determine the contract's validity, the tribunal must first determine the law applicable. Giving effect to the parties' choice, the governing law of the contract is the law of Mediterraneo including the CISG. Second, a clear agreement was reached due to correct interpretation of the parties' declarations.

19 PART I **ISSUE II:** CLAIMANT has proposed an arbitration clause in Art 9 of her GC, establishing jurisdiction of the arbitral tribunal. The inclusion of the GC in either parties' declarations is founded in their lengthy business relationship and substantiated by reference.

20 PART II **ISSUE III:** The tribunal should treat the arbitration agreement separate from the rest of the contract. By virtue of parties' implicit choice of law and choice of lex arbitri, the law of Danubia is appropriate and upholds the arbitral agreement to be valid, allowing CLAIMANT to pursue its interests in the dispute resolution mechanism shaped by party autonomy.

Part I: The contract is governed by and was validly concluded according to the law of Mediterraneo

A. The contract was validly concluded according to the law of Mediterraneo including the CISG

21 The existence and validity of a contract is determined by the law which would govern it if the contract was valid. It is therefore necessary to identify the law which is applicable to the contract.

1. The law of Mediterraneo including the CISG is applicable to the contract and therefore its conclusion

1.1. The law of Mediterraneo is applicable to the contract

22 Party autonomy is a pivotal principle in international commercial law. Hence, the expressed will of the parties is crucial in determining the substantive law which governs a contract (see e.g. Introduction to the Hague Principles on Choice of Law in International Commercial Contracts). CLAIMANT and RESPONDENT exchanged several emails regarding the law applicable to the contract they planned to conclude. (Exh C 1, Exh C 4, RNoA) Due to the facts of the case as well as PO 2 N°33 there is no doubt that the parties expressly chose the law of Mediterraneo to govern their contractual relationship.

23 The parties' concordant choice of law has to be respected by the arbitral tribunal. According to Rule 13.5 of the AIAC rules, under which the arbitration takes place, the arbitral tribunal has the power to determine "the rules of law applicable to the substance of the dispute […] in the absence of any agreement by the Parties." Therefore, the parties' choice of law prevails. It shall be noted, that any concerns regarding the validity of this choice-of-law agreement are unfounded. In the absence of any explicit rules regulating the validity of choice-of-law agreements, it has to be decided applying the general principles of international commercial law. Therefore, the validity of the parties' choice-of-law agreement must be determined according to the hypothetically applicable law. This is a conflicts rule, which is well established in various international, supranational or regional instruments, such as the Rome I Regulation (Art 3 (5)) in conjunction with Art 10 (1), the Mexico City Convention (Art 12 (1)) and the Hague Principles (Art 6 (1a)). The substantive law which is hypothetically applicable to the parties' contract is the law of Mediterraneo. As per PO 2 N°36, Mediterraneo has incorporated the Hague Principles on Choice of Law in International Commercial Contracts. In accordance with the principle of

party autonomy, the Hague Principles do not specify any formal or material requirements for choice-of-law agreements. Therefore, the parties' agreement on the law of Mediterraneo suffices for a valid choice-of-law agreement .

1.2. The law of Mediterraneo is applicable to the conclusion of the contract

24 The parties' choice of law regarding the contract must also be applied to the conclusion of the contract. This follows from principles of international law. Art 9 (1) Hague Principles is based on the principle that, unless the parties agree otherwise, the law chosen shall govern all aspects of the contract from its formation until its end. (Commentary on Hague Principles, Art 9) Particularly Art 9 (1e) states that the validity of the contract, which must include its conclusion, shall be governed by the law chosen by the parties. Similarly, Art 10 Rome I Regulation determines that the existence and validity of a contract shall be determined by the law which would govern it if the contract was valid. An equivalent rule is also found in Art 12 Mexico City Convention. Consequently, both the contract and the conclusion of the contract follow the law of Mediterraneo.

1.3. The CISG is part of the law of Mediterraneo and therefore applicable to the contract and its conclusion

25 The contract concluded between CLAIMANT and RESPONDENT meets all the requirements for the applicability of the CISG. Firstly, the contract falls under the territorial scope of application of the CISG. Not only is the contract of an international nature with CLAIMANT's place of business being Mediterraneo and RESPONDENT's place of business being Equatoriana, but it is also undisputed that, as required in Art 1 (1)(a) CISG, Mediterraneo and Equatoriana are both contracting states of the CISG. (PO 1) Secondly, the contract concluded between CLAIMANT and RESPONDENT falls under the material scope of the CISG, because it is a contract for the sale of goods. RSPO-certified palm oil as an aggregated asset certainly falls under the category of "goods" in the meaning of the CISG. (BRUNNER, 2019, p. 31; SCHWENZER, 2019, p. 28) Since most sub- and special forms of sale, including purchase according to type and delivery of goods by instalments, are covered by the CISG (BRUNNER, 2019, p. 31) and the contract does not fall under any of the exclusions in Art 2, it lies within the material scope of application. Thirdly, the temporal scope of application of the CISG is also met (Art 100 CISG). Furthermore, it follows from the facts that the parties have not excluded the

application of the CISG under Art 6 CISG. (PO 2 N°16) Consequently, the CISG is applicable to the contract and its conclusion.

2. The contract was validly concluded as RESPONDENT accepted CLAIMANT's offer

2.1. CLAIMANT's oral offer at the Palm Oil Summit

26 Whether CLAIMANT's proposal at the Palm Oil Summit qualifies as a legally binding offer needs to be evaluated on the basis of Art 14 (1) CISG requiring two elements to be met: (a) sufficient definiteness and (b) the offeror's intention to be bound.

27 Pursuant to Art 14 (1) CISG, an offer is sufficiently definite when the goods and the quantity are indicated. The quantity does not need to be defined in minute detail – rather "all we have" or "a truck full" is specific enough. (SCHWENZER, 2019, Art 14 para 46; BRUNNER, 2019, p. 126; HONSELL, 2009, p. 104) The Austrian Supreme Court considered even "larger quantities" to be sufficient to determine the quantity. (OGH 2 Ob 547/93) In the case at issue the quantity is 2/3 of CLAIMANT's annual production. Specifying the quality is not a requirement. (HONSELL, 2009, p. 104) For the price to be determinable, the offer or agreement must refer to the actual or future market price. (BRUNNER, 2019, p. 125-126; SCHWENZER, 2019 Art 14 CISG para 56; *T-18/*07)

28 The offer of RSPO-certified Palm Oil satisfies product and quality specification and the reference to the future market price renders the price sufficiently determinable. It can be assumed that RESPONDENT was aware of the agreed quantity as she herself translated 2/3 of CLAIMANT's annual production to be 20,000t / month.

29 If the offeror's statements and conduct do not clearly express his intention to be bound, they must be evaluated by interpretation (SCHWENZER, 2019, Art 14 CISG para 92), according to the party's intent if the other knew or could not have been unaware thereof (Art 8 (1) CISG). As both parties' were aware of CLAIMANT's search for a new business partner (Exh R3, N°6) and as they agreed for RESPONDENT to convey a final decision following management's approval within three days, mutual willingness to be bound can be reasonably assumed.

2.2. The oral offer was validly accepted by RESPONDENT via email on 1 April 2020

30 Art 18 (3) CISG requires an oral offer to be accepted immediately, unless the circumstances of the case indicate otherwise. (*A1 2003-70*) In the case at issue we are confronted with such

special circumstances (SCHWENZER, 2019, Art 18 para 60), as Ms Bupati declared that, she would like to seek approval of RESPONDENT's management and contact CLAIMANT within three days. CLAIMANT did not object to this procedure.

31 According to Art 18 (2) CISG, the acceptance must reach the offeror within the time he has determined; RESPONDENT asked for three days in order to consult its management, which CLAIMANT agreed to. Hence the nature of these must be interpreted. Given that RESPONDENT was aware of CLAIMANT's search for a new business partner, it cannot be assumed that CLAIMANT's intention was, that the offer should terminate immediately, but should rather be interpreted as a gentlemen's agreement which has no binding effect. (BUNTE, 2017, §1 para 6) Considering CLAIMANT's bad situation, in which he logically tried to find a contracting partner as soon as possible, it would have been unwise to set such a narrow deadline for acceptance.

32 RESPONDENT's awareness can be substantiated, as it placed its order later, but within short and reasonable time, which, in the absence of a legal definition in Art 18 (2) CISG, is generally understood to be the time necessary for transmission and consideration. (SCHWENZER, 2019, Art 18 para 54; HONSELL, 2009, p. 155) The time of transmission is negligible as acceptance by email is as immediate as oral notice. (SCHWENZER, 2019, Art 18 para 54; HONSELL, 2009, p. 155) The reasonable time for consideration depends on the relevant parameters which must be assessed on a case-by-case basis. (BRUNNER, 2019, p. 141) Given the size and duration of the contract, the acceptance on 1 April 2020 after four days (excluding the day of offer) via email should be considered quick and within reasonable time. As the consultation of RESPONDENT's management indicates a necessary internal decision-making process, it naturally requires some time. Considering the Palm Oil Summit took place on a Saturday, Ms Bupati was presumably able to contact RESPONDENT's management on Monday at the earliest.

33 As shown, the three-days constitute a gentlemen's agreement without binding effect. Another consequence is, that the rules of counting provided in Art 20 CISG do not apply as they refer to a fixed period for acceptance set by offeror (HONSELL, 2009, p. 180), thus RESPONDENT's acceptance by email on 1 April 2020 is valid.

2.3. RESPONDENT's mention of the arbitration agreement does not lead to a deviation from CLAIMANT's offer

34 RESPONDENT's mention of the arbitration forum in its email from 1 April 2020 does not prevent the parties' valid conclusion of the contract as it does not qualify as a counter-offer under Art 19 (1) CISG, because, first, parties' representatives discussed the arbitration matter at the Palm Oil Summit, the disposition is thus affiliated with the offer. (Exh C 2) Second, no provision of the offer was left out, and, third, no clause was transformed or adjusted in a way which accorded it a different meaning. Therefore no addition, limitation or modification in the sense of Art 19 (1) CISG occurred. Further, even if it were considered an addition, it does not amount to a *materially altering* deviation from the offer.

35 While additional terms relating to the settlement of disputes, including arbitration clauses, are generally considered to be materially altering as per Art 19 (3) CISG, the presumption is rebuttable and they may be qualified as immaterial if viewed as such by the parties or if it was derivable from usage or parties established practice. (BRUNNER, 2019, p. 145-146) Interpretation pursuant to Art 8 CISG determines whether or not a modification has actually been made. Taking into account practices and usages, interpretation shows that additions or modifications, if any, were already included in the offer without being expressly set out. (BRUNNER, 2019, p. 144)

36 First, it is a common business practice in the palm oil industry to include arbitration clauses in the GC. (PO 2 N°11) Second, it was parties' established practice to refer to arbitration. Ms Bupati's objection merely concerned the specific institution to be chosen, but not the manner of dispute resolution itself. Hence, the rules governing the dispute resolution would only change in minute detail and do not sufficiently infringe upon parties' general consensus to arbitrate. Further, Ms Bupati's concern of a palm-oil specific arbitration institution gaining authority was unwarranted from the beginning, as Art 9 of CLAIMANT's post-2016 GC (Exh R4) already nominated the AIAC, thus a neutral arbitration institution. Ms Bupati's knowledge of the fact could justifiably be assumed by CLAIMANT. (*para* 47)

3. In eventu: The contract was validly concluded by CLAIMANT's transmission of the contract template

3.1. RESPONDENT's offer via email of 1 April 2020

37 Even if one were to dispute the plausible assumption that the contract was concluded by way of CLAIMANT's offer at the Palm Oil Summit and RESPONDENT's acceptance in form of the

order placement, the contract would nevertheless have been concluded by CLAIMANT's transmission of the contract template. On 1 April 2020, RESPONDENT sent an email to CLAIMANT, ordering 20,000t of RSPO-certified palm oil per annum for the years 2021-2025 to be delivered in up to six yearly instalments with delivery starting in January 2021.This email constitutes an offer under the legal regime of the CISG.

38 All of the prerequisites for an offer laid out in Art 14 CISG are met in RESPONDENT's email. Firstly, it contains a declaration, namely the order of 20,000t of RSPO- certified palm oil per annum for the years 2021-2025, specifically directed at CLAIMANT (Exh C2). Secondly, RESPONDENT's email shows a clear intention to be bound to said declaration. After all, the terms of the contract were already agreed on by be the parties at the Palm Oil Summit (NoA, Exh C 1, Exh C 2). RESPONDENT only had to run them by its management before making a valid offer via email (Exh C 2), which it even referenced as "Purchase offer". RESPONDENT's intent to be bound to the contract also follows from interpretation pursuant to Art 8 CISG. Since an offer is not subject to any form requirements and need not even be designated as such (BRUNNER, 2019, p. 122), the reference "Purchase offer" certainly implies a declaration with intent to be bound. Thirdly, the declaration is so sufficiently definite that it may serve as the basis of a contract pursuant to Art 14 CISG. RESPONDENT's email containing its valid offer reached CLAIMANT's server on 1 April 2020, thus becoming effective in accordance with Art 15 (1) CISG. (BRUNNER, 2019, p. 131)

3.2. CLAIMANT accepted RESPONDENT's offer via email of 9 April 2020

39 Following RESPONDENT's email, CLAIMANT prepared the necessary contractual documents, which it sent to RESPONDENT on 9 April 2020. The facts of the case sufficiently substantiate that CLAIMANT expressed a corresponding intent to be bound to the terms of the offer pursuant to Art 18 (1) CISG. On 9 April 2020, at 06:09, CLAIMANT sent its statement of assent without any conditions regarding the commercial terms to RESPONDENT via email by accepting the terms of RESPODENT's offer explicitly, "which we accept". (Exh C4) The acceptance thus became effective upon receipt on RESPONDENT's server, even if it remained unread, as per Art 1.15 (1) CISG. (*Tenax SS Co. Ltd v. The Brimnes, 1974*) Thus CLAIMANT's email to RESPONDENT of 9 April 2020 expressly states that RESPONDENT's offer was accepted by CLAIMANT (Exh C 4). In addition, CLAIMANT's transmission of the contractual

documents, which contained the terms agreed on at the Palm Oil Summit and included in RESPONDENT's offer, is to be interpreted as an acceptance by conduct (Exh C 3). CLAIMANT's acceptance is effective, as it reached RESPONDENT in due time. Since RESPONDENT did not fix a time period for acceptance, such acceptance must follow within a reasonable time pursuant to Art 18 (2) CISG. A time period of eight days between the submission of the offer and the acceptance is to be considered reasonable.

4. In eventu: The contract was concluded with Ms Bupati's failure to object to the contractual terms

40 Even if one were to refute the conclusion of the contract by means of RESPONDENT's order placement and CLAIMANT's acceptance thereof, the contract would nevertheless have been concluded due to the business practice established between CLAIMANT and RESPONDENT.

4.1. The business practice established between CLAIMANT and Ms Bupati

41 Between 2010 and 2020, CLAIMANT and Ms Bupati established a business practice for contracts concluded between them. From 2010 onwards, contracts were usually concluded remotely without the representatives of the concluding parties being present in the same place. Ms Bupati would call Mr Chandra and inquire about the existing conditions before sending an order with a price, which would seldom be met by a counter offer but rather be accepted by CLAIMANT. The necessary contract documents would then be sent to her by Mr Chandra. Only in three cases parties introduced minor amendments, typically concerning the delivery conditions, or engaged in further discussion. Predominantly, contracts were accepted via sending back a signed version of the contract. At least five contracts were performed without the signed version of the contract having been returned. Objections to the contract documents were typically raised by Ms Bupati within one week after having obtained the documents (Exh C 1; PO 2 N°9).

42 It is known and undisputed that RESPONDENT is Southern Commodities' subsidiary. (SoF; PO 2, N°4; para 78) The control of a holding company over its subsidiary depends on the form and content of communications between both. As RESPONDENT seems to act in accordance with Southern Commodities, starting with the conclusion of contracts to the appointment of employees, and appreciating Southern Commodities full ownership, it is quite apparent, that Southern Commodities controls RESPONDENT and directs its actions. (ALCOCK, 2020) The

control exercised by Southern Commodities is domination, going far above mere determination of policies, exercising supervision or simply controlling finances. (Craig v. Lake Asbestos of Quebec, Ltd, 1998; RANDS, 1999) RESPONDENT is not only under full ownership and governance of Southern Commodities, but there is unity of interest and identity, as the subsidiary company only serves the purpose of centralising all of the parent company's palm oil activities such that RESPONDENT's individuality as an independent legal entity has ceased to exist, thus sufficiently qualifying Southern Commodities' past contract conclusions with CLAIMANT over the course of eight years as business practice on behalf of RESPONDENT. (Riddle v. Leuschner, 1959)

43 It is necessary to determine whether the parties' actions qualify as an individual practice under the CISG. Practices in the sense of Art 9 CISG are rules of conduct which are not acknowledged generally, but only between the individual parties at stake. Practices pursuant to Art 9 (1) CISG "become applicable based on the parties' mutual express or implicit intent". (BRUNNER, 2019, p. 100) An established practice requires "a certain duration of the commercial relationship, or a number of contracts concluded, so that it appears justified for one party to rely on a particular conduct as being usual". (BRUNNER, 2019, p. 100; *49 C 502/00*)

44 In general, the compliance with orders without explicit acceptance falls under the definition of such an individual practice. (BRUNNER, 2019, p. 100; *96 J / 00101*) The business relationship established between CLAIMANT and Ms Bupati had already lasted ten years, during which they had concluded at least 40 contracts. (Exh C 1; Exh C 4) Thus, CLAIMANT and Ms Bupati established a practice under the CISG according to which contracts were concluded and fulfilled even though the signed contractual documents were not always returned.

4.2. The business practice's consequence for RESPONDENT

45 Individual practices established between parties "supersede the provisions of the CISG if they are applicable pursuant to Art 9 (1)" (BRUNNER, 2019, p. 100). In the case of the practice established between CLAIMANT and RESPONDENT this means that in order to conclude the contract no explicit or implicit acceptance was necessary on part of RESPONDENT as long as Ms Bupati did not object to the terms of the contract within a week. Following from this practice, CLAIMANT had no reason to doubt that a valid contract had been concluded. Any other interpretation of the facts of the case would be grossly unfair to CLAIMANT and favour

an overpromising party.

5. CLAIMANT's GC of Sale were part of the contractual agreement

46 Apart from the conclusion of the contract it has to be determined whether the GC were validly included by the parties. As established in *paras 30-33*, CLAIMANT's offer was accepted by RESPONDENT's order including CLAIMANT's GC (*para* 47-50). Should the arbitral tribunal come to the conclusion that the contract was concluded by transmission of the contract template (*paras 37-39*), CLAIMANT's GC would still have been included in the contract as will be demonstrated in *paras* 48-50.

5.1. CLAIMANT's GC were validly included in CLAIMANT's offer at the Palm Oil Summit

47 CLAIMANT's GC were included in its offer at the Palm Oil Summit and accepted as such in RESPONDENT's acceptance. Whether GC are part of an offer is to be interpreted pursuant to Art 14 CISG and in the light of previous negotiations as well as existing practices or international usages. (HONSELL, 2009, p. 84) In particular, it has to be established whether RESPONDENT knew or had to know of CLAIMANT's intention to include its GC and their content. (HONSELL, 2009, p. 84) At the Palm Oil Summit, CLAIMANT and Ms Bupati discussed not only the commercial terms of their contract, but also CLAIMANT's new policy that contracts should be governed by the law of Mediterraneo while the remaining terms would be those of the previous contracts including CLAIMANT's GC. (PO 2, N°13) Since CLAIMANT explicitly referenced its GC in its offer and their content was already known to RESPONDENT due to previous contractual relationships, no doubt remains that the GC were validly included in CLAIMANT's offer. In the case of repeated contract conclusions, a reference to previously included GC is sufficient so long as they remain unchanged; changes to previous GC have to be indicated or else the GC which were to be expected by their recipient apply. (HONSELL, 2009, p. 87-88) The change of CLAIMANT's GC to include the arbitration clause was communicated to Ms Bupati in 2016. (Exh C 1, PO 2 N°7, PO 2 N°18) Although at this point it cannot be determined whether the new GC were actually sent to Ms Bupati in 2016, they must have been known to RESPONDENT. Following from this, the content of CLAIMANT's GG was indicated to RESPONDENT and as such the GC were those to be expected by it. Consequently, RESPONDENT accepted CLAIMANT's GC when it accepted CLAIMANT's

47 CLAIMANT's GC were included in its offer at the Palm Oil Summit and accepted as such in RESPONDENT's acceptance. Whether GC are part of an offer is to be interpreted pursuant to Art 14 CISG and in the light of previous negotiations as well as existing practices or international usages. (HONSELL, 2009, p. 84) In particular, it has to be established whether RESPONDENT knew or had to know of CLAIMANT's intention to include its GC and their content. (HONSELL, 2009, p. 84) At the Palm Oil Summit, CLAIMANT and Ms Bupati discussed not only the commercial terms of their contract, but also CLAIMANT's new policy that contracts should be governed by the law of Mediterraneo while the remaining terms would be those of the previous contracts including CLAIMANT's GC. (PO 2, N°13) Since CLAIMANT explicitly referenced its GC in its offer and their content was already known to RESPONDENT due to previous contractual relationships, no doubt remains that the GC were validly included in CLAIMANT's offer. In the case of repeated contract conclusions, a reference to previously included GC is sufficient so long as they remain unchanged; changes to previous GC have to be indicated or else the GC which were to be expected by their recipient apply. (HONSELL, 2009, p. 87-88) The change of CLAIMANT's GC to include the arbitration clause was communicated to Ms Bupati in 2016. (Exh C 1, PO 2 N°7, PO 2 N°18) Although at this point it cannot be determined whether the new GC were actually sent to Ms Bupati in 2016, they must have been known to RESPONDENT. Following from this, the content of CLAIMANT's GG was indicated to RESPONDENT and as such the GC were those to be expected by it. Consequently, RESPONDENT accepted CLAIMANT's GC when it accepted CLAIMANT's offer at the Palm Oil Summit.

5.2. In eventu: CLAIMANT's GC were included in the acceptance of RESPONDENT's offer

48 Should the arbitral tribunal come to the conclusion that the contract was not concluded by means of RESPONDENT's acceptance of CLAIMANT's offer at the Palm Oil Summit, but through CLAIMANT's acceptance of RESPONDENT's offer (*para* 39), the GC would still have been included into the contract. Under the CISG, the inclusion of GC into a sales contracts by means of an acceptance is governed by Art 19 with respect to the rules of interpretation of Arts 8 and 9. The practice established between CLAIMANT and RESPONDENT (*paras* 41-45) justifies that CLAIMANT's GC contained no material alterations (*para* 35) and thus became part of the contract.

49 Since CLAIMANT and Ms Bupati discussed that CLAIMANT's GC would be part of the contractual terms at the Palm Oil Summit (PO 2, N°13), it is likely that RESPONDENT knew that the GC would be part of the contract, but simply did not reference them in its offer, assuming that CLAIMANT would do so in the contract template.

50 RESPONDENT's silence in regard to the transmission of the GC does not constitute dissent. The offeror's silence in response to the attachment of standard terms and conditions is to be "interpreted as assent if a corresponding international trade usage or practice (Art 9 CISG) exists and additional circumstances justify it." (BRUNNER, 2019, p. 145) As previously mentioned, it is a common business practice in the palm oil industry to include arbitration clauses in the GC. (PO 2 N°11; *para* 36) Secondly, a practice was established between CLAIMANT and RESPONDENT, according to which the GC were already known to RESPONDENT. The international usage as well as these additional circumstances lay sufficient ground for the assumption that RESPONDENT has accepted CLAIMANT's GC. Thus they were validly included into the contract.

5.3. In eventu: GC were part of CLAIMANT's offer which was accepted by RESPONDENT

51 Should the arbitral tribunal come to the conclusion that the contract was not concluded by means of CLAIMANT's acceptance of RESPONDENT's offer, but by RESPONDENT's acceptance of CLAIMANT's offer of 9 April 2020 (*para* 45), the GC would still have been included into the contract. The prerequisites for the inclusion of GC into an offer were already established under *para* 47. Here too, it has to be determined whether RESPONDENT knew or had to know of CLAIMANT's intention to include its GC and their content. (HONSELL, 2009, p. 84) Since CLAIMANT explicitly referenced its GC in its offer and their content was already known to RESPONDENT due to previous contractual relationships, no doubt remains that the GC were validly included in CLAIMANT's offer. In terms of the need to include GC into the offer and the change to the GC in 2016, it is referred to *para* 47. CLAIMANT's GC were therefore included in its offer and accepted by RESPONDENT by way of the business practice established between CLAIMANT and Ms. Bupati.

B. In eventu: The contract was validly concluded according to the law of Danubia

52 As discussed above, the parties‘ contract is valid under the applicable law of Mediterraneo with the CISG. This conclusion is no mere artefact of any idiosyncrasies of Mediterranean law, but simply the result of the fact that the parties arrived at a bi-lateral agreement on the sale of RSPO-certified palm oil, each accepting a set of obligations and rights. Mediterranean law simply respects the parties' commercial choice, as would any other developed legal system. This is demonstrated by the only other law that could reasonably be considered to be applicable to the parties' contract (although it is not), the law of Danubia.

53 Some may consider the law of Danubia to be applicable to the contract, though it is not in this case, because CLAIMANT's GC seem to submit the parties' contract to the substantive law of Danubia, but parties' amended Art 9 GC by expressly choosing the law of Mediterraneo to govern their main contract. (NoA N°7)

1. The contract was validly concluded as CLAIMANT accepted RESPONDENT's offer

54 The validity of the parties' contract conclusion is the logical consequence of their concordant offer and acceptance and thus accepted by both the law of Mediterraneo with the CISG and the law of Danubia. The relevant provisions pertaining to CLAIMANT's offer, of Art 14 CISG and Art 2.1.2 UNIDROIT Principles largely correspond; the latter does not provide a legal definition of the required definiteness, referring instead to common consent that no essential term may be indefinite (VOGENAUER, 2015, p. 271) and only non-essential terms may be left vague without causing the offer's invalidity. CLAIMANT will thus refer to its arguments in *paras* 34-36 to maintain the offers validity under the law of Danubia.

55 Equally, Art 2.1.6 UNIDROIT Principles imposes the same prerequisites as Art 18 CISG for RESPONDENT's email to qualify as acceptance, allowing CLAIMANT's reference to *paras* 30-33. RESPONDENT's mention of the arbitration clause does not introduce any addition or modification, and if, it would not meet the threshold of it being materially altering, hence does not invoke Art 2.1.22 UNIDROIT Principles, for the reasons laid out in *paras* 34-36.

2. In eventu: RESPONDENT's contract offer was validly accepted by CLAIMANT's express acceptance and transmission of the contract template

56 Should the tribunal not consider RESPONDENT's order as a valid acceptance, the parties would have nevertheless concluded their sales contract by CLAIMANT's express acceptance and transmission of the contract template under the law of Mediterraneo which again, giving effect to party autonomy, is also valid under the law of Danubia. As both provisions, the CISG and the applicable UNIDROIT Principles exert the same standard, CLAIMANT refers to its arguments in *paras* 37-38 to uphold RESPONDENT's offer's validity. The threshold for definiteness being further substantiated by Ms Bupati requesting the preparation of the contract documents and deferring to her assistant for subsequent implementation, as per Art 2.1.2 UNIDROIT Principles.

57 Regarding CLAIMANT's acceptance, it is valid pursuant to Art 2.1.6 and Art 2.1.7 UNIDROIT Principles and equally became effective upon receipt on RESPONDENT's server as per Art 1.10 (2) UNIDROIT Principles in either case as argued in *para* 39 for CLAIMANT's acceptance per express statement and in *para* 39 for CLAIMANT's acceptance by conduct.

3. In eventu: CLAIMANT's offer was accepted by Ms Bupati's failure to object

58 The parties' established business practice warrants legal respect and consequence in the framework of any legal system and both the law of Mediterraneo and Danubia afford it the deserved authority to influence the parties' dealings. The parties' mutual knowledge of the practice and its applicability under the law of Mediterraneo on both CLAIMANT's offer and RESPONDENT's acceptance as per Art 1.9 (1) UNIDROIT Principles, amending the natural understanding of one party's silence pursuant to Art 2.1.6 (1) UNIDROIT to be interpreted pursuant to the party's intention as per Art 4.2 UNIDROIT Principles, as previously argued by CLAIMANT for the law of Mediterraneo in *paras 41*-45.

59 The business practice established between CLAIMANT and Ms Bupati may be imposed on CLAIMANT's relationship with RESPONDENT due to the reasons described in *para* 42.

4. CLAIMANT's GC of Sale were validly included

60 In accordance with the doctrine of separability the choice of the law applicable to the contract and to the arbitration agreement can differ. In the case at issue, the conclusion and effective conduct of the arbitration depends on the law of Danubia, being the chosen seat of arbitration. (LEGAL, 2013)

61 CLAIMANT's GC were validly included into the contract through RESPONDENT's silent acceptance of CLAIMANT's offer in its mail from 9 April 2020 as per Art 2:101 PECL.

4.1. CLAIMANT's GC were validly included by RESPONDENT's silent acceptance of CLAIMANT's offer

62 According to Danubian law even a reference in a contract to GC, which contain an arbitration agreement, would suffice to make the arbitration clause part of the contract. (NoA, N°16) In the case at issue, however, CLAIMANT has done even more, as it expressly stated that the GC should be included in its offer of 9 April 2020.

63 The GC that apply are the post-2016 GC including the Arbitration Clause. (NoA N°14.) Their content was known to RESPONDENT and they remained unchanged except for Art 9 (Exh R4) being replaced by the AIAC model clause. (Exh C1, N°4)

64 Under the applicable Danubian law the inclusion of GC into an existing contract, requires a clear statement, that such conditions are to be applied. It is, however, not necessary that they are made available to the other party. (PO 1, p. 46, III. 3.)

65 Firstly, RESPONDENT was aware of the post-2016 Art 9 GC's content since Ms Bupati was informed while negotiating a contract for Southern Commodities. (PO 2, N°18) A notice may be given by any means pursuant to Art 1.10 (1) UNIDROIT Principles. In the case at issue CLAIMANT notified Ms Bupati during a phone conversation pertaining to business negotiations in 2016. She accepted the adaptions immediately as required by Art 1.10 (2) UNIDROIT Principles and has not objected to the post-2016 version of the GC with its amended Art 9.

66 Ms Bupati herself admitted that - despite being aware of the amended Art 9 - she never demanded a copy of the post-2016 version of the GC, indicating she had sufficient knowledge thereof to include the altered GC into the commercial terms.

67 As the post-2016 GC have already been applied to 12-15 contracts between Ms Bupati and CLAIMANT (Exh C1, N°2), it would have been a mere and unnecessary formality to require them to be made available for the present contract conclusion, as due diligence to be expected at this level suggests that she was already familiar with the terms. This may be readily assumed by CLAIMANT due to their business practice under the bona fide principle in Art 1.7 UNIDROIT Principles.

68 Further, CLAIMANT's proposed inclusion of the GC and their applicability to issues not regulated in the contractual documents in the email on 9 April 2020 constitutes an offer according to Art 2.1.2 UNIDROIT Principles as it is sufficiently definite and indicates CLAIMANT's willingness to be bound by their provisions. By not objecting within one week or in its email of 3 May 2020 as RESPONDENT inquired about the recognised banks, the offer was accepted as per Art 2.1.6 UNIDROIT Principles. The parties' business practice (*paras* 41-45) allows for a common understanding of RESPONDENT's silence to be interpreted as acceptance while having regard to all circumstances as per Art 4.2 and 4.3 UNIDROIT Principles.

69 Minding all circumstances and prior conduct in five cases where no signed version of the contract was returned but the obligation performed regardlessly (Exh C1,3) this habitual omission to protest creates a business practice as per Art 4.3 UNIDROIT Principles. It supports party's expectation of a certain behaviour now and in the future while taking into account party's intention, trade usages and the principle of good faith. (*Murex v. Abbott, 2014*)

70 Here, a business practice has been established because of RESPONDENT's repetitive behaviour bearing the same outcome, making no amendments to CLAIMANT's offer on all these occasions. Therefore RESPONDENT willingly and knowingly reached an agreement by way of silence with CLAIMANT for the inclusion of the GC, which CLAIMANT perceived and was allowed to perceive as such. (VOGENAUER, 2015, p. 137-138) The consensual inclusion of the GC is thus based in the good faith principle in Art 1:201 PECL and parties' business practice as per Art 2:101 PECL. In order to exclude the application of the GC to this specific contract, RESPONDENT would have had to explicitly protest their inclusion. (EISELEN, 2011).

4.2. Business practice and RESPONDENT's knowledge of their content due to previous transmission thereof in contract conclusions according to D.1.

71 Had the GC not been included into the contract by CLAIMANT's clear statement and RESPONDENT's silent acceptance thereof, they still would have been included because of the established business practice that the post-2016 GC were included into eight contracts they concluded between 2016 and 2018. (PO 2 N°7)

72 The fact that Ms Bupati did not protest to the inclusion of the post-2016 GC in 2016, when she first heard about them from Mr Chandra in the course of the negotiations of a contract (PO 2 N°7) nor any time thereafter, she agreed to their inclusion by way of silence pursuant Art 2.1.6. (1) UNIDROIT Principles. Any other perception of Ms Bupati's silence would contradict the good faith principle. According to the case law of the ICJ, RESPONDENT's silence qualifies as a "qualified silence" as it is "equivalent to a tacit recognition by a unilateral conduct", (*Gulf of Maine, 1984*) which CLAIMANT rightfully interpreted as consent. (REINHOLD, 2013, p. 55)

73 RESPONDENT's conduct after the conclusion of the contracts from 2016 onwards, was the performance, which speaks for its knowledge of and willingness to conclude the delivery contracts according to agreed-upon terms. (*Franklins v. Metcash, 2009*)

74 Regarding the business practice from 2016 to 2018 of Ms Bupati's silence constituting acceptance of CLAIMANT's offer including the post-2016 GC, CLAIMANT references to *paras* 41-45.

75 Due to the business practice established, the inclusion of the GC can furthermore be viewed as an agreed commercial term (PO 2 N°13.). Established usages bind the parties according to Art 1.9 (1) UNIDROIT Principles, in cases where the parties knew or ought to have known about them or where they are widely known in international trade. (Commentary to TransLex-Principles, No. I.2.2) Tacit recognition is also a known international practice, when all relevant circumstances are considered and no relevant reasons exists to interpret the conduct differently.

76 CLAIMANT rightfully comprehended RESPONDENT's conduct in a certain way, endorsed by RESPONDENT's past behaviour, hence by virtue of reasonableness and continuance of established patterns which accounts for RESPONDENT's acceptance of the GC's inclusion pursuant to Art 1:302 PECL. (*ICC 11295*) Both parties are bound to abide by this established usage as per Art 1.9 (1) UNIDROIT Principles.

PART II: The arbitral tribunal has jurisdiction

77 As discussed in PART I, RESPONDENT's attempts to renege on its contractual obligations by disputing the valid conclusion of the contract and the valid inclusion of CLAIMANT's GC fail. PART II shows that RESPONDENT's further attempts to avoid honouring its contractual promises by means of procedural subterfuges fail as well. RESPONDENT has entered into a valid arbitration agreement and must now respect thus commitment.

78 Firstly, the parties' arbitration agreement is valid under the law applicable to this agreement (*paras* 82-95), the law of Danubia, which the parties' have explicitly chosen to govern this agreement (*paras* 85-88).

79 Secondly, the parties' arbitration agreement would be valid under the only other law that could reasonably be considered to apply to their arbitration agreement, the law of Mediterraneo excluding the CISG (*paras* 125-139).

A. The arbitration agreement can be governed by a law different from the law applicable to the main contract

80 As discussed in PART I, the law that is applicable to the parties' main contract, is the law of Mediterraneo and the parties have validly entered into this contract under this law. Likewise, the parties have entered into a valid arbitration agreement under the law that is applicable to this agreement. In fact, the parties agreement to arbitrate would be valid, and the tribunal would have jurisdiction, even if the main contract were invalid or deficient in any way (which they are not) (*RTS Flexible Systems v. Molkerei Alois Muller, 2010; Pagnan SpA v. Feed Products, 1987;* MILLS, 2020, p. 78-79), as the separate and autonomous character of the arbitration agreement is universally accepted by courts, arbitral tribunals and commentators. (*see e.g. ICC 8938*) Therefore, it is accepted that the validity, and therefore enforceability of the arbitration agreement shall prevail "apart from the remainder of the contract." (*Buckeye Check Cashing,. v. Cardenga, 2006*) Hence, even if the main contract itself or the GC's inclusion were flawed as argued by RESPONDENT (which it is not), the tribunal's jurisdiction would be preserved.

81 This broad consensus is reflected in the doctrine of severability, which also extends to the question of the applicable law. The arbitration agreement may thus be governed by a different law than the main contract. (*Buckeye Check Cashing, Inc. v. Cardenga,* 2006) as disussed below, in the case at issue, the law applicable to the parties's arbitration agreement is the law of Danubia

and the agreement has been validly concluded under this law.

B. The arbitral tribunal has jurisdiction under the applicable law of Danubia

82 The parties have not expressly chosen the law that is applicable to their arbitration agreement and the tribunal thus enjoys broad discretion in determining the applicable law. In exercising this discretion, the tribunal will take into consideration all factors relevant for making this determination. In this case, the weight of these factors clearly points into one direction: to Danubian law. As discussed in more detail below, these factors include the parties implicit choice of the law of Danubia, the fact that this law is most intimately connected to the case and the application of Art V of the NYC.

1. The law of Danubia is applicable to the arbitration agreement

83 As subsequently argued a multitude of reasons supports the view that the arbitration agreement is governed by the law of Danubia This is first due to the fact that the law of Danubia is applicable due to the parties' choice (*paras* 85-91) or subsidiarily by virtue of closest connection (*para* 92). Secondly, the NYC and the UNCITRAL ML equally mandate the law of the seat of the arbitral tribunal to be applicable (*para* 93-94).

84 In order to safeguard the parties' justified expectations, an express choice or implied choice by the parties will carry particular weight in determining the law applicable to the arbitration agreement. The assessment of the parties' implied choice will also take into consideration the question which law has the closest and most real connection to the case. (KWAN, 2020; *Sulamérica v Eneas, 2012; Enka v. Chubb, 2020*)

85 **First**, in this case parties' correspondence only includes their express choice of the law applicable to their main contract, namely the law of Mediterraneo. Due to the separability doctrine, this choice does **not**, however, extend to the law applicable to their arbitration agreement. Whether there has been an express choice or not requires a look at the arbitration agreement in its entirety. (*KABAB-JI v KOUT, 2020*; *Enka v Chubb, 2020*)

86 The arbitration clause contained in Art 9 of CLAIMANT's GC (Exh R 4) states that the seat of arbitration should be Danubia as well as that the contract should be governed by the substantive law of Danubia. However, the second part was amended by the parties as they agreed in their correspondence that the contract should be governed by the law of Mediterraneo. (Exh C 2,4)

87 In contrast to the *Kabab-JI v. Kout* case the wording of the arbitration agreement at hand does not make it clear that there was an express choice of law to govern the arbitration agreement. The arbitration clause contained in Art 9 of the GC states:

"This contract shall be governed by the substantive law of Danubia"

Further, in the email of 1 April 2020 (Exh C2) Ms Bupati clearly states that "the submission [to the law of Mediterraneo] of the sales contract" was not an issue. By clearly referring to the sales contract it becomes obvious that the law of Mediterraneo should only govern said sales contract and not the arbitration agreement within. Also, in the email of 9 April 2020 (Exh C4) it is pointed out that "the sale will be governed by the law of Mediterraneo" thus again only referring to the sales contract itself.

88 **Second**, the parties' have, however, included an express choice of law clause in Art 9 GC that **does** extend to their arbitration agreement. By choosing the seat in Danubia the parties demonstrated their intention, that the arbitration agreement should be governed by the law of Danubia. (BORN, 2014, p. 510f.; ASHFORD, 2019, p. 287f.; MARAVELA, 2020; GLICK and VENKATESAN, 2018, p. 143, 146; *C v D, 2007; Enka v Chubb, 2020*) The parties' express choice is thus clear: the substance of their contract should be governed by the law of Mediterraneo, but their arbitration should be governed by the law of Danubia. The arbitration agreement, which is of a procedural nature and forms the very basis for the parties' arbitral proceedings is thus also governed by the law of Danubia. (HENDERSON and WALDEK, 2014; *C v D, 2007*)

89 **Third**, even if the tribunal took the view that the parties' choice of the seat does not amount to an **express** choice of the law applicable to the arbitration agreement (which it does), it must at least be accepted as reflecting an **implicit** choice of the parties that the arbitration agreement be governed by the law of Danubia. The implied choice is determined by deducing parties' intention from the surrounding circumstances. (CHAN and YANG, 2020, p. 642; *Akai v. The People's Insurance, 1996*)

90 By choosing Danubia as the seat of arbitration the parties clearly articulated their intent to insulate the dispute resolution mechanism from the national law of either party, because the substantive commercial obligations are governed by the law of Mediterraneo, which is not a neutral law but instead CLAIMANT's place of business. Since RESPONDENT made clear in

Exh C 2 that they wanted any arbitration to take place under a non-industry related arbitration institution, thus clearly expressing RESPONDENT's will for neutrality, parties obviously desired any disputes about the dispute resolution mechanism to be governed by the neutral law of Danubia. (GLICK and VENKATESAN, 2018, p. 145)

91 Further, the presumption of the law of Danubia governing the arbitration clause's validity is necessary in order to provide consistent treatment by the law and procedure in determining the validity. (BOSE, 2020, p. 56; CHAN and YANG, 2020, p. 642) This is in line with a general strong interest of parties to avoid any conflict between the law applicable to the arbitration clause and the lex arbitri. (KRÖLL, 2021, para 42) There is no indication in the file, that the parties did not share thus common-sense interest when agreeing on Danubia as the law of the arbitration.

92 **Forth**, even if the tribunal disregard that the choice of seat was at the same time an implied choice of the law governing the arbitration agreement, the law of Danubia would still be applicable, as it constitutes the closest connection to the agreement. (BORN, 2014, p. 510; MARAVELA, 2020) Danubia, being the place where the arbitration agreement is performed as well as the fact that Danubian authorities have the power to supervise the arbitral proceedings applying the national arbitration law strongly indicates this close connection. (CHOI, 2015, p. 110)

93 **Fifth**, even if the tribunal was not persuaded by the express choice of the parties for the law of Danubia, by the implicit choice of the parties for the law of Danubia and by the fact that the law of Danubia has the closest connection to their arbitration agreement, Danubian Law would be applicable on the basis of the conflict of law provisions in both the NYC and the UNCITRAL ML, which both form part of the legal basis on which the tribunal has to decide this case. Specifically, Art V(1)(a) of the NYC as well as Art 34(2)(a)(i) of the UNCITRAL ML both state that an arbitration award must be recognised if the arbitration agreement is found to be valid **under the law of the country where the award was made**. (BORN, 2014, p. 493; BOSE, 2020, p. 56) As this only applies absent an express or implied choice of law, it further supports the scheme presented in *para* 83. (BORN, 2014, p. 495, QUI, 2020, p. 55)

94 It is undisputed that the law where the award is made in this case is the law of Danubia, as the seat of arbitration. Therefore, this also is the law that is relevant for determining the validity of the arbitration agreement pursuant to the UNCITRAL ML, the lex arbitri in this arbitrtaion. It is

universally accepted that the same is true under the NYC. Even though the wording of Art V refers to the enforceability of arbitral award, its scope of application also includes the the enforceability of the arbitration agreement underlying a future award. If the award is valid pursuant to the law of the seat i.e. Danubian law in this case, CLAIMANT can enforce this arbitration agreement against RESPONDENT and RESPONDENT thus cannot evade its obligation to arbitrate the present dispute. (BORN, 2014, p. 499; BOSE, 2020, p. 56; CHOI, 2015, p. 107)

2. The provisions applicable under the law of Danubia

95 Danubia is a member of the NYC, its national arbitration law is a verbatim adoption of the UNCITRAL ML and Danubian general contract law is modelled after the UNIDROIT Principles with the adaption that the inclusion of standard terms into a contract only requires a clear statement but not that the terms be made available to the other party. Further, Danubia is not a contracting state of the CISG.

96 Even if the Arbitration Clause is not valid under Art II NYC, according to Art VII (1) NYC it can still be valid if it fulfils the requirements under the law applicable to the arbitration clause's validity, therefore if declared formally valid by the national arbitration law of Danubia ("**DAL**"). (*34 Sch 20/08*)

97 Art 7 Opt 1 UNCITRAL ML as opted for by Danubia, requires the arbitration agreement to be in writing in order to be formally valid. However Art 7 Opt 1 para 6 states that a reference in a contract to a document containing an arbitration clause, e.g. GC, constitutes an arbitration agreement in writing if the reference is such as to make that clause part of the contract.

98 Since under Danubian law it is sufficient for GC to be included into the contract if a clear statement is made that such conditions are to be applied, the inclusion of the GC including the arbitration clause fulfils the requirement of Art 7 Opt 1 UNCITRAL ML.

3. The arbitration agreement was validly concluded under the law of Danubia

99 The Parties have not only concluded a sales contract but also validly incorporated the arbitration clause contained in CLAIMANT's GC in their agreement. This was done by way of agreement and interaction between Mr Chandra, Ms Bupati and Mr Rain (*paras* 100-103). The parties have expressly consented to the arbitration agreement and all requirements for formal validity have

been met (*paras* 104-116). Should the tribunal find that the parties have not expressly agreed to the arbitration clause, they did so implicitly due to a business practice between them (*paras* 117-122).

3.1. The arbitration agreement was concluded by interaction of Mr Chandra, Ms Bupati and Mr Rain

100 As already elaborated above, on 28 March 2020, Mr Chandra and Ms Bupati met at the Palm Oil Summit and discussed the contract at issue. Among other things, they also discussed CLAIMANT's wish to submit possible future disputes to arbitration (Exh C1, N° 11).

101 Ms Bupati did not turn down CLAIMANT's wish at the summit and, on 1 April 2020, placed her written palm oil order with Mr Chandra, also addressing the dispute mechanism discussed at the summit and indicating that she would not be able to agree to the submission of future disputes to an arbitration institution which exclusively deals with palm oil because of the strong opposition of influential activist groups in Equatoriana against such institutions (Exh C2). With this communication, agreeing to arbitration under a particular condition, the parties have already reached agreement to arbitrate their dispute, as the only condition made by RESPONDENT at the time was already met. As Mr Chandra had already told Ms Bupati in 2016, CLAIMANT's GC already contained the AIAC model clause, the model clause of an institution that is non-palm-oil-related anyway. At any rate, when Ms Bupati suggested and offered in her email to select any non-industry related arbitration institution (Exh C1), knowing that agreeing to any other dispute resolution mechanism than arbitration was almost impossible for Mr Chandra (Exh C1) and would put the whole deal at risk, the choice of the concrete arbitration institution, meeting the only condition set by RESPONDENT, was left open and could therefore be made by CLAIMANT. In response, Mr Rain sent Ms Fauconnier an email on 9 April 2020, stating that Claimant would accept Ms Bupati's offer and attached the corresponding contractual documents. In this email, Mr Rain also pointed to the fact that issues not regulated in the attached contractual document would be governed by Claimant's GC which were known to Ms Bupati (Exh C1 N°4)

102 The GC contained a detailed arbitration clause (Exh R4), which provided for the submission to arbitration under the AIAC Rules, the seat and language of the arbitration as well as the applicable substantive law.

103 In principle, all of this had already been discussed by Mr Chandra and Ms Bupati at the Palm Oil

Summit (NoA, N°5; PO 2, N°13; Exh C1, N°10-12; Exh C2). Against this backdrop, Ms Bupati's email, in which she placed her order "as agreed at the Summit", had to be understood exactly in the sense in which Mr Rain apparently understood it: as an offer to conclude, *inter alia,* an arbitration agreement under CLAIMANT's contractual terms, especially its GC, provided that the parties submit to a palm-oil-neutral institution. Mr Rain's email therefore reflected just what Ms Bupati must have had in mind when making her offer on 1 April 2020, including the incorporation of CLAIMANT's GC with a submission to a non-palm-oil-related institution of CLAIMANT's choice. In other words, Mr. Rain simply accepted what Ms Bupati had implicitly offered in the light of her conversation with Mr Chandra. This is underscored by the fact that neither Ms Bupati nor her assistant Ms Fauconnier have ever articulated any form of protest in response to Mr Rain's email.

3.2. The parties have expressly consented to arbitration

104 The parties have concluded a valid arbitration agreement through the above acts. Art 2.1.1 UNIDROIT Principles states that "[a] contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement". According to Art 2.1.2 UNIDROIT Principles, a proposal constitutes an offer "if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance".

105 Ms Bupati's email of 1 April 2020 with her proposal to submit future disputes to arbitration meets the requirements for a valid offer under Art 2.1.2 UNIDROIT Principles. Her offer to submit to arbitration is definite as, in the light of her discussions with Mr Chandra at the summit, it is clear that the details of the arbitration agreement should be precisely those laid down in CLAIMANT's contractual terms, especially its GC, provided that no palm-oil-related institution gets involved. Ms Bupati's intention to be bound by her proposals is evident throughout the whole email and becomes especially visible in her choice of words when introducing the order: "I would like to place the following order with you" (Exh C1).

106 It is obvious that, in Ms Bupati eyes, negotiations had been successfully completed at this point in time and that she did not want to put the whole order at risk only because of a possible conflict over the dispute resolution mechanism, which is exactly why she made a binding offer to submit to a non-industry-related institution, effectively leaving the choice of the concrete arbitration institution to CLAIMANT.

107 This offer to submit to arbitration was accepted by CLAIMANT. Pursuant to Art 2.1.6 UNIDROIT Principles, "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance". Pursuant to Art 2.1.19 UNIDROIT Principles, this provision also applies in cases where parties use standard terms in concluding a contract. As for the inclusion of standard terms under Danubian contract law, standard terms only have to be declared applicable but do not have to be made accessible in order to become part of an agreement. In his reply email of 9 April 2020, Mr Rain not only explicitly stated that CLAIMANT accepted RESPONDENT's offer but also implicitly expressed his assent to the submission to arbitration by validly incorporating CLAIMANT's GC (Ex C4). The GC were known to Ms Bupati and executed her wish to submit to a palm-oil-neutral institution. Thus, Mr Rain's email reflected exactly what Ms Bupati had proposed in the light of her prior conversation with Mr Chandra. RESPONDENT's offer was therefore accepted by CLAIMANT and the parties concluded a valid arbitration agreement.

108 Should the arbitral tribunal, however, come to the conclusion that there were deviations between Ms Bupati's offer and Mr Rain's acceptance (quod non), the arbitration agreement still would have been concluded. According to Art 2.1.11 UNIDROIT Principles, "an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance." Should Mr Rain's email have contained any deviations from Ms Bupati's offer, which is not the case, they were not materially altering.

109 Ms Bupati had talked about the provisions of the arbitration agreement with Mr Chandra before and expressed her will to submit to arbitration as discussed, provided that the arbitration institution is non-palm-oil-related. This is exactly what Mr Rain accepted by sending the confirmatory documents, especially the GC, in his email of 9 April 2020, only leaving room for deviations in details. Ms Bupati has never objected to this email. The Parties have therefore also concluded an arbitration agreement even if Mr Rain's acceptance slightly deviated from Ms Bupati's offer.

110 The arbitration agreement concluded by the parties is formally valid as it meets all requirements set out in Art II NYC and Art 7 DAL. Both Art II NYC and Art 7 DAL provide that an arbitration agreement must be in writing. To further define what is meant by "in writing", Art II

(2) NYC states that an arbitration agreement is in writing both when it is a clause in a contract or when it is an individual agreement. To be valid, the agreement must be either signed by the parties or contained in an "exchange of letters or telegrams". The vast majority of authorities nowadays interprets this provision to also extend to emails. (BORN, 2021, p. 729; SCHRAMM, 2010, p. 83) This is convincing with regard to the purposes of Art II NYC's „in writing" requirement, which are (1.) to ensure that there is proof of the conclusion of the arbitration agreement and (2.) proof of its content as well as (3.) to ensure that the parties are aware that they are entering such an agreement. (SCHRAMM, 2010, p. 74) In this light, there is no discernible reason to treat emails differently than letters or telegrams: emails provide reliable record of an agreement just as much as letters or telegrams do and also serve the "warning purpose" of the written form to the same degree. (BORN, 2021, p. 729, 730) That the wording of Art II(2) NYC is limited to "letters and telegrams" owes solely to the fact that at the time of origin of the NYC in 1958 these means of communication were the most popular and emails did not exist. (BORN, 2021, p. 730)

111 As for the inclusion of an arbitration clause contained in GC and the „in writing" requirement, it is generally regarded to be sufficient when one party does not transmit the GC to the other party but only generally refers to them, provided that there has been an already existing business relationship between the parties due to which they could and should have known the arbitration clause. (SCHRAMM., 2010, p.91) This approach is well-reasoned, as under these circumstances the reference to the GC serves all the above-mentioned purposes of the requirement that the agreement be in writing: (1.) the conclusion of the agreement is recorded through the reference to the GC, (2.) its content is recorded in the GC and (3.) it is ensured that the parties were aware they were entering an arbitration agreement as they knew it was contained in the GC due to their business relationship.

112 In the case at issue, the requirement of an "agreement in writing" in the sense of Art II NYC is fulfilled. Ms Bupati sent her offer regarding a submission to arbitration to Mr Rain by email, who accepted it not only by explicitly writing so but also by sending her the contract documents together with a written reference to CLAIMANT's GC. The contract was thus concluded through an exchange of writings in the sense of Art II(2) NYC.

113 That the GC themselves were not attached to Mr Rain's email does not invalidate the arbitration agreement. As laid out above, pursuant to Art II NYC, it is sufficient for the inclusion of an

arbitration clause in GC when the parties refer to their GC in writing if there has been a preexistent business relationship due to which the parties should have known that there is an arbitration clause in these GC. This is precisely what is the case here. In his acceptance email of 9 April 2020, Mr Rain referred to the GC in writing, which is just what Ms Bupati must have expected him to do when making her offer. Ms Bupati, the authorized agent of RESPONDENT, was aware that there was an arbitration clause included in CLAIMANT' GC because she had been in a business relationship with CLAIMANT for over 10 years and had concluded numerous contracts on the basis of the current GC in the years from 2016 to 2018 (PO 2, N°7). Moreover, she had even talked about the arbitration clause with Mr Chandra, who had provided her with detailed information on it (Exh C1, N°4). Furthermore, the arbitration clause was accessible to Ms Bupati throughout the whole duration of the negotiations and even thereafter on CLAIMANT's website (PO 2, N°18). The arbitration clause was therefore validly concluded pursuant to Art II NYC.

114 If the arbitral tribunal were to conclude, however, that, contrary to the above arguments, the arbitration agreement did not comply with the requirements of Art II NYC, the arbitration clause would still be valid. For in this case, according to the more-favourable law provision of Art VII(1) NYC, the more lenient provision Art 7 DAL would apply.

115 Just like Art II NYC, Art 7 DAL states that arbitration agreements must be in writing (Art 7(2) DAL). However, the written form stipulated here is to be understood more broadly than that of Art II NYC: Art 7(3) DAL provides that an arbitration agreement is to be regarded as being in writing when the content of the arbitration agreement is recorded in any way, in particular also when it is recorded electronically (Art 7 (4)). As for the conclusion of arbitration agreements contained in GC, Art 7(6) DAL expressly states that "[t]he reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract".

116 In the present case, the parties have validly agreed on an arbitration agreement pursuant to Art 7 DAL. The agreement was effectively incorporated by Mr Rain's reference to CLAIMANT GC in his email of 9 April 2020 (Exh C 4). This email, as set out above, is to be understood as an acceptance of the offer made by Ms Bupati in her email of 1 April 2020 (Exh C 2). The content of the arbitration agreement is fully recorded in the parties' email correspondence and in CLAIMANT GC (Exh C 2-4 and R 4) and therefore meets the

requirement of being in writing in the sense of Art 7(2) and (3) DAL. The conclusion of the arbitration clause by reference to CLAIMANT GC was valid, as Mr Rain stated that "issues not regulated in the attached [contractual] document" were regulated by CLAIMANT's GC. He thus made clear that they would be part of the agreement, which was exactly what Ms Bupati must have had in mind when making her offer. Whether or not Ms Bupati had knowledge of the exact contents of CLAIMANT's GC (which she had as shown above) does not matter under Art 7 DAL, which does not impose a knowledge requirement (*Kastrup v. Aluwood, 2009*).

3.3. Should the tribunal find that the parties have not expressly agreed to the arbitration clause, they did so implicitly due to their established business practice

117 As laid out in more detail above (*paras* 41-45), there is a business practice between the parties, pursuant to which offers of CLAIMANT made by, inter alia, sending contractual documents are accepted by RESPONDENT if it does not object within one week upon receipt of the offer. This practice also pertains to arbitration agreements contained in GC, as all offers that Ms Bupati had not explicitly accepted but that had nevertheless been performed in the past included CLAIMANT's GC with the arbitration clause (Exh C1, N°3,4).

118 Against this backdrop, it is clear that the parties have concluded a valid arbitration agreement, even if the Arbitral Tribunal should decide that the parties have not entered into such an agreement by Ms Bupati making a corresponding offer and Mr Rain accepting it on 9 April 2020. In this case, Mr Rain's email of 9 April 2020 could reasonably only be regarded as an offer to conclude, *inter alia,* the arbitration agreement included in CLAIMANT's GC. This offer was subsequently accepted by Ms Bupati on the basis of the business practice between the Parties, as she did not object to Mr Rain's offer within a week's time. The parties have hence concluded an arbitration agreement also in this case.

119 The arbitration agreement concluded on the basis of the business practice between the parties is formally valid pursuant to Art VII(1) NYC in conjunction with Art 7 DAL, as it meets the „in writing" requirement of the latter provision.

120 According to the more favourable right provision in Art VII(1), the NYC does not prevent parties of any right to avail themselves of an arbitration agreement. As a consequence, Art 7 DAL applies in the case at hand because its "in writing" requirement is more lenient than that

of Art II NYC.

121 As already stated above, Art 7(3) DAL provides that an arbitration agreement is to be regarded as being in writing when the content of the arbitration agreement is recorded in any way, in particular also when it is recorded electronically (Art 7 (4)). Whether the agreement itself was concluded in written form, orally, or by other means does not matter (Art 7(3) DAL). As for the conclusion of arbitration agreements contained in GC, Art 7(6) DAL states that a reference to the GC which should be included suffices.

122 The content of the Parties' arbitration agreement is recorded in CLAIMANT's GC. Mr Rain referred to these GC in his email of 9 April 2020 to make them part of the contract between the parties. All above cited requirements being met, the agreement was validly concluded under Art 7 DAL and is to be recognized by the Tribunal.

C. Even if the law of Mediterraneo applied, the arbitral tribunal has jurisdiction

123 As discussed above, the parties' arbitration agreement is valid under the applicable law of Danubia. This conclusion, however, is not a mere artefact resulting from any idiosyncrasies of Danubian law. It is simply the result of the fact, that both parties did arrive at an agreement to arbitrate any future disputes between them relating to their main contract. Danubian law simply respects that choice, as would any other developed legal system. This is demonstrated when looking at the only other legal system that could reasonably be considered to be applicable to the parties' arbitration agreement (although it is not in this case), the law of Mediterraneo.

1. Even if the arbitral tribunal were to find the law of Mediterraneo to be applicable, the arbitration clause would be valid

124 Some may consider the law of Mediterraneo to be applicable to the arbitration agreement, though it is not in this case, because it is parties' express choice of law to govern their main contract. In this section, CLAIMANT will first show, that if one considers the law of Mediterraneo to be applicable, it would not include the CISG, as it does not apply to arbitration agreements. (*paras* 129-133) Secondly, CLAIMANT will show that the parties validly entered into their arbitration agreement even when applying the law of Mediterraneo (excluding the CISG). (*paras* 134-138) Thirdly, CLAIMANT will show, that the arbitration agreement would even be valid if one chose to submit it to the CISG. (*paras* 139-140)

125 This should not come as a surprise. As established, the validity of the arbitral agreement under

the law of Danubia is not merely an erratic consequence of some legal idiosyncrasy, but rather the law giving effect to the parties' understanding when entering into their agreement, that "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration…" The law now obligates RESPONDENT to honour this agreement, be it the law of Danubia, the law of Mediterraneo without the CISG, the law of Mediterraneo with the CISG or in fact any other developed legal system taking seriously the parties' justified expectations at the time of contract formation.

2. The provisions applicable under the law of Mediterraneo

126 The arbitration agreement meets the standards exacted by the law of Mediterraneo.

127 Mediterraneo is a member of the NYC, its national arbitration law as well as the general non-harmonized contract law are a verbatim adoption of the UNCITRAL ML and the UNIDROIT Principles. Mediterraneo is a contracting state of the CISG but there is conflicting jurisprudence regarding the applicability of the CISG to arbitration clauses within sales contracts.

128 In regards to the formal validity of the arbitration clause according to the NYC CLAIMANT refers to *paras* 111-114. Therefore the previously mentioned rule of Art VII NYC also renders the arbitration clause to be valid if it is valid under Mediterranean arbitration law ("MAL"). Since the MAL has adopted Art 7 Opt 2 of the UNCITRAL ML there is no requirement for the arbitration agreement to be in writing. It is sufficient under Art 7 Opt 2 if there is an agreement by the parties to submit all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, to arbitration.

129 But first the CISG's applicability must be determined. While there is conflicting case law regarding the applicability of the CISG on the arbitration clause in Mediterraneo, there are numerous arguments why the CISG should not be applicable and why instead the non-harmonized contractual law should be applied to the validity of the arbitration clause.

2.1. The doctrine of severability requires the arbitration agreement to be treated differently from the remainder of the contract

130 As discussed in detail above (*paras* 80-81), under the doctrine of severability an arbitration agreement must be evaluated separate from the main contract and the law applicable to the arbitration agreement must be determined separately from that applicable to the main contract. For thus reason it is irrelevant for determining the law applicable to the arbitration agreement

that the main contract is a sales agreement to which the CISG applies. The relevant question thus is not whether the CISG applies to sales contracts. It does. The question is whether the CISG applies to arbitration agreements. And it does not, for the reasons discusses below.

2.2. Arbitration agreements are of procedural nature and therefore lack sales contract's characteristica

131 Arbitration agreements fall outside the scope of the CISG due to their procedural nature, lacking the sales contract characteristics. (SCHWENZER and JAEGER, 2017, p. 320; SCHWENZER and JAEGER, 2016) The wording of Art 4 CISG points towards the CISG only being applicable to the formation of **the sales contract** and the rights and responsibilities arising out of this **sales contract**. (*I ZB 78/20*) The CISG should therefore not be applied to the arbitration agreement. The reference in Art 4.1 CISG to the parties' rights and obligations arising from a contract does not include the rights and obligations arising from an arbitration clause, which will be governed by the non-uniform domestic law, since these are different from the rights and obligations of a sales contract. (VISCASILLAS and MUNOZ, 2011, p. 71.)

2.3. If the arbitration agreement was concluded after a dispute arose, the CISG would not be applicable

132 The force of the above logic becomes evident when considering that, the CISG would clearly not be applicable to the arbitration agreement if the agreement to arbitrate was concluded after the main contract was concluded or after a dispute arose. In thus case, the procedural nature of the arbitration agreement as separate from the sales contract would emerge particularly clearly. Therefore, as to treat arbitral agreements consistently, it is illogical to apply the CISG merely because the arbitration clause is part of the main contract. (VISCASILLAS and MUNOZ, 2011, p. 70-71.; SCHWENZER and JAEGER, 2016)

2.4. Art 12 and 96 CISG point towards and intend to exclude arbitration agreements

133 Also, Arts 12 and 96 suggest that the drafters of the CISG intended to exclude arbitration agreements from the CISG as otherwise States that require arbitration agreements to be in writing might have made a respective declaration. (VISCASILLAS and MUNOZ, 2011, p. 74)

3. The arbitration agreement was validly concluded under the law of Mediterraneo excluding the CISG

134 Since the CISG is not applicable to the arbitration clause on the grounds portrayed in *paras* 129-133, the formation and validity of the arbitration agreement is solely governed by the non-harmonised contractual law of Mediterraneo and its national arbitration law.

135 In terms of the arbitration agreement fulfilling the standards of the NYC the same arguments apply as in the analysis pertaining to Danubian law in *paras* 111-114.

136 Further, even if the tribunal were to arrive at the conclusion that the NYC's requirement was not entirely met, the more lenient rules of the MAL would still confirm the arbitration agreement's validity as Art 7 MAL does not impose any form requirements upon it and is deferred to by Art VII NYC as to uphold parties' mutual intention to arbitrate. Hence, any form, including oral and implied agreements, sufficiently fulfils the standards imposed by MAL, as it corresponds to Art 7 Opt 2 UNCITRAL ML, "incorporation by reference" institutes a valid arbitral agreement. (BANTEKAS and ORTOLANI, 2020, p. 139)

137 The question whether the arbitration agreement is valid in formation must be resolved according to the non-harmonised contractual law of Mediterraneo, as the CISG is not applicable. As Mediterranean law is a verbatim adoption of the UNIDROIT Principles, the decisive provision to scrutinise the validity of the clause is Art 2.1.19 UNIDROIT Principles, which states that the general rules of formation are to be employed when concluding a contract using standard terms.

138 As both the Danubian and Mediterranean non-harmonised contractual law are verbatim adoptions of the UNIDROIT Principles, they exert identical legal standards on the formation, so CLAIMANT's argument in *paras* 100-109 equally sustains the arbitration agreements valid conclusion if the law applicable were the law of Mediterraneo.

4. Even if the CISG was applicable, the arbitration agreement would still be valid

139 The CISG does not impose any formal requirements upon parties' arbitration agreement, thus, if the tribunal were to find it applicable, it would not be subject to any examination adherent to formal legal standards. Withal, if the tribunal were to determine the CISG's applicability to be restricted to the arbitral agreement's formation, its formal validity would be preserved for the reasons provided in *paras* 110-126.

140 As argued in *paras* 46-51, CLAIMANT's GC have been validly included in the contract under the standard exerted by the law of Mediterraneo including the CISG, consequently the therein included arbitration clause was likewise subject to parties' consensus.

PART III: Conclusion and requests

141 In conclusion, the tribunal's jurisdiction is preserved irrespective of the law of Mediterraneo including the CISG or Danubia being chosen to be applicable to the contract and arbitration agreement, but parties' choices of law should be respected, serving the pre visibility of proceedings characteristics and justifying their preference to submit to arbitration.

142 RESPONDENT's willingness to be bound in addition to sufficient definiteness of the offer can be ascertained under several circumstances. Due to Ms Bupati's established business practice and employment, RESPONDENT was aware of the GC's content at the time of their order, equally so if the tribunal were to find the contract to have been concluded at a later time.

143 The doctrine of severability then empowers the tribunal to uphold parties' implicit choice of law of Danubia to govern the arbitration agreement, but the arbitration agreements validity and valid formation perseveres by either submission.

144 In view of the above, **CLAIMANT respectfully requests** the honourable tribunal to affirm

I. the consensual submission of the substantial contract to the law of Mediterraneo including the CISG,

II. the law of Danubia's applicability to parties' arbitral agreement, and

III. its proper jurisdiction derived from parties's agreement to arbitrate.

145 CLAIMANT reserves the right to amend its requests as may be necessary.