Sklapanje ugovora o međunarodnoj kupoprodaji robe- analiza slučaja

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SKLAPANJE UGOVORA O MEĐUNARODNOJ KUPOPRODAJI ROBE – ANALIZA SLUČAJA

Diplomski rad

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Izjava o izvornosti

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_____ Sara Senjak, v. r.

SADRŽAJ

1. UVOD

Willem C. Vis moot je studentsko natjecanje iz međunarodne trgovačke arbitraže koje okuplja oko 400 timova iz cijeloga svijeta i postoji već gotovo 30 godina. Natjecanje je koncipirano na način da se svake godine objavljuje imaginarni slučaj koji portretira aktualne probleme u međunarodnoj kupoprodaji robe. Slučaj se sastoji od procesnog i materijalnog dijela. Naglasak je na stjecanju praktičnog znanja, vještina i pristupanju pravnoj problematici iz perspektive odvjetnika. Svrha natjecanja je istraživanje slučaja i zastupanje obje strane, kako tužiteljeve, tako i tuženikove. Shodno tome, slučaj je opsežan te sadrži arbitražne podneske, iskaze stranaka te ostale dokazne materijale.[1]

Cilj ovoga rada je analiza materijalnog dijela Willem C. Vis moot slučaja iz 2021/2022. godine. Materijalni dio slučaja sastojao se od ispitivanja pretpostavki za sklapanje ugovora, kao prvog dijela, te ispitivanja pretpostavki za inkorporaciju općih uvjeta poslovanja u isti, kao drugog. U ovome radu analizirati će se prvi dio materijalnog dijela, elementi relevantni za sklapanje ugovora: pregovori, ponuda, protuponuda, prihvat ponude te utjecaj prakse uspostavljene između stranaka na sklapanje ugovora. U radu će se prvo izložiti činjenično stanje slučaja (2.), sporazum stranaka o mjerodavnom pravu (3.), zatim se u središnjem dijelu rada iznose argumenti u prilog tužitelja (4.), a potom i argumenti u prilog tuženika (5.) koji su konačno popraćeni zaključkom (6.). Pritom treba naglasiti kako je središnji dio rada, analiza slučaja, pisana na engleskom jeziku jer je analizirani slučaj također na engleskom jeziku, a i stoga što su stranke u tom simuliranom slučaju ugovorile primjenu engleskog jezika kao službenog jezika za rješenje njihova spora. Također, svakako treba naglasiti da se u arbitražnim sporovima s međunarodnim elementom redovito ugovara engleski jezik kao jezik postupka. Shodno tome, u dogovoru s mentorom, ovaj rad predstavlja savršenu priliku za vježbu korištenja pravnog engleskog jezika.

[1] Willem C. Vis International Commercial Arbitration moot, About the Moot, https://www.vismoot.org/about-the-moot/, pristupljeno 25.09.2022.

2. FACTS OF THE CASE

ElGuP plc ("**CLAIMANT**") is one of the largest producers of RSPO-certified palm oil and palm kernel oil. It has an annual output of 30.000t of palm oil and 7.000t of palm kernel oil.

JAJA Biofuel ("**RESPONDENT**", together with CLAIMANT "**the Parties**") is a well-established producer of biofuel. In late 2018, RESPONDENT was acquired by **Southern Commodities**, a multinational conglomerate engaged in all kinds of commodities and their derivatives. RESPONDENT is a 100% subsidiary of Southern Commodities.

Mr Chandra is CLAIMANT's COO. He and his assistant, **Mr Rain**, were authorized to conclude the contract. **Ms Bupati** is RESPONDENT's Head of Purchasing since 2019. Until then, she was the main purchase manager for Southern Commodities' palm kernel oil section. She and her assistant, **Ms Fauconnier**, were also authorized to conclude the contract.

Mr Chandra and Ms Bupati **had a long-lasting professional relationship**. **Between 2010 and 2018,** they concluded around 40 contracts. Their practice was that Ms Bupati would call Mr Chandra and ask for quotations. Based on those quotations, Ms Bupati would make an offer, and Mr Chandra would send her the necessary contractual documents. If those documents were unacceptable to Ms Bupati, she would object within a week from their receipt. If acceptable, she would sign them within a week or remain silent and perform the contract.

The contractual documents sent by Mr Chandra always referred to the CLAIMANT's General Conditions of Sale ("**the General Conditions**"), including the Arbitration Clause contained therein. In 2016 Mr Chandra informed Ms Bupati via phone that the new Arbitration Clause was the Asian International Arbitration Centre (AIAC) model clause and that the seat of the arbitration is in Danubia.

On **28 March 2020,** Mr Chandra visited the Palm Oil Summit in Capital City in Mediterraneo searching for a buyer for 2/3 of CLAIMANT's annual palm oil production. There he met Ms Bupati who was trying to put RESPONDENT's palm oil business on its feet. They quickly agreed on all relevant commercial terms for a contract for the sale of palm oil ("**the Contract"**). Mr Chandra informed Ms Bupati that CLAIMANT's usual General Conditions will apply and that agreeing on anything but arbitration would be very difficult. Since Ms Bupati needed RESPONDENT's management approval, they agreed that she would get back to Mr Chandra with a firm offer within the next 3 days.

On **1 April 2020**, Ms Bupati sent an email reflecting the commercial terms agreed at the Palm Oil Summit. It specified the quality and quantity of the palm oil and set the price.

On **9 April 2020**, Mr Rain sent an email containing the contractual documents to Ms Bupati and Ms Fauconnier. The email stated that CLAIMANT accepts the terms of the offer and that the General Conditions apply to the Contract.

On **3 May 2020**, Ms Fauconnier contacted Mr Rain to ask about the banks that were acceptable to CLAIMANT for opening the letter of credit.

On **30 May 2020**, Ms Fauconnier contacted several of those banks to get quotations as to the terms for the letter of credit.

On **15 June 2020**, the film "Saving Lucy" was released in Equatoriana. It portrays the negative impacts of palm oil production on the environment. The film caused activist campaign against RESPONDENT and its palm oil business.

On **29 October 2020**, Commodity news published an article in which Ms Lever, RESPONDENT's CEO, announced that RESPONDENT terminated its negotiations with CLAIMANT for the long-term supply contract.

On **30 October 2020**, CLAIMANT received a letter from Ms Lever in which she declared termination of negotiations between the parties.

3. LAW APPLICABLE TO THE CONTRACT

According to Art. 1(1)(a) of the United Nations Convention on Contracts for the International Sale of Goods (**"CISG"**), the Convention applies to contracts of sale of goods between parties whose places of business are in the different Contracting States. CLAIMANT's place of business is in Mediterraneo, and RESPONDENT's place of business is in Equatoriana[2]. Both Mediterraneo and Equatoriana are CISG Contracting States [3]. Moreover, the Parties agreed that the Mediterranean law will govern the Contract[4]. The CISG is a part of that law, and the Parties did not exclude its application[5]. Consequently, the conclusion of the Contract was governed by the provision of the CISG.

[2] Notice of Arbitration, p. 4
[3] Procedural order no.1, p. 46, para. III.3
[4] Claimant's Exhibit C4, p. 17; Procedural Order no. 2, p. 52 para. 33
[5] Procedural Order no. 2, p. 52 para. 33

In order for a contract to be concluded, CISG requires two consecutive manifestations of assent, an offer and an acceptance[6].

4. THE CONTRACT WAS CONCLUDED

4.1. RESPONDENT made an offer on 1 April 2020

According to Art. 14 CISG, a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and if it indicates the offeror's intention to be bound in case of acceptance. Proposal is sufficiently definite if it indicates the goods and contains provisions for determining the quantity and the price[7].

Offeror's intention to be bound should be examined in accordance with Art. 8 CISG. If the offeror's actual intent (Art. 8(1) CISG) is not entirely clear, as it is often the case, its statements and other conduct are to be interpreted according to the understanding that a reasonable person of the same kind as the offeree would have had in the same circumstances (8(2) CISG)[8].

Ms Bupati and Mr Chandra agreed on all relevant commercial terms already at the Summit. Since Ms Bupati needed management approval, she told Mr Chandra that she would get back to him with a firm offer within the next three days[9]. Ms Bupati kept her promise by sending an order which mirrored the agreed terms in an email of 1 April 2020. She ordered 20,000t of RSPO-certified palm oil for each year from 2021 to 2025, delivered in up to six annual instalments, with the delivery starting in January 2021. The price was USD 900/t for the first year and 5 % below the market price for the remaining years. Ms Bupati confirmed the seriousness of her intentions by stating that RESPONDENT is "… *strongly interested in securing a long-term supply*…" [10].

Every reasonable person would understand such order as an offer. It specified the goods, the quantity and the price and showed RESPONDENT's intention to be bound in case of acceptance. Even Ms Bupati refered to that email as a "*firm offe*r"[11].

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[6] Matthew Bender para. 3.03; Kroll/Mistellis/Perales Viscasillas, pp. 146, 212; Peter Schlechtriem, p. 47; Schlechtriem/Schwenzer p. 240; Huber/Mullis p. 69; Rapeseeds dregs case

[7] Explanatory note, p. 37; Huber/Mullis, pp. 70, 72; Slechtriem/Schwenzer pp. 269-270; Bianca/Bonell pp. 133, 138

[8] Huber/Mullis p. 71; Schlecthriem/Schwenzer pp. 282-283; Official Records p. 57; Kroll/Mistellis/Perales Viscasillas, p. 218

[9] Notice of Arbitration, p. 5 para. 5

[10] Notice of Arbitration, p. 5 para. 6; Claimant's Exhibit C2, p. 12

[11] Notice of Arbitration, p. 5 para. 5; Claimant's Exhibit C2, p. 12; Response to Notice of Arbitration, p. 27 para. 12; Respondent's Exibit R3, p. 31 paras. 2, 3

4.2. CLAIMANT accepted the offer on 9 April 2020

According to Art. 18(1) CISG, acceptance is a declaration of assent to an offer. An offeree can declare its acceptance either by a statement or by its conduct[12]. In principle, the terms of the acceptance must fully correspond to the terms of the offer. This is known as a mirror image rule[13]. Art. 19(1) CISG acknowledges this principle by stipulating that a reply to an offer that purports to be an acceptance but contains additional or different terms is both a rejection of the original offer and a counter-offer.

CLAIMANT accepted Ms Bupati's offer by email of 9 April 2020. Mr Rain, Mr Chandra's assistant, told Ms Bupati and her assistant, Ms Fauconnier, that "*I have inserted the terms of your offer into the Contract, which we accept.*"[14]. This is a catch-all phrase which shows CLAIMANT's intent to accept all terms of the offer. Both Mr Rain and Ms Fauconnier were empowered to conclude the Contract[15].

RESPONDENT relied on the fact that Mr Rain's email contained certain additions not present in the offer. Most importantly, that the Contract would be subject to CLAIMANT's General Conditions[16]. Consequently, RESPONDENT argued that CLAIMANT's email was not an acceptance but a counter-offer[17].

Art. 19(2) CISG, however, provides for an exception to the mirror image rule from Art. 19(1) CISG. It stipulates that a reply to an offer that contains additional or different terms remains an acceptance if those terms do not materially alter the terms of the offer and if the offeror does not, without undue delay, object to the discrepancy. In other words, if the modifications of the offer are immaterial and the offeror fails to object promptly, the contract is concluded. Such contract encompasses both the terms of the offer and modifications contained in the acceptance[18].

[12] Kroll/Mistellis/Perales Viscasillas, p. 263; Schlechtriem/Schwenzer, p. 332; Huber/Mullis p. 88; Bianca/Bonell pp. 165-166

[13] Huber/Mullis pp. 88-89; Kroll/Mistelis/Perales Viscalis, pp. 280-283; Schlechtriem/Schwenzer, p. 351; Bianca/Bonell, p. 178; Bridge, pp. 536-537

[14] Claimant's Exhibit C4, p. 17

[15] Procedural Order no. 2, p. 49 para. 12

[16] Claimant's Exhibit C4, p. 17

[17] Response to Notice of Arbitration, p. 27 paras. 16-17

[18] Huber/Mullis pp. 89-91; Kroll/Mistelis/Perales Viscasillas, pp. 280-283; Schlechtriem/Schwenzer, pp. 362-363; Bianca/Bonell, p. 179; Bridge, p. 537

Art. 19(3) CISG contains a non-exclusive list of the terms which are considered to alter the terms of the offer materially. One of the mentioned terms is the dispute settlement clause. RESPONDENT argued that since Art. 9 of the General Conditions contains an Arbitration Clause, CLAIMANT's email of 9 April 2020 was not an acceptance but a counter-offer.

However, the presumption that the terms from Art. 19(3) CISG are material can be rebutted in light of particular circumstances of the case[19].

CLAIMANT's addition of its General Conditions, including the Arbitration Clause contained therein, was immaterial because of the negotiations (**4.2.1**.), the practice established between the parties (**4.2.2.**), and because they were beneficial to RESPONDENT (**4.2.3.**). Since RESPONDENT did not object without undue delay (**4.2.4.**), the Contract was concluded with those modifications forming part of the Contract.

4.2.1. Modifications were immaterial because of the Parties' negotiations

The modifications of the offer are immaterial if the offeree had a reason to assume that they were acceptable to the offeror[20]. Modifications can, thus, be immaterial if the parties discussed them during the negotiations[21].

During negotiations at the Palm Oil Summit, Mr Chandra informed Ms Bupati that the Contract would be subject to CLAIMANT's General Conditions. He also stated that agreeing on anything but arbitration would be very difficult[22].

Ms Bupati sent her offer only three days after those negotiations. She stated that RESPONDENT is "*strongly interested in securing long-term supply at the conditions we discussed at the Summit."*[23]. Since the conditions discussed during negotiations at the Summit included the General Conditions and the arbitration of potential disputes, CLAIMANT had reason to assume that adding those terms to the acceptance would be acceptable to RESPONDENT.

[19] Kroll/Mistellis/Perales Viscasillas, pp. 284-285, Huber/Mullis, p. 89, Schlechtriem/Schwenzer, p. 356, Ford Escort Cabrio case, Taiwanese manufactured goods case
[20] Enderlein/Maskow p. 99
[21] Schlechtriem/Schwenzer, p. 356, DiMatteo/Dhooge/Greene/Maurer/Pagnattaro p. 73
[22] Response to Notice of Arbitration, p. 26 para. 10; Claimant's Exhibit C1, p. 10 para. 11; Procedural Order no. 2, p. 49 para. 13
[23] Claimant's Exhibit C2, p. 12

4.2.2. Modifications were immaterial because of the Parties' previous practice

Modifications of the offer can be rendered immaterial if they are implied by the practice established between the parties. For example, if the parties established a practice to arbitrate disputes, inclusion of an arbitration clause that reflects such practice does not represent a material modification of the offer[24]. Furthermore, in the *Insolvent wholesaler case* the Austrian Supreme Court held that general conditions might impliedly become part of the contract if one contracting party hinted to them in the context of a long-term business relationship and the other party did not object.

Ms Bupati and Mr Chandra were engaged in a long-lasting business relationship. Between 2010 and 2018 they negotiated and concluded around 40 contracts for the sale of palm kernel oil. Every single one of those contracts was subject to CLAIMANT's General Conditions and the Arbitration Clause contained therein[25]. Such practice implies that the General Conditions, including the Arbitration Clause, were not a material modification of the offer. If RESPONDENT did not want them anymore, it had to object without undue delay, which it failed to do.

RESPONDENT argued that the relationship between Ms Bupati and Mr Chandra does not constitute a practice between the Parties, since, at that time, Ms Bupati worked for Southern Commodities, not RESPONDENT[26]. Although those facts are true, CLAIMANT can still rely on such practice.

First, although Ms Bupati changed her employers, she is still the same person. Both Ms Bupati and Mr Chandra remembered and relied on their personal contacts. In her offer, Ms Bupati told Mr Chandra that she would like "*…to re-establish our long-lasting and successful business relationship*"[27]. Even in her Witness Statement, Ms Bupati declared "*With Mr Chandra I had established a practice…*"[28]. Therefore, it is obvious that Ms Bupati and Mr Chandra put more weight on their personal relationship than on the identity of their employers.

[24] Honnold, p. 187; Bianca/Bonell, pp. 180-181
[25] Respondents's Exhibit R3, p. 31 para. 2; Procedural Order no. 2, p. 48 para. 7
[26] Notice of Arbitration, p. 5 para 4; Respondent's Exhibit R3, p. 31 para. 2
[27] Claimant's Exhibit C2, p. 12
[28] Respondent's Exhibit R3, p. 31 para. 3

Second, although Ms Bupati technically changed employers, her new employer, RESPONDENT, is a subsidiary of her previous employer, Southern Commodities. Moreover, Southern Commodities dictates RESPONDENT's business activities. For example, it established RESPONDENT's new palm oil unit, and staffed it with a new CEO, new management, and 10 of its own former employees[29]. As Ms Bupati stated in her email: "*JAJA Biofuel* [RESPONDENT] *is supposed to play a crucial role in this expansion strategy of Southern Commodities*"[30]. Therefore, RESPONDENT acted as an extended arm of Southern Commodities.

Third, Ms Bupati got her job in RESPONDENT precisely because of her previous experiences in the palm oil industry. As Ms Bupati stated in her Witness Statement "*My experience in the palm kernel oil market and the resulting connection to the palm oil producers was one of the reasons why Southern Commodities offered me the position as Head of Purchase at JAJA Biofuel.*"[31]. RESPONDENT should not be allowed to benefit from Ms Bupati's connection with the palm oil producers and to disown that connection whenever it suits its needs.

This is supported by the case law. In *Nucap v. Bosch case,* Nucap tried to prove that it had a confidentiality agreement with Bosch. It pointed to the Terms of Use Agreement that was concluded with a different company from the same group, Bosch China. The Court dismissed Nucap's argument because Bosch China and Bosch defendant have separate officers, managers and employees. This suggests that if Bosch and Bosch China had the same officers, managers and employees, Nucap could rely on Terms of Use Agreement between it and Bosch China. Moreover, in the *Tantalum powder case II*, the Austrian Supreme Court held that the knowledge of an agent or a representative naturally ascribes to the knowledge of the company,

In the case at hand, Southern Commodities and RESPONDENT exchanged many of their employees, most importantly Ms Bupati as the chief negotiator[32]. Therefore, CLAIMANT can rely on its previous practice with Ms Bupati.

[29] Notice of Arbitration, pp. 4-5 paras. 2, 4; Respondent's Exhibit R1, p. 29; Respondent's Exhibit R3, p. 31 para 5; Procedural Order no. 2, p. 48 para. 5
[30] Claimant's Exhibit C2 p. 12
[31] Respondent's Exhibit R3, p. 31 para. 4
[32] Notice of Arbitration, pp. 4-5 paras. 2, 4; Respondent's Exhibit R1, p. 29; Respondent's Exhibit R3, p. 31 para. 5; Procedural order np. 2, p. 48 para. 5

4.2.3. Modifications were immaterial because they are beneficial to RESPONDENT

The offeree's modifications of the offer are also immaterial if they are beneficial to the offeror. Such modifications become a part of the contract without further formalities and do not require the offeror's acceptance[33].

This is supported by *Monoammonium phosphate case*, decided by the Austrian Supreme Court. The seller offered Monoammonium phosphate with certain specifications regarding quantity. The buyer accepted the offer but inserted different specifications. The Supreme Court instructed the court of first instance to determine if the buyer's modification was favorable to the seller. If it was, it was immaterial and the acceptance did not become a counter-offer.

In the case at hand, CLAIMANT's modifications were beneficial to RESPONDENT. In her offer, Ms Bupati suggested that potential disputes should not be submitted to an arbitration institution that exclusively deals with palm oil. She specified that *"At least we should select a non-industry related arbitration institution…"*[34].

CLAIMANT's modifications met that expectation. The Arbitration Clause contained in Article 9 of the General Conditions provides for arbitration before AIAC, a non-industry related arbitration institution. Therefore, the addition of the Arbitration Clause was an immaterial modification. Ms Bupati also suggested the application of Uncitral Rules on Transparency[35]. RESPONDENT argued that CLAIMANT did not meet such request. However, this was not because CLAIMANT did not want to accommodate RESPONDENT, but because Uncitral Rules on Transparency have an unsuitable scope of application. In particular, according to Art. 1 of Uncitral Rules on Transparency, these rules apply only to the investor-state arbitration.

Mr Rain, Mr Chandra's assistant, explained this to Ms Fauconnier, Ms Bupati's assistant. Ms Fauconnier accepted the explanation and suggested that Ms Bupati mentioned those rules by mistake[36]. Both Mr Rain and Ms Fauconnier were empowered to conclude the Contract[37].

[33] Kroll/Mistellis/Perales Viscasillas, p. 286; DiMatteo/Dhooge/Greene/Maurer/Pagnattaro, p. 73; Shlechtriem/Schwenzer, p. 357
[34] Claimant's Exhibit C2, p. 12
[35] Claimant's Exhibit C2, p. 12
[36] Claimant's Exhibit C5, p. 18 para. 5
[37] Procedural Order no. 2, p. 49 para. 12

Therefore, RESPONDENT relinquished its request for the application of Uncitral Rules on Transparency and CLAIMANT's modifications were still beneficial for RESPONDENT.

4.2.4. RESPONDENT did not object to the modifications

As already explained, an acceptance with immaterial modifications leads to a binding contract only if the offeror does not object without undue delay. CISG commentators interpret "without undue delay" as a maximum of three working days [38]. Moreover, in the *Rapeseed dregs case,* CIETAC considered objection after five days untimely. If the offeror does not object timely, the contract is considered concluded when the acceptance reaches the offeror, and it includes the immaterial modifications[39].

In the past dealings between Ms Bupati and Mr Chandra, if the terms of acceptance were unacceptable, Ms Bupati would object within one week after obtaining them[40]. This time, CLAIMANT's acceptance with immaterial modifications reached Respondent on 9 April 2020 [41]. Not only that Ms Bupati did not object within one week, she did not object at all. The first "objection" was voiced by Ms Youni Lever, RESPONDNET's CEO, half a year later, when she "terminated all negotiations" with CLAIMANT in order to appease the Equatorianian public[42]. Since this cannot be considered a timely objection, the Contract was concluded on 9 April 2020 with CLAIMANT's General Conditions and Arbitration Clause contained therein forming a part of the Contract.

4.3. If the Contract was not concluded on 9 April 2020, it was concluded a week after

A replay to an offer that purports to be an acceptance but contains additions, limitations, or other modifications that materially alter the terms of the offer is, in fact, a counter-offer. For a contract to be concluded, this counter-offer must, in turn, be accepted by the initial offeror[43].

[38] Schlechtriem/Schwenzer p. 362; Huber/Mullis, pp. 90-91
[39] Kroll/Mistellis/Perales Viscasillas, pp. 291-292; Bianca/Bonell, p. 180
[40] Procedural order no. 2, p. 49 para. 9
[41] Claimant's Exhibit C4, p. 17
[42] Claimant's Exhibit C7, p. 20
[43] Explanatory note, p. 37; Schwenzer/Hachem/Kee, p. 151; KrollMistellis/Perales Viscasillas, p. 283; Schlechtriem/Schwenzer, pp. 359-360

If CLAIMANT's inclusion of General Conditions and Arbitration Clause contained therein was a material modification, then CLAIMANTS's email of 9 April 2020 constituted a counter-offer. RESPONDENT argued that such counter-offer was never accepted since Ms Bupati did not sign the contractual documents and return them to CLAIMANT[44]. However, Ms Bupati's inactivity, in conjunction with her previous practice with Mr Chandra, amounted to an acceptance of CLAIMANT's counter-offer.

According to Art. 18(1) CISG, "*Silence or inactivity does not in itself amount to acceptance."* The term "itself", however, suggests that silence and inactivity can constitute acceptance if there are other circumstances which indicate the offeree's intention to accept the offer. Circumstances which may indicate such intent include, *inter alia*, the practice established between the parties[45].

In the *Filanto v. Chilewich case,* the United States District Court held that extensive course of prior dealings between the parties placed a duty on the seller to object in a timely manner. Since the seller failed to do so, its silence amounted to an acceptance.

In their past dealings, Mr Chandra and Ms Bupati established the following practice. Mr Chandra would send the contractual terms to Ms Bupati for acceptance and signing. If those terms were acceptable to Ms Bupati, she would usually sign them within one week from their receipt. If they were not acceptable, she would object also within a week. If Ms Bupati neither signed nor rejected the terms, the contract was considered concluded and was subsequently performed. Therefore, either by activity or by inactivity, the contract would always be concluded within one week [46].

In the case at hand, Ms Bupati never objected to contractual documents. Therefore, the Contract was concluded at the latest a week after RESPONDENT received the contractual documents from CLAIMANT.

[44] Response to Notice of Arbitration, p. 28 para. 17
[45] Kroll/Mistellis/Perales Viscasillas, pp. 267-268, Schlechtriem/Schwenzer. pp. 339-340; DiMatteo/Dhooge/Greene/Maurer/Pagnattaro p. 60; Sté Calzados Magnanni v. SARL Shoes General International
[46] Claimant's Exhibit C1, p. 11 para. 14; Respondent's Exhibit R3, p. 31 para. 3; Procedural Order no. 2, p. 49 para. 9

Moreover, on 3 May 2020 Ms Fauconnier contacted Mr Rain to specify the payment terms and determine the banks in which RESPONDENT could open a letter of credit[47]. Then, on 30 May 2020, Ms Fauconnier even contacted several of those banks to get their quotations as to the terms for the letter of credit[48]. Such RESPONDENT's conduct is a clear first step in performing its obligations under an already concluded contract and confirms that there are no objections to the contract terms.

5. THE CONTRACT WAS NOT CONCLUDED

5.1. RESPONDENT'S email of 1 April was not an offer

As already stated, for a proposal to constitute an offer Art. 14(1) CISG stipulates two prerequisites. It must be sufficiently definite, and it must indicate the offeror's intention to be bound in case of acceptance[49].

On 1 April, Ms Bupati sent an email to Mr Chandra in which she expressed interest in purchasing a certain amount of RSPO-certified palm oil for a certain price[50]. CLAIMANT argued that this email was RESPONDENT's offer to conclude the Contract[51]. However, this is not true since the email neither indicated RESPONDENT's intention to be bound in case of acceptance (**5.1.1.**) nor was it sufficiently definite (**5.1.2.**).

5.1.1. RESPONDENT had no intention to be bound in case of acceptance

The offeror's intention to be bound distinguishes non-binding negotiations from a binding commitment. If a party has no intention to be bound in case of acceptance of its proposal, the proposal should be considered a mere invitation to make an offer[52].

The offeror manifests its intent to be bound with a proposal that is definite, conclusive, and suitable for acceptance with a simple "yes". On the other hand, the offeror does not intend to be bound if its proposal contains conditions, reservations, raises questions and doubts, or

[47] Respondent's Exhibit R2, p. 30
[48] Procedural Order no. 2, p. 51 para. 23
[49] Explanatory note, p. 37; Huber/Mullis, p. 70; Slechtriem/Schwenzer, p. 269; Bianca/Bonell, p. 133; Kroll/Mistelis/Perales Viscasillas, p. 217; Bender § 3.03; Schlechtriem, p. 50; Enderlein/Maskow, p. 84; Scafom International BV & Orion Metal BVBA v. Exma CPI SA case
[50] Claimant's Exhibit C2, p. 12
[51] Memorandum for Claimant, p. 27 para. 106
[52] Schwenzer/Hachem/Kee, p. 136; Huber/Mullis, p. 71; Schlechtriem/Schwenzer, pp. 282-285; Kroll/Mistelis/Perales Viscasillas, p. 219

makes an invitation for further negotiations[53].

In the case at hand, both the negotiations and RESPONDENT's email of 1 April demonstrate that it did not intend to be bound by its proposal. RESPONDENT was initially held in high esteem by Equatorianian eco-conscious citizens. After it was acquired by Southern Commodities, a company with a dubious reputation, RESPONDENT suffered a public backlash. To retain its goodwill, RESPONDENT had to tread carefully[54]. Thus, at the Summit, when Mr Chandra suggested arbitration, Ms Bupati refused. She explained that arbitration is not an option given "the *wide-spread hostility to arbitration in Equatoriana*.". Mr Chandra was not accommodating when he responded that "*for us* [CLAIMANT] *agreeing on anything but arbitration would be very difficult*"[55].

In the email of 1 April, Ms Bupati also reflected on the issue, declaring that agreeing on Mediterranean law is "*less a problem for us than the submission to arbitration*". She added, "*You are probably aware of the strong opposition of several of the most influential activist groups in Equatoriana to investment arbitration castigating its lack of transparency and the perceived self-interest of the players involved. The fewer potential arguments we give them to attack our business the better*."[56].

Every reasonable person in Mr Chandra's shoes would understand that RESPONDENT did not want to be bound by its proposal, at least not before the Parties agree on an acceptable dispute settlement clause. Thus, the proposal of 1 April was not an offer but a mere invitation for further negotiations.

Ms Bupati also emphasized the non-binding nature of the email by stating "*Could you please prepare the necessary contractual documents for signature and send them to my assistant, Adrienne Fauconnier*"[57]. This suggests that Ms Bupati wanted to read the contractual documents before RESPONDENT finally agrees to the Contract terms. In other words, Ms Bupati invited CLAIMANT to make an offer which, if it meets RESPONDENT's demands, she will accept by signing the contractual documents.

[53] Schlechtriem/Schwenzer, p. 285; Kroll/Mistelis/Perales Viscasillas, pp. 221-223
[54] Claimant's Exhibit C 6, p. 19
[55] Claimant's Exhibit C1, p. 10 para 11
[56] Claimant's Exhibit C2, p. 12
[57] Claimant's Exhibit C2, p. 12

CLAIMANT relied on the fact that RESPONDENT titled its email "*Purchase Offer*"[58]. However, Ms Bupati is a salesperson, so she can hardly be expected to use precise legal terms[59]. Moreover, the content of a document is much more important than its title[60].

CLAIMANT also relied on the previous practice established between Mr Chandra and Ms Bupati[61]. First, as it will be shown, such practice does not bind RESPONDENT. Even if it did, the practice was actually that Mr Chanda makes an offer to Ms Bupati and not *vice versa*[62]. Therefore, even if RESPONDENT was bound by the practice between Ms Bupati and Mr Chandra, the email of 1 April would still not be an offer.

5.1.2. RESPONDENT's email was not sufficiently definite

According to Art. 14(1) CISG, a proposal is sufficiently definite if the essential elements of a future contract are determined or, at least, determinable. In other words, essential elements must be proposed in such a manner that they can be performed once the contract is concluded. Usually, the essential elements of a sales contract are the goods, their quantity, and the price[63].

In line with the principle of party autonomy (Art. 6 CISG), the parties are free to deem other elements essential[64]. Whether this indeed happened depends on the particular circumstances of each case. For example, the negotiations can indicate that parties consider reaching an agreement on a dispute settlement clause essential. In that case, a proposal in which such clause is not determined or determinable would not be sufficiently definite[65].

At the Summit, Ms Bupati and Mr Chandra quickly agreed on the description and quantity of the goods, the delivery terms, and the price[66]. However, when it came to a dispute resolution mechanism, Ms Bupati and Mr Chandra did not see eye to eye. As they both stood their ground, it is obvious that they considered a dispute settlement clause an essential element.

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[58] Memorandum for Claimant, p. 28 para. 112
[59] Respondent's Exhibit R3, p. 31 para 2
[60] Schlechtriem/Schwenzer, p. 269; Kroll/Mistelis/Perales Viscasillas, pp. 217-218
[61] Memorandum for Claimant, p. 29 para. 113
[62] Claimant's Ex C1, p. 9 para. 3
[63] Explanatory note, p. 37; Huber/Mullis, p. 72; Slechtriem/Schwenzer, p. 270; Bianca/Bonell, p. 138; Kroll/Mistelis/Perales Viscasillas, p. 224; Bender § 3.03
[64] Slechtriem/Schwenzer, pp. 113, 272; Kroll/Mistelis/Perales Viscasillas, pp. 224-225; Bianca/Bonell, p. 138; Huber/Mullis, p. 66; Schwenzer/Hachem/Kee, p. 132
[65] Schwenzer/Hachem/Kee, p. 132; Huber/Mullis, p. 72; Bianca/Bonell, p. 138; Kroll/Mistelis/Perales Viscasillas, pp. 224-225; Schlechtriem/Schwenzer, p. 271
[66] Notice of Arbitration, p. 5 para. 5; Procedural Order no. 2, p. 49 para. 13

RESPONDENT's email of 1 April reflected the agreement on the goods and the price reached at the Summit. However, it also stated that RESPONDENT is generally opposed to arbitration and that it might consider it only under two conditions – that the Parties agree on a non-industry related arbitration institution and that they provide for some sort of transparency, for example the UNCITRAL Transparency Rules[67]. Such an open wording statement is neither sufficiently determined nor determinable to be performed once the Contract is concluded. Namely, there are many non-industry related arbitration institutions and many ways to ensure transparency, not to mention the other elements of a typical arbitration agreement. Therefore, the email of 1 April was merely an invitation for further negotiations on a mutually acceptable dispute settlement mechanism.

5.2. Even if RESPONDENT'S email of 1 April was an offer, CLAIMANT did not accept it

As already stated Art. 19(1) CISG provides for a mirror image rule according to which the terms of the acceptance must fully correspond to the terms of the offer. If the offeree attempts to add terms into the acceptance that are not present in the offer, such acceptance turns into a counter-offer[68].

On 9 April, Mr Rain, Mr Chandra's assistant, replied to RESPONDENT's email of 1 April. Mr Rain stated that CLAIMANT accepts all terms contained in RESPONDENT's email and that he inserted them in the attached contractual documents. If RESPONDENT's email of 1 April was an offer, which it was not, this could indeed amount to an acceptance. However, Mr Rain also declared "*In addition, Claimant's General Conditions of sale apply*"[69]. As CLAIMANT's General Conditions were not even mentioned in RESPONDENT's offer, CLAIMANT's email constituted a counter-offer, not an acceptance as CLAIMANT asserted[70]. CLAIMANT relied on an exception to the mirror image rule contained in Art. 19(2) CISG [71]. It is, thus, essential to determine whether the additional terms materially altered the offer.

[67] Claimant's Exhibit C2, p. 12
[68] Huber/Mullis, pp. 88-89; Kroll/Mistelis/Perales Viscalis, p. 280; Schlechtriem/Schwenzer, p. 351; Bianca/Bonell, p. 178; Bridge, pp. 536-537; Schwenzer/Hachem/Kee, p. 151
[69] Claimant's Exhibit C4, p. 17
[70] Claimant's Exhibit C1, p. 12; Memorandum for Claimant, pp. 29-30 paras. 115-116
[71] Memorandum for Claimant, p. 22 paras. 90-92

CLAIMANT argued that its reply of 9 April did not materially alter the terms of the offer because the quality and quantity of goods, the price, and the time of delivery remained the same[72]. However, the exception from Art. 19(2) CISG cannot be applied since Art. 4 (**5.2.1.**) and Art. 9 (**5.2.2.**) of the General Condition materially altered the offer.

5.2.1. Art. 4 of the General Conditions materially altered the offer

Whether the offeree's alterations are material or immaterial primarily depends on their significance for the parties[73]. Accordingly, in *Rapeseeds dregs case,* the CIETAC Arbitral Tribunal considered if the alteration affected the other party's rights and obligations, whereas, in *StencilMaster 1621 case,* the Swiss Commercial Court held that the alteration was material because it deviated from the provisions of an otherwise applicable international convention.

Art. 4 of the General Conditions significantly affected RESPONDENT's rights granted by an international convention – the CISG. It provides that "*In case of any breach of contract, in particular concerning the conformity of the goods, the seller is given two months after being notified by the buyer to remedy such breach. Only if the remedial actions were not successful may the buyer terminate the contract.*"[74]. Simply put, even if CLAIMANT commits a fundamental breach, RESPONDENT would not be allowed, in accordance with Art. 49(1)(a) CISG, to terminate the Contract immediately, but would have to wait for at least two months.

This could be detrimental to RESPONDENT in light of the specific circumstances of the case. Prior to the acquisition by Southern Commodities, RESPONDENT was recognized as "*one of the darlings of the supporters of green economy*" [75]. After the acquisition RESPONDENT's reputation unfoundedly took a big hit which raised concerns about its future[76]. To assure the Equatorianian public of continued devotion to sustainable production Ms Lever, RESPONDENT's CEO, promised in a press conference that RESPONDENT "*would ensure that only RSPO-certified palm*

[72] Memorandum for Claimant, p. 29 para. 114
[73] Schlechtriem/Schwenzer, p. 358; Huber/Mullis, p. 89; Kroll/Mistelis/Perales Viscasillas, pp. 284-285; Schwenzer/Hachem/Kee, p. 152
[74] Procedural Order no. 2, p. 52 para. 31
[75] Respondent's Ex R1, p. 29
[76] Claimant's Exhibit C6, p. 19

oil would be used"[77]. Mr Chandra was fully aware of this before it started negotiating with Ms Bupati[78].

Furthermore, Ms Bupati warned Mr Chandra that due to the role environmental topics play in Equatoriana, palm oil must be RSPO-certified[79]. In RESPONDENT's email of 1 April, Ms Bupati reiterated that it is "*absolutely crucial for us* [RESPONDENT] *that all palm oil delivered is RSPO-certified and that the supply chain is properly monitored*"[80].

After discovering that CLAIMANT was involved in falsifying RSPO certificates, RESPONDENT needed to sever all ties with CLAIMANT as soon as possible[81]. In the event that the Contract was concluded, which is not the case, RESPONDENT should not be forced to wait for additional two months. The reputation which RESPONDENT loses each day due to its association with CLAIMANT will be very difficult to restore. Therefore, Art. 4 of the General Conditions materially altered RESPONDENT's offer and constituted a counter-offer.

5.2.2. Art. 9 of the General Conditions materially altered the offer

As already stated, Art. 19(3) CISG contains a non-exhaustive list of terms that are considered to alter the terms of the offer materially. One of the terms included in the list is the dispute settlement clause[82].

In *Printed works for CD cover case*, the German Court of Appeal stated "*any provisions for the settlement of disputes are always considered as material amendments*". In *Industrial product case*, the ICC Arbitral Tribunal held that if one party makes clear that it finds a certain term to be important, a change in such term is a material alteration.

As already demonstrated, the dispute settlement clause was important not just for one, but for both Parties. In its email, RESPONDENT suggested that it might consider arbitration only if

[77] Respondent's Exhibit R1, p. 29
[78] Claimant's Exhibit C1, p. 10 para. 8
[79] Claimant's Exhibit C1, p. 10 para. 10
[80] Claimant's Exhibit C2, p. 12
[81] Claimant's Exhibit C7, p. 20
[82] Schlechtriem/Schwenzer, pp. 355-356; Huber/Mullis, p. 89; Bianca/Bonell, pp. 180-181; Schwenzer/Hachem/Kee, p. 152; Armacom EBVBA v. Geurts Trucks BV case; Slovenian jurisdiction case

CLAIMANT makes certain concessions[83]. Instead of engaging in meaningful negotiations, CLAIMANT simply referred to its standard Arbitration Clause contained in Art. 9 of the General Conditions[84]. Therefore, this has to be considered as a material alteration.

CLAIMANT argued that the Arbitration Clause was not a material alteration because it was favorable to RESPONDENT[85]. An alteration is indeed immaterial if the offeree had reason to assume that its alterations are acceptable to the offeror[86].

In the email of 1 April, Ms Bupati emphasized that it is essential that the Arbitration Clause provides "*for some sort of transparency, for example applying UNCITRAL's Transparency Rules*"[87]. RESPONDENT needed this because it was already in the public spotlight, and the Equatorianian public was hostile to arbitration[88].

Although, as RESPONDENT later found out, UNCITRAL's Transparency Rules are not suitable for non-investment arbitration, this does not change the fact that RESPONDENT was deeply concerned with transparency[89]. The Arbitration Clause provided arbitration under AIAC rules which stipulate that all matters relating to the arbitral proceedings are confidential[90]. Since the Arbitration Clause did not meet RESPONDENT's condition for accepting arbitration, it was not favorable to it and, therefore, a material alteration.

5.3. RESPONDENT never accepted CLAIMANT's counter-offer

A counter-offer represents a new offer that must be accepted for a contract to be concluded[91]. RESPONDENT never accepted the counter-offer, presumably because it did not meet its expectations for the dispute resolution mechanism. First, RESPONDENT did not sign the contractual documents (**5.3.1.**). Second, RESPONDENT did not indicate its assent in any other way (**5.3.2.**). Third,

[83] Cl's Ex C2, p. 12
[84] Claimant's Exhibit C4, p. 17; Notice of Arbitration, p. 6 para. 14
[85] Memorandum for Claimant, p. 23 paras. 93, 95
[86] Enderlein/Maskow, p. 100; Official Records, p. 24
[87] Claimant's Exhibit C2, p. 12
[88] Claimant's Exhibit C1, p. 10 para. 11; Claimant's Exhibit C6, p. 19
[89] Claimant's Exhibit C5, p. 18 para. 5
[90] Notice of Arbitration, p. 6 para. 14; AIAC rules 2018, rule 16
[91] Explanatory note, pp. 37-38; Schwenzer/Hachem/Kee, p. 151; Kroll/Mistelis/Perales Viscasillas, p. 283; Schlechtriem/Schwenzer, p. 360; Slovenian jurisdiction case

CLAIMANT cannot rely on the practice established between Ms Bupati and Mr Chandra (**5.3.3.**). Fourth, even according to such practice RESPONDENT's behavior would not amount to acceptance (**5.3.4.**).

5.3.1. RESPONDENT did not sign contractual documents

The CISG does not require any particular form of acceptance (Art. 11 CISG). However, the offeror is allowed to restrict acceptance to a particular form. The reasons for this are usually legal certainty and/or evidentiary purposes. If the offeror restricts the form of the acceptance, the acceptance cannot occur in any other form. If it does, the contract is not concluded[92].

In CLAIMANT's counter-offer of 9 April, Mr Rain stated "*I have sent you two signed versions of the contract documents. Could I kindly ask you to sign one copy and return it to me for my files and the necessary paperwork for shipments*"[93]. With that statement, CLAIMANT restricted the form of acceptance. CLAIMANT needed such form to have evidence in its files and to be able to give the documents to the customs authorities[94].

RESPONDENT, however, neither signed nor returned the contractual documents[95]. Considering the size and the importance of the Contract, this could hardly be an oversight[96]. Therefore, the Contract was not concluded.

5.3.2. RESPONDENT did not indicate its assent in any other way

Even if CLAIMANT did not restrict the form of the acceptance, the Contract was still not concluded. According to Art. 18(1) CISG, the offeree can indicate its assent to the offer either by a statement or by its conduct. Nevertheless, silence by itself cannot constitute an acceptance[97].
After RESPONDENT received the counter-offer on 9 April, it remained silent for almost a month[98]. This suggests that RESPONDENT was at least not too enthusiastic about what was

[92] Kroll/Mistelis/Perales Viscasillas, pp. 264-265; Schlechtriem/Schwenzer, p. 359; Bianca/Bonell, p. 166; Schwenzer/Hachem/Kee, p. 146
[93] Claimant's Exhibit C4, p. 17
[94] Claimant's Exhibit C5, p. 18 para. 3
[95] Claimant's Exhibit C1, p. 11 para. 14; Response to Notice of Arbitration, p. 28 para. 17
[96] Claimant's Exhibit C3, p. 13
[97] Kroll/Mistelis/Perales Viscasillas, pp. 265-267; Schlechtriem/Schwenzer, pp. 332-339; Huber/Mullis, pp. 84-85; Bianca/Bonell, pp. 165-167; Schwenzer/Hachem/Kee, pp. 146-147; Schlechtriem, p. 54
[98] Procedural Order no. 2, p. 51 para. 21

offered. When Ms Fauconnier finally broke the silence and contacted Mr Rain, she did not accept the offer. On the contrary, she wanted to resume negotiations about the payment terms and the acceptable banks for opening the letter of credit[99].

That was not an implicit acceptance. An offer could be accepted by conduct if, for example, the offeree opens a letter of credit and, thus, essentially performs the contract[100]. A mere discussion about the terms of the letter of credit, however, still falls within the realm of negotiations.

Ms Fauconnier never even suggested that RESPONDENT felt bound by the Contract. In fact, she wanted to "*change*" the terms of the contractual documents to consider the particularities of RESPONDENT's current situation. She wanted to meet with Mr Rain because "*it is always easier to negotiate open issues in person*"[101].

Most importantly, Ms Fauconnier wanted to amend the arbitration section in clause 7 of the contractual documents by adding at least a reference to UNCITRAL Transparency Rules. This shows that RESPONDENT could still not accept the lack of transparency in arbitration. Although Mr Rain explained that those rules are unsuitable, he did nothing to offer an alternative[102].

Finally, when Mr Rain reminded Ms Fauconnier to return the signed version of the Contract, she replied that she would "*look into that*"[103]. This sounds more like an expression of a polite refusal than of an eager acceptance. It does not surprise that she never got back to him. The next time RESPONDENT broke its silence was on 30 October when Ms Lever terminated all negotiations with CLAIMANT[104].

[99] Respondent's Exhibit R2, p. 30
[100] Schlechtriem/Schwenzer, pp. 336-337; Kroll/Mistelis/Perales Viscasillas, pp. 265-267; StencilMaster 1621 case; Magellan Int'l Corporation v. Salzgitter Handel GmbH case
[101] Respondent's Exhibit R2, p. 30
[102] Claimant's Exhibit C5, p. 18 para. 5
[103] Claimant's Exhibit C5, p. 18 para. 6
[104] Claimant's Exhibit C7, p. 20

5.3.3. CLAIMANT cannot rely on the practice established between Ms Bupati and Mr Chandra

CLAIMANT argued that there is a practice between the Parties which allows for a contract to be concluded despite the silence. CLAIMANT was referring to several occasions when Ms Bupati did not sign contractual documents, but the contracts were nevertheless concluded[105].

According to Art. 9(1) CISG, parties are bound by practices they have established between themselves. "Practice" is a course of conduct established between participants in a contract through a certain time and a number of contracts[106].

Between 2010 and 2018, Ms Bupati and Mr Chandra indeed established a certain course of conduct by concluding around 40 contracts[107]. However, during that period, Ms Bupati was not working for RESPONDENT, but its parent company, Southern Commodities[108]. RESPONDENT and Southern Commodities are independent legal entities[109]. Therefore, participants in those 40 contracts were CLAIMANT and Southern Commodities, and the practice was established between them. Since there has never been any contractual relationship between CLAIMANT and RESPONDENT, there is also no established practice between them[110].

Furthermore, a course of conduct can be considered a practice only if it creates an expectation that it will be continued. When circumstances change, there is no such expectation, and the established practice ends[111]. In *Lycra-type fabric case* the French Court of Appeal held that, due to the change in the object of the contract, the offeror could not invoke the previously established practice with the offeree.

This is exactly what happened in the case at hand. First, the object of the sales contract changed. All previous contracts concluded by Ms Bupati and Mr Chandra were for the sale of palm kernel oil and not for the sale of palm oil[112]. Although this might sound similar at first, CLAIMANT's customers buy palm kernel oil to manufacture foodstuff and palm oil for industrial application[113].

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[105] Memorandum for Claimant, p. 30 paras. 117-118
[106] Schlechtriem/Schwenzer, p. 185; Kroll/Mistelis/Perales Viscasillas, p. 157; Bridge, p. 525; Bianca/Bonell, p. 106; Schwenzer/Hachem/Kee, pp. 310, 313
[107] Respondent's Exhibit R3, p. 31 paras. 2-3; Claimant's Exhibit C1, p. 9 para. 2
[108] Claimant's Exhibit C1, p. 9 para. 2; Respondent's Exhibit R3, p. 31 para. 2
[109] Procedural Order no. 2, p. 48 para. 4
[110] Response to Notice of Arbitration, p. 28 para. 18; Procedural Order no. 2, p. 48 para. 3
[111] Schlechtriem/Schwenzer, pp. 185-186; Honnold, p. 175; Schwenzer/Hachem/Kee, p. 315
[112] Claimant's Exhibit C1, p. 9 para. 2; Procedural Order no. 2, p. 48 para. 2
[113] Procedural Order no. 2, p. 48 para. 2

Second, the quality of the goods changed. During negotiations, Ms Bupati made clear to Mr Chandra that RESPONDENT is operating in a completely different political and commercial environment than Southern Commodities. In Equatoriana environmental topics play an important role, which is in stark contrast to the attitude she had experienced while working for Southern Commodities in Ruritania[114]. Consequently, all 40 previously concluded contracts were for the purchase of non-RSPO-certified palm kernel oil. However, this time it was "*absolutely crucial*" for the palm oil to be RSPO-certified[115].

Third, there is a change in the duration of the sales contract. This is Ms Bupati's and Mr Chandra's first five-year supply contract. Previously they concluded only short term contracts four to five times per year[116].

Therefore, even if the practice established between Ms Bupati and Mr Chandra when she represented Southern Commodities could be attributed to CLAIMANT and RESPONDENT, CLAIMANT still cannot rely on it because it ended due to the changes in circumstances.

5.3.4. Even according to the practice established between Ms Bupati and Mr Chandra RESPONDENT's behavior would not amount to acceptance

In deciding whether a certain conduct constitutes a binding practice, the Belgian Court of Appeal considered the number of contracts in which it occurred in relation to the overall amount of concluded contracts. As a result, the Court held that different conduct in 5 out of 43 contracts is too small of a number to be considered a practice[117].

In the past dealings between Ms Bupati and Mr Chandra, she signed and returned 35 contracts. Ms Bupati did not sign only 5 out of 40 concluded contracts[118]. Therefore, those several occasions to which CLAIMANT is referring did not constitute a practice. The practice was actually that Ms Bupati signs the contracts, and the lack of signature was an exception.

[114] Claimant's Exhibit C1, p. 10 para. 10; Response to Notice of Arbitration, p. 26 para. 5
[115] Response to Notice of Arbitration, p. 26 para. 6; Claimant's Exhibit C2, p. 12
[116] Claimant's Exhibit C1, p. 9 para. 2
[117] Eurochampignon BVBA v. Nawrot sp. z o.o. case
[118] Claimant's Exhibit C1, p. 9 para. 3; Respondent's Exhibit R3, p. 31 paras. 2-3

Moreover, even on those five occasions, the contracts were not concluded by mere silence. Southern Commodities always opened a letter of credit following the receipt of contractual documents[119].

In the present case, RESPONDENT never opened a letter of credit. Although it negotiated with CLAIMANT about the acceptable banks and even contacted a few of them, it never took the final step. To avoid any confusion about its intent, RESPONDENT made clear that those negotiations were just a precaution since it had issues with another supplier regarding payment terms[120]. It is safe to assume that RESPONDENT never opened a letter of credit because CLAIMANT did not accommodate its wishes concerning the dispute resolution mechanism. In any case, RESPONDENT did not accept the counter-offer.

6. ZAKLJUČAK

Tužiteljeva pozicija je da je ugovor sklopljen 9. travnja 2020. godine kada je gosp. Rain e-mailom prihvatio ponudu sadržanu u e-mailu gđe. Bupati od 1. travnja 2020. godine, a podredno, tjedan dana kasnije sukladno praksi uspostavljenoj između gđe. Bupati i gosp. Chandrae. Tužitelj tvrdi da je e-mail od 1. travnja 2020. godine ponuda jer su svi bitni element kupoprodajnog ugovora (cijena, predmet kupoprodaje i količina), sukladno čl. 14. CISG-a, bili određeni. Također, tvrdi da je volja za sklapanjem ugovora bila izražena time što je navedeni e-mail nazvan ponuda i što je gđa. Bupati izrazila velik interes tuženika za sklapanjem ugovora. Tuženik, oslanjajući se na stranačku autonomiju iz čl. 6. CISG-a, osporava da je taj e-mail ponuda jer je strankama bitan element spornog ugovora bila i arbitražna klauzula oko koje se, prema tuženiku, stranke nisu nikada uspjele usuglasiti. Tužitelj, zatim, smatra e-mail od 9. travnja 2020. godine prihvatom jer njegov zastupnik, gosp. Rain, u njemu izričito navodi da prihvaća ponudu, dok upućivanje na vlastite opće uvijete poslovanja smatra nebitnim dodatkom koji, stoga, ne može pretvoriti namjeravani prihvat u protuponudu. Tvrdi da opći uvjeti poslovanja nisu dodatak koji bitno utječe na ugovor jer se o njima pregovaralo, jer su bili sastavni dio poslovne prakse uspostavljene između gđe. Bupati i gosp. Chandre te jer je sporna arbitražna klauzula sadržana u njima bila u skladu sa zahtjevima sadržanim u navodnoj ponudi gđe. Bupati.

[119] Procedural Order no.2, p. 49 para. 10
[120] Procedural Order no. 2, p. 51 paras. 22-23; Respondent's Exhibit R2, p. 30; Notice of Arbitration, p. 5 para. 8

Tuženik sve izneseno logično osporava jer, prema, doduše, oborivoj presumpciji iz čl. 19. CISG-a, dodatak arbitražne klauzule sadržane u općim uvjetima poslovanja je bitan dodatak koji pretvara željeni prihvat ponude u protuponudu. To potkrepljuje sudskom i arbitražnom praksom prema kojoj je svaki dodatak, a osobito arbitražna klauzula, koji je barem za jednu stranku relevantan, bitan te pretvara namjeravani prihvat u ponudu. Također, tuženik tvrdi da se tužitelj ne može osloniti na praksu uspostavljenu između gđe. Bupati i gosp. Chandre jer se praksa, sukladno čl. 9. CISG-a, uspostavlja između stranaka ugovora, a stranke su u svim ranijim ugovorima bile tužitelj i tuženikovo društvo majka, a ne tuženik. Podredno, tužitelj tvrdi da je praksa, čak i da se tužitelj na nju može osloniti, prestala zbog bitno promijenjenih okolnosti. Tuženik dalje tvrdi da ta protuponuda nikada nije bila prihvaćena jer, od strane tužitelja, određenom obliku prihvata nije bilo udovoljeno te da nijednom naknadnom izjavom i postupanjem tuženik nije očitovao svoju volju za sklapanjem ugovora.

Uzevši u obzir sve navedeno, smatram da, iako je postojala suglasnost oko objektivno bitnih elemenata kupoprodajnog ugovora iz čl. 14. CISG-a, ugovor između tužitelja i tuženika nikada nije bio sklopljen. Jedno od glavnih načela CISG-a je stranačka autonomija iz čl. 6. CISG-a, a ona dopušta strankama da same odrede koji su im sastojci ugovora o kupoprodaji bitni. Obje stranke su od početka pregovora naglašavale važnost postizanja sporazuma oko mehanizma rješavanja sporova. Tužitelj je inzistirao na arbitraži, dok tuženik na državnim sudovima ili, barem, arbitraži koja je transparentna. S obzirom da stranke nikada nisu uspjele pomiriti razlike oko tog subjektivno bitnog elementa ugovora o kupoprodaji, ugovor nikada nije bio sklopljen.

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3. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration iz 2014.

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2. **Eurochampignon BVBA v. Nawrot sp. z o.o. case**-Hof van Beroep Gent (Court of Appeal Ghent), CISG online 2291,13 January 2010.
3. **Ford Escort Cabrio case**-Court of Appeal Naumburg, CISG online 512, 27 April 1999.
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5. **Industrial product case**-ICC International Court of Arbitration, CISG online 1173
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