Preface

The China International Economic and Trade Arbitration Commission ("CIETAC") is one of the major permanent commercial arbitration institutions in the world.

CIETAC was set up in April 1956 in accordance with the *Decision Concerning the Establishment of A Foreign Trade Arbitration Commission Within the China Council For the Promotion of International Trade* adopted on 6 May 1954 at the 215th session of the Government Administration Council. Since then, for the first time in Chinese history, an independent and impartial arbitration institution for hearing international commercial disputes has emerged, starting the course of practical exploration of foreign-related arbitration in China.

Since its inception, CIETAC has focused on providing high-quality arbitration services for international commercial disputes. Even before the reform and opening up of China, CIETAC had already concluded a large number of cases in English and other foreign languages. After the reform and opening up, with China's increasingly close foreign economic relations, the number of international commercial arbitration cases received by CIETAC, the value of the subject matter and the number of nationalities of the parties have all increased significantly. During the period 2000-2021, the total number of foreign-related cases handled by CIETAC is 10,753, and the average number of foreign-related cases handled annually is nearly 500. In 2021 alone, 636 foreign-related cases were accepted, including 61 cases in which both parties were foreign and 109 cases in which the parties agreed to apply English or Chinese-English language; the cases involved 93 countries and regions, of which the parties came from 74 countries and regions; the parties agreed to apply Hong Kong law, English law, Dutch law, Greek law, Philippine law, Cambodian law, Kazakhstan law and other foreign laws to deal with the disputes; the amount in dispute in foreign-related cases was RMB 57,352.22 million, accounting for 46.55% of the total amount in dispute, and the average amount in dispute in each case reached RMB 90,176,400.

In order to better handle international commercial disputes, CIETAC has built an international team of arbitrators, with 1,897 arbitrators from 144 countries and regions, covering six continents, thus realizing the globalization of the team of arbitrators. CIETAC arbitrators are highly professional, international and authoritative in their hearings and decisions, and are highly appreciated by both Chinese and foreign parties. In addition, the *CIETAC Arbitration Rules* have been revised eight times, fully absorbing and learning from

international advanced concepts, while continuously innovating and creating with Chinese practice, paving a broad road for international commercial arbitration in China.

Over the years, the arbitral awards of CIETAC have been widely recognized and enforced worldwide, forging the credibility and influence of Chinese arbitration with numerous examples. In May 2021, CIETAC was ranked as one of the top five most popular arbitration institutions in the world by an authoritative international arbitration research report. It is the first time an arbitration institution in China has been ranked among the top five, reflecting the recognition and trust of the international arbitration community and arbitration users in the rule of law in Chinese arbitration.

In order to better summarize the experience of international commercial arbitration cases in the past, under the premise of strictly observing the confidentiality of information related to arbitration cases, CIETAC has conducted a systematic review and summary of foreign-related arbitration cases concluded in English from 2000 to 2021, from which 17 cases have been selected and the awards have been collected into this book. The issues in dispute cover sale and purchase of goods, investment and financing, insurance, cooperative development and licensing, etc., with a view to showing the basic appearance and development of international commercial arbitration cases in China to the arbitration practitioners and arbitration users.

The arbitral tribunals of the cases selected are diverse in composition, and the arbitrators from different jurisdictions and cultural backgrounds fully demonstrate their individual characteristics in the course of the hearings and awards, resulting in a variety of award forms and styles. By presenting the different forms and styles of awards, this book hopes to provide an opportunity to promote comparative study of Chinese and foreign arbitration cases and to promote cultural exchange in international arbitration.

Due to limited experience and time, this book inevitably may have room for improvement, and we sincerely invite the readers to criticize and correct.

In the future, CIETAC will continue to uphold the concept of international arbitration, contribute valuable practical experience in foreign-related arbitration, promote the further enhancement of the credibility of Chinese arbitration, and contribute to the development of Chinese arbitration to the center of the world stage in the new era.

CIETAC

December 2022

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CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Chinese A Machinery Corp.

Chinese B Cereal & Oil Co.,

Chinese C Harbour Bureau

Claimants

v.

British D Materials Ltd.

Respondent

Matter for arbitration: Disputes over ship unloader sales contract

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

1. The China International Economic and Trade Arbitration Commission (hereinafter referred to as "the Arbitration Commission" or "CIETAC") accepted a dispute arising from the Terms and Conditions of Contract for Simporter Grain Ship Unloader dated June 1996 (hereinafter referred to "the Contract") signed by and between Chinese A Machinery Corp. (hereinafter referred to "Company A") (the Buyer), Chinese B Cereal & Oil Co., (hereinafter referred to "Company B") and Chinese C Harbour Bureau (hereinafter referred to "Bureau C") (the End-users) (jointly referred to "the Claimants") as one party and British D Materials Ltd. (hereinafter referred to "the Respondent" or "Company D") as the other party. The Arbitration Commission took cognizance of the dispute based on the arbitration clause incorporated in the Contract, and the written arbitration application filed by the Claimants in November 2001. The *CIETAC Arbitration Rules* effective from 1 October 2000 shall be applied to the present case.

2. The dispute was referred to the Arbitration Commission pursuant to Clause 24.4 of the Contract. It states as follows:

   "24.4 Formal Arbitration

   Any dispute which is referred to formal arbitration subsequent to the precedent steps outlined in Clause 24.1 shall be settled by arbitration in Beijing conducted by the China International Economic and Trade Arbitration Commission in accordance with its Arbitration Rules/procedures, by three arbitrators selected in accordance with the said Rules. Unless otherwise specified herein:

   (A) the arbitration award given by the arbitrator(s) shall be final and binding on the Parties to the Contract. Neither party shall seek recourse to a law court or other authorities to appeal for revision of the decision.

   (B) the cost of arbitration shall be borne by the losing party; unless otherwise awarded by the arbitrator(s); and

   (C) the official language of the arbitration shall be English."

3. A Notice of Arbitration was sent to the Respondent in November 2001 by the Secretariat of the Arbitration Commission. Within the time limit set up in the said Notice, the Respondent filed with the Arbitration Commission a Statement of Defense and Counterclaim.

4. In March 2002, an Arbitration Tribunal was formed consisting of X, the Presiding Arbitrator, appointed by the Chairman of the Arbitration Commission in conformity with the relevant provisions of the *Arbitration Rules*, Arbitrator Y appointed by the Claimants, and Arbitrator Z appointed by the Respondent.

5. After an examination and consideration of the written submissions by the Claimants and the Respondent, an oral hearing was held in Beijing by the Arbitration Tribunal on May 2002. Both the Claimants and the Respondent were represented by their authorized arbitration attorneys at the hearings, who made oral statements and arguments, replied to the questions of the Tribunal. After the hearings, both parties submitted written supplementary documents to the Arbitration Commission.

6. According to Article 52 of the *Arbitration Rules*, an award should be rendered by the Tribunal no later than December 2002. However, because of the complexity of the case, two extensions of the time limit for rendering an award were granted by the Secretary General of the Arbitration Commission at the requests of the Tribunal, the first extension expiring in March 2003 and the second extension expiring in May 2003.

7. In accordance with the arbitration clause contained in the Contract, the language of this arbitration is English.

8. The case has now been concluded. Having carefully and conscientiously considered the submissions and materials before it, having conferred with each other, the Tribunal hereby renders the following award pursuant to Article 56 of the *CIETAC Arbitration Rules*.

I. FACTS AND DISPUTES

A. Statements by the Claimants

9. In the Application for Arbitration in October 2001, Claimants made their statements as follows.

10. In June 1996, the Claimants, a group consisting of the Buyer Company A and the End-users Company B and Bureau C, concluded a Contract with the Respondent Company D as the Seller to buy one unit of 800TPH Simporter grain ship unloader for the use in berth of Terminal M, a port in China (hereafter referred to "Terminal M"). The parties to the Contract have performed most of their duties and obligations.

The Simporter was installed in the above-mentioned berth in November 1997 and the parties conducted two trial operations and acceptance tests in May and July 1998 respectively. However, the results thereof did not fulfill the guarantees and acceptance criteria, i.e., rated unloading capacity of 800 tons per hour, promised by the Respondent. In February 2000, the parties conducted another trial operation but still there derived no satisfactory results.

11. On 7 March 2000, the Claimants informed the Respondent that there would be a vessel with 53,000 tons of wheat arriving at Terminal M on 15 March 2000 and asked the Respondent to send its technicians to the site to retest the rated loading capacity in accordance with its Commitment Letter issued in September 1998. The Respondent did not give any response. After waiting for 14 days and seeing no technicians coming, the Claimants started the fourth trial operation alone by themselves on 21 March 2000. On around 25 March 2000, great deformation occurred on the whole elevator leg of the Simporter. The front leg bucked at about 3 metres away from the top and the back leg at about 2 metres away from the top and the connection of bracing to the leg deformed and partially broken. The gap between the front leg and the feeder was 40 mm.

12. In the afternoon of that day, the Claimants informed the Respondent of the damage occurred to the Simporter. The Respondent sent technicians to Terminal M to conduct site inspection on 31 March and 1 April 2000. On 30 April 2000, the Respondent gave the Claimants a report on site visit to Terminal M during 31 March and 3 April 2000, alleging that the cause for the damage to the elevator leg was the misuse thereof by the Claimants and refused to take any responsibility.

13. To identify the exact cause for the damage, the Claimants entrusted the university F to analyze the structure of the elevator and the exact cause for the damage on 19 June 2000. According to the Analysis Report 2 [August 2000], the cause for the damage is the design defect originally existing in the elevator.

14 On the basis of this report, the Claimants requested the Respondent to take responsibility for the damage and redesign, manufacture and reinstall the elevator leg at its own cost. In December 2000, the parties negotiated on this problem in City G but did not reach any agreement. Under such circumstances, the Claimants had to entrust Chinese Science and Trading Company Ltd. E (hereinafter refereed to "Company E") to repair the elevator leg. Up to then, the Claimants had suffered a total loss of more than RMB 1,400,000 for the damage.

B. Defenses by Respondent

1. In its Answer to Application for Arbitration in January 2002, the Respondent made defense as follows.

15. On 7 March 2000, Company D were advised that certain repair works had been undertaken by the Claimants themselves without reference to Company D per Claimants' fax on that date. At the same time reference was made to a future vessel 53,000dwt that would arrive at Terminal M; however, due to the short notice given and pressures of other contracts, Company D was unable to send its technicians to the site.

16. As soon as the damage was reported to Company D, engineers were dispatched to investigate the situation, in disregard to other contract work, arriving in Terminal M on 31 March 2000. Following the site inspection, Company D reviewed all aspects of the incident, including its own design, in order to arrive at a reason for the accident.

17. The conclusion of Company D's investigation using an independent Structural Design Company was that the elevator leg of the unloader had received a horizontal force at the feeder of a magnitude 2.25 times greater than that capable of being generated by the prime mover of the leg, i.e., the hydraulic cylinders. Thus, the damage could not have been a result of the unloaders systems but must be a result of a significant externally applied force.

18. Company D has been advised that there was initial damage to the elevator leg prior to the total failure and that there was an attempt to repair this by the Claimants without reference to Company D, the designers, and obviously therefore without Company D's approval. The quality of this initial repair work to what appeared to be a minor failure was found to be very poor, with welding lacking penetration, and this was then a significant contributory factor in the final failure of the elevator leg. Apparently, there was no attempt made by the Claimants to investigate and establish why this initial damage had occurred.

19. With reference to the report carried out by University F, Company D cannot accept the report on the basis of the wrong "assumptions" made by University F, not least of which being that their analysis was based on a fully welded structure whereas in fact the structure had bolted bracing members. This fact alone has a significant impact on the finite analysis resulting in a totally wrong conclusion. This report is clearly

flawed due to generalizations and assumptions made as referred to therein above already. Company D did at the time of the accident immediately make an independent structural review to the only conclusion that maloperation was the direct cause of the accident and the initial damage due to maloperation was further compounded by the poor and inadequate attempts at a repair undertaken by the Claimants. These inadequate attempts at a repair then contributed to the final catastrophic failure of the leg.

20. In respect of the repairs that have now been carried out by Company E, Company D has not been approached in any way concerning the repairs undertaken by Company E.

2. In its Skeleton Arguments on 29 May 2002, the Respondent made further defenses as follows.

(i) The design of Simporter M is in conformity with the contract and in accordance with internationally accepted standards.

21. First of all, the Simporter ship unloader provided for Terminal M (hereinafter referred to "Simporter" or "Simporter M") has been manufactured in accordance with the technical specifications contained in the Contract which was approved by the Claimants. Therefore, Simporter M is in conformity with the contract. The Contract between the Claimants and Company D contains an attachment entitled "Technical Specifications" which is 148 pages and provides full details of the design of the Simporter including the elevator leg. As part of the Contract, the Technical Specifications were signed and agreed between the Claimants and Company D. Simporter M actually delivered to the Claimants is in conformity with the Technical Specifications agreed between the parties. The Claimants do not contend that Simporter M actually delivered is not in conformity with the Contract. On the premise that Simporter M is in conformity with the Contract, the Claimants' claims against Company D lack grounds legal or contractual and should be dismissed.

22. Prior to the unit delivered for Terminal M, four other Simporters had been supplied to the Ports of H and I in China and to the Respondent's knowledge these units are still in operation today, some 17 years after their delivery. The basic design concept for Terminal M in principle is similar to previous Simporters already in operation.

23. The design of this particular Simporter M is correct, is in conformity with the Contract, and is in accordance with international accepted standards. At the request of the Claimants after the accident, Company D and independent structural design specialist paid a site visit to the Terminal M port. Following the on-site-inspection, a review of relevant part of the design was carried out both internally within Company D and by the main system suppliers. The Design was verified, and relief valves test certificates were checked to ensure that the actual on-site-setting was as designed, and that the hydraulic cylinders could not import overloads during normal operation. In this respect, Company D has submitted a technical report which was prepared by a design specialist. Structural analysis revealed that the elevator leg structure as designed was more than adequate to withstand the normal forces that can be applied to in its normal operation.

(ii) Comments on University F's Report (the Claimants' Technical Report).

24. The Claimants submitted a technical report prepared with assistance from the University F. Company D firmly believes that the Claimants' Technical Report is flawed in several essential aspects leading to the wrong conclusion.

25. The Claimants' Technical Report is flawed because it is based on a wrong assumption. The Claimants' Technical Report assumed that the diagonal tie bracings of the elevator leg are welded to the elevator leg structure, while in fact, the diagonal tie bracings are connected to the elevator leg by bolts. In other words, the Claimants' Technical Report assumed a welded rigid structure, while in the reality the elevator leg is a bolted structure will have the effect of releasing stress concentration on the bracing connections. The Claimants' Technical Report used a model that is essentially different from the real configuration of the elevator leg, therefore the Claimants' Technical Report is irrelevant and leading to a wrong conclusion.

26. The Claimants' Technical Report is flawed also because it used a model which assumed that the feeder at the tip of the elevator leg is positioned. This is not true in the operation of Simporter M. This wrong assumption necessarily leads to the prediction of very high stress concentration.

27. The Claimants' Technical Report is flawed further because the model they utilized in their analysis failed to take into consideration the interaction of the kicking cylinders and the luffing cylinders. When the feeder is subject to force, not only the kicking

cylinders will react to this force but also the luffing cylinders and the luffing will substantially reduce the stress concentration.

(iii) The accident was due to improper maintenance of Simporter M by the Claimants.

28. It is stated in the Claimants' Technical Report that "*[f]urthermore, as the site workers advised, before this accident the damage of the connections of the bracings to the leg had happened and caused simple welding repairs*".

29. The Respondent was not informed of this initial damage to the elevator leg when it occurred and the "simple welding repair" was done by the Claimants without reference to the Respondent. The Respondent later found that the quality of this initial repair work was very poor, with welding lacking penetration, and this was then a significant contributory factor in the final failure of the elevator leg.

30. Company D appointed structural specialist who found that "*[t]he diagonal tie bracings of the elevator leg, which form the main lattices framework of the structure and give had also failed. Most of the tension members had torn away from the supporting bracket. Close examination of these tension failures revealed that extensive weld repairs had recently been carried out on these members and in fact it was these weld repairs that had failed*".

(iv) The accident was due to maloperation of Simporter M by the Claimants.

31. Company D was not informed of the previous damage to the elevator leg, therefore Company D is not clear when that incident happened and under what circumstances the incident happened and what kind of damage had been caused to the Simporter. But this shows that the Claimants had used Simporter M without notice to Company D and without attendance from Company D and the Claimants had used the Simporter before it is properly commissioned. This is maloperation on the part of the Claimants.

32. After the initial damage, the Claimants did not reveal this fact to Company D but tried to repair the initial damage by simply welding which repair turned out to be of poor quality with welding lacking penetration. The Claimants in their fax to Company D dated 7 March 2000 even said they had tried to reform the Simporter. Company D has not been made aware of the extent of such reform to the Simporter, thus unable to assess the impact on the safe operation of the Simporter. Company D believes that

such improper repair and reform to the Simporter by the Claimants without reference to Company D have released Company D of its liabilities under the warranty given under the contract.

33. Evan after the initial damage to the elevator leg, the Claimants failed to give sufficient prior notice to Company D and continued to use the Simporter to carry out ship unloading in March 2000, which led to the ultimate failure of the elevator leg. This is maloperation on the part of the Claimants. The Claimants alleged that Company D has not responded to their request for Company D's attendance in March 2000. This is not true. Company D did respond promptly to their fax of 7 March 2000 by a fax dated 10 March 2000 and a fax dated 21 March 2000, pointing out that due to the short notice Company D was unable to mobilize its personnel to attend the ship unloading. According to the Commitment Letter, Company D is entitled to at least 14 days prior notice to attend trial operation of the Simporter, but the Claimants failed to give Company D sufficient prior notice resulting in that Company D was unable to mobilize its personnel to attend the trial operation.

34. The Simporter is manufactured for unloading ships up to 50,000DWT. This is stipulated in the Technical Specifications of the contract. However, in March 2000 when the damage occurred to the elevator leg, the Claimants were using the Simporter to unload a ship of 80,000DWT. This is beyond the specifications contemplated by the parties when designing and manufacturing the Simporter. This is maloperation on the part of the Claimants.

C. Arguments Over Issues Relating to the Accident and the Damage of the Elevator Leg

35. On 13 May 2002 the Claimant made a series of submissions as objections to the Respondent's defenses; on 29 June 2002 the Respondent made item by item answers to Claimants' objections.

1. Claimants' opinion

36. The damage to the elevator leg is due to neither maloperation and repair nor a compound result thereof.

Respondent's opinion

37. Company D firmly believes that the accident and the resulting damage to the elevator leg is due to maloperation compounded by improper repair and maintenance on the part of the Claimants.

(i) Claimants' opinion

38. The Respondent only gave one-to-one training to the operators; however, the Respondent did not supply any textbooks, records or other written materials to them, and the unloader used as practice training model in Dalian by the Respondent was not in the same generation with that one in Terminal M. The Respondent did not give any training about the operation of this Simporter in Terminal M to the operators. Therefore, if the operators had any maloperations in operating the Simporter, the Respondent shall be fully responsible for the results thereof for it had not fulfilled its obligation of providing sufficient training.

Respondent's opinion

39. Company D firmly believes that one-to-one training is the best way to give instructions to the operators. In addition to this one-to-one training, Company D has provided the Claimants with the User's Guide as the Claimants admitted. The correct name for the User's Guide is "Bureau C Simporter M Operation & Maintenance Manuals", supplied in several volumes, which was provided to the Claimants together with delivery of the equipment. The User's Guide contains necessary instructions and information about the proper use, operation and maintenance of the equipment. The fact that the other ship unloader used for the one-to-one training is not the same generation with this Simporter M does not have much significance, because Simporter M was designed and manufactured on the same concept design as of the other ship unloader used for the one-to-one training. Simporter M is of a "new generation" only because it is designed and manufactured on the same concept design but by taking into consideration the materials available and the actual working conditions in Terminal M port and incorporating improvements. There is not a revolutionary technical change in the design or manufacturing of this "new generation". The training was satisfactorily completed in accordance with the Contract as the memoranda signed by the representatives of the Claimants had acknowledged that the training was satisfactory. Besides, Company D was ready to provide further on-job training according to the terms of the contract,

but the Claimants did not give Company D this opportunity to perform such on-job training. Appendix 4 to the Technical Specification contains provisions for the on-job training, which says "On job training, running simultaneously during commissioning for 30 days". Clearly "on job" would be performed during the commissioning of the equipment. However, because the Claimants have not provided the "necessary vessels for the trial operation at not more than two (2) weeks intervals", and the land-based conveyor, which was provided by the Claimants, failed to provide sufficient capacity for the trial operation, initial attempts for the trial operation were abandoned. Another attempt at trial operation in January 2000 was also abandoned, because the cargo was not sufficient in quantity to carry out the trial operation. Therefore, the commissioning of the Simporter has never been completed as required by the Contract due to circumstances attributable to Claimants.

(ii) Claimants' opinion

40. The Claimants find no warnings that the elevator leg cannot suffer horizontal force, i.e., swing, in the User's Guide provided by the Respondent. On the day when the damage occurred, the operator was operating the Simporter in such a correct way exactly as the Respondent had taught and the Claimants found no maloperation records. In fact, no horizontal force could come into being through the operation of the operator since he was not moving the elevator leg directly and the Simporter is wholly computer-controlled although he might destroy the controlling instruments. Therefore, the conclusion of the Report submitted by the Respondent is not in conformity with the actual situation and thus unreliable.

Respondent's opinion

41. It is not that the elevator leg cannot sustain any horizontal force, but that the elevator should never be subjected to excessive external horizontal force. Simporter M is designed and manufactured for unloading ships up to 50,000DWT, the Claimants were using it for unloading a ship of 80,000DWT when the damage occurred to the elevator leg. There are evidence before the Tribunal showing that the damage to the elevator was caused by maloperation on the part of the Claimants:

    (a) According to the Claimants' fax to Company D dated 7 March 2000, there had been some initial damage to the elevator leg before 7 March 2000. The Claimants did not report this to Company D, but instead they repaired the elevator leg

themselves without informing Company D. The "simple repair", as Company D later found, was not adequate and was of very poor quality with the welds lacking penetration, thereby weakening the elevator leg, such that in service, the welds carried out by the Claimants failed causing subsequent damage to the elevator leg. This "simple repair" was also recorded in the Claimants' Technical Report — This is maloperation on the part of the Claimants.

(b) In the same fax dated 7 March 2000, Claimants even said that they had "made some reform for Simporter". Company D has not been made aware of the extent of such "reform" to the Simporter had been undertaken by the Claimants, but Company D contends that the Claimants are not competent to make any "reform" to the Simporter. Since they have reformed the Simporter without prior notice to Company D, Company D accordingly have been relieved of any warranty liability for the Simporter. Company D should not be held responsible for a product that has been reformed by its user, not to mention that the reform and the damage occurred more than one year after the expiration of the contractual warranty period. This is maloperation on the part of the Claimants.

(c) During the hearing on 29 May 2002, the Claimants' representatives further admitted that there was another damage to the elevator leg on the day just before 23 March 2000 when the elevator leg finally failed. Again, the Claimants did not give notice to Company D about this second-time damage to the elevator leg. Company D could not know whether this time the Claimants had repaired the damage or how they had repaired the damage, but from later events Company D can say for sure that the Claimants continued to use the Simporter despite these initial damages. This is severe maloperation on the part of the Claimants.

(d) Simporter M was designed and manufactured in accordance with the Technical Specifications signed by the parties as part of the Contract. The Technical Specifications specify on page 22 that "*[t]he Simporter will have sufficient reach to enable it to command the hatches of ocean-going bulk carrier vessel of up to 50,000DWT*". This is what the Claimants ordered from Company D, and Company D carried out the design and manufacturing of Simporter M in accordance with the Technical Specifications. But in practice, the Claimants were using the Simporter for unloading a ship of 80,000DWT when the damage actually occurred. Using Simporter M which was designed for unloading ships of up to 50,000DWT to unload a ship of 80,000DWT, because of the bigger size

of the vessel, this in turn may have caused the damage to the elevator leg. This is maloperation on the part of the Claimants.

(iii) Claimants' opinion

42. As the name implies, a ship unloader can only be used to unload cargos in ships on the sea, while as a matter of fact, there will unavoidably waves on the sea. Therefore, in accordance with the Report of Defense, if this Simporter cannot bear horizontal force, it is not qualified to its use purpose and it has serious design defect in that it has no protective devices to prevent such force in such a way as it will stop working automatically as soon as it receives over-rated horizontal force.

Respondent's opinion

43. As explained above, it is not that the elevator leg cannot sustain any horizontal force, but that the elevator should never be subjected to excessive external force. When the Claimants were using the Simporter for unloading a ship of 80,000DWT, there would be the real risk that the Simporter leg would have been subjected to an excessive external force.

(iv) Claimants' opinion

44. If the damage is really due to maloperation, the Respondent should also be held fully responsible for it had violated its promise made in the Commitment Letter, which says it would "*mobilize the required personnel to implement the necessary work at site*" if the Claimants gave it a 14-days-notice. If the Respondent had kept its promise and really came to site, the damage would not have occurred. In this respect, the damage is still due to the Respondent's fault.

Respondent's opinion

45. The Commitment Letter was issued on 25 September 1998. In the following period of more than one year, Company D had never been approached by the Claimants for the commissioning of the Simporter and the demonstration of unload capacity. Company D did not know what the Claimants had done to the Simporter during this period. Eventually, Company D received notice from the Claimants on 11 January 2000 and dispatched technical personnel to the site. Because the Claimants gave very short notice (the Claimants' fax dated 11 January 2000 advised that vessel would arrive

on 14 January 2000, i.e., only 3 days' notice) and that the cargo was not sufficient in quantity to demonstrate the unloading capacity, the intended demonstration of unloading capacity was not carried out. According to the site report prepared by Company D's engineer who site-visited the Simporter in Terminal M in January 2000, the Simporter had reached an unloading capacity of 750TPH, i.e., 93.75% of the maximum unloading capacity required under the Contract. Then in March 2000, Company D received notice from the Claimants saying that another vessel was coming on 15 March 2000 and requesting Company D to send out technicians to "test the maximum unloading rate". According to the Commitment Letter, Company D is entitled to at least 14-days-notice to mobilize its personnel to attend the site. But the Claimants gave very short notice, and it was impossible for Company D to mobilize its technical personnel under such a short notice, particularly when this was already about one and half years after the Commitment Letter was issued. As a responsible seller, Company D responded to the Claimants' request promptly by two faxes dated 10 March and 21 March 2000 respectively, saying that it was impossible for Company D to mobilize its technical personnel under such a short notice and request the Claimants to give sufficient notice next time.

(v) Claimants' opinion

46. The repair work mentioned in Claimants' fax to the Respondent dated 7 March 2000 has nothing to do with the elevator leg and has nothing to do with the damage occurred, for the Claimants had done nothing to it. A site inspection can prove this fact since no repair work done by Claimants to the leg will be found.

Respondent's opinion

47. The Claimants are not telling the truth. The Claimants' Technical Report recorded that "*furthermore, as the site workers advised, before this accident the damage to the connections of the bracings to the leg had happened and cause simple welding repair*". This is further evidenced by the photographs already submitted as Attachment A of Company D's Report on the Damage.

(vi) Claimants' opinion

48. The attempt to repair the initial damage was totally due to Respondent's fault that it had not kept its commitment made in the Commitment Letter and come to demonstrate the

unloading capacity of the Simporter. The Respondent even did not give any response to the Claimants' notice advising the arrival of the vessel.

Respondent's opinion

49. The Claimants' statement is not true. Again, this clearly demonstrates a contradiction in the Claimants' Answers since in 1(5) they claim "had done nothing to it", yet in 1(6) they state "*[t]he attempt to repair the initial damage…*". What is more,

(a) Company D had never been informed of the initial damage to the Simporter, not to mention that Company D had never been requested to fix the elevator leg after the initial damage.

(b) The Claimants even denied the fact that there was the initial damage during the hearing on 29 May 2002.

(c) Company D has never been given the opportunity to inspect and comment on the initial damage or to demonstrate the unloading capacity.

(d) Company D certainly did give prompt response to the Claimants' notice. Company D responded to the Claimants' notice twice by faxes dated 10 March and 21 March 2000 saying that it was impossible for Company D to mobilize its technical personnel under such short notice and requesting the Claimants to give sufficient notice next time.

(vii) Claimant's opinion

50. The Claimants found no record of maloperation before the damage occurred. Actually, the Simporter had been working for more than two days under the operation by the same operator until the damage occurred.

Respondent's opinion

51. Some examples of maloperation on the part of the Claimants have been explained above in Item 1(2).

2. Claimants' opinion

52. The damage to the elevator leg is caused by the design defect originally existing in Simporter.

Respondent's opinion

53. The design of Simporter M is in conformity with the contract and in accordance with internationally accepted standards.

(i) Claimants' opinion

54. As aforesaid, the Simporter supplied by the Respondent is the latest generation of its kind, and it is understandable that the design thereof may unavoidably exist some defects. Due to this reason, it was said that damage also occurred to the other Simporter of this generation in Egypt, this Simporter in Terminal M was being continuously modified and stiffened before and after it had been transported to Terminal M from shipyard N, the manufacturer of the elevator leg. Fax documents left in the former office, which are provided by the Claimants, used by the site representatives of the Respondent show that the Respondent had been continuously modifying, stiffening the elevator leg and changing the design thereof at least for five months, i.e., from 19 October 1997 to March 1998.

Respondent's opinion

55. The Claimants' allegation that because Simporter M is of the latest generation "the design thereof may unavoidably exist some defects" is groundless and totally wrong. This new generation of Simporter is an improvement from the original ones. But this new generation is not a revolutionary change to the original ones. This new generation is based on the same concept design as the original ones but incorporated some improvements taking into account the materials available and the actual working conditions of the specific Simporter. Before this Simporter M, Company D had produced and supplied 17 Simporters to various customers all over the world, all of which are still in normal operation except Simporter M. The so called "damage to the Egypt Simporter" was under totally different circumstances and had nothing to do with the design of Simporter. The Claimants exercised a lot of imagination in contending that the damage to the Egypt Simporter was due to design defects. In fact, the Egypt Simporter was damaged by the superstructure of a large incoming vessel when the Simporter was not in operation. The damage to the Egypt Simporter had nothing to do with the design, because Simporter was not in operation when it was hit and damaged by the superstructure of the coming vessel. But after the Egypt incident, Company D as a responsible seller and manufacturer thought it expedient to

make the elevator leg more durable than is required by the Technical Specifications of the Contract and for its normal working conditions, in anticipation of extremely exceptional circumstances such as the Egypt incident. Company D left some of its documents in the site office provided by the Claimants, this shows that Company D had nothing to hide regarding the design of the Simporter.

(ii) Claimants' opinion

56. Compared the elevator leg in kind with that in its design drawings, a great difference could be found. The elevator leg in kind has eight pieces of steel which are not in its design drawing. The reason for this was that knowing that damage had occurred to the leg of that Simporter in Egypt, the Respondent added four pieces of angled steel to it before it was transported from Shipyard N to Terminal M and another four pieces of channel steel to it after it was install to the Simporter in Terminal M but before dry commissioning.

Respondent's opinion

57. The Claimants are exaggerating. The so-called "great difference" is only that Company D improved the metal structure of the elevator leg to make it more durable than is required for operation under normal working conditions. As a consequence of the Egypt incident, Company D considered it prudent to consider that some exceptional circumstances may occur to other Simporters and that it might be desirable to make Simporter M's elevator leg more robust than is required under normal working conditions. Company D did this to the elevator leg without additional costs to the Claimants. This only shows Company D is a responsible designer and seller.

(iii) Claimants' opinion

58. The Analysis Report by University F shows that the design of the boom is not mature and perfect.

Respondent's opinion

59. We have commented on the Claimants' Technical Report in our Skeleton Arguments. See II[B] above.

(iv) Claimants' opinion

60. Another fatal defect of the boom is that there is no buffer plate on the feeder to avoid the damage to the feeder from the direct contact with the deck.

Respondent's opinion

61. This is totally an untrue and false statement. The feeder already has buffer plates incorporated as part of its inherent design. Photographs of the Feeder clearly identifies the Buffer Plates.

(v) Claimants' opinion

62. Comparing the original leg designed by the Respondent and made by Shipyard N, which had unloaded about 80,000 tons of materials until it damaged, with the new one designed and made by Company E, which had unloaded 204,065.986 tons of materials until now, we can see that the original leg is so thin and weak and the new one is much thicker and more solid. The new one has been used for more than half a year and it is still in very good condition for the time being.

Respondent's opinion

63. The fact that the new elevator leg made by Company E is thicker and more solid is not proof that the original design of Company D is not adequate and sufficient. It is not always true that being thicker and more solid will necessarily mean being safer. To fit a new (probably heavier) elevator leg to Simporter, without first assessing the implications on the whole machine, is tantamount to the Claimants' negligence. After this first accident to the elevator leg, the Claimants' wish to make the elevator leg much stronger than necessary for normal working conditions in order to prevent damage under exceptional circumstances, or from maloperation or other circumstances, is not part of the original contract. The Claimants' new elevator leg design is not proof that the original design is not adequate and sufficient.

(vi) Claimants' opinion

64. In practice, an operator's maloperation cannot and should not cause damages to the elevator leg because he does not operate the elevator leg directly and the elevator leg is the final part to receive the strength deriving from his operation. If the elevator leg

may be damaged by the operation of the operator, then it should have a protective device to avoid the occurrence of the damage, no matter how the operator operates. If there is not such a protective device or the device does not function, there of course exists a serious defect in the Simporter.

Respondent's opinion

65. As a matter of fact, Simporter M is equipped with necessary protective devices to prevent damage from improper operation, such as elevator leg protection cables/ switches. However, every protective device has its limitations and at the end of the day, if the Simporter's operator or unloading commander willfully or otherwise misuses the Simporter, Company D cannot be responsible for such an event. If the Claimants, without consultation with Company D, improperly repaired or even "reformed" the Simporter, the protective devices may lose their protective function. If the Claimants continued to use the Simporter after the initial damage to the elevator leg and the improper repair and "reform", the protective devices which are adequate and sufficient under normal working conditions may prove to be inadequate and insufficient under such abnormal working conditions.

3. Claimants′ opinion

66. The Respondent shall be fully responsible for the damage occurred to the elevator leg.

Respondent's opinion

67. The Claimants' claims are time barred and the Commitment Letter contains only an undertaking by Company D to "demonstrate" the unloading capacity of the Simporter, which is irrelevant to the damage to the elevator leg and the issues in this arbitration.

(i) Claimants′ opinion

68. Claimants think that no matter how the Contract defines and even if the damage is not caused by the design defect originally existing therewith, the Respondent shall be fully responsible for the damage occurred to the elevator leg for that the Commitment Letter issued by the Respondent to Claimants constitutes a new contractual relationship between the two parties. Under this relationship, the Respondent bears the obligation "*to undertake to demonstrate the 800TPH rated unloading capacity, in full accordance with the Contract requirement, on the next suitable vessel to arrive at*

Inca…", while the Claimants bear the obligation to pay the 5% outstanding Contract payment upon receipt of the Commitment Letter and to advice the Respondent of the arrival date of the next vessel 14 days prior to the arrival thereof. As two parties agreed, for the time being, the Claimants has fulfilled their two obligations to the Respondent's satisfaction while the Respondent had not. Thus, in accordance with relevant regulations of the *Contract Law of the People's Republic of China* ("PRC"), the Respondent shall be fully responsible for all losses caused by its violation of its obligation.

Respondent's opinion

69. The Claimants' allegation that the Commitment Letter contains a new contractual relationship between the two parties is groundless. It is clear that the Commitment Letter was issued under the Contract between the parties. The only remaining issue under the Commitment Letter is the demonstration of the unloading capacity of the Simporter. Regardless the Commitment Letter constituted a new contractual relationship or not, the remaining issue under the Commitment Letter, i.e., the demonstration of the unloading capacity, is absolutely irrelevant to the damage to the elevator leg or any issues in this arbitration. As a matter of fact, in a period of more than a year following the issuance of the Commitment Letter on 25 September 1998, Company D received no information from the Claimants until January 2000. Company D dispatched technical personnel to the site upon notice from the Claimants in January 2000. Though the remaining cargo was not sufficient to carry out a trial operation and an official demonstration capacity, the operation of the Simporter showed satisfactory results and the unloading capacity reached a level of 750TPH, that is 93.75% of the 800TPH maximum unloading capacity. Furthermore, the Commitment Letter has nothing to do with the warranty period under the Contract. According to the terms of the Contract, the warranty period is 33 months from the date of signing Contract. The warranty period expired on 4 March 1999, more than a year before the damage to the elevator leg occurred on 23 March 2000.

(ii) Claimants' opinion

70. If the damage to the elevator leg is really caused by the design defect originally existing therewith, the elevator leg will not be in conformity with its use purpose. In accordance with Article 40 of the *Law of the PRC on Product Quality*, the Respondent shall compensate all losses suffered by the Claimants.

Respondent's opinion

71. The use purpose of the Simporter as stipulated in the Technical Specifications of the Contract is for "unloading ships up to 50,000DWT". It is not designed for unloading a ship of 80,000DWT. Prior to the Claimants' first attempt to use an 80,000DWT vessel for conducting tests on the Simporter, it should at least have had the courtesy to ask the seller whether or not it was safe and practical to do commissioning tests on a vessel of this size. It could be considered negligent on the part of the Claimants for not consulting the designer/seller in this particular instance (especially with respect to the safety aspects), as the designer/seller would not have agreed to carry out Simporter's commissioning tests or use on a vessel that was considerably larger than it was designed for. The Claimants were already aware that an 80,000-ton vessel would have to be partially unloaded elsewhere for it to safely enter onto their berth. This being the case, the Claimants should have been aware that the vessel was oversize its beam and draft. Any responsible operator would have contacted the designers as to the practicalities of use and conducting tests on such a large vessel, when it was a contractual test of the machine in question.

(iii) Claimants' opinion

72. The "Deemed Acceptance" mentioned in Annex 1 of the Contract is not applicable to this case since the Claimants have arranged vessels to conduct Acceptance Testing within 3 months of readiness for acceptance testing or within 5 months of readiness for delivery (readiness for acceptance testing was confirmed on 27 March 1998 and the first acceptance testing was conducted in May). The reason why the Claimants have not issued the Final Acceptance Certificate to the Respondent is that the Simporter has never shown its rated unloaded capacity of 800 TPH. Although the other two Acceptance Criteria have not been tested formally, the Claimants still agreed to pay the final 5% of the Contract value under the condition that the Respondent undertook to demonstrate the rated unloaded capacity of 800TPH in consideration of the good relationship between the two parties. In a word, now and for the time being, the Respondent is still obliged to show the rated unloaded capacity of 800TPH of the Simporter.

Respondent's opinion

73. It is not sufficient for the Claimants to provide a vessel or two vessels during the 3 months of readiness for acceptance testing. The terms of the contract require that the Claimants should provide "necessary vessels for trial operations and acceptance tests at no more than two (2) weeks internals". Besides, the Claimants were also required to provide other conditions for the trial operations and acceptance tests, for example, the land-based conveyors. Because the Claimants had not provided the necessary vessels at the required frequency and the land-based conveyors provided by the Claimant could not provide sufficient capacity for the trial operations and the acceptance tests, demonstration of the 800TPH rated unloading capacity could not be carried out or completed. This is clearly due to reasons attributable to the Claimants. Therefore, "deemed acceptance" was actually achieved. As a matter of fact, one of the Claimants — Company A, being the Buyer under the Contract — has already issued a User's Certificate which clearly states that "*[t]he Ship unloader has passed two trial operation and in good condition now"* and "*[i]n fulfillment with the Contract, Company D discharges its responsibilities in strict accordance with the contract terms, and conscientiously serves its customers, honest and reliable. It possesses adequate technical, financial and project management capabilities*". This clearly shows that the Simporter was delivered and Company D discharges its responsibilities "in strict accordance with the contract terms, honest and reliable" and to the satisfaction of the Claimants. The only remaining issue under the Contract was the "demonstration" of the unloading capacity of Simporter which had not been completed due to "circumstance attributable to the Seller". It was under such circumstances, Company D, at the request of the Claimants, issued this Commitment Letter and obtained payment of the remaining 5% of the contract price. Because the letter of credit for the transaction had already expired, therefore the Certificate of Final Acceptance which was required under the letter of credit became unnecessary, and instead the Claimants issued this User's Certificate. Accordingly, to the terms of the Contract, "deemed acceptance" had been achieved.

(iv) Claimants' opinion

74. The project contained in the Contract is a turnkey project. The fundamental unloading capacity of the Simporter has not been demonstrated yet, how can the Respondent say that it has fulfilled all his obligations?

Respondent's opinion

75. Nowhere in the Contract it is expressed or implied that this is a "turnkey project". The only remaining issue under the Contract is the demonstration of the unloading capacity of the Simporter as indicated in the Commitment Letter. As a matter of fact, the reason for the demonstration having not yet been done is also due to the Claimants' fault. They have never given Company D the opportunity to demonstrate the unloading capacity; therefore Company D should be considered as having completed all its obligations under the Contract and Commitment Letter.

(v) Claimants' opinion

76. Furthermore, the Respondent violated the Contract in the following respects: (a) it used about 400 meters of local-produced cable instead of imported cable as stipulated in the Contract; and (b) there are about 350 meters of cable found with joints while the Contract does not allow the existence of such cable joints. The Claimants reserve their right to claim for these violations of the Contract at a proper time in the future.

Respondent's opinion

77. Company D cannot understand the relevance of this issue with respect to the damage to the elevator leg, which is the subject of this Arbitration. However, the majority of the cables used for the Simporter is imported from outside China. Company D used some China-made cable because of shortage in storage and the urgent needs. Company D had examined and verified the quality of these China-made cables before deciding to use them. Company D can guarantee the reliability of such China-made cables. The fact that part of the cables used for theSimporter were made in China has been disclosed to the Claimants, and the Claimants have accepted it without objection. The electrical equipment supplied is of first class manufacture as evidenced by the use of ISO9001/9002 accredited manufacturers, and the electrical installation has been carried out in accordance with the Contract and established good practice.

D. Arguments Over the Issue of Time-Bar

78. The Respondent said in its Skeleton Arguments on 29 May 2002 that it is an internationally accepted principle of commercial law that a seller cannot be held responsible for goods that he sold in an unlimited period of time. On the contrary,

a seller is only responsible for the goods he sold to others within a limited period of time. This limited period of time can either be imposed by statutory provisions of law, such as international convention or domestic legislation, or be agreed between the contracting parties. Such limited period of time during which a seller can be held responsible for goods that he sold is called the period of warranty or guarantee period.

79. After citing relevant stipulations in the *United Nations Convention on Contract for the International Sales of Goods* (the "CISG") and the *Contract Law of the PRC*, the Respondent also cited relevant clauses in the Contract, and said that according to Clause 18 (Warranty) the Seller's responsibility to the warranty period is twelve (12) months from the date of acceptance at Terminal M or thirty-three (33) months after signing of the Contract, whichever is earlier.

80. The Respondent also gave a Summary of Key Contractual Dates as follows:

Contract signed	4 June 1996
Company D Notice of Readiness for Acceptance Testing	20 March 1998
Claimants Acknowledgement of Company D Readiness	27 March 1998
Deemed Acceptance Date (due to reason outside control of Company D)	20 June 1998
Warranty Period Expired	4 March 1999
Simporter Elevator Leg Failure Reported	23 March 2000

81. The Respondent concludes that it is very clear from above that the Claimants' claims which are the subject matter of this arbitration are time barred.

82. The Claimants said that "our claims are not time barred" and made their objections as follows:

(1) As we have pointed out, there exist serious defects in the design of the Simporter. In accordance with Article 45 of the *Law of the PRC on Product Quality*, the time expiration for claims resulted from product defect is two years commencing from the day the injured knows or should have known the injury occurred.

(2) The Commitment Letter creates a new warranty that has no time limitation.

(3) The User's Certificate issued by Company B can only prove that Company D has provided a Simporter to us and the Simporter was in good condition in 1998 but cannot prove that the Simporter has been tested and proved qualified. Company

D itself also accepts that the unloading capacity has never been demonstrated by Company D until now.

E. Claims of the Claimants

83. In the Claimants' Final Submission, the Claimants declared that:

(1) The Claimants' Claims are not barred.

(2) There exists originally serious defect in the design of Simporter. The Claimants conclude that the exact cause for the damage to the elevator leg is the design defect originally existed in the Simporter.

(3) The accident was not due to maloperation.

84. The Claimants asked the Tribunal to make decisions to support their claims as follows:

(1) A compensation of more than RMB 1.4 million from the Respondent for the expense caused by repair of the broken elevator leg of the Simporter be awarded to the Claimants.

(2) A compensation of more than RMB 140,000 from the Respondent for the partial expense caused by dealing with this case be awarded to the Claimants.

(3) All arbitration fees be borne by the Respondent.

85. The Respondent in its Comments on the Claimants' Final Submission said that:

(1) Claimants' claims are time barred.

(2) The Simporter was designed in compliance with the Contract and was fit for its purpose.

(3) The accident was due to maloperation.

86. The Respondent asks the Tribunal to rule that the Claimants' claims be dismissed in total, and all the arbitration cost and expenses be borne by the Claimants.

F. Counterclaims of the Respondent

87. The Respondent made its counterclaims for nearly GBP 160,000 in February 2002 and an amendment for an addition of nearly US$ 20,000 in June 2002.

88. The amount of nearly GBP 160,000 is composed of the following items:

1	Delay to Dry Commission (January 1998)	Nearly GBP 60,000
2	Discontinuous site presence (February 1998)	Nearly GBP 20,000
3	Delay to Wet Commissioning (March 1998)	Nearly GBP 30,000
4	Aborted Capacity trials on 1st vessel (May 1998)	More than GBP 10,000
5	Additional commissioning costs due to aborted capacity trials on 2nd vessel (June 1998)	Nearly GBP 30,000
6	Site visit of Specialist "Cable Reeling Drum" Engineer (November 1999)	GBP 5,174
7	Additional site visit to carry out further capacity trials (January 2000)	More than GBP 3,000
8	Site visit and report of independent Structural Engineer to investigate Elevator Leg Failure (March 2001)	More than GBP 10,000

89. The amount of nearly US$ 20,000 is for the payment of final 3% of the local fabricator's price in the contract price.

90. The Respondent's statements, the Claimants' objections and the Respondent's replies are as follows:

1. Delay to dry commissioning

Respondent's statement

91. Two months delay incurred to dry commissioning due to non-availability of HV power supply from Bureau C sub-station.

92. Company D was ready in mid-December 1997, and power eventually available in mid-February 1998.

Claimants' objection

93. (1) After the Simporter had been delivered at the site of M Terminal Port, Claimants managed to, without delay, provide temporary power supply from the power supply sockets of the crane at the forward position of the port for the following installations of Simporter and the testing of some parts of the Simporter. In fact, what Company D charged that Claimants failed to provide HV power supply could only have effect on the testing of the high-tension cable and the HV power slip ring, which could only be regarded as a separate part of the Simporter as a

whole and therefore could have no adverse effect on the installation progress of the Simporter.

(2) Company D had not finished the installation until February of 1998 (see the "Outstanding Work and First Hit Snag List"), so it is not true to say that Company D was ready in December 1997. Furthermore, it was during that period of time that the extra modifications and stiffening to the horizontal supporting leg and the elevator leg by Company D were carried out, which was very much tied by Shipyard N in terms of price, material, manpower and equipment, and exerted a direct effect on the working progress of that period of time.

Respondent's reply

94. (1) Company D acknowledges that a temporary power supply was available however it was not of sufficient capacity to carry out the testing and dry commissioning of major elements of the Simporter.

(2) The work listed in the "Outstanding Work" and "First Hit Snag List" are items that are undertaken during the dry commissioning of the Simporter for which an adequate power supply is required.

Company D acknowledges that this was used to carry out additional works on the boom and leg but this work does not form part of its claim.

2. Discontinuous site presence

Respondent's statement

95. The discontinuous site attendance involved Company D in additional flights and site establishment costs. Also, Company D had to employ a Specialist Control Engineer to attend site when at short notice the client requested site presence to continue commissioning.

Claimants' objection

96. (1) The month of February of 1998 was the time when Company D was bound to carry out the installation of the Simporter. Therefore, it is the responsibility of Company D to dispatch its staff to deal with problems occurred to the Simporter during that period of time.

(2) In respect of the specialist from Siemens, he was dispatched by Siemens to attend site for two purposes: one was to make modifications to the parameter of the PLC program, and the other was to carry out testing of those related equipment manufactured and supplied by Siemens.

Respondent's reply

97. (1) The original intention was for this work to be done at the time of dry commissioning; however sufficient power was not available to run the system. It was originally planned to use the local Siemens engineer but due to the delay and non-availability in February of local engineers, Company D was forced to employ the services of a Siemens engineer from the UK at all additional cost due to no fault of Company D.

(2) Company D agrees with the comments by the Claimants; however with reference to 2(1) above the Siemens local engineer would have been able to undertake the work. Company D's claim is based on the additional costs due to the deployment of the UK engineer only.

3. Delay to wet commissioning

Respondent's statement

98. One month's delay incurred while waiting for 1 vessel, Company D was notified of readiness on fax dated 17 March 1998. No vessel arrived for testing until May 1998.

Claimants' objection

99. (1) According to the Contract, it is the duty of the buyer to arrange vessel for unloading testing within 3 months after the installation testing of Simporter has been completed. In fact, the first vessel for testing arranged by the buyer arrived in the month of May 1998, which indicated that the buyer committed no breach of the Contract and caused no delay to Company D.

(2) In fact, it was not true that Company D had got ready for the unloading testing by the time of 17 March 1998. It can be inferred from the final date — 26 March 1998 — of the service report by Siemens that the installation testing by Company D could only be finished at least after 27 March 1998, let alone that there still existed many problems with equipment during the period of time.

(3) As Company D was informed that the arrival date of the testing vessel had been put off, at the beginning of April 1998, the site representatives from Company D put forward a proposal that they should go back to Britain, which indicated that there was no staff of Company D staying in City G during that period of time and thus no costs.

Respondent's reply

100. (1) The Respondent believes that the Claimants' interpretation of the clause is incorrect.

Contract Technical specification clearly states that if acceptance is not carried out within 3 months the Buyer shall issue the Seller an acceptance certificate and is irrelevant to Company D's claim.

Company D Engineers remained at site in anticipation of a vessel at any time in the absence of any information to the contrary from the Buyer.

(2) It is confirmed that Company D sent a fax on 17 March 1998, which confirmed that Company D would be ready for wet commissioning on 27 March. Company D's claim only relates to time after 27 March 1998.

The reference to the many existing issues is again totally irrelevant since these issues were of a superficial and minor nature and in no way prevented wet commissioning from taking place.

(3) Company D confirms that engineers were on the site during the following period.

27 March — 8 April	12 days
20 April — 12 May	22 days
Total	34 days

Company D has only claimed 30 days attendance.

4. Aborted capacity trials on 1st vessel

Respondent's statement

101. Full commissioning and capacity trials had to be aborted on Simporter due to inability of land-based conveyors to handle capacity.

Claimants' objection

102. It is normal that the first acceptance testing failed; otherwise, there would be no need to stipulate in the Contract that a few acceptance testing should be conducted. The aborted capacity trial was not only due to inability of land-based conveyors, but also due to many problems occurred to the unsuccessful Simporter of Company D.

Respondent's reply

103. Company D agrees with the comment by the Claimant that it is expected that some problems will occur during the first run of wet commissioning of such equipment. However, the Simporter's problems would not have resulted in the tests being aborted. The sole reason for aborting the acceptance test was for the belt breakage of the Claimants' quayside convey resulting in the vessel being ordered to leave the berth for the discharge of other cargoes. The wet commissioning on this vessel was not completed until 7 June 1998, i.e., some 26 days after the start of acceptance tests.

104. Company D's claim is only for 14 days.

5. Additional commissioning costs due to aborted capacity trials on 2nd vessel

Respondent's statement

105. Capacity trials were aborted on the 2nd vessel again due to land-based conveyors inability to handle the rated capacity. Due to the need for the client to unload the vessel as quickly as possible to limit the demurrage charges, the client insisted that Company D work 24 hours a day.

106. In order to fully supervise the extended working time, Company D had to arrange for additional cover for two weeks during unloading.

Claimants' objection

107. (1) The land-based conveyors functioned quite normally during the 2nd capacity trials and provided enough capacity for the testing of the unloading capacity for a considerable long time. Even though all the requirements had been met by the port, there were a lot of problems with the Simporter, which could not come up to the rated capacity of 800TPH.

(2) Under the circumstances that the 2nd unloading test had failed, the Claimants proposed that the rest of the work be continued with the Claimants' operators, so as to finish the loading work of the vessel, and demanded no extra work hours from the staff of Company D. However, the Claimants' proposal was denied. According to the records, the longest daily working hour of Company D's staff who stayed at site was 13.5 hours.

Respondent's reply

108. (1) Company D fails to understand the response of the Claimant.

(2) Company D confirms it did have engineers available to supervise the unloading in line with the Respondents' company policy as a responsible Contractor. In addition, Company D's attendance was necessary since this period was still commissioning only, the second vessel had yet to be unloaded and the Claimants had not accepted responsibility for the unloader.

6. Site visit by specialist "Cable Reeling Drum" engineer

Respondent's statement

109. The Claimants reported a major problem with "HV Power Reeling Drum" when the main HV power from the substation was switched back on. Company D arranged for a specialist engineer from the Reeling Drum supplier to attend site immediately, to investigate and repair the damaged equipment. Following the detailed examination, the problem was identified as a buildup excessive condensation within the HV power slip rings. The indication was that the main power had been switched off for some considerable time (in excess of 9 months). This was despite Company D's specific instructions to the Claimants that power must be maintained to the Simporter at all times to ensure the anti-condensation heaters were energized and active. This was not covered under the equipment warranty, as the manufacturer's recommendations were not followed.

Claimants' objection

110. (1) Cable Reeling Drum has been poorly designed mainly because the insulator between the slippery rings and that between the slippery rings and the shaft are vulnerable to pressure, which results in its inability to function normally under

the conditions of the port. After the event, because Company D did not accept that it had design defect but did not know how to reform it, the Claimants have to make modifications to the original design and reform the drum by themselves and since then the drum has been functioning very well.

(2) The problem of Condensation of Cable Reeling Drum housing once occurred in the course of installation at the beginning of 1998, which was a sheer problem of the original design. Besides, as a matter of fact, power had been always maintained to the Simporter at all times.

(3) Company D has never fulfilled the three requirements of Acceptance: (a) rated unloading capacity of 800TPH; (b) power consumption of not more than 0.30kw hr/MT at rated unloading capacity of 800TPH (not tested); and (c) continuous run for 8 hours without stoppage due to mechanical or electrical malfunction of the Simporter, the Claimants deem that the Simporter has never been accepted due to the reasons stated above, therefore Company D should take up full responsibility of any problem occurred to Simporter, and the Claimants reserve the right to claim against Company D in respect of the modifications to theSimporter by the Claimants.

Respondent's reply

111. (1) The Cable Reeling Drum and Slip Ring Assembly were supplied as a proprietary piece of equipment from an internationally renowned manufacturer and supplier. Company D cannot accept that the design was in any way substandard or inadequate. The fault was solely the reason of the power being removed from the Simporter for long periods of time therefore resulting in the anti-condensation heaters being inoperative. Any work undertaken by the Claimants was purely at their own risk and not approved by Company D. The work carried out was not necessary in the opinion of Company D, and had heaters been left on in line with the instructions from Company D there would have been no problem.

(2) Company D refers to the fax given by the Claimant to its engineers on site effectively advising them that from experience gained on another Simporter that during installation i.e., while there is no power available, they should take care to avoid any water/condensation build up.

Thereafter there would not be a problem once the power supply was energized and remained so.

The fax shows Company D's commitment to our engineering responsibilities in that we have a system in place to keep all our engineers updated and informed of any particular requirements and in no way could be used against Company D.

(3) Company D cannot be held responsible for any problems that occurred to the Simporter as stated by the Claimants. In the Claimants' fax dated 20 October 1999 from Mr. Ma it is stated that the Simporter was not operated since July 1998 to 15 October 1999 some 15 months. From this statement above it clearly indicates that the plant remained stationary for an excessive period of time and thus the Claimant must take full responsibility for failing to maintain and operate the plant in line with Company D's recommendations as given as part of the comprehensive training.

Notwithstanding the above, the claims by the Claimants are outside the Contractual Period of the Contract and as such are time barred as already previously presented.

7. Additional site visit to carry out further capacity trials

Respondent's statement

112. The client requested at very short notice (2 days) for Company D to attend site to carry out further capacity trials once again on another vessel. The Claimants advised that now extensive modifications had been carried out to the land-based conveyor. When Company D dispatched an engineer to the site, unloading was well under way and the various flow restrictors to limit capacity were still in place. Company D requested stopping of the vessel unloading to allow full access to the Simporter to carry out all the necessary modifications and adjustments to achieve the rated capacity. The Claimants only allowed limited access to the Simporter by the Respondent's engineer and by the time some, but not all, adjustments could be made, the unloading had continued using another unloader, there was not enough material in any of the vessels holds to prove capacity over a sustained period.

Claimants' objection

113. The Claimants have tried their best to meet the requirements of the site representatives of Company D and provided any help they need. Furthermore, the Claimants have

removed the flow control buffer plate between the two belts located in the feeder and another buffer plate at feed shoe according to the requirement of the site representatives. Even though the volume of the goods was quite enough for this unloading operation, the Simporter still could not come up to the rated unloading capacity due to its inability. In the course of the testing, the unloading capacity was about 300TPH at the most due to the failure of the clutch, and the situation lasted for more than two days. The site representatives of Company D had made a wrong analysis of the breakdown that it is mainly because of the power control, and prevented the Claimants' staff from making any inspection of the clutch, which delayed the Claimants' effort to fix the breakdown. It was not until Sunday (24 January 2000) that the Claimants' staff fixed the breakdown because the site representatives of Company D failed to come to the site.

Respondent's reply

114. Company D finds the answer from the Claimants is not to address Company D's claims and goes onto issues totally irrelevant to the item.

115. The Respondent's engineer report for this visit clearly illustrates that the Claimants was reluctant to undertake any acceptance testing, their main aim being to discharge the vessel as quickly as possible.

116. Accordingly, the visit was totally unnecessary and a waste of time.

8. Site visit and report of independent Structural Engineer to investigate Elevator Leg Failure

Respondent's statement

117. The Claimants reported the elevator leg had suffered a failure during unloading. Company D immediately arranged for a senior engineer and an Independent Structural Consultant to visit the site to carry out a full appraisal and report on the cause of the failure and any repair procedures/recommendations to get the Simporter back into service.

Claimants' objection

118. (1) The Simporter has not been accepted, and the contract remains unfulfilled.

(2) As the total failure of the Elevator Leg is entirely due to the poor design of the Simporter, Company D should take up full responsibility. Therefore, it is the responsibility of Company D to dispatch any one necessary to investigate the damage and carry out any repair.

Respondent's reply

119. (1) Company D considers the Contract complete and thus the claims are time barred as previously presented. Thus, by the "User's Certificate" issued on 3 August 1998 by Company B, which clearly states that Company D has fulfilled the Contract, Company D discharges its responsibilities in strict accordance with the Contract terms, and conscientiously serves its customer with honesty and reliability.

(2) Company D maintains that this issue is not a problem of design as already presented to the CIETAC but is an issue of maloperation on the part of the Claimants; therefore, the Claimants must bear the associated costs related to this item of counterclaim.

120. The Claimants also made comments on evidence (mostly invoices, etc.,) in their submission on 9 January 2003, and said that: as Company D did not attach any illustration about the above evidence, "*we are not very clear about the relation between these evidence and the case and what Company D wants to prove by providing them*". The Claimants asked the Tribunal to consider the validity of all these evidence.

121. For the amount of nearly US$ 20,000, i.e., the payment of final 3% of the local fabricator's price in the contract price, the Respondent's statement is as follows:

(1) The Contract provides that payment for local fabrication, totaling nearly US$ 660,000, shall be borne by the Claimants.

(2) The Claimants breached contract by not paying the 1% shortage under the first four installments and the final 2% of the local fabricator's price.

122. At the request of the Local Sub-contractor Company P, Company D as a responsible party paid the remaining 3% of the local fabricator's price in US dollar.

123. The Claimants said that: "The relation between Company D and its local fabricators has nothing to do with us since we only have contractual relation with Company D

but no contractual relation with the fabricators." Therefore, any debts owed to the fabricators shall naturally be paid by Company D.

II. OPINIONS OF THE TRIBUNAL

A. Applicable Law

124. The parties to the Contract in this case have agreed upon the applicable law in the Contract, which says that: The Contract shall be interpreted in accordance with the current laws of the PRC and the regulations, rules and ordinances concerned legally established by the PRC Government which may be issued and in force from time to time. The Tribunal respects the agreement reached by the parties and confirms that the law of the PRC shall be the applicable law in resolving the disputes in this case.

125. In view of the fact that the Contract was signed on 4 June 1994 and at that time the valid law on contract in China was the *Law of the PRC on Economic Contracts Involving Foreign Interests*, the Tribunal holds that, in examining this case, when Chinese law on contract shall be applied, the *Law of the PRC on Economic Contracts Involving Foreign Interests* is applicable.

126. The Tribunal notes that in the statements by both the Claimants and the Respondent either in written or in oral, clauses and stipulations in the *Contract Law of the PRC* which came into force on 1 October 1999, were sometimes cited. The Tribunal, with reference to the interpretations made by the Supreme People's Court of the PRC on issues regarding the application of the *Contract Law of the PRC*, thus decides that if there are no stipulations in the *Law of the PRC on Economic Contracts Involving Foreign Interests*, stipulations in the *Contract Law of the PRC* shall be applied.

B. The Issue of Time-Bar

127. Referring to Section D of Part I above, it is clear that the critical point of the disputes on this problem involves how to correctly understand the real meaning expressed in the User's Certificate and that in the Commitment Letter.

128. The User's Certificate was issued by Company B, one of the End-users to the Contract and one of the Claimants in this case, on 3 August 1998.

129. The main contents of the User's Certificate are as follows:

> *"…The Shipunloader was delivered to Terminal M for installation and erection in November 1997. The Ship unloader has passed two trial operation and in good condition now.*
>
> *In fulfillment with the contract, Company D discharges its responsibilities in strict accordance with the contract terms, and conscientiously, honestly and reliably serves its customers, …"*

130. The Commitment Letter was issued by the Respondent on 25 September 1998. The full text of the Letter reads as follows:

> *"Following receipt of all outstanding Contract payments to Company D, Company D confirms to remain committed to the completion of all its obligations and responsibilities as defined under the Contract at no extra charge to you. Thus, Company D will undertake to demonstrate the 800TPH rated unloading capacity, in full accordance with the Contract requirements, on the next suitable vessel to arrive at Terminal M carrying grain in accordance with the Contract specification. However, a minimum of 14 days' notice will be given to enable Company D to mobilize the required personnel to complement the necessary works at site.*
>
> *This letter supersedes our letter of 18 September 1998 to you*."

131. From these two documents, it can be obviously seen that up to the time of August/ September 1998, although the User's Certificate cannot be deemed as a formal and final certificate of acceptance, the fact is that the End-user, after two trial operations, was much satisfied with the quality of Simporter except for the unloading capacity. The expression of "confirms to remain committed to the completion of all its obligations and responsibilities as defined under the Contract" in the Commitment Letter is obviously a re-statement, not a new commitment, of the warranty obligation as the Contract stipulated. Therefore, it becomes very clear that, besides the proving of rated unloading capacity, the obligations of the Respondent are to be released after the expiration of the warranty period.

132. In accordance with the Contract, the warranty period shall be twelve (12) months counting from the date of acceptance at the Terminal M Site or thirty-three (33) months after signing of the Contract, whichever is earlier.

133. The Contract was concluded on 4 June 1996, so the warranty period was expired on 4 March 1999. Therefore, the re-statement of warranty obligation expressed in the Commitment Letter expired also on 4 March 1999.

134. The Tribunal thus makes it clear that after 4 March 1999, the only obligation to the Respondent is to prove the unloading capacity of 800TPH. The Claimants submitted their application for arbitration on 28 October 2001, their claims based on accidents occurred on 25 March 2000, not on unloading capacity. The Respondent said that the claims are time barred. The Claimants said that in accordance with Article 45 of the *Law of the PRC on Product Quality*, the time expiration for claims resulted from product defect is two years commencing from the day the injured knows or should have known the injury occurred. The Tribunal finds that Article 45 of the *Law of the PRC on Product Quality* does have a stipulation of two years, but that stipulation is for the time limit of bringing action by litigation and there is no stipulation on warranty period of a seller.

135. After examining the statements by the parties and also in conferring with Chinese law, the Tribunal decides that:

(1) In considering the time of the Claimants' application for arbitration, in accordance with Article 39 of the *Law of the PRC on Economic Contracts Involving Foreign Interests*, Article 129 of the *Contract Law of the PRC*, Article 45 of the *Law of the PRC on Product Quality* and Article 74 of the *Arbitration Law of the PRC*, the application on 28 October 2002 was within the stipulated time limit for arbitration. So, the Tribunal has the power to examine the case.

(2) In considering the Respondent's responsibility on the quality of the goods, in accordance with Article 158 of the *Contract Law of the PRC*, besides the unloading capacity of 800TPH, the Respondent's obligations were released on 4 March 1999. So, the Respondent's proposition on the Claimants' claims being time barred can be upheld.

136. In view of the decisions made above, the Tribunal confirms that:

137. At the time when the accident occurred on 3 March 2000, Simporter was operated totally under the Claimants' control, without the Respondent's participation, and the re-making of the elevator structure afterwards also was totally the Claimants' own determination, without the acknowledgement of the Respondent. Therefore, because that the warranty period has already expired on 4 March 1999, although the Claimants

still have the right to apply for arbitration on disputes with the Respondent on matters related with accident of 3 March 2000, the Respondent will bear no responsibility and have no further obligations on those matters, no matter what the cause of the accident would be.

C. Serious Design Defects

138. Referring to examinations made above, it is natural to consider that the examination of this case can therefore be terminated and award being made, without the necessity to examine problems relating to "Design Defects" as the Claimants contended. But the Tribunal finds that the "Design Defects" the Claimants mentioned are so surprisingly serious that the Tribunal has to consider whether there were really some surprisingly serious problems to be disclosed.

139. In accordance with the evidence submitted by the Claimants, the internal stress in the elevator structure under normal operating condition is as high as 160.633 to 262 kg/mm2 (1575.81 to 2570.22 N/mm2) about 6.85 to 11.17 times of the yield strength (230 N/mm2), and 4.26 to 6.95 times of the tensile strength (370 N/mm2) of the steel used.

140. It is known that the elevator is a steel structure of traditional technology. Immense experience in designing and manufacturing steel structures was richly accumulated. Company D, the Respondent, is a company with long history and experience in making such goods. It will be really a surprisingly serious problem if the design defects as the Claimants described have really existed. If such surprisingly serious design defects have really existed, the Tribunal will consider whether situations as stipulated in the third paragraph of Article 158 of the *Contract Law of the PRC* can be established and that paragraph can be applied. The Tribunal considers that, even the warranty period has long been expired, it will be of significance if critical points of the disputes relating to design defects can be clarified. The Tribunal thus determines to make efforts in clarifying such surprisingly serious problems.

D. Claimants' Application for Survey by Specialists

141. On 28 June 2002, the Claimants submitted an application for survey. The Application said:

> "*In order to establish whether the Simporter in dispute between Applicants and Company D in the Arbitration Case is defective and in order to provide the arbitration tribunal with the ground and base to arbitrate the case, Applicants hereby request the arbitration tribunal to entrust a qualified domestic research institute or college which is good at the study of port machinery (ship unloader) to conduct a comprehensive comparison on the Report by Company D and the MECHANICS ANALYSIS RRPORT by University F entrusted by Bureau C and conduct necessary investigation, calculation and analysis so as to determine the conclusion of which report is correct and thus determine whether the elevator leg of the Simporter is defective in design.*"

142. The Respondent made objections to the application of the Claimants. Besides issues on time barred, etc., the Respondent said:

> "*Further or in the alternative, there are already various technical reports before the Tribunal submitted by the parties which have dealt in sufficient details with the technical issues in this arbitration. Company D believes that it is absolutely unnecessary to produce another technical report by another technical expert. At the end of the day, it is the arbitrators that will make the decision as to the disputes between the parties, not another technical expert to decide the disputes between the parties.*"

143. After carefully reading the Claimants' Application, the Tribunal understands that the Claimants have set two very important restrictions on specialist surveying:

(1) The specialist surveying must be done by domestic research institute or college.

(2) Documents for specialist surveying are limited to the following two reports: the Report by Company D and the Mechanics Analysis Report by University F.

144. Those two reports are the earliest reports made by each of both sides. The Report by University F is essentially a comment on the Report by Company D. To arrange any specialist surveying without giving the Respondent chance to make comments on Report of the Claimants' side is unfair to the Respondent. About the same time of the Claimants submitting their application, i.e., around the end of June 2002, the Tribunal received from the Respondent the Report by Mr. R.

[The Respondent submitted the Report by Mr. R in two times. The Report mentioned above is the first Report the Respondent sent, which has the name of Mr. R mentioned

but without Mr. R's signature. About one month later, the Respondent sent the Report again with the same contents but with Mr. R's signature. — Note by the Tribunal]

145. The Report by Mr. R is very detailed and systematic, with paragraphs substantially commenting the Report by University F.

146. The Tribunal considers that the appearance of the Report by Mr. R making the specialist surveying limited to two earliest reports as the Claimants mentioned will be far less adaptable to requirements of the progress of the examination. But to include the Report by Mr. R is not in conformity with the Claimants' application. And more importantly, to arrange any specialist surveying including the Report by Mr. R before the Claimants is given an opportunity to make comments on it will be unfair to the Claimants.

147. The Tribunal waited for some time hoping to know the Claimants' comments, but the Claimants kept silent for a long time. Around mid-August 2002, the Tribunal could not wait further, and gave the Claimants a letter (c.c. to the Respondent) urging the Claimants to make comments. More than two months later, on 24 October 2002, the Claimants at last submitted their Final Submission with attachments to the Tribunal.

148. By carefully reading Claimants' Final Submission and attachments, the Tribunal finds that the critical aspects of disputes and debates became very clear. All critical aspects of disputes are really focused on a single point: how to make a proper modeling as the basic of stress calculation. Referring to examinations in the following sections, especially by reading answers by each side to the five questions listed by the Tribunal, it is very clear that all those critical aspects of disputes lie within the realm of common sense and most elementary fundamentals in engineering mechanics known to high-school students, and there is no need to go deeply into any profound special technical and technological issues. The Tribunal has those common knowledge and capability to make judgment on those disputing problems and make award for this case. In accordance with Article 44 of the *Arbitration Law of the PRC* and Article 39 of the *CIETAC Arbitration Rules*, the Tribunal hereby decides not to make any arrangement on specialist survey and/or consultation.

E. Reports

149. The Reports involved in this case are very important to the examination, they are:

[A] Reports from the Claimants:

(1) Mechanics Analysis Report by Terminal M Port of Bureau C, August 2000.

(2) Mechanics Analysis Report by University F, August 2000.

(3) Mechanics Analysis Report by University F, June 2002.

150. Report 1 and Report 2, except for the change of one sentence, i.e., from "*So we entrusted University F to have site inspection…*" to "*Entrusted by Bureau C, we, College of Traffic & Communications, University F have site inspection…*" are totally the same. Report 3 is a revised and enlarged version of Report 2, re-made by University F about two years later, i.e., after the hearing.

[B] Reports from the Respondent:

(1) Report on Site Visit to Simporter X on 31 March and 3 April 2000, by Company D, April 2000, and as one of its attachment, Design Report on Ship Loader for Company D Stockport for M Terminal, April 2000.

(2) Simporter M Report by Mr. R, May 2002.

151. The Tribunal has read all those reports carefully and, in connection with statements and comments both parties had made, finds that more important ones to the examination of this case are: Report 2 from the Claimants and Report 2 from the Respondent. Simplified names for these two reports are given as follows:

(1) Report by University F for the Claimants — Claimants' Report 2.

(2) Report by Mr. R for the Respondent — Respondent's Report 2.

[The Claimants' Report 3 is an enlarged and revised version of Claimants' Report 2. Except for the language, the data, arguments and conclusion, Report 3 is totally the same as Claimants' Report 2. But Report 3 was prepared after the hearing of this case, not the original one in debates, and comments made by the Respondent in Mr. R's Report is referring to Claimants' Report 2. For the convenience of examination, the Tribunal chooses Claimants' Report 2 and Respondent's Report 2. But other reports, including Claimants' Report 3 can also be used as references. — Note by the Tribunal]

152. The Report by University F described the damage as follows:

> "*…, the front leg buckled at about 3 metres away from the top, the back leg at about 2 meters away from the top and the connection of the bottom of the leg to the leg feeder deformed. All the angle steel of the connections of the bracings to*

the leg deformed, and partially broken. The gap between the front leg and the feeder was 40mm."

153. After statements in many sections and by many figures, the Report by University F said in its last Section, i.e., Section 4 on "The result and conclusion of the structural analysis", that:

> "*Figure 6 described the stress distribution on the elevator leg in working case 1. Through this figure, it could be seen that the stress on most parts of the whole structure was less than the yield limit (23kg/mm) of the material. But detailed inspection on the parts discovered that there was great stress centralizing on the connection of the bracings to the leg and on the connection of the leg to the feeder. The max stress on the connections of the bracings to the leg was 160.633kg/mm., exceeding the yield limit (23kg/mm). The max stress on the connection of the feeder to the leg was 71kg/mm, exceeding the yield limit (23kg/mm). This was the basic cause of the damage of the structure.*
>
> *Figure 9 indicated the stress distribution on the elevator leg while it was in damage attitude, supposing the cylinder drew back (working case 2). Through this figure, it could be also seen that on most parts of the whole structure the stress was less than the yield limit (23kg/mm) of the material. Similarly, detailed inspection on the parts discovered that there was great stress centralizing on the connections of the bracings to the leg and on the connection of the leg to the feeder. The local stress on the connections of the bracings to the leg was 262kg/mm, exceeding the yield limit (23kg/mm). The local stress on the connection of the feeder to the leg was 232kg/mm, exceeding the yield limit (23kg/mm). If the structure were operated under such condition, the elevator leg should be more dangerous and easier to damage than under the actual damage condition.*
>
> *The finite element analysis model offered by Company D Material Handling Ltd, adopted 127 beam elements. This model could only analyze the structure stress of the beam elements and could not analyze the key parts where the damage happened to the elevator leg — the connections of the bracings to the leg and connection of the leg to the feeder. However, these parts were just the place where the stress centralized. According to our analytic result, the stress centralizing on these parts were several times, even over ten times of the other parts, and greatly exceeded the yield limit of the material.*

To sum up, the direct cause of the damage to the structure was that when the structure was subjected to the design force of the cylinder (the thrust of the cylinder full-bore was 106,965 kg, the cylinder annulus was 156,225 kg), there were great stress centralizing on the connections of the bracings to the leg and the connection of the leg to the feeder. This was also a serious defect and a pity of the whole design for the elevator leg. It is suggested that the elevator be redesigned and remanufactured to meet the demands of the actual work."

[1 kg force = 9.81 Newton. The unit for stress and yield strength is kg or Newton per square millimeter, so the unit of kg/mm as the Report used is evidently wrong (but kg/mm2 in Report 1 and Report 3 is correct). — Note by the Tribunal]

154. The Report by Mr. R sent by the Respondent described the damage in Section 6 (Damage to Simporter M) as follows:

"*The damage to Simporter as reported is wholly within the elevator leg assembly. Damage has occurred as follows:*

- *Damage to the connection of the feeder to the elevator leg structure*
- *Damage to the bracing members connecting both halves of the elevator leg structure*
- *Damage to both halves of the elevator leg structure.*"

155. After detailed systematic calculation and analysis, the Report by Mr. R gave a long statement on conclusions (Conclusions) as follows:

"*This report examines the adequacy of the Simporter under normal operation with the Boom at -10°below horizontal and the Elevator leg at -15°from vertical (kicking in towards the quayside). This is the configuration under which the Simporter was being operated at the time of the reported failure.*

Based on the analysis in this report failure of the elevator leg is unexpected and not predictable in normal operation. If however under extraordinary forces or couples in excess of that designed are imposed at the feeder, such conditions can develop to create failure.

A detailed conclusion covering each mode of failure encountered is provided below, it is however the general conclusion of this report that failure of the feeder connection and the elevator leg fabricated plate sections is as a direct result of the failure of the lattice bracing.

Damage to the elevator leg element of the Simporter shows the following:

1. Damage to the connection of the feeder to the elevator leg structure

Failure of the connection of the elevator leg to the feeder frame is not due, as speculated in the claimant's engineers report, to the high stress concentrations that occur at the connection under normal operation. The high stress concentrations shown are due to:

- *Use of basic hydraulic ram pressures rather final hydraulic ram pressures*
- *Poor and inaccurate modeling techniques*

An assessment of the stresses in the connection of this report shows the stress levels in the connection are significantly within the working stresses of the materials (BS5973).

Failure of the feeder to elevator leg connection is due to the failure of the bracing.

The mechanism of failure is such that once the brace members had failed each half of the elevator leg structure concerted from a lattice frame to a vertical cantilever with encastré end connections at the feeder frame and the upper section of the elevator leg. Resistance of the sideway conditions that will have occurred once the lattice bracing the elevator leg had failed would be via the connection of the elevator leg to the feeder.

It can be seen from the mode of failure (appendix 9 photographs) that the front (waterside) half of the elevator leg bracket hinged about the front plate resulting in a tensile failure of the weld/plate whilst the failure mode of the rear bracket (quayside) is one of crushing due to rotation of the connection about the rear plate.

2. Damage to the bracing members connecting the front and rear halves of the elevator leg structure.

Prior to the current failure an earlier occurrence of a failure to a bracing member was reported. This was not reported to any representatives of Company D Materials Handling thus not allowing any examination of the probable cause for the failure at that time; a review of the elevator leg and damage that it may have sustained; the repair procedure carried out or the quality of the "on-site" welding and reinstatement works undertaken.

The assessment of the design conditions used in determining the adequacy of the elevator leg structure under normal loading have verified that the members selection and overall fabrication was satisfactory. The normal operating force at the feeder at the moment of reported failure is 0.071 MN.

Under non-operational and extreme conditions, where protection to the elevator leg structure relies wholly on the operation of pressure relief for the kicking rams, the force imposed at the feeder can rise to 0.157 MN. Examination of the elevator leg bracing shows, in accordance with BS5973 clause 4.3.2 that the maximum sustainable force at the feeder to be 0.183 MN. This is greater than the 0.157 MN permitted by the kicking ram pressure relief settings.

The claimants' engineers report shows that the connection of the bracing to the elevator leg is significantly overstressed. This is incorrect; the over stress conditions are due to:

- *Use of basic hydraulic ram pressures rather final hydraulic ram pressures.*
- *Poor modeling techniques. The basic is shown as a welded connection to the elevator leg plate sections. The practical detail used in a bolted connection. FE modeling of the connection as welded will attract stress concentrators that do not exist in practice.*
- *Inaccurate modeling with the feeder being fixed in position; this is in error.*

It is the conclusion of this report that failure of the elevator leg bracing is due to either:

- *to a force or couple outside the agreed design parameters being encountered*
- *a premature failure to the previously repaired brace member(s) on the elevator leg, or*
- *failure to operate the Simporter in accordance with the procedures agreed and instructed during training of the operatives.*

3. Damage to the front and rear halves of the elevator leg structure

Failure of the folded plate section of the elevator leg members is due to the failure of the elevator leg bracing.

Failure of the lattice bracing significantly changed and the effective slenderness of the plate sections of the leg structure such that a reduction in both the bending and buckling characteristics of the folded plate occurred. This condition may have been exacerbated by the earlier failure of a lattice bracing member(s) during which an axial deformity of the plate sections may have occurred, not been corrected and consequently locked in position."

[The "Claimants' engineers report" mentioned in the Report by Mr. R is just the report with the simplified name of "Report by South China University". — Note by the Tribunal]

156. From those reports it becomes very clear that:

(1) There is little essential difference between both parties on the description of the damage.

(2) It is natural to think that the cause of damage, in technical sense, is tress concentrations in those parts where the damage happened.

(3) The sharp and uncompromising dispute lies in the question of "why there are stress concentrations?"

(4) The Claimants insist on taking the Report of South China University as hard evidence to prove that stress concentrations being existing originally in the structure of the elevator due to serious design defects made by the Respondent.

(5) The Respondent asserts that the conclusion in the Report by University F is not correct and not reliable. Stress concentrations are the result of the action of extraordinary horizontal force due to maloperations of Claimants.

157. In such a situation, whether the conclusion made in the Report by University F is correct and reliable becomes the most important critical issue the Tribunal has to examine and make justified assessment.

F. Combined Assessment by the Claimants and the Reliability of the Report by University F

158. On 30 July 2002, the Respondent made a Final Submission. In Part B3 of the Final Submission, the Respondent made some comments on the Report by University F,

repeating what the Respondent had already said in its Skeleton Argument two months ago, i.e., on 29 May 2002.

159. The Comments by the Respondent can be summarized to say that the Report by University F has two wrong assumptions and one mistake leading to the wrong conclusion of stress concentration. The two wrong assumptions and one mistake are:

(1) It wrongly assumed that the diagonal tie bracings of the elevator leg are welded to the elevator leg while in fact they are connected by bolts.

(2) It wrongly assumed that the feeder at the tip of elevator leg is positioned.

(3) It failed to take into consideration the interaction of the kicking cylinders and the luffing cylinders.

160. About three months later, on 24 October 2002, upon the Tribunal's request, the Claimants submitted their Final Submission. In the Final Submission, the Tribunal cannot find anything said by the Claimants in connection with the wrong assumptions and mistake of the Report by University F as the Respondent had contended.

161. But the Tribunal finds that in one of attachments to the Final Submission, the Claimants had made a document with a very long name. That document was entitled "Combined Assessment on (1) Design Report on the Ship Loader for Company D Stockport for Terminal M, (2) Mechanics Analysis Report by University F, and (3) Simporter M Report on the Damage to the Elevator Leg and Feeder". This is a document prepared by the group of parties acted as the Claimants in this case, namely, Company A, Company B and Bureau C, on 30 October 2002. The Tribunal suggests simplifying its name as the "Combined Assessment from the Claimants".

162. In Section 3(3) of the Combined Assessment from the Claimants, the Tribunal finds something relating to the first wrong assumption as the Respondent contended. The key words are:

> "*In Report 3, it is thought that our analysis model in Report 2 is not correct because supporting brackets are welded in the front and rear halves of leg. We think our model cannot affect the analysis result a lot because in the actual structure the supporting brackets are bolted so tight that there is no rotating action between the brackets and two halves of leg.*"

[Report 2 and Report 3 mentioned in the Combined Assessment from the Claimants are those reports with simplified names of the Report by University F and the Report by Mr. R respectively used in this Award. — Note by the Tribunal]

163. In fact, the diagonal tie bracings of the elevator leg are actually bolted to the elevator leg. The Combined Assessment from the Claimants admitted that analysis and calculation in the Report by University F was actually based on the assumption that the diagonal tie bracings of the elevator leg were welded to the elevator leg but declared to be bolted so tight that there is no rotating action and would not affect the analysis result.

164. As an attachment to the Respondent's Comments on Claimants' Final Submission on 2 December 2002, Mr. R said in his Comments as follows:

> "*3.3 It is not contested by the claimants that the model used for their analysis employs welded connection rather than a bolted connection. This is a fundamental departure from the actual characteristics of the actual manufactured and originally designed connection. It is wrong to suggest that the bolts were 'tightened' to emulate the characteristics of welded joint since this would require special 'friction grip' bolts to be torque tightened to a specific value. This is not the case; neither friction grip bolts have been used nor has any torque settings for tightening the bolts been specified. The bolts do not create a fixed joint.*
>
> *It is well understood that significant differences in member stress and connection stress concentrations exist between members rigid welded and bolted joints. It is known that small rotations at a bolted joint, say 0.1 deg, can result in stress concentration reduction of 80%.*
>
> *The type of bolts employed in connecting the elevator leg bracing are of a type that greater rotations will occur with dramatic reductions in member stresses.*
>
> *The other factor to be considered in the differences between welded and bolted connections is the stress concentrations that occur in the weld metal. These have high stress values in analysis and do not reflect the actual manufactured details.*"

165. Bolted joints are substantially different from welded joints. In comparing statements of the Claimants with that of the Respondent, it is very easy to see that the Claimants' expressions on "*brackets are bolted so tight that there is no rotating action between*

the brackets and two halves of leg" are only a subjective surmise without any proof and therefore the conclusion of "model cannot affect the analysis result a lot" is not scientific.

166. The Tribunal finds that Section 4 in the Combined Assessment is an analysis of the supporting brackets made by the Claimants. The Claimants said in this Section that:

> "*…in Report 1 & 3 there almost is no analysis to supporting brackets but to bracings. In fact, supporting bracket stresses are confused with bracing stresses in Reports 1 & 3 due to poor analysis models without supporting bracings as shown in Table 2…*
>
> *As shown in Table 3, Fig 5 and Fig 6, bracket and bracing of the elevator leg can be calculated as Classic mechanical model,…*"

[Report 1 in Claimants' statements is the Design Report; Report 2 is the Report by University F; the Report 3 is the Report by Mr. R. — Note by the Tribunal]

167. By using FBracket = 157.63 KN, Claimants gave their results of calculation that the bending stress in the bracket equals to 3,082.0 N/mm2, and said that:

> "*All stresses exceed several times of Yield Point 230 N/mm2. Any one of the above stresses can destroy the bracket.*"

168. Mr. R said in his Comments on 28 November 2002 that:

> "*3.4 The analysis of the support bracket is using the wrong basic data reflected by the poor model and as such has little bearing on the matter concerned.*"

169. The Tribunal notes that in accordance with the Claimants' calculation in Section 4 of the Combined Assessment, the stress in bracket is 3,082 N/mm2, 13.4 times of the yield strength and 8.33 times of the tensile strength.

170. Such high numerical figures of stress appeared in Section 4 of the Combined Assessment and also appeared in the Report by University F were really suggesting a very surprisingly serious problem. According to the Claimants' argument, those high numerical figures of stress are undeniable hard proofs of the serious design defects.

171. The Tribunal understands that all calculations in the Section 4 of the Claimants' Combined Assessment are based on Classic mechanical model of bracket, shown as Fig 5 on Page 7 of the Combined Assessment, and the following is its re-drawn imitative copy:

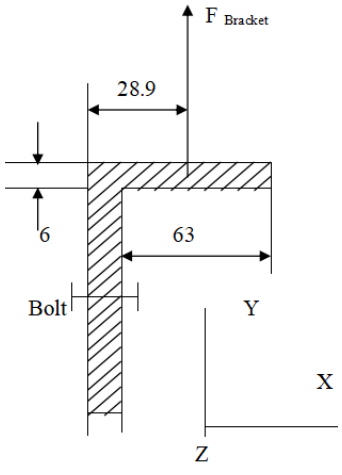

Fig. 5 Classic mechanical model of bracket

172. As Claimants said later, the method the Claimants used in Section 4 of the Combined Assessment is a "simple and comprehensible method, the classic theory of Material Mechanics". According to teachings in almost every elementary textbook on engineering mechanics, it is natural to ask whether Fig 5 as copied above is a proper free-body diagram, which is very important as being the basis in making mechanical analysis and calculations. Also, according to teachings in almost every elementary textbook on engineering mechanics that a proper free-body diagram is a sketch of an object or a connected group of objects, modeled as a single body, that isolates the body from its environment or surrounding bodies and represents the interactions of its environment by appropriate external forces.

173. Is Fig. 5 a proper free-body diagram? If it is, by this model itself, as $F_{Bracket}$ is the only force acting on the bracket, in accordance with Newton's second law of motion, which can be found in middle school textbooks on physics, and is common knowledge to intellectuals, the bracket must be moving with an extremely high acceleration of $a = F_{Bracket}$ /(mass of the bracket), along the direction of $F_{Bracket}$. But in fact, brackets are stationary with legs and braces in the elevator structure. The Tribunal presumes that the Claimants were not making their analysis and calculations on the basis of fast-moving bracket. Then, what forces, couples and/or moments of forces make the bracket stationary with the leg and the brace in the elevator structure? The model in Fig 5 does not give the answer. The extremely high acceleration $a=F_{Bracket}/m_{Bracket}$ calculated is virtually signifying the suspiciously unreasonable weakness of the bracket

structure as shown by the model in Fig 5. If it is not a proper free-body diagram, then what would be a proper free-body diagram? Under the action of $F_{Bracket}$ = 157.63 KN, a bracket with a low moment of inertia I_{Z-Z}=3240mm4 is really very week. What will be the result? And other problems.

174. In order to make clear of those puzzling problems, the Tribunal listed five questions on 12 December 2002 and asked each side to answer. Dr. Q of the University F made the answers on behalf of the Claimants. Mr. R made answers on behalf of the Respondent.

175. Those five questions are questions easy for both sides to answer, and the Tribunal, in the letter on 12 December 2002, asked both sides to make answers in detailed comments and/or explanations. In view of that the purpose of the five questions, as said in the letter, is for the sake of understanding correctly the meanings expressed in Section 4 of the Claimants' Combined assessment, the Tribunal decides to analyze first what the Claimants answered.

176. The first question of the five questions is a simple but important one, trying to make clear problems relating to free-body diagram, or relating to modeling, which is important in doing mechanical analysis by classic methods and theories.

177. The first question that the Tribunal asked is: "It is well known that having a Free-body Diagram is fundamental to make force analysis and stress calculation. Whether it is proper to consider Fig 5 (Classic mechanical model of bracket) of the Claimants' Combined Assessment as a correct and complete Free-body Diagram necessary for making force analysis and calculation of the bracket?"

178. The Claimants' answer is:

> "*When analyzing a part in a structure system, it is a very popular and common method on Engineering Mechanics to isolate it from the whole system. Since the supporting brackets are weakest parts in the elevator leg, we concentrated our analysis on these brackets in our Combined Assessment. Therefore, the analysis method adopted in Fig 5 of our Combined Assessment is proper, rational and necessary*."

179. The Claimants' expression on isolating a part for analysis is understandable and rational. But the problem is how to make a proper model for this part to be analyzed. Correct modeling is not determined by whether the part is the weakest or not. How to make a proper model can be found easily in elementary textbook on engineering mechanics. The Claimants' answer does not make this problem clear. The first question

that the Tribunal asked is to make clear whether the model shown in Fig 5 is correct or not. But the Claimants did not give a direct answer to this question but shifted the question from problems of modeling onto problems of analysis method. The Tribunal does not have doubts on the method of calculation the Claimants used, i.e., formulae for calculating moment of inertia and bending stress, etc., as the Claimants expressed in Section 4 of the Combined Assessment. The problem is what are to be put into formulae for calculation. Correct input can only be available in connection with correct modeling and correct analysis of the correct model. The Claimants' statement in the answer that "the method adopted in Fig. 5" is "proper, rational and necessary" can only be understood that the Claimants have already confirmed the correctness of using model in Fig 5 as the basis of analysis and calculation. By the Claimants' answer, it can only be concluded that the Claimants were making their analysis and calculation of the stationary bracket on the basis of the model of a fast-moving bracket. The model is evidently wrong, and logically, analysis and calculations based on a wrong model can be nothing but giving wrong results.

180. The second question is: "It is also well known that a body under different actions of forces the body will suffer different kinds of deformation. Why only the bending deformation on brackets was analyzed and bending stress was calculated in Section 4 of the Claimants' Combined Assessment?"

181. The Claimants made the answer as follows:

> "*In our Combined Assessment, much more attention has been paid to the supporting brackets, which should be responsible for the whole structure failure. Since the function of these supporting brackets is to support the bracings of the elevator leg, one supporting bracket can take as a bended [sic.] plate to be analyzed. These bended [sic.] plates in the elevator leg have been analyzed by FEM (Finite Element Method) Software ANSYS in our "Mechanics Analysis Report by University F" and the analysis result thereof has shown that the local stress on the bracket is about 262kg/mm2, nearly 12 times more than its yield limitation (23 kg/mm^2).*
>
> *In our Combined Assessment, we adopted simple and readily comprehensible method, the classic theory of Material Mechanics, taking the supporting brackets as a beam-bending problem of the classic Material Mechanics as shown in Fig 5. Although the precision of the analysis result thereof may be lower than that*

in our "Mechanics Analysis Report by University F", it is enough to verify that the supporting brackets are too week to support the structure.

Concerning how to solve a beam-bending problem in the classic Material mechanics, there is a lot of references, such as Strength of Materials by the famous Professor S Timoshenko and so on. A simple explanation is also shown in the following Fig 1 and Fig 2[omitted]. The maximum tensile and compressive stresses σ_{max},σ_{min} *occur in the outermost fibers where the Shearing stresses* τ *are zero. That is why only the bending stresses are calculated in our Combined Assessment. The maximum stress* σ_{max} *exceed several times of Yield Point 230* Nmm^{-2}*."*

182. It is now very clear that the purpose of the Claimants' calculation by using simple and readily comprehensible method, i.e., the classic theory of Material Mechanics, in Section 4 of the Combined Assessment, is to verify the correctness of calculation and conclusion in the Report by University F. According to the Claimants' statement, the verification is successful. But the calculation of bending stress in Section 4 of the Combined Assessment is a wrong calculation based on a wrong model. Logically, a wrong one can only to verify another wrong one. Therefore, the result of verification can only be understood that the calculation and conclusion in the Report by University F is wrong.

183. The third question is: "Under normal operating conditions whether there is substantial possibility of occurring significant bending deformation of the brackets in real structure of the Elevator?"

184. This is a rather simple question, acting as a prelude to the fourth question, and the Claimants gave a short answer as follows:

"*Definite.*

Under normal operating conditions, it is definite that there is a substantial possibility of occurring significant bending deformation of the brackets in real structure of the Elevator."

185. The fourth question is very important, which is: "Referring to calculating results in Section 4 in the Claimants' Combined Assessment, it can be seen that under the action of normal working force, the bending stress in brackets is as high as 3082N/mm^2, more than 13.4 times of the Yield Point and 8.33 times of the Tensile Strength of the steel used for brackets. And also considering the low value of the moment of inertia

I_{Z-Z}=180×63/12=3240mm4, an indication of very week bending resistance of the bracket area along Z-Z axis, whether it is appropriate to make a prediction that the structure of the Elevator would likely collapse quickly even at normal operating conditions?"

186. The Claimants made a very clear and definite answer as follows:

> "*The answer is definite. It is appropriate to say that the structure of the Elevator would collapse quickly even under normal operating conditions.*
>
> *As the arbitration tribunal understood finally, the defect in the Elevator design, which we have tried to show in our serial reports, is that the value of the moment of inertia IZ-Z is only equal to 3240 (mm4) calculated in our Combined Assessment, too low to support the bracings of the Elevator Leg. How can such a thin and small plate with a thickness of 6mm and a width of 180mm support the normal bending load of the Elevator Leg? That is why very high bending stresses, which is as high as 3082 Nmm-2 and 13.4 times more than the Yield Point, occur in the supporting brackets.*"

187. It is interesting to note that the Respondent also made answers essentially the same with that of the Claimants.

188. The Respondent said:

> "*The stresses are so high that just moving the leg from one location to another (not necessary in a ship) should cause the whole leg to fall off.*
>
> *As explained, the magnitude of the stresses encountered in the Claimant's modeling is beyond the capacity of any normal steel material. Under these conditions the whole of the elevator leg structure should collapse if it were correct.*
>
> *If the model used by the Claimant is correct the elevator leg should have collapsed the moment it was moved to either a forward or rearward angle.*"

189. The Tribunal knew well the weakness of the bracket not at the time of "finally" but at the time the data concerned first appeared in documents submitted by the Claimants. So, the Tribunal put forward the third and fourth questions. The Tribunal fully agrees with the same predictions made separately by both parties. Predictions must be tested by facts. What are the facts?

190. In accordance with statements made by the Claimants, it can be found that:

(1) The Claimants said that the Simporter was installed in November 1997, and the accident occurred on 25 March 2000. The time span between these two dates is about two years and four months.

(2) The Claimants said that there were trial test runs in May 1998, July 1998, and February 2000.

(3) The Claimants said that the Simporter did not reach the rated unloading capacity, and the maximum capacity ever reached was but 690 tons per hour.

(4) The Claimants said that up to the time of accident on 25 March 2000, the Simporter had unloaded grains only about 80,000 tons. If using the maximum capacity reached, i.e., 690 tons per hour, to make a computation, and the accumulated time of operation of the Simporter is more than one hundred and fifteen hours.

(5) The Claimants said that the Simporter was put into operation on 21 March 2000 and had the accident on 25 March 2000. That is to say that before the accident, the Simporter was operated normally for four days. On the very date of 25 March 2000, the Simporter had been operated for many hours before the accident occurred at 12:50 pm.

191. In accordance with the Claimants' statement, there has never been any "collapse quickly" at all.

192. After making the prediction, the Respondent said:

> "*This did not happen and indeed the Elevator leg and Simporter had articulated satisfactorily until the accident.*"

193. The predictions made separately by both parties and agreed by the Tribunal cannot be proved by facts. That means the predictions are totally wrong. The "correctness" of calculations in the Section 4 of the Combined Assessment cannot be proved by facts.

194. The Claimants said that the Report by University F depends its verification on the calculation in the Section 4 of the Combined Assessment. By the answers made by the Claimants to the first and fourth questions, it can be obviously seen that the calculation in Section 4 of the Combined Assessment is wrong by using a wrong model of bracket as the basis of calculation, and prediction made in accordance with the calculation results cannot be proved by facts.

195. It easily leads one to think whether calculations in the Report by University F are correct or not.

196. The Tribunal understands that in the Report by University F, calculations were made by computer analysis using finite element method, not the classic method as being used in Section 4 of the Combined Assessment.

197. The Respondent made answers to the first question and second question as follows. In those long answers, the Respondents was making further detailed and systematic discussions, as the Respondent's opinion, on calculations by computer analysis. The discussions can be considered as supplementary to the Report by Mr. R.

198. Following is the Respondent's answer to the first question:

> *"1. There are different methods of carrying out a computer analysis and design for the elevator leg. Both methods use a computer but run different programs. These are:*
>
> - *Finite element method analysis, and*
> - *Frame analysis.*
>
> *The difference in the methods of analysis is that for:*
>
> *In a FEM computer model the whole of the elevator leg structure is divided into an array of small interconnected rectangular, square or triangular plates. These plates when joined together replicate the shape of the steel elements of the bracing, frame and front and back plates. The joint/junction between adjoining plates, are by the nature of the analysis, assumed to be rigid and can be likened to a fold in a piece of paper. Such a junction has full material continuity along its edge to transfer moment, shear, axial and torsion forces/stresses. Joint/junctions are considered to be "rigid".*
>
> *In a FAM computer model, the elevator leg is represented as a series of "stick" members. These "stick" members join together to form of overall geometry of the elevator leg bracings, frame and front and back plates. The connection between adjacent "stick" members can be altered to simulate rigid or flexible joints.*
>
> *Both computer techniques provide member forces and stresses whilst the FEM analysis provides detailed connection stresses. When using the FAM analysis method, it is necessary to manually determine the detailed connection stresses.*

Both computer techniques depend upon accuracy of model creation; however the FEM model requires sophisticated modeling techniques to ensure that the stress data output for the connections reflects the manufactured/built structural case.

When using a computer to simulate a manufactured construction there are many factors that have to be taken into account in the generation of the computer model. The basic elements of these factors are:

(a) The manufactured geometry of the computer simulation, i.e., does the model accurately represent the actual form of construction?

(b) Are the support constraints for the computer model the same as in the manufactured construction?

(c) Is the applied load to the model (the elevator leg), to simulate use of the manufactured construction, the same as in the manufactured construction?

(d) Is the method by which elements of the computer model have been assembled the same as in manufactured construction?

(e) Are the material specifications for the manufactured construction simulated in the computer model?

If one or more of the above factors has not been correctly modeled, then the computer analysis and results obtained are at best flawed and at worst provide totally incorrect data.

In outline the basis geometry of the Elevator Leg structure has been accurately represented in the Claimant's model. However, the detailed geometry of the model relating to:

- *the connection of the bracing members to the elevator leg side plates, and*
- *the support conditions used in the computer model to simulate the operation of the elevator leg,*

are in error.

For the reasons explained earlier in this report these modeling errors have a significant effect on the data output for the connection stresses and from the computer analysis.

The computer model used by the Claimants is incorrect in two parts:

***PART 1** - The model of the bracing to elevator leg plate connection.*

With the FEM analysis technique used by the Claimants it is essential that the correct connection model for the bracing to the elevator leg front and back plate is created. By default the computer analysis assumes that this connection is rigid i.e., is fully welded. Such a connection has significant stress concentrations at the weld interface; it is these stresses that are highlighted in the Claimants' report. It is known that the manufacturing detail and the original design for the connection of the bracing members is by bolting to the elevator leg front and back plates.

The actual detail used in the manufacture for the connection of the bracing to the elevator leg front and back plates is totally different from a welded connection and the connection is bolted; as such the analysis and design of a bolted connection is totally different from that of a welded connection.

For the Claimants' model to be correct, it is necessary to change the stiffness of the plates at the joint between adjacent plate elements.

It can be seen from the Claimants' computer analysis that the high stress values are concentrated at the joint between plate elements. Examination of the stresses a short distance away from the connection show the values to be acceptable.

The design assessment made by the Respondent covers both FEM and FAM computer model techniques. The results presented show that for a bolted connection the high stress values of the Claimants' analysis did not exist in practice.

***PART 2** - The modeling of the support details for the elevator leg.*

With either FEM or FAM computer modeling technique the method applying external forces and the support conditions used are equally critical.

The claimants' model has adopted the following technique.

(a) The joint between the elevator leg and the boom is a support.

(b) The joint between the elevator leg and the hydraulic actuating cylinder is modeled as an applied force; either tension or compression (the value used for this force is the maximum tensile or compressive force provided

on the Rexwroth hydraulic data sheets; the values of the maximum forces subsequently reported by Company D to be design values rather than the concept values used by the Claimant.).

(c) The location of the feeder has been modeled as 4 number support locations. This, by the nature of 4 supports, provides a "rigid" frame support.

It is agreed that the Claimants' model using the connection between the elevator leg and the boom as a support is correct. From this point on the Claimants' computer model is in error. The error is a combination of how the Claimants has applied a force at the top of the elevator leg (the hydraulic cylinder connection) and how the elevator leg "feeder" is restrained. The Claimants' model, by adopting the method of support at the feeder, has fixed the feeder in a rigid mode. The correct model should allow the feeder to be free with resistance provided by restraint against product but able to rotate. See appendix 1 (omitted) for a sketch highlighting the different modeling effects.

The fixing of the feeder on 4 supports has introduced additional stresses that do not occur in the manufactured construction. It is these stresses that the Claimants is reporting as being the over stress values of the computer output. The model created by the Claimants will show wrong and increased stresses in the elevator leg front and back plates; increased stresses in the joint between the elevator leg and the feeder and increased stresses in bracing connections in the area around the feeder connection. "

199. Following is the Respondent's answer to the second question:

"2. Both detailed FEM and FAM computer models have been created by the respondent in order to review the stresses predicted by the Claimants. Because of the specific statements made by the Claimants with respect to the stresses in the bracing of the elevator leg a specific analysis of the bracing connection was made. The issue of the connection of the bracing to the elevator leg front and back plates is central to the claimants' claim.

The detailed analysis of the connection of the bracing to the elevator leg front and back plates using a bolted connection design showed that the stresses in the connection fall within the permissible values for the grade of steel used. It was

possible for the Respondent to create the same stresses as that in the Claimant's' analysis by welding the connection joint; this however is not correct."

200. After those answers, the Respondent made its conclusion as follows:

"*In all points the very high stresses reported by the Claimants is due to incorrect modeling. The significance of the wrong model is shown by the drastic reduction of stresses (shown in the Claimants' model) just a short distance away from the location of the "welded" joint.*

These errors have occurred because of two reasons:

(a) the model created by the Claimants gas welded joints for the bracing connections to the elevator leg front and back plates, and

(b) the method of supporting the feeder for the analysis is incorrect.

If the model used by the Claimants is correct, the Elevator Leg should have collapsed the moment it was moved to either a forward or rearward angle. This did not happen and indeed the Elevator leg and the Simporter had articulated satisfactorily until the accident.

It is believed that the failure of the joints to the bracing and feeder connections is due to extraordinary circumstances that have occurred in the operation of the Simporter. These have not been explained by the Claimants or their agent."

201. By examinations as stated above and statements by both parties, it can now be definitely concluded that the Report by University F is incorrect and not reliable, so it is unacceptable as evidence to support the Claimants' position on design defects having existed in the elevator structure of Simporter.

G. Other Issues and the Final Conclusion

202. In Sections 3(1) and 3(2) of the Combined Assessment, the Claimants put forward problems on the differences of hydraulic pressures and cylinder forces in 3 reports. The Claimants said that:

"*… The same set is used in Report 1 and 2, but different set in Report 3. The smaller hydraulic pressures and cylinder forces for leg kicking is used as original data in Report 3.*

In fact, the set of hydraulic pressures and cylinder forces in Report 1 & 2 was adjusted and sealed by Company D engineers and was verified by Mannesmann Rexroth in Apr 2000 shown in Appendix 1, rather than the basic hydraulic ram force mentioned in Report 3 and issued in Nov 1997 in Appendix 2. It is never and impossibly adjusted by our Xinsha engineers. But Report 3 shows that our analysis in Report 2 uses the basic hydraulic ram force rather than the final ram force. So we do not agree to the opinion. Our analysis in Report 2 uses the actual hydraulic ram force. …

The force is very important to the structure failure…

The force at feeder in Report 1 and 2, namely Ffeeder12 is calculated by RDG Engineering in Report 3, i.e., Ffeeder12 = 167.31 KN. And the force at feeder, namely $F_{feeder3}$ *in Report 3 is claimed as a correct one by itself, i.e.,* $F_{feeder3}$ *= 71 KN. That is Ffeeder12 / Ffeeder 3 = 2.35. Even if we assume* $F_{feeder3}$ *- 71 KN is correct,* $F_{feeder3}$ *still is large enough to destroy the elevator leg due to the great stress centralizing on supporting brackets, the connections of the bracings to the leg, and on the connection of the leg to the feeder due to the poor leg design. …"*

[Report 1 in the Claimants' statements is the Design Report; Report 2 is the Report by University F; Report 3 is the Report by Mr. R. — Note by the Tribunal]

203. The Respondent made the replies by Mr. R in his Comments on 28 November 2002 as follows:

"3.1 It was explained at the tribunal and in the report submitted at that time that the analysis and design undertaken by both Claimants used the basic concept design hydraulic pressure relief settings. As part of the design process undertaken by Company D a final design review of the weights of the articulating parts of the Simporter is undertaken and any changes to pressure setting made. This was the case for Simporter M with the resulting reduction in pressure relief settings. There is no ambiguity in the statement made concerning the change in pressure setting values and indeed demonstrates the quality procedures undertaken during the Simporter design process.

3.2 With the corresponding reduction in the active pressure relief settings for the hydraulic control operations it is logical that a reduction in the feeder force capability results."

204. The Tribunal, at the time of reading the Combined Assessment, was much impressed by the Claimants' statement that "Even if we assume $F_{feeder3}$ - 71 KN is correct, $F_{feeder3}$ still is large enough to destroy the elevator leg due to the great stress centralizing…". As the Claimants said in the Combined Assessment that in the Design Report from the Respondent side, i.e., Report 1 as the Claimants mentioned in the Combined Assessment, the feeder force F_{feeder} used was much high than $F_{feeder3}$ = 71 KN, it seems proper to predict that the Design Report must also have a same conclusion as the Claimants do: large enough to destroy the elevator leg. But what the Tribunal found in the Design Report is a statement opposite to what was predicted. The Design Report said: "The calculations show that for this working load case there are no stresses that exceed the maximum permissible stress level and as such the design was acceptable." Why? Evidently it is because that each of both sides had their respective conclusions based on their opposite understanding on issues relating to modeling. So, debates on feeder forces are only a subsidiary to the debates on modeling.

205. Issues Sections 5 and 6 of the Combined Assessment dealt are:

"*5. Analyzing the collapse of the whole structure*

6. Analyzing the connection between the feeder frame and two halves of leg"

206. Issues relating to those two sections have already been examined, the Tribunal will not repeat what has already been discussed.

207. Section 7 of the Combined Assessment is the Claimants' conclusions, which said:

"*(1) Supporting bracket stresses based on both Report 1 and Report 3 exceed several times the material Yield Point 230 Nmm-2. Any stresses of analyzed cases can destroy the brackets.*

(2) The damaging process of whole leg is firstly the supporting brackets were damaged due to overload, and then the whole leg collapsed without brackets and bracing supporting.

(3) The maximum stress 686.1 Nmm-2 of the connection, a plane between the feeder frame and two half legs exceeds the yield limit (230 Nmm-2). That is

the main reason why a plate in the connection plane was torn off the feeder frame in the failure accident."

208. Report 1 and Report 3 the Claimants mentioned are the Design Report and the Report by Mr. R, respectively. The Tribunal cannot find in these two reports any expression that "stresses exceed several times the material Yield Point".

209. The fifth question the Tribunal asked is: "Whether the calculating results in the section 4 in the Claimants' Combined Assessment are so correct and reliable that it can be taken as hard evidence of ascertaining and making conclusion that structure of the Elevator is of seriously defected design as the Claimants described?"

210. The Claimants made a very clear-cut answer as follows:

> "*The answer is definite. The calculating results in Section 4 in the Combined Assessment are so correct and reliable that it can be taken as a hard and irrefutable evidence to ascertain and conclude that the structure of the Elevator is of seriously defected design as we described.*"

211. Obviously, the Claimants' answer is in conformity with the conclusions and other statements Claimants have made.

212. The Tribunal understands that the Claimant's conclusions and statements were based on the Report by University F. By detailed and careful examination as stated above, the Report by University F has already been confirmed as incorrect and not reliable. Therefore, the conclusions made by the Claimants are lacking reasons and evidence.

213. As final conclusion, the Tribunal confirms that the Claimants' position on serious design defects having existed in Elevator structure of Simporter is lacking reasons and evidence and cannot win support from the Tribunal.

H. Claimants' Claims

214. The Claimants asked the Tribunal to make decision on the Respondent's payment nearly RMB 1.6 million to compensate the Claimants' expenses for repairing the Simporter and for dealing with this case. The Claimants also asked that the arbitration fee be borne by the Respondent.

215. In considering that:

(1) The Tribunal has confirmed, based on the expiration of the warranty period as agreed in the Contract, that all obligations of the Respondent on the goods, except the proof of rated unloading capacity, have been released;

(2) The Claimants' allegation that serious design defects exist in the Simporter is lacking reason and evidence; and

(3) The Claimants are not claiming for the failure of proving the unloading capacity.

216. The Claimants' claims shall be dismissed.

217. The arbitration fee shall be borne by the Claimants themselves.

I. Respondent's Counterclaims

218. The Respondent's counterclaims are of two parts.

1. The first part is for Nearly GBP 160000, including 8 items of expenses, from January 1998 up to March 2001.

219. In considering that:

(1) 5 out of 8 items are of expenses incurred during the time before the expiry of warranty period;

(2) The rated unloading capacity of 800TPH has so far not been proved;

(3) The Claimants also suffered a lot of loss during that time period; and

(4) Relative evidence is of poor validity, as the Claimants have doubted.

220. The Tribunal considers it being unreasonable to make decisions on unilateral compensation. This part of the Respondent's counter claim shall be dismissed.

2. The second part is for Nearly US$ 20,000, i.e., the amount the Respondent paid instead of the Claimants to local fabricator. The Respondent asked for the refund of this amount by the Claimants.

221. The Claimants made their comments on 9 January 2003 as follows:

"C. Attachments to Amendment [sic.] to Counterclaims.

We have never been informed whether the tribunal has accepted Company D's addition to its counterclaim and whether Company D has paid the arbitration fee for such addition."

222. This is a repetition of what the Claimants said in their Final Submission on 24 October 2002.

223. The Tribunal must make it clear here that in accordance with the *CIETAC Arbitration Rules*, either of disputing parties has the right to make amendment on his claims or counterclaims, including addition or deletion of claims or counterclaims.

224. For the sake of helping the Claimants to know better, the Tribunal sent a letter on 25 December 2002 and made a very clear expression that "*the tribunal wishes to advise the parties that the amendment by the Respondent to its counterclaims has been accepted by the tribunal*".

225. The Claimants said further in the Comments of 9 January as follows:

"*Nevertheless, concerning such addition, we would like to stress that we have made full payment of the contract price strictly in accordance with Contract by and between the parties. The Commercial Invoice issued by Company D on 20 October 1998 proves that 'Final payment due, 5% of Contract Value' has been received by Company D upon issuance of the invoice (please see Attachment 3 of our Application).*"

226. The Tribunal finds the Contract following stipulations:

"*Total Contract Price*

Total price of this Contract is Nearly US$ 3.4 million …

Description of the price:

The Contract Price consists of the following two parts:

A) Price for the imported portion, which is More than $2.7 million …

B) Price for the local portion, which is Nearly US$ 660,000…"

227. The Commercial Invoice as Attachment 3 of the Claimants' Application for Arbitration really showed the invoice was for "Final payment due, 5% of Contract value", but had an amount of nearly US$ 140,000 shown at the bottom of the Invoice. By the simplest

arithmetic calculation, 5% × More than US$ 2.7 million = More than US$ 140,000, it becomes very clear that the final 5% is the 5% of the price for imported portion only.

228. The Claimants made further comments as follows:

> "*The relation between Company D and its local fabricators has nothing to do with us since we only have contractual relation with Company D but no contractual relation with the fabricators. Therefore, any debts owed to the fabricators shall naturally be paid by Company D.*"

229. The Tribunal finds the Contract stipulates that:

> "*6.2 Payment for Local Fabrication*
>
> *Local fabricator's price, i.e., Nearly US$ 660,000 shall be effected by the Buyer directly to the Local Sub-Contractor by means of a bank check or bank transfer against the Seller's written instruction…*"

230. It is very clear that though the contract for local fabrication was a contract between the Respondent and the local fabricator, but that the responsibility and obligation of payment must be borne by the Claimants. This is a clear stipulation in the Contract agreed upon by the Claimants and the Respondent.

231. The last paragraphs of the Claimants' comments are:

> "*Finally, what is most important, in accordance with Contract by and between the parties, the total contract price Nearly US$ 3.4 million has consisted of all costs, freight, insurance and fees until and after the Simporter has been tested to be qualified through commissioning and transferred to the Claimants price for the local portion… includes: … (d)* ***unloading, erection and commissioning support of the Ship Unloader at Site****). Such price is firm and fixed. That means Company D has no right to ask the Claimant for any extra money until ans [sic.] after the Simporter has passed the test and proves itself to be qualified. However, until 21 March 2000, the Simporter has never been tested to qualified for even only one Acceptance Criteria, Rated Unloaded Capacity of 800TPH, leaving the other two Criteria untested forever.*
>
> *For all above reasons, we insist that all costs mentioned above be borne by Company D itself.*"

232. In accordance with the Respondent's statement in its Amendment to Counterclaim on 29 June 2002, the amount nearly US$ 20,000 is 3% of the local fabricator's price;

1% is a short payment of the first four payment installments and 2% is the unpaid last payment. (See Section D of Part I in this Award.) That means, for the local fabricator's price, the Claimants has already paid 97% of the total amount, left 3% to be paid later. The Claimants did not make any comments on those paid and unpaid amounts but asserted that the Respondent has no right to ask the payment because of the rated unloading capacity has so far not been successfully tested and proved.

233. The Tribunal notes that 1% is but a short payment and the last 2%, in accordance with the Contract, "*shall be effected after the expiration of the guarantee period*". In considering:

(1) the Tribunal has already made decisions on dismissing the first part of the Respondent's counterclaim to balance the unproven of unloading capacity, and

(2) the guarantee period has expired on 4 March 1999.

234. The Tribunal confirms that the Respondent is entitled to ask the refund by the Claimants the amount of nearly US$ 20,000 the Respondent has paid to the local fabricator. Therefore, the Tribunal supports this part of the Respondent's counterclaim.

3. In view of the fact that only a small part of the Respondent's counterclaim is supported by the Tribunal, the Tribunal finds it reasonable that 10% of the arbitration fee for the Respondent's counter claim shall be borne by the Claimants and 90% of it shall be borne by the Respondent itself.

III. AWARD

235. The Tribunal hereby rejects all the claims by the Claimants.

236. The Claimants hereby shall pay to the Respondent nearly US$ 20,000 within 30 days from the date of this award.

237. The Tribunal hereby rejects all the other counterclaims claimed by the Respondent.

238. The arbitration fee for the Claimants' claims, shall be borne by the Claimants. The said sum has already been paid to the CIETAC by the Claimants.

239. The arbitration fee for the Respondent's counterclaims shall be borne by the Respondent while 10% of which shall be borne by the Claimants.

240. This award is made here in Beijing, China on 24 April 2003 and is final and binding upon all the parties.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

German A Maschinenfabrik GmbH

Claimant

v.

China B Brewery Co., Ltd.

Respondent

Matter for arbitration: Disputes over equipment sales and installation contract

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. INTRODUCTION

This arbitration is between Claimant, German A Maschinenfabrik GmbH ("A GmbH"), and Respondent, China B Brewery Co., Ltd. ("Company B"), concerning the dispute arising from the Contracts No. 1 and No. 1A, which were entered into by Claimant and Respondent on November 25 1995 and November 30 1995 respectively.

II. THE ARBITRATION PROCEEDINGS

A. Initiation of Arbitration

This arbitration was initiated by Claimant filing an Application for Arbitration with China International Economic and Trade Arbitration Commission [originally named Foreign Trade Arbitration Commission ("FTAC"), later renamed Foreign Economic and Trade Arbitration Commission ("FETAC") and now settled as China International Economic and Trade Arbitration Commission ("CIETAC")]. Based on the arbitration clauses in the aforesaid contracts, CIETAC accepted the Application. CIETAC sent a Notice of Arbitration with appendices to Claimant and Respondent respectively in 2001. The CIETAC Arbitration Rules ("*CIETAC Rules*") effective from 1 October 2000 are applicable to the arbitration proceedings of the present case.

B. Language of Arbitration

Claimant and Respondent disagreed with each other on the language to be used in the proceedings for the present case. In accordance with Article 85 of the *CIETAC Rules*, CIETAC Secretariat made the following decisions in April 2001:

(1) Although the Contracts provided that "*all communication between both parties in the course of the present contract shall be made in English format*", the parties made no specific provision in Chapter "Arbitration" of the Contract concerning the language to be used in the arbitration proceedings. Therefore, according to Paragraph 1, Article 85 of the *CIETAC Rules*, the official language of the present arbitration shall be Chinese.

(2) In view of the fact that the Claimant is a German company and all communication between the parties in the course of performing the Contract was made in English, the CIETAC Secretariat thinks it necessary that all written statements submitted by both parties shall be accompanied with an English or Chinese

translation, in accordance with Paragraph 3, Article 85 of the *CIETAC Rules*. The evidential documents, if submitted in Chinese, shall be accompanied with an English translation and no Chinese translation is necessary if they are submitted in English.

(3) At the oral hearings, CIETAC Secretariat may provide an English interpreter for the tribunal and the parties.

C. Counterclaim

In April 2001, CIETAC Secretariat received Respondent's counterclaim.

D. Constitution of Arbitral Tribunal

Claimant appointed X as Arbitrator, and Respondent appointed Y as Arbitrator. In accordance with Article 24 of the *CIETAC Rules*, the Chairman of CIETAC appointed Z as the Presiding Arbitrator. The arbitral tribunal consisting of the above-mentioned three arbitrators was constituted in May 2001.

E. Hearings

The arbitral tribunal held three oral hearings in Beijing for the present case respectively from 2001 to 2003. Claimant and Respondent with their arbitration agents were present at the three hearings.

After the hearings, both Claimant and Respondent filed further written submissions, which had been passed by CIETAC Secretariat onto their respective opposite parties.

F. Time-limit for Rendering Final Award

As the present case is very complicated, the Secretary General of CIETAC, upon the request of the arbitral tribunal and pursuant to Article 52 of the *CIETAC Rules*, permitted the time limit for rendering the final award to be finally extended to March 2005.

III. FACTUAL BACKGROUND

A. Contract No.1

On 25 November 1995, Claimant (Seller) and Respondent (Buyer) entered into Contract No.1. Under the Contract, Claimant agreed to sell, and Respondent agreed to

buy equipment for the extension of Respondent's existing brewery from 1,000,000 hl to 1,500,000 hl, equipment for a new brewery with a capacity of 1,000,000 hl as well as all the technical documentation necessary for installation, test run, normal operation and maintenance of the Contract Equipment.

The total contract price of the equipment, shipping, installation, services and technical documentation of the Contract Equipment to be supplied by the Seller amounted to DM 89 million and was a firm and fixed price for delivery free brewery.

The total contract price shall be paid by the Buyer to the Seller according to the following manner and percentage: (1) 15% of the total contract price equivalent to DM 13,350,000 shall be paid by the Buyer to the Seller as a down payment of the total contract price by telegraphic transfer not later than 30 days after having received an irrevocable letter of guarantee, *pro forma* invoice and sight draft/banker's receipt from the Seller and found them in order; and (2) 85% of the total contract price equivalent to DM 75,650,000 shall be paid by the Buyer to the Seller in the form of an irrevocable letter of credit, payable at sight issued by the Buyer's first class bank. The letter of credit, allowing partial shipment and transshipment, shall be opened at least 30 days after the down payment is paid.

The Seller shall complete the delivery of the Equipment and Materials according to the following procedure and schedule: (1) Equipment for the extension of the existing brewery from 1,000,000 hl to 1,500,000 hl — within 6 months after receiving down payment and/or 5 months after receiving acceptable letter of credit, whichever is later; and (2) Equipment for a new brewery with a capacity of 1,000,000 hl — within 9 months after receiving down payment and acceptable letter of credit. If postponement of the shipment is required, the Buyer should inform the Seller in written form before 31 March 1996. The postponement however could not exceed 6 months. After the new delivery time is confirmed, both parties shall sign a letter of memorandum.

The erection, test run, commissioning and performance test of the Contract Equipment should be carried out under the organization and the technical instruction of the Seller. After the accomplishment of erection, the representatives of both parties shall make inspection and carry out test run together according to the technical documents and drawings when they think the erection work is done in full conformity with design requirements. The erection certificates for the single machine and the series of machines and equipment will be signed by the representatives of both parties. After the completion of the test run, the commissioning shall be carried out as quickly as possible. The start-up date shall be fixed between both parties through negotiation. The commissioning period shall be at least 1 month beginning

from the date of starting initial commissioning. When good and stable operation of the main equipment of the Contract Equipment has been achieved, a date for the performance test shall be fixed. If all the guarantee figures are fulfilled, a "Certificate of Acceptance of the Contract Equipment" shall be signed by the representatives of both parties within 5 days in four copies. If any performance test fails due to the Seller's reason, the Seller shall have to make necessary repair, replacement and/or modifications to the Equipment and Materials as quickly as possible within the period agreed upon by both parties.

B. Contract No.1A

On 30 November 1995, Claimant and Respondent signed Contract No.1A. Under the Contract, Claimant agreed to sell, and Respondent agreed to buy equipment and services for the modernization of the existing storage cellar and equipment and services to connect 10 additional bright beer tanks to 5 additional filling lines, as well as to deliver all the technical documentation necessary for installation, test run, normal operation and maintenance of the contract equipment.

The total contract price of the equipment, shipping, installation, services and technical documentation of the contract equipment to be supplied by the Seller amounted to DM 4,100,000 and was a firm and fixed price for delivery free brewery.

The total contract price should be paid by the Buyer to the Seller according to the following manner and percentage: (1) 15% of the total contract price equivalent to DM 615,000 should be paid by the Buyer to the Seller as a down payment of the total contract price by telegraphic transfer not later than 30 days after having receiving an irrevocable letter of guarantee, *pro forma* invoice and sight draft/banker's receipt from the Seller and found them in order; and (2) 85% of the total contract price equivalent to DM 3,485,000 should be paid by the Buyer to the Seller in form of an irrevocable letter of credit, payable at sight issued by the Buyer's first class bank. The letter of credit, allowing partial shipment and transshipment, should be opened at least 30 days after the down payment is paid.

The Seller should complete the delivery of the equipment and materials within 9 months after receiving down payment and acceptable letter of credit.

C. Dispute

In Appendices to both Contracts, a tentative time schedule for the engineering, manufacturing, shipping, erection, testing, commissioning and training was specified. However, the whole project was considerably delayed, and the parties disputed over who

should be held liable for the delay. After the parties' efforts to resolve the dispute through friendly negotiation failed through, Claimant filed this arbitration.

IV. CLAIMANT'S CASE AND CLAIM

A. Applicable Law

According to Article 142, first Section, of the *International Private Law of China*, the *Civil Law of China* is not applicable, (a) if an international convention to which China is a party is applicable and (b) if such international convention stipulates something different from Chinese Law. If this is not the case, Chinese law is applicable and if something is not stipulated by Chinese law, "international trade usage" shall apply according to Article 145, second Section, of the *International Private Law of China*.

The People's Republic of China ("PRC") and German are both a party to the *United Nations Convention on Contracts for the International Sales of Goods* ("CISG"). According to Article 3 of the *CISG* the convention would be applicable on the Contracts in dispute.

The *Contract Law of the PRC* ("PRC Contract Law") does not contain any special provisions for contracts for industrial plants. Consequently, Article 124 of the *PRC Contract Law* is applicable, which stipulates the following: "*As to contracts for which there are no express stipulations in the special rules of this (Contract) Law … the most closely similar stipulations in the special provisions of this (Contract) Law … shall be referred to*." Therefore, due to the fact that contracts for industrial plants show elements of "Sales Contracts" (Chapter 9 of the *PRC Contract Law*), of "Contractor's Agreements" (Chapter 15 of the *PRC Contract Law*) and of "Construction Project Contracts" (Chapter 16 of the *PRC Contract Law*), reference is made with regard to such contracts for industrial plants to the "most closely similar stipulations in the special provisions" of the *PRC Contract Law* dealing with "Sales Contracts", "Contractor's Agreements" and "Construction Project Contracts".

In conclusion, Claimant refers with regard to its claims to: (a) the Contracts; (b) Article 157, first sentence, and Article 158, first and second sentences, of the *PRC Contract Law* (Chapter 9 on Sales Contracts); (c) Article 257, second sentence, and Article 258 of the *PRC Contract Law* (Chapter 15 on Contractor's Agreements); (d) Articles 283, 284 and 285 of the *PRC Contract Law* (Chapter 16 on Construction Project Contracts); and (e) international trade usages; and (f) the *CISG* (in case the convention stipulates something which is different from (b) to (d)).

B. The Contractually Agreed Period of Time for Installation, Testing and Commissioning was Actually Extended by 25 Months.

The installation should have started in week 33 (12 August 1996) with the Old Brewery/ Brewhouse 1+2 and commissioning should have ended in week 96 (2 November 1997) with "Commissioning, Automatic Mode" of the New Brewery/Brewhouse 3. Therefore, the contractually agreed period for installation plus testing and commissioning was in total (96 weeks minus 32 weeks =) 64 weeks or (64 weeks / 4.35 =) 14.7 months.

Actually, Claimant's engineers arrived at Respondent's site in the first week of 1997 and the last of Claimant's engineers left the site on 28 April 2000. Consequently, Claimant's engineers stayed on Respondent's site in total 39.7 months.

The difference between the contractually agreed period of time of 14.7 months and the period of time of 39.7 months actually spent on site is 25 months.

C. The Extension of the Contractually Agreed Period of Time for Installation, Testing and Commissioning was Solely Caused by Circumstances within Respondent's Sphere of Responsibility.

According to the contents of the Contracts in dispute the plant was not to be erected "turn-key". Claimant owes the supply of certain brewery equipment, its transport, its installation and certain technical documentation. According to the wording of the Contracts there is a "Seller" (Claimant) and a "Buyer" (Respondent) and the "Seller" owes "the delivery of the Equipment and Materials".

Civil works (including all civil works drawings) were Respondent's sole responsibility. The installation of the contractual equipment cannot start before the respective buildings/ civil works are ready for access.

Claimant's access to the civil works of the Old Brewery/Brewhouse 1+2 and Claimant's access to the civil works of the New Brewery/Brewhouse 3 were actually delayed.

Claimant's access to the civil works of the Old Brewery/Brewhouse 1+2 and Claimant's access to the civil works of the New Brewery/Brewhouse 3 were extended due to failures of Respondent's civil works, Respondent's contractors, Respondent's Civil Work Design Institute ("GDI ") and because of Respondent delaying payments to them. These facts are evidenced by many Claimant's Exhibits, just to state a few: (1) Exhibit CX-1 (Respondent's Inter Office Memo, December 1996); (2) Exhibit CX-2: (Respondent's Inter

Office Memo, April 1997); (3) Exhibit CX-3: (Respondent's Internal Memorandum, April 1997); (4) Exhibit CX-4 (Report on A GmbH, May 1997); (5) Exhibit CX-5 (Respondent's Letter, June 1997); and (6) Exhibit CX-6 (Minutes of Meeting, June 1997).

In April 1996 there was a meeting in China, which was attended by representatives of both parties. In this meeting, Claimant handed over to Respondent the General Time Schedule, April 1996 and one "Off Lay Out Plan with Marked Areas to Be Finished for Installation". Items a/b/c, page 1/2 of the General Time Schedule (April 1996) state for Brewhouse as date for start of installation (access date) 30 September 1996. Item d, page 2/2 of the General Time Schedule (April 1996) states for Brewhouse 1+2 as date for start of renewing (access date) 31 March 1997.

Due to Claimant's delayed access to the civil works of the Old brewery/Brewhouse 1+2 and due to Claimant's delayed access to the civil works of the New Brewery/Brewhouse 3, the General Time Schedule and with it the access dates for the Old brewery/Brewhouse 1+2 and for the New Brewery/Brewhouse 3 were revised at least five times upon Respondent's request. These revisions include Revision November 1996, Revision December 1996, Revision April 1997, Revision May 1997, Revision November 1997, Revision March 1998, and Revision July 1999.

D. All Civil Works Requirement Drawings Necessary to Prepare the Civil Works Drawings Were Handed Over to Respondent by Claimant on Time.

The usual term for the documents needed by the Civil Works Engineers for the civil works engineering is "Civil Works Requirement Drawings". Referring to the Appendices of the Contracts the term "Civil Works Requirement Drawings" would cover the following sections of "Technical Documentation": "1.1. Basic Design, 1.1.2. Layout Drawings", "1.2. Detailed Equipment Design, 1.2.1. Building Requirement Drawings".

Each brewery project consists of several "project groups". The period of time needed for all the design works as well as for all the civil works and installation is different for each "project group". Due to the fact that at the time of commissioning/first brew, the installation of all the different "project groups" must be finished, the overall period of time needed for the execution of the whole brewery project is determined by that "project group" which needs the longest period of time for the execution. The more a "project group" is sophisticated, the more time is needed for its execution. The most sophisticated "project group" within a

brewery project which also needs the longest period of time for its execution, is always the brewhouse. Therefore, the total period of time needed for the execution of a whole brewery project (including all kinds of design work, civil works and installation) is determined by the total period of time needed for the execution of the brewhouse. Consequently, when it comes to civil works requirement drawings, civil works drawings, civil works and installation, it is "state of the art" to always begin with the brewhouse. Upon receipt of the civil works requirement drawings for Brewhouse 3, Respondent could have commenced with the civil works drawing.

On the occasion of the meetings in China in April 1996, Claimant, besides other drawings, handed over to Respondent civil works requirement drawings for Brewhouse 3. In June 1996 and in June 1997, Respondent's project manager Mr. C confirmed in writing that the above-stated drawings had been handed over by Claimant to Respondent on 1 February and 14 February 1996. The above renders clear evidence that Respondent could have worked on the civil works drawings as early as from February 1996.

According to a Table handed over by Respondent to Claimant in August 1998, the complete civil works requirement drawings for the thirteen different "project groups" state in Appendix I ("Brewery Plant", New Brewery) to Contract No.1 had been submitted to Respondent by Claimant in 1996 on the following dates:

"BBT Plant"	April 17	(week 16)
"Packaging Plant"	March 6	(week 10)
"Old Fermentation Reconstruction" = "Modification of existing fermentation plant"	April 17	(week 16)
"Boiler Plant" = "Boiler House"	April 17	(week 16)
"Wastewater Treatment" = "Wastewater treatment plant"	July 15	(week 29)
"Water Treatment Plant"	March 6	(week 10)
"Fermentation Public Plant" = "Fermentation cellar, utility room"	April 17	(week 16)
"Brewhouse III" = "Brewhouse"	March 6	(week 10)
"Oil Tank"	May 29	(week 22)
"Rice Storage" = "Malt silo" and "Spent grain silo"	April 17	(week 16)
"Raw Material Handling" = "intake"	April 17	(week 16)
"Pipe Bridge"	May 29	(week 22)

With the exception of the Civil Works Requirement Drawings for pipe bridge, oil tank and wastewater treatment plant all civil works requirement drawings had been handed over to Respondent on 17 April 1996 (week 16) or before 6 March 1996.

GDI could have started with the civil works engineering from the time when they were in receipt of the civil works requirement drawings concerning the Brewhouse (Extension) which was from 6 March 1996 onwards. Nothing more is needed to start with the foundation and building drawings.

The handing over of civil works requirement drawings for pipe bridge, oil tank and wastewater treatment plant at a later stage could not and did not give reason to any delay with regard to the beginning with or carrying out of the civil works engineering and did not affect at all the period of time needed for civil works engineering and/or civil works construction. The civil works requirement drawings concerning pipe bridge, oil tank and wastewater treatment plant were irrelevant for the ongoing execution of the civil works engineering and could have been submitted later any time before completion of the civil works.

Even if Claimant would have handed over to Respondent the Civil Works Requirement Drawings one by one over a longer period of time, this would not have affected the civil works engineers' capability to carry out the civil works engineering once they were in receipt of the Civil Works Requirement Drawings concerning the Brewhouse (Extension).

On 17 April 1996 (week 16) at the latest, when Respondent's Civil Works Engineers, G Design Institution ("GDI"), had received from Claimant almost all the civil works requirement drawings, Respondent's Civil Works Engineers could have started to work on the civil works engineering (civil works drawings and static calculations).

According to the Appendices to the Contracts the Civil Works Requirement Drawings should have been ready (with the exception of the "piping drawings") in week 16 of 1996 (which began on 21 April 1996). When Claimant on 17 April 1996 and on 6 March 1996 provided Respondent with the civil works requirement drawings Claimant complied with its respective contractual obligation on time.

Revisions of the civil works requirement drawings, in particular in a big project like this (DM 100 million), are quite normal, and as usually also in this project such revisions did not result in any delays with regard to the civil works engineering or with regard to the civil works or the whole brewery project. None of the alleged revisions of the civil works requirement drawings was caused by Claimant or was otherwise Claimant's responsibility.

Respondent claimed at no time before submitting its counterclaim and defense about any alleged shortcomings with regard to the civil works requirement drawings or any other engineering and technical documentation provided to it by Claimant. In April 1996, the parties for the first time agreed on a specific time schedule as to the dates at which Respondent's civil works were to be ready for "access" (to bring in and install the equipment supplied by Claimant), which for almost all of them was 30 September 1996. At that time Respondent was already in receipt of the civil works requirement drawings, which had been supplied to Respondent by Claimant on 17 April 1996 and 6 March 1996.

E. Respondent's Allegation that Before January 1999 Claimant had not provided Respondent With the Civil Works Requirement Drawings for the Foundation of the Wort Kettles and This was the Reason for a Delay in the Making of the Civil Works Drawings Which Again Caused the Delay of Claimant's Access to the Civil Works of the Old Brewery/ Brewhouse 1+2 is Not True.

Respondent admits that it received from Claimant the drawing, which Claimant submitted as Exhibit CX-7. This drawing establishes clear evidence that by 5 May 1998 at the latest Respondent was in receipt of all data necessary to complete the civil works drawings. Exhibit CX-7 indicates the weight of the two wort holding tanks/pre-run vessels, each 72 tons (load plus weight of vessels). In addition to the weight of the vessels, Exhibit CX-7 indicates the dimensions of these two vessels. Nothing more is needed to complete the civil works drawings.

Moreover, the drawing No 8, the receipt of which was confirmed by Respondent in January 1997, also shows (a) the location of the wort kettles/pre-run vessels as planned by Claimant, (b) the size of them, (c) that they rest on six legs, and (d) their diameter (3.2 m) and their load (55 tons each). This drawing establishes evidence that even before January 1997, Respondent had all information necessary to complete the civil works drawings.

F. The Redesign of the Civil Works Requirement Drawings Concerning the Old Brewery/Brewhouse 1+2 Due to a Change in the Location of

the New Wort Tanks/Pre-run Vessels was Caused by Respondent and Claimant was Not Responsible for it.

At the end of January 1999, Respondent informed Claimant that it wanted to have the new Wort Tanks/Pre-Run Vessels for Old Brewery/Brewhouse 1+2 installed at a location different from the one originally planned. The reason for that request was that the Wort Tanks/Pre-Run Vessels, which due to their heavy weight needed specific foundations, could not be installed at the location previously planned because at that location there were building underground foundations which could not be removed by reasons of statics. These building underground foundations were not shown in the General Layout Plan of the existing (old) brewery which Respondent had handed over to Claimant during a meeting in China some time in 1995. These foundations were not visible because they were underground and there was no basement. Only Respondent knew that about them but did not disclose this information to Claimant.

By its "Memorandum" of February 1999, Respondent asked Claimant whether it would be possible to use the "old water tanks foundation" as foundations for the new two Wort Tanks/Pre-Run Vessels for Old Brewery/Brewhouse 1+2, which by the aforesaid reasons, had to be moved to a new location (a location different from the one originally planned), to save the time and the costs which would be needed otherwise to erect new foundations.

Finally, in May 1999, both parties and GDI had agreed to the new location of the new Wort Tanks/Pre-Run Vessels for the Old Brewery/Brewhouse 1+2, and by fax Respondent sent to Claimant the "New Plan Setting Program Chart for Pre-run Tanks".

The new location of the new Wort Tanks/Pre-Run Vessels for the Old Brewery/Brewhouse 1+2 made it necessary to redesign the civil works requirement drawings and the installation drawings for the Old Brewery/Brewhouse 1+2 accordingly. Such revised civil works requirement drawings and the installation drawings for the Old Brewery/Brewhouse 1+2 were handed over to Respondent in May 1999.

G. Claimant, once Brewhouse 1+2 and Brewhouse 3 Were Ready for Access, Did not at all Exceed the Contractually Agreed Period of

Time for Installation, Testing and Commissioning Neither for the Old Brewery/Brewhouse 1+2, nor for the New Brewery/Brewhouse 3.

According to the Contract No.1, Appendix I, the brewery project had been divided in two "main-groups". "Group 1" dealt with the extension of the Old Brewery/Brewhouse 1+2, and "Group 2" dealt with the New Brewery/Brewhouse 3.

According to the Contractual Timetable II, the installation works concerning the Old Brewery/Brewhouse 1+2 were scheduled to start in week 33 (12 August 1996), and the installation works for the New Brewery/Brewhouse 3 were scheduled to start in week 54 (6 January 1997).

If the installation had been carried out in this sequence (i.e., Brewhouse 1+2 the first, and Brewhouse 3 the second), Respondent's beer production would have come to a complete stop. During the installation works concerning the Old Brewery, beer production would have come to a standstill since Brewhouse 3 had not yet been installed and therefore could not yet produce any beer. Therefore, the parties, upon Claimant's recommendation and in deviation of the Contractual Timetable, had agreed to have first the New Brewery/Brewhouse 3 installed and only thereafter to start with the installation works concerning the Old Brewery/Brewhouse 1+2. This change enabled Respondent to produce beer with the New Brewery/Brewhouse 3 during the period in which the installation works concerning the Old Brewery/Brewhouse 1+2 were carried out. This change safeguarded Respondent's capability to produce beer without interruption for the whole period of installation works concerning the Old Brewery/Brewhouse 1+2, as well as the New Brewery/Brewhouse 3. Respondent's allegation that it did not agree to this change is ridiculous.

The fact that Claimant is neither partly nor wholly responsible for this extension, is strongly and convincingly supported by the following consideration.

It is undisputed and complies with common sense logic that the installation of machinery can't start before the civil works at the place where the machinery is to be erected are finished and the building is ready for access.

The contractually agreed period for installation/testing/commissioning for the New Brewery/Brewhouse 3, according to the Contractual Timetable, was 322 days. According to the Access Letter of 19 February 1998 issued by Respondent, the New Brewery/Brewhouse 3, first floor was ready for access the same day: 19 February 1998. A period of 322 days starting at the access date of 19 February 1998 expires on 7 January 1999. The end of

commissioning is the first brew (start of production "in automatic mode"). Actually, the end of commissioning took place exactly two months earlier on 7 November 1998.

According to the Access Letter of 10 April 1998 issued by Respondent, the New Brewery/Brewhouse 3, second floor was ready for access the same day, i.e., 10 April 1998. A period of 322 days starting at the access date of 10 April 1998 expires on 26 February 1999. The end of commissioning is the first brew (start of production "in automatic mode"). Actually, the end of commissioning took place exactly four months earlier on 7 November 1998. After the end of commissioning there is always some time needed to optimize the equipment in order to get it ready for the acceptance procedure including the drafting, issuing and signing of the Acceptance Certificate (in particular, both parties' competent people in charge of the work are not always continuously at hand). The Acceptance Certificate for New Brewery/Brewhouse 3 was signed on 29 April 1999.

Even if one would consider the 40 additional days (between 13 May 1997 and 21 June 1997) for installation of the New Brewery/Brewhouse 3, which Respondent is talking about, the actual end of commissioning would have taken place before the end of commissioning date according to the contractual period for installation/testing/commissioning.

The contractually agreed period for installation/testing/commissioning for the Old Brewery/Brewhouse 1+2, according to the Contractual Timetable VI, first column, was 252 days. According to the Access Letter of 30 September 1999 issued by Respondent, the Old Brewery/Brewhouse 1+2 were ready for access on the same day, i.e., 30 September 1999. The period of 252 days started from the access date of 30 September 1999 and expired on 8 June 2000. The end of commissioning is the first brew (start of production "in automatic mode"). Actually, the end of commissioning took place exactly two months earlier on 23 February 2000 and 20 March 2000. After the end of commissioning there is always some time needed to optimize the equipment in order to get it ready for the acceptance procedure. The Acceptance Certificate for the Old Brewery/Brewhouse 1+2 was signed on 26 June 2000.

By comparing the dates on which the contractually agreed periods for installation, testing and commissioning (starting from the respective actual access dates) expires with the dates on which the periods for installation, testing and commissioning actually ended and with the dates on which the Acceptance Certificates were actually signed, proof is established for the fact that Claimant did not at all exceed the contractually agreed period for installation, testing and commissioning.

H. Claimant Had Frequently Complained About the Delay in Civil Works Requested to be Compensated/Remunerated for its Additional Costs/ Expenses due to the Extension of the Period for Installation Plus Testing and Commissioning Resulting Thereof.

Claimant raised such claims, just to state a few, for at least seven times in March, June and December 1997, and in January and May 1998.

I. Due to the Extension of the Contractually Agreed Period of Time for Installation, Testing and Commissioning, Claimant Incurred Additional Costs/Expenses in the Amount of Approximately Euro 1,300,000.

Claimant explained in its Submission of February 2002 these additional costs/ expenses in detail, which include the following:

Section 1	Depreciation of tools for fermentation tanks assembly	DM 50,000
Section 2	Depreciation standard tools	DM 70,000
Section 3	Additional costs rising wages German (Second Alternative)	DM 170,000
Section 4	Additional costs rising wages China	DM 160,000
Section 5	Additional costs by additional head-supervisor weeks	DM 1,440,000
Section 6	Additional Costs for site office	DM 80,000
Section 7	Interruption mechanical installation Brewhouse 3	DM 70,000
Section 8	Interruption mechanical tank installation filter plant, BBT and CIP plant	DM 70,000
Section 9	Interruption electrical installation Brewhouse 3	DM 10,000
Section 10	Installation insurance (additional)	DM 20,000
Section 11	Watchmen (additional)	DM 80,000
Section 12	Foreign exchange losses	DM 140,000
Section 13	Customs authorities: warehouse and transport	DM 10,000
Section 14	Redesign pipe bridges	DM 30,000
Section 15	Airconditioning equipment and related costs	DM 100,000
Section 16	Redesign oil tanks	DM 20,000
Section 17	Road to fermentation tank platform	DM 30,000
Section 18	Redesign pre-run vessels	DM 50,000

	(Euro 1 = DM 1.95583)	DM 2,600,000
Total		Euro 1,300,000 (Approximately)

J. Claimant's Claim

The Claimant's final claim and prayers for relief as amended are as follows:

(1) That Claimant be awarded the amount of Euro 1,300,000 plus interest at the following rates per annum for the period from 30 May 1998 to the day of payment: (i) before 30 April 2000, 5%; (ii) 1 May 2000 to 31 August 2000, 8.42%; (iii) 1 September 2000 to 31 August 2001, 9.26%; (iv) 1 September 2001 to 31 December 2001, 8.62%; (v) 1 January 2002 to 30 June 2002, 7.57%; and (vi) from 1 July 2002 onward, 7.47%;

(2) That Respondent be ordered to pay any and all arbitration costs (CIETAC administrative costs and fees and disbursements of the arbitrators); and

(3) That Respondent be ordered to compensate Claimant for all its party costs connected with the present arbitration proceedings, including its attorney's fees.

Claimant states that those costs, fees and disbursements amount to approximately Euro 470,000 and include attorney's fees, CIETAC, translation costs, travel costs and other various costs.

K. Respondent's Counterclaim is Completely Unfounded.

Chinese law is very clear concerning damages. Either there is an agreement on liquidated damages or the party claiming damages has to establish evidence that the damages claimed (which have to be specified) are the direct result of the breach.

Respondent insisted to apply Indemnity Articles of the Contract No. 1 and the Contract No. 1A and urged Claimant to pay a monetary compensation equivalent to 5% of the total value of the two contracts. Apparently, Articles of the Contract No. 1 and the Contract No. 1A apply only when the delivery of the equipment purchased under the two contracts was delayed.

Claimant, as the seller of the equipment purchased under the two contracts, had duly carried out the delivery. There were never in fact any dispute between Claimant and Respondent arising from the delivery.

There is nothing stated in the two contracts that allows Respondent to refer to Indemnity Articles of the Contract No. 1 and the Contract No. 1A for any other circumstances beside delay of equipment delivery. Therefore, Indemnity Articles of the Contract No.1 and the Contract No. 1A are not applicable to the "losses in expenses of personnel" and losses in relation to loan interest claimed by Respondent.

In accordance with the *General Principles of the Civil Law of the PRC* and the *PRC Contract Law*, if there is no specific rule made in regard to damage compensation for contract violation, the compensation shall be limited to the damage suffered by the non-breaching party, provided such damage is actually incurred and foreseeable by the breaching party.

Claimant believes that all figures provided by Respondent were hypothetically made by Respondent, and the limited evidence provided by Respondent makes it impossible for any reasonably normal person to assess how much damage Respondent actually suffered, if any, or assure Claimant be relevant to these losses. Lastly, it is impossible for Claimant to foresee the likelihood that Respondent will suffer what it claims for. As a result, Claimant shall not be required to compensate what is irrelevant and unforeseeable by it, especially, for those damages not existing or no way to be determined.

Claimant requests that all of Respondent's counterclaims be rejected and that Respondent concerning its counterclaims be ordered to pay any and all arbitration costs and to compensate Claimant for all its party costs connected with the present arbitration proceedings, in particular those related to Respondent's counterclaims, including Claimant's attorney's fees and such other costs as Claimant will specify in due course.

V. RESPONDENT'S CASE AND COUNTERCLAIM

A. Applicable Law

It is the Respondent's view that even the provisions of the *CISG* cannot solve all legal issues arising from a contract for sale of goods. Moreover, the contracts in this case are not purely sale of goods, but also involve installation of equipment in China and other matters. International practice calls for application of the law of the state where factory construction takes place. As a result, Respondent holds that the *CISG* shall apply to legal matters relating to sale of goods and for matters not covered by the *CISG*, Chinese law shall apply.

B. Appendix II to the Contract is the Sole Basis for the Determination of the Date for Delivery of Civil Engineering Design Documentation and

the Dates for Commencing and Finishing Installation and Commission of the Equipment for the Brewery Project.

According to the contracts, Respondent was responsible for the civil construction design and construction while Claimant was responsible for civil engineering design, supply of civil engineering design documentation, supply of equipment and installation and commissioning.

Appendix II to the Contract provided for the date for the Claimant's delivery of civil engineering design documentation and for the dates for commencing and finishing installation and commissioning of the equipment. As no separate contract for construction was signed by Claimant and Respondent, Respondent as employer and Claimant as contractor should follow the timetable for different projects agreed on in Appendix VI. Appendix II is the sole basis for the determination of the date for delivery of civil engineering design documentation and the dates for commencing and finishing installation and commission of the equipment for the brewery project.

C. The Actual Completion of the Brewery Project was 32 Months Later Than the Agreed Date of Completion as Provided in Appendix II to the Contract and Claimant is Responsible for the Delay of the Project.

According to Article of the Contract No. 1, "*if all the guarantee figures specified in Appendix III to the present Contract are filled, a Certificate of Acceptance of Contractual Equipment shall be signed by the representatives of both parties within five days*." The date of completing the brewery project should be the date when the representatives of both parties sign the Certificate of Acceptance of the Contractual Equipment. However, both parties did not sign such a certificate and Respondent shall regard the date of ending the commissioning as the completion date of the whole project.

Appendix II to the Contract stipulates that the commissioning of the project equipment should end on 2 November 1997. The commissioning of the last project of the brewery was actually completed on 26 June 2000. This date should be taken as the date for the ultimate completion of the whole project, 32 months behind the contractual stipulation.

Claimant's statement that the project was extended by 25 months is not based on Appendix II to the contract. First of all, neither the contract nor Appendix II to the contract provided that the calculation of the period of the project should be based on the period of the stay of Claimant's engineers on the construction site. Secondly, the Contract and Appendix

II did not provide for the time of arrival or departure for Claimant's engineers. It was solely the Claimant's business and had nothing to do with Respondent. Respondent noted that Claimant's engineers who arrived at the construction site in January 1997 were not for installation but for the purpose of making the fermentation tank. It took them 7 months to finish the tank.

The delay of the project by 32 months was due to Claimant's delay in providing the civil engineering design documentation and in equipment commissioning as well as Claimant's unauthorized suspension of work during the Christmas and New Year holidays. The economic losses suffered by Respondent due to Claimant's delay in finishing the project must be borne by Claimant.

D. Claimant's Delay in Providing Civil Engineering Design Documentation

In the brewery project, Respondent was responsible for the civil engineering while Claimant was responsible for providing Respondent with civil engineering design documentation before the civil construction started. According to Appendix II of the Contract, Claimant should provide civil design documentation from the 8th week to the 16th week of 1996 (before 21 April 1996). The civil engineering design documentation includes process flow diagrams, layout drawings, foundation drawings, building requirement drawings, total utility consumption and utility connection. Claimant should submit civil engineering documentation for 12 civil engineering projects, which include malt silo/intake, spent grain silo, water treatment plant, brew house, modification of the existing fermentation plant, fermentation cellar/utility room, BBT plant, boiler house, packaging plant, pipe bridge, oil tank and wastewater treatment plant.

In fact, however, Claimant breached Appendix II to the Contract and delayed delivery of the technological drawings for 11 single subprojects: the technological drawings of "Bright Beer Tank" and "Bottling Line Plant" were delivered on 29 May 1996; those of "Renovation of Old Fermentation" and "Boiler House" were delivered on 15 July 1996; those of "Waste Water Treatment Plant" on 18 July 1996; the "Water Treatment Plant" and "Fermentation Utility" on 16 September 1996; "Brewhouse III" on 17 October 1996; the technological drawings of the "Oil Tank" were still being modified on 16 September 1996; and the technological drawings of the "Malt Storage and Raw Materials Handling" were being modified on 28 January 1997. The latest delivered "Pipe Bridge" projects' technological drawings were still being modified on 12 March 1997. The time period in which Claimant handed over the technological drawings was 10 months and 21 days later

than that set in Appendix II of the Contract. The late delivery of technological drawings and repeated variations in the technological drawings is a fundamental cause of the delay in the whole project.

During the over 10 months' delay, the following major evidence and items may prove that Claimant delayed submitting more civil engineering design documentation besides the documentation of the pipe bridge:

(1) Claimant's Exhibit CX-8 proves that in September 1996, Claimant, Respondent and GDI were still discussing the civil engineering design documentation, which were constantly revised by Claimant. The revised civil engineering design documentation covered 16 items.

(2) Although Claimant refuses to admit that it delayed 10 months and 21 days in handing over the civil engineering design documentation, Claimant's Exhibit CX-9 indicates that Claimant had already delayed in delivering to Respondent the revised civil engineering design documentation until 17 October 1996, 179 days later than the agreed time limit in Appendix II to the Contract.

(3) Claimant's Exhibit CX-10 shows that on 19 December 1996, Claimant, Respondent and GDI were still exchanging the revised drawing.

(4) Claimant's Exhibit CX-10, the Minutes of Meeting on 19 December 1996 compiled by Claimant, states: "*GDI has handed over a list of applicable civil work drawings with their actual revision number. … A Maschinenfabrik GmbH will check all drawings if they are according to their technical requirements and comment.*" Claimant put forward their comments regarding seven major single items respectively in February 1997. Claimant's comments resulted in another two months delay of the time limit of the project (from December 1996 to February 1997). Until 20 February 1997, the entire brewery construction project of Respondent had remained at the designing stage in terms of normal project construction procedure. After Claimant submitted its comments to Respondent, GDI would spend time in revising the work drawings according to Claimant's comments. Only when the revision was done, could the construction of the civil engineering project be started.

(5) Claimant had expressed its apology for the delay caused by its revision of the civil engineering design drawings.

Claimant also delayed in submitting the civil engineering design documentation for the Old Brewery/Brewhouse 1+2. Respondent provided Claimant with the original as-built drawing at the end of 1995. According to Appendix II to the Contract, Claimant should supply Respondent with the civil engineering design documentation for the renovation of the Old Brewery before 24 March 1996. In January 1999, Claimant, Respondent and GDI held a meeting to discuss the civil engineering design for the Brewhouse 1+2 at the request of Claimant. During the meeting, Claimant put forward a demand for building the foundation of the wort-handling tanks in the old plant. At the same time, it handed Respondent 5 blueprints for general technological arrangement plan and equipment drawing for wort holding tanks. Respondent was surprised by the move of Claimant as it did not put forward the demand until 1999. After considering the long run demand for the project of the old plant, Respondent finally accepted the demand of Claimant. But Respondent found that location of the wort-holding tank in the drawing overlapped with that of the bearing column of the original plant and asked Claimant to redesign the drawing. Claimant provided the redesigned civil engineering design documentation of the foundation installation of the wort-holding tanks on 25 May 1999 and the project had to be delayed. The renovation of Brewhouse 1+2 was finished in June 2000. Claimant should bear the responsibility for the delay of the Old Brewery's renovation and construction.

As Claimant had delayed the delivery of the complete and correct civil engineering design documentation, GDI could not timely finish the civil construction documentation, resulting in the delay of the civil construction which in turn was the important cause of the whole project's delay.

E. Commissioning Delayed by Claimant

Respondent alleges that the commissioning of both the new factory and Brewhouse 1+2 in the old factory was delayed. The delayed time was 18 months in total and because of this the completion of the whole project was also delayed.

1. The commissioning of the new factory was delayed.

According to Appendices VI to the Contract, the period of time for commissioning the new factory was set from the 90th to 96th week (one month and 12 days) in 1996. In fact, Claimant spent 18.5 months in commissioning the equipment. As stipulated in Hand-over Certificates for the delivery of the whole beer project, 17 subprojects should be turned over. The Water Treatment Plant was the first to be commissioned and the last to be finished in the

new factory. The Water Treatment Plant started commissioning on 23 September 1998 and the commissioning ended on 29 March 2000. It was 17 months longer than the time agreed upon in Appendix II to the Contract.

2. The commissioning of Brewhouse 1+2 in the old factory was delayed.

Appendices VI to the Contract stipulates that the period of time for commissioning the old factory was set for 5 weeks from the 46th to 50th week in 1996. Claimant started commissioning in February 2000 and concluded it on 30 April 2000. Claimant's commissioning was delayed for one month according to Appendix II to the Contract.

3. Causes for claimant's commissioning delay

The causes for Claimant's commissioning delay include:

(1) The steam-pipe's breakdown caused delay of commissioning of the production line in new beer factory. The steam-pipe accident was caused by the inferior quality of equipment supplied by Claimant and the liability should rest with Claimant.

(2) Ever since the beginning of the commissioning, problems had repeatedly cropped up on the equipment supplied by Claimant for single subprojects and much time was spent to solve them. Though Claimant had solved these problems without ceasing, there were still 43 equipment problems on single subprojects till May 1999. Of the 43 problems, 36 had not yet been solved in August 1999. In September 1999, there were still 17 problems on 5 single subprojects that had not been solved.

(3) The equipment supplied by Claimant failed to come up to the standards under the Contract and need to be expanded. For example, the subproject "water treatment plant" began commissioning in September 1998 and went into full operation in October 1998. However, Claimant demanded the expansion of the subproject as it did not meet the contractual specifications and failed in the trial operation of water treatment. The subproject was expanded in April 1999. Much time was spent on the designing of the expanded equipment, type selection, re-import, on the spot manufacturing of the expanded equipment, civil construction coordination, installation and commissioning of the expanded equipment. Only on 29 March 2000 could the subproject be checked, turned over and accepted. Claimant should be held responsible for the delay of the commissioning

caused by the expansion of water treatment plant because the expansion was carried out during the commissioning period of the water treatment plant. In addition, the Minutes of Meeting signed by Claimant and Respondent in April 1999 requested "the extension of service water treatment" and pointed out "*A GmbH will provide an extension of the water treatment system according to the contractual specification*". Claimant states that the reason for redesigning the water treatment workshop was the poor quality of the water. Respondent is of the view that, even if the water quality was poor, it is Claimant to be blamed since it should know the condition of the water quality before working out a design method for the water treatment workshop.

F. Claimant Delayed the Project by Unauthorized Suspension of Work During Holidays.

The Contract between Claimant and Respondent made no provision for festivals and holidays. In its letter to Respondent in November 1997, Claimant said that "*It is to notify that A GmbH will close the whole work site from 16 December 1997 to 14 January 1998. There will be no person from the side of A GmbH and the subcontractor on the site*." Claimant should bear responsibility for delaying the project for 29 days since it unilaterally stopped work to enjoy the Christmas time and the New Year Festival in 1997 and 1998.

G. Except for Appendix II (Tentative Project Time Schedule) to the Contract, no General Time Schedules Were Agreed Upon by the Two Parties From the Beginning to the End of the Project Construction.

Claimant handed over to Respondent the first-time schedule in April 1996 and marked a word "Proposal" in its letter. Therefore, the time schedule Claimant delivered to Respondent was a proposed one from the very beginning.

There were no construction contents in the second-time schedules which Claimant handed over in April 1996 respectively. They could not be regarded as general time schedules for the construction process.

In November 1996, Claimant wrote a letter to Respondent with an attachment of a time schedule made in November 1996. Claimant wrote in this letter: "*There is a general time schedule and shows only main jobs, more detailed programmers will be issued in respect of interfaces of civil work and installation requirements. If you have any question,*

please contact us." Thus, it is a proposed time schedule but not a so called first revised time schedule as Claimant stated in the General Project Milestones.

Claimant's Exhibit CX-11 includes a time schedule which Respondent's project manager, Mr. D, sent on 17 December 1996 to the person in charge in his company. Respondent noted in the explanatory part of this time schedule: "*In this plan, we have adjusted the installation time schedule, the access time for installation shall be adjusted by A GmbH. … Because of delaying of designing drawings, some items which have not been signed contract yet, i.e., pipe bridge, water treatment, oil tanks, the time schedule for these items is done according to the recent objective fact and our experience.*" The time schedule is Respondent's internal time schedule but not a second time schedule as Claimant stated in the General Project Milestones.

The time schedule sent from Respondent's site manager, Mr. C, to Respondent's General Manager, Mr. E, in March 1997 in the form of a memo is also an internal document of Respondent. It was marked with "to be confirmed" with an explanation that "once all the above has been scrutinized and agreed upon by all parties concerned, a final binding project end date will be issued". So, the time schedule is just an internal proposed time schedule. It is not the third revised time schedule as Claimant stated in the General Project Milestones.

Respondent provided Claimant with a time schedule on 16 May 1997, which is numbered as Claimant's Exhibit CX-12. In its letter to Claimant, Respondent wrote: "*A GmbH: Enclosed please find the time schedule revision by our company. Please check and give us an answer.*" This time schedule was not the one confirmed by both sides, nor it was the fourth revised time schedule as Claimant stated in the General Project Milestones. By this time, at least a dozen of time schedules had been exchanged between the parties, but no one was confirmed by both parties.

In conclusion, the fifth-time schedules claimed by Claimant did not exist at all. The time schedule proposed by Respondent on 2 July 1999 was for the renovation of the Brewhouse 1+2. Since Claimant finally provided the civil engineering design documentation for the wort holding tanks on 25 May 1999, it was possible for Respondent to work out a civil work construction time schedule. Claimant should bear responsibility for the delayed completion of the renovation of Brewhouse 1+2, because Claimant delayed providing the civil engineering design drawings for foundation installation of the wort holding tanks.

The brewery project is not a project based on a general time schedule as claimed by Claimant, but a project which was constructed while its design drawings change from

time to time. The constant revision of the design by Claimant led to delay of the project construction and Claimant should be liable for the delay of the project.

H. Respondent Has Incessantly Put Forward Compensation Claims, Censures and Complaints Concerning Claimant's Delays.

Respondent was very indignant over Claimant's delay in submitting the documentation for civil engineering construction and in commissioning. It had put forward compensation claims and continually censured Claimant and complained to it of its delays.

At the meeting of March 1997, Respondent stated that Claimant was still altering the documentation. By then, Claimant had not submitted documentation for civil engineering design for construction. Claimant had put Respondent's complaints into the meeting minutes.

In a letter of August 1998 to Claimant, Respondent requested Claimant to compensate Respondent' losses due to Claimant's delay in submitting the civil engineering design documentation. In addition to the sum of the compensatory money, Respondent also listed separately in the letter Claimant's breach of contract in delaying the delivery of the civil engineering design documentation, revising designs, doing poorly done work over again and installing equipment, etc.

In the letters of October 1998 to Claimant, Respondent demanded that a date be set as soon as possible for renewing commissioning.

In the letter of December 1998 to Claimant, Respondent once again demanded that Claimant renew commissioning as soon as possible.

I. Claimant's Claim is Unfounded and Should be Dismissed.

Respondent is of the view that as the delay of the project was caused by Claimant all losses derived thereby should be borne by it and therefore Claimant's claims are unfounded and should be dismissed.

J. Respondent's Counterclaim

Respondent had suffered great losses due to Claimant's breach of contract by delaying in providing technical documentation and commissioning, etc. These losses include expenses of Respondent's personnel and loan interest for the project. The total personal expenses are approximately USD 2,650,000 and the total loan interest is USD 3,180,000.

Taking the longstanding business cooperation with Claimant into consideration and in view of the fact that consequences of the foregoing delay caused by Claimant is similar to those of the delayed delivery of cargoes stipulated in Indemnity Articles of Contract No.1 and Contract No. 1A, Respondent is willing not to demand compensation of the all the losses, but to set the sum of compensation form Claimant according the above said articles.

Based thereon, Respondent lodged its counterclaim and requested the tribunal to award:

(1) That Claimant be ordered to pay Respondent 5% of the total contract price as compensation for Claimant's breach of contract.

(2) That Claimant be ordered to pay Respondent's arbitration fee, lawyer's fee and other expenses for the present case.

VI. OPINIONS OF ARBITRAL TRIBUNAL

A. Applicable Law

The arbitral tribunal noticed that:

(1) there was no agreement between Claimant and Respondent as to the applicable law for Contracts No. 1 and No. 1A;

(2) the said two contracts were signed in China;

(3) the dispute took place in China;

(4) the place of arbitration is in China; and

(5) both Claimant and Respondent mentioned that *PRC Contract Law* and the *CISG* should be applicable for the present case.

Hence, according to the *PRC Arbitration Law* and the *CIETAC Rules*, the arbitral tribunal decided that the applicable law for the present case should be the Chinese law including the *PRC Contract Law* and the *CISG* and that in addition the international trade usage and the principle of reasonableness and fairness should be also applicable where the Chinese law and the *CISG* are silent.

B. Key Dispute Between Claimant and Respondent

The key dispute between Claimant and Respondent is that the completion of the whole project was delayed for 25 months (Claimant's calculation) or 32 months (Respondent's calculation), for which Claimant asserted that it was Respondent's liability and Respondent held opposite assertion.

Claimant claimed against Respondent for damages and Respondent lodged a counterclaim against Claimant for damages.

C. Liability

The arbitral tribunal noticed the fact that Respondent long delayed in starting and finishing the civil work and Claimant on some occasions delayed in handing over some civil works requirement drawings to Respondent and delayed in commissioning and that from the technical point of view and from the facts, Claimant's occasional delay in supplying some civil works requirement drawings did somewhat affect the process of some part of the civil work, but did not materially affect the whole process of the civil work, and the delay in completing the whole project was mainly caused by the delay in starting and in finishing the civil work on the part of Respondent.

Therefore, the arbitral tribunal decided that Respondent should be held liable for the delay and should indemnify Claimant for his losses thereof.

D. Claimant's Claim

Claimant claimed:

(1) Claimant be awarded the amount of approximately Euro 1.3 million plus interest at the following rates per annum for the period from 30 May 1998 until the day of payment: (i) before 30 April 2000, 5.00%; (ii) 1 May 2000 to 31 August 2000, 8.42%; (iii) 1 September 2000 to 31 August 2001, 9.26%; (iv) 1 September 2001 to 31 December 2001, 8.62%; (v) 1 January 2002 to 30 June 2002, 7.57%; and (vi) from 1 July 2002 onward, 7.47%.

(2) Respondent be ordered to pay any and all arbitration costs (CIETAC administrative costs and fees and disbursement of arbitrators).

(3) Respondent be ordered to compensate Claimant for all its costs connected with the present arbitration proceedings, including its attorney's fees and such other costs as Claimant will specify in due course.

The breakdowns of Claimant's above claiming amount of approximately Euro 1.3 million are as follows:

Section 1	Depreciation of tools for fermentation tanks assembly	DM 50,000
Section 2	Depreciation standard tools	DM 70,000
Section 3	Additional costs rising wages in German (Second Alternative)	DM 170,000
Section 4	Additional costs rising wages in China	DM 160,000
Section 5	Additional costs by additional head-supervisor weeks	DM 1,440,000
Section 6	Additional Costs for site office	DM 80,000
Section 7	Interruption mechanical installation Brewhouse 3	DM 70,000
Section 8	Interruption mechanical tank installation filter plant, BBT and CIP plant	DM 70,000
Section 9	Interruption electrical installation Brewhouse 3	DM 10,000
Section 10	Installation insurance (additional)	DM 20,000
Section 11	Watchmen (additional)	DM 80,000
Section 12	Foreign exchange losses	DM 140,000
Section 13	Customs authorities: warehouse and transport	DM 10,000
Section 14	Redesign pipe bridges	DM 30,000
Section 15	Airconditioning equipment and related costs	DM 100,000
Section 16	Redesign oil tanks	DM 20,000
Section 17	Road to fermentation tank platform	DM 30,000
Section 18	Redesign pre-run vessels	DM 50,000
	Converted to Euro at the rate: Euro 1 = DM 1.95583	DM 2,600,000
Total		Euro 1,300,000 (Approximately)

Since Respondent was liable for the delay in the completion of the whole project, it should indemnify Claimant for the above-mentioned losses. However, the arbitral tribunal could not endorse each quantum indicated by Claimant in the above 18 sections.

Section 1 Claimant used a highly theoretical accounting argument for the depreciation of tools. In fact, the depreciation of tools depended upon the time during which the tools were used. Due to the delays of the project, the tools were brought in time, but they were not used during the time of

the delays. Thus, they did not lose value. Therefore, this Claimant's claim in an amount of DM 50,000 should be dismissed.

Section 2 Claimant's claim in an amount of DM 70,000 should be rejected for the same reasons as indicated in Section 1.

Section 3 The arbitral tribunal found that Claimant's claim calculations in an amount of DM 170,000 were basically correct and therefore Claimant was obliged to pay the sum due. However, the arbitral tribunal considered that it was Claimant's obligation to mitigate the losses and that it had not been proved that this had been done. Therefore, the arbitral tribunal would only support Claimant's claim in an amount of DM 110,000.

Section 4 Claimant's claim was an amount of DM 160,000. The arbitral tribunal could support only 60% of the Claimed amount i.e., approximately DM 100,000, because the Claimant has not fully proved the requested quantum.

Section 5 Claimant's calculation amounting to DM 1,440,000 was correct. However, the arbitral tribunal could only support 70% of Claimant's claim i.e., approximately DM 1 million for the reasons that there was no proof that Claimant had made efforts to mitigate the damages.

Section 6 There was no proof that the car could have been sold at a better price if the sale would have been effected earlier. Therefore, the arbitral tribunal would reject the claim for DM 20,000 and award only DM 60,000.

Section 7 The arbitral tribunal supported Claimant's claim in an amount of DM 70,000 because it was correct and justified.

Section 8 The arbitral tribunal also supported Claimant's claim for damages in an amount of DM 70,000 as it was correct.

Section 9 The arbitral tribunal rejected this claim in an amount of DM 10,000 as not sufficiently proved.

Section 10 The arbitral tribunal endorsed this claimed amount of DM 20,000 as it was correct and justified.

Section 11 The arbitral tribunal also endorsed this claimed amount of DM 80,000 because it was correct and justified.

Section 12 The arbitral tribunal dismissed this claim in an amount of DM 140,000 because Claimant's foreign exchange losses were based on theoretical calculation and actual losses had not been proved.

Section 13 The arbitral tribunal supported this claim of Claimant in an amount of DM 10,000 as it was correct and justified.

Section 14 The responsibility for the losses here should be shared by Claimant and Respondent. Therefore, the arbitral tribunal reduced Claimant's claim in an amount of DM 30,000 by 50% to DM 15,000.

Section 15 Respondent shall compensate Claimant for air conditioning equipment and related costs in an amount of DM 100,000 as the equipment was supplied by Claimant.

Section 16 Respondent shall compensate Claimant for redesigning oil tanks as Claimant claimed in an amount of DM 10,000.

Section 17 The arbitral tribunal rejected this claiming amount of DM 30,000 since the additional costs were in this case a result of Claimant's wrong managerial decision concerning the dates of the rent of the crane.

Section 18 The arbitral tribunal rejected this claim in an amount of DM 50,000 because the problem could have been solved if an inspection of the site before the drawings were made by Claimant.

Summing up the above, the arbitral tribunal determined that Respondent shall pay Claimant in a total amount of approximately DM 1,650,000 equivalent to approximately Euro 840,000 (at the conversion rate of Euro 1 = DM 1.95583).

As to Claimant's claim for interest upon the total amount of Euro 840,000 to be indemnified by Respondent to Claimant, the arbitral tribunal found that the interest rates indicated by Claimant were too high. The arbitral tribunal determines that 6.5% of interest rate per annum would be reasonable and practical. As to the dates on which the interest should be counted, the arbitral tribunal believes that it would be proper to award interest from the date of receipt by the Secretariat of CIETAC of Claimant's Application for Arbitration i.e., 26 December 2000, to the date of payment.

As to Claimant's claim against Respondent for compensation for his expenses connected with the present case, Claimant informed the arbitral tribunal that his expenses

amounted to approximately Euro 470,000 (including lawyers fee, CIETAC arbitration fee, translation cost, travel cost in Euro and various cost).

E. Respondent's Counterclaim

The arbitral tribunal takes notice of Respondent's counterclaim that:

(1) Claimant be ordered to pay Respondent 5% of the total contract price as compensation for Claimant's breach of contract; and

(2) Claimant be ordered to pay Respondent's arbitration fee, lawyer's fee and other expenses for the present case.

The arbitral tribunal is not in a position to support Respondent's counterclaim because:

(1) the counterclaim is not supported by the evidence submitted by Respondent;

(2) almost all of the revisions of the contractual timetable have been initiated by Respondent;

(3) there is no document in which Respondent officially accused Claimant of delay in connection with the revised time schedule and requested for the completion of the works during the execution of the works; and

(4) Indemnity Article of the Contract which Respondent uses as the contractual basis for its calculation is not applicable to the type of delays which Respondent alleged.

F. Costs of Arbitration

Claimant requests the arbitral tribunal to order Respondent to pay all arbitration costs (CIETAC administration costs and fees and disbursement of arbitrators).

Respondent requests the arbitral tribunal to order Claimant to pay Respondent's arbitration fee, lawyer's fee, and other expenses for the present case.

Since Claimant and Respondent are both delayed in completing the whole project and the arbitral tribunal does not support Respondent's counterclaim, the arbitral tribunal would hold that 90% of the fee for Claimant's claim arbitration should be paid by Respondent and the remaining 10% should be paid by Claimant.

G. Other Expenses

Any other expenses paid by Claimant and Respondent respectively for the present case should be borne by Claimant and Respondent themselves respectively.

VII. AWARD

The arbitral tribunal awards:

(1) Respondent shall pay Claimant a total amount of approximately EURO 840,000 as compensation to Claimant for Claimant's losses resulted from Respondent's delay in the completion of the whole project including the extension of Respondent's existing brewery and the construction of the new brewery.

(2) Respondent shall pay Claimant interest upon the aforesaid amount of approximately Euro 840,000 at the rate of 6.5% per annum from 26 December 2000 until the date of actual payment.

(3) The counterclaim of Respondent be dismissed.

(4) Respondent shall compensate Claimant Euro 65,000 for Claimant's expenses for the present case.

(5) 90% of Arbitration fee for Claimant's claim shall be paid by Respondent and the remaining 10% shall be paid by Claimant. Arbitration fee for Respondent's counterclaim shall be paid by Respondent.

(6) Claimant has paid in advance to CIETAC arbitration fee in USD and Respondent has paid in advance to CIETAC counterclaim arbitration fee in RMB. After set-off, Respondent shall pay Claimant equivalent USD to compensate Claimant's payment for arbitration fee on behalf of Respondent.

(7) Respondent shall pay Claimant pay the sums indicated in above (1), (2), (4) and (6) on or before 25 April 2005. Any payment under (4) or (6), if made after 25 April 2005, shall be effected plus interest at the rate of 0.45% per month from 26 April 2005 until the date of actual payment.

This AWARD is final.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

British A Technologies Ltd.

American B L.L.C

Claimants

v.

Chinese C Petrochemical Co.,

Respondent

Matter for arbitration: Disputes over petroleum contract

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. PARTIES

China D Energy Company ("Company D") and American B L.L.C ("Company B") as the contractor entered into an agreement entitled "Petroleum Contract for the Enhanced Oil Recovery" in March 1998 (the "Petroleum Contract" or the "Contract").

Company D assigned its rights and obligations under the Contract to Chinese C Petrochemical Co., ("Company C") by virtue of a Deed of Assignment dated August 1998. Consequently Company D, Company C and Company B signed a Modification Agreement in September 1998.

Company B (with the approval of Company C) assigned part of its rights as the contractor under the Contract to Australian E Petroleum Ltd. ("Company E") in October 1999. Company E ceased to have any interest in the Contract following a Severance, Assignment and Assumption Agreement made between Company B and Company E dated September 2000, reverting its interest to Company B which asssumed 100% interest of the contractor under the Contract.

With the agreement of Company C, Company B assigned 67% of its rights as the contractor in the Contract to British A Technologies Ltd. ("Company A") by virtue of an agreement dated March 2001.

By the above assignments, the parties to the Contract are Company A (also referred to as "Claimant A") and Company B (also referred to as "Claimant B") jointly as one party (Claimant A and Claimant B are collectively referred to as the "Claimants"), and Company C (also referred to as "Respondent") as the other party. In the meantime, Bureau F (hereinafter referred to as "F Oilfield") and its Plant 5 are entities under Company C which were responsible for performing the Contract, and the consequences of their words and deeds were deemed as those of the Respondent's.

II. ARBITRATION PROCEEDINGS

On 28 August 2003, Claimant A and Claimant B submitted an application for arbitration to the China International Economic and Trade Arbitration Commission ("CIETAC") against Respondent. According to the arbitration clause in the Petroleum Contract, the relevant agreements modifying the Contract and the arbitration application of both Claimant A and Claimant B, the CIETAC accepted the case which arose from disputes under the Petroleum Contract.

According to the arbitration clause of the Petroleum Contract agreed upon by both parties, both the Chinese and English languages shall be official languages used in the arbitral proceedings. The parties reached an agreement during the proceedings that the case shall be heard in the Chinese language.

Since the parties neither jointly appointed the Presiding Arbitrator nor entrusted the Chairman of the Arbitration Commission to make such appointment on their behalf within the prescribed time, in accordance with Article 24 of the *CIETAC Arbitration Rules*, the Chairman of the Arbitration Commission appointed Mr. Z as the Presiding Arbitrator. Claimants appointed Mr. X as one replacement Arbitrator and Respondent appointed Mr. Y as another replacement Arbitrator accordingly.

A written defense was filed with the CIETAC by Respondent in November 2003.

The Tribunal held two hearings in Beijing in May 2004 and October 2004, respectively. The attorneys retained by both Claimants and Respondent appeared before the Arbitration Tribunal. Both parties presented the merits of the case, stated their respective legal positions, argued with each other and answered questions raised by the Arbitration Tribunal. Thereafter, through consultations by both parties, Respondent waived its right to audit the actual expenses with a written confirmation in December 2004.

Since the merits of the case were complex, the Arbitration Tribunal was unable to render an award within the time period prescribed in the *CIETAC Arbitration Rules*. Upon request by the Arbitration Tribunal and with the approval of the Secretary-General of the Arbitration Commission, the time period for rendering the award was finally extended to March 2005.

The trial of this case is now concluded. The Arbitration Tribunal, on the basis the materials available and the two hearings and after deliberations, renders this Award.

III. RELEVANT ARTICLES OF THE PETROLEUM CONTRACT

The above-mentioned modifications to the Petroleum Contract and the changes of parties thereunder have been approved by the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China. Claimants are referred to in the Petroleum Contract as "Contractor".

The dispute in this case involves 5 sub-blocks, i.e., Hu 12, Hu 2, H 5, Hu 7N and Hu 7S within the Hzj Contract Block under the Petroleum Contract. The articles of the Contract, which are directly relevant to the dispute in this case, are as follows:

Article 1 "Definitions" provides:

> "*1.26 'Enhanced Oil Recovery' or 'EOR' means through using appropriate and advanced technology, equipment and managerial experience during the term or the Contract, the oil recovery of the Contract Blocks is economically and efficiently enhanced in contrast to the estimated oil recovery that Company D would be able to reach by applying original Development Well pattern, development mode, production technology and facilities in the Contract in the contract Blocks during the same period.*
>
> *1.40 'Pilot Test Program' means the program formulated by the Operator for the purpose of implementing the Pilot Test Operations and enhancing the oil recovery from the Pilot Test Areas during the Pilot Test Period, which has been reviewed and adopted by the Joint Management Committee ('JMC') , and approved by Company D.*
>
> *1.41 'Primary Oil' means, during the Pilot Test Period, the amount of Crude Oil estimated to be recovered by Company D from Pilot Test Area, and which is described in Annex VI — Primary Oil Production herein.*"

Article 2 "Objective of the Contract" provides:

> "*2.1 The objective of the Contract is to enhance the recovery factor of Petroleum resources that exist in the Contract Area.*
>
> *2.2 The Contractor shall apply its appropriate and advanced technology and assign its competent experts to perform the EOR Operations in cooperation with Company D.*
>
> *2.4 The Contractor shall provide all the costs necessary for the Pilot Test. If the Pilot Test succeeds and the Contractor opts to enter into the Development Period, the Contractor shall pay all the Development Costs. The Contractor shall recover the costs for the Pilot Test Operations and the Development Operations from the Incremental Oil in accordance with Articles 11 and 12 and Annex II — Accounting Procedure herein.*

If the Pilot Test fails or after it succeeds, if the Contractor fails to recover the costs incurred for the Pilot Test Operations and Development Operations from the Incremental Oil in accordance with Articles 11 and 12 and Annex II — Accounting Procedure herein, the unrecovered costs shall be deemed as risk losses of the Contractor. In the case of Articles 5.3 and 10.4.2 hereof, the above-mentioned provisions shall apply."

Article 3 "Contract Area" provides:

"3.5 Within the Pilot Test Period, the Pilot Test Area(s) shall be an area or areas to be selected by the Contractor at the time of submission of the Pilot Test Program in accordance with Article 5.1 herein. Any change in a Pilot Test Area(s) shall be proposed by the Contractor, adopted by the JMC through discussions, and determined upon Company D's approval. The area other than the Pilot Test Area(s) shall continue to be managed by Company D itself.

3.5.1 During the Pilot Test Period, the Contractor shall carry out the Pilot Test Program for one or sub-Blocks as appropriate.

3.52 There may be more than one (1) Pilot Test Area in the Hzj Contract Block, it being understood that each Pilot Test Area in Hzj Contract Block shall be sub-Block."

Article 4 "Contract Term" provides:

"4.1 The term of the Contract shall include a Pilot Test Period, a Development Period and a Production Period.

4.2 The Pilot Test Period shall be two (2) consecutive Contract Years, beginning on the Date of Commencement of Implementation of the Contract.

4.3 When time is insufficient to complete the appraisal work on the predicted commerciality of the Incremental Oil of the Development Period and Production Period and an EOR Program for the Contract Area before the expiration of a Pilot Test Period, the Pilot Test Period as described in Article 4.2 herein shall be extended. The period of extension shall be subject to the approval of Company D and shall be a reasonable period of time required to complete the above-mentioned appraisal work and

the EOR Program in order to enable the JMC to make a decision on the commerciality of the said Incremental Oil in accordance with Article 10 hereof, and until the Department or Unit approves or finally rejects the EOR Program. The period of extension shall not exceed six (6) months unless otherwise agreed on by the Parties.

4.4 The Development Period shall begin on the date of approval by the Department or Unit of the EOR Program, and end on the Date of Commencement of Obtaining Commercial Incremental Oil. The Development Period shall not exceed twenty-four (24) months unless otherwise provided for in the EOR Program.

4.5 The Production Period shall be a period of maximum twenty (20) consecutive Production Years beginning on the Date of Commencement of Obtaining Commercial Incremental Oil, unless…"

Article 5 "Minimum Pilot Test Work Commitment and Expected Minimum Pilot Test Expenditures" provides:

"5.1 The Contractor shall present the Pilot Test Program to the JMC within three (3) months after the Date of Commencement of the Implementation of the Contract, and shall begin mobilizing personnel and equipment in the F Oilfield to perform the Pilot Test Operations within three (3) after the date on which the Contractor receives written notification from Company D that the Pilot Test Program has been approved, unless otherwise agreed by the Parties. Between the date on which the Contractor actually begins field operations, Company D shall not perform any work involving any well located within the Pilot Test Area without Contractor's prior written consent.

5.1.1 There shall be one (1) Pilot Test Program for the Contract Area, however, the Pilot Test Program may be amended at the start of the second Contract Year. In exceptional circumstances, with JMC approval, amendments to the Pilot Test Program may be submitted at any time for Company D approval. Any amendments to the Pilot Test Program shall be formulated by the Operator.

5.1.2 Company D approval(s) of the Pilot Test Program and any subsequent amendments to the Pilot Test Program shall be granted within thirty

(30) Calendar Days of the receiving date after JMC approval, unless otherwise agreed by the Parties.

5.1.3 The total work program proposed in the Pilot Test Program, regardless the number of Pilot Test Areas, shall fulfill the minimum work program set forth in Article 5.2 herein.

5.1.4 The take-over arrangements of a Pilot Test Area shall be included in Pilot Test Program.

5.2 The Contractor shall fulfill the minimum pilot work commitment and expected minimum pilot test expenditures in accordance with the following provisions:

5.2.1 The minimum Pilot Test Work commitment shall include the items as follows:

(a) Perform detailed research on the development geology and reservoir engineering (including laboratory research) for the reservoirs or pay zones to determine the optimal method for enhancing oil recovery;

(b) Unless otherwise agreed by the Parties, perform well repair, recompletion or drilling operations on forty (40) wells, including new drilling of and/or sidetracking in fourteen (14) wells, necessary for production enhancement or completion of injectivity tests and pilot displacement tests;

(c) Perform pilot displacement test for the Pilot Test Area(s); and

(d) Complete formulation of the appraisal report and EOR Program.

5.2.2 The total minimum pilot test expenditure shall be Ten Million U.S. dollars (US$ 10 million) for the Contract Area. All costs paid by the Contractor and charged to the Joint Account during the Pilot Test Period, including General and Administrative ('G&A') costs that shall be less than twenty-five percent (25%) of the total Pilot Test Costs, shall be credited toward the minimum expenditure requirement. Pilot Test Period G&A costs not credited toward the minimum expenditure requirement, if any, but which may be confirmed by the non-operating Party through audit, shall be charged to the Joint Account and shall be recoverable.

5.5 If Contractor elects to enter the Development Period and the actual expenditures charged to the Joint Account by the Contractor during the Pilot Test Period are less than the minimum Pilot Test work commitment set forth in Article 5.2.1 herein, the Contractor shall pay Company D a withdrawal fee according to Article 5.7 herein.

5.6 If at any time during the Pilot Test Period Contractor elects to withdraw from the Contract or if the Contractor elects to enter the Development Period for selected Contract Blocks, Contractor shall pay Company D a withdrawal fee according to Article 5.7 herein only if the actual Pilot Test Work fulfilled by the Contractor during the Pilot Test Period is less than the minimum pilot test expenditure commitment set forth in Article 5.2.2 herein."

Article 6 "Management Organization and Its Functions" provides:

"6.1 For the purpose of the proper performance of the EOR Operations, the Parties shall establish a Joint Management Committee ('JMC') within forty-five (45) days from the Date of Commencement of the Implementation of the Contract."

6.2 The Parties shall empower the JMC to:

6.2.1 review and adopt the Work Programs and budgets proposed by the Operator and subsequent amendment hereto;

6.2.2 review and adopt the Pilot Test Program and budgets proposed by the Operator, and subsequent amendments thereto, and submit them to Company D for confirmation;

6.2.3 review and adopt the appraisal reports proposed by the Operator, and subsequent amendments thereto, on the estimated commerciality of the Increment Oil and submit them to Company D for confirmation;

6.2.4 review and adopt the EOR Program and budget proposed by the Operator, and subsequent amendments thereto, and submit them to Company D for confirmation.

6.4.1 During the Pilot Test Period, the Parties shall endeavor to reach agreement through consultation on Pilot Test Programs and annual work Program. If the Parties fail to reach agreement through consultation, the

Contractor's proposal shall prevail, provided that such proposal is not in conflict with the relevant provisions in Articles 2, 3, and 5 herein."

Article 7 "Operator" provides:

"*7.1 The Parties agree that Company B (Contractor) shall act as the Operator for the Pilot Test Operations, Development Operations and Production Operations within the Contract Area, unless otherwise stipulated in Article 7.8.*"

Article 9 "Work Program and Budget" provides:

"*9.1 There shall be one (1) annual Work Program and budget each Calendar Year for the entire Contract Area during the Pilot Test Period, Development Period and Production Period. After the Date of Commencement of the Implementation of the Contract, the Operator shall propose and submit to the JMC the annual Work Program and budget for the remainder of the same Calendar Year at the first regular meeting of the JMC. Before the fifteenth (15th) of September of each Calendar Year, the Operator shall complete and submit to the JMC for its review an annual Work Program and budget for the next Calendar Year unless otherwise agreed by Company D. The JMC shall either adopt the annual Work Program and budget as submitted or make such modifications agreed by the Partied. The adopted annual Work Program and budget shall be submitted to Company D for review and approval within thirty (30) days from which they are submitted to the JMC. Within fifteen (15) days following the receipt of the annual Work Program and budget, Company D shall notify the JMC in writing of its approval or disapproval or any modifications thereto with its detailed reasons. If Company D requests any modifications to the aforesaid annual Work Program and budget, the Parties shall promptly hold meetings to make modifications and any modifications agreed upon by the Parties shall be effected immediately. In case Company D fails to notify the JMC in writing of its approval or disapproval or any modifications within fifteen (15) days, the annual Work Program and budget adopted by the JMC shall be deemed to have been approved by Company D. The Operator shall make its best efforts to perform the EOR Operations in accordance with the approved or modified annual Work Program and budget.*"

Article 10 "Determination of Commerciality of the Incremental Oil" provides:

"*10.1 If, during the Pilot Test Period, the result obtained from the pilot test indicates that the estimated Incremental Oil obtained from all or part of the Contract Area during the Development Period and Production Period (hereafter abbreviated as 'EIOPP') is with commercial value through the EOR method and operations, then the Operator shall submit to the JMC the appraisal report and the EOR Program to be approved. There shall be one (1) EOR Program for the entire Contract Area. The aforesaid appraisal report shall include:*

(a) Report on the result of the Pilot Test;

(b) Appraisal report on the EIOPP from the Contract Area, including appraisal on geology, development, engineering and economy; and

(c) Report on the effect on the environment prepared by the Operator and qualified assigned unit."

Article 11 "Financing and Cost Recovery" provides:

"*11.1 Funds required for the EOR Operations shall be raised by the Operator in accordance with the EOR Program and budget determined pursuant to the relevant provisions of the Contract, the provisions described in Annex II-Accounting Procedure herein, and the provisions described herein.*

11.1.1 All the Pilot Test Costs required for the Pilot Test Operations shall be provided solely by the Contractor. However, the costs required for the fulfillment of the minimum Pilot Test Period work commitment shall be deemed the equity capital of the Contractor. But the costs required to compensate Company D for the Decremental Oil of the Pilot Test Period shall be recovered from the Cost Recovery Oil as provided in Article 12.2.2 herein simultaneously with the recovery of Contractor's Pilot Test Costs.

11.1.2 The Development Costs required for Development Operations shall be solely provided by Contractor. But the costs required to compensate Company D for the Decremental Oil of the Development Period shall, unless otherwise stipulated in Article 10.4.2 herein, be recovered from the

Cost Recovery Oil as provided in Article 12.2.2 herein simultaneously with the recovery of Contractor's Development Costs.

11.1.3 The Production Operating Costs required for Production Operations shall be paid respectively by Company D and the Contractor in proportion to their respective shares of Allocable Remainder Oil before Cost Recovery in accordance with Article 12.2.2 and Allocable Remainder Oil after Cost Recovery in accordance with Article 12.2.3 herein. But the costs required to compensate Company D for the Decremental Oil of the production period shall be recovered from the Cost Recovery Oil as provided in Article 12.2.2 and Article 12.2.3 herein simultaneously with the recovery of Company D's and Contractor's Production Operating Costs.

11.1.4 Within the Pilot test Period and before the date on which the Contractor actually begins field operations, the operating costs for the Contract Area shall be for the sole account of Company D. Within the Pilot Test Period and after the date on which the Contractor actually begins field operations, the operating costs for each Pilot Test Area shall be considered as part of the Pilot Test Costs for said Pilot Test Area and shall be entered into the Joint Account, and the operating costs for the non-Pilot Test Areas shall be for the sole account of Company D. Within the Development Period and Production Period, the operating costs for the Contract Area shall be considered as part of the respective Development and Production Operating Costs for said Contract Area and shall be entered into the Joint Account. Within the term of this Contract, the operating costs for the Contract Blocks relinquished by the Contractor shall be for the sole account of Company D.

During the Pilot Test Period and after the date on which the Contractor actually begins field operations and acts as Operator, the primary Oil shall be owned by Company D and Contractor shall be entitled to receive from Company D twenty five percent (25%) for the Primary Oil from each Pilot Test Area, unless otherwise agreed by the Parties, as compensation for the operating costs for the Primary Oil from the said Pilot Test Area. All such compensation shall be entered into the Joint Account."

Article 12 "Incremental Oil Production and Allocation" provides:

> "*12.2.2 Cost Recovery Oil and Allocable Remainder Oil Before Cost Recovery Seventy percent (70%) of the remainder of the Incremental Oil from the Contract Area in the said Calendar Year after the payments referred to in Article 12.2.1 herein shall be deemed 'Cost Recovery Oil' and shall be allocated in accordance with 12.2.2 (a) herein, and Thirty percent (30%) of the remainder of the Incremental Oil from the Contract Area in the said Calendar Year after the payments referred to in Article 12.2.1 herein shall be deemed 'Allocable Remainder Oil before Cost Recovery' and shall be allocated in accordance with Article 12.2.2 (b) herein.*"

Article 25 "Consultation and Arbitration" provides:

> "*25.2.1 If agreed upon by the Parties, such dispute shall be referred to arbitration conducted by the China International Economic and Trade Arbitration Commission in accordance with the arbitration proceeding rules thereof.*"

Article 26 "Effectiveness and Termination of the Contract" provides:

> "*26.3 If in the course of implementation of the Contract, the Parties decide through consultation to make amendment or supplement to any part of the Contract, a written agreement signed by the authorized representatives of the parties shall be required. Such written agreement shall be subject to the approval the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China should there be any significations herein.*"

Article 27 "Applicable Law" provides:

> "*27.1 The validity, interpretation and implementation of the Contract shall be governed by the laws of the People's Republic of China. Failing the relevant provisions of the laws of the People's Republic of China for the interpretation or implementation of the Contract, the principles of the applicable laws widely used in petroleum resources countries acceptable to the Parties shall be applicable.*"

The annexes to the Contract include: Annex I: Descriptions of the Contract Blocks; Annex II: Accounting Procedure; Annex III: Personnel Costs; Annex IV: Training of Chinese Personnel and Transfer of Technology; Annex V: Data Control; Annex VI: Primary Oil Production; and Annex VII: Joint Operating Body.

IV. FACTUAL BACKGROUND

On 8 March 2000, Respondent and the Contractor signed an agreement named "Acceleration Agreement (F Oilfield-Company B / Company E EOR Project)" in the following terms:

"1. *The Mode / Company E JOB (JOB) will conclude a formal agreement with Plant 5 to drill three wells (HC12-14, H12-155, H12-156) starting the program as soon as possible, but before 10 March 2000. The well locations and technical details of these new wells/sidetracks shall be discussed and agreed between JOB and Plant 5.*

2. *F Oilfield will pay for these wells initially, and the JOB will repay F Oilfield from 80% of the incremental oil after deducting taxes, F Oilfield's share of incremental oil revenue and more than US$ 2.00/Bbl tariff — as per the methodology outlined in the attachment.*

3. *The JOB will also pay more than US$ 340,000 (equivalent nearly RMB 2.8 million) to F Oilfield in recognition of the workovers performed in the 4Q of 1999 from incremental oil revenue in the manner described in point 2, above, after the costs of the first three wells have been repaid.*

4. *The cost of the first three wells and the more than US$ 340,000 payment will not be part of the US$ 10 million expenditure commitment for the Pilot Test Period, as specified in the Petroleum Contract.*

5. *The JOB will also pay US$ 150,000 to gain full access to the complete set of results of the 18-month study of Hu 12 that was completed in 1999. The payment will come from incremental oil production as described in point 2 above after the costs in points 1 and 3 have been recovered. F Oilfield/Plant 5 will assist JOB in drafting each individual workover program in Hu 12 during Pilot Test Period.*

6. *The JOB will start workover operations as soon as possible according to the time schedule specified in the Program Contract in order to keep up Production in Hu 12.*

7. *After this agreement becomes effective, JOB will have the right to incremental oil production and associated revenue on the completion of the first well activity specified in Article 1 or on the completion of the first workover operation*

(minimum US$ 25,000 equivalent expenditure) funded by JOB, whichever comes first.

8. *The JOB will provide a revised implementation plan including activity schedule and budget taking into account the Plant 5 Year 2000 Program and Contractor's Pilot Test Program, to the joint Management Committee ('JMC') with the intention of having it reviewed and approved during the second JMC meeting.*

9. *This agreement will be considered the master agreement and as such the terms and conditions of the Implementation Agreement concluded between the JOB and Plant 5 concerning pricing and operational issues will be upheld and enforced under this agreement.*"

On 15 September 2000, Mr. J of F Oilfield sent a fax to Claimant B, stating that Respondent would grant Company E an unconditional release from the Project without the withdrawal penalty if Claimant B assumed this responsibility.

On 27 September 2000, Claimant B and Company E signed a "Severance Agreement, Assignment and Assumption."

On 10 and 13 October 2000 respectively, Respondent sent a fax to Company E, agreeing to release Company E of all its responsibilities under the Petroleum Contract on condition that Claimants bear all of the responsibilities thereof.

On 19 October 2000, Claimant A, Claimant B, Respondent and F Oilfield signed a "Formal Minute of Meeting between Company C, F Oilfield, Company A and Company B" which reads, *inter alia*, that "*Company A would take a 67% of the Contractor's interest in the EOR Petroleum Contract. Company A and Company B intended to undertake technical studies and produce a revised Pilot Test Program (PTP) by 7 March 2001*". It was agreed that the PTP will be extended until 31 August 2002 and that, if at that time, the Contractor requires a further extension of up to eight (8) months then Company C will grant such an extension.

On 21 October 2000, Claimant A, Claimant B and F Oilfield signed a "Formal Minute of Meeting between F Oilfield, Company A and Company B", in which it wrote: "*(b) Hu 12 Acceleration Agreement and Other Costs Incurred by F Oilfield*". F Oilfield noted that under this agreement approximately US$ 1.8 million costs were due by the Contractor. Claimant A commented that it could not be responsible for the historic situation. After discussion between Claimant B and F Oilfield, it was agreed that Claimant B would compensate F Oilfield in the amount nearly US$ 1.4 million for resolving the historic issue.

On 8 November 2000, two Joint Management Committee ("JMC") members Company C and one JMC Contractor member signed a memorandum named the "Memorandum between F Oilfield and Company B Group". The relevant terms are as follows:

"1. *Company B Group should pay the operation costs to F Oilfield in amount of US$ 1.38 million;*

2. *The two parties should assign their representatives to confirm the Hu 12 incremental oil amount before 30 September 2000, and the incremental oil amount monthly until Company A's starting oil field operations.*

3. *Company B Group reimburses the operations costs in the above first article from the incremental oil itself.*

4. *From November 2000, Company B Group will pay monthly US$ 20,000 to Plant 5 separately until Company A's starting the oil field operations. The payment should be done before the tenth day each month.*

5. *If the above operation costs have not been paid completely when Company A's starting oil field operations, the balance of the payment will be paid from Company B Group's incremental oil earned from Company A's starting oil field operations.*"

On 14 December 2000, Claimant B (in the name of the Contractor) and Respondent signed a "Contract for the Sale of Crude Oil" setting out the terms and conditions under which Company C will purchase and the Contractor will sell the Contractor's share of crude oil and excess Associated Natural Gas recovered from Hzj and Wl Blocks according to the Contract.

On 12 March 2001, Claimant A and Claimant B signed a "Pilot Test Program in F Hzj-Wl Block for the Enhancing Oil Recovery".

On 13 March 2001, Claimant A and Claimant B signed an "Acquisition Agreement" with regard to the Contractor's interests under the Contract.

On 20 March 2001, Claimants and Respondent signed a "Minutes for the JMC Meeting of the EOR Project Hzj-Wl Blocks in F Oilfield" ("the JMC3 Meeting Minutes"), the relevant terms are as follows:

"2. *Hu 12 PTP*

The JMC agreed that Hu 12 PTP submitted by Contractor is the result of mutual efforts from both sides and is feasible, both sides agreed:

2.1 The Contractor will complete the implementation of 12 new drillings/ sidetrack (its Chinese version has "in the first half year of 2001" words, the Tribunal notes) which are listed in Hu 12 PTP. Company A / Company B will implement based on monthly implementation schedule.

2.2 The Contractor will pay Plant 5 the costs for the 3 ongoing new drillings/ sidetrack (HC91, H12-149 and H12-57) which are listed in Hu 12 PTP and being implemented by Plant 5. The payment will be made within 30 days after the Contractor/JOB receive the cost invoice of the above mentioned 3 wells are drilling finished and put into production.

2.3 The calculation of Hu 12 Incremental Oil will commence on 1 April 2001.

3. *Entry of Blocks Hu 7S, Hu 7N, Hu 2 and Hu 5*

3.1 The Contractor will enter all Hu 7S, Hu 7N, Hu 2 and Hu 5 Block (or only few of these blocks selected) on 1 January 2002. Plant 5 will provide the Contractor/JOB the cost invoice for new drilling/sidetrack, workover (as defined in the Plant 5 Cooperation Agreement) which occurred from 1 July 2001 to 31 December 2001 by the date of 1 January 2002;

3.2 Plant 5 will provide well proposals of the above 4 blocks to the Contractor/ JOB for review and confirmation from 1 July 2001, the Contractor will respond to Plant 5 after receiving well proposals within 48 hours;

3.3 The Contractor will pay Plant 5 66.7% of the total operation costs as defined in Article 3.1 above;

3.4 The payment of Article 3.2 will be made evenly per month over 12 months from 31 January 2002;

3.5 The Contractor will submit work programs of 4 blocks mentioned above to JMC for review and approval in September 2001;

3.6 The calculation of the Incremental Oil from the selected entry blocks will commence on 1 January 2002;

3.7 This Article 3 shall apply to other blocks the Contractor selects to enter but not apply to blocks not selected;

3.8 It is agreed that these costs are recoverable under the terms of the Petroleum Contract.

…

8. The previous costs of Contractor (including the cost of Company A for building the reservoir model of Hu 12 Block)

The confirmation and approval of the previous costs of Contractor subjects to the providing of support documents/invoices by the Contractor."

On 9 July 2001, Respondent sent a fax to Claimants, stating that:

"*We think the work of the JOB for previous stage is successful. Under the management of Mr. Zhang Yancai, the General Manager, the JOB achieved good performance with the completion of drilling of 8 new wells/sidetracks, 16 workovers and the investment nearly US$ 3.80 million. The oil output is continuously increasing. By the end of June, the daily output has reached to the highest level of the past two years. The Incremental Oil reached about 4500 mt from April to June. The research is also well developed. By virtue of the communication among the technicians, we widened both parties' mind for further development, come close to mutual understanding of each other, and have laid down a good foundation for our cooperation in the Contract area.*

Regarding to the next step work of the JOB, we consider that the following aspects should be strengthened:

1. Complete the budget of the Pilot Test Program for 2001 as soon as possible. According to the resolution made at the JMC Meeting in March, the twelve new/sidetracked wells, required to be completed in the program for the first half of the year, of which only eight such wells have been completed so far, accounting for only 67% of the total. We hope that after the completion of evaluation & research, new well locations will be proposed as soon as possible and great efforts will be made to have all things done in the third quarter.

…

6. According to the JMC3 Meeting Minutes, the Contractor will enter Hu 7S, Hu 7N, Hu 5 and Hu 2 Blocks or few blocks thereof on 1 January 2002. From 1 July 2001, the Plant 5 will provide the Contractor/JOB with the detailed list of new wells/sidetracks and workovers from 1 July 2001 to 31 December 2001.

7. The Training Program should be made out and implemented as soon as possible."

Claimants sent Respondent a fax dated 8 August 2001 (the Tribunal notes that Respondent received the fax on 15 August 2001) to reply Respondent's letter dated 9 July 2001. In the fax it states:

"*To end July 2001, the JOB has invested more than US$ 5 million and 7 of the budgeted new wells have been drilled. (Taken together with the 3 wells drilled by the Contractor prior to Company A's involvement, this represents a total of 10 of the minimum 14 new wells required by Article 5.2.1(b) of the Petroleum Contract).*

The budget approved at the 3rd JMC did indeed propose 12 new wells and we are currently reviewing options for drilling additional economically viable wells. However, I must emphasize that only 2 of the 7 wells drilled this year so far appear capable of yielding commercial returns. This means that we have to properly evaluate any new well locations to ensure that they have a reasonable chance of being economic.

Based on results to date, Company A strongly believes that there is a need to obtain a better understanding of the reservoir management aspects associated with this Block and the JOB is working closely with Plant 5 / F Oilfield to input their knowledge and learning into this work.

I agree that the JMC3 Meeting Minutes state that, on 1 January 2002, the Contractor will enter those further Blocks it selects from the nominated Contractor Area. I also agree that Plant 5 is required to provide the JOB with proposed locations for new wells / sidetracks to be drilled on these Blocks from 1 July 2001 for prior approval. It is clear from both the Petroleum Contract and the Plant 5 Co-operation Agreement that these well activities should not take place without such prior approval.

Please note that the Contractor is currently considering entry into the other Blocks it has nominated in the Contract Area before 1 January 2002, in accordance with its rights under the Petroleum Contract."

In response to the above fax, on 30 August 2001, Respondent sent a fax to Claimants, stating as the follows:

"*Regarding to the minimum work commitment of the Contractor in Hu 12 Block that is stated in the Pilot Test Program approved by JMC and Company C, we think the work commitment should be carried out based upon the Pilot Test Program and*

any alteration of the PTP should be discussed and approved on JMC meeting. As for the 3 wells drilled by the Contractor prior to Company A's involvement, we would remind you that we had made agreement with Company E that the costs of these 3 wells to be paid from incremental oil and will not be counted as the minimum work commitment (14 new drilling and sidetracking)."

On 2 November 2001, the JMC held the 4th meeting and agreed on the minutes. Meanwhile, Claimants and Respondent signed an "Agreement for Implementation of 2002 and 2003 Production Operation on the Investment Area" (hereinafter referred to as the "JMC4 Agreement"). The relevant contents include the following:

"*In the spirit of cooperation and following the discussion of the Contractor's proposed Work Program and Budget for 2002, the following is agreed by the Parties for the two-year period from 1 January 2002 to 31 December 2003:*

1. *Other than as amended herein, the terms and conditions of the Contract and the existing Sale of Crude Oil and Excess Associated Natural Gas Agreement ("the Sales Agreement") shall remain in force.*

2. *The Pilot Test Period will be extended to 31 December 2003 and the Contractor shall proceed with relevant application and approval procedures as stipulated in the contract.*

3. *The Contractor will pay Company C nearly US$ 1.90 million per month for 24 months for investment into the Contract Area and will obtain the amount of incremental oil as specified in Clauses 6 and 8 herein in such 24-month period.*

   The first payment will be made by 1 January 2002 and the calculation of incremental oil will begin from 1 January 2002. in the case of delay of the first payment made, Company C will begin the calculation of incremental oil from the date of such first payment is made. Each subsequent payment will be made within 5 working days after receipt by the Contractor of its incremental oil income due for the previous month. After making the first payment, the Contractor will be deemed to have met its minimum Pilot Test Work Commitment and Expected Minimum Pilot Test Expenditures as defined under Article 5 of the Contract.

4. *This monthly sum will also cover the processing Related Fee of US$ 2.1 per incremental barrel referred to in Clauses 3.5 and 5.1 of the Sales Agreement which is no longer payable separately.*

5. *Plant 5 will use this money in Pilot Test Operations in the Contract Area. JOB will work with Plant 5 to develop an annual work program and budget. Plant 5 will provide Contractor with monthly operations, production and reserves reports for the Contract Area.*

6. *Unless in case of Force Majeure, Company C Group guarantees to deliver 19,139 metric tones to the Contractor as its gross share of incremental oil each month. After deduction of 5% VAT the Contractor's entitlement becomes 18,181 metric tones and after further deduction of Company C's 12% share of Allocable Remainder Oil becomes 16,000 metric tones (i.e., 83.6% of the gross entitlement). For the avoidance of doubt, short term interruptions to production caused by normal operational risks, such as power supply failures etc, are not Force Majeure events.*

7. *Payment for Crude Oil purchased by Company C will be made in US$ into the Contractor's designated bank account as soon as possible following the month of production.*

8. *Company C Group and the Contractor will share all incremental oil produced from the Investment Area above the level of 19,139 metric tonnes in any month 50% each.*

9. *The Contractor will reimburse Company C with 50% of the portion of incremental oil income which is generated as a direct result of the oil price achieved being higher than US$ 25 per barrel.*"

On 28 December 2001, Mr. Jiang Huanbin from F Oilfield of Respondent sent a fax to Mr. P of Claimant A, stating as follows:

"*I am noticed just now that the first installment you made has been returned to its formal address by the Planning & Financial Department of F Oilfield. The accountant staffs of the Planning & Financial Department of F Oilfield think that the foreign side should make the first installment nearly US$ 1.90 million. They don't know why another mount of about US$ 1.60 million was received. Because they are preparing the annual financial report of this year, do not know how to deal with this money and think you made payment amount was incorrect, so they returned the first installment to its formal address.*

We agree the Processing Fee of US$ 2.1/bbl could not be included in these installments to be made by your side. However, both of the parties shall have a written record for this method."

On 31 December 2001, Claimant A sent a fax to Respondent, explaining how the amount remitted to Respondent was calculated and expressing that Claimants would resend the money to Respondent.

On 7 January 2002, Mr. Jiang Huanbin from F Oilfield of Respondent sent a fax to Claimants, stating as follows:

"*Your fax dated on 31 December 2001 has been received. I understand how you arrived at remitting nearly US$ 1.6 million which is the balance after the US$ 2.1 processing fee is deducted. However, we have not received any report about this change before your message.*

Plant 5 submitted JOB the cost list for all stimulation workovers done by Plant 5 within the second half year of 2001 in the four blocks of Hu 2, Hu 5, Hu 7S and Hu 7N as well on 28 December 2001 with the amount more than RMB 142 million. The parties shall confirm this amount as early as possible in order to 66.7% of which is paid in time according to the JMC3 Meeting Minutes."

On 8 January 2002, Claimant A sent a fax to Respondent, stating that according to item 3.2 in the JMC3 Meeting Minutes on well proposals in respect of 2H 2001 work on Hu 7S, Hu 7N, Hu 2 and Hu 5 Blocks were to be presented to them for their approval, that the confirmation process was inserted to ensure that Claimants were satisfied with the likely commercial return from any F Oilfield's proposal compared to its cost, if Claimants were to be expected to bear that cost. However, no such well proposals were presented to them for their approval, that point 6 of Claimants' fax to the JMC Members which stated on 10 October 2001 was to be referred to, that Claimants also pointed out in very clear terms during the meeting in Beijing which immediately preceded the 4th JMC Meeting that no such proposals had been presented to Claimants for their approval during the period from 1 July 2001 to the date of the JMC meeting, and that therefore Claimants made it clear that, under the terms of the JMC3 Meeting Minutes, they had (and still have) no obligation to pay for any unapproved work which may have been undertaken.

On 14 January 2002, Mr. Jiang Huanbin of F Oilfield of Respondent sent a fax to Mr. Phil Moore of Claimant A, stating that:

"The amount nearly US$ 1.6 million has reached to F Oilfield's account. A memorandum about this method should be made between Plant 5 and JOB.

We could not agree with what you mentioned in your message that you have no cost liability for the workovers done by Plant 5 for Hu 2, Hu 5, Hu 7S and Hu 7N Blocks of during the second half year of 2001 under the terms of the JMC3 Meeting Minutes. Actually, Plant 5 should simply provide the workover proposals to the contractor for review and conformation rather than for approval according to the JMC3 Meeting Minutes. Plant 5 has provided these proposals to JOB. I hope the parties confirm the amount of this costs as early as possible in order to 66.7% of which is paid in time according to the JMC3 Meeting Minutes."

On the same day, in response to the above fax, Claimants sent a fax to Respondent, stating that in the JMC3 Meeting Minutes, Plant 5 was required to provide well proposals to Contractor/JOB for review and confirmation. In English, "confirmation" has the same meaning as "approval". The reason that no proposals were presented by Plant 5 for their review and approval were that Plant 5 knew that a large proportion of these would have been rejected by the Contractor as being uneconomic. In October 2001, Claimants pointed out that no well proposals had been presented to them, this being in breach of the JMC minutes, and that Plant 5 was maintaining a tactical silence on the subject and adopting the following strategy:

(1) spend money on wells without allowing us our right to veto the work, and

(2) argue for cost recovery from the Contractor later, using obstruction to Block entry as the threat.

On 23 January 2002, Respondent sent a fax to Claimants. The relevant contents are quoted as follows: "*Each parties believes that they must and have honored the JMC3 Meeting Minutes and the JMC4 Agreement*". "*The JMC3 Meeting Minutes states that the Contractor will compensates the Company C as well as the compensation amount as the precondition for the Contractor to enter into new Blocks. The JMC4 Agreement has made clear of the new operating method for the cooperation. Both agreements were reached through mutual understanding that is the only way to obtain the possible win-win results." "In order to ensure our smooth cooperation, we hope the parties could confirm the operation cost amount compensated by the Contractor to Company C."*

On the same day, Claimants replied to Respondent by fax, reiterating Claimant's position and proposing to have a 5th JMC Meeting.

On 30 January 2002, Respondent sent a fax to Claimants, stating that in view of the fact that Plant 5 had provided JOB the operation proposals of 2H 2001 according to the procedures stipulated in the JMC3 Meeting Minutes and kept corresponding records but had not received any reply from the JOB. They thought all these proposals should have been deemed as confirmed under the JMC3 Meeting Minutes. They thought the reason behind such result was the lack of strong enough technical supporting force, the deficiency of local field work experience, the slack in management and the complicate procedure of decision-making of JOB upon the retrospection of the 2001 cooperation. It had proven that all these works done by Plant 5 in the 2H 2001 were essential supporting operations for the oilfield development. Without these works done in the 2H 2001, there would not have been the negotiation basis of the incremental oil amount designed in the JMC4 Agreement. The required compensation that was only part of the total operation expenditures of 2H the year before was relatively less by comparing with the actual investment. The incremental oil of January 2002 should not be paid in advance until the common ground being reached. In addition, they agreed the proposal to have a JMC meeting during the week beginning 4 March 2002.

On 1 February 2002, Claimants sent a fax to Respondent, stating that: Plant 5 had not sought advance confirmation for any 2H 2001 work proposals; the statement of Respondent that without these works done in the 2H 2001, there would not have been the negotiation basis of the incremental oil amount at the 4th JMC Meeting was not a condition of the JMC4 Agreement; Claimants did not accept this new proposal; and Claimants proposed 13 March 2002, Wednesday, as the firm date for the 5th JMC Meeting, to be held in Beijing.

On 5 February 2002, Respondent sent a fax to Claimants, stating that "*It is found in our correspondences recently that we are holding different understanding on the confirmation of operation proposals in respect of work on Hu 7S, Hu 7N, Hu 2 and Hu 5 Blocks for 2H in 2001. During the period of 1 July 2001 and December 2001, Company C had the operation right in these blocks and bore the operation investment risk (including the risk of not entering these blocks by the Contractor). Therefore, it is unnecessary for Company C to get approval of operation proposals in advance in respect of these blocks. Furthermore, it is not showed in the JMC3 Meeting Minutes that the prior approval of operation proposals from the Contractor is required*."

Based on these disputes unsolved by the two parties, on 19 March 2002, Claimants asked Respondent to return the money nearly US$ 1.6 million to Claimants. Afterwards, Respondent returned the money to Claimants.

Whereas the disputes between the two parties could not be resolved by negotiations between themselves, Claimants submitted an application for arbitration to the Arbitration Commission on 25 August 2003.

V. ALLEGATIONS AND OPINIONS OF THE PARTIES

A. Main Claims of the Claimants

Claimants alleges that:

Notwithstanding that the Contractor had made and Company C had accepted the first month's payment due under the JMC4 Agreement, Company C did not deliver, either in whole or in part, to the Contractor the latter's share of the Incremental Oil, or, alternatively, make payment to the Contractor in respect thereof in accordance with the provisions of the Sale Contract.

The Contractor (which term in this instance includes Company E during the period when it was a party to the Contract) has, during the life of the Contract to date and pursuant to its obligations thereunder, carried out considerable work and incurred substantial expense. The work performed to date by the Contractor can be summarized as:

(1) drilling of 10 new wells/sidetracks;

(2) 66 work-overs;

(3) transfer of technology and training of Chinese staff;

(4) research (including laboratory research) on the development geology and reservoir engineering; and

(5) consultancy work to develop an optimized reservoir management strategy.

The Contractor (including Company E when it was a party to the Contract) has to date incurred a total PTP expenditure of over US$ 10 million in connection with and pursuant to its obligations under the Contract. However, Company C has been repeatedly in breach of the Contract including various JMC agreements by:

(1) failing to obtain prior approval from the Contractor/JOB for well operations in Hu 2, Hu 5, Hu 7S and Hu 7N Blocks during the second half of 2001 and unjustifiably demanding that the Contractor assumes liability for the costs so incurred.

(2) refusing to accept the work program presented at the 4th JMC Meeting which consequently (i) blocked the Contractor's plans to manage the reservoir in a different way to Company C and ultimately increase the recovery of oil reserves and (ii) caused the Contractor to have to negotiate the JMC4 Agreement as an alternative way forward.

(3) then, after Claimants conceded the JMC4 Agreement and made the initial payment nearly US$ 2 million, failing to honor its obligations under the JMC4 Agreement and to deliver to the Contractor the latter's share of Incremental Oil due thereunder.

(4) Company C's wholly unjustified failure to honor its obligations under the Contract and agreements and to deliver to the Contractor the latter's share of the Incremental Oil due thereunder amounts to an unequivocal indication that Company C does not intend to be bound by the terms of the Contract and agreements, is not prepared to perform the same and has by its conduct repudiated it.

(5) The Contractor has thus been deprived of the benefits it would otherwise have received under the Contract and has incurred substantial costs and expenses which, as a result of Company C's conduct and its clear indication that it does not intend to observe its continuing and future obligations under the Contract, the Contractor has no prospect of recovering.

As to the Calculation of the losses, Claimants alleged that according to Article 11 of the Contract, all Pilot Test Costs should be provided solely by the Contractor, be entered into the Joint Account, and be recoverable by sharing the Incremental Oil. By 30 April 2003, the total expense recorded in the Joint Account (including expenses incurred when Company E was a party to the Contract) amounts over US$ 10 million and nearly US$ 2.2 million has been recovered by the Contractor during the course of 2001 from its share of the Incremental Oil from Hu 12 Block. This leaves a net unrecovered expenditure more than US$ 8.1 million, details of which are set out in Appendix 16. As to the Contractor's Obtainable Benefit under the Contract, it is difficult to estimate accurately at this stage what profits might have been earned by the Contractor over the full term of the Contract. However, it is clear that had the Contract and the agreements been performed, the Contractor's income to date would cover all its unrecovered expenditure and would also have earned it considerable profits.

Clarified on 13 February 2004 and on 13 October 2004, Claimants seek an award finally in the following terms:

(1) an order that the Contract is rescinded.

(2) an order that Respondent reimburse Claimants' Unrecovered Expenditure on the EOR Project more than US$ 8 million with interest.

(3) an order that Respondent compensate Claimants' Obtainable Benefit under the Contract nearly US$ 15 million with interest.

(4) an order that Respondent shall bear all the arbitration fees and Claimants' lawyer's fee and other expenditure by Claimants.

B. Defense of the Respondent

In response to the Application for Arbitration of Claimants, Respondent replies as follows:

With regard to the performance of Petroleum Contract, Respondent alleges that:

1. About Hu 12 Block

According to the Petroleum Contract, the pilot test period shall be for a period of two years starting from the date when the Petroleum Contract becomes effective, that is to say, it shall end on 31 May 2000. However, not long after the Petroleum Contract became effective, Claimants repeatedly tried to change their commitments by the excuses of being unable to find suitable partners and internal problems of funds, and requested once again to delay the time limit for submitting the Pilot Test Program and the time of site operation stipulated in the Petroleum Contract.

On 14 December 1999, at the first meeting of the Joint Management Committee attended by both parties, Claimants delivered the Pilot Test Program for Hu 12 Block and designated the Hu 12 Block of the 5 contract blocks in the Hzj Block as the pilot test area. However, the delivery date was 13 days after the deadline on December 1. The Pilot Test Program was approved by the joint management committee at its first meeting, yet Claimants were requested to make revision to its implementation plan so as to further meet the requirement of activities to increase oil recovery ratio.

Because the revised Pilot Test Program for Hu 12 Block had not been submitted, large-scale oil output increase actions of F Oilfield had been suspended for a long time,

which was in no case acceptable, if it was allowed to continue in that situation, very serious damage and consequences would be caused thereof. Therefore, the Acceleration Agreement for Hu 12 Block was signed.

On 12 March 2001, Claimants delivered the revised Pilot Test Program for Hu 12 Block, which was 5 days later than the required time. In the test program, Claimants undertook to complete the following workload at Hu 12 Block in 2001:

(1) 12 new drilling/sidetracking wells

(2) Operations on producers and injectors: 53 wells

(3) Cost: more than US$ 5.4 million

(4) Total budgetary estimates for 2001: nearly US$ 8.2 million

On 9 July 2001, Respondent informed Claimants in a letter that at the first half of 2001, Claimants only completed 8 new drilling/sidetracking wells, 18 wells of stimulation operations at Hu 12 Block with the field investment nearly US$ 3.8 million, which was 67% of the workload required to be completed as per the Pilot Test Program; hence Claimants were requested to accelerate the operation so as to accomplish the required workload and budgetary estimates of the year 2001.

Nevertheless, on one hand, Claimants refused to continue work on another 4 sidetracked holes that should have been completed in the first half of 2001 with the reason that the commercial return from the 8 completed holes was not satisfactory; on the other hand, it demanded that Plant 5 / F Oilfield must agree to largely reduce the drilling operation cost agreed upon by both Claimants and Respondent so as to raise the economic return for the pilot test operation, which was taken as the precondition by Claimants to continue to execute the Pilot Test Program for Hu 12 Block.

Due to the significant differences existing between Claimants and Respondent, Claimants did not conduct any further substantial field operation to increase oil recovery ratio. In December 2001, Claimants officially stopped issuing Work Orders for Hu 12 Block, showing that it abandoned the pilot test operation for Hu 12 Block.

2. About execution at Hu 7 (South & North), Hu 2 and Hu 5 Blocks

Hu 7 (South & North), Hu 2 and Hu 5 Blocks are sub-blocks within the scope of Hzj Block (hereinafter referred to as "Hu 2, Hu 5 and Hu 7 Blocks"). The first Pilot Test Program for Hu 2, Hu 5 and Hu 7 Blocks submitted by Claimants on 28 October 2001 was

not approved by the meeting as it could not increase recovery rate and provide enough workload.

Thereafter, disagreements arose between Claimants and Respondent regarding historical questions and operational problems at the sub-blocks of Hu 2, Hu 5 and Hu 7 and no reconciliation could be reached then, therefore, from then on, Claimants never submitted any revised Pilot Test Program for Hu 2, Hu 5 and Hu 7 Blocks to Respondent. To date, Claimants has never entered Hu 2, Hu 5 and Hu 7 Blocks, let alone performed any pilot test operation in the areas, and therefore made no contribution to oil recovery and incremental production in any aspect.

Since Claimants never entered Hu 2, Hu 5 and Hu 7 Blocks to execute pilot test operations and Claimants had never made any payment or compensation thereof to Respondent, Claimants' claim that Respondent did not obtain prior approval from Claimants for any action taken for incremental oil at Hu 2, Hu 5 and Hu 7 Blocks at the second half of 2001 is irrelevant to the claim in this case.

3. On Claimants' indemnity claim for default

In the opinion of Respondent, the nature of Claimants' above claim is to take the investment risk that it should have undertaken under venture capital investment as the loss of the principal under the loans so that the investment risk would be transferred to the shoulder of Respondent. Since the claim from Claimants is neither in compliance with the Petroleum Contract nor has any factual or legal basis, it should be rejected completely. The reasons are as follows:

(1) According to the Petroleum Contract, the investment of Claimants is classed as venture capital investment and Respondent has no liability to pay or guarantee to pay for the refund and benefit of the investment of Claimants under the Petroleum Contract.

During the performance of Petroleum Contract, Claimants entered Hu 12 PTP Block on 1 April 2001 and stopped ordering in the early of December of 2001 and quit it completely by 4 December 2001. In the period, Claimants acquired all its shares for the incremental oil production (total 15,580 tons), which is 13024.88 tons, produced from 1 April 2001 to 4 December 2001 under Petroleum Contract and recovered nearly US$ 2.2 million. In this case, the cost claimed by Claimants is actually the expenses occurred in Hu 12 PTP Block. Obviously, the

cost should be recovered by allocation from the incremental oil production in Hu 12 PTP Block in the whole contract term (25 years) according to Petroleum Contract. However, Claimants withdrew from the said project after only 8 months of operation in the area and requested Respondent to compensate its pilot test expenses which, according to the Petroleum Contract, Claimants have to contribute, and which shall be recovered by allocation from the incremental oil production on its operation in 25 years, and there is also risk not to be recovered in total. Undoubtedly, Claimants' claim for compensation is absolutely not in compliance with the Petroleum Contract. The reason why it cannot recover its cost is totally because of its withdrawal ahead of time when enough incremental oil production was not produced on its operation, and it has nothing to do with Respondent and the contract liabilities of Respondent.

With respect to the four blocks of Hu 2, Hu 5 and Hu 7 which were chosen by Claimants but in which Claimants had never entered and never took any operations, there is no cost in these blocks for Claimants to claim for compensation against Respondent, and there is obviously no ground for Claimants to claim against Respondent for compensation for its so-called pilot test expenses from the incremental oil production in these blocks.

(2) The reason why Claimants cannot recover its pilot test expense in Hu 12 PTP Block is because of its improper conduct and it has nothing to do with Respondent.

Respondent's point of view is as follows: firstly, the nonperformance of Respondent claimed by Claimants is not the fact; secondly, the nonperformance of Respondent claimed by Claimants has nothing to do with whether its cost in Hu 12 PTP Block can be recovered. Much more importantly, facts and evidence show sufficiently that Claimants are not only able to recover all its cost occurred but also to achieve fundamental investment return in the pilot test period in the assumption that Claimants had fulfilled its obligation under the Petroleum Contract in the widest interpretation. According to the calculation of Respondent, should Claimants have continued with its performance of the Petroleum Contract, until December 2003, Claimants would have had income of nearly US$ 11 million after the deduction more than US$ 45 million operations fee to be paid by Claimants, nearly US$ 10 million compensation fee for

Respondent's operation in the second half of the year of 2001, and Claimants' US$ 6 million non-recovered cost before 2001.

In all, it is proved by the fact that the improper action of the withdrawal of Claimants ahead of time is the direct and the fundamental reason which made its investment non-recoverable, let alone that, under the Petroleum Contract, Claimants should bear the risk that its investment may not be able to recover during the period of term of the Petroleum Contract of 25 years.

(3) Since Claimants did not fulfill all its contract liabilities that should be fulfilled by it in the remaining period of the Petroleum Contract, its claim on the so-called nonperformance of Respondent has no basis in fact or law.

(a) After the conclusion of the Petroleum Contract, for Claimants' own reasons, the submission of the Pilot Test Program was delayed for seven times, and the Pilot Test Program was finally submitted on 12 March 2001, while under the Petroleum Contract, it should have been submitted on 1 September 1998, that is to say, two and a half years late than the request of the Contract. It is only for Hu 12 PTP Block. Regarding the PTP for Hu 2, Hu 5 and Hu 7, Claimants did not submit the program until on 28 October 2001. The Characteristics of oil field production and the fact of delaying in submission of the Pilot Test Program on the part of Claimants have substantially changed Respondent's plan and the financial arrangement and have substantially changed the ground of the Petroleum Contract which was entered into by the two parties in the year of 1998.

(b) Claimants alleged that they had finished 10 wells in Hu 12. This is because Claimants have calculated the three wells that Plant 5 injected according to the Acceleration Agreement between with NIDO. However according to the Acceleration Agreement between Claimants and Respondent, these three wells shall not be calculated as Claimants' minimum work under the Petroleum Contract, and Claimants and Respondent also acknowledged this several times afterwards.

(c) According to the provisions in the Petroleum Contract, the obligations of Claimants are not only to provide the funds required for implementation of enhancing oil recovery program and to carry out the on-site enhancing oil recovery operations, but also to assign the relevant technology under

the Contract. Claimants have gained vigorously assistance from the professional technical personnel of Respondent even in the fundamental works Claimants have done instead of assignment of any relevant technology to Respondent. Otherwise, the work progress at present could be far beyond the target.

(d) Claimants claim they have fulfilled the obligation of technical training for the personnel in the Chinese Party under the Contract. In the opinion of Respondent, this work has not been carried out.

(e) Claimants claim they have engaged in geological and petroleum reservoir engineering science research after signing the Petroleum Contract. In the opinion of Respondent, the above-mentioned work done by Claimants as an operator is not performance of the obligation under the Contract, but the minimal essential preparatory work for the fulfillment of its contractual obligations.

(f) By comparison, the fact proves that Claimants do not have any comparable advantage. The claimed petroleum reservoir management mode may be appropriate for the specific condition of North American Oilfield but is not appropriate for oil exploitation under the specific geologic condition of F Oilfield at all. Claimants shall provide appropriate and advanced technology and operation administration experiences under the Petroleum Contract, while the petroleum reservoir management mode alleged by Claimants is not appropriate for the geologic condition of the contract blocks in this case. It cannot be considered of advanced character.

In the opinion of Respondent, this malicious claim should not be supported by the Tribunal and should be entirely rejected.

C. Supplementary Opinions of the Parties

1. Referring to the Pilot Test Work in H 12 Block mentioned in Respondent's defense, Claimants argue as follows:

The 3rd JMC approved the Work Program presented by the Contractor for the pilot test in H 12 Block for the year of 2001, which indicated the start of substantial progress of the pilot test.

In accordance with H 12 project, the Contractor planned to conduct operations including the drilling of 12 new wells/sidetracks and 41 work-overs, with an estimated direct expenditure for these operations more than US$ 5.4 million out of a total budgeted expenditure for the period of US$ 8.64 million. Actually completed by the end of the year were 7 new wells/sidetracks and 52 work-overs, with direct expenditure on these operations more than US$ 4.10 million out of the nearly US$ 7.9 million total actual expenditure for the period. Regarding Pilot Test Work in Hu 12 Block in the year of 2001, Claimants have the following comments:

(a) Hu 12 PTP, as presented by the Contractor and approved by the JMC, is the work program for the whole year of 2001, rather than for the first half of the year only. Claimants noticed that in Clause 2.1 of the Chinese version of the JMC3 Meeting Minutes, it reads as: "*The Contractor will complete the implementation of 12 new drillings/sidetrack which are listed in Hu 12 PTP within the first half of 2001*". Claimants believe that the phrase "within the first half of 2001" is a clerical error as there is no corresponding wording in the English version of these minutes.

(b) Hu 12 PTP represents only a small part of the whole Pilot Test Work.

(c) Considering that the Pilot Test Work during the past 7 months in Hu 12 had achieved much of the goal, and also taking into account that the Pilot Test Work was to be carried out to a much larger extent in the coming year, the Contractor adjusted Hu 12 PTP for the last 2 months of 2001 accordingly and submitted it to the 4th JMC Meeting held in the end of October 2001 for review and approval. In accordance with the adjusted Hu 12 PTP, the Contractor was to complete another 15 workovers with an total cost of US$ 200,000 in the last 2 months of 2001. The adjusted Hu 12 PTP was duly approved by the JMC at the 4th JMC Meeting. Thus, the Contractor's performance on Hu 12 Block is consistent with the program approved by the JMC all the time. There is no breach of the agreement from the Contractor's side.

(d) The Pilot Test operation in Hu 12 Block was fruitful and achieved the goal for which it was designed.

2. As to the two stages of performance of the Contract, Claimants allege that:

During the period between 1 June 1998, when the Contract came into implementation, and March 2001, when Company A formally joined the Contract and became a party of the Contractor, Company E joined and then finally quit. There had been no substantial progress with the Pilot Test and the Pilot Test Period was extended as agreed by both parties. The reason for this situation was mainly on the side of the Contractor.

During the negotiation of Company A's entry, Company B and Company A had a discussion with Company C and F Oilfield on these historical issues and reached unanimous agreements that were recorded in the minutes of that meeting. According to the minutes, the settlement reached was that Company B would pay nearly US$ 1.40 million to Company C for operations conducted before a new Pilot Test Program is formulated and Company A would not be responsible for any of such historical events. Around the same time, officials of different levels from Company C also wrote to Company B and acknowledged that Company C would exempt Company E's liabilities for withdrawal from the Contract as long as Company B assumed 100% of the rights and obligations under the Contract. It is apparent that, without such understanding and settlement, there would have no Company A's entry to the Contract and thus there would have been no subsequent development of the Contract. Therefore, by the time Company A formally joined the Contract on 20 March 2001, the parties had already reached comprehensive understandings over historical events and settled all outstanding issues which had ever existed up to then.

Respondent deems that the above allegation of Claimants is completely ill founded owing to the following reasons:

(a) During court hearing, both Claimants and Respondent confirm that under Petroleum Contract, both parties to the Contract are always Claimants and Respondent, or in short, foreign party and Chinese party.

(b) When Company E duly withdrew from Claimants on 3 July 2000, Respondent only gave up a right to claim indemnity directly from Company E in the future for noncompliance of Claimants before withdrawal of Company E, nevertheless on the premise that Claimants who were still engaged in the project or still under Petroleum Contract shall agree bear 100% responsibility thereof, i.e., Claimants, as still one of the parties to Petroleum Contract shall assume all responsibility for their noncompliance before withdrawal of Company E from the project. In this regard, both parties had definite written common understanding and consensus

(c) Moreover, Respondent must draw attention of Tribunal to this: since Claimants conceive that performance of the entire transaction should be divided into two phases in accordance with the time when Company A joined, and performance of the first phase has no connection with that of the second phase so Tribunal shall only take relevant facts and performance state of the second phase into consideration when arbitrating this case.

3. In respect of the validity of the JMC4 Agreement, the defendant alleged that:

(1) The JMC4 Agreement failed to obtain the approval of Respondent and the former Ministry of Foreign Trade and Economic Cooperation, thereby, it never came into effect.

(2) The regulation on Respondent guaranteeing Claimants fixed Incremental Oil yield share in the JMC4 Agreement violates the inhibitory compulsory administrative rules on the Chinese party guaranteeing the fixed return to foreign investors, so it is void. Claimants are not authorized to request any compensation for predicted benefits for reasons given above.

Even leaving aside the issue that the JMC4 Agreement is void due to the non-obtained approval of national examining and approving organ, the JMC4 Agreement has changed the principle that foreign investor shall bear the risk into the arrangement that foreign investor shall obtain fixed return with fixed invested capitals. Respondent regards, this important change also violates the inhibitory compulsory administrative rules on giving the fixed return to foreign investors, so it is void. Claimants are not authorized to request any compensation for predicted benefits for reasons given above.

Claimants allege that:

The 4th JMC Meeting approved two documents, one being the minutes of the meeting, and the other being the JMC4 Agreement. The JMC4 Agreement should be deemed as an important part of the resolution of the 4th JMC Meeting as it involves almost all major issues adopted by the meeting.

(a) Reviewing and approving the annual work program is a power endowed to the JMC by the Contract.

(b) The content of the JMC4 Agreement is to set a working mechanism and make arrangements in respect of the Pilot Test Work to be performed in 2002 and 2003 within the Pilot Test Period. By nature, this agreement is a workable measure to

perform the Contract for a stage covering only two years. It has never changed the framework and scope of the Contract, nor has it modified the rights and obligations of the contractual parties. Therefore, the JMC4 Agreement does not constitute a material change to the Contract as provided in Article 26.3 and thus does not need to be approved by an authority higher than Company C.

(c) In the JMC4 Agreement, it is agreed that the Pilot Test Period shall be extended to 31 December 2003, and for this extension, the Contractor "shall proceed with relevant application and approval procedures as stipulated in the Contract". Looking at the Contract, Article 4.3 provides: "*The period of extension shall be subject to the approval of Company C" and "The period of extension shall not exceed six (6) months unless otherwise agreed by the Parties*". Claimants' understanding of the above provisions is, the Pilot Test Period can be extended, and can be extended for more than six months upon the agreement of the Parties. The Contractor believed that the extension of the Pilot Test Period has been approved by Company C. There remained no need to further "proceed with relevant application and approval procedures as stipulated in the Contract".

(d) According to the Article 9.1 of the Contract, there is no provision in the Contract as to which party shall be responsible for the submission to Company C. Claimants reasonably believes that the submission should be conducted by the representative appointed by Company C in the JMC, and Claimants believe that Mr. DHs from Company C and in charge of F EOR Project was already aware of the major content of the JMC4 Agreement before it was executed and made no objection to it. Further, Mr. WD from the Planning and Development Department of Company C attended the meeting in the position of "Representative of Company C" (see the minutes). In the same article it is provided: "*In case Company C fails to notify the JMC in writing for its approval or disapproval or any modification within fifteen (15) days, the annual Work Program and budget adopted by the JMC shall be deemed to have been approved by Company C*". Thus, Claimants are of the opinion that the JMC4 Agreement had been approved by Company C before its implementation.

(e) Claimants are of the opinion that specific issue in the JMC4 Agreement, i.e., the content in the third paragraph from the bottom, might have exceeded the power of the JMC and even that of Company C. However, this paragraph is concerning the arrangement after 1 January 2004, which is irrelevant to the subject of the

agreement, being the implementation of work in 2002 and 2003. Since the event related in this paragraph has never happened, it has nothing to do with the dispute of this Case. As a JMC resolution, any individual issue resolved which exceeds the power of the JMC members shall not affect the validity of other resolutions thereof.

(f) Under the JMC4 Agreement, is it true that the Contractor will be released from other obligations except for the monthly payment of US$ 1.88 million during 2002 and 2003? The answer is no. In addition, this resolution does not exempt other obligations of the Contractor under the Contract. In March 2002, the Contractor prepared a technical report of the Pilot Test Work in Hzj Block for the 5th JMC Meeting, which incorporated data of all operations performed in each sub-block during January and February of 2002 and related analysis. The report reflects the Contractor's close involvement of the operations performed in the area.

(g) The JMC4 Agreement does not guarantee a fixed return to the Contractor. The distribution ratio of the Incremental Oil set out in the agreement is designed in accordance with Article 12 of the Contract. When the investment of the Contractor is fixed, whether the Contractor gets a return or not is subject to the oil price. The oil price is out with the control of the parties. While the oil price is lower than a certain level, there is a risk that the Contractor will be unable to recover its investment from the Incremental Oil it shares.

4. In respect of the relationship between the JMC3 Meeting Minutes and the JMC4 Agreement, the Respondent allege that:

Firstly, there are no complexion of JMC4 Agreement replacing the JMC3 Meeting Minutes. Under this situation, Claimants actually recognized that they could gain 8,448 tons oil per month from the mitigation measures carried out by Respondent when they entered Hu 2, Hu 5, Hu 7 (South & North) Blocks on 1 January 2002.

Respondent must point out, after signing of Petroleum Contract, all of agreements including the JMC3 Meeting Minutes and the JMC4 Agreement between the two parties (Respondent insists on that the JMC4 Agreement does not take effect) together with the Petroleum Contract constitute a complete, constant, and causal relationship as well as contractual transaction arrangement which cannot be divided from each other.

According to Article 3.4 of the JMC3 Meeting Minutes, Claimants should averagely pay compensation to Respondent monthly in 12 months from 31 January 2003, and according to Article 7 of the JMC4 Agreement, Respondent should pay oil fund to Claimants from the second month of production. That is to say, Claimants should pay compensation to Respondent from January 2002 according to the JMC3 Meeting Minutes, and Respondent should pay oil fund to Claimants from February 2002 according to the JMC4 Agreement. Under Article 67 of the *PRC Contract Law*, "*If each party has an obligation towards the other and a sequence for the performance of those obligations was agreed upon but the party which was to perform his obligation first fails to do so, the other party has the right to refuse his demand for performance. If the party which was to perform his obligation first performs his obligation in a way other than agreed upon, the party which was to perform his obligation last has the right to refuse his demand for corresponding performance.*" Under the JMC3 Meeting Minutes, the payment of compensation by Claimants to Respondent is the precondition for the performance of the JMC4 Agreement, and the date for such payment is earlier than the date for Respondent to pay the oil fund to Claimants. However, Claimants failed to make such payment as required, and therefore, in accordance with the foregoing stipulations of the *Contract Law*, Respondent is fully entitled to reject Claimants' request for performance of the JMC4 Agreement.

Claimants allege that:

(a) The JMC4 Agreement does not provide that its performance is subject to the performance of the JMC3 Meeting Minutes. The dispute arising out of performance of the JMC3 Meeting Minutes should not affect the performance of the JMC4 Agreement, nor should it affect the performance of the Contract.

(b) Company C failed to submit the well proposals for prior approval as required by the JMC3 Meeting Minutes and thus breached the agreement. Following warnings from the Contractor, Company C reported part of the proposals but still not all of them. Company C should bear all the consequence arising therefrom.

(c) The Contractor has sufficient reason to refuse to recognize the necessity and rationality of a substantial part of the operations conducted by Plant 5. Pursuant to the statement delivered during the Hearing by the counsel of Respondent, Company C has invested a total of RMB 430 million on operations in the whole Hzj Block during the three and a half years period from June 1998 to the end of 2001, and the costs for four sub-blocks during the second half of 2001 amounted to RMB 140 million, which is one third of the total costs and double the average

costs incurred in the three and a half year period. It is rational to suspect that the amount of RMB 140 million is exaggerated. As Mr. PM put it, "*I am unaware of any such activities that have been undertaken on these blocks during this period*".

(d) From a review afterwards, quite a number of the new wells drilled by Plant 5 were uneconomical and inefficient and made little, if any, contribution to the Incremental Oil. Plant 5 realized that it would have no chance of obtaining the Contractor's approval to these operations and thus held back the proposals until the operations were finished. That is totally unacceptable.

(e) The Contractor has never refused to honor its undertaking under the JMC3 Meeting Minutes. Notwithstanding it was Company C who breached the Contract, the Contractor did not want to let this issue interrupt the performance of the Contract. Instead, the Contractor has always shown to Company C its willingness to honor its undertaking under the JMC3 Meeting Minutes and bear a reasonable amount of the costs. On 20 March 2002, the Contractor wrote to Company C to reiterate its proposal presented at the 5th JMC Meeting days before that the Contractor agrees to pay US$ 4.2 million for the well costs in the second half of 2001 and requested both parties to establish "*an equitable mechanism which gave the Contractor a reasonable chance of recovering its ongoing and past costs*".

(f) Although the dispute on the payment of the 66.7% costs has yet to be resolved, Claimants believe that this dispute should not have affected the performance of the JMC4 Agreement, nor should it have caused the termination of the Contract.

5. In respect of the breach of the contract, Claimants allege Respondent has breached contract in its application for arbitration, while the Respondent alleges that:

(1) Claimants severely delay the performance of contract

The delayed performance of Claimants has substantively altered the responsibilities of the contracting parties, risk division and purpose of the contract and disturbed the overall capital arrangement of Respondent.

(2) Claimants fail to perform the minimum compulsory work stipulated for the Pilot Test Period

During the Test Pilot Period, the minimum contractual obligations to be fulfilled by the contracting party include:

(a) At least 14 wells be newly drilled/sidetracked;

(b) At least US$ 10 million (of which the management cost shall not exceed 25%) be invested;

(c) EOR Program be completed; and

(d) Evaluation report on the value of commercial oil produced in the development and production periods be completed.

Altogether three and a half years have passed from 1 June 1998 when the contract become effective to 31 December 2001 when the contracting party stopped issuing work orders for Hu 12. In such a long period, Claimants had operations in Hu 12 Block for only nine months starting from 1 April 2001 and ending on 31 December 2001, completing eight new/sidetracked wells, one of which was left unpaid. Therefore, only seven wells were actually completed (the fact was also confirmed by Claimants). Claimants only completed seven new/sidetracked wells, which is far from the 14 new/sidetracked wells set forth in the Contract, even the annual basic work for 12 new/sidetracked wells required by JMC3 Meeting Minutes to be completed in the first half of 2001 was not completed.

Up to now, Claimants fail to enter Hu 2, Hu 5, Hu 7 (South) and Hu 7 (North) Blocks and fail to implement any pilot test operation.

Claimants did not finish minimum capital input required by the Contract. Claimants has input nearly US$ 10.3 million within three years and a half in terms of his own calculation. Among aforesaid total input of Claimants, off-site work input accounted for about 60% of the total cost. Aforementioned data indicates Claimants' input reached US$ 10 million stipulated by the Contract on the surface, but site work input only accounted for 40% of total input. Shortage of Claimants' site work input would inevitably reduce the output of corresponding contract block. Oil yield of the corresponding period did not reduce seemingly only because Respondent's large input out of contract formed so-called "Incremental Oil yield".

During three and a half years, Claimants failed to work out the EOR Program and report on value assessment of commercial oil in development and production stage.

(3) Contractor failed to command applicable and advanced technology and management experience.

The Pilot Test Program of Hu 12 Block raised by Claimants at the first JMC Meeting held on 14 December 1999 was required for further amendment because it failed to increase oil recovery ratio.

The Pilot Test Program of Hu 12 Block ultimately passed at the 3rd JMC Meeting held on 20 March 2001 was amended and finished with the help of Respondent.

The alleged Pilot Test Program on Hu 2, Hu 5, Hu 7 (South), Hu 7 (North) and Hu 12 Blocks was not approved at the 4th JMC Meeting held on 2 November 2001 due to serious shortage of technical support and failure in achieving the aim of increasing oil recovery ratio.

Claimants failed to provide any advanced equipment during the whole operation. However, as per the provisions of the Petroleum Contract, Claimants were not only required to provide advanced and applicable technology, as well as advanced and applicable production equipment.

The entire operation of Hu 12 Block of Claimants was conducted and organized by Plant 5. Claimants failed to offer any applicable and advanced management experience.

6. The Respondent also argued that Claimants should be held fully liable for the non-continuation of the Contract and the request of compensation for anticipated profits of Claimants could not be established:

Even if assuming the JMC4 Agreement is effective agreement (which Respondent denies), Claimants still have no rights to request compensation for anticipated profits according to the JMC4 Agreement to Respondent for the reasons below:

(a) Since the signing of the Contract, Claimants firstly, continuously and seriously violated the regulations of the Contract, while they have not adopted any remedial measures for the consequence of their breach, nor has made any compensation for the measures taken by Respondent to mediate the damage.

(b) The JMC3 Meeting Minutes is an outcome of Claimants' noncompliance.

(c) Claimants did not follow the JMC3 Meeting Minutes to compensate Respondent for the mitigation measures in Hu 2, Hu 5 and Hu 7 (South & North) Blocks in the second half of year.

(d) The JMC4 Agreement shall be implemented based on the precondition that Claimants compensate Respondent for mitigation measures in accordance with the principle determined in the JMC3 Meeting Minutes.

(e) Claimants' refusal to pay compensation in accordance with principles set forth in the JMC3 Meeting Minutes violates principles of honesty, credit, fairness and reasonableness. Consequently, Claimants are far from being with goodwill.

Additionally, the request of Claimants violates their obligations of mitigation under the law. Therefore, Claimants bear no right to make a claim of so-called compensation for loss of anticipated profit.

VI. FINDINGS OF THE TRIBUNAL

A. Applicable Law

According to the Petroleum Contract, the applicable law for this case is the law of the People's Republic of China.

B. Relevant Issues on Claimant A's Entry to the Petroleum Contract

One of the key points at issue is whether the disputes between Company C and the Contractor had been resolved before Claimant A joined the Petroleum Contract and whether these disputes are relevant to the instant case. On this point, the opinion of Claimants is in direct contrast with that of Respondent. The Tribunal concludes that the disputes are relevant to this case, but they had been settled by agreement. The reasons are as follows:

(1) Although Claimants allege that during the negotiations for Claimant A's entry to the Petroleum Contract, Claimant B, Claimant A, Company C and F Oilfield have reached some agreements on the historic issues, which were recorded by the minutes of the related meetings and there were not any unresolved disputes existed. However, Company E's expenditures for the performance of the Petroleum Contract before Claimant A's entry are claimed by Claimants in the arbitration requests; in addition, Respondent alleges that the issues which happened before Claimant A's entry to the Petroleum Contract be relevant to this

case. Based on this situation, it is certain that the two parties have not reached consensus on the nature of the issues.

(2) In the Petroleum Contract, the two parties are referred to "Company D" and "Foreign Contractor" ("Contractor"), respectively. "Company C" has replaced "Company D" and the Contractor has undergone the changes from Company E's entry and release to Claimant A's entry. Accordingly, as far as the two parties to the Petroleum Contract are concerned, one party is Respondent and the other party includes Claimant A and Claimant B.

(3) During the arbitration proceedings, in order to ascertain the facts of this case, the Tribunal sometimes refers to Claimant A and Claimant B respectively rather than Claimants, however, they can only act as one party in terms of the contractual relationship and the parties to the arbitration proceedings. Claimant A and Claimant B, together as Claimants in the Application for Arbitration, jointly submitted the application for arbitration. The statement of their specific arbitration claim also requires that Respondent should make payment thereof to the two Claimants as one party.

(4) If there were some unresolved disputes between the Contractor and Company C before Claimant A joined the Petroleum Contract, Claimant A was in a position to reach an agreement with the original Contractor for settling the unresolved issues and assuming respective liabilities between themselves. For example, Claimant B and Company E signed the "Severance Agreement, Assignment and Assumption" on 27 September 2000. However, such agreement is only binding on the Contractor rather than Company C as the counterpart of the Contractor in the Contract, unless otherwise agreed between them.

In the same token, after joining the Contractor, Claimant A is naturally part of the "Contractor" — Claimants as a whole cannot severally claim that it has nothing to do with the historic issues happened before it joined the Petroleum Contract. How Claimant A protected its rights and dealt with the "historical issues" properly when it joined the Contractor are incidental to the internal relationship between it and Claimant B. Therefore, Claimants' allegation that without such "understanding and settlement, there would have no Company A's entry to the Contract" has nothing to do with Company C or Respondent, nor does it fall within the jurisdiction of the Tribunal.

(5) According to the fax dated 15 September 2000 from Mr. Jiang Huanbin of F Oilfield to Claimant B, as well as the faxes dated 10 and 13 October 2000 from Respondent to Company E, Respondent released Company E's contractual liabilities on condition that Claimant B should assume all the liabilities continuously as the Contractor rather than exempting Company E's liabilities unconditionally. As to the issue whether Company E should assume liabilities to Claimant B, being the subsequent Contractor by other means, it has nothing to do with Company C or Respondent.

(6) In this case, Respondent particularly stressed the serious delays by Claimants in performing the Contract. On this point, Claimants acknowledge in its first legal opinion submitted to the Tribunal after the first hearing that "*during the period between 1 June 1998 when the Contract came into implementation, and March 2001 when Company A formally joined the Contract and became a party of the Contractor, there had been no substantial progress with the Pilot Test and the Pilot Test Period was extended as agreed by both parties. The reason for this situation was mainly on the side of the Contractor.*" Meanwhile, Claimants allege that the Pilot Test Period could be extended by the two parties' agreement according to the Petroleum Contract. There would not have been any breach of the Petroleum Contract arising from delays had the Pilot Test Period been extended by agreement between the two parties.

In view of the facts of the case, at the beginning Respondent had not waved the liabilities arising from the delays by the "Contractor" during the time when Company E was a Contractor. As to the Company E's release, the liabilities for breach of the Petroleum Contract were determined to be borne by Claimant B after negotiations. "The Memorandum between F Oilfield and Company B Group" signed on 8 November 2000 embodies the parties' true intentions in terms of time and content, indicating that Claimant B should "pay" costs to Respondent. The costs include not only the expenditures for oil well operations, but also the unspecified US$ 20,000 per month. On such grounds, the Tribunal presumes that under the arrangements, the fact of "no substantial progress with the Pilot Test", which caused the Contractor's liabilities, was taken into account. Accordingly, the disputes between the Contractor and Company C before Claimant A's entry to the Petroleum Contract had been settled by the two parties through negotiations and the signing of the Memorandum. It appears from the second hearing of this case that the two parties have no disagreement over the performance of the Memorandum. The Tribunal have reason to believe that there are no

grounds between the two parties on which one party can claim damages for breach of the Petroleum Contract before Claimant A joined the Contract.

C. JMC3 Meeting Minutes and its Performance

The JMC3 Meeting Minutes was signed after consultations by Claimants and Respondent. The two parties agree on the validity of the Minutes but disagree on its contents and the performance thereof. According to the facts of this case, the Tribunal makes the following analysis:

(1) Regarding the expression of "the first half year of 2001"

For the time period within which Claimants should have completed 12 new wells/sidetracks in Hu 12 Block, there are discrepancies between the Chinese version and the English version: in the Chinese version there is the expression "in the first half year of 2001" while in the English version the words "the first half year" are missing. Both parties signed the two versions of the Minutes. Therefore, the two parties should bear the responsibilities arising from the problems caused by the inconsistencies. Having considered that "the first half year" only specify and modify "2001", they are not contradictory to each other in nature, the Tribunal concludes that the limit of "the first half year" is binding on Claimants. Another reason for the Tribunal to draw such a conclusion is that the Tribunal takes note of a fax dated 9 July 2001 sent by Respondent to Claimants, mentioning that "*According to the resolution made at the JMC Meeting in March, the twelve new/sidetracked wells, required to be completed in the program for the first half of the year, of which only eight such wells have been completed so far, accounting for only 67% of the total. We hope that after the completion of evaluation & research, new well locations will be proposed as soon as possible and great efforts will be made to have all things done in the third quarter.*" Claimants neither refused nor disputed the explicit reference of "the first half year" and the extension of the time limit to "the third quarter" made by Respondent in its reply to Respondent dated 8 August 2001.

(2) Regarding determination of the scope of Claimants' duty of completing 12 new wells/sidetracks in the Hu 12 Block

About this issue, whether the 3 new wells drilled in Company E period can be counted in the 12 new wells/sidetracks referred to in the JMC3 Meeting Minutes should be decided

in the first place. The Tribunal concludes that the answer is negative. The reasons are as follows:

(a) According to the Acceleration Agreement, the cost of the three new wells is not part of the US$ 10 million expenditure commitment for the Pilot Test Period, as specified in the Petroleum Contract. Although Claimants argue that the "cost for operation" is different from the "work commitment", the Tribunal believes that "the minimum US$ 10 million expenditure commitment" corresponds with "the minimum Pilot Test work commitment". Since the cost of the 3 new wells is not included in "the minimum expenditure commitment", the workload of the 3 new wells should not be included in "the minimum Pilot Test work commitment", unless explicitly agreed on by both parties.

(b) The 12 new wells/sidetracks mentioned in the JMC3 Meeting Minutes should be the "operation program" to be completed in "2001" rather than the "workload" of 3 wells, which had "already been completed" in "2000".

(c) The workload of the 3 new wells is obviously not included in the completed "67%" of the program mentioned in the fax dated 9 July 2001 by Respondent to Claimants. In the fax dated 8 August 2001 by Claimants to Respondent, Claimants claimed that the 3 new wells drilled by the Contractor prior to Company A's involvement should be taken together, Respondent rebutted it in the fax dated 30 August 2001. Because Claimants did not reply to Respondent's rebuttal, with sufficient reasons Claimants should be regarded as having accepted Respondent's position.

(3) Regarding the performance of Claimants' duty of 12 new wells/sidetracks in Hu 12 Block

Regarding the JMC3 Meeting Minutes, Respondent asked Claimants to perform its duty according to it, but Claimants, while insisting that Respondent should carry out the JMC4 Agreement, made little comments on whether the JMC3 Meeting Minutes should be performed continuously. The Tribunal concludes that there were defects in the performance of the JMC3 Meeting Minutes by Claimants. The reasons are as follows:

As a matter of fact, neither "in the first half year of 2001" as mentioned in the Chinese version of the JMC3 Meeting Minutes, nor "in the third quarter of 2001" as expressed by Respondent in the fax dated 9 July 2001, nor even "in 2001" as stated in the English version

of the JMC3 Meeting Minutes did Claimants complete the workload of drilling 12 new wells/sidetracks in Hu 12 Block. Because there was one well for which Claimants did not pay Respondent its cost, Claimants had drilled 7 new wells/sidetracks actually.

The cause and the responsibility for non-performance of the above duty should be attributable to Claimants. The real reason of the two parties' disputes, as analyzed by Claimants in their first legal opinions submitted after the first hearing, is conflict of interest, specifically, "*according to the Contract, the goal of the Pilot Test Period is to complete the appraisal work on the predicted commerciality of the Incremental Oil and an EOR Program for the contract area. This means the annual output of the elected testing blocks is not a concern of the Pilot Test. It is not a contractual obligation for the Contractor to satisfy the output and profit quota set by either Plant 5 or F Oilfield during the Pilot Test Period, so long as the goal of the Pilot Test is achieved. Thus, a conflict of interest between the parties arose. Company C had explained to the Contractor that there were 'important needs' in China to maximize production while implicitly recognizing that the satisfaction of such 'important needs' might contradict the objective of the Pilot Test as provided in the Contract. Unfortunately, at the 4th JMC Meeting, Company C forgot its undertaking and provided support to Plant 5's proposal. The Contract thus was leading to a path of no return.*" The Tribunal concludes that Claimants' understanding of the purpose and nature of the Pilot Test Program is correct and conforms with the objectives of the Petroleum Contract. However, Claimants stated in its fax dated 8 August 2001 to Respondent that "*The budget approved at the 3rd JMC Meeting did indeed propose 12 new wells and we are currently reviewing options for drilling additional economically viable wells. However, I must emphasize that only 2 of the 7 wells drilled this year so far appear capable of yielding commercial returns. This means that we have to properly evaluate any new well locations to ensure that they have a reasonable chance of being economic. Based on results to date, Company A strongly believes that there is a need to obtain a better understanding of the reservoir management aspects associated with this Block and the JOB is working closely with Plant 5 / F Oilfield to input their knowledge and learning into this work.*" This statement indicates that the cause for Claimants not intending to fulfill its duty of drilling new wells/sidetracks is that new wells must be economic, not because of the Pilot Test Program itself, as stressed by Claimants. Meanwhile, there were no sufficient grounds for Claimant to have Respondent involved in performing Claimants' duties. As a result, Claimants did not perform the duty stipulated in the JMC3 Meeting Minutes strictly.

(4) Regarding whether the well proposals of Plant 5 on the Hu 7S, Hu 7N, Hu 5 and Hu 2 Blocks should be agreed by Claimants

The Tribunal concludes, in terms of the well proposals and the payment of costs thereof, that the two parties' expression of intentions were not very clear and their understandings were not consistent. The reasons are as follows:

(a) There is indeed inconsistency between "for studying and agreeing (供研究同意)" in Chinese and "for review and confirmation" in English, the former conveys the meaning of going through symbolic procedural formalities only, while the latter conveys the meaning of a formal approval.

(b) There was no agreed amount of the wells operation cost which the Contractor should pay Plant 5. Instead, the amount was to be calculated as 66.7% of the total operation cost, while how to accurately determine the amount of the operation cost was left out.

According to the JMC3 Meeting Minutes, for Claimants, the Incremental Oil derived from the entry into the new blocks were to be calculated as from 1 January 2002. It is apparent that for causes on the Contractor's side the carrying out of the Pilot Test Program in the new blocks was delayed. Because Respondent took some mitigation measures and made an extra investment in the said blocks, the oil production in those blocks increased rather than decreased. Therefore, it was necessary that Claimants should compensate Respondent reasonable costs. In the meantime, as the bearer of the operation cost, Contractor/Claimants was entitled to foreseeing and controlling the expenditure which it was to bear after all. Accordingly, Respondent was under the obligation of controlling the wells operation cost within a reasonable scope rather than leaving it increasing, therefore preventing damage to Claimants. As a result, the Tribunal neither agrees to Claimants' opinion that Claimants shall not bear the operation cost nor supports Respondent's view that it is not necessary that Plant 5's well proposals should be provided to Claimants for approval. It is the necessary procedure and method that Plant 5 provides the Contractor/JOB with well proposals "for review and confirmation" for determining the specific amount of the operation cost.

Respondent submitted after the first hearing of this case some evidentiary materials to prove that Plant 5 had provided JOB with 44 well proposals during the stipulated period by the JMC3 Meeting Minutes. Claimants acknowledged receipt in its legal opinions submitted after the first hearing of this case of 41 well proposals provided by Plant 5. Although there is a little difference between the numbers of well proposals of the two parties, it indicates

that Claimants did not "*respond to Plant 5 after receiving well proposals within 48 hours*" in the light of the JMC3 Meeting Minutes. Therefore, Claimants shall take responsibilities for its inactivity in replying Plant 5. Meanwhile, Respondent shall also bear its share of the responsibilities for not providing all well proposals.

D. Validity of the JMC4 Agreement and the Related Issues Thereof

(1) Regarding the validity of the JMC4 Agreement, the first thing to be decided is whether the contents of the JMC4 Agreement constitutes a material modification to the Petroleum Contract and as a result whether the JMC4 Agreement should be approved by the original examination and approval authority.

Having reviewed the JMC4 Agreement by comparing it with the Petroleum Contract, the Tribunal concludes that the contents of the JMC4 Agreement are indeed inconsistent with the principles established in the Petroleum Contract, specifically:

Because F Oilfield under the Petroleum Contract is an ageing oilfield with very complicated geographical situation, the objective and principle of the Contract is to enhance the oil recovery ratio by the cooperation between the Chinese and foreign parties. The significance of the items embodying the foreign party's cooperation is "*applying its appropriate and advanced technology and assigning its competent experts to perform the EOR Operation*", of course injection of funds is certainly also included in those items, but the latter is not the most important. However, the JMC4 Agreement replaced the foreign party's important cooperation item by injection of funds, hence injection of funds became the most important cooperation item. In addition, the JMC4 Agreement exempted Claimants of the duty of providing reports on the Pilot Test Program, shifted the responsibility of doing well exercise from the Contractor to Plant 5 with funds provided by the Contractor and did not mention that the Contractor should provide the commercial appraisal report, etc. All these alterations constitute material modifications to the Petroleum Contract.

According to the Chinese law and the Petroleum Contract's stipulations, the Contract is subject to approval. Article 77 of the *Contract Law of the People's Republic of China* provides that: "*A contract may be modified if the parties reach a consensus through consultation. If the laws or administrative regulations stipulate that a contract shall be modified through the procedures of approval or registration, such provisions shall be*

followed." Therefore, material modifications to such a contract should also be subject to approval by the original examination and approval authority. The JMC4 Agreement has no legal effect without approval by the original examination and approval authority of the Petroleum Contract.

(2) That the JMC4 Agreement has no legal effect does not mean that the parties need not bear any responsibilities accordingly. The Tribunal concludes that Respondent should bear the primary responsibilities and Claimants should bear secondary responsibilities. The reasons are as follows:

(a) Respondent repeatedly stresses that the essence of the agreements in the JMC4 Agreement is "guaranteeing" Claimants a "fixed investment return", which violates the relevant provisions of Chinese law and hence those agreements are void. The Tribunal concludes that it is not in the position to answer the question whether the contents of the JMC4 Agreement violate the Chinese law, because according to Chinese laws and regulations, the JMC4 Agreement should be submitted to the original examination and approval authority for approval. The original examination and approval authority will decide the legality of the contents of the JMC4 Agreement. If the JMC4 Agreement had been submitted to the original examination and approval authority for approval and it had not approved it, naturally the JMC4 Agreement has no legal effect; if the original examination and approval authority had approved the JMC4 Agreement, that the alleged ineffectiveness of the guaranteeing of fixed investment return would be groundless. If the content of guaranteeing fixed investment return in the JMC4 Agreement had no effect because it violates the mandatory rules of laws and regulations, Respondent should bear the primary responsibilities arising therefrom because Respondent knows Chinese law well than Claimants do.

(b) According to the JMC4 Agreement, the Contractor shall proceed with relevant application and approval procedures for the extension of the Pilot Test Period as stipulated in the Contract. Under the Petroleum Contract the approval authority is "Company C", however, Company C is different from third party approval authorities (usually governmental agencies). In the instant case, the approval authority, Company C, is also a party to the JMC4 Agreement as well as a party to the Petroleum Contract. Although the Chinese members of the JMC are different from Company C in form, they are the same in essence, they

represented "Company C", just as they did under other agreements relating to the instant case. In the event that "Company C" was a party to the negotiation and signing of the JMC4 Agreement, the approval of extension of the Pilot Test Program by Company C, after decided in the JMC Agreement, should be merely an approval in form. Claimants should not simply be required to apply actively for approval by Company C on the one hand, Respondent sat back and waited for application by the Contractor passively on the other hand. In accordance with the principle of complete performance in good faith established in the *Contract Law*, Respondent should also seek to approve the JMC4 Agreement in form and the approval by the original examination and approval authority rather than to rebuke Claimants or the JMC not to apply for its approval according to the words of the JMC4 Agreement only.

(c) Respondent repeatedly stressed the validity of the JMC4 Agreement after it was signed on the one hand, and it alleges that the JMC4 Agreement is void for not having been submitted for approval on the other hand. Obviously, its position on the validity of the JMC Agreement then is contradictory with its position now. Nevertheless, Respondent has failed to actively take measures to have the JMC 4 Agreement submitted and approved. As a result, Respondent should bear primary responsibilities arising therefrom.

(d) As one party to the Petroleum Contract, Claimants should have a comprehensive understanding thereof and be aware of the consequences arising from the modifications made in the JMC4 Agreement. Therefore, Claimants should bear secondary responsibilities arising from the invalidity of the JMC4 Agreement.

E. The Two Parties' Liabilities and Claimants' Claims

Having gone through the dispute in this case, the Tribunal concludes that the dispute arose partly from some historical roots, i.e., Claimants delayed for a long time in carrying out the Pilot Test Program, which led to the subsequent change of objective circumstances and the conflict of interests between the parties. In addition, the defects by Claimants in performing the JMC3 Meeting Minutes exacerbated the dispute between the two parties; furthermore, Respondent had defects in performing the JMC3 Meeting Minutes; and it was mainly due to its fault that led to the invalidity of the JMC4 Agreement, while the validity of the JMC3 Meeting Minutes could not continue, as a result, there was no way that the cooperation between the two parties under the Petroleum Contract could go on. In

conclusion, both parties should bear corresponding responsibilities for the dispute and the termination of the cooperation. However, Respondent shall bear primary responsibilities for frustration of performance of the Petroleum Contract in the end.

Respondent pointed out breaches by Claimants of the Petroleum Contract in various aspects. Even though it has not claimed damages for Claimants' breaches, Claimants are not entitled to the part of the damages arising from Claimants' rather than Respondent's defects in performing the Petroleum Contract.

With regard to Claimants' specific claims, the Tribunal's opinions are as follows:

(1) With regard to the claim of rescinding the Petroleum Contract: Because both parties breached the Petroleum Contract concurrently and have agreed not to cooperate in performing the Petroleum Contract, the Tribunal affirms this claim.

(2) Respondent pointed out that Claimants claimed both the actual loss and the loss of expected profit concurrently, there is overlapping between the two and hence no legal basis therefor. Such argument of Respondent is without legal basis. The Tribunal notes that the claims of Claimants for compensation include an "actual loss" of more than US$ 8 million and a "obtainable benefit" nearly US$ 15 million. The Tribunal holds that these two claims are independent of each other, on which it will determine separately. In addition, the Tribunal is of the view that, based on the actual circumstance of this case, the "actual loss" claimed by Claimants should be interpreted as a "direct investment loss".

(3) Regarding the reimbursement of Claimants' actual loss of more than US$ 8 million with interest, Respondent argues that the request should be rejected due to Claimants' breach of the Petroleum Contract on the one hand, and that some of the expenditure had no corresponding evidence on the other hand. The Tribunal concludes that Claimants are entitled to the reimbursement of its unrecovered expenditure with interest where Respondent breached the Petroleum Contract, and the Contract was rescinded. Because there were financial personnel assigned by Respondent with the JMC to participate in the management of the Joint Account and Respondent does not have sufficient evidence proving that the amount of the unrecovered expenditure is inaccurate, the Tribunal affirms the amount of Claimants' actual loss. Because there were defects in performing the Petroleum Contract by Claimants, the Tribunal decides that Respondent should reimburse 90% of Claimants' actual loss, namely nearly US$ 7.20 million and

Claimants should bear the remaining10% of the expenditure. Regarding the interest on the actual loss of Claimants to be reimbursed by Respondent, the Tribunal, in view of the circumstances of the case, concludes that it is reasonable for Respondent to pay a flat 5% rate of the reimbursement amount, namely in the amount of more than US$ 360,000. The reimbursement and its interest totally are in the amount of nearly US$ 7.6 million.

(4) Regarding Claimants' claim for compensation of its obtainable benefit under the Contract in the amount of nearly US$ 15 million with interest, the Tribunal concludes that, first, based on the determination of the Tribunal on the responsibilities of each party, there are some defects in Claimants' performance of contract; second, Claimants bear secondary responsibilities for the non-implementation of the JMC4 Agreement; and third, Claimants have made no further injection of funds at all. In sum of the foregoing, there is no legal and contractual basis for Claimants to claim for its obtainable benefit and such claim is not supported by the Tribunal.

(5) With regard to the claim that the legal costs and expenses and all other costs and expenses incurred by Claimants be borne by Respondent, in view of the circumstances of the Case, the Tribunal cannot affirm it, which shall be borne by Claimants. The arbitration fee shall be borne by the parties in equal share.

VII. AWARD

The Tribunal awards as follows:

(1) The Petroleum Contract is rescinded.

(2) Respondent is ordered to indemnify Claimants in the amount of nearly US$ 7.6 million.

(3) Other requests of Claimants are rejected.

(4) The arbitration fee for which amount Claimants shall bear 50 percent, and Respondent shall bear 50 percent.

Payment of the amounts to be made by Respondent to Claimants shall be made in one lump sum within 30 days from the date on which this Award is rendered.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

China A International Co., Ltd.

Claimant

v.

Switzerland B Food Production Equipment Co., Ltd.

Respondents

Matter for arbitration: Disputes over contract for purchase of food processing line

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. THE PARTIES[1]

A. Claimant

1. Claimant, China A International Co., Ltd., is a limited liability company duly incorporated under the laws of the People's Republic of China ("PRC") and registered at N Province, PRC.

2. Claimant was formerly named "China A Import & Export Co., Ltd." (中国A进出口有限公司) and changed its name in March 2006 with effect from August 2006 to "China A International Co., Ltd." (中国A国际贸易有限公司) (Exhibit CX5a and CX5b).

3. Claimant is part of China A Group Corp. (also referred to as "China A Group Company")[2] which is one of the largest enterprises in the agricultural products processing field in China (CL 08.06.07, p. 7). It consists essentially of the following eight major production enterprises: Claimant, China A Biochemical Co., Ltd., China A Pharmaceutical Co., Ltd., China A Food Co., Ltd., China S Biochemical (Bioethylene)

1 (The parties' legal submissions are referred to as follows:
- CL 25.07.06 = Claimant's Application for Arbitration in July 2006
- RSP 18.12.06 = Respondent's Preliminary Statement of Defense in December 2006
- CL 11.01.07 = Claimant's Submission on 11 January 2007 and received by CIETAC in January 2007 as per Procedural Order No.1
- RSP 02.04.07 = Respondent's Response to Claimant's Statement re. Procedural Order No. 1 in April 2007
- CL 08.06.07 = Claimant's Supplementary Statement on 8 June 2007 received by CIETAC in June 2007
- RSP 05.07.07 = Respondent's Procedural Requests concerning Claimant's Latest Submission, in July 2007
- CL 17.09.07 = Claimant's "Statement of Claimant" in September 2007
- RSP 19.10.07 = Respondent's "Rejoinder to Statement of Claimant" in October 2007
- CL 19.11.07 = Claimant's "Final Statement" in November 2007
- RSP 19.11.07 = Respondent's Post-Hearing Brief in November 2007
- CL 26.03.08 = Claimant's Comments on "Post-Hearing Statement by The Respondent"
- RSP 26.03.08 = Respondent's Comments on the Post-Hearing Evidence as Submitted by Claimant.

2 "A" is the English translation of "China A International Co., Ltd."

Co., Ltd., China J Pharmaceutical (VC) Co., Ltd., China A Edible Oil Co., Ltd. and China A Gelatin Co., Ltd. Claimant owns the National Engineering Research Centre of Fermentation Technology.

4. Claimant's scope of business is "self-operating" and acting as an import and export agent, as well as "technology import and export", processing imported materials, "mutual trading" and "transferred trading" (CL 08.06.07, p. 5).

B. Respondent

5. Respondent, Switzerland B Food Production Equipment Co., Ltd., is a company duly incorporated under the laws of Switzerland and registered in M State, Switzerland.

6. Respondent is a market leader in food production equipment, in particular in basic technologies for grinding, blending & mixing, bulk handling, thermal treatment and shaping for processing of cereal grains and food. It provides various services and equipment related to the fabrication of various products from pasta to ink, beer, chocolate, bakery products, etc.

7. Started in 1860 with an iron foundry, Claimant soon began selling equipment for processing food. During the past 50 years, it has acquired various companies.

II. THE ARBITRAL TRIBUNAL

8. In November 2006, Claimant appointed U as arbitrator.

9. In November 2006, Respondent appointed Y as arbitrator.

10. In January 2007, the Chairman of CIETAC appointed S as the presiding arbitrator (Chairman of the Tribunal) for the case.

11. In February 2007, the Arbitral Tribunal was formed. Copies of Declaration of Acceptance and Statement of Independence signed by three members of the Tribunal were sent to the parties along with the "Notice on the Formation of Arbitral Tribunal".

12. In June 2007, Claimant notified the Secretariat that its counsels were being replaced. The new counsels are Mr De, Mr Ba, Ms Ju and Mr Ji of Beijing D Law Firm.

13. S's "Statement of Disclosure" on 7 June 2007, indicating that he had been contacted by the new counsels of Claimant, was served to the parties. The parties were required

to forward challenges, if any, to CIETAC within 10 days under Article 26.1 of the *CIETAC Rules*.

14. In June 2007, X resigned as arbitrator for conflicts of time.

15. In June 2007, the Secretariat received Respondent's Comments on Proposed Resignation of Chairman. According to the Comments, Respondent would "*not challenge the Chairman, but reserves the right to examine whether Chairman has an obligation according to PRC arbitration law to withdraw*".

16. In June 2007, S informed CIETAC Secretary General Mr YU that he had decided to withdraw as presiding arbitrator of the present case.

17. In June 2007, Claimant appointed Madam Bai as substitute arbitrator. Madam Bai, however, refused to accept the appointment for conflicts of time. Upon notice from the Secretariat, Claimant appointed C as arbitrator on 11 July 2007.

18. In July 2007, the Chairman of CIETAC appointed X as the substitute presiding arbitrator.

19. In July 2007, the Secretariat notified the parties of the substitute arbitrators. Copies of Declaration of Acceptance and Statement of Independence signed by C and X respectively were also sent to the parties.

20. In August 2007, the Secretariat notified the parties that C was no longer in a position to fulfil his duties as arbitrator and invited Claimant to appoint a new arbitrator.

21. In September 2007, Z was appointed as party-appointed arbitrator by Claimant. CIETAC's notice and copies of Declaration signed by Z were sent to the parties in September 2007.

III. PROCEDURAL HISTORY

A. The Initiation of the Arbitration

22. In August 2006, Claimant filed its Application for Arbitration in which Claimant claimed a total amount of about CHF 10 million and over RMB 20 million.

Claimant raised the following claims:

"*(1) Order that the 03AI8040 Contract between Claimant and Respondent in September 2003 (the 'Contract') avoided; Order that Claimant returns to Respondent the Equipment (as defined below) purchased under the Contract, Respondent returns to Claimant about CHF 10 million that it has received as part of the purchase price for the Equipment under the Contract, and compensates Claimant interest calculated on the basis of the loan interest rate announced by the People's Bank of China from time to time;*

(2) Order that Respondent compensates all losses Claimant has suffered so far, including, without limitation to, over RMB 20 million for the investment on matching facilities by Claimant for the Equipment, about RMB 300,000 for the last commissioning of the Equipment and freight to be incurred as a consequence of the return of the Equipment; and

(3) Order that Respondent bears arbitration fees prepaid by Claimant and lawyer's fees incurred by Claimant."

23. In December 2006, Respondent filed its Preliminary Statement of Defense. In this Statement, Respondent requested the arbitral tribunal to reject all Claimant's claims and also raised some procedural requests related mainly to the unclear relationship between Claimant and the company who signed the Purchase Contract, i.e., China A Import & Export Co., Ltd., and to the alleged lack of substantiation regarding Claimant's allegation that the 3% rules of Article 15 of the Contract would be applicable:

"*REQUESTS ON THE MERITS:*

1. *To reject all claims and requests of Claimant.*
2. *To order Claimant to bear any and all costs of the Arbitration Tribunal and this arbitration proceedings and to order Claimant to compensate Respondent for all its costs and damages connected with the present arbitration proceedings, including attorney's fees.*

REQUESTS ON THE PROCEDURE:

1. *To order Claimant to provide English translations of all Chinese documents submitted as evidence.*

2. *To order Claimant to provide an accurate Business License of Claimant and, if necessary, additional evidence to demonstrate its relation to Respondent's contractual partner (China A Import & Export Co., Ltd.).*

3. *To order Claimant to substantiate its claims to an extent that it becomes clear why Claimant feels that the 3%-Rule of Article 15 Section 1 Contract is allegedly applicable.*

4. *To order Respondent to submit its Additional Statement of Defense and its counterclaims within 30 days of Respondent's receipt of Claimant's substantiated claims.*"

Respondent based its requests on the main argument that Claimant failed to substantiate the allegations on which it based its claims, i.e., the allegation that the products produced by the Puffing Line and Extrusion Line have not met the technical requirements and the allegation that the Puffing Line and Extrusion Line did not meet the time requirements as agreed upon (RSP 18.12.06, p. 9, para. 13 ff).

24. In December 2006, Procedural Order No. 1 was rendered by the Secretariat. Claimant was ordered, among other things, to provide an additional statement before January 2007 so as to clarify why the 3%-Rule of Article 15 of the Contract should apply.

25. In January 2007, the Secretariat received Claimant's submission on 11 January 2007 as per Procedural Order No. 1.

Claimant therewith submitted:

- A translation of some of the Chinese documents submitted as evidence with its Request of Arbitration;
- A description of the relationship between China A International Co., Ltd. and China A Import & Export Co., Ltd., with supporting documents as evidence;
- An additional statement to clarify the applicability of the 3%-Rule of Article 15 of the Contract.

26. In April 2007, Respondent filed a submission in order to comment on Claimant's submission of January 2007. Respondent mainly brought forward that Claimant had failed to provide a translation of all the Chinese documents submitted previously, and had also failed to sufficiently clarify and substantiate the reasons why the 3%-Rule should apply (RSP 02.04.07, p. 2 fol.).

27. In May 2007, a preliminary meeting was held (the "Preliminary Meeting"). Dr. Blessing participated the meeting via conference call unit. Counsels for both parties and representative(s) from both sides were present. The arbitral tribunal decided on (i) the timetable for submitting the Parties' future submissions (ii) the date for an oral hearing, i.e., in August 2007, (iii) the sequence of the pleadings, examination and cross-examination of witnesses, documentary evidence, rebuttal, etc., and (iv) the date and time of the next conference.

28. In May 2007, the Arbitral Tribunal rendered the Procedural Order of May 2007, which recorded the decisions made by the Arbitral Tribunal at the Preliminary Meeting. Under the Procedural Order of May 2007, Claimant was to submit its Memorial and other materials no later than June 2007 (inclusive) and Respondent was to submit its Memorial and other materials no later than June 2007 (inclusive). A second telephone conference was to be held in July 2007.

29. In June 2007, the Arbitral Tribunal rendered an Amendment to Procedural Order of May 2007, unanimously granting a short period of extension for the filing of the parties' submissions. Claimant was required to file all its submissions no later than June 2007 and Respondent no later than July 2007.

30. In June 2007, the Secretariat received Claimant's Supplementary Statement in June 2007, in which Claimant raised the following additional claims:

> "*1. To order Respondent to refund the equipment expenses paid in the amount of about RMB 16 million;*
>
> *2. To order Respondent to compensate the direct economic losses of bank interests for the purchase and construction of the workshop and so on.*"

Claimant then amended its previous requests as follows:

> "*In this stage, Claimant requests the Arbitral Tribunal:*
>
> *1. to order that the 03AI8040 contract between Claimant and Respondent in as of September 2003 avoided;*
>
> *2. to order Respondent to refund the total sum of money paid to Respondent by the amount of over RMB 80 million (over CHF 12 million);*

3. *to order Respondent to compensate the losses of construction of the workshop facilities suffered by Claimant by the amount of over RMB 20 million;*

4. *to order Respondent to compensate the direct losses of the bank charges, customs clearance, insurance, freight for the purchase of the equipment of Respondent by the amount of over RMB 3 million;*

5. *to order Respondent to compensate the expenses for the last trial run of the equipment by the amount of about RMB 300,000;*

6. *to order Respondent to pay the bank interest of all fees above calculated on the basis of the same rate of the loan of the People's Bank of China from time to time;*

7. *to order Respondent to bear all expenses actual happen for the notary public, lawyer fees and the arbitration fee; and*

8. *to order B Equipment Engineering (China) Co., Ltd. to bear joint and several liability with Respondent."*

In summary, Claimant brought forward that the equipment and products of Respondent have not reached the agreed standard, and the percentage of underperformance was much more than 3%. Moreover, the problems related to the shortage in design of the automatic cleaning system would render it impossible to produce food complying with applicable sanitary standards and such food could therefore not be sold in the market. Based thereon and on the relevant provisions of the *CISG*, Claimant is entitled to avoid the contract (CL 08.06.07, p. 34).

31. In July 2007, Respondent filed its Answer to Claimant's Supplementary Statement of June 2007. Respondent required the arbitral tribunal:

"*1. to reject Claimant's submission and other documents.*

Alternatively, if the request 1 is not granted, to order Claimant:

(i) to submit in hard copy before a specified date and a soft copy in Word or PDF format contemporaneously only the English version of the 'Supplementary Statement' (including no Chinese explanations) without making any changes to the present English content; and

(ii) to reject Claimant's request for GMP and HACCP appraisal;

2. *to limit the scope of this arbitration proceeding to the examination of whether the Claimant still has the right to avoid the Contract, under the never true assumption that Claimant once had such right.*

3. *to order Respondent to submit before July its Memorial concerning Claimant's loss of right to avoid the Contract.*

   Alternatively, if Request 3 is rejected and if Request 1(i) is granted, to order Respondent to submit within 28 days its such Memorial calculating from the date on which Claimant's proper English version of 'Supplementary Statement' and of 'Evidence' as described in Request 1(i) is submitted.

4. *to cancel the telephone conference originally scheduled for July 2007.*"

In its request No. 2, Respondent actually requested the arbitral tribunal to render a partial award examining Claimant's right to rescind the contract.

Respondent based its requests mainly on the fact that Claimant (i) failed to comply with the deadline for submission of its Memorial, (ii) failed to submit a Memorial, but had instead just submitted a Supplementary Statement, and (iii) violated the principle of good faith contemplated in Article 7 of the *CIETAC Rules* by submitting erroneous translations of Chinese documents (RSP 05.07.07, p. 2 ff).

32. In July 2007, Respondent requested CIETAC and the Arbitral Tribunal to extend the time limit for the submission of Respondent's Memorial (see above para. 28) as suggested by Dr. Blessing's email in July 2007 and to order Claimant to resubmit a proper English version of its submission dated June 2007.

33. In August 2007, Respondent spontaneously filed its Statement of Defense. Respondent mainly repeated the requests already filed with its submission of 5 July 2007 (see above para. 31) as follows:

"REQUESTS ON THE MERITS:

1. *To reject all claims and requests of Claimant*

2. *To order the Claimant to bear any and all costs of the Arbitration Tribunal and these arbitration proceedings to order the Claimant to compensate the Respondent for all its substantial costs and damages connected with the present arbitration proceedings, including attorney's fees.*

REQUESTS ON THE PROCEDURE

1. *to reject Supplementary Statement of Claimant and other documents along with it.*

   Alternatively, if the request 1 is not granted, to order Claimant:

   (i) to submit in hard copy before a specified date and a soft copy in Word or PDF format contemporaneously only the English version of the "Supplementary Statement" (including no Chinese explanations) without making any changes to the present English content; and

   (ii) to reject Claimant's request for GMP and HACCP appraisal;

2. *to limit the scope of this arbitration proceeding to the examination of whether the Claimant still has the right to avoid the Contract, under the never true assumption that Claimant once had such right.*"

34. In August 2007, Claimant sent a request to the Arbitral Tribunal and requested permission to submit new evidence and statements in response to Respondent's submission of its Statement of Defense of August 2007.

35. In August 2007, Respondent sent an email requesting the Arbitral Tribunal to reject Claimant's request based on the grounds that Claimant's latest submission was clearly final and that given the delay already occurred in this arbitration, further delay should be avoided.

36. In August and September 2007, the Parties further exchanged their opinions on Claimant's request for an additional submission, whereby each Party maintained its original position.

37. In September 2007, the Chairman of the Arbitral Tribunal, after consultation with his co-arbitrators, sent an email to all the parties agreeing to a second round of written submissions, fixing the oral hearing in October 2007, and deciding on other miscellaneous procedural aspects, such as the problems raised by Respondent concerning Claimant's submissions and translations.

38. In September 2007, Claimant submitted its Statement of Claimant which are the detailed arguments for its previous requests. Claimant repeated its previous position according to which Respondent had committed a fundamental breach of contract. Claimant based this allegation mainly on the Memorandum of November 2005 (see below para. 73, Exhibit CX-4j), the Proposal of January 2006 (see below para. 77, Exhibit CX-4m) and a Memorandum of April 2006. Claimant further maintains that

such fundamental breach substantially deprived Claimant of what it was entitled to expect under the Contract thereby causing a substantial detriment to Claimant, which was actually foreseeable to Respondent.

Besides Claimant's allegations on the merits of the case, Claimant requested the Arbitral Tribunal to reject a series of evidentiary material submitted by Respondent, such as the newspaper report of August 2006 (see below para. 84 , Exhibit RX-50), the information gathered on the internet, the raw material examination reports, some pictures submitted by Respondent, etc. Claimant bases its requests on the argument that such evidence would be partly illegal, partly inappropriate or inaccurate and therefore not admissible under the applicable regulations on evidence issued by the Supreme People's Court. (CL 17.09.07, pp. 78-83; CL 19.11.07, pp. 19-20)

39. In October 2007, Respondent submitted its Rejoinder to Statement of Claimant in which it repeated its previous request, and additionally required the Arbitral Tribunal to reject Claimant's suggestion for a site visit based on the following reasons: (i) firstly, a site visit was not necessary, since Respondent already demonstrated that Claimant's allegations concerning the problems with the Equipment are not true; (ii) a site visit would not allow the discovery of any relevant fact, not only because the Equipment is under the absolute control of Claimant and therefore Claimant could easily and substantially influence the results of the site visit, but also because even if the site visit enabled the status of the Equipment to be ascertained, it would be only the status of the Equipment at the time of the site visit or site check; and (iii) a site visit on the October 2007 would not be technically feasible. (RSP 19.10.2007, para. 1 ff)

Respondent then rejected Claimant's objections concerning the admissibility of its evidentiary material and insisted on the admissibility of its evidence, and in particular of the news report, the information gathered on internet, the evidence provided by a China trademark agency, Respondent's examination reports of the raw material, etc. (RSP 19.10.07, para. 45-114)

Finally, Respondent commented on the admissibility and probative value of the evidence submitted by Claimant, including the evidence submitted by Claimant with its submission of September 2007. (Exhibits CX-9 to 16)

B. The Hearing

40. In October 2007, the main Hearing took place in Beijing. During the hearing, the parties produced a number of witnesses and made oral submissions on their respective positions.

C. The Post-Hearing Briefs

41. In November 2007, Claimant submitted its Final Statement in which it raised a request for an interim award ordering a new commissioning of the production lines, and in which it repeated its main arguments:

    (1) that Claimant correctly avoided the Contract;

    (2) that Claimant provided adequate raw material;

    (3) that Respondent failed to provide Claimant with adequate training;

    (4) that part of the evidence Respondent bases its arguments on is inadmissible; and

    (5) that Respondent's arguments are partly illogical.

42. On the same day, Respondent submitted its Post-Hearing Statement in which it requested the Arbitral Tribunal to reject all claims of Claimant and to grant the requests of Respondent including payment of a total compensation of over CHF 380,000 to be paid by Claimant to Respondent within 30 days of issuance of the arbitration award as a compensation for the reasonable expense and costs incurred by these arbitration proceedings (CL 19.11.07, p. 46 and p. 10, para. 21).

    Respondent bases its requests on the following main arguments:

    (1) The Contract was not a turn-key project and the feasibility study reports and bidding documents are irrelevant and do not form part of the Contract;

    (2) Claimant's raw materials did not meet the contractual requirements of Annex 2 (Exhibits RX-28 to 30, RX-42 and RX-45) and the parties never agreed on any samples as a relevant standard;

    (3) Claimant failed to avoid the Contract after the third commissioning, which demonstrates that it considered the plant as acceptable and only wished to receive ongoing optimization free of charge;

(4) The good quality of the Equipment and Products has been confirmed in various written documents by both parties and even external experts;

(5) Erection and commissioning were the obligation of Claimant, and commissioning should have taken place in accordance with the stipulations of the technical documentation provided by the Seller, which Claimant failed to do;

(6) Claimant continued to publicly state that the Equipment purchased from Respondent was in production; and

(7) Claimant's understanding and interpretation of the 3%-Rule is contradictory and incorrect. Further, the 3%-Rule only applies to the first three commissioning and does not apply after the fifth commissioning (RSP 19.11.07, para. 58 ff).

Based on these main factual arguments, Respondent concludes that Claimant failed to discharge its burden to prove that Respondent committed a fundamental breach of contract, be it in the light of the 3%-Rule or in the light of Article 25 of the *CISG*. But even if the Arbitral Tribunal was to establish a fundamental breach, Claimant would have lost its right to avoid the Contract, and in the eventuality that it did not lose the right, it has failed to exercise it correctly.

IV. SUMMARY OF FACTS[3]

A. Background of Contract 03AI8040: the Parties' Negotiations

43. In July 2003, A Technology Import & Export Co., Ltd. Issued an invitation for bids concerning the supply of a "Whole Wheat Grain Puffing Food Processing Line" with a capacity of 1150-1250 kg/h. This bid was issued for and on behalf of Purchaser, China A Food Co., Ltd. (see CL 0-P7, pp. 4, 6 and 11).

44. In August 2003, Claimant formally entrusted A Technology Import & Export Co., Ltd. to issue an invitation to bid on China International Bidding Net concerning the supply of a "Puffing and Cereal Food Production Line" ("Production Line"). The Bid concerned three distinctive parts: Part One concerning wheat pellets puffing, Part Two concerning breakfast cereal puffing food, and Part Three concerning the packaging

3 This summary is not intended to be exhaustive but is intended simply to lay down the main facts as they arise from the Parties' various submissions and the hearing.

line. Claimant alleges that this project was to be a so-called turn-key project (CL 08.06.07, p. 11).

45. In September 2003, Part One and Part Two of the Bid were awarded to Respondent.

B. Key Aspects and Elements of the Contract

46. In September 2003, Claimant (under its former name "China A Import & Export Co., Ltd.") (see above para. 2) and Respondent entered into a Contract for the purchase by Claimant of a Cereal Puffing Food Processing Line ("Puffing Line") and an Extrusion Food Processing Line ("Extrusion Line") from Respondent and related materials and services as described in Annex 1 thereto ("the Contract").

47. The Contract price was over CHF12 million on FOB European terms (Article 1). According to the Contract, the Seller had to deliver the equipment as described in Annex 1 to the Contract within 5 months FOB from the effectiveness of the Contract and receipt of down-payment, whereby part-shipments were allowed (Article 3). The place of delivery was "any European port" (Article 4). The place of destination was any of City C, City D or City E, China (Article 5).

48. All goods supplied under the Contract were required to be made in Switzerland, the EU, or the US (Article 2).

49. Respondent was responsible for insuring the goods up to "*arrival date of delivery place*" (sic), and Claimant was responsible for (i) "*insuring the goods after date of delivery port*" (sic), and (ii) informing the Seller of delivery (Article 6).

50. The Parties agreed that 10% of the Contract price (over CHF 1,200,000) would be paid within 30 days of effectiveness of the Contract, and that the balance would be paid through an irrevocable Letter of Credit, providing for the balance of 90% of the Contract price to be paid in four parts of 60%, 10%, 10% and 10% respectively. The first payment under the L/C was 60% of the Contract price (over CHF 7,400,000), to be paid on the submission by Respondent of certain documents to Claimant's bank, essentially demonstrating that the goods had been shipped as required under the Contract. The next payment of 10% was payable after the issue of take-over certificates, the next payment of 10% was payable after six months of normal operation from Final Takeover, and the final payment of 10% was payable after 12 months of operation of the equipment from Final Takeover (Article 9).

51. Under the contract, Claimant (i.e., Buyer) was responsible for the erection and commissioning of the Equipment, and Respondent (i.e., Seller) was responsible for supervising such erection and commissioning according to Article 14, para. 1, of the Contract:

> "*The Seller's technicians shall arrive at the site within 10 (Ten) days after the Buyer has notified the Seller in written for the supervision for erection, commissioning and training of operators (all fee to be borne by seller). The Contract includes all technical services for supervision of erection necessary to fulfil the contractual obligation. In case the time of this project be delayed by user, The seller shall offer continual service for erection, commissioning and training till the takeover has been achieved. Once the time be delayed by Seller, the Seller shall compensate the direct costs evidenced by an official receipt (approved time sheet and suppliers' invoice etc.).*
>
> *The Seller warrant that the services to be rendered by the Seller according to the present Contract are executed in accordance with good engineering practice and, within this warranty, take over responsibility to the effect that Seller's service are properly executed.*"

52. Seller entered into a series of further contractual warranties including:

- **Equipment Warranty** (Article 14.2 of the Contract), under which Respondent guaranteed the quality of the equipment delivered and its performance in complying with the specifications contained in the relevant Annexes to the Contract for a period of 12 months starting from the date of Take-Over (however, latest 24 months after the date of the document of the last main shipment presented under the Letter of Credit); and
- **Process Warranty** (Article 14.3 of the Contract), under which Respondent guaranteed that the equipment would perform in accordance with the quality and performance data stipulated in Annex 2 of the Contract. Respondent further guaranteed that the product quality would be in accord with the stipulations of Annex 2. This warranty is valid under the condition that the equipment is erected and commissioned according to Respondent's instructions and supervision, and that the design previously agreed upon by Respondent is not altered. Further, Claimant undertook at its own expense to provide and be liable for sufficient raw material in accordance with Annex 2, trained personnel, access to site and

foundations according to the data submitted by Respondent. The equipment was to be tested through so-called "Performance Tests" under Respondent's supervision during the start-up period after Mechanical Completion. During the start-up period, repeated Performance Tests would be permissible.

53. Article 14.3 of the Contract states that "*[t]he Seller warrants that the equipment will perform in accordance with the quality and performance data in Annex 2" and further that "the Seller ensure products quality must accord with the stipulation of Annex 2*". Annex 2a of the Contract contains "Raw Materials Specifications", and Annex 2b of the Contract contains "Product Specifications". The Raw Materials Specifications are recommended specifications for raw materials to give optimum performance of the machinery, and the Product Specifications are guideline specifications for products which the equipment will produce. Each Product Specification in Annex 2b states that "*[a]bove values are proposed by B and serve as guideline[s]. They may vary depending on product characteristics. Any deviations from these values need to be discussed*". However, nowhere in the Contract is the relationship between the Raw Materials Specifications and the Product Specifications made crystal clear.

Respondent's view is that it is clear that the Raw Materials Specifications and Product Specifications when read together simply give examples of what products the equipment will produce if certain raw materials are used, and in no way constitute any absolute commitment on the final products. Respondent further makes clear that just because raw materials outside the specifications are used, and the final product specifications do not accord with those in Annex 2b, this does not mean that the products are any better or worse than those meeting the specifications in Annex 2b.

Claimant's view is that the relationship between raw materials and product specifications was not clear to Claimant. Claimant was also under a misunderstanding with regard to samples, as the Chinese text of this article differs substantially from the English text (see below para. 147 ff).

When trying to understand the obligations contained in the Contract and the understandings of the Parties, it is important to note that the English and Chinese versions of Article 14.3 of the Contract are different. The English text refers only to the equipment performing "*in accordance with the* ***quality and performance data*** *in Annex 2*" whereas the Chinese text of Article 14.3 states that "*the Products to be produced are to be in line with the* ***samples*** *(contained in Annex 2…)*". This

appears to have led to radically different understandings of this clause by Claimant and Respondent respectively (see below paras. 138-151).

54. The performance of the equipment was to be measured by performing the "Performance Test" as defined in Article 14.3.4 of the Contract:

> "*After the successful performance of the Test Running (Accepting standard: all the equipment are continually running for 72 (seventy-two) hours without fault), or after an arrangement has been reached on the compensation for non-compliance with the respective performance data as per Article 15, the Buyer shall within 1 (one) month issue the respective Taking-Over Certificates to that effect (hereinafter referred to as 'Take Over of the Equipment'). In case the Test Run is delayed due to the fault of the Buyer (lack of raw material etc.) [sic] the dead time shall be considered as running time. In case the Test Run is delayed due to the fault of the Seller, the dead time shall be recuperated to reach 72h of Test Run.*"

The meaning of this clause is that the Contract is only fully performed when **either** the Equipment can be shown to run continuously for 72 hours, performing at the standards laid out in the Contract, **or** an alternative agreement has been reached by the Parties.

55. If Respondent breaches the aforementioned warranties and a claim is made by Claimant within the period of claim or quality guarantee period as stipulated in Articles 13 and 14 of the Contract, Respondent is liable as follows (Article 15 of the Contract):

> "*If for reasons attributable to the Seller, the specified performance is not attainted either in whole or in part, the Seller shall:*
>
> — *At their own risk and cost and being liable for direct costs of the Buyer (against presentation of official receipt or invoices) once more make such changes, modifications and/or additions to the Works or any part of the Works as may be necessary to attain the specified performance, and repeat any tests necessary to demonstrate attainment of the specified performance. This item should be finished within 1 (One) month after the equipment had failed to pass the Over-Take Test.*
>
> — *the Seller shall pay 10 % (Ten Per Cent) of the total value of the Contract to the Buyer if the final percentage of underperformance is between 1% (One Per Cent) and 3% (Three Per Cent), including 3% (Three*

Per Cent). The Seller shall compensate over 3% (Over three percent) of the total value of the contract to the Buyer if the final percentage of underperformance is 1% (One percent); and if 2% (Two percent) underperformance then compensates 7% (About seven percent) of contract value and if 3% (Three percent) underperformance then compensates 10% (Ten percent) of contract value. The calculation of the compensation shall also consider the prorate number of products achieved according to Annex 2.

…

If the final percentage of underperformance is above 3%, the Buyer has the right to reject the goods and refund to the Buyer the value of goods so rejected in the same currency as contracted herein, and bear direct expense in connection therewith including interests occurred, banking charges, freight, insurance premium, inspection charges, storage, stevedore charges against presentation of official receipts and invoices evidencing the existence of these costs. In case the underperformance is above 3% for only one or two products, the Seller is entitled to perform a third test run for the underperformance products within one month after the second test run in case during the test run the performance is not achieved, the Buyer has the right to reject the goods."

56. Besides the warranties on the quality and performance of the line, Respondent also undertook liability for late delivery. According to Article 18 of the Contract:

"*In case of delayed delivery, except for Force Majeure cases, the Seller shall pay to the Buyer for every week of delay a penalty amounting to under 1% (Under One Per Cent) of the total value of the Contract value of the delayed equipment. Any fractional part of a week is to be considered a full week. The total amount of penalty shall not, however, exceed 5% (five Percent) of the total value of the Contract and is to be deducted from the amount due to the Seller by the paying bank at the time of negotiation, or by the Buyer direct at the time of payment. In case the period of delay exceeds ten weeks after the stipulated delivery date the Buyer have the right to terminate this Contract but the Seller shall not thereby be exempted from the payment of penalty.*"

57. Although the Contract provides for the possibility for one party to ask damages from the other breaching party, Article 15 of the Contract nevertheless excludes indirect losses:

> "*However, neither party of the Contract shall be liable to the other for any loss of profit, loss of use, loss of production, loss of Contracts or for any other indirect or consequential damage that may be suffered by the other party. The Seller is liable only for direct damages caused to people and property in accordance with the applicable product liability law, in case the Buyer makes use of the Equipment according to the contractually agreed purpose and in accordance with the Seller's operating instructions.*"

The effect of this clause is to exclude liability for any consequential loss for non-performance of the Contract.

C. The Arbitration Clause

58. The Contract provided for the following arbitration clause (Article 19 of the Contract):

> "*All disputes in connection with this Contract or the execution there of shall be settled through friendly negotiations. In case no settlement can be reached through negotiation. In case should then be submitted for arbitration to the China International Economic and Trade Arbitration Commission, for settlement by arbitration in accordance with the said Commission's rules. The arbitration shall take place in Beijing and the decision rendered by the said Commission shall be final and binding upon both parties, neither party shall seek resources to a law court or other authorities for revising the decision. The arbitration fee shall be borne by the losing party. The arbitration language shall be English.*"

D. The Parties' Performance Pursuant to the Contract

1. The Execution of the Contract and the Related Dispute

59. In late 2003, Claimant brought samples of puffing food and cereal breakfast food products back from some supermarkets in Germany, which Claimant claims as reference samples for the starting of the project and the negotiation of the contract (CL 08.06.07, p. 11).

60. From January 2004 to May 2005, the civil engineering phase took place.

61. In February 2004, the Letter of Credit was issued by Claimant (Exhibit CX-2).

62. In June 2004 and July 2004, the 1st and 2nd part-shipments respectively were shipped on board in Antwerp, Belgium (Annex 3). The two shipments arrived in City C in August 2004 respectively (Exhibit CX-2, p. 2).

63. From September 2004 to February 2005, the Installation period took place, during which China North Installation Corp. conducted the Installation of the equipment received under the supervision of Respondent.

64. From January 2005 to April 2005, the first commissioning period took place.

According to Claimant, the products produced during the commissioning tests run during that period were not compliant with the contractual requirements (CL 08.06.07, p. 18). According to Respondent, the commissioning tests had to be interrupted because of a problem with the steam supply system under the responsibility of Claimant (Exhibit RX-8).

65. In April 2005, Mrs. Ke of Claimant sent a fax to Mr. Gutt of Respondent concerning the progress of the project and the remaining issues. In this letter Mrs. Ke acknowledged "*big progress on both lines*" but listed a series of issues: as concerns the Puffing Line, Claimant wished to further improve the wheat cleaning system and the processing of the coating system; as concerns the Extrusion Line, Claimant raised some issues relating to the flavour and surface layer of the pillow samples, problems with the horizontal conveyor, coating system and drier. Mrs. Ke concluded that the commissioning period would be continued after the May holidays (Exhibit RX-10).

66. In May 2005, Mr. Gutt of Respondent answered to Mrs. Ke of Claimant. He first acknowledged Claimant's satisfaction with the results achieved and the performance of Respondent's staff and then listed a series of comments answering the issues raised in Mrs. Ke's fax. In summary, as concerns the Puffing Line, the colour was easy to change, the size of the product depended on the raw material used, and Claimant's requirements as to the sugar coating deviated from the contractual specifications and could therefore only be partly implemented, etc. Respondent then went on to issue recommendations as to Claimant's handling of the cooling air system, the vapour sugar-boiling system and the steam supply. Concerning the Extrusion Line, Respondent considered the general quality of the products was good and only considered that some minor adjustments for some of the products would be necessary. Respondent

stressed the fact that there are always differences in product, which are attributable to raw material, process and machinery, but that the products produced so far were of very good quality and would be marketable in Europe. Respondent agreed to further commissioning and hoped that the plant could be handed over at the end of May (Exhibit RX-3).

67. From May 2005 to June 2005, a second commissioning period took place.

According to Claimant, the products produced by the Puffing Line during the commissioning test runs during that period were still not in compliance with the contractual requirements and the Extrusion Line could not function properly (Exhibits CX-6, 7 and 8). According to Respondent, many of the problems which occurred and were listed in the "Action list for technical problems" in June 2005 (hereafter "Action List") were not unusual and moreover were under Claimant's responsibility, in particular as concerns the quality of the multi-grain used, which would be crucial for the quality of the end product (RSP 18.12.06, p. 9, para. 16; CL 25.07.06, Exhibit CX-4a).

68. In June 2005, Mr. Gutt of Respondent sent a fax to Mr. Sun of Claimant referring to the meeting in City E and the corresponding Action List prepared. Respondent stated that (i) as concerns the Puffing Line, it was ready for production with certain limitations as mentioned in the Action List, and (ii) as concerns the Extrusion Line, the formulation for all extruded products was finished and the line was ready for the production of all products (with certain limitations as mentioned in the Action List).

69. In August 2005, the Parties signed a Memorandum (Exhibit CX-4c) aimed to speed up the commissioning and taking-over of the production line and during which the attendees discussed the next program for executing the project. A short "review of the problems of the products" included problems with the colour, shape and taste of some of the products. The Memorandum also mentioned issues with the Letter of Credit, which should not be drawn by Respondent until the issuance by Claimant of the take-over certificate. Further, based on the punch list in June 2005 (Exhibit missing, mentioned in Exhibit CX-4c), the parties confirmed the "unfixed mechanical problems and the relevant solution" (Exhibit CX-4f).

70. In August 2005, a further Memorandum was signed regarding the product formula and the main bearer (Exhibit CX-4d). The main issues were recorded as follows:

"*1. Proposals for next commissioning*

A will prepare the commissioning raw material upon B's request. B will carry on the commissioning strictly complying with the contract, and both parties will execute the taking-over strictly according to the relative contractual standard.

The proposal referred by B that it would like to adjust the formula during the coming commissioning, A cannot accept this, and both parties will execute the commissioning as stipulation of contract.

B mentioned that in case the performance test is carried out strictly according to the formula stipulated in the contract, some products would be different from the sample. A could not accept to changes in the formula and will consult its legal expert if formula can be changed as well as the consequence in changing the formulas.

2. Filling mass

As both parties consider that the device for filling mass of pillow, which is lack on the line now, should not be supplied under their own responsibility, A agrees that it will try its best to provide the filling mass temporarily for speeding-up the commissioning. But A insists on 2 points as well: (1) A does not take the responsibility and obligation of the device, and (2) A only supplies the contractual filling mass but will not be responsible for the result of the mass."

71. From September 2005 to October 2005, a third commissioning period took place, the main task of which was to test the consumption of raw material, of power and the issues with the equipment (see Commissioning Memo on 4 October 2005 and Commissioning Memo in October 2005, Exhibit CX-4i or RX-20).

Claimant asserts that due to various problems, the tests had unsatisfactory results (Exhibits CX-4e and CX-8). According to Respondent, in September, Claimant was already operating the lines under normal industrial operation, which showed that the lines were functioning satisfactorily, although it simultaneously refused to issue the Taking-Over Certificate for the whole plant (see below para. 72).

72. In September 2005, Respondent sent a letter to Claimant concerning the Mechanical Take-Over of Lines. Respondent stated as follows (Exhibit RX-7):

"*We understand that you operate the mentioned lines under normal industrial operation (as wheat puffing plant) although the issuance of the Taking-Over*

Certificate for the whole plant of parts of the plant is still outstanding. B hereby states that the Buyer shall not use any parts of the Works unless the Buyer has issued a Taking-Over Certificate for such parts or the lines. If the Buyer does use any part of the Works before Taking-Over Certificate is issued, the lines which are used are deemed to have been taken over at the date on which they are under normal operation the first time. At the same time, the warranty period starts from such date.…"

73. In a Memorandum in November 2005, the situation was summarized as follows (Exhibit CX-4j):

"By the past commissioning, we can see there are still somewhat difference between the current products and samples imported from Europe. Problems as follow:

A. The product of puffing-line is not evenly coated and puffed.

B. Chocolate-coated corn flakes are not coated evenly, and the coating-amount are exceeded the contractual data.

C. The appearance of pillow product is coarseness, and the filling mass is getting hard, the mass cannot be enveloped in the small size pillows.

D. The breakage of multi-grain is too high during last commissioning; A prepared the parboiled rice here and will be tested in next commissioning.

E. There were no comparable samples for the Granola product.

A food introduces current problems regarding the equipment and process on site.

A. The puffing channel still slide down during it's running, and rubbed against the fixed bearing, which caused lots of scrap-iron falling on the ground.

B. The sugar concentrated degree (high Brix) cannot be checked and control online.

C. The cleaning for the sugar preparing system, coating drum, cooling drum, separator is difficult to be clean out completely in the puffing line.

D. There is no filling mass preparing system in the extrusion line.

E. The break-rake of the dryer cannot be raised and fallen as normal way in the extrusion line.

F. The noise from the running of Flaker is high; will be subjected to Chinese relative inspection.

G. Parts of equipment (such as Spices dosing system and oil dosing system) have not been run so far.

Problems mentioned above and some other mini problems should be overcome in next commissioning."

The Memo further listed problems linked to the Letter of Credit, the filling mass machine, and the formula modification. In this respect, the parties agreed that "*they will have a respective inner discussion firstly and then negotiate on 3 November 2005*".

74. In a Memorandum in November 2005, the situation was summarized as follows (Exhibit CX-4k):

(1) The costs of the last commissioning from September 2005 to October 2005 would be borne by Claimant;

(2) Respondent agreed to pay over RMB 300,000 to Claimant for the purchase of filling mass preparing equipment, but Claimant refused since it already manufactured a new filling mass, but would not bear any liability for the quality of the final product provided that it complies with the specifications to be issued by Respondent;

(3) A second performance test would be held in November 2005, and the first week would be dedicated to improving the mechanical parts, and the second week, i.e., after 28 November 2005, to the commissioning with product. Those costs would be borne by Respondent;

(4) Respondent confirmed that B Equipment Engineering (China) Co., Ltd. would issue a Guarantee Letter updating the guarantee submitted under the contract and guaranteeing the compliance with the contract;

(5) Respondent confirmed that it would not negotiate the L/C without good reason;

(6) Claimant refused to change the contractual formula;

(7) Respondent would buy the filling mass for the next commissioning and issue specifications for the material in advance;

(8) Respondent would offer a system and detailed commissioning schedule (including the work program, timetable, delegation, and raw material list) in November 2005; and

(9) Both parties agreed that the extrusion machine was of good quality and met the industry requirements, but that the products developed so far were unsatisfactory.

75. From November 2005 to December 2005, a fourth commissioning period took place.

According to Claimant, the performance tests for the Puffing Line had been executed but the results were unsatisfactory. As concerns the Extrusion Line, a performance test had been executed in November 2005, but the results were also unsatisfactory. In December 2005, the product for Granola had been accepted by Claimant although not in compliance with the contractual formula. As to corn flakes and three pillows various problems remained (Exhibit CX-8).

As mentioned in its fax in December 2005, Respondent considered the products to be of good quality and considered that it had fulfilled all its contractual obligations (see below para. 76)

76. In December 2005, Respondent sent an email to Mr. He of Claimant in order to give a status report on the work completed since the meeting in City E of 2/3 November 2005 and the action plan agreed upon during the discussions (see above para. 74). Respondent raised following points (Exhibit RX-5):

(1) Respondent acknowledged the good cooperation between the parties during the November/December commissioning and the good progress made during this period;

(2) The products samples resulting from the tests would be of good quality and in accordance with European standards; and

(3) Claimant did not allow Respondent to demonstrate all products over the full period of an acceptance run, due to the non-availability of raw material or to the inadequate quality of the raw material and other operating shortcomings of Claimant's staff.

Respondent concluded that since Claimant refused to sign the acceptance certificate for the products that were successfully demonstrated, Respondent considered all its contractual obligations as completed. Further Respondent stated that Claimant's staff were now in a position to proceed with all necessary adjustments. In order to finalize the project, Respondent invited some of Claimant's management staff to visit Switzerland.

77. In January 2006, the Parties signed a Summary of the Actual Product Status according to which, problems persisted during the performance tests of December 2005, namely with the production lines concerning the puffing, the Granola, the cream filling pillow, chocolate filling pillow, the big size pillow and the multi-grain (Exhibit CX-4l). Some of the problems mentioned included unqualified bulk density for four products, problems with the sugar frosting on the puffing line, coating coverage not even on the cornflakes, cream and chocolate filled pillows not sealed properly, incorrect specifications for the filling mass, etc.

78. On the same day, the Parties signed a Proposal for Completion of A Cereal Foods Project (Exhibit RX-4m), according to which:

> "*Both parties contributed significantly to this project and good progress was achieved over the last commissioning period. The installation of the equipment is of good quality and few points (such as oil coating pump and sugar refill control) need to be corrected as soon as possible. Also, both parties agree, that the products still need more optimization and the next and final phase should concentrate on this topic.*"

Based on this basic agreement, Respondent agreed to send a new team to Claimant and focus on specific points during the next commissioning period of 2-3 weeks, such as the optimization of pillow products, the performance run of puffed, coated wheat, the optimization of chocolate coated cornflakes, the development, optimization and performance run of multi-grain flakes, the commissioning of oil-coated direct expanded product (rings). If the product quality was accepted by Claimant, no further performance tests would be needed.

On the other side, Claimant agreed to document in a future memo that:

(1) The installation of the equipment is completed, and the equipment has been demonstrated to be able to produce the required throughput;

(2) The Granola product is accepted, while the other products still need optimization;

(3) Respondent had agreed to pay a contribution for raw material, utilities, customs clearance fee and manpower during the past commissioning of September/ October 2005 and November/December 2005 and for the final commissioning of February/March 2006 (according to the formula of the Memorandum of August 2005);

(4) Respondent agreed to extend the L/C by 3 months to cover time period for final commissioning (to May 2006); and

(5) Respondent agreed to issue an upin Guarantee Letter with a new expiry date of 11 May 2007 from B Equipment Engineering (China) Co., Ltd. (backed by B Food Production Equipment Co, Switzerland) before January 2006.

79. From February 2006 to March 2006, a fifth commissioning period took place.

Claimant asserts that due to various problems, the tests still had unsatisfactory results (Exhibit CX-8, p. 10-11; CL 08.06.07, p. 18 and pp. 25-26, Appendix 14). Respondent asserts that these tests were successful, that the only remaining work related to the optimization of the equipment, and further that only these results should be taken into consideration. Respondent maintains that any other document or material connecting with any event before the last commissioning is not relevant to Claimant's request for avoidance (RSP 19.10.07, para. 15).

80. In March 2006, Mrs. Ke of Claimant sent a letter to Mr. Hofer of Respondent in which Mrs. Ke stated that the results of the fifth commissioning tests were still unsatisfactory and that the plant still could not be taken over, since it was not yet operational. Mrs. Ke went further stating that although Claimant had offered Respondent many chances to improve the project, especially during latest several commissioning, Claimant could not let Respondent modify the contractual formula to produce the sampled products and that except the Granola product, the other products did not meet the specifications. Based thereon Mrs. Ke raised following requests in the name of Claimant:

> "*1. Because the line cannot produce the qualified product, cannot be put into practical producing, we require that the whole line would be sent back to B, and B should compensate relevant expense to A according to the related terms of above contract.*
>
> *2. B could not negotiate the 30% L/C just from their single side before the formal take-over certificate is signed.*"

Whereas Claimant brings forward that this letter constituted a due declaration of avoidance of the contract (CL 17.09.07, p. 25 ff), Respondent alleges never having received such letter and maintains that it is a forgery and does not fulfil the requirements of a formal declaration of avoidance under the *CISG* (RSP 19.10.07, paras. 40 ff).

81. In April 2006, a meeting took place between Claimant and Respondent in City E. According to the internal Memorandum prepared by Respondent, all open issues as per Memorandum on 18 January 2006 (see above para. 77) had been addressed and completed during the February/March commissioning period. In summary, Respondent concluded that all contract products had achieved an acceptable quality, comparable to other market products. The products could be optimized further but they would never be exact copies of the samples presented by Claimant, as these had been manufactured with different raw materials, formulations and in many cases also different processes or equipment. Respondent considered the installation as operational, with the 7 products at an acceptable quality level. Respondent finally requested that the acceptance certificate be signed by Claimant, and considered itself entitled to call the next 10% of the L/C (RSP 18.12.06, Exhibit RX-6).

82. In April 2006, Mr. Hofer and Mr. Gutt from Respondent sent a letter to Mr. He from Claimant, in which they confirmed Respondent's position on many of the points mentioned in the Memorandum of 18 January 2006. In conclusion, Respondent stated the following:

> "*B consider the A installation now as fully commissioned and operational. This has also been confirmed in the joint memo of January 18, 2006. B therefore now ask A to sign the equipment acceptance certificate (contract annex 6). As there is still not agreement on the quality of the six remaining products, B do not ask for signing the product acceptance certificates (contract annexes 5) now, but propose to continue work as per the bullet point list above. Even without signature of annex 6, B has to draw the next 10% share of the L/C in order to cover at least some of the already incurred and future cost. This still leaves 20% of the L/C open although the plant being fully installed and operational. There is therefore no need for A to extend the validity of the L/C. …*"

2. The Culmination of the Dispute

83. In the summer 2006, Respondent entrusted a China trademark agency to do some background research and undercover investigations into China A Group Company,

which is another name for China A Group Corp. (see above para. 3). The investigation agent posed as someone interested in buying breakfast cereals and phoned China A Group Corp. in July 2006. The investigation agent was given a phone number for a Mr. Zhang, Sales Manager for China A Food Co., Ltd, which is the actual user of the production plant. The investigation agent subsequently phoned him and made an appointment with him on 10 July 2006. The investigation agent visited the company in City E with two officials from the Beijing Notarial office. The investigation agent was shown product samples of grain clusters, maize flakes, and popcorn, and was told that the company could produce an order of 20-30 tons in a fairly short space of time (the document is a little confused on timings and amounts, but the investigator was told that raw materials were always kept ready), and that the cereal products were manufactured by the B line from Switzerland. The investigator asked to see the line, but was told that the line was idle, and only maintenance staff were allowed into the building. Mr. Zhang also informed the investigator that though the company used to manufacture complete (i.e., packaged) products, they now mainly produce goods for other companies. He stated that the line requires little maintenance, washing with steam once or twice a month is sufficient (Exhibit RX-52).

Claimant denies the accuracy of this information as well as the admissibility of this report as evidence in the present proceedings, as the information therein was allegedly obtained by illegal means (CL 17.09.07, pp. 78-83).

84. In August 2006, the City C Securities News published an article concerning a detailed and long-term investigation into "G A" motivated by reports of impropriety in the reporting of the profits and affiliated transactions by the company. The article analyses the company's financial position and performance, in particular expressing the view that the company made the mistake of expanding production without considering marketing, which has meant that sales, particularly of food products, have not been good. This has in turn led to poor financial performance, with a debt ratio of 70%. Chairman Li is quoted in the article as saying that the company would give up business in the edible oil and food sectors, and return to its core biochemical business. He also admitted that the investments in this area since 2000 had not been successful. The article reports him as talking about investing RMB 60 million in a production line to manufacture puffed food, targeting the breakfast market, which had been bought from Switzerland, though he also stated that food was no longer mentioned in board meetings, and the group was no longer interested in this industry (Exhibit RX-50).

Although this article is about "G A", Respondent is of the opinion that the information contained in this article is relevant since "G A" is another name for China A BioChemical Ltd., which is a company listed at the City C Stock Exchange, part of the China A Group Corp. (see above para. 3; RSP 19.10.07, para. 50 ff). On the other side, Claimant alleges that this news article, besides being inaccurate, is not relevant since it does not concern Claimant, but an unrelated entity "G A" (CL 17.09.07, p. 29 ff).

85. In November 2006, Claimant telephoned Respondent and proposed settlement of the dispute. Claimant proposed that it would sign final take-over certificates for the Equipment and all seven Products, in return for Respondent renouncing all claims under the Letter of Credit for the remaining 20% of the Contract price (Exhibit RX-40a).

86. In November 2006, Mr. Bo of Respondent wrote to Mrs. Lu of Claimant, confirming the above telephone call, and stating that without prejudice to the ongoing arbitration proceedings, Respondent would consider Claimant's proposal in detail. Respondent requested an explanation of the calculation of the 20% discount on the Contract price (Exhibit RX-40a).

87. In December 2006, Mrs. Lu of Claimant contacted Dr. Ho of Respondent to endorse Claimant's settlement proposal of full acceptance by Claimant against waiver of the remaining Contract price by Respondent (Exhibit RX-40b).

88. Simultaneously, Respondent negotiated the next payment under the Letter of Credit with the Bank (Exhibit RX-40b).

89. In December 2006, Dr. Ho and Mr. Bo wrote to Mrs. Liu to acknowledge her contacting Dr. Ho in the previous week. Respondent commented that it was satisfied that Claimant agreed that the installation was fit for the intended purpose, and repeated its request for justification of the discount on the Contract price. Respondent also stated that although it was inevitable that it had negotiated the next payment under the Letter of Credit due to the need to observe time limits, it was still open to an amicable solution provided that Claimant would be willing to withdraw its arbitration request (Exhibit RX-40b).

V. THE CLAIMS AND DEFENCES OF THE PARTIES

A. Summary of Claimant's Claims and the Relief Sought

90. In its various briefs and submissions up to the Hearing, Claimant raised the following requests:

(1) To order that the Contract between Claimant and Respondent be avoided as of 30 September 2003;

(2) To order Respondent to refund the total sum of money paid to Respondent by the amount of over RMB 80 million (equivalent to over CHF 12 million);

(3) To order Respondent to compensate the losses of construction of the workshop facilities suffered by Claimant by the amount of over RMB 20 million;

(4) To order Respondent to reimburse the equipment expenses paid in the amount of about RMB 16 million; (*claim newly added in CL 08.06.07*)

(5) To order Respondent to compensate the direct losses of the bank charges, customs clearance, insurance, and freight for the purchase of the equipment of Respondent in the amount of over RMB 3 million;

(6) To order Respondent to compensate the direct economic losses of bank interest for the purchase and construction of the workshop and so on; (*claim newly added in CL 08.06.07*)

(7) To order Respondent to compensate the expenses for the last trial run of the equipment by the amount of about RMB 300,000;

(8) To order Respondent to pay the bank interest of all fees above calculated on the basis of the same rate of the loan of the People's Bank of China from time to time;

(9) To order Respondent to bear all expenses actually incurred for notary fees, lawyer's fees, and the arbitration fee; and

(10) To order B Equipment Engineering (China) Co., Ltd. to bear joint and several liability with Respondent. (CL 08/06/07 p2-3).

91. In summary, Claimant bases its right to avoid the Contract on a double line of argument deriving on one hand from the 3%-Rule (Article 15 of the Contract) and on the other hand from the remedy system of the *CISG* (Article 49 of the *CISG*).

(1) As concerns the 3%-Rule Claimant alleges that the problems in the performance of the Contract due to Respondent's failures amount to an underperformance of over 3%, which entitles Claimant to cancel the Contract under Article 15 thereof, and further also constitute a fundamental breach under Article 25 the *CISG* which entitles Claimant under Article 49 thereof to cancel the Contract.

(2) As concerns the fundamental breach, Claimant mainly bases its position on the following arguments:

— the agreed goal of the Contract was for Claimant to produce high-end breakfast cereals for the Chinese market;

— the project was a "turn-key" project; and

— after five test runs, the Equipment supplied by Respondent did not fulfil the terms of the contract, particularly with respect to the quality of the products, the capacity of the Equipment, and Respondent's obligations to provide support in optimizing the lines.

92. More specifically, Claimant alleges that the breach of contract by Respondent is constituted as follows:

(1) the Equipment supplied and the products which the Equipment produces do not conform with the Contract specifications, in the flowing respects:

— Problems of Performance: Claimant maintains that the performance of the Equipment did not reach the standard required for take-over (CL 08.06.07 p. 23);

It is Claimant's understanding that the "performance" comprises four aspects: (a) the functions of the products, (b) the productivity, (c) the standard of continuous running, and (d) the standard of formula and technology, all of which relate directly to whether the expected goal for the production line can be reached, and all of which have been stipulated in the Contract (CL 08.06.07 p. 32).

Claimant asserts that such performance of the Equipment is below the standard agreed in the Contract to such extent that the 3%-Rule applies (Article 15 of the Contract):

- According to Article 15, if the final percentage of underperformance is above 3%, the Buyer has the right to reject the goods and the Seller must refund to the Buyer the value of goods so rejected and bear direct expenses in connection therewith.
- It is Claimant's understanding that the method of ascertaining the percentage of underperformance should be the difference between the real function and the contract stipulation, for example: the 3%-Rule would mean that if the specification states that the final moisture content should be 5%, and it is in fact over 5%, the relevant underperformance amounts to 10% (5% / 0.5% = 10). Claimant also argues that if one of the applicable specifications is not met, this means that the product should be deemed as not meeting the specifications in any respect (CL 11.01.07, p. 1).

According to Claimant, any discrepancy in one of the four standards disqualifies the product completely (CL 08.06.07, p. 33) and, in casu, the "unqualified percentage" would be 100% for the equipment delivered by Respondent (CL 08.06.07, p. 34).

— Problems with the conformity of the goods produced: Claimant invokes a series of problems affecting the specifications of the goods produced:

- the machinery is not able to produce products in accordance with the contractual specifications (CL 08.06.07, p. 18);
- the products produced are not in conformity with the samples bought in Germany (CL 08.06.07, p. 25) or with the contractual specifications, i.e., to Annex 2b of the Contract; and
- the anticipated 'first-class' production line failed to run continuously and to produce products fulfilling the contractual specifications or that could be sold (CL 08.06.07, p. 41).

— Problems with the quality of the equipment delivered: Claimant asserts that the Equipment delivered by Respondent was partly not in compliance with the contractual specifications:

- the Equipment itself does not conform to the specifications agreed in the Contract;

- some components are not in accordance with the specifications, and some components were rusty on arrival (CL 08.06.07, p. 16);
- there are serious defects with all of the equipment (CL 08.06.07, p. 20);
- the production line lacks a cleaning system, in breach of HACCP (CL 08.06.07, p. 24); and
- the production line cannot perform in a systematic way (CL 08.06.07, p. 24).

As a consequence of the above problems being encountered, the goal of the contract has become unattainable, which constitutes a fundamental breach of Contract entitling Claimant to cancel the contract (CL 08.06.07, p.19).

(2) Besides problems in delivery of equipment and conformity of the goods produced, Respondent has also failed to comply with its accessory duties under the Contract, i.e., its duty to assist Claimant during the erection and the commissioning and to remedy any defect according to the contractual warranty:

— Respondent wrongly considered that the equipment had been commissioned and thereby refused to honour its contractual obligations, by claiming that the Equipment has been commissioned (CL 01.08.06, p. 3);

— Respondent insisted on changing the contractual formulas for the products, which constitutes a fundamental breach of the Contract (CL 08.06.07, p. 25);

— After five test runs, Respondent fully stopped to cooperate with Claimant (Article 14 of the Contract) (CL 08.06.07, p. 42); and

— Respondent failed to duly train Claimant's staff (CL 19.11.07, pp. 17-18).

93. In Claimant's view, these breaches amount to a fundamental breach based on the following arguments:

Due to Respondent's breach of contract, Claimant has suffered a substantial detriment, which was foreseeable to Respondent and thereby entitles Claimant to avoid the Contract under the *CISG* (Article 25 in relation to Article 49 of the *CISG*). Claimant makes the following points in this regard:

(1) Firstly, the fundamental character of the breach can be demonstrated by the fact that the Contract itself provides for the Buyer's right to avoid the Contract, if the underperformance is such as to exceed 3%. An underperformance of 3% directly entitles the Buyer to cancel the contract and therefore is to be considered as a "fundamental breach" under the *CISG*;

(2) Secondly, independently of the 3%-Rule, Respondent's failure would in any case constitute a fundamental breach entitling Claimant to cancel the Contract under Article 49 of the *CISG*:

— Through its breach of contract, Respondent has deprived Claimant of its key expectations under the Contract (Article 25 of the *CISG*). In this respect, Claimant summarizes its expectations as follows:

- The production lines should be suitable for continuous production;
- During the bidding and negotiation, it was repeatedly stressed that this was a "turn-key" project, i.e., Respondent should supply the complete production line, together with installation, training, commissioning until products can be produced which comply with the contractual stipulations (CL 08.06.07, p. 9);
- The goal of the Contract was to obtain a production line that could produce food up to the standard of the market in City C and Hong Kong (CL 08.06.07, p. 40);
- The product produced should have been of the same quality and specification as the samples bought in Germany (CL 17.09.07, pp. 19-20); and
- Claimant would make profit out from the Project (CL 17.09.07, pp. 15-16).

These expectations were all unmet insofar as the production lines do not work properly and the products produced are not in compliance with the contractual specifications.

— The above deprivation of Claimant's expectations constitutes a substantial detriment which caused Claimant heavy economic losses such as the loss of the Contract price and other investments related to the project (CL 08.06.07, p. 41); and

— This detriment was foreseeable to Respondent, who was aware of the goal of the Contract and Claimant's expectations thereunder (CL 08.06.07, p. 41; CL 17.09.07, pp. 16-18).

94. Moreover, Claimant asserts that Respondent cannot shift the responsibility for the failure of the project on Claimant, who asserts having complied with all its obligations under the Contract:

(1) Claimant has performed all its contractual duties, i.e., payment of the purchase price, providing housing for the machinery, submitting raw materials in accordance with the contract specifications, as well as water and electricity (CL 17.09.07, pp. 21-22). In particular with regard to the raw material, Claimant insists that it provided adequate raw materials (CL 19.11.07, pp. 12-17);

(2) Claimant maintained the machinery properly (CL 08.06.07, p. 35);

(3) Claimant has avoided the Contract within a reasonable time (CL 17.09.07, pp. 23-26): The time limit for avoidance had not passed because the claim was raised within a reasonable time, as Claimant allowed Respondent to perform two further trial runs (CL 08.06.07, p. 34); and

(4) The method for declaring the contract avoided was proper, and in fact was first raised in a letter from Claimant to Respondent on 24 March 2006 and was orally mentioned several times before by Mrs. LH as evidenced in Respondent's letter on 18 December 2006 (CL 17.09.07, pp. 26-27; CL 19.11.07, pp. 11-12; Exhibit RX 40(b)).

95. Claimant further denies that it has used the line commercially since the last trial run (CL 08.06.07, p. 37; see also Exhibit CX-26 Testimony of Wuxi Zhongcui Foods Co., Ltd.) and suggested a site visit by the Arbitral Tribunal in order to verify such commercial use (CL 19.11.07, p. 8, para. (1)).

96. In its Final Statement, i.e., Post-Hearing Brief, on 19 November 2007 (see above para. 41), Claimant raised a new request for an interim award ordering Respondent to start a new commissioning of the production lines (CL 19.11.07, pp. 2, 3-6, paras. (2)-(7)). Claimant bases this request on Article 9.2 (Section 2) of the Contract, according to which a neutral expert will decide on a dispute concerning the issuance of the Take-Over Certificate and the related down-payment, and maintains that the Arbitral Tribunal is a "neutral expert".

Claimant also suggested that the Arbitral Tribunal does a site visit in order to gain a better view of the production line and the related problems (CL 19.11.07, pp. 8-11, paras. (1)-(9)).

B. Summary of Respondent's Defences and the Relief Sought

97. In its various briefs and submissions (RSP 03.08.07, p. 2), Respondent raised the following requests:

(1) To reject all claims and requests of Claimant; and

(2) To order Claimant to bear any and all costs of the Arbitration Tribunal and these arbitration proceedings; to order Claimant to compensate Respondent for all its substantial costs and damages connected with the present arbitration proceedings, including attorney's fees.

98. *On the procedure*, Respondent raises the objection that Claimant (i.e., China A International Co., Ltd.) is not Respondent's contractual partner under the Contract (i.e., China BCC Import & Export Co., Ltd.) and therefore lacks standing to sue (RSP 03.08.07, para. 5 ff.).

99. *On the merits*, in summary, Respondent's position is that it fulfilled all its contractual obligations, and that in fact, its performance was far in excess of its obligations under the Contract in the face of considerable difficulties, in the interests of furthering its and Claimant's common interests. Therefore, Respondent argues that (i) there was no breach of contract; (ii) if there was a breach of contract, it was not a fundamental breach; (iii) if there was a fundamental breach, Claimant lost its right to avoid the Contract due to its inappropriate behaviour; and (iv) in any case Claimant is precluded from claiming indirect damages based on Article 15(1) of the Contract.

100. Respondent argues that there was no breach of the Contract based on the argument that Claimant has failed to meet its burden of proof in this respect as well as on the following further arguments (RSP 03.08.07, p. 41; RSP 03.08.07, pp. 57-58; RSP 19.10.07, para. 131 ff):

(1) First of all, Respondent argues that Claimant had unreasonable expectations:

— The project was not a turn-key project and the erection and commissioning were the responsibility of Claimant. Claimant was required to perform all tasks explicitly excluded from the Contract, including building works

and supplying many components, whereas Respondent's obligations were limited to the delivery of qualified goods, and providing technical assistance (RSP 03.08.07, pp. 42-43);

— The samples brought forward by Claimant as comparison are not relevant (RSP 19.10.07, para. 30): The only relevant standard is Annex 2 (RSP 03.08.07, pp. 37-38). Although, the Chinese version of Article 14.3 of the Contract mentions a sample, the English version prevails, and in any case, the alleged samples are irrelevant since they would have been bought two months after the date of signature of the Contract and include samples of bran flakes, which are non-Contract products (RSP 03.08.07, pp. 23 and 39);

(2) All contractual specifications were met:

— Installation, commissioning and tests all successfully took place, even though Claimant unreasonably refused to sign the take-over certificates (RSP 18.12.06, p. 7);

— The Production Lines can run in a "continuous and coordinated" way (RSP 03.08.07, p. 35);

— In spite of Claimant's unqualified raw materials, the equipment and the resulting products were of good quality (RSP 03.08.07, pp. 50-52; RSP 19.10.07, para. 21), and Claimant agreed that Respondent's Equipment and products were good (RSP 03.08.07, p. 25); and

— Respondent claims Claimant has been using the Equipment in large-scale commercial use since before 30 September 2005 (see below para. 72).

(3) There was no breach of the 3%-Rule:

— Respondent understands the 3%-Rule as referring to the production performance per hour (kg produced per hour), i.e., the production capacity as the relevant specification to measure the performance of the Equipment (RSP 02.04.07, p. 6; RSP 19.10.07, para. 27 ff; RSP 19.11.07, para. 67).

Claimant's understanding of the 3%-Rule in Article 15 of the Contract would result in the Contract being avoided for a very slight variation and no prudent businessperson would agree to such a contract (RSP 02.04.07, p. 4). Respondent only accepted the 3%-Rule because (i) this rule can only be seriously understood

by reference to production performance per hour, and (ii) Respondent argues strongly that the product specifications in Annex 2b of the Contract are guidelines only: each product specification in Annex 2b of the Contract clearly states that "*above values [i.e., technical data] are proposed by B and serve as a guideline. They may vary depending on product characteristics. Any deviations from these values need to discussed*" (RSP 02.04.07, p.6);

Thus, according to Respondent, the performance of the Equipment is within the requirements of the 3%-Rule (RSP 03.08.07, p. 46).

— Even under Claimant's criteria, the 3%-Rule was not breached, and Claimant failed to fulfil its burden of proof (RSP 03.08.07, p. 41; RSP 19.10.07, para. 139 ff);

— Further, if at all, the 3%-Rule only applies to the first three commissioning and does not apply after the fifth (RSP 19.11.07, para. 68).

101. Respondent argues that even if there had been a breach of contract, i.e., if any specifications were not met or obligations not fulfilled, this was due to Claimant's own faulty behaviour and could therefore not be held against Respondent (RSP 19.10.07, para. 32 ff):

(1) Claimant did not cooperate sufficiently, as was its obligation under the Contract (RSP 19.10.07, para. 148; Exhibits RX-53, 55 and 56). It did not provide sufficient raw materials, facilities, frequently changed the team on the project, and declined all offers of training in Europe (RSP 03.08.07, pp. 63-64). Claimant supplying insufficient raw materials, but subsequently refusing to change the formula in the Contract is viewed by Respondent as an attempt to sabotage the successful commissioning (RSP 03.08.07, p. 21);

(2) Laboratory test information as is available shows that the raw materials provided by Claimant did not meet contract specifications (RSP 03.08.07, pp. 47-48; RSP 19.10.07, para. 35);

(3) Claimant did not comply with Contract requirements to erect and commission Equipment etc under the supervision of the Seller and according to its instructions, and the construction work for the factory was improperly done (RSP 03/08/07, pp. 26-27; RSP 19.10.07, para. 34; RSP 19.11.07, paras. 48-49):

— Claimant installed the Equipment before its accommodation was ready (RSP 03.08.07, p.27);

— The erection was performed by unskilled employees (RSP 03.08.07, p. 33);

(4) Claimant did not provide qualified utilities, e.g., the steam provided by Claimant was not saturated steam, it was wet steam (RSP 03.08.07, p. 26);

(5) Claimant did not take good care of the Equipment (RSP 03.08.07, p. 27; RSP 19.10.07, para. 148; Exhibits RX-37 and 47); and

(6) Claimant used the plant in large scale industrial production since before September 2005, and before take-over certificates were issued, in violation of the Contract (RSP 03.08.07, p. 23; RSP 19.10.07, para. 149 ff; RSP 19.11.07 paras. 50-52) (see above para. 72).

Thus, Respondent brings forward that if any lack in conformity of the goods or the equipment was to be established, such lack would be due to Claimant's failures and would not be attributable to a breach of Respondent's obligations.

102. Even if a breach was to be established, Respondent contends that such breach would not be fundamental so as to justify the avoidance of the Contract (RSP 03.08.07, pp. 58-60).

103. Finally, even if the Arbitral Tribunal came to the conclusion that there was a fundamental breach of contract, Claimant would have lost the right to avoid the contract due to its own faulty behaviour:

(1) Avoidance is not possible under the 3%-Rule: Claimant lost the right to avoid the Contract according to the 3%-Rule, after the fifth test run, 1.5 years from the first test (RSP 05.07.07, p. 9);

(2) In any case, there was no effective declaration of avoidance: Article 26 of the *CISG* requires that "*a declaration of avoidance of the contract is effective only if made by notice to the other party*". Though it is sometimes argued that notice to the arbitration tribunal suffices, the *CISG* requires notice to the other party. Respondent alleges to have never received such notice from Claimant (RSP 03.08.07, p. 66). In particular, Respondent contends that it never received the letter on 24 March 2006, but that in any case such letter would not suffice to constitute a due notice of avoidance under Article 26 of the *CISG* (RSP 19.10.07, para. 39ff);

(3) Further, even if the Arbitral Tribunal considered that Claimant did serve notice of avoidance on Respondent, such service would not have been made within a reasonable time: There has been no proper and timely declaration of avoidance according to Article 49(2) of the *CISG* (RSP 03.08.07, p. 66). Claimant knew of the alleged breach at the latest on 1 July 2005, due to the email from Mrs. Ke (of Claimant) to Mr. Bolli (of Respondent) of this date. Claimant filed its application one year after this date, so it was clearly out of time (RSP 03.08.07, pp. 67-68). Even if the date of knowledge of the alleged breach is deemed to be 23 December 2005, when Respondent wrote to Claimant and informed Claimant that they considered all their contractual obligations to be fulfilled, this is still 3 months before the sending of the letter of 24 March 2006 and seven months before Claimant filing for arbitration in August 2006, and so clearly out of time (RSP 03.08.07, p. 68; RSP 19.10.07, para. 44);

(4) Moreover, no restitution of the equipment in substantially the same condition as delivered is possible and an avoidance of contract is therefore excluded under Article 82 of the *CISG* (RSP 03.08.07, p. 64). The Equipment has not been looked after for three years and has been used for almost two years. It is therefore impossible for it to be in substantially the same condition as when it was supplied (RSP 03.08.07, pp. 62-65); and

(5) Finally, an avoidance of the contract should further be excluded due to Claimant's bad faith based on Article 7 of the *CISG* (RSP 03.08.07, p. 61 ff). Indeed, avoidance would not be reasonable in the present circumstances: An international transaction of such price volume and with such an amount of equipment should not be easily avoided after both parties have invested a substantial amount of time, money and expertise to implement the contract (RSP 18.12.06, p. 9). If Claimant were really so dissatisfied with the performance of the Lines, it would have avoided the Contract a long time ago and would not have waited until three years after the purchase date (RSP 18.12.06, p. 7).

104. Even if the Arbitral Tribunal came to the conclusion that Claimant duly avoided the Contract (which is contested by Respondent), Respondent maintains that Claimant's claim for consequential damage should be rejected based on the contractual exclusion of consequential damage (Article 15.1 of the Contract).

105. In general, Respondent alleges that Claimant is acting in bad faith with regard to this arbitration, in that Claimant is motivated by no longer being interested in the

food business, and by its financial difficulties and market failures, and wished to obtain a discount on the sales price, i.e., avoid the final payment under the Letter of Credit of 10% of the Contract price. Respondent cites the fact that Claimant twice contacted Respondent after the commencement of arbitration proceedings to offer to sign all take-over certificates if Respondent did not call in the last payment under the Letter of Credit (Exhibits RX-40a and RX-40b) as evidence for this. Respondent also argues that from the fact that Claimant was willing to accept the Equipment for a relatively small compromise in price, it is self-evident that the Equipment is useable, that Claimant agrees the Equipment is useable, and that avoidance of the Contract should therefore not be allowed. Respondent also argues that the change of lawyers by Claimant soon after the final payment was made under the Letter of Credit shows that after finding that commencing arbitration proceedings was not an effective strategy to put price pressure on Respondent, Claimant decided to take the arbitration procedure seriously (RSP 19.10.07, paras. 52, 154-163, 192-195; RSP 19.11.07, para. 95).

VI. ISSUES TO BE DETERMINED BY THE TRIBUNAL

A. Procedural and Jurisdictional Issues

106. Claimant's standing to sue: The Arbitral Tribunal will analyse Claimant's relationship to China A Import & Export Co., Ltd., i.e., the party having signed the Contract with Respondent and make a decision on Claimant's locus standi.

107. Interim award: The Arbitral Tribunal will make a decision whether to grant Claimant's request for an interim award comprising the commencement of a new (sixth) commissioning of the production lines, contained in Claimant's post-hearing submission (CL 19.11.07).

108. Admissibility of evidence: The Arbitral Tribunal will make a decision on whether to accept the post-hearing evidence received from the parties.

B. Substantive Issues

109. On the merits, the Arbitral Tribunal needs to decide on Claimant's right to declare the Contract avoided and on the consequences of such avoidance, if granted. Claimant bases its right to avoid the Contract on a double line of argument deriving on one hand from the 3%-Rule (Article 15 of the Contract) and on the other hand from the remedy system of the *CISG* (Article 49 of the *CISG*) (see above para. 91). The main

question is thus whether Claimant is entitled to avoid the Contract under either of these two lines of argument, whereby the Tribunal has the authority to make an award independently, reflecting what is just and equitable in the light of the facts.

1. Remedies under the Contract

110. The Contract does not actually provide for a comprehensive and organized system of remedies for breach of Contract.

111. The only remedies expressly mentioned in the Contract are the following (Articles 15 and 18 of the Contract):

(1) In case of non-conformity of the goods, the Buyer has the right to request Respondent to make changes, modification and/or additions to the works as may be necessary to attain the specified performance;

(2) In case of underperformance in the range of 1% to 3%, the Buyer can request a penalty payment from Respondent up to 10% of the Contract Price;

(3) In case of an underperformance exceeding 3%, the Buyer has the right to reject the goods and ask for reimbursement of the Contract price in case; and

(4) In case of late delivery, the Buyer has the right to claim for a penalty.

112. The Contract does not expressly address any other remedy.

2. Remedies under the *CISG*

113. The *CISG* provides the Buyer with three different kinds of remedies in case of breach of contract by the Seller: (1) the right to specific performance (Article 46 of the *CISG*), (2) the right to price reduction (Article 50 ff of the *CISG*), and (3) under limited circumstances, the right to declare the contract avoided (Article 49).

114. As mentioned above, according to Article 49(1) of the *CISG* in relation with Article 25 entitles the Buyer to declare the contract avoided where the Seller fails to perform any of his obligations under the contract and this non-performance amounts to a fundamental breach of contract.

The concept of "**fundamental breach**" is defined in Article 25 of the *CISG* and is given where the breach caused a **substantial detriment** to the other party, i.e., a detriment that substantially deprives him of what he is entitled to expect under the

contract, and such detriment was **foreseeable** to the breaching party at the time of the conclusion of the contract.

115. However, even where a fundamental breach is found, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless:

(1) he does so within a reasonable time in the sense of Article 49(2) of the *CISG*; and

(2) where it is impossible for the buyer to make restitution of the goods in substantially the same condition in which he received them, unless this impossibility is not due to the Buyer's acts or omissions, the goods have perished or deteriorated as a result of the examination provided for in Article 38 of the *CISG*; or the goods have been sold in the normal course of business or have been consumed or transformed by the Buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity (Article 82 of the *CISG*).

116. Further, according to Article 80 of the *CISG*, a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission. If any failure to reach contractual requirements was linked to a failure on Claimant's side, this would also prevent Claimant from declaring the Contract avoided.

117. Irrespective of a right to declare the contract avoided, the Buyer may claim for damages according to Article 74 ff of the *CISG*, unless otherwise provided for in the relevant contract.

118. Where the remedy of contract avoidance is not given, the *CISG* provides for the possibility to request a reduction of the purchase price and/or damages (Articles 50 and 74 ff of the *CISG*).

3. Questions to be resolved

119. Thus, based on the Contract and the *CISG*, in order to decide on Claimant's requests, the Arbitral Tribunal will analyse the following issues in the following order:

(1) Did Respondent commit a breach of contract entitling Claimant to cancel the Contract under Article 49 of the *CISG*?

- What were the Claimant's reasonable expectations under the Contract?
- Did Respondent fulfil its obligations under the Contract?

(2) Based on a breach by Respondent or on the 3%-Rule, does Claimant have the right to avoid the Contract?

(3) If Claimant is not entitled to cancel the Contract, is it entitled to any other remedy such as a reduction of the purchase price or damages in the light of the Parties' responsibilities in the performance of the Contract?

VII. JURISDICTION AND LOCUS STANDI

A. Determination of the Tribunal's Jurisdiction

120. Article 19 of the Contract between the Parties contains the following arbitration clause (Article 19 of the Contract) (see above para. 58):

> "*All disputes in connection with this Contract or the execution there of shall be settled through friendly negotiations. In case no settlement can be reached through negotiation. In case should then be submitted for arbitration to the China International Economic and Trade Arbitration Commission, for settlement by arbitration in accordance with the said Commission's rules. The arbitration shall take place in Beijing and the decision rendered by the said Commission shall be final and binding upon both parties, neither party shall seek resources to a law court or other authorities for revising the decision. The arbitration fee shall be borne by the losing party. The arbitration language shall be English.*"

121. This arbitration clause fulfils all the requirements of Article 16 of the *PRC Arbitration Law* of 1994 and is therefore valid under Chinese law. The dispute at stake is of commercial nature and directly relates to the execution of the Contract. It is thus arbitrable in nature (see Articles 2 and 3 of the *PRC Arbitration Law* of 1994) and falls within the scope of the arbitration clause as reproduced here above. The present arbitration clause thus clearly establishes the jurisdiction of the present Arbitral Tribunal. This has not been further contested by Respondent.

122. Based thereon the present Arbitral Tribunal has jurisdiction to decide on the present dispute between the Parties.

B. Determination of Claimant's Standing as a Party

123. The Contract has been entered into by a company called "China A Import & Export Co., Ltd.", whereas the present arbitration has been initiated by a company called "China A International Co., Ltd.".

124. Respondent therefore alleges that these two entities are not identical and that Claimant lacks standing to be a party in the present arbitration, which is based on the Contract (RSP 03.08.07, para. 5 fol.). Claimant brings forward that "China A Import & Export Co., Ltd." is the former name of "China A International Co., Ltd." and that these two names therefore refer to one and the same entity (CL 11.01.07).

125. It arises out of the documents provided by Claimant in its Supplementary Submission of January 2007, and in particular of the copy of the Enterprise Name Change Approval Notice in February 2007 and of the Business License inMarch 2006, that China A Import & Export Co., Ltd. has changed its name to "China A International Co., Ltd." with effect as of March 2006.

126. The Arbitral Tribunal therefore finds that Claimant and China A Import & Export Co., Ltd. are one and the same entity and that Claimant has therefore standing to be a party in the present arbitration.

C. Claimant's Request for an Interim Award

127. In its Final Statement, i.e., Post-Hearing Brief, in November 2007 (see above para. 41), Claimant raised a new request for an interim award ordering Respondent to start a new commissioning of the production lines (CL 19.11.07, pp. 2, 3-6, paras (2)-(7)). Claimant bases this request on Article 9.2 (Section 2) of the Contract, according to which a neutral expert shall decide on a dispute concerning the issuance of the Take-Over Certificate and the related down-payment, and maintains that the Arbitral Tribunal is a "neutral expert".

128. It is not totally clear how this request relates to Claimant's previous request to avoid the Contract. At first sight, the request for a further commissioning would mean that Claimant requests a further execution of the Contract giving each party a supplementary opportunity to remedy the existing problems (see CL 19.11.07, pp. 3-4, paras. (2)-(4)), which would be in contradiction with its request to avoid the contract and thus abandon the project. However, the Arbitral Tribunal actually understands such request as a means of establishing whether or not the production

lines are in conformity with the contractual requirements, which would then allow the question of whether Claimant's request to avoid the Contract is or is not justified to be determined (CL 19.11.07, pp. 4, para. (5)). In so far, this request does not alter Claimant's previous request for avoidance of the Contract but is a mere procedural request for further taking of evidence.

129. The Arbitral Tribunal is of the opinion that based on all the submissions of the Parties and the witness testimonies and clarifications brought during the Hearing of October 2007, it is in the position to render a final and global award. It does not consider it necessary to take further evidence and in particular to order a sixth commissioning.

130. The Arbitral Tribunal therefore rejects Claimant's request for an interim award.

D. Admissibility of the Evidence Submitted After the Hearing of October 2008

131. According to the Arbitral Tribunal's Procedural Order of May 2007, the Arbitral Tribunal's email in September 2007 and the general practice under the *CIETAC Rules*, the Parties were required to submit all their claims before the Oral Hearing of October 2007. Evidence supporting such claims was to be submitted together with the relevant Party's submission.

132. The Parties both filed evidence together with their Post-Hearing Briefs (see above para. 41 ff), despite the fact that they were not invited to do so and that Post-Hearing Briefs are usually limited to the comments of the evidence submitted and presented at the Hearing.

133. The Arbitral Tribunal considers that the Parties have had sufficient opportunities to submit such evidence at an earlier stage of the proceedings and neither of them asserted not to be in a position to do so. As a consequence thereof and based on the power deriving from Article 14 of the *CIETAC Rules*, the Arbitral Tribunal herewith rejects the admissibility of the evidence submitted after the hearing by the Parties relating to the merits of the case and admits only evidence relating to the costs of the arbitration.

VIII. SUBSTANTIVE ISSUES AND MERITS OF CLAIMANT'S CLAIMS

A. Reasonable Expectations Under the Contract

134. To establish whether Respondent was in breach of the Contract, it is first necessary to establish what Claimant was entitled to expect under the Contract, and what the relevant standards for measuring performance are.

1. Was the Contract a Turn-Key Contract?

135. Claimant claims that during the bidding and negotiation, it was repeatedly stressed that this was a "turn-key" project, i.e., Respondent should supply the complete production line, together with installation, training, commissioning until products can be produced which comply with the contractual stipulations (CL 08.06.07, p. 9).

136. Respondent claims that the project was not a turn-key project and the erection and commissioning was the responsibility of Claimant. Claimant was required to perform all tasks explicitly excluded from the Contract, including building works and supplying many components, whereas Respondent's obligations were limited to the delivery of qualified goods, and providing technical assistance (RSP 03.08.07, pp. 42-43).

Respondent makes the simple point that the long list of exclusions in Annex 1 of the Contract clearly shows that the Contract is not a "turn-key" contract (RS 19.11.07, p. 12).

137. *The Tribunal's Comments and Conclusions*:

The "turn-key contract" is not a recognised legal concept. Its meaning has to be understood in the context where it is used. The Tribunal therefore must look at what Claimant means when it says the Contract was a "turn-key contract", and then establish whether the Contractual agreement in fact meets Claimant's definition of a "turn-key contract":

(1) Claimant's definition: Claimant expressed its understanding as meaning that Respondent should supply the complete production line, together with installation, training, commissioning until products can be produced which comply with the contractual stipulations (CL 08.06.07, p. 11).

(2) The Contractual position: The first point is that the term "turn-key contract" is not used in the Contract itself, though the concept may have been referred to in the bidding documents and negotiations. It is important to note that the Contract as finally agreed differs significantly from what was discussed during the bidding and negotiation stage (RS 19.11.07, p. 14).

- The Scope of Supply for the Contract is contained in Annex 1 of the Contract. The final section of Annex 1 contains a list of exclusions, which runs to some ninety items, such as all building and civil works, the water treatment plant, the steam plant, etc. It is therefore clear that without a significant contribution from Claimant, it would be impossible for the production lines to function at all.

- Article 14.1 of the Contract entitled "*Service Warranty, Erection, Commissioning and Training*" states that "***The Buyer*** *[Claimant]* ***is responsible for erection and commissioning of the Equipment*** *[sic] under the supervision of the Seller [Respondent], and in accordance with the stipulations of the technical documentations provided by the Seller*". The erection and commissioning of the Equipment is therefore quite clearly the primary responsibility of Claimant. Respondent's responsibility in this regard is limited by Article 14.1 to supervising Claimant's performance of this process.

- Article 14.1 also states that "*The Seller's* [Respondent's] *technicians shall arrive at the site with 10 days after the Buyer has notified the Seller… for the supervision of erection, commissioning, and the training of operators (all fees to be borne by the Seller). The Contract includes all technical services for supervision of erection necessary to fulfil the contractual obligation.*" There is therefore a clear obligation on the face of the Contract for Respondent to provide all necessary training to Claimant.

In conclusion, Claimant had significant responsibilities under the Contract, including supply of various significant items specifically excluded under Annex 1 to the Contract, and the primary responsibility for installing and commissioning the Equipment. Claimant was also responsible for providing raw materials which complied with Annex 2 of the Contract. Thus, the Contract is clearly not a "turn-key contract", though it is possible that Claimant did not clearly understand the scope of its obligations. The more important general point here is that the Contract initiated a

project which required complicated and comprehensive cooperation between Claimant and Respondent, and could not succeed without the full attention and motivation of both parties.

2. What are the relevant standards for the products produced by the equipment?

Was respondent's performance to be measured against samples?

138. Claimant claims that in late 2003, Claimant had bought "*puffing food and cereal breakfast food products*" from a supermarket in Germany, which were used as reference samples for the negotiation of the Contract and the start of the project (CL 08.06.07, p. 11). In its subsequent submissions, Claimant consistently repeats its belief that the product produced should have been of the same quality and specification as the samples bought in Germany (CL 17.09.07, pp. 19-20).

Claimant claims that Article 14.3 of the Contract implies that the products should be the same as the samples (see above para. 53), and Claimant feels that this view is confirmed by the Chinese version stating that the products should be in line with the samples. Claimant further claims the same conclusion derives from Article 35(2)(c) of the *CISG*, which requires that the goods delivered possess the same qualities as the goods which the seller has handed out to the buyer as a sample or model (CL 08.06.07, p.12).

139. Respondent claims that the samples brought forward by Claimant as comparison are not relevant (RSP 19.10.07, para. 30), the only relevant standard being Annex 2 (RSP 03.08.07, pp. 37-38). Respondent acknowledges that the Chinese version of Article 14.3 of the Contract states that the products produced by the Equipment should conform with the "samples". However, Respondent argues that Article 23 of the Contract states that "*Chinese and English in this Contract are valid in law. In case there are some disputes, the ruling language should be English*" and the English version of the Contract therefore prevails.

Respondent further claims that in any case, the alleged samples are irrelevant since they were bought two months after the date of the Contract, and included samples of bran flakes, which are non-Contract products (RSP 03.08.07, pp. 23 and 39). Respondent further brings forward that Claimant also failed to present any samples for reference, either with its submissions or at the hearing (RSP 19.11.07, p. 19). Respondent argues that Article 35 of the *CISG* does not help Claimant either, since

the contractual requirements were clearly listed in Annex 2 and that the reference to samples is therefore inapplicable to the present case.

Article 35(2)(c) of the *CISG* can only be invoked in the situation where goods are sold on the basis of samples of the goods themselves, and the goods subsequently supplied do not conform to the samples. An example would be where a contract for the sale of clothing is concluded on the basis of reference samples which define the quality of the clothing, the fabric used, the styles, sizes etc. In this situation, the subject matter of the Contract was the Equipment, and the alleged samples were of the products which the Equipment was intended to produce. Article 35(2)(c) of the *CISG* is not relevant in the situation where the samples in question are of products produced by the subject matter of the Contract, and is therefore not relevant here (RS 19.11.07, p. 20).

In summary, Respondent argues that the parties never agreed on samples. Even if they had, Claimant failed to show (i) that it had collected products from the relevant commissioning, the fifth; (ii) these products had been compared with the alleged samples; and (iii) that relevant differences had been thus demonstrated (RS 19.11.07, p. 45).

140. As the issue of samples and the significance of Annex 2 are closely related, the Tribunal's comments and conclusions are dealt with together below at para. 143 ff.

Relevance and significance of the specifications in annex 2 of the contract

141. Claimant claims that the Products produced are not in accordance with the contractual specifications (CL 08.06.07, p. 18).

Claimant also states that "*Annex 2 made detailed stipulations in respect of the technology, outlook, basic formula, volume density, water content, and size etc for the chocolate filled chocolate pillow, nougat chocolate pillow, pillow with cream filling mass, chocolate coated cornflake, whole wheat flakes, multi grain flakes, puffed wheat under the Contract*" (CL 08.06.07, p. 12).

However, Claimant has also consistently argued that the relevant standard for comparison is the samples bought in Germany (CL 08.06.07, p. 25; CL 17.09.07, pp. 19-20).

With respect to the raw materials, Claimant claims it paid close attention to the quality of the raw materials, that the Contract nowhere stated that the raw materials should be European, and that it is not scientific to allege that the raw materials from Europe are of

higher quality than raw materials from China (CL 19.11.07, p.14). Claimant therefore seems to claim that the non-conformity of the products is in no way connected to the raw materials it supplied, and a potential non-conformity of the raw materials did not affect the end product. Moreover, Respondent has failed to prove that the raw materials did not comply with the contractual requirements (CL 19.11.07, pp. 12-14).

142. Respondent's view is that though the Chinese version of Article 14.3 of the Contract mentions samples, the English version prevails (see above para. 100) and the only relevant standard is Annex 2 (RSP 03.08.07, p. 37-38).

Respondent further stresses that the product specifications in Annex 2b of the Contract are guidelines only, and simply give information on what products can be produced with given raw materials, defined in the Raw materials specifications in Annex 2a. Each product specification in Annex 2b of the Contract clearly states that "*[a]bove values [i.e., technical data] are proposed by Switzerland B Food Production Equipment Co., Ltd. and serve as a guideline. They may vary depending on product characteristics. Any deviations from these values need to discussed*" (RSP 02.04.07, p. 6).

Respondent claims that Claimant's raw materials did not accord with the Contractual standards in Annex 2a (RS 19.11.07, p.15), which means that the products of the Equipment can therefore not be judged by the Contractual standards in Annex 2b (RS 19.11.07, p.13). In spite of this, Respondent argues that despite the non-conforming raw materials, the products produced were actually good in terms of quality and production capacity (RS 19.11.07, p. 17), and were in fact as good or better than other comparable Chinese products (RS 19.11.07, p. 24). It was Claimant's responsibility to supply raw materials in accordance with the Contract, it was not Respondent's responsibility to communicate with Claimant to resolve this issue. However, Respondent frequently brought up the issue of the non-conforming raw materials with Claimant (RS 19.11.07, p. 17).

Respondent views Claimant supplying insufficient raw materials, but subsequently refusing to change the formula in the Contract as an attempt to sabotage the successful commissioning (RSP 03.08.07, p. 21).

The tribunal's comments and conclusions

143. As the questions of the existence of samples and the significance of the specifications in Annex 2 of the Contract are related, they will be dealt with together.

144. The first point to address is whether the Contract between the parties contains any agreement on a reference sample for the products produced by the Equipment. Article 14.3 of the Contract deals with the issue of the standards of the final products, and states that "*The Seller [Respondent] warrants that the equipment will perform in accordance with the quality and performance data stipulated under Annex 2*".

145. Annex 2 in turn contains 2 sections:

(1) Annex 2a contains "Raw materials specifications", which are qualified as follows: "*Since above values relate to a natural, genuine product they can only serve as general guideline only. Any deviations from these values are recommended to be discussed*."

(2) Annex 2b contains "*Product specifications*", which are also qualified as follows: "*Above values are proposed by Switzerland B Food Production Equipment Co., Ltd. and serve as a guideline. They may vary depending on product characteristics. Any variations from these values need to be discussed*".

146. The Contract does not provide for the existence of any reference samples. It further arises from the wording of Annex 2 that the specifications therein are to be guidelines only. This makes sense, as the products are made from natural raw materials which naturally vary from batch to batch.

147. However, the Chinese version of Article 14.3 of the Contract does not precisely reflect the English version and contains a reference to the "*samples [sic] in Annex 2*" in contrast to the "*quality and performance data in Annex 2*" in the English version. There is no mention whatsoever of the existence of samples in the English version of the Contract.

148. Claimant's understanding appears to be a result of the discrepancy between the English and Chinese versions of the Contract (see paras. 138 above). Though the English version of the Contract prevails (according to Article 23 of the Contract), it is understandable that this error may have led to some degree of misunderstanding on the part of Claimant, who as Chinese speakers, naturally referred to and relied on the Chinese version of the Contract in preference to the English version. However, Article

23 of the Contract is very clear in both the English and Chinese versions, and states that "*Chinese and English in this Contract are valid in law. In case there are some disputes, the ruling language should be English*".

149. Moreover, no real samples can be found in Annex 2 of the Contract, there is no mention of samples in the English version of the Contract, and the Chinese version does – apart from that one mention of samples – not contain any further description or reference to these samples. Thus, it is clear that the discrepancy between the English and Chinese version is linked to a translation error, and given the priority of the English version, Claimant must bear the responsibility for its misunderstanding, however sympathetic the Arbitral Tribunal may be.

150. Further, Claimant expresses conflicting views. On the one hand, Claimant claims that the correct standard for the final products are the samples bought in Germany. On the other hand, Claimant simultaneously claims that the correct standard for reference is the technical data contained in Annex 2 of the Contract (CL 08.06.07, p. 12).

151. In the light of the above, the Tribunal is of the view that there are no reference samples agreed under the Contract. The Tribunal concludes that in establishing whether the products produced by the Equipment meet an acceptable standard, the test will be, in accordance with Article 35(2)(a) of the *CISG*, whether the products produced by the Equipment were in compliance with Annex 2b of the Contract.

B. Did Respondent Fulfil its Obligations Under the Contract?

152. Having examined the specific key points made by Claimant above, in order to properly assess the merit of Claimant's claims, the Tribunal must look at the Contract and its performance in a more general sense and take a global view on whether Respondent has fulfilled its obligations.

1. Had a sufficient commissioning been performed by the parties?

153. Claimant's view is that after five test runs, Respondent had not fulfilled the terms of the Contract, particularly with respect to the quality of the products, the capacity of the Equipment, and Respondent's obligations to provide support in optimizing the lines. In fact, after five test runs, Respondent completely stopped cooperating with Claimant (Article 14 of the Contract) (CL 08.06.07, p. 42).

Claimant therefore claims that Respondent failed to comply with its accessory duties under the Contract to assist Claimant during the erection and the commissioning and to remedy any defect according to the contractual warranty.

Further, Claimant argues that Respondent wrongly claimed that the equipment had been commissioned and thereby further refused to honour its contractual obligations (CL 01.08.06, p. 3).

Claimant feels the five commissioning were not sufficient, as evidenced by the fact that Claimant has also asked for the Tribunal to make an interim award, for an independently supervised sixth commissioning to take place (CL 19.11.07, p. 4 ff).

154. Respondent's view is that installation, commissioning and tests were all concluded successfully even though there were problems, and Claimant unreasonably refused to sign the take-over certificates (RSP 18.12.06, p. 7) (for a detailed summary of the commissioning, see above para. 64 ff).

In any case, Article 14.1 of the Contract clearly states that "*The Buyer is responsible for erection and commissioning of the Equipment under the supervision of the Seller, and in accordance with the stipulations of the technical documentations provided by the Seller*". Therefore, Claimant, rather than Respondent, is responsible for commissioning; and Respondent had the right to demand that Claimant follow Respondent's instructions. Nevertheless, Respondent at all times offered training and good supervision, and warned Claimant about potential problems (RS 19.11.07, p. 25).

Claimant did not comply with Contract requirements to erect and commission Equipment etc under the supervision of the Seller and the construction work for the factory was improperly done (RSP 03/08/07, pp. 26-27; RSP 19.10.07, para. 34). Respondent cites the following examples of factors which affected the commissioning: (i) Claimant installed the Equipment before its accommodation was ready (RSP 03.08.07, p. 27); (ii) The erection was performed by unskilled employees (RSP 03.08.07, p. 33); (iii) Claimant did not provide qualified utilities, e.g., the steam provided by Claimant was not saturated steam, it was wet steam (RSP 03.08.07, p. 26); and (iv) Claimant did not take good care of the Equipment (RSP 03.08.07, p. 27; RSP 19.10.07, para. 148; Exhibits RX-37 and 47).

In spite of this, Respondent claims that all the lines have been confirmed as being of good quality or have been actually or expressly accepted (RSP 19.11.07, p. 23). In

support of this argument, Respondent claims Claimant has been using the Equipment in large-scale commercial use since before September 2005 (see above paras. 83 and 84). Even after five commissioning, Claimant still offered to accept the Equipment for a discount on the Contract Price, showing that in actual fact the commissioning were successful (RS 19.11.07, p. 45).

155. The Tribunal's Comments and Conclusions

(1) The respective obligations of the Parties:

Article 14.1 of the Contract states that "***The Buyer*** [Claimant] ***is responsible for erection and commissioning of the Equipment*** *[sic] under the supervision of the Seller* [Respondent], *and in accordance with the stipulations of the technical documentations provided by the Seller*". Article 14.1 further provides that "*The Seller shall offer continual service for erection, commissioning and training until the take-over has been achieved*".

So, as previously discussed (see para. 137 above), Claimant was primarily responsible for the commissioning, and Respondent was responsible for supervising Claimant during that process. What does this mean? It means that Claimant was responsible for supplying everything necessary for the commissioning of the Equipment supplied by Respondent to take place. This included preparing the accommodation for the Equipment, supplying the manpower with the required expertise to install the Equipment, supplying all the necessary utilities and components explicitly excluded from the Scope of Supply in Annex 1 of the Contract (e.g., various bins and silos, steam supply, water supply, etc), supplying staff with the requisite skill levels to be trained to operate the Equipment, and supplying the correct raw materials. Claimant can therefore be seen as being responsible for supplying manpower and facilities. Respondent's responsibility during the commissioning can be seen as supplying "know-how" — Respondent was required to be on site to supervise and instruct Claimant in the installation and commissioning where necessary.

(2) The Commissioning

In total, five commissioning were performed, as follows:

- From January 2005 to April 2005, the first commissioning period took place. According to Claimant, the products produced during the commissioning tests run during that period did not comply with the contractual requirements

(CL 08.06.07, p. 18). According to Respondent the commissioning tests had to be interrupted because of a problem with the steam supply system, which was the responsibility of Claimant (Exhibit RX-8).

- From May 2005 to June 2005, a second commissioning period took place. According to Claimant, the products produced by the Puffing Line during the commissioning tests run during that period were still not compliant with the contractual requirements and the Extrusion Line could not function properly (Exhibits CX-6, 7 and 8). According to Respondent, many of the problems which occurred and were listed in the "Action list for technical problems" on 3 June 2005 were not unusual and moreover under Claimant's responsibility, in particular concerning the quality of the multi-grain use, which would be crucial for the quality of the end product (RSP 18.12.06, p. 9, para. 16; CL 25.07.06, Exhibit CX-4a).
- From September 2005 to October 2005, a third commissioning period took place, the main task of which was to test the consumption of raw material, of power and the issues with the equipment (see Commissioning Memo in October 2005 and Commissioning Memo in October 2005, Exhibit CX-4i). Claimant asserts that due to various problems, the tests had unsatisfactory results (Exhibits CX-4e and CX-8). According to Respondent, in September Claimant was already operating the lines under normal industrial operation, which showed that the lines were functioning satisfactorily, although it simultaneously refused to issue the Taking-Over Certificate for the whole plant.
- From November 2005 to December 2005, a fourth commissioning period took place. According to Claimant, the performance tests for the Puffing Line had been executed but the results were unsatisfactory. As regards the Extrusion Line, a performance test had been executed on 30 November 2005, but the results were unsatisfactory. On 7 December 2005, the product for Granola had been accepted by Claimant although not in compliance with the contractual formula. As to corn flakes and three pillows, various problems remained (Exhibit CX-8). As mentioned in its fax on 23 December 2005, Respondent considered the products to be of good quality and considered that it had fulfilled all its contractual obligations.

- From February 2006 to March 2006, a fifth commissioning period took place. Claimant asserts that due to various problems, the tests had still unsatisfactory results (Exhibit CX-8, pp. 10-11; CL 08.06.07, pp. 18, 25-26, Appendix 14). Respondent asserts that these tests were successful, the only remaining work related to the optimization of the equipment, and that only these results should be taken into consideration. Respondent maintains that any other document or material connecting with any event before the last commissioning is not relevant to Claimant's request for avoidance (RSP 19.10.07, para. 15) (see para. 64 ff for more detail on the commissioning).

In summary, Respondent claims that after five commissioning, the Equipment was operating satisfactorily, and that the products produced were also satisfactory. Respondent therefore claims that the refusal of Claimant to sign the take-over certificates was unreasonable. Claimant for its part claims that the equipment was not yet performing satisfactorily. An important point to note is that the Contract did not provide any resolution mechanism for the eventuality that the Parties could not reach an agreement on the performance of the Equipment.

In line with the Tribunal's determination that the commissioning of the Equipment was the primary responsibility of Claimant, while Respondent had a duty to supervise, this question can be broken into two parts: (i) did Claimant fulfil its obligation to commission the Equipment? and (ii) did Respondent fulfil its obligation to supervise that commissioning?

(3) Findings:

- Did Claimant fulfil its obligations to commission the Equipment?

  A complicated cooperation project like this requires not only the financial commitment of the Contract price, but also dedicated and motivated staff to make delicate and complicated equipment work at its optimum. From this point of view, Claimant does not seem to have shown sufficient commitment to efficiently cooperate. The Tribunal is left unconvinced that Claimant lived up to what could be reasonably expected of it in the execution of this project. Examples include the incomplete accommodation for the Equipment when the installation began, as evidenced by Respondent's pictures, and not really disputed by Claimant, the unqualified installation staff, the unsuitable utility supplies, and the frequent changing of personnel who were to operate

the Equipment. It is therefore apparent that there are areas where Claimant could have better fulfilled its duties under the Contract to ensure the success of the project. The Arbitral Tribunal, however, believes that this failure on the part of Claimant is more due to a lack of experience and expertise and a very early misunderstanding of the nature of the Contract, rather than a lack of good faith on the part of Claimant.

- Did Respondent fulfil its obligations to supervise the commissioning?

  The files do not indicate that Respondent failed to comply with its duty to supervise commissioning and instruct Claimant's team. Indeed, for each commissioning, Respondent placed teams of technicians on site and memos were drafted before and after in order to set forth what exactly was needed for the commissioning and how it went. It therefore appears that Respondent complied with its obligation to supervise the erection and commissioning as provided for in the Contract. Actually, in the light of the adverse circumstances outlined above, the version of events that arises from the briefs and the hearing is that Respondent seems to have taken much more control of the commissioning process than the words of the Contract suggest it would. This is for example evidenced by the fact that Respondent performed two extra commissioning, which were not provided for in the Contract, and the fact that Respondent even accepted to provide and/or pay for raw material for commissioning, although providing such raw material was Claimant's obligation.

  Although this extended service from Respondent was originally not provided for in the Contract, it arose as necessary for the success of the project, given the lack of experience on the side of Claimant. Indeed, as mentioned above (see above para. 137 *in fine*), the Contract initiated a project which required complicated and comprehensive cooperation between Claimant and Respondent, and could not succeed without the full attention and motivation of both parties. Therefore, even though the Contract may have set forth very specific obligations for each party, the success of the project required that those obligations be slightly adapted to the real circumstances and the level of experience of each party.

2. To what extent was Respondent responsible for Claimant's dissatisfaction?

156. Claimant asserts that Respondent insisted on changing the contractual formulas for the products, which Claimant considered to constitute a breach of the Contractual obligations (CL 08.06.07, p. 25).

Claimant also consistently alleges that the products produced by the lines never reached the contractually agreed standards, for example, Claimant cites the memo on 2 November 2005 between Claimant and Respondent, and the "Summary of actual product status" (see above para. 77) and the "Proposal for completion of A Cereal Foods Project" (see above para. 78), both on 18 January 2006.

157. In summary, Respondent's position is that it has fulfilled all its contractual obligations, and that in fact, its performance was far in excess of its obligations under the Contract in the face of considerable difficulties, in the interests of furthering its and Claimant's common interests.

Thus, Respondent maintains that if any lack in conformity of the goods or the equipment was to be established, such lack would be due to Claimant's failures and would not be attributable to a breach of Respondent's obligations.

The Tribunal's comments and conclusions

158. The fundamental question here is whether the products produced by the Equipment provided by Respondent fulfil the specifications stipulated in Annex 2 (see para. 151 above).

Both parties have made substantial submissions on this point. On balance, the Tribunal finds the most convincing "snapshot" of the real situation regarding the quality of the Products produced by the Equipment to be contained in the Summary of Actual Product Status (see above para. 77) and the Proposal for completion of A Cereal Foods Project (see above para. 78), both on 18 January 2006. The Tribunal notes that these are the last documents which were mutually agreed by the Parties, and were signed by representatives of Claimant and Respondent respectively. These documents clearly demonstrate that after the fourth commissioning, of all the products, only the granola product had been accepted. All the other products were agreed by the parties to still be unsatisfactory in some way. This failure to reach the agreed standards in Annex 2b of the Contract is a *prima facie* breach by the Respondent of the warranty contained in Article 14.3 of the Contract (see above para. 53).

For its part, Respondent has argued that the raw materials provided by Claimant did not meet the specifications given in Annex 2a. Respondent also states that without conforming raw materials, the Product specifications in Annex 2b cannot be attained. As Claimant is responsible for providing the raw materials for the commissioning under Article 14.3.2 of the Contract, Respondent argues that if the products did not reach the required standard, it was Claimant's fault. Further, Respondent argues that the specifications stipulated in Annex 2 were guidelines, and that they should not be handled as strict requirements.

On the other hand, Claimant clearly has some genuine dissatisfaction with Respondent's performance of the Contract. The Tribunal discerns that there is a real expectation gap between what Claimant expected from the Contract and what Respondent supplied.

In consideration of the Parties' submissions, the Tribunal is of the view that the overall narrative of the dispute shows that Claimant was to some extent justified in its expectations, and also shows Respondent to have been a little complacent with regard to its own abilities. Respondent should have exercised a higher degree of circumspection during the negotiation and bidding process, including a very serious assessment of Claimant's ability to execute the Contract and of how Respondent could manage Claimant's expectations. Respondent was clearly under some illusions regarding Claimant's position as an inexperienced player in the retail food industry: though Claimant had ambitions in this area, it did not really have the expertise to realise them.

In consideration thereof and of the Parties' submissions, the Tribunal notes that if Respondent were allowed to succeed with the argument that the standards set forth in Annex 2b were non-binding guidelines, Respondent would be allowed to avoid any of its contractual commitments regarding the standard of the products produced by the Equipment. If that was the case, it is difficult to understand why such a standard was inserted in the Contract in the first place. Indeed, even if the specifications of Annex 2b were dependant on various factors, such as the quality of the raw material, and may therefore not be considered as establishing an immutable standard, they nevertheless created a reasonable expectation on Claimant's side concerning the quality of the products. The Tribunal is therefore of the view that Annex 2b must have some relevance, and the Tribunal should not allow Respondent to succeed with this argument.

The Tribunal therefore concludes that in the light of the complexity of the project at stake and the global circumstances of the case, Respondent is at least partly responsible for the failure to fulfil the specifications set forth in Annex 2b and should therefore not be relieved of its liability under its contractual warranty with regard to the product specifications (see para. 53 above).

C. Avoidance of the Contract by Claimant

1. Does Claimant have the right to avoid the Contract?

159. As described above, Claimant bases its right to avoid the Contract on a double line of argument deriving on one hand from the 3%-Rule (Article 15 of the Contract) and on the other hand from the remedy system of the *CISG* (Article 49 of the *CISG*) (see above paras. 91 ff).

The Claimant also consistently alleges that the products produced by the lines never reached the contractually agreed standards. For example, Claimant cites the memo on 2 November 2005 between Claimant and Respondent, and the Summary of actual product status (see above para. 77) and the Proposal for completion of A Cereal Foods Project (see above para. 78), both on 18 January 2006 (concerning the product standards which will be applied by the Tribunal, see above para. 151).

160. Respondent's position is that it fulfilled all its contractual obligations, and that in fact, its performance was far in excess of its obligations under the Contract in the face of considerable difficulties, in the interests of furthering its and Claimant's common interests. Therefore, Respondent argues that (i) there was no breach of contract; (ii) if there was a breach of contract, it was not a fundamental breach; (iii) if there was a fundamental breach, Claimant lost its right to avoid the Contract due to its inappropriate behaviour; and (iv) in any case Claimant is precluded from claiming indirect damages based on Article 15(1) of the Contract (see paras. 99 ff).

As to the 3%-Rule, there was no breach. Respondent understands the 3%-Rule as referring to the production performance per hour (kg produced per hour), i.e., the production capacity as the relevant specification to measure the performance of the Equipment. Thus, according to Respondent, the performance of the Equipment is within the requirements of the 3%-Rule.

The Tribunal's comments and conclusions

161. The fundamental question here is whether or not Respondent committed a breach that was either "fundamental" in the light of Article 25 of the *CISG*, or fundamental in such sense that the Contract itself would provide for Claimant's right to avoid the Contract.

(1) As mentioned above (see para. 114), Article 49(1) in relation with Article 25 of the *CISG* entitles the Buyer to declare the contract avoided where the Seller failed to perform any of his obligations under the contract and this non-performance amounts to a fundamental breach of contract.

The concept of "**fundamental breach**" is defined in Article 25 of the *CISG* and is given where the breach caused a **substantial detriment** to the other party, i.e., a detriment that substantially deprives him of what he is entitled to expect under the contract, and such detriment was **foreseeable** to the breaching party at the time of the conclusion of the contract.

Although the Arbitral Tribunal is of the opinion that Respondent committed a breach by not living up to all the expectations that lay upon it due to the complexity of the project and its position as expert in the field (see above para. 158), it also believes, as explained above (see paras. 135-151), that Claimant's expectations were not all justified. In the memo of 18 January 2008, signed by both parties, the Equipment and products were confirmed to be of good quality, even though they did not fully meet the standard set forth in Annex 2b and some further improvement of the products was contemplated (see CX 4m). Thus, the Arbitral Tribunal finds that Respondent's failure in the present project may not be considered "fundamental" in the light of Article 25 of the *CISG* and therefore does not entitle Claimant to avoid the Contract.

(2) As concerns the 3%-Rule, the Arbitral Tribunal finds that the term "under-performance" is to be interpreted as referring to the production capacity. Indeed, if Claimant's reasoning was to be followed, the 3%-Rule would actually entitle the Buyer to avoid the contract for very minor problems, which would be contrary to the *ultima ratio* nature of the right to avoid a contract of such complexity and scope.

> With respect to this, Claimant failed to prove that the quantities of product which the Equipment was able to produce were less than the quantities specified in the contractual documents by a margin of more than 3%.

It is the Arbitral Tribunal's position that in such contractual relationships as the one at hand, which subsist for several years and require substantial commitment and investment from both parties, the right to avoid the contract should be handled very restrictively. Indeed, avoiding a contract aims to re-establish the pre-contractual status, thus create a situation as if the contractual relationship had never existed. This is rarely practicable and is extremely burdensome for the losing party, which simultaneously loses the contract and has to bear the costs of losing it.

Thus, in the light of the overall circumstances of the case and the substantial efforts put in by both parties, the Arbitral Tribunal finds that Claimant is not entitled to avoid the Contract be it under Articles 49 and 25 of the *CISG*, or under the contractual 3%-Rule.

For the sake of completeness, it should be noted that even if Respondent's failure was considered fundamental so as to entitle Claimant to avoid the Contract, it is very likely that Claimant would have lost such right based on Article 82 of the *CISG*. Indeed, Article 82, para. 1, of the *CISG* states that the Buyer loses the right to declare the contract avoided if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. It is not contested that Claimant would not be in a position to give back the equipment to Respondent in the condition in which it received it, nor did Claimant bring forward that any of the exceptions of Article 82, para. 2, of the *CISG* would apply. Moreover, it is questionable whether Claimant would have complied with the requirement of "timely" avoidance in accordance with Article 49, para. 2, of the *CISG*.

2. Is Claimant entitled to an alternative remedy?

162. This Tribunal has found as a matter of fact that the Contract was substantially performed, and Claimant's claim to avoid the Contract must therefore fail (see para. 170). The Tribunal has also decided that with respect to the products produced by the Equipment, the standard upon which the Tribunal will adjudicate this arbitration is whether the products produced reach the standard specified in Annex 2b to the Contract (see above paras. 143-150), and has found as a matter of fact that the products produced by the Equipment do not reach this standard (see para. 151).

However, the Tribunal has also reached the conclusion that although the failure to reach the standard of Annex 2b constitutes a breach of Respondent's warranty contained in Article 14.3 of the Contract (see above para. 158), it is not of a fundamental feature and is thus not entitled Claimant to avoid the Contract.

This puts Claimant in the unfortunate position of its claim being to some extent justified, yet a strict interpretation of its legal request to avoid the Contract leaving it without a remedy. The question therefore arises whether the Tribunal can grant Claimant an alternative remedy.

163. The Tribunal notes that from the start of the project, Claimant and Respondent expressly contemplated that price reduction would be a remedy in the event that there was a dispute between the parties. Article 15(1) of the Contract states:

> "*…The Seller shall pay 10% (Ten Per Cent) of the total value of the Contract to the Buyer if the final percentage of underperformance is between 1% (One Per Cent) and 3% (Three Per Cent), including 3% (Three Per Cent). The Seller shall compensate 3.3% (Three point three percent) of the total value of the Contract to the Buyer if the final percentage of underperformance is 1% (One percent); and if 2% (Two percent) underperformance then compensates 6.7% (six point seven percent) of contract value; and if 3% (Three p*ercent) *underperformance then compensates 10% (Ten percent) of contract value…*"

The principle of price-reduction is also clearly stipulated in the *CISG*, namely in Article 50, which states that:

> "*If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at that time.*"

There is therefore clearly a legal basis for awarding the remedy of price reduction in this arbitration.

164. The Tribunal further notes that the remedy of price reduction has been consistently present in Claimant's submissions and arguments, as follows:

(1) Firstly, the Tribunal notes that Claimant continued to recognise price reduction as a remedy for contractual disputes when it attempted to negotiate a price reduction to resolve the dispute in the months following the initiation of the arbitration, in the autumn of 2006 (see above paras. 85-89).

(2) Secondly, the Tribunal is cognisant of the fact that during the hearing, Claimant expressly requested a price reduction as an alternative remedy.

165. Therefore, although Claimant has not expressly raised an alternative request for price reduction in its submissions, this Tribunal is willing to conclude, from

(1) the fact that price reduction as a remedy was expressly contemplated by the parties in their Contract;

(2) the recognition of price reduction as a remedy in Article 50 of the *CISG*;

(3) the fact that price reduction as a remedy has been consistently present in Claimant's arguments from the start of the dispute;

(4) the principle of "*qui veut le plus, veut le moins*"; and

(5) the Tribunal's inherent jurisdiction to make the award which is just in the circumstances;

that it is implicit in Claimant's claim that if its claim for avoidance of the Contract should fail, it expects that an alternative remedy such as damages for late delivery or a price reduction should be available.

166. It arises out of Respondent's requests for relief and the circumstances of the case (see e.g., above para. 82), that Respondent rejects Claimant's entitlement to a price reduction based on the argument that there was no breach on part of Respondent and that any failure in the project is linked to failures of Claimant itself (see above para. 99).

The Tribunal's comments and conclusions

167. As discussed above at paras. 162-165, this Tribunal finds that there is sufficient legal basis for awarding a price reduction as a remedy for Claimant.

The next question is whether Respondent's failure as described above (para. 158) in fact entitles Claimant to a price reduction.

As discussed at para. 158 above, though Respondent did earnestly attempt to fulfil its obligations under the Contract and the Contract was substantially performed, there were some areas where it was under some crucial misapprehensions regarding the situation, which led to some divergence in the cooperative relationship required for the full success of the project.

In particular, the Tribunal has found that the applicable test for judging the products produced by the Equipment is Annex 2b of the Contract (see para. 151), and that the products produced by the Equipment did not in fact meet that standard, which was a breach of the warranty contained in Article 14.3 of the Contract (see para. 158).

In consequence, the Tribunal finds that Claimant is entitled to a price reduction on the Contract price to remedy this breach of warranty.

168. Having established that Claimant is therefore entitled to a price reduction, the question arises of how that price reduction should be calculated.

Article 50 of the *CISG* states that the buyer may reduce the price of the goods in the same proportion that the value of the goods supplied bears to the value of goods conforming to the Contract (see above para. 163).

The Tribunal will therefore base its award by placing a value on the detriment caused to Claimant by this denial of expectation caused by the fault of Respondent.

In the light of:

- the price reductions contemplated by the parties in the Contract and otherwise (see para. 164);
- the Tribunal's finding that Respondent is in breach of the warranty contained in Article 14.3 of the Contract (see above para. 158); and
- the fact that the Contract has however been substantially performed (see in particular CX-4m, Memo on 18 January 2006 and signed by both parties);

the Tribunal is of the view that Claimant should be awarded a price reduction of 15% of the full contract price.

D. The Tribunal's Findings and Determination as to Liability and Quantum

169. In the light of the above considerations, the Arbitral Tribunal finds that:

(1) Claimant is not entitled to avoid the contract;

(2) the Contract has been substantially performed; and

(3) Respondent did not fully discharge its responsibilities under the Contract, was in breach of the warranty in Article 14.3 of the Contract and should therefore bear

a liability of 15% entitling Claimant to a corresponding reduction of the Contract price, i.e., of about CHF1.9 million.

IX. COSTS AND THEIR ASSESSMENT

A. The Arbitration Costs

1. Total Costs

170. The arbitration costs were secured by deposits of the Parties.

2. Allocation of costs between the parties

171. The allocation of the costs should follow the event and therefore the Tribunal decides as follows: the parties each bear the fees paid for their own nominated arbitrators, and the Tribunal orders that Respondent reimburse Claimant for arbitration fees incurred.

B. Parties' Legal Costs

1. Costs submissions by counsel to both parties

172. Respondent argues that claimant's total legal costs have not been clearly substantiated, and claims that they are excessively high (RSP 26.03.08, para. 16).

173. Claimant has not queried Respondent's legal costs.

2. Allocation of costs and reimbursement to the more successful party

174. The Tribunal first of all notes that Claimant's legal fees are substantially higher than Respondent's. The Tribunal also notes that Respondent challenges the reasonableness of Claimant's legal fees (RSP 26.03.08, para. 16), whereas Claimant does not comment on Respondent's legal fees.

175. The starting point for the allocation of legal costs between the parties is that litigation or arbitration is a risk contemplated by the parties to any Contract, and the risk should be to some extent shared. On this basis, the Tribunal adjudicates that it would be a fair and reasonable allocation of risk between the parties in the circumstances for a portion of Respondent's legal fees to be recovered from Claimant. The Tribunal therefore awards Respondent for the payment of legal fees, by way of deduction against the price reduction awarded to Claimant.

X. HOLDING OF THE AWARD

Based on the foregoing considerations and reasons, the Arbitral Tribunal renders its decisions by holding as follows:

As to Jurisdiction:

The Arbitral Tribunal affirms that Claimant is a proper party to the present proceedings and that it has legal standing to file the claims arising out of the Contract for the purchase by Claimant of a Cereal Puffing Food Processing Line ("Puffing Line") and an Extrusion Food Processing Line ("Extrusion Line") of 30 September 2003 against Respondent.

Respondent's pleas regarding jurisdiction and legal standing are, therefore, denied.

As to Claimant's request for an Interim Award:

Claimant's request for an interim award is denied.

As to the Substance:

(a) Claimant's main request for avoiding the Contract No 03BBCAI8040 between Claimant and Respondent of September 2003 is hereby denied.

(b) Respondent owes Claimant a fractional restitution of about CHF 1,900,000 in respect of the purchase price which had been paid by Claimant, subject to the determination below under the heading "Final Payment Due to Be Made By Switzerland B Food Production Equipment Co., Ltd. to China A International Co., Ltd.".

(c) Any and all further claims, in particular Claimant's claims for a full restitution of the sum of over RMB 81 million for the deliveries, over RMB 20 million for the construction of the workshop facilities, over RMB 3 million for further costs including banking charges, customs, insurance, freight, and any and all other costs as claimed by Claimant, are hereby denied.

As to the Arbitration Costs:

(a) The arbitration costs were secured by deposits of the Parties.

(b) Taking into consideration the other findings of the Tribunal, the Tribunal orders that Respondent reimburse Claimant for arbitration fees incurred.

As to the Parties' Legal Costs:

Regarding the Parties claims for a compensation of the costs incurred in the present arbitration (lawyers' fees, notary costs, travelling expenses for the Parties' counsel, representatives, witnesses/experts), it is hereby determined that Claimant pays the costs to Respondent.

Final Payment Due to Be Made By Respondent to Claimant

The Tribunal determines further that Respondent may deduct from the payment owed to Claimant. Claimant is also entitled to reimbursement from Respondent of partial arbitration fees, and such RMB amount shall be converted into CHF at the current exchange rate (such rate as indicated by the Bank of China as of the day of remittance).

Such net amount shall be paid by Respondent to the bank account of Claimant within 30 days of the receipt of this Award by Respondent's counsel.

For the purpose of enabling Respondent to effectuate the aforementioned net amount, Claimant shall within 15 days from receipt of this Award by its counsel indicate the bank account details to Respondent.

If Respondent does not satisfy the Award within 30 days from receipt of this Award by its counsel, interest (at the Bank of China's daily rate) will be payable by Respondent from the 31st day onwards, up to the day of full paymemt.

This Award is communicated by CIETAC in one original to Claimant and in one original to Respondent. These originals shall be addressed by CIETAC to the counsel of record of the Parties. One further original is kept by CIETAC, and copies of the signed Original Award are sent to the Arbitrators.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Chinese Company A

Chinese Company B

Claimants

v.

International Organization A
German financial institution B
Singapore Company C

Respondents

Matter for arbitration: Disputes over share capital subscription agreement

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. FACTS

A. The Parties

1. The Claimants

(1) Claimant A is a company incorporated in China.

(2) Claimant B is a 100% owned subsidiary of Claimant A.

The two Claimants have acted jointly in this arbitration and are referred to in this arbitration as the "Claimants" even if there are matters which only concern one of them. When necessary or important to distinguish between the two, reference is made to their respective names.

2. The Respondents

(1) Respondent A is an international organization.

(2) Respondent B is a financial institution incorporated and existing under the laws of the Federal Republic of Germany.

(3) Respondent C is a limited liability company incorporated and existing under the laws of the Republic of Singapore.

The three Respondents have acted separately and independently in this arbitration. Their defenses, however, coincide to a large extent. They are therefore in this award often jointly referred to as the "Respondents" even if their respective submissions are not identical. When necessary or important to distinguish between the three, reference is made to their respective names.

B. Place of Arbitration, Language and Governing Law and Rules

As follows from the Subscription Agreement the arbitration shall take place in Beijing, China and be conducted in both Chinese and English. The Parties have further agreed that the Agreement shall be governed by and be construed in accordance with the laws of China, and that the *CIETAC Rules* effective from 1 May 2005 shall apply.

C. The Procedural History of the Arbitration

08/2009: Claimants filed its Arbitration Application.

10/2009: CIETAC Secretariat issued the Notice of Arbitration.

01/2010: The Respondents submitted the Statement of Defense. Respondent C also submitted the Counterclaim against the Claimants. CIETAC accepted the Counterclaim after completing the filing procedures.

08/2010: The Claimants jointly appointed Arbitrator X as the arbitrator. The Respondents jointly appointed Arbitrator Y as the arbitrator. In accordance with the parties' agreement, Arbitrator X and Arbitrator Y have jointly appointed Arbitrator Z as the presiding arbitrator of this case. The aforementioned three arbitrators have formed the arbitral tribunal to hear this case. CIETAC Secretariat notified the parties of the formation of the Tribunal.

08/2010: The Arbitral Tribunal issued the First Procedure Order.

09/2010: CIETAC Secretariat notified the parties that the Arbitral Tribunal has decided to hold a Pre-hearing Meeting of this case in September 2010.

09/2010: A Pre-hearing Meeting was held in Beijing, and the Parties reached an Agreement on Procedural Matters.

10/2010: The Arbitral Tribunal issued the Second Procedure Order according to the Agreement on Procedural Matters reached by the Parties, and the Arbitral Tribunal decided to hold the oral hearing for two days in November 2010, with one day afterwards in reserve.

11/2010: The oral hearing was held in Beijing. Both the Claimants and the Respondents attended the hearing. The Parties have made statements, examined the original evidence and answered the Tribunal's questions.

11/2010: The Arbitral Tribunal issued the Third Procedure Order.

D. Summary of the Circumstances of the Case

In 2003, Chinese Municipal Government of City D issued a plan to relocate the downtown industry in District E in the city within five years. In May 2023, Claimant A concluded an *Enterprises Relocation Contract* with the relocation implementing entity appointed by Government of City D. In accordance with this contract, Claimant A should relocate before June 2007, and would receive a relocation compensation of more than RMB 400 million.

During the relocation of its fine chemistry section, Claimant A established Claimant B in District E in March 2005.

In the second half of 2005 the Claimants entered into negotiations with several overseas investment organizations in order to raise funds for the Claimants' relocation and expansion. As the negotiations progressed slowly, Claimant A raised funds for Claimant B by short-term bank loans and other short-term sources.

The problem remained, however, and Claimant B needed equity investments to enhance its operation capacity.

In September 2005, Claimant A concluded a Financial Services Agreement with Corporate F, which required Company F to provide investment banking services and make financing arrangement for the Claimants' relocation.

In 2006, Corporate F approached Respondent A regarding a potential investment in Claimant B to re-finance Claimant B's relocation and expansion. These contacts resulted in a joint mandate letter (the "Mandate Letter"), which was signed by Respondent A and two other investors, Investor G and Respondent B in June 2007. After some negotiations, Investor G decided not to participate in the investment. Instead Respondent C joined the negotiations as a potential investor in or around November 2007.

After long negotiations, Claimant A and Claimant B on one side and Respondent A, Respondent B and Respondent C on the other in September 2008 executed the Subscription Agreement, out of which the present dispute arises. According to the Subscription Agreement, Respondent A, Respondent B and Respondent C should invest US$ 10 million, US$ 5 million and US$ 20 million, respectively, to acquire approximately 10%, 5% and 21% of Claimant B's total registered capital.

Apart from the Subscription Agreement the Parties in September 2008 also executed an Equity Joint Venture Contract and Amended and Restated Articles of Association of Claimant B. The Subscription Agreement together with the Joint Venture Contract and the Articles of Association are the "JV Documents" as defined in the Subscription Agreement. Together with the Account Agreement and certain other documents they constitute the "Transaction Documents" as defined in the Joint Venture Contract for the Claimant B project.

Following the execution of the Subscription Agreement, the parties began working on the application for government approval, which was required in order for the Subscription Agreement to become effective.

In a letter dated January 2009, the Respondents requested the Claimants to suspend the application for government approval.

In February 2009, Respondent C issued a termination notice to the other Parties to the Subscription Agreement. This was followed by termination notices from Respondent B in February 2009 and from Respondent A in March 2009.

Claimants have requested the Tribunal:

(1) to order the Respondents to compensate the Claimants for all the losses incurred by the Respondents' breach of the Contract in the amount of US$ 20 million;

(2) to order the Respondents to pay all costs associated with this Arbitration, including but not limited to, arbitration fee, expenses for legal counsel, travelling related expenses, and expense for translation.

The basis for the Claimants' claims is that the Respondents materially breached the legal obligation imposed by Chinese law and regulations and the contractual obligations imposed by the contract, i.e., the Subscription Agreement. The principal grounds invoked by the Claimants are the following:

The Respondents did not submit the documents required for government approval. The Respondents unilaterally terminated the Agreement without any justified reason.

The Claimants have further contended that the Subscription Agreement did not become effective until government approval, and that the Agreement was void.

Respondent A has requested the Tribunal:

(1) to dismiss the Claimants' claims entirely;

(2) to declare that the Subscription Agreement was validly terminated in February 2009;

(3) to declare that Respondent A has not breached the Subscription Agreement;

(4) to order the Claimants to pay Respondent A's legal and other costs, including (but not limited to) its legal and other costs of this arbitration;

(5) to declare that the fees, costs and expenses paid pursuant to the Mandate Letters are not covered by this arbitration; and

(6) to order such further or other relief as the Tribunal may deem appropriate.

Respondent B has requested the Tribunal:

(1) to dismiss all of the Claimants' claims; and

(2) to order the Claimants to pay all costs of this arbitration, including all expenses that Respondent B has borne or will bear in respect of the fees and expenses of the arbitrators, the CIETAC, legal counsel, experts and consultants and its own legal costs.

Respondent C has requested the Tribunal

to dismiss the Claimants claims in their entirety and to award damages, interest and costs in favor of Respondent C.

The Respondents' position is that they did not breach any legal or contractual obligations. They timely provided the documents required for government approval and were entitled, and had valid reasons, to terminate the Subscription Agreement. The termination provisions in the Agreement had binding force as from execution of the Agreement and there was no ground which could make the Agreement void.

Respondent C's Counterclaim

Respondent C has requested the Tribunal

(1) to order Claimant B to reimburse Respondent C for the legal fees and other expenses that Respondent C had incurred with respect to the transactions contemplated in the transaction documents, in the total amount of nearly US$ 126 million, plus interest temporarily calculated to the end of 2009, in the amount of more than US$ 7,000.

(2) to order Claimant B and Claimant A to pay damages sustained by Respondent C as a result of Claimant B's and Claimant A's fault during formation of the Subscription Agreement in the amount of more than US$ 5,000.

(3) to order Claimant B and Claimant A to bear all legal fees and other expenses that Respondent C had incurred and is still incurring in connection with this arbitration and the negotiation prior to arbitration.

II. FINDINGS OF THE ARBITRAL TRIBUNAL

A. Introduction

The Parties have argued extensively and presented both written and oral evidence. The Tribunal has considered all arguments and assessed all evidence, written as well as oral, which has been presented by the Parties. Some of these arguments and evidence are cited or noted in this award. Other arguments and evidence have not been expressly mentioned. This should not be construed, however, as if they have not been studied and considered by the Tribunal.

B. Government Approval

The Claimants' position is that the Respondents had an obligation to provide application documents for the approval process but that they did not provide all documents that were required to obtain approval within the three months' period laid down in the Subscription Agreement.

The Respondents' position is that they timely provided all documents that were required to obtain approval.

Claimant B was required to submit the JV Documents for approval according to the Subscription Agreement. It was quite active to fulfill this task not only as far as the JV documents as such were concerned but also regarding the other documents that were required for obtaining approval. Mainly through its financial advisor of Corporate F, the Claimants both informed the Respondents which documents were required in order to obtain approval, and reminded the Parties to provide such documents.

Furthermore, the Claimants have through Chairman and General Manager of the Claimant A and Chairman of Claimant B, and CFO of the Claimant A and director of Claimant B also visited the authorities regarding the approval process.

However, even if the Claimants handled the approval process both by collecting the necessary documentation and keeping contacts with the authorities, it is equally clear that the Respondents were obliged to facilitate the approval application by providing documents to the Claimants.

According to the Claimants the Respondents did not provide all documents that were required although the Claimants both informed the Respondents which documents

were required to obtain approval and, on several occasions, reminded them to provide such documents. The Claimants have, however, not been able to prove that documents were not forthcoming.

The only evidence which the Claimants have submitted in support of their allegations that documents from the Respondents were missing are e-mails from Mr. Song of Corporate F, who was the Claimants' financial advisor and acted for them in this process. However, Mr. Song admitted on cross examination that he had never actually spoken with the approval authorities, but rather had relied on information from the Claimants. There is thus no evidence on the record that the documents that he requested from the Respondents were actually required by the governmental authorities in connection with the approval process.

More importantly, however, there are evidence that support the Respondents' contention that they provided the documents that were required by the approval authorities. Documents submitted by the Respondents have shown that both Foreign Economic and Trade Bureau of District E and the Provincial Department of Foreign Economy and Trade approved the Subscription Agreement without requesting any further documents. Nor, indeed, did the Ministry of Commerce in its written notice entitled "Preliminary Advice for Approval from Department of Foreign Investment Administration of Ministry of Commerce" (the "Preliminary Advice") require any further documents from the Respondents. The two documents that were required by the Ministry of Commerce were both documents that should have been submitted by Claimants but were not.

Even the Claimants themselves seem to have been convinced that the documents submitted were sufficient for approval. In a letter to the Respondents in January 2009, they stated that approval would "*be grant by government authorities soon*" without referring to any missing documents.

The Tribunal's conclusion is thus that the Respondents timely submitted the documents required for obtaining government approval.

C. Termination of the Subscription Agreement

1. Effectiveness of the Subscription Agreement

The Parties seems to agree that the Subscription Agreement was binding but not effective. They have, however, drawn different conclusions on what that means.

The Claimants hold that only the provisions of the Subscription Agreement related to obtaining the required approval became binding upon execution of the Subscription Agreement. No other provisions became binding until the Agreement had been approved by the authorities.

The Respondents' position is that all provisions became binding upon execution of the Subscription Agreement, except for those specific provisions that concerned the subscription of increased capital and the payment of subscription price.

The Claimants have, *inter alia*, invoked Article 1, para. 2, of the *Supreme People's Court Regulation on Trial of Cases concerning Disputes of Foreign Investment Enterprises* ("SPC Interpretation") which states that the fact that an Agreement has not entered into effect because approval has not been obtained, shall not affect the performance by the parties of the provisions of the contract on their approval application obligations or the validity of the provisions specified therein relating to their approval application obligations.

The Respondents' position is that the *SPC Interpretation* does not apply to the Subscription Agreement. In contrast to Joint Venture Agreements or Articles of Association the Subscription Agreement is a contract that is not required by law or administrative regulation to be approved by the government, although the subject matter of certain of its specific clauses may require government approval. In support of such interpretation the Respondents have invoked material from a press conference immediately after the issue of the *SPC Interpretation*, where the spokesman of the Supreme People's Court made it clear that the *SPC Interpretation* does not apply to merger and acquisition cases.

The Claimants have also invoked Article 8 of the *PRC Contract Law*, which provides that "*Contracts concluded in accordance with the law shall be legally binding on the parties*" and Article 45 of the same law, which provides that "*The Parties may agree to attach conditions to the effectiveness of a contract*".

It seems likely that the intention of the Parties when drafting the Subscription Agreement was that the major part of the Agreement should became binding upon its execution. If the termination article would be the only operative and effective provision of the contract until the Subscription Agreement had been approved, it would, in effect, mean that if approval could not be obtained it would be impossible to terminate the agreement, and the approval application obligations of the parties would continue for an indefinite term. This can hardly have been the parties' intention, nor the legislator's.

Under the *PRC Contract Law*, there is a distinction between the formation of a contract and the effectiveness of the same. A contract is formed when all contracting parties put their signatures and/or stamps on the contract. A contract becomes binding and effective when it is formed, unless the parties agree or the law requires otherwise. The parties may prescribe that effectiveness of a contract be subject to certain conditions. Nevertheless, such a condition will affect the contractual duties of the parties only to the extent the parties and the relevant law intend it to affect.

The Chinese government has, since the end of 1970's, been exercising control over foreign direct investment ("FDI") in a way that the establishment of a FDI enterprise in Mainland China will be subject to government approval. However, such approval, even if required by law as a condition to the effectiveness of a joint venture contract, will affect only those contractual obligations of the parties, the performance of which is conditional upon approval.

The Parties to the present arbitration proceedings agree that Subscription Agreement is binding on them upon execution and certain obligations therein are effective and do not depend on the government approval, albeit they have pointed to different obligations. The *SPC Interpretation* as cited by the Parties clearly shows that Chinese judiciary is of the view that in a contract establishing a Chinese-foreign joint venture, some provisions therein are effective and do not depend on the government approval. The *SPC Interpretation* mentions the contractual provisions concerning the party's obligation to apply for government approval. However, it may not be correct to interpret this obligation as an exhaustive example.

In the present case, what requires approval is essentially the transformation of the Company from a domestic entity into a FDI enterprise. Consequently, under the Subscription Agreement, only those duties the performance of which is conditional upon such approval, e.g., the subscription and payment of increased capital by the Respondents as foreign shareholders of the Company, will be effective and binding after the approval. Other duties especially those relevant to matters before the approval under that agreement are effective and not conditional upon the approval.

The Tribunal's conclusion is that Subscription Agreement had binding force as from execution save for the specific obligations regarding the subscription of increased capital and the payment of subscription price, and such other provision.

2. Validity of Certain Provision of the Subscription Agreement

The Claimants have also contended that the Section H of the Subscription Agreement is void arguing that this provision only provides for its termination by agreement and unilaterally by the Respondent. The Claimants had no right to unilaterally terminate the Agreement.

The Respondents' view is that this contention has no merit at all.

The Tribunal takes note of the structure of Subscription Agreement. Section H was the other side of the obligation of the Respondents to proceed with the share subscription. This obligation was conditional upon the fulfillment of various conditions precedent. If they were not fulfilled the Respondents need not proceed with the transaction, and, as a consequence, could terminate the Agreement.

Furthermore, the Claimants could also terminate the Subscription Agreement, however not under Section H, which dealt with situations regarding conditions to invest, but under the other article.

The Tribunal does not find anything unfair in this stipulation. The Tribunal also notes that this Agreement was negotiated for a long time by the Parties, which were assisted by professionals in such matters.

3. Termination for failure to satisfy conditions precedent

Having concluded that the Subscription Agreement was valid and that the termination provisions in the Agreement had binding effect as from execution, the next step for the Tribunal is to examine whether the Respondents were entitled to terminate the Subscription Agreement, i.e., whether there existed a ground for termination as held by the Respondents.

The provisions in the Subscription Agreement are clear. Section H provides that "*This [Subscription] Agreement may be terminated by an Investor upon its written notice (a 'Termination Notice') to the other Parties and the Company [i.e., Claimant B] if any of the following (the 'Event of Termination') occur.*"

This is in compliance with Article 93 of the *PRC Contract Law*, which provides that "*The parties may prescribe a condition under which one party is entitled to terminate the contract. Upon satisfaction of the condition for termination of the contract, the party with the termination right may terminate the contract.*"

Pursuant to Section H of the Subscription Agreement, the parties agreed that there would be seven Events of Termination. Two of these Events are relevant to the current arbitration: Section H(i) and Section H(ii).

Section H(i) provides that it is an Event of Termination if "*the conditions precedent set out in Section J hereof have not been satisfied or waived in writing by the Investors within three (3) months after the signing date of this Agreement, unless the Investors agree in writing to have the deadline for satisfaction of such conditions extended*."

Section J of the Subscription Agreement sets out 19 conditions precedent.

The Parties have argued extensively on several of the conditions precedent, and on the obligations and covenants as well as representation and warranties laid down in Section H(ii). They have also submitted a lot of evidence in support of their respective positions.

One condition precedent and "Event of Termination" appears under the title "Effectiveness of the JV Documents" in Section J(b) in the Subscription Agreement. It provides that all "JV Documents", one of which, according to the definition in the Subscription Agreement, shall have been approved by the Approval Authority within three months after the signing of the Subscription Agreement (Section H(i)), i.e., by 26 December 2008, unless the Respondents agree in writing to have the deadline extended. It is undisputed among all parties that approval had not been obtained by 26 December 2008, and that the time limit had not been extended. Hence, a termination event existed on 20 February 2009 when Respondent C issued a termination notice to the other Parties, which was followed by termination notices from Respondent B on 27 February 2009 and from Respondent A on 5 March 2009.

The Claimants' contention that the condition precedent that all "JV Documents" should have been approved by the Approval Authority within three months after the signing of the Subscription Agreement should be deemed to have been fulfilled because of the Respondents' failure to submit the documents necessary for approval has been determined above by the conclusion that the Respondents timely submitted the documents required for obtaining government approval. The Tribunal's conclusion is therefore that the Subscription Agreement was correctly terminated.

Having so concluded the Tribunal need not examine any further condition precedent. However, the Tribunal will briefly also deal with the condition precedent concerning material adverse changes, since the Parties extensively argued this matter.

It is undisputed among the Parties that the turnover and net revenues had dropped during the relevant period in 2008. The question is if such development "*could reasonably be expected to materially and adversely affect the carrying out of the business of Claimant B or its business prospects or financial condition*". On this the views of the Claimants and the Respondents differ.

The Subscription Agreement does not define the term "material" in the expression "material adverse effect" used in the condition precedent. However, having studied Claimant B's financial statements for the third quarter 2008 and for November 2008, which shows a fall of the net revenue from RMB 134.7 million in July to RMB 90.3 million in August and a further decrease to RMB 77 million in September, and after the execution of the Subscription Agreement, a further decline to RMB 63.6 million in October and RMB 46.7 million in November 2008, the Tribunal cannot draw any other conclusion than that such development could reasonably be expected to materially and adversely affect the carrying out of the business of Claimant B and its business prospects and financial condition, particularly as other figures point in the same direction. The Respondents therefore had a valid reason to terminate the Subscription Agreement.

The closure of the VMC unit is also undisputed among the Parties, while the views differ regarding its significance.

Having studied the documents and listened to the witnesses the Tribunal's finds that the VCM unit was an important part of Claimant B. The Claimants had specifically represented to the Respondents that the VCM unit relied on calcium carbide technology and therefore had a more stable supply chain and lower production costs than Claimant B's market competitors, which were mainly overseas competitors, who had adopted a petroleum-based technology. Claimant B therefore had a certain competitive advantage over its market competitors. It was estimated that the VCM unit would contribute about 25% of the total sales. Further, Chairman and General Manager of the Claimant A and Chairman of Claimant B testified that VCM had by far the highest value among all the chlorine products manufactured by Claimant B. The Tribunal's conclusion is therefore that also the closure of VCM could reasonably be expected to materially and adversely affect the carrying out of the business of Claimant B, and that the Respondents thus had a valid reason to terminate the Subscription Agreement.

A further finding is that the Claimants failed to disclose to the Respondents both the decline in revenues and sales of Claimant B and the closure of the VCM unit, which

means that neither the condition precedent of "no material adverse effect" nor the condition precedent of "true representations and warranties" had been met.

D. Respondent A's Request for Declaratory Decision

Respondent A has requested that several declaratory decisions be included in the Award. Since Respondent A has not filed its own case in this arbitration by way of a counterclaim, the request for declaratory decisions shall therefore be dismissed.

E. Respondent C's Counterclaim

The reimbursement of the fees and expenses which the Respondents had paid to their counsel with respect to the transactions contemplated in the Transaction Documents were related to their obligation to make the Remaining Capital Contribution in such a way that they did not have to contribute if they were not reimbursed. The Tribunal does not find it convincingly proved by Respondent C that it also in a situation where, because of the termination of the Subscription Agreement, the obligation to subscribe for Claimant B's increased capital never have and never will crystallize under the Agreement, was entitled to be reimbursed by Claimant B for the legal fees and other expenses.

Respondent C also holds that according to Article 42 of the *PRC Contract Law*, Claimants shall be responsible for the fault committed during the formation of the Subscription Agreement. Specifically, Respondent C holds that Claimants (i) did not fulfill the filing obligations stipulated in the Subscription Agreement; and (ii) provided false information regarding the financial situation of Claimant B.

Under PRC law, before a contract comes into effect, the contracting parties have certain pre-contract obligations, including the obligations of acting in good faith and facilitating the coming into effect of contract. The violation of such obligations will result in responsibilities of *culpa in contrahendo*.

In the present case, Respondent C holds that the Claimants have violated the pre-contract obligations of acting in good faith, which caused damages to Respondent C, thus the Claimants shall be liable for compensating such damages.

The Tribunal finds that, same as the Respondents, the Claimants also have expected for the successful implementation of the project. They have actively participated in (i) filing documents with authorities so as to obtain government approval, and (ii) cooperating with the Respondents in pushing forward the project. The failure of the project is a loss to both

Claimants and Respondents. However, the Claimants should have timely informed the Respondents of the financial status of Claimant B, which may have saved the project and avoided this dispute.

In conclusion, the Tribunal finds that the Claimants did not behave in bad faith during the formation of the Subscription Agreement. Moreover, Respondent C's argument on pre-contract obligation is at odds with the Respondents' general position that the Subscription Agreement has binding force upon execution. Accordingly, the Claimants shall not be liable for the damages of Respondent C.

III. AWARD

For the reasons set out above, the Tribunal makes the following orders and declarations:

(1) The Claimants' claims are dismissed.

(2) Respondent C's Counterclaim is dismissed.

(3) Each party shall assume the arbitration fees and other costs it has paid to CIETAC and the arbitrators.

(4) The Claimants are ordered to pay to each of Respondent A and Respondent B RMB 1 million and to Respondent C RMB 500,000 as compensation for their legal representation and related expenses.

This Award, being made in Beijing, China in January 2011, is final and binding on the Parties and shall take effect upon rendering.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

China A Capital Co., Ltd.

Claimant

v.

China B Investment Co., Ltd.

Respondent

Matter for arbitration: Disputes over equity transfer agreement

Place of arbitration: City P, P.R.China

TABLE OF CONTENT

I. THE PARTIES

A. The Claimant

1. The Claimant is China A Capital Co., Ltd., a company incorporated under the laws of the People's Republic of China.

2. The Claimant is represented by: Mr Ju of the Claimant and Mr Do / Ms Ji / Mr So / Mr Da / Ms Jun / Mr Xi of D Law Offices.

B. The Respondent

3. The Respondent is China B Investment Co., Ltd., a company incorporated under the laws of the People's Republic of China.

4. The Respondent is represented by: Mr Xi / Mr Fu / Mr Ed / Mr Ke / Ms Ch / Mr Ga.

5. In this Award, the Claimant and the Respondent shall be referred to individually as a "**Party**", or together as the "**Parties**".

6. In this Award, the Tribunal shall refer to pleadings and exhibits by reference to their location in the hearing bundles, numbered 1-15.

II. THE ARBITRAL TRIBUNAL

7. The Tribunal consists of a panel of three arbitrators, X, Y and Z.

8. Y was appointed by the Claimant, by letter to CIETAC in January 2011. Z was appointed by the Respondent, by letter to CIETAC in May 2011. X was appointed following a joint proposal by the co-arbitrators.[1] His appointment was confirmed by letter from Mr J of CIETAC in July 2013. The file was transmitted to the Tribunal under cover of the same letter.

III. ADMINISTRATIVE SECRETARY

9. The Administrative Secretary to the Tribunal is: Ms Br.

1 The co-arbitrators originally nominated Dr Michael Pryles to chair the tribunal. Dr Pryles resigned before the file was transmitted to the Tribunal, and the co-arbitrators nominated Mr D'Agostino to replace him as chairman.

IV. CIETAC SECRETARIAT

10. To administer the arbitral proceedings on its behalf, the CIETAC Secretariat has designated: Mr Sh.

V. LANGUAGE OF THE ARBITRATION

11. The Equity Transfer Agreement in November 2005 (the "ETA") provides: "*The English and Chinese languages shall be used in all arbitral proceedings and related documentation, unless otherwise agreed by the Parties*".

12. The proceedings were conducted in accordance with the ETA and the Parties' subsequent agreement as to language, as recorded in the Terms of Reference in September 2013.

13. The Parties have agreed that any arbitral award issued by the Tribunal shall be in English, with an official Chinese translation.

VI. GOVERNING LAW OF THE ETA

14. The ETA contains the following governing law clause:

> "*This Agreement shall be governed by, and construed in accordance with, the laws of the PRC.*"

VII. ARBITRATION AGREEMENT

15. The ETA contains the following arbitration agreement:

> "*(a) Any dispute arising from the execution or performance of, or in connection with, this Agreement shall be settled through friendly consultation between the Parties hereto. The claiming party (the 'Claimant') shall promptly notify the other party (the 'Respondent') in a dated notice that a dispute has arisen and describe the nature of the dispute. If no settlement can be reached through such consultation within sixty (60) days after the date of such notice of dispute, either Party may refer the matter to the China International Economic and Trade Arbitration Commission (the 'Commission'), for final arbitration in City P by an arbitration tribunal consisting of three (3) arbitrators (none of which may be a Finnish or*

Chinese citizen) according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the 'Rules') and this Article.

(b) The arbitration tribunal shall consist of three (3) arbitrators. The Claimant shall appoint (1) arbitrator, the Respondent shall appoint one (1) arbitrator, and the two (2) arbitrators so appointed shall appoint a third arbitrator. If the Claimant and the Respondent fail to appoint one (1) arbitrator, or the two (2) arbitrators appointed fail to appoint the third arbitrator within the time period set by the then effective Rules, the relevant appointment shall be made promptly by the Commission.

(c) In rendering their decision, the arbitrators shall consider the intention of the Parties hereto insofar as it can be ascertained from this Agreement. The English and Chinese languages shall be used in all arbitral proceedings and related documentation, unless otherwise agreed by the Parties.

(d) The award of the arbitration tribunal established pursuant to this Article shall be in writing and final and binding upon the Parties and may be enforced, if necessary, in any court of competent jurisdiction. The Parties shall use their best efforts to effect the prompt execution of any such award and shall render whatever assistance as may be necessary to this end. The losing Party shall be responsible for the costs of the Commission, the fees of the arbitration, the expenses of the arbitration proceedings, and all costs and expenses of enforcement of any arbitral award. The arbitration tribunal shall make an award as to the respective Parties' costs not otherwise specified in this Article.

(e) The foregoing provisions in this Article shall not preclude the Parties from applying for any preliminary or injunctive remedies available for any purpose, including, but not limited to, securing the subsequent enforcement of an arbitration award.

(f) During the period when a dispute is being resolved, the Parties shall continue to perform this Agreement except for the matters in dispute."

16. The arbitration agreement provides that the legal seat of the arbitration is City P. By agreement of the Parties, the merits hearing took place in City L. This does not affect the legal seat of the arbitration, which remains City P.

17. The arbitration agreement also provides for arbitration administered by CIETAC under the *Rules of Conciliation and Arbitration of the International Chamber of Commerce*. When the ETA was signed in November 2005, the Rules of Conciliation and Arbitration of the International Chamber of Commerce had been replaced by the *Rules of Arbitration of the International Chamber of Commerce* (the "ICC Rules 1998"). CIETAC therefore requested the Parties' submissions on the rules applicable to this arbitration.

18. Having considered the Parties' submissions, CIETAC determined by letter in April 2011 that the *ICC Rules 1998* apply to this arbitration. By letter in April 2011, the Claimant objected to this determination. However, CIETAC did not amend its determination, and by execution of the Terms of Reference,[2] the Parties have agreed and acknowledged that the Tribunal is properly appointed in accordance with:

    (1) the dispute resolution provisions at the ETA;

    (2) the governing law of the ETA;

    (3) Article 4.2 of the *CIETAC Rules 2005*; and

    (4) the *ICC Rules 1998*,

    and that the Tribunal has jurisdiction to deal with the disputes in the present arbitration.

19. Accordingly, the arbitration has been administered by CIETAC and the Tribunal in accordance with the *ICC Rules 1998*.

VIII. PROCEDURAL HISTORY

20. The procedural history is a matter of record. Below is a brief description of the key procedural events. This description does not purport to be a complete record of events.

21. The Claimant filed its Statement of Claims for Arbitration in June 2010.

22. By emails in March 2014, the Parties notified the Tribunal that they had agreed to hold both the prehearing conference and the merits hearing in City L rather than City P. The Tribunal confirmed its agreement to the hearing arrangements by Tribunal Communication No.11 in March 2014, and sought confirmation that the decision to hold hearings in City L would have no effect on the choice of City P as the legal seat

2 Article 47: Terms of Reference

of the arbitration. By email in March 2014, the Respondent confirmed that the Parties did not intend to change the seat of the arbitration. The Claimant voiced no objection at any time.

23. A pre-hearing conference was held in City L in May 2014. With the Parties' consent, the Chairman of the Tribunal presided alone.

24. The merits hearing took place in June 2014 at the City L International Arbitration Centre in City L. All the fact and expert witnesses appeared and were cross-examined by the opposing Party's counsel.

25. By letter in June 2015, CIETAC extended the deadline for rendering the award to July 2015.

IX. SUMMARY OF THE DISPUTE

26. The Tribunal has carefully reviewed the Parties' oral and written submissions. If a fact or event is not mentioned in the following summary, such omission shall not be taken to indicate that the Tribunal has overlooked or ignored it. The summary below is provided with no prejudice to either Party.

27. This is a dispute over entitlement to dividends arising out of over 20% stake in a Chinese-foreign joint venture company, NT Limited ("NT"). NT owned and operated a business in China, manufacturing and selling mobile phones.

28. The Claimant and the Respondent were both shareholders in NT, with holdings of over 20% and under 60%, respectively. The Claimant is a subsidiary of China CT Co., Ltd. ("**C**" or "**T**"), a prominent Chinese state-owned communications and information technology company.

29. In 2005, the Claimant was experiencing significant financial difficulties. In particular, it owed its parent, C, over RMB 500m in respect of an inter-company loan. To help alleviate these difficulties, the Parties agreed that the Respondent would buy the Claimant's over 20% stake in NT. They conducted negotiations, which included reference to the "present value of future earnings" method as an option for valuing NT.[3]

3 Witness Statement of He, para. 22 (Bundle 10, Tab 1); Witness Statement of Gu, para. 26 (Bundle 4, Tab 6).

30. In August 2005, the Parties signed a nonbinding Memorandum (the "**Memorandum**"),[4] recording their agreement to the transfer at an agreed price of over RMB 1.7 billion (the "**Purchase Price**"). The Purchase Price was expressed to be payable on completion of the equity transfer, *"i.e., the final approval from Ministry of Commerce for such equity transfer has been granted and the relevant changes to the [NT] company profile have been registered with State Administration of Industry and Commerce.*[5]*"* The Memorandum also provided that the Claimant would withdraw from NT on completion. Finally, the Memorandum recorded the Parties' agreement that the Claimant would be entitled to receive the dividends attributable to its over 20% stake in NT for the second half of 2005.

31. In August 2005, after the Purchase Price had been agreed, the Claimant instructed ZA Co., Ltd. ("**ZA**") to produce a valuation of the Claimant's over 20% stake in NT. Since the Claimant's parent, C, is state-owned, the Claimant's stake was classed as a state-owned asset. Chinese law and regulation require such a valuation as a pre-condition to the sale of a state-owned asset. The valuation was also a condition precedent to completion of the ETA and the equity transfer.[6]

32. In September 2005, ZA issued its report, valuing the over 20% stake at about RMB 1.60 billion. The valuation benchmark date was July 2005. ZA applied the "present value of future earnings" method to produce its valuation. The valuation took into account analysed and predicted earnings of the company for the periods July–December 2005 and 2006–2010.[7]

33. The Parties subsequently entered into the ETA. The transaction was subject to Chinese regulatory approvals, including approval by the PRC Ministry of Commerce ("**MOFCOM**') and State-Owned Assets Supervision and Administration Commission ("**SASAC**"), and the issue of an amended business licence by the PRC State Administration of Industry and Commerce ("**SAIC**").

34. When the ETA was signed, both Parties anticipated that the transfer would be complete by the end of 2005.

4 Bundle 2, Tab 1.
5 Article 2 of the Memorandum.
6 Article 3.1(g) of the ETA (Bundle 2, Tab 2).
7 Asset Appraisal Report of ZA Asset Appraisal Co; WCL-1 and WCL-2 (Bundle 4, Tab 25).

35. Consequently, in December 2005, the shareholders in NT (other than the Claimant) signed an Amended and Restated Joint Venture Contract ("**Amended JV Contract**") and Amended and Restated Articles of Association ("**Amended Articles of Association**").[8] The ETA provided that the Amended JV Contract and Amended Articles of Association would come into effect on the "Approval Date", i.e., the date on which MOFCOM issued a certificate approving those contracts and the ETA itself. The ETA further provided that, as of the Approval Date, the Claimant would cease to be a party to NT.[9]

36. In December 2005, the directors appointed by the Claimant resigned from the NT board.[10]

37. By late 2005, it had become clear that the transfer was unlikely to complete by the end of that year. The Claimant remained in urgent need of cash. In December 2005, the Parties and C therefore entered into an agreement (the "**December Agreement**"), pursuant to which the Respondent agreed to pay half the Purchase Price (about RMB 870 million) into a bank account opened by the Claimant, once MOFCOM had issued its approval certificate for the transfer and in return for a bank guarantee. This payment was expressed as a deposit, to be deducted from the Purchase Price. The deposit would be held in escrow, and the signatures of the Claimant, the Respondent and C were required to release any funds from the account.[11] In return, the Claimant and C would use best efforts to cause SAIC to issue an amended business licence to NT. If such licence were not issued within thirty days following the issue of the approval certificate, the Claimant and C would be required to repay the deposit to the Respondent, plus interest.[12]

38. MOFCOM approved the transfer and issued its approval certificate in December 2005, at which point the ETA, Amended JV Contract and Amended Articles of Association came into effect.

39. However, there were delays in obtaining other regulatory approvals, notably that of the National Development and Reform Commission ("**NDRC**").[13]

8 Bundle 2, Tab 3; Bundle 5, Tab 13.
9 Article 2.4 of the ETA.
10 Resignation letter of Directors (Bundle 5, Tab 9).
11 Articles 1 and 2 of the December Agreement (Bundle 2, Tab 4).
12 Articles 3 and 4 of the December Agreement (Bundle 2, Tab 4).
13 The Respondent alleges that it was the Claimant's responsibility to obtain the NDRC's

40. The Claimant and its parent, China CT Co., Limited ("**T**", also referred to as "**C**"; see para. 28 above), assisted NT to obtain these approvals.

41. In the period between March and April 2006, NDRC's approval had still not been obtained. The Parties therefore entered negotiations to extend the deposit arrangement and the bank guarantee, pending receipt of all the required approvals.[14] It was the Parties' mutual understanding at this time that, if NDRC's approval could not be obtained, the transaction would fail.

42. In March 2006, President Zh and Mr Xd of the Claimant met with Ms Hs of the Respondent. There was a second meeting of the Parties' representatives in March 2006, and a third meeting in April 2006.[15]

43. In April 2006, the Parties signed an agreement amending the December Agreement (the "**April Agreement**").[16] The April Agreement:

    (1) noted that the bank had agreed to extend the guarantee to May 2006;

    (2) required the Claimant and its parent company, T, to use best efforts to obtain the outstanding regulatory approvals by May 2006;

    (3) required the Claimant to repay the Deposit if it failed to obtain the approvals by May 2006;

    (4) provided that the Respondent would release the balance of the Purchase Price to the Claimant if the approvals were obtained by May 2006;

    (5) required the Respondent to use best efforts to cause NT to obtain an amended business licence from SAIC once the approvals were obtained; and

    (6) stated that "*Capitel will remain to be the shareholder of NT prior to the completion of the procedures necessary to amend such [SAIC] registration*".

44. NDRC approved the transaction in May 2006.

45. However, since all required approvals had not been obtained by the May deadline, the Parties and T agreed a further extension. In May 2006, they signed a second

approval, and that the delay was the Claimant's responsibility. The Claimant denies that it was responsible for the delay.

14 Witness Statement of He, para. 31 ff (Bundle 10, Tab 1).

15 Chronology of Events (Bundle 1, Tab 1).

16 Bundle 2, Tab 5.

amendment agreement (the "**May Agreement**").[17] The May Agreement was in substantially similar terms to the April Agreement, but reflected a further extension of the bank guarantee, and of the period for issue of the amended business licence, to June 2006. The English version of the May Agreement does not contain the sentence stipulating that Capitel remains a shareholder of NT pending issue of the amended business licence. The Chinese version does contain this sentence. Both versions are equally authentic.

46. The transfer eventually completed in June 2006, when all approvals had been obtained and SAIC had issued an amended business licence to NT, reflecting the change in ownership.

47. In June 2006, the NT board declared a dividend for the fourth quarter of 2005.

48. In June 2006, the Respondent paid the outstanding 50% of the Purchase Price to the Claimant.

49. In September 2006, NT paid to the Claimant the share of the fourth quarter 2005 dividend attributable to the over 20% stake the Claimant formerly held in NT.

50. In September 2006, the NT board declared a dividend for the first half of 2006. The Claimant did not receive any share of this dividend. It is common ground that the Claimant was no longer a shareholder in NT in September 2006.

51. The Claimant claims that it is entitled to over 20% of the dividend for the first half of 2006 (up to June). The Respondent rejects this claim, on grounds that dividends arising after 2005 were included in the Purchase Price, which was determined before the ETA was signed and with reference to NT's value, as determined by the "present value of future earnings" method.

X. THE CLAIMANT'S CASE

52. The Claimant's case has altered during the course of the arbitration. However, having reviewed the Claimant's Statement of Claims, Memorial, Reply Memorial and Written Opening Submissions, together with their exhibits, and having heard the Claimant's oral submissions during the merits hearing, the Tribunal understands the Claimant's case to be as follows.

17 Bundle 2, Tab 6.

53. The Respondent wrongfully acquired the dividends arising out of the over 20% equity stake in NT for the first half of 2006. On the Claimant's case, these dividends are properly payable to the Claimant.

54. The transaction by which the over 20% equity stake was transferred to the Respondent was implemented by a suite of four legally binding contracts, namely, the ETA, the December Agreement, the April Agreement and the May Agreement. The Claimant also relies on the Memorandum as part of the factual matrix and evidence of the Parties' precontractual intentions.[18] In the Claimant's submission, it is necessary to look at the entire contractual matrix in order to understand the Parties' true intentions; the true nature of the Parties' agreement can be understood only by taking a "holistic approach" to the contracts.[19] There is no impediment to the Tribunal adopting this approach; PRC law allows precontractual correspondence and documentation to be considered in the context of contractual interpretation.[20]

55. Read together, the four contracts evidence an agreement between the Parties that the Claimant remained a shareholder in NT until the SAIC business registration was amended and the new business licence received, and that it was entitled to receive both the Purchase price and all dividends arising out of the over 20% stake prior to completion of the equity transfer.[21] In addition, the Parties recorded in the Memorandum their agreement that the Claimant would be entitled to precompletion dividends paid by NT (see para. 74 below).

56. The Claimant accepts that, during negotiations in June and July 2005, the "present value of future earnings" method was discussed in the context of a valuation methodology option.[22] However, the Claimant denies that the Purchase Price therefore included any element calculated by reference to entitlement to future dividends. On the Claimant's case, the Purchase Price and the right to receive precompletion dividends are separate issues.[23]

18 Claimant's Memorial, para. 3.18; Transcript Day 1, p. 35, lines 17-18.
19 Claimant's Memorial, para. 4.17 *ff*; Claimant's Opening Submissions para. 1.2.
20 Claimant's Memorial, para. 3.15; Claimant's Reply to Defence Memorial, para. 9.28.
21 Claimant's Memorial, para. 4.5.
22 Witness Statement of Gu, para. 26.
23 Claimant's Memorial, paras. 3.8-3.9; Claimant's Reply to Defence Memorial, para. 4.2; Witness Statement of Gu, paras. 23-28.

57. The Parties initially agreed that the Claimant would cease to be a shareholder in NT as of the date when MOFCOM approved the transaction (December 2005),[24] but subsequently amended that agreement in April 2006, and recorded the new position in the April and May Agreements.[25] The Claimant emphasises that PRC law includes a principle of "freedom of contract", which must be balanced against the principle of "justice of contract". In other words, parties to a contract are free to agree what they wish in that contract, subject to considerations of fairness.[26]

58. Specifically, the Claimant relies on the April Agreement, which states: "*Capitel will remain to be the shareholder of the NT prior to the completion of the procedures necessary to amend* [the SAIC] *registration*."[27] The May Agreement contains the same wording in the Chinese version, but not in the English version. The Claimant initially suggested that this was a translation error, but during the merits hearing submitted that it might instead have been a deliberate omission by the Respondent's representative, Mr Aj. [28] Mr Aj was formerly in-house counsel at the Re-spondent, and represented the Respondent during negotiation of the April and May Agreements. Mr Aj did not appear as a witness in this arbitration.

59. The Parties discussed rights to dividend distribution during their initial negotiations in mid-2005. They agreed that, in addition to the Purchase Price, the Claimant would be entitled to receive 2005 dividends "ahead of schedule", in order to help address its cash flow needs. This agreement is recorded in the Memorandum, Article 3 of which provides: "*In the second half of Year 2005 and before the completion of the above-mentioned equity transfer, NT is expected to pay dividends of about RMB 1.5 billion in total to each equity holders* [sic] *and Capitel whose equity represents 22% of NT will be entitled to receive about RMB 0.25 billion.*"

24 Article 2.3 of the ETA: "*Upon the payment of the Purchase Price in full by NCIC to CAPITEL pursuant to Article 2.2, CAPITEL shall transfer and deliver to NCIC, and NCIC shall acquire and assume from CAPITEL, the Equity Interest and all related rights, title and interest of CAPITEL in and to the Equity Interest, free from any and all security interests, pledges, liens, encumbrances, conditions or restrictions of any kind*".

25 Claimant's Memorial, para. 3.24; Claimant's Reply to Defence Memorial, para. 3.4; Transcript, Day 4, p. 50.

26 Claimant's Reply to Defence Memorial, paras. 7.2-7.3.

27 Bundle 2, Tab 5.

28 Claimant's Memorial para. 6.5; Transcript Day 4, pp. 53-54.

60. The Memorandum does not expressly refer to dividends beyond end 2005 because, at the time it was negotiated and signed, neither Party contemplated that the transaction would complete later than 2005. However, the Claimant submits that, in the "Chinese high-context communication culture", it was clear to both Parties that the substance of this agreement was that the Claimant would be entitled to all pre-completion dividends, not just to 2005 dividends.[29]

61. However, the NDRC unexpectedly "asserted its purported 'approval power'" in or around January 2006.[30] At this point, it became clear to both sides that completion would be further delayed.

62. On the Claimant's case, the delay was not its fault. NDRC's involvement was not expected at the beginning of the deal. Both the Claimant and Respondent had obtained legal opinions from PRC law firms, neither of which stated that NDRC's approval would be required. NDRC's approval was not expressly a condition precedent under the ETA, and neither MOFCOM nor SA-SAC, which issued transaction approvals in 2005, required prior approval by NDRC.[31]

63. NDRC's involvement was necessitated by a name change for NT (from "China B Investment Co., Ltd. Capitel Communications Limited" to "China B Investment Co., Ltd. Telecommunica-tions Limited"). This, in turn, might affect NT's ability to produce and sell products under its mobile phone product sales permit, and therefore required an amendment to the permit. In order to have the permit amended, NT had to consult NDRC, as well as the Ministry of Information Industry ("**MII**").[32]

64. When NDRC did intervene, the Claimant and its parent, T, assisted NT in good faith to obtain NDRC's approval. The Claimant later discovered that the Amended JV Contract imposed re-sponsibility for assisting NT to obtain the amended permit on the remaining shareholders in NT (DNX Co., Ltd., SA Ltd., and HM Co.,), not on the Claimant.[33] However, the Claimant was not aware of this at the time because it was "prejudicially excluded" from the NT from January 2006, and had not seen a

29 Claimant's Memorial paras. 3.10-3.17 and 6.12; Witness Statement of Gu, paras. 27-28.
30 Claimant's Memorial para. 5.1; Claimant's Reply to Defence Memorial, para. 5.8.
31 Claimant's Reply to Defence Memorial, paras. 5.1-5.11 and 8.46.
32 Claimant's Memorial, para. 5.5.
33 Claimant's Memorial para. 5.6.

copy of the Amended JV Contract until September 2013 when it was produced in this arbitration.[34]

65. Instead, the Respondent and NT "*abused C/Capitel's good faith by taking advantage of the rich government relations resources available on C/Capitel's side free of charge*" to obtain NDRC's clearance.[35]

66. Further, it was the responsibility of the Respondent, not the Claimant, to obtain the amended business licence from SAIC, once MOFCOM's approval had been received[36].

67. The Claimant's overriding concern during the period of delay (i.e., between receiving MOFCOM's approval in December 2005 and the issue of the amended business licence in June 2006) was to receive cash, in the form of part of the Purchase Price, before the end of 2005. Another overriding concern was to preserve its rights as a shareholder in NT, including its right to receive dividends. These concerns formed the backdrop to the execution of the December Agreement, and to the negotiation and execution of the April and May Agreements.

68. The Claimant's cash flow concerns were addressed in the December Agreement (the terms of which are set out at para. 37 above).

69. During the negotiations in the first half of 2006 to amend the December Agreement and extend the escrow arrangements, the Claimant's representatives insisted that the Claimant should remain a shareholder of NT, enjoying full shareholder rights, including entitlement to dividends, up to the date on which SAIC issued the amended business licence.[37] The Claimant accepts that there was some disagreement between the Parties on this point, including one particularly heated exchange between the Claimant's President Sun and Ms Hs of the Respondent during their meeting in March 2006.[38]

70. On the Claimant's case, however, the Parties eventually agreed that the Claimant would remain a full shareholder, and this was expressly recorded in the April Agreement: "*Capitel will remain to be the shareholder of the NT prior to the completion of the*

34 Claimant's Memorial paras. 5.6-5.11.
35 Claimant's Memorial para. 5.10.
36 Claimant's Memorial para. 5.8-5.9.
37 Claimant's Memorial, para. 6.3.
38 Witness Statement of Zh, paras. 36-37.

procedures necessary to amend [the SAIC] *registration*" and the May Agreement: "*在工商变更登记手续办理完成之前，首信仍然是合资公司的股东*".[39]

71. The Claimant also submits that the *PRC Company Law* are implied into the April and May Agreements, such that those Agreements, respectively, read in effect: "*Capitel remains to be a shareholder of the NT prior to the completion of the procedures necessary to amend the SAIC registration, and therefore is entitled to get dividends that arise out of its over 20% equity in the NT. till the completion of the procedures necessary to amend the SAIC registration*".[40] In its written pleadings, the Claimant relies on this wording in the April and May Agreements in support of its claim for entitlement to the disputed dividend.

72. During the merits hearing, however, counsel for the Claimant accepted that, as a matter of PRC law, a party's status as shareholder is determined by statute, not agreement. Moreover, even if the Claimant had remained a full shareholder between December 2005 and June 2006, this would not entitle it to a dividend declared in September 2006, at which date it was unequivocally not a shareholder.[41]

73. Mr Wang submitted that the Claimant's claim is thus predicated on an implied agreement between the Parties that the Respondent (which, in the Claimant's submission, "entirely controls" NT) would procure NT to pay the H1 2006 dividend to the Claimant. He accepted that the Claimant has no statutory entitlement to the disputed dividend, and therefore no claim against NT.[42]

74. Mr Wang submitted that the Parties made an agreement, which originated in a "meeting of the minds" among senior executives on both sides in or around August 2005, when the Memorandum was signed, and "crystallised" on or around April 2006, in light of the delay to the transaction. On Mr Wang's submission, the substance of this agreement was that the Respondent would pay to the Claimant both the Purchase

39 Bundle 2, Tabs 5 and 6; Witness Statement of Zh, paras. 42 and 44.

40 Claimant's Memorial, para. 7.27. Article 4 of the *PRC Company Law* provides that "*Shareholders of a company shall be entitled to enjoy the capital proceeds, participate in making important decisions, choose managers and enjoy other rights".* Article 35 provides that "*Shareholders shall distribute dividends on the basis of the percentages of capital contributions actually made by them unless all shareholders agree that the dividends are not distributed on the percentages of capital contributions…*".

41 Transcript, Day 1, p. 31 and Day 4, p. 51.

42 Transcript, Day 1, pp. 29-31 and Day 4, p. 52.

Price and "all dividends arising out of [NT]" prior to completion, on condition that the transaction did complete and in return for the Claimant and C using their best efforts to secure NDRC's approval.[43] Mr Wang further submitted that it would be unjust for the Claimant to have been deprived of all its rights and entitlements as a share-holder, in respect of a period during which it had received no payment in return for its shares, and during which it continued to assist the Respondent and NT to obtain NDRC's approval.[44]

XI. THE RESPONDENT'S CASE

75. The Respondent denies that the Claimant is entitled to dividends for the first half of 2006, on the following grounds.[45]

76. As a matter of PRC law, the Claimant has no entitlement to dividends declared after it ceased to be a shareholder. There is no dispute that the Claimant was no longer a shareholder in NT in September 2006, when the disputed dividend was declared. Thus, the Claimant is not entitled to the disputed dividend.[46]

77. The Claimant ceased to be a shareholder in NT in December 2005, when MOFCOM's approval was obtained and the ETA, Amended JV Contract and Amended Articles of Association came into effect.[47] The Claimant was not a shareholder during the period between receipt of MOFCOM's approval in December 2005 and issue of the amended SAIC business licence in June 2006.[48]

78. In the alternative, the Claimant was merely a "nominal shareholder" during this period. As a matter of PRC law, nominal shareholders are not entitled to receive dividends.[49] The ETA, Amended Articles of Association and Amended JV Contract all came into effect on receipt of MOFCOM's approval. Under PRC law, this had the effect of

43 Transcript, Day 4, pp. 47-50, 57, 61.
44 Transcript, Day 4, p. 58.
45 As set out in Respondent's Defense Memorial (Bundle 9, Tab 1); Respondent's Rejoinder (Bundle 9, Tab 2); Respondent's Written Opening Submissions, Section III (Bundle 9, Tab 6), and during the merits hearing. The summary at paras 90-101 reflects the Tribunal's understanding of the Respondent's position, based on its written and oral submissions.
46 Respondent's Defense Memorial, para. 120.
47 Respondent's Defense Memorial, para. 1.2; Expert Legal Opinion of Prof. Si, paras. 19-24.
48 Transcript, Day 1, pp. 81-82.
49 Respondent's Rejoinder, paras. 91-93.

transferring full ownership in the transferred equity to the Respondent, together with all associated shareholder rights, including the right to receive dividends.[50] Moreover, the Parties agreed that the Claimant would cease to be a shareholder from December 2005. This agreement is recorded in the ETA: "*as of the Ap-proval Date…CAPITEL shall cease to be a party to the NT*". It is supported by the Amended Ar-ticles of Association and Amended JV Contract (which do not include the Claimant), by the Claimant's own actions in procuring the resignation of its NT directors in December 2005, and by the Claimant's failure either to participate in the running of NT after the end of 2005 or to complain that it was being prevented from participating.

79. The April and May Agreements do not alter this fact. The April and May Agreements amend the December Agreement; they do not amend the ETA. The purpose of the April and May Agree-ments was to extend the deadline for completion of the transaction, in light of the delay in ob-taining NDRC's approval. They were entirely separate from the ETA, whose purpose was to record the deal structure and implement the share transfer. The sentence in the April and May Agreements on which the Claimant relies does not "correct" or "restore" the Claimant's position as a shareholder. On the Respondent's case, that sentence refers merely to the Claimant's status on the register maintained by SAIC, pending amendment of the registration. No substantive rights attached to the shares pending the update of the SAIC register.[51]

80. Even if the April and May Agreements had purported to amend the shareholdings in NT as recorded in MOFCOM's December Approval Certificate, such amendment would have required specific approval from MOFCOM. MOFCOM's approval was not sought, nor obtained, in respect of the April and May Agreements. In addition, it would have required an additional agreement between all the NT shareholders, and an amendment to the new Amended Articles of Association, to restore the Claimant's status as a full shareholder. No such agreement or amendment was made.[52]

81. The Claimant has no contractual claim against the Respondent for payment of the dividends. None of the ETA, the December Agreement, April Agreement or May Agreement contains an obligation on the Respondent to pay to the Claimant

50 Respondent's Defense Memorial, para. 90.

51 Transcript, Day 1, pp. 70-71.

52 Respondent's Defense Memorial, para. 119; Rejoinder paras. 34, 116; Transcript, Day 1, p. 84.

dividends in respect of the first half of 2006.[53] During negotiation of the April and May Agreements, the Claimant repeatedly requested that it be paid dividends pending SAIC's approval, and that the Agreements reflect that entitlement to dividends. The Claimant's requests were expressly rejected by the Respondent, on the grounds that entitlement to such dividends was already included in the Purchase Price.[54] The language at Articles, respectively, of the April and May Agreements (that "*Capitel will remain to be a shareholder of the NT prior to the completion of the procedures necessary to amend such registration*") was inserted following those rejections, and was accepted by the Claimant. It reflects only the shareholdings as they appeared on the SAIC business register, and does not imply any entitlement to dividends for 2006. Articles were included as a compromise, on the understanding that they would help to clear the approval process with NDRC. If the Parties had agreed that the Claimant would be entitled to the dividend, which amounts to hundreds of millions of RMB, they would have recorded such agreement expressly.[55]

82. When the Parties valued the over 20% stake and agreed on the Purchase Price, using the "present value of future earnings" method, they included (among other things) the dividends in respect of the first half of 2006. Giving the Claimant those dividends now would amount to the Respondent paying for the same thing twice.[56]

83. It would be particularly unjust to require the Respondent to pay the Claimant twice in respect of the H1 2006 dividend, because the delay in obtaining NDRC's approval, and the consequent delay to the transaction, was the Claimant's fault. The Claimant knew, or should have known, that NDRC approval would be required for this transaction.[57] The Claimant warranted, in Article 4.3 of the ETA, that no regulatory approval was required for the deal, other than as mentioned in the ETA, and the Respondent relied on that warranty.[58] The Claimant was contractually obliged, under the Original Amended JV Contract, to help NT obtain all necessary government approvals for its production and business activities.[59] Because NDRC's approval should have been obtained before

53 Transcript, Day 1, p. 80.

54 Respondent's Defense Memorial, paras.114-115; Witness Statement of He, para. 35; Supplemental Witness Statement of He, para. 13; Expert Report of Mu, paras. 4.1-4.10.

55 Respondent's Defense Memorial, paras. 122-123; Witness Statement of Mi, para. 26.

56 Respondent's Rejoinder, para. 139.

57 Respondent's Defense Memorial, paras. 94-95.

58 Transcript, Day 4, p. 74.

59 Respondent's Defense Memorial paras. 85-87; Respondent's Rejoinder, para. 80; Article 7.1

MOFCOM's approval (i.e., while the Claimant was still a shareholder in NT), the Claimant had a "residual contractual obligation" to assist NT to obtain NDRC's approval.[60] On top of that, it is normal practice in a transaction such as this that the Chinese party is responsible for obtaining regulatory approvals.[61] The Claimant, as a state-owned entity with strong relationships with the regulators, was best placed to obtain such approvals. It would be unjust and inequitable for the Claimant to receive the disputed dividends when the delay was its own responsibility.

84. The Claimant was not "prejudicially excluded" from the NT in 2006. It was no longer a share-holder after December 2005; its directors had resigned, and it had no right to participate in the running of NT during this period. The Claimant was shown copies of the Amended Articles of Association and Amended JV Contract during the process of signing the ETA, despite its claims not to have seen them until 2013.[62]

85. As a matter of both law and contract, the Claimant's claim against the Respondent is not made out.

86. In any event, a claim for failure to pay dividends lies properly against NT, but any such claim in this case is time-barred under PRC law.[63]

XII. RELIEF SOUGHT BY THE CLAIMANT

87. The Claimant requests the Tribunal to:

(i) Declare that the Claimant had been and remained to be the exclusive owner owning the entire and unencumbered right, title and interest in and to the over 20% equity interest of NT up to June 2006;

(ii) Declare that the Respondent had wrongfully acquired, in the context of the resolution of the board of directors of NT dated September 2006, all the dividends that should have been paid to the Claimant on the basis of the Claimant's over 20% equity interest of NT up to June 2006;

of the Original Amended JV Contract.

60 Respondent's Rejoinder, para. 81.

61 Transcript, Day 1, p. 76.

62 Respondent's Defense Memorial, paras. 83-84.

63 Respondent's Opening Written Submissions, para. 71.

(iii) Order the Respondent to compensate the Claimant, in the context of the resolution of the board of directors of NT dated September 2006, for all the dividends of about **RMB 227 million**[64] that it had wrongfully acquired on the basis of the Claimant's over 20% equity interest of NT up to June 2006;

(iv) Order the Respondent to pay the Claimant interest on all amounts awarded;

(v) Order the Respondent to pay the Claimant all the costs and expenses in connection with this arbitration; and

(vi) Grant such further or other relief as the Tribunal may in its discretion deem appropriate.[65]

XIII. RELIEF SOUGHT BY THE RESPONDENT

88. The Respondent requests the Tribunal to:

(1) Dismiss all of the Claimant's claims;

(2) Order the Claimant, pursuant to the ETA, to pay the Respondent all of the costs of the Commission, the fees of arbitration, the expenses of the arbitration proceedings, and all cost and expenses of enforcement of the arbitral award.

(3) Order the Claimant to pay all the costs of the arbitration not otherwise set out in the ETA, including the Tribunal's fees and the Respondent's costs and counsel's and experts' fees, with interest thereon at an appropriate commercial rate to be determined by the Tribunal; and

(4) Order such other relief as the Tribunal deems appropriate.[66]

XIV. IMPLIED AGREEMENTS UNDER PRC LAW

89. PRC law does not expressly recognise the concept of an implied agreement or implied term in a contract as it is recognised in, for example, English or Australian

64 In its Statement of Claims dated 11 June 2010, the Claimant sought compensation of RMB 360 million. By letter to CIETAC dated 25 November 2011, the Claimant reduced its claim to RMB 309,770,046.46. In its Memorial, the claim was reduced again to RMB 226,625,759.79.

65 Claimant's Memorial, Section 9.

66 Respondent's Opening Submissions, Section V (Bundle 9, Tab 6).

law. However, it appears to be common ground that PRC law admits pre-contractual documents and negotiations as evidence of parties' intentions in concluding a contract, for the purposes of interpreting that contract[67]. In their submissions, both Parties have argued for the existence of what are, in effect, terms implied into the transaction documents, and both Parties have characterised these terms as "implied terms" or "implied agreements".

90. The Claimant cites various authorities for this principle, including:

(i) Article 125 of the *PRC Contract Law*, which provides: "*In case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith;*"[68] and

(ii) a Judicial Rule of the PRC Supreme People's Court: "*…contract meaning interpretation should not stick to isolated words or vocabularies used in the contract. Rather, one should have regard to all the languages in the contract and the overall process of the parties' commercial dealings to figure out the real intention expressed by the parties when the contract was made. And contract interpretation should abide by the principle of good faith.*"[69]

91. The Respondent cites Articles 61 and 62 of the *PRC Contract Law* in support of its own argument for an implied term in the ETA that the Claimant's entitlement is limited to dividends arising in 2005:

> Article 61: *Where, after the contract becomes effective, there is no agreement in the contract between the parties on such contents as quality, price or remuneration, or place of performance etc., or such agreement is ambiguous, the parties may agree upon supplementary terms through consultation; if a supplementary agreement cannot be reached, such terms shall be determined in accordance with the relevant provisions of the contract or the transaction practices.*

67 Respondent's Defense Memorial, para. 61; Claimant's Reply to Defence Memorial, para. 8.47.

68 Claimant's Reply to Defence Memorial, para. 9.25.

69 Volume One of the Collection of the Supreme People's Court's Judicial Rules (Bundle 7, Tab 1, p. 83).

Article 62: *Where certain contents agreed upon by the parties in the contract are ambiguous and cannot be determined in accordance with the provisions in Article 61 of this Law, the following provisions shall be applied:*

(1) if quality requirement is not clear, performance shall be in accordance with the state standard or industry standard; absent any state or industry standard, performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract;

(2) if price or remuneration is not clear, performance shall be in accordance with the prevailing market price at the place of performance at the time the contract was concluded, and if adoption of a price commissioned by the government or based on government issued pricing guidelines is required by law, such requirement applies;

(3) where the place of performance is not clear, if the obligation is payment of money, performance shall be at the place where the payee is located; if the obligation is delivery of immovable property, performance shall be at the place where the immovable property is located; for any other subject matter, performance shall be effected at the place of location of the party fulfilling the obligations;

(4) if the time of performance is not clear, the obligor may perform, and the obligee may require performance, at any time, provided that the other party shall be given the time required for preparation;

(5) if the method of performance is not clear, performance shall be rendered in a manner which is conducive to realizing the purpose of the contract; and

(6) if the responsibility for the expenses of performance is not clear, the party fulfilling the obligations shall bear the expenses.

92. The Respondent notes that the above articles "*talk, in reasonable detail, about filling the gap of a contract, which, in our submission, is analog [sic] to finding the implied terms of a contract.*"[70]

93. The Respondent also refers the Tribunal to a number of cases, an SPC Interpretation, and legal commentary. [71]

94. The authorities submitted by both Parties make clear that Chinese law admits – at least on a *de facto* basis – the existence of implied terms for the purpose of contractual interpretation.

95. The Claimant also refers to a Privy Council case, which determines the criteria for implying a term into a contract under Australian law.[72] Although the Respondent also adopts these criteria in its defence, the Tribunal does not consider that they are relevant in this case, in which the agreements in dispute are governed by PRC law.

A. The Tribunal's Findings

96. In order to succeed in its claim, the Claimant must demonstrate that either:

(i) as a matter of PRC law, it was a shareholder in NT in September 2006, when the H1 2006 dividend was declared, and therefore had a statutory right to receive the dividend; or

(ii) the Parties agreed, expressly or impliedly, that the Respondent would procure NT to pay the H1 2006 dividend to the Claimant, regardless of whether the Claimant had a statutory right to receive the dividend on the date it was declared.

B. Was the Claimant a Shareholder When the H1 2006 Dividend was Declared?

97. In the PRC, a party has a statutory right to receive a dividend only if it is a shareholder of the company on the date the dividend is declared. For example, Article 4 of the *PRC Company Law* provides: "*The shareholders of a company shall be entitled to enjoy the capital proceeds, participate in making important decisions, choose managers, and*

70 Respondent's Defense Memorial, para. 61.

71 Explanatory Notes to Respondent's Legal Authorities, Section IX (Bundle 9, Tab 3).

72 *B. P. Refinery (Westernport) Pty Ltd. v. Shire of Hastings (Victoria)* [1977] UKPC 13, at Claimant's Memorial, para. 7.25.

so on." These rights attach to the equity interest. Once a party has transferred or relinquished its equity interest, it no longer enjoys these rights, including the right to receive "capital proceeds", or dividends.[73] This was confirmed at the hearing by the Respondent's legal expert, Professor Shen.[74] In this respect, PRC law tracks the position in most other developed jurisdictions. The Parties do not dispute the position under PRC law.

98. On the Respondent's case, the Claimant ceased to be a shareholder on December 2005, when the ETA, Amended JV Contract and Amended Articles of Association took effect. In the alternative, the Claimant was merely a "nominal shareholder" between December 2005 and June 2006, with no right to receive dividends.

99. In its written pleadings, the Claimant submitted that it remained a full shareholder until June 2006, when NT's business registration was amended to reflect the change in shareholdings. During the merits hearing, the Claimant dropped that argument, and presented its claim as founded in contract only.[75] The contractual claim is considered below.

100. In any event, it is undisputed that the Claimant was no longer a shareholder of NT in September 2006. Thus, as a matter of PRC statute, the Claimant is not entitled to a dividend declared on 25 September 2006, regardless of the period to which the dividend relates. The Claimant admits this.[76]

C. Was There an Agreement That the Respondent Would Procure NT to Pay the H1 2006 Dividend to the Claimant?

101. The Tribunal is therefore left to determine whether, once it became apparent that the equity transfer would not complete by the end of 2005, the Parties renegotiated the

73 *Special Judges of Supreme People's Court [sic] Exposit Complicated Problems Concerning Civil and Commercial Judgements* (Bundle 15, Tab 25)*: "Shareholders no longer enjoy the dividend distribution request right after the transfer of equity, no matter the company's earnings before or after the transfer".*

74 Transcript, Day 1, pp. 150-151.

75 Transcript, Day 1, pp. 30-31 and Transcript, Day 4, p. 52: "*MR KAPLAN: Is it your case, the bottom line, that your case depends upon an agreement between the Parties to pay the dividends in 2006? Is it as simple as that: there was an agreement between the Parties?* MR WANG: *Correct, yes.*"

76 Transcript, Day 1, pp. 12, 14 and 31.

terms of the deal and agreed to preserve the Claimant's status as a full shareholder of NT, with a commensurate right to receive dividends in respect of the period before completion.

102. It is clear that there was an agreement that the Parties would use best efforts to ensure NT paid the Claimant dividends for H2 2005. This was expressly discussed during the original negotiations in June and July 2005, and recorded in the Memorandum in August that year. This agreement formed part of the Parties' negotiated solution to the Claimant's cash flow difficulties and the Respondent honoured the agreement, despite the nonbinding status of the Memorandum. The dividend was duly declared in favour of the Claimant in June – despite the fact that the Claimant had ceased, on any interpretation, to be a shareholder the previous day.

103. The Claimant says that it would be incorrect to distinguish between the declaration of H2 2005 dividends in June 2006, on a date when the Claimant was no longer a shareholder in NT, and the declaration of H1 2006 dividends on 25 September 2006, when the Claimant was also no longer a shareholder.[77]

104. The Claimant accepts that there is no agreement that expressly entitles it to H1 2006 dividends declared by NT. The ETA does not address entitlement to dividends, and none of the other binding agreements between the Parties states expressly that the Claimant has a right to receive dividends beyond the end of 2005.

105. The Claimant's case therefore depends on the existence of an implied agreement, the terms of which oblige the Respondent to procure NT to pay to the Claimant the H1 2006 dividends (or all pre-completion dividends) arising on the over 20% stake.[78] The Claimant submits that it is in the Respondent's power to procure such payment, because the Respondent, as majority shareholder, effectively controls NT.

106. During the hearing, counsel for the Claimant articulated this claim as follows.

107. The Parties agreed at the outset of the transaction that the Claimant would be entitled to all pre-completion dividends. There was a "meeting of minds" on this point among the relevant executives on both sides, from at least August 2005, throughout the period until the equity transfer completed. This agreement "crystallized" on or around April 2006, when the April Agreement was being negotiated. In failing to procure NT to pay

77 Claimant's Memorial, paras. 6.15-6.18; Claimant's Reply to Defence Memorial, para. 7.5.
78 Transcript, Day 1, pp. 30-31; Day 4, p. 52.

the H1 2006 dividend to the Claimant, the Respondent has breached that agreement and the Claimant is entitled to damages.[79]

108. In support of its claim, the Claimant relies on:

(1) the Memorandum: "*In the second half of Year 2005 and before the completion of the above-mentioned equity transfer [emphasis added], NT is expected to pay dividends of over RMB 1,450 million in total to each equity holders and Capitel whose equity represents over 20% of NT will be entitled to receive RMB 230 million*";

(2) the April Agreement: "*Capitel will remain to be the shareholder of the NT prior to the completion of the procedures necessary to amend [the SAIC] registration*"; and

(3) the May Agreement (Chinese version).

109. The Tribunal will consider each of these agreements, in turn.

D. Article 3 Memorandum

110. The Claimant's case is that the Memorandum, although not binding, forms part of the factual matrix by which the equity transfer may be interpreted and the Parties' true intentions determined.[80]

111. Both Parties acknowledge that in the summer of 2005, when they negotiated the original deal and signed the Memorandum, they had not contemplated that the transaction might last beyond the end of 2005, and they had not expressly discussed entitlement to dividends arising in 2006.

112. However, the Claimant says that the Parties' mutual intention was that the Claimant was entitled not just to dividends arising in 2005, but to all dividends arising before the equity transfer completed. The Claimant's case is that it was clear to the individuals who participated in the June/July 2005 negotiations, operating in the "*high-context Chinese communication culture*"[81] , that the Claimant was entitled to pre-completion dividends, whenever completion occurred, and that Article 3 of the Memorandum records their agreement to that effect.

79 Transcript, Day 4, pp. 47-48.
80 Claimant's Memorial, paras. 3.14-3.18.
81 Claimant's Memorial, para. 3.10.

113. The Respondent counters that the Memorandum was intended only to address dividend entitlement for 2005, as indicated in the Recitals: "*Whereas, upon the completion of equity transfer, Capitel will withdraw from NT and the parties wish to make appropriate arrangements concerning, inter alia, the dividend payments for year 2005.*" The Respondent relies on the non-binding nature of the Memorandum, and on the fact that it was expressly superseded by the ETA, which makes no reference to dividends. The Respondent acknowledges that the Parties agreed to pay H2 2005 dividends to the Claimant, on an expedited basis, in order to help it address its cash flow problems. However, the Respondent maintains that neither Party ever considered payment of dividends beyond 2005, because neither Party had contemplated, when the Memorandum was signed, that completion would take place after the end of 2005.

114. On the facts of this case, the Tribunal is not persuaded that Article 3 of the Memorandum records an agreement to confer on the Claimant the right to receive dividends after the end of 2005.

115. The Tribunal has seen no conclusive evidence that the Parties mutually intended the Memorandum to bear the meaning the Claimant would give it. On the contrary, both sides repeatedly acknowledge that 2006 dividends were neither contemplated nor discussed. Mr Mi, who took part in the negotiations on behalf of the Respondent, says, in terms: "*The Memorandum did not mention dividends for 2006, because it was not an issue at all at that time*". The Claimant's representative during the negotiations, Mr Gu, admits in very similar language that, whereas distribution of 2005 dividends was raised, "*nobody in the Capitel/C team and nobody in the Re-spondent's team have ever raised the specific issue as to how to handle the dividend distribu-tion for the first and/or second half of 2006 – because it was NOT an issue at all*" during the negotiation period.[82]

116. In the Tribunal's opinion, the words "*and before the completion of the above-mentioned equity transfer*" operate merely to qualify, or limit, the preceding words. Whereas the agreement in respect of H2 2005 dividends is clearly set out in the Memorandum, the Tribunal does not consider that the Memorandum either constitutes in itself, or is evidence of, a valid and binding agreement to extend the Claimant's entitlement to dividends beyond the end of 2005.

82 Witness Statement of Mi, para. 14; Witness Statement of Gu, para. 28.

E. Article 1(e) April Agreement

117. The terms of the April Agreement are set out at para. 58 above.

118. The Claimant places considerable weight on the final sentence of Article 1(e), which states: "*Capitel will remain to be the shareholder of NT prior to the completion of the procedures necessary to amend such* [SAIC] *registration*", and on the negotiations that led to its inclusion. The Claimant maintains that it was "specifically agreed" during the negotiations that Capitel would remain a full shareholder of NT until the equity transfer completed. The Claimant further says that "*by virtue of*" Articles 4 and 35 of the *PRC Company Law* (quoted above), Article 1(e) "*effectively implies that the parties have agreed that Capitel shall be entitled to participate in the dividend distribution as a result of NT's continued profit-making legend [sic] in 2006*".[83]

119. The Respondent says that the purpose of the negotiations in March and April 2006 was to extend the bank guarantee and deposit arrangements, not to confer on the Claimant a right to 2006 dividends, to which they had no entitlement under the ETA. During the negotiations, the Claimant requested a right to 2006 dividends, but the Respondent rejected this request. If it had been the Parties' intention to confer such rights, the agreements would have said so expressly. Moreover, the other shareholders in NT would have had to attend the meetings and sign the April Agreement. They did not.[84]

120. In order to determine whether the Parties did intend Article 1(e) to bear the meaning for which the Claimant contends, it is necessary to look in detail at what occurred during the meetings that led to signature of the April Agreement, and at the Parties' communications outside those meetings.

121. The first meeting took place in March 2006, between Ms Hs (for the Respondent) and President Sun and Mr Xd of the Claimant. President Sun mentioned that, given the delay in obtaining NDRC's approval, the Claimant "*should be entitled to enjoy shareholder dividends on the basis of its shareholder status in the NT*". Both Parties accept that Ms Siu disagreed, on the grounds that the 2006 dividends were already included in the Purchase Price.[85]

83 Claimant's Memorial, para. 6.3.

84 Supplemental Witness Statement of He, para. 21 and HS-7-11; Witness Statement of Mi, para. 21.

85 Witness Statement of Zh, paras. 36-37; Supplemental Witness Statement of He, para. 20.

122. The second meeting took place in March 2006. It was attended on behalf of the Claimant and C by Zf, Ch, Jk and Tl. Car, Mi, Hs and Aj attended for the Respondent. The minutes of this meeting do not record any discussion on the question of dividend entitlement.[86]

123. There was a further meeting in April 2006. Attendees were Car, Mi, and Hs for the Respondent and Ch, Wx and Jj for the Claimant/C. The Claimant has exhibited minutes of this meeting. According to the minutes, "*C pointed out that* [the Claimant] *remained to be a shareholder …and therefore should enjoy a shareholder's rights… including entitlement to dividends up to the amended business license registration at the SAIC. the Respondent agreed with it but indicated that specific dividend distribution arrangement should be made by* [NT's] *board of directors*".[87]

124. Ms Siu's evidence is that she "*unequivocally rejected*" the Claimant's suggestion when it was raised during one of these meetings, on grounds that the Purchase Price had been agreed using the "*present value of future earnings*" method, "*which had already discounted NT's future earnings into the Purchase Price, therefore, Capitel had already been compensated for its future interest in the NT by receiving the Purchase Price*". On Ms Siu's evidence, she addressed Mr Ch specifically, asking "*how this could be suggested in circumstances where he clearly knew that the purchase price already accounted for future earnings*".[88] Mr Wu disputes that this exchange took place.[89] In Ms Siu's recollection, the Claimant's representatives "*did not protest or make any counteroffers… Because tensions were running high at the meeting, I ended the subject by saying that the declaration of dividends was in any event a matter for the JV's board to decide, not NCIC*".[90]

86 WCL-1 (Bundle 4, Tab 21).

87 WCL-2 (Bundle 4, Tab 22). At para. 24 of his Witness Statement, Mi appears to question the authenticity of these minutes. Hs makes the same suggestion, at para. 36 of her Witness Statement, in relation to the minutes of both the 28 March and 7 April meetings. However, the Respondent has not made any submissions on this point, and it is therefore assumed that the Respondent accepts the minutes are genuine.

88 Witness Statement of He, paras. 33-34; Supplemental Witness Statement of He, paras. 13-14. Ms Siu's Witness Statements do not specify the date of the meeting in question.

89 Second Witness Statement of Ch, paras. 6-8.

90 Supplemental Witness Statement of He, paras. 13-14.

125. Mi also denies that the Respondent ever agreed that the Claimant should remain a full share-holder pending completion.[91] An email in April 2006 from Mr Harju to the Respondent's legal advisers, Mf and Ed of S & S, summarises the meeting. It makes no reference to any agreement on either the Claimant's status as shareholder or its entitlement to dividends.[92]

126. Ch stated during cross-examination that, although shareholders' rights were discussed in general terms at the April meeting, there was no discussion of the Claimant's entitlement to 2006 dividends. This is apparently inconsistent with the meeting minutes (see para. 123 above). However, Mr Wu also testified that he called President Sun after the April meeting and told him that the Respondent had agreed that the Claimant would remain a shareholder of NT pending SAIC registration, but did not expressly say that the Respondent had agreed on the Claimant's entitlement to dividends.[93]

127. Following these meetings, the Parties' legal advisers set about drafting the April Agreement. Various drafts were circulated.

128. In April, Mr Aj of the Respondent received an email from Jk of C, attaching an amended draft. Mr Aj forwarded it the same day to Fu at Shearman & Sterling, and to his colleagues at the Re-spondent. C had inserted the following wording at Article 1(d): "*Before the issuance of the Amended Business Licence, Capitel shall enjoy all rights corresponding to an equity interest of over 20% in NT, including but not limited to profit distribution*" [emphasis added].[94]

129. The Respondent responded at the same day, by email from Aj to Jk, attaching a further amended draft.[95] In that draft, the language proposed by C has been deleted.

130. The next draft on the record is attached to an email dated April 2006 from Aj to Fu, Jk and the Respondent's team. At this stage, the Parties were under considerable pressure to get the Agreement signed before the bank guarantee expired in April. Mr Aj's email makes clear that certain concessions had been made to the Claimant: "*This is the latest version after discussion with T.… I discussed with Hera and both of us*

91 Witness Statement of Mi, paras. 22 and 26.
92 HS-7 (Bundle 10, Tab 9).
93 Transcript, Day 3, pp. 8-10.
94 HS-9 (Bundle 10, Tab 9, pp. 81, 86A-86B and 150-151).
95 HS-9 (Bundle 10, Tab 9, pp. 81, 86A-86B and 150-151).

felt that the attached proposal should be acceptable to us even though it deviated from what [Car and Mi] *agreed in the meeting and [Fu]'s last proposal, in that: …we admit before the new business license is issued, Capitel shall remain an equity holder [sic] of NT*". The attached draft duly includes the wording: *在工商变更登记手续办理完成之前，首信仍然是合资公司的股东*("*Capitel will remain to be the shareholder of the NT prior to the completion of the procedures necessary to amend* [the SAIC] *registration*").[96]

131. Fu replied in the early morning of April, attaching an English translation of the April draft. The translation includes the inserted sentence: "*Capitel will remain to be the shareholder of the NT prior to the completion of the procedures necessary to amend [the SAIC] registration*".[97]

132. Neither the Chinese draft of April, nor its English translation circulated in April, includes any express entitlement to receive dividends. This is the version of Article that appears in the final April Agreement, as signed by the Parties in April 2006.[98]

133. The documentary evidence therefore indicates that the Claimant proposed wording expressly entitling it to dividends, but this was deleted by the Respondent, and the Claimant did not insist on its re-insertion before signing the April Agreement.

134. The witness evidence on both sides is that the Parties disagreed during the negotiations as to whether the Claimant was entitled to 2006 dividends, and that when the Claimant raised the point, the Respondent rejected it.

135. There is no evidence to suggest that the Parties had reached agreement on this point by the time the April Agreement was signed. Despite its arguments about high and low-context communication cultures, it is difficult to see how the Claimant could have construed the alternative, more general language ultimately included in Article as incorporating the same entitlement to dividends as the express wording that the Respondent had repeatedly and explicitly rejected verbally and deleted in the draft agreement. This is particularly so since the Claimant accepted, during the hearing, that whether or not it technically remained a shareholder (and therefore automatically had a right to dividends) is a question of law and cannot be decided by agreement

96 HS-10 (Bundle 10, Tab 9, p. 87).

97 HS-11 (Bundle 10, Tab 9, p. 93).

98 The April Agreement was backdated to 11 April 2006: Supplemental Witness Statement of He, para. 26.

between the Parties. Mr Wang also appeared to accept that the disputed sentence could be understood differently by parties from different cultural backgrounds. [99] In the Tribunal's opinion, this is exactly what happened – there was no "meeting of the minds" on the Claimant's entitlement to dividends after the end of 2005.

136. Further, the Tribunal is not persuaded by the Claimant's submission that Articles 4 and 35 of the *PRC Company Law* operate to imply an agreement on 2006 dividend entitlement into Article of the April Agreement. The Tribunal prefers the interpretation submitted by the Respondent, that Articles *"state general principles of law only in relation to a shareholder's rights to dividends…".*[100] In the Tribunal's view, neither article addresses the situation where a shareholder has transferred its equity and claims to be entitled to dividends after the transfer has occurred.

F. Article 1(d) May Agreement

137. The terms of the May Agreement were not heavily negotiated.[101] The May Agreement's purpose was merely to extend the deposit and bank guarantee arrangements a second time, until the regulatory approval process was fully concluded, and the amended SAIC business licence obtained.

138. For the purposes of this arbitration, the important fact is that the May Agreement includes the sentence on which the Claimant relies, stating that Capitel "remained to be the shareholder" of NT until SAIC registration was obtained.

139. As the Claimant has pointed out, this sentence appears only in the Chinese version of the May Agreement. It is missing from the English translation that was prepared, and signed, contempo-raneously. While it would be interesting to understand why and how this omission occurred, it is not relevant to the Tribunal's determinations. What is clear is that the sentence was carried across from the April Agreement into the Chinese version, which is the version that was negotiated by the Parties and reviewed by their representatives before signature.

140. The Tribunal considers that the legal effect of the sentence is no different in the May Agreement than in the April Agreement.

99 Respondent's Rejoinder, para. 31
100 Respondent's Rejoinder, para. 31
101 Witness Statement of Mi, para. 27.

G. Conclusion

141. The Claimant has failed to prove that Article 3 of the Memorandum, the April Agreement or the May Agreement evidence or imply an agreement that the Claimant is entitled to dividends arising after the end of 2005, either by virtue of Articles 4 and 35 of the *PRC Company Law*, or otherwise.

142. The evidence shows that the Claimant told the Respondent on more than one occasion that the Claimant believed it was entitled to the 2006 dividends (or, in the Claimant's alternative formulation, to all pre-completion dividends). However, there is no evidence that the Respondent ever agreed on this point. On the contrary, each time the Claimant suggested that it was entitled to 2006 dividends, the Respondent rejected the suggestion, on grounds that entitlement to dividends arising after 2005 had been taken into account when calculating the Purchase Price.

143. Both sides were represented by sophisticated businesspeople and the question of entitlement to 2006 dividends was, on the Claimant's own admission, a significant point, involving significant sums. Had there been an agreement that the Claimant was entitled to dividends declared after the end of 2005, it is only reasonable to expect that the Parties would have recorded it expressly. Since they did not, and on the evidence before it, the Tribunal concludes that no such agreement was reached, and that it would be incorrect to construe the pleaded agreements to imply otherwise.

H. Transfer of the Claimant's Equity Interest in NT

144. The Parties have made submissions on when, as a matter of PRC law, the Claimant's equity interest transferred to the Respondent. Although it appears to the Tribunal that there may be some tension between Articles of the ETA in this respect, in light of our findings above we do not consider it necessary to rule on this issue. Whether the transfer took place on receipt of MOFCOM's approval in December 2005, or on completion and payment in June 2006, the Claimant was no longer a shareholder when the H1 2006 dividend was declared in September 2006. The Claimant therefore had no statutory right to payment of the H1 2006 dividend, and it has failed to prove the existence of any contractual right to such payment.

145. In any case, the Claimant's conduct between December 2005 and June 2006 is inconsistent with its submission that it remained a shareholder during that period but was "prejudicially excluded" from the running of NT. The Claimant did not

participate in shareholder meetings, nor, on the evidence, did it request to participate. Its directors had resigned from NT's board in early December 2005, arguably before it became clear that the transaction would be delayed into 2006. However, the Claimant did not request their reinstatement.

146. The Claimant and C did continue to work with NT to secure NDRC's approval. The Claimant has presented this as an act of goodwill, in return for which it received nothing. The Tribunal disagrees. It was in the interests of both Parties, and NT, to obtain NDRC's approval as quickly as possible, so that the transfer could complete and NT could continue to operate. In addition, it was in in the Respondent's interest to obtain the shares and in the Claimant's interest to progress quickly to completion, so it could receive the Purchase Price. Transferring the Purchase Price to the Claimant was, after all, the ultimate aim of the transaction.

147. Promptly after NDRC's approval and the amended SAIC business licence were obtained, the transfer completed and the Claimant received the Purchase Price. The Respondent also honoured its commitment to procure payment of the H2 2005 dividend to the Claimant, even though the Purchase Price (as consideration for the transfer of the shares) did not separately require the Respondent to pay out the H2 2005 dividend.

148. In the Tribunal's view, the Claimant's claim is not made out.

149. Before concluding this Award, the Tribunal would like to thank counsel for their assistance in this case and for their courtesy throughout.

XV. COSTS OF THE ARBITRATION

150. Both Parties have claimed costs and expenses in the event that they are successful in this arbitration.

151. Article 31(1) of the *ICC Rules 1998* states: "*The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.*"

152. The "costs of the arbitration" described in Article 31(1) may be divided into:

(1) "arbitral costs", being the fees and expenses of the arbitrators and the administrative expenses incurred by CIETAC (which in this case fulfils the role of the ICC Secretariat and Court in administering the *ICC Rules 1998*); and

(2) "party costs", being the reasonable legal and other costs and disbursements incurred by the parties to the arbitration.

153. Article 31(3) of the *ICC Rules 1998* states: "*The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.*"

154. The arbitration agreement provides, at the ETA, that "*[t]he losing Party shall be responsible for the costs of the Commission* [i.e., CIETAC], *the fees of the arbitration, the expenses of the arbitration proceedings, and all costs and expenses of enforcement of any arbitral award. The arbitration tribunal shall make an award as to the respective Parties' costs not otherwise specified in this Article.*"

155. In light of this agreement, and of its findings set out above, the Tribunal is of the view that costs should follow the event. The Claimant has failed to make out its claims in these proceedings, and the Respondent is therefore entitled to an award of its reasonable party costs, as well as its share of the arbitral costs.

A. The Parties' Legal and Other Costs

156. By its revised schedule of costs, submitted in July 2014, the Respondent has claimed costs of legal representation.

157. This includes a significant number of hours recorded by the Respondent's in-house legal team and by the Respondent's two external law firms, G Office and B & B. In the Tribunal's view, the claims against the Respondent are neither sufficiently complex, nor of sufficiently high value, to merit this number of hours, and it would not be reasonable to require the Claimant to bear the entire amount claimed.[102]

158. In light of the above, the Tribunal finds that the Respondent is entitled to 70% of the amounts claimed in respect of its costs of legal representation.

159. In addition, the Respondent has claimed:

102 The Tribunal notes that the Claimant has claimed significantly less in respect of its own costs of legal representation.

(1) experts' fees and expenses;

(2) party witness fees and expenses; and

(3) other expenses.

The Tribunal finds these amounts reasonable in the circumstances of the case. The Respondent is therefore entitled to its full costs in respect of experts, party witnesses, and other expenses.

160. Accordingly, the Tribunal finds that the Respondent is entitled to an award of its reasonable legal costs and expenses in the amounts set out at 159 and 161.

161. The Claimant shall bear its own legal costs and expenses.

B. Other Costs of the Arbitration

162. The total advance on costs fixed by CIETAC is paid by the Claimant and the Respondent in equal shares.[103]

163. In accordance with the ICC Costs Schedule (2010), CIETAC has fixed the final fees of the Tribunal.

164. CIETAC has fixed its own administrative expenses.

165. Consistent with its determination in respect of the Parties' costs of legal representation, and with the ETA, the Tribunal finds that costs in respect of the Tribunal's fees and expenses and CIETAC's administrative expenses shall also follow the event.

166. As the advance on costs paid by the Parties exceeds the costs in respect of the Tribunal's fees and expenses and CIETAC's administrative expenses, CIETAC shall refund the surplus advance to the Claimant and Respondent in equal shares.

XVI. THE AWARD

167. For the reasons stated above,

(i) The Tribunal dismisses the Claimant's claims; and

103 CIETAC calculated the advance on costs in USD. It was paid by the Parties in RMB.

(ii) The Tribunal orders the Claimant to pay to the Respondent the costs of the arbitration, being the amounts set out at paras. 173 and 175 above and 50 per cent of the amounts set out at paras. 179-181 above.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Chinese Company A

Claimant

v.

Chinese Company B

Respondent

Matter for arbitration: **Disputes over agreement of equipment lease and products supply**

Place of arbitration: **City L, P.R.China**

TABLE OF CONTENT

I. INTRODUCTION

A. The Parties

1. The Claimant, Chinese Company A , is a company specializing in distributing medical equipment and pharmaceutics, with its main office address at 18/F, Unit 2, Building 3, Navigator International Plaza, Guang-qv-men-nan-xiao-Street, City L, China (the "**Claimant**").

2. The Respondent, Chinese Company B (the "**Respondent**").

B. Agreement to Arbitrate

3. Annex 14.7 of the *No. RAP 440 Agreement of Equipment Lease and Products Supply* concluded by the Claimant and the Respondent in April 2007 (the "**RAP 440 Agreement**") provides that:

> "*(F) Any dispute arising from or in connection with this Agreement shall be finally settled by the China International Economic and Trade Arbitration Commission (CIETAC), City L, China Sub-commission under the Commission's Arbitration Rules in effect at the time of applying for arbitration and the rules amended by the Annex 14.7 of the Agreement.*
>
> *(G) There shall be three (3) arbitrators. Both Parties shall appoint one (1) arbitrator. The third (3rd) arbitrator shall be appointed by the CIETAC, who must preside at the arbitration. All the arbitrators shall be fluent in English and Mandarin.*
>
> *(H) The arbitration shall be conducted and recorded in English.*
>
> *(I) The arbitral award is final and binding upon both Parties.*
>
> *(J) The costs, expenses and taxes arising out or in connection with the enforcement of the arbitral decision or award shall be borne by the party that resists or impedes such enforcement. The award shall decide the interests on losses incurred at the time of breaching the Agreement, commencing from the date the award is issued to the date the sums are paid up.*"

C. Summary of the Procedure

4. The Claimant initiated this arbitration by filing an English-written Application for Arbitration in October 2010 and a Chinese version in November 2010 with the China International Economic and Trade Arbitration Commission (the "**CIETAC**"). CIETAC took cognizance of the case in accordance with the arbitration clause in the Agreement. The *Arbitration Rules* of CIETAC effective as from 1 May 2005 (the "*Arbitration Rules*"), shall apply to this case.

5. In January 2011, the Respondent submitted a letter dated January 2011 with its attachments including Defense and Counterclaim and related evidence. In February 2011, the Secretariat forwarded the above-mentioned documents to the Claimant.

6. The Claimant appointed X as the arbitrator. The Respondent appointed Y as the arbitrator and has prepaid US$ 50,000 as his expenses according to Article 69(1) of the *Arbitration Rules*. Since the parties failed to jointly appoint the Presiding Arbitrator or jointly entrust the Chairman of CIETAC to make such appointment within the specified time period, the Chairman of CIETAC appointed Z as the Presiding Arbitrator. In July 2011, The Secretariat forwarded the Notice on the Formation of Arbitral Tribunal to both parties and each member of the Arbitral Tribunal.

7. In June 2012, the Arbitral Tribunal held the first hearing of the present case in City L, China. The Claimant and the Respondent delegated arbitration agents present in the hearing. Before the hearing, the Respondent submitted supplemental evidence. During the hearing, both parties presented the facts and merits of the case, exhibited the originals of evidence, explained the evidence and answered the questions raised by the Arbitral Tribunal.

8. The Arbitral Tribunal could not render an arbitral award within the time limit under Article 65 of the *Arbitration Rules* due to the complexity of the case. Therefore, the Arbitral Tribunal requested the Chairman of CIETAC to extend the time limit. The Chairman of CIETAC, upon considering such extension necessary and the reason for extension justified, accepted the Arbitral Tribunal's request and decided to extend the final time limit for rendering the award to May 2017.

II. FACTS AND BACKGROUND AND THE PARTIES' SUBMISSIONS

A. Facts and Background

9. In April 2007, the Claimant and the Respondent entered into the *Agreement of Equipment Lease and Products Supply* (the "**RAP Agreement**") under which the Respondent was obliged to deliver the US Company C-owned equipment (Architect i2000) (the "**Equipment**") to the Claimant and the Claimant was obliged to pay the handling fee over RMB 120,000 for each Equipment to the Respondent. The Claimant agreed to purchase from the Respondent, its affiliate or distributor specified by the Respondent, the product Reagent (the "**Product**"). Then the parties began to discuss signing the Contract for Sale and Purchase of Reagents (the "**Purchase Contract**"). But the parties failed to reach an agreement to sign the Purchase Contract. As the parties could not resolve the dispute through friendly negotiations, the Claimant applied for arbitration to CIETAC on 28 October 2010.

B. The Claimant's Submissions

10. The Claimant recites the facts and reasons for the arbitration. The Claimant states that it is a company specializing in distributing medical equipment and pharmaceutics. The Respondent and its parent company, US Company C , are companies engaging in production and sale of medical equipment and pharmaceutics. Since 1999, the Claimant started cooperation with US Company C and later with the Respondent and has purchased or rented from the Respondent or US Company C the immunoassay system and other equipment for the use in the hospitals. The Claimant as well has purchased specific reagent, the Product, from the Respondent or US Company C to sell to the hospitals equipped with the Equipment.

11. From the year of 1999 to the end of 2007, the Claimant has purchased or rented from the Respondent or US Company C more than 100 sets of Equipment and put them into dozens of hospitals in City L, O, P, Q provinces in China. With the aforementioned cooperation model, the Claimant has invested a huge amount of manpower, materials, funds to carry out marketing promotion and maintenance for the Respondent and its affiliates. The Claimant bought from the Respondent and US Company C equipment more than RMB 50 million for marketing purpose. In order to continuously expand, maintain, and consolidate its position in the market, the Claimant set up a full-service

system consisting of engineering, logistics, distribution, market, business, customer service and etc., totaling hundreds of millions in RMB.

12. Because of the foregoing efforts, the Respondent held a much larger market share than other competitors in the districts where the Claimant operated its business. By taking the advantage of the distributing network of the Claimant, the equipment and specific reagents have been sold to many influential and representative clients in the industry. Under the foregoing cooperative model, the Claimant played a role as distributor of the products of the Respondent and US Company C and supplied the specific reagents. The Claimant bought or rented from the Respondent medical equipment that is designed solely for the specific reagents and incurred a huge amount of expenses for market promotion, sale and services. In this way, the Claimant obtained the limited price difference between the purchase and sale of the specific reagents.

13. A contractual relationship has been established between the parties. The parties concluded the Agreement in April 2007 and pursuant to which the Claimant agreed to rent equipment and buy reagents from the Respondent. The Agreement became effective and was implemented before the Respondent breached the Agreement and stopped the supply of reagents. The dispute in question represents only part of the comprehensive contractual relationship between the Claimant and the Respondent and US Company C, namely, the dispute over the Architect i2000 immunoassay system agreed in the Agreement. Pursuant to the Agreement, the Claimant paid the Respondent over RMB 120,000 as "commission" to rent the Equipment, which was handed over by the Respondent to the Claimant.

14. Referring to the market of Equipment and sale of specific reagent, the Claimant states that it delivered the Equipment rent from the Respondent to a Shandong Hospital (the "**Hospital**") which was officially put into operation in April 2007. The Respondent sold the specific reagents for the Equipment to the Claimant through its affiliate US Company C. From April 2007 when the Equipment was put into service to December 2007, the Claimant, through its affiliate Yxxxxx Technical & Trade Co. Ltd. in City L, China ("Yxxxxx") sold the specific reagents to the Hospital it bought from the Respondent. The sales amount of the Reagents between April 2007 to December 2007 is about RMB 400,000.

15. The Respondent violated the contractual stipulations, principal obligations and collateral obligations of contract, principle of fairness and good faith, and the transaction practices and industry practices, by its breaching behaviors of stopping

supply of specific reagents, which has caused heavy economic losses to the Claimant. When the Claimant tried to implement the Agreement with vigor and continue to contribute resources to expand the market share of the Respondent, the Respondent stopped the supply of the specific reagents to the Claimant since November 2007 without any reason or basis. In respect of the breaching behaviors of the Respondent, the Claimant sent several letters to the Respondent requesting resumption of the supply but the requests from the Claimant had been ignored.

16. The Respondent violated relevant provisions of the Agreement, principal obligations and collateral obligations of contract, and principle of fairness and good faith and the transaction practices, international practices and industry practices by stopping to supply specific reagents to the Claimant. The Respondent caused a huge amount of direct economic losses and anticipatory profit losses to the Claimant due to its breaching behaviors which also terminated the cooperative relationship between the parties and made it impossible to realize the purpose of the Agreement.

17. The Claimant states that the Respondent breaks the Agreement by stopping the supply of specific reagents. According to the Agreement, the term shall be 8 years starting from the effective date and the Agreement provides that the Agreement shall take effect after being signed by the distributor (the Claimant) and the Respondent and remain effective during the whole term. Pursuant to provisions of the Agreement, the term during which the Claimant rents the Equipment from the Respondent shall be 8 years. Since the Equipment requires exclusively the specific reagents produced by the Respondent, the Respondent is obliged to supply the specific reagents to the Claimant during the term of lease. Otherwise, the Equipment as agreed in the Agreement shall by no means be operated. Only after 8 months after the parties concluded the Agreement, the Respondent stopped the supply of reagents to the Claimant. Subsequently, the Equipment cannot provide any useful value to the Claimant.

18. The Agreement provides that the distributor (the Claimant) agrees that it shall purchase the products listed in Annex 9.1 from US Company C or US Company C's affiliated companies or sub-distributor appointed at such price and in such quantities as agreed in the Annex on or before the date designated in Annex 9.1. Annex 9.1 of the Agreement indicates the purchase commitment as follows: not less than about US$ 100,000 each year. According to the aforementioned provisions, the Claimant shall be obliged to buy from the Respondent a minimum of US$ 101,000 worth of specific reagents each year during the lease term as set forth in the Agreement, that

is from April 2007 to March 2014. The provisions mentioned create the obligation on the Claimant to purchase the specific reagents and, they also create the obligation on the Respondent to provide the Claimant with such specific reagents. According to such provisions, the Claimant directly and explicitly has the right of buying the specific reagents from the Respondent and the Respondent is willing to cooperate with and encourage the Claimant to purchase the reagents. Under the current circumstance, the parties cannot implement such provisions because of the Respondent's breaching behaviors.

19. In conclusion, the Agreement reflects truthfully the intention of the Claimant and the Respondent and contractual purpose of both parties, namely, selling the specific reagents through the distribution of the Equipment. The parties set a clear expectation in respect of the perpetual supply of the Product. The Respondent terminated such supply for no reasons, which not only violates the Agreement but also makes it impossible to realize the purpose of the Agreement.

20. The Respondent violates principal obligations and collateral obligations of contract, and the basic principle of the *PRC Contract Law*, namely, the principle of fairness and good faith by stopping the supply of the specific reagents. Article 60 of the *PRC Contract Law* provides that "*The parties shall fully perform their respective obligations in accordance with the contract. The parties shall abide by the principle of good faith, and perform obligations such as notification, assistance, and confidentiality, etc. in light of the nature and purpose of the contract and in accordance with the relevant usage.*" Article 5 provides that *"The parties shall abide by the principle of fairness in prescribing their respective rights and obligations"*. Article 6 provides that: *"The parties shall abide by the principle of good faith in exercising their rights and performing their obligations.*"

21. The Claimant takes the view that supply of the Product is the Respondent's principal obligation under the Agreement. Even if the Product supply is the Respondent's collateral obligation according to the said legal regulations, the parties shall still implement their obligations. Obviously, the Respondent's behavior violated the *PRC Contract Law*. As the manufacturer of the Equipment, the Respondent is fully aware that the Equipment requires exclusively the specific reagents it produces. The Respondent refused to sell the specific Product after the Claimant rented the Equipment, abusing its monopoly position created by the exclusive matching relationship between the Equipment and the specific Product, abusing its rights and avoiding its obligations.

Such a behavior on the Respondent has stuck the Claimant in the mire, where its huge investment is unrecoverable, the rent Equipment turns into iron scrap and the business is at risk of bankruptcy and has broken the balance of contract's benefit between the two parties. The Respondent's behavior is extremely irresponsible and selfish, which has completely violated the said basic principles and rules of the *PRC Contract Law*.

22. The Respondent violates the transaction practices, international practices and industry practices by stopping the supply of specific Product. The Respondent entrusted the Claimant to distribute two parts of its products: Equipment and specific Product. According to the distribution mode between the Claimant and the Respondent and US Company C, the Claimant first rented the Equipment and installed it in the Hospital pursuant to the Agreement, and then to meet the Hospital's needs, purchases from the Respondent the specific Product and sells them to the Hospital. Judged from not only the frequency but also the duration of the transaction (namely the sale and lease for over one hundred sets of equipment and the supply of the reagents for almost ten years), the distribution mode between the Claimant and the Respondent and US Company C has been repeated over and over and has formed the fixed transaction practices trusted between the parties. The Respondent's behavior of stopping reagent supply violated such transaction practices and cause heavy economic losses to the Claimant.

23. In addition, in the same or similar industries such as industries of medical equipment, automotive, making-pen or duplicating machines, the security of supply for equipment parts and expendable materials are obviously conventional and international practices and industry practices. The international practices and industry practices explain and verify a simple principle that is the Respondent is obliged to provide the Claimant with such specific Product for the Equipment.

24. The Claimant is not able to obtain the specific Product from other sources to reduce the losses caused by the Respondent's behavior of breaching the Agreement. Different from the ordinary consumables, the Product required by the Equipment is not sold in shopping malls or department stores, and not anyone who obtains the specific Product can distribute it to the Hospital. The Respondent has very strict control on all the distributors and never allows them to sell the Product without the Respondent's permission. Right after stopping the Product supply, the Respondent illegally appointed other distributor to distribute the Product to the Equipment rent by the Claimant and forcibly occupied the Claimant's sales channels in order to obtain

illegal benefits. Furthermore, the Claimant is generally required by the Hospital to provide authorization for distribution of the Product. Therefore, the Claimant cannot sell Product to Hospital without the Respondent's authorization, even assuming that the Claimant managed to get the Product.

25. The real reason for the Respondent stops the Product supply is the Respondent has appointed other distributors to sell Product to the Hospital to which the Claimant installed the Equipment. The new distributors have never spent such huge amount of prior-period costs on equipment leasing, advertising and marketing promotion. They are much easier to be controlled by the Respondent and to accept a higher purchase price of the Products. The Claimant was informed that the reagent price for the new distributors is at least 13-16% higher than that for the Claimant. The Respondent realizes a much higher reagents sale profit by violation of the contract and commercial ethics. Since the stop of reagents supply in November 2007 to date, the Respondent and those distributors appointed by the Respondent have been using the equipment rent and installed by the Claimant to get illegal profit all through the three years. The Claimant's "anticipatory profit" 3 years ago is now turned into the interest of the Respondent and those distributors.

26. Therefore, the Claimant applies for the compensation from the Respondent for the direct economic losses incurred by leasing the Equipment. The breaching conduct of the Respondent has made it impossible to operate the Equipment after December 2007. Therefore, the Claimant is entitled to request the Respondent to reimburse the so called "commission" paid for the Equipment less the residual value after depreciation for the reasonable period of the normal operation. As stated above, the Claimant paid the Respondent "commission". According to provisions of the Agreement, the lease term of the Equipment shall be 8 years, or 96 months. From April 2007 when the Agreement was concluded to the stop of Products supply in late December 2007, the Agreement was performed for only 9 months. Considering the proportion of actual performance period to the lease term, the Respondent should refund the proportionate "commission" of the rest lease term. The amount constitutes the direct losses claimed by the Claimant about RMB 110,000.

27. The Claimant claims as well that the Respondent should compensate the Claimant for anticipatory profit losses based on the provision of Article 113 of the *Contract Law* which provides that "*where a party failed to perform or rendered non-conforming performance, thereby causing loss to the other party, the amount of damages payable*

shall be equivalent to the other party's loss resulting from the breach, including any benefit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract." From 1999 to November 2007, the volume of specific reagents bought by the Claimant form the Respondent grew in a stable manner, a high increase was also seen in 2003 when the SARS pandemic broke. Considering the stable development of the cooperative relation between the parties and the increasing revenues of sale, the Claimant continuously bought and rented new equipment from the Respondent to expand the market share, which was even continued in 2007. That means the Claimant continuously increased the prior-period investment and costs. Late 2007 was the critical period for the Claimant to recover gradually the prior-period investment, however, the Respondent then stopped without reason selling the specific reagents to the Claimant, which caused all the considerable investment of the Claimant to go up in smoke and the business operation to stand, let alone the reasonable returns and profits.

28. As already mentioned before, what the Claimant obtained was the price differential between the purchase and sale of the specific Product of the Respondent. Since the Respondent has stopped supplying specific Product to the Claimant, the latter is bound to suffer, besides the direct loss, anticipatory losses of profits, which is foreseeable to the Respondent. The Claimant requests the Respondent to compensate for such losses of profits to safeguard the efficacy of the Agreement, the authority of laws and the order of transaction of good faith. According to the Claimant's statistics, the Claimant sold about RMB 400,000 worth of specific Products to the Hospital in 2007 to assure the normal operation of the Equipment. In 2007, the cost spent by the Claimant to buy the specific Products from the Respondent stood at about RMB 200,000. In view of the fact that of the Equipment was put in service in April 2007 and the actual operation period totaled 8 months, the profits acquired by the Claimant in 2007 by virtue of the Equipment shall be about RMB 200,000. Based on the annual profits generated by the foregoing formula and ignoring the fact that the specific Products generated year-on-year increasing profits in the past more than 9 years, the Claimant claims the expected losses of profits for the rest lease term, that is about RMB 1,700,000.

29. Due to the fact that the Respondent breached the Agreement, illegally stopped supplying the Claimant with the specific Products exclusively required by the Equipment, the

Claimant has no choice but to file this application for arbitration to preserve its legal rights and interests. Therefore, the Respondent shall bear the arbitration cost of this case and compensation the Claimant for the related attorney fees.

30. The Claimant therefore claims as follows:

(1) for an award that the Respondent pays the Claimant about RMB 120,000 in compensation for direct losses on Equipment;

(2) for an award that the Respondent pays the Claimant about RMB 180,000 in compensation for anticipatory losses of profits; and

(3) for an award that the Respondent bears the arbitration cost of this case and the attorney fees RMB 200,000 disbursed by the Claimant for the same.

C. The Respondent's Submissions

31. The Respondent makes the following defense and counterclaim.

32. US Company C (hereinafter referred to as "**US Company C HK**") sold and /or leased diagnostic medical equipment, reagents and /or pharmaceutical products for its parent company US Company C Laboratories and its affiliate companies (hereinafter referred to as "**US Company C USA**") to distributors in China. In about 2007, upon the instructions of US Company C HK, the Respondent (US Company C Laboratories Trading (City H, China) Co. Ltd.) started to enter into certain agreements concerning leasing of medical equipment and sale of reagents to distributors of US Company C HK in China.

33. To acquire the right to obtain US Company C's equipment and reagents from US Company C HK directly, distributors in the Mainland China were required to enter into an annual distribution or agency agreement with US Company C HK. The annual distribution or agency agreement governed various matters between the parties including the granting of the authority to the distributors to sell diagnostic medical equipment in certain geographical districts in the Mainland China. If a distributor wished to lease or purchase equipment from US Company C HK, it was required to enter into separate agreements with US Company C HK or (upon US Company C HK's instructions) the Respondent (US Company C City H, China), to formalize the arrangements, such as Equipment Rental and Product Supply Agreement.

34. During all material times up to 20 November 2007, Chinese Company C, the Claimant in the arbitration, was one of the distributors of US Company C HK and had signed a number of annual distribution and agency agreements in the past many years since about 2002, but as a consequence of the Claimant's refusal to sign the annual distribution agreement for 2007 (the "**2007 Distribution Agreement**"), the Claimant ceased to be US Company C HK's distributor in November 2007.

35. Throughout the period between December 2006 and November 2007, US Company C HK and the Respondent were expecting the Claimant to execute the 2007 Distribution Agreement with US Company C HK in the same way as the Claimant had been happily doing in past years. With this legitimate expectation in mind, US Company C HK negotiated the terms of the 2007 Distribution Agreement with the Claimant and instructed the Respondent to enter into, *inter alia*, the Agreement (i.e., the RAP Agreement, the subject agreement in this arbitration) with the Claimant in March 2007. Unfortunately, to US Company C HK and the Respondent's disappointment, the Claimant refused to execute the 2007 Distribution Agreement which led to the termination of the distributorship relationship between the Claimant and US Company C HK. While the Claimant is no longer US Company C HK's distributor, it has the continuing obligation under the Agreement to purchase US Company C's reagents from the distributors of US Company C HK ("**US Company C HK's Distributors**"). However, in breach of the Agreement, the Claimant ignored such obligation and chose to take no action to purchase Products from US Company C HK's Distributors.

36. The Claimant alleges that the Respondent has breached its obligation to supply Products under the Agreement. The Respondent refuses to admit such allegation. It is plain from the terms of the Agreement and the dealings between the parties that if the Claimant's distributorship relationship with US Company C HK has been terminated, it will be required to purchase Products from US Company C's distributors at a price to be negotiated between the Claimant and the distributors concerned. In fact, both US Company C HK and the Respondent have repeatedly told the Claimant that it could purchase US Company C's reagents from the distributors if it wanted to. The same message was also repeated in previous arbitration proceedings. Unfortunately, despite the Respondent's express and repeated requests, the evidence submitted by the Claimant shows that the Claimant has done nothing to purchase reagents from the Distributors, it could have obtained the reagents and there would not be any issues of

compensation at all. If one considers why it is that the Claimant did not take any such simple steps, one can easily work out that this is a purely strategic move developed with the intent of extorting money from the Claimant as discussed in more detail in the following paragraphs.

37. The Claimant's inaction in purchasing reagents from the Distributors clearly revealed that it was not at all interested in doing business with US Company C HK and the Respondent anymore, whether directly or indirectly. In fact, US Company C HK's subsequent investigations revealed that in 2007, a company, which was set up by Mr. D (a shareholder of the Claimant), had been assisting US Company C's competitor, Siemens, to develop its market share and sell its products in the Mainland China.

38. Furthermore, the Claimant did not sell the Products to the Hospital as required under the Agreement. Nor did the Claimant ever demand the Products from the Respondent or US Company C HK in respect of the Products sale under the Agreement. The Claimant sought to rely on the sales carried out by another company called "Yxxxxx" to seek compensation from the Respondent, which has no basis as discussed in more detail in the paragraphs below.

39. In those circumstances, the Claimant has no valid claim against the Respondent as alleged or at all. It is therefore not necessary for the Respondent to comment on the alleged losses claimed by the Claimant. For the sake of completeness, the Respondent will comment on the alleged direct loss and loss of anticipated profits claim in the below paragraphs.

40. The Respondent describes the relationship among US Company C HK, the Respondent and the Claimant as following. US Company C HK is a company wholly owned subsidiary of US Company C USA. US Company C USA has sales, manufacturing, research and development, and distribution facilities around the world. US Company C HK looks after among other things, the leasing and sales of diagnostic equipment as well as sale of reagents for use on diagnostic equipment in China. It has numerous distributors in China and only deals with distributors which have a distributorship relationship with it. The Respondent is a limited liability company incorporated under the laws of China and is an affiliate within the US Company C Group. The Claimant is a limited liability company incorporated under the Chinese laws.

41. The Respondent and/or US Company C HK's dealings with US Company C HK's Distributors in the Mainland and termination of distributorship relationship with

the Claimant in November 2007. US Company C HK sold and/or leased diagnostic medical equipment, reagents and/or upon the instructions of US Company C HK, the Respondent started to enter into various Agreements with the Distributors of US Company C HK in the Mainland in respect of leasing medical equipment and sale of reagents to those distributors.

42. To acquire the right to obtain US Company C's equipment and reagents from US Company C HK directly, distributors in the Mainland China were required to enter into an annual distribution or agency agreement with US Company C HK. The annual distribution or agency agreements governed various matters between the parties including the granting of the authority to the distributors to sell US Company C's equipment and reagents in certain geographical districts in the Mainland China. The agreements would also normally specify a minimum amount of reagents and instruments that a distributor had to purchase for the relevant year as part of the consideration for US Company C HK's agreement to appoint it as a distributor. Every distributor knew that US Company C HK would not sell instruments or reagents to individuals or companies which were not US Company C HK's distributor. They also knew that as US Company C HK's distributor, they would be able to purchase instruments and reagents from US Company C HK at certain preferential prices (representing certain percentage of discount from the US Company C List Price), and that once an annual distribution or agency agreement between US Company C HK and a distributor was terminated, US Company C HK was under no obligation to supply reagents to the distributor anymore. Therefore, it can be understood that US Company C HK's obligation to supply reagents to distributors is predicated upon the existence of the annual distribution or agency agreements.

43. In order to assist the distributors to finance their purchase of US Company C's instruments, US Company C HK allowed the distributors to pay the purchase price in other forms. A distributor could purchase an instrument at preferential price and make payment by installments (the "**CAP model**"), it may rent an instrument from US Company C HK with the ownership in the instrument to pass to the distributor after the distributor had fulfilled its obligation to purchase an agreed minimum amount of US Company C's reagents and pay the requisite rentals (the "**Rental model**"), US Company C HK supplied an instrument to the distributor free of charge on the condition that the distributor would purchase certain minimum amounts of US Company C's reagents for a certain period of time and pay the relevant handling fees for importing

and transporting the instrument to the relevant hospital (the "**RAP model**"). RAP 440 Agreement, which is the subject matter of this arbitration, belongs to the RAP model. Apparently, if a distributor is able to find a purchaser who can pay the full purchase price without requiring any special financial arrangements, the financial assistance mentioned above would not be needed.

44. Under the RAP model, US Company C HK would receive no purchase price at all. To recoup the price difference or the market price and/or the loss in revenue resulting from the delayed receipt of the instrument's purchase price, US Company C HK required distributors to undertake the obligation of purchasing a certain amount of US Company C's reagents for a certain period of time. It was against this background that a distributor's obligation to purchase reagents under these models was created.

45. In about 2000, US Company C HK started to do business with a company called Chinese Company C. From about 2002 onwards (up to 2005), US Company C HK and Chinese Company C entered into an annual distribution/agency agreement on a yearly basis whereby Chinese Company C was granted the right to act as one of US Company C HK's distributors in certain regions in the Mainland China. In the Claimant's Application for the Arbitration, the Claimant contends that the rights and obligations acquired and undertaken by Chinese Company C were transferred to Assegai in May 2006. There is a dispute between the parties as to whether such transfer, which was not notified to US Company C HK or the Respondent at the material times, was a legally valid and effective transfer. It is the position of US Company C HK and the Respondent that Chinese Company C only notified US Company C HK and the Respondent in 2006 of a change of name of the company from Chinese Company C to "City L, China Un-Assegai Technical & Trade Co. Ltd. " without any mention of transfer of rights and obligations between the companies. Accordingly, US Company C HK and the Respondent had been conducting business with the Claimant on the assumption (which was wrongly held as a result of misrepresentation given by Chinese Company C) that the Claimant and Chinese Company C were the same company. Since such dispute is not directly relevant to the issues in this arbitration, the Respondent does not discuss this issue further.

46. During all material times up to November 2007, Chinese Company C/the Claimant was one of the distributors of US Company C HK in the Mainland. In about late 2005, US Company C HK had entered into a 2006 annual distribution agreement (the "**2006 Distribution Agreement**") with the Claimant in which US Company

C HK appointed the Claimant as its authorized distributor in respect of sale of certain diagnostic instruments and reagents in certain regions in the Mainland for the period between December 2005 and November 2006. The Claimant had purchased instruments and reagents from US Company C HK pursuant to the 2006 Distribution Agreement.

47. The Claimant remained US Company C HK's distributor in 2007, which led to the signing of the RAP Agreement. In the late 2006 when the 2006 Distribution Agreement was about to expire, US Company C HK started discussing with the Claimant and other distributors the sales targets for next year for the purpose of preparing the following year's annual distribution agreements. This was then followed by the circulation of the draft 2007 annual distribution agreement (the "**2007 Distribution Agreement**") to the Claimant for its consideration in March 2007. The Claimant showed little interest in the draft agreement. In fact, it was only until about mid-August 2007 and after many chasers from US Company C HK that the Claimant provided some comments on a few commercial terms of the draft agreement. US Company C HK discussed these with the Claimant and made relatively larger concessions on those commercial matters.

48. Given the long working relationship with Chinese Company C/the Claimant and the absence of any complaint in the past about the execution of the annual distribution/agency agreements, US Company C HK had firmly believed that the 2007 Distribution Agreement would be similarly executed by the Claimant and itself, as they always happily did in the many previous years. Upon that belief and acting in good faith, despite the expiry of the 2006 Distribution Agreement in November 2006, US Company C HK continued to treat the Claimant as its distributor, US Company C HK and the Claimant continued to deal and transact with each other based upon the distributorship relationship in the interim awaiting the execution of the 2007 Distribution Agreement and US Company C HK continued to discuss and fix the sales targets for 2007 with the Claimant based upon which the parties assessed the Claimant's performance.

49. It is based upon the distributorship relationship that US Company C HK instructed the Respondent, *inter alia*, to enter into the RAP Agreement with the Claimant including the RAP Agreement, which is the subject matter of this arbitration. Had the Claimant hinted to US Company C HK earlier before the execution of the RAP Agreement that it would not be signing the 2007 Distribution Agreement, US Company C HK

would not have instructed the Respondent to enter into the RAP Agreement with the Claimant.

50. The Respondent states that it was US Company C HK, not the Respondent which sold reagents to distributors in the Mainland China, and every distributor knew who the other distributors were. The Respondent stresses the importance that: (a) the Claimant always knew that the Respondent did not supply reagents and it was US Company C HK, not the Respondent, which supplied reagents to distributors in the Mainland China. In fact, the Claimant did not ever place any order for reagents with the Respondent, (b) the Claimant was also fully aware that only US Company C HK had the authority to appoint distributors to lease and/or sell US Company C's instruments and/or reagents, and (c) each distributor knew who the other distributors in the same regions were.

51. The Claimant made its own decision to not be US Company C HK's distributor by refusing to sign the 2007 Distribution Agreement in November 2007. Regrettably, the Claimant had been dilatory in finalizing the terms of the 2007 Distribution Agreement. Notwithstanding that the terms of the draft 2007 Distribution Agreement had almost been finalized, the Claimant kept postponing the discussion of the signing of the Agreement without proffering any reason. The term for the 2007 distributorship ended in November 2007, and before then, other distributors had signed the 2007 Distribution Agreements with US Company C HK, except the Claimant. In fact, as late as November 2007, the Claimant still did not positively respond that it would sign the 2007 Distribution Agreement. Given the Claimant's decision not to continue the distributorship relationship with US Company C HK, US Company C HK had no better choice than to formally advise the Claimant that the negotiations between the parties about the distributorship for 2007 had terminated and that US Company C HK would not agree to appoint the Claimant as its distributor of US Company C's products.

52. US Company C HK could not understand the reasons for the Claimant's refusal to sign the 2007 Distribution Agreement to continue to act as US Company C HK's First-tier distributors. In about November 2007, US Company C HK received an email from the Claimant. In the email, the Claimant essentially informed US Company C HK that the Claimant consciously deployed the strategy of delaying the signing of the 2007 Distribution Agreement upon the advice of its legal department. Neither US Company C HK nor the Respondent was informed of what the legal advice was. No

doubt the Claimant's action had caused tremendous disruptions to US Company C's operation. This had not only caused a loss of business to US Company C but also a lot of troubles to US Company C in having to address complaints raised by the hospitals. Tremendous unnecessary administration time and efforts had been incurred. With the Claimant's failure to sign the 2007 Distribution Agreement, which is a requisite for continuing the distributorship relationship with US Company C HK and obtaining reagents supply from US Company C HK directly, the obligation of US Company C HK (and therefore the Respondent, if, which is denied, there is any obligation by the Respondent) to supply reagents to the Claimant also ended.

53. The Arbitral Tribunal should take note of the circumstances leading to the signing of RAP Agreement which is set out above when examining the terms of the RAP Agreement. Under the RAP Agreement, the Claimant has specially committed to purchase the Reagents at no less than US$ 101,000 per year. As discussed in the above paragraph, the Claimant never placed any order of reagents with the Respondent. Since December 2006, the Claimant had, pursuant to the distributorship relationship with US Company C HK, purchased the reagents from US Company C HK by procuring an import company to enter into separate agreements for the sale and purchase of reagents with US Company C HK, but when making the purchase, the Claimant generally would not identify pursuant to which agreements the purchase was made.

54. The Claimant has breached its obligation to obtain reagents from the distributors. Of relevance to the issues in this arbitration is the RAP Agreement, which provides that: "*At any time during the Term, if Distributor cease to be US Company C's distributor or the Distribution Agreement between US Company C or its affiliate and Distributor terminates for whatever reason, at US Company C's request, Distributor shall purchase the Products from US Company C's affiliates or authorized distributor as specified by US Company C which purchase shall be subject to such price as specified by the affiliate or distributor.*" By virtue of this Clause, since the Claimant was no longer a distributor of US Company C HK and the distributorship relationship between the parties had terminated in November 2007, the Claimant could no longer purchase the reagents from US Company C HK directly, but it has the obligation to continue purchasing the reagents from the distributors of US Company C HK and its aware of such obligation as seen from evidences submitted by the Respondent.

55. With the benefit of the background set out above, it is obvious that the purpose of this Clause is to make it clear beyond doubt that should the Claimant cease to have

any distributorship relationship with US Company C HK, a possibility over which US Company C HK could not have full control, the RAP Agreement will continue to subsist as the Claimant can always source reagents from the distributors, until its term expires or either party terminates the Agreement. Because of this, there are therefore no provisions in the RAP Agreement imposing an obligation on the Respondent that it must sell the reagents to the Claimant as long as the Agreement is still effective. Since December 2007, the Claimant has neither purchased reagents from the distributors (but the Respondent found it is untrue as the Claimant had purchased reagents from US Company C's distributor directly in 2008) nor approached the Respondent to negotiate a termination of the RAP Agreement. This constitutes a breach of the RAP Agreement by the Claimant.

56. The Claimant fully knew that it could purchase the reagents from the distributors and it together with its Second-tier distributor did make such purchase in the past. In fact, the Claimant had obtained reagents from US Company C's distributors successfully since November 2007. For instance, the Claimant had purchased reagents from a Company in City L, China in August 2008 and also managed to continue selling reagents to the Force Hospital in April 2009.

57. Sometimes, a distributor might not want to continue to be a distributor because of the various obligations (including minimum purchase commitments in respect of purchase of instruments and reagents which, if failed to achieve, may lead to penalties and non-competition obligation) bundled with obtaining the status of a distributor to make the purchase at preferential price. In fact, at some stage during the negotiation of 2007 Distribution Agreement, the Claimant had once proposed to US Company C HK that it would want to be a Second-tier distributor. Second-tier distributors refer to sub-distributors to US Company C HK's distributors, with whom US Company C HK has no direct contractual relationship.

58. Not only did the Claimant purchase reagents from US Company C HK's distributors, the Claimant's own Second-tier distributor, City L, China Yxxxxx Technical & Trade Co. Ltd, also purchased reagents from US Company C HK's distributors as shown in the delivery notes and invoices in the evidence submitted by the Respondent. Accordingly, the Claimant, if it wishes to, can always obtain reagents from US Company C's distributors.

59. Furthermore, US Company C HK and the Respondent had repeatedly reminded the Claimant that it could always obtain the reagents from US Company C's distributors

if it wished to. The written witness statements given by US Company C's various distributors in connection with the issues raised in previous arbitrations between US Company C HK/the Respondent on the one hand and the Claimant on the other, also evidenced that the distributors can sell US Company C's reagents to both the end-user hospitals or other entities with the approval of US Company C HK and US Company C HK's approval would generally be given.

60. The Claimant has itself to blame for the unwise decision of not continuing the distributorship relationship with US Company C HK. If the Claimant considers it to be not sufficiently profitable to purchase reagents from the distributors because of higher purchase prices charged by the distributors, it will have no one to blame but only itself for its own unilateral decision to discontinue the distributorship relationship with US Company C HK. If because of non-profitability, the Claimant does not want to continue the RAP Agreement, it has the option to negotiate with the Respondent for a return of the instrument. In fact, the Clause provides that in the event of the Claimant failing to meet the purchase commitment (i.e., to purchase the specified amount of reagents within the contractual fixed period) owing to, e.g., non-profitability of the business, the Respondent may terminate the RAP Agreement and one of the possible consequences of such termination is either US Company C takes back the instrument or the Claimant purchases the instrument at a price to be negotiated (as provided for under the 2nd row of the table in the Schedule 9.2 in the Agreement). In the circumstances, to allow the Claimant to renege on its obligation to purchase reagents from the distributors and make allegations of breach of contract against the Respondent would be the most unfair to the Respondent. It was the Claimant's own decision not to continue the distributorship relationship with US Company C HK.

61. The Claimant's decision is a strategic one aiming to extort money from the Respondent. Despite having the necessary knowledge of other available third-party distributors, the Claimant has not even attempted to purchase reagents from them to avoid breach of its obligation owed to the Respondent. The Respondent is not aware of any difficulties encountered by the Claimant in obtaining reagent supplies from the distributors. One obvious reasonable inference that can be drawn from the Claimant's behavior is that the Claimant was no longer interested in selling US Company C's products and therefore, it did not bother taking any steps to ensure that the minimum purchase commitment as required under the RAP Agreement was met. If it had wanted to continue the business

of selling the reagents and honoring the purchase commitment, it should have tried all means to obtain reagents from the third-party distributors.

62. Additionally, the Claimant's such behavior, which is extremely unusual and strange by any objective view of the circumstances of the case, can only be reasonably explained as a strategy developed to extort money from the Respondent rather than as a result of genuine difficulties with obtaining reagents from the distributors. It is not at all hard to imagine that had the Claimant taken the steps as provided for under Clause, it would not have been able to make any claim against the Respondent.

63. Given that it is the Claimant who chose not to continue the business of selling US Company C's reagents anymore, there is no legal basis for the Claimant to claim compensation from the Respondent. Quite to the contrary, the Respondent contends that the Claimant had breached its obligation to meet the minimum purchasing commitment that is owed to the Respondent, and the Respondent counterclaims against the Claimant for the loss and damage that it has suffered as a consequence of the breach.

64. The Claimant did not ever supply reagents to the Hospital under the RAP Agreement. One of the elements of the Claimant's claims which the Claimant has to prove with supporting evidence is that it has suffered loss. Since there is no loss, the Claimant's claim must fail. It is another company called Yxxxxx, not the Claimant, that sold reagents to the Hospital. The Claimant relies on the delivery notes and Fapiao under the Claimant's evidence to show that it had supplied reagents to the Hospital. The Respondent does not admit the authenticity and truthfulness of these documents. Without prejudice to the non-admission, the documents in the Claimant's evidence show that the Hospital purchased reagents from Yxxxxx, not the Claimant.

65. The Claimant admits that it did not sell any reagents to the Hospital. It alleges that it has a Consignment Contract dated January 2006 with Yxxxxx such that any sale made by Yxxxxx to the Hospital should be treated as sale by itself. The Respondent does not admit the authenticity and truthfulness of the Consignment Contract. Furthermore, there is no evidence that: (a) the reagents which Yxxxxx sold to the Hospital were obtained from the Claimant. Quite to the opposite, there is evidence that Yxxxxx obtained reagents from other distributors, (b) Yxxxxx sold the reagents as agent for the Claimant rather than on its own account, (c) Yxxxxx did pay the 5% handling fee provided for under the Consignment Contract and Yxxxxx had issued an invoice

to acknowledge receipt of that payment, and (d) the Claimant had raised with the Respondent that is required reagents for RAP Agreement.

66. The Claimant's claims have been time barred. The Respondent denies that the Claimant has any valid claims as submitted herein. Without prejudice to the denial, the Respondent submits that the claims by the Claimant have been time barred and should also be dismissed on the ground. The alleged failure to supply reagents occurred in November 2007, but the claim was brought in October 2010, which is more than 2 years from November 2007 and is therefore outside the applicable limitation period of 2 years under Article 135 of the *PRC Civil Code* (1987).

67. For the sake of completeness, the Claimant's so-called formula for calculating the alleged loss of profits is confusing, has no legal or factual basis and is not supported by evidence. The claim for direct loss in respect of the handling fee also has no legal or factual basis. By reason of the matters set out above, the Claimant's claims against the Respondent should be dismissed. It is therefore not necessary for the Respondent to comment on the alleged losses claimed by the Claimant. However, for the sake of completeness, the Respondent comments on those allegations as follows.

68. The Respondent contends that the Claimant's claim for the alleged loss of profits is confusing, has no legal or factual basis and is not supported by evidence. Alleged loss of profits and the Claimant's obligation to obtain reagents supply from First-tier distributors to reduce its alleged loss. First, the Claimant did not sell the reagents to the Hospital as discussed above.

69. Second, the Claimant's claim for alleged loss of profits is based on the impossible and unreal assumption that the Claimant could have sold the corresponding average amounts of reagents to the Hospital for the period between January 2008 and March 2015, as it had done so during the period April to December 2007. Such assumption is not proven. There is not any evidence (such as agreement between the Claimant and the Hospital) which evidence that the Hospital has a binding continuing obligation, which cannot be terminated or discharged, to purchase the alleged amounts of reagents from the Claimant at the alleged prices for a considerable period of 7 years and 3 months from January 2008 till March 2015. As such, the claims should fail and should be dismissed.

70. Third, assuming that the Respondent has breached its obligation to supply reagents (which is strongly disagreed and objected to by the Claimant as discussed above),

the Claimant has the obligation under the law to take measures to mitigate its loss. However, the Claimant has not taken any such measures by obtaining reagents from the distributors. The law should not compensate a person who has deliberately taken no measures to reduce a loss which would not otherwise have arisen. Accordingly, the Claimant has no right to claim any damages against the Respondent in respect of losses which could have been reduced or eliminated had the measures been taken by the Claimant.

71. Fourth, the so-called formula used for calculating the alleged loss of profits is a piece-meal exercise seemingly devised to give misleading impression that a huge loss has been suffered. This is wholly unsubstantiated because:

(a) the Claimant has not submitted any credible evidence to substantiate the costs allegedly incurred in purchasing the reagents. All it has provided are only self-serving figures as set out in the Claimant's evidence. They are bare allegations without support of any contemporaneous documents. Accordingly, all those figures such as the so-called import duties, value added tax (VAT), import agent's fee, customs clearance charges and other miscellaneous charges incurred in purchasing the reagents should not be adopted as the basis for calculating the loss of profit.

(b) how and on what basis the co-efficient of 9.50 (being the coefficient for translating US$ into RMB in 2007) is arrived at is not explained and is confusing. The co-efficient should not therefore be accepted.

(c) there are obvious items of costs and expenses which are missing and not taken account of in the formula. Such items should, at a minimum, include the following expenses and charges:

— Freight for the reagent,

— Warehousing charges (insulated packaging, room/low temperature storage, ingredient label in Chinese,

— Customer education and training charges (lecture fees, charges for training and guiding onsite operating personnel), and charges for training of its own personnel;

— charges for providing free calibration services to customers (own standard product),

— instrument maintenance expenses,

— reagents wastage (reagent expiry, repair compensation, transport losses),

— administrative and sales costs (management wages, office rent, water and electricity charges, etc.),

— financial expenses,

— wages of sales representatives and market promotion,

— other unforeseeable expenses, etc.

Based on US Company C's understanding of the industry, the operational and market promotion expenses incurred by a distributor in selling reagents usually accounts for a high percentage of its sales turnover.

(d) the Claimant is required to pay the VAT, but it has not subtracted such tax payable by it from its calculation. VAT is a turnover tax calculated based on the sales amount of the merchandise that is imposed on the basis of the tax deduction principle (not based on the purchase price). In China VAT is calculated exclusive of tax. The basic tax rate is set at 17%. According to the Provisional Regulation of the PRC for Value Added Tax, it shows that the annual purchase cost claimed by the Claimant = total US$ amount of the annual purchase price x annual cost ratio (which incorrectly incudes the 17% VAT).

Applicant's calculation	Calculation as the regulations	
profit analysis	profit analysis	VAT 17%
sales price 1,170	sales price 1,000	output tax amount 170
purchase cost 936	Purchase cost 800	input tax amount 136
gross profit 234	gross profit 200	Tax payable 34

From the Respondent's analysis, it can be seen that the calculation of the annual cost ratio includes the VAT incurred by the Claimant in importing the reagents. Accordingly, the Claimant's annual purchase cost already includes the VAT input tax amount, and its so-called annual sales price in fact is the total of the annual sales amount and the VAT output tax amount. The sales price and purchase cost have included the output tax amount and input tax amount respectively, but the Claimant's calculation does not subtract the final VAT tax payable from its calculations. In other words, the inclusion of RMB 34, which is the "amount of tax payable" as part of its gross profit calculation, is incorrect and such sum

should be subtracted from the gross profit. The formula for such subtraction is as follows: gross profit as calculated by the Claimant /1.17 (e.g., 234 /1.17 =200).

(e) any part of the loss of profits claim that relates to future profits should be discounted to reflect the present value of such sum the Claimant could receive earlier than the actual dates of earning the (future) profits and use it to generate income (e.g., investment or bank deposits).

(f) the total value of the sales made to the Hospital based upon the figures shown in the Fapiao issued by Yxxxxx to the Hospital amounts to about RMB 3,800,000 rather than RMB 390,000.

72. Referring to the alleged direct loss on the equipment, the RAP Agreement provides that the sum of about RMB 130,000 was paid by the Claimant as handling fee for US Company C to arrange for the provision and transportation of the equipment to the Claimant. Such fee was not calculated by reference to the duration of the agreement, but rather by reference to the cost of importing the equipment into China (such as import tax). Such costs would have incurred, whether the Agreement be 8 years or just a few months. It is therefore not appropriate to reimburse the fees in the manner as contended for by the Claimant.

73. By reason of the matters stated above, all the claims by the Claimant should be dismissed with costs to the Respondent.

74. The Respondent refers to and incorporates within its counterclaim all matters set out in the paragraphs above. In breach of the RAP Agreement, the Claimant has failed to purchase the Reagents at no less than US$ 101,000 per year during the currency of the RAP Agreement and supply the same to the Hospital. In fact, the Claimant did not ever supply any reagents to the Hospital.

75. As result of the facts and matters pleaded herein, the Respondent has suffered loss and damage as follows:

Loss of value of the equipment about RMB 840,000 calculated as follows, of which a sum of RMB 290,000 is attributable to the loss of value in the period between December 2007 and January 2011 and at a monthly rate of RMB 11,142.86 thereafter.

76. The Claimant has not only failed to honor its obligation under the RAP Agreement to purchase reagents from US Company C HK's distributors and to sell them to the Hospital, but has also by conduct indicated that it has no intention to continue to

perform the RAP Agreement as reflected by its claim for loss of anticipated profits in the Application for Arbitration. Accordingly, the Respondent also asks for an award from the Arbitral Tribunal that the Respondent has the right to repossess the Equipment forthwith. In the event that the Claimant refuses to allow the Respondent to repossess the Equipment, the Respondent asks the Arbitral Tribunal to compensate it the full value of the Equipment, which is about RMB 1 million.

77. The Respondent hereby counterclaims the following relief:

(1) The Claimant be ordered to pay the Respondent a sum about RMB 850,000 as pleaded in paragraphs above or such sum as may be found to be appropriate by the Arbitral Tribunal as damages for the Claimant's breach of its obligation under the RAP Agreement.

(2) A declaration that the Respondent has the right to repossess the Equipment forthwith, and in the event that the Claimant refuses to allow the Respondent to repossess the Equipment, an order that the Claimant pay to the Respondent the full value of the Equipment about RMB 940,000 as pleaded in the paragraph above.

(3) The Claimant be ordered to pay interest on the whole of the sum awarded to the Respondent at a rate and a period as the Arbitral Tribunal shall deem fit.

(4) The Claimant be ordered to pay to the Respondent the reasonable costs of and occasioned by this arbitration including the fees of its lawyers/attorneys. The fees of the lawyers/attorneys are calculated on a time-spent basis and hence, the fees will continue to accrue as the case progresses. The fees that have been incurred up to the date of this Defense and Counterclaim are estimated to be about RMB 190,000, and the fees will, as mentioned, continue to accrue as the case continues. The Respondent will submit to the Arbitral Tribunal evidence as to its costs nearer the end of the arbitral proceedings or at such time as may be directed by the Arbitral Tribunal.

(5) Such further and other relief as may be appropriate to be granted to the Respondent.

D. The Claimant's Post-hearing Submissions

78. After the hearing, the Claimant submitted its post-hearing brief based on the documentary evidence, the witness statements and oral submissions of both parties.

In its post-hearing brief, Claimant confined itself to an analysis of only the most fundamental and key issues of the present dispute, including those issues identified during the Oral Hearing and tasked to the Parties by the Tribunal at the hearing. For any issues not addressed in the present brief, the Claimant refers the Arbitral Tribunal to its prior written submissions.

79. The Claimant contends that (a) the Respondent breached the RAP Agreement and applicable Chinese law; (b) Respondent's breaches caused direct and material damages to Claimant; (c) and the basis for and amount of damages sought by Claimant, including lost profit, are well-founded and reasonable.

80. The Claimant submits that the Respondent breached its contractual and legal obligations to the Claimant. This factual and legal conclusion was supported by facts and applicable Chinese law, in addition to Claimant's submission in its Application for Arbitration which Claimant has reiterated without repetition, summarized as follows:

81. First, by failing to supply reagents either by itself or through an affiliate or distributor specified by it, the Respondent has breached its obligations under the Agreement.

82. Second, separate and apart from its breaches of Article, by failing to supply reagents, the Respondent also breached its statutory duties of honesty, fairness and good faith dealing pursuant to Articles 6 and 60 of *PRC Contract Law* and Article 4 of the *General Principles of Civil Law*.

83. Third, by failing to provide necessary certification for sale of reagents, the Respondent breached its collateral obligations pursuant to Article 60 of the *PRC Contract Law*.

84. Finally, by knowingly and intentionally instructing and authorizing other distributors to directly supply reagents to the Hospital, the Respondent further breached its statutory duties of honesty, fairness and good faith dealing pursuant to Articles 6 and 60 of the *PRC Contract Law* and Article 4 of the *General Principles of Civil Law*.

85. By its failure to supply reagents, the Respondent breached its obligation under the RAP Agreement.

86. First, the RAP Agreement is titled "Equipment and Product Supply Agreement", which is a clear indication that Respondent agreed to supply product, i.e., reagents under the agreement.

87. Second, the RAP Agreement specifies the purpose of the agreement is that Claimant is desirous of leasing certain diagnostic equipment and purchasing certain reagents

from Respondent. It is specified that the Parties agree to the terms of the agreement "in consideration of the premise" stated above.

88. Third, "RAP" is an abbreviation of Reagent Agreement Plan, which reveals that the essence of this type of agreement is to obtain benefit through the sales of reagents, instead of rental of equipment which would indeed be provided to designated hospital to use for free.

89. Fourth, "Product Purchase" and "Price Adjustments and Payment", together with Schedule 9.1 "Purchase Commitment", sufficiently spell out the framework and essential factors of bilateral commitments by the Claimant and the Respondent of the reagent transaction.

90. More specifically, among other things, the Respondent breached its obligation to supply reagents under the RAP Agreement. The RAP Agreement provides: "*9.1 Purchase Commitment. Distributor agrees to purchase from US Company C, its affiliate or distributor specified by US Company C the products specified in Schedule 9.1 ("Products") at the prices/volumes indicated therein on or before the date specified in the Schedule ("Purchase Commitment").*"

91. The Claimant submits that judging from purpose of the agreement stated above, the nature of RAP type transaction, and the principle of good faith, the Article shall be interpreted as Claimant agrees to purchase via-a-vis Respondent agrees to supply reagents. The Claimant submits that the purpose of the RAP Agreement, as stated in the premise of the agreement, is Claimant wishes to purchase reagents from Respondent. To serve that purpose, the Respondent has to commit to supply reagents to Claimant while Claimant commits to purchase reagents.

92. The Claimant further submits that the nature of the RAP type transaction also supports the interpretation that the Respondent shall be obliged to supply under Article. Since the rented equipment is designed to be provided to the designated hospital to use for free, the only way the Claimant could recoup its costs and investments under the RAP Agreement is through resale of reagents to be supplied by Respondent. Therefore, the Respondent must be obliged to supply reagent, otherwise the whole transaction will have lost commercial sense to the Claimant entirely.

93. The RAP Agreement is titled as "Product Supply Agreement", which causes the Claimant to believe that the Respondent commit to supply reagent under the RAP Agreement. Therefore, the Respondent shall be obliged to supply reagent under

the RAP Agreement. According to this Article, the Respondent shall either supply reagents by itself, or specify its affiliate or distributor to supply reagents to the Claimant for the rented equipment. Prior to November 2007, the Respondent performed its reagent supply obligation through its affiliate US Company C HK. However, after November 2007, US Company C HK ceased to supply reagents to the Claimant, and the Respondent failed to either supply by itself or specify other affiliate or distributor to continue supplying of reagents to the Claimant. Thus, the Respondent breached its obligation under the RAP Agreement.

94. The Claimant's interpretation of the RAP Agreement is supported by applicable Chinese law. First, the Claimant submits that pursuant to Articles 5 and 125 of the *Contract Law*, Article shall be interpreted such that the Respondent is obliged to supply reagents.

95. Article 5 of the *Contract Law* provides that when defining the rights and obligations of each party, one shall abide by the principle of fairness. Further, Article 125 of the *Contract Law* provides that where the parties dispute over the understanding of any clause of the contract, the true intention of such clause shall be determined according to the terms and expressions used in the contract, other relevant clauses of the contract, the purpose for entering into the contract, the trade customs and the principle of good faith.

96. Based on the Claimant's analysis in the paragraphs above, the Claimant's interpretation of Article is in line with the language of the title, the premise and other terms of the agreement, the purpose of the parties to enter into the agreement, and the nature and trade customs of RAP type agreement, as well as the good faith principle.

97. Second, Claimant submits that pursuant to Article 41 of the *Contract Law*, in case there are two different interpretations held by the Claimant and the Respondent respectively, the Article shall be interpreted to the disadvantage of the Respondent. According to Article 41 of the *Contract Law*, when there is a dispute over the understanding of a standard term, and there are two or more kinds of interpretation of the disputed term, the interpretation unfavorable to the party supplying the standard term shall be preferred.

98. Claimant submits that the RAP Agreement consisted of standard terms (including the Article) that were prepared by the Respondent in advance for general and repeated

use with all distributors. If there is any ambiguity as to interpretation of the RAP Agreement, it shall be interpreted to the advantage of Claimant instead of Respondent.

99. The Claimant's interpretation of the Article of the RAP Agreement is supported by previous arbitration tribunals in similar cases with identical RAP terms, and the Respondent is bound by such findings. Prior to the current arbitration, the Claimant and the Respondent have been parties to several arbitrations on similar RAP Agreement disputes, where the terms of the disputed RAP Agreement are exactly the same as in the RAP Agreement in the current case. In those arbitrations, the arbitral tribunal all found that Respondent is obliged to supply reagents under the Article of the RAP Agreement. The relevant arbitral awards are final and binding on the Respondent.

100. By stopping reagent supply, failing to provide necessary certification and instructing other distributors to supply reagents to the Hospital directly, the Respondent additionally breached its obligations under Chinese law to act in good faith. Claimant submits that Respondent, in addition to its breach of contractual obligation under the RAP Agreement, also breached its obligations of good faith dealing under Chinese statutory law.

101. Article 4 of the *General Principles of Civil Law* and Articles 6 and 60(2) of the *Contract Law* require parties to observe the principles of good faith in exercising their rights and performing their duties. It is generally accepted in Chinese law that the principle of good faith is one of the "fundamental" and "imperial" principles of the *Contract Law*. The good faith principle serves as the moral standard in market activities and aims at balancing the interests among parties involved in civil activities. No party to a contract may pursue its own interests without prejudice to the interests of the other party.

102. The application of the principle of good faith may often impose rights and duties that supplement or qualify, or sometime even negate the terms of the applicable contract terms. Respondent fully understand that the only way the Claimant could recoup its investment under the RAP Agreement is to supply reagents to the Hospital. A good faith party to the RAP Agreement would not cut off the reagent supply, refuse to renew necessary quality certification and did not specify other distributor to supply reagents but instead to instruct and authorize those distributors to supply reagents to the hospital in direct competition with the Claimant, who was disadvantaged both in source of reagent supply and quality guarantee to the hospital. (The harmful

consequences of the Respondent's conducts are to be further discussed in more details in paragraphs related to damages to the Claimant.)

103. The Claimant states that the Respondent knew, or should have known, the consequences of its actions or no-actions. Indeed, the Respondent presumably intended such harmful consequences, and has never denied that this was knowingly and intentionally its aim. A good faith partner who sincerely wants the cooperation to continue under the RAP Agreement as now alleged by the Respondent would not act in the way as the Respondent has chosen to act.

104. The Respondent has sufficient knowledge and experience in the industry to know its behavior would inevitably lead to Claimant's distribution channel with the hospital to collapse, yet the Respondent carried through its plan notwithstanding the negative consequence, and then took steps to prolong and cement in place such negative measures in perpetuity. To sum up, it was regrettably of a course of conduct accompanied by commercial indifference and malice by the Respondent.

105. The Claimant deems that the Respondent's defenses of no breach are not viable. The Respondent's obligations under the RAP Agreement are not conditioned upon existence of annual distribution agreement.

106. The Claimant rejects the Respondent's submission that the validity of the RAP Agreement is conditioned upon existence of Annual Distribution Agreement between Claimant and US Company C HK.

107. The RAP Agreement clearly provides that the RAP Agreement "*shall become effective on the Effective Date and only after being signed by Distributor and US Company C. The Agreement will continue throughout the Term*."

108. It is undisputed by the Parties that the RAP Agreement was signed by the Claimant and the Respondent in April 2007, and that the agreed term of the RAP Agreement is for eight years commencing from the Effective Date.

109. It is obvious and undisputed that when the RAP Agreement was signed and became effective, there was no valid annual distribution agreement between the Claimant and US Company C HK. The previous annual distribution agreement of 2006 expired in November 2006. And the Claimant and US Company C HK eventually did not agree and sign the 2007 annual distribution agreement.

110. Therefore, the effectiveness of the RAP Agreement is not conditioned upon the existence of an annual distribution agreement between the Claimant and US Company C HK, both as a matter of fact and contract.

111. The RAP Agreement further clearly indicates that it will remain effective in the absence of annual distribution agreement between the Claimant and US Company C HK.

112. The Claimant further submits that the language in the RAP Agreement clearly indicates that the Parties intended the RAP Agreement to continue to be effective and operative in the absence of annual distribution agreement between Claimant and US Company C HK. The RAP Agreement provides:

> "*Purchase from Distributor. At any time during the Term, if Distributor ceases to be US Company C's distributor or the Distribution Agreement between US Company C or its affiliate and Distributor terminates for whatever reason, at US Company C's request, Distributor shall purchase the Products from US Company C's affiliate or authorized distributor as specified by US Company C which purchase shall be subject to such prices as specified by the affiliate or distributor.*"

113. The language clearly indicates that the Parties, when signing the RAP, anticipated a situation where Claimant and US Company C HK, an affiliate of the Respondent, were no longer bound by an effective annual distribution agreement, and intended the RAP Agreement to remain effective and operative under such a situation throughout the term of the RAP Agreement.

114. Therefore, it is clear beyond doubt that the failure of Claimant and US Company C HK to reach agreement on an annual distribution relationship would not cause the RAP Agreement to become ineffective.

115. Respondent's counterclaim rebuts its submission that the RAP Agreement lost effect after the Claimant and US Company C HK failed to reach agreement on the 2007 annual distribution agreement.

116. The Respondent raises counterclaims against Claimant, claiming that the Claimant fails to purchase reagents as promised under the RAP Agreement and the Respondent has suffered losses and damages thereof. More specifically, the Respondent submits that the Claimant's obligation to purchase reagents survives US Company C HK's termination letter to Claimant in November 2007. Therefore, by raising a counterclaim

against the Claimant, the Respondent has made it clear that the Respondent believes that the RAP Agreement shall remain effective in the absence of effective annual distribution agreement between the Claimant and US Company C HK.

117. The Respondent is not an agent of US Company C HK. The Claimant rejects Respondent's submission that Respondent was acting in the capacity as US Company C HK's agent to enter into the RAP Agreement with the Claimant, and thus shall not be responsible for any obligation under the RAP Agreement. The Claimant further rejects the Respondent's allegation that the Claimant was aware that the RAP Agreement was entered into by the Respondent in the capacity as US Company C HK's agent.

118. First, the RAP Agreement was signed by the Claimant and the Respondent in their respective own names. There is not any statement or provision in the RAP Agreement indicating that the Respondent was signing the RAP Agreement in the capacity as US Company C HK's agent, and that the RAP Agreement would only be binding against US Company C HK and not Respondent.

119. Second, the Respondent performed the RAP Agreement by itself. As a matter of fact, the equipment under the RAP Agreement was imported and owned by the Respondent. The Respondent delivered the equipment to the Claimant. Further, the Claimant paid the RMB 130,000 handling fee to the Respondent for rental of the equipment. And the Respondent issued a formal commercial invoice to Claimant for the handling fee. The fact that reagents were purchased from US Company C HK instead of the Respondent during performance of the RAP Agreement does not change the status of the Respondent, because the RAP Agreement have anticipated that reagents could be purchased from either the Respondent or the Respondent's affiliate.

120. Third, the Respondent presents no sufficient evidence to support its allegations. None of the evidence submitted by the Respondent could sufficiently prove that US Company C HK authorized the Respondent in 2007 to sign the RAP Agreement for US Company C HK. The "Statement by US Company C HK" submitted by the Respondent as Evidence R-2 was issued by US Company C HK on 18 May 2012, long after the execution of the RAP Agreement, and could not constitute a proper authorization instrument to Respondent. None of the evidence submitted by the Respondent could sufficiently prove that the Claimant was aware that the Respondent was acting in the capacity of US Company C HK's agent at the time the RAP Agreement was entered into.

121. Lastly and decisively, the Respondent rebuts its own allegation of agency by raising a counterclaim against Claimant under the RAP Agreement, because the pre-condition for the Respondent to make counterclaim would be that the RAP Agreement is binding between the Claimant and the Respondent.

122. The Respondent's complaint that the Respondent previously did not directly supply reagents to the Claimant does not constitute a valid defense to its obligation to supply reagents. The Claimant submits that the RAP Agreement has anticipated that reagents could be purchased from either Respondent or Respondent's affiliate (See the Article of the RAP Agreement). The fact that Respondent previously did not supply reagents by itself does not contradict the terms of the RAP Agreement. Therefore, there is no indication such a practice constitutes any de facto amendment by the Parties in view of the Respondent's obligations under the RAP Agreement.

123. The Respondent's breaches caused damages to the Claimant. The Respondent's breaches caused the Claimant to be unable to sell reagents to the Hospital. As a result of the Respondent's ending reagents supply, Claimant was cut off from stable and commercially meaningful source of reagents to resell to the existing hospitals. Moreover, the Respondent knowingly and purposefully refused to renew authorization letters that are necessary to certify to the Hospital the good quality of reagents supplied by Claimant. Meanwhile the Respondent instructed and authorized other distributors to supply reagents to the Hospital directly. Ultimately, the Claimant was deprived of the right and capability to supply reagents to the hospital. More specifically, the Claimant says as follows.

124. Detrimental effects of Respondent's Failure to supply by itself or to specify affiliate or distributor to continue to supply reagents.

125. US Company C imposes strict control over the distribution channels of its reagent products. Among other things, US Company C imposes stringent territory limitation to US Company C distributors. Only distributor with explicit written approval from US Company C could sell reagents to a specific hospital, either directly or indirectly.

126. The Hospital is the exclusive territory and distribution channel of the Claimant. Prior to November 2007, there was no distributor other than Claimant who has this hospital on their cited list of authorized sales territory. Therefore, without the Respondent's specification of affiliate or authorized distributor, the Claimant could not possibly obtain stable reagents supply legitimately from the open market.

127. As a result of the Respondent's ceasing the supply of reagents and its failure to specify either its affiliate or any authorized distributor to supply reagents to Claimant, Claimant was cut off from stable and commercially meaningful source of reagents to resell to the existing hospitals.

128. As a consequence of the breaching behavior of the Respondent as stated above, the Claimant could not continue to obtain reagents supply and resell to the Hospital, as it has rightfully anticipated under the RAP Agreement.

129. Respondent's failure to renew authorization letter required by the Hospital had Detrimental effects. The Hospital requires the Claimant to provide an authorization letter issued by the manufacturer of reagents to certify that the reagents supplied are originally imported goods and are entitled to sufficient quality assurance. Such a requirement was understandably due to the need of public health, and/or the mandatory regulatory requirements for distribution of medical reagents.

    The originally issued authorization letter addressed to the Hospital was to expire by November 2007. In November 2007, the Claimant sent an email to the Respondent, requesting, among other things, renewed authorization letters for existing clients (the hospitals) by the end of November, which was the expiration date of original authorization letters. However, Respondent refused to provide renewed authorization letters by taking no action or even providing a reply. As a result, the Claimant was no longer qualified to supply reagents to the Hospital after the original authorization letters expired in November 2007.

130. While refusing to provide the renewed authorization letter to the Claimant, the Respondent instead provided authorization letters to other distributors, who then approached the existing clients of Claimant and told them that Claimant could no longer rightfully supply reagents with the same quality assurance as before. The Claimant had to send an email to the Respondent, contesting such behavior and required the Respondent to cure such breaching behaviors. Once again, the Respondent totally ignored the rightful demands of the Claimant.

131. Due to such intentional and ill-wishful behavior of the Respondent, the hospital had to turn to the new distributor of Respondent for reagent supply, and thus the Respondent has completely deprived the Claimant of the distribution channel to the Hospital.

132. The Respondent is liable to the Claimant for its lost profits. Compensation of lost profits is available under the Chinese law. Based on the foregoing and pursuant to

Articles 107 and 113 of the *Contract Law*, the Claimant is entitled to be compensated for the profits which they would otherwise have made, but for Respondent's breaches.

133. Article 113 of the *Contract Law* provides:

> "*Where one of the parties does not perform a contractual obligation, or does not perform a contractual obligation as agreed, thereby causing loss to the other party, the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including benefits that the other party would have been able to obtain upon the contract being performed, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract. …*"

134. Therefore, if a party breaches its contract, under the applicable Chinese law, the injured party is entitled to compensation for all foreseeable losses resulting there from, including lost profits.

135. As a result of the Respondent's stop of reagent supply and refusal to renew the authorization letter, the Respondent forced the Claimant to forego profits, which but for the Respondent's multiple breaches the Claimant would have foreseeably made from resale of reagents.

136. The lost profits claimed by the Claimant are sufficiently certain. The lost profit quantification submitted by the Claimant is sufficiently certain and reliable. It provides the Tribunal with a reasonable and reliable quantification of the profits which the Claimant would foreseeably have achieved until 2015, the time when the term of the RAP Agreement would have expired, "but for" the Respondent's multiple breaches.

137. The lost profit claim is sufficiently certain as a matter of fact. Claimant has provided the Tribunal with the actual sales data from the time the RAP Agreement was executed to the time the Respondent stopped reagent supply as the basis for calculation of lost profits quantification. Those data indicate there was a stable sale, even at the beginning of the operation. The hospital is a top-tier hospital in the capital city of Shandong Province, a province with huge population and large and fast-growing medical service demand. Therefore, one could reliably project the likely profits of reagent sales based on the actual sales data. The quantification of the Claimant is sufficiently conservative not to take into account the fast-growing rate of the medical market.

138. The lost profit claim is sufficiently certain also as a matter of Chinese law standards. Article 107 and Article 113 of the *Contract Law* do not require 100% certainty of future losses. As observed by a Chinese legal commentator, the test is "*only one of reasonable certainty, not one of mathematical precision. Where the existence of loss is proven and only the precise extent of it cannot be established, to deny relief to the aggrieved party on the basis of uncertainty may work injustice*."

139. The Claimant submits that the certainty of lost profit is sufficiently proved by the fact that until today the hospital is still using the rented equipment under the RAP Agreement, and thus has been in constant demand for special reagents until today. The lost profits claimed by the Claimant was foreseen or should have been foreseen by the Respondent in 2007.

140. The Claimant submits that the Respondent in 2007 indeed had foreseen the profits claimed by the Claimant as lost profits in this arbitration. In fact, prior to the execution of each RAP Agreement, the Claimant was required to submit a ROI (Rate of Investment) to Respondent for approval. In the ROI, the Claimant was required to provide analysis and data on the regional medical market and forecast on reagents demand of the specific hospital under the RAP Agreement. The Respondent would examine and approve the ROI before it decided to enter into RAP Agreement with Claimant for that specific hospital. Therefore, the Respondent foresaw that the Claimant would have made profits from resale of reagents through the whole term of the RAP Agreement under normal circumstances.

141. The foreseeability requirement of Article 113 of the *Contract Law* does not require that the breaching party have foreseen or should have foreseen the exact extent of the losses which a future breach may cause. As observed by a Chinese legal commentator, "*what is required to be foreseeable is the nature or type of the particular loss, rather than its precise extent*." Respondent, in the course of examination and approval of the ROI furnished by Claimant, foresaw the nature or type of the loss profits, i.e., the price margin of sales of reagents to the hospital.

142. The RAP Agreement is not applicable to exempt the Respondent from compensation of lost profits. The Respondent cites Article 12.2 of the RAP Agreement as its defense to the Claimant's lost profit claim. However, a careful examination of the language of this Article will reveal that this clause is not applicable to the current case. The Article clearly provides that it only applies to "*US Company C non-willful failure to supply equipment and products hereunder.*" Apparently, the Respondent knowingly

and willfully stopped reagent supply. Therefore, Article 12.2 is not applicable in the current case. The Respondent is liable to the Claimant for repayment of the value of its investment.

143. The Claimant submits that the Respondent's multiple breaches have indeed deprived the Claimant of its valuable distribution channel that the Claimant had invested heavily in to establish. As a company engaging in distribution business, the Claimant's most valuable assets are its distribution channels that it establishes and accumulates over time. In the current case, the Claimant invested a lot of time, manpower and money to develop the Hospital to become its client. The Claimant also invested, *inter alia*, more than RMB 100,000 handling fee to rent the equipment and undertook the expenses to install the equipment in the Hospital. The rented equipment and the contractual right to supply reagents for that equipment actually constitute a distribution channel that Claimant has invested for under the RAP Agreement. The Claimant is relying on that distribution channel to gain a price margin to cover its investment.

144. However, as a result of the Respondent's having ceased the supply of reagents and its refusal to renew the authorization letter, as well as authorizing other distributor(s) to directly sell reagents to hospital for the rented equipment, the Claimant has been virtually deprived of such a distribution channel, thus directly causing the Claimant's complete loss of the value of its investment.

145. It was foreseeable at the time the Parties entered into the Agreement that a breach of the RAP Agreement by the Respondent to supply reagents to the Claimant would lead to complete failure of the profit mechanism under the RAP Agreement and would cause the loss of total investment made by the Claimant.

146. Accordingly, the Claimant is entitled to be compensated for value of its investment which has been destroyed by the Respondent's various contractual and statutory breaches. As the Claimant has previously set out in its Application for Arbitration, the value of the Claimant's investment amounts at the very least to the residual value of the handling fee after deduction of depreciation of the years when Claimant was able to normally supply reagents to the hospital for the rented equipment. Claimant is entitled to reimbursement of all costs related to this arbitration.

147. Finally, Claimant seeks an award, pursuant to Article 46 of the CIETAC Rules, that the Respondent be ordered to bear all of Claimant's costs in bringing this arbitration,

including the CIETAC arbitration fees and expenses, as well as the reasonable legal and other costs incurred by Claimant for the arbitration.

148. Pursuant to Article 46 of the *2005 CIETAC Rules*,

(1) The arbitral tribunal has the power to determine in the arbitral award the arbitration fee and other expenses to be paid by the parties to the CIETAC.

(2) The arbitral tribunal has the power to decide in the award, according to the specific circumstance of the case, that the losing party shall compensate the winning party for the expense reasonably incurred by it in pursuing its case. In deciding whether the winning party's expenses incurred in pursuing its case are reasonable, the arbitral tribunal shall consider such factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute, etc.

149. The permissible components of the Claimant's claim for costs are as follows:

(1) Direct costs of the arbitration (CIETAC fees and expenses advanced by Claimant);

(2) Fees and expenses of legal representation by Law Firm E; and

(3) Fees and expenses of translation.

150. By far, the Claimant estimates the total amount for (2) and (3) to be around RMB 270,000, with RMB 250,000 for (2) legal fees and RMB 20,000 for (3) translation fees. As the arbitration proceeding is still in process, the costs may increase. With the permission of the Tribunal, the Claimant will submit the evidence of invoices related to (2) and (3) within the deadline specified by the Tribunal.

151. The Claimant submits that the fees and expenses for legal representation should be granted in full as they were reasonably incurred considering the complexity of the case and the special need to conduct the proceeding in English. The Claimant submits that the Respondent unreasonably rejected the proposal by the Claimant and the Tribunal to conduct the proceedings in Chinese in view of the nature of the case and language of the evidence and witnesses. The Respondent shall therefore be responsible for the extra costs for conducting the proceeding in English.

152. The Claimant concludes as follows: due to the facts and reasons stated above, as well as the facts and reasons Claimant has already stated in previous submissions, the

Claimant pleas that the Tribunal support its claims for remedies and dismiss all of Respondent's counterclaims.

E. The Respondent's Post-hearing Submissions

153. The Respondent also submitted its post-hearing submission. The Respondent stated that this is to be considered together with the Defence and Counterclaim filed in January 2011, all evidence filed pursuant to the procedural orders, and the oral submissions made, and the documents and evidence submitted at the hearings in June 2012.

154. The Respondent reiterated the parties to the action and the main players in this arbitration. US Company C USA is a health care company specializing in production of new medicines with the use of technologies to help people manage their health. US Company C USA has sales, manufacturing, research and development, and distribution facilities around the world.

155. US Company C HK is a company incorporated in December 1960 in Hong Kong and is a wholly-owned subsidiary of US Company C USA. US Company C HK looks after, among other things, the leasing and sales of diagnostic medical equipment as well as sale of reagents for use on diagnostic equipment in China. It has numerous distributors in China and only deals with distributors which have a distributorship relationship with it.

156. In the past, export of medical equipment into China was done through a distributor's import-export agent company. Distributors had complained that the import procedures and duty declaration were always very complicated and troublesome. In particular, the equipment had to be routed through Hong Kong before it arrived at the China ports. These also increased costs and operation expenses for the distributors.

157. Chinese Company B. ("US Company C City H, China") is a limited liability company incorporated under the laws of the People's Republic of China on 4 September 2001 and is an affiliate company within the US Company C Group.

158. In 2007, the situation of import of medical diagnostic equipment as mentioned in the paragraph above had begun to improve as US Company C City H, China, was used as an entity to import the medical equipment from US Company C USA directly. Equipment would be imported directly into and stored in City H but not pass through Hong Kong. Following this change of arrangement, distributors in China were

required to sign the equipment-supply agreements, e.g., the RAP Agreement, with US Company C City H, China, instead of US Company C HK. During the material time, US Company C City H, China, never supplied reagents to distributors and the Claimant admitted that it never requested or placed any order with US Company C City H, China, for reagents.

159. The Claimant (Chinese Company A. or "Assegai") is a limited liability company incorporated under the laws of the People's Republic of China as before mentioned.

160. In about 1999, US Company C HK started to do business with Assegai Technical & Trade Co., Ltd. in City L, China ("Chinese Company C"). US Company C HK, and Chinese Company C entered into an Annual Distributor Agreement (the "**ADA**") on a yearly basis whereby Chinese Company C was granted the right to act as one of US Company C HK's distributors in certain regions in the Mainland China. ADA for the years 2002 to 2005 were produced.

161. Chinese Company C, which was established in 1998 by Mr. D's brothers ("**Mr. D brothers**"), was dissolved in 2006 after the Claimant was alleged to take over all its rights and liabilities. Both Chinese Company C and the Claimant are owned and controlled by the same Mr. D brothers. In fact, the ADAs for 2002, 2003, 2004 and 2005 were all signed by Mr. D while the ADA for 2006 was signed by his brother Mr. D F.

162. In the Claimant's Application for Arbitration dated 28 October 2010, the Claimant contends that the rights and obligations acquired and undertaken by Chinese Company C were transferred to the Claimant in May 2006. There was a dispute between the parties as to whether such transfer, to which US Company C HK and/or US Company C City H, China, was not notified at the material time, was a legally valid and effective transfer.

163. In a nutshell, it is the position of US Company C HK and the Respondent (US Company C City H, China) that Chinese Company C only notified US Company C HK and the Respondent in 2006 of a change of name of the company from "City L, China xxxxxxx Co., Ltd" to the name of the Claimant (Chinese Company A) without any mention of transfer of rights and obligations between the companies.

164. Accordingly, US Company C HK and the Respondent had been conducting business with the Claimant on the assumption (which was wrongly held as a result of misrepresentation given by Chinese Company C) that the Claimant and Chinese

Company C were the same company. Since such dispute is not directly relevant to the issues in this arbitration, the Respondent does not discuss this issue further.

165. During all material times up to November 2007, Chinese Company C/the Claimant was one of the distributors (First-tier, to be further explained below in the paragraph below) of US Company C HK in the Mainland. In this claim, the Claimant had invited the Arbitral Tribunal to refer the Claimant as referring to and including Chinese Company C.

166. The Respondent describes the Business Operation Model of US Company C HK in China. US Company C USA is a drug manufacturer. Part of its business in China is the supply of reagents for conducting different kinds of medical tests. Most of these medical tests require medical equipment which is expensive to purchase. Therefore, as part of its promotional and sales strategy, US Company C HK offered to its distributors` three different methods to finance the supply of the medical equipment. There are two types of distributors, the First-tier distributor and the Second-tier distributor. The First-tier distributor, upon signing the ADA every year, has the following benefits and obligations:

167. To obtain equipment supply from US Company C HK by one of the three methods in addition to cash sale and purchase, i.e.

(a) by capital agreement plan ("**CAP**") (purchase at concessionary price and payment by instalments);

(b) by rental plan ("**RENTAL**") (renting the equipment and pay rental charges); and

(c) reagents agreement plan ("**RAP**") (by paying the handling charge for the importation and installation of the equipment).

168. Directly purchase reagents from US Company C HK at preferential price of about 15 to 20% discount. Second-tier Distributor cannot obtain supply of reagents directly from US Company C HK nor can they purchase or lease equipment at preferential prices. US Company C HK only supplies reagents to First-tier distributor directly.

169. The First-tier distributor has the following obligations:

(a) to undertake a minimum number of equipment supply;

(b) to undertake the purchase of a minimum amount of target sale of reagents. The target sales on reagents imposed on the distributors is required in order to enable

US Company C HK to recoup the price of the equipment supplied under the different types of supply mentioned above. The target sales amount of reagents sometimes is proportional to the value of the medical equipment. If the sale is at market price, there is no need to make any promise on the amount of sales of reagents. This explains why in the RAP and 450 Agreements, the period of the lease of the equipment was for 8 years for reagent. The value of reagent was about RMB 900,000 and the Claimant/distributor only paid an amount about RMB 100,000 as handling charge but did not pay any price of the equipment. US Company C HK hoped to recover the cost of the equipment from the sale of reagents in the following 8 years. For reagent Axxxxx Plus, because the value of the equipment is lower, a period of 5 years was imposed;

(c) (from 2004) to undertake not to engage in product promotion activities which are in competition with US Company C HK's products; and

(d) (since 2005) to comply with the rules of conduct prescribed by US Company C HK in its commercial activities.

170. If the sale of US Company C's medical equipment is at market price, there is no need for the purchaser to make any promise on the amount of sales of reagents. A copy of the Relationship Chart of Three Types of Agreements, the Relationship between RAP Agreements 440/450 and Two Other Kinds of Agreements and the Table comparing the main obligations of US Company C and the Claimant in the three types of Agreement are exhibited in Appendices A, B and C of the final submission, respectively, for better illustration of the relationship among the necessary contractual agreements.

171. All these terms and conditions relevant to a First-tier distributor are contained in the ADA to be signed between US Company C HK and the distributors every year covering the business calendar year from 1 December to 30 November. The ADA is used to deal with the way the medical equipment is financed, the place (Hospital) where it is placed. The distributor will undertake a certain amount of purchase of reagents. This is known to all First-tier distributors including Chinese Company C and the Claimant.

172. The difference between a First-tier distributor and a Second-tier distributor is that a Second-tier distributor does not have the benefits available to a First-tier distributor and does not have the burden imposed on a First-tier distributor. Second-tier distributors

cannot obtain equipment supply using the three methods mentioned in paragraph above and they cannot purchase reagents directly from US Company C HK at preferential prices, but they can purchase from other First-tier or Second-tier distributors at higher prices. A First-tier distributor can have its own Second-tier distributors. In 2007, US Company C HK had 8 First-tier distributors and 15 First-tier distributors in 2008 in Northern China but had 38 in 2007 and 57 in 2008 First-tier distributors in the whole of China. A Second-tier distributor has to make an application to US Company C HK to become such a distributor, but this is normally approved. In 2009, there were about 180 Second-tier distributors of US Company C HK in the whole of China. In order to illustrate the relationship among US Company C HK, the First-tier and Second-tier distributors, and hospitals better, please refer to the Relationship Chart Regarding US Company C HK, First-tier and Second-tier Distributors and Hospitals exhibited as Appendix D.

173. In brief, it is a balancing situation, i.e., if a distributor wants to get benefits as a First-tier distributor, it has to give those reagents supply and equipment supply undertakings. If it does not want to give promises, undertakings or have obligations imposed, it can choose to be a Second-tier distributor. It is the Respondent's case that after the Claimant decided not to sign the 2007 ADA, and giving up its First-tier distributor status, it can still become a Second-tier distributor. This is exactly the situation envisaged by clause 10.2 of the RAP Agreement which expressly provides that the Claimant can obtain supply of reagents from US Company C's distributor, i.e., by becoming a Second-tier distributor. It is the Claimant who has chosen not to become a Second-tier distributor (Claimant Evidence, C-12; Respondent Evidence, Vol. II, R-5; Vol. III, R-10, also exhibited in Appendix I hereto). Not only did the Claimant not want to sign the ADA, but it also has engaged in the conduct of serving other competing manufacturers of US Company C, such as Japan First Chemical and Japan First Chemicals Company. This is equivalent to free-riding the benefits that US Company C HK has granted exclusively to its First-tier distributors and yet getting away from the obligations therein.

174. The Respondent (US Company C HK) also welcomes companies to become its Second-tier distributors because they can assist the Respondent to expand the market in Mainland China and sell as many products as possible. As such, procedurally, the Respondent (US Company C HK) only requires the First-tier distributors to make an application to US Company C HK for the Second-tier distributors. These applications

are normally approved. In fact, in practice and as testified by Mr. S, the Respondent (US Company C HK) only asks the First-tier distributor to report and make a record for the Second-tier distributors for the purpose of management and repair. Even if the First-tier distributor does not report, it would not be a big problem (Witness Statement of Mr. S dated June 2012 exhibited as Appendix G hereto).

175. The Relationship between Chinese Company C and the Claimant with US Company C HK and the Respondent (US Company C City H, China). The business relationship between Chinese Company C and US Company C HK probably started in 1999. The produced ADA for the years from 2002 shows that every year, Chinese Company C as distributor was required to sign and did sign an ADA to cover equipment and reagent supply. From 2002 to 2005, Chinese Company C was the First-tier distributor of US Company C HK in Northern China. In 2006, without knowing the details about the dissolution of Chinese Company C and the formation of the Claimant, the 2006 ADA was signed as if the Claimant and Chinese Company C were the same entity. In 2007, with the expectation that the Claimant would continue to sign the ADA, the RAP Agreements 440 and 450 were signed in April 2007 before the ADA was signed. This is not unusual and happened from time to time between US Company C HK and its First-tier distributors.

176. In the years 2002 to 2006, the ADA was signed between Chinese Company C/the Claimant and US Company C HK without any difficulty. The Claimant is well aware of the trading pattern and trading mode of US Company C HK, and the requirement to sign an ADA for the supply of reagents. The following ADAs are in evidence:

- February 2002 — A tripartite distributor agreement between US Company C HK, China Medical Equipment Machinery Technology Services Ltd. and Chinese Company C for supply of equipment and reagents with sales target for reagents for period up to November 2002 (Respondent Evidence, Vol. I, p. 1);
- January 2003 — A two party distributor agreement between US Company C HK and Chinese Company C for supply of reagents and equipment again with sales target for reagents for period up to November 2003 (Respondent Evidence, Vol. I, R-1, p. 8);
- December 2003 — A two party distributor agreement between US Company C HK and Chinese Company C for equipment and reagent supply with sales target

for reagents for the period up to November 2004 (Respondent Evidence, Vol. I, R-1, p. 15);

- Undated distributor agreement between US Company C HK and Chinese Company C for equipment and reagent supply with sales target for reagents for the period up to November 2005 (Respondent Evidence, Vol. I, R-1, p. 27); and
- May 2006 — A distributor agreement signed between US Company C HK and the Claimant for equipment and reagent supply with sales target for reagents for the period up to November 2006 (Respondent Evidence, Vol. I, R-1, p. 59).

177. The Claimant itself also admitted the course of dealing between US Company C HK and the Claimant. It said:

> "*Judged from not only the frequency but also the duration of the transaction (namely the sale and lease for over 100 sets of equipment(sic) and the supply of reagents for almost 10 years), the distribution mode between the Claimant and the Respondent and US Company C has been repeated over and over and has formed the fixed transaction practice between the parties*." (Application for Arbitration dated October 2010, para. 2, p. 9).

178. The Claimant further admitted in its Defence to Counterclaim dated April 2012 (para. 7, p. 5) that the hospital requires from the supplier of reagents (US Company C HK) to provide formal authorization letter that the reagents are authentic and subject to normal after sale service. The Claimant knew that US Company C HK was the supplier and required its formal authorization.

179. In 2007, the Respondent signed the RAP Agreement with the Claimant on the instructions of US Company C HK. This is because in 2007, the method of importation of the equipment has been changed. Before 2007, import and export documentation was signed by third parties designated by the distributor (including the Claimant) with US Company C HK. This had caused unnecessary inconvenience to the distributor. In order to help the distributors, in the beginning of 2007, US Company C HK changed the method of importation. The equipment was directly shipped from abroad to City H, China, no longer passing through Hong Kong. The import was all to be undertaken by the Respondent. See the evidence of Mr. Q (Witness Statement of Mr. Q dated June 2012, exhibited as Appendix F hereto). The distributor only needed to pay the handling charge. The RAP Agreements were signed by the Respondent as the agent or a vehicle used by US Company C HK.

180. The Application for Arbitration was lodged by the Claimant in October 2010. The claim is for an award that the Respondent pays the Claimant more than RMB 100,000 in compensation for direct losses on equipment; an award that the Respondent pays the Claimant more than RMB 1,700,000 as compensation for anticipatory losses of profit; and for an award that the Respondent bears the arbitration cost of this case and the attorney fees of RMB 200,000.

181. The basis of the claim is that the parties concluded the RAP Agreement on 6 April 2007 and pursuant to which the Claimant agreed to rent equipment and buy reagents from the Respondent. The RAP Agreement has become effective and been actually implemented before the Respondent breached the RAP Agreement and stopped to supply reagents.

182. The Claimant says that the dispute in question represents only part of the comprehensively and perpetually contractual relationship between the Claimant and the Respondent (US Company C HK), namely, the dispute over the Architect i2000 immunoassay system agreed in the RAP Agreement (the "Equipment").

183. Pursuant to the RAP Agreement, the Claimant paid the Respondent about more than RMB 100,000 as commission to rent the equipment.

184. The Defence and Counterclaim was filed by the Respondent in January 2011. The defence and counterclaim are:

185. US Company C USA is a manufacturer of diagnostic medical equipment, reagents and/or pharmaceutical products. US Company C HK is an affiliated company of US Company C USA. Part of its business in China is the supply of reagents for conducting different kinds of medical tests. Most of these medical tests require medical equipment which is expensive to purchase. Therefore, as part of its promotional and sales strategy, US Company C HK offered to its distributors` three different methods of equipment acquisition to finance the supply of the medical equipment. There are two types of distributors, the First-tier distributor and the Second-tier distributor.

186. To acquire the right to obtain US Company C's equipment and reagents from US Company C HK directly, distributors in the Mainland China were required to enter into an ADA with US Company C HK. The ADA governed various matters between the parties including the granting of the authority to the distributors to sell diagnostic medical equipment in certain geographical districts in the Mainland China. A distributor of US Company C HK enjoys preferential price discounts and the opportunity to

obtain equipment supply under different methods but also takes on certain obligations. If a distributor wished to lease or purchase equipment from US Company C HK, it was required to enter into separate agreements with US Company C HK or (upon US Company C HK's instructions and from 2007) the Respondent (US Company C City H, China) to formalize the arrangements, such as the RAP Agreement. It is the Respondent's case that a RAP Agreement cannot exist alone in its own right, and it must be read and construed together with the ADA and the Purchase Contract for the sale and purchase of Reagents as a package deal to consider and explain the business relationship between the Claimant and the Respondent or Chinese Company C and US Company C HK.

187. During all material times up to November 2007, Chinese Company C/the Clamant, was one of the distributors of US Company C HK in Mainland China enjoying the rights to be supplied with equipment and preferential prices for the supply of reagents. Chinese Company C/ the Claimant on the one hand and US Company C HK on the other had signed ADAs in many previous years. As a consequence of the Claimant's deliberate refusal to sign the ADA for 2007 (the "**2007 ADA**") because the Claimant did not want to be a distributor of US Company C HK so that it would not be bound by the obligations under the ADA and it would be free for it to act as distributor for other competitors of US Company C HK such as Siemens, Roche, Bayer, or Japan First Chemicals Company, etc., the Claimant (Assegai) ceased to be US Company C HK's distributor in November 2007.

188. Throughout the period between December 2006 and November 2007, US Company C HK and the Respondent (US Company C City H, China) were expecting the Claimant to execute the 2007 ADA with US Company C HK in the same way as the Claimant (or Chinese Company C) had been happily doing in past years. With this expectation in mind, US Company C HK negotiated the terms of the 2007 ADA with the Claimant and instructed the Respondent (US Company C City H, China) to enter into, the RAP Agreement, (the subject agreement in this arbitration) and RAP 450 Agreement, concerning leasing of medical equipment and purchase of reagents with the Claimant.

189. Regrettably, up to the end of 2007, Claimant still refused to execute the 2007 ADA which led to the termination of the distributorship relationship between the Claimant and US Company C HK in November 2007.

190. After the Claimant ceased to be US Company C HK's distributor, it had no right to purchase directly from US Company C HK the reagents at preferential prices but it

still has the continuing obligation under the RAP Agreement to purchase and it can still purchase US Company C's reagents from the distributors of US Company C HK. However, in breach of the RAP Agreement, the Claimant ignored such obligation and chose to take no action to purchase reagents from US Company C's distributors.

191. The Claimant alleges that the Respondent (US Company C City H, China) breached its obligation to supply reagents under the RAP Agreement. Such allegation is wrong. It is plain from the terms of the RAP Agreement and known to the Claimant from the dealings between the parties that the Respondent (US Company C City H, China) has no obligation to supply reagents. The supplier was US Company C HK, and an ADA needs to be signed every year for a distributor to become a First-tier distributor. If the Claimants distributorship relationship with US Company C HK has been terminated, it would be required to, and still can, purchase reagents from US Company C's distributors at a price to be negotiated between the Claimant and the distributors concerned. In fact, both US Company C HK and the Respondent (US Company C City H, China) have repeatedly told the Claimant that it could purchase US Company C's regents from the distributors if it wanted to. The same message was also repeated in previous arbitration proceedings. Unfortunately, despite the Respondent (US Company C City H, China)'s express and repeated requests, the evidence submitted by the Claimant shows that the Claimant has done nothing to purchase reagents from the other distributors.

192. The Claimant's inaction in purchasing regents from the distributors clearly reveals that it was not at all interested in doing business with US Company C HK and the Respondent (US Company C City H, China) anymore, whether directly or indirectly. In fact, US Company C HK's subsequent investigations revealed that in 2007, a company, which was set up by Mr. D (a shareholder of the Claimant) and Mr. D's brother, had been assisting US Company C's competitor, Siemens, to develop its market share and sell its products in the Mainland. See Evidence of Mr. Q (Witness Statement of Mr. Q dated June 2012, exhibited as Appendix F hereto). Further evidence shows that the Claimant was distributing products for Roche and for Japan First Chemicals Company. The Respondent submits that this was the real reason for the Claimant's refusal to sign the ADA. The Claimant chose not to become US Company C's distributor. It was not that supply cannot be obtained but rather, it was because the Claimant wants only the benefits and not the obligations as a First-tier distributor. This is grossly unfair, and it should not be allowed to do that.

193. Furthermore, as a matter of fact, the Claimant did not sell reagents to the Hospital (Shandong Province Hospital) as required under the RAP Agreement. Nor did the Claimant ever demand reagents from the Respondent (US Company C City H, China) or US Company C HK in respect of reagents sale under the RAP Agreement. The Claimant (Assegai) sought to rely on the sales carried out by another company called "Yxxxxx" to seek compensation from the Respondent (US Company C City H, China), which has no basis. The Consignment Contract is dubious and suspicious.

194. The Claimant has produced no evidence to show that the Shandong Provincial Hospital had installed the equipment or used the reagent. The Claimant pleaded in its claim under II that "*The Claimant delivered the Equipment rent from the Respondent to Shandong Provincial Hospital/Shandong Qianfoshan Hospital, which was officially put into operation in April 2007*" (Application for Arbitration dated October 2012, p. 5). Yet, the Claimant had not produced any rental agreement signed by the hospital. There was also no evidence of any purchase of reagents pursuant to the RAP Agreement. The Consignment Contract between the Claimant and Yxxxxx and the purchase by Yxxxxx are not admitted.

195. In those circumstances, the Claimant (Assegai) has no valid claim against the Respondent (US Company C City H, China) as alleged or at all.

196. The Respondent (US Company C City H, China) contends that the Claimant has a clear obligation to purchase reagents in the amount of US$ 101,000 as contained in Schedule 9.1 of the RAP Agreement. This was not performed. The Respondent (US Company C City H, China) therefore counterclaims against the Claimant for the relief set out in its Counterclaim (Counterclaim dated January 2011, paras. 59-63, pp. 27-29 because of the breach of the Claimant in fulfilling its obligation under clause 9.1 of the RAP Agreement.

197. The Respondent sets out below the various issues that it would like the Arbitral Tribunal to consider in this case:

    (1) Is the RAP Agreement a stand-alone agreement between the Claimant and the Respondent in respect of supply of equipment and reagents or is it just part of a package deal?

    (2) Under the RAP Agreement, is there any obligation, expressed or implied, for the Respondent to supply reagents?

(3) Is the Claimant obliged to purchase reagents under the RAP Agreement after the termination of distributorship whether at the request of the Respondent or not?

(4) Whether there was any loss suffered by the Claimant and if there was, whether it was caused by the Respondent?

(5) Whether there was a breach of contract by the Claimant in the Counterclaim in failing to comply with the RAP Agreement?

(6) What are the damages to be awarded if either the Claimant or the Respondent is successful in their respective cases?

198. The Respondent says that the following important points seem to be common ground between the Claimant and the Respondent. Since 1999, there was a course of dealing between the parties. Chinese Company C started co-operation with US Company C HK/the Respondent and has purchased or rent from US Company C HK/Respondent the immunoassay system and other equipment for use in hospitals.

199. The Claimant purchased reagents under the RAP Agreements directly with US Company C HK (Defence to Counterclaim dated April 2012, Summary of Facts).

200. The Claimant did not place orders for reagents with the Respondent. The Respondent insisted that it never sold reagents itself and instructed Claimant to purchase reagents from US Company C HK (Defence to Counterclaim dated April 2012, para. 1(2), p. 3).

201. The Claimant did not sign the 2007 ADA by its own volition and the distributorship was terminated by notice dated November 2007.

202. The Respondent notes that the oral hearing in the arbitration took place in June 2012 in the CIETAC's Offices in City L, China. At the hearing, apart from the documentary evidence produced pursuant to procedural orders, the Claimant did not call any witness and the various witness statements were withdrawn at the beginning of the hearing. A note of caution is that, therefore, the statements made by Mr. D of the Claimant at the hearings are not evidence. The previous awards were irrelevant, and it is absolutely untrue for him to say that the Claimant won all the cases. It won only five. The Respondent won four and one other arbitration was withdrawn by the Claimant. The photographs attempting to show large inventories were withdrawn too. Essentially, the Clamant is relying on a strict interpretation of the RAP Agreement as a stand- alone and independent document to give it the right to be supplied with

the Equipment (at the handling charge without paying the proper purchase price of the Equipment) and the supply of reagents (at preferential prices given to First-tier distributors of US Company C HK).

203. The Respondent produced 7 volumes of documents of evidence pursuant to the procedural orders and at the hearing also produced two factual witnesses, Mr. Q and Mr. S. The Respondent's case is that the RAP Agreement is not a stand-alone document. It is part of the documents of a package deal between US Company C HK and its distributors which includes the ADA, the RAP, RENTAL or the CAP and a Purchase Contract for the sale and purchase of reagents at preferential prices directly from US Company C HK. It is also the Respondent's case that both under the RAP Agreement as a stand-alone document or under the package, it is clear from the wording, and it was known and understood by the Claimant and the Respondent that there was no obligation on the part of the Respondent to supply reagents to the distributors at the material time.

204. The Defence Evidence and Arguments show that the transaction is a package deal. The RAP Agreement is not a stand-alone document. It is the Respondent's case that the RAP Agreement is not an independent document. It is not an isolated transaction between the Claimant and the Respondent as the Claimant would like to put it. One cannot merely look at the RAP Agreement, which is an incomplete transaction with incomplete documentation in regulating the rights and liabilities of the parties, without looking at the bigger commercial arrangement. It is one of the many documents generated yearly in a manufacturer and distributor relationship.

205. Equally, the supply of equipment is not a stand-alone business activity as well. It has to be read with the purchase and supply of reagents. There are also the rights and obligations between US Company C HK and the distributors. In the current case, the Claimant has, intentionally or not, given the Arbitral Tribunal an incomplete picture by revealing only a small part of the full story. Once the Arbitral Tribunal gets the full picture, the Claimant's case must fail and be dismissed.

206. The ADA under which reagents are supplied is the key document in this commercial arrangement. Mr. Q said that this is the constitution. Mr. S said that this is the basis for the distributor relationship. It governs the supply of reagents and enables US Company C HK to recover the capital value of the equipment and also enables the Claimant to recover its handling charge for the supply of the equipment to the hospitals from the sales of reagents through a period of time and in this case, 8 years. If it is a sale and

purchase of the equipment at full market value and US Company C HK incurs no cost on the equipment as described in the relevant paragraph above, the minimum reagents commitment is unnecessary, and the Claimant would have no obligation to purchase them at a minimum amount.

207. If the Claimant does not want to be bound by all those obligations as set out in the ADA, it has the alternative of purchasing the equipment from US Company C HK outright by making a full payment for the equipment upfront. For instance, the Equipment is worth more than RMB 900,000 (Respondent Evidence, Vol. VII, R-53).

208. To be able to finance the acquisition of US Company C HK's expensive diagnostic instruments, to place them at hospitals and in turn supply the hospitals with reagents that are to be used on these instruments, the Claimant had to sign a yearly ADA with US Company C HK. The ADA deals with among other things:

209. The number of equipment supply/installation to be undertaken by the distributor for that particular business calendar year which would be followed by separate agreements governing equipment supply; and the target amount of reagents to be purchased by the Claimant to fulfill its obligations for minimum purchase under the various equipment agreements for the purpose of enabling US Company C HK to recoup its capital outlay for the equipment supplied for that and other business calendar years.

210. In other words, the ADA confirms a distributor's qualification to be US Company C HK's First-tier distributor which status enjoys preferential treatments in respect of supply of reagents and equipment which are expensive to obtain. As part of the marketing strategy of US Company C HK, a First-tier distributor gets to finance the acquisition of the medical instruments in three ways, namely, CAP, RENTAL and RAP.

211. As such, the RAP Agreement does not provide for the supply of reagents from the Respondent. There is also no positive, reciprocal obligation, express or implied, in the RAP Agreement to require the Respondent to supply reagents. Rather, it is the ADA signed between the distributors and US Company C HK that provides for supply of reagents and provides the preferential price treatment to First-tier Distributors of US Company C HK.

212. Accordingly, the RAP Agreement was only part of the commercial arrangement between US Company C HK and its distributors. Had the Claimant indicated that it would not sign the 2007 ADA with US Company C HK, the RAP Agreement would

not have been signed. This is because the Equipment was supplied under a RAP Agreement and was for free with only a handling charge imposed.

213. In comparison, what US Company C HK has done to the Claimant is to offer better terms and conditions to the Claimant by giving it the very expensive medical equipment free-of-charge as opposed to demanding for an upfront payment. In the RAP business model, the Claimant is not required to pay anything for the equipment to be installed in hospitals, except the import administrative handling charge of more than RMB 100,000. Despite US Company C HK's good intention and concessions, the Claimant now complains and unreasonably demands that US Company C HK should continue to supply reagents to it under the same conditions and at the same preferential price even when it has decided not to execute the 2007 ADA to continue with the distributorship relationship with US Company C HK (Respondent Evidence, Vol. IV, R-11; Comparison Table entitled "US Company C intended to assist the distributors but is now being sued!" exhibited as Appendix E). This is simply unfair and inequitable.

214. As a distributor, Chinese Company C and the Claimant should have known from the course of dealings with US Company C HK in the last decade that the ADA was and is an integral part of the commercial arrangement for doing business with US Company C HK as its distributors. Therefore, the Respondent submits that there is no denial that the Claimant was aware that the ADA was part and parcel of the documentation governing the business relationship between US Company C HK and its distributors. The following evidence supports this contention.

215. The Claimant admits and relies on the previous course of dealing between US Company C HK and Chinese Company C and/or the Claimant. It states in its Application for Arbitration dated October 2010:

> "*US Company C HK (the Respondent) entrusted the Claimant to distribute two parts of its products: Equipment and specific reagents. According to the Distribution Mode between the Claimant and the Respondent (US Company C HK), the Claimant first rent the equipment and installed it in the hospital pursuant to the Agreement, and then to meet the hospital's needs, purchases from the Respondent/US Company C Hong Kong the specific reagents and sells them to the hospital. Judged from not only the frequency but also the duration of the transaction (namely the sale and lease for over 100 equipment and the supply of reagents for almost 10 years), the distribution mode between*

the Claimant and US Company C Hong Kong/Respondent has been repeated over and over and has formed the fixed transaction practices trusted between the parties." (sic) (Application for Arbitration dated October 2010, para. 3, pp. 8-9).

216. Both of the two factual witnesses for the Respondent, Mr. Q and Mr. S, testified that in order to be US Company C HK's distributor and maintain the distributor status, the Company is required to sign an ADA with US Company C HK every year. Mr. Q said that "*The ADA specifies the rights and obligations of both US Company C HK and the distributor with respect to both the equipment and reagents supply.*" (Witness Statement of Mr. Q dated June 2012, exhibited as Appendix F, para. 3) Mr. S said that "*In order to be US Company C HK's First-tier distributor and maintain the distributor status, I was required to sign an ADA with US Company C HK every year to deal with the supply of medical equipment and purchase of reagents from US Company C HK. The ADA specifies the rights and obligations of both US Company C HK and Prewin with respect to both the equipment and reagents supply. The ADA is also the basis to the distributorship relationship between US Company C HK and the Company, without which no other arrangement of equipment provision or reagents supply would have been possible.*" (Witness Statement of Mr. S dated June 2012, exhibited as Appendix G, para. 4).

217. The Claimant was not able to produce any evidence to support that the RAP Agreement had existed independently as a document in its own right. When one looks at the RAP Agreement, the rights and obligations are not completely set out and even on the purchase obligation, the details about the reagents, the price, the payment and the date of delivery are missing. The details are set out in the ADA without which the RAP Agreement becomes meaningless. For example, the total purchase obligation set out in Schedule 9.1 is meaningless without the detailed price list attached to the draft ADA (Respondent Evidence, Vol. II, R-7, pp. 65-67).

218. Although the ADA and the RAP Agreement were not often signed together or on the same date, this sequence of signing the RAP Agreement prior to the ADA is not unusual and happened from time to time between US Company C HK and its First-tier distributors, as long as there has been a consistent course of dealing between the two and a reasonable legitimate expectation that the distributor would remain a First-tier distributor. For example, the 2006 ADA was signed on 3 May 2006, when was after

more than 5 months from the beginning date, i.e., 1 December 2005, of the 2006 distribution calendar year.

219. Because of the detailed terms contained in the ADA, there are normally discussions between US Company C HK and the distributors about the terms such as quantities, credit terms, delivery dates and places, etc. This is evident from the email exchanges between Mr. L and Manager H and Ms. Z of the Claimant concerning the terms in the ADA. (Respondent Evidence, Vol. II, R-5, pp. 15-22, and translation, pp. 16 to 19, pp. 1-3).

220. Since the medical equipment was manufactured in the US, import and export documentation had to be signed if it was to be imported into Hong Kong. Before 2007, these documentations were signed by third parties designated by the distributors (including the Claimant) with US Company C HK. As one can imagine, these procedures had caused unnecessary inconvenience to the distributors. In order to assist the distributors and simplify the medical equipment import procedures, in the beginning of 2007, US Company C HK had changed the method of import (Witness Statement of Mr. Q dated June 2012, exhibited as Appendix F hereto, para. 8). From 2007 onwards, the equipment was directly shipped from abroad to City H, China, no longer passing through Hong Kong. Import of the equipment was all to be undertaken by the Respondent and the distributor only needed to pay a small amount of handling charge. This explains why in 2007, the RAP Agreement was signed by the Respondent as the agent or vehicle used by US Company C HK. Clearly, the Respondent did not supply and has never supplied reagents to the Claimant. The Claimant also did not request and did not obtain supply of reagents from the Respondent.

221. Likewise, the Claimant further admitted that the hospital requires from the "manufacturer of the products" (i.e., US Company C HK) to provide formal authorization letter that the reagents are "authentic and subject to normal (sic) after sale service" (Defence to Counterclaim dated April 2012, para. 7, p. 5). Obviously, the Claimant knew that US Company C HK, but not the Respondent (US Company C City H, China), was the proper reagents supplier whose formal authorization could be obtained vis-à-vis the hospitals.

222. The Respondent's evidence shows that from 2002 onwards, every year, Chinese Company C (as US Company C HK's distributor) was required to sign and did sign an ADA with US Company C HK to cover equipment and reagents supply. Previous course of dealing from at least 2002 as evidenced by the signing of the following

ADAs show that US Company C HK was the supplier of reagents (Respondent Evidence, Vol. I, R-1):

223. In February 2002, a tripartite distributor agreement between US Company C HK, China Medical Equipment Machinery Technology Services Ltd and Chinese Company C for supply of equipment and reagents with sales target for reagents for period up to November 2002 was signed.

224. Later an ADA between US Company C HK and Chinese Company C for equipment and reagents supply with sales target for reagents was signed on 1 December 2003 (which is for the period up to November 2004) and in November 2005 and May 2006 (for the period up to November 2006) respectively.

225. The Claimant itself admitted the course of dealing between US Company C HK and the Claimant:"*Judged from not only the frequency but also the duration of the transaction (namely the sale and lease for over 100 sets of equipment (sic) and the supply of reagents for almost 10 years), the distribution mode between the Claimant and the Respondent and US Company C has been repeated over and over and has formed the fixed transaction practice between the parties*." (Application for Arbitration dated October 2010, para. 2, p. 9)

226. The Claimant was unable to adduce any evidence to show that a RAP Agreement can exist independently without the ADA. Therefore, it is without doubt that the RAP Agreement cannot exist alone, is not a stand-alone document and cannot be looked at in isolation. When the whole business arrangement is considered together, it is obvious that the RAP Agreement is just a document for the supply of equipment and an obligation was imposed on the Claimant to purchase the reagents to enable both parties to recover the cost of their investment, i.e., US Company C HK to recover the cost of the Equipment and the Claimant, the handling charge. Equally, the Respondent has no obligation to supply reagents, and the Claimant knew and admitted (one of the common grounds) that the ADA is the agreement required for the supply of reagents. Without the ADA which the Claimant deliberately chose not to sign, it of course will not be able to get a supply of reagents at preferential prices from US Company C HK directly. The failure to get supply of reagents and any damage suffered is self-inflicted and cannot be the liability of the Respondent.

227. Could the RAP Agreement have been signed if the Claimant was not a First-tier distributor? The question has been asked by the Arbitral Tribunal as to whether the

RAP Agreement can exist independently. The answer can be gauged in different scenarios. If the Claimant was a newcomer and was not a First-tier distributor, no RAP Agreement could have been signed. This is clear from the evidence of Mr. Q and Mr. S. The value of the Equipment in the RAP Agreement is nearly RMB 1,000,000 (Respondent Evidence, Vol. VIII, R-53). The Claimant did not pay for this price or any part of it. It only paid a handling charge of about more than RMB 100,000. The Equipment was supplied for free. US Company C HK and the Claimant could only recover the cost of the equipment and the handling charge from the sale of reagents. The distributors can only have a higher profit margin from bulk sales and at preferential prices obtained under the ADA. All these are closely tied together. It is, therefore, not difficult to understand that if the Claimant was not a First-tier distributor and if it was not the Claimant who pretended that it would continue to sign the 2007 ADA, no RAP Agreement would have been signed and no free supply of the equipment would have been possible.

228. It is the Respondent's case that if the Respondent or US Company C HK knew that the Claimant was not going to sign the 2007 ADA, the RAP Agreement would not have been signed. The Claimant did not tell US Company C HK. Mr. D said he had planned it for a year.

229. If a First-tier distributor entered into a RAP Agreement, did not continue as a First-tier distributor and the ADA was not signed, the RAP Agreement might still be continued if the First-tier distributor changed to be a Second-tier distributor and obtained the supply of reagents from other distributors but not directly from US Company C HK. It would pay a higher price, but it would not be obliged to accept the distributor conditions such as not acting for competitors of US Company C HK, etc. the RAP Agreement provides for a situation of the termination of the distributorship and a situation of the non-signing of the ADA after the equipment supply. The clause enables the Claimant to obtain continual supply if it still wishes to become a Second-tier distributor albeit at a higher price from other distributors.

230. The "At US Company C's Request" in the clause was not triggered because the Claimant never confirmed to US Company C HK it wanted to become a Second-tier distributor. It had never applied to US Company C or any distributor, First-tier or Second-tier, to become a Second-tier distributor of US Company C HK. Rather, evidence shows that the Claimant did not want to become a Second-tier distributor (Respondent Evidence, Vol. II, R-8). The Claimant's counsel also indicated and

admitted that it did not want to become a Second-tier distributor. It wants to have the benefit of a First-tier distributor in respect of the supply of equipment and supply of reagents but not the obligation of a First-tier distributor. This is unacceptable conduct.

231. The Respondent submits that the Claimant had never wished to be supplied reagents at the Second-tier distributor level and price. The Claimant cannot just take the benefits, but not the obligations.

232. The Respondent characterizes the Claimant as a dishonest, greedy and unethical distributor. It did not inform US Company C HK of the dissolution of Chinese Company C, the formation of the new entity and the taking over of rights and liabilities. The Claimant knew and relied on the course of dealing between US Company C HK and the Claimant/Chinese Company C. It knew that the ADA has to be signed for it to get reagents supply at preferential prices. As early as 1 March 2007, the draft ADA was sent to the Claimant for consideration and execution. Other distributors have signed and returned the ADA (Respondent Evidence, Vol. III, R-9). The Claimant did not sign despite a number of email chasers by Mr. L of US Company C HK. Please refer to Respondent Evidence, Vol. III, R-5, p.. 1 (email dated 1 March 2007 enclosing the draft ADA for 2007), pp. 2-10 (email attaching extra information about hospitals), p. 117 (emails from Mr. L to Mr. D, Manager H and Ms. Z of the Claimant chasing for the execution of the ADA) and translation from pp. 1-18 attached to the back of the Chinese documents.

233. Originally, US Company C HK thought that the Claimant had raised some genuine discussion about the terms. The points raised were entertained and resolved. There was still no execution following many email chasers to Mr. D, Manager H and Ms. Z of the Claimant (Respondent Evidence, Vol. II, R-5 pp. 18-21).

234. The Claimant then engaged in activities which were detrimental to the interest of US Company C HK. It acted as distributor for Siemens and installed equipment of Siemens openly in competition with US Company C HK. Mr. Q in his evidence, which is supported by Respondent Evidence, Vol. VIII, R-48, confirmed the dishonest behavior of the Claimant which is prohibited under the ADA. Please refer to the evidence of Mr. Q who said, "*I am aware that the Claimant engages in sale of products and reagents from US Company C HK's competitors, such as Siemens and Roche*." (Witness Statement of Mr. Q dated June 2012, exhibited as Appendix F hereto, para. 14).

235. At the trial, it was drawn to the Arbitral Tribunal's attention that some of the products shown in the photographs of the Plaintiff's evidence (Claimant Evidence, C-10) were not products of US Company C HK and they should not be reagents which needed to be kept at low temperature or to be refrigerated. Such evidence was eventually withdrawn. It shows that the Claimant was distributing other products in addition to those of Siemens. These include Roche's and Japan First Chemicals Company's. Nevertheless, it still tried to obtain preferential prices from US Company C HK pretending that it would sign the ADA. This is totally dishonest, and it had abused the trust placed by US Company C HK on it as a business partner for so many years. Apart from the oral evidence of Mr. Q, Respondent Evidence, Vol. VIII, R-48 shows a list of Siemens instruments installed by the Claimant in the hospitals of the Northern areas of China with details of the hospitals and contact persons. Furthermore, in the photographs produced by the Claimant as Claimant Evidence, C-10, which was subsequently withdrawn at the hearing, it shows that the Claimant was storing in its warehouse, probably used for the purpose of distribution for the manufacturers, products not belonging to US Company C HK such as glass and also products manufactured by Japan First Chemicals Company. We submit this is exactly the reason why the Claimant did not want to sign the ADA. This is a conduct which is expressly prohibited under the ADA.

236. Another type of activity/conduct of the Claimant which is dishonest can be found in Respondent Evidence, Vol. VIII, R-44 and 45, which show that the Claimant removed without the authority and permission of the Respondent or US Company C HK the equipment from the original hospital installed with the equipment. When being demanded for an explanation, Mr. D explained that "*Due to other customers' defective equipment, we would like to switch this equipment and would return it back to a City L, China Hospital within a short period.*" In another instance, Respondent Evidence, Vol. IV, R-13, an IMX 1601 equipment originally installed with the Cancer Hospital in a Chinese Academy was removed by the Claimant without knowing where it was removed.

237. Yet another dishonest act was the obtaining of preferential prices from US Company C HK for reagents for the whole of 2007 pretending that it would sign the ADA which was sent to Mr. D as early as 1 March 2007. Mr. D said that he had planned for one year not to sign it despite the emails from Mr. L from June 2007 onwards chasing for the execution and return of the 2007 ADA. (Respondent Evidence, Vol. II, R-5).

238. As the Claimant clearly understood that it would not become a First-tier distributor of US Company C HK after the 2006 ADA expired in November 2007 with the consequence of not being able to obtain the supply of reagents directly from US Company C HK, it misled the Respondent into believing that the 2007 ADA would be eventually executed so that US Company C HK would sign the RAP Agreement with it first. The facts were that the RAP Agreement was signed on 6 April 2007 but the Claimant had raised all sorts of excuses to delay execution of the 2007 ADA which was sent to it in March 2007 (Respondent Evidence, Vol. II, R-5). In the words of Mr. D, he had planned it for a year and was well prepared for the distributorship termination (Respondent Evidence, Vol. IV, R-11). The result of such a calculated plan from the Claimant was that it continued to obtain advantage at the expense of US Company C HK and other distributors by getting the discounted price for the reagents from US Company C HK without the minimum reagents and equipment purchase commitment, and the other obligations as US Company C HK's distributor. This is both unethical and unprofessional.

239. The Claimant knew that it needed to sign such an ADA but chose not to sign. In fact, it simply had no intention of signing it. The natural consequence of this is that it could not enjoy the exclusive benefits of being a First-tier distributor, though it could still obtain reagents supply from other distributors. Regrettably, the Claimant wanted to take only the benefit but not the liability.

240. In the end, US Company C HK decided to terminate the distributor relationship in November 2007. Mr. D of the Claimant then wrote emails uttering threats to Mr. KH To of US Company C HK and demand for the supply of reagents and services in accordance with the original terms. In an email dated November 2007 from Mr. D of the Claimant to Mr. KH To of US Company C HK, Mr. D said, "*However, our company's bottom line is: according to the normal customs with regards to all of the existing clients of our company, we hope your company would agree to continue supply and service in line with previous conditions.*"*（但我司到今天的底线是：按照正常惯例，我司到现在为止的所有客户希望贵司可以同意，仍然可以按照以前的条件进行供货服务。）*

241. In another email from Mr. D to Mr. KH To of US Company C HK dated November 2007, Mr. D wrote:

> "*We are not concerned about how long you have prepared for the present decision, but we have been well prepared for the present outcome. We have*

prepared it for a whole year! … We understand your decision but according to normal commercial principles, our company requests that up to now, with regard to all the existing customers of our company, your company must agree to supply goods and services in accordance with the original conditions. You must guarantee our company for normal goods supply and services. At the end of this month, give us the customer supply authorization…（你们对今天的决定准备多久我们不关心，但我们对今天的结果早有准备！我们准备了整整一年！. . . . . 我司理解你们的决定，但按照正常商业规则：我司要求到目前为止，我司的现有所有客户你们必须同意按照原有的条件进行供货和服务，你们必须保证对我司的正常供货和服务，本月末，把这些客户的供应授权给我们。）" (Respondent Evidence, Vol. IV, R-11)

242. In another email dated December 2007 to Mr. KH To of US Company C HK, Respondent Evidence, Vol. VIII, R-52, Mr. D wrote that "*Given how things have been so far, I do not want to say anything more. We have been friends many years, so I guarantee that I did not hurt you intentionally. But things may be getting out of control! I hope from now on you also act according to circumstances. I hope we will be lucky.*" (*事已至此我也不想再说其他了，我和您也算多年友情，我保证无心伤害您！但事情可能越来越不可收拾！希望您再往后也见机行事吧，希望我们都好运！*)

243. This is outrageous because the Claimant was no longer a First-tier distributor. It could no longer enjoy the same type of preferential treatment. Mr. Chen acting for the Claimant tried to offer a strained explanation with the aid of Mr. D's oral evidence which should not be allowed and should be disregarded but this could not avail the Claimant.

244. Mr. D did not only say that he had planned it for a whole year, but also said that the decision was by his legal department. In Respondent Evidence, Vol. IV, R-10, an email dated November 2007, he wrote to US Company C HK stating that "*it is also the opinion of our legal department that we have not signed an agreement with your company on time!*" Therefore, his legal department had considered the ADA legally and decided not to sign. All these shows that the Claimant would like to exploit US Company C HK by obtaining preferential prices without the obligation of a First-tier distributor. This is dishonest and unethical. It should not be allowed to do this.

245. US Company C HK originally thought that the Claimant wished to become a Second-tier distributor and Mr. Kelvin Chen of US Company C HK had asked Mr. D as early

as April 2007 to clarify officially (Respondent Evidence, Vol. II, R-8, p. 4). There was no reply or confirmation. In the end, it was discovered that Mr. D did not want to become a distributor of US Company C HK, either First-tier or Second-tier. He just would like to take advantage of US Company C supplying the equipment for free, the reagents at preferential price to the Claimant without the obligation of its being a First-tier distributor and therefore, it takes all the benefits. This is what the Claimant is asking the Arbitral Tribunal to decide. This is the Claim of the Claimant. No reasonable Arbitral Tribunal will allow this to happen.

246. There is no obligation by the Respondent to supply reagents based on a proper construction of the RAP Agreement (Claimant Evidence, C-2). As a preliminary point, the agreement title of the RAP Agreement is Equipment Rental and Product Supply Agreement and expressed to be effective as of March 2007.

247. Two points arose from there. One is although the heading mentioned product supply, there is no clause in the RAP Agreement which deals with reagents supply. There are clauses under Articles which deal only with product purchases but there are no clauses which deal with supply of reagents in the RAP Agreement. The other is that it mentioned equipment rental under Article but there was no rental of equipment. The Equipment was supplied for free without any rental to be paid under the Equipment and both US Company C HK and the Claimant were hoping to recover the price of the Equipment (for US Company C HK) and the handling charge (for the Claimant) by selling the reagents to the hospital in which the Equipment was to be installed for a certain number of years.

248. On a proper construction, there is no obligation by the Respondent to supply reagents. There is only the obligation of the Claimant to purchase under the RAP Agreement:

> "*Product Purchases*
>
> *Purchase Commitment. Distributor agrees to purchase from US Company C, its affiliate or distributor specified by US Company C the products specified in Schedule 9.1 ("Product") at the prices/volumes indicated therein on or before the date specified in the Schedule ("Purchase Commitment").*
>
> *Failure to meet purchase commitment. Should Distributor fail to meet the Purchase Commitment, US Company C may terminate this Agreement in which case Distributor is required to pay US Company C the maintenance costs of the Equipment as specified in Schedule 9.2. US Company C will*

review the Purchase Commitment on an annual basis and shall have the right to issue a new Minimum Purchase Commitment following consultation with Distributor."

249. In Schedule 9.1, there is only a gross amount of "Annual Architect i2000 Reagent Purchasing Commitment is no less than US$ 94,000". There is no reciprocal clause in the RAP Agreement to state that the Respondent has a corresponding obligation to supply reagents. The Claimant admitted in its Application for Arbitration dated October 2010 and the Defence to Counterclaim dated April 2012 that no orders were placed with the Respondent for reagents.

250. Schedule 9.1 does not contain any price or volume but just the total commitment to be made by the Claimant. There are no references to reagents quantity, types, specifications, model numbers, price, payment method and delivery date or place. The missing details are contained in the ADA.

251. There is no express term to obligate the Respondent to supply reagents. The Claimant knew (see Defence to Counterclaim dated April 2012, p. 5, para. 7) that the Respondent did not supply reagents and had never placed order with the Respondent to supply reagents. There is no and cannot be any implied term under the RAP Agreement because of clause:

"*Sole Understanding. This Agreement is the sole understanding and agreement of the Parties hereto with respect to the subject matter hereof and supersedes all other such prior agreements and understandings.*"

252. Clause further supports that there is no obligation by the Respondent to supply reagents:

"*Purchase from Distributor. At any time during the Term, if Distributor ceases to be US Company C's distributor or the Distribution Agreement between US Company C or its affiliate and Distributor terminates for whatever reason, at US Company C's request. Distributor shall purchase the Products from US Company C's affiliate or authorized distributor as specified by US Company C which purchase shall be subject to such price as specified by the affiliate or distributor.*"

253. The second part of this clause provides that a distributor shall purchase the reagents from US Company C's affiliate or authorized distributor as specified by US Company C which supports that the Respondent has no obligation. This clause expressly

deals with the situation that the Respondent is not the supplying entity and clearly contemplates a situation that if the ADA terminates, the distributor can still obtain supply from other sources.

254. The Respondent's interpretation of the RAP Agreement is that the Respondent is clearly not the entity to supply reagents. Coupled with the RAP Agreement, which places an obligation on the Claimant to purchase reagents, what clause contemplates is that if the ADA between a distributor and US Company C HK terminates, the Claimant can approach either an affiliate or distributor (i.e., First-tier distributor or Second-tier distributor) for supply. It did not provide for the Claimant, expressly or impliedly, to come to the Respondent for supply in the event of termination. Accordingly, the Respondent does not have the obligation.

255. Similarly, the words "at US Company C's request" under clause mean that it would be up to US Company C to decide. However, we submit that this mechanism of having US Company C specify an alternative distributor who can supply reagents has not been triggered simply because the Claimant has declined to become a Second-tier distributor which is the situation that this clause contemplates, i.e., if the ADA is terminated, the Claimant is no longer a First-tier distributor and will be a Second-tier distributor if it so desires. If the Claimant becomes a Second-tier distributor, it may need US Company C's guidance on where to get supply, though it is still the Respondent's submission that the Claimant knows where to get it after doing business in the Shandong province for 10 years.

256. Accordingly, the Respondent did not and was not responsible for supplying reagents. Instead, it acted as the agent or the importing vehicle of US Company C HK starting from 2007 in executing the RAP Agreement as part of the commercial arrangement. In the 2002, 2003, 2004, 2005 and 2006 ADAs, equipment supply and reagents supply were concluded between the Claimant and US Company C HK. It was only in 2007 that the Respondent, a PRC company, was instructed by US Company C HK and used as a vehicle for the equipment import since the importation was done directly from abroad to City H, China without passing through Hong Kong.

257. The actual fact of this case remains that the Claimant has refused to become a Second-tier distributor every now and then because Mr. D considered himself to have been the "big brother" in Northern China since 1999. US Company C HK has asked the Claimant to clarify its position whether it did not want to be a First-tier distributor and wanted to become a Second-tier distributor (Respondent Evidence, Vol. II, R-8).

It never replied or clarified its intention. In an email dated November 2007 to Mr. KH To (Claimant Evidence, C-12), Mr. D said, "*However, our company's bottom line is: according to the normal customs, with regards to all of the existing clients of our company, we hope your company would agree to continue supply and service in line with previous conditions.*" This is a request for First-tier treatment. With the Claimant expressly rejecting to accept a Second-tier distributor status, the particular provision under clause 10.2 has not been triggered. Similarly, in November 2007, Mr. D's emails to Mr. KH To of US Company C HK requesting US Company C HK to continue supplying reagents to the Claimant according to the previous supply conditions indicate that the Claimant was unwilling to become a Second-tier distributor (Claimant Evidence, C-12; Respondent Evidence, Vol. IV, R-11).

258. Therefore, US Company C did not make a specific designation because the Claimant had clearly refused to be a Second-tier distributor. With hindsight, US Company C now understands that the Claimant had long had its own plan in mind, i.e., to become other manufacturers' distributor, whether that be Siemens, Roche or the First Japanese Chemicals Company and to continue free riding the benefits without bearing the obligations as US Company C HK's distributor.

259. The Respondent repeats here the Claimant's admission in its pleading that it never placed any order for reagents with the Respondent and all the orders were placed with US Company C HK.

260. A point has been raised by the Claimant that the RAP Agreement is a standard term contract (格式合同) without any opportunity of comment or revision. This is untrue. In fact, the different reagents purchase commitments among the distributors was a reflection of the continuous communications and negotiations between US Company C HK and the distributors on the RAP Agreements.

261. The Claimant and the Mr. D brothers are sophisticated businessmen in China. The contracts were negotiated at arm's length. Please refer to Mr. D's email to Mr. KH To of US Company C HK (Respondent Evidence, Vol. IV, R-11) when he said that "*Please do believe that we are not Qianshi Company, and also we are not XiangheBaolei Company or Shenzhuo Company; we can make a difference in business performance compared to others, and we must also make a difference in maintaining our competitiveness to distinguish ourselves from others.*" The Claimant has a legal department to advise them. This is clear from what Mr. D said about the non-signing

of the ADA was advised by his legal department (Respondent Evidence, Vol. IV, C-10).

262. The RAP Agreement is not the first equipment supply document. The Claimant has admitted it had signed over 100. Therefore, this is a normal agreement.

263. The Claimant has the opportunity to review the terms and could have refused to sign. It did not object and signed both the RAP and Agreement very quickly.

264. The Claimant is able to obtain reagents supply. It has been argued by the Claimant that it was unable to get reagents supply. This is not true. The following evidence supports the Respondent's contention that it is not that the Claimant cannot get supply but rather, it is the Claimant who does not want to obtain supply from other distributors. This is because it does not want to become a First-tier distributor in order to do business with other competitors of US Company C HK and act as distributor for their products. It does not want to be a Second-tier distributor because it has been a First-tier distributor for too long. It does not want to lose face.

265. The price for supply is higher. It wants to pressure the Respondent to supply in accordance with the old terms and therefore getting all the benefits without the obligation.

266. Mr. Q and Mr. S's evidence support that reagents can be obtained. The Respondent's evidence shows that the Claimant obtained supply from distributors and invoices showing the Claimant's supply of reagents to hospitals including the Force Hospital. Evidence shows the supply of reagents to a City L, China Hospital in June 2008 (Respondent Evidence, Vol. IV, R-12), supply of reagents to Yxxxxx, the alleged agent of the Claimant by City L, China Rui Tian Company Ltd in January 2009 (Respondent Evidence, Vol. IV, R-13), and supply of reagents to the Force Hospital in April 2009 (Respondent Evidence, Vol. IV, R-14). The Claimant has produced no evidence to support its contention that it was unable to get reagents supply from any of the distributors. As said, this was not what the Claimant wants. It wanted to have reagents supply at preferential prices as a First-tier distributor as before, in accordance with the old terms but without any obligation under the ADA.

267. By reason of the matters set out above, the Claimant's claims against the Respondent (US Company C City H, China) should be dismissed. It is therefore not necessary for the Respondent (US Company C City H, China) to comment on the alleged losses

claimed by the Claimant. However, for the sake of completeness, the Respondent (US Company C City H, China) responds to those allegations as follows.

268. On a proper construction of the RAP Agreement, there should not be any claim by the Claimant. This is because under the RAP Agreement, it states that in no event shall US Company C be liable for losses under the agreement.

> "*Distributor's risk. Distributor assumes all risk for the suitability of the test results obtained by using any item of Equipment and/or Equipment hereunder, and the consequences which flow there from when such item(s) of equipment and/or Equipment(s) are used other than in accordance with the applicable US Company C package insert for such item of Equipment or product(s) or any applicable operator manual so as to effect its stability or reliability, and is used either: (i) alone; or (ii) in combination with other articles, substances or reagents (or any combination thereof) not provided or recommended for use with each such Equipment and Product(s). IN NO EVENT SHALL US COMPANY C BE LIABLE FOR LOST REVENUE, LOST PROFITS, OR LOST BUSINESS OR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL OR SPECIAL DAMAGES OR LOSSES OF ANY NATURE WHATSOEVER ARISING OUT OF THIS AGREEMENT OR THE USE OF EQUIPMENT OR PRODUCTS OR US COMPANY C NON-WILLFUL FAILURE TO SUPPLY EQUIPMENT AND PRODUCTS HEREUNDER.*"

269. The Claimant's counsel has made a point that the heading of the clause concerns the distributor's risk. The Respondent submits that this is misconceived. Under clause, the heading is for convenience only and shall not be deemed as a part hereof.

270. In any event, the Claimant has not proved any loss. The Claimant has produced no evidence to show that it has ever installed the equipment or supplied any reagents to the hospital by itself. It contends that the supply was from Yxxxxx based on the Consignment Contract, but assignment is not allowed based on the RAP Agreement.

271. Further, the Consignment Contract is not admitted as a genuine document and its authenticity is challenged on the following grounds:

272. The Claimant had refused to produce the original Consignment Contract for inspection in the past for no reason despite repeated requests. The Consignment Contract was alleged to have been signed in January 2006. This is impossible when Chinese

Company C was preparing its dissolution but not yet dissolved and the Claimant was not yet in business. Chinese Company C was only dissolved in May 2006.

273. Under the RAP Agreement, assignment of rights and liabilities is not permitted unless with prior written consent. The Article on Assignment provides:

> "*Distributor may not assign or transfer any of its rights and obligations in this Agreement and/or any Equipment without US Company C's prior written consent. US Company C may assign any of its rights and/or obligations under this Agreement to an affiliate or parent of US Company C. US Company C shall also have the right to designate any of its affiliated company as may be necessary or convenient, in US Company C's sole opinion, to perform any of its obligations hereunder or to receive any rights pursuant to this Agreement*."

274. The Claimant has not shown any evidence that US Company C HK or the Respondent was notified, informed, and/or has permitted or authorized the performance of the obligation by Yxxxxx.

275. The Claimant's claim for damages has no basis and is not supported by evidence. The Claimant has suffered no loss and, therefore, the claim in this arbitration should be dismissed. The alleged damages are non-existent as the Claimant's claim is misconceived, and the damages are unsupported by facts and evidence.

276. First, the claim for refund of the handling charge is unsustainable because this represented the Claimant's cost for getting the Equipment from the Respondent. The Claimant chose not to continue the distributorship relationship with US Company C HK by itself. The harm is self-inflicted and not caused by the Respondent.

277. Second, in respect of the loss of anticipated profits, it is again not caused by the Respondent and the Claimant's formula is flawed. The income projection should be anticipated income minus the anticipated costs and tax which were not supported by any primary evidence. In particular:

278. Financial reports filed by the Claimant with the City L, China Administration of Industry and Commerce indicate that Chinese Company C's management was poor and was operating at a loss which were the primary reasons for its dissolution ("近年来, 因为经营管理不善, 致使连年亏损, 因此申请注销") (Respondent Evidence, Vol. V, R-21, p. 122, and translation, p. 129). The Claimant submitted at the hearings that it had made several hundreds of millions of RMB in its investment for its business with US Company C HK. This completely contradicted with the evidence that the

Respondent had presented to the Arbitral Tribunal. As such, the Claimant submitted that the Respondent has exaggerated what it can make as profits in the damages claim.

279. The formula of anticipated loss of profits is not supported by facts and law. There was no supply of reagents by the Claimant. It does not show the total income and total cost to come to the anticipated profit amount. In fact, the Claimant suffered no loss.

280. There are obvious items of costs and expenses which are missing and not taken account of in the formula. Such items should, at a minimum, include the following expenses and charges:

(1) freight for the reagent;

(2) warehousing charges (insulated packaging, room/low temperature storage, ingredient label in Chinese);

(3) customer education and training charges (lecture fees, charges for training and guiding onsite operating personnel), and charges for training of its own personnel;

(4) charges for providing free calibration services to customers (own standard product);

(5) instrument maintenance expenses;

(6) reagent wastage (reagent expiry, repair compensation, transport losses);

(7) administrative and sales costs (management wages, office rent, water and electricity charges, etc.);

(8) financial expenses;

(9) wages of sales representatives and market promotion; and

(10) other unforeseeable expenses, etc.

281. The above is consistent with the evidence of Mr. Q that other expenses need to be deducted. Evidence from Mr. Q indicates that net profits are only about 5% (Witness Statement of Mr. Q dated June 2012, exhibited as Appendix F hereto, para. 19).

282. As submitted in para. 31(j) above, the Claimant has produced no evidence to show that the Shandong Province Hospital had installed the equipment or used the reagents. While the Claimant pleaded that it had "*delivered the Equipment rent from the Respondent to Shandong Provincial Hospital… which was officially put into*

operation in April 2007" (Application for Arbitration dated October 2010, para. 2, p. 5), it had not produced any rental agreement signed with the hospital. There was also no evidence of any purchase of reagents. The Consignment Contract between the Claimant and Yxxxxx, and the purchase by Yxxxxx are not admitted and is a breach of the RAP Agreement.

283. It is submitted that the Claimant was dishonest in trying to mislead the Tribunal by producing untrue evidence such as the photographs showing the inventory which was subsequently withdrawn. Any claim for loss and damage without proper evidence to support should be dismissed.

284. Even if, which is denied, there was a breach by the Respondent, the Claimant has failed to mitigate its loss by purchasing reagents from other distributors. The Respondent submits in Appendix H of its opinion to challenge the Claimant's evidence filed for this case.

285. The Respondent therefore concludes that the claims of the Claimant should be dismissed because:

286. The RAP Agreement is not a stand-alone agreement. It is part of a package deal with the ADA as its constitution (or the body) and the RAP Agreement and the Purchase Contract as the subordinate legislations (the two limbs). The Claimant has chosen not to sign the ADA to avoid the obligations and the restrictions imposed by it under the ADA and therefore could not now complain that it could not receive supply of reagents directly from US Company C HK at preferential prices (because it was no longer a First-tier distributor). The Claimant could have become a Second-tier distributor and obtained supply from other First-tier distributors. but it chose not to because (a) it was a First-tier distributor before and it would be a loss of face; and (b) it would like to become distributor of other competing brands of US Company C HK. In such a case, the Claimant cannot now claim that it does not receive supply of reagents in accordance with the old terms. The Claimant was just too greedy in trying to get all the benefits without the detriments or restrictions imposed on it as a First-tier distributor of US Company C HK. The greed has been fully demonstrated by the evidence referred to above such as acting as distributor for competing brands, pretending to sign the ADA for 2007 to obtain preferential prices, unauthorized removal of equipment, etc.

287. Even if the RAP Agreement is a stand-alone agreement, which is denied, on a proper interpretation of the Agreement, there is no obligation on the part of the Respondent

to supply reagents to the Claimant. Clause only imposes a purchase obligation on the part of the Claimant. It does not contain any reciprocal obligation on the part of the Respondent to supply. The Claimant knew and admitted in his Defence to Counterclaim that it did not request the Respondent to supply reagents and it had never received supply of reagents from the Respondent. Clause further supports that there is no obligation on the part of the Respondent to supply reagents. The "*At US Company C's Request*" was not triggered because the Claimant did not want to become a Second-tier distributor. It wanted to obtain supply of reagents in accordance with the old terms as a First-tier distributor but without the First-tier obligations. It should not be allowed to do that. Furthermore, clause is also a bar to any claim for damages from the Claimant.

288. Claimant was in breach of the RAP Agreement in failing to purchase reagents in accordance with the required amount. The Consignment Contract between the Claimant and Yxxxxx is doubtful in nature. The assignment of rights and obligation under the RAP Agreement is not permitted. It did not specify the purchase was for the Claimant. It did not specify the specific hospital that the purchase and quantity was made.

289. The Claimant was able to obtain supply of reagents from other First-tier distributors based on the evidence of Mr. Q and other documentary evidence of proof. Even as late as 2009, there is evidence (Respondent Evidence, Vol. IV, R-14 of supply of reagents to Force Hospital by Yxxxxx, an entity alleged to be the agent of the Claimant.

290. The damages alleged to have been suffered are unsustainable. The handling charge was expended on behalf of the Claimant to import the equipment into China. The Claimant inflicted the damages on itself by not signing the ADA. The loss of profit is not supported by any evidence, documentary or otherwise. Equally, the claim for arbitration fees should be dismissed for lack of evidence.

291. The Respondent emphasizes its Counterclaim and the Purchasing Obligation of the Claimant under the RAP Agreement. As submitted before, the RAP Agreement is an equipment supply and reagents purchase agreement. It does not contain obligations for either US Company C HK or US Company C City H, China, to supply reagents. The obligation of the Claimant to purchase is unequivocal. As admitted by the Claimant's counsel at the hearing, clause 9.1 imposed a clear obligation on the Claimant to purchase from US Company C, its affiliates or distributor specified by US Company C the products specified in Schedule 9.1 at the prices/volumes indicated therein.

However, contrary to what he had said, there is no *vice versa*. There is no reciprocal obligation of sales of product by the Respondent.

292. The Claimant has no intention to perform its part of the obligation as a distributor. It has never supplied reagents to the Shandong Province Hospital directly pursuant to the RAP Agreement. In particular: it has produced no evidence to show that the Shandong Province Hospital had installed the equipment or used the reagents, such as showing a signed rental agreement with the hospital. There was also no evidence of any purchase of reagents pursuant to the RAP Agreement. Before November 2007 (i.e., the date when US Company C HK terminated the negotiation with the Claimant), the Claimant could have obtained and was obliged to purchase the reagents from US Company C HK. It did not do so, and it is inexplicable why there were no reagents supplied to the Shandong Province Hospital under the RAP Agreement.

293. The Claimant, in its defense, alleged that it had a Consignment Contract with Yxxxxx (Claimant Evidence, C-4), and produced invoices for the supply of reagents. The authenticity of the Consignment Contract and the invoices are not admitted. Most importantly, it has not been proved to the requisite standard that the reagents supplied by Yxxxxx were the reagents of US Company C HK and the purchase was pursuant to the RAP Agreement since Yxxxxx also obtained reagents from other distributors.

294. The Consignment Contract also did not contain any exclusivity clause restricting Yxxxxx to only sell reagents for the Claimant. In other words, reagents sold by Yxxxxx (even if it can be proved that such reagents came from US Company C HK, which is denied) did not necessarily represent that those sales were made exclusively for the Claimant and were pursuant to the RAP Agreement.

295. In breach of the RAP Agreement, the Claimant has failed to purchase the reagents at no less than US$ 101,000 per year during the currency of the RAP Agreement and supply the same to the hospital. In fact, as discussed above, the Claimant did not ever supply any reagents to the hospital. Under the RAP Agreement, the Respondent has the right to terminate the RAP Agreement based on the Claimant's breach of contract.

296. According to RAP Agreement Right to Terminate, US Company C shall have the right to terminate this Agreement in the event of any of the following: "*(a) Distributor fails to fully comply with and perform or is in breach of any and all terms and conditions of this Agreement or other agreements signed with US Company C or its affiliated companies…*".

297. Under the RAP Agreement, the Claimant was given a possessory right to the equipment, but the title of the equipment still rests with the Respondent. In the RAP Agreement, "*Article 3.1 Ownership, US Company C is the owner of and retains title to the Equipment except to the extent of Equipment purchases is required under Section IV or affected under this Agreement. The terms and conditions shall cease to have effect with respect to any such Equipment purchased by Distributor*."

298. As a result of the facts and matters pleaded herein, US Company C City H, China, has suffered loss and damage as follows:

Loss of value of the Equipment in the amount of nearly RMB 900,000 calculated as follows, of which a sum of nearly RMB 300,000 is attributable to the loss of value in the period between December 2007 and January 2011 and at a monthly rate of RMB 9,750 thereafter:

Original value	A	more than RMB 900,000
8-year	B = months	96
Amortization per month	C = A/B	RMB 9,750
Apr. — Nov. 2007 (8 months)	D = C x 8months	nearly RMB 100,000
Net book value as of 30 Nov. 2007	A - D	nearly RMB 1,000,000
Loss of value between Dec. 2007 — Jan. 2011	C x 26 months	nearly RMB 300,000
Monthly rate after Jan 2011	C	RMB 9,750

299. The Claimant has not only failed to honor its obligation under the RAP Agreement to purchase reagents from US Company C HK's distributors and selling them to the hospital, but has also by conduct indicated that it has no intention to continue to perform the RAP Agreement as reflected by its claim for loss of anticipated profits. Accordingly, US Company C City H, China, also asks for an award from the Arbitral Tribunal that US Company C City H, China, has the right to repossess the Equipment forthwith. In the event that the Claimant refuses to allow US Company C City H, China, to repossess the Equipment, US Company C City H, China, asks the Arbitral Tribunal to compensate it the full value of the Equipment, which is nearly RMB 1 million.

300. The Counterclaim of the Respondent should be allowed. US Company C City H, China, hereby counterclaims the following relief: that the RAP Agreement signed in April 2007 is terminated by the breach of the Claimant in failing to purchase US$ 101,000 of reagents pursuant to the RAP Agreement; the Claimant be ordered to pay to US Company C City H, China, a sum of nearly RMB1 million or such sum as may

be found to be appropriate by the Arbitral Tribunal as damages for the Claimant's breach of its obligation under the RAP Agreement; a declaration that the Claimant was in breach of the RAP Agreement which was terminated by the Claimant's breach of contract and that US Company C City H, China, has the right to repossess the Equipment forthwith, and in the event that the Claimant refuses to allow US Company C City H, China, to repossess the Equipment, an order that Assegai pay to US Company C City H, China, the full value of the Equipment about RMB 1 million; the Claimant be ordered to pay interest on the whole of the sum awarded to US Company C City H, China, at a rate and for a period as the Arbitral Tribunal shall deem fit; the Claimant be ordered to pay US Company C City H, China, the reasonable costs and occasioned by this arbitration including the fees of its lawyers/attorneys. The fees of the lawyers/attorneys were calculated on a time spent basis and hence, the fees had continued to accrue as the case progressed. The fees that have been incurred up to June 2012 are estimated to be about RMB 700,000; and such further and other relief as may be appropriate to be granted to the Respondent (US Company C City H, China.).

III. OPINION OF THE TRIBUNAL

A. Legal Effect of the Agreement

301. The Tribunal has reviewed the RAP Agreement which had been entered into between the Claimant and the Respondent in April 2007 with the number of RAP 440. In the RAP Agreement, the Parties agreed that the Respondent would provide the Equipment free from leasing fees except for a fixed amount of handling fees. The Claimant would commit to purchase a minimum quantity of reagents for a certain number of years (for this Agreement, the period is 8 years).

302. The Tribunal has found that the Agreement had been formally signed and been actually carried out by delivering and installing the Equipment. The Claimant had also purchased reagents from the Respondent for 8 months by its treatment as a First-tier distributor although the parties had not signed any Annual Distributor Agreement (ADA) which would usually be signed between US Company C HK and First-tier distributors. The Tribunal recognizes and considers the Agreement had been duly signed by the parties and sealed with the companies' stamps. The parties agreed that the Agreement should be governed by Chinese law. The evidence shows that negotiation had been made and the Parties signed the Agreement with sincerity and

true meaning respectively. Further, the Agreement had been performed accordingly for a period of about 9 months. Based on the facts found during the hearing and the evidence submitted by the Claimant and the Respondent, the Arbitral Tribunal finds that the Agreement is valid and effective and that the arbitration of this case can proceed based on the arbitration agreement contained in the Agreement.

B. Relationship Between the Agreement and Annual Distribution Agreement (ADA)

303. The Majority of the Tribunal does not accept the allegation that the Agreement was signed by the Respondent as an agent of US Company C HK and holds that the Agreement established a contractual relationship between the Claimant and Respondent. The evidence and statements made by the Parties show that the Respondent is an affiliate of US Company C Group and US Company C HK is the actual supplier of the reagents. The Claimant has never signed the annual distribution Agreement with US Company C HK and was a First-tier distributor of US Company C HK in the northern part of China. According to the Respondent's post-hearing submission which described the relationship among US Company C USA, US Company C HK and US Company C City H, China (the Respondent), US Company C City H, China, is an affiliate company within the US Company C Group. In 2007 the medical equipment produced by US Company C USA was imported into and stored directly into the mainland China by the Respondent, not via US Company C HK. The Respondent further admits that the change of the former arrangement by the US Company C Group required the distributors in the mainland China to sign the equipment-supply agreements, for instance, the RAP Agreement, with the Respondent directly instead of with US Company C HK. No evidence provided to the Arbitral Tribunal shows that there is an agency relationship between the Respondent and US Company C HK although some of the obligations of the Respondent in the Agreement were performed by US Company C HK (such as in the transaction of the Product (the reagents)).

304. The relationship between the Agreement signed by the Claimant and the Respondent and the ADA alleged to be signed by the Claimant with US Company C HK is another key issue in this arbitration as it is related to the question of whether the Respondent shall be liable for the supply of the Product (reagents) under the Agreement.

305. The Arbitral Tribunal notices that the relationship between the RAP Agreement and the ADA, which has already signed before or expected to be signed in this case by

the Claimant, the Respondent and US Company C HK, should be clarified and the business operation model concerned be mentioned. The Respondent's statement on the business operation model is as follows: as part of its promotional and sales strategy, US Company C HK offered to its distributors` three different methods to finance the supply of the medical equipment. There are two types of distributors, the First-tier and the Second-tier. Only the First-tier distributor, upon signing the ADA every year, has the following rights and obligations: (a) obtaining equipment supply from US Company C HK by one of three methods like CAP, RENTAL, RAP; (b) directly purchasing reagents from US Company C HK at preferential price of about 15% to 20% discount. US Company C HK does not directly install, rent or sell the medical equipment and reagents to the end-users in the mainland China, but chooses local enterprises as distributors instead. Some competent local companies sign the annual distribution afterward. US Company C HK would provide the equipment for free or sell or lease its equipment to those annual distributors who are on the level of First-tier and the distributors will at the same time install the equipment in the hospital for free or sell or lease the equipment to the hospital. In order to perform the above cooperation arrangement, a comprehensive and connected business model, which is composed of the ADA, RAP, RENTAL, CAP and etc., as mentioned above is designed.

306. As stated by the Respondent, the situation for the equipment importation had changed in or about the year of 2007. In the RAP, CAP and Rental Agreements, the Respondent took the position of US Company C HK to supply an instrument to the distributor for handling fees, or sell or lease the instrument to hospitals through the Claimant at a preferential price; meanwhile the Claimant was required to make certain commitments to purchase of agreed minimum amount of reagents. The form to fulfill the respective rights and obligations of the Respondent and the Claimant was to sign the specific contract on the purchase and sale of the reagents. That is to say, the obligation of the Respondent or US Company C HK, as the Respondent stressed, is to supply the reagents to distributor only based on the ADA, and there is no such obligation for US Company C HK in the Agreement of RAP, CAP, and the Rental agreement. The Respondent alleged that the RAP Agreement was normally based on the ADA as the US Company C Group required, without the distribution agreement ADA, there would be no RAP Agreement.

307. The Claimant stated that the Agreement is an independent contract and had nothing to do with the ADA. The latest ADA between the Claimant and US Company C HK was terminated in November 2006 and the RAP Agreement in the dispute was not based on any ADA. During the execution and performance of this RAP Agreement, there was no ADA between the Claimant and the Respondent or between the Claimant and US Company C HK for at least 9 months after the Agreement became effective.

308. The Respondent rejected to admit the Claimant's statement that no requirement to sign the two agreements together or in a designed procedure. It contested the Agreement was signed under the special circumstance that US Company C HK and the Claimant were in the process of negotiation on the 2007 ADA and US Company C HK believed that the Claimant would sign the ADA. Although the ADA had not been signed before signing of the Agreement as usual, the period of the termination to the 2006 annual distribution Agreement could continue to be effective or extended until November 2007. In this period the distributorship relationship between the Claimant and US Company C HK were still in existence. Without the distributorship relationship, US Company C HK would never arrange the Respondent to sign the Agreement with the Claimant.

309. The Arbitral Tribunal finds that the RAP Agreement between the Claimant and the Respondent was signed and effective on 6 April 2007, based on the Tribunal's examination of the relevant evidence and on statements made by the Parties at the hearing. At that time, the ADA, formally called Immunoassay & Clinical Chemistry Agency Agreement of the year of 2006, was terminated in November 2006 according to the provision set in this agreement. To clarify the relationship between the Agreement and the ADA, the Arbitral Tribunal carefully reviewed the contents of the 2006 ADA and found there are no provisions describing the relationship between the RAP Agreement and the ADA nor any terms or provisions to stipulate that the Agreement is or should be based on the ADA. Similarly, there is no stipulation in the RAP Agreement signed between the Claimant and the Respondent mentioning about the 2006 ADA or any other ADA alleged by the Respondent to be signed concerning the RAP Agreement's execution. On the contrary, the Agreement stipulates that: "*At any time during the term, if the Distributor ceases to be US Company C's distributor or the Distribution Agreement between US Company C or its affiliate and distributor terminated for whatever reason, at US Company C's request, Distributor should purchase the Products from US Company C's affiliate or authorized distributor as*

specified by US Company C which purchase shall be subject to such price as specified by the affiliate or distributor." It clearly indicates the obligations for the distributor to purchase the reagents when the ADA is terminated for any reason. Meanwhile, without ADA, the reagents should be supplied as well by the Respondent according to the RAP.

310. Based on the above-mentioned evidence and the statements made by both Parties, the majority of the Arbitral Tribunal has therefore reached the following conclusions:

(1) The Claimant was treated by the Respondent and US Company C HK as a first-tier distributor and met the criteria set by the Respondent and US Company C HK when the Agreement in this case was signed although the ADA in 2007 had not been signed. The Respondent and US Company C HK knew clearly the signing of the Agreement by the Parties did not conform to the strict procedure of the business operation model as described by the Respondent, which is to sign the ADA simultaneously with or before the signing of the Agreement. In fact, according to the explanation made by the Respondent, even if the unusual action of signing the RAP Agreement between the Claimant and the Respondent was due to time pressure and the belief in signing the ADA by the Claimant in the near future, it is clear that the Respondent was willing to take the risk by breaching the procedure set by US Company C (if it was existing). Thus, the Respondent should be liable for the above actions that it took.

(2) There are no terms or provisions in the Agreement indicating that the existence of the Agreement should be dependent on the existence of the ADA and the validity and performance of the Agreement should be subject to the existence of the distributor relationship between the Claimant and US Company C HK. During the performance of the Agreement, the supply of reagents under the Agreement took place without the existence of an effective ADA but in fact the purchase was made by the Claimant from US Company C HK.

(3) The period for the Agreement is 8 years while the term for the ADA is only one year. Without the ADA the Agreement is still valid, and both Parties should be bound by the terms of the Agreement. The Respondent should not ignore its obligations to perform the Agreement for 8 years including the assurance of the Claimant's ability to purchase the Product (reagents) according to the terms set in the Agreement.

311. Based on the aforesaid conclusions, the majority of the Arbitral Tribunal is persuaded that the Agreement was signed under the circumstance that Claimant was treated actually as a First-tier distributor of US Company C HK, and the obligation of the Respondent under the Agreement to provide the Product (reagents) would be also conducted by US Company C HK. At least the Claimant had the impression from the Agreement and the period that the Agreement would be implemented between the parties from the effective date until November 2007. But the conclusion and performance of the Agreement are not subject to the existence of the ADA. Both parties to the Agreement should still be bound by the terms and continue to conduct themselves as described in the Agreement even without the ADA.

312. The Arbitral Tribunal has made certain findings on the purpose and role performed by the parties under the US Company C business operation model. Having considered the Respondent's above statement on the business operation model, it is obvious that the sale of reagent by authorized distribution channels is essential to the marketing model under the distributorship, and the installment of the concerned equipment is only one of the means to sell reagents. All concerned parties expect to recoup the investment and make profits through the sale of reagents. The main difference for the concerned parties to recover the investment or make profits is that the Respondent and US Company C HK could make profits as long as there were sales of the reagents, while the Claimant could earn profits through the resale of the reagent at the position of the First-tier distributor. The purpose of both parties in signing the Agreement is to sell or resell the reagent for profits or for the large price margin they might make. It is obvious that the Claimant could not recover investment and make profits in a certain period as it expected without getting the position of First-tier distributor to make the resale of the reagents.

313. The Arbitral Tribunal considers that there are no disputes between the Parties on the performance of the Agreement, including the delivery and rent of the equipment, payment of handling fees under the Agreement in this case, the Arbitral Tribunal therefore considers that attention should focus on the dispute regarding the obligation of the Claimant to purchase and the Respondent to supply the reagents under this Agreement.

314. The Agreement provides that the Claimant shall make a guarantee to purchase the Products listed in Annex 9.1 from the Respondent or its affiliated company or sub-distributor appointed at the prices/volumes indicated therein. In the Annex 9.1, it is

found that Claimant is committed to purchase annual Architect I-2000 reagents at a price no less than US$ 101,000 and that US Company C has the obligation to review distributor's order of Architect I2000 reagents on a bimonthly basis. During the period from the date of the Agreement's execution to November 2007, the Claimant purchased reagents from the Respondent's affiliated company US Company C HK and the obligations under this Agreement were performed smoothly without any disputes. After November 2007 when the Claimant refused to sign the 2007 ADA with US Company C HK, it happened that US Company C HK stopped supplying reagents to the Claimant as the First-tier distributor. Then the Claimant began to complain to the Respondent about its inability to obtain such reagents with the same treatment as a First-tier distributor. As it is mentioned above, the Respondent alleged that the obligation to supply the reagents originated from the ADA which usually would be signed annually to keep the distributorship with US Company C. As the Claimant refused to sign the ADA with US Company C HK, the Respondent is not liable to supply reagents to the Claimant at the First-tier treatment.

315. The Tribunal considers it is important to make sure the Parties reached the agreement under which the Respondent should be liable to supply reagent or US Company C HK should be reliable for the supply. It is also important to make sure what the ADA's position is in the procedure of the implementation of the Agreement.

316. The majority of the Arbitral Tribunal considers that the Respondent is obliged to supply reagents under the Agreement. Based on the evidence and statements made by the Parties, the Tribunal finds as follows:

317. At the beginning of the Agreement, it states that the Claimant is desirous to lease certain diagnostic equipment and purchasing certain reagents from the Respondent, and, through friendly consultations, that both parties were desirous of entering into the Agreement.

318. Considering the contents of "Purchase of Product", "Price & Payment" and Annex 9.1, the purchase commitments set out in this Agreement make reference to the subjects, amount and performance terms, thus the purchase commitment is a bilateral agreement rather than a unilateral obligation.

319. Referring to the background and purpose of the Agreement, the supply and purchase of the reagents constitute the fundamental rights and obligations of both Parties under this Agreement. The fact, as stated by the parties, that the sale and purchase of the

reagents took place between the Claimant and the Respondent or its affiliate, US Company C HK, actually took place previously cannot offset the obligation of the Respondent to supply reagents to the Claimant in this Agreement.

320. As mentioned above, the Respondent admits that the ADA which the distributor is required to sign with US Company C HK stipulates the benefits which US Company C HK would offer to the First-tier distributor and the obligations the distributor would undertake. The ADA is an agreement between the First-tier distributor and US Company C HK. There is no direct legal link which could be found between the RAP Agreement and the ADA.

321. The majority of the Arbitral Tribunal considers that the obligations of the Respondent to supply reagents to the Claimant under the Agreement would not be terminated as a result of the termination of the ADA.

322. Firstly, there is no connection in the precondition, validity and terms agreed by the parties between the Agreement and the ADA. On the contrary, obviously, there is a difference between the terms of the two agreements, as the duration of annual distribution is one year, while the term of the Agreement is eight years. The validity of the ADA (annual distribution agreement) would not affect the validity of the Agreement.

323. Secondly, there are no stipulations in both agreements which explicitly provide or imply that the termination of the ADA would simultaneously result in the termination of the Agreement. Even if the duty of reagent supply under this Agreement is relevant to the ADA (as the Respondent mentioned in the submission that the reagents actually supplied by US Company C HK), the termination of the ADA will not affect the Respondent's duty of reagent supply under this Agreement. Therefore, the Respondent is liable for the failure of performing its obligation of reagent supply under the Agreement.

324. The Arbitral Tribunal also notes the Respondent's claim that it never supplied any reagents by itself after the execution of the Agreement and that all the reagents were supplied by US Company C HK during the performance period. US Company C HK has no obligation to further supply any reagents to the Claimant as a First-tier distributor due to the refusal made by the Claimant when it was required to sign the ADA for the year of 2007. The Arbitral Tribunal also finds the fact that the Agreement have clearly provided the purchases and the supply channels of the

reagents. That indicates the reagents could be supplied by the Respondent. Based on the fact described, the majority of the Arbitral Tribunal considers that the fact of the Respondent never supplying reagent directly before could not be sufficient legal reasons to negate its obligation of supplying reagents. And such obligation of the Respondent shall be conducted in accordance with the Agreement, including the appointment of its affiliate company or another distributor to supply the reagents to the Claimant once the Claimant terminates to be a distributor of US Company C. Otherwise, the Respondent should be considered to be in breach of the contract by not assuming its obligation to supply reagents. The fact shows that the Respondent never appointed any distributors for the Claimant to purchase reagents.

325. The Arbitral Tribunal also notes that one of the important issues between the Claimant and the Respondent in this case is whether the Claimant could enjoy the First-tier preferential price for the transaction of the reagents. The Respondent states that as a First-tier distributor, it should sign ADA every year with US Company C HK to have the benefits and the obligation provided thereof, especially on purchasing reagents from US Company C HK directly at a preferential price of about 15% to 20% discount. During the hearing and from the evidence of both parties, it is noted that the Claimant has built the First-tier distributorship relationship with US Company C and made the performance for years. When the Agreement was executed in April 2007, the Respondent treated the Claimant as a First-tier distributor to not only enjoy all the benefits but also take the relevant obligations. The Claimant assumed it could enjoy the benefits of First-tier distributor during the whole period of the Agreement if it could meet the requirements provided in the Agreement like the purchase commitments.

326. It becomes not so important whether the Claimant sign the ADA with US Company C HK which its legal counsel advised it not to sign, as the Agreement's validity is not relied on the validity of the ADA which has been mentioned above. Since the Respondent signed the Agreement by taking the Claimant as a First-tier distributor, it should assure the Claimant to enjoy the benefits of the First-tier distributor for the whole term unless it could terminate the Agreement by finding the Claimant's breach of contract according to the relevant provisions in the Agreement. Although the Respondent states that the performance should be actually made according to the methods which US Company C designed and follow the ways they did before in practice with the distributors, including the Claimant, the majority of the Arbitral Tribunal could not find strong legal grounds for the Respondent to defend its action to

terminate distributorship with the Claimant as a First-tier distributor by refusing to let the Claimant to purchase reagents from US Company C directly because it refused to sign an agreement (ADA) with a third party (US Company C HK) which is not a party to the Agreement. It should be deemed that the supply of the reagents to the Claimant is the obligation of the Respondent other than other affiliates of the US Company C Group.

327. Based on the above, the majority of the Arbitral Tribunal is fully convinced it is the Respondent who makes the Claimant as the First-tier distributor in the Agreement once the Claimant would reach the criteria set in the Annex 9.1. If the Respondent claims that the Claimant did not follow the business model and should not enjoy the benefits of First-tier distributor by not signing the ADA with US Company C HK, it was the Respondent's fault to sign the Agreement with the Claimant. Therefore, the Respondent should be liable for its fault but not transferring it to the Claimant without convinced legal reasons and/or relevant contractual provisions set in the Agreement.

C. The Claims of the Claimant

328. The Claimant claims that the Respondent should compensate the Claimant for direct economic losses incurred by leasing the Equipment. The Claimant had paid the Respondent RMB 130,000 as the handling fees for leasing the Equipment. According to the Agreement, the leasing term of the Equipment is eight years, which is 96 months. As the fact that the Equipment started operation since April 2007 and the Respondent stopped supplying the reagent in November 2007. The actual operation term was only 9 months. The Respondent should return the Respondent the leasing "handling fees" at such ratio and amount: 130,000*(96-9)/96 = more than RMB 100,000. Under the circumstances, it is clear that the Respondent should return the Claimant the handling fees of more than RMB 100,000 in compensation for direct losses incurred by leasing the Equipment.

329. The Arbitral Tribunal notices that while the Claimant claims the equipment handling fees for the period of the whole leasing term deducting the actual operation months, it also claims the predict profits for the same period of the whole leasing term it may get. The latter handling fees to the Claimant anticipatory profits that should be obtained during the time when the Equipment should be leased. In this way, the Claimant should not claim both the handling fees and the anticipatory profits incurred during the Equipment leasing period. This claim to the handling fee could not be supported.

330. The Claimant claims that the Respondent should compensate the Claimant for its anticipatory profit losses. The Claimant states that the only source for the Claimant to obtain commission and profits from the transactions conducted with the Respondent lies in the margin between the buying price of reagents from the Respondent and the selling price of reagents to hospitals. Because the Respondent stopped selling reagent, constituting breach of the Agreement, the Claimant suffered from direct losses as well as anticipatory profit losses. The afore-said anticipatory profit losses are obvious and predictable to the Respondent. The Claimant asserted legal rights to lodge a claim on the Respondent, to comply with the stipulations in the agreement, to defend the authority of law and contractual rule of fairness and honesty.

331. According to the Claimant's statistics, the Claimant sold specific reagents worth about RMB 400,000 to the Hospital in 2007 to assure the normal operation of the Equipment. In the year of 2007, the cost spent by the Claimant to buy the specific reagents from the Respondent stood about RMB 200,000. As the actual operation period of the Equipment in the Hospital totaled 9 months, the profits acquired by the Claimant in 2007 by virtue of the Equipment shall be more than RMB 200,000.

332. Based on the annual profits generated by the foregoing formula and ignoring the fact that the specific reagents generate year on year increasing profits in the past more than 9 years, the Claimant claims the expected losses of profits for the rest of the leasing term and expects the anticipated profits about RMB 1,700,000.

333. With regard to the anticipatory profit losses claimed by the Claimant, the Respondent contends that it has no obligation to supply reagents and the Claimant could obtain reagents supply from other distributors and the Claimant could, indeed obtain reagents from the third party to maintain the normal operation of the Equipment. The Claimant's claim on anticipatory profit losses is without factual and legal basis. With regard to whether the Claimant could purchase the reagents from the other distributors at the preferential price it enjoyed before, the Arbitral Tribunal reviewed the statements of both parties and relevant evidence of this case, and the Arbitral Tribunal found that the Claimant has to buy reagents from the First-tier distributor rather than buying reagents from US Company C HK or other US Company C affiliates directly. Since the Claimant entered into the RAP Agreement with the Respondent and this RAP Agreement would not be terminated and remain valid even if the ADA expires or is not signed, the Claimant should enjoy the First-tier's preferential price to purchase the reagents during the term period of the Agreement.

334. Even according to the Agreement which provides that at any time during the Term, if the Claimant ceases to be the Respondent's distributor or the Distribution Agreement between the Respondent or its affiliate and the Claimant terminates for whatever reason, at the Respondent's request, the Claimant shall purchase the products from the Respondents. Affiliate or authorized distributor as specified by the Respondent will supply reagents subject to such purchase price as specified by the affiliate or distributor. Based on this, the majority of the Arbitral Tribunal admits that after the termination of the distribution agreement the Claimant "*should purchase the reagents from US Company C's affiliate or its appointed distributors at the instruction of the Respondent*". But it is found that the Respondent did not arrange the supply of reagents to the Claimant, therefore, the majority of the Arbitral Tribunal is of the opinion that the Respondent did not perform its obligation of supplying reagents under the Agreement and should assume liability of breach, including compensating the anticipatory profit losses of the claimant.

335. With regard to the calculation formula of the anticipatory profit losses, the Tribunal agrees that the resale profit of a distributor may be impacted by many factors like market fluctuation, reagents consumed in the Hospital, etc. Although the Claimant and the Respondent have different stances, neither of them could provide persuasive evidence to support their comments on the profit losses. The Arbitral Tribunal also considers that the Claimant should be partly liable for the termination of the Agreement by refusing to sign the ADA unilaterally as it knew the importance and the correlation of the ADA in this transaction. And after the termination of the supply reagents, the Claimant did not try its best to get the reagents according to the provisions set in the Agreement from other resources to minus the loss of anticipatory profits. By fully considering the forementioned, in accordance with the principle of fairness, the majority of the Arbitral Tribunal recognizes that the profit rate which the Claimant could acquire is around 15% to 20% which is the preferential price percentage discount a First-tier distributor could enjoy and the anticipatory profits losses should be calculated for 70 months. The Arbitral Tribunal could not recognize the calculation formula made by the Claimant for the anticipatory profit loss. So the majority of the Arbitral Tribunal considers the calculation for the anticipatory profits losses should be made according to requirement set in the schedule 9.1 of the Agreement and the percentage of preferential price of the reagents which a first-tier distributor could enjoy. Then the calculation should be about RMB 700,000.

336. The Claimant stated that due to the fact that the Respondent breached the Agreement, illegally stopped supplying the Claimant with the specific reagents, the Claimant found no choice but had to file the application for arbitration to preserve its legal rights and interests. Therefore, the Respondent should bear the arbitration costs and the attorney fees paid by the Claimant for this arbitration. Considering the facts of this case, the majority of the Tribunal has decided to award that the Claimant should bear 20% of arbitration cost, and the Respondent should bear 80% thereof. The attorney fees of the Claimant should be assumed by the Respondent solely.

D. The Respondent's Counterclaim

337. The Counterclaims include:

(a) referring to the counterclaims of the Respondent, the Respondent claims for the loss of value of the equipment worth about RMB 800,000,of which a sum about RMB 300,000 is attributable to the loss of value in the period between December 2007 and January 2011 and at a monthly rate about RMB 10,000 thereafter; and

(b) a declaration that the Respondent has the right to repossess the Equipment forthwith, and in the event that the Claimant refuses to allow the Respondent to repossess the Equipment, an order that the Claimant pay Respondent the full value of the Equipment about RMB 1 million.

338. The Claimant is requested to pay interest on the whole of the sum awarded to the Respondent at such rate and for such period as the Tribunal shall deem suitable.

339. The Claimant is requested to pay to the Respondent the reasonable costs of and occasioned by this arbitration including the fees of its lawyers/attorneys. The fees that have been incurred up to the date of the defense and counterclaim are estimated to be about a sum in RMB and the fees will continue to accrue as the case continues. The Claimant should bear the arbitration cost of this case and the attorney fee paid by the Respondent.

340. The majority of the Arbitral Tribunal could not support the counterclaim (a) which the Respondent claims for the loss value of the Equipment since the Respondent is liable to the non-performance of the Agreement after 9 months operation based on the reasons analyzed above.

341. Referring to the possession of the equipment, the Arbitral Tribunal reminds the Respondent that its right of possession of the Equipment is provided in both the RAP

Agreement and the Equipment Rental Agreement. The Hospital acknowledges and agrees that US Company C is the owner of, and retains the title to, the Equipment. The Claimant has no right to refuse the Respondent to possess the Equipment. And the Arbitral Tribunal considers that the Claimant should assist the Respondent to get the Equipment from the Hospital if it is necessary since it is the Claimant who found the Hospital as the Lessee.

342. Considering the facts of this case, the majority of the Tribunal has decided to award that the Claimant should bear 30% of arbitration cost for the Counterclaim, and the Respondent should bear 70% thereof.

343. The findings and decisions of the Arbitral Tribunal set out above are made by the majority of the Tribunal. Y most respectfully disagrees with the majority findings and decisions except for those relating to the Respondent's right to repossess the Equipment.

IV. THE AWARD

344. According to the opinions of the majority of the Tribunal, the Tribunal hereby renders the award as follows:

345. The Respondent shall compensate the Claimant for the loss of anticipatory profit in the sum about RMB 700,000 and the attorney fees in the sum of RMB 200,000.

346. Other claims sought by the Claimant are dismissed.

347. The Respondent has the right to repossess the Equipment.

348. Other claims sought by the Respondent are dismissed.

349. The arbitration fee for the Claim shall be borne by Respondent by 80% and the Claimant shall bear 20%. 30% of the arbitration fee for the Counterclaim shall be borne by the Claimant and the Respondent shall bear 70% of the arbitration fee.

350. Y's expenses as the arbitrator shall be assumed by the Claimant by 30% and by the Respondent by 70%.

351. All the payment (minus the amount which the Claimant shall pay to the Respondent) being made by the Respondent to the Claimant shall be made within 30 days from the effective date of this award.

352. The award is effective as from the date of issuance and shall be final and binding on both parties.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

A Culture Co., Ltd.

Claimant

v.

B Sports and Culture Development Co., Ltd.

Respondent

Matter for arbitration: Disputes over agreement for resale of media resources

Place of arbitration: Beijng, P.R.China

TABLE OF CONTENT

I. INTRODUCTION

A. The Parties

1. The Claimant and Respondent for Counterclaim in this arbitration is: A Culture Co., Ltd., with its registered address in Province M, China (hereinafter referred to as "**Company A**" or the "**Claimant**").

2. The Respondent and Counterclaimant in this arbitration is B Sports and Culture Development Co., Ltd., with its registered address in Province N, China (hereinafter referred to as "**Company B**" or the "**Respondent**").

B. Agreement to Arbitrate

3. On 4 May 2010, the Claimant filed an Application for Arbitration with relevant supporting documents in regard to the disputes arising under the Sales Agreement and all the supplementary agreements and amendatory agreements with China International Economic and Trade Arbitration Commission ("CIETAC"). The application is based on the arbitration clause in the Sales Agreement concluded between the Claimant and the Respondent on 17 October 2008, stating that "*this Agreement is governed by, and shall be construed and enforced in accordance with, the laws of the People's Republic of China, excluding its choice of law principles. All disputes arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration conducted at the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing in accordance with its rules, and determined by three arbitrators appointed in accordance with its rules, with the two co-arbitrators having 30 days from their appointment to nominate the Chair. The place of arbitration shall be Beijing, and the language to be used in the arbitral proceedings shall be English. The arbitrators shall award to the prevailing party its costs, including its attorney's fees, incurred in connection with the arbitration. The arbitration proceedings and the resolution thereof shall be completely confidential, subject only to such disclosures as are required by law or as are necessary to enforce an award. Prior to the full constitution of the arbitral tribunal, any party may apply to any court of competent jurisdiction for provisional or interim relief. The arbitration award shall be final and binding on the parties*."

C. Summary of the Procedure

4. In June 2010, CIETAC officially accepted the Claimant's application for arbitration. In June 2010, the Secretariat of CIETAC sent a Notice of Arbitration to the parties, together with a copy of the *CIETAC Arbitration Rules* (effective from 1 May 2005), the CIETAC Panel of Arbitrators, sent a copy of the Claimant's Application for Arbitration to the Respondent, and asked the parties to appoint arbitrators and the Respondent to file a statement of defense and counterclaims, if any.

5. In May 2010, the Claimant submitted its Application for Changing Arbitral Language. In June 2010, the Respondent submitted its Opposition to Application for Changing Arbitral Language, Objection to Exhibits Attached to Request for Arbitration without English Translations and Application for Extension of Time for Filing Statement of Defense and Counterclaims. Since the Claimant and Respondent did not reach a mutual agreement on changing the arbitral language, the Secretariat sent a notice to the parties in June 2010, stating that the arbitral language shall be English pursuant to the Sales Agreement.

6. In June 2010, the Claimant appointed X as its arbitrator. In August 2010, the Respondent appointed Y as its arbitrator. Pursuant to the Sales Agreement, X and Y jointly nominated Z as the presiding arbitrator of this case in October 2011. In November 2011, according to a notice of CIETAC on the Formation of Arbitral Tribunal, the Arbitral Tribunal was officially formed.

7. In November 2011, upon reading submissions from the Claimant and the Respondent dated 14 November 2011 and 10 November 2011, respectively, the Tribunal issued the First Procedural Order in this case, which laid out the time schedule for the further proceedings and set the dates of the oral hearing to be 7-9 February 2012.

8. The evidentiary hearing was held in Beijing on 7-8 February 2012 at CIETAC. The arbitration agents of the Claimant and of the Respondent were present at the hearing, which pursuant to the Sales Agreement was conducted in English. Both parties made oral presentations of their respective cases, exhibited the original copies of their evidence, debated on the legal opinions, and answered the questions raised by the Tribunal. The Respondent's witness appeared in the hearing for cross-examination by the parties and answered the Tribunal's questions.

II. CLAIMS AND DEFENSE

A. Claims and Reasons of the Claimant

9. In the Application for Arbitration the Claimant requested the Tribunal to:

(1) rescind the Sales Agreement and all the supplementary agreements and amendatory agreement (collectively referred to as the "**Agreements**") signed between the Claimant and the Respondent;

(2) restitute to the Claimant the amount of RMB 13.7 million by the Respondent;

(3) pay the Claimant the amount of RMB 2.4 million by the Respondent as damages;

(4) pay the Claimant RMB8.1 million by the Respondent as the loss of profits suffered;

(5) pay the Claimant for the legal costs for the Attorney-at-law by the Respondent; and

(6) bear the arbitration fees of this case by the Respondent.

9.1 In the Claimant's Reply to Tribunal's List of Questions, the Claimant made its final claims as follows:

(1) to terminate the Sales Agreements and all Amendments entered into between the Claimant and the Respondent;

(2) to award a return of RMB16.5 million from the Respondent to the Claimant;

(3) to award damages of RMB8.3 million payable by the Respondent to the Claimant for accrued interests lost;

(4) to award attorney's fees on the part of the Claimant payable by the Respondent; and

(5) to award arbitration costs on the part of the Claimant payable by the Respondent.

9.2 The Claimant clarified in its Reply to the Tribunal's Questions that its request has always been to "terminate", rather than to "rescind" the Agreement. In the Application for Arbitration and all subsequent submissions during and after the hearings, the Claimant's request had always been to "terminate" the Agreements

as a legal right conferred by Article 94 of the *Contract Law*. The point of time of termination shall accrue from the date of Application for Arbitration, i.e., 4 May 2010.

10. The facts and arguments relied upon by the Claimant are as follows:

10.1 On 17 October 2008, the Claimant and the Respondent signed the Sales Agreement, according to which the Respondent promised to offer the Claimant series of media resources that include the rights of advertisement broadcasting on J, Regional Telecasters and Digital Media. The Claimant shall sell the aforesaid media resources to other user advertisers, and the Respondent shall issue the Confirmation Letter in which the Respondent shall acknowledge that the Claimant has the right to resell such media resources. The term of the Sales Agreement shall last for four years, and the yearly fees as agreed in the above Agreements are USD 10 million for the first year, USD10.5 million for the second year, USD 11 million for the third year, and USD11.6 million for the fourth year.

10.2 After the Sales Agreement was signed, the Claimant paid to the Respondent the amount of RMB 13.7 million as advance payment. Because the Respondent failed to provide the Letter of Authorization and other documents confirming its right or authority to sell the media resources, there was a lot of doubt in the market about whether the Claimant was authorized to resell the media resources or not. As a result and based on the fact that the inventories promised by the Respondent faced heavy competition and chaotic marketing channel which were caused by the Respondent, the inventories promised by the Respondent have failed to resell. Accordingly, revisions of the Sales Agreement had to constantly be done.

10.3 On 19 January 2009, a supplementary agreement was signed to revise the amount of the Performance Guarantee, and to revise the content of the cooperation between the parties during the second, third and fourth year "to be negotiated under the matter of fact".

10.4 On 9 February 2009, another supplementary agreement was signed to revise the fees for the first year to USD 6.6 million.

10.5 After the supplementary agreement dated 9 February 2009 was signed, the Claimant paid as advance money to the Respondent the amount of RMB 10.3 million. But in the performance afterwards, the Respondent still failed to guarantee the advertising as demanded by the end-user clients, and this fact resulted in the balance of

RMB19 million between the prepayment to the Respondent by the Claimant and the actual advertising revenue of the Claimant. Accordingly, the parties signed the Amendatory Agreement on 29 October 2009, canceling the cooperation of the third and fourth years and revising the terms of the Agreements to the period from the original starting date to 30 September 2010. The total amount which the Claimant shall pay the Respondent according to the Agreements was limited to the prepayment of USD 3.5 million (RMB 24 million) already paid by the Claimant. For the balance of RMB 19 million, both parties agreed to recover through the following methods: (a) the Respondent offers the Claimant the media resources to sell, the value of which shall be equal to USD 1 million; (b) the Respondent offers the Claimant the advertising boards, the value of which shall be equal to USD 300,000 during the 2010 "B Jam Van" project; and (c) the Respondent pays the Claimant the commission of not more than USD 1.5 million from the trademark royalty fees collected from the clients introduced by the Claimant.

10.6 However, after the aforesaid Amendatory Agreement was signed on 29 October 2009, the Claimant discovered that the price of the media resources equal to USD 1 million offered by the Respondent was much higher than the market price, and to reduce more losses, the Claimant had to purchase inventories from other advertisement companies as to fulfill the contracts with clients. Such facts have caused the Claimant a direct loss of RMB 2.4 million. Simultaneously, the Respondent refused to fulfill the demands of using Company B's trademarks by citing various reasons and showed no intention to fulfill the agreement regarding the "B Jam Van" project. As a result, the Agreements had no condition to perform, the loss of the Claimant could not be recovered, and the prospective profits of the Claimant could not be achieved.

B. Defense of the Respondent

11. Upon the receipt of the Application for Arbitration from the Claimant, the Respondent submitted its Defense and Counterclaim in July 2010. Its main points are as follows:

11.1 The Respondent admits that CIETAC has jurisdiction over this dispute as both parties executed a binding Sales Agreement in which they agreed that all disputes arising out of the Sales Agreement shall be resolved by CIETAC.

11.2 The Respondent considered that during the course of negotiations for the Sales Agreement, the Claimant held itself out to the Respondent as an experienced agency for TV media advertisements, creation, production, public relations for outdoor advertisements, film and TV advertisements, etc. Company A apparently has almost 400 employees and is a 4A company, i.e., a member of the Association of Accredited Advertising Agencies of China.

11.3 On 17 October 2008, the Claimant executed a Sales Agreement (the "**Agreement**") with the Respondent, almost immediately after execution of the Agreement, the Claimant began to ask the Respondent for favours to excuse Company A's inability to sell the Inventory they had purchased. In an effort to accommodate Company A, during the first six months of the term of the Agreement, Company B agreed, *inter alia*, to (1) eliminate Company A's obligation to purchase digital media, the yearly fee for which was USD 2.3 million; (2) convert Company A's obligation to produce a Letter of Credit of RMB 20.6 million within 10 business days to a Bank Guarantee of RMB13.7 million, despite that Company A in fact has never provided the Bank Guarantee to Company B; and (3) waive the required payments of USD 1.2 million for the Inventory that Company A failed to sell in November 2008.

11.4 In addition to the contract variations, the Respondent provided numerous other types of assistance to the Claimant above and beyond its obligations under the Agreement. For example, Company B provided training to Company A's sales staff in an attempt to educate them on sports media event after Company A fully replaced its entire sales force dealing with Company B's Inventory.

11.5 Despite these efforts by Company B, during the first year of the Agreement, Company A sold only a small portion of USD 10 million worth of Inventory that Company B reserved for it.

11.6 As a result, in the end of the first year, Company A again asked to vary the terms of the Agreement. On 29 October 2009, both parties executed a Third Amendment, whereby Company B agreed to release Company A from its obligation to pay the remaining USD 3 million it was required to pay for the First Year. Company B also waived Company A's obligation to pay the Yearly Fee for the Second Year (USD 10.5 million) and released Company A from its commitment to pay the Third and Fourth years' inventory purchase fees (USD 11 million and USD 11.6 million, respectively). Company B agreed to extend benefits to Company A (at no

cost to Company A) during the Second Year, including to provide: (a) J Inventory valued at USD 1 million; (b) signage at the "B Jam Van"; and (c) Commissions on Marketing Agreements that (in B's sole discretion) could result from introductions by Company A to six specified companies (namely, China D Airlines, E Watch, F Flooring, G Battery, H Motels, and I Kitchen Supplies).

11.7 After the Third Amendment was executed, Company B provided all the Inventory to Company A at fair rates. Company A, however, failed to notify Company B of the brand for the sign board to be used at "B Jam Van" 2010 and did not present viable marketing opportunities to Company B regarding any of the 6 approved companies listed in Attachment C.

11.8 In summary, of the USD 43.1 million total amount that Company A originally agreed to pay under the Agreement, Company B has received only USD 3.51 million. Company A, however, received far more than this in value because Company A received revenues from its sale of Inventory and was permitted to associate with Company B's brand. To support Company A, Company B reserved more than USD 3.51 million worth of Inventory and provided additional goods and services beyond what was required by the Agreement. Company A in fact has acknowledged receipt of at least USD 3.51 million in value in the Third Amendment which states that this sum was paid on account of Company A's receipt of the Inventory set forth in Exhibit A which in turn contains a list of the 2008 season inventory.

11.9 In late 2009/early 2010, Company B was in negotiations with C Education & Technology Group ("Company C") with respect to a promotional partnership and event involving the use of Company B's intellectual property. The parties had discussed and agreed on several of the main deal terms including price and were expecting to enter into a business agreement soon.

11.10 In January 2010, Company A had knowledge of the expectancy between Company B and Company C to enter into a business agreement.

11.11 In February 2010, Company A sent to Company B by itself and via its lawyer written requests to add Company C as a listed company in Attachment C to the Third Amendment. On the same dates, Company B responded to such requests in writing, stating that any amendment to Attachment C must be through written

agreement executed by both parties and prior to such an agreement Company A must comply with the requirements of the then-effective Attachment C.

11.12 Company A intentionally and unjustifiably interfered with the business relationship between Company B and Company C.

11.13 Company B failed to eventually enter into the business agreement with Company C.

11.14 During the course of its dealings with Company A, Company B has received complaints from the market that Company A was creating confusion about the extent of its authority.

11.15 In addition, while the Agreement clearly states that neither party shall have any right to use any marks, logos, photos, footage or other intellectual property of the other, the most recent business cards that Company B has received from Company A contain unauthorized use of Company B's logo. Association with Company B's brand is highly valued and is an essential element of Company B's business.

11.16 In general, Company A's overselling of its authority and unauthorized use of Company B's logo have caused market confusion and diluted the value of Company B's reputation and intellectual property and have impacted Company B's business.

11.17 Based on the above, Company B denies each and every, all and singular, material charges and allegations contained in Company A's Application for Arbitration and demands strict proof thereof as required by the laws of the People's Republic of China ("PRC"). Company B denies that it breached the Sales Agreement, Supplementary Agreements or Amendments. The Inventory promised under the Third Amendment was supplied, Company A failed to request any "B Jam Van" signage and no Commission was earned. Company B therefore denies that Company A has incurred any damages in connection with the Sales Agreement. Apart from the fact that there was no breach, the services and Inventory upon which Company A's claims are based (i.e., items related to the 2009 season – the Second Year) were essentially provided by Company B for free in accordance with the Third Amendment. If Company A suffered any damages in relation to the Sales Agreement, it was not caused by Company B but instead by Company A's own conduct. Company A's damages claim is speculative. Company A's claims are barred, in whole or in part, by Company A's own persistent, material breaches of the Sales Agreement, Supplementary Agreements or Amendments.

Company A's claims are barred, in whole or in part, by unclean hands. Company A's claims are barred, in whole or in part, by Company A's failure to satisfy precedent conditions. Company A's claims are barred, in whole or in part, by the Sales Agreement and the amendments hereto which are binding on Company A. According to the Agreement, even if any specific Inventory or other benefits to be provided to Company A under the Agreement are not made available to Company A for any reason other than Company A's breach, Company B shall NOT be in breach of the Agreement. Instead, as Company A's sole remedy, Company B will use commercially reasonable efforts to make available to Company A "make-good media or benefits of equivalent value". In the event Company B is unable to secure sufficient "make good media or other benefits of equivalent value", Company B shall have the unilateral right to either: (i) adjust the Yearly Fee to reflect the undelivered Inventory or (ii) terminate the Agreement. Company A fails to state a claim upon which relief may be granted. Company A has failed to state any legal basis in its Application for Arbitration to support its claims against Company B. Furthermore, Company B believes that Company A has no legal basis whatsoever to support its claims. The specific amounts that Company A claims for restitution, damages and loss of profits are not supported by any proof of evidence or any calculation method. Furthermore , Company A has claimed amounts for which services have already been rendered. Company A must elect between its claim for rescission and restitution and its claim for damages and lost profits. One cannot simultaneously seek to rescind and enforce the same agreement.

C. Reply to the Defense of the Respondent by the Claimant

12. In December 2011, the Claimant submitted its Reply and Defense to Counterclaim as follows:

12.1 The Claimant in its reply the first time claimed that Respondent was not a licensed advertising agent in the PRC, which was one of the reasons the Sales Agreement failed to be performed. It again claimed the certificate issue which caused Company A fail to win the confidence of Company A's Clients. This had a huge impact on resale of the Inventory.

12.2 To make things worse, an advertising agency had already been authorized by J long before the Sales Agreement, and its subsequent amendments had been executed between Company A and Company B. In addition, Company B sales

staff also had been reselling the Inventory of J. Subject to Company B and another authorized agent, it was hard for Company A to resell the inventory of J or to run the advertisements when the end advertisers wanted.

12.3 Because Company B cannot schedule the commercials which made advertisements not be broadcasted in the time which Company A's Clients wanted. More often than not, the advertisements were placed in fringe time. It significantly influenced the advertising effectiveness. Furthermore, it diluted the value of Company A's reputation.

12.4 The terms of the Sales Agreement and the subsequent amendments (the "Amendment") relating to B Partner had been actually restricting the market for Company A to sell the Inventory, constituting market monopoly.

12.5 Company C had authorized Company A to directly reach agreement with Company B relating to the use of Company B's intellectual property and other interests. Despite this, Company A had sent Company B a lawyer's written request to add Company C in the company list to Attachment C of the Third Amendment in accordance with the terms of the Agreement; Company B did everything possible to postpone giving an official reply to Company A, so that Company A failed to cooperate with Company C and lost its best opportunity to save losses.

12.6 As for the so-called "additional benefits" Company B agreed to provide to Company A, it was virtually the method by which Company B wanted to avoid the potential liability, even economic compensation, of not completely and reasonably performing under the Agreement. It was why the amount of the so-called "additional benefits" balanced the difference between the payment of Company A and the actual value of the Inventory Company B had provided to Company A.

12.7 The six approved companies had already been listed in Attachment C so that it was unnecessary to notify Company B again. Furthermore, Company A did not have any idea when the "B Jam Van" event would start, with no notice from Company B, so how could Company A have notified Company B first?

D. Respondent's Rejoinder to the Reply to the Defense

13. In January 2012, the Respondent submitted its Rejoinder to the Reply to the Defense.

13.1 In its Rejoinder, the Respondent introduced Company B's organization in China, Company B's advertising business as well as Company A's organization and the Sales Agreement and its amendment. The matter of Company C is also mentioned. The new arguments made by the Respondent are as follows:

13.2 The Respondent claimed that *PRC Advertising Law* is not applicable to this dispute. The Respondent claimed that it never claimed to be and indeed is not a licensed advertising company.

13.2.1 Article 1 of the *PRC Advertising Law* provides that "*this law is formulated in order to regulate advertising activities promote the sound development of advertising business protect the legitimate rights and interests of consumers…*". The entities regulated by the law are the advertiser, advertising agent, and advertising publisher under Article 2. The Law does not apply to every entity tangentially related to the advertising business.

13.2.2 Moreover, reality belies Company A's claims that because Company B is "not a properly licensed advertising agent", Company A had difficulty selling the Inventory. Neither Company B nor Future, J's advertising affiliate, encountered similar difficulties. The source of Company A's problems was its inexperienced sales team.

14. Company B acted in good faith at all times.

14.1 Company A falsely claims that Company B' refusal to expand the list of six companies in Attachment C was in bad faith. Company B had no obligation to expand that list and there was never any suggestion that it would. Based on the negotiations between the parties on this point, Company A should not have had an expectation that companies would be added to this list. The six companies on the list were selected because they had existing relationships with Company A, and Company B had no obligation to include companies with whom there was already a relationship and provide free commissions to Company A.

14.2 On the other hand, Company A was never limited to whom it could attempt to sell Inventory. Attachment C only limited commissions on the sale of marketing rights consummated through successful introductions to the six specified companies.

14.3 When the Third Amendment was executed, Company A indicated that it was confident that it would be able to recoup its losses with the Inventory provided and secure the introductions necessary to get a commission. However, Company

A never introduced Company B to any of the six companies listed in Attachment C. Instead, it attempted to force Company B to pay Company A money for its interference in the Company C relationship.

14.4 Company B's good faith efforts in maintaining the relationship with Company A are evident in the support provided to Company A. Company B provided multiple rounds of training, reduced payment requirements and extended payment deadlines, and also accommodated Company A's demands for difficult advertising time slots by cutting longer more lucrative segments up into smaller portions saleable by Company A. None of these services were provided for in the Agreement and Company B provided them all in good faith for the benefit of Company A.

15. Company B is not in breach of the Agreement.

15.1 None of Company A's claimed breaches are grounded on fact. Company B provided letters certifying that Company A was an authorized reseller of Company B's Inventory. Also, the price of the Inventory that Company B provided was at the level as negotiated between the parties. Lastly, Company B's repeated amendment of the Agreement is evidence of attempts to assist Company A in fulfilling its contractual obligations, not of any wrongdoing.

15.2 Company A alleges that Company B did not provide letters certifying that Company A was an authorized re-seller of media inventory and that without such letters potential advertisers did not trust that Company A was a legitimate reseller. In fact, Company B did provide multiple letters certifying Company A's authority. While there was some disagreement over the exact wording of Company A's authority the parties agreed to describe Company A's role as an official reseller of Company B's media. In addition, Company B went beyond what was required of it and provided letters certifying Company A's authority under the Third Amendment to resell the approximately USD 1 million Inventory it had received for free and introduced Company B to the companies listed in Attachment C.

15.3 Company B complied with all its contractual obligations to issue certifying letters and Company A had all the evidence of authority that it needed in order to pursue advertising sales. In the event that additional expressions of authority were required, Company A should have requested such from Company B at the appropriate time but did not. Company B was more than willing to assist Company

A with its sales efforts as evidenced by the multiple rounds of amendments to the Agreements.

15.4 Company A agreed to the valuation of Inventory. The prices for Inventory were clearly set out in the Agreement and its Amendments. Exhibit A indicates the rates for various types of media that Company B provided to Company A. Beyond this, the rate information was available in Company B's rate schedules. Company A was fully aware of the prices for the inventory it was selling.

15.5 Additional evidence of Company A's awareness is found in the fact that it negotiated over Inventory prices. Company A requested that the prices of the media be reduced and Company B declined because the Inventory was being provided essentially for free. Company A signed the agreement fully knowing the prices specified therein. Company A should not be allowed to seek a better deal through arbitration than it agreed to at the time it signed the contract.

15.6 Company A believes that the prices it agreed to are unfair because it was able to locate other Inventory at cheaper prices through other resellers. These Claims are irrelevant because they understood the value of the Inventory at the time they agreed to it and because it was provided to them at no cost.

15.7 Company A's claim that Company B exhibited bad faith in pricing media is likewise baseless. The approximately USD 1 million in Inventory provided to Company A in the Third Amendment was understood and agreed by Company A. Detailed charts attached to the amendment include a schedule of the value and specific time segments provided to Company A.

15.8 Company B provided all Inventory as specified in the Agreement. Company A appears to allege that Company B exhibited bad faith by providing "fringe time" placements for advertising. Unsurprisingly, Company A does not describe what "fringe time" is, as no such thing exists in B games.

15.9 The additional claim that Company B failed to provide the advertising time promised is wrong. Inventory was always supplied as required by the Agreement. In fact, Company B went out of its way to ensure that Inventory was made available even when Company A submitted material late and had multiple last-minute changes.

15.10 The central claim that Company A appears to be making is that the reselling market for Company B's Inventory was confusing because both Future and Company B

resold media. Company A's claims are unfounded. In any event, a mere "confusion" is not a basis for a legal claim. As an experienced advertising company familiar with the market as well as J's practices, Company A was fully aware in negotiating and signing the contract that Company B and Future also resold Inventory. The Agreement clearly stated that Company A was a non-exclusive reseller.

15.11 Company A itself breached the agreement by claiming otherwise. Company A held itself out to potential advertisers as an "exclusive" reseller of Company B's Inventory. While Company A claims without evidence that Company B's Inventory market was "confusing", Company A's false claims to exclusivity actually created market confusion as demonstrated by a letter from Future to Company B in May 2009.

15.12 Beyond providing sales support, Company B also provided other forms of business assistance to Company A. When Company A's initial failure to meet sales goals became apparent, Company A requested Company B to restructure scheduled payments so that Company A's financial statements would not reflect its own shortcomings. Company B agreed to this request.

15.13 Company A continued to fail to deliver the services and sales as promised. It missed payment deadlines, failed to meet Inventory sales goals, and provided what advertisements it was able to sell late. Still, Company B attempted to restructure the Agreement through multiple amendments to accommodate Company A.

15.14 The Third Amendment reflected a final set of accommodations by Company B acknowledging that Company A had failed to uphold its obligations and had lost money under the Agreement. Company B offered Company A a package of free TV media Inventory, signage at travelling B live events, and commissions for successfully introducing Company B to potential marketing partners. Even this third round of concessions was not enough for Company A, and Company B was rewarded with the current arbitration for its efforts.

16. Company A is not entitled to revoke or rescind the Agreement.

16.1 Company A's claims for revocation of the Agreement are not supported by the PRC law. PRC law limits the circumstances where a contract may be undone. It may be declared invalid under Article 52 of the *PRC Contract Law* or revocable under Article 54 of the *PRC Contract Law*. A contract entered into in an ordinary

course of business, like the Agreement, will not be undone under either of these Articles.

16.2 Similarly, Company A may not rescind the Agreement. Article 94 of the *PRC Contract Law* provides the following causes for rescission:"*(1) the aim of the contract cannot be attained because of force majeure; (2) before expiration of the deadline for performance, the other party expressly states, or indicate through its conduct, that it will not perform its main obligation; (3) the other party has delayed performance of its main obligation and fails to perform within a reasonable time period after demand of performance; (4) the other party delays performance of its obligation or breaches the contract in some other manner rendering it impossible to achieve the purpose of the contract; or (5) any other circumstances as provided for by law.*" Because none of the above causes apply, restitution is not available.

16.3 The Claimant responded in its Reply to Tribunal's Questions in August 2012 by stating that: Article 94.4 of the *PRC Contract Law* provides that "*the parties to a contract may terminate the contract under any of the following circumstances … (4) the other party delays performance of its obligations, or breaches the contract in some other manner, rendering it impossible to achieve the purpose of the contract*." This rule empowers the observing party a legal right of termination against fundamental breaches made by the breaching party. Article 97 of the *PRC Contract Law* says that "*after the termination of a contract, performance shall cease if the contract has not been performed; if the contract has been performed, a party may, in accordance with the circumstances of performance or the nature of the contract, demand the other party to restore such party to its original state or adopt other remedial measures, and such party shall have the right to demand compensation for damages*". Thus, according to the *PRC Contract Law*, Company A may claim for termination of contract and demand Company B to pay damages for its fundamental breach.

17. Damages are not available to Company A in this case.

17.1 Company A is not entitled to any of its claimed damages, because the Agreement clearly states that "make good media" is Company A's "sole remedy". Such damage limitations are valid and enforceable under Article 52 of the *PRC Contract Law*.

17.2 Company A is not entitled to monetary damages of any kind. Company A may not claw back the RMB 13.6 million paid for media that it has already received because Company A has already enjoyed the benefit of this Inventory. Any funds returned would serve as a windfall to Company A.

17.3 Additionally, Company A may not recover damages for media purchased from other resellers. Company A, as a signatory to the Agreement and its amendments, was fully aware of the Inventory that it had to resell. The fact that Company A chose to sell more Inventory than it received from Company B does not make Company B responsible for Company A's poor judgment.

17.4 Company A's claims are also limited as it did not attempt to mitigate its damages as required. Article 119 of the *PRC Contract Law* provides: "*After either party breaches the contract, the other party shall take appropriate measures to prevent the increase of the loss; the party that fails to take appropriate preventive measures and thus aggravates the loss may not claim compensation for the increased part of the loss.*" Company A's purchase of additional Inventory from other resellers is not a mitigation but merely an attempt to cover up its own mistake in selling a product that it did not already own.

17.5 Restitution is only allowed under the *PRC Contract Law* in three limited circumstances: when a contract is invalid, revocable or subject to rescission. The Agreement is valid, non-revocable, and not subject to rescission as discussed above. Because none of these circumstances apply, Company A may not collect restitution.

17.6 Lastly, Company A may not collect lost profits. Article 113 of the *PRC Contract Law* provides : "*If either party fails to perform its obligations under the contract or does not perform its obligations as contracted and thus causes losses to the other party, the amount of compensation for the loss shall be equivalent to the loss actually caused by the breach of contract and shall include the profit obtainable after the performance of the contract but shall not exceed the sum of the loss that might be caused by a breach of contract and has been anticipated or should be anticipated by the breaching party in the making of the contract*". Company A presents no evidence of any lost profits or their foreseeability at the time of contracting, and given its sporadic sales history, any number it could produce would be so speculative that it could not properly serve as the basis for an award.

E. Claimant's Post-Hearing Statement

18. The Claimant submitted its Post-Hearing Brief with the main points being:

18.1 It restated that Company B was an advertising agent and actually provided service of introducing end users, advertisers to J or Regional Telecasters, it should abide by the *PRC Advertising Law* when it engaged in advertising activities in China. Company B has failed to provide the Tribunal with such exhibits to prove that it has obeyed this Law.

18.2 Besides, Company B did not comply with the principle of fairness, honesty and good faith in their advertising activities, which is a violation of Article 5 of the *PRC Advertising Law*.

18.3 Pursuant to the *Regulations on Control of Advertisement*, Company B engaged in promoting sport and cultural transmission, and concurrently engaged in advertising business in China. Company B should file the application for charge of business scope registration to the relevant departments according to Article 6 of the Regulations.

18.4 According to Article 18 of the *Regulations on Control of Advertisement*, Company B shall be given the penalties including stopping advertising, confiscation of the illegal gains, fines, suspending business for consolidation, revocation of business licences or the licences for advertising operation, etc.

18.5 According to the *Provisions on the Administration of Foreign-Funded Advertising Enterprises*, Company B as a foreign-funded enterprises which engages in advertising business shall submit the project proposal and the feasibility study report of a foreign-funded advertising enterprise to the State Administration for Industry and Commerce and its authorized administration for industry and commerce of provincial level for being examined and approved, but it did not. Company B is in violation of Article 4 and Article 5 of the *Provisions on the Administration of Foreign-Funded Advertising Enterprises*.

18.6 Company B engaged in promoting sport and cultural transmission, and concurrently engaged in advertising business in China. But it neither had a legal license to engage in agency and publishing of advertisement for both domestic and foreign publishers nor filed the application for charge of business scope registration, which is in violation of Article 15 of the *Administration of Registration of the Scope*

of Business of Enterprises Provisions, Article 63 of the *Detailed Implementation Rules for the Regulations of the People's Republic of China for Controlling the Registration of Enterprises as Legal Person*, and Article 6 of the *Order of the State Council of the People's Republic of China (No. 370)*. According to Article 15 of the *Administration of Registration of the Scope of Business of Enterprises Provisions* and Article 14 of the *Order of the State Council of the People's Republic of China*, Company B is subject to the penalties including cancellation of business registration, revocation of business licences, stopping advertising, and confiscation of the illegal gains.

18.7 The Claimant also alleged that Company B was in violation of *Anti-Monopoly Law of the Peoples' Republic of China* ("AML"). Company B drafted the Third Amendment to restrict Company A to engage in discussions with any company outside of the 6 companies in Attachment C and later on, it unreasonably refused to amend Attachment C, which was in violation of Article 17 of the AML which prohibits, allowing their trading counterparts (i.e., Company A) to make transactions exclusively with themselves or with the following designated by them (6 companies in Attachment C), without justifiable reasons. According to Article 47 of the AML, the authority for enforcement of the AML shall instruct Company B to discontinue such violation, confiscate its unlawful gains and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year.

F. Respondent's Post-Hearing Statement

19. The Respondent submitted its Post-Hearing Statement in Response to Claimant's Post-Hearing Brief in which it claims as follows:

19.1 Regarding the confirmation letters to Company A provided by Company B, Company B stated that Company A's claim is disproved by the evidence and Company A cites no legal authority to establish its argument. Most importantly, Company A's claim ignores both the language and meaning of the Agreement which states that"*[u]pon receipt of written request from [Company A], Company B shall from time to time issue a letter addressed to [Company A]'s potential purchasers of Inventory with the form and content to be determined by [Company B] ('Confirmation Letter') to confirm that [Company A] is an authorized reseller of the Inventory (subject to the terms of this Agreement)*". The record contradicts

Company A's story: Company A's own evidence shows that Company B apparently did issue a confirmation letter prior to November 2008, even if Company A was not entirely satisfied with it. Those issues were apparently resolved when Company B issued another confirmation letter in December 2008. It was not until February 2009 that Company A first expressed concerns, not about the existence of the confirmation letter, but about the letter's content and Company A's desire to have it amended. None of the three proposed wordings complied with the Agreement. In November 2009, Company B provided an additional confirmation letter at Company A's request. Obviously, based on the record before the Tribunal, Company B did provide confirmation letters as was contemplated in the Agreement. Even if Company A would have preferred a different format, the Agreement, clearly left the format of the Confirmation Letter to Company B' discretion. Still, Company B did what it could to address Company A's requests. It is also important to note that in each instance for which evidence has been provided, in the end, Company B issued a revised confirmation letter to which Company A never objected or complained. The record before the Tribunal therefore reflects that this issue was resolved.

19.2 Company B provided multiple media plans to Company A. There is no evidence to support Company A's statement that Company B "*intentionally failed to provide Company A with Annual Media Plans*". The only evidence in the record, however, shows that Company B did in fact provide multiple Media Plans to Company A within the time frames specified in the Agreement, and there are no documents in the record that contradict this evidence. Moreover, the testimony of the witness Mr. L was very clear that the 2008-2009 Media Plan was provided ("*Pursuant to the Agreement, Company A and Company B agreed on an Annual Plan which provided further detail on the Inventory to be provided.*"). Nothing in the cross examination of Mr. L contradicted that testimony. The Media Plan for the 2009-2010 Season is attached to the Third Amendment signed by both parties. Company A cannot reasonably claim it did not receive the Media Plan attached to the contract that it signed.

19.3 Company B and its partners did not sell the same Inventory that Company A was reselling.

19.3.1 Company A's Inventory was separately reserved. Company A alleges that the Inventory it was to resell was also being sold by Company B itself or Company

B's partners. Company A knew at the time it signed the Agreement that it was not an exclusive seller of the Inventory. The Agreement states that Company A's right to refer to itself as a reseller is "limited" and "non-exclusive". The testimony at the Hearing was that Company A was a non-exclusive reseller. Mr. L testified that "*there's no exclusivity in selling B game-related media inventory*". Company A has not substantiated its claim that other parties were reselling the exact same Inventory as Company A, or indeed shown what Inventory other parties were reselling at all.

19.3.2 While Company A does not identify any evidence directly, it has pointed to one instance involving Inventory related to KTV slots that Company A asserts that Company B had been selling Company A's Inventory, but the correspondence regarding this matter and whether the Inventory mentioned was part of Company A's Inventory or not, is unclear at best. Even if this was the case, which it is not, this is the only instance out of the thousands of seconds of Inventory resold by Company A that it identifies to substantiate its claim – hardly a basis for the substantial damages it now claims.

19.3.3 While there are multiple parties that sell advertising slots for B games (including J), all these entities are selling separate slots available during the same games. All these partners of Company B, including Company A, are selling the same type of product (i.e., Inventory), but they are selling separate and distinct units of that product (i.e., at different time slots). Company B and its partners did not sell the same inventory as Company A, and no evidence has been produced that suggests otherwise.

19.3.4 When Company A and Company B entered into the Agreement, a Media Plan was provided, as discussed above, and based on this Media Plan, Company B reserved designated inventory for Company A. The Inventory reserved for Company A was therefore set aside and separate from the rest of the Inventory available to Company A or its partners. To demonstrate these reservations, Company B has produced documents demonstrating its internal reservation systems. These charts show the total amount of spots Company B had available and the number of slots reserved for different parties. As Mr. L testified, these slots were held for Company A, and Company A was free to resell these slots to any customer.

19.4 All of Company A's slots were reserved and properly scheduled once Company A notified Company B.

19.4.1 Although Company A does not specify the basis of its claim regarding a failure to schedule, Company B believes that Company A is referring to its prior allegations regarding O Garments Co., and possibly KTV slots.

19.4.2 If Company A is referring to its allegations regarding O Garments Co., this issue has already been resolved. Company B offered Company A several slots as "make good media" to compensate for the accidental omission (under the Agreement's damages limitation clause). Company B understands that Company A accepted these slots and that the "make good media" resolved any concerns from Company A or O Garments Co.

19.4.3 If Company A is referring to the KTV slots, its argument is disproven by Company B's Spot Plan and Avails Chart showing that the full amount of Inventory to which Company A was entitled was in fact reserved. As with O Garments Co., any allegations regarding KTV were also resolved by the Third Amendment which clearly specified that Company A provided payment to Company B in return for the services and slots that it had received to date.

19.4.4 Additionally, even if Company A was correct that these issues are breaches, they are in no way material or significant enough to justify rescission of the contract.

19.5 Regarding Company A's allegation that four O Garments Co.'s slots were missed. The four slots out of the total 13,974 slots reserved for Company A under the Agreement represents approximately 0.02% of the overall performance of the Agreement. Similarly, Company A alleges that Company B failed to reserve four slots, totaling 30-seconds each, on KTV. Company A indicates that purchasing such slots cost USD 634 a slot, therefore four slots cost Company A USD 2,536. The USD2,536 that Company A alleges it had to spend reflects approximately 0.005% of the total USD 43.1 million contract price in the Agreement. Company A has offered no evidence, other than these two cases, to support its claims of substantial damages.

19.6 Regarding the "Jam Van" sports event.

19.6.1 It was Company A, not Company B, that was under the obligation to get in contact regarding the "Jam Van" Sports Event. Company A is also alleging that Company B did not give Company A sufficient notice of the start time of the "B Jam Van" event and that therefore it missed the benefit of having advertisements placed at

the event. Company A's argument is directly contradicted by the terms of the Third Amendment.

19.6.2 The Third Amendment states, regarding the "Jam Van" event, that: "*Company A should notify Company B of the brand to be placed on the sign board as soon as possible to facilitate sign board production. Company B shall not provide any make good for event stops missed as a result of late notification by Company A.*" Accordingly, Company A was on notice from the very beginning that it had to notify Company B "as soon as possible" regarding its selection of advertising for the "Jam Van" event, and that if it failed to do so, there would be no recourse against Company B.

19.6.3 There is no dispute that Company A never notified or otherwise contacted Company B regarding the Jam Van until raising the issue in this arbitration.

19.7 Company B was unable to enter into any agreement with Company C due to Company A's interference, and Company B did not unreasonably refuse to add Company C to Attachment C.

19.7.1 Company A alleges that Company B unreasonably withheld its consent to add Company C to the list of companies in Attachment C which entitles Company A to a commission. As a result, Company A claims USD 1.5 million in damages. Company A presents no evidence as to why in this particular instance Company A is entitled to a commission. Nor does Company A explain how it was entitled to a commission of USD 1.5 million on a deal that was worth USD 1 million. Company A also ignores the fact that it did not introduce any of the six companies to Company B; yet it claims a commission for an entity not listed in Attachment C. Moreover, Company B did not enter into any agreement with Company C – this fact is the basis of Company B's counterclaim.

19.7.2 Company A has no legal or factual basis for its allegation that Company C should have been added to Attachment C. Company A did not introduce Company C to Company B – Company B already had a deep relationship with Company C. In fact, Company A's interference with the already existing relationship between Company B and Company C made it impossible for Company B to close the deal. The Third Amendment states that an amendment to Attachment C required the "written agreement of the parties". Likewise, Attachment C reinforces this concept requiring Company B's "prior written consent" before Company A could

approach any other companies not on the list as an agent of Company B. This section was included to prevent confusion that would result if Company A tried to sell to companies with whom Company B had an existing relationship and is both reasonable and appropriate.

19.7.3 Moreover, the Third Amendment itself, states exactly the opposite of Company A's position: "*[Company B] shall have no obligation to pay any commissions, fees, royalties, revenue sharing or other payments to Company A on account of introducing a Company (or Companies) … [f]or the avoidance of doubt, the Commissions will be payable to Company A only to the extent (i) a Marketing Agreement(s) is executed prior to 30 September 2010, and (ii) [Company B] actually receives the underlying payments from Company…*". There is no dispute that these conditions were never met as Company B never executed a deal or received payment.

19.8 Company A is not entitled to rescission.

19.8.1 Without providing a legal basis or a factual analysis, Company A alleges that the breaches it complains of warrant rescission of the Agreement and Third Amendment. At the Hearing, when asked by the Tribunal to specify its claim, Company A elected a remedy and indicated that it is relying on Article 94 of the *PRC Contract Law* governing rescission of contracts. However, to date, Company A has never provided the Tribunal with a legal basis upon which to rescind the contract. Company A's Post-Hearing Brief is devoid of any citations or authority explaining why or by what legal standard recession is required.

19.8.2 Company A has not established any of the five grounds that would entitle it to rescission. Under the PRC law, a contract is subject to rescission for five reasons, none of which Company A has established: "*(1) the aim of the contract cannot be attained because of force majeure; (2) before the expiration of the deadline for performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation; (3) the other party has delayed performance of its main obligation and fails to perform within a reasonable time period after demand of performance; (4) the other party delays performance of its obligation, or breaches the contract in some other manner, rendering it impossible to achieve the purpose of the contract; or (5) any other circumstance as provided for by law.*" (*Contract Law*, Article 94).

19.8.3 Company A has not established any of these grounds for rescission. Neither Company A nor Company B has ever made a claim of *force majeure*. Company A has never alleged that Company B "*expressly state[d]*" or indicated that it would not perform its obligations under the contract. Company B did not delay or fail to perform any of its "main obligations" under the contract. The alleged breaches are: (i) failing to provide confirmation letters; (ii) failing to provide the Annual Media Plans; (iii) failing to allow Company A to be the exclusive reseller of Inventory; (iv) not scheduling the slots that Company A's clients wanted; (v) failing to inform the start of the "B Jam Van"; and (vi) failing to add Company C to Attachment C. Even if Company A could establish these breaches, which it cannot, none of these could be held to be "main obligations". The main obligation under the Agreement was clearly to provide Inventory. Company B did exactly that. For example, Company A sold approximately USD 1 million of slots that it received in the Third Amendment (showing Company A's resale of over RMB 5.3 million worth of B Inventory to O Garments Co., Ltd.). Similarly, even if Company B did breach, Company A has produced no evidence that it made a demand of performance or that any breach was material. It did not make such a demand. Company A has likewise not shown that it was impossible to achieve the purpose of the contract. It was clearly not impossible to achieve the purpose of the contract.

19.8.4 If Company A is correct and the contract is subject to rescission, Company A would owe Company B USD 5,465,931 to restore both parties to their positions prior to the agreement. If a contract is subject to rescission, under Article 94 of the *Contract Law*, the parties to that contract are to be returned to the "original position" that they would have been in, had the contract never been entered into.

Company A's final brief does not provide any calculation or support for what would be required to return to its pre-contracting position. However, calculating the value of each party's performance in executing the contract shows that, under the contract, Company A paid Company B USD 3.5 million. If the contract is rescinded, Company B must return this sum to Company A. Inventory is like melting ice in the sense that if the Inventory is not used (i.e., if a game is aired with Inventory unsold), that Inventory is lost (the ice has melted). Therefore, because Company B reserved a large amount of Inventory for Company A under the Agreement, that was never used and for which Company A never paid, Company

A must compensate Company B for its losses in performing under the Agreement and reserving Inventory to restore both parties to their original position.

19.8.5 In performing under the Agreement, Company B reserved Inventory for Company A as described in the Media Plans, Spot Plan, and Avails Charts produced by Company B. These documents show that Company B reserved 13,974 slots for the 2008-2009 Season. The value of these slots is provided in the Chart found in Section 3 of the Agreement. For the 2008-2009 Season, Company B reserved USD 4.2 million worth of Inventory on J and USD 3.5 million of Inventory on various regional telecasters. Company A admits the authenticity of these amounts and valuation in the Claimant's Post-Hearing Brief at p. 4. Therefore, for the 2008-2009 season Company B reserved and lost USD 7.7 million in total in Inventory because of its performance under the Agreement.

19.8.6 Company B's performance under the Third Amendment, as specified in Section 3(a), also resulted in two additional losses, namely, USD 1 million worth of J Inventory provided to Company A at no charge (and immediately sold by Company A to O Garments Co., Ltd.) and signage at the "B Jam Van" event worth USD 300,000. In performing the Third Amendment, Company B incurred USD 1.3 million in losses.

19.8.7 Therefore, if the Agreement and Third Amendment are rescinded, in order to restore Company A and Company B to the original position they would have been in, had the Agreement never been executed, Company A must compensate Company B for its losses incurred in performing the contracts in the amount of USD 9 million. If we offset the USD 3.5 million that Company B must return to Company A against this amount, Company A would owe Company B USD 5.4 million to return both parties to the positions they would be in, had the contract never been executed.

19.9 Company A is not entitled to damages.

19.9.1 Even if Company A's claims regarding breaches are accurate, which they are not, Company A is not entitled to damages. The Third Amendment represented a settlement and release of any previous claims between Company A and Company B stemming from the Agreement. This Amendment eliminated older claims based on the superseded Agreement and the parties were bound only by this Amendment. Both Company A and Company B agreed that this Amendment would resolve prior

claims between the parties. Company A's future and past payment obligations were forgiven, to the extent specified, and Company B's obligations to provide future Inventory, other than as specified, were eliminated.

19.9.2 Under the PRC law, there is a principle that a subsequent contract prevails over a previous contract, which is generally recognized among legal scholars and is adopted by the Chinese courts. An amendment to a contract is treated similarly as a subsequent contract where parties reach new agreements different from the previous contract (see *Contract Law*, Article 77). Accordingly, the Third Amendment represents the Agreement as amended and should stand as the relevant agreement between the parties.

19.9.3 The breaches identified by Company A did not cause the damages that it claims. Company A claims that because of alleged breaches by Company B it was unable to resell Inventory. However, the facts contradict Company A's claims. In particular, it immediately sold the free J Inventory worth USD 1 million provided by Company B in the Third Amendment. Again, it is important to note that Company A provides no support for its position that it had difficulty reselling Inventory due to Company B's breaches. Company A has not produced any email, transcript, or witness testimony to describe or explain why any of the claimed breaches had any material effect on Company A's ability to resell Inventory. There is no evidence that Company A could not resell its Inventory because of: (i) confirmation letters; (ii) the Annual Media Plan; (iii) market confusion; (iv) not scheduling the slots that Company A's clients wanted; (v) failing to inform the start of the "B Jam Van"; and/or (vi) failing to add Company C to Attachment C. Company A has simply not carried its burden of proof, nor has it produced any evidence on which the Tribunal could make an award that any damages claimed by Company A are as a result of any alleged breach.

19.9.4 Company A's damages calculations rely on the incorrect assumption that that USD 3.5 million was a pre-payment. Company A Claims RMB 16.5 million in direct damages. According to Company A's Supplemental Evidence list, this is the amount that it paid to Company B (USD 3.5 million), minus its calculation of the Inventory it used in the 2008-2009 season (RMB 4.7 million) and minus the value of the Inventory it used during the 2009-2010 Season (RMB 5.2 million) plus the contract price it paid to J Future to perform the O Garments Co., contract (RMB 300,000 + 1,400,000 + 700,000).

19.9.5 Company A's assertions regarding its damages are based on an incorrect explanation of the nature of its relationship with Company B. Company A appears to believe that it only "purchased" the Inventory that it actually sold to customers, and therefore any amounts that it paid to Company B, before Company A itself had sold Inventory, were a "pre-payment". Company A appears to view the nature of the Agreement as a consignment relationship between Company B and Company A. This is incorrect. As the Agreement itself makes clear, Company A agreed to purchase a set amount of Inventory from Company B for a set amount of money. Once Company A purchased the Inventory, Company B reserved that Inventory so that it was available when Company A eventually made a resale. As Company A itself states several times in the Claimant's Post-Hearing Brief, the Agreement created a "reseller" relationship. Company A purchased goods from Company B, thereby acquiring the business risk of owning the rights to those goods, and became free to resell them. Company A received all the benefits of the Inventory that it agreed to purchase as soon as it paid the purchase price and Company B reserved the Inventory. Company A Actually received all, indeed more than, the benefits (Inventory) it agreed to purchase.

19.9.6 Company A likewise has no basis for claiming lost profit. Additionally, Company A's claim for RMB 8.3 million in lost profits is not in accordance with the *PRC Contract Law*. Under the *PRC Contract Law* , lost profits must be foreseeable for both parties at the time of contracting (*Contract Law*, Article 113). Company A has presented no evidence of the foreseeability of its damages. In fact, it is impossible that Company B would have been able to foresee the specific damages, Company A is attempting to claim, as Company B could not have known the prices Company A intended to charge, the margin it planned to earn, and the volume at which it anticipated reselling. The necessary meeting of the minds for Company A's lost profits claim never occurred.

19.9.7 Company A is bound by its election of Article 94 of the *Contract Law* as a remedy and may not claim both rescission and lost profit. As explained above, the proper remedy in the event that the contract is terminated according to Article 94 of the *Contract Law* is the restoration of both parties to the status they would have in, had the contract never been executed. In this case, however, Company A is claiming both lost profits and rescission of the contract. If the contract is rescinded, and both parties are returned to their original positions, there would be no expected profits

for Company A to attempt to claim as the contract would never have existed. Company A now requests both a refund of the USD 3.5 million it paid (i.e., restore the parties' positions to the state before the Agreement was signed, albeit with no consideration of restoring Company B to its position) and loss of profit (i.e., the profit that could be obtained after the contract is performed), such claims cannot stand under the *PRC Contract Law* as they are mutually exclusive remedies. Because Company A has elected, and represented to the Tribunal and Respondent, that it is seeking relief under Article 94 of the *PRC Contract Law* its remedy is limited to a return of the USD 3.5 million paid to Company B (offset by the amount of USD 5.5 million owed to return Company B to its pre-contract position).

19.10 Company A also failed to mitigate its damages as required by PRC law (*Contract Law*, Article 119). Company A has not specified or produced any evidence of measures, it took to mitigate its damages, as is its burden in claiming damages. In fact, Company A actively exacerbated its damages by attempting to purchase additional Inventory other than that to which it was entitled, in order to perform its contract with O Garments Co., and by never contacting, notifying or otherwise communicating with Company B regarding many of its alleged breaches. Company A thus aggravated its own losses and therefore may not seek compensation for them.

19.11 Company A makes several assertions, one of which is completely new, in its Post Hearing Brief that Company B is not in compliance with various PRC laws and regulations. Company A's assumptions and unexplained assertions regarding the scope of these laws and regulations are incorrect. Company B is certainly subject to and in compliance with the PRC laws and regulations.

19.11.1 B obtained Chinese legal advice when setting up the various entities. When setting up its operations in China, Company B and all B's affiliated entities spent significant time and resources in seeking proper and experienced PRC legal counsel to provide advice on the necessary steps required for it to comply with PRC laws and regulations. Company B relied on that advice and has adhered to it in conducting its various business operations. Company B believes that it is operating fully in compliance with applicable PRC laws and regulations.

19.11.2 Even if Company A's assertions about compliance with the PRC laws and regulations have merit, which they do not, Company A has provided no evidence to show that it encountered any problems reselling Inventory which is attributable

to any regulatory compliance matters. Company A has not, in fact, presented any evidence that there is any connection between the alleged regulatory compliance, the alleged breaches and the damages that it claims. Because Company A has not met its burden to produce evidence demonstrating causation, there is no basis on which to award Company A the damages it claims. Instead, Company A's claims on these regulatory issues invite the Tribunal to step into the role of government agencies in evaluating the applicability of these laws and regulations, interpreting their meaning, and identifying consequences that are typically decided by the regulators themselves. In the absence of some damage caused to Company A that resulted from these alleged regulatory compliance matters, for which Company B owed Company A (as opposed to the PRC law) a duty to comply, Company A has no claim that it can properly bring before this Tribunal.

19.11.3 If Company A, a "large and sophisticated advertising company", actually believed that Company B was not in compliance with the law or that any such non-compliance might affect Company A's business, Company A should have said so in an earlier date before being half-way through this arbitration. Instead, Company A worked to extract more benefits from Company B and continued to actively resell Inventory not only under the Agreement, but also under the subsequent Third Amendment. Although Company A sold large amounts of this Inventory, and benefitted from those resales, it would now like to allege that Company B was not legally registered or properly licensed. If this was the case, according to Company A's own argument, Company A could be considered not only complicit but also actively encouraging the alleged breaches of the PRC law.

19.11.4 Company B is not in violation of the *PRC Advertising Law*. The *PRC Advertising Law*, the *Regulations on the Control of Advertising*, or the *Provisions on the Administration of Foreign-Funded Advertising Enterprises* apply to activities in which Company B did not engage. Although primarily concerned with the content of advertisements, the *PRC Advertising Law* applies to three types of entities as provided in Article 2, namely, "*Advertisers, advertising agents and advertisement publishers shall abide by this law in engaging in advertising business within the territory of the People's Republic of China.*" Company B is none of these. Company A, however, contends that Company B is an "advertising agent". This is incorrect.

19.11.5 The *PRC Advertising Law* further defines an "advertising agent" as "*a legal person, an economic organization or an individual that provides services in*

designing and producing advertisements or providing related services on a commissioned basis". An advertising agent's role is defined in Article 26 of the *PRC Advertising Law*, i.e., "*[a]n advertising agent shall have the necessary professional staff and advertisement making equipment and have gone through the company or advertising management registration before carrying out advertising activities*". An "advertising agent" therefore is involved in the creation and design of advertisements on a commission basis. Article 27 of the *PRC Advertising Law* which states that "*advertising agents shall not provide services in the designing and production of advertisements and in agency business for advertisements whose contents are not factual or the documents of certification for which are incomplete and advertisement publishers shall not publish the advertisements thereof.*" The role of an "advertising agent" is the design and production of advertisements or services related to the design and production of advertisements.

19.11.6 Because it is uncontested that Company B does not actually design, produce, or assist in the design or production of any advertisements, it is not an "advertising agent" as defined under PRC law. As Company B's activities are outside of the scope of the *PRC Advertising Law*, the *Regulations on the Control of Advertising* likewise do not apply.

19.11.7 Company A also alleges, for the first time in this arbitration, that Company B is in violation of the *Foreign-Funded Advertising Enterprises Law*. Aside from the fact that Company A has neither produced or cited any proof nor explained its argument beyond merely invoking a law, Company B is not an "Advertising Enterprise" or an entity covered by the Advertising Law. Accordingly, as discussed in greater details above, it is outside the scope of these administrative provisions.

Company B complies with the AML and both the Agreement and the Third Amendment are not in violation of the law. Company A misunderstands the restrictions included in the Third Amendment. Company A was only restricted from attempting to execute a "marketing agreement", as that term is defined in the Third Amendment, with other than six specified companies. It was explicitly not prohibited from approaching, dealing with, or attempting to resell Inventory to any company, as this Amendment stated "*[f]or avoidance of doubt, the list of companies [in Attachment C] does not limit or restrict Company A's ability to sell Inventory.*" Lastly, Article 17 of the AML, cited by Company A, applies to activities in which Company B was not engaged. Claimant's Post-Hearing Brief

requires a company to have a "*dominant market position*". The same Article defines a "dominant market position" as "*a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in relevant market, or to hinder or affect any other business operator to enter the relevant market*". Company B has no such power as the market for Inventory is in fact controlled by the broadcasters providing the inventory (e.g., J). Additionally, many entities non-exclusively resell Company B's Inventory, as shown by the fact that Company A itself purchased Inventory directly from a broadcaster. Company B does not have a "dominant market position" as defined in the PRC law and Company A cites no evidence, testimony, or other explanation in any form to substantiate its position.

III. COUNTERCLAIMS AND ITS DEFENSE

A. Counterclaims

20. The Respondent submitted its Counterclaims in July 2010. Its claims and reasons on the Counterclaims are as follows:

20.1 The Respondent incorporates the statements in paras. 27.2 - 27.16.

20.2 Company A did not perform its contractual obligations under the Sales Agreement. Company B did not strictly insist on Company A's full performance, and instead worked with it to reach accommodations that excused Company A from performing significant parts of its obligations under the Sales Agreement, and provided Company A with additional benefits, as reflected in the amendments to the Agreement. Those amendments reduced Company A's burden and extended additional favours and benefits to Company A. Nevertheless, Company A has failed even to perform its obligations as amended.

20.3 Company B states that Company A has breached Attachment C of the Third Amendment by approaching Company C, a company not listed in Attachment C. There was an existing or prospective business relationship between Company B and Company C. Both parties were expecting to enter into a business agreement and Company A had knowledge of the relationship between Company B and Company C. Company A intentionally and unjustifiably interfered with that relationship. Due to Company A's interference, Company B was not able to enter into the business agreement with Company C. Company B claims damages for at

least USD 500,000 being the lost revenue that Company B reasonably expected to receive from the prospective business agreement with Company C.

20.4 Company A has breached the Agreement by using Company B's intellectual property on Company A's business materials (i.e., business cards). Company B requests that Company A comply with the Agreement and remove all Company B's logos, marks, photos, footage or other Company B's intellectual property from its business cards or other material (if any).

20.5 Company B claims pre-award and post-award interest at the maximum legal rate.

20.6 Company B claims arbitration fees, costs and expenses.

20.7 Company B claims reasonable and necessary attorney's fees.

B. Defense to the Counterclaims

21. The Claimant made its Defense to the Counterclaims as follows:

21.1 Company A prays that Company B's counterclaim for damages in an amount of at least USD 500,000 for lost revenue that Company B reasonably expected to receive from the prospective business agreement with Company C should be dismissed. Because this counterclaim neither falls within the scope of the arbitration clause, nor accords with the provisions of the *PRC Contract Law* relating to the interests receivable.

21.2 On 29 October 2009, Company B executed the Third Amendment with Company A in which the two parties did not list Company C in Attachment C and Company B did not approve Company A to amend Attachment C to the Third Amendment, even if Company A had requested to add Company C as a list company in Attachment C. Obviously the issue of Company C has nothing to do with the Sales Agreement and is over the scope of Arbitration clauses.

21.3 Company B's counterclaim for damages in an amount of at least USD 500,000 for lost revenue is obviously untenable, as Company B misunderstands Article 113 of the *PRC Contract Law*.

21.4 Company B's counterclaim for damages in an amount of at least USD 500,000 for lost revenue that Company B reasonably expected to receive from the prospective business agreement with Company C should be dismissed.

C. Respondent's Reply to the Defense to Counterclaims

22. The Respondent's Reply to the Defense to Counterclaims is as follows:

22.1 Under Articles 16-18 of the *PRC Arbitration Law*, unless under the circumstances where a party is incompetent or the arbitration consent is obtained by coercion, an arbitration clause is valid if it contains the following items clearly: (1) an expression of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission. Article 13 of the *CIETAC Arbitration Rules (2005)* grants the Tribunal the authority to decide the counterclaims.

22.2 The arbitration clause contained in the Agreement is clearly stated and gives this Tribunal broad jurisdiction over all events "arising out of, relating to, or in connection with" the Agreement. Company B's trademark claim is clearly related to the Agreement prohibiting the use of Company B's trademarks without prior permission. Company B's intentional interference claim is also clearly related to the marketing commission arrangement in the Third Amendment.

22.3 Company A itself conceded that this Tribunal has jurisdiction over issues relating to Company C by raising the transaction in its original submission. Company A is now attempting to backpedal and claim that it may raise issues related to Company C but Company B may not. If the Arbitration Clause is broad enough to encompass Company A's claim it is certainly broad enough to cover Company B's claim.

22.4 Company A does not contest that it is improperly using Company B's trademarks and Company A concedes that it is improperly using Company B's trademarks and intellectual property by not answering any of Company B's claims in its reply. Company A apparently believes that it has no colorable defense for its misappropriation of Company B's marks. The Agreement in plain terms prohibits the use of Company B's marks without prior approval. It is uncontested that Company A never sought the consent of Company B and that such consent was never granted.

22.5 Company B's concern was well founded as Company A has made unauthorized use of Company B's marks on, at least, individual business cards. Company A has used these marks intentionally to give the impression that it has a close relationship with Company B and is an exclusive reseller of Company B's Inventory. This has caused confusion in the marketplace regarding individual reseller's authority and

Company A's continued use of Company B's marks will only cause more trouble for Company B's business in China.

22.6 Based on the plain wording of the Agreement and in order to prevent further damage to Company B and its intellectual property rights, Company B is entitled to a decision prohibiting Company A from further use of Company B's marks in violation of the Agreement, as well as damages.

22.7 Company A breached the Agreement by intentionally interfering with Company C's reseller relationship. Company A's intentional interference with the Company C relationship led to the loss of a lucrative business opportunity for Company B in connection with the Third Amendment and Company A's commission arrangement. Company A knew that Company B had an existing relationship with Company C and that it was negotiating to set up a joint promotion event. Using this knowledge, Company A injected itself into the middle of the relationship and convinced Company C that it should deal exclusively with Company A. Company A itself would then handle negotiations with Company B for the myriad reasons set forth above such an arrangement was impossible for Company B to accept.

22.8 Company A was clearly aware due to Attachment C that it was only entitled to a commission for a successful introduction to the six companies listed therein. This was not enough for Company A and it desired a commission for a relationship that it did nothing to foster. It is important that Company A was not in fact selling Inventory to Company C which it was allowed to do but attempting to obtain a commission by intervening in an existing relationship between Company C and Company B

22.9 Article 113 of the *PRC Contract Law* allows for the recovery of these lost profits when they "*have been anticipated or should be anticipated by the breaching party in the making of the contract*". Here, as opposed to Company A's claims, the prospective contract had a clear value and the loss to Company B was foreseeable at the time of contracting. Based on Company A's intentional interference with prospective business opportunities, Company B is entitled to an award from this Tribunal of USD 500,000 in damages.

22.10 Company B requests that Company A be ordered to cease and forever desist from unauthorized use of Company B's marks, to pay USD 500,000 for lost profits

for its intentional interference with Company B's business opportunities, and to compensate Company B for its attorney and arbitration fees and costs.

D. Respondent's Post-Hearing Statement in Support of Respondent's Counterclaims

23. In its Post-Hearing Statement in Support of Respondent's Counterclaims, the Respondent made its conclusion that the Tribunal has jurisdiction over Company B's Counterclaims against Company A in relation to Company A's intentional interference with Company B's business relationship with Company C. It again requested that the Tribunal award an injunction preventing Company A from further misappropriation of Company B's marks, as well as damages of a total of RMB 2 million.

E. Claimant's Second Post-Hearing Statement

24. On receipt of Respondent's Post-Hearing Statement in Support of Respondent's Counterclaim, the Claimant submitted its Second Post-Hearing Submission in May 2012. The Claimant still insists that the Respondent's counterclaim of USD 500,000 as the loss of foreseeable profits is totally unfounded both in fact and in law, thus the Arbitration Tribunal is requested to dismiss this unfounded counterclaim.

24.1 Besides, the Claimant claimed that the Tribunal does not enjoy the jurisdiction to decide Company B's Counterclaim of USD 500,000.

24.2 The Claimant also claimed that it never interfered with the business relations between Company B and Company C and never breached the Third Amendment.

24.2.1 In fact, the counterclaim is a totally invented story. The truth is that Company A contacted Company C for the P project at a time much earlier than Company B contacted Company C for the same matter. Company C had total trust in Company A and appointed Company A to be generally responsible for the design and implementation of the P project, and authorized Company A to enter into agreement with Company B concerning the purchase of intellectual property rights and other interests. Company B unilaterally and unreasonably assumed that Company A on behalf of Company C would pose a risk and asked instead to enter into another agreement with Company C on a separate basis. In the end,

Company B decided not to enter into an agreement with Company A on behalf of Company C. As a legal person, Company C has the right to authorize an agent to act in civil matters (Article 36 of the *General Principles of Civil Law of PRC*) and Company C may be liable for the acts of Company A as an agent (Article 63 of the *General Principles of Civil Law of PRC*). Company A never intended to control nor was able to control the intellectual property rights of Company B. Company B's unilateral guess about Company A was unfounded and Company B's failure to enter into an agreement with Company C on account of fears for risks bore no relations with Company A. Any possible losses arising therefrom shall be borne by Company B alone.

24.2.2 The Third Amendment provides for "Attachment C (which may be amended upon written agreement executed by the parties)", which was not a restriction of amendment of the listing six companies. The provision in Attachment C providing that "*Company A may not engage in discussions with any company outside of this list without Company B' prior written approval*" contravenes Article 17.4 of the AML providing that "*Undertaking bolding dominant market positions are prohibited from doing the following by abusing their dominant market position: … (iv) Without justifiable reasons, following their trading counterparts to make transactions exclusively with themselves or with the undertakings designated by them*", and shall be declared void accordingly. Secondly, Company B admitted that market confusions may arise from the situation where many companies would sell the same commodity. This further proves that Company A's losses in reselling the inventories were caused by the market confusions in which Company B and Futures and others, in addition to Company A, engaged in the concurrent sales of the same inventories. The market confusions were caused by Company B's purposeful act of defining Company A as a non-exclusive reseller in the drafting of the Sales Agreement. Thus, Company B shall bear Company A's losses suffered therefrom. In another word, Company B itself admitted that Company A's claims shall be supported by the Arbitral Tribunal.

24.2.3 Company B's counterclaim of USD 500,000 as the losses of foreseeable profits is not in line with relevant legal rules. Company B failed to prove that it had suffered the damages (USD 500,000). Company B pointed out that the claim was supported by Exhibit 16 of Mr. L — an outline of the talks over Company C as a market partnership. First, such a document is merely an internal file of C, bearing

neither signatures of the parties nor any seals for confirmation and being "DRAFT FOR DISCUSSION ONLY" and marking such words as "*For discussion purposes only. The contents herein shall not be binding by either party*" in the lower part. Thus, such a document is a draft for discussion only and was never confirmed for any specifics and was unfit for any purposes. Second, the document provides for "Total investment and terms, Year-1 USD 500,000 (upon contract execution to 30 September 2010), Year-2 USD 600,000 (1 October 2010 to 31 December 2011)". Put in another way, the amounts specified were the total investment put by Company C into U-Can events for the first and second year including English competitions, spelling games, market promotions for 10 cities, etc. Thus, they were not the sums to buy intellectual property rights from Company B as claimed by Company B. Lastly, the "terms" in the document specified that "*Upon execution through December 2011 (with option-out after first year ending)*". Thus, even if assuming that this document is a valid contract rather than a draft and that USD500,000 for the first year and USD 575,000 for the second year were not total investment but the sum to buy the intellectual property rights from Company B, Company B cannot find a claim for USD 575,000 for the second year as the second-year cooperation may be opted out. On the one hand, in the Respondent's Post-Hearing Statement, Company B stated that "*Company B suffered losses amounting to USD1 million, and out of a consideration of compromise and fairness, Company B requests the Tribunal to award the half amounts of USD 500,000 as damages*". On the other hand, in the Respondent's Post-Hearing Statement, Company B stated that "*In addition, Company B is seeking only USD 500,000 in damages for Company A's breach, less than half of the amount to which it is entitled. This reduction demonstrates Company B's good faith commitment to mitigating its damages*". Obviously, such points of view are a bad faith distortion of the duty of mitigation of losses in law and confuse the distinction between the disputing Parties' disposal of their own rights and the duty of mitigation of losses, intending to defraud the Arbitrational Tribunal. In fact, the duty of mitigation of losses refers to the situation in which the observing party shall take measures to prevent the expansion of losses when there is a breach, but not to the situation in which a party to an action may fix its claims at will in litigation or arbitration proceedings.

24.2.4 The so-called "losses of USD 500,000 suffered by Company B" are not "the losses of foreseeable profits" and constitute no lawful claim against Company A. The losses of foreseeable profits as defined in Article 113 of the *PRC Contract Law*

refer to: (1) the interests attainable for a party if he performs this duty; (2) the losses foreseeable by the parties at the formation of the contract; and (3) the losses foreseeable by the breaching party rather than by the observing party. Accordingly, the losses of foreseeable profits in this case are and merely are the interests foreseeable by the breaching party about the losses caused to the observing party at the formation of the contract when there is a breach against the Sales Agreement by one party and another party observes the Agreement. Therefore, there are the losses of foreseeable profits, that is, the RMB 8.3 million claimed by Company A against Company B for Company B's breaches. On the contrary, the USD 500,000 claimed by Company B is not the loss of foreseeable profit, for a couple of reasons. Firstly, Company B and Company C or its agent Company A has never reached an agreement on the P project. Secondly, there is neither breach nor performance. Thirdly, the losses of USD 500,000 could not have been foreseen by the breaching party at the formation of the contract.

24.3 Company B's counterclaim of RMB 2 million in damages for Company A's unauthorized use of Company B's trademarks is not founded in facts and in law.

24.3.1 Such a counterclaim lacks grounds and Company A requests that the Arbitral Tribunal may dismiss this counterclaim. Company A's use of Company B's trademarks was an appropriate use and was for the performance of the Sales Agreement entered into by the parties. It was agreed in the Inventory Sales Agreement that "*Company A will have the limited, non-exclusive and non-transferable right to use, during the Term and solely within the Territory, the designation an 'Official Reseller of B Medias' translated into simplified Chinese only (i.e., Company B 官方推广合作伙伴).*" As an official Reseller of Company B's Media, Company A faced suspicions and distrust from end users when trying to resell the inventory, and Company B had continuously failed to "*issue a letter addressed to Company A's potential purchases of inventory ('Confirmation Letter') to confirm that Company A is an authorized reseller of the inventory*" as provided in the Sales Agreement. Against such backgrounds, Company A's use of the trademarks related to Company B as agreed in the Agreement was lawful and legitimate to facilitate the reselling of the inventories, being a legitimate use of right as agreed in the Agreement. Even if Company B thought such use as unauthorized, it should be considered as an implied duty for Company B to agree to the use by Company A of such logos and marks according to the fundamental

objectives of the Agreement between the parties. Company A's use of Company B's trademarks was not a tort against the registered trademark and Company A incurred no liability.

24.3.2 According to Article 52 of the Trademark Law of the PRC, "*any of the following conducts constitutes an infringement of the exclusive right to use a registered trademark: (1) using a trademark that is identical with or similar to a registered trademark in connection with the same or similar goods without the authorization of the owner of the registered trademark; (2) selling goods that violate the exclusive right to use a registered trademark; (3) counterfeiting, or making, without authorization, representations of another panty's registered trademark, or selling such representations; or (4) altering another party's registered trademark without authorization and selling goods bearing such an altered trademark*".

24.3.3 Company B's claim of RMB 2 million as damages shall be dismissed as it neither accords with the procedural law nor accords with the substantive law. In terms of the procedural law, Company A objects that Company B's sudden submission in its Post-Hearing Statement for amending its claims (adding a new claim of RMB 2 million) in April 2012. Company B never submitted such a claim in its prior submissions before and did not do so on the hearing held in February 2012. Company B's sudden request for amending claims in its Post-Hearing Statement deprived Company A's rights under Article 13.4 of the *Arbitration Rules of CIETAC* which says that, *inter alia*, "*Where the formalities required for filing a counterclaim are found to be complete, the CIETAC shall send the Statement of Counterclaim and its attachments to the Claimant. The Claimant shall, within thirty (30) days from the date of receipt of the Statement of Counterclaim and the attachment, submit in writing its Statement of Defense to the Respondent's counterclaim*". Therefore, Company A hereby requests the Arbitration Tribunal "*not to permit any such amendment for considering that the amendment is too late and may delay the arbitral proceedings*" according to Article 14 of the *Arbitration Rules of CIETAC*.

24.3.4 In terms of the substantive law, Company B's claim fails to meet Article 56 of the *PRC Trademark Law*. Article 56 of the Trademark Law provides that "*the amount of damages for infringement of the exclusive right to use a registered trademark shall be the profit that the infringer has earned through the infringement during the period of the infringement or the losses that the infringee has suffered through*

the infringement during the period of the infringement, including any reasonable expenses the infringee has incurred in his effort to stop the infringement. Where the profit earned by the infringer or loss suffered by the infringee through the infringement mentioned in the preceding paragraph cannot be determined, the people's court shall grant a compensation not exceeding RMB 500,000, according to the circumstances of the act of infringement. Where a party unknowingly offers for sale goods that are in infringement of the exclusive right of another person to use a registered trademark, but is able to prove that he has obtained the goods lawfully and to identify the supplier, he shall not be held liable for damages." Firstly, Company A's use of Company B's trademarks did not infringe upon the exclusive right to use a registered trademark and instead was for the performance of the Agreement according to the *PRC Contract Law*. Company A has never been a tortfeasor and Company B did not suffer torts at all. There was no basis for claims founded upon infringement against exclusive right to use a registered trademark. Secondly, Company A gained nothing from its use of Company B's trademarks. Even if assuming there were benefits gained, it was for the performance of the Agreement and thus favorable for Company B. In addition, Company A's use of Company B's trademarks never caused Company B to suffer any losses and, in the opposition, Company B actually gained from it. Lastly, Company B alleged that four name cards had caused damages of RMB 500,000 each, such a claim is obviously a mistaken understanding of the rule that "*where the profit earned by the infringer or losses suffered by the infringee through the infringement mentioned in the preceding paragraph cannot be determined, the people's court shall grant a compensation not exceeding RMB 500,000, according to the circumstances of the act of infringement*" according to Article 56 of the *PRC Trademark Law*. Such a claim shall be disallowed.

IV. ANALYSIS AND OPINIONS ON THE ISSUES OF THE TRIBUNAL

A. Applicable Law and Validity of the Agreements

25.1 This Arbitration involves one master agreement, that is the Sales Agreement concluded between the Claimant and the Respondent on 17 October 2008, and three Amendments, the Supplementary Agreement concluded on 19 January 2009,

the Amendment Agreement concluded on 9 February 2009 and the Amendment (i.e., the Third Amendment) concluded on 29 October 2009, all made between the same parties.

25.2 The Arbitration Application was based on the Arbitration Clauses in the Inventory Sales Agreement which states: "*This Agreement is governed by and shall be construed and enforced in accordance with the laws of the People's Republic of China, excluding its choice of law principles. All disputes arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration conducted at the China International Economic and Trade Arbitration Commission ('CIETAC') in Beijing in accordance with its rules, and determined by three arbitrators appointed in accordance with its rules, with the two co-arbitrators having 30 days from their appointment to nominate the chair. The place of Arbitration shall be Beijing, and the language to be used in the arbitral proceedings shall be English. The arbitrators shall award to the prevailing party its costs, including its attorney's fee, incurred in connection with the arbitration. The arbitration proceedings and the resolution thereof shall be completely confidential, subject only to such disclosures as are required by law or as are necessary to enforce an award. Prior to the full constitution of the arbitral tribunal, any party may apply to any court of competent jurisdiction for provisional or interim relief. The arbitration award shall be final and binding on the parties*."

25.3 The three Amendments have no such arbitration clauses, but each of the Amendment mentioned that it "*is to the Sales Agreement*". Therefore, the Tribunal believes that the arbitration clause also governs the three Amendments, and the Tribunal has jurisdiction over the disputed issues within the scope of the master agreement and the three amendments.

25.4 Based on the same clause, the master agreement and the three amendments should be governed and construed by the PRC laws, excluding its choice of law principles.

25.5 In relation to the validity of the Agreements, the Tribunal would like to mention that the Claimant in its various submissions alleged that Company B was in violation of certain relevant Chinese laws and regulations; for instance, the Claimant in its reply to the defense submitted in December 2011 claims that the Respondent/ Company B was not a licensed advertising agent in China. In its Post-Hearing Statement submitted in April 2012, the Claimant alleges that (a) Company B

should file the application for charge of business scope registration according to Article 6 of the *Regulations on Control of Advertisement* and should be punished based on Article 18 of the Regulations; (b) Company B was in violation of Articles 4 and 5 of the *Provisions on the Administration of Foreign-Funded Advertising Enterprises*; (c) Company B was in violation of Article 5 of the *PRC Advertising Law*; (d) Company B was in violation of Article 15 of the *Administration of Registration of the Scope of Business of Enterprises Provisions*, Article 63 of the *Detailed Implementation Rules for the Regulations of the People's Republic of China for Controlling the Registration of Enterprises as Legal Person* and Article 6 of the *Order of the State Council of the People's Republic of China*; (e) Company B was in violation of Article 17 of the AML, etc.

25.6 However, the Claimant did not submit evidence or legal authorities to the Tribunal as to how, even if the assertions were made good, the Agreements or particular provisions thereof would become null and void. From the statements, the Tribunal could understand that at least some of the provisions the Claimant relied on only relate to the administration and supervision of the Chinese advertising industry by the Chinese Government and any violation of which may render sanctions or punishment against the relevant enterprises by the authority in charge. However, this would not affect the validity of the agreements. It is clear that the Tribunal has no authority to deal with the violation (if any) of the PRC administration and supervisory legislation and therefore it is not within the scope of its jurisdiction. As to whether some of the provisions may have effect on the performance or the compensation, the Tribunal will deal with them in the relevant parts of this Award.

25.7 In any event, the Claimant in its reply to the Tribunal's questions clarified that it claims that "*Company B was not licensed as an advertising agent in China*", but it does not claim that the Sales Agreement, the First, Second and Third Amendments are invalid or null and void. The PRC laws and regulations governing the advertising industry are of administrative nature and are not substantive rules governing the validity and shall not affect the validity of the Sales Agreement, the First, Second and Third Amendments. Moreover, the Claimant in its Reply and Defense to Counterclaim stated that "*Respondent/Company B is not a licensed advertising agent in the People's Republic of China, which is one of the reasons the Sales Agreement failed to be performed*." The contention of the Claimant is

therefore to challenge the non-performance of the agreements, not invalidity of the same.

25.8 Since both parties to these agreements confirmed in their Replies to the Tribunal's Questions that the Sales Agreement and the three Amendments are all valid contracts, and the Tribunal has not found the agreements and any of their provisions are in violation of the compulsory provisions of the PRC laws and administrative regulations pursuant to Article 52(5) of the *PRC Contract Law*, the Tribunal therefore concludes that all the Agreements are valid and enforceable under the PRC laws and regulations.

B. Claims of the Claimant

26.1 Two issues arose:

(1) Whether the "Confirmation Letter" or the "Letter of Authorization" was issued to Company A by Company B?

(2) Was the "Confirmation Letter" in compliance with the terms of the Agreement?

In respect of issue (1), the Tribunal notes that in its Application for Arbitration dated 4 May 2010, Company A alleged that "*the Respondent failed to provide the Letter of Authorization and other documents confirming his right or authority to sell the media resources*". In its Reply and Defense to Counterclaim dated on 15 December 2011, Company A claimed that "*Company B should issue Claimant Company A a certificate or related document to confirm that Company A had been authorized by J or the regional television stations to resell the Inventory. However, Company A had not gained any certificate or document from Company B after Inventory Sales Agreement executed between Company A and Company B.*" In its Post-Hearing Brief dated 19 April 2012, Company A alleged that "*Company B intentionally failed to provide the promissory confirmation letters to confirm Company A is an authorized reseller of the Inventory*". Company A's allegation makes it very clear that Company B did not provide the Confirmation Letter as required by the Agreement.

26.1.1 One of the evidence in the Supplementary Exhibits Lists submitted by Company A on 16 February 2012 was an email sent to Company B by Company A on 24 November 2008, saying "*however, in the current 'Confirmation Letter', such terms*

as 'not allowed to use for any purpose in any manner', this 'Confirmation Letter' is and remain effective from 31 October 2008 to 1 January 2009, on which day this Letter shall expire and lose all binding force' make it devoid of any meaning related with an authorization and unfit to be presented to clients at all. So please help to communicate in this matter and reissue us a Confirmation Letter of full legal efficacy. Thanks". The evidence indicates that in November 2008, Company A did have received a "Current Confirmation Letter" and because of it being devoid of authorization and unfit for presentation, Company A requested Company B to reissue one with full legal efficacy. This evidence contradicts its own allegation on this point that the Respondent failed to provide any confirmation letter.

26.1.2 Turning to the position raised by the Claimant in its last submission, i.e., issue (2), Company A did not submit to this Tribunal any confirmation letter sent to it in 2008 by Company B as evidence to show that the confirmation letter was not in compliance with the provisions of the Agreement. One primary principle on burden of proof of the Chinese law is that a party who asserts affirmative of a particular claim or defense, is responsible for providing proof thereof. Therefore, this Tribunal is not in a position to review the Letter and to make a judgment whether the Letter was in compliance with the terms as stipulated in the Agreement, since Company A failed to discharge its burden of proof.

26.1.3 Mr. L, witness of Company B, before the hearing on 20 January 2012, submitted one copy of "Confirmation Letter" issued by Company B on 4 December 2008 which states: "*We, Company B, hereby confirm that in October 2008, Company A and Company B entered into a Sales Agreement which shall expire on 30 September 2012. This letter shall remain in force from the issuance date to 30 June 2009 and shall then automatically expire and be of no further effect. If there is any question, please feel free to contact Legal Department.*"

26.1.4 On 20 August 2012, in Company A's Reply to the Tribunal's Questions, Company A clearly based on the "Confirmation Letter" submitted by Mr. L, witness of Company B, on 20 January 2012, claimed that the Respondent breached the Sales Agreement, since the "Confirmation Letter" issued by Company B to Company A (i) failed to mention Advertisement Inventories, (ii) failed to mention that the Claimant is an authorized reseller of the Inventory, and (iii) was effective only from 4 December 2008 to 30 June 2009.

26.1.5 The Respondent claimed that the terms of the Agreement permitted the Claimant to request a "Confirmation Letter" from the Respondent to confirm that the Claimant owned the relevant Inventory as a principal and was not acting as an agent for the Respondent. Further, the Respondent said the "Confirmation Letter" has already been provided to the Claimant. Respondent does not sell the Inventory through agents, nor is it an agent of J (or anyone else) and, thus, it does not have and has not issued the "Letters of Authorization".

26.1.6 The Tribunal finds that the relevant terms regarding the Confirmation Letter are regulated in the Inventory Sales Agreement, which says: "*upon receipt of written request from Company A, Company B shall from time to time issue a letter addressed to Company A's potential purchasers of Inventory with the form and content to be determined by Company B (Confirmation Letter) to confirm that Company A is an authorized reseller of the Inventory (subject to the terms of this Agreement)*". The article requires Company B to issue confirmation letters which confirm that Company A was an authorized reseller of the Inventory.

26.1.7 Pursuant to the wording of the Sales Agreement, the Confirmation Letter submitted by Mr. L demonstrated the fact that firstly, Company B had issued at least one such letter; secondly, in the letter it did not mention expressly the term of "Advertisement Inventories" and that "*the Claimant is an authorized reseller of the Inventory*". As to the issue of effectiveness of the time period of the letter only from 4 December 2008 to 30 June 2009, that means the time period was too short, the Tribunal believes that it is a moot question since the Contract term stipulates that "*Company B shall from time to time issue a letter*". One letter was not going to cover the whole Contract term and there would be several letters.

26.1.8 Based on the above facts and analysis, the Tribunal concludes that Company A did not establish its allegation that Company B did not provide the Confirmation Letter to Company A. Even considering its last minute changed position that the Confirmation Letter provided by Company B to Company A was not in compliance with the terms of the Agreement, the Tribunal does not accept that Company A has submitted evidence or argument that is adequate to discharge its burden of proof in relation to this allegation, let alone the fact that it is not fair to admit the allegation since it was too late for Company A to raise such a new issue in this arbitration proceedings and for this to be fairly argued and dealt with by the Respondent. Therefore, this claim of Company A is rejected by this Tribunal.

26.2 Did Company B breach the Sales Agreement because of heavy competition, chaotic marketing channel, and buyback and omission accidents?

26.2.1 Company A complained in its Application for Arbitration that it faced heavy competition and chaotic marketing channel caused by Company B and thus made Company A fail to resell the Inventories. In Company A's Post-Hearing Brief, it claims that "*Company B and other companies were selling the same Inventory which Company B should have provided to Company A. Company B used its dominant position to unfairly compete with Company A*"; and "*as to the Inventory resold by Company A, Company B could not schedule the slots Company A's clients wanted*".

26.2.2 Company B responded to this point by stating that "*the central claim of Company A is that the reselling market for Company B's Inventory was confusing because both Future and Company B resold media … Company A was fully aware when negotiating and signing the Contract that Company B and Future also resold Inventory. The agreement clearly stated that Company A was a non-exclusive reseller*". The Respondent also stated that Company A has not substantiated its claim that other parties were reselling the exact same Inventory as that of Company A, or indeed showed what Inventory other parties were reselling at all. Further, the causation of the loss claimed has not been established.

26.2.3 Regarding the issue of heavy competition and chaotic marketing channel, the Tribunal finds that Company A did not inform the Tribunal when and how Company B caused the heavy competition and chaotic marketing channel to Company A in its resales and did not present any relevant evidence to prove its allegations. Mere assertion is clearly not adequate, and causation has to be specifically established. Secondly, in a market economy, non-exclusivity in selling of a commodity reflects competition. The Sales Agreement states: "*provided that Company A has been and remains, in full compliance with all terms and conditions of this Agreement, Company A will have the limited, non-exclusive and non-transferable right to use, during the Term and solely with the Territory, the designation of 'Official Reseller of B Media' provided that any proposed use of the Designation shall be subject to the prior written approval of Company B*". In Mr. L's statement, he said that "*Company A instead wanted us to describe our relationship incorrectly, for example, as the exclusive reseller of Company B Inventory even though it knew it was not, since Company B and the broadcasters were also selling the same Inventory. It took some*

time for Company A finally to agree…". Based on the Contract terms, Company A was actually the non-exclusive reseller of Company B's Inventory and other broadcasters were also selling the same Inventory simultaneously. Therefore, from the very beginning of the business, Company A should have known that there must be competition in the market. Further, Company B cannot make a false statement as to Company A's exclusivity. Finally, even if it were established that Company A faced the heavy competition and chaotic marketing channel (which the Tribunal has rejected), that should be regarded as Company A taking normal commercial risks. If Company A cannot demonstrate that there was a breach of particular contractual terms on Company B's side, the existence of heavy competition and chaotic marketing channel cannot be ascribed to any acts or omissions of Company B.

26.2.4 The accusations of Company A on heavy competition and chaotic marketing channel caused by Company B resulting in it being unable to resell the Inventory therefore are hereby rejected by the Tribunal and the Tribunal finds that there was no breach of contract by Company B on these points.

26.2.5 Company A also alleged in item 5 of the Application for Submission of Supplementary Exhibits that the Respondent failed to reserve Inventory for the Claimant, and the Claimant had to purchase or buyback Inventory from telecasters at double the price before reselling the Inventory of B games (buyback issue). Company A presented e-mails showing that the buyback price of KTV resources was USD 634 for a 30-second slot. Company A presented another e-mail of May 2009 which complained that 4 Tries consecutive slots of Claimant were omitted and Claimant's business reputation was damaged (omission issue).

26.2.6 Company B rebutted that Company A did not identify any direct evidence showing that Company B had been selling Company A's Inventory to KTV slots. The correspondence relied on by Company A, regarding this matter and whether or not the Inventory mentioned was indeed part of Company A's Inventory, is unconvincing and unclear. The evidence relied on has missing limits to support the allegations made. On balance, the Tribunal finds that it cannot draw by inference that the Inventory mentioned was Company A's Inventory or that it did have buy back at double the price it would otherwise have had to pay. Even if the evidence supported Company A's case, which it is not, this is the only instance out of the thousands of seconds of Inventory resold by Company A that it identifies

to substantiate its claim. It is hardly fair for this to be a basis for the substantial damages they now claim.

26.2.7 As to the allegation of the failure to schedule, if Company A is referring to its allegations regarding O Garments Co., this issue has already been resolved since Company B offered Company A several slots as "make good media" to compensate for the accidental omission.

26.2.8 In any event, the Third Amendment was a settlement of all outstanding issues between the Parties and this issue was resolved by then.

26.2.9 The Tribunal finds that under an article of the Sales Agreement signed on 17 October 2008, Company B had the obligation to provide Inventory for Claimant based on the mutually agreed amounts. However, another article stipulates: "*if any specific Inventory or other benefits to be provided to AC under this Agreement and is not made available to AC for any reason other than Company A's breach, Company B shall not be in breach of this Agreement, but instead as Company A's sole remedy, Company B will use commercially reasonable efforts to make available to Company A "make good media or benefit of equivalent value". In the event that Company B, after using commercially reasonable efforts, is unable to secure sufficient 'make good media' or other benefits of equivalent value, Company B shall have the unilateral right to either (i) adjust the Yearly Fee to reflect the undelivered Inventory or (ii) terminate this Agreement*."

26.2.10 The Tribunal also finds that the buyback and omission accidents all occurred in May 2009. On 29 October 2009, Company A and Company B executed the Third Amendment which amended the terms of the Inventory Agreement as follows: (1) Company B agreed to release Company A from its obligation to pay the remaining USD 3 million it was required to pay for the First Year (October 2008 to September 2009); (2) Company B also waived Company A's obligation to pay the Yearly Fee for the Second Year (USD 0.5 million), Third Year (USD 11 million) and Fourth Year (USD11 million) respectively; and (3) Company B agreed to extend benefits to Company A (at no cost to Company A) during the Second Year including providing (a) J Inventory valued at USD 1 million; (b) signage at the "Jam Van"; and (c) Commissions on marketing Agreements that (in Company B's sole discretion) could result from introductions by Company A to six specified companies.

26.2.11 The Tribunal accepts the Respondent's submission that even if the buyback and omission, which were not pleaded in Company A's Application for Arbitration, constituted a breach of contract by Company B, it had already been resolved by the Third Amendment to the Sales Agreement. Therefore, it is untenable for Company A to terminate the Contract and request compensation based on this ground.

26.3 Did Company B fail in providing the Annual Media Plan to Company A?

26.3.1 Company A in its Post-Hearing Brief alleges that: "*Company B intentionally failed in providing Company A with Annual Media Plans (four years) to set forth the specific Inventory.*"

26.3.2 Company B in its Post-Hearing Statement in response to this allegation of Company A stated that: Company B asserted that Company A provided no evidence to support this allegation. The only evidence in the record submitted by Mr. L, Company B's witness, however, showed that Company B did in fact provide the Media Plan to Company A within the time frames specified in the Agreement and in the Third Amendment. There were no documents in the record that contradict this evidence. Moreover, the testimony of the witness Mr. L was very clear that the 2008-2009 Media Plan was provided pursuant to the Agreement. Nothing in the cross examination of Mr. L contradicted that testimony either. The Media Plan for 2009-2010 was in fact attached as Attachment B of the Third Amendment signed by both parties. Company A cannot reasonably claim it did not receive the Media Plan.

26.3.3 The Tribunal finds that the term of the Sales Agreement originally was 4 years (October 2008 to September 2012) stipulates: "*the specific Inventory to be provided to Company A each shall be set forth in an annual media plan to be finalized by the parties. Company B shall provide Company A with an Annual Plan for the first year on or before 1 November 2008. The Annual Plan for the First Year shall be finalized by the Parties on or before 30 November 2008*". Following the subsequent changes in the arrangement of the business, in the Third Amendment provides the parties agree that "*Company B and Company A agree to amend the Agreement by deleting the annual media plan clause of the Agreement*" and attached the Media Plan directly to the Third Amendment.

26.3.4 The Tribunal accepts the evidence of Company B's witness Mr. L who stated that Company B submitted "Company B 2008-09 Season TV Media Plan", on which

Company A did not make any comment. The Tribunal also finds that the Third Amendment submitted by Company A on 6 May 2010 was attached with the J Media Plan for the time period between 28 October 2009 and 30 June 2010 in "Attachment B, Inventory to be delivered in the Second Year".

26.3.5 Based on the above evidence, the Tribunal concludes that Company A's allegation that Company B failed in providing the Annual Media Plan to Company A cannot be supported by this Tribunal.

26.4 Did Company B violate the Third Amendment in the "Jam Van" event?

26.4.1 The Claimant asserted that the Respondent failed to offer required notices to the Claimant in regard to the beginning and conclusion date, locations and contents, features and targeted people related with such an event while it had the obligation to do so. Without such information, the Claimant said it found it hard to fix the name list of various clients and offer it to Company B.

26.4.2 Company B responded that Company A failed to provide to notify Company B of the brand for the sign board to be used at "B Jam Van" event in 2010 and also relied on the Third Amendment, regarding the "Jam Van", which states that: "*Company A should notify Company B of the board to be placed on the sign board as soon as possible to facilitate sign board production. Company B shall not provide any make good media for event stops missed as a result of late notification by Company A*". The Respondent said, the Claimant never notified or otherwise contacted Company B regarding the "Jam Van" until the raising of this issue in this Arbitration.

26.4.3 The Tribunal notes that the payment to Company B by Company A for selling the Inventory in the first year was reduced to USD 3.5 million (equal to RMB 24 million, and the original figure was USD 10 million) as stated in the Third Amendment to the Sales Agreement. Based on Company A information, the difference between the payment to Company B and the actual advertising revenue of Company A in the first year was RMB 19 million. To address this difference, both parties reached an agreement and recorded that in the Third Amendment by which Company B offered three ways of media resources as mentioned before in para. 42.2.10 for Company A to sell and one of which was the signage at the "B Jam Van" in 2010 which is equal to a value of USD 275,000. The Third Amendment states: "*In addition, Company B will make available for either Company A or a*

single customer of Company A one (1) sign board to be marked with Company A's brand or the brand of the single customer of Company A to be located at all event stops of the Company B-controlled touring property known as 'B Jam Van' within the mainland China during the calendar year of 2010."

26.4.4 The Tribunal finds that Section 3(a) of the Third Amendment does not stipulate clearly who should start to perform first in terms of the notifications, that is, should Company B notify Company A first "*in regard to the beginning and conclusion date, locations and contents, features and targeted people related with such an event?*", or should Company A notify Company B of the board to be placed? Although the same section also states that "*Company A should notify Company B first of the board to be placed on the sign board as soon as possible to facilitate sign board production. Company B shall not provide any make good media for event stops missed as a result of late notification by Company A*", the problem of first performance on this item is still not solved.

26.4.5 The Tribunal, based on the normal business practice, since there was no definitive procedural arrangement agreed between the parties on who should first notify the other party on this item, believes that Company B should take the first step to notify Company A of the beginning and conclusion dates, locations, contents and features of the "Jam Van" event, so that Company A could be in a position to sell the sign board to its customers, and then, if it was successful, to feedback or notify Company B about the possible brand to be placed on the sign board. This should be the only sufficient way for Company A to sell and for Company B to facilitate the sign board production. Without Company B's primary information about the sign board and the "Jam Van" event, it would be hard to imagine how Company A could sell the sign board. The Tribunal believes that without Company B's initiative communication, Company A would not know when and where such an event would take place or even whether there would be such an event. To understand best, the provision cited in para. 42.3.4 can demonstrate only that Company A's notification was the feedback communications after the sign board was being sold. Article 6 of the *PRC Contract Law* provides that "*Good Faith: the parties shall abide by the principle of good faith in exercising their rights and performing their obligations*." The Tribunal observes that Company B should abide by this principle in its performance of this obligation. Based on the above

analysis and reasoning, the Tribunal believes that Company B should undertake the main liability on this failed business by 70% of the total business amount.

26.4.6 Of course, the Tribunal also believes that Company A as a culture development and advertising company, pursuant to the Contract Terms, should also contact Company B timely and clarify its queries about the event with Company B. For a successful commercial transaction, one of the key elements is to have a timely communication and co-operation between the parties. Therefore, the Tribunal believes that Company A should also be responsible for such failed business by 30%.

26.4.7 Based on the above facts and reasons, the Tribunal concludes that Company B shall take the primary responsibility for its failure to notify Company A on the "Jam Van" event and thus shall pay a damage of USD 192,500 to Company A.

26.5 Whether Company B breached the Contracts by not adding Company C into the 6-company list?

26.5.1 The Claimant asserted that Company B restricted Company A's capacity for market promotion by refusal to add Company C in the 6-company list in Attachment C. As a result, Company B made it impossible for Company A to promote the probable marketing agreement between Company C and Company B so as to receive commissions and caused Company A to lose the opportunities to cooperate with Company C.

26.5.2 The Respondent contended that the Claimant was only authorized to approach the 6 companies in Attachment C and the special commission provided under the Third Amendment was likewise only available to these companies and Attachment C can only be expanded with the Respondent's prior written approval. Moreover, the Respondent never gave its consent to any such modification of adding Company C. The Respondent never even suggested that Company C could be added.

26.5.3 The Tribunal notes that on 29 October 2009, Company A and Company B executed the Third Amendment which amended the terms of the Inventory Agreement. One of the provisions of the Third Amendment was to allow Company A to obtain Commissions through concluding marketing agreements with six specified companies listed in Attachment C. The Amendment states that "*if Company B enters into one or more Marketing Agreement(s) with a Company (or companies) listed in Attachment C (which may be amended upon written agreement executed*

by the parties) before 30 September 2010 provided that the Company remains in compliance with the terms of the Marketing Agreement, then Company A shall be entitled, as its sole consideration, to receiving payments ('Commissions') from Company B up to an aggregate limit of USD 1.5 million equal to the net payments (i.e., net of any PRC business tax, withholding or other deductions) actually collected by Company B from the Company (or companies) on account of the license fees for Company's use of Licensed Marks (Rights Fees) during the initial term of, and pursuant to, such marketing Agreement". The 6 companies listed in Attachment C of the Third Amendment are "China D Airlines, E Watch, F Flooring, G Battery, H Motels, I Kitchen Supplies." Attachment C also explicitly states that "*Company A may not engage in discussions with any company outside of this list without Company B's prior written approval.*"

26.5.4 The Tribunal believes that the terms of the Amendment and Attachment C have answered Company A's complaints already. Firstly, the Tribunal finds that under the Third Amendment, the goal for Company A was to work on the six companies listed on the Attachment. Secondly, if Company A wished to engage in discussions with any company outside of the 6 companies, it should obtain Company B's prior written approval. Thirdly, the 6 companies listed in Attachment C could be amended, but only by a written agreement executed by the parties. In fact, Company A without Company B's prior written approval had engaged in discussion with Company C on the use of Company B's intellectual property and other interest, and in February 2010 a Letter of Authorization of Company C was issued to Company A. After Company A's contacts with Company B, the two Parties did not reach an agreement to amend Attachment C. From the facts above the Tribunal finds that there was no fault on the part of Company B.

26.5.5 Company A also alleged that Attachment C of the Third Amendment violated Article 17 of the AML, which prohibits operator to abuse its dominant market position by restricting its trading counterparts (Company A) to do business exclusively with itself or to do business with companies (i.e., 6 companies in Attachment C) designated by itself without justifiable reasons.

26.5.6 The Tribunal observes that Article 10 of the AML stipulates that the organs designated by the State Council are responsible for the enforcement of the AML. Article 47 states that if the abuse of dominant market position exists, the designated organs shall order operator concerned to cease unlawful act, confiscate

its unlawful gains, and to impose a fine between 1-10 percent of the sales of its previous year. Article 53 of the AML states that if the operator is not satisfied with the state organs decision, it may bring the case for the administrative review proceedings or bring it to an administrative action before the court according to law. The AML does not say that the relevant contract involved would be rendered or become invalid if there is such unlawful act.

26.5.7 The Tribunal believes that pursuant to the apparent meaning of the stipulations of the AML, this Tribunal is not the proper forum to review Company A's allegation on the issue of the abuse of dominant market position under the AML. As to Company A's allegation of invalidity of Attachment C based on the AML, Company A has not established which article or provision of the AML would render the contract or the Attachment to be invalid. The Tribunal therefore holds that Attachment C is part of the valid contract and both parties should abide by it.

26.5.8 The Tribunal concludes that there was no breach of contract on the part of Company B for not adding Company C to the 6 companies list.

26.6 The Claimant's direct loss of RMB 2.4 million

26.6.1 Company A claimed that the Price of the media resources equals USD 1 million offered by the Respondent in the Third Amendment, was much higher than the market price, and to reduce more losses, the Claimant had to purchase Inventories from other advertisement companies for fulfillment of the contracts with its clients. This caused the Claimant a direct loss of RMB 2.4 million.

26.6.2 Company B claimed that the claims are irrelevant both because the Claimant understood the value of the Inventory at the time of contract and of the Third Amendment and in any event it was provided to them at no cost.

26.6.3 The Tribunal notes that the Third Amendment states that "*Company B and Company A agree that during the Second Year, Company B or its affiliate will make available for Company A's customers the Inventory…*" and Attachment B lists all the details of the media plan. The total value of the Inventory is USD 1 million which is provided to Company A with no cost. Company A did claim that it suffered a direct loss of RMB 2.4 million because of the high price involved in its Application for Arbitration dated 4 May 2010. However, in its Reply and Defense to Counterclaim dated December 2011, in its Post-Hearing Brief dated April 2012, Company A no longer mentioned this Claim. The Tribunal specifically asked:

"*the Tribunal requests the Claimant to confirm whether there is any change to its claims as stated in the Application for Arbitration dated May 2010*". Company A's Replies to this question dated August 2012 did not mention this claim.

26.6.4 Based on the above, the Tribunal concludes that this claim of Company A no longer exists and the Tribunal needs not to make a ruling on it.

26.7 Did Company A have the right to terminate the Sales Agreement and all the Amendments concluded between the two parties?

26.7.1 Company A in its Application for Arbitration and Post-Hearing Brief requested the arbitral tribunal to rescind the Sales Agreements and all the Amendments. In its Replies to the Tribunal's Questions submitted on 20 August 2012, it has been requesting to "terminate" rather than "rescind" the Agreement and all Amendments based on Article 94(4) of the *PRC Contract Law*.

26.7.2 Company B in its Post-Hearing statement responded that "*Company A has not established any of its grounds for rescission. Neither Company A nor Company B has ever made a claim of force majeure. Company A has never alleged that Company B 'expressly stated' or indicated that it would not perform its obligations under the contract. Company B did not delay or fail to perform any of its 'main obligations'under the contract. The alleged breaches are: (i) failing to provide confirmation letters; (ii) failing to provide the Annual Media Plans; (iii) failing to allow Company A to be the exclusive reseller of Inventory; (iv) not scheduling the slots that Company A's clients wanted; (v) failing to inform the start of the 'Jam Van'; and (vi) failing to add Company C to Attachment C. Even if Company A could establish these breaches, which it cannot, none of these could be held to be 'main obligations'. The main obligation under the agreement was clearly to provide Inventory. Company B did exactly that. For example, Company A sold approximately USD 1 million of slots that it received in the Third Amendment (showing Company A's resale of over RMB 5.3 million worth of B Inventory to O Garments Co., Ltd.). Similarly, even if Company B did breach the Contract, Company A has produced no evidence that it made a demand of performance or that any breach had been material. It did not make such a demand. Company A has likewise not shown that it was impossible to achieve the purpose of the contract. It was clearly not impossible to achieve the purpose of the contract.*"

26.7.3 The Tribunal takes note of the fact that Company A clarified its claim that it requested to terminate the Agreement according to the provisions of Article 94.4 of the *PRC Contract Law* which states that "*the other party delayed performance or otherwise breached the contract, thereby frustrating the purpose of the contract*".

26.7.4 However, the Tribunal has already analyzed and concluded in paras. 42.1 - 42.6, Claims of the Claimant, that Company A's allegations of the breach of contract by Company B are untenable, save for the claim on "Jam Van" event.

26.7.5 Therefore, the Tribunal believes that the request of Company A to terminate the Agreement and all the Amendments from 4 May 2010 was its subjective desire and based on one-party's decision with no legal grounds and therefore cannot be supported by this Tribunal.

26.7.6 However, the Third Amendment stipulates that "*Company B and Company A agree to amend the Agreement by deleting the original contents of Paragraph 2(a) (term of the Agreement to be valid till 30 September 2012) and (b) (before 1 August 2010, the Agreement could be terminated by written notice) and replaced with the following language", and the following paragraph stipulates that "unless earlier terminated pursuant to the terms of this Agreement, the term of this Agreement shall commence on the Effective Date and expire on 30 September 2010*". Therefore, the Tribunal concludes that the Sales Agreement and the three Amendments expired on 30 September 2010 based on the parties' agreement.

26.8 Whether the Tribunal should award RMB 16.5 million and RMB 8.3 million to Company A because of Company B' s breach of contract?

26.8.1 In Company A's original Application for Arbitration, it requested the Tribunal to award, *inter alia*, Company B: "*2. to restitute to the Claimant the amount of RMB 13.7 million; 3. to pay the Claimant the amount of RMB 2,364,000; 4. to pay the Claimant RMB 8.1 million as the loss of profits suffered*". In August 2012, Company A in its Replies to the Tribunal's Questions changed its claims and finally requested the Tribunal to award Company A, *inter alia*, "*(2) a return of RMB 16.5 million from the Respondent"* and *"(3) damages of RMB 8.3 million payable by the Respondent for accrued interests lost*". The final clarification of damages Company A claimed should be understood result of Company B's breach of contract. This is because at the last moment Company A requested to terminate the Agreement based on Article 94.4 of the *PRC Contract Law*.

26.8.2 Company B responded that Company A failed to state a claim upon which relief may be granted and failed to state any legal basis in its Application for Arbitration to support its claims against Company B. It contended that Company A is not entitled to any of its claimed damages because the Inventory Sales Agreement states that "make good media" is Company A's "sole remedy". Company B also contended that the Third Amendment represented a settlement and release of any previous claims between Company A and Company B stemming from the Agreement and the subsequent contract prevails over the previous contract.

26.8.3 The Tribunal notes that the losses Company A requested of RMB 16.5 million is calculated based on the following Company A's method: "*the payments made by Claimant to Respondent – the value of inventory used by the Claimant – the actual payment recovered by Claimant from the third Amendment*", namely, RMB (24,000,000 – 4,700,000 – 2,900,000 =) 16,500,000. RMB 8.3 million is the accrued interests calculated by Company A.

26.8.4 The master agreement is named "Inventory Sales Agreement" and an article therein stipulates that "*Subject to, and in accordance with, the terms of this Agreement, each Year, Company A shall purchase from Company B (or its designee), and Company B (or its designee) shall provide to Company A, the right to the benefit of and the trafficking of advertisements or commercials within the mutually agreed inventory in the following amounts…)*" and another article states that "*Company A shall resell the inventory … (followed by a chart showing the yearly fee to be paid by Company A to Company B)*". The Agreement also contains clauses on the term of the Agreement, financial terms, representations and warranties, indemnification, non-competition, etc. Based on the plain and apparent meaning of the wordings and terms of the Agreement, the Tribunal finds that this is a sale contract. Company B is the seller of the Inventory, and Company A is the buyer of the Inventory. The relationship of the two parties is not a consignment relationship as Company B pointed out in its Post-Hearing Statement.

26.8.5 According to the Sales Agreement, Company A should pay the Inventory fee of USD 10 million for the first year, and the corresponding consideration offered by Company B is 13,507 slots. After the Agreement was signed, Company A paid RMB 13.7 million. Then the parties concluded the First Amendment in January 2009 and the price to be paid by Company A for the first year was reduced to USD 6.6 million. In February 2009, the parties reached the Second Amendment and

after that, Company A paid RMB 10.3 million. The total payment by Company A to Company B is in the sum of RMB 24 million which was equal to USD 3.5 million based on the then exchange rate. In October 2009, the two parties concluded the Third Amendment, which fixed the total amount of the price to be paid by Company A for the first year to USD 3.5 million. In the meantime, Company B also offered some other "make-good media" items.

26.8.6 All the above development in this transaction between the two parties show that revisions of some of the terms of the Sales Agreement were made based on the market situation and the parties' agreement. The revisions did not change the nature of the Sales Agreement. Therefore, it is not correct to say that Company A's payment is a prepayment. In fact, it was the payment for Company B's Inventory. Moreover, there are no legal grounds for Company A to request the return of the balance of the payment it made.

26.8.7 An article of the Sales Agreement Company B relied on states: "*if any specific inventory or other benefits to be provided to Company A under this Agreement and is not made available to Company A for any reason other than AC's breach, Company B shall not be in breach of this Agreement, but instead as Company A's sole remedy, Company B will use commercially reasonable efforts to make available to Company As 'make good media' or benefit of equivalent value. In the event Company B, after using commercially reasonable efforts, is unable to secure sufficient 'make good media' or other benefits of equivalent value, Company B shall have the unilateral right to either (i) adjust the Yearly Fee to reflect the undelivered Inventory or (ii) terminate this Agreement*." This Article remained unchanged through the three Amendments.

26.8.8 Article 112 of the *PRC Contract Law* stipulates: "*Where a party failed to perform or rendered non-conforming performance, if notwithstanding its subsequent performance or cure of non-conforming performance, the other party has sustained other loss, the breaching party shall pay damages."* The phrase of "shall pay damages" in this provision clearly shows that to pay damages is a mandatory obligation of the breaching party. So an article of the Agreement is not a balanced provision, but one sided. Company A still has the right to rely on the Chinese law to claim damages if Company B breached the Agreement and the Amendments and if the claims are supported by the Tribunal.

26.8.9 As to the argument of Company B that the Third Amendment represented a settlement and release of any previous claims between Company A and Company B stemming from the Agreement and the subsequent contract prevails over the previous contract, the Tribunal believes that any settlement and release of the previous claims between the two parties should be expressly made in the Third Amendment, but there is no such expression. So the Tribunal does not believe that the Third Amendment is a settlement and release of any previous claims between Company A and Company B. Regarding the theory that the subsequent contract prevails over the previous contract, the Tribunal believes that generally the theory is acceptable, but it must be specific, as to whether it prevails over the whole previous contract or only part of it, and if partially, which part? In the present case, the Third Amendment states that "*except to the extent modified herein, the terms and conditions of the Agreement shall remain in full force and effect*". So the general argument of Company B on these points cannot be accepted by this Tribunal. The Tribunal believes that the disputes between the two parties should be the issues relating to the Third Amendment and issues relating to the terms of the Sales Agreement which are not amended.

26.8.10 However, the Tribunal has already analyzed the issues on breaches of contract alleged by Company A and concluded that breaches except for the "Jam Van" event are mainly supported by the Tribunal, and all other allegations of breaches of contract by Company A are not supported by this Tribunal. Therefore, the return of RMB 16.5 million and the damages of accrued interests of RMB 8.3 million requested by Company A must be rejected by this Tribunal.

C. Counterclaims by Company B

27.1 Did Company A intentionally and unjustifiably interfered with the business relationship between the Respondent and Company C, and whether USD 500,000 should be supported?

27.1.1 Company B claimed that Company A chose to act as the agent of Company C and at the same time hold itself out as the Respondent's agent. The special commission provided for under the Third Amendment, was only limited to the 6 companies that were affiliates of the Claimant and the special commission would not be available in relation to other companies. Nevertheless, Company A, acted as New Oriental's agent was for demanding "the special commission" to be paid by Company B.

The agency relationship between Company B and Company A only related to "Marketing Agreement" between Company B and one of the six companies in Attachment C and Company A could hold itself out as the Respondent's agent in doing so. The Claimant breached the Agreement by approaching Company C to facilitate a "Marketing Agreement" as the Respondent's agent. Company A was not authorized to do so. Company B was already in advanced negotiations with Company C regarding a marketing partnership. The Claimant approached Company C around January 2010 and engaged in negotiations to an advanced stage. The manner in which Company A approached Company C was unjustified and a breach of the Third Amendment. Therefore, Company B counterclaimed USD 500,000 thereof.

27.1.2 Company A claimed that it never intentionally or unjustifiably interfered with the business relationship between Company B and Company C. Company A actually intended to promote the business relationship between Company B and Company C. As an intermediary rather than a competitor, Company A was not in any position to intentionally or unjustifiably interfere with the business relationship between the Respondent and Company C. Company C decided to authorize Company A as agent to promote the marketing agreement between Company C and Company B, and Company C was entitled to choose its agent. For whatever reasons, Company B decided to give up the chance to enter into marketing agreement with Company C and should bear the result and could not blame others. In Company A's Defense to Counterclaim, it agreed that Company B's counterclaim neither fell within the scope of the Arbitration Clause, nor accorded with the provisions of the *PRC Contract Law* relating to the interests receivable.

27.1.3 The Tribunal finds that the Arbitration Clause states that "*all disputes arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration conducted at the China International Economic and Trade Arbitration Commission ("CIETAC") in Beijing in accordance with its rules*". The Tribunal considers that Company B and Company A concluded the Sales Agreement and later they amended the Agreement three times. Attachment C of the Third Amendment provided 6 companies to Company A to facilitate marketing agreement between Company B and anyone of the 6 companies and to obtain special commissions. The issue involved here is whether Company A

was restricted to approach only these 6 companies or it may also approach other companies which were outside the 6 companies for the special commission. Company B alleged that Company A "*intentionally or unjustifiably interfered*" the business relationship between Company B and Company C, which was a company outside the 6 companies. It also claimed that Company A was in breach of the Third Amendment. Moreover, since Company A in its claims alleged that Company B breached the Contracts by not adding Company C on the 6-company list and requested the Tribunal to adjudicate its claims, it evidences that Company A submits that the Tribunal has jurisdiction over the issue of Company C. However, when faced with Company B's counterclaims, Company A whilst maintaining its position on the issue of Company C in its claims, contended that the Counterclaim in relation to the Company C issue does not fall within the scope of the Arbitration Clause and the Tribunal has no jurisdiction over it. This contradictory position of the same party (i.e., Company A) on the same issue in the same case cannot be supported by this Tribunal.

27.1.4 Therefore, the Tribunal concludes that the issue of whether Company A "*intentionally or unjustifiably interfered*" with the business relationship between Company B and Company C and Company B's claim for USD 500,000 are within the scope of this Tribunal's jurisdiction because they are the disputes "*arising out of, relating to, or in connection with*" the Third Amendment closely.

27.1.5 The Tribunal notes that Attachment C of the Third Agreement states: "*Company B and Company A agree that Company A may only approach these companies as listed below… Company A may not engage in discussions with any company outside of this list without Company B's prior written approval*." Based on this provision and because the purpose of Company A's contacts with Company C was for the special commission from Company B, it is clear that without Company B's prior written approval, any act of Company A in discussion of business relating the using of Company B's intellectual property right and other interest with Company C, a company outside the 6-company list, is a breach of contract by Company A.

27.1.6 However, Company C is an independent legal person under Chinese law, and its business relationship with Company B is different from the relationship between Company C and Company A. What kind of the business relationship, or whether there would be a contract concluded between Company B and Company C should be decided by these two companies themselves. If Company B accused that Company

A "*intentionally or unjustifiably interfered*" with its business relationship with Company C, it must prove when and how Company A caused such interference and what damages was suffered. Company B failed to discharge this burden of proof. Without such evidence this Tribunal cannot support such claim.

As to the fact that in February 2010, Company C appointed Company A as the master planner and executer of the P project through a power of attorney, the Tribunal considers that it was simply a document issued unilaterally by Company C, which cannot demonstrate there was any intentionally or unjustifiably interference by Company A of the business relationship between Company C and Company B. Hence, Company B's allegation that Company A "*intentionally or unjustifiably interfered*" with the business relationship between Company B and Company C must be denied by this Tribunal.

27.1.7 As to the counterclaim of USD 500,000, Company B said in its Rejoinder to the Reply to the Defense and Counterclaim that: "*Because of Company A's interference Company B lost USD 500,000 in profits. Article 113 of the PRC Contract Law allows for the recovery of these lost profits when they 'have been anticipated or should be anticipated by the breaching party in the making of the contract.*" The Tribunal wishes to cite the whole article as follows: Article 113 of the *PRC Contract Law* stipulates that "*Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract and causes losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of the contract, including the interests receivable after the performance of the contract, provided not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to foreseen when the party in breach concludes the contract.*" It is clear that this Article regulates the compensation for losses, including the interest receivable when there is a breach of contract. Under this Article the relationship between the claiming party and the breaching parties must be the parties to the same contract. Now Company B is trying to claim damages from Company A which was a third person to the relationship between Company B and Company C. Even if Company B succeeded and there was a contract, that contract would be concluded between Company B and Company C, Company A would be still the third person. If there was a breach of contract on the part of Company C, Company B could only claim damages from Company C, not Company A, based on Article 113. Therefore, the

Tribunal observes that Company B misapplied Article 113 of the *PRC Contract Law* to this point and there is no legal base for Company B to claim such loss even there was. Furthermore, the Tribunal believes that such loss is moot because there was no contract concluded between Company B and Company C.

27.1.8 Based on the above, the Tribunal concludes that Company B did not prove there was any intentionally or unjustifiable interference by Company A of the business relationship between Company C and Company B and the damages counter-claimed by Company B is hereby rejected.

27.2 Did Company A improperly use B marks on its business cards and if RMB 2 million for damages should be supported?

27.2.1 Company B claimed that Company A's use of Company B's intellectual property on Company A's business cards including B's trademarks was without permission. The Third Amendment states in relevant part that: "*Company A shall not use, or permit any third party to use, any intellectual property related to, or associated with Company B or any B team, including, without limitation any logos, marks uniform design, or any photos or footage containing any of the foregoing … without prior written approval of Company B*". Company A failed to comply with the Agreement and the Third Amendment, with respect to their obligation not to use Company B's intellectual property without prior approval. So, Company A's action was a breach of the contract according to the *PRC Contract Law* (Article 107). In its Posting-Hearing Statement in Support of the Counterclaims, Company B requests that the Tribunal award Company B RMB 500,000 in statutory damages for each of the four sets of business cards, for a total of RMB 2 million for Company A's unauthorized use of Company B's trademarks and order Company A to cease and forever desist from unauthorized use of Company B's marks.

27.2.2 Regarding the statutory damages by Company B, Company A submitted that: (1) its use of Company B's marks is legitimate for the performance of the Sales Agreement; (2) the use of B marks did not violate the exclusive rights of registered trademark and it incurred no liability; and (3) the requested RMB 2 million in damages or more do not come in line with the relevant rules in the *PRC Trademark Law*. Because Article 56 of the *PRC Trademark Law* provides that where the profit earned by the infringer or losses suffered by the infringee through the infringement mentioned in the preceding paragraph cannot be determined, the

people's court shall grant a compensation not exceeding RMB 500,000 according to the circumstances.

27.2.3 The Tribunal notes that Article 7(d) of the Sales Agreement states that "*neither party shall have any right to use any marks, logos, footage or other intellectual property of the other party*". The Third Amendment states that: "*notwithstanding anything to the contrary in this Agreement, Company A shall not use, or permit any third party to use, any intellectual property related to, or associated with, Company B or any B team, including, without limitation, any logos, marks, uniform designs, or any photos or footage containing any of the foregoing (collectively, 'B property') during or after the Term without the prior written approval of Company B*".

27.2.4 Based on Company A's defense on this point, it is a clear fact that Company A used Company B's intellectual property including the trademarks through Company A's business cards and based on the above-mentioned provisions in these contracts, it is also a clear breach of contract by Company A since prior to its use of Company B's intellectual property, Company A had not obtained Company B's prior written approval. Company A has to be liable for such a breach.

27.2.5 Article 56 of the *PRC Trademark Law* states: "*The amount of damages for trademark infringement shall be the profit that the infringer has earned as a result of the infringement during the period of the infringement or the losses that the infringed has suffered as a result of the infringement during the period of the infringement, including any reasonable expenses the infringer has incurred in its effort to stop the infringement. Where the profits earned by the infringer or losses suffered by the infringed referred to in the preceding paragraph cannot be determined, the People's Court shall award damages up to RMB 500,000, depending on the facts of the case…*".

27.2.6 Company B did not try to apply the first paragraph of Article 56 but asked the Tribunal to apply the second paragraph and requested Company A to pay a compensation of RMB 500,000 for each name card containing Company B's intellectual property, four of which made the total of RMB 2 million. In the application of the second paragraph, one point is how to interpret "*the amount of damages for trademark infringement*" as used in the first paragraph. The first paragraph regulates the infringer has to compensate the profit it has earned or the losses the infringed has suffered including any reasonable expenses. The second paragraph states that if either of the two kinds of the amounts cannot be determined, the people's court

shall award damages up to RMB 500,000, depending on the facts of the case. The Tribunal considers that the damages to be paid to the infringed under the Article should be within one case and the amount of the damages is up to RMB 500,000 (in Chinese, 五十万元以下的赔偿). The paragraph does not require to calculate the damages suffered by the infringed by unit and then to get a total amount of damages. If that were the case, the amount of damages may easily exceed the standard of "up to RMB 500,000", like Company B's calculation in the present case and paragraph two of Article 56 would become redundant or inutile.

27.2.7 Based on the above reasons, the Tribunal concludes that for the reasons of infringement of Company B's intellectual property and the breach of the Sales Agreement and the third Amendment by Company A, Company A is liable to pay Company B the damages of RMB 500,000.

D. Attorney and Arbitration fees

28.1 Company A and Company B both request that the Tribunal awards their attorney fees to be paid by the counterparty. In this case both parties have been successful in one of their claims but failed in all the others. The Tribunal finds that it is fair and reasonable that each party should bear its own costs. Further, neither party has provided the specific amount of the attorney's fee, nor provided the relevant evidence to support their claims. So both parties' claims on this issue cannot be supported by the Tribunal and the Tribunal hereby decides that each party shall bear their own attorney fees.

28.2 The arbitration fee was fully paid by the Claimant in advance. The Tribunal based on the claims supported and Article 46 of the *CIETAC Arbitration Rule 2005*, decides that 50% of the arbitration fee shall be borne by each party equally to this case. Therefore, Company B shall pay Company A 50% of the arbitration fee.

28.3 The arbitration counterclaim fee was paid by Company B. The Tribunal based on the counterclaims supported and Article 46 of the *CIETAC Arbitration Rule 2005*, decides that 50% of the arbitration fee shall be borne by each party equally to this case. So Company A shall pay Company B 50% of the arbitration counterclaim fee.

V. THE AWARD

The Arbitral Tribunal hereby decides and awards as follows:

1. The claim of the Claimant to terminate the Sales Agreement dated 17 October 2008, the Supplementary Agreement dated 19 January 2009, the Amendment Agreement dated 9 February 2009 and the Amendment Agreement dated 29 October 2009 are hereby rejected but all the Agreements expired on 30 September 2010.
2. The Claimant's all other claims are hereby dismissed.
3. The Respondent's all other counterclaims are hereby dismissed.
4. Each party shall bear 50 percent of the arbitration claim and counterclaim fees.

This arbitration award shall become effective on and from the date of its issuance and it is final and binding upon both parties of this arbitration.

This award is made in English at the China International Economic and Trade Arbitration Commission (CIETAC) on 22 November 2012 in Beijing.

(Apart from the signatures to the Award, there is no other text on this page.)

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Germany A Company

Claimant

v.

Chinese B Company

Respondent

Matter for arbitration: Disputes over steel bars sales contract

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. INTRODUCTION

A. The Parties

1. Claimant

1. Claimant is a Germany Company A.

2. Respondent

2. Respondent is a Chinese Company B.

3. Claimant and Respondent are collectively referred to as the "Parties".

B. The Arbitral Tribunal

4. The arbitral tribunal (the "Tribunal") is composed of:

(1) X, as the co-arbitrator appointed by Claimant;

(2) Y, as the co-arbitrator appointed by the Chairman of the China International Economic and Trade Arbitration Commission ("CIETAC"), as Respondent failed to appoint any arbitrator; and

(3) Z, as the presiding arbitrator appointed by the Chairman of CIETAC, as the Parties failed to jointly appoint the presiding arbitrator.

C. The Arbitration Clause and the Governing Law

5. The dispute arose under Purchase Order No. 1 and Purchase Order No. 2 entered into by Claimant and Respondent in January 2011 and March 2011, respectively. Purchase Orders No. 1 and No. 2 are collectively referred to as the "Contracts", each of which contains an identical arbitration clause (the "Arbitration Clause") which reads as follows:

> "*Any disputes arising out of or in connection with this contract, including disputes on its conclusion, binding effect, amendment and termination, shall be submitted to the exclusion of the ordinary courts to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at*

the time of applying for arbitration. The arbitral tribunal shall consist of three arbitrators. The arbitrators shall neither have the claimant's nor the defendant's nationality. All costs and expenses of the arbitration proceedings, including administrative expenses and fees of the arbitrators, costs for experts, lawyer's fees etc., shall be borne by the losing party. Place of arbitration shall be U city, P.R. of China. The law to be applied is the law of the People's Republic of China. Arbitration proceedings shall be held in English language. The arbitral award is final and binding upon both parties."

6. In accordance with the Arbitration Clause contained in the Contracts, the Parties have submitted the disputes between them to arbitration, and the Tribunal has been duly formed to hear and arbitrate this case. The arbitration proceedings are conducted in the English language and in accordance with the *CIETAC Arbitration Rules* effective as from 1 May 2012 (the "CIETAC Rules"). The seat of arbitration is U city, China, and the governing law is the law of the PRC.

D. Summary of the Procedure

7. On October 2012, Claimant initiated these arbitration proceedings by filing its *Application for Arbitration*, together with its attachments, with CIETAC.

8. On May 2013, the Secretariat sent a *Notice on the Formation of the Arbitral Tribunal* to the Parties, notifying them that Claimant nominated X as the arbitrator, and that since Respondent did not nominate arbitrator within the designated time limit and the Parties failed to jointly nominate the presiding arbitrator, the Chairman of CIETAC appointed Y as the arbitrator and Z as the presiding arbitrator of this case. In the same notice, the Secretariat announced that the Tribunal was duly constituted, and transmitted the case files to the Tribunal.

9. In August 2013, Respondent submitted its *Statement of Reply to Claimant's Statement Regarding Counterclaim of Respondent*, together with its attachments.

10. In December 2013, the Tribunal convened the oral hearings in U city, China, and representatives from both Parties attended the hearings. During the hearing, the Claimant and the Respondent presented their cases, examined the evidence and answered questions from the tribunal.

II. CONTRACTUAL BACKGROUND

11. As noted above, the Parties signed Contract No. 1 and Contract No. 2 in January 2011 and March 2011, respectively.

12. It was agreed under Contract No. 1 that, *inter alia*, (i) Claimant would purchase from Respondent 4,830 mt prime deformed reinforcing steel bars for a total price over USD 3 million; (ii) the goods should conform to certain specifications[1] (the "Specifications") including the standards of the CSA G30.18-M92[2] ; (iii) the latest shipment date should be February 2011, and partial shipment would not be allowed; (iv) any notice of a quality defect would be deemed timely if it reached the Supplier, i.e., the Respondent, within 120 days after bill of lading date by letter, telefax or by email; and (v) the Supplier shall respond to any notice of defect at the latest within 30 days after receipt, failing which it shall be deemed to have acknowledged and accepted the claim by the Supplier.

13. It was agreed under Contract No. 2 that, *inter alia*, (i) Claimant would purchase from Respondent 1,660 mt prime deformed reinforcing steel bars for a total price over USD 1 million; (ii) the goods therein should conform to the Specifications as outlined in the Contract No. 1; (iii) the latest shipment date should be May 2011 and partial shipment would not be allowed; and (iv) the provisions regarding any notice of quality defect were the same as those found in Contract No. 1.

14. The goods under Contract No. 1 and Contract No. 2 are collectively referred to as the "Goods".

1 "4,830 mt prime deformed reinforcing steel bars acc. to CSA G30.18-M92 400W, boron added (min.0.0008% and max.0.002%), newly produced, in straight bars, length per piece as indicated in the specifications, tolerance on length -0/+100mm, no short lengths are allowed, no flame cut ends are allowed. Mill test certificates to show physical and chemical properties. The heat numbers on the marking tags must exactly meet those shown on the relative mill test certificate(s)…"

2 Industrial standard issued by Canadian Standards Association in 1992, replaced by the CSA Standard G30.18-09 in July 2009. Claimant submits that the CAS Standard G30. 18-09 should be the version to be applied to the Goods since the Contracts were concluded in 2011. Claimant further submits that the two versions contain same or identical requirements with respect to the major aspects such as the deformed bar designation numbers and associated requirements, chemical composition requirements, tensile test requirements, best test requirements, etc.

15. The shipment for Contract No. 1 was made in March 2011 (date of bill of lading: March 2011), and the shipment for Contract No. 2 was made in April 2011 (date of bill of lading: 22 April 2011).

16. In May 2011, Mr. C of Claimant sent several emails to Mr. D of Respondent to notify him about alleged defects found in the goods shipped under Contract No. 1. Claimant further entrusted Inspection authority E to conduct quality tests on the Goods as provided under Contract No. 1 and Contract No. 2.

17. Claimant officially informed Respondent by letter of the defects in the Goods and requested Respondent to replace them in their entirety in May 2011 (for Contract No. 1) and in June 2011 (for Contract No. 2).

18. Inspection Authority E issued four test reports on the steel bars provided under Contract No. 1 ("Test Reports 1") dated May 2011, June 2011, June 2011 and June 2011. It issued a test report on the steel bars provided under Contract No. 2 ("Test Reports 2") in June 2011. These reports were sent to Respondent by Claimant in June 2011.

19. The Parties communicated via email, telephone and personal meetings from June 2011 in attempts to resolve their differences, but they did not reach any resolution.

III. THE PARTIES' SUBMISSIONS

A. Claimant's Claims and Relief Sought

20. Claimant claims that Respondent has breached the Contracts by failing to perform its obligations thereunder.

21. Specifically, Claimant contends that Respondent has failed to perform under Contract No. 1 because the goods provided under Contract No. 1 failed to meet the Specifications in the following ways:

    (1) The steel bars break brittle when bended after 45 degrees.

    (2) The longitudinal ribs are outside tolerances.

    (3) Broken debars.

    (4) Split debar after bending.

(5) The steel bars failed to meet the mass requirement of the CSA Standard G30.18-09 as indicated by the Test Reports 1.

(6) The steel bars failed to fulfil the minimum yield strength and minimum tensile strength required by the CSA Standard G30.18-09 as indicated by the Test Reports 1.

(7) The steel bars failed to meet requirements on chemical composition as indicated by the test report issued by Authority F dated May 2011.

22. Claimant contends that Respondent failed to perform under Contract No. 2 because the goods provided under Contract No. 2 failed to meet the Specifications in the following ways:

(1) The steel bars failed to meet the mass requirement of the CSA Standard G30.18-09 as indicated by the Test Reports 2.

(2) The steel bars failed to fulfil the minimum yield strength requirement of the CSA Standard G30.18-09 as indicated by the Test Reports 2.

23. Claimant refers to the relevant articles of the *United Nations Convention on Contracts for the International Sale of Goods* ("CISG") and submits that: (i) according to the *CISG*, the seller must deliver conforming goods that are fit for general purpose of such goods as well as the particular purposes expressly or impliedly made known to the seller; (ii) according to the *CISG*, damages for breach of contract shall include the other party's foreseeable loss of profit; and (iii) according to the *CISG*, the breaching party is also liable for interest accrued on the damages.

24. Claimant further claims that the Goods delivered by Respondent did not comply with the requirements expressly agreed between the Parties, and that Respondent acknowledged such breaches on various occasions. Thus, according to Claimant, Respondent has breached the *CISG*, and Claimant is consequently entitled to exercise its rights under the *CISG* and to claim damages under the *CISG*.

25. Claimant calculates its damages to include the following:

(1) Losses caused by the defective Goods provided under Contract No. 1, including:

(a) Claimant's loss of profit in the amount over **USD 15,000** for the resale of the Goods to Company C;

(b) Company C's claims filed against Claimant for loss of profit in the amount of over **USD 600,000** due to Company C's failure to sell the defective Goods to the end-users;

(c) Company C's claims filed against Claimant for losses in the amount over **USD 1,500,000** due to Company C's reduction of the retail price for part of the defective Goods. (Amount already billed by Company C: about **USD 1,100,000**)

(2) Losses caused by the defective Goods provided under Contract No. 2, including:

(a) Claimant's loss of profit in the amount over **USD 40,000** for the resale of the Goods to Company C;

(b) Company C's claims filed against Claimant for loss of profit in the amount over **USD 20,000** due to Company C's failure to sell the defective Goods to the end-users;

(c) Company C's claims filed against Claimant for losses in the amount over **USD 600,000** due to Company C's reduction of the retail price for the defective Goods; and

(d) Claimant's loss of foreign exchange hedging in the amount over **EUR 80,000** caused by Company C's refusal to accept the defective Goods.

(3) Additional losses claimed by Company C against Claimant for the defective Goods in the amount over **USD 400,000** and **EUR 130,000**, which were incurred as inspection costs, material handling costs, legal fees, courier fees, reloading and transportation fees, offloading and moving fees and storage fees.

26. In this arbitration, Claimant has sought the following relief:

(1) Respondent shall compensate Claimant for its losses caused by failure to perform its contractual obligations towards the Claimant in the amount over **USD 3,400,000** plus [simple] interest [at the rate] of 4.83% [per annum] from June 2011 until December 2011 and [simple interest at the rate of] 5.07% [per annum from January 2012 until December 2012]; and in the amount over **EUR 100,000** plus [simple] interest [at the rate] of 5.969% [per annum] from June 2011 until

December 2011, and [simple interest at the rate of] 5.452% [per annum from January 2012 until December 2012][3];

(2) Respondent shall compensate Claimant for its lawyers' fee and all costs and expenses in relation to the arbitration proceedings, including but not limited to all travel and accommodation costs;

(3) Respondent shall compensate Claimant for its expenses related to the arbitrator appointed by Claimant; and

(4) All arbitration fees and expenses shall be borne by Respondent.

B. Respondent's Defense and Counterclaim

1. There is no breach by Respondent

27. Respondent argues that it has not breached the Contracts, and that Respondent has duly performed all its contractual obligations.

2. *CISG* does not apply to the Contracts

28. Respondent contends that the *CISG* does not apply to this case and that only the laws and regulations of the PRC apply because:

(1) According to the Contracts, PRC law is the applicable law governing the Contracts.

(2) The Parties should honour the stipulations of the Contracts.

(3) There is no legal ground to apply the *CISG*, because the *Contract Law of the PRC* (the "*Contract Law*") and the *Product Quality Law of the PRC* (the "Product Quality Law") both contain provisions that govern quality problems arising out of contracts.

(4) The Contracts were drafted solely by Claimant, and Claimant agreed that PRC law would apply exclusively.

29. Consequently, Respondent contends that Claimant's claims based on the *CISG* have no legal basis, as the *CISG* does not apply to the Contracts.

3 Insertions in brackets are made by the Tribunal to clarify Claimant's relief.

3. The Test Reports are inadmissible

30. Respondent argues that the Inspection Authority E test reports relied upon by Claimant are inadmissible because:

(1) The party applying for the tests was Company C, not Claimant itself.

(2) Respondent did not have the opportunity to participate in the testing process, and therefore the relevant test reports are unjustified and cannot be admitted into evidence.

(3) The standard adopted in these tests (CSA Standard G30.18-09) is inconsistent with the standard agreed upon in the Contracts (CSA Standard G30.18-M92).

4. The damages calculated by Claimant are unjustified

31. Respondent disagrees with the damages claimed by Claimant in the following aspects:

(1) Pursuant to the principle of privity of contract, Claimant has no right to claim damages for Company C's losses.

(2) Neither Claimant nor Company C has any legal ground to claim for compensation or losses, because Company C resold the alleged defective Goods instead of returning the Goods to Respondent or requesting substitution by Respondent in accordance with the *Contract Law* and the *Product Quality Law*.

(3) Company C is a subsidiary of Claimant, and therefore there is fraud on Claimant's side.

(4) Exchange hedging loss and other losses claimed by Claimant have no legal basis.

32. Respondent counterclaims for:

(1) Attorney fees in the amount of RMB 200,000;

(2) Arbitration fees in the amount of RMB 80,650; and

(3) Such other costs as it may incur or be liable for.

C. Claimant's Reply to the Defense and Answer to the Counterclaims

1. Applicable law

33. Claimant argues that the *CISG* applies to this case for the following reasons:

    (1) China has adopted and ratified the *CISG*, which has thus become a binding treaty for the PRC.

    (2) Pursuant to Article 142 of the *General Principles of the Civil Law of the PRC* ("*General Principles of the Civil Law*"), as well as a notice by the Supreme People's Court dated 17 April 2000, the rules of international conventions shall prevail over the civil laws of the PRC except for those reservations made by the PRC.

    (3) Both Germany and the PRC are contracting States of the *CISG*, and no reservations made by the PRC to the *CISG* are applicable to this case. Further, the Parties did not agree to exclude the application of the *CISG* in the Contracts.

34. Consequently, Claimant claims that, except where the *CISG* does not contain relevant provisions, the *CISG*, rather than PRC law, applies to the Contracts.

2. Breach of Contracts

35. Claimant claims that Respondent breached the Contracts, as the Inspection Authority E test reports show that the Goods were not in conformity with the Specifications. Further, although certain test reports used CSA G30.18-09 instead of CSA G30.18-M92 as the applicable standard, the major requirements of these two standards are the same or identical in substance.

3. The Test Reports

36. Claimant denies Respondent's argument that Respondent had no opportunity to participate in the testing process. Claimant asserts that Respondent was invited to participate in choosing a test laboratory and in the testing process itself, but that Respondent did not reply to those proposals.

37. Claimant claims that the test reports were issued by reputable and accredited testing laboratories and are fully justified.

38. Claimant argues that Company C has legal grounds to examine the quality of the Goods because it is a customer of Claimant, and that Respondent was fully aware of this fact based on former dealings as well as the stipulations contained in the Contracts providing that Claimant and its customer will examine the Goods.

4. Allegation of fraud/collusion

39. Claimant denies Respondent's allegation that there was any fraud or collusion between Claimant and Company C because they are related entities. Claimant claims that the transactions between Claimant and Company C were conducted on an arm's-length basis.

5. Denial of Respondent's counterclaims

40. Claimant denies Respondent's counterclaims in whole on the ground that Respondent is in breach of the Contracts and should be required to compensate Claimant for its losses.

D. Respondent's Reply to the Answer

41. Respondent claims that there are no factual or legal grounds for any of the claims raised by Claimant. Therefore, Claimant should be required to compensate Respondent for all its costs and expenses incurred in relation to these arbitration proceedings.

E. Claimant's Post Hearing Submission

1. Further legal and hearing expenses

42. Claimant further claims for:

(a) Legal fees of Law Firm G incurred from September 2013 until December 2013 in the amount over **EUR 40,000**. The original invoice has been destroyed, but a confirmation letter by Law Firm G has been submitted as evidence of the invoicing of such fees.

(b) Legal fees of Law Firm H incurred from June 2013 until January 2014 in the amount over **EUR 10,000**.

(c) Additional expenses incurred by Claimant related to the hearing in the amount over **EUR 10,000** and **USD 20,000**.

2. Invitation of Respondents to Canada

43. Claimant further describes the factual situation relating to the invitation of Respondent to travel to Canada to participate in the testing process:

(1) In May 2011, Claimant commenced discussions with Respondent regarding the quality problems of the Goods.

(2) After receipt of the photos and videos provided by Inspection authority E, Claimant requested Respondent in May 2011 to attend the testing in Canada.

(3) Respondent at that time assumed that the problem was not severe and did not feel the urgency to travel to Canada, but only suggested that they might organize a trip with representatives from the mill.

(4) At the beginning of June 2011, Claimant received further test results showing that all the materials had failed to meet the mass requirements. Claimant informed Respondent that its customers would reject the materials due to the mass problem. In June 2011, Claimant requested that Respondent come immediately to Canada together with representatives from the mill.

(5) In a meeting in June 2011, Respondent confirmed that it would send personnel to Canada.

(6) In June 2011, Respondent sent a copy of Mr. D's passport to Claimant and Claimant issued an invitation letter accordingly. However, the visit to Canada never took place.

3. Quantum

Breakdown of Claims and interest

44. Claimant further specifies its damages sought as follows:

(1) Damages of Claimant, which include:

(a) Loss of profit under Contract No. 1 in the amount over **USD 10,000**;

(b) Loss of profit under Contract No. 2 in the amount over **USD 40,000**[4];

(c) Exchange hedging loss in the amount over **EUR 80,000**.

(2) Damages of Company C, which include:

(a) Loss of profit under Contract No. 1 in the amount over **CAD 600,000**;

(b) Loss of profit under Contract No. 2 in the amount over **CAD 20,000**;

(c) Price reduction under Contract No. 1 in the amount over **CAD 1,500,000**;

(d) Price reduction under Contract No. 2 in the amount over **CAD 600,000**;

(e) Additional costs (inspection, storage etc.,) under Contract No. 1 in the amount over **CAD 400,000**;

(f) Additional costs (inspection, storage etc.,) under Contract No. 2 in the amount over **EUR 100,000**.

45. Claimant argues that if the Goods had been shipped back to China, Claimant's damages would have amounted about CAD 4,000,000, even higher than the amount claimed herein. Claimant further argues that its damages for liability to its customer, Company C, are within the foreseeability requirement under the *CISG*.

46. Claimant quotes note 31 to Article 78 of the *Commentary on the UN Convention on the International Sale of Goods* (*CISG*), 3rd Ed, (the "*CISG Commentary*"), and argues that the application of a 5.25% interest rate (3.25% as fixed by the US Federal Reserve plus an extra 2%) to the damages sought in US dollars is justified.

47. Claimant calculates the interest rate applied to the damages sought in Euro in a similar way and applies 3.125% (1.125% average minimum bid-rate in 2011+2%) for 2011, 2.875% (0.875% average minimum bid-rate in 2012 +2%) for 2012 and 2.5% (0.5% average minimum bid-rate in 2013 + 2%) for 2013.

Damages in total

48. Based on the above calculation, the total damages and losses claimed by Claimant are over **USD 3,400,000** and **EUR 200,000**, plus applicable interest.

4 Correction: based on Claimant's Notice of Arbitration, its claimed loss of profit under PO315 ought to be USD 45,294.19, not EUR 45,294.19 as shown on p. 4 of its Post-hearing Statement.

Renewed relief sought by Claimant

49. The Claimant's prayer for relief in this arbitration has been clarified and renewed to be the following:

    (a) Respondent shall compensate Claimant for its losses caused by failure to perform its contractual obligations towards the Claimant in the amount over **USD 3,400,000**, plus [simple] interest [at the rate] of 5.25% [per annum] from June 2011 [until December 2011] and **EUR 200,000** plus [simple] interest [at the rate] of 3.125% [per annum] from June 2011 [until December 2011], [simple interest at the rate of] 2.875% [per annum] from January 2012 until December, 2012 and [simple interest at the rate of] 2.5% [per annum] from January 2013 [until December 2013][5] ;

    (b) Respondent shall compensate Claimant for its expenses related to the arbitrator appointed by Claimant; and

    (c) All arbitration fees and expenses shall be borne by Respondent.

F. Respondent's Post Hearing Submission

50. In addition to the arguments already stated in the Defense, Respondent further submits the following:

51. Claimant did not raise any objection to the mill test reports provided by Respondent, nor did it raise any quality concerns with respect to the samples it tested before loading the Goods.

52. Claimant did not take any measures to mitigate its losses, as required under both the *CISG* and the *Contract Law*. Therefore, any losses caused from reselling the Goods should not be recoverable. If Claimant had sent the Goods back to Respondent, the losses would only be around USD 800,000, or not exceeding USD 1 million, far below the amount now claimed of over USD 3.5 million.

53. The damages claimed by Claimant were not foreseeable because Respondent could not have foreseen that (i) Company C would resell the Goods at a very low price and (ii) Claimant would refuse to return the Goods even on the reasonable terms and prices suggested by Respondent. Further, the transport fees and storage fees would

5 Insertions in brackets are made by the Tribunal to clarify Claimant's relief sought.

be incurred regardless of whether there were quality issues, thus they cannot be recovered.

54. Claimant did not provide any original invoices to prove its claimed damages, including its further legal fees from Law Firm G and Law Firm H and additional expenses. The invoices issued by Law Firm G, U city, China representative office are illegal because representative offices of foreign law firms are not permitted to operate as money-making entities.

55. Respondent reserves the right to report this case to the relevant authorities in China and Canada because:

(1) Company C resold the Goods to its end users in Canada despite claiming the existing quality issues;

(2) The current proceedings have been fraudulently filed by Claimant. Claimant and Company C are affiliated companies, and Company C has sold all of the Goods and received payment, while it is now seeking damages from Respondent in an amount almost equal to the price of the Contracts; and

(3) All the Test Reports are untrue and illegal because (i) the name of the applicant and that of the party on the invoices from the test agencies are inconsistent; and (ii) the test agencies cannot prove the origins of the sample.

G. Claimant's Reply to Respondent's Post Hearing Submission

56. Claimant admits that it sent representatives to Respondent's factory to undertake visual and other mechanical/chemical examination of samples of the Goods, and these examinations did not indicate any irregularities. However, visual and mechanical/chemical examinations could not reveal non-compliance with the "mass test", which was not part of the tests conducted at the factory.

57. The resale at a lower price and non-return of the Goods to Respondent were foreseeable under the *CISG*, which only requires that the party in breach foresaw or ought to have foreseen the damage as a possible consequence at the time of the conclusion of the contract. Respondent could have foreseen that the defective Goods would be sold at a much lower price, that there would be extra costs of shipping and storage costs, and

that the Goods would be resold to minimize the damages instead of being shipped back to Respondent which would cost much more.

58. The invoices issued by Law Firm H are in line with widely accepted commercial practice among international legal services providers and their clients, and thus are true and admissible to prove the incurred legal costs of Claimant.

VI. FINDINGS OF THE ARBITRAL TRIBUNAL

59. Having reviewed and carefully considered all of the written submissions and evidentiary materials submitted by the Parties, and having heard and carefully considered all of the oral arguments made by the Parties during the hearing conducted in December 2013, and upon further internal discussions and deliberations, the Tribunal sets forth below its findings along with relevant analysis of the factual and legal issues involved in this case.

A. Issue One: Is the *CISG* Applicable to the Dispute?

60. Claimant relies on certain articles of the *CISG* in making its claims and seeking relief, but Respondent contends that the *Contract Law* and the *Product Quality Law*, and not the *CISG*, apply to the Parties' dispute. Respondent denies the application of the *CISG* on the ground that PRC laws and regulations apply exclusively to the Contracts pursuant to the stipulations of the Contracts, implying that the *CISG*, as an international treaty, is not part of the domestic law of the PRC, or at least does not have priority in application to the Contracts as compared to the domestic laws and regulations of the PRC.

61. Respondent's arguments are incorrect in the Tribunal's view. The Tribunal agrees with Claimant that the *CISG* has been adopted and ratified by China, and thus has become part of PRC law. Accordingly, the PRC is obliged to enforce the provisions of the *CISG* except for those expressly reserved thereunder. The currently effective reservation expressly made by the PRC under the *CISG* concerning application of the *CISG* does not apply to the instant case. Furthermore, the Tribunal finds that, because the *CISG* has been incorporated into the PRC legal regime, it therefore has binding effect upon contracts entered into between Chinese parties and parties having their place of business in other member states of the *CISG*, such as Germany in this dispute. In addition, the Tribunal finds that, in accordance with Article 142 of the

General Principles of the Civil Law, the application of the *CISG* enjoys priority over the domestic laws and regulations of the PRC. Article 142 provides that "*…where there are different stipulations in the international treaties ratified or entered into by the People's Republic of China and the civil laws of the People's Republic of China, the stipulations of the international treaties shall apply, except for the provisions that have been declared for reservation by the People's Republic of China…*".

62. Having established that the *CISG* has been incorporated into and thus become part of PRC law and considering also that the Parties did not expressly exclude the application of the *CISG* in the Contracts, the Tribunal holds that the mere fact that the Parties agreed on the application of PRC laws in the Contracts does not exclude or prevent the application of the *CISG* to the dispute arising under the Contracts.

63. In conclusion, the Tribunal finds that *CISG* does apply in this instance, and that the civil laws and regulations of the PRC would be applicable only where such matters are not provided for in the *CISG*.

B. Issue Two: Was There a Breach of the Contracts by Respondent?

64. The *CISG* provides that: "*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*". This provision defines a seller's general contractual obligation to provide goods in conformity with the requirements of the contract.

65. In the present case, the Parties do not dispute the quantity of the Goods delivered under the Contracts, and the relevant B/Ls (the Claimant's Attachments 8 and 10) indicate that Respondent has provided to Claimant 4,851.010 mt Prime Deformed reinforcing steel bars under Contract No. 1 and 1,920.059 mt of the same goods under Contract No. 2, both slightly exceeding the amounts required under the Contracts (viz, 4,830 mt under Contract No. 1 and 1,660 mt under Contract No. 2). Therefore, the Tribunal is of the view that the quantities of Goods provided by Respondent are in conformity with the requirements of the Contracts.

66. The Parties also do not dispute the shipment dates of the Goods. Therefore, the Tribunal takes it as recognized fact that the shipments of the Goods were timely made under the Contracts.

67. After finding that there were certain defects with the Goods, Claimant first notified Respondent of such defects in May 2011 through several emails, and then sent formal letters to Respondent on May 2011 (for Contract No. 1) and June 2011 (for Contract No. 2). Respondent raised no objection to these facts. Since Claimant's formal notices of defects were given within 120 days after the corresponding B/L dates (B/L dates: March 2011 for Contract No. 1 and April 2011 for Contract No. 2) as required by the Contracts, the Tribunal takes it as recognized fact that Claimant has timely notified Respondent of the defects (if any) of the Goods according to the Contracts.

68. The question now becomes whether the Goods delivered by Respondent to Claimant were in conformity with the "quality and description" required by the Contracts.

69. Contract No. 1 and Contract No. 2 contain the following descriptions regarding the Goods:

Contract No. 1

"4,830 mt Prime deformed reinforcing steel bars acc. to CSA G30.18-M92 400W, boron added (min.0.0008% and max.0.002%), newly produced, in straight bars, length per piece as indicated in the specifications, tolerance on length -0/+100mm, no short lengths are allowed, no flame cut ends are allowed Mill test certificates to show physical and chemical properties. The heat numbers on the marking tags must exactly meet those shown on the relative mill test certificate(s)…"

Contract No. 2

"1,660 mt Prime deformed reinforcing steel bars acc. to CSA G30.18-M92 400W, boron added (min. 0.0008% and max. 0.002%), newly produced, in straight bars, length per piece as indicated in the specifications, tolerance on length -0/+100mm, no short lengths are allowed, no flame cut ends are allowed Mill test certificates to show physical and chemical properties. The heat numbers on the marking tags must exactly meet those shown on the relative mill test certificate(s)."

70. The Tribunal notes that both Contract No. 1 and Contract No. 2 require the Goods delivered thereunder to conform to, *inter alia*, the CSA G30.18-M92 400W (and the relative mill test certificates).

71. Claimant submits that the Goods provided by Respondent did not conform to the descriptions of the Contracts. In particular, they did not conform to the mass requirements under the CAS Standard G30.18-09, which is the applicable version of standard and has identical mass requirements as CSA G30.18-M92 400W.

72. After reviewing the relevant evidence, the Tribunal summarizes the conclusions of Inspection Authority E Test Reports below:

Inspection Authority E Test Report 310

(1) Test Report issued to Company C dated June 2011 (Claimant's Attachment 13): All the tested samples failed the mass requirement (kg/m) and some failed the yield strength requirement (Mpa) according to the specifications of CSA G30.18-09, Grade 400W.

(2) Test Report issued to Company C dated June 2011 (Claimant's Attachment 14): All the tested samples failed the mass requirement (kg/m) and some failed the yield strength requirement (Mpa) according to the specifications of CSA G30.18-09, Grade 400W.

(3) Test Report issued to Company C dated June 2011 (Claimant's Attachment 15): All the tested samples failed the mass requirement (kg/m) and some failed the yield strength requirement (Mpa) according to the specifications of CSA G30.18-09, Grade 400W.

Test Reports 2

Test Report issued to Company C dated June 2011 (Claimant's Attachment 19): All the tested samples failed the mass requirement (kg/m) and some failed the yield strength requirement (Mpa) according to the specifications of CSA G30.18-09, Grade 400W.

73. In addition to the above Inspection Authority E Test Reports, Claimant also submitted the following test reports:

(1) An Inspection Authority E test report issued to an American company, dated May 2011 (Claimant's Attachment 16): Some of the tested samples failed the tensile strength and yield strength requirements according to the specifications of CSA G30.18-M92 (r2002), Grade 400W.

(2) Test reports issued by Laboratories G to Natural Person H dated May 2011 (Test Report 3, Claimant's Attachment 17): For the samples marked "Broken", they "*failed to meet requirement of CSA G30.18-M92 for Tensile, Bend and Physical Properties; Grade 400W Reinforcing Steel*".

(3) Test reports issued by Authority F to Laboratories G dated May 2011 (Laboratories G Test Report, Claimant's Attachment 18): "*Sample C and H meet the chemical composition requirements of CAN/CSA-G30.18-M92 … Sample A and F do not meet requirements of carbon, manganese, silicon, and carbon equivalent content of Grades 400W and 500W.*"

74. Respondent argues that the above-mentioned test reports (collectively, the "Test Reports") are all inadmissible for the below reasons:

(a) The parties requesting the tests under the Test Reports are all third parties, not Claimant itself. Specifically, the Inspection Authority E Test Reports were issued to Company C, the Test Report 3 was issued to Natural Person H and the Laboratories G Test Report was issued to Laboratories G.

(b) Respondent did not participate in the selection or appointment of the testing agencies.

(c) The testing agencies cannot prove the origin of these tested samples. In other words, there is no evidence showing that the tested samples were taken from the Goods provided by Respondent.

(d) The standard used in some of the tests is inconsistent with the agreed standard in the Contracts.

75. Since the Test Reports are the key evidence relied upon by Claimant in establishing the lack of conformity of the Goods (and further the potential breaches and corresponding liability of Respondent), the admissibility of the Test Reports is a major issue that the Tribunal needs to determine. The Tribunal will now turn to consider each of Respondent's arguments to come to its conclusion.

1. The rightful party applying for the tests

76. Respondent argues that the Inspection Authority E Test Reports are inadmissible because it was Company C, not Claimant, who ordered these tests. Claimant responds

that both Claimant and its customer (Company C) have the right to examine the Goods pursuant to the Contracts.

77. The Contracts provide that "*Company A, respectively its customer will examine the quality and quantity of the goods upon their receipt to the extent both reasonable and technically feasible in accordance with CSA G30.18-M92 400 W*". This provision is clear on Claimant's customer's right to examine the quality and quantity of the Goods. Therefore, the Tribunal concludes that the fact that Company C, instead of Claimant, ordered these tests has no bearing on the admissibility of the Inspection Authority E Test Reports.

78. The same analysis and conclusion also apply to the Test Report 3 and the Laboratories G Test Report. It seems obvious that the Laboratories G Test Report was issued as part of the Test Report 3 because the latter noted on every page that "chemical test in progress". Although the Test Report 3 was issued to Mr. I (a customer of Company C), the invoices issued by a law firm to Company C regarding the services provided by Laboratories G in connection with a leasing company, as well as the correspondence between Claimant and Respondent regarding Claimant's engagement of Laboratories G to conduct the chemical tests (Claimant's Attachments 83, 84, 85 and 135) adequately demonstrate that the Test Report 3 was ordered by Claimant or Company C for Mr. I's benefit or per his request. Therefore, the Tribunal finds it reasonable to conclude that the Test Report 3 and the Laboratories G Test Report were also ordered by a party which enjoys the right to examine the Goods under the Contracts. In any event, even assuming that the Test Report 3 and the Laboratories G Test Report were not ordered by Claimant or Company C and thus were inadmissible, such fact would still not affect the admissibility of the Inspection Authority E Test Reports and the conclusions thereunder.

79. Respondent also argues that the party ordering the Inspection Authority E tests (Company C, i.e., X International (Canada) X) was not the same party whose name was shown on Inspection Authority E's invoices (Claimant's Attachments 79-82), which is X (Canada) Inc., without "International". However, the Tribunal notes that the address of "X (Canada) Inc." as shown on the Inspection Authority E invoices is exactly the same address as Company C. The Tribunal therefore concludes that the party to which the Inspection Authority E invoices were issued was Company

C, and the missing "International" in the spelling of the name is either an error by Inspection Authority E or an acceptable abbreviation between Inspection Authority E and Company C.

2. Involvement of Respondent in the selection/appointment of testing agencies

80. Respondent also argues that it was not involved in the selection or appointment of the testing agencies, and that therefore these Test Reports should not be admitted.

81. Having established that Claimant and its customers had the right to examine the Goods according to the Contracts, it is therefore only a matter of reasonableness, not an obligation, for Claimant or its customers to involve Respondent in their examination process. In other words, as long as Claimant or its customer, i.e., Company C in this case, made reasonable efforts to engage Respondent in the testing process, such testing and the results thereof should be justified.

82. Claimant submitted Attachments 133 – 137 and Attachment 141 to prove that it invited Respondent to visit Canada to participate in the testing process.

83. After reviewing these documents, the Tribunal finds that:

(a) Claimant proposed to Respondent to jointly conduct the tests, including jointly selecting the testing agency and participating in the testing process (Claimant's Attachment 133, email from Natural Person J of Claimant to Respondent dated May 2011).

(b) Three testing agencies were proposed to the Respondent for selection (Claimant's Attachment 134, email from Natural Person J to Respondent dated May 2011).

(c) Claimant explained to Respondent the urgency of conducting the tests and urged Respondent to confirm its representatives to Canada (Claimant's Attachment 135, email from Natural Person J to Respondent dated May 2011).

(d) Upon obtaining the draft test reports from Inspection Authority E, Claimant further urged Respondent and the mill to visit Canada (Claimant's Attachment 137, email from Natural Person J to Respondent dated June 2011).

84. In addition to the above, in the Witness Statement of Mr. K of Company C dated September 2013 (Claimant's Attachment 141), Mr. K stated that "*The supplier was offered the opportunity to participate both in choosing the Independent Inspection Company, and to witness the extensive sampling and testing of the material in Canada – they did not react to either*."

85. Respondent challenges the admissibility of Claimant's Attachments discussed above on the grounds that: (i) they are Claimant's one-side statements; (ii) Respondent had agreed to visit Canada but Claimant did not cooperate in obtaining the visa for Respondent's representative; and (iii) the Witness Statement of Mr. K is inadmissible because Company C is an affiliated company of Claimant, thus evidencing "fraud" between Claimant and Company C.

86. Respondent submitted a statement issued by a Chinese company dated January 2014, stating that Mr. D of Respondent entrusted this company to apply for a visa to Canada, but the application was rejected by the Canadian Embassy.

87. The Tribunal has carefully considered all the submissions and evidence and is not persuaded by Respondent's arguments. Claimant's Attachments 133 – 137 are printed copies of email correspondence between Claimant and Respondent, with clear indications of the relevant dates, subjects, parties involved and the contents of the correspondence. In absence of any evidence to the contrary or any evidence showing that these attachments were forged, the Tribunal considers this correspondence admissible in terms of their evidentiary form. With respect to the Witness Statement of Mr. K of Company C, Respondent did not submit any concrete evidence, apart from its pure speculation, that there was any fraudulent conduct or collusion between Claimant and Company C. In the Tribunal's view, transactions between affiliated companies are normal and commonly seen in today's international business activities, and they are widely acceptable and justified in terms of third parties' interests as long as they are conducted on an arm's-length basis. Therefore, the Tribunal concludes that Respondent has failed to prove the existence of any fraudulent conduct or collusion between Claimant and Company C, and consequently has failed to prove that the Witness Statement of Mr. K of Company C is biased due to alleged fraud between Claimant and Company C. The Tribunal thus decides that the Witness Statement of Mr. K of Company C is also admissible.

88. Having established the admissibility of Claimant's Attachments cited in this section, the Tribunal concludes that Claimant and/or Company C did undertake due efforts to engage Respondent in the selection and appointment of the testing agencies. The fact that Respondent was denied a visa to Canada does not negate such efforts by Claimant and/or Company C.

3. The origin of samples used in the tests by Inspection Authority E

89. Respondent also denies the admissibility of the Test Reports, based on the ground that the testing agencies did not prove that the tested samples were taken from the Goods.

90. The Tribunal notes the following points from Claimant's evidence:

(a) In the email from Natural Person J to Respondent in June 2011 (Claimant's Attachment 137), Mr. C stated that "*Please see the attached 8 draft test reports from Acuren. These samples were from material still at a port in Canada from the shipment on vessel M … We have sampled but not yet tested any material from the second shipment of approx. 1920 mt…*";

(b) In the Witness Statement of Mr. K, Mr. K stated that "*…The material could be identified due to the roll markings on the bars as stipulated by the CSA Specification. In this case the letters F/D identified the material as being from a Tangshan company … The firm of Inspection authority E were hired, and they supervised the sampling of bars from more than 90pct of the heats delivered in 2 shipments from this mill. The samples collected were then taken to Inspection authority E's facility for testing…*"; and

(c) The Inspection Authority E Test Reports describe the tested samples as "*Hot Rolled Carbon Steel Bars for Concrete Reinforcement – vessel M*" and "*Hot Rolled Carbon Steel Bars for Concrete Reinforcement – Quetzal Arrow*"; in the meantime, the B/Ls issued by the carrier of the Goods, Bermuda (Claimant's Attachments 8 and 10), indicate that the vessels carrying the Goods from China to a port of Canada were respectively "*M/V 'vessel M' V093*" and "*Quetzal Arrow*", exactly matching the descriptions of the vessels from where the samples were taken in the Inspection Authority E Test Reports.

91. Based on the above findings, in particular the fact that the names of the vessels carrying the Goods to Canada as shown on the B/Ls and the descriptions of the origins of the tested samples in the Inspection Authority E Test Reports are the same, the Tribunal concludes that Claimant has adequately proved that the tested samples by Inspection Authority E were taken from the Goods.

4. The applicable standard for the test reports

92. Respondent challenges the applicable standard used in the Test Reports, arguing that CSA G30.18-09, Grade 400W ("CSA-09"), the standard used in the Inspection Authority E Test Reports, is inconsistent with the standard agreed upon in the Contracts, CSA G30.18-M92, Grade 400W ("CSA-M92").

93. The Tribunal notes that the main conclusion of the Inspection Authority E Test Reports is that the Goods do not conform to the mass requirements under the standard CSA-09. Therefore, as long as the two standards contain identical mass requirements, the application of CSA-09 instead of CSA-M92 should not change the conclusion of the Inspection Authority E Test Reports.

94. The Tribunal therefore turns to the descriptions of the mass requirements under these two standards, which are quoted below:

CSA-M92

"*13. Permissible Variations in Mass*

13.1 The permissible variation in mass shall not exceed 6% below the nominal mass except for plain bars with diameters less than 10 mm, where the permissible variation in mass shall not exceed 10% below the nominal mass. Reinforcing bars are evaluated on the basis of nominal masses. In no case shall the overmass of any bar be the cause for rejection."

CSA-09

"*13. Permissible variations in mass*

The permissible variation in mass shall not exceed 6% below the nominal mass except for plain bars with diameters less than 10 mm, where the permissible variation in mass shall not exceed 10% below the nominal

mass. A bar shall not be rejected for having a mass greater than the required nominal mass."

95. The first two sentences of Article 13 of CSA-M92 and CSA-09 are identical in both wording and with respect to the technical parameters. Although CSA-M92 contains one more sentence than CSA-09, which reads "*Reinforcing bars are evaluated on the basis of nominal masses*", the deletion of this sentence in CSA-09 does not impact on the results of any tests conducted accordingly. Finally, the last sentences of the two standards have essentially the same meaning despite their different wording.

96. The Tribunal therefore concludes that the CSA-M92 and CSA-09 contain identical technical parameters for the mass capacity of reinforcing bars. Therefore, the application of CSA-09 instead of CSA-M92 in the Inspection Authority E Test Reports does not change the conclusion reached thereunder.

5. The mill test reports and examination by Claimant before shipment

97. Respondent argues that Claimant did not raise any objection on the quality of the Goods upon receipt of the mill test reports or upon examination of the Goods by its own representatives before the Goods were sent for shipment.

98. Claimant replies that the examination of the Goods before shipment was conducted visually and could not reveal the defects of the Goods in respect of their mass capacity, chemical components, etc.

99. The Tribunal is of the view that under the *CISG* and international sales practice, the buyer is entitled to examine the quality of the goods upon receipt. This right is also recognized under the Contracts. The examination conducted on-site before shipment is often a preliminary visual check of the appearances of the goods, and it could hardly reveal whether the goods are conforming to applicable technical requirements under the contract. Furthermore, in the present case, the mill test reports are only part of the requirements under the Contracts. The conformity of the Goods is still subject to other contractual requirements such as those under CSA-M92.

100. In conclusion, the Tribunal holds that the mill test reports and Claimant's examination of the Goods before shipment do not impact on the admissibility of the Test Reports issued after the shipments were received in Canada.

6. Conclusion

101. In summary, the Tribunal therefore concludes that, according to the Test Reports and other relevant evidence, which have been found admissible in the present case, the Goods failed to meet, among other requirements, the mass requirements under the applicable standard CSA-M92 (or CSA-09), and therefore were not in conformity with the contractual requirements. Respondent's failure to provide conforming goods constitutes breaches of the Contracts and violations of Article 35(1) of the *CISG*.

C. Issue Three: Was Respondent Given a Reasonable Opportunity to Remedy the Breaches?

102. Having established that Respondent breached the Contracts and that Claimant timely notified Respondent of such breaches, the Tribunal now examines the question of whether Respondent was given a reasonable opportunity to cure the breaches.

103. The *CISG* grants a seller the right to remedy breaches after the date of delivery:

Article 48 of the *CISG*

"*(1) Subject to article, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.*

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph of this article is not effective unless received by the buyer."

104. Based on the provisions of Article, the preconditions for a seller to exercise his right of remedy after date of delivery include that:

(a) the seller can do so without "*unreasonable delay*" and without "*causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer*"; and

(b) the seller has sent a notice to the buyer requesting the buyer to decide whether it will accept the remedy the seller intends to take within a specific time period.

105. The Tribunal holds that Respondent, as the seller in the present case, had the right to remedy or cure the breaches after the date of delivery. To do so, Respondent must not cause unreasonable delay in performing its obligations, unreasonable inconvenience to Claimant, or uncertainty as to the amount of expenses Claimant would need to advance for such remedial measures. In addition, Respondent must send a notice to Claimant, indicating its desire to cure the breaches within a specified time period and requesting Claimant to accept or reject its offer to cure. When determining whether Respondent's offer to cure may cause unreasonable inconvenience to Claimant, the Tribunal may consider whether Claimant has claimed damages or declared the price reduced. Lastly, Claimant has the right to decide, on a reasonable basis and upon considering the aforementioned factors, whether to accept Respondent's offer to cure the breaches.

106. Applying the above-mentioned analysis to the facts, the Tribunal noted that Mr. Natural Person J of Claimant and Mr. D of Respondent had communicated via email and in-person meetings since June 2011, trying to reach agreement on the return of the Goods to Respondent. However, the Parties could not agree on the relevant terms. Claimant's evidence shows the following communications between the Parties:

(1) In June 2011, Natural Person J sent an email to Respondent, rejecting Respondent's proposed price ($470/mt) for the return of Goods from Canada to China. In June 2011, Natural Person J sent another email to Respondent, requesting it to furnish an "ideal resolution plan". (Claimant's Attachment 26)

(2) In July 2011, Respondent sent an email to Natural Person J, in which it increased the proposed price for the return of Goods from $470/mt to $500/mt. (Claimant's Attachment 27)

(3) In October 2011, the legal department of Claimant sent a letter to Respondent, further requesting Respondent to either accept the terms proposed by Claimant for returning the Goods, or it would resort to legal action. (Claimant's Attachment 28)

107. Respondent does not dispute the authenticity of Claimant's evidence cited above. However, Respondent argues that each Party had its respective reasons for insisting on its own terms for the proposed return of Goods, and they therefore could not reach an agreement. Respondent further comments that if the Goods were defective, they were not supposed to be resold to any third parties, but in the end, all the Goods were sold by Company C.

108. Respondent's arguments on this point are irrelevant to the question of whether Respondent was given the opportunity to remedy its breaches. On review of Claimant's Attachments 26-28, it is obvious that Claimant offered Respondent a reasonable opportunity to remedy the breaches by trying to negotiate an acceptable return price before Claimant decided to initiate this arbitration. However, the preconditions for Respondent to exercise its right to cure did not arise – Respondent did not specify within what time period it would take actions to cure the breaches, and the circumstances suggest that Respondent's proposed terms of return were either an "unreasonable inconvenience" to Claimant or would cause "uncertainty" in the amount of expenses that Claimant would need to advance for such remedial measures.

D. Issue Four: What Remedies are Allowed Under the *CISG* for Respondent's Breaches?

1. Available remedies under the *CISG*

109. Having established that the *CISG* applies to this case, that Respondent breached the Contracts by failing to provide conforming Goods, and that Claimant timely notified Respondent of such breach and offered Respondent a reasonable opportunity to cure the breaches, the Tribunal now examines what remedies are available to Claimant under the *CISG* for Respondent's breaches of the Contracts.

110. Claimant relies on the following articles of the *CISG* in claiming its remedies:

> "*If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.*
>
> *Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.*
>
> *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.*"

111. The *CISG* provides a buyer the right to claim a reduction of price regardless of whether the price has been paid. This Article, however, does not prejudice a buyer's right to claim damages under the Article should it be able to prove foreseeable damages. The Article affirms a party's right to interest accrued on any payment in arrears, including the payment for damages.

112. The *CISG Commentary* cited by Claimant in Attachment 148 shows that an injured party is entitled to recover under the *CISG* the following categories of losses, provided that they are foreseeable: (i) Non-performance loss, (ii) incidental loss and (iii) consequential loss.

113. Accordingly, the Tribunal holds that the Claimant is entitled to recover:

(1) Losses for reduction of value in the Goods due to the existing defects; (*CISG*)

(2) Foreseeable losses suffered by Claimant as a consequence of the breach, including: (*CISG*)

(a) Loss of profit;

(b) Reasonable additional costs;

(c) Third party claims; and

(3) Interest accrued on payments in arrears. (*CISG*)

2. Mitigation of losses and Claimant's right to resell the defective goods

114. Respondent contends that Claimant had the obligation to mitigate the losses caused by the breaches, and therefore Claimant should have returned the defective Goods to Respondent instead of reselling them to third parties and claiming for damages.

115. Claimant's position is that the cost of returning the Goods to Respondent would have been much higher than the costs incurred by selling the Goods to customers at reduced prices, and that reselling the Goods was actually an effort to mitigate its losses.

116. The *CISG* contains the following article concerning an injured party's obligation to mitigate losses caused by a breach:

> "*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.*"

117. The Tribunal is of the view that mitigation principles do not appear to require the injured party to choose the remedy which would be least expensive to the party in breach.

118. It is clear from the evidence that the two parties consulted with each other but failed to agree on the terms and conditions for returning the defective Goods to Respondent before Claimant decided to resell these Goods (Claimant's Attachments 26 – 28). The *CISG* only requires Claimant to take "reasonable" measures to mitigate its losses, and the measures taken do not have to be the least expensive to the party in breach. Therefore, the Tribunal only needs to decide whether reselling the Goods was a "reasonable" measure by Claimant to mitigate its losses at the time of Respondent's breaches, and does not need to determine whether it is the least expensive measure for Respondent.

119. Considering that (i) the storage fees for keeping the Goods at the port of Vancouver could rise significantly pending the Parties' discussion of the terms and conditions

for returning the Goods to Respondent, (ii) the Parties were unable to reach any consensus on such terms and conditions, and (iii) Company C was under time pressure to perform the contracts already signed with its end-customers, the Tribunal considers it a "reasonable" measure for Claimant to decide to resell the defective Goods to its customers at reduced prices and to claim the difference from Respondent. In the Tribunal's view, this measure was a sound commercial judgment by Claimant under the circumstances.

120. Based on the findings above, the Tribunal concludes that Claimant has duly performed its mitigation obligation under the *CISG*.

E. Issue Five: Calculation of Damages

121. Claimant has claimed the following damages and corresponding interest:

Item	Damages	Amount
1.	**Claimant's Losses**	
1.1	Loss of profit under Contract No. 1	Over USD 10,000
1.2	Loss of profit under Contract No. 2	Over USD 40,000
1.3	Hearing costs	Over USD 20,000 & EUR 10,000
1.4	Legal fees (BEITEN BURKHARDT) for April 2012 – August 2013	Over EUR 30,000
	Legal fees (BEITEN BURKHARDT) for September – December 2013	Over EUR 40,000
1.5	Legal fees (Law Firm H) for June 2013 – January 2014	Over EUR 10,000
2.	**Company C's Losses**	
2.1	Loss of profit under Contract No. 1	Over CAD 600,000
2.2	Loss of profit under Contract No. 2	Over CAD 20,000
2.3	Loss for reduction of price under Contract No. 1	Over CAD 1,500,000
2.4	Loss for reduction of price under Contract No. 2	Over CAD 600,000
2.5	Additional costs under Contract No. 1	Over CAD 400,000
2.6	Additional costs under Contract No. 2	Over EUR 100,000
In total (USD:CAD = 1:1)		Over **USD 3,400,000 & EUR 200,000**

1. The issue of foreseeability – Company C's losses

122. The Tribunal will first decide whether Company C's losses were foreseeable by Respondent (and hence recoverable) under the *CISG*. The Tribunal notes that "*When merchantable goods are sold to commercial traders the seller must anticipate that a delivery of defective goods may lead to liability of the buyer to his customers…*" (Claimant's Attachment 148, *CISG Commentary*). The Tribunal agrees with such view and holds that under the *CISG*, an aggrieved party should be entitled to damages for pecuniary loss resulting from claims by third parties as a result of the breach of contract. Because Respondent was aware of the fact that the Goods were purchased by Claimant for resale to third party customers in Canada (the Contracts and the B/Ls all clearly indicate such information), any claims filed by Company C against Claimant for its losses caused due to the defects of the Goods supplied under the Contracts should be regarded as having been foreseeable by Respondent and hence are recoverable by Claimant under the *CISG*.

2. Calculation of damages under the *CISG*

123. Based on the Tribunal's findings in para. 129 herein, the Tribunal now examines the damages claimed by Claimant under the *CISG*.

Recovery under the CISG

Claimant's Loss of Profit Under Contract No. 1

=Price invoiced by Claimant to Company C[6] – Price invoiced by Respondent to Claimant[7]

= over $3,500,000 – over $3,500,000 = over **$10,000**

6 Although the price fixed in the Purchase Order between Claimant and SMIV is $3,502,474.50 for 4,830mt, the price actually invoiced by Claimant to SMIV is $3,517,709.90 for 4,851.010 mt (see Claimant's Attachment 31). This represents the price receivable from SMIV by Claimant if the Goods were conforming in quality.

7 This invoice price indicates the price actually paid to Respondent by Claimant. The Tribunal notes that Claimant cited the wrong figure in the first para. of p. 17 of *Application for Arbitration*. The payment made by Claimant to Respondent for the Steel Bars under PO 310 should be $3,056,136.30 for 4,851.010mt (see Claimant's Attachment 7), not $3,502,474.50. However, since this is an error made by Claimant itself, the Tribunal must follow the same calculation advanced by Claimant.

Claimant's Loss of Profit Under Contract No. 2

= Price invoiced by Claimant to Company C[8] – Price invoiced by Respondent to Claimant[9]

= over $1,200,000 – over $1,200,000 = over **$40,000**

Company C's Loss of Profit Under Contract No. 1

= Price Company C would have received from end-customers if the Goods were conforming[10] – Price invoiced by Claimant to Company C[11]

= over $4,200,000 – over $3,500,000 = over **$600,000**

Company C's Loss of Profit Under Contract No. 2

= Price Company C would have received from end-customers if the Goods were conforming[12] – Price invoiced by Claimant to Company C[13] – Freight cost over $100,000[14]

= over $1,400,000 – over $1,200,000 – over $100,000 = over **$20,000**

3. Recovery of legal fees & arbitration costs under the Contracts

124. Claimant further claimed about USD 400,000 and EUR 100,000 as additional costs incurred by Claimant and Company C under Contract No. 1 and Contract No. 2 as a result of Respondent's breaches of the Contract.

125. According to Claimant, the additional costs were for "*inspection costs, material handling cost, legal fees, courier fees, reloading and transportation fees, offloading and moving fees, and shortage fees*." (Claimant's Attachment 45 and Attachments 79 – 128)

8 The price receivable from SMIV by Claimant if the Goods were conforming in quality (see Claimant's Attachment 63).
9 The price actually paid by Claimant to Respondent (see Claimant's Attachment 9).
10 See Claimant's Attachments 32-44.
11 The price SMIV actually paid to Claimant (see Claimant's Attachment 31).
12 See Claimant's Attachments 65-68.
13 The price SMIV actually paid to Claimant (see Claimant's Attachment 63).
14 Charges SMIV incurred for shipping the Goods from Xingang, PRC to Vancouver (see Claimant's Attachment 69).

126. A summary of these additional costs is provided below based on Claimant's submissions:

Item	Contract No. 1	Contract No. 2
Inspection Authority E testing fees	Over USD 30,000	Over USD 30,000
Legal fees by Borden Landner Gervais LLP	Over USD 4,000	
Courier service	Over USD 400	
Reloading, storage & transportation fees	Over USD 200,000	Over USD 50,000
Further storage, offloading fees	Over USD 40,000	Over USD 10,000
Sub-total	**Over USD 200,000**	**Over USD 100,000**
Legal fees of Law Firm G for May 2011 – February 2012	EUR X	
Exchange hedging losses	Over EUR 80,000.00	
Cargo insurance	Over EUR 20,000.00	
Sub-total	**Over EUR 100,000**	

127. The Tribunal considers the above expenses, except for the cargo insurance and exchange hedging loss, justified as foreseeable consequences of Respondent's breaches of the Contracts. Based on the *CISG*, the Tribunal confirms that Claimant is entitled to recover about **USD 400,000** and **EUR 20,000** for its additional costs.

128. The reason that the Tribunal does not support recovery of the exchange hedging loss is because the Tribunal does not think this type of loss was foreseeable to Respondent at the time of concluding the Contracts. The Tribunal's denial of Claimant's cargo insurance is because such expenses would be incurred in any case, regardless of whether Respondent provided conforming Goods under the Contracts. Therefore, the expenses for cargo insurance could not be considered as a consequence of Respondent's breaches of the Contracts.

Recovery under the *CISG*

129. According to the *CISG*, the buyer is entitled to claim reduction of price caused by the defects of the delivered goods. Such losses essentially reflect the decrease of value in the goods that the buyer received due to its inconformity. The purpose for allowing

recovery of this category of losses is to restore the buyer to the position it would have enjoyed if the contract had been duly performed and the buyer had received conforming goods as anticipated under the contract.

130. Therefore, the losses for reduction in price are essentially the losses for reduction in goods' value, and it can be measured, in the present case, by the difference between the market value of the conforming Goods (i.e., the price actually paid by Claimant to Respondent) and the market value of the defective Goods actually delivered (i.e., the price actually received from reselling the defective Goods to Company C).

131. Claimant claimed losses arising from the reduction in price/value suffered by Company C (Damages Items 2.3 & 2.4).

132. Specifically, under Contract No. 1, Claimant submits Attachments 46 – 61 to prove that losses from the reduced price received by Company C from its customers total over $1.5 million. The Tribunal understands that such figure reflects the difference between the price that should have been receivable from Company C's customers by Company C if the Goods were conforming, and the price actually received from such customers when selling the non-conforming Goods.

133. The Tribunal does not agree with this calculation method, because such difference would also include Company C's profit, which has been claimed and accounted for separately under Company C's loss of profit. The Tribunal considers it appropriate to calculate Company C's losses for reduction in price/value by comparing the price paid by Company C to Claimant under Contract No. 1 (which reflects the market price/value of conforming goods) and the price actually received by Company C when reselling the non-conforming Goods (which reflects the market price/value of non-conforming Goods). However, since Claimant did not specify the latter amount, the Tribunal considers it appropriate to apply the following formula:

Company C's Losses for Reduction in Price/Value of Goods Under Contract No. 1

= reduced price to the Company C's customers (Claimant's Attachments 46 – 61) – Company C's loss of profit under Contract No. 1

= over $1,500,000 – over $600,000

= over **$800,000**

Company C's Loss of Reduction in Price/Value of Goods Under Contract No. 2

= reduced price to Company C's end-customers (Claimant's Attachments 73 – 77) – Company C's loss of profit under Contract No. 2

= over $600,000 – over $20,000

= over **$600,000**

4. Recovery of interest under the *CISG*

134. Although Claimant's request for relief is not crystal clear about the specific time periods for which the interest sought by Claimant should apply, upon reading Claimant's *Application for Arbitration* and Post-Hearing Statement, the Tribunal understands that Claimant prays for simple interest accrued on the damages for the period starting from the occurrence of the damages (i.e., the date when Claimant informed Respondent of the defects of the Goods, or June 2011) until the date of Respondent's actual payment of these damages. For instance, on p. 36 of Claimant's *Application for Arbitration*, it is stated that "*the Claimant is entitled to such interests calculated as of occurrence of the damages, i.e., the date when the Claimant informed quality defects of the Steel Bars provided by the Respondent which was June 2011, until the date when the payment of compensation is made by the Respondent*."

135. Claimant's prayer for interest accrued on the damages is based on the *CISG*.

136. For the specific rates of the interest, Claimant initially argued that since the *CISG* provides no express guidance, the normal standard in practice should apply, which is the applicable USD & EUR LIBOR interest rate plus 4%. Claimant further provides examples for the applicable USD & EUR LIBOR interest rate in 2011 and 2012. On p. 36 of its *Application for Arbitration*, Claimant stated that "*the average 12-month USD LIBOR interest rate for the year of 2011 was 0.830% and for 2012 is 1.070%. The average 12-month EUR LIBOR interest rate for the year of 2011 was 1.969% and for 2012 is 1.452%. Therefore, the applicable USD interest rates shall be 4.83% for 2011 and 5.07% for 2012 and the applicable EUR interest rate shall be 5.969% for 2011 and 5.452% for 2012*." In its Post Hearing Statement, Claimant changed its position and argued that according to the "*Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd Ed, note 31 to Art. 78*", it is appropriate to apply the prime rate fixed by the US Federal Reserve plus two percent for the sum payable in US Dollars, and the minimum bid rate for main re-financing operations fixed by the European Central Bank plus two percent for the sum payable in Euro.

137. The Tribunal will examine this issue as follows:

Legal basis for interest recovery

138. The Tribunal has held in para.129 herein that pursuant to the *CISG*, Claimant, as the injured party in this arbitration, is entitled to interest accrued on any payment in arrears from Respondent. In this arbitration, Respondent is held liable to Claimant for compensation of damages awarded herein. Accordingly, Claimant is entitled to interest accrued on the damages from Respondent.

Applicable time period for interest recovery

139. The Tribunal does not agree with Claimant's position that the calculation of interest should start from the date when Claimant informed Respondent of the defects in the Goods, i.e., June 2011. The Tribunal notes that the Parties had, after such date, communicated via email, letters and in-person meetings in an attempt to resolve the problems. Respondent was entitled to be provided with the opportunity to cure its breach of the Contracts according to the *CISG*. Therefore, for the time period during which the Parties were amicably consulting and negotiating on a proper settlement of the dispute, the interest should not apply.

140. Without a clear indication of the date since which Respondent had lost its right to cure the breach of the Contracts, the Tribunal holds that it is appropriate to start calculation of the interest from the commencement date of this arbitration, i.e., October 2012, which represents the complete failure of the Parties' amicable consultation and negotiation.

141. Furthermore, although Claimant only specified in its renewed relief the rates for 2011, 2012 and 2013, without any rate provided for 2014, Claimant explained in its Request for Arbitration that its prayer for interest was "*until the date when the payment of compensation is made by Respondent*" (p. 36). The Tribunal considers such request reasonable and justified and will consider Claimant's request to also include interest during the year 2014, as clearly intended by Claimant's prayer for relief.

Applicable rates of interest

142. The Tribunal does not agree with Claimant's proposed rates of interest; however as noted above, for matters that are not provided in the *CISG*, relevant PRC law should

apply. Nonetheless, application of relevant PRC law[15] would result in higher rates than those advanced by Claimant, and Claimant should be bound by its submissions. Therefore, the Tribunal decides to apply the rates advanced by Claimant, provided that there shall be no interest accrued prior to 9 October 2012.

143. Specifically, the rates advanced by Claimant are 5.25% per annum for the sum payable in USD for the time period in question, and for the sum payable in Euro, 3.125% per annum for 2011, 2.875% per annum for 2012 and 2.5% per annum for 2013. Upon checking the websites[16] specified in Claimant's submissions, the Tribunal notes that for 2014, the rate of interest applicable to the sum payable in USD remains 5.25% (3.25% +2%) per annum, and the rate of interest applicable to the sum payable in Euro is 2.15% (0.15% +2%).

V. FINAL AWARD

144. The Tribunal hereby finds, directs, orders and awards as follows:

(1) Respondent shall pay to Claimant damages in the amount over **USD 2,700,000** plus simple interest at the rate of 5.25% per annum from 9 October 2012 until the date of Respondent's actual payment of the amount specified herein; and **EUR 100,000** plus simple interest at the rate of 2.875% per annum from 9 October 2012 until 31 December 2012, simple interest of 2.5% per annum from 1 January 2013 until 31 December 2013 and simple interest of 2.15% per annum from 1 January 2014 until the date of Respondent's actual payment of the amount specified herein;

(2) all other claims of Claimant and the counterclaims of Respondent are dismissed;

15 According to Article 24(4) of the *Interpretations of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases Involving Disputes over Sale and Purchase Contracts*, promulgated on 10 May 2012 and effective from 1 July 2012, the RMB benchmark loan rate issued by the People's Bank of China ("PBOC") for the same period may be applied to overdue payment under purchase and sale contracts. The applicable benchmark loan rates issued by PBOC is 5.6% per annum for the year 2012, and 6% per annum for the year 2013 and 2014, both higher than the rates advanced by Claimant.

16 http://www.bankrate.com/rates/interest-rates/prime-rate.aspx.

https://www.ecb.europa.eu/stats/monetary/rates/html/index.en.html.

(3) arbitration fees for the claims shall be borne by the Respondent. Such fees have been prepaid by Claimant. Therefore, Respondent is ordered to pay this amount to Claimant; and

(4) arbitration fees for the counterclaims shall be borne by the Respondent. Such fess has been prepaid by Respondent. The deposit paid by Respondent for arbitrators' fees is non-refundable.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

China A International Co., Ltd.

Claimant

v.

B Sports and Culture Development (China) Co., Ltd.

Respondent

Matter for arbitration: Disputes over retail product license agreement

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. THE PARTIES

A. The Claimant

1. China A International Co., Ltd. (**中国A国际贸易有限公司**) ("**Company A**" or the "**Claimant**"), a company incorporated and existing under the laws of the People's Republic of China, with its registered address at […], People's Republic of China ("P.R. China" or "PRC") and with […] as its legal representative.

2. In these arbitration proceedings, the Claimant is represented by: […] of XXX Law Offices with the address at […], P.R. China; and […], Passport No. Exxxxxxxx.

B. The Respondent

3. B Sports and Culture Development (China) Co., Ltd. (**B体育文化发展(中国)有限责任公司**), a company incorporated and existing under the PRC laws with its registered address at […], P.R. China (the "**Respondent**").

4. In these arbitration proceedings, the Respondent is represented by: […] of XXX LLP with the address at […], P.R. China; and Ella Betsy Wong of the Respondent with the address at […], China.

5. The Claimant and the Respondent are hereinafter collectively referred to as the "**Parties**" and individually referred to as "**party**".

II. PROCEDURAL HISTORY

6. In November 2012, the Claimant filed its Application for Arbitration with the China International Economic and Trade Arbitration Commission ("**CIETAC**"), based on the arbitration clause contained in the "Retail Product License Agreement" signed in March 2009 by and between China C Biotechnology Co., Ltd. ("**Company C**") and the Respondent and the "First Amendment" by and between the Claimant, Company C and the Respondent.

7. The arbitration clause states as follows:

> "*17. ARBITRATION: All disputes arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration conducted in accordance with the China International Economic and Trade Arbitration*

Commission ('CIETAC') Arbitration Rules. The appointing authority shall be CIETAC Beijing, which shall administer the arbitration in accordance with its Procedures for International Arbitration in force at the date of this Agreement. There shall be three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Beijing, and the language to be used in the arbitral proceedings shall be English."

8. After the Claimant had completed the formality requirement, CIETAC took cognizance of the case based on the above arbitration clause and the Claimant's Request for Arbitration. The *Arbitration Rules of the CIETAC* effective as from 1 May 2005 (the "**CIETAC Rules**") applies to this arbitration.

9. In January 2013, the Secretariat of the CIETAC sent a Notice of Arbitration to the Claimant and the Respondent respectively by courier. Attached to the Notice of Arbitration to the Claimant were the Panel of Arbitrators and the *CIETAC Rules*; and to the Respondent, the Application for Arbitration and its attachments submitted by the Claimant, the Panel of Arbitrators and the *CIETAC Rules*.

10. In April 2013, the Secretariat resent a Notice of Arbitration to both Parties after receiving and considering the Claimant's request for clarification on applicable arbitration rules. CIETAC confirmed that the relevant provisions in the other Chapters (except Chapters Four and Five) of the *CIETAC Rules* shall apply.

11. In June 2013, the Secretariat transmitted "Defense and Counterclaim" and its attachments submitted by the Respondent to the Claimant. In July 2013, after the Respondent had completed the requisite formalities, the Secretariat informed both Parties that the Respondent's Counterclaim has been accepted.

12. In November 2013, the Arbitral Tribunal (the "**Tribunal**") was constituted as per the *CIETAC Rules* to hear this case. The Tribunal was comprised of Mr. Y appointed by the Claimant, Mr. Z appointed by the Respondent and Mr. X, as the presiding arbitrator, appointed by the Chairman of CIETAC.

13. In August 2014, the oral hearing was held in Beijing as scheduled. The representatives of the Claimant and the Respondents participated in the hearing. the Parties respectively stated the facts, expressed their opinions, examined the original copies of evidence brought by the opposite party and answered the questions of the Tribunal.

14. In December 2015, the Respondent submitted "Confirmation of Counterclaims" and its attachments. In February 2016, the Secretariat acknowledged the receipt of

the additional deposit of arbitration fee respectively paid by the Claimant and the Respondent. The Tribunal decided to accept the confirmed Claims/Counterclaims respectively stated in the letter dated 18 December 2015 submitted by the Claimant and the "Confirmation of Counterclaims" submitted by the Respondent.

15. All the materials in association with the arbitration of this case have been properly and effectively served on both Parties in pursuant to Article 68 of the *CIETAC Rules*.

16. This case is now concluded. The Tribunal duly renders this Award in pursuant to Article 43.4 of the *CIETAC Rules* after reviewing materials in writing submitted by both Parties along with the facts investigated in hearings through panel discussion.

III. CLAIMANT'S CLAIM AND SUBMISSIONS

17. The Claimant authorized China C Biotechnology Co., Ltd. ("**Company C**") to enter into a Retail Product License Agreement (the "**License Agreement"**) in March 2009 with the Respondent. In June 2009, the Claimant, the Respondent and Company C signed the First Amendment to clarify that the actual parties to the License Agreement were the Claimant and the Respondent.

18. The Recitals of the License Agreement state that the Parties entered into the License Agreement with regard to the commercial use of certain current names, logos, symbols, designations, emblems, colour combinations, designs, uniforms, identifications, labels, insignia, indicia and trade dress thereof ("**Marks**") of "a certain sports association" ("**B**") and its Member Teams (collectively, "**B Marks**") in connection with the names, nicknames, photographs, portraits, likenesses, signatures or other identifiable features of current "B" players ("**B Player Attributes**").

19. By the License Agreement, the Respondent grants to the Claimant the non-exclusive right and license to use the primary and secondary logos of the Member Terms, the wordmark "B", the "B" silhouetted dribbler logoman ("**B Logo**") and B Marks, "B" All-Star Weekend, "B" Playoffs and "B" Finals (collectively, the "**Licensed Marks**"), as set forth in the Trademark License Agreement Exhibit A and/or the Licensed Marks in combination with B Player Attributes, in either case solely in connection with the manufacture, distribution, advertisement, promotion and sale of the products, including one or more of the Licensed Marks (the "**Licensed Products**").

20. The License Agreement states that the Licensed Products are: aftershave lotion, body wash, conditioner, deodorant/antiperspirant, eau de toilette, face wash, hair gel, shampoo, shower gel, skin care, soap and sunscreen.

21. The Trademark License Agreement set forth in Exhibit A of the License Agreement states during the Term and within the Territory, the Respondent grants to the Claimant the non-transferable right and license to use the Licensed Marks including B Logo (in Trademark Class 35 and Class 41) and B wordmark (in Trademark Class 35 and Class 41) solely in connection with the manufacture, distribution, promotion, advertising and sale of the Licensed Products.

22. After the signature of the License Agreement, the Claimant made efforts to establish channel and actively promoted B brand. Meanwhile, the Claimant paid huge amount of license fee to the Respondent. During the period of the License Agreement performance, the Claimant found that there was no such so-called "B" brand in products within Class 3 (as the range of Licensed Products) and even no precedent worldwide. However, it is the Claimant who spent money to help the Respondent to promote such brand, invest lots of labour and resources in marketing B Products but should pay the Respondent huge amount of license fee.

23. Apart from promoting B brand for the benefit of the Respondent, the Claimant also had to satisfy its various harsh requirements. The Claimant made several complaints, which were all ignored by the Respondent who used the signed License Agreement which was unfair and grossly unconscionable as an excuse. The result which the Claimant got during the performance was nothing, but the Claimant helped the Respondent to promote its brand for free as well as collect large amount of license fee.

24. The Claimant found later that a third party had registered "B" marks in Trademark Class 3. The detailed facts are as follows: in October 2003, China D Advertising Trading Co., Ltd. in M City, China, applied and registered "B" as trademark in Trademark Class 3. The registration number is xxxxxxx. The exclusive use period is from June 2006 to June 2016.

25. At the same time, the Claimant found the Respondent's trademark application information within the Trademark Class 3 is as follows: the Respondent submitted two trademark applications 44xxxxx and 64xxxxx in December 2007 which are most relevant to the trademark authorized in the License Agreement. But these two applications were rejected. The Claimant found that the other relevant applications

submitted by the Respondent: No. 91xxxx4 in February 2011 and No. 91xxxx2 and No. 91xxxx1 in March 2011 were all rejected. The application No. 94xxxx4 and No. 94xxxx3 submitted in May 2011 are still under review by the relevant governmental authority. Therefore, the Respondent has no related trademark exclusive right in Trademark Class 3 from the date when the License Agreement was signed till now.

26. The Respondent should have the knowledge of the above said pre-existing third-party trademark registration at the time when it signed the License Agreement with the Claimant.

27. The Claimant immediately urged the Respondent to resolve the problem and then authorized attorneys to send two letters in September and October 2012 to the Respondent. Both letters expressed the meaning that the Respondent shall give the explanation and reasonable solution to the above-mentioned problem. However, the Respondent did not give any written explanation but sent the Claimant a formal notice to terminate the License Agreement.

28. In fact, the Respondent had no registered mark in Trademark Class 3 but obtained a huge amount of license fee and helped with the promotion of its brand free from the Claimant.

29. The Claimant, relying on the following reasons and legal grounds, seeks an Order for the cancellation of the License Agreement.

30. First, the legal basis for the cancellation is Article 54 of the *Contract Law*.

31. Second, circumstances for the cancellation mainly includes: (1) Material Mistake: The purpose for signing the License Agreement is for the Respondent to authorize the Claimant to use B marks on products in Class 3. But the reality is the Respondent has no trademark right for B marks on products in Class 3 and it has only trademark rights in Class 35 and Class 41. In the meantime, the authorized logo is limited to B team logo. The Claimant has no need to use these logos on products in Class 3 except for uses on promotional posters and booklets. Based on blind trust and admiration, the Claimant mistakenly believed that the Respondent should have had the trademark right for B marks in Trademark Class 3 or exclusive copyright of wordmark B or other exclusive rights. Therefore, the Claimant had material mistakes in signing the License Agreement and it should be cancelled.

32. (2) Gross Unconscionability: Similar to the reasons as mentioned above, any party has the right to use B marks on products in Trademark Class 3 provided that the

Respondent has no exclusive trademark right or copyright of B marks in Trademark Class 3. Since any party has the right to use the mark for free, the Respondent has no reason to charge the Claimant for such huge amount of license fee. It is grossly unconscionable that the Claimant paid the Respondent more than RMB 6 million which shall be cancelled.

33. (3) Fraud: The Respondent had knowledge of the above said pre-existing third-party trademark registration at the time when the License Agreement was signed. The Respondent clearly knew that it had no exclusive trademark right or copyright in the products of Class 3. The Respondent even brazenly use trademarks in Class 35 and Class 41 in the License Agreement and used them as covers at the time of signature. Therefore, the Respondent took advantage of the Claimant's lack of knowledge in intellectual property area and their trust induced the Claimant to sign the License Agreement by using their trademarks in Class 35 and 41 as covers. These fraudulent acts shall be cancelled.

34. (4) Reasons for Invalidation: The reason for the invalidation is that the Respondent has no right to authorize B marks. The main purpose of the License Agreement is the Respondent authorized the Claimant to use B Marks on the products in Class 3, which is the only and sole purpose for the Claimant to sign the License Agreement. However, the Respondent has no "B" trademark in Class 3 or any other related trademarks since the signing date (March 2009) till the termination date (November 2012).

35. The Respondent has no right to authorize trademark license provided that they have no exclusive trademark rights. Anyone has the right to use B marks and any such authorization is without legal basis. Furthermore, the Respondent has no exclusive copyright for the wordmark B. The Respondent might argue based on the existed registered marks in the trademark Class 35 and Class 41. However, this argument is irrelevant as the Claimant is using the marks on the products in Class 3. The authorized other B Marks, player portraits etc. have never been used on any products. Therefore, the Respondent's authorization for use of B Marks to the Claimant without trademark right is legally invalid and shall be determined to be void.

36. In conclusion, the action of signing the License Agreement between the Parties is subject to cancellation and invalidation. The above License Agreement shall be deemed invalid *ab initio* according to the *Contract Law*, relevant rules and judicial interpretation, the Respondent shall return license fee the Claimant has paid and shall compensate the Claimant for all losses.

37. The Claimant therefore claims the following reliefs:

(1) Applies for the cancellation of the Retail Product License Agreement (March 2009) and its Amendment by and between the Claimant and the Respondent.

(2) Applies for the determination of the Retail Product License Agreement (March 2009) and its Amendment by and between Claimant and Respondent as invalid.

(3) The Respondent shall return the sum of more than RMB 6.8 million that the Claimant has paid for the license fee.

(4) The Respondent shall compensate the Claimant for the attorney's fee in the sum of approximately RMB 230,000, and the attorney's fee after the arbitration request in the sum of approximately RMB 2 million.

(5) The Respondent shall compensate the Claimant for the travelling and translation expenses related to this case. The Claimant has paid approximately RMB 50,000 for translation and RMB 35,000 for travelling expenses.

(6) The Respondent shall pay for the arbitration fee.

(7) The Claimant reserves the right to recover losses sustained as a result from the Respondent.

IV. RESPONDENT'S DEFENCE AND COUNTERCLAIM AND SUBMISSIONS

38. The Respondent files the statement of Defence and Counterclaim as follows: the Respondent admits CIETAC has the jurisdiction over this dispute as both Parties executed a binding License Agreement, as amended, that incorporates the Respondent's Standard Terms and Conditions (collectively referred to the "**Agreement**") in which the Parties agreed that all disputed arising out of the Agreement shall be resolved by CIETAC.

39. The Respondent is a member of a group of companies established by B, a preeminent men's professional sports league in the North America, to conduct all the league's business in Greater China. The Respondent was established in January 2008 to conduct B's business and help develop the game in China. China has more than 300 million fans and B is the most popular international professional sports league herein. B games are broadcast widely throughout China and are often the most highly rated

sports programming in their timeslots. There are more than five hundred unique B products available through B's retail network in China and on B's e-commerce platforms.

40. A central facet of the Respondent's business is permitting businesses to use B brand's popularity to promote and sell their products. This is done by licensing companies to use the names, logos, symbols, designations, emblems, colour combinations, designs, uniforms, identifications, labels, insignia, indicia, and trade dress of B as well as its teams (collectively referred to **B Marks**") in advertising and promotional campaigns. In some cases, the Respondent permits these partners to use B Marks to brand and sell products as B products.

41. The principals of the Claimant have years of experience with the practice of partnering with well-known brands to promote and sell products. The Claimant's principals sought out the Respondent so that they could build a business around selling B branded men's personal care products. Throughout the course of its relationship with the Respondent, the Claimant represents itself and acted as a sophisticated company engaged in the production, marketing and sale of men's skin and personal care products. As a demonstration of the success of this practice, two years after beginning to sell B branded men's care products as its principal product line, the Claimant successfully raised millions of dollars of investment from a well-known venture capital fund with extensive investment in China.

42. The founders of the Claimant were first introduced to the Respondent in September 2008 by two senior executives of China E Import and Export Co., Ltd. These were F and G who were senior executives of China H Maternal and Child Supplies International Trade Co., Ltd. ("**Company H**"), a subsidiary of Danish H International ApS, a well-known personal care products manufacturer. These two executives claimed to represent Company H and promoted their team as a highly experienced group that would successfully develop and market B brand men's personal care products in China (the "**Business**").

43. After months of negotiation the Respondent learned that instead of signing a contract with Company H, F and G's proposal was to sign the contract with Company C which was introduced as formed for the operation of Company H's men personal care product line.

44. The Respondent entered into the License Agreement with Company C shortly thereafter was informed another new company, i.e., Company A, had been established to operate the Business. With the Business already underway and given the time effort and expenses the Respondent had already incurred, the Respondent had little choice but to agree to this transfer. In June 2009, at the request of F and his colleagues and only two months after entering into the License Agreement, all parties to the License Agreement executed an amendment assigning all of Company C's rights and obligations under the License Agreement to the Claimant. References in this Defence and Counterclaim to the Claimant shall include Company C and the individual owners and founders of both Company C and the Claimant.

45. The License Agreement permitted the Claimant to produce Licensed Products and permitted the Claimant to market, promote and sell Licensed Products using B Marks and B's other intellectual property, including, but not limited to, B Player Attributes and, collectively with B Marks and B's other Intellectual Property in mainland China and Hong Kong. In return, the Claimant undertook several obligations, certain of which included:

    (1) making royalty payments on the Licensed Products sold under the License Agreement;

    (2) properly using B Marks within B guidelines designed to protect the value and effectiveness of B Marks;

    (3) foregoing development of a separate and independent brand or using "B" Intellectual Property to promote such a brand; and

    (4) providing bank guarantees to secure royalty payment obligations.

46. As described above, the License Agreement granted the Claimant the right to use B's Intellectual Property including more than 32 B Marks such as word mark B, B Player silhouette logo, and the names, primary and secondary marks of 32 B teams. The License Agreement was the result of extensive negotiations between the Respondent and the Claimant. In addition to negotiation of standard business terms, the Parties discussed at length exactly what B's Intellectual Property (e.g., B word mark, B logo, various other marks and logos, and B Player Attributes) would be licensed, the scope of that license, and how those marks could be used. As a result of these negotiations, they Claimant was aware of exactly what "B" Intellectual Property it had the right to use under the License Agreement and the relevant restrictions and limitation of those

rights. At the time the License Agreement was negotiated and signed, the registration status of B trademarks was also publicly available at the website http://sbcx.saic.gov.cn/trade_-e/ of the Trademark Office of State Administration of Industry and Commerce.

47. In particular, before entering into the License Agreement, the Claimant was aware or should have been aware that registration of B word mark had not yet been finalized in the international trademark classification that covers those products to be made under the License Agreement (Class 3). The Claimant was aware or should be aware that a third-party company, unaffiliated with B, had attempted to register the B word mark but not any other B Marks, in that category. The Claimant also was aware or should be aware that B was challenging this attempt through administrative proceedings before the China Trademark Office, and that this process, together with finalizing the registration of B Marks in Class 3 could take several years. It is important to note that it is not uncommon in China for a mark to be licensed, used extensively and protected before and during the process of trademark registration. During that period the owner of a mark has substantial rights under both Chinese law and international treaties notwithstanding the registration status of the mark.

48. Soon after executing the License Agreement, the Claimant began withholding payments and complaining about difficulties it claimed to be encountering in getting Licensed Products into retail outlets. In the spirit of cooperation, the Respondent repeatedly offered to assist the Claimant with any problems it may have been encountering. When pressed for details about where it was having problems and who the Respondent could contact to help address them, the Claimant stated that retailers had made inquiries seeking to clarify ownership of B Marks. Despite the Respondent's repeated requests for additional information, the Claimant failed to provide third party letters, notices, addresses, phone numbers or names that would have permitted the Respondent to provide confirmation of the rights that the Claimant enjoyed under the License Agreement. This type of confirmation is common in the Chinese market and something that the Respondent routinely does with other licensees.

49. Importantly, the Claimant never claimed that anyone challenged or threatened to challenge the validity of B Marks, B's ownership of B Marks or B's right to license and protect B Marks. In addition, notwithstanding its repeated complaints, the Claimant successfully sold Licensed Products into many of the largest retailers in China. The Claimant also made extensive and improper use of B brand for its own purposes in

violation of the License Agreement, loading its website and microblog with B Marks and B's branded promotions incorporating "B" into the name of its company, onto signage, on name cards and using B logos on its correspondence and emails. The Claimant's goal was to give the clear impression that it was not just a licensee but an affiliated company of B.

50. Once the Claimant had established vendor and retail relationships for the sale of B's branded Licensed Products, it filed a series of trademark applications for "I" mark and began to produce, market and sell Licensed Products under its own brand name of "I", also in violation of the License Agreement, using B Marks and B's Intellectual Property. The Claimant began selling those products side-by-side with B's branded Licensed Products and B's branded promotional materials and advertising.

51. The development of a separate brand is specifically addressed in the License Agreement. B Marks enhance the value of the brand they are associated with, any new brand developed by a licensee marketing use of B Marks becomes an extension of B's brand. Therefore, as a matter of fairness and under the License Agreement signed by both Parties, rights to that brand should necessarily remain with B. Specifically, the License Agreement requires the Claimant to transfer the rights to such a brand to the Respondent upon its request. However, when the Respondent requests the Claimant to adhere to its obligations and transfer the brand, the Claimant refused and notwithstanding the Respondent's demands, continued to use B's products. In fact, the Claimant continues to do so as of the date of this submission.

52. After making the first payment required under the License Agreement, the Claimant routinely withheld payments, making unsupported claims about difficulties associated with the registration status of B word mark. But as it was clear to B's personnel during discussion with the Claimant, its true purpose in withholding payments was to create leverage in order to renegotiate the terms of the License Agreement. In 2012, the Claimant completely stopped making the royalty payments required under the License Agreement.

53. More than two years of trying to accommodate the Claimant's unsupported concerns and in light of Claimant's continued payment delays and other breaches, the Respondent began a course of communication with the Claimant to confirm the Respondent's rights and to remind the Claimant of its obligations under the License Agreement to pay royalties, provide a bank guarantee and seek approval for its proposed use of B's Intellectual Property. There was frequent communication between the Parties from

August 2012 to the end of that year on the problems of failure to pay the royalties and breach of the License Agreement. On 31 October 2012, the Respondent wrote to the Claimant outlining the Claimant's continued material breaches and notifying it of the Respondent's termination of the License Agreement according to the relevant terms. Until the date of this submission (June 2013), the Claimant continues to make unauthorized use of B Marks.

54. The breaches of the License Agreement committed by the Claimant are listed as follows:

(1) sale of the Licensed Products that were not approved by the Respondent;

(2) use of B Marks to develop and promote its own independent brand "I";

(3) sale of the Licensed Products online through sites that were not approved by the Respondent;

(4) use of B Marks on its business cards, company signage and corporate letterhead, without the approval of the Respondent to give the impression that the Claimant was an affiliate of B;

(5) failure to provide a bank guarantee; and

(6) refusal, without justification, to make required royalty payments to the Respondent of approximately USD 970,000.

55. In response to these breaches and the Claimant's refusal to cooperate in reaching a mutually agreeable resolution, the Respondent was forced to terminate the License Agreement on 31 October 2012.

56. The License Agreement requires that, upon termination, the Claimant stop using any and all of B Marks and transfer to the Respondent the brands created and marketed using B's Intellectual Property. Despite repeated requests by the Respondent, the Claimant has refused to comply with its contractual obligations and transfer "I" brand to the Respondent. Moreover, contrary to the Claimant's own assurances that it is no longer using B Marks, as of 6 June 2013, the Claimant continues to actively sell B's branded products, use B's Intellectual Property to promote these products and use B's Intellectual Property to promote "I" brand and related products.

57. The Respondent denies each and every, all and singular, of the material charges and allegations contained in the Claimant's application for arbitration and demands strict proof thereof as required by the PRC laws.

58. As described above, the Respondent licenses a wide range of intellectual property rights in China, some of the most important of which are trademark rights. The Claimant licensed more than 32 B Marks under the terms of the License Agreement and has used most of those marks in one form or another. Under Chinese and international trademark laws, a trademark must actually be used in the category for which it is registered in order to maintain the registration. Therefore, B does not, as matter of course, maintain registration status for all B Marks across all trademark categories. Such an approach would not be legally practicable or feasible from a business perspective. Because of the popularity of B in China, it is not uncommon for unaffiliated third-party companies to attempt to register certain B Marks in international trademark classes in China in which those B Marks have not yet been registered.

59. B has successfully challenged such attempts to improperly register "B" Marks on numerous occasions including successfully challenging prior attempts to register the "B" word mark in the class at issue here, i.e., Class 3, based on the fame and well-recognized value of B brand. B has enjoyed similar success in the pending proceeding involving a third party's attempt to register "B" Mark in Class 3. The China Trademark Office has upheld B's challenge and, although appeals are ongoing, there is no basis to expect the decision will be reversed- especially in light of the fame of B brand and B's prior success in challenging improper registrations of B Marks. B also has previously worked closely with licensees and their suppliers to resolve any concerns related to B Marks raised by retail channels and local Administrations for Industry and Commerce.

60. It is important to note that under both PRC law and relevant international treaties, registration of a trademark merely enhances available rights and is not a prerequisite to having rights in the mark. The Respondent has maintained and continues to maintain rights in B Marks at issue at all times, regardless of attempts by third parties to improperly register certain B Marks. Even without registration, the Claimant was able to enjoy the goodwill and popularity associated with B brand through the use of B Marks.

61. The Claimant clearly received value from the License Agreement by using more than 32 B Marks it licensed on its products, business cards, company signage, website

advertisements and marketing materials. The Claimant's basketball themed men's product line called "I" was essentially created by associating the name of "I" and the existing word connotations with the sports, with B brand, the most famous sports brand in the world. Even without Class 3 registration, the Claimant was able to enjoy the good will and popularity associated with B brand, something the Claimant obviously believes is valuable as demonstrated by their continued use of B Marks and B's other Intellectual Property. Having received those benefits pursuant to the License Agreement, the Claimant cannot now ignore the obligations that were contained in the same agreement.

62. The Respondent considers that License Agreement is valid and not subject to cancellation. It states that the agreement was extensively negotiated by the Parties and the Respondent expended significant efforts in cooperation with the Claimant and assisting it in complying with its responsibilities under the License Agreement. The Claimant has not provided any legal basis under Article 52 of the *Contract Law* to support invalidation of the License Agreement. The Claimant was completely aware of its obligations under the License Agreement and accepted those obligations in exchange for the valuable benefits it received. The License Agreement is neither unfair nor invalid under the Chinese law.

63. The License Agreement is not subject to cancellation. The grounds that the Claimant alleges justify cancellation are factually incorrect, and even if they were correct, would not form a basis for cancellation under the *Contract Law*.

(1) There were no material mistakes in the negotiation, signing or practice of the License Agreement. The Parties were fully aware of and accepted the registration status of B Marks in Class 3 and, in any event, the Claimant's subjective beliefs regarding the meaning of the License Agreement cannot form a basis for material mistake under the Chinese law.

(2) The License Agreement is not "grossly unconscionable" under the Chinese law. The Claimant is a sophisticated company and its principals and management have extensive experience in the industry. It was fully able to understand the License Agreement that it negotiated and signed. The Respondent does in fact enjoy licensable trademark rights notwithstanding registration status.

(3) There was no fraud in the formation of the License Agreement. The Parties were fully aware or should have been aware of the registration status of the relevant

B Marks at the time the License Agreement was negotiated and signed. All of B Marks and relevant trademark classes included in the License Agreement were the result of the negotiations between the Parties.

64. The Claimant now seeks to invalidate the License Agreement in order to receive a better deal than it originally bargained for. That is inherently unfair.

65. The Respondent advances additional defences that the Claimant's claims should be barred by its own persistent, material and continuing breaches of the License Agreement, its failure to satisfy conditions precedent. The Claimant has failed to state any legal basis in Application for the Arbitration to support its claims against the Respondent and provided no legal basis whatsoever to support its claims. The Claimant already has received benefits through its use of B Marks and B's Intellectual Property and its association with B brand in excess of the amounts that it seeks to recover in this arbitration. The damages that the Claimant seeks would amount to an inappropriate windfall.

66. The Claimant's claims are barred by the License Agreement which is binding on the Claimant. According to the Standard Terms and Conditions incorporated in the License Agreement, neither party is liable to the other for "*indirect, incidental, consequential, special, or exemplary damages*". Further, "*neither party shall be liable to the other party for more than the aggregate amounts payable hereunder in the contract year in which the event giving rise to such liability occurred*". It is important to note that these limits do not apply to the Counterclaims the Respondent asserts of below as "*each party shall remain liable for the aggregate amount of any payment obligations owed to the other party under the provisions of this agreement*", and because these limits do not apply to the "unauthorized use of intellectual property".

67. Under the PRC law, a party is not allowed to delay pursuing its rights and then attempt to collect unwarranted damages. Article 55 of the *Contract Law* provides that "*The right to revoke a contract shall extinguish [if] a party having the right to revoke the contract fails to exercise the right within one year from the date that it knows or ought to know the revoking caused…*". Accordingly, the Claimant's claims for cancellation of the License Agreement are barred under the PRC law as the Claimant knew or should have known of facts that it alleges gave rise to a right to revoke the License Agreement more than one year before initiating the current arbitration.

68. Even if the Claimant could cancel the License Agreement, the remedy under the *Contract Law* is to return the Parties to the positions they would have been in if the License Agreement did not exist. This is not possible since the Claimant has been using and profiting from the use of B Marks for the past three years and continues to do so.

69. The Respondent makes the counterclaims as the Claimant breached the License Agreement by not paying royalties due. Paragraph E (2) of the License Agreement contains the minimum royalty payment owed by the Claimant. According to it the Claimant was required to pay (1) USD 350,000 by October 2011; and (2) USD 350,000 by April 2012 and a further USD 500,000 by October 2012. Recognizing its obligation to pay these royalties, the Claimant has already paid USD 230,000 to the Respondent (although even these payments were made late). However, the Claimant still owes USD 970,000 in unpaid royalties to the Respondent.

70. In addition to the non-payment of the royalties, the Respondent breached the License Agreement by failing to provide a bank guarantee as required by the License Agreement. The Claimant has engaged in the sale and marketing of unauthorized Licensed Products and continues to do so, has engaged in the sale of Licensed Products over the internet through websites that have not been approved by the Respondent and continues to do so and has made use of unapproved promotional materials for Licensed Products featuring B Marks and continues to do so in breach the License Agreement and infringing the rights of the Respondent. Without the approval from the Respondent, the Claimant breached the agreement by using B's Intellectual Property on its business materials (e.g., business cards, signage and letterhead) and distributed Licensed Products through unapproved third-party distributors.

71. The Claimant developed an independent brand named "I" by associating that brand with B Marks and B's other Intellectual Property and then refused to transfer "I" brand and all of its related marks to the Respondent in breach of the License Agreement. The Claimant continues to use B Marks to promote "I" brand, infringing the rights of the Respondent.

72. The Respondent requests damages for these unpaid royalties and the unauthorized use of B Marks and B's other Intellectual Property, as well as an order compelling the Claimant to stop the unauthorized use of B's Intellectual Property and to transfer "I" brand to the Respondent in accordance with the terms of the License Agreement.

73. The Respondent requests that the Claimant's claims be dismissed in their entirety and that the Tribunal award the Respondent, as against the Claimant, the following:

(1) payment in an amount of USD 970,000 for unpaid royalty fees accrued during the term of the License Agreement and due and owing to the Respondent plus interest in the amount of approximately USD 250,000 accrued as of February 2015;

(2) payment of damages, temporarily in the amount of RMB 3 million for the Claimant's breach of the License Agreement by its continued and unauthorized use of B Marks and B's other Intellectual Property on product packaging, product promotions, product marketing materials, websites, business cards, signage, corporate letter head and other business materials, plus interest in the amount of RMB 568,744.52 accrued as of 10 February 2015 ;

(3) Claimant be required to transfer "I" brand and its associated marks to the Respondent, as required by the License Agreement (Standard Terms and Conditions);

(4) that the Claimant cease its use of B Marks and B's other Intellectual Property, whether in connection with "I" brand or otherwise, including but not limited to use on product packaging, product promotions, product marketing materials, websites, business cards, signage, corporate letter head and other business materials;

(5) that the Claimant pay the Respondent's reasonable and necessary attorneys' fees including all travel and other expenses as specifically agreed in the License Agreement (Standard Terms and Conditions) in the amount of more than RMB 2,800,00 incurred as of February 2015 plus an additional RMB 200,000 in reasonable and necessary attorneys' fees incurred by the Respondent from February 2015 to date;

(6) the arbitration fees, costs and expenses be borne by the Claimant; and

(7) such other and further relief to which the Respondent is justly entitled.

V. CLAIMANT'S DEFENCE TO COUNTERCLAIM

74. The Claimant makes its defence to the counterclaim by clarifying that it has not had years of experience in partnering with well-known brands to promote and sell

products. Before the cooperation with the Respondent, the principal of the Claimant has neither cooperated nor dealt with any brand licensing company, nor has it held a position in any enterprise engaged in the manufacturing of licensed products. On the contrary, the Respondent is very experienced in brand licensing and its core business is to license "B" brand to other companies for profit.

75. The Claimant denies it has successfully raised venture capital investment mainly because of the cooperation with the Respondent. It explains that it has its own departments for research and development, sales management, production management and quality control system and is independent in the research and development, design, raw material procurement, manufacturing and sales of all of its products. Before cooperation with the Respondent, the Claimant as a co-founder had established Company H which obtained investment from two venture capital in 2007 and 2009 respectively. The Claimant was able to get venture capital investment purely as a result of its own management and operation capability and good quality of its principal and team members, who are definitely irrelevant to the cooperation with the Respondent.

76. The Claimant states they knew J, the head of the licensing department of the Respondent who persuaded F and G to sign the License Agreement because his job performance may be affected by the project suspension (the original China E Import and Export Co., Ltd. did not agree to the cooperation with the Respondent) since the License Agreement had been submitted for the approval in US headquarter. Then the Claimant was forced to change its role from investor to project manager and executor. The Claimant had no choice but sign the License Agreement in the name of Company C in the face of such tight schedule. The Claimant specially mentions that although the License Agreement was signed in March 2009, but the royalty fee was paid as early as September 2008 since the Respondent explained that it had to meet its certain fiscal year requirement.

77. Referring to the Respondent's claim that the Claimant was aware or should be aware that the registration of B word mark had not yet been finalized in the international trademark classification that covers the products to be made under the License Agreement, the Claimant considers it is an inevitable causal relationship with the Respondent's misleading and fraud acts. First, the Respondent failed to inform the Claimant of the fact that it has been unauthorized to dispose of B word mark in Class 3. It even deliberately concealed the fact and misled the Claimant. It is expressly

provided in the License Agreement that the Licensee has the right and obligation to manufacture, sell, market, advertise and promote the Licensed Products and all of which are in Class 3 of China's trademark registration system. The Claimant was informed by its attorney that China D Advertising Trading Co., Ltd. Applied and registered "B" as its trademark in Class 3 in October 2003 with the registration number 37xxxx6. The applications made by the Respondent for the registration of two trademarks in Class 3 (numbers 44xxxx4 and 64xxxx5) are most relevant to the subject dispute hereunder were rejected. The Respondent was fully aware but deliberately concealed the fact mentioned above to push the License Agreement to be entered into by the Parties. When the truth came to light, the Respondent has kept covering up the fact with various excuses and tried to mislead the Claimant in order to make profits continually without authorization.

78. Secondly, the Respondent deliberately attached copies of its trademark registration certificates in Class 35 and Class 41 to prove its trademark rights. It purposely misled the Claimant by seemingly showing that the Respondent owns the rights of B word trademark without defects in relevant products in the PRC when signing the License Agreement.

79. Thirdly, according to Article A3 of the License Agreement, the licensed logo shall include not only B word mark but also the Member Team Logos (more than 32 B marks). None of these marks and logos claimed by the Respondent is B word mark in Class 3 that the Claimant looked for. The Claimant only used the B Member Teams logo on 4 perfume products accounting for only 0.25% of its overall sale during the cooperation. The Respondent was fully aware of fact that B word mark is the real purpose behind the execution and fulfilment of the License Agreement. The Respondent has concealed the fact that it is unauthorized to use Class 3 trademark by conducting under the disguise of bundle licensing.

80. With respect to the claim the Respondent made that the Claimant has not affected in operation notwithstanding its repeated complaints on the Class 3 trademark issue, the Claimant submits that the Respondent made a hasty generalization and ignored the efforts made by the Claimant. The Claimant successfully sold its licensed products into many retailers mainly because of the work the Claimant made with these retailers for years and trusted each other.

81. Referring to the invalidity and cancellation of the License Agreement, the Claimant has sufficient legal and factual basis. It is grossly unconscionable and shall be

cancelled. According to Article 72 of the *Opinion of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of PRC*, "*if one of the parties uses the advantage or the lack of experience of the other party to make that the rights and obligations of the both sides are obviously in violation of the principle of fairness and equal value, it shall be regarded as unfair*". In this case, the License Agreement has neither reflected the principles of fairness and equal value, nor has balanced the rights and obligations of both Parties. The Respondent mentions the Claimant has taken advantage of the reputation of B Marks in exchange for the valuable benefits it received. But the fact is the Respondent took advantage of the Claimant's lack of experience in brand licensing. The Claimant has not received valuable benefits from the reputation of the licensed logo but made every effort to enhance the popularity of B Marks in the licensed product territory and paid expensive royalty fees to maintain the unfair contractual relationship.

82. The inequality of the rights and obligation under the License Agreement are mainly as follows: firstly, B Marks do not enjoy the popularity relevant to its contract value in the licensed product territory; secondly, the Claimant had to promote B Marks in the licensed product territory while paying expensive royalty fees.

83. B Marks do not necessarily have popularity in Class 3 trademark based on the case-by-case review principle. The principle generally applies in administrative review and judicial review which provides for that any trademark review should be made in this way rather than by analogy. B enjoys its popularity as a famous sports event in the US but has never licensed others to manufacture or sell similar products in mainland China before licensing the Claimant to do so. Based on the reviewing principle mentioned above, it is no means reasonable by making a horizontal analogy of the popularity of B word logo in the sports game field and the licensed product territory. The Respondent always emphasized the high popularity which is valuable to the manufacturing and sales of the licensed products of the Claimant, but it does not comply with the review principle for trademark. Therefore, the Respondent do not have the popularity in Class 3 relevant to the contract value under the License Agreement.

84. Based on the full trust in the Respondent, the Claimant has still spared effort, mentally and physically, to promote B Marks in the licensed products territory. The result is the Claimant suffered big losses during the cooperation with the Respondent. The Claimant has not received relevant consideration by paying royalty fee and the Respondent has not paid any contract consideration in exchange. Thus, pursuant to

Article 54 of the *Contract Law*, the License Agreement is grossly unconscionable due to its inequality in rights and obligations and shall be cancelled.

85. Pursuant to Article 68 of the *Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC*, "*one of the parties notifies the other party the fake information or conceal the truth intentionally, causing the other party make wrong decisions, it shall be deemed a fraud*". The Respondent committed the following fraudulent acts: concealed the fact that B word mark is not registered in Class 3; concealed the fact that B word mark was registered by the third party and is under dispute; confused the Claimant through bundled licensing, and induced the Claimant to sign the License Agreement in exchange for the knowingly complete and defect-free trademark title of B word logo in the Licensed Products (class 3). Therefore, pursuant to Article 54 of the *Contract Law*, the License Agreement shall be cancelled due to the fraud of the Respondent.

86. The Claimant states that the License Agreement shall be cancelled as it was formed based on gross misunderstanding. According to Article 71 of the Opinion of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law Of PRC, "*the consequences of the an actor's behaviour conflicts with its intention due to misunderstanding of the nature of behaviour, the other party or the type of the subject matter, quality, specification and quantity of the mistakes, and thereby causing big losses, it shall be deemed a gross misunderstanding*". As mentioned above, the Claimant reasonably understood that the licensed logo territory under the License Agreement shall be the trademark covering B Marks under the category of the licensed product. As the licensed logo is an important subject matter and the Claimant has suffered losses due to such trademark issue. Therefore, pursuant to Article 54 of the *Contract Law*, the License Agreement shall be cancelled due to gross misunderstanding.

87. The Respondent states that the right of the Claimant to pursue its rights has extinguished due to the expiration of scheduled period but failed to provide proof to support its statement.

88. As the License Agreement is invalid, the Respondent has no right to dispose B word mark. Pursuant to Article 51 of the *Contract Law*, "*where a person having no right to disposal of property disposes of other persons' properties, and the principal ratifies the act afterwards or the person without power of disposal has obtained the power after concluding a contract, the contract shall be valid*". The Respondent has remained

unauthorized in disposing of B word mark in Class 3. From the date of the License Agreement, i.e., March 2009, to the date of termination of the License Agreement, i.e., November 2012, the Respondent did not own B word logo in Class 3 and relevant registered trademarks. During the period, the Respondent's applications of relevant trademarks were rejected by China Trademark Office. This means the Respondent was not entitled to dispose B word mark and logo in Class 3. Thus, the License Agreement shall be declared invalid.

89. In respect to the Respondent's statement that the Claimant's claim shall be subject to the Standard Terms and Conditions but the request of the Claimant to return the royalty fees and reserves the right to recover losses from the Respondent is irrelevant to this paragraph. Pursuant to Article 56 and Article 38 of the *Contract Law*, "*A contract is null and void or revoked shall be not legally binding ab initio", and "The property acquired as a result of a contract shall be returned after the contract is confirmed to be null and void or has been revoked*". The Claimant claims for return of the royalty fees that it has paid based on its right to request for returning improper gain rather than claim for damages, and it shall not be subject to the Standard Terms and Conditions.

90. The Claimant notes the amount of royalty fee, USD 970,000, claimed by the Respondent is calculated with no factual basis. As stated in the application and this statement, the License Agreement shall be cancelled or declared void. No royalty shall be required to be paid by the Claimant and the royalty fee paid shall be return to the Claimant. As the royalty fee paid from August 2008 and the Claimant has fully paid the royalty fee for 2008, 2009 and 2010. Since the dispute arose, the Claimant notified the Respondent in writing that the Claimant had stopped all manufacturing activities of the products with B Marks since June 2012. Therefore, the Respondent has no right to claim for the royalty fee for 2012, i.e., USD 50,000.

91. For the 4th year of the cooperation March 2011, due to the suspension of B commercial games, the Respondent offered to reduce the royalty fee from USD 700,000 to USD 320,000 for the 4th year upon the mutual consultation and agreement through email. The Claimant has paid USD 230,000 for 2011 and has a balance of USD 90,000. Therefore, the amount claimed by the Respondent in the counterclaim conflicts with the royalty fee agreed by the Parties upon adjustment.

Cooperation year	Original contract amount	New contract amount	Paid amount	Unpaid amount

1st year 2008.10.1 -2009.9.30	USD 150,000	--------	USD 150,000	------
2nd year 2009.10.1 -2010.9.30	USD 200,000	------	USD 200,000	------
3rd year 2010.10.1 -2011.9.30	USD 400,000	------	USD 400,000	------
4th year 2011.10.1 -2012.9.30	USD 700,000	USD 320,000	USD 230,000	USD 90,000

92. Referring to the alleged failure to provide the bank guarantee, the reason is the Respondent only accepted the bank guarantee issued by K Bank. The Claimant had provided a bank guarantee issued by L Bank but the Respondent refused to accept it. Since the License Agreement did not expressly provide the bank guarantee should be issued by K Bank, the refusal made by the Respondent was unpredictable to the Claimant. The Claimant has endeavoured to fulfil its obligations to provide a bank guarantee from L Bank, there was no reason for the Respondent to refuse it by requiring a guarantee only from K Bank. In fact, the License Agreement has been performed normally for 3 years in the absence of bank guarantee. Therefore, the statute of limitation for the Respondent to make a claim has exceeded two years.

93. The Claimant rejects the claim of breach of contract and infringement of intellectual property. The Respondent is entitled to claim that the Claimant has either breached the contract or infringed the rights of the Respondent, rather than both of them. The Claimant refuses to the claim of Respondent the Claimant has engaged in the sale and marketing of unauthorized licensed products, the sale of licensed products over the internet through unapproved websites and continued to do so infringing the Respondent's rights. The Respondent has not expressly provided for non-licensed products and evidence it submitted point to the products with "I" logo. The production and sales of the products with "I" logo were approved by the Respondent. After the Claimant started to manufacture and ship the products with "I" logo, the Respondent changed its position by requiring the Claimant not to design the package in the email in April 2012. The sale evidence provided by the Respondent regarding the products using "I" and "B" logos only reflect the inventory digestion of distributors and the resale of the products after being freely circulated into the internet. This is not the direct sales made by the Claimant and is an inevitable process for the product digestion after sales. Pursuant to the principle of exhaustion of trademark rights, the trademark holder is not allowed to interfere further circulation of the products after

lawful launch into the market. The Claimant has not breached the License Agreement nor has infringed the rights of the Respondent in relation to "I" trademark. In addition, the sales of products through internet were approved by the Respondent and agreed by the Parties through emails.

94. Referring to the claim about using B Marks on the Claimant's business materials without approval from the Respondent, the Claimant considers that there is no specific requirement regarding these details and immediately modified as notified by the Respondent.

95. The Claimant has informed the Respondent in writing that it had stopped all manufacturing activities of the products with B Marks since June 2012 and ceased to use all B Marks since August 2012. The Claimant provides relevant photos and videos to prove that it has destroyed relevant inventories. Those submitted by the Respondent only reflect the products been freely circulated into the market before the cancellation of the License Agreement rather than the result of the current sales by the Claimant.

96. Referring to "I" band, the Claimant submits that "I" brand has nothing to do with the Respondent and Claimant has no obligation to cease using and transfer it. Firstly, the transfer requirement is based on the Terms and Conditions which is prepared by the Respondent for repeated use, i.e., standard terms and not negotiated with the Claimant during the formation of the License Agreement. Pursuant to Article 39 of the *Contract Law*, "*where standard terms are adopted in concluding a contract, the party supplying the standard terms shall define the rights and obligations between the parties abiding by the principle of fairness…*". With reference to the fraud made by the Respondent in terms of B logo in Class 3, the Respondent has never mentioned its inherent defects of trademark right but required the Claimant to transfer "I" trademark and all intellectual property rights thereto under the forgoing standard terms. Such terms are obviously unequal. Pursuant to Article 40 of the *Contract Law*, if the party who supplies the standard terms exempts itself from its liabilities, increases the liabilities of the other party, and deprives the material rights of the other party, the terms shall be invalid. The term of transfer could not be the basis for the Respondent's claims for the "I" trademark transfer.

97. Even if the terms are valid, "I" trademark has no connection with B Marks in actual use. Given that the manufacturing and sales of "I" series products was approved but later refused by the Respondent, the manufacturing and sale of the products containing "I" and "B" logos only lasted for a very short period and the relevant sales only

accounted for a tiny portion of the overall turnover. Under these circumstances, it is not likely for "I" trademark to establish any connection with the B logo and achieve promotional purpose.

98. "I" trademark has no correlation with B or B Marks as it has literally different meaning in English. "I" trademark in Class 3 was designed by Mr. N who is a Japanese designer influenced by a Japanese manga and has maintained a good relationship with the Claimant. The Claimant does not want to associate "I" logo with B Marks nor creating such correlation. As stated previously, the Respondent enjoys a good reputation only limited to the sports arena but no corresponding value in Class 3 territory while skin care products industry concentrates more on the company's R&D background and products capability. The Respondent neither has any R&D institutions focus on skin care products nor has it engaged in the cosmetics industry. Thus, B logo enjoys no popularity in cosmetics industry that is worth reliance.

99. Since the License Agreement has not provided the details of the transfer, even "I" trademark shall be transferred, the price of the transfer is necessary to be agreed by the Parties. The Claimant is willing to transfer "I" trademark at a price agreed.

100. About the claim for the USD 970,000 royalty fee, the Claimant considers the amount calculated without factual basis. The Claimant shall not be required to pay the additional royalty fee, but the Respondent shall return the royalty fee already paid. The RMB 500,000 damage compensation claim shall be dismissed as the Respondent failed to provide relevant evidence to support its claim.

101. The Claimant states that it had stopped all manufacturing activities of the products with B Marks since June 2012 and ceased to use all B Marks since August 2012. Since "I" trademark has no connection with the Respondent, when the use of B Marks is suspended, the Claimant has neither obligation to cease to use and transfer "I" trademark nor the obligation to provide the Respondent monetary compensation equal to the value of "I" trademark. The Claimant refuses to pay the Respondent any pre-award and post-award interest, arbitration fees, costs and expenses, reasonable and necessary attorneys' fees since the Respondent failed to state any legal basis whatsoever to support its claims. In conclusion, the Claimant requires to reject each and every, all and singular counterclaims of the Respondent and support the Claimant's claim.

Respondent's Reply to the Defence to Counterclaim

102. The Respondent denies the Claimant's contentious that it had no experience in brand licensing. The Claimant's principals were sophisticated businessmen with years of experience in building and developing licensed products in China. It has numerous occasions, before and after the License Agreement was executed, provided the Respondent with material highlighting their experience and expertise in dealing with licensed products.

103. The Claimant confirms that it was part of team considering together with China E Import and Export Co., Ltd. in business develop, products and sell B's branded men's care products. It proved the Claimant be involved earliest discussion about all aspects of this opportunity. At that time the trademark status of B Marks had been discussed extensively. The Claimant had or shall have had a complete understanding of the status of B Marks well before the negotiation and signed the License Agreement. The Respondent has not withheld or concealed in any way the status of its Class 3 trademark registration.

104. The trademark Class 3 registration status is a matter of public record and easily accessible to the general public. The Claimant would be expected to have knowledge of this information. The Claimant was well aware of the registration status of B Marks in Class 3 from the very first time when the Claimant and its lawyers began to negotiate the License Agreement and at every subsequent occasion over the past four years since the Claimant complained about the trademark registration.

105. Referring to the third party had registered the "B" trademark in Class 3, it is not and has never been the case. A third party submitted an application to register a mark in Class 3, but the registration has never been issued. The Respondent successfully opposed the third-party application to register "B" trademark in Class 3. A decision on the third party's appeal of this ruling is pending. It is widely known that under the Chinese law a mark is not regarded as a registered trademark until a final registration certificate is issued.

106. It is a well-established principle of law in China that a business mark can be licensed to anyone willing to enter into a license agreement. The more broadly the business mark has been used and is recognized, the greater the value and greater protection that attaches to it. A mark that has become a famous brand in China receives additional protection under the PRC law. Registration a trademark is not required in order to

permit a third party to use business marks and the holder of the mark to claim rights and protect its rights in the marks.

107. Despite the Claimant's complaints that it was unable to sell B's Licensed Products due to the lack of Class 3 registration, the Claimant admits that it successfully sold Licensed Products into many large retailers. The Claimant has never provided credible evidence to show it was unable to sell product as a result of the Class 3 registration status or that anyone has ever challenged B's rights in the marks.

108. Referring to the unfairness of the License Agreement and no benefit obtained from the operation claimed by the Claimant, the Respondent considers the License Agreement was extensively negotiated by the Parties. The Claimant had input from its counsel and full knowledge of the Class 3 trademark registration status. The License Agreement fully reflects the Claimant's bargained-for agreement. It is neither unfair nor unconscionable.

109. B brand is widely known and throughout the world. The Respondent expends vast sums to operate the B league, product broadcasts that are seen throughout China, and stage events and other activities within China that promote the brand. The Claimant approached and sought a license from the Respondent. The Claimant made extensive use of B Marks, logos, team logos, B Player Attributes and trade name on its product, website, e-commerce platforms, promotional materials, and business materials and exploited the brand goodwill, recognition and popularity of B. The Claimant received multiple capital injections from prominent venture capital investors as a result of the License Agreement. The Claimant created an independent brand using B Marks and other intellectual property. The Claimant refused to pay royalties since 2011. It is the Claimant not the Respondent who has benefited from the License.

110. The Claimant's contention that B is not popular in Class 3 is unsupported by evidence and contradicts Claimant's admitted success in selling B Licensed Products in Class 3. The "B" marks have been repeatedly recognized as well-known marks by the Chinese Trademark Office in categories in which B has registered and unregistered marks. B Marks have already been recognized as well-known with respect to Class 3. In 2005, B successfully opposed a third-party application to register its mark in Class 3 citing that B Mark was a well-known mark in China and that the registration of B Mark by a third party in Class 3 could mislead consumers into believing that B was the true source of the product.

111. The Parties discussed the modification of the royalties in 2012, but the discussion formed part of series of attempts to resolve a wide range of issues, including but not limited to Claimant's failure to make payments and create leverage to entice the Respondent to agree to a longer-term license. No final agreement was reached to amend the License Agreement.

112. The Respondent rejects the interpretation of the *Contract Law* with respect to standard terms. The License Agreement was extensively negotiated in good faith in accordance with the principles of fairness and equal benefit by experienced businesspersons who were represented by legal counsel. All terms and conditions of the License Agreement are fair, appropriate and reflect the Parties' bargained-for agreement.

113. The Claimant's contention that "I" has no connection with B Marks is simply unbelievable. It is generally known, the literature meaning of the word "I" is a signature action of B Players. It can be no coincidence that Claimant launched the "I" brand extensively using B Marks, logos, team logos, B Player Attributes and trade names on product packaging and other promotional materials. There is no doubt that the Claimant intended to associate "I" brand with B in order to enhance the value of "I" brand.

VI. OPINION OF THE ARBITRAL TRIBUNAL

114. The Arbitral Tribunal has reviewed the statements, replies and all the evidence submitted by the Parties. The arguments of both Parties in the hearing and after hearing statement have been considered as well. Based on the foregoing, the Tribunal sets out below its opinion and findings on the disputes between the parties.

A. The Applicable Law and the Effect of the Agreement

115. The Tribunal found that the License Agreement had been formally signed and actually implemented by the Parties in March 2009 and an amendment had been made in June 2009 to change the Licensee from Company C to the Claimant in this case.

116. The Parties agreed in the Paragraph (Arbitration) of the Respondent's Standard Terms and Conditions that "*all disputes arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity, or termination shall be referred to and finally resolved by arbitration conducted in accordance with*

the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules".

117. In the Paragraph (Governing Law), the Parties agree this Agreement shall be construed in accordance with the laws of the PRC without regard to its principles of conflicts of laws.

118. In the License Agreement, the Parties agreed the licensee was authorized to make commercial use of certain current names, logos, symbols, designations, emblems, colour combinations, designs, uniforms, identifications, labels, insignia, indicia and trade address thereof ("Marks") of "a certain sports association" ("B") and its member teams in combination with B Player Attributes. The Respondent grants to the Claimant the non-exclusive right and license to use the primary and secondary logos of Member Teams, B logo and B Marks and Licensed Marks and/or the Licensed Marks in combination with B Player Attributes in accordance with the terms of this Agreement, in either case solely in connection with the manufacture, distribution, advertisement, promotion and sale of products in the list of Licensed Products set in the License Agreement.

119. The Licensed Products would be aftershave lotion, body wash, conditioner, deodorant/antiperspirant, eau de toilette, face wash, hair gel, shampoo, shower gel, skin care, soap and sunscreen. The Claimant shall have the right to manufacture, distribute, sell, advertise and promote the Licensed Products. The Licensed Products shall be manufactured, distributed, advertised and sold under the Claimant owned labels only, subject to the prior written approval of the Respondent in each instance. The Licensed Products shall be either B identified featuring "B" logo with B word mark only, and/or the Team identified featuring a minimum number of 6 Member Teams as per condition release approved in advance in writing by the Respondent in its sole discretion. The Member Team logos licensed shall include without limitation the coloured logos set forth in the License Agreement. The Claimant shall have the right to create additional packaging sleeves, featuring B Player Attributes for the Licensed Products subject to the prior written approval of the Respondent in accordance with the Standard Terms of the Licensed Agreement.

120. The Tribunal has considered the Claimant's claim for rescission and invalidity of the License Agreement. The grounds relied on by the Claimant are: its inexperience in the negotiation of the license, the urgency of signing the License Agreement, the Respondent's intentional concealment of the actual fact that the licensed products in

Class 3 have not been registered in China. So according to Article 54 of the *Contract Law*, the License Agreement shall be subject to rescinded for fraud, material mistake or gross unconscionability.

121. The Tribunal sets out Article 54 of the *Contract Law*, which reads: "*Contract Subject to Amendment or Cancellation: Each of the parties may petition the People's Court or an arbitration institution for amendment or cancellation of a contract if (i) the contract was concluded due to a material mistake; (ii) the contract was grossly unconscionable at the time of its conclusion. If a party induced the other party to enter into a contract against its true intention by fraud or duress, or by taking advantage of the other party's hardship, the aggrieved party is entitled to petition the people's court or an arbitration institution for amendment or cancellation of the contract*."

122. Although the Claimant in its statement repeatedly mentioned about the fraud and gross unconscionability in the signature of the License Agreement, the Tribunal is not persuaded by the evidence provided herein, for these reasons: (1) the Claimant should know clearly when it negotiated with the Respondent on the license rights it is a business involving the knowledge of license, intellectual property protection, legal rights registration, etc. No excuses should be considered for the inexperience in business, lack of knowledge, negligence or no legal or financial due diligence which leads to failure of reaching the goal set by itself. In any event, the Tribunal could hardly be persuaded to believe the persons representing the Claimant in the contractual negotiations lacked business experience. They were then Executives of H, an established European personal care manufacturer. (2) Fraud is a very serious allegation in a business transaction and accordingly requires a much higher standard of proof. In this case, the fraud alleged by the Claimant is concealment by the Respondent of the registration situation during the negotiation about the license. It was submitted that the Respondent should disclose all the information relevant to the license, especially such an important fact. However, it is a long stretch to equate any passiveness (in terms of disclosure) on the part of the Respondent as fraud, since the information about the registration is public information and is easily found and checked by the public. But this omission to disclose is considered by the Tribunal as a certain responsibility which the Respondent should bear in the dispute. (3) As to the ground of gross unconscionability, it is difficult to find gross unconscionability in a contract simply by tallying the benefits and profits the Parties gained in the transaction. Unconscionability has to be much more than that. There is little or no

evidence submitted to prove the unfair fact that the Respondent took advantage of the Claimant by forcing the Claimant to enter into an agreement with it, paying royalty fees, promoting the licensed products but suffered losses. Considering the above mentioned in the License Agreement, the Tribunal finds at least that B Marks had been extensively used by the Claimant during the existence of the License Agreement, without any adverse consequences notwithstanding its claim that the products are not registered under Trademark Class 3. The result of the usage is hard to judge since the situation in the performance was made by the Claimant and the Respondent.

123. Article 55 of the *Contract Law* provides: "*Extinguishment of Cancellation Right: A party's cancellation right is extinguished in any of the following circumstances: (i) it fails to exercise the cancellation right within one year, commencing on the date when the party knew or should have known the cause for the cancellation;…*". The Tribunal checked the chronology of the implementation of the License Agreement and found that the Claimant should be aware of the trademark registration status of B Marks in Class 3 at least in January 2010 when the Claimant provided one retailer with B's Class 35 and 41 trademark registration certificates which had been rejected because they did expressly cover products in the Class 3 apart from the claims made by the Respondent that the Claimant was aware or should be aware since 2008 when the Parties involved in the negotiation for "B" men's personal care license until the end of October 2012 when the Respondent terminated the License Agreement. No action was taken by the Claimant to cancel the License Agreement by the reasons claimed. So it is difficult for the Tribunal to support the claim to apply Article 55 of *Contract Law* hereby.

124. The Tribunal does not admit the allegation of the Claimant that the License Agreement was signed as the Claimant was induced by the Respondent with fraud. The Parties did negotiate the terms and purpose of the License Agreement and knew clearly what the other party wanted.

125. Based on the above-mentioned evidence and the statements made by both Parties, the Arbitral Tribunal therefore comes to the following conclusions:

(1) The Claimant and the Respondent did discuss about B's Licensed Products with B Marks, trademark and word marks before the Parties signed the License Agreement to get the license authorization from the Respondent. There is no evidence to explicitly show the actual Class numbers disapproval although the

Claimant who considered, based on its own knowledge of the licensed products, would have known the authorized licensed products that are registered in China.

(2) There are no terms or provisions in the License Agreement indicating that the existence of License Agreement should be conditional upon all the licensed products being registered in China. Since the Claimant did not do its due diligence investigation on the status of the licensed products authorized by the Respondent when signing the License Agreement, it should be responsible for its omission to check on this very important fact as it claims in this transaction.

(3) The period agreed by the Parties for the License Agreement is five years while the term for the Parties actually had already performed is around four years before the License Agreement had been terminated. The License Agreement was deemed valid, and the Parties been bound by the terms of the License Agreement until the dispute arose between the Parties.

126. There is little evidence submitted to the Tribunal to prove that the Claimant had ever challenged the effectiveness of the License Agreement, except for the belated unilateral claim the Claimant that it is unfair and signed by been induced by fraud on the part of the Respondent. Therefore, the Tribunal recognizes and considers the License Agreement had been duly signed by the Parties and sealed with the companies' stamps. The Parties agreed that the License Agreement should be governed by the PRC law. The evidence submitted show that negotiation had been made and the Parties signed the License Agreement with their sincerity and true meaning respectively. And the License Agreement had been performed normally for a period about 4 years. Based on the situation found during the hearing and the evidence submitted by the Claimant and the Respondent, the Arbitral Tribunal deems that the License Agreement have been duly effective, valid and the arbitration of this case could be made based on the License Agreement.

127. The Tribunal notes that the Respondent claims for the outstanding royalty payment of around USD 97,000 and makes the following findings in respect of the royalty.

Contract year	Amount due	Payment Due Date	Amount paid (approximately)	Amount Outstanding
1st contract year	75,000	06.2009	75,000	(100)
(06.2009 - 09.30.2009)	75,000	04.01.2009	75,100	

2nd contract year (01.10.2009 -09.30.2010)	100,000 100,000	01.10.2009 04.01.2010	199,990	(10)
3rd contract year (01.10.2010 -09.30.2011)	200,000 200,000	01.10.2010 01.04.2011	199,900	100
4th contract year (01.10.2011-30.09.2012)	350,000 350,000	11.2011	230,000	120,000 350,000
5th contract year (01.10.2012 -30.09.2013)	500,000	01.10.2012		500,000
Total Outstanding Amount				970,000

128. The Parties do not deny the calculation of the royalty payment amount, but there is a dispute whether the royalty payment for the 4th contract year from USD 700,000 reduced to USD 320,000. The Claimant alleges there is an email evidencing such agreement of reduction for the reason due to the suspension of B's commercial games. The Respondent explains that in or around October 2010, the Claimant approached the Respondent for extension of the term of Licensed Agreement until 30 September 2019 with an option to renew until 31 September 2031 and expanding the scope of the License to convert personal products for women and children. The Claimant proposed to lower the annual amount of royalty and media fees in early contract years. The Claimant contends that in June 2011, the Parties agreed to enter the Second Amendment to the Licensed Agreement attached to its Defence to the Respondent's Counterclaim. According to the Second Amendment, as part of the negotiations for a substantial long-term agreement, the Parties discussed reducing the amount of royalties and media fees due in the Fourth Contract Year from USD 700,000 to USD 320,000. But the Respondent insists the Second Amendment was never executed.

129. The Tribunal notes the Parties' statements and finds no definite agreement had been reached for the Respondent to reduce the royalty amount provided in the Licensed Agreement for the 4th contract year. However, the Tribunal notes that the Respondent had unilaterally terminated the Licensed Agreement on 31 October 2012 by writing to notify the Claimant of the Respondent's termination of the License Agreement for the Claimant's continued material breaches of contract. According to relevant PRC law, the termination of a contract means the rights and obligations of contract had been terminated and the contract should not be performed by the Parties involved into the contract. The action taken by the Respondent to terminate the Licensed Agreement is akin to rescinding the contract. In this case, if a contract has not yet been performed, its performance shall terminate upon rescission. If it has been performed, a party

to the contract may, in light of the performance and the character of the contract, request that original status be restored or other remedial measures and compensation to losses be taken. The Respondent's claim for the Claimant to make a further royalty payment after the date of termination it declared but not a compensation for the losses it suffered has no legal basis.

130. Referring to the Respondent's request for compensation of the infringement made by the Claimant to the Intellectual Property, the Tribunal notes several claims made by the Respondent. The Respondent states the Claimant engaged in the sale and marketing of unauthorized Licensed Products in breach the Licensed Agreement and infringed the rights of the Respondent, made use of unapproved promotional materials for Licensed Products featuring "B" Marks in breach of Paragraph […] of the Standard Terms and Conditions infringing the rights of the Respondent, used B's intellectual property on the Claimant's business materials without approval infringing the rights of the Respondent, distributed Licensed Products through unapproved third party distributors, and developed an independent brand "I" by associating the brand with B Marks and B's other Intellectual Property and refused to transfer the brand with all its related marks to the Respondent in breach of the Licensed Agreement infringing the rights of the Respondent.

131. According to the *PRC Contract Law*, in case the breach of contract by one party infringes upon the other party's personal or property rights, the aggrieved party shall be entitled to choose to claim the assumption by the violating and infringing party of liabilities for breach of contract according to this Law, or to claim the assumption by the violating and infringing party of liabilities for infringement according to other laws. In this case, the liability of breach of contract and Intellectual Property infringement claimed by the Respondent has become a concurrent liability. When exercising the right of claim in civil dispute, the Respondent should choose based on which ground, breach of contract or infringement, it launches its counterclaim. In the statement made by the Respondent, the Tribunal finds the claims made had been fully combined and some contradicted with each other.

132. For example, in the post-hearing submission, the Respondent states that for purposes of simplicity, the Respondent is prepared to limit its claims to damages of RMB 3 million. This amount reflects a statutory measure of damages that is permitted under Article 63 of the *PRC Trademark Law* for the unauthorized use of marks by a third party, similar to those conducted by Dream Team (the Claimant). This measure is

used as a means to simplify the determination of damages in complex circumstances. For the avoidance of doubt, the Respondent's claims are contract claims based on Company A's breach of contract not on a breach of the Trademark Law. The RMB 3 million is used in this case for convenience and to limit the need for further time spent analysing actual damages.

133. If the Respondent's claim is for the compensation due to the Claimant's breach of contract, it should make the claim and calculate the compensation to its losses based on the provisions of the *Contract Law* but not the Trademark Law on which the damages are claimed based on infringement. According to the *Contract Law*, where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract, the party shall bear such liabilities for breach of contract as to continue to perform its obligations, to take remedial measures, or to compensate for losses. Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract and causes losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, but not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concluded the contract.

134. This clearly shows that in claims based on breach of contract, the compensation for losses should be calculated carefully and equal to the losses caused by the breach of contract. The compensation amount should be proved by clear evidence but not optionally estimate an amount according to a law which is obviously referring to losses calculation of the trademark infringement.

135. Another issue in dispute between the Parties in this case involves the transfer of the "I" brand which is developed by the Claimant. The Respondent states that "*in the Licensed Agreement, the Claimant and its legal counsel makes clear that any intellectual property used or created by the Claimant in connection with B's Intellectual Property belongs to the Respondent*". The said Licensed Agreement provides: "*Licensee agrees to assign to [the Respondent] or its designee all its rights and interests in or to (or in the case of rights and interests not yet assignable, shall assign such rights and interests in or to) any copyright, trademark, service mark or other intellectual property right used or created by Licensee…. Any copyright, trademark, service mark or other*

intellectual property right affecting or relating to the Licensed Marks procured in the name of Licensee or applied for in the name of Licensee is hereby assigned to B."

136. In March 2011, after the Claimant had established vendor and retail relationships for the sale of Licensed Products, it began to file a series of trademark applications for the "I" mark. In 2012, the Claimant created its own *www.xxxxxxxx.com* website and began to produce, market and sell Licensed Products under its own "I" brand name using B's Intellectual Property. Based on the statement made by the Claimant, "I" was a seasonal product and not a brand, the Respondent initially approved a limited series of red and white packaged "I" products. Once the Respondent realized that "I" was being promoted as an independent brand, in accordance with the Licensed Agreement, the Respondent instructed the Claimant to stop manufacturing, selling and promoting "I" products and to transfer the "UN brand to B". The Claimant agreed not to use UN on any new products or website going forward but refused to transfer the UN brand to the Respondent.

137. The Claimant rebuts that "I" brand has nothing to do with the Respondent and the Claimant has no obligation to cease to use and transfer "I" brand to the Respondent. It states that the Terms and Conditions of the Licensed Agreement is standard terms and not negotiation with the Claimant. According to the *PRC Contract Law*, the party which supplies the standard terms exempts itself from its liabilities, increases the liabilities of the other party, and deprives the material rights of the other party, the terms shall be invalid. Even the term is valid, "I" trademark has no connection with B Marks in actual use. "I" Series is one of the product series developed by the Claimant. The manufacture and sales of "I" series products was approved but later refused by the Respondent, so the products containing "I" and "B" logos only lasted for a very short period of time. It is groundless to state that the Claimant promote "I" trademark by taking advantage of B logos.

138. "I" trademark has no correlation with B or B Marks. It literally has other meaning in English. "I" trademark in Class 3 was designed by Mr. N who is a Japanese designer influenced by Japanese manga and maintained a good relationship with Company A. It is no sense for the Claimant to associate "I" logo with "B" Marks nor has deliberately created such correlation. As stated previously, the Respondent enjoys a good reputation only limited to the basketball area but no corresponding value in Class 3 territory while skin care products industry concentrates more on the company's R&D background and products capability. The Respondent neither has any R&D institutions focused on

skin care products, nor has it engaged in the cosmetics industry. Thus, B logo enjoys no popularity in cosmetics industry that is worth Claimant's reliance. Given that the transfer is not provided in the Licensed Agreement, "I" trademark shall be transferred at a price if such transfer is indeed necessary. The Claimant has indicated in its email to the Respondent the transfer price.

139. The Tribunal finds in the Terms and Conditions of the Licensed Agreement, the Parties agreed on the disposal of the ownership of other Intellectual Property by providing that the Claimant agrees to assign all such rights and interests to the Respondent and its designee relating to the any copyright, trademark, service mark or other intellectual property rights used or created by the Claimant. As it is analysed previously, the License Agreement had been discussed between the Parties and the provisions in the Agreement agreed should be obeyed. Since "I" brand created by the Claimant as the Claimant expressed was for the products sale under the provision of the Licensed Agreement, the transfer or keep of "I" brand should be complied with in accordance with the Terms and Conditions of the Licensed Agreement. According to the aforesaid, the Tribunal is convinced that the Terms and Conditions of the Agreement should be applied and "I" brand should be transferred.

B. The Claim of the Claimant

140. The Claimant applies for the cancellation of the Retail Product License Agreement dated March 2009 and its Amendment by and between applicant and respondent. As the Parties stated in the statements and express in the evidence submitted, the License Agreement had been unilaterally terminated by the Respondent in October 2012. It is no longer necessary for the Tribunal to decide on this issue.

141. The Arbitral Tribunal notes that while the Claimant claims to cancel the License Agreement, it applies for a determination that the Retail Product License Agreement in March 2009 and its Amendment by and between the Claimant and the Respondent are invalid. As stated above, the Tribunal finds that there is insufficient evidence to prove that the Respondent fraudulently induced the Claimant to sign the License Agreement. Further, after the Claimant found the Licensed Products were not under the registration of Class 3, it took no action to cancel or revoke the License Agreement for more than 1 year. Therefore, the Tribunal does not support the claim of the Claimant for this application to declare the License Agreement as invalid after it had been performed by the Parties for more than 4 years.

142. The Claimant applies for the Respondent to return the sum of more than RMB 6.8 million which had been paid by the Claimant for the license fee. The Tribunal finds that the License Agreement (and its Amendment) is legally effective and there are no reasons to support the return of the license fee (royalty payment) which was paid based on the contractual agreement. No laws or regulations provide all licensed products should be registered unless the parties involved explicitly require. The Tribunal is convinced that the Claimant did make profit or enjoy benefit for the usages of B Marks in its business and commercial transaction, so there are no definite legal or contractual ground to order the Respondent to return the fees it had received based on the License Agreement.

143. Referring to the amount of approximately "RMB 23,000 + RMB 2,000,000 + RMB 52,000 + RMB 35,000" of the fee the Claimant paid for its attorney and the travelling, translation expense, subject to the actual expense, related to this case, the Tribunal based on its analysis above, considers the Claimant should bear all these fees itself.

144. The Tribunal considers the Claimant should pay all the arbitration fee for its claim made in this case as all the claims for the arbitration had been overruled.

C. Respondent's Counterclaim

145. The Tribunal considers that the counterclaim made by the Respondent seeking payment of the amount of USD 970,000 which had not been paid royalty fees due and owing to the Respondent, shall be supported. As it mentioned previously in the opinion of the Tribunal, after the termination of the License Agreement, there is no contractual ground for the Respondent requires the Claimant to perform a contract which had been terminated by the Respondent already. The predicted or future royalty fee stipulated in the License Agreement could be considered as the losses being required to be compensated but not enforced to be paid as unpaid royalty fees. And once the License Agreement had been early terminated, all the right and obligation of the Parties arose from it had also terminated. So the amount of USD 50,000 of the fifth contract year should not be paid and the royalty payment due for the payment shall be approximately USD 469,980. Referring to the interest on the unpaid principal from October 2011 to February 2015 for the amount of USD 120,000 for the first half of the fourth contract year, the interest amount is approximately USD 38,940, and for the amount of USD 350,000 for the second half of the fourth contract year, the interest amount is approximately USD 96,670. The interest is calculated based on the agreed

rate in the License Agreement at the rate equal to the lesser of 3% per annum over the highest prime rate (announced by Bank of China). The total amount until the date of 10 February 2015, the Claimant shall pay is approximately USD 605,590 (principal USD 469,980, interest USD 38,940 and USD 96,670).

146. Referring to the damages for the unauthorized use of B Marks on the production distribution, products packing, product promotions, product marketing materials, business cards, signage, letter head, products and marketing or other materials, the temporarily request of the Respondent was the amount of RMB 3 million plus interest of more than RMB 560,000. As the Tribunal has expressed above, the contractual damage claim and infringing damage claim could not be combined based on the different laws. Although the Respondent states that its claims are contractual claims based on the Claimant's breach of the License Agreement not on the breach of the Trademark Law. But the damage amount for the compensation claimed by the Respondent does not consist of the contract breach damages. The Tribunal considers the Respondent shall claim the damages for the infringement by applying based on the Tort Law.

147. As to "I" brand, the Respondent claims for the transfer together with its associated marks to it as required by the License Agreement, the Tribunal has made the analysis above. The request of the Respondent on this shall be supported.

148. The Tribunal considers the requests of the Respondent referring to the Claimant shall comply with the License Agreement and remove all B Marks and B's Intellectual Property from its business cards, signage, letter head, products, websites, and marketing or other material, cease its use of B Marks and B's other Intellectual Property and including but not limited to use on product packaging, product promotions, product marketing materials, business cards, signage, corporate letter head and other business materials or marketing materials shall be supported.

149. 70% of the arbitration costs and expenses, and attorney fees including all travel and other expenses, i.e., more than RMB 2,130,000 incurred by the Respondent, shall be paid by the Claimant with the reasons mentioned above in the opinions of the Tribunal.

150. Referring to the arbitration fees, the Tribunal, considering the facts of this case, awarded the Claimant should bear 70% of the counterclaim arbitration cost, and the Respondent should bear 30% thereof.

VII. THE AWARD

Accordingly, the Tribunal orders and awards as follows:

151. The Claimant shall pay the amount of approximately USD 605,590 (principal USD 469,980, interest USD 38,940 and USD 96,670) to the Respondent. Additional interest at 6% will accrue until the time payment is made in full.

152. The Claimant shall pay the amount of more than RMB 2,130,000 for the 70% of the arbitration costs and expenses, and attorney fees including all travel and other expenses incurred by the Respondent.

153. "I" brand and its associated marks, as required by the License Agreement (Standard Terms and Conditions), shall be transferred to the Respondent.

154. The Claimant shall cease and desist from its use of B Marks and B's other Intellectual Property, whether in connection with "I" brand or otherwise, including but not limited to use on product packaging, product promotions, product marketing materials, websites, business cards, signage, corporate letter head and other business materials.

155. All of the Claimant's requests in this case are dismissed.

156. All other counterclaims sought by the Respondent are dismissed.

157. The arbitration fee for the application shall be borne by the Claimant, to be set off against the total amount of the deposit remitted by the Claimant.

    The arbitration fee for the counterclaim should be borne by Claimant by 70% and the Respondent should be borne by 30%. Considering the arbitration fee has been fully paid by the Respondent to arbitration commission, the Claimant should pay the Respondent for its 70% share.

158. All the above payments referred in paras. 151, 152, and 157 are to be made by the Claimant to the Respondent not later than 30 days from the effective date of this Award.

159. This Award is effective as from the date of issuance and is final and binding on both Parties.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Chinese A Chemical Company

Claimant

v.

Chinese B Glass Company
Italy C Glass Company

Respondents

Matter for arbitration: Disputes over oxygen supply contract

Place of arbitration: City R, P.R.China

TABLE OF CONTENT

I. FACTS

A. The Parties

The Claimant

1. Chinese A Chemical Company (the "**Claimant**"), a company incorporated and existing under the laws of the People's Republic of China.

The Respondents

2. Chinese B Glass Company (the "**First Respondent**"), a company incorporated and existing under the laws of the People's Republic of China ("**PRC**"), with Mr. J as legal representative.

3. Italy C Glass Company (the "**Second Respondent**"), the parent company of Chinese B Glass Company, a company incorporated and existing under the law of Italy, with K, Chairman of the Board, as legal representative.

4. The First Respondent and the Second Respondent are hereinafter collectively referred to as the "Respondents".

B. Summary of the Procedure

5. In December 2012, the Claimant filed its Request for Arbitration with the China International Economic and Trade Arbitration Commission (the "**CIETAC**"), based on the arbitration clause contained in a "Onsite Gas Supply Contract" dated September 2008 signed by and between the Claimant and the Respondents.

6. The arbitration clause states as follows:

> "*6. Arbitration: Any dispute between the parties in connection with this Contract shall first be discussed with a view to resolution in good faith. If no resolution is reached within 40 days of the written notice from a party requesting such discussion, then if the dispute is not abandoned or resolved by mutual agreement, it shall be submitted for resolution exclusively to the China International Economic and Trade Arbitration Commission ("CIETAC") for final resolution by arbitration in accordance with the rules and procedures of CIETAC. The parties shall comply with all requirements and rulings of the CIETAC with regard to the proceedings which shall be conducted in English*

and (if required by either party) in Chinese. Any award or determination by the CIETAC tribunal shall be final and binding on the parties."

7. In May 2013, the Arbitral Tribunal (the "**Tribunal**") were formed as per the *CIETAC Rules* to hear this case. The Tribunal was comprised of Y appointed by the Claimant, Z appointed by the Respondents, and X, as the presiding arbitrator, appointed by the Chairman of the CIETAC.

8. In June 2013, the Secretariat notified the Parties that the Tribunal had decided to hold an oral hearing of the case in R City, China, in July 2013.

9. The First Respondent made the Counterclaim.

10. In July 2013, the oral hearing (the "**First Hearing**") was held in R City, China as scheduled. The representatives of the Claimant and the Respondents participated in the hearing.

11. During the First Hearing, the Tribunal informed the Parties that the First Respondent's Counterclaim was accepted and would be heard in this case together with the Claimant's claims.

12. In July 2013, the Secretariat transmitted the "Procedural Order No.1" (the "**Procedural Order**") issued by the Tribunal to the parties based on the consultation with the Parties during the First Hearing, confirmed that the second oral hearing (the "**Second Hearing**") should commence in September 2013 with two days reserved.

13. In September 2013, the Tribunal held the Second Hearing as scheduled. The representatives of the Claimant and the Respondents participated in the hearing.

14. In November 2014, the Secretariat forwarded the Claimant's application for preservation of property to the L Court.

15. Due to the complexity of the case, the Tribunal could not render the arbitral award within the time limit stipulated in the *CIETAC Rules*. Upon the request of the Tribunal, the Secretary General of the CIETAC eventually decided to extend the deadline to render the award to June 2015.

C. Facts and Disputes

1. Submissions in the Request for Arbitration and its Amendment by the Claimant

16. The Claimant alleges that it and the Respondents entered into the Contract, which provides, *inter alia*, that the Claimant was to build an oxygen generation plant (the "**Gas Plant** "or "**D**") at the First Respondent's site to supply gaseous oxygen (the "Product") to the First Respondent up to a Contract volume for an initial term of 10 years, and the First Respondent shall pay for the liquid oxygen (the "**Supplemental Product**") produced and supplied by the Claimant when the Gas Plant is incapable of meeting the First Respondent's volume requirements. According to the Contract, the Gas Plant will remain owned, operated and maintained by the Claimant throughout the Contract term while the First Respondent is responsible for the required power.

17. In terms of the contract price, the Contract sets forth two elements, i.e., (1) a monthly Base Product Supply Charge ("**BPSC**") for normal supply of gaseous oxygen; and (2) a Product Unit Charge ("**PUC**") for the provision of Supplemental Product, if any. The initial BPSC is about more than RMB 700,000, to be annually adjusted in light of PPI fluctuations according to the BPSC adjustment formula provided in the Contract, and shall be paid "*irrespective of the volume of the Product taken by the Customer*". The PUC is charged at an initial unit price of about RMB 1/kg on the weight of any liquid oxygen supplied by the Claimant to the First Respondent. The unit price of PUC is to be adjusted annually in light of power price and CPI fluctuations in accordance with a PUC adjustment formula provided in the Contract.

18. The above prices are net of any tax other than enterprise income tax. The Claimant is free to increase the prices "*to recover the additional costs of complying with any charge in laws or other requirements with which it is obliged to comply*".

19. The Second Respondent undertakes to guarantee the latter's performance of its obligations under the Contract and "*shall promptly after receipt of the Claimant's written request to that effect, perform such obligations on the same terms and conditions as stated in this Contract*".

20. The Claimant started to supply Product to the First Respondent in September 2009. The First Respondent had paid the initial monthly BPSC of about RMB 800,000 (which comprised of about RMB 700,000 plus 17% VAT as per the contract) until

April 2011, when it refused to pay the Claimant the escalated portion of BPSC in about RMB 8,000 as adjusted by the Claimant for that month and onward for the first time in accordance with the Contract. Following the April 2011 escalation, BPSC became about RMB 800,000 including VAT.

21. According to the Contract, the Claimant has the right to adjust the amount of BPSC annually after the gas supply date. However, the Claimant had not made the first adjustment until April 2011, six months later than allowed by the Contract, such delay being in the interest of the First Respondent. Furthermore, the Claimant has not made any further adjustment of BPSC. The First Respondent refused to pay the monthly BPSC increments (about RMB 8,000) ever since April 2011 and refused to pay any part of BPSC (about RMB 850,000 as adjusted) since December 2011 until now.

22. Apart from default in paying the BPSC due, the First Respondent also defaulted in paying the PUC for several supplies of Supplemental Product in 2010. The total principal of PUC dues amounts to about RMB 500,000.

23. With regard to the First Respondent's default on the above accounts, the Claimant sent to the First Respondent an in-house demand and reply letter in April 2012, an Overdue Demand Notice in April 2012, an attorney letter in July 2012, as well as an attorney letter to the Second Respondent. In all above correspondences, the Claimant made clear demands to the Respondents to make the overdue payments immediately.

24. In view of the Respondents' continuous default in honouring their principal obligations under the Contract, the Claimant sent a notice entitled Request to Remedy Default or Risk Contract being terminated to both the First Respondent and the Second Respondent by courier and email ("**Termination Notice**") in February 2013. The letter, sent as per the Contract, reminded the First Respondent of its default as delineated in the Request for Arbitration, and requested it to furnish the Claimant with a remedial plan within 30 days of the notice, which plan shall set forth concrete steps and timetable to redress the default within 180 days of the Claimant's receipt of the plan. Failing so, as the letter stated, the Contract shall be terminated upon the first anniversary of the notice, i.e., 5 February 2014.

25. The Claimant has not received any remedial plan or response from the Respondent either within the 30-day period or afterwards.

26. The Claimant's claims on BPSC principal, BPSC increment and the overdue charges for supplemental product ("**PUC arrears**") are based on express contractual terms:

the Contract clearly provides for an annual adjustment of BPSC and PUC in light of inflations, which is the ground for the BPSC increment.

27. The Claimant's right to BPSC is further fortified by the Contract, which reads: "*BPSC shall be charged irrespective of the volume of Product taken by the Customer*".

28. The Claimant's claim for Termination Damages is based on Article 97 of the *PRC Contract Law*, which provides that an aggrieved party is entitled to claim compensation of damages in the event of contract rescission which has transpired as per Article 94 of the *Contract Law*. The Claimant has rescinded the Contract as per Article 94(3) of the *Contract Law*, which empowers a non-defaulting party to rescind a contract when his counterpart defaults in honouring his principal obligation and remains so after reasonable notice of demand.

29. The Termination Damages should in concept be equal to Gross Lost Revenue ("**GLR**") minus Gross Saved Costs ("**GSC**") for the unfinished term. The amount of Termination Damages should be adjusted discounted to the actual payment date (Benchmark Date) at an appropriate discount rate. The value obtained after discounting is called Present Vale ("**PV**"). As MLR is monthly lost revenue and MSC is monthly saved costs, the general formula for computing Termination Damages is:

$$\text{"TD} = PV\_GLR - PV\_GSC = \sum(PV\_MLR - PV\_MSC)$$
$$= \sum PV\_(MLR - MSC)\text{"}$$

30. In view of above facts and reasons, incorporating developments over the proceedings, the Claimant clarified its final Claims as follows:

    (a) The First Respondent should pay all the overdue BPSC principal, amounts to about RMB 22 million as of January 2014.

    (b) The First Respondent should pay the BPSC Increment (the part of BPSC representing the escalation of BPSC which accrued from April 2011 to November 2011), amounts to about nearly RMB 100,000.

    (c) The First Respondent should pay the Claimant about RMB 700,000 as overdue charges for Supplemental Product.

    (d) The First Respondent should pay the Claimant about RMB 4.1 million as interests.

(e) The First Respondent should reimburse about RMB 200,000 for attorney fees and expenses incurred by the Claimant for this case.

(f) The First Respondent should bear all the arbitration costs of this case.

(g) The First Respondent should compensate the Claimant about RMB 38 million for loss of gains due to the premature termination of the contract.

(h) The First Respondent should pay interest on any amount of Termination Damages paid later than February 2014 at the benchmark bank loan rate for the corresponding period as published by the People's Bank of China.

(i) The Second Respondent should pay the Claimant, at the first demand, any amount payable but unpaid by the First Respondent, whether or not the Claimant has made any antecedent demand or sought enforcement on the First Respondent.

2. Submissions in Defence and Counterclaim by the Respondents

31. The Claimant is a company within the Air Product group of companies set up specifically for the D project. The First Respondent is a company set up by a Sino-Italian joint venture and is engaged in glass manufacture. The Second Respondent is a party named in the Contract thereinafter defined but did not sign the Contract. It has not authorized any one to sign the Contract on its behalf. The claims against it should be dismissed.

32. The First Respondent had good reasons and justifications not to pay BPSC, the PUC and the BPSC increment charge. The Onsite Gas Supply Contract is a contract prepared and supplied by the Claimant and is a standard form contract. It is one sided and only protects the interest of the Claimant. The purported termination by the Claimant is unlawful for want of justification and was itself a repudiation of the Contract. In the alternative, the Contract was frustrated by a *force majeure* event or events and the First Respondent was exempted from further performance and/or liability.

33. There was inducement and misrepresentation by the Claimant to the First Respondent, leading to the installation of the D plant, such representation on the efficiency and energy saving were not fulfilled. The Claimant should be liable to the First Respondent for the loss and damage including the land cost and the energy saving loss caused by the misrepresentation and the First Respondent's agreement to allow the Claimant to use the land free of charge and for investing in the D plant. The Contract signed between the Claimant and the First Respondent with an obligation for the First

Respondent to purchase all quantities of gaseous oxygen produced by the Claimant through the Gas Plant is not a lease of the Gas Plant and was never intended to be such a lease as claimed by the Claimant.

34. The Contract is one for the supply of oxygen on site. It was an investment by the Claimant on site to facilitate its supply of oxygen. The First Respondent provided the land free of charge; the Claimant provided the techniques, equipment and know-how for the Gas Plant to generate the supply of oxygen. The construction cost of the Gas Plant was paid by the First Respondent. The power was supplied to the Gas Plant through a meter in the name of the First Respondent. The Gas Plant after its completion was maintained by both Parties.

35. The Contract should be properly interpreted to mean if there was no supply of oxygen, BPSC should not be payable.

36. In addition to the *force majeure* event of S County government, China, imposing power restriction policies in 2010 that from January 2012 the furnace of the ultra-white production line would be collapsed and the production line broke down, the First Respondent and the Claimant both agreed to shut down the D facility. There was therefore no supply of oxygen by the D Gas Plant to the First Respondent since then. The Parties further agreed to resume the supply of liquid oxygen under the Product Supply Contract signed between the First Respondent and E. Therefore, there is no obligation to pay the Claimant BPSC from December 2011 to October 2012.

37. In 2010, a number of new policies related to power restriction were issued by various levels of government from the Central Government level to S County, China local government. These power restriction policies, which basically require the D facility and the First Respondent's furnaces to cut down their power consumption by a large percentage, significantly affected the First Respondent's business and frustrated the purpose of the Contract. This should properly be construed and should be recognised by both parties as a *force majeure* event. During this period, the Claimant was not able to perform its contractual obligation by operating the D facility at full steam and supplying adequate quantity of oxygen to the First Respondent. The Claimant was not even able to supply enough liquid oxygen to the First Respondent as an alternative in compliance with its contractual obligation under the Contract. In the Claimant's letter to the Respondent dated July 2011, it unequivocally referred to the power reduction as a *force majeure* event. The First Respondent had to shut down one of its production lines to save the D facility from a complete shut down and had suffered substantial

economic loss as a result. The First Respondent therefore should be exempted from any liabilities arising from the power consumption restriction.

38. The Claims of the Claimant in respect of BPSC increment from April 2011 to November 2011 in total of about nearly RMB 100,000 is not sustainable because the First Respondent did not agree to its increase. The Claimant should not increase the price arbitrarily and without reference to the First Respondent. The increment was unjust and inequitable. It violated the provisions of the *PRC Contract Law* as being unfair and unconscionable.

39. The charges for Supplement Product accrued in August 2010 in total of about RMB 600,000 cannot be sustained and should be dismissed because this was caused by the *force majeure* event of the power restriction policy of S County government, China. If not for this *force majeure* event, oxygen would have been supplied normally under the D plant and there was no need for the supply of the Supplemental Product. Therefore, the charge of supplemental product should not be borne by the First Respondent whose liability was exempted, or alternatively it should not be borne by the First Respondent solely but should be shared with the Claimant.

40. There was no breach of contract by the First Respondent and the termination of the Contract by the Claimant on the ground of breach by the First Respondent was unlawful and was itself a repudiation of the Contract which the First Respondent accepted.

41. Further, in January 2012 there was another *force majeure* event. The main furnace of the First Respondent's factory plant collapsed and S County Security Inspection Bureau, China, ordered that the plant should not reopen without its approval. The approval to reopen had not been given up to date. The power restriction policy in S County, China, continued without any clear indication when the policy would be cancelled or relaxed. All these events made the performance of the Contract impossible thereafter. The Claimant had in 2011 accepted that the power restriction policy was a *force majeure* event. The Claimant agreed in January 2012 to shut down the D plant for one year. The *force majeure* events are subsisting and continuing. Therefore, the Claimant's claim for termination damages is unjustified and should be dismissed.

42. Based on above facts and reasons, the Respondents stated its final Counterclaims as follows:

    (a) Declaration that the Onsite Gas Supply Contract has been terminated.

(b) The Claimant should pay the energy costs about RMB 10,000 in total as compensation for the First Respondent's loss and damage as result of the misrepresentation made by the Claimant.

(c) The Claimant should pay to the First Respondent a sum of about RMB 10.3 million as compensation for the First Respondent's loss and damages in shutting down the ceramic plant and other loss of margin in responding to the power restriction policy in 2010.

(d) The Claimant should pay to the First Respondent a sum of about RMB 8.3 million as damages for loss of investment caused by the misrepresentation and in agreeing to build the Gas Plant.

(e) The Claimant should bear the arbitration fees of the First Respondent and pay to the Respondents a sum of about EUR 70,000 (about RMB 2.9 million) as the full costs of and occasioned by this arbitration including but not limited to their attorneys' fees and costs incurred.

3. Submissions in Reply by the Claimant

43. The Respondents contended that the Contract was a standard form contract and therefore should be interpreted against the Claimant or some of its provisions should be declared void. This is untenable. Firstly, it is denied that the Contract was a standard form contract. Although the Contract was probably based on a template, it was not a boilerplate contract subject to no negotiations. In fact, the Respondents, as customers in the highly competitive demand-side market, had much say in shaping the terms of the Contract. The Respondents themselves adduced two different versions of contracts involving the Claimant and its affiliate. Secondly, Chinese law only allows interpretation when there is ambiguity in the terms. All the terms in the Contract are crystal clear in meaning and therefore there is no room for interpretation. Thirdly, Chinese law has clear and strict conditions for the nullification of contract or contract terms. The Respondents failed to prove that any of the allegedly unfair provisions meet the conditions. In fact, there is no unfairness in the Contract. All terms were structured to meet the special conditions of the gas industry.

44. The Claimant denies any allegations of inducement or misrepresentation. The Claimant is not required to adduce any evidence in support of the denial as the burden

of proof is on the Respondents who made the allegations. The Respondents did not adduce any credible evidence in support of their allegations.

45. The Respondents did not deny in the Defence any facts relied on by the Claimant in its Request for Arbitration and Amendment to Request for Arbitration, such as their receipt of some liquid oxygen supplies without paying for them. They merely contended, from a legal point of view, that they had valid legal defences or contractual basis for not being liable for the overdue debts or damages as claimed. It can therefore be inferred that they knew they were true facts and acknowledged it implicitly.

46. The Respondents entered into the present Contract of supplying oxygen through the Gas Plant with the Claimant, they were buying liquid oxygen ("**LOX**") from an affiliate of the Claimant, F. After the Gas Plant came into operation, they terminated the LOX contract with F. After the Gas Plant was shut down at the request of the Respondents while the Contract was still in force, they resumed the LOX contract with Company F, and used the storage tank of the Gas Plant to store the LOX bought from Company F without paying for the use of the tank either to the Claimant or to F. It must be pointed out that Company F is a separate legal person from the Claimant. Different contracts between different entities should be dealt with separately.

47. The Respondents heavily relied on the power restriction policy as its defense. However, the best the evidence adduced by the Respondents can prove is that the local government published some general guidelines as to energy conservation for all enterprises in the region without any specific mention of power restriction or power cutoff for the First Respondent, imposed a power cap specifically for the First Respondent for the period of August to September 2010 and a total power cutoff specifically for the First Respondent for the period of September 2010. There is no evidence that total power cutoff or even a cap for the First Respondent occurred for any other periods in 2010, not to say in subsequent years. Therefore, the effect of the power restriction on the First Respondent was only temporary and its impact on the Respondents' legal obligations could only be temporary, if any.

48. Article 117 of the *Contract Law* only exempts a party's liability for failure to perform a contract where and to the extent that such failure was proximately caused by *force majeure*. The policy behind the *force majeure* institution is to exonerate a party from an impossible situation, not from economic hardship which may have been caused by *force majeure*. Therefore, the temporary effect of the power restriction on the First Respondent, even if assuming it qualified as *force majeure* as legally or contractually

defined, could not have exempted the Respondents from liabilities for not honouring the obligation of paying BPSC and PUC as the performance of such a monetary obligation could not have been rendered impossible by the power restriction, not to say discharged the Respondents from performing such obligations permanently.

49. With regard to the Respondents' Counterclaim, the Claimant requested the Tribunal to dismiss the counterclaim in its entirety for lack of grounds:

(a) The Respondents' allegations of inducement and misrepresentation are false and not supported by any evidence. The cost of using a Gas Plant is fixed and stipulated in the Contract as well as the price of liquid oxygen. The Respondents knew and should know the prices of the Gas Plant and liquid oxygen and can make their own calculation about the cost difference.

(b) The Respondents' claimed losses are barred by the Contract as indirect losses. Any losses arising out of the shutdown of the ceramic line could at the best be categorized as indirect losses, which are precluded by the disclaimer in.

(c) The Claimant has never made a promise to the Respondents about energy saving. The Respondents' claim for energy costs is without any contractual or legal ground.

(d) As stipulated in Annex to the Contract, the supply of electrical power is within the First Respondent's scope of responsibilities. Any consequences of disruption of the electrical power supply are to be borne by the Respondents. The Claimant is not liable for the shutdown of the Respondents' production line.

(e) The Claimant has terminated the Contract because the Respondents have persistently defaulted in their primary obligation to pay the overdue BPSC and PUC. Such termination is in faithful conformity with the Contract and is lawful. And prior to the termination, the Gas Plant as well as the Respondents' production lines have been laid idle for most of the time. Therefore, the Claimant is not liable for the Respondents' costs in building auxiliary facilities and the power and land use costs.

(f) The legal costs of the Respondents are unreasonable and unproven.

4. Submissions in Rejoinder by the Respondents

50. The First Respondent has a legitimate reason not to pay BPSC when there was no supply and no use of oxygen. The PUC claim should not be supported in full because the Claimant had agreed to share the outstanding PUC equally with the First Respondent.

51. The First Respondent only needs to pay the amount of BPSC for December 2011 and up to January 2012 when the D plant was still running despite the crown of the main furnace of the First Respondent had collapsed and other outstanding payments. The amount which was actually due and payable are in the sum of about RMB 1.7 million calculated as follows:

    (a) PUC: about RMB 600,000 x 50% (based on an equal split expressed by the Claimant)

    (b) BPSC: about RMB 800,000 + RMB 500,000 (for December 2011 and some days in January 2012)

    (c) Increment: about nearly RMB 100,000

52. This amount of the charges payable is not substantial. There was therefore no material breach by the First Respondent, and it was unlawful for the Claimant to terminate the Contract. The termination amounted to a repudiation upon which the First Respondent accepted and put an end to the Contract. The Claim for interests should not be supported because the First Respondent had a legitimate reason not to pay the amount as demanded by the Claimant.

53. The calculation of damages of termination is wrong and inaccurate. The D plant is not tailor made for the First Respondent. The D plants have different sizes, but the sizes and the standards are fixed. Also, the D plant has been installed for only 4 years and is relatively new. It is easy to be removed and be reused by other customer.

54. G, the Respondents' expert, has issued their expert opinion on the Claimant's computation of termination damages and concluded it was overstated. The termination damages, based on G's calculation, is only about RMB 23.2 million even assuming the Claimant's contention that it was tailor made, cannot be resold or re-installed in another location and has no residual value. G further pointed out that the written down value is about RMB 14.9 million as shown in the financial statement of the Claimant in the year 2012. The written down value of the equipment or machinery is indicative

of the selling price of the equipment or machinery in the market as in December 2012. This written down value of about RMB 14.9 million was audited by the accountants. Therefore, the D plant is not valueless as claimed by the Claimant even if the First Respondent is liable to the Claimant, the amount of damages should be about RMB 8.3 million after taking into account of this written down value based on G's report.

55. Further, the payment of liquid oxygen in the average of about RMB 500,000 per month to Company F needs to be accounted for and to be deducted.

56. Besides, VAT should not be added to BPSC when calculating the loss and damage. As mentioned by G, the Respondents' expert, the VAT element should be exclusive of VAT. The VAT is a tax to the Government and was not revenue belonging to the Claimant. The monthly BPSC in the Onsite Gas Supply Contract was stated as about RMB 700,000 net of VAT. There was no onsite oxygen supplied or consumed after the shutdown of the D plant and therefore, there was no sales and should not be any VAT payable. Interests were calculated based on the amount of about RMB 800,000 instead of BPSC net of VAT in the amount of about RMB 700,000. This was wrong. No interest should be paid on the VAT part added to BPSC. The Claimant therefore should not be allowed to claim interest in whole or in part. If interest is payable, it is only fair that it should be paid from the date of the award and exclude VAT.

57. Once again, the Second Respondent is not a guarantor. It has not signed or authorized anybody to sign on its behalf as a guarantor. H of the Claimant did not accept the signature of Mr. J as the proper signature without the proper chop of the Second Respondent. Mr. J was not the managing director or a director of the Second Respondent at the time. The claim against the Second Respondent should be dismissed.

II. OPINION OF THE ARBITRAL TRIBUNAL

58. The Parties have made comprehensive submissions and produced plenty of evidence. In the analysis below, the Tribunal has considered all those submissions and evidence. If some of them are not referred to expressly in this award, they have nonetheless been fully taken into account in reaching the findings and in making the decisions set out below.

59. After carefully reviewing the written statements and evidence submitted by the Parties, oral arguments made by the Parties as well as oral testimony presented by

the witnesses during the oral hearings, the Tribunal is called to make decisions with regards to the following issues:

A. Applicable law to the Contract

B. The Second Respondent's capacity in the Contract

C. The validity of the Contract

D. *Force majeure*

E. Termination of the contract

F. The Claims

G. The Counterclaims

H. Legal cost and arbitration fees

A. Applicable Law to the Contract

60. Article 9 of the Contract, dated September 2008 signed by and between the Claimant and the Respondents, explicitly stipulates that "*this Contract shall be governed by the laws of the People's Republic of China*". Neither the Claimant nor the Respondents has raised objection to the applicability of the PRC laws, but they referred to and relied upon the relevant stipulations of the PRC laws in their written submissions or oral arguments. The Tribunal is therefore of the view that the PRC laws shall apply to this arbitration.

B. The Second Respondent's Capacity in the Contract

61. The Second Respondent submitted its objection to its capacity in the Contract by alleging that it did not sign the Contract. Mr. J was not authorized to sign the Contract on behalf of the Second Respondent. The chop on the signing page of the Contract for the guarantor was not the chop of the Second Respondent, but that of "M". The claims against the Second Respondent therefore should be dismissed.

62. The Claimant contended that Mr. J had the authority to sign the Contract for the Second Respondent and the Second Respondent did not deny its capacity in the Contract in the performance of the Contract afterwards.

63. The Tribunal noticed that:

(a) It is a common practice to have a guarantor to guarantee the performance of a party to the contract similar to the circumstances in the present arbitration.

(b) The Second Respondent was mentioned and nominated at the beginning of the Contract to act as a "Guarantor". However, a company chop of "M" was affixed and a signature of Mr. J was signed in the signature page of the Contract on behalf of the Second Respondent.

(c) Mr. J was the legal representative of the First Respondent, which is a joint venture between the Second Respondent and a Sino-Italian company. Company M is the parent company of the Second Respondent which held about 90% shares of the latter.

(d) In accordance with the business license of the Second Respondent in 2012, Mr. J was appointed as the Managing Director of the Second Respondent in May 2011. And Mr. K is or was the legal representative of the Second Respondent.

(e) Before the submission of the Respondents' defence in this arbitration case in June 2013, neither Mr. J nor the Second Respondent had ever denied the fact that the Second Respondent was the guarantor in the Contract or stated that the Second Respondent did not sign the Contract.

(f) In a reply letter dated August 2012 from N, to the Claimant's attorney's letter asking the Second Respondent to perform its obligation as guarantor under the Contract, it clearly stated that N acted for the Second Respondent. The reply letter also showed that the Second Respondent knew about the Contract and did not deny its capacity in the Contract. The counsel representing the Second Respondent in this arbitration case also comes from N.

(g) Article 49 of the *PRC Contract Law* provides that *"If an actor has no power of agency, oversteps the power of agency, or the power of agency has expired and yet concludes a contract in the principal's name, and the counterparty has reasons to trust that the actor has the power of agency, the act of agency shall be effective."*

(h) Article 66 of the *PRC General Principles of Civil Law* provides that *"if a principal is aware that a civil act is being executed in his name but fails to repudiate it, his consent shall be deemed to have been given."*

64. Based on the above facts, it appears to the Tribunal that the key persons in the management of the Respondents have shared the same family name and presumably have close relations. It is not without justification that the management of the Second Respondent knew clearly about the lengthy negotiation of the Contract between the First Respondent and the Claimant. Consequently, the Tribunal is not persuaded that the Second Respondent was ignorant of the fact that Mr. J put his signature on the Contract on behalf of the Second Respondent as the Guarantor. It is also reasonable pursuant to the PRC laws to conclude that the Claimant, as the counterparty to the Contract, had reasons to trust that Mr. J had the power to sign the Contract for the Second Respondent and the Second Respondent had given its consent to such signature. The Tribunal is thus of the view that the Second Respondent's objection to its capacity in the Contract shall be dismissed, the Second Respondent is a party to the Contract and should fulfil its guarantor's obligation under the Contract if the First Respondent is found liable.

C. Validity of the Contract

65. Before entering into the analysis of the validity of the Contract, the Tribunal has to look at the two arguments raised by the Respondents, which may affect the validity of the whole Contract or some articles of the Contract.

1. Inducement and Misrepresentations

66. The Respondents accused those representatives from various affiliates of the Claimant, such as O and P, of inducing the First Respondent to enter into the Contract by misrepresenting the very attractive but misleading cost-saving effects and energy-saving effects of the D plant.

67. The Tribunal does not support the Respondents' allegation in this regard for the following reasons:

(a) Inducement and misrepresentation are not a legal concept defined under the PRC laws. While a misrepresentation, a representation that is untrue, or a statement or conduct conveying a false or wrong impression, happens during the formation of a contract, the contract so entered into by the parties will be voidable. The innocent party, who is induced to enter into a contract because of a misrepresentation made by the other, may elect to rescind or affirm the contract under Articles 54 and 55 of the *PRC Contract Law*.

(b) Article 54 of the *PRC Contract Law* provides: "*A party shall have the right to request the people's court or an arbitration institution to modify or revoke the following contracts: (1) those concluded as a result of significant misconception; or (2) those that are obviously unfair at the time when concluding the contract. If a contract is concluded by one party against the other party's true intentions through the use of fraud, coercion, or exploitation of the other party's unfavourable position, the injured party shall have the right to request the people's court or an arbitration institution to modify or revoke it.*"

(c) Article 55 of the *PRC Contract Law* provides: "*The right to revoke a contract shall extinguish under any of the following circumstances: (1) a party having the right to revoke the contract fails to exercise the right within one year from the day that it knows or ought to know the revoking causes; or (2) a party having the right to revoke the contract explicitly expresses or conducts an act to waive the right after it knows the revoking causes.*"

(d) The Respondents did not persuade the Tribunal that the conclusion of the contract was against its true intentions because of any use of fraud. In fact, the negotiation of the Contract started in April 2008 and the Contract was concluded in September 2008. The D plant established by the Claimant had been put into use in some other sites for some time. The Respondents, as experienced business entities, had enough time to carry out necessary investigation and study of practicability of the transaction before making its own decision on whether or not to enter into the Contract which will last for 10 years and with the amount of about RMB 100 million.

(e) D established under the Contract began to work in September 2009. Until the submission of their defence in the arbitral proceedings in June 2013, the Respondents had never raised the issue of misrepresentation and exercised its right to revoke the Contract for fraudulent misrepresentation. The revocation of contract is the only remedy available under the *PRC Contract Law* and the period of exercising the right to revoke has expired in the present arbitration.

68. Accordingly, the allegation of inducement and misrepresentation made by the Respondents, which may affect the validity of the Contract, is dismissed.

2. Standard terms

69. The Respondents argued the Contract was one with standard terms provided by the Claimant. Some provisions should be interpreted against the Claimant. Some provisions, which exempted the Claimant from its liability for the Counterclaims unjustly and inequitably, should be annulled by the Tribunal.

70. Article 39 of the *PRC Contract Law* provides: "*Where standard terms are adopted in concluding a contract, the party supplying the standard terms shall define the rights and obligations between the parties abiding by the principle of fairness, and shall inform the other party to note the exclusion or restriction of its liabilities in a reasonable way, and shall explain the standard terms upon request by the other party. Standard terms are clauses that are prepared in advance for general and repeated use by one party, and which are not negotiated with the other party when the contract is concluded.*"

71. In accordance with this provision, to be characterized as standard terms, the contractual clauses must not only be prepared in advance for repeated use, which is accepted practice in modern business society, but also not negotiated with the other party when the contract is concluded.

72. The transaction under the Contract might have been initially suggested by the Claimant; however, given the fact that the negotiation of the Contract between the Parties lasted for about half a year, the Respondents did not provide any evidence proving that the Claimant had deprived the Respondents of a reasonable chance for the discussion and negotiation of the Contract terms. To the Contrary, the facts in this arbitration show the Respondents had enough time and had negotiated the Contract carefully.

73. This conclusion is reinforced by the last paragraph of the Contract, which is in bold print and provides: "*The parties, having carefully read and negotiated this Contract as they deemed appropriate*" and "*The Provisions of this Contract limiting the rights a party may otherwise have had in the event of default of the other party are specifically recognized and accepted.*"

74. Also, the entire context which the Respondents thought as unjust and inequitable terms and wanted to annul, were highlighted in bold print.

75. Even though Article excludes some general liabilities in favour of the Claimant and specifies a ceiling for the Claimant's liabilities up to a maximum level of 3 months BPSC, the highlighted appearance of these articles in the Contract shows that the Claimant has fulfilled its obligation required by Article 39 of the *PRC Contract Law* to inform the Respondents the exclusion or restriction of its liabilities in a reasonable way.

76. Based on the foregoing, the Tribunal is of the view that the provisions of the Contract, especially Article specified by the Respondents do not fall within the concept of standard terms defined by the *PRC Contract Law*. There is no ground to annul, and the Respondents' argument of standard term are not supported.

77. In conclusion, the Claimant and the Respondents were experienced business entities and concluded the Contract voluntarily after lengthy negotiation. It was the true intention of the Parties that led them to sign the Contract without any violation of the mandatory provisions of the PRC laws and regulations. Thus, the Tribunal is of the view that the Contract is effective and binding on the Parties. Each party shall fully perform its own obligations as agreed upon.

D. *Force Majeure*

1. Constitution of *force majeure* event

78. The Respondents alleged that the performance of the Contract has been affected by two *force majeure* events, one is the power restriction in S County, China County, and the other is the collapse of the crown of the furnace.

79. The Claimant contends that the two events, power restriction and furnace breakdown, did not satisfy the statutory criteria provided in the PRC laws and could not be regarded as a *force majeure* event.

80. The Tribunal noticed that:

(a) Article 153 of the *PRC General Principles of Civil Law* provides: "*For the purpose of this Law, 'force majeure' means unforeseeable, unavoidable and insurmountable objective conditions*". Article 117 of the *PRC Contract Law* provides for the same definition of *force majeure*. These provisions have been generally understood to clarify the three statutory criteria to define a *force majeure* event.

(b) The Contract states that "*Force majeure means workforce disturbances including strikes and lockouts, fire, explosion, flood, the elements, civil disturbance, curtailment or failure of normal sources of supply and breakdown of machinery (unless in either case due to the lack of due care of the party claiming force majeure), action or delay of public authorities, compliance with order or policy of any government, or any circumstances beyond the reasonable control of the party in question.*"

(c) Power restriction policy had been imposed by the government since the year of 2010. The evidence provided by the Parties shows that several notices or circulars related to power restriction had been issued by various level of governments or public authority, such as Notice issued by the General Office of the T Provincial People's Government on 3 August 2010, Notice issued by the People's Government of S County, China on 10 August 2010, Notice to the First Respondent issued by the Management Committee of S County, China Economic Development Zone on 27 August 2010, Notice to the Claimant issued by the Management Committee of S County, China Economic Development Zone on 27 August 2010, Circular issued by S County, China Power Office on 18 January 2012, Circular issued by S County, China Power Office on 9 April 2012, Circular issued by Economy and Information Committee on 26 April 2012, Notice issued by S County, China Power Office to the First Respondent in 2012 and Circular issued by S County, China Power Office on 1 May 2013.

(d) During the communication between the Claimant and the First Respondent on how to deal with the power restriction, either the Claimant or the Respondent had treated the power restriction as a *force majeure* event. In the letter from an affiliated company of the Claimant dated July 2011, it stated: "*Because of the abovementioned force majeure event of government's power restriction, our company cannot guarantee the supply of liquid oxygen to your company during the period of the government's power restriction.*" In the letter from the General Manager of the First Respondent in August 2010, after explaining the plan the First Respondent may take to dealing with power restriction, it stated: "*In case the above plan will not be sufficient … we will be obliged to terminate the contract of oxygen supply for force majeure" in the last page.*

(e) In December 2011, the crown of a main furnace collapsed which led to the shutdown of the First Respondent's ultra-white production line.

81. Based on the above legal provisions and facts, the Tribunal is of the following opinions:

(a) The PRC statutes provide a general definition of *force majeure*. The scope of *force majeure* can be interpreted broadly or narrowly.

(b) Parties entering into a contract are allowed to reach agreement as to the scope of *force majeure* depending on the target or circumstance of the contract. For example, since power restriction may badly influence the performance of the contract in an energy-consuming and tightly-controlled industry under the environment policy, it is reasonable to include it in the scope of *force majeure* by parties' agreement.

(c) Party autonomy is a general principle of PRC civil law. Parties' agreement not against the mandatory provisions of laws should be respected and has priority over the statutory requirement. So in the present arbitration, it is the Contract that shall be used to determine the constitution of party-agreed *force majeure* event.

(d) Both the Claimant and the First Respondent are in the energy-consuming industries and had been required by the government or public authority to cut the use of power for the purpose to comply with the power restriction policy.

(e) During the performance of the Contract, the Claimant and the First Respondent had reached a kind of consensus that power restriction constituted a party-agreed *force majeure* event.

(f) The collapse of the crown of furnace and shutdown of the ultra-white production line may be caused by various reasons which were not clarified by the Respondents who have the burden of proof when relying on such incident as a *force majeure* event. The Respondents failed to prove that the collapse and shutdown was not due to its lack of due care, which is set as the precondition for the breakdown of machinery to constitute a *force majeure* event in the Contract.

82. In sum, the Tribunal concludes that the power restriction is a kind of "compliance with order or policy of any government" listed in the Contract and constitutes a *force majeure* event but the collapse of the crown of furnace is not a *force majeure* event.

2. Legal consequences of *force majeure*

83. The Respondents contended that it should be exempted from the liability under the Contract because of the *force majeure* events.

84. The Tribunal holds that the Respondents cannot be fully exempt from the liability relying solely on the occurrence of the *force majeure* event. The reasons are as follows:

(a) According to Article 117 of the *PRC Contract Law*, a party who is unable to perform a contract due to *force majeure* is exempted from liability in part or in whole in light of the impact of the event of *force majeure*. The occurrence of the *force majeure* event will not definitely result in the exemption from the liability. The scope of exemption, i.e., whether it will be an entire exemption or a partial exemption or no exemption, will depend on the specific impact of the *force majeure* event on the performance of the contract of the party who suffers the *force majeure* event.

(b) According to (the Article entitled "customer obligation") the Contract, the First Respondent is obliged to provide the items listed in the Annex part 4, in which electrical power is listed as Article.

(c) According to the notices or circulars listed in para. 95c, most power restrictions were imposed during the spring festival holiday or summer peak time for power. It means the power restriction was periodic and was not imposed all the time during the term of the contract. A new Ceramic production line was built by the First Respondent after July 2011, which suggests that the power restriction did not exist continuously and the power restriction at the time did not deter the First Respondent from expanding its power-consuming production.

(d) In the summer of 2010 and 2011, some explicit power restriction instructions had been given to the First Respondent, but the First Respondent still performed its obligation under the Contract and the D plant was not shut down during that period.

(e) The shutdown of the D plant under the Contract was carried out after the collapse of the crown of furnace and shutdown of the ultra-white production line. So the reasons for shutdown of the D plant at least include the power restriction and the collapse of the furnace for which the Respondent will be held responsible because it fails to prove its innocence.

(f) The Contract states that if *force majeure* renders the Claimant unable to supply product for more than 30 days, BPSC shall from that time be suspended until the problem is resolved. The Tribunal is not presented with evidence that the failure of payment of the relevant charges on the part of the First Respondent was due to the no-supply of the product by the Claimant. Secondly, had the *force majeure* result in the no-supply of the product for a month, the consequence would be a temporary suspension of payment, not an indefinite stop of payment. The payment shall be resumed when *force majeure* ceases to exist.

85. The Tribunal thus concludes the periodic power restriction made the First Respondent relatively difficult in performing its obligation to provide power supply to the Claimant, which had a negative impact on the use of the D plant. Together with other reasons, this led to the shutdown of the D plant. If there is any liability resulting from this non-performance, the First Respondent shall be partly exempted from the relevant liability.

E. Termination of the Contract

86. It is not disputed by the Parties that the Contract was not terminated along with the shutdown of the D plant.

87. The Claimant contended that because of the First Respondent's material default in paying charges in compliance with Contract, the Claimant served a written notice of termination on the Respondents as per the Contract in February 2013 and the Contract was terminated in February 2014.

88. The Respondents agreed on the termination of the Contract but contended that the Claimant's termination of the Contract was unlawful in the first place and was itself a repudiation of the Contract by the Claimant, the consequence of which was the First Respondent should pay under the Contract a relatively small amount for an immaterial default.

89. The Tribunal noticed that:

(a) For the oxygen supply contract, no matter it is an on-site supply or a LOX supply, the charges for the supply always contain two parts, one is for the facility charged irrespective of the volume of the product, no matter it is called BPSC or Monthly Based Fee, the other is for the fees calculated in accordance with the volume of the product.

(b) When the Contract in this case replaced the contract signed in March 2008 (the "**Contract II**") between the First Respondent and Q, the First Respondent and Q signed an agreement to remove the relevant facility and no monthly fees will be required.

(c) When the First Respondent and Q signed the agreement to reactivate the Contract II in January 2012, it was clearly stated in the agreement that the D plant under the Contract of this case would be used.

(d) When the D plant was shut down, there was no evidence showing that the Claimant had asked for the adjustment of BPSC or the PUC arrears and the Claimant and the First Respondent had reached an agreement to modify the BPSC or PUC arrears specified in the Contract.

(e) The Contract provides: "*The Term may be terminated by one party by written notice served on the other party due to its material default. However, such termination shall not be effective if the other party within 30 days of receiving the notice informs the terminating party of what it will do to remedy the default and then carries out the remediation plan within the plan timetable, which must be reasonable having regard to the interest of both parties and shall not be less than 180 days*."

(f) Article 94 of the *PRC Contract Law* provides: "*The parties to a contract may terminate the contract under any of the following circumstances: (1) it is rendered impossible to achieve the purpose of contract due to an event of force majeure; (2) prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation; (3) the other party delayed performance of its main obligation after such performance has been demand, and fails to perform within a reasonable period; (4) the other party delays performance of its obligations, or breaches the contract in some other manner, rendering it impossible to achieve the purpose of the contract; and (5) other circumstance as provided by law.*"

(g) Until the filing of this arbitration by the Claimant in December 2012, the First Respondents had not paid BPSC since December 2011, the BPSC increment from April 2011 to November 2011, the PUC arrears from August 2010 to December 2010 and the total unpaid amount had exceed about RMB 10 million.

90. Based on the above legal provisions and facts, the Tribunal is of the opinion:

(a) Since the Contract was not terminated at the time of the D plant's shutdown and also not modified by the Parties, the Contract was still in effect and had binding force on the Parties until its termination.

(b) The First Respondent should pay relevant charges in accordance with the provisions of the Contract, especially after the Claimant sent them the notice of payment in April 2012 and the attorney's letter in July 2012.

(c) The occurrence of the *force majeure* event and the impact of such event on the Respondents' performance may partly and temporarily exempt the Respondents from their liabilities under the Contract. However, the occurrence of the *force majeure* event in the present arbitration did not entitle the First Respondent to an indefinite stop of fulfilment of its payment obligation under the Contract.

(d) If the First Respondent wanted to be exempted from its liability under the Contract due to *force majeure* event, it could raise this issue and negotiate with the Claimant pursuant to the Contract.

(e) The Respondents had not paid BPSC since the shutdown of the D plant although the D plant was still used for the supply of liquid oxygen for the First Respondent.

(f) Under the Contract, paying relevant charges is the main obligation of the First Respondent. The First Respondent's failure to pay relevant charges for such a long time and with such a huge amount evidences a material default and entitles the Claimant to terminate the Contract in accordance with Article 94(3) of the *PRC Contract Law*.

(g) The Claimant's termination, including the condition and the procedure of the termination, was in compliance with the provision the Contract.

91. The Tribunal thus concludes that the Claimant has the right to terminate the Contract because of the Respondents' non-payment of relevant charges for a long time. The requirement for termination provided in Article has been met and the Contract was terminated on 5 February 2014.

F. The Claimant's Claims

1. BPSC principal

92. The Claimant's first claim is about the BPSC principal. In its post-hearing submission, the final amount of this claim is clarified as about RMB 22 million, calculated at a monthly amount of about RMB 800,000 from December 2011 up to January 2014.

93. During the arbitral proceedings, the Respondents admitted a payment duty of the BPSC principal before the shutdown of the D plant in January 2012, which is about RMB 1.3 million, including the BPSC principal for December 2011 and 17 days in January 2012. The Respondents refused the payment request of the remaining amount in this claim according to the Contract and contended that shall be applied on the premise that the D plant works and produces oxygen.

94. The Tribunal cannot support the Respondents' defence in this regard for the following reasons:

(a) As analysed in para. 99, power restriction had an impact on the First Respondent's performance of the Contract and may partly and temporarily exempt it from its liability under the Contract. However, there is no sufficient evidence to show that the Claimant' performance of the Contract was impacted by the power restriction or the shutdown of the D plant was the result of the non-performance of the Claimant impacted by the *force majeure* event. Accordingly, the Respondents cannot rely on the provision in Article that "*If force majeure renders AP unable to supply Product for more than 30 days, BPSC shall from that time be suspend until the problem is resolved…"* to refuse the payment of BPSC while the D plant was shut down.

(b) The Contract provides: "*BPSC shall be charged irrespective of the volume of Product taken by the Customer*". The product here should not be limited to gas oxygen generated by the D plant.

95. But the Tribunal cannot completely support what the Claimant asserted in this claim for the following reasons:

(a) The shutdown of the D plant was partly because of the impact of the power restriction on the performance of the First Respondent. The First Respondent can be partly exempted from its liability under the Contract.

(b) The purpose of the Contract is the supply of oxygen to meet the requirement of the production line in the First Respondent's factory. The supply is partly in the state of gas produced by the D plant and partly in the state of liquid provided by the Claimant's trunk. In the communication between the two sides to deal with the power restriction, it is clear that there is some kind of seesaw between BPSC and the payment for supply of liquid oxygen. In a letter from the General Manager of the First Respondent in August 2010, it stated that "*we will continue to pay about RMB 800,000/month as monthly leasing fee according to the contract as R, this additional liquid cost linked with force majeure we will not pay the bill*". In an email from the Claimant's staff in December 2011, it stated that "*With regards to product pricing reduction and escalation turn off, we are now in difficulty to do it as the charge will greatly impact on the investment return based on the previous capital locked and high…. But we could consider partially to share liquid consumption caused by power shortage, the particular share amount should be approved by our top management firstly.*"

96. The Tribunal thus concludes that except for the BPSC admitted by the Respondents, which is about RMB 1.3 million, it is reasonable to support 60% of the rest of the amount asserted by the Claimant in this Claims, which shall be about RMB 12.4 million. The total amount supported by the Tribunal shall be about RMB 13.8 million.

2. BPSC increment

97. During the arbitral proceedings, there is no dispute between the Parties with regards to this claim of BPSC increment in the amount of about RMB 60,000. Accordingly, the claim is supported.

3. PUC arrears

98. The Claimant asserted about RMB 600,000 in this claim for PUC arrears happened during August 2010 to December 2010.

99. The Respondents did not refuse the occurrence of PUC arrears but contended that they were only responsible for half of the amount, specifically about RMB 300,000, because in the staff's email mentioned in para. 110 the Claimant had offered to share this payment.

100. The Tribunal noticed that the email was sent in December 2011 and the PUC arrears happened from August 2010 to December 2010; it is not persuasive for the Respondents to rely on an email written a year later after the occurrence of the default, and that email did not indicate that the discussion therein would apply retroactively. Even though the email was for the discussion of this part of PUC arrears, the sharing portion of the Claimant was not decided since it stated that "*the particular share amount shall be approved by our top management firstly*".

101. The Tribunal thus concludes that the Respondents' contention in this regard should be denied and the amount claimed by the Claimant should be supported.

4. Interest for overdue debt

102. The Claimant requests the payment of interest for the overdue payment of the above outstanding charges in the amount of about RMB 4 million, which was calculated as of December 2013 at a monthly rate of 1.5% provided in the Contract.

103. The Tribunal is of the view that the interest should be paid according to the Contract on the outstanding amount of the BPSC principal, the BPSC Increment, and PUC arrears as supported by the Tribunal. The interest accrued as of December 2013 on the BPSC principal as calculated by the Claimant is about RMB 3.8 million. As the Tribunal supports full amount of BPSC principal admitted by the Respondents stated in paragraph 108 and 60% of the BPSC principal claimed by the Claimant, correspondingly, the interest that will be supported are 100% of the interest of BPSC principal admitted by the Respondents plus 60% of the remaining amount of interest claimed, i.e., about RMB 2.4 million. The interest accrued as of 31 December 2013 on BPSC increment is about RMB 30,000 and the interest accrued as of 31 December 2013 on PUC Arrears is about RMB 300,000, both interests is hereby supported by the Tribunal.

104. Consequently, the total interest as of December 2013 the Respondents owed to the Claimant will be:

2,400,000 + 30,000 + 300,000 = 2,730,000 (RMB)

5. Termination damages and interest for termination damages

105. The Claimant asserted that the Respondents are liable for its loss since the premature termination of the Contract resulted from the Respondents fault in the performance

of the Contract. The Claimant's loss is, in nature, loss of expected gains from the complete performance of the Contract, which is calculated by Gross Lost Revenue minus Gross Saved Costs for the unfinished term with a monthly based discount. The finally clarified amount of the termination damages is about RMB 38 million. The Respondents should pay an interest on the termination damages at the yearly rate of about 6% from February 2014 up to the award date.

106. The Respondents contended that the Claimant's termination of the Contract is unlawful and refused to admit their fault in the termination of the contract as well as their liability for the termination damages. Even if the termination is lawful, the termination damage was just about RMB 23.2 million based on an expert report. Considering the residual value of D plant and the monthly payment of liquid oxygen, the amount of termination damage will be less.

107. The Tribunal is of the view that the Respondents are partly liable to the Claimant for its loss due to the premature termination of the Contract. The reasons had been discussed in part E above.

108. In accordance with Article 113 of the *PRC Contract Law*, it is reasonable for the Claimant to ask for the compensation of expected gains should the performance of the Contract be properly carried out.

109. With regards to the amount of the termination damages, the Tribunal noticed that:

(a) According to the agreement of reactivating the Contract II between the First Respondent and Q, D plant was a necessary facility for the supply of liquid oxygen and has been used for the supply of liquid oxygen since January 2012.

(b) Even though different on the amount of value, the Parties agreed that there will be some residual value of D plant when the Contract comes to an end or to a premature termination.

(c) According to the Contract, the Claimant is at all times the exclusive owner of D.

(d) The Respondents disputed the argument that D plant was tailor-made for the First Respondent and asserted the Claimant did not provide sufficient and persuasive evidence to support that argument.

(e) The responsibility for the termination of the Contract discussed in part E, the impact of the *force majeure* event discussed in part D plant and the seesaw

between BPSC and the payment for the supply of liquid oxygen discussed in para. 110 are relevant to the judgement of the amount of the termination damages.

110. Based on the above facts, the Tribunal is of the view that the continuous use of D plant for the supply of liquid oxygen constitutes cost-saving for both the Claimant and the First Respondent, that the Claimant or its affiliated companies are professional air suppliers and in a better place to know and handle the residual value of D plant and that the asserted number of the termination damages claimed by the Claimant should be adjusted on an equitable basis.

111. The Tribunal concludes that it is reasonable to award the termination damages for the Claimant in the amount of about RMB 15 million without interest.

6. The Second Respondent's liability as the guarantor

112. The Claimant contended that the Second Respondent should perform its obligation as a guarantor with joint and several liability for the payment of the charges owed by the First Respondent.

113. The Contract provides: "*Guarantor hereby guarantees unconditionally and irrevocably that Customer shall perform its obligations arising out of this Contract. If Customer shall fail to so perform any of its obligations, Guarantor shall itself promptly after receipt of AP's written request to that effect, perform such obligations on the same terms and conditions as stated in this Contract*." According to this provision, the Tribunal supports this claim.

G. The First Respondent's Counterclaims

1. Termination of the Contract

114. As discussed in part E, the Tribunal supports the termination of the Contract but cannot agree with the First Respondent on the reason of the termination. Nonetheless, the Tribunal is of the view that the Contract was terminated in February 2014 due to the fault of the Respondents.

2. Compensation for energy cost and damages for loss of investment

115. The Tribunal noticed the First Respondent based these two counterclaims on the allegation of misrepresentation. For the reason analysed in part B, these two counterclaims cannot be supported by the Tribunal.

3. Compensation for shutdown of ceramic plant and other loss in power restriction

116. The First Respondent argued that in order to guarantee the operation of D, the First Respondent sacrificed its interest to shut down one of its production lines and also suffered other loss in response to the power restriction policy implemented in 2010, and requested the Claimant to compensate its loss arising out of such shut down.

117. The Tribunal cannot support this counterclaim for the following reasons:

(a) The Claimant was not responsible for the power restriction which was a government policy.

(b) The gas oxygen produced by D plant is used for the manufacture of glass in the First Respondent's factory. The First Respondent was in a position to make the decision. If the gas oxygen is not necessary for the manufacture, the First Respondent may well choose to shut down D plant instead of its own production line.

(c) It is more reasonable to assume that the First Respondent's decision to shut down the production line was the result of some economic and market considerations.

H. Legal Cost and Arbitration Cost

118. Both the Claimant and the Respondents had claimed or counterclaimed for the legal cost and arbitration cost.

119. The Tribunal noted that the Claimant provided the engagement contract signed by the Claimant and its attorney, the relevant bank payment slips and invoices proving that the Claimant has engaged the attorney to handle this arbitration and paid the attorney fees. Based on the proportion of the Claims supported by the Tribunal and the established breach of the Contract on the part of the Respondents leading to this arbitration, the Tribunal rules that 70% of the Claimant's attorney fees, shall be reimbursed by the First Respondent.

120. With regards to the arbitration fees for the Claims, based on the same considerations expressed in the preceding paragraph, the Tribunal rules that the Claimant and the First Respondent shall be responsible for the payment of the arbitration fees with the ratio of 3:7.

121. With regards to the Respondents' attorney fee and arbitration fees for the Counterclaims, based on the fact that almost all of the Counterclaims had been dismissed and the established breach of the Contract on the part of the Respondents leading to this arbitration, the Tribunal rules that the Respondents shall bear its own attorney fee as well as the arbitration fees for the Counterclaims.

III. AWARD

122. Based on the above reasons, the Tribunal awards as follows:

(a) The First Respondent shall pay to the Claimant BPSC principal in the amount of about RMB 13.8 million.

(b) The First Respondent shall pay to the Claimant the BPSC increment in the amount of about nearly RMB 100,000.

(c) The First Respondent shall pay to the Claimant PUC arrears in the amount of about nearly RMB 600,000.

(d) The First Respondent shall pay to the Claimant about RMB 2.8 million as interest for the overdue payment in the BPSC principal, BPSC increment and PUC arrears as of December 2013.

(e) The Onsite Gas Supply Contract was terminated in February 2014.

(f) The First Respondent shall compensate the Claimant about RMB 15 million for loss of gains due to the premature termination of the Contract.

(g) The First Respondent shall reimburse the attorney fees and expenses incurred by the Claimant.

(h) The arbitration fee for the Claims is that the Claimant shall bear 30%, while the First Respondent shall bear 70%. The arbitration fee for the Claims had been advanced by the Claimant, so the First Respondent shall reimburse the Claimant the arbitration fees in the sum of about corresponding expenses.

(i) The arbitration fee of the Counterclaim is which shall be borne by the First Respondent.

(j) The Second Respondent shall be jointly and severally liable for all the above amounts that the First Respondent shall pay to the Claimant.

(k) The actual expenses for the Respondents' appointed arbitrator, Z, is which shall be paid from the Respondents' advanced deposit. The rest of the deposit will be returned to the Respondents.

(l) All other Claims are dismissed.

(m) All other Counterclaims are dismissed.

123. The Respondents shall pay the above amount within 30 calendar days from the date of the rendering of this award.

124. The award is final and shall come into effect on the date it is rendered.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

China A Automobile Co.,

Claimant

v.

Tanzania B Transportation Enterprises

Respondent

Matter for arbitration: Disputes over vehicles sales contract

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

China International Economic and Trade Arbitration Commission ("**CIETAC**") took cognizance of this case in accordance with the arbitration clause contained in the Purchase and Sales Contract (the "**2011 Contract**") which was signed by and between the Claimant China A Automobile Co., (the "**Claimant**") and the Respondent Tanzania B Transportation Enterprises (the "**Respondent**") in May 2011, and the Claimant's Request for Arbitration dated September 2014.

The *Arbitration Rules of CIETAC* effective as from 1 May 2012 (the "*Arbitration Rules*") shall apply to this case.

According to Article 71 of the *Arbitration Rules* and the arbitration clause of the 2011 Contract, the English language is the official language to be used in the arbitration proceedings of this case.

The Claimant appointed X as an arbitrator of this case. The Respondent appointed Y as an arbitrator of this case. Since the parties failed to jointly appoint a presiding arbitrator or jointly entrust the Chairman of

CIETAC to appoint a presiding arbitrator, the Chairman of CIETAC appointed Z as the presiding arbitrator of this case in accordance with the *Arbitration Rules*. The Arbitral Tribunal constituted by the above-mentioned three arbitrators was formed in January 2015.

In January 2015, the Secretariat received the Claimant's Rebuttal to Answer.

In February 2015, the Tribunal issued a Procedural Arrangement, which set out the requirements and procedures of the case proceedings.

In May 2015, the Secretariat issued a Notice of Payment to request the Respondent to advance the corresponding arbitration fee for its counterclaim.

In June 2015, the arbitration fee of counterclaim was received by the Secretariat.

In July 2015, the Tribunal decided to hold an oral hearing in August and September 2015.

In August 2015, the Respondent applied to have witness testimony at the oral hearing. The Claimant stated its objection to the Respondent's application, but the Respondent insisted.

In August 2015, the Tribunal decided to postpone the oral hearing to the last week of October 2015 and set out the requirements and procedures for witness testimony. On

24 August 2015, the Respondent submitted the Witness Statement of Witness C, Witness Statement of Witness D and the Witness Statement of Witness E.

In September 2015, the Tribunal decided to hold an oral hearing on 26 and 27 October 2015.

In September 2015, the Claimant submitted the Witness Statement of Witness Mr. F, the Witness Statement of Witness Mr. G, the Witness Statement of Witness Mr. H, and the Witness Statement of Witness Mr. I.

In September 2015, the Respondent submitted the Supplementary Witness Statement of Witness Mr. C, the Supplementary Witness Statement of Witness Mr. D, and the Supplementary Witness Statement of Witness Mr. E.

In October 2015, both the Claimant and the Respondent submitted the Opening Statement.

On 26 and 27 October 2015, the oral hearing was conducted in Beijing. The Claimant and the Respondent delegated the representatives to attend the hearing. The Claimant and the Respondent explain the factual and legal basis of their claims and counterclaims, conducted cross-examination of documentary evidence and witnesses. The Tribunal decided to admit the Respondent's correction on calculation of damages but denied the new evidence from the Respondent. Both parties agreed to submit closing statement thereafter.

In November 2015, both the Claimant and the Respondent submitted the Closing Statement. The Claimant further submitted an updated closing statement in January 2016 according to the amended transcripts.

All the relevant documents in this case have been effectively and timely delivered to both parties by the Secretariat in accordance with the *Arbitration Rules*.

Upon the request of the Tribunal to extend time limit for rendering arbitral award, after several extensions, the Secretary General of CIETAC agreed and decided to extend the time limit for rendering the arbitral award finally to January 2017.

Based on the materials submitted by the Claimant and the Respondent, together with the facts clarified in the oral hearing, the Tribunal hereby renders this Award.

I. PARTIES' SUBMISSIONS AND ARGUMENTS

A. The Claimant's Claims

1. The Claimant entered into a Purchase and Sales Contract with the Respondent.

In May 2011, the Claimant and the Respondent entered into the Sales Contract (i.e., the 2011 Contract), according to which the Claimant agreed to sell and the Respondent agreed to buy the vehicles subject to the terms and conditions set out in the 2011 Contract.

The terms of the 2011 Contract, *inter alia*, that are relevant to this dispute are as follows:

(a) The vehicles, quantity and the unit price are provided in Annex 1 of the 2011 Contract:

Description	QTY	Unit Price (USD)	Amount (USD)
CA1070PK2L2YA80 5 Ton Truck	20	nearly 19,000	nearly 380,000
CA1122PK2L2Y 7 Ton Truck	30	more than 25,000	more than 760,000
CA1320P2K15L2T1YA80 HP Cargo Truck	60	more than 47,000	more than 2,800,000
Three Axle Skeleton Semi-trailer for 40' (Air Suspension & A.B.S)	60	nearly 20,000	nearly 1,200,000
Double Diff Dolly	60	more than 13,000	nearly 800,000
Total	230		nearly 6,000,000

(b) The contract require the Respondent to make the down payment (20% of the value of each purchase order) when it places the purchase orders, and to pay the balance of the purchase price (the remaining 80% of the value of each purchase order) in 24 monthly instalments by no later than the 26th day of each month, in the form of cheques, and beginning 90 days after the date of the bill of lading.

(c) The contract requires the Respondent to pay the exchange rate differential due to the differences between agreed Basic Exchange Rate (6.5 : 1) and the exchange

rate of RMB against US$ published by the Bank of China on the 26th day of each month.

(d) The contract requires the Respondent to pay the interest at the rate of 4% per year, beginning 60 days after the Bill of Lading date.

(e) If the Respondent delays in payment of the balance, Article 8.2 requires the Respondent to pay the penalty from the due date at the rate of 0.3% per day.

2. The Respondent purchased vehicles from the Claimant under the Sales Contract.

After signing the Sales Contract, the Respondent placed two purchase order with the Claimant in 2011.

In or about June 2011, the Respondent placed the first purchase order with the Claimant for vehicles with a value of more than US$ 1.2 million. At the same time as placing the first purchase order, the Respondent paid the Claimant nearly US$ 250,000, being 20% of the price for the first purchase order.

In or about August 2011, the Respondent placed the second purchase order with the Claimant for vehicles with a value of more than US$ 1.2 million. At the same time as placing the second purchase order, the Respondent paid the Claimant the down payment of nearly US$ 250,000, being 20% of the price for the first purchase order.

Upon receipt of each purchase order and each down payment, the Claimant fulfilled its obligation under such purchase order by shipping and delivering the ordered vehicles to the Respondent.

The vehicles under the first purchase order were delivered by the Claimant on 15 and 21 August 2011. The vehicles under the second purchase order were delivered on 14 and 16 October 2011. This is set out in the Packing Lists, invoices and bills of lading respectively.

Pursuant to the Sales Contract, the Respondent is liable to pay 80% of the total price (the "**balance**") under the purchase orders by monthly installments within next 24 months after 90 days from the bill of lading date. And the Respondent was required to make each payment no later than the 26th date of each month.

According to the articles of the Sales Contract referred to above, payments of the balance under the first purchase order were to be made monthly from November 2011 to

November 2013. Payments under the second purchase order were to be made monthly from January 2012 to January 2014.

However, the Respondent only made payments of balance on 18 April 2012, 24 April 2012, 3 May 2012, and 7 May 2012, amounting to more than US$ 330,000. These payments, however, were all made after the date they were due. Since 7 May 2012, the Respondent has failed to pay any of the outstanding balance. Till now, the due and unpaid payment is amounting to more than US$ 1.6 million.

Furthermore, the Respondent has not paid the exchange rate differential pursuant to the Sales Contract.

3. Despite the Claimant's repeated attempts at collection, the Respondent failed to pay the outstanding amount of price under its purchase orders.

As a result of the Respondent not paying the balance after 7 May 2012, the parties held a meeting on June 2012 to discuss payment issues under the Sales Contract and other contracts. The Claimant and the Respondent signed the minutes of the meeting, in which the Respondent promised to start paying the Claimant in July 2012 for the due portion of balance of May, June and July 2012, as well as future monthly payment accordingly.

In breach of the terms of the minutes of the meeting, the Respondent did not make any payment after the meeting.

As a result, the Claimant sent letters to the Respondent on 28 September 2012, 18 October 2012, and 9 November 2012 to urge the payment of outstanding amount of the balance under the two purchase orders subject to the Sales Contract.

On 5 October 2012 and 27 October 2012, the Respondent responded to the Claimant's demands for payment. The Respondent did not provide any basis for failing to pay the outstanding balance. Instead, the Respondent raised a number of arguments that are inconsistent with the terms of the Sales Contract.

In April 2014, two engineers from the Respondent visited the Claimant and agreed to pay US$ 5 million for this Sales Contract and another contract concluded by the Respondent and China J Motors Ltd, an associated company of the Claimant, in 2008. They further promised that the Respondent would pay US$ 2 million within 2 weeks after they went back to Tanzania and the remaining US$ 3 million would be paid in monthly installments within

next 24 months after the payment of US$ 2 million. Unfortunately, none of the payments were made as promised.

As a result of the Respondent's breach of the Sales Contract, on 7 July 2014 South Africa K law firm (a law firm authorized to act on the Claimant's behalf in this regard) sent a letter of demand to the Respondent. In this letter, the Claimant requested the Respondent to pay the outstanding amount under the two purchase orders, interest on the outstanding amount, exchange rate differentials and penalty in accordance with the Sales Contract. The Respondent chose to continue ignoring the Claimant's reasonable requirement and the Claimant has not received any official reply in regard of the above letter of demand till date of this application for arbitration.

4. The Respondent's failure to pay the outstanding amount under the two purchase orders constitutes a material breach of the Sales Contract, and the Respondent is liable for all losses suffered by the Claimant.

The Respondent's failure to pay the full purchase price under the two purchase orders constitutes a material breach of the Sales Contract.

The governing law of the Sales Contract and related Purchase Orders is the law of the People's Republic of China ("**PRC**") (See the Sales Contract). Article 107 of the *PRC Contract Law* provides that "*[i]f a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract such as to continue to perform its obligation, to take remedial measures, or to compensate for losses*." Article 109 provides that "*[i]f a party fails to pay the price or remuneration, the other party may request it to make the payment*".

According to the Sales Contract, the Respondent shall pay the interest from 60 days after Bill of Lading date at the rate of 4% per year. The Respondent also needs to pay 0.3% of the amount of the delayed payments as penalty after the due date if the delay lasts for over 20 days.

Under PRC law and the above-mentioned articles of the Sales Contract, the Claimant requests that the Respondent pays the interest as well as the penalty due to its breach of contract in addition to the outstanding amount of price and exchange rate differential. The interest incurred under the Sales Contract amounts to more than US$ 170,000 and penalty amounts to nearly US$ 2.4 million as of 3 June 2014. At the same time, the outstanding amount of interest and penalty will continue to accumulate till date of payment.

As the current arbitration is commenced solely as a result of the Respondent's breach, the Respondent should be liable for all attorney's fees of the Claimant, which are estimated to be more than US$ 160,000 and other reasonable expenses and the arbitration fee incurred by the Claimant for this arbitration.

Based on the foregoing facts and reasons, the Claimant hereby submits this application to the CIETAC in accordance with relevant laws and respectfully requests that relief be granted to safeguard the legitimate rights and interests of the Claimant. The Claimant reserves its right to amend the relief if it becomes necessary.

5. Relief and Remedies Request

The Claimant requests the Tribunal order the Respondent to:

(a) pay more than US$ 1,660,000 to the Claimant, as the outstanding portion of the payment price due under the Sales Contract;

(b) pay interest on the outstanding portion of the payment price to the Claimant calculated based on annual interest rate of 4% from 60 days after bill of lading date until the date of payment. As at 3 June 2014, the amount of interest was more than US$ 170,000;

(c) pay the outstanding exchange rate differential to the Claimant, which amounts to more than US$ 98,000;

(d) pay the penalty for late payment calculated at 0.3% of the amount of the delayed payments per day until the date of payment, which as at 3 June 2014 was nearly US$ 2.4 million;

(e) reimburse the Claimant's reasonable expenses incurred in connection with this arbitration (including but not limited to the attorney's fees), which are estimated to be approximately more than US$ 160,000; and

(f) bear all arbitration fees.

B. The Respondent's Answer to the Claimant's Claim

There is no agreement between the parties on 31 May 2011 (that is, there is no 2011 Contract).

Nevertheless, the Respondent does not deny that Claimant agreed to sell Respondent certain vehicles at prices set out in the Contract.

The Claimant did deliver certain vehicles to the Respondent and the Respondent made payment of more than US$ 4,290,000 to the Claimant for said vehicles.

Upon delivery of some of the vehicles, the Respondents discovered several problems with the Claimant's performance of the agreement, including but not limited to wrongful supply of 240HP engine instead of 260HP engine for 4 trucks, defective drawbar hooks 60 units, wrongful supply of rear tires on model number CA1320P2K12LYA80, difference of high fuel cost, and the Claimant was accordingly informed of these facts.

The Claimant has not resolved the problems with the vehicles it provided to the Respondent, and the extensive delay has caused the Respondent additional damages.

The Contract provides that the "*Purchaser (Respondent) shall pay 0.3% of the amount of delayed payment per day to the vendor*". The wording of this provision is unclear. However, if this is intended as a penalty clause, three tenths of one percent for each day of delayed payment is unconscionable and should be set aside, particularly where the Vendor (Claimant) has produced and sold vehicles that do not meet the standard of the contract and has yet to correct these damaged vehicles.

The Contract provided that if the Vendor delays the delivery, "*…Vendor [Claimant] shall pay 0.3% of the amount of the delayed payment per day to the Purchaser [Respondent]*". Sending vehicles that do not meet the standard of the contract and are damaged or inadequate and failing to repair them is the equivalent of either no delivery or delayed delivery. As such, the Claimant is responsible for payment of this penalty pursuant to this clause to the Respondent.

The Contract reads: "*Both the unit price and the total contract amount hereof shall not include any maintenance, repair work, warranty service, and for any other kind of after-sales service for the Vehicles. The Purchaser agrees to waive off the entire claim against the Vendor for the order. Instead, the Vendor agrees to supply 4% spare parts of the total value to the purchaser. If the same quality problem occurs for more than 10% of the total amount of the Vehicles hereof, and subject to the Vendor's written confirmation, the Vendor will provide the spare parts in kind to the Purchaser and bear the cost of ocean freight, other relevant costs shall be borne by the Purchaser*".

This clause is unconscionable as it specifies that the Claimant can deliver any kind of damaged vehicles it wishes and "*the Purchaser agrees to waive all claim against the Vendor*" and all the Claimant has to do is to supply spare parts equal to 4% of the value of the purchase to the Purchaser (i.e., the Respondent).

In view of the unconscionable provisions of the Contract, the Respondent states that this entire Contract is null and void and the parties are not bound by the Contract.

Furthermore, the Respondent has been substantially damaged by the delivery of vehicles having substantial problems, which could neither be properly utilized nor sold. In this regard, the Respondent makes a claim against Claimant for an amount to be determined after further proceedings and for consequential damages.

C. The Claimant's Rebuttal to the Respondent's Answer

1. The Sales Contract was agreed by the Claimant and the Respondent is legally binding upon the parties.

The Claimant states:

(a) The agreement dated 31 May 2011 (i.e., the 2011 Contract) was duly executed by the parties.

(b) The Respondent has not provided any evidence or any basis for the allegation that there is no such agreement.

(c) Furthermore, the Respondent admitted that Claimant agreed to sell vehicles to Respondent at prices set out in the Sales Contract. It further admitted that the Claimant did deliver certain vehicles to the Respondent and the Respondent partially paid for these vehicles. Accordingly, the Respondent has admitted that the parties entered into a contract.

2. The Respondent only paid more than US$ 330,000 under the Sales Contract.

The Claimant:

(a) denies that the Respondent made payment of more than US$ 4,290,000 to the Claimant for the vehicles delivered by Claimant;

(b) states that the Respondent's claim that it has more than paid US$ 4,290,000 is groundless and lacks any evidence in support; and

(c) further states that it only received more than US$ 330,000 from the Respondent under the Sales Contract.

3. Respondent's claim regarding quality problems is not true and shall be rejected.

The Claimant:

(a) denies all these allegations;

(b) denies that the Respondent informed the Claimant of any of issues alleged;

(c) states that the Claimant has fully performed its obligations under the Sales Contract by delivering good-quality products in accordance with the Sales Contract; and

(d) further states that the Respondent has failed to produce any evidence in support of these allegations.

4. Respondent's allegations against validity of the Sales Contract have no legal basis.

The Claimant states:

(a) Article 8.2 is not a penalty. It is a pre-estimation of damages in respect of any late payments. Accordingly, Article 8.2 is valid and binding upon both parties.

(b) The Sales Contract provides that the contract is "*governed by and interpreted in accordance with the laws of People's Republic of China*". Under PRC law, the parties are permitted to include a clause such as 8.2 in a contract where a purchaser is required to pay interest on a late contractual payment.

(c) The Respondent clearly agreed on such a clause and signed the Sales Contract without raising objections regarding Article 8.2. The Respondent shall not be allowed to deny the validity of this article when it breached the contract.

(d) The Respondent failed to provide any evidence to prove that the penalty rate at 0.3% is unconscionable.

(e) The Claimant notes that the Respondent objects to the interest under Article 8.2, however, the Respondent does not object to the interest of 0.3% as set out in the contract. It is clear that the Respondent agreed to the 0.3% interest on late payments, but now objects once it is liable to make payments under Article 8.2.

(f) In the alternative, the Claimant states that Article 56 of the *PRC Contract Law* provides that "*[w]here a contract is partially invalid, and the validity of the remaining provisions thereof is not affected as a result, the remaining provisions are nevertheless valid*". Accordingly, even if Article 8.2 is set aside, the rest of the Sales Contract remains effective and in force.

The Claimant:

(a) denies that delivering vehicles not in conformity with the Sales Contract "is the equivalent of either lack of delivery or delayed delivery";

(b) denies that it is responsible for payment in the Sales Contract, because the vehicles were allegedly not in conformity with the Sales Contract;

(c) states that the vehicles delivered were in conformity with the Sales Contract and therefore, even on the Respondent's erroneous argument, Article 8.3 is not applicable; and

(d) states that, even if the vehicles were not in conformity with the Sales Contract, Article 8.3 only applies to delayed delivery and not to issues regarding quality of the vehicles supplied.

The Claimant:

(a) denies that Article 5.2 is unconscionable;

(b) states that the parties agreed that the contract price shall not include the additional and after-sales services fees, which is valid. Such agreement does not deprive the Respondent of its right to ask for additional services or after-sales services, or exempt Claimant from its liabilities if quality problems arise. The Claimant did not intend to escape its liabilities if there is any complaint regarding quality issues;

(c) states that the Respondent had never complained about the quality of vehicles and it is the first time that the Claimant has been notified of a complaint regarding the quality of the vehicles delivered; and

(d) In the alternative, the Claimant repeats its position under Article 56 of the *PRC Contract Law* above. Accordingly, even if Article 5.2 is set aside, the rest of the Sales Contract remains effective and in force.

5. Conclusion by the Claimant

To sum up, the Respondent's allegations have no contractual or legal basis. The Claimant respectfully requests that its relief be granted to safeguard the legitimate rights and interests of the Claimant.

D. The Respondent's Counterclaim for Damages against the Claimant

1. Blatant unconscionability of the Claimant's Purchase and Sales Contract

As referenced in the Respondent's original Answer to Claimant's Request for Arbitration, several provisions within the Claimant's Purchase and Sales Contract[1] are so extremely unjust and overwhelmingly one-sided in favor of the Claimant, that they are contrary to good conscience. Typically, when material provisions of a contract are unconscionable on their face the provision would be unenforceable in every instance of its attempted application. The perpetrator should not be allowed to benefit from such a Contract where it is clear no meeting of the minds ever occurred.

The Purchase and Sales Contract states that "*Both the unit price and the total contract amount hereof shall not include any maintenance, repair work, warranty service, and for any other kind of after-sales service for the Vehicles. The Purchaser agrees to waive off the entire claim against Vendor for the order. Instead, the Vendor agrees to supply 4% spare parts of the total value to the purchaser. If the same quality problem occurs for more than 10% of the total amount of the Vehicles hereof, and subject to the Vendor's written confirmation, the Vendor will provide the spare parts in kind to the Purchaser and bear the cost of ocean freight, other relevant costs shall be borne by the Purchaser*."

In essence, if enforceable, this provision permits the Claimant to deliver any kind of vehicle regardless of its quality or functionality, while Purchaser agrees to waive all claim against Vendor, provided the Claimant supply 4% unidentified spare parts of the total value to the Respondent.

Article 5.1 operates under the guise that there might be small issues with the content of some of the shipments of vehicles and parts, yet the Claimant seeks to insulate itself from delivering large quantities of defective trucks, engines, parts, tires, and differences in specific fuel consumption to the severe detriment of the Respondent. No reasonable person

1 The "Purchase and Sales Contract" is same to the "Sales Contract" referred in the Claimant's "Request for Arbitration".

would agree to such a provision knowing it would be exploited to the degree characterized by the Claimant.

The Purchase and Sales Contract states that "*Purchaser shall pay 0.3% of the amount of payment Vehicles per day to the vendor*" which, barring enforceability on the basis of ambiguity, is unconscionable.

In conjunction with Article 5.1 previously referenced, the Claimant seeks an exorbitant penalty for late payments on the total value of shipments of which it claims it has no responsibility to deliver the right kind of truck, engine, part, or tire, nor safeguards the quality of the content of those shipments.

In light of the goods actually shipped, the Claimant has aimed to use Article 8.2 to seek an enormous penalty arising from late payments on severely defective goods. This provision threatens any purchaser to which it is applied.

Regardless of how justified a purchaser may be in trying to discuss or dispute the defective goods shipped, belief in its enforceability incentivizes purchasers to begrudgingly remit payment for fear the daily accumulating penalty may quickly outweigh the value of attempting to dispute it.

Furthermore, the Claimant has no incentive to follow up on any dispute of the purchaser, as the daily penalty that the Claimant now claims has accumulated to nearly US$ 2,400,000.

These unconscionable provisions affect both the content of the shipments and the ability of the Respondent to attempt to dispute those shipments, and thus, affects the heart of the Contract. As such, the Purchase and Sales Contract is unconscionable on its face and should not be enforceable.

2. Basis of Counterclaim

The Claimant Request for Arbitration is premised on a dispute arising from the second lot of the Purchase and Sales Contract signed in May 2011 between the Claimant and the Respondent.

Specifically, the Claimant requests the Tribunal to order the Respondent to pay more than US$ 1,660,000 as the correct outstanding portion of payment, interest on the outstanding portion of payment amounting to more than US$ 170,000, outstanding exchange rate

differential amounting to more than US$ 98,000, and a penalty for late payment amounting to nearly US$ 2,400,000.

However, the Claimant's exorbitant claims for damages under the Sales Contract for specific goods are belied by the actual content and quality of the vehicles and parts shipped in the second lot.

The same defects that arise in the second lot are prevalent throughout the first and third lots of the Sales Contract, which will be further elaborated upon during the course of this Arbitration. This formalization of Respondent's counterclaim serves to offer a measure of damages incurred, of which can further aid the calculation of damages for all three lots under the Sales Contract.

Assuming normal damages seek to place the parties in the position they were in before they entered the Sales Contract, it may be impossible in this case due to the attempted use and repair of many of the defective goods. However, damages must still flow to the Respondent for the substantial costs it has incurred in having to replace the defective products, modifications to unsuitable parts, and the foreseeable loss to profits the defective products have caused in the form of substantial delays and damage to the vehicles and cargo.

The Purchase and Sales Contract states that "*The Vehicles hereof are brand new and manufactured in 2011" and "The vehicles hereof shall conform to the relevant quality standards in Commodity Inspection Certificate issued from the commodity inspection authorities before the delivery.*"

As the associated portion of supplementary evidence demonstrates, the Claimant shipped unsuitable engines. The Workshop Manager of the Respondent, Witness C, additionally confirmed this fact with the Claimant after testing. He also confirmed with the Claimant that many of vehicles contained manufacturing defects, including gear box assembly failure, steering box failure, and differential failure.

Pursuant to the specifications within the annexure of the Sales Contract, 260HP engines were supposed to be shipped, the high horsepower being essential for the trucks' purpose in hauling and pulling cargo. However, in at least 4 trucks only 240HP engines were actually shipped in this particular lot. The difference is substantial as the trucks were not suitable for their purpose owing to their deficient horsepower.

Witness C informed the Claimant of the incorrect engines and defects in others, and while acknowledged the incorrect shipment, nothing further was done to attempt to cure the problem, forcing the Respondent to replace the defective engines and parts.

As the associated portion of supplementary evidence demonstrates, the Claimant shipped defective and low-quality drawbar hooks, many of which were unusable or broke in transit that resulted in the cargo being unhinged from the truck during normal driving conditions.

The defective drawbar hooks have damaged the Respondent's trailers and the cargo being hauled by breaking enroute and have caused substantial economic loss for the foreseeable delays the low-quality hooks have caused to the Respondent's trucking business.

Witness C informed the Claimant that the drawbar hooks were defective and breading enroute, capable of seriously endangering both person and property, however even after the Claimant acknowledged the low quality of its drawbar hooks nothing was ever done to cure the problem.

The Claimant's noncompliance has forced the Respondent to replace and repair the deficient parts and the property those parts have damaged.

As the associated portion of Supplementary evidence demonstrates, the Claimant shipped the incorrect rear tires on at least two different vehicle models within the lot.

As the trucks are used for hauling, the specific Lug pattern or similar design for the rear wheels is necessary for basic traction and stability when hauling or pulling cargo.

The Claimant seemingly did not discriminate between front and rear tires leading many of the trucks to be supplied with rear tires designed for the front of the vehicle, which are unsuitable for hauling. Witness C informed the Claimant that it has supplied unsuitable rear tires for two models of vehicles, however the Claimant has never attempted to cure the problem.

The Claimant's noncompliance has forced the Respondent to replace the unsuitable tires.

As the associated portion of supplementary evidence demonstrates, the Claimant promised to ship vehicles with explicit specifications regarding fuel consumption and other vehicle characteristics.

The supplementary evidence indicates that the Claimant promised to ship vehicles with a posted fuel consumption rate of 0.42 liter/km. Since an individual the Respondent truck travels an average distance of 4,000 kilometers per month, pursuant to the Sales Contract the vehicles should be able to travel that distance on more than 1600 liters of fuel. However, on at least 59 trucks, the actual performance of the vehicle posted a fuel

consumption rate of 0.60 liter/km, requiring 2,400 liters of fuel to travel the same distance for an individual truck.

Witness C, again, informed the Claimant of the substantial losses the Respondent was incurring as a result of the Claimant's shipment of underperforming trucks in breach of the quality standards outlined within the Sales Contract. However, the problems the Respondent raised with the defective trucks were never cured, forcing the Respondent to unjustifiably bear the costs.

The remaining supplementary evidence included illustrates the late shipments and renegotiation concerning shipment of the third lot, for which if the penalty clause within the Sales Contract is enforceable, is applicable to the Claimant for its failure to deliver the third lot in accordance with the delivery schedule.

In addition to the future calculation of the business the Respondent lost as a result of the severe delays and failure to fulfil orders resulting from the attempted use of some of the defective goods, the Respondent requests the Tribunal order the Claimant to: (a) pay Tsh 80 million, the value of 4 trucks with a 260HP engine, for which unsuitable engines were actually shipped; (b) pay Tsh 150 million, the value of 60 units of normal quality drawbar hooks, for which severely defective drawbar hooks were actually shipped; (c) pay more than Tsh 130 million, the value of the correct rear tires suited to hauling, for which the wrong supply of tires not suitable for this purpose were actually shipped; (d) pay more than Tsh 2.2 billion, the difference in the value of fuel for the specific fuel consumption rate specified under the Sales Contract and the rate at which the trucks actually consumed fuel; (e) pay such other damages that may be discovered through the course of this Arbitration; and (f) pay the costs and fees incurred as a result of arbitrating.

The total value of the above-mentioned damages is more than Tsh 2.6 billion (nearly US$ 1,600,000).

E. The Claimant's Reply to Respondent's Counterclaim and Comments on examination of Respondent's evidence

1. Claimant denies Respondent's position that the Sales Contract was not agreed on or was unenforceable.

The Claimant submits that the Sales Contract was duly executed by both parties. The fact that the Respondent is now unhappy with the terms of the bargain does not change the fact that the Sales Contract was agreed on and is enforceable.

In response to Respondent's allegations in paras. 2 to 4, the Claimant refers to its Rebuttal to Respondent's Answer ("**Rebuttal**") signed in January 2015. As stipulated in para. 8(b) of the Claimant's Rebuttal, Article 5.1 was not meant to deprive the Respondent of its right to after-sales services. However, the Respondent failed to provide proper proofs to prove its quality claim.

In response to the Respondent's allegations in paras. 5 to 10, the Claimant refers to para. 6 of its Rebuttal. The Claimant also submits that it is absurd that Respondent interpreted its payment of the down payment as a fear of accumulating a penalty under Article 8.2. As a reasonable and experienced enterprise, the Respondent had full discretion not to accept or execute the Contract rather than doubt the agreed term which it breached.

2. Claimant denied all of the Respondent's quality claims in the basis of Counterclaim

The Claimant denies all facts, characterizations, legal interpretations, causes of action and requested reliefs put forward in the Counterclaim. The Claimant submits that the counterclaims have no merit and should be dismissed.

Firstly, the Respondent failed to prove that the Claimant breached the Sales Contract by delivering "the defective goods". The evidence submitted by the Respondent is not relevant or insufficient to prove its counterclaim. The Claimant's comments on the Respondent's evidence are stipulated in detail in the below paragraphs.

Secondly, the Respondent failed to prove that it suffered any damage due to the alleged breach. The Respondent submitted four Debit Notes to attempt to prove that it suffered the damages of nearly US$ 1,600,000. However, the Debit Notes were issued by

the Respondent itself and the Claimant never received them before, which failed to prove the actual damages.

Thirdly, the Respondent failed to make claim within the two-year limitation of action and has no right to make claim now.

Pursuant to Articles 135 and 137 of the *General Principles of Civil Law of the People's Republic of China*, the limitation of action for protection of civil rights shall be two years from when the party knows or ought to know that its rights have been infringed upon.

Pursuant to Article 158 of the *PRC Contract Law*, if the buyer fails to notify within a reasonable period or within two years, commencing on the date when it received the goods, the quality of the goods is deemed to comply with the contract.

The vehicles under the Contract were delivered by the Claimant to the Respondent in 2011. After receipt of the goods, during the past 5 years, the Respondent did not raise claim against the Claimant until the Claimant file this arbitration. The two-year limitation action has expired, and the Respondent has no right to raise any claims regarding the quality of the vehicles.

F. The Respondent's Reply to Claimant's Answer to Counterclaims

1. In response to the Claimant's Answer rejecting the Respondent's position that the Sales Contract is unenforceable

In its Answer to the Respondent's Counterclaim, the Claimant contends that unconscionability is not applicable as the Sales Contract was executed by both parties. The Claimant referred to Article 56 of the *PRC Contract Law* that provides that "*An invalid or canceled contract is not legally binding ab initio. Where a contract is partially invalid, and the validity of the remaining provisions thereof is not affected as a result, the remaining provisions are nevertheless valid.*"

However, Article 56 read alone is misleading on the issue of unconscionability under the *PRC Contract Law* without the context of Article 54 [Contracts Subject to Amendment or Cancellation]. Article 54 states that "*Either of the parties may petition the People's Court or an arbitration institution for amendment or cancellation of a contract if: (i) the contract was concluded due to a material mistake; (ii) the contract was grossly unconscionable at the time of its conclusion. If a party induced the other party to enter into a contract against its true intention by fraud or duress, or by taking advantage of the other party's hardship, the*

aggrieved party is entitled to petition of the People's Court or an arbitration institution for amendment or cancellation of the contract."

Thus, under the *PRC Contract Law*, where the contract was grossly unconscionable at the time of its conclusion, cancellation or amendment can be warranted regardless of whether the contract as executed by both parties.

Claimant next contends that the Sales Contract "*was not meant to deprive the Respondent of its right to after-sales services*." Claimant asserts that Respondent's "lack of proofs" to its quality claims ensure it has no obligation to provide after-sales services to Respondent. However, to date, none of the evidence provided by the Respondent was able to meet the Claimant's contrived bar of sufficient "proofs". It would seem this bar, which has never been clarified but only asserted, dismisses all evidence wrought unilaterally, regardless of content or whether such evidence is only prone to be collected unilaterally. The Claimant's contrived aegis serves to ensure no after-sales services need ever be addressed.

As expounded upon in the Respondent's Counterclaim, the Workshop Manager of the Respondent, Witness C, sent a host of emails to the Claimant about defects he and his staff observed upon receiving goods. Those emails were never sufficiently addressed or often never addressed at all. If the Claimant refuses to address the issues of its defective goods with Respondent or claims it has no responsibility to follow up when it alleges proofs do not meet its standards, it amounts to a substantial breach of contract.

The Claimant lastly argues in this section that its penalty clause is reasonable, citing that since both parties are experienced enterprises Respondent enjoyed discretion not to accept.

While it is true both parties are established enterprises, when one party has control over whether the other can perform its side of the bargain and fails to act reasonably in that regard, that party cannot be permitted to benefit from the contract. A party should not be able to benefit when failing to meet its own responsibilities triggers massive penalties against whom it owed those same responsibilities. If the Claimant ships defective goods and refuses to follow up on multiple assertions and evidence such goods are defective, penalties cannot be permitted to accumulate on the nonpayment of those goods when the Claimant's diligence in responding to inquires is necessary in order to avoid them.

As referenced in the Respondent's counterclaim, the Claimant has no incentive to follow up on any dispute of the purchaser, as each day the Claimant waits to address a

concern equates to substantial penalties. Now the Claimant's claims for penalties have accumulated to nearly US$ 2.4million, more than one third the total contract value.

The unconscionable provisions referenced in the Respondent's Counterclaim and this Reply affect both the content of the shipments and the ability of the Respondent to attempt to dispute those shipments, and thus, affects the core of the Sales Contract. As such, the Sales Contract is unconscionable on the *prima facie* and is unenforceable as a whole.

As reiterated in the Respondent's Counterclaim, since the Sales Contract is grossly unjust, the Respondent moves to void the contract. However, pursuant to the *PRC Contract Law*, even if the Sales Contract is deemed valid, damages must still flow to the Respondent for the substantial costs incurred in replacing defective goods, modifying unsuitable parts, and the foreseeable loss of profits of vehicles and cargo caused by the substantial delay and damage of defective goods.

Article 111 [Liabilities in Case of Quality Non-Compliance] of the *PRC Contract Law* states that "*Where a performance does not meet the prescribed quality requirements, the breaching party shall be liable for breach in accordance with the contract. Where the liabilities for breach were not prescribed or clearly prescribed, and cannot be determined in accordance with Article 61 hereof, the aggrieved party may, by reasonable election in light of the nature of the subject matter and the degree of loss, require the other party to assume liabilities for breach by way of repair, replacement, remaking, acceptance of returned goods, or reduction in price or remuneration, etc.*"

Furthermore, Article 113 [Calculation of Damages] of the *PRC Contract Law* reads that "*Where a party failed to perform or rendered non-conforming performance, thereby causing loss to the other party, the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including any benefit may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract. Where a merchant engages in any fraudulent activity while supplying goods or services to a consumer, it is liable for damages in accordance with the Law of the People's Republic of China on Protection of Consumer Rights*."

The Sales Contract states that all vehicles shipped would be "brand new" and manufactured in 2011, and thus, the Claimant has violated Article 111of the *PRC Contract Law* by shipping vehicles that clearly deviate from this contractual standard. As the Claimant has breached the Sales Contract by sending defective goods and making no effort to cure or

adequately address issues of quality, damages are due to the Respondent under Article 113 of the *PRC Contract Law* which is designed to put the aggrieved party back in a position it would have been in had the Claimant never breached the contract.

2. In response to the Claimant's Answer denying all of the Respondent's quality claims

As referenced in the Claimant's Answer to the Respondent's Counterclaim, the Claimant misrepresents the law with respect to Article 158 of the *PRC Contract Law*.

As illustrated in the Respondent's Counterclaim, the Workshop Manager of the Respondent, i.e., Witness C, sent a host of emails to the Claimant regarding various defects he analyzed in the shipments within a reasonable time after receipt. Such emails constitute sufficient notice under Article 158 of the *PRC Contract Law*, which simply uses the phrase "*the buyer shall notify the seller of any noncompliance*".

No reasonable interpretation of Article 158 of the *PRC Contract Law* would suggest, as the Claimant does, that sufficient notice requires the Respondent to file a complaint with a court or tribunal within that time period.

G. The Claimant's Opening Submission and Closing Submission

1. The Claimant's allegations: failure to make repayments

The Claimant alleges that the Respondent placed two orders for vehicles totaling more than US$ 2,490,000. After making the 20% down payment for each of the purchase orders, the Respondent failed to fulfill its payment obligations under the 2011 Contract[2]. The Respondent only paid more than US$ 330,000 in total in respect of its repayments. In doing so, the Respondent fundamentally breached the 2011 Contract.

Repayments under Article 4.2

The evidence clearly demonstrates that the Respondent failed to make the required repayments in respect of the two purchase orders under the 2011 Contract.

2 The "2011 Contract" is the same as the "Sales Contract" referred in the Claimant's "Request for Arbitration", i.e., the contract with Contract No. 11D16TA01MG and dated 31 May 2011.

The Respondent placed two purchase orders under the 2011 Contract totaling more than US$ 2,490,000. The Respondent then paid an advance payment of 20% in respect of each purchase order, totaling nearly US$ 500,000. Accordingly, the Respondent owed nearly US$ 200,000. However, the Respondent only paid more than US$ 330,000. From May 2012, the Respondent has failed to make any other repayments under the 2011 Contract. As a result, the Respondent breached the 2011 Contract.

The Respondent does not deny that it has failed to perform its payment obligations. In fact, at para. 37 of Witness C's supplementary statement, he admits that the Respondent failed to make the repayments. Instead, the Respondent's defence is that the Claimant should agree to proceed with another unrelated contract before the Respondent will pay some of the outstanding amounts. In October 2012, the Claimant issued a demand to the Respondent requesting payment of the outstanding price of the purchase orders. In response, the Respondent did not deny that it was liable to pay the outstanding purchase price for the two orders. Instead, the Respondent proposed that it would pay the outstanding amounts only if the Claimant confirmed the shipment of vehicles under an unrelated contract. On 27 October 2012, the Respondent stated that it has "*maintained our position to pay upon confirmation from your principals regarding the shipment plan as per*" ("**2012 Contract**").

Accordingly, the Claimant submits that the Respondent admits that it has failed to make the repayments under the 2011 Contract. The Respondent's reason for not making payment is completely unjustified. The 2011 Contract is unrelated to the 2012 Contract. As a result, there is no excuse for the Respondent failing to make the repayments under the 2011 Contract until the Claimant proceeds with the completely unrelated 2012 Contract. In doing so, the Respondent has breached the 2011 Contract.

Exchange rate differential under Article 4.4

The Respondent is also liable to pay the exchange rate differential of more than US$ 98,000 as set out in the 2011 Contract.

Article 4.4 provides: "*Both the unit price and total contract amount hereof is calculated based on RMB against US Dollars, the exchange rate of which is 6.5:1, hereinafter referred to as 'the Basic Exchange Rate'. Each month, both Parties shall compare the basic exchange rate with the RMB-US$ exchange rate announced by the Bank of China on the 26th of each month to confirm the exchange rate difference. The Buyer and the Vendor shall settle exchange rate differences every three months.*"

During its opening address, the Respondent's counsel submitted that there was no obligation on the parties to pay the exchange rate differential.

In any event, Article 4.4 clearly contains an obligation on the parties to reimburse each other if the RMB fluctuates. The last sentence provides that "the Buyer and the Vendor shall settle exchange rate differences every three months". This wording clearly makes it clear that, if the RMB fluctuates in relation to the US dollar, then a party will have an obligation to pay to the other side the amount of variance from the "Basic Exchange Rate" being RMB 6.5 : USD 1.

Interest under Article 4.6

The Claimant is also claiming interest in the 2011 Contract in the amount of US$ 172,524.21. This amount is calculated up to and including June 2014. However, the Respondent's obligation to pay this amount continues to accrue up to and including the date of payment by the Respondent.

Article 4.6 provides that "*[b]oth parties confirm the interest hereof is calculated based on annual interest rate of 4%, the Purchaser shall pay the interest from 60 days after the B/L date*".

Penalty interest under Article 8.2

The Claimant is also claiming penalty interest in the 2011 Contract in the amount of more than US$ 2,290,000. This amount is calculated up to and including June 2014. However, the Respondent's obligation to pay this amount continues to accrue up to and including the date of payment by the Respondent.

Article 8.2 provides: "*If the Purchaser makes the balance payment delay or arrange the acceptance of the Vehicles delay after the Vehicles arrived at the port, the Purchaser shall pay 0.3% of the amount of the delayed payment per day to the Vendor. If the above-mentioned delay lasts for more than 20 days from the date specified in Article 4, the Seller shall be entitled to terminate this Contract upon written notice…*"

The Claimant submits that if the Respondent fails to make the repayments under Article 4.2, then the Claimant is entitled under Article 8.2 to charge interest in the amount of 0.3% per day. The obligation on the Claimant to pay the penalty interest under Article 8.2 arises as a result of the Claimant's breach of the 2011 Contract. Accordingly, the payment under Article 8.2 is separate and distinct from the Respondent's obligation under Article

4.6 to pay interest. The obligation under Article 4.6 does not require a breach of the 2011 Contract for an amount to become payable.

During the hearing, the Respondent argued that the rate of penalty interest under Article 8.2 was too high and that the Claimant should not be entitled to claim anything under Article 8.2. However, the Claimant submits that this is not the correct approach. The Claimant submits that it is entitled to claim the full amount under Article 8.2. As an alternative, if the Tribunal finds that the rate of interest under Article 8.2 is too high, then the Claimant is entitled to claim a reduced amount on the reasonable basis.

2. Was the 2011 Contract Unconscionable?

Article 54 of the *PRC Contract Law* provides as follows: "*Either of the parties may petition the People's Court or an arbitration institution for amendment or cancellation of a contract if: (1) the contract was concluded due to a material mistake; and (2) the contract was grossly unconscionable at the time of its conclusion*."

Article 72 of the *Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)* (the "**SPC Opinions**") provides that "*[i]n case any party makes use of his own advantages or takes advantage of the other party's lack of experiences to have the rights and obligations of the two parties obviously violate the principle of fairness and making compensation for equal value, it shall be determined as grossly unconscionable*".

The *SPC Opinions* contain two requirements in order for a contract to be considered "grossly unconscionable":

Firstly, a party must make use of its "own advantages or takes advantage of the other party's lack of experiences". The term "advantages" refers to a party's position of strength over its counterparty (generally its overly strong bargaining position due to its commercial or financial status). A party will then have to use those "advantages" to force the counterparty to accept contractual terms that are grossly unconscionable.

Secondly, the rights and obligations of the two parties must "obviously violate the principle of fairness and making compensation for equal value". This requires an objective consideration of the contractual terms to determine whether they are fair and whether the compensation is for a value equal to the nature of the goods or services provided under the contract.

(a) Was the 2011 Contract non-negotiable?

The Respondent repeatedly alleged that the 2011 Contract was non-negotiable. In his witness statements, Witness E[3] stated that "*upon their arrival to enter into negotiations they presented us with a pre-drafted Purchase and Sales Contract, of which was non-negotiable*" and "*the 2011 Contract was drafted entirely by the Claimant and we were informed that it was not negotiable*".

However, during cross-examination, Witness E conceded that the 2011 Contract was subject to lengthy negotiations.

This was consistent with the Claimant's evidence that the 2011 Contract was subject to many rounds of negotiation occurring over many months. In particular, Witness F[4] annexes a draft of the 2011 Contract, which indicates the contract was subject to negotiation and amendment. The draft 2011 Contract indicates that the Respondent successfully made a number of amendments. Many of these amendments made the 2011 Contract more favorable to the Respondent. According, the Claimant did not present the Respondent with a pre-drafted, *pro-forma* and non-negotiable contract. This allegation is completely contrary to the factual and oral evidence.

Accordingly, the Respondent's central allegation (that the 2011 Contract was non-negotiable) is without any evidentiary basis. As a result, the Respondent's allegation that the 2011 Contract was grossly unconscionable must fail at the first hurdle.

(b) Did the Claimant take advantage of the Respondent's lack of experiences?

During cross-examination, Witness E admitted that the Respondent was a large multinational company with revenue in excess of US$ 1.5 billion. As a result, the Respondent was not in a weak bargaining position. As such a large purchaser of vehicles, the Respondent was in fact in a very strong bargaining position. This was evidenced by the fact that the Respondent was able to get the Claimant to reduce its price and make a number of concessions. According to the PRC judicial practice, the court considers that a business entity with years of experience (such as the Respondent) must conduct its business with due diligence and will assume commercial risk arising from its conduct.

3 Witness E, Executive Chairman of the Respondent.

4 Witness F, Project Manager of Technical Service Department of the Parent Company of the Claimant.

Furthermore, Witness E also conceded that the Respondent was not suffering from any lack of experience.

As a result, the Claimant submits that the first element of Article 72 of the *SPC Opinions* is not satisfied. As a result, the Respondent is unable to prove the necessary elements under Article 54 of the *PRC Contract Law*.

(c) Violation of the principle of fairness and making compensation for equal value

In relation to the 2011 Contract, the Respondent did not require after-sales service, because it had a large workshop and could carry out repairs on its own. It also requested the provision of free spare parts. As a result, the Claimant reduced the contract price to carve out the provision of after-sales services. The Claimant also agreed to provide spare parts up to the value of 4% of a particular purchase order. In return, the Claimant negotiated a waiver of claims in relation to vehicles provided under a purchase order. The Claimant required this waiver, because it would not be responsible for the after sales service and replacing spare parts. As a result, it could not ensure the quality of the workmanship and therefore did not want to be liable for any defects caused by the Respondent's repairs. This history of contractual negotiations indicates that the current wording of Article 5.1 represents a fair outcome considering the parties' requirements.

In relation to Article 8.2, the Claimant requested that it be included in the 2011 Contract, due to the Respondent's failure to make repayments under the 2008 contract[5]. This was an important article, because the Claimant was concerned that the Respondent would again fail to make repayments (an outcome that subsequently occurred). In addition, the Claimant was concerned that the Respondent would only pay the 20% advance payment and then get the benefit of the vehicles without paying the balance of the purchase price (again, an outcome that subsequently occurred).

Lastly, if the Tribunal decides that the rate of interest under Article 8.2 is too high, the appropriate remedy is for the Tribunal to make an appropriate reduction under Article 114 of the *PRC Contract Law*. The appropriate remedy is not to seek to declare the whole contract or the specific article invalid under Article 54 of the *PRC Contract Law*.

In light of the above, the Claimant submits that there is no basis for the Tribunal to declare Article 5.1 or Article 8.2 to be invalid. As a result, Article 5.1 operates such that

5 A previous contract concluded between the Respondent and China J Motors Ltd, an associated company of the Claimant in 2008.

the Respondent has waived its rights to make the defects claims 1 to 4, set out below. Accordingly, the Claimant makes the following submissions in relation to the defects claims 1 to 4 only in the event that the Tribunal finds that Article 5.1 is invalid (which is strongly denied).

3. Regarding the Counterclaim

Defects claim 1: engines with incorrect horsepower

The Respondent alleges that the Claimant provided at least four trucks which had 240HP engines in breach of its promise to provide vehicles with 260HP engines. The Respondent claims damages in the amount of Tsh 80 million.

The Claimant submits that the Tribunal has no jurisdiction to hear this claim, because the vehicles that are the subject of the Respondent's complaints were not provided under the 2011 Contract. Instead, the vehicles were provided under a separate and unrelated contract, that is, the 2012 Contract.

This is evidenced by the following:

(a) The 260HP trucks were provided under the 2012 Contract. Page 6 of the 2012 Contract indicates that the Claimant was to provide five of the 260HP trucks under the second lot of the 2012 Contract. In contrast, the 2011 Contract does not refer to any 260HP trucks.

(b) In cross-examination, Witness C confirmed by the 260HP trucks were in relation to the 2012 Contract and not the 2011 Contract. This was also confirmed by Witness H[6] in re-examination.

(c) The email from Witness C refers to the chassis numbers of the 260HP trucks. None of the chassis numbers matches the chassis numbers at Annexure 2 to these submissions.

Accordingly, the Claimant submits that the Tribunal does not have jurisdiction to hear this allegation, because the matter is not a dispute or claim arising from the 2011 Contract.

Furthermore, the Claimant submits that the Respondent has not proven its loss and therefore has failed to meet its evidentiary burden under Article 39 of the *Arbitration Rules*.

6 Witness H, Department Manager of Plan and Financial Department of the Claimant.

The Respondent has not produced any evidence as to the damages it incurred in relation to this allegation.

The Respondent has not provided any evidence to support its claim for Tsh 80 million. There is no explanation whatsoever as to how the Respondent calculated this figure. Accordingly, even if the Respondent were successful in demonstrating that this claim falls within the 2011 Contract and that the Claimant was somehow liable (both of which the Claimant denies), the Respondent has failed to prove the damages component of its claim.

Defects claim 2: drawbar hooks

The Respondent alleges that, in breach of the 2011 Contract, the Claimant supplied vehicles with "*low quality drawbar hooks, many of which were unusable or broke in transit*". The Respondent claims Tsh 150 million, being the value of 60 drawbar hooks.

Ton Trucks

As an initial point, it appears that the Respondent's allegation of defective drawbar hooks only relates to the 7 Ton Trucks. At para. 20 of its Counterclaim, the Respondent alleges that the Claimant "*shipped defective and low-quality drawbar hooks*". The "Debit Note" states that the drawbar hook claim only relates to the "CA1122PK2L2Y", which is the 7 Ton Truck. If this is correct, then the Respondent's allegation can only be in relation to 20 units of the 7 Ton Trucks (instead of 60 units), because the Claimant only provided 20 units of the 7 Ton Trucks under the first and second purchase orders. Accordingly, any assessment of damages needs to be divided in three at the outset.

The Claimant's position is that only the Cargo Trucks had drawbar hooks attached to the rear cross-member of the chassis.

However, the 2011 Contract provides: "*If the Purchaser makes any modification of the Vehicles, including but not limited to any attachment to, or removal of parts of, the Vehicle and/or use the non-original parts (which is purchased from any third party other than the Vendor), the Purchaser shall assume all responsibility for any fault, deficiency, defect caused in or by such modification…*"

Accordingly, it clearly has the effect that, once the Respondent modifies a vehicle (in particular by attaching a part purchased from a third party other than the Claimant), the Claimant is no longer liable for any fault, deficiency or defect caused by the modification. As a result, once the Respondent modified the 7 Ton Trucks by attaching a drawbar hook

purchased from a third party, then the Claimant no longer became liable for the quality of the drawbar hook or any fault caused by the drawbar hook. Therefore, it follows that to the extent that the Respondent's allegation of defective drawbar hooks relates to the 7 Ton Trucks, the Claimant is not liable due to the operation of the 2011 Contract.

Lack of evidence

If the Respondent's allegation relates to the Cargo Trucks as well as the 7 Ton Trucks, the Respondent has failed to meet its burden of the facts on which it relies to support its Counterclaim.

The Respondent has not produced any evidence of any vehicle under the 2011 Contract being involved in any accident that was caused by defective drawbar hooks. In fact, there is no evidence proving that any vehicle under the first and second purchase orders of the 2011 Contract is defective. As a result, the Respondent has failed to meet its evidentiary burden under Article 39 of the *Arbitration Rules*. Therefore, the Respondent's allegations regarding the defective drawbar hooks must fail.

The Respondent has failed to prove the alleged loss or damages caused by the defective drawbar hooks.

Defects claim 3: incorrect tires

The Respondent alleges that, in breach of the 2011 Contract, the Claimant provided vehicles with the incorrect rear tires on at least two different models within a purchase order. The Respondent alleges that, as the vehicles were used for hauling, the specific "*Lug Pattern or similar design for the rear wheels is necessary for basic traction and stability when hauling or pulling cargo*". The Respondent alleges that, due to the Claimant's failure to provide these specific rear tires, the Claimant had to replace the unsuitable tires. As a result, the Respondent is claiming Tsh 9,600,000 in damages.

First, the Respondent's claim is in respect of 60 vehicles. However, as previously established, the Claimant only provided 20 Cargo Trucks under the 2011 Contract. Accordingly, the Respondent's claim needs to be reduced by two-third at the outset.

Secondly, there was no obligation in the 2011 Contract that required the Claimant to provide lug patterns on the rear tires of the Cargo Trucks.

Thirdly, the specification for the Cargo Truck does not refer to the rear tires having lug patterns. The specification for the wheels is at the bottom right corner of the page.

There is no reference to the tread of the tires for the Cargo Trucks.

Fourthly, the evidence from the Respondent's witness was as follows:

(a) The vehicles provided under the 2008 Contract did not have lug patterns on the rear tires. Witness C admitted this in cross-examination. And yet there was no evidence of the Respondent complaining about the rear tires of these vehicles.

(b) There is no evidence that Witness E or Witness C specifically asked for lug patterns on the rear tires of the vehicles under the 2011 Contract. During cross-examination, Witness E admitted that he never requested the Claimant to provide lug patterns on the tires of the vehicles under the 2011 Contract.

(c) The minutes of the meeting in June 2012 clearly indicate that the "special specifications" included "Tyre: running/front, cross/rear". The Claimant submits that this is obviously a reference to the rear tires have a lug pattern on the rear tires. Accordingly, the requirement of lug patterns on the rear tires was a "special specification".

(d) As the lug pattern requirement was a "special specification", it was necessary for the Respondent to request that it be included. Otherwise, the Claimant would provide the "normal specification", which did not include lug patterns on the rear tires of the vehicles. Witness E conceded this point in cross-examination, when he gave the following evidence:

> "Q. *… if you do not ask for the special specifications, they will give you the normal specifications.*
>
> A. *Yeah, special is like — like the — like something what you need, different than the standard.*"

The Claimant's evidence was that normal tires cost the same amount as tires with a lug pattern. In addition, the Claimant would provide lug patterns on the rear tires if the Respondent had simply made a request to do so. Furthermore, as outlined above, the Claimant had provided vehicles without lug patterns on the rear tires under the 2008 Contract and there is no evidence that this caused a problem or any complaints from the Respondent. Accordingly, it makes sense that the Claimant would adopt a similar practice under the 2011 Contract, unless there was a specific request for the lug pattern on the rear tires.

In addition, the Respondent relied on the printout of a webpage from the Bridgestone website. The webpage contains a picture of Bridgestone's "M722" tire, which appears

to have a lug pattern. In the middle of the webpage, there is a diagram of three vehicles with a small triangle next to the words "recommended' and "optional". The Respondent's counsel cross-examined the Claimant's witnesses on this webpage in an attempt to argue that Bridgestone recommends that the rear tires of vehicles should have a lug pattern. There are three problems with this argument. Firstly, the document before the Tribunal is in black and white, so it is not possible to determine if the arrow pointing to the rear wheels is in fact "recommended" or "optional". Secondly, the webpage tends to indicate that on a large truck (such as the Cargo Truck) the lug pattern should be on the front tires, rather than the rear tires. And thirdly, the sentence towards the bottom of the webpage states that the "M722 tread pattern is discontinued". So the Claimant submits that there is nothing to be gained by relying on a printout of a webpage of a tire that is no longer in use.

Fifthly, there is no evidence that the vehicles without the lug pattern were not suitable for hauling, as alleged in para. 26 of the Respondent's Counterclaim. The Respondent has only produced one email dated December 2011, which refers to the issue of the lug pattern on the rear tires. There is no other evidence that the vehicles provided under the 2011 Contract were not suitable for hauling. Accordingly, the Respondent's allegation lacks sufficient evidentiary basis.

The final issue regarding the rear tires is that the Respondent has failed to produce any evidence of the damages it has allegedly incurred. The Respondent produced a Debit Note claiming damages of more than Tsh 130 million. At the hearing, the Respondent reduced this amount to Tsh 9.6 million. However, again, there is no evidence as to how the Respondent calculated this amount. There is no way of determining whether the Respondent's initial amount of more than Tsh 130 million or its revised amount of Tsh 9.6 million is correct, because the Respondent has failed to produce any evidence. There are no invoices or quotations from tire manufacturers to prove the costs of lug pattern tires. As a result, the Respondent has again failed to meet its evidentiary burden under Article 39 of the *Arbitration Rules*.

Defects claim 4: fuel consumption

The Respondent alleges that the 2011 Contract was required to provide trucks with a fuel efficiency rate of 0.42 liter/km. In breach of the 2011 Contract, the Claimant provided at least 59 trucks with a fuel consumption rate of 0.60 liter/km. As a result, the Respondent is claiming damages in the amount of Tsh.

Firstly, the Respondent is claiming the fuel consumption costs of 60 Cargo Trucks. However, as previously established, the Claimant only provided 20 Cargo Trucks under the 2011 Contract. Accordingly, at the outset, the Respondent's claim needs to be reduced by two thirds.

Secondly, even if the claim is reduced, the Claimant submits that the Respondent fails at the first hurdle, because there is no obligation under the 2011 Contract for the Claimant to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km. The specification for the Cargo Truck refers to a fuel consumption rate of 42 liter/100km. However, the specification did not form part of the 2011 Contract. It is a completely separate and unrelated document. Furthermore, the Respondent did not produce any evidence that the Claimant had provided the specification for the Cargo Truck at the time of negotiating the 2011 Contract. It appears that the Respondent may have obtained the specification sometime after it entered into the 2011 Contract.

Thirdly, even if the Claimant had an obligation to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km, the fuel consumption rate is flexible. It would not require the Claimant to provide Cargo Trucks that obtained a fuel consumption rate of 0.42 liter/km in all circumstances.

A vehicle's fuel consumption rate fluctuates according to a number of factors, such as the roads on which the vehicle is travelling (whether they are paved, their gradation, etc), the vehicle's speed, the vehicle's load, and manner that the vehicle is driven. Any variance in these factors will affect a vehicle's fuel consumption rate. In other words, it is not possible to argue that a vehicle's fuel consumption rate is set in stone and that a party breaches its contractual obligations if a vehicle exceeds its fuel consumption rate. As set out at para. 40 of Witness I[7]'s statement, "*fuel consumption value listed in the specification form is merely a theoretical value, an ideal value calculated based on the engine parameters. It is not a guaranteed value*". In cross-examination, Witness C accepted this statement.

Fourthly, even if there was an obligation on the Claimant to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km, there is insufficient evidence that the Claimant did not comply with this obligation.

Furthermore, the Claimant's witnesses indicated that the reason why the Claimant had not sent its employees to conduct the tests was due to safety concerns. Witness H gave

7 Witness I, Technical Supervisor of Product Department of the Claimant.

evidence that he and other employees of the Claimant were concerned about their personal safety in Tanzania and had notified the Respondent of this issue.

Lastly, the Respondent has failed to demonstrate how the Claimant's alleged failure to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km resulted in damages of more than Tsh 2.6 billion. For example, there is no evidence of the cost of fuel in Dar es Salaam during the time that the Respondent was required to purchase extra fuel for the Cargo Trucks. As a result, even if the Respondent can prove that there was an obligation to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km, and that the Claimant did not comply with this obligation, the Respondent cannot prove its damages. Accordingly, its allegation regarding the fuel consumption rate of the Cargo Trucks cannot succeed.

4. Other issues raised by the Respondent

Commodity inspection certificate

During the Respondent's opening address, Representative L[8] alleged that the Claimant had breached an obligation under the 2011 Contract to provide a hardcopy of the Commodity Inspection Certificate with each vehicle.

Firstly, the Respondent has again failed to raise this issue in its pleadings as required by Article 15(2) of the *CEITAC Rules*. Instead, the Respondent raised it in is opening address at the hearing. The Claimant objects to the Respondent raising a new issue at such a late stage in the pleadings.

Secondly, the Claimant disagrees with the Respondent's construction of Articles 2.3 and 3.2. Article 2.3 refers to "Commodity Inspection Certificate", while Article 3.2 refers to "Inspection Certificate". The words "Inspection Certificate" is not a reference to "Commodity Inspection Certificate". If the parties intended to include a "Commodity Inspection Certificate" under Article 3.2, then they would have added the word "Commodity" in front of the words "Inspection Certificate". However, the fact that the parties did not do so, tends to indicate that they were referring to a different type of certificate in Article 3.2.

Thirdly, the Claimant's evidence was that "Inspection Certificate" referred to the ex-factory certificate, which it delivered with each vehicle. This accords with the construction of Article 3.2 outlined in the paragraph above.

8 Representative L, the Respondent's Counsel and legal representative in this Arbitration.

Fourthly, even if the Claimant breached two articles of the 2011 Contract, the Respondent never articulated what was the significance of this breach. For example, the Respondent never articulated how this breach caused it any loss, nor did the Respondent articulate what was the amount of loss caused. It is not the Claimant's obligation to assist the Respondent in proving its case. The Respondent has failed to place these factual circumstances in a legal framework. But for the avoidance of any doubt, the Claimant will briefly address this issue. The Respondent must have been aware of the breach at the time of receiving the vehicles, but the Respondent decided to proceed with the 2011 Contract. Therefore, even if the breach were material, the Respondent confirmed at the hearing that it wanted to proceed with the 2011 Contract and did in fact proceed with the contract by making some repayments. Accordingly, the Respondent affirmed the 2011 Contract and cannot rely on this breach to terminate the 2011 Contract. As a result, the Respondent could only seek an award of damages in relation to this breach. But the Respondent has failed to show how the breach caused it loss and what its loss amounted to. Accordingly, even if the Tribunal were to make a finding that the Claimant failed to provide a hardcopy of the Commodity Inspection Certificate with each vehicle, the allegation cannot proceed any further. It was simply another allegation that the Respondent raised at the very last minute without giving it the necessary though it required and without articulating it properly.

Mitigation

During the Respondent's oral opening at the beginning of the hearing, the Respondent's counsel raised the issue of mitigation. The Respondent's counsel put this argument as follows:

- *"Now, in other words, the vendor had a perfect opportunity to mitigate its damages [by virtue of Article 4.3 of the 2011 Contract]. Nothing in any of the actions of the claimant indicated it ever tried to mitigate its damages. Apparently it does not feel it has any responsibility to do so; no mitigation for damages was necessary";*
- *"The vendor had an opportunity again to mitigate its damages by terminating the contract. They did not do that"*; and
- *"They had the right to take the vehicles back, take the vehicles and keep (inaudible). What a wonderful way to mitigate then, but did they do that? No".*

Firstly, Article 15(2) of the *Arbitration Rules* requires a party, when filing its Counterclaim, to "state the facts and grounds on which its counterclaim is based".

Accordingly, if the Respondent wanted to raise the issue of mitigation, it was required to do so in its Counterclaim (or its Defence to the Request for Arbitration or its Reply to the Defence to the Counterclaim). The Respondent failed to do so. Instead, it attempted to raise the issue during its oral opening. This was inappropriate, because the Respondent did not provide the Claimant with any notice of the allegation. As a result, it is likely to cause prejudice to the Claimant and the Respondent should not be permitted to raise the allegation during its oral opening statement.

Secondly, the Respondent has failed to advance this allegation with sufficient details. It has failed to refer to any piece of legislation or judicial opinion. The Respondent has failed to indicate precisely when the duty to mitigate arose (e.g., when the Respondent failed to make the first repayment or during the meeting in June 2012). The Respondent has also failed to indicate precisely what steps the Claimant was required to take and when it was required to take them (was the Claimant required to instruct a local Tanzanian law firm to initiate proceedings in a local Tanzanian court to enforce the mortgage?). The Claimant is left in a difficult position. Not only has it not been given notice of this allegation but also not been provided with sufficient information to defend the allegation.

Thirdly, the Respondent appears to be alleging that the Claimant could have recovered the vehicles under Article 4.3 and/or terminated the 2011 Contract. However, the Respondent was unwilling to handover the vehicles under the 2011 Contract. In fact, the evidence at the hearing was that the Respondent wanted to proceed with the 2011 Contract. Accordingly, the Claimant could not simply have recovered the vehicles. Nor could the Claimant have initiated proceedings in a Tanzanian court to enforce the mortgage (due to the arbitration clause in the 2011 Contract). Instead, the Claimant would have had to initiate arbitration proceedings to recover the vehicles. Therefore, the situation would be no different to the current circumstances in which the Claimant has initiated arbitration proceedings to recover the repayments. Furthermore, it is unreasonable to require the Claimant to terminate the 2011 Contract in circumstances where the Respondent wanted to continue with the contract by making up its late repayments and the Claimant wanted to continue providing vehicles under future purchase orders.

Fourthly, following the Respondent's failure to make the repayments, the parties engaged into negotiations to arrange for the Respondent to meet its repayment obligations. It was reasonable for the Claimant to allow the Respondent an opportunity to make the repayments before initiating these arbitration proceedings. It was only when these negotiations broke down that the Claimant initiated these arbitration proceedings.

Insurance

In the Respondent's opening address, Representative L sought to attribute an "insurance double-dipping" motive to the Claimant's bringing of this claim. The Respondent's line of reasoning seemed to be that the Claimant would receive two lots of money to compensate it for the loss it sustained under the 2011 Contract: an award of damages and payment from its insurer.

The Claimant confirms that it has not received any payment from its insurer in relation to this matter. Accordingly, the Claimant will not be compensated twice if the Tribunal orders the Respondent to pay it an award of damages.

Further, and most importantly, even if the Claimant were to receive a payment from its insurers in relation to their loss resulting from the 2011 Contract with the Respondent, this does not relieve the Respondent from its contractual obligations under the 2011 Contract.

The Claimant respectfully requests that the Tribunal makes the following award in the Claimant's favour.

5. Orders Proposed by the Claimant

The Respondent pay to the Claimant an award of damages in the amount of more than US$ 4.3 million, which is calculated as follows:

(a) more than US$ 1,660,000 as the outstanding payments for the two purchase orders;

(b) more than US$ 98,000 as the outstanding exchange rate differential in accordance with the 2011 Contract;

(c) interest on the outstanding payments in accordance with the 2011 Contract, which is calculated as more than US$ 170,000 till 3 June 2014 (inclusive) and continues to accrue up to any including the date of payment by the Respondent; and

(d) penalty interest for late payment under Article 8.2, which is calculated as more than US$ 2,290,000 till 3 June 2014 (inclusive) and continues to accrue till the date of payment by the Respondent.

The Respondent pay to the Claimant more than US$ 230,000 by way of costs in connection with the arbitration, which is calculated as follows:

(a) more than US$ 60,000 in respect of CIETAC fees;

(b) more than US$ 160,000 in respect of the Claimant's attorney's fees; and

(c) more than US$ 4,100 in respect of the Claimant's transcription and translation costs.

The Respondent's Counterclaim is dismissed in its entirety.

H. The Respondent's Opening Submission and Closing Submission

1. Is the 2011 Contract cancellable as a whole? Alternatively, are specifically Articles 5.1 and Articles 8.2 cancellable?

Respondent maintains that the 2011 Contract is voidable. The Respondent discovered this upon its employment of counsel and has asserted this stance since its first Answer to the Claimant's Request for Arbitration. Alternatively, the Contract is partially cancelable due to the unconscionability of the effect of several provisions and the Claimant's means of obtaining them.

One of the most grossly unconscionable provisions within the 2011 Contract is Article 5.1, which reads: "*Both the unit price and the total contract amount hereof shall not include any maintenance, repair work, warranty service, and for any other kind of after-sales service for the Vehicles. The Purchaser agrees to waive off the entire claim against Vendor for the order. Instead, the Vendor agrees to supply 4% spare parts of the total value to the purchaser. If the same quality problem occurs for more than 10% of the total amount of the Vehicles hereof, and subject to the Vendor's written confirmation, the Vendor will provide the spare parts in kind to the Purchaser and bear the cost of ocean freight, other relevant costs shall be borne by the Purchaser*."

Pursuant to Article 4 of the *Products Quality Control Law of the People's Republic of China*, "*Producers and sellers are responsible for the product quality according to the provision of this law*".

Thus, no matter how broad waiver purports to cover, a vendor can never waive a purchaser's right to a warranty over the quality of its goods. However, despite the *Products Quality Control Law*'s demand that vendors are responsible to warranty the quality of their goods, the Claimant has interpreted Article 5.1 to mean the Respondent has lost this very right. The Claimant argues that "*if the Tribunal finds Article 5.1 of the 2011 Contract is*

applicable, then the Respondent has waived its right to make any claims in respect of the two purchase orders".

The Claimant has argued throughout its pleadings that "*The Claimant also agreed to provide spare parts up to the value of 4% of the particular purchaser order. In return, the Claimant negotiated a waiver of claims in relation to vehicles provided under a purchase order*". However, 4% of the value of either purchase order under the 2011 Contract clearly only equates to nearly US$ 50,000 (more than US$ 1,240,000 x 0.04) a sum irreconcilable with the value of a waiver covering the entire order. Again, it is undisputed these spare parts were not shipped to the Respondent for over a year, where the consequences of their absence on the Respondent's shipping lines far outweighs the value of the actual spare parts themselves, and furthermore, the condition of Article 5.1's application fails because of it.

Moreover, as the Claimant alleges the value of 4% spare parts was negotiated for a waiver of liability applicable to the entire order, one would imagine the party benefitting from such a one-sided exchange would at least perform their end of the supposed bargain. However, despite the Respondent's continued requests for spare parts, the Claimant admits that spare parts were not delivered on the first and second purchase orders until 30 October 2012, over a year after the delivery of the first purchase order when the Respondent insisted the spare parts be sent.

The Claimant should not be entitled to reap the benefit of what was allegedly negotiated for 4% spare parts, when it did not even fulfill that condition.

Another grossly unfair provision, at least as interpreted by the Claimant's lawyers, is Article 8.2 of the 2011 Contract which reads: "*If the Purchaser make the balance payment delay or arrange the acceptance of the Vehicles delay after the Vehicles arrive at the port, the Purchaser shall pay 0.3% of the amount of delayed payment per day to the Vendor. If the above-mentioned delay lasts for more than 20 days from the date as regulated in Article 4, the Seller shall be entitled to terminate this Contract upon written notice; the down payment shall not be refunded from the Vendor.*"

Apart from the imagination required to glean meaning from this provision (on how to calculate a penalty on the amount of delayed payment per day), the Claimant belatedly alleges Article 8.2 is really meant to be translated as entitling it to collect 0.3% of the value of every outstanding installment on a purchase order, on a daily basis and without any constraints on time. Thus, the longer a purchase order remains unpaid, the more installments

will accrue at a rate of 0.3% per day. This alleged penalty thus accrues over 100% of the value of what it applies to a year, with no time limit.

Furthermore, pursuant to Article 66 of the *PRC Contract Law on simultaneous performance, "Where the parties owe performance toward each other and there is no order of performance, the parties shall perform simultaneously. Prior to performance by the other party, one party is entitled to reject its requirement for performance. If the other party rendered non-conforming performance, one party is entitled to reject its corresponding requirement for performance."*

2. How should the parties interpret Article 8.2 of the 2011 Contract?

The plain language of Article 8.2 of the 2011 Contract could be interpreted in a variety of ways, all of them requiring some form of conjecture.

The contested portion of Article 8.2 states that "*If the Purchaser make the balance payment delay or arrange the acceptance of the Vehicles delay after the Vehicles arrive at the port, the Purchaser shall pay 0.3% of the amount of delayed payment per day to the Vendor*".

The conditions modified by the conjunction "if" refer to a Purchaser either making a "balance payment delay" or "arrange the acceptance of the Vehicles delay". It is unclear whether the word "or" is disjunctive or conjunctive, however if either or both of those conditions are met, a penalty will apply to "*the amount of delayed payment per day*".

The only reasonable interpretation of what Article 8.2 was likely trying to convey indicates that a penalty would apply to the Purchaser's delays in accepting the vehicles at the port. Thus, "the amount of delayed payment per day" is afforded significance in that it would clearly refer to the vehicles left at the port, which is an act likely to incur a fee for the shipper. The first condition, "balance payment delay", may then refer to this fee a shipper would bear for storage at the port of arrival or the outstanding balance on the Vehicles up until the Vehicles are picked up at the port. The penalty would thus function to ensure the Vehicles are picked up at the port promptly.

This interpretation is made more plausible by the function of Article 4.6 of the 2011 Contract, which applies interest to late payments on outstanding installments. Pursuant to Article 4.6 of the 2011 Contract, "*both confirm the interest hereof is calculated based on annual interest rate of 4%, the Purchaser shall pay interest from 60 days after the B/L date*".

Where the Claimant already possesses a mechanism to punish late payments on installments, it would not need a duplicative penalty clause applicable to same behavior and time period.

Article 8.2 is completely unenforceable on the basis of ambiguity. Not only are numerous interpretations possible arising from the way it is written, the important feature of Article 8.2 is that no interpretation is possible with alteration of the wording. A plain, strict reading of Article 8.2 as it appears within the Contract is nonsensical and meaningless. No reasonable person could deduce from the plain language when the penalty applies, how it applies, or to what it applies.

This rampant ambiguity is not unique to Article 8.2. Several other provisions similarly have little meaning without conjecture or are plainly contradictory to other provisions within the 2011 Contract.

The Respondent only realized the rampant ambiguity and potentially cancellable provisions within this 2011 Contract upon electing to hire counsel, and has requested since its original Answer to the Claimant's Request for Arbitration for a cancellation of the Contract. Respondent maintains the 2011 Contract is cancelable. If the Tribunal holds Claimant's interpretation of Article 8.2 unenforceable, the Claimant has also relinquished its right to claim a higher interest rate is applicable as a penalty beyond the plain language of Article 4.6 of the 2011 Contract.

3. Were the damages the Claimant alleged pursuant to their interpretation of Article 8.2 of the 2011 Contract foreseeable?

Pursuant to Article 113 of the *PRC Contract Law* on the calculation of damages, "*Where a party failed to perform or render non-conforming performance, thereby causing loss to the other party, the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including any benefit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract.*"

Thus, Article 113 serves to limit the benefits that may be acquired to solely damages that are foreseeable at the time of concluding a contract. The definition of foreseeability is the reasonable anticipation of the possible results of an action, such as what may happen if one is negligent, or consequential damages resulting from a breach of contract. The

conventional approach to determining whether penalties or liquidated damage clauses are enforceable depends on whether they were foreseeable at the time of contracting.

To date, the Claimant has claimed that nearly US$ 2.4 million in penalties resulting from the 2011 Contract is due. This value represents almost one and half times the value of the total outstanding portion of the payment price due under the Contract.

No reasonable purchaser could possibly anticipate that a vendor would seek penalties in excess of the actual value of the trucks, especially when the Claimant also seeks relief in the form the outstanding purchase price, interest on the outstanding portion of the purchase price, and a healthy exchange rate differential. As such, the disproportionate relationship between the value of the penalty and the outstanding debt is strong evidence to conclude this penalty was not foreseeable at the time of contracting and likely designed to deter a party from withholding payment despite the quality of the shipment.

Pursuant to Article 29 of the *Several Issues Concerning Application of the PRC Contract Law Interpretation (II) of the Supreme People's Court* ("**SPC Interpretation II**"), "*Where a relevant party alleges that the agreed amount of liquidated damages is excessively high and requests an appropriate reduction thereof, the people's court shall, according to the principles of equity and good faith, take a measurement and render a decision on the basis of actual losses*."

Paragraph 2 of Article 114 of the *PRC Contract Law* further clarifies that "*where the amount of the liquidated damages agreed upon by the parties concerned exceeds 30 percent of the losses incurred, it may be generally deemed as excessively higher than the loss caused by the breach*."

Assuming there was no breach of Contract by the Claimant, 30% of the interest due on the outstanding portion price equates to more than US$ 50,000. Thus, the Claimant has alleged penalties in excess of 46 times the threshold. Even if losses could possibly mean 30% of the outstanding balance owed under the 2011 Contract, this sum still only totals nearly US$ 500,000. The Claimant would still be requesting penalties in excess of five times higher than the most liberal threshold the Supreme People's Court deems excessive and unwarranted.

4. Did the Claimant undertake its obligation to mitigate its damages?

When a party suffers damages as a result of a breach of contract, that party is obligated to minimize the effects and losses resulting from the injury. Failing to perform one's duty

to mitigate damages works to deny the recovery that could have been avoided exercising reasonable diligence.

The *PRC Contract Law* has specifically adopted this obligation under Article 119, which states "*where a party breached the contract, the other party shall take the appropriate measures to prevent further loss; where the other party sustained further loss due to its failure to take the appropriate measures, it may not claim damages for such further loss. Any reasonable expense incurred by the other party in preventing further loss shall be borne by the breaching party*."

The Respondent has attempted to mitigate its damages by attempting to repair what it could upon uncovering the extensive component failure, including gear box assembly failure, steering box failure, differential failure, accelerated deterioration of the clutch and pressure plates, spring assembly failure, and drawbar hook breakages at its own workshop. However, the Claimant has failed to undertake its duty to mitigate its damages.

According to the Contract, after 20 days of not receiving payment from the Respondent, the Claimant can terminate the contract, retain the down payment, and make a claim for the outstanding purchase price. This option is designed to provide Claimant an appropriate amount of expectation damages in that it rather immediately provides Claimant a legal avenue to recover the value of the trucks shipped if payment is not received.

However, the Claimant chose to never trigger the effect of this clause. If, as the Claimant now claims, it always intended for Article 8.2 to be a penalty, then it chose to let those penalties escalate until 3 June 2014, allowing the 0.3% penalty per day to escalate on an installment for 768 days, or 2.1 years. 768 days of accrual represents 748 days that the Claimant had the opportunity to terminate the 2011 Contract and recoup its losses but chose idle escalation rather than termination.

5. What key terms did the Claimant and the Respondent discuss prior to 2011, what terms were presented on that day, and what is the effect on the 2011 Contract?

Pursuant to Article 54 of the *PRC Contract Law*, "*Either of the parties may petition the People's Court or an arbitration institution for amendment or cancellation of a contract if: (i) the contract was concluded due to a material mistake; or (ii) the contract was grossly unconscionable at the time of its conclusion. If a party induced the other party to enter into a contract against its true intention by fraud or duress, or by taking advantage of the*

other party's hard ship, the aggrieved party is entitled to petition the People's Court or an arbitration institution for amendment or cancellation of the contract."

Pursuant to Article 39 of the *PRC Contract Law*, "*Where a contract is concluded by way of standard terms, the party supplying the standard terms shall abide by the principle of fairness in prescribing the rights and obligations of the parties and shall, in a reasonable manner, call the other party's attention to the provision(s) whereby such party's liabilities are excluded or limited, and shall explain such provision(s) upon request by the other party*."

Furthermore, Article 40 of the *PRC Contract Law* speaks to the consequences of introducing nonnegotiable terms that materially affect a party's rights under Contract: "*A standard terms is invalid if it falls into any of the circumstances set forth in Article 52 and Article 53 hereof, or if it excludes the liabilities of the party supplying such term, increases the liabilities of the other party, or deprives the other party of any of its material rights*."

Thus, the provider of standard terms has the obligation to explain their meaning in a reasonable fashion. Unreasonable new terms will be invalid where they deprive the other party of material rights. The Respondent has always maintained the only terms that were discussed prior to 2011 were price, quantity, models, and the need for spare parts. However in 2011 when representatives from the Claimant came to Port M, Tanzania, to discuss the purchase of trucks, the Respondent was presented with a pre-drafted contract and was told that some material, key provisions were non-negotiable.

Article 5.1 and Article 8.2's non-negotiability is strong evidence that the Claimant has improperly used surprise, insistence, and the vulnerability of the Respondent's imminent need of trucks to achieve their inclusion within the Contract. The Claimant has thus used its strength and tactics to effect an unequal value exchange of the parties' rights and obligations, a behavior explicitly unconscionable pursuant to the *PRC Contract Law*.

For the foregoing reasons, both Article 5.1 and Article 8.2 of the 2011 Contract must be found unconscionable. Their tenuous method of introduction, ambiguity, and potential for absurd consequences clearly demonstrate the cancelability of these provisions.

6. What is the relationship between the 2011 Contract and its supplement dated June 2012, and should the Tribunal hear Respondent's claims arising under the third purchase order dated June 2012?

The Claimant suggests that portions of the Respondent's claim that arise from the third purchase order dated June 2012 are so unrelated to the 2011 Contract that this Tribunal does not have jurisdiction to hear them.

In the context of the Respondent's counterclaim for four 260 HP engines resulting from the third purchase order, the Claimant argues that "*the Tribunal has no jurisdiction to hear this claim, because the vehicles that are the subject of the Respondent's complaints were not provided under the 2011 Contract.*" Thus, the Claimant argues the 2011 Contract is sufficiently unrelated to the third purchase order dated June 2012, because ultimately the vehicle models do not match.

The Respondent contends that not permitting the portions of the Respondent's counterclaim that arise from the third purchase order dated June 2012 would be an immense waste of arbitral resources and highly prejudicial to the Respondent.

The inclusion of the third purchase order into the Respondent's counterclaim entails four 260 HP engines, 40 of the total 60 drawbar hooks of the Claimant, and the value of excess fuel consumed from 40 of the total 60 CA 1320 model trucks provided by the Claimant. To sever the Respondent's counterclaim would inevitably lead to multiple arbitrations before CIETAC that would entail litigation over the exact same issues and the exact same claims between the exact same parties, and would necessitate the calling of predominantly the same witnesses. To sever the Respondent's counterclaim effectively permits Claimant a second try to defend against the Respondent's counterclaim after determining the effectiveness of its procedural argument at avoiding entire claims.

Before this Tribunal, the third purchase order dated June 2012 was introduced into evidence within the Respondent's original counterclaim. The Claimant enjoyed numerous opportunities since then to adequately respond to claims that exclusively arose from the third purchase order.

The unique causal relationship between the 2011 Contract and the third purchase order clearly demonstrates their relatedness and the necessity for the two contracts to be litigated together.

7. What is the effect of the Claimant's failure to obtain and ship the Commodity Inspection Certificate issued from the commodity inspection authorities prior to delivery?

Where the Claimant has no firsthand quality control over the manufacturing of arguably the most important element of the truck, it cannot then absolve itself from liability relying on the perceived reputation of other manufacturers that such controls were strict. This is especially true that the Claimant enjoys the opportunity to elect every vehicle exported be inspected at customs, yet cannot confirm whether any vehicle was inspected, relying again on a third party to conduct the exportation.

When the Claimant cannot even determine the extent to which its vehicles underwent examination at customs nor provide any such documentation, this negligence forges a climate where defects have a higher probability of arising than where established controls exist.

The Claimant's material breach of Article 2.1, Article 2.2, and Article 3.3 of the 2011 Contract and the third purchase order demonstrate very few if any quality controls were in place during the manufacture of the vehicles for the Respondent. The Claimant's failure to provide any certification of the quality of its goods, as it was required to do under Contract, must function to ensure the Respondent's evidence of defects remains incontrovertible.

8. What is the value of the Claimant's failure to send a technician to the Respondent's workshop in Port M, Tanzania to conduct mutual fuel testing?

Pursuant to the Minutes of Meeting dated June 2012, the Claimant promised to send a technician to the Respondent's workshop. The Claimant suggests that "*since both the parties failed to reach an agreement over the way of the test, the route of test and personnel safety, the test was not performed*".

The Claimant's reasons for its failure to conduct mutual testing are not supported by the evidence. Witness C has affirmed at all times he attempted to reach out to the Claimant nearly 50 times to initiate the scheduling of a technician to come to the Respondent's workshop; however, the Claimant continued its pattern of neglect and ignored him. On 8 October 2012, Witness C again summarized his complaints and concerns over the Claimant's neglect via email, but to no avail.

To date, the Claimant has made no attempt or unreasonably refused to initiate the scheduling of a technician to mutually determine whether some of the engines on model CA1320 truck were excessively consuming fuel.

The obvious reason the Claimant never sent a technician to conduct the mutual testing is clear, the Claimant is aware of the underperformance of said vehicles.

The Claimant clearly chose to not conduct mutual testing of fuel or drawbar hooks but now attempts to use the absence of that evidence as a shield to the very claims it feigned participation in to create. This conduct was performed in bad faith and should operate to make the evidence Respondent has produced incontrovertible.

9. Towards claim for 4 260HP engines against the wrong supply of 5 trucks with 240HP engines under the third purchase order in 2012

Pursuant to Annex 1 of the third purchase order dated June 2012, the Claimant was obligated to ship a quantity of 5 "FAW 260HP Truck".

After the Respondent executed the purchase order of the unsigned contract dated June 2012, and received the trucks, the Respondent noticed severe underperformance of all 5 engines of model CA1163P7K2L2Y A80 260 HP trucks, as they could not haul an appropriate tonnage an engine with 260 HP should the Respondent immediately notified the Claimant of this problem as early as 15 February 2013.

The Claimant confirmed soon after it would send one default 260 HP engine to test its output compared with the incorrect 240 HP engines shipped. When the one 260 HP engine arrived, was installed, and exposed to the same appropriate tonnage a 260 HP engine is designed to haul, the 260 HP engine could pull a payload of 23.5 metric tons while the 240 HP engine could only pull a maximum payload of 18 metric tons, tweaked or not. This analysis was confirmed by Witness D who upon testing the pulling capacity of four of the Claimant's 240 HP engines found the maximum payload capacity to be 18 tons. However, the 260 HP engine the Claimant shipped could pull a payload capacity of 25 tons.

Despite the Respondent informing the Claimant of the disparate output between the 240 HP engines shipped and the default 260 HP engine that was ordered, it is undisputed that the Claimant never shipped 4 other 260 HP engines pursuant to the third purchase order of 2012.

During all of the Claimant's pleadings and submissions, the only argument the Claimant has put forward in defense of this claim have been procedural, arguing that "*The Claimant submits that the Tribunal has no jurisdiction to hear this claim, because the vehicles that are the subject of the Respondent's complaints were not provided under the 2011 Contract. Instead, the vehicles were provided under a separate and unrelated contract*".

As detailed previously, the Claimant's argument holds little weight in light of the numerous and varied causal connections between the 2011 Contract and the third purchase order dated June 2012. Furthermore, it is undisputed the third purchase order was paid in full, yet even sill the Claimant has provided the Respondent with something much less valuable than what was purchased.

The Claimant has put forth the no argument that approaches the merits of the Respondent's claim, and thus, if the Tribunal finds the third purchase order related to the 2011 Contract this claim must succeed.

The value of 260 HP engines is clearly known to both parties, especially the Vendor who sells them. Respondent claims Tsh 80 million (nearly US$ 50,000 at Tsh 1630) as the value of four 260 HP engines the Respondent already paid for in full under the third purchase order of June 2012.

10. Claim for 60 units of defective drawbar hook on model CA1320 truck

An examination of the evidence Respondent has presented in its pleadings and the testimony elicited from the witnesses during the oral Hearing demonstrate the defective nature of both the drawbar hooks and the engines provided by the Claimant under the 2011 Contract and the third purchase order.

The Respondent's Counterclaim Exhibit, p. 9, reflects the value of 60 units of drawbar hooks less installation and labor costs that required replacement due to their consistent breakages enroute.

The Claimant's sole argument as to why it did not conduct mutual testing of the draw bar hooks and why it rejects the Respondent's claim as to the value of 60 units of drawbar hook affixed to the CA1320 models arises from its unsupported opinion overloading is the true cause as to the breakages. The Claimant's position is not supported by any evidence and is false.

The Respondent has previously argued at length the strict overloading regulations and enforcement currently in effect in Tanzania. Furthermore, Respondent has produced sample weighbridge receipts documenting that it does not engage in the practice of overloading.

The Claimant's failure to ship quality drawbar hooks has forced the Respondent to replace 60 units of drawbar hooks affixed to the CA 1320 models, 20 arising under the 31 May 2011 Contract and 40 arising under the third purchase order.

Accordingly, the Claimant requests compensation of Tsh 150 million (more than US$ 90,000 : Tsh 1630), or the value of 60 units of drawbar hook less tax.

11. Towards claim for the incorrect supply of rear tires on truck model CA1320

Pursuant to the parties' initial discussions prior to 31 May 2011, it is undisputed that the Respondent conveyed and the Claimant well understood the necessity for the vehicles purchased to be specifically suitable to the unique road conditions in Tanzania. The Respondent has maintained throughout its pleadings that at all times during the initial negotiations for the 2011 Contract that the Respondent expected it would receive tires suitable to the soft, often unpaved roads in Tanzania.

If the Claimant takes the initiative to factor in actual road conditions and well understood FAW Africa's desire for trucks suitable to Tanzanian road conditions, then the Claimant should have known to equip Lug type pattern tires on the rear wheels of the 20 units of CA 1320 truck under the 2011 Contract.

As Witness I is the only witness presented by the Claimant with high technical knowledge, he was also presented with the recommendations from Birdgestone Tire Company that gave the plain recommendation that for soft road conditions Lug type pattern tires are recommended. He was asked, "*You can see in the diagram here with these trucks, you have the double-axle bus, you have a single-axle truck and you have a triple-axle cargo truck. I know it's a little bit unable to see 'Optional' and 'Recommended' but the little arrows point to which axles is the lug-type pattern would be the most suitable for. I supposed would you disagree with this recommendation?*" to which he confirmed, "*I agree with the recommendation but their suggestion would not necessarily be the best one.*"

From Witness I's own sworn testimony, he has reiterated he at least agrees with the recommendation of internationally renowned tire manufacturers and retailers outlining Lug or similar type pattern is best suited for soft road conditions. It follows that if the Claimant was aware of the Respondent's specific requirements prior to the 2011 Contract that the

trucks would be used on soft ground in Tanzania, consultation with its technical department would have revealed more suitable tires exist than the standard front running tires equipped on the CA1320 vehicles under the first and second purchase orders.

Accordingly, as the Claimant well understood that the Respondent required trucks to be suitable to the road conditions in Tanzania, the Claimant failed to use reasonable efforts to meet those expectations. This is especially true where consultation with its technicians at China J Motors Ltd could have revealed standard front running tires are not recommended for soft road conditions.

Thus, the Respondent has requested compensation in the form of Tsh 9,600,000 (nearly US$ 6,000 : Tsh 1630), as the value of 160 new tires it expected to be installed on the 20 units of CA 1320 cargo truck received under the 2011 Contract.

12. Towards claim for excessive fuel consumption on 60 units of truck model CA1320

Pursuant to the specifications provided by the Claimant concerning the fuel consumption rate of truck model CA 1320, it is undisputed, on average, the truck should consume approximately 42 liters of fuel for 100 kilometers of travel.

As has been reiterated in Respondent's pleadings, in early 2012, the Respondent's workshop started to calculate highly excessive fuel costs on the CA1320 trucks. Specifically, the Respondent's workshop calculated from its fuel costs that the CA1320 truck was consuming 60 liters of fuel for 100 kilometers of travel, requiring 2,400 liters more of fuel to travel the same distance of 4,000 km/per month. A disparity the Respondent perceived outside the realm of normal variation in fuel consumption. Thus, for one month of average business for 59 trucks, the Respondent has been required to purchase 42,000 liters more of fuel than what was promised and expected under the 2011 Contract and the third purchase order in 2012.

The Claimant maintains the specification of 0.42 liter/km is not a strict requirement. The Claimant argues that "*However, this is not a strict requirement, such that the Cargo Trucks always use 0.42 liter/km of fuel. A vehicle's fuel consumption rate fluctuates according to a number of factors, such as the roads on which the vehicle is travelling (whether they are paved, their gradation, etc), the vehicle's speed, the vehicle's load, and manner that the vehicle is driven. Any variance in these factors will affect a vehicle's fuel consumption rate. In other words, it is impossible to argue that vehicle's fuel consumption rate is set in stone*

and that a party breached its contractual obligation if a vehicle exceeds its fuel consumption rate."

However, the Claimant inherently misunderstands the Respondent's argument about how the Claimant has breached its contractual obligations by delivering trucks consuming 60 liters/100 kms of fuel compared with the average 42 liters/100 kms. It is undisputed the posted specification for fuel consumption of 42 liters/100 kms is an average, and the Respondent has never maintained this average is set in stone. 0.42 liter/km is of course subject to normal variation, but also, importantly, subject to the quality of a vehicle's components.

Where numerous defects within vehicles have an aggregate effect on fuel consumption to transform normal variation of fuel consumption due to road conditions into dramatic differences unforeseeable at the time of purchase, a vendor cannot shield itself from liability by claiming any range of fuel consumption should only be ascribed to road conditions. If the Claimant or another vendor similarly situated is permitted to claim any variation in fuel consumption is caused exclusively by road conditions and the like, all vendors similarly situated would be exempt from covering the increased cost of fuel defects actually influenced. This precedent would be highly prejudicial to any purchaser, and would effectively eliminate a large portion of expectation damages to any purchaser of defective vehicles.

The Respondent maintains the large variance in fuel consumption of 60 liters of fuel per 100 kilometers could only be caused by the aggregate effect of defects within the vehicle, for the variation is far more dramatic than the influence road condition, climate, or personal driving could produce alone.

As discussed previously, the Claimant explicitly agreed to conduct mutual fuel testing to determine if the Respondent's claim of over consumption was informed. However, it is undisputed the Claimant never sent a technician over to the Respondent's workshop, and thus, the Claimant's removed the only opportunity it possessed to be convinced of the Respondent's position that defects were causing a more dramatic change to fuel consumption beyond normal variance.

The Respondent maintains the substantial variance revealed by its own fuel testing could only be due to the added influence of defects within the engines provided by the Claimant under the 2011 Contract and the third purchase order in 2012.

Accordingly, the Respondent has requested compensation in the form of more than Tsh 2.2 billion (more than US$ 1,300,000 : Tsh 1630), which represents the increased fuel

cost it incurred on 59 model CA1320 trucks travelling a distance of 4,000 kilometers a month for two years. The cost of one liter of fuel is public domain and has always been easily deduced from the Respondent's pleadings at Tsh 2,200 (more than Tsh 1,500,000/720 liter = Tsh 2,200 = US$1.35 per liter at Tsh 1630), a reduction compared with the country standard due to the Respondent's bulk fuel purchasing and individualized internal fueling stations around Tanzania.

13. Conclusion by the Respondent

The Respondent maintains there are several scenarios of fact and law from which the Tribunal could potentially render a judgment. The most important consideration in all scenarios is the appropriate calculation of damages.

II. OPINIONS AND DECISIONS OF THE ARBITRAL TRIBUNAL

Following the parties' submissions/arguments, which are very much being cited verbatim, the Arbitral Tribunal now proceeds to its Opinions and Decisions in paragraphs to follow.

The Tribunal must also point out that not all the side and/or minor issues put forward by the parties have been specifically dealt with in writing, but they have all been considered, deliberated between members of the Tribunal and taken into account in arriving at the final decision in this ARBITRAL AWARD.

A. Jurisdiction of the Arbitral Tribunal

1. The 2011 Contract

Article 10.1 of the Purchase and Sales Contract (Contract No. 11D16TA01MG) dated 31 May 2011 (i.e., the 2011Contract) provides that: "*Any dispute or claim arising out of or relating to this Contract shall be settled by negotiations and conciliations between authorized representatives of the Parties. Should these negotiations or conciliation not lead to any result acceptable to the Parties, such disputes, or claims shall be submitted to arbitration in accordance with the Rules of China International Trade & Economic Arbitration Commission then in force by three arbitrators appointed in accordance with the said Rules. Proceedings shall be held and the award stated in English. The award shall be final and binding on the Parties. The Parties hereto shall recognize and execute the awards*

in their respective country. The arbitration shall take place in Beijing, China. The language of arbitration is English."

Correspondence between the Claimant and the Respondent show that the parties had consulted and negotiated with each other on the issues at disputes, before the time the Claimant initiates the arbitration proceeding, i.e., September 2014. However, the dispute was not solved through negotiation. Therefore, the Claimant is entitled to refer the disputes to arbitration.

The Tribunal opines that, the dispute brought up by the Claimant in this Arbitration arises from the 2011 Contract executed by the Claimant and the Respondent, and both parties had already made effort to, however failed in, solving the disputes by negotiation. Moreover, the Request for Arbitration meets the requirements in the above arbitration clause. As a result, the Arbitral Tribunal has jurisdiction in this case.

2. The 2012 Contract

The Tribunal noticed that there exists another purchase and sales contract (Contract No. 2012FA10129) dated 21 June 2012 (the "**2012 Contract**"), according to which the Claimant sold certain quantity of vehicles to a company incorporated in Tanzania "Glenrich Transportation Co., Limited", and the consignee under the 2012 Contract was the Respondent. In the present arbitration proceedings, the Respondent raised some of its counterclaims on basis of the 2012 Contract, contending that the 2012 Contract is the third purchase order of the 2011 Contract. However, the Tribunal finds the types of vehicles sold under the 2012 Contract are partially different from that of the 2011 Contract, and the purchaser thereof is not the Respondent. Therefore, the Tribunal opines that the 2011 Contract and the 2012 Contract are separate contracts, and the Tribunal does not have any jurisdiction to hear any dispute arising out of the 2012 Contract.

B. Applicable Law

According to the 2011 Contract, the 2011 Contract shall be governed by and interpreted in accordance with the PRC laws.

C. Effect of the 2011 Contract

The Respondent admitted the conclusion of the 2011 Contract but alleged that the Tribunal should cancel the 2011 Contract in its entirety. In the alternative, the Respondent

alleges that Articles 8.2 and 5.1 in the 2011 Contract are unconscionable and should be set aside.

1. Whether the 2011 Contract is unconscionable in its entirety?

The Respondent alleged that the 2011 Contract was "*extremely unjust and overwhelmingly one-sided in favor of the Claimant*", and the Claimant presented the Respondent "*with a pre-drafted Purchase and Sales Contract, of which was non-negotiable*", therefore the 2011 Contract is unconscionable in its entirety and shall be cancelled.

The legal basis contended by the Respondent is Article 54 of the *PRC Contract Law*, which provides that "*Either of the parties may petition the people's court or an arbitration institution for amendment or cancellation of a contract if: (1) the contract was concluded due to a material mistake; (2) the contract was grossly unconscionable at the time of its conclusion.*"[9]

Article 72 of the *SPC Opinions* provides that "*In case any party makes use of his own advantages or takes advantage of the other party's lack of experiences to have the rights and obligations of the two parties obviously violate the principle of fairness and making compensation for equal value, it shall be determined as grossly unconscionable*".[10]

The Tribunal opines that, according to Section 72 of the *SPC Opinions*, two requirements shall be met at the same time in order for a contract to be considered as "grossly unconscionable". Firstly, a party must make use of its "own advantage or takes advantage of the other party's lack of experience". Secondly, the two parties "violate the principle of fairness and making compensation for equal value". However, in this case, as admitted by the witness of the Respondent, Witness Mr. E, Executive Chairman of the Respondent, the Respondent is a large multinational company with revenue in excess of US$ 1.5 billion, and it was not under any pressure or any inexperience when negotiating the 2011 Contract. Therefore, the first element of Article 72 of the *SPC Opinions* is not satisfied. As a result,

9 Article 54 of the *Contract Law* stipulates that "*a party to the following contracts has the right to request the people's court or an arbitration institution to modify or cancel: (1) contract concluded due to a major misunderstanding; and (2) contract which was obviously unfair when it was concluded*".

10 Article 72 of the *SPC Opinions* stipulates that "*where one party takes advantage of its advantages or takes advantage of the other party's lack of experience, causing the rights and obligations of both parties to obviously violate the principles of fairness and equal value and compensation, it can be deemed obviously unfair*".

Article 54 of the *PRC Contract Law* does not support the allegation by the Respondent that the 2011 Contract is unconscious in its entirety.

The Tribunal further opines that, the Respondent's allegation that the 2011 Contract was non-negotiable (or rather, the Respondent meant not having negotiated before entering the contract) is without any evidentiary basis. Contrarily, the draft 2011 Contract submitted by the Respondent demonstrates the negotiation and revision process of the 2011 Contract before execution. During cross-examination, the witness of the Respondent, Witness E, Executive Chairman of the Respondent, also admitted that the negotiations took place in his office.

In conclusion, the Tribunal finds that the 2011 Contract was made and entered into freely by and between the Claimant and the Respondent, being the true and correct representation of the parties' intentions, the content of which is not in violation of any mandatory provision prescribed in PRC law, neither does it consist of any legal cause or situation that may render the whole contract void. Therefore, the 2011 Contract shall be legally binding on both parties. Pursuant to requirements in Article 60 of the *PRC Contract Law*, the Claimant and the Respondent shall perform their respective obligations under the 2011 Contract.

2. Whether Article 5.1 and Article 8.2 of the 2011 Contract shall be considered as unconscionable and void?

Alternatively, the Respondent alleged that Article 8.2 and Article 5.1 of the 2011 Contract are unconscionable and should be set aside.

Article 5.1 provides that "*Both the unit price and the total contract amount hereof shall not include any maintenance, repair work, warranty service, and/or any other kind of after-sales service for the Vehicles. The purchaser agrees to waive off all the claim against the vendor for the order. Instead, the vendor agrees to supply 4% spare parts of the total value to the purchaser*".

Article 8.2 provides that "*If the Purchaser make the balance payment delay or arrange the acceptance of the vehicles delay after the Vehicles arrived at the port, the Purchaser shall pay 0.3% of the amount of the delayed payment per day to the Vendor*".

Article 39 of the *PRC Contract Law* provides that "Standard clauses" means the clauses that are formulated in anticipation by a party for the purpose of repeated usage and that are not a result of consultation with the other party in the making of the contract.

Article 40 of the *PRC Contract Law* provides that Standard clauses shall become invalid if they fall under any of the circumstances set forth in Articles 52 and 53 of this Law or if the party that provides the standard clauses exempts itself from the liability, imposes heavier liability on the other party, or precludes the other party from its main rights. However, as per the Tribunal's analysis above, both parties truly negotiated the clauses of the 2011 Contract before the execution of the contract, therefore the 2011 Contract is not a standard contract subject to no negotiation and does not meet the requirements for the contract or provisions of the contract to become invalid set forth under the *PRC Contract Law*.

In this case, the Tribunal finds that the Respondent is a large multinational company with revenue in excess of US$1.5 billion, therefore it is almost impossible to view the Respondent to be in a weak bargaining position. Besides, a business entity with years of experience must conduct its business in due diligence and shall assume commercial risk arising from it. Therefore, the Respondent's allegation that Article 5.1 and Article 8.2 of the 2011 Contract are unconscionable and should be set aside on basis of "pre-drafted and non-negotiable" is rejected. The Tribunal is also satisfied, on basis of the evidence, that the 2011 Contract was entered into like another normal commercial transactions on arm-lengthy basis. The Tribunal accepts the Claimant's submission and evidence that Article 5.1 was agreed, including that "*The purchaser agrees to waive off all the claim against the vendor for the order*", as a result of negotiation with reduction in purchase prices in return (see Section I.7(2)(c) above).

Nevertheless, the Tribunal believes that it is necessary to test the validity of Article 5.1 of the 2011 Contract under Article 53 of the *PRC Contract Law* relating to liability exemption.

Article 5.1 of the 2011 Contract provides that "*… [t]he purchaser agrees to waive off all the claim against the vendor for the order. Instead, the vendor agrees to supply 4% spare parts of the total value to the purchaser*".

According to Article 53 of the *PRC Contract Law*, "*the following liability exemption clauses in a contract shall be null and void: (1) those that cause personal injury to the other party; and (2) those that cause property damages to the other party as result of deliberate intent or gross negligence*".

The Tribunal opines that if the Claimant intentionally or gross negligently supplied the poor quality vehicles to the Respondent, such waiver under Article 5.1 of the 2011

Contract should be taken as void and null. Further analysis will be made in the following paragraphs about the test set forth in Article 53 of the *PRC Contract Law*.

D. Is there any outstanding payment under Article 4.1?

According to Article 4.1 of the 2011 Contract, as the purchaser, the Respondent shall pay 20% of the total amount of the purchase order as down payment at the same time of placing the purchase order, and shall effect the balance payment, which is 80% of the total amount of each purchase order by monthly installments within next 24 months after 90 days from the bill of lading date.

The Claimant alleged that: (1) the Respondent placed two purchase orders under the 2011 Contract totaling nearly US$ 2.5 million; (2) the Respondent paid an advance payment of 20% in respect of each purchase order, totaling nearly US$ 500,000; (2) the balance amount is nearly US$ 2 million, but the Respondent only paid more than US$ 330,000; (3) from 7 May 2012, the Respondent has failed to make any other repayments under the 2011 Contract.

Neither did the Respondent deny the quantity and amount of the vehicles delivered by the Claimant under the two purchase orders of 2011 Contract, nor did it deny its failure to perform the payment obligations. In fact, at para. 37 of Witness C's supplementary statement as well as para. 26 of Witness E's witness statement, they admitted that the Respondent failed to make the payments, and the last payment made to the Claimant was submitted in May 2012.

The Tribunal finds that the outstanding payment for two purchase orders under 2011 Contract is more than US$ 1.6 million.

E. Whether the quality claims raised by the Respondent are tenable?

As per the Tribunal's analysis of Article 53 of the *PRC Contract Law* above, if the Claimant intentionally or gross negligently supplied the poor-quality vehicles to the Respondent, the stipulation that the Respondent agreed to waive off all the claim against the Claimant should be taken as void and null. Therefore, the Respondent's quality claim shall be heard in this arbitration to find out whether it was a case of intentional or gross negligence. It goes without saying that if the burden of proof of Claimant's intentional or gross negligence breach cannot be discharged by the Respondent, Article 5.1 of the 2011

Contract must apply, meaning that the quality claims by the Respondent, even if valid, are expressly waived.

Besides, concerning the Claimant's contention that the Respondent failed to make claim within the two-year limitation of action and has no right to make claim now, the Tribunal opines that, according to Article 129 of the *PRC Contract Law*, the time limit of action arising out of the contract for international sales of goods is four years from the date when the party knows or ought to know that its rights have been infringed upon. In this case, the 2011 Contract was concluded in May 2011, and the vehicles under the 2011 Contracts were delivered in August and October 2011. The Respondent filed its counterclaims on 28 April 2015, which obviously was within the four-year limitation of action. Therefore, the Claimant's contention that the Respondent failed to make claim within limitation of action is rejected.

Defects claim 1: engines with incorrect horsepower

The Respondent alleged that the Claimant provided at least four trucks which had 240 HP engines in breach of its promise to provide vehicles with 260 HP engines. The Respondent claims damages in the amount of Tsh 80 billion.

The Claimant submitted that the Tribunal has no jurisdiction to hear this claim, because the vehicles that are the subject of the Respondent's complaints were not provided under the 2011 Contract. Instead, the vehicles were provided under a separate and unrelated contract, that is, the 2012 Contract.

The Tribunal finds that vehicles with 260 HP engines were provided only under 2012 Contract, rather than 2011 Contract. As stated above, the Tribunal opines that it does not have jurisdiction to hear any claim raising out of the 2012 Contract in the present arbitration. Therefore, the Tribunal does not have jurisdiction to hear this specific allegation raised by the Respondent.

Defects claim 2: defective drawbar hooks

The Respondent alleged that, in breach of the 2011 Contract, the Claimant supplied vehicles with "*low quality drawbar hooks, many of which were unusable or broke in transit*". The Respondent claims Tsh 150 million, being the value of 60 drawbar hooks.

The Tribunal finds that for this allegation the Respondent submitted a Debit Note, stating that the drawbar hook claim only relates to the "CA1122PK2L2Y", which is the

7 Ton Truck. It appears that the Respondent's allegation of defective drawbar hooks only relates to the 7 ton Truck. But the 7 Ton Trucks did not have a drawbar hook attached. The Respondent admitted that it purchased drawbar hooks from a local supplier and then fitted these drawbar hooks to the 7 Ton Trucks.

In view of the modifications on vehicles made by the Respondent itself, the Tribunal opines that, according to the 2011 Contract, which provides that "*If the Purchaser make[s], any modification of the Vehicles, including but not limited to any attachment to, or removal of parts of, the Vehicle and/or use the non-original parts (which is purchased from any third party other than the Vendor), the Purchaser shall assume all responsibility for any fault, deficiency, defect caused in or by such modification…*", the Claimant is no longer liable for any fault, deficiency or defect caused by such modification.

Besides, if the Respondent's said allegation relates to the Cargo Trucks as well as the 7 Ton Trucks, the Tribunal finds that the Respondent has failed to meet its burden to provide evidence on which it relies to support its Counterclaim. The Respondent even did not give proper evidence to demonstrate that any of the vehicles provided under 2011 Contract was involved in an accident due to the defective drawbar hooks.

Needless to say, the issue of the Claimant's intentional or gross negligence was not proven in this specific claim.

Therefore, the Respondent's claim for defective drawbar hooks is dismissed.

Defects claim 3: incorrect tires

The Respondent alleged that, in breach of the 2011 Contract, the Claimant provided vehicles with the incorrect rear tires on at least two different models within a purchase order.

The Respondent alleged that (1) in breach of the 2011 Contract, the Claimant provided vehicles with the incorrect rear tires on at least two different models within a purchase order; (2) as the vehicles were used for hauling, the specific "*Lug Pattern or similar design for the rear wheels is necessary for basic traction and stability when hauling or pulling cargo*"; and (3) due to the Claimant's failure to provide these specific rear tires, the Respondent had to replace the unsuitable tires. As a result, the Respondent is claiming Tsh 9.6 million in damages.

However, the Tribunal finds that no obligation exists in the 2011 Contract that requires the Claimant to provide lug patterns on the rear tires of the vehicles. Furthermore, the Respondent also did not submit sufficient evidence to prove that the vehicles without

the lug pattern were not suitable for hauling, or any damage was caused by such vehicles. Therefore, the Respondent's claim for incorrect tires is dismissed.

Again, the issue of the Claimant's intentional or gross negligence was not proven in this specific claim.

Defects claim 4: fuel consumption

The Respondent alleges that the 2011 Contract required to provide trucks with a fuel efficiency or consumption rate of 0.42 liter/km. In breach of the 2011 Contract, the Claimant provided at least 59 trucks with a fuel consumption rate of 0.60 liter/km. As a result, the Respondent is claiming damages in the amount of more than Tsh 2.2 billion.

However, the Tribunal finds that no obligation exists in the 2011 Contract that requires the Claimant to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km. Even if there was an obligation on the Claimant to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km, there is insufficient evidence that the Claimant did not comply with this obligation. Besides, the Respondent also failed to demonstrate how the Claimant's alleged failure to provide Cargo Trucks with a fuel consumption rate of 0.42 liter/km resulted in damages of more than Tsh 2,242,944,000. Therefore, the Respondent's claim for defective fuel consumption is also dismissed.

Last but not least, the issue of the Claimant's intentional or gross negligence like all other alleged defect claims was not proven in this specific item.

Conclusion and Decisions by the Arbitral Tribunal on the Respondent's Counterclaim

Furthermore, considering that all the quality claims raised by the Respondent are all untenable, the Respondent's contention that it has the right to terminate payment due to poor quality of the vehicles is also untenable. The Respondent's counterclaims are hereby dismissed.

F. Exchange Rate Differential Under Article 4.4

Article 4.4 provides that "*Both the unit price and total contract amount hereof is calculated based on the RMB against the US Dollars, the exchange rate of which is 6.5:1, hereinafter referred to as 'the Basic Exchange Rate'. Each month, based on the Basic Exchange Rate, both Parties shall confirm the amount of exchange rate differential, comparing to the exchange rate of RMB against US Dollar published by the Bank of China on 26th of*

each month. Each three months, the Buyer and the Vendor shall make the settlement of the exchange rate differential."

The Claimant contended that the Respondent is liable to pay the exchange rate differential of US$ 98,309.93 which is US$ 98,000 more than what is set out in the 2011 Contract. However, the Respondent considers that the parties are not liable to pay each other because of the changes of currency.

The Tribunal opines that the Respondent's contention in this regard is untenable. The last sentence provides that "*the Buyer and the Vendor shall make the settlement of the exchange rate differential*", which clearly means that, if the RMB fluctuates in relation to the US dollar, each party shall have the obligation to pay the other party the amount of variance from the Basic Exchange Rate, namely, RMB 6.5: USD 1.

G. Interest Under Article 4.6

The Claimant claimed for the interest under the 2011 Contract in the amount of more than US$ 170,000. This amount is calculated up to and including June 2014. The Claimant also contended that the Respondent's obligation to pay this amount continues to accrue up to and including the date of payment by the Respondent.

The Tribunal opines that, according to the 2011 Contract, which reads that "*Both parties confirm the interest hereof is calculated based on annual interest rate of 4%, the Purchaser shall pay the interest from 60 days after the B/L date*", the Respondent is obliged to pay the interest to the Claimant, for which the principal amount shall be more than US$ 1.6 million, the interest calculation starting date be the 60th day after the last shipment date of the second purchase order under the 2011 Contract, i.e., December 2011, and the interest rate shall be 4% per year. The interest shall be calculated up to the payment date of the Respondent.

H. Penalty Interest Under Article 8.2

The Claimant also claimed for penalty interest under Article 8.2 of the 2011 Contract in the amount of more than US$ 2.2 million. This amount is calculated up to and including June 2014. The Claimant contended that the Respondent's obligation to pay this amount continues to accrue up to and including the date of payment by the Respondent.

Article 8.2 provides: "*If the Purchaser make[s] the balance payment delay or arrange the acceptance of the Vehicles delay after the Vehicles arrived at the port, the Purchaser*

shall pay 0.3% of the amount of the delayed payment per day to the Vendor. If the above-mentioned delay lasts for more than 20 days from the date as regulated in Article 4, the Seller shall be entitled to terminate this Contract upon written notice…"

The Respondent argued that the meaning of Article 8.2 is ambiguous, and the Claimant already possesses a mechanism to punish late payments on installments under Article 4.6, it would not need a duplicative penalty clause applicable to same behavior and time period. The Respondent also requested to reduce the amount of penalty according to the *PRC Contract Law*.

The Claimant contended that if the Respondent fails to make the repayments under Article 4.2, then the Claimant is entitled under Article 8.2 to charge penalty interest in the amount of 0.3% per day. The obligation on the Respondent to pay the penalty interest under Article 8.2 arises as a result of its breach of the 2011 Contract. Accordingly, the payment obligation under Article 8.2 is separate and distinct from the Respondent's obligation under article 4.6 to pay interest.

The Tribunal opines that the payment under Article 8.2 is separate and distinct from the Respondent's obligation under Article 4.6, therefore the Claimant is entitled to claim for both. It is not unusual to find contracts imposing a high contractual interest rate on late payment of a debt, in order to compel timely payment. However, the Tribunal on balance feels that the penalty interest set forth under Article 8.2 is excessively high, which may exceed greatly the actual losses of the Claimant. Pursuant to Article 29 of the *SPC Interpretation II*, "*Where a relevant party alleges that the agreed amount of penalty is excessively high and requests an appropriate reduction thereof, the people's court shall, according to the principles of equity and good faith, take a measurement and render a decision on the basis of actual losses*", and upon requests from the Respondent, the Tribunal opines that it is appropriate and fair not to follow the contractual provision of 0.3% of the amount of the delayed payment per day. To that end, the Tribunal finds it proper and fair that the penalty interest be set at a level of 6% per year.

I. Reasonable Costs for This Arbitration

In view that most part of the Claimant's arbitration requests are granted, while the counterclaims raised by the Respondent are all denied, the Tribunal opines that 80% of the reasonable costs of the Claimant in this arbitration shall be borne by the Respondent which means, the Respondent shall pay 80% of the amount claimed by the Claimant to the Claimant in respect of the Claimant's attorney fees and other related expenses.

J. Arbitration Fee

In view that most part of the Claimant's arbitration requests are granted, while the counterclaims raised by the Respondent are all denied, the Tribunal opines that 80% of the arbitration fee for the Claimant's claim shall be borne by the Respondent, and all the arbitration fee for counterclaim shall be borne by the Respondent.

The actual expenses and special remuneration incurred by the Respondent-appointed arbitrator is fully advanced by the Respondent. The Tribunal opines that the Claimant shall bear 20% and the Respondent shall bear 80% of the actual expenses and special remuneration.

III. AWARDS

According to the opinions set out above, and as per Article 47 of the *Arbitration Rules*, the Tribunal hereby renders the following awards:

(1) The Respondent shall pay the Claimant the outstanding payment for goods delivered under 2011 Contract in the amount of more than US$ 1.6 million.

(2) The Respondent shall pay the Claimant the interest on the outstanding payment as stipulated under Article 4.6 of the 2011 Contract. The principal amount shall be more than US$ 1.6 million, the interest shall be calculated from 15 December 2011 to the actual payment date of the Respondent, and the interest rate shall be 4% per year.

(3) The Respondent shall pay the Claimant the outstanding exchange rate differential in the amount of more than US$ 98,000.

(4) The Respondent shall pay the penalty interest for late payment calculated at 6% per year of the amount of the delayed payments, i.e., more than US$ 1.6 million, from 15 December 2011 to the actual payment date of the Respondent.

(5) The Respondent shall reimburse the Claimant its incurred expenses for this arbitration in the amount of more than US$ 120,000.

(6) All other relief (if any) sought by the Claimant is hereby rejected.

(7) All relief sought in Counterclaim by the Respondent are hereby rejected.

(8) The Claimant shall bear 20% of the arbitration fee and the Respondent shall bear 80%. all the counterclaim fees of the present case shall also be borne by

the Respondent. As the Claimant has already paid the above arbitration fee to CIETAC in advance, the Respondent shall pay corresponding arbitration fee to the Claimant.

The Claimant shall bear 20% of the actual expenses and special remuneration incurred by the Respondent-appointed arbitrator, and the Respondent shall bear 80%. After offsetting the deposit advanced by the Respondent, the Claimant shall reimburse 20% to the Respondent.

The above payments shall be made and cleared by the Respondent to the Claimant within 7 days from the effective date of this Award.

This Award is final and effective as from the date of issuance.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Chinese Company A

Claimant

v.

Germany Company B

Respondent

Matter for arbitration: Disputes over promoter's contract

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. INTRODUCTION

A. The Claimant

1. The Claimant in this arbitration is **Company A**, a company incorporated under the laws of Hong Kong SAR, People's Republic of China (the "**PRC**" or "**China**").

2. The Claimant is represented in this arbitration by: (omit).

B. The Respondent

3. The Respondent in this arbitration is **Company B**, a company incorporated under the laws of Germany.

4. The Respondent is represented in this arbitration by: (omit).

5. Each of the Claimant and the Respondent is also referred to in this final award (the "**Final Award**") as a "**Party**" and the two together as the "**Parties**".

C. The Arbitral Tribunal

6. The arbitral tribunal (the "**Tribunal**") is comprised of the following arbitrators:

   Mr. X, appointed by the Claimant

   Mr. Y, appointed by the Respondent

   Mr. Z, the presiding arbitrator, appointed by the Arbitration Court of the China International Economic and Trade Arbitration Commission (the "**Arbitration Court**").

D. Governing Law and Arbitration Agreement

7. This arbitration is brought under the Promoters Contract signed by Company A on May 2013 and by Company B in July 2013 (the "**Contract**"). Article 13(1) of the Contract provides as follows:

   "*The formation, effect, performance and interpretation of this Agreement shall be governed by the laws and regulations of the PRC.*"

8. Article 13(2) of the Contract provides as follows:

"*Any disputes arising from or in connection with this Agreement shall be resolved through friendly consultations between the Parties. If such disputes cannot be resolved in this manner within thirty (30) days after the commencement of such consultations, either Party may submit such disputes to China International Economic and Trade Arbitration Commission City S for arbitration in accordance with the commission's arbitration rules in effect at the time of applying for arbitration. The arbitral proceedings shall be in English and the third arbitrator shall come from a third country other than Germany or the PRC. The arbitral award is final and binding upon the Parties.*"

9. The arbitration agreement in Article 13(2) of the Contract refers to the "China International Economic and Trade Arbitration Commission City S". It was, however, agreed by the Parties that, given subsequent developments in the organizational structure of the China International Economic and Trade Arbitration Commission ("**CIETAC**"), arbitration claims under the Contract should be submitted to CIETAC in Beijing to be determined in accordance with the *CIETAC Arbitration Rules* effective from 1 January 2015 (the "*Arbitration Rules*"). The place of arbitration was therefore agreed to be the PRC, with hearings to be held in Beijing.

II. PROCEDURAL HISTORY

10. Set forth below is a brief procedural history of this arbitration:

(1) On 26 January 2016, CIETAC received a hard copy of the Request for Arbitration dated 22 January 2016 from Company A against Company B.

(2) On 22 March 2016, the Arbitration Court issued a Notice of Arbitration to the Parties, notifying them that CIETAC had taken cognizance of this case based on the arbitration clause contained in the Contract with the Notice of Arbitration, the Arbitration Court forwarded to Company B a copy of Company A's Request for Arbitration and exhibits, together with the *Arbitration Rules* and the Panel of Arbitrators.

(3) Company A appointed Mr. X as the Claimants party-appointed arbitrator. Company B appointed Mr. Y as the Respondents party-appointed arbitrator. Since the Parties failed to jointly appoint a presiding arbitrator within the specified time, the Chairman of CIETAC appointed Mr. Z, a New Zealand national, as the presiding arbitrator of the case, taking into account the stipulation

in the arbitration agreement in the Contract that the presiding arbitrator shall come from a country other than Germany or the PRC. After signing the relevant Arbitrator's Declaration of Acceptance and Statement of Independence, the aforementioned three arbitrators formed the Tribunal as of July 2016 to hear this case, as advised by notice to the Parties on the same day by the Arbitration Court.

(4) The final merits hearing (the "**Hearing**") took place at CIETAC headquarters in Beijing in March 2017. The Hearing was set down for three days and ended at 2.35pm on 31 March 2017. BCG presented the evidence of one witness for the Claimant at the Hearing. ITR presented the evidence of one witness for the Respondent at the Hearing.

11. The following conventions shall be adopted in this Final Award: (1) references to written submissions shall be to document name and page or paragraph number; (2) references to documents, laws or authorities submitted by the Parties as part of their Hearing Bundles shall be to "Exhibit C-(Bundle Letter)-(Exhibit Number)" in the case of documents, law or authorities submitted by Company A, and to "Exhibit R-(Bundle Number)-(Exhibit Number)" in the case of documents, law or authorities submitted by Company B; and (3) references to the Hearing transcript shall be by date, page and line (dd, T_/_/_).

12. Based on the materials submitted by the Claimant and the Respondent, together with the facts clarified at the Hearing, the Tribunal hereby renders this Award by majority decision. Mr. X's dissenting opinion is appended to this Final Award, which shall not form a part of the Final Award.

III. FACTUAL BACKGROUND

13. Company A is a Hong Kong-based company specializing in the promotion and organization of sports, cultural and entertainment events, particularly in the PRC. Company B is a non-profit organization based in Germany dedicated to the promotion and marketing of the Deutsche Tourenwagen Masters ("**DTM**") motor racing series, and was at the relevant time principally supported by the three German car manufacturers C, D and E (collectively, the "**Manufacturers**"). According to a contract between Company B and the German Association F (the "**Association F**"), Company B is the owner of the original rights to commercial exploitation of the

production, recording, dissemination, editing, broadcasting and distribution of film, television, radio and video products on all DTM competitions.

14. The annual DTM car racing championship, first held in 1984, is one of the world's most prestigious touring car championships and involves a circuit often races in ten venues across Europe over an annual season starting in April and finishing in October. As a non-profit organization, Company B partners with local promoters for each race and demands a licence fee from those promoters in exchange for the promoters being able to market and profit from the DTM series in various ways.

15. Company A and Company B first co-operated in 2010 when they signed a Promoter's Contract for the organization of an exhibition street race in City S (the "**2010 Contract**"). It is common ground that the race was staged successfully. Nevertheless, Company B terminated the 2010 Contract on the grounds that Company A had failed to pay a licence fee of Euro 1 million that it was obliged to pay Company B under that contract.[1]

16. The Parties then in 2013 entered into another Promoters Contract (the "**Contract**", which is the subject contract of this arbitration). The Contract was signed by Company A on 28 May 2013 and by Company B on 24 July 2013. The purpose of the Contract was to hold one or more official DTM races per year in the PRC for the years 2014 to 2016. Company B would engage Company A as the Promoter to organize and promote the races and the DTM Series generally in the PRC. Company A would pay Euro 3 million to Company B as a licence fee (the "**Licence Fee**") for each of the three years of the Contract and promote a series of three annual DTM street races in China. In return, Company B granted Company A certain rights by which it could profit from the co-operation, including sponsorship opportunities, exclusive merchandising rights in the PRC market, exclusive TV rights in the PRC market, and sales from seating.

17. According to the Contract, the race venue would be a street circuit in a PRC city, and the date and location of each race would be mutually agreed by the Parties by 25 November of the preceding year in which the race was to be held.

18. According to the Contract, Company A guaranteed that CCTV Sports would be the "Chinese Host TV Broadcaster" of each race held in China and that each such race would be broadcast live and in full length in the PRC by CCTV Sports.

1 Exhibit C-A-ll.

19. According to the Contract:

> *"The Promoter shall be obliged to set up, design and perform in cooperation with the free to air broadcasting station CCTV 5 or other free to air TV stations a regular DTM TV Show (at least a minimum of 10 episodes) in year 2013 or 2014 (with a length of at least 55 minutes) covering all races of the DTM 2013 or 2014 season which imply a substantial marketing value to the benefit of famous car manufacturers.*
>
> *The DTM TV Show shall include at least*
>
> - *Race highlights of each DTM race.*
> - *Interviews with DTM Drivers/Team Captains prior and after the DTM race.*
> - *Review of DTM races by invited experts.*
> - *Spectator raffles.*
>
> *The Promoter shall be obliged to invest a minimum sum of Euro 1 million into the DTM show in consideration of the outstanding amount payable by the promoter resulting out of the previous Promoter Contract of 2010. The Promoter shall provide evidence to the Company B that the aforementioned sum had been invested into the DTM TV Show, by providing a summary of all activities."*

20. According to the Contract, the Licence Fee for the first year (2014) of Euro 3 million was to be paid in five instalments and according to a detailed payment schedule, as follows:

> *"The first installment in the amount of € 300,000 is due and payable within 3 weeks upon signing of the present contract.*
>
> *The second installment in the amount of € 900,000 is due and payable by 13 January 2014.*
>
> *The third installment in the amount of € 900,000 is due and payable by 1 of April 2013. (sic.)*
>
> *A Letter of Credit in the original form will be issued for the fourth and fifth installment on 1 May 2014.*

The fourth installment in the amount of € 600,000 is due and payable until 1 August 2014.

The fifth installment in the amount of € 300,000 is due and payable within 1 week prior to the race at the latest."

21. As can be seen from Article, the fourth and fifth payments were to be secured by letter of credit. The letter of credit was to be in the form set out in detail at the Contract.

22. According to the Contract, if any race was cancelled in writing by Company B, Company B would reimburse Company A by repaying the amount already paid by Company A by way of Licence Fee for the cancelled race.

23. According to the Contract, the Contract would be valid from the date of signature until 31 December 2016, with the possibility of an extension of two years if agreed in writing by the Parties. In respect of termination, its Article provided as follows:

> "*The right of either Party to terminate this Agreement in case of a fundamental breach of contract shall not be impaired by the foregoing. The Company B shall have in particular the right to terminate the contract with immediate effect in case the Promoter is in default to pay one of the aforementioned installments or with its obligation to provide the letter of credit for more than 15 days.*"

24. On 18 October 2013, Company B issued an invoice granting an extended date of 8 November 2013 for payment of the first instalment of Licence Fee in connection with the DTM race to be held in China in 2014 (the "**2014 Race**").

25. On 22 November 2013, Company A paid Euro 100,000 of the first instalment of Licence Fee for the 2014 Race, and on 28 November 2013 paid the balance of Euro 200,000 for the first instalment.

26. On 5 December 2013, Company B issued an invoice for payment of the second instalment of Licence Fee in connection with the 2014 Race, with a due date of 13 January 2014 for payment.[2] [3]

27. On 17 March 2014, Company B received Company A's payment of the second instalment of Licence Fee. On the same day, Company B issued an invoice for the

2 Exhibit C-B-l.

3 *Ibid*.

third instalment of Licence Fee in connection with the 2014 Race, with a due date for payment of 1 April 2014.[4]

28. On 19 March 2014, Mr. J of Company A advised Mr. L of Company B by email that Company A had sent the race layout for the 2014 Race to the City G government for approval.[5]

29. On 22 April 2014, Ms. I, Company A's CEO, sent a letter to Mr. W, the Chairman of Company B, asking Company B for support in selling sponsorship packages to the Manufacturers, saying that Company A needed to generate income from the Manufacturers to cover the costs of making the 2014 Race happen. If not, Ms. I suggested that the cheaper option of a race on a permanent race circuit could be explored.[6]

30. Mr. W replied to Ms. I by letter the same day,[7] [8] saying that if the Manufacturers were advising that they did not have the budget to purchase Company A's sponsorship packages, then the Parties needed to find alternative solutions for holding the 2014 Race, otherwise the event would be jeopardized. Mr. W concluded his letter by saying: "*If the manufacturers cannot change their budget situation and also you cannot change your list of demands then unfortunately it looks like it will not work.*"

31. Company B then insisted on holding what they called in these proceedings a "crisis meeting" with Company A to explore options for maintaining the 2014 Race. The Parties met at the Hockenheim racetrack in Germany on 3 May 2014. Participants included Ms. I and Mr. J for Company A, and Mr. L and various board members for Company B, as well as representatives of the Manufacturers. At the end of the meeting the Parties entered into a one-page amendment of the Contract, which is, in these proceedings, referred to as the "**Hockenheim Agreement**"). The five provisions of the Hockenheim Agreement are set out below:

> "*1. The DTM race in China 2014 will happen on the planned weekend (26-28.09.2014).*

4 *Ibid*.
5 Exhibit R-2-20.
6 Exhibit R-3-18.
7 Exhibit R-3-19.
8 Exhibit R-3-20.

2. *Company A has to transfer the third instalment of the agreed contractual fee to Company B until Wednesday, 07.05.2014. This means the outstanding sum of Euro 900.000 has to be on the account of Company B on 07.05.2014. After that every payment has to take place four weeks earlier than stated in the contract.*

   If for any reason the race will not happen Company A agrees that Company B will keep the Euro 3 million fee.

3. *The race will take place on City S international circuit.*

4. *If Company A is able to prove that Company A is able to renovate the City U international circuit to 'fit for purpose' European standard on time, then it could be possible to have the race at City U international circuit. This proof has to be given latest by Tuesday, 13.05.2014.*

   Association E (Christian Schacht) and representatives of the manufacturers and Company B will visit the City U racetrack within the next couple of days in order to define a list of necessities of renovation works which have to be fulfilled. Also a timeline will be set. If Company A will guarantee this timeline and the renovation works until 13.05.2014 then the manufacturers and Company B agree to have the DTM race 2014 (26-28.09.2014) at City U international circuit.

5. *The race has to take place on the conditions of the signed contract.*"

32. The main amendments to the Contract set out in the Hockenheim Agreement were therefore the following:

(1) The payment date for the third instalment of the Licence Fee was amended and the dates of payment for the fourth and fifth instalments were accelerated by four weeks.

(2) If for any reason the 2014 Race did not take place, Company A agreed that Company B would keep the Euro 3 million Licence Fee for 2014, whereas under the Contract, if the 2014 Race was cancelled by Company B, Company B had been obliged to reimburse Company A the amount of Licence Fee already paid in respect of the cancelled race.

(3) The 2014 Race was to take place on a circuit track, rather than being a street race as originally envisaged by the Contract.

33. In addition, the Hockenheim Agreement confirmed the weekend of 26 to 28 September 2014 as the date of the 2014 Race and imposed tight deadlines on Company A to confirm the venue for the race. The Hockenheim Agreement named the City S international circuit as the venue for the race, but also raised the alternative possibility of holding the race at the City U international circuit (the "**UIC**") so long as Company A could prove by 13 May 2014 that it was able to renovate the UIC to "fit for purpose" European standards. To that end, representatives of the Association F, the Manufacturers and Company B would visit the UIC within several days after the signing of the Hockenheim Agreement and define a list of renovations that needed to be carried out, and a timeline for those renovations.

34. The site visit to the UIC took place on 7 May 2014, and a site visit report (the "**Site Report**") was sent by Company B to Company A on the same day.[9] The Site Report set out the renovation works that needed to be carried out to bring the UIC up to fit for purpose European standards. The Site Report nevertheless expressed some doubt as to whether the UIC could be renovated to those standards before the confirmed date of the 2014 Race, and proposed a solution involving the demolition of the current pit building and its replacement with a temporary pit building for the 2014 Race. Company A was asked in the Site Report to examine whether this solution was viable and to provide "*definitive feedback*" by 12 May 2014.

35. On 12 May 2014, Company A paid the third instalment of Licence Fee for 2014.

36. In his email to Mr. L of Company B dated 13 May 2014,[10] Mr. J of Company A confirmed that the UIC would be the venue for the 2014 Race, and advised that a local construction company that had visited the site on 9 May 2014 had concluded, after considering both options of renovating the existing structure or replacing the existing structure with a new temporary structure, that the only realistic option given the timeframe would be to renovate the existing structure in accordance with the directions set out in the Site Report. Mr. J also raised a further issue that would need to be resolved before the 2014 Race could take place at the UIC: the UIC was already booked by manufacturer M for another event on 28 September 2014.

9 Exhibit R-3-25.

10 Exhibit R-3-26.

37. On 31 May 2014, Mr. L of Company B sent an email to Ms. I and Mr. J of Company A requesting Company A's confirmation of the UIC as the venue for the 2014 Race.[11] Mr. L stated in his email:

> "*We need a definite letter of acceptance from you, which states that the DTM China race 2014 will take place at City U International Circuit on the weekend of 26-28.09.2014. The race has to take place according to the agreed conditions — same as on any other DTM race at a racetrack.*
>
> *If we will not receive this statement from you latest by Thursday (05.06.2014) the DTM China race will be cancelled.*"

38. On 5 June 2014, Mr. L sent an email to Mr. J[12] confirming that manufacturer M had rescheduled its event at City U and that therefore the UIC should be available for the 2014 Race on the relevant weekend of 26 to 28 September 2014.

39. On 13 June 2014, Mr. J sent an email to Mr. L attaching a renovation schedule and confirming that, according to that schedule, all renovation work would be completed by 21 September 2014.[13] [14]

40. On 26 June 2014, Mr. W of Company B sent an email to Ms. I of Company A saying that an official press release confirming the 2014 Race needed to be made without any further delay, in particular to explain officially why the 2014 Race was being held in City U and not Guangzhou as originally planned. Ms. I responded by email saying that Company A and the UIC were still in discussions about the "*renovation terms*" and did not wish to release a press statement until after 7 July 2014.[15] Mr. J, in his email to Mr. L dated 10 July 2014,[16] also said that Company A was still negotiating the renovation contract with the UIC and that the press release should therefore wait until the following week.

41. In his email to Mr. W dated 12 July 2014,[17] Mr. J assured Mr. W that the 2014 Race in City U was "*secure*" and that Company A had an agreement for rental of the UIC

11 Exhibit R-2-23.
12 Exhibit C-B-19.
13 Exhibit R-2-24.
14 Exhibit R-2-25.
15 *Ibid*.
16 Exhibit R-2-26.
17 Exhibit R-2-27.

and all its facilities from 23 to 29 September 2014. In addition, Mr. J reported that negotiations for the renovation plan were still ongoing between Company A and the UIC and that Company A expected a renovation contract to be signed "next week". Mr. J also made various other assurances about work progress, including sponsorship packages and customs issues.

42. On 14 July 2014, Dr. T, general counsel of Company B, sent an email to Mr. J[18] attaching an invoice dated 9 July 2014 for the fourth payment of Licence Fee of Euro 600,000[19] and reminding Company A to open a letter of credit to secure the fifth payment.

43. On 18 July 2014, Mr. J sent an email to Mr. L,[20] the contents of which related principally to the issue of sponsorship for the 2014 Race. Mr. J said that he had received two days previously an email from the Manufacturers advising that they would not buy Company A's sponsorship packages for the 2014 Race. Mr. J reminded Mr. L that Company A was "*investing a large amount of money to bring the manufacturers to China and to stage this event" and that "if the manufacturers refuse to invest in branding activities or allow their Chinese counterparts to invest, then Company A would have to consider why we are doing this event*". Mr. J also said in his email that the proposed sponsorship packages worth RMB 9,800,000 per Manufacturer "*would be our target to ensure that Company A has a chance to cover the costs for this event*". Mr. J continued by saying that "all parties are working to a tight deadline", and that Company A would like to conclude a renovation contract with the UIC by the following week, followed by a joint Company B/Company A press release. However, concluded Mr. J, "*before this commitment, Company A would like to receive plans from the manufacturers of their customized packages which they deem to be valued at the targeted amount by the 22nd of July.*"

44. On 21 July 2014, Mr. L sent an email to Mr. J asking for Company A to provide evidence of a number of activities and milestones related to Company A's responsibilities under the Contract, including proof of marketing and media activities to promote the 2014 Race, proof of a valid contract and broadcasting of DTM, proof of a valid race track

18 Exhibit R-2-14.
19 Exhibit C-B-2.
20 Exhibit R-2-19.

rental contract with the UIC, and a clear statement as to what Company A would do if the Manufacturers continued to refuse to buy Company A's sponsorship packages.[21]

45. On 22 July 2014, Mr. J replied to Mr. L's email,[22] listing marketing and media activities carried out by Company A up to that date. With respect to the CCTV contract, Mr. J said that, according to past practice, Company A did not need formal contracts with CCTV and had always been able and would, for the 2014 Race, continue to be able to broadcast live on CCTV based on the "special relationship" between Company A and CCTV. Mr. J did not directly answer the question as to what Company A would do if the Manufacturers continued to refuse to buy Company A's sponsorship packages. Instead, Mr. J emphasized that Company A was open to customizing the packages for the benefit of the Manufacturers, that Company A should be allowed to discuss sponsorship opportunities freely with the PRC affiliates of the Manufacturers and that if that were not permitted, "*it will have a negative effect on Company A's income and therefore the race.*"

46. Also on 22 July 2014, Ms. I of Company A sent an email to Mr. W of Company B[23] [24] asking Company B to allow Company A to sell the sponsorship packages to the PRC joint venture affiliates of the Manufacturers "*without interference*", in order to make the 2014 Race successful, although Ms. I also mentioned that it was more than likely that the 2014 Race would not be a profitable event.

47. On 23 July 2014, Company B sent a letter to Company A terminating the Contract on "*hard ship grounds*" (the "**Termination Letter**"). The Termination Letter set out various non-exhaustive grounds for termination, which the Tribunal summarizes as follows:

    (1) Company A breached the Contract by demonstrating its incapacity and unwillingness to prepare the UIC racetrack in time and up to fit for purpose standards for the proposed 2014 Race.

    (2) Company A was late in its payment instalments of the Euro 3 million Licence Fee for 2014.

21 Exhibit C-B-30.
22 *Ibid*.
23 Exhibit C-C-7.
24 Exhibit C-C-l.

(3) Company A was in breach of its obligations under Article 5(1)(a) of the Contract to issue letters of credit to secure the payment of the fourth and fifth instalments of the Licence Fee for 2014.

(4) Company A was in breach of its obligations under the Contract to broadcast at least ten episodes of the DTM races in 2013 and 2014, to provide evidence that at least Euro 1 million had been invested into a DTM show, and to provide evidence that the DTM race would be broadcast live or relive by CCTV Sports.

48. On 24 July 2014, Company A replied by email stating that Company B had no right to unilaterally terminate the Contract, that Company A did not agree to the termination and hoped to negotiate a settlement of the dispute with Company B. The Parties attempted to negotiate a settlement of their disputes, but without success. The Parties' negotiations were carried out principally through correspondence by Company A's external lawyers from Zhonglun W&D Law Firm with Dr. T, general counsel of Company B,[25] and there was also an unsuccessful settlement meeting between the Parties on 26 November 2014 in South Korea.[26]

49. On 22 January 2016, Company A commenced these arbitration proceedings by filing a Request for Arbitration with CIETAC, alleging that Company B's termination of the Contract was invalid and claiming for, *inter alia*, reimbursement of Euro 2.1 million already paid by Company A towards the Licence Fee for 2014, and compensation for all of Company A costs and losses incurred in relation to Company A's preparatory work for the 2014 Race, in the amount of more than RMB 10 million.

IV. THE PARTIES' SUBMISSIONS

A. Summary of Company A's Claims and Requests for Relief

50. Company A requests the following relief from the Tribunal:

(1) Company B shall return to Company A nearly HK$23 million equivalent to Euro 2.1 million of Licence Fee already paid by Company A to Company B.

25 See, for example, the five letters sent from Zhonglun W&D Law Firm to Dr. T between 29 July 2014 and 3 November 2014 at Exhibit R-2-28.

26 See paras. 84 and 85 of Justin Choi's Witness Statement dated 14 February 2017 at Exhibit C-E-9.

(2) Company B shall compensate Company A for all costs and losses in the amount of more than RMB 10 million.

(3) The Tribunal shall declare it has no jurisdiction over the counterclaim for payment of Euro 1 million under the Contract.

(4) The Tribunal shall otherwise dismiss both of Company B's counterclaims.

(5) Company B shall be responsible for Company A's attorney's fees for this arbitration.

(6) Company B shall be responsible for all the arbitration costs of this arbitration.

51. Company A's first claim relates to Company B termination of the Contract, which Company A said failed to meet the requirements of Articles 93 and 94 of the *PRC Contract Law* (1999) (the "*Contract Law*") in respect of unilateral terminations of contract. Therefore, Company A argues, Company B's unilateral termination of the Contract was in breach of contract and caused the failure of the relevant races under the Contract to be held. As a consequence, Company B should return to Company A the sum of nearly HK$23 million, equivalent to Euro 2.1 million of Licence Fee already paid by Company A to Company B.

52. Company A's second claim is for damages of more than RMB 10 million as compensation for the losses Company A alleges it has suffered as a consequence of TR's invalid unilateral termination, being all relevant costs incurred by Company A for the preparation of the 2014 Race.

53. Company A also claims for its legal costs in this arbitration and requests an order that Company B be responsible for all the arbitration costs of this arbitration, including the fees and expenses of the Tribunal and the administrative fees of CIETAC.

54. In relation to the first claim, Company A asserts that it was at all times in compliance with its obligations under the Contract. Company A makes reference to Articles 93 and 94 of the *Contract Law* and applies those provisions to each of the grounds for termination raised by Company B in the Termination Letter to conclude that Company B's termination of the Contract was not justified and was itself a repudiatory breach of contract. Company A has accepted that repudiatory breach of contract and therefore, by the time of the Hearing, both Parties were in agreement that the Contract had already been terminated.

55. Articles 93 and 94 of the *Contract Law* provide as follows:

> *"Article 93 The parties may terminate a contract if they reach a consensus through consultation.*
>
> *The parties may agree upon conditions under which either party may terminate the contract. Upon satisfaction of the conditions, the party who has the right to terminate may terminate the contract.*
>
> *Article 94 The parties to a contract may terminate the contract under any of the following circumstances:*
>
> *(1) it is rendered impossible to achieve the purpose of the contract due to an event offeree majeure;*
>
> *(2) prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligations;*
>
> *(3) the other party delayed performance of its main obligations after such performance has been demanded, and fails to perform within a reasonable period;*
>
> *(4) the other party delays performance of its obligations, or breaches the contract in some other manner, rendering it impossible to achieve the purpose of the contract; or*
>
> *(5) other circumstances as provided by law."*[27]

56. Company A's position on each of the grounds for termination relied upon by Company B is examined in turn below.

1. Alleged Delays in payment of instalments of Licence Fee by Company A

57. In the Termination Letter, Company B reminded Company A that payment of all the instalments of the Licence Fee to date (i.e., the first three instalments of the Licence Fee) had all been late, and that the fourth instalment was already due and payable. Company B also clarified in its Statement of Defense that it considered Company A's "delinquent payments" to constitute breach of contract.

27 The Tribunal has adopted the English translation provided by BCG at pp. 3 and 4 of its Request for Arbitration.

58. Company A raised various arguments against Company B relying on the allegedly late payments to terminate the Contract. First, Company A said that the Parties had established a pattern of Company A paying the instalments of Licence Fee on the basis of invoices setting out a payment date, even though the Contract did not mention invoices. In other words, the contractual procedures for payment had been modified by this established practice of the Parties, and Company B therefore has no right to rely on the strict terms of the Contract with respect to payment in order to terminate the Contract. Company A also argued that any overall delay in payment of instalments of the Licence Fee, as compared to the dates originally set out in the Contract, was Company B's fault because it had delayed in countersigning the Contract and thereafter issuing the invoice for the first instalment.

59. Payment of the first three instalments was therefore not only later than the dates set out in the Contract, but also later than the dates specified on the relevant invoices, and Company B had accepted those late payments and never raised the lateness of the payments as a serious concern. Company B therefore could not at a later date characterize those late payments as a fundamental breach of contract justifying termination. Furthermore, the agreed payment date of the fourth instalment of the Licence Fee was 1 August 2014, as set out in Company B's invoice dated 9 July 2014, which overrode any previous dates for payment set out in the Contract or the Hockenheim Agreement. Payment of the fourth instalment was therefore not due at the time of termination on 23 July 2014, and indeed Company A had, in its email to Company B dated 21 July 2014, promised to make payment of the fourth instalment by the agreed maturity date of 1 August 2014. Therefore, Company A argued that termination of the Contract by Company B on the grounds of late payment of any of the instalments of the Licence Fee was invalid.

2. Alleged failure to issue letters of credit in respect of the fourth and/or fifth instalments of the Licence Fee

60. In the Termination Letter, Company B cites as an additional breach of contract Company A's failure to issue letters of credit to secure the fourth and fifth instalments, in contravention of Article 5(1)(a) of the Contract. Company B had, in its email of 14 July 2014, reminded Company A to provide a letter of credit but Company A had failed to do so.

61. As with the payment of the Licence Fee, Company A argued that the Parties' agreement with respect to the opening of letters of credit had been modified through their behavior. The Contract had stipulated that the letter of credit to secure the fourth payment should be provided by 1 May 2014. Although that date was not adhered to by Company A, Company B did not terminate the Contract at that time and continued to work together with Company A on preparations for the 2014 Race in City U, with Company A investing a significant amount of time and resources in the project. Company B only terminated the Contract nearly three months after the due date for issuance of the letter of credit. Company B had therefore created a reasonable expectation on the part of Company A that Company B would not insist on the strict terms of the Contract in this regard, and on the basis of that expectation Company A continued to work on[28] preparations for the 2014 Race. Company B therefore argued that Company A had lost any right to terminate the Contract on this basis.

3. Alleged failure to invest minimum sum of Euro 1 million into a DTM TV show and provide broadcasting of the DTM race

62. In the Termination Letter, Company B alleged that Company A was in breach of Articles 4(3) and 4(4) of the Contract by failing to broadcast at least ten episodes of the DTM races for 2013 or 2014 (with a minimum length of 55 minutes for each episode) in Chinese free-to-air TV shows, by failing to provide evidence that the sum of Euro 1 million had been invested into a DTM TV show (the "**DTM TV Show**"), and by failing to provide evidence that the DTM races in China would be broadcast live or re-live by CCTV Sports.

63. Company A argued that it had or was in the process of complying with all its obligations under Articles 4(3) and 4(4) at the time of termination of the Contract. In order to fulfil its obligations to broadcast the DTM races, Company A had signed a contract with TDM TV station in Macao, with that station agreeing to broadcast the DTM races live. Company A had also reached preliminary agreement with Hong Kong Now TV on the broadcasting of DTM races, as a result of which Hong Kong Now TV had broadcast 138 episodes of races of the 2013 DTM race season. For the 2014 DTM race season, Company A argued that the evidence that it had submitted in these proceedings showed that Hong Kong Now TV had broadcasted 804 episodes of the

28 Exhibit R-2-15.

full ten races of the 2014 DTM race series, and TDM TV had broadcast 26 episodes of races of the 2014 DTM race series, including live broadcasts of every race since the third race of the 2014 DTM race series. Company A argued that the commercial effect of broadcasting the entire race live was better than purely broadcasting the highlights of the race and therefore went beyond the requirements of Article 4(4) of the Contract, and that the length of the broadcasting satisfied the requirements of at least ten episodes of the DTM races in 2013 or 2014.

64. With respect to the requirement to invest Euro 1 million in the DTM Show, Company A pointed first of all to the co-operation proposal sent by Company A to Company B by email on 12 April 2013,[29] which showed that Company A intended to invest at least Euro 1 million to create a new DTM TV show on Chinese free-to-air TV. For Company A the provision of TV airtime of a media value of at least Euro 1 million was sufficient for it to have complied with its obligations. It did not have to provide the airtime and then on top of that invest Euro 1 million into a DTM show.

65. Company A said that it had in any case invested large sums of money, manpower and resources into promoting the DTM races, including building up the DTM Chinese website and promoting DTM races through the social interactive platform Sina Weibo and China's largest mobile application WeChat, all of which added to the commercial value of the DTM races and expanded DTM's influence and visibility in China. Company A submitted as Bundles DI to D4 a large number of receipts to evidence the expenses it had incurred in this regard.

66. Company A argued that Company B's unilateral termination of the Contract prevented Company A from making further investments into the DTM TV Show. Company A contended that it had provided or would have provided but for the termination (and there was no time limit for compliance with Company A's obligations under Article 4(4)) media value of at least Euro 1 million in this regard and was therefore not in breach of the provisions of Article 4(4).

67. Company A said it was also in contact with CCTV 5 and was confident that it would have reached agreement with that station with respect to broadcasting the 2014 Race in China, just as Company A had successfully arranged broadcast of the 2010 DTM Race in City S on CCTV 5 based on a Memorandum of Understanding reached with CCTV 5 only 21 days before that race took place. Furthermore, the Contract does

29 Exhibit C-A-6.

not require that Company A provide a written contract with CCTV 5. The Contract stipulates only that the DTM race should be broadcast on CCTV 5, which Company A says it would have delivered but for Company B's unilateral termination.

68. Based on the above, Company A argues that Company B did not have the right to terminate the Contract on the basis of any alleged breach of Article 4(3) or 4(4).

4. Alleged breach of obligation regarding choice and confirmation of the race venue and race date

69. In the Termination Letter, Company B referred to the Parties' decision in the Hockenheim Agreement to modify the original agreement as stipulated in the Contract to hold the race as a street race and to hold it instead at the permanent UIC racetrack in City U, on the condition that Company A carried out substantial renovation works at the UIC. Despite that agreement, Company B said in the Termination Letter that Company A in its email of 18 July 2014 was essentially declaring to Company B that conclusion of a renovation contract by Company A in respect of the UIC and completion of all necessary renovation works was conditional on, and not possible without, each of the three Manufacturers or their PRC affiliates buying sponsorship packages with a value each of RMB 9.8 million, or a total of RMB 29.4 million. This was despite Company B having told Company A many times not to rely on the Manufacturers signing up for sponsorship packages, since the Manufacturers had already invested significant sums in the DTM races.

70. Company B said in the Termination Letter that this was a fundamental breach of Company A's contractual obligations and was yet another example of Company A demonstrating its inability to fulfil its financial (and other) obligations under the Contract.

71. Company A argued that its 18 July 2014 email was merely in response to Company B's question as to whether Company A had informed the Manufacturers that the 2014 Race could only be held if all three Manufacturers bought sponsorship packages of RMB 9.8 million. Company A further argued that its 18 July 2014 email did not state that the purchase of such sponsorship packages by the Manufacturers was a pre-condition to holding the race, and Company A's only purpose was to inform the Manufacturers of the additional rights they could obtain through the sponsorship packages on top of the rights already offered to them by Company B. Since Company A was not imposing any preconditions to its continued performance of the Contract,

Company A said Company B was not entitled to terminate the Contract on that basis. At the same time, Company A said that Company B clearly knew that the main target sponsors of Company A for the 2014 Race were the PRC joint ventures established by the Manufacturers. Company B breached the Contract, and made it more difficult for Company A to comply with its obligations under the Contract, by using its influence with the Manufacturers to prevent those joint ventures from buying the sponsorship packages offered by Company A.

72. Furthermore, Company A argued that it had in every respect complied with its obligations under the Contract, including the choice and confirmation of the venue and date for the 2014 Race. After the Parties had agreed that the 2014 Race would be held in City U, Company A had many discussions regarding the renovation plan for the UIC with the potential contractor Sinoma and kept Company B up to date with all developments. For example, Company A sent the Renovation Schedule to Company B on 13 June 2014[30] and obtained a formal quotation from Sinoma for the renovation work by email on 16 July 2014. Company A said it was very confident that the renovation work for UIC would have been completed before the scheduled race date if Company B had not unilaterally terminated the Contract.

73. In summary, Company A argued that Company B failed to meet the conditions for termination of the Contract, including under Articles 93 and 94 of the *Contract Law*. Company B's unilateral termination of the Contract was therefore a breach of the Contract, which caused the failure of the 2014 Race to be held in the PRC. As its first claim, Company A therefore claimed for reimbursement of Licence Fee already paid in the amount of nearly HK$ 23 million (equivalent to Euro 2.1 million).

74. As its second claim, Company A claimed for compensation for all other losses suffered by Company A as a result of Company B's breaches, essentially being the costs Company A had expended in preparing for the 2014 Race. Company A calculated those losses as being more than RMB 10 million.

75. The basis for the above two claims was Article 97 of the *Contract Law*, which states:

> "*After the dissolution of a contract, for those clauses not yet performed, the performance shall cease. For those already performed, the party concerned may, in accordance with the situation of performance and the nature of the contract,*

30 Exhibit R-2-24.

demand their restoration to the original status or take other remedial measures, and have the right to claim compensation."

76. In addition to its unilateral termination of the Contract, Company A in its Request for Arbitration also claimed that Company B, in breach, failed to perform its own relevant obligations under the Contract. Company A referred to the various representations and warranties made by Company B, which were set out at the Contract. For example, its Article provides that Company B will maintain sufficient and competent rights and authority and grant to Company A as Promoter all of the rights described in the Contract. The Article provides that Company B is obliged to actively assist Company A to promote, market and advertise the 2014 Race and the DTM event generally in Germany. The Article provides that Company B will perform its obligations to no less than the standard consistent with and applicable to the performance of similar obligations arising from a major world sporting event. The Article provides that Company B has an obligation to fully support and cooperate with Company A in the resolution of any conflict that may arise in the course of discharging of Company A's obligations under the Contract. In addition, pursuant to the Article of the Contract, Company A argued that it had the right to sell local sponsorship packages and other marketing products to the PRC affiliates and branch offices of the Manufacturers.

77. Company A submitted that Company B had breached the above obligations of support by, in particular, influencing the Manufacturers to prevent their PRC affiliates from purchasing sponsorship packages for the 2014 Race and by failing to assist Company A in explaining to the Manufacturers the additional benefits provided by Company A's sponsorship packages. Furthermore, Company B failed to perform its obligations to the standard required by Article. On the contrary, it misled Company A into continuing preparations for the 2014 Race at the UIC while it was already planning to terminate the Contract and hold a race in Town V, The Netherlands, to replace the planned 2014 Race in City U.

78. Company A submitted that these actions and omissions by Company B amounted to a breach of contract, which harmed Company A's interests, and for which Company B should compensate Company A for its relevant losses (although no losses for these alleged breaches were itemized by Company A separately from the losses claimed as arising as a result of Company B's allegedly invalid termination of the Contract].

79. In its Post-hearing Brief dated 12 May 2017, Company A also set out, in response to what it perceived as Company B's attempts to cast Company A in the role of the "bad

guy", various examples of what Company A claimed were examples of bad faith on the part of Company B. These included the following: (a) imposing the unfairly one-¬sided provisions of the Hockenheim Agreement on Company A; (b) maliciously and secretly recording the meeting between the Parties on 17 July 2014; and (c) refusing to provide packing lists and arranging logistics for the 2014 Race; (d) issuing the Termination Letter and then, only one day later, issuing a press release announcing the selection of Town V, in The Netherlands, as the replacement race venue; (e) preventing the Manufacturers or their PRC affiliates from buying Company A's sponsorship packages; and (f) drafting Mr. L's witness statement for him. Company A asked the Tribunal to take these examples of bad faith into consideration when assessing which Party had in fact breached the Contract and whether Company B's termination of the Contract was valid.

B. Summary of Company B's Defences, Counterclaims and Requests for Relief

80. In summary, Company B asks the Tribunal for the following relief:

(1) A dismissal of each and every ground of Company A's prayer for relief.

(2) An award in favor of Company B for its first counterclaim for Euro 900,000 plus interest, applied at an annual rate of 6% (the loan interest rate provided by the People's Bank of China for the corresponding period) from the due date of payment until the date such amount is paid.

(3) An award in favor of Company B for its second counterclaim for Euro 1 million plus interest at 6% until the date such amount is paid.

(4) An award of attorney fees of nearly Euro 300,000 in favor of Company B.

(5) An award in favor of Company B for fees and expenses incurred for witnesses, co-counsel, translation, notarization, stenography services and other expenses, totaling nearly Euro 60,000.

(6) An award that Company A be responsible for the arbitration costs of this arbitration.

C. Company B's Defences

81. Company B's defences are essentially twofold: (1) Company A objection to Company B's termination of the Contract was out of time; and (2), if Company A's objection to termination was not out of time, Company A's claims must nevertheless fail since Company A was in repudiatory breach of the Contract and Company B's termination of the Contract was therefore valid.

82. As for the first defence, Company B argues that Company A's arbitration claims are time- barred, based on Article 96 of the *Contract Law*, which provides:

> "*The party availing itself of termination of a contract in accordance with Paragraph 2 of Article 93 and Article 94 hereof shall notify the other party. The contract is terminated when the notice reaches the other party. If the other party objects to the termination, the terminating party may petition the People's Court or an arbitration institution to affirm the validity of the termination.*"

83. Company B also relied on an interpretation issued in 2009 by the Supreme People's Court of the PRC (the "**SPC**") setting a three-month limitation on objections to termination of contract, absent party agreement to another time of limitation (the "**SPC Interpretation**"):

> "*Where a party objects to the rescission of a contract or debt offset as prescribed in Article 96 or 99 of the Contract Law, but only lodges a lawsuit in the people's court after the expiration of the agreed time limit for raising objections, the people's court shall reject such a lawsuit. If the parties fail to agree on the time limit for raising objections and a party lodges a lawsuit in the people's court three months after the day when the notice of contract rescission or debt offset is served on it (him), the people's court shall reject such a lawsuit.*"

84. Company B argued that the only contractual provision that might modify the provisions of the *SPC Interpretation* was the arbitration agreement in Article 13(2) of the Contract, which requires the Parties to first attempt to resolve their disputes through friendly consultations and, if a dispute cannot be resolved within thirty days after the start of those consultations, either Party may submit the dispute to resolution by CIETAC arbitration. Company B said that some consultations did take place between the Parties, but unsuccessfully, and pointed to the letter from Company A's counsel

dated 3 November 2014[31] putting Company B on notice that the friendly consultation period would elapse on 13 November 2014. Therefore, Company B contends, under an interpretation of the applicable time period most favorable to Company A, Company A had three months from 13 November 2014 to file its arbitration claim to challenge Company B's termination of the Contract. Company A filed its Request for Arbitration on 22 January 2016, which is clearly out of time. For this reason, Company A should be deemed to have acquiesced to Company B's termination and Company A's claims should accordingly be dismissed.

85. With respect to the second defence, Company B in its Statement of Defense and other submissions essentially reiterated and expanded on the grounds for termination as set out in the Termination Letter. Company B submitted that its right to terminate the Contract was justified because the conditions for termination provided by Articles 94(2), (3) and (4) of the *Contract Law* had been satisfied. Article 94(2) permits termination after repudiation of a contract, i.e., when a party expresses, either by words or conduct, an intention not to perform its "main" obligations. Article 94(3) permits termination following unreasonable delay, i.e., a party delays performance of a "main" obligation and continues to delay for an excessive period after receipt of a demand to perform. Article 94(4) permits termination following fundamental breach, i.e., after a party's breach or delayed performance has frustrated the purpose of the contract. Company B submitted that Company A had satisfied the conditions for termination of each of those three provisions by repudiating the Contract, exhibiting multiple instances of unreasonable delay, and by fundamentally breaching the Contract.[32]

86. In particular with respect to Company A's alleged late payments, Company B objected to Company A's statement in the Request for Arbitration that Company A's late payments "*were accepted by Company B without dissent*". First, Company B said that the Hockenheim Agreement (which Company B pointed out Company A had tellingly neglected to refer to in the Request for Arbitration) was meaningful evidence of dissent. Company B also pointed to the various communications sent by Dr. T to Company A expressing Company B's non-acceptance and discontent with late payments as evidence that Company B at no time and in no manner accepted any breach by Company A of its payment obligations under the Contract.

31 Exhibit R-2-28.

32 Statement of Defense, para. 81, at Exhibit C-E-4.

87. With respect to Company A's obligation to invest Euro 1 million into the DTM TV Show under Article 4(4) of the Contract, Company B argued that Company A had not been able to prove that it had invested a single cent into the DTM TV Show, and that this failure was itself a breach and grounds for termination of the Contract. Company B argued that Company A had not been able to produce any reports or summaries dealing with Company A's broadcasting efforts or expenses, contrary to Company A's obligations under Article 4(4). More details with respect to Company B's position on this point are set out below in respect to Company B's second counterclaim, which deals with the same alleged failure by Company A to fulfil its Article 4(4) obligation to invest Euro 1 million into the DTM TV Show.

88. As a further ground of defence, Company B argued that Company A's "manifest incompetence" prevented Company A from properly promoting the 2014 Race or finalizing preparations for the 2014 Race, even after Company B had given Company A a "second chance" through the modified conditions of the Hockenheim Agreement. Company A's responsibility as "Promoter" under the Contract was to promote the race to sponsors and to complete all preparatory work to enable the 2014 Race to take place on time and according to "European standards", in other words the same standards as the other DTM races that had been held in Europe.

89. In the Hockenheim Agreement, Company B agreed reluctantly to a permanent track race rather than a street race, but on certain conditions. Company A had until 13 May 2014 (i.e., ten days) to demonstrate that it was capable of renovating (at Company A's own expense) the UIC to fit for purpose European standards in time for the planned date of the 2014 Race. In particular, the UIC pit building was totally worn out and needed to be replaced. Several areas of the track and buildings also required substantial maintenance and renovations, as confirmed by the Site Report dated 7 May 2014.[33]

90. After the Hockenheim Agreement, Company A continued to fall behind schedule and Company B became more and more concerned about whether the 2014 Race could be held on schedule at the UIC.

91. As can be seen by the various correspondences between the Parties, which is described in more detail in the Factual Background section of this Final Award, Company B argues that instead of taking advantage of all the sponsorship and promotional opportunities offered by the Contract, Company A appeared to be relying on the PRC

33 Exhibit R-3-25.

joint venture affiliates of the Manufacturers to purchase sponsorship packages as the principal means of financing the 2014 Race. Company A insisted on this approach even though Company B had made it clear to Company A that the Manufacturers had already made significant investments in the DTM races and had already obtained from Company B most of the supposed advantages that Company A was offering them in the sponsorship packages.

92. Company B says that Company A's overall mismanagement was exacerbated by Company A's threats to delay further preparations for the 2014 Race if the Manufacturers or their PRC affiliates did not make further investments in the event. This was manifested most clearly in the statements made by Mr. J in his email dated 18 July 2014, which have been quoted in detail in the Factual Background section above.

93. Company B says it was alarmed by Mr. J's email of 18 July 2014, which it interpreted as a refusal to continue preparations for the 2014 Race unless the three Manufacturers provided further sponsorship for the 2014 Race in the total amount of RMB 29.4 million. Mr. J argued at the Hearing that his email did not amount to a refusal to organize the 2014 Race. Nevertheless, Mr. J did concede that he was trying to "*apply a little bit of commercial pressure or to make them have some empathy towards our position*".[34] However Mr. J's words are interpreted, Company B said it considered at the time that Company A was seeking to impose conditions on Company A's continued compliance with its obligations under the Contract. In Company B's submission, Company A had no right to impose any such conditions, or to apply any such "commercial pressure". Company A was free to try to sell its sponsorship packages to whomever they wished, including the Manufacturers of their PRC affiliates. The Manufacturers and their PRC affiliates were free, in turn, to refuse to purchase those packages. It was, however, futile for Company A to continue to focus its efforts on the Manufacturers and their PRC affiliates, particularly as Company B (and the Manufacturers) had made it clear to Company A on a number of occasions that, having already obtained many of the rights contained in Company A's sponsorship packages and having already invested heavily in the DTM series, the Manufacturers were unlikely to be interested in making further investments in the form of sponsorship packages.

34 T2/215/11-12.

94. Furthermore, Company B rejected any suggestion by Company A that Company B was somehow at fault or in breach or had in any way impeded Company A's ability to comply with its contractual obligations, in particular in relation to Company A's attempts to persuade the Manufacturers or their PRC affiliates to purchase Company A's sponsorship packages. The Manufacturers had no obligation in this respect, and Company B in any case rejected any accusation that it had attempted to persuade the Manufacturers or their affiliates one way or the other with respect to the purchase of Company A's sponsorship packages.

95. Company B said it had become obvious by the time of termination that Company A was not going to be able to fulfil its contractual commitments. At that time, Company A had still not signed a renovation contract to make the City U racetrack fit for purpose, and was giving strong signals that it would not proceed further without further sponsorship support from the Manufacturers or their PRC affiliates. This, contended Company B, amounted to an anticipatory repudiation of the Contract by Company A. It eventually became clear to Company B that Company A had not even signed a racetrack rental contract with the UIC, despite Company A's vague assurances to the contrary. Even at the hearing, Mr. J under cross- examination refused to confirm whether there was a signed race contract between Company A and the UIC, and would only go so far as to say that there was some kind of "agreement" between Ms. I and the owners of the UIC.

96. By July 2014, Company A had neither a race contract nor a renovation contract signed in respect of the UIC, and the date for the 2014 Race was rapidly looming. The UIC renovation schedule provided by Company A on 13 June 2017 contemplated renovations starting on 1 July 2014 and finishing on 21 September 2014 (less than a week before the scheduled date for the 2014 Race), but by 18 July 2014 no renovation contract had been signed and therefore no renovations had commenced. What had originally been a very tight schedule now looked impossible to complete in time, and Company B said it was forced to begin contemplating alternative venues for the 2014 Race. Furthermore, Company A was now trying to impose conditions, in particular in terms of sponsorship support from the Manufacturers, for the finalization of the renovation contract and the issuance of the joint press release for the 2014 Race.

97. In summary, following the Hockenheim Agreement, Company B says that Company A breached the Contract in the following fundamental ways: by not performing the necessary renovation work to make the UIC fit for purpose; by not concluding and

providing a contract for renovation; by not issuing a press release; by not evidencing a CCTV (or other) broadcasting contract; and by threatening to cancel the 2014 Race if the Manufacturers did not subscribe to sponsorship packages of a total value of RMB 29.4 million. The accumulative effect of these breaches was that Company B was unable to obtain the purpose of the Contract, i.e., to hold a DTM race in the PRC in 2014. Company B contended that these fundamental breaches of the Contract by Company A meant that the conditions for termination set out in Articles 94(2), (3) and (4) of the *Contract Law* had been satisfied. Company B says it was therefore entitled to terminate the Contract, pursuant to Clause 11(2) of the Contract and the relevant provisions of Article 94 of the *Contract Law* so that Company B could, without further delay, locate an alternative venue itself for the 2014 Race, which it did by holding the race at Town V in the Netherlands.

D. Company B's Counterclaims

98. Company B has raised the following two counterclaims, which are examined in turn below:

(1) Company A owes Company B Euro 900,000 as liquidated damages for Company A's breach of contract, being the outstanding unpaid amount of the Euro 3 million Licence Fee for 2014 under the Contract; and

(2) Company A owes Company B Euro 1 million under Article 4(4) of the Contract, being the amount that Company A was obliged to invest into the DTM TV Show.

99. In addition, together with its counterclaims, Company B included its claim for attorney's fees in this arbitration and the sum of nearly Euro 60,000 for other expenses incurred by Company B including for witnesses, co-counsel, translation, notarization and stenography services.

Counterclaim 1: Company A owes Company B Euro 900,000 as liquidated damages for Company A's breach of contract, being the outstanding unpaid amount of the Euro 3 million Licence Fee under the Contract

100. As outlined in detail in the Statement of Defense, Company B says it terminated the Contract pursuant to explicit and justified conditions permitting termination and in response to clear and fundamental breaches of the Contract by Company A.

101. Paragraph 2 of the Hockenheim Agreement states that "*If for any reason the race will not happen Company A agrees that Company B will keep the Euro 3 million fee*". Company B says that this amended and overrode application of Article of the Contract (which had mandated that in the case of termination of the Contract by Company B, Company B was obliged to reimburse any amounts of Licence Fee already paid by Company A), so that Company A would not be entitled to reimbursement for any amount of Licence Fee already paid at the time of termination of the Contract.

102. Company B said the modified arrangement in the Hockenheim Agreement meant that Euro 3 million was agreed by the Parties to be liquidated damages payable by Company A to reflect the losses Company B could be expected to suffer as a result of Company B's termination of the Contract, including loss of branding and marketing opportunities that three years (or more) of annual DTM races in China were likely to have brought Company B, as well as damage to reputation.

103. Despite the "*If for any reason*" words of para. 2 of the Hockenheim Agreement, Company B confirmed at para. 4 of its "Counter-Claimant's Reply to Counter-Respondent's Statement of Defense to Statement of Counterclaims" dated 23 December 2016 that Company B could only claim those liquidated damages if its termination of Contract was justified ("for cause") as a result of Company A's fundamental breach of the Contract. Given Company A's fundamental breaches of the Contract, Company B argued its termination was justified, and that the liquidated damages were therefore owing, as recognized by Article 114 of the *Contract Law*.

104. Since Company A had already paid Euro 2.1 million at the time of termination of the Contract, Company B claims it is entitled to an additional Euro 900,000 in liquidated damages. Given the egregious nature of Company A's breaches and the fact that Euro 3 million reflected an accurate estimation of Company B's actual losses, Company B argued that no deduction should be made from the amount of liquidated damages agreed by the Parties in the Hockenheim Agreement.

Counterclaim 2: Company A owes Company B Euro 1 million under the Contract, being the amount that Company A was obliged to invest into the DTM TV Show

105. Pursuant to the Article the Contract, Company A was to commission ten episodes of DTM TV shows of at least 55 minutes, duration each. The Contract also specified certain features that each episode was to display, including race highlights of each DTM race, interviews with DTM drivers and team captains, reviews of DTM races

by invited experts, and spectator raffles. In addition, under Article, Company A had to provide a summary of activities as evidence of its investment into the DTM TV Show.

106. Company B explained the genesis of the obligation in the Contract to invest Euro 1 million as being in consideration for the outstanding Licence Fee debt of Euro 1 million owed by Company A to Company B under the 2010 Contract, as stated explicitly in the last paragraph of the Article of the Contract. Company B explained that, because of its experience with Company A's default under the 2010 Contract, it had insisted that safeguards be inserted in the Article to ensure Company A's payment of Euro 1 million, e.g., the specific use of the terms "*invest*", "*in consideration of the outstanding amount*", "*provide evidence*" and "*summary of all activities*".

107. Company B argued that the word "invest signified adding value or profit through actual monetary support, in other words to put money to work for a specific result. The direction to "*provide evidence*" put the burden on Company A to demonstrate that it had actually produced and aired the DTM TV Show. Lastly, Company B argued that the "*summary of all activities*" should include, at minimum, the identity of payees, dates of payments, dates when the TV shows were aired, and some description of the markets and audiences reached.

108. Company B said that Company A had completely failed to provide any proof of any investment at all in the DTM TV Show, or any relevant TV network contract. The receipts for expenses submitted by Company A clearly included, Company B argued, many activities that had nothing to do with the Contract. Furthermore, Company B submitted, Company A statements that it was in discussion with various television networks and that it would, based on its past experience, have been able to have broadcasting set up in time for the 2014 Race, was not sufficient evidence of Company A's compliance with its obligations under the Contract. Company B said that Company A should not simply be allowed to pocket the Euro 1 million, particularly since it was explicitly stated to be in consideration for the outstanding amount owing under the 2010 Contract.

109. Finally, Company B's claims for its legal fees and other expenses are supported by invoices attached to the Respondents Post-Hearing Brief dated 12 May 2017.

E. Company A's Defences to Counterclaims and Challenge to Jurisdiction (and Company B's Response on Jurisdiction)

110. With respect to the first counterclaim, Company A first states its position (with which Company B agrees) that the liquidated damages provision under the Hockenheim Agreement would only apply if Company A's breaches of the Contract resulted in the 2014 Race not taking place in China. Company A repeats its argument that it was in all respects compliant with its obligations under the Contract, and that it was Company B who was in breach by unjustifiably terminating the Contract. It was Company B's termination that caused the 2014 Race to "not happen", not any action or omission on the part of Company A. Therefore, Company A argues that Company B's first counterclaim must fail.

111. Even if Company B were able to establish that Company A had breached the Contract, triggering the liquidated damages clause in the Hockenheim Agreement, Company A argues that the Euro 3 million liquidated damages are too high and far exceed the actual losses that Company B would have suffered on termination of the Contract.

112. Pursuant to Article 114 of the *Contract Law* and Article 29 of *Interpretation H of the Supreme People's Court on Several Issues concerning the Application of the PRC Contract Law* ("**SPC Interpretation II**"), liquidated damages should have some correspondence with the actual losses incurred by the party. If the liquidated damages agreed upon by Company B and Company A are significantly higher or lower than the actual losses suffered, the court or arbitral tribunal may adjust the liquidated damages taking into consideration the amount of actual losses. The text of the relevant PRC law provisions is set out below:

Article 114 of the *Contract Law*:

"*The parties may stipulate that in case of breach of contract by either party a certain amount of penalty shall be paid to the other party according to the seriousness of the breach, and may also stipulate the method for calculating the sum of compensation for losses caused by the breach of contract.*

If the stipulated penalty for breach of contract is lower than the loss caused by the breach the party concerned may apply to a people's court or an arbitration institution for an increase. If the stipulated penalty for the breach of contract is excessively higher than the loss caused by the breach, the party

concerned may apply to a people's court or an arbitration institution for an appropriate reduction."

Article 29 of the *SPC Interpretation II*:

"*Where a party alleges that the agreed default fine is too much and requests a proper reduction, the people's court shall weigh the request and make a ruling on the basis of the actual losses, in consideration of the performance of contract, seriousness of the fault of the party, expected benefits and other comprehensive factors and under the principles of fairness and good faith.*

If the default fine agreed on by the parties exceeds the losses incurred by 30%, generally, it shall be deemed as 'significantly higher than the losses incurred' as mentioned in paragraph 2 of Article 114 of the Contract Law."

113. Company A argued that in accordance with the above provisions, the actual losses incurred by Company B, if the Tribunal allowed Company B's first counterclaim, would be the costs and expenses that had already been incurred by Company B in relation to preparation of the 2014 Race up until the termination of the Contract.

114. Since Company B was a non-profit organization, Company A argued it could be inferred that the Euro 3 million Licence Fee should not be seen as Company B's profit in exchange for granting Company A the right to hold the 2014 Race in China, but rather should be seen as allocating specific expenses incurred by Company B. An indication of where the Licence Fee was intended to be expended can be seen in the "'Co-operation Proposal" sent by Company A to Company B by email on 12 April 2013,[35] in other words before the Contract was signed. The proposal stated that Company A would pay Company B compensation of Euro 3 million per year in exchange for the following costs to be covered by Company B:

"*Transport logistics (Estimated costs for return flight*

cargo + sea freight + fuel € 2,500,000)

Flights and hotel (Estimated costs up to and depending on manufactures/ teams)

TV matters (Estimated cost for production, single & graphics/timekeeping: nearly € 1.4million)."

35 Exhibit C-A-6.

115. Company B had agreed to this proposal, as confirmed by Mr. L in cross- examination at the hearing,[36] which shows, Company A argued, that the real purpose of the Licence Fee was to pay for transport logistics, flights and hotels, and "TV matters" related to the DTM Race.

116. At the time of termination of the Contract, the 2014 Race had not yet happened, so that the costs related to transport logistics and "TV matters" had not yet been incurred. Company B may have incurred a limited amount of flight and hotel costs, but far less than the Euro 3 million claimed by Company B as liquidated damages. Indeed, Company B had estimated its "sunken costs" in connection with the 2014 Race in China and including the costs of holding a substitute race in The Netherlands as only about Euro 300,000.[37]

117. Therefore, even if the Tribunal were minded to determine that Company A was in breach of the Contract and that Company B's termination of the Contract was valid, which Company A argues the Tribunal should not do, the Tribunal should make an appropriate deduction to take into account the significant discrepancy between the liquidated damages claimed and the amount of losses that Company B, even according to its own calculations, can be deemed to have suffered or be potentially liable to suffer.

118. With respect to the second counterclaim, Company A's first argument is that the Tribunal does not have jurisdiction. In its application dated 14 February 2017 to exclude one of Company B's counterclaims, Company A refers to the following statement at para. 9 of the "Counter-Claimants Statement of Counterclaims", as evidence that Company B had based its second counterclaim on the 2010 Contract and not the Contract entered into by the Parties in 2013:

> "*Company A owes Company B Euro 1 million under the Promoter's Contract of 2010. Company A failed to pay Euro 1 million due as a license fee under that agreement.*"[38]

119. A further indication that Company B had based its second counterclaim on the 2010 Contract is in the relevant prayer for relief where Company B claims interest on

36 Exhibit C-A-6.

37 See para. 35 of Counter-claimant's Reply to Counter-respondent's Statement of Defense to Counterclaims dated 23 December 2016 at C-E-7.

38 Exhibit C-E-3.

the Euro 1 million claimed under the second counterclaim at an annual rate of 6% calculated as from 15 October 2010 up until the time of payment, in other words starting from the date that the Licence Fee of Euro 1 million was due under the 2010 Contract.

120. Company A argued that the 2010 Contract was an entirely independent contract and if Company B wanted to claim on the basis of that contract against Company A, it should file a separate arbitration claim in accordance with the dispute resolution clause set out in the 2010 Contract. The second counterclaim was therefore, concluded Company A, outside this Tribunal's jurisdiction and should be excluded from the scope of adjudication in the current arbitration proceedings.

121. If the Tribunal accepted jurisdiction over the second counterclaim, Company A contended that the second counterclaim must nevertheless fail because Company A had complied with all its obligations under the Article of the Contract. The details of Company A's arguments in this respect have already been set out in the section above discussing Company A's claims and Company A's position on the grounds for termination set out in the Termination Letter, including Company A's alleged failure to comply with its obligations under the Article.

122. With respect to Company A's jurisdiction argument, Company B argued that even though the Euro 1 million obligation had its genesis in the 2010 Contract, that obligation had clearly been carried over as a new obligation into Article 4(4) of the Contract signed by the Parties in 2013, in which the obligation to invest Euro 1 million into the DTM TV Show was made in consideration of the outstanding amount owing by Company A resulting from the 2010 Contract. The Tribunal therefore argued that Company B had clear jurisdiction over any dispute arising out of or in connection with that obligation.

V. ISSUES TO BE DETERMINED

123. On 3 and 4 March 2017, the Parties submitted separate Lists of Issues to be determined by the Tribunal. The Tribunal sets out below the issues to be determined in this arbitration, based for the most part on the shorter List of Issues submitted by Company B. At the same time, the Tribunal confirms that, in its analysis below, it has taken into account all the additional and subsidiary issues and points raised by Company A in its List of Issues.

Issue 1: Did Company A assert its action in a timely manner, or had Company A's rights to contest termination of the Contract by Company B expired?

Issue 2: Did Company B or Company A breach the Contract, in other words was Company B entitled to terminate the Contract because of Company A's alleged breaches?

Issue 3: If Company B's termination of the Contract was invalid, what is the measure of Company A's losses?

Issue 4: If the Tribunal finds that Company A breached the Contract, should Company B succeed in its first counterclaim to recover the balance of Euro 900,000 in liquidated damages, and is Company A entitled to a reduction from the Euro 3 million liquidated damages?

Issue 5: Does the Tribunal have jurisdiction over Company B's second counterclaim for Euro 1 million?

Issue 6: If the answer to Issue 5 is yes, did Company A comply with its obligations under Article 4(4) of the Contract and, if not, is Company B is entitled to recover Euro 1 million from Company A?

VI. THE TRIBUNALS ANALYSIS AND CONCLUSIONS

124. The Tribunal has been assisted by the Parties' written submissions, documentary evidence and authorities, and by the witnesses presented at the Hearing. The Tribunal considers it would serve no useful purpose to summarize the entirety of the evidence offered in this arbitration. The Tribunal will instead make reference to the evidence, as and where appropriate, in the following analysis of the issues to be determined in this arbitration.

125. For the avoidance of doubt, the Tribunal confirms that, in reaching its decisions in this Final Award, it has taken full account of the submissions of the Parties, and the evidence presented by them, whether or not expressly referred to in this Final Award. On that basis, the Tribunal makes the various findings set out below in this Section VI.

126. As a preliminary point, for the avoidance of doubt the Tribunal confirms its view that the requirement under the Article of the Contract for the Parties to attempt to settle any disputes arising out of or in connection with the Contract through friendly consultations was met by Company A before it filed its Request for Arbitration on 22 January 2016.

The attempts to resolve the Parties' disputes through friendly consultations were not successful and Company A was therefore clearly, in the Tribunal's view, within its rights to bring this arbitration claim in accordance with the Article of the Contract.

Issue 1: Did Company A Assert its Action in a Timely Manner, or had Company A's Rights to Contest Termination of the Contract by Company B Expired?

127. Company B referred to Article 96 of the *Contract Law* and the associated *SPC Interpretation* in support of its argument that Company A needed to bring any objection to termination of the Contract before a court or arbitral tribunal within three months after the date of termination.[39] Taking into account the requirement under the Article of the Contract for the Parties to attempt to resolve their disputes firstly through friendly consultation, this would mean, according to Company B, that Company A should have brought these claims in arbitration no later than 13 February 2015. Since the Request for Arbitration was filed on 22 January 2016, Company B says Company A's claims are out of time.

128. Company A's position is that Article 96 can only apply if Company A did not accept Company B's termination of the Contract. Since Company A has accepted Company B's (repudiatory in Company A's view) termination, Company A is not objecting to the termination *per se*, and the three-month deadline does not apply. The only deadline applicable to Company A's claims would be the usual limitation for civil cases provided by the *PRC General Principles of Civil Law* to the effect that a civil claim should be brought within two years from the date that the injured party knew, or should have known, that his or her rights had been infringed.[40]

129. The Tribunal does not consider that Company A's arbitration claims are time- barred. Article 96 of the *Contract Law* itself does not impose any deadlines on making objections to termination before the people's courts or arbitral tribunals. The *SPC Interpretation* refers only to the making of objections before a people's court, and is silent on such objections before arbitral tribunals. Even if the *SPC Interpretation* was binding as a matter of PRC law, it is not clear that the SPC's intention was to include arbitration within the ambit of its interpretation.

39 See Statement of Defense section V.F. and ITR's Written Opening Statement paras. 15 to 18.
40 T1/63/2-5.

130. In any case, the Tribunal agrees with Company A's interpretation that Article 96 and the *SPC Interpretation* only apply where a party has decided to raise an objection to the termination with the courts (or possibly with an arbitration institution). In that case, Article 96 would give Company B the opportunity to petition the court or the arbitration institution to affirm the validity of the termination. Company A originally objected to the termination itself, but subsequently took the position that it accepted what Company A alleges is an invalid and repudiatory termination by Company B, and to claim for damages. Article 96 and the *SPC Interpretation* therefore do not apply. The only time limitation that would apply would be the usual two-year time limitation for the bringing of civil claims applicable under PRC law. Since Company A filed its Request for Arbitration on 22 January 2016, in other words less than two years after the termination of the Contract by Company B on 23 July 2014, the Tribunal finds that Company A's claims in these arbitration proceedings are not time-barred.

Issue 2: Did Company B or Company A Breach the Contract, in Other Words was Company B Entitled to Terminate the Contract Because of Company A's Alleged Breaches?

131. To answer that question, the Tribunal will examine below the various grounds on which Company B says in its Termination Letter and elsewhere in its various pleadings that Company A fundamentally breached the Contract, to see if Company B's termination of the Contract was justified under the Contract and the relevant provisions of the *Contract Law*. The Tribunal will examine first the grounds relating to delayed payments and failure to issue letters of credit, before examining the other grounds of termination raised by Company B.

Delayed payments of licence fee

132. The Article of the Contract sets down a strict timetable for the five instalments of Licence Fee to be paid by Company A to Company B in respect of the 2014 Race. Further, the Article of the Contract gives Company B the right to terminate the Contract with immediate effect in case Company A as the Promoter was in default in payment of any of those instalments for more than 15 days.

133. The Tribunal agrees with Company A's argument that in respect of first three instalments of Licence Fee for the 2014 Race, the Parties did not adhere to or insist on the instalment dates set out in the Article of the Contract. That schedule was replaced

in practice by a system whereby Company B would issue an invoice for each payment, specifying a date (which turned out in practice to be later for each instalment than the date stipulated in the Article by which Company A should make the payment. This amounts to a modification of the Contract by the Parties in respect of the time and mode of payment. It is not entirely clear why the Contract was modified in this regard, and the Tribunal does not need to make any determination on that point. In respect of payment of the third instalment of the Licence Fee, the Parties' agreement was further modified by the terms of the Hockenheim Agreement, which stipulated that payment of the third instalment needed to reach Company B's bank account by 7 May 2014.

134. Despite these modifications, Company A was late in payment of the first two instalments by reference to the deadlines set out in the invoices issued by Company B by more than 15 days, and slightly late (but not more than 15 days late) in payment of the third instalment (12 May 2014 instead of the date of 7 May 2014 as agreed in the Hockenheim Agreement). In the Tribunal's view, Company B would have been entitled to terminate the Contract with immediate effect in respect of either the first or second instalments, since they were both paid more than 15 days later than the deadline stipulated on the relevant invoice. Nevertheless, Company B would have had to exercise that right within a reasonable time, and certainly would not be able to exercise that right after it had accepted both the first and second payments, albeit late, and continued cooperating with Company A to implement the Contract, involving continued efforts and expenditure by Company A. The various comments, complaints or reminders that Company B made to Company A about late payments did not, in the Tribunal's opinion, in any way amount to Company B's having effectively reserved its rights to terminate the Contract on the grounds of the late payment of either the first or the second instalments of the Licence Fee.

135. With respect to payment of the fourth and fifth payments of the Licence Fee, the Parties' original agreement as set out in Article 5(1) of the Contract, as modified by the Parties' agreed practice that payment be made against invoice, was also further modified by the Hockenheim Agreement. The Hockenheim Agreement stated that the fourth and fifth payments were "*to take place four weeks earlier than stated in the contract*." This meant that the fourth payment would be due on 4 July 2014, four weeks before the date of 1 August 2014 stipulated in the Contract. The fifth payment had been stipulated to be due one week before the 2014 Race, and the Hockenheim

Agreement was therefore due five weeks before the scheduled time for the 2014 Race, in other words by 22 August 2014.

136. On 14 July 2014, Dr. T, the general counsel of Company B, sent an email to Company A attaching an invoice dated 9 July 2014 for the fourth payment, with the "Maturity Date", i.e., the due date of payment, stated to be 1 August 2014. In other words, Company B had agreed to not apply the Hockenheim Agreement in respect of the fourth payment, and instead to reinstate the 1 August 2014 deadline that had applied under the Contract. Since Company B terminated the Contract on 23 July 2014 before the 1 August 2014 deadline had been reached, Company B could not rely on the non-payment of the fourth instalment (let alone the fifth instalment) at the time of termination as a valid ground of termination of the Contract.

137. The Tribunal is therefore of the view that Company B did not, as of 23 July 2014, have the right to terminate the Contract for the non-payment of any of the instalments of Licence Fee in relation to the 2014 Race.

Failure to open a letter of credit

138. Under the Article of the Contract, Company B was obliged to open a letter of credit on 1 May 2014 to secure the payments of the fourth and fifth instalments of the Licence Fee in relation to the 2014 Race. No such obligation applied for the first three instalments of the Licence Fee.

139. The Hockenheim Agreement, signed by the Parties on 3 May 2014, does not mention the obligation to open a letter of credit when modifying the deadlines for payment of the fourth and fifth instalments of the Licence Fee. In his email of 14 July 2014 attaching the invoice dated 9 July 2014 asking for payment of the fourth instalment, Dr. T does not mention the need to issue a letter of credit for the fourth instalment but does remind Company A to provide Company B with a letter of credit to secure the fifth instalment. The implication of this email, in the Tribunal's opinion, is that Company B was, given the rapidly approaching deadline for payment of the fourth instalment of the Licence Fee, prepared to waive the requirement for the opening of a letter of credit to secure that payment, but was insisting on the original contractual requirement for a letter of credit to secure payment of the final fifth instalment.

140. Given the above background, the Tribunal is of the view that Company B did not have the right to terminate the Contract for non-issuance of a letter of credit to secure

payment of the fourth instalment, because Company B had already made it clear to Company A that such a letter of credit was no longer needed so long as payment of the fourth instalment was made by 1 August 2014. With respect to the letter of credit for the fifth payment, the fact that this had not been opened at the time of termination, only nine days after Company B's request of 14 July 2014 (which did not mention a deadline for the opening of that letter of credit), was not, in the Tribunal's opinion, sufficient justification for Company B to terminate the Contract on those grounds on 23 July 2014.

141. Finally, although the Tribunal does not find that any late payments of Licence Fee instalments or any failure to issue letters of credit were, on their own, sufficient justification for Company B to terminate the Contract for breach, those factors would, in the Tribunal's view, have nevertheless contributed to Company B's growing concerns about Company A's willingness and capability to finalize all racetrack renovations and other preparations to allow the 2014 Race to take place on time and up to the standards required by the Contract.

Alleged failure to invest minimum sum of Euro 1 million into the DTM TV Show and to provide broadcasting of the DTM race

142. Article 4(4) of the Contract obliged Company A to do two things: (1) to organize in conjunction with CCTV 5 or other free-to-air television stations in China a regular DTM TV Show (at least ten episodes of at least 55 minutes each covering all races of the DTM 2013 or 2014 season); and (2) invest a minimum sum of Euro 1 million into the DTM TV Show in consideration of the outstanding amount payable by Company A resulting out of the 2010 Contract and to provide Company B with evidence of that investment by way of a summary of all activities. Pursuant to Article 4(3) of the Contract, Company A also guaranteed that the 2014 Race would be broadcast live and in full length by CCTV Sports.

143. Company A argued that in fact the two obligations under Article 4(4) amounted to the same thing, in other words that the Euro 1 million investment was in relation to organization of the regular DTM TV Show. Further, Company A argued, by organizing the DTM TV Show, it was providing media value of at least Euro 1 million even if Company A was not necessarily able to prove that it had physically invested Euro 1 million into the DTM TV Show.

144. Company A provided evidence to show that it had organized broadcasting on various stations of live races from the 2013 and 2014 DTM race seasons in Europe. Although this was arguably not strictly in accordance with the requirements of Article 4(4), which called for the broadcast of highlights of those races, the Tribunal is persuaded that Company A had substantially complied with its obligations in this regard in terms of content and duration of broadcasts.

145. The Tribunal also accepts Company A's argument that the reference to an investment of Euro 1 million into the DTM TV Show was an indication of the media value that Company A needed to provide, rather than an additional investment on top of the various media activities to be organized by Company A pursuant to Articles of the Contract. Company A still had an obligation to demonstrate, by providing "*a summary of all activities*", that it had made or would make investments of an equivalent value of Euro 1 million. Although Company A's evidence with respect to its actual expenses was not entirely clear, with many of the receipts provided not, as Company B pointed out, clearly related to the broadcasting activities envisaged by Articles of the Contract, the Tribunal is satisfied that Company A has shown sufficient broadcasting events already accomplished, or in the process of being organized, at the time of termination, to satisfy the requirements of Articles of the Contract. This included discussions with CCTV 5 to broadcast the 2014 Race live. Although at the time of termination no contract or even memorandum of understanding with CCTV 5 had been signed, the Tribunal is satisfied that, based on Company A's past experience with CCTV 5, this level of informality was not unusual and that Company A would have, but for the termination of the Contract, been in a strong position to finalize arrangements with CCTV 5 for the live broadcast of the 2014 Race.

146. In summary, the Tribunal does not find that Company A was in substantial breach of its obligations under Articles of the Contract at the time of termination of the Contract by Company B. Company B was therefore not entitled to terminate the Contract on the basis of alleged breaches of Article.

Alleged breach of obligation regarding choice and confirmation of the race venue and race date and completing all necessary preparations for the 2014 Race

147. Company A's alleged fundamental breaches in respect of its obligations in relation to the choice and confirmation of the venue and date of the 2014 Race and the completion of all necessary racetrack renovations and other preparations for that Race

were the main focus of Company B's case that it had validly terminated the Contract for Company A's breach.

148. As the Promoter of the 2014 Race, Company A was granted the exclusive right in the territory of the PRC to prepare, organize and promote races in China as part of the DTM series. Although certain matters were subject under the Contract to the approval of Company B or to the joint decision of the Parties (for example, mutual agreement as to race dates and race venues), the bulk of the responsibility for promoting the Race in the PRC and making all necessary preparations to ensure that the Race could take place on time at the selected venue rested on the shoulders of Company A as the Promoter.

149. Company A argued that it had "on the whole" fulfilled its obligations under the Contract to promote the DTM race series and prepare for the 2014 Race. Company A attempted in its submissions and at the Hearing to shift the blame for any difficulties in implementing the Contract onto Company B for failing to live up to its own contractual obligations and to provide the necessary support to Company A under the Contract. The Tribunal is satisfied, however, that the evidence supports Company B's contention that any difficulties in achieving the purposes of the Contract the delays were largely attributable to Company A, and in particular Company A's repeated failure to confirm a suitable venue for the 2014 Race and, once a venue was agreed upon (albeit conditionally), Company A's failure to ensure that the agreed venue could be renovated in time to the required standards to allow the 2014 Race to take place on the agreed weekend of 26 to 28 September 2014.

150. The correspondence between the Parties that was in evidence in these proceedings points to Company B's growing frustration and concern about Company A's failure to respond clearly to Company B's questions or to demonstrate that all preparations for the 2014 Race were on track. To start with, the date of 25 November 2013 specified in the Contract as the date by which the race date and race venue should have been agreed came and went without any indication that Company A had identified a race venue or was able to confirm a race date for 2014. Little progress in locating a venue or confirming a race date was made in the first few months of 2014, which was followed by the proposition by Company A, in Ms. I's letter of 22 April 2014, that the original idea of a street race could possibly be replaced by a track race.

151. The Tribunal agrees with Company B's interpretation that the Hockenheim Agreement was essentially a "second chance" granted by Company B to Company A

to demonstrate that Company A was able to fulfil its obligations as Promoter under the Contract. The main focus of the Tribunal's examination of the question of Company A's alleged breach of obligation regarding choice and confirmation of the race venue and race date and completing all necessary preparations for the 2014 Race and the validity of Company B's termination will therefore be on the Parties actions and/or omissions in the period following the signing of the Hockenheim Agreement up until the time of termination of the Contract. Moreover, certain findings of the Tribunal set out in this section in relation to that alleged breach and the validity of Company B's termination are those of the majority of the Tribunal rather than unanimous findings of the Tribunal.

152. Company B was, at the time of the signing of the Hockenheim Agreement, prepared to overlook previous delays and to compromise and accommodate a track race, at least for the first year. Company B nevertheless exacted certain concessions from Company A in return. Apart from an accelerated payment schedule (which, as we have seen above, the Parties did not ultimately insist on adhering to), Company A agreed that if the 2014 Race did not happen, Company B would be entitled to keep the entire Licence Fee for 2014 of Euro 3 million as liquidated damages.

153. In addition, the Hockenheim Agreement confirmed the weekend of 26 to 28 September 2014 as the date of the 2014 Race and imposed very tight deadlines on Company A to confirm the venue for the race. The City S international circuit was named as the venue of the race, but the UIC was also mentioned in the Hockenheim Agreement as a possible alternative venue, so long as Company A could prove by 13 May 2014 that it was able to renovate the UIC to fit for purpose European standards. It is clear that Company A did not meet that 13 May 2014 deadline. In the Tribunal's opinion, given the already tight schedule, the measure of whether Company A had proven its ability to renovate and prepare the UIC in time for the 2014 Race would be, at a minimum, the signing of a renovation contract with a construction company and commencement of renovation works. At the time of termination, Company A had still not signed a renovation contract despite various assurances that negotiations were progressing well and that signature of the renovation contract was imminent.

154. Company B implies in its pleadings that the 18 July 2014 email from Mr. J was for Company B the last straw, in that it amounted to a refusal by Company A to take further steps (and in particular to sign the renovation contract and to issue the joint press statement) unless it received confirmation that the Manufacturers or their PRC

affiliates would purchase sponsorship packages from Company A for the 2014 Race. Mr. J admitted himself in his evidence that he was trying to apply some "commercial pressure" on Company B in this regard.

155. The Tribunal accepts that Mr. J may genuinely have believed that the commercial pressure Company A was seeking to apply on Company B was legitimate and was simply a way of making Company B "*have some empathy towards our position*".[41] Mr. J appeared also to genuinely believe that with further financial support from the Manufacturers, Company A would have been able to conclude the renovation contract and ensure the completion of all necessary renovations to bring the UIC up to fit for purpose European standards in time for the scheduled 2014 Race at the end of September 2014, even if, as Mr. J himself admitted at the first day of the Hearing, things were tight: "*Of course it was tight, but it was doable*".[42]

156. The Tribunal is of the view that Mr. J and Company A in general were acting in good faith in respect of their efforts to prepare for the 2014 Race. That is not, however, determinative of the issue of whether Company A was in breach of the Contract. Even assuming that Company A was acting in all respects in good faith, the Tribunal still needs to determine, objectively observed, whether Company A's actions and/or omissions, including the position it took in Mr. J's email of 18 July 2014, amounted to a demonstration of an inability and/or a refusal by Company A to perform the Contract, which would in turn amount to a repudiatory breach of the Contract justifying Company B's termination. Put another way, was Company B acting reasonably and within its contractual rights in concluding, at the time of termination on 23 July 2014, that Company A was unable or unwilling to perform the Contract?

157. The Tribunal considers that Company B's decision to terminate must be examined in the context of the Contract as a whole and in particular the timing of the 2014 Race and the preparations that needed to be finalized to ensure that the 2014 Race could take place on schedule and to the standards required by the Contract. Company A's main argument is essentially that it was on track with respect to preparations for the 2014 Race, and that it would have been able to finalize all preparations if it were not for Company B's termination and had Company B been more supportive and complied with its own obligations under the Contract.

41 T2/215/12.

42 T1/167/13.

158. The Tribunal is satisfied that Company B was in substantial compliance with its obligations under the Contract. In particular, Company B had no obligation to persuade the Manufacturers to invest more sums into the 2014 Race either by way of sponsorship packages or otherwise, and even if Company B may have had some influence over the Manufacturers, and vice versa, the Tribunal is not persuaded by the evidence that Company B actually urged the Manufacturers or their PRC affiliates not to purchase Company A's sponsorship packages. The Tribunal also considers that Company B was generally cooperative with and supportive of Company A, as it was obviously in Company B's interests, from a short-term perspective with respect to the 2014 Race, and from a longer-term perspective with respect to its interest in capitalizing on the opportunities in the China market, to make a success of the 2014 Race.

159. At the same time, the Tribunal is of the view that Company B would have been within its rights to terminate the Contract if it became clear that Company A was not going to be able to deliver the 2014 Race on time at a racetrack that was "fit for purpose" and up to European standards, as required by the Hockenheim Agreement. A failure of that nature by Company A would be a fundamental breach of contract justifying termination.

160. The Contract had set out a schedule, starting with identification of the racetrack in the November of the year preceding the relevant race, which allowed ample time for all preparations to be finalized. Clearly, things did not proceed in that manner with respect to the 2014 Race. While the Tribunal would hesitate to conclude that all delays in the schedule were due to omissions or lack of organization on the part of Company A, the Tribunal is of the view that most of the delays can be attributed to Company A. Furthermore, the tone and terms of the Hockenheim Agreement entered into by the Parties on 3 May 2014 were a clear sign to Company A that timing was now very tight and that there was little margin for further delays if the 2014 Race was to take place on time and up to the required safety and other relevant standards.

161. The Hockenheim Agreement stipulated that, if the UIC was to be the venue for the 2014 Race, then this choice, plus a timeline for renovation works and other matters to be completed before the proposed race date of 26 to 28 September 2014, needed to be provided by Company A to Company B by 13 May 2014. The Site Report dated 7 May 2014 established a baseline for repairs, including some urgent matters that needed attention, including renovation of the racetrack, the pit building, the pitlane

and the control room. The Site Report concluded that renovations for the UIC would be expensive and needed to begin immediately.

162. Company A confirmed the choice of the UIC as the race venue on 13 May 2014, although there was initially still the issue of manufacturer M's prior booking of the UIC for 28 September 2014, which was later resolved. Mr. L of Company B was sufficiently anxious at the continuing lack of confirmation of availability of the UIC according to the agreed conditions that he sent an email to Company A on 31 May 2014[43] asking for that confirmation by 5 June 2014, otherwise the 2014 Race would be cancelled. The 5 June 2014 deadline passed without confirmation from Company A and it was not until 13 June 2014 that Company A sent Company B a renovation schedule, according to which renovation was to begin on 1 July 2014 and conclude on 21 September 2014, in other words just in time for the proposed 2014 Race on 26 to 28 September 2014.

163. At the same time, Company A did not respond positively to Company B's requests for a joint press release regarding the 2014 Race, saying instead, for example in Ms. I's email of 26 June 2014, that Company A and the UIC were still negotiating the renovation terms and that they did not wish to issue a press statement until after 7 July 2014. Company A pushed this date back several more times. Since the renovation contract had not been signed, the renovation works had not yet commenced. The Tribunal is of the view that Company B was within its rights to be very concerned at this stage about Company A's lack of progress in preparing the UIC for the 2014 Race. What had already been a very tight schedule if the renovation works had commenced on time on 1 July 2014 was, as of the middle of July 2014 with the renovation works still not commenced and with no renovation contract even signed, looking more and more unrealistic.

164. Mr. J at the Hearing expressed the view that, as is often the case in China, and as Company A had experienced previously with other similar projects in China, it is always possible in China to complete all necessary preparations for an event such as the 2014 Race with a concentrated last-minute investment of effort and time. Mr. J appeared to be convinced that, although timing was indeed tight, Company A could have, but for the termination of the Contract, readied the UIC in time for the late September race date. The Tribunal would have been more prepared to explore

43 Exhibit R-2-23.

that possibility if it had seen clearer evidence that Company A was indeed, as at the second half of July 2014, pulling out all the stops to ensure that all renovations and other race preparations were completed as quickly as possible. Instead, it was clear from Company A's email dated 18 July 2014 that, although Company A had not necessarily put matters on hold, Company A was not overly committed to completing the renovation contract with the UIC or to issuing a joint press release with Company B until it saw a clearer intention on the part of the Manufacturers to provide further sponsorship support for the 2014 Race.

165. Understandably very concerned on receipt of that email of 18 July 2014, Mr. L of Company B asked Mr. J by email on 21 July 2014 for Company A's confirmation that it had a racetrack rental contract with the UIC, a document required in addition to the renovation contract with the UIC.[44] Mr. J was evasive in his reply, saying Company A did have a race contract with the UIC but that it could not give Company B a copy as it was subject to commercial privilege. At the Hearing, Mr. J refused to confirm clearly whether there was a signed racetrack contract, merely referring to an "agreement" between Ms. I and the owners of the UIC. The Tribunal is satisfied that if there had been such a signed contract in existence, it would have been produced by Company A in these proceedings.

166. Mr. L in his 21 July 2014 email also asked Company A to state clearly what would happen if the Manufacturers did not purchase Company A's sponsorship packages. Mr. J's reply on 22 July 2014 would have provided little comfort to Company B. In what Mr. J admitted at the Hearing was a "*little bit of commercial pressure*",[45] he replied by reiterating that Company A should be freely allowed to discuss sponsorship opportunities with the PRC affiliates of the Manufacturers, otherwise "*it will have a negative impact on Company A's income and therefore the race*."[46]

167. As at 22 July 2014, Company B was therefore faced with a situation where it was apparent that Company A had neither a signed race contract nor a renovation contract with the UIC. Even if those contracts could be signed without further delay, the majority of the Tribunal consider that it would be perfectly reasonable for Company B to have doubted whether Company A could prepare the UIC racetrack on time for the 2014 Race in City U at the end of September. This was particularly so since the

44 Exhibit C-B-30.
45 T2/215/1L.
46 Exhibit C-B-30.

renovation schedule, even assuming that the renovations had started on time on 1 July 2014, was already very optimistic and contained in reality very little room for further delay, given that the renovations were scheduled to terminate on 21 September 2014.

168. Company B's legitimate concerns about the ever-shrinking time for completing the necessary renovations at the UIC were clearly exacerbated by Company A's fixation on obtaining further financial support from the Manufacturers or their PRC affiliates for the 2014 Race. Although Company A did not state directly that obtaining such financial support was a precondition for Company A's continued compliance with its obligations to prepare the UIC for the 2014 Race, Company B was, in the majority of the Tribunal's opinion, entitled to conclude that Company A was in effect applying such a precondition, even if cloaked in ambiguous terms. Company B made several efforts to clarify the situation and Company A's refusal to directly answer Company B's questions regarding Company A's options if the Manufacturers did not purchase sponsorship packages will have only confirmed Company B in its suspicion that Company A was in effect making its continued compliance with its contractual obligations contingent on further sponsorship guarantees from the Manufacturers, in fundamental breach of the Contract. At the very least, Company A did not seem to have clear proposals for alternative funding if the Manufacturers did not provide sponsorship for the event.

169. Company A may have genuinely felt, based on past experience, that it had a legitimate expectation for additional support from the Manufacturers or their PRC affiliates. Nevertheless, the Tribunal is satisfied that there was no contractual obligation on the part of the Manufacturers or their PRC affiliates to provide such financial support. Company A had the right to locate one title sponsor and two local sponsors for the 2014 Race. The Tribunal does not consider that it was reasonable, in the circumstances, for Company A to focus its efforts so exclusively on trying to obtain financing from the PRC affiliates of the Manufacturers, particularly as Company B had explained to Company A on numerous occasions[47] that the Manufacturers had already invested substantial sums, and obtained extensive rights, with respect to the DTM race series, and that therefore Company A needed to look for alternative sources of financing.

170. At the time of termination, given the above circumstances, the majority of the Tribunal is satisfied that Company B was entitled to conclude that Company A had

47 For example, the letter from Mr. W to Ms. I dated 22 April 2014 at Exhibit R-3-19.

demonstrated by its actions and statements that it was not willing or able to comply with its obligations under the Contract, as modified by the Hockenheim Agreement, with respect to renovation and preparation of the UIC racetrack up to "fit for purpose" European standards in time for the 2014 Race proposed for 26 to 28 September 2014 in City U. In the opinion of the majority of the Tribunal, this was a fundamental breach by Company A that justified Company B's termination of the Contract on 23 July 2014, pursuant to Article 11(2) of the Contract and the provisions of Article 94 of the *Contract Law*, and in particular sub-articles (2) and (3).

171. One could query whether, in the above-described circumstances, Company B had the right to terminate the Contract by notice with immediate effect on 23 July 2014 or whether it should have first given Company A a chance to cure its breach. First, it does not appear to the Tribunal that such a cure period is mandatory, either under the terms of the Contract itself; or pursuant to the provisions of Article 94 of the *Contract Law*. Secondly, even if there were an obligation to provide Company A with a chance to cure its breach, it is clear to the majority of the Tribunal that Company B did indeed provide Company A with such a chance on several occasions. For example, Mr. L's email to Company A on 31 May 2014[48] put Company A on notice that unless Company B received, by 5 June 2014, a "*definite letter of acceptance*" from Company A stating that the 2014 Race would take place at the UIC on the weekend of 26 to 28 September 2014, the 2014 Race would be cancelled. Company B's various emails in July 2014 seeking confirmation on various issues in relation to Company A's actions, which were met mostly with evasive replies, should also have put Company A on notice that Company B was very concerned about whether Company A was able, and more latterly willing, to comply with its contractual obligations.

172. One could also query why the Parties did not explore the alternative possibility of holding the race in City S, as originally envisaged by the Hockenheim Agreement. Indeed, the presiding arbitrator posed this question at the Hearing to Mr. L, who responded that Company A, and in particular Ms. I, had determined at an early stage that City U was a better option, in part because Company A had a better relationship with the relevant officials in City U.[49] [50] Mr. J also mentioned in cross-examination the more significant following among fans of motor racing in City G than in City S, and

48 Exhibit R-2-23.
49 T3/55/7-20.
50 T2/82/3-22.

referred to the City S race circuit as a "white elephant" and said that City S "struggles to fill their grandstands". It therefore appears that once the Parties had decided to plan the 2014 Race at City U, they no longer considered City S as an option, and the Tribunal is satisfied that at the time of termination of the Contract, it was not a realistic alternative, and not considered by either Party, to move the 2014 Race to City S.

173. Company A no doubt found Company B's termination of the Contract harsh and would have wished for a chance to continue to try to arrange the 2014 Race at City U. As a matter of law, however, the majority of the Tribunal considers that Company B was within its rights to terminate the Contract when it did. Company A made much of the fact that Company B announced the replacement event in The Netherlands only one day after the termination of the Contract. Company B had clearly begun planning for a replacement venue before the termination took place. Although this was evidently a disagreeable surprise for Company A, the Tribunal does not find the preparation of an alternative potential venue for the 2014 Race by Company B to be anything more than what a prudent operator in Company B's position would have done in the circumstances.

174. In light of the majority of the Tribunal's finding that Company B's termination of the Contract was justified and valid, Company A's claims in this arbitration must therefore, by logical deduction, fail.

Issue 3: If Company B's Termination of the Contract was Invalid, What is the Measure of Company A's Losses?

175. Given the majority of the Tribunal's finding that Company B's termination of the Contract was justified and valid, Issue 3 is no longer of any relevance.

Issue 4: If the Tribunal Finds That Company A Breached the Contract, Should Company B Succeed in its First Counterclaim to Recover the Balance of Euro 900,000 in Liquidated Damages, and is Company A Entitled to a Reduction From the Euro 3 Million Total Amount of Liquidated Damages?

176. It is the Parties common understanding that, under the Hockenheim Agreement, Company B would be entitled to keep the Euro 3 million Licence Fee for 2014 as liquidated damages if the 2014 Race did not take place due to a breach of contract

by Company A. Given the majority of the Tribunal's finding the Company A was in fundamental breach of the Contract, the starting point is that Company B is entitled to keep the amount of Licence Fee already paid by Company A (Euro 2.1 million) and to require Company A to pay the Euro 900,000 outstanding balance, unless a reduction is for any reason justified.

177. Such a reduction could be justified if any of the situations contemplated by Article 114 of the *Contract Law* or the *SPC Interpretation II* were applicable. In particular, Company A says a reduction is justified in the present case because the liquidated damages agreed in the Hockenheim Agreement are significantly or excessively higher than any actual losses that could have been caused to Company B by the alleged breach by Company A, in which case Company A had the right, pursuant to Article 114, to request an appropriate reduction by the Tribunal. Further, Article 29 of the *SPC Interpretation II* provides the guideline that if the liquidated damages agreed by parties exceed the actual losses incurred by 30% or more, this would generally be deemed to be significantly or excessively higher than the losses incurred as understood by Article 114.

178. The Tribunal notes that, in considering whether a reduction is justified, Article 29 requires the Tribunal to take into consideration such factors as the performance of the contract, the seriousness of the fault of the party in breach, the expected benefits of the party not in breach, as well as the principles of fairness and good faith.

179. It is clear from the above that, in assessing whether a reduction should be granted, the Tribunal should look not only at the losses already incurred by Company B as a result of Company A's breach, but also the expected benefits that Company B was denied as a result of Company A's breaches. First, with respect to the actual losses already incurred, the Tribunal relies on the "sunken costs" estimated by Company B in its Reply of 23 December 2016[51] of nearly Euro 2 million, which Company B confirmed included the costs of holding a substitute race in The Netherlands. In other words, to the extent that the Euro 3 million Licence Fee was expected to be at least loosely reflective of actual costs that Company B would incur in promoting and participating in the 2014 Race, it was clear that, at the time of termination, Company B had not yet incurred substantial expenditure, but had already received the majority (Euro 2.1

51 Exhibit C-E-7.

million) of the Licence Fee. That discrepancy in itself might suggest that a reduction was justified.

180. Company B argued, however, that other factors should be taken into account such as damage to Company B's reputation and Company B's inability, even if temporary, to capitalize on the opportunities of the China market caused by the failure of the 2014 Race to take place as planned. Company B has not provided any cogent evidence to support its argument in this regard. At the same time, the Tribunal recognizes that it is difficult for Company B to estimate with any certainty the magnitude of the potential losses it might suffer as a result of Company A's breaches of the Contract. Nevertheless, after due consideration, the Tribunal is not convinced that the failure to hold the 2014 Race in City U has caused or will cause lasting damage to Company B's reputation in the China market or elsewhere, or cut Company B off significantly from further opportunities to organize successful DTM races in China in the future.

181. Accordingly, taking into account the actual losses already suffered by Company B and even accepting the possibility that some nominal loss of access to the China market might be suffered by Company B as a result of Company A's breaches, it seems clear to the Tribunal that the sum of liquidated damages of Euro 3 million is indeed very likely to exceed by at least 30% the actual losses Company B has suffered and might suffer as a result of Company A's breaches. The Tribunal is therefore of the opinion that some reduction of the agreed liquidated damages amount is justified in the present case. The Tribunal does not consider that the nature of Company A's breaches of the Contract is so egregious so as rule out the possibility of such a reduction. Indeed, despite the efforts of each Party in this arbitration to suggest that the other Party was motivated in large part by bad faith, the Tribunal is of the view that both Parties, including Company A in breach, conducted themselves in the main in good faith. There are therefore no aggravating factors related to the conduct of either Party that would militate for or against a reduction in the liquidated damages awarded, or influence the amount of any such reduction.

182. Taking all relevant factors into account, including the actual expenses incurred by Company B in relation to the 2014 Race, and the fact that a certain amount of Company B's losses would be recovered through the replacement event in The Netherlands, the majority of the Tribunal considers that it would be appropriate to apply a reduction of 30% to the liquidated damages provided for under the Hockenheim Agreement, so that Company B is entitled to a total of Euro 2.1 million in liquidated damages as a

result of Company A's breaches of the Contract. Since Company A has already paid Euro 2.1 million in Licence Fee to Company B, the Tribunal, by majority decision, therefore makes no order for the further payment or reimbursement by either Party to the other with respect to any sums already paid or still outstanding in relation to the liquidated damages envisaged by the Hockenheim Agreement.

Issue 5: Does the Tribunal Have jurisdiction Over Company B's Second Counterclaim for Euro 1 Million?

183. The Tribunal is satisfied that it has jurisdiction over Company B's second counterclaim for Euro 1 million. The second counterclaim arises clearly and directly out of the Article of the Contract. From the point of view of the Tribunal's jurisdiction, it is irrelevant that Company A's original obligation to pay Euro 1 million arose out of the 2010 Contract, or that Company A's obligation to invest a minimum sum of Euro 1 million into the DTM TV Show under the Article of the Contract was expressed to be in consideration of the outstanding amount payable by the promoter resulting out of the 2010 Contract.

184. Even if this meant that the original obligation under the 2010 Contract had been "carried over" into the Contract, the obligation exists as a separate and new obligation under the Contract and any dispute "arising from or in connection with" (to borrow the language of the arbitration agreement contained in the Article of the Contract) the obligation under the Article of the Contract is therefore clearly within the Tribunal's jurisdiction.

Issue 6: If the Answer to Issue 5 is yes, did Company A Comply With its Obligations Under Article 4(4) of the Contract and, if not, is Company B is Entitled to Recover Euro 1 Million From Company A?

185. As set out in detail above with respect to Company A's claims and Company B's termination of the Contract, the Tribunal is of the view that Company A was substantially in compliance with its obligations under the Article of the Contract.

186. For that reason, the Tribunal finds that Company B is not entitled to recover Euro 1 million from Company A in connection with the Article of the Contract, and Company B's second counterclaim is therefore dismissed.

Costs

187. As a final point, each Party claimed its legal and related costs from the other Party and submitted that the other Party should be responsible for all the arbitration costs of this arbitration. Company A's claims in this arbitration have been wholly dismissed. Company B was partly successful in its counterclaims. Since neither Party was wholly successful in this arbitration, the Tribunal is of the view that each Party should be responsible for its own legal and related costs, that each Party should be responsible for the arbitration costs fixed by CIETAC in relation to their respective claims, and that each Party should be responsible for 50% of the other costs of this arbitration, such as the remuneration and extra expenses of the arbitrators.

VII. OPERATIVE PART

188. For the reasons stated herein, and having carefully considered the evidence provided and submissions made by the Parties, the Tribunal hereby finally decides, declares, orders and awards:

(1) That the Tribunal has jurisdiction over all claims submitted by the Claimant and all counterclaims submitted by the Respondent in this arbitration;

(2) By majority decision, that the Claimant was in fundamental breach of its obligations under the Contract with respect to the renovation and preparation of the UIC racetrack in City U to the necessary standards in time for the 2014 Race scheduled for 26 to 28 September 2014;

(3) By majority decision, that the Respondents termination of the Contract on 23 July 2014 was therefore valid and all of the Claimants claims are dismissed;

(4) By majority decision, that the Respondent is entitled to liquidated damages under the Contract, as amended by the Hockenheim Agreement and as further reduced by the Tribunal, of Euro 2.1 million, which have already been paid in full by the Claimant to the Respondent;

(5) That the Respondents counterclaim for Euro 1 million pursuant to Article 4(4) of the Contract is dismissed;

(6) That the arbitration fee in relation to the Claimants claims has been set at US$ 66,762, all of which shall be borne by the Claimant, and the arbitration fee in relation to the Respondents counterclaims has been set at US$ 50,285, all of

which shall be borne by the Respondent, and the abovementioned arbitration fees shall be set off against the deposits advanced by the Parties;

(7) That each Party shall be responsible for its own legal and other costs related to this arbitration; and

(8) That all other requests and claims are dismissed.

188. This Final Award is final and effective as from the date of issuance.

Appendix: Mr. X's dissenting opinion

DISSENTING OPINION

1. The arbitral tribunal has deliberated on the case and discussed on all the relevant issues. As expressed to my co-arbitrators during the deliberations, I agree in part with their opinion, and respectfully disagree with them in regard to the following issues.

A. Company B's termination

2. I agree with the analyses in regard to most of Company B's alleged grounds for termination of the contract, namely alleged delays in payment of the license fee, alleged failure to issue L/C in respect of the fourth and fifth installments of the license fee, and alleged failure to invest minimum sum of Euro 1 million into DTM show, etc. Those grounds are not valid for terminating the contract.

3. However, I do not think Company B has properly terminated the contract. As pointed out in para. 154 of the Award, both Parties were generally acting in good faith in their efforts to prepare for the 2014 Race.

4. My co-arbitrators accept Company B's view that the 18 July 2014 email from Mr. J was the "last straw" for Company B, in that it amounted to a refusal by Company A to take further steps (and in particular to sign the renovation contract and to issue the joint press statement) unless it received confirmation that the Manufacturers or their PRC affiliates would purchase sponsorship packages from Company A for the 2014 Race (para. 152). At the same time, they also accept that that Mr. J may genuinely have believed that the commercial pressure Company A was seeking to apply on Company B was legitimate and was simply a way of making Company B "*have some empathy towards our position*" (para. 153). I would agree with what Mr. J said when

giving evidence at the hearing, namely his email in July 2014, was just a way to give Company B "*a little bit of commercial pressure*". After all, Company B, comprised of the three auto makers in Germany, does have influence on the three auto makers; it should also be noted that, for the 2010 event, Company A had successfully secured sponsorship packages from two of the three auto makers' affiliates in China. Given the circumstances, it was not unreasonable for Company A to expect similar arrangements in regard to the 2014 events and try to obtain such arrangements by way of exercising some "commercial pressure". There is no evidence that Mr. J or anyone else from Company A would not have committed themselves to the 2014 event had the three auto makers' affiliates decided not to provide sponsorship packages in support of the 2014 event.

5. If Company B had acted in a prudent way, it should have informed Company A that it would terminate the Contract unless Company A proceeded with the project in a way satisfactory to Company B. In my view, if Company B sent such an ultimatum to Company A, Company A, which had already paid Company B Euro 2.1 million, was very likely to proceed to further perform the Contract.

6. It also comes to my attention that Company B announced the replacement event in the Netherlands only one day after the termination. Apparently it had negotiated for the replacement event for some time prior to the termination, and was ready and willing to give up the China event organized by Company A. This may explain why Company B did not offer Company A further opportunity to discuss sponsorship packages and further performance of the contract.

7. In light of above, I would not conclude that Company B had validly and properly terminated the contract.

B. Remedies

8. Without prejudice to my aforesaid view on the liability issue, now I move on to deal with the remedies. The issue here is, even assuming Company B had validly terminated the contract, what are the rightful remedies for Company B?

9. On the said assumption, I would agree that Company B would be entitled to damages under the *PRC Contract Law*. I further agree Clause 2 of the Hockenheim Agreement is a provision on liquidated damages. Under Article 114 of the *PRC Contract Law* and the related judicial interpretations, the court or the arbitration organ may make

reduction of the agreed liquidated damages if it is excessively higher than the actual damages. It follows that liquidated damages under the PRC law is in nature compensatory rather than punitive.

10. I agree with my co-arbitrators that there shall be reduction of the liquidated damages in this case. When assessing the adjustment, the majority view takes into account the following two factors, namely, (a) the actual expenses incurred by Company B in relation to the 2014 Race, and (b) the fact that a certain amount of Company B's losses would be recovered through the replacement event in the Netherlands (para. 179). 1 have no objection that these are the major factors to be considered.

11. The actual expenses incurred by Company B in relation to the 2014 Race in China are less than Euro 300,000, which also cover the costs for holding the Netherlands event. This number is less than 10 percent of the liquidated damages (Euro 3 million).

12. According to Article 29 of the *SPC Interpretation on Contract Law (II)*, when a reduction on the liquidated damages is sought, the court (in this case, the tribunal) shall make its judgment primarily based on the amount of actual damages. Although under the same provision, collateral factors such as status of contractual performance, parties' fault and existence of expectation damages are also to be considered, those factors do not come into play in this case, because: (a) there is no bad faith on either party in their contractual performance, and (b) Company B is non-profit organization engaged in the promotion and marketing of the motor racing series, and it does not contend that it suffered expectation damages due to Company A's non-performance (Company B merely mentions in its Statement of Counterclaims that it suffered "loss of branding, reputation and marketing opportunities").

13. In light of the above analyses, I would consider that at least 50 to 60 percent of the liquidated damages should be deducted. As a consequence, Company A should be entitled to some refund (Euro 300,000 to 600,000). I believe this would be a fair outcome for the entire dispute.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Finnish A Logistics Company

Claimant

v.

Chinese B Electronic Company

Respondent

Matter for arbitration: Disputes over coil packing line sales contract

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

The China International Economic and Trade Arbitration Commission ("CIETAC") accepted the reference of a dispute arising out of the Contract for Coil Packing Line for Hard Alloy (hereinafter "Contract I" or "Project I") and the Contract for Coil Packing Lines 2, 3, 4 for Can Stock Line (hereinafter "Contract II" or "Project II"; Contract I and Contract II jointly, the "Contracts") which were concluded by and between Finnish A Logistics Company (hereinafter the "Claimant", "Company A" or the "Seller") and Chinese B Electronic Company (hereinafter the "Respondent", "Company B" or the "Buyer") in October 2013. CIETAC took cognizance of the reference to arbitration based on the arbitration clause in Contract I and the Request for Arbitration submitted to CIETAC by the Claimant in May 2019.

The Contracts provides as follows:

> "*Any dispute shall finally be settled by arbitration, conducted by China International Economic and Trade Arbitration Commission, Beijing, P.R. China (CIETAC) in accordance with the rules of the said institute, using Chinese material law. Three arbitrators shall be appointed in accordance with the respective above-mentioned rules. Unless otherwise agreed, the official language of Arbitration shall be English.*"

The *CIETAC Arbitration Rules* effective as from 1 January 2015 shall apply to these cases.

A Notice of Arbitration was sent to the Claimant and the Respondent respectively in June 2019, by the Arbitration Court of CIETAC ("Arbitration Court"). Attached to the Notice of Arbitration to the Claimant were the Panel of Arbitrators and the *CIETAC Arbitration Rules*, and to the Respondent were the Application for Arbitration and its attachments submitted by the Claimant, the Panel of Arbitrators and the *CIETAC Arbitration Rules*.

The Notices of Arbitration noted that according to the Contracts in dispute, the language of arbitration to be used in the proceedings shall be English.

In July 2019, the Respondent requested to join Chinese C Aluminium Company ("Company C") as an additional party to the arbitrations in accordance with Article 18 of the *CIETAC Arbitration Rules*. The reasons for the joinder include: (1) Company C is the End-User of the Equipment supplied by the Claimant under the two contracts; (2) the two contracts provide in the main body signed by the Respondent that "Buyer and End-User shall be jointly and severally liable for the fulfilment of their contractual obligations"; and (3) Company C "has promised to be bound by the arbitration agreements", in respect of

which the Respondent submitted a letter issued by Company C to that effect. No separate agreement is signed between Company C and Company A regarding arbitration of disputes by CIETAC.

In August 2019, the Claimant submitted that Company C did not sign the two contracts in the cases, in which the arbitration agreements were included. That suffices to lead to the conclusion that there is no *prima facie* evidence to demonstrate that Company C is bound to the arbitration agreements with the Claimant and the Respondent. The arbitration agreements shall be restrictively effective on the disputes between the Respondent and the Claimant.

By notice in August 2019, CIETAC informed both parties that based on the opinions of the Parties and given the specific circumstances of the case, the Arbitration Commission decides not to join Company C as an additional party in accordance with Article 18 of the *CIETAC Arbitration Rules*.

The Claimant nominated Mr. X as co-arbitrator of the case. The Respondent nominated Mr. Y as co-arbitrator of the case. As the Claimant and the Respondent failed to jointly nominate or jointly entrust the Chairman of CIETAC to appoint a presiding arbitrator within the specified time, the Chairman of CIETAC appointed Mr. Z as the presiding arbitrator. After the arbitrators submitted their respective Declaration of Acceptance and Statement of Independence, the Tribunal was formed in September 2019 to hear the case to resolve the disputes.

Upon consultation with the Arbitration Court, the Tribunal decided to hold an oral hearing in November 2019 at CIETAC, Beijing, China, for the case. The Arbitration Court sent the Notice of Oral Hearing to the Claimant and the Respondent respectively in October 2019.

In November 2019, the Tribunal held the hearing as scheduled in Beijing. The Claimant and the Respondent sent in their authorized representatives to attend the hearing. In accordance with the parties' agreement, the hearing was conducted in English. The Claimant made oral presentation of their case, presented the originals of its evidence and answered questions raised by the Tribunal. The Respondent made oral defence in the case, presented evidence and examined the evidence of the Claimant and answered questions from the Tribunal.

At the hearing and upon direction from the Tribunal, the parties agreed to meet "without prejudice" and discuss about possible settlement of the dispute among themselves

post the hearing. The Parties did not successfully settle their disputes in their own meetings post the hearing.

The Respondent raised an Application for Appraisal of the equipment in December 2019 during the arbitral procedure.

Upon request from the Parties, the Tribunal decided to have a second hearing of the dispute scheduled to fall in January 2020. The Arbitration Court sent the Notice of Oral Hearing to the Claimant and the Respondent respectively in December 2019. A schedule for the oral evidence hearing was attached to the notice.

In January 2020, the Tribunal held the oral evidence hearing as scheduled in Beijing. The Claimant and the Respondent sent in their authorized representatives to attend the hearing. At the hearing, the Respondent raised its request to file counterclaims. The Tribunal ordered the counterclaims to be filed before the agreed date, i.e., late January 2020, after the hearing.

After the second oral evidence hearing, CIETAC sent a notice informing the Claimant and the Respondent of the time schedule decided by the Tribunal on post hearing submissions. In January 2020, the Respondent filed its counterclaims with reasons and evidence in support of the counterclaims.

In April 2020, CIETAC notified the parties that the Tribunal accepted the counterclaims. The counterclaims would be heard together with the Claimant's claims in the application for arbitration in accordance with the *CIETAC Arbitration Rules* applicable to the case.

In respect of the counterclaims and based on the deliberation of the Tribunal, CIETAC issued a notice requiring the parties to address questions about the scope of disputes in the arbitration based on the agreement clauses in the Contracts. The Tribunal held an oral hearing of the counterclaims in August 2020. The parties submitted their summary statements of their respective cases after the hearing.

After the oral hearing, the parties exchanged opinions on the case and on the evidence.

Due to the complexity and specific situation of the case and based on the request of extension made by the Tribunal, the President of the Arbitration Court agrees and decides to extend the time limit of rendering arbitral award to December 2020.

CIETAC has properly served all the documents, notices and materials in relation to the case according to the *CIETAC Arbitration Rules* to the parties. Both the Claimant and

the Respondent had submissions in the arbitration process of this case and appeared at oral hearings.

The majority of the Tribunal makes this Award based on the evidence heard in the proceedings. The statements of the parties, the majority opinions of the Tribunal and the Award are presented as follows.

I. STATEMENTS OF THE PARTIES

The parties in this dispute entered into the deals for sale and purchase of coil packing line for hard alloy and can stock lines under the two Contracts. Contract I is for hard alloy coil packing line 1, and Contract II is for coil packing lines 2, 3, 4 for can stock line. The Total Contract Price for Contract I is around EUR 2.1 million; and the Total Contract Price for Contract II is around EUR 6 million.

The Total Contract Price composes of the price for the Imported Equipment (including spare parts), the price for technical documentation, and the price for technical services. The Total Contract Prices of the two Contracts are listed in the chart below:

Items	Contract I (EUR)	Contract II (EUR)
Imported Equipment	around 1.9 million	around 5.4 million
Technical Documentation	around 0.1 million	around 0.2 million
Technical Services	around 0.1 million	around 0.4 million
Total	around 2.1 million	around 6 million

The Imported Equipment under both Contracts were imported and delivered to Company C (End-User)'s site. There is no dispute on the fact of delivery of the Imported Equipment. Payments for the Total Contract Price were agreed to be made by installments under the Contracts. The Claimant filed the claims in the Request for Arbitration in the dispute to seek full payment for the Imported Equipment under the Contracts.

A. Claimant's Claims

The Claimant's claims under the two Contracts are set out below.

1. Contract I

It is undisputed that the Respondent has paid 90% of the Total Contract Price. According to Contract I, 10% (ten percent) of the total amount of Imported Equipment shall be paid under letter of credit ("L/C") against: (i) Commercial Invoices, (ii) "Certificate

for acknowledgement of the Expiration of 12-month ("CA12") after Final Acceptance Certificate ("FAC") signed by the Seller and the Buyer and/or End-User, and (iii) Bank Guarantee covering 5% of the total amount of the Imported Equipment and valid until the end of the Warranty Period.

In February 2017, Company C and Company A issued the FAC.

The Claimant stated that "despite that FAC was signed in February 2017 and signing of CA12 is due in February 2018, Company B has refused to sign CA12 to enable Company A to receive the payment of 10% of equipment in amount of around EUR 0.2 million". The Claimant also stated that there are Additional Man-day of Technical Services ("AMD") in the amount of around EUR 0.1 million that the Respondent owed to it due to additional services provided by the Claimant.

Under the Contract, the Total Contract Price is composed of the following:

Price for Imported Equipment:	around EUR 1.9 million
Price for Technical Documentation:	around EUR 0.1 million
Price for Technical Services:	around EUR 0.1 million
Total Contract Price:	**around EUR 2.1 million**

There is no dispute that the technical services charged in the amount of around EUR 0.1 million were fully paid "pro rata progress" according to Contract I by the Respondent to the Claimant under L/C. However, the AMD charges as "*inconfirmed (sic) by both parties and invoiced by Company A remain unpaid*".

In the Request for Arbitration dated May 2019, the Claimant sought the following reliefs:

(a) To order the Respondent to effect payment of around EUR 0.2 million which was due in February 2018.

(b) To order the Respondent to pay interest for its delay of payment against CA12, in amount of around EUR 10,000 (calculated till May 2019 on basis of basic interest rate for loans between 1 year to 5 years at 4.75% per annum announced by People's Bank of China in 2019) and interests from May 2019 to the payment date as actually decided in the Arbitral Award.

(c) To order the Respondent to pay AMD charges in amount of around EUR 0.1 million and interest from the due date till the payment date as decided in the Arbitral Award;

(d) To order the Respondent to bear the costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to the present arbitration, including the fees and expenses of the Claimant's lawyers (in the amount of around EUR 40,000 by the time of the Request for Arbitration) and witnesses and experts (if any); and

(e) To order such further relief as the Tribunal may deem appropriate.

2. Contract II

In respect of Contract II, the Claimant stated that the Respondent paid 80% of the price of the Equipment but failed to pay the 10% against Deemed Acceptance Certificate ("DAC") and 10% against CA12, while the Claimant delivered the Equipment as per contract under the Bill of Lading showing shipment in November 2015. The Equipment was eventually installed by the Respondent through engagement of a third party instead of the Claimant due to reasons caused by the Respondent and the End-User.

There is no dispute on the payment of the technical services according to Contract II. The Claimant asserted that the Respondent is obliged to sign DAC and effect payment of 10% of the Equipment in the amount of around EUR 0.5 million not later than November 2016 according to Contract II. The Respondent refused to do so without any legitimate reasons, so the Respondent should be held liable for the payment and interest for delayed payment.

Further, the Respondent refused to sign CA12 even when the contractual time has already been due in November 2017, which prevented the Claimant from receiving the payment of 10% of the Equipment in the amount of around EUR 0.5 million. Consequently, the Respondent shall be held liable for the payment of the CA12 and interest for the delayed payment.

In respect of Contract II, the Claimant requested the following reliefs:

(a) To order the Respondent to effect payment of around EUR 0.5 million which was due in November 2016;

(b) To order the Respondent to effect payment of around EUR 0.5 million which was due in November 2017;

(c) To order the Respondent to pay interest for its delay of payment against DAC, in the amount of around EUR 70,000 (calculated till May 2019 on basis of basic

interest rate for loans between 1-year to 5-year period at 4.75% per annum announced by the People's Bank of China in 2019) and interests from May 2019 to the payment date as decided in the Arbitral Award;

(d) To order the Respondent to pay interest for its delay of payment against CA12, in the amount of around EUR 40,000 (calculated till May 2019 on basis of basic interest rate for loans between 1-year to 5-year period at 4.75% per annum announced by the People's Bank of China in 2019) and interests from May 2019 to the payment date as decided in the Arbitral Award;

(e) To order the Respondent to bear the costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to the present arbitration, including the fees and expenses of the Claimant's lawyers (currently around EUR 0.2 million), witnesses and experts (if any); and

(f) To order such further relief as the Tribunal may deem appropriate.

B. Respondent's Position

The Respondent submitted written statements of defense, sent authorized representatives to attend the hearings, and submitted post hearing submissions in respect of Contracts I and II It also raised counterclaims which will be discussed below.

1. Contract I

The Respondent stated that during the supply, installation and operation of the Contract Equipment, the Respondent found that the Contract Equipment, with a number of quality problems, could not meet the quality requirements prescribed in the Contract. During the performance test held by the Respondent and the Claimant between the end of November and the beginning of December in 2016, several significant guaranteed figures, including the capacity, availability, enter scale accuracy and exit scale accuracy, etc. did not reach the level prescribed by the Contract. Other quality problems include the following:

(a) "The PET strapping machine is stuck occasionally.

(b) The equipment trouble frequently happened on the 2# coil car.

(c) The equipment trouble happened on the manipulator of 6# station.

(d) The language in the HMI panel needs to be changed into Chinese from English.

(e) The Contract I line does not work smoothly, especially the Auto status needs to be further optimized."

The Respondent also stated that the Claimant has not fulfilled the training obligations under Contract I. The Claimant did not issue the performance security covering 10% of the Total Contract Price under Article 14.1 of Contract I. Further, the Claimant has not issued the Bank Guarantee covering 5% of the total amount of the imported Contract I Equipment for the Warranty Period of eighteen (18) months, counting from the actual date of the Final Acceptance Certificate for the Contract I Equipment.

The Respondent asserted that the pre-conditions under Contract I had not been met. Since the Contract I Equipment had quality problems, no FAC was issued and the Deemed Acceptance Certificate provided in Contract I is not applicable. The "Certificate for acknowledgement of the Expiration of 12-month after Final Acceptance Certificate or Deemed Acceptance Certificate" (CA12 or DAC) issued by the Seller and signed by the Seller and the Buyer and/or End-User is not due, so the corresponding payment of the 10% of the Contract Price under Contract I is not due, either.

The Respondent further stated that the AMD technical services provided by the Claimant is inaccurate and unreliable. Therefore, The Respondent refused to pay the AMD costs.

2. Contract II

The Respondent stated that regarding Contract II, the Claimant has not fulfilled its contractual obligations of erection and commissioning of the Equipment. The Respondent acknowledged that due to local government's variety of actions to strengthen and enhance the prevention and control of atmospheric/[air] pollution, delay was caused in getting the construction permit of the End-User Company C's factories, resulting in delay of the erection of the Contract II Equipment. However, after the End-User's factories had the conditions for erection of the Contract II Equipment in June 2018, the Claimant should have fulfilled its obligations to provide technical instruction for the erection work and to complete the commissioning and performance test of the Contract II Equipment. The Respondent requested the Claimant to provide the erection and commissioning services by email in June 2018 and demanded that the consequences of non-performance be borne by the Claimant.

The Claimant failed to complete its contractual obligations. To mitigate, the Respondent had to engage a third party to erect the Contract II Equipment on its own.

Similar to Contract I, the Claimant did not issue the performance security covering 10% of the Total Contract Price under Contract II. Further, the Claimant has not issued the Bank Guarantee covering 5% of the total amount of the imported Contract II Equipment for the Warranty Period of eighteen (18) months, counting from the actual date of the Final Acceptance Certificate for the Contract II Equipment.

Similar to Contract I, the pre-conditions for payment by the Respondent of the remaining Contract Price under Contract II have not been met. No FAC or DAC was issued. And the signing of the DAC provided under Contract II is not applicable. Since the issuing of the "Certificate for acknowledgement of the Expiration of 12-month after Final Acceptance Certificate or Deemed Acceptance Certificate" (CA12 or DAC) is not due, the payment of the remaining Contract Price is not due, either.

Respondent's Appraisal Request

As noted above, the Respondent raised an Application for Appraisal of the Contract I Equipment delivered. It had enquired with the State Administration for Market Regulation (the "SAMR"), which took over the appraisal function of the State Administration of Quality Supervision, Inspection and Quarantine (the "AQSIQ") when the latter was cancelled[/ dismantled] by the State Council in March 2018. According to the Respondent, it did not get a favorable reply out of the enquiry from the SAMR.

In addition, the Application for Appraisal was not entertained upon consideration by the Tribunal, because at the time of the application, that is December 2019, about three years have passed since the Equipment arrived and gone through check by both parties as evidenced by the email exchange of the parties in December 2016 regarding the Contract I Final Acceptance Test ("FAT").

As between the Seller and the Buyer under the *United Nations Convention for the Contracts for International Sale of Goods* ("**CISG**"), which is taken into account by reference before the Tribunal in this case, any appraisal should have been conducted within as short a period as possible by the Buyer, according to Article 38 of the *CISG*. Further, under Contract I, if due to Buyer's reason, no Final Acceptance is conducted for the Contract I Equipment within 12 months from Bill of Lading of the last major shipment, the Contract I Equipment shall be deemed as being accepted by the Buyer and DAC shall be issued by the Seller and signed by the representatives of both parties. As such, given the equipment were delivered a few years ago, and the status of the equipment may have been affected by

many extraneous factors, the Application for Appraisal was not entertained in the arbitration proceedings.

C. Respondent's Counterclaims

In the course of the arbitration, the Respondent filed the Statement of Counterclaims, and requested the Tribunal to award as follows:

(1) To order the Claimant to bear the costs in the amount of around EUR 0.5 million, converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020, to be paid for repairing and altering the Contract I Equipment, and affirm the Respondent has the right to deduct such costs from the Contract Price of Contract I.

(2) To order the Claimant to pay to the Respondent the liquidated damages in the amount of around EUR 30,000 for not reaching the guaranteed figures of the Capacity, Availability, Accuracy of Entry Scale and Accuracy of Exit Scale.

(3) To order the Claimant to return to the Respondent the training fee in the amount of around EUR 4,000 having been paid to the Claimant.

(4) To order the Claimant to indemnify the Respondent the costs in the sum of around EUR 0.3 million, converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020, occurred for engaging Chinese Machinery Company D ("Company D") to take the place of the Claimant and carry out the erection, commissioning, performance test and acceptance of the Contract Equipment under Contract II.

(5) To order the Claimant to indemnify the Respondent the cost in the sum of around EUR 0.3 million, converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020, to be occurred for engaging Company D to take the place of the Claimant and carry out the quality warranty of the Contract Equipment under Contract II.

(6) To order the Claimant to indemnify the Respondent the legal fee in the amount of around EUR 0.1 million converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020.

(7) To order the Claimant to bear all the arbitration costs.

Grounds of Counterclaims

The Respondent stated that the Claimant had delivered the Coil Packing Line for Hard Alloy in Contract I, but the Contract I Equipment were found at least having 13 problems as recorded in the Company A & Company C Status Step by Step Plan signed by the parties in June 2018. Such problems, according to the Respondent, included the Axial Wrapping Machine and the PET Strap and Pallet Manipulator, and were not addressed by the Claimant to reach the guaranteed figures of Contract I.

According to the Respondent, Company C had no choice but to engage a third party to repair and alter the equipment and the cost of repairing and alteration from the fee quote was around RMB 4 million converted into around EUR 0.5 million at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020. The Respondent requested that this cost of Company C shall be borne by the Claimant and the Respondent shall have the right to deduct the cost of repair from the Contract Price of Contract I in accordance with Article 111 of the *PRC Contract Law*.

Besides, several significant guaranteed figures, including the capacity, availability, enter scale accuracy and exit scale accuracy, etc., stipulated in Appendix 5 to Contract I, were not reached. Per Appendix 5, Availability of the line of Contract I is measured during 48-hour continuous production. The guaranteed figure of capacity stipulated in p. 15 of the Appendix 5 is 12 coils per hour. The Contract Equipment in Contract I failed to meet these guaranteed figures during the test. The guaranteed figures for Enter Scale Accuracy and Exit Scale Accuracy did not meet the levels stipulated in Appendix 5 in Contract I either.

In accordance with Contract I, the Claimant shall pay liquidated damages if the guaranteed figures cannot reach the agreed levels. The total amount of liquidated damages payable by the Claimant shall be around "EUR 2.1 million × 1.4%", equaling to EUR 30,000.

The Respondent has paid the technology service fees to the Claimant, which includes the training fee of EUR 4,000. Due to the fact that the Claimant has not provided the technical training in Contract I, the training fee must be returned to the Respondent.

In respect of Contract II, there was no dispute that the Equipment was shipped in November 2015, and the date of Bill of Lading was November 2015. The Equipment had arrived in the factory of Company C located in City M of China, in or about December 2015. Due to haze pollution around City M Area and under requirements from local government, delay was caused in Contract II. When Company C notified the Claimant by email in June 2018 and requested the Claimant to perform the obligation of erection and commissioning

of the Equipment, the Claimant had refused to provide the erection and commissioning services, due to unsatisfactory performance of payment under the Contracts.

To mitigate the losses, the Respondent engaged Company D to erect and commission the Contract Equipment in Contract II after the settlement negotiation between Company C and the Claimant was broken in September 2018. Company C had paid around RMB 3 million to Company D for the technical services regarding the erection and commissioning services. An additional amount of around RMB 2 million is to be paid to Company D for the quality warranty of Contract II.

As it has taken measures to complete the erection and commissioning of the Equipment of Contract II, the Respondent does not need to pay the amount of around EUR 0.4 million stipulated in Contract II to the Claimant anymore. The difference between RMB 5 million and EUR 0.4 million is around EUR 0.3 million, at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020. This difference amount is the loss of Company C and shall be indemnified by the Claimant in accordance with Article 107 of the *PRC Contract Law*.

As the Respondent engaged Company D to take care of the warranty obligations, the cost for such shall be undertaken by the Claimant in Contract II. The amount of around RMB 2 million was offered from Company D for it to take the place of the Claimant to carry out the quality warranty during the warranty period of Contract II, this amount is the loss of Company C and shall be indemnified by the Respondent in accordance with Article 107 of the *PRC Contract Law*.

The legal fees of the Respondent in the amount of EUR 0.1 million shall be undertaken by the Claimant in this case.

According to the Respondent, the Respondent is the contracting party with the Claimant, but the Contract Equipment user is Company C. Company C is the party acting for and on behalf of Company B when executing Contract I and Contract II. Company B and Company C are jointly and severally liable for the fulfilment of their contractual obligations. The losses of Company C are the losses of the Respondent. Therefore, the Claimant shall have the obligation to indemnify the Respondent for its losses in the counterclaims.

D. Defense to Counterclaims

The Claimant made defense to the counterclaims from both theory and practice, and mainly in the following aspects:

(1) The counterclaims were not supported by evidence, did not follow the claim procedure under the Contracts, and should be categorically rejected.

(2) In respect of Contract I, the Contract states clearly that the CA12 payment is only subject to the expiration of 12 months after signing of FAC or DAC. Since the FAC was signed, the CA12 payment must be made.

(3) In respect of Contract II, the Claimant took the position that because the Respondent refused to sign the DAC, the Claimant is entitled not to instruct installation of the Contract Equipment. The End User Company C committed DAC would be signed by late December 2016, which was four months prior to the Construction Permit. Subsequent meeting of June 2018 demonstrated that both parties confirmed to solve the DAC before commencing installation. As such, the Claimant stated that signing the DAC prior to instruction of installation is the term of Contract II, as well as true consensus between the parties, which the Respondent breached.

(4) The counterclaims fail to follow the contractual procedure for the Buyer to file claims if there are quality problems of the Equipment, including the quality inspection certificate from State Administration of Quality Supervision, Inspection and Quarantine ("AQSIQ"). The Respondent failed to follow the contractual claim procedure, so the counterclaims must be rejected.

(5) Company C is not party to the Contracts, and it does not have eligibility to file counterclaim for its losses against Company A. Allowing Company C to file counterclaim would violate the principle of privity of contract under Chinese law.

The parties exchanged evidence and statements on such evidence during the period of Covid-19. Upon notice, the parties exchanged submissions on the question of the scope of disputes under the arbitration clause between the parties to the Contracts raised from the Tribunal before the hearing on the counterclaims. The Claimant took the view that the counterclaims are raised by ineligible parties, hence they should be dismissed. In particular, Company C established no contractual relationship with Company A, hence in pursuit of governing and construing laws of the Contracts and doctrine of privity of contract, Company C has no rights to claim against Company A. Company C is not a participant in this arbitration, hence it is not entitled to present or delegate for defense or counterclaim.

The parties have not raised any objection in the course of the arbitration procedure in accordance with the *CIETAC Arbitration Rules*. The Tribunal has considered all the facts and evidence submitted in the proceedings and given reasonable opportunities to the parties to present their claims, defence and counterclaims. The Tribunal now sets out its majority Opinions in the section below.

II. ARBITRATORS' OPINIONS

Upon deliberation, the Tribunal raised the following list of questions at the hearings of the case.

List of Issues

The issues in the case are listed below:

(1) Scope of jurisdiction of the Tribunal in this case;

(2) The applicable laws in the dispute;

(3) Joint and several liabilities;

(4) Whether non-performance took place in the case, and if so, the extent of liability to be held for non-performing party; and

(5) As to the claims and counterclaims:

  (a) Whether the 10% CA12 in Contract I was payable and should be paid;

  (b) Whether the outstanding amounts of payment in Contract II was payable and should be paid;

  (c) Whether interest should be borne on the unpaid sum;

  (d) Whether the requested AMD charges are payable;

  (e) What and to what extent Company B's counterclaims should be supported?

  (f) Costs of the arbitration.

Upon hearing, examination of all evidence and review of parties' written submissions and post-hearing submissions, the Tribunal discusses the legal issues as below:

Issue 1. Scope of jurisdiction of the Tribunal

The Contracts at issue in this case are Contract I and Contract II, both of which were signed by Company A and Company B in October 2013. It is crystal clear that the parties to the Contracts are Company A and Company B, that is the Claimant and the Respondent in this case.

Company C is the End-User, as defined in the Contracts. According to the Respondent, Company C is the party acting for and on behalf of Company B when executing Contract I and Contract II, and Company B and Company C are jointly and severally liable for the fulfilment of their contractual obligations.

The Tribunal hold that, Company C, as an End-User, is a third party to the Contracts, and not a party to the Contracts. Company C did not sign the Contracts, although it held a counterpart copy of the Contracts, and signed the Technical Documents attached to the Contracts.

As noted above, the Contracts provides the arbitration clause in the Contracts, by requiring the parties to submit disputes to CIETAC for arbitration in accordance with its *Arbitration Rules*.

As the parties to the Contracts are Company A and Company B only, the arbitration clauses bind these two parties, but do not bind third parties. As such, procedurally speaking, the disputes between Company A and Company B fall within the scope of jurisdiction of the Tribunal in this case. This Tribunal has arbitral authority, according to the arbitration clauses in the Contracts, to deal with disputes that fall within the scope of its jurisdiction.

According to the Contracts, the Tribunal has proper jurisdiction over the disputes arising from the Contracts as between the two parties. Company A and Company B are proper parties to the Contracts and have proper legal standing to claim or counterclaim against each other as a matter of the *PRC Contract Law* as far as the arbitration proceedings are concerned.

In view of the above, the Tribunal finds that the claims filed by the Claimant against the Respondent fall within the scope of jurisdiction of the Tribunal. The counterclaims filed by Company B against Company A for the losses Company B suffered under the Contracts fall within the scope of jurisdiction of the Tribunal.

It is noted that Company B entered into an agreement with Company C in January 2020 to attempt to claim against Company A to indemnify Company C's losses. Because

Company C is not a party to the Contracts, particularly not a party to the arbitration agreement under the Contracts, Company C lacks party standing to counterclaim against the Claimant, in the absence of consensus of the parties about arbitration between Company A and Company C.

The Tribunal noted that Company C "initial-signed" the attached technical documents on behalf of Company B. Company C's representatives acted on behalf of Company B to sign the attachments. It is, however, clear that Company C did not sign the main body of the Contracts, not making itself a party to the main body of the Contracts, including the arbitration agreement. Therefore, it is reasonable to conclude that Company C is not party to the arbitration agreements under the Contracts. Company C's party standing in the arbitration was not confirmed or consented to by Company A.

Accordingly, the Tribunal finds Company C's alleged counterclaims or the counterclaims filed by Company B to seek recovery of Company C's losses fall outside the scope of jurisdiction of the Tribunal. By entering into an agreement with Company C to counterclaim against Company A to indemnify Company C's losses, Company B failed, procedurally, to make Company C a party to the arbitration agreements in the Contracts. Company C was structurally not a contractual party to the arbitration agreements and has no party-standing in the arbitration.

In short, this Tribunal has no jurisdiction to deal with the counterclaims filed by Company C, because Company C lacks party-standing to the arbitration case on the basis of the arbitration clauses in Contract I and Contract II. As such, the counterclaims in connection with and to the extent of Company C's losses are legally inadmissible in this arbitration case.

Issue 2. Applicable law

Article 13.2 of the Contracts provides in part as follows:

> "*Any dispute shall finally be settled by arbitration, conducted by China International Economic and Trade Arbitration Commission, Beijing, P.R. China (CIETAC) in accordance with the rules of the said institute,* ***using Chinese material law.***" (emphasis added)

The Tribunal hold that Chinese law applies to the case. In addition, where matters require consideration of international customary rules such as the rules under the *CISG*, the Tribunal may consider provisions of the *CISG*, by reference to Article 142 of the *General Principle of Civil Law*, which reads: "*If any international treaty concluded or acceded to by*

the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has made reservation. Where the laws of the PRC or the international treaties are silent, international customary rules may be applied".

Where the PRC laws or the international treaties are silent, the international customary rules will be applied. In this regard, the *UNIDROIT Principles (2010)* may also be used to supplement the material laws of the PRC when the Tribunal consider the relevant issues in this case, given the Contracts in this case are international commercial contracts.

Article 5.2.1 (2) of *UNIDROIT Principles (2010)* provides as follows:

> "*The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.*"

Accordingly, the rights of the promisor Company A over the obliged party Company B/End-User, or vice versa, would also be subject to the conditions or limitations under the arbitration agreements of the Contracts in this case. Consequently, Company C being a non-party to this arbitration, has no party standing. Only the Respondent has the right to bring counterclaim against the Claimant in this case. The disputes are simply owned and need to be dealt with by the Seller and the Buyer.

Issue 3. Joint and several liabilities

The Respondent stated that Company B and Company C are jointly and severally liable for the fulfilment of their contractual obligations. Company C's losses in executing the two contracts are the losses of Company B.

Both Contracts have the definitions as follows:

> "1.1.1 "Buyer" means Company B.
>
> 1.1.2 "End-user" means Company C acting for and on behalf of the Buyer.
>
> *Buyer and End-user shall be jointly and severally liable for the fulfillment of their contractual obligations*" (Emphasis added)

While the Respondent takes that position based on the terms of the Contracts, the Tribunal notes that the arbitration clauses in the Contracts were only signed by the parties to the case, Company A and Company B. Company C is not a party to the arbitration

clause, as such, substantively speaking, Company C may be jointly and severally liable to the Claimant, but procedurally speaking, only the Respondent has proper party standing in dealing with the claims of the Claimant and its own counterclaims against the Claimant.

Company C is merely an agent of Company B and as an agent, acting for and on behalf of Company B. If Company B owes liability to Company A, the latter may take action against Company B or Company C jointly and severally, but when it comes to arbitration, it must observe the rules on arbitration as a matter of party autonomy between parties who are signatories to an arbitration agreement. As Company C is not a party to the arbitration agreements under the Contracts, Company A cannot pursue its claims against Company C, but merely against Company B. The same is true vice versa. Only Company B in this arbitration case can file the counterclaims against Company A for its losses.

It is noted that, substantively speaking, Company B and Company C are jointly and severally liable to Company A under the Contracts. In the circumstances of the case, the Tribunal would have reason to consider Company B's counterclaims in the following way:

(1) where the liability is framed as Company C's losses, it is inadmissible for Company C's part (because it lacks party standing); and

(2) where the liability is framed as Company B's losses or anticipated losses, which includes liability of Company C's losses, the counterclaim is admissible for the part of Company B in this case, but such liabilities for Company B will be considered in accordance with the rules of evidence and the principle of fairness and reasonableness under Chinese law.

Issue 4. Non-performance and Extent of liabilities

Based on the evidence submitted, the Claimant and the Respondent entered into the Contracts dated October 2013. On behalf of the Seller, natural Person E, Vice President/ Sales and Marketing, signed the Contracts; and on behalf of the Respondent (Buyer), a natural Person F, signed the Contracts as General Manager.

Accordingly, the Tribunal finds that Contracts I and II in this dispute were validly entered into and are legally binding on the parties.

Contract I

The Claimant relied on Contract I to seek payment of the 10% of total amount of the Contract. Contract I provides as follows:

> *"10% (10 percent) of the total amount specified in clause before (Imported Equipment), namely around EUR 0.2 million (say: EURO One hundred and eighty-five thousand one hundred and twenty only) shall be paid by the Buyer to the Seller against presentation of the following documents:*
>
> *A. Signed commercial invoice in 6 (six) originals.*
>
> *B. "Certificate for acknowledgement of the Expiration of 12-month after Final Acceptance Certificate or Deemed Acceptance Certificate" issued by the Seller and signed by Seller and Buyer and/or End-User in 1 (one) original and 2 (two) photocopies.*
>
> *C. Bank Guarantee covering 5% of the total amount specified in clause 2.2.1 (Imported Equipment) and valid until the end of the Warranty Period."*

Evidence shows that in March 2017, the parties, represented by a natural person G on the part of Company B, and a natural person H on the part of Company A, signed the Certificate of Handover (dated February 2017). The Claimant relied on this document as FAC, because the document states *prima facie* that "*Prerequisites for installment of Final Acceptance Test have been met*".

The Respondent, however, argued that contrary evidence showed that the Contract I Equipment had not passed the final acceptance. Company A and Company B signed the Memo No. 1 to Contract I in May 2017, about two months later than the date of the Certificate of Handing Over.

The Memo No. 1 states, *inter alia*, that the original Contract I "*has not accomplished Final Acceptance and the Seller has not fulfilled guarantee obligations of original contract equipment*". The Buyer has not paid to the seller 10% of original Contract Price against FAC or DAC and 10% of original Contract Price against *Certificate of acknowledgement of the Expiration of 12-month after Final Acceptance Certificate or Deemed Acceptance Certificate.*

The Tribunal hold that, based on the above contrary evidence, it is clear that the *prima facie* Certificate of Handing Over relied upon by the Claimant as FAC, did not, in substance, meet the requirement of Contract I as FAC, and therefore the claim for payment of the 10% after expiry of 12-month after the FAC cannot be fully supported by the Tribunal.

It is also noted in the proceedings that the document of Bank Guarantee covering 5% of the total amount and valid until the end of the Warranty Period as required in Contract I was not made available in the case, as the Claimant never issued such Bank Certificate in this case. Without such document, the Claimant could not expect to have the 10% be fully paid under the Letter of Credit in any event.

On the one hand, it is noted that the Respondent signed the Certificate of Handover in March 2017, with intention to make full payment to the Claimant; on the other hand, quality problems were raised by the Respondent and in addition, the Claimant failed to issue the Bank Guarantee in violation of Contract I. Based on the quality problems raised (NB: the costs of repairing the quality problems are addressed in the counterclaims filed by the Respondent), and the Claimant's failure to issue the Bank Guarantee, the Tribunal considers that an appropriate discount of 30% in regard to this claim should be applied to the remaining payment of 10% of the price of the Imported Equipment. On balance, it is hereby determined that 70% of the 10% installment of payment for the Contract I Equipment should be paid to the Claimant. This is a result of applying the fairness and reasonableness principle under Chinese law, without prejudice to the right of the Respondent to counterclaim its losses due to the repairs incurred in the Project (see below).

Contract II

The Claimant relied on Contract II to seek payment of the 20% of total amount of the Contract.

A clause in Contract II provides as follows:

> *"10% (ten percent) of the total amount of each line specified of Imported Equipment, namely around EUR 0.5 million (say: EURO Five hundred and forty-two thousand and six hundred and eighty only) shall be paid by the Buyer to the Seller against presentation of the following documents:*
>
> *Breakdown As:*
>
> *Around EUR 0.2 million (say: EURO One hundred and seventy-six thousand only) for Line 2;*
>
> *Around EUR 0.2 million (say: EURO One hundred and seventy-nine thousand one hundred only) for Line 3;*

Around EUR 0.2 million (say: EURO One hundred and eighty-seven thousand five hundred and eighty only) for Line 4.

A. Signed commercial invoice in 6 (six) originals.

B. A Final Acceptance Certificate or Deemed Acceptance Certificate for the Contract Equipment issued by Seller and signed by Seller and Buyer and/or End-User in 1 (one) original and 1 (one) photocopy."

Its next clause in Contract II provides as follows:

"10% (10 percent) of the total amount specified in clause of Imported Equipment, namely EUR 0.5 million (say: EURO Five hundred and forty-two thousand six hundred and eighty only) shall be paid by the Buyer to the Seller against presentation of the following documents:

EUR 0.2 million (say: EURO One hundred and seventy-six thousand only) for Line 2;

EUR 0.2 million (say: EURO One hundred and seventy-nine thousand one hundred only) for Line 3;

EUR 0.2 million (say: EURO One hundred and eighty-seven thousand five hundred and eighty only) for Line 4.

A. Signed commercial invoice in 6 (six) originals.

B. 'Certificate for acknowledgement of the Expiration of 12-month after Final Acceptance Certificate or Deemed Acceptance Certificate' issued by the Seller and signed by Seller and Buyer and/or End-User in 1 (one) original and 2 (two) photocopies.

C. Bank Guarantee covering 5% of the total amount of each line specified in clause of Imported Equipment and valid until the end of the Warranty Period."

It is undisputed that the Lines of Imported Equipment were delivered to the End-User Company C and foundation inspection was conducted in February through April 2018. There was no erection and commissioning conducted by the supplier Company A in Contract II.

The parties disputed on the reason for the failure of erection and commissioning. Contract II provide as follows:

"The Erection of the Contract Equipment shall be carried out by the Buyer's personnel under the supervision of the Seller's personnel. No-load and load commissioning and Test(s) should be carried out and be responsible by the Seller with the assistance of Buyer's personnel, the detail information refers to the Appendix 1 of the present Contract. The Seller's technical personnel shall bring along their own judgment and special instruments and tools used for adjustment.

Two (2) months before the beginning of Erection, the Buyer shall nominate 1 (one) General Site Representative and inform the Seller in writing and the Seller shall nominate 1 (one) General Site Representative for the Erection phase and 1 (one) General Site Representative for the commissioning phase and inform the Buyer in writing. Such General Site Representatives shall deal with all technical matters in connection with the present Contract during the period starting from Erection up to the Final Acceptance Test of the Contract Equipment. Detailed arrangement shall be made through friendly consultation by the General Site Representatives of both parties. The General Site Representatives of both parties shall fully co-operate to complete construction of the Contract Equipment according to the General Time Schedule of Appendix 10.

Before the Erection begins, the Seller's technical personnel shall give the detail explanation of the Erection drawings and descriptions of the methods and requirements of the Erection and Erection schedule. The Seller's technical personnel shall give technical instruction and supervision and practical demonstrations (if necessary) for the Erection work and take part in the inspection and test of Erection quality of all the Contract Equipment and confirm the Erection quality of the Contract Equipment."

Evidence shows that the Claimant refused, partly on ground that Company C disagreed to sign the Certificate of Acknowledgement under Contract I and partly because it needed to "find agreement" with Company C before it commences installation, to fulfil its obligation of erection supervision, commissioning and test, even after Company C notified it that the equipment foundation and installation conditions were available for the Contract II Equipment in June 2018.

At the time of the notification from Company C, some of the Claimant's engineers were at the location of Company C, but no one was implementing Contract II. Failure of the Claimant to erect and commission the Contract II Equipment shall have legal consequences,

and the Respondent requested the Claimant to undertake the legal consequences in its counterclaims.

Based on the above-mentioned evidence, the Respondent argued that the Claimant was unwilling to perform its remaining contractual obligations under Contract II. Since the Claimant refused to fulfill the obligations of technical instruction for the erection work and of the commissioning, the final acceptance of the Contract Equipment cannot be conducted, therefore the Contract Equipment is still within the warranty period. The Claimant has the obligation to issue the Bank Guarantee for the warranty period. Therefore, it shall not have the right to claim the remaining Contract Price of Contract II.

The Claimant argued that it did not proceed to the erection and commissioning services because the Respondent failed to sign DAC and make payment, as agreed, under Contract II.

The Tribunal finds that the Claimant apparently *chose* to suspend performance of its obligations under Contract II, pending payment issues to be resolved. This choice of suspension should have had reasonable grounds to justify. Linking the claim for payment to the obligation of erection and commissioning is not proper, in the circumstances of the case of equipment supply. The Claimant chose to suspend its erection and commissioning services when the Contract II Equipment arrived and foundation inspection was completed.

The contract terms on installment payments are subject to the satisfaction of specific conditions as provided under Contract II, which do not relate expressly to the performance of erection and commissioning obligations of the Claimant. Having said that, the fact that the Claimant delivered the equipment to the End-User is a matter of undisputed fact in the case of Contract II. The Tribunal noted that the DAC payment for Contract II is subject to the FAC and the DAC signed by the representatives of both parties. While the Respondent could have signed the FAC or DAC upon arrival of the equipment, and according to the punch list of the parties, the Respondent did not proceed to issue the FAC or the DAC at the time, making the payment process suspended.

In response at the hearing to the question why the amount was not paid, the Claimant said the Respondent simply did not want to make the payment. The DAC payment is part and parcel of the agreed price of the Contract II Equipment. As Buyer, the Respondent should make payment as agreed and according to the agreed conditions. The Respondent alleged delay that was caused due to government circular on environmental protection. This allegation cannot justify the delay in making the payment according to the contract requirements. Under the *PRC Contract Law*, when certain conditions were not fulfilled

because one party's action stopped that/those condition(s) from being fulfilled, the condition(s) shall be deemed to have been fulfilled.

In this case, simply upon the fact that the goods arrived and if there is no quality issue found, the payment should have been made according to the agreed installment payment schedule. In respect of the first item of claim for the 10% DAC payment, the Tribunal is of the view that in the absence of clear evidence of defects of the goods in Contract II, the Respondent should have paid the DAC but failed to do so. Therefore, the conditions for the 10% DAC payment should be deemed to have been satisfied and the claim for the 10% DAC payment should be upheld in this case.

The fact in this case shows that the Claimant did not provide the required technical services for assisting the erection and commissioning of the equipment. This failure costs entitlement that the Claimant receives any fees for the technical services provided in Contract II. Therefore, the portion of the required service fee in the amount of EUR 0.4 million shall be deducted from the DAC payment to the Claimant. This deduction is mandated in accordance with the fairness principle under Chinese law. Since the Claimant did not provide the technical services, it is not acceptable to receive any payment for technical services under Contract II.

Regarding the second item of claim for the 10% Warranty Payment, as it related to the sequence of events in the case of performance, and to the satisfactory document requirements, including the Bank Guarantee of 5% which was not issued from the Claimant in this case as well, the claim of the 10% Warranty Payment cannot be upheld by the Tribunal to its full extent. The Claimant stated that the Respondent never requested the Bank Guarantee. This statement is simply not reasonable, as the obligation of providing a Bank Guarantee of 5% is a provision in the Contract which the Claimant signed as a party, and which binds itself from the date of Contract II. The Claimant's failure to provide the Bank Guarantee shows that it did not perform the contractual requirement associated with its warranty obligations of the Seller under the Contracts. As such, it should bear the corresponding legal consequences of such non-performance.

Further, in the view of the Tribunal, the Claimant's failure to supervise the erection and commissioning of the Contract Equipment lacks legal and contractual basis. In this case, the Claimant as the Seller knows that the Buyer has paid 80% of the Contract Price. The Seller should have kept on performance of contract regarding its erection and commissioning obligations. Failure to do so would likely entitle the Buyer to suspend making further payment under Contract II. In the view of the Tribunal, the Claimant's claim for the 10% Warranty

Payment connected with the Claimant's warranty obligations shall only be supported 50% in this case as a result of the Claimant's failure to provide erection supervision service. The Claimant's failure to supervise the erection and commissioning of the Equipment and failure to issue the Bank Guarantee of 5% is a fault of itself. The dismissal of the other 50% of the 10% Warranty Payment is a result of applying the rule of fairness and reasonableness under Chinese law, without prejudice to the right of the Respondent in securing replacement services and counterclaim for its losses.

Issue 5. As to the Claims and Counterclaims

Based on the above reasons, the Tribunal considers dealing with the claims and counterclaims as follows:

(1) Claim — Whether the 10% CA12 in Contract I was payable and should be paid

As noted above, the claim for CA12 in Contract I should be supported to the extent of 70% of the amount. The calculation is as follows:

Awarded amount: around EUR 0.1 million = around EUR 0.2 million × 70%

Interest accrued on this amount from March 2018 at the annual rate of 4.75% to August 2019 shall be calculated and paid by the Respondent, and interest accrued from August 2019 to the date of actual payment shall be calculated and paid by the Respondent in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre (全国银行间同业拆借中心) as authorized by the People's Bank of China.

(2) Claim — Whether the outstanding amounts of 20% payment in Contract II were payable and should be paid

10% DAC Payment

As noted above, the claim for payment of around EUR 0.5 million, the first 10% DAC payment, is to be supported as this is part of the agreed instalment payment for the price of the Contract Equipment. As Seller, the Claimant is entitled to the installment payment under Contract II. However, the amount of technical services EUR 0.4 million must be deducted from this payment, because the Seller did not provide such technical services under Contract II. Therefore, the awarded amount is calculated below:

Awarded amount: around EUR 0.2 million = around EUR 0.5 million – around EUR 0.4 million

Interest accrued on this amount from November 2016 at the annual rate of 4.75% to August 2019 shall be calculated and paid by the Respondent, and interest accrued from August 2019 to the date of actual payment shall be calculated and paid by the Respondent in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

10% Warranty Payment

The claim for the Warranty Payment of final 10% of EUR 0.5 million is to be supported to the extent of **fifty percent (50%)**. This is partly because the Claimant failed to issue any Bank Guarantee covering 5% of the total amount of each line of the Imported Equipment for purpose of the warranty obligations. And failure by the Claimant to perform its obligations, including its technical services obligations under the Contract, does not justify its receiving the full amount of the final portion of the 10% Warranty Payment either.

Therefore, the awarded amount is calculated below:

Awarded amount: around EUR 0.3 million = around EUR 0.5 million × 50%

Interest accrued on this amount from November 2016 at the annual rate of 4.75% to August 2019 shall be calculated and paid by the Respondent, and interest accrued from August 2019 to the date of actual payment shall be calculated and paid by the Respondent in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

In addition, it is noted that the Respondent has taken "replacement measures" for erection and commissioning of the Contract Equipment due to failure of the Claimant's providing technical supervision services. The Claimant suffered from loss of 50% of the 10% Warranty Payment by its failure to perform its contractual obligation of providing a Bank Guarantee and of provision of its technical supervision services. The forfeiture of performance on the part of the Claimant effectively means the abandonment of the 50% of the 10% Warranty Payment under Contract II. This forfeiture does not prejudice the right of the Respondent's counterclaim for additional costs incurred as a result of the "replacement measures" taken by the Respondent (see further discussions below).

In short, the Claimant's request of 20% outstanding payment under Contract II is supported to the extent of the first 10%, with deduction of the contractual price for technical

services. The second 10% installment of Warranty Payment is supported only to the fifty percent (50%) extent, as a result of the failure of the Claimant to provide a Bank Guarantee of 5% and failure to provide technical supervision services under Contract II, in accordance with the fairness and reasonableness principle under Chinese law.

(3) Claim — Whether interest should be bearing on the unpaid sum

As noted above, interest accrued on the amount payable from its due date at the annual rate of 4.75% to August 2019 shall be calculated and paid by the Respondent, and interest accrued from August 2019 to the date of actual payment shall be calculated and paid by the Respondent in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

(4) Claim — Whether the requested AMD charges are payable

The Claimant claimed that there were AMD charges of around EUR 70,000 and Company B, as the Buyer, should have paid such actual man-day charges in respect of the engineer's time spent on the project in Contract I. The Respondent disputed some of the time sheet recorded by the engineers. The Respondent alleged overcharge of AMD services but did not deny completely the existence of unpaid AMD services.

In view of the evidence submitted by the Claimant, the Tribunal hereby permits the AMD charges to the extent of 80% of the amount claimed. The calculated is as follows:

Awarded AMD charges: around EUR 60,000 = around EUR 70,000 × 80%

As it is determined hereunder that the above awarded amount of AMD charges is due, interest accrued from the date of this Award shall be calculated and paid by the Respondent in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

(5) What counterclaims of Company B should be supported

As noted above, since Company C is not a party to the arbitration (lacking party standing), the counterclaims that have been framed in the name of Company C's losses cannot be supported by the Tribunal, as otherwise, there would be a procedural defect in this arbitration.

To the extent that the counterclaims are framed in the name of Company B and proved as Company B's losses or anticipated losses, such counterclaims are to be considered as

falling within the scope of jurisdiction of the Tribunal, subject to the rules of evidence and the principle of fairness and reasonableness under Chinese law.

Specifically, the counterclaims filed by Company B in this case are determined as follows:

(i) Counterclaim for repair costs under Contract I

This counterclaim regards the order that the Claimant bear the costs in the amount of around EUR 0.5 million, converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020, to be paid for repairing and altering the Contract I Equipment, and that the Respondent has the right to deduct such costs from the Contract Price of Contract I.

In its final submission, the Respondent stated:

> "*Company B had no other choice, but asked Company C to engage a third party to repair and alter the Contract Equipment for and on behalf of Company B. Company C contacted Company D and asked Company D to offer a price for the repair and alteration of the Contract Equipment for and on behalf of Company B. Company D provided a fee quote in the amount of around RMB 4 million, converted into around EUR 0.5 million at the exchange rate of EUR 1 to RMB 7.6994 on 13 January 2020.*
>
> *It is obvious that as Company A refused to solve the quality problems of the Contract Equipment and to perform its warranty obligation anymore, the Buyer of the Contract Equipment, Company B, had to pay a third party for repairing the Contract Equipment itself or through Company C acting for and on its behalf. Therefore, the cost of repairing the Contract Equipment is the anticipated loss of Company B that will definitely be occurred to Company B, and shall be borne and indemnified by Company A due to Company A's breach of contract in accordance with Article 107 of the PRC Contract Law.*"

Article 107 of the *PRC Contract Law* provides that "*a party who fails to perform the contractual obligations or perform its contractual obligations in violation of contract provisions, shall undertake liabilities for breach of contract such as continuing performance, adopting remedial measures or compensation of losses*". According to Chinese law and jurisprudence on contract damages, the losses suffered by the non-breaching party due to the breach are to be compensated.

The Respondent has submitted a Fee Quote from Company D for repairing services in the amount of around RMB 4 million, converted into EUR 0.5 million at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020. Such amount was presented as anticipated losses of the Respondent. The Fee Quote was offered from Company D to Company C. Company C is not a party to this arbitration as above discussed, Company C cannot counterclaim its own losses against Company A. Company B as the Respondent can counterclaim its losses, after it satisfies its burden of proof. In this regard, the Respondent has provided evidence to the effect that Company C had anticipated losses under the Fee Quote which was allegedly incurred on behalf of Company B.

Considering the fact that both the Claimant and the Respondent signed the Memo No. 1 to Contract for Coil Packing Line for Hard Alloy in March 2017 which acknowledged that the original Contract had not accomplished Final Acceptance and the Seller had not fulfilled guarantee obligations of original Contract Equipment, it is reasonable that the Claimant would foresee that the Respondent would suffer losses due to the failure of complying with its guarantee obligations of the original Contract Equipment. Such losses, to the extent of proof and proportionality, should be accounted for on the part of the Claimant as the Seller of the Contract Equipment.

Article 113 of the *PRC Contract Law* provides that where a party fails to perform a contract or performs the contract not in accordance with its terms, causing losses to the other party, damages for breach of contract shall include the losses suffered by the other party, including loss of expected interests had the contract been performed, but shall be limited to the extent of losses to which the non-breaching party foresaw or could have foreseen at the time when the contract was concluded.

The anticipated losses of Company C claimed by the Respondent in its counterclaim must be examined under the terms of Contract I. On the one hand, Company C is not a party to this arbitration, so it lacks locus standi to counterclaim these losses; on the other hand, the Respondent who has the party standing in this arbitration was authorized by Company C to file the counterclaim but needs to satisfy its burden to prove the extent of such losses and the losses are due to the failure of the performance by the Claimant in the case of Contract I.

In the circumstance of the case in Contract I, Respondent could have obtained direct evidence for the repair measures, such as entering acceptance or co-acceptance of Fee Quote in its own name. However, the current evidence offered to Company C is of less evidential weight than the Respondent's own direct evidence, such as documents framed or formed in its own name, in the case of the counterclaim.

In addition, as between the Claimant and the Respondent, it must be noted that the Respondent as the Buyer had signed the Certificate of Handover (in February 2017). The Claimant relied on this document as FAC, because the document states "*prima facie* that *Prerequisites for installment of Final Acceptance Test have been met*". As such, the Respondent would be estopped, at the relevant time, from taking a stand that the Contract Equipment had quality problems after it signed the Final Acceptance Certificate in March 2017.

It followed that the Respondent would be prepared to make the payment for this 10% after signing of the FAC in March 2017. However, it did not make the payment as agreed. The Respondent failed to make payment as agreed, causing or contributing to the cause for the dispute to arise. The Respondent should be held liable for the legal consequences of such failure to make payment as agreed.

In view of this fault on the part of the Respondent or its agent in regard to the performance of the Contracts that *first* contributed to the arising of the dispute, taking into account the Claimant's claim for the 10% CA12 payment having been reduced by 30% due to the quality problems (see discussion in Part II Section 5 Item (a) above), and considering the weight of the evidence lying with Company C (a party that has no standing in the arbitration) instead of the Respondent in this case, the Tribunal holds that the counterclaim filed by the Respondent can be supported only to the extent of thirty percent (30%) as an appropriate proportion of the counterclaim for losses suffered by the Respondent.

For reasons stated above, the calculation of the awarded amount under this item of the counterclaim for the repair costs is as follows:

Awarded amount: around EUR 0.2 million = around EUR 0.5 million × 30%

As a matter of fairness, interest accrued on this amount shall be calculated and paid to the Respondent by the Claimant in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China. As it is an awarded amount, this amount is due from the date of the Award.

(ii) Counterclaim for liquidated damages

This item of counterclaim is related to the order that the Claimant pays to the Respondent the liquidated damages in the amount of around EUR 30,000 for not reaching the guarantee figures of the Capacity, Availability, Accuracy of Entry Scale and Accuracy of Exit Scale. This is directly read from and evidenced by Contract I. The Tribunal finds that

the calculation of liquidated damages conforms to the terms of Contract I. Therefore, the item of counterclaim raised by the Respondent is fully supported:

Awarded amount: around EUR 30 thousand

(iii) Counterclaim for return of the training fee

This item of counterclaim relates to the order that the Claimant returns to the Respondent the training fee in the amount of around EUR 4,000 having been paid to the Claimant.

It is clear that the Contract had included the training fee of around EUR 4,000. There is no evidence that the Claimant has provided such training to the representatives of the Respondent. Therefore, the item of this counterclaim for return of this training fee is to be supported:

Awarded amount: around EUR 4,000

(iv) Counterclaim for the costs of replacement erection under Contract II

This relates to the order that the Claimant indemnifies the Respondent the costs in the sum of around EUR 0.3 million, converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020, occurred for engaging Company D to take the place of the Claimant and carry out the erection, commissioning, performance test and acceptance of the Contract II Equipment.

The Claimant stated that the meeting in June 2018 demonstrated that both parties confirmed to solve the DAC before commencing installation in Contract II.

As time passed, the Respondent requested the Claimant to assist in "installing and debugging" the Contract II Equipment. The Respondent's email to the Claimant in late June 2018, about a week after the meeting in mid-June 2018, stated:

> "*At present, the equipment foundation and equipment installation conditions are already available. But you have not yet arranged for personnel to install and debug. And some of you are in City M, but no one is implementing COM. II. Now there's no action in this project, and the consequences will be borne by you.*"

A request in writing was framed as the above. It does not contain sincere words of request in the business context and did not achieve the purpose of requesting email.

The Respondent further asked the Claimant to do installation and commissioning in August and September of 2018, with no result. The Claimant insisted that the parties "find agreement" before installation work would be carried out.

There were various emails exchanged between representatives of the parties in respect of performance of Contract I and Contract II. No work of erection and commissioning was carried out from the Claimant eventually.

The Respondent sought replacement services by entering into a Technical Service Agreement with Company D in October 2018, so as to mitigate further losses. The costs of replacement services were around RMB 5 million. The Respondent argues that Company C has engaged Company D to complete the erection, commissioning, performance test and acceptance of the Contract II Equipment, and the Respondent has no further obligation to pay the technical service fee in the amount of EUR 0.4 million stipulated in Contract II to the Claimant anymore. The difference between RMB 5 million and EUR 0.4 million, being around EUR 0.3 million converted at the exchange rate of "EUR 1 : RMB 7.6994" of 13 January 2020, and this exceeding amount is the loss of Company C and shall be indemnified by the Claimant in accordance with Article 107 of the *PRC Contract Law* (as noted above).

The Claimant stated that Company C was not eligible to counterclaim against Company A, and in addition, the Respondent should have signed the FAC and DACs which it did not sign before its first notice to Company A to install, and both had actually agreed to find agreement with DAC (i.e., payment first) before erection. So the counterclaim should be dismissed.

The Tribunal notes that Article 119 of the *PRC Contract Law* provides: "*where the non-breaching party took remedial measure to avoid losses from expanding, the reasonable costs of such measures should be undertaken by the breaching party.*"

By reference to international rules, the Tribunal also notes the *CISG* permits a party to take remedial measures to mitigate further losses under Article 77:

> "*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.*"

The Claimant failed to respond positively on the technical supervision obligation of erection and commissioning, pending remaining payment issue to be resolved. However, it

should be noted that the Claimant relied on the Respondent with respect to the appropriate time to provide the erection and commissioning, when they agreed "to find agreement" for the erection and commissioning. The Respondent delayed in signing documents and making available the payment alleging causes due to governmental environmental protection. This delay appears to be unreasonable as payment is dependent on arrival of the equipment and the signing of documents, and then usually completed through normal banking transaction. There is not very much relevance to environmental protection policy in the locality. Further, it should be noted that the Claimant had, by that time effectively received 90% of the payment for the Equipment under Contract I and 80% of the Contract Price under Contract II. The Claimant's unreasonable failure to assist in the erection and commissioning, upon notice, is not acceptable in international equipment trading, in violation of Contract II. The Claimant knew clearly that the Contract Equipment required it to conduct "no-load" and "load-commissioning" tests. Supervision and technical services (including giving detailed explanation of erection drawings and descriptions of methods and requirements of erection and erection schedules) fall within its responsibility.

The Claimant unreasonably refused to provide technical services as required under Contract II, when the Respondent had paid by that time 80% of the Contract Price. While this may be due partly to the failure of the Respondent to sign off the FAC and the DACs, the obligation to provide technical supervision services in respect of erection and commissioning is part and parcel of the obligation of the Seller of the Contract II Equipment, and it was not expressly made subject to the installment payment schedules under Contract II.

The Tribunal would permit the Respondent to counterclaim its extent of anticipated losses under this item. Under Contract II, Company B and Company C are jointly and severally liable to Company A for the fulfillment of contractual obligations. Further, while the Claimant's unreasonable refusal to provide technical supervision on erection and commissioning should also be accounted for in relation to this item of counterclaim, it should also be noted that the Respondent consented to the various minutes of meetings regarding the status of erection. On balance, the Tribunal finds that it is fair and reasonable for the Claimant to undertake 50% of the total amount of counterclaim from Company B under this item.

The calculation is as follows:

Awarded amount of this counterclaim: around EUR 0.1 million = around EUR 0.3 million × 50%

Interest to be accrued on this amount shall be payable by the Claimant to the Respondent as of the date of this Award to the date of actual payment in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

(vi) Counterclaim for costs of replaced warranty obligation under Contract II

This item of counterclaim relates to the order that the Claimant indemnifies the Respondent the cost in the sum of EUR 0.3 million, converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020, to be occurred for engaging Company D to take the place of the Claimant and carry out the quality warranty of the Contract II Equipment.

The evidence shows that the Contract Equipment was not installed, and the commissioning was not done by the Claimant in this case. The Respondent engaged Company D to erect the Contract Equipment and provide follow up services to the Respondent. As such, the Respondent and Company C themselves undertook the risks associated with the engagement of Company D in respect of the warranty services of the Contract Equipment. Had the Claimant performed the erection and commissioning of the Equipment, the warranty obligations will be taken care of by the Claimant. Because the Claimant failed to do the erection and commissioning of the Equipment, the Respondent took remedial measures to have the Equipment erected and commissioned by a third party. According to Article 119 of the *PRC Contract Law*, the reasonable costs of the remedial measures should be undertaken by the Claimant.

In effect, in the view of the Tribunal, the Claimant's failure to provide its technical services under the Contract released partly the Respondent from its obligation of making full payment of the remaining portion of the Contract Price. By managing and controlling the erection and commissioning on its own, the Respondent took up remedial measures and the risks of the warranty period on its own. Logically, the risks associated with warranty obligation will be taken over by the Respondent after the erection and commissioning by Company D. However, the Tribunal support the counterclaim of the Respondent under this item to a reasonable extent.

Under Contract II, Company B and Company C are jointly and severally liable to Company A for the fulfillment of contractual obligations. Since between Company B and Company C, the most liability Company B could have been apportioned with is 50% of the total liability as between the two when there is no express apportionment agreement between

Company C and Company B, the Tribunal would allow Company B to counterclaim 50% of the amount requested in this item.

Accordingly, the calculation is as follows:

> Awarded amount of counterclaim: around EUR 0.1 million = around EUR 0.3 million × 50%

Interest accrued on this amount shall be calculated and paid to the Respondent by the Claimant from the date of this Award to the date of actual payment in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

(vii) Counterclaim re legal costs

This counterclaim relates to the order that the Claimant indemnifies the Respondent the legal fee in the amount of EUR 0.1 million converted at the exchange rate of "EUR 1 : RMB 7.6994" on 13 January 2020.

The majority of the Tribunal agree that the legal fees of the parties in this case should be undertaken by the parties themselves. This item of counterclaim is to be rejected.

(viii) Arbitration costs

Respondent requests the order that the Claimant bear all the arbitration costs.

The majority of the Tribunal agrees that the arbitration costs of the case shall be shared on 40%:60% basis, as between the parties. The Claimant has paid for the claims, and the Respondent has also paid for the counterclaims. The Respondent shall pay to the Claimant to compensate its arbitration fees.

III. AWARD

Based on the above reasons, the majority of the Tribunal awards as follows:

A. Claims

1. The Respondent shall pay to the Claimant around EUR 0.1 million under Contract I, plus interest of such amount at the rate of 4.75% per annum from March 2018 to August 2019, and interest accrued from August 2019 to the date of actual payment in

accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

2. The Respondent shall pay to the Claimant around EUR 0.2 million under Contract II, plus interest of such amount at the rate of 4.75% per annum from November 2016 to August 2019, and interest accrued from August 2019 to the date of actual payment in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

3. The Respondent shall pay to the Claimant around EUR 0.3 million under Contract II, plus interest of such amount at the rate of 4.75% per annum from November 2016 to August 2019, and interest accrued from August 2019 to the date of actual payment in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

4. The Respondent shall pay to the Claimant around EUR 60,000 to compensate the Claimant for its AMD costs under Contract I, plus interest of such amount at the rate of 4.75% per annum from the date of this Award to the date of actual payment in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

B. Counterclaims

5. The Claimant shall pay Respondent around EUR 0.2 million under Contract I, plus interest accrued from the date of this Award to the date of actual payment in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

6. The Claimant shall pay the Respondent EUR 30,000 under Contract I.

7. The Claimant shall pay the Respondent EUR 4,000 under Contract I.

8. The Claimant shall pay the Respondent EUR 0.1 million under Contract II, plus interest accrued from the date of this Award to the date of actual payment in accordance with the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

9. The Claimant shall pay the Respondent EUR 0.1 million under Contract II, plus interest accrued from the date of this Award to the date of actual payment in accordance with

the loan market prime rate (LPR) published by the National Interbank Funding Centre as authorized by the People's Bank of China.

C. Others

10. All other claims and counterclaims are hereby rejected.

11. The total arbitration fees shall be undertaken by the Claimant the Respondent in 40%:60% shares. The arbitration fees advanced by the Claimant shall be offset against the above amount. The Respondent shall pay to the Claimant.

All payments as awarded above shall be made within 30 days after the date of the Award.

This Award is final and shall be effective on the date when it is issued.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

A Chemical Industry Co., Ltd.

Claimant

v.

B Insurance Company China Ltd.

Respondent

Matter for arbitration: Disputes over insurance policy

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. INTRODUCTION

A. The Parties and Their Representatives

1. 中国A化工公司 (**A Chemical Industry Co., Ltd.**), a company incorporated under the law of the People's Republic of China ("**China** or **PRC**") in M Province, China, hereinafter "**Claimant**". Claimant is represented by C.

   中国B保险公司 (**B Insurance Company China Ltd.**), a company incorporated under the law of China, hereinafter "**Respondent**". Respondent is represented by D, E, F, F, G and H.

B. Arbitration Agreement, Applicable Law and *Arbitration Rules*

2. The arbitration agreement in this arbitration is found under the Policy of Insurance issued by Respondent as the insurer (referred to the "Company" in the Insurance Policy) in April 2018 to Claimant as the insured. It reads as follows:

   "*If the Insured and the Company fail to agree on certain coverage provided under this Policy and/or the amount of loss, such dispute shall be submitted to the China International Economic and Trade Arbitration Commission (the "CIETAC") for arbitration in L in accordance with the CIETAC Arbitration Rules in effect at the time of applying for arbitration, unless otherwise provided in this clause. Once the application for arbitration is accepted by the CIETAC, the Insured and the Company each will, on the written demand of either, select a competent and disinterested arbitrator from or out of the Panel of Arbitrators provided by the CIETAC.*

   Each will notify the other of the arbitrator selected within 20 days of such demand.

   The arbitrators will first select a competent and disinterested umpire. If the arbitrators fail to agree upon an umpire within 30 days, and then, on the request of the Insured or the Company, the umpire will be selected by the Chairman of the CIETAC. The arbitrators selected by the parties will then arbitrate the concerned coverage provided under this Policy and/or the amount of loss based on the application for arbitration and upon arbitrating the amount of loss, stating separately the Actual Cash Value and replacement cost value as of the date of loss and the amount of loss, for each item of physical loss or damage or

if, for TIME ELEMENT loss, the amount for each TIME ELEMENT coverage of this Policy.

If the arbitrators fail to agree, they will submit their differences to the umpire. An award agreed to in writing by any two will determine the concerned coverage provided under this Policy and/or the amount of loss based on the application of arbitration and will be final.

The Insured and the Company will each:

(1) Pay its chosen arbitrator; and

(2) Bear equally the other expenses of the arbitration and umpire.

A demand for ARBITRATION shall not relieve the Insured of its continuing obligation to comply with the terms and conditions of this Policy, including as provided under REQUIRMENTS IN CASE OF LOSS.

The Company will not be held to have waived any of its rights by any act relating to arbitration."

3. In respect of the applicable laws of this arbitration, the "Declarations" Section of the Policy states as follows:

> "*This policy will be governed by the laws of the People's Republic of China (excluding Hong Kong, Macau and Taiwan).*"

The Tribunal finds it appropriate that the Parties' mutual wish on this matter should be respected, and the applicable laws of the mainland China shall apply in this arbitration.

4. The applicable rules of this arbitration shall be the *CIETAC Arbitration Rules* that took effect as of 1 January 2015 (the "**Arbitration Rules**").

C. The Arbitral Tribunal

5. In composing the arbitral tribunal, the Parties did not follow the method provided for in the Policy of Insurance quoted above to appoint an umpire. Instead, they adopted the approach under the *Arbitration Rules*. Claimant nominated X as arbitrator and Respondent nominated Y as arbitrator. The chairman of China International Economic and Trade Arbitration Commission ("**CIETAC**") appointed Professor Z as the presiding arbitrator since the Parties failed to jointly nominate within the prescribed period or jointly entrusted the chairman of CIETAC to appoint the presiding arbitrator.

6. The above three arbitrators formed the Arbitral Tribunal (the "**Tribunal**") on 3 April 2020.

7. The Tribunal is assisted by the case manager W working for CIETAC.

II. PROCEDURAL HISTORY

8. In June 2019, Claimant submitted its Application for Arbitration and attachment thereto, Identity Certification and Power of Attorney to the Arbitration Court of CIETAC.

9. Since Claimant nominated X as arbitrator of this case, and the Respondent nominated Y as arbitrator of this case and X and Y failed to agree upon a presiding arbitrator, the Chairman of CIETAC had appointed Z as the presiding arbitrator of this case. The Three-Arbitrator Tribunal was formed in April 2020 to hear this case. The Notices on Formation of Arbitral Tribunal were delivered to the Parties with three Declarations signed by each arbitrator. Both Parties confirmed the formation of the Tribunal subsequently.

10. In May 2020, the Tribunal ordered Procedural Order No.1 to both parties. According to Procedural Order No.1, it is directed that after considering the opinions of both parties, the language of the arbitration shall be English, but the language to be used in the oral hearing shall be Chinese as an exception.

11. After consultation with the Arbitration Court, the Tribunal decided to hold an oral hearing in August 2020. In June 2020, Procedural Order No.2 issued by Tribunal and the Notice of oral hearing were sent to both parties.

12. With the agreement of the Parties, the oral hearing was postponed to and held in August 2020 in L. Claimant and Respondent were represented by their authorized representatives. Both Claimant and Respondent made oral presentations of their respective cases, presented the original copies of their evidence, debated on the factual and legal opinions, and answered questions raised by the Tribunal. The Parties also submitted supplementary materials in the hearing.

III. THE FACTUAL BACKGROUND

13. The disputes between the Parties have arisen out of a property insurance policy (the "**Policy**") issued by Respondent as insurer to Claimant as one of the insured on 16 April 2018.

14. Claimant is a Sino-foreign joint venture operating a plant located in M Province. It is the manufacturer of PAP, a raw material used in the production of paracetamol. The main raw materials used in the production of PAP are PNCB (P-Chloronitrobenzene) and hydrogen. Claimant's foreign shareholder is a subsidiary of Company I, formerly known as J, a French pharmaceutical conglomerate with operations around the world.

15. FM Global ("**FM**") is a global insurance conglomerate with offices around the world. Company I is a client of FM who issued a master policy dated December 2017 to Company I for its assets around the world, including its subsidiaries' assets in China.

16. FM works in cooperation with local insurers around the world to co-insure or reinsure for its clients' operations. Respondent, FM's local partner in China, issued the Policy to Claimant in this case through the arrangement and coordination of FM.

17. On 3 May 2018, an explosion (the "**Accident**") occurred at No.1 hydrogenators ("**HG1**") located in Workshop 1 of Claimant's plant, with the gas inside HG1 blowing out, damaging the pressure meter therein, resulting in the death of a worker operating the hydrogenators and damaging the roof of Workshop 1.

18. As a result, the Taixing Safe Production Supervisory Bureau (the "**Safety Bureau**") on the same day issued an administrative decision titled Onsite Measure Decision (the "**Stop Order**") ordering the immediate suspension of production of the plant. After three months, the plant restarted production fully on 4 August 2018.

19. During the negotiation on the insurance indemnity to Claimant, a dispute occurred between the Parties over the Recoverable Losses under the Policy. The Parties failed to settle their dispute and Claimant commenced this arbitration.

IV. THE RELIEF SOUGHT BY CLAIMANT

20. Claimant seeks an award ordering Respondent to pay or reimburse Claimant within 30 days of the award date the following amounts:

(1) insurance indemnity of Gross Earnings loss for the period from 4 May 2018 to 31 May 2018 in an amount of RMB 15,100,000 ("**May Loss**");

(2) insurance indemnity of Gross Earnings loss for the period from 1 June 2018 to 2 June 2018 in an amount of RMB 1,800,000 ("**Early June Loss**");

(3) insurance indemnity of Gross Earnings loss for the period from 3 June 2018 to 30 June 2018 in an amount of RMB 24,900,000 ("**Late June Loss**");

(4) insurance indemnity of Gross Earnings loss for the period from 1 July 2018 to 31 July 2018 in an amount of RMB 34,490,000 ("**July Loss**");

(5) insurance indemnity of Gross Earnings loss for the period from 1 August 2018 to 7 August 2018 in an amount of RMB 720,000 ("**August Loss**");

(6) insurance indemnity of Gross Earnings loss for the time of production needed to replenish the stock of 407.906 tons of products in an amount of RMB 4,200,000 ("**Stock Loss**");

(7) insurance indemnity of repair costs in an amount of RMB 300,00 ("**Repair Costs**");

(8) insurance indemnity of claims preparation costs in an amount of RMB 1,300,000 ("**Claims Preparation Costs**");

(9) reimbursement of Claimant's legal expenses it has incurred with respect to this case, including attorney fee in USD 200,000 (or RMB 1,300,000) and other expenses such as expert fees in an amount to be specified close to the end of the arbitration proceedings ("**Legal Expenses**");

(10) reimbursement of any amount in excess of half of the arbitration costs of the arbitration proceedings, which Claimant has advanced, unless Respondent has already borne half of the arbitration costs ("**Arbitration Costs**").

(11) insurance indemnity of Gross Earnings loss for the unsaved semi-variable costs in May 2018 in an amount of RMB 1,900,000 ("**May Semi-variable Loss**");

(12) insurance indemnity of Gross Earnings loss for the unsaved semi-variable costs in June 2018 in an amount of RMB 800,000 ("**June Semi-variable Loss**"); and

(13) insurance indemnity of Gross Earnings loss for the unsaved semi-variable costs in July 2018 in an amount of RMB 1,500,000 ("**July Semi-variable Loss**").

21. The above items aggregate in a sum of RMB 87,000,000 excluding items (9) and (10).

V. THE PARTIES ALLEGATIONS AND POSITIONS

A. Claimant's Allegations

22. Claimant alleges that after the issuance of the Stop Order by the Safety Bureau, it conducted internal investigation of the causes of the Accident and filed a preliminary cause report to the Safety Bureau in May 2018, and a more elaborate report in May 2018, with the final EHS report issued in August 2018.

23. Through an internal investigation, Claimant identified the root cause of the Accident as a failure by the operator to follow Claimant's safety control protocols due to lack of training of operators. As such Claimant had to redesign its operational process and strengthen its training and control programs. In order to assess whether the redesigned process and programs meet the requirements of the Safety Bureau, Claimant engaged "**K**", an independent consultant, to advise on the redesign and assess the soundness of the programs.

24. The revised final version of the K Assessment Report was produced and submitted to the Safety Bureau in June 2018 for comments and positive feedback from the Safety Bureau was received in July 2018.

25. During the period from June to July 2018, repair of the damaged roof of Workshop 1 was carried out and completed. However, as the Accident was still under investigation then, Claimant could not carry out any repair of HG1 until the investigation was completed and proposed rectification measures approved by the Safety Bureau.

26. An independent investigation team under the auspices of the Safety Bureau was set up after the Accident to investigate the causes of the Accident and an investigation report was issued in July 2018 laying out its findings.

27. An expert group set up at the request of the Safety Bureau held a meeting to review the rectification measures and issued its opinion on 25 July 2018.

28. Based on the expert group opinion, the Safety Bureau issued the formal permission to restart production in July 2018. On the same date, Claimant restarted production run of all the hydrogenators except HG1.

29. HG1 was repaired after the reproduction permission was received in July 2018. It was then put on test runs during July to August 2018. Satisfied with the test results, HG1 was restarted for partial production in August 2018 and full production in August 2018.

30. In order to assess the Recoverable Losses resulting from the Accident under the Policy, Claimant engaged "O", an internationally reputable loss adjuster, to prepare a loss adjustment report so that Claimant can claim under the Policy.

31. O issued a series of staged loss assessment reports, one of which was dated August 2018 ("**August Report**") and another dated September 2018 ("**September Report**"). According to the August Report, Claimant's Gross Earnings losses up to the end of July 2018 were RMB 78,500,000, and RMB 83,400,000 by the end of August 2018 as per the O September Report.

32. Based on the above O Reports, Marsh, on behalf of Claimant, issued a note to FM in September 2018 claiming for indemnity of RMB 85,800,000 ("**Total Losses**") comprising of Gross Earnings losses, Property Damage and some incidental costs.

33. During a meeting between Marsh and FM on 18 October 2018, inter alia, a claim of RMB 83,800,000 ("**Recoverable Losses**") was raised on behalf of Claimant. The Recoverable Losses were the result of deducting a deductible of RMB 2,000,000 from the Total Losses pursuant to the provision on deductibles of the Policy. Marsh also exchanged a number of emails with FM on the subject from September to November 2018.

34. FM, on behalf of Respondent, set out their positions in details and offered to pay Claimant only RMB 19,500,000 in settlement of all the claims in their email dated 31 October 2018. This position has been maintained by FM on behalf of Respondent until the present date. On the other hand, Claimant has largely maintained its position on the claim amount too, as shown in the letter dated 15 January 2019 issued by its counsel P to Respondent.

35. The main differences between the Parties' positions lie in which specific clauses Claimant can rely on to claim for indemnity of losses in the "Time Element" Section of the Policy and how long a period is. FM averred that Claimant is not entitled to the entire Gross Earnings losses incurred by Claimant for the whole period between 4 May 2018 and 7 August 2018 since not all such losses were "*directly resulting from physical loss or damage of the type insured*" to the insured property. In the best

scenario to Claimant, FM conceded that Claimant's losses may be covered under the "Crisis Management" Clause, for which a 30-day Period of Liability would apply pursuant to the terms of the Policy. According to FM's own adjuster's assessment, Claimant's Time Element loss ("**TE loss**") over a 30-day period from 4 May 2018 would stand at RMB 16 million. Based on this assessment and interpretation of the Policy terms, FM offered to settle all the claims in an amount of RMB 19,500,000.

B. Claimant's Positions

36. Claimant argues that firstly, Claimant believes it is entitled to claim May Loss and Early June Loss under the "Gross Earnings" Clauses (in the "Time Element" Section). Alternatively, should Claimant not be entitled to claim under the "Gross Earnings" Clauses, which Claimant denies, it can always claim such losses under (i) the "Crisis Management" Sub-clause ("Additional Time Element Coverage Extensions" in the "Time Element" Section), or (ii) the "Civil or Military Authority" Sub-clause ("Supply Chain Time Element Coverage Extensions" in the "Time Element" Section). This group of losses are reflected in the "Prayer for Relief" Section in the Request for Arbitration.

37. Secondly, Claimant is entitled to claim the Late June Loss, July Loss, August Loss and Stock Loss under the "Gross Earnings" Clauses for its losses sustained as a result of the Accident and shutdown for the period from June 2018 to early August until its stock was replenished to the pre-Accident level. The clauses to invoke for this claim are in the "Time Element" Section.

38. Claimant submits the above group of losses as claimed are indisputably directly caused by the physical damage of the type insured, i.e., the Accident, following which the Stop Order was issued by the Safety Bureau pursuant to the *Safe Production Law* and Claimant's production was suspended at the operation of law. The sequence of events was the blowing out of the gas and materials inside HG1 at the very first, followed by damaging of the pressure meter, followed by the death of the operator and damaging of workshop roof, followed by the Stop Order and Gross Earnings losses as claimed.

39. It is a trite theory and common sense that an end event which naturally transpires following a cause event as a matter of natural law will be considered as directly caused by the cause event even if there may be a few or numerous intermediate events which may have naturally ensued and interposed between the cause event and end event. In the present case, the Gross Earnings losses over the period from 4 May to

early August 2018 as claimed by Claimant was directly caused by the Accident (or the physical damage) as there was no fortuitous intervening event in between. Therefore, the losses as claimed fall under the scope of loss insured as provided in the "Time Element" Section.

40. Thirdly, Claimant is entitled to claim the Repair Costs of the damaged workshop roof and HG1. This loss is covered under the "Property Damage" Section of the Policy. This count of loss is reflected in the "Prayer for Relief" Section hereof.

41. Fourthly, Claimant is entitled to the Claims Preparation Costs, as reflected in the "Prayer for Relief" Section hereof, pursuant to the "Property Damage" Section.

42. Fifthly, Claimant is entitled to reimbursement of the Legal Expenses and Arbitration Costs as reflected in the "Prayer for Relief" Section hereof pursuant to the 2015 Rules and arbitration clause of the Policy.

43. Last but not the least, Claimant is entitled to claim the May Semi-variable Loss, June Semi-variable Loss and July Semi-variable Loss under the "Gross Earnings" Clause because the semi-variable costs reflected in those items were included as variable costs in the calculation of the May Loss, Early June Loss, Late June Loss and July Loss but were actually not saved due to the shutdown of production in those periods and therefore should be compensated in strict compliance with the measurement provision of Gross Earnings losses.

C. Respondent's Allegations

44. Respondent acknowledges virtually all factual events alleged by Claimant related to the issuance of the Policy and the Accident until the restart of production of Claimant's plant in early August 2018. However, it does object to the findings of the adjuster, O as instructed by Claimant, in its two adjustment reports.

D. Respondent's Positions

45. Respondent submits that the claims of Claimant are founded in neither fact nor law and should be rejected.

(1) Loss caused by the Stop Order are not TE loss under Respondent's TE Insurance

46. Respondent argues that the TE loss caused by the Stop Order is not covered by the insured TE loss as it did not directly result from physical loss or damage of the insured property.

47. The loss covered by the Policy TE Insurance refers to the loss directly resulting from the suspension of or limitation on the insured's production and operation which is caused by the physical damage of the property (generally the machinery or other production equipment) used by the insured for production and operation.

48. According to the Stop Order and the K Assessment Report, the decision made by the Safety Bureau to cease the production of the insured was based on the fact of the Insured's illegal operation which caused the serious safety accident and casualty and gave rise to hidden risks of a serious accident against work safety in the future, rather than the physical loss of Claimant.

49. Claimant claimed a total of 96 days of TE loss calculated from 4 May 2018 to 7 August 2018, among which only a maximum of 14 days of TE loss due to the maintenance of HG1 and the roof structure of Workshop 1 belonged to the TE loss directly resulting from physical loss or damage of the risks insured. That is to say, the other 82 days of TE loss which were simply caused by the Stop Order for future safety consideration, is not covered by TE Insurance.

50. In any event, the proximate cause of the TE loss during the 3 months suspension period claimed by Claimant is the Stop Order, instead of the explosion.

51. The negligent and non-compliant operation by Claimant's managers and staffs of the Claimant No. 1 Workshop, lax operating rules, rubber-stamp work approval procedures, and improper performance of their duties led to the Safety Bureau's concern that Claimant's site had hidden risks which could lead to another serious accident. As a result, the Safety Bureau issued the Stop Order in conformity with the *Work Safety Law*, giving the Insured a period of time to identify and eliminate any hidden risk of a serious accident.

52. Accordingly, the "proximate cause" for the 3 months suspension period was the administrative decision issued by the Safety Bureau, rather than the explosion. The

claimed loss for the three months suspension period, accordingly, fall beyond the ambit of the TE insurance.

(2) The TE loss caused by the Stop Order is subject to applicable time limit of 30 consecutive days.

53. Contractually, Respondent is liable only for up to 14 days of TE loss incurred during the roof repair period and the concurrent repair period for the impaired hydrogenator. However, considering the long-term cooperative relationship with its client and its good faith effort to provide its customers with substantial support, Respondent agrees that Claimant may claim for the TE loss caused by the Stop Order based on the "Crisis Management" Clause or "Civil or Military Authority" Clause under the "Time Element Coverage Extensions".

54. In the "Declarations" Section of the Policy, the time limit for the "Crisis Management" Clause and "Civil or Military Authority" Clause is 30 consecutive days. Therefore, Respondent maintains its offer to extend coverage to Claimant, *ex gratia*, that even assuming the TE loss caused by the Stop Order issued by the Safety Bureau might fall within the "Time Element Coverage Extensions" by citing the "Crisis Management" Clause or "Civil or Military Authority" Clause, such possible claim of Claimant is subject to applicable time limit of 30 consecutive days.

(3) Claimant's averred loss calculation methods are incorrect, and the calculation result under the report issued by Q shall prevail.

55. During the insurance claim process, Respondent hired Q to assess the TE loss based on the data provided by Claimant. On 28 May 2018, McLaren issued the First Report, which assessed that the TE loss suffered by Claimant within the period of liability of 30 days is RMB 16,300,922.

56. On 12 October 2018, McLaren issued the Final Report, which assessed that the TE loss suffered by Claimant within the period of liability of 30 days totals RMB 14,209,654 and RMB 12,368,419 with a deductible of RMB 1,950,993 deducted.

57. Therefore, even if applying the "Crisis Management" Clause and "Civil or Military Authority" Clause and computing the TE loss of Claimant as 30 days, Claimant's eligible claim under the Policy would be RMB 12,368,419 (with a deductible of RMB 1,950,993 deducted).

(4) The repair costs claimed by Claimant are unsupported by evidence

58. Claimant did not submit any relevant evidence on these costs to repair the roof or the impaired hydrogenator during the arbitration process. The survey costs for the Investigation Group and the design review service fee for K that Claimant claims for are not even repair costs.

59. Therefore, the repair costs claimed by Claimant are unsupported by evidence. Respondent does not recognize such costs and reserves the right to raise further objections.

(5) The Stock Loss claimed by Claimant falls outside of the insurance coverage and the stock loss and semi-variable loss lack evidentiary support

60. Article 3 of the "Property Damage" Section of the Policy provides that:

> "*3. Exclusions*
>
> …
>
> *C. This Policy excludes the following, but, if physical damage not excluded by this Policy results, then only that resulting damage is insured:*
>
> …
>
> *(2) loss or damage to stock or material attributable to manufacturing or processing operations while such stock or material is being processed, manufactured, tested, or otherwise worked on.*"

61. In any event, Article 3.C of the "Physical Damage" Clause of the Policy stipulates that stock loss are excluded from the insurance coverage. Moreover, Claimant has not shown how the explosion caused any provable stock loss. Except for the two O Reports, Claimant did not submit any evidence to prove the stock loss or the semi-variable loss during the insurance claim process and the arbitration proceeding.

62. Therefore, the stock loss claimed by Claimant falls beyond the scope of coverage and the stock loss and semi-variable loss lack evidentiary support. Accordingly, Respondent denies such loss and reserves the right to raise further objections.

(6) Respondent is not obligated to bear the claims preparation costs, attorney's fees, expert fees or arbitration costs claimed by Claimant.

63. According to the "Property Damage" Section of the Policy and Article 52 and Article 82 of the *Arbitration Rules*, only the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing its case.

64. Therefore, Respondent shall not bear the claims preparation costs, attorney fees, expert fees, or arbitration costs claimed by Claimant. In any event, Claimant did not submit any evidence to prove any such expenses. Respondent does not recognize such expenses and reserves the right to raise further objections as to their payment.

E. Claimant's Supplementary Opinions

65. Claimant rejects Respondent's assertion that "*The TE loss caused by the Stop Order issued by The Safety Bureau is not covered by the insured TE loss as it did not directly result from physical loss or damage of the insured property*". Claimant argues that the loss was caused by the Accident, not by the Stop Order. In fact, the Accident was the "cause" of the Stop Order. Since the Respondent acknowledged that the Accident was covered by the Policy, it had no reason to deny that the TE loss caused by the Stop Order was covered because the Stop Order directly resulted from the Accident which also caused physical loss or damage of the insured property.

66. Claimant denies that the Stop Order was the "proximate cause" of the TE losses and submits that the *Proximate Cause Doctrine* does not apply to the present case where only one accidental event occurred with all the subsequent events being the mere consequence of this original event. According to Claimant, what should be applied in the present case in term of causation is the *Single Cause Doctrine or the Direct Cause Doctrine* which indicates that TE losses are indisputably directly caused by the Accident, following which the Stop Order was issued by the Safety Bureau and Claimant's production was suspended. The sequence of events was: the blowing-out of the gas and materials inside HG1 at the very first, followed by damaging of the pressure meter, followed by the death of the operator and damaging of the workshop roof, followed by the Stop Order and the TE losses as claimed. Every subsequent event in the chain of events is a spontaneous and necessary result of the previous event. There was no fortuitous intervening event in between. Therefore, the TE losses

caused by the Stop Order was also directly caused by the Accident, and hence fall under the scope of losses insured. The Respondent is liable to indemnify the TE losses.

67. As regards the period of time which is covered by the "Time Element Coverages" of the Policy, Claimant rejects Respondent's position that only a maximum of 14 days required for physical repairs belonged to the TE loss directly resulting from physical loss or damage of the risk insured. Claimant argues that in addition to the 14 days as admitted by Respondent, the other 82 days of TE loss which is the time required for the Plant to be made ready for operation is also covered by Policy. Claimant asserts its claim under the "Gross Earnings" provision of the Policy, especially Article 3.A.(1) on Period of Liability.

68. Claimant further asserts that pursuant to the doctrine of *contra proferentem*, the interpretation of the Policy should be made against Respondent if the Tribunal were to be more or less equally persuaded by the Parties' respective interpretations, because the Policy is a form contract proffered by Respondent.

69. In respect of Respondent's assessment defense, Claimant submits that the figures in the O Report, rather than those in the Q Report, is more convincing because the latter, as instructed by Respondent, did not explain how they reached their figures of expected sales, nor did it take into account of the trend in market demands for Claimant's products before and after the Accident, as required by Clause 1D of the "Time Element" Section of the Policy.

70. Regarding the Respondent's defence on the Stock Loss claim, Claimant argues that this claim is not loss for stock resulting in the normal course of production, not even a claim under the "Property Damage" Clause. The stock referred here was the stock of products kept by Claimant prior to the Accident for emergency purposes, which Claimant had to sell to meet market demands during the Suspension Period and which has to be replenished to the pre-Accident level to standby for future emergencies. The Stock Loss claim is "*Gross Earnings loss for the time of production needed to replenish the stock of 407.906 tons of products*", which actually is part of the TE Losses.

F. Respondent's Supplementary Opinions

71. Respondent reiterates the TE loss caused by the Stop Order does not fall within the scope of Time Element Coverages of the Policy as it did not directly result

from physical loss or damage of the insured property. Time Element insurance is an additional insurance attached to the traditional Property Damage insurance or machinery breakdown insurance, which only covers the indirect loss including profit loss or increased costs directly caused by the loss or damage of the insured property. In the present case, 82 days of TE loss was caused by the Stop Order, not directly by physical repairs of the damaged property insured, thus falls outside the scope of Time Element Coverages.

72. Claimant suffered a maximum of 14 days of TE loss, from 17 June 2018 to 1 July 2018 during which period the physical damage to the HG1 and Workshop 1 had been repaired, which belongs to the loss caused by physical loss and damage under the Time Element insurance. That Second Report issued by Q estimates the repair period is 14 days.

73. Pursuant to Article 3.A.(1) that period of liability will end when with due diligence and dispatch the building or an equipment could be repaired and made ready for operation, as relied upon by Claimant, should not apply because the loss of Claimant suffered from the Stop Order is not covered by Time Element insurance Policy.

74. Considering the long-term cooperative relationship with the customers and the good faith effort to provide the customers with substantial support, Respondent agrees that Claimant may claim for the TE loss caused by Stop Order based on the "Crisis Management" Clause or "Civil or Military Authority" Clause of the Policy, but such claim is subject to time limit of 30 consecutive days.

75. Respondent contends that the doctrine of *contra proferentem* does not apply to the interpretation of the terms of Policy which are not based on the standard clauses of the insurer and have been adequately negotiated between the Parties before execution by the Parties.

76. In respect of the calculation of the losses, the two reports issued by O indicating Claimant suffered a TE loss up to the end of August 2018 (for a period of 96 days and including stock loss) of RMB 83,400,000 had never been submitted to Respondent in the process of claim. Respondent hired Q and R to do the loss assessment, and the TE loss Claimant suffered for the liability period of 30 days were reported as RMB 14,200,000 (as per Q) and RMB 16,200,000 (as per R) respectively. It is Respondent's position that the calculation result under the report issued by Q and R should prevail over that of the O report.

77. Respondent also submits that the following claims are rejected by Respondent for lack of evidence support and/or falls out of the insurance coverage, which include the repair costs, the stock loss and semi-variable loss, preparation costs, attorney fee, expert fee, and arbitration fee.

VI. THE TRIBUNAL'S OPINIONS

A. The Policy is a Binding Contract

78. The Policy (Claimant's exhibit 1 and Respondent's exhibit 1) issued on 16 April 2018 by Respondent as insurer to Claimant (and the other two subsidiaries of I) as Insured is a property insurance contract comprising Property Damage insurance and TE loss insurance.

79. The Tribunal finds the issuance of the Policy is based on the Parties' mutual agreement and its content is not incompatible with the mandatory provisions of the PRC law. Accordingly, the Policy shall be deemed a lawfully concluded contract and has binding force on its Parties.

B. The Insurance Provided Under the Policy

80. The Policy provides Claimant with two types of insurance at the same time, namely, Property Damage insurance and TE loss insurance. The former is the principal and basic insurance, and the latter an ancillary insurance to the former.

81. The Property Damage insurance of the Policy covers specified property against all risks of physical loss or damage, except as being excluded, while the property locates as described in the Policy.

82. Under Time Element insurance, the Policy insures TE loss as provided in the "Time Element Coverages" Section and "Time Element Coverage Extension" Section. When Time Element insurance is applicable, the Insured has option to make claims based on either Gross Earnings and Extended Period of Liability, or Gross Profit.

C. The Key Facts Relevant to the Dispute

83. Claimant operates a plant which is insured by Respondent under the Policy at one of the three locations of the specified property thereunder, at M Province, China, manufacturing PAP, a raw material used in the production of paracetamol. There are

two workshops in the plant in which a total of 11 hydrogenators (4 in Workshop 1, and 7 in Workshop 2) were installed to produce PAP.

84. On 3 May 2018, a flash explosion (the Accident) took place at around 13:49 at No. 1 hydrogenator (HG1) in Workshop 1 damaging pressure meter of HG1 and 125m² roof of Workshop 1, resulting in the death of an operator (Claimant's exhibits 2, 4 and 5). On the same day, the Safety Bureau issued the Stop Order (Claimant exhibit 2 and Respondent's exhibit 14) ordering suspension of production of Claimant's entire plant until further notice.

85. During the downtime and while the investigation of the Accident and the assessment of the process design safety were under way, Claimant carried out the roof repair of Workshop 1, which took 14 days from 17 June to 1 July to complete (Claimant exhibit 13 and Respondent exhibit 33).

86. On 19 July 2018, an Investigation Report of the Accident issued by an investigation group composed of government officials from M Province determined the Accident to be an incident of production safety responsibility and direct economic loss was estimated to be around RMB 1,400,000 (Claimant's exhibit 5).

87. On 25 July 2018, a written Examination Opinion (Claimant exhibit 6) issued by three experts determined that after the Accident, 6 safe production measures suggested have been successfully adopted by Claimant and 33 problems identified during the investigation of the Accident have been addressed. On the same day, the Safety Bureau issued to Claimant a Rectification Review Letter (Claimant exhibit 7 and Respondent exhibit 16) expressing consent to the above expert's Examination Opinion, and the letter indicated government permission to Claimant's plant to restart production. Apart from HG1, the other 10 hydrogenators restarted or were ready to restart production on that date.

88. HG1 was able to partially resume its production on 4 August 2018, after the pressure meter had been replaced and pressure test had been completed.

D. Whether the Accident Is Covered by the Policy

89. The "Declarations" Section of the Policy has the following provisions:

> "*This Policy covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in the Policy.*

1. NAMED INSURED AND MAILING ADDRESS

In consideration of the payment of premium charged, B Insurance Company China Ltd. (hereinafter referred to as "the Company") agrees, subject to this Policy's provisions, conditions, stipulations, Exclusions, endorsements and Limits of Liability, to insure:

S Pharmaceutical Co., Ltd., A Chemical Industry Co., Ltd., and T Chemical Co., Ltd. as their respective interest may appear; all hereafter referred to as the "Insured", including legal representatives.

…

2. POLICY DATES

Term:	one year
From:	1 January 2018 at 12:01 a.m. Standard Time
To:	1 January 2019 at 12:01 a.m. Standard Time

3. INSURANCE PROVIDED

The coverage under this Policy applies to property described on the Schedule of Locations or covered under the terms and conditions of the AUTOMATIC COVERAGE, ERRORS AND OMISSIONS OR MISCELLANEOUS PROPERTY provisions, unless otherwise provided.

Schedule of Locations are as listed on the Schedule of Locations attached to this Policy."

90. The Schedule of Locations, Appendix A to the Policy, lists three locations the first of which is "M Province, China". That is the plant of Claimant.

91. It is apparent and undisputed, in the Tribunal's view, that under the Policy, Claimant is (one of) the Insured and the Accident took place during the term of the Policy at Claimant's address, one of the three locations listed in the Schedule of Locations attached to the Policy.

92. The Tribunal notes that Claimant has submitted and Respondent admitted that the Accident and the physical loss and damage suffered by Claimant as a result of the Accident falls into the coverage of the Policy. Based on the Investigation Report of 19 July 2018 (Claimant's exhibit 5), it is not disputable that the Accident caused physical damage to Workshop 1 and HG1, which is Claimant's property. Accordingly, the

Accident triggered Respondent's obligation of indemnity to Claimant under the Policy not only under the "Property Damage" Section but also under the "Time Element" Section.

93. There is no dispute about Respondent's duty to indemnify the Property Damage suffered by Claimant, which damage includes the pressure meter of HG1 and the roof of Workshop 1. The specific amount of insurance indemnity to the Property Damage, also with little dispute between the Parties, will be dealt with later in the award. The main controversy between the parties centered on the scope of TE loss recoverable under the Policy.

E. Time Element Under the Policy

94. Time Element, as a separate type of insurance affiliated to Property Damage insurance, insures TE loss as a result of the physical loss or damage to the property insured under the Policy according to the "Time Element" Section. TE loss is commonly understood as the loss suffered by the insured as a result of the interruption of its business caused by the property loss or damage.

95. The "Time Element" Section of the Policy begins with the following provisions:

> "*TIME ELEMENT loss as provided in the TIME ELEMENT COVERAGES and TIME ELEMENT CONVERAGE EXTENSIONS of this section of the Policy:*
>
> *A. is subject to the applicable limit of liability that applies to the insured physical loss or damage but in no event for more than any limit of liability that is stated as applying to the specific TIME ELEMENT CONVERAGE and/or TIME ELEMENT OVERAGE EXTENSION; and*
>
> *B. will not increase the Policy limit of liability; and*
>
> *C. is subject to the Policy provisions, including applicable exclusions and deductibles, all as shown in this section and elsewhere in this Policy.*
>
> *1. LOSS INSURED*
>
> *A. This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from physical loss or damage of the type insured:*

(1) To property described elsewhere in this Policy and not otherwise excluded by this Policy or otherwise limited in the TIME ELEMENT COVERAGES below or in endorsements attached to the Policy.

(2) Used by the Insured, or for which the Insured has contracted use;

(3) While located as described in the INSURANCE PROVIDED provision…; or

(4) …

(5) During the period of liability described in this section.

Provided such loss or damage is not at a contingent time element location.

…"

96. It is clear from the above provisions, and both Parties agree that, save as to the specific amount recoverable, the TE loss sustained by Claimant is in principle covered by the Policy and shall be indemnifiable. The controversy, however, lies in the scope of the TE loss that is covered under the Policy. In particular, how long should the period of time be, during which the TE loss is to be calculated? Is it 14 days as Respondent concedes, or 30 days as Respondent would consider *ex gratia*, or 3 months as Claimant claimed?

1. TE loss is to be directly resulting from physical loss or damage of the type insured.

97. Respondent stress that "*in 'Time Element' Section, only the TE loss that is directly resulting from physical loss or damage of the type insured, i.e., Property Damage, will be covered*". The phrase "*directly resulting from physical loss or damage of the type insured*" shall be understood as the period of time necessary for the repair or replace of the damaged property. In the present case, this means the time that had been spent for the repair work of the roof of Workshop 1, which took 14 days. The time taken for the replacement of the pressure meter of HG1 is very short and no extra day should be counted. Respondent submits that the remaining part of the TE loss (around 82 days) claimed by Claimant is not the loss directly resulting from physical loss or damage of the type insured but is caused by Stop Order.

98. Claimant contends that all TE loss for a period of more than 3 months is *directly resulting from physical loss or damage of the type insured*. Because the ultimate cause is the Accident taking place in May 2018, which caused the physical damage to Claimant's property as well as the issuance of the Stop Order which in turn lead to the temporary stop of production of the entire plant. The stop of production continued without interruption for 3 months and were mostly resumed only after July 2018. There is clear and direct link between the physical damage in the first place and 3-month TE loss suffered by Claimant.

99. The Tribunal finds that it is common ground between the Parties that *the type insured* is the Property Damage and Claimant did suffer physical damage to its property, i.e., the damaged 125m² roof of Workshop 1 and pressure meter of HG1 as a result of the Accident.

100. The plain meaning of the expression "*directly resulting from*" indicates that a direct and uninterrupted link between the TE loss and the physical loss or damage to Claimant's property shall be established.

101. Physical loss or damage to the property is not equivalent to the Accident causing the physical loss or damage. Judging from the Policy expression "*directly resulting from physical loss or damage of the type insured*", the reference, in the present case, shall be made to the physical damage to Claimant's property, namely, the damage to the roof of Workshop 1 and to HG1, rather than to the Accident. Accordingly, unless otherwise provided for in the Policy or consented by Respondent, only Claimant's loss of business interruption that directly linked to the damage of Workshop 1 and HG1 will satisfy the above requirement of the TE loss.

2. Time Element Coverage and Claimant's Opinion

102. The "Time Element Coverages" Section of the Policy provides the basic coverage against TE loss, which states:

> "*2. TIME ELEMENT COVERAGES*
>
> *A. INSURED OPTION*
>
> *The Insured has the option to make claim based on either*
>
> *a) GROSS EARNINGS and EXTENDED PERIOD OF LIABILITY; or*
>
> *b) GROSS PROFIT.*

…

B. GROSS EARNINGS

Measurement of Loss:

(1) The recoverable GROSS EARNINGS loss is the Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY:

(a) Gross earnings;

(b) less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services;

(c) plus all other earnings derived from the operation of the business.

(2) For the purposes of the measurement of Loss, Gross Earnings is:

For manufacturing operations: the net sales value of productions less the cost of all raw stock, materials and supplies used in such production; or

For mercantile or non-manufacturing operations: the total net sales less cost of merchandise sold, materials and supplies consumed in the operations or services rendered by the Insured.

Any amount recovered under property damage coverage at selling price will be considered to have been sold to the Insured's regular customers and will be credited against net sales.

(3) In determining the indemnity payable as the Actual Loss Sustained, the Company will consider the continuation of only those normal charges and expenses that would have been earned had there been no interruption of production or suspension of business operations or services.

(4) There is recovery hereunder to the extent that the Insured is:

(a) wholly or partially prevented from producing goods or continuing business operations or services;

(b) unable to make up lost production within a reasonable period of time, not limited to the period during which production is interrupted;

(c) unable to continue such operations or services during the PERIOD OF LIABILITY; and

(d) able to demonstrate a loss of sales for the operations, services or production prevented."

103. In the Request for Arbitration, Claimant selects the Gross Earnings loss as the chief basis for its claim. Respondent does not contest that selection. In view of the Tribunal, Claimant is entitled under the Policy to make that choice. The provisions on Gross Earnings are therefore applicable.

104. The recoverable Gross Earnings loss to the Actual Loss Sustained is limited by the Insured during the "Period of Liability". That refers the Tribunal to "Period of Liability" in the "Time Element Coverages" Section.

3. Period of Liability

105. It states:

"3. PERIOD OF LIABILITY

The PERIOD OF LIABILITY applying to all TIME ELEMENT COVERAGES, except GROSS PROFIT and LEASEHOLD INTEREST and as shown below or if otherwise provided under any TIME ELEMENT COVERAGE EXTENSION, and subject to any Time Limit provided in the LIMITS OF LIABILITY clause in the DECLARATIONS section, is as follows:

(1) For building and equipment, the period:

a) starting from the time of physical loss or damage of the type insured; and

b) ending when with due diligence and dispatch the building and equipment could be:

(i) repaired or replaced; and

(ii) made ready for operations,

under the same or equivalent physical and operating conditions that existed prior to the damage.

…"

106. Pursuant to this clause, the period of liability of Respondent in respect of TE loss shall end when the damaged building and equipment could be restored and made ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage. Claimant argued that this shows that a 3-month period shall be calculated, because only after 25 July 2018, the restart of production was permitted by the government which indicates that only after that date, the damaged building and equipment could be regarded as ready for operation under the same or equivalent conditions existing prior to the damage.

107. The Tribunal notes that the "Period of Liability" Clause envisages the occurrence of physical loss or damage to the equipment and/or building as a pre-condition for TE loss to accrue, and the completion of the reparation or restoration of the same equipment and/or building to the physical and operating conditions that existed prior to the loss or damage as the condition for TE loss to stop accruing.

108. The Tribunal further notes the language used to describe the end of period is "*under the same or equivalent physical and operating conditions that existed prior to the damage*". The expression physical conditions can be understood as the physical conditions of the roof of Workshop 1 and HG1 before the Accident. When the repair work to the roof of Workshop 1 have been completed and the pressure meter on HG1 replaced, it shall be deemed that the building and equipment have been restored to its physical conditions prior to the damage. While the expression *operating conditions* may not exclude the physical conditions, it could have a broader meaning and arguably include the element of government permission or restriction of plant production. In that sense, only when the Safety Bureau signaled the green light to restart production on 25 July 2018 can Claimant's building and equipment be considered ready for operation under the same operating conditions prior to the damage.

109. It stipulates that Gross Earnings loss is subject to the "*Time Limit provided in the LIMITS OF LIABILITY clause in the DECLARATIONS section*". In that section, however, there is no specific time limit for Gross Earnings loss.

4. Crisis Management and Civil or Military Authority

110. Claimant contends that in case its claims based on Gross Earnings loss for around 3 months cannot be supported by the Tribunal, it would alternatively request insurance indemnity under the "Crisis Management" Clause under the Policy.

111. Respondent states that it could consider the application of the "Crisis Management" Clause or "Civil or Military Authority" Clause out of its good faith effort to provide its customers with substantial support and maintenance of a long-term customer relationship. In fact, as understood by the Tribunal, Respondent offers to settle the dispute with Claimant by application of the "Crisis Management" Clause or "Civil or Military Authority" Clause to the TE loss of Respondent's entire plant including all 11 hydrogenators.

112. The "Civil or Military Authority" Clause of the Policy states as follows:

> "*This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location provided such order is the direct result of physical damage of the type insured at the insured location or within eight kilometers of it.*"

113. The "Crisis Management" Clause of the Policy provides:

> "*This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location, provided such order is a direct result of:*
>
> *(1) a violent crime, suicide, attempted suicide, or armed robbery; or*
>
> *(2) a death or bodily injury caused by a workplace accident;*
>
> *at such insured location.*
>
> *For the purposes of this Extension only, a workplace accident shall be considered a sudden, fortuitous event that happens during working hours and arises out of work performed in the course and the scope of employment.*"

114. It is noted that both "Civil or Military Authority" Clause under "Time Element Coverage Extensions" Section and "Crisis Management" Clause under the "Additional

Time Element Coverage Extensions" Section allow Claimant to claim TE loss for a maximum 30-day time period.

115. Both clauses envisage a situation where access to the insured location is limited, restricted or prohibited by government authority. The facts of the present case, however, do not fall exactly into the scenario envisaged by the above two clauses, because access to Claimant's plant was permitted and repair work had been carried out on-site during the suspension period. However, the stop of production is similar in effect to the limit of access to the insured location in that the normal operation of the plant is suspended in both cases. And the cause of the crisis (*a death caused by a workplace accident*) provided for in the "Crisis Management" Clause is exactly what happened in the present case. Consequently, the application in the present arbitration of the "Crisis Management" Clause is not without merit.

116. In light of the foregoing, the Tribunal would consider it an option in treating the above submissions of the Parties as a special agreement between them on the application of the "Crisis Management" Clause to the issue of insurance indemnity of the Accident, should the Tribunal determine that this is the solution best for the settlement of the present dispute.

The Specific Property Damages and the Resulting TE loss

117. There are 11 hydrogenators in Claimant's plant, 4 in Workshop 1 and 7 in Workshop 2. The actual damages occurred to (i) HG1 (its pressure meter), and (ii) Workshop 1 (its 125m² roof). Workshop 2 and the 7 hydrogenators therein were unaffected by the Accident. In light of this situation, the Tribunal thinks it reasonable to distinguish these damaged or undamaged properties and determines their respective TE loss and time limits according to the situation particular to each of them.

118. In respect of HG1 on which physical damage occurred, it was not until 4 August 2018 that HG1 was able to partially resume production after the successful testing of the replaced pressure meter. In other words, it was on that date that HG1 was *under the same or equivalent physical and operating conditions that existed prior to the damage*. The TE loss pertaining to HG1, therefore, shall start to accrue from 3 May 2018 the date when the damage to HG1 occurred and shall end on 4 August 2018 subject, however, to the 90 days maximum time limit.

119. Regarding Workshop 1 on which physical damage also occurred, the other 3 hydrogenators therein (excluding HG1) could not run for foreseeable safety reason because of its damaged roof. The repair work of the 125m² roof of Workshop 1 was not completed until 1 July 2018, the date when Workshop 1 and equipment inside could be deemed under the same or equivalent *physical* conditions that existed prior to the damage. The permission to restart production of Claimant's plant was given by the Safety Bureau on 25 July 2018. In view of the Tribunal, Workshop 1 and the 3 hydrogenators therein, exclusive of HG1, were under the same or equivalent *operating* conditions that existed prior to the damage on the date the restart of production was permitted. For these reasons, TE loss pertaining Workshop 1 and equipment inside (excluding HG1) shall be counted to 25 July 2018.

120. With respect to Workshop 2, it seems that there is no basis for the indemnification of TE loss at the first glimpse, because there was no physical loss or damage to it (or the 7 hydrogenators inside). However, as mentioned above, both Parties consent to the possibility of applying the "Crisis Management" Clause as an alternative to Gross Earning and the Tribunal believes that it is appropriate to apply the "Crisis Management" Clause to the TE loss of Workshop 2.

121. A closer look at the relevant provisions of the Policy reveals that the requirement of "*directly resulting from physical loss or damage of the type insured*" is expressly stipulated as applicable to Time Element Coverage including Gross Earning and to "Civil or Military Authority" Clause. However, under the "Crisis Management" Clause, that requirement is noticeably missing. This shows that the Parties treat Crisis Management differently and the physical loss or damage to the property is not a pre-requisite to indemnify the Actual Loss Sustained in the circumstance of such a crisis.

122. Pursuant to the "Crisis Management" Clause, it will be applicable if an order of the civil authority *is a direct result of a death or bodily injury caused by a workplace incident* (which is exactly what happened in this case), not a direct result of physical loss or damage to the insured property. The Tribunal therefore understands that the "Crisis Management" Clause is an exception to the general requirement of TE loss under this particular Policy between the Parties. The Tribunal also notes that the application of the "Crisis Management" Clause is subject to the Period of Liability, according to which the TE loss pertinent to Workshop 2 shall be limited to 30 days.

5. Deductible loss

123. Under the "Declarations" Section, it provides that *subject to the deductible general provisions stated below, in each case of loss covered by this Policy the following deductible apply*. In the table that follows, the deductible applicable to Claimant's plant is indicated as RMB 2 million. The Deductible General Provisions provides:

> "*In each case of loss covered by this Policy, the Company will be liable only if the Insured sustains a loss, including any insured TIME ELEMENT loss, in a single occurrence greater than the applicable deductible specified above, an only for its share of that greater amount*."

124. Both Parties agree that this deductible shall be applicable to Claimant's claims. The Tribunal determines, therefore, that this deductible shall be subtracted from the total indemnity amount recoverable by Claimant.

F. Proximate Cause

125. The Parties have discussed extensively on the issue of proximate cause related to TE loss in insurance industry and submitted relevant authorities. However, the provisions of the Policy themselves have provided solutions to the disputed issues between the Parties and the Tribunal thinks it unnecessary to analyze the issue of proximate cause.

G. Claimant's claims

126. Claimant raises totally 13 pecuniary claims against Respondent. However, the first group of five claims (Claim No.1 to 5) and last group of three claims (Claim No. 11 to 13) are each of the same type and are essentially claim of Gross Earnings losses. The Tribunal deals with all the claims as follows:

1. Gross Earnings Loss (May to August Losses)

127. The first group of five claims are of the same type all based on Gross Earnings loss suffered by Claimant as a result of interruption of business from 4 May to 7 August 2018 for a total number of 96 days. They are alleged as follows:

May Loss (4 May 2018 to 31 May 2018):	RMB 15,100,000
Early June Loss (1 June 2018 to 2 June 2018):	RMB 1,800,000
Late June Loss (3 June 2018 to 30 June 2018):	RMB 24,900,000

July Loss (1 July 2018 to 31 July 2018):	RMB 34,500,000
August Loss (1 August 2018 to 7 August 2018):	RMB 700,000

128. The Tribunal notes that Claimant takes 4 May 2018 as the first date for the period of liability and the Tribunal determines that on the one hand, it may not be correct pursuant to the Policy provisions and, on the other, whether the starting date is 3 May or 4 May 2018 will not prejudice the accuracy of the computation, since the indemnity amount for May Loss (RMB 15,100,000) requested by Claimant is arrived by deducting the actual sales from the theoretical sales in the whole month of May 2018 (p.14 of the O August Report).

129. Claimant relies on two reports by O prepared respectively in August and September 2018 (the O August Report and the O September Report, respectively, Claimant exhibit 8 and 9) to support its claims. Respondent objects to the calculation conclusions reached in the O Reports and submitted that the report made by Q in October 2018 ("**Q Report**"), which essentially based on the calculation of **R** (Respondent exhibit 33), shall prevail. Based on these assertions, the Tribunal determines that the findings in the O Reports represent Claimant's position, and findings in the Q Report represent Respondent's position. All these reports serve as the basis of the Tribunal's analysis below.

130. The provision most relevant to the computation of Gross Earnings loss in the Policy is in the "Time Element" Section, which provides:

> "*GROSS EARNINGS*
>
> *Measurement of Loss:*
>
> *(1) The recoverable Gross Earnings loss is the Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY:*
>
> *a) Gross earnings;*
>
> *b) less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services;*
>
> *c) plus all other earnings derived from the operation of the business.*
>
> *(2) For the purposes of the measurement of Loss, Gross Earnings is:*

for manufacturing operations: the net sales value of productions less the cost of all raw stock, materials and supplies used in such production.

…

Any amount recovered under property damage coverage at selling price will be considered to have been sold to the Insured's regular customers and will be credited against net sales.

(3) In determining the indemnity payable as the Actual Loss Sustained, the Company will consider the continuation of only those normal charges and expenses that would have been earned had there been no interruption of production or suspension of business operations or services.

…"

131. After review of the O Reports and the Q Report, the Tribunal is of the view that all these reports employ the same basic formula of calculation in conformity to the above-quoted provisions, i.e., the net sales value minus costs (production costs and sales costs).

132. In order to ascertain the Gross Earnings loss, the Tribunal looks at the sales volume first. As determined by the Tribunal, the shortfall in production (or production loss) which would have been achievable but for the Accident in a period of 90 days from 3 May 2018 to 31 July 2018 shall be taken into account.

133. According to the O August Report (at p. 8), the estimated sales in May 2018 is 3435.795 tons and is 3388.661 tons in June and July 2018. The estimated figures for June and July are based on the average figure of sales in March and April 2018. The Q Report, however, points out that the production in March and April 2018, the two months immediately pre-Accident, may not correctly reflect the fluctuation of the raw materials supply shortage that happened prior to March 2018 (at p. 475 of Respondent's bundle of evidence). Alternatively, the Q Report takes Claimant's production data from September 2017 to April 2018 and reaches the conclusion that the average daily production in that 8-month period is 102.508 MT/day (at pp. 476-477). This figure is acceptable to the Tribunal because a longer period would on the whole naturally better reflect the fluctuation and contingencies in the market.

134. Respondent further submits that according to the data provided by Claimant, only 99.3% of the PAP produced has been actually sold. Claimant did not contest this submission. Consequently, the salable daily production will be 101.79 MT/day [= 102.508×99.3%]. By applying the daily production, the estimated production in May (29 days), June (30 days) and July (31 days) will be 2,951.91 tons, 3,053.7 tons, and 3,155.49 tons, respectively.

135. Pursuant to the O August Report (at p. 4), during the period of May to July, Claimant actually sold 1041.919 tons of PAP (700.667 tons in May, 150.524 tons in June, and 190.718 tons in July). That figure shall be deducted from the estimated salable production and the sales loss from 3 May to 31 July 2018 will then be as follows:

Table 1: Sales loss

	May 2018	June 2018	July 2018
Salable volume	2,951.91	3,053.7	3,155.49
Actual sales	700.667	150.524	190.718
Sales loss	2,251.243	2,903.176	2,964.772

136. Regarding the selling price, Claimant has provided the average net selling prices (the gross price less the sales cost) purportedly achieved/achievable for domestic and export sales during the interruption period from May to July 2018, quoted in Q Report (at p. 478 of Respondent's bundle of evidence), as follows:

RMB 21,958.25/MT in May 2018

RMB 25,493.26/MT in June 2018

RMB 28,878.00/MT in July 2018

Q Report accepts those prices. Accordingly, the net sales value during the period from 3 May to 31 July 2018 is computed as follows:

Table 2: Net sales value

	May 2018	June 2018	July 2018
Sales loss	2,251.243	2,903.176	2,964.772
Selling price/MT	21,958.25	25,493.26	28,878.00
Net sales value	49,400,000.00	74,000,000.00	85,600,000.00

137. The expected COSTS level for production claimed by Claimant, as indicated in Schedule 6 of the Q Report (at p. 489 of Respondent bundle of evidence), with detailed

break up figures, is RMB 16,431.24/MT in May 2018, RMB 17,266.99/MT in June 2018 and RMB 18,094.10/MT in July 2018. The corresponding figures calculated by Q in Schedule 6A (at p. 490) are RMB 16,638.59/M in May 2018, RMB 17,491.45/M in June 2018 and RMB 17,969.25/M in July 2018. The Tribunal finds the figures provided by Claimant are more persuasive.

138. By applying those figures of production costs, the net revenue loss during 3 May to 31 July 2018 will be RMB 68,300,000, calculated as follows:

Table 3: Net revenue loss

	May 2018	June 2018	July 2018
Sales loss	2,251.243	2,903.176	2,964.772
Costs/MT	16,431.24	17,266.99	18,094.10
Production costs	37,000,000.00	50,100,000.00	53,600,000.00
Net sales value	49,400,000.00	74,000,000.00	85,600,000.00
Net revenue loss	12,400,000.00	23,800,000.00	32,000,000.00
Total net revenue loss (May to July 2018): 68,300,000.00			

139. The net revenue loss as a result of the interruption of Claimant's business due to the Accident, as computed above, has already taken into account the costs directly linked to sales (commission, maritime, insurance, taxes). Neither party raise any issue about *other earnings derived from the operation of the business or any amount recoverable under property damage coverage* as provided. Accordingly, the net revenue loss shown in Table 3 is the total TE loss suffered by Claimant during a 90-day period from 3 May 2018 to 31 July 2018.

140. All the calculations and figures recorded in Tables 1-3 are on the basis of Claimant's entire plant and 11 hydrogenators. However, not all the TE loss suffered by Claimant can be indemnified, As described above, Claimant's indemnifiable TE loss shall be determined respectively on HG1, the other 3 hydrogenators in Workshop 1, and the 7 hydrogenators in Workshop 2, according to their different situations.

141. Regarding HG1, which suffered physical damage and was only partially able to resume production on 4 August 2018, TE loss will be calculated from the date the damage occurred until the date when it was under the similar physical and operating conditions that existed prior to the damage. However, a 90-day time limit shall be applicable to the calculation of its TE loss. It is noted that there are precisely 90 days from 3 May 2018 to 31 July 2018. Therefore, the net revenue loss figure in Table

3 can be relied upon. As HG1 is one of the 11 hydrogenators in Claimant's plant, assuming all 11 hydrogenators have equal production capacity, the TE loss associated with HG1 should be 1/11 of the figure shown in Table 3, i.e., RMB 6,200,000 [= RMB 68,300,000 ÷11].

142. In respect of the 3 hydrogenators in Workshop 1 which suffered physical damage to its roof, and which was repaired and restored to the similar physical and operating conditions that existed prior to the damage (capable of operation) after 25 July 2018, a period of 84 days (from 3 May to 25 July) shall be counted for the computation of their TE loss. Looking at the figures in Table 3, the net revenue loss in this 84-day period includes the figures in May and June 2018, and that of the first 25 days in July 2018. The total net revenue loss in July is RMB 32 million, the figure for 11 hydrogenators and for a period of 31 days. The net revenue loss of 11 hydrogenators for the last 6 days in July shall be deducted from the total loss in July and the resulting figure is 6,200,000 [= 32,000,000 ×6 ÷31]. The net revenue loss pertaining to the 3 hydrogenators in Workshop 1 for the period from 3 May to 25 July 2018 now stands as RMB 16,900,000 [= (68,300,000 - 6,200,000) ÷11×3].

143. With respect to the 7 hydrogenators in Workshop 2, to which the "Crisis Management" Clause applies and physical damage is not required, TE loss shall be calculated from the date on which the crisis took place, subject to a 30-day time limit. The 30-day period shall start from 3 May to 1 June 2018. Claimant's net revenue loss in May (for 29 days) is 12,400,000 (Table 3). The net revenue loss of 1 June (one day loss in June) is 800,000.00 [= 23,900,000 ÷30, Table 3]. Consequently, the TE loss of the 7 hydrogenators in Workshop 2 shall be RMB 8,400,000 [= (12,400,000 + 800,000) ×7 ÷11].

144. The aggregate amount of TE loss indemnifiable to Claimant before the deductible therefore shall be RMB 31,600,000 [= 6,200,000 + 16,900,000 + 8,400,000].

145. Pursuant to the Deductible General Provisions, an amount of RMB 2,000,000 shall be subtracted from the total amount recoverable by Claimant. It is proper to less this deductible from the Gross Earnings loss granted here.

146. Accordingly, in view of the Tribunal, Claimant's first five claims based on Gross Earnings loss will be supported together in the amount of RMB 29,600,000 [= 31,600,000 - 2,000,000].

2. Gross Earnings Loss (Semi-variable Losses)

147. The last three claims (Claim No. 11, 12 and 13) are of the same type that Claimant called Semi-variable Loss, also claimed as Gross Earnings Loss, totaling RMB 4,200,000 divided as follows (at pp. 14 and 15 of the O August Report):

Semi-variable Loss in May 2018 in an amount of RMB 1,900,000

Semi-variable Loss in June 2018 in an amount of RMB 800,000

Semi-variable Loss in July 2018 in an amount of RMB 1,500,000

Claimant submits these are costs that could not be saved during the shutdown of the plant and, therefore, should be added to production costs when calculating Gross Earnings losses.

148. In Respondent written submissions, this claim was denied for it is outside the scope of insurance coverage and lack of evidence support.

149. There is no specific provision in the Policy related to the Semi-variable Loss claim. The Tribunal is of the view that during 3 May to 25 July 2018, when the production was ordered to stop, Claimant's plant nonetheless continued to incur some costs, e.g., utilities and some basic costs in order for a smooth restart of production once the Stop Order is lifted. In Q Report a similar amount of such costs, called "increase cost of working" (Schedule 1, at p. 484 of Respondent's bundle of evidence), is recognized but Q Report takes into account the element of "saving in fixed costs" in the amount of RMB 1,100,000.

150. The Tribunal believes it is reasonable for Claimant to claim semi-variable loss during May to July 2018 to maintain the plant in a ready-to-go condition, but it is also acceptable to the Tribunal that RMB 1,100,000 shall be deducted from the amount claimed. Accordingly, Claimant is entitled to semi-variable loss in the amount of RMB 3,100,000 [= 4,200,000 - 1,100,000].

3. Stock Loss

151. As its 6th claim, Claimant request insurance indemnity of Gross Earnings loss for the time of production needed to replenish the stock of 400,000 tons of products in an amount of RMB 4,100,000.

152. Claimant submits that a stock of 600,000 tons of PAP was kept at the end of April 2018. Because of the business interruption, part of the stock was sold during the May to July and only 100,000 tons was left in the stock, which according to Claimant's projected production, is projected at 500,000 tons at the end of May (p.15 of the O September Report). The difference of 407.906 tons in the amount of RMB 4,200,000 is Claimant's loss and should be replenished. Claimant clarifies that the claim for Stock Loss is made under Time Element insurance.

153. Respondent objects to this claim contending that it falls outside the scope of the insurance coverage.

154. The Tribunal looks again at the Policy, especially the provision of the "Time Element" Section and is of the view that there is no specific provision in the Policy dealing with the reduction of stock of the finished products as a result of the occurrence of the insured incident. As mentioned above, Claimant is entitled to claim TE loss either as a loss directly resulting from physical loss or damage to Claimant's property or as a reduction of sales due to business interruption. There is no proof the decrease of the stock results in the reduction of sales. The Stock Loss claim does not fit in any of the above two categories and the reduction of sales has already been considered by the Tribunal in determining the quantum of the Gross Earnings loss in the first group of claims. Consequently, this claim for Stock Loss is dismissed.

4. Repair Costs

155. The 7th claim is for insurance indemnity of repair costs in an amount of RMB 300,000, including the costs of roof repair in RMB 78,579, HG1 repair in RMB 19,226, survey costs by U in RMB 6,000 and design review service fee for K in RMB200,000.

156. Respondent contends that this claim or at least part of it should be dismissed for lack of evidence support and/or falls out of the insurance coverage.

157. In view of the Tribunal, the first three items should be regarded as damage to Claimant's property and therefore are covered by Property Damage insurance of the Policy:

- Roof repair in RMB 78,579
- HG1 repair in RMB 19,226
- Survey costs by U in RMB 6,000

These three in the aggregate amount of RMB 100,000 are supported by the evidence (Claimant's exhibits 22-24) and at least the first two items are admitted by Q Report.

158. In respect of the service fee of K in RMB 200,000, it is charged by K for preparing the reports identifying Claimant's production safety problems and making improvement suggestions. Respondent clearly rejects this claim. The Tribunal is of the view that this fee is not covered by Property Damage, nor by Time Element under the Policy.

159. Accordingly, Claimant's request for repair costs is sustained by the Tribunal in the amount of RMB 100,000.

5. Claims Preparation Costs

160. The Claims Preparation Costs of RMB 1,300,000 made by Claimant consists of O loss adjustment fees in RMB 800,000 and other costs incurred by Claimant (and Company I on behalf of Claimant) for monitoring, handling, and preparing the claims in RMB 700,000.

161. Respondent contends it is not obligated to pay for claims preparation costs of the "Property Damage" Section as claimed by Claimant.

162. The "Property Damage" Section has the following provisions:

> "*This Policy covers the actual costs incurred by the Insured:*
>
> *(1) of reasonable fees payable to the Insured's: accountants, architects, auditors, engineers, or other professionals; and*
>
> *(2) the cost of using the Insured's employees, for producing and certifying any particulars or details contained in the Insured's books or documents, or such other proofs, information or evidence required by the Company resulting from insured loss payable under this Policy for which the Company resulting has accepted liability.*
>
> *This Additional Coverage will not cover the fees and costs of:*
>
> *(1) attorneys, public adjusters, and loss arbitrators, all including any of their subsidiary, related or associated entities either partially or wholly owned by them or retained by them for the purpose of assisting them.*
>
> *(2) Loss consultant who provides consultation on coverage or negotiate claims.*

This Additional coverage is subject to the deductible that applies to the loss."

163. Pursuant to this "Property Damage" Section, the fees charged by O who is to be viewed as a public adjuster, is indeed excluded from the insurance coverage.

164. To support the second part of this claim costs, Claimant provide a witness statement of V, the Asia HSE Manager of I. The Tribunal notes that, among the tickets and hotel expenses allegedly incurred by six senior personnel who travelled to Claimant's plant after the Accident, the Q Report assessed that a small part of the costs in the amount of RMB 11,952 incurred by three of them will be deemed loss under Property Damage (at pp. 456-457 of Respondent's bundle of evidence).

165. In view of the Tribunal, the assessment by Q Report is more in line with Policy provision. Accordingly, the Tribunal supports this claim in the amount of RMB 11,952.

6. Legal Expenses

166. Claimant requests that the legal expenses incurred by it in the amount USD 200,000 (or RMB 1,300,000) be reimbursed. Respondent objects to this claim.

167. The Tribunal understands this claim is not based on the Policy but on the *Arbitration Rules*, of which the Tribunal has discretion to decide that the losing party shall compensate the winning party for expenses reasonably incurred by it in pursuing the case.

168. It is noted upon review of the forgoing analysis, that among all the claims made by Claimant, some are sustained by the Tribunal, others are not. The Tribunal also considered it important to bear in mind that the present arbitration stems from the different but honest comprehensions of the provisions of the Policy by the Parties. The meaning of those provisions in the Policy may not be crystal clear. Having regard to the circumstances of the case, the Tribunal determines that it is appropriate that each Party shall bear its own legal expenses.

7. Arbitration Costs

169. Claimant request reimbursement of any amount in excess of half of the arbitration costs of the arbitration proceedings, which Claimant has advanced, unless Respondent has already borne half of the arbitration costs.

170. Under the *Arbitration Rules*, the Tribunal has the power to determine in the arbitral award the arbitration fees and other expenses to be paid by the parties to CIETAC. According to the Arbitration clause in the Policy, the Parties shall bear equally the arbitration costs. The Tribunal considers this request of Claimant for the equal share of arbitration costs is in line with the Arbitration clause and will uphold it.

VII. FINAL AWARD

171. Having regard to the circumstances of the case, after careful consideration of all the submissions and evidence provided by the Parties, upon deliberation, the Tribunal decides it is proper to consolidate the awarded amount of the same type of claims and awards as follows:

(1) Respondent shall indemnify Claimant of its Gross Earnings Loss incurred from 3 May 2018 to 31 July 2018 in the amount of RMB 29,600,000.

(2) Respondent shall indemnify Claimant of its Semi-variable Loss incurred from 3 May 2018 to 31 July 2018 in the amount of RMB 3,100,000.

(3) Respondent shall indemnify Claimant of its Repair Costs in the amount of RMB 100,000.

(4) Respondent shall indemnify Claimant of its Claims Preparation Costs in the amount of RMB 11,952.

(5) Each Party shall bear the legal expenses it has incurred with respect to this arbitration.

(6) The arbitration fees and expenses shall be equally borne by the Parties.

(7) The actual expense of business trips for Arbitrator X is RMB 6,156. The fees advanced by Claimant is in the amount of USD 12,000. The balance will be refunded by CIETAC to Claimant in the amount of RMB 5,844.

(8) The actual expense of business trips for Arbitrator Y is RMB 2,887. The fees advanced by Respondent is in the amount of USD 12,000. The balance will be refunded by CIETAC to Claimant in the amount of RMB 9,113.

(9) All other claims of Claimant are dismissed.

172. The above aggregate amount of RMB 32,900,000 payable to Claimant shall be paid by Respondent within 30 days of the date of this award.

173. This award is final and effective from the date of issuance.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Chinese A Trading Company

Claimant

v.

Chinese B Automobile Distribution Company

Respondent

Matter for arbitration: Disputes over dealer agreement

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. THE PARTIES

1. China International Economic and Trade Arbitration Commission (hereinafter the "CIETAC") took cognizance of the present case regarding the disputes between the Claimant Chinese A Trading Company (hereinafter the "Claimant" or "Company A") and the Respondent Chinese B Automobile Distribution Company (hereinafter the "Respondent" or "Company B") based on the arbitration clause contained in the Dealer Agreement dated August 2011 signed by the Claimant and the Respondent, and the written application for arbitration submitted by the Claimant to CIETAC in November 2018.

2. The *Arbitration Rules of CIETAC* effective as from 1 January 2015 (hereinafter the "*Arbitration Rules*") shall apply to this case. Considering that the case is not foreign-related, Chapter V [Special Provisions for Domestic Arbitration] shall apply to this case according to Article 65 of the *Arbitration Rules*. Matters not provided for in this chapter shall be governed by the provisions in other chapters of the *Arbitration Rules*.

3. According to the arbitration clause, the arbitration languages of this case are Chinese and English.

4. In August 2019, Arbitration Court of CIETAC (hereinafter "Arbitration Court",) sent the Notice of Arbitration, the *Arbitration Rules* and the Panel of Arbitrators to the parties, and enclosed the Claimants Written Application for Arbitration and its attached evidence to the Respondent by courier.

5. In September 2019, Arbitration Court received the Application for Deferring Deadline for Defense, Counterclaim and Evidence Abduction, Evidence List for Defense/Counterclaims (1st) and attached evidence submitted by the Respondent. Later in September 2019, Arbitration Court forwarded the above documents to the Claimant and notified the parties that Arbitration Court agreed and decided to extend the deadline for submitting defense, counterclaims of the Respondent to mid October 2019.

6. According to the arbitration clause of the Dealer Agreement, the case shall be heard by a three-member tribunal. The Claimant appointed Mr. X as an arbitrator. The Respondent appointed Ms. Y as an arbitrator. According to the arbitration clause of the Dealer Agreement, the President of CIETAC appointed Mr. Z as the presiding arbitrator. The above-mentioned three arbitrators signed the Declaration and formed the Arbitral Tribunal (hereinafter the "Tribunal") in October 2019 to hear the case.

The Tribunal issued Procedural Order No. 1, inviting the parties to comment on the arbitration language of the case. On the same date, Arbitration Court sent the Notice on the Formation of Arbitral Tribunal and its attached Arbitrator's Declaration as well as Procedural Order No. 1 to the parties.

7. In October 2019, Arbitration Court received the Request for Counterclaims, Statement of Defense, Evidence List for Defense/Counterclaims (2nd) and its attached evidence submitted by the Respondent. In October 2019, Arbitration Court forwarded the above documents to the Claimant and notified the Respondent to advance the arbitration fees for the counterclaims. Subsequently, the Respondent advanced the payment in time.

8. In October and November of 2019, Arbitration Court received the replies to Procedural Order No. 1 submitted by the Respondent and the Claimant, respectively. According to the replies and the circumstances of the case, the Tribunal issued Procedural Order No. 2 in mid-November 2019 to notify the parties the final decision on the arbitration language made by the Tribunal that: the oral hearing will be conducted in Chinese; the evidence shall be submitted in its original form without translation, whereas the rest of the documents shall be submitted in English and Chinese; and the award shall be rendered in Chinese with English translation.

9. Having consulted with Arbitration Court, the Tribunal decided to hold an oral hearing of this case in Beijing in December 2019. The Tribunal issued Procedural Order No. 3 to invite the parties to comment on the question list attached to the Order, and to notify the parties that the Tribunal decided to accept the counterclaims of the Respondent. In late November 2019, Arbitration Court sent the Notice of Oral Hearing and Procedural Order No. 3 to the parties.

10. In early December 2019, Arbitration Court received the Request to Postpone the Hearing and the Request for Extension of Time to Provide Evidence submitted by the Claimant. In mid-December 2019, Arbitration Court forwarded the above documents to the Respondent and notified the parties that having consulted with Arbitration Court, the Tribunal decided to postpone the oral hearing to February 2020.

11. In mid-January 2020, Arbitration Court received the documents from the Respondent [the Evidence List for Defense/Counterclaims (3rd) by Respondent and its attached evidence, the written opinions on the evidence, and the Answers to Questions from Arbitral Tribunal] and the documents from the Claimant [the Application for the Amendments of Arbitration Claims, the Response to the List of Point-at-Issue attached

to Procedural Order III, the Defense on Counterclaims, the List of Supplementary Evidence (2nd) and its attached evidence, and the written opinions on the evidence]. Two days later in January 2020, Arbitration Court forwarded the above documents to the opposing party and notified the parties that given that the Claimant submitted the Application for the Amendments of Arbitration Claims, the Tribunal decided to defer the oral hearing scheduled in February 2020.

12. In mid-January 2020, Arbitration Court received the Application for Additional Arbitration Claims submitted by the Claimant, and forwarded the Application to the Respondent and notified the parties that the Tribunal decided to hold an oral hearing of this case in mid-February 2020.

13. Due to the COVID-19 pandemic, the hearing scheduled in mid-February 2020 was unable to proceed. Arbitration Court notified the parties of the postponement of the oral hearing by phone.

14. In late March 2020, Arbitration Court notified the parties that the Tribunal decided to accept the Claimant's additional arbitral claims and hold an oral hearing of this case in mid May 2020 after consulting Arbitration Court.

15. In late April 2020, Arbitration Court received from the Respondent the Evidence List for Defense/Counterclaims (5th), the Application for Deferring Hearing, and the Confirmation of Counterclaims. Arbitration Court forwarded the above documents to the Claimant and notified the Respondent to advance the arbitration fees for the confirmed counterclaims. Arbitration Court notified the parties of the postponement of the oral hearing at the same time. Subsequently, the Respondent advanced the payment in time.

16. In May 2020, Arbitration Court received the Defense on Counterclaims and the written opinions on the evidence submitted by the Claimant.

17. In mid May 2020, Arbitration Court notified the parties that the oral hearing scheduled in May 2020 was postponed, and having consulted with Arbitration Court, the Tribunal decided to hold an oral hearing of this case in July 2020 and accept the Respondent's amended counterclaims.

18. In early July 2020, the Tribunal decided to postpone the oral hearing to late September 2020 due to the COVID-19 pandemic. Arbitration Court notified the parties of the postponement by phone and sent the Notice on Postponement of the Oral Hearing to the parties in August 2020.

19. In September 2020, the oral hearing was held in Beijing as scheduled. Authorized representatives of the parties were present at the hearing. The Claimant submitted the Application for Amendment Arbitral Claims, the List of the Fourth Supplementary Evidence, and the Summary of Evidence List before the hearing. The Respondent submitted the Evidence List for Defense/Counterclaims (6th) by Respondent and its attached evidence, as well as the Summary of Evidence List before the hearing. During the hearing, the parties made submissions on the claims/counterclaims, the facts and legal grounds they relied on, submitted rebuttal opinions on the claims/counterclaims made by the opposing party, exhibited and examined the evidence, and answered the questions raised by the Tribunal. The Claimant's witness appeared at the hearing and answered the questions raised by the parties and the Tribunal. The parties reached an agreement on the post-hearing procedural arrangement. After the hearing, the parties examined the original of the evidence submitted by the opposing party as organized by the Tribunal.

20. In late September 2020, Arbitration Court received the Application for the Amendments of Arbitration Claims submitted by the Claimant.

21. In mid-October 2020, Arbitration Court received the amended Application for Arbitration submitted by the Claimant.

22. In October 2020, Arbitration Court notified the parties that the amended arbitral claim submitted by the Claimant has been accepted.

23. In November 2020, Arbitration Court received the Supplementary Statement of Defense submitted by the Respondent.

24. Upon the Tribunal's request, the President of Arbitration Court decided to extend the time period for rendering the award to January 2021.

25. All the arbitration documents, notices and materials in relation to this case have been properly served on the parties under the *Arbitration Rules* and the language clause contained in the Dealer Agreement.

26. The arbitration proceedings of this case have been closed. The Tribunal renders this Award after deliberation based on full understanding of facts and legal claims of the parties, the submissions of the parties and legal analysis disclosed to the parties.

27. The statements of the parties, the opinion of the Tribunal and the Award are presented as follows.

II. STATEMENTS OF THE PARTIES

28. Based on the understanding of the facts and reasoning listed in the Claimant's Written Application for Arbitration and the Respondent's Statement of Defense and the Application for Counterclaim, the Tribunal issued a question list, demanding further opinions on the substantive issues of this case. Subsequently, the Claimant submitted the Amendments of Arbitration Claims, making further statements on the facts in dispute and major amendments to the original arbitral claims accordingly.

29. Since the Claimant amended his arbitral claims and further elaborated on the substantive issues of this case in the Application for the Amendments of Arbitration Claims, the Tribunal holds it not necessary to list the content of the former Written Application for Arbitration. Rather, the Tribunal will directly quote the Application for the Amendments of Arbitration Claims.

30. The Claimant stated in the Application for the Amendments of Arbitration Claims that:

31. The Claimant was an authorized dealer of Company B in City M, China. In August 2011, the Dealer Agreement was concluded between the Claimant and the Respondent, under which the Claimant was in charge of the sales and related set of service of Company B automobiles in City M. Before the expiration of the Dealer Agreement in December 2013, the parties agreed to extend the Dealer Agreement up to December 2016.

32. During the performance of the Dealer Agreement, for the purpose of cooperation and mutual benefits, the Claimant invested heavily in the construction of stores, exhausted all capacities and resources to contribute to the brand publicity of Company B (hereinafter the "Brand B"), and actively carried out business activities in accordance with the Dealer Agreement. Particularly, when the Respondent was caught in the recall crisis in 2014, the Claimant remained to fulfill all the contractual obligations fully and properly, without any breach of the Dealer Agreement.

33. During the performance of the Dealer Agreement, to pursue business growth, the Respondent ignored the actual market conditions and took advantage of his dominant position, forcibly transferred the operating pressure to the Claimant, frequently set unreasonable sales targets for the Claimant and consequently led to overstock. The Respondent even acted in a manner against the principles of fairness and good faith, and disrupted the cooperative relationship between the parties, including the abuse of

its supplier's dominant position to carry out rebate policies which seriously infringed the interests of the Claimant, the optional deduction of sales rebates without a just cause, the bundled business assessment of the Claimant's same-store sales with other dealers' stores in the group, etc.

34. In February 2014, the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China ("AQSIQ") released the Announcement on Risk Warning of Auto Parts Problems of Imported Brand B Automobiles, in which it states: "*Recently, Company B submitted an automobile recall program on imported automobiles for the potential auto parts problems. The company plans to recall over 1,000 imported cars of Company B that were made between November 2007 to December 2013 for repair. After preliminary verification, we confirmed that this the third recall initiated by Company B Lagonda Co., Ltd. due to the same defect. The company and its authorized dealers shall stop importing and marketing defective cars immediately and undertake relevant responsibilities and duties as producers and operators.*" The main legal relationship between the Claimant and the Respondent in signing the Dealer Agreement is that the Claimant invested in the construction of showroom and after-sale repair site in accordance with the Respondent's authorization. Based on the principle of privity of contract, the Respondent should protect the reputation of Brand B, and supply the Claimant with vehicles that meet the quality requirements of national compulsory laws and regulations. However, after the Claimant invested a huge amount of capitals to build the corresponding showroom and after-sale repair site in accordance with the Dealer Agreement, the Brand B vehicles authorized by the Respondent had serious quality problems, even the import was directly restricted because the quality problem was quite serious. At the same time, the Respondent blamed a manufacturer in City N, China, and tried to transfer the responsibility for pedals with quality problems to this manufacturer. It was later confirmed that the City N manufacturer did not supply auto parts to Company B at all. The Respondent's irresponsible reaction further increased distrust of Brand B vehicles in China. A large number of influential medias such as the People's Daily, the Economy Observer, the Capital Business Daily, the China Quality News, the China Youth Daily, Sina.com, Tencent.com, ifeng.com reported the Company B vehicle recall issues in depth. The Claimant's business was greatly impacted by the 2014 recall, the sales volume dropped dramatically compared to 2013. From the Respondent's proposal to adjust the Claimant's vehicle retail target to from 72 in 2013 to 55 in 2014, it can be seen that the respondent also fully recognized the impact of the recall event. Therefore, the

Respondent should make compensation for the Claimant's profit loss caused by the recall.

35. In April 2015, the Claimant and the Respondent negotiated twice on the completion of the Claimant's sales targets. During the first negotiations in April, the Claimant believed that it was both impracticable and impossible to achieve the retail and wholesale targets of 2015 proposed by the Respondent. For this reason, the Respondent provided three alternatives and the Claimant was asked to choose one of them: firstly, four shops including the Claimant in City M, City O, City P and City Q all to reach the sales targets set by the Respondent. Secondly, to transfer all business of Brand B of the four shops including the Claimant to an investor recommended by the Respondent at a reasonable price. Thirdly, if the Claimant did not agree to reach the sales targets, as well as was unwilling to transfer the business on reasonable terms, the Respondent would authorize another dealer in City M to achieve the overall sales targets in City M. During the second negotiations in April, the Claimant expressed its willingness to accept the second option, which is to sell the Brand B business. The Respondent was pleased and requested that before the store was sold, the Claimant needed to maintain as a dealer and to continue the cooperation with the Respondent to achieve the retail and wholesale targets. Therefore, the Claimant was convinced that the agreement on the sale of Brand B business had been reached with the Respondent, and the Respondent would not authorize a second dealer in City M, nor will it terminate the Claimant's dealer authorization (for the Respondent was clearly aware that the dealer authorization was the core and most valuable asset in the Claimant's sale of Brand B business, once the authorization was terminated, companies including the Claimant of Group Company C would suffer great losses). Based on the mutual agreement, the Claimant had agreed to cooperate with the Respondent on retail and wholesale targets and in order to achieve the targets, from May 2015, the Claimant purchased eleven new vehicles from the Respondent successively when the inventory was enough for annual sales and there was no procurement demand for new vehicles at all.

36. In July 2015, the second dealer shop Chinese Automobile Sales Service Company D (hereinafter "Company D") authorized by the Respondent started trial operation in City M, when the Claimant was uninformed, just completed the purchase of the eleven new vehicles . The Respondent expressly stated in the second negotiations in April that before any decisions were made, the Claimant would be noticed, and nothing would be done without consulting the Claimant. However, the second dealer

was authorized without informing the Claimant just at that time when the Claimant was convinced that the Respondent would not do such a thing and was helping the Respondent to achieve the sales targets regardless of the cost. The Respondent's breach of the commitment caused severe losses to the Claimant, including the interest loss in the purchase of eleven new vehicles from the Respondent in 2015, the business loss and the panic selling loss caused by vicious competition, both resulted from the impact of the new shop opened by the second authorized dealer. All shall be compensated by the Respondent.

37. After the Respondent authorized the second dealer shop in City M, it also sent advertisement text messages to the existing customers and potential customers of the Claimant without the Claimant's consent. The content included making recommendations for Company D in a ranking priority manner. The Respondent treated dealers differently, which is extremely unfair to the Claimant. This behavior violates the fairness principle of the market economy and seriously damages the fair competition order in the market.

38. The Claimant sent a letter by email to the Respondent in November 2016, requesting the renewal of the dealer's authorization, and the letter was sent by courier to the Respondent in November 2016. The same day, November 2016, the letter was received by the Respondent. Thereafter, the Respondent did not reply in writing concerning the refusal of renewing the Claimant's dealer authorization. Instead, in late November and December 2016, the Claimant was still asked to purchase new tools and vehicles by the Respondent, the Claimant acted accordingly and prepared adequately for 2017's business operation. The aforementioned preparation work was certainly taking place in the precondition of dealer authorization renewal, the requests of purchasing new tools and vehicles made by the Respondent in December 2016 clearly indicated that the authorization would be renewed. However, to the Claimant's astonishment, in December 2016, Group Company C suddenly received the Expiry Notice delivered by courier and issued by the Respondent, in which stated that after the expiration of the Dealer Agreement concluded amongst the Respondent, the Claimant and British Wings in December 2016, the Claimant must not sell Brand B vehicles and parts in City O as the authorized dealer in City O of Brand B. The Respondent arbitrarily terminated the authorization when the Claimant did not breach any part of the contract.

44. After the Claimant's dealer authorization was terminated, Company D directly entered into the Claimant's original showroom in City M in 2017 and held an

opening ceremony in April 2018. Moreover, Company D's showroom in City M basically retains the Claimant's original interior decoration without making any further changes. The market for Brand B in City M was created from scratch and was cultivated by the Claimant. During the period, tens of millions of monies were invested. The Respondent knew that the City M market could not accommodate two Brand B dealers, maliciously authorized a second distributor in violation of the agreement reached with the Claimant, and next recommended Company D to the Claimant's customers in a ranking priority manner, and then further maliciously terminated the Claimant's dealer authorization. Finally, it arranged for Company D to enter the Claimant's original showroom in City M to fully undertake the City M Market of Brand B that was cultivated by the Claimant. The Respondent's malicious behavior completely violated the principles of fairness and good faith in the market economy and caused huge economic losses to the Claimant. Not only the Claimant's investment in the decoration of the original showroom could not be recovered, but the Respondent also arranged for Company D to occupy the new high-standard exhibition hall where the Claimant had only renovated for two years. Such economic losses should be compensated by the Respondent.

45. According to the Dealer Agreement, the Respondent may purchase any unused, unsold, undamaged and complete Goods and any special tools at the Invoice Price upon the expiration or termination of the Dealer Agreement; and this provision shall continue in force on or after the termination of the Agreement. Based on the above agreements, the Respondent bears an obligation to purchase back the six warehouse vehicles and parts in store.

46. The Respondent still owes the Claimant the sales incentives, rebates and personnel rewards of 2015 and 2016, totally up to around RMB 2.7 million, the Respondent shall pay the Claimant these amounts and the corresponding interest loss.

47. In March 2013, the Claimant paid the Respondent the deposit of 19 vehicles in the amount of around RMB 2.9 million. After offsetting around RMB l.2 million purchase price, there is still an unreturned amount of deposit, i.e., around RMB 1.7 million in total. The Respondent shall return this payment and compensate the corresponding interest loss to the Claimant.

48. After the Dealer Agreement was signed, the Claimant had prepaid a total amount of around RMB 88.6 million to the Respondent for vehicle booking from 2011 to 2013, and the aforementioned prepaid vehicle price was offset by around RMB 87.5 million

when the vehicle was put in warehouse in 2012 and 2013, and the remaining RMB 1.2 million has not been refunded to the Claimant. The Respondent should return the balance of the prepaid vehicle price to the Claimant and compensate the Claimant for the loss of interest caused by the non-refundable item.

49. Based on the Respondent's breach of contract described above, the Claimant confirmed the following arbitral claims:

(1) The Respondent pays the sales loss in the amount of around RMB 14.1 million to the Claimant resulted from the impact of vehicle recalls occurred in 2014.

(2) The Respondent pays the interest loss of eleven new vehicles (purchased by the Claimant from the Respondent in 2015) to the Claimant. The interest is calculated from the date at which the wholesale loans were granted to the date when the vehicles were sold (tentatively, the interest to November 2019 is around RMB 1.5 million).

(3) The Respondent pays the loss caused by the impact on sales resulted from the Respondent's breach of the contractual commitment (the Respondent had authorized the second dealer in City M and opened a new store) to the Claimant, in the amount of around RMB 8.5 million.

(4) The Respondent pays the panic selling loss to the Claimant generated from Respondent's breach of the contractual commitment (the Respondent had authorized the second dealer in City M and opened a new store), in the amount of around RMB 18.8 million.

(5) The Respondent pays the loss for the irrecoverable investment in the decoration of showroom in City M caused by the Respondent's malicious failure to renew the Dealer Agreement with the Claimant, in the amount of around RMB 2.4 million.

(6) The Respondent repurchases six warehouse vehicles from the Claimant and pay the repurchase price in the amount of around RMB 17 million.

(7) The Respondent repurchases the parts in stock from the Claimant and pay the repurchase price, totally in the amount of around RMB 1.5 million.

(8) The Respondent pays the sales rebates which should have been paid to the Claimant in the amount of around RMB 2.8 million, and the corresponding

interest loss, tentatively from the date when the rebates should have been paid to November 2019, in the amount of around RMB 0.4 million.

(9) The Respondent returns the deposit paid while not yet offset by the Claimant, in the amount of around RMB 1.7 million, and the corresponding interest loss, from April 2017 to the date when the deposit is returned, tentatively to November 2019, in the amount of around RMB 0.2 million.

(10) The Respondent returns the vehicle price prepaid while not yet offset by the Claimant, in the amount of around RMB 1.2 million, and the corresponding interest loss, from January 2014 to the date when the vehicle price is returned, tentatively to November 2019, in the amount of around RMB 0.3 million.

(11) The Respondent pays the attorney fees to the Claimant.

(12) The Respondent bears the full arbitration fee and the cost for protective measures.

(13) The Respondent purchases back the special tools from the Claimant and pay the repurchase price, in the amount of around RMB 2.1 million.

50. The Respondent replied in the Statement of Defense submitted in October 2019 that:

51. The Dealer Agreement reads that "*Either party may extend this Agreement for an additional period of twelve (12) months ("Additional Period") by giving the other party written notice of extension and obtaining the other party's written consent prior to the expiration of the Initial Period or Additional Period (as applicable) ... and in the Dealer Agreement that "If notice of extension is not given by either party, or if such notice is given but the other party's written consent is not obtained, this Agreement will automatically expire at the end of the Initial Period or Additional Period (as applicable)*." In the subject case, the Dealer Agreement automatically expired and terminated in December 2016 because both parties did not extend the Dealer Agreement prior to the expiration of the Additional Period of the Dealer Agreement.

52. In addition, the Dealer Agreement reads that "*The termination of this Agreement at any time and for any reason shall not entitle the Dealer to payment from Company B by way of compensation or indemnity or otherwise for goodwill, initial or continuing publicity or advertising, or any other activity in relation to the sale and service of the Goods in the Territory, including any amount of investment made by the Dealer in the Dealership or in developing the market for Goods. The Dealer irrevocably and*

unconditionally waives all rights it may have to claim such compensation, indemnity or damages, whether statutory or otherwise." and further covenanted that "have no claim against Company B for compensation for loss of distribution rights, loss of goodwill or any similar loss". Therefore, as the Dealer Agreement automatically expired and terminated in December 2016, the Claimant has no right to claim against the Respondent for any compensation or indemnity, either under the aforesaid explicit covenants by and between both parties in the Dealer Agreement or by operation of any legal provision, and all its claims are completely untenable and should be rejected.

53. As to the arbitral claim that the Respondent should repurchase the related vehicles, parts and special tools, the fact is that after the termination of the Dealer Agreement in December 2016, the Respondent ever issued the notices in writing in January and February of 2017 respectively, for a good faith purpose that it could repurchase from the Claimant related products (including vehicles and parts) and special tools.

54. In the aforesaid written notices, the Respondent has repeatedly requested the Claimant to provide relevant information on related products and special tools in order to carry out the accounting of the repurchase price, and clearly informed the Claimant of the legal consequence that any failure to reply or deliver related products and special tools in due course of time would be deemed as the Claimant's irrevocable waiver of the very repurchase of the same by the Respondent.

55. However, the Claimant completely ignored the aforesaid goodwill notices repeated by the Respondent, and neither responded nor delivered any vehicle, part or special tool to the Respondent. Therefor the Claimant has chosen at its discretion to waive the very repurchase of such products by the Respondent. Obviously, the proposal raised by the Claimant that the Respondent should repurchase those vehicles, parts and special tools years later is completely untenable.

56. It is also worth mentioning that, in respect of the very four vehicles which the Claimant proposed that the Respondent should repurchase in the Claimant's additional arbitration request, as the Claimant owed a huge loan to Bank of City P Co., Ltd. City R Branch (hereinafter "R Branch") which is not a party to the subject case, the People's Court of S District, City R (hereinafter the "S District Court") enforced a seal-up of the same in November 2016 upon the application raised by R Branch. Thereafter, the S District Court brought out a judgment in November 2018 that R Branch could have the priority right to be compensated by the proceeds from conversion-into-money, auction. or sale of the very four vehicles sealed up. The City

R Financial Court brought out a judgment of second instance which has become final and effective in April 2019 that the judgment brought out by the S District Court be upheld. Because the Claimant refused to fulfill its obligations under the very judgment, R Branch applied for enforcement of the aforesaid four vehicles sealed up. Therefore, the Claimant itself does not have the right to dispose of the same, and its proposal in the subject case that the Respondent should repurchase the same is a pure nonsense. The Respondent raised the following counterclaims:

(1) The Claimant pays the attorney fees (tentatively, around RMB 0.3 million) to The Respondent.

(2) The Claimant bears the full arbitration fee that has been paid in advance by the Respondent and the Claimant itself to CIETAC for the case.

58. The parties submitted additional statements and a large amount of evidence respectively during the arbitral proceeding. The tribunal responds to these materials in the corresponding part of the "Opinion of the Tribunal".

III. THE OPINION OF THE TRIBUNAL

59. Since the arbitration case is heard in camera, and the parties are well aware of the conclusion of the Dealer Agreement and its performance as well as the other party's statements in this case, the Tribunal will not discuss every detail of the facts of the case.

60. Since the parties raised their claims within the Chinese law framework and made no objection to the validity of the Dealer Agreement or the law applicable to the dispute, the Tribunal determined that the Dealer Agreement concluded by the parties voluntarily was valid and binding upon both parties. The Tribunal will apply the laws of the People's Republic of China ("PRC"), as agreed by the parties in the Dealer Agreement, to this case.

61. Given that the effective arbitral awards of the two related arbitration cases have thoroughly analyzed the relevant facts and legal issues in this case, the Tribunal does not intend to repeat what have been earlier decides. Considering that the 13 arbitral claims of the Claimant have different facts and core issues, the Tribunal categorizes the claims into groups and analyzes them one by one to present the reasoning process of the Tribunal to the parties.

A. The First Arbitral Claim of the Claimant

62. The first arbitral claim of the Claimant is that the Respondent pays the sales loss in the amount of around RMB 14.1 million to the Claimant resulted from the impact of vehicle recalls occurred in 2014.

63. At the oral hearing of the case, the Claimant summarized that all the differences between the parties arose from the meeting held in April 2015.

64. Construed accordingly, as per the Claimant there were no disputes between the parties before that meeting of April 2015. Moreover, the Claimant seemed to agree that before the event of April 2015 there was no disputes between the parties after the "recall event" in 2014, or that they would not claim any compensation even if there was a difference at that time. Therefore, the Respondent made a defense on statute of limitations against the Claimant's first arbitral claim.

65. Based on the Article 107 of the *Contract Law of the People's Republic of China* (hereinafter the "Contract Law"), the Tribunal understands that the legal nature of the Claimant's first claim is to request the Respondent assume liability for "breach of contract", and the factual basis of which is the recall event of 2014. The factual argument of the Claimant herein is based on the Announcement to "prohibit the sale of all Brand B vehicles", released by the AQSIQ.

66. However, the Announcement is an event outside this case. To this end, only if the event were considered as the breach of the Dealer Agreement by the Respondent, there could be liability of the Respondent to be further discussed.

67. From the Claimant's perspective, it was the Announcement, which completely banned the importing and marketing of Company B vehicles, that caused a cliff drop in 2014 sales compared with 2013. Therefore, the Respondent should be responsible for that.

68. The Tribunal expresses the following opinion on the foregoing claim.

1. In the 1960s, the United States initiated safety recall system of automobiles which gradually developed into an important system for automobile manufacturing and selling in many countries in the world in recent years. Nowadays, especially, it is rather common to use foreign parts and components to manufacture automobiles (including expensive brand cars).

With the development of economy and the expanding demand of cars, such recall system has matured and now protected by law in China.

69. It is highly unlikely that consumers stop buying their favorite cars because of a recall event, since the recall system has already been well aware by the consumers, and as a matter of fact that globally it is hard to find an automobile brand (including prestigious cars) that has zero recall incident.

70. The core issue in this case is that whether the "recall event" alleged by the Claimant shall be considered as a breach of the Dealer Agreement by the Respondent which caused the sales drop of the Claimant.

2. The factual precondition to determine the Respondent's breach of contract based on the Announcement is that the Respondent cannot supply automobiles due to the Announcement. However, the Claimant did not argue and prove this fact.

71. Legally speaking, if the vehicles sold by the Claimant have "quality defects", recalling these vehicles is an act of remedy of the Respondent. Only if the Claimant could prove the Respondent's refusal of recalling (defected vehicles), could the Tribunal consider the Respondent's breach of contract by relying on such evidence. However, the Claimant did not present and prove the aforementioned fact.

3. At the oral hearing of the case, the Claimant alleged that a legal basis for the Respondent's liability for breach of contract for the "recall event", was the *Product Quality Law of the People's Republic of China*. Since recall is a way for manufacturers to redress quality defects which may exist or have already existed in their vehicles already sold, there is no factual basis for violating the *Product Quality Law* if they eliminated the quality defects by recall.

72. Secondly, from the perspective of burden of proofs the Claimant is obliged to prove which specific vehicles were of defects in quality under the Dealer Agreement and the fact that the Respondent did not recall these vehicles, because this is the evidence and factual ground of determining the Respondent's violation of the Produce Quality Law.

73. Furthermore, the Claimant claimed that the "recall event" had a huge impact on its sales in 2014 and clarified the corresponding calculation detail. However, if the Respondent should be liable for breach of contract due to violation of the *Product Quality Law*, it is necessary to prove that "what specific losses are caused by vehicles with quality defects".

4. An important factual basis for the Claimant's claim is that "*the Announcement released by the General Administration of Quality Supervision, Inspection and Quarantine of the Peoples Republic of China completely prohibited the import and sale of Brand B vehicles*". The Respondent pointed out at the oral hearing that the "Announcement" prohibited "importing and selling vehicles with quality defects" only, but not the vehicles without quality defects.

74. From the Tribunal's understanding, it is normal for the AQSIQ to prohibit the import and sale of defective cars of any brand. However, if the scope expanded to "any vehicle" of a certain brand, it would inevitably involve the country's foreign trade policy (it may even lead to a "trade war"). Therefore, it is difficult for the Tribunal to determine that the Announcement is the fundamental cause of the performance decline of the Claimant in 2014, if the Claimant submitted no evidence other than the Announcement to prove that the Respondent failed to perform the contractual obligation of suppling vehicles due to the Announcement, or could not directly prove if any customers ordered the vehicle involved in the case from the Claimant but cancelled the order or returned the car due to the Announcement.

5. During the hearing, the Respondent, based on the Respondent's Evidence exhibit, proposed that the real reasons for the Claimant's alleged decline in performance in 2014 were China's economic downturn in 2014, the strengthening of anti-corruption efforts, the Claimant's misreporting of 2013 performance and its poor financial conditions, etc. The Claimant did not

provide reasonable explanations and corresponding evidence to counter the aforementioned points of the Respondent.

6. The Respondent raised defense of the statute of limitation against the first arbitral claim of the Claimant.

75. From the Tribunal's understanding of provisions about the "statute of limitations" in the *General Principles of the Civil Law of the People's Republic of China*, the *General Rules of the Civil Law of the People's Republic of China* and relevant judicial interpretations issued by the Supreme People's Court, the two-year or three-year time limitation of arbitration shall apply to the dispute in this case. And the "starting point" for calculating the statutory limitation is from the date "knowing or ought to know when the right was infringed".

76. During the hearing, the Claimant stated that "this case is a 'lawsuit for breach of contract' thus the date of termination of the contract is the 'starting point' of the statutory limitation".

77. The Tribunal cannot agree with this argument. Since the starting point for calculating the statutory limitation is clearly stipulated, and the Claimant fails to invoke a legal basis that is sufficient for the Tribunal to determine that "a lawsuit for breach of contract, can extend the statutory limitation to the date of termination of the contract."

78. In this case, since the Claimant's first arbitral claim alleges that "the impact of the 2014 'recall event' on its sales" and "the Claimant's sales in 2014 has experienced a cliff drop compared to 2013", at least in the first quarter of 2015, the Claimant should know the causes and actual losses of the cliff drop, and the right to claim damages against the Respondent accordingly. Calculated from this point, before the implementation of the *General Rules of the Civil Law of the PRC*, the two-year statute of limitation stipulated in the *General Principles of the Civil Law* has passed (even if the "three-year limitation" applies, it also expired) when the Claimant submitted its written application for arbitration in this case in November 2018.

79. The Claimant did not propose or prove that any interruption/suspension of the statutory limitation during the above-mentioned period. Therefore, the Tribunal supports the Respondent's "statutory limitation defense" against the Claimant's first arbitral claim.

80. Therefore, even if the Tribunal determines that the Claimant has the right to claim against the Respondent based on the so-called "recall event" in 2014, it will lose the "right to win" due to the expiry of statute of limitation.

81. Therefore, the Tribunal dismisses the first arbitral claim of the Claimant.

B. The Second, Third and Fourth Arbitral Claims of the Claimant

82. The Claimant clarified the factual basis for his second, third, and fourth arbitral claims, which was that the Respondent's act of authorizing a second dealer in City M constituted a breach of contract.

83. The basic defense of the Respondent was that, according to the relevant provisions of the Dealer Agreement, the distributorship granted by the Respondent to the Claimant was not "exclusive". Therefore, the Dealer Agreement did not prohibit the Respondent from authorizing a second dealer in the area specified in the Dealer Agreement.

84. The Claimant did not provide sufficient contractual or legal basis against the defense of the Respondent. However, the Claimant alleged the parties negotiated in April 2015, twice about the Claimant's sales targets performance, where the Respondent proposed three solutions to the problem, among which the Claimant adopted the second option. Therefore, the Respondent should not "authorize a second dealer in City M without notifying the Claimant" before the Claimant sold the four 4S stores including the store authorized by the Respondent to the third party at a reasonable price.

85. The legal basis for the Claimant's claim is that "*the Respondent violated its legally binding 'commitment'*". The Tribunal makes the following analysis in this regard.

1. According to the Claimant's statements and the corresponding evidence, the three-option solution proposed by the Respondent was a single choice solution, that is, Claimant abandons the other two choices when he makes one choice. Therefore, unless the Respondent clearly states that "*a second dealer in City M will not be authorized until the Claimant completes the second plan*", the Respondent will no longer be obliged to the first and third options when the Claimant chooses (rather than completes) the second plan. However, the

second plan chosen by the Claimant does not include the condition stated above.

2. Taking a step back, even if the Claimant could prove that the Respondent promised not to authorize a second dealer in City M before the Claimant "completed" the second plan, the Respondent's liability is limited to the "violation of commitment", rather than losing the right to "authorize a second dealer in City M".

3. Then, if the Respondent "violates its commitment", what "actual losses" will be caused to the Claimant?

(1) The Claimant claimed that "the dealer authorization was the core and most valuable asset in the Claimant's sale of Brand B business", and the Claimant applied for the appearing of a witness to prove that "a third party to this case stopped the deal with the Claimant when he learned the Respondent authorized a second dealer in City M".

86. The Respondent questioned the witness at the oral hearing that whether he knew "the authorization is not exclusive". The whiteness answered "no". In this regard, the Respondent asserted that the deal failed because the Claimant did not inform the counter party of the real situation, thus the failure had nothing to do with the Respondent.

87. Logically, since the Claimant stated that "*the dealer authorization was the core and most valuable asset in the Claimant's sale of Brand B business*", the value of the "asset" would vary with the "legal nature of the authorization" (non-exclusive or exclusive). Therefore, even if it is true that "*a third party to this case stopped the deal with the Claimant when they learned the Respondent authorized a second dealer*" is true, the failure of the deal shall be attributable to the Claimant's failure to clarify the legal nature of the "dealer authorization" to the counter party, which may have misled the counter party about the nature of the "dealer authorization" as "exclusive". Accordingly in this regard, more legal and factual basis is required to determine the Respondent's liability for the failure of the Claimant's deal (there may be many other reasons, such as price, etc.).

(2) Regarding the "actual losses" claimed by the Claimant.

88. The Claimant stated that the Respondent authorized the second dealer in July 2015, and that "*Company D directly entered into the Claimant's original showroom on the first floor of the Regent Hotel, No.99 Jinbao Street, Dongcheng District, City M in 2017, and held an opening ceremony in April 2018*."

89. In these statements, the relevant facts to this issue are that the second dealer "directly entered into the Claimant's original showroom", and "held an opening ceremony in April 2018". In this case, unless the Claimant provides evidence to prove that the second dealer had already started selling Brand B vehicles in City M before the termination of the Dealer Agreement in December 2016, it is difficult for the Tribunal to support the Claimant's claims that the Respondent authorization to a second dealer in City M has caused actual losses to the Claimant by violating a promise.

4. The Claimant's second arbitral claim involves the fact that "*the Respondent authorized a second dealer to open a new store right after the Claimant completed the purchase of 11 new cars, resulting in the loss of interest on 11 new cars*".

90. According to Articles 159 to 161 of Chapter 9 "Sales Contract" of the *Contract Law*, the main obligation of the buyer is to pay the price as agreed. The funding resource has nothing to do with the deal.

91. For the buyer, the cost of purchase with his own money is different from loan. If the buyer pays the contract price with loan, the interest shall be a "cost" to the buyer, which has nothing to do with the seller. Because the seller only cares about getting the money, not the source of it.

92. The Tribunal holds that there is no basis for the Claimant's second arbitral claim. Subsequently, there is no need to further elaborate on the Respondent's defense regarding the statutory limitation.

5. The Claimant's third arbitral claim involves "*the loss of sales caused by the Respondent's authorization to a second dealer*".

93. As clarified above, the facts stated by the Claimant are that the second dealer directly entered into the Claimant's original showroom in 2017 and held an opening ceremony in April 2018. The Dealer Agreement was terminated in December 2016 due to the

expiration of the validity period. Therefore, unless the Respondent's authorization to a second dealer in City M constitutes a breach of contract, and the Claimant proves that the second dealer had sold any Brand B vehicles during the validity period of the Dealer Agreement, which directly led to a decline in the Claimant's sales due to the competition, the Claimant's third arbitral claim cannot be supported.

6. The Claimant's fourth arbitral claim is that the Respondent compensates for the sales loss caused by the "panic dumping" due to the opening of a second dealer store.

94. The conditions for the Claimant's claim to be supported include: (1) that the Respondent's act of authorizing a second dealer constitutes a breach of contract; (2) the Claimant lowered the price of sale due to competition with the second dealer; and (3) the dumping is necessary and inevitable. Since the Respondent's authorization to the second dealer does not constitute a breach of contract, and the Claimant cannot prove the so-called "dumping" is necessary and inevitable, the Claimant's fourth arbitral claim is dismissed.

C. The Fifth Arbitral Claim of the Claimant

95. The fifth arbitral claim of the Claimant is that the Respondent compensates for the loss of the decoration of the showroom. The basic fact and legal basis for this claim is that "*the Respondent refused to renew the Dealer Agreement with the Claimant maliciously*".

96. Freedom of Contract is a fundamental rule to follow when the parties establish a contract relationship. Unless the Claimant could provide more sufficient legal basis, there is no legal ground for ascertaining that the Respondent's failure to renew the Dealer Agreement constitutes a breach of contract when the expiration date and conditions to renew the Dealer Agreement is clearly prescribed therein.

97. In addition, the Respondent submitted the Arbitration Award No. 1 (hereinafter the "No.1 Award") and the Arbitration Award No. 2 (hereinafter the "No. 2 Award", and together with the No.1 Award, referred to the "two awards"). The two awards show that the claimants in the two cases and the Claimant in this case are affiliated companies, the arbitration agents of the parties in these two cases are the same as in this case. The two awards described in detail how the Tribunals of the two cases

analyzed and adopted the same evidence regarding the two negotiations in April 2015 mentioned by the Claimant in this case.

98. The Tribunal in this case agrees with the analysis made by the two awards. Since the parties in this case are well aware of the analysis and decision on "whether malicious non-renewal constitutes a breach of contract", to avoid repetition, the Tribunal does not intend to elaborate on the same issue using the same or similar reasoning.

99. The "actual loss" claimed by the Claimant on its fifth arbitral claim is the "Loss of decoration of the showroom". The primary condition to establish this claim is that "the Respondent breached the contract by terminating the contract ahead of time", which does not exist in this case.

100. At the oral hearing, the Claimant explained that the showroom was rented. The lessor came to inform the Claimant that the second dealer was willing to rent the place. Afterwards, the Claimant negotiated with the second dealer about the conditions for moving out from the showroom (the latter only paid for part of the furniture).

105. The facts claimed by the Claimant involve two lease relationships.

106. Firstly, the lease between the Claimant and the lessor. Ordinarily, when returning the lease to the lessor, a tenant is obliged to restore the place to its original state at their own expenses unless otherwise agreed or specified by relevant laws. The best way, therefore, is that someone would like to rent the site with the same set up and decoration (then previous tenant has no need to restore the place to its original state). Whereas the exhibition equipment, as moveable property, could be taken away or sold to the new tenant by the previous tenant.

107. Secondly, the lease between the lessor and the new lessee. It is a good solution that the lessor, as the connection point of the two lessees, "matches the transaction" in a way that is beneficial to all parties. (Such as here, the lessor introduced the second dealer authorized by the Respondent to the Claimant). Once a deal is closed, there will be a number of "benefits" entailed: for example, saving the cost of the original tenant for restoration; generating some "earnings" (such as the disposal of original exhibits, etc.); reducing the depletion of the site caused by "restoration" (repeated decoration might cause unnecessary damage to the site); reducing the troubles to "neighbors or passers-by" due to demolition and refurbishment; reducing the burden of manpower, materials and financial resources; and so on.

108. Regardless of the right of claim for the Claimant's fifth arbitral claim, the fact that "*the second dealer directly entered the original showroom*" should be a beneficial transaction concluded by the two parties in their own interests. Under such circumstances, it is not only lack of necessary contract or legal basis, but also unfair to request the Respondent to compensate the Claimant for the cost of decorating the showroom.

109. In summary, since the Respondent is under no obligation to renew the contract with the Claimant, and there is no legal basis to determine the non-renewal as a "breach of contract", the Tribunal holds that the Claimant's fifth arbitral claim is dismissed.

D. The Sixth, Seventh and Thirteenth Arbitral Claims of the Claimant

110. The three arbitral claims involve the dispute of "whether the Respondent should 'repurchase' the vehicles, parts and components and tools after the termination of the Dealer Agreement". The contractual basis for these three arbitral claims is the Dealer Agreement, namely:

> "*Upon the expiry or termination of this Agreement (or part of this Agreement) for whatever reason: Company B may by giving notice in writing to the Dealer within thirty (30) days of expiration or termination purchase any unused, unsold, undamaged and complete Goods and any special tools, including the AMDS, owned by and in the possession of the Dealer at that time, at a price to be agreed or, failing agreement within thirty (30) days of the commencement of negotiations, at the Invoice Price and taking into account any deterioration of condition and depreciation. Such goods and the AMDS shall be dispatched by the Dealer at its sole risk to Company B within twenty (20) days of being notified by Company B of its wish to purchase them. Company B shall pay for them within thirty (30) days of the end of the month in which the goods are delivered to Company B, subject to the same being safely delivered and in good condition. If Company B does not elect to purchase the AMDS, the Dealer shall thereafter be free to sell, transfer or otherwise dispose of the AMDS to any person, provided that, for the avoidance of any doubt, the Dealer shall not be entitled to include the Software in such sale, transfer or disposal, and the Software shall be immediately returned to Company B.*"

111. The Tribunal expresses the following opinion regarding this issue.

1. The Claimant's claim for the Respondent to "repurchase unsold vehicles" lacks sufficient factual and legal basis.

112. In view that the two awards submitted by the Respondent as evidence have made detailed analysis and determination on the interpretation of the Dealer Agreement [the text of corresponding clauses are the same in the three arbitration cases], the Tribunal agrees with the analysis and findings of the two awards relating to this Article, and does not intend to repeat the same here.

113. Regarding the 6th, 7th, and 13th arbitral claims of the Claimant, the Respondent stated and proved that he notified the Claimant in writing to "repurchase related vehicles, parts and components and special tools" twice in January and February of 2017 after the Dealer Agreement expired and terminated in December 2016. Meanwhile, the Respondent clearly informed the Claimant that "*if no reply is received from the Claimant by 28 February 2017, it will be regarded as the Claimant having irrevocably waived the repurchase of such products by the Respondent*".

114. While the Tribunal does not agree with the Respondent that "*(if the Claimant does not reply) it will be regarded as the Claimant having irrevocably waived his rights*", the Claimant's failure to respond and negotiate with the Respondent in time has a material adverse impact on his claims in this case.

115. According to the understanding of the contract terms cited by the Claimant, from a fair and reasonable perspective, the "complete and flawless" condition in the Dealer Agreement is a key factor when discussing whether the Respondent should repurchase the "unsold vehicles".

116. It is well-known that the "timing" of sales of vehicles, especially branded vehicles, is of great importance to dealers. If the sales opportunity is missed, not only the vehicles will lose the favor of consumers, but also the dealers get "dead inventory" if they do not take timely measures (such as price reductions or other preferential methods, etc.).

117. The Respondent claimed and proved that the 4 vehicles involved in the Claimant's sixth arbitral claim had been seized by the court when the Respondent notified the Claimant to repurchase the unsold vehicles.

118. The Claimant submitted evidence, "Transcripts of Interviews between S District Court and R Branch on Removal of Vehicle Seizures", to prove that "*S District Court has lifted the seizure of the aforementioned four vehicles and there are no barriers to*

repurchase." From the perspective of the validity of evidence, even if the evidence is authentic, it is merely an interview transcript. However, the evidence to prove the aforesaid facts should be corresponding legal documents officially issued by the court.

119. These vehicles would fail to meet the condition of being "complete and flawless" even if the seizure has been lifted. The depreciation of the vehicles (especially luxury vehicles) by not being used for several years may be even worse than if actually used. Moreover, according to the Claimant's statement, one of the six vehicles is of the 2013 model, four (two of which were not seized) are of the 2014 model, and one is of the 2015 model.

120. It shows that even if four out of the six "unsold vehicles" were seized when the Respondent notified of the repurchase, the Claimant could at least return the two unseized 2014 model vehicles. No matter what reasons the Claimant might have in not responding to the purchase offer in time, there is no legal ground to determine that the Respondent shall bear the adverse consequences.

121. The Claimant argued that another arbitral Award (not the two awards submitted by the Respondent, the Tribunal notes) related to this case ordered the Claimant to stop selling the Respondent's vehicles, but did not submit the corresponding evidence.

122. The view of the Tribunal is:

123. Firstly, the Tribunal is not aware why the tribunal of another case ordered the Claimant to stop selling the Respondent's vehicles. But there is a logical question that if the Claimant requested the Respondent to "repurchase the 'unsold vehicles'" in that case, why would the tribunal in that case rule to "stop selling" on the one hand and dismiss the "repurchase claim" on the other hand? (If the "repurchase claim" was supported, there is no need for the Claimant to file the same arbitral claim in this case.)

124. Secondly, there is another possibility that the Claimant did not ask the Respondent to "repurchase 'unsold vehicles'" in that case, but the Respondent's counterclaim for "prohibition of selling" was supported. If this is true, the Tribunal's order in that case could be that "(the Claimant) stop selling the vehicles concerned in the case in the name of the Respondent".

125. At the oral hearing, the Tribunal inquired the Respondent whether he would allow the Claimant to sell the so-called "unsold vehicles", and the Respondent answered that "*of course yes, except selling the vehicles in the name of the Respondent's authorized*

dealer." Therefore, there are no "barriers" from the Respondent for the Claimant to continue selling the "unsold vehicles".

126. Thirdly, there are no other legal barriers for the Claimant to continue selling the "unsold vehicles", either. Since the legal relationship between the two parties is mainly "buyer-seller relationship", the buyer takes ownership of the subject as soon as the seller completes the delivery. The Claimant is certainly entitled to sell his own vehicles.

127. Legally speaking, the Respondent's requirement that the "unsold vehicles must not be sold in the name of the Respondent's authorized dealer" involves whether the Claimant's distribution behavior violated the market principle of fair competition rather than whether the subject sold by the Claimant was legal.

128. Fourthly, from the perspective of intellectual property rights, once a trademark owner launches the goods with his registered trademark on the market, his "exclusive right" to the registered trademark is "exhausted" (Exhaust of Exclusivity). In other words, the trademark owner cannot prohibit others from reselling goods with his registered trademarks.

129. In addition, there is another factor that has to be taken into account. That is, there is a big difference between the two "valuation report of 6 vehicles", both issued by professional institutions, submitted by the parties (the Claimant's valuation is around RMB16.5 million, while the Respondent's valuation is much lower). Faced with such difference, even if the Tribunal supports the Claimant's claim for repurchase, how to properly determine the reasonable amount of repurchase remains a thorny issue. Designating another professional institution to reassess is time-consuming and expensive, and the parties may not recognize the result. More importantly, it is unnecessary.

130. More importantly, regardless of the "present value" of the six vehicles, the Claimant shall bear the adverse consequences for not responding to the Respondent's "repurchase" notice at the time.

131. In summary, the Tribunal finds that there is no contractual or legal basis for the Claimant's claim to request repurchase of the unsold vehicles by the Respondent under the Dealer Agreement now, while the Claimant did not respond to the notice of repurchase of the Respondent, after the Dealer Agreement was terminated several

years ago. Such claim also violates the principle of "resolving disputes fairly and reasonably". Therefore, the Claimant's sixth arbitral claim is dismissed.

2. The Respondent shall "repurchase" parts that conform to the Dealer Agreement.

132. The Claimant's seventh arbitral claim involves a request for the Respondent to "repurchase the stock parts". In view of the fact that, for this claim, the analysis and examination of the evidence, the finding of facts, and the application of law have been discussed in detail in the aforementioned two awards (in the form of a "majority opinion"), which the Tribunal agrees with, the Tribunal does not plan to repeat the detailed analysis here. Accordingly, the Claimant's seventh arbitral claim is upheld.

133. Before the end of the hearing, the Tribunal asked the parties to check the quantity and value of the relevant stock parts. Both parties sent deputies to check the inventory after the hearing, and formed the verification record in the annex to this Award.

134. The Tribunal accepts the amount agreed upon by the parties and expresses the following opinions on the differences.

136. Firstly, since the Tribunal agrees with the analysis and reasons on this issue in the two earlier awards, in which the tribunal mainly based on the principle of "resolving disputes fairly and reasonably" rather than "the Respondent's contractual or legal obligations to repurchase the stock parts", the Tribunal in this case shall order the Respondent to repurchase "within an acceptable range" of the Respondent. Otherwise, it is hard to meet the requirement of the "fair and reasonable" principle.

137. Secondly, it is understandable that the parties divided on the repurchase price of the parts, especially on whether these parts meet the "repurchase" conditions. If the parts were "unused" for several years, their physical and value status would undoubtedly be different from a few years ago. Since the Claimant neither replied to the Respondent's "repurchase" notice in time at the beginning of 2017, nor negotiated the repurchase price with the Respondent on the condition of the physical status and market value of the inventory parts at that time, the Claimant shall bear the corresponding adverse consequences even if he is not willing to accept the price assessed by the professional institution engaged by the Respondent based on the current physical and value status of the corresponding parts.

138. Thirdly, there needs to mention another point. Once the award is rendered, since the Tribunal applies the "fair and reasonable" principle to request the Respondent to repurchase the stock parts, even if the Respondent considers it "unfair", the award must be enforced. On the contrary, if the Claimant considers the award "unfair", he may opt out, that is, the Claimant may dispose the parts in other way to reduce the loss.

139. In summary, the Tribunal holds that it is relatively appropriate to order that the Respondent to repurchase the parts at a price of around RMB 1 million, which is recognized by the Respondent and written in the Respondent's evidence "evaluation report", with the confirmed quantity and status of the inventory parts.

140. The Claimant's arbitral claim for the Respondent to repurchase the "special tools" shall not be supported.

141. The Claimant submitted evidence to prove the name, specification, quantity, amount, and origin of the "special tools".

142. The 0948 Award submitted by the Respondent analyzed the arbitral claim of the claimant in that arbitration case for "repurchase of special tools" in detail. The Tribunal in this case agrees with the logical, factual and legal analysis of the No. 2 Award, which the Tribunal will not repeat here.

143. As far as the dispute in this case is concerned, the core condition of "Repurchase Special Tools", in the "Dealer Agreement" cited by the Claimant is "unused". However, the Claimant marked a large number of "95% new" ("九五新") in the "Status", column of the form shown in its evidence. Such "status" does not meet the "unused" condition.

144. For those marked as "new" in the "Status" column of the form, even if some could meet the "unused" condition, the Claimant failed to prove they were all "special tools".

145. For example, the Claimant failed to clarify and prove that which ones, among a large number of marked-new "Automotive Hand (Workshop, Spring Compressor, Hose Clip Removal) Tool", "Automotive Tyre Pressure Monitor Tool", etc., were "special hand tools" for the vehicles involved in this case.

146. For another example, the Claimant failed to clarify why the "Automotive Self-Adhesive Label" was a "special tool" and why the "written documents", been listed

as "Parts Quick reference Manual" and "Maintenance Sheet Printed Matter" should be "special tools".

147. And so on.

148. Furthermore, the Claimant's evidence "Invoices and Payment Vouchers Corresponding to the Special Tools to Be Repurchased" showed that the time was between 2012 and 2013. The Claimant did not explain why so many "special tools" imported during these years "met the 'unused' condition". Subsequently, the question is, was it necessary to continue importing the tools while so many "special tools" were "unused"?

149. Most importantly, since the Claimant owned so many "unused" "special tools" imported between 2012 and 2013, why the Claimant did not respond to the Respondent's repurchase notice in January and February 2017?

150. In summary, based on the analysis of the relevant evidence submitted by the Claimant and the doubts thereof especially the doubt that why the Claimant did not reply to the Respondent's repurchase notice in time, the Tribunal holds that it would be obviously unfair to support the Claimant's thirteenth arbitral claim under the principle of "resolving disputes fairly and reasonably".

151. Therefore, the Claimant's thirteenth arbitral claim is dismissed.

E. The Eighth Arbitral Claim of the Claimant

152. The eighth arbitral claim of the Claimant is the Respondent pays "the unpaid sales rebates and relevant interests".

153. The Claimant submitted its evidence to prove the existence of the "unpaid sales rebates". The Respondent delivered an examination opinion on these evidence.

154. The Tribunal expresses the following opinions on this issue.

1. The Claimant's "rebates claim", is based on several Announcements issued by the Respondent from July 2015 to October 2016 instead of the Dealer Agreement. Since the content of the Announcements related to the

performance of the Dealer Agreement, the Tribunal treats them as the contractual basis for the Claimant's claim for " sales rebates".

2. The Tribunal noticed that these Announcements were an "incentive measure" adopted by the Respondent to "further strengthen the retail-oriented sales strategy, expand the potential market, and optimize the inventory structure, within a prescribed time limit". The Announcements clearly stipulated different "policy periods", "target objects", "support contents", "application procedures" and other matters in different periods.

155. It is worth mentioning that the "target objects" column clearly stipulates that "*vehicles that have never been registered for warranty in the DCS system (not drought-resistant test drive vehicles and not officially imported by Company B)*". The "support content" column clearly stipulates "models, retail support and remarks". The "remarks" column contains conditions such as "limited to X units, first come first served", "adjustment", "batch sale time of XXX is before the end of X, 2011", "Monthly/quarterly targets completion" and other special conditions such as "time limit" and "quantity". In other words, the Claimant is obliged to prove that his claimed rebates met all the special conditions such as the corresponding period and quantity. However, the Tribunal is unable to determine the related facts based on the Claimant's current evidence.

3. More importantly, since the Respondent regards the rebates as an "incentive mechanism (applicable to all authorized dealers)", it was necessary to make corresponding procedural regulations.

156. The procedural conditions under which dealers can obtain "sales rebates" are listed in the "Special Instructions" column of the Announcements. For example, all materials, related to the vehicles that meet the rewarding conditions, and the Sales Incentive Application Form must be submitted to Sales Administration of Company B within 5 working days but not more than the end of the month after reporting to the DCS system. After all the submitted documents are confirmed by Company B, the retail support for the vehicle can be obtained.

157. According to the understanding of the above-mentioned "restrictive" conditions, the amount of "unpaid (sales rebates)" claimed by the Claimant shall be the amount "confirmed" by the Respondent (only after confirmed by the Respondent could the

money be called "payable"). Since the Respondent does not recognize the Claimant's "unpaid (sales rebates)" claim, the Claimant bears the burden of proof (to prove the facts that the rebates were "confirmed by the Respondent").

4. The Claimant claimed that the corresponding "sales rebates", was reported in accordance with the prescribed procedures, but no corresponding payment had been made by the Respondent. Since the Respondent closed the DCS system to the Claimant, he was unable to obtain the corresponding evidence.

158. The Claimant's claim involves two points:

159. The first one is that the Tribunal shall reverse the burden of proof due to reasons attributed to the Respondent. The Claimant's claim is reasonable in terms of the fact that the Respondent allegedly closed the DCS system.

160. However, the Claimant fails to bear the burden of proof when making this claim. The declaration procedure stipulated in the "special instructions" firstly requires the Claimant to submit "all retail related materials" and the Sales Incentive Application Form. Since these materials were submitted by the Claimant, the Claimant should archive the corresponding files, especially the copy of the Sales Incentive Application Form. Now that the Claimant fails to submit the retained materials, there is no factual basis to shift the burden of proof to the Respondent.

161. The second one is that even if the Claimant has proved the fact of "declared" by submitting corresponding materials, the fact that the Respondent "confirmed" (the Claimant's materials), which is necessary for the Tribunal to determine the fact of "unpaid (sales rebate)" remains unproved.

162. The Claimant alleged that it had chased the Respondent about the sales rebate and submitted evidence (the Respondent submitted an examination opinion thereof). The Tribunal carefully examined those evidence but could not see that the Claimant had clearly urged the Respondent to "pay the 2015-2016 sales rebates which has been confirmed by the Respondent". That is to say, even if the Tribunal accepts the Claimant's evidence and recognizes the fact of urging the Respondent, the fact that "the Respondent confirmed the sales rebates" cannot be verified.

5. Since the Claimant alleged at the oral hearing that "*all the differences between the parties arose from the meeting held in April 2015*"; then, at

least logically, there were no disputes between the parties before the meeting. The relevant question is why the Respondent did not confirm the sales rebates after the Claimant declared in accordance with the prescribed procedures when they had "no disagreement"?

163. The "answers" may be, either the Claimant did not declare in accordance with the procedures, or the Claimant's declaration was rejected by the Respondent, or the chance was taken by others on a "first come, first served" basis. Regardless of whether the Tribunal could come up with a reasonable answer, at least the Claimant did not provide sufficient explanations to convince the Tribunal.

164. In summary, based on current evidence and determined facts, the eighth arbitral claim of the Claimant is dismissed.

F. The Ninth Arbitral Claim of the Claimant

167. The Claimant argued that "*in March 2013, the Claimant paid the Respondent the deposit of 19 vehicles in the amount of around RMB 2.9 million* [the Tribunal notes that while the "deposit" (订金) claimed by the Claimant is different from the "deposit" (定金) shown in its evidence, the Claimant explained at the oral hearing that the "deposit" (订金) here referred to "advance payment". Thus, the actual meaning of "deposit" hereinafter is decided by the parties, which has no substantial impact on the analysis of the Tribunal]. *There is a balance of around RMB 1.7 million after offsetting around RMB 1.2 million as purchase price.*" Therefore, the Claimant filed the ninth arbitral claim.

168. The Respondent's basic defense was that the performance of the Dealer Agreement lasted for several years, during which the money exchanged involving many transactions. Thus, the amount of money claimed by the Claimant had already offset the purchase price.

169. The Claimant submitted evidence to prove that "*the Respondent shall return the prepaid but not offset deposit and capital for vehicle prices in the amount of around RMB 1.9 million*". (The Claimant did not explain whether the two concepts, "deposit" and "capital", should be treated as one or separately.)

170. The Tribunal expresses the following analysis and opinions on the Claimant's evidence.

1. The Tribunal understands that the Claimant does not claim that "*19 vehicles were ordered but only 4 were delivered by the Respondent*". Otherwise, the Claimant would argue that "*the Respondent breached the contract in short of delivery*" and claims for a double return of the deposit. Therefore, the Tribunal interprets the Claimant's statement of "*offset around RMB 1.2 million only*", as out of the 19 vehicles purchased by the Claimant, only 4 were involved in the deposit offset.

171. The corresponding fact would be that the other 15 vehicles were paid in full before the end of March 2017 (see Claimant's Evidence). As such, the Claimant is obliged to prove the aforementioned fact.

2. The Claimant's evidence is a table titled "Deposit Shall Be Returned by Company B", in which the data is collected by the Claimant himself. The table shows "Company B Deposit (19 Vehicles)" and the corresponding "Date" is "2013-3". The table also shows the time when "4 Model I vehicles' purchase price offset the deposit" is "2016-12" and "2017-3".

172. The content shown in the table lacks coherence. The time span in the table is from "2013-3 to 2017-3". However, the Claimant did not explain nor prove with evidence that during the four-year period, the Claimant only ordered 19 vehicles from the Respondent, and the Respondent only delivered 4 Model I vehicles. If the Claimant claims that these 19 vehicles are all Model I, and in addition to this model, the Claimant has also ordered other models of vehicles from the Respondent, but the payment for these models is irrelevant to around RMB 2.9 million, the Claimant shall provide further evidence.

3. The Claimant's evidence 56 is titled "Model I Vehicles Purchase Invoice" which matches the "4 vehicles", listed in his evidence. However, the Tribunal could only determine from these evidence that "4 Model I vehicles, purchase

price offset the deposit", but not that "the other 15 vehicles purchase price does not offset the deposit".

4. The Claimant's evidence 57 probably aims to prove that the deposit of each Model I vehicle is around RMB 0.3 million. The Tribunal recognizes this fact but cannot support the Claimant's ninth arbitral claim only based on this.

5. The Claimant submitted evidence after the oral hearing to prove that the Respondent should return the Claimant's deposit of around RMB 1.7 million.

173. The Tribunal expresses the following opinions on these evidence.

(1) The Claimant intends to prove with Evidence that "the Claimant has claimed the deposit and the whole vehicle payment from the Respondent in March 2017, and the Respondent recognizes the deposit and rebates shall be repaid/paid to the Claimant."

174. The Claimant's Evidence is relevant emails replied to the Claimant by the Respondent in April 2017, stating that "*the verification and settlement of your company's deposit is a matter of aftermath of expiration and non-renewal of the Dealer Agreement. Our company has received the bank's request for suspending the payment of deposits and rebates before the court judgment. Our company is negotiating a specific action plan with your company and the bank for the time being, and will deal with it after all parties reach an agreement. Before that, please make full payment for the No.1 vehicle in time, so as not to affect customer delivery*."

175. Based on the Claimant's evidence, the Tribunal finds that the Respondent recognized an unpaid deposit in April 2017 and would deal with it after reaching an agreement with the Claimant and the bank and requested the Claimant to make full payment for the No.1 vehicle in time.

176. According to the Claimant's evidence, the Tribunal cannot tell whether "all parties reached an agreement" as shown in the email or not, and consequently, the Tribunal cannot determine whether the Respondent recognizes the deposit of around RMB 1.7 million and is willing to return these moneys to the Claimant. The Claimant has failed to prove that "the parties reached an agreement", or if an agreement was reached

what was the contents, or if "the parties failed to reach an agreement", why should the Respondent return the RMB 1.7 million deposit to the Claimant?

(2) The Claimant intends to prove with evidence that "the outstanding amount of refundable deposit is around RMB 1.4 million".

177. The Claimant's evidence is the "Vehicle Payment Notice" sent by the Respondent to the Claimant; evidence is the Respondent's reply to the Claimant's email, both sent in March 2017. The Claimant intends to prove that "*After the Claimant paid the deposit and balance of the first two of the three Model I (No.2 and No.3) in accordance with the Payment Notice, the Claimant required the remaining deposit of around RMB 1.4 million to be deducted as the vehicle payment for No.1 due to the termination of the dealer's authorization, and the Respondent has no objection to the amount of the remaining deposit...*"

178. The Claimant stated in his email in March 2017, "*As of now, our company has a deposit balance of around RMB 1.4 million in your account, and our company has converted this deposit into the payment for a Model I. After calculation, our company needs to pay another amount of around RMB 1.9 million. We have notified the accountant to pay this amount to your company today. Please check it.*"

179. The Respondent replied on the same day, "*please pay the vehicle price in accordance with the Payment Notice. The verification and settlement of your company's deposit is a matter of aftermath of expiration and non-renewal of the Dealer Agreement. Our company is negotiating a specific plan with your company for the time being and will deal with it after reaching an agreement*."

180. Based on the Claimant's Evidence, the Tribunal finds that in March 2017, the Claimant requested a deposit of around RMB 1.4 million to offset the price of the No.1 vehicle; however, the Respondent believed that the deposit should be separated from the vehicle payment.

(3) The Claimant intends to prove with Evidence that "(the Respondent) decided not to deliver the No. 1 and No. 3 vehicle of Model I to the Claimant, but to refund the vehicle price prepaid by the Claimant in full. However, the deposit was not

refunded". This evidence does not prove whether the full payment for the No. 2 vehicle claimed by the Claimant is refunded or not.

181. Based on the analysis of the relevant evidence submitted by the Claimant after the oral hearing, it could prove the fact that the "four vehicles related to the deposit offset" while facts such as the delivery and payment of the other 15 vehicles are not.

182. Taking a step back, without discussing the delivery and payment of the 15 vehicles, the Claimant should still prove the fact that the parties have reached agreement (in settling the debts). Therefore, even if the Respondent recognized at the time that "the deposit should be a wind-up matter after the termination of the Dealer Agreement", the Claimant is still obliged to prove the fact how parties have settled the payments and deposit issue.

183. Certainly, if the parties have not settled the "deposit" yet, the Claimant has the right to request the Respondent to close the account and consider his next move based on the result.

6. According to the Claimant's statements, the final settlement of the 19 vehicles by the parties should occur within a "reasonable period" after the end of March 2017. The Tribunal questions why the Claimant did not request the Respondent to settle the deposit within a "reasonable period", and why no such claim was raised at the time when this case was filed in November 2018. Further, why the Claimant still raised no such claim when it submitted its "Application for Additional Arbitral Claims" dated June 2019 prior to the issuance of the Notice of Arbitration, but only until the time when the Claimant submitted its "Application for Amendment Arbitral Claims" in January 2020?

184. In summary, the Claimant's ninth arbitral claim could not be supported based on the existing evidence.

G. The Tenth Arbitral Claim of the Claimant

185. The Claimant's tenth arbitral claim is the Respondent refunds payments for vehicle prices prepaid but not offset in the amount of around RMB 1.2 million and its interest.

186. The Claimant submitted Evidence to prove that "*the Respondent shall return the vehicle payment prepaid but not offset fully in the amount of around RMB 1.5 million*".

187. The Respondent stated that since the beneficiary was a third-party to this case, this claim should not be heard by the Tribunal. The Claimant replied that "*the fact is the Respondent requires the Claimant to pay to its parent company*" but provided no relevant evidence.

188. The Tribunal expresses the following opinions on this issue.

1. Evidence of the Claimant, a form made by himself, shows "prepaid vehicle payment-Brand B UK", "2011-12 around RMB 74.8 million", "2012 payment of vehicle price around RMB 13.9 million", "2012 vehicle storage around RMB 60.7 million", "2013 vehicle storage around RMB 26.8 million", "2013-12 around RMB 0.2 million", and "capital occupation cost around RMB 0.3 million".

189. The Tribunal's understanding of the content shown in the Claimant's form is that the Claimant paid "Brand B UK" "prepaid vehicle prices" at the amount of around "RMB 74.8 million" in December 2011; the amount of "vehicle prices" involved in the tenth arbitral claim is the former deducting the amount of "vehicle prices of 2012 and 2013". In addition, the Claimant believed that the Respondent should also pay the so-called "capital occupation fund around RMB 0.3 million". The sum of the two is the amount shown in the tenth arbitral claim.

2. Evidence of the Claimant shows that the entity received the "prepaid vehicle prices" is "Brand B UK" rather than the Respondent. The currency shown in the Claimant's evidence is Euro. Therefore, the Tribunal finds that the Claimant has paid the foreign manufacturer directly the "prepaid vehicle prices" for importing the vehicle from abroad.

190. An international trade inevitably involves "parties of import and export transactions", "payment methods (L/C, TT or other methods, etc.)", as well as import declaration of the vehicles. As far as the Claimant's current evidence is concerned, the Tribunal

cannot determine the fact that the Respondent participated in such transactions and should refund the Claimant's corresponding advance payment for the vehicles.

3. Taking a step back, even if the Tribunal recognizes that the Claimant has the right to claim the refund of the prepaid vehicle prices from the Respondent, Respondent's defense on statutory limitation is a valid defense.

191. The Claimant submitted evidence after the hearing to prove the fact that "*the Claimant has prepaid around RMB 74.8 million for the vehicles to the Respondent from December 2009 to December 2011*".

192. Generally speaking, the so-called "advance payment", should match the "order". That is, the "prepaid prices" that the Claimant intends to prove with Evidence shall relate to the Claimant's "booked vehicle" during the period "2009-2011". Based on this inference, the Claimant should clearly know whether there was an "un-deducted vehicle payment" at the end of 2012 or a little longer at the latest.

193. At the very least, the "commodity vehicle storage" time shown in the form attached to the Claimant's Evidence is "2013/6". In this case, the Claimant should know whether there was any refundable deposit in the "prepaid vehicle payment" at the latest by the end of June or July 2013 or a reasonable period (such as several months) thereafter. The Claimant did not claim the right against the Respondent neither at that time, nor at the time when this arbitral claim was filed in November 2018 or even June 2019.

194. Therefore, the Tribunal holds that the Respondent has valid defense of statutory limitation.

4. As the Claimant's claim of the "prepaid vehicle prices" is dismissed, there is no need for the Tribunal to discuss the "capital occupation cost".

195. In summary, the Claimant's tenth arbitral claim is dismissed.

H. The Claims of the Claimant on Attorney Fees and preservation fees

196. Based on the foregoing opinions, the Tribunal considers that it is appropriate not to support the Claimant's arbitral claim for attorney fees and preservation fees.

I. The Counterclaim of the Respondent on Attorney Fees

197. Considering the circumstances of the dispute in this case and the overall decision -making of the Tribunal, the Tribunal considers that it is relatively appropriate not to support the Respondent's counterclaim for attorney fees.

J. The Arbitration Fees for the Claims and Counterclaims

198. Taking into consideration of all the above-mentioned opinions, and the amount of claims supported as well as the grounds thereof the Tribunal holds that the Respondent shall bear 15% of the arbitration fees for the claims, the Claimant shall bear 85%. The arbitration fees for counterclaims shall be entirely borne by the Respondent.

IV. AWARD

199. According to the above findings and reasons, the Tribunal renders the Award as follows:

(1) The Respondent shall repurchase from the Claimant the parts which had been checked and agreed upon by the parties (as in the attachment of the Award) and pay the Claimant in the amount of around RMB 1 million.

(2) All other claims of the Claimant are dismissed.

(3) The counterclaims of the Respondent are dismissed.

(4) 85% of the arbitration fees for the claims shall be borne by the Claimant, and the Respondent shall bear 15%. The arbitration fees for the claims have been fully offset by the advance payment from the Claimant, therefore the Respondent shall pay the Claimant to cover the sum advanced by the Claimant; and

(5) The arbitration fees for the counterclaims shall be borne by the Respondent. The arbitration fees for the counterclaims are settled and offset with the advance payment by the Respondent.

200. For the above awarded amounts, the Respondent shall pay to the Claimant within thirty (30) days from the date of this Award. If the payment is overdue, the overdue interest shall be doubled in accordance with Article 253 of the *Civil Procedure Law of the PRC*.

201. This Award shall be final and binding upon the parties and is effective from the date of issuance.

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRAL AWARD

Company A

Claimant

v.

Company B

Respondent

Matter for arbitration: Disputes over asset transfer agreement

Place of arbitration: Beijing, P.R.China

TABLE OF CONTENT

I. FACTS OF THE CASE

A. The Claimant's Arbitral Claims and Facts and Grounds

Company C is a solely State-owned non-bank financial institution with its establishment approved by the State Council and the People's Bank of China, and having the main business as management, acquisition and disposal of non-performing assets. The Respondent is a branch of Company C established in M City, which operates its business activities under the authority of the head office.

The Claimant is an overseas investment entity engaging in management and disposals of non-performing assets; it purchased from the Respondent the assets against Company D, Company E and Company F with a principal amount of RMB 170 million.

The detailed transaction process is as follows:

In May 2013, for the purpose of applying to I Bank M Branch for conducting the invoice discount business ("K Business"), Company D signed a General Facility Agreement with I Bank J Branch. On the same day, Company D and I Bank J Branch signed a Domestic Commercial Invoice Discount Agreement, which is an individual agreement under the General Facility Agreement.

The total facility granted by I Bank J Branch for Company D was approximately RMB 200 million (including financing interests and costs). The facility was valid from May 2013 to January 2014 and it was a revolving facility for invoice discount.

The underlying contract that Company D used for applying invoice discount financing was the Coal Supply Agreement signed by Company D with Company F in April 2013, pursuant to which, from April 2013 to December 2013, Company D was to supply thermal coal to Company F, and Company F was to make corresponding payment to Company D. Afterwards, due to Company F's internal organization restructuring, Company F entrusted Company F1 to perform the payment obligation on its behalf. In April 2013, Company F signed with Company D a Supplemental Coal Supply Agreement, by which both parties agreed that Company F1 shall fulfill the payment obligation under the Coal Supply Agreement on behalf of Company F; value-added tax invoices shall be issued by Company D to Company F1; Company F1 shall affix seals on settlement statements of coal sales for confirmation; and in case of Company F1's failure to fulfill the above payment obligation, Company F shall be ultimately responsible for the payment.

With accounts receivable from Company F, Company D transferred all such accounts receivable to I Bank J Branch in accordance with Clause 5 of the Domestic Commercial Invoice Discount Agreement, whereby Company D issued the Notice of Accounts Receivable Assignment to Company F1 in May 2013, and on the same day, Company F1 replied to Company D in the form of the Confirmation of Notice of Accounts Receivable Assignment, confirming that it had been informed of the assignment and would pay all the accounts payable in full to the designated bank account.

Since May 2013, Company D has made 18 applications to I Bank J Branch for the K Business, and 2013 No. 20-23 of the K Business are relevant to this case. In order to conduct the K Business, Company D submitted to I Bank J Branch the Applications of Domestic K Business with Right of Recourse, the Commercial Invoices, the Confirmation of Assignment of Accounts Receivable, the Settlement Statements of Coal Sales, etc., by which transferred its accounts receivable from Company L to I Bank J Branch in batches as fund source for the repayment of the funding under the K Business; based on this, I Bank J Branch granted the corresponding discount amounts, which are shown in details below:

No.	Application Date	Invoice Amount	Discount Amount	Grant Date	Due Date
20	2013.12	50 million	40 million	2013.12	2014.3
21	2013.12	50 million	46 million	2013.12	2014.3
22	2013.12	50 million	46 million	2013.12	2014.3
23	2013.12	50 million	38 million	2013.12	2014.3
		Total:	**170 million**		

The above No. 20-23 of the K Business have not been repaid, with the total principal amount being RMB 170 million. According to Clause 4 of Applications of Domestic K Business with Right of Recourse, the discount interest rate was 5.1%/year (the "**Creditor's Right**").

In April 2014, I Bank J Branch filed two separate lawsuits against Company D, Company F and other relevant guarantors in relation to the Creditor's Right with the Intermediate People's Court of M City, N Province (the "**M Intermediate Court**").

In December 2014, I Bank N Branch transferred the Creditor's Right as one of the non-performing assets to the Respondent. Thereafter in October 2016, the Respondent and the Claimant signed the Asset Transfer Agreement, with the Creditor's Right being listed as Item 102 "D" in Schedule 1 to the "Assets Schedule" annexed to the Asset Transfer Agreement. In accordance with the terms of the Asset Transfer Agreement and the Statement issued by the Respondent to the Claimant, the Respondent transferred the Creditor's Right to

the Claimant, with the Cut-Off Date being March 2016, the principal outstanding amount of the Creditor's Right as an individual asset being RMB 170 million, the outstanding interest balance being approximately RMB 9 million, and the purchase price of this individual asset being RMB 95 million.

In December 2016, the Claimant paid the Respondent the purchase price of the individual asset, which is RMB 95 million, and the Respondent handed over the underlying asset contracts, invoices, notarized certificates, and other documents evidencing the rights relevant to the Creditor's Right to the Claimant.

In February 2018, the Respondent and the Claimant published on N Economy Journal a Joint Announcement on Creditor's Rights Assignment and Debt Collection (the "**Joint Announcement**") to notify Company D, Company F and Company F1 of the facts about assignment of the Creditor's Right and demand them to repay the principal and interest to the Claimant and to honour the rights concerned as claimed by the Respondent.

As described above, after the Creditor's Right was transferred to the Respondent, the plaintiff of the above two cases was changed to the Respondent. After the Respondent transferred the Creditor's Right to the Claimant, the plaintiff of the above two cases was then changed to the Claimant during the appeal.

On December 2018, the High People's Court of N Province (the "**N High Court**") issued final judgments in relation to the appeals of the above two cases. The final judgments determined that Company F1 had fulfilled its payment obligations under 2013 No. 20-23 of the K Business in December 2013, hence Company F should have no obligation to make any repayment.

The only reason why the Claimant was willing to purchase the Creditor's Right with a consideration of RMB 95 million was that the Respondent's accounts receivable were from Company F, as Company F is a company listed on the O Stock Exchange, with its most recent annual report (the "**2015 annual report**") prior to the transfer indicating the total asset being as much as RMB 50 billion and net assets exceeding RMB 3 billion, and Company F is also a large state-owned enterprise. All the above gave the Claimant reasons to believe that Company F had sufficient funds and willingness to repay the Creditor's Right.

Under Section 9.2 [Representations and Warranties by Seller Regarding All Assets] of the Asset Transfer Agreement, the Respondent has undertaken that the representations and warranties made in relation to each Asset on the Closing Date were true and correct, and the Asset included the accounts receivable from Company F. I Bank J Branch and the

Respondent's act of requesting Company F to carry out their repayment obligations through civil litigations also convinced the Claimant that Company F had not made the repayments under 2013 No. 20-23 of the K Business and that the Respondent did have rights against Company F in respect of the accounts receivable. The Joint Announcement also confirmed this.

However, the final judgments of the N High Court concluded that Company F1 had fulfilled all its payment obligations to I Bank J Branch (including 2013 No. 6-23 of the K Business) before December 2013, and at the time when the Creditor's Right was transferred to the Respondent from I Bank N Branch in December 2014, I Bank N Branch's accounts receivable from Company F had already been eliminated because of Company F1's full performance of its obligations. Therefore, it is impossible for the Respondent to enjoy any claims of accounts receivable against Company F. In other words, there was a material defect in the Creditor's Right transferred from the Respondent to the Claimant, and the Respondent's accounts receivable from Company F as represented and warranted by the Respondent to the Claimant did not exist from the very beginning. As a result, the Claimant's contract purpose of collection of the Creditor's Right could not be realized, and there has been a repudiatory breach of contract by the Respondent.

Article 94 of the *Contract Law of the People's Republic of China* (the "*Contract Law*") provides that "*the party may rescind a contract under any of the following circumstances: … (iv) either party delays performance or otherwise breaches the contract and thus makes the realization of the purpose of the contract impossible; …".* Article 165 of "Chapter 9 on Sales Contracts" of this Law further stipulates that *"where the subject matter comprises of a number of objects, one of which does not comply with the contract, the buyer may rescind the part of the contract in respect of that object …*".

Due to the repudiatory breach of contract by the Respondent and the Creditor's Right is one of the objects under the Asset Transfer Agreement, and in accordance with the provisions above, the Claimant has entrusted H Law Firm to issue a Lawyer's Letter to the Respondent in January 2019, in which the Claimant demanded to rescind the individual asset clauses, and such contractual provisions have been rescinded at the time when the Lawyer's Letter arrived at the Respondent. As the Lawyer's Letter arrived at the Respondent in January 2019, the Claimant asserts that the individual asset clauses had been rescinded according to the law in January 2019.

After the rescission of the individual asset clauses, according to Article 97 of the *Contract Law*, the Respondent shall pay the following amounts to the Claimant: (i) purchase

price of the individual asset in the amount of RMB 95 million; (ii) loss of interest, which shall be calculated at the bank lending rate for the same period from the Claimant's payment date for the purchase price (i.e., December 2016) to the Respondent's actual repayment date (calculated temporarily as at February 2019, the interest is RMB 9,852,292); and (iii) loss of anticipated benefit in the amount of RMB 75 million (RMB 170 million minus RMB 95 million) in accordance with Article 113 of the *Contract Law*.

Even if the Tribunal does not support the Claimant's first arbitral claim regarding the rescission of the individual asset clauses in the Asset Transfer Agreement, the Claimant should be entitled instead to claim against the Respondent for compensating the loss so incurred due to the Asset Defects in accordance with Section 7.2 of the Asset Transfer Agreement, which states that "*Seller (i.e., the Respondent) shall indemnify Purchaser (i.e. the Claimant) for losses incurred due to Defects*". Since the Respondent's accounts receivable from Company F included in the Creditor's Right did not exist from the very beginning, the Respondent has materially breached its representations and warranties under Section 9.2, which clearly constitutes a material defect, and the Respondent shall be responsible for the Claimant's loss incurred due to such material defect.

The Claimant believes that in accordance with the terms of the Asset Transfer Agreement above, the material defect of the Creditor's Right has resulted in the Claimant's inability to collect the Creditor's Right, and the losses incurred by the Claimant should be at least equal to the purchase price of this individual asset, which is RMB 95 million, and thus the Respondent shall be responsible for compensating such loss and the loss of interest, which shall be calculated based on RMB 95 million and at the benchmark lending rate for the same period from the Claimant's payment date.

Pursuant to Article 52 [Allocation of Fees] of the *Arbitration Rules*, the Tribunal has the power to decide in the arbitral award, having regard to the circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case.

Having committed a repudiatory breach of contract, the Respondent should reimburse the Claimant for the arbitration fee and the legal costs of RMB 2 million for this case.

In conclusion, the Claimant submitted the following arbitral claims:

(1) Order to confirm that the purchase and sale clauses regarding the individual asset Item 102 "D" in Schedule 1 "Assets Schedule" annexed to the Asset Transfer Agreement have been rescinded in January 2019, and order the Respondent

to refund the RMB 95 million purchase price of the individual asset to the Claimant, and compensate the Claimant for the loss of interest, which shall be calculated at the bank lending rate for the same period from the date of payment by the Claimant (i.e., December 2016) to the date of the actual repayment by the Respondent (being temporarily calculated as at February 2019, the interest is approximately RMB 9 million), and compensate the Claimant for the losses of anticipated benefit in the amount of RMB 75 million;

(2) If the Tribunal does not support the Claimant's first arbitral claim regarding the rescission of the individual asset clauses in the Asset Transfer Agreement, the Claimant seeks to order the Respondent to indemnify the Claimant for its losses in the amount of RMB 95 million due to the material defect of the asset and losses of interest, which shall be calculated at the bank lending rate for the same period from the date of payment by the Claimant (i.e., December 2016) to the date of the actual repayment by the Respondent (being temporarily calculated as at February 2019, the interest is approximately RMB 9 million); and

(3) Order the Respondent to bear the arbitration fee of this case and reimburse the Claimant for its legal costs for this case in the amount of RMB 2 million.

B. The Respondent's Statement of Defense and Counterclaims

1. The Claimant alleges that the Respondent has violated Section 9.2 of the Asset Transfer Agreement and constituted a fundamental breach and the Claimant's purpose of the contract could not be achieved, and therefore, the Claimant has the right of legal rescission. Such allegation should be rejected due to lack of factual and legal basis. The details are as follows:

(1) The assets involved in the case originated from the non-performance assets (i.e., Creditor's Right) transferred by the Respondent from I Bank N Branch. Both the transfer documents signed by I Bank N Branch and the Respondent and the transfer documents signed by the Claimant and the Respondent indicate that the transferred assets are the loan creditor's right against Company D and the corresponding guarantee creditor's rights, but the transferred assets have never included the accounts receivable creditor's right of Company F. The effective judgment has confirmed that the Claimant has the principal creditor's right

against Company D and the corresponding guarantee creditor's rights. Therefore, the purpose of the contract has already been achieved.

(a) The Agreement on Batch Transfer of Non-performance Assets and Transfer Agreement of Creditor's Rights (Applicable to Individual Creditor's Right) signed by I Bank N Branch and the Respondent indicates that the creditor's rights are: the principal amount of non-performance assets owned by Company D (RMB 170 million) and the corresponding interest and legal costs, including the assessment fee for the registration of accounts.

(b) Section 1.1 of the Asset Transfer Agreement signed by the Respondent as seller and the Claimant as purchaser defines "Asset" as "*all the assets listed in the Assets Schedule in Schedule 1 hereof, including all the debts under the Loan Contracts initially created by the Prior Holder and that have been transferred to Seller, all the secured debts under the Guaranties and the Mortgage Contracts, and other rights that Seller can legally enjoy with respect to such Assets*". As stated in Assets Schedule annexed to the Agreement, the transferred assets involved in this case are the principal amount of RMB 170 million and the interest owed by Company D.

(c) The Confirmation Letter on Assets Transfer signed by the Claimant and the Respondent in December 2016 further sets out the specific contents of the assets (Creditor's Rights), including: the creditor's rights against Company D under Applications of Domestic K Business with Right of Recourse; the rights against the guarantors under the Maximum Amount Guarantee Contracts; and the right of security interest against the mortgagors under the Maximum Mortgage Contracts.

(d) Moreover, according to the Announcement on Disposal of 143 Companies' Asset Packages of Company A and its List released by the Respondent in April 2016, the specific content of the Creditor's Right is consistent with above-mentioned Confirmation Letter on Assets Transfer, and the guarantee type of the Creditor's Right is "guarantee + mortgage", where the accounts receivable creditor's right of Company F is not included.

(e) Although Company F was listed as debtor in the Joint Announcement, the announcement was issued unilaterally by the Claimant, and the content

of the announcement had not been confirmed by the Respondent. In fact, when the Announcement was issued, the Civil Judgments had confirmed that Company F had fulfilled the payment and rejected the lawsuits against Company F. Accordingly, the Announcement cannot be regarded as the Respondent's commitment to transfer assets including the accounts receivable creditor's right of Company F.

(f) The Asset Transfer Agreement signed by the Respondent and the Claimant and the related transaction documents stipulate that the transferred assets have always been the principal creditor's right against Company D and the corresponding guarantee creditor's rights, and the accounts receivable creditor's right of Company F has never been listed as the transferred asset. The Civil Judgments of the N High Court were based on the Asset Transfer Agreement signed by the Respondent and the Claimant, and the Claimant was adjudicated to have the right to request Company D to repay the debt principal of RMB 170 million and the corresponding interest, to request the guarantors to assume their responsibilities of guaranty, and to enjoy the priority right of repayment against the collateral provided by the debtor and the guarantors. Therefore, the Claimant has acquired all the rights and interests of the assets involved, and the outstanding principal amount is not lower than RMB 170 million. It is in consistence with the representations and warranties under Section 9.2(a) and (b) of the Asset Transfer Agreement. Accordingly, the purpose of contract of the Claimant to obtain the rights and interests of the assets involved in the case has already been achieved.

(2) The Respondent has delivered all documents and information it held in respect of the assets to the Claimant, and there is no concealment or fraud. Although the information provided by the Respondent contains materials related to the accounts receivable of Company F, the Respondent never promised that the Claimant could realize its creditor's right by recourse to Company F. Moreover, before purchasing the assets, the Claimant had a full due diligence investigation on the assets and learned that there was a risk of uncertainty in the right of recourse of Company F.

(a) Based on the Receipt of Asset Documents, the appendices hereto and the List of Delivery of Supplementary Materials executed by the Claimant

and the Respondent, the Respondent has handed over all documents and materials relevant to the assets to the Claimant (including the civil indictment of I Bank J Branch, the civil ruling of the M Intermediate Court and other litigation documents) meanwhile, the Respondent has also handed over new documents generated after the acceptance of creditor's right to the Claimant (such as the Joint Announcement). Therefore, the Respondent has handed over all those materials relevant to the Creditor's Right which are sufficient to affect the Claimant's judgment to the claimant, without any concealment or fabrication.

(b) Although the documents handed over by the Respondent to the Claimant contain the Confirmation of Accounts Receivable Assignment issued by Company F, the Sales Settlement Form for Coal and other materials, these are only delivered as background materials with a view to facilitating the Claimant's full understanding of the assets to be transferred in this case. The Respondent made no representation with respect to the accounts receivable creditor's right of Company F and had not guaranteed that the Claimant could realize its creditor's right by claiming accounts receivable from Company F.

(c) Prior to acquisition of the assets involved in the case, the Claimant has carried out adequate due diligence on the assets. According to the certificate issued by Company G, which as a potential buyer of the assets, conducted sufficient due diligence on the assets. Thereafter, when the Claimant was investigating the assets, Company G had informed the Claimant of the results of the due diligence in the previous period and warned the Claimant of the uncertainty of exercising the right of recourse against Company F.

Based on the above, the Respondent has, before and during the transfer of the assets, truthfully and sufficiently disclosed the information about the assets (including the uncertainty of the right of recourse to Company F) to the intentional buyer including the Claimant, without any concealment or misleading. After the transfer of the assets, the Respondent has transferred to the Claimant all documents relating to the transfer of assets which can affect the Claimant's judgment in the case. Accordingly, the Respondent has fully fulfilled the representations and warranties of Section 9.2(c) and

(d) of the Asset Transfer Agreement. As for how the Claimant judged the possibility of realizing the Creditor's Right and made its decisions, that has nothing to do with the Respondent. Even if the Claimant's purchasing of the assets was based on the accounts receivable creditor's right of Company F, it is also the result of its own misjudgment, and the Respondent should not be held to have any responsibility.

(3) The Claimant knows that the assets involved in the case are non-performance assets and there might be Asset Defects or the risk that the interests being anticipated by the transferee may not be realizable in the end due to various factors, and promised that the transferor will not be liable for the Asset Defects unless the transferor fabricates or forges the asset documents. Therefore, even if the accounts receivable of Company F is counted as part of the transferred assets, the Claimant has no right to claim breach of contract and claim rescission of contract and/or damages on the ground that it is impossible to enjoy any rights and interests in accounts receivable of Company F anymore.

(a) Section "Whereas" (a) and (c) of the Asset Transfer Agreement stipulate that the assets transferred by the Respondent are "*non-performance loans*", and "*there are associated with special risks and possible difficulties in collecting the repayments thereof in part or as a whole*".

(b) In Section "Whereas" (d) of the Asset Transfer Agreement, the Claimant confirms that "*it has conducted independent investigations with respect to the Assets, and is fully aware of the status of the Assets and agrees to assume the above risks and difficulties*"; and in Section 10.2, the Claimant undertakes again that "*it has been told and completely understands that the Assets that it purchases, including creditors' rights of the non-performing loans and their subordinate rights, may have Asset Defects or may not be paid off due to all kinds of factors, so that ultimately the Purchaser may be unable to realize its anticipated profits. Unless Seller fabricates or forges Assets Documents, Seller does not bear any liabilities with respect to Asset Defects, regardless of whether Asset Defects have been expressly indicated or can be reasonably understood and discovered through an analysis of the Investor Review Files*".

(c) The transfer of the assets between the Respondent and the Claimant was carried out by auction. Clause 2 [Risk Tips] of the Auction Rules and

Auction Agreement for Creditor's Rights issued by Company P has stated that "*creditor's rights of auction exist, including but not limited to all or part of the creditor's rights that have not been supported by the court*", "*the creditor's rights have been reduced in whole or in part, but cannot be found by the existing creditor's right certificate documents*", etc. Clause 3 [Recognition and Commitment of the Bidder] has stated that "*the bidder is willing to independently bear all losses or expected benefits that cannot be realized caused by the assigned creditor's rights*".

To sum up, the Respondent has disclosed all the information related to the assets in question to the Claimant truthfully and completely. Based on the special nature of the non-performance assets and the promises of the Claimant, the Claimant has no right to claim rescission of the contract and/or claim compensation from the Respondent even if it cannot claim rights against Company F or realize its creditor's rights.

(4) The Asset Transfer Agreement has stipulated the objection period in which the Claimant lodges a defective claim on the assets, but the Claimant has not raised any objection during the objection period and has subsequently confirmed that the two parties have completed the delivery without dispute. Accordingly, the Claimant has no right to claim that the assets involved in the case are defective.

(a) According to Section 7.1 of the Asset Transfer Agreement, from the date of closing to the 60th day after closing, the Claimant has the right to claim defects in the assets.

(b) According to the agreement on the "Closing Date" in the Asset Transfer Agreement, the date of closing of the assets shall be December 2016. During the objection period (from December 2016 to February 2017), the Claimant did not raise any defective claim on the assets involved in the case to the Respondent. After the expiration of the objection period, the two parties signed the Service Agency Agreement and the Extension and Modification Agreement in April 2017 and April 2018, which made it clear that the two parties had completed the closing of the Creditor's Right without dispute.

The Respondent believes that there was no defect in the assets transferred by it, the objection period during which the Claimant can claim the

"Defected Assets" in the case has expired, and therefore, the Claimant has no right to ask the Respondent to take the responsibility for breach of contract.

2. The Claimant has acquired the principal and guarantee creditor's rights of Company D, and the corresponding guarantees and guarantee creditor's rights are still validly existing. The Claimant has not exercised its right and there is no loss occurred, and therefore the Claimant has no right to claim compensation from the Respondent.

As mentioned above, according to the Civil Judgments, the Claimant has obtained the principal and corresponding guarantee creditor's rights of Company D. Up to now, the Claimant has not yet taken any enforcement measures against the debtor, the guarantors and the collaterals, so it cannot be said there are any losses occurred. Even if the Claimant cannot make profits after exercising the relevant rights to recover, it is the normal business risks in the transaction of non-performing assets, which have nothing to do with the Respondent, and the Claimant should not have any right to claim the so-called losses against the Respondent.

To sum up, the assets involved in the case are non-performing assets with natural commercial value "defects" and being involved in the lawsuits with legal uncertainties. The Respondent has transferred RMB 170 million being the principal, interest of creditor's right and listed guarantee rights of Company D to the Claimant, and fulfilled the corresponding obligations in accordance with the representations and warranties stipulated in Section 9.2 of the Asset Transfer Agreement. The Respondent has not breached any contract under the transaction agreement, and the assets involved have no defect. Therefore, the Claimant's contractual purpose has been achieved. As for the Claimant's belief that the creditor's right can be realized by recourse to accounts receivable from Company F, it is purely a matter of its own misjudgment and has nothing to do with the Respondent, and the Claimant has promised to voluntarily assume the related risks of not realizing the creditor's right. Therefore, the Claimant's claims and reliefs for rescission of the contract and making the Respondent to take the responsibility for breach of contract and compensate for losses have no factual and legal basis, and thus should be rejected in accordance with the law.

To sum up, the Respondent made the following counterclaims:

(i) The Claimant bears RMB 2 million in total of the attorney fee of RMB 2 million, translation fee of approximately RMB 4,000, and travel expense of RMB 11,100 incurred to the Respondent for the arbitration case.

(ii) The Claimant bears the whole arbitration fee of this case.

C. The Claimant's Supplementary Opinions

1. The assets transferred from the Respondent to the Claimant pursuant to the Asset Transfer Agreement shall include the accounts receivable from Company F.

(1) According to the Asset Transfer Instruments, the relevant assets shall include the Respondent's accounts receivable from Company F.

First, according to the Asset Transfer Agreement, the relevant assets shall include the Respondent's accounts receivable from Company F.

Section 1.1 of the Asset Transfer Agreement defines "Asset" as "*a collective concept, means all the assets listed in the Assets Schedule in Schedule 1 hereof, including all the debts under the Loan Contracts initially created by the Prior Holder and that have been transferred to Seller, all the secured debts under the Guaranties and the Mortgage Contracts, and other rights that Seller can legally enjoy with respect to such Assets;…*".

Section 1.1 of the Asset Transfer Agreement defines "Obligor" as "*… (iv) any person who shall bear obligations under any Loan Contract, Mortgage Contract, Guaranty or any other agreements and documents relating to the Assets, or under the documents in connection with the transfer, extension, endorsement or modification of the said agreements or documents…*".

From the above definitions, the Respondent's accounts receivable from Company F shall be the "other right" of the "Assets" and Company F are one of the obligors.

The Respondent argues that the Assets Schedule in Schedule 1 of the Asset Transfer Agreement only stated Company D, not Company F, and thus the obligors do not include Company F.

In the Claimant's view, there are a total of 140 assets under the Asset Transfer Agreement with 140 main debtors and a several times number of guarantors, warrantors and other obligors, making it difficult to list all out (which is consistent with the common

practice). However, only listing the main debtors does not mean in any way that only the principal creditor's right but not the guarantee or other right are transferred, or that the repayment obligation by the other obligors is exempted. The definitions of "Assets" and "Obligors" in the Asset Transfer Agreement clearly demonstrate that the principal creditor's right, the guarantee right and other right collectively constitute the "Assets" and all are the subject for the transfer under the Asset Transfer Agreement.

Second, the instruments named by the Confirmation with respect to Asset Transfer clearly provides that Company F is obligor.

As requested by the Asset Transfer Agreement and in the form of Exhibit 4.7(B)(iii) of the Asset Transfer Agreement, the Claimant and the Respondent signed the Confirmation with respect to Asset Transfer for the relevant assets in this case.

The Confirmation with respect to Asset Transfer clearly states that "'*Seller' transferred to 'Purchaser' all of its rights and interests in the Assets described below as well as all of its rights and interests under the Loan Contract, Repayment Agreement, Guarantee Contract and any other legal documents in connection with such Assets*". The Respondent's accounts receivable from Company F is "*the rights and interest under any other legal documents*".

The table in the Confirmation with respect to Asset Transfer indicates the number of loan contracts being "2013 Q". These contract numbers refer to the Applications of Domestic K Business with Right of Recourse, the first column of which shows the obligor is Company F.

Thus, the instruments named by the Confirmation with respect to Asset Transfer clearly provides that Company F are obligors; in other words, the relevant assets transferred from the Respondent to the Claimant should include the accounts receivable from Company F, and Company F should be the repayment obligor.

Third, the Receipt of Asset Documents proves that the Respondent transferred to the Claimant its accounts receivable from Company F.

As required by the Asset Transfer Agreement, the Respondent handed over the Asset Documents in connection with the determination or enforcement of the rights and interests under the "Assets", and the Respondent and the Claimant signed the Receipt of Asset Documents in the form of Exhibit 4.7(B)(i) of the Asset Transfer Agreement.

Item 23-42 in the Schedule A List of Asset Documents of the Receipt of the Asset Documents are the documents handed over by the Respondent to the Claimant which prove

that the Respondent is entitled to the accounts receivable from Company F; such documents include: (i) Applications of Domestic K Business with Right of Recourse stating Company F being the obligors; (ii) Commercial Invoices (for sale of goods) in the name of Company F; (iii) Confirmations of Assignment of Accounts Receivable chopped by Company F1; (iv) Settlement Statements of Sales chopped by Company F1; and (v) N Special VAT Invoices issued to Company F1.

The Respondent's handover to the Claimant the documents for its accounts receivable from Company F demonstrates that the Respondent itself thinks that these documents are in connection with the determination or enforcement of rights and interests under the relevant assets in this case, and that the Respondent's accounts receivable from Company F formed part of the relevant assets in this case and have been transferred to the Claimant.

Fourth, the Joint Announcement by the Respondent and the Claimant for the relevant assets in this case expressly listed Company F as the debtor.

In February 2018, the Respondent and the Claimant jointly published on N Economy Journal a Joint Announcement, specifically listing Company F as obligors.

The Respondent argues that the Joint Announcement was "unilaterally published" by the Claimant with "the content unverified" by the Respondent. The Claimant contends that such Respondent's argument is contradictory with the facts and thus is untenable, due to the reasons that: (i) before the publishing of the Joint Announcement, the Claimant sent the announcement to the Respondent for review in February 2018, but the Respondent did not raise any objections; (ii) according to the requirement for publishing joint announcement of the N Economic Journal, any announcement make in two parties' name shall be approved in writing by both parties before publishing; and (iii) as stated in the final judgement of second instance, during the trial, the appellant was changed from the Respondent to the Claimant, one of the documents reviewed by the court was the Joint Announcement, and the court would also asked the Respondent for its view. As such, it is impossible that the Respondent did not know and it cannot deny the content of the Joint Announcement.

(2) The Respondent's litigation acts display that it owns the accounts receivable from Company F and has transferred such Accounts Receivable to the Claimant.

With respect to the Creditor's Right, I Bank J Branch filed two separate lawsuits in which Company F are listed as one of the defendants, claiming that Company F has repayment obligations. After replacing I Bank J Branch as plaintiff, the Respondent

continued the lawsuits demanding repayment from Company F. All these demonstrate that the Respondent has always believed it owns the right to accounts receivable from Company F.

After the transfer of the relevant assets in this case by the Respondent to the Claimant and during the proceedings in second instance, the appellant was changed from the Respondent to the Claimant and the Respondent exited the lawsuits; thereafter, the Claimant continued the recourse against Company F. All these further proves that the Respondent transferred its accounts receivable from Company F to the Claimant.

(3) The legal nature of K business's factoring business determines the assets in this case shall include the accounts receivable from Company F enjoyed by the Respondent.

The financial creditor's right from Company D is generated from 2013 No. 20-23 of the K Business. According to Article 2 of the Domestic Commercial Invoice Discount Agreement and the Applications of Domestic K Business with Right of Recourse, the legal nature of the K Business is factoring.

The China Banking Regulatory Commission, the China Banking Association and the Supreme People's Court all promulgated rules on factoring. According to such rules, the transfer of the accounts receivable is the precondition and core element for the establishing of a factoring legal relationship, and if without the transfer of the accounts receivable, there would be no factoring at all. Therefore, when transferring the financial creditor's right in respect of the factoring business, the accounts receivable, which account for the very basis and precondition for establishing such financial creditor's right, shall have been transferred together as a whole and consolidated arrangement.

The above provisions also provide that the payment of accounts receivable is the primary source of repayment for financial creditor's right. Therefore, the transfer of the accounts receivable shall have the function and effect of securing the repayment of the financial creditor's right, and looking from this perspective, the transfer of the accounts receivable has the nature and function of repayment guarantee, and thus it is of an "accessory right"; and according to Article 81 of the *Contract Law*, the accounts receivable shall be transferred together with the financial creditor's right.

Therefore, in this case, transfer of the Respondent's accounts receivable from Company F is the premise and basis for the establishment of the financial creditor's right towards

Company D, and the accounts receivable shall be transferred together with Respondent's financial creditor's right towards Company D. Otherwise, the Claimant would in no way spend RMB 95 million to purchase the financial creditor's right.

In conclusion, the provisions and performance of the asset transfer instruments in this case, the Respondent's litigation behaviors, and the legal nature of K Business' factoring business all prove that the Relevant Assets transferred by the Respondent to the Claimant under the Asset Transfer Agreement shall include Respondent's accounts receivable from Company F.

2. The accessory nature and importance of the account receivable creditor's rights

The Claimant has also noticed that the Respondent emphasizes on the account receivable creditor's right being accessory and accordingly being insignificant and there will be no essential impact on the performance of the Asset Transfer Agreement regardless of whether such right is in existence or whether it has been delivered. The Claimant contends that the Respondent's allegations above are not consistent with the bank's financing business (including factoring) customs and the commercial purpose of non-performing assets transactions.

First, with respect to the factoring specifically, pursuant to the provision that "*factoring is subject to the creditor's assignment of its accounts receivable*" in Article 6 of the *Interim Measures for the Administration of the Factoring Business of Commercial Banks* promulgated by the China Banking Regulatory Commission and Article 4 of the *Norms for the Factoring Business in the Banking Sector of China* promulgated by the China Banking Association, if the accounts receivable creditor's right of Company F did not exist, the K Business would not have been conducted and Company D would not have obtained financing from the bank. In this sense, the accounts receivable creditor's right of Company F is indispensable and is the core value of this K Business.

Secondly, the reason why the Claimant is willing to spend RMB 95 million to purchase the assets in this case is fully because of the evaluation of the value of the accounts receivable creditor's right of Company F. Company F is a listed company with good credit and the ability and willingness to make repayment, based on which the Claimant considers the assets in this case is of significant value. As far as Company D, the Claimant also conducts a due diligence investigation on it and believes that it completely lacks the ability to repay the principal and interest. In other words, obtaining the accounts receivable creditor's right

of Company F is the sole purpose for the Claimant to purchase the assets in this case. The Respondent's allegation that "*the accessory right shall not affect the validity of the transfer of the asset in the case*" has no basis.

Thirdly, the accounts receivable creditor's right of Company F is not a "contingent" right. Nowhere in the Asset Transfer Agreement has any reference of "contingent". The Respondent's allegation that the parties have made it clear that the accounts receivable creditor's right of Company F is contingent through the Asset Transfer Agreement is baseless.

Fourthly, with respect to the assets in this case, the accounts receivable creditor's right of Company F was found fully discharged due to its repayment, and this not just affected the performance of the Asset Transfer Agreement, but more importantly, caused the Claimant unable to realize its purpose under the contract.

Fifthly, the change of the appellant from the Respondent to the Claimant in the litigation does not mean that the Respondent had delivered the accounts receivable creditor's right of Company F to the Claimant, nor had the Claimant enjoyed the recourse against Company F. The final judgement of the N High Court have confirmed that the Respondent did not enjoy the accounts receivable creditor's right of Company F and had no way to transfer and deliver it to the Claimant.

In summary, the Claimant contends that although the accounts receivable creditor's right of Company F is accessory right, it is an indispensable, important and core part of the assets in this case and is the basis and premise for the Claimant's willingness to pay a high price to purchase the assets in this case; and the Respondent's failure to deliver the accounts receivable creditor's right of Company F to the Claimant caused the Claimant unable to realize its purpose under the contract.

3. The Assets the Respondent transferred to the Claimant have a material defect, and that constitutes a material breach of the contract, and the Claimant has the right to exercise legal right to rescind the contract or claim for damages.

(1) The Respondent has materially breached Section 9.2(a) of the Asset Transfer Agreement.

The Respondent represents and warranties in Section 9.2(a) of the Asset Transfer Agreement that "'*Seller' is the only legal and/or beneficial owner, … Assets transfer*

conducted by 'Seller' to 'Purchaser' on 'Closing Date' would not be affected by any third-party rights, benefits or effective claims. 'Seller' is entirely entitled to sell and transfer the rights and benefits of and to the Assets under this Agreement, …".

However, the N High Court issued the final judgement of second instance on 26 December 2018, which concluded that Company F1 had made all payments in December 2013 relating to 2013 No. 20-23 of the K Business, and Company F have no further repayment obligations.

In other words, since Company F had made the payments relating to No. 20-23 K Business, the accounts receivable from Company F became extinct because of such repayment, and the Respondent's accounts receivable from Company F as so represented and warranted by the Respondent did not exist since the very beginning, the Respondent did not perform its obligation of delivering the accounts receivable from Company F to the Claimant, and the individual asset transferred by the Respondent to the Claimant contains a material defect. Clearly, the Respondent has materially breached Section 9.2(a) of the Asset Transfer Agreement.

(2) The Respondent materially breached Section 9.2(c)(d) of the Asset Transfer Agreement.

The Respondent represents and warranties in Section 9.2 (c) of the Asset Transfer Agreement that "*… 'Seller' is not aware of any change, development or incident that would render the information about Assets listed in Assets Schedule to be untrue or misleading information. The copies of the 'Asset Documents' contained in the 'Investor Review Files' are the whole documents and materials created or obtained by 'Seller' in its possession currently, as was received from 'Prior Holder' and then further generated or received thereafter, and are true, correct and complete copies of such files…"*; and in Section 9.2(d) that "*'Seller' has included in the 'Asset Documents' and/or 'Investor Review Files' all agreements and documents about the Assets that it has received or thereafter obtained, and there is no intentional concealment or fraud…*".

It can be seen from the Statement issued by R Law Firm submitted by the Respondent that the Respondent had known Company F's defense and submissions as early as in "July and August 2016". Such information and submissions clearly fall under the "change, development or incident" in Section 9.2(c) and "all agreements and documents about the Assets that it has received or thereafter obtained" in Section 9.2(d) of the Asset Transfer Agreement. However, the Respondent did not disclose these to the Claimant at signing

or closing of the Asset Transfer Agreement [it is especially notable that as stated by the Claimant during the hearing, the Respondent's lawyer had never introduced to the Claimant Company F's defense nor made an appointment to meet the judge in July and August 2016; the Claimant actually met with the judge on 28 February 2017, which was after signing and closing of the Asset Transfer Agreement], nor include Company F's submissions in the "Asset Documents" and/or "Investor Review Files" being provided to the Claimant. Clearly, the Respondent has materially breached Section 9.2(c)(d) of the Asset Transfer Agreement.

(3) The Respondent's material breach caused the Claimant unable to realize the purpose of contract, and the Claimant has the right to exercise statutory right to rescind the contract or claim for damages.

Before the execution of the Asset Transfer Agreement, G, the Respondent's cooperation partner, conveyed to the Claimant its due diligence result at the Respondent that Company F had the ability and intent for repayment. And Company F is a listed company in good condition. The Claimant was only willing to spend RMB 95 million to purchase the relevant assets in this case because of Company F's repayment obligations. Therefore, the relevant assets in this case purchased by the Claimant shall include the Respondent's accounts receivable from Company F, for which the Claimant paid the relevant consideration, and the Claimant's purpose of the contract on the relevant assets in this case is to obtain the full right to recourse on the whole assets including the accounts receivable from Company F.

If the Claimant fails to obtain the accounts receivable from Company F and has no right at all to claim against Company F, its purpose of contract will be totally frustrated. The Claimant contends that under the circumstance where the Respondent's accounts receivable never existed at the very beginning, the Respondent has, by means of fraud, concealment and misleading, tricked the Claimant into purchasing the relevant assets in this case, thereby the Respondent has constituted a material breach. Pursuant to Article 94(4) of the *Contract Law*, the Claimant has the right to rescind the contract.

In addition, pursuant to Section 7.2 of the Asset Transfer Agreement, the Claimant also has the right to claim against the Respondent for compensation based on "Defected Assets", which is the Claimant's alternative claim.

(4) The Respondent's arguments that it did not breach or the Claimant knew the defect could not stand.

First, the Respondent intentionally confuses the differences between "whether the creditor's right exists" and "whether the creditor's right can be realized".

The Respondent repeatedly emphasized during the hearing that it has never promised the Claimant to realize its right against Company F, and submitted Company G's Statement to prove the Claimant knew the uncertainties of collection from Company F. However, in the Claimant's view, there are distinguishable difference between "whether the creditor's right exists" and "whether the creditor's right can be realized" and the Respondent has intentionally confused the different nature of these two matters.

In this case, the risk faced by the Claimant is not that "the creditor's right cannot be realized", but that the Respondent's accounts receivable from Company F "did not exist in the very beginning". As provided in the Asset Transfer Agreement, what the Claimant could accept is that the accounts receivable from Company F are "associated with risks and possible difficulties in collecting the repayments thereof in part or as a whole" (i.e., the "factual defect" as mentioned by the Tribunal), but the Claimant has never and ever accepted the situation that the accounts receivable from Company F "did not exist in the very beginning" (i.e., the "legal defect" as mentioned by the Tribunal). The Claimant can accept it as the "factual defect", but not the "legal defect".

With respect to "the uncertainties for exercising the recourse right against Company F" raised by the Respondent in its Statement of Defense, the Claimant contends that the premise for exercising the recourse right is having the recourse right. Under the circumstances where the Respondent informed that its accounts receivable from Company F existed, provided relevant materials to the Claimant, and concealed documents that the accounts receivable may not be existent, it is impossible for the Claimant to discover any clue through due diligence investigation. On the contrary, Company G's "preliminary due diligence findings" was "*listing Company F2 shall be jointly liable for this creditor's right, now Company F2 has negotiated repayment agreement with Company A and intended to repay RMB 80 million*", which further made the Claimant believe that the Respondent enjoyed accounts receivable from Company F and Company F had the ability and intention for repayment.

Second, the special nature of the non-performing assets does not include the risk that the asset does not exist from the very beginning. The Claimant's commitments in the

Asset Transfer Agreement and the relevant contents in the Auction Rules and Debt Auction Agreement shall not preclude the Respondent's liabilities for breach of contract.

The Respondent also asserts that the Claimant knows that the relevant assets in this case are non-performing assets, and it made corresponding confirmations and commitments in the Asset Transfer Agreement. And the Auction Rules and Debt Auction Agreement lists out the potential risk for "Asset Defect". Hence, the Claimant has no right to claim against the Respondent on the ground that it is impossible to enjoy the accounts receivable from Company F anymore. Such claims of the Respondent are its misinterpretation and misreading of the Asset Transfer Agreement and the Auction Rules and Debt Auction Agreement, and thus are untenable at all.

The Claimant believes that the Auction Rules and Debt Auction Agreement represents an independent legal relationship to be formed between the auctioneer and the bidder, and its purpose is to allow the auctioneer to be exempted from liabilities under certain conditions, but the Respondent has no right to claim exemption from its liabilities under the Asset Transfer Agreement. Moreover, Part II, Section 3(8) of the Auction Rules and Debt Auction Agreement and Section 16.4 of the Asset Transfer Agreement both clearly provide that in case of discrepancies, the Asset Transfer Agreement shall prevail. As such, with respect to "Defects" and "Asset Defect", there is no need to consider relevant contents in the Auction Rules and Debt Auction Agreement, and the Respondent cannot be exempted from its liabilities because of this.

4. The Claimant's exercise of the legal right to rescind and claim defect compensation liabilities shall not be limited by the "60-day defect objection period".

First, the Claimant's exercise of the legal right to rescind does not equal to claim "Remedies for Defect" pursuant to Section 7 of the Asset Transfer Agreement and shall not be limited by the "60-day defect objection period" provided in Section 7.1 of the Asset Transfer Agreement. Because the Respondent constitutes a material breach under Article 94 of the *Contract Law*, the Claimant has the right to exercise the right to rescind the contract on this individual asset.

Second, the Claimant's claiming defect compensation liabilities shall not be limited by the "60-day defect objection period", for the following reasons:

According to Section 7 of the Asset Transfer Agreement, the "60-day defect objection period" is in essence the inspection period for sales of contract. The defect of the Respondent's accounts receivable from Company F can only and finally be determined upon issuance of the final judgements, which cannot be detected and found within such period, thus it is a "hidden defect", and according to Articles 18, 17 and 45 of the *Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts*, the "60-day defect objection period" provided in the Asset Transfer Agreement does not apply to such situation in this case and the Claimant can raise objections in a "reasonable period". The Claimant further contends that its filling of this arbitration within 60 days after the issuance of the effective court judgements is clearly reasonable.

The Respondent's understanding and assertion of the "60-day defect objection period" will in essence deprive the buyer of its right to objection, thereby severely damaging the buyer's legitimate rights. The starting point for a period has two criteria in theory, one is the objective criterion, i.e., from the time when the right comes into being, in which case, the duration is generally long, e.g., the longest time for statute of limitation is twenty years from the time the right is damaged; the other is the subjective criterion, i.e. from the time when it is known or should have been known that the right can be exercised, i.e. the statute of limitation is from when the obligee knows or should have known the right is damaged and the obligor. In comparison, the subjective criterion better fits the aim to protect the obligee's right, because if the right is there but cannot be exercised or is unknown to the obligee, starting from the time the right coming into being will only deprive this right. The Claimant contends that the "objection period" under the Asset Transfer Agreement starts from the "Closing Date" and only lasts for 60 days, during which, the Respondent was still in litigation with Company F and has not obtained effective judgements to determine whether the defect existed. The Claimant cannot exercise its right during such period.

Under this circumstance, and even taking into consideration the "objection period" provided in Section 7.1 of the Asset Transfer Agreement, the starting time should be the time when the effective judgement were rendered, rather than the "Closing Date". The N High Court rendered the effective judgement of second instance in December 2018, and the Claimant filed this case in February 2019, and with respect to the Claimant's alternative claim, the Claimant's making such claim complied with the Asset Transfer Agreement.

In summary, the Claimant's exercise of the legal right to rescind a contract has no time limit, and the Claimant's bringing the alternative claim for defect remedy shall not be

limited by the "60-day defect objection period". To take a step back, the defect objection period shall at the most start from the issuance date of the second-instance judgement, and the Claimant's exercise of the defect objection right in this case has not exceeded the 60-day defect objection period.

5. The Claimant suffered real and huge losses.

The Respondent also asserted during the hearing and in the Statement of Defense that the court judgements have confirmed its rights against Company D and the guarantors, and the Claimant can collect from through enforcement proceedings; therefore, the Claimant suffers no loss. The Claimant contends that such assertion of the Respondent cannot stand.

The Claimant believes that whether losses were incurred is not a premise for contract rescission. The ground for Claimant's rescission of the contract was the Respondent's material breach (i.e., failure to transfer accounts receivable from Company F to the Claimant) has led Claimant's inability to recourse against Company F and failure of purpose of contract. Further, the legal consequence for contract rescission is to reinstate to the original state, i.e., the Respondent returns purchase price for this relevant asset, compensates interest and profit losses, rather than compensates the Claimant's unrealized amount from Company D and the guarantors. Therefore, whether the Claimant received enforcement amount from the enforcement procedures would not affect the Claimant's legal right to rescind the contract.

As a matter of fact, the Claimant's losses are real and huge. Despite the dispute between the Claimant and the Respondent in this case, to duly perform the responsibility of a *bona fide* party to manage the asset, the Claimant has filed for court enforcement. However, after court's comprehensive search, the parties subject to enforcement (including Company D, guarantors and warrantors) barely have any enforceable assets. To date, only one real estate under Company D's name was auctioned for RMB 3.92 million, and the proceeds are being kept by the court. Such facts further prove that the value of the principal right and guarantee right is little, and the accounts receivable from Company F were the main source for repayment and the reason why the Claimant spent RMB 95 million for this specific asset. But the Respondent's failure to transfer its accounts receivable from Company F to the Claimant made the Claimant unable to claim against Company F. Therefore, it could be seen from enforcement that the Claimant's losses are real.

In summary, the Respondent's allegation that the Claimant can collect through the enforcement proceedings largely contradicts from reality and cannot stand.

6. The Respondent's counterclaims are not tenable

In this case, the Respondent's raised counterclaims requesting the Claimant to bear its legal fees RMB 2 million, translation and transportation expenses and arbitration fee, etc. for this case. Assuming the Tribunal supports the Claimant's claims, the Respondent's fees above are caused by its own breach and shall be borne by itself.

D. The Respondent's Supplementary Opinions

1. The "Assets" under the Asset Transfer Agreement refers to the creditor's right to Company D, and the rights to Company F are the other rights of subordinate nature.

According to Section 1.1 of the Asset Transfer Agreement, the scope of "*Assets*" is "*all the assets listed in the Assets Schedule in Schedule 1 hereof, including all the debts under the Loan Contracts initially created by the 'Prior Holder' and that have been transferred to 'Seller', all the secured debts under the Guaranties and the Mortgage Contracts, and other rights that 'Seller' can legally enjoy with respect to such 'Assets'*". According to Schedule 1 on Assets Schedule, the borrower of an individual asset in this case is only Company D.

According to the above provisions, the agreement of both parties on the scope of assets is definite. The "Assets" in this case are the loan creditor's right against Company D, the relevant security rights attached thereto and other possible subordinate rights. Among which, the main creditor's right to Company D is the object of the individual asset transaction, while the accounts receivable creditor's right of Company F is only other subordinate right in the assets.

The accounts receivable of Company F, like other rights not listed in the Assets Schedule attached to the Asset Transfer Agreement, may be deemed as "relevant rights" in the state of uncertainty under the transaction structure and understood in broad sense, i.e., subordinate rights in the legal sense. However, in fact, such "relevant rights" are not within the scope of the contract object for which the transferor bears the contract responsibility. In the practice of transaction of non-performing assets, the seller is generally exempted from the uncertain and indescribable "related rights" directly or rights that are not included in the list of related assets as specified or agreed contract objects but "attached" without consideration.

The so-called "core assets" referred to by the Claimant in terms of business concept are of importance as expressed now. In case the importance also exists at the time of the transaction, the parties to the transaction shall incorporate such importance into the legal documents of the transaction and clearly include such assets in the list of relevant assets for which the Respondent may assume contractual liability. Obviously, the "relevant rights" (contingent rights on Company F) that the transferor has to avoid the corresponding contractual liabilities during the transaction process shall not affect the stability of the transaction, where there is no contractual basis and commercial management basis, the argument of the Claimant based on unilateral commercial judgment is of no legal significance; the legal significance and importance of the Claimant's contingent rights against Company F, as being represented by the Claimant's "core assets of this case", are not reflected in the legal documents mutually agreed with the Respondent and should only be carefully considered by the Claimant as the buyer at the time of offering. In the package transaction of non-performing assets, the overall pricing is agreed upon, while no single price is agreed upon a single item and no corresponding repurchase is so arranged, that is irrelevant to the Respondent, but only the Claimant may need to consider in commercial sense.

It should be noted that the "Assets" transferred by the Respondent to the Claimant are from I Bank N Branch. The Joint Announcement issued by the Claimant unilaterally listed Company F as the debtor, which obviously goes beyond the scope of rights created by I Bank N Branch and transferred to the Respondent, and the Claimant did not send the Announcement to the email address set forth in the Asset Transfer Agreement for confirmation by the Respondent.

Therefore, the Claimant regards the accounts receivable creditor's right of Company F as the main creditor's right under the Asset Transfer Agreement, which is only a unilateral misunderstanding, lacks contract basis, and has not been recognized by the Respondent.

2. The creditor's right against Company F is other subordinate and contingent rights of creditor's right against Company D, which is finally judged as

repaid by the court and does not affect the performance of the Asset Transfer Agreement under this case.

(1) The creditor's right of Company F under the Asset Transfer Agreement only belongs to the subordinate right of the main creditor's right.

In terms of legal relationship, in accordance with the Domestic Commercial Invoice Discount Agreement, I Bank J Branch has extended the financing fund to Company D, in the event that the financing fund fails to be collected, I Bank J Branch shall have the right to deduct the fund from the account of Company D on its own initiative or collect the fund by other means. The accounts receivable creditor's right of Company F is only one of sources of repayment. Therefore, in the transaction in this case, the creditor's right against Company D is the core right in the legal relationship while Company F's creditor's right is only a subordinate right related to the creditor's right of the contractual object.

In terms of the written document on the assets transaction, according to Section 1.1 of the Asset Transfer Agreement, the scope of the "Assets" is mainly determined in accordance with Schedule 1 hereto, the Assets Schedule; in other words, the assets listed in the Assets Schedule shall be the assets under the asset transfer transaction in this case, and the object of the contract determined by both parties is the "core assets" in the transaction.

Specifically, the assets involved in the dispute between the parties, the Assets Schedule shows that the Item 102 asset is the creditor's right against Company D, and the Confirmation with respect to Asset Transfer shows that the substance of the assets is its creditor's right and the relevant security and guarantee creditor's rights. It should be brought to the attention of the Tribunal that, except for the information of Company F to be handed over as the background documents regarding the assets transfer, no accounts receivable from Company F are mentioned in any document executed by the parties during the asset transfer.

(2) When concluding the Asset Transfer Agreement, both the Claimant and the Respondent clearly knew that the creditor's right against Company F was subordinate right.

First, neither the Asset Transfer Agreement nor its Assets Schedule makes any representations with respect to the "accounts receivable creditor's rights of Company F". The documents relating to the accounts receivable creditor's right of Company F as stated in

the Confirmation Letter are only background materials in order to facilitate the Claimant to fully understand the situation of the assets involved in the case.

In its Application for Arbitration and during the hearing, the Claimant alleged that its main purpose of purchasing the assets was to purchase the accounts receivable from Company F. Unfortunately, allegation is not mentioned at all in the parties' transaction documents and lacks evidence to support it. Moreover, the Claimant acknowledges that its right against Company F is other accessory right. Therefore, the Claimant's claim is obviously inconsistent with facts.

Secondly, when the Respondent transferred the assets to the Claimant, such assets are under judicial proceedings and there are risks that the court may deem the creditor's right extinguished or non-existent. With respect to such risk, prior to the assets transfer, the Claimant, with the assistance of the Respondent, conducted an independent due diligence and was fully aware of the relevant information, which means that the Claimant clearly knew the great uncertainty in the repayment of accounts receivable creditor's right of Company F.

(3) The elimination of the subordinate right to Company F does not affect the performance of the Asset Transfer Agreement.

According to the above content, the transferred assets involved in the case refer to the main creditor's right to Company D. According to the N High Court's Civil Judgments, the Claimant has the right to require Company D to repay the debt with a principal of RMB 170 million and corresponding interest and require the guarantors to assume the guarantee responsibility, and enjoys the priority of repayment over the collaterals provided by the debtor and the guarantors. Therefore, under the Asset Transfer Agreement, the main obligations of the Respondent as Seller have been performed, and the contract purpose of the Claimant has been achieved.

As for the right against Company F, the Claimant has become the litigant of related case by changing the litigant subject, so that the Claimant can claim the right against Company F in the lawsuits. The Respondent has performed the obligations under the Asset Transfer Agreement in respect of the accounts receivable creditor's right of Company F. The final effective judgment of the court confirmed that the accounts receivable of Company F had been repaid, which was the risk that the Claimant had foreseen and should bear when it participated in the bidding of assets involved in the case and signed the Asset Transfer Agreement, and this is the inherent risk of the transfer of non-performing assets. Even if the subordinate right fails to be realized, it has no material impact on the achieving of

the contract purpose of the Asset Transfer Agreement, and the Claimant can still claim its rights against Company D and other guarantors, which is consistent with the Asset Transfer Agreement.

In conclusion, the contract purpose of the Claimant has been achieved, and the elimination of subordinate right to Company F shall not affect the performance of the Asset Transfer Agreement.

3. The "Assets" in this case do not have the "Defects" as stipulated in the Asset Transfer Agreement. The Claimant shall bear the inherent commercial risks of the non-performing assets on its own and shall not transfer them to the Respondent.

(1) The Respondent has delivered all documents and materials related to the assets involved in the case to the Claimant without any concealment or fraud. The Claimant's failure in claiming right from Company F does not violate the representations and warranties (by the Respondent) nor does it belong to "Defects" as stipulated in the Asset Transfer Agreement.

For the "Defects" of assets, there is a clear definition in Section 1.1 of the Asset Transfer Agreement. It only refers to the "*violation of the representations and warranties made by the Respondent in Section 9.2 and/or Section 9.3*". In fact, the Respondent has no concealment or fabrication, and does not violate the representations and warranties. The assets involved in the case do not have "Defects" as defined in the agreement.

According to Section 1.1 of the Asset Transfer Agreement on "Asset Defect", the Claimant's failure in realizing its right against Company F only belongs to the commercial defect of the assets, and the relevant risks shall be borne by the Claimant itself.

(2) The Claimant has known and accepted the fact that the creditor's right of Company F is uncertain in the process of asset transfer and litigation, but it has not raised any objection to this fact. It shall bear the inherent commercial risks of non-performing assets.

According to the Statement of R Law Firm submitted by the Respondent, and the Claimant's admission as well in the court trail, the Claimant has full knowledge of the

litigation in respect of Company F and Company F's defense before entry into the Asset Transfer Agreement. The Claimant chose to sign the Asset Transfer Agreement with the Respondent though it was fully aware that Company F might have made repayment and the risks arising therefrom, and did not require to specifically mention the creditor's right of accounts receivable to Company F in the main text and attachment of the agreement.

Later on, the Claimant became a party of the relevant case and further understood Company F's claim on repayment, but it still claimed in the second trial, believing that the repayment was not made for factoring financing business involved in the case, and did not raise any objection to the Respondent. Claimant's behavior demonstrates that it has a full understanding of the inherent defect of the creditor's right to Company F, and therefore it shall bear the inherent commercial risks of non-performing assets on its own.

(3) The objection period set forth in the agreement has expired when Claimant raised its objection, and the Respondent shall not be held liable for breach of contract.

Section 7 of the Asset Transfer Agreement is about the liability for defects caused by violation of representations and warranties, in which Section 7.1 clearly stipulates that the Claimant has the right to claim Defects within sixty (60) days after the Closing Date. This period is a fixed period agreed by both parties without being subject to any extension or suspension. Therefore, even if the Claimant believes that the assets involved in the case have "Defects", it shall raise the objection to assets defects no later than 26 February 2017. This clause is the autonomy of will between the parties, and also with a view to maintaining the stability of non-performing assets transaction, and thus shall be abided by both parties.

Even if as the Claimant claimed, the period shall commence from the date on which the Claimant knows or shall have known the existence of the asset defects, since the Claimant has known Company F's defense claim no later than the first instance court proceeding, such period for claiming defect has been expired when the Claimant raised its objection, and therefore the Respondent has no liability for breach of contract.

In conclusion, the Respondent is of the view that both "assets" and liability for defect in this case shall be ascertained according to the text of the Asset Transfer Agreement and the real intention of both parties as being reflected by the behaviors of both parties in the process of concluding and performing the contract. Therefore, the creditor's right of accounts receivable to Company F is only other subordinate and contingent right. The

Claimant's failure in claiming the right against Company F does not constitute assets defect. The Respondent has no breach of contract. The Claimant has no right to rescind the contract or require the Respondent to bear the liability for breach of contract.

II. OPINIONS OF THE TRIBUNAL

First of all, the Tribunal has noticed that both parties had submitted quite a lot of materials, claims and legal arguments in this case. The Tribunal has read and considered all such documents. However, this does not mean that the Tribunal will list all the evidence or arguments in this Award. If the Tribunal does not address or comment on any of evidence, claim or argument in this Award, it does not mean that the Tribunal had not noticed such evidence or considered such claim or points.

Based on the documents of the case and the hearing and in accordance with the relevant legal provisions, the Tribunal hereby gives the following opinions:

A. Application of Laws in This Case

Since the Asset Transfer Agreement was signed by and between the Claimant which is a company registered in S Country and the Respondent, the Asset Transfer Agreement belongs to a foreign-related civil relation.

Article 3 of the *Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations* provides that "*the parties concerned can explicitly choose the laws applicable to civil relations involving foreigners in accordance with what the laws*", and Article 41 thereof provides that "*the parties concerned shall negotiate and choose the applicable laws for the contracts*"; Section 16.6(a) of the Asset Transfer Agreement stipulates that "*this Agreement shall be construed, and the rights and obligations under this Agreement shall be determined in accordance with the laws of the PRC*"; Section 1.1 "Definitions" of the Asset Transfer Agreement stipulates that "'*PRC' or 'China' means the People's Republic of China. The term of PRC or China referred to under this Agreement does not include Hong Kong, Macau and Taiwan*".

Therefore, the Tribunal holds that the provision on applicable law in the Asset Transfer Agreement is valid, and the Asset Transfer Agreement shall be governed by PRC law which exclusive of the law of Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan.

B. Relevant Facts of This Case and Contractual Provisions

1. On April 2013, Company D and Company F entered into the Supply Agreement, pursuant to which D shall provide Company F with steam coal and Company F shall make payment within 90 days after the delivery of goods.

Thereafter, Company F and Company F1 entered into the Agreement, pursuant to which, Company F's payment obligation under the Supply Agreement is entrusted to Company F1, and if Company F1 fails to perform the same as agreed, Company F shall assume the final payment obligation.

In April 2013, Company D and Company F entered into the Supply Supplementary Agreement, pursuant to which, Company D agreed that Company F1 shall perform the payment obligation under the Supply Agreement on behalf of Company F; and if Company F1 fails to make the payment as agreed, Company F shall assume the final payment obligation.

2. In May 2013, Company D and I Bank J Branch entered into the General Facility Agreement, agreeing that the parties shall engage in loan, overdraft of corporate account, bank acceptance draft, trade financing, letter of guarantee, fund business and other facility businesses (the "Individual Facility Business"); if Company D carries out Individual Facility Business with I Bank J Branch, Company D shall submit to I Bank J Branch the corresponding application to and/or enter into corresponding contract/ agreement (the "Individual Agreement").

On the same day, Company D (the seller) and I Bank J Branch (the factor) entered into the Domestic Commercial Invoice Discounting Agreement (i.e., the Individual Agreement), stipulating that Company D plans to sell coal to Company F on a credit sale basis and utilize the commercial invoice discounting service provided by I Bank J Branch. Domestic commercial invoice discounting refers to the business that Company D transfers its current or future receivables under sales or service contracts entered into with the buyer (the debtor) to I Bank J Branch and meanwhile I Bank J Branch provides services such as financing and collection of receivables to Company D. The discount line approved by I Bank J Branch

is RMB 206,172,000 which is a revolving credit line, with a period from 15 May 2013 to 30 January 2014. When applying for quota, Company D shall submit the Application for Discount Line of Domestic Commercial Invoice, Company D shall transfer all qualified receivables subsequently against the buyer to I Bank J Branch as of the effective date of this Agreement, and I Bank J Branch shall take its measures to collect the transferred receivables of Company D prior to the due date thereof. If the receivables discounted for financing fail to be collected within 30 days after the due date of invoice, I Bank J Branch shall have the right to immediately collect the financing principal and interest.

3. **On 15 May 2013, Company D and I Bank J Branch jointly issued the Notice of Accounts Receivable Assignment to Company F1, notifying Company F1 that Company D had transferred its entire receivables under the Coal Supply Agreement to I Bank J Branch and then requested Company F1 to pay the receivables under the Coal Supply Agreement to the 2540 Account opened by Company D at I Bank J Branch.**

On the same day, Company F1 replied to Company D and I Bank J Branch with the Confirmation on Notice of Accounts Receivable Assignment, by which it confirmed and agreed on the contents of the aforesaid notice and acknowledged that it was aware that I Bank J Branch is the legal assignee of accounts receivable. Company F1 would pay all accounts receivable under the Coal Supply Agreement in full to Account on the due date.

4. **On 10 December 2013, Company D and I Bank J Branch entered into the Applications for Domestic K Business with Right of Recourse (i.e., the "Applications for Domestic Commercial Invoice Discount Financing" referred to in the Domestic Commercial Invoice Discount Agreement, hereinafter collectively referred to as the "No. 20-21 K Business Agreement") respectively. Company D requested I Bank J Branch to discount the qualified accounts receivable arising from transactions under the commercial invoices in the amount of approximately RMB 51 million and RMB 57 million respectively and the amounts discounted are RMB 40 million and RMB 46 million respectively; the obligations under the two agreements are secured by 8 maximum amount guarantees and 6 maximum mortgages. In the event**

I Bank J Branch is unable to collect relevant amounts as scheduled due to the occurrence of any circumstance mentioned in the Domestic Commercial Invoice Discount Agreement, I Bank J Branch shall have the right to deduct relevant amounts from the account opened by Company D with I Bank J Branch.

On the same day, Company D issued two Commercial Invoices (for sale of goods) to Company F with the total prices of approximately RMB 51 million and RMB 57 million respectively, notifying the latter that I Bank J Branch had become the legal assignee of the receivables under the "Invoices". Only payment by Company F1 to the Account within 90 days after the delivery of goods by Company D would release Company F from its debts to Company D.

In December 2013, Company F1 issued two Confirmation of Accounts Receivable to I Bank J Branch, assuring that it will pay approximately RMB 51 million by March 2014 and RMB 57 million by March 2014 to the Account.

5. In December 2013, Company D and I Bank J Branch entered into the Applications for Domestic K Business with Right of Recourse (i.e., the "Application for Domestic Commercial Invoice Discount Financing" referred to in the Domestic Commercial Invoice Discount Agreement, hereinafter collectively referred to as the "No. 22-23 K Business Agreement"). Company D requested I Bank J Branch to discount the qualified accounts receivable arising from transactions under the commercial invoices in the amount of approximately RMB 57 million and RMB 56 million respectively and the amounts discounted are RMB 46 million and RMB 38 million respectively; the obligations under the two agreements are secured by 8 maximum amount guarantees and 6 maximum mortgages (same as the No. 20-21 K Business Agreement). In the event I Bank J Branch is unable to collect relevant amounts as scheduled due to the occurrence of any circumstance mentioned

in the Domestic Commercial Invoice Discount Agreement, I Bank J Branch shall have the right to deduct relevant amounts from the Account.

On the same day, Company D issued two Commercial Invoices (for sale of goods) to Company F with the total prices of approximately RMB 57 million and RMB 56 million respectively, notifying the latter that I Bank J Branch had become the legal assignee of the receivables under the "Invoices". Only payment to the 2540 Account within 90 days after the delivery of goods would release Company F from its debts to Company D.

In December 2013, Company F1 issued two Confirmation of Accounts Receivable to I Bank J Branch, assuring that it will pay approximately RMB 57 million by March 2014 and approximately RMB 56 million by March 2014 to the Account.

6. In February 2014, I Bank J Branch sued Company D and other guarantors providing joint and several liability guarantee to Company D as the defendants to the M Intermediate Court, requesting the defendants to repay the discount amount of RMB 86 million and corresponding interest under the No. 20-21 K Business Agreements ("Case I"). In April 2014, I Bank J Branch applied to add Company F and Company F1 as defendants to this case.

In April 2014, I Bank J Branch sued Company D, Company F, Company F1 and other guarantors providing joint and several liability guarantee to Company D as the defendants to the M Intermediate Court, requesting the defendants to repay the discount amount of RMB 84 million and corresponding interest under the No. 22-23 K Business Agreements ("**Case II**"). Unless otherwise specified, Case II and Case I are collectively referred to as the "**Litigation Cases**".

7. In December 2014, I Bank N Branch signed the Agreement on Batch Transfer of Non-performing Assets with the Respondent, agreeing that I Bank N Branch would transfer 51 debts to the Respondent, including the debts of I Bank J Branch against Company D, totaling RMB 170 million.

With respect to the creditor's right of I Bank J Branch against Company D, I Bank N Branch and the Respondent signed the Agreement on Assignment of Creditor's Right (applicable to each individual) in January 2015. As of September 2014 (the base day for assignment), the book value of the creditor's right was RMB170 million for principal,

approximately RMB 9 million for interest, and RMB 960,000 for the legal fee including charge for assessment on account.

8. In October 2016, the Respondent and the Claimant entered into the Asset Transfer Agreement, agreeing that the Respondent would transfer all creditor's rights set out in the appendix attached thereto to the Claimant; Item 102 of the Assets Schedule is the Creditor's Right in dispute, indicating that the borrower is Company D, the outstanding principal amount is RMB 170 million, and the outstanding interest amount is RMB 9 million.

The Claimant and the Respondent agreed that the purchase price of the Creditor's Right is RMB 95 million.

9. In December 2018, the N High Court rendered Civil Judgments in respect of two Litigation Cases, determining that F1 had fulfilled the obligation to pay for the goods under No. 20-23 K Business; however, it could not be deemed that Company D had repaid the principal and interest of the financing under the said K business to I Bank J Branch, so it was determined that Company D had not repaid the financing.

10. In January 2019, the Claimant sent the Lawyer's Letter to the Respondent claiming that there exist serious defects in the Creditor's Right and Respondent had materially breached the contract, and asserting to rescind the individual asset clauses in accordance with Article 94 of the *Contract Law* and requiring the Respondent to return the purchase price of the assets involved in individual clauses and to compensate for losses of interest and the expected benefits. In January 2019, the Letter was delivered to the Respondent.

C. Major Issues in Dispute

Upon the hearing, the Tribunal holds that there are the following major disputing issues in this case:

1. Do the "Assets" transferred from the Respondent to the Claimant include the accounts receivable against Company F? If so, what is the legal nature/status of such accounts receivable in the Assets?

The Claimant contends that, the Assets transferred by the Respondent to the Claimant under the Asset Transfer Agreement include the accounts receivable creditor's right against Company F, which is because that under the asset transfer documents including the Asset Transfer Agreement the Assets are inclusive of the accounts receivable against Company F, and also because of the nature of K business which requires such inclusion of the accounts receivable against Company F in Assets transferred in this case. While the Respondent argues that the Assets transferred was the non-performing assets (creditor's rights) originally transferred from I Bank N Branch to the Respondent. Neither in the transfer documents between I Bank N Branch and the Respondent nor in those transfer documents between the Respondent and the Claimant was it stipulated that the transferred assets in these documents include the accounts receivable creditor's right against Company F; the transferred assets only refer to the principal creditor's right against Company D and the corresponding security interest.

In this regard, the Tribunal gives analysis as follows:

According to the Asset Transfer Agreement and its Schedule 1 on the Assets Schedule, the non-performing assets transferred in this case between the Parties is the RMB 170 million financing creditor's right against Company D under Item 102 of the Assets Schedule, and the relevant underlying transaction is the K business between I Bank J Branch and Company D. This is the base fact which the Parties have no dispute. What the Parties are in dispute lies in how to define the specific content, composition or scope of this RMB 170 million Assets. For which, the Tribunal gives its analysis from the following three aspects:

(1) The formation and transfer process of the Assets

According to the facts found out, I Bank J Branch and Company D conducted the K business, i.e., factoring business, on the basis of aforesaid General Facility Agreement and Domestic Commercial Invoice Discount Agreement, I Bank J Branch granted a credit facility to Company D, and under the facility, loans were rendered to Company D upon the withdrawal application of the latter and provision of security and transfer of the accounts receivable creditor's right against Company F.

Specifically, pursuant to No. 20-21 K Business Agreements and No. 22-23 K Business Agreements, Company D transferred its accounts receivable of approximately RMB 200 million against Company F1 to I Bank J Branch, and I Bank J Branch paid to Company D a discounted amount (financing fund) RMB 170 million; in case I Bank J Branch is unable to collect such accounts receivable, it shall have the right to claim for principal and interest repayment from Company D; meanwhile, for the purpose of securing the repayment of its RMB 170 million debt obligation, Company D arranged eight maximum-amount guarantees and six maximum-amount mortgage security interest to be provided by third parties to I Bank J Branch.

In December 2014, I Bank N Branch transferred to the Respondent the creditor's right at the principal amount of RMB 170 million (together with relevant interests and fees) under the aforesaid four Applications of Domestic K Business with Right of Recourse as non-performing financial assets.

In October 2016, the Respondent wholly transferred such non-performing financial assets to the Claimant.

(2) Do the non-performing assets include the creditor's right of accounts receivable against Company F?

In this case, the Parties have no dispute on the fact that the non-performing assets include the RMB 170 million loan creditor's rights against Company D (the "**Loan Creditor's Right**") and the security rights of the guarantor and the mortgagor with respect to such Loan Creditor's Right (the "**Security Creditor's Rights**"). Nevertheless, the Parties have different opinions on whether or not the Assets include the creditor's right of accounts receivable against Company F and the nature of such right.

The Tribunal believes that the Loan Creditor's Right was arising from operation of K business between I Bank J Branch and Company D, while in nature as a matter of factoring business, transfer of the underlying accounts receivable (i.e., the accounts receivable against Company F) was the foundation and indispensable part of the factoring business. And in accordance with the factoring business norms for the Chinese banking industry, such accounts receivable are the primary source of repayment for the Loan Creditor's Right. Thus, although the creditor's right of accounts receivable against Company F were not explicitly set forth in the content of the Asset Transfer Agreement and its Schedule 1 on the Assets Schedule, based on the basic rules of K/factoring business and the relevant actual financing arrangements (e.g., the fact that Company D issued a Notice of Accounts

Receivable Assignment to Company F1, notifying it that such accounts receivable were transferred in full to I Bank J Branch and requesting it to repay the accounts receivable to the 2540 Account and etc.), it can be certainly concluded that the transfer of the Loan Creditor's Right naturally includes the transfer of accounts receivable against Company F.

In this case, the assets documents delivered from the Respondent to the Claimant also include the documents regarding the creditor's right of accounts receivable against Company F (such as Commercial Invoice (for sale of goods), N VAT Special Invoices, Confirmation of Accounts Receivables Assignment sealed by F1, Settlement Statement for Sales of Coal, etc.). These documents are the documents which confirm and enable the exercise of the creditor's right of accounts receivable against Company F. In this sense, the accounts receivable from Company F owned by the Respondent were part of the Assets and transferred to the Claimant.

In addition, as early as before the transfer of the Assets involved in the case, I Bank J Branch has filed lawsuits against Company F to demand payment of accounts receivable, and with the Assets involved in the case being transferred to the Respondent and then to the Claimant, the Parties have actually become the party to the Litigation Cases respectively and directly claimed the rights against Company F. These facts also prove that the Assets involved in the case include the creditor's right of accounts receivable against Company F.

To sum up, the Tribunal holds that the Assets involved in this case include creditor's right of accounts receivable against Company F.

(3) The legal nature/status of the creditor's right of accounts receivable against F

Based on the actual composition or content of the Assets involved in the case, it could be said that the Assets are composed of a combination of a variety of legal rights, which are not only directly embodied by Loan Creditor's Right (against Company D) and the Security Creditor's Rights, but also includes the creditor's right of accounts receivable against Company F.

The Tribunal holds that, compared with the Assets involved in the case as a whole, the creditor's right of accounts receivable against Company F could be viewed as follows: in economic terms, the accounts receivable creditor's right against Company F is the source of repayment and support of the Loan Creditor's Right, and is functionally the same as Secured Creditor's Rights; in legal terms, the accounts receivable creditor's right against Company F is accessory right. Furthermore, given that the business between I Bank J Branch and

Company D was K/factoring business, i.e., the factoring financing business with recourse, under which if the creditor's right of accounts receivable against Company F could not secure the repayment of loan debts (whether in whole or in part), I Bank J Branch could still have recourse against Company D, and Company D was the ultimate person responsible for repayment. Thus, the transfer of the creditor's right of accounts receivable against Company F does not constitute direct repayment to Loan Creditor's Right, but merely credit enhancement support for the repayment to Loan Creditor's Right, which provides assurance for the repayment to Loan Creditor's Right. This is similar to security in economic function but is not identified as a typical security arrangement under the *Security Law*. If viewed against Section 1.1 of the Asset Transfer Agreement, "*the 'Assets' as a collective concept, means all the assets listed in the Assets Schedule in Schedule 1 hereof, including all the debts under the Loan Contracts initially created by the 'Prior Holder' and that have been transferred to 'Seller', all the secured debts under the Guaranties and the Mortgage Contracts, and other rights that 'Seller' can legally enjoy with respect to such Assets*", the Tribunal believes that the creditor's right of accounts receivable against Company F obviously belongs to "other rights" in the assets.

The Tribunal has noted that the Claimant contends that the creditor's right of accounts receivable against Company F is not only included in the assets, but is also the "core asset", and this is the prime reason for its purchase of the Assets. The Tribunal considers that the Claimant's claim is based more on its own judgment of the realizable economic value of this portion of the Assets, but without any contractual provision or legal implication.

2. Whether the Assets involved in this case have any "Defect" or "Asset Defect".

The dispute between the Parties arose from the final judgments rendered by the N High Court, which concludes that the accounts receivable against Company F had been fully repaid before I Bank N Branch transferring the Assets involved in this case to the Respondent.

Therefore, the Claimant contends that the accounts receivable against Company F did not exist since the very beginning, and the Respondent concealed such information, which constitutes a breach of the Representations and Warranties under Section 9.2(a), (c) and (d) of the Asset Transfer Agreement and as a result, the transferred Assets contain material defects. This made the contractual purpose of the Claimant to collect the creditor's rights in this case be unrealizable, and consequently the Respondent committed a fundamental breach of contract.

The Respondent argues that the transferred Assets set forth in the Asset Transfer Agreement and relevant transaction documents have always been the principal creditor's right against Company D and the corresponding security rights, and the accounts receivable against Company F were never listed as assets to be transferred, so the Respondent committed no concealment. The final judgments made by the N High Court confirmed that the Claimant has the right to require Company D to repay its debt obligation, principal and interest, and to require the guarantors to assume the guarantee liabilities and enjoy a priority right of payment with respect to the collaterals provided by the debtor and the security posters. Therefore, the Claimant has obtained all the rights and interests of the Assets in this case and the outstanding principal amount is no less than RMB 170 million. The Respondent does not violate the Representations and Warranties obligations under Section 9.2(a), (c) and (d) of the Asset Transfer Agreement. In the meanwhile, the Respondent argues that the Assets involved in this case are non-performing financial loans, with natural defects in commercial value and legal uncertainty, and difficulties in repayment due to various factors and the risk of the anticipated interest being unrealizable. The Respondent, as the seller, is not liable for any defect in assets unless there is any fabrication or forging in asset document. Therefore, even if the accounts receivable against Company F is part of the transferred Assets, the Claimant has no right to claim for the breach of contract by the Respondent or for rescission of the contract and/or compensation for the losses on the ground that the creditor's right of accounts receivable against Company F cannot be realized.

To sum up, with respect to the fact that the creditor's right of accounts receivable against Company F has ceased to exist due to the court judgments, the Claimant contends that such circumstance constitutes severe "Defects" and hence the Respondent should be held liable for compensation; while the Respondent argues that such circumstance belongs to the natural and possible defects of non-performing assets and the Claimant shall bear the risk of unrealization of the assets value on its own account, the Respondent has no liability in this regard. It is fair to say that the dispute on whether the nonexistence of the creditor's right of accounts receivable against Company F belongs to the "Defects" or "Asset Defect" is the very core legal dispute of this case. The Tribunal hereby makes the following analysis with reference to the relevant provisions of the Asset Transfer Agreement:

With regard to "Defects" and "Defected Assets", Section 1.1 of the Asset Transfer Agreement is so defined: "'*Defects' mean, with respect to each individual 'Asset', the fact that the representations and warranties made by 'Seller' in Section 9.2 and/or 9.3 are violated, and such violation of representations and warranties will cause a significant adverse effect*

to the value of such 'Assets' or the rights, ownerships or interests that 'Purchaser' is entitled to under such 'Assets'…"; and "'*Defected Assets' mean any 'Assets' with 'Defects', or assets confirmed by the arbitration award that have the Defects claimed by 'Purchaser'*'". The Tribunal notices that Section 9.2 is about the representations and warranties made by the Seller regarding all assets and Section 9.3 is about the representations and warranties regarding environmental issues (which is irrelevant to the disputed issues – noted by the Tribunal). Section 9.2(a) (Ownership and Right to Sale) stipulates that "*For each 'Asset', 'Seller' is the only legal and/or beneficial owner and would transfer to 'Purchaser' on 'Closing Date' of the legal and/or beneficial ownership of 'Assets' without any 'Encumbrances'. Previously made decisions of or participation in any sale, transfer or share arrangement would not constitute limitations to any or all parts of Assets, nor would any agreements to execute the aforementioned sale, transfer or share constitute limitations to any or all parts of 'Assets'. 'Assets' transfer conducted by 'Seller' to 'Purchaser' on 'Closing Date' would not be affected by any third-party rights, benefits or effective claims. 'Seller' is entirely entitled to sell and transfer the rights and benefits of and to the 'Assets' under this 'Agreement' and will not require the consent of any 'Obligor' or other third parties, except for relevant consents that 'Seller' has obtained or should have obtained before 'Closing'. Transfer of 'Assets' on 'Closing' will constitute the legal, effective and binding transfer from 'Seller' to 'Purchaser'*'". Section 9.2(c) (Assets Information Accuracy; Asset Documents) stipulates that "*… 'Seller' is not aware of any change, development or incident that would render the information about 'Assets' listed in Assets Schedule to be untrue or misleading information. The copies of the 'Asset Documents' contained in the 'Investor Review Files' are the whole documents and materials created or obtained by 'Seller' in its possession currently, as was received from 'Prior Holder' and then further generated or received thereafter, and are true, correct and complete copies of such files…;*". Section 9.2(d) (All Documents) stipulates that "'*Seller' has included in the 'Asset Documents' and/or 'Investor Review Files' all agreements and documents about the 'Assets' that it has received or thereafter obtained, and there is no intentional concealment or fraud…*". Regarding "Defected Assets", Section 7.2 of the Asset Transfer Agreement stipulates that "'*Seller' shall indemnify 'Purchaser' for losses incurred due to 'Defects'. The Parties agree that the amount of indemnity payable by 'Seller' to 'Purchaser' for an 'Asset' shall not exceed the 'Allocated Purchase Price' of such Asset*".

As for "Asset Defect", the definition in the Asset Transfer Agreement is "*with respect to or in relation to an 'Asset', any defect with respect to the 'Asset' itself or the related 'Asset Documents', whether legal in nature or related to the commercial value of the Asset, whether*

already apparent or not yet apparent, whether able or unable to be remedied, that could affect the purchase price of the Asset, as well as factors with respect to an obligor's ongoing status which could be adverse to the realization of the 'Asset', but does not include any breach by the 'Seller' of its representations, warranties or undertakings under this Agreement". With respect to "Asset Defect", Section 10.2 (Purchaser's Covenants), Item (i), of the Asset Transfer Agreement stipulates that "*…it has been told and completely understands that the 'Assets' that it purchases, including creditors' rights of the non-performing loans and their subordinate rights, may have 'Asset Defects' or may not be paid off due to all kinds of factors, so that ultimately the 'Purchaser' may be unable to realize its anticipated profits. Unless 'Seller' fabricates or forges 'Assets Documents', 'Seller' does not bear any liabilities with respect to 'Asset Defects', regardless of whether 'Asset Defects' have been expressly indicated or can be reasonably understood and discovered through an analysis of the 'Investor Review Files'. 'Purchaser' further undertakes that, where 'Purchaser' sells any Assets to any third parties, 'Purchaser' shall require the third parties that purchase such Assets to make the same covenants, and require the third parties that purchase such Assets to further require its assignees to make such covenants*".

The Tribunal holds that the Asset Transfer Agreement gives the definitions of "Defects" and "Asset Defect" (and clarifies their different legal consequences) in a meticulous manner, and literally the definitions can be largely summarized as follows: Defects mainly refer to problems in legal rights of the Seller with regard to the transferred assets, while Asset Defect mainly refers to the legal, commercial or other factors that may affect the pricing or realization of asset value of the assets transferred. In other words, Defects are mainly related to the defects and issues of asset rights, while Asset Defect is mainly related to the defects and issues affecting the economic value of the assets. But no matter whether it is the Defects or Asset Defect, what the common point between them is that they will all eventually affect the commercial interests of the assets transferred.

Then, whether the fact that the creditor's right of accounts receivable against Company F being determined by the courts to have been actually repaid before the assets transfer is a matter of "Defects" or "Asset Defect"? The Tribunal holds that purely in the context of the creditor's right of accounts receivable per se against Company F, the assets had objectively been in good existence without any question, but as part of the Assets transferred between the Parties to the case, it had ceased to exist due to its repayment as so determined by the final judgment of the N High Court with a retroactive legal effect, namely, it was no longer existent at the closing (actually prior to the closing) of the Assets transfer transaction. The

transfer of such non-existing creditor's right by the Respondent obviously constitutes breach of the representations and warranties set forth in Section 9.2(a) (Ownership and Right of Sale) of the Asset Transfer Agreement, i.e., "*For each 'Asset', 'Seller' is the only legal and/or beneficial owner, and would transfer to 'Purchaser' on 'Closing Date' of the legal and/or beneficial ownership of 'Assets' without any 'Encumbrances'…*". For assets which do not exist, there is no way to talk about the "legal and/or beneficial ownership" over the assets, nor "the sole legal and/or beneficial owner of the assets". Non-existing assets cannot be the subject assets to be transferred, and the purpose of such transfer cannot be achieved at all. Such transfer contemplated is just no more than a fantasy or illusion. Therefore, with respect to the Assets Transfer in this case, the non-existence or extinction of the subject assets constitutes a violation of the representations and warranties under Section 9.2(a) of the Asset Transfer Agreement, and constitutes the "Defects" defined in the Asset Transfer Agreement, and such Defects are the defect in an absolute sense. Of course, such Defect of the nonexistent assets implies an absolutely no value in the assets, and in the sense, such "Defects" also constitutes "Asset Defect" or absolute defect. But according to the above definition of "Asset Defect", such a defect situation does not fall into the category of the "Asset Defect" so defined in the Asset Transfer Agreement.

Indeed, it is also noted to the Tribunal that the Respondent claimed that the Loan Creditor's Right against Company D is the subject matter of the assets transaction in issue, while other relevant security rights and the creditor's right of accounts receivable against Company F "*could be deemed as 'relevant rights' in the uncertain state under the transaction structure and understood in broad sense, i.e., subordinate rights in the legal sense, but in fact, such 'relevant rights' did not fall within the scope of the subject matter of the contract for which the transferor should assume the contractual liability*". When confirming that the accounts receivable against Company F had been repaid, the court still recognized the Loan Creditor's Right (and related security rights) of the Claimant. The Tribunal understands that the Respondent was trying to express that there was no defect in the assets transferred from the Respondent, because it had been completely recognized by the court ruling. Furthermore, the Respondent was intending to express such an argument, i.e., even though the creditor's right of accounts receivable against Company F is deemed to be part of the Assets transferred in the case, namely, the relevant subordinate right, and the extinction of which leads to no commercial value, such extinction or loss of assets should be regarded as the "Asset Defect" contained in the non-performing assets so transferred (as a whole asset) rather than "Defects". To some extent, such position of the Respondent is reasonable and logical. As a matter of fact, the Tribunal has also noticed that there was

such an issue, and believes that it is necessary to make an adequate analysis in this regard, otherwise it would be difficult to achieve a circumstantial inference or conclusion.

It should be right that if for instance the Assets in question were treated as a single asset, just like an automobile vehicle, when such vehicle is sold at a low price as a non-performing asset, it would be a normal, anticipatory and acceptable thing for the buyer to find that there are some missing or complete damage of certain components thereof, and the buyer would not in turn make any particular claim against the seller with respect to such missing or damaged components. Then, whether the Assets in question can be treated in this way? This posts a very crucial perspective for the dispute in this case, that is, when exploring whether there are any "Defects" or "Asset Defect" in the Assets in question, can the Assets as a single asset be cut open and looked into the inside one layer further? This is a question that must be answered with clarity. The Tribunal analyzes as follows:

As mentioned above, as to the factual situation of the Assets in question, the Assets consist of multiple components, besides the Loan Creditor's Right against Company D, there are Security Creditor's Right and the creditor's right of accounts receivable against Company F. Therefore, the Assets in question are a combination of asset rights rather than a single form asset, with the relevant obligor differing from each item or each type of asset/right. In this sense, discussion of the existence of "Defects" or "Asset Defect" in the Assets must be conducted on the basis of the specific components which make up the Assets, namely, the pertinent analysis must be conducted in respect of each of the assets/rights of different legal nature versus the different obligors (of course, such approach is not necessary if the asset is such a single form asset as shown by the above vehicle example). Otherwise, there would be no ground to talk about the "Defects" or the "Asset Defect" if without referring to the particular type of assets/rights or their respective obligors. For this, the Tribunal has particularly noticed the several definitions in Section 1.1 of the Asset Transfer Agreement. The first one is the definition of "Assets", i.e., "'*Assets', as a collective concept, means all the assets listed in the Assets Schedule in Schedule 1 hereof, including all the debts under the Loan Contracts initially created by the 'Prior Holder' and that have been transferred to 'Seller', all the secured debts under the Guaranties and the Mortgage Contracts, and other rights that 'Seller' can legally enjoy with respect to such Assets*". This definition of "Assets" means that although the Assets involved in this case are transferred as a single asset package, the assets themselves are separable, that is, the Assets involved in this case are not assets of a single legal nature or class, but consist of several types of assets or asset rights. The second definition is about "obligor", i.e., "'*Obligor' means (i) the 'Borrower',*

(ii) the 'Mortgagor', (iii) the 'Guarantor', (iv) any Person who shall bear obligations under any Loan Contract, Mortgage Contract, Guaranty or any other agreements and documents relating to the 'Assets', or under the documents in connection with the transfer, extension, endorsement or modification of the said agreements or documents, and/or the liquidation committee of the 'Person' listed in the foregoing (i) to (iv) collectively or any of them". This definition also shows that different types of assets have different types of obligors, or in other words, the existence of different obligors indicates the separability of each type of asset right contained in the Assets and the legal suability of each such type of asset right. In addition, there is the definition of "Asset Documents", *i.e., "…… all the documents in connection with the determination or enforcement of the rights and interests under the 'Assets' …*". This definition also shows that the seller shall provide all the relevant documents of rights and interests in respect of the particular type of assets upon the transfer. In light of the above definitions, it should be right to say that if the assets cannot be or do not need to be checked one step further inward, or it is sufficient enough to only describe the Assets in question generally as non-performing assets (package), or the Assets are limited to the Loan Creditor's Right against Company D without any necessity to explore the relevant subordinate or accessory rights, then such detailed definition of "Assets", "Obligor" or "Asset Documents" in the Asset Transfer Agreement would seem to be unnecessary or meaningless.

As a matter of fact, the Tribunal understands that based on the knowledge that asset means right (from the legal perspective) and value (from the economic perspective), no matter it is for the purpose of achieving the ultimate commercial realization of non-performing assets or merely for the purpose of reviewing the defects of relevant assets' rights or defects in assets' value, all such need to be, and must be, conducted on the basis of specific asset form, so as to review whether the legal rights are genuine and complete and how are they vested, and to assess their value and liquidity. While it is not appropriate to examine the Assets in this case, or so simply in such a way, by taking the non-performing assets in this case as a whole or a single form asset, and adopting a vague, namely non-penetrative, approach to review the "Defects" or "Asset Defect". In the meanwhile, the Tribunal is also of the view that, where a penetrating review of a specific category of assets is possible, the above-mentioned definitions in the Asset Transfer Agreement also indicate that such a review can certainly be conducted towards both the "Defects" and the "Asset Defect", other than towards the "Asset Defect" only, or to categorize all the problems so identified ultimately into the concept of "Asset Defect", and one cannot find any provision or implication about such latter approach in the Asset Transfer Agreement. Moreover, from

the legal point of view, due to the difference in the nature of the legal rights of various components (as well as obligors and the specific asset documents) of the Assets involved in the case, they are able to be, and shall be, legally reviewed in a separate manner, and the corresponding legal recourse can be and shall be conducted against the relevant different obligors. In other words, although the non-performing assets are traded by way of pricing as a whole rather than separate pricing on each of the components, and from the legal point of view, each part (right) of the non-performing assets relatively independently exists, and can be examined, evaluated and claimed separately. Thus, the Tribunal holds that, in handling this case, the Tribunal may directly explore the issue of whether there are Defects in respect of the creditor's right of accounts receivable against Company F (rather than merely in relation to the Loan Creditor's Right against Company D), and further deliberate legally whether the fact of non-existence of the creditor's rights of accounts receivable against Company F constitutes Defects.

Therefore, to sum up, the Tribunal holds that, according to the definition of the "Asset Defect" in the Asset Transfer Agreement, the fact that the accounts receivable against Company F had no longer existed due to its being repaid as ruled by the court constitutes "Defects" other than "Asset Defect".

In addition, despite the above conclusion on the issue of "Defects" / "Asset Defect", the Tribunal considers necessary to analyze and respond to other relevant viewpoints and opinions raised by the parties in their debate on the issue of "Defects" / "Asset Defect", which are mainly the following two aspects:

(i) Is there any subjective fault of the Claimant or the Respondent with respect to the existence of Defects in the assets?

The Tribunal has noted the Claimant's allegation that, prior to the signing of the Asset Transfer Agreement, Company G, the Respondent's business partner, had informed the Claimant of the results of its due diligence for the Respondent, indicating that Company F were solvent and willing to repay; (based on the Statement of R Law Firm submitted by the Respondent, it can be seen that) the Respondent had become known of the defense of Company F and had received the documents submitted by the latter in July and August 2016; the Respondent, however, failed to disclose such information to the Claimant at the signing or closing of the Asset Transfer Agreement, nor did it include the materials submitted by Company F into the Asset Documents and/or the Investor Review File and hand over to the Claimant. Such acts of the Respondent are deceptive, concealing and misleading, and

have seriously violated Section 9.2(c)(d) of the Asset Transfer Agreement and constituted a fundamental breach. Therefore, the Claimant has the right to rescind the Agreement in accordance with law.

Nevertheless, the Respondent asserted that it had truthfully and fully disclosed the condition of the Assets in the case without any concealment or misleading. Prior to the purchase, the Claimant had conducted adequate due diligence on the Assets. And during the investigation of the Assets, Company G had informed the Claimant of the results of its due diligence, and reminded the Claimant of the uncertainty of exercise of the legal recourse against Company F. After the transfer, the Respondent has delivered to the Claimant all the documents relating to the transferred assets that might affect the judgment of the latter. The Respondent had fully performed the representations and warranties obligations under Section 9.2(c)(d) of the Asset Transfer Agreement.

With respect to the foregoing each other blames between the Parties, the Tribunal believes that neither Party has provided sufficient or direct evidence to support their view. The Tribunal is puzzled as to when the Claimant became aware of the Litigation Cases which had already existed before I Bank N Branch transferred the assets to the Respondent, in particular, when the Claimant knew about the defense raised by Company F and the relevant materials submitted by the latter. Despite the Parties raised their own opinions, neither of them has made sufficient explanation or provided relevant proof. Nevertheless, based on the existing evidence in this case, the Tribunal seems to be convinced that before the final judgment rendered by the N High Court, the Parties did not actually dispute over the issue whether or not the accounts receivable against Company F contain any Defects. Moreover, during the entire process of litigation, the Parties did not seem to engage any non-cooperation. Therefore, it can be concluded that even if, for any reason before the signing of the Asset Transfer Agreement, the Claimant had not got any knowledge about the litigation of accounts receivable against Company F, especially the defenses of Company F, or had not become known or fully known of such conditions which it should have known about during its due diligence on the Assets, the Claimant still has plenty opportunities to realize such conditions and conduct further investigations after the purchase. The Tribunal understands that the crux of the matter is not the blames to each other, but the Parties (even including the prior holder, I Bank J Branch, though it might be aware of the real situation) actually have the common understanding over the issue of the creditor's right of accounts receivable against Company F, that is, they were not aware, or sufficiently aware, of the non-existence of the accounts receivable due to the full repayment of Company F. Therefore, it

can be said that although the accusations to each other was directly caused by the decision of the N High Court, the Tribunal holds that such accusations, i.e., whether there exists any deceptive, concealing or misleading behaviors or insufficient due diligence before such the creditor's right of accounts receivable are being ruled of being repaid, are of little practical significance in comparing with the legal result concerning the extinction of the creditor's right of accounts receivable.

(ii) Issue of time limit for claiming Defects

The Tribunal notes that the Respondent claimed that even if there were Defects in the Assets, according to Section 7.1 of the Asset Transfer Agreement, the Claimant only had the right to claim the Defects within 60 days after the closing date, and such period had long passed, so the Claimant had no right to claim. The Claimant contended that the 60-day period under the Asset Transfer Agreement shall not be applicable in this case, there is no time limit for the Claimant to exercise its statutory right of rescission and its selective claim for Defects remedy should not be subject to the 60-day period. The Claimant may raise such objection within a "reasonable period". Furthermore, the Claimant alleged that it was justifiable for the Claimant to file this arbitration within 60 days after the judgment rendered by the court coming into force.

According to Section 7.1 of the Asset Transfer Agreement, the purchaser shall have the right to claim Defects of the Assets within 60 days since the closing date. The Tribunal is of the view that, on the one hand, the period provision is very clear, while on the other hand, it is too simple on content wise. Fairly speaking, it is a matter worthy discussing as to how is the proper manner to understand and apply this period. Generally, there is an implied pre-condition for a party making a claim, that is, no matter such a claim is about breach of contract, liability for breach of contract, damages or tort, and no matter the period is reasonably long or short, the starting point of such period should be the time when the party making the claim actually knows, is able to know, should have known or is presumed by law to know of its right being infringed. Otherwise, such stipulation of a period for claim would be meaningless, especially when the period of time is very short. This is the specific circumstance in this case. Of course, from the perspective of the Respondent, this is a voluntary contract between the Parties, and there is no reason not to comply with. In this sense, the above analysis of the Tribunal is still not convincing enough.

However, the Tribunal also considers that with respect to the particular situation of the non-existence of creditor's right of accounts receivable against Company F due to the court

judgment which was a very unique circumstance, it was not a general defected asset; to be precise, it was not a defect in the Assets to be discovered after the closing of the transfer, but a defect of no asset being transferred at all. The asset itself does not exist, let alone the defect in the asset. In this sense, the definition of "Defects" in the Asset Transfer Agreement is only so "borrowed" when and for the purpose of discussing the problem involved in the transfer of accounts receivable against Company F in this case. Similarly, the "Closing" or "Closing Date" is only a matter of literal provision of a contract; it is meaningless to the purchaser because there was no such actual asset being transferred.

To better illustrate it, assuming that if not only the creditor's right of accounts receivable against Company F has not been actually transferred, but also all other parts of the underlying assets in the Asset Transfer Agreement have not been transferred either, in such a circumstance, it would be naturally of no practical meaning to discuss the objection period; following the same assumption, the more important legal issue would be the rescission of the contract. Therefore, the Tribunal believes that with respect to the Defect in the creditor's right relating to the accounts receivable against Company F, Section 7.1 of the Asset Transfer Agreement should not be applicable in its absolute term, and the general legal principle relating to the calculation of time limit should be adopted, that is, the period should start from the date on which the party actually knows or should know its rights being harmed.

From this perspective, the Tribunal considers that it is justifiable for the Claimant to assert that the period of claiming Defects should start from the judgment date of second-instance proceedings. Thus, the Claimant has the right to assert "Defects" in the Assets in this case.

3. Whether the Claimant is entitled to rescind the individual asset clauses.

In this case, the Claimant claims that its purchase of the Assets was completely based on evaluation of the value of the accounts receivable against Company F. Although the creditor's right of accounts receivable against Company F was an accessory right, it was an integral and core part of the Assets and was the primary foundation and premise that the Claimant was willing to spend a huge amount of money to purchase the Assets. However, the court ruling that the accounts receivable against Company F was repaid made the Respondent unable to deliver such right to the Claimant, which causing the Claimant unable to achieve it purpose of contract. Therefore, the Claimant claims that it has the right to rescind the individual asset clauses.

The Respondent submits that the Assets are non-performing financial loans with inherent "Defect" in commercial value and are in litigation with legal uncertainty. The Respondent had transferred to the Claimant the Loan Creditor's Right against Company D and other security rights, so the Respondent did not commit any breach of contract and the Assets in question had no defect. As a result, the Claimant's contractual purpose has been achieved. The Claimant's belief that it could realize the creditor's right through payment from Company F was solely due to its own judgment going wrong and had nothing to do with the Respondent, and the Claimant had promised to voluntarily bear the risks arising from the failure in realizing the creditor's right. Therefore, the Claimant's request to rescind the individual asset clauses lacks both factual and legal basis and cannot stand.

The Tribunal holds that with respect to the non-performing asset transferred in this case, as described above, it consists of three parts in general, i.e., the Loan Creditor's Right against Company D, the Security Creditor's Rights and the creditor's right of accounts receivable against Company F being the other rights (the latter two rights are credit support for the repayment of Loan Creditor's Right against Company D), among which the creditor's right of accounts receivable against Company F is only part of the Assets. Despite that the Claimant highly valued the creditor's right of accounts receivable against Company F and it cannot be precluded that it would be possibly the case, the Tribunal considers that, as far as the purpose of the contract itself was concerned, it was not the same as the commercial purpose that the parties intended to achieve through the contract. From the perspective of contractual purpose, even if the creditor's right of accounts receivable against Company F does not exist, the other two parts of assets have been effectively transferred, and both have been confirmed by the N High Court. Therefore, it is fair to say that the Claimant's main contractual purposes are basically achieved. As for how the Claimant's commercial purpose can be achieved through the purchase of the Assets in the case, it is not a matter that needs to be considered by the Tribunal. Thereafter, the Tribunal decides that the purpose of the contract in question has been basically achieved, so that the Claimant's claim to rescind the individual asset clauses fails.

4. Whether the Respondent should be liable for the problem regarding the existence of the accounts receivable against Company F.

As stated above, the Tribunal has determined that the non-existence of creditor's right of accounts receivable against Company F as a result of its repayment so ruled by the court judgements has constituted the Defect of the Assets. According to Section 7.2 of the Asset

Transfer Agreement which stipulates that "'*Seller' shall indemnify 'Purchaser' for losses incurred due to 'Defects'. The Parties agree that the amount of indemnity payable by 'Seller' to 'Purchaser' for an 'Asset' shall not exceed the 'Allocated Purchase Price' of such 'Asset*'", the Respondent should compensate the Claimant for its losses arising from the Defect of the creditor's right against Company F.

As for how the Respondent shall specifically assume the responsibility for compensation, please refer to the below.

D. Regarding the Claimant's Arbitral Claims

1. The Claimant's first arbitral claim is requesting to confirm that purchase and sale clauses regarding the individual asset Item 102 "N D Enterprise Development Co., Ltd." in Schedule 1 "Assets Schedule" annexed to the Asset Transfer Agreement have been rescinded as of January,2019, and order the Respondent to refund the RMB 95 million purchase price of the individual asset to the Claimant and compensate the Claimant for the loss of interest, which shall be calculated at the bank lending rate for the same period from the date of payment by the Claimant (i.e., December 2016) to the date of the actual repayment by the Respondent (temporarily calculated as of February 2019, the interest is approximately RMB 9 million), and meanwhile compensate the Claimant for the loss of anticipated benefit in the amount of RMB 75 million.

Based on the above analysis, the Tribunal determines that the purpose of the contract under the individual asset clauses has been basically achieved, and the Claimant's reasons for claiming the rescission of the clauses regarding the individual asset are not sufficient, and therefore the Tribunal decides not to uphold.

As for the RMB 75 million loss of anticipated benefit claimed by the Claimant, the Tribunal notes that the Claimant's calculation basis was actually the RMB 170 million principal amount of the Loan Creditor's Right minus the RMB 95 million amount of the transfer price of the non-performing assets. Obviously, the Claimant's claim is based on the assumption that the Loan Creditor's Right can be realized in full amount, and this assumption is further based on the Claimant's belief that the creditor's right of accounts

receivable against Company F can be realized in full amount. The Tribunal is of the view that the Claimant's assumption is too bold in terms of the non-performing asset transactions in the case. Even if such a possibility cannot be precluded in theory, it cannot be so inferred in law. In fact, it is not a matter which cannot be sufficiently proved, nor is it in line with the usual practice of trading of non-performing assets. Therefore, the Tribunal cannot give its consent. To sum up, the Tribunal does not uphold the first arbitral claim of the Claimant.

2. The Claimant's second arbitral claim is that, if the Tribunal does not support the Claimant's first arbitral claim regarding the rescission of the individual asset clauses in the Asset Transfer Agreement, the Claimant seeks to order the Respondent to indemnify the Claimant for its loss in the amount of RMB 95 million due to the material Defect of the asset and loss of interest, which shall be calculated at the bank lending rate for the same period from the date of payment by the Claimant (i.e., December 2016) to the date of the actual repayment by the Respondent (temporarily calculated as at February 2019, the interest is approximately RMB 9 million);

Based on the foregoing analysis, the Tribunal determines that the Respondent should compensate the Claimant for the loss in connection with the Defect in the Assets, that is, the non-existence of creditor's right of accounts receivable against Company F. As for the amount of loss, the Tribunal notes that the above principal amount raised by the Claimant had already reached the maximum amount set forth in Section 7.2 of the Asset Transfer Agreement, i.e., the purchase price of individual asset. The Tribunal is of the view that the amount claimed by the Claimant is apparently unjustifiable for the reasons are as follows:

First, as stated above, the creditor's right of accounts receivable against Company F is not the entire assets of an individual transaction in this case but only a part thereof. The price of RMB 95 million paid by the Claimant is the price for purchasing all assets of an individual transaction. Obviously, it is not logical for the Claimant to claim for compensation of the entire assets due to the Defect in part of the Assets.

Secondly, even if the Claimant highly valued the creditor's right of accounts receivable against Company F and therefore paid a substantially high purchase price for the Assets as a whole, this is only the Claimant's own business consideration. The Parties did not reach any pricing arrangement for the creditor's right of accounts receivable against Company F.

Therefore, in any event, the Defect of non-existence of creditor's right of accounts receivable against Company F should not entitle the Claimant to claim for full refund of the purchase price of the Assets.

Notwithstanding the above, the Tribunal notes that the transaction price of RMB 95 million of the non-performing assets transaction in this case was indeed a pretty high price giving the total amount of the loan principal being RMB 170 million, somehow the price obviously exceeds the normal price level for non-performing assets, which could be partially attributable to the fact that the Claimant highly values the creditor's right of accounts receivable against Company F, and objectively speaking, the creditor's right of amount receivables against Company F is of a high cashing ability. After a comprehensive consideration of all relevant factors in this case, the Tribunal holds that it is fairly reasonable for the Respondent to compensate the Claimant for the loss at a 50% level of the purchase price of the Assets due to the Defect in the Asset, so that the Respondent shall compensate the Claimant in the amount of approximately RMB 47 million.

As for the Claimant's claim for indemnifying for loss of interest, the Tribunal understands that there is lack of reasonable ground and therefore does not support the claim.

3. The Claimant's third arbitral claim is that the Respondent be ordered to indemnify the Claimant's expenses of arbitration fee and attorney fees for this case in the amount of RMB 2 million.

In view of the above analysis and conclusion, the Tribunal holds that 50% of the arbitration fee for the case shall be borne by the Claimant and the other 50% by the Respondent; meanwhile, the Respondent shall compensate the Claimant RMB 600,000 for the attorney fee.

E. Regarding the Counterclaims of the Respondent

1. The Respondent's first counterclaim is that the Claimant bears approximately RMB 2 million in total of the attorney fee of RMB 2 million, translation fee

of approximately RMB 4,000, and travel expense of RMB 11,000 incurred to the Respondent for the arbitration case.

In view of the facts of the case, the Tribunal holds that the attorney fee and the relevant expenses such as translation fee and travel expenses incurred by the Respondent shall be borne by itself.

2. The Respondent's second counterclaim is that the Claimant bears all the arbitration fee of this case.

According to the relevant support of the Claimant's arbitral claims in this case, the Tribunal holds that the arbitration fee for counterclaims in this case shall be borne by the Respondent itself.

III. AWARD

Based on the above facts and analysis, the Tribunal, pursuant to Article 49.6 of the *Arbitration Rules*, renders the Award as follows:

(1) The Respondent shall compensate the Claimant in the amount of approximately RMB 47 million for the loss due to the Defect of the Assets;

(2) The Respondent shall compensate the Claimant RMB 600,000 for attorney fee;

(3) Dismiss the other arbitral claims of the Claimant;

(4) Dismiss all the arbitral counterclaims of the Respondent;

(5) The arbitration fee for the claims is approximately USD 200,000 (which has been paid by the Claimant in advance), the Claimant shall bear 50% of it and the Respondent shall bear the other 50%. So the Respondent shall compensate the Claimant approximately USD 100,000 for the advance payment; and

(6) The arbitration fee for counterclaims is approximately RMB 75,000, all this shall be borne by the Respondent. This fee has been offset against the full advance payment by the Respondent.

The Respondent shall pay the above amounts payable to the Claimant within 15 days after the coming into effectiveness of this Award.

This Award is final and effective from the date on which it is rendered.

ARBITRATOR X'S OPINION ON THE ARBITRAL AWARD

In my opinion, I basically agree with the Arbitral Award in relation to the responsibility, but it shall go far beyond the current conclusion given that the Respondent is the defaulting party in this case and sold a false claim to the Claimant while it has always believed that it has no fault, which shall be the prerequisite to assess responsibility. As to the damage assessment, I could not accept the reasons and conclusions on quantitative assessment as set out in the arbitral award, which means, the quantification is too low.

My different opinions on the Arbitral Award are as follows:

A. About the Responsibility

According to the judgments of the courts of first and second instances, the case involves the General Facility Agreement and the Domestic Commercial Invoice Discount Agreement in May 2013, whereby I Bank granted financing of approximately RMB 600 million to Company L from May to December 2013, the par value of the value-added tax invoices for the invoice discounting is approximately RMB 800 million, and the amount remitted by Company F to the Account of I Bank is RMB 800 million. This shows that Company F has repaid in full the debt to Company L, which the I Bank is aware of. However, I Bank failed to timely transfer the above amount repaid by Company F to its own account, and consequently, Company L transferred approximately RMB 300 million from the Account of I Bank to its another account opened with I Bank from July to December 2013, which is thus the amount repaid by Company F to I Bank and misappropriated by Company L. The courts also concluded that Company F shall make repayment to I Bank's special account, which should be specifically used to repay the principal and interest on Company L's financing, but I Bank allowed Company L to transfer the fund in the special account to the general settlement account. Thereafter, Company L transferred a large amount of money to outsiders so that Company L's financing involved in the case could not be paid off.

It should be noted that Company F has repaid all the money and I Bank has also received it and is aware of it quite clearly. Meanwhile, Company L also knows about this, but it misappropriated the repayment of Company F to its other projects while I Bank delayed to transfer the money to its own account. Consequently, I Bank could not be repaid under Company L's financing in the end, resulting in bad debt. But it is strange that after Company F paid RMB 170 million, from February to April 2014, I Bank still insisted on suing Company F and Company L respectively in the M Intermediate Court for the above

RMB 170 million, and transferred the above non-performing asset ("NPA") of RMB 170 million to the Respondent in December of the same year. Besides, the Respondent replaced I Bank as the plaintiff in the first instance in the M Intermediate Court. The Respondent, as a company specializing in NPA disposal, should have a very clear understanding of the ins and outs of the RMB 170 million claim. It is not convincing to say that the Respondent does not know or do not understand the merit of the RMB 170 million claim, and of course, Company L understands above even more clearly. During the litigation in the M Intermediate Court, the Respondent transferred the RMB 170 million claim to the Claimant. In other words, I Bank, Company L and the Respondent are well aware of the performance and final results of the so-called false NPA of RMB 170 million, while only the Claimant is not aware of it. When the Claimant and the Respondent signed the agreement on this case, the Claimant replaced the Respondent as the plaintiff in the second instance, and insisted on dunning for payment from Company F. Until the judgment was issued, it knew that RMB 170 million was already paid in 2013 and this NPA was fictitious. According to the evidence in this case, during the above-mentioned period, some persons or entities did inquire about acquisition of such NPA, but they all gave up in the end. Only the Claimant took the bait and paid RMB 95 million to acquire this fictitious NPA of RMB 170 million.

The conclusion is that due to its own reasons and without permission of I Bank, Company L misappropriated the repayment of Company F, which should belong to I Bank, to other projects, resulting the bad debt of I Bank. This is deliberate and Company L should be liable for that. At the same time, when I Bank knew that Company F had repaid the loan, it insisted on filing a lawsuit against Company L and Company F respectively. It does not rule out the possibility that I Bank and Company L colluded to file a false lawsuit, and the Respondent joined the false lawsuit which it knew and should know and have known and transferred the fictitious bad debt to the Claimant during the litigation requesting Company F to make duplicate repayment in relation to Company L's financing, so as to seek for improper profit. For the reasons stated above, in this case, the Respondent should bear all the liabilities for breach of the contract and compensate the Claimant for all losses arising therefrom.

B. Acquisition Price About the Subject of This Case

In October 2016, the Claimant and the Respondent of this case signed an agreement on transfer of the asset under this case, and the Respondent transferred the above NPA of RMB 170 million to the Claimant, which was listed in Item 102 of the table annexed to the agreement. Both parties agree that the transfer benchmark date is March 2016, whereupon

the claim principal to be transferred is RMB 170 million and the acquisition price for such claim principal is RMB 95 million. According to the table annexed to the agreement, in the list of 140 items, only Item 102 shows a principal of RMB 170 million borrowed by Company L, and there is no other item containing principal of RMB 170 million. Further, the source of the RMB 170 million is the No. 20-23 K Business confirmed by the court judgement. In light of the above, the underlying transaction in this case is closely in connection with Company F. As far as the transfer of claim is concerned, for the acquirer, the amount of the claim and NPA should not merely depend on the representation made by the seller. The acquirer should have a thorough understanding of the formation, *status quo*, value and legal status of the claim or NPA. After all, the acquisition and disposal of NPA is a deal by which the seller wants to obtain funds as soon as possible, while the acquirer wants to realize profit, debt recovery or enforcement of claim. Therefore, the acquisition amount is the result of mutual negotiation which is true intention of both parties. And the arbitral tribunal has no ground to deny the parties' agreement on the acquisition price in the contract which is also the true intention of both parties. Further, during the arbitration proceedings, neither party put forward that the acquisition price was too high. For the reason set out as above, the arbitral tribunal should respect the intention of the parties on the acquisition price. However, the reasons for adjusting the acquisition price or reducing the amount of compensation proposed in the current arbitral award is unfounded, since it does not reflect the protection of the interests of the innocent party, and it is inconsistent with the conclusion that should be drawn on the basis of the Respondent's behavior determined in the arbitral award.

C. NPA of Company L

Company L does have NPA, but it has nothing to do with this case and the RMB 170 million of Company F. The final judgment of the court has determined that the NPA of Company L under the contract is the repayment of Company F, which belonged to I Bank and was misappropriated by Company L to other projects, resulting in the bad debt of I Bank. However, the Respondent does not acquire the above-mentioned NPA of Company L. Meanwhile, the table annexed to the agreement does not contain such item. As mentioned above, what the Respondent acquired is the fictitious claim fabricated by Company L in collusion with I Bank which the Respondent participated in subsequently. The underlying transaction of the contract under this case shall be the debt owed by Company F. Therefore, even if Company L has NPA, it has nothing to do with this case, and should not be included in the scope of acquisition subject under this case proposed by the Respondent.

ARBITRATOR Y'S OPINION ON THE ARBITRAL AWARD

The three arbitrators of the arbitral tribunal cannot reach a majority opinion. According to the *Arbitration Rules*, the arbitral award (hereinafter referred to as the "Arbitral Award") shall render as per the presiding arbitrator Mr. Z's opinions. My opinions shall keep with the file and append to the Arbitral Award for the related parties' reference.

Three explanations in advance:

A. Regarding the Citing of the Articles of the *Civil Code of the People's Republic Of China* (Hereinafter Referred to as the "*Civil Code*") On Factoring Contracts

Comparing to the *Contract Law of the People's Republic of China*, the *Civil Code* has added articles on factoring contracts. The *Civil Code* is not yet in effect, and the parties have not cited it as a reference in the case. But the related articles confirm factoring's practice and industry's customary rule by the *Civil Code*. For example, some principles of the *Temporary Regulations on Managing Factoring of Commercial Bank* by the China Banking Regulatory Commission and the *Norms for the Factoring Business in the Banking Sector of China* by the China Banking Association. Therefore, I would cite the specific articles of the *Civil Code* on factoring contracts to analyze the case's related issues. The citing of the *Civil Code*'s articles is regarded as a citing of legal principles, not as a valid law.

1. Litigation Cases and the responsibility of the parties to the arbitration case

My quoting of the Court Judgment text and analysis is to find the basic facts and the source from which the arbitration case arises. Analyzing the Litigation Cases does not mean hearing those cases instead of the judges, for I have no power to hear. Furthermore, I have no power to evaluate the responsibility of the judges for the judgments. In contrast, I understand that the final judgments are binding legal documents. These judgments cannot change without judicial proceedings. My purpose is to identify the differences between defect and risk and decide the parties' responsibilities to the arbitration case during the assets transaction and litigations by analyzing some unusual circumstances in the facts.

2. Regarding the abbreviated form of some related names or matters

Unless specifically explained, the related entities and matters I mention here, such as the parties' names, banking account number, etc., will align with those in the Arbitral Award.

The unusual circumstances affirmed by the judgments

On 26 December 2018, the N High Court rendered Judgment I and Judgment II for two Litigation Cases accordingly. The two final judgments' texts are mostly the same, except for some related numbers, dates, etc. Unless explained specifically, the Judgment I Is hereinafter referred to as the Judgment.

The arbitration case's key point lies in the time Company L paid money to Company D's bank account 2540 where I Bank and Company L have different views on the payment's type and nature. I Bank regarded the payments as repayments of the K factoring business No. 15, No. 16 and No. 19, but Company L regarded the payments as repayments of the K factoring business No. 20-23. Finally, both the M Intermediate Court and the N High Court's judgments supported Company L's claim that the accounts receivable had cleared.

Although the Court affirmed the clearance of accounts receivable, the issue is directly related to the analysis and decision of this arbitration case. It is essential to analyze this issue in depth. As Judgment No. 2210, e.g., the transactions of K factoring No. 20-21 had some rare circumstances as below:

As the facts affirmed by the Judgment, on 11 December 2013, Company L signed the Confirmation of Assignment of Accounts Receivable, confirming that "*1. Having received Company D's added-value invoice for Contract and Supplemental Agreement, the seller had normally performed the contract, and Company L had not made the payment; 2. Guaranteeing to make the payment RMB 51,804,585 under the invoice unconditionally to the account designated by I Bank before 8 March 2014…*". On 13 December 2013 (the Judgment corrects it as "10 December 2013"), D submitted No. 20 [Application for Domestic K Business with Right of Recourse] to I Bank. I Bank granted a loan of RMB 40 million to Company D with account number 1205 on 13 December 2013. Still, Company L made the payment of RMB 51,804,585 to Company D's account number 2540 in advance on 12 December 2013.

As the same circumstance affirmed by the Judgment, on 20 December 2013, Company D submitted No. 21 [Application for Domestic K Business with Right of Recourse] to I Bank. I Bank granted a loan of RMB 46 million to Company D with account number 1205 on 24 December 2013. Company L provided the Confirmation of Assignment of Accounts Receivable to I Bank on 22 December 2013. The contents were mostly the same as the one of 11 December 2013: RMB 57,349,770 under invoice, payment before 15 March 2014. But Company L made the payment of RMB 57,349,770 to Company D's account number 2540

in advance again on 23 December 2013 before I Bank granted the loan to Company D. The Judgment also said: "*the two applications for assignment of accounts receivable mentioned above were sealed by Company L and signed by Mr. Zheng Ning. Company L has confirmed its authenticity*". The N High Court's judgment No. 2211 has also affirmed that the time of payments for K factoring business No. 22-23 by Company L are the same dates as those on which I Bank granted loans to Company D. The time was not after the loan made, which is the same as K factoring business No. 20-21.

B. The Time on Which Company L Made Payments did not Accord With the Economic Principles nor Legal Principles

The advanced payments made by Company L are significant matters under the condition of the existing factoring relationship between I Bank and Company D.

1. Not conforming to usual trading practices

I Bank could not be aware that Company L, the related party to the factoring business, had made payments to clear accounts receivable before granting loans to Company D without any notice. Neither could they deduct the remittance from Company D's account. After all, the financing period for I Bank's granted loan to Company D is 90 days, and I Bank calculates its interests of the loan according to the days passed. Also, the deadlines of payments promised by Company L on the Confirmation of Assignment of Accounts Receivable were 8 March and 15 March 2014. If I Bank had a contrary understanding, it would not align with the trading practices between I Bank and D: Granting a loan is always before deducting money, e.g., the last loan cleared on 22 April 2013, under the Domestic Factoring Agreement for 2012; and the last loan cleared on 22 July 2013, under the Domestic Factoring Agreement for February 2013. (p. 38 in the Judgment).

2. Not conforming to economic rationality

As an enterprise, making a profit is its main purpose, and the bankroll is a lifeline for its daily operation. The amount of the invoices for K Factoring No. 20-21 involves more than RMB 100 million, thus how could Company L make the huge payments out in advance without taking into account its cashflow? Besides Company L's clearly stated promise of payments before March 2014 in Confirmation of Assignment of Accounts Receivable, "Relevant Facts of This Case and Contractual Provisions" affirmed by the Arbitral Award confirms "*On 1 April 2013, Company D and L Group entered into the Coal*

Supply Agreement, pursuant to which Company D shall provide L Group with steam coal and L Group shall make payment within 90 days after the delivery of goods". That is to say, Company L had 90 days to make payments. The nature of the coal sale transaction between Company D and Company L is a kind of credit sale. It is very unusual for Company L to make the payments in advance without taking advantage of the credit.

Company L asserted during the litigation that "*the litigation case belonged to a financing dispute, but Company L was not any party to the financing contract relationship. Neither did we know the transaction information of the K factoring between I Bank and Company D*". However, contrary to Company L's claim, K factoring had three batches in total from 2012 to 2013. The first batch had 19 transactions, the second batch had 5, and the third batch had 18. Strangely, the last four transactions had problems. Every transaction of K factoring must have the Confirmation of Assignment of Accounts Receivable with Company L's seal, correspondingly "*the added-value invoice issued by Company D was affixed by a seal showing the accounts receivable under the invoice assigned to I Bank*" (p. 25 in the Judgment). The *Regulations on Factoring for China Banking* divides factoring into two types based on different conditions, one is public factoring, and the other is private factoring.

On the one hand, Company L received the sealed added-value invoice showing the accounts receivable were assigned to I Bank by D; on the other hand, Company L affixed a seal on the factoring document, the Confirmation of Assignment of Accounts Receivable. These facts make the factoring in this case as the typical public factoring. Consequently, Company L gave a false statement that they did not know about the K factoring business. But regrettably, the Court did not further analyze the false statement by Company L. Neither did the Court review the legality and validity of the payments made by Company L before granted related loans.

3. According to legal principles, Company L's time points of making payments show malicious fabrication of accounts receivable or modification of factoring contracts without justification

The first level: fabricating the accounts receivable as the subject matter of the assignment

Article 761 of the *Civil Code* stipulates: "*A factoring contract is a contract by which an accounts receivable creditor assigns existing or future accounts receivable to a factor, who provides financial facilities, management, collection of accounts receivable, and assurance of*

payment from accounts receivable debtors, and other services". Article 761 of the *Civil Code* stipulates: "*When an accounts receivable creditor and debtor fabricate accounts receivable as the subject matter of the assignment and enter into a factoring contract with a factor, the accounts receivable debtor shall not use the non-existence of accounts receivable as an excuse against the factor unless the factor knows about the fabrication.*" Based on the two articles, there are two aspects to be analyzed:

On the one hand, Company L made the payments to Company D's account before or on the dates when I Bank granted loans to Company D, turning the nature of the funds not to be accounts receivable, thus fabricating accounts receivable as the subject matter of the assignment.

On the other hand, a factor is to provide financial facilities, management, collection of accounts receivable, and assurance of payment from accounts debtor. Because the related payments were sent in advance or on the same dates as granting loans, the situations made I Bank have nothing to provide service to and fulfill the factoring contract. For I Bank, no financing, no management, and no collection of accounts receivable make the factoring contract meaningless totally.

Compared with these provisions, Company L's time points of making payments testify that the accounts receivable were fabricated as the subject matter of the assignment.

Thus, Company L's cannot use the excuse of cleared accounts receivable against I Bank.

The second level: modification of factoring contract without I Bank's consent

Article 765 of the *Civil Code* stipulates: "*After an accounts receivable debtor receives notice of assignment of accounts receivable, if the accounts receivable creditor and debtor negotiate to modify or terminate the underlying transaction contract without justification, which adversely affects the factor, the modification or termination shall not affect the factor*". This provision expresses two issues:

Although a factoring contract has two parties, three parties are needed to take part in and cooperate to perform the contract. That is to say, the underlying contract should align with the factoring contract, and there is a coordinating mechanism between these two contractual relationships. The two contracts' association is not mechanical and independent, unlike the analysis made by the Court. As mentioned above, Company L understood the factoring contract relationships fully. Additionally, the Arbitral Award affirmed that the

payment period in the Coal Supply Agreement is 90 days. As the two contracts had been related closely together by Company L's commitment to the payment period and affixing seal on the Confirmation of Assignment of Accounts Receivable, Company L has responsibilities to comply with the Coal Supply Agreement and its commitment. The argument of Company L can make payments any time in advance cannot be established.

Secondly, Company L's arbitrary advanced payment modified the payment period on the Coal Supply Agreement and breached its obligations. Meanwhile, as the payments made, the Coal Supply Agreement had been finished and terminated in advance. Under this circumstance, according to the provisions of the *Civil Code* on factoring contract, Company L's making payments in advance had caused serious damage to I Bank's interest, and Company L's action could not be binding on I Bank.

Also, Article 5 of the *Norms for the Factoring Business in the Banking Sector of China* stipulates: "*The factoring business has the following characteristics: 1. Through the assignment of the creditor's right, the bank acquires direct claim right against the debtor.*" As per this provision, Company L had made a false credit to I Bank by arranging payments in advance before granting loans. Therefore, the Judgment's assertion that the accounts receivable cleared is not accurate. It was a malicious clearance to assign a false credit to I Bank. Company D and Company L concealed their illegal purpose jointly by a lawful cover of the factoring contract.

Thus, if the time points of making payment by Company L are regarded as modifying the Coal Supply Agreement or terminating it, Company L's action should not be binding on I Bank.

All in all, according to these three provisions of the *Civil Code*, the related accounts receivable should not be regarded as clearance by the Court. Company L's has no legal basis for arguing against the factor, I Bank, with the excuse of non-existent accounts receivable. Company L should undertake the liability to I Bank.

C. I Bank's Action and Company L's Liability

Mr. An's Opinion said that "*when I Bank knew that Company L had repaid the loan, it insisted on filing a lawsuit against Company L and Company F respectively. It does not rule out the possibility that I Bank and Company L colluded to file a false lawsuit.*" I agree with Mr. An's opinion that there could be a malicious conspiracy, including the possibility of someone within I Bank participated. But according to the materials of the case and the

Judgment, I am inclined to believe the possibility of Company D maliciously colluded with Company L to damage I Bank's lawful rights and interests using time difference of payments.

On the one hand, from the apparent facts, there are some doubtful points in the sales of coal. L Group's full name is Shan Coal International Energy Holding Group Co., Limited, a listed company from the coal province Shanxi Province. As an enterprise producing and selling coal, why would it sign a contract to purchase coal from another enterprise within M city? When I reviewed the arbitration case materials, I actually thought that L Group was the seller of the sale of coal contract. It is also unreasonable if

L Group would like to import coal abroad through Company D, because L Group, as a listed company, has stronger business capability than Company D. L Group's name with "International Energy" shows that it can import coal without Company D's assistance. Moreover, Company D remitted all the funds from the loan to a shell company, Company W1. Consequently, the transaction is likely to be criminal fraud.

On the other hand, besides the governance of banking is more rigorous, and banks usually are more cautious than regular enterprises, Company L are more suspicious than I Bank through the analysis of the case facts above. Mr. X's opinions deemed that I Bank initiated fabricated litigation. Although some individuals within I Bank might have participated in this conspiracy, it is impossible that I Bank, as an enterprise, initiated a fabricated litigation. Imagine the difficulties and uncertainties I Bank would face if it had a loss of RMB 170 million first and then try to make up for the loss by fabricating litigation unless I Bank could forecast meeting a perfect buyer like the Respondent or the Claimant. Would not I Bank be afraid of the conspiracy discovered during due diligence or litigation proceedings? In fact, I Bank suffered a huge loss in transferring the creditor's right at the price of non-performing assets.

Although the Judgment said that "*the bankroll entered into this account should be used to pay off the principal and interests for clearing the K factoring business, but I Bank let Company D transfer the bankroll to its normal clearance account 1250 go unchecked*" (pp. 52-53 in the Judgment), at the same time it indicated "*I Bank at its own will used the loan relating to the two K factoring business paid by Company L as a partial deduction to the principals and interests of the not-yet-due K factorings No. 15, No. 16, and No. 19*" (p. 53 in the Judgment). I think the conclusion of I Bank's "let go unchecked" illustrates that the Court ignored intentionally or unintentionally the unusual circumstances of the payment time points by Company L. Nevertheless, the Court unwittingly recognized that I Bank

deducted funds for undue K factoring loans, confirming that I Bank strictly followed its banking procedures.

Mr. An explained the main reason for his assumption of I Bank's malicious litigation is that the payment to account 2540 by Company L surpassed the amount of the invoices issued by Company D and the loans granted by I Bank. Mr. An thus asserted that I Bank knew the accounts receivable cleared. I disagree with Mr. An on this point because the account belongs to Company D, and I Bank must abide by the rules to deduct the bankroll. The total amount of commercial invoices and funds entering Company D's account typically should surpass the loans granted by I Bank. Otherwise, it would not be financing, and how would the clients do business without money in their accounts? Meanwhile, it is unreasonable for a bank to deduct its client's bankroll at will. There must be some conditions to be met for a bank to do this. It is challenging for a bank to deduct a client's bankroll when the loan has not yet been granted. Furthermore, the Court of the First Instance affirmed that Company D submitted its application for K factoring to I Bank on 13 December 2013, and the business began then. Any reasonable person could not be aware of the future loan was cleared in December 12 before granting loans.

To say the least, if I Bank deducted the amount of RMB 51,804,585 paid by Company L to Company D on 12 December 2013 as clearing of K factoring No. 20, I Bank would not get any profit from the loan of RMB 40 million they granted on 13 December 2013. In theory, because RMB 51,804,585 was occupied in advance, I Bank should pay one day interest thereof to Company D. Also, Company D's account 2540 may have other bankrolls from Company L with a different nature, or money from other enterprises. For example, an amount of RMB 30 million was paid by Wuzhai County Longtai Company by six installments (p. 37 in the Judgment).

Furthermore, the Court has only resolved the issue of clearance based on the amount of bankroll paid by Company L was more than that of the invoices. However, the liabilities to the malicious activities by Company L are still there. I will continue to analyze this issue with the *Civil Code* later. The Court was aware of the problem but did not elaborate: "*For this, I Bank, Company D, L Group, and L Sales may all have liabilities thereof, but having no initiated claims by the related parties, the related facts do not fall within this jurisdiction for review.*"

D. The Subject Matter of the Assignment of Non-performing Assets and the Nature of Accounts Receivable

Based on the facts, the rights and obligations of I Bank and Company D were bound firstly by the General Facility Agreement between them, and Company D provided eight maximum guarantee contracts and six highest mortgage contracts to I Bank. Secondly, I Bank and Company D had signed the Domestic Commercial Invoice Discount Agreement. The guarantors to the General Facility Agreement had argued in the litigation that they should not be liable for the commercial invoices' discount, but the Court rejected the argument. The Court stated that "*the related loans belong to domestic financing within the practice scope of the General Facility Agreement and the scope of guarantee and mortgage by all guarantors and mortgagers*" (p. 29 in the Judgment). Therefore, according to the Judgment, the creditor's rights from the loans of RMB 170 million granted by I Bank to Company D was the principal of non-performance assets formed and transferred later.

The Court stated: "*It is a kind of security way for I Bank to designate an account for Company L to make payments to collect the loan*" (p. 50 in the Judgment).

All in all, I mostly agreed with the Arbitral Award on its determination of the nature of the accounts receivable: "*The Tribunal believes that the creditor's right of accounts receivable against Company L obviously belongs to 'other rights' in the assets.*" Because the accounts receivable is a kind of right for credit enhancement, it follows the RMB 170 million principal creditor's rights for Company D.

Mr. An's opinions stated that "*However, the Respondent does not acquire the abovementioned NPA of L*", and bought a fictitious creditor's rights instead, and continued "*But it is strange that after Company L paid RMB 170 million, from February to April 2014, I Bank still insisted on suing Company L and Company F in the M Intermediate Court respectively for the above RMB 170 million, and transferred the above non-performing asset ('NPA') of RMB 170 million to the Respondent on December 1st of the same year.*" I disagree with this opinion, because what is this amount of RMB 170 million? It is the total amount of four loans granted by I Bank to Company D, not anything arbitrary of its nature and the number, and not anything Company L can determine. Company L should make a total payment of RMB 223,860,385 to Company D's account 2540. Because Company D opened the bank account, the bankroll belonged to it. As I Bank monitored the bank account, it could decide how much principal and interests to deduct for loans on financial agreements, monetary amount, discount rate, and the financing period when the bankroll

was credited. Therefore, the amount of RMB 170 million itself indicates that the subject matter of transfer is creditor's rights for Company D, not for accounts receivable from Company L. As accounts receivable is a kind of subordinate right, I Bank added Company L as a defendant during the litigation procedure. Besides, according to Mr. An's opinion, having Company L as a defendant, I Bank's claim against it should be RMB 223,860,385 if the accounts receivable is the subject matter of the assignment. The non-performance assets I Bank and the Respondent transferred were the creditor's rights for Company D that arose from the loans of RMB 170 million.

E. The Loss of Accounts Receivable is a Kind of Risk, not a Defect

The Arbitral Award's main train of thought is that the accounts receivable of Company L were decided by the Court as cleared, and the Respondent's transfer of nonexistent rights to the Claimant is a kind of defect under the Asset Transfer Agreement. I disagree with this opinion. The related non-performance asset transaction naturally has two characteristics: the intrinsic defect and the risk while actualizing the asset rights. The loss caused by the Court's subjective judgment is a kind of risk, not a defect. The reasons are as below:

1. An understanding of the difference between defect and risk

The word defect in Chinese originally means blackspots and flaws on jade, and later means all weak points in general. The characters contain the meaning of natural and inherent, a quiescent condition that is unchangeable by human subjectivity. In a transaction, if the defects were concealed and discovered later, the seller or the transferor should be liable even if the transaction has completed.

All situations of defect are foreseeable and may list in the contract in advance. The responsibilities for the defects cannot be transferable.

The word risk means danger, the possibility of loss, injury, damage, and destruction. The risk is not intrinsic and may happen in the future. It is in a dynamic condition and involves time points. In a transaction, the transferor or the seller would not be liable for the risk when the transaction was complete or the risk was transferred. As risk always happens in the future, it is not easy to foresee or predict, so it is difficult to arrange in the contract. The responsibility for risk can transfer.

As the word defect is different from risk, and each has its emphasis, they collocate with different words. We often say assets defect. It is challenging to say assets risk, but

rather say commercial risk and legal risk. Also, we do not say commercial defects or legal defects. During legal services, a lawyer is usually requested by his client to analyze the case based on the materials before initiating litigation or arbitration. He or she will point out whether evidence is sufficient. The lawyer will be likely to say that the evidence has a defect rather than a risk. At the same time, upon the client's request to predict the win rate of the litigation or the arbitration, the lawyer would be likely to say that there is a losing risk rather than a losing legal defect. After all, the evidence comes from the client, and it is inherent and in a quiescent condition. Thus, it is the client's responsibility if there is a defect with the evidence. On the other hand, the law is formulated by a state; the legal risk is decided by a judge's subjective analysis.

2. The Arbitral Award regards the non-existence of accounts receivable as a kind of unusual circumstance

The Arbitral Award states that "*Therefore, with respect to the Assets Transfer in this case, the non-existence or extinction of the subject assets constitutes a violation of the representations and warranties under Section 9.2(a) of the Asset Transfer Agreement and constitutes the 'Defects' defined in the Asset Transfer Agreement, and such Defects are the defect in an absolute sense.*" However, it continues in another direction: "*with respect to the particular situation of the non-existence of creditor's right of accounts receivable against Company L due to court judgment, it was a very unique circumstance, it was not a general defected asset, to be precise, it was not a defect in the Assets to be discovered after the closing of the transfer, but a defect of no asset being transferred at all. The asset itself does not exist, let alone the defect in the asset.*"

These two remarks on the defect contradict each other in the Arbitral Award. On the one hand, the Arbitral Award deems the circumstance unusual: non-existent assets cannot have assets defect. On the other hand, it considers the event constitutes a defect defined under the Assets Transfer Agreement. The inconsistent remarks are improper and unreasonable. I think that the statement of "exceptionally unusual circumstance" would make a third concept, i.e., "special defect", differing from "defect" and "risk". In fact, "exceptionally unusual circumstance" illustrates that this circumstance is far beyond the normal scope defined under the Assets Transfer Agreement, and thus entering into risk areas. In other words, only the concept of legal risk can explain the unusual circumstance thoroughly.

3. Accounts receivable regarded as clearance should be an issue of legal risk

The Court's view of accounts receivable as clearance is, in fact, defining the right as a loss in law. The loss in law during the realization process of rights does not equal the nonexistence of the accounts receivable from the beginning. This point gives rise to an essential issue for this arbitration case. I Bank and D signed the Domestic Commercial Invoice Discount Agreement; Company D submitted to I Bank the Application for Domestic K Business with Right of Recourse; Company L signed the Confirmation of Assignment of Accounts Receivable; and I Bank granted loans to Company D. All the facts from the materials verify the existence of accounts receivable rather than its non-existence. The non-existence of accounts receivable is a different legal concept from clearance viewed by the Court as a loss later. Company L's making payments to Company D's account 2540 in advance is an objective fact. Whether the payments should be regarded as the repayment for corresponding K factorings business No. 20-23, or whether Company L should be held liable as it did not comply with the factoring contract, are questions to be examined by the Court when a dispute arises. Either the accounts receivable would be decided as clearance, or it would not. These uncertainties fall into the scope of legal risk rather than defects.

4. There is no breach of the Asset Transfer Agreement by the Respondent during the performance

In this transaction, the Respondent is a middleman of the non-performance assets, so is the Claimant. Neither of the two parties is the original creditor, I Bank. Because the Respondent is not the party to the account receivable's legal relationship, it has nothing to do with the clearance of accounts receivable viewed by the Court. It also has no responsibility for the loss of accounts receivable.

Although the Claimant claims that "*Under the circumstances where the Respondent informed the existence of creditor's rights in accounts receivable from Company L, provided relevant materials to the Claimant, concealed the documents that show the accounts receivable may not exist, it is impossible for the Claimant to discover any clue through due diligence investigation.*" But the Claimant did not provide any evidence to show the Respondent's concealment before signing the Asset Transfer Agreement. Actually, since both of them are middlemen for the non-performance assets, they have no difference in their business models and due diligence procedures. Except for reception, packing, transfer of the non-performance assets, the Respondent had done nothing to the non-performance assets' inherent legal rights.

It is this situation that the Arbitral Award considers that "*Nevertheless, based on the existing evidence in this case, the Tribunal seems to be convinced that before the final judgments issued by the N High Court, the Parties did not actually have dispute over the issue whether or not the accounts receivable against Company L contain any Defects. Moreover, during the entire process of litigation, the Parties did not seem to engage any non-cooperation. Therefore, it can be concluded that even if, for any reason before the signing of the Asset Transfer Agreement, the Claimant had not got any knowledge about the litigation of accounts receivable against Company L, especially the defenses of Company L, or had not become known or fully known of such conditions which it should have known about during its due diligence on the Assets, the Claimant still has plenty opportunities to realize such conditions and conduct further investigations after the purchase*." On this, I agree with the conclusion, which is the Respondent should not bear any responsibility for the transfer procedure of the non-performance assets. There was no evidence to prove the Respondent had malicious collusion, fabricating non-performance assets to cheat the Claimant to buy the assets. Therefore, the non-performance assets should restore to its original nature, which has uncertainties and commercial and legal risks. Because the transaction of the non-performance assets had been delivered, the risk that arose from the accounts receivable was also transferred, and the Claimant should bear the future risk. If the court of second instance changes the original decision to support the Claimant's request, in the circumstances of the current economic downturn and the pandemic, there is also a big risk to collect the creditor's rights smoothly.

It is necessary to emphasize again that the Respondent did not breach the contract during the transfer of assets. A breaching behavior should exist first for the Respondent to be regarded as breaching the Agreement. As said before, for the non-performance assets, the Respondent neither acted legally nor abstained from an action. The Respondent just transferred the non-performance assets from I Bank to the Claimant in its entirety without breaching any contract. Defect means breaching, and they accompany each other. However, risk implies that the encountered party should bear the loss, and it has nothing to do with breaching a contract.

5. The Claimant promises to bear the risk of irrecoverable non-performance assets

Clause (d) mentioned the risk matter: *"the assets have been independently investigated, and fully understands the assets situation and accepts the risks and difficulties that part or*

all of the non-performance loans cannot recover." According to this Clause, because the accounts receivable were regarded by the Court as loss in the process of clearance, thus becoming a legal risk, and the non-performance assets were delivered, the Claimant should bear the legal risk of loss of the accounts receivable.

F. If the Clearance of Accounts Receivable Forms the Defect Under the Asset Transfer Agreement, the Objection Period Expires

The Asset Transfer Agreement was signed on 28 October 2016, and the closing date was 29 December 2016. According to Article 7.1 of the Agreement, the objection period was 60 days after its closing date. The transferee had the right to claim defects on the assets. To say the least, if the loss of accounts receivable forms the defect under the Asset Transfer Agreement, the last day of the objection period would be 26 February 2017.

However, the Arbitral Award made a change in explaining the clearly defined Clause in the Asset Transfer Agreement: "*The Tribunal is of the view that, on the one hand, the period provision is very clear, while on the other hand, it is too simple on content wise.*" It seems contradictory using the words "very clear" and "too simple" simultaneously. Even if the explanation for the objection period can be flexible, it should be reasonable and have a basis. The time when the Claimant knew about the defect can be set to the date on which the first instance judgment was received, because the Court of First Instance affirmed its decision on the accounts receivable by then. Still, both parties had not submitted the receipt of the judgment. Based on the Judgment, the case of second instance was filed on 27 December 2017, and the last day of the objection period was 24 February 2018, if calculating the period started with the filing day.

Furthermore, even if calculating the objection period from the hearing day of the second instance, it still had expired. The second instance's hearing day was on 2 February 2018, and exchanging evidence was on 4 May 2018. Page 46 of the Judgment indicates "*during the second instance hearing, LSREF5 Dragon 2 Investment Co., Ltd, L Group, L Sales had no objection to the facts clarified in first instance*". With the last extension, calculating from the hearing day, the objection period had also expired.

The Arbitral Award explains that "*Therefore, the Tribunal believes that with respect to the Defect in the creditor's right relating to the accounts receivable against Company L, Section 7.1 of the Asset Transfer Agreement should not be applicable in its absolute term and the general legal principle relating to the calculation of time limit should be adopted, that is, the period should start from the date on which the party actually knows or should know its*

rights being harmed. From this perspective, the Tribunal considers that it is justifiable for the Claimant to assert that the period of claiming Defects should start from the judgment date of second-instance proceedings." The explanation is inconsistent with the facts and argues against itself. If the issue of accounts receivable was a defect, it would have been decided in the first instance. Objectively, no matter the Claimant had known or should have known about the defect, they would have known since the first instance judgment rather than the final Judgment. The Arbitral Award regards the date of the Final Judgment as the time point for knowing, hence ignored the objective facts. Why did the Arbitral Award forcedly and mistakenly explain the Clause? The primary reason is that it confused defect with risk. This confusion caused chaos and mistake when dealing with the "second-instance-being-the-final-instance" system in the civil litigation process. As everyone knows, civil procedure is the "second-instance-being-the-final-instance" process. If the parties to the first instance would like to appeal to a high court, the high court's judgment should be the binding one. It is an obvious error that the Arbitral Award linked up the objective fact of knowing the defect with legal documents' coming into force. Besides the Claimant as one of the appellants during the litigation, there was another appellant, Mr. Sun. If Mr. Sun was ignored and the Claimant would like to give up the appeal, the M Intermediate Court's Judgment would become the binding document. According to the Arbitral Award's logic, the Claimant would know about the defect upon the issuance of the first instance judgment, thus making the objective knowing time becomes something that can be controlled by the Claimant subjectively.

All in all, the objective facts and coming into force in law are two different concepts, and the logic that mixes up different ideas cannot establish. Only by differentiating the objective "defects" from the legal "risks" can the problem be resolved thoroughly. Otherwise, the Arbitral Award can only mistakenly explain the issues in question by overstepping the Asset Transfer Agreement's scope.

Secondly, suppose the Arbitral Award regarded the final Judgment as the time point when the Claimant had known the defect. In that case, it means that every party to the case thought the second instance could change the decision of the first instance judgment. Furthermore, the analysis and conclusion of the first instance judgment become an issue of subjective understanding, in which there are uncertainties and possibilities for change. Uncertainties and possibilities for change mean risk. If there were inherent defects, how can there be uncertainties? Also, it is impossible to change or overthrow something inherent by

litigation strategy and argument. The Claimant would not risk buying a nonperformance asset in a hurry if a long time were required to determine a defect by the litigation procedure.

Thirdly, as everyone knows, the rate of changing the original judgment in the second instance is very low. The judgment of first instance is the conclusion most of the time. Based on this point, if the accounts receivable issue is a defect while recognizing the low changing rate of the original judgment, the Claimant should tackle the Respondent over this issue once they noted the first instance judgment. At least, the Claimant should make a declaration to the Respondent for reservation of rights rather than presenting the issue after the 60-day objection period. If the Claimant ignores the low rate of changing the first instance judgment and is confident in winning the litigation case, it means that they disagree with the first instance judge's conclusion and would like to appeal, thus taking the risk.

G. The Related Legal Risk had Been Transferred to the Claimant

The Judgment recognizes that the original creditor I Bank lodged a claim against Company D and other guarantors on 28 February 2014. The Respondent signed an agreement with I Bank to accept the non-performance assets in December 2014. During the first instance litigation, the Respondent transferred the non-performance assets to the Claimant.

The Claimant substantially handled the non-performance assets in law after taking over. They presented the claim for rights and participated in the follow-up procedures, including taking part in the hearing, submitting evidence, and applying for investigation, cross-examination, and presenting legal opinions. The Court had agreed to their application for investigation and went to the original creditor's address for obtaining evidence.

According to the Judgment, Company D had sent the remittance in whole to Company W1 after receiving the loan granted by I Bank (p. 36 in the Judgment). Still, the Claimant did not follow up to check the relationship between the two companies and the funds' flow. I checked Company W1 on the internet and surprisingly found that its business license had been revoked since 2 July 2015. There are more doubts about the fact that the company's supervisor is Mr. Sun, the defendant and appellee in the litigation case. Meanwhile, he was also the Director of Office in the company. At the same time, Company W1 had involved with another financing dispute. The M Intermediate Court judged the dispute with the judgment T (the "T Judgment"), which was very similar to the litigation case in question. According to the T Judgment, China U Bank V Branch and Company W had signed a Domestic Factoring Contract with Right of Resource. Company W got the factoring advance

payment of RMB 20 million. They transferred the accounts receivable of RMB 25 million from Company W1 to U Bank V Branch. At the same time, Company W1 submitted a return receipt to U Bank V Branch. Besides, Company D, Company W2, and another three people, surnamed Li, had provided guarantees accordingly. When the hearing was held, none of the defendants attended. I Bank present the dispute of the T judgment to indicate that there are a lot of things that can be done by the parties to the case for their best result in the litigation procedure. Both I Bank and U Bank V Branch had factoring cases during the same period in M, having the same defendant and ways of operation. It provides much food for thought why the Judgment mentioned the parties' responsibility thereof.

There is a question not to be evaded: who should bear the final Judgment's risk. Having received the non-performance assets, the Claimant handled the assets by taking part in the litigation procedure. In theory, if the Claimant loses the final instance due to wrong legal strategies and measures, they should bear the result themselves and cannot transfer the risk to someone else in any way. I Bank was not the one to first raise the litigation parties' responsibility issue. As stated above, the Judgment has pointed out the possible liability of Company L and other companies in p. 32. But the Claimant had not submitted any corresponding request due to their litigation strategy and legal opinions. In a sense, the Judgment has two meanings: on the one hand, when the Court viewed the accounts receivable cleared, the related issues did not end and could be further investigated, for example, Company L's responsibility. On the other hand, the Claimant was negligent, for they had not done their best to investigate Company L's duty.

There is an obvious error that the Arbitral Award regards the time of knowing the defect as the time when the Judgment was made. That is to say, the Claimant participated in the second instance, but the result was born by the Respondent that exited the procedure earlier. The Arbitral Award severely violated the "do at your own risk" legal principle.

H. The Amount of Loss Claimed by the Claimant has not Been Certified and Confirmed

The litigation before the Court is how the transaction parties on the market realize their rights of assets through the judicial system. The Judgment embodies this point: As the original creditor's rights have transferred twice, the Claimant's lawful creditor position was affirmed, and its creditor's rights have been realized rightfully in nature. As for the amount of creditors' rights realized, it is an issue of quantity, not quality, and it does not affect the confirmation of the rights. It is unreasonable to say that their rights have not been

realized and protected by law if an insufficient amount of creditors' rights were realized. The Arbitral Award points out that "*the other two parts of assets have been effectively transferred, and both have been confirmed by the N High Court. Therefore, it is fair to say that the Claimant's main contractual purposes are basically achieved.*" For this point, I agree with the Judgment's rejection to the Claimant's request of rescinding of the Asset Transfer Agreement.

Regarding the five verdict items of the first instance judgment, the Claimant appealed to change the fifth item and maintain the first, second, third items without mentioning the fourth. The Judgment has maintained the first three items and rejected changing the fifth item. Specifically, the first item is that Company D should return the loan and interests. The second item is that the Claimant's compensation prioritizes the highest creditor's rights from selling off or auction the mortgaged properties of Company D, Company W3, Company W2, and Mr. Sun, respectively. The third item is that Company W, Company W4, Company W5, Company W2, Company W3, Company W6, Company W7, Mr. Li and Mr. Fan shall be held jointly and severally liable for Company D's debts from the first item within the scope of the maximum amount of RMB 207 million.

How much of the rights the Claimant can realize depends on the procedure and the result of the Court enforcing the Judgment? For two reasons, the situation could not be clear:

On the one hand, the Claimant sent a letter to the Respondent demanding to rescind the Asset Transfer Agreement on 29 January 2019, within one month of the Judgment renders. Suppose the Claimant pushes the procedure to enforce the Judgment, it will conflict with their assertion of rescinding the Asset Transfer Agreement and reinstatement. Thus, the Claimant would not promote the procedure of enforcement of the Judgement in theory.

On the other hand, even if the Claimant pushes for the enforcement of the Judgment, it should be a difficult and long period for the court to enforce the properties of multiple entities. Adding the situation of the pandemic, the result of the enforcement would not come quickly. Therefore, the Claimant did not provide detailed evidence on getting the rights through the court's enforcement procedure.

Currently, the Arbitral Award did not support the Claimant's request to rescind the Asset Transfer Agreement, meaning the Claimant should continue pushing the enforcement procedure in the court after receiving the Arbitral Award.

I. My Opinions on Dealing With This Case

1. The Asset Transfer Agreement is the result of negotiation by the two parties and should be respected adequately

Both the Claimant and the Respondent are big professional companies engaging in nonperformance asset transactions and have their own legal teams. On the one hand, the contents of the Agreement reflect the non-performance asset industry's common practices. On the other hand, the Agreement is the result of in-depth negotiations by the two parties rather than an occasional transaction between ordinary persons. Unless with sufficient reasons, the Agreement's clauses cannot be denied but should be respected adequately. The Arbitral Award has several cases of overstepping the Asset Transfer Agreement's explicit contents to interpret the case at will. It is necessary to summarize these circumstances as below:

(1) The Arbitral Award states that "*The Tribunal holds that the Asset Transfer Agreement gives the definitions of 'Defects' and 'Asset Defect' (and clarifies their different legal consequences) in a meticulous manner*". This statement positively affirms that the Agreement is comprehensive and rigorous between the two parties in the nonperformance assets business. As the Asset Transfer Agreement is very "meticulous manner", the contents of "Defects" and "Asset Defects" should include all circumstances the two parties could think of when they negotiated the Agreement. As said in opinion E2 above, the Arbitral Award oversteps the boundary of "meticulous", "Defects" and "Asset Defects" in the Asset Transfer Agreement, and claims it to be "Defects". It is unnecessary to repeat here.

(2) The Arbitral Award states that "*the 'Closing' or 'Closing Date' is only a matter of literal provision of a contract, it is actually meaningless to the purchaser because there was no such actual asset transfer.*" This explanation directly denies the definite arrangement of "Closing" and "Closing date" in the Asset Transfer Agreement. The Arbitral Award regards the accounts receivable as a kind of subordinate rights for the whole time. Even if the subordinate rights were lost, the principal rights did not lose. According to the Arbitral Award's previous explanation, there is a defect in all non-performance assets or assets with defects. How did it suddenly become "non-delivery of assets"? If the Respondent performed non-delivery of assets, which is a fundamental breach

of contract, why does not the Arbitral Award support the request of rescinding the Asset Transfer Agreement? This way, the statements were inconsistent throughout the Arbitral Award, indicating its wrongful explanation made on Asset Transfer Agreement.

(3) My opinion in Section F explains in detail the Arbitral Award's arbitrary explanation on the defect objection period, and then it denies the parties' arrangement in the Asset Transfer Agreement. It is unnecessary to repeat here.

(4) The Arbitral Award states that "*the Tribunal notes that the transaction price of RMB 95 million of the non-performing assets transaction in this case was indeed a pretty high price giving the total amount of the loan principal being RMB 170 million, somehow the price obviously exceeds the normal price level for non-performing assets, which could be partially attributable to the fact that the Claimant highly values the creditor's right of accounts receivable against Company L, and objectively speaking, the creditor's right of amount receivables against Company L is of a high cashing ability. After a comprehensive consideration of all relevant factors in this case, the Tribunal holds that it is fairly reasonable for the Respondent to compensate the Claimant for the loss at a 50% level of the purchase price of the Assets due to the Defect in the Asset, so that the Respondent shall compensate the Claimant in the amount of RMB 47.5 million.*" In the Arbitral Award's opinion, Mr. An said that "*Therefore, the acquisition amount is the result of mutual negotiation which is true intention of both parties. And the arbitral tribunal has no ground to deny the parties' agreement on the acquisition price in the contract which is also the true intention of both parties. Further, during the arbitration proceedings, neither party put forward that the acquisition price was too high. For the reason set out as above, the arbitral tribunal should respect the intention of the parties on the acquisition price.*" I agree with Mr. An at this point. The price of assets confirmed by the parties in the Asset Transfer Agreement should not be denied easily, especially in the circumstance that no party raised the issue during the arbitration proceedings.

The price of the non-performance assets was determined within a batch of assets. If the price was determined separately, the non-performance asset of RMB 170 million with multiple guarantees and mortgages could not sell at the low price of RMB 95 million. Based on the industrial practice of selling non-performance assets in a package and with discounts,

it is inappropriate for the acquiring party to pick the fat or choose the lean. The buyer picked a single asset retrospectively to claim its loss by using defect rather than risk. This claim is inconsistent with the industrial practice of selling non-performance assets in a package. After differentiating "defect" and "risk", it will be straightforward to judge that the accounts receivable being regarded as cleared is a legal risk rather than a defect. Legal defect means that there are defects within the law itself. Suppose one insists on viewing the judgment of a cleared accounts receivable as the non-performance asset's defect in the law, there will be a bizarre situation in which every batch of nonperformance assets should be determined of its legal defects through litigation and wait for the results of the first instance and the second instance. But when a final judgment renders and everything is apparent, how will the non-performance asset business function properly? In a certain sense, a non-performance asset business is just like the insurance industry containing a luck or gambling element. Once everything is definite and clear, a buyer might not buy, and a seller might not sell after some elements have changed. If both parties need a judgment for determining the asset's legal defect, it will make a nonperformance asset's defect and risk disappear eventually. The industry of nonperformance assets should change its name to the standard assets transaction business.

According to the Arbitral Award's logic, if the Respondent compensates the Claimant's loss in this situation, I Bank should do the same to the Respondent in the future. In this case, a transaction's security and stability are destroyed, and endless litigations can arise at any time. Apparently, this way of dealing with the case is against legal principles.

The case's fundamental circumstances can be summarized into two points: firstly, both the Claimant and the Respondent are not parties to the accounts receivable relationship. They had no wrongdoings for their loss. Secondly, during the litigation procedure, I Bank initiated the case, and the Claimant replaced the Respondent to continue the litigation. For the litigation result, the Claimant has the responsibility rather than the Respondent. Based on respecting the Asset Transfer Agreement by the parties, taking into account the analysis above, the loss of subordinate rights arising from the accounts receivable being regarded as cleared by the Court is a legal risk. The risk had thus been transferred to the Claimant. If the Claimant refuses to accept the final Judgment, they can appeal to the higher court to change the Judgment in due course. If the Claimant recognizes the final Judgment, it can realize its rights to the non-performance assets by applying for enforcement of the Final Judgment in the Court. It can also lodge another claim against Company L according to the Judgement's reminders and the law. To say the least, if the loss of subordinate rights to the accounts

receivable is a defect under the Asset Transfer Agreement, then the rejection period has expired, and the Respondent has no liability for the defect.

2. Dealing with the case with the fairness principle

The Arbitral Award indicates that while facing a very unusual circumstance and based on the wish for fairness, the presiding arbitrator decides that the two parties each bear half of the RMB 95 million loss. I understand the kind wish to be fair in dealing with the case. Still, I think that even if the fairness principle is adopted, the actual loss of the Claimant should be investigated clearly, and divide the loss according to the law. Specifically, there are two steps to be done:

(1) The Claimant's first request is to rescind the Asset Transfer Agreement and be compensated RMB 75 million as a loss of profit. The second request, which the Arbitral Award mainly deals with, is that the Respondent needs to pay the Claimant RMB 95 million for the asset's defect in question. The Claimant claims the loss as a "caused loss", meaning actual damages, not an evaluation of the asset's discounted price. If the Arbitral Award supports the Claimant's second request, there should be an investigation into whether the Respondent' breach of contract actually caused loss to the Claimant as a precondition. Suppose the Claimant received some amounts of creditor's rights from the court during the enforcement procedure. In that case, the Claimant's actual loss in the arbitration should be the amount of RMB 95 million minus the creditor's rights received from the court. According to the Claimant's narration, at least "*one property under Company D's name had been auctioned at the price of RMB3.92 million, and the money is under the court's custody*". Besides the pandemic reason, up till now, there is no detailed information on the whole enforcement procedures and results. The RMB 95 million loss claimed by the Claimant cannot be investigated and confirmed.

(2) Having confirmed the Claimant's loss, according to the principles set up by the *Civil Code*, the Respondent bears one-third of the actual loss. The reasons are as below:

The Claimant said in its statement that it would like to do this non-performance asset business only because of the accounts receivable's rights. The Arbitral Award has not supported this view, and it regards the accounts receivable as a subordinate right to the non-

performance asset. Besides, the principles of the *Civil Code* do not support the Claimant's claim either.

Article 766 of the *Civil Code* stipulates: "*Where the parties agree on recourse factoring, the factor may ask for the return of the principal and interest of factoring financing or buyback of the accounts receivable from the accounts receivable creditor, or the factor can ask for the accounts receivable from the accounts receivable debtor. In the latter case, the remainder, if any, after the deduction of the principal and interest of factoring financing and related expenses, shall be returned to the accounts receivable creditor*." The arbitration case is a recourse factoring, so I Bank may ask Company D for the principal's return and interest in factoring financing or buyback of the accounts receivable, or ask Company L for the accounts receivable. It means that requesting Company L for the accounts receivable is one of the two choices. I Bank would not necessarily claim accounts receivable from Company L. Furthermore, when there's no result in claiming the accounts receivable from Company L, I Bank should request the principal's return and the interest of factoring financing from Company D, as well as the eight maximum guarantees and six maximum mortgages. In the end, the Court supported the Claimant's claim of the eight maximum guarantees and six maximum mortgages.

Article 767 of the *Civil Code* stipulates: "*In the case of the parties agreeing on non-recourse factoring, the factor shall claim accounts receivable against the accounts receivable debtor and is not required to return to the accounts receivable creditor any excess acquired by the factor over the principal and interest of factoring financing and related expenses*." From this article, it is clear that non-recourse factoring and recourse factoring is different in claiming rights. Economically, non-recourse factoring has a higher profit and higher risk than recourse factoring. There is only one way to claim rights, which is claiming the accounts receivable against the accounts receivable debtor. Correspondingly, recourse factoring has lower profit and lower risk. I Bank's loan security can be ensured mainly with the eight maximum guarantees and six maximum mortgages rather than the accounts receivable for Company L. The Claimant deemed that the asset under the Asset Transfer Agreement is the accounts receivable for Company L. Still, according to the article's classification of recourse factoring and non-recourse factoring, the Claimant's opinion is not justified.

Consequently, in the recourse factoring circumstance, the accounts receivable creditor is the final guarantor to the factor. That is to say, the eight maximum guarantees and the six maximum mortgages are more critical than the accounts receivable for the factor. Based on

these, for the loss to be shared fairly, it is reasonable for the Respondent to bear one-third of confirmed damages caused.