ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 24330/MK/PDP

# LACROSSE FOOTWEAR, INC. V. 9055-3827 QUÉBEC INC., DOING BUSINESS AS CALCIO

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## FINAL AWARD

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31 July 2020

Tribunal:
Urs Martin Laeuchli (Sole arbitrator)

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# Final Award

## The Parties and their Representatives

| Claimant | Represented by |
|---|---|
| LACROSSE FOOTWEAR, INC. 17634 NE Airport Way<br>Portland, OR 97230 USA | Mr. [Person 1]<br>GARVEY SCHUBERT BARER 121 SW Morrison St, 11th Fl.<br>Portland, OR 97204<br>USA |
| | Tel: [Redacted]<br>Email: [Redacted] |

| Respondent | Not represented by counsel |
|---|---|
| 9055-3827 QUÉBEC INC. doing business as CALCIO<br>7092 boul. St. Laurent<br>Montreal, Québec H2S 3E2<br>Canada | |
| Email: [Redacted]<br>Email: [Redacted] | |

The Arbitral Tribunal

*Sole Arbitrator*
Mr. Urs Martin Laeuchli
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# A. Introduction

## 1. The Case

1.

This dispute is between an Oregon (US) manufacturer of boots, LaCrosse Footwear, Inc. ("Lacrosse"), and a Québec (Canada) retail reseller, 9055-3827 Québec Inc., dba Calcio ("Calcio"; collectively, the "Parties"), who has not made full payment for delivered boots. Calcio alleges improper forum and choice of law, unenforceability of their agreement, entitlement to a discount and commission, an allowance for currency fluctuation, Lacrosse's wrongful bid rigging, and a claim for punitive damages.

2.

Throughout, Calcio had the opportunity to participate and be heard in the procedure - and Calcio **did** participate through telephone hearings and transmittal of written submissions and emails (see Procedural History below).

## 2. Legend of Abbreviations

3.

Calcio: a Québec (Canada) reseller, 9055-3827 Québec Inc., dba Calcio

Charter: *La charte de la langue française* [the Québec Charter of the French Language]

Court: the International Court of Arbitration of the ICC

Credit Agreement: the agreement the Parties entered into on or about February 21, 2014

Lacrosse: an Oregon (US) manufacturer of boots, LaCrosse Footwear, Inc.

ORS: Oregon Revised Statutes

Parties: Calcio and Lacrosse

The Rules: the ICC Arbitration Rules in force as of March 1, 2017

UCC: Uniform Commercial Code

## B. Constitution of the Arbitral Tribunal

4.

After the parties agreed to a sole arbitrator but did not jointly nominate one, the Tribunal was constituted on May 23, 2019. Urs Laeuchli was appointed by the Court as sole arbitrator, upon the proposal of the Swiss ICC National Committee, pursuant to Article 13(3) of the ICC Arbitration Rules in force as of March 1, 2017 (hereafter, the "Rules"). Neither party has challenged the proper constitution of the Arbitral Tribunal in general nor the appointment of Mr. Laeuchli in particular.

## C. Procedural History

5.

1. On March 12, 2019 the Court received the Request for Arbitration from the Claimant, Lacrosse, dated March 8, 2019.
2. In its Request, Lacrosse proposed that the arbitration be submitted to a sole arbitrator.
3. The Secretariat notified the Respondent, Calcio of the Request for Arbitration on March 20, 2019 and requested comment on the number of arbitrators and an Answer by April 22, 2019 (Article 5(1) of the Rules).
4. On April 19, 2019 Calcio requested an extension until June 30, 2019 for filing an Answer. However, because Calcio did not comment on the number of arbitrators, pursuant to Article 5(2) of the Rules, the Secretariat did not grant the extension to submit the

Answer. Calcio did not file an Answer by April 22, 2019. The Secretariat granted Calcio until April 29, 2019 to comment on the number of arbitrators.

5. On April 25, 2019, the Secretariat informed the Parties that this matter was not referred to the Court pursuant to Article 6(3) of the Rules. Accordingly, the arbitral tribunal would decide any question of jurisdiction or of whether the claims may be determined together (Article 6(3) of the Rules), after providing the Parties with an opportunity to comment. As the Parties disagreed as to the language of the arbitration, the tribunal would decide the language or languages of the arbitration in accordance with Article 20 of the Rules.
6. On May 3, 2019, the Secretariat took note of the Parties' agreement to have one arbitrator and indicated that, as the Parties had failed to jointly nominate the sole arbitrator within the time limit granted, the Court would appoint the sole arbitrator (Article 12(3) of the Rules).
7. Pursuant to Article 16 of the Rules, the file was transmitted to the Tribunal on May 23, 2019.
8. As required by Article 24 of the Rules, the Tribunal convened a case management conference that took place via telephone conference on June 18, 2019. The Tribunal consulted the Parties on procedural measures that may be adopted pursuant to Article 22(2) of the Rules and Appendix IV to the Rules. This bilingual conference was offered with French language assistance. No French language assistance was requested at further hearings.
9. On June 20, 2019, the Tribunal issued Procedural Order No. 1 with an initial timeline. This allowed Calcio to submit a Statement of Defence and Counterclaim by July 15, 2019.
10. On June 21, 2019 Calcio requested an extension to sign the Terms of Reference. On June 27, 2019 the Court extended the time limit for establishing the Terms of Reference until July 31, 2019 (Article 23(2) of the Rules).
11. On July 15, 2019, the Respondent, Calcio, submitted its Response, including counterclaim.
12. On July 22, 2019, the Tribunal held a telephonic hearing regarding the Terms of Reference and jurisdiction. (See Minutes, Telephonic Hearing, July 22, 2019, 11am PDT/ 2pm EDT). This was conducted in English with the Parties' consent.
13. On July 26, 2019 both of the Parties submitted their Requests for Production of Documents.
14. On August 6, 2019 the Terms of Reference were signed by Lacrosse.
15. On August 15, 2019 Lacrosse submitted its Response to Request for Documents.
16. On August 21, 2019 Lacrosse submitted a Motion Regarding Lack of Document Production by Calcio.
17. On August 28, 2019 the Tribunal issued Procedural Order No. 2 including a decision on Lacrosse's motion.
18. On August 29, 2019 the Court approved the Terms of Reference, which triggered a 6-months time period for rendering the final award.
19. On September 6, 2019 Calcio submitted its amended counterclaim in *Réponse Du Défendeur - Requête De Production De Documents* [Reply of the Defendant and Request for Production of Documents].
20. On September 10, 2019, Lacrosse requested that Calcio's September 6, 2019 submission be disallowed as untimely and that Lacrosse be given two additional weeks to respond.
21. On September 12, 2019 the Tribunal held a procedural hearing on the telephone with the Parties. This was conducted in English with the Parties' consent.
22. On September 12, 2019 the Tribunal issued Procedural Order No.1a with a modified

timeline.

23. On September 13, 2019, Calcio emailed that they would not be liable for costs and invited Lacrosse to make a settlement offer.
24. On September 13, 2019 the Court wrote that it had not received Calcio's signed Terms of Reference by August 29, 2019.
25. On October 1, 2019 Lacrosse submitted its Reply.
26. On October 16, 2019 Calcio requested an extension of the deadline to submit documents until October 24, 2019 because of a public holiday in Canada and the Canadian elections.
27. On October 16, 2019 the Tribunal granted an extension until October 22, 2019 to submit a Rejoinder and witness statements.
28. On October 22, 2019 Calcio submitted its *Réplique du Défendeur* [Respondent's Reply].
29. On October 23, 2019 Calcio submitted an additional attachment, *Pièce P-7 - Factures Avec Escompte* [Exhibit P-7 - Invoices with Discount].
30. On November 1, 2019, Lacrosse filed its Opening for the Document Hearing.
31. On November 1, 2019, Calcio filed *Requête Pour Une Motion D'ordonnance* [Motion for Order].
32. On November 2, 2019, the Tribunal denied Calcio's motion.
33. On November 2, 2019, Calcio submitted observations on Lacrosse's Opening for the Document Hearing.
34. On November 2, 2019, Calcio filed its *Déclaration Liminaire* [Opening Statement] for the Document Hearing.
35. On November 2, 2019, the Tribunal conducted its Document Hearing.
36. On November 8, 2019, Calcio submitted an inquiry regarding its French submissions.
37. On November 14, 2019, the Tribunal answered Calcio's inquiry, requested input from the Parties about the timing of submission of costs, and closed the proceeding subject to cost submissions.
38. On December 23, 2019, the Tribunal invited submissions on costs by January 7, 2020 and replies to cost submissions by January 17, 2020.
39. On January 7, 2020 the Parties submitted cost notes.
40. On January 17, 2020, the Parties submitted replies to cost notes.
41. On January 18, 2020 the Tribunal held a desk hearing to determine the allowance and final allocation of costs. This was also the date of the final closing of the proceedings, including the cost determination, under Article 27 of the Rules.

## D. Organizational Telephone Conference of June 18, 2019

6. As required by Article 24 of the Rules, the Tribunal convened a case management conference via telephone conference on June 18, 2019. The Tribunal consulted the Parties on procedural measures that may be adopted pursuant to Article 22(2) of the Rules and Appendix IV to the Rules. The Tribunal and the Parties discussed the language of the arbitration and preliminary procedural timeline. The Tribunal offered French language assistance to the Parties. As no

French language assistance was requested at further hearings, the latter were conducted in English.

## E. Languages of the Arbitration

7.

The arbitration agreement does not specify the language of arbitration. Lacrosse requested English and Calcio requested French. Pursuant to Procedural Order No. 1, dated June 20, 2019, the languages of the arbitration are English and French, with English as the prevailing language. This means that Parties could communicate in French or English to the Tribunal or the other Party; the Tribunal would communicate primarily in English to the Parties.

## F. Parties' Arguments with respect to Applicable Law and Jurisdiction, and Applicable Law and Enforceability of Credit Agreement

## 1. Calcio's Objection to Choice of Law and Jurisdiction

8.

Calcio argues that Québec civil law instead of Oregon (U.S.) law is applicable to the choice of forum because Calcio is located in Québec.[1] Calcio holds that "Regardless of what any contract stipulates, the Quebec's Civil Code supercedes any contract clauses that don't comply with it or can be considered abusive and/or restrictive."[2]

9.

Calcio contends that Quebec courts should adjudicate this matter but Calcio does not deny the existence of an ICC arbitration agreement signed by Calcio. At the July 22, 2019 telephone hearing, however, Calcio stated that Lacrosse had not signed the Credit Agreement that contains the arbitration agreement. Being distinct from the choice of law question, the tribunal will address Lacrosse's consent to arbitrate in its discussion on jurisdiction.

10.

In furtherance of its argument that Québec courts should adjudicate this matter, Calcio cites article 3149 of the Civil Code of Quebec that states, "A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer

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[1] Calcio ICC Response, July 15, 2019, p.4.
[2] Calcio ICC Response, July 15, 2019, p.4.

or worker may not be set up against him".[3]

11.

Calcio cites several authorities to argue that the Credit Agreement's choice of forum, and choice of Oregon law clauses were invalid because they were part of an adhesion contract[4]: Article 1437 of the Civil Code of Quebec states that "An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced" and Article 1432, which states, "In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer."[5] Calcio also cites Section 211 of the Restatement (Second) of Contracts (1981), concerning standardized contracts, which states, "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[6]

12.

Calcio cites Article 3076 of the Quebec Civil Code, "*Les règles du présent livre s'appliquent sous réserve des règles de droit en vigueur au Québec dont l'application s'impose en raison de leur but particulier*" [The rules contained in this Book apply subject to those rules of law in force in Québec which are applicable by reason of their particular object] and then states,

13.

*Ainsi, quiconque serait adhérent et soumis à une clause de rattachement juridictionnel abusive serait assuré de l'inefficacité de la clause. Conséquemment, la clause d'élection du for de la partie demanderesse est nulle*. [Thus, anyone who is an adhering party and subject to an unfair jurisdictional clause is assured of the ineffectiveness of the clause. Consequently, the forum selection clause of the plaintiff is void].[7]

14.

However, Calcio also cites the Quebec Code of Civil Procedure that an arbitrator may rule on his own competence.[8]

## 2. Calcio's Argument that Applicable Law for the Credit Agreement is Quebec Law, and that Credit Agreement is Void under Quebec Law

15.

Calcio argues that Québec civil law instead of Oregon (U.S.) law is applicable to the validity of the Credit Agreement because Calcio is located in Québec.[9]

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[3] Calcio *Réplique du Défendeur*, Oct. 22, 2019, p.5
[4] Calcio *Réplique du Défendeur*, Oct. 22, 2019, p. 3-5.
[5] Calcio *Réplique du Défendeur*, Oct. 22, 2019, p.4
[6] Calcio, *Déclaration Liminaire*, Nov. 2, 2019, p.3.
[7] Calcio *Réplique du Défendeur*, Oct. 22, 2020, p.5
[8] Calcio *Réplique du Défendeur*, Oct. 22, 2020, p.5

[9] Calcio ICC Response, July 15, 2019, p.4.

16.

Calcio also holds that the Credit Agreement violated Section 55 of *La charte de la langue française* [the Québec Charter of the French Language, hereafter the "Charter"]. Calcio argues that the Credit Agreement violated Section 55 because it was not written in French, Calcio did not consent to an English-only agreement[10], and therefore the Credit Agreement is void.[11] "*Selon les règles de gouvernance internationales, toute compagnie qui souhaite faire affaire dans un pays étranger est tenue de se conformer aux lois de ce pays, ainsi qu'à son système judiciaire. N'en déplaise à la partie demanderesse, ces lois s'appliquent à elle aussi et elle est sommée de s'y conformer*. [Under international governance rules, any company wishing to do business in a foreign country is required to comply with the laws of that country, as well as its legal system. Whether the plaintiff likes it or not, these laws apply to her as well and she is required to comply with them.][12]"

17.

Section 55 of the Charter states that preprinted forms with standard clauses must be in French, unless expressly agreed to. The Credit Agreement was only written in English and there was no express agreement that it could only be written in English.

18.

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[10] Calcio's *Réponse Du Défendeur - Requête De Production De Documents* [Reply of the Defendant and Request for Production of Documents], September 6, 2019, p.7.

[11] In Calcio's *Réponse Du Défendeur - Requête De Production De Documents* [Reply of the Defendant and Request for Production of Documents], September 6, 2019, p.2, Calcio wrote: *Selon l'article 55, de la presente loi, il est clairement stipulé que:*
*Les contrats d'adhésion, les contrats où figurent des clauses-types imprimées, ainsi que les documents qui s'y rattachent sont rédigés en français. Ils peuvent être rédigés dans une autre langue si telle est la volonté expresse des parties.*
*Les contrats d'adhésion et les contrats où figurent des clauses types imprimées sont visés par la Charte de la langue française. Le contrat est d'adhésion lorsque les stipulations essentielles qu'il comporte ont été imposées par l'une des parties ou redigées par elle et qu'elles ne pouvaient être librement discutées... Les contrats d'adhésion et les documents qui s'y rattachent...doivent être rédigés en français ou à la fois en français et dans une autre langue.*
*Cependant, lorsque les parties en conviennent expressément, le contrat peut être rédigé dans une autre langue seulement. La « volonté expresse des parties » doit alors être exprimée clairement dans une clause figurant soit dans le contrat lui-même, soit dans un document joint au contrat. La version française du contrat d'adhésion doit être disponible en tout temps pour que l'adhérent ou l'adhérente puisse exprimer librement sa volonté quant à la langue de rédaction du contrat. Il ne suffit donc pas de mettre à la disposition de la clientèle un contrat déjà rédigé dans une autre langue et qui contiendrait une clause stipulant que le contrat n'est pas en français. Finalement, on ne peut éluder la loi en faisant signer au client ou à la cliente une clause de renonciation à la version française.*

*Or, une telle clause n'apparait aucunement dans le Canadian Commercial Credit Application and Agreement, rendant ledit contrat nul. En soumettant une version unilingue anglaise, le Demandeur s'est mis en défaut et a clairement contrevenu a la loi.*

[According **to Article 55** of this law, it is clearly stipulated that:
*Membership contracts, contracts containing printed standard clauses, as well as related documents are written in French. They can be written in an other language if this is the express wish of the parties.*
Adhesion contracts and contracts containing printed standard clauses are covered by the Charter of the French language. The contract is an adhesion contract when the essential stipulations contained in it were imposed by one of the parties or drafted by it and that could be freely discussed...Membership contracts and related documents...must be written in French or both in French and in another language.
However, where the parties expressly agree, the contract may be written in another language only. The "express will of the parties" must then be expressed clearly in a clause appearing either in the contract itself or in an attached document to the contract. The French version of the membership contract must be available at all times for that the member may freely express his/her will as to the language of the drafting the contract. It is therefore not enough to make a contract available to customers already written in another language and which contains a clause stating that the contract is not not in French. Finally, we can not evade the law by having the client sign a waiver clause to the French version.
However, such a clause does not appear in the Canadian Commercial Credit Application and Agreement, **rendering the said contract void.** By submitting a unilingual English version, the Claimant went into default and clearly contravened the law.]

[12] Calcio's *Réplique du Défendeur,* Oct. 22, 2019, p.2.

Calcio also cites Quebec Civil Code sections 1432, 1435, and 1436, respectively, that favor the adhering party, nullify clauses that the party has no knowledge of, and that invalidate illegible and incomprehensible clauses if the contract party suffers prejudice.[13]

## 3. Lacrosse's Arguments regarding Applicable Law to Jurisdiction and Jurisdiction, Applicable Law to the Credit Agreement, and Enforceability of the Credit Agreement

19.

Lacrosse states that the applicable law with respect to jurisdiction is Oregon law.[14] This is in accordance with Section 18.9 of the Credit Agreement.[15] Lacrosse states that the Tribunal has jurisdiction because Section 18.10 of the Credit Agreement provides that "...their dispute is subject to arbitration in Portland, Oregon, United States of America, to be administered by and conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce."[16]

20.

Lacrosse states that the applicable law with respect to the validity of the Credit Agreement is Oregon law, in accordance with Section 18.9 of the Credit Agreement.[17] The Credit Agreement was valid because Calcio completed, signed and delivered the Credit Agreement to Lacrosse for purposes of purchasing goods from Lacrosse.[18]

21.

Lacrosse states that the Charter of the French Language does not apply to the Credit Agreement, because the applicable law is Oregon law in accordance with Section 18.9 of the Credit Agreement.[19]

22.

Lacrosse also states that even though the Credit Agreement was not in French, if a party wishes to rescind a contract, the injured party must (1) promptly notify the other party of their intention to rescind and (2) not engage in conduct inconsistent with an intention to rescind.[20] Calcio did not raise the unenforceability of the contract until this arbitration.[21] Also, Calcio conducted business with Lacrosse pursuant to the terms of the Credit Agreement from 2014 to 2018, thereby receiving a substantial benefit.[22]

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[13] Calcio's *Réponse Du Défendeur - Requête De Production De Documents* [Reply of the Defendant and Request for Production of Documents], September 6, 2019, p. 2.

[14] Lacrosse Request for Arbitration, March 8, 2019, p. 1.

[15] Lacrosse Request for Arbitration, March 8, 2019, p. 1.

[16] Lacrosse Request for Arbitration, March 8, 2019, p. 1.

[17] Lacrosse Request for Arbitration, March 8, 2019, p. 1.

[18] Lacrosse Claimant's Reply, Oct. 1, 2019, p. 5.

[19] Lacrosse Claimant's Reply, Oct. 1, 2019, p. 5. Lacrosse Request for Arbitration, March 8, 2019, p.1.

[20] Lacrosse Claimant's Reply, Oct. 1, 2019, p. 6.

[21] Lacrosse Claimant's Reply, Oct. 1, 2019, p. 6.

23.

Further, the doctrine of laches bars Calcio from asserting that the Credit Agreement is void because (1) Calcio delayed in asserting its claim for an unreasonable length of time, (2) with full knowledge of all relevant facts, (3) resulting in such substantial prejudice to Lacrosse that it would be inequitable for the arbitrator to grant relief.[23]

# G. Tribunal's Discussion on Applicable Law and Jurisdiction, and Applicable Law and Enforceability of the Credit Agreement

## 1. Applicable Law and Jurisdiction of the Tribunal

24.

Under the doctrine of *Kompetenz-Kompetenz* and Article 6(3) of the Rules, the Tribunal has competence to decide the question of the jurisdiction of the Tribunal. *Compétence-Compétence* is one of the most venerable and important principles of arbitration law.[24] It operates independently of express contractual consent and is, in practical effect, ordinarily applicable in international cases governed by U.S. arbitration law.[25] The jurisdiction is determined by the Parties' arbitration agreement and the applicable law to the arbitration agreement. The Tribunal finds that Parties validly chose ICC to administer the arbitration, and the ICC conferred jurisdiction to the Tribunal.

25.

According to the Federal Arbitration Act (9 U.S. Code, Section 2) arbitration agreements in commercial transactions "...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".

26.

Here, the Parties' arbitration agreement is section 18.10 of the Credit Agreement. Under the separability doctrine, an arbitration clause contained in a contract is considered to be a separate agreement. The validity or invalidity of the main agreement does not necessarily affect the validity or invalidity of the arbitration agreement. The Parties also affirmed the separability doctrine in their Credit Agreement under section 18.2, which states,

> Severability. Any provision of this Agreement which in any way contravenes the law of any state or country in which this Agreement is effective shall, in such state or country, to the

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[22] Lacrosse Claimant's Reply, Oct. 1, 2019, p. 6.

[23] Lacrosse Claimant's Reply, Oct. 1, 2019, p. 6-7.

[24] F.G. de Cossio, "The Competence-Competence Principle, Revisited," J. of International Arbitration, vol. 24 (2007) at p. 231.

[25] Gaitis, Gwyn, Kastler, McCauley, Eds., The College of Commercial Arbitrators, Guide to Best Practices in Commercial Arbitration (Fourth Edition, 2017) at p. 532. While the Guide was correct here, on p. 530 it erroneously equates *Kompetenz-Kompetenz* with jurisdiction.

extent of such contravention of law, be deemed severable and shall not affect any other provision hereof or the validity hereof.

27.

The Tribunal may assess the validity of the arbitration agreement apart from the rest of the Credit Agreement.

28.

The Tribunal finds that the applicable law with respect to jurisdiction is Oregon law because of the parties' choice of law clause, and because Oregon is the seat of the arbitration.[26] In a conspicuous provision, namely, Section 18.9, the Parties' Credit Agreement specified Oregon as the applicable law. Also, Section 18.10 states that the arbitration shall be instituted and conducted in Portland, Oregon, U.S.A. The Parties not only agreed upon Oregon as the place of arbitration pre-dispute, but also post-dispute have not contested Oregon as the place of arbitration[27]. The term "seat of arbitration" is used interchangeably with "place of arbitration" and there is a broad consensus that its meaning goes beyond a geographical understanding.[28] Therefore, because of the parties' choice of law clause and designation of Oregon as the seat of the arbitration, Oregon is the applicable law for the arbitration agreement and to determine jurisdiction.

29.

Oregon law expressly states that an arbitrator may rule on his own jurisdiction.[29]

30.

Under Oregon law, an international commercial arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[30]

31.

Under Oregon law, an international commercial arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a part of the contract.[31]

32.

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[26] There is a multiplicity of approaches to deciding the applicable law of an arbitration agreement in the absence of a choice of law clause. Gary Born, International Commercial Arbitration, p. 491. These include the "most significant relationship" and "closest connection" standards. *id.*, p. 517. Some arbitral tribunals have embraced a "validation principle." *Id.*, p. 542.

[27] See all submissions by the parties, including even the attempted edited Calcio version of the Terms of Reference, faxed by Calcio on June 26, 2019, but never approved.

[28] The new Restatement (Third) U.S. Law of Int'l Comm. Arb. § 1.1 PFD (2019) 47, with various accompanying cites, and while distinguishing its choice of term, supports this.

[29] ORS 36.484 (2017).

[30] 2020 ORS 36.450 (4).

[31] 2020 ORS 36.466.

Oregon law also states that if the international commercial arbitration agreement is governed by Oregon law that "...it shall be valid and enforceable in accordance with ordinary principles of contract law."[32]

33.

Under Oregon law, a domestic agreement to arbitrate is valid except upon a ground that exists at law or in equity for the revocation of a contract.[33]

34.

Under Oregon law, examples of grounds that would invalidate a contract are incapacity, fraud, mistake, misrepresentation, duress, and undue influence. None of those grounds have been alleged by Calcio.

35.

Also, under Oregon law a commercial agreement is signed if it ".includes using any symbol executed or adopted with present intention to adopt or accept a writing".[34] This is an ordinary principle of contract law and thus applies to international arbitration agreements as stated above.

36.

Further, Oregon's statutory language about signed written international commercial arbitration agreements contains language from the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") which then became part of the Federal Arbitration Act. On June 1, 2020, the U.S. Supreme Court, in interpreting the New York Convention, held that nonsignatories may be parties to an arbitration agreement in accordance with domestic law.[35]

37.

Calcio has stated that Lacrosse did not sign the Credit Agreement, which contained the arbitration agreement. However, Lacrosse has stated that Calcio "...executed the Agreement with Lacrosse",[36] i.e., Lacrosse is a party to the Credit Agreement, including the arbitration agreement, and has consented to arbitration.

38.

Here, Calcio's signature is at the end of the Credit Agreement that contained the arbitration agreement and Lacrosse's signature is not. However, Lacrosse's letterhead is on the first page of the Credit Agreement, which under Oregon law is a symbol adopted with present intention to adopt or accept the Credit Agreement, including consent to an arbitration agreement, i.e., signed by Lacrosse. Therefore, Lacrosse has consented to the arbitration agreement. Also, Lacrosse has submitted this matter to arbitration, and therefore waived any argument that it has not

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[32] 2020 ORS 36.452 (2).

[33] ORS 36.620 (2017).

[34] 2020 ORS 71.2010(2)(kk).

[35] *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, No. 18-1048, 2020 WL 2814297, (U.S. June 1,2020), 590 US __(2020).

[36] Lacrosse Request for Arbitration, Para. 11, March 8, 2019, p.2.

consented to the arbitration agreement.

39.

Under Oregon law, choice of Oregon law is also subject to prohibited acts and public policy[37] in the law of the state where the contract is performed:

> **OR 15.355 Limitations on choice of law by parties.** (1) The law chosen by the parties pursuant to ORS 15.350 does not apply to the extent that its application would:
>
> (a) Require a party to perform an act prohibited by the law of the state where the act is to be performed under the contract;
>
> (b) Prohibit a party from performing an act required by the law of the state where it is to be performed under the contract; or
>
> (c) Contravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute under ORS 15.360.
>
> (2) For purposes of subsection (1)(c) of this section, an established policy is fundamental only if the policy reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue. [Formerly 81.125]

40.

In this case, the contract is performed in part in Québec. Therefore the choice of Oregon law is also subject to prohibited acts and public policy in Québec. Québec law provides similar standards as to the applicable law and validity of the arbitration agreement.[38]

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[37] "Finally, and exceptionally, a nation's law may dictate that particular claims or defenses must be heard by the arbitrator under mandatory national law. For example, where certain statutory (or EU law) protections - such as the Hague Visby Rules, antitrust, securities, anticorruption, or labor protection laws - are involved, national courts have frequently held that arbitrators are required to consider claims based on those laws. This can be regarded as a specialized choice-of-law rule of sorts, mandating application of a specific substantive rule in particular cases." Gary Born, International Commercial Arbitration, 2635.

[38] The Quebec Civil Code Section 2638 states,

> *La convention d'arbitrage est le contrat par lequel les parties s'engagent à soumettre un différend né ou éventuel à la décision d'un ou de plusieurs arbitres, à l'exclusion des tribunaux.*
> [An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.] The Quebec Code of Civil Procedure Section 622 states,
>
> *Les questions au sujet desquelles les parties ont conclu une convention d'arbitrage ne peuvent être portées devant un tribunal de l'ordre judiciaire, alors même qu'il serait compétent pour décider de l'objet du différend, à moins que la loi ne le prévoie.*
> [Unless otherwise provided by law, the issues on which the parties have an arbitration agreement cannot be brought before a court even though it would have jurisdiction to decide the subject matter of the dispute.] The Quebec Code of Civil Procedure states the doctrine of competence-competence in Section 943: "The arbitrators may decide the matter of their own competence". The Civil Code of Quebec Section 2642 states the doctrine of separability thus:
>
> *Une convention d'arbitrage contenue dans un contrat est considérée comme une convention distincte des autres clauses de ce contrat et la constatation de la nullité du contrat par les arbitres ne rend pas nulle pour autant la convention d'arbitrage.*
> [An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement.] The Quebec Civil Code Section 2640 also states that an arbitration agreement must be in writing, which was the case here. Moreover, the Civil Code of Quebec Section 3121 states that the governing law of the arbitration is the governing law of the contract:

41. Calcio has alleged several legal grounds under Québec law for the invalidity of the arbitration clause. However, these Québec statutes do not invalidate the arbitration clause for the reasons stated below.

42. Calcio has argued that the arbitration clause is unenforceable because it violates Section 55 of the Québec Charter of the French Language (the "Charter")[39]. Section 55 of the Charter states:

Contracts pre-determined by one party, contracts containing printed standard clauses, and the related documents, must be drawn up in French. They may be drawn up in another language as well at the express wish of the parties.

43. Section 205 of the Charter states that violators of the Charter shall be liable for fines; however, the Charter does not provide that a contract drafted in a different language than French is unenforceable. Most importantly, in order to benefit from the provision, Calcio must not only prove the Credit Agreement was pre-determined by Lacrosse and had printed standard clauses, i.e., it was an adhesion contract, but that Calcio was disadvantaged from the English-only language in the contract. As known in Québec, courts have held that preprinted forms in English are enforceable particularly where the adhering party did not ask for a form in French, was not disadvantaged by an English text, had sufficient knowledge of English, and conducted business in English.[40]

44. Here, the Credit Agreement containing the arbitration agreement and choice of law clause, was pre-determined by Lacrosse and had printed standard clauses. It is an adhesion contract. However, even though it was not printed in French, it is still enforceable because Calcio has not offered any evidence that Calcio was disadvantaged from the English-only language in the contract. Calcio has not offered any evidence that Calcio requested a form in French, was disadvantaged by an English text, did not have sufficient knowledge of English, and did not conduct business in English.

45. Calcio's arguments based on Articles 1437 and 3149 of the Quebec Civil Code also do not invalidate the arbitration agreement.

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*En l'absence de désignation par les parties, la convention d'arbitrage est régie par la loi applicable au contrat principal ou, si cette loi a pour effet d'invalider la convention, par la loi de l'État où l'arbitrage se déroule.*
[Failing any designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the country where arbitration takes place.]

[39] *Les contrats d'adhésion, les contrats où figurent des clauses-types imprimées, ainsi que les documents qui s'y rattachent sont rédigés en français. Ils peuvent être rédigés dans une autre langue si telle est la volonté expresse des parties.* [Contracts pre-determined by one party, contracts containing printed standard clauses, and the related documents, must be drawn up in French. They may be drawn up in another language as well at the express wish of the parties.]

[40] Parent v. British Aviation Insurance Group (Canada) Ltd., [1999] R.J.Q. 843, Nationwide Advertising Service inc. c. David, C.S. Montreal 500-05-006166-886, le 5 octobre 1988, J.E. 88-1336 et D.T.E. 88T-981, à la page 10. Bacon-Gauthier c. Banque Royale du Canada [1997] R.J.Q. 1092, 1098, (C.S.). Len-Jay inc. c J.R.S. Transport inc., [2001] R.R.A. 799.

46.

Article 1437 of the Québec Civil Code states,

> *La clause abusive d'un contrat de consommation ou d'adhésion est nulle ou l'obligation qui en découle, réductible.*
>
> *Est abusive toute clause qui désavantage le consommateur ou l'adhérent d'une manière excessive et déraisonnable, allant ainsi à l'encontre de ce qu'exige la bonne foi; est abusive, notamment, la clause si éloignée des*
>
> *obligations essentielles qui découlent des règles gouvernant habituellement le contrat qu'elle dénature celui-ci.*
>
> [An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.
>
> An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore contrary to the requirements of good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause].

47.

The arbitration clause is not abusive as it is not excessively and unreasonably detrimental to Calcio. It does not fundamentally change the nature of the Credit Agreement. Also, it appears that the majority, if not all, of the case law cited by Calcio on the subject of adhesion contracts relates to contracts involving consumers (buying goods or services only for their personal use) as opposed to contracts entered into for business purposes as in the present case.[41]

48.

Calcio's argument from Article 3149 of the Québec Civil Code also fails. Article 3149 states,

> *Les autorités québécoises sont, en outre, compétentes pour connaître d'une action fondée sur un* ***contrat de consommation*** *ou sur un contrat de travail si le consommateur ou le travailleur a son domicile ou sa résidence au Québec ; la renonciation du consommateur ou du travailleur à cette compétence ne peut lui être opposée.*
>
> [Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.]

49.

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[41] Calcio's *Réponse Du Défendeur - Requête De Production De Documents* [Reply of the Defendant and Request for Production of Documents], September 6, 2019, p.9. Cases cited include *Chamberland c. Desjardins Sécurité financière, compagnie d'assurance-vie,* 2019 QCCQ 1621; *Danis (Rénovatech Experts) c. Husny*; *Banque de Montréal c. Desroches*, 2017 QCCQ 8352; *123719 Canada inc. (Groupe Sutton Excellence) c. De Lima*, 2017 QCCQ 941; *Masson c. Telus Mobilité,* 2017 QCCS 1675; *Paquin-Charbonneau c. Société des casinos du Québec inc.*, 2016 QCCS 4703; *Roberge c. Groupe Laro Alta inc.*, 2016 QCCQ 5141;*Lavoie c. Club Privilège* (621725 Canada inc.), 2015 QCCQ 7456;*Delorme c. Concession A.25, s.e.c.*, 2015 QCCS 2313;*Marinier c. Voyages à rabais inc.*, 2015 QCCQ 3293.

According to this article, the Québec authorities are competent to hear cases regarding Québec residents and this competency cannot be denied on the grounds of a forum selection clause stipulated between the parties of a contract. However, this article is applicable only in the case of consumer or employment contracts. The Credit Agreement is neither. A consumer contract is when the goods or services are bought for personal use or consumption of individuals and their families. In the present case, Calcio did not purchase goods from Lacrosse for personal purposes. Instead, the purchase orders were placed within the context of a public tender initiated by the British Columbia Ministry of Public Safety as part of Calcio's business activities. Consequently, Calcio is not a consumer under Article 3149 of the Québec Civil Code and is therefore not entitled to benefit from the protections of exclusive Québec jurisdiction reserved for consumers and employees. Accordingly, the forum selection provision in the Credit Agreement is enforceable.

50.

Therefore, the Tribunal finds that Oregon is the applicable law as to jurisdiction. Under Oregon law, the Tribunal finds an enforceable international commercial arbitration agreement in Section 18.10 of the Credit Agreement. Both Parties consented to arbitration. The Tribunal has jurisdiction over this case and both Parties.

## 2. Applicable Law and Validity of the Credit Agreement

51.

The applicable law with respect to the validity of the Credit Agreement is Oregon law. In a conspicuous provision, namely, Section 18.9, the Parties' Credit Agreement specified Oregon as the applicable law; as a consequence, Oregon law is the applicable law to decide whether the Credit Agreement is valid.

52.

Section 18.9 of the Credit Agreement excludes the application of the United Nations Convention on Contract for the International Sale of Goods. Therefore, Uniform Commercial Code (UCC) Article 2, which governs sales of goods in Oregon applies to the Credit Agreement.

53.

Under Section 2-204[42] of the latter, "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract".

54.

The Credit Agreement was validly formed because the Credit Agreement was entered into voluntarily and assented to by Calcio. This was evidenced by Calcio's [legal representative]'s, [Person 7]'s signature on the Credit Agreement and Calcio's subsequent orders pursuant to the Credit Agreement.[43]

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[42] ORS 72.2040 (1) (2017).

[43] At a telephonic hearing on the Terms of Reference and jurisdiction on July 22, 2019, Mr. [Person 7], when asked, did not deny having

55.

Lacrosse also voluntarily entered into and assented to the Credit Agreement. Lacrosse's signature is not at the end of the Credit Agreement. However the Credit Agreement is on Lacrosse's letterhead. As mentioned earlier, under Oregon law, a commercial agreement is signed if it "...includes using any symbol executed or adopted with present intention to adopt or accept a writing.[44] Lacrosse's letterhead is a symbol to adopt or accept the Credit Agreement. Lacrosse also assented to the Credit Agreement by accepting orders and delivering boots to Calcio in accordance with the Credit Agreement.

56.

Also, the Credit Agreement is a contract for the sale of goods, namely, boots. Under Oregon law, contracts for the sales of goods need only be signed by the party to be charged, in this case, Calcio. ORS 72.2010 states,

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by the authorized agent or broker of the party.

57.

In addition to mutual assent by the Parties, the mutual promises in the Credit Agreement constituted consideration for their promises. Therefore the Parties entered into a valid Credit Agreement.

58.

Calcio has argued that Section 55 of the Charter would invalidate the Credit Agreement because the Credit Agreement was not in French, and there was no express agreement that an English-only form was sufficient. As mentioned above in the Tribunal's discussion with respect to the arbitration agreement and the jurisdiction of the Tribunal, Section 55 requires predetermined contracts with printed standard clauses, i.e., adhesion contracts, to be in French. This was a pre-determined agreement with printed standard clauses. However, as mentioned above, Québec courts have held that preprinted forms in English are enforceable particularly where the adhering party did not ask for a form in French, was not disadvantaged by an English text, had sufficient knowledge of English, and conducted business in English. Calcio has not provided evidence that Calcio asked for a form in French, was disadvantaged by an English text, did not have sufficient knowledge of English, or did not conduct business in English. Calcio has failed to prove any harm resulting from the choice of language.

59.

Calcio has argued that the forum selection clause of the Credit Agreement was abusive. According to Article 1438 of the Civil Code of Québec[45], even if the forum selection clause is to be declared

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signed the Credit Agreement, and neither did Calcio in several submissions thereafter.

[44] 2020 ORS 71.2010(2)(kk).

[45] *La clause qui est nulle ne rend pas le contrat invalide quant au reste, à moins qu'il n'apparaisse que le contrat doive être considéré comme un tout indivisible. Il en est de même de la clause qui est sans effet ou réputée non écrite.* [A clause which is null does not render the contract invalid in other respects, unless it is apparent that the contract may be considered only as an indivisible whole. The same applies to

abusive, that could not constitute a basis to declare the nullity of the whole contract.

60. The applicable law with respect to validity of the Credit Agreement is Oregon law. The Credit Agreement is enforceable. Calcio has not asserted any legal or equitable grounds to find otherwise.

# H. Prayers for Relief

## 1. Lacrosse

61. Lacrosse requests the Tribunal to render an award (exact words of Lacrosse):

a. Declaring that Respondent breached its contractual obligations under Agreement;
b. Awarding damages to Claimant in the amount of US $126,345.45, plus late charges of 1.5% per month commencing 30 days from the date of each Invoice;
c. Awarding post-award interest to Claimant at a rate and in an amount to be decided and quantified by the Tribunal until the date of full and final payment;
d. Awarding Claimant its attorneys' fees and costs as authorized by the Credit Agreement;
e. Requiring the Respondent to bear all the costs of the arbitration as set out in Article 37 of the Rules; and
f. Granting such additional or other relief as may be just and proper under the law.[46]

## 2. Calcio

62. Calcio originally requested the Tribunal on July 15, 2019 to render an award for the following (exact words of Calcio):

1. A 10% discount will be deducted from the total amount of the purchases, which as of today amounts to a total of 395,512.76$, as an account of reference would be entitled to (39 551.28$);
2. The 5% commission that was paid to DANNER sale's representative (Mr. [Person 8]) will be deducted from the amount owed. Since, he was **as useful as a pair of tits on a bull** during this whole agreement, it is a non-sense that such commission should be allowed

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a clause that is without effect or that is deemed unwritten.]

[46] Lacrosse Request for Arbitration, March 8, 2019, p.3.

to him (19 775.64$);

3. An additional amount of 10 000$ will be deducted, in order to compensate with the dollar fluctuation. Since, everyone tried to pull his side of the blanket, without caring about the burden that such effect would cause to CALCIO I financial situation, it is a small price to pay for such lack of consideration.
4. Furthermore, DANNER will remit the sale's representative commission on all the residual sales generated from this legal tender, commencing on September 1st 2018 up to its termination. Such commissions to be sent every 30 days to CALCIO I. Also, a commission on all future sales generated by the Solicitor General of British-Columbia and DANNER will be remitted to CALCIO I.
5. Once all the amounts will be deducted and redeemed, the balance owed will be calculated at a rate of 1.**27 CAD** or less (as per the official rate established by the Bank of Canada).
6. It is in the interest of each party to settle this matter in the proper way. CALCIO I would like to remind to each one that Québec laws are governed by the Civil Code. Being a company based in Québec, CALCIO I will abide to the Québec laws.

**All amounts mentioned from points 1 to 6, are in US dollar FUNDS[47]

63. After the Terms of Reference were drawn up, Calcio later **amended** its request to the Tribunal on September 6, 2019, to render an award on the following (exact words of Calcio):

*1) Le Canadian Commercial Credit Application Agreement soit déclaré nul;*

*2) Qu'une somme de 19 775.64$ US (dix-neuf mille sept cent soixante-quinze dollars et soixante-quatre cents en devises américaines), représentant 5% (cinq pourcent) des commissions versées au représentant de Danner, soit remise au Défendeur (ce montant ne pouvant être révisé qu'à la hausse, lorsque le Demandeur aura fourni les preuves du versement des commissions pour la période concernée);*

*3) Qu'une somme de 49 551.28$ US (quarante-neuf mille cinq cent vingt et un dollars et vingt-huit cents en devises américaines) soit remise au Défendeur et qui se ventile de la façon suivante:*

> *(a) 39 551.28$ US (trente-neuf mille cinq cent vingt et un dollars et vingt-huit cents en devises américaines) représentant 10% (dix pourcent) des achats totaux effectués par le Demandeur, dans le cadre de l'appel d'offres précité;*
>
> *(b) 10 000.00$ US (dix mille dollars en devises américaines) représentant un montant forfaitaire, afin de compenser pour les fluctuations de la devise canadienne par rapport à celle américaine.*

*4) Qu'une somme de 25 000$ US (vingt-cinq mille dollars en devises américaines) soit versée à titre de dommages punitifs en guise de compensation pour la mauvaise foi et les torts commerciaux (pertes de revenus et de temps) ayant été causes par le Demandeur.*

[47] Calcio ICC Response, July 15, 2019, p. 4.

*5) Qu'un montant équivalent des commissions des ventes, versées à partir du mois d'août 2018 et jusqu'à la date du règlement du présent litige, soit remis au Défendeur. Ce montant sera déterminé à partir des relevés de vente que le Demandeur sera sommé de fournir. Ce montant est justifié encore une fois que l'adjudication de ce contrat n'est dû qu'au travail et au suivi assidus déployés par et uniquement par le Demandeur.*

*6) Que tout solde restant soit acquitté au cours n'excédant pas 1.27$CND ou moins, selon le taux établi par la Banque du Canada, au moment de l'accord;*

*LE TOUT SANS DÉPENS POUR LE DÉFENDEUR*[48]

**[1)** That the Canadian Commercial Credit Application Agreement be declared null and void;

2) That a sum of US$19,775.64 (nineteen thousand seven hundred and seventy-five dollars and sixty-four cents in U.S. dollars), representing 5% (five percent) of the commissions paid to Danner's representative, be remitted to Respondent (this amount may only be revised upwards upon proof provided by Claimant that commissions were paid for the relevant period);

3) That a sum of US$49,551.28 (forty-nine thousand five hundred and twenty-one dollars and twenty-eight cents in U.S. dollars) be remitted to Respondent, broken down in the following way:

(a) US$39,551.28 (thirty-nine thousand five hundred and twenty-one dollars and twenty-eight cents in U.S. currency) representing 10% (ten percent) of the total purchases made by Claimant, in the context of the aforementioned call for tenders;

(b) US$10,000.00 (ten thousand dollars in U.S. currency) representing a lump sum to compensate for the fluctuations of the Canadian dollars against the U.S. dollars.

4) That an amount of US$25,000.00 (twenty-five thousand dollars in U.S. currency) be paid as punitive damages to compensate for the bad faith and commercial harm (loss of income and time losses) caused by Claimant.

5) That an equivalent amount of sales commissions, paid from August 2018 through the date of settlement of this litigation, be remitted to Respondent. This amount will be based on the sales records that Claimant is required to provide. This amount is justified once again that the award of this contract is due solely to the diligent work and monitoring done solely by Claimant.

6) That any outstanding balance be paid at a rate not exceeding CND$1.27 or less, based on the exchange rate set by the Bank of Canada at the time of the agreement;

ALL WITHOUT COSTS TO RESPONDENT]

# I. Calcio's Right to Submit Counterclaims and Amended Counterclaims

[48] *Calcio's Réponse Du Défendeur - Requête De Production De Documents [Reply of the Defendant and Request for Production of Documents], September 6, 2019, p.8.*

64.

As stated above, Calcio submitted counterclaims and amended counterclaims.

65.

Lacrosse filed a motion on August 21, 2019, in which they requested that Calcio's pleadings be stricken. On October 1, 2019, Lacrosse objected to Calcio's counterclaims in Claimant's Reply.

66.

For the reasons stated below, the Tribunal allows Calcio's counterclaims but limits the scope of all counterclaims to that of Lacrosse's claim.

67.

At the organizational phone conference of June 18, 2019, Calcio was granted a right to submit a statement of defence. In the ensuing Procedural Order No. 1, the Tribunal provided a deadline of July 15, 2019, for a statement of defence including Counterclaim, in accordance with the Timetable in Appendix 1. Calcio did submit counterclaims by July 15, 2019.

68.

On September 6, 2019, Calcio submitted an amended version of its counterclaims, with its Réponse Du Défendeur - Requête De Production De Documents [Reply of the Defendant and Request for Production of Documents]. That version included two additional claims, one revised claim, and one abandoned one. The new ones are: "*1) Le Canadian Commercial Credit Application Agreement soit déclaré nul* [That the Canadian Commercial Credit Application Agreement be declared null and void]", and "4) *Qu'une somme de 25 000$ US (vingt-cinq mille dollars en devises américaines) soit versée à titre de dommages punitifs en guise de compensation pour la mauvaise foi et les torts commerciaux (pertes de revenus et de temps) ayant été causes par le Demandeur*. [4) That an amount of US$25,000.00 (twenty-five thousand dollars in U.S. currency) be paid as punitive damages to compensate for the bad faith and commercial harm (loss of income and time losses) caused by Claimant]." Instead of the previous 4) (in the basic counterclaim), Calcio revised this to: "5) *Qu'un montant équivalent des commissions des ventes, versées à partir du mois d'août 2018 et jusqu'à la date du règlement du présent litige, soit remis au Défendeur. Ce montant sera déterminé à partir des relevés de vente que le Demandeur sera sommé de fournir. Ce montant est justifié encore une fois que l'adjudication de ce contrat n'est dû qu'au travail et au suivi assidus déployés par et uniquement par le Demandeur.*[49] [5) That an equivalent amount of sales commissions, paid from August 2018 through the date of settlement of this litigation, be remitted to Respondent. This amount will be based on the sales records that Claimant is required to provide. This amount is justified once again that the award of this contract is due solely to the diligent work and monitoring done solely by Claimant.[50]]" And Calcio left out its prior position 6).

69.

Lacrosse filed a motion on August 21, 2019, in which they requested that Calcio's pleadings be stricken, but did not specifically mention the counterclaims, and objected later, in Claimant's Reply on October 1, 2019, to Calcio's counterclaims. In this latter submission, Lacrosse denied that Calcio is entitled to any relief sought. Moreover, Lacrosse listed eight affirmative defenses, none

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[49] *Recte: demandeur reconventionnel.*

[50] *Recte*: counter-claimant.

of which were sufficient to invalidate Calcio's submission of counterclaims.

70. According to Article 23(4) of the Rules, Calcio's amended counterclaim occurred after the approval of the Terms of Reference by the Court, and was untimely.

71. In the interest of due process and efficiency, the Tribunal in its discretion acquiesced to the admissibility of Calcio's counterclaims.[51] However, because Calcio's counterclaims were not filed in a timely fashion, the Tribunal may in its discretion limit Calcio's counterclaims to the scope of Lacrosse's claim. That means *inter alia* that the Tribunal will only consider a claim for a discount or commission on the unpaid orders that are the subject of Lacrosse's claim, i.e., the orders that amount to US $126,345.45. To maintain the scope of Calcio's counterclaims to include further dealings between Lacrosse and Calcio, i.e., $395,512.76, would necessitate providing Lacrosse an opportunity to also adequately respond in this regard, and would lead to additional arbitration costs.

72. Therefore, the Tribunal will only consider Calcio's request for a discount or commission with respect to the unpaid orders at stake in this arbitration, i.e., the orders that amount to US $126,345.45. This is because Calcio's counterclaims were not timely filed, and the Tribunal in its discretion may not only admit them, but limit their scope to that of Lacrosse's claim.

## J. Findings of Facts

73. 1) Claimant LaCrosse Footwear, Inc. ("Lacrosse") is incorporated in Wisconsin with its principal place of business in Portland, Oregon.[52] Lacrosse manufactures Danner boots and other footwear. The Respondent, 9055-3827 Québec Inc., dba Calcio ("Calcio"), was incorporated in Québec in 1994 and is engaged in the wholesale and retail sale of athletic, school, and workwear uniforms and shoes.[53]

FACTS UNCONTESTED.

2) On or about February 21, 2014, the Parties entered into a Canadian Commercial Credit Application and Agreement dated February 21, 2014 (the "Credit Agreement") issued by Lacrosse and signed by Calcio.[54] [Person 7] signed on behalf of Calcio as [legal representative].[55]

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[51] Article 5 and Article 42 of the Rules, and applying also the principle of procedural economy.

[52] Lacrosse Request for Arbitration, March 8, 2019, p.1.

[53] Calcio Response, July 15, 2019, p.1. Calcio *Déclaration Liminaire, Nov. 2, 2019, p. 1.*

[54] Lacrosse Request for Arbitration, March 8, 2019, Exhibit 1.

[55] Lacrosse Request for Arbitration, March 8, 2019, Exhibit 1, p. 6.

FACTS UNCONTESTED.

3) The Credit Agreement contained the following arbitration clause:

***18.10 Arbitration**. All disputes, differences or questions arising out of or relating to this Agreement, or the validity, interpretation, breach or termination thereof, shall be resolved by binding arbitration in accordance with the following provisions: (a) the arbitration shall be administered by, and conducted in accordance with, the Rules of Conciliation and Arbitration of the International Chamber of Commerce; (b) judgement on the award rendered by the arbitrator may be entered in any court having jurisdiction over the subject matter of the controversy, and the resolution of the disputed matter as determined by the arbitrator shall be final and binding on the parties; (c) any arbitration shall be instituted and conducted in Portland, Oregon, U.S.A. and Customer irrevocably waives any objection to the laying of venue of the arbitration in Portland, Oregon, or any claim that such arbitration has been brought in an inconvenient forum; (d) a party may, without inconsistency with this Agreement, seek from a court any interim or provisional relief that may be necessary to protect the rights or property of that party pending the establishment of the arbitration (or pending the arbitrator's determination of the merits of the dispute, controversy, or claim); (e) the arbitrator shall have authority to issue preliminary and other equitable relief; and (f) the prevailing party shall be entitled to recover reasonable costs and attorney fees as fixed by the arbitrator.*

Text: FACTS UNCONTESTED.

4) Article 18.9 of the Credit Agreement stated the governing law to be Oregon law.

***18.9 Governing Law**. This Agreement shall be deemed to have been executed and entered into Portland, Oregon, U.S.A., and shall be governed, construed, performed and enforced in accordance with the laws of the State of Oregon, U.S.A., without regard to its conflict of law, principles and such laws shall be applied and controlling in any arbitration conducted pursuant to Section 18.10 below. The Parties agree to exclude in its entirety, the application of the United Nations Convention on Contract for the International Sale of Goods.*

Text: FACTS UNCONTESTED.

5) Section 3 of the Credit Agreement stated that Lacrosse could change its prices at any time, and that purchase prices were "...payable in United States dollars and without deduction for any exchange or conversion". The Credit Agreement also stated in Section 7 that Lacrosse could "...at any time or from time to time change the terms of payment...".

FACTS UNCONTESTED.

6) Lacrosse does not have an internal sales agent in Canada but contracts with Eastern Outdoor Sales, Inc. ("EOSI") to accept orders from buyers.[56] Lacrosse provided discounts to certain buyers, called Dealers of Record, for new sales territories and other new business.[57]

FACTS UNCONTESTED.

[56] Declaration of [Person 9], Para. 4, Oct. 1, 2019.
[57] Declaration of [Person 9], Para. 7, Oct. 1, 2019.

7) Calcio started submitting purchase orders on March 24, 2014.[58] Calcio received an initial discount of 5%[59].

FACTS UNCONTESTED.

8) Calcio directed the boots to be shipped to specific addresses for its customers. For each order, Lacrosse issued an invoice, which contains the order date, shipment date and due date for the balance due under each invoice as well as the shipping address and recipient. Pursuant to Section 7 of the Credit Agreement, Calcio was liable for a late charge equal to 1.5% per month of the amount of invoice if the amounts set forth in the invoice are not paid in full within 30 days.

FACTS UNCONTESTED.

Lacrosse's invoices to Calcio typically had 60 day payment terms.[60]

TRIBUNAL'S FACTUAL FINDINGS.

9) In May 2016, a legal tender (ITQ 004837-2) for Danner boots was published by the Procurement Services of British Columbia, for the [Redacted] Correctional Centre.[61] Calcio contacted Mr. [Person 8], agent for Lacrosse, and was given a 7% discount on the regular wholesale price.[62] But, during that same phone conversation, Mr. [Person 8] mentioned that this legal tender was meant to be awarded to another company located in British Columbia who would be awarded a 10% discount.[63]

TRIBUNAL'S FACTUAL FINDINGS.

10) On June 3, 2016, Calcio was awarded the contract with the Procurement Services of British Columbia for CAD 112,100.[64]

FACTS UNCONTESTED.

11) Contrary to Ms. [Person 9]'s Declaration of Oct. 1, 2019, paragraph 7, that Lacrosse only granted Calcio a discount in 2014, in summer 2016 Lacrosse granted a 7% discount to Calcio on Danner boots for an order of 340 pairs for Mrs. [Person 10], Director of the [Redacted] Correctional Center.[65] This order was worth around USD 80,000.[66] [67]

TRIBUNAL'S FACTUAL FINDINGS.

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[58] Declaration of [Person 9], Para. 7, Oct. 1, 2019.
[59] Spreadsheet listing sale history with Calcio, [Person 9] Declaration, Exhibit 2, Oct. 1, 2019.
[60] Declaration of [Person 9], Para. 6, Oct. 1, 2019.
[61] Calcio ICC Response, July 15, 2019, p.1.
[62] Calcio ICC Response, July 15, 2019, p.1.
[63] Calcio ICC Response, July 15, 2019, p.1.
[64] Calcio ICC Response, July 15, 2019, p.1.
[65] Spreadsheet listing sale history with Calcio, [Person 9] Declaration, Exhibit 2, Oct. 1, 2019. Calcio, *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 3
[66] Spreadsheet listing sale history with Calcio, [Person 9] Declaration, Exhibit 2, Oct. 1, 2019.
[67] Calcio, *Réponse Du Défendeur - Requête De Production De Documents*, submitted Sept. 6, 2019.

12) In January 2017, upon Mrs. [Person 10]'s recommendation, Mr. [Person 11], purchasing agent for one of British Columbia's correctional centers, contacted Calcio about supplying boots for their correctional officers.[68] Calcio recommended the Danner boots.[69]

TRIBUNAL'S FACTUAL FINDINGS.

13) In Spring 2017 Calcio requested a 7% discount on the Danner boots. On March 3, 2017, Ms. [Person 12], then Canadian accounts coordinator for Lacrosse, informed Calcio by email, that Calcio could have a 4% discount for twelve (12) pairs of boots or a 10% discount for forty-eight (48) pairs.

FACTS UNCONTESTED.

14) On July 20, 2017 a legal tender (ITQ-005233) of a maximum value of CAD 600,000 was issued by the British Columbia Ministry of Public Safety calling for bids for Danner boots.[70] Although it was initially awarded to a company called Work Authority, Calcio contacted the head purchaser and was awarded the contract.[71]

FACTS UNCONTESTED.

15) On July 25, 2017, in an email exchange between Calcio and [Person 8] about the July 20, 2017 legal tender, and Calcio's request for a discount, [Person 8] stated that "*Ce programme est fait en fonction d'avantager les marchands Danner locaux* [This program was designed to benefit local Danner merchants]". [Person 13], on behalf of Calcio, then asked, "*Donc, est-ce que les détaillants locaux ont les mêmes prix que moi ou bénéficent ils d'un escompte?* [So, are local retailers offered the same prices as I or do they get a discount?]" to which [Person 8] replied, "*Seulement que un peut beneficier d'un tariff reduit entre 5 et 10%* [Only that you can benefit from a reduced rate, between 5% and 10%]".

FACTS UNCONTESTED.

16) On August 28, 2017 Lacrosse gave a greater than 3% discount to Calcio for purchase order 9893 for the correctional center Surrey Pretrial Services Center (one of the correctional centers of the July 20, 2017 bid).[72]

TRIBUNAL'S FACTUAL FINDINGS.

17) From August 31, 2017 through August 3, 2018, Calcio submitted purchase orders to Lacrosse through EOSI for approximately USD 170,000, including for 545 pairs of boots.[73] Lacrosse processed and delivered the products as requested by Calcio and issued invoices for the boots ordered pursuant to the Purchase Orders.[74] The invoices stated 60 days payment terms.[75]

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[68] Calcio, *Réponse Du Défendeur - Requête De Production De Documents*, submitted Sept. 6, 2019, p. 3.

[69] Calcio, *Réponse Du Défendeur - Requête De Production De Documents*, submitted Sept. 6, 2019.

[70] Calcio ICC Response, July 15, 2019, p.1.

[71] Email correspondence dated August 28, 2018 between [Person 8] and [Person 13]. Calcio ICC Response, July 15, 2019, p. 2.

[72] A 3.07% discount was calculated based on invoices submitted by Calcio on Oct. 23, 2019. See Procedural History above, item 29.

[73] Lacrosse Request for Arbitration, March 8, 2019, Exhibit 2, Purchase Orders.

[74] Lacrosse Request for Arbitration, March 8, 2019, Exhibit 3, Unpaid Invoices.

[75] Lacrosse Request for Arbitration, March 8, 2019, Exhibit 3, Unpaid Invoices.

TRIBUNAL'S FACTUAL FINDINGS.

18) In Fall 2017, Lacrosse raised Calcio's line of credit from USD 8,500 to USD 175,000.[76]

FACTS UNCONTESTED.

19) Calcio subsequently failed to pay for the 545 pairs of boots from Lacrosse subject to a credit issued for the return of 14 pairs of boots.[77] The outstanding balance is $126,345.45 plus interest due on each invoice from the due date of the invoice at the rate of 1.5% per month plus attorneys' fees and collection costs.[78]

FACTS UNCONTESTED.

20) In December 2017 the US Canadian exchange rate plummeted and Calcio suffered losses on its boot orders.[79] On March 15, 2018 Calcio contacted Lacrosse for an accommodation but was denied one.[80] In that email [Person 13] wrote, "Rest assure[d] that I will respect my obligations regardless of the currency fluctuation."

FACTS UNCONTESTED.

21) On November 26, 2018, [Person 13] wrote to [Person 9] an email that acknowledged that the amount of $126,000 was outstanding. He stated, "...my sole goal is to bring this account to zero in a reasonable time span. I would ask you to be [sic] believe me when I do say that all amounts due will be settled. I do understand that you might fear this account to be in jeopardy but, rest assure[d] that I will honour my obligations."

FACTS UNCONTESTED.

# K. Proceedings on the Merits

## 1. Basic Claim - Breach of Contract

### a. Calcio's Argument that Contract was Void

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[76] Calcio, *Réplique Du Défendeur,* Oct. 22, 2019.

[77] Declaration of [Person 9], Para. 10, Oct. 1, 2019. Credit Memo SC-00178045 dated October 17, 2018; Lacrosse Request for Arbitration, March 8, 2019, Exhibit 4.

[78] Declaration of [Person 9], Para. 10, Oct. 1, 2019.

[79] Calcio ICC Response, July 15, 2019, p.2.

[80] Calcio ICC Response, July 15, 2019, p.2.

74.

As stated above, Calcio argued that the contract was void because it violated the Charter. Calcio asserts that its claim is timely because the Oregon statute of limitations for contractual actions is six years.[81]

## b. Lacrosse's Argument that the Contract was Breached

75.

As stated above, Lacrosse argued that the Credit Agreement was valid. Lacrosse argued that the Credit Agreement was breached because Calcio did not pay for ordered boots. Lacrosse also argued that Calcio acknowledged that Calcio owed Lacrosse $126,345.45 in November 2018 communications.[82] Under Oregon law, an agreement may also be inferred from a failure by a debtor to deny an account stated.[83]

76.

With regard to any counterclaim, Lacrosse also argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract, misrepresentation, and laches.[84]

## c. Tribunal's Decision that Contract was Breached

77.

As stated above, the Tribunal has decided that the Credit Agreement is valid. The Credit Agreement was breached by Calcio because Calcio failed to pay for boots that Calcio ordered and Lacrosse delivered to Calcio's customers.[85] According to Section 7 of the Credit Agreement, payment was required within the terms of Lacrosse's invoices.

78.

Calcio's customers received 545 pairs of Danner boots from Lacrosse that Calcio has not made full payment for.[86] Calcio has admitted this nonpayment.[87]

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[81] Calcio *Réplique du défendeur,* Oct. 22, 2019, p. 6.

[82] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11.

[83] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11.

[84] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

[85] Declaration of [Person 9], Para. 10, Oct. 1, 2019.

[86] Declaration of [Person 9], Para. 10, Oct. 1, 2019.

[87] On November 26, 2018, [Person 13] wrote to [Person 9] an email that acknowledged that the amount of $126,000 was outstanding. He stated, "...my sole goal is to bring this account to zero in a reasonable time span. I would ask you to be [sic] believe me when I do say that all amounts due will be settled. I do understand that you might fear this account to be in jeopardy but, rest assure[d] that I will honour my obligations."

## 2. Commission

### a. Calcio's Assertion that Calcio is Entitled to a Commission

79.

Calcio asserts that it is entitled to a commission of $19,775.54 for orders that Lacrosse received as a result of the July 20, 2017 legal tender (ITQ-005233). This legal tender was issued by the British Columbia Ministry of Public Safety calling for bids for Danner boots.[88] The legal tender was worth CAN 600,000.[89] Calcio argues that but for its efforts, Lacrosse would never have received these orders because Calcio first recommended the Danner boots, and then intervened when Lacrosse's competitor, Work Authority, was wrongly awarded the public contract.[90] "*Le Défendeur réitère de nouveau qu'aucuns représentants du Demandeur n'ont apportés aucune aide, ni support durant cette période. Qui plus est, aucune intervention n'a été faite par eux, lorsque le Défendeur leur a fait part que le contrat avait été adjugé par erreur à l'un de leur compétiteur, en l'occurrence le groupe WORK AUTHORITY (propriété du groupe DICKIES) et qui aurait soumissionné des produits autres que ceux de DANNER, alors que l'appel d'offres stipulait clairement que seules les bottes DANNER étaient acceptées dans le* cadre de cet appel d'offres. [The Respondent reiterates again that no representatives of the Claimant have made any help or support during this time. What's more, no intervention was made by them, when the Respondent informed them that the contract had been erroneously awarded to one of their competitors, in this case the WORK AUTHORITY group (owned by the DICKIES group) and who would have submitted product offers other than those of DANNER, while the call for tenders clearly stated that only DANNER boots were accepted for this call for tenders.][91]

### b. Lacrosse's Argument that Calcio is Not Entitled to a Commission

80.

Lacrosse argues that Calcio is not entitled to any commission because Calcio was not Lacrosse's agent: Lacrosse never consented to an agency relationship, nor had the power to control Calcio.[92] Also, there was no express or implied agreement to pay Calcio a commission.[93] According to Lacrosse, in order to find an implied-in-fact agreement (quasi-contract) in Oregon, one must find that (1) a benefit has been conferred; (2) the recipient is aware that a benefit has been conferred; and (3) it would be unjust for the recipient to retain the benefit.[94] Lacrosse argues that Calcio

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[88] Calcio's *Réponse Du Défendeur - Requête De Production De Documents*, submitted Sept. 6, 2019, p. 3.
[89] Calcio's *Réponse Du Défendeur - Requête De Production De Documents*, submitted Sept. 6, 2019, p. 3.
[90] Calcio's *Réponse Du Défendeur - Requête De Production De Documents*, submitted Sept. 6, 2019, p. 3.
[91] Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 3-4.

[92] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.
[93] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.
[94] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.

provided no benefit to Lacrosse.[95]

81.

As stated above, with regard to any counterclaim, Lacrosse also argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract, misrepresentation, and laches.[96]

## c. Tribunal's Decision that Calcio is Not Entitled to a Commission

82.

Although Calcio has asserted that it is entitled to a commission on orders that it facilitated with the British Columbia correctional facilities, Lacrosse never agreed to pay Calcio a commission for such orders. Also, Lacrosse was not unjustly enriched by such orders as Calcio was aware that Lacrosse had not agreed to pay Calcio a commission for soliciting orders.

83.

The Credit Agreement did not allow for commissions to be paid to Calcio. In fact, Section 12 stated that Calcio's sales of Danner boots were solely for Calcio's account and that Calcio was free to determine its own prices. Section 13 of the Credit Agreement stated that "...[Calcio] shall have no authority to represent Seller as agent..., or...to allow [Calcio] to create or assume any obligation on behalf of [Lacrosse] for any purpose whatsoever." So Lacrosse had no contractual obligation to pay a commission to Calcio.

84.

Lacrosse also does not owe a commission to Calcio as restitution for unjust enrichment, which is an implied-in-law contract.

85.

The Restatement (3rd) Restitution and Unjust Enrichment states that "A person who is unjustly enriched at the expense of another is subject to liability in restitution".

86.

The established test in Oregon for unjust enrichment is (1) a benefit conferred on the defendant by the plaintiff; (2) the defendant's awareness of the benefit; and (3) under the circumstances, it would be unjust for the defendant to retain the benefit without compensating the plaintiff.[97] There are three subelements for determining if the defendant's enrichment would be unjust: (1) the plaintiff had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; and or (3) society's reasonable expectations of security of person and property would be defeated by non-payment.[98]

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[95] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.

[96] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

[97] *Grimstad v. Knudsen*, 282 Ore. App. 28 (2016) at 41-42.

87.

In 2017, Calcio urged the British Columbia Ministry of Public Safety to solicit bids for Danner boots. The Ministry did solicit bids for Danner boots, Calcio received the bid, and Calcio did order Danner boots. So Lacrosse has received a benefit from Calcio's urging the Ministry, and Calcio's subsequently ordering the Danner boots. Lacrosse was aware of this benefit.

88.

However, Lacrosse has not been unjustly enriched by this benefit. As mentioned above, the Credit Agreement stated in Section 12 that Calcio's sales of Danner boots were solely for Calcio's account and that Calcio was free to determine its own prices. Section 13 states that Calcio is not Lacrosse's agent. Therefore, Calcio had no reasonable expectation of payment; Lacrosse should not have reasonably expected to pay a commission; and society's reasonable expectations of security of person and payment would not be defeated by Lacrosse's nonpayment.

89.

Therefore, Calcio is not owed a commission under contract law, nor as a matter of restitution.

## 3. Currency Fluctuation

## a. Calcio's Argument for Currency Fluctuation Payment

90.

Calcio argues that beginning March 2018, on multiple occasions it asked for relief from Lacrosse from the US Canadian currency fluctuation but was denied such relief.[99] Calcio claims it was in financial distress.[100] "*Enfin, la défenderesse tient à rappeler, que depuis le mois de mars 2018, à maintes reprises a fait part de ses appréhensions par rapport aux fluctuations galopantes de la devise canadienne par rapport à celle américaine et que de telles fluctuations lui causaient un stress financier, qui devenait de plus en plus difficile à supporter. Les nombreux courriels soumis en témoignent. Ce qui est sidérant c'est qu'aucun représentant, employé et cadre à l'emploi du défendeur ont cru opportun d'intervenir et/ou apporter une solution quelconque".* [Finally, the Respondent wishes to remind that since March 2018, he has repeatedly expressed its apprehensions regarding the considerable fluctuations of the Canadian currency vis-a-vis the United States' and that such fluctuations caused it financial stress, which was becoming ever more difficult to bear. The numerous emails submitted prove it. What is astonishing is that no representative, employee and manager of the Respondent deemed it appropriate to intervene and / or provide any solution.] [101]

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[98] *Grimstad v. Knudsen*, 282 Ore. App. 28 (2016) at 41-42.

[99] Calcio *Déclaration Liminaire,* November 2, 2019, p.5.

[100] Calcio *Déclaration Liminaire,* November 2, 2019, p.5.

[101] Calcio *Déclaration Liminaire,* November 2, 2019, p.5.

## b. Lacrosse's Argument against Currency Fluctuation Payment

91. As stated above, with regard to any counterclaim, Lacrosse argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract, misrepresentation, and laches.[102]

## c. Tribunal's Decision regarding Currency Fluctuation

92. Although Calcio requested an accommodation from Lacrosse for fluctuation in the US Canadian exchange rate, the language and circumstances of the Credit Agreement allocates this risk of fluctuation to Calcio in Section 3. Lacrosse is not obligated to give Calcio an accommodation for currency fluctuation.

93. Section 3 states that Lacrosse could change its prices at any time, and that purchase prices were "...payable in United States dollars and without deduction for any exchange or conversion".

94. In discussing when contract performance may be excused by impracticability, the Restatement (2d) Contracts § 261 states,

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

95. The change in the US Canadian exchange rate has created losses for Calcio on Danner boots Calcio has ordered from Lacrosse. Calcio has stated that it is impossible to make a profit on the Danner boots. Even if no currency fluctuation was a basic assumption of the Credit Agreement, however, the language and circumstances of the Credit Agreement does not discharge Calcio's obligation to pay for the Danner boots. Section 3 states that Lacrosse could change its prices at any time, and that purchase prices were "...payable in United States dollars and without deduction for any exchange or conversion". In other words, any financial hardship created by fluctuation does not discharge Calcio's duty of payment.

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[102] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

96.

Calcio confirmed this assumption of the risk of currency fluctuation when it asked for an accommodation in March 2018 and wrote, "Rest assure[d] that I will respect my obligations regardless of the currency fluctuation." Thus, Calcio is not due an accommodation for the currency fluctuation. The language and circumstances of the Credit Agreement do not discharge Calcio from payment because of the currency fluctuation.

## 4. Discount Pricing, Price Discrimination, Bid Rigging, and Anti-Competition Practices

## a. Discount Pricing

## i. Calcio's Assertion of Wrongful Discount Pricing, Bid Rigging, and AntiCompetition Practices

97.

Calcio asserts that Lacrosse discriminated against Calcio by awarding discounts to only one retailer in British Columbia, the dealer of record.[103] Calcio asserts that if only the dealer of record would receive a 10% discount, or a savings of $16 per pair of boots, this would have a detrimental effect on other bidders, thus violating not only Section 45.1 of Canada's anticompetition law, but also the Agreement on Free Trade in Canada (ALEC), the Constitutional Law of Canada of 1867, the Sherman Antitrust Act, the Clayton Antitrust Act, the Robinson-Patman Act[104] and Section 646.040 of Oregon's Antitrust Act.[105]

98.

Calcio argues that since the call for bids is for a two-year term, the bidder must maintain prices of $298 to $302 per pair of boots; with the Canadian exchange rate plunge, it is impossible to make any profit.[106] Calcio stated that for February and March 2019, Calcio lost $7 per pair of boots.[107] Calcio argued that this resulted in price discrimination between different purchasers, a monopoly, exclusive dealing agreements, tying arrangements, and mergers and acquisitions that substantially reduce market competition.[108] *Ce faisant, cet "account of reference" a pu bénéficier*

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[103] Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 5.
[104] Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 5.
[105] Calcio *Réplique du Défendeur* [Respondent's Reply] Oct. 22, 2019, p. 7.
Calcio's *Déclaration Liminaire,* November 2, p. 2.
[106] Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 5.
[107] Calcio *Réplique du Défendeur* [Respondent's Reply] Oct. 22, 2019, p. 7.
[108] Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 5.

*d'une réduction, moyenne, d'environ 16$ (seize dollars) du prix de vente par paire de bottes, par rapport à tous les autres soumissionnaires établis au Canada. Cette façon de faire a un effet préjudiciable à l'endroit de tous les autres soumissionnaires et contrevient, non seulement à la Loi sur la concurrence mais aussi à l'Accord sur le libre-échange canadien (ALEC), ainsi qu'à la Loi Constitutionnelle du Canada de 1867.* [In doing so, the "account of reference" benefited from an average discount of approximately $ 16 (sixteen dollars) of the selling price per pair of boots, compared to all other bidders located in Canada. This had a detrimental effect on all other bidders and violates not only Competition Law but also the Canadian Free Trade Agreement.][109]

99. As a result, Calcio suffered financial losses on its sales to correctional facilities in British Columbia because Calcio did not have a discount. Calcio claims that this was bid rigging, and therefore violative of anticompetition laws.

## ii. Lacrosse's Assertion that Calcio was not Entitled to a Discount and that Lacrosse did not Conspire with other Parties to Negatively Impact Calcio's Business

100. Lacrosse argues that Calcio did not engage in collusive practices because the Credit Agreement did not entitle Calcio to any discount.[110] Lacrosse argues that no Canadian law cited by Calcio applies to their case.[111] Lacrosse denied any allegations of, and stated that Calcio did not provide any evidence of, Lacrosse conspiring with other parties to negatively impact Calcio's business.[112]

101. Lacrosse argued that although Calcio alleged that Lacrosse violated ORS Chapter 646 on Trade Practices and Antitrust Regulation, "...there were no admissible facts in support of such a claim and Calcio failed to timely raise this claim."[113]

102. Lacrosse also argued that Calcio did not submit any admissible evidence.[114]

103. As stated above, with regard to any counterclaim, Lacrosse also argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract,

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[109] Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 5.

[110] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

[111] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

[112] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

[113] Lacrosse Opening for Document Hearing, Nov. 1, 2019, p.5.

[114] Lacrosse Opening for Document Hearing, Nov. 1, 2019, p.3.

misrepresentation, and laches.[115]

## iii. Tribunal's Decision that Calcio was Entitled to a Price Discount

104. Despite Calcio's allegations, there is no evidence that bid rigging occurred or that anticompetition laws were otherwise violated. Calcio has not shown it has suffered actual antitrust injury.

105. Nonetheless, Calcio is entitled to a price discount because of the course of performance of the contract[116]; and in light of the reduced competition for public bids caused by Lacrosse's "price discrimination," even if this did not rise to the level of an actionable anticompetitive practice.

106. There is no express provision in the Credit Agreement about discount pricing. However, Section 3 of the Credit Agreement states that Lacrosse's "...prices vary depending on the type, style, and quantity of products offered." Section 3 also states that Lacrosse "...reserves the right to change its prices, and any price quotation to Customer, at any time without notice, provided, however, such price change shall apply only to orders submitted by Customer after receipt of notice of such change." Lacrosse stated that in its discretion it provided price discounts to "...certain buyers...for new business on specific sales to buyers. If a discount is provided, the buyer or dealer is referred to as a Dealer of Record for that particular discount. The Dealer of Record is sometimes used if Lacrosse products are introduced into a new sales territory...".[117]

107. Under Oregon law, an adjudicator may construe a contractual term that is ambiguous, e.g., when a term can have more than one meaning.[118] In Section 3 of the Credit Agreement, the meaning of the terms "prices"; "type, style, and quantity"; and "change its prices" are ambiguous about whether Lacrosse can use price discounts for any reason, including for Dealers of Record. Therefore, the Tribunal turns to the Parties' course of performance to interpret Section 3 with respect to price discounts.

108. Under UCC Section 1-303(d),[119] course of performance of a contract may be used to interpret the meaning of the contract. This includes the meaning of Section 3 of the Credit Agreement. UCC Section 1-303(d) states,

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[115] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

[116] Calcio Response, July 15, 2019, p.3, states "...CALCIO I did find incomprehensible the fact of being denied any discount based on the volume of this legal tender. Especially, that on one of the first orders to be shipped to one of the correctional center, a 7% discount was applied to the invoice. Why allow a discount once and not apply it on all the other following invoices?"

[117] Declaration of [Person 9], Para. 7, Oct. 1, 2019.

[118] *Yogman v. Parrott,* 325 Or. 358, 937 P 2d 1019 (1997). Cited in *Johnson v. JG. Wentworth Originations, LLC,* 284 Or App 47, 52, 391 P3d 865, 867 (2017), in Claimant's Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 5.

[119] ORS 71.3030(4) (2017).

109.

A course of performance...is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.

110.

Further, Section 1-303(c)[120] states that course of performance should be construed whenever reasonable as consistent with the express terms of the contract.

111.

Section 18.1 of the Credit Agreement expressly states that trade usage and prior course of dealing may not be used to interpret the contract; it does not state that course of performance may not. Therefore, course of performance may be used to interpret Section 3 of the Credit Agreement.

112.

The course of performance of the Credit Agreement was to give Calcio discounts. Calcio received an initial discount of 5%, then a discount of 7% on its 2016 public bid order worth around USD 80,000. Calcio was also offered a 4% and 10% discount in Spring 2017 for 12 and 48 pairs of boots respectively.

113.

Calculation of the Prices

Lacrosse's prices varied according to the different styles of the boots, namely:

a. #25200 - $223.00
b. #21210 - $228.00
c. #22500 - $234.00

114.

The discounts of 7%, 5% or 3% were applied depending on the previous practice of the Parties, based on the model and quantity of the ordered goods. Lacrosse's Dealers of Record were given a 5-10% discount on prices. Therefore, because of the Credit Agreement's course of performance, in which Lacrosse changed its prices several times, Calcio is owed a discount of 5% on its 2017-2018 orders with the British Columbia correctional facilities.[121] This discount is not applied for the US$ 395,512.76 requested by Calcio, for the reasons stated above in evaluating Calcio's counterclaims.

115.

Since the express terms of the Credit Agreement, namely Paragraph 3, state that Lacrosse may change its prices at any time, a course of performance granting discounts is consistent with the express terms of the Credit Agreement. In fact, because of the ambiguity in Section 3 of the Credit Agreement with respect to price discounts, Section 3 must be interpreted in light of the Credit Agreement's course of performance.

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[120] ORS 71.3030(5) (2017).

[121] Lacrosse's claim for $126,345.45 relates solely to the 2017-2018 orders on which the 5% discount is being applied. Declaration of [Person 9], Para. 11, Ex. 2,3,4, Oct. 1, 2019.

116.

The course of performance also dovetails with the duty of good faith and reasonable commercial standards for fair dealing implied in every contract[122], including Section 3. The definition of good faith is "...honesty in fact and the observance of reasonable commercial standards of fair dealing."[123] Lacrosse's practice of only giving a price discount to a Dealer of Record in a particular region raises questions of good faith and the observance of reasonable commercial standards of fair dealing, especially where public bids are involved. This is even more the case when a buyer loses money on a public bid when a discount is reserved for only one dealer of record.

## b. Bid Rigging

## i. Calcio's Argument that Lacrosse Engaged in Bid Rigging

117.

Calcio has alleged that Lacrosse engaged in bid rigging in violation of the Canadian Competition Act of 1985 under Sections 45(1), and 47(1) which state:[124]

> [45] (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.
>
> [47] (1) In this section, bid-rigging means
>
> (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or
>
> (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
>
> where the agreement or arrangement is not made known to the person calling for or

[122] ORS 71. 3040 (2017).

[123] ORS 71.2010 (2)(t)(2017).

[124] Calcio ICC Response, July 15, 2019, p. 2.

> requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

Calcio alleges this happened when Lacrosse decided to only give a discount to its dealer of record even when public bids were involved.[125]

## ii. Lacrosse's Denial of Bid Rigging

118.

As stated above, Lacrosse argues that Calcio did not engage in collusive practices because the Credit Agreement did not entitle Calcio to any discount.[126] Lacrosse denied any allegations of, and stated that Calcio did not provide any evidence of, Lacrosse conspiring with other parties to negatively impact Calcio's business.[127]

As stated above, with regard to any counterclaim, Lacrosse also argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract, misrepresentation, and laches.[128]

## iii. Tribunal's Decision Regarding Bid Rigging

119.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the US Supreme Court held that claims arising under the Sherman Act and encompassed in a valid arbitration clause in an international commercial transaction are arbitrable under the Federal Arbitration Act.[129] The law on arbitrability of antitrust claims has since developed and solidified; history has proven the Mitsubishi majority correct and the dissent Incorrect.[130] Concerning the law of arbitrability of antitrust claims and the law of antitrust claims, the applicability is the same *in casu*.[131] Therefore, *in favorem arbitrii,* the Tribunal considers this claim and other antitrust

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[125] Calcio ICC Response, July 15, 2019, p. 2.

[126] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

[127] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

[128] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

[129] Interestingly, in 2019 the US Department of Justice and merging parties agreed to use arbitration to decide certain antitrust matters. This involves Novelis Inc.'s proposed $2.6 billion acquisition of Alris Corporation. This is pursuant to the Administrative Dispute Resolution Act of 1996 (5 U.S.C. § 571 et seq.) and the Antitrust Division's implementing regulations (61 Fed. Reg. 36,896 (July 15, 1996)).

[130] Richard C. Levin, On Arbitration of Competition/Antitrust Disputes: A Tribute to *Mitsubishi,* Dispute Resolution Journal (DRJ), Vol: 73, No: 4, p. 3, JurisNet, LLC, 2018.

[131] Alexis Mourre points out that under the law applicable to arbitrability of antitrust claims that the effects doctrine should be considered,

claims.

120. Bid rigging is a civil wrong in the U.S. where the coordination among bidders undermines the bidding process. Bid rigging is a type of anticompetitive practice. Anticompetitive behavior typically manipulates prices, artificially and secretly. This harms a free market, and ultimately consumers. Under Section 1 of the Sherman Act, bid rigging is also a federal felony, however, criminal law is outside the purview of a commercial arbitration tribunal. Calcio's claim is for civil damages. Under the applicable standard set out in *Twombly*[132] a claimant or counter-claimant is required to plead sufficient facts to state a plausible claim for relief, i.e., the plausibility of an antitrust violation.

121. In addition to US and Oregon antitrust law, Lacrosse must comply with Canadian antitrust law as well. This is because of territoriality principles of antitrust law, the effects doctrine,[133] and specifically under Oregon law, as mentioned above, the choice of Oregon law is subject to mandatory relevant public law:

> **OR 15.355 Limitations on choice of law by parties.** (1) The law chosen by the parties pursuant to ORS 15.350 does not apply to the extent that its application would:
>
> (a) Require a party to perform an act prohibited by the law of the state where the act is to be performed under the contract;
>
> (b) Prohibit a party from performing an act required by the law of the state where it is to be performed under the contract; or
>
> (c) Contravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute under ORS 15.360.
>
> (2) For purposes of subsection (1)(c) of this section, an established policy is fundamental only if the policy reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue. [Formerly 81.125]

122. Canadian antitrust law is mandatory public law. Antitrust claims are arbitrable in Canada.[134] The

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in addition to (1) tribunal versus court criteria and differing national legislation; (2) international conventions; (3) the transnational concept of arbitrability; and (4) the choice of law in arbitration proceedings. Alexis Mourre, Chapter 1: Arbitrability of Antitrust Law from the European and US Perspectives, Gordon Blanke and Phillip Landolt, Eds., EU and US Antitrust Arbitration, A Handbook for Practitioners, Vol. 1, p. 19-23, Wolters Kluwer, 2011. The effects doctrine looks at the actual or potential effect of restricting competition on the market of a given country. *Id.*, p. 23. While points (1) through (4) point toward the application of U.S. law to determine arbitrability, the effects doctrine points toward the application of Canadian law to determine arbitrability; in any case, both Canada and the US view antitrust claims as arbitrable. See FN 134 below.
Mourre also reminds us that the standard for the application of antitrust law should not be too tedious as the efficacy of the arbitral process requires that substantive review should be minimal. *Id.,* p. 28-29.

[132] *Bell Atlantic Corp. vs. Twombly*, 550 U.S. 544 (2007).

[133] See Mourre, FN 131.

[134] In *Murphy vs. Amway Canada Corporation*, [2014] 3 F.C.R. 478, a Federal Court of Appeal decision in Canada, the Court stated that without express legislative language to the contrary, courts must give effect to the parties' agreement to arbitrate. The Judge disagreed with

burden of proof is the civil burden, which requires that the claimant or counterclaimant prove the claims on a balance of probabilities.[135]

123.

The Canadian Competition Act applies when there is an effect on Canadian commerce and the market affected by the anticompetitive practices is situated in Canada or outside Canada's borders, and at least one of the parties is a Canadian company.

124.

Here, both conditions are satisfied as the public contract for boots supply was awarded by the British Columbia Ministry of Public Safety, a Canadian public authority, and the items were designated for the Canadian market exclusively. Therefore the Tribunal must also apply the Canadian Competition Act.

125.

Under section 47 of the Canadian Competition Act, four elements must be met for a finding of bid rigging: (1) there was a call for tenders; (2) there was an agreement between two or more bidders where one or more agrees not to submit a bid, or to withdraw a bid, or two or more submit bids that were arrived at by agreement or arrangement; (3) bids were submitted in response to the call for tenders and (4) the person who called for the tenders was not made aware of any agreement or arrangement, at or before the bids were submitted.[136]

126.

Here, however, there is no evidence of bid rigging.

127.

There is no evidence submitted by the parties that Lacrosse entered into an agreement with another party for the same public tender initiated by the British Columbia Ministry of Public Safety. Nor has Lacrosse withdrawn a bid or submitted an offer in accordance with an agreement between the parties. In addition, Calcio and Lacrosse did not engage in joint bidding. The fact that Lacrosse refused to grant a discount to Calcio is not conclusive for bid rigging.

128.

In the United States, bid rigging is forbidden under Section 1 of the Sherman Act where the coordination among bidders undermines the bidding process. The elements of the wrongdoing are the same as under Canadian Competition Law and the analysis and therefore the conclusion are similar.

129.

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appellant that such language could be found in section 36 of the Competition Act. In his view, section 36 simply identifies the Federal Court as a court of competent jurisdiction for disputes arising under Part VI of the Competition Act but is not exclusive. Thus, a private claim for damages brought under section 36 of the Competition Act is arbitrable.
The Canadian Federal Court followed the Supreme Court in *Seidel v. Telus Communications Inc.*, (2011 SCC 15, [2011] 1 S.C.R. 531) according to which express legislative language is required before the courts could refuse to give effect to the terms of an arbitration agreement. The Competition Act does not contain language showing intent to restrict or prohibit arbitration clauses. *Murphy.*

[135] The standard of proof in claims under Section 36 of the Canadian Competition Act is the civil standard, which requires that the claimant or counterclaimant prove the claims on a balance of probabilities. The standard in Oregon, U.S., is the one of plausibility. *Twombly*, see FN 132.

[136] Section 47, Canadian Competition Act.

Therefore, the Tribunal has jurisdiction to decide this antitrust matter; under applicable US, Oregon, and Canadian law, the Tribunal does not find evidence of bid rigging. Calcio has not made a plausible claim of bid rigging.

## c. Possible Abuse of Dominant Position by Lacrosse

## i. Calcio's Argument

130.

As stated above, Calcio has argued that because Lacrosse denied Calcio a discount on orders for a public bid, but gave this discount to only one dealer of record, Lacrosse violated Canada's anticompetition law, the Agreement on Free Trade in Canada (ALEC), the Constitutional Law of Canada of 1867, the Sherman Antitrust Act, the Clayton Antitrust Act, the Robinson-Patman Act[137] and Oregon's Antitrust Act. *Le Défendeur tient à lui rappeler qu'il a non seulement violer la Lois sur la Concurrence, en participant à un stratagème visant à fixer des prix dans le cadre d'un appel d'offres, se rendant ainsi complice d'une collusion des prix mais, qu'il a aussi enfreint les dispositions des Sherman Antitrust Act, Clayton Antitrust Act et du Robinson-Patman Act* [The Respondent would remind the Claimant that he did not only violate Competition Law by participating in a scheme aimed at fixing prices, making himself an accomplice of price collusion, but also violated the provisions of the Sherman Antitrust Act, Clayton Antitrust Act and the Robinson-Patman Act.][138]

## ii. Lacrosse's Argument

131.

Lacrosse argues that it did not engage in collusive practices because the Credit Agreement did not entitle Calcio to any discount.[139] Lacrosse argues that no Canadian law cited by Calcio applies to their case.[140] Lacrosse denied any allegations of, and stated that Calcio did not provide any evidence of, Lacrosse conspiring with other parties to negatively impact Calcio's business.[141]

132.

Lacrosse argued that although Calcio alleged that Lacrosse violated ORS Chapter 646 on Trade Practices and Antitrust Regulation, "...there were no admissible facts in support of such a claim

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[137] Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 5.
[138] Calcio's *Réponse Du Défendeur - Requête De Production De Documents*, submitted Sept. 6, 2019, p. 5.

[139] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.
[140] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.
[141] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

and Calcio failed to timely raise this claim."[142]

133.

Lacrosse also argued that Calcio did not submit any admissible evidence.[143]

134.

As stated above, with regard to any counterclaim, Lacrosse also argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract, misrepresentation, and laches.[144]

## iii. Tribunal's Decision Regarding Dominant Position

135.

Subsection 79 (1) of the Canadian Competition Act states three elements for a Competition Tribunal to grant an order prohibiting anti-competitive practices: (1) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business; (2) that person or these persons have engaged or are engaging in a practice of anticompetitive acts; and (3) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

136.

According to Oregon Antitrust law, Section 646.730, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce, shall be in violation [of the anti-trust law]." Section 646.725 states "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal".

137.

There is no evidence that Lacrosse abused its dominant position under the Competition Act in Canada, or under Oregon Antitrust Law.

138.

This would be the case if Lacrosse's discount policy created one monopoly company for the distribution of Lacrosse's products for Lacrosse's own benefit; and directed its Dealer of Record not to resell its products to others. It is difficult to see how some 540 pairs of Danner boots would make a difference with regard to monopolizing the boots market in Canada. There was also no evidence that Lacrosse in fact enjoys monopoly power on the market for boots in Canada. Lacrosse does not set the terms of the market unconstrained by competition. There is no evidence that Lacrosse had a possibility of gaining monopoly power.

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[142] Lacrosse Opening for Document Hearing, Nov. 1, 2019, p.5.

[143] Lacrosse Opening for Document Hearing, Nov. 1, 2019, p.3.

[144] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

139.

Calcio has not shown it suffered actual antitrust injury. Calcio also did not show an injury to competition in general. Calcio has not made a plausible claim that Lacrosse abused its dominant position under the Competition Act in Canada, or conspired with any other person to monopolize any part of trade or commerce under Oregon Antitrust Law.

## d. Price Discrimination

## i. Calcio's Argument

140.

As stated above, Calcio has argued that because Lacrosse denied Calcio a discount on orders for a public bid, but gave this discount to only one dealer of record, Lacrosse engaged in price discrimination and violated Canada's anticompetition law, the Agreement on Free Trade in Canada (ALEC), the Constitutional Law of the Canada of 1867, the Sherman Antitrust Act, the Clayton Antitrust Act, the Robinson-Patman Act[145] and Oregon's Antitrust Act. "*Qui plus est, selon la preuve soumise le 22 octobre dernier, le défendeur*[146] *était prêt à consentir à un rabais de 10% sur une simple commande de 48 paires mais, refuse obstinément à un quelconque rabais sur des commandes totalisant plus de 1700 paires. Où est la logique???* [Moreover, according to the evidence submitted on October 22, the Respondent[147] was willing to agree to a 10% discount on a single order of 48 pairs but stubbornly refuses any discount on orders totaling more than 1,700 pairs. Where is the logic???]" [148]

## ii. Lacrosse's Argument

141.

Lacrosse argues that it did not engage in collusive practices because the Credit Agreement did not entitle Calcio to any discount.[149] Lacrosse argues that no Canadian law cited by Calcio applies to their case.[150] Lacrosse denied any allegations of, and stated that Calcio did not provide any evidence of, Lacrosse conspiring with other parties to negatively impact Calcio's business.[151]

142.

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145 Calcio's *Réponse Du Défendeur - Requête De Production De Documents,* submitted Sept. 6, 2019, p. 5.

146 *Recte: défendeur reconventionnel.*

147 *Recte:* Counter-respondent.

148 Calcio *Declaration Liminaire*, November 2, 2019, p.3 top.

149 Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

150 Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

151 Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.

Lacrosse argued that although Calcio alleged that Lacrosse violated ORS Chapter 646 on Trade Practices and Antitrust Regulation, "...there were no admissible facts in support of such a claim and Calcio failed to timely raise this claim."[152]

143.

Lacrosse also argued that Calcio did not submit any admissible evidence.[153]

144.

As stated above, with regard to any counterclaim, Lacrosse also argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract, misrepresentation, and laches.[154]

## iii. Tribunal's Decision Regarding Price Discrimination

145.

Oregon law Chapter 646.040 prohibits price discrimination that substantially lessens competition or creates a monopoly in any line of commerce, or injures, destroys or prevents competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. In addition, actionable price discrimination must have an adverse effect on competition. The Article further specifies the possible cases where such a discrimination might be justified, namely in the case of differences in the cost of manufacturing, sale or delivery or for the purposes of a non-discriminatory customers selection or price changes in response to changing market conditions.

146.

The price discrimination claim of Calcio does not sufficiently show the negative effect on competition of the pricing policy as applied by Lacrosse. Moreover, there is no evidence that Lacrosse's Dealer of Record in British Columbia actually competed for the same bid or intends to compete for future bids of the correctional facilities in British Columbia.

147.

However, both Lacrosse and Calcio have shown that Lacrosse was only willing to offer a discount to Lacrosse's Dealer of Record in British Columbia. It appears that Lacrosse's discount policy was price manipulation that lessened competition among resellers, namely the Dealer of Record and Calcio. While Calcio did not present evidence of other resellers besides the Dealer of Record and Calcio, Calcio has shown that Danner boots were required by the British Columbia Ministry of Public Safety. This would inevitably lead to higher prices for the correctional facilities and losses for Calcio, especially with the US Canadian currency price fluctuation. While this may not have risen to the level of price discrimination and actionable anticompetitive practice, Lacrosse's price

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[152] Lacrosse Opening for Document Hearing, Nov. 1, 2019, p.5.
[153] Lacrosse Opening for Document Hearing, Nov. 1, 2019, p.3.
[154] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

manipulation does lead to the question of lack of equity and fairness to Calcio, especially where public bids are involved. Therefore, this further bolsters Calcio's claim for a price discount. Thus, there is no finding of price discrimination but a price discount is justified for the reasons stated earlier in the award.

## e. Payment Terms

148.

Lacrosse alleged in its Request for Arbitration that the Credit Agreement had 30 day payment terms. Calcio has asserted that the payment terms were 60 days.

149.

The Credit Agreement's 30 days payment terms were validly modified to 60 days under the written invoices sent to Calcio stating 60 days payment terms.

150.

Section 7 of the Credit Agreement stated 30 day payment terms. Section 18.8 of the Credit Agreement also allowed modifications to its terms if in writing and signed by both parties. Section 18.7 also states that a party may make a binding waiver of a term of the Credit Agreement by executing the waiver in writing.

151.

Lacrosse modified its payment terms by waiving two rights. First, in accordance with Section 18.7, Lacrosse waived its right to 30 day payment terms by sending invoices in writing with 60 days payment terms. Second, also in accordance with Section 18.7, and with the same written invoices, Lacrosse waived its right to requiring two signatures for modification of the 30 day payment terms.

152.

Thus Lacrosse's written invoices stating 60 day payment terms, were Lacrosse's binding waiver of 1) the 30 days payment terms in the Credit Agreement and 2) of Section 18.8 requiring two signatures for modifications.

153.

Therefore, the 30 days payment terms in the Credit Agreement were validly modified to 60 days under written invoices sent to Calcio stating 60 day payment terms.

## f. Punitive Damages

## i. Calcio's Argument for an Award of Punitive Damages

154. Calcio argues that Lacrosse deserves to be punished severely for denying a discount to Calcio, thereby causing loss to Calcio because of the US Canadian currency fluctuation.[155] "*Cette faute démontre clairement que le demandeur se croit au-dessus des lois. Cette façon de faire est déplorable et condamnable; elle se mérite d'être sanctionnée sévèrement.* [This fault clearly demonstrates that the Claimant believes himself to be above the law. This is deplorable and reprehensible, and deserves to be severely punished.]" [156]

## ii. Lacrosse's Argument against Punitive Damages

155. As stated above, Lacrosse argues that it had no contractual obligation to give a discount to Calcio, and Lacrosse did not engage in collusive practices because the Credit Agreement did not entitle Calcio to any discount.[157] Lacrosse denied any allegations of, and stated that Calcio did not provide any evidence of, Lacrosse conspiring with other parties to negatively impact Calcio's business.[158]

156. As stated above, with regard to any counterclaim, Lacrosse also argued that Calcio had failed to state a claim, had waived any rights to assert the invalidity of the Credit Agreement or assert counterclaims, was equitably estopped from denying liability and asserting counterclaims, and also could not assert counterclaims because of promissory estoppel, reliance, breach of contract, misrepresentation, and laches.[159]

## iii. Tribunal's Decision regarding Punitive Damages

157. Calcio is not entitled to punitive damages for bad faith and commercial harm caused by Lacrosse, including not providing additional discounts to Calcio. Under Oregon law, there is no recovery in punitive damages for breach of contract, unless tortious conduct is involved.[160]

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[155] Calcio *Déclaration Preliminaire*, Nov. 2, 2019, p. 3.
[156] Calcio *Déclaration Preliminaire*, Nov. 2, 2019, p. 3.

[157] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.
[158] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p. 10.
[159] Lacrosse Reply to Respondent's Request for Production, Oct. 1, 2019, p.11-12.

[160] *Express Creditcorp. v. Oregon Bank*, 95 Ore. App. 121 (1989), at 124.

158.

Oregon's law on "Standards for award of punitive damages" states:

> Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.[161]

159.

Here, Calcio has not provided evidence of such tortious conduct by Lacrosse. Calcio has not shown malice by Lacrosse, nor a reckless and outrageous indifference to a highly unreasonable risk of harm, nor a conscious indifference to the health, safety, and welfare of others.

## g. Late Payment Charges and Post Award Interest

## i. Invoices

160.

The Parties agreed in Section 7 of the Credit Agreement to a late charge of 1.5% per month on outstanding invoices. As explained in the "Payment Terms" section above, this means 18% p.a. starting 60 days after issuance of each invoice. The Parties did not agree to any form of compound interest, thus the interest in this regard is deemed to be simple interest. Calculating these late charges through the date of the award, July 31, 2020, results in a cumulative interest amount of USD 46,529.69 (Please see the following page for calculation details including the different due dates[162]).

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[161] 2017 ORS 31.370.

[162] The figures were provided by Lacrosse who submitted ample invoices with its initial claim. The Tribunal organized the figures in a one-page table to illustrate the positions of the critical time span of April 2018 until October 2018 with the corresponding late charges (= pre-award interest) calculations.
The last five entries have end dates other than the date of the award because they represent merchandise returned by Calcio on 10/17/18. Lacrosse stated this in its Credit Memo SC-00178045, dated 10/17/2018, for a total credit of $3,375.75.

Lacrosse / Calcio
Simple interest calculation on open invoices
For the period of April 10, 2018 to July 31, 2020

| Ref | Due Date (c) | End Date (d) | Invoice amount - Unadjusted | Applied Credit | Invoice amount - Adjusted | Discount (b) | Invoice Balance | Days Overdue | Interest rate | Interest |
|---|---|---|---|---|---|---|---|---|---|---|
| (3) | 4/10/18 | 7/31/20 | 3,840.15 | 388.30 | 3,451.85 | 186.45 | 3,265.40 | 843 | 18.00% | 1,357.51 |
| (3) | 4/17/18 | 7/31/20 | 1,950.15 | | 1,950.15 | 94.69 | 1,855.46 | 836 | 18.00% | 764.96 |
| (3) | 4/17/18 | 7/31/20 | 239.40 | | 239.40 | 11.62 | 227.78 | 836 | 18.00% | 93.91 |
| (3) | 4/17/18 | 7/31/20 | 957.60 | | 957.60 | 46.49 | 911.11 | 836 | 18.00% | 375.62 |
| (3) | 4/17/18 | 7/31/20 | 5,267.10 | | 5,267.10 | 255.74 | 5,011.36 | 836 | 18.00% | 2,066.05 |
| (3) | 4/17/18 | 7/31/20 | 729.00 | | 729.00 | 35.40 | 693.60 | 836 | 18.00% | 285.96 |
| (3) | 4/24/18 | 7/31/20 | 250.80 | | 250.80 | 12.18 | 238.62 | 829 | 18.00% | 97.55 |
| (3) | 5/1/18 | 7/31/20 | 245.30 | | 245.30 | 11.91 | 233.39 | 822 | 18.00% | 94.61 |
| (3) | 5/1/18 | 7/31/20 | 1,924.95 | | 1,924.95 | 93.46 | 1,831.49 | 822 | 18.00% | 742.43 |
| (3) | 5/1/18 | 7/31/20 | 1,919.70 | | 1,919.70 | 93.21 | 1,826.49 | 822 | 18.00% | 740.40 |
| (3) | 5/8/18 | 7/31/20 | 12,197.45 | | 12,197.45 | 592.23 | 11,605.22 | 815 | 18.00% | 4,664.34 |
| (3) | 5/8/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 784 | 18.00% | 86.13 |
| (3) | 5/8/18 | 7/31/20 | 1,416.05 | | 1,416.05 | 68.75 | 1,347.30 | 815 | 18.00% | 541.50 |
| (3) | 5/8/18 | 7/31/20 | 1,404.90 | | 1,404.90 | 68.21 | 1,336.69 | 815 | 18.00% | 537.24 |
| (3) | 5/8/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 815 | 18.00% | 89.54 |
| (3) | 5/8/18 | 7/31/20 | 239.40 | | 239.40 | 11.62 | 227.78 | 815 | 18.00% | 91.55 |
| (3) | 5/8/18 | 7/31/20 | 468.30 | | 468.30 | 22.74 | 445.56 | 815 | 18.00% | 179.08 |
| (3) | 5/8/18 | 7/31/20 | 2,809.80 | | 2,809.80 | 136.43 | 2,673.37 | 815 | 18.00% | 1,074.48 |
| (3) | 5/8/18 | 7/31/20 | 468.30 | | 468.30 | 22.74 | 445.56 | 815 | 18.00% | 179.08 |
| (3) | 5/8/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 815 | 18.00% | 89.54 |
| (3) | 5/8/18 | 7/31/20 | 702.45 | | 702.45 | 34.11 | 668.34 | 815 | 18.00% | 268.62 |
| (3) | 5/8/18 | 7/31/20 | 468.30 | | 468.30 | 22.74 | 445.56 | 815 | 18.00% | 179.08 |
| (3) | 5/15/18 | 7/31/20 | 239.40 | | 239.40 | 11.62 | 227.78 | 808 | 18.00% | 90.76 |
| (3) | 5/15/18 | 7/31/20 | 957.60 | | 957.60 | 46.49 | 911.11 | 808 | 18.00% | 363.04 |
| (3) | 5/15/18 | 7/31/20 | 724.75 | | 724.75 | 35.19 | 689.56 | 808 | 18.00% | 274.77 |
| (3) | 5/15/18 | 7/31/20 | 468.30 | | 468.30 | 22.74 | 445.56 | 808 | 18.00% | 177.54 |
| (3) | 5/15/18 | 7/31/20 | 947.75 | | 947.75 | 46.02 | 901.73 | 808 | 18.00% | 359.31 |
| (3) | 5/15/18 | 7/31/20 | 1,884.35 | | 1,884.35 | 91.49 | 1,792.86 | 808 | 18.00% | 714.39 |
| (3) | 5/15/18 | 7/31/20 | 468.30 | | 468.30 | 22.74 | 445.56 | 808 | 18.00% | 177.54 |
| (3) | 5/15/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 808 | 18.00% | 88.77 |
| (3) | 5/21/18 | 7/31/20 | 289.90 | | 289.90 | 14.08 | 275.82 | 802 | 18.00% | 109.09 |
| (3) | 5/21/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 802 | 18.00% | 88.11 |
| (3) | 5/21/18 | 7/31/20 | 702.45 | | 702.45 | 34.11 | 668.34 | 802 | 18.00% | 264.33 |
| (3) | 5/21/18 | 7/31/20 | 249.15 | | 249.15 | 12.10 | 237.05 | 802 | 18.00% | 93.76 |
| (3) | 5/28/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 795 | 18.00% | 87.34 |
| (3) | 5/28/18 | 7/31/20 | 267.60 | | 267.60 | 12.99 | 254.61 | 795 | 18.00% | 99.82 |
| (3) | 5/28/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 795 | 18.00% | 87.34 |
| (3) | 5/28/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 795 | 18.00% | 87.34 |
| (3) | 5/28/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 795 | 18.00% | 87.34 |
| (3) | 6/4/18 | 7/31/20 | 239.40 | | 239.40 | 11.62 | 227.78 | 788 | 18.00% | 88.51 |
| (3) | 6/19/18 | 7/31/20 | 1,425.15 | | 1,425.15 | 69.20 | 1,355.95 | 773 | 18.00% | 516.90 |
| (3) | 6/19/18 | 7/31/20 | 2,861.55 | | 2,861.55 | 138.94 | 2,722.61 | 773 | 18.00% | 1,037.87 |
| (3) | 6/19/18 | 7/31/20 | 956.85 | | 956.85 | 46.46 | 910.39 | 773 | 18.00% | 347.05 |
| (3) | 6/19/18 | 7/31/20 | 488.55 | | 488.55 | 23.72 | 464.83 | 773 | 18.00% | 177.20 |
| (3) | 6/19/18 | 7/31/20 | 2,398.50 | | 2,398.50 | 116.46 | 2,282.04 | 773 | 18.00% | 869.93 |
| (3) | 6/19/18 | 7/31/20 | 4,037.55 | | 4,037.55 | 196.04 | 3,841.51 | 773 | 18.00% | 1,464.41 |
| (3) | 6/19/18 | 7/31/20 | 2,627.40 | | 2,627.40 | 127.57 | 2,499.83 | 773 | 18.00% | 952.95 |
| (3) | 6/22/18 | 7/31/20 | 46,333.10 | | 46,333.10 | 2,249.64 | 44,083.46 | 770 | 18.00% | 16,739.64 |
| (3) | 6/25/18 | 7/31/20 | 249.15 | | 249.15 | 12.10 | 237.05 | 767 | 18.00% | 89.66 |
| (3) | 7/2/18 | 7/31/20 | 5,592.50 | | 5,592.50 | 271.54 | 5,320.96 | 760 | 18.00% | 1,994.27 |
| (3) | 7/2/18 | 7/31/20 | 473.55 | | 473.55 | 22.99 | 450.56 | 760 | 18.00% | 168.87 |
| (3) | 7/2/18 | 7/31/20 | 468.30 | | 468.30 | 22.74 | 445.56 | 760 | 18.00% | 166.99 |
| (3) | 7/2/18 | 7/31/20 | 239.40 | | 239.40 | 11.62 | 227.78 | 760 | 18.00% | 85.37 |
| (3) | 7/2/18 | 7/31/20 | 936.60 | | 936.60 | 45.48 | 891.12 | 760 | 18.00% | 333.99 |
| (3) | 7/2/18 | 7/31/20 | 473.55 | | 473.55 | 22.99 | 450.56 | 760 | 18.00% | 168.87 |
| (3) | 8/7/18 | 7/31/20 | 702.45 | | 702.45 | 34.11 | 668.34 | 724 | 18.00% | 238.63 |
| (3) | 8/7/18 | 7/31/20 | 951.60 | | 951.60 | 46.20 | 905.40 | 724 | 18.00% | 323.26 |
| (3) | 8/7/18 | 7/31/20 | 2,154.50 | | 2,154.50 | 104.61 | 2,049.89 | 724 | 18.00% | 731.90 |
| (3) | 8/7/18 | 7/31/20 | 2,841.20 | | 2,841.20 | 137.95 | 2,703.25 | 724 | 18.00% | 965.17 |
| (3) | 8/7/18 | 7/31/20 | 1,909.45 | | 1,909.45 | 92.71 | 1,816.74 | 724 | 18.00% | 648.65 |
| (3) | 8/14/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 717 | 18.00% | 78.77 |
| (3) | 8/14/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 717 | 18.00% | 78.77 |
| (3) | 8/14/18 | 7/31/20 | 234.15 | | 234.15 | 11.37 | 222.78 | 717 | 18.00% | 78.77 |
| (3) | 8/24/18 | 7/31/20 | 718.85 | | 718.85 | 34.90 | 683.95 | 707 | 18.00% | 238.46 |
| (2) | 9/4/18 | 7/31/20 | 146.15 | | 146.15 | 7.10 | 139.05 | 696 | 18.00% | 47.73 |
| (2) | 9/4/18 | 10/17/18 | 88.00 | | 88.00 | 4.27 | 83.73 | 43 | 18.00% | 1.78 |
| (3) | 9/11/18 | 10/17/18 | 2,039.00 | | 2,039.00 | 99.00 | 1,940.00 | 36 | 18.00% | 34.44 |
| (3) | 9/11/18 | 10/17/18 | 234.15 | | 234.15 | 11.37 | 222.78 | 36 | 18.00% | 3.96 |
| (3) | 10/2/18 | 10/17/18 | 775.20 | | 775.20 | 37.64 | 737.56 | 15 | 18.00% | 5.46 |
| (3) | 10/2/18 | 10/17/18 | 239.40 | | 239.40 | 11.62 | 227.78 | 15 | 18.00% | 1.68 |
| Subtotal | | | 130,109.50 | 388.30 | 129,721.20 | 6,317.28 | 123,403.92 | | | 46,529.69 |
| (2) | 10/17/18 | | | 3,375.75 | (3,375.75) | | (3,375.75) (a) | | | |
| Total | | | 130,109.50 | 3,764.05 | 126,345.45 | 6,317.28 | 120,028.17 | | | 46,529.69 (e) |

Credit from R/A. Reduces interest bearing principal.
It is sustained that a $6,317.28 discount for the respondent was not applied to purchases from the claimant. Accordingly,
e total discount of $6,317.28 has been applied pro-rata to the outstanding invoices.
Represents the end of the 60-day period from date invoice to be issued.
Date interest is calculated through as arbitration award will be issued at July 31 of 2020.
Interest due on invoice balances.

## ii. Post Award

161. The Claimant requests the Tribunal to set a post award interest rate. The Tribunal decides on a late interest rate of **four (4)% p.a.**, compounded in 3-months intervals, starting with the issuance of the award. The 4% rate is within the norm of Oregon law[163] and international arbitration standards. A 4% compound interest rate is initially more beneficial for the debtor[164], but with delay, not. The creditor shall not be penalized for further delays in unpaid debt. As a business, the creditor could alternatively invest these sums, allowing for a quarterly compounded growth.

162. This post award interest shall apply to any amount owed under this award including damages, pre-award interests, legal fees, and arbitration costs. This 4% p.a. rate shall be an interest rate compounded quarterly as the Parties may want to wrap this issue up rather sooner than later, and have no incentive to speculate with delays in payments.

# 5. Summary

163. Calcio breached the Credit Agreement by failing to pay for 545 pairs of Danner boots. Calcio is not entitled to any commission for reselling the Danner boots, or for an accommodation for fluctuations in currency rates. Calcio's payment terms were modified to 60 days under Lacrosse's invoices and under their course of performance. There is no finding of price discrimination, however, a price discount is justified for the reasons stated earlier in the award. Calcio was entitled to a 5% price discount on orders from 2017-2018 for boots for British Columbia's correctional facilities, here granted for the unpaid remainder. There was no evidence of bid-rigging and Calcio is not entitled to punitive damages. Calcio is liable for 18% p.a. simple pre-award interest, and 4% p.a. (i.e., 1% per quarter) compound post-award interest.

# L. Costs

164. According to Article 38 of the Rules, the Arbitral Tribunal has discretion to allocate the costs of arbitration fixed by the Court, as well as the parties' legal costs, and fix the amount to be borne by each party. Moreover, the parties agreed in the Credit Agreement, Section 18.10 that the prevailing party shall be entitled to recover reasonable costs and attorney fees as fixed by the

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[163] According to ORS 82.010, judgment interest rates of up to 9% are acceptable. However, the law does not state a fixed interest rate, and does not mandate simple or compound interest. Neither has Claimant specified an interest rate.

[164] This is more beneficial than, e.g., a 9% simple interest rate.

arbitrator. In accordance with the foregoing, the arbitrator determines to apply the principle of Costs follow the event.

Summary of partial claim and counterclaim regarding monetary value as basis for calculation of costs:

## 1. Claim by Lacrosse

165.

a. Damages in the amount of US $126,345.45 **(sustained)**, plus late charges;
b. Calcio shall bear all the costs of the arbitration **(94% of the costs sustained)**.
c. Late charges of 1.5% per month commencing 30 days from the date of each Invoice **(sustained 60 days from the issuance of each invoice which amounts to a total of $46,529.69 pre-award interest).**

## 2. Counterclaim by Calcio

166.

a. 5% bid commission of $19,775.64 **(denied)**
b. i. $39,551.28 discount (**$6,317.28 sustained)**
ii. $10,000.00 currency fluctuation loss **(denied)**
c. $25,000.00 punitive damages **(denied)**

Calcio's counterclaim consists of $94,326.92 plus some non-dollar figures. Of this, $6,317.28 is granted, as mentioned above.

## 3. Cost Outcome

167.

With a basic claim of $126,345.45 and a win after setoff of part of the counterclaim, Lacrosse is owed $120,028.17 in damages. Because of the counterclaim, the cost allocation is 94% to be paid by Calcio, and 6% to be paid by Lacrosse.

# 4. Cost Notes and Evaluation

## a. Party Costs

168.

In their simultaneously exchanged cost notes on January 7, 2020, and replies on January 17, 2020, the parties disagreed on the amount and allocation of costs.

169.

They contend that the other party's costs should be reduced (sometimes relying on Section 18.6 of the Credit Agreement, Article 38 of the Rules, and Oregon Civil Procedure Rule 68). They disagreed on who the prevailing party is; whether both parties conducted the proceedings in an expeditious and costeffective manner; whether costs have been sufficiently documented; whether non-lawyers may be compensated especially if they work in a party's enterprise, and if so, on the same basis as counsel; and finally what effect the parties' conduct has on the allocation of costs.

170.

Calcio states the following opinion on costs: *"L'état de frais de la partie demanderesse soit révisé considérablement à la baisse. Un montant de 5000$ ... étant amplement suffisant pour la qualité du travail effectué.* [The claimant's statement of costs shall be considerably revised downwards. An amount of USD 5,000...should be more than enough for the quality of the work performed.]"

171.

After taking into consideration all relevant facts according to Article 38(5) of the Rules, the Tribunal grants the following:

Lacrosse submitted a cost note for $26,857.53 on January 7, 2020. The items are sufficiently documented and reasonable.

172.

To begin with, this proceeding was Lacrosse's contractual choice to recover after having delivered the merchandise and not being paid. The proceedings were complicated by non-filings (e.g., production of documents), and made more time consuming through extraneous filings by Calcio (e.g., Observations on November 2, 2019). Avoidable motions were filed which increased the legal fees of Lacrosse. Lacrosse's spending 77.95 hours under these circumstances was reasonable, as was an attorney's hourly rate of $166-550 (according to experience level), and paralegals' of $215. The time spent by Lacrosse's counsel is itemized in their annex 1 to the Cost Note, and is well documented, necessary and reasonable.

173.

Calcio alleges that Lacrosse's attorney omitted these points:
"1) la validité du Canadian Credit Agreement;

2) la violation des dispositions de la loi de la Charte française du Québec, portant sur les contrats;

3) la détermination de l'élection du for;

4) la preuve sans équivoque sur la collusion de contrats

[1) The validity of the Canadian Credit Agreement;

2) the violation of the relevant provisions of the law of the French Charter of Quebec, relating to contracts;

3) the determination of the choice of forum;

4) the unequivocal evidence of the collusion of the contracts]"[165]

174.

However, Lacrosse addressed these issues, and an expansion was not necessary; to run up more hours, would not have changed the outcome of the case.

175.

Calcio submitted a cost note with party costs of $45,900 on January 7, 2020. While Calcio's efforts at self-representation were impressive, several items were superfluous and some were self-inflicted. Regarding the application of Oregon procedural law in this international arbitration, see Order No. 2 of August 28, 2019. While the Tribunal acknowledges that this case was not easy for a nonlawyer to handle, Lacrosse should not be charged for this.

176.

The allowable party costs are as follows:

Lacrosse $26,857.53

177.

These costs shall be allocated between the parties according to the outcome of the case. After a 6% deduction of $1,611.45, Calcio is liable for 94% of Lacrosse's costs, i.e., $25,246.08.

## b. Arbitration Costs

178.

Lacrosse paid $35,000 to the ICC. In addition, Lacrosse claims reasonable expenses of $75.08. The

[165] *Réplique Á L'État Des Frais Soumis Par Le Demandeur* [Costs Reply by Respondent], submitted January 17, 2020, p. 2.

$75.08 represents expenses for long distance phone calls, overnight shipping, photocopies, and scanning. These expenses are necessary and reasonable in light of the $120,028.17 damages Lacrosse is recovering. This amounts to total arbitration costs of Lacrosse of $35,075.08. (Claimant's Detailed Cost Notes, January 7, 2020)[166].

179. Calcio did not make any payment to the ICC. It claims $750 in expenses relating to this arbitration. (*L'état des frais de la partie défenderesse*, January 7, 2020). Calcio is to bear its arbitration expenses of $750 as well as and for the same reason as its party costs of $45,900.

180. According to the outcome, Calcio shall reimburse Lacrosse for 94% of Lacrosse's arbitration costs, i.e., $32,970.58, subject to any reimbursement of the costs to Lacrosse by the Court.

## c. Reimbursement by the Court to Lacrosse

181. At its session of July 20, 2020, the Court fixed the administrative expenses with $6,482, the sole arbitrator's fee with $17,820, and the expenses with $198, for a total of $24,500. Lacrosse will be reimbursed $10,500 by the Court.

## d. Total Costs in Addition to Damages

182. To sum up, Calcio owes Lacrosse a combined total of USD 224,774.50 as of July 31, 2020: this amount includes damages, pre-award interest, party costs, and arbitration costs, before any reimbursement by the Court of payments made by the parties. After taking into consideration the expected reimbursement by the Court to Lacrosse, Calcio owes Lacrosse a net amount of USD 214,274.50.

# M. Disposition

183. **Dispositive Final Award**

[166] Claimant Lacrosse's Detailed Cost Notes, January 7, 2020, incorrectly stated that Lacrosse paid $40,000. See May 23, 2019 letter from the Secretariat to the Parties informing the Parties that the Court fixed the advance on costs at $35,000; and the Secretariat's email dated August 20, 2019 to the Parties stating that the advance on costs had been fully paid at $35,000, and the correlating Financial Table.

(see following page)

# DISPOSITIVE

In this Arbitration between the Claimant, LACROSSE FOOTWEAR, INC., and the Respondent, 9055-3827 QUÉBEC INC., doing business as CALCIO, for the reasons appearing above, and rejecting all submissions and contentions to the contrary, the Arbitral Tribunal FINDS, DECLARES, RULES, ORDERS and AWARDS that:

1. The Credit Agreement between the parties of February 21, 2014, is a valid contract.
2. The Arbitral Tribunal under the ICC Arbitration Rules in force as of March 1, 2017, has jurisdiction over the dispute and the parties.
3. CALCIO shall pay to LACROSSE USD120,028.17 (principal), plus USD46,529.69 (simple interest until July 31, 2020), for a total of USD166,557.86.
4. CALCIO shall pay to LACROSSE USD25,246.08 towards party representation costs.
5. CALCIO shall pay to LACROSSE USD22,470.58 for its unreimbursed arbitration costs.
6. The above stated sums [position (3), plus (4), plus (5)] are due with the issuance of the award; from this date (July 31, 2020), post award interest of 4 (four)% p.a. compounded quarterly shall be added.

Place of Arbitration: Portland, Oregon, USA

Dated: July 31, 2020