AAA/ICDR case 01-19-0003-0137

between

China Railway No. 10 Engineering Group Co. Ltd.

- *Claimant* -

And

Triorient LLC.

- *Respondent* -

Final Award

SOLE ARBITRATOR:

Professor Franco Ferrari

Place of arbitration: New York

Table of contents

I, THE UNDERSIGNED SOLE ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named Parties dated as indicated below, and having been duly sworn, and having heard the proofs and allegations of the Parties, do hereby FIND and issue this FINAL AWARD as follows:

A. THE PARTIES

I. Claimant

1. Claimant's name and address

1 Claimant, China Railway No. 10 Engineering Group Co. Ltd. ("Claimant"), is a company incorporated under the laws of the People's Republic of China.

2 Claimant's registered address is:

Building No. 7
Shuntai Square, High Tech District
Jinan City
People's Republic of China.

2. Claimant's counsel's name and address

3 Claimant's counsel are Xinyu Zhu and Xue J. Huang of Huang, Chen & Wu Law Group P.C (with the following office address: 38-08 Union Street, Suite 9B, Flushing, NY 11354), for whom the following email addresses are used in these proceedings: xyzhu@hcwlawgroup.com; xhuang@hcwlawgroup.com.

II. Respondent

1. Respondent's name and address

4 Respondent, Triorient LLC., is a company headquarterd in Darien, Connecticut.

5 Respondent's address is:

76 Tokeneke Road
Darien, CT 06820.

2. Respondent's counsel's name and address

6 Respondent's counsel is Patrick F. Lennon of Lennon, Murphy & Phillps, LLC. (with the following office address: 1599 Post Road East, Westport, CT 06880), for whom the following email address is used in these proceedings: pfl@lmplaw.net.

7 Claimant and Respondents are jointly referred to as the "**Parties**".

B. THE ARBITRATION AGREEMENT

8 Clause 11 of the Direct Reduced Iron (A) Briquettes Contract entered into and executed between Claimant and Respondent as of 4 September 2017 ("**CONTRACT**") contains the Arbitration Agreement ("**Arbitration Agreement**") and reads: "Any difference, dispute or controversy arising between the Parties arising out of or related o this CONTRACT that cannot be settled in an amicable manner between the Parties within fifteen (15) days following the notice of the dispute that a Party makes to the other, shall be settled through a mandatory arbitration conducted before a single arbitrator in accordance with Commercial Arbitration Rules of the American Arbitration Association [("**AAA**")], 140 West 51st Street, New York, New York. Both Parties agree to abide by the decision/award of the arbitrator designated to serve on the matter by this Association, and that such decision/award shall be final. Judgment upon such decision/award may be entered in any court having jurisdiction thereof. The prevailing Party in any arbitration case hereunder shall be awarded its reasonable attorney fees and costs. The arbitration procedure shall take place in New York, New York and be held in the English language."

C. THE ARBITRAL TRIBUNAL

9 The Arbitral Tribunal, duly constituted in accordance with the Arbitration Agreement referred to above in para. 8 and the applicable AAA Rules, consists of Sole Arbitrator Professor Franco Ferrari, NYU School of Law, 40 Washington Square 409B, New York, NY 10012, USA, whose email address for purpose of these proceedings is: franco.ferrari@nyu.edu.

D. THE PLACE OF ARBITRATION

10 As expressly stated in the Arbitration Agreement referred in to para. 8, the place of arbitration is New York, New York.

E. THE LANGUAGE OF THE ARBITRATION

11 As expressly stated in the Arbitration Agreement referred to in para. 8, the language of the arbitration is English.

F. THE APPLICABLE LAWS

12 As expressly stated in Clause 10 of the CONTRACT, the "CONTRACT shall be governed by the laws of the Republica Bolivariana de Venezuela." As agreed upon by the Parties during the preliminary hearing held on 11 March 2020,[1] the CONTRACT is also governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

13 As stipulated in the Arbitration Agreement referred to above in para. 8, this arbitration is governed by the AAA's Commercial Arbitration Rules ("**AAA Rules**").

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1 *See* also para. 9.1 of Procedural Order No. 1 (p. 9).

14 This arbitration is also governed by any Procedural Order issued by the Arbitral Tribunal as well as by the arbitration law of the seat to the extent the Parties have not validly derogated from it.

G. THE PROCEDURAL HISTORY

15 On 18 September 2019, Claimant initiated these arbitration proceedings by filing - in accordance with R-4 of the AAA Rules - a "**Demand for Arbitration**" received by the AAA/International Centre for Dispute Resolution ("**ICDR**") on 23 September 2019.

16 On 23 September 2019, the ICDR also received Claimant's "**Statement of Claim**" dated 17 September 2019.

17 On 13 February 2020, the ICDR informed the Parties that it had appointed the undersigned as Sole Arbitrator in the proceedings. It further informed the Parties that this Sole Arbitrator had made a disclosure, which the ICDR submitted to the Parties with the request that the Parties advise the ICDR of any objections to the appointment of this Sole Arbitrator by 28 February 2020.

18 On 2 March 2020, the ICDR informed the Parties that, because no objections had been filed in response to this Sole Arbitrator's disclosure statement dated 13 February 2020, the appointment had been reaffirmed.

19 On 2 March 2020, the Arbitral Tribunal reached out to the Parties in view of identifying a date on which to hold the preliminary hearing as per R-21 of the AAA Rules.

20 On 3 March 2020, after reviewing the correspondence received from Claimant and Respondent earlier that day, the Arbitral Tribunal scheduled the preliminary hearing for 11 March 2020, starting at 9.30 am (ET).

21 On 11 March 2020, the preliminary hearing took place as scheduled and lasted from 9.30 am to 10.15 am (ET).

22 On 11 March 2020, the Arbitral Tribunal submitted to the Parties a draft of Procedural Order No. 1, which also included a Procedural Timetable in para. 1.1., and invited the Parties to comment on it.

23 On 16 March 2020, Claimant commented on the draft and asked, *inter alia*, that the Procedural Timetable provide for the possibility for the Parties "to exchange information through written document request and response".[2]

24 On 16 March, Respondent commented on the draft Procedural Order No. 1, stating, *inter alia*, that the Procedural Timetable contained in para. 1.1. of the draft was "rather compressed",[3] suggesting that it should be revised, because "the requirement to draft witness statements, review them with the witnesses and to have them executed with supporting documentation within a period of three weeks' time in the case of the deadline for Respondent's Statement of Defense & Counterclaim (if any) will present an onerous task – particularly during this period of indefinite social distancing, remote working, etc. due to the coronavirus."[4]

25 On 17 March 2020, Claimant commented on Respondent's remarks.

26 On 17 March 2020, the Arbitral Tribunal issued Procedural Order No. 1, in which the Arbitral Tribunal set forth the procedural rules relating, *inter alia*, to written submissions generally, documentary evidence, evidence of fact and expert witnesses, the hearing of witnesses, translations, confidentiality, established the procedural timetable on the basis of the comments received from Parties, and identified the applicable laws and confirmed the language of the arbitration.

27 On 17 April 2020, the Arbitral Tribunal reached out to the Parties to acknowledge that Claimant had not submitted an Amended Statement of Claim nor had Respondent submitted a Statement of Defense & Counterclaim within the time frame indicated in para. 1.1. of Procedural Order No. 1. In light of the fact that no request for extension of the deadlines had been lodged as per para. 1.2 of Procedural Order No. 1, this was unusual, and led the Arbitral Tribunal to invite the Parties to inform the Arbitral Tribunl whether this was due to the dispute having been settled.

28 On 17 April 2020, Respondent informed the Arbitral Tribunal that there had been no settlement discussions. Respondent further stated that the pandemic had very greatly affected Respondent's operations and ability to conduct business, including devoting resources to dealing with the proceedings at hand. Furthermore,

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2 Email by Xue Huang dated 16 March 2020, 12.25 pm.
3 Email by Patrick Lennon dated 16 March 2020, 9.12 pm.
4 *Ibid*.

Respondent stated that it had not submitted a Statement of Defense, because it had expected that an Amended Statement of Claim would be served.

29 On 17 April 2020, the Arbitral Tribunal reminded the Parties that during the preliminary hearing the Claimant had stated that it would not necessarily submit an Amended Statement of Claim, but that it wanted a chance to do so. The Arbitral Tribunal futrher stated that because Claimant had decided not to submit an Amended Statement of Claim by the date indicated as deadline in para. 1.1. of the Procedural Order No. 1, the Statement of Claim to be replied to by Respondent was the one initially submitted by Claimant. The Arbitral Tribunal extended the deadline for submission of Respondent's Statement of Defense & Counterclaim to 20 April 2020, 7.00 p.m. (ET).

30 On 20 April 2020, Respondent submitted the "**Answering Statement of Respondent, Triorient, LLC**".

31 On 22 April 2020, Claimant submitted its document production request.

32 On 29 April, Respondent submitted the Redfern Schedule with Respondent's responses and objections incorporated therein.

33 On 14 May 2020, the ICDR informed the Arbitral Tribunal that it had required the Parties to make certain additional deposits to cover the potential expenses of the arbitration, as the ICDR was entitled to do pursuant to the applicable AAA Commercial Arbitration Rules, but that payments had not been received. In light of this, on that same day, the Arbitral Tribunal decided to suspend the proceedings pursuant to R-57(e) AAA Commercial Arbitration Rules. The Arbitral Tribunal granted the Parties until 21 May 2020, 5.00 pm (ET)) to make the payments in the amount requested by the ICDR.

34 On 20 May 2020, Claimant notified the Arbitral Tribunal that initial payments had been made and that it would effect payment of its share of the additional desposits invoiced by ICDR in a timely manner. Claimant also requested the Arbitral Tribunal to resume the proceedings.

35 On 21 May, in light of a discussion had with ICDR relating to the financial matters regarding these proceedings and the apparent willingness of Claimant to comply with ICDR's request for additional deposits in a timely manner as manifested to all Parties concerned on 20 May 2020, the Arbitral Tribunal decided to further suspend the proceedings until 28 May 2020, 6.00 pm (ET). The Arbitral Tribunal also ordered Respondent to inform the Arbitral Tribunal by 25 May 2020 whether it would effect payment of its share of the additional deposit requested by ICDR.

36 On 22 May 2020, Respondent confirmed that it intended to remit payment of the additional deposit by the end of May.

37 On 28 May 2020, in light of both the statement received on 20 May 2020 from Claimant regarding payment "in a timely manner" of the additional advance on costs and statement received from Respondent dated 22 May 2020 confirming that Respondent intended to remit payment of the additional deposit by the end of May, the Arbitral Tribunal decided to lift the suspension and resume the arbitration proceedings. At the same time, the Arbitral Tribunal issued an Amended Procedural Timetable that took into account the period of suspension and the steps taken until said suspension. However, the Arbitral Tribunal reserved the right - granted to it by the applicable rules - to suspend or terminate the proceedings in case payment would not to occur.

38 On 28 May 2020, after the Arbitral Tribunal had decided to resume the proceedings, Respondent stated that, for the avoidance of any confusion or misunderstanding, its earlier statements regarding payments related to the initial deposit. Respondent had not paid, and would not be in a position to pay, the additional deposits before the end of May. Respondent also stated that at the time it was making the statement it could not make any representation as to when Respondent would be in a position to pay the additional deposits requested by ICDR.

39 On 1 June 2020, Respondent requested leave to submit an amended answering statement and affirmative defenses. Respondent added that the only changes made related to the deletion of paragraphs 35 and 36 from Respondent's original Answering Statement of Respondent.

40 On 1 June 2020, the Arbitral Tribunal granted Claimant until noon (ET) of 2 June 2020 to submit comments regarding the request submitted by Respondent.

41 On 2 June 2020, Claimant requested an extension of the deadline to comment on Respondent's request.

42 On 2 June 2002, the Arbitral Tribunal granted Claimant until 3.00 pn (ET) of 2 June 2020 to submit its comments.

43 On 2 June 2020, Claimant objected to the application for leave several reasons, including, *inter alia*, that Respondent had failed to specify any grounds on which the Arbitral Tribunal should grant the motion, that the granting of a proposed amendment filed on the eve of the deadline imposed by the Arbitral Tribunal for the submission of Redfern Schedule to the Arbitral Tribunal regarding disputes on the requests to produce would cause undue prejudice to Claimant, because

Claimant's request to produce documents had been submitted to Respondent on 22 April 2020. Among the documents requested by the Claimant were documents related to the Respondent's determination of the scrap metal (HMS scrap) pricing on various points of time, and documents related to the price and value for the resale of the alleged non-conforming products by Respondent to its client. The requests for those documents were central to Claimant's establishment and the Tribunal's determination on the merit of Claimant's claim, especially given the factual statements made by Respondent on Paragraphs 35 and 36 on its original Answering Statement. The proposed amendment would cause undue prejudice to Claimant by hindering Claimant's ability to obtain and present facts and evidence supporting Claimant's claim. Claimant therefore requested that the Arbitral Tribunal deny Respondent's application to amend its original answering statements.

44 On 2 June 2020, Respondent stated that it "would be pleased to respond to the Claimant's objection and claims of prejudice based on the deletion of two factual recitals from the Respondent's answering statement, noting that neither the AAA Arbitration Rules or the Tribunal's Procedural Orders preclude submission of an amended claim or answering statement, and in fact allow changes to a claim or counterclaim at any time before the close of hearings (see R-6)."[5]

45 On 2 June 2020, having taken into account Respondent's request as well as the objections to the same submitted by Claimant, and having further considered that Respondent had submitted its Answering Statement of Respondent on 20 April 2020, but requested leave to submit an amended answering statement and affirmative defenses only about 6 weeks thereafter, and this without adducing any justification for its request, the Arbitral Tribunal decided to deny Respondent's request. In so deciding, the Arbitral Tribunal made it clear that no futher rounds of comments were necessary.

46 On 2 June 2020, Respondent asked that Respondent's exception to the Arbitral Tribunal's decision ruling be noted for the arbitral record. Respondent claimed that the decision was made without having afforded Respondent an opportunity to

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5 Email by Patrick Lennon dated 2 June 2020, 3.13 pm.

respond to the Claimant's objection, thus depriving Respondent of procedural due process. Respondent also stated that Respondent's rights were therefore reserved.

47 On 3 June 2020, Claimant submitted the Redfern Schedule to the Arbitral Tribunal as per no. 1 of the Amended Prcedural Timetable.

48 On 4 June 2020, the Arbitral Tribunal acknowledged receipt of the completed Redfern Schedule and postponed the cut-off period referred to in para. 4.6 of Procedural Order No. 1 until 17 June 2020.

49 On 6 June 2020, the Arbitral Tribunal issued Procedural Order No. 2 with the completed Redfern Schedue as Appendix 1, ordering Respondent to produce the documents responsive to Claimant's requests No. 15, No. 16, No. 20, No. 21, No. 22, and No. 23 as specified in the Redfern Schedule attached as Appendix 1 to Procedural Order No. 2.

50 On 16 June 2020, the Arbitral Tribunal extended the cut-off date referred to in para. 4.6 of Procedural Order No. 1 until 12 August 2020.

51 On 25 June 2020, Claimant submitted "Claimant's Motion to Compel Responses to Claimant's Discovery Demand" requesting an order from the Arbitral Tribunal "compelling Respondent to produce responsive documents in compliance with the Tribunal's orders or in the alternative confirm that there are no additional responsive documents being withheld by the Respondent."[6]

52 On 25 June 2020, the Arbitral Tribunal granted Respondent until 3.00 pm of the following day, *i.e.*, 26 June 2020, to comment on Claimant's request.

53 On 25 June 2020, Respondent asked that the Arbitral Tribunal clarify whether it required a formal response to Claimant's request by 3.00 pm of 26 June 2020, which would not be possible due to other commitments.

54 On 25 June 2020, the Arbitral Tribiunal stated that that was indeed what had been ordered. In light of Respondent's statement regarding Respondent's other commiments, however, the Arbitral Tribunal granted an extension to Respondent to comment on Claimant's request until 3.00 pm of 27 June 2020.

55 On 25 June 2020, the Respondent objected to the abbreviated deadlines that according to Respondent had been imposed upon it in this circumstance and

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6 Claimant's Motion to Compel Responses to Claimant's Discovery Demand, p. 2.

previously, and requested that this exchange be made part of the record in the arbitration. Respondent also indicated that it would submit a formal response to the Claimant's motion by 3.00 pm of 26 June 2020, given that the extended deadline, which Respondent had not requested, was falling on a Saturday.

56 On 25 June 2020, the Arbitral Tribiunal, commenting on Respondent's latest statement, stated that it had been under the wrong impression that 27 June 2020 would fall on a Friday, having been convinced that when it was writing it was Wednesday. In light of this, the Arbitral Tribunal extended the deadline until 3.00 pm. of Monday, 29 June 2020.

57 On 25 June 2020, Respondent stated that it would submit its opposition to Claimant's motion by 3.00 pm of the following day, *i.e.*, 26 June 2020.

58 On 26 June 2020, Respondent submitted "Respondent's Objection and Opposition to Claimant's Motion to Compel" (accompanied by Exhibit 1), which also contained a request for "an award of its legal fees incurred in responding to Claimant's specious motion made in bad faith."[7]

59 On 27 June 2020, the Arbitral Tribunal issued Procedural Order No. 3 containing the Arbitral Tribunal's decision regarding Claimant's request received on 25 June 2020. In light of the fact that the Arbitral Tribunal had already ordered Respondent to produce the documents responsive to Claimant's requests No. 15, No. 16, No. 20, No. 21, No. 22, and No. 23 as specified in the Redfern Schedule attached as Appendix 1 to Procedural Order No. 2, the Arbitral Tribunal denied Claimant's request, because granting the request would not add anything to the Arbitral Tribunal's previous order on the very same issue. Furthermore, in Respondent's Objection and Opposition to Claimant's Motion to Compel, Respondent expressly stated, *inter alia*, that "there are no responsive documents to be produced, and Respondent has otherwise produced all documents in its possession, custody and control responsive to the requests permitted by Procedural Order No. 2" (p. 2-3), thus not only rendering any order by the Arbitral Tribunal mirroring its earlier order on the very same issue futile, but also unnecessary. As regards this latter point, the Arbitral Tribunal pointed to the fact that Claimant had requested, in the alternative to an order by the Arbitral Tribunal compelling Respondent to produce responsive documents in compliance with the Arbitral Tribunal's previous order contained in Procedural Order No. 2, a "confirm[ation] that there are no additional responsive documents being withheld by the Respondent", confirmation which Respondent

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7 Respondent's Objection and Opposition to Claimant's Motion to Compel, p. 3.

had issued. As regards Respondent's request for an award of its legal fees incurred in responding to Claimant's request, the Arbitral Tribunal decided to reserve the right to decide any cost issues, including the issue of the costs of legal representation, at a later point in time, after giving all Parties the opportunity to make cost submissions.

60 On 1 July 2020, Claimant submitted the witness statements of Ruixue Yang (with Exhibit A) and Doudou Chen (with Exhibits A-K), employees of CREC, as well as the expert report by Dr. Joseph J. Poveromo (with Exhibit JP-1).

61 On 1 July 2020, Respondent submitted the witness statement of Albert Winslow (with Exhibits 1-9).

62 Due to technical issues, Respondent's submission referred to in the previous paragraph was received by the Arbitral Tribunal only on 2 July 2020. On that day, the Arbitral Tribunal stated that it would admit the submission.

63 On 6 July 2020, the Arbitral Tribunal ordered the Parties to comply with para. 4.2 of Procedural Order No. 1, regarding the consecutive numbering of the exhibits.

64 On 15 July 2020, Claimant resubmitted the witness statements as well as the expert report referred to in para. 60 with the same annexes as the ones referred to in para. 60, but with a different numbering of the annexed exhibits to comply with the Arbitral Tribunal's order of 6 July 2020. The witness statements of Ruixue Yang were accompanied by Exhibit C12, and that of Doudou Chen by Exhibits C1-C11, while the expert report by Dr. Joseph J. Poveromo was accompanied by Exhibit C13.

65 On 15 July 2020, Respondent resubmitted the witness statement referred to in para. 61 with the same annexes as the ones referred to in para. 61, but with a different numbering of the annexed exhibits to comply with the Arbitral Tribunal's order of 6 July 2020.

66 On 15 July 2020l Respondent also submitted a rebuttal expert witness statement of Jose Luis Solano Delgado in both PDF and PowerPoint versions, the latter of which contained and embedded video. When submitting said rebuttal expert witness statement, Respondent also informed the Arbitral Tribunal that it was awaiting receipt of a second rebuttal expert witness statement, but that due to issues with the witness's employer in Venezuela, the witness had not yet received approval to release the rebuttal expert witness statement. For this reason, Respondent requested until 17 July 2020 to submit the second rebuttal expert witness statement.

67 On 16 July 2020, the Arbitral Tribunal authorized Respondent to submit the second rebuttal expert witness statement by 17 July 2020.

68 On 17 July 2020, Respondent submitted the Expert Witness Statement of Gabriel de Diego.

69 On 30 July 2020, the Arbitral Tribunal sent out a communication stating that it had not received Claimant's Statement of Reply as per n. 6 of the Amended Procedural Timetable.

70 On 31 July 2020, Claimant informed the Arbitral Tribunal that, because Respondent had not filed any counterclaim against the Claimant, the Claimant waived its right to file a statement of reply. Claimant further informed the Arbitral Tribunal of its intention to file an application seeking permission from the Tribunal to file a motion for summary judgment in due course and that it would be grateful to the Arbitral Tribunal for its attention to the matter.

71 On 31 July 2020, the Arbitral confirmed receipt of Claimant's communication regarding the fact that it had not submited a statement of reply. In respect of Claimant's further statement, the Arbitral Tribunal informed the Parties that it had not received any application and, therefore, did not need to take any decision.

72 On 13 August 2020, the Arbitral Tribunal wrote to the Parties asking whether the Arbitral Tribunal's understanding that Respondent had not submitted a Statement of Rejoinder (within the time frame given in n. 7 of the Amended Procedural Timetable) because Claimant had decided not to submit a Statement of Reply was correct. In light of the correlation between the Statement of Rejoinder and the Statement of Reply the Arbitral Tribunal thought that this was logical, but stated that a confirmation would have been welcome. Also, in order to start the conversation regarding potential dates for the pre-hearing conference listed in the Amended Procedural Timetable under n. 9, the Arbitral Tribunal asked the Parties to indicate their availability during the week of 24 August as well as that of 31 August.

73 On 18 Augsut 2020, not having received any feedback regarding the Parties' availability for the pre-hearing conference to be held via telephone (referred to in the Amended Procedural Timetable under n. 9), the Arbitral Tribunal suggested the following times and dates for the pre-hearing conference: 24 August 2020, 9.30 am (NY time), 25 August 2020, 9.30 am (NY time), and 31 August 2020, 9.30 am (NY time), and ordered the Parties to submit any comments regarding their availability for the dates indicated by noon (NY time) of Thursday, 20 August 2020.

74 On 18 August 2020, Claimant replied that it was available for a pre-hearing conference on both 24 August and 25 August. Additionally, Claimant submitted an

application to seek the Arbitral Tribunal's permission to file a motion for summary judgment.

75 On 18 August 2020, the Arbitral Tribunal acknowledged receipt of the application and granted Respondent until noon of 27 August to comment on the application to seek the Arbitral Tribunal's permission to file a motion for summary judgment. The Arbitral Tribunal also requested the Parties to indicate by noon of Thursday, 20 August 2020, whether they would be available to hold the pre-hearing conference on 31 August 2020, rather than on 24 or 25 August 2020.

76 On 20 August 2020, Mr. Patrick F. Lennon, counsel for Respondent, advised all parties involved in the proceedings that Lennon, Murphy & Phillips and he himself were withdrawing as counsel for Triorient LLC in this arbitration with immediate effect.

77 On 20 August 2020, the Arbitral Tribunal confirmed receipt of Mr. Lennon's communications and stated that all communications sent to Mr. Lennon prior to receiving his communication at 12.23 pm were effective vis-à-vis Respondent.

78 On 20 August 2020, Mr. Lennon sent a communication stating that it was not obvious to him what the Aribtral Tribunal meant when stating that its communications were "effective" vis-à-vis Respondent, but that he could confirm that the Arbittal Tribunal's prior correspondence had been relayed to the Respondent.

79 On 20 August 2020, the Arbitral Tribunal acknowledged receipt of Mr Lennon's communication and stated that it would not copy him to any further correspondence in the proceedings.

80 On 26 August 2020, the Arbitral Tribunal issued Procedural Order No. 4, which was triggered by Claimant's application dated 18 August 2020, by the imminent 27 August 2020 deadline for Respondent's submission of comments regarding said application as well as by Mr. Lennon's communication dated 20 August 2020. In its Procedural Order No. 4, the Arbitral Tribunal extended the deadline for Respondet to comment on Claimant's application dated 18 August 2020 until noon of 10 September 2020 to ensure that Respondent had all the opportunity to submit comments. Furthermore, in light of the withdrawal of Lennon, Murphy & Phillips and Mr. Lennon himself as counsel for Respondent, the Arbitral Tribunal amended para. 3.3 of Procedural Order No. 1 so as to allow Respondent to receive notice of the communications and/or submissions in these proceedings. Therefore, the Arbitral Tribunal ordered that all communications to Respondent be sent until

further notice in hard copy (that allows proof of delivery) to Triorient LLC., 76 Tokeneke Road, Darien, CT 06820. At the same time, the Arbitral Tribunal ordered Respondent to indicate to all parties involved by noon of 10 September 2020 an email address to which all communications and/or submissions regarding these proceedings should be sent, because it had been agreed by the Parties during the first case management conference and ordered by this Arbitral Tribunal in para. 3.1 of Procedural Order No. 1 that "[a]ll submissions will be in writing and shall be transmitted via email". Also, to allow an efficient and effective continuation of the current proceedings, the Arbitral Tribunal ordered the Parties to indicate by no later than noon of 10 September 2020 whether they would be available for a pre-hearing conference call starting at 9.30 am of 17, 18, 21, or 22 September. To avoid inefficiencies and delays, the Arbitral Tribunal fixed a pre-hearing conference call for 9.30 am of 24 September 2020, to be considered a default date in case it were not possible to identify a date in light of the Parties' communications to be received by noon of 10 September 2020 regarding their availability for one of the dates proposed (17, 18, 21, or 22 September). In Procedural Order No. 4, the Arbitral Tribunal ordered the Parties to indicate by noon of 10 September 2020 their availability for a one-day hearing to be held via video-conferencing (as per n. 19 of para. 1.1 of Procedural Order No. 1, para. 5.4 of Procedural Order No. 1, and n. 13 of the Amended Procedural Timetable issued on 28 May 2020) starting at 9.00 am of 2, 5, or 6 October 2020. If it were not possible to identify a hearing date in light of the Parties' communications to be received by noon of 10 September 2020 regarding their availability for one of the hearing dates proposed (2, 5, or 6 October 2020), the Arbitral Tribunal would fix a hearing date. For the purpose of clarification, the Arbitral Tribunal also stated that the foregoing did not prejudice any decision this Arbitral Tribunal would take regarding Claimant's pending application. The foregoing was meant to avoid delays in the proceedings and was subject to the Arbitral Tribunal's decision on Claimant's pending application.

81 On 11 September 2020, the Arbitral Tribunal issued Procedural Order No. 5. In its Procedural Order No. 5, the Arbitral Tribunal acknowlegded that by noon of 10 September 2020 Respondent had not sumitted any comment regarding Claimant's application, which was then still pending, and that the fact that Respondent had not done so had to be considered a conscious choice not to submit any such comment

rather than the lack of opportunity to do so. The Arbitral Tribunal acknowledged that its Procedural Order No. 4 had been communicated to Respondent directly, both via FedEx, with proof of delivery having occurred being on file with the ICDR, and via email. As far as the latter means of communication was concerned, the email had been sent by the ICDR to fsantucci@triorient.com, the email address for Mr. Facundo Santucci, who represented Respondent in the Direct Reduced Iron (A) Briquettes Contract and signed said Contract as per Respondent's Exhibit R-1. Furthermore, said email address (fsantucci@triorient.com) was indicated in that very Contract under Clause 14 as being the email address to which the notices to Respondent under the Contract had to be sent (in case this means of communication would have been used). Furthermore, Respondent relied on email exchanges involving Mr Santucci, who in those occasions used the email address referred to (as in Respondent's Exhibit R-3). Claimant also submitted exhibits in which Mr. Santucci's email address is used, either by him or by others when addressing him. In light of the above and the fact that this Arbitral Tribunal had been advised by the ICDR that the ICDR had not received any message of error upon the email with Procedural Order No. 4 attached to it and that said email had not bounced back, the Respondent had to be considered to have duly received Procedural Order No. 4 also via email. This led the Arbitral Tribunal to conclude that Respondent had chosen not to submit any comment, not even one simply declaring that Claimant's application was to be rejected. And because under the applicable AAA Commercial Arbitration Rules "any party may participate without representation (pro se)" (R-26), to do so it was not necessary for Respondent to be represented by (new) counsel. Still, the Arbitral Tribunal was conscious of the fact that Respondent's decision not to submit any comment could *per se* be analogized to an acknowledgement that Claimant's application be granted. Rather, absent an agreement of the Parties, the Arbitral Tribunal itself had the power under the applicable rules to determine whether the application should be granted. In light of the advanced stage of the proceedings, and that the applicable procedural timetable based on an early agreement by the Parties, the Arbitral Tribunal rejected Claimant's application. As a consequence, the applicable procedural timetable, specifically, the Amended Procedural Timetable, continued to govern.

82 In Procedural Order No. 5, in light of the decision to reject Claimant's application and absent any indication by the Parties regarding their preferences for any of the alternative dates for a pre-hearing conference proposed in Procedural Order No 4, the Arbitral Tribunal also decided that the pre-hearing conference would take place on 24 September 2020, from 9.30 am onwards (the default date and time indicated in Procedural Order No. 4). In respect of the hearing itself, the Arbitral Tribunal noted that neither Party indicated its preferences for any of the alternative hearing dates proposed in Procedural Order No. 4. As per the power granted to the Arbitral Tribunal to fix the hearing date, provided that "a notice of hearing [be sent] to the parties at least 10 calendar days in advance of the hearing date", the hearing was fixed for 15 October 2020, starting at 9.00 am (NY time), thus giving all parties involved ample time to make provision for their participation (either *pro se* or through counsel) as well as the participation of fact and/or expert witnesses, where required.

83 In Procedural Order No. 5, the Arbitral Tribunal also recalled that in Procedural Order No. 4, the Arbitral Tribunal had ordered Respondent to indicate to all parties involved by noon of 10 September 2020 an email address to which all communications and/or submissions regarding the current arbitration proceedings would have to be sent, because it had been agreed by the Parties during the first case management conference and confirmed by this Arbitral Tribunal in para. 3.1 of Procedural Order No. 1 that "[a]ll submissions will be in writing and shall be transmitted via email". Respondent failed to do so. Respondent did not comply with the order. In light of this, the Arbitral Tribunal amended para. 3.3 of Procedural Order No. 1, as amended in Procedural Order No. 4, further. To allow for the efficient administration of these proceedings and the compliance with para. 3.1 of Procedural Order No. 1, all communications to Respondent would from the date of the Procedural Order No. 5 have to be sent via email to fsantucci@triorient.com, the email address referred to above, as well as to awinslow@triorient.com. The latter was the email address for Mr. Albert Winslow, who, as per his own witness statement submitted by Respondent on 2 July 2020 was "President of Triorient, LLC ("Triorient" or "Respondent"), the Respondent in this arbitration" (para. 1 of Witness Statement of Albert Winslow). The email address was used by Mr. Santucci when copying Mr. Winslow to an email to Claimant in relation to the

quality of the goods delivered under the Direct Reduced Iron (A) Briquettes Contract at issue in these arbitration proceedings (Claimant Exhibit D attached to Claimant's application submitted on 18 August 2020). The email address was also referred to in Respondent's Exhibit R-4. Furthermore, the above email address for Mr. Winslow had also been used by ICDR on 2 September 2020 in connection with the current proceedings when communicating with Respondent re financial matters after Mr. Lennon's withdrawal, and Mr. Winslow replied on 9 September 2020 using that very same email address.

84 On 24 September 2020, from 9.30 am to 10.05 am (NY time), the pre-hearing conference took place via telephone as per Procedural Order No. 5 and R-21 of the applicable AAA Commercial Arbitration Rules, with Ms. Huang participating on behalf of Claimant, while Respondent did participate neither *pro se* nor through counsel in said pre-hearing conference, although Respondent had been made aware of the pre-hearing conference so as to allow Respondent to make provision for participation. Following the pre-hearing conference, the Arbitral Tribunal issued Procedural Order No. 6, ordering *inter alia* all Parties to summon all fact and expert witnesses, who had made submissions in these proceedings, to participate in the evidentiary hearing scheduled for 15 October 2020, starting at 9.00 am (NY time). In Procedural Order No. 6, the Arbitral Tribunal also fixed the order of presentation and evidence at the evidentiary hearing, ordered how the fact witness testimony and the expert witness testimony the evidentiary hearing had to proceed, and what the logistics of the virtual evidentiary hearing format had to be. Annexed to the Procedural Order as Annex A was the Affirmation according to which oral evidence at the evidentiary hearing had to be affirmed.

85 On 28 September 2020, the Arbitral Tribunal requested the Parties to address in their opening statements scheduled for the first part of the evidentiary hearing that was to place on 15 October 2020, among other issues, the law applicable to the statute of limitation of the claim for payment of the outstanding part of the purchase price, the date on which payment of the balance of the purchase price was supposed to occur as per Clause 7.2 of the CONTRACT, and the applicable interest rate for late payment of the purchase price (or part thereof). The Arbitrtal Tribunal assured the Parties that the request did in no way imply that the Arbitral Tribunal had taken any decision on the foregoing issues, which it had not. The request was rather

triggered by those issues (or related ones) having been raised by one or both Parties in one way or another without, however, having been addressed in detail.

86 On 12 October 2020, Claimant submitted 25 trial exhibits, including demonstrative exhibits, to the Arbitral Tribunal as per the Amended Procedural Timetable and exchanging the same with the Respondent.

87 On 12 October 2020, the Arbitral Tribunal reminded the Parties that no new exhibits could be used during the hearing. The fact that an exchange of demonstrative exhibits was allowed, did not mean that new exhibits could be submitted, as the Arbitral Tribunal had made clear in its Procedural Order No. 1, para. 4.6, which was amended on two occasions, more specifically, on 4 June 2020 (when the Arbitral Tribunal had postponed the cut-off period referred to in para. 4.6 of Procedural Order No. 1 until 17 June 2020, and on 16 June 2020, when the Arbitral Tribunal had extended the cut-off date referred to in para. 4.6 of Procedural Order No. 1 until 12 August 2020).

88 On 12 October 2020, Mr. Facundo Santucci informed all involved that Triorient had terminated its business operations and anticipated dissolving in the near future and, therefore, would not be appearing in the hearing. Mr. Santucci did so using the email address referred to above (fsantucci@triorient.com), in para. 81, thus confirming that the email address indicated was the correct one. When sending out the email, Mr. Santucci copied Mr. Winslow, for whom he used the email address indicated above (awinslow@triorient.com), in para. 83, thus also confirming that that was indeed the email address for Mr. Winslow to be used in these proceedings.

89 On 13 October 2020, the Arbitral Tribunal requested the Parties to submit cost submissions by 3.00 pm of Monday, 19 October 2020.

90 On 15 October 2020, the hearing date fixed in Procedural Order No. 5 issued by the Arbitral Tribunal on 11 September 2020, the hearing took place via video conference. The hearing started at 9.15, with Claimant's counsel, Song Chen, Xinyu Zhu and Xue J. Huang, and Claimant's witnesses, Ruixue Yang (fact witness), Doudou Chen (fact witness), and Joseph J. Poveromo (expert witness) present. Respondent did not participate in the hearing, neither pro se nor through counsel, nor did its witnesses. This must be understood as being a choice, given that Respondent had had enough time to make provision for its participation and having

its witnesses participate, as ordered by the Arbitral Tribunal in Procedural Order No. 6, issued on 24 September 2020. Respondent's lack of participation was in line with the communication it had submitted by way of an email authored by Mr. Santucci dated 12 October 2020, informing all involved that Triorient LLC had terminated its business operations and anticipated dissolving in the near future and, therefore, would not be appearing in the hearing. Also present were Mr. Way P. Moy, interpreter, and Ms. Michelle Cox from TSG Reporting, court reporter.

91 As for the hearing itself, to the extent possible, given the non-participation of Respondent and its witnesses, it followed the order of presentation and evidence fixed by the Arbitral Tribunal in its Procedural Order No. 6. The hearing ended at 12.37 pm, at which time the Arbitral Tribunal formally closed the evidentiary hearing.

92 On 15 October 2020, the Arbitral Tribunal issued Procedural Order No. 7. It decided that it would grant the Parties the possibility to comment on the issues raised and the statements made during the hearing as recorded in the transcript of the evidentiary hearing, which the Arbitral Tribunal would send to the Parties as soon as it would become available. The Arbitral Tribunal also decided to grant the Parties the possibility to comment on any comments received from opposing Party. The time frame for the exchange of comments would be set once the transcript would have become available. In lighti of these decisions, the Arbitral Tribunal suspended the deadline originally set for the Parties' cost submissions (i.e. 19 October 2020).

93 On 15 October 2020, Claimant informed all parties involved, as per the Arbitral Tribunal's request made during the hearing, of the date when the initial payment of $7.000.000,00 had been received by Claimant, namely 25 October 2017.

94 On 4 November 2020, Claimant submitted to the Arbitral Tribunal (and in copy to all parties involved) the hearing transcript it had received from the court reporter who had participated in the hearing, Ms. Michelle Cox.

95 On 4 November 2020, the Arbitral Tribunal submitted the hearing transcript to the Parties and gave the Parties until 2.00 p.m. NY time of Monday, 9 November 2020, to comment exclusively on the issues raised and the statements made during the hearing as recorded in the hearing transcript. Furthermore, each Party was granted

the possibility to comment by 6.00 pm NY time of Tuesday, 10 November 2020, on any comments received from opposing Party by 2.00 pm NY time of Monday, 9 November 2020. The Arbitral Tribunal also requested the Parties to submit their cost submissions at the latest by 6.00 pm NY time of Tuesday, 10 November 2020.

96 On 10 November 2020, Claimant submitted its Cost Report showing a total cost of $173,572.80 (with legal fees amounting to $81,592.50 and costs and expenses, including the advance the arbitration costs, amounting to $91,980.30).

97 On 10 November 2020, the Aribtral Tribunal granted the Parties until noon of 12 November 2020 to comment on opposing Party's cost submissions.

98 On 12 November 2020, after the expiration nof the deadline for the Parties to comment on opposing Party's had run out (without any comments having been received), the Arbitral Tribunal closed the proceedings.

H. SUMMARY OF THE FACTUAL BACKGROUND OF THE CLAIM

99 The following summary of the factual background of the claim has been established by the Arbitral Tribunal for the purposes of this decision. The circumstance that certain facts, allegations and/or legal arguments are not expressly or in full detail referred to in the following summary does not imply that the Arbitral Tribunal has not taken them into consideration. In fact, the Arbitral Tribunal has fully considered and taken cognizance of the Parties' submissions made in these arbitration proceedings.

100 As per Claimant's Demand of Arbitration received by the AAA/ICDR on 23 September 2019, and as also confirmed by Claimant's Statement of Claim as well as statements made during the hearing,[8] the dispute relates to Respondent's alleged refusal to pay the full price for goods delivered by Claimant pursuant to the CONTRACT.

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8 *See* Hearing Transcript, p. 19 et seq.

101 On 4 September 2017, Claimant and Respondent entered into the CONTRACT,[9] *i.e*., a contract for the sale and purchase of HBI from Venezuela produced by FMO and/or Venprecar.[10] Pursuant to the CONTRACT, Claimant had to deliver HBI to Respondent, that, if produced by FMO, had to contain a minimum of 85% FeM, and if produced by Venprecar, had to contain a minimum of 84.7% FeM.[11]

102 Pursuant to Clause 2 of the CONTRACT, "[t]he HBI to be delivered by [Claimant] to [Respondent] shall conform to the [. . .] chemical and physical specifications, in hold of Vessel at loading port."[12] As regards the quantity, Clause 1 of the CONTRACT specified that there had to be "[o]ne (1) shipment of 33,000 metric tons, more or less ten percent (+1- 10%) at Seller's option", *.i.e*, at the option of Claimaint.[13]

103 As for the price, the Parties agreed that the final FOBST price for the goods was $255/MT.[14]

104 As regards the performing vessel, it was determined that it should be the MV Summer Wind.[15] As a consequence, in October 2017, the MV Summer Wind was

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9 *See* Respondent's Exhibit R-1.

10 *See* Respondent's Exhibit R-1; para. 3 of Claimant's Statement of Claim (p. 1); para. 3 of Amended Answering Statement of Respondent, Triorient, LLC.

11 *See* Clause 2 of the CONTRACT, Respondent's Exhibit R-1; para. 4 of Claimant's Statement of Claim (p. 2); para. 4 of Amended Answering Statement of Respondent, Triorient, LLC.

12 *See* also para. 5 of Claimant's Statement of Claim (p. 2); but *see* para. 5 of Amended Answering Statement of Respondent, Triorient, LLC (denying that the chemical specifications were to be measured at the loading port).

13 See also para. 6 of Claimant's Statement of Claim (p. 2); but *see* para. 6 of Amended Answering Statement of Respondent, Triorient, LLC (denying the that the chemical specifications were to be measured at the loading port).

14 *See* Clause 4 of the CONTRACT, Respondent's Exhibit R-1; para. 6 of Claimant's Statement of Claim (p. 2); para. 4 of Witness Statement of Doudou Chen (p. 2); para. 9 of Witness Statement of Albert Winslow (p. 3); Claimant's Exhibit C1 - Annex B; but *see* para. 6 of Amended Answering Statement of Respondent, Triorient, LLC.

15 *See* para. 7 of Claimant's Statement of Claim (p. 2); para. 10 of Witness Statement of Albert Winslow (p. 3); para. 7 of Amended Answering Statement of Respondent, Triorient, LLC.

loaded with 30,503 metric tons of HBI,[16] of which 13,993 were from FMO[17] and 16,51O were from Venprecar.[18]

105 On October 16, 2017, Claimant sent Triorient an invoice in the amount of $7,778,265.00 as well as a copy of the shipping documents.[19] Included in the shipping documents were the Certificates of Analysis reporting that FMO's portion of the goods contained 83.46% of FeM and that Venprecar's portion of the goods contained 85.30% of FeM.[20] In light of this, Respondent raised an issue of pricing for the portion of the goods which appeared not to meet contract specifications,[21] and on 12 January 2018, Respondent informed Claimant that due to the quality difference it would reduce the contract price (of which Respondent paid $7,000,000.00)[22] by $699,650.00.[23] The reduction of price was calculated by Respondent at $50MT per the 13,993 metric tons of product that were allegedly non-conforming. The $50/MT amount corresponded to the price difference between the CFR Turkey price of $355/MT for HBI on 4 September 2017 (the date of the CONTRACT) and the CFR Turkey price of $305/MT for HBI at the time of delivery of the goods by Claimant to Respondent.

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16 *See* para. 8 of Claimant's Statement of Claim (p. 2); para. 10 of Witness Statement of Albert Winslow (p. 3); but *see* para. 8 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2) (denying the allegations contained in para. 8 of Claimant's Statement of Claim).

17 *See* para. 8 of Claimant's Statement of Claim (p. 2); para. 10 of Witness Statement of Albert Winslow (p. 3); paras. 14 & 15 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

18 *See* para. 8 of Claimant's Statement of Claim (p. 2); para. 10 of Witness Statement of Albert Winslow (p. 3)

19 *See* para. 9 of Claimant's Statement of Claim (p. 2); para. 11 of Witness Statement of Albert Winslow (p. 3); para. 9 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

20 *See* para. 10 of Claimant's Statement of Claim (p. 2); para. 12 of Witness Statement of Albert Winslow (p. 3); para. 10 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2); Respondent's Exhibit R-2.

21 *See* para. 11 of Claimant's Statement of Claim (p. 2); but *see* para. 11 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2) (denying Claimant's allegation).

22 See para. 25 of Claimant's Statement of Claim (p. 4); para. 25 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 3).

23 *See* para. 13 of Claimant's Statement of Claim (p. 2); para. 17 of Witness Statement of Albert Winslow (p. 4); para. 13 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2); Respondent's Exhibit R-5.

I. SUMMARY OF CLAIMANT'S POSITION REGARDING THE CLAIM AND COSTS

106 Under the CONTRACT entered into between Claimant and Respondent on 4 September 2017, Claimant was obliged to deliver a total amount of HBI of 33,000 MT +/-10% at Claimant's option versus payment of a final FOBST price for the goods of $255/MT.[24] Claimant having delivered 30,503 metric tons of HBI, of which 13,993 metric tons were from FMO[25] and 16,51O metric tons from Venprecar, [26] Claimant was entitled to a contract price of $7,778,265.00.[27] For this reason, on 16 October 2017, Claimant sent an invoice to Respondent over that amount together with shipping documents. These shipping documents included the certificates of analysis showing that FMO's portion of the goods contained 83.46% of FeM, while Venprecar's portion of the goods contained 85.30% of FeM.[28]

107 Respondent took issue with the cargo,[29] stating that it did not comply with the CONTRACT,[30] "and in order to avoid obstacles and delays in unloading the ship upon arrival at destination",[31] Respondent, after initially proposing a partial payment of $6,000,000.00 against the delivery of the original documents by

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24 *See* Clause 4 of the CONTRACT, Respondent's Exhibit R-1; para. 6 of Claimant's Statement of Claim (p. 2); Hearing Transcript, p. 20; para. 4 of Witness Statement of Doudou Chen (p. 2); para. 9 of Witness Statement of Albert Winslow (p. 3); Claimant's Exhibit C1 - Annex B; but *see* para. 6 of Amended Answering Statement of Respondent, Triorient, LLC.

25 *See* para. 8 of Claimant's Statement of Claim (p. 2); para. 5 of Witness Statement of Doudou Chen (p. 2); Hearing Transcript, p. 20; para. 10 of Witness Statement of Albert Winslow (p. 3); paras. 14 & 15 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

26 *See* para. 8 of Claimant's Statement of Claim (p. 2); Hearing Transcript, p. 20; para. 5 of Witness Statement of Doudou Chen (p. 2); para. 10 of Witness Statement of Albert Winslow (p. 3).

27 See para. 9 of Claimant's Statement of Claim (p. 2).

28 *See* para. 10 of Claimant's Statement of Claim (p. 2); para. of Witness Statement of Doudou Chen (p.); Claimant's Exhibit C2; para. 12 of Witness Statement of Albert Winslow (p. 3); para. 10 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2); Respondent's Exhibit R-2.

29 *See* para. 8 of Claimant's Statement of Claim (p. 2); email by Mr. Santucci dated 16 October 2017, 6:07 pm., Claimant's Exhibit C3.

30 *See* para. 8 of Witness Statement of Doudou Chen (p. 3); Hearing Transcript, p. 20.

31 Email by Mr Santucci, dated 17 October 2017, 11:03 am, Claimant's Exhibit C3.

Claimant,[32] agreed to effect payment of $7,000,000.00 as initial payment for the goods,[33] which Respondent did indeed effect[34] on 25 October 2017.[35]

108 Claimant argued that it was entitled to the outstanding balance,[36] including the price reduction in the amount of $699,650.00 applied by Respondent due to the quality difference in the goods delivered. According to Claimant, Respondent calculated this price reduction of $50/MT based on the differential between the contract price and the market price at the time of delivery of the 13,993 metric tons of product that were non-conforming.[37] Respondent got to the $50/MT by comparing the price difference of scrap metal (Scrap HMS 80:20 CFR Turkey price) of 4 September 2017, the day of the CONTRACT, and 16 October 2017, the day Respondent allegedly renegotiated a new price with its own client.[38] Respondent claimed that a $50/MT discount was extended to its client, without, however, providing any proof of such deductions to support its claim,[39] despite various requests to do so[40]. Moreover, Respondent claimed that Article 50 of the CISG supported the price reduction.[41]

109 However, Claimant asserted that Respondent's interpretation of Article 50 of the CISG was inaccurate.[42] Pursuant to the CISG, any applicable discount should be calculated by determining the price difference between the conforming goods and non-conforming goods at the date of delivery.[43] In light of this, Respondent's price reduction approach based on a comparison between the price difference of scrap

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32 *See* email by Mr Santucci, dated 17 October 2017, 11:03 am, Claimant's Exhibit C3; Hearing Transcript, p. 21.

33 *See inter alia* Hearing Transcript, p. 21.

34 *See* para. 25 of Claimant's Statement of Claim (p. 4); para. 25 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 3).

35 *See* email by Ms. Huang, dated 15 October 2020, 4:29 pm.

36 *See* para. 28 of Statement of Claim (p. 4).

37 *See* para. 14 of Claimant's Statement of Claim (p. 3); para. 14 Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

38 *See* para. 15 of Claimant's Statement of Claim (p. 3); Hearing Transcript, p. 25; para. 13 of Witness Statement of Doudou Chen (p. 4); email by Mr. Stanucci, dated 12 January 2018, 5.27 pm, Claimant's Exhibit C5.

39 *See* para. 16 of Claimant's Statement of Claim (p. 3); para. 14 of Witness Statement of Doudou Chen (p. 4).

40 *See* paras. 14-17 of Witness Statement of Doudou Chen (p. 4-5); Hearing Transcript, p. 26 et seq.

41 *See* para. 17 of Claimant's Statement of Claim (p. 3); Hearing Transcript, p. 28.

42 *See* para. 18 of Claimant's Statement of Claim (p. 3).

43 *See* para. 19 of Claimant's Statement of Claim (p. 3).

metal between the day of the CONTRACT and the day it allegedly renegotiated a the contract with its client was not in compliance with Article 50 of the CISG.[44] In fact, according to Claimant, the quality and price difference between HBI with 83.46% of FeM and HBI with 85% FeM was minor.[45] If at all, based on past price negotiations between Claimant and Respondent, the price difference should be no more than $64,647.66. Furthermore, Claimant asserted that neither Respondent nor its client had rejected the goods delivered[46] and that Respondent was paid in full by its client.[47]

110 In light of the foregoing, Claimant contended that Respondent's unilateral withholding of a payment in the amount of $778,265.00 was unjustified[48] and, therefore, amounted to a breach of contract,[49] entitling Claimant to the outstanding part of the contract price, *i.e.*, to $778,265.00.[50]

J. SUMMARY OF RESPONDENT'S POSITION REGARDING CLAIMANT'S CLAIM

111 Respondent admitted that it had concluded the CONTRACT with Claimant,[51] and that the CONTRACT provided that the HBI to be delivered by Claimant and produced by FMO was to contain a minimum of 85% FeM, and the HBI produced by Venprecar had to contain a minimum of 84.7% FeM.[52] Respondent also confirmed that the M/V Summer Wind had been nominated as the performing

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44 *See* para. 20 of Claimant's Statement of Claim (p. 3).
45 *See* para. 21 of Claimant's Statement of Claim (p. 3).
46 *See* para. 23 of Claimant's Statement of Claim (p. 3).
47 *See* Hearing Transcript, p. 31;
48 *See* para. 26 of Claimant's Statement of Claim (p. 4); para. 17 of Witness Statement of Doudou Chen (p. 5).
49 *See* para. 27 of Claimant's Statement of Claim (p. 4).
50 *See* para. 28 of Claimant's Statement of Claim (p. 4); para. 20 of Witness Statement of Doudou Chen (p. 6).
51 *See* para 3 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 1); para. 5 of Witness Statement of Albert Winslow (p. 2).
52 *See* para 4 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 1); para. 7 of Witness Statement of Albert Winslow (p. 2).

vessel.[53] And although Respondent denied *inter multa alia*[54] that on 4 October 2017, the M/V Summer Wind had been fully loaded with 30,503 metric tons of HBI, of which 13,993 were from FMO and 16,510 were from Venprecar,[55] as asserted by Claimant,[56] Respondent confirmed that the metric tons of HBI from FMO were indeed 13,993, when referring to this number on various occasions,[57] including to calculate the price reduction Respondent claimed it was entitled to.[58]

112 Respondent confirmed that on 16 October 2017, Claimant had sent an invoice in the amount of $7,778,265.00, of which Respondent paid $7,000,000.00,[59] and a copy of the shipping documents,[60] including shipping documents which reported that FMO's portion of the goods contained 83.46% of FeM and the Venprecar's portion of the goods contained 85.30% of FeM.[61] In its Amended Answering Statement, Respondent denied, however, that in turn, it had raised an issue of pricing for the portion of the goods which appeared not to be in compliance with the contract specification.[62] Rather, Respondent asserted that it had notified Claimant of a quality claim on 21 December 2017,[63] and that on 12 January 2018, for the second time, it had informed and notified Claimant of a quality claim based on Claimant's delivery of non-conforming goods and of a corresponding price

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53 *See* para 7 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

54 For example, in para 6 of its Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).), Respondent denied that, as asserted by Claimant (para. 6 of Claimant's Statement of Claim (p. 2)), on 17 September 2017, the Parties confirmed that the final FOBST price for the goods was $255/MT, and a total amount of HBI to be delivered was 33,000 MT +/-10% at Claimant's discretion. According to Respondent, the price of $255/MT had been agreed upon in the CONTRACT; see para. 9 of Witness Statement of Albert Winslow (p. 3).

55 *See* para 8 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

56 *See* para. 8 of Claimant's Statement of Claim (p. 2).

57 *See* paras. 14 and 15 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2-3)'

58 *See* paras. 17 and 35 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2-3 and 4 respectively); para. 20 of Witness Statement of Albert Winslow (p. 5).

59 *See* para. 25 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 3).

60 *See* para. 9 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

61 *See* para. 10 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2); para. 12 of Witness Statement of Albert Winslow (p. 3); Respondent's Exhibit R-2.'

62 *See* para. 11 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2); tbut *see* para. 14 of Witness Statement of Albert Winslow (p. 3).

63 *See* para. 29 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 3).

reduction of $699,650.00[64] calculated - pursuant to CISG Article 50 -[65] at $50/MT based on the differential between the contract price and the market price at the time of delivery of the 13,993 metric tons of product that was out of specification.[66]

113 According to Respondent, at the time the CONTRACT was entered into, *i.e.*, on 4 September 2017, the CFR Turkey price for HBI was $355/MT.[67] At the time of delivery of the goods by Claimant to Respondent, based on the Platt's Index, the CFR Turkey price for HBI was $305/MT.[68] And Respondent claimed that pursuant to CISG Article 50 it was entitled to exercise its right to reduce the purchase price by $50/MT for the nonconforming 13,993 metric tons of product delivered by Claimant,[69] a non-confomrity which, according to Respondent,[70] was even worse than the one evidenced by the shipping documents sent by Claimant to Respondent. According Respondent, the result of the analysis of the goods by an independent surveyor had revealed that the product produced by FMO and sold by Claimant to Triorient had an FeM content of merely 82.02%.[71]

114 Furthermore, Respondent asserted that the product produced by FMO and sold by Claimant was also severally oxidized revealing that it had not been newly produced and consisted of stock material whose quality had degraded due to its exposure.[72]

115 Ultimately, according to Respondent, Claimant failed to state a claim upon which relief could be granted; Respondent also denied any liability to Claimant, and asserted that Claimant had suffered no damages by reason of the acts complained of in the Statement of Claim, or by any acts or omissions of Respondent, and that in any case Claimant had suffered no damages for which Respondent was legally

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64 *See* paras. 13 and 30 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2 and 3 respectively).

65 *See* para. 17 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2-3).

66 *See* para. 14 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

67 *See* para. 33 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4).

68 *See* para. 34 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4).

69 *See* para. 35 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4).

70 *See* para. 36 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4).

71 *See* para. 37 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4); Respondent's Exhibit R-4.
Respondent also asserted that the analysis by that same independent surveyor of the goods produced by Venprecar and sold by Claimant had revealed that they an FeM content of 83.94%; *see* para. 39 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4); Respondent's Exhibit R-4.

72 *See* para. 38 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4).

responsible, but that Claimant's alleged losses, if any, had been caused by Claimant's own actions and inaction and, therefore, was precluded from recovery.[73]

116 Respondent furthermore asserted that Claimant's claim was barred, in whole or in part, by governing statute(s) of limitation, and that it was entitled under CISG Article 50 to reduce the purchase price of the non-conforming 13,993 metric tons of product by $50/MT.[74]

K. RELIEF REQUESTED

117 Claimant requested the Arbitral Tribunal to award to Claimant against Respondent $778,265.00 together with pre-award interest and the costs, fees, expenses and disbursements of the arbitration, amounting as per Claimant's Cost Report of 10 November 2020 to $173,572.80 (with legal fees amounting to $81,592.50 and costs and expenses, including the advance the arbitration costs, amounting to $91,980.30), as well as other and further relief as the Arbitral Tribunal would deem just and proper.

118 In its Amended Answering Statement, Respondent requested the Arbitral Tribunal to dismiss Claimant's claim in its entirety, to order Claimant to pay all arbitration costs, including Respondent's reasonable attorney's fees, costs and expenses, and order any further and/or additional relief as the Arbitral Tribunal would deem appropriate. Furthermore, in Respondent's Objection and Opposition to Claimant's Motion to Compel dated 26 June 2020, specifically requested "an award of its legal fees incurred in responding to Claimant's specious motion made in bad faith."[75]

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73 *See* „Affirmative Defenses" of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4-5).

74 *Ibid*.

75 Respondent's Objection and Opposition to Claimant's Motion to Compel, p. 3.

L. THE ARBITRAL TRIBUNAL'S REASONING THE CLAIM

119 Claimant's claim arises out of the alleged breach of the CONTRACT entered into by the Parties on 4 September 2017, neither the existence nor the validity of which had been questioned.

120 As expressly stated in Clause 10 of the CONTRACT, the "CONTRACT shall the laws of the Republica Bolivariana de Venezuela." Furthermore, as agreed upon by the Parties during the preliminary hearing held on 11 March 2020,[76] the CONTRACT is also governed by the CISG, which both Parties did indeed refer to in their submissions. Absent from their submissions is any reference to the "laws of the Republica Bolivariana de Venezuela". This Aribtral Tribunal interprets this circumstance to mean that the CISG prevails over the "laws of the Republica Bolivariana de Venezuela", to the extent that the CISG deals at all with a matter.

121 This does not mean, however, that the "laws of the Republica Bolivariana de Venezuela" are irrelevant. To the extent that the CISG does not address a given matter either expressly or implicitly,[77] recourse is to be had to the "laws of the Republica Bolivariana de Venezuela." This issue is not merely a theoretical one, but it has implications for the dispute at hand.

122 In its Amended Answering Statement, Respondent made various affirmative defenses,[78] asserting *inter alia* that Claimant's claim was barred, in whole or in part, by governing statute(s) of limitation, without however elaborating at all on which law or laws were applicable, thus disregarding *inter alia* the requirement set forth in para. 1.4 a. of Procedural Order No. 1, pursuant to which all statements listed in that a paragraph, including Respondents statement of defense, "shall set set out in detail the *legal* and factual allegations made by the party in putting its case or in responding to the case put against it."

123 It is common knowledge, that the CISG does not address the statute of limitation issue. To fill this gap, resort is therefore to be had to the otherwise applicable law, which in the case at hand, as per the Parties' choice contained in Clause 10 of the

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76 *See* also para. 9.1 of Procedural Order No. 1 (p. 9).
77 *See* CISG Article 7(1).
78 *See* Amended Answering Statement of Respondent, Triorient, LLC. (p. 4-5).

CONTRACT, are "the laws of the Republica Bolivariana de Venezuela." And it is on the basis of the applicable statute of limitation provision of the Bolivarian Republic of Venezuela that this Arbitral Tribunal must deny Respondent's affirmative defense.

124 In Venezuela, in relation to contracts of sale, the applicable statute of limitation depends on whether the contract of sale is subject to the Civil Code or the Commercial Code. In light of the characteristics of the CONTRACT at hand, under the laws of the Bolivarian Republic of Venezuela it quafies as one subject to the Commercial Code, which, as far as the statute of limitation is concerned, provides for a 10 (ten) year[79] statute of limitation period.[80] In light of this, Respondent's affirmative defense at hand must be denied.

125 For the sake of completeness, the affirmative defense at hand would also have to be denied if this Arbitral Tribunal were to apply the laws of the State of New York due to the seat of the arbitration being located in New York. The laws of the State of New York provide in relation to matters regarding written contracts a 6 (six) year statute of limitation,[81] the application of which would also require this Arbitral Tribunal to deny the affirmative defense at hand. Still, it is worth noting that this Arbitral Tribunal does not consider the relevant New York statute as being mandatorily applicable to international arbitrations sat in the State of New York.

126 The above affirmative defense is, however, the only one in relation to which the laws of the Bolivarian Republic of Venezuela are applicable; all other affirmative defenses are subject to the CISG and, therefore, do not require resort to rules other than those set forth by the CISG itself.

127 The same holds true also in respect of a seller's claim to the purchase price, such as Claimant's claim to the full purchase price at hand in these proceedings. In effect, as per CISG Article 53, "[t]he buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." This provision

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79 *See* also Hearing Transcript, p. 39.

80 It is worth pointing out that under the Civil Code of the Bolivarian Republic of Venezuela as well the statute of limitiation period regarding contract claims is generally a 10 (ten) year period, but for limited instances, which, however, are irrelevant for the purpose of the CONTRACT at hand.

81 *See* Hearing Transcript, p. 39.

requires this Arbitral Tribiunal to turn to the CONTRACT and first determine what price had been upon and whether it had been paid. Only then will this Arbitral Tribunal have to examine whether, in case of non-payment, there are grounds that justify non-payment; but these grounds as well have to be identified on the basis of the rules set forth by the CISG rather than by resort to rules external to the CISG, such as the laws of the Bolivarian Republic of Venezuela.

128 As regards the price agreed upon by the Parties, its determination does not cause any difficulties. This is due to the fact that there appears to be no dispute between the Parties as to the per-metric-ton price agreed upon, although there seems to be an issue as to when such agreement was reached. According to Claimant, the agreement was reached on 19 September 2017,[82] while according to Respondent's witness, Mr. Winslow, the agreement goes back to Clause 4 of the CONTRACT.[83] For the purpose of these proceedings what is relevant is the fact that there was agreement between the Parties as to a price of $255/MT. [84] This per-metric-ton price allows this Arbitral Tribunal to determine that the price for the goods delivered by Claimant amounted indeed to $7,778,265.00, the exact amount for which Claimant submitted an invoice to Respondent.[85] This amount is the result of a simple multiplication of the $255/MT by the number of metric tons of HBI delivered by Claimant, *i.e.*, 30,503,[86] of which 16510 were produced by Venprecar,[87] while the remaining 13,993 were produced by FMO.[88] And because Respondent did pay on 25 October 2017 $7,000,000.00 to Claimant as price for the goods delivered under the CONTRACT,[89] the outstanding amount is in effect the one claimed by Claimant in these proceedings, namely $778,265.00.[90]

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82 See para. 6 of Claimant's Statement of Claim (p. 2).
83 *See* para. 9 of Witness Statement of Albert Winslow (p. 3).
84 See para. 6 of Claimant's Statement of Claim (p. 2).; para. 9 of Witness Statement of Albert Winslow (p. 3).
85 See para. 9 of Claimant's Statement of Claim (p. 2); para. 11 of Witness Statement of Albert Winslow (p. 3
86 *See* para. 8 of Claimant's Statement of Claim (p. 2); Hearing Transcript, p. 19; para. 10 of Witness Statement of Albert Winslow (p. 3).
87 *See* para. 8 of Claimant's Statement of Claim (p. 2); para. 10 of Witness Statement of Albert Winslow (p. 3).
88 *See inter multa alia* Hearing Transcript, p. 19 et seq.
89 *See* para. 25 Amended Answering Statement of Respondent, Triorient, LLC. (p. 3).
90 *See inter multa alia* Hearing Transcript, p. 44.

129 According to Respondent, the full price was not paid for justifiable reasons: Respondent was entitled to withhold payment by way of price reduction under CISG Article 50, due to the goods not conforming to contract specification. In effect, as also confirmed by Claimant,[91] as per Clause 2 of the CONTRACT,[92] the HBI to be delivered, if produced by FMO, had to contain a minimum of 85% FeM, and if produced by Venprecar, had to contain a minimum of 84.7% FeM.[93] Admittedly, and as evidenced by certificates of analysis included in the shipping documents handed by Claimant to Respondent, FMO's portion of the goods contained 83.46% of FeM and Venprecar's portion of the goods contained 85.30% of FeM.[94] And it is this quality deficiency that Respondent relied on as a justification for non-payment of $699,650.00[95] calculated - pursuant to CISG Article 50 -[–] by multiplying the amount of $50/MT (corresponding to the differential between the CFR Turkey price for HBI at the time of the conclusion of the CONTRACT, *i.e.*, $355/MT,[96] and the CFR Turkey price for HBI at the time of delivery, *i.e.*, 305/MT),[97] with the number of the 13,993 metric tons of product delivered by FMO that was out of specification.[98]

130 According to Claimant, however, the quality and price difference between HBI with 83.46% of FeM actually delivered and HBI with 85% FeM contracted for was minor.[99] Whether this is the case, and whether this assessment should be reviewed in light of the result of the analysis of the goods by an independent surveyor, which had revealed that the product produced by FMO had an FeM content of merely

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91 *See* para. 3 of Claimant's Statement of Claim (p. 1); para. 3 of Witness Statement of Doudou Chen (p. 2).

92 *See* Respondent's Exhibit R-1.

93 *See* para 4 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 1); para. 7 of Witness Statement of Albert Winslow (p. 2).

94 *See* para. 10 of Claimant's Statement of Claim (p. 2); para. 12 of Witness Statement of Albert Winslow (p. 3); para. 10 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2); Respondent's Exhibit R-2.

95 *See* paras. 13 and 30 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2 and 3 respectively).

96 *See* para. 33 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4).

97 *See* para. 34 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4).

98 *See* para. 14 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).

99 *See* para. 21 of Claimant's Statement of Claim (p. 3).

82.02%,[100] and those produced by Venprecar an FeM content of 83.94%,[101] needs not to be decided by the Aribtral Tribunal. This is due to the fact that CISG Article 50, on which Respondent based its justification for non-payment of the full purchase price, does not require such decision.

131 CISG Article 50 provides a unilateral right for the buyer to declare a reduction of the purchase price, thus allowing the buyer to unilaterally alter the terms of the contract. And CISG Article 50 does not distinguish between minor or major non-conformities. Unlike some other remedies available under the CISG, the remedy of price reduction is readily available in case of non-conformity, that is, irrespetive of the degree of non-conformity. For the purpose of the case at hand, this means that even if the non-conformity were to be qualified as "minor", as asserted by Claimant, the remedy of price reduction would be available under the CISG, and this regardless of actual loss on the buyer's/Respondent's side and regardless of fault on the seller's/Claimant's side.

132 This does not mean that there are no preconditions that need to be met for a buyer to justifiably claim price reduction. As per CISG Article 50, a buyer may declare price reduction "[i]f the goods do not conform with the contract." This requirement of non-conformity limits the availability of price reduction to cases in which goods are actually delivered but do not conform to contract specifications, as in the case at hand. As per the certificates of analysis provided by Claimant, the HBI produced by FMO lacks the requisite quality.[102]

133 Furthermore, a justifiable price reduction requires, as do all other remedies available under the CISG relating to the delivery of non-conforming goods, that the

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100 *See* para. 37 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4); Respondent's Exhibit R-4.

101 *See* para. 39 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4); Respondent's Exhibit R-4.

102 This Arbitral Tribunal does not have to determine whether the HBI produced by Venprecar are non-conforming in light of the result of the analysis of the independent surveyor engaged by Respondent (*see* Respondent's Exhibit R-4), because as per Clause 2 of the CONTRACT, "[t]he HBI to be delivered by [Claimant] to [Respondent] shall conform to the [. . .] chemical and physical specifications, in hold of Vessel at loading port." The Arbitral Tribunal reads this Clause to mean that the chemical specifications were to be measured at the loading port. Furthermore, the price reduction claimed by Respondent relates to non-conforming HBI produced by Fmo. Granting any price reduction not claimed (in relation to a potential non-conformity regarding the HBI produced by Venprecar) would amount to an excess of power.

buyer gave a CISG Article 39 notice of the non-conformity to the seller within a reasonable time and in a substantiated manner. And it is the buyer, Respondent in these proceedings, who has the burden of proving that such notice has indeed been given, if the buyer accepted, as Respondent did in the case at hand, delivery without complaints or reservations.

134 In this respect, it is important to note that in para. 11 of its Amended Answering Statement,[103] Respondent expressly denied Claimant's assertion that after receiving the certificates of analysis Respondent "in turn raised an issue of pricing for the portion of the goods which appeared to be incompliant with the contract specification."[104] And this denial is in line with Respondent's further statements, also to be found in its Amended Answering Statement, that it "notified Claimant of a quality claim on December 21, 2017",[105] and that it "sent a further quality claim notice to Claimant on January 12, 2018, supported by photographic evidence and Certificates of Analysis establishing that the FMO material delivered by Claimant failed to meet the contractual specifications."[106]

135 If this Arbitral Tribunal had to solely rely on the foregoing denial by Respondent and the timeline set forth by way of the statements cited in the previous paragraph, the Arbitral Tribunal would have to deny that Respondent is entitled to price reduction. It is common knowledge that the reasonable period of time within which a notice of non-conformity under CISG Article 39 has to be given by the buyer to the seller does normally not exceed one month, but in rather exceptional circumstances. This maximum one month period runs from the moment set forth in CISG Article 38, *i.e.*, from the moment the buyer did become aware of or could have become aware of the non-conformity. In the case at hand, this would have been the date on which Claimant sent Respondent the shipping documents, including the certificates of analysis showing the quality discrepancies at issue, *i.e.*, 16 October 2017. In light of this, a notice of non-conformity sent on 21 December 2017 would have to be considered untimely, with the consequences that buyer/Respondent would have lost all its rights to rely on the lack of conformity.

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103 *See* para. 11 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 2).
104 Para. 11 of Claimant's Statement of Claim (p. 2).
105 *See* para. 29 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 3).
106 *See* para. 30 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 3).

136 It is worth pointing out, however, that in the course of these proceedings additional statements were made, including during the hearing,[107] and certain documents were submitted that have to be taken into account by this Arbitral Tribunal when deciding on the timeliness of the notice of non-conformity. On the one hand, Respondent's denial and the timeline to be derived from Respondent's statements cited in the previous paragraph are in stark contrast with statements by Mr Winslow in his witness statement. In para. 15 of his witness statement, Mr. Winslow expressly stated that "[o]n October 16, 2017, Triorient emailed CREC formally providing notice of its quality claim in respect of the non-conforming Ferrominera HBI."[108] And by way of proof of the assertion made, Mr. Winslow attached Respondent's Exhibit R-3 to its witness statement, which contains an email exchange between Mr. Santucci, on Respondent's behalf, and Claimant, showing that notice of the non-conformity was indeed given, which is why the Respondent's denial referred to earlier is rather surprising.

137 Furthermore, even Claimant's statements corroborate that a timely notice was given. In its Statement of Claim Claimant stated that after receiving the certificates of analysis, Respondent "in turn raised an issue of pricing for the portion of the goods which appeared to be incompliant with the contract specification".[109] Furthermore, Claimant's fact witness Ms. Doudou Chen expressly stated that "[o]n or about October 16, 2017, Triorient stated via email that the cargo did not comply with the Contract",[110] and attached Claimant's Exhibit C3 to corroborate the statement, containing the exchange changes to be found in Respondent's Exhibit R-3. Similar statements were also made during the hearing.[111]

138 In light of the foregoing, this Arbitral Tribunal holds that the requirement that a timley notice be given to the seller (here: Claimant) was met.

139 However, under CISG Article 39 it is not sufficient for the buyer to give a timely notice. According to CISG Article 39(1), the buyer must also specify (all) the non-conformities in a way which allows the seller to get a picture of the situation and to

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107 *See* Hearing Transcript, p. 21.
108 Para. 15 of Witness Statement of Albert Winslow (p. 4).
109 Para. 11 of Claimant's Statement of Claim (p. 2).
110 *See* para. 8 of of Witness Statement of Doudou Chen (p. 2-3).
111 *See* Hearing Transcript, p. 21.

decide how to react. Even though this does not mean that Article 39(1) imposes overly demanding standards of specificity, a generic notice that merely states that the goods are defective cannot be considered a proper notice under Article 39(1). As regards the case at hand, the notice given by Respondent via email referred to above in para. 137 meets the Article 39(1) specificity requirement, as it does clearly state what quality discrepancies Respondent had identified. As stated by Mr. Santucci in that email, reproduced in English in Claimant's Exhibit C3, "we must notify you that the quality of the cargo does not comply with the contract between our companies. More specifically, the metallic iron content of the portion corresponding to Ferrominera is well below the minimum guaranteed".[112]

140 In light of this, the Arbitral Tribunal considers that a specific and, therefore, proper notice was given. This, in turn, means that Respondent did not loose its right to rely on the lack of conformity and, therefore, was entitled to rely on the remedy of price reduction pursuant to CISG Article 50.

141 However, in the case at hand. CISG Article 50 does not allow for the price reduction claimed by Respondent for reasons relating both to the way to calculate the reduction in price, which differs from the one employed by Respondent, as well as the burden of proof relating to the various elements relevant for such calculation.

142 The method for calculating a CISG Article 50 price reduction differs from the method employed by Respondent. Under CISG Article 50 it is not appropriate to take the value of conforming goods, subtract the value of the actually delivered non-conforming goods, and get to a monetary amount. Rather, the amount of a price reduction under CISG Article 50 is determined relying on what is known as the "proportional method." First, the value at the time of delivery of the actually delivered non-conforming goods is divided by the value at the time of delivery of conforming goods, generating the percentage of value the goods have lost. The purchase price is then reduced by this percentage, leading to the following formula: reduced price = value of delivered non-conforming goods/value of owed conforming goods x contract price. Although this proportional method of calculating price reductions may reduce the effect of changes in market price occurring between contract formation and delivery, it is the (only) one to be used

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112 Email by Mr Santucci, dated 16 October 2017, 6:07 pm, Claimant's Exhibit C3Email

pursuant to CISG Article 50. This can be derived from the text of this provision itself, which states in the relevant part that "the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time."

143 In light of the foregoing, it is necessary to determine both the value that the goods actually delivered had at the time of the delivery and the value that conforming goods would have had at that time. This, in turn, requires to first determine when "delivery" occurs for purposes of price reduction. According to the predominant view, also adopted by this Arbitral Tribunal, under the CISG, the determination of when "delivery" occurs has to be made in light of the delivery obligations set forth by the CISG itself, more specifically, by CISG Aticle 31. However, because this provision is dispositive in nature, any contractual provision addressing the time when delivery has to occur prevails over the default rules set forth in CISG Article 31. As regards the case at hand, Clause 3 of the CONTRACT clearly stipulates that "[d]elivery of said HBI in the quantity specified in Clause 1 shall be made by Seller and risk of loss, damage or destruction to said HBI shall be transferred to Buyer when said HBI is loaded and stowed into hold of Vessel at loading port Venezuela." These delivery terms are in line with the agreement on a FOBST price for the goods, which both Parties referred to.[113]

144 The foregoing means that the time of delivery relevant for the purpose of the price reduction under CISG Article 50 is 4 October 2017, the date when, as stated for example by Mr. Winslow, Respondent's witness, "13,993 metric tons of HBI produced by FMO and 16,510 metric tons of HBI produced by Venprecar were loaded on the MN SUMMER WIND, a vessel chartered by Triorient for the purpose of transporting and delivering the HBI to its customer."[114] Thus, in these proceedings, for the purpose of the price reduction under CISG Article 50, it is the foregoing date, 4 October 2017, and this date only, that is relevant to identify the proportion of "the value that the goods actually delivered had at the time of the

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113 *See* Clause 4 of the CONTRACT, Respondent's Exhibit R-1; para. 6 of Claimant's Statement of Claim (p. 2); para. 4 of Witness Statement of Doudou Chen (p. 2); para. 9 of Witness Statement of Albert Winslow (p. 3); Claimant's Exhibit C1 - Annex B.

114 Para. 10 of Witness Statement of Albert Winslow (p. 3); *see* also para. 8 of Claimant's Statement of Claim (p. 2); para. 5 of Witness Statement of Doudou Chen (p. 2).

delivery"[115] and "the value that conforming goods would have had at that time."[116] And as per the CISG's rules on the allocation of the burden of proof, the burden to prove the value of the goods actually delivered on 4 October 2017 as well as the value conforming goods would have had on that same date, *i.e.*, on 4 October 2017, lies with Respondent.

145 Respondent did, however, not meet this burden. Respondent did not prove at all that there was a drop in value and, therefore, a right to reduce the price pursuant to CISG Article 50, which, as stated, requires a comparison of "the value that the goods actually delivered had at the time of the delivery", *i.e.*, on 4 October 2017, and the value that conforming goods would have had on that very same day. Respondent focused on the per-metric-ton price the HBI allegedly had when the contract was made on 4 September 2017,[117] and at a CFR Turkey price at that.[118] Respondent relied on this price in its calculation rather than on the value the use of which is mandated by CISG Article 50, *i.e.*, the value "that conforming goods would have had at [the time of delivery]", on 4 October 2017. Also, Respondent did not use the proportional method imposed by CISG Article 50 and indicated above. In other words, Respondent failed to prove there was a price differential it was entitled to under the strict requirements of CISG Article 50.

146 Respondent also failed to prove why it would be entitled to further reduce the price by the difference between the remaining purchase price claimed by Claimant (in the amount of $778,265.00) and the amount Respondent tried unsuccessfully to withhold by way of price reduction under CISG Article 50 (*i.e.*, $699,650.00).

147 In light of the foregoing, the Arbitral Tribunal holds that Respondent's claim for price reduction is rejected and dismissed. Claimant's claim for the payment of the outstanding part of the purchase price amounting to $778,265.00 is therefore granted.

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115 CISG Article 50.

116 *Ibid*.

117 *See* para. 33 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4); para. 20 of Witness Statement of Albert Winslow (p. 5).

118 *See* para. 33 of Amended Answering Statement of Respondent, Triorient, LLC. (p. 4); paras. 20 and 21 of Witness Statement of Albert Winslow (p. 50).

148 As a consequence of the decision to grant Claimant's request for payment by Respondent of the outstanding part of the purchase price amounting to $778,265.00, the Arbitral Tribunal has to address Claimant's request for pre-award interest on such amount.

149 As regards the right to interest on sums in arrears, it is enshrined in CISG Article 78, at least as regards sums such as the one at hand. As regards the right to interest on a late refund of a purchase price on the part of a seller, the claim for interest must be based on CISG Article 84 rather than Article 78, the former provision being the more specific one. The former provision does, however, not apply to the case at hand. Thus, the provision to be resorted to is CISG Article 78, which provides that in the event of failure to pay any sum (other than a refund of the purchuase price), the creditor "is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74". CISG Article 78 limits itself, however, to providing for the general entitlement to interest and establishing when the creditor is entitled to interest. From the text of the provision one can gather that the creditor's entitlement to interest requires the sums to be in arrears, meaning that although the sum has become due, payment has not been effected. As regards the payment of the purchase price, it generally is due at the time agreed upon in the contract; failing such agreement (or any prevailing practices established between the parties or any usage applicable pursuant to CISG Article 9), resort is to be had to CISG Article 58 to identify when payment has to be effected. Pursuant to this provision, the purchase price is generally due at the time "when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and [the CISG]." Apart from the aforementioned requirement, no further requirement is to be met for the creditor to be entitled to interest on a given sum. This means, *inter alia*, that the right to interest on a sum in arrears does not depend on any additional formality to be fulfilled, such as a notice of default having to be sent to the debtor.

150 Under the CONTRACT, as per Clause 7.2, "[t]he balance of the total payment ha[d] to be made within three (3) following business days of the Bill of Lading (B/L) date, against presentation of copy of signed original BIL via email."[119] Thus,

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119 Clause 7.2 of the CONTRACT, Respondent's Exhibit R-1.

payment of the amount of $778,265.00 in dispute had to occur on 9 October 2017.[120] It would therefore seem that as of the day following that date that interest started to accure. However, in light of the fact that the initial payment of $7.000.000,00 was received by Claimant - as per Claimant's own information -[121] only on 25 October 2017, and that Claimant did not take issue with the late payment, it would violate the CISG's general principle of *venire contra factum proprium non valet*, *i.e.*, the prohibition to set one's self in contradiction to one's own previous conduct, to allow Claimant to interest on the sum in arreas starting 10 October 2017 (i.e, the day following the contractual due date). Rather, the date from which Claimant is entitled to interest on the amount claimed of $778,265.00 has to be 26 October 2017.

151 The open issue is that of the interest rate to be applied. CISG Article 78, while addressing the issues referred to in the previous paragraph, does not address the interest rate to be applied (or a way to identify said interest rate). Rather, the interest rate is one of the issues not at all addressed by the CISG, which, therefore, has to be settled in light rules external to the CISG itself.

152 This does not mean that the Arbitral Tribunal has to apply the relevant interest rate of the place of the seat, New York. In effect, even when an international commercial arbitration is governed by New York substantive law and seated in New York, arbitral tribunals do not have to apply the prejudgment interest provisions contained in Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules and, therefore, do not have to apply the rate of nine percent. In light of this, arbitral tribunals, such as this one, seated in New York which do not have to apply New York substantive law, are even less compelled to apply the prejudgment interest provisions referred to contained in the New York Civil Practice Law and Rules. Rather, and as acknowledged also by New York courts, in the absence of express party agreement on the interest rate to be applied, arbitrators have discretion to determine interest based on a broad range of considerations, but may of course also apply the nine per cent interest rate under New York law.

153 As stated by many courts and arbitral tribunals, where the CISG does not settle an issue, not even by way of resort to its general principles, recourse it to be had to the

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120 *See* Hearing Transcript, p. 43.

121 *See* email by Ms. Huang, dated 15 October 2020, 4:29 pm.

otherwise applicable law. In the case at hand, this law was identified by the parties themselves when they operated a choice of law in their CONTRACT. As stated earlier, pursuant to Clause 10 of the CONTRACT, to the extent that the CISG does not govern, "the laws of the Republica Bolivariana de Venezuela" apply. According to Claimant,[122] the interest rate (applicable to commercial contracts such as the one at hand as per Articlde 108 of the Comnmercial Code) is 12 per cent annum. A reading of the provision does, however, not allow this Arbitral Tribunal to agree with the statement made. Rather, as per Article 108 of the Venezuelan Commercial Code, interests accrue "at the current market interest rate, provided this does not exceed twelve percent per annum." This means that it is market interest rate that governs, to the extent that it does not exceed 12 per cent annum.

154 In light of the fact that Claimant failed to prove the market interest rate (and whether, and if so, how it had changed over the course of time since 26 October 2017), this Arbitral Tribunal decides not to apply the Venezuelan interest rate, but rather the 9 per cent per annum interest rate applicable in New York, which this Arbitral Tribunal is allowed to do.

M. THE ARBITRAL TRIBUNAL'S REASONING REGARDING COSTS AND FEES

155 As regards costs and fees, this Arbitral Tribunal is entitled to take a decision on costs and fees on the basis of R-47(c) and (d) AAA Rules. R-47(c) entitles this Arbitral Tribunal to decide on the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55, and apportion such fees, expenses, and compensation among the parties in such amounts as this Arbitral Tribunal determines is appropriate. R-47(1)(d)(ii), on the other hand, entitles this Arbitral Tribunal to "award [. . .] attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." As shown in paras. 117 and 118, the Parties have both requested that this Arbitral Tribunal take a decision on costs, including attorneys' fees, thus entitling this Arbitral Tribunal to do so as per R-47(d)(ii). But while this provision grants this Arbitral Tribunal the authority

122 *See* Hearing Transcript, p. 43-44.

to decide on the apportionment of attorneys' fees, it does not, nor do other AAA Rules, instruct arbitral tribunals with presumptions or principles that might inform their decision. Thus, the AAA Rules reserve wide latitude for tribunals on what basis to take a decision of apportionment of costs and on legal fees. And it is in the exercise of this latitude that this Arbitral Tribunal turns to the rule pursuant to which "costs follow the event", which is a rule commonly used in international commercial arbitration, including in international commercial arbitrations administered by AAA/ICDR.

156 In light of all of the above findings (referred to in paras. 144-153), this Arbitral Tribunal holds that the costs (in the sense of the Arbitral Tribunal's fees as well as the AAA/ICDR's administration fees and expenses/incidentals) have all to be borne by Respondent. This Arbitral Tribunal, after consultation with the ICDR, fixes the total costs of arbitration as follows:

Tribunal's Fees & Expenses	**USD**
Sole Arbitrator's Fees	61,425.00
Sole Arbitrator's Expenses	N/A
GST	N/A
TOTAL ARBITRATOR'S FEES & EXPENSES	**61,425.00**
AAA/ICDR Administration Fees & Expenses/Incidentals	
AAA/ICDR Administration Fees	12,875.00
AAA/ICDR Expenses/Incidentals	N/A
TOTAL AAA/ICDR ADMINISTRATION FEES & EXPENSES/INCIDENTALS	**12,875**
TOTAL COSTS OF ARBITRATION	**74,300.00**

157 The Respondent is to bear the full costs of arbitration in the amount of $74,300.00.

158 In light of the findings referred to in the above paras. 144-153, this Arbitral Tribunal finds that the legal fees and the other expenses relating to this arbitration incurred by Claimant also have to be borne by Respondent, while Respondent has to bear the legal fees and other expenses incurred by Respondent itself. Therefore, Respondent has to pay Claimant an amount of $74,300.00.

159 An issue distinct from that of the allocation of the legal fees and other costs relating to this arbitration incurred by Claimant referred to in the previous paragraph is that of whether it is the entire the amount of the legal fees and the other expenses claimed by Claimant that has to be borne by Respondent. The wide latitude granted by the AAA Rules in taking a decision on the legal fees and the other expenses claimed by Claimant would allow the Arbitral Tribunal to order that the Respondent bear only part of these fees and costs. Criteria generally used in international commercial arbitration in the exercise of the latitude granted to arbitral tribunals are those of reasonableness and appropriateness, the first of which was also referred to by Respondent in its Amended Answering Statement.[123] And it is in light of these criteria that this Arbitral Tribunal finds that all legal fees and other expenses claimed by Claimant in relation to services rendered and procured by counsel of record for Claimant in these proceedings (amounting to $81,592.50) have to be borne by Respondent. The same holds true as regards the expenses incurred by Claimant in relation to the services rendered by Dr. Joseph J. Poveromo, Claimant's expert witness, by Mr. Way P. Moy, the interpreter, and by Ms. Michelle Cox, the court reporter (for a total of $ 11,655.3).

N. DISPOSITIVE

160 In light of all of the above, the Arbitral Tribunal hereby renders the following

Final Award

1. The Arbitral Tribunal orders Respondent to pay to Claimant the outstanding part of the purchase price in the amount of $778,265.00.

123 *See* Amended Answering Statement of Respondent, Triorient, LLC. (p. 5).

2. **The Arbitral Tribunal orders Respondent to pay to Claimant interest on the outstanding part of the purchase price (of $778,265.00) at a rate of 9% *per annum* calculated from the date of default, *i.e.*, 26 October 2017, until payment is made.**

3. **The Arbitral Tribunal orders that Respondent shall bear the costs of this arbitration and shall pay Claimant the amount of $74,300.00 as fixed in this Final Award.**

4. **The Arbitral Tribunal orders Respondent to pay to Claimant post-award interest on the costs of this arbitration at a rate of 9% *per annum* calculated from the date of the Award until payment is made.**

5. **The Arbitral Tribunal orders Respondent s to pay to Claimant the amount of $ 93,247.8 corresponding to Claimant's reasonable legal fees and other costs incurred by Claimant in connection with its representation in this arbitration. The Arbitral Tribunal orders Respondent to pay to Claimant post-award interest on the above amount at a rate of 9% *per annum* calculated from the date of the Award until payment is made..**

6. **Respondent has to bear all legal fees and other costs incurred in connection with its representation in this arbitration.**

7. **All other requests and claims are rejected and dismissed.**

I hereby certify that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in New York, New York, United States of America.

Date: 11 December 2020

Franco Ferrari, Sole Arbitrator

State of New York)

) SS:

County of New York)

I, Franco Ferrari, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.

11 December 2020 Professor Franco Ferrari, Arbitrator