TWENTY-NINTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, AUSTRIA — 9 APRIL TO 14 APRIL 2022

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF INNSBRUCK

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

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

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
DRM	Dispute Resolution Mechanism
e.g.	exempli gratia (for example)
ed. / eds.	edition / Editor / Editors
et al.	et alii (and others)
Exh C	CLAIMANT's Exh
Exh R	RESPONDENT's Exh
GC	General Conditions of Sale
ICC	International Chamber of Commerce
ICJ	International Court of Justice
icw	in connection with
i.e.	id est (that is to say)
Inc.	Incorporated
Ltd	Limited Company
MAL	Mediterranean Arbitration Law
MfC	Memorandum for CLAIMANT
MfR	Memorandum for RESPONDENT
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 the acquisition in late 2018, RESPONDENT has been a 100% subsidiary of Southern Commodities.

2 In **October 2011**, CLAIMANT submitted 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 that 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 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 was a customised and shortened version of the FOSFA / PORAM 81 form which also constituted the basis of the previous contracts (more than 40) 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 ARGUMENT

17 In respect of two persons' contractual relationship a certain level of trust in and expectation of repetitive behaviour is of course permissible, but in a commercial setting the circumstance of either party — most prominently the party's professional ties to a company — must always be taken into account. It is not tolerable that CLAIMANT acted on its mere presumption of Ms Bupati's acceptance despite the fact that at the crucial time she was already representing a different set of interests. CLAIMANT now tries to shift the drawback of its inactivity onto RESPONDENT and reap the benefits as if a contract had been concluded.

18 CLAIMANT tries to construct the obligation on a multitude of levels: it alleges that a five-year contractual agreement had been concluded and entangles RESPONDENT in legal proceedings. RESPONDENT must now withstand the attempt fabricate an arbitration agreement and a contractual obligation to performance. As both allegations lack the very basis of a contractual relationship, namely consensus, both must fail.

19 **ISSUE I**: To evaluate its own jurisdiction, the tribunal should first determine that the CISG is applicable to the potential arbitration agreement. However, any law which could reasonably be considered to be applicable, would regard it impossible, that an arbitration agreement could have been concluded in absence of the Parties' consensus.

20 **ISSUE II**: As the Parties never mutually agreed to a set of terms but rather both introduced materially altering changes in their alleged acceptance, no contract was concluded. This further negates the possibility of an arbitration agreement having been introduced by virtue of the contract and precludes any contractual obligation of RESPONDENT.

21 **ISSUE III**: Finally, even if the contract had been concluded, the Parties would not have not validly included CLAIMANT's GC nor agreed on those terms in a separate agreement, preventing the inclusion of an arbitration agreement via inclusion in standard terms.

ISSUE I: This tribunal does not have jurisdiction over the present dispute because the arbitration agreement has not been validly concluded

A. The Arbitration Agreement has not been successfully incorporated into the contract under the law of Mediterraneo

1. Mediterranean contract law governs the Arbitration agreement

22 Contrary to the arguments brought forth by CLAIMANT the law that governs the arbitration agreement is the law of Mediterraneo as the law of the main contract and not the law of Danubia. The fact that the Parties expressly chose Mediterranean law to govern the entire contract shows that they also implicitly chose said law to govern the arbitration agreement. Additionally, the law of the main contract also has the closest connection to the arbitration agreement and should therefore be applied absent a choice of law agreement. Further, the validation principle should not be applied.

1.1. The Parties did not expressly choose a law to govern their arbitration agreement

23 The reason for the discussion on the law applicable to the arbitration clause is that the agreement lacks an express choice of law in this regards. Had there been an express choice, the law applicable to the arbitration agreement would be clear.

24 Since the alleged choice of law clause is contained in the GC, the non-inclusion of the GC as argued in *paras* 122-151 consequently renders any choice of law contained in the GC inapplicable. Even if the GC were included in the contract (quod non), there would still not be any express choice of the law of Danubia, but rather a general choice of Mediterranean law.

25 While it is possible for arbitration agreements to contain a choice of law clause specifically aimed at the arbitration agreement and hereby expressly choosing the law applicable to said arbitration agreement (Born, 2021, p. 525), Art 9 GC does not provide such express choice of Danubian law. Contrary to CLAIMANT's opinion the choice of law clause contained in Art 9 GC is not an express choice of law only for the arbitration agreement but rather a general choice of law for the entire sales contract, including the arbitration clause.

26 First, the wording "this contract" in Art 9 GC clearly indicates that CLAIMANT intended the entire contract to be governed by the substantive law of Danubia and not just the arbitration agreement. Otherwise CLAIMANT would have worded it to specifically aim at the arbitration agreement. Secondly, Mr Chandra explicitly asked Mr Rain to point out to Ms Bupati, that the

sales contract should be governed by the law of Mediterraneo in deviation from the choice of law clause contained in CLAIMANT's sales conditions because the GC had not been revised accordingly yet. (Exh C1, N° 13; Exh C5, N° 2) While this change might not have been made yet at the time of negotiations between CLAIMANT and RESPONDENT, the clause in Art 9 GC was however amended accordingly by the Parties in their correspondence. Therefore Art 9 should be read as "this contract shall be governed by the substantive law of Mediterraneo".

27 Also the fact that the 2021 AIAC rules now contain a choice of law clause specifically pointed at the arbitration clause does not necessarily lead to a different interpretation of the choice of law clause contained in the 2017 rules. The changes made in the 2021 model clause merely reflect the now generally recognized view amongst arbitrators, tribunals and commentators that in order to avoid any delays or costs, resulting out of the need to examine the law governing the arbitration agreement, one should always specify the applicable law. (*Weigand and Baumann*, 2019, p. 10)

28 Further, CLAIMANT's position that the doctrine of separability also allows the arbitration agreement to be governed by a law other than the law of the main contract does not hold up, as the doctrine of separability only applies in cases where the main contract is not valid, non-existent or simply ineffective. Apart from these cases, the arbitration agreement is just a clause of the main contract and should therefore not be treated as separate from the rest of the contract. (*Ashford*, 2019, p. 290; *Sulamerica v Enesa,* 2012, para 26)

29 Second, even if the doctrine of separability was applicable to the determination of the applicable law, this would not lead to the conclusion, that the law governing the arbitration agreement must be different from the one governing the main contract. In fact, it is rather common that the arbitration agreement as well as the underlying contract are governed by the same law. (*Born*, 2021, p. 511)

30 By changing the clause contained in Art 9 GC the parties chose the law of Mediterraneo to govern the entire contract.

1.2. The Parties implicitly chose Mediterranean law to govern the arbitration agreement

31 RESPONDENT disputes CLAIMANT's position that the choice of seat should also be an implicit choice of law governing the arbitration agreement because (1) the Parties did not wish to submit the contract to multiple different laws, (2) the previous contracts have no relevance

when determining the applicable law in the present case, (3) commercial Parties can expect a choice of law to extend to the entire contract and (4) the arbitration agreement does not become a separate contract on its own, just because it is contained in a different document.

32 While CLAIMANT tries to make it seem as if the choice of the seat is generally regarded as an implicit choice of law governing the arbitration agreement this approach is highly controversial, in fact, there is a variety of different approaches to this issue. Among those, the most convincing approach is that the law chosen to govern the main contract should also be the one governing the arbitration agreement, because parties of a contract usually want the entire contract to be submitted to the same law. (*Sulamerica v Enesa,* 2012, paras 11,15, 26) This assumption also extends to the arbitration clause. (*Hope and Johansson*, 2021, p. 156) In the absence of any factors suggesting otherwise, the Parties clearly intended to submit the arbitration clause to the law of Mediterraneo. (*Weigand and Baumann*, 2019, p. 10) In contrast, the choice of the seat of arbitration in Danubia is not by itself sufficient to reject the general inference, that the choice of law for the main contract also applies to the arbitration agreement included in the main contract. (*Hope and Johansson*, 2021, p. 152).

33 The argument made by CLAIMANT in *para* 34 of its Memorandum, that the previous sales contracts between Mr Chandra and Ms Bupati have all been governed by Danubian law and that the change of the substantive law was only made in order to secure a more favourable position with regards to unjustified terminations of the contracts and that the change therefore had no relation to the arbitration agreement, is not convincing. First, the previous contracts do not have any relevance in determining the law that should be applicable to the arbitration agreement at hand, because they contained a different arbitration and choice of law clause. Second, the reasons for the change of the applicable law were not known to RESPONDENT. RESPONDENT was merely informed of the change of the applicable law to the law of Mediterraneo but was never informed about the reasons for this change. Therefore RESPONDENT could only assume that this change was made in order to secure a more favourable position with regard to all matters of the contract, including the arbitration agreement RESPONDENT justifiably assumed that any arbitration should also be submitted to the law of Mediterraneo.

34 While CLAIMANT alleges that the choice of law as well as the choice of seat in Art 9 GC should be the only basis for determining the governing law of the arbitration agreement

CLAIMANT fails to realise two important points: First, the GC have not even been validly included into the contract as will be shown in *paras* 120-151. Secondly, the choice of law clause in Art 9 GC has been amended as already argued in *paras* 25-26.

35 Also, the doctrine of separability does not apply to questions of the applicable law as argued in *paras* 28-29. The fact that the doctrine of separability has no bearing in deciding the law applicable to the arbitration agreement is further substantiated by the fact that this doctrine is one, which is usually not very well known among commercial parties. Therefore, commercial Parties can reasonably expect that a choice of law extends to the entire contract. (*Hope and Johansson*, 2021, p. 156) Since the contract was not negotiated by lawyers, but instead Ms Bupati and Mr Chandra, RESPONDENT could reasonably believe that the change of law to the law of Mediterraneo also meant that the arbitration agreement will be governed by Mediterranean law as well.

36 Also, the arbitration agreement in the present case does not form a free-standing document, but instead is part of the main contract. Just because the arbitration agreement is contained in a different document, does not make it a free-standing one. In fact, free-standing agreements are very rare. In *BCY v BCZ* the Singapore High Court named two examples of free-standing arbitration agreements: (1) when Parties conclude a single arbitration agreement to cover disputes arising out of several contracts and (2) if the arbitration agreement is concluded after a dispute has already arisen. (*Singh, Kartikey and Foo*, 2017) Therefore, an arbitration agreement contained in a different document does not automatically make it freestanding. While the GC may be applied to a multitude of cases the arbitration agreement between CLAIMANT and RESPONDENT would have solely been concluded (quod non) for the contract at hand. Consequently, any argument that the arbitration agreement should be governed by the law of the seat because it does not form part of the main contract fails to convince.

1.3. Absent a choice-of-law agreement, Mediterranean law should apply as it has the closest connection to the arbitration agreement

37 When applying the closest connection test in the case at hand, it results in the law of Mediterraneo being the law with the closest connection to the arbitration agreement.Determining the law with the closest connection, in absence of indications to the contrary, there is a presumption that the law of the contract should also apply to the arbitration agreement. (*Dewan*,

2021, p. 112, *Weigand and Baumann*, 2019, p. 10) The arguments brought forward by CLAIMANT fails to portray any indication strong enough to rebut this presumption.

38 The choice of a seat alone is insufficient to disprove the presumption that the law of the main contract has the closest connection to the arbitration agreement. Only in such cases, where there is no express choice of substantive law the law of the seat would presumably have the closest connection. (*Dewan*, 2021, p. 113)

39 Further, the law with the closest connection is the law of Mediterraneo because of the close commercial connection between the contract and Mediterraneo (*Sulamerica v Enesa*, 2012) Contract negotiations took place in Mediterraneo (NoA, N°4) and CLAIMANT's place of business is also located there. (NoA, N°1)

1.4. The validation principle should not be applied because this rule can apply only once it has been ascertained that the Parties actually agreed on arbitration

40 While the validation principle tries to give recognition to the parties' common intent to have disputes decided by an arbitral tribunal, in the case at hand there was never any common intent regarding arbitration. (*Commentary to Trans-Lex Principle*) The validation principle therefore cannot be applied.

41 First of all, the Parties in the present dispute never even agreed to arbitrate. While it is true that RESPONDENT suggested that if they were to agree to arbitration, they should "at least select a non-industry related arbitration institution" (Exh C2), this is not enough to infer a common intent of the Parties to agree to arbitration.

42 In fact, RESPONDENT clearly objected to arbitration in its email on 1 April 2020, stating that "the submission of the sales contract to Mediterranean law, … is less a problem for us than the submission to arbitration, in particular if we submit to an institution which exclusively deals with palm oil". (Exh C2) By stating this RESPONDENT clearly showed that it did not want to agree to arbitration in general, irrespective of the institution.

43 Since the purpose of the validation principle is to uphold Parties' commercial intentions (*Born*, 2014, p. 838) it cannot be applied in cases where one Party clearly has absolutely no intention to agree to arbitration.

2. The CISG is applicable to the arbitration agreement

44 Besides not being expressly submitted to its scope of application, the CISG should also apply to arbitration agreements for multiple reasons as argued in *paras* 45-48. Further, the legislative history does not exclude arbitration agreements from the applicability of the CISG as assumed by CLAIMANT (MfC *paras* 56-58). Also Arts 19 (3) and 81 (1) CISG clearly point towards its applicability. Last, the CISG has the closest connection of eligible laws to an international sales contract.

2.1. The CISG applies to the arbitration agreement despite not expressly including it in its scope of application

45 Contrary to CLAIMANT's opinion that the CISG should not be applied as it only governs "contracts for international sale of goods" and an arbitration being a "contract on procedure" the scope of applicability of the CISG also extends to arbitration agreements.

46 First, one cannot just see the entire arbitration agreement as being procedural. Moreover, one has to differ between a contractual and a procedural component of the arbitration agreement. (*Schwenzer and Jaeger*, 2016, para 103). Therefore, only the procedural aspects, namely questions of form, fall outside the scope of applicability of the CISG. Questions regarding the contractual components (e.g. the valid conclusion) are, however, governed by the provisions of the CISG. (*Schwenzer and Jaeger*, 2016, para 104)

47 Further, arbitral tribunals tend to apply the law with the closest connection to the arbitration agreement, if there was no explicit or implicit choice by the Parties. The same rule should also be applied, when the issue at hand is not which of the different national laws should be applied, but whether one should apply the non-harmonized or the harmonized law within the same national law. Absent a clear choice by the Parties as of whether or not the CISG should apply to the arbitration agreement as well, the fact, that the contract at hand is an international sales contract clearly shows, that the CISG, as the harmonized contractual law, has a closer connection than the non-harmonized law. (*Schwenzer and Jaeger*, 2016, para 105).

48 Second, Art 4 CISG has been widely criticized in the past as it is too narrow and does not mention matters which are clearly covered by the CISG, for example the interpretation of statements (Art 8 CISG) and contract modifications. (Art 29 CISG; *Kröll*, 2000, p. 41) Therefore, CLAIMANT cannot just rely on the wording of Art 4 CISG to argue that matters of arbitration are excluded from the scope of application. While it is widely recognised that

questions of jurisdiction of courts are not governed by the CISG, the arbitration agreement in the case at hand forms a part of the general contract between CLAIMANT and RESPONDENT. (*Kröll*, 2000, p. 43). As a consequence, the issue of consent in regard to the procedural clause is closely connected to the contract conclusion. Consequently, since the contract is governed by the CISG, the same should apply to questions of validity of the arbitration clause. (*Kröll*, 2000, p. 43)

2.2. The legislative history of the CISG does not sufficiently demonstrate that arbitration agreements are not subject to the CISG

49 In its argument (MfC *para* 58) CLAIMANT neglects that the article that was proposed by Mexico, Panama and Peru in the process of drafting the CISG did not concern the applicability of the CISG to arbitration agreements. Instead it was supposed to acknowledge the ways of dispute settlement available to parties of international commercial contracts. This was also explicitly stressed out by the proposing sponsors of the article. Since the proposal suggested that disputes should be settled solely by either "the ordinary judicial channels or by arbitration". (*A/CONF.97/L.19*, paras 54, 55) By providing parties with only these two choices the suggestion left out other recognised methods of dispute resolution such as mediation. Therefor it seems reasonable that the drafters of the convention felt like limiting dispute resolution to only these two options was outside of their competence.

2.3. Art 19 (3) and Art 81 (1) clearly point towards the CISG's applicability to arbitration agreements

50 In Art 19 (3) CISG dispute settlement procedure is regarded as a materially altering term of the contract. Additionally, Art 81 (1) CISG states that the avoidance of a contract does not have any effect on the means of dispute settlement. Therefore, the CISG clearly recognizes arbitration clauses in contracts and should also apply to them. (*Lakhina*, 2020, p. 11)

51 The fact that Art 19 (1) CISG states that any deviation in the acceptance of the contract regarding dispute settlement clauses counts as materially altering and causes the non-conclusion of the contract at the same time means, that in the case of concurring statements by the Parties automatically make them part of the contract. (*Schroeter*, 2019, para 50; *Saenger*, 2021, para 19) Therefore, the conclusion of settlement agreements is regulated by the CISG and shows that the CISG should also be applied to the formation of arbitration clauses.

52 Also, Art 81 (1) CISG only states that arbitration agreements are separable from the remainder of the contract for purposes of affirming their validity in case a contract is declared invalid. It does however not state in any shape or form, that arbitration agreements are in fact separate in every manner from the contract. (*Schwenzer and Beimel*, 2021, p. 56)

53 From the wording of both, Art 19 (3) as well as Art 81 (1) CISG it is obvious that the CISG treats arbitration agreements equal to other contractual provisions. (*Schwenzer and Jaeger*, 2016, p. 103)

2.4. The application of the CISG is further supported by the fact that the CISG has the closest connection to the contract

54 If one rejected any choice of law approach, as regularly done in France, one would apply international substantive law rules to the arbitration agreement. (*Flecke-Gimmarco and Grimm*, 2015, p. 45) Since the contract at hand is an international sales contract, the only set of specific international rules that would make sense to be applied, would be the CISG, as it is the law, which has the closest connection to an international sales contract. This further substantiates RESPONDENT's position that the CISG should be applicable to the arbitration agreement.

3. Under Mediterranean law including the CISG, the arbitration agreement was not validly incorporated into the alleged contract

55 If the Parties had concluded a contract (quod non) as they could not have validly incorporated an arbitration agreement into the contract due to a lack of incorporation of CLAIMANT's GC as elaborated by RESPONDENT in *paras* 120-151.

56 As CLAIMANT rightfully acknowledges in *para* 68 "the arbitration agreement forms an integral part of the GCS" and its incorporation is therefore "inseparably intertwined" with the valid incorporation of the GC. It must therefore not be subjected to a different legal standard of incorporation but must satisfy the requirements of the CISG. (*see* MfR *paras* 44-54) The issue at hand is a question of contract formation and should be evaluated under the same standard (MfC *paras* 118-119) due to its close affiliation via its embeddedness in CLAIMANT's GC which could be part of the contract (quod non) allegedly concluded by the Parties.

57 A person thus seeking to incorporate an arbitration agreement via inclusion in its standard terms must first show her intent to incorporate said terms and second, make them available to the other person in a reasonable manner. (*Dobrynski*, 2018 p. 6) The intention to incorporate

CLAIMANT's standard terms and the therein embedded arbitration agreement must be clear to a reasonable person's understanding as set out in Art 8 (2) CISG, (*CISG-AC Op. 13*, N°5.1; *Schroeter*, 2019, Art 14 para 44) which will be discussed in *paras* 102.

58 However, RESPONDENT disputes CLAIMANT's assumption that the "make available test" is optional and satisfied in the case at hand (MfC *paras* 122, 130-132). This test mandates, that GC be transmitted in text or made available in another term by the Party using them (*Machinery Case*), establishing the offeror's duty. CLAIMANT's position that upon satisfaction of the first requirement there shall be a shift of this burden (MfC *para* 122) as to require RESPONDENT to investigate would not only be irrational but render the second condition, which must be cumulatively satisfied, obsolete, allowing for the incorporation of terms whose content one Party of a bilateral accord might not have been privy to. Due to the extensive implications which any manner of dispute resolution exerts on a contractual relationship, mutual knowledge of the clause's actual content is necessary. Even more so, as provisions within standard terms typically serve the interests of the Party introducing them. (*Kruisinga*, 2013, p. 352) As RESPONDENT was not aware of the GC's content as further argued in *paras* 146-151 it also could not have been aware of the arbitration agreement. If CLAIMANT argues that RESPONDENT must have been aware of the arbitration agreement included in it GC (MfC *para* 66) it does not act in good faith, as Ms Bupati's email on 1 April, objecting to the submission to arbitration and in particular any "institution which exclusively deals with palm oil" (Exh C2) does not find a proxy in CLAIMANT's GC at the time of the contract, which already provides for the neutral AIAC.

59 Even if the tribunal were to find, that CLAIMANT's GC were validly incorporated into the contract, Parties would not have agreed on the submission to arbitration as provided in Art 9 of CLAIMANT's GC as RESPONDENT, for lack of awareness, could not have consented.

4. Even if the CISG was not applicable, the Parties would not have concluded an arbitration agreement

60 As discussed above, the Parties' arbitration agreement does not satisfy the conditions to be validly incorporated into the contract. (*paras* 55-59) This is a logical consequence of the fact that one Party could not have been aware of the arbitration terms the other attempted to impose upon their relationship. The legal system chosen by the Parties (*paras* 31-36) simply adheres to the standards developed in international business transactions and any developed legal system

RESPONDENT will demonstrate the fact by considering the only other legal order to be reasonably considered to be applicable to the Parties' arbitration agreement (though it is not) taking into consideration the Parties' justified expectation at the time of contract formation: the national arbitration law and general non-harmonised contract law of Mediterraneo excluding the CISG which are verbatim adoptions of the UNCITRAL ML and UNIDROIT Principles respectively.

4.1. The arbitration agreement would not have been validly incorporated into the contract

61 The Parties could only have concluded an arbitration agreement if they had established consensus regarding arbitration as their method of dispute settlement, which they did not.

62 Even if one were to find, that the mere reference to CLAIMANT's GC in the contract template (Exh C3) and statement in the Email on 9 April that the GC were to apply to "issues not regulated in the attached [contractual] document" (Exh C4) was sufficient to incorporate the Art 9 arbitration agreement into its offer (quod non, *see paras* 141-144), RESPONDENT could not have been aware of the actual terms proposed the text was never transmitted nor otherwise accessible in a reasonable manner. (*see paras* 145-151) A shift of burden as to force RESPONDENT to inquire about the terms provided in the supposed arbitration agreement, as assumed by CLAIMANT (MfC *para* 122) further is preposterous as standard terms typically serve the party using them and CLAIMANT chose to again amend them to enhance its position should a dispute arise.

63 Further, if CLAIMANT construes RESPONDENT's assent to the arbitration agreement as incorporated in its GC, it omits Ms Bupati's objections to arbitrate in general and especially any "institution which exclusively deals with palm oil." (Exh C2) As the AIAC is a non-specialised arbitration centre, RESPONDENT apparently did not have access to the GC as CLAIMANT looked to incorporate them into the contract. Since then, RESPONDENT never indicated any change in its displeasure with the proposed DRM. RESPONDENT never affirmed CLAIMANT's offer as required by Art 2.1.1 UNIDROIT Principles in neither acceptance nor conduct which could have expressed its agreement.

64 If one were to ignore the absence of consent, the substantive criterion for contract formation, as CLAIMANT appears to do by restricting its evaluation to the formal prerequisite, the most basic principle of contract law - consent - would be neglected.

4.2. The Parties did not conclude an arbitration agreement in their correspondence

65 As an arbitration agreement may be either incorporated by reference in Parties' preceding negotiations, which it did not, or have been concluded as an autonomous agreement, RESPONDENT will briefly address the issue though no such claim can be reliably derived from Parties' statements (Exh C1, R3) nor their common communication via electronic media.

66 Ms Bupati's Email in 1 April clearly expressed her discontent with CLAIMANT's choice of DRM and even more so, with any arbitral institution specialising on the palm oil trade (Exh C2). Acting for RESPONDENT, she identifies it as a "problem", implicating a substantial impediment to the contract's conclusion and nowise abandons this position in the later stages of negotiations.

4.3. Even if the Parties had agreed to arbitrate, they did not do so in a formally valid way

67 Even if the Parties had consented to arbitration, which they did not, they would have needed to do so in accordance with both, Art 7 MAL and Art II NYC for the clause to be formally valid and enforceable as sought by CLAIMANT.

68 First, Art 7 MAL does not impose any formal requirements on the Parties' arbitration agreement, but was based on the intent, that if the Parties' had overtly agreed to submit their dispute to arbitration and given the widespread acceptance of arbitration in commercial transactions, they should not have to expend much energy to and should not be hindered by what had come to be considered a formality. (*Binder*, 2019, p. 9; *UNCITRAL secretariat*, 2008, p. 28) At the time of active negotiation on the non-concluded contract, the general appreciation for the benefits of arbitration had not ceased, but RESPONDENT disfavoured this method of dispute resolution for the potential contractual relationship with CLAIMANT, which it clearly expressed in its correspondence. (Exh C2)

69 Second, Art II NYC demands the arbitration agreement to either be in writing or adhere to the more lax standards of national law. The writing, here, is neither satisfied by the Parties correspondence nor by CLAIMANT's reference in the contract template. Parties never declared an analogous intent to arbitrate any disputes arising from the legal relationship (*paras* 65-66, Exh C2, R3)

70 Should an arbitration agreement be concluded via reference, as CLAIMANT attempts to do, it must be specific and ensure that the parties are aware of their agreeing to a condition of such

potent consequence. (*Granitalia v. Agenzia Maritime Sorrentini*, 2000) A reference as general as in the case at issue would simply not suffice. (*Schramm*, 2010, p. 91) One may only figure an arbitration agreement arising out of CLAIMANT's contract template, had it been accepted by RESPONDENT, pertaining to monetary grievance arising of poor or absent contractual performance (Art 7, Exh C3). This particular provision would further discourage any devoir of RESPONDENT to expect a clause regarding the Parties DRM in CLAIMANt's GC.

71 If CLAIMANT were to rely on the "more favourable law provision" of the NYC, thus seeking to submit the arbitration agreement to the formal requirements of Equatoriana, the seat of RESPONDENT's headquarters, it would have to comply with the more strict requirements of Art 7 Option II UNCITRAL ML which equals the prevalent provision of DAL. (see *paras* 77-80)

72 Hence, had the Parties concluded an arbitration agreement, quod non, it would not satisfy the formal standards exacted by Art 7 MAL, Art II NYC and Art VII NYC ice Art 7 Option II UNCITRAL ML.

B. Even if Danubian law governs the arbitration agreement (quod non), it was not incorporated into the contract

73 Contrary to CLAIMANT's assertion (MfC *paras* 45-47), the Parties did not conclude a valid arbitration agreement under Danubian law as they have never consented to such an agreement (1). Moreover, even if the Parties had consented to arbitration, the formal requirements for a valid agreement would not have been met (2).

1. The Parties did not agree to arbitrate

74 As with any other contract governed by the UNIDROIT Principles, an arbitration agreement can only be concluded by acceptance of an offer. Under Art 2.1.1. UNIDROIT Principles, which regulates the basic principles of contract formation, RESPONDENT would have had to accept an offer of CLAIMANT to conclude an arbitration agreement either explicitly or by conduct showing agreement.

75 Even if one, like CLAIMANT seems to do (MfC, *para* 45), were to regard CLAIMANT's email of 9 April 2020, in which it stated that its GC apply "to issues not regulated in the attached [contractual] documents" as an offer to conclude an arbitration agreement (quod non), an arbitration agreement would not have been concluded. RESPONDENT never responded to this

offer in any way, let alone formally accepted it, but rather clearly stated that it was not happy with the suggested DRM both in its email of 1 April 2020 and at the summit (Exh C2). After that, RESPONDENT has never acted in a way that could have made CLAIMANT believe that it had changed its mind. The Parties have therefore not agreed to arbitration.

76 Ignoring this lack of consent, CLAIMANT simply states that, according to PO 1, Danubian law only requires a clear statement that standard conditions are included in a contract to incorporate such conditions (MfC *paras* 45). It further asserts that, therefore, CLAIMANT's statement in its email of 9 April 2020 to RESPONDENT, in which it pointed to the fact that its GC apply to 'issues not regulated in the Contract', suffices for the incorporation of these terms (MfC *para* 45). This way, CLAIMANT brushes aside the basic substantive requirement for the formation of an arbitration agreement (consent) and only focuses on the formal prerequisites (clear statement referring to GC). It thus tries to hide that the very foundation of every agreement to arbitrate, party consent, is missing in the case at hand.

2. Even if the Parties had consented to arbitration, they did not do so in a formally valid way

77 Even if the Parties had consented to arbitration, they would still not have concluded a valid arbitration agreement as also the formal requirements for an arbitration agreement have not been met. Firstly, contrary to CLAIMANT's assertion, the lax standard regarding the inclusion of GC under Danubian law referred to in PO 1 is of no relevance for arbitration agreements. PO 1 only addresses "Danubian general contract law" (PO 1 N°3) and thus explicitly excludes areas of law which are regulated by special provisions, such as arbitration law. This is only logical because Art II NYC and Art 7 (6) DAL provide for special (and stricter) rules for the incorporation of arbitration through reference to GC. Secondly, the requirements of Art II NYC and Art 7 (6) DAL have not been met in the case at hand.

78 Article II NYC requires that a reference to an arbitration agreement in GC has to be specific (i.e. the arbitration clause must be addressed explicitly) (*Granitalia v. Agenzia Marittima Sorrentini*, 2000). General references to the GC do not suffice as the Parties would otherwise not even have the chance to be aware that they are taking the big step of submitting to arbitration (see e.g. *Schramm*, 2010, p. 91). This, however, is exactly the case here: CLAIMANT sent RESPONDENT some contractual documents (which did not include its GC) and added that issues not regulated in the documents would be governed by the GC. A more general reference

can hardly be imagined. RESPONDENT had no chance to be aware that this was an offer concerning an arbitration agreement, especially as (1) it had told CLAIMANT several times that it did not want to submit to arbitration as suggested, (2) CLAIMANT had not attached its GC and (3) RESPONDENT had never seen CLAIMANT's arbitration clause before. It is evident that the requirements of Art II NYC have not been met in this case.

79 The same is true for the prerequisites set forth in Art 7 (6) DAL: Art 7 (6) DAL states that arbitration clauses can be incorporated by reference, 'provided that that the reference is such as to make that clause part of the contract'. It is clear already from the wording of the provision that the reference must specifically address the arbitration clause (*see* e.g. *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff,* 1999). This is convincing as it ensures that the Parties are aware of taking the big step of submitting to arbitration (see generally regarding the "warning function" of form requirements *Born,* 2021, p. 701). As has been shown in the paragraph above, RESPONDENT could in no way have been aware that the offer included a submission to arbitration.

80 The requirements of Art 7 (6) DAL have therefore not been met. Consequently, even if the Parties had agreed on arbitration, they would not have done so in a formally valid way.

ISSUE II: The Parties have not concluded a contract of sale of goods, but were still at the stage of negotiation

A. Whether a contract was concluded (quod non) is determined by the law of Mediterraneo including the CISG

81 Contrary to CLAIMANT's assertions in *para* 70, the law applicable to the conclusion of the contract is not the CISG itself, but the law of Mediterraneo including the CISG. It is further not clear why CLAIMANT refers to PO 2 N°31 (which is related to the GC) when stating that the Parties had agreed on the CISG to govern their contractual relationship, when it is clarified in PO 2 N°33 that the Parties wanted the law of Mediterraneo including the CISG to govern a potential contract. The Parties' agreement on the law of Mediterraneo including the CISG suffices for a valid choice-of-law agreement regarding a potential contract and must also be applied to the conclusion of the contract.

82 The existence and validity of a contract is determined by the law which would govern it if the contract was valid. Due to the principle of party autonomy, 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 a potential contract. (Exh C 1, Exh C 4, RNoA N°10) 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 a potential contract. The Parties' agreement on the law of Mediterraneo for their potential contract, which they then never concluded, suffices for a valid choice-of-law agreement and thus has to be respected by the arbitral tribunal.

83 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, the conclusion of the contract follows the law of Mediterraneo.

84 Had a contract been concluded between CLAIMANT and RESPONDENT, it would meet the territorial, material and temporal requirements for the applicability of the CISG. First, the potential contract is of an international nature with CLAIMANT's place of business being Mediterraneo and RESPONDENT's place of business being Equatoriana, both of which are, as required in Art 1 (1)a CISG, contracting states of the CISG. (PO 1) Second, the potential contract is a contract of 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 potential contract does not fall under any of the exclusions in Art 2, it lies within the material scope of application. Third, 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) Whether a contract was concluded

between CLAIMANT and RESPONDENT, therefore is to be determined by the law of Mediterraneo including the CISG.

B. RESPONDENT's offer in its email on 1 April was not accepted by CLAIMANT

1. RESPONDENT's email on 1 April os no contract-concluding notice to CLAIMANT's oral offer from 28 March at the palm oil summit, but constitutes a counter offer instead

85 On 28 March 2020 CLAIMANT orally proposed to RESPONDENT the sale of 2/3 of the annual Palm-Oil production for a duration of five years to a price 5% below the future market price, starting 2021 with USD 900/t. According to Art 14 (1) CISG the sufficient definiteness and the offeror's intention to be bound are the necessary elements for constituting a binding offer. The first element means the clear indication of the good and the quantity, whereby the quantity does not need to be defined minutely (*Schwenzer*, 2019, Art 14 CISG, para 46; *Brunner*, 2019, p. 126; *Honsell*, 2009, p. 104; *OGH 2Ob547/93*). The price may be determinable expressly or via reference, such as a future market price (*Brunner*, 2019, p. 125-126; *Schwenzer*, 2019, Art 14 CISG, para 56; *T-18/07*). CLAIMANT's intention to be bound was more than obvious, because he has lost a major business partner recently and needed someone to sell its product to. RESPONDENT knew about this precarious situation (Exh R3 N°6). Both necessary elements for constituting a legally binding offer were met perfectly. However, RESPONDENT wanted to consult the management for approval first. Art 18 (3) CISG was taken out of effect, because both sides agreed that RESPONDENT would transfer the answer to the oral offer within three days. The next contact the Parties had was RESPONDENT's email on 1 April. According to the rules of counting of Art 20 CISG, the period begins to run the moment the offer reaches the offeree (here: 28 March), and non-business-days are included. This means, a reply had to reach the offeror on 30 March at the latest. As this did not happen, the oral offer lost its legally binding character and fell apart. RESPONDENT obviously knew that he was late with an acceptance and therefore titled the email on 1 April with "purchase offer" and expressed that he is "strongly interested", indicating the nature of this email clearly (Exh C2). RESPONDENT wanted to make a counter-offer.

86 In this email RESPONDENT requested 20,000t RSPO/certified palm oil p.a. between 2021 and 2025 to a price of 900 USD/t for the first year and 5% below the market price afterwards. Additionally, RESPONDENT requested a different arbitration clause in order to not submit to a

palm-oil-industry bound institution. Furthermore, RESPONDENT asked for the applying of the UNCITRAL Transparency rules (Exh C2). This "package" states a new and independent offer. It is hardly worth mentioning that it fulfils the just explained elements needed to state a binding offer according to Art 14 (1) CISG.

2. CLAIMANT did not accept RESPONDENT's counter-offer from 1 April in its reply on 9 April because of material alterations in it

87 Whether a contract was concluded or not now depends on CLAIMANT'S reaction to the offer from 1 April 2020. This reaction was the email of 9 April 2020. According to Art 18 (1) CISG an offer is accepted by the indication of assent. This means the expression of the will to be bound and to conduct the contract to the terms proposed (*Honsell,* 2009, p. 143). However, this did not only not happen. Hereby Art 19 CISG clearly and expressively prohibits the conclusion of a contract.

88 CLAIMANT did not accept RESPONDENT's offer from 1 April 2020 since it presented material alterations and modifications in its response email of 9 April 2020, making it a counter-offer according to Art 9 (1) CISG, which in turn was not accepted by RESPONDENT. (*see paras* 89-96). First, it is undisputed that RESPONDENT made a valid offer (*see* also MfC 72-83) in its proposal to conclude a contract, which was sufficient enough and indicated its intention to be bound in case of acceptance in its wording that RESPONDENT was "strongly interested in securing a long-term supply at the conditions we discussed at the summit." (Exh C2) The exact goods, their price and quantity were expressly set forth by RESPONDENT pursuant to Art 14 (1) CISG. (NoA N°5-6; Exh C2)

89 The alterations to RESPONDENT's offer as introduced by CLAIMANT, first, the switch in choice-of-law from Danubian to Mediterranean contract law. (Exh C1 N°3, C4), represent a deviation, not only from alleged previous practice, but from the Parties negotiated terms at the palm oil summit which were incorporated in Ms Bupati's offer by clear reference in her email on 1 April 2020. She made her intentions abundantly clear by writing "I would like to place the following order with you as agreed at the Summit." (Exh 2) Second, the notification that the contract was to be submitted to CLAIMANT's GC - which in itself does not amount to a counter-offer (*see paras* 133-135)— and which were thus far unbeknownst to RESPONDENT altogether, since they were not transmitted in tandem with the contractual document or made

available in another way. (*see paras* 145-151)

2.1. Omitting the Transparency Rules constitutes a material change

90 The UNCITRAL Transparency Rules are a set of rules of procedural nature in case of arbitration. CLAIMANT in its reply on 9 April 2020 did not mention them or added them to the contractual documents.

91 Art 19 CISG states that additions, limitations or other modifications in a reply are incompatible with an assent, if they have to be seen as materially altering. What "materially altering" exactly means needs would be interpreted case-by-case according to the model-figure of Article 8 CISG, as no legal definition exists (*Honsell,* 2009, p. 166; *Schwenzer*, 2019 Art 19, para 43). Furthermore, the subjective importance of a matter to a Party has to be seen as a fair guideline.

92 In our case the mentioned case-by-case-assessment is obsolete, because Art 19 (3) CISG clearly states that matter regarding the "settlement of disputes" is always materially altering. This is additionally reinforced by the fact that RESPONDENT clearly pointed out the necessity of providing some transparency in relation to arbitration due to the strong opposition in Equatoriana (Exh C2).

93 Insofar CLAIMANT accepted the essentialia negotii, but completely ignored this procedural matter, which is of high importance to RESPONDENT. Therefore, only a part of the offer was accepted, not all of it. This is not mutual assent as required by the CISG´s contract concluding mechanism.

2.2. The agreement to arbitrate constitutes a material change

94 On top of that, CLAIMANT wrote a short note on the contractual documents sent on 9 April 2020, saying that its GC were to apply (Exh C3). Ms Bupati received earlier in her career CLAIMANT's GC. But from 2016 onwards a different arbitration-institution shall be consolidated in case of disputes (Exh R4). And it is very disputed if a current version of the GC was ever properly transmitted to RESPONDENT. However, under the jurisdiction for the CISG GC have to be provided in written form and before the conclusion, if they shall become part of a contract (*OGH8Ob 104/16a*). Therefore, if CLAIMANT cannot prove that RESPONDENT had enough access to the new GC, the change of the arbitration-institutions

is a materially altering change according to Art 19 (3) CISG as well, because these changes again concern the crucial matter of "settlement of disputes". RESPONDENT most certainly had not enough access to them. If RESPONDENT had access to them, why would he ask about the comparability of the contractual documents to previous business-cases (Exh C2)

95 In conclusion it has to be recorded that CLAIMANT's email from the 9 April contained one obvious material change regarding the omission of the transparency rules. This alone is enough to not qualify CLAIMANT's email from the 9 April as an acceptance. And furthermore, there was one probable material change.

96 For the aforementioned reasons, CLAIMANT's Email from 9 April 2020 does not constitute an acceptance, but instead another counter-offer in accordance with Art 19 (1) CISG. However, even this counter-offer may be seen as deficient, because the GC might not have been provided to RESPONDENT properly.

C. RESPONDENT did not accept CLAIMANT's counter-offer

1. RESPONDENT did not accept CLAIMANT's counter-offer by conduct

97 After receiving CLAIMANT's email on 9 April, RESPONDENT remained silent, thus did not agree to the conclusion of the contract. Rather, the only information received by CLAIMANT was that Ms Fauconnier, as acting agent, wanted to amend two existing terms of the contractual documents on 3 May 2020 and her desire to meet Mr Rain in person, though said meeting never took place. (Exh R2) RESPONDENT's behaviour leading up to that email and the email's content must have certainly prompted CLAIMANT to believe that the contract would not be pursued in the way it had proposed in its counter-offer on 9 April. Added to that, CLAIMANT has clearly been made aware of the fact, that RESPONDENT has been in contact with other palm oil producers. (Exh R2) Thus, at the very least, it should have been lear to CLAIMANT that no contract hade been concluded on 3 May 2020, when Ms Fauconnier suggested changes to the existing terms of the contractual documents, therein still not accepting the offer. (Exh R2)

98 Since RESPONDENT never explicitly accepted CLAIMANT's counter-offer, an acceptance could only have taken place by conduct. Contrary to CLAIMANT's assertions, the simple performance of "necessary preparatory work" does not constitute an acceptance by conduct.

99 While, as CLAIMANT states, "acts of a more preparatory nature may also amount to acceptance" (*Huber and Mullis*, 2007 p. 85), this is not true for the present case. CLAIMANT

refers to several cases in order to demonstrate how RESPONDENT's actions may have amounted to an acceptance of CLAIMANT's counter-offer, yet these assertions fail to convince. None of the cases cited by CLAIMANT are applicable to the case at issue.

100 It may be true that in *Magellan International Corporation v. Salzgitter Handel GmbH* (*Magellan case*), the Illinois Court concluded that there was an acceptance when the buyer issued the letter of credit which claimed specific performance showing its willingness to pay the price of the counter-offer amended by the seller. RESPONDENT, however, only enquired about the letter of credit but never actually issued it.

101 As CLAIMANT correctly pointed out, Ms Fauconnier approached CLAIMANT to discuss the opening of the required letter of credit and wanted to directly determine the names of the banks which would classify as 'recognized banks' in the sense of the Contract." (Exh R2, N°2). It is further true that on 30 May 2020, Ms Fauconnier contacted "several of the acceptable banks to get quotations as to the terms for the letter of credit" (PO2 N°23). However, none of these actions amount to an acceptance under the CISG. While RESPONDENT may have contemplated accepting CLAIMANT's counter-offer and wanted to be prepared *in case* it decided to take the counter-offer, it never actually accepted it.

102 CLAIMANT further points to Art 8 CISG, which states the Parties' conduct should be interpreted according to their intents and consider all relevant circumstances such as the process of the negotiation and the usage established between them. It seems necessary to point out that CLAIMANT and RESPONDENT had never even concluded a contract at the point of their contract negotiations in the present case (PO 2 N° 3), which is why no practice could have been established between them in the first place. For this reason alone, CLAIMANT had no reason to assume that RESPONDENT's behaviour amounted to an acceptance by conduct.

103 An acceptance by conduct consists of an implicit indication by the offeree of its acceptance of the offer (*Brunner*, 2019, p. 138). However, pursuant to the reliance principle as established in Art 8 (2) CISG, this requires that an intention to be bound to the offer in question is expressed with sufficient clarity. (*Brunner*, 2019, p. 138) RESPONDENT may have undertaken preparatory steps for a potential acceptance, such as enquiries about the letter of credit, but never actually intended to accept the counter-offer. It certainly did not express an intention to be bound to the offer with sufficient clarity to constitute an acceptance under the CISG. When Ms Fauconnier and Mr Rain discussed issues concerning the letter of credit, Mr Rain pointed out to

her that CLAIMANT had not yet received a signed copy of the contract (NoA, N°8). Mr. Rain's efforts to clarify that no signed copy of the contract had been returned at that point in time clearly demonstrate his awareness that no contract had been concluded at stage of negotiations. If the contract conclusion by conduct had been sufficiently clear, it would not have mattered whether the contract papers had been signed or not. When Ms Fauconnier promised that she would look into it (NoA N°8), she was referring to the state of the contract negotiations.

104 The CISG clearly states in Art 18 (1) second sentence that silence or inactivity alone do not constitute an acceptance. Silence in response to an offer may only be taken as acceptance in context with further relevant circumstances if this is justified on the basis of the principle of good faith (*Brunner*, 2019, p. 138). Thus CLAIMANT had no reason to assume that RESPONDENT's inactivity after the counter-offer constituted a valid acceptance.

2. RESPONDENT could not accept CLAIMANT's counter-offer for lack of established business practice

105 RESPONDENT also did not accept CLAIMANT's counter-offer by way of a past practice established between the Parties under the CISG.

106 CLAIMANT's assumption that CLAIMANT and RESPONDENT had established a business practice under the CISG is unfounded and was pulled out of thin air. CLAIMANT and RESPONDENT had never entered into a contractual relationship before commencing negotiations in the present case (PO 2 N°3) and therefore could not have established a business practice. Neither did CLAIMANT establish a business practice with Southern Commodities, which could be applied to the negotiations in the case at issue. Therefore, CLAIMANT had no reason to believe that a valid contract could have been concluded without RESPONDENT accepting the offer either explicitly or by conduct.

107 CLAIMANT tries to establish a business practice where there never was one. It is true that the contract negotiations between CLAIMANT and RESPONDENT show similarities to previous commercial transactions between CLAIMANT and Southern Commodities. What CLAIMANT fails to recognize however, is that CLAIMANT and Southern Commodities never established a business practice in the first place. Where there is no business practice, such practice cannot be extended to similar transactions.

108 According to CLAIMANT, a practice had been established between the Parties that if

RESPONDENT did not timely reject the contract terms sent by CLAIMANT, the contract was nevertheless concluded even without RESPONDENT's signature. It may be correct that in past transactions concluded between Ms Bupati and Mr Chandra as actors for their respective companies, sometimes contracts were performed without the contracts having been signed by Ms Bupati. This negligence on her part, however, does not fulfil the requirements of a business practice under the legal regime of the CISG.

109 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; *Pizza boxes case; Tantalum powder case II; Dutch plants case I*).

110 Over the years, Mr Chandra and Ms Bupati concluded overall around 40 contracts. In around 80% of the cases, Ms Bupati then signed the documents and returned a copy of the contract to Mr Chandra. In three cases, she deemed the added terms unacceptable and asked for changes after having received the contract documentation. The contracts were signed after the documentation was changed accordingly. In only five cases did Ms Bupati not return a signed version of the respective contract but nevertheless performed all of them (Exh R3). Between 2016 and 2018, Mr Chandra and Ms Bupati concluded eight contracts, two of which – one large and one small contract – were not signed but were performed (PO 2 N° 7). In total, only five out of 40 contracts concluded between Ms Bupati and Mr Chandra were not signed and yet performed. How CLAIMANT deduces a business practice from an occurrence which took place in 12,5 % of their commercial transactions is unclear.

111 In order to establish a business practice under the legal regime of the CISG, the conduct of the Parties shall be interpreted according to their subjective intent; if the subjective intent cannot be established, the conduct of the Parties shall be interpreted objectively. (Art 8 (1) CISG; Art 8 (2) CISG)

112 RESPONDENT showed neither subjective nor objective intent to be bound to CLAIMANT's offers without signing them first. For the five unsigned contracts between Southern Commodities and CLAIMANT, a letter of credit was opened following the receipt of the contracts by Southern Commodities (PO 2 N° 7). In the present case, RESPONDENT enquired about the letter of credit, but never opened one (PO 2 N° 23). This shows even more clearly that

RESPONDENT never intended to accept CLAIMANT's counter-offer in the case at hand.

113 In order to establish a practice, it is further necessary that the behaviour is recognised as a practice by the parties. (*Schwenzer*, 2019, Art 9 CISG para 8a; *Propane gas case*; *CISG online*, 224) This presupposes that a behaviour gives rise to the legitimate expectation that the same behaviour will occur in the future. (*Schwenzer*, 2019, Art 9 CISG para 8a; *Vine wax case*; *CISG online*, 479) As elaborated extensively above, this was never the case, which is why no individual practice was established between CLAIMANT and RESPONDENT.

2.1. Even if a business practice was established between CLAIMANT and Southern Commodities, it does not translate to the present case

114 While an individual practice may have been established between CLAIMANT and Southern Commodities, such practice would not apply to contract conclusions between CLAIMANT and RESPONDENT.

115 It is true that RESPONDENT was acquired by Southern Commodities and is now a 100% subsidiary of Southern Commodities. However, it remained otherwise an independent legal entity (PO 2 N°4). When Southern Commodities' palm kernel oil unit was transferred to JAJA Biofuel and became a wholly owned subsidiary of JAJA Biofuel, 26 out of 40 employees became employees of JAJA Biofuel's subsidiary and stayed in Ruritania where the subsidiary was located (PO 2 N°5). 10 employees were moved from the palm kernel oil unit to the newly founded palm oil unit within JAJA Biofuel and had to move to Equatoriana and JAJA Biofuels' headquarters. The same applied to Ms Bupati who was promoted to become the Head of Purchasing for all types of oil products, in part due to her connections with the palm oil industry (PO 2 N°5).

116 In the light of these structural and personnel changes, it is incomprehensible why CLAIMANT would believe that any business practice established between CLAIMANT and Southern Commodities would transfer to business relationships between CLAIMANT and RESPONDENT.

117 Pursuant to Art 9 para 2 CISG, the parties are bound to practices which they have established between themselves. It seems necessary to point out that in this context, the emphasis is to be put on the phrase "the parties themselves". Even if CLAIMANT and Southern Commodities had established a business practice as described in *para* 110, they never intended such practice to be

extended to any contractual relationships other than contacts concluded between CLAIMANT and Southern Commodities. It is a core characteristic of any business practice established under Art 9 CISG that such practice justifies the legitimate expectation that the same practice will occur in the future (*Schwenzer*, 2019, Art 9 CISG para 8a; *Vine wax case; CISG-online*, 479). In the case at hand, the parties never gave rise to a legitimate expectation that such practice would extend to any other contract than a contract concluded between CLAIMANT and Southern Commodities. For CLAIMANT and RESPONDENT to establish a business practice, would require them to actually have concluded a number of contracts before, which they have not (*Schwenzer*, 2019, Art 9 CISG para 8a).

118 Finally, it is deemed necessary to point to the fact that an established practice may be subject to change and may be terminated (*Schwenzer*, 2019, Art 9 CISG para 9; *Food products case*; *CISG-online*, 750). A termination may occur through a change of the foundation of the business relationship (*Schwenzer*, 2019, Art 9 CISG para 9). Considering the structural and personnel changes involved with Southern Commodities' acquisition of RESPONDENT, it is clear that any established business practice between CLAIMANT and Southern Commodities was terminated when Southern Commodities' palm kernel oil unit was transferred to RESPONDENT.

2.2. Even if a business practice was established, it would not be applicable in the present case as the Parties have introduced numerous materially altering changes

119 Even if the arbitral tribunal comes to the conclusion that a business practice was established between CLAIMANT and RESPONDENT, such business practice would not be applicable to the present case due to the materially altering changes contained in CLAIMANT's counter-offer. (see *paras* 87-96) Due to the introduction of these materially altering changes, any business practice, which might have been established between CLAIMANT and RESPONDENT (quod non) could not extend to the case at issue.

ISSUE III: The General Conditions of Sale were not agreed on by the Parties

A. Since the Parties did not conclude a contract, they did not agree on the General Conditions of Sale as part of the alleged contract

120 Mediterranean law including the CISG is applicable to the review of the existence of an alleged contract conclusion since the factual, temporal and local requirements of the application of the

CISG are met. The same goes for the review of whether the GC form part of the alleged contract.

121 A contract for the delivery of 100.000 t of palm oil for 5 years, at the price of 900 USD/t, thereafter at 5 % below the "market price" has not been established between the Parties, as the business dealing remained at the stage of negotiations (see *paras* 85-119).

122 RESPONDENT has not accepted CLAIMANT's counter-offer on 9 April 2020, neither by express acceptance nor conduct as per Art 18 (1) CISG (*see paras* 97-119), it simply remained silent. CLAIMANT should have known that RESPONDENT's silence was not to be interpreted as acceptance, since this was the first contract negotiation between these Parties, because of the (partially) new acting agents (see *para* 124) different goods (RSPO-certified palm oil instead of palm oil), a different management and company as CLAIMANT's contractual partner and a strong importance placed on environmental issues based on RESPONDENT's attitude towards this topic, (Exh C1 N°10) which altogether completely differs from Ms Bupati's contract conclusion handlings back at Southern Commodities. Thus, there is no established practice for CLAIMANT to base its assumptions of RESPONDENT's silence counting as acceptance of the transmitted contractual documents, as will be explained below in *paras* 123-126.

123 In contrast to opposing counsel's claims of a business practice being established and it being transferred to present case with Ms Bupati's silence counting as acceptance one week after the transfer of the contract documents, none of this is true because of the simple fact that at the time of the contract negotiations the acting agent worked for completely different companies. They may be entangled – RESPONDENT is Southern Commodities' subsidiary company – but certainly do not share the same identity, purpose, management or share of capital, as RESPONDENT is an independent legal entity (PO 2 N°4). Furthermore, the present deal is not similar enough to Southern Commodities' prior commercial transactions, as opposed to CLAIMANT's counsel's claims, bearing in mind the Tantalum powder case II, for following reasons:

124 The acting agents differ from the previous transactions between Southern Commodities and RESPONDENT, as there are Ms Bupati and Ms Fauconnier on RESPONDENT's side and Mr Chandra and Mr Rain on CLAIMANT's side. Even though, Ms Bupati was part of the contract conclusions for Southern Commodities from 2010 to 2018 — in a different position as opposed to now as the Head of Purchasing — she switched firms, (Exh C1 N°8; Exh R3 N°4) making the practice not applicable to the present case. Thus, the only consistent factor in regards to the

acting agents is Mr Chandra, who was Head of Sales for CLAIMANT for 8 years and in 2018 became its COO, thereby only broadening his area of responsibility at the same company (Exh C1 N°2).

125 The goods in question might have similar names and revolve around similar commodities, palm oil and palm kernel oil, but in present case RESPONDENT requested RSPO-certified palm oil in its offer, which makes a big difference regarding qualification, price and sustainability. Equatoriana and RESPONDENT itself place extreme importance on the compliance with sustainability obligations (Exh C1 N°5, C6, C7, R1) and it was precisely the lack thereof (non-compliance of the certification) which caused RESPONDENT to finally terminate its negotiations with CLAIMANT altogether (Exh C7). To be noted is also the price difference between palm oil and RSPO-certified palm oil, which can differ to up to USD 70 / t (RNoA N°6). Solely as a response to CLAIMANT's memorandum, RESPONDENT would also like to point out that there is even a significant difference between palm oil and palm kernel oil (despite there being "no difference in the certification requirements of the contractual documents"), as palm oil is primarily used for chocolate production and is also suitable for CBE (cocoa butter equivalent) formulations, while palm kernel oil primarily suits the production of confectionery products.(*Traitler and Dieffenbacher*, 1985)

126 Added to that, RESPONDENT points out that Southern Commodities is the parent company of RESPONDENT but does not have nearly as much control over its subsidiary as CLAIMANT tries to make believe. It is undisputed that 36 employees transferred to RESPONDENT and its subsidiary in 2018 (PO 2 N°5.), but CLAIMANT does not control RESPONDENT's actions or employ respectively lay off their employees. These 36 employees were simply transferred to RESPONDENT for logistical and convenience purposes, as Southern Commodities "lost" its palm kernel oil unit after acquiring RESPONDENT in 2018 and the palm oil activities were centralised at subsidiary's headquarters. They willingly transferred and were not made to do anything by Southern Commodities, as is quite clear with three employees leaving Southern Commodities after the acquisition of JAJA Biofuel.

127 Thus, for aforementioned reasons the practice between Southern Commodities and CLAIMANT for the contracts concluded between 2010 and 2018 cannot be transferred to RESPONDENT and the present case. Moreover, RESPONDENT's offer from 1 April 2020 was not accepted by CLAIMANT (*see paras* 85-96), resulting in no reached agreement between the Parties regarding the alleged contractual relations.

128 Since a contract has not been concluded between RESPONDENT and CLAIMANT for the delivery of the 100.000 t of RSPO-certified palm oil, the GC could not form part of the alleged contract since it is non-existent. Furthermore, the GC could not have been concluded as a stand-alone contract as they regularly form part of a different (sales) contract and are purposeless as an individually formed agreement or "umbrella" document. It is impossible for the Parties to apply it with no scope of application.

129 For GC to be applicable to a contract, which in this case does not exist since it has not been concluded by the Parties (see *paras* 85-119), their content has to be known by both Parties, thus the GC have to be made available to the party not proposing their inclusion. When both Parties are aware of their content the GC have to be agreed upon by the Parties in order to be included into a contract. As the Italian court of Rovereto held in *Takap B.V. v. EUROPLAY* "standard terms can only be validly incorporated into a contract, if the addressee of the proposal was aware of such terms", bearing in mind the provision of Art 7 and 8 CISG. And finally, the offer of including the GC has to be accepted. (*Takap B.V. v. EUROPLAY,* 2007)

130 Under the CISG the inclusion of standard terms is determined as per the rules of the formation of a contract (*CISG-AC Op. N°13*, 2013, p. 6). The inclusion of GC into a contract occurs through the acceptance of an offer, which has to be sufficiently definite and indicate the intention of the offeror to be bound in case of acceptance.

131 First, CLAIMANT has not made a valid offer for the incorporation of the GC into an alleged contract for the sale of palm oil since it has not sent a proposal including the essentialia negotii, which in itself would be insufficient for a valid offer, but would also have to be sufficiently definite and indicate the intention of the offeror to be bound in case of acceptance as per Art 14 (1) CISG.

132 The standard terms can only be included into an existing contract, where the Parties have expressly or implicitly agreed to their inclusion at the time of the contract formation and only if the other Party had a reasonable opportunity to take notice of the terms and familiarise itself with those terms (*CISG-AC Op. N°13*, 2013, p. 7). RESPONDENT was not given a reasonable opportunity to take notice of standard terms, which will be further discussed in *paras* 140-151.

133 The wording in Mr Rain's email from 9 April 2020 "CLAIMANT's General Conditions of Sale apply to issues not regulated in the attached document" (Exh C4) is not an offer as it does not contain the essentialia negotii, which are the "goods" — a commodity — being offered to RESPONDENT, and the "price", the service rendered in return for the goods. A reference in a

contract template is firstly not an offer as per Art 14 (1) CISG and secondly does not fulfill any of the required prerequisites for a valid offer, thus is not enough for the inclusion of the GC (Exh C3).

134 The only possibility for an existing offer regarding the GC is the proposal of the inclusion of the GC into a contract made by CLAIMANT to Southern Commodities in October 2011, if it met all necessary requirements, but it would not translate to present case since CLAIMANT's contracting Party is RESPONDENT and not Southern Commodities.

135 Since none of the given proposals meet the criteria of an offer according to the CISG and no other offers have been made by RESPONDENT for the application of the GC, no legally binding agreement has been concluded between the Parties for application of the GC to a non-existent contract or for the GC as a stand-alone contract.

136 Even if a valid offer for the inclusion of the GC had reached RESPONDENT, quod non, it would not have been accepted by it, since acceptance is given through an explicit statement or other conduct indicating assent to the offeree as per Art 18 (1) CISG, and not by remaining silent or inactive (i.e. by not answering an email or staying out of contact altogether, as is the case presently), also explicitly stated in Art 18 (1) CISG.

137 The non-existent offer of the GC inclusion has also not been accepted through an act as a result of established usage between the Parties as per Art 18 (3) CISG, as no practice has been established between RESPONDENT and CLAIMANT (*see paras* 105-118, 123-127).

138 Even if a business practice had been established, quod non, it would not apply to the present case as too many material alterations have been presented in this case (*see paras* 88-96, 119).

139 Therein, if Ms Bupati has ever spoken of an established business practice, it is of that regarding pre-2016 GC for Southern Commodities, since only these were made available to her in 2011 and consequently allowed her to take notice of their content and be able to accept their incorporation into past contracts. Regarding Ms Bupati's wording to "re-establish our long-lasting and successful business relationship in my new function", it was not a phase used in any way of legally binding effect. Ms Bupati is not a professional of the law and cannot be subjected to the same standards as one.

B. Had a contract been concluded, quod non, the General Conditions of Sale would not have been incorporated

140 If a contract had been concluded (quod non) the GC would not have been incorporated into the

alleged contract since both Parties, i.e. also the other Party (RESPONDENT) expressly or implicitly has to agree to their inclusion at the time of the formation of the contract after having had the opportunity to familiarise itself with their content. (*CISG-AC Op. N°13*, 2013, p. 7) This would have been the case if the terms had been attached to the contractual documents, the terms were made available to the Parties during the negotiations in each other's presence or made available and retrievable electronically by the first Party and are accessible to the other Party at the time of contract negotiations. (RNoA N°14;*CISG-AC Op. N°13*, 2013 p. 12). The contract negotiations lasted until 30 October 2020, when Ms Lever finally terminated all pending negotiations with her letter to Mr Chandra, so CLAIMANT had enough opportunities to make the terms available to RESPONDENT, but did not manage to do so at any point. Point 3.4 – "where the Parties have had prior agreements subject to the same terms" – does not apply to this case as only Southern Commodities had concluded five contracts with CLAIMANT under the same standard terms, the post-2016 GC, from 2016 to 2018, which simply does not translate to RESPONDENT for aforementioned reasons (*see paras* 114-118, 123-126).

1. CLAIMANT's reference to its General Conditions of Sale was not sufficient for their incorporation

141 A reference to the GC may only be sufficient for an incorporation, if the other Party has also agreed to their inclusion whether explicitly or implicitly, it has had reasonable opportunity to take notice of the standard terms/their content by having had the chance to look through it at the time of contract negotiations and the reference is clear to a reasonable person in the same circumstances (*CISG-AC Op. N°13*, 2013, p. 15)

142 RESPONDENT has not had reasonable opportunity to look through the GC, since they were not included into CLAIMANT's letter from 9 April, any email sent thereafter or anywhere else (NoA N°7). While the references to the GC were quite clear (to a reasonable person in the same circumstances) in the contractual documents (Exh C3) and in the accompanying letter (Exh C4), solely these requirements are not enough for the inclusion of the GC, as was brought forward above. This way of alleged incorporations of GC – "by reference in a written communication without clear and express agreement on the incorporation" (*Schlechtriem and Schwenzer*, 2016, Art 14 para 37) – is insufficient and unfulfilling, as the Party using the GC cannot prove whether they have validly included these standard terms. (*CISG-AC Op. N°13*, 2013, p. 5) RESPONDENT herein attests that it had no access to CLAIMANT's post-2016 GC.

143 RESPONDENT has not agreed to the inclusion of the GC into an alleged contract neither explicitly nor implicitly – there was no mention of the GC in Ms Bupati's email from 1 April or Ms Fauconnier's email from 3 May (Exh C5, C2). Given the size of the contract and the political sensitivity of the palm oil expansion, Ms Bupati and Ms Fauconnier were both very hesitant to agree to any (commercial or) standard terms prematurely (RNoA N°8), as they have both stated on several occasions. (Exh R2, C2) After all, they did not agree on any of the CLAIMANT's proposed terms. (Exh C7)

144 Only under Danubian contract law is the reference to the use of GC in a contract document sufficient for the incorporation of these standard terms, (NoA N°16) but in present case the applicable contract law is the law of Mediterraneo including the CISG, thus only a reference to §the application of the GC to rules not regulated in the contract" is in no way shape or form sufficient for their inclusion into an alleged contract.

2. CLAIMANT did not satisfy the requirements of the "make available test"

145 It is uncontested, that RESPONDENT has not had reasonable opportunity to look through the GC, since they were not included into CLAIMANT's letter from 9 April accompanying the contractual documents (NoA N°7) nor were they made available to RESPONDENT at the Palm Oil Summit in 2020. They are also not easily accessible on CLAIMANT's website, thus RESPONDENT had no opportunity to look through the (post-2016) GC.

2.1. RESPONDENT never received CLAIMANT's General Conditions of Sale

146 The only time Ms Bupati in her function as main purchase manager of Southern Commodities – and not RESPONDENT – was sent the GC was when they were transmitted to Southern Commodities in October 2011 and once more when she had a closer look at them in 2014 for the purpose of an arbitration between CLAIMANT and Southern Commodities (RNoA N°11.). Both times the GC contained the arbitration clause of the FOSFA/PORAM contract Form 81 (Exh R3) and not the recent AIAC arbitration clause (Exh R4), making this transfer of the pre-2016 GC irrelevant for present case.

147 While it is uncertain whether Southern Commodities received a copy of the post-2016 version of the GC, Ms Bupati has not had access to them during the negotiation process, only thereafter, as Mr Dosep, a former employee of CLAIMANT, provided them in June 2020. (PO 2 N°19)

Further, it is undisputed that RESPONDENT has never been sent the current or any previous version of the GC (Exh C1, RNoA N°13, PO 2 N°18).

148 When CLAIMANT speaks of the fact that RESPONDENT should have requested a copy of the GC if it wanted to have a look at them, it forgets that it is not offeree's, RESPONDENT's, responsibility to request a copy of the standard terms from the party, which seeks to incorporate those terms. (*CISG-AC Op. N°13*, 2013, p. 10)

2.2. CLAIMANT's General Conditions of Sale are not easily accessible on its Website

149 For GC to be validly incorporated into any alleged contract, they have to be made available to the other Party so that any concurrence of wills of the Parties can include the same content. (*CISG-AC Op. N°13*, 2013, p. 8) The least the Party, seeking to incorporate the standard terms could do, is provide the other Party with a link to easily accessible GC, which was omitted. Moreover, CLAIMANT's GC are not easily accessible on its website, making it even harder for RESPONDENT to familiarise itself with their content. (PO 2 N°18)

150 The Machinery case, dealing with the sufficient incorporation of standard terms, was interpreted by the German Federal Supreme Court in the way that the Party seeking the inclusion of the standard terms also needs to "transmit the text or make it available in another way" to the other Party (*Machinery case*). This is a reasonable approach to this issue, as the other Party knowing the content of a set of standard terms is the minimum requirement for this Party to be able to agree to its incorporation (*CISG-AC Op. N°13*, 2013, p. 8-9). There is simply no other way for an agreement to be formed based on the principles of simple contract law.

151 Since CLAIMANT has not provided RESPONDENT with any copy of the GC nor has it provided a link to its website nor is CLAIMANT's website easily accessible, the GC have not been incorporated into the non-existent contract.

CONCLUSION AND REQUESTS

152 Despite either Parties earnest intention, they could not agree on a mutually acceptable manner of dispute resolution and hence not conclude a contract for the sale and delivery of RSPO-certified palm oil. RESPONDENT has voiced its objections to arbitration as the DRM proposed by CLAIMANT from the very start of negotiations, preventing any consensus being established on the conditions of the business transaction.

153 Even if the tribunal were to find that a contract had been concluded between the Parties, the arbitration agreement would not have been incorporated into said contract for lack of incorporation of CLAIMANT's GC as they were not made available to RESPONDENT and for lack of RESPONDENT's awareness of the individual clause containing the arbitration agreement.

154 The arbitral tribunal is empowered to examine the Parties potential arbitration agreement under the law of Mediterraneo including the CISG as the presumably applicable law, however, as the agreement has never been validly concluded in neither formation nor form, it shall subsequently refer the dispute to national arbitration.

155 In view of the above, **RESPONDENT respectfully requests** the honourable tribunal to affirm

I. the consensual presumptive submission of both the substantial contract and arbitral agreement to the law of Mediterraneo including the CISG,

II. the lack of Parties' consensus to conclude either agreement, and

III. thereof resulting jurisdiction of the national courts of Equatoriana.

156 RESPONDENT reserves the right to amend its requests as may be necessary.

CERTIFICATE

We hereby confirm that this Memorandum was only written by the persons whose names are listed below and who signed the certificate.

Fabian Abfalter

Katharina Gächter

Mag. Lukas Jäger, B.A.

Matthias L. Krivdić, B.A. LL.B.

Aleksandra Marković

Mag.ª Katharina Stöbich, B.A.