**Summary and Questions**

**The Facts**

On 31 May 2016, Mr Fasttrack sent a Request for Arbitration to the President of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) for his client, Wright Ltd (CLAIMANT) raising claims against SantosD KG (RESPONDENT).

CLAIMANT is a highly specialized manufacturer of fan blades for jet engines, incorporated in Equatoriana.

RESPONDENT is a medium sized manufacturer of jet engines, incorporated in Mediterraneo. Until 2010, CLAIMANT and RESPONDENT were both subsidiaries of Engineering International SA, a multinational based in Oceania and active in various fields of engineering. Following the financial crisis in 2008 and the need to restructure its financing, Engineering International SA divested itself of several of its previously held subsidiaries to reduce its debts and to concentrate on its core business. In June 2010, CLAIMANT was sold to CLAIMANT’s present parent company, which was then renamed Wright Holding PLC. RESPONDENT was sold one month later to SpeedRun, a Private Equity Fund.

At the time of their sale in 2010, CLAIMANT and RESPONDENT were in negotiations to jointly “develop” a new fan blade for the next generation of RESPONDENT’s high-spec jet engine, JE 76/TL 14b. The fan blade was to be based on CLAIMANT’s newest model of swept fan blades, the TRF 192, which had been released few months earlier. The engine was to be developed for use in the newest version of the signature executive line 100 jet of Earhart SP (“Earhart”), a world-wide operating aircraft manufacturer for medium size and range passenger and business jets.

The TRF 192-I was to be developed jointly under the technical leadership of CLAIMANT. RESPONDENT agreed to buy at least 2,000 of the swept fan blades in the first year. At the time the Parties entered into the contract, the final development and production costs for the new blade were not yet certain. Nevertheless, RESPONDENT insisted on fixing a maximum price to be paid, in order for it to be able to make a binding offer for the engine to Earhart (Claimant’s Exhibit C 1). To reflect the uncertainty as to the actual production cost for the blades and to share the risks resulting from that the Parties agreed on a flexible price structure for the fan blade. It was determined largely by CLAIMANT’s production costs but provided for a maximum price to ensure, as far as possible, that both Parties would generate a profit from the overall transaction and that RESPONDENT could already at that stage offer the engine at a largely fixed price to Earhart. Furthermore, RESPONDENT insisted on a price in US$ though CLAIMANT’s production costs would be incurred in Equatorianian Denars (EQD).

In their Development and Sales Agreement (DSA) of 1 August 2010 (Claimant’s Exhibit C 2) RESPONDENT ordered 2,000 swept fan blades, model TRF 192-I, from CLAIMANT for a price per blade between US$ 9,975 and US$ 13,125. The price range in Section 4 DSA was determined on the basis of an estimate by CLAIMANT about the likely cost per blade to which a certain profit was to be added. This profit was to decrease with the increase of the costs. Given a production cost of US$ 9,500 per blade a profit of 5% would be added. However, that profit component in the price would reduce to 0% if the unit-cost per blade was US$ 13,125 or higher. US$ 13,125 was the maximum price RESPONDENT would be required to pay per blade under normal circumstances. According to the agreed risk sharing structure of the agreement CLAIMANT had to bear the risk that the production cost would be actually above that maximum price, subject to the ordinary hardship defence.

On the basis of its recent experience with the TRF 192, CLAIMANT estimated that the production costs per blade would be around EQD 20,000. That would have been around US$ 10,000 on the then prevailing exchange rate, which had largely stayed the same for the last three years fluctuating between US$ 1 = EQD 2.00 and US$ 1 = EQD 2.02. Section 4 DSA contained, however, no rule as to the applicable exchange rate.

As already indicated during the negotiations of the Development and Sales Agreement, RESPONDENT subsequently decided to order the same number of clamps needed for connecting the blades to the shaft of the fans. As suggested by RESPONDENT the Parties added a handwritten addendum onto the original contract which provided under the heading “**Addendum of 26 October**” as follows (Claimant’s Exhibit C 2):

*The Buyer may request the Seller to produce and deliver 2,000 clamps to attach the fan blades to the fan shaft. The Price for the clamps shall be on a cost coverage base and be paid in US$.*

*Other terms as per main Agreement.*

*The exchange rate for the agreement is fixed to US$ 1= EQD 2.01.*

The Parties were successful in improving the TRF 192 so that the new TRF 192-I gave the required noise reduction. CLAIMANT delivered the fan blades and the clamps on 14 January 2015 to RESPONDENT as per contract and attached invoices for both goods, an invoice of US$ 20,438,560 for the fan blades and an invoice of US$ 183,343.28 for the clamps. In both cases the fixed exchange rate of US$ 1 = EQD 2.01 from the Addendum was applied to convert CLAIMANT’s costs into US$. The costs incurred for the production of each fan was EQD 19,586 or US$ 9,744.28 when converted on the basis of the fixed exchange rate. Between the conclusion of the Addendum and the production of the fans the conversion rate had, however, fallen considerably. Had CLAIMANT applied the conversion rate at the time of production of the blades, which was US$ 1 = 1.79 EQD the costs in US$ would have been 10,941.90 which would have resulted in a contract price of US$ 22,723,800 for the fan blades.

On 15 January 2015, Mr Cyril Lindbergh, RESPONDENT’s Chief Financial Officer, e-mailed Ms Amelia Beinhorn, the Chief Operating Officer of CLAIMANT, internally responsible for the TRF 192-I project, that he had effected payment of US$ 20,438,560 and US$ 183,343.28 to the CLAIMANT’s account at the Equatoriana National Bank (Claimant’s Exhibit C 3) for the fan blades and clamps respectively.

Immediately after receiving the e-mail, Ms Beinhorn contacted Mr Lindbergh to inform him that the invoice for the fan blades was based on a mistake in their accounting department applying the fixed exchange rate for the clamps also to the fan blades. She made clear that in CLAIMANT’s view, the fixed exchange rate in the Addendum only applied to the clamps but not the fan blades. For the latter the costs incurred were to be converted on the basis of the exchange rate at the time of production, resulting in an overall purchase price for the 2,000 fan blades of US$ 22,723,800 (Claimant’s Exhibit C 5). Ms Beinhorn asked for the payment of an additional amount of US$ 2,285,240 to CLAIMANT’s account.

On 29 January 2015, US$ 20,336,367.20 was credited to the CLAIMANT’s account at the Equatoriana National Bank. It subsequently turned out that the Equatoriana Central Bank had deduced a fee of 0,5%, i.e. US$ 102,192.80, from the amount transferred by RESPONDENT for the fans for a money-laundering investigation per Section 12 of Regulation ML/2010C (Claimant’s Exhibit C 8).

On 9 February 2015, Ms Beinhorn notified Mr Lindbergh by e-mail that CLAIMANT was demanding the outstanding payment of US$ 2,387,432.80 by 4 March 2015 (Claimant’s Exhibit C 6).

In his reply of 10 February 2015, Mr Lindbergh denied that any additional purchase price payment was due (Claimant’s Exhibit C 7). He reiterated RESPONDENT’s view that the costs per fan blade amounted to only US$ 9,744.28, insisting again on the application of the fixed exchange rate set out in the Addendum to the Development and Sales Agreement for converting the cost incurred by CLAIMANT in EQD into US$. Furthermore, Mr Lindbergh stated that RESPONDENT was not aware of any reason why US$ 102,192.80 had been deducted from the US$ 20,438,560 it had transferred.

In line with the requirements in Section 21 DSA, CLAIMANT tried to resolve the dispute amicably. CLAIMANT made several offers combining a reduction in the sales prices for the 2,000 fan blades directly covered by the Development and Sales Agreement with a firm commitment for further fan blades to be delivered within the next five years. RESPONDENT, however, insisted on costs of US$ 9,744.28 per fan blade.

In reaction CLAIMANT sent its Request for Arbitration on 31 May 2016. The Request for Arbitration, however, deviated in two respects from the requirements of the CAM-CCBC Rules.

The attached power of attorney was not from CLAIMANT but from its parent company Wright Holding PLC. Furthermore, instead of R$ 4,000 only R$ 400 were originally paid. In its letter of 1 June 2016, the President of CAM-CCBC informed CLAIMANT that before RESPONDENT would be notified about the Request for Arbitration these deficiencies should be remedied and granted CLAIMANT 10 days to comply with the requirements of Article 4.1. CAM-CCBC Rules.

On 7 June 2016, Mr Fasttrack sent the required power of attorney from CLAIMANT and informed CAM-CCBC that the outstanding amount had been paid.

With its Request for Arbitration CLAIMANT asked for the payment of what it considered to be the still outstanding purchase price. In its view, the fixed exchange rate of US$ 1= EQD 2.01 contained in the Addendum applied only to the clamps but not to the fan blades. The price for those were to be calculated on the basis of the current exchange rate which is US$ 1 = EQD 1.79. Consequently, in CLAIMANT’s view, the purchase price under Section 4 DSA was US$ 22,723,800 and not US$ 20,438,560, which RESPONDENT wanted to pay. Furthermore, CLAIMANT was of the view that RESPONDENT had to bear the levy of 0,5% charged by the Equatoriana Central Bank.

More specifically, **CLAIMANT raises the following claims**:

1. to order RESPONDENT to pay the still outstanding purchase price in the amount of US$ 2.285.240 and

2. to order RESPONDENT to pay the bank charge in the amount of US$ 102,192.80.

**RESPONDENT asks the Arbitral Tribunal:**

1. to reject the claims.

2. to order CLAIMANT to provide Security for Costs in the amount of minimum US$ 200,000.

RESPONDENT submits that CLAIMANT’s claims are already inadmissible since the arbitration proceedings were initiated too late. Pursuant to Section 21 DSA the arbitral proceedings had to be initiated “*within 60 days after the failure of the negotiation*”. According to RESPONDENT, the time limit started to run from 1 April 2016 onwards, when CLAIMANT declared the negotiations to be failed (Respondent’s Exhibit R 3). Consequently, the arbitration proceedings had to be initiated on 31 May 2016 at the latest. The Request for Arbitration submitted by CLAIMANT on 31 May 2016, however, was not sufficient to start arbitral proceedings as it did not comply with the requirements of Article 4.1 and 4.2 CAM-CCBC Rules. Consequently, the arbitration proceedings only started when CLAIMANT remedied the effects, i.e. at the earliest on 7 June 2016 and thereby too late.

In addition, RESPONDENT considers the claims to be unjustified. In its view, the Parties had agreed in the Addendum to the Development and Sales Agreement on a fixed exchange rate of US$ 1 = 1.79 EQD for the cost element of the price formula for the clamps as well as for the fan blades. Thus, the price for the fan blades was only US$ 20,438,560.

In relation to the 0,5% levy by the Equatoriana Central Bank for the examination of its Financial Investigation Unit under Section 12 Regulation ML/2010C, RESPONDENT submits that the levy has to be borne by CLAIMANT. It is no part of the ordinary bank charges for payments but based on a very specific public law regulation in Equatoriana where CLAIMANT has its place of business. No comparable rule exists in Mediterraneo or any other country known to RESPONDENT. Had RESPONDENT been aware of the levy it would either have taken the levy into account in the price calculations or would have insisted on the inclusion of an explicit provision into the contract that CLAIMANT should bear this extraordinary charge arising from circumstances which are much more associated with CLAIMANT than with RESPONDENT. CLAIMANT by contrast knew of the levy or at least ought to have known about it. Enquiries with other engine producers made by RESPONDENT after the initiation of this arbitration have revealed that the levy has been charged by the Equatoriana Central Bank already before at least on two occasions where payments had been made to CLAIMANT. In one of these cases, CLAIMANT also paid the levy.

The Request for Security for Costs pursuant to Article 8 CAM-CCBC Rules was submitted on 6 September 2016 following an information in the Carioca Business News (Respondent’s Exhibit R 6) that CLAIMANT had not complied with another CAM-CCBC award. According to RESPONDENT, that information justified the conclusion that CLAIMANT might also not comply with a likely award on costs rendered in favour of RESPONDENT if CLAIMANT’s claims should be rejected. Furthermore, the non-compliance with the other award in combination with further information about CLAIMANT’s financial situation, which allegedly had been presented by CLAIMANT too positively, raised doubts as to the financial ability of CLAIMANT to fulfill such an award.

CLAIMANT asks the Arbitral Tribunal to reject such request. In its view, the claim was not mentioned in the terms of reference and RESPONDENT had failed to submit any evidence about exceptional circumstances which could justify the granting of an order for security for costs. CLAIMANT explained the non-compliance with the other award with its willingness to set off the claim with another claim for a larger amount owed to CLAIMANT’s parent company.

The Parties agreed that the Request for Security for Costs could be decided jointly with the other requests as CLAIMANT’s chairman was willing to undertake a personal guarantee ensuring compliance with an order should it be granted.

\* The applicable Rules in this case are: CAM-CCBC Rules, UNCITRAL Model Law, New York Convention, CISG (in this case, the arbitration clause is also governed by the CISG), UNIDROIT Principles.

**You may choose among the following questions or develop any legal perspective of your own. You are expected to give clear answer to the question, and to unfold your legal or factual reason(s) in a logical and comprehensive way.**

Q1: Does the Tribunal have the power to order CLAIMANT to provide security for RESPONDENT’s costs?

Q2: If the Tribunal have the power to order security for cost, should it order CLAIMANT to provide security for RESPONDENT’s costs?

Q3: Are CLAIMANT’s claims admissible or have they been submitted out of time?

Q4: Is CLAIMANT entitled to the additional payments from RESPONDENT in the amount of US$ 2,285,240.00 for the blades based on the present exchange rate (US$ 1 = EQD 1.79)?

Q5: Is CLAIMANT entitled to the additional payments from RESPONDENT in the amount of US$ 102,192.80 for the fees deducted by the Equatoriana Central Bank?

**Tips:** Maybe you’d like to use Articles including, but not limited to:

Q1&2: Art 17 of the Model Law, Arts 4, 8 of the CAM-CCBC Rules

Q3: Arts. 4.1, 4.2 of the CAM-CCBC Rules, Art. 2.2.9 of the UNIDROIT Principles, Art. 8 of the CISG

Q4: Arts. 5.1.7, 6.1.9 of the UNIDROIT Principles, Arts. 8, 48, 55 of the CISG

Q5: Arts. 8, 35, 53, 54, 80 of the CISG, Art. 6.1.8 of the UNIDROIT Principles.