CASE NO. 22423/FS
IN THE MATTER OF AN ARBITRATION
UNDER THE ICC ARBITRATION RULES
BETWEEN:

SURPASS COMMERCIAL CORP. LTD.

15/F Poly Plaza, 14 Dongzhimen Nandajie
Dongcheng District, Beijing
People's Republic of China

SURPASS

v.

BARIVEN S.A.

Av. Libertador, Edif. Petróleos de Venezuela
Torre Este, Piso 6, Of. BARIVEN
La Campiña, Distrito Capital
Zona Postal 1060
Venezuela

BARIVEN

FINAL AWARD

---

27 May 2019

The Tribunal

Mr Otto L.O. de Witt Wijnen (Bergambacht, President)
Professor Arthur S. Hartkamp (The Hague)
Mr Alfons F.J.A. Leijten (Amsterdam)

CONTENT:

I. INTRODUCTION AND PROCEDURAL HISTORY 4

II. THE TERMS OF REFERENCE 7

PARTICULARS OF THE ARBITRATION AND PROCEDURAL RULES 7

THE DISPUTE BETWEEN THE PARTIES 8

SURPASS' POSITION 8

BARIVEN'S POSITION 11

III. ISSUES TO BE DETERMINED BY THE TRIBUNAL (AS DETERMINED BY THE TERMS OF REFERENCE) 16

IV. ARBITRATION AGREEMENTS 17

V. THE PARTIES TO THIS ARBITRATION 18

VI. THE COMMERCIAL RELATION BETWEEN THE PARTIES 19

VII. THE SUBMISSIONS OF THE PARTIES - ON JURISDICTION AND ON THE MERITS 21

SUBMISSIONS BY SURPASS 21

SUBMISSIONS BY BARIVEN 30

SUBMISSIONS BY SURPASS 54

SUBMISSIONS BY BARIVEN 85

SUBMISSIONS BY SURPASS 107

VIII. THE REQUESTS FOR RELIEF 116

IX. THE ISSUES TO BE DECIDED (AFTER THE PARTIES'SUBMISSIONS) 123

X. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO ITS JURISDICTION ON THE CLAIM IN GENERAL AND ON PO NO. 5400003102 IN PARTICULAR 124

PURCHASE ORDER NO. 5400003102 130

XI. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO SINGLE ARBITRATION 135

XII. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO THE MERITS: CORRUPTION AND THE FORGED LETTER 139

XIII. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO THE COUNTERCLAIM 147

XIV. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO PURCHASE ORDER NO. 5100111750 149

XV. CONCLUSIONS AND COSTS 154

XVI. THE AWARD 156

I. INTRODUCTION AND PROCEDURAL HISTORY

1. This arbitration commenced with a Request for Arbitration by the Claimant (hereafter: **"Surpass"**) dated 23 March 2016, received by the ICC Secretariat on 24 March 2016. On 6 February 2017, the Respondent (hereafter: **"Bariven"**) submitted a Response, with a Counterclaim. On 10 March 2017, Surpass replied to the Counterclaim.

2. By letter of 9 February 2017, pursuant to article 13(2) of the 2012 Arbitration Rules of the International Chamber of Commerce (**"Rules"** and **"ICC"** respectively), the Secretary General of the ICC International Court of Arbitration (**"the Court"**) confirmed Messrs. Leijten and Hartkamp as co-arbitrators on, respectively, Surpass' and Bariven's nomination. On 20 April 2017, pursuant to article 13(2) of the Rules, the Secretary General confirmed Mr. Otto de Witt Wijnen as President of the Arbitral Tribunal (**"the Tribunal"**), on a joint nomination of the co-arbitrators.

3. Parties' counsel were:

- *for Surpass:*

Dirk Knottenbelt, Thomas Stouten, Loes Stevens, Matthew Brown, Lennart Baijer;
Houthoff Buruma, Weena 355, P.O. Box 1507, 3000 BM Rotterdam, The Netherlands;
Telephone: +31 10 21 72 935 ;
E-mail: d.knottenbelt@houthoff.com / t.stouten@houthoff.com / l.stevens@houthoff.com / m.brown@houthoff.com / l.baijer@houthoff.com

- *for Bariven:*

Tom Claassens, Jonathan Ruff, Melle Boevink;
Loyens & Loeff, Blaak 31, 3011 GA Rotterdam, P.O. Box 2888, 3000 CW Rotterdam, The Netherlands;
Telephone: +31 10 22 46 613;
E-mail: tom.claassens@loyensloeff.com / jonathan.ruff@loyensloeff.com / melle.boevink@loyensloeff.com

Raúl Mañón, Rebekah J. Poston;
Squire Patton Boggs (US) LLP
200 South Biscayne Boulevard, Suite 4700
Miami, FL, USA
Tel: +1 305-577-7000
E-mail: raul.manon@squirepb.com / rebekah.poston@squirepb.com

Eugenia Brache
Squire Patton Boggs Pena Prieto Gamundi
Av. Pedro Henríquez Ureña No. 157
La Esperilla
Santo Domingo, D.N.
Dominican Republic
E-mail: eugenia.brache@squirepb.com

4. During the proceedings Bariven notified the Tribunal that Loyens & Loeff was no longer (co-)counsel to it. At the Hearing Mr M. Deckers (Dentons Boekel) attended and made a closing statement on Dutch law.

5. By letter of 19 December 2016, Surpass nominated as co-arbitrator:

   Mr Alfons Franciscus Jan Adriaan Leijten, Stibbe N.V., Beethovenplein 10, 1077 WM Amsterdam, the Netherlands, telephone +31 20 546 0409; email: fons.leijten@stibbe.com

6. By letter of 6 January 2017, in accordance with Article 5(2) of the ICC Rules whilst requesting an extension for the submission of its Answer, Bariven nominated as co-arbitrator:

   Professor Arthur Severijn Hartkamp, Alexander Gogelweg 21, 2517 JD The Hague, the Netherlands, telephone: +31 70 355 2540; email: a.hartkamp@jur.ru.nl.

7. Following their appointment and in accordance with the arbitration agreements set forth in Article 27 of the 2009 T&C and 2014 T&C, on 20 April 2017 the ICC informed the Parties that the co-arbitrators jointly nominated as president of the Tribunal:

   Mr Otto Lambert Oswald de Witt Wijnen, Tussenlanen 35, 2861 CB Bergambacht, the Netherlands, telephone: +31 182 353 643; email: olo.dewittwijnen@ideka.org.

8. After consultation with the Parties, Terms of Reference were established and signed by the Parties and the members of the Tribunal in June 2017. Procedural Order No. 1, with a Procedural Timetable, was established and signed by the President on 16 June 2017. It was agreed that there was no need for a case management conference.

9. In accordance with the Procedural Timetable, with some deviations regarding the timing on which agreement was reached, Surpass submitted its Statement of Claim, with Exhibits and Witness Statements on 1 August 2017, Bariven its Statement of Defence and Counterclaim, with Exhibits and Witness Statements on 3 November 2017, Surpass its Statement of Reply and Defence on the Counterclaim on 8 June 2018, Bariven its Statement of Rejoinder and Reply on Counterclaim on 20 September 2018, and Surpass its Statement of Rejoinder on the Counterclaim on 8 November 2018.

10. On 24 May 2017, Surpass addressed the Tribunal with a request regarding the Terms of Reference and Procedural Order to be agreed upon. In that address, Surpass inter alia requested to bifurcate the proceedings. Bariven replied that it did not believe that bifurcation was required in this case. The Tribunal, on 29 May 2017, ruled that the request to bifurcate the proceedings was denied.

11. On 22 November 2017, the Parties submitted Requests for Document Production, including Redfern Schedules. Objections and Replies were exchanged subsequently. On

21 January 2018, the Tribunal issued its decision on these requests. Correspondence was exchanged on the manner in which documents should be produced, in the light of the different time zones. It was agreed that the Parties would provide blind submissions to the Tribunal on the relevant dates. This was laid down in a new Procedural Timetable of 6 December 2017.

12. In the light of these decisions, the Parties subsequently agreed on a new Procedural Timetable. This new agreement was laid down in Procedural Order No. 2, signed by the President of the Tribunal on 7 March 2018. Later, the Parties agreed to a further amendment regarding the date of the production of documents (13 April 2018).

13. On 10 September 2018, Bariven requested a postponement of the Hearing. Surpass resisted this request and the Tribunal denied it.

14. Later, the Hearing dates were definitely fixed for 12 and 13 December 2018.

15. On 28 September 2018, the Secretariat informed the Arbitral Tribunal, with cc to the Parties, that the Court, in its session of 6 September 2018, had extended the time limit to render the award until 31 December 2018.

16. As provided for in the Procedural Order No. 1, a pre-Hearing telephone conference took place on 30 November 2018.

17. On 29 November 2018, Bariven requested a postponement of the Hearing. Also this request was opposed by Surpass. It was discussed during the telephone conference on 30 November 2018. On 1 December 2018, the Tribunal denied this request. It was established during the said telephone conference that – apart from some minor technical details – all was set for the Hearing, such as the venue, the time schedule, the court reporter and the interpreter.

18. The Hearing took place on 12 and 13 December 2018, in The Hague. One witness was heard. The Parties made Opening Statements and Closing Statements. All according to a time schedule as agreed upon. Draft transcripts were made and distributed. Final transcripts were circulated on 10 January 2019.

19. On 10 January 2019 the Parties, at the Tribunal's request, provided Cost Submissions.

20. Pursuant to Article 27 of the Rules, the Arbitral Tribunal declared the proceedings closed on 26 January 2019.

21. By letter of 27 September 2018, the ICC Secretariat had informed the Parties and the Arbitral Tribunal that the Court, on 6 September 2018, had extended the time limit for the Final Award until 30 April 2019 (Art. 30(2) of the Rules).

II. THE TERMS OF REFERENCE

22. Besides a description of the dispute, in summary, and the Parties' Claims, the Terms of Reference contain the following.

Particulars of the Arbitration and Procedural Rules

(i) Pursuant to Article 27 of the Terms and Conditions for Good Purchases – Rev.08-2009 (**"the 2009 T&C"**) or Rev.09-2014 (**"the 2014 T&C"**), The Hague (the Netherlands), is the place of the arbitration for the purpose of Article 18 (1) of the ICC Rules.

(ii) Pursuant to Article 25 of the 2009 T&C and 2014 T&C,

"[the] *Order and all resulting and connected orders and or agreements and all connected rights and obligations (including any claims based on tort) shall be governed by and construed in accordance with the law of The Netherlands."*

The Arbitral Tribunal shall take into account any contract between the Parties and provisions of relevant trade usages in accordance with Article 21(2) of the ICC Rules.

(iii) The Arbitral Tribunal shall decide in accordance with the rules of law.

(iv) Subject to any mandatory rules of law of the place of arbitration, the proceedings before the Arbitral Tribunal shall be governed by the ICC Rules and, where those rules are silent, by any rules – including these Terms of Reference – which the parties or, failing them, the Arbitral Tribunal may settle on.

(v) Pursuant to Article 27 of the 2009 T&C and 2014 T&C, the language of the arbitration shall be English.

(vi) The Tribunal has been duly constituted in accordance with the ICC Rules and the agreement between the Parties.

(vii) PO No 1 provides that, in all matters regarding evidence, the Tribunal shall use, as guidance, the IBA Rules on the Taking of Evidence in International Arbitration (2010).

The dispute between the Parties

23. The dispute between the Parties concerns, in essence, the question whether Bariven could rightly refuse payment of a number of invoices issued to it by Surpass for the delivery of goods supplied to Bariven by Surpass, and claim back what it paid already under a number of Purchase Orders. Further, the Tribunal's jurisdiction is disputed on a number of issues. More in particular, as per the Terms of Reference, the Parties submitted the following, in summary.

Surpass' position

24. Between 14 October 2011 and 25 August 2015, PDVSA Services B.V., on behalf of and for the account of Bariven, placed 29 orders with Surpass for the purchase and delivery of approximately 2,000 commercial vehicles, spare parts and other industrial equipment. PDVSA Services B.V. and Bariven belong to the same group of companies. These transactions resulted in the issuance of 29 purchase orders (**"the Purchase Orders"**). As Surpass noted in its Reply to Bariven's Counterclaim, "*the Houston Claims are no longer included in this arbitration because of the absence of Bariven's consent.*"[1]

25. Each of the transactions proceeded according to the following pattern:

(i) PDVSA Services B.V. would issue a Request for Quotation on behalf of Bariven;

(ii) Surpass would issue its Quotation;

(iii) PDVSA Services B.V. would then issue a Purchase Order on behalf of Bariven, with each Purchase Order providing either that the Terms and Conditions for Goods Purchases (Rev. 08-2009) of PDVSA Services B.V. – **the 2009 T&C** - apply or Terms and Conditions for Goods Purchases (Rev. 09-2014) of PDVSA Services B.V. – **the 2014 T&C** - apply;

(iv) in all instances Surpass delivered the relevant goods and invoiced according to the terms of the relevant transaction, or preserved the goods in accordance with applicable law; and

(v) Surpass provided an invoice to be paid, due to PRC currency controls, to the account of its Hong Kong subsidiary and designated payment beneficiary, Surpass (Hong Kong) Commercial Corp Limited. Surpass (Hong Kong) Commercial Corp Limited later began directly issuing invoices for purposes of expediency.

---

1 The Request for Arbitration mentioned at least 39 Orders in total, cf. par. 8.

26. Despite numerous reminders and demands, Bariven has not paid the outstanding invoices. The claims have remained undisputed.

27. Because the agreement between the parties concerns the sale of goods and (i) the law of the Netherlands applies, which is a party to the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**"), and (ii) the PRC, the country of the place of business of Surpass is also a party to the CISG, the CISG applies on the basis of Article 1(b) CISG and Dutch law applies insofar as gaps must be filled.

28. Surpass submits that the disputes arising from the Purchase Orders may be heard together in a single arbitration under Article 9 ICC Rules. The identical arbitration agreements under the ICC Rules indicate both compatibility and consent to practice under the ICC Rules, which explicitly provide that "*claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the [ICC] Rules.*" As Bariven itself acknowledged in its Answer and Counterclaim, the claims under the Purchase Orders involve common issues of law and fact. As a result, there is no real reason that these claims cannot be dealt with in a single arbitration.

29. Consequently, Surpass submits that Bariven is to compensate Surpass for the outstanding purchase price of USD 63,601,331.97.

30. Surpass denies:

(i) that it participated in or knowingly benefited from any criminal scheme;

(ii) that Surpass entities owned by Mr Cautilli played any role in the transactions at issue;

(iii) that the Purchase Orders were obtained, procured through, or in any way the "*product of illegality or other corrupt conduct or irregularities*";

(iv) that there is any ground for annulment of the Purchase Orders for fraud, violation of the law, error or otherwise;

(v) that the Arbitral Tribunal has jurisdiction to hear the part of Bariven's counterclaim that does not relate to any of the Purchase Orders; and

(vi) that Bariven suffered any damages in relation to the Purchase Orders that are in any way attributable to Surpass.

31. Bariven, in its Answer to Surpass' Claim and Counterclaim, also asserts that it will submit a counterclaim for an amount and related to purchase orders that remain heretofore undefined. The counterclaim will apparently "*extend to recover damages arising under purchase orders already paid by Bariven (and thus, not at issue in Surpass' Request for*

Arbitration)". As Bariven admits, its counterclaim relates to purchase orders other than those which form the basis of Surpass' claims.

32. Surpass submits that Purchase Orders other than those which form the basis of its claims are separate contracts with separate arbitration agreements. Indeed, such forms the basis of Surpass' submission under Article 9 ICC Rules, and Bariven's position that Surpass "*seeks to consolidate into a single arbitration individual claims arising under the 29 Dutch POs*" and that these are "*29 separate claims*" does not differ on this point. As such, Bariven's counterclaim is inadmissible where it is not "*subject to the same arbitration agreement as the one on which the claim is based*" pursuant to Article 1038c(1) of the Dutch Code of Civil Procedure ("**DCCP**"). Surpass therefore submits that any part of Bariven's counterclaim not subject to one of the 29 arbitration agreements contained in the Purchase Orders is inadmissible.

33. Surpass reserves the right to expand, amend, or complete its position as set forth above during the course of these proceedings.

34. Accordingly, Surpass requests that the Arbitral Tribunal award the following relief:

a) that the disputes concerning the Purchase Orders be heard in a single arbitration under Article 9 of the ICC Rules;

b) that the Tribunal deem inadmissible any portion of Bariven's counterclaim for which the Purchase Orders and their arbitration agreements do not form the basis of the claim under Article 1038c(1) DCCP;

c) that Bariven pays to Surpass the amount of USD 63,601,331.97, representing the principal outstanding amount under the Purchase Orders;

d) that Bariven reimburse Surpass for costs it has incurred as a result of Surpass' failure to perform under Purchase Order 5100111750 in accordance with applicable law at an amount to be determined;

e) that Bariven pays to Surpass:

a. the statutory interest as provided by Article 6:119a of the Dutch Civil Code ("DCC"); or

b. alternatively if the Arbitral Tribunal finds the statutory interest of Article 6:119a DCC not applicable, the statutory interest as provided by Article 6:119 DCC or any other interest the Arbitral Tribunal finds applicable,

that has accrued on each of the Purchase Orders from the respective due dates thereof to the date of full payment pursuant to Dutch law;

f) that the counterclaim and relief sought by Bariven are fully and completely rejected; and

g) that Bariven reimburses Surpass for all costs, expenses and attorney's fees and disbursements incurred by Surpass in this arbitration pursuant to Article 37 of the ICC Rules.

Bariven's position

35. **Bariven**, in its **Answer to Surpass' Request for Arbitration** (with Exhibits), challenges Surpass' claims on jurisdictional grounds and on the merits. It submitted that the Tribunal does not have jurisdiction over the so-called 10 Houston Purchase Orders.

36. More in particular it submitted that Surpass' Request for Arbitration relates to 39 separate purchase orders, each of which is a standalone contract specifying a separate dispute resolution mechanism. 29 of those purchase orders each contain a separate ICC arbitration clause and are governed by Dutch law (the "**Dutch POs**"), while 10 of those purchase orders each contains a forum selection clause providing for the "*exclusive jurisdiction*" of the "*applicable State and Federal courts of Harris County, Texas*" and are governed by Texas law (the "**Houston POs**").

37. The 10 Houston POs are included in the prayer for relief set forth in Surpass' Request for Arbitration, and Surpass is requesting an award in its favor on those 10 purchase orders. However, in its Reply to Bariven's Counterclaim, Surpass agrees with Bariven's position that the Tribunal does not have jurisdiction over the 10 Houston POs because none of them contain an ICC arbitration clause. Nonetheless, Surpass has yet to formally dismiss or withdraw its claim for relief under the 10 Houston POs.

38. Accordingly, for the avoidance of doubt Bariven requests that, as a preliminary matter: (*i*) Surpass formally dismiss from this arbitration or withdraw from the consideration of this Tribunal its claims under the 10 Houston POs; or (*ii*) should Surpass so fail to act, that the Tribunal rule that it does not have jurisdiction over the 10 Houston POs because none of the 10 Houston POs contain an ICC-arbitration clause and Bariven has not otherwise agreed to resolve disputes arising under those purchase orders through arbitration.

39. Further, Bariven submitted that Surpass cannot consolidate into a single arbitration the individual claims arising under the 29 Dutch POs. Surpass' reliance on Article 9 of the ICC Rules is misplaced because Article 9(b) requires that "*all parties to the arbitration . . . agree[] that those claims can be determined together in a single arbitration.*" Bariven alleges that there has been no such agreement on its part.

40. Nevertheless, for purposes of this arbitration only and given the common issues of law and fact, Bariven is willing to agree to resolve these 29 separate claims under the 29 Dutch POs in a single arbitration, *provided that* Surpass agrees to resolve in this arbitration the claims asserted and to be asserted by Bariven in its Counterclaim pertaining to purchase orders that it has already paid to Surpass. Bariven's Counterclaim

pertaining to those already paid purchase orders, as discussed below, is premised on purchase orders between the same Parties and which are governed by the very same set of Terms and Condition that govern the 29 Dutch POs.

41. On the merits of the 29 Claims, subject to Surpass' acceptance of the condition set forth in par. 40 above, Bariven denies all of the claims asserted against it by Surpass, and argues that the 29 Dutch POs are to be annulled because they were obtained through bribery and corrupt practices, or under the influence of fraud or error.[2]

42. Bariven has reason to believe that Surpass formed part of and/or knowingly benefited from a criminal conspiracy that defrauded Bariven out of hundreds of millions of dollars. That conspiracy was designated and implemented by Roberto Enrique Rincón Fernández ("**Mr. Rincón**"), and others, and its purpose was to obtain procurement contracts from Bariven through corrupt and fraudulent means, including by paying bribes and conveying other things of value to former rogue employees of Bariven.

43. To date, eight individuals have been indicted for this criminal conspiracy and all have entered pleas of guilty in U.S. federal court in Houston, Texas. The U.S. Government has indicated that its investigation is ongoing. Accordingly, the eight individuals thus far indicted are by no means all of the defendants who have been or will be charged in connection with this criminal conspiracy.

44. As explained by the U.S. prosecuting authorities in an indictment dated 10 December 2015 (the "**Indictment**"), the conspiracy was composed of certain Bariven vendors who offered and paid bribes and other things of value to former rogue employees of Bariven in exchange for those employees' assistance in "*obtaining and retaining business for and with, and directing business to*" the bribe-paying vendors—all in violation of the U.S. Foreign Corrupt Practices Act (the "**FCPA**") and other U.S. federal statutes.

45. Bariven has reasonable basis to believe that Surpass is one of the vendors that may have participated in or benefited from this criminal scheme. As part of its ongoing investigation into this matter, Bariven recently learned that Surpass is represented before Bariven by Mr. Ottavio Cautilli ("**Mr. Cautilli**"), who is Mr. Rincón's son-in-law.

46. Moreover, Mr. Cautilli personally owns two other entities that share the name "*Surpass*," including: (i) a Hong Kong entity named "*Surpass Commercial Corp Limited*," the same name of Surpass in this arbitration; and (ii) a Texas entity named "*Surpass Industrial, LLC*." Additionally, in documents submitted with Bariven, Surpass—Surpass in this arbitration—designated as its beneficiary account for payments from Bariven, the bank account belonging to another entity, "*Surpass (Hong Kong) Commercial Corp. Limited*."

[2] If, for whatever reason, Bariven's Counterclaim is not decided by this Tribunal in this arbitration, and therefore Surpass' individual claims under the 29 Dutch POs are not consolidated in this arbitration, the arguments sets forth below by Bariven in its Answer shall apply to the remaining single purchase order over which this Tribunal ultimately retains jurisdiction.

47. In sum, to Bariven's knowledge there appear to exist four separate entities sharing the name "*Surpass*," and they are all connected to Mr. Cautilli.

- Surpass Commercial Corp., Ltd.—Surpass in this arbitration.
- Surpass Commercial Corp. Limited—a Hong Kong entity incorporated by Mr. Cautilli.
- Surpass (Hong Kong) Commercial Corp. Limited—a Hong Kong entity identified as the beneficiary of payments made by Bariven.
- Surpass Industrial, LLC—a Texas entity incorporated by Mr. Cautilli.

48. The above facts and others that Bariven will make available in this arbitration place into question the circumstances surrounding the procurement contracts secured by Surpass, and specifically whether those contracts are the product of illegality or other corrupt conduct or irregularities that may render them legally and equitably invalid and unenforceable. Equally, Surpass' potential participation in the described corrupt scheme also has legal implications under the laws of multiple jurisdictions, including, among others, that of Venezuela, the United States, and The Netherlands. Chief among them, Bariven may be precluded by law from, and may incur criminal liability for, paying any sum allegedly owed to Surpass under any contract obtained through fraud or corruption.

49. Even assuming, *arguendo*, that Surpass is entitled to payment under one or more of the purchase orders at issue in its Request for Arbitration, any such amount must be reduced to account for any damages suffered by Bariven were it to be confirmed that those purchase orders (and others already paid by Bariven) were obtained through fraud and corruption. Those damages include the amount of overpricing charged to (and in some instances already paid by) Bariven and any damages incurred by Bariven.

50. Accordingly, Surpass' claims under the 29 Dutch POs fail on numerous grounds, including:

(1) To the extent that Surpass' 29 Dutch POs were illegally obtained through the payment of bribes and other corrupt practices, they are invalid and unenforceable under Dutch law. In particular, the 29 Dutch POs may be null and *void ab initio* pursuant to article 3:40 of the Dutch Civil Code ("**DCC**"); or they could, alternatively, be subject to annulment pursuant to Article 3:44 of the DCC, or, more alternatively, under Article 6:228 of the DCC as having been entered into as a result of a fraud and/or error.

(2) To the extent that Surpass' 29 Dutch POs were illegally obtained through the payment of bribes and other corrupt practices, they are invalid and unenforceable under transnational public policy.

(3) To the extent that Surpass' 29 Dutch POs were illegally obtained through the payment of bribes and other corrupt practices, Bariven is precluded by Dutch, Venezuela, and U.S. law, as well as applicable principles of equity, from making payment on those purchase orders.

(4) Even if Surpass were entitled to receive payment of whatever amounts may be owed under the 29 Dutch POs, to the extent that Surpass' 29 Dutch POs were illegally obtained through the payment of bribes and other corrupt practices, any such payment must be reduced to account for: (i) the amount of any bribes paid or benefiits conferred to secure the corresponding purchase order; (ii) any overpricing above the fair market value of each item procured; and (iii) the amount of Bariven's Counterclaim.

51. Bariven then lodges a **Counterclaim** in two parts:

(1) To the extent that any of the 29 Dutch POs were illegally obtained through the payment of bribes and other corrupt practices, Bariven is seeking to recover from Surpass the damages that it suffered as a result. In this respect, pursuant to Articles 4 and 13 of the Terms and Conditions for Goods Purchases Revision 08-2009, Bariven is entitled, respectively: (*i*) to recover from Surpass "*any amount over paid (sic) or wrongfully paid however such payment may have arisen including by mistake*;" and (*ii*) to being indemnified and held harmless by Surpass from "*any and all losses, expenses, awards, and damages (including without limitation, court costs and reasonable attorneys' fees) arising out of or relating to any claim ... for [Surpass's] breach of any of the terms or conditions of the [Purchase] Order (including, without limitation, these Terms and Conditions of purchase).*" This Counterclaim seeks damages under both contractual provisions. This statement is applicable *mutatis mutandis* to the already paid purchase orders, which are governed by the same Terms and Conditions.

(2) To the extent that any of the other purchase orders placed with Surpass that have already been paid by Bariven, and that contain the same applicable law and dispute resolution clause as that set forth in the 29 Dutch POs, were illegally obtained through the payment of bribe and other corrupt practices, Bariven is seeking to recover from Surpass the damages that it suffered as a result, including without limitation: (*i*) the amount of bribes and the value of the benefits that Surpass and others may have paid to rogue former Bariven employees in order to secure contracts from Bariven, which sums were factored into invoices paid by Bariven; (*ii*) the amount of any overpricing charged by Surpass and paid by Bariven; and (*iii*) any other damages recoverable by Bariven under law. Bariven's offer to accept the consolidation in a single arbitration of Surpass' claims under the 29 Dutch POs is contingent on Surpass accepting to consolidate in this same arbitration the previously described claims.

52. Based on the foregoing, Bariven seeks an award whereby the Arbitral Tribunal:

(1) As a preliminary matter, declare that it does not have jurisdiction over the 10 Houston POs, and issue a Final Award dismissing Surpass' claims as to those purchase orders in their entirety;

(2) Fully and completely reject the relief sought by Surpass as set out in the Request for Arbitration;

(3) Declare the 29 Dutch POs and any other purchase orders tainted by corruption to be null and void *ab initio*, or, alternatively, annul the 29 Dutch POs and any other purchase orders tainted by corruption, and, in either case, order Surpass to compensate Bariven for the damages arising thereof, plus interest;

(4) Grant Bariven's counterclaim regarding the already paid purchase orders and order Surpass to compensate Bariven for the damages arising thereof, plus interest;

(5) Order Surpass to pay Bariven's costs incurred in connection with this arbitration, including the fees of its lawyers, consultants, and experts and those of Bariven's own employees on a full indemnity basis, and the fees of the Arbitral Tribunal and the ICC, plus interest thereon at a reasonable rate from the date of which such costs are incurred to the date of payment.

(6) Grant such further or other relief, which the Arbitral Tribunal deems necessary or appropriate.

53. Bariven reserved the right to amend its defenses and claims and the relief it seeks, and to provide additional evidence and authority in support of its case, during the course of this arbitration.

54. In its **Reply, Surpass** submitted that Bariven's contention that Article 9 of the ICC Rules is inapplicable lacks any basis, and that the Tribunal does not require any further consent to proceed under those Rules. Surpass explained that Bariven attempts to include Claims in its Counterclaim that are impermissible under Article 1038c(1) of the Dutch Code of Civil Proceedings, which is mandatory law.

55. Further, Surpass denied the suggestions (unsubstantiated, in its view) that Bariven used to form the basis of its Counterclaim, namely that Surpass, a Chinese state owned entity, either formed a part of, or knowingly benefitted from a criminal conspiracy.

56. And finally that, by relying solely on a defense of illegality, Bariven admits that Surpass properly performed its obligations under the 29 Dutch Purchase Orders and that, if no illegality is found – or for which there is no evidence – Bariven admits that it owes payment.

III. ISSUES TO BE DETERMINED BY THE TRIBUNAL (as determined by the Terms of Reference)

57. Pursuant to the Terms of Reference, the issues to be determined by the Arbitral Tribunal shall be those resulting from the Parties' submissions, including forthcoming submissions in the course of this arbitration and any question of law, fact, or evidence that the Arbitral Tribunal may deem necessary to decide in order to determine such issues, and which are relevant to the adjudication of the claims and defenses, as described above, subject to the provisions of Article 23(4) of the ICC Rules.

58. Pursuant to Article 23(1)(d) of the ICC Rules, the Arbitral Tribunal does not consider it appropriate to list the issues to be determined in a more specific manner than described above.

59. The Arbitral Tribunal may at any time in its discretion decide that all or any of the above issues have become irrelevant for the purposes of this arbitration.

IV. ARBITRATION AGREEMENTS

60. Surpass has initiated this arbitration against Bariven pursuant to arbitration clauses contained in the 2009 T&C and 2014 T&C.

61. Article 27 of the 2009 T&C and 2014 T&C provide the same arbitration agreements verbatim:

> *"Any and all disputes, controversies and claims arising out of, involving, or relating to the Order shall be referred to, settled and finally resolved exclusively by arbitration under the rules of the ICC International Court of Arbitration (the "Rules") by three arbitrators appointed in accordance with the Rules. All procedural matters arising in connection with any arbitration shall be resolved in accordance with the Rules. The Party commencing the arbitration shall appoint one arbitrator and the defendant Party shall appoint one arbitrator and a third arbitrator will be appointed by the two arbitrators appointed by the Parties, in accordance with the Rules. The existence of any dispute or the initiation or continuance of the arbitration proceedings shall not postpone, suspend or delay the obligation of the Parties to perform or the performance by the Parties of their respective obligations pursuant to this Agreement. The payment of the costs and expenses of the arbitration will be determined by the arbitrators. The place of the arbitration shall be The Hague. The language used in the arbitral proceedings shall be English."*

V. THE PARTIES TO THIS ARBITRATION

62. Surpass submits, in its Statement of Claim, that it was, at all relevant times for this proceeding, owned 90% by China Poly Group Corp. ("Poly Group") and 10% by Poly Technologies Inc. ("Poly Technologies"), itself a subsidiary of Poly Group. Thereafter, an internal restructuring of the Poly Group passed Surpass' shareholding to another wholly owned subsidiary of Poly Group, Poly International Holdings Ltd. The Poly Group itself is an entity under the supervision and management of the State-owned Assets Supervision and Administration Commission ("SASAC"), a special commission of the People's Republic of China ("PRC"). Surpass (Hong Kong) Commercial Corp. Ltd. ("Surpass Hong Kong") is a wholly owned subsidiary of Surpass.

63. Surpass is therefore ultimately a Chinese state-owned entity. Surpass supplies – inter alia – commercial vehicles, vehicle spare parts and equipment for the oil industry. Surpass acts as the exclusive supplier to PDVSA for a number of products and product lines, e.g. the exclusive supplier for Sinotruk **("Sinotruk")** and as Poly Group's exclusive representative to cooperate with PDVSA.

64. In its Statement of Defense, Bariven submits that it, and its Dutch purchasing agent, PDVSA Services B.V. **("PDVSA Services")**, belong to the group of Petróleos de Venezuela S.A., also referred to as **"PDVSA Group"**, the national oil company of Venezuela.

65. Bariven is a corporation organized and existing under the laws of the Bolivarian Republic of Venezuela. It is a subsidiary of Petróleos de Venezuela S.A. **("PDVSA")**, the Venezuelan state owned oil company. Bariven is in charge of: (i) procuring and acquiring parts, materials, and equipment needed by some of PDVSA's subsidiaries and affiliates for their exploration, production, and refining activities, as well as for their gas-production related activities; and (ii) managing and maintaining the inventory and warehouses of parts, materials, and equipment that it procures and acquires from third party providers. Bariven's registered address and principal place of business is Av. Libertador, Edificio Petróleos de Venezuela, Torre Este, Piso 6, Of. Bariven, La Campiña, Distrito Capital, Caracas, 1060, Venezuela. Bariven also has offices in the city of Maracaibo, Estate of Zulia, Venezuela, and in other parts of Venezuela.

66. Bariven has approximately 1,000 employees spread throughout all of its locations in Venezuela. In conducting its procurement activities internationally, Bariven employs the agency services of its subsidiary entities: PDVSA Services, Inc. **("PSI")**, a Delaware corporation, headquartered and operating out of Houston, Texas; and PDVSA Services B.V. **("PSBV")**, a Netherlands entity, headquartered and operating out of The Hague. PSI and PSBV are not parties to this dispute.

VI. THE COMMERCIAL RELATION BETWEEN THE PARTIES

67. In its Statement of Claim, Surpass gave the following survey of the commercial relation between the Parties and its background.

68. Beginning in 2001, the governments of Venezuela and the PRC have endeavored to cooperate economically, focusing primarily on two sectors: agriculture and energy ("**Programme**"). The Programme has been overseen by the Joint High-Level Commission between the Bolivarian Republic of Venezuela and the People's Republic of China ("**Joint High-Level Commission**"). The Energy and Mining Subcommittee of the Joint High-Level Commission has overseen the economic cooperation for the energy sector ("**Joint Subcommittee**"), in particular as between large state-owned Chinese enterprises and PDVSA.

69. As a subsidiary of the Chinese state-owned company Poly Group, by 2012 Surpass had through the Programme supplied to PDVSA such products as steel coils, oil pipelines, heavy-duty tractor trucks and fuel tanks for the oil industry. The Joint Subcommittee even recognized Surpass' satisfactory performance at its eleventh meeting on 28 November 2012, referencing Surpass in the meeting minutes by its parent company Poly Group. The Joint Subcommittee stated:

> The Sub-committee expressed its satisfaction with the execution of contracts for the procurement of steel coils, oil pipes, heavy-duty tractors and fuel tanks regarding oil equipment, signed between the Poly Group and PDVSA. It also confirms awareness of the agreements signed between the Poly Group and PDVSA. The Sub-committee supports the cooperation of both parties in the areas of fuel transport and oil equipment.

70. As follows from its Request for Arbitration, Surpass, between October 2011 and August 2015, concluded further Purchase Orders with Bariven.

71. On 21 September 2013, the Joint Subcommittee again expressed its satisfaction with Surpass' execution of the Purchase Orders during its twelfth meeting. The minutes of the meeting state:

> "The Sub-Committee expressed its satisfaction with the execution of contracts for the procurement of steel coils, oil pipes, heavy-duty tractors, fuel tanks and spare parts for vehicles regarding oil equipment, signed between the Poly Group and PDVSA. It also acknowledged that it was informed of the agreements signed between the Poly Group and PDVSA and expressed its support to increase the cooperation of the aforementioned areas between both parties. The Sub-Committee supported the successful establishment of the post-sale service system in Venezuela by Surpass."

72. And then again on 20 July 2014 in its thirteenth meeting, the Joint Subcommittee stated:

> "The Sub-committee expressed its satisfaction with the execution of the contracts signed between Surpass Commercial Corp., Ltd., of the Poly Group, and PDVSA, for the procurement of trucks, heavy-duty tractors, fuel tanks and spare parts for vehicles, and equipment and materials for the transport and distribution of oil and gas. It also confirms awareness of the agreements signed between the Poly Group and PDVSA in the area of the supply of oil equipment and the establishment of post-sale service in Venezuela, and expresses its support to increase the cooperation in the aforementioned areas through the financing of special terms."

73. Bariven, in its Statement of Defense, has not contested this survey.

VII. THE SUBMISSIONS OF THE PARTIES - ON JURISDICTION AND ON THE MERITS[3]

Submissions by Surpass

74. In its **Statement of Claim, Surpass** maintained its position as expressed in the Terms of Reference. With regard to jurisdiction it submitted first of all that, between October 2011 and August 2015, Surpass and PDVSA Services B.V., on behalf of Bariven, concluded the 29 Purchase Orders at issue in these proceedings through the Programme. Each of the transactions proceeded according to the following procedure:

(i) PDVSA Services B.V. would issue a Request for Quotation on behalf of Bariven;

(ii) Surpass would issue its Quotation;

(iii) after a rigorous bidding process including internal checks and reviews by Bariven, PDVSA Services B.V. would then issue a Purchase Order on behalf of Bariven, with each Purchase Order providing either that the Terms and Conditions for Goods Purchases (Rev. 08-2009) of PDVSA Services B.V. **("2009 T&C")** apply or Terms and Conditions for Goods Purchases (Rev. 09-2014) of PDVSA Services B.V. **("2014 T&C"**, referred to jointly with the 2009 T&C as **"T&Cs"**) apply;

(iv) in all instances Surpass would then cause the delivery of the goods subject to the Purchase Orders ("Equipment") and invoiced according to the terms of the relevant transaction (or in one instance Surpass preserved the goods in accordance with applicable law); and

(v) Surpass would then – due to PRC currency controls and PDVSA's usual urgent demand for delivery of the goods – send Bariven an invoice to be paid to the account of its Hong Kong subsidiary and designated payment beneficiary, Surpass Hong Kong. For purposes of expediency, Surpass Hong Kong later began directly issuing invoices on behalf of Surpass.

75. Surpass submits that the Tribunal has jurisdiction under the arbitration agreements to which the Parties agreed in the Purchase Orders, found in the T&Cs at Article 27. The arbitration agreements are identical, and provide that:

> "*Any and all disputes, controversies and claims arising out of, involving, or relating to the Order shall be referred to, settled and finally resolved exclusively by arbitration under the rules of the ICC International Court of Arbitration (the*

[3] The Parties' Submissions contain a great number of footnotes and refer to a substantial number of Exhibits. That will not be repeated in this Chapter to the full extent. The Tribunal will only refer to same in this Chapter in so far as the references were considered useful for the purpose.

> *"Rules") by three arbitrators appointed in accordance with the Rules. All procedural matters arising in connection with any arbitration shall be resolved in accordance with the Rules. (...) The place of arbitration shall be The Hague."*

76. It submitted further that the disputes arising from the Purchase Orders may be heard together in a single arbitration under Article 9 of the ICC Rules. Article 9, entitled "Multiple Contracts" provides:

> *Subject to the provisions of Articles 6(3)-6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.*

As such, the ICC Rules plainly make available the option of submitting claims that have arisen under multiple contracts, as is the case here with the 29 separate Purchase Orders, to be decided together in a single arbitration. Given that "*Article 9 confirms that claims may be brought under different contracts and different arbitration agreements in one and the same arbitration*", the only real issues are whether it is permissible to bring multi-contract claims covered by separate arbitration agreements under the applicable *lex arbitri*, and, if so, whether the conditions for bringing multi-contract claims in a single arbitration are satisfied in this case.

It is undisputed that Dutch arbitration law is the *lex arbitri* applicable to these arbitral proceedings. There is no express provision of the DCCP barring multi-contract claims from being pursued in a single arbitration. Importantly, Article 1020(6) DCCP provides that "*Arbitration rules referred to in an arbitration agreement shall be deemed to form part of that agreement.*" Thus, by including the ICC Rules in the arbitration agreement without any reservation, Article 9 of the ICC Rules forms a part of the arbitration agreement.

77. Moreover, "*by agreeing to ICC arbitration, the parties are agreeing to the Rules and therefore agreeing to the criteria in the Rules*". It had been ICC practice for multi-contract claims to proceed in a single proceeding prior to the amendment of the ICC Rules in 2012. Thus, the addition of Article 9 in the 2012 revision merely codified already existing practice.

78. Article 9 ICC Rules provides that the conditions of Articles 6(3)-6(7) and 23(4) of the ICC Rules must be met. Despite Bariven's puzzling and continued adherence to a non-existent Article 9(b) of the ICC Rules up to and including the ToR, the Secretary General did not raise the issue or refer the case to the ICC's Court of Arbitration pursuant to Article 6(3) ICC Rules. Article 6(4) ICC Rules and its contents are therefore not required, and the Tribunal is free to determine the claims together in one arbitration.

79. Even if the Secretary General had decided to refer the case to the Court, the Purchase Orders meet the applicable test. Article 6(4)(ii) provides a two-prong threshold test for *prima facie* admissibility of multi-contract claims. The threshold test requires *prima facie* evidence that there is (i) compatibility of the separate arbitration agreements, and (ii) consent to having the separate claims heard together in a single arbitration. Under Article 6(5) ICC Rules, however, once the threshold test is met, the Tribunal is not bound by this criteria and may exercise its own discretion.

80. In this case, both of the *prima facie* prongs are satisfied. First, there can be no doubt that the arbitration agreements are compatible as they are identical reproductions of one another. Second, as the Secretariat's Guide to ICC Arbitration describes, "*the existence of identical arbitration agreements may be a prima facie indication that the parties have consented to the arbitrations being heard together.*" Given Bariven's unqualified consent to Article 9 of the ICC Rules, a separate express consent after-the-fact is not required. The Tribunal may further infer from the Secretary General's silence on the matter that the *prima facie* test is met and no further consent is necessary.

81. Having met the threshold to determine whether the 29 separate claims *may* be heard together in a single arbitration, Surpass submits that the Tribunal should exercise the discretion provided it under Articles 9 and 6(5) of the ICC Rules to admit all 29 claims arising from the Purchase Orders in this arbitration because, as Bariven has acknowledged repeatedly in this arbitration, the claims under the Purchase Orders involve common issues of law and fact. By way of a non-exhaustive illustration, these claims involve the same two parties, under Purchase Orders concluded through the same regulated bidding process, with the same payment terms,[4] incorporating either of the same two T&Cs that include the same relevant article on "*PRICE AND PAYMENT TERMS*",[5] under the same governing law, using the same arbitration clauses, under the same governmental cooperation Programme, and within the same industry.

82. Groups of contracts like the Purchase Orders just described "*show, in view of the contractual set-up and economic context, an intention of the parties when concluding the contracts and the arbitration agreements to allow for the determination of the claims in a single arbitration.*"

Thus, there is no reason why "*all disputes, controversies and claims arising out of, involving, or relating to*" the Purchase Orders should not be heard together before this Tribunal and in this proceeding.

---

[4] With the exception of PO 5100111750; Purchase Order Nos. 5100099339 and 5100099340 ("*Payable immediately Due net*"); and Purchase Order Nos. 5400004251, 5400004253 and 5400004276 ("*Only PDVSA services Inc.*"), all payment terms are "*net 30 days*".

[5] See Article 4, Exhibit C-40; Article 4, Exhibit C-41.

83. Article 25 of the T&Cs provide that the Purchase Orders are governed by and construed in accordance with the laws of The Netherlands. Pursuant to Article 1(1)(b) CISG, the CISG is the applicable law for international contracts for sales of goods "when the rules of private international law lead to the application of the law of a Contracting State". Since the parties have chosen Dutch law and The Netherlands is a Contracting State to the CISG, the CISG is the substantive law applicable to the legal relationship between Surpass and Bariven.

84. With regard to the **Counterclaim, Surpass** submits that only counterclaims arising from the Purchase Orders are admissible. It submits as its understanding that Bariven wishes to include claims for damages in its counterclaim arising from purchase orders "*not at issue in Surpass' Request for Arbitration*". However, under the *lex arbitri*, counterclaims are only admissible if and to the extent that they are based on the same arbitration agreement(s) as the principal claims. While the *lex arbitri* is silent as to the scope of admissible multi-contract claims such as those submitted in accordance with Article 9 ICC Rules, the DCCP does expressly regulate the admissible scope of counterclaims. Article 1038c DCCP governs the admissibility of counterclaims in arbitral proceedings in The Netherlands. In particular, Article 1038c(1) provides:

> *"A counterclaim is admissible if the same arbitration agreement on which the claim is based also applies to that counterclaim, or if that same arbitration agreement is expressly or tacitly declared applicable by the parties."*

Put differently, claims must actually counter against principal claims under the same arbitration agreement in order to qualify as counterclaims, otherwise they are in fact standalone claims that must be submitted as principal claims in their own arbitration(s).

85. According to the Dutch legislator, all articles of the Dutch Arbitration Act are mandatory law unless the article states otherwise, *i.e.* permits the parties to otherwise agree. Article 1038c(1) DCCP is such an article of mandatory law. In contrast with Article 1038c(2), which allows the parties to agree otherwise, Article 1038c(1) provides no such opt out. Instead, it describes the manner by which parties may comply with its requirement of applicability of "*same arbitration agreement*". In this case, that requirement is not met under Bariven's proposed counterclaim.

86. As expressly recognized by Bariven in its Answer and Counterclaim and again in the ToR, Surpass' claims under the Purchase Orders are premised on 29 separate, standalone contracts, which each include a separate, individual arbitration agreement incorporating the ICC Rules. That each arbitration agreement is included by reference to one of two sets of T&Cs is of no relevance to the analysis.

87. The 29 separate arbitration agreements do not meet the definition of "*that same arbitration agreement*" under Article 1038c(1) DCCP just because the same words are used. By that logic, every contract with an arbitration agreement using a particular arbitral institution's model clause would provide the basis for an admissible counterclaim under Dutch law. Such an interpretation would, without question, defeat the entire purpose of Article 1038c DCCP, and it is doubtful that even Bariven would argue such an outcome. Rather, each of the Purchase Orders is a standalone contract with its own offer and acceptance, and the inclusion of standard terms and conditions is governed by the provisions of the CISG on contract formation. It is for this reason that Surpass invoked Article 9 of the ICC Rules when it set forth its principal claims.

88. For the avoidance of doubt, Surpass states that it does not now and has never previously consented to the applicability or extension of any of the 29 arbitration agreements contained in the Purchase Orders to cover claims arising from other purchase orders. Nor, as it has steadfastly maintained the individual integrity of the 29 Purchase Orders as separate contracts including by the invocation of Article 9 of the ICC Rules, has Surpass tacitly consented. Bariven's counterclaims must be based on the arbitration agreements applicable to Surpass' claims.

89. It is clear that, to the extent Bariven's counterclaim seeks damages arising under purchase orders expressly "*not at issue in Surpass' Request for Arbitration*" and, therefore, arbitration agreements not already at issue, the purported 'counterclaim' is not a counterclaim at all. It consists of standalone claims, which, pursuant to the mandatory provisions Article 1038c(1) DCCP, are inadmissible in this arbitration.

90. On the **merits**, Surpass submits that Article 25 of the T&Cs provide that the Purchase Orders are governed by and construed in accordance with the laws of The Netherlands. Pursuant to Article 1(1)(b) CISG, the CISG is the applicable law for international contracts for sales of goods "*when the rules of private international law lead to the application of the law of a Contracting State*". Since the parties have chosen Dutch law and the Netherlands is a Contracting State to the CISG, the CISG is the substantive law applicable to the legal relationship between Surpass and Bariven.

91. Once accepted, the Purchase Orders and incorporated T&Cs formed the terms of the Parties' agreements. In sales of goods transactions governed by the CISG, the primary obligation of the seller is to deliver the goods in accordance with the terms of the contract and the CISG, while the primary obligations of the buyer are to "pay the price for the goods and take delivery of them as required by the contract and [the CISG]".

92. With regard to the delivery of the Equipment, the Purchase Orders provide, inter alia, that the primary obligation of Surpass was to deliver the goods according to the

various delivery terms contained in the Purchase Orders, a table of which is appended as Exhibit C-57.

93. According to Article 4(II) of the T&Cs, Surpass also was to "issue invoices only upon delivery of all of the [Equipment] to Buyer".

94. It is not in dispute between the Parties that Surpass correctly delivered the Equipment in accordance with the various delivery terms contained in the Purchase Orders. Indeed, Bariven has not even raised the issue. It is further not in dispute between the Parties that Surpass correctly issued its invoices. All relevant invoices have been received and approved by Bariven. Such approval is further evidenced by the repeated reference of Bariven's CEO to these outstanding amounts as "debts" in the minutes of the 27 January 2016 meeting between him and Vice President of Surpass, Mr. Chen Jinshuang.

95. The Purchase Orders and incorporated T&Cs provide, inter alia, that the primary obligations of Bariven were to accept delivery according to the various delivery terms contained in the Purchase Orders, and to pay the relevant purchase price "within thirty (30) days of receipt of correct and conforming Vendor invoice at Agent's offices." It is not in dispute between the Parties that Bariven took delivery of the Equipment.

96. With regard to Purchase Order 5100111750, Surpass submits that, under Article 71 CISG, "A party may suspend the performance of its obligations if (. . .) it becomes apparent that the other party will not perform a substantial part of its obligations as a result of a serious deficiency in his ability to perform or in his creditworthiness; or his conduct in preparing to perform or in performing the contract." This is particularly true if the non-performance is a pre-requisite to counter-performance.

97. Surpass has suspended its delivery of the Trucks under PO5100111750 because Bariven's obligation under PO5100111750 required it to pay the 70% balance on the Trucks before delivery. Until Bariven has fulfilled its payment obligation, the Trucks remain in storage at a third party facility. Surpass has incurred storage costs of USD 30.00 per truck per month, i.e. USD 3,000.00 per month, during the period from Bariven's failure to pay on 29 November 2015 and 16 January 2016 until today, which costs are further set out Paragraphs 10.4 to 10.8.

98. By failing to fulfil its multiple obligations to pay the purchase price, Bariven has breached the Parties' agreement pursuant to Article 61(1) CISG.

99. Bariven has repeatedly acknowledged the outstanding payments owed to Surpass over the course of at least the 13 months from December 2015 through December 2016. Beginning in December 2015, Bariven sent at least three emails indicating the approval of payment to Surpass under invoices issued in accordance with the Purchase

Orders. On 2 December 2015, Ms. Ana Diaz, an Accounts Payable Analyst at Bariven's Dutch purchasing agent PDVSA Services, confirmed "Your invoice was approved and sent to Venezuela for payment. (. . .) once payment is made we will notify you." Then on 15 January 2016, Ms. Diaz again confirmed by email that "Your invoice was approved and sent to Venezuela for payment." Finally, on 22 November 2016, just one day before Surpass filed its RfA, Ms. Diaz responded to a Surpass email inquiring into the status of payment by stating "We don't have yet any confirmation of payment." In other words, Ms. Diaz did not contest the validity of the invoice or the request for payment. She certainly did not mention anything about possible corruption. Instead, she confirmed that payment was outstanding.

100. Both before and after Ms. Diaz's final email in November of2016, high level officials from Bariven and then later Bariven's parent, PDVSA, all acknowledged the outstanding payments owed to Surpass expressly as debts.

- Bariven's CEO on 27 January 2016:

> Mr. Francisco Jiménez stated that they will assess the different scenarios that will allow the future payment of the debt incurred by PDVSA in favor of Poly Surpass.
>
> Mr. Francisco Jiménez states that he will take the steps to pay the debts of Poly Surpass and carry out the relevant consultations in order to be able to use the financing mechanisms of the Chinese Fund (. . .).
>
> Mr. Francisco Jiménez recognized the support provided by Surpass and the need to maintain the timely supply of spare parts to ensure the operational continuity of the fleet and, in this sense, commented that PDVSA will make its best effort to maintain the payment of the debts.

- PDVSA's CFO, Mrs. Ana Maria España Girardi, on 2 February 2016:

> [Mrs. España] stated that she would support us in giving priority to these amounts due when the new phase of the Chinese fund began.
>
> Mrs. España gave thanks for Poly Surpass' support and is thankful for having a strategic partner like Poly Surpass. At the same time, she expressed her concern about PDVSA not being able to make the outstanding payments to Poly Surpass on time.

- PDVSA's Executive Director of Treasury, Mr. Waldemar Negrín Piñero, on 8 December 2016, two weeks after the filing of the RfA:

Mr. Waldemar Negrin responded that he would convey the requirements of the [Joint Subcommittee] and the proposal to his superior directors, besides expressed his confidence that the two companies could find a practicable way to solve the debts problems.

101. Both parties expressed their satisfaction for the execution of the contracts between SURPASS COMERCIAL CORP., LTD, SURPASS (HONG KONG) CORP., LTD, wholly owned subsidiaries of CHINA POLY GROUP, and PDVSA, for the purchase of heavy duty trucks, fuel tanks and vehicle spare parts, LPG pressure tanks, petroleum tubes and steel coil, as well as the good disposition of both parties in finding solutions which permit both firms to resolve the actual debts situation and continue also deepen the cooperation between the two sides.

102. Mr. Waldemar Negrin manifested that he would communicate with the Commerce and Supply Direction, PDVSA GAS and PDVSA Servicios Petroleros about the debts solution with POLY SURPASS, in order to find a practicable way.

103. It is not in dispute between the Parties that despite this acknowledgment and subsequent reminders and demands, Bariven has not remitted payment for the outstanding invoice amounts. Surpass delivered the Equipment according to the terms of the Purchase Orders.

104. However, Bariven has failed to comply with its obligations under the Parties' agreements to pay the purchase price of all delivered Equipment and for the Trucks awaiting shipment. Surpass therefore respectfully requests that the Tribunal order Bariven to pay the purchase price for the Equipment, with the accrued interest, pursuant to Article 61(1)(b) CISG in conjunction with either Article 62 CISG or Article 74 CISG. Both grounds support Surpass' claim, as Bariven is held to pay the purchase price pursuant to Article 62 CISG, or to reimburse Surpass pursuant to Article 74 CISG for the losses suffered as a direct consequence of Bariven's breach, which include the purchase price and the accrued interest.

105. Pursuant to Article 78 CISG in conjunction with Article 4 of the T&Cs, interest is due on the purchase price from the dates as set out in Exhibit 57, i.e. the day after the lapse of the payment term from the date of receipt of the invoice. Absent a provision in the CISG on the applicable interest rate, Article 7(2) CISG requires this matter to be resolved according to the applicable national law, i.e. Dutch law pursuant to Article 25 of the T&Cs. Accordingly, the statutory commercial interest rate provided by Article 6:119a Dutch Civil Code ("DCC") applies, as it concerns a commercial agreement *(handelsovereenkomst)*. Should the Tribunal decide otherwise, the statutory interest rate provided by Article 6:119 DCC applies.

106. Surpass made additional storage costs in order to preserve the Trucks under PO5100111750. These costs are recoverable under Article 85 CISG. That Article

requires a seller to take all reasonable steps in the relevant circumstances to preserve the goods for the buyer, if the buyer is in delay in taking delivery of the goods or if the buyer fails to pay the purchase price of these goods. The CISG does not regulate for what period the seller has to continue to take the reasonable measures in order to preserve the goods.

107. Article 87 CISG further grants the seller the right to store the goods in a warehouse of a third person at the expense of the other party, provided that the expense incurred is not unreasonable. Given the purchase price of PO5100111750, storage costs at a rate of only USD 30.00 per truck per month are entirely reasonable. Bariven has not given any indication that it would not purchase the trucks, so Surpass had the obligation to maintain and preserve the trucks in order to meet its (future) obligations for the delivery of the trucks. Indeed, ongoing negotiations from January 2016 show Bariven to remain keenly interested in the Trucks. The decision to incur storage costs must also be judged at the time the decision was made, rather than with perfect hindsight given Bariven's continued non-performance.

108. Furthermore, Surpass could not have taken reasonable measures to resell the Trucks, as evidenced by the minutes of the meeting of 27 January 2016 between Surpass' Vice President and Bariven's CEO, where it was stated that:

- Mr. Chen Jingshuang added that the trucks are exclusively designed in accordance with the transport legislation and the conditions of use in Venezuela, which means that they cannot be resold to other clients.

109. For this reason, Article 88 CISG is inapplicable.

110. The overall costs and other efforts that Surpass would have to take in order to sell the Trucks exceed the requirement of reasonable measures. A party bound to preserve the goods is not obliged to sell the goods at any cost. It has to make only a best effort to find a reasonable opportunity to sell, if one such exists. The duty to mitigate damages furthermore does not require extraordinary effort, but only reasonable measures in the circumstances.

111. In addition to the above, Surpass claims reimbursement of the costs, expenses and attorneys' fees and disbursements incurred in this arbitration pursuant to Article 37 of the ICC Rules. Surpass respectfully requests that the Tribunal grant it the opportunity to substantiate its costs before the Tribunal renders its decision on costs.

112. Surpass expressly reserves the right to expand, amend, or complete its position as set forth above during the course of these proceedings.

113. With regard to Bariven's earlier allegations on corruption, Surpass submitted that these are baseless. There is no evidence substantiating these allegations. There is no

reason to annul the contracts. If they are annulled, Surpass is entitled to compensation.

Submissions by Bariven

114. **Bariven**, in its **Statement of Defence and Counterclaim**, maintained its position as well.

115. With regard to the jurisdictional issues, Bariven noted that Surpass agreed that the Tribunal has no jurisdiction on Houston Claims, because of a selection clause for another form. It added however that 25 of the 39 purchase orders at issue in Surpass' claim contain precisely such a forum selection clause. Eleven[6] of those 25 purchase orders are governed by the Terms and Conditions of Bariven's subsidiary in Houston, Texas: PDVSA Services, Inc. ("**PSI**"). PSI's applicable Terms and Conditions provide:

> "*The Order shall be governed by and interpreted in accordance with the laws of the state of Texas, United States of America* without regard to its conflict of law rules or the application of the United Nations Convention on Contracts for the International Sale of Goods. The Parties agree that ***the exclusive jurisdiction for all disputes arising from or related to the Order shall be the applicable State and Federal courts of Harris County, Texas***."[7]

116. The remaining 14 purchase orders are all governed by a 1 January 2015 Blanket Purchase Agreement entered between Bariven and Surpass that contains an almost identical forum selection clause. These 14 Purchase Orders contain the same instruction just referred to:

> "*INSTRUCTION:*
> *Unless covered by a Blanket Purchase Agreement,* ***this purchase order is subject to the present standard BARIVEN, S.A. c/a PDVSA Services, Inc. Terms and Conditions*** *which are already in your possession.* In the event that you do not have the above mentioned Terms and Conditions, please advise us. Otherwise,

---

6 These are purchase orders No. 5100110689 (**C-30**); 5100115421 (**C-31**); 5100116241 (**C-32**); 5100118091 (**C-33**); 5100118162 (**C-34**); 5100118163 (**C-35**); 5100121990 (**C-36**); 5100122004 (**C-37**); 5100122114 (**C-38**); 5400004464 (**C-39**); and 5400003102 (**C-29**). These ten purchase orders provide (emphasis added):

"INSTRUCTION:

Unless covered by a Blanket Purchase Agreement, **this purchase order is subject to the present standard BARIVEN, S.A. c/a PDVSA Services, Inc. Terms and Conditions** which are already in your possession. In the event that you do not have the above mentioned Terms and Conditions, please advise us. Otherwise, acceptance of this purchase order signifies your acknowledgement, understanding, and acceptance of said Terms and Conditions."

7 PDVSA Services, Inc.'s Terms and Conditions for Goods Purchases (emphasis added), **RE-13**.

acceptance of this purchase order signifies your acknowledgement, understanding, and acceptance of said Terms and Conditions."

117. If an order is covered by a Blanket Purchase Agreement or interactive agreement, the Terms and Conditions of the applicable Agreement (number) mentioned on the item(s) of this purchase order apply to this document."[8]

118. Pursuant to the Blanket Purchase Agreement (the "**BPA**"), Bariven agreed to purchase from Surpass up to USD $131 million in vehicle spare parts.[9] The BPA, which had a two-year duration, called for the issuance of purchase orders to Surpass through non-competitive processes for the acquisition of the materials covered in the agreement.[10] The following provisions of the Blanket Purchase Agreement are here relevant:

"1. Finance Consideration and Overriding Character of this Blanket Agreement

1.2 Unless otherwise agreed to by both parties in writing, ***this Blanket Agreement shall apply to all Purchase Orders and other documents of purchase (hereinafter collectively referred to as "Releases") which Purchaser may place with Seller for Products after the effective date of this Blanket Agreement.*** The Terms of the Conditions of this Blanket Agreement shall apply to any Release, whether or not this Blanket Agreement or its terms and conditions are expressly referenced in the Release.

1.3 *Unless otherwise agreed to by both parties in writing for a specific transaction, no inconsistent or additional term or condition in any Release shall be applicable to a transaction within the scope of this Blanket Agreement.* Special provisions as set forth in Article 3 herein, as agreed to by both parties, shall be applicable only to specific transactions.

1.4 Purchaser and Seller agree to use reasonable efforts to place a legend on each Release within the scope of this Blanket Agreement substantially as follows: "Subject to the provisions of Blanket Purchase Order Agreement No. 4620004815. Nevertheless, the terms of this blanket Agreement shall apply to a Release regardless of whether any such legend shall have been printed on any

---

8 Purchase orders No. 5400003396, p. 27 (**C-15**); No. 5400003398, p. 43 (**C-16**); No. 5400003399, p. 29 (**C-17**); No. 5400003403, p. 51 (**C-18**); No. 5400003404, p. 36 (**C-19**); No. 5400003453, p. 28 (**C-20**); No. 5400003458, p. 29 (**C-21**); No. 5400003459, p. 30 (**C-22**); No. 5400003461, p. 33 (**C-23**); No. 5400003463, p. 34 (**C-24**); No. 5400003464, p. 37 (**C-25**); No. 5400004251, p. 42 (**C-26**); No. 5400004253, p. 74 (**C-27**); and No. 5400004276, p. 43 (**C-28**).

9 Section 1.1, Blanket Purchase Agreement, 1 January 2015, **RE-14**.

10 Bariven acquires materials through two separate procurement methods: through a *competitive* process where numerous providers submit bids or through a *non-competitive* process where contracts are awarded to a specific provider. The *competitive* procurement process is the preferred method.

Release.
(...)

4.1 Releases – General

a. Releases will normally be limited to Products listed in Addendum "A"; however, some Releases may be made for Products or services handled by the Seller which are not shown in Addendum "A"."

119. Thus, under the above provisions, a purchase order is governed by the BPA if it is placed with Surpass "*after the effective date of this Blanket Agreement [1 January 2015]*." The 14 referenced purchase orders were placed with Surpass after 1 January 2015 and are all governed by the BPA. These 14 purchase orders are described in the following table[11]:

Purchase Orders Governed by the Blanket Purchase Agreement				
PO Number		**PO Date**	**PO Amount in USD**	**Exhibit Number**
1	5400003396	16 January 2015	$1,889,681.55	C-15
2	5400003398	16 January 2015	$1,545,702.26	C-16
3	5400003399	16 January 2015	$1,107,650.09	C-17
4	5400003403	16 January 2015	$1,960,873.64	C-18
5	5400003404	16 January 2015	$1,825,139.71	C-19
6	5400003453	27 January 2015	$2,168,877.28	C-20
7	5400003458	28 January 2015	$2,208,898.99	C-21
8	5400003459	28 January 2015	$1,354,938.99	C-22
9	5400003461	28 January 2015	$1,672,826.10	C-23
10	5400003463	28 January 2015	$324,731.71	C-24
11	5400003464	28 January 2015	$1,564,941.92	C-25
12	5400004251	14 August 2015	$3,779,150.94	C-26
13	5400004253	14 August 2015	$1,672,482.04	C-27
14	5400004276	25 August 2015	$10,253,131.45	C-28
		Total in USD	$33,329,026.67	

[11] Statement of Defense and Counterclaim, par. 18.

120. Additionally, while not required under the BPA, these 14 purchase orders all: (*i*) pertain to vehicle spare parts covered under Addendum A to the agreement; and (*ii*) explicitly reference the BPA.

121. Surpass and Bariven further agreed in the BPA that its provisions are to govern over any inconsistent terms and conditions, including those contained in individual purchase orders. Section 4.22 of the BPA states:

> "[I]n the event of any conflict, *the Terms and Conditions of this Blanket Agreement* ***shall take precedence over any terms and conditions appearing in any Release [defined as a Purchase Order]***. Any delivery of Products or performance of services by Seller shall be deemed ***acceptance by Seller of the terms and conditions set out in this Blanket Agreement.***"

122. As with all other Houston Purchase Orders, Surpass and Bariven agreed to resolve disputes arising under the BPA (and purchase orders governed by it) before the courts in Houston, Harris County, Texas and subject to Texas law. Section 4.21 of the BPA provides in this respect:

> "4.21 Applicable Law and Jurisdiction
>
> The definition of terms used, interpretation or construction of this Blanket Agreement and any Release thereof, and the rights of the parties hereunder shall be ***interpreted, construed, and governed by the laws of the state of Texas. Venue of actions hereunder is stipulated in Houston, Harris County, Texas.***"

123. In sum, the BPA sets forth the terms and conditions that govern the above-described 14 purchase orders, and all other purchase orders issued under it. These terms and conditions govern, among other things:

- How disputes should be resolved—through litigation in court in Houston, Texas, not through ICC arbitration.

- Where disputes should be resolved—in "*Houston, Harris County, Texas*," not in The Hague.

- The law under which disputes should be resolved—"*the law of the state of Texas*," not Dutch law.

124. Accordingly, the Tribunal does not have jurisdiction over the above-mentioned 14 purchase orders. Surpass' claims under those 14 purchase orders must, like its claims under all other Houston Purchase Orders, be dismissed.

125. Moreover, Bariven submitted that, aside from the absence of consent to arbitrate claims arising under the BPA, the distinct provisions of that agreement also render impossible

Surpass' efforts to decide in a single arbitration claims arising under the 14 purchase orders subject to it and those arising under the remaining 14 purchase orders governed by Bariven's 2009 and 2014 Terms and Conditions. The BPA contains a host of provisions that differ materially from, and in some cases are not even contained in, Bariven's 2009 and 2014 Terms and Condition, including those pertaining to, among others: (*i*) the chosen dispute resolution mechanism; (*ii*) the chosen venue for disputes; (*iii*) the governing law; (*iv*) the prices of the materials offered and payment conditions; (*v*) the right to audit Surpass' records; and (*vi*) the obligation to provide free training to personnel designated by Bariven.

126. The BPA's more onerous provisions result from the fact that it was a separate, stand-alone transaction that did not follow Bariven's standard competitive bidding process. The terms and conditions governing the 14 purchase orders under the BPA are incompatible with the terms and conditions governing the remaining 14 purchase orders.

127. Bariven notes that Surpass has never disclosed to the Tribunal (or to the ICC Secretariat at the time it initiated this arbitration) the existence of the BPA, or the fact that it contains a forum selection clause assigning jurisdiction to the courts in "*Houston, Harris County, Texas*." This seems to be a trend with Surpass. Of the 39 purchase orders included in its Request for Arbitration, Bariven now knows that only 14 contain arbitration clauses and are governed by Dutch law, the rest do not contain either provision. Bariven will seek an award on costs against Surpass for its claims under the 25 Houston Purchase Orders over which the Tribunal lacks jurisdiction.

128. Further, the Tribunal does not have jurisdiction to decide in a single arbitration claims arising from separate, distinct agreements. Surpass seeks to bootstrap into this arbitration claims arising under separate, distinct agreements. That can only be done with the consent of Surpass and Bariven, which consent is not present. Under the ICC Rules, parties must give their consent to bring into a single arbitration claims arising under separate agreements. The ICC Secretariat explains:

> "***Article 9's cross-reference to Articles 6(3)-6(4) is essential to its operation.*** It ensures that Article 9 is ***not used as a jurisdictional*** or contractual basis for hearing together in a single arbitration claims made under more than one arbitration agreement ***where there is no consent***."

129. In favour of this position Bariven argues that this has been ratified by numerous authors. Gary Born explains that whether claims arising out of different arbitration agreements can be heard in a single arbitration "*is a question of parties' intent.*" It is insufficient that parties may have agreed to arbitration under separate contracts. For such claims to be decided in a single arbitration, the parties must have agreed to do precisely that. As the ICC Secretariat reasons: "*it might very well be that each of the parties is bound by one of the arbitration agreements,* ***but that the parties are not bound to arbitrate with each***

other or together in a single arbitration. " For claims arising out of different arbitration agreements, that consent could be contained, for example, in an "*umbrella agreement.*"

130. With respect to the 14 separate procurement contracts that contain ICC arbitration clauses, there is no such umbrella agreement evincing the Parties' consent to decide in a single arbitration claims arising under separate purchase orders. To the contrary, since the commencement of this arbitration, Bariven has made clear that it does not consent to resolving disputes arising under numerous purchase orders in a single arbitration. While Bariven extended to Surpass a conditional offer to decide in a single arbitration claims arising under numerous purchase orders, Surpass rejected that offer, and it is no longer open for acceptance.

131. Seeking to sidestep the need to establish consent to decide multiple claims in a single arbitration, Surpass raises four flawed arguments.

First, Surpass argues that its claims under multiple purchase orders are "*admissible*" under Article 9 of the ICC Rules. Surpass is wrong. For claims to be "*admissible,*" the Tribunal must first have jurisdiction over those claims.

This results from the express language of Articles 6 and 9 of the ICC Rules. Article 9 states that its applicability is "*subject to Article 6(3)-6(7)*" of the ICC Rules. Article 6(3) in turn makes clear that, unless the Secretary General refers the matter to the ICC Court for its decision (which did not occur here), any issue of jurisdiction *shall* be decided by the Tribunal. Article 6(3) states (emphasis added):

> "[I]f any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or ***concerning whether all of the claims made in the arbitration may be determined together in a single arbitration***, the arbitration shall proceed and ***any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal***, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)."

Second, contrary to Surpass' suggestion, the Tribunal's mandate to establish jurisdiction through consent under Article 6(3) is not subject to the lower threshold of Article 6(4) of the ICC Rules. Article 6(4) applies only to *prima facie* determinations made by the ICC Court. And *par force* the two factors set forth in Article 6(4) are relevant only in respect of that *prima facie* determination by the ICC Court.

The ICC Court's *prima facie* determination is not binding on the arbitral Tribunal, which has to engage in a plenary review under Article 6(3) to determine whether it has jurisdiction based on the existence of the Parties' consent to arbitrate. Article 6(4) says just that: "*[t]he Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.*"

Third, even if Article 6(4) of the ICC Rules provided the standard to be applied by this Tribunal in establishing the existence of consent—it does not—Surpass still has no case. Article 6(4) requires ***both*** the Parties' consent *and* that the different arbitration agreements be compatible.

Surpass rests its case almost entirely on the issue of compatibility, ignoring altogether the requirement of consent. It argues the similarities between the purchase orders, its Terms and Conditions, and the alleged common "*contractual set-up and economic context*" in which they were awarded. Whether or not all that is true—it is not—is legally irrelevant. Again, there must exist consent, and the alleged commonality Surpass advances, even if true, does not equate consent.

But, even on the issue of commonality, Surpass loses because that commonality extends to ***all*** purchase orders containing similar terms and conditions between the Parties—not just to the 14 purchase orders handpicked by Surpass.

The commonality that Surpass advances, however, is negated by the very process through which Bariven awards purchase orders to providers. Over a period of several years, Surpass received numerous purchase orders. Some contained arbitration clauses and others contained forum selection clauses referring disputes to courts in "*Houston, Harris County, Texas*." The separate and distinct nature of each purchase order is a function of how Bariven conducts its business—a fact that is understood and accepted by its providers, Surpass included. A purchase order is issued at the conclusion of each procurement process, after Bariven and its subsidiaries, PSI and PSBV, identify from a list of potential providers the one best fitted to supply the material. As a result, purchase orders are not linked to each other, and do not follow a predetermined order or a particular pattern displaying a single economic transaction or contractual relationship. To the contrary, a provider that receives a purchase order has no guarantee of recurring business. As a result, each purchase order is a standalone contract containing the parties' bargain for that particular transaction. Importantly, Surpass itself acknowledges the separate nature of the distinct purchase orders and the absence of consent to resolve in a single arbitration claims arising under more than one purchase order.

Additionally, there is no assurance that a purchase order will be subject to a particular (or the same) set of Terms and Conditions. That is a function of: (*i*) when the purchase order is placed, as Bariven and its subsidiaries, PSI and PSBV, periodically update the Terms and Conditions; and (*ii*) where the purchase is placed. Usually, although not necessarily, purchase orders resulting from procurement processes administered by PSBV contain arbitration clauses, whereas those resulting from processes administered by PSI contain forum selection clauses referring disputes to the courts in Houston, Texas. The providers have no input on any of these factors.

Given the disparate nature, scope, timing, and terms of Bariven's purchase orders, all of which are set unilaterally by Bariven, it cannot be argued that the Parties had some form

of understanding that concomitantly expressed an intention to resolve a number of claims arising from multiple purchase orders in a single arbitration proceeding.

This conclusion is buttressed by the fact that, whenever Bariven and its providers desire for ostensibly separate purchase orders to be part of a single, global transaction, and thus governed by the same terms and conditions (including dispute resolution), they expressly provide for that in writing. That was precisely the case for those purchase orders covered by the BPA between Bariven and Surpass. Currently, Bariven has some 100 similar blanket purchase agreements with other providers, mostly manufacturers, including General Electric and Siemens.

Alternatively, to the extent there is sufficient commonality to infer consent with respect to the 14 purchase orders at issue in Surpass' claim, this conclusion must logically extend to *all* purchase orders between Bariven and Surpass that share the common factors set out by Surpass in paragraph 5.9 of its Statement of Claim. Thus, to the extent Surpass argues the existence of consent to resolve in a single arbitration its claims arising under 14 purchase orders, that same consent is present with respect to the additional purchase orders at issue in Bariven's Counterclaim.

Fourth, Surpass' reference to Article 1046 DCCP is a red herring. That article applies to the consolidation of separate arbitrations with a common subject matter. Here, there exists only this arbitration and the issue of consolidation is not before the Tribunal.[12]

132. The truth of the matter is that there simply has been no consent from either Party to resolve their respective claims in a single arbitration. Without that consent, the Tribunal's jurisdiction is limited to deciding Surpass' claim under one of the 14 purchase orders in its claim that contains an arbitration clause, and Bariven's counterclaim arising under that same purchase order. In this respect, Bariven accepts Surpass' offer to arbitrate its claim under purchase order number 5100099339 dated 28 June 2012.

133. For ease of reference, the table below identifies the 39 purchase orders included in Surpass' Request for Arbitration, organized into those subject to an ICC clause and those subject to the jurisdiction of Texas courts.

[12] Under the ICC Rules, the consolidation of two or more arbitrations is governed by Article 10. That article clarifies that it "*does not include situations where claims have been brought in a single arbitration under more than one contract or more than one arbitration agreement.*"

POs with ICC Clause and Governed by Dutch law	**POs Subject to the Jurisdiction of Houston, Texas courts and Governed by Texas law**	
Subject to PSBV's Terms and Conditions	*Governed by the BPA*	*Subject to PSI's Terms and Conditions:*
1. 5100093799 (**C-1**)	1. 5400003396 (**C-15**)	1. 5100110689 (**C-30**)
2. 5100099339 (**C-2**)	2. 5400003398 (**C-16**)	2. 5100115421 (**C-31**)
3. 5100099340 (**C-3**)	3. 5400003399 (**C-17**)	3. 5100116241 (**C-32**)
4. 5100108462 (**C-4**)	4. 5400003403 (**C-18**)	4. 5100118091 (**C-33**)
5. 5100111750 (**C-5**)	5. 5400003404 (**C-19**)	5. 5100118162 (**C-34**)
6. 5100114292 (**C-6**)	6. 5400003453 (**C-20**)	6. 5100118163 (**C-35**)
7. 5400002306 (**C-7**)	7. 5400003458 (**C-21**)	7. 5100121990 (**C-36**)
8. 5400002467 (**C-8**)	8. 5400003459 (**C-22**)	8. 5100122004 (**C-37**)
9. 5400002639 (**C-9**)	9. 5400003461 (**C-23**)	9. 5100122114 (**C-38**)
10. 5400002640 (**C-10**)	10. 5400003463 (**C-24**)	10. 5400004464 (**C-39**)
11. 5400002687 (**C-11**)	11. 5400003464 (**C-25**)	11. 5400003102 (**C-29**)
12. 5400002689 (**C-12**)	12. 5400004251 (**C-26**)	
13. 5400002746 (**C-13**)	13. 5400004253 (**C-27**)	
14. 5400003155 (**C-14**)	14. 5400004276 (**C-28**)	

134. With regard to its **Counterclaim, Bariven** submits that subject to the jurisdictional objections asserted above, Bariven's Counterclaim relates to the 14 purchase orders at issue in Surpass' claim that contain an ICC arbitration clause and 50 additional purchase orders[13] that: (*i*) Bariven already paid to Surpass; and (*ii*) are governed by the same Terms and Conditions as the 14 purchase orders at issue in Surpass' claim that contain an ICC arbitration clause. If the Tribunal decides to hear in a single arbitration all 14 purchase

[13] List of Counterclaim Purchase Orders, **RE-66**; ZIP Folder of All Counterclaim Purchase Orders, **RE-48**.

orders at issue in Surpass' claims that contain an ICC arbitration clause, it must also decide the purchase orders at issue in Bariven's Counterclaim.

135. With respect to the six Purchase Orders that are at issue both in Surpass' claims and in Bariven's Counterclaim, Surpass cannot contest this Tribunal's jurisdiction. Damage incurred by Bariven pursuant to Surpass' corrupt and fraudulent scheme is unambiguously a "*dispute[], controvers[y] and claim[] arising out of, involving, or relating to the Order*" and thus within the scope of the same arbitration agreements invoked by Surpass. Nor is consolidation of the claims and counterclaims arising under those purchase orders improper.

136. Surpass does, however, contest this Tribunal's jurisdiction over the remaining purchase orders comprising Bariven's Counterclaim—*i.e.*, those involving a purchase order *other than* the 14 asserted in Surpass' claims that contain ICC arbitration clauses. Surpass adduces in this respect that such counterclaims are inadmissible under Article 1038c(1) of the Dutch Code of Civil Proceedings. As discussed above, this argument is wrong.

137. On the **merits**, Bariven submits that, even if this Tribunal would have jurisdiction, Bariven has no obligation under any of the Purchase Orders as they were all secured, by Surpass, from Bariven through corrupt and fraudulent means, including paying of bribes and the conferring of other things of value to former rogue employees of Bariven. Surpass, according to Bariven, had a close association with Mr. Rincón.

138. Prior to its association with Mr. Rincón, Surpass had received no business from Bariven and was not even a registered vendor. That all changed in the summer of 2010 when Surpass appointed Ottavio Cautilli (**"Mr. Cautilli"**), then a 31-year-old recent graduate with little to no experience in the industry, as its "contact person" and representative before Bariven. Mr. Cautilli just so happened to be Mr. Rincón's son-in-law (he married Mr. Rincón's daughter), employee and business associate. Only four months after, Surpass received its first procurement contract, and, eventually, receiving 94 procurement contracts for approximately USD $435 million over a little more than three years.

139. Mr. Cautilli's appointment as Surpass' representative had no commercial justification. Mr. Cautilli had little to no experience in the field, and there is no evidence that he had a prior relationship with Surpass, was knowledgeable of Surpass' products, maintained an office in China, or spoke the language. His only real asset was being Mr. Rincón's son-in-law and employee.

140. Surpass also dealt directly with Mr. Rincón and his many companies. As is discussed below, Mr. Rincón communicated with Bariven on Surpass' behalf and submitted documents needed to conclude a USD $131 million procurement contract for Surpass. Mr. Rincón's companies also acted, before and after Surpass became a registered vendor with Bariven, as "Venezuela agency" and "local agent" for Surpass. Further, Mr. Rincón's brother-in-law, Humberto Bravo, acted as "contact person" in Venezuela for

goods sold by Surpass, and another of Mr. Rincón's entities was identified as "exporter" for goods sold by Surpass.

141. Yet there is more. In order to induce Bariven into awarding it procurement contracts, Surpass misrepresented its relationship with the manufacturers of the goods it sold. Surpass submitted a letter to Bariven purporting to be from one such manufacturer that stated: "[i]n 2010, we assigned the SURPASS (HONG KONG) CORP., LIMITED, CHINA POLY GROUP as our sole authorized SINOTRUCK spare parts distribution agent in Venezuela." The manufacturer, however, recently informed Bariven that:

> *"SINOTRUK group and SINOTRUK (HONG KONG) Limited Company have received the report from our lawyer* ***that someone counterfeit official authorized letter to pretend as SINOTRUK sole authorized spare parts agent in Venezuela.*** *Presently, the law and audit department of SINOTRUK group is taking legal action to this issue[.]"* (SoD 6)

142. The existence of Mr. Rincón's corrupt criminal scheme is not in dispute. Mr. Rincón has pled guilty to just that, and so have eight of his criminal co-conspirators. Nor is Mr. Rincón's modus operandi in dispute. He has admitted that as well. He said in Houston that he and others acting on his behalf offered and paid bribes to rogue employees of Bariven so that they would "do and omit to do acts in violation of the lawful duty of such" employees, including assisting companies associated with Mr. Rincón and others in "obtaining and retaining business . . . in violation of the Foreign Corrupt Practices Act."

143. The criminal conspiracy extended from "at least 2009 and continu[ed] through at least 2014," the very same time-period covering all the purchase orders issued to Surpass.

144. In the face of these facts, Surpass seeks to present this dispute as a simple breach-of-contract case. The evidence clearly shows that it is not. It is fundamentally a case about admitted illegal conduct and contracts that were procured and obtained through bribery, corruption, and fraud. Conduct that vitiates any remedy, contractual or equitable, that Surpass would otherwise be entitled to under law.

145. More in particular, Bariven argues that the facts in this case show that Surpass actively relied on Mr. Rincón, his companies, and his family members to solicit, secure, and retain procurement contracts from Bariven. Those contracts bear the hallmarks of Mr. Rincón's criminal conspiracy.

146. Mr. Rincón admitted to criminal conspiracy and corruption scheme. After being charged by the U.S. Government on 10 December 2015 with having led a criminal conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), among other U.S. federal criminal statutes, on 16 June 2016, Mr. Rincón entered a plea of guilty to three crimes, including the crimes of violating the FCPA and conspiring with others to violate the FCPA. His sentencing is currently scheduled for 8 February 2018.

147. The terms of Mr. Rincón's guilty plea are sealed to the public, but are known to him and his family members, including his son-in-law and business partner Mr. Ottavio Cautilli. Mr. Rincón's plea of guilty is recorded in the Houston District Court's docket entry No. 65 for his case, which reads:

> *"Minute Entry for proceedings held before Judge Gray H Miller: ARRAIGNMENT as to Roberto Enrique Rincón-Fernandez (1) regarding Counts 1s,2s,3s held on 6/16/2016. RE-ARRAIGNMENT held on 6/16/2016. Roberto Enrique Rincón-Fernandez (1) waived the reading of the Criminal Information and pled guilty to Counts 1s,2s,3s. Waiver of Indictment executed and entered. Sealed plea agreement executed and entered."*

148. This entry states that Mr. Rincón plead guilty to "Counts 1s, 2s, 3s" of the "Criminal Information" filed in his case. That Criminal Information is public and has been submitted in this arbitration as RE-3. Count 1 pertains to the crime of criminal conspiracy to violate the FCPA and is set out in paragraphs 1 through 84 of the Criminal Information—whose content and veracity Mr. Rincón has admitted.

149. As part of his plea deal with the U.S. Government, Mr. Rincón admitted to being part of a criminal conspiracy "[b]eginning in at least 2009 and continuing through at least 2014:"

> *"The purpose of [which] was for RINCÓN . . . and [his] co-conspirators, to enrich themselves by obtaining and retaining lucrative energy contracts with PDVSA [Bariven] through corrupt and fraudulent means, including by paying bribes to PDVSA [Bariven] officials."*

150. He acknowledged that he offered and paid those bribes for the purpose of:

> *"(i) influencing acts and decisions of such foreign official in his official capacity; (ii) inducing such foreign official to do and omit to do acts in violation of the lawful duty of such official; (iii) securing an improper advantage; and (iv) inducing such foreign official to use his influence with a foreign government and agencies and instrumentalities thereof to affect and influence acts and decisions of such government and agencies and instrumentalities[.]"*

151. He admitted that, through those bribes, he bought assistance for his and his co-conspirator's *"and their U.S. companies in obtaining and retaining business for and with, and directing business to Rincón ... [his] companies, and others."*

152. But that was not all. He further acknowledged that he paid bribes to subvert Bariven's bidding and procurement process and did so through the following "manner and means"—i.e., his modus operandi. His corrupt actions were for the purpose of, among other things:

"a. assisting RINCON's . . . companies in winning [Bariven] contracts;

b. providing RINCON . . . with inside information concerning the [Bariven] bidding process;

c. placing one or more of RINCON's . . . companies on certain bidding panels for [Bariven] projects;

d. helping to conceal the fact that RINCON ... controlled more than one of the companies on certain bidding panels for [Bariven] projects;

e. supporting RINCON's . . . companies before an internal [Bariven] purchasing committee;

f. preventing interference with the selection of RINCON's . . . companies for [Bariven] contracts;

g. updating and modifying contract documents, including change orders to [Bariven] contracts awarded to RINCON's . . . companies;

h. assisting RINCON's . . . companies in receiving payment for previously awarded PDVSA contracts, including by requesting payment priority for projects involving RINCON's . . . companies."

153. Lastly, Mr. Rincón acknowledged that he did all of this in order to defraud Bariven into awarding companies associated with him procurement contracts. As stated above, he admitted that the purpose of the conspiracy was "to enrich [himself and his co-conspirators] by obtaining and retaining lucrative energy contracts with [Bariven] through corrupt and fraudulent means." Further in this respect, the Grand Jury found probable cause that he:

> "[...] devise[d] and intend[ed] to devise a scheme or artifice **to defraud [Bariven] . . . and for obtaining money and property from [Bariven] . . . by means of materially false and fraudulent pretenses, representations, and promises**[.]"

154. Mr. Rincón was not alone in doing all of this. From the bribe-paying side, at least nine other individuals acted in concert with him. This includes the following five named individuals—all of whom have plead guilty and have admitted the facts underlying the criminal conspiracy:

- **Mr. Shiera**, a Venezuelan national, who owns and controls numerous entities that received procurement contracts from Bariven through the payment of bribes and other corrupt means.

- **Mr. Juán José Hernández Comerma ("Mr. Hernández")**, who was "an employee of SHIERA, including serving as the general manager of Shiera Company 3" and who later became Mr. Shiera's "business partner."
- **Mr. Moisés Abraham Millán Escobar ("Mr. Millán")**, who was an "independent contractor" for Mr. Shiera and "acted as an agent" for companies owned by both Messrs. Rincón and Shiera.
- **Mr. Charles Quintard Beech, III ("Mr. Beech")**, who owns and controls numerous entities that received procurement contracts from Bariven through the payment of bribes and other corrupt means.
- **Mr. Fernando Ardila-Rueda ("Mr. Ardila")**, who "was a business partner" of Mr. Shiera and a "minority owner" in Mr. Shiera's companies, and who approached former rogue Bariven employees to secure contracts for both Messrs. Rincón's and Shiera's companies.

155. And the following four yet-to-be-named individuals:

- ***"Associate 1"*** in Mr. Rincón's Information, who is a U.S. lawful permanent resident and "a relative of RINCON, who controlled, along with RINCON, several of the U.S. companies controlled by RINCON."
- ***"Associate 2"*** in Mr. Rincón's Information, who is a "Venezuelan national who maintained a residence in Texas" and was "employed by, or worked as an independent contractor for, SHIERA and assisted both RINCON and SHIERA in their business operations, including by assisting RINCON and SHIERA and their companies."
- ***"Accountant 1"*** in Mr. Ardila's Information, who "worked as an accountant for Shiera's companies" and communicated with Mr. Ardila and others about bribes paid as part of the criminal conspiracy involving Messrs. Rincón and Shiera.
- ***"Accountant 2"*** in Mr. Ardila's Information, who "worked as an accountant for Shiera's companies" and communicated with Mr. Ardila and others about the payment of bribes and regarding the list they kept of bribes paid, to which they referred as "Schindler's List."

156. The facts underlying Mr. Rincón's criminal conspiracy, including his payment of bribes and their intended purpose, have also been admitted by the bribe recipients—the rogue ex-Bariven employees who accepted the bribes. To date, the U.S. Government, undoubtedly with Mr. Rincón's and the other defendants' cooperation, have identified eight ex-employees as bribe recipients: "Foreign Officials" A through H. This includes the following four named individuals—three of whom have plead guilty and have admitted the facts underlying the criminal conspiracy:

- **Mr. Christian Javier Maldonado-Barillas ("Mr. Maldonado")**, whom Bariven believes is referred to in the Indictment as "Foreign Official B" and who was employed by Bariven and PSI in several "positions related to purchasing, including serving as purchasing analyst."

- **Mr. José Luis Ramos-Castillo ("Mr. Ramos")**, whom Bariven believes is referred to in the Indictment as "Foreign Official C" and who was employed by Bariven and PSI in a "number of positions related to purchasing, including purchasing manager and superintendent of purchasing."

- **Mr. Alfonso Eliezer Graviña-Muñoz ("Mr. Graviña")**, whom Bariven believes is referred to in the Indictment as "Foreign Official E" and who was employed by Bariven and PSI in "a number of positions related to the purchase of energy services equipment and services, including purchasing manager."

- **Mr. César David Rincón Godoy ("Mr. Rincón-Godoy")**, who was arrested in Spain on 27 October 2017 at the request of the U.S. Government and is being sought in extradition to the U.S. for being part of Mr. Rincón's criminal conspiracy. Mr. Rincón-Godoy is a former General Manager for Bariven.

157. There are also five yet-to-be-named Foreign Officials: A, D, F, G, and H.

158. The U.S. Government has indicated that its investigation is ongoing. Accordingly, the individuals named above (collectively, the "Houston Defendants") are by no means all of the defendants who have been or will be charged in connection with this criminal conspiracy. There may be other individuals and entities that have been criminally charged, but whose charging documents may currently be under seal. The U.S. Government has also indicated that there are more yet-to-be-named Bariven vendors, and persons associated with them, involved in the criminal conspiracy. Bariven expects that additional persons will be charged in the near future.

159. Additionally, the facts described below establish that, in perpetrating his scheme, Mr. Rincón was assisted by many more people, including immediate and removed family members.

160. In sum, Mr. Rincón's and his co-conspirators' admissions and other statements made in Federal Court in Houston establish that:

- Mr. Rincón engaged in a criminal conspiracy from at least 2009 through at least 2014 to defraud Bariven.

- The purpose of the conspiracy was to illegally and fraudulently obtain procurement contracts and payments from Bariven through the payment of bribes to certain Bariven ex-employees.

- The beneficiaries of those procurement contracts were companies associated with Mr. Rincón and others.

- Surpass' contracts fit squarely within the admitted facts of Mr. Rincón's criminal conspiracy. While egregious in their own right, the aforementioned facts are only part of the story—the part that has been made public and only a portion of what Mr. Rincón plead guilty to in consideration for his plea deal with the Government. The full story, particularly as it pertains to Surpass' association with Mr. Rincón, rests with Surpass, whom benefited from these corruption induced-contracts, and Messrs. Cautilli and Rincón, among others.

- The contracts at issue in this arbitration were obtained as part of Mr. Rincón's criminal conspiracy.

161. As has been admitted in Houston, Mr. Rincón's criminal conspiracy was not limited to companies directly owned by him, it also extended to companies nominally owned by others and companies associated with him. Surpass falls in the latter category.

162. Surpass registered as a vendor with Bariven on 14 July 2010, while Mr. Rincón's criminal conspiracy was in full swing. In its registration application filed with Bariven, Surpass identified Mr. Cautilli as its "*contact person.*"

163. At the time, Mr. Cautilli was a ***31-year-old*** recent engineering graduate with little to no experience, who happened to be married to Mr. Rincón's daughter, Alexandra Carolina Rincón, and who worked for Mr. Rincón. Surpass insinuates in its Statement of Claim that it appointed Mr. Cautilli as its "*salesperson and/or outside sales consultant*" on account of his own merit and not because of his relationship to Mr. Rincón. The facts prove otherwise.

164. Mr. Cautilli is from the city of Maracaibo, Venezuela, the same city from where Mr. Rincón and his family hail. Mr. Cautilli was pursuing a degree in civil engineering in April 2007 from a university in Maracaibo. Little more than a year later, in 2008, Mr. Cautilli relocated to Houston, Texas and on 15 November 2008 married Mr. Rincón's daughter Alexandra Carolina. A few months before marrying into the family and less than one year after completing his final project for purposes of his engineering degree, Mr. Cautilli bought a USD $810,020 home next to Mr. Rincón's own multi-million dollar home in the affluent Houston neighborhood of The Woodlands.

165. Mr. Cautilli then began working for Mr. Rincón and his companies. By way of example, on 29 November 2008, Mr. Rincón identified Mr. Cautilli as part of the management of one of his flagship companies and a Bariven vendor: Tradequip Services & Marine, Inc. ("**Tradequip**"). Tradequip is not just any company, it was the main corporate vehicle through which Mr. Rincón perpetrated his criminal conspiracy. It alone received USD $305 million in procurement contracts from Bariven during Mr. Rincón's criminal

conspiracy. Mr. Cautilli was also involved with Ovarb Industrial, LLC and Reliable Process & Instruments, LLC, which were used by Mr. Rincón to perpetrate his criminal scheme.

166. Mr. Cautilli's involvement in Mr. Rincón's business follows a familiar trend. Mr. Rincón actively involved his family in his criminal enterprise and positioned them strategically. For example, Mr. Rincón's:

- Oldest son José Roberto is a Director and holds important management positions in at least seven entities associated with Mr. Rincón and that conducted business with Bariven.

- Daughter Alexandra Carolina is second Vice-President in Tradequip, C.A., a Rincón entity incorporated in Venezuela and that provides services domestically.

- Son Ricardo Rincón was a Managing Member of Northland Automation & Services LLC, another Bariven vendor. Messrs. Rincón, Shiera, and Ardila were Managing Members as well.

- Brother José Gregorio Rincón Fernández incorporated Venmar, Inc., also a Bariven vendor.

- Sister-in-law Daphne Herrera (José Gregorio's wife), was the President of Oilsource, Inc., another Bariven vendor.

- Maternal uncle Freddie Ramón Fernández Montiel is a Director in Petroleum Procurement of Houston, LLC, another Bariven vendor.

- Bothers-in-law Hernán and Humberto Bravo Zambrano incorporated Wells Ultimate Service, LLC and are behind the trust that nominally owns that entity.

167. It is against this backdrop that Mr. Cautilli was appointed as Surpass' "*contact person*" with Bariven and then became "*salesperson and/or outside sales consultant.*" At the time, Mr. Cautilli's knowledge and involvement in the oil and gas supply business was limited to his relationship with and work for his father-in-law, Mr. Rincón. There is no evidence of Mr. Cautilli's prior relationship with Surpass, or of his knowledge of the goods that Surpass sold to Bariven, or that he maintained an office in China, or that he even spoke the language. In short, there is no commercial justification for Surpass' appointment and use of Mr. Cautilli's services—except for his relationship with Mr. Rincón.

168. Despite all of this, in the summer of 2010, Surpass entrusted Mr. Cautilli—then a 31-year old Houston resident with scant experience—with negotiating and securing multi-million dollar procurement contracts from Bariven. Mr. Cautilli certainly did not disappoint. Shortly after his appointment as Surpass' "*contact person,*" Surpass began receiving

procurement contracts from Bariven. The first contract was awarded on 19 October 2010, and ultimately Surpass received 94 separate procurement contracts, totaling some USD $435 million.

169. At the same time that Mr. Cautilli was acting as Surpass' representative, he continued to work for Mr. Rincón.

170. Mr. Cautilli also suspiciously incorporated two other entities that shared the same name as Surpass: Surpass Commercial Corp. Limited, a Hong Kong entity incorporated and managed by Mr. Cautilli from October 2010 until June 2017; and Surpass Industrial, LLC, a Texas entity incorporated on 20 February 2015 and managed by Mr. Cautilli. Surpass argues that those entities were incorporated for the purpose of "*deploy[ing] post-sales service in Venezuela*" in connection with the goods that Surpass was supplying to Bariven and that the Hong Kong entity was closed because the costs associated with maintaining an office in Hong Kong "***apparently** made the project . . . financially nonviable.*"

171. These are lawyer arguments made for purposes of this arbitration, and no evidence has been put forth in their support. If these entities were intended for legitimate business, then why was there not a Chinese representative in their management? That would have been consistent with the manner in which Surpass claims it conducted business with Mr. Cautilli: *"[w]here Mr. Cautilli was involved in the contracting process with Bariven . . . Mr. Cautilli was **always assisted** by Surpass' Vice President, Mr. Chen Jingshuang.*" Instead, Mr. Cautilli is listed as the Hong Kong entity's *sole* Director and Mr. Rincón's son, José Roberto, signs the Articles of Incorporation as a witness.

172. Surpass also fails to explain why separate companies were needed to provide these "*post-sales service in Venezuela*" (that could have been done through Surpass' own corporate platform—after all, it was the seller of the goods) and how those services were to be provided concurrently from Hong Kong and from a Houston residential address belonging to a "***charming 3 bedroom, 2.5 bathroom home***." Additionally, Surpass already had a Hong Kong subsidiary through which it invoiced Bariven, Surpass (Hong Kong) Commercial Corp. Ltd. It could just as easily have used that existing entity, which would have avoided the need for Mr. Cautilli to incorporate yet another Surpass entity in Hong Kong.

173. But Surpass' relationship was not limited to Mr. Cautilli. It had direct dealings with Mr. Rincón. Indeed, even before it became a registered vendor with Bariven, Surpass was already working with Mr. Rincón in anticipation of future contracts with Bariven. A 24 June 2010 inspection report prepared by Tuboscope Vetco, GmbH on pipes manufactured in China by Shougang Qianann Iron & Steel Co., and that were being offered in sale by Surpass, states:

> "***TRADEEQUIP C.A is the Venezuela Agency of Poly group Surpass Company***, they will respond of claim immediately and staff will arrive at Venezuela scene in 15 days."

174. As was described above, Tradequip, C.A. was Mr. Rincón's entity in Venezuela, in which his son José Roberto and daughter Alexandra Carolina were, respectively, First and Second Vice-Presidents.

175. Importantly, on 23 July 2010, a little less than a month after the inspection report was issued, Surpass was selected by Mr. Maldonado, one of the rogue ex-Bariven employees who pled guilty in Houston, to participate in a 'competitive' bidding process for pipes needed by Bariven. Unsurprisingly, on 19 October 2010, Surpass was awarded the contract for the very same pipes that had been inspected in June 2010 and in respect of which Tradequip, C.A. was the "*Venezuela Agency of Poly group Surpass Company*."

176. The ties between Surpass and Mr. Rincón continued to grow in the years that followed. For example, a bill of lading dated 20 November 2012 and related to purchase order number 5100103283 (at issue in Bariven's counterclaim) identifies Mr. Rincón's Tradequip Services and Marine Inc. as the "*exporter*" for Surpass.

177. Similarly, other shipping documents dated 23 April 2013 relating to the largest purchase order awarded to Surpass (purchase order number 5100100963 for USD $169,848,814.00) identified the exporter as: "*YANGZHOU CIMC TONGHUA SPECIAL VEHICLES CO., LTD.* ***VIA Tradequip Services & Marine Inc.***" The shipping documents for this purchase order further identified another of Mr. Rincón's Venezuelan entities, Tradequip C.A., and his brother-in-law Humberto Bravo as "*local agent*" and "*contact person*," respectively.

178. At the same time that Mr. Rincón and his companies were working together with Surpass and acting as their "*agents*," they were also appearing as purported competing bidders in Bariven procurement processes. It was all a sham to give the appearance of legitimacy.

179. The following examples of this "bidding panel stacking" are instructive and particularly egregious. In June 2012, the same exact bidding panel was used in two separate procurement processes, where four of the seven vendors included in those two panels were related to the Houston Defendants. The table below shows the bidding panels for purchase orders number 5100099340 for USD $25,349,700 and 5100099339 for USD $4,875,100, both dated 28 June 2012.

Exact vendor bidding panel for two PO's	Vendor relationship
Surpass Commercial Corp. Limited (Claimant)	Mr. Rincón
Goals, LLC	Mr. Rincón
Epsilon Drilling Services	Mr. Rincón
Premiere Procurement Group, LLC	Mr. Rincón
Campanarello Investments, LTD	
China Great Wall Computer	
Nakasawa Mining & Energy, LTD	

180. The same thing happened with procurement processes conducted in March and November 2012. For those two unrelated procurement processes the exact bidding panel was used, and six of the ten vendors included in those two panels were related to the Houston Defendants. The table below shows the bidding panels for purchase orders number 5100096686 for USD $117,762.52, dated 12 March 2012, and 5100103242 for USD $3,712,005.02, dated 14 November 2012.

Exact vendor bidding panel for two PO's	Vendor relationship
Surpass Commercial Corp. Limited (Claimant)	Mr. Rincón
Poly Technologies, Inc.	Surpass / Mr. Rincón
ISS Industrial Sourcing Services	Mr. Shiera
PROTEA Sp. z o.o.	Mr. Rincón
Premiere Procurement Group, LLC	Mr. Rincón
Control & Applications Emirates	Messrs. Shiera and Ardila
Ashburton International Supply, Soc	
Servimeca Industrial, SAS	
GSL Limited	
Energreen, S.A.	

181. Notably, this last panel included both Surpass and Poly Technologies, Inc., which Surpass claims as one of its parent companies. It is highly irregular that Surpass was competing with its own parent company and part owner in at least two procurement processes.

182. And there is more. On 13 August 2013, Mr. Rincón personally e-mailed another former rogue employee of Bariven in connection with Surpass' second biggest procurement contract to date: the USD $131 million BPA. Through that e-mail Mr. Rincón submitted on Surpass' behalf copy of a purported distribution letter from the manufacturer of the vehicle spare parts covered by the BPA confirming that Surpass was its "*authorized distributor [for those] spare parts for three years in . . . Venezuela.*"

183. In that email, Mr. Rincón copied his son José Roberto and son-in-law Mr. Cautilli (at his Surpass e-mail address). The e-mail reads:

From:	roberto@tradequip-ve.com
To:	JOSE ORLANDO CAMACHO <camachojo@psi.pdv.com>
Cc:	Ottavio Cautilli <cautilli@surpasscorp.com>, rjrincon@tradequipsm.com, jrincon@tradequipsm.com
Sent:	August 14, 2013 9:27:27 AM EST
Received:	August 14, 2013 9:40:48 AM EST
Attachments:	Certif.cate Sinotruck.pdf, untitled, untitled

José buenos dias, anexo la carta oficial de SINOTRUCK para el convenio de las partes de los Camiones HOWO A7

Saludos

TRADEQUIP, C.A.
Roberto E. Rincon
e-mail:roberto@tradequip-ve.com
Móvil: 0414-3619040/0416-6611402
Teléf. oficina: 0261-7650665/0414-3616515
Fax: 0261-7650032 / 0261-7654030
Usa Phone +1-954-646-4111 / +1-281-751 7154
Web site:www.tradequip-ve.com <www.tradequip-ve.com>

184. Bariven asks the Tribunal to pause here and consider the implications of this e-mail. If, as Surpass claims, it had nothing to do with Mr. Rincón, then why was Mr. Rincón submitting copy of a document needed to finalize Surpass' second largest procurement contract with Bariven? Why didn't Surpass submit that document itself? And why did Mr. Rincón have a copy of that document to begin with? The answer to these questions is simple: because Mr. Rincón was personally involved and instrumental in securing Bariven business for Surpass.

185. The above facts establish a direct working relationship between Surpass and Mr. Rincón that exceeded the ministerial role Surpass now seeks to assign to Mr. Cautilli. This is not a case about "*guilty by association*," as Surpass would have the Tribunal believe. It is a case about a purposeful direct association with Mr. Rincón and his criminal cohorts.

186. Further, Surpass submitted a forged letter to Bariven to secure procurement contracts.[14] Bariven purchases goods through two alternative procurement methods: a *competitive* process, where numerous providers submit competing bids, and a *non-competitive* process, where contracts are awarded to a specific provider. The competitive procurement process is the preferred method. The non-competitive procurement process is the exception. It is employed in case of emergency or where materials are available from a single provider, such as the manufacturer or an exclusive distributor.

187. For at least 25 of the procurement contracts at issue in Surpass' claim, Surpass acted to avoid a competitive bidding process. It achieved that by misrepresenting its condition as the alleged *exclusive distributor* of goods it sought to sell to Bariven. Surpass submitted a letter to Bariven purporting to be from the manufacturer of those goods, which stated:

14 Forged Letter from Sinotruk (Hong Kong) Limited Parts Sales Department, 23 March 2015, **RE-58**.

> In 2010, we assigned the SURPASS (HONG KONG) CORP., LIMITED, CHINA POLY GROUP as our ***sole authorized SINOTRUK spare parts distribution agent in Venezuela.***

188. On 13 August 2015, Surpass again wrote to Bariven reiterating its claim as the exclusive distributor of Sinotruk for Venezuela. In an e-mail written by Santiago Varela Gandica, a Maracaibo, Venezuela resident, associated with Messrs. Cautilli and Rincón, Surpass stated:

> "***Surpass never renounce[d] the exclusive rights to the Venezuelan Market*** of spare parts, in the attachment below you can find the last communication from Sinotruk Spare parts Center ***supporting Surpass as the exclusive supplier*** of spare parts in accordance to the contract executed with PDVSA to supply such spare parts.
> We urge you to please expedite the procurement process of spare parts, and not delay any further this process, which are urgently needed to support our fleet of products in Venezuela. In our meeting, [w]e just mentioned the situation in which *Sinotruk Import and Export Company is involved with PDVSA PCP for irregularities that have been committed solely by them*, in which Surpass has nothing to do with this situation and will continue to support and provide products and quality services to PDVSA like in the last 6 years."

189. Surpass' claim of exclusive distributorship was false and the letter it submitted to Bariven from Sinotruk was a forgery. Sinotruk itself confirmed that. Sinotruk wrote to Bariven's agent, PSI explaining the following:

> "1. SINOTRUK group . . . never assigned or authorized SURPASS (HONG KONG) CORP, LIMITED, CHINA POLY GROUP as SINOTRUK sole spare parts distribution agent in Venezuela . . .
>
> 2. SINOTRUK ***only authorized SINOTRUK Import & Export Company** as **official spare parts provider in international market including Venezuela***, and only SINOTRUK Import & Export Company has right to authorize third party as official spare parts agent in international market . . .
>
> 3. Mr. Wu Hai who is the president of SINOTRUK American division is the officially authorized representative who is responsible for SINOTRUK's sales and after sales business in the whole South America, including Venezuela.
>
> 4. SINOTRUK group and SINOTRUK (HONG KONG) Limited Company have received the report from our lawyer that ***someone counterfeit official authorized letter to pretend as SINOTRUK sole authorized spare parts agent in Venezuela***. Presently, the law and audit department of SINOTRUK group is taking legal action to this issue[.]"

190. Contrary to Surpass' misrepresentations to Bariven and this Tribunal, the above shows, among other things, that Surpass never was Sinotruk's exclusive distributor.

191. The Purchase Orders are void because they are vitiated by the said corruption. In the alternative, the Purchase Orders are voidable under the Dutch Civil Code: fraud under section 3:44 and error under section 6:228. Equally transnational public policy and mandatory laws preclude Surpass' Claims under vitiated Purchase Orders. The result under US law and Venezuelan law would not be different from the consequences under Dutch law. Bariven deals extensively with these issues. Bariven cannot make payment on Surpass' illegal contracts and Surpass must return all ill-gotten gains under Bariven's Counterclaim, under the applicable laws.

192. Bariven further explains that neither the CISG, nor the provisions of the DCC invoked by Surpass, change these conclusions.

193. As a special matter, Bariven disputes that Surpass is entitled to storage costs uncured in connection with Purchase Order no. 5100111750.

194. Surpass claims storage costs of USD $3,000 a month from 16 January 2017 to the date of full payment allegedly incurred in connection with purchase order No. 5100111750 for the sale of trucks. This claim fails for several reasons. First, because it was procured through corruption, this purchase order is null and void ab initio or subject to annulment. As such, no payment is owed under it. On the contrary, Surpass must reimburse Bariven for the USD $5,609,235 advance payment Bariven made under that purchase order, with interest.

Second, storage costs are expressly excluded by the PSBV Terms and Conditions that govern that purchase order. Article 13 thereof states: "Vendor and Buyer shall not be liable to each other for incidental or consequential damages or loss of profit in connection with the Order." Surpass' storage costs are unequivocally incidental or consequential damages, as CISG case law and commentary recognize, and thus fall within the exclusion clause in Article 13 of the Terms and Conditions.

Third, Surpass has failed to mitigate its losses, as required by Article 77 of the CISG should it apply. In its Statement of Claim, Surpass attempts to reason away this failure without success. It begins by offering the contradictory positions that (i) the trucks could not be resold and (ii) then admits they could conceivably be resold, but only with unreasonable and disproportionate effort. In making this argument, Surpass leans heavily on a self-serving and terse commercial statement allegedly made by its Vice-President, Mr. Chen Jingshuang and noted in internal corporate meeting minutes. It fails to submit Mr. Chen Jingshuang as a witness in this arbitration. More fundamentally, it fails to establish that he is correct in his purported belief that the trucks could not be resold. Surpass can and should have done more. It in fact concedes that, as a matter of law, "[i]t has to make . . . a best effort to find a reasonable opportunity to sell, if one such

exists." Surpass makes no attempt to show that it sought out such opportunities to sell, and accordingly failed to mitigate its damages.

195. With regard to the **merits** of its Counterclaim, Bariven submits that the corrupt scheme in which Surpass is complicit was designed to defraud Bariven by obtaining procurement contracts through illicit and fraudulent means. As described above, Surpass was a vehicle for that fraudulent scheme orchestrated by its representatives, including Messrs. Rincón and Cautilli. Bariven seeks to recover damages suffered as a result of Surpass' fraudulent conduct.

196. Subject to the jurisdictional objections asserted above, Bariven's Counterclaim relates to the 14 purchase orders at issue in Surpass' claim that contain an ICC arbitration clause and 50 additional purchase orders that: (i) Bariven already paid to Surpass; and (ii) are governed by the same Terms and Conditions as the 14 purchase orders at issue in Surpass' claim that contain an ICC arbitration clause.

197. As discussed above, Surpass is required by law to return to Bariven the ill-gotten gains it received under the already-paid, corruption-induced contracts. Dutch law, as confirmed in the Staal decision, entitles Bariven to full reimbursement of all sums paid to Surpass pursuant to the contracts that are subject to the Counterclaim. Such a result is fully consistent with the transnational public policy identified above.

198. If, in the alternative, the contracts are not deemed void ab initio or voidable, then Surpass is in breach of Articles 4, 13, and 17 of the Terms and Conditions governing each of its contracts with Bariven, and has committed an unlawful act vis-à-vis Bariven (in Dutch: *'onrechtmatige daad'*) on the basis of which Surpass is required to return to Bariven the ill-gotten gains that it received under the already-paid, corruption induced contracts.

199. With regard to the applicable interest rate, Bariven submits that the DCC provides that the statutory commercial interest rate in Section 6:119a applies to commercial agreements. Alternatively, if the Tribunal finds that rate to be inapplicable, then Section 6:119 of the DCC should apply.

200. With respect to the six Purchase Orders that are at issue both in Surpass' claims and in Bariven's Counterclaim, **Bariven** submits that Surpass cannot contest this Tribunal's jurisdiction. Damage incurred by Bariven pursuant to Surpass' corrupt and fraudulent scheme is unambiguously a "*dispute[], controvers[y] and claim[] arising out of, involving, or relating to the Order*" and thus within the scope of the same arbitration agreements invoked by Surpass. Nor is consolidation of the claims and counterclaims arising under those purchase orders improper.

201. Surpass does, however, contest this Tribunal's jurisdiction over the remaining purchase orders comprising Bariven's Counterclaim—*i.e.*, those involving a purchase order *other than* the 14 asserted in Surpass' claims that contain ICC arbitration clauses. Surpass

adduces in this respect that such counterclaims are inadmissible under Article 1038c(1) of the Dutch Code of Civil Proceedings. As discussed above, this argument is wrong.

Submissions by Surpass

202. Surpass maintains its position in its **Reply and Defence on the Counterclaim**. It reiterates that this Tribunal has the jurisdiction to hear claims submitted by Surpass that are subject to a valid ICC arbitration clause. The consent which Bariven now complains was never given, was – as is basic and uncontroversial arbitration doctrine – provided at the time the contracts were concluded. Under the ICC Rules, that jurisdiction includes Article 9 of the ICC Rules, which grants the Tribunal the jurisdiction to decide whether "*claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.*" Thus, the Tribunal has the jurisdictional discretion to decide whether the Parties either impliedly or expressly consented – at the time of the conclusion of their contracts – to the possibility that an entire principal claim in relation to multiple purchase orders, whether as either Surpass or Bariven as Surpass) may be heard in a single arbitration proceeding.

203. It submits that Bariven continues to erroneously raise the issue related to ten purchase orders which Surpass submitted in its Request for Arbitration with an explicit offer to proceed to arbitration despite those purchase orders not being subject to a valid (ICC) arbitration agreement, which would have constituted a valid post-dispute submission to arbitration. After Bariven did not consent to the offer to arbitrate in its Answer, Surpass did not further raise the claim in its Statement of Claim. Yet, Bariven raises the issue again in its Statement of Defense, even threatening to seek a cost award as it would pertain to these 'claims'. As is abundantly clear, there is no merit to Bariven's complaints regarding these purchase orders and the complaints should be disregarded.

204. Surpass has become aware that three of the twenty-nine Claim Purchase Orders[15], namely Purchase Order No. 5400004251, No. 5400004253, and No. 5400004276, were issued to Surpass subject to Blanket Purchase Agreement no. 4620004815 ("**BPA**") and therefore are not subject to the 2014 T&C and the ICC arbitration clause contained therein. Surpass therefore formally and respectfully withdraws its claims with regard to these three purchase orders, and the updated quantum in the petitum reflects this withdrawal.

205. However, the BPA does not govern any of Surpass' remaining 26 Claim Purchase Orders. Bariven contends that "*[t]wenty-five of the 39 purchase orders at issue in Surpass' claim*" contain forum selection clauses referring to the courts of Harris County, Texas, USA, rather than ICC arbitration seated in The Hague. Of that number, as just described, 10

[15] Exh. C-26, C-27 and C-28.

have never been included in Surpass' Principal Claim and three are now withdrawn. That leaves 26 purchase orders which are the subject of Surpass' claim:

C-1	PO 5100093799	$ 46,144.46	
C-2	PO 5100099339	$ 40,540.00	
C-3	PO 5100099340	$ 143,700.00	
C-4	PO 5100108462	$ 2,506,304.43	
C-5	PO 5100111750	$ 393,652.00 $ 12,694,563.00	
C-6	PO 5100114292	$ 71,706.30	
C-7	PO 5400002306	$ 3,066,108.99	
C-8	PO 5400002467	$ 3,137,667.24	
C-9	PO 5400002639	$ 2,252,255.05	
C-10	PO 5400002640	$ 1,777,781.10 $ 645,660.00	
C-11	PO 5400002687	$ 265,670.00	
C-12	PO 5400002689	$ 761,580.00	
C-13	PO 5400002746	$ 9,972.14	
C-14	PO 5400003155	$ 709,300.00	
C-15	PO 5400003396	$ 1,889,681.55	*
C-16	PO 5400003398	$ 1,545,702.26	*
C-17	PO 5400003399	$ 490,986.02 $ 616,664.07	*
C-18	PO 5400003403	$ 1,960,873.64	*

C-19	PO 5400003404	$ 1,803,520.71 $ 21,619.00	*
C-20	PO 5400003453	$ 2,168,877.28	*
C-21	PO 5400003458	$ 2,208,898.99	*
C-22	PO 5400003459	$ 1,354,938.99	*
C-23	PO 5400003461	$ 1,672,826.10	*
C-24	PO 5400003463	$ 324,731.71	*
C-25	PO 5400003464	$ 1,564,941.92	*
C-26	PO 5400004251 - WITHDRAWN	$ 3,452,696.13 $ 326,454.81	
C-27	PO 5400004253 - WITHDRAWN	$ 676,367.16 $ 875,962.98 $ 33,922.25 $ 1,830.50 $ 28,776.90 $ 33,922.25 $ 21,700.00	
C-28	PO 5400004276 - WITHDRAWN	$ 7,972,432.85 $ 1,969,676.90 $ 311,021.70	
C-29	PO 5400003102	$ 1,746,266.47 $ 3,434.12	
	TOTAL	**$ 47,896,567.54**	

206. Of these 26 Purchase Orders, Bariven contends that 14 purchase orders are governed by the BPA. The three Purchase Orders that have been withdrawn by Surpass are included in these 14 purchase orders, which leaves 11 remaining Claim PO's that Bariven contends are subject to the forum selection clause in the BPA. These Claim PO's have been marked with an asterisk in the schedule above (*).

207. Surpass notes, for the record, that Bariven does not contest the jurisdiction of the Tribunal with regard to the Claim PO's submitted as Exhibits C1-C14, on any ground other than the Tribunal's ability to hear these disputes in a single arbitration.

208. With regard to the purchase orders marked in the above schedule, Bariven submits that, "*a purchase order is governed by the BPA if it is placed with Surpass 'after the effective date of this Blanket Agreement [1 January 2015].'*"

209. In its response to Surpass' production requests, Bariven argued that "*the Parties agreed that the Effective Date or 'date of the latest signature below' is, by the very terms of the BPA, 1 January 2015*", referring to boilerplate language above the signature block that states "*the parties have executed this Blanket Agreement (...) as of date first set forth above.*"

210. Bariven's assumption that the 'effective date' of the contract is the same as the date of the agreement, is, however, fundamentally incorrect.

First, Bariven fails to note that 'effective date' is actually a defined term under the BPA. Instead of saying the effective date is the date listed at the top of the contract, or even simply the date of the contract, Clause 2.1 of the BPA provides:

> *2.1 The effective date of this Blanket Agreement is the date of the latest signature below (the "Effective Date")."*

Thus, a purchase order is only governed by the BPA if it is placed with Surpass after the date of the latest signature.

There can be no mistake that the effective date referred to in Clause 1.2 of the BPA is the same as that defined later in Clause 2.1. Clause 2.2 of the BPA goes on to provide that the term of the BPA does not commence until "*the Effective Date and shall remain in full force and effect for a period of two (2) years, from the Effective Date unless terminated in accordance with the terms and conditions herein in Paragraph 2.3 below.*" In other words, the BPA does not even begin its two-year term until the date of the last signature.

Second, Bariven's argument stands in stark contrast to Bariven's own understanding of the 'effective date', as is evidenced by internal Bariven documents related to the BPA. In particular, Minutes of Purchasing & Contracts Committee Meeting, dated 25 July 2014, states in plain language the understanding Bariven had regarding the Effective Date of the BPA:

. DVSA Services, Inc.

MINUTES OF PURCHASING & CONTRACTS COMMITTEE MEETING

Presented by: Myrna Khaki	**July 25, 2014**
SUPPLIER:	**Surpass Commercial Corp.**
SCOPE/AGREEMENT TYPE:	**Blanket Purchasing Agreement**
EFFECTIVE DATE:	**August, 2014 (from the date it is signed)**
EXPIRATION DATE:	**August, 2016**
ESTIMATED TOTAL VALUE	**US$ 131MM**

This July 2014 document assumes incorrectly that the BPA would have been signed soon thereafter in August 2014. As will be shown below, the parties were still negotiating the BPA in January 2015. However, this July 2014 document shows that Bariven was clear in its understanding: The Effective Date of the BPA is "*from the date it is signed*".

Third, the Parties were still exchanging drafts as late as 14 January 2015.

It was not even until 15 January 2015 that Surpass signed the BPA at Bariven's Houston office (i.e. at the offices of PDVSA Services, Inc.), per the invitation of Ms Khaki. Bariven then couriered the unilaterally signed BPA to Venezuela to have it countersigned and returned on 2 February 2015:

From: <mkhaki@psi.pdv.com>
Date: Mon, Feb 2, 2015 at 2:38 PM
Subject: Re: Contrato - SURPASS
To: Ottavio Cautilli <cautilli@surpasscorp.com>

Estimado Ottavio,
Unicamente para comunicarte que el contrato ya fue firmado y ya estan liberados en SAP para ser usados.
Te envío copia digital para tus records y el cuanto reciba los originales te haré llegar un set para tus archivos.
Saludos,

Myrna C. Khaki
Contracts Administration Lead
PDVSA Services Inc.
1293 Eldridge Pkwy. N-4034
Houston, Texas 77077 USA
Ph. 281-588-6414 - e-Fax 281-588-6369
e-mail: mkhaki@psi.pdv.com

The email reads: "*Only to communicate that the contract has been signed and are already released in SAP to be used. I send you a digital copy for your records and when you receive the originals I will send you a set for your files.*"[16]

211. Hence, the BPA was signed by Bariven on 2 February 2015 and a copy of the signed BPA was sent to Surpass for its records. The Effective Date of the BPA is, therefore, 2 February 2015.

212. Bariven's reference to an email of 19 January 2015 from Mr Varela to Bariven does not support its contention that Surpass understood 1 January 2015 to be the Effective Date of the BPA. First, because the Parties were still negotiating the BPA up to 15 January 2015, when Surpass signed the BPA in Houston for it to then be couriered to Bariven in Venezuela to be countersigned. Second, Mr Varela's email refers to the spare parts agreement "*that we have signed with PDVSA*" (alternatively, "*that we are subscribed with PDVSA*"). Surpass had by that time factually signed the BPA; Bariven had not. Mr Varela's separation of 'we' from 'PDVSA' – under either translation – therefore cannot be construed as unintentional. In view of the chronology of the facts, 'we' could only have referred to Surpass and not to the Parties collectively. It certainly does not mean under any translation that Surpass believed the BPA to be 'executed' as Bariven alleges.[17]

213. In order to settle the dispute over the factual date of Bariven's signature to the BPA, Surpass requested documents from Bariven in this Arbitration. Surpass did not hide the information it was seeking, stating that "*[t]he date of the approval and, in particular, <u>the date of signing of the BPA,</u> is relevant to determining the 'effective date' on which the BPA came into force.*" Yet Bariven did not comply with the Tribunal's order; the latest date on a document Bariven produced in response to this request was 27 October 2014, despite the fact that the Parties were still exchanging drafts three months later.[18]

214. In the absence of Bariven's production of any evidence regarding the actual date of its signature to the BPA, Surpass respectfully requests that the Tribunal take an adverse inference that the BPA was in fact signed on 2 February 2015, the date when the fully executed document was sent to Surpass.

215. For the foregoing reasons, it is clear that the 'Effective Date' of the BPA is, as the term is defined, the date of the last signature. The unrebutted evidence of the date of the last signature is 2 February 2015, and any Claim PO's issued prior to this Effective Date are not governed by the BPA.

---

16 Exhibit C-80, Email attaching BPA 2 February 2015 (unofficial translation).

17 See Bariven's translation of '*suscritos*' into '*executed*' so as to match the boilerplate language it advances as the date of signature. Surpass Redfern Ruling, p.21.

18 See Exhibit **C-78**, Email from O. Cautilli to M. Khaki dated 14 January 2015.

216. Also Purchase Order No. 5400003102 is subject to the T&C included in Bariven's RFQ and Surpass' Offer under the Parties' standard practice.

217. Bariven contends that Claim PO No. 5400003102 is subject to the standard terms and conditions of PDVSA Services, Inc., rather than PDVSA Services, BV and that, therefore, there is no arbitration agreement. Bariven, however, fails to consider the Parties' commercial course of dealing and the practice established between themselves. Such practices are applicable whether the CISG or the Uniform Commercial Code of Texas is applied, and thus should inform the Tribunal's decision as to what terms and conditions are applicable to this Claim PO.

218. Under Article 9(1) of the applicable CISG, "*parties are bound by any usage to which they have agreed and <u>by any practices which they have established between themselves</u>.*" According to the CISG Digest:

> *[P]ractices within the meaning of article 9 CISG are established only between the parties. Practices are conduct that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance.*

219. Numerous courts and arbitral tribunals have applied this Article to the issue of the inclusion of standard terms and conditions.

220. The Parties are thereby bound by established practices which form the basis of their understanding regarding their contracts. Here, as Bariven has pointed out, the Parties have agreed to a course of 94 separate procurement contracts in the form of purchase orders between 2010 and 2015.[19] Some were issued by PDVSA Services, Inc. and subject to terms and conditions with a forum selection clause opting for the courts of Harris County, Texas. Most (i.e. the 76 presently at issue in this Arbitration) were issued by PDVSA Services B.V. and subject to the 2009 T&C or 2014 T&C including an ICC arbitration agreement.

221. However, of those 94 separate purchase orders, only one of which Surpass is aware was made subject to a different set of terms and conditions than the one in both the RFQ and Surpass' Quotation (i.e. the offer). In other words, 93 times an RFQ and quotation were submitted subject to the same terms and conditions, and 93 times the subsequent purchase order was similarly subject to the same terms and conditions. On that basis Surpass is entitled to the good faith belief that Claim PO No. 5400003102 would likewise be subject to the same standard terms as the RFQ and offer.

---

[19] SoD, ¶ 73.

222. Here, the RFQ is made expressly subject to the terms and conditions of PDVSA Services BV.[20] Surpass' Quotation was then submitted to PDVSA Services BV, indicating the understanding of the Parties' and the terms under which the order would be governed.[21] Inexplicably, however, the purchase order itself purports to be issued by PDVSA Services, Inc. and governed by its standard terms and conditions.

223. Given the overlap of employees and dealings between PDVSA Services Inc. and PDVSA Services BV, and the lack of counsel present for the negotiation of these contracts, permitting the use of the terms and conditions would, given the Parties' established practices, enact an arbitrary surprise on Surpass. It would effectively work a bait and switch operation with the effect of depriving Surpass the ability to access its chosen dispute forum according to the offer it submitted to PDVSA Services BV.

224. Consequently, Claim PO No. 5400003102 was subject to the 2009 T&C in accordance with the Parties' established practice, and, therefore, subject to the ICC arbitration agreement contained therein.

225. With regard to the issue of a Single Arbitration, Bariven consented to hearing separate contract disputes resolved in a single arbitration under Article 9 ICC Rules.

226. At a minimum, the Tribunal has the jurisdiction to decide whether Surpass' Principal Claim may be decided in a single arbitration. As Bariven does not challenge the arbitration agreement of at least 14 of Claim PO's, it concedes that it has consented to – at a minimum – 14 valid ICC arbitration agreements. It is furthermore uncontested that none of those arbitration agreements contain any reservation concerning Article 9 of the ICC Rules. Under Article 1020(6) DCCP, Article 9 ICC Rules is thereby "*deemed to form part of that [arbitration] agreement.*"

227. Since the ICC Court has not barred jurisdiction under Article 6(3) ICC Rules, the Tribunal thus – at a minimum – has jurisdictional discretion on the matter. As Surpass has shown, this question applies equally not just to the 14 uncontested Claim PO's but to all 23 of Claim PO's that contain ICC arbitration agreements.

228. Contrary to Bariven's contention, Surpass has never argued the direct application of Article 1046 DCCP, and Bariven even has to repeat earlier Surpass arguments attempting to make the point. Rather, Article 1046 DCCP is offered to show that the operation of Article 9 ICC Rules does not violate any norms of Dutch law. Moreover, Surpass never argued that there is a lower threshold of consent under Article 6(5) of the ICC Rules. Surpass merely submitted that once the *prima facie* test is met, no <u>further</u> consent is

---

[20] **Exhibit C-29.01**, p.9 ("In the event of an order, PDVSA Services, BV, a Dutch Corporation located in The Hague, The Netherlands, will issue the purchase order on behalf of, and for the account of Bariven S.A., Venezuela. Bariven S.A. c/o PDVSA Services, BV Terms and Conditions apply to this request for quotation.").

[21] Exhibit C-29.02, p.1.

necessary. This issue seems to be the only real point on which the Parties apparently disagree. Namely, whether Bariven consented to the possibility of hearing multiple contracts together in a single arbitration.

229. Bariven argues that it never gave consent, yet offers no factual evidence to support the lack of consent other than to say these are separate contracts with separate arbitration agreements. On this point the Parties are in complete agreement; the Claim PO's are each distinct contracts with distinct arbitration agreements. This is the precise reason why Bariven's argument on its Counterclaim fails under Article 1038c(1); however, as for Surpass' Principal Claim, Bariven consented to the ICC Rules, including Article 9, which expressly permits this very type of action.

230. Bariven, however, seems to posit that there is either secondary consent required, or that its consent must be express. In so making these arguments, Bariven fundamentally misses the timing of consent to an arbitration agreement, which is measured at the time of the conclusion of that agreement. If Bariven had any reservation as to the scope of its consent at that time (it did not), then it would have expressed such a reservation against Article 9 ICC Rules, or, alternatively, not entered into a series of contracts with Surpass under the same terms and conditions with identical arbitration agreements under the ICC Rules, which were more often than not issued as batches on the same or overlapping days. Mr Chen Jingshuang, Vice President of Surpass, testified exactly to this effect in his Witness Statement.

231. Bariven offers two quotes, but neither support its position. Quoting first from Gary Born (*"This is a question of the parties' intent..."*), Bariven argues that the parties must have agreed to hear claims arising out of different arbitration agreements in a single arbitration, for instance by concluding an *"umbrella agreement"*. Bariven ignores, however, that the parties, by agreeing to the applicability of the ICC Rules, have expressed their consent to hear multiple claims under multiple arbitration agreements in one arbitration if it makes sense to do so within the factual circumstances of the case.

232. Bariven also refers to the ICC Secretariat for guidance. This quote, however, comes from a paragraph about arbitrations involving more than two parties under Article 6(4)(i) ICC Rules, which explains the quote's otherwise inexplicable reference that *"each of the parties"* being *"bound by one of the arbitration agreements"*. This quote is therefore inapplicable, since the situation is covered by Article 8 ICC Rules rather Article 9 ICC Rules.

233. Bariven's arguments with regard to Article 9 ICC Rules fundamentally misunderstand the concept and timing of consent to an arbitration agreement and therefore fail to rebut the presumption that the Parties agreed to having multiple claims resolved within a single arbitration proceeding. It requests that this arbitration should be limited to only one Purchase Order (No. 5100099339).

234. However, If the Tribunal determines the Parties did not consent under Article 9 ICC Rules, then Purchase Order No. 5100111750 constitutes Surpass' Alternative Principal Claim.

235. Surpass expressly rejects what can only be a counter-offer (i.e. not an acceptance of an offer) by Bariven to limit the present Arbitration only to Claim PO No. 5100099339 dated 28 June 2012. Should the Tribunal determine that its jurisdiction is limited to only one of the Claim PO's, it is not Bariven's prerogative as a Bariven to choose which of the Claim PO's to be at issue. It is a fundamental right of Surpass to pursue its claim in the manner it sees fit, including which claim it chooses to pursue. Bariven may not be permitted to hijack this Arbitration.

236. Strictly as an alternative position, and only if the Tribunal were to determine that it has jurisdiction over just one of the Claim PO's, then Surpass seeks performance of the unpaid amount outstanding under Claim PO No. 5100111750, hereinafter referred to Surpass' "**Alternative Principal Claim**".

237. Consequently, it is clear that Bariven has made no challenge on the merits of Surpass' Principal Claim, instead electing only to challenge the formal validity of the Tribunal's jurisdiction. However, as has been shown, the Effective Date of the BPA is 2 February 2015 and therefore does not govern Surpass' Principal Claim.

238. Article 9 ICC Rules, to which Bariven consented at the time of the conclusion of the Claim PO's, permits the Tribunal to hear disputes under the Claim PO's together in a single arbitration. The clear evidence that Bariven consented to the use of Article 9 ICC Rules is unrebutted, because the statement 'these are separate contracts' is not a defence to the operation of Article 9 ICC Rules.

239. **Surpass** maintains that, on the **Counterclaim**, the Tribunal has no jurisdiction in respect of Bariven's counterclaim beyond the claim PO's and/or it is inadmissible.

240. Over a year since Bariven submitted its Answer in this arbitration, the time at which Bariven was required to "*provide any relevant agreements*" under Article 5(5)(c) ICC Rules, Bariven has failed to fulfil its obligation under Article 1021 DCCP to prove the arbitration agreement by an instrument in writing. From the evidence produced by Bariven to the Tribunal, it follows that not only is Bariven still unable to submit arbitration agreements for two of the purchase orders forming the basis of Bariven's Counterclaim, it also has not proven that the parties agreed to arbitration with regard to the remaining 48 purchase orders.

241. Even if Bariven had proven valid arbitration agreements under Article 1021 DCCP (*quod non*), to the extent that Bariven's Counterclaim is based on valid arbitration agreements other than those at issue in Surpass' Principal Claim (or Alternative

Principal Claim), Bariven's Counterclaim is inadmissible under Article 1038c(1) DCCP.

242. However, Bariven has not proven that the Parties agreed to arbitration in respect of the vast majority of Bariven's Counterclaim. It has not carried its burden of proving the existence of valid arbitration agreements in writing under Article 1021 DCCP for its Counterclaim Purchase Orders listed in Exhibit R-66. Bariven has failed to do so in two ways.

First, Bariven is unable to produce two contracts upon which its Counterclaim is based, as it admits, albeit in a footnote of an exhibit. Yet, Bariven's admission goes one step further, as it actually states that Bariven is not even sure if the terms and conditions referred to in these two outstanding purchase orders even contain ICC arbitration agreements at all. Bariven attempts to reserve its right to submit these purchase orders at a later date "*if the terms and conditions that apply to these purchase orders contain an ICC arbitration clause. Bariven has reason to believe that they do.*" For the avoidance of doubt, Bariven's 'reason to believe' does not satisfy its burden of proving a written agreement under Article 1021 DCCP.

Second, each and every purchase order that Bariven has submitted to this Tribunal as an exhibit forming the basis of its Counterclaim does not contain an arbitration clause which was agreed to by the parties at the time that the purchase order was issued.

243. In point of fact, Bariven has submitted 48 separate purchase orders, each contained in a zip file that was submitted to the Tribunal as Exhibit R-48. For ease of reference, Surpass refers to the list of purchase orders that Bariven submitted as Exhibit R-66. The latest date of issuance of these purchase orders is 2 December 2014, in the case of purchase order No. 5400003154. An overwhelming majority of those 48 purchase orders (31 of them), were issued prior to 2014.

244. Like every purchase order issued by Bariven, purchase order No. 5400003154 follows the same order of documents and instructions:

First, the cover page, which includes the specifically agreed terms, such as payment and delivery terms (pages 1 and 2);

Second, the description of the goods purchased by Bariven and the total price (pages 3);

Third, the P.O. general terms, subject to revisions, which includes instructions with regard to certificates, packing and delivery (pages 4 and 5);

Fourth, the Terms of delivery, which include further general instructions for packing, marking and invoicing (pages 6 to 8);

Fifth, the Terms of payment (page 9);

Sixth, the Important Instructions, subject to revisions, which contains the reference to the applicable Standard Terms and Conditions, including the arbitration agreement (pages 10 and 11).

245. The parties are in agreement that the reference to the Standard Terms and Conditions, which would include the arbitration clause, constitutes the arbitration agreement between the Parties. Consequently, the Important Instructions in every purchase order are critical, as they refer to the applicable Standard Terms and Conditions, thereby constituting the arbitration agreement between the Parties. Yet, every single one of the 48 purchase orders which form the basis of Bariven's counterclaim (beyond the Claim PO's) includes Important Instructions that were revised on 23 December 2014, i.e. after the date of the relevant purchase order:

Page: 10 of 11

Purchase Order
5400003154

SUPPLIER:
SURPASS (HONG KONG) COMMERCIAL CORP
15/F POLY PLAZA, 14 Dongzhimen Nand
DONGCHENG DISTRICT, BEIJING

IMPORTANT INSTRUCTIONS TO SELLER
(Doc. Z_ME_PO_GEN_BE00, rev 5 23-Dec-2014)

If this Document is issued from BARIVEN, S.A. c/o PDVSA Services, BV, follow Instruction:

INSTRUCTION

This purchase order is issued by PDVSA Services, BV on behalf of, and for the account of BARIVEN, S.A. and is subject to the PDVSA Services, BV Standard Terms and Conditions (Rev 09-2014) for goods; or PDVSA Services, BV Standard Terms and Conditions (Revision 01-2012) for Services; hereinafter referred to as T&C's, with the amendments and modifications as agreed upon between vendor and buyer. These T&C's are an integral part of this purchase order, and are already in your possession. In the event that you do not have these T&C's, please advise us. Acceptance of this purchase order signifies your acknowledgement, understanding, and acceptance of said Terms and Conditions.

246. In other words, the part of the purchase order which would constitute the arbitration agreement between the parties, did not exist at the time the purchase order was issued. Irrefutably, this means that the arbitration clause to which Bariven refers did not exist *at the time of the conclusion of the contract*. Hence, Bariven has not proven that the Parties, at the time of the conclusion of the purchase orders, agreed to arbitration for any of purchase orders at issue in its counterclaim beyond the few Claim PO's under which it has made partial payment.

247. For this reason, the Tribunal should deny jurisdiction over the purchase orders listed in Bariven's Exhibit R-66 since Bariven has failed to prove the existence of valid arbitration agreements under Article 1021 DCCP with regard to its counterclaim.

248. Further, Bariven's Counterclaim is inadmissible under Article 1038c(1) DCCP pursuant to the purchase orders listed in Exhibit R-66. Even if Bariven had proven the existence of valid arbitration agreements under Article 1021 DCCP, Bariven's Counterclaim is inadmissible under mandatory Dutch arbitration law because, by contrast to the permissive standard regarding claims being made under Dutch

arbitration law, counterclaims are not afforded the same permissiveness except to the extent that they fall under the same arbitration agreement(s) as the principal claim.

249. As Surpass has repeatedly argued, Dutch arbitration law provides that a counterclaim is admissible only if it is subject to the same arbitration agreement as the one on which the claim is based under Article 1038c(1) DCCP. Bariven submits one argument – found in a footnote – in response, that Surpass has, by arguing 'commonality' or 'compatibility' as a means of proving consent under Article 9 ICC Rules, "*(i) ma[de] the arbitration agreements at issue in all similarly situated purchase orders the "same agreement" for purposes of Article 1038c(1); or (ii) extend[ed] consent to arbitrate in a single proceeding all disputes arising under similarly situated purchase orders. In either case, Article 1038c(1) is satisfied.*" The fallacy of these arguments will be dealt with in turn.

250. **First**, the act of consent to having separate claims decided together in a single arbitration does not (magically) transform those 26 separate arbitration agreements into the 'same agreement'. Bariven's first argument fundamentally confuses the concepts of Article 9 of the ICC Rules and Article 1038c DCCP.

On the one hand, Article 9 ICC Rules permits a claimant to bring separate claims governed by separate arbitration agreements to be resolved within a single arbitration. Under Article 9 ICC Rules, the claims remain separate under their respective arbitration agreements, except they are permitted to be resolved within a single proceeding. Illustrating the operation of this point is Article 4(3)(f) ICC Rules, which governs the Request for Arbitration. Article 4(3)(f) ICC Rules requires the inclusion of, "*where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made*".

On the other hand, Article 1038c(1) DCCP provides a limit to that freedom by forbidding a respondent from introducing a counterclaim that is not based on the same arbitration agreement as the principal claim. Article 1038c(1) DCCP provides for a sole exception whereby the parties otherwise agree, but in the matter at hand, no such agreement has been made.

In this case, therefore, Bariven is constrained by the mandatory provision in Article 1038c(1) DCCP. This is confirmed in the award in *Wells Ultimate Service, LLC v. Bariven S.A.*, a recently decided ICC arbitration ("**Wells Award**"), also seated in The Hague. An eminent tribunal, composed of Judge Dominique Aarts (president), Prof. Rieme-Jan Tjittes and Mr Willem van Baren ("**Wells Tribunal**") compared Article 9 ICC Rules before discussing the mandatory nature of Article 1038c(1) DCCP.

The Wells Tribunal further opined on the meaning of 'same arbitration agreement':

> *[T]he wording "the same arbitration agreement" [in Article 1038c(1) DCCP] means an arbitration agreement, laid down in the*

> *same legal contract. This interpretation is in accordance with the basic principle that arbitral jurisdiction is based on the Parties' clear consent and that an arbitral tribunal may decide only on the issues which fall under the scope of the (same) arbitration agreement.*

The Wells Tribunal then confirmed the fallacy of the argument that the same words under an identical arbitration agreement equates to the 'same arbitration agreement' under Article 1038c(1) DCCP:

> *The mere fact that each Purchase Order refers to the T&C (of which Article 27 is part) does not entail that the T&C are to be considered the same arbitration agreement. It is only in conjunction with the relevant Purchase Order itself that the relevant arbitration provision of the T&C can be considered the (same) arbitration agreement. Article 27 T&C reads and is to be understood that only for the Purchase Order it is referred in it will be applicable. If, for example, something went wrong with the conclusion of a specific Purchase Order between the parties, the T&C do not apply. As a consequence, a different Purchase Order will constitute a different arbitration agreement in the sense of Article 1038 c (1) DCCP, unless that same arbitration agreement has been expressly or tacitly declared applicable by the parties to the other Purchase Order.*

Since neither does the invocation of Article 9 ICC Rules create a single arbitration agreement from many, nor do standard terms and conditions act as an umbrella agreement, Bariven's argument regarding the 'same arbitration agreement' must fail.

Secoud, Bariven's argument equating consent to Article 9 ICC Rules with "*consent to arbitrate in a single proceeding all disputes arising under similarly situated purchase orders*" simply does not meet the standard required under Article 1038c(1) DCCP.

The precise problem is that Bariven consented to both Article 9 of the ICC Rules and, by agreeing to The Hague as seat of the arbitration, the applicability of the Dutch Arbitration Act and its mandatory provisions as per Article 1073(1) DCCP (*lex arbitri*). Article 1038c DCCP is one of those mandatory provisions. Bariven is therefore bound to this provision as it is bound to Article 9 of the ICC Rules. Consequently, Bariven's possible counterclaims are constrained. The quid pro quo for the applicability of this provision is that if Bariven were to be claimant, it would not have to face counterclaims made pursuant to different arbitration agreement(s).

251. There is a sound policy rationale for this mandatory rule; it protects Claimants from certain litigation tactics used to dissuade well-founded claims, such as deploying counterclaims based on unrelated contracts or disproportionately large counterclaims. The ICC also recognizes such policy considerations by, for example, permitting the split of advance on costs in the event of an inflated counterclaim under Article 36(3) of the ICC Rules. Thus, Bariven itself would be protected from these same litigation tactics if it were a claimant. Due to the mandatory nature of Article 1038c(1) DCCP as noted by the Wells Tribunal, public policy does not permit the disposal of this protection on the basis of consent to Article 9 ICC Rules in the context of principal claims.

252. If Bariven wished to make its own claim, based on the 48 purchase orders submitted in this Arbitration in Exhibit R-48, it is free to do so. Bariven may even proceed under Article 9 ICC Rules. However, unless and until it does so, this counterclaim can be construed as nothing more than an abusive litigation tactic. That Bariven does not even properly quantify its counterclaim in its petitum for the ICC Secretariat to take notice, shows the games Bariven plays. Here, however, Bariven is the cause of its own downfall, since the choice of seat comes from its own standard terms.

253. As such, due to Bariven's failure to prove a written arbitration agreement under both Article 5(5)(c) ICC Rules and Article 1021 DCCP, Surpass respectfully requests the Tribunal to dismiss or disregard USD 321,477,894.40 of Bariven's Counterclaim. Alternatively, Surpass requests Bariven's Counterclaim be lowered by the amount of USD 321,477,894.40, representing the amount Bariven has counterclaimed (but in no way substantiated) under contracts which do not fall under "*the same arbitration agreement as the one on which the claim is based*" under Article 1038c(1) DCCP.

254. With regard to the **merits**, Surpass submits that Bariven has submitted no evidence that Surpass was a Party to or beneficiary of corruption. A survey of the evidence shows the fallacy of these naked assumptions and mischaracterisations of fact. Problematically for Bariven, it has not submitted any evidence that Surpass is involved in or benefited from any corruption whatsoever. First, none of Bariven's submissions on the facts show any signs of corruption. Second, neither Surpass nor Mr Cautilli have any links to the Houston criminal proceedings, upon which Bariven has based the entirety of its corruption allegations. Third, without any evidence of wrongdoing on the part of Mr Cautilli, his mere presence cannot be indicative of corruption. Fourth, commercial and after-sales transactions which do not pertain to obtaining procurement contracts from Bariven do not indicate the presence of corruption. Fifth, Bariven displays a disregard for the truth by taking a claim of counterfeiting that not only is more than three years old, but was the subject of an internal PDVSA investigation that cleared Surpass of any wrongdoing, and misrepresenting this claim to the Tribunal as 'new'.

255. Surpass submits that Bariven bears the burden of proof and that the burden of proof for corruption in arbitrations have consistently been held as the high standard of "clear and

convincing" evidence. It was not able to meet this threshold: despite its contentions to the contrary, Bariven has offered literally no evidence that Surpass was a party to any corruption. Instead, it puts assumptions ahead of facts and speculation ahead of evidence, drawing a series of unsupported conclusions that do not stand up to scrutiny. A review of the evidence reveals no link between Surpass and any actual corrupt activities.

256. **First**, Bariven argues – essentially – that based on Mr Cautilli's qualifications, experience and age, as well as the timing of his appointment in relation to the issuance of Surpass' first purchase order from Bariven, Surpass could only have appointed Mr Cautilli on the basis of his familial connection to Mr Rincón.

However, as Mr Chen Jingshuang, Surpass' Vice President, thoroughly describes in his witness statement, Bariven's conclusions that Mr Cautilli had no "prior relationship with Surpass, or of his knowledge of the goods that Surpass sold to Bariven" and that Mr Cautilli's appointment and work with Surpass was based on any kind of an association with Mr Rincón are both plainly wrong.

The relationship between Surpass and Mr Cautilli began in September 2009, a full 10 months prior to Surpass' registration as a vendor with Bariven on 14 July 2010. Mr Cautilli's involvement with Surpass began because Sinotruk – a company with which Surpass' parent company, Poly Technologies, had had a long standing relationship – wanted to sell trucks to Venezuela in a quantity which only a Chinese producer like Sinotruk could provide. It is against this backdrop that Surpass was introduced to Mr Cautilli which eventually led to his appointment as one of Surpass' agents.

Surpass' first procurement contract with PDVSA thereafter came on 10 February 2010, in a contract with PDVSA. In this case, however, the Venezuelan Government had declared a state of emergency, permitting PDVSA end users to deal directly with vendors. The contract was for the sale and purchase of 750 trucks, manufactured by Sinotruk. It had been through Mr. Cautilli that Sinotruk had become aware of PDVSA's need for a large quantity of trucks and for which Sinotruk had approached Surpass.

Based on Sinotruk's introduction and without committing to exclusivity or a long-term contract, Surpass appointed Mr Cautilli as its agent. Mr Cautilli delivered what he promised and the contract with PDVSA for the delivery of 750 trucks was signed on 10 February 2010. Although the value of the contract was high (USD 104,880,000.00), due to the upfront payment obligations of PDVSA, the risk for Surpass (and Sinotruk) was minimal.

In July 2010, after the emergency measure expired and normal procurement resumed, Surpass registered as a vendor for Bariven, as Bariven notes.

Bariven makes a point of calling Mr Cautilli underqualified and with a lack of knowledge of the goods or industry in which he was operating. Although Mr Cautilli's previous

experience is not immediately relevant for Surpass, as long as he performs under the agency agreement, Bariven's submission also is wrong. By the time Mr Cautilli began working with Surpass, he had already owned and operated several businesses in Venezuela, including import/export and trucking businesses. Mr Cautilli's experience at Tradequip Services & Marine ("TQSM") only represents a fraction of his overall experience. Moreover, there has never been a suggestion by the U.S. Government that TQSM or the other Rincón entities did not actually perform the contracts procured from Bariven. Just the opposite. Thus, although Bariven regards this experience as a mark against Mr Cautilli, it in fact provided Mr Cautilli with experience in the very industry that Bariven claims he had none.

Under the Agency Agreement, Mr Cautilli undertook two primary types of responsibilities. The first type of responsibility was securing procurement contracts by "us[ing] [his] best efforts to promote and coordinate the sales of the Products by SURPASS to end users/customers in Venezuela." This precise responsibility was defined to include searching for quotations of products as well as "tak[ing] charge of offering the accurate quotation for, including but not limited to re-eqiup [sic] expenses, ocean freight, charge of Venezuelan customs clearance and inland transportation, after-sales service, food, accommodation, transportation expenses and allowance for the technicians and engineers of the Chinese suppliers in Venezuela, etc."

The second type of responsibility pertained to Surpass' obligations under the already-procured contract, including the myriad obligations of "provid[ing] technical support, after-sales service, equipment nationalization, customs clearance, inland transportation in Venezuela, food, accommodation and allowance for Chinese technical team in Venezuela, as well as performance of any other work or obligations required by the contract."

Thus, Bariven's reference to Mr Cautilli's age, qualifications, lack of experience, prior relationship with Surpass or the timing of Surpass' 'first procurement contract' with Bariven are not only based on wholly incorrect assumptions, they do not qualify as evidence of corruption.

Second, Bariven's characterisation of the 24 June 2010 inspection report by Tuboscope Vetco Deutschland GmbH ("Tuboscope") of the Shougang Qianann Iron & Steel Co., Ltd ("Shougang") mill in Qianan, China ("Tuboscope Report"), is entirely incorrect in multiple different ways. Bariven argues that (1) the inspection was carried out before Surpass became a registered vendor; and (2) one of the Houston Defendants chose Surpass to be a vendor for the same pipes as were inspected prior to Surpass' having registered as a vendor. Consequently, according to Bariven, Surpass had direct dealing with Mr Rincón.

To begin, there was nothing irregular about the timing of the report, as Bariven suggests. Surpass had not yet registered as a vendor because it had not needed to during the declared

electricity emergency. Tuboscope had to perform the audit of Shougang for PDVSA because Shougang was not yet an approved supplier for hot rolled steel coil.

Next, despite Bariven's contention that Purchase Order No. 5100084836 was issued for "the very same pipes that had been inspected in June 2010", the Tuboscope Report indicates that Shougang was audited for its "major product (...) hot-rolled strip" because it is not a pipe manufacturer. Hot-rolled strip steel is the product visible in the photographs in the very same Tuboscope Report Bariven submitted to this Tribunal; there is not a pipe in sight. Contrary to Bariven's contention, Bariven actually never issued any purchase orders to Surpass for Shougang hot-rolled strip steel.

Accordingly, this is a complete work of fiction on Bariven's part. Tuboscope's Report and Purchase Order No. 5100084836 have absolutely nothing to do with one another. It certainly does not qualify as evidence of a link between Surpass and Mr Rincón, let alone of corruption.

Third, Bariven argues that the incorporation of a Hong Kong entity by Mr Cautilli was suspicious because Surpass already had one, or that Surpass' Hong Kong entity undermined Chinese currency controls.

There is nothing suspicious about the entities used by either Surpass or Mr Cautilli. As Mr Chen explains in his witness statement, the use of Hong Kong entities is standard in China even for State-owned entities and this practice does not undermine Chinese currency controls as Bariven alleges in a footnote. The overall purpose of this footnote is puzzling and somewhat troubling, whether Bariven is attempting to cast doubt on Surpass being a Chinese State-owned entity, or on the existence and oversight of the Joint High Level Commission – neither of which have been challenged.

Under the Agency Agreement, Mr Cautilli undertook a number of responsibilities, including representation, coordination, and subcontracting duties. To perform these duties, Mr Cautilli was authorised to represent Surpass as its agent and through the use of various titles. Mr Chen explains that he was aware of Mr Cautilli's Texas-incorporated company, Surpass Industrial, LLC ("Surpass Industrial"), which Mr Cautilli used to perform his various obligations. Surpass even provided Surpass Industrial with its own Credential of Representation for the Ecuadorian market.

Bariven tries to make an issue out of the fact that Mr Cautilli established a Hong Kong company in the same name as Surpass. Bariven makes it sound suspicious and illegal, but the facts prove different.

Mr Chen was not aware of the existence of Mr Cautilli's Hong Kong company. Even if he had been aware, he would not have objected to Mr Cautilli using the Surpass name. After all, Surpass is not a protected name and there are more than 100 companies

registered in Hong Kong using the name 'Surpass'. As far as Surpass is aware, Mr Cautilli's Hong Kong company has never been used and ceased to exist in June 2017.

Consequently, Bariven's assumptions regarding the use of Hong Kong entities again do not support its allegations as evidence of corruption.

Fourth, Bariven suggests that Mr Santiago Varela is "associated with (...) [Mr] Rincón", yet provides no evidence to substantiate this claim. Such a naked (and false) assertion of counsel may be disregarded for lack of substantiation.

Mr Varela was employed by Mr Cautilli to work for him in Venezuela, and without any evidence of a link to Mr Rincón (of which there is none) likewise does not stand as evidence of corruption.

Bariven relies on the investigation of the U.S. Government but there is no link in those proceedings to Surpass or Ottavio Cautilli.

Bariven relies exclusively on the Charging Documents filed by the U.S. Government in the criminal proceedings against the so-called Houston Defendants for the purpose of showing actual criminal corruption and misconduct. Bariven is limited by several the shortcomings of this tactic, most notably the fact that neither Surpass nor Mr Cautilli are mentioned in any of the Charging Documents.

257. In fact, the evidence submitted by Bariven in connection with the Houston Defendants does not even bear a resemblance to Surpass or Mr Cautilli. Bariven asserts that "Surpass' contracts fit squarely within the admitted facts of Mr. Rincón's criminal conspiracy." As will be seen, however, Bariven's square fit is that of a square peg in a round hole. Bariven attempts to create the illusion that Surpass and Mr Cautilli are related to the Houston criminal proceedings, but this illusion fails even at a first scrutiny.

First, Bariven claims that Mr Cautilli was underqualified, inexperienced and the only reason therefore for his appointment as Surpass' agent in Venezuela was his connection to Mr Rincón. It is against this backdrop that Bariven attempts to pigeonhole Surpass into one of the Rincón-related companies that is nominally owned or controlled by Mr Rincón.

However, as Mr Chen explains, Mr Rincón was neither involved in nor exerted influence over Surpass in any manner. Nor was Mr Rincón involved in the appointment of Mr Cautilli to serve as Surpass' Venezuelan agent. Nor is Mr Cautilli either a nominal owner or manager of Surpass. When Mr Cautilli's already-described qualifications and experience are considered, the only thing that remains is that Mr Cautilli is, by marriage, a family member of Mr Rincón.

Second, the amounts paid to Mr Cautilli as commissions would not satisfy the bribery scheme outlined in the Charging Documents. In particular, the U.S. Government's

Indictment of five former high-level officials of PDVSA, Bariven and the Venezuelan government ("Management Team Indictment") – is highly instructive. Although the indictment was filed in August 2017, it was not unsealed until February 2018.

One of these defendants, Mr César David Rincón-Godoy, the former General Manager of Bariven and of no relation Mr Roberto Rincón, has pled guilty to Count One of the Management Team Indictment. Count One – to which Mr Rincón-Godoy has pled guilty – in the Indictment explains the scheme of Mr Rincón-Godoy and the rest of the 'Management Team' vis-à-vis Mr Rincón:

In or about 2011, Rincón and Shiera were approached by a group of individuals who consisted of then-current PDVSA [and Bariven officials referred collectively as "PDVSA"] and individuals outside PDVSA with influence at PDVSA (...) referred to as the 'management team.' The management team offered to give Rincón's and Shiera's companies payment priority over other PDVSA vendors, ensuring that Rincón's and Shiera's companies would get at least partial payment on outstanding PDVSA invoices, and to provide Rincón's and Shiera's companies with assistance in winning future PDVSA business, in exchange for providing a bribe to the management team in the amount of 10% of all payments Rincón and Shiera received from PDVSA. (...) In addition, individual members of the management team solicited additional bribe payments from Rincón and Shiera.

In other words, if Surpass were paying bribes as a part of Mr Rincón's criminal scheme and used Mr Cautilli as the conduit to this conspiracy, then Surpass would have had to pay Mr Cautilli – at a minimum – 10% of all payments received from Bariven. Nor are these the allegations alone of the U.S. Government. Indeed, Bariven itself acknowledges the 10% bribery scheme.

As the Agency Agreement makes clear, Mr Cautilli's 3% compensation falls woefully short of this mark. Taking the payments received under Bariven's Counterclaim Purchase Orders as a guide, Mr Cautilli should have received at least USD 32,147,789.44. In the interest of transparency, Surpass herebyattaches as an exhibit, a copy of all the invoices from Mr Cautilli to Surpass pertaining to the Counterclaim Purchase Orders. The total Surpass paid Mr Cautilli as commission under the Counterclaim Purchase Orders is USD 9,977,164.31 (approximately 3.10% as agreed in the Agency Agreement), is significantly less than half of the 10% extorted by the Management Team from Mr Rincón.

After factoring in Mr Cautilli's expenses for "provid[ing] technical support, after-sales service, equipment nationalization, customs clearance, inland transportation in Venezuela, food, accommodation and allowance for Chinese technical team in Venezuela", and for the many times he travelled between Venezuela and China, Mr Cautilli personal gain was only part of the fees he received. There is no evidence in the record of this Arbitration or otherwise which fits the Agency Agreement squarely within the admitted facts of Mr Rincón's criminal conspiracy.

Third, as Bariven admits, it does not allege overpricing in this Arbitration (which of course calls into question whether it has suffered any damages at all since no overpricing implies that Bariven paid the commercial value for the Equipment). Yet, in the Houston criminal proceedings that is precisely the argument Bariven made before the U.S. District Court for the Southern District of Texas. Therein, Bariven argued under the heading "Bariven's Overpricing Investigation" in support of its Motion for Recognition of Its Rights as a Victim and Entitlement to Restitution (which was denied):

Bariven retained a forensic team to analyze and quantify the financial impact of the Defendants' conspiracy upon Bariven. The preliminary forensic analysis of all Bariven purchase orders for the period January 1, 2009 through December 31, 2015 reveals that the Defendants overcharged Bariven by far more than the 10% in bribes that Rincon and Shiera have admitted to in their plea colloquies. In fact, Bariven was overcharged more than four times as much, or an average of nearly 48% per purchase order.

Thus, according to Bariven's own arguments before a U.S. Federal Court Judge, a key feature of Mr Rincón's criminal scheme was overpricing in an average of "nearly 48% per purchase order." The same argument recounts the 10% allegation contained in the Management Team Indictment, even hinting that these amounts may have even been higher than 10%. Yet here is yet another feature by which Surpass' contracts do not fit squarely within the admitted facts of Mr Rincón's criminal conspiracy.

Fourth, although Bariven attempts to paint a picture whereby the Houston Defendants were intimately involved in Surpass' procurement contracts, the evidence lays bare this fallacy. There simply is no pervasive presence of the Houston Defendants.

Of the 94 separate procurement contracts received by Surpass from Bariven exactly one of them, Purchase Order No. 5100084836, was issued by a Houston Defendant. Moreover, of all of the Houston Defendants, only Mr Christian Maldonado and Mr Jose Luis Ramos actually sent RFQs (15 in total) to Surpass. As Bariven notes, one of the 'manner and means' of the Charging Documents is "assisting RINCON's (...) companies in winning [Bariven] contracts", but then 14 of the 15 RFQs – or failure rate of 93.33% – that were specifically issued by Houston Defendants do not fit the manner and means.

Moreover, the Purchasing Process Recommendation Form which was issued by Mr Maldonado for Purchase Order No. 5100084836 shows no signs of influence on the part of Mr Maldonado. Despite there having been a proposed list of 17 bidders for the "critical pipeline cases" (i.e. not the hot-rolled strip from the Tuboscope Report), only three eventually bid: Surpass, Tenaris and Tuberia Laguna. None of the three are evidently connected to the Houston Defendants. According to the Recommendation Form, the end user's technical inspection disqualified Tuberia Laguna, leaving only Surpass and the Uruguayan firm Tenaris as qualified bidders.

Between these two bidders, Tenaris' bid was more expensive by nearly a third. It is therefore no surprise that Mr Maldonado recommended Surpass. In fact, the only thing surprising would have been if Mr Maldonado had not recommended Surpass. In the end, Surpass participated in over 400 competitive bidding processes, and still, only one purchase order was issued by a Houston Defendant.

Bariven has alleged that Mr Rincón was intimately involved in Surpass obtaining the BPA. However, Bariven's internal approvals related to the BPA indicate zero involvement of Mr Rincón or any of the Houston Defendants.

Bariven has tried to reason away the lack of involvement by the Houston Defendants by stating, "Bariven's corruption and fraud allegations are not limited to the involvement of the ex-employees convicted in Houston. It is Bariven's position that the contracts at issue in this arbitration were affected by corruption and fraud even if none of the ex-employees convicted in Houston were ostensibly involved." The logical consequence would be to lower the bar to contract avoidance so much so that it would effectively permit Bariven to nullify every one of its procurement contracts at will. As much as this would likely please Bariven to have effectively no standard to proving corruption, this is with due respect, not a serious position.

The lack of involvement of the Houston Defendants likewise does not fit squarely within the admitted facts of Mr Rincón's criminal conspiracy.

Fifth, Bariven's evidence of 'bidding panel stacking', to which it refers as "examples" that are "instructive and particularly egregious", are in reality the only examples of 'bidding panel stacking' to which Bariven could refer at all.

258. The first major problem with Bariven's argument is that it is based on an unsupported premise. According to Bariven, "[a]t the same time that Mr. Rincón and his companies were working together with Surpass and acting as their 'agents,' they were also appearing as purported competing bidders in Bariven procurement processes." The difficulty with this argument is that the dealings Bariven complains of are all commercial dealings with Surpass that have no bearing on the procurement process. They are all post-procurement transactions, such as in-country, Venezuelan after-sales service, or the shipment of goods Bariven had already purchased.

If companies that had ever conducted business with one another – as opposed to companies who were actually owned, controlled or coordinated by the same people – were not conflicted from participating on the same bidding panels, then Bariven would be unable to seat any bidding panels whatsoever.

The U.S. Government, on which Bariven so heavily relies has made no allegations regarding post-sales conduct, nor has it made any allegations about the actions of Mr Rincón's Venezuelan service company Tradequip C.A. Moreover, the U.S. Government

has confirmed that there have been no allegations made that Mr Rincón's were not commercially viable, operating companies. Bariven alleged in its application for victim status in the Houston criminal proceedings that the Houston Defendants "billed Bariven for equipment not delivered and services not performed, or never completed at all." However, the U.S. Government directly responded, stating:

> *"The Government has made no such allegations, and the citations Bariven points to in furtherance of its assertion to the contrary provide no support for these allegations. To the extent that the charging documents refer to false invoices prepared for services never rendered, these were not invoices submitted to, or services supposed to be rendered for, Bariven. Rather, they were invoices submitted to Rincon's and Shiera's companies to falsely justify the bribe payments."* (Reply 8.58)

259. The second major problem with Bariven's argument is that Bariven's own internal documents do not show even the slightest hint of any collusion or coordination on the part of Surpass vis-à-vis any of the companies that Bariven has identified as being 'Rincón-related' within the four examples of purported 'bidding panel stacking'.

To begin, none of the approval processes for the four bidding panels show the involvement of any Houston Defendants at all. Then, every one of the bidding panels involved the actual bidding participation of at least 2 entities which Bariven does not even allege are 'Rincón related'.

260. Bariven tries to manufacture that link through the mere presence of Ottavio Cautilli, without any indication of wrongdoing. Bariven's repeated reference to Mr Cautilli as if he is a member of Mr Rincón's 'criminal empire' is grounded purely on assumption and speculation. As already addressed, Bariven's contentions regarding Mr Cautilli's age, qualifications, experience and use of a Texas-incorporated limited liability company are pure speculation, with no basis in fact. What remains when those incorrect assumptions are removed is the fact that Mr Cautilli's email address was used to register some websites, and the location and value of Mr Cautilli's home in relation to his father-in-law's. Common sense dictates that the use of an email address to set up a website – which is neither criminal in itself nor indicative of any wrongdoing – is not a sufficient basis on which to found a claim of involvement in a corruption scheme.

261. Bariven's case against Mr Cautilli is so thin that it must offer a tax assessment of Mr Cautilli's home from nine years after it was purchased in order to hint – not even outright allege – that Mr Cautilli could not purchase the house on his own. To be clear, a tax assessment prepared 9 years after the date of purchase was made does not indicate the purchase price. This argument is so speculative and bears such a tenuous link to reality that it should be dismissed on its face. Again, however, common sense dictates both that a tax assessment is not the purchase price and that nine years is too great a distance to give weight without any explanation or description of the housing market. None of this

even takes into account the wild assumptions that Bariven had to make with regard to Mr Cautilli's work experience and family history just to be able to present such evidence as indicative of anything.

262. What it does is to lay bare Bariven's naked speculation about the core of its argument. Bariven has no evidence of any wrongdoing by Surpass or Mr Cautilli and must rely on Mr Cautilli's status as the son-in-law of Mr Rincón. There remains no clearer example of an attempt to criminalise a person on the basis of his family connections. Indeed, there is no clearer example of an attempt to disguise an argument of 'guilt by association'.

263. Bariven would apparently like Mr Cautilli's mere presence to indicate some form of corruptive or criminal activity. However, Bariven fails to analyse Mr Cautilli's demonstrated history with Surpass, including his many – perhaps hundreds – of trips to China and Venezuela in pursuit of his work with Surpass and obligations under the Agency Agreement. Mr Cautilli was not a mere conduit to Mr Rincón as Bariven has alleged, he was an incredibly hard worker who has not been swallowed up as a part of the ongoing Houston criminal proceedings. Yet again, without any connection to the Houston criminal proceedings, Mr Cautilli's role does not fit squarely with the admitted facts of Mr Rincón's criminal conspiracy.

264. Bariven tries to manufacture that link through the de minimus presence of Roberto Rincón, without any indication of wrongdoing. Based on a single email dated 14 August 2013 ("14 August Email"), Bariven jumps to the unsustainable conclusion not only that Mr Rincón was involved in Surpass' business dealings, but "personally involved and instrumental in securing Bariven business for Surpass." Moreover, according to Bariven, this is evidence of "purposeful direct association with Mr. Rincón and his criminal cohorts." As will be shown, however, Bariven's conclusions are the assumptions of counsel that do not bear the slightest resemblance to reality.

265. Notably absent from Bariven's speculation is any definition as to which 'criminal cohorts' Bariven refers. It would be impossible to do business with Bariven and not come into contact with some of the Houston Defendants along the way; however, as discussed, there is no pervasive presence of the Houston Defendants. Moreover, there is no basis for Mr Cautilli to be described as a criminal cohort, as much as Bariven tries to paint the opposite picture.

266. Scrutiny of the email on which Bariven essentially rests its entire claim shows that this email simply does not mean what Bariven wishes it would. By way of background, Tradequip C.A. is a Venezuelan service company. There is no evidence that it is in the business of contract procurement from Bariven in the manner of Mr Rincón's other companies. Rather, it is commercially involved in the provision of after-sales services in Venezuela. Critically, none of the 'manner and means' found in Mr Rincón's Charging Document – and on which Bariven so heavily relies – pertain to commercial after-sales services that do not relate directly to obtaining the procurement contracts for Bariven.

267. In this context, Tradequip C.A. was one of 18 contractors that provided after-sales service in Venezuela to the fleet of Sinotruk trucks which Bariven procured from Surpass. The 14 August Email appears to be related to the BPA, as Bariven correctly points out. What Bariven fails to consider, however, is the context of the 14 August Email.

First, the BPA was an agreement designed to speed up the procurement of spare parts for the continued service and maintenance of the fleet of nearly 2000 heavy-duty Sinotruk trucks. These trucks are in constant need of maintenance having to operate in the Venezuelan climate and on the Venezuelan infrastructure.

Second, at no place in Mr Rincón's email does he purport to send it on behalf of Surpass. Rather, Mr Rincón's email is sent from his Tradequip C.A. email address and includes an enormous Tradequip C.A. signature block. Anyone reading this email could not mistake it for having come from or on behalf of Surpass. As one of the authorised after-sales service providers for Sinotruk trucks, Tradequip C.A. (and therefore Mr Rincón) had a direct commercial interest in seeing the BPA go into effect. There is also no evidence that Mr Camacho is a "former rogue employee" as Bariven alleges. In any event, Mr Camacho's role coordinating the BPA was taken over by Ms. Myrna Khaki. Bariven also poses the question "Why didn't Surpass submit that document itself?" And indeed, Surpass did submit the document itself. It did so via email to the same Mr Camacho (plus four other employees of Bariven that are also not party to the Houston criminal proceedings) on 19 August 2013.

Third, Bariven argues that the BPA was "Surpass' second biggest procurement contract to date" for "USD $131 million" as if it were a massive contract in itself. Nothing could be farther from reality. The BPA, by its own terms, is merely a facilitation framework agreement. It contains no minimum purchase requirement; it contains no purchase requirements at all. In fact, the BPA expressly excludes such a requirement, stating "Nothing in this Blanket Agreement obligates [Bariven] to any minimum purchase volume. Quantities shall be indicated on individual [purchase orders] issued by [Bariven]." Instead, the BPA does the opposite. It actually caps the amount of yearly expenditures permitted under the agreement. Thus, at best the BPA is a facilitation agreement, so even if Mr Rincón had helped secure the agreement (quod non) he did not assist in securing any actual purchase orders by so assisting. As is consistent with his involvement as an owner-operator of a Sinotruk-authorised after-sales service provider, he would have helped procure a facilitation agreement.

268. **Finally**, Bariven will without a doubt submit that an email which Mr Cautilli sent to Mr Rincón-Godoy on 11 June 2012 with Mr Rincón blind copied is somehow evidence of corruption. At the time, Surpass was updating its bank account details to Surpass Hong Kong, its payment beneficiary. It was a critical moment for the reasons explained in Mr Chen's Witness Statement, so it is not surprising that Mr Cautilli would attempt to impress on people of influence at Bariven (Mr Rincón-Godoy was then Bariven's General

Manager) that this change needed to be implemented before Bariven made the down payment needed to finance the construction of 400 trucks.

269. Messrs Rincón and Rincón-Godoy knew one another (Mr Rincón-Godoy was a member of the Management Team extorting 10% payments from Mr Rincón). However, Mr Rincón-Godoy could not have been aware of Mr Rincón's presence on the email, since it was in blind copy. The email does not suggest any impropriety.

270. Again, the evidence simply does not add up to what Bariven wishes it would. There is nothing like the sustained presence or direct influence which Bariven alleges. It simply is not there.

271. With regard to the forged letter, Surpass submits that Bariven takes an old allegation that was thoroughly investigated and dismissed and misrepresents it to the Tribunal as 'new'.

272. After having successfully worked together in the Venezuelan market for five years, it appears that in March of 2015, Sinotruk wished to do business directly with Bariven. This apparently led to some internal disagreements at Sinotruk, which eventually led to an apparent allegation of the 'counterfeiting' of a Sinotruk authorisation letter. After an investigation cleared Surpass of any wrongdoing, Bariven issued Surpass a further three purchase orders.

273. As Mr Chen addresses at length in his Witness Statement, however, Bariven has taken a now three-year old allegation and presented it to the Tribunal as if it were a new allegation. In short, the presentation evidences a complete lack of good faith and candour on the part of Bariven and would warrant sanctions if the argument were made before a State court.

274. Bariven initiated its investigation of the issue around the time the allegation was made in April of2015.[22] Bariven fails to disclose to the Tribunal the initial date of the allegations contained in the Undated Letter, refusing even to provide to Surpass the communication by which the Undated Letter was sent (apparently) from Sinotruk.

275. PDVSA's Loss Prevention and Control Management unit, "PCP-PDVSA", then conducted a thorough investigation as Mr Chen describes. Thereafter, apparently satisfied by the results of the investigation having cleared Surpass of any wrongdoing, Bariven issued three new purchase orders to Surpass for the exact products that were covered by the 23 March Letter.[23]

276. As Mr Chen describes, Surpass never would have concluded and performed those final three purchase orders at a total value of USD 15,704,764.43 had it known that Bariven

[22] Reference is made to Exh. C-114

[23] Reference is made to Exh. C-26, C-27 and C-28.

would attempt to re-raise the issue as a ground to abandon its payment obligations under those contracts.

277. The evidence of a thorough investigation is overwhelming. That Sinotruk refused to attend the proceedings to defend its own false allegations is irrefutable. Had Bariven performed even a modicum of due diligence investigating its serious allegations before presenting them then it could not form a good faith basis from which to present the argument.

278. Consequently, Bariven's allegation of forgery is baseless and Surpass has every intention of seeking a cost award for having to defend against such a frivolous claim utterly devoid of good faith.

279. In its Statement of Defense, Bariven contests neither the receipt of the Equipment nor the satisfaction of its condition and performance. As noted, as recently as 28 April 2018, the end user PDVSA ENT has publicly expressed its satisfaction with the Equipment (including with trucks specifically at issue under Bariven's Counterclaim). And, despite the Equipment having been delivered between 2013 and 2016 with invoices issued to Bariven during the same period, i.e. between three and five years ago, Bariven never once raised an allegation of misfeasance. It was not until this Arbitration, in fact, that the opportunity to excuse itself from its payment obligations arose in the form of Mr Cautilli's father-in-law. It raises suspicion that Bariven never advanced its allegations and its defences up until these arbitral proceedings; it certainly was never a reason for Bariven's prior non-payment. It also casts suspicion on the overwhelmingly disproportionate counterclaims Bariven has deployed as a litigation tactic against purchase orders which have been fully performed by both Bariven and Surpass.

280. Surpass reemphasizes that Bariven has acknowledged that it bears the burden of proof with regard to factual bases on which all of its legal arguments rest, and that this burden of proof as it pertains to corruption in international arbitration has consistently held to be a high standard, often articulated 'clear and convincing' evidence. As explained already however, Bariven has not provided any evidence that Surpass was a party to any bribery or other corrupt practices that would be a part of an admitted criminal conspiracy. Its conclusions are based on incorrect assumptions and speculation only. Thus, if the Tribunal finds that Bariven has not met this heightened standard of review, then Bariven's arguments fail per se without even the need for further analysis.

281. With regard to Bariven's legal reasoning on the **merits** of Surpass' Claims, Surpass first makes some observations:

- First, Bariven's legal argument is entirely based on the assumption that Surpass, in the person of Mr Cautilli, is liaised to Mr Rincón, and that Surpass is therefore is guilty of bribery and corruption in the same manner as Mr Rincón through this purportedly criminal 'association'.

- The 'evidence' of corruption that Bariven has put forward, relates only to Mr Rincón. Although Bariven apparently equates Mr Cautilli with Mr. Rincón, there is no evidence in the record to support such equation.

- Moreover, even if Surpass could be equated with Mr. Rincón (quod non), such equation does not establish that corrupt or fraudulent payments would have taken place regarding any of the purchase orders issued to Surpass, or that the evidence regarding the Houston Defendants serves to prove such allegations.

- Bariven's attempt at submitting evidence of misrepresentation by Surpass independent of the Houston criminal proceedings itself misrepresents the facts by (1) omitting in its entirety the internal investigation by PCP-PDVSA following Sinotruk's allegations of a 'forged letter', including the issuance of three purchase orders for the parts covered by the purportedly false letter after the conclusion of the investigation, and (2) presents this allegation to the Tribunal as if it were on the basis of new information, and not a three-year old allegation that has already been thoroughly investigated.

- There is nothing inherently wrong with exclusive distribution deals, despite Bariven's categorisation of them as not being the 'preferred method' of competitive bidding. If Surpass had misrepresented its status, then the investigation would have uncovered this and Bariven would not have issued the three additional purchase orders in August 2015 after the investigation had ended. Surpass was even able to deliver the spare parts within one month after the issuance of these purchase orders in order to satisfy Bariven's urgent needs.

- It is therefore incomprehensible that Bariven tries to use as a defence in this Arbitration its very own decision not to follow a competitive bidding process, which was fully understandable given the circumstances at the time. The attempt to link its allegations of fraud and corruption, despite only one of the 94 purchase orders issued to Surpass having been issued by a Houston Defendant, is therefore completely unfounded.

282. Surpass further notes that Bariven's legal arguments are wrong as well: Bariven wrongly claims:

- that the CISG does not support Surpass' claim;

- that all the purchase orders issued to Surpass are illegal as a matter of Dutch law, and that there is essentially no distinction between contracts that provide for bribery and those procured through bribery and corruption under Dutch law. That pursuant to Article 3:40 DCC, all of these purchase orders are null and void ab initio;

- that the consent of all purchase orders issued to Surpass was vitiated (wilsgebrek) because they were entered under the influence of fraud and, pursuant to Article 3:44(3) and/or 6:228 DCC, subject to annulment;

- that it is legally precluded from making payment to Surpass under the laws of the United States and Venezuela;

- that a payment, whether voluntary or pursuant to an arbitral award, would place Bariven in criminal jeopardy under the laws of the United States and Venezuela and would be contrary to transnational public policy.

283. On all these arguments, Surpass disagrees fundamentally. To the contrary, CISG and Dutch law support Surpass' Claims. Under Dutch law, the Purchase Orders are legal and enforceable, they are not null and void on the basis of 3:40 DCC, or subject to annulment for fraud, error or "wilsgebrek". And even if there were, Bariven further argues that "[t]he invalidation of the purchase orders erases the rights and obligations thereunder. Therefore no claims for payment based on these non-existent contracts can lie." This conclusion is both wrong in view of the T&Cs and Dutch law.

284. Bariven further wrongly argues that *"[t]he invalidation of the purchase orders erases the rights and obligations thereunder. Therefore no claims for payment based on these non-existent contracts can lie."* This conclusion is both wrong in view of the T&Cs and Dutch law.

285. Further, neither US nor Venezuelan law prevent Bariven from making payments in satisfaction of an arbitral award. Transnational Public Policy does not support Bariven's position either.[24]

286. If the Tribunal were to deem the Purchase Orders null and void, or were to annul the Purchase Orders, it has to be determined what compensation is to be awarded to Surpass for the value of goods already delivered pursuant to these Purchase Orders. That compensation equals the amount of USD 47,896,567.54.

287. Further, Bariven also wrongly alleges that it does not have to compensate Surpass for the storage expenses that Surpass continues to incur in the preservation of the Trucks under Claim PO No.5100111750. It argues that:

- Claim PO No. 5100111750 was procured through corruption, and that therefore it is null and void ab initio and that therefore no payment is due;

- the storage expenses are expressly excluded under the 2009 T&Cs that govern the Claim PO;

---

[24] For further details cf. Reply par. 9.64/9.73, 10 and 11 resp. (Tribunal's Note)

- Surpass failed to mitigate its losses under Article 77 CISG; and
- Surpass has not established that the trucks cannot be resold.

288. For the following reasons, Bariven's argumentation fails.

First, as has been repeatedly set forward, there simply is no evidence in the record that Claim PO No. 5100111750 was procured through corruption. Moreover, even if the relevant Claim PO had been procured through corruption (quod non), Surpass would still be entitled to payment. This is both the case under applicable Dutch law and alternatively under transnational law.

Second, the exclusion Bariven references in its T&Cs is inapplicable in the current situation for the following two reasons:

i. Surpass is claiming performance, not damages. Surpass is claiming performance of Claim PO No. 5100111750 pursuant to Article 62 CISG, not damages under Article 74 CISG. Surpass now requests the Tribunal to order Bariven to fulfill its side of the bargain as it is entitled to do under Articles 61(1)(a) and 62 CISG, namely to pay the remaining purchase price and to take subsequent delivery of the goods. Bariven has at no time indicated that it would not pay the remainder of the purchase price, nor that it would not take delivery of the Trucks after payment and shipment.

   In order for Surpass to be able to fulfill its future obligations as a prudent debtor, it has taken all necessary steps to preserve the Trucks at a secure parking lot near to the Shanghai port, in order to ship the Trucks FOB Shanghai as soon as Bariven pays the outstanding amounts.

ii. Article 13(IV) 2009 T&Cs does not extend to 'expenses'.

   In addition, Article 85(1) CISG provides in its last sentence: "*(...) He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.*"

Surpass' actions are not inconsistent with the requirement of performance under Article 62 CISG. This means that Surpass is entitled to retain the goods until it has been reimbursed its 'reasonable expenses' by Bariven, which has not yet happened to date.

Bariven itself makes a clear distinction between losses, damages and expenses in its T&Cs. Article 13(IV) 2009 T&C explicitly mentions only damages and lost profits, not expenses:

> *"Vendor and Buyer shall not be liable to each other for incidental or consequential damages or loss of profit in connection with the Order."*

As Bariven itself distinguishes between loss (of profits), damages and expenses in its T&Cs, these reasonable expenses fall outside of the scope of Article 13(IV) 2009 T&Cs. Having not claimed any damages anyway, expenses do not qualify as incidental or consequential damages or loss of profit, even according to Bariven's own T&Cs. If Bariven wished to exclude reimbursement of reasonable expenses incurred as a result of its own failure to perform, then it must have done so explicitly. Surpass notes that Bariven makes this distinction in various places through its T&Cs, for example in the same Article under 13(I) T&Cs:

> *"Vendor shall Indemnify and hold harmless Buyer Group or Agent from any and all losses, expenses, awards, and damages (including, without limitation, court costs and reasonable attorneys' fees), arising out of or relating to any claim (a) for Vendor's breach of any of the terms or conditions of the Order (...)"*

Thus, these storage expenses fall under Article 85 CISG and outside of Bariven's damages exclusion.

Third, not only is Article 77 CISG inapplicable because, again, Surpass is not claiming damages to which Article 77 pertains, there is no reason to assume that Surpass did not fulfill its duty to mitigate its losses under Article 88 CISG.

Article 88(1) CISG provides that a party which is bound to preserve goods in accordance with Article 85 CISG, *"may sell them by any appropriate means if there has been an unreasonable delay by the other party (...) in paying the price or the cost of preservation."* This gives Surpass a right, not an obligation, to sell the goods if Surpass would deem this necessary. Given the previously expressed interest in the Trucks and the perfect satisfaction from the end user of the trucks as to date, Surpass had no indication that Bariven was not interested or not willing to perform under the Claim PO.

On the other hand, Article 88(2) CISG, would place an obligation on the seller to resell the goods, if the goods would be subject to rapid deterioration or if their preservation would involve unreasonable expenses. There are no indications that the Trucks are subject to rapid deterioration (they were designed withstand the Venezuelan climate) or that the preservation would involve unreasonable expense, so there is therefore no obligation for Bariven to sell the trucks to a third party. Bariven's position is such that Surpass would have had the obligation to resell the trucks, and thereby breached its own obligations under the Claim PO towards Bariven. Moreover, reselling the Trucks would be just such an action that is inconsistent with requiring performance, as Surpass is permitted to do, under Article 62 CISG.

Fourth, the meeting minutes to which Surpass referred are countersigned by Bariven and speak for themselves. It is truly a case of the world being turned upside down that Surpass should make an assessment of a possible resell for goods which are specifically designed for Bariven and its strenuous needs according to the Venezuelan climate and

infrastructure. If the Tribunal is so inclined, Surpass is happy to provide the hundreds of pages of specifications of these trucks and their Venezuelan-specific design which were produced to Bariven (despite Bariven of course already being in possession of all of this information) in this Arbitration.

289. Surpass performed its duties under the Claim PO and the CISG, and remains both able and willing to deliver the Trucks to Bariven to this very date, but only after it has received the full and agreed purchase price.

290. For the reasons set out above, Surpass is entitled to be reimbursed for the storage expenses it has made up to the date of full payment.

Submissions by Bariven

291. **Bariven**, in its **Rejoinder and Reply on the Counterclaim**, maintained its position. It submits that its jurisdictional objections present an insurmountable problem for Surpass. Surpass concedes that: "the Parties are in complete agreement [that] . . . the Claim POs are each distinct contracts with distinct arbitration agreements." As a result and as Surpass further concedes, in order for this Tribunal to have jurisdiction to decide in this arbitration the separate disputes arising under each of those distinct contracts, the Parties must first give their consent. Both Parties admit that they did not sign a document setting forth their consent for that to occur. Instead, Surpass argues that the Parties' consent is "presumed" by operation of Article 9 of the ICC Arbitration Rules, which Rules Surpass argues apply to all the contracts at issue in its Claim. Surpass offers no authority for this novel proposition. Instead, Surpass exclusively relies on its own wrong interpretation of Article 9, and, at that, ignores the article's express reference to its interplay with Article 6(3) of the ICC Arbitration Rules.

292. A mere reading of Articles 9 and 6(3) of the ICC Arbitration Rules confirms that consent is not presumed under either article. Consent must be express and in writing. Similarly, all of the authors who have commented on the subject agree with Bariven's position and none support Surpass' position.

293. Furthermore, the ICC Secretariat, the definitive authority on the scope of application of the ICC Arbitration Rules, has expressly addressed the scope and application of Article 9 and it too has explained that what Surpass seeks to accomplish cannot be done. The ICC Secretariat has said:

> *"Article 9's cross-reference to Articles 6(3)-6(4) is essential to its operation. It ensures that Article 9 is not used as a jurisdictional or contractual basis for*

hearing together in a single arbitration claims made under more than one arbitration agreement where there is no consent."[25]

294. This explanation makes it clear that Article 9 cannot be used as a mechanism to bypass the requirement that parties consent. And that is precisely what Surpass is seeking to do here when it argues that Article 9 presumes the Parties consented to decide in a single arbitration disputes arising under separate, distinct contracts. Again, no consent can be presumed under Article 9. The consent must be express and in writing. Because no such consent has been provided by the Parties here, the Tribunal lacks jurisdiction to decide in this arbitration the separate disputes brought by Surpass under distinct contracts. Accordingly. Surpass' Claim should be dismissed in its entirety.

295. Surpass agrees with Bariven that each purchase order is a standalone, distinct contract each containing a separate ICC arbitration clause. Therefore, this Tribunal must determine its jurisdiction as to each individual contract. It is also undisputed that none of the contracts provide for disputes arising under them to be resolved in a single arbitration. Despite the absence of that language, Surpass argues that by including ICC arbitration clauses in each contract the Parties *ipso facto* consented to resolving each of those separate disputes in a single arbitration. In support of this novel proposition, Surpass relies exclusively on an erroneous interpretation of Article 9 of the ICC Arbitration Rules.

296. According to Surpass, Article 9 "*expressly permits this very type of action*"—*i.e.*, the adjudication in a single arbitration of separate disputes arising under distinct contracts, each having their own arbitration agreement. According to Surpass, Article 9 presumes that consent across all of the separate contracts such that, according to Surpass, specific consent is not required. Surpass fundamentally misunderstands Article 9 of the ICC Arbitration Rules.

297. Article 9 states (emphasis added):

> "*Subject to the provisions of Articles 6(3)-6(7) and 23(4),* claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules."

Article 6(3) of the ICC Arbitration Rules, in turn, states in relevant part (emphasis added):

> "[I]f any party raises one or more pleas . . . concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and *__any question of jurisdiction__* or of whether the claims

[25] J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration,* ICC Publication 729 (Paris, 2012), ¶ 3-343 (emphasis added), **RLA-2**.

may be determined together in that arbitration <u>*shall be decided by the arbitral tribunal.*</u>"

298. Articles 9 and 6(3) therefore provide for the situation in which, as here, a Party seeks to resolve in a single arbitration disputes arising under more than one contract (in ICC parlance, this is called multicontract arbitration). When that happens, and if the issue is not previously identified by the Secretary General and referred to the ICC Court (as was the case here), it is then up to the Tribunal to decide "*any question of jurisdiction.*" In deciding that "*question of jurisdiction,*" a Tribunal's analysis axiomatically must focus on whether the Parties consented to having their separate disputes resolved *in a single arbitration.* The consent to resolve separate disputes in a single arbitration is not, as Surpass argues, present just because parties include ICC arbitration clauses in two or more separate contracts. If that were the true, then there would be no need for Article 6(3) to require the Tribunal to take on "*any question of jurisdiction.*" Rather, when there are separate contracts each providing for ICC arbitration, as here, the parties consent to precisely that: to resolve each dispute arising under each individual contract through *an* arbitration, not to resolve all disputes under every contract in a *single* arbitration. In that respect, the grant of jurisdiction under each separate ICC arbitration clause is circumscribed to the dispute arising under each corresponding contract and does not extend to disputes arising under *other* agreements between the parties. The grant of jurisdiction is specific to the particular arbitral tribunal constituted under each corresponding contract.

299. In the case at hand, the Parties' grant of jurisdiction to this Tribunal is, at most, limited to disputes arising under *one* of the purchase orders. The Parties have not consented to having this Tribunal resolve separate disputes arising under the other purchase orders, each of which contains its own ICC arbitration clause.

300. This is precisely how the ICC Secretariat and the doctrine interpret and apply Articles 9 and 6(3) of the ICC Arbitration Rules. Bariven already quoted in its Statement of Defense and repeats here for the sake of clarity the ICC Secretariat's definitive explanation on the matter:

> "Article 9's cross-reference to Articles 6(3)-6(4) is essential to its operation. It ensures that *Article 9 is not used as a jurisdictional or contractual basis for hearing together in a single arbitration claims made under more than one arbitration agreement* <u>*where there is no consent.*</u>"

301. This explanation from the ICC Secretariat puts to rest Surpass' tortured interpretation of Article 9. This quote makes two points clear. That: (*i*) specific consent from the Parties is necessary for a Tribunal to decide claims arising under more than one arbitration agreement in a single arbitration; and (*ii*) Article 9 shall not be used as a procedural mechanism to get around or substitute that consent. The quoted explanation from the ICC

Secretariat's Guide (§ 3-343) is squarely on point and is definitive as to the scope and application of Article 9. Surpass however entirely ignores in its Statement of Reply.

302. Attempting to distract from the issue, Surpass instead focuses on another section of the ICC Secretariat's Guide (§ 3-238), which states in relevant part: "*[i]t might very well be that each of the parties is bound by one of the arbitration agreements, but that the parties are not bound to arbitrate with each other or together in a single arbitration.*" Surpass argues that this language only applies to claims between multiple parties (Article 8 of the ICC Arbitration Rules) and not to issues arising under Article 9. Here too, Surpass is mistaken. The quoted language is part of Section 3-238 of the ICC Secretariat's Guide, which is titled "*Claims made under more than one arbitration agreement*" and that begins with the following statement: "*Where claims are made under more than one arbitration agreement, the requirements set out in Article 6(4), subparagraph (ii), apply in addition to Article 6(4), subparagraph (i).*" Article 6(4), subparagraph (ii), in turn, explicitly references situations in which "*claims pursuant to Article 9 are made under more than one arbitration agreement*" and the matter is referred to the ICC Court under Article 6(3). In short, contrary to Surpass' suggestion, the quoted language of Section 3-238 is on point and applies to the situation at hand in which two parties are bound by separate arbitration agreements but are not, solely because of that, bound to arbitrate "*together in a single arbitration.*"

303. Notwithstanding, if Surpass were correct that Section 3-238 refers to claims between multiple parties under Article 8 of the ICC Arbitration Rules, the ICC Secretariat's explanation under Section 3-343 (above quoted and ignored by Surpass) is dispositive on the issue: for there to be a multicontract arbitration, the parties must consent and Article 9 does not substitute for that consent.

304. Surpass also ignores the doctrine cited by Bariven, all of which ratifies Bariven's position in this arbitration: that disputes arising under different contracts can be decided in a single arbitration only if the parties specifically consent to that. That consent may be present, for example, in an *umbrella agreement*. Surpass sidesteps the quoted doctrine by resorting again to its unsupported and erroneous proposition that Article 9 of the ICC Arbitration Rules somehow provides or *presumes* that consent.

305. Based on the foregoing authority, Bariven submits that this Tribunal does not have jurisdiction to adjudicate in this arbitration disputes arising under the 26 separate, distinct contracts on which Surpass bases it claims. Surpass' position to the contrary is based on nothing more than a gross misinterpretation of Article 9 of the ICC Arbitration Rules, for which it provides no authority. A position that further is directly at odds with the very language of Articles 6 and 9 of the ICC Arbitration Rules, the ICC Secretariat's authoritative explanation, and the best doctrine on the subject. Bariven therefore reiterates its request that the Tribunal: (*i*) declare that it does not have jurisdiction to hear in this arbitration claims arising under separate, distinct contracts; and (*ii*) issue a Final Award dismissing Surpass' claims in their entirety and awarding costs to Bariven.

306. Lastly, Surpass' alternative position that it is entitled to cherry pick, out of the 26 purchase orders that remain, the one purchase order under which this arbitration should proceed fails. Surpass brought this arbitration seeking to resolve disputes arising under 39 separate contracts. Bariven promptly objected on the basis that, as explained above, this Tribunal does not have jurisdiction to decide in this arbitration the separate disputes arising under each contract. Although it did not have to do so, Bariven offered in the alternative to allow this arbitration to proceed on claims arising under *one* of the 39 purchase orders. Surpass deems that to have been a "*counter-offer*" which it "*expressly rejects*." Surpass now presents a new offer: that the arbitration proceed on a different purchase order that it unilaterally selected. Bariven does not accept that offer. As a result and as set forth in the Terms of Reference, the only issue before this Tribunal is whether it has jurisdiction to decide the disputes arising under the remaining 26 separate contracts. If the Tribunal finds that it does not, then Surpass' claim must be dismissed in its entirety.

307. Surpass argues it has the "*fundamental right ... to pursue its claim in the manner its sees fit, including which claim it chooses to pursue.*" Assuming *arguendo* that is a "*fundamental right*," Surpass already exercised that right when it brought a claim under numerous separate, distinct contracts in a single arbitration and then ratified that position in the Terms of Reference, which frame the issues to be decided by this Tribunal. Surpass is now precluded from unilaterally adopting a different position this late in the proceedings. It cannot belatedly force Bariven into arbitrating against its consent a claim different than the one Surpass originally presented.

308. Additionally, several of the purchase orders at issue in Surpass' Claim for Howo A7 truck spare parts are governed by the terms and conditions specifically negotiated by the Parties and that are memorialized in the Blanket Purchase Agreement. Surpass acknowledges the existence and validity of the Blanket Purchase Agreement, which is governed by Texas law and contains a forum selection clause conferring to the courts in Houston, Texas the exclusive jurisdiction to resolve disputes arising under purchase orders governed by its terms.

309. Surpass' argument that the Blanket Purchase Agreement applies only to purchase orders dated after 2 February 2015 is incorrect. The explicit terms of the Blanket Purchase Agreement say otherwise and, pursuant to established Texas law, Surpass cannot challenge the clear, unambiguous terms of the Blanket Purchase Agreement through evidence extrinsic to the contract. Alternatively, to the extent the purchase orders at issue in Surpass' Claim are governed by the United Nations Convention on Contracts for the International Sale of Goods, as Surpass argues, then all purchase orders for Howo A7 truck spare parts are subject to the terms and conditions specifically negotiated by the Parties for the sale and purchase of those spare parts, which terms are memorialized in the Blanket Purchase Agreement. As a result, this Tribunal lacks jurisdiction to decide disputes arising under purchase orders for Howo A7 truck spare parts because the Parties

agreed to subject those to Blanket Purchase Agreement, which does not contain an ICC arbitration clause.

310. Surpass admits the Tribunal lacks jurisdiction over 13 of the 39 purchase orders that formed part of its original claim. Of those 13 purchase orders:

- Ten are subject to the PSI Terms and Conditions, which grant "*exclusive jurisdiction for all disputes . . . [to] the applicable State and Federal courts in Harris County, Texas.*" Surpass acknowledges that the PSI Terms and Conditions do not provide for arbitration and argues it simply made an "*offer to proceed to arbitration despite those purchase orders not being subject to a valid (ICC) arbitration agreement.*"

- Three are subject to the Blanket Purchase Agreement ("BPA"), which does not contain an arbitration clause and requires that disputes be resolved before the courts in "*Houston, Harris County, Texas.*" Surpass just now acknowledges this—after more than one-and-a-half years of arbitral proceedings—and has "*withdrawn its claims with regard to these three purchase orders.*"

311. Surpass seeks to proceed with claims under the remaining 26 purchase orders. However, the Tribunal lacks jurisdiction over those 26 remaining purchase orders because:

- As Surpass admits, each purchase order is a standalone, "*distinct contract[] with distinct arbitration agreements.*" The Parties have not consented to resolve in a single arbitration claims arising each of those 26 separate, distinct contracts.

- One of those 26 remaining purchase orders is governed by the PSI Terms and Conditions, which do not contain an arbitration clause. Surpass admits this too.

- Purchases for Howo A7 truck parts are governed by the specifically negotiated terms and conditions memorialized in the BPA, which, as admitted by Surpass, does not contain an arbitration clause.

312. Bariven further submits that Surpass acknowledges that Purchase Order No. 5400003102 ("**PO 5400003102**") was issued by PDVSA Services, Inc. ("**PSI**") in Houston and is subject to the PSI Terms and Conditions. Admittedly, those terms do not contain an ICC arbitration clause. They state that disputes shall be resolved exclusively before "*the applicable State and Federal courts in Harris County, Texas.*" Cognizant of that, Surpass has already admitted that this Tribunal does not have jurisdiction over the set of purchase orders Surpass dubs the "*Houston Claims.*" Purchase Order No. 5400003102 is no different. It too is part of the Houston Claims.

313. Surpass, however, asks the Tribunal to ignore all of this and set aside the Parties' express agreement on PO 5400003102. It argues for the first time in this arbitration that, despite its express terms, PO 5400003102 is subject to a *different* set of terms and conditions, the

PSBV Terms and Conditions, in light of the Parties' supposed "*commercial course of dealing and practices.*" Surpass claims the CISG and Texas' Uniform Commercial Code support its novel argument.

314. Surpass is wrong.

First, the CISG does not apply to PO 5400003102 for two independent reasons: (*i*) as a matter of Texas law, the CISG does not apply to contracts governed by Texas law; and (*ii*) more importantly, PSI's Terms and Conditions expressly exclude application of the CISG. They state:

> "22. CHOICE OF LAW: The Order shall be governed by and interpreted in accordance with the laws of the state of Texas, United States of America without regard to its conflict of law rules ***or the application of the United Nations Convention on Contracts for the International Sale of Goods.*** The Parties agree that the exclusive jurisdiction for all disputes arising from or related to the Order shall be the applicable State and Federal courts of Harris County, Texas."

Opting out of the CISG is expressly permitted under Article 6 of the CISG. It is also consistent with the principle of party autonomy that the CISG seeks to guarantee. The Tribunal in ICC Case No. 16168, faced with a provision similar to that set forth in the PSI Terms and Conditions excluding application of the CISG, found the CISG inapplicable and reasoned:

> "In the light of Sect. 24(1) of the Contract stipulating that the Contract 'shall be governed in accordance with the laws of Germany. The United Nations Convention on International Sale of Goods (CISG) shall not apply', the Arbitral Tribunal finds that German law – with the exclusion of the CISG (Art. 6 CISG) – applies to the merits of the dispute as the law chosen by the parties (Art. 17(1) first sentence ICC Rules))."

Accordingly, Surpass' allegations under the CISG lack merit because the CISG is inapplicable. Only Texas domestic law governs PO 5400003102. As explained below, that law does not support Surpass' allegations either.

Second, Surpass mentions Texas' UCC in passing only. Surpass offers no actual analysis of the Texas UCC and does not even mention an applicable section. This is no accident. It stems from the fact that Texas' UCC simply does not support Surpass' position.

315. The Texas UCC specifically gives preeminence to express contractual terms over usages and course of dealings. Section 1.303(e)(1) of the Texas UCC provides:

> "(e) Except as otherwise provided in Subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage

of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) express terms prevail over course of performance, course of dealing, and usage of trade[.]"

316. In interpreting Section 1.303(e)(1), Texas courts have held that parties cannot rely on course of dealings and usages to contradict express terms and conditions of a contract. That is precisely what Surpass is trying to do here.

317. PO 5400003102 is subject to clear and unambiguous terms and conditions to which both Parties agreed. Those terms and conditions provide for disputes to be submitted to the exclusive jurisdiction of "*the applicable State and Federal courts in Harris County, Texas.*"[26] As a matter of Texas law, Surpass cannot render that express contractual term inapplicable by pointing elsewhere, such as the Parties' alleged course of dealings. Simply said, this Tribunal lacks jurisdiction over PO 5400003102.

318. Bariven acknowledges the withdrawal, by Surpass, of 3 Purchase Orders because they were subject to BPA no. 4620004815 and therefore not subject to the 2014 T&C and the ICC arbitration clause contained therein. It then submitted that the BPA is a master agreement that applies to purchases by Bariven of the specified Howo A7 truck spare parts sold by Surpass. And the facts establish that, of the 26 Purchase Orders remaining of Surpass' claim, 21 are for Howo A7 truck spare parts.

319. Although Surpass did not mention the BPA in its earlier submissions to this Tribunal, Surpass now acknowledges the BPA's existence and validity. Surpass also admits that purchase orders governed by the BPA are not subject to ICC arbitration—disputes under the BPA are to be resolved in court in Houston, Texas. As a result, Surpass "*withdraws its claims with to regard to . . . three purchase orders*" that it stipulates are governed by the BPA.

320. As Bariven explained in its Statement of Defense and Counterclaim, the Parties entered into the BPA so that Bariven could directly purchase from Surpass (and without the need to conduct competitive tender processes) up to USD $131 million in spare parts, to be used in the Howo A7 trucks that Surpass previously had sold to Bariven. The Parties identified under Addendum A to the BPA the spare parts covered under the BPA and agreed to purchase those spare parts under a specific set of negotiated terms and conditions (including a discounted price for volume) that differed from the ordinary terms and conditions Bariven used for its purchases, including other purchases it made from Surpass.

[26] Neither Party disputes that these terms and conditions are unambiguous. And, as a matter of Texas law, the Parties' course of conduct cannot be used to create an ambiguity in an otherwise unambiguous contract.

321. In short, the BPA is a master agreement that applies to purchases by Bariven of the specified Howo A7 truck spare parts sold by Surpass. The BPA's first two "*whereas*" are explicit on this:

> "WHEREAS, Purchaser desires to purchase on a continuing basis, and Seller desires to sell, on a continuing basis, various type of equipment and its spare parts (hereinafter generally referred to as 'Products' and/or 'Services') as selected by Purchaser from those Products listed in Addendum 'A'.
>
> WHEREAS, to avoid repetitive negotiations, the parties hereto desire to enter into this Blanket Purchase Agreement (hereinafter referred to as the 'Blanket Agreement'), establishing the terms and conditions of sale which will be applicable to the sale of the Products."

322. Surpass agrees that this is the intended scope of the BPA. Mr. Chen Jingshuang testifies that discussions about the BPA began as early as 2013, and the requisite approvals within Bariven had been obtained by early 2014. Mr. Chen's description of what the Parties sought to accomplish through the BPA and the BPA's intended scope coincides with what Bariven has previously said. Mr. Chen states:

> "Since the after sales service of the trucks could not properly be performed due to a lack of spare parts and Bariven wanted to avoid a lengthy bidding and procurement process – which sometimes took a year or more – Bariven suggested the conclusion of ***an agreement on the basis of which Bariven could simply order spare parts without going through the bidding process . . . The agreement eventually became the Blanket Purchase Agreement no. 46620004815 ('BPA')***."

323. Additionally, Mr. Chen explains that non-parties to the BPA, such as Surpass' supplier Sinotruk (which also is the spare parts manufacturer), were made aware of the BPA's intended scope. Thus, everyone involved knew, accepted, relied, and acted on the understanding that the BPA governed the sale by Surpass to Bariven of Howo A7 truck spare parts. The following additional facts, among others, are further evidence of this common intent and understanding: (*i*) the Parties assembled a list of the Howo A7 truck spare parts that were to be sold pursuant to the terms of the BPA; (*ii*) Bariven agreed to forego its standard practice of conducting competitive bidding processes, proceeding instead to purchase the spare parts in bulk directly from Surpass; (*iii*) Surpass agreed in turn to sell the listed parts at volume-discounted prices, which in most cases exceed 80% of the unitary prices originally listed; and (*iv*) purchases for these spare parts were to be delivered pursuant to the "*delivery terms*" set forth in the BPA, which call for materials to be "*delivered CFR Puerto Cabello.*"

324. Consistent with what was agreed, whenever Bariven sought to purchase Howo A7 truck spare parts from Surpass, Bariven initiated a non-competitive process through the issuance of Requests for Quotations ("**RFQs**") all of which stated:

> "Outline Agreement. If material-requested herein is covered by a previously negotiated Blanket Purchase Agreement, ***prices and delivery must be quoted according to the terms and conditions of said agreement***."

325. Surpass, in turn, complied with that term and submitted offers quoting prices and delivery according to the terms and conditions negotiated in the BPA. Bariven then issued purchase orders for the quoted Howo A7 truck spare parts, with each purchase order stating: "*If this order is covered by a Blanket Purchase Agreement or interactive agreement, **the Terms and Conditions of the applicable Agreement (number) mentioned on the item(s) of this purchase order apply to this document***."

326. It is therefore surprising, to say the least, for Surpass to argue for the first time in this arbitration that *some* of the purchase orders for those very same Howo A7 truck spare parts are somehow not part of the BPA. The facts establish, however, that of the 26 purchase orders remaining in Surpass' claim, 21 are for Howo A7 truck spare parts covered by the BPA. Indeed, a cursory review of those 21 purchase orders confirms they are all for Howo A7 truck spare parts:

- ***Bought through a non-competitive bidding process***, consistent with Mr. Chen's testimony, the terms of the BPA, and the internal approvals and authorizations issued by Bariven in connection with the negotiation of the BPA.

- ***Listed in Addendum A to the BPA***. In fact, of the ____ materials purchased through those 21 purchase orders, _____ are Howo A7 truck spare parts listed in Addendum A. In other words, ___% of the materials included in these purchase orders are listed in Addendum A to the BPA.

- ***Priced pursuant to the volume-discounted prices included in the BPA***. This point cannot be overstated. It confirms Surpass' understanding and intent to be bound by the terms of the BPA and further establishes that Surpass acted upon that understanding. Indeed, Surpass sold materials at the volume-discounted prices set forth in Addendum A to the BPA after having: (*i*) quoted those prices in response to RFQs that expressly incorporated the terms of the BPA; and (*ii*) accepted purchase orders that expressly incorporated the terms of the BPA.

- ***Delivered pursuant to the "delivery terms" set forth in the BPA***. The BPA provides for materials to "*be delivered CFR Puerto Cabello*." The 21

purchase orders all similarly provide for delivery according to those same terms.

327. Of these 21 purchase orders, nine are dated prior to 1 January 2015 and twelve are dated after. The table below shows these two sets of purchase orders.

Purchase Orders for Parts Covered by the BPA				
PO Number		PO Date	Amount in Dispute USD	Exhibit Number
1	5100114292	6 May 2014	$71,709.30	C-6
2	5400002306	24 July 2014	$3,066,108.99	C-7
3	5400002467	21 August 2014	$3,137,667.24	C-8
4	5400002639	22 September 2014	$2,252,255.05	C-9
5	5400002640	22 September 2014	$1,777,781.10 $645,660.00	C-10
6	5400002687	29 September 2014	$265,670.00	C-11
7	5400002689	29 September 2014	$761,580.00	C-12
8	5400002746	3 October 2014	$9,972.14	C-13
9	5400003155	2 December 2014	$709,300.00	C-14
10	5400003396	16 January 2015	$1,889,681.55	C-15
11	5400003398	16 January 2015	$1,545,702.26	C-16
12	5400003399	16 January 2015	$1,107,650.09	C-17
13	5400003403	16 January 2015	$1,960,873.64	C-18
14	5400003404	16 January 2015	$1,825,139.71	C-19
15	5400003453	27 January 2015	$2,168,877.28	C-20
16	5400003458	28 January 2015	$2,208,898.99	C-21
17	5400003459	28 January 2015	$1,354,938.99	C-22
18	5400003461	28 January 2015	$1,672,826.10	C-23
19	5400003463	28 January 2015	$324,731.71	C-24
20	5400003464	28 January 2015	$1,564,941.92	C-25
21	5400003102	25 November 2015	$1,746,266.47 $3,434.12	C-29
		Total in USD	**$32,071,666.65**	

328. Bariven maintains its position that 11 of the 12 purchase orders issued after 1 January 2015 (C-15 through C-25) are subject to the BPA by virtue of their date. If, however, the Tribunal were to agree with Surpass' new argument that the United Nations' Convention on the International Sales of Goods (the "CISG") applies to the purchase orders at issue in this arbitration, then all 21purchase orders must fall under and be subject to the BPA.

329. Pursuant to Texas law, by the BPA's express terms, the agreement governs purchase orders issued after 1 January 2015. If the CISG were to apply, the BPA governs all 21 Purchase Orders for Howo A7 truck spare parts. It then argues that ignoring the intended scope of the BPA, as described above, Surpass argues that Purchase Orders C-15 through C-25 are not subject to the BPA, claiming that the agreement was not effective until 2 February 2015. This argument contradicts the unambiguous language of the BPA, which states that the agreement was executed—and therefore entered into effect—on 1 January 2015. Nonetheless, Surpass seeks to get around the BPA's express language by presenting three equally unavailing arguments.

330. **First**, Surpass argues that it is wrong to *"assum[e] that the 'effective date' of the contract is the same as the date of the agreement,"* which is listed in the BPA as I January 2015. Surpass then claims that the definition of *"Effective Date"* under Section 2.1 of the BPA is the only provision that matters. The definition states: *"[t]he effective date of this Blanket Purchase Agreement is the date of the latest signature below."*

331. Surpass, however, ignores the last paragraph of the BPA, which appears immediately above the Parties' signature and states:

> IN WITNESS WHEREOF, the parties have executed this Blanket Agreement by authorized representatives **as of the date first set forth above**.

332. It is undisputed that the *"date first set forth above"* is 1 January 2015, the only date that appears in the BPA. The quoted language, therefore, is an attestation and express confirmation by both Parties to having executed the BPA on 1 January 2015. Accordingly, the date of the *"latest signature below"* by the Parties' express and unequivocal acknowledgement in the BPA can be no other than 1 January 2015.

333. Surpass' arguments to the contrary fly in the face of the clear and unambiguous terms of the BPA. Cognizant of that, Surpass next resorts to documents extrinsic to the BPA in an attempt to dispute its otherwise clear and unambiguous language. That brings us to the next two arguments raised by Surpass.

334. In its Reply on Surpass' jurisdictional objections to the **Counterclaim**, Bariven submits that Surpass challenges the Tribunal's jurisdiction over the purchase orders at issue in Bariven's counterclaim on two grounds.

335. Surpass **first** claims Bariven has failed to establish the existence of an arbitration clause with respect to 31 of the purchase orders at issue in the Counterclaim. Surpass argues those 31 purchase orders were issued prior to 2014 and therefore cannot be subject to the PSBV Terms and Conditions that were revised and put in place in December 2014. This argument is disingenuous. The PSBV Terms and Conditions that were in place prior to December 2014—and on which Surpass relies for its Claim—also contain an ICC arbitration clause. Those are the PSBV Terms and Conditions for Goods Purchases,

Revision 08-2009 that Surpass has introduced into evidence as C-40. They contain an ICC arbitration clause in Section 27. Surpass' argument has no merit. Surpass **next** claims the Counterclaim purchase orders are inadmissible under Article 1038c(1) DCCP. Bariven's position is simple: Article 1038c(1) does not preclude the Parties from ***agreeing*** to resolve counterclaims unconnected to the main claim. Article 1038c(1) in fact express provides for that possibility. Thus, the Tribunal's jurisdiction over Bariven's counterclaims is premised on the Parties' consent.

336. Bariven has explained already in sufficient detail how that consent can be present in this case and will not reiterate its argument on that issue. Surpass offers nothing new other than a tortured misinterpretation of Article 9 of the ICC Arbitration Rules. As explained above, Article 9 does not presume or imply consent to decide in a single arbitration disputes arising under separate, independent contracts. Therefore, the Tribunal can decide claims arising under more than one purchase order (be it a purchase order in the Claim or the Counterclaim) *only if it first* determines that the Parties specifically consented to that. If that consent exists with respect to the Claim purchase orders—which Bariven disputes—then *par force* the same is true with respect to the Counterclaim purchase orders.

337. With regard to the cancelled PO 5100111750, Bariven submits that specific performance is not available under the CISG and that the PSBV T&C limits the amounts recoverable under that order, and that Surpass' claim for specific performance under the CISG in connection with PO 5100111750 fails on three grounds.

338. ***First***, as previously stated, Surpass is taking an entirely new position. Surpass has always sought damages arising from Bariven's alleged breach for non-payment. The request for specific performance was not included in the Terms of Reference. Surpass is therefore precluded by Article 23(4) of the ICC Arbitration Rules from introducing that new claim this late in the proceedings.

Second, pursuant to the Parties' agreement, memorialized in the terms and conditions that govern this purchase order, specific performance is not an available remedy in case of breach of contract by Bariven. The PSBV Terms and Conditions spell out the remedies available to Surpass in case of breach by Bariven, and they do not provide for specific performance. For example, in case of breach by Bariven, Article 13 of the PSBV Terms and Conditions limits Surpass' remedy to the recovery of certain damages, excluding "*incidental or consequential damages or loss of profit*." While Article 20 of those terms and conditions allows Bariven to cancel the purchase order at any time and for any reason, and limits Surpass' remedies in case of cancellation to the recovery of specified sums of money. Article 20 states in this respect (emphasis added):

> "Buyer and Vendor shall promptly agree on a cancellation settlement, based on that portion of the Order satisfactorily performed to the date of cancellation. Included in such *settlement shall be reimbursement for reasonable overhead and*

> *profit on the Order or the canceled part thereof, reasonable and necessary expenses resulting from the cancellation, as substantiated by documentation satisfactory to and verified by Agent or Buyer, and disposition of work and Material on hand. Amounts previously paid by Buyer shall be offset against amounts determined to be due. Vendor shall not be entitled to any prospective profits or damages because of such cancellation.* Should the amounts previously paid by Buyer outbalance those determined to be due, Vendor shall return the excess to Buyer."

Under both Article 13 and 20, the Parties expressly agreed to limit remedies in the case of breach or cancellation by Bariven to compensation for certain sums of money. These articles do not provide for the possibility of specific performance, either for an action on the price or for taking delivery of the goods. Surpass therefore is limited to a certain sum for the concepts spelled out in either Article 13 or 20. The agreed-upon limited remedies under both articles is in derogation of the CISG's default provisions. In this respect, Article 6 of the CISG allows parties to agree on terms that "*derogate from or vary the effect of any of its provisions.*" This is consistent with the principle of party autonomy that underpins the CISG. In their seminal legal treatise on the CISG, Professors Schlechtriem and Schwenzer explain:

> "While the parties may find the CISG generally suitable for their sales contract, they may not be satisfied by individual provisions of the Convention or with their default effect. ***Article 6 allows for the parties to either derogate from the respective provision or to generally have it applied but change its effect.*** Clauses derogating from individual provisions or varying their effects again function at the level of substantive law and are therefore governed by the rules on formation of the Convention."

Bariven refers to certain doctrine in support thereof.

Accordingly, Surpass' claim for specific performance under PO 5100111750 fails. Surpass is contractually limited to recover monies for those concepts specified in Article 13 or 20 of the PSBV Terms and Conditions, as the case may be, and must offset that amount against the USD $5,609,235.00 that Bariven already paid under PO 5100111750.

Third, a significant part of PO 5100111750 is for labor and other services to be provided in connection with the goods being sold therein. That labor and those other services have not and will not be provided by Surpass, nor is their provision covered under the CISG. By way of example, PO 5100111750 states in several places that the price listed includes:

> "[The] total cost of preventative maintenance . . . labor costs . . . in the warranty period."

> "***Staff – Training - certification and training*** in preventive, predictive and corrective specialized support for one (1) year, fifty (50) students will be trained in Venezuela in [S]panish"

339. Surpass cannot seek specific performance of the significant labor, maintenance, and other services included in PO 5100111750. The PSBV Terms and Conditions limit the amounts recoverable under PO 5100111750. Because PO 5100111750 was cancelled by Bariven, Article 20 of the PSBV Terms and Conditions governs here. Article 20 by its very terms does not allow recovery by Surpass of the full price of the purchase order—nor does Surpass seem to have access to that remedy because it conditions delivery of the goods on first receiving full payment from Bariven.[27] Under Article 20, Surpass is only entitled to "*reasonable and necessary expenses . . . as substantiated by documentation satisfactory to and verified by [Bariven].*" Surpass, however, "*shall not be entitled to any prospective profits or damages.*"

340. As a preliminary issue, Surpass has not provided Bariven with documentation substantiating the sums it seeks to receive as reimbursement in connection with the cancellation of PO 5100111750. Bariven has reviewed the documentation submitted by Surpass in this arbitration and does not find it satisfactory or verifiable. Other than seeking payment of the full price of PO 5100111750—again, not an available remedy here—Surpass seeks as expenses payment of storage costs for the trucks, calculated at USD $3,000 per month from the date when the trucks were supposed to be delivered (according to Surpass that was supposed to occur in November 2015 and early-2016).

341. The incurred storage costs are not reimbursable "*reasonable and necessary **expenses** resulting from the cancellation*" of PO 5100111750. As Bariven explained in its Statement of Defense, storage costs are incidental or consequential *damages*—not expenses—and, therefore, fall within the exclusion of both Article 20 and Article 13(IV) of the PSBV Terms and Conditions.[28]

---

[27] Surpass' Statement of Reply and Defense on the Counterclaim, ¶ 9.102. Schlechtriem & Schwenzer, "*Commentary on the UN Convention on the International Sale of Goods (CISG),*" Oxford University Press, 4th ed. (2016), Pt. III, Ch. III, Art. 62, ¶ 10, p. 909 ("*If the payment of the price becomes due by handing over the goods or documents or by placing them at the buyer's disposal, the **seller will only be able to request and obtain judgment for payment against delivery**.*") (emphasis added), **RLA-77**.

[28] CISG Advisory Council Opinion No. 6, Calculation of Damages under CISG Article 74, available at http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html ("Article 74 provides no exhaustive list of incidental damages that may be recoverable. In the case where a buyer rejects the goods without justification or refuses to make payment upon delivery of the goods as agreed in the contract, additional costs incurred by an aggrieved party in order to avoid greater loss may include **costs incurred in storing** or preserving goods."), **RLA-49**; P. Butler, "Damages Principles under the Convention on Contracts for the International Sale of Goods (CISG)," The Guide to Damages in International Arbitration (Global Arbitration Review 2016), **RLA-50** (characterizing the "seller's expenses for storing and preserving goods that the buyer has unjustifiably rejected or has not taken delivery of to avoid greater loss" as "incidental loss"); Delchi Carrier Spa v. Rotorex Corp., 71 F.3d

342. In any event, even if the claimed storage costs were deemed expenses recoverable under Article 20 of the PSBV Terms and Conditions, the amount Surpass seeks to recover is neither reasonable, nor necessary. At most, Surpass would be entitled to seek reimbursement of the storage costs incurred through the date it became aware Bariven no longer was going to take delivery of the trucks. At the latest, that is the date of Surpass' Request for Arbitration, 24 November 2016. By then, it was reasonably clear to Surpass that Bariven was not paying under this purchase order and was not going to take delivery of the trucks. In the best case scenario, that means Surpass is entitled to one year of storage costs, which at USD $3,000 per month amounts to USD $36,000.00. Surpass can deduct that amount from the more than USD $5 million it already received from Bariven and shall return the balance to Bariven.

343. Article 13(IV) of the PSBV Terms and Conditions further limits Surpass' potential recovery to actual damages and prevents Surpass from seeking "*incidental or consequential damages or loss of profit in connection with the order.*" This limitation is in derogation of Article 74 of the CISG. As previously stated, Surpass is seeking payment of the full price of PO 5100111750 and the storage costs its claims to have incurred. Neither concept is recoverable under Article 13(IV) of the PSBV Terms and Conditions or Article 74 of the CISG.

344. As previously explained, Bariven has not taken delivery of the trucks, which remain under Surpass' title and possession. Surpass, therefore, cannot seek payment of the full price as damages for breach as that would equate to specific performance, a remedy not available here. The only other "*loss*" Surpass has claimed in this arbitration are the storage costs, which Surpass acknowledges it is precluded from recovering under the damages limitation set forth in Article 13(IV) of the PSBV Terms and Conditions. Surpass makes no other claim for losses recoverable as damages under Article 74 of CISG, as limited by Article 13(IV) of the PSBV Terms and Conditions.

345. Lastly, Surpass alleges, without more, that the trucks were "*specifically designed for Bariven and its strenuous needs according to the Venezuelan climate and infrastructure.*" Surpass provides no support for this naked assertion. Nothing in the technical specifications set forth in PO 5100111750 establishes that the three types of trucks listed in the purchase order were designed specifically for Bariven's unique use in Venezuela and that they cannot be used by anyone else, anywhere in the world. In fact, these trucks appear to be standard stock models of tanker trucks manufactured and sold by Sinotruk in the open market.

346. Whether or not these were specifically manufactured trucks for Bariven's exclusive use—a fact Surpass has failed to establish—Surpass had a duty to mitigate under Article 77 the CISG. As the tribunal in ICC Case No. 8817 put it:

1024, 1030 (2d Cir. 1995), **RLA-51** (characterizing "storage expenses for the second shipment at Genoa" as "incidental damages").

> "Respondent points out pertinently that it is a principle of international commercial law that the party suffering harm must take the necessary steps to mitigate the harm. For contracts of sale, this rule is expressed in Article 77 of the Vienna Convention[.]
>
> ...
>
> 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."

347. Surpass has offered no evidence of having even attempted to comply with the duty to mitigate imposed by the CISG and must bear the consequence of its own inertia:

> *"In the absence of indications as to the efforts and attempts made by Claimant during the alleged year of inactivity, the arbitrator considers that this commercial inactivity was caused in part by Claimant's inertia."*

348. With regard to corruption and other irregularities, Bariven submits that Surpass makes a stunning admission about Mr. Cautilli's critical role in securing business from Bariven. Surpass' key witness, Mr. Chen, admits that but for Mr. Cautilli Surpass would not have secured contracts from Bariven and its parent, PDVSA. Mr. Chen states:

> *"It would therefore be necessary for Surpass to work with Mr. Cautilli to procure the contract from the Venezuelan client (rather than Sinotruk).*
>
> . . .
>
> All that was needed from Surpass was a credential letter to go try to get the contract. Because Surpass wanted to develop the Venezuelan market and the risk was controllable, we decided to give the proposal a try. Sinotruk provided a quotation sheet in December 2009 for 750 tractor trucks and tankers and on that basis, Mr. Cautilli approached the Venezuelan client.
>
> . . .
>
> On 10 February 2010 . . . and through the involvement of Mr. Cautilli, we signed our first procurement contract for 750 tractor trucks and tankers[.]
>
> . . .
>
> Mr. Cautilli proved himself to be a very hard worker and landed many procurement contracts with Bariven and PDVSA."

This [sic] are remarkable statements. They confirm what Bariven has been saying all along: that Mr. Cautilli's involvement was the reason why Surpass was able to secure contracts from Bariven in the first place and why it continued to receive hundreds of millions of dollars in additional contracts. It confirms as well that Surpass' business model vis-à-vis Bariven rested on Mr. Cautilli's ability to deliver on his promise to secure contracts from Bariven.

349. Given all that it had riding on Mr. Cautilli, it would be expected that a USD $100 billion dollar, highly sophisticated Chinese-state owned entity, like Surpass, would have conducted some basic due diligence and vetting on Mr. Cautilli to at least determine beforehand who he was, what was his background, and, more importantly, how was it that a then 31-year-old young man was able to secure hundreds of millions of dollars' worth of contracts but Surpass itself could not. But Surpass did not do that, even though Mr. Chen acknowledges that Surpass was "initially skeptical about whether Mr. Cautilli could obtain contracts for Surpass" and had "doubts that [a first contract for USD $104 million secured by Mr. Cautilli] contract would go through." Mr. Chen even finds it remarkable that Mr. Cautilli was able to do that "despite his young age." Bariven could not agree more.

350. Surpass' explanation for not conducting even minimal due diligence on Mr. Cautilli is as improbable as it is implausible. According to Surpass, its apprehensions and skepticism about Mr. Cautilli were assuaged because Sinotruk, a third party, "vouched for [Mr. Cautilli]" and because, after sustaining a single conversation with Mr. Cautilli, Surpass "found that he was quite familiar with the Venezuelan market" and allegedly had general experience in the field.

351. Surpass provides no documentation backing up this claim. There are no internal notes, memoranda, minutes of meetings, or other documentation setting forth the considerations or thought process of Surpass' employees in deciding to hire Mr. Cautilli. No documents analyzing the risks and benefits to Surpass of conditioning what turned out to be a multimillion-dollar business relationship on Mr. Cautilli. No documents justifying Surpass' reliance on Sinotruk "vouching" for Mr. Cautilli. Not even a witness statement from either Sinotruk or Mr. Cautilli on the subject. Cognizant that it cannot back up this claim with hard evidence, Surpass offers an even weaker excuse: that this is just "the way business is done in China, based on trust." With due respect, trust alone is insufficient when a USD $100 billion dollar Chinese-state owned entity is paying a 31-year old, uncredentialed young man millions of dollars in commissions in order to "land" hundreds of millions of dollars' worth of contracts from a Venezuelan-state owned entity located halfway across the world.

352. Against this backdrop, Bariven addresses below Surpass' arguments regarding the applicable burden of proof and its challenges to the evidence of corruption submitted with Bariven's Statement of Defense and Counterclaim.

353. With regard to the evidence required, Bariven refers first of all to the burden of proof for bribery and corruption. The evidence put forth by Bariven in this arbitration conclusively shows that Surpass participated in and benefited from acts of corruption in securing procurement contracts from Bariven. The tribunals in World Duty Free and Metal-Tech explained that arbitral tribunals need not resort to presumptions or particular burdens of proof in corruption cases. Rather, the question is whether corruption was established with reasonable certainty on the basis of the evidence before the Tribunal. In particular, the

tribunal in World Duty Free observed that "this is not a case which turns on legal presumptions, statutory deeming provisions or different standards of proof." Similarly, the tribunal in Metal-Tech (referring to World Duty Free) explained:

> *"As in World Duty Free, the present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments. Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence."*

What matters, in the words of Yves Derains, "is that you are convinced or you are not convinced."

354. "Preponderance of the evidence" is the appropriate standard. Nevertheless, if the Tribunal feels it necessary to identify a particular standard of proof that applies in this case, the "preponderance of the evidence" standard should apply. This is because arbitrators deal exclusively with the civil consequences of a finding of corruption. The higher standard of "clear and convincing evidence" proposed by Surpass is more appropriately applied in a criminal context where the fundamental right of freedom is at stake and the presumption of innocence plays a predominant role. Bariven refers to other commentators as well.

355. Further, the Tribunal should draw adverse inferences given Surpass' failure to explain key events. Adverse inferences can be an important element in corruption-related cases where, as here, there are unexplained transactions, including an unexplained money trail between Surpass and Mr. Cautilli and an unexplained involvement by Mr. Rincón in helping Surpass secure contracts from Bariven. In addressing this issue, the Metal-Tech tribunal considered it its duty to "understand what services these payments were intended to compensate." That tribunal therefore asked the claimant to provide an explanation for a certain money transaction. When claimant failed to do so, the tribunal drew adverse inferences against it:

> *"While the Tribunal does not believe that the Claimant sought to conceal evidence, the inference that inexorably emerges from this dearth of evidence is that the Claimant can provide no evidence of services, because no services, or at least no legitimate services . . . The tribunal will bear this inference in mind when further assessing the facts."*

This approach is common in international arbitration. Antonio Crivellaro has similarly noted a tribunal's duties "to be proactive and require the parties to disclose all evidentiary

elements in their possession" and to "apply all adverse inferences resulting from the parties' lack of cooperation."

356. Tribunals will usually draw adverse inferences in two circumstances: (i) where a party has refused to produce evidence that is reasonably within its possession or control; and (ii) where a party has failed to respond to the prima facie case put forward by the other party. In this regard, Hwang and Lim observe:

> *"Drawing of an adverse inference in this situation is different from reversing the burden of proof. An adverse inference only arises from a failure by the impugned party to adduce evidence, which can be reasonably construed in the circumstances as an attempt to conceal corrupt activities. It provides the party alleging corruption with an additional inferred fact to discharge its burden of proof, which burden remains on that party throughout the proceedings. On the other hand, a reversal of the burden of proof is effected upon mere provision of some prima facie evidence of corruption by the party alleging corruption, even if there is no suspicious withholding of or refusal to adduce evidence by the impugned party; the latter thereafter bears the burden of disproving corruption."*

These adverse inferences may then be used to establish that a party has met its burden of proof: "[t]he situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation."

357. Based on the foregoing, Bariven submits that the ordinary "preponderance of evidence standard" should be applied by the Tribunal when examining Bariven's corruption allegations. Furthermore, Bariven reserves the right to request the Tribunal to draw adverse inferences from Surpass' failure to put forward witnesses and evidence addressing Bariven's corruption allegations, including, in particular:

- The failure to offer Mr. Cautilli as a witness in this case, especially since he is central to Bariven's allegations of corruption and Surpass, as explained above, admits he was the reason why Surpass received contracts from Bariven.
- The failure to offer any evidence of the due diligence it performed on Mr. Cautilli prior to engaging him, including to determine the manner and means by which he was going to "land" contracts with Bariven.
- The failure to offer a representative from Sinotruk as a witness in this case, especially since Surpass claims its apprehensions and skepticism about Mr. Cautilli were assuaged because Sinotruk "vouched for [Mr. Cautilli]"
- The failure to produce all of the evidence of payments made to Mr. Cautilli and his companies. A cursory review of the Cautilli invoices produced by Surpass confirms

there are missing invoices for the purchase orders at issue in Bariven's counterclaim (Surpass has received payment for all counterclaim purchase orders).

358. Surpass cannot disprove Bariven's evidence of corruption and irregularity affecting Surpass' procurement contracts

359. While Surpass claims to have taken Bariven's corruption "accusations very seriously," it points to no concrete action undertaken to investigate these allegations of corruption or, as explained above, to shed light into the due diligence it performed on Mr. Cautilli or the companies to which Surpass paid the commissions charged by Mr. Cautilli. Quite the contrary, Surpass has taken to vigorously defending Messrs. Cautilli and Rincón, going as far as to argue that: (i) "there is no factual basis set out for any criminal action against Mr. Cautilli," although the Spanish authorities already found he engaged in criminal conduct and are prosecuting him in Spain at this very moment; and (ii) Mr. Rincón was the victim of "extor[tion]" by rogue ex-Bariven employees, despite the fact that Mr. Rincón was accused by the US Government of and has personally admitted to masterminining the corruption scheme.

360. Bariven reiterates that there is – unrebutted - evidence of a direct relationship between Mr. Rincón and Surpass, and once more refers to Mr. Cautilli's role also in this context.[29]

361. With regard to Surpass' PO 510008436, 5100100963, 5100103283, 5100099340, 5100099339, 5100096686, 5100103242, 5100107117 and 5100097655, Bariven submits that Surpass appointed Tradequip, the company owned by Mr. Rincón and some of his family members, and that certain Purchase Orders had bid trackings connected to other Rincón-companies and that once more Mr. Cautilli was involved.[30]

362. With regard to Mr. Cautilli's Agency Agreement Bariven submits that it is dated 11 February 2010 and Mr. Chen claims it has remained in existence since: "[w]e have continued working with Mr. Cautilli on this basis since February 2010. We have paid him an agency fee according to the Agency Agreement."

363. The Agency Cautilli provides the agency fee to be charged by Mr. Cautilli for his services:

> *"The agency fee for Ottavio should be 3% of the contract value or otherwise agreed by both parties, taking into account the obligations and workload by Ottavio."*

364. Surpass confirms in its Statement of Reply and Defense to the Counterclaim that Mr. Cautilli's compensation has always been determined based on the 3% fee set forth in the Agency Agreement.

---

[29] For further details cf. par. 140 et seq. of Bariven's Rejoinder (Tribunal's Note).

[30] For further details cf. par. 151 et seq. of Bariven's Rejoinder (Tribunal's Note).

365. Surpass argues that "the amounts paid to Mr. Cautilli as commission would not satisfy the bribery scheme outlined in the Charging Documents," which refer to bribes amounting to 10% of the value of each Bariven contract. Surpass then aggregates the payments it claims it has paid to Mr. Cautilli and arrives at an average of 3.10% of the value of the corresponding contracts.

366. This argument fails on several grounds.

First, the Houston Defendants' admission to paying kickbacks of up to 10% of the value of each contract does not actually mean that it is all they paid in bribes. That is an admission made on the facts that the defendants and the U.S. prosecutors believe are sufficient to form the factual predicate of the crimes being charged. In other words, the defendants would be just as guilty if they admitted to paying 1% in bribes, as they would be if they paid 20% in bribes.

Second, Surpass does not admit that Mr. Cautilli's 3% commission was intended to pay bribes. It may well be that that was his "cut" of the transaction and that the bribes were paid from some other pot of money.

Third, Surpass' exercise in arithmetic is misleading. The Agency Agreement calls for a 3% fee of the value of each contract. Surpass has not done that exercise. It instead has averaged some of the payments it claims to have made to Mr. Cautilli. Of the 46 invoices produced by Surpass, only 10 of the invoices reflect commission payments ranging between 3% and 3.99% of the value of the underlying contract. The rest range from 0.36% all the way to 8.09%. Clearly, not all payments Surpass made to Mr. Cautilli fall under the purported Agency Agreement.

Fourth, Surpass has not produced or considered in its exercise all of the invoices issued in connection with all of the purchase orders at issue in this arbitration. Surpass has argued that it does not have invoices for purchase orders that have not yet been paid (i.e., those at issue in its Claim), but it should have invoices for all of the purchase orders at issue in the Counterclaim because those have all been paid. Yet, Surpass did not produce or consider those invoices in its calculation.

Fifth, Surpass originally suggested that it paid Mr. Cautilli the 3% commission under the Agency Agreement, when, in fact, it recently became known that Surpass paid Mr. Cautilli's commission to companies in which allegedly he was the "ultimate beneficiary." Companies that were not party to the Agency Agreement and, therefore, could not have provided the services described in the agreement or received payment for those services, which they had not provided.

Sixth, Bariven also has serious doubts about the Agency Agreement and whether it, in fact, has been in place since February 2010. Several of the agreement's provisions appear to be specifically tailored to respond to Bariven's allegations in this arbitration. For

example, the Agreement refers to Mr. Cautilli as its "agent" and lists includes every other descriptive term cited by Bariven when referring to Mr. Cautilli's relationship with Surpass. It is as if the agreement was drafted to ensure that it squarely capture every challenge raised by Bariven.

367. Whether taken together or as a whole, the above discussed facts confirm that Surpass participated in and benefited from Mr. Rincón's criminal scheme, a scheme in which Mr. Cautilli actively participated. Faced with these overwhelming facts, offers without any hard evidence an alternative theme that makes little sense. Surpass knew exactly what it was getting into when it became involved with Mr. Cautilli and got exactly what it wanted: hundreds of millions of dollars in corruption-induced Bariven contracts.

368. With regard to the legal consequences of the finding of corruption, Bariven reiterates that it cannot make payment on illegal contracts, and that Surpass, in all respects, is wrong on the law. The CISG is inapplicable, regardless of Bariven's corruption allegations, and Surpass misconstrues Dutch law. Bariven was defrauded and acted in error: the Purchase Orders (contracts) are consequently null and void, or should be annulled.

369. Surpass wrongly argues that, if there would be an annulment, it is entitled to reclaim the goods delivered to it. Also this is wrong reasoning, inter alia because it conflicts with the standards of reasonableness and fairness under Dutch law. Bariven further deals with consequences of an annulment of the contract.

370. Bariven also maintains its position regarding the consequences under Dutch law, U.S. law, Venezuelan law and transnational public policy.[31]

Submissions by Surpass

371. In its **Rejoinder on the Counterclaim, Surpass** reiterates its position: the Tribunal has no jurisdiction in respect of Bariven's counterclaim beyond the claim PO's and/or it is inadmissible. Bariven has not satisfied its burden of production that the Parties agreed to arbitration in respect of the vast majority of Bariven's Counterclaim.

First, as stated by **Surpass** in its **Statement of Reply**, Bariven has still not produced two contracts (being PO's 5100111296 and 5100111762) upon which its Counterclaim is based. Bariven is not even sure itself if the terms and conditions referred to in these two outstanding PO's contain ICC arbitration agreements, merely stating that it had "*reason to believe*" that there were ICC arbitration agreements applicable. Bariven provides no response. Bariven has failed to submit these two PO's and therefore failed to prove the existence of valid agreements in writing under Article 1021 DCCP. The only conclusion

[31] For further details cf. par. 209 et seq. 225 of Bariven's Rejoinder (Tribunal's Note).

that follows from this lack of evidence is that Bariven's Counterclaim in relation to these two PO's must be dismissed.

Second, Bariven tries to muddy the waters of Surpass' arguments about the 48 PO's that were actually submitted by Bariven. For the avoidance of doubt, Surpass argued that none of the 48 PO's were issued after the date required for the application of the terms and conditions on the face of the documents. Of these 48 PO's, 31 of them were issued in the years prior to the revision. The PO's Bariven submitted were therefore *prima facie* not authentic documents.

372. Bariven does not dispute this inconsistency. Rather, Bariven's response confirms the facts. Bariven acknowledges that the revised terms and conditions did not come into force until December 2014, just as Surpass alleged. None of the PO's were issued after 23 December 2014, i.e. the date after which the 2014 T&C would apply. This is nothing short of an acknowledgment that all of the PO's Bariven submitted as a part of Exhibit R-48 – which form the basis of the overwhelming majority of its counterclaim – are indisputably not authentic.

373. Bariven has the basic – minimal – burden of producing the contracts, including the pertinent arbitration agreements under Article 5(5)(c) ICC Rules for its Counterclaim:

> *"Any counterclaims made by Bariven shall be submitted with the Answer and shall provide:*
> *(...)*
> *c) any relevant agreements and, <u>in particular, the arbitration agreement(s)</u>"*

374. Setting aside the clear questions raised given Bariven's acknowledgment that it submitted inauthentic documents as the basis of its counterclaim, the effect is nonetheless the same as if the documents had not been submitted altogether. Bariven has failed in this most basic burden of production. Instead, Bariven attempts to (i) shift its minimal burden of production (not even proof) onto Surpass, in the apparent expectation that Surpass will represent it in these proceedings, and (ii) divert the Tribunal's attention away from the fact that the exhibits Bariven submitted are now uncontestably inauthentic. On both points, Bariven is mistaken. The critical outstanding issue is that the authentic PO's that form the basis of the Counterclaim remain unsubmitted by the party charged with producing these documents as the basic precondition to the submission of a counterclaim. Bariven tries to casually repair its lack of production by referring to the *"PSBV Terms and Conditions that were in place prior to December 2014"* that *"also contain an ICC arbitration clause"*. Given the existence in the record of PO's issued by Bariven that refer to terms and conditions of another one of its subsidiaries (PDVSA Services, Inc.) that refer to the courts of Houston, Bariven's casual referral absent proof is not enough for Bariven to meet its burden of production under Article 5(5)(c) ICC Rules.

375. Article 1038c(1) DCCP requires the 'same' arbitration agreement. Bariven argues that if the Tribunal concludes that Surpass' Claim PO's are admissible on the basis of Article 9 ICC Rules, this conclusion must logically be extended to the Counterclaim PO's. In other words, to the extent Surpass argues the existence of consent to resolve in a single arbitration Surpass' Claim PO's, the same consent is both present and sufficient with respect to the additional PO's at issue in Bariven's Counterclaim. Surpass shall set out that (i) Article 9 ICC Rules does not specify any form requirement for consent for the Article's applicability and (ii) consent under Article 9 ICC Rules is insufficient for Article 1038c(1) DCCP because the Parties are consenting to two fundamentally different things. Both can only lead to the finding that Bariven's *'logical'* conclusion is unfounded.

First, Bariven wrongly argues that in respect of Article 9 ICC Rules *"specific consent from the Parties is necessary for a Tribunal to decide claims arising under more than one arbitration agreement in a single arbitration"*. Bariven quotes the Secretariat's Guide to ICC Arbitration, but the requirement of *"specific consent"* is nowhere to be found in this quote. Nor is 'express consent'. Nor is any specification as to a required form of consent at all. In the absence of a designated form of consent, basic contract principles must apply. Dutch law governs the PO's at stake in this arbitration, both as to the substantive law and the *lex arbitri*. There is therefore no doubt that Dutch law governs the interpretation of the arbitration agreement and the Parties' consent. Under the *Haviltex* principles, the Tribunal must take into account not only the words themselves, but the circumstances surrounding the contract to determine the meaning of those words and what the parties could have reasonably expected under the circumstances.[32]
Here the Parties referred to the ICC Rules, at which point such rules formed part of the arbitration agreement between the Parties. By agreeing to the applicability of the ICC Rules without reservation, the Parties expressed their consent to the possibility that multiple claims under multiple arbitration agreements could be heard in one arbitration, if the Parties could have reasonably expected such disputes would be heard together under the circumstances. Although Bariven (again) had to misstate this argument in order to respond to it, Bariven did not contest the facts regarding Bariven's issuance of multiple PO's at the same time.

A seller receiving multiple PO's at the same time, from the same buyer, subject to the ICC Rules (including Article 9), the same or similar terms and conditions, regarding the same or similar procurement processes, would reasonably conclude that disputes under these contracts could be resolved together under the umbrella of a single arbitration proceeding. Surpass has acted under that belief all along, for example, by sending payment reminders for outstanding invoices together in one email.

Second, Article 1038c(1) DCCP protects Surpasss from certain litigation tactics, but provides for a sole exception of this strict rule in the event parties agree thereupon. Such

[32] Dutch Supreme Court, 13 March 1981, ECLI:NL:PHR:1981:AG4158, NJ 1981/635, m.nt. C.J.H. Brunner (*Ermes/Haviltex*).

agreement is absent in this case. Surpass clearly did not consent to this because the consent given under Article 9 ICC Rules and that required under Article 1038c(1) DCCP are consents to two fundamentally different things.
Consent given under Article 9 ICC Rules is therefore insufficient to satisfy the consent requirement of Article 1038c(1) DCCP. As Surpass has previously set out, under Article 9 ICC Rules, the claims remain separate under their respective arbitration agreements, except that they are permitted to be resolved within a single proceeding.
On the other hand, as already explained, Article 1038c(1) DCCP requires an agreement to the <u>same</u> arbitration agreement. Surpass made this point in its Statement of Reply and Defence on the Counterclaim at §§ 7.15-7.21. Bariven does not dispute or even respond to these points.

376. As Surpass noted, the Wells Tribunal confirmed Surpass' argument under Article 1038c(1) DCCP. Bariven had the opportunity to contest the Wells Tribunal's understanding on this point, as it relates to jurisdiction of the Wells Tribunal. When Bariven started annulment proceedings with regard to the Wells Award, an alleged incorrect application of Article 1038c DCCP by the Wells Tribunal was not one of the annulment grounds. In failing to so challenge, Bariven implicitly accepted the Wells Tribunal's understanding of Article 1038c DCCP.

377. The Wells Tribunal opined:

> *"[T]he wording "the same arbitration agreement" [in Article 1038c(1) DCCP] means an arbitration agreement, laid down in the same legal contract. This interpretation is in accordance with the basic principle that arbitral jurisdiction may decide only on the issues which fall under the scope of the (same) arbitration agreement."*

And:

> *"(...) a different Purchase Order will constitute a different arbitration agreement in the sense of Article 1038 c (1) DCCP, unless that same arbitration agreement has been expressly or tacitly declared applicable by the parties to the other Purchase Order."*

By not challenging the abovementioned opinions of the Wells Tribunal, Bariven acknowledges Surpass' understanding of Article 1038c(1) DCCP. Bariven's Counterclaim in respect of the PO's that do not form a part of Surpass' Principal Claim, must therefore be dismissed.

378. In addition, Surpass submits that Bariven's New Claim and Counterclaim are barred at this stage of the proceeding under Article 23(4) ICC Rules.

379. Article 23(4) ICC Rules provides:

> *"After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."* (4.1)

There can be no clearer instance of a party introducing a new claim (and counterclaim) in violation of Article 23(4) ICC Rules than Bariven's invocation of Article 20 of the 2009 T&C with regard to PO 5100111750 in its final written submission.

380. Bariven invokes Article 20 2009 T&C for two purposes: (i) Bariven attempts to use Article 20 2009 T&C as a limitation of the remedies available to Surpass under PO 5100111750; and (ii) Bariven attempts to use Article 20 2009 T&C as a counterclaim under which "Surpass can deduct that amount [for storage of Trucks] from the more than USD $5 million it already received from Bariven and shall return the balance to Bariven."

381. Critically, this claim and counterclaim do not depend on a finding of corruption, because, as Bariven itself explains, Article 20 2009 T&C "allows Bariven to cancel the purchase order at any time and for any reason". Bariven did not cancel the purchase order, however, until five months after the signing of the ToR in November 2017 in a footnote in its SoD.[33] Bariven admits this, citing to footnote 199 in its SoRej as the proof that "PO 5100111750 was cancelled by Bariven".

382. Under the footnote that cancels the purchase order, corruption was not mentioned:

> 199 **Additionally, PSBV's Terms and Conditions allow for this purchase order to be cancelled by Bariven. Terms and Conditions for Goods Purchases (Rev. 08-2009) of PDVSA Services BV, Art. 20, C-40. To the extent needed, Bariven hereby cancels this purchase order.**

Compare this statement to Bariven's summary of its claims in the ToR:

> 32. **Bariven denies all of the claims asserted against it by Surpass, and argues that the 29 Dutch POs are to be annulled because they were obtained through bribery and corrupt practices, or under the influence of fraud or error.**

Bariven's defence is – in its entirety – that Surpass' claims must be denied due to the presence of corruption, fraud or error.

383. Likewise Bariven's counterclaim says nothing of the return of any balance to Bariven over a damages limitation that stems from the cancellation of a purchase order. Bariven's counterclaim is also based entirely on Bariven's allegations of corruption:

33 Bariven's SoD, § 174, fn. 199.

> **D. Bariven's Counterclaim**
>
> 42. Bariven's Counterclaim has two parts:
>
> (1) To the extent that any of the 29 Dutch POs were illegally obtained through the payment of bribes and other corrupt practices. Bariven is seeking to recover from Surpass the damages that it suffered as a result.[7]
>
> (2) To the extent that any of the other purchase orders placed with Surpass that have already been paid by Bariven, and that contain the same applicable law and dispute resolution clause as that set forth in the 29 Dutch POs, were illegally obtained through the payment of bribe and other corrupt practices. Bariven is seeking to recover from Surpass the damages that it suffered as a result, including without limitation: (*i*) the amount of bribes and the value of the benefits that Surpass and others may have paid to rogue former Bariven employees in order to secure contracts from Bariven, which sums were factored into invoices paid by Bariven; (*ii*) the amount of any overpricing charged by Surpass and paid by Bariven; and (*iii*) any other damages recoverable by Bariven under law.[8] Bariven's offer to accept the consolidation in a single arbitration of Surpass's claims under the 29 Dutch POs is contingent on Surpass accepting to consolidate in this same arbitration the previously described claims.

384. In sum, Bariven did not invoke the cancellation of PO 5100111750 under Article 20 2009 T&C until its SoD, filed five months after the signing of the ToR. Now, nearly a year after the signing of the ToR, it seeks to rely on that cancellation for the first time to argue that a limitation of remedies is required and counterclaims that anything over that limitation of remedies must be returned to Bariven. Because this claim and counterclaim do not rely on corruption, but rather Bariven's cancellation of the purchase order "for any reason", it is clearly a "new claim that falls outside of the limits of the Terms of Reference" and should be barred under Article 23(4) ICC Rules.

385. Further, Bariven improperly invokes Article 23(4) ICC Rules against Surpass' claim for performance of PO 5100111750. Its previous argument presents a stark contrast to Bariven's own invocation of Article 23(4) ICC Rules in its SoRej, in which Bariven incorrectly introduces the common law concept of "specific performance" into a discussion guided by the CISG and Dutch law.

386. Under the common law, performance is an extraordinary remedy that is secondary to the payment of money damages and only available in certain circumstances. Thus, at common law, according to "its broadest usage, 'damages' means any type of monetary award."

387. However, such is not the case under either the CISG or Dutch law, because the CISG takes the civil law position on remedies as its default. Instead of making damages the default and performance the secondary remedy, the CISG permits common law courts to opt out under Article 28 CISG and "adopt the solution of its national law regarding specific performance in the context of an international sale of goods governed by the

Convention." Performance under the civil law is neither an extraordinary measure nor limited only to non-monetary performances.

388. Accordingly, Surpass summarised its position in the ToR as follows:

> "Consequently, Claimant submits that Respondent is to compensate Claimant for the outstaninding purchase price of USD 63.601.331.97."

389. This position makes no mention of either performance or damages, merely 'compensation'.

390. As Bariven acknowledges in its SoRej, Surpass clarified the legal basis of its claim for such compensation in its SoC, invoking either Articles 62 or 74 CISG. Bariven disingenuously categorises the fundamental legal basis of Surpass' entire claim as a "mention[] in passing". Paragraph 10.2 is the second under the main heading "SURPASS' CLAIM" and first sub-heading "Breach of Contract" and twice mentions Article 62 CISG as one of the CISG articles on which the claim is based.

391. According to the CISG Digest, "Article 62 CISG is frequently implemented or cited by judges and arbitrators in that it enables the seller to require payment of the price of the goods sold." Surpass notes that the Digest's footnote thereafter lists more than 2.5 pages of cases and awards in support of this statement. Moreover, "[i]t has been held that a damages claim and a claim for specific performance are not necessarily inconsistent remedies; the creditor may therefore resort to both." Thus, Surpass' mention of "Article 61(1)(b) CISG in conjunction with either Article 62 CISG or Article 74 CISG" as a claim for either performance or damages was therefore not internally inconsistent.

392. Thus, Surpass' position has remained consistent since the ToR, requesting either performance or damages. Bariven's invocation of a limitation against certain types of damages does not tough Surpass' request for performance and the reasonable costs associated with that performance, and this position remains the same regardless of whether the CISG or Dutch law (Article 3:296(1) DCC and Article 6:74(1) DCC) is applicable.

393. In conclusion, whereas Bariven has introduced an entirely new claim and counterclaim that falls outside the limits of its corruption arguments, Surpass' position has remained consistent throughout. The only party against whom Article 23(4) ICC Rules should therefore be invoked is Bariven, barring the entirety of its arguments under the first heading of Part III of its SoRej.

394. Bariven improperly invokes Article 23(4) ICC Rules against Surpass' claim for performance of PO 5100111750.

395. With regard to the **merits** – corruption - Surpass submits that Bariven's unsupported speculations and mischaracterizations are not evidence of corruption by or for the benefit of Surpass.

396. Bariven is aware that its unsupported speculations and misrepresentations do not meet "the prevailing arbitral practice of subjecting complainants of corruption to a high standard of proof". As a result, Bariven now attempts to lower – or even shift – the burden of proof, requesting adverse inferences instead of presenting evidence to meet the burden of proof.

397. Bariven cannot meet this burden of proof because the 'direct' evidence it claims to have produced does not exist, and adverse inferences are not warranted in the present situation.

398. Before discussing the inadequacy of Bariven's attempt to prove its case, however, Surpass notes the deafening silence of any fact witnesses from Bariven. Despite all of the alleged wrongdoing having taken place within Bariven's own 'house', despite Bariven ostensibly being the party in control of the evidence within this 'house', Surpass requests the Tribunal to consider the troubling fact that Bariven has put forth no single fact witness to testify on issues of corruption, and why this could possibly be the case. All of this despite the fact that it is up to Bariven to supply its own proof.

399. Further Surpass disputes Bariven's lowered standard for the burden of proof of preponderance of the evidence.[34]

400. Further, according to Surpass, there are no adverse inferences warranted in this case. There is no adverse inference possible for Sinotruk's silence. There are no missing, unproduced or withheld documents. There is no adverse inference warranted for Mr. Cautilli's silence.[35]

401. Further, Bariven has not proven any wrong doing via the involvement of Mr. Cautilli. It denies the relevance of the Agency Agreement, his work for certain companies, and certain payments made to him as evidence for Mr. Cautilli being corrupt.

402. Bariven again grossly misstates the evidence by arguing that:

> "It has been admitted in Houston that the payment of bribes by Mr. Rincón and others resulted in favorable treatment for the companies that benefited from the criminal scheme, Surpass included."

403. These kind of allegations are only based on the Charging Documents filed by the U.S. Government in the criminal proceedings in Houston. Bariven provides no other evidence

---

34 For further details cf. Surpass' Rejoinder on the Counterclaim, par. 5.9 et seq. (Tribunal's Note).

35 For further details on this and the following paragraphs: cf. Surpass' Rejoinder on the Counterclaim, par. 5.17 et seq. (Tribunal's Note).

of corrupt activity. Because Bariven solely relies upon the evidence put forward in the criminal proceedings, it is bound by the outlines thereof. The alleged scheme in the present case must match the facts of Mr Roberto Rincón's criminal scheme as described in the Houston proceedings or else Surpass does not form a part of that conspiracy. Surpass already shown that it does not. The facts here simply do not support Bariven's theory that Surpass' or Mr Cautilli's actions form a part of Mr Roberto Rincón's scheme. The Charging Documents show the opposite.

404. In conclusion, not a single Purchase Order of the 76 at issue in this Arbitration matches the description of the transactions described in the Houston Charging Documents, and evidence of some commercial activity between Surpass and Tradequip C.A. (or any other of Mr Roberto Rincón's entities) does not change that fact.

405. With regard to the specific Purchase Orders dealt with above, Surpass denies Bariven's allegations. Surpass equally reiterates its earlier arguments with regard to Dutch law, US and Venezuelan law and Transnational Public Policy. Its basic position remains that the Purchase Orders at issue are not invalid.

406. Bariven attempts to lower the burden of proof, shift the burden of proof and request adverse inferences because it is unable to produce any evidence of wrongdoing by Mr Cautilli, either on behalf of Surpass or on behalf of TQSM. Critically, the evidence of Mr Cautilli's work at TQSM does not support the claim that he, Mr Cautilli, was paying bribes to officials in Venezuela. This evidence does not even support the idea that he was Bariven-facing as an employee. Rather, this evidence supports that Mr Cautilli was operating on the commercial side of this entity doing the work that Special Agent Matthew confirmed transpired at TQSM. That Mr Cautilli worked for TQSM moreover does not indicate that he was doing anything illicit for Surpass, because time and again Surpass was not awarded the contracts when it did compete against Rincón-related companies. If anything, this evidence disproves Bariven's central thesis; it certainly does not support it.

407. Finally, Surpass submits that there is no legal substantiation for counterclaim damages.

VIII. THE REQUESTS FOR RELIEF

408. **In its Statement of Claim, Surpass** requested that the Tribunal award the following relief to Surpass.

a. that Bariven pay to Surpass the amount of USD 63,601,331.97;

b. that Bariven pay to Surpass the interest that has accrued on the amount of

(i) USD 46,144.46 from 16 May 2013 to the date of full payment;

(ii) USD 40,540.00 from 2 December 2012 to the date of full payment;

(iii) USD 143,700.00 from 10 November 2012 to the date of full payment;

(iv) USD 2,506,304.43 from 6 October 2013 to the date of full payment;

(v) USD 393,652.00 from 30 November 2015 to the date of full payment;

(vi) USD 12,694,563.00 from 17 January 2016 to the date of full payment;

(vii) USD 71,706.30 from 21 August 2014 to the date of full payment;

(viii) USD 3,066,108.99 from 5 March 2015 to the date of full payment;

(ix) USD 3,137,667.24 from 5 March 2015 to the date of full payment;

(x) USD 2,252,255.05 from 18 December 2015 to the date of full payment;

(xi) USD 1,777,781.10 from 5 March 2015 to the date of full payment;

(xii) USD 645,660.00 from 25 September 2015 to the date of full payment;

(xiii) USD 265,670.00 from 5 March 2015 to the date of full payment;

(xiv) USD 761,580.00 from 25 September 2015 to the date of full payment;

(xv) USD 9,972.14 from 5 March 2015 to the date of full payment;

(xvi) USD 709,300.00 from 5 March 2015 to the date of full payment;

(xvii) USD 1,889,681.55 from 12 November 2015 to the date of full payment;

(xviii) USD 1,545,702.26 from 3 July 2015 to the date of full payment;

(xix) USD 490,986.02 from 3 July 2015 to the date of full payment;

(xx) USD 616,664.07 from 13 November 2015 to the date of full payment;

(xxi) USD 1,960,873.64 from 8 November 2015 to the date of full payment;

(xxii) USD 1,803,520.71 from 11 November 2015 to the date of full payment;

(xxiii) USD 21,619.00 from 17 December 2015 to the date of full payment;

(xxiv) USD 2,168,877.28 from 31 July 2015 to the date of full payment;

(xxv) USD 2,208,898.99 from 25 November 2015 to the date of full payment;

(xxvi) USD 1,354,938.99 from 31 July 2015 to the date of full payment;

(xxvii) USD 1,672,826.10 from 31 July 2015 to the date of full payment;

(xxviii) USD 324,731.71 from 9 November 2015 to the date of full payment;

(xxix) USD 1,564,941.92 from 26 November 2015 to the date of full payment;

(xxx) USD 3,452,696.13 from 1 January 2016 to the date of full payment;

(xxxi) USD 326,454.81 from 3 April 2016 to the date of full payment;

(xxxii) USD 676,367.16 from 30 November 2015 to the date of full payment;

(xxxiii) USD 875,962.98 from 25 December 2015 to the date of full payment;

(xxxiv) USD 33,922.25 from 25 December 2015 to the date of full payment;

(xxxv) USD 1,830.50 from 25 December 2015 to the date of full payment;

(xxxvi) USD 28,776.90 from 25 December 2015 to the date of full payment;

(xxxvii) USD 33,922.25 from 25 December 2015 to the date of full payment;

(xxxviii) USD 21,700.00 from 7 January 2016 to the date of full payment;

(xxxix) USD 7,972,432.85 from 1 January 2016 to the date of full payment;

(xl) USD 1,969,676.90 from 1 April 2016 to the date of full payment;

(xli) USD 311,021.70 from 14 April 2016 to the date of full payment;

(xlii) USD 1,746,266.47 from 12 December 2015 to the date of full payment;

(xliii) USD 3,434.12 from 16 March 2015 to the date of full payment;

or any other date that the Tribunal finds applicable, at the rate of:

- the statutory commercial interest rate as provided by Article 6:119a DCC; or

- alternatively, if the Tribunal finds the statutory commercial interest rate of Article 6:119a DCC not applicable, the statutory commercial interest rate as provided by Article 6:119 DCC; or

- in the further alternative, any other interest rate the Tribunal finds applicable;

c. that Bariven pay to Surpass the storage costs for the Trucks at a rate of USD 30.00 per truck per month (i.e. USD 3,000.00 per month) from 16 January 2017 to the date of full payment; and

d. that Bariven reimburse Surpass for all costs, expenses and attorneys' fees and disbursements incurred in this arbitration pursuant to Article 37 of the ICC Rules.

409. In its **Statement of Defense and Reply on the Counterclaim**, **Surpass** amended that Request for Relief, and requested that the Tribunal award the following relief to Surpass:

a. that Surpass' Principal Claim be granted in its entirety such that Bariven pay to Surpass the amount of USD 47,896,567.54;

b. that Bariven pay to Surpass the interest that has accrued on the amount of:

(i) USD 46,144.46 from 16 May 2013 to the date of full payment;

(ii) USD 40,540.00 from 2 December 2012 to the date of full payment;

(iii) USD 143,700.00 from 10 November 2012 to the date of full payment;

(iv) USD 2,506,304.43 from 6 October 2013 to the date of full payment;

(v) USD 393,652.00 from 30 November 2015 to the date of full payment;

(vi) USD 12,694,563.00 from 17 January 2016 to the date of full payment;

(vii) USD 71,706.30 from 21 August 2014 to the date of full payment;

(viii) USD 3,066,108.99 from 5 March 2015 to the date of full payment;

(ix) USD 3,137,667.24 from 5 March 2015 to the date of full payment;

(x) USD 2,252,255.05 from 18 December 2015 to the date of full payment;

(xi) USD 1,777,781.10 from 5 March 2015 to the date of full payment;

(xii) USD 645,660.00 from 25 September 2015 to the date of full payment;

(xiii) USD 265,670.00 from 5 March 2015 to the date of full payment;

(xiv) USD 761,580.00 from 25 September 2015 to the date of full payment;

(xv) USD 9,972.14 from 5 March 2015 to the date of full payment;

(xvi) USD 709,300.00 from 5 March 2015 to the date of full payment;

(xvii) USD 1,889,681.55 from 12 November 2015 to the date of full payment;

(xviii) USD 1,545,702.26 from 3 July 2015 to the date of full payment;

(xix) USD 490,986.02 from 3 July 2015 to the date of full payment;

(xx) USD 616,664.07 from 13 November 2015 to the date of full payment;

(xxi) USD 1,960,873.64 from 8 November 2015 to the date of full payment;

(xxii) USD 1,803,520.71 from 11 November 2015 to the date of full payment;

(xxiii) USD 21,619.00 from 17 December 2015 to the date of full payment;

(xxiv) USD 2,168,877.28 from 31 July 2015 to the date of full payment;

(xxv) USD 2,208,898.99 from 25 November 2015 to the date of full payment;

(xxvi) USD 1,354,938.99 from 31 July 2015 to the date of full payment;

(xxvii) USD 1,672,826.10 from 31 July 2015 to the date of full payment;

(xxviii) USD 324,731.71 from 9 November 2015 to the date of full payment;

(xxix) USD 1,564,941.92 from 26 November 2015 to the date of full payment;

(xxx) USD 1,746,266.47 from 12 December 2015 to the date of full payment;

(xxxi) USD 3,434.12 from 16 March 2015 to the date of full payment;

or any other date that the Tribunal finds applicable, at the rate of:

- the statutory commercial interest rate as provided by Article 6:119a DCC; or
- alternatively, if the Tribunal finds the statutory commercial interest rate of Article 6:119a DCC not applicable, the statutory commercial interest rate as provided by Article 6:119 DCC; or
- in the further alternative, any other interest rate the Tribunal finds applicable;

c. that Bariven pay to Surpass the storage expenses for the Trucks at a rate of USD 30.00 per truck per month (i.e. USD 3,000.00 per month) from 16 January 2017 to the date of full payment;

d. alternatively, if the Tribunal determines not to hear the Claim PO's in a single arbitration, that the Tribunal grant Surpass' Alternative Principal Claim in its entirety and order Bariven to perform under Claim PO NO. 51000111750 to pay Surpass the outstanding amount of USD 13,088,215.00 plus the storage expenses for the Trucks as just elaborated;

e. alternatively, if the Tribunal were to annul any of the purchase orders, that it refuses to give effect to the annulment under Article 3:53(2) DCC:

f. alternatively, if the Tribunal were to annul or declare null and void:

- the purchase orders, that Bariven compensate Surpass in the amount of USD 47,896,567.54; and/or
- the purchase orders, that Surpass shall be entitled to a compensation for delivered Equipment in the amount of the invoice value of the purchase orders.

g. that Bariven's Counterclaim be dismissed in its entirety;

h. that USD 321,477,894.40 of Bariven's Counterclaim be dismissed for failure to prove a written arbitration agreement under Article 1021 DCCP, or, alternatively for being inadmissible under Article 1038c(1) DCCP; and

i. that Bariven reimburse Surpass for all costs, expenses and attorneys' fees and disbursements incurred in this arbitration pursuant to Article 37 of the ICC Rules plus interest from the date of the award to the date of full payment.

410. This Request was reiterated in Surpass' Rejoinder, but for sub para h., which read as follows:

> *"h. that for all Counterclaim PO's listed in Exhibit R-66, Bariven's Counterclaim be dismissed for failure to prove a written arbitration agreement under Article 1021 DCCP and Article 5(5)(c) ICC Rules, or, alternatively for being inadmissible under Article 1038c(1) DCCP; and (...)*

411. In its **Statement of Defense and Counterclaim, Bariven** requested that the Tribunal:

a) Declares that it does not have jurisdiction over the 25 purchase orders that do not contain ICC arbitration clauses, but are subject to the jurisdiction of courts in "Houston, Harris County, Texas" and are governed by "Texas law."

b) Declares that it does not have jurisdiction to hear in this arbitration claims arising under the 14 separate, independent purchase orders that contain ICC arbitration clauses.

c) Issues a Final Award dismissing Surpass' claims in their entirety.

412. With regard to its Counterclaim, Bariven requested that, if its jurisdictional objections are denied, the Tribunal issue a Final Award:

a) Granting Bariven's counterclaim under the single purchase order Bariven consents is subject to the Tribunal's jurisdiction, and ordering Surpass to pay Bariven the damages arising from Surpass' wrongful conduct consisting of the amounts Bariven paid to Surpass under this purchase order, plus interest.

b) Alternatively and if the above request is denied, granting Bariven's counterclaims in their entirety and ordering Surpass to pay Bariven the damages arising from Surpass' wrongful conduct consisting of the amounts Bariven paid to Surpass under the purchase orders at issue in Bariven's counterclaim.

In any case, Bariven requested that the Tribunal order Surpass to pay, pursuant to Article 31(3) of the ICC Arbitration Rules, all costs incurred in connection with this arbitration proceeding, including the costs of the arbitrators and of the ICC, as well as legal and other expenses incurred by Bariven, including but not limited to the fees of their legal counsel, experts, and consultants and those of Bariven's own employees on a full indemnity basis, plus interest thereon at a reasonable rate from the date of which such costs are incurred to the date of payment.

Bariven reserved the right to amend their defenses and claims and the relief they seek, and to provide additional evidence and authority in support of their case, during the course of this arbitration.

413. In its **Rejoinder, Bariven** requested that the Tribunal

a) Declare that it does not have jurisdiction over disputes arising under any of the remaining claim purchase orders.

b) Declare that it does not have jurisdiction to hear in this arbitration disputes arising under the purchase orders subject to the terms and conditions memorialized in the Blanket Purchase Agreement.

c) Issue a Final Award dismissing Surpass' Claim in its entirety.

414. With regard to its Counterclaim, Bariven further requested that if its jurisdictional objections are denied, the Tribunal issues a Final Award:

a) Granting Bariven's Counterclaim under the single purchase order Bariven conditionally consents is subject to the Tribunal's jurisdiction, and ordering Surpass to pay Bariven the damages arising from Surpass' wrongful conduct consisting of the amounts Bariven paid to Surpass under this purchase order, plus interest.

b) Alternatively and if the above request is denied, granting Bariven's Counterclaim in its entirety and ordering Surpass to pay Bariven the damages arising from Surpass' wrongful conduct consisting of the amounts Bariven paid to Surpass under the purchase orders at issue in Bariven's counterclaim.

c) In any case, Bariven requested that the Tribunal order Surpass to pay, pursuant to Article 31(3) of the ICC Arbitration Rules, all costs incurred in connection with this arbitration proceeding, including the costs of the arbitrators and of the ICC, as well as legal and other expenses incurred by Bariven, including but not limited to the fees of their legal counsel, experts, and consultants and those of Bariven's own employees on a full indemnity basis, plus interest thereon at a reasonable rate from the date of which such costs are incurred to the date of payment.

d) Bariven reserved the right to provide any new, additional evidence that is made public or becomes available after the date of filing of this submission.

415. The Parties did not dispute these respective amendments in the further submissions.

IX. THE ISSUES TO BE DECIDED (AFTER THE PARTIES'SUBMISSIONS)

416. It follows from the Parties' Submissions after the Terms of Reference that the issues to be decided can be identified as follows:

a) What is the Tribunal's jurisdiction, if any, with regard to the Claims and the Counterclaim?

b) If there is jurisdiction with regard to any of the Claims:

- Can those Claims then be decided in this single arbitration?
- Should the underlying Purchase Orders be declared null and void, or be annulled and voided?
- If not: should the Claims be awarded?

c) If there is jurisdiction with regard to the Counterclaim, should this Counterclaim be awarded?

X. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO ITS JURISDICTION ON THE CLAIM IN GENERAL AND ON PO NO. 5400003102 IN PARTICULAR

417. Before going into the legal aspects of this issue, it is useful to list the Purchase Orders and the Claims related thereto.

- The relief requested in its Request for Arbitration was based on 29 Claims.[36]
- That number was equally the basis for Surpass' Request for Relief in the Statement of Claim.[37]
- In the Statement of Reply and Defense on the Counterclaim, this number was reduced to 26.[38]
- These 26 remaining Claims are listed in par. 205 above. I.e.: that list encompassed the 29 Claims referred to in the Statement of Claim, but of which 3 were withdrawn.

418. For the ease of reference, the Tribunal will hereafter refer to those 26 Claims/Purchase Orders only with their Exhibit Number: C-1/C-25 and C-29.[39]

419. Surpass' primary argument for the Tribunal's jurisdiction is that all of its remaining 26 Purchase Orders are subject to the 2009 T&C or the 2014 T&C, which contain, in Article 27, an ICC arbitration clause reading as follows:

> *"Any and all disputes, controversies and claims arising out of, involving, or relating to the Order shall be referred to, settled and finally resolved exclusively by arbitration under the rules of the ICC International Court of Arbitration (the "Rules") by three arbitrators appointed in accordance with the Rules. All procedural matters arising in connection with any arbitration shall be resolved in accordance with the Rules. (...) The place of arbitration shall be The Hague."*

420. As a preliminary matter, the Tribunal notes that this is an explicit contractual provision which, in principle, prevails over such elements as usages and course of dealing. This, apparently, is also a principle of Texas law, which was invoked by Bariven several times, also on this issue.[40]

---

36 Cf. Request for Arbitration par. 10 io. 22a. In total, Surpass referred to 39 Orders; cf. par. 8.

37 At par. 2.3. In par. 4.7 of the Reply it is set out how the single sales contracts were concluded; cf. par. 74 above. The Tribunal agrees that the Purchase Orders were concluded as set out in par. 74 above; the issuance of the Purchase Orders is to be considered as the acceptance of the offer whereby the contract was concluded.

38 At par. 4.5.

39 The corresponding numbers for each of these Purchase Orders can be found in the second column of this list.

40 Cf. e.g. Opening Statement, sheet 14 and Rejoinder par. 69 et seq.

421. However, Bariven does not accept that this arbitration agreement governs the said 26 remaining Purchase Orders. As mentioned above, Bariven submits that all 26 Purchase Orders contain a Houston jurisdiction clause, for various reasons. In summary: the application of the BPA[41] and, with regard to Purchase Order 5400003102, for a special reason.[42]

422. For 14 of the Purchase Orders, Bariven submits in its Statement of Defense that they were governed by the BPA of 1 January 2015, because that was the Effective Date of the BPA and the said 14 Purchase Orders were placed with Surpass after that date.[43] Further, in general, Bariven contends that the BPA applied to all these 26 Purchase Orders, in the light of the Parties' conduct. The BPA was a master agreement in order to facilitate the purchasing process, notably for Howo A7 truck spare parts. It superseded the arbitration agreement of Article 27 of the T&C 2009/2014, because Surpass and Bariven agreed in the BPA that its provisions are to govern over any inconsistent terms and conditions, including those contained in individual purchase orders. And section 4.22 of the BPA states:

> *"[I]n the event of any conflict, the Terms and Conditions of this Blanket Agreement shall take precedence over any terms and conditions appearing in any Release [defined as a Purchase Order]. Any delivery of Products or performance of services by Seller shall be deemed acceptance by Seller of the terms and conditions set out in this Blanket Agreement."*

423. As with all other Houston Purchase Orders, according to Bariven, the Parties agreed to resolve disputes arising under the BPA (and Purchase Orders governed by it) before the courts in Houston, Harris County, Texas and subject to Texas law pursuant to section 4.21 of the BPA, which provides:

> *"4.21 Applicable Law and Jurisdiction*
> *The definition of terms used, interpretation or construction of this Blanket Agreement and any Release thereof, and the rights of the parties hereunder shall be interpreted, construed, and governed by the laws of the state of Texas. Venue of actions hereunder is stipulated in Houston, Harris County, Texas."*

424. In sum, according to Bariven, the BPA sets forth the terms and conditions that (also) govern the above mentioned 14 Purchase Orders and all other Purchase Orders issued under it. I.e.:

---

[41] Cf. par. 115/127, 308/311 and 319/333 above and Exh. RE-14.

[42] Cf. par. 312/317 above.

[43] Three of those were withdrawn by Surpass; cf. par. 425 hereafter.

- *How disputes should be resolved—through litigation in court in Houston, Texas, not through ICC arbitration.*
- *Where disputes should be resolved—in "Houston, Harris County, Texas," not in The Hague.*
- *The law under which disputes should be resolved—"the law of the state of Texas," not Dutch law.*

425. Surpass, in its Reply, accepts that the BPA governs Purchase Orders after its Effective Date, that those Purchase Orders have a Houston, Texas jurisdiction clause, and that, consequently, this Tribunal has no (longer) jurisdiction over those Claims. It was precisely for that reason that Surpass withdrew 3 of its remaining 29 Claims.[44] That would bring the total of the Claims, based on Purchase Orders procured after 1 January 2015 and before 2 February 2015 and thus, in Bariven's opinion, governed by the BPA to 11: Exhibits C-15/C-25.[45]

426. Surpass then notes that Bariven does not contest the Tribunal's jurisdiction on its Claims exhibited under C-1/C-14 as such, but only on the ground that they cannot be heard in a Single Arbitration. That, in the Tribunal's view, seems to be a correct note, subject to Bariven's later general argument with regard to the application of the BPA to be dealt with hereafter.[46]

427. In the Tribunal's view, Bariven's argument that the BPA is applicable to the 11 Purchase Orders issued between 1 January and 2 February 2015 cannot be accepted. Key question is: what is the Effective Date of the BPA?

428. As said, Bariven argues that the Effective Date of the BPA is the same as the date of the Agreement as such: 1 January 2015.

> *"... Thus, under the above provisions, a purchase order is governed by the BPA if it is placed with Surpass "after the effective date of this Blanket Agreement [1 January 2015]." The 14 referenced purchase orders were placed with Surpass after 1 January 2015 and are all governed by the BPA. These 14 purchase orders are described in the table below..."*[47]

429. This cannot be accepted. Art. 1.2 of the BPA provides:

---

[44] Cf. par. 204 above.

[45] Cf. par. 4.5 Reply. The fact that there were two groups of 14 Claims, before the withdrawal of three Claims by Surpass, is somewhat confusing (C-1/C-14 and C-15/C-28).

[46] At par. 433.

[47] Cf. par. 18 Statement of Defense. Those 14 Claims still comprised the three withdrawn Claims C-26, C-27 and C-28.

> *"Unless otherwise agreed to by both parties in writing, this Blanket Agreement shall apply to all Purchase Orders and other documents of purchase (hereinafter collectively referred to as "Releases") which Purchaser may place with Seller for Products after the effective date of this Blanket Agreement. The Terms of the Conditions of this Blanket Agreement shall apply to any Release, whether or not this Blanket Agreement or its terms and conditions are expressly referenced in the Release."*

And Article 2.1 of the BPA provides:

> *"(...) The effective date of this blanket agreement is the date of the latest signature below ("the Effective Date")."*

430. So the Effective Date is the date of the latest signature, and has to be distinguished from the date of the Agreement as such. The latter date is referred to in the first paragraph of the BPA: *"This Agreement, dated as of 1st January 2015 ..."*. Article 1.2 does not refer to this date as decisive for the application of the BPA to all Purchase Orders and other documents of purchase, but to the Effective Date. Clearly, in its Rejoinder[48] Bariven confuses the date of the signature with the Effective Date, as defined by the BPA, and the notions of "Execution" and "Effective".[49]

431. The evidence on record shows that the date of the latest signature is 2 February 2015. In any event, on that date, PDVSA Services Inc. notified Surpass that *"the contract"* had been signed and was sent to Surpass. It had been signed earlier by Surpass and was now signed by PDVSA.[50] Bariven has not contested the unofficial translation of this message provided by Surpass.[51] There is no evidence to the contrary.

432. However, as mentioned above, in its Rejoinder Bariven further argues that the BPA applies to all the Purchase Orders at issue at large, if the Tribunal understands it correctly, so also if concluded before 1 January 2015, because of the reason referred to.[52]

433. It submits[53] that the BPA covered 21 of the 26 Purchase Orders remaining in Surpass Claims: C-6/C-25 and C-29. Those Purchase Orders, as also follows from the list

---

48 At par. 61/64 and 74.

49 In its Rejoinder, par. 65, Bariven refers to the minutes of the 25 July 2014 meeting. Exh. C-77. Whatever their meaning, these minutes are not decisive in this matter.

50 Exh. C-80

51 In Reply, par 4.16, cf. par. 210 above.

52 Cf. par. 422/424 above.

53 Cf. par. 327/333 above.

submitted by Bariven[54], includes the 14 referred to hereinbefore – for which however Bariven maintains its earlier submission as well, that those Purchase Orders were subject to the BPA because of their date.[55]

434. The Tribunal derives from this further argument that, even if the BPA would not apply to the 11 Purchase Orders concluded between 1 January and 2 February 2015 because of the Effective Date being 2 February 2015, it would nonetheless apply because the Parties' conduct, for some time before this Effective Date, was already totally in line with its provisions. The BPA would thus apply not only to the said 11 Purchase Orders, but to all the Purchase Orders issued before 1 January 2015.[56]

435. It is noted, first of all, that Bariven, in this context, only refers to Purchase Orders Exh. C-6/C-29.[57] That would entail that, also in Bariven's approach, Purchase Orders Exh. C1/C-5 are not governed by the BPA. That seems to be confirmed by Bariven's Rejoinder[58], where it is said that

> *"(...) the facts establish (...) that of the 26 Purchase Orders remaining in Surpass' Claim, 21 are for Howo A7 truck spare parts covered by the BPA."*

436. With regard to the argument as such it is noted that, in so far as in (the documents for) those 21 Purchase Orders reference is made to the BPA, that is conditional. Each of the Purchase Orders referred to in this context by Bariven states:

> *"**If**[59] this Order is covered by a Blanket Purchase Agreement or interactive agreement, the terms and conditions of the applicable agreement (number) mentioned on the item(s) of this Purchase Order apply to this document."*[60]

437. Further and finally: the question whether the BPA, even before the Effective Date, governed a number of Purchase Orders both before and after 1 January 2015, is a question of fact and of law. The facts, as they follow from the evidence on record, should support Bariven's argument that the Parties, before the Effective Date of the BPA, deviated or

---

54 Cf. par. 327 above.

55 Cf. par. 328 above (which refers to 11 Purchase Orders, taking into account the 3 that were withdrawn).

56 And after; but that is not disputed by Surpass, be it for another reason. Cf. par. 425 above.

57 Rejoinder, footnotes 63 and 64 at par. 53 and 54 (cf. par. 324/334 above); and Opening Statement sheet 1 (attached to sheet 36). Transcript Day 1, p. 117 et seq.

58 At par. 56; (Cf. par. 324 above).

59 Tribunal's emphasis.

60 Cf. Bariven's Rejoinder at par. 53. (Cf. par. 326 above).

intended to deviate from the then existing agreements between them – including their agreement with regard to the jurisdiction clause and the applicable law clause.

438. This has to be considered and decided in the light of Dutch law and the CISG. These regimes governed the relation between the Parties before the Effective Date of the BPA. If it is argued that the Parties agreed on a different regime, already before that date, this has to be considered in the light of the then applicable legal regimes of Dutch law or the CISG. The BPA cannot govern the relation in deviation of the existing regime(s), let alone: foreshadow such a change, if it is not proven under the existing legal regime(s) that this is what the Parties agreed upon, or clearly intended to agree upon. This is not a question of the lex arbitri, the seat of this arbitration being in the Netherlands[61], but of the substantive applicable law: Dutch law or the CISG, art. 8.

439. In this context, the Tribunal notes that, in its view, the CISG is applicable pursuant to its art. 1 at b, because the Netherlands did not make the reservation referred to in its art. 95. Where Bariven argues that the CISG is excluded by its general conditions and/or the BPA this is irrelevant, as it follows from the Tribunal's considerations above that these are not applicable to the 26 Claims at issue. And further: in so far as relevant for the issues at stake in this context, the Tribunal sees no difference between the application of the relevant provisions of Dutch Law and the corresponding regime of the CISG. However, as the CISG is not concerned with the validity of the contract or any of its provisions[62] this matter is governed by Dutch law. The same is true for the rate of the statutory interest[63]) and the cancellation of Purchase Order No. 5100111750, to be dealt with hereafter in Chapter XIII.

440. That there was agreement, or an intention to deviate from the 2009 and/or 2014 T&C, does not follow from the evidence on record. No facts are adduced to that effect, generally. Clearly, the burden of proof also in this regard was with Bariven. It has not proven its allegations. More in particular it should be noted that, under Dutch law, an agreement in writing is required for an arbitration agreement. The Tribunal cannot find such an agreement in any written form in the evidence on record, in deviation of the arbitration agreement laid down in Article 27 of the 2009/2014 T&C, for any of the 26 Purchase Orders underlying Surpass' Claims.

441. The conclusion is that Bariven's general argument that the BPA applies at large thus cannot be accepted either. Consequently, the Tribunal has jurisdiction with regard to the 26 Claims.

---

[61] Cf. Bariven's Rejoinder, par. 75

[62] Cf. Art. 4 CISG.

[63] Cf. Art. 78 CISG.

442. The Tribunal cannot see why this arbitration should be limited to only one Purchase Order.[64] The fact that Surpass did not disclose the BPA[65] is not relevant. Surpass could rightly consider the BPA as not relevant for the jurisdiction for its remaining 26 Purchase Orders and has corrected this in so far as necessary.[66]

Purchase Order No. 5400003102[67]

443. As a special argument Bariven contends, that of the 25 out of the 39 Purchase Orders at issue in Surpass' Claim that contain a forum selection clause assigning jurisdiction to courts in Houston, Texas, 11 are governed by the Terms and Conditions of Bariven 's subsidiary in Houston (PDVSA Services, Inc, hereafter 'Inc') , which provide:

> *"The Order shall be governed by and interpreted in accordance with the laws of the state of Texas, United States of America without regard to its conflict of law rules or the application of the United Nations Convention on Contracts for the International Sale of Goods. The Parties agree that the exclusive jurisdiction for all disputes arising from or related to the Order shall be the applicable State and Federal courts of Harris County, Texas."*

444. One of these is Purchase Order 5400003102.[68]

445. In its Statement of Reply and Defence on the Counterclaim Surpass argues[69] that Purchase Order 5400003102 is subject to the standard terms and conditions of Bariven's subsidiary in The Netherlands (PDVSA Services, BV, hereafter 'BV'), which include an ICC arbitration clause. According to Surpass, the reason for this can be found in the Parties' commercial course of dealing and the practices established between them, which are relevant irrespective of whether the CISG is applicable or the Uniform Commercial Code of Texas is applied. These practices were as follows.

446. The Parties have agreed to a course of 94 separate procurement contracts in the form of purchase orders between 2010 and 2015. Some were issued by Inc and subject to terms and conditions with a forum selection clause opting for the courts of Harris County, Texas. Most (i.e. the 76 presently at issue in this arbitration) were issued by BV and subject to the 2009 T&C or 2014 T&C including an ICC arbitration agreement. Of those

---

64 Exh. C-2; cf. Statement of Defense and Counterclaim, par. 426 (cf. par. 132 above).

65 Statement of Defense, par. 26 (cf. par. 127 above).

66 Cf. par. 426 above.

67 Exh. C-29.

68 Par. 15 fn. 6 (cf. par. 115 fn. 6 above).

69 At par. § 4.23 ff

94 separate purchase orders, only one was made subject to a different set of terms and conditions than the one referred to in both the RFQ and Surpass' quotation (i.e. the offer). In other words, 93 times a RFQ and quotation were submitted subject to the same terms and conditions, and 93 times the subsequent purchase order was similarly subject to the same terms and conditions. On that basis Surpass is entitled to believe, in good faith, that Purchase Order 5400003102 would likewise be subject to the same standard terms as the RFQ and offer.

447. The RFQ which led to this Purchase Order is made expressly subject to the terms and conditions of BV, which read as follows:

> *"In the event of an order, PDVSA Services, BV, a Dutch Corporation located in The Hague, The Netherlands, will issue the purchase order on behalf of, and for the account of Bariven S.A., Venezuela. Bariven S.A. c/o PDVSA Services, BV Terms and Conditions apply to this request for quotation."*[70]

448. Surpass' Quotation was then submitted to BV, indicating the understanding of the Parties and the terms under which the order would be governed.[71] Inexplicably, however, the purchase order itself purports to be issued by PDVSA Services, Inc. and governed by its standard terms and conditions. Given the overlap of employees and dealings between Inc and BV, and the lack of counsel present for the negotiation of these contracts, permitting the use of the terms and conditions would, given the parties' established practices, enact an arbitrary surprise on Surpass. It would effectively work a bait and switch operation with the effect of depriving Surpass the ability to access its chosen dispute forum according to the offer it submitted to BV.

449. Consequently, Purchase Order 5400003102 was subject to the 2009 T&C in accordance with the Parties' established practice, and, therefore, subject to the ICC arbitration agreement contained therein.

450. Bariven in its Statement of Rejoinder and Reply on Counterclaims rebuts[72] Surpass' view for two reasons:

(i) the CISG does not apply to contracts governed by Texas law, as Section 1.303(e)(1) of the Texas UCC provides:

> "(e) Except as otherwise provided in Subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

---

[70] Exh. C-29.01, p. 9.

[71] Exh. C-29.02, p. 1.

[72] At par. 38 et seq.

(1) express terms prevail over course of performance, course of dealing, and usage of trade[.]"

(ii) In addition, Inc's Terms and Conditions (Exh. RE-13) expressly exclude application of the CISG:

> "22. CHOICE OF LAW: The Order shall be governed by and interpreted in accordance with the laws of the state of Texas, United States of America without regard to its conflict of law rules or the application of the United Nations Convention on Contracts for the International Sale of Goods. The Parties agree that the exclusive jurisdiction for all disputes arising from or related to the Order shall be the applicable State and Federal courts of Harris County, Texas."

451. Bariven then argues that Purchase Order 5400003102 is subject to clear and unambiguous terms and conditions to which both Parties agreed. Those terms and conditions provide for disputes to be submitted to the exclusive jurisdiction of *"the applicable State and Federal courts in Harris County, Texas."* As a matter of Texas law, Surpass cannot render that express contractual term inapplicable by pointing elsewhere, such as the Parties' alleged course of dealings. Consequently, the Tribunal lacks jurisdiction over Purchase Order 5400003102.

452. Bariven adds[73] that Texas law does not permit Surpass to use certain emails as means to set aside the clear, unambiguous terms of the BPA. Pursuant to Section 4.21 of the BPA, the agreement is governed by and must be interpreted and construed in accordance with Texas law, and must be interpreted and construed without regard to the CISG. In any case, the CISG cannot apply to the BPA.
This argument is not further pursued here as the applicability of the BPA to the Purchase Orders is discussed generally above in this chapter.

453. In its Oral Argument at the hearing on 12 December 2018[74] Surpass reiterates its argument and argues that the threshold of offer and acceptance for a valid arbitration agreement has been met. On 3 November 2014 Bariven has issued its RFQ through its Dutch purchasing agent, BV, and on 5 November 2014 Surpass has submitted its quotation to Bariven through that same purchasing agent. On 25 November 2014 Bariven issues Purchase Order 5400003102. Although the header of that Purchase Order refers erroneously to Inc as purchase agent, it is clear from the Purchase Order itself that in fact BV was the purchasing agent as it had to carry out the purchasing agent's tasks and the Purchase Order also mentions that it *'is placed using a purchasing agent in The Netherlands'* and that a *'Credit Note must contain a reference to the original invoice as per art. 15, 35, 35a to 35b and art. 37 of the turnover tax act European Commission'*.

[73] At par. 68

[74] Transcript p. 81 et seq.

On 12 November 2015 and 15 February 2016 Surpass sent its invoices to BV as the party understood to be the purchasing agent. It follows that the reference in the header of the Purchase Order to Inc is a clerical error; the contract has been concluded with BV on its Terms and Conditions mentioned in its RFQ.

454. In its Opening Statement[75] Bariven, while now accepting Surpass' view that the Purchase Order was issued through BV, adheres to its position that the Parties have declared Inc's Terms and Conditions applicable.

455. In its Closing Argument on Jurisdictional Objections[76] Surpass adds that Bariven's line of argument with regard to this Purchase Order already fails because it approaches the validity of the existence of a valid arbitration agreement as if the terms and conditions of Inc already apply. However, the first important question that must be answered before diving in an analysis of these terms and conditions is whether these terms and conditions of Inc apply in the first place. This is the very point where the Parties differ of opinion. The answer to that question is that Inc's terms and conditions do not apply as the Purchase Order has been issued by BV, which was admitted by Bariven in its Opening Statement. Surpass refers to the wording of the Purchase Order (p. 14) stating that *'If this Document is issued from BARIVEN, S.A. c/o PDVSA Services, Inc., follow instruction'* (the Instruction contains a reference to BARIVEN, S.A. c/o PDVSA Services, Inc. Terms and Conditions). The condition expressed by 'if' is not fulfilled. This means that BV's terms and conditions are applicable, because they were referred to in BV's RFQ and accepted in Surpass' quotation.

456. In its Closing Statement[77] Bariven does not address new arguments and it does not return to this matter in its oral presentation.

457. The Tribunal notes first of all that this matter – viz. the question who is the party to the contract - has to be considered and decided according to Dutch law and/or the CISG (not Texas law), because - as was set out above – (i) the RFQ referred to BV and its general conditions, (ii) Surpass submitted its Quotation to BV, and (iii) the Purchase Order was issued through BV. This combination of circumstances justifies the applicability of Dutch law and/or the CISG; the Tribunal sees no difference between the application on this matter of the relevant provisions of Dutch law and the corresponding regime of the CISG to the conclusion of the contract and in particular to the question who are the parties thereto.

458. Although the Purchase Order itself mentions 'PDVSA Services, Inc.' as the purchasing agent, the Tribunal is satisfied that this must be considered as a clerical error. This follows

---

75 P. 9 et seq.; Transcript p. 100 et seq.

76 Hearing, 13 December, § 3; Transcript p. 300 et seq.

77 Sheet 29.

in the first place from the acknowledgement of Bariven at the Hearing. But even in the absence of that acknowledgement the Tribunal would have reached the same conclusion on the basis of (i) the fact that the RFQ was issued by BV and accepted by Surpass, (ii) the sentences of the Purchase Order as quoted and (iii) the fact that Surpass sent its invoices to BV as the party it understood to be the purchasing agent.

459. As an *obiter dictum* the Tribunal notes that it sees an additional argument in the fact that in all other (75) cases where Surpass has received and accepted a RFQ issued by BV the contract was concluded between Surpass and BV. No explanation has been offered why this should have been different in the case of Purchase Order 5400003102. In this light the Tribunal is of the opinion that the decision would not be different if, as Bariven has argued (see par. 450 (i)), the matter would be governed by Texas law. An interpretation based on the course of dealing between the parties leading to the inapplicability of the express term referred to in par. 450 (ii) is not unreasonable and would for that reason not be overruled by that term.

460. In the RFQ (as in all other RFQ's issued by BV) reference was made to BV's Terms and Conditions[78], which contain an arbitration clause providing for ICC arbitration. Bariven argues that nevertheless parties have agreed on Inc's Terms and Conditions being applicable as these conditions are mentioned in the Purchase Order which states[79] 'If this Document is issued from BARIVEN, S.A. c/o PDVSA Services, Inc., follow instruction' (the Instruction contains a reference to BARIVEN, S.A. c/o PDVSA Services, Inc. Terms and Conditions).
This argument fails because, as stated in the previous paragraphs, the Purchase Order has not been issued by Inc, but by BV.

461. The conclusion is that the Arbitral Tribunal accepts Surpass' contention that Purchase Order 5400003102 has been issued by Bariven's subsidiary in The Netherlands (PDVSA Services ('BV'). Consequently, this Purchase Order is subject to the standard terms and conditions of BV, which include an ICC arbitration clause. Consequently, the Tribunal has jurisdiction in relation to Purchase Order 5400003102.

---

[78] Exh. C-29.01, p. 2

[79] Exh. C-29.03, p. 14

XI. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO SINGLE ARBITRATION

462. In its Statement of Claim Surpass advocated that, under the circumstances, a Single Arbitration was admissible. It referred to a number of commentators in support of that argument. This was reiterated in the Statement of Reply and Defense on the Counterclaim.[80] From its part, Bariven, In its Statement of Defense and Counterclaim and its Rejoinder[81], argued that a Single Arbitration was not admissible, equally with reference to a number of commentators. The Parties reiterated these positions in their Opening and Closing Statements.

463. Under the applicable Dutch law and under the Rules, the key point in answering this question is, also in the light of the doctrine referred to by the Parties, whether there is, in this arbitration, consent to have a Single Arbitration.

464. As said, all 26 Purchase Orders underlying Surpass' Claims have the same provision concerning arbitration[82]:

> *"Any and all disputes, controversies and claims arising out of, involving, or relating to the Order shall be referred to, settled and finally resolved exclusively by arbitration under the rules of the ICC International Court of Arbitration (the "Rules") by three arbitrators appointed in accordance with the Rules. All procedural matters arising in connection with any arbitration shall be resolved in accordance with the Rules. (. . .) The place of arbitration shall be The Hague."*

465. Article 9 of the thus applicable ICC Rules provides as follows.

> *"Subject to the provisions of Articles 6(3)-6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules."*

466. Clearly, the Purchase Orders at issue are *"more than one contract"*.

467. Of articles 6(3) through 6(7) of the Rules, only 6(3) and 6(4)(ii) are relevant. They read as follows:

> *"3*
> *If any party against which a claim has been made does not submit an answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration*

80 At par. 5.1/5.11 and par. 4.30/4.37 respectively(cf. resp. par. 75 et seq. and 225 et seq. above).

81 At par. 28/47 and par. 22/37 respectively (cf. resp. 128 and 291 et seq. above).

82 Art. 27 of the 2009 and 2014 T&C (cf. par. 61 above).

agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)."

"4
In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. In particular:
(...)
(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied

(a) that the arbitration agreements under which those claims are made may be compatible, and

(b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration. The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas."

468. Article 23(4) of the ICC Rules reads as follows:

"4
After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."

469. In so far as the Parties have raised new claims after the Terms of Reference, this is of no relevance for the question of the Single Arbitration. This question was raised in time: in its Answer to the Request for Arbitration, Bariven has conditionally raised a plea that the (then) 29 Claims may not be decided in a Single Arbitration, because there was no agreement thereto on Bariven's part.[83] However, it declared itself prepared, for purposes of this arbitration only and given the common issues of law and fact, that it would agree to resolve these 29 separate Claims in a Single Arbitration, provided that Surpass agrees to resolve in this arbitration the Claims asserted and to be asserted by Bariven in its Counterclaim. Surpass did not agree to this condition. But the issue as such was raised in time.

---

[83] At par. 29.

470. The Secretary General of the ICC Court has not referred the matter to the Court. Consequently, the Tribunal shall have to decide.

471. Article 6(4) identifies certain criteria for a decision of the Court on this issue, if the matter would be referred to the Court. It is debatable whether these criteria should apply for a decision by the Tribunal, or whether the Tribunal has more discretion. The provision only refers to the fact that the **Court**[84] should be satisfied that the said criteria are met. However, the Tribunal accepts, for argument's sake, that the said two criteria could also apply to the (final) decision the Tribunal has to take. It can only conclude that they have been met in this case.

472. For this issue it is Surpass that has the burden of proof: are the agreements compatible and was there consent?

473. Clearly, the arbitration agreements under the 26 (remaining) Purchase Orders are compatible. The provisions in Article 27 are identical and they are part of almost identical Purchase Orders; the main, if not only difference in those Orders are the goods and the purchase prices. The Claims further involve common issues of fact and law – as accepted by Bariven in its Answer to the Request for Arbitration - and, as Surpass has submitted correctly, the Claims involve the same two parties, under purchase orders concluded through the same regulated bidding process, incorporating either of the same two Terms and Conditions that include the same relevant article on price and payment terms[85], under the same governing law, under the same governmental corporation program and within the same industry.

474. This does not only mean that the arbitration agreements are compatible, but also that the Parties clearly intended that disputes arising thereunder should be determined together in a Single Arbitration. There is no evidence to the contrary. And that the agreements formally, in themselves, were 'stand-alone', is no such evidence. No rationale can be conceived why the Parties could have intended, by adopting this system of, in essence, the same approach to and the same provisions for these Purchase Orders, to have disputes arising thereunder decided in 26 separate arbitrations. And, indeed, it is noted that Bariven never, in any of the relevant Purchase Orders that were accepted, made a reservation with regard to the possible application, through Art. 27 of the applicable T&C, of Art. 9 of the ICC Rules.

475. From these facts it follows that Surpass has met its burden of proof to convince the Tribunal that there was consent. It was up to Bariven to adduce facts and circumstances to rebut the initial proof provided by Surpass. However, Bariven has not been able to prove the contrary. It has not convinced the Tribunal that the agreements were not compatible. It has not proven that the Parties did not have the intention to have the various

[84] Tribunal's emphasis.

[85] The fact that a few Orders have different terms does not substantially alter this.

disputes dealt with in a single arbitration. Bariven only notes that there was no consent and that the alleged communality – if true, which Bariven denies – does not equate consent. To that effect, Bariven does not refer to any factual evidence. Neither does it proffer any factual evidence against the Parties' intention, as follows from their approach to the Purchase Order referred to above. The fact that other Purchase Orders than those at issue have or may have contained a different arbitration clause[86] or may follow a different pattern otherwise, is beside the point. Neither does the fact – if true – that a provider that receives a purchase order has no guarantee of receiving business alter this. Relevant is only the system/approach by the Parties in the 26 Purchase Orders at issue. And Bariven's approach in this context seems somewhat at odds with its argument that all Purchase Orders at stake (with the exception of C-1/C-5) are subject to the BPA, described by Bariven as *'a monolithic system followed by the Parties even before its Effective Date'*.

476. This is not a matter of presumption.[87] It is a conclusion from the facts on record. It is not a matter of consolidation either.

477. In so far as Bariven argues that the Haviltex-principle is not applicable because there are or were no written arbitration agreements, this is not comprehensible.[88] Each Purchase Order referred, in writing, to Art. 27 of the applicable T&C, which provision was equally agreed upon in writing.

478. In conclusion: there was consent with regard to a Single Arbitration. The Tribunal finds no difference between the system chosen by the Parties in this case, and a separate umbrella agreement to have the Claims under the Purchase Orders decided in one Single Arbitration.[89] That the arbitration agreements were formally separate and distinct does not alter this.

479. Bariven cannot withdraw its consent to this system unilaterally, after the fact. That Surpass has not accepted its condition does not alter this: Bariven's consent was there before, when the agreements were concluded.

480. The conclusion is that the Claims at issue can be dealt with in this Single Arbitration.

481. In light of the Tribunal's conclusion that the Purchase Orders are not subject to the BPA, there is no need to go into Bariven's argument that there can be no Single Arbitration under the BPA either.

---

86 Statement of Defense, par. 40 (cf. par 131 above).

87 Rejoinder par. 34 (cf. par. 294 above).

88 Cf. Opening Statement sheet 33; Closing Statement sheet 8.

89 Statement of Defense and Counterclaim, par 30 (cf. par. 129 above).

XII. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO THE MERITS: CORRUPTION AND THE FORGED LETTER

482. Bariven's central and crucial argument on the merits is that the contracts between the Parties are null and void, or have to be annulled and voided, because – in summary – all those contracts were obtained through corruption. That argument is – in essence – based on the following factual allegations.[90]

a) A central role in the relation between Bariven and Surpass was played by Mr. Rincón, his companies and his family members. Surpass actively relied thereon in order to solicit, secure and retain procurement contracts from Bariven. Notably, Surpass relied heavily on Mr. Cautilli, Mr. Rincón's son-in-law who, according to Bariven, was involved in Mr. Rincón's criminal dealings.

b) After being charged by the U.S. Government, on 10 December 2015, with having led a criminal conspiracy to violate the Foreign Corrupt Practices Act, among other U.S. federal criminal statutes, on 16 June 2016, Mr. Rincón entered a plea of guilty to three crimes, including the crimes of violating the U.S. Foreign Corruption Practices Act (**"the FCPA"**) and conspiring with others to violate the FCPA.

c) Further, in order to induce Bariven into awarding it procurement contracts, Surpass misrepresented its relationship with the manufacturers of the goods it sold.[91]

In the same vein, Bariven argues that the contracts were concluded in error.[92]

483. It has to be noted that, without any doubt, the burden of proof with regard to these allegations is with Bariven. The Parties have debated what standard of proof should apply: *"reasonable certainty"* or *"balance of probabilities"* [more probable than not] in Bariven's view[93] and *"clear and convincing evidence"* in Surpass' view.[94]

484. One can debate, generally, what the difference is between the various standards of proof with which doctrine and case law are (over)flooded. The Swiss Federal Tribunal once considered that *'beyond reasonable doubt'* means probability that comes close to the level of certainty which, in its view, is reached if the judge or tribunal, based on objective considerations, is convinced by the correctness/accuracy of the presentation of the facts.[95] It is not necessary to reach the level of absolute certainty. Rather, it is sufficient if the

90 For details cf. par. 137/185 and 348 et seq. above

91 Cf. par 186/190 above; Statement of Defense 93/97

92 Rejoinder at par 205.

93 Rejoinder at par. 125/131 (cf. par. 353 et seq. Above).

94 Reply at par. 8.5 (cf. par. 255 above).

95 SFT130III321E.3.2., SFT132III715E.3.1.

judge or tribunal does not have any serious doubts regarding the existence of the alleged facts, or if any remaining doubts appear to be minor.

Lord Denning once said that *'proof beyond a reasonable doubt'*:

> *"... need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond a reasonable doubt, but nothing short of that will suffice."*[96])

and, as a jury in the USA was once instructed:

> *"What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. 'Proof beyond a reasonable doubt' does not mean 'proof beyond all possible doubt', for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true. (...) If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted."*[97]

485. It all boils down to the question whether, in simple terms, a Court or Tribunal is convinced – as aptly mentioned by Bariven.[98]

486. The Tribunal need not go into this. Neither standard, proposed by the Parties, is met on any of the relevant allegations: that Mr. Rincón's criminal conduct, or the - possible - criminal conduct of any person or company related to him, was instrumental in obtaining any of the Purchase Orders at issue from Surpass. More in particular, Bariven has not proven that there was any criminal conduct on the part of Mr. Cautilli in this regard.

487. With regard to Mr. Rincón's criminal conduct, Bariven submits that, in the criminal proceedings in Houston, Mr. Rincón acknowledged that he paid bribes to subvert Bariven's bidding and procurement process. His corrupt actions were for the purpose of, among other things:

- assisting Rincón's . . . companies in winning [Bariven] contracts;

---

[96] Miller v. Minister of Pensions, 21947 All. ER 372373.

[97] Quoted in CAS 2016/A/4417-4419-4420.

[98] In the reference in its SoD to Yves Derains, par. 353 above in fine.

- providing Rincón . . . with inside information concerning the [Bariven] bidding process;
- placing one or more of Rincón's . . . companies on certain bidding panels for [Bariven] projects;
- helping to conceal the fact that Rincón ... controlled more than one of the companies on certain bidding panels for [Bariven] projects;
- supporting Rincón's . . . companies before an internal [Bariven] purchasing committee;
- preventing interference with the selection of Rincón's . . . companies for [Bariven] contracts;
- updating and modifying contract documents, including change orders to [Bariven] contracts awarded to Rincón's . . . companies;
- assisting Rincón's . . . companies in receiving payment for previously awarded PDVSA contracts, including by requesting payment priority for projects involving Rincón's . . . companies."

He acknowledged

- that he did all of this in order to defraud Bariven into awarding companies associated with him procurement contracts. He admitted that the purpose of the conspiracy was "*to enrich* [himself and his co-conspirators] *by obtaining and retaining lucrative energy contracts with [Bariven]* ***through corrupt and fraudulent means***." Further in this respect, the Grand Jury found probable cause that he:

  > "[...] devise[d] and intend[ed] to devise a scheme or artifice ***to defraud [Bariven] . . . and for obtaining money and property from [Bariven] . . . by means of materially false and fraudulent pretenses, representations, and promises***[.]"

- Mr. Rincón was not alone in doing all of this: he admitted to have conspired with others. He mentioned a number of individuals acting in concert with him, including eight ex-Bariven employees. Further, Mr. Rincón's criminal conspiracy was not limited to companies directly owned by him, it also extended to companies nominally owned by others and companies associated with him. Bariven submits that Surpass falls in the latter category.

488. It follows indeed from the evidence on record so far that:

- criminal investigations were lodged against Mr. Rincón in the US and that he entered a plea of guilty to three crimes, including the crimes of violating the FCPA and conspiring with others to violate the FCPA. He admitted to being part of a criminal conspiracy "[b]eginning in at least 2009 and continuing through at least 2014:"

  "The purpose of [which] was for RINCÓN . . . and [his] co-conspirators, to enrich themselves by obtaining and retaining lucrative energy contracts with PDVSA [Bariven] through corrupt and fraudulent means, including by paying bribes to PDVSA [Bariven] officials." ;

- Mr. Rincón acknowledged that he offered and paid those bribes for the purpose of:

  "(i) influencing acts and decisions of such foreign official in his official capacity; (ii) inducing such foreign official to do and omit to do acts in violation of the lawful duty of such official; (iii) securing an improper advantage; and (iv) inducing such foreign official to use his influence with a foreign government and agencies and instrumentalities thereof to affect and influence acts and decisions of such government and agencies and instrumentalities[.]" ;

- he also admitted that, through those bribes, he bought assistance for his and his co-conspirator's *"and their U.S. companies in obtaining and retaining business for and with, and directing business to Rincón ... [his] companies, and others."* ;

- and that he acknowledged that he did all of this in order to defraud Bariven into awarding companies associated with him procurement contracts. And that the purpose of the conspiracy was *"to enrich [himself and his co-conspirators] by obtaining and retaining lucrative energy contracts with [Bariven] through corrupt and fraudulent means."* Further in this respect, the Grand Jury found probable cause that he:

  "[...] devise[d] and intend[ed] to devise a scheme or artifice to defraud [Bariven] . . . and for obtaining money and property from [Bariven] . . . by means of materially false and fraudulent pretenses, representations, and promises[.]".[99]

489. However, it does not follow from the evidence on record that all this concerned Mr. Rincón's relation, or the relation of any of his companies or third parties or persons, with Surpass; or with any contracts concluded between Bariven and Surpass. Bariven submits that Surpass' contracts fit squarely within the admitted facts of Mr. Rincón's criminal conspiracy.[100] However, even if that would be so this submission is, as such, not sufficient

---

[99] It is not quite certain whether Mr. Rincón was sentenced in the criminal proceedings in Houston, Texas. There is no information to that effect after the SoD/40. *('His sentencing is currently scheduled for 8 February 2018.')*

[100] Par. 65 Statement of Defense.

evidence for the more direct allegation referred to above that, indeed, those contracts were obtained through fraud. And, equally, the mere fact that Surpass may have had contact with Mr. Rincón, does not mean that he was connected to him in the incriminating manner submitted by Bariven.

490. Similar observations can be made with regard to – in summary – Mr. Cautilli, his conduct and Surpass' relation with him. Bariven submits that Surpass registered as a vendor with Bariven on 14 July 2010, while Mr. Rincón's criminal conspiracy was in full swing. In its registration application filed with Bariven, Surpass identified Mr. Cautilli as its "*contact person.*" Bariven dwells extensively on the background of Mr. Cautilli, generally and more specifically, with regard to Mr. Rincón, his family and his companies. He married Mr. Rincón's daughter and got more and more involved in Mr. Rincón's business. Bariven then suggests that Mr. Cautilli's relation with Surpass, and Mr. Cautilli's further business activities were or may not have been legitimate. In Bariven's view the facts establish a direct working relationship between Surpass and Mr. Rincón that exceeded the ministerial role Surpass seeks to assign to Mr. Cautilli. According to Bariven, this is a case about a purposeful direct association with Mr. Rincón and his criminal cohorts.[101]

491. The facts that were submitted by Bariven generally in this context are not disputed, such as that Mr. Cautilly was Mr. Rincón's son-in-law, that he was appointed as contact person for Surpass, and that he was (heavily) involved in the relation with Surpass and its contracts concluded with Bariven thereafter. However: Surpass denies all further allegations and incriminations regarding Mr. Cautilli.

492. Bariven suggests that Mr. Cautilli was appointed as Surpass' contact person with Bariven within a certain context, bordering, if not worse, on Mr. Rincóns criminal enterprise and strategy to position family members strategically in that regard. Also here however, in the Tribunal's view, there is no evidence that Mr. Cautilli was instrumental during fraudulent contacts and/or in obtaining fraudulent contracts with Surpass. Such facts as that Mr. Cautilli was, or may have been, copied in on certain correspondence, or that his email address was used by the Rincón group, cannot be considered as such evidence.

493. The same is true for:

- the (alleged) fact that Mr. Cautilli may not have had the – in Bariven's view – necessary qualifications and/or age for the job and was appointed without proper due diligence;
- the 24 June 2010 Inspection Report and Purchase Order 5100084836;
- the incorporation of certain companies by Mr. Cautilli;

[101] For further details cf. par. 138/139, 162/172 and 348/351 above.

- that Mr. Cautilli, as Mr. Chen testified, was a hard worker and landed many procured contracts with Bariven and PDVSA;
- any of the of the other allegations or incriminations against Mr. Cautilli.

494. Such allegations and submissions against Mr. Cautilli do not meet Bariven's burden of proof either, in any of the relevant standards.

495. In addition, it should be noted that Bariven has failed to adduce other – possible – evidence. It mentions one specific contract where Surpass was selected by one of the rogue ex-Bariven employees, who pleaded guilty in the Houston criminal proceedings to participate in a competitive bidding process for pipes needed by Bariven and that Surpass was awarded this contract. Bariven has not explained why this employee, Mr. Maldonado, or any other of the rogue ex-Bariven employees were not called as a witness in this arbitration. It has not even been contented that efforts were made thereto. Bariven has submitted that this would have been Surpass' duty, but that is not the case: the burden of proof for these (serious) allegations is clearly with Bariven.

496. There is no reason to draw adverse inferences against Surpass, e.g. because Surpass failed to explain key events[102], such as (the failure to) present certain witnesses.[103] Bariven, as said, has the burden of proof and could – or should - have called witnesses if it had wished to meet this burden of proof. The Tribunal cannot find any failure at Surpass' side. It is not up to Surpass to disprove Bariven's evidence of corruption and irregularity.

497. In conclusion: there is no evidence in the record that convincingly supports Bariven's allegations that all Purchase Orders at stake – be it those underlying the Claims or the Counterclaim – were obtained, in summary, through corruption or concluded in error.

498. The evidence that was referred to at the Hearing[104] does not change this: once more it referred to Mr. Rincón and his companies and certain other persons, and their (alleged) criminal conduct regarding Bariven's transactions, but not one piece of evidence in that regard against Mr. Cautilli. It was repeated that he was Mr. Rincón's son-in-law, that he was a member of management at Trade Quip Services and Marine Inc. and that he registered certain domain names with his personal email. His relation with Surpass, as once more explained at the Hearing brought nothing new and contains no evidence of criminal conduct either. Even if, without Mr. Cautilli, Surpass would not have received any contracts from Bariven, this does not constitute evidence on any criminal conduct in relation thereto. Also the observations at the Hearing on Surpass' relationship with Mr. Rincón, its participation in his modus operandi and its payments to Cautilli and Rincón

---

[102] Cf. par. 355 above.

[103] Cf. par. 357 above.

[104] For details cf. Opening Statement, sheet 56 et seq.

bring nothing new, generally or in the way of such evidence. The same is true for Bariven's Closing Statement.[105]

499. With regard to the Forged Letter, Bariven alleged, as said, that Surpass misrepresented itself as Sinotruk's exclusive distributor and that the letters pertaining thereto were a forgery.

500. In its Reply, Surpass has denied this.[106] It points out that Bariven has taken an old allegation and presented it to the Tribunal as if it were new. Second, it submits that, when this issue of apparent allegation of counterfeiting a Sinotruk authorisation letter cropped up, Bariven initiated an investigation hereof. In that context, Surpass refers to an email from 'mkhaki@psi.pdv.com' to Sinotruk of 17 April 2015, on the subject of 'Sinotruk distribution letter for Surpass, Commercial Howo spare parts'. It submits that, after this investigation, Bariven issued three new Purchase Orders to Surpass for the exact products that were covered by the letter that triggered the investigation (apparently of 23 March 2015).[107]

501. The said email reads as follows: [108]

> *"Dear Mr. Wo Hai,*
> *We refer to the letter received from SINOTRUK (copy attached) where you informed PDVSA that SINOTRUK has never assigned SURPASS COMMERCIAL as SINOTRUK authorized distributor.*
> *(...)*
> *As you may be aware, PDVSA Services Inc. has signed a Purchasing Agreement with SURPASS COMMERCIAL for the distribution of HOWO spare parts for PDVSA / Bariven in Venezuela.*
> *In its opportunity, as part of the negotiation of this agreement, the following letter was provided to us from SINOTRUK IMPORT AND AEXPORT (copy attached). On this letter SINOTRUK assigned SURPASS COMMERCIAL as their distributor for the HOWO A7 trucks and spare parts. This letter, as you may verify, is sealed with the unique seal number which according to your communication, is the original seal from HOWO.*
> *(...)*
> *In addition, PDVSA Services Inc. received the attached letter from SINOTRUK certifying the authenticity of the materials and spare parts supplied by SURPASS to PDVSA. As you may notice, this letter is sealed with the official unique seal number from Sinotruk as well.*

---

105 Sheet 34/43.

106 Cf. par. 271/278 above

107 Exh. C-26, C-27 and C-28.

108 Exh. C-114.

(...)
We would appreciate your comments regarding this matter.

502. It is noted that the said Sinotruk letter was not attached to this email as exhibited. However, no reply to this email was produced by either Party. Bariven has not disputed its contents and did not come back to Surpass' said submission in its Rejoinder. That the said three Purchase Orders were issued after the date of this letter, follows from the record: C-26 and C-27 on 14 August 2015 and C-28 on 25 August 2015. The Tribunal accepts that this would, in all likelihood, not have been the case if, in the meantime, it would have been discovered that Surpass was not the exclusive representative of Sinotruk.

503. The conclusion is that Surpass did not misrepresent itself.

XIII. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO THE COUNTERCLAIM

504. Having accepted jurisdiction for Surpass' Claims, the Tribunal now turns to the Counterclaim.

505. Bariven's position is, in summary, that if the Tribunal decides to hear, in a Single Arbitration, all 14 Purchase Orders at issue in Surpass' Claims that contain an ICC arbitration clause, it must also decide the Purchase Orders at issue in Bariven's Counterclaim.[109] Further, if the Tribunal would deny that, in this light, the Purchase Orders underlying the Counterclaim constitute the same arbitration agreement as incorporated in Purchase Orders underlying (some of) Surpass' Claims, the Tribunal should accept that Surpass consented to arbitration with regard to the Purchase Orders underlying the Counterclaim.

506. Surpass' position is, in summary, that this Tribunal has no jurisdiction in respect of Bariven's Counterclaim beyond the claimed Purchase Orders and/or that this Counterclaim is inadmissible. In Surpass' view, Bariven was and still is unable to submit arbitration agreements for two of the Purchase Orders forming the basis of the Counterclaim, and it has not proven either that the Parties agreed to arbitration with regard to the remaining 48 Purchase Orders. Surpass submits that the admissibility of the Counterclaim is determined by art. 1038(c)1 of the Dutch Code of Civil Proceedings, which is mandatory law. Surpass' Claims under the Purchase Orders are premised on 29 separate, stand-alone contracts which each include a separate, individual arbitration agreement incorporating the ICC Rules. That each arbitration agreement is included by reference to one of two sets of the T&C's is of no relevance to the analysis. And further, Surpass has never consented to applicability or extension of any of the 29 arbitration agreements contained in the Purchase Orders to cover claims arising from other Purchase Orders.

507. The question is whether Bariven has any interest in the Tribunal answering this jurisdictional issue. It has not. It follows from the Tribunal's considerations on the merits of Surpass' Claims that there is no evidence that any Purchase Order was acquired through corruption. If the Tribunal would accept jurisdiction for Bariven's Counterclaim, this conclusion would equally apply to the Purchase Orders underlying the Counterclaim. All and everything that was considered in Chapter XII should, to that effect, be considered as reiterated here. Consequently, the Counterclaim would have to be denied on the merits in any event and, thus, Bariven has no interest in a decision on the Tribunal's jurisdiction in this respect. However, the Tribunal considers the following.

[109] Par. 178/180 and 185 Statement of Defense and Rejoinder 91/94 (cf. 196 et seq. and par. 334 et seq. above).

508. Clearly, also this issue has to be decided in the light of Dutch law, as the lex arbitri. Article 1038c(1) of the Dutch Code of Civil Proceedings ("DCCP") reads as follows:

> *"A Counterclaim is admissible if the same arbitration agreement on which the Claim is based also applies to the Counterclaim, or if that same arbitration agreement is expressly or tacitly declared applicable by the Parties."*

509. As said above, in its Statement of Defense and Counterclaim, Bariven argued that, if the Tribunal would decide to hear in a Single Arbitration all 14 Purchase Orders at issue in Surpass' Claims that contain an ICC arbitration clause, it must also decide the Purchase Orders at issue in Bariven's Counterclaim.[110] The Tribunal has decided to do so and agrees with Bariven on this point: for those 14 Counterclaims, as a consequence of this decision, the Tribunal has jurisdiction in light of Article 1038c(1) DCCP; these Counterclaims relate to the same (14) contracts and they thus have the same arbitration agreement.

510. The same reasoning applies to the remaining 12 contracts where the Tribunal has accepted that they can be dealt with in a Single Arbitration.[111] These 12 contracts have the same features as the 14 contracts just referred to, as set out in par. 473 above, for which the Tribunal accepts jurisdiction on the Claims and a Single Arbitration.

511. However, as said: Bariven's Counterclaim with regard to those Purchase Orders has to be denied on the merits. They are based, in summary, on the allegation that those contracts were corrupt and these allegations are rejected by the Tribunal.[112]

512. The Tribunal cannot accept jurisdiction for any other Counterclaim beyond the said 26 – be it the 31 issued prior to 2014[113] or any other Counterclaim (the maximum of those seeming to be 50).[114] Bariven has not proven that there was an arbitration agreement with regard to any of those other Counterclaims, or a tacit agreement to arbitration in the sense of Article 1038c(1) DCCP.

513. The conclusion is that the Tribunal has jurisdiction with regard to the Counterclaims based on the 26 Purchase Orders referred to in Chapter XI, but that those Counterclaims are rejected on the merits, and that the Tribunal has no jurisdiction with regard to any other Counterclaim.

---

110 Statement of Defense and Counterclaim at par. 179, cf. par. 134 above.

111 Cf. Chapter XI.

112 Cf. Chapter XII.

113 Cf. Statement of Rejoinder and Reply on Counterclaim par. 92.

114 Cf.. RE-66.

XIV. THE TRIBUNAL'S ANALYSIS AND CONCLUSION WITH REGARD TO PURCHASE ORDER NO. 5100111750

514. There are two issues with regard to this Order:

- Surpass' suspension of its obligations;
- Bariven's cancellation.

515. Surpass has suspended its obligations because Bariven did not fulfil its obligation to pay 70% on the equipment to be delivered thereunder before delivery. It stored the equipment and claims storage costs. Surpass is holding this equipment at Bariven's disposal.

516. Bariven, in its Statement of Defense, has disputed Surpass' right to these storage costs. It argues that storage costs are expressly excluded by the applicable Terms and Conditions and that Surpass has failed to mitigate its losses; and it submits that also this Order was corrupted. On its part, it claims US$ 5,609,235, which payment Bariven advanced under this Order, with interest.

517. Surpass denies all this in its Reply – except that 30% was paid by Bariven on this Order -, reiterates that it was fully entitled to store the goods, and that the expenses made thereto are fully recoverable under the applicable law and Terms and Conditions; as with the other Purchase Orders, it denies corruption.

518. Bariven, in its Rejoinder and Reply on the Counterclaim, disputes this once more. It further submits that it has cancelled this Order. It denies that specific performance is possible under the Parties' agreement, that Surpass' Claim is too late, that the amount claimed for expenses – in summary - is not reasonable/necessary, that Surpass has failed to document this Claim and that Surpass failed to mitigate its losses.

519. With regard to its cancellation, Bariven, in its said Statement, refers to its Statement of Defense and Counterclaim § 174 footnote 199. That footnote reads as follows:

> *"Additionally, PSBV's Terms and Conditions allow for this purchase order to be cancelled by Bariven. Terms and Conditions for Goods Purchases (Rev. 08-2009) of PDVSA Services BV, Art. 20, C-40. To the extent needed, Bariven hereby cancels this purchase order."*

520. Article 20, first sentence, of these Terms and Conditions, on which Bariven relies, reads as follows:

> *"Buyer may, at any time, acting directly or through the Agent, cancel for its convenience, by written notice to Vendor, further performance of all or of any separable part of the Order."*

521. Surpass, in its Statement of Rejoinder on the Counterclaim, refers to that footnote and denies the consequences attached to it by Bariven. And it submits that, in light of Art. 23(4) of the Rules, Bariven's claim based on its cancellation of this Order is too late.[115]

522. In its Oral Argument at the hearing on 12 December 2018, Surpass observes[116] that the cancellation was conditional upon the Purchase Order not being declared null and void by the Tribunal for being procured through corruption, meaning that, as long as no final award is rendered, the Parties do not know if the condition is fulfilled. Subsequently[117] it argues that Bariven was not entitled to cancel this Purchase Order. And further, in view of the special circumstances of the case[118], relying on clause 20 Terms and Conditions would be *"unacceptable according to standards of reasonableness and fairness"* in the sense of Article 6:248(2) DCC.

523. Barinven, in its Opening Statement[119], reiterates that it has cancelled the Purchase Order, referring to the footnote mentioned above as well as to a passage in the minutes of a meeting between the Parties on 26 January 2016, where it is said that *'mr. Francisco Jiménez [President of Bariven, Trib.] informed that the instruction given by mr. Eulogio del Pino [President of PDVSA, Trib.] for this project was for Surpass Commercial to deliver a number of pieces of equipment equivalent to 30% of the agreement, corresponding to the 30% advance paid. This proposal could be applied on all the agreements for which PDVSA has paid the advance.'*

524. In its Closing Argument on Merits and Dutch Law[120] Surpass reiterates its position and adds that nothing in the minutes quoted in the previous paragraph suggests that Bariven expressed any intention to cancel the Purchase Order. On the contrary, the payment of the trucks was again discussed during the subsequent meetings in February and December 2016 and in the email exchanges on the outstanding invoices.

525. Bariven in its Closing Statement[121] did not adduce new arguments.

526. The first question to be dealt with is whether Bariven's claim based on its cancellation of this Order is admissible or whether, in light of Art. 23(4) this Claim was raised too late.

527. Article 23(4) of the ICC Rules provides:

[115] Cf. par. 379 et seq. above.

[116] At par. 6.6; Transcript p. 50, 55.

[117] At par. 6.18.

[118] Listed in par. 6.19 of this Argument.

[119] At p. 47; Transcript p. 153 et seq.

[120] At par. 4.1 et seq.; Transcript p. 321 et seq.

[121] At p. 30.

> *"After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."*

528. The Terms of Reference were signed in June 2017. Bariven has not invoked the cancellation until the date of its Statement of Defense and Counterclaim, i.e. 3 November 2017. The Terms of Reference do not refer to any cancellation of this Purchase Order. Neither does Bariven's Answer to the Request for Arbitration. There can have been no misunderstanding that this Order was one of those comprised in Surpass' claim.[122] Bariven has proffered no reason why it did not invoke the cancellation already at that point in time.

529. Nevertheless: the Tribunal concludes that Bariven's reference to the cancellation as such should be accepted. It is a defence, not a claim, in the Tribunal's view, in the sense of Art. 23(4). Moreover, in the Terms of Reference, Bariven reserved the right to amend its defences and claims.[123]

530. The question then is whether this cancellation is valid. That can be doubted. The declaration in the said footnote is to be understood as a declaration aimed at cancellation under the suspensive condition that the Purchase Order is not declared null and void, or annulled by the Tribunal on account of bribery. As discussed above, that is not the case. However, this does not mean that the cancellation is valid.

531. For two reasons the Tribunal doubts whether this is the case.

In the first place, according to Dutch law[124] a cancellation cannot normally be effected under a condition, because that would be prejudicial to the position of the other party, which has a right to know forthwith whether the contract must be considered to be terminated or not.[125]

In the second place, according to art. 20 of the applicable Terms and Conditions[126], the right to cancel presupposes *'further performance of all or any separable part of the Order'* by the Vendor (in this case Surpass). Surpass has argued[127] that it has fulfilled all

---

122 Cf. Exh. C-5, referred to in par. 10 of the Request for Arbitration.

123 At par. 44.

124 The CISG does not have a provision on this issue, so Dutch law is applicable.

125 See Asser/Hartkamp & Sieburgh *6-III* 2014/324; Asser/Sieburgh *6-III* 2018/324.

126 Exh. C-40.

127 Oral Argument at the Hearing § 6.19 sub d

its contractual obligations, and it is for Bariven to arrange for transport and take delivery of the trucks Free On Board. This statement has not been disputed, at any rate not explicitly, by Bariven.

532. However, the Tribunal is mindful that Surpass has not explicitly argued that one or both of these circumstances render the cancellation invalid. The Tribunal therefore concludes that the cancellation is valid.

533. That raises the question of (the effect of) article 20 of the T&C. With regard to the suspension and its consequences, the Tribunal accepts that Surpass had the right, under the circumstances, to store the equipment and that it is thus entitled, in principle, to the costs thereof.

534. The Tribunal further accepts that relying on article 20 of the T&C in the circumstances of this case would be *"unacceptable according to standards of reasonableness and fairness"* in the sense of Article 6:248(2) DCC.[128] The Tribunal considers the following circumstances particularly relevant:

(i) all 100 trucks ordered in the Purchase Order have been manufactured by Claimant;

(ii) they have been manufactured according to Respondent's specifications, including specifications related to the use of the trucks in Venezuela, customizing them to apply to the standards of Venezuelan law and the requirements of PDVSA;

(iii) the trucks were to be delivered Free on Board and were awaiting delivery in the port of Shanghai, meaning that Claimant has performed all its obligations under the contract;

(iv) Respondent has expressed satisfaction with the trucks, even after the Request for Arbitration was filed, and has promised payment for the trucks. It has never given the impression that it was going to cancel this purchase order and that it was not going to take delivery of the trucks;

(v) the Purchase Order is dated 20 December 2013, the production of the trucks was completed in in December 2015, whereas the cancellation took place only on 3 November 2017.

535. However, with regard to the expenses claimed, Bariven invokes article 13 of the applicable T&C, which would exclude this type of expenses. Article 13 was quoted in para 194 and reads as follows:

[128] Which, as said, is applicable because the CISG does not have a provision on this issue; and the result under Dutch law is in conformity with the general principles on which the CISG is based.

> *"Vendor and Buyer shall not be liable to each other for incidental or consequential damages or loss of profit in connection with the Order."*

The Tribunal agrees on this point. The claimed storage costs cannot be considered as the consequence of the cancellation. They were consequential to Bariven's failure to take delivery of the equipment. They thus fall within the scope of article 13. In that article, a possible reimbursement of expenses incurred as a consequence of a cancellation is explicitly considered - and excluded.

536. The Tribunal disagrees with Bariven's argument that Surpass cannot seek payment of the purchase price as long as Bariven has not taken delivery of the equipment.[129] This is not specific performance – a notion which is unknown under Dutch law in this context anyway - but simply an obligation to pay what is due. That the Purchase Price may comprise certain special components, such as labour costs and costs for other services, does not alter this. Bariven has adduced no good reason why the balance was not due. From the circumstances listed in para 534 it follows that the Tribunal holds that the balance of the purchase price was due.

537. Bariven has adduced no good reason why the balance was not paid. The Tribunal considers the same circumstances relevant as mentioned in par. 534.

538. Bariven submits that it does not find the documentation, submitted by Surpass on the storage expenses, satisfactory or verifiable. The Tribunal need not to go into this, as Surpass' Claim for these expenses is denied any way.[130]

539. In conclusion, Surpass' Claim, based on Purchase Order 5100011170, for storage expenses will be denied. Its claim, based on the same Purchase Order, for payment of the balance of the purchase price (70%) will be granted as that amount is due; for the same reason (Bariven is under an obligation to pay the whole purchase price to Surpass) Bariven's Claim for reimbursement of the advance payment of 30% of the Purchase Price has to be denied.

540. It follows from the Tribunal's earlier considerations that Surpass' other Claims are to be rewarded. The underlying Purchase Orders were valid. It is not disputed that the requirements for payment – including delivery and acceptance of the purchased goods under these Purchase Orders – were fulfilled.

---

[129] Rejoinder Bariven at par. 113 (cf. par. 337 above).

[130] Cf. par. 535 above.

XV. CONCLUSIONS AND COSTS

541. In the light of the above considerations, the Arbitral Tribunal concludes as follows:

(a) It has jurisdiction with regard to Surpass' Claims;

(b) The Claims can be dealt with in a Single Arbitration;

(c) It has jurisdiction with regard to the Counterclaims based on the 26 Purchase Orders referred to in Chapter XI, but those Counterclaims are rejected on the merits. The Tribunal has no jurisdiction with regard to any other Counterclaim;

(d) The Purchase Orders underlying the Claims are not null and void, nor are they to be annulled and voided;

(e) Consequently, Surpass' Principal Claim is to be awarded as requested in its amended form;

(f) Surpass' Claim for storage expenses regarding PO No. 5100111750 is denied.

542. The costs of the arbitration have been fixed by the Court as follows on 9 May 2019.

Administrative expenses	:	EUR 91,394.00
President's fees	:	EUR 259,000.00
Co-arbitrators' fees	:	EUR 259,000.00 (2 x 129,500.00)
Expenses incurred	:	EUR 2,250.00
Total	:	EUR 611,644.00

Both Parties have advanced amounts of EUR 305,822.00 each, or EUR 611,644.00 in total.

543. The said arbitration costs will be paid from the deposits thus received from the Parties. That entails that there will be no reimbursement to the Parties and that Bariven shall have to reimburse an amount of 305,822.00 to Surpass.

544. With regard to the above, reference is made to Article 31 (1998 Rules) / 37 (2012 Rules) / 38 (2017 Rules) and to the discretion to allocate costs of arbitration – Article 37(5) (2012 Rules) / Article 38(5) (2017 Rules).

545. As said above, on 10 January 2019 Surpass has submitted its Statement of Costs and related annexes. It follows therefrom that Surpass' ICC arbitration costs consist of:

a) US$ 150,000, as registration costs and the original advance on costs, payed to the ICC;

b) US$ 175,000, the additional advance on costs, payed to the ICC following the submission of Bariven's unquantified Counterclaim.

In total: US$ 325,000.

c) Party costs:

(i) Legal Fees – Houthoff	EUR	1,077,671.92
(ii) Out of pocket expenses and costs of the hearing:		
Court reporter	GBP	3,953.46
Hearing venue	EUR	7,972.48
Interpreters	EUR	7,439.35
Total Party Costs	EUR	1,093,083.75
	GBP	3,953.46
Total costs:	USD	325,000.00
	EUR	1,093,083.75
	GBP	3,953.46

546. With reference to Article 38(5) of the Rules, since Surpass' Request for Relief is, on the principle, fully awarded and Bariven's Defenses and Counterclaim, equally on the principle, are fully denied, Surpass is entitled to its full costs. The fact that Surpass withdrew some Claims from this arbitration in the course of the proceedings does not alter this. Neither does the fact that the comparatively small claim for storage costs is denied. The key point is that the Principal Claims as they were presented are eventually fully awarded, in principle, and that the Counterclaim is denied.

547. The rate of interest primarily claimed, of the statutory commercial rate as provided by Art. 6:119a DCC[131] and the period over which interest is due are not contested, so this rate can be awarded on all amounts due pursuant to Surpass' Principal Claims as requested.

[131] Cf. Statement of Defense and Counterclaim par. 183.

XVI. THE AWARD

The Award is as follows.

The Arbitral Tribunal:

(1) Declares that it has jurisdiction with regard to Surpass' Claims and that these Claims can be dealt with in this Single Arbitration;

(2) Declares that it has jurisdiction with regard to the Counterclaims related to the 26 Purchase Orders dealt with in Chapter XI, and no jurisdiction with regard to any other Counterclaim;

(3) Grants Surpass' Principal Claim, as submitted in its Statement of Reply and Defense on Counterclaim, in its entirety, such that Bariven pays to Surpass the amount of USD 47,896,567.54;

(4) Orders that Bariven pay to Surpass the interest that has accrued on the amount of:

(i) USD 46,144.46 from 16 May 2013 to the date of full payment;

(ii) USD 40,540.00 from 2 December 2012 to the date of full payment;

(iii) USD 143,700.00 from 10 November 2012 to the date of full payment;

(iv) USD 2,506,304.43 from 6 October 2013 to the date of full payment;

(v) USD 393,652.00 from 30 November 2015 to the date of full payment;

(vi) USD 12,694,563.00 from 17 January 2016 to the date of full payment;

(vii) USD 71,706.30 from 21 August 2014 to the date of full payment;

(viii) USD 3,066,108.99 from 5 March 2015 to the date of full payment;

(ix) USD 3,137,667.24 from 5 March 2015 to the date of full payment;

(x) USD 2,252,255.05 from 18 December 2015 to the date of full payment;

(xi) USD 1,777,781.10 from 5 March 2015 to the date of full payment;

(xii) USD 645,660.00 from 25 September 2015 to the date of full payment;

(xiii) USD 265,670.00 from 5 March 2015 to the date of full payment;

(xiv) USD 761,580.00 from 25 September 2015 to the date of full payment;

(xv) USD 9,972.14 from 5 March 2015 to the date of full payment;

(xvi) USD 709,300.00 from 5 March 2015 to the date of full payment;

(xvii) USD 1,889,681.55 from 12 November 2015 to the date of full payment;

(xviii) USD 1,545,702.26 from 3 July 2015 to the date of full payment;

(xix) USD 490,986.02 from 3 July 2015 to the date of full payment;

(xx) USD 616,664.07 from 13 November 2015 to the date of full payment;

(xxi) USD 1,960,873.64 from 8 November 2015 to the date of full payment;

(xxii) USD 1,803,520.71 from 11 November 2015 to the date of full payment;

(xxiii) USD 21,619.00 from 17 December 2015 to the date of full payment;

(xxiv) USD 2,168,877.28 from 31 July 2015 to the date of full payment;

(xxv) USD 2,208,898.99 from 25 November 2015 to the date of full payment;

(xxvi) USD 1,354,938.99 from 31 July 2015 to the date of full payment;

(xxvii) USD 1,672,826.10 from 31 July 2015 to the date of full payment;

(xxviii) USD 324,731.71 from 9 November 2015 to the date of full payment;

(xxix) USD 1,564,941.92 from 26 November 2015 to the date of full payment;

(xxx) USD 1,746,266.47 from 12 December 2015 to the date of full payment;

(xxxi) USD 3,434.12 from 16 March 2015 to the date of full payment;

with interest equalling the statutory commercial interest rate as provided by Article 6:119a of the Dutch Civil Code;

(5) Denies the Claim for storage expenses for certain trucks at a rate of USD 30.00 per truck per month (i.e. USD 3,000.00 per month, with interest) from 16 January 2017 to the date of full payment;

(6) Dismisses Bariven's Counterclaims in so far as the Tribunal has jurisdiction thereon;

(7) Orders that Bariven reimburse Surpass for a) the amount referred to at par. 543 above of EUR 305,822.00 and b) all costs, expenses and attorneys' fees and disbursements incurred in this arbitration pursuant to Article 37 of the ICC Rules, viz. USD 325.000,00; EUR 1,093,083.75; GBP 3,953.46, with interest equalling the statutory interest rate as

provided by Article 6:119 of the Dutch Civil Code from the date of the award to the date of full payment;

(8) In so far as not granted above, all Claims and Counterclaims are denied.

Place of Arbitration: The Hague, The Netherlands.

Signed by:

A.S. Hartkamp	A.F.J.A. Leijten	O.L.O. de Witt Wijnen
On: 27 May 2019	On: 27 May 2019	On: 27 May 2019