CISG-online 6272	
Arbitral Tribunal	Cairo Regional Centre for International Commercial Arbitration (CRCICA)
Seat of the arbitration	Cairo (Egypt)
Sole arbitrator	Sherif El Saadani
Date of the decision	19 February 2023
Case no./docket no.	1527/2021 (Final award)
Case name	*Diammonium phosphate case*

I. Introduction

A. The Parties

II. Claimant: […]. An Italian company 1

III. Respondent: […] An Egyptian company 2

(individually «Party» and collectively «Parties»)

B. The Tribunal

3. 3
The tribunal consists of a sole arbitrator, Sherif El Farouk Omar El Saadani, Partner at Amereller Legal Consultants – Cairo Office **(«Tribunal» or «Sole Arbitrator»).**

C. The Dispute

4. 4
The Purchase Contract No. 210305/DAP entered into between the Parties on 24 January 2021 **(«Agreement»)** stipulated Respondent's delivery of 5000 Metric Tons +/-10% of Diammonium Phosphate **(«DAP»)** to Claimant. However, Respondent allegedly failed to fulfill its contractual obligation and only made a partial delivery of 3,300 Metric Ton **(«MT»).** Claimant made a substitute purchase of the remainder of 2,200 MT and claims for the difference in price between the Agreement and the replacement purchase.

D. The Arbitration Agreement

5. 5
Article 13 of the Agreement states, as follows:

> *«This Contract shall be governed by and construed in accordance with the laws of Egypt. All disputes arising from or in connection with the present contract which could not be settled amicably which could not be settled amicably between the Parties shall be finally settled through arbitration according to the Rules of the Cairo Regional Center for International Commercial Arbitration, Cairo, Egypt, via one arbitrator to be appointed pursuant to the Rules of the Centre. The language of arbitration shall be English. The arbitration award shall be final and binding on both Parties.»*

II. Procedural History

6. 6
By virtue of the notice of arbitration dated 7 December 2021 **(«NoA»),** Claimant commenced the present arbitral proceedings against Respondent, pursuant to the 2011 Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration **(«CRCICA»** and **«Rules»).**

7. 7
On 10 January 2022, CRCICA contacted the Sole Arbitrator inquiring whether there exists any conflict(s) of interest he may be aware of, or of any circumstances that may give rise to doubts as to his impartiality and/or independence vis-a-vis the Parties. On the same day, the Sole arbitrator confirmed that there was no conflict of interests vis-a-vis either Party and/or their counsels.

8. 8
On 14 February 2022, CRCICA appointed the Sole Arbitrator in application of Articles 8(2) and 8(3) of the Rules.

9. 9
On 21 February 2022, the Sole Arbitrator submitted his signed declaration of acceptance, and statement of impartiality and independence, absent any circumstances or facts deemed by the Sole Arbitrator likely to have given rise to justifiable doubts as to any of the qualities required in Article 11(1) of the Rules. On the same day, the Sole Arbitrator received the correspondence between the Parties that preceded his appointment.

10. 10
On 24 February 2022, the Tribunal circulated a draft procedural order to determine the agreeable aspects of the arbitral proceedings, and invited both Parties to provide their comments thereon.

11. 11
On 3 March, Claimant provided its comments, followed by Respondent's comments dated 7 March 2022.

12. 12
On 9 March 2022, a case management call was held and attended by the Sole Arbitrator, the legal counsels for both Parties and the representative of CRCICA, Ms. Malak Lotfi. A draft procedural order was circulated on the same date of the said call for the Parties' final comments.

13. 13
On the same day, the procedural order No. 1 **(«PO 1»)** was issued by the Tribunal registering the agreement of the Parties on certain procedural matters, and, where no agreement was reached, setting forth the Tribunal's instructions that took the Parties' views into account. Article IV thereof stated: *«The Parties confirm that the Tribunal has been properly constituted in accordance with the CRCICA Rules of 2011 ('Rules'), and that they have no objection to the appointment of the Sole Arbitrator.»* During the time when the draft PO 1 was circulated, and prior to its issuance, no objection to the aforementioned text of Article IV was provided by counsel of either Party.

14. 14
On 16 March 2022, Claimant filed its Statement of Claim **(«SoC»),** together with lists of factual and legal exhibits.

15. 15
On 6 April 2022, Respondent filed its Statement of Defense **(«SoD»),** together with lists of factual and legal exhibits.

16. 16
On 7 April 2022, Respondent sent its request for production of documents **(«PoD»)** to Claimant.

17. 17
On 10 April 2022, Claimant replied, asserting that Respondent's PoD request is a mere fishing expedition to cause the prolongation of the procedures. Claimant submitted no request for PoD.

18. 18
On 13 April 2022, Respondent replied asserting that its PoD request is (a) limited and specific; (b) pertains to a short timefrarne; and (c) is relevant and material.

19. 19
On 17 April 2022, the Tribunal issued its decision on Respondent's PoD request. Claimant declared that it is unable to produce the proof of Claimant's payment of Invoice no. 7320. Production by Claimant of the granted documents was to be completed by 18 April 2022, and Claimant was instructed to submit its Statement of Reply on 5 May 2022 in accordance with the terms of PO 1.

20. 20
On 18 April 2022, Claimant requested an extension of deadline to submit the PoD documents until 20 April 2022, due to an official public holiday in Italy on 17 and 18 April 2022. On the same day, the Tribunal granted Claimant's request.

21. 21
On 20 April 2022, Claimant produced two of three requested documents granted by the Tribunal, and declared the inexistence of the third.

22. 22
On 21 April 2022, Claimant expressed that it does not wish to submit any further statements on the merits, and that it believes that the oral pleadings and the post-hearing memorials ought to be sufficient to address the substantive arguments put forward by the Parties. Claimant requested the amendment of the procedural timetable in PO1 to delete steps 8 and 9 of the procedural timetable, namely the outstanding Statement of Reply **(«SoR»)** and Statement of Rejoinder **(«SoRJ»).**

23. 23
On the same day, the Tribunal explained that it sees a substantial paradox in permitting a PoD, nevertheless, prohibiting Respondent from making use of the produced or unproduced documents, especially since the requested documents were accepted without objection by Claimant. While Claimant waived its right to request that Respondent produces documents in support of its case (rightfully so, if it deemed the procedure superfluous to its stances),

Respondent did not waive its right to make use of information established after the PoD. To address efficiency and time concerns of Claimant, the Sole Arbitrator added that the hearing, as well as the post-hearing briefs, should not include any new arguments, unless new facts or circumstances warrant the introduction of which. In light of the foregoing, the Tribunal rejected Claimant's request to change the PO 1 unless Respondent approved Claimant's request, which it did not.

24. **24**
On 9 May 2022, Claimant submitted its SoR, and surpassed the midnight deadline by 5 hours and 5 minutes. Claimant followed its submission by an explanation that there was a technical glitch causing the delay.

25. **25**
On 12 May 2022, Respondent objected to the 5 hour delay, and stated that

> «*there could not have been a technical glitch ..., as it was evident that Claimant's Reply and its exhibits were created and modified between 1:00 to 5:00 am, i.e., after the designated deadline in the PO 1.*» And further requested that the Sole Arbitrator takes «*a firm action against Claimant, including the complete disregard of Claimant's unjustified late submission of its Statement of Reply and its accompanying exhibits.*»

26. **26**
On the same day, Claimant admitted that correction of typos to the document took place after finding out about the glitch, and that it «*did not modify the submission as the Respondent is trying to insinuate.*» Claimant proposed an addition of 24 hours to the allocated time for the SoRJ.

27. **27**
On the same day, Respondent replied stating that:

> «*Claimant should not be seated in the driving seat of the present proceedings to decide what is fair and enough for Respondent or what the Tribunal should make. Respondent hopes that the Sole Arbitrator considers all of Claimant's misleading actions since the commencement of the present proceedings.*»

Respondent did not submit a request or demand in connection with its objection.

28. **28**
On the same day, in light of the correspondence between the Parties, the Sole Arbitrator decided that the date for submittal of the SoRJ shall be 24 May 2022 instead of 23 May 2022 to grant Respondent 24 hours to compensate for the 5 hour delay by Claimant, according to the latter's proposal.

29. **29**
On 15 May 2022, Respondent requested that the Sole Arbitrator reconsiders his instruction with regard to the date of the following submittal. Respondent raised the fact that the Tribunal directed Claimant

> «*to submit its Statement of Reply by 5 May in case the said date is not declared official holiday for the private sector; otherwise the said statement will be due on 8 May 2022*».

Respondent argued that that

> «*5 May 2022 was not declared an official holiday for the private sector ... Claimant has unjustifiably and unwarrantedly delayed filing its Statement of Reply ... for 4 days without seeking an extension or permission from the Sole Arbitrator*».

Respondent further contended:

> «*the Tribunal granted Claimant 18 days as of 17 April 2022 to submit its Statement of Reply, without request .... The Tribunal thus gave Claimant 18 days to submit its Reply, with another 3 days added to Claimant's time due to the Tribunal's extended time in rendering its decision, totaling 21 days. Given that Claimant sent its Statement of Reply on 9 May 2022, Claimant had another additional unjustified and unwarranted four days, totally 25 days to prepare its submission and respond to Respondent's Statement of Defense.*»

Therefore, Respondent requested that the due date for submitting its Statement of Rejoinder should be 2 June 2022 if the Tribunal is inclined to accept Claimant's belated submission.

30. **30**
On 16 May 2022, Claimant responded to Respondent's request stating that

> «*according to the Prime Minister's Decree No. 1426 of 2022* (a copy of the decree was attached to the email), *5 May 2022 was a public holiday. The courts and banks, same as the entire country, were on a public holiday for Eid El Fitr*» (a press release was attached to the email).

Claimant further stated that

> «*Respondent never objected or brought up this matter until the evening of 15 May 2022, despite having a number of chances to do so. Respondent could have objected at any time right after said alleged deadline had lapsed, i.e. 6, 7 or 8 May 2020 but it did not. Respondent could have also objected to this matter after Claimant's submission on 8 May 2022 or even along with its email on 12 May 2022, but still no objection was made. This, in Claimant's view, only shows that said objection is nothing but a tactic Respondent is using to justify its present extension of time request.*»

Claimant rejected Respondent's assertion that it was granted 25 days to reply to Respondent's SoD,

> «*whereas the days from 29 April 2022 to 7 May 2022 were an official public holiday, thus, it should not be deemed as part of the period in question. As per the procedural timetable, the deadline for Claimant's submission of its Reply is '15 days from Tribunal's*

decision on the production of documents'. The Sole Arbitrator's decision was rendered on 17 April 2022. Had it not been a public holiday, Claimant's due date should have been 2 May 2022. Said date was shifted to the following working day, on which Claimant submitted its SoR. Accordingly, Respondent's allegations in this respect are simply baseless.»

Claimant finally noted that it does not object to the extension of deadline requested by Respondent.

31. **31**
On the same day, Respondent replied that

«5 May 2022 was not an official holiday for the private sector. The official holidays for the private sectors are determined by the Minister of Manpower. Respondent attached the said Minister's decree No. 14 of 2022 and stated *that only granted the private sector a two-day holiday on the occasion of Eid Al-Fitr, which did not include 5 May 2022.»*

32. **32**
On 18 May 2022, the Sole Arbitrator cited the following facts:

«The Tribunal rendered its decision on the production of documents on Sunday, 17 April 2022, instead of Friday, 15 May 2022, as per the PO 1.

Claimant provided the documents requested for production on 20 April 2022, two days after the mandated date, as per the PO 1. Claimant requested such extension, and the Tribunal granted it.

Respondent did not object to the request, or the grant of which. Respondent's objection to the delay in submittal of the above documents was first expressed on 15 May 2022.

The PO 1 states that the Statement of Reply (SoR) is due 15 days from Tribunal's decision on the production of documents, issued on 17 April 2022. The original due date of 2 May 2022 was extended to 5 May (due to Eid EL Fitr) with a caveat that the day is not declared holiday for the private sector. In the event that it would be declared public holiday for the said sector, the Tribunal instructed Claimant to submit the SoR on 8 May. The Claimant submitted its Statement of Reply on 9 May 2022.

Although 5 May 2022 was declared a public holiday for the public sector, and despite the fact that most entities of the private sector followed suit; the private sector (also, albeit the CBE's direction to declare 5 May 2022 as holiday for banks) was not officially granted the day off.»

Based on the above facts, the Sole Arbitrator noted the following:

«Respondent implicitly accepted any delay in connection with the production of documents by not objecting to neither, the date of the actual PoD, nor the Tribunal's

decision thereon, in a timely manner. A period of 28 days for an objection is not reasonable, especially with the timeframe contemplated, and agreed by the Parties, for the proceedings at hand. Any days of delay should not be considered.

Claimant ought to have submitted its SoR four days earlier than it was actually submitted. The objection by Respondent was not made in a timely, but acceptable, manner.

Therefore, the Tribunal decided to grant Respondent 4 additional days, causing the due date for submitting the Statement of Rejoinder to be Saturday, 28 May 2022.»

33. **33**
On 22 May 2022, Respondent objected to the Tribunal's directions in the form of a letter. Respondent rejected what it called a *«procedural irregularity»* and stated that the Tribunal *«seems to endorse or find justifications for Claimant's requests, unjustified wishes, and procedural breaches».* Respondent further stated the Tribunal demonstrated a *«complete disregard of Respondent being a Party to the present proceedings».*

Furthermore, Respondent added that

«the above facts on their own constitute a severe departure from fundamental procedural fairness and effectively trigger justified concerns for Respondent as to the procedural integrity of the proceedings and how the final determination on merits will be made. It is alarming that Respondent's basic rights are severely breached and contravened in such a manner, and the merits of the case appear to be predetermined before the Parties have provided their full submissions. ... Respondent respectfully submits that the tribunal's primarily procedural role is to ensure equality and due process (including that each party has been granted a full and complete opportunity to present its case), without any predispositions or favouring any party or its counsel. This role should always be observed, irrespective of the value or the nature of the dispute and regardless of how the tribunal would act if it were in the place of the parties' counsels.»

Moreover, Respondent contended:

«These basic principles have been clearly disregarded. Respondent notes that the Sole Arbitrator has been imposing its predispositions favouring Claimant, without affording an equal footing to Respondent or even a chance to be heard and provided full consideration of its submissions. This clearly contradicts the Sole Arbitrator's general duty to act fairly and impartially between the Parties.

Finally, Respondent stated:

«Respondent expressly and strenuously demands full clarification from the Sole Arbitrator as to the following: (a) the Sole Arbitrator's insistence on granting Respondent a lesser number of days than those granted to Claimant, even without a request, for the preparation of its Statement of Rejoinder; (b) the Sole Arbitrator's

adoption and endorsement of the vast majority of Claimant's requests, wishes, breaches, albeit of the non-compliance with the PO 1 and the Sole Arbitrator's directions; and (c) ***the existence of any relationship, fact or circumstances, of whatsoever nature, between the Sole Arbitrator and Claimant, including its counsel team members, that may require disclosure in accordance with Article 11 of CRCICA Rules whether before or after the initiation of this arbitration.»*** *Respondent respectfully and transparently voiced its concerns hoping that the Sole Arbitrator would clarify them. When Respondent and Claimant have agreed to the person of the Sole Arbitrator, Respondent rightly expected the highest standard of fairness and impartiality; full consideration of all the Parties' submissions without any predisposition before rendering any decision or finding; and equal treatment of both Parties, irrespective of the value of the arbitration.* (Emphasis added by Respondent)

Respondent did not provide evidence to support its allegation of the Sole Arbitrators' bias and partiality in favor of Claimant.

34. **34**
On the same day, Claimant replied stating that

«Respondent made an outrageous accusation. It accused the Sole Arbitrator of being biased and favoring Claimant. Respondent also, audaciously, questioned whether the Sole Arbitrator has any relationships with Claimant, despite having signed the declaration form upon his appointment. To this, Claimant wishes to point out the following:

a. The relationship between Sole Arbitrator and Claimant is nothing more than colleagueship and mutual respect.

b. It was Respondent who chose the Sole Arbitrator from a list of six names which Claimant nominated, despite not being the first name on said list. It is therefore perplexing how Respondent is now questioning the Sole Arbitrator's partiality having been the one who chose him.»

35. **35**
On the same day, the Sole Arbitrator responded to the Parties' communications, stating the following:

«The Tribunal is in receipt of Respondent's letter dated 22 May 2022, and its following email bearing the same date.

Whereas the Tribunal gave clear instructions to the Parties to refrain from sending any further communications on the subject, Respondent chose to raise concerning allegations directed at the tribunal in a manner that requires a response.

Respondent's allegations of bias in favor of Claimant are entirely unfounded. Respondent's dismay of the tribunal's directions is no base for raising such allegations. The tribunal granted several requests by Respondent, and denied several of Claimant's requests, as well. The Tribunal is guided by fairness and professionalism in this regard.

> *The Tribunal invites Respondent to dig out the Tribunal's previous responses to the Parties' requests.*
>
> *Regardless of the elaborate grounds that the Tribunal expressed to explain its direction on the matter; to eliminate any grounds for claiming unfair treatment of Respondent and minded by its duty to 'avoid unnecessary delay and expenses that are likely to increase the costs of arbitration in an unjustified manner' (CRCICA Rules Article 17(7)),* ***the Tribunal grants Respondent its request to submit its Statement of Reioinder on 2 June 2022.*** (Emphasis added)
>
> *Respondent received the impartiality and independence declaration of the Sole Arbitrator at the outset of these proceedings. The Parties have also confirmed in Item IV of the PO 1 that they have no objection to the appointment of the Sole Arbitrator, absent any justifiable doubts. More importantly, Respondent wished to amend Item X of the draft PO 1 to state: 'Both Parties have declared that on the date of this Procedural Hearting they have no objection as to the appointment of the Tribunal and accordingly they have waived all challenges as to the Sole Arbitrator's impartiality and/or independence in respect of all matters known to them on or before the date hereof' (Respondent's email dated 7 March 2022).*
>
> *Therefore, Respondent is instructed to produce the novel matters it received, which warranted its grave doubts in the integrity of these proceedings. Previously expressed statements and analyses are to be avoided.*
>
> *With the exception of Respondent's precise and direct answer to the Tribunal's above direction, the Parties are strictly instructed not to send any unsolicited communications on the matter, to avoid any impact on the allocation of costs.»*

36. **36**
On 23 May 2022, Counsel for Claimant submitted a legalized power of attorney to represent Claimant in the arbitral proceedings.

37. **37**
In an email dated 24 May 2022, Respondent maintained its claim of the Tribunal's bias, stating:

> *«It is also quite surprising that the Tribunal would rely on some proposed statements that were not even included in the final PO 1, irrespective of the party who advanced them, to disregard its duty to make any disclosure and afford assurances when receiving any request from the Parties in that respect.»*

Respondent renewed its request that the Tribunal ought to produce a clarification to the nature of its relationship with Claimant's counsel:

> *«As the Tribunal has made emphasis on some parts of these wrong statements, Respondent would respectfully and immediately urge the Tribunal to clarify and explain the nature of its relationship with Claimant (including its counsel team members) before and after the commencement of the present proceedings.*

Furthermore, Respondent rebutted Claimant's response to its plea:

> «*Indeed, Respondent notes that it is the Party who insisted on the appointment of the Sole Arbitrator, rightfully expecting the highest standard of fairness and impartiality. Respondent also notes that it had no objections to the appointment of the Sole Arbitrator at the outset of the present proceedings in light of the Sole Arbitrator's declaration of the impartiality and independence, which included no disclosure of any relationship, facts or circumstances that might undermine both essential aspects. However, Respondent remains entitled and has the right to seek any clarifications from the Tribunal that, absence of which, would raise justifiable doubts about the integrity of the present proceedings. As the Tribunal knows, the impartiality and independence are continuous and ongoing obligations that should always be observed; and any doubts in that respect are interpreted in favour of disclosure, as per Clause 11/1 of CRCICA Rules, which provides: '... (...) An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances. Any doubts as to the duty to disclose a fact, circumstance or a relationship shall be interpreted in favour of disclosure.'*»

Moreover, Respondent further *stated:*

> «*Based on the above explanation (which Respondent kept to the minimum to not burden the Tribunal and in full respect to its below directions), Respondent respectfully urges the Tribunal to issue its clarifications to the questions raised by Respondent in its letter of 22 May 2022, hoping that the Tribunal would – as per its – primary duties – diminish any doubts or concerns about the integrity of the present proceedings. While noting the Tribunal's busy schedule, Respondent respectfully implores the Tribunal to allocate sufficient time to consider the Parties' position when rendering any decision throughout the course of the present proceedings. This is important to avoid attributing any statements to a Party who has never made them, which would likely affect the Tribunal's conclusions and determinations.*

In response to the Tribunal's request to lay forward any novel evidence that substantiate its new stance, Respondent did not provide evidentiary support to its bias and partiality allegation.

38. **38**

On the same day, the Sole Arbitrator in turn replied:

> «*Respondent, again, repeated its views mentioned in the letter dated 22 May 2022, and invoked additional remarks of no value to the Tribunal. Respondent is requested to produce any novel information/matters that gave rise to alleging doubts about the integrity of the proceedings.*
>
> *The Sole Arbitrator is aware of his duty to renew its affirmation of his independence and impartiality, if any grounds exist anew, and no events to his awareness gave rise to such thing.*

The Sole Arbitrator will expect the disclosure of new matters by EoB [End of Business] *today.»*

39. **39**
On the same day, Respondent replied:

«Respondent respectfully and firmly rejects the Tribunal's below communication and its tone. A tribunal would not normally be addressing any requests from any party in such a manner, even if these requests are unwelcomed. It is really flabbergasting for a tribunal to decide that a party's position is of no value to it! With all due respect, Respondent's communication of today's date did not repeat anything stated in Respondent's letter of 22 May 2022. Instead, Respondent was simply explaining to the Tribunal its factually wrong and inaccurate references attributed to Respondent; and unwarranted conclusions, which any tribunal should normally appreciate or at the very least take into consideration, if it seeks justice and fairness and is keen on affording each party the opportunity to be heard.

Furthermore, Respondent respectfully adds that the Tribunal's strict disclosure duty does not require the existence of any 'novel information/matters'. Any information/matters, whether old or novel, mandate(s) disclosure from the Tribunal. The below communication is thus a clear disinclination from the Tribunal to clarify the exact nature of its relationship with Claimant (and its counsel). Its tone further shows the Tribunal's aggravation against Respondent, which should not normally be the case. Moreover, Respondent is not under any legal obligation to make any disclosure. Instead, this is the Tribunal's strict obligation and duty. Respondent was only hoping that the Tribunal, bearing in mind its duties, would diminish any justifiable doubts about the integrity of the present proceedings, not magnify them.»

In response to the Tribunal's renewed request to present any novel evidence that warrant Respondent's change of stance, the latter did not provide evidence in support to its claim of the Sole Arbitrator's bias and partiality.

40. **40**
On the same day, the Tribunal concluded the discourse, as follows:

«Steered by its decision to eliminate any grounds for claiming unfair and/or unequal treatment, and to save the Parties' efforts and costs invested in this discussion, the Tribunal has considered and granted Respondent's request for the additional days to submit its Statement of Rejoinder. The Tribunal expressed that there are no circumstances, old or new, which may impact its role in the current proceedings. The Tribunal will not engage in any further correspondence regarding its impartiality and independence, absent any disclosure by Respondent of any grounds to justify its expressed doubts. Respondent's Statement of Rejoinder is due on 2 June 2022.»

41. 41
On 3 June 2022, Respondent submitted its SoRJ. The date set by the Tribunal in accordance with the PO 1 was 2 June 2022. Respondent stated:

> «*Respondent hereby submits its Statement of Reply with a sincere apology for the unintentional delay of a few hours.*»

42. 42
On the same day, Claimant pointed out that given the existence of a jurisdictional challenge by Respondent, a rejoinder on the jurisdiction is yet to be submitted by Claimant. And in a separate email on the same day, Claimant stated:

> «*As for Respondent's delay in submitting its Rejoinder, we note that Respondent stated that such delay was unintentional. We understand that sometimes delays occur for reasons outside of a party's hands, therefore, in the spirit of good faith, we wish to overlook such delay.*»

43. 43
On the same day, the Sole Arbitrator granted Claimant the right to react to Respondent's reply on jurisdiction **(«Reply on Jurisdiction»)** in a statement of rejoinder on the jurisdictional challenge **(«Rejoinder on Jurisdiction»),** instructing that it will be due on 17 June 2022.

44. 44
On 5 June 2022, Respondent objected to the Sole Arbitrator's decision of admitting a Rejoinder on Jurisdiction by Claimant. Respondent stated:

> «*Respondent hereby firmly rejects (i) Claimant's unwarranted request to submit a Statement of Rejoinder on Respondent's Jurisdictional Challenge; and (ii) the Tribunal's prompt decision endorsing Claimant's unfounded request, once again, without seeking Respondent's comments or even granting Respondent a chance to comment, which is considered another serious procedural irregularity.*
>
> *According to the general principles of Egyptian law, the non-jurisdiction pleas are not, by their very nature and name, considered counterclaims or new claims! It is needless to state that no case, whether a court or arbitration case, is devoid of a number of defences, whether those defenses are procedural or substantive.*
>
> *Furthermore, under the basic norms of disputes, it is well established that the defendant (i.e., Respondent) is the last one to be heard. Remarkably, this is now not the case after the Tribunal's quick adoption of Claimant's unwarranted request, which would devoid this principle of any merits. Respondent cannot accept another procedural breach of its fundamental rights and due process in the present proceedings.*
>
> *With due respect, Respondent respectfully reminds the Tribunal, once again, that it must hear the Parties' views before rendering any decision, even if the Tribunal is inclined to follow one predisposition over another. Regrettably, Respondent finds itself*

forced to keep restating some basic procedural principles in handling arbitration proceedings.

In these circumstances and given that the Tribunal has endorsed Claimant's unwarranted request to submit a Statement of Rejoinder on Respondent's Jurisdictional Challenge on 17 June 2022. Respondent hereby reserves its right to respond to Claimant's Statement of Rejoinder by 2 July 2022 (i.e., 15 days of Claimant's Statement of Rejoinder).»

45. **45**
On the same day, the Sole Arbitrator wrote in an email to the Parties:

«Claimant is respondent in the jurisdictional challenge, as I hope Respondent is aware. The PO 1 procedural timetable did not include any reference to jurisdictional challenges; Respondent did not even suggest changing it [the draft PO 1]. *Nevertheless, the Tribunal accepted the jurisdictional plea* [of Respondent] *based on Article IV of the PO 1 and Article 23(2) of the Rules. Claimant is irrefutably entitled to respond to Respondent's reply on jurisdiction. Needless to say that the Tribunal is not obligated to hear, or invite to express, the views of both Parties on every matter.*

And Respondent's counsel is advised to choose their language more prudently. The Tribunal has exercised a great deal of reasonableness in its replies to counsel's unconventional emails, and with regard to its determinations on Respondents' objections; only to achieve the farthest extent of procedural fairness and equality.

The matter has been conclusively decided. The Tribunal will not entertain any further communications in this regard.»

46. **46**
One the same day, Respondent wrote the following:

«Respondent firmly and expressly objects to the Sole Arbitrator's below email and decision. It is a trite rule of law that a tribunal or judge must hear both parties in any proceeding. Respondent deeply regrets that the Tribunal seems determined to ignore the basic and well-established rules and norms in administrating arbitration proceedings or any dispute for this matter. It is quite astonishing that the Tribunal has undoubtedly revealed – once again – its disinclination to hear the Party's' views, especially those expressed by Respondent (and its counsel!), in a complete disregard of its strict duty and mandate under the applicable law and CRCICA Rules.

Respondent respectfully invites the Tribunal to check any leading jurisprudence on arbitration (including decisions of the Court of Cassation) to recognize how arbitral tribunals must handle arbitration proceedings and their obligation to seek the parties' positions on, at least, requests made by an opposing party. This is a fundamental principle that tribunals must always follow if they want to apply due process, equality, the right of confrontation, and allow each party its entitled right of defense, as well as to maintain the minimum appearance of impartiality.

Furthermore, Respondent has expressly objected, at the Procedural Hearing of 9 March 2022, to any addition proposed by Claimant regarding the validity of the present proceedings. Moreover, Respondent is not legally required to request any change in the PO 1. The Tribunal also has no right to accept or reject Respondent's warranted pleas for the invalidity of the present proceedings as long as they are submitted timely in accordance with the applicable law and CRCICA Rules.

Remarkably and regrettably, the Tribunal has been (i) misinterpreting and misrepresenting Respondent's warranted requests, the record of the present proceedings and the applicable law; (ii) administering the present proceedings to the sole benefit of Claimant and its counsel; and (iii) rejecting Respondent's requests to disclose the nature of its relationship with Claimant and its counsel.

In these circumstances, and since the Tribunal has clearly and expressly shown its annoyance and aggression towards Respondent and its counsel, the Tribunal has left Respondent with no other option than to seek the other available legal options under the applicable law and CRCICA Rules.»

47. **47**
On the same day, the Sole Arbitrator replied:

«Respondent's request to submit a third statement on jurisdiction is rejected.»

48. **48**
On 6 June 2022, Claimant submitted its reply to Respondent's contention, stating:

«Claimant is aware that non-jurisdiction pleas are not new arguments or claims from a substantive perspective of the case, however, they are certainly new claims when it comes to the formal or procedural perspective thereof. The fact that Respondent debates this issue is, with all due respect, laughable.

Ironically, Respondent claims it only seeks the right to be heard last (given its status as a respondent on the merits of the case). At the same time, Respondent denies Claimant the same right. It is established that although Claimant is the claiming party when it comes to the case's merits, Respondent, nonetheless, is the claiming party when it comes to the jurisdictional challenge. Thus, according to Respondent's own words, Claimant should be the last to speak in respect of the jurisdictional challenge. Given that the jurisdictional challenge was first raised by Respondent in its SoD dated 6 April 2022, Claimant submitted its defense to said challenge in its SoR dated 8 May 2022 and Respondent submitted is response to Claimant defense along with its SoJ on 2 June 2022, Claimant (being the responding party on the jurisdictional challenge) should be entitled to submit a rejoinder to Respondent's response within 15 days pursuant to PO 1.

Therefore, Claimant's request was nothing more than to have the same opportunity on the jurisdictional challenge as Respondent had with respect to the merits of the case: to be the last to speak. The foregoing is quite clear and is well-known to any junior practitioner of international arbitration. However, Respondent tries tirelessly to create a blur of needless confusion.»

49. **49**
On 17 June 2022, Claimant submitted its Rejoinder on Jurisdiction.

50. **50**
On 19 June 2022, after consulting with the Parties, the Tribunal set the date and time for holding the pre-hearing conference call on Sunday, 26 June 2022 at 13:00.

51. **51**
On 24 June 2022, the Tribunal circulated a draft hearing protocol for comments and amendments by the Parties, if any, to be finalized into a procedural order after the prehearing call.

52. **52**
On 26 June 2022, a pre-hearing conference call was attended by the Parties' counsels and the Sole Arbitrator. Counsel for Respondent communicated its power of attorney to the Tribunal on the same day.

53. **53**
On 1 July 2022, Respondent submitted a note with exhibits in connection with its claim that it should be the last Party to be heard regarding its jurisdictional challenge.

54. **54**
On the same day, Respondent communicated to the Tribunal its suggested changes and comments to the draft hearing protocol.

55. **55**
On 5 July 2022, Claimant communicated to the Tribunal its suggested changes and comments to the draft hearing protocol.

56. **56**
On 6 July 2022, Claimant expressed its opposing standpoint to Respondent's communication dated 1 July 2022 on the former's jurisdictional challenge.

57. **57**
On 8 July 2022, Respondent sent its objection to the comments communicated by Claimant with regard to the legal capacity of Dr. Sherif El Gabaly and rejected the removal of the capacity of its legal representative from the hearing protocol.

58. **58**
On the same day, Respondent communicated a further objection to Claimant's email dated 6 July 2022 regarding Respondent's stance on its jurisdictional challenge.

59. **59**
On 9 July, Respondent communicated a bill of lading and further pleas in support of its position on the issue of determining what is meant by «vessel's option».

60. **60**
On the same day, the Tribunal expressed that it no longer accepts unsolicited communications on the matter of jurisdiction, stating that its decision on the matter will be included in the final award.

61. **61**
On 20 July 2022, and after several delays caused by events outside the control of the Parties, the Tribunal decided to hold the hearing on 1 August 2022.

62. **62**
On 1 August 2022, the hearing took place, and both Parties were properly represented by their legal counsels.

63. **63**
On 2 August 2022, the Tribunal sent an email to the Parties with agreed post-hearing instructions.

64. **64**
On 3 August 2022, Claimant communicated to the Tribunal documents that evidence Claimant's stance regarding what is meant by *«vessel's option»* in Article 6 of the Agreement, including contracts and their respective bills of lading.

65. **65**
On 7 September 2022, acting upon an invitation by the Tribunal, Respondent commented on Claimant's email dated 3 August 2022 and its attached documents.

66. **66**
On the same day, Respondent submitted a judgment by the Cairo Economic Court (Appellate Division) No. 423 of JY 6, alongside a certificate by the Court of Cassation evidencing that the said judgment has not been challenged, as cited by Respondent at the hearing.

67. **67**
On 11 September 2022, Claimant responded to Respondent's communication dated 7 September in objection to the late submission, along with counterarguments.

68. **68**
On 19 October 2022, the Parties submitted the agreed-on transcript of the hearing. In accordance with the Parties' agreement in the hearing dated 20 July 2022, the Parties were to submit their post-hearing briefs and statements on costs two weeks from date of the final transcript, i.e. 2 November 2022 before CoB.

69. **69**
On 20 October, Claimant submitted a translation of the email dated 15 June 2021.

70. **70**
On 2 November 2022, the Parties submitted their post-hearing briefs and statements on costs.

71. 71
On 3 November 2022, the Tribunal declared the closing of the proceedings.

III. Undisputed Facts

72. 72
On 24 January 2021, the Parties entered into the Agreement regarding the sale of 5000 MT +/-10% of DAP **(«Goods»)** to be supplied by Respondent to Claimant in consideration of USD 452 per metric ton **(«MT»),** and the delivery thereof by *«end March 2021»* (undated). The Agreement was concluded through a trade broker, Escofert S.R.L. **(«Broker»).**[1]

73. 73
On 19 January 2021, Respondent agreed on the quantity of DAP with the Nasr Company for Intermediate Chemicals **(«NCIC»).**[2]

74. 74
On 2 March 2021, Respondent informed Claimant that it cannot accept a vessel, as it *«did not start loading the product to the port».* The email was in reply to Claimant's nomination of the ship «MV Lucky Joy» to load the Goods.

75. 75
On 10 March 2021, the Broker informed Claimant that Respondent began loading DAP on 6 March 2021 and as of 9 March 2021, 241.130 MT of DAP was loaded at the port.

76. 76
On 29 March 2021, the Broker informed Claimant that up until 27 March 2021, the total amount of DAP loaded at the port was 2,091.040 MT.

77. 77
On 10 April 2021, the NCIC sent a letter to Respondent, noting the following:

> *«due to the unprecedented cost increase of production materials which is outside of the company's hands, this has resulted in an increase in the price of the final product to become USD 550 per ton».* (Translation provided by Respondent)

78. 78
On 12 April 2021, Respondent requested that Claimant nominates a vessel with a capacity to load 3,000 MT +/-10% of DAP and an amount of GTSP.

79. 79
On 10 April 2021, NCIC informed Respondent that the increase of costs for the production material resulted in a price increase reaching USD 550 PMT instead of USD 415. NCIC urged

[1] For the purposes of this award, the Sole Arbitrator will refer to the indirect communications between the Parties (through the Broker) as being direct correspondence between the Parties.
[2] As evident in the NCIC letter dated 10 April 2021 – Exhibit C-14.

Respondent to do the necessary action to settle the outstanding balance after the price increase.

80. **80**
On 15 April 2021, Claimant informed Respondent that it began the vessel nomination process, and that it is waiting for a reply from the vessel owners. On 20 April 2021, Claimant informed the Broker of the availability of a vessel MV HEBA M with «laycan» period from 28 April to 3 May 2021.

81. **81**
On 21 April 2021, Claimant informed Respondent that it was assured that 3,300 MT of DAP were available, but Respondent's acceptance only included 3,000 MT+/-10%.[3]

On the same day, the Broker informed Claimant that Respondent will be loading 3,300 MT of DAP.

82. **82**
On 22 April 2021, Respondent sent Claimant the invoice for the payment of 95% of the 3,300 MT of DAP shipment, amounting to USD 2,085,820.

83. **83**
On 9 May 2021, a bill of lading was issued by the carrier indicating the shipment of 3,300 MT of DAP to Claimant.

84. **84**
On 19 May 2021, Claimant requested that Respondent provides a date whereby the remaining amount of DAP will be available.

85. **85**
On 20 May 2021, Respondent replied by informing Claimant that its DAP supplier, NCIC, has initially increased the price of DAP, and then entirely stopped its production and supply, due to technical problems in acid production and the continued price increases of material. Respondent stated that it is unable to ship any more products under the Agreement. Respondent attached a letter from the NCIC dated 10 April 2021, which asserted that due to unprecedented increases in the cost of DAP production, the NCIC will supply Respondent with the DAP at USD 550, as opposed to the previously agreed price of USD 415.

[3] The record only shows the reply email of Respondent dated 21 April 2021 to the claimed assurance – Exhibit C-10. The statement was not challenged or refuted by Respondent; therefore, it was considered as an undisputed fact.

86. **86**
On 27 May 2021, Claimant informed Respondent that its actions qualify as a breach of the Agreement, stating:

> *«it is clear that the sellers breached the contract because they failed to deliver the contractual quantity. Consequently, buyers put the contract to an end subject only to their right to claim damages for sellers' default».*

87. **87**
On 3 June 2021, Claimant received an email from the OCP SA Jorf Fertilizers Company **(«New Seller»)** indicating a «sales confirmation» of 5000 MT +/-10% for USD 620 PMT.

88. **88**
On 12 July 2021, an invoice was issued by the New seller for 5,500 MT of DAP to Claimant for USD 3,410,000 (USD 620 PMT).

IV. Relief Requested

89. **89**
In its Post-Hearing Brief, Claimant requests to issue an award ordering Respondent to:

- *Pay the compensation amount of USD 369,600 (Three* [hundred] *thousand, sixty-nine thousand and six hundred United States Dollars) representing the difference in DAP price;*[4]
- *Pay the legal interest equivalent to 5% of the total outstanding amount, which shall be calculated from the due date of said amounts; and*
- *Reimburse all legal costs relating to this arbitration, including, but not limited to, arbitration and attorney's fees as detailed in Claimant's submission on cost.*

90. **90**
In its SoRJ, Respondent requests to issue an award to the effect of the following:

- *Declaring the invalidity of the arbitration agreement due to lack of capacity and proper representation for its valid conclusion;*
- *Declaring the Tribunal's lack of jurisdiction to decide on the present dispute due to the illegality of the arbitration agreement;*
- *Dismissing Claimant's case and claims in their entirety;*
- *In the alternative, declaring Respondent's exemption of any purported liability of whatsoever nature due to the occurrence of an impediment beyond its control under the 2003 ICC Force Majeure Clause;*
- *Dismissing Claimant's alleged claims for damages, legal interests, and legal costs;*

[4] The Tribunal chose to uphold the numerical indication of the amount requested – USD 369,600, trusting that Claimant made a typo by omission of «hundred»).

- *Ordering Claimant to bear the arbitration costs and Respondent's costs and expenses in connection with this arbitration, including Respondent's counsel fees and any other expenses; and*
- *Ordering any further relief that the Tribunal shall deem appropriate.*

V. The Arguments of the Parties

A. Does the Tribunal Lack Jurisdiction?

91. **91**
Respondent challenges the jurisdiction of the Tribunal by claiming that the arbitration agreement was signed by Mr. Bahgat, an employee who is not recognized by Respondent's commercial register **(«CR»)** as its authorized legal representative.

92. **92**
On the other hand, to refute such plea, Claimant invokes two doctrines, namely the agent's «apparent authority» and estoppel. What follows are the arguments submitted by the Parties in support of their respective positions. The Tribunal recognizes that both latter doctrines by Claimant intersect substantially; the conduct creating the apparent authority claimed to be the initial behavior that ought not be contradicted by a following conduct/statement. Therefore, the Tribunal decided to address all related arguments of the Parties under one segment of its award.

a) Respondent's position

93. **93**
Respondent contends that the Agreement was not signed by any of the only authorized persons listed in its CR, namely Messrs. Sherif Mostafa El Gabaly and Abdel Salam Abdel Salam Mostafa El Gabaly. Mr. Bahgat did not enjoy the legal capacity to represent Respondent, nor did he have a special mandate to conclude the arbitration agreement. Therefore, he lacks the legal capacity to conclude the arbitration agreement on behalf of Respondent.

94. **94**
Citing Article 11 of the Egyptian Arbitration Law No. 27 of 1994 **(«Arbitration Law»)** and Article 702(1) of the Egyptian Civil Code **(«ECC»),** Respondent asserts that to consider the arbitration agreement valid, a special and specific capacity superior to the ordinary management powers is required, namely the capacity to dispose of rights.[5]

95. **95**
In reply to Claimant's pleas of estoppel and apparent authority, Respondent submits that as a partnership, it is not subject to the Law No. 159 of 1981 **(«Companies Law»).** Article 1 of the Companies Law and Article 1 of the Commercial Law No. 17 of 1999 **(«Commercial Code»)** confirm that the Companies Law only applies to joint-stock companies, partnerships limited

[5] SoD, para 21.

by shares, limited liability companies and sole ownership companies, whereas the High Order of 13 November 1883 and the ECC regulate the affairs of a partnership.

96. **96**
Furthermore, Respondent argues that the court judgments submitted by Claimant have applied the estoppel doctrine in the context of Articles 55(1), 56(2), and 57(1) of the Companies Law, the addressee subjects of which are joint stock companies, and not partnerships.

97. **97**
Respondent challenges the validity of the arbitration clause, and not the Agreement. Respondent cites Article 23 of the Arbitration Law and Article 23(1) of the Rules on the doctrine of separability and independence of the agreement to arbitrate.

98. **98**
Additionally, Respondent argues that challenging the validity of the arbitration agreement concluded by an unauthorized person in a partnership is plausible. Respondent cites the Cairo Economic Court (Appellate Division),[6] which held that an arbitration agreement is invalid, due to unauthorized representation, while upholding the agreement that contains it.[7]

99. **99**
Furthermore, Respondent argues that it did not create any external appearance demonstrating Mr. Bahgat's authority. Respondent's general partner has timely and firmly invoked the invalidity of the arbitration agreement upon becoming aware of the arbitration proceedings.

100. **100**
Respondent also contends that Claimant is not a *bona fide* third party. It cites Article 58 of the Companies Law, which states that

> «*is not considered a bona fide third party the individual/person who effectively knows or could have known through his position in the company or through his dealings with it of the defects or deficiencies of the action invoked against the Company.*»
> (Translation provided by Respondent)

101. **101**
Accordingly, Respondent asserts that Claimant must prove its good faith and that it took the necessary precautions. The third party dealing with the agent must investigate the existence of the relation between the agent and the principal. Accordingly, it must examine the agent's proxy. In this regard, the objective standard of the reasonable person prevails.

102. **102**
Additionally, Respondent insists that a *bona fide* third party dealing with the manager might be excused if the act by which the manager exceeded its authority falls within his/her regular

[6] Judgment No. 423 of JY 6 dated 11 November 2014.
[7] SoRJ, para 32 (Exhibit RL-13).

mandate. However, Mr. Bahgat exceeded the usual authority of managers of a partnership by concluding an arbitration agreement. As opposed to joint stock companies, concluding arbitration agreements is not considered an act within the usual authority of the managers of partnerships. Only a general partner can conclude such agreements without authorization.

103. **103**
Furthermore, the Agreement did not refer to Mr. Bahgat as a general manager. It stated *«ENG. Ahmed Bahgat»* on the last page of the Agreement, without designation of any specific authority. Also, jurisprudence supports Respondent's position, as it confirms that a party entering into an arbitration agreement should at least be required to educate itself as to the capacity of the other party».[8]

104. **104**
Moreover, Respondent rejects the application of the estoppel doctrine, as the Egyptian Court of Cassation sets two conditions to invoke it; first, an act or omission that contradicts the same party's previous conduct, and second, such contradiction must be detrimental to the other party which relied on the validity of the previous conduct. Respondent argues that neither is found in Respondent's conduct, as it committed no contradicting conduct, nor is its action detrimental to Claimant's interests.

105. **105**
Respondent asserted that it is entitled to challenge the jurisdiction of the Tribunal in accordance with Article 22 of the Arbitration Law and Article 32(2) of the CRCICA Rules.

b) Claimant's position

106. **106**
Claimant, on the other hand, argues that estoppel and Apparent authority are well-established principles halting parties from escaping their undertaking to arbitrate absent a valid excuse. Claimant asserts that Respondent used its own template, which included the arbitration clause; and the signed Agreement bears Respondent's seal. Mr. Ahmed Bahgat is also typed in such template as the signatory and his name is not hand-written. Using the title of «General Manager» of Respondent, Mr. Bahgat was also the individual who sent the email that contained what Claimant qualified as Respondent's termination of the Agreement.

107. **107**
Furthermore, the Agreement has been implemented over a period of months. Therefore, it is fair to assume that Respondent knew about the signature, and thereby, it ratified the Agreement and the arbitration clause after the fact. Since the inception of the relationship in 2015, Respondent dealt with Claimant, while the former presented Mr. Bahgat as its general manager. The Parties signed a number of contracts, all of which: (a) used Respondent's template, (b) contained arbitration clauses, (c) were signed by Mr. Bahgat and (d) stated that Mr. Bahgat is Respondent's «General Manager».

[8] CL-13.

108. **108**
Claimant cites the judgment of the Court of Cassation,[9] asserting that post-ratification is tantamount the prior approval:

> *«Whereas the agent's request to enforce the sale vis-a-vis his principal requires a special power of attorney that allows him* [so], *according to article 702 of the civil code.* [However], *if the agent surpasses the limits of his general agency and concludes a* [legal] *action, such* [legal] *action is conditional upon the ratification of the principal. If* [the principal] *ratifies it, it then becomes enforceable against him.»*[10] (translation provided by Claimant)

109. **109**
Claimant invokes the apparent authority doctrine, citing Article 56 of the Companies Law, which states that a *bona fide* third party may bind a company by its employee's actions. However, this is only possible if the said company presented the said employee as the individual authorized to pursue the act challenged by the third party.

110. **110**
Claimant also cites the judgment of the Court of Cassation,[11] which stated:

> *«According to the jurisprudence of this court, if the person dealing with the agent* [is] *a third party, he is considered foreign to the relationship between the agent and the principal, which requires him – principally – to investigate the capacity of the person with whom he deals on behalf of the principal [...]. However, he could be exempted from* [such requirement] *if* [an action] *is taken by the principal that demonstrates, in appearance, that he had intended to delegate another person to act on his behalf by undertaking an external appearance attributed to him that would* [give an impression] *to a third party that a proxy exists between* [him and the agent].» *«Whereas the legislator widely adopts the principle of protecting third parties that have dealt with the company on the basis of its apparent.»* (translation provided by Claimant) [Emphasis added]

111. **111**
Furthermore, Claimant cited a Cairo Appellate Court judgment, which asserted that:

> *«a realistic de facto assumption exists that a delegation was granted by the appellate company to the 'persona' of the signatory, and the type and extent of such delegation does not matter»*[12] (modified translation by the Tribunal)

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[9] Court of Cassation, Challenge No. 485 of JY 40, dated 29 January 1975 – Exhibit CL-8.
[10] SoR, para. 12.
[11] Court of Cassation in Challenge No. 17666 of JY 77, hearing dated 19 May 2009 – Exhibit CL-10.
[12] SoC, para. 17. Case No. 90 of JY 126 the decision is mentioned in Mohamed Selim El-Awa's *Qanon Al Tahkem Fi Misr Wel Dewal Alarabia,* 2014, Vol. 1.

Accordingly, the principal could have easily inferred the encroachment of the unauthorized individual, but it did not object when the contract was drafted nor when it was implemented.

112. **112**
Reference was also made by Claimant to the application of the apparent authority doctrine in French courts.[13]

113. **113**
Claimant, further, adds that if a certain principle is not regulated by legislation, it is acceptable to apply the provision of another principle if the purpose of both principles is the same, i.e. to apply deduction by analogy, as asserted by the Higher Administrative Court.[14]

114. **114**
Claimant contends that by applying the principle of «deduction by analogy» to the present case, Article 56 of the Companies Law aims to protect *bona fide* third parties against a given company's use of its internal corporate regulations, as a means to escape fulfilling its contractual obligations. The same doctrine applies to this dispute in light of the similar circumstances, despite the non-existence of a comparable black-letter article that applies specifically for partnerships.

115. **115**
Claimant challenges Respondent's argument of the former being the party who submitted Respondent's CR; therefore, Claimant should have been aware of Respondent's corporate structure from the beginning of the relationship. It is a *«paradoxical argument»,* according to Claimant. If Mr. Bahgat had been acting beyond the limitations of his powers for the past 7 years, Respondent should have alerted Claimant about that. Respondent *ex post-facto* approved all of the contracts signed over the years by conduct. Claimant cited the Court of Cassation Case no. 748 of JYl 946, dated 21 June 1984, and Case no. 7041 of 63 JY, dated 16 February 1998;[15] both confirm that the silence of a party might be indicative of its consent to a certain conduct.

116. **116**
Claimant also maintains that the prerequisites of estoppel are met, as follows: (a) Respondent had *«deluded»* Claimant into believing that Mr. Bahgat had the adequate authority to conclude the arbitration agreement, i.e. Respondent's actions or omissions led Claimant to believe that Mr. Bahgat was duly authorized to conclude the arbitration agreement, and (b) that Claimant was a *bona fide* third party.

117. **117**
Claimant contends that Respondent relies on Article 58 of the Companies Law despite previously denying the application of the said law in the present case. Article 58 is not applicable here. The Parties' relationship extends over seven years, during which Respondent failed to indicate the lack of Mr. Bahgat's capacity. To the contrary, it confirmed that

[13] SoR, para. 18.
[14] Higher Administrative Court, Case No. 25268 of 56 JY, dated 3 March 2012 – Exhibit CL-32.
[15] Exhibits CL-33 and 34.

Mr. Bahgat was duly authorized to represent Respondent in this respect. Thus Respondent's argument in this respect must fail.

118. **118**
Claimant argues that Respondent's plea that it should have investigated the relation between Mr. Bahgat and Respondent, i.e., request to examine the proxy, is groundless. Respondent alleges that according to *as-Sanhoory,* failure to investigate is considered negligence. However, this is a misquote, since the cited authority (i.e. pages 509, 519 and 521 of *as-Sanhoory's* commentary)[16] does not provide for such allegation.[17] According to Claimant, *as-Sanhoory* explains that, although the general rule is not to bind a principal to its agent's actions, if the latter exceeds his/her proxy; however, the external appearance by action or omission exceptionally confirms due authority. The author was misquoted.

119. **119**
In addition to international judicial precedents, affirming the doctrine of estoppel, Claimant cites two decisions by the Court of Cassation, namely Cassation Court Judgment No. 18309 of JY 89 dated 27 October 2020 and Cassation Court Judgment No. 13892 of 81 JY, dated 22 February 2022.

120. **120**
Finally, Claimant contends that it never alleged that the arbitration agreement was valid because the Agreement was valid. Thus, Respondent's plea in this respect is groundless and must fail.

121. **121**
Also, with regard to the Companies Law in the context of estoppel, the Court of Cassation established estoppel in another decision in reliance on Article 1(2) of the Civil Law.[18]

c) The Tribunal's discussion and findings

122. **122**
Article 13 of the Agreement did not clearly specify the seat of the arbitration. It mentioned Cairo, Egypt, only as the address of CRCICA. However, Article VI of PO 1 confirmed Cairo as the place of arbitration to no objection of the Parties. Therefore, the *lex arbitri* in this case is Egyptian Law.

123. **123**
Before delving into the procedural pleas concerning the Tribunal's jurisdiction, the Tribunal finds it necessary to address a matter raised by Respondent in the proceedings. On 12 May 2022, Respondent objected to a 5 hour delay by Claimant in its submittal of the SoR, and further requested that the Sole Arbitrator takes

[16] Exhibit RL-14.
[17] Exhibit RL-14.
[18] Exhibit CL-15.

«a firm action against Claimant, including the complete disregard of Claimant's unjustified late submission of its Statement of Reply and its accompanying exhibits».

124. **124**
The Tribunal is not convinced that the grounds relied on by Respondent qualify to hold Claimant's SoR inadmissible. There is nothing in the Rules, the Arbitration Law or PO 1 that provides for dismissal of the said submission based on an insignificant delay.

125. **125**
Absent any proof of detriment borne by Respondent caused by such delay, and in light of the fact that Respondent was equally delayed in submitting its SoRJ, the Tribunal finds that Claimant's delay in filing its SoR does not warrant any ramifications. Therefore, the Tribunal dismisses Respondent's objection and admits Claimant's SoR and its lists of exhibits.

• ***External Appearances***

126. **126**
Respondent contends that it is not bound by the arbitration clause in the Agreement, because Mr. Bahgat was not authorized to sign on behalf of Respondent. As evident in the law provisions and court decisions cited by both Parties, the general rule requires an express and specific authorization to the agent by the principal to execute an agreement to arbitrate disputes. However, an exception has strongly emerged in court jurisprudence to hold *bona fide* third parties unharmed by such lack of authority, if the principal sufficiently demonstrates by appearances (express or silent) that the agent has the necessary mandate to represent it, and therefore, may bind the principal to the arbitration agreement signed by the unauthorized agent.

127. **127**
The Tribunal examined the authorities submitted by the Parties. Whereas negligence and mistake are considered grounds for not excusing a deceived *bona fide* third party, there is no active duty to verify or investigate the agency relationship in the presence of confirmed external appearance attributed to the principal.

128. **128**
In this regard, *as-Sanhoory* was referenced by Respondent to have indicated an example of the duty of *bona fide* third parties to *«investigate the existence of a relationship between the agent and the principal, i.e., requesting to examine the proxy».*[19] The exhibit missed the cited page 520. The Tribunal resorted to its own copy of the commentary and affirms that it did not find Respondent's reference of *«requesting to examine the proxy»,* as used by Respondent and suggested by the reference of *as-Sanhoory* in the separate footnote no. 19 in the same sentence. The eminent scholar in the unexhibited page 515 of the commentary refers to «viewing/reading the source of agency», as a means available to the third party, before it

[19] Exhibit RL-14.

enters into the transaction with the agent. However, such act is demonstrated as a presumed option available to the third party. To clarify, the eminent scholar states:

> *«Since the third party is presumed to confirm the agency of the agent before entering into a contract with him, and as a means to do, so he may view his source for agency* [proxy or power of attorney], *the presumption that he knew of the inexistence of the agency is reasonable. Therefore, the third party bears the burden of proof that he is a bona fide party, and when he contracted with the agent, he did not know of the lack of agency, although he could have confirmed that before the conclusion of the contract. In most cases, the third party resorts to prove his good faith by proving the external appearance attributed to the principal.»*[20]

129. **129**
As-Sanhoory states that good faith alone is not sufficient to bind a principal to conduct of an apparent agent. Only if the third party's good faith is accompanied by external appearance to the contrary of the truth, he/she is then protected by the law. The duty of taking the necessary precautions, as advocated by *as-Sanhoory,*[21] requires significantly less in the presence of external appearances than actively investigating the propriety of the agency. It certainly does not equal scrutinizing what seems to be fairly conclusive for a reasonable person in the same position. Unless there were actions or statements inviting the third party to doubt the veracity of the agency, a *bona fide* third party may rely on the external appearances that lead to a reasonable conclusion. The criterion of *«regular person in similar circumstances»* applies,[22] resorting to an objective standard.

130. **130**
Based on the above, in the presence of external appearances, failure to investigate the agency does not prove negligence, as suggested by Respondent. Such an active obligation is not imposed by the law. The arbitrator or judge will deduct from the facts and circumstances whether there was good faith or not, i.e. whether the third party genuinely believed that the agent maintained the authority to conclude the arbitration agreement. Dismissing the apparent authority of the agent and disqualifying the agent's action based on the *bona fide* third party's failure to investigate the agency, absent any justifiable reasons to do so, is nowhere to be found in the literature or court jurisprudence cited by Respondent. The argument, therefore, fails.

• ***Separability***

131. **131**
Respondent argues that the judgment of the Cairo Economic Court (Appellate Division) No. 423 of JY 6, dated 11 November 2014, supports its stance. The Tribunal is convinced that there are multiple significant distinguishing factors in the said court case that cause the

[20] Abd al-Razzak as-Sanohuri, ed. Ahmed Medhat al-Maraghy, *al-Wassit fi Sharh Al-Kanoon Al-Madani,* Volume 7, part 1, Dar Masr, 2021, p. 515.
[21] RL-14, p. 519 and 521.
[22] as-Sanhoory, p. 520.

Tribunal to consider the ruling of the court inapplicable to the dispute at hand, the most significant of which:

1- The apparent agent in the court case (first defendant) is not an employee of the principal (plaintiff company) or affiliated with it in any form; therefore, he does not regularly represent it in contracts containing arbitration clauses. He is a full alien to the principal and its internal managerial structure. On the other hand, Mr. Bahgat is not only an employee of Respondent, he also represented himself as the general manager of Respondent, and acting de facto as such, having signed arbitration agreements presumably with all of Respondent's customers (using the company template) at least since 2015,

2- There was no transactional history between the agent representing the principal and the third party (second defendant) in the court case to warrant a comfortable stance towards the apparent agent, as opposed to Respondent concluding and successfully performing numerous transactions, all of the submitted include arbitration clauses with Claimant, and which extend over several years, using the same individual, Mr. Bahgat, as the **only** signatory.

132. **132**

Furthermore, the judgment confirms that the established rule of «apparent agency» shields *bona fide* third parties against principals dismissing the agent's actions for lack of proper authority. Although it dismisses the plaintiff company's plea request to uphold the arbitration agreement, the court expressly states that third parties are excused, if they were misled by the external appearance attributable to the principal, which led them to believe that the signatory is empowered to represent the principal. It clearly echoes the aforementioned judgment of the Cairo Appellate Court.[23] It states, as follows:

> «[third requirement for protecting the third party against a principal that invokes the lack of authority of his agent]: *there is an external appearance of an agency attributed to the principal that deceived the third party – whether by way of his shortcoming or without it (as long as the principal caused it) – and the appearance is of the effect to make him* [the third party] *comfortable to the existence of an agency ...* [the general rule is] *the third party is required to verify the capacity/standing of whom he deals with as representative of the principal. However, this is no longer required if the principal conducts himself in a manner indicating that he intends to delegate someone else to act on his behalf, e.g. cause an external appearance to the effect of misleading the third party, making him excused to believe that an agency exists. In such event, the third party is entitled to holding the transaction, which he concluded with whom he thought to be an agent of the principal, effective vis-a-vis the principal, not based on a actual agency (which does not exist), rather on an apparent agency ... The apparent agency produces the same effect as an actual agency between the principal and the third party,*

[23] Fn. 19.

which means that the effect of the transaction concluded by the apparent agent is upheld against the principal.»[24]

133. **133**
The Tribunal is convinced that the aforesaid court judgment is distinguishable from the current dispute. It does not refute or discard the long established doctrine of apparent agency, which has been repeatedly confirmed by the Court of Cassation and scholars, which qualifies the general rule and requirement of a special agency to conclude arbitration agreements.

134. **134**
Even if Claimant ought to have checked whether Mr. Bahgat had proper authority to sign the Agreement and the arbitration agreement in their first transaction, it is no longer required to have done so after seven years of fully performed transactions.

135. **135**
The Tribunal notes that Respondent's object, as evident in Respondent's CR, is «import and export of chemicals» (including DAP). Respondent regularly uses its standard «purchase contract», which has always incorporated an arbitration agreement. Discrediting such distinguishing details of the case at hand removes the reasonable person standard and introduces a standard severally harmful to the stability of commercial cross-border transactions. The argument, therefore, fails.

• ***General Manager***

136. **136**
Indeed, the Agreement did not expressly include the title of «General Manager» next to the signature of Mr. Bahgat, as confirmed by Respondent. And there is no way for the Tribunal to conclude – as a matter of fact – that all of the contracts previously signed between the Parties contained the said title, ever since the start of the relationship in 2015, as Claimant alleged. However, all of the five exhibited preceding contracts entered into between the Parties include the said title, namely the contracts dated 5 August 2015; 28 June 2016; 2 August 2016; 8 December 2016; and 8 May 2019.[25]

137. **137**
In this regard, the Tribunal concurs with Respondent that it ought not to address the validity of the arbitration agreement in the previous contracts. The Tribunal did not determine the validity, or the lack thereof, of any of the previous arbitration agreements. The Tribunal utilizes the previous contracts to establish a practice that both Parties successfully pursued over 7 years, which is indicative of a reasonable expectation by Claimant that the general manager is authorized to conclude arbitration agreements. One concludes that Respondent knew – or ought to have known – about Mr. Bahgat referring to himself in Respondent's standard contract as the general manager, so it is precluded from claiming the contrary, and

[24] RL-13.
[25] Exhibits C-20, C-21, C-22, C-23, and C-24.

that Claimant acted in a prudent manner by signing the Agreement with the assumption that Mr. Bahgat is duly authorized to sign the arbitration agreement.

138. **138**
There was no reason for Claimant to doubt the capacity of Mr. Bahgat. If Respondent was unaware of Mr. Bahgat's overreach of the general partners' authority, as well as being uninformed of the fact that the partnership uses a standard contract that contained an arbitration clause, for seven consecutive years, Claimant should not bear the consequences of such trespass, nor is it expected to investigate Mr. Bahgat's powers. Respondent challenging the validity of the arbitration agreement when a notice of arbitration is filed is a not a *«timely and firm»* invocation of a right, it is the expected reaction of a respondent attempting to escape an agreement struck in good faith by claimant when it is time to claim a violation of their contract.

• ***1981 Companies***

139. **139**
Furthermore, with regard to the distinction drawn by Respondent between partnerships and companies regulated by the Companies Law, it is the stance of the Sole Arbitrator that contrary to the limited shareholder liability enjoyed by owners of companies where management is separate from ownership **(«1981 Companies»),** owners of a partnership cannot opt out of the personal and joint liability for its actions and debts. This is due to their expected personal and direct involvement in a partnership's operations, as opposed to shareholders of 1981 Companies that delegate the management thereof in most cases and they participate only in the oversight through the board of directors and the general assembly of shareholders.

140. **140**
It is, therefore, the Tribunal's understanding that the very nature of Respondent dictates a more involved role for its owners in the implementation of purchase orders and supply contracts, or at least this is how it ought to be. The authorized managers, who are both owners of Respondent, are reasonably expected to be aware of the content of consecutive contracts signed and implemented over a period of seven years. Claimant should not bear the consequences of the Mr. Bahgat's trespass over the authorized managers' authorities. As the record shows, Mr. Bahgat has been signing contracts that contain arbitration clauses on behalf of Respondent since 2015.

141. **141**
The Court of Cassation in the Challenges No. 485 of JY 40 dated 29 January 1975, and No. 17666 of JY 77 dated 19 May 2009, establish a clear reading of the rules governing apparent authority. According to these judgments, the doctrine is not exclusive to a specific form of principals, as in both cases they are individuals and not companies or partnerships, meaning that the doctrine applies to all legal persons, natural and juristic. The latter judgment explicitly states that external appearances by the principal, to the effect of presenting the agent as authorized to transact on his/her behalf, *«suffices to replace»* the original duty of third parties to *«verify the capacity»* of the agent. In such event, the transaction is considered

effective and enforceable. The requirement of a special authorization is trumped by the external appearances that justify the conviction of a prudent *bona fide* person that the agent is properly authorized.

142. **142**
By the same token, the judgment of the Cairo Appellate Court in Case No. 50 of JY 135, dated 6 February 2019, affirmed that if the appellate company (the principal) failed to oppose the trespass of its legal representative on its authority to conclude an arbitration agreement in any of the following events: 1) when the contract was tendered to such principal, and 2) when the contract was drafted and signed, and 3) during its long contract performance period; a presumption persists that there is a delegation from the company to its chairman authorizing him to conclude arbitration agreements. The court added that as long as the arbitration agreement is connected to an operation that falls within the scope of ordinary contractual acts of the company, and within its commercial practices, then it does not require a special power of attorney or a delegation to its chairman or general manager that is already empowered to represent it in court.

143. **143**
The same reading of the law is aJso adopted by eminent scholars such as *Fathy Waly.*[26] He echoed the judgment of the Cairo Appellate Court asserting that the form of the legal entity is entirely irrelevant:

> *«If the appealing party challenges the arbitral award to an annulment, justifying his plea by claiming that the signatory to the contract – subject of the arbitral procedures – does not have the authority to conclude an arbitration agreement in the said contract, this can be rebutted by the fact that the appealing party could have rectified this trespass easily, but it did not object at the time of signing the contract or during its performance. Therefore, there is a de facto presumption that there is a delegation, and it is irrelevant at that time, what type of delegation and its extent, because the relationship of a company – **every company*** [including partnership companies] – *with its employees should not affect by any means its relationship with bona fide third parties»*[27]

144. **144**
Also, a CRCICA tribunal in 2015 held that absent any objection by the principal to any of the terms of the contract concluded by the agent, including the arbitration clause, in addition to the principal's performance of its contractual obligations, constitute an ex-post ratification of the said contract, and an *ex-post facto* consent, and are no different in effect to an ex-ante authorization to sign the arbitration agreement.[28]

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[26] Fathy Waly. *al-waseet fil tahkeem al-watany wal tegaary al-dwawly.,* Vol. 1, paras 64 and 65, p. 184 et *seq.,* 2021.
[27] *Ibid*.
[28] CRCICA Case No. 981/2015 dated 3 September 2015.

145. **145**
The Tribunal is of the opinion that Respondent misled Claimant – without assumption of malice – to believe that Mr. Bahgat is authorized to conclude arbitration agreements. The Tribunal deems Claimant to be a bona fide third party in light of the above.

• ***Commercial Register***

146. **146**
The Tribunal dismisses Respondent's argument that Claimant is not a *bona fide* third party, because it submitted the commercial register of Respondent with the NoA; therefore, it was aware of Mr. Bahgat's lack of authority. The extract of the CR is dated 9 November 2021, nearly 10 months after the conclusion of the Agreement, and it was issued upon the application of Mr. Abdel Salam Mostafa El Gabaly, the general manager of Respondent, whereas the relationship dates back to 2015, as evident in Exhibit C-20. The CR extract does not prove any prior relevant knowledge by Claimant of the inexistence of the agency.

147. **147**
Finally, Respondent erred in its construction of CRCICA's request to verify Mr. Bahgat's authority as an acknowledgment of evidentiary value to bis lack of capacity. Jurisdictional pleas fall within the exclusive jurisdiction of the Sole Arbitrator, according to the *Kompetenz-Kompetenz* principle and Article 22(1) of the Arbitration Law.

• ***Estoppel***

148. **148**
Even if we entirely dismiss apparent authority as a doctrine binding Respondent to the actions of Mr. Bahgat, Egyptian law recognizes the doctrine of estoppel. Its applicability was initially highlighted by the Cairo Appellate Court in the context of arbitration, specifically in the event of principals claiming the lack of their agent's authorities in concluding arbitration agreements. It was then generalized to apply in all commercial transactions by the Court of Cassation, as will follow.

149. **149**
With regard to the application of the doctrine, it is clear that by invoking that Mr. Bahgat lacks the authority to conclude the arbitration agreement, Respondent would gain from previously conducting itself in a manner inconsistent with its current pleadings in these proceedings, to the detriment of Claimant. The detriment is clear, Claimant would be stripped of being able to resort to arbitration; a dispute settlement mechanism that it opted for when it concluded the Agreement.

150. **150**
As cited by Claimant, the Court of Cassation in its judgment in the Challenge No. 18309 of JY 89 explained the maxim «*non concedit venire contra factum proprium*» to mean «prevention of contradictions prejudicial to others». It, further, stated:

> «*The criterion for application of this principle* [estoppel] *entails two conditions: the first condition is that a statement, an act, or an omission is made by a party and contradicts a previous conduct by the same party; and the second condition is that this contradiction could cause damage to the other party whom has dealt with the first party in reliance on the validity of that first party's previous conduct.* ***Taking in consideration that the principle: 'prevention of contradictions prejudicial to others' is a general principle, its scope of application is not exclusive to arbitration, but extends to all other dealings. In addition, the judge has the discretion to ascertain whether the conditions of application of this principle exist in light of the circumstances of each case, respectively.***» (Translation provided by the Tribunal) (Emphasis added)

151. **151**
Also, the Cairo Court of Appeal, judgment in the Case No. 57 of JY 128 states:

> «*In arbitration practice, in compliance with the overarching principle of good faith, prevailing in the commercial arena, the 'estoppel' doctrine has become fortified and well-vested. According to the said doctrine, it is possible to frustrate an opponent's efforts to benefit from its contradicting statements, behavior, and legal positions in order to acquire privileges to the disadvantage of its counter-party.*
>
> *The aforementioned principle – noting the different classification according to the legal system in application – has become explicitly and directly applied, and even a rule of thumb, as one of the primary legal principles, which may not be disregarded or denied, or else this shall be a serious encroachment on the values of justice, which any community considers indispensable.*» (Translation provided by the Tribunal)

152. **152**
The Cairo Court of Appeal and the Court of Cassation assert that estoppel requires the mere contradiction in acts, statements, or legal position, to the detriment of the other party. The doctrine is directly applicable to the circumstances at hand, where Respondent's claim in these proceedings contradicts its earlier pre-dispute conduct for 7 years.

153. **153**
The Tribunal is convinced that Respondent is estopped from claiming that Mr. Bahgat lacks authority to conclude the arbitration agreement on behalf of Respondent. Such stance is clearly in contradiction with his consistent representation of Respondent and being the signatory on behalf for Respondent to all arbitration agreements with Claimant, including the Agreement, and bearing the title of «general manager» of Respondent in at least five previous contracts with Claimant. The rightful owners and managers of the partnership watched the performance of contracts that contained the arbitration clause for 7 years, without challenging it. This suffices as estoppel-worthy conduct.

154. **154**
Based on all of the above, the Tribunal deems itself of proper jurisdiction *ratione personae* over Respondent.

B. Is Respondent Entitled to a Third Submission on Jurisdiction?

a) Respondent's position

155. 155
On 5 June 2022, Respondent objected to the Sole Arbitrator's decision of permitting the Rejoinder on Jurisdiction by Claimant. Respondent requested to submit a third submission on jurisdiction, following two rounds of submissions by both Parties. In this regard, Respondent stated:

> «*Respondent hereby firmly rejects (i) Claimant's unwarranted request to submit a Statement of Rejoinder on Respondent's Jurisdictional Challenge; and (ii) the Tribunal's prompt decision endorsing Claimant's unfounded request, once again, without seeking Respondent's comments or even granting Respondent a chance to comment, which is considered another serious procedural irregularity.*
>
> *According to the general principles of Egyptian law, the non-jurisdiction pleas are not, by their very nature and name, considered counterclaims or new claims! It is needless to state that no case, whether a court or arbitration case, is devoid of a number of defences, whether those defenses are procedural or substantive. Furthermore, under the basic norms of disputes, it is well established that the defendant (i.e., Respondent) is the last one to be heard. Remarkably, this is now not the case after the Tribunal's quick adoption of Claimant's unwarranted request, which would devoid this principle of any merits. Respondent cannot accept another procedural breach of its fundamental rights and due process in the present proceedings.*
>
> *With due respect, Respondent respectfully reminds the Tribunal, once again, that it must hear the Parties' views before rendering any decision, even if the Tribunal is inclined to follow one predisposition over another. Regrettably, Respondent finds itself forced to keep restating some basic procedural principles in handling arbitration proceedings.*
>
> *In these circumstances and given that the Tribunal has endorsed Claimant's unwarranted request to submit a Statement of Rejoinder on Respondent's Jurisdictional Challenge on 17 June 2022, Respondent hereby reserves its right to respond to Claimant's Statement of Rejoinder by 2 July 2022 (i.e., 15 days of Claimant's Statement of Rejoinder).*»

156. 156
During the pre-hearing conference call, the Tribunal granted Respondent's request to submit legal authorities in support of its plea to be the last Party to be heard. On 1 July 2023, Respondent sent an email with attached authorities, stating the following:

> «*In compliance with the Tribunal's directions at the Pre-Hearing Conference Call, Respondent hereby submits a brief explanation, along with the supporting legal authorities, regarding its position that it should be the last one to be heard for its plea for the Tribunal's lack of jurisdiction to decide on the present arbitration case.*

Respondent's position is supported by the general legal principles of the Civil and Commercial Procedural Law **[(«CCPL»)],** *as follows:*

1. *Parties to a case can invoke two things: (a) claims/requests; and/or (b) pleas/defences. [Attachment No. 1, P. 315]*
2. *Claims/requests are classified into: (a) original or introductory claims/requests, i.e., the main claim (i.e., the requests made at the time of filing a dispute); and (b) incidental claims/requests (i.e., a claim that is raised during the course of the proceedings). [Attachment No. 1, P. 316* & *Attachment No. 2, P. 236]*
3. *If the incidental claim is raised by a claimant, it is called an additional claim. On the other hand, if an incidental claim is raised by a respondent, it is classified as a counterclaim. [Attachment No. 1, P. 320* & *Attachment No. 2, P. 236]*
4. *A respondent in a case can pursue the following positions: (i) a defensive position by responding to the claimant's claims in the form of substantive, procedural or inadmissibility defences/pleas and/or (ii) an offensive position by filling an opposing request (counterclaims). [Attachment No. 2, P. 236]*
5. *A counterclaim is thus an offensive attack adopted by a respondent whereby it goes beyond rejecting or negating the claims initiated by a claimant by raising new claims/requests against the claimant, thus making the latter a respondent in a different and a distinct claim/request. [Attachment No. 2, P. 236]. In this respect, Article 125 of the CCPL sets out the different forms of the counterclaim. [Attachment No. 3* & *Attachment No. 1, PP. 325–327]*
6. *A plea, on the other hand, is the respondent's response to the claimant's claims with the aim to respond to the claimant's claim and prevent it from having a favourable verdict. [Attachment No. 1, P. 346* & *Attachment No. 2, P. 236]*
7. *Pleas are divided into (i) substantive pleas, (ii) procedural pleas, and/or (iii) inadmissibility pleas. [Attachment No. 4, P. 14* & *Attachment No. 5, P. 7]*
8. *In this respect, the plea of a court's/tribunal's non-jurisdiction to rule over a dispute is a procedural plea whereby the respondent, as a means of defence, refutes the claimant's case [Attachment No. 6] with the response that the court in question is incompetent to rule over the dispute in the first place with the aim to avoid a verdict against it, thus calling into question the procedures of the dispute. [Attachment No. 4, P. 14 & Attachment No. 5, P. 7]*
9. *Since this plea is simply a response to the filing of the arbitration case by a claimant, the respondent must have the last word according to Article 102 of the CCPL. It is only when the respondent files an opposing request, the initial claimant would be considered a respondent regarding this request. [Attachment No. 2, P. 242]*
10. *Based on the above, Respondent's plea for the non-jurisdiction of the Tribunal to decide on the present proceedings is a procedural plea aiming to respond to Claimant's filing of the present arbitration case, which entitles Respondent to be the last party to be heard on the whole case. In other words, Claimant's filing of the present proceedings necessarily includes its claim that a valid arbitration clause*

exists. Respondent's defense that no valid arbitration clause exists and thus there is no jurisdiction for the Tribunal is just refuting Claimant's claim that a valid arbitration clause exists. Therefore, Respondent must be the last to speak on this point.

11. *Respondent thus respectfully urges the esteemed Tribunal to reconsider its decision and allow Respondent to be the last Party to be heard concerning its plea for the Tribunal's lack of jurisdiction to decide on the present proceedings. Respondent fully reserves its legal and procedural rights.*» (Typos in quote were corrected by the Tribunal)

b) Claimant's position

157. **157**
On 6 July 2023, Claimant responded by arguing that the CCPL is the general rule applicable to the procedural side of court proceedings. Nevertheless, the Arbitration Law overrides the general rules of the CCPL in arbitral proceedings. The Arbitration Law considers jurisdictional challenges a separate issue that should be addressed by the arbitral tribunal alongside the case merits, as per Article 22 of the Arbitration Law.

158. **158**
Additionally, Claimant contends that Article 23 of the CRCICA Rules addresses only the issue of jurisdictional challenges made by the Parties. Therefore, unlike local court litigation, jurisdictional challenges in international arbitration are treated as separate pleas and respondents are considered claimants of such jurisdictional challenges, and it should, therefore, be the last to be heard so long as this is limited to the comers of the jurisdictional challenge. Additionally, the authorities cited by Respondent support Claimant's position.

c) The Tribunal's discussion and findings

159. **159**
To Respondent's email dated 5 June 2022, the Tribunal's initial reply on the same day was to reject Respondent's request, as follows:

> «*Claimant is respondent in the jurisdictional challenge, as I hope Respondent is aware. The PO 1 procedural timetable did not include any reference to jurisdictional challenges; Respondent did not even suggest changing it. Nevertheless, the Tribunal accepted the jurisdictional plea* [of Respondent] *based on Article IV of the PO 1 and Article 23(2) of the Rules. Claimant is irrefutably entitled to respond to Respondent's reply on jurisdiction.*»

160. **160**
Upon its request, Respondent was invited to submit its views on its claimed right to submit a third submission on jurisdiction after the pre-hearing conference. In application of Article 32(3) of the Rules, the Tribunal decided to settle Respondent's jurisdictional pleas in this final award on the merits.

161. **161**
In its email dated 5 June 2022, Respondent engaged in a discussion on the distinction between a plea and an «opposing request» (counterclaim). Respondent attempted to establish that a procedural plea is not considered an «opposing request», and, therefore, and regardless of the fact that it filed the first submission on jurisdiction, it should be the last to submit on jurisdiction, as well.

162. **162**
Meanwhile, the authorities cited by Respondent in its emails dated 1 and 8 July 2022, merely present an introduction to the different types of parties' submissions regulated by the CCPL, and the circumstances and conditions connected thereto. None of them expressly state that a respondent/defendant is the last party to speak with regard to jurisdictional challenges. As a matter of established jurisprudence, as noted by Fathy Waly in his commentary, «*procedural pleas in arbitration are not subjected to the same rules applicable to procedural pleas regulated by the CCPL in court, but they are subject to special rules that differ from those applicable in court.*»[29]

163. **163**
CCPL Article 102 is claimed by Respondent to apply to its request. However, the article pertains to oral pleadings in hearings. The title of the chapter is «*the Order of Hearing*». It also explicitly mandates courts «*to listen to the **oral pleadings** of the parties and may not interrupt them unless they depart from the subject matter or the necessities of presenting their case*».

164. **164**
The Tribunal assumes that the said article could be constructed in some farfetched manner to expand its application to written submissions in court. Nevertheless, there is no viable analysis of the said text that points to considering it as reasonable grounds for breaching a fundamental principle of procedural equality in arbitration; one that is explicitly enshrined in Article 26 of the Arbitration Law:

> «*The parties of the arbitration are to be treated on an equal footing and both shall be granted the full and equal chance to present their case*».

Respondent asking for three submissions while Claimant is only entitled to two submissions is a quintessential breach of equal opportunity to present a party's case. The sheer numerical count of requested submissions on jurisdiction is sufficiently indicative of how fundamentally unfounded such request is.

165. **165**
Similarly, Article 24 of the Rules grants the Sole Arbitrator full discretion over written statements:

> «*Further written statements: The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall*

[29] Fathy Waly, *al-waseet fil tahkeem al-watany wal tegaary al-dawly,* Vol. 2, para. 50, p. 151 et seq. (2021).

be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.»

166. **166**
Article 17 of the Rules dictates that the Tribunal must: «*conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an equal and full opportunity of presenting its case.*» The Tribunal believes that the term «*case*» here encompasses each and every point of contention between the Parties, including jurisdictional challenges.

167. **167**
Moreover, the judgment of the Court of Cassation No. 648 of JY 73, referred to by Respondent, addresses the inadmissibility of the annulment action on a partial award, before a final award has been rendered. It is in strict application of Article 22(3) of the Arbitration Law, the special law applicable to the matter at contention, and not the CCPL.

168. **168**
The Sole Arbitrator is of the conviction that jurisdictional challenges in arbitration differ fundamentally from those in state courts:

First, the scope of jurisdiction for state courts (within the ordinary/civil judiciary) is clearly defined and set by the black letter CCPL, whereas the rules governing jurisdictional challenges in arbitration are ever developing, as they expand or limit the scope of jurisdiction, depending on the circumstances of the respective case. There is nothing more evident to this fact more than Egyptian courts acknowledging doctrines of «group of contracts» and «group of companies» without legislative base.

Second, the procedures may seem conceptually identical, but the consequences of a given jurisdictional plea are entirely different in the two parallel practices. Whereas a decision on a jurisdictional challenge in state court proceedings may result in merely referring the case to another state court, a decision by a court or a tribunal on a jurisdictional challenge in arbitration may maintain the arbitral tribunal's jurisdiction, or it could remove the mandate of dispute resolution entirely out of arbitral panels and refer it to state courts. It could either force a claimant to resort to state courts, potentially against its contractual preference, or it could eliminate the parties' constitutional right of access to a state judge.

169. **169**
Therefore, upon deciding on a tribunal's jurisdiction, a tribunal or court must give full deference to the greatest extent possible to a) the Arbitration Law, b) the institutional rules agreed upon by the parties, as well as c) established arbitral customs and practices. Otherwise, it would fundamentally violate party autonomy. This does not contradict the gap-filling role of the CCPL in the absence of special rules for arbitration. The Tribunal's view that the Arbitration Law and Rules are not silent on the matter, and therefore, the CCPL finds no application here.

170. **170**
Based on the foregoing, the Tribunal hereby dismisses Respondent's plea that it may submit the final word on jurisdiction.

171. **171**
Having found that it has jurisdiction over Respondent and the Agreement, the Tribunal now moves to the subject matter of the dispute.

C. Is the CISG Applicable to this Dispute?

172. **172**
The Sole Arbitrator's mandate is to pursue the proper application of the law, regardless of the Parties' pleas and submissions, as repeatedly asserted by the Court of Cassation.[30] The Sole Arbitrator is required to search for the relevant rule oflaw and apply it to the present dispute. On many occasions, the Parties omitted the autonomous nature of the CISG and resorted to domestic rules of law, entirely dismissing CISG Article 7, as will follow in detail. Therefore, those pleas and arguments were entirely dismissed, as they are not the proper applicable law.

a) Claimant's position

173. **173**
In its SoC, Claimant argues that pursuant to Article 13 of the Agreement, Egyptian law is the applicable law thereto. Article 88(2) of the Commercial Code provides that with respect to international sale of goods, international treaties in force apply, as follows:

> *«The provisions of international treaties, in force in Egypt, shall apply to international commercial sales regarding such sales, as well as the prevailing norms in international trade and the interpretations prepared by international organizations for the terms used in trade if the contract referred to them.»* (Translation provided by Claimant)

174. **174**
Claimant asserts that CISG Article 1 applies whenever the contract in question is a contract for sale of goods, where the parties are located in different contracting states. This is the case here, as both states, Egypt (i.e. where Respondent is *«domiciled»)* and Italy (i.e. where Claimant is *«domiciled»)* are signatory states of the convention.

175. **175**
Claimant submits that this is supported by the Egyptian Cassation Court precedents, where it had established that:

> *«Pursuant to Article 88 of the Commercial Law No. 17 of 1999 and Articles 1, 4,* 7, *8, 11 and 13 of the United Nations Convention on Contracts for the International Sale of Goods Vienna 1980, whenever sale of goods occurred between a buyer located in a contracting state of the convention and a seller in a different state that is also a contracting state to the treaty, the provisions of the convention shall be applicable to*

[30] Court of Cassation, Challenger No. 9543 of JY 91, hearing dated 16 March 2022.

the formation of the sales contract and to the rights and obligations arising thereof [...].» (Translation provided by Claimant)

b) Respondent's position

176. **176**
Respondent objects to Claimant's assertion regarding the applicability of the CISG to the present dispute. Party autonomy and the Parties' contractual freedom should prevail. The Parties have allegedly expressly agreed in Article 13 of the Agreement to apply the substantive domestic law of Egypt to the Agreement. It excludes the application of any other instruments that are not explicitly enshrined therein. Respondent cites CISG Article 6, along with the CISG Explanatory Note and the UNCITRAL Digest of Case Law on implicit exclusion by opting for contradicting terms in the contract.

c) The Tribunal's discussion and findings

177. **177**
The Tribunal is convinced that the CISG applies to the current dispute. To the greatest extent, reference by the Parties to Egyptian domestic rules of law is largely irrelevant to the current dispute. In this segment of the award, the Tribunal will demonstrate not only the grounds of applicability of the CISG, but also the extent of it, dismissing reference to domestic principles and doctrines that cannot be echoed in the uniform and international application of the CISG by courts and tribunals across contracting states.

178. **178**
The United Nations Convention on Contracts for the International Sale of Goods **(«CISG»)** is enforceable in Egypt, as an integral part of the national legislation, by virtue of the Presidential Decree No. 471 of 1982, published in the Official Gazette on 30 January 1997. It became retroactively effective as of 1 August 1981.

179. **179**
CISG Article (1)(a) states:

«This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States».

180. **180**
The Parties have *places of business* in two different contracting states; therefore, the territorial scope of application of the convention covers the Agreement. Also, the subject matter of the Agreement is a sale of goods contract dealing with goods that are not among the excluded goods mentioned in CISG Article 2.

181. **181**
Nevertheless, Respondent invokes CISG Article 6 in two separate pleas. First, it challenged the applicability of the CISG in its entirety, and second, partially in the context of force majeure by way of implicit exclusion, as will follow.

182. **182**
CISG Article 6 states:

> «*The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*»

183. **183**
Party autonomy is certainly one of the fundamental principles of the CISG. Accordingly, the Parties have the power to exclude the application of the CISG altogether by indicating such intention expressly, e.g. «the Egyptian Commercial Code» shall govern this agreement. In such case, the provision should be interpreted to allow for the respective domestic sales law to entirely replace the CISG.

184. **184**
However, this is not the case here; the Parties only referred to Egyptian law as the «Applicable Law». Therefore, CISG inarguably directly applies as an integral part of Egyptian law. A generic positive choice of law referring to domestic law without any further specification – in the event that both parties are located in different contracting states – is understood by the majority of courts and tribunals worldwide to include the CISG.[31] Therefore, Respondent erred in its interpretation of CISG Article 6. Based on the above, the Tribunal is of the view that CISG applies to the Agreement, absent proof of express or implied intention to exclude the application of the CISG. As to partial exclusion, a discussion thereon will follow in the section of the award on exempting performance impediments under the CISG.

185. **185**
In the events where the text is silent, courts and arbitral tribunals seek guidance in Article 7(1) on the interpretation of the convention, which states, as follows:

> «*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade*».
>
> *(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or,* [only] *in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*

186. **186**
Pascal Hacashem opines on the purpose of CISG Article 7, as follows:

> «*Article 7(1) focuses on* ***three principles*** *of interpretation:* ***regard is to be had to the origin of the rules (their 'international character'),*** *the* ***aim of promoting uniformity***

[31] Cases available at Pace Law Albert H. Kritzer CISG Database. Germany, December 12, 2022 Oberlandesgericht [Court of Appeal] Case No. 7 U 4810/21; France, October 26, 2022 Cour De Cassation (Supreme Court] (Ipso Facto S.A.S. v. Win System Int'l Ltd.) Case No. 20-22.528; France, October 13, 2022 Cour d'appel [Court of Appeals] (SA Engie Energie Services v. SPRL Foronex) No.: 20/04405.

and, finally, ***the promotion of good faith' in international trade.*** *The phrasing regard is to be had is more than a mere recommendation to use the interpretative principles established by Article 7(1).* ***It is a most explicit command directed at courts and arbitral tribunals applying the Convention.***

The reference to the international character of the CISG means that courts and arbitral tribunals when interpreting the CISG ***need to keep in mind that they are dealing with an international contract, parties coming from different legal backgrounds*** *and the Convention having been drafted to facilitate international sales.* ***On that basis Article 7 mandates an autonomous interpretation of the Convention, i.e. the meaning of the Convention's provisions must be determined independently from any domestic preconception. Article 7(1) certainly excludes any recourse to the meaning of legal terms in the domestic laws of these six languages.***[32] (Emphasis added)

187. **187**

On the need to promote uniformity of application, Hachem continues:

«The primary addressees of the requirement to promote uniform application are courts and arbitral tribunals. ***The principle itself necessarily follows from the unificatory aim of the Convention.*** *Since there is no international supreme court competent to decide as a last instance on divergent interpretations, that aim can be achieved only if courts and arbitral tribunals applying the CISG* ***have regard to the decisions of courts and awards of arbitral tribunals in other States*** *and thereby develop a common interpretation of the CISG, just as they do at a national level.*[33] (Emphasis added)

188. **188**

With regard to the gap-filling role of the CISG Article 7(2), Hachem also explains:

«The basic concept underlying the gap-filling rule is simple and provides for a two-step procedure. The first step is to fill the gap by means of uniform rules. This step requires fist 'questions concerning 'matters governed by this Convention'. These gaps are usually referred to as 'internal gaps'. Secondly, 'general principles on which [the Convention] *is based' have to be discerned to fill the gaps.* ***Only if this*** **[two step procedure]** ***procedure fails is recourse to be had to domestic rules determined by the conflict rules of the forum».***[34] (Emphasis added)

189. **189**

In line with the above literature, the Egyptian Court of Cassation recognized the international character of the CISG as quintessential uniform law. It confirmed the need to consider the application of the CISG in other contracting states. Egyptian courts should seek guidance in the international application of CISG to discern the rules of law applicable to disputes viewed before them. In its landmark 2020 judgment on CISG, the court explicitly referred to

[32] Pascal Hachem in Schlechtriem/Schwenzer: *Commentary on the UN Convention on the International Sale of Goods (CISG),* 5th Edition, Art. 7, para 7 and 8.
[33] Id. at 10.
[34] Id. at 27.

international judicial practice to determine what is considered a «reasonable period to notify the seller of the nonconformity of the goods»:

> «*The comparative court jurisprudence in its application of this convention* [United Nations Convention on the International Sale of Goods], *has established that ...* ».[35]

190. **190**
Therefore, absent Egyptian CISG-related court jurisprudence, as is the case here, court decisions in other CISG contracting states must be of binding guidance to the Tribunal in distinguishing the rules applicable to the current dispute.

D. Did Respondent Breach the Agreement?

i. What was the agreed quantity of Goods in the Agreement?

a) Respondent's position

191. **191**
In its SoD, Respondent contends that Article 6 of the Agreement expressly stipulates that the agreed quantity of DAP is «*5000 MT+/-10%*», i.e., 4500, **or** 5000 **or** 5500 MT of DAP. Therefore, and since Respondent has already shipped 3,300 MT of DAP to Claimant, the remaining volume of DAP under the Agreement is only 1200 MT (i.e., 4500 - 3300 = 1200).

192. **192**
In its SoRJ, Respondent disagrees with Claimant's view on the meaning of «vessel's option». The term «vessel's option» is used to indicate the capacity of the cargo, the space available on board of the vessel. It is also called a «*more or less*» *clause* that is usually incorporated in contracts to permit certain deviations in quantity and give the seller some latitude as to the amount it can deliver.

193. **193**
Respondent argues that using «vessel's option» in a FOB contract identifies the possible latitude, and extent of the cargo to be shipped, while giving the parties «a more or less» threshold to be determined later during the performance of the contract. Respondent refers to the statements by Claimant and the Broker to support this.[36]

194. **194**
Respondent maintains that the remaining quantity of DAP under the Agreement includes -10%, not only +10%, i.e. only 1200 MT, due to the following: (a) Respondent is entitled to accept the vessel's nomination, it has a say in the 10% increase or decrease, (b) Article 6 of the Agreement expressly stipulates that the agreed quantity of DAP is «5000 MT +/-10%», (c) the DAP supply was unprecedently unattainable, and (d) Claimant's

[35] Court of Cassation, Challenge No. 2490 of JY 81.
[36] SoRJ, paras 207–210.

failure to establish the readiness of a ship at the loading port to load the alleged 2,200 MT of the DAP.

195. **195**
Respondent argues that unlike the Agreement, all but one of the contracts provided by Claimant expressly made the delivered quantities of the products subject to «buyer's option». This is not the case in the present Agreement, where the volume of the DAP is subject to «vessel's option», which denotes to a different intention of the Parties. Also, Claimant and Respondent had another DAP contract in 2016 where Claimant only received 3,000 MT of DAP without any surplus. Respondent argues that any reference to previous contracts should only be limited to those involving the purchase of DAP.

b) Claimant

196. **196**
In the SoC, Claimant contends that under Egyptian Law and CISG, Respondent is required to fulfil its obligations towards Claimant in the manner which the Parties agreed on. This is included in Article 35(1) of the CISG, which states:

> *«The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.»*

197. **197**
The same principal exists under Egyptian Law, where Respondent has the obligation to abide by the terms of the Agreement. ECC Article 147(1) provides that:

> *«The contract is the law of its parties, it may not be rescinded or amended except with the agreement of its parties, or for reasons determined by law.»*

198. **198**
In its SoR, Claimant states that Respondent's statements contradict the Parties' behavior and Article 6 of the Agreement. Article 9 of the Agreement confirms that the delivery of the DAP shall be on FOB basis. Claimant is, therefore, responsible for nominating the vessel. Thus, «vessel's option» means «buyer's option». Accordingly, the «+/-10%» is an option exercisable solely by Claimant.

199. **199**
Claimant asserts that it exercised its right of the «vessel's option», and such was accepted by Respondent. While discussing and arranging for the amount of DAP to be shipped to Claimant, Respondent initially wanted to ship only 3,000 MT of DAP,[37] while Claimant insisted that the quantity shipped be increased by 10%, making the total quantity shipped 3,300 MT.

[37] Email dated 21 April 2021 – Exhibit C-18.

Respondent agreed to such increase, indicating that it is well known to both Parties that such 10% is actually Claimant's option.[38]

200. **200**
Claimant alleges that Respondent is not entitled to claim that the total agreed quantity of DAP is 4,500 MT instead of 5,500, which would lead to decreasing the damages. A party may not benefit from its own wrongdoing. The Court of Cassation in this regard held that:

> «*It is from the fundamental principles established in jurisprudence and the judiciary – as established in the precedents of the Court of Cassation – that it is not permissible for a person to benefit from their wrongdoing or negligence.*» (Translation provided by Claimant)

201. **201**
Therefore, since Respondent delivered 3,300 MT, the remaining quantity of undelivered DAP is 2200 MT (i.e., 5,500 - 3,300 = 2,200 MT).

c) The Tribunal's discussion and findings

202. **202**
The Parties are at odds with regard to the quantity agreed between them at the conclusion of the contract, i.e. does «*500 MT +/-10 'Vessel's Option'*» mean 4,500 MT or 550 MT, and who gets to decide?

203. **203**
The fact is «vessel's option» means «up to the capacity that the carrier/ship can load». This could be a buyer's or a seller's option. The party that selects the ship naturally decides on its capacity, and the amount that the ship will be carrying, as the ship's capacity is one of the criteria for a choice of vessel.

204. **204**
This is often coupled with expressly agreed terms of trade for the sale of goods (e.g. Incoterms). Whereas it is conventional for a CIF seller to choose the ship that will carry the goods to the buyer, the former bearing freight, cost and insurance, a buyer customarily elects the freight forwarder in FOB contracts, as the seller loads the goods free of any risk. In the current case, FOB entails that the buyer will pay the carrier, which strongly indicates, unless otherwise proven, that Claimant is the party entitled to decide on which ship to carry the goods.

205. **205**
In this regard, the exhibited communications between the Parties include Claimant's description of the vessel, and Respondent's acceptance, of the capacity of MV Reba M (the

[38] *Ibid*.

vessel/carrier) to be «*MIN 5,500 MT FCC* ***in Shippers' option*** *of two different harmless fertilizers*».[39] The description expressly states, «shipper's option», i.e. Claimant's option.

206. **206**
Moreover, Respondent replied on 21 April 2021 stating: «*Also, we confirm we will load 3300 MT DAP + 2200 MT GTSP* ***according to Master stowage plan received today***».[40] Respondent indicated that it received a storage plan of the carrier as decided by the shipper, i.e. Claimant. Also, the email dated 15 April 2021, Respondent expressly requested that Claimant identifies a vessel to load the DAP,[41] followed by Claimant extending the details of the said vessel on 20 April 2021.[42]

207. **207**
Respondent is of the view that by using «vessel's option», the Seller maintains the right to decide on the quantity. Respondent references *Kröll* in support of the purported former's reading of the term «vessel's option».[43] Having examined the relevant exhibit, it does not discuss the term «vessel's option», it discusses the impact of the terms «*more or less*» and «*not less than*», which corresponds to the «/+10%» stipulation; it could give the seller some latitude in determining the quantity of the goods. The Parties linking the delivered quantity to the vessel's capacity, as opposed to only stating «more or less», is decisive. By introducing «vessel's option» in addition to «more or less», the Party which chooses the vessel chooses its capacity, whereas «more or less» is a vague term, absent any previous practices or customs to complement the construction thereof.

208. **208**
However, the above communications between the Parties irrefutably indicate that the choice of vessel was up to Claimant with no objection by Respondent, and therefore, it also decides on the additional or reduced amounts of DAP within the agreed limits. Absent any further construction tools to the contrary (according to CISG Articles 8 and 9), this is essentially what «vessel's option» is.

209. **209**
Respondent also contends that «buyer's option» was almost always the term used in previous contracts between the Parties, but not in the current Agreement. As it appears from previous contracts provided by Claimant, the Parties consistently opted in almost all of them for amounts additional to the base amount (here, 5,000 MT); however, there is no uniformity between the additional quantities throughout the years, and at least one contract applied the base amount as is, as pointed out by Respondent in its email dated 7 September 2022.

[39] Exhibits C-8 and C-9.
[40] Exhibit C-10.
[41] Exhibit C-7.
[42] Exhibit C-8.
[43] RL-28.

210. **210**
The Tribunal is of the view that the above establishes a practice between the Parties in light of CISG Articles 8(3) and 9(1), which states:

> Article 8(3): «*In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*»
>
> Article 9: «*(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves*».

211. **211**
Martin Schmidt-Kessel explains the role of practices in interpreting the intention of the parties in a CISG-governed contract, as follows:

> «*Practices established between the parties are among those circumstances expressly mentioned in Article 8(3). Such practices also include* ***the meaning that the parties had previously given to similar clause.*** *Frequently at issue is the* ***extension of provisions from prior contracts to subsequent contracts.*** *This has been presumed, for instance, for prior, specially agreed upon notice periods, delivery clauses, or maturity, and occasionally even for standard terms as a whole.* ***A subsequent contract can also be understood as ex works if the prior contracts were carried out accordingly and the buyer did not object.***[44] (Emphasis added)

212. **212**
In a dispute with quite similar circumstances, the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce decided that at the time of the contract conclusion, the buyer was aware of the seller's intent to deliver the oil in a quantity less than 2,000,000 MT. The tribunal deemed the fixing of the goods quantity at the option of «+/-10%» as an established practice between the parties, evidencing the seller's intent to deliver the oil in a quantity less than 2,000,000 MT. The tribunal held that the seller was bound to deliver the oil not in the exact quantity of 2,000,000 MT, but up to 2,000,000 MT, i.e. less than the said amount.[45]

213. **213**
In the current case, the practice between the Parties was that Claimant chooses the carrier, and it decides on the quantity, which was never below the base, in the majority of contracts submitted by Claimant.

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[44] Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), 5th Edition (2022), Art. 8, para 50.
[45] Tribunal of Int'l Commercial Arbitration at the Russian Federation Chamber of Commerce, Case No. 373/1995, https://www.unilex.info/cisg/case/375.

214. 214
However, conclusive on the matter in the view of the Tribunal is the NCIC letter dated 20 April 2021, which referred to its agreement with Respondent dated 19 January 2021 (unfurnished by the Parties) regarding the supply of 5,000 MT +/-10%. The said letter expressly indicated a specific amount being the remainder of DAP requested of NCIC, namely 2,200 MT. It could have been silent on the remaining quantity or stated otherwise, e.g. 1700, 2000 or 2100 MT, but it stated the following:

> «*We inform you that the remaining quantity from your contract* [the contract dated 19 January 2021], ***which is 2,200 MT,*** *due to the continuous increase of costs ...* ».[46] (Emphasis added).

215. 215
Therefore, the Tribunal infers from the above that NCIC and Respondent, therefore also the Parties, expected at the decisive time of contract conclusion the supply of 5,500 MT. Based on the Parties' expectation, Respondent conveyed such expectation to NCIC.

216. 216
Based on the above, the Tribunal is of the opinion that the undelivered quantity is 2,200 MT.

ii. Was the delivery of Goods impossible for Respondent?

a) Respondent's position

217. 217
In its SoD, Respondent argues that performance of DAP delivery under the Agreement was challenging and subject to frequent unforeseen events that eventually rendered the delivery of the remaining quantity of the DAP impossible.[47]

218. 218
Respondent argues that the production costs of the DAP have increased in an unprecedented manner that led to a substantial increase in the sale price, reaching USD 550 per MT instead of USD 415 (i.e., an increase of USD 135 per MT). This price increase was a «hardship event» that entitles Respondent to seek the amendment of the Agreement, due to the caused imbalance in the economic equilibrium thereof. Respondent claims it had to absorb a price increase by USD 445,500 to deliver the 3,300 MT of the DAP to Claimant. The said hardship event is evident in the NCIC letter to Respondent dated 10 April 2021, where NCIC informed Respondent of the price increase.

219. 219
After the said shipment of 3,300 MT to Claimant, Respondent explained to Claimant the unforeseen circumstances it faced and the high costs it paid, and the fact that NCIC was unable

[46] R-05.
[47] SoD, paras 17, 26, 31 and SoRJ para 133.

to produce further DAP, due to the continued price increase in production costs and the shortage of raw materials.

220. **220**
In short, Respondent argues that through no fault of its own, it faced an unforeseeable event outside of its control, which it could not have avoided, and one that caused an impossibility in securing the remaining quantity of DAP. Therefore, Respondent must be relieved of any liability, due to the impossibility to perform the Agreement.

221. **221**
Respondent cites ECC Article 215, which states:

> «*When specific performance by the debtor is impossible, a judgment shall be rendered ordering him to pay damages for non-performance of his obligation, unless he proves that the impossibility of performance arose out of an* ***independent cause*** *in which he played no part. The same principle shall apply if the debtor is late in the performance of his obligation*» (Translation provided by Respondent).

222. **222**
Also, Respondent cites ECC Article 165, which explains what qualifies as «an independent cause». It stipulates:

> «*In the absence of a provision of law or an agreement to the contrary, a person is not liable for damages if he proves that the harm resulted from an independent cause in which he played no part, such* ***as unforeseen events, force majeure, the fault of the injured party or of a third party.***» (Translation provided by Respondent).

223. **223**
Respondent also cites the judgment of the Court of Cassation on «independent cause».[48]

224. **224**
Furthermore, Respondent contends that NCIC is the sole manufacturer of DAP in Egypt, and Claimant was aware that Respondent acquired the Goods from a third party supplier. The delivery of Goods was dependent on receiving it from NCIC. Therefore, Respondent is neither responsible for the non-delivery of the outstanding DAP, nor the claimed damages, due to the impossibility of performance that resulted from the above independent cause.

225. **225**
Respondent argues that the conditions of the 2003 ICC Force Majeure Clause **(«ICC FM Clause»)** are met in the present dispute for both, Respondent and NCIC, alike, as follows:

(a) The unprecedented increase in the production costs and shortage of raw materials, leading to the stoppage of the DAP production and its unavailability, was an event that is beyond the reasonable control of both;

[48] Court of Cassation, Challenge No. 677 of JY 69, dated 10 April 2012 – RL-4.

(b) Neither Respondent nor NCIC could have reasonably predicted such event at the time of concluding the Agreement; and

(c) They could not have reasonably avoided the said event. The Goods could not have been obtained from any other company in Egypt. When the production material became unavailable in the Egyptian market, NCIC had no option but to stop the DAP production until it can obtain it again.

226. **226**
In reliance on paragraphs 4 and 5 of the ICC FM Clause, Respondent deems itself relieved of liability, as well as the duty to perform its obligations, under the Agreement. This is arguably the case as of the date that the impediment caused the failure to perform, if the notice thereof is given without delay; or if notice thereof is not given without delay, from the time at which the notice reaches the other party.

227. **227**
Respondent argues that the factual evidence submitted by Claimant proves that it was fully aware of Respondent's dependency on NCIC. There was an acknowledgement of the fact that the NCIC is the sole source of the DAP in Egypt.

228. **228**
Based on the above, Respondent deems its relationship with NCIC relevant and known to Claimant, even though the latter's awareness of the said relationship is not a requirement for the force majeure to take effect. Hence, Claimant's factual argument must fail.

229. **229**
Respondent also argues that the ICC FM Clause is the only applicable rule on the aforementioned unforeseeable event, and no other legal rules on impossibility of performance are relevant, whether under the applicable Egyptian law or the CISG (including any scholarly or commentary work).

230. **230**
Moreover, the ICC FM Clause does not require any *«impossibility in performance»* to invoke it. The threshold for invoking it is *«considerably lower»* than that of the *«impossibility of performance»*. It is expressly stated in the Notes of 2003 ICC Force Majeure Clause, para. (a) providing:

> *«The threshold adopted for the invocation of the Clause is considerably lower than impossibility of performance: hence the use of the phrase 'beyond its reasonable control' in paragraph 1(a) and 'could not reasonably have avoided' in paragraph 1(c)».*[49]

231. **231**
Respondent argues that accordingly, it is not required to offer proof that performance by neither Respondent nor NCIC became absolutely impossible, but rather that they were both

[49] RL-24.

met with an impediment beyond their reasonable control, one they could not have reasonably taken into account at the conclusion of both contracts, and one that could not have been reasonably avoided. Also, the existence of a link between the third party supplier (i.e., NCIC) and the creditor of the obligation (i.e., Claimant) is not required.

232. **232**
Respondent disagrees with Claimant and maintains that Egyptian law, the CISG and the ICC FM Clause, do not apply the same threshold. Respondent argues that the difference between the ICC FM Clause and the CISG is well established in international scholarship, as 1) the word «reasonable» is lacking in Article 79(1) CISG; additionally, 2) the ICC FM Clause speaks of overcoming the effects of the impediment whereas CISG Article 79 covers the overcoming of the impediment itself.

233. **233**
In reply to Claimant's claim that it is irrelevant whether NCIC is the sole source of DAP in Egypt or not, as Respondent could have procured it elsewhere, Respondent argues that Article 4 of the Agreement clearly describes the Goods to have Egypt as *«Origin of Products».* Therefore, Respondent was strictly obliged to only source the DAP from Egypt and nowhere else.

234. **234**
In this regard, Respondent cites the CISG Advisory Council, which concluded that

> *«Of course the seller's liability is not unconditional, for in exceptional cases he may be able to establish that he had no control over the choice of such third person, either because the third person enjoys a monopoly in the supply of goods or services, or if the third person was chosen by the buyer, or if the seller may otherwise establish that default by the third person was actually beyond his control». It also established that «The Seller may be exempted from liability in some extreme and exceptional cases,* ***such as when the supplier is the only available source of supply ...».***

235. **235**
Moreover, Respondent disagrees with Claimant's plea that it failed to notify it of the impediment within a reasonable time. Claimant asserts that Respondent took around 40 days to inform it of the impediment, which is not in compliance with CISG Article 79(4). However, Respondent argues that *«about 10 days»* after securing the shipment of the first batch of DAP (i.e., on 9 May 2021) is considered «notice within a reasonable time» or one «without delay». Therefore, Claimant's allegations in that regard are baseless and must fail.

236. **236**
Respondent insists that Claimant's allegation that Respondent could have mitigated the damage, but it never did, is incorrect, due to the chain of events and Respondent's tied hands regarding the supply source in Egypt. The claim is baseless.

237. **237**
Respondent finds it surprising that Claimant expected that Respondent would have engaged in «discussions» with Claimant instead of terminating the Agreement, despite the fact that Claimant considered Respondent's notification of the performance-impeding event a

rescission of the Agreement. Claimant failed to prove any damage it may have sustained to date.

238. **238**
Furthermore, Respondent rejects Claimant's contention that it submitted no evidence to support its inability to deliver the Goods under the Agreement, and that it relied on evidence ofits own creation, which is Respondent's email dated 20 May 2021. Respondent deems the documents submitted so far sufficient.

239. **239**
Also, Claimant failed to provide evidence for the damage it allegedly suffered; therefore, it may not seek any damages under the Applicable Law. Claimant shifted between two different bases for its compensation claim without fulfilling the requirements of either. Claimant relied on Article 96 of the Commercial Code and CISG Article 75, which regulate the event where the creditor performed the debtor's obligation at the latter's expense.

b) Claimant's position

240. **240**
Claimant cites *as-Sanhoory* with regard to the debtor's burden to prove the claim of impossibility of performing its obligation. Respondent may not rely on its own evidence. Its claim is, therefore, baseless.

241. **241**
Additionally, Claimant argues that Respondent's relationship with NCIC is entirely irrelevant, as Claimant is not a party to the contractual relationship between Respondent and NCIC and it was never agreed between the Parties, nor did Claimant accept that the Agreement is a «back-to-back» arrangement. Claimant was unaware of its existence, extent or terms. Therefore, Respondent cannot legally invoke any arguments arising from such agreement against Claimant.

242. **242**
Claimant argues that even if NCIC were the sole manufacturer of DAP in Egypt, it should have been aware of NCIC's status at the time of entering into the Agreement. It should have been aware of the risk that NCIC might default. This is claimed to be supported by several cases cited in the UNCITRAL Digest of Case Law on the CISG article 79, as follows:

> «*Several decisions have suggested that a correct application of article 79 must focus on assessing the risks that a party claiming exemption assumed when it concluded the contract. The decisions suggest, in other words, that the essential issue is to determine whether the party claiming an exemption assumed the risk of the event that caused the party to fail to perform.*»[50]

[50] SoR, para 47.

243. **243**
Nevertheless, Respondent entered into the Agreement with Claimant without including NCIC's performance as a prerequisite for the fulfillment of its obligations, nor did it highlight the fact that NCIC is the sole supplier of DAP in Egypt.

244. **244**
Furthermore, Claimant argues that good faith dictated that Respondent discusses these new circumstances with Claimant in an attempt to reach an equitable solution instead of abruptly terminating the Agreement.

245. **245**
Claimant invokes paragraph 2 of the ICC FM Clause, where a party to invoke its exemption due to the default of a third party (here, NCIC), it must first prove that the same requirements of paragraph 1 of the ICC FM Clause are met with regard to that third party. Respondent failed to meet the above requirements. Therefore, its alleged reliance on NCIC's default is of no relevance, and therefore, its claim must fail.

246. **246**
Also, Claimant contends that Respondent does not meet the criteria for exemption under Egyptian Law, CISG or the ICC FM Clause. Claimant cites two different cases mentioned by the UNCITRAL Digest of Case Law on the CISG, regarding the breach of a seller's third party supplier and the increase of cost of performing, both did not qualify as excusing impediments. Foreseeability was one reason cited by a arbitral tribunal for denying an impediment exemption to a seller that had failed to deliver the goods because of an emergency production stoppage at the plant of a third party supplier. That said, a manufacturer facing issues with its production is not an unforeseeable event exempting the seller.[51]

247. **247**
Also, Respondent did not inform Claimant of the alleged impediment hindering the delivery of the rest of the Goods up until Claimant inquired about the missing delivery.[52] According to Claimant, this demonstrates Respondent's ill intentions or gross negligence. Respondent should have notified Claimant of such alleged event promptly, which it did not.

248. **248**
Invoking para 7 of the ICC FM Clause, Respondent should have taken steps in order to mitigate Claimant's damages in a number of ways, including, but not limited to, (1) informing Claimant of the alleged impediment «immediately» after it became aware of NCIC's default, (2) resorting to other DAP suppliers to fulfill its obligations vis-a-vis Claimant and (3) engaging in discussions with Claimant to find alternatives that would mitigate, fully or partially, the damage incurred by Claimant.

[51] SoR, para 66.
[52] C-13.

249. **249**
Also, Claimant submitted two reports on the DAP international market, which evidence that the upwards fluctuation of the prices was quite expected, especially in the very recent period of time preceding the conclusion of the Agreement. Despite such increase, Respondent still entered into the Agreement with Claimant and accepted the obligations based on the price stated therein. Therefore, Respondent may not claim that it absorbed a loss of USD 445,000 and use such loss as excuse for relieving itself of its contractual obligations.

c) The Tribunal's discussion and findings

• ***Hardship***

250. **250**
Before delving into the ICC FM Clause, the change of circumstances is considered by Respondent to be sufficiently onerous to qualify as «hardship», which purportedly warrants revisiting the Agreement to retain the economic balance of the Agreement, by way of applying ECC Article 147(2). According to Respondent, any increase in the DAP price would have been subject to the hardship theory.[53]

251. **251**
The Tribunal finds it paradoxical to present an argument of hardship under the classic view of the ECC while pleading the existence of an exempting event under the ICC FM Clause. The grounds for invoking hardship are entirely different than those for force majeure. CISG Article 79 encompasses both exempting impediments to performance, impossibility and hardship; however, the latter under نظرية الظروف الطارئة in ECC 147(2) does not render the performance of contractual obligations impossible, merely overly onerous. Both doctrines are not reconcilable. A party must choose either.

252. **252**
The Parties have agreed to apply the ICC FM Clause but did not do the same for the ICC Hardship Clause, so it entirely falls under the CISG Article 79(1). Under the CISG, there is no duty to renegotiate the contract in case of hardship (economic impossibility), nor is there a specific threshold of imbalance for a judge or arbitrator to apply the doctrine, and accordingly re-introduce the economic balance in the contract. Moreover, the standard of exempting hardship is significantly higher than the ECC Article 147(2), *«where the ultimate 'limit of sacrifice' has been exceeded».*[54]

[53] SoRJ, para 165.
[54] CISG Advisory Council Opinion No. 7 Exemption of Liability for Damages Under Article 79 of the CISG: *«It is certainly not possible or even convenient to attempt a definition of hardship, beyond accepting that the impediment may entail a situation of 'economic impossibility' which, while short of an absolute bar to perform, imposes what in some legal systems is conceptualized as a 'limit of sacrifice' beyond which the obligor cannot be reasonably expected to perform.»*

253. This is more evident in the manner by which CISG handles price fluctuations: **253**

> *«As a rule of thumb, price fluctuations amounting to over 100 percent do not yet constitute a ground for exemption.»*[55]
>
> *«Several court decisions have rejected the possibility that negative market developments constitute an impediment within Article 79(1). Indeed, as of the time of the drafting of this opinion, no court has exempted a party from liability on the grounds of economic hardship.»*[56]

254. **254**
Procurement risk is borne by the seller, as supported by the overwhelming scholarship and court judgments.[57] The seller can pass the risk to the buyer by incorporating clauses to that effect in the contract, e.g. *«performance is subject to the availability of the goods»*.[58]

• 2003 ICC Force Majeure Clause

255. **255**
Article 12 of the Agreement states, as follows:

> *«**To the extent applicable under governing law** as set out hereunder, the force majeure (exemption) clause 2003 of the International Chamber of Commerce (ICC Publication no. 650) is hereby incorporated in this contract».* (Emphasis added)

Therefore, the force majeure conditions applicable to the present dispute are those of the ICC FM Clause. The Parties have chosen the ICC FM Clause as their substantive rule to govern the impediments to the performance of the Agreement. However, they did not fully derogate from the CISG or substantially vary the effect of Article 79(1), if any, as will follow.

256. **256**
In this respect, the ICC FM Clause provides:

> Para 1: *«Unless otherwise agreed in the contract between the parties expressly or impliedly, where a **party to a contract fails to perform one or more of its contractual duties,** the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves: [a] that its failure to perform was caused by an **impediment beyond its reasonable control;** and [b] that it could not reasonably have been expected to have taken the occurrence of the impediment **into account** at the*

[55] CISG-online 694; CISG-online 870, cited by Ingeborg Schwenzer in Schlechtriem/Schwenzer, Article 79, para 31.
[56] CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, item 31.
[57] For a full list on supporting scholarship and court decisions, see Schwenzer in Schlechtriem/Schwenzer, Article 79, para 27, Fn. 88.
[58] Schwenzer in Schlechtriem/Schwenzer, Article 79, para 27.

*time of the conclusion of the contract; and [c] that it could not reasonably have **avoided or overcome the effects** of the impediment.*

Para 2: *«Where a contracting party fails to perform one or more of its contractual duties because of **default by a third party** whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party: [a] if and to the extent that the contracting party establishes the **requirements set out in paragraph 1** of this Clause; and [b] if and to the extent that the contracting party proves that the **same requirements apply to the third party**».*

257. **257**
To consider any event sufficiently impeding to excuse Respondent from delivering the agreed quantity of the Goods, Respondent has to prove the following: a) that its failure to perform is caused by an impediment beyond its reasonable control; b) it could not have been reasonably expected to take the occurrence of the impediment into account at the time of contract conclusion; and c) it could not have reasonably avoided or overcome the effects of the impediment. The Tribunal does not consider the increase of price of production or the halt of production by NCIC sufficient grounds that qualify as exempting impediments.

258. **258**
It would have been prudent of Respondent to add the impeding events that are beyond its reasonable control to the standard ICC FM Clause that it introduced in its standard contract, similar to Article 11 of the Agreement on shipment and loading, which has been drafted in a fairly detailed manner. The latter article discussed contingencies and liabilities of the Parties in length. However, it does not mention NCIC in any capacity.

259. **259**
There is no provision in the Agreement suggesting that NCIC is the only source for the Goods. The Tribunal believes, the fact that there is only one exclusive supplier of DAP in Egypt makes it inherently a considerable and foreseeable risk that the Goods may not be available at the agreed time of delivery. NCIC's exclusivity in Egypt makes the need for protective contractual terms against nonavailability imminent. It is not only prudent for a seller to contemplate alternative sources to an exclusive third-party supplier, but it is reasonably expected of the seller to include remedies addressing the event of failure by its supplier in its own standard contract. Respondent could have also avoided rendering the pleaded impediment of no effect, had it conditioned its obligation to deliver the Goods on the availability of the DAP in Egypt at the agreed date of delivery.

260. **260**
Equally, a costs increase in the manufacturing of the goods delivered by an exclusive seller is an obvious risk, as opposed to goods delivered by one of multiple competing third-party suppliers, who can replace each other in the event of any one's failure. Respondent could have introduced a price-hedging mechanism against the unavailability of the Goods, locally, by resorting to the global market prices. Any price difference, if the DAP were to be obtained outside Egypt due to price hikes, could have been properly addressed in the Agreement. The

grounds of monopoly cited by the CISG Advisory Counsel, as suggested by Respondent, encompasses events of a far more impeding nature than reaching out to another supplier in the same continent.

261. **261**
The Tribunal believes that all of the aforementioned risks are reasonably foreseeable and avoidable by a prudent business. The DAP could have been obtained elsewhere, as evident in the replacement goods acquired within weeks by Claimant from Morocco.

• ***Claimant's knowledge of NCIC's exclusivity***

262. **262**
Certainly, no contractual relationship is required between Claimant and NCIC to consider the delivery of Goods to Claimant conditional on the supply of the DAP by NCIC. However, to hold Respondent exempt from its contractual duty to deliver the Goods, 1) Claimant had to know, or at least ought to have been aware, at the time of the contract conclusion, of the exclusivity of NCIC's role; and more importantly, 2) it must have been reasonably foreseeable for Claimant that Respondent will not be able to obtain the Goods elsewhere in case NCIC fails to supply the DAP on time. Otherwise, Claimant would be held responsible for a contractual risk it did not, nor was it expected to, contemplate at the contract conclusion.

263. **263**
There is no conclusive evidence submitted by either Party to indicate that Claimant knew or ought to have known that NCIC is the only supplier of DAP in Egypt, and that Respondent will consider itself relieved of its contractual duties, if NCIC does not supply the DAP, nor is there any stipulation or communication to that effect. Claimant should not be expected to presume that a reputable business, with which it dealt for 7 years, has no other source for the Goods but one supplier it briefly indicated as the source in the Parties' correspondence.

• ***Origin of Products***

264. **264**
As to Respondent's plea that the Goods had to come from Egypt, because the Agreement states *«Origin of Products: Egypt»,* the Tribunal is guided by CISG Article 35(1), which adopts a subjective defect test in light of CISG Article 8. Accordingly, to construct the Parties' intention while drafting the said term, the first resort is to be made to the specific agreement of the Parties. An implicit intention may be inferred. However, the Tribunal is not convinced that Claimant was keen on receiving DAP from Egypt, particularly. There is nothing in the case record and the Parties' submissions that indicates Claimant's particular wish for Respondent to only source the DAP from Egypt.

265. **265**
In this regard, the Parties were keen on including a description of the Goods. Article 3 of the Agreement points to the attached table of specifications,[59] which included a clear set of

[59] Exhibit C-1.

conditions that the Goods had to conform with, and which could have been equally fulfilled by goods of another origin, as evident from the substitute goods acquired from Morocco. Respondent submitted nothing to support any unique features of Egyptian DAP that justify concluding that Claimant would have rejected DAP of another origin. Respondent did not even inquire if an alternative DAP is acceptable by Claimant, nor did it offer a commercially viable replacement thereof.

266. **266**
In short, Claimant merely looked for the most economically viable deal, which happened to be in Egypt at the time. If it could have found a cheaper transaction elsewhere, Claimant would not have chosen Egypt as the place of the Goods' origin. This is expressly confirmed by Respondent in its Post Hearing Brief: «*Claimant knew that DAP from any other source than Egypt would have meant a more expensive cost. This is the reason why Claimant was acquiring DAP from Egyptian origins*»[60] (Emphasis added)

267. **267**
It is, therefore, the conclusion of the Sole Arbitrator that whereas the Parties reasonably expected that the Goods would originate from Egypt, there was no obligation to procure the Goods only from Egypt, as suggested by Respondent. Even if it were the case that Claimant insisted on receiving DAP only from Egypt, absent any mention of NCIC in the Agreement, one can neither presume an obligation nor a reasonable expectation for Claimant to know that there will be no delivery of the Goods, if NCIC does not supply the Goods to Respondent. Absent a reasonable assumption of such risk by Claimant at the time of contract conclusion, Respondent must assume it.

• ***CISG Article 79 vs. ICC FM Clause***

268. **268**
As to the application of the ICC FM Clause and CISG Article 79 in the current dispute, Respondent cites *De Ly,* who notes that:

> «*The drafting of the* ***general standard was based on Article 79****(1) of the Convention on the International Sale of Goods (CISG) with two differences: (1) the Clause provides that an impediment is to be beyond the reasonable control of the debtor while the word 'reasonable' is lacking in Article 79(1) CISG; and (2) the Clause as to avoidance or overcoming the effects of the impediment – unlike CISG – does not cover avoidance or overcoming the impediment itself*».[61] (Emphasis added)

269. **269**
In light of the facts of this case, the Tribunal fails to see the significance behind the invoked difference between CISG 79(1) and the ICC FM Clause, i.e. the difference between the inability to avoid and overcome the impediment (CISG Article 79), as opposed to the inability to avoid and overcome *the effects* thereof (ICC FM Clause); in addition to the qualification of the

[60] Respondent's Post-Hearing Brief, para 134.
[61] Exhibit RL-20.

promisor's control with a standard of reasonableness in the ICC FM Clause. Whereas the impediment to be overcome by Respondent under CISG Article 79 is NCIC's failure to supply Respondent, the effects of the impediment to be overcome under the ICC FM Clause is the unavailability of the outstanding DAP in Egypt. In both cases, Respondent could have overcome the impediment (or its effects) by acquiring the DAP elsewhere. The Tribunal is also of the opinion that the impediment was not beyond the «reasonable» control of Respondent. The Sole Arbitrator also notes that CISG Article 79(4) speaks of a promisor's notice of both, *the impediment and its effect* as a prerequisite to invoking the performance-excusing event.

270. **270**
Whereas the Tribunal can follow the argument of the ICC FM Clause to be distinct from the comparable provision on force majeure in the ECC, Respondent errs in portraying the ICC FM Clause entirely distinct from CISG Article 79(1). Commentators consistently explain, the 2003 ICC FM Clause is based on CISG Article 79 with substantial resemblance in conditions as the author cited by Respondent, *De Ly,* noted. This goes for the current 2020 ICC FM Clause of 2020, as well.[62]

271. In its SoRJ, Respondent correctly explained that: **271**

> «*This threshold is expressly stated in the 2003 ICC Force Majeure Clause, providing: «The* ***threshold adopted*** *for the invocation of the Clause is* ***considerably lower than impossibility of performance:*** *hence the use of the phrase '****beyond its reasonable control****' in paragraph 1[a] and '****could not reasonably have avoided****' in paragraph 1[c]»*[63] (Emphasis added)

272. **272**
However, CISG Article 79 is not considered a proponent of the classic view on exempting impossibility. Respondent overlooked the referenced consistency among the several uniform rules, e.g. UNIDROIT Principles and Principles of European Contract Law in the preceding paragraph in the said ICC Note:

> «*The general formula triggering the consequences of force majeure set out in paragraph 1 of the Clause amalgamates elements of the previous ICC Force Majeure Clause 1985,* ***CISG article 79,*** *the Principles of European Contract Law section 8:108 and the UNIDROIT Principles for International Commercial Contracts article 7.1.7.*»[64] (Emphasis added)

273. **273**
Moreover, the express language of the force majeure clause in the Agreement (Article 12) did not exclude the CISG, but rather placed it as the greater parameter for interpretation. The

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[62] Prof. Dr. H. Ercüment Erdem, *«Dealing with Force Majeure erents in international trade»:* The ICC Force Majeure and Hardship clauses 2020, ICC-UNIDROIT Conference, 14 October 2022: *«No difference between the 2003 Clause and the New Clause in establishing the conditions of force majeure: In line with Art. 79 of the CISG, Section 8:108 of the PECL and Art. 7.1.7 of the UNIDROIT Principles»*.
[63] SoRJ, para. 120.
[64] RL-24.

sentence is clear: «***To the extent applicable under governing law*** *as set out hereunder, the force majeure (exemption) clause 2003 of the International Chamber of Commerce (ICC Publication no. 650) is hereby incorporated in this contract»,* i.e. the mandatory rules of the applicable law are not to be overridden, as the ICC FM Clause applies under the umbrella of the CISG. However, in this context, operating under the CISG umbrella means to derogate from the contradicting provisions, while maintaining the commonalities. In light of the above discussion, the Tribunal deems the differences of no significance to the current set of facts of this dispute. The Tribunal is convinced that both clauses essentially adopt the same test.

274. **274**
Moreover, as the governing law, CISG Article 7 (on the international and autonomous nature of the CISG and the need for uniformity of its application), is of paramount authority and binding obligation. Given the unequivocal homogeneity of both provisions, the Tribunal deems the relevance of the majority of CISG court judgments and awards to the current dispute proper; the prevailing majority of which allocate the risk of failure by seller's supplier to the seller, and not the buyer, absent any contract provisions to the contrary.

275. **275**
As correctly stated by Claimant, Respondent is not entitled to invoke NCIC's failure to supply the DAP as grounds for exemption from liability. CISG Advisory Council Opinion No. 7 notes the predominant view of the judiciary and arbitral tribunals:

> «*In several cases, a seller has invoked ils supplier's default as an impediment that, they argued, should exempt the seller from liability for its own resulting failure to deliver the goods or to deliver conforming goods. Several decisions have suggested that the seller normally bears the risk that its supplier will breach, and that the seller will not generally receive an exemption when its failure to perform was caused by its supplier's default. In a detailed discussion of the issue, a court explicitly stated that under CISG the seller bears the 'acquisition risk' – the risk that its supplier will not timely deliver the goods or will deliver non-conforming goods – unless the parties agreed to a different allocation of risk in their contract, and that a seller therefore cannot normally invoke its supplier's default as a basis for an exemption under article 79.*»[65]
>
> «*There is a consistent line of decisions suggesting that the seller normally bears the risk that third-party suppliers or subcontractors may breach their own contract with the seller, so that at least in principle, the seller will not be excused when the failure to perform was caused by its supplier's default.*»[66]

276. **276**
The Sole Arbitrator also notes the following excerpts from the said CISG Advisory Council Opinion:

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[65] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, p. 376.
[66] CISG Advisory Council, Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG,* dated 12 October 2007, Item 18.

«Article 79(1) remains the controlling provision even if a contracting party has engaged a third person to perform the contract in whole or in part. (a) In general, the seller is not exempted under Article 79(1) when those within its sphere of risk fail to perform; for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semi-manufactured goods. The same principle applies to the buyer in relation to the buyer's own staff or personnel and those engaged to perform the obligations of the buyer under the contract.»[67]

277. **277**
In all events, Schwenzer is of the view that *«even an impediment that the promisor could not have taken into account when concluding the contract does not exempt it if overcoming the impediment or its consequence* [i.e. effect – as in ICC FM Clause] *is both possible and reasonable for it».*[68]

• ***Reasonable notice***

278. **278**
CISG Article 79(4) sets a prerequisite promiser's obligation to invoking an impeding event, namely a notice within a reasonable period of time after its knowledge of such event. Claimant asserts that Respondent did not inform Claimant on time, although it knew on 10 April 2021 of the impediment. However, this is not entirely correct, Claimant should consider the letter by NCIC dated 20 April 2021 as the decisive communication. The letter dated 10 April was merely informative of a price increase, whereas the other letter 10 days later indicated the inability to supply Respondent.

279. **279**
However, Respondent was already late on delivery for 20 days (delivery should have taken place by the end of March); Respondent had no [submitted] excuse to justify a delay by an additional month to inform Claimant, especially that Respondent did not reach out for other suppliers or attempt to renegotiate the price with Claimant.

280. **280**
Also, Respondent implicitly bases its arguments on the assumption that it had the privilege of delivering the Goods in installments, which was not the case. The delivery was agreed to take place by the end of March, all of the 5,000 MT +/-10% of the Goods. This did not happen. At the time of delivery of the non-conform quantity of 3,300 MT, there was no proof provided by Respondent on the existence of an impediment for the delivery of the rest of the Goods. Claimant in good faith implicitly extended the date of delivery. Only when Respondent explicitly declared that it will not be able to deliver the rest of the Goods, Claimant terminated the Agreement and sought replacement goods.

281. **281**
Due to the reasons it stated, Respondent regarded its partial fulfillment of delivering 3,300 MT

[67] Id., at Opinion.
[68] Ingeborg Schwenzer, Schlechtriem/Schwenzer, Article 79, para 15.

as sufficient, and it declared its inability to fulfill the delivery of the rest of the agreed amount. The Tribunal is convinced that it was not prudent of Respondent to wait until Claimant inquired.[69]

282. **282**
Moreover, Respondent did not meet the requirement of reasonable notice in para 4 of the ICC FM Clause. Consequently, Respondent did not satisfy the requirement of mitigation of damages under paragraph 7 of the ICC FM Clause either, which states:

> «*A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties*».

283. **283**
Based on the above, the Sole Arbitrator deems the force majeure plea submitted by Respondent unfounded.

E. Is Claimant Entitled to Damages?

a) Claimant's position

284. **284**
In its SoC, Claimant invokes CISG Article 75 to recover the difference between the price of DAP in the Agreement and the price of the substitute DAP that Claimant purchased from the New Seller.

285. **285**
CISG Article 75 provides that:

> «*If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has* ***bought goods in replacement*** *or the seller has resold the goods,* ***the party claiming damages may recover the difference between the contract price and the price in the substitute transaction*** *as well as any further damages recoverable under article 74.*» (Emphasis added)

286. **286**
Claimant contends that similar rules for the quantification of damages are afforded under Egyptian Law. Article 96 of the Commercial Code provides, as follows:

> «*If the seller fails to deliver the sold product at the time determined in the contract, the buyer may notify [him] to implement the contract, within a suitable period to be determined thereby. If, within that period, the seller failed to deliver the sold product, the buyer may obtain a similar product at the expense of the seller, and claim the*

[69] C-13.

difference between the price agreed upon and that which he paid in good faith in order to [alternatively] purchase that product» (Translation provided by Claimant)

287. **287**
Moreover, ECC Article 221(1) states, as follows:

«If the compensation value was not stipulated in the contract or by virtue of law, the [court] shall decide thereupon, and such compensation shall include the losses suffered by the creditor and the profits [it] lost. This is conditional on [these losses and lost profits] a normal consequence of the not fulfilling the contractual obligation [...]» (Translation provided by Claimant)

288. **288**
Furthermore, Claimant cites the Court of Cassation on the aggrieved party's entitlement to a compensation for the direct harm, loss of profits and moral damage.[70]

289. **289**
Claimant is of the view that it has fulfilled its contractual obligations in a *bona fide* manner, and it has allowed Respondent ample time to do the same. Claimant contends that it has suffered damage, including the delay of DAP delivery beyond the shipping schedule, as well as the reputational damage vis-a-vis its clients and customers. Claimant requested damages only under Articles 75 and 78.

290. **290**
In its claim for interest for excess payment for the substitute goods, Claimant invokes the applicability of Article 226 of the ECC and Article 64 of the Commercial Code. Claimant believes that both provisions apply to the case at hand, as it is entitled to the difference in price between the agreed but undelivered Goods and the replacement thereof, starting the date of its maturity. Therefore, a legal interest of 5% on such amount, calculated from the date of purchase from the New Seller, 12 July 2021.

291. **291**
Claimant refers to Respondent's conclusion that Claimant rescinded the Agreement to be incorrect. Claimant is convinced that Respondent was the one who sent an email to Claimant on 20 May 2021 stating: *«[Respondent] therefore cannot ship anymore product under this contract».* Thereby, Respondent made it clear that it is not willing to fulfill its obligation under the Agreement. This, in Claimant's view, is a unilateral termination.

292. **292**
According to Claimant, Respondent decided, without legal basis, to interpret Claimant's case as a claim for specific performance, whereas it is a case of compensation for the damage caused by Respondent's unilateral termination of the Agreement. Such compensation is quantified at an equal sum to what Claimant had to pay in excess of the original price, to purchase the replacement goods from another supplier. It does not include any specific

[70] Court of Cassation, Challenge No. 8780 of JY 82, hearing dated 8 May 2018.

performance. Specific performance in this case would have been Respondent delivering the 2,200 MT of DAP for the agreed price of USD 452 PMT, as per the Agreement. Claimant's email dated 27 May 2021 is a documentation of Respondent's wrongdoing and a reservation of Claimant's right to claim compensation for the aforementioned damage suffered. Claimant was keen on fulfilling the Agreement until Respondent confirmed its decision to terminate the Agreement. On the day preceding Respondent's termination, Claimant inquired about when the remaining quantity of DAP would be delivered.

b) Respondent's position

293. **293**
In its SoD, Respondent contends that Claimant's claim of damages covering the «*difference in prices between the price it had agreed with Respondent and the price for which it was forced to buy the replacement shipment for the remaining 2200 MT of DAP*» violates Egyptian law and contradicts Claimant's conduct. According to Respondent, Claimant's compensation claim is characterized under Egyptian law as «*specific performance at the debtor's expense*», which is prohibited after the rescission of the respective agreement. Both reliefs cannot be sought collectively.

294. **294**
Respondent cites ECC Article 157(1):

> «*In bilateral contracts, if one of the parties does not perform his obligation, the other party may, after notifying the debtor, demand the performance of the contract or its rescission, with damages, in either case, if justified.*» (Translation provided by Respondent)

295. **295**
Respondent is of the view that Claimant has rescinded the Agreement via its communication of 27 May 2021. Therefore, Claimant's claim for alleged damages is baseless under Egyptian law, being the applicable law to the merits of the present proceedings and it should be entirely dismissed. Therefore, Claimant may not seek specific performance. In this respect, the Supreme Administrative Court held that:

> «*[I]t is established in the jurisprudence of this court that it is prohibited to combine between the sanctions of contract rescission and the enforcement at the [debtor] expenses [...]*» (Translation provided by Respondent)

296. **296**
Respondent asserts that Claimant invoked Article 96 of the Commercial Code, which jurisprudence considers a call for specific performance, whereby if a seller fails to deliver the sold goods on time, the purchaser may serve a notice claiming specific performance within a «suitable period». If the seller fails to deliver the goods within the said period, the purchaser can acquire a similar product at the buyer's expense. However, the buyer can only claim the difference actually «paid in good faith», i.e. the buyer cannot claim such difference if it purchases the goods at a higher price than what it was offered.

297. **297**
Jurisprudence also contemplates another remedy for the buyer, which is to rescind the contract due to non-delivery. According to Respondent, this negates «the idea» that the purchaser can terminate the contract, and simultaneously, call for the price difference for specific performance at the debtor's expense. Both options cannot exist together.

298. **298**
Also, Respondent asserts that Claimant did not prove any of the requirements of the said provision, including: 1) the DAP from the New Seller was acquired at a lower price, and 2) that the DAP purchased from the New Seller is substitute for the undelivered Goods. Respondent asserts that Claimant did not seek any offers from other DAP producers to choose the lowest price. Respondent argues that such failure was confirmed on 8 May 2021 during the production of documents phase; Claimant confirmed that there are no sale offers from other DAP suppliers during the period from May to July 2021 exist.

299. **299**
Similarly, the conditions of CISG Article 75 were not met. Respondent claims that Claimant failed to prove that it purchased the remaining DAP at Respondent's expense in a reasonable manner, i.e., at the best terms available in the market, the lowest price possible. The aggrieved party cannot rely on the difference in price unless the cover purchase was made in a reasonable manner. Claimant failed to show that it purchased the DAP at the best available terms in the market.

300. **300**
In this regard, Respondent quotes *Mohsen Shafiq* in his commentary published in 1988; the eminent Egyptian scholar who personally participated at the 1980 Vienna Diplomatic Conference opined:

> «*When entering into a substitute transaction, a seller must aim for the highest achievable price and a buyer for the lowest requested price.*»

301. **301**
In this respect, Respondent cites an award by a China International Economic and Trade Arbitration Commission («CIETAC») tribunal referred to in *Kröll*'s commentary.[71] It ruled that damages could not be calculated under CISG Art. 75 because of conflicting and insufficient records of the seller's storage company. Therefore, the Seller failed to prove that the goods subject of the avoided contract were used to fulfil a substitute sale. Therefore, Claimant failed to establish the legal requirements necessary to claim the price difference.

302. **302**
In its SoRJ, Respondent asserts that Claimant's compensation claim under the ECC requires

[71] RL-39.

three pillars: (1) contractual breach, (2) damages and (3) causal link between the breach and the damages. Claimant failed to establish those three pillars in its compensation claim.

303. **303**
Respondent argues that according to ECC Article 221(1), compensable damage caused by the breaching party must be a «natural result» of the contractual breach. This is the case when the creditor is unable to avoid the damage by exerting reasonable effort. The damage must also be foreseeable at the time of contract conclusion, which is the case when a reasonable person in the same circumstances of the debtor could expect it at the time of contracting. In addition, the burden of proof of the damage falls on the creditor. Respondent is of the view that Claimant failed to substantiate any of the required three elements, Claimant's claim for compensation must fail altogether.

304. **304**
Furthermore, in its SoRJ, Respondent maintains that the offer and invoice[72] extended to Claimant from the New Seller do not indicate a substitute delivery of the remaining quantity of the contracted goods, due to the following reasons:

- Document No. 2121 produced by Claimant during the PoD (i.e., *Claimant Confirmation Email for Purchase from New Sellers)* refers to different quantities of DAP.

- Document No. 2 is dated 17 June 2021. Email sent 14 days after OCP's email of 3 June 2021. According to Respondent, this indicates no urgency.

- In Claimant's email of 17 June 2021, Claimant inquired about *«the supply of the balance 2000 MT ...».* Therefore, the OCP's offer of 3 June 2021 was a different and new deal.

- Tribunal instructed Claimant to produce Document No. 7 (i.e., *«any sale offers received by Claimant from other suppliers to purchase the DAP from May to July 2021 to substitute the alleged non-delivered DAP from Respondent»).* Claimant responded on 8 May 2021 stating that *«the requested documents do not exist».*

305. **305**
Claimant is claimed to have rescinded the Agreement via its communication of 27 May 2021. Therefore, Claimant's alleged damages claim is baseless under Egyptian law, being the applicable law to the merits of the present proceedings and should, thus, be entirely dismissed. Therefore, Claimant may not seek specific performance. In this respect, the Supreme Administrative Court held that:

> *«[I]t is established in the jurisprudence of this court that it is prohibited to combine between the sanctions of contract rescission and the enforcement at the [debtor] expenses [...]»* (Translation provided by Respondent)

306. **306**
Also, with regard to the termination of the Agreement, in response to Claimant's inquiry about

[72] Exhibits C-16 and C-17.

the delivery of the remaining goods on 19 May 2021, Respondent argues that it explained to Claimant that it is unable to *«ship anymore product».* Respondent did not use words to the effect of termination or recession of the Agreement. It is Claimant who sent an email on 27 May 2021 with a clear wording of recession, stating, *«It is clear that sellers breached the contract ...»* and *«Consequently buyers [Claimant] put the contract to an end ...».*

c) Tribunal's discussion and findings

307. **307**
The CISG expressly precludes courts and tribunals from resorting to rules of domestic law to fill the void of express provisions therein. In the context of damages sought by Claimant, the Tribunal notes that CISG Chapter II, Section III on «remedies for breach of contract by the seller», along with Chapter V on «provisions common to the obligations of the seller and buyer» govern the following, but not limited to: damages, interest, exemptions (force majeure and hardship), effects of avoidance (termination). Therefore, the Tribunal deems irrelevant the domestic provisions regulating the same, which were raised by the Parties. The matter is governed by the CISG alone, as will be reasoned below.

308. **308**
In this section of the award, the Tribunal will address the question of whether Claimant fulfilled all CISG prerequisites asked of a party before it invokes the right to the remedy of damages. Here, the remedy is a consequence of Respondent's partial failure to deliver the agreed quantity of the Goods.

309. **309**
The remedies available to the buyer for the breach of contract by the seller are: 1) performance, including substitute delivery and repair in the cases of non-conformity (CISG Art. 46), avoidance of the contract (CISG Art. 49), reduction of the purchase price (CISG Art. 50), and damages (CISG Art. 45(1)(b) and Art. 74 et seq.). This is in addition to the damages available to Claimant as regulated by CISG Articles 74–77. CISG Article 74 determines what a claim for damages may cover – loss, foreseeable at contract conclusion; CISG Article 75 determines the buyer's right to purchase replacement goods in a reasonable manner within a reasonable time after avoidance; Article 76 asserts the buyer's option of claiming the difference between the contract-fixed price and price at the time of avoidance; and Article 77 requires the mitigation of damages, or, otherwise, the damages may be reduced upon the breaching party's request.

310. **310**
In the case at hand, Claimant, the buyer, is requesting damages for non-conformity (quantity), or the incomplete delivery, of the Goods. The Parties are not in disagreement on whether the quantity delivered was less than that agreed by the Parties in the Agreement. Rather, Claimant claims damages for the non-delivery of the quantity agreed on, while Respondent invokes an exempting impediment in accordance with the ICC FM Clause to refute an obligation to deliver the undelivered part of the Goods.

311. **311**
In this regard, CISG Article 33 states, as follows:

> *«The seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract.»*

312. **312**
Also, CISG Article 49(1)(b) states, as follows:

> *«The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.» (Emphasis added)*

313. **313**
Furthermore, CISG Article 51(1) states, as follows:

> *«If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing, or which does not conform.»*

• ***Avoidance/Termination***

314. **314**
On the distinctiveness of the CISG rules governing the avoidance/termination of contracts under the CISG, *Markus Müller-Chen* explains:

> *«Contrary to the rule in many domestic legal systems, only a fundamental breach of contract establishes the right to avoid the contract. Particularly when delivery has already occurred, avoidance of the contract should represent for a promise the ultima ratio, which will intervene when the other remedies – the right to require performance, claims for damages, price reduction – are insufficient. If the defect in the item is only of subordinate significance, the buyer also cannot acquire the right to avoid the contract by fixing an additional period of time for the seller to remedy it.» On the other hand, those drafting the Convention regarded a failure to deliver, despite an additional period of time having been fixed, as a serious breach of contract which in any event justified avoidance of the contract, without the need for the buyer to prove specially that the breach was of a fundamental nature.»*[73]

[73] Markus Müller-Chen in Schwenzer/Schlechtriem, Article 49, para 2.

315. **315**
If the seller fails to deliver the goods on time, fully or partially, the buyer may fix an additional period for the seller to fulfill its obligation. The buyer may terminate the contract, without a need to prove a fundamental breach, if the seller fails to fulfill its obligation to deliver within the fixed additional period. The same applies, if the seller refuses to deliver within such period or at all.

316. **316**
In the case at hand, the Tribunal is not convinced that Claimant fixed an additional period for Respondent to deliver. Although by admission of Respondent in its SoRJ, para 96(e) *«Claimant extended the shipping schedule until the end of May 2021»,* and despite that Claimant requested the delivery of the outstanding part of the Goods, its request/notification lacked the required firmness of wording, and a clear indication of a time period. Claimant's statement *«we await the availability of the* [remaining] *goods in order to look for a vessel»*[74] does not qualify as fixing an additional period for Respondent's performance, nor does Claimant's statement *«In the absence of your prompt reply, I will buy this quantity at the best price on the market and charge you the difference»*[75], as it has no effect post-termination of the Agreement, as will follow.

317. **317**
Nevertheless, the partial non-performance of Respondent suffices as fundamental breach, in and of itself, without the need to fix an additional period. When a seller firmly and conclusively declares that it will not deliver the goods, or a part thereof, this justifies the buyer's termination/avoidance of the contract.

318. **318**
Again, an insightful analysis is provided by *Müller-Chen* in Schlechtriem & Schwenzer (5th ed.), the most acclaimed commentary on CISG at the time of writing this award:

> *«A fundamental breach of contract exists when delivery is impossible either objectively or subjectively, initially or after the delivery date, or when the seller seriously and definitely declares, prior to or after the passage of the delivery date, that he is no longer able or willing to make the delivery under the terms agreed to in the contract. Such a refusal to perform may exist, for instance, if the seller wrongly pleads a right to refuse performance, invalidity of the contract, or the existence of force majeure, or if he attempts to enforce an unjustified price increase. If the buyer is uncertain whether the seller will still be able or willing to perform (e.g. in case of temporary impossibility), it is advisable for the buyer to fix an additional period of time for his own security.»*[76]

319. **319**
Based on the undisputed facts, the Tribunal deducts that Claimant maintained its interest in

[74] C-13.
[75] C-25.
[76] Markus Müller-Chen, Article 49, para 6.

the Goods after the due delivery date. Respondent, however, sent an unequivocal declaration that it will not deliver the remainder of the Goods,[77] which was followed by Claimant's notice of breach and avoidance/termination.[78]

320. **320**
Thereafter, Claimant secured a «sales confirmation» from the New Seller for the substitute goods at a higher price within 14 days from Respondent's declaration, and 7 days from its notice of termination. Having established that the agreed and undelivered quantity is 2,200 MT of DAP, and that there was no force majeure event in light of the Tribunal's reading of the ICC FM Clause, the Tribunal moves to the final questions, did Claimant fulfill all preconditions set by the CISG to request the payment of damages? Did Claimant mitigate and limit the damage caused by Respondent, and reasonably expected from, the partial non-delivery of the Goods?

321. **321**
The Tribunal notes that Claimant did not quantify or request relief for the damage of delayed Goods or the reputational damage, and limited its relief requested to the difference in price between the undelivered portion of the Goods and the substitute goods.

• ***Substitute goods***

322. **322**
CISG Article 75 is the relevant provision here. It presumes that the contract has been terminated, and afterwards within a reasonable period of time the aggrieved party buys replacement goods, and accordingly, it is entitled to the price difference, in addition to any other damages:

> «*If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has* ***bought goods in replacement*** *or the seller has resold the goods,* ***the party claiming damages may recover the difference between the contract price and the price in the substitute transaction*** *as well as any further damages recoverable under article 74.*»

323. **323**
As evident in the black letter text of CISG Article 75, it is clear that Claimant is entitled to terminate the Agreement, and, additionally, request damages for the substitute goods it bought afterwards to cover for the missing Goods. In fact, a substitution transaction is only available after a given contract is terminated by the aggrieved party.[79] Combining termination and damages, as requests for relief, is permissible under the CISG.

• ***Mitigation of Damages***

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[77] CL-14.
[78] CL-15.
[79] Oberlandesgericht Düsseldorf (Court of Appeal Dusseldorf), 09 July 2010, Case nr./docket nr. I-17 U 132/08. CISG-online number 2171.

324. **324**
With regard to the duty of mitigation of damages, CISG Article 77 states:

> «*A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.*»

325. **325**
The reasonable measures expected of the aggrieved party are to be determined primarily by the type of breach and the party in breach. A seller of perishable non-conform goods is expected to reasonably sell to another buyer as fast as possible. Equally so, is a trading buyer, such as Claimant, dealing in goods that are subject to strong price fluctuations, and/or is already bound by other existing customer contracts, which could impose penalties upon the delay of delivery. Time is of the essence in mitigating a potential and reasonably foreseeable loss.

326. **326**
Also, the duty to mitigate damages does not only occur when a loss has been already endured, but also before that time. In this regard, the application of domestic rules of compensation is not permissible, therefore they are entirely disregarded, in the presence of CISG Articles 74 et seq, as previously explained.

327. **327**
Reduction of the claimed damages by the breaching party is only possible if it can prove that the aggrieved party did not take the necessary measures expected of a reasonable person in the same circumstances. No extraordinary or disproportionately high costs should be involved.

328. **328**
Accordingly, both Parties have to prove that they exerted all reasonable effort to mitigate the damages emanating from the partial non-delivery of the Goods. Respondent was proven not to have mitigated the damages in light of para 7 of the ICC FM Clause, as a prerequisite to invoking it.

329. **329**
Furthermore, Respondent is presumed to be aware that Claimant is a professional trader of DAP, like itself, having concluded several purchase orders throughout the years. This means that Claimant must uninterruptedly conclude supply transactions to provide its customers. This may cause a difficulty in identifying this particular transaction with the New Seller as the substitute contract for the breached Agreement.

330. **330**
A number of scholars are of the opinion that the possibility of attributing one contract (here, the contract with the New Seller) to the breached contract (the Agreement) is not a

requirement to prove that the former substitutes the latter's undelivered quantity.[80] From the facts submitted by both Parties, a helpful timeline ensues, as follows:

- Email dated 19 May 2021: Reminder by Claimant that there is an undelivered quantity of the Goods.[81]
- Email dated 20 May 2021: Declaration by Respondent that it will not be able to deliver the remainder of the Goods.[82]
- Email dated 27 May 2021: Claimant terminated the Agreement – «*buyers put the contract to an end*».[83]
- Email dated 3 June 2021: Offer in writing from New Seller to Claimant to provide the substitute goods – «sales confirmation».[84]
- Email dated 15 June 2021: Claimant's notice to Respondent stating that it will seek substitute goods if DAP will not be delivered.[85]
- Email dated 17 June 2021: Claimant's request for comments on additional 1650 MT at USD 680 in addition to the confirmed 5,500 MT at USD 620.[86]
- New Seller Proforma Invoice dated 3 July 2021: 5,500 MT at USD 620 (Total sum: USD 3,410,000).[87]
- New Seller Invoice dated 12 July 2021: 5,500 MT at USD 620 (Total sum: USD 3,410,000).[88]
- Email containing SWIFT payment dated 17 July 2021 evidencing payment of USD 3,410,000.[89]

331. **331**
Based on the timeline, the Tribunal is convinced of the following:

- Claimant inquired about the price and availability of the substitute goods and it received a sales confirmation by 3 June 2021 from the New Seller.
- According to CISG Article 26: «*A declaration of avoidance of the contract is effective only if made by notice to the other party*». The declaration of avoidance was received by Respondent on 27 May 2021, and therefore, produced its effect. Arguably, Claimant might have been estopped from claiming the termination of the Agreement, if Respondent had

[80] Rolf Herber & Beate Czerwenka, *Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen am 11. April 1980 über Verträge über den internationalen Warenkauf,* Article 75, para 4, Munich (1990), mentioned in Schlechtriem/Schwenzer, Article 75, para 3.
[81] Exhibit C-13.
[82] Exhibit C-14.
[83] Exhibit C-15.
[84] Exhibit C-16.
[85] Exhibit C-25.
[86] Doc. No. 2 in Claimant's email dated 20 April 2022.
[87] Doc. No. 4, p. 2 – in Claimant's email dated 20 April 2022.
[88] Exhibit C-17.
[89] Doc. No. 4, p. 1 – in Claimant's email dated 20 April 2022.

communicated willingness to deliver the missing Goods thereafter, but nothing in the case record shows any proof thereto.[90]

- On 15 June 2021, Claimant made a post-termination attempt to obtain the missing quantity from Respondent, and it declared that it will alternatively seek substitute goods. However, Claimant received no reply from Respondent, as the record shows no answer to the query. The Tribunal deems this email of no effect on the termination of the Agreement. There was no «*withdrawal*» of Claimant's termination of the Agreement, as suggested by Respondent;

- Two days later, Claimant emailed the New Seller with vessel details and a request for confirmation with regard to the additional DAP of 1650 MT. The price of the additional DAP – unrelated to the Agreement – increased by USD 60 than the price of 14 days earlier – 3 June 2021. The quantity of 5,500 MT and price correspond to the «sales confirmation».

- Two consecutive invoice documents followed, reflecting the same price and quantity of 5,500 MT (including the substitute goods) as in the above correspondence. The Tribunal deems the difference of reference numbers of no evidentiary value to the claim that they are two different transactions. There is no contradiction of data between the proforma and the final invoice. The Tribunal deems this claim unfounded.

- Claimant's correspondence with the New Seller dated 3 June and 17 June 2021 indicates neither lack of urgency nor the existence of a separate deal, as claimed by Respondent. The Tribunal finds the communication with the New Seller timely, and both dates are not far apart.

- Also, the email contains a request for an additional amount of DAP, other than the initially agreed 5,500 MT. The confirmation and comments requested by Claimant are expressly needed for the additional quantity that was not included in the sales confirmation sent on 3 June 2021. The email did not exclude the originally agreed quantity. In all events, given his professional trading activities, Claimant is not obligated to restrict itself to ordering an identical quantity of the Goods to replace the non-delivered part thereof. The timeline is sufficiently indicative that the substitution of the Goods took place by the cover goods from the New Seller, absent any evidence presented by Respondent to the contrary. Additionally, the fact that Claimant required a different quantity, provided it is at least equivalent to the undelivered Goods, does not cancel its right to claim that the new order covers – in whole or in part – the missing quantity of the Goods. It can be in excess of, or less than, the missing quantity.

- The Tribunal considers Claimant to have purchased 2,200 MT from the New Seller as substitute from the missing Goods.

332. **332**
CISG Article 75 requires that the Agreement be terminated/avoided before Claimant can

[90] Florian Mohs, Article 64, para 36 in Schlechtriem/Schwenzer.

pursue a substitute transaction, unless at the time of the substitute transaction it is certain that Respondent will not perform, especially if it declared such in a final and conclusive manner,[91] which was established; however, no avoidance is necessary by the time the buyer concludes the substitute transaction. Upon Respondent's declaration of non-performance, Claimant is entitled to seek alternative deliveries.[92]

333. **333**
Substitute transactions under CISG Article 75 must be pursued in a reasonable manner. This denotes several factors, including price, quantity and quality similar to the original transaction. *Ingeborg Schwenzer* explains:

> «*When entering a substitute transaction, a buyer must aim for the lowest requested price. However, the promisee* [Claimant] *does not need to go out of its way when looking for opportunities to conclude a substitute transaction. For instance, the buyer who must purchase elsewhere cannot be expected to explore in detail how much advantageously purchase substitute goods.*»[93]

334. **334**
On 20 May, Respondent communicated to Claimant that the price of DAP reached USD 550 PMT ex-factory in April 2021, as opposed to USD 415 PMT in January. The price increased exponentially, as evident in the difference between the initial amount agreed between Claimant and the New Seller (USD 620) and the amount added briefly after the latter's initial «sales confirmation» (USD 680) in a span of two weeks. This was also evidenced in price-reporting sites. As one noted:

> «*High global demand raised prices of Diammonium Phosphate in Europe during Q2 2021. Import demand of Europe remained high in the meantime and traders were ready to pay high prices on cargoes coming from India and Middle East. In addition, increase in feedstock Ammonia and Phosphoric Acid prices due to shortage, also contributed to the rise in DAP prices in Europe. On the demand side, demand for DAP from end users remained high enough to encourage this steep se in the region.* [In Asia – Q3] ... *monthly average prices of DAP stood at USD 652.49 per MT in September with a rise by around USD 60 per ton since July.*»[94]

335. **335**
As there was no DAP available in Egypt, Claimant attempted to reach for closer markets like Morocco. A strong presumption exists that this was a reasonably good price at the time. This is drawn from the fact that Claimant bought an additional amount of 1650 MT, which are irrelevant to the substitute goods, from the same New Seller, despite the USD 60 increase. It does not make any sense for Claimant to purchase an additional and unrelated quantity from

[91] Schwenzer in Schlechtriem/Schwenzer, Article 75, para 3 et seq.
[92] Id at para 5.
[93] Id at para 6.
[94] DAP Price Trend and Forecast, Market Overview, available at Chemanalyst.com.

the same seller, if it were not an economically sensible purchase for that specific quantity, albeit at a higher price.

336. **336**
Also, as evident from the timeline, within less than a month from the date of declaration by Respondent of its inability to supply the missing Goods, Claimant had received a «sales confirmation» and determined a vessel to ship the Goods. The Tribunal deems this a reasonable period to conclude the substitute transaction, absent any submissions by Respondent to a more customarily acceptable period. A notice of purchasing substitute goods did also occur within a reasonable time after the avoidance. The Tribunal deems Claimant to have satisfied the duty to mitigate the damages.

337. **337**
In light of the above, absent an obligation to prove damages or foreseeability in application of CISG Article 75, the Tribunal is convinced that Claimant has provided sufficient evidence that the substitute DAP was effectively purchased from the New Seller in a reasonable manner, by achieving a reasonable price in comparison to the two-months older price offered by NCIC. It also did so within a reasonable time period after the avoidance of the Agreement. Claimant has acted prudently in lessening the probability of loss, as possible, and gave Respondent a prior reasonable notice/warning of its intention to substitute the missing Goods. No reply from Respondent indicated any intention to rectify its breach, before the actual conclusion of the contract with the New Seller.

338. **338**
The Tribunal believes that by virtue of the above notice/warning, the damages have certainly been mitigated. Claimant secured a sales confirmation on 3 June 2021 – 14 days after Respondent's conclusive declaration of inability to fulfill the remainder of the Agreement. It is also evident from the aforementioned Chemanalyst report, that the price of the substitute goods would have been significantly higher if Claimant had waited for an additional month – an increase by an additional USD 60 PMT, as evident in light of the additionally ordered DAP, and the above market review.

339. **339**
The CIETAC decision cited by Respondent concerns the failure of an aggrieved party to prove that a specific purchase can be considered a substitute transaction. The CIETAC tribunal was of the opinion that there were contradicting data, which casted doubt over its role as replacement goods. This is not the case here, as reasoned above.

340. **340**
Claimant fulfilled its duty to mitigate the damages; they are, therefore, not to be reduced.

• ***Burden of Proof***

341. **341**
Unlike CISG Article 74(2) on damages covering foreseeable loss, including loss of profit, CISG

Article 75 does not require foreseeability or proof of damage.[95] The allocation of burden of proof in this regard is governed by the CISG.[96] Therefore, arguments put forward to the contrary by the Parties are dismissed.

342. **342**
However, with regard to the burden of proof for Respondent's plea for reduction of Claimant's requested damages, *Petra Butler* explains:

> «*If the obligor* [Respondent] *asserts that the substitute transaction could have been made sooner* [or pleads any other mitigation grounds to reduce the damages], *the obligor also implicitly invokes a breach of the duty to mitigate damages (Article 77) for which the obligor carries the burden of proof.*»[97] (Emphasis added)

343. **343**
The *lex fori* governs the admissibility of evidence and the manner by which it is submitted.[98] According to Egyptian law, in commercial matters, rules limiting the evidentiary weight of certain instruments, e.g. self-produced documents, do not apply. Article 69 of the Commercial Code states:

> «*1- Proof of commercial obligations, whichever their amount is, may be established by all methods of proof unless otherwise prescribed by law.*
>
> *2- In other than the events for which the law mandates proof of commercial matters in writing, it is permitted in those* [commercial] *matters to prove the opposite of what is contained in the written evidence or prove what complements such evidence,* ***using all methods*** [of evidence].*»* (Emphasis added)

344. **344**
In the context of proof of payment for the substitute goods, applying the «using all methods» trait of evidence in commercial matters, the Court of Cassation admitted letters produced by a creditor to prove the apparentness (صورية) XXXX of a written loan contract that the creditor and debtor signed, as follows:

> «*the apparentness of a causa in a loan contract may be established by the documents issued by the party relying on it* [the simulated contract], *hence, if the documents underlying the debt state that the value of the loan has been paid in cash, and later on it was discovered from letters issued by the creditor to the debtor in different circumstances and events that the debtor pleaded with the creditor and thanked him*

[95] Ingeborg Schwenzer in Schlechtriem/Schwenzer, Article 75, para 5 and 8.
[96] German Federal Court of Justice (BGH), 9 January 2002, CISG-online 651.
[97] Petra Butler, *Damages Principles under the Convention on Contracts for the International Sale of Goods,* Global Arbitration Review, 1 February 2021.
[98] Ingeborg Schwenzer, Schlechtriem/Schwenzer, Article 74, para 68.

for his charity and kindness [evidencing that the amount was a grant, not a loan], *those letters may be considered as written proof sufficient to deny that the loan is real.*»[99]

345. **345**
Additionally, according to Article 27(4) of the Rules, the Sole Arbitrator maintains full discretion to determine the admissibility, relevance, materiality and weight of the evidence offered by the Parties. This is also in line with Article 9 of the applicable IBA Rules of 2020 on the Taking of Evidence in International Arbitration, which states that «*the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*»

346. **346**
The Email containing the SWIFT suffices as proof of payment. There is no form for proof of payment required under the CISG. Egyptian law recognizes electronically conveyed messages, including their attachments, as mediums of full egal (evidentiary) effect.[100]

• ***Interest***

347. **347**
On interests, CISG Article 78 states, as follows:

«*Article 78: If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.*»

348. **348**
The Sole Arbitrator concurs with the view that damages based on substitute purchases are to be calculated from the date of the replacement contract,[101] however, in the opinion of the Tribunal, only if this coincides with the date by which the payment of such contract price is payable, i.e. the date by which Claimant could have utilized the amount paid in excess for the replacement goods in a different manner, hence, justifying the interest. This is regardless of other due damages that may have preceded the said date, which Claimant did not assert, albeit mentioning it in passing.

349. **349**
CISG Article 78 does not regulate the interest rate and does not envision a uniform rule under the convention for the interest rate. The CISG Advisory Council advises the following:

«*The rate of interest may be determined by the agreement of the parties. In the absence of such agreement, the applicable rate of interest is the rate which the court* ***at the creditor's place of business*** *would grant in a similar contract of sale not governed by the* CISG.»[102]

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[99] Court of Cassation, Challenge No. 33 of JY 2, dated 3 November 1932.
[100] Court of Cassation, Challenge No. 17689 of JY 89, dated 10 March 2020.
[101] Klaus Bacher in Schlechtriem/Schwenzer, Article 78, para 18.
[102] CISG Advisory Council Opinion No 14, Interest Under Article 78 CISG, items 8 and 9.

350. **350**
Absent an interest-based penalty agreed between the Parties in the event of Claimant's purchase of substitute goods, which would have warranted a higher interest rate in light of Article 64 of the Commercial Code, the Tribunal looked at the interest rate at the relevant period in Italy, and it varied between 8 and 10.5%. However, the Tribunal is confined by the requests for relief advanced by the Parties, so it deems ECC Article 226 applicable here, i.e. 5% for commercial matters to count as of 13 July 2021, the date of the SWIFT payment.

F. Allocation of Costs

a) Claimant's position

351. **351**
Claimant invokes Article 46 of the CRCICA Rules, and Article 184 of the Civil Procedures Law, which provide that the arbitral tribunal is at discretion to decide on which Party bears the costs of arbitration. It also cites the Court of Cassation to establish that the purpose of a compensation is to remove the entire damage incurred by a party, i.e. to make the injured party whole.[103]

352. **352**
Claimant itemizes its requested costs and interest thereon, and provides invoices for all of the items listed, as follows:

- USD 500 paid as registration fees,
- USD 2891.5 paid representing Claimant's share of the arbitration costs,
- USD 2891.5 representing Respondent's share of the arbitration costs,
- USD 22,500 as a fixed legal fees for Jurisera Attorneys at Law, local counsel, and EUR 18,012.68 as fees for Legale Associato Ridolfi Ghigi Longanesi, Italian counsel, in addition to an amount equivalent to 7% of the awarded amount by the Tribunal, and
- EGP 26,803 for miscellaneous disbursements.

b) Respondent's position

353. **353**
Respondent itemizes its requested costs and interest thereon, and provides invoices for all of the items listed, as follows:

- USD 55,000 as invoiced legal fees for MBH (including VAT),
- USD 10,000 as post-award legal fees (excluding VAT),

[103] Court of Cassation, Challenge No. 1644 of JY 60.

- EGP 11,797.5 as transcript preparation costs, and
- an amount equivalent to 5% of the awarded amount by the Tribunal.

c) Tribunal's discussion and findings

354. **354**
Article 42 on Definition of costs, states as follows:

> 1. *The arbitral tribunal shall fix the costs of arbitration in the final award and, it deems appropriate, in another decision.*
> 2. *The term «Costs» includes only:*
>   a. *A registration fee to be determined in accordance with article 43 of the Rules;*
>   b. *The administrative fees to be determined in accordance with article 44 of the Rules;*
>   c. *The fees of the arbitral tribunal to be determined in accordance with article 45 of the Rules;*
>   d. *The reasonable travel and other expenses incurred by the arbitrators;*
>   e. *The reasonable costs of expert advice and of other assistance (translation, case reporting, etc ...) required by the arbitral tribunal;*
>   f. *The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
>   g. *The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; and*
>   h. *Any fees and expenses of the appointing authority in case the Centre is not designated as the appointing authority.*

355. **355**
Article 46 on Allocation of costs, states as follows:

> 1. *The Costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
> 2. *The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party(s) as a result of the decision on allocation of costs.*

356. **356**
In accordance with Article 42(1) of the Rules, the Tribunal shall fix the costs of the arbitration and in accordance with Article 46(2); it shall decide which of the Parties shall bear the costs of the arbitration, and in what proportion.

357. **357**
Article 42.2 of the Rules defines the arbitration costs, which include *inter alia* registration and administrative fees, the Tribunal's fees and expenses and the reasonable legal and other costs incurred by the parties.

358. **358**
According to the CRCICA's financial statement, the CRCICA registration and administrative fees as well as the Tribunal's fees have been solely paid by Claimant.

359. **359**
On the reasonableness test, the Tribunal notes that, whilst Claimant's legal fees (EUR 66,000) are triple those of the Respondents (USD 22,000), the Tribunal generally considers that none of the Parties' respective legal costs is substantially unreasonable in light of the respective submissions.

360. **360**
As for the allocation of the costs between the Parties, the Tribunal is guided by Article 46(1) of the Rules which provides that «the costs of the arbitration shall in principle be borne by the unsuccessful party», as well as the well-established «costs follow the event» principle.

361. **361**
Applying the above principles, the Tribunal notes that Respondent has advanced allegations of bias and partiality against the Sole Arbitrator on three consecutive occasions and failed in all of them to meet his request to produce novel and/or newly discovered bases therefor, in addition to Respondent's highly unconventional request to submit a third submission on jurisdiction, while maintaining that Claimant shall submit only two. Nevertheless, Claimant was not invited to comment on either issue, so any additional work by Claimant's counsel caused by Respondent not conducting itself in an expeditious and cost-effective manner was an unsolicited act. Respondent is excused for the delays caused by the unavailability of Covid-19 infected team members. Any harm caused by the inefficiency of the proceedings is covered by the interest on the awarded amount. Therefore, Respondent will not bear the legal fees of Claimant's counsel.

362. **362**
The Tribunal also notes that Respondent has not prevailed on its jurisdictional plea, and Claimant has entirely prevailed on the merits, as all the reliefs sought by Claimant were granted, and therefore, Claimant's claims can be considered as totally successful.

363. **363**
Consequently, the Tribunal deems it fair and reasonable that Respondent bears 100% of the

CRCICA registration and administrative fees as well as the arbitrators' fees amounting accumulatively to USD 6,283, as entirely advanced by the Claimant, while each Party is to bear its own legal and other costs. Accordingly, Respondent shall reimburse to Claimant USD 6,283.

VI. Dispositive

364. **364**
Based on the above considerations, the Sole Arbitrator hereby:

365. **365**
Dismisses Respondent's jurisdictional plea and declares that he has jurisdiction over Respondent and the Agreement;

366. **366**
Declares that Respondent has breached the Agreement by not delivering the remainder of the Goods amounting to 2,200 MT of DAP;

367. **367**
Orders Respondent to pay to Claimant the compensation amount of USD 369,600 (Three hundred thousand, sixty-nine thousand and six hundred US Dollars) in addition to an interest at the contractual annual interest rate of 5% to be calculated from 13 July 2021 until the date of actual payment;

368. **368**
Orders Respondent to pay to Claimant an amount of USD 6,283 (Six thousand and two hundred and eighty three US Dollars) representing 100% of the CRCICA registration and administrative fees as well as the arbitrators' fees, as entirely advanced by Claimant;

369. **369**
Orders that each Party shall bear its own legal and other costs in these proceedings; and

370. **370**
Dismisses any other claim or request for relief made by either Party.

Place of Arbitration: Cairo, Egypt.

Signature: Sherif El Saadani

Nationality: Egyptian