ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 15372/JRF

VRG LINHAS AÉREAS S.A. V. VARIG LOGÍSTICA S.A., VOLO DO BRASIL S.A., VOLO LOGISTICS LLC AND MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II LP AND MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II LLP

AWARD

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02 September 2010

Tribunal:
Juan Fernández-Armesto (President)
Gustavo José Mendes Tepedino (Co-Arbitrator)
Pedro A. Batista Martins (Co-Arbitrator)

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Award

I. PERSONS WHO PARTICIPATED IN THE ARBITRATION

1. CLAIMANT

1. Claimant is, currently, VRG Linhas Aéreas S.A. ["VRG," "Claimant" or "Purchaser"]. VRG is universal successor to GTI S.A., original Claimant in this arbitration ["GTI"], with head office at Avenida Vinte de Janeiro, s/no, Passenger Terminal No. 2, Rio de Janeiro International Airport/Galeão – Antonio Carlos Jobim, Departure Level between Axes 53-54/E-G, Segment D – CEP [postal code] 21,941-570, in the City and State of Rio de Janeiro, Brazil.

2. GTI integrates the Gol Group.

3. Claimant has been represented in this arbitration primarily by Flávio Pereira Lima, Daniel Calhman de Miranda and Carlo de Lima Verona, all of them from the law firm of Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga, located at Al. Joaquim Eugênio de Lima, 447 – 01403001, São Paulo, Brazil, such as stated in the power of attorney attached to the case records.

2. RESPONDENTS

4. Respondent 1 is VARIG LOGÍSTICA S.A. ["VLog," "Respondent 1" or "Seller"], a Brazilian corporation with head office at Rua Gomes de Carvalho, no 1609, Vila Olímpia – CEP 04547-006, São Paulo, Brazil.

5. Respondent 2 is VOLO DO BRASIL S.A. ["Volo DB" or "Respondent 2"], a Brazilian corporation with head office at Rua Padre João Manuel no 450, CJ. 121 – CEP 01411-000, São Paulo, Brazil. Respondent 3 holds 20% of Respondent 2's common shares, while Messrs. Marco Antônio Audi ["Mr. Audi"], Marcos Michel Haftel ["Mr. Haftel"] and Luís Eduardo Gallo ["Mr. Gallo"], collectively referred to as ["Brazilian Partners"], held 80% of its common shares.

6. VLog and Volo DB shall be collectively referred to as [the "Sellers"].

7. Respondent 3 was the company Volo Logistics LLC ["Volo Logistics" or "Respondent 3"], a legal entity organized under the Laws of Delaware, U.S.A., with head office at 2711 Centerville Road, Suite 400 – Delaware, U.S.A., dismissed pursuant to the partial award on jurisdiction handed down on April 7, 2009 [the "Partial Award"].

8. Respondents 4 are Matlinpatterson Global Opportunities Partners II L.P. (U.S.A.) and

Matlinpatterson Global Opportunities Partners (CAYMAN) II L.P., legal entities organized under the Laws of Delaware, U.S.A., with head office at 520 Madison Avenue, 35th floor – New York, NY 10022, U.S.A. [collectively "MatlinPatterson," the "MatlinPatterson" fund or "Respondent 4"]. Respondent 4 is the holder of all shares in Respondent 3.

9. Respondents 1 and 2 have been represented in this arbitration primarily by Roberto Teixeira and Larissa Teixeira Martins, from the law firm of Teixeira Martins Advogados, located at Rua Padre João Manuel, no 755, Conjunto [suite] 131 – Jardim Paulista, São Paulo, Brazil, such as stated in the power of attorney attached to the case records.

10. Respondent 4 was initially represented in this arbitration by Cristiano Zanin Martins and Guilherme de Andrade Campos Abdalla, also from the law firm of Teixeira Martins Advogados, at the aforementioned address, such as stated in the power of attorney attached to the case records. After the rendering of the partial award on jurisdiction, Respondent 4 has been represented by Pedro Soares Maciel, Mateus Aimoré and Alfred Habib Siouf Filho from the law firm of Veirano Advogados, located at Avenida das Nações Unidas No. 12995, 18o andar, São Paulo Brazil, according to the delegation of powers attached to the case records.

3. THE ARBITRATION TRIBUNAL

11. The Arbitration Tribunal is comprised of co-arbitrator Gustavo José Mendes Tepedino, with offices at Rua da Assembléia, 58, 10o andar – Centro [Downtown] – 20011, Rio de Janeiro, Brazil; co-arbitrator Pedro Antônio Batista Martins, resident at Rua Timóteo da Costa, 371/301, Leblon – 22450, Rio de Janeiro, Brazil; and its Chairman, Juan Fernández-Armesto, with offices at General Pardiñas 102, 28006 Madrid, Spain.

12. The Administrative Secretary for this proceeding is Alexandre Soveral Martins, with offices at Avenida Sá da Bandeira, 114, 1o – 3000-350 Coimbra, Portugal, pursuant to paragraph 14 of the Terms of Reference ["AdM"].

4. ICC'S COUNCILLOR

13. The Councilor of the Secretariat of the International Court of Arbitration [the "Court"] of the International Chamber of Commerce ["ICC"] in charge of this case is José Ricardo Feris, assisted by Maria Cláudia de Assis Procopiak, both with professional domicile at Cours Albert 1er 38, 75008 Paris, France.

II. BACKGROUND

14. In the Partial Award rendered, the Arbitration Tribunal summarized the procedural background on this arbitration up until the hearing on jurisdiction.[1] Wherefore, the Arbitration Tribunal refers

[1] Partial Award on jurisdiction at paragraphs 12 to 35.

to the procedural background already therein described.

1. THE ARBITRATION AGREEMENT

15. One should recall that the Agreement for Sale and Purchase of Equity Control in VRG Linhas Aéreas S/A and Other Covenants [the "Agreement"], executed on March 28, 2007 between VLog and Volo DB, as Sellers, and GTI as Purchaser, contains an arbitration agreement [the "Arbitration Agreement"] under Section 14, which reads as follows:

"Section Fourteen

Arbitration, Governing Law and Election of Venue

Section 14.1 – All disputes arising out of or in connection with this instrument, including but not limited to those involving its validity, effectiveness, violation, construction, termination, rescission and its consequences shall be resolved by arbitration, as provided under Law 9,307/96 (the "Arbitration Act"), pursuant to the following conditions.

Section 14.2 – The dispute shall be submitted to the ICC ("ICC") in accordance with its Rules (the "Rules") in effect on the date of the request for commencement of arbitration.

Section 14.3 – The hearings, pleadings and exhibits in the arbitration shall be conducted in the Portuguese language and, if requested by any of the parties or by the arbitrator, simultaneous translation into the English language shall be provided. The place of arbitration shall be the City of São Paulo.

Section 14.4 – Except in the case of more than one claimant or respondent, whereupon the claimants, jointly, and the respondents, jointly, shall appoint one arbitrator, the dispute shall be analyzed and decided by three (3) arbitrators, each one of them independent and impartial (the "Arbitration Tribunal"), and it shall be up to each Party to nominate one arbitrator within the term provided for in the Rules, which term may never be greater than 20 days. The two above-nominated arbitrators shall appoint, by mutual agreement, a third arbitrator who shall officiate as Chairman of the Arbitration Tribunal. If the two (2) arbitrators nominated by the Parties fail to appoint a third arbitrator within ten (10) days measured [sic] [misspelling in Portuguese] *from the date the last one of the two (2) arbitrators is appointed, or either party involved fails to nominate its arbitrator, it shall be up to the ICC to nominate a third arbitrator.*

Section 14.5. The chosen arbitrators shall have a command of the English language, whatever their nationality might be.

Section 14.6. This Agreement shall be construed in accordance with and governed by the laws of Brazil, and the Arbitration Tribunal shall decide the dispute and litigation in accordance with the laws of Brazil, disregarding any rule of private international law [conflict of laws] *that might cause the laws of any country or jurisdiction other than Brazil to apply.*

Section 14.7. The Arbitration Tribunal shall decide the matters submitted to it only pursuant to legal provisions, and shall ground its decision pursuant to the laws of Brazil.

Section 14.8. The arbitral award shall be rendered no later than six (6) months from the installation of the Arbitration Tribunal, in writing and in Portuguese, and if requested, with a translation into the English language, and shall contain the grounds for the arbitral decision and be signed by all arbitrators comprising the Arbitration Tribunal. In the event of any divergence between the Portuguese and English versions of the arbitral award, the Portuguese version shall prevail.

Section 14.9. At any time before the installation of the Arbitration Tribunal, any Party may apply to any court of competent jurisdiction of the Judiciary Branch for the granting of injunctions aimed at protecting or safeguarding a right, or for purposes of payment into court, prior to the installation of the arbitration tribunal, provided this shall not be construed as a waiver of arbitration. To provide said jurisdictional relief, the Parties elect the Central Venue of the São Paulo Judicial District, and expressly waive any other venue, however privileged such venue may be. After the Arbitration Tribunal is installed, any injunctions shall be requested from the latter.

Section 14.10. Appearing in this instrument to express its full awareness of this transaction, is VRG, a business company under private law with head office at Avenida Vinte de Janeiro, no 330, Cargo Sector O, Ilha do Governador [Governor's Island]*, State of Rio de Janeiro – CEP 21941-570, registered in the CNPJ* [National Register of Legal Entities – federal taxpayer number] *under No. 07,575,651/0001-59, herein represented by its attorneys-in-fact Marco Antonio Audi and Luiz Eduardo Gallo, both described above.*

Section 14.11. Appearing in this instrument, as intervening and consenting party and guarantor, is the company Gol Linhas Aéreas Inteligentes S/A, a company with head office at Rua Gomes de Carvalho, no 1,629, 15o andar – Vila Olímpia – CEP 04547-006, in the City of São Paulo, State of São Paulo, registered in the CNPJ/MF [Ministry of Finance] *under No. 06,164,253/0001-87, herein represented pursuant to Article 20(a) of its Articles of Incorporation, by its President* [Diretor Executivo]*, Constantino de Oliveira Júnior, Brazilian citizen, married,* [ID card] *No. 929,100-SEP/DF, registered in the C.P.F.* [Individual Taxpayers Register] *under No. 417,942,901-25, and by its Vice President for Investor Relations* [Diretor de Relações com Investidores]*, Richard Freenan Lark Jr., Brazilian citizen, single, R.G.* [ID card] *No. 50,440,294-8-SSP/SP, registered in the C.P.F. under No. 214,996,428-73, both elected at the Board of Directors' Meeting held on March 27, 2006, having its Minutes duly recorded at the Commercial Registry of the State of São Paulo under No. 94,807/06-1, in session on April 7, 2006. The guarantor expressly assumes, jointly with GTI, jointly liability to the Sellers for all obligations undertaken in this agreement."*

16. In accordance with Section 14.3 of the Agreement, the language for arbitration is Portuguese, and the place of arbitration is the city of São Paulo, Brazil. It should be mentioned that none of the parties requested, pursuant to Section 14.8 of the Agreement, a translation of this award into the English language.

2. PARTIAL AWARD

17. It should be mentioned that Claimant in the AdM [Terms of Reference] had moved, with respect to the issue of Respondents 3 and 4 having standing, "*preliminarily, for an acknowledgment that the Arbitration Tribunal has jurisdiction to examine the controversy not only against the signatory*

parties to the Agreement, but also against [Volo Logistics] *and* [the] *MatlinPatterson* [fund], *which shall be bound by the Arbitration Tribunal's ruling*."

18. Respondents 1 and 2, in turn, stated[2] in their brief that "*because of the impossibility of Claimant making any unilateral modification of the Agreement, including having Respondents 3 and 4 join in the arbitral proceeding focused on herein*," they believed that "*Respondents 3 and 4 should be dismissed 'prima facie' from the arbitral proceeding in question.*"

19. Respondents 3 and 4 argued for their immediate dismissal from this arbitral proceeding, claiming that they "*were joined in this arbitral proceeding even though they are <u>not</u> signatories of the arbitration agreement on which it is based*,"[3] and stated that they "*do not acknowledge the jurisdiction of the Arbitration Tribunal, and reserve their right to oppose any rulings rendered by it.*"

20. The Arbitration Tribunal, after the hearing on jurisdiction held on December 15 and 16, 2009, in Rio de Janeiro, and as Procedural Order ["OP"] No. 2 allowed it to do, ruled in its Partial Award for the standing to be sued of Respondents 3 and 4, thus bifurcating this arbitral proceeding.

21. As regards Respondent 4, the Arbitration Tribunal concluded that as the latter was a signatory of Addendum No. SL/VR/005 ["Addendum 5"] to the Agreement, "*there was a valid Arbitration Agreement, executed by the signatories of the Agreement and its Addenda, to resolve by way of arbitration all controversies arising between the parties to the contractual relationship.*"[4] The Arbitration Tribunal thus concluded that it had jurisdiction to rule on the controversies between Claimant and Respondent 4.

22. Now, as far as the binding of Respondent 3 was concerned, the Tribunal analyzed whether the latter would have been bound by the Arbitration Agreement by tacit consent, and concluded that Respondent 3 "*at no time stated either expressly or tacitly its will to submit to the Arbitration Agreement*,"[5] and subsequently analyzed if lifting the corporate veil would be admissible,[6] whether because of the alleged undercapitalization of VLog or because of possible fraud against article 181 of the Brazilian Aviation Code [the "CBA"].

23. The Arbitration Tribunal, after analyzing the facts, concluded that Respondent 3's investment in Respondent 1 could not be qualified as shammed,[7] and that on the other hand, in light of the preliminary ruling by the Judge of the 5th Federal Division of Brasilia, it could not be regarded as proven that Respondent 3 had created the corporate structure with the intention of circumventing the application of CBA article 181 or of committing fraud against the Brazilian legal system.[8] Consequently, the Arbitration Tribunal ruled that Respondent 3 did not engage in a shammed transaction, such as might justify lifting the corporate veil.

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[2] Esc. [written communication] R129.
[3] Paragraph 36 of the Terms of Reference.
[4] Page 20 of the Partial Award.
[5] Page 31 of the Partial Award.
[6] Page 31 of the Partial Award.
[7] Page 34 of the Partial Award.
[8] Page 36 of the Partial Award.

24. With these legal grounds, the Arbitration Tribunal issued the following ruling: [9]

"1. To declare that it has jurisdiction to rule on motions entered by Claimant in this arbitration relative to Respondent 4.

2. To declare that it lacks jurisdiction to rule on motions entered by Claimant in this arbitration relative to Respondent 3.

3. To postpone any other ruling, including a ruling on costs, until the final award."

3. INJUNCTIONS

25. On October 17, 2008, the Arbitration Tribunal issued OP [Procedural Order] No. 3, in which it dictated in Claimant's favor, on a highly injunctive basis, provisional remedies pursuant to article 23 of the ICC Rules:

"To order Respondents 1, 2 and 3 to refrain from engaging in any and all action prone to expropriate, adjudicate, transfer or dispose of the Gol Shares, except pursuant to the Arbitration Tribunal's prior and express authorization.

To order Claimant deliver to the Arbitration Tribunal, as a pledge, within one month from the date these provisional remedies are granted, a banking guarantee upon first demand in the amount of US$ 2,000,000, worded in a manner acceptable to the Tribunal, and guaranteeing against the risks of possible damage to Respondents."

26. Claimant provided said banking guarantee on December 3, 2008, and its wording was challenged by Respondents. [10] Such challenge caused the Tribunal to order Claimant provide a new banking guarantee on such terms as defined by the Arbitration Tribunal.

27. As this arbitration is finalized, and Respondents have not alleged, much less proven, any damage as a result of the injunctions granted hereunder, the Arbitration Tribunal shall rule to return the banking guarantees to Claimant, at its request.

4. PROCEDURAL ORDER No. 5

28. As was stated in the Partial Award, [11] the Arbitration Tribunal issued, on April 24, 2009, an OP on the development of the arbitral proceeding, [12] which also modified OP No. 3 regarding the injunctions.

29. This OP was sent to the parties in draft form on April 16, 2009, and was discussed during a

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[9] Page 38 of the Partial Award.

[10] Esc. R1217.

[11] Page 38 of the Partial Award.

[12] OP No. 5.

conference call on April 24, 2009.

30. In OP No. 5, the Arbitration Tribunal ruled that in order to answer, in the Final Award, the questions contained in the Terms of Reference, the parties should submit new written communications of allegations on merit, and Claimant should clarify in a concrete fashion:

"(i) whether it agrees or disagrees with the balance sheet attached as Appendix III to the Agreement and prepared by PwC [the "Reviewed Balance Sheet"], *and in case it disagrees, to identify and justify each caption and amount with regard to which it disagrees, observing – such as required in section 5.1.1 – "only and solely the same items, the same methodology referred to in section 5.1, having as a base-date the day prior to the event dealt with in Section 9.2;" (ii) the factual and legal grounds whereby it believes that Respondents 2 and 4 could be liable for a possible price adjustment."*

31. Respondents should, in a concrete fashion, contest:

"(i) Claimant's allegations regarding any disagreement to the balance sheet attached as Appendix III to the Agreement, observing – such as required in section 5.1.1 – "only and solely the same items, the same methodology referred to in section 5.1, having as a base-date the day prior to the event dealt with in Section 9.2;" (ii) the liability pertaining to Respondent 4's liability in light of a possible price adjustment."

32. In the same OP No. 5, the Arbitration Tribunal invited the parties to enter or reiterate a motion for production of evidence in the counterparty's possession.

33. On the other hand, the Arbitration Tribunal, with the parties' agreement, modified item 1 of OP No. 3, which thereafter was on record as follows:

"To order Respondents 1 and 2 to refrain from engaging in any and all act prone to expropriate, adjudicate, transfer or dispose of the GoI Shares, except pursuant to a prior and express authorization from the Arbitration Tribunal or from the Court responsible for Respondent 1's Judicial Reorganization case."

5. OBJECTIONS TO PROCEDURAL ORDER No. 5

34. Still in OP No. 5, the parties were granted four weeks time in which to "*submit allegations regarding other claims.*" [13]

35. So, and within the time period granted by the Arbitration Tribunal, Respondents 1 and 2 submitted a written communication titled "*Objection to Procedural Order No. 5.*" [14]

36. After the time period Claimant was granted to contest it, the latter submitted a communication

[13] Page 15, paragraph 47, OP N°5.

[14] Esc. R1228

titled "*Claimant's Response to the Objection of Respondents 1 and 2 to Procedural Order No. 5*."[15]

37. Wherefore, the Arbitration Tribunal gave an answer to Respondents' allegations, and provided the necessary clarifications contained in communication A 32.

38. However, on June 8, 2009, Respondents 1 and 2 submitted communication R1232, titled "*New material facts: a necessary modification of Procedural Order No. 5*," in which they informed the Tribunal that "*all prime* [audit] *firms queried by the respondents declined the invitation, and would not agree to do the work requested, consequently rendering the evidentiary phase itself unviable in such manner as allowed by the Arbitration Tribunal*." Respondents 1 and 2 concluded by moving that the Arbitration Tribunal appoint an audit firm to review the balance sheet submitted by PwC.

39. Respondent 4,[16] in turn, informed the Arbitration Tribunal that it agreed to the motion submitted by Respondents 1 and 2.

40. Claimant, in its communication C 34, moved that the Arbitration Tribunal uphold OP No. 3 and OP No. 5.

41. The Arbitration Tribunal then ruled[17] to uphold OP No. 5, clarifying that the pool of professionals capable of performing the accounting examination requested by the Arbitration Tribunal was very large, and was not circumscribed to top audit firms.

42. On June 22, 2009, Respondents 1 and 2 submitted an objection to communication A 34[18] regarding the non-use of top audit firms, and once again moved to revise OP No. 5.

43. The Arbitration Tribunal ruled[19] to uphold the wording of OP No. 5.

6. MOTION TO DISCLOSE DOCUMENTS

44. Claimant submitted its new motion to disclose documents in Respondents' possession on May 8, 2009.[20]

45. The Arbitration Tribunal granted, in its communication A 29, a time period for Respondents to attach the documents or to oppose with grounds the motion to disclose such documents.

46. Respondents opposed,[21] with one exception, the disclosure of documents.

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[15] Esc. C30.
[16] Esc. R419.
[17] Esc. A34.
[18] Esc. R234.
[19] Esc. A 36.
[20] Esc. C 27.
[21] Esc. R1229 and R416

47. Wherefore, the Arbitration Tribunal ruled on the terms of communication A 31, and ordered Respondents submit certain documents.

48. On June 22, 2009, Respondents 1 and 2 submitted their motion to disclose documents in Claimant's possession. [22]

49. Claimant responded to Respondents' motion, in communication A 35, on June 25, 2009, [23] reserving the right to respond to Respondents' motion to disclose "other documents" by the end of the time period granted by the Arbitration Tribunal (July 1, 2009), and refused to disclose all accounting documents they had moved to disclose, except for one such item.

50. On July 1, 2009, Claimant refused to submit documents qualified by Respondents as "*other documents*."

51. On July 2, 2009, Respondents 1 and 2 submitted a communication titled "Reply to Claimant's Motion to disclose Documents," [24] in which they reiterated that Claimant should be required to disclose certain documents.

52. Given such communications from the parties, the Arbitration Tribunal set up a conference call with the parties on July 8, 2009, with the goal of (i) discussing the motion to disclose documents entered by Respondents 1 and 2, and (ii) setting up a hearing.

53. Minutes of said conference call were drawn up and signed by the Administrative Secretary.

54. On July 15, 2009, Respondents 1 and 2 informed the Arbitration Tribunal that Claimant had not yet complied with the Arbitration Tribunal's order of July 8th to disclose documents in its possession, and moved further for a copy of said documents.

55. Consequently, the Arbitration Tribunal held a conference call on July 22, 2009 and issued communication A 43.

7. MODIFICATION OF INJUNCTIONS

56. The Arbitration Tribunal, after briefing by the parties, [25] issued OP No. 6, and ruled:

> *"I. To order Respondents 1 and 2 to refrain from performing directly or indirectly any and all action prone to expropriate, adjudicate, transfer or dispose of the Gol Shares, except pursuant to a prior and express authorization from the Arbitration Tribunal or from the Court responsible for Respondent 1's judicial reorganization case.*
>
> *2. To keep in effect the banking guarantee provided by Claimant.*

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[22] Esc. R1235.

[23] Esc. C 35.

[24] Esc. R1236.

[25] Escs. C 28, C 31, R1231, R418, C 32, R1233, C 34, R420, C 37, R1238.

3. To reject the other motions submitted by Claimant."

8. WRITTEN COMMUNICATIONS SUBMITTED IN REGARD TO MERIT

57. Claimant submitted, on June 8, 2009,[26] its written communication of allegations as to merit, having attached thereto Mr. Silvio Simonaggio's expert report ["First Simonaggio Expert Report"].

58. Respondents 1 and 2 submitted, on August 10, 2009,[27] their written communication as to merit, having attached thereto Mr. Milton Rodrigues de Sá's expert report ["First Rodrigues de Sá Expert Report"].

59. Respondent 4 also submitted its written communication as to merit on August 10, 2009.[28]

9. WITNESS EVIDENCE

60. Claimant, in its C 33 brief, indicated as witnesses to be heard at the hearing [the "Evidentiary Hearing"], Messrs.:

- Silvio Simonaggio, accounting expert

- Henrique Constantino

- Márcio Nobre

- Marco Antônio Provetti

- Lup Wai Ohira

- Lap Chan

- Santiago Born

61. Of the witnesses subpoenaed by Claimant, four were its own witnesses and three were the counterparty's witnesses, for whom Claimant moved that the Arbitration Tribunal order their appearance.

62. Claimant, in its C 40 brief, moved that the Arbitration Tribunal include in its witness list Messrs.:

- Marcelo Bento Ribeiro

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[26] Esc. C33.

[27] Esc. R1244.

[28] Esc. R422.

- Sérgio Rego

63. Said additional list would serve to "*contend against such facts as Respondents brought forth in briefs R1244 and R422.*"

64. The Arbitration Tribunal accepted to include in its list the witnesses indicated in paragraph 62 above. [29]

65. As for Respondents 1 and 2, in their R1244 brief, they subpoenaed as witnesses Messrs.:

- Milton Rodrigues de Sá, accounting expert;

- Nelson Franco de Azevedo Junior;

- Roula Zaarour;

- Ana Luiza Derenusson [30]

- Humberto Tognelli

- Flávio Tamura

- Edward Leek

- Josh Connor

- Denise Afonso

- Fabio de Assis da Silva

- Lap Wai Chan

66. Respondent 4, in its R422 brief, informed the Arbitration Tribunal that it intended to hear the witnesses:

- Constantino de Oliveira Júnior; and

- Lap Chan

10. EVIDENTIARY HEARING

67. The Arbitration Tribunal set up two conference calls with the parties in order to discuss, among other subjects, the development of the Evidentiary Hearing. [31]

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[29] OP No. 7, paragraph 19.

[30] Ex. R1253.

68. Thereupon, the Arbitration Tribunal issued Procedural Order No. 7, which accepted the agreements reached for the Evidentiary Hearing to be held. The latter was effectively held at Fundação Armando Álvares Penteado [Armando Álvares Penteado Foundation], located at Rua Alagoas 903, Pacaembu District, São Paulo, Brazil, on September 9, 10 and 11, 2009.

69. At said Evidentiary Hearing, the following expert witnesses were heard:

- Silvio Simonaggio, designated by Claimant; and

- Milton Rodrigues de Sá, designated by Claimants 1 and 2.

70. As far as witnesses are concerned, the following individuals were heard:

- Henrique Constantino

- Lap Chan

- Lup Wai Ohira

- Márcio Nobre

- Constantino de Oliveira Júnior

- Roula Zaarour

- Flávio Tamura

- Edward Leek

71. Respondents 1 and 2 indicated during the course of the Evidentiary Hearing that they would waive witnesses Fábio de Assis da Silva, Nelson Franco de Azevedo, Denise Afonso and Josh Connor. [32]

72. Claimant, in turn, stated that it would waive the remainder of the witnesses. [33]

11. HUMBERTO TOGNELLI'S TESTIMONY

73. Witness Humberto Tognelli, subpoenaed by Respondents 1 and 2, did not appear at the Evidentiary Hearing, advised the Arbitration Tribunal of such fact pursuant to a communication on September 3, 2009, and justified his absence by invoking professional secrecy.

74. At the Evidentiary Hearing, the Arbitration Tribunal requested that both parties prepare, within ten days, two lists of witness questions.

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[31] Minutes of conference call on July 8, 2009 and OP No. 7.
[32] Minutes of Evidentiary Hearing, paragraphs 78 and 80.
[33] Minutes of Evidentiary Hearing, paragraphs 64 and 81.

75. The parties submitted their lists of questions,[34] and on September 29, 2009. the Tribunal sent a consolidated list of questions to witness Humberto Tognelli.

76. The witness submitted his answers to the Arbitration Tribunal on October 30, 2009.

77. On November 4, 2009, Respondents 1 and 2 submitted to the Arbitration Tribunal a communication[35] titled "Looking into a Possible False Testimony," alleging there was a contradiction between Humberto Tognelli's testimony and Márcio Nobre's testimony (given at the Evidentiary Hearing).

78. The alleged contradiction had to do with Mr. Márcio Nobre's assertion that he had not attended any type of meeting with KMPG staff during VRG's acquisition phase.

79. After a procedural measure was granted Claimant, the Arbitration Court notified both witnesses, on November 17, 2009, to provide their clarifications on the alleged contradiction.

80. Witness Humberto Tognelli[36] ratified the terms of his testimony, and witness Márcio Nobre[37] provided the necessary clarifications.

81. Respondents 1 and 2 submitted a communication titled "Breach of Communication A 46 by Claimant's Expert Witness and Irregularities in the Written Statement submitted by Mr. Márcio Nobre."[38]

82. After a procedural measure[39] granted Claimant[40] and Respondent 4,[41] the Arbitration Tribunal informed the parties that it was taking note of the parties' allegations, and ruled to deny with grounds Respondents' motion to subpoena two new witnesses; it also denied Respondents' motion for a recross of witness Márcio Nobre.

83. As regards the motion to disregard Márcio Nobre's testimony, the Arbitration Tribunal ruled[42] that "*in its final award it shall make a ruling on disregarding (fully or in part) Mr. Márcio Nobre's testimony, and in the event it does not disregard such testimony, it shall evaluate in proper fashion the circumstances alleged by Respondents 1, 2 and 4, and the incidents raised for such purpose*."

84. The Arbitration Tribunal, after pondering on both testimonies, on the clarifications provided by the witnesses, and on both briefs from counsel, rules to give greater credibility to Mr. Humberto Tognelli's written testimony, and therefore to disregard in part witness Márcio Nobre's testimony, with respect to those points in his testimony where a direct contradiction is found; such contradictions are circumscribed solely to facts in connection with KPMG's participation in the

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[34] Esc. C 46 and R1254.
[35] Esc. R1257.
[36] Communication dated November 23, 2009.
[37] Communication dated November 24, 2009.
[38] Esc. R1259.
[39] Esc. A 51.
[40] Esc. C 48.
[41] Esc. R430.
[42] A 52, paragraph 26.

process prior to VRG's sale.

12. ADDITIONAL WORK REQUESTED OF THE EXPERT WITNESSES

85. At the Evidentiary Hearing, the Arbitration Tribunal asked the two expert witnesses to simultaneously provide the following:

> *"(i) first, a presentation on the arguments in favor and against their position as regards each difference between the two of them, placing more emphasis on differences greater than one million* Reais*, and looking to place less emphasis as such differences get smaller;*
>
> *(ii) in liabilities, at least as regards large sums, to say whether they are paid or not, and in the latter case why;*
>
> *(iii) as regards information on where debts and assets originate in time, the Tribunal believes it appears to be costly and a major effort to accurately describe to the last Real where expenses originate in time; so, if such information can be provided, that will be helpful, but if obtaining such information is complicated, the Tribunal reserves the right, if necessary, to make a ruling or procedural order to obtain such information."*

86. Both expert witnesses submitted their supplemental expert reports on November 17, 2009 ["Second Simonaggio Expert Report" and "Second Rodrigues de Sá Expert Report"].

13. ALLEGED IRREGULARITIES IN THE SECOND SIMONAGGIO EXPERT REPORT

87. As previously mentioned, Respondents 1 and 2 submitted to the Arbitration Tribunal a communication [43] titled "Breach of Communication A 46 by [the Expert Witness of] Claimant and Irregularities in the Written Statement submitted by Mr. Márcio Nobre."

88. In said communication Respondents 1 and 2 alleged that Claimant's expert witness had expressed in his supplemental opinion (item "Deposit in Guarantee – Visa") the opportunity he had to conduct "interviews of VRG employees." Thus, he presumably had access to information that was not made available to the Expert Witness of Respondents 1 and 2.

89. Based on such grounds, they moved "*to disregard the* [Second Simonaggio Expert Report] *submitted by Mr. Silvio Simonaggio with respect to the aforementioned chapter* [Deposit in Guarantee – Visa], *subject to the due process of law being violated*."

90. Respondent 4 agreed with the allegations of Respondents 1 and 2, [44] and moved to disregard the conclusions of Claimant's Expert Witness, particularly as regards the item "Deposit in Guarantee –

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[43] Esc. R1259.

[44] Esc. R430.

Visa."

91. Claimant alleged[45] that the information provided by VRG's management had already been provided during the first expert examination, and been amply debated at the evidentiary hearing.

92. Furthermore, Claimant said that the Expert Witness of Respondents 1 and 2 made no objection to the sufficiency of information during the 57 days lapsed between the Tribunal's Order on September 21, 2009 and the delivery of his opinion on November 17th of the same year.

93. The Arbitration Tribunal took note of the parties' allegations, and informed the parties that it would take them into account in this award.[46]

14. CLOSING OF THE EVIDENTIARY PHASE

94. On December 3, 2009, the Arbitration Tribunal proceeded, under the terms and for the purposes of article 22(1) of the ICC Rules, to close the evidentiary phase within the scope of this arbitral proceeding,[47] safeguarding the submission of final written allegations.

15. FINAL WRITTEN ALLEGATIONS

95. On January 7, 2010, both parties submitted their final written allegations,[48] respecting the time period set by the Arbitration Tribunal in communication A 52.

16. BRIEFS ON THE ARBITRATION CHARGES INCURRED

96. In view of communication A 52 from the Arbitration Tribunal, the parties submitted a list itemizing the costs and expenses incurred during this arbitral proceeding [hereinafter "Arbitration Charges"].[49]

17. PRINCIPLES OF THE ADVERSARY SYSTEM AND EQUITY

97. At the end of both hearings (on jurisdiction and on evidence), the Arbitration Tribunal asked the parties whether at any time during the arbitral proceeding the principles of the adversary system and the parties' equity were violated. Both parties answered no, and confirmed the Arbitration Tribunal's respect for such principles as have served as a beacon for the proceeding.[50]

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[45] Esc. C48.
[46] Esc. A 52, paragraph 21.
[47] Esc. A 52, paragraph 27.
[48] Esc. C 50 and R1261, p. 117, and R432, p. 105.
[49] Esc. C 51, R1261, p. 117, and R432, p. 105.
[50] Minutes of the Evidentiary Hearing, paragraph 89.

18. TERM FOR ISSUANCE OF THE AWARD

98. The parties expressly agreed that the award would be issued within the term, in the manner and with the contents provided under articles 24 and 27 of the ICC Rules, and therefore waived the term provided for in section 14.8 of the Agreement.[51] Thus, pursuant to article 24 of the ICC Rules, the Arbitration Tribunal has an initial term of six months to issue a final award after the Secretariat notifies the Arbitration Tribunal that the Court has approved the Terms of Reference. Notification was given on September 15, 2008, and therefore the initial term for issuing a final award would expire on March 15, 2009.

99. Article 24(2) of the ICC Rules allows the ICC Court to extend the term for the Arbitration Tribunal to issue a final award, and it did so on March 12, 2009, June 18, 2009, November 12, 2009, January 14, 2010, March 11, 2010, May 20, 2010, and July 8, 2010, granting the Arbitration Tribunal additional time until July 30, 2009, July 31, 2009, December 31, 2009, March 31, 2010, May 31, 2010, July 31, 2010, and September 30, 2010, respectively, for a final award to be issued.

100. Wherefore, this final report is issued within said term.

III. FACTS

101. Varig (Viação Aérea Rio Grandense S/A) [hereinafter "Old Varig"] incorporated on May 7, 1927, is Brazil's oldest airline and one of the oldest in the world,[52] providing regular air transportation services for both passengers and cargo in the domestic and international markets. On June 17, 2005, Old Varig, finding itself in a financial bind (with a negative net worth of R$ 6,838 billion),[53] applied in Rio de Janeiro for protection under Law 11,101, of February 9, 2005, which regulates the judicial and extrajudicial reorganization and bankruptcy of businesspersons and business companies [the "LRJ" Act].

102. MatlinPatterson, in turn, is an American investment fund specializing in "distress investing,"[54] which is engaged in complex reorganization and company control transactions,[55] and which created a very complex corporate structure to make three large financial transactions in Brazil in connection with Old Varig:

103. In late 2005, it acquired the control – albeit indirect – of VLog, an Old Varig subsidiary engaged in the business of air cargo transportation (1);

104. In March 2007, through a controlled company named VRG, it acquired the Varig Business Unit

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[51] Per AdM paragraph 53, e-mail from the Chairman of the Arbitration Tribunal to the parties, dated August 13, 2008, and letters from Respondents 1 and 2 and from Respondents 3 and 4, dated August 18, 2008.

[52] Varig, Rio Sul and Nordeste Judicial Reorganization Plan, p. 3.

[53] Varig, Rio Sul and Nordeste Judicial Reorganization Plan, p. 4.

[54] Esc. R432, p. 9, and transcripts of Mr. Lap Chan's testimony, p. 154: "The fund has its own criteria, and its criteria is simply the distress business. Its focus is on investing in a company under reorganization or purchasing assets that are basically having financial problems. So this is the fund's focus."

[55] Ex. CD 12, p. 12.

["UPV"] (2) (which resulted from Old Varig's judicial reorganization proceeding), engaged in the business of air passenger transportation, in order thereby to gain control both of the air passenger and air cargo transportation businesses.

105. However, and only three months after VRG's purchase of the passenger business,[56] MatlinPatterson decided to sell the VRG company, which owned the passenger business, to the Gol Group; it should be mentioned that such Agreement is the subject-matter of this arbitration (3).

106. Later, i.e., in March 2009, because of numerous problems felt in the air transportation market, and as a consequence of having posted almost R$ 400 million in operating liabilities for the year, VLog submitted an application for judicial reorganization under the LRJ Act.

107. Virtually soon afterwards, only four months after the application for judicial reorganization was filed, the MatlinPatterson Fund sold all of VLog's shares to Ms. Lap Wai Ohira (sister of Mr. Lap Chan, an executive officer of the MatlinPatterson Fund) (4).

108. A corporate change likewise occurred in the Purchaser's group (5).

1. VLOG'S INDIRECT PURCHASE BY THE MATLINPATTERSON FUND

109. As early as during Old Varig's judicial reorganization, in 2005, the decision was made to sell VLog, a company engaged in air cargo transportation, and VEM, a company engaged in maintenance, both Old Varig subsidiaries, to a consortium named Aero-LB (with the participation of the Portuguese airline TAP – Transportadora Aérea Portuguesa), for the amount of US$ 62 million.

110. Such sale was subject to the condition precedent of Old Varig not receiving, by the end of 2005, a more advantageous offer for the sale of its two subsidiaries, in which case the Aero-LB consortium would receive a premium equivalent to 20% of the capital initially invested in them.

111. However, the MatlinPatterson Fund offered US$ 48.2 million[57] for the purchase of VLog, an offer that was more advantageous than Aero-LB's, and was therefore accepted. Thus, the MatlinPatterson Fund acquired, indirectly and in a manner better explained below, the control of VLog, an air cargo transportation business, and the Aero-LB consortium was left with only the control of VEM, a maintenance business.[58]

A. Structure of the Transaction

112. As is the case with many other legal systems,[59] in Brazil there is a CBA [Brazilian Aviation Code] in effect, which caps foreign capital in Brazilian airlines at 20% of the voting capital:

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[56] Initially named Aéreo Transportes Aéreos S/A.

[57] Ex. CD 131.

[58] In that regard, see transcripts of Mr. Lap Chan's testimony, p. 157.

[59] Just as an example, Canada and the U.S.A. cap foreign capital holdings at 25% of the voting capital.

"Article 181 – A concession [franchise] shall only be given to a Brazilian legal entity having:

I – its head office in Brazil;

II – at least four fifths (4/5) of its voting capital belonging to Brazilians, such limitation to prevail in any corporate capital increases;

III – its management entrusted solely to Brazilians."

113. The MatlinPatterson Fund created the following corporate structure for the purchase of VLog and later of UPV, which formally avoided the application of said Article:

114. As a first step, the MatlinPatterson Fund organized a company headquartered in the USA, Volo Logistics (Respondent 3, already dismissed from this arbitration by the Partial Award). That company created, in turn, jointly with Messrs. Marco Antônio Audi, Marcos Michel Haftel and Luís Eduardo Gallo (already collectively described as Brazilian Partners), the Volo DB company,[60] currently Respondent 2.

B. Control of the Volo DB Company

115. Each one of the Brazilian Partners invested in the Volo DB company only the amount of R$ 2,199,362, while Volo Logistics invested R$ 26,392,354 (about 11 times more than the Brazilian Partners). Thus, each one of the Brazilian Partners was the holder of 2,199,362 voting shares (a total of 80% of voting shares), while Volo Logistics was the holder of 1,649,522 voting shares (corresponding only to 20% of the total) and 8,247,610 preferred shares (corresponding to 100% of preferred stock).[61]

116. It should be underscored that the Brazilian Partners pledged the shares to JP Morgan Chase Bank N.A. on account of a loan taken by each one of the Brazilian Partners, in the amount of US$ 1,003.58, on January 26, 2006,[62] and which served to finance the disbursement for their holdings in Volo DB's capital stock. That loan was guaranteed for JP Morgan by Volo Logistics.[63]

117. Some instruments were also signed which imposed, albeit through Volo Logistics, control by the MatlinPatterson Fund in Volo DB:

- A call option agreement[64] signed between Volo Logistics and the Brazilian Partners[65] whereby Volo Logistics had, in case certain circumstances occurred,[66] a call option to purchase all shares

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[60] CD A3, Ex. 32, p. 1028.
[61] In that regard, see transcript of Mr. Lap Chan's testimony, pp. 162 and 163.
[62] CDA2, Ex. 22.
[63] In that regard, see transcripts of Mr. Lap Chan's testimony, p. 163.
[64] CDA2, Ex. 22.
[65] CDA2, Ex. 19.
[66] Section 1 of Ex. 19, CDA2.

belonging to the Brazilian Partners. In turn, the Brazilian Partners had, once certain circumstances occurred,[67] an irrevocable put option to sell all shares held by them in Volo DB to Volo Logistics or to whomever the latter might designate.

- A shareholders' agreement signed between the Brazilian Partners and Volo Logistics, as partners in Volo DB, whereby, among other things, the possibility was established for changing the equity interest held by Volo Logistics in Volo DB, should airline industry rules so allow.[68]

VLog's Purchase

118. In late 2005, Volo DB purchased all VLog shares from Old Varig for US$ 48.2 million.

Loan Agreements

119. Two years later, in 2006 and 2007, and so as to finance the UPV purchase transaction, Volo Logistics entered into a series of loan agreements in favor of VRG and VLog amounting to at least US$ 201 million.[69] In 2007, as a result of VRG's sale to the Gol Group, VLog assumed VRG's debt resulting from said loan agreements, and undertook to settle such debt.[70]

120. As a result of the non-payment of such loans, a series of lawsuits were initiated between Volo Logistics and Respondents 1 and 2, VLog and Volo DB, in both New York[71] and São Paulo[72] courts. On August 8, 2007, Volo Logistics filed a collection suit in São Paulo Civil Division Courts against VLog for an amount of over US$ 92 million, and moved to attach more than six million Gol shares owned by VLog.[73] As a result, in the first place, a motion was entered and granted to seize valuable assets existing in VLog's equity, which included the Gol shares.[74]

121. Later, on December 31, 2008, Volo DB, with Volo Logistics' consent, received and assumed from VLog all debts resulting from the loan agreements.[75]

2. UPV'S INDIRECT ACQUISITION BY THE MATLINPATTERSON FUND

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[67] Section 5 of Ex. 19, CDA2.
[68] Section 3.7.1 of the shareholders' agreement, Ex. 20, CDA2.
[69] CD 163, p. 13.
[70] CD 163 and CD 5 of the Motion for a Preliminary Order.
[71] CD 5 of the Motion for a Preliminary Order.
[72] CD 6 of the Motion for a Preliminary Order.
[73] CD 6 of the Motion for a Preliminary Order, p. 8.
[74] CD 8 of the Motion for a Preliminary Order.
[75] CD 163.

122. The Brazilian legal system allows a company under judicial reorganization to harbor within it a separate business unit that inherits a part of the old company's business. Thus, it was determined that the judicial reorganization would be carried through by creating a vehicle into which only a part of Old Varig's business would be transferred,[76] which pertained to Old Varig's regular domestic and international passenger transportation.

123. For this reason, UPV was created within Old Varig,[77] integrating into it the air passenger transportation business.

124. At this point, the MatlinPatterson Fund decided to take part in UPV's purchase using the corporate structure created for VLog's acquisition all but incorporating a new company named VRG, which would be the one to take part in the auction at which UPV would be sold off.

125. At the judicial auction that took place on July 20, 2005, UPV was effectively sold off to VRG[78] for the price of US$ 24,000,000.[79] And so it was that, albeit indirectly, UPV was eventually sold off to the MatlinPatterson Fund.

126. And thus, both air passenger transportation and air cargo transportation were joined together into the same group.

127. It should be mentioned that in the legal notice of judicial sale[80] [the "Legal Notice"] two conditions were established for the deal to materialize:

• That the successful bidder make:

"an investment in the VARIG Business Unit of an amount corresponding to seventy-five million U.S. dollars (US$ 75,000,000) within forty-eight (48) hours from the Auction Result Report. If by the end of the time period in question ANAC has not yet issued the proper authorizations allowing the bidder to take over the VARIG Business Unit, said amount shall be deposited, within the above time period, in an account available to the Court of the 8th Commercial Division of Rio de Janeiro, to be used toward the continuity of the VARIG Business Unit's operations while such authorizations have not been issued."

128. At this moment VRG has underway, against Old Varig, an action for settlement of accounts pertaining to the time period from the auction date to the UPV-awarding date in connection with certain particular items.[81] Such settlement of accounts will be better explained in paragraph 354

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[76] Section 1 of the Legal Notice of UPV's judicial sale better describes the object consisting of UPV, disposed in the manner and terms provided under article 60 sole § of Law 11,101/05: "a set of movable assets needed for the operation, comprising (i) the operational model of the business unit respectively organized to conduct VARIG's and Rio Sul's regular domestic and international air transport operations, including but not limited to VARIG's and Rio Sul's Certificate of Air Transport Authorization, and a listing of domestic and international air routes and domestic and international airport [slots] assigned to the VARIG and Rio Sul concessionaires [government franchisees] and in effect as of March 2006, but excluding "cheta hotrans" and slots belonging to Nordeste; (ii) the contracts in which the successful Bidder will be subrogated as a result of said transaction after the date the purchase at auction is officially ratified [...]."

[77] Per Legal Notice of Judicial Sale, Ex. 9 in Volume I of the Witness Book.

[78] At that point named Aéreo Transportes Aéreos S/A.

[79] Legal Notice of Old Varig's Judicial Sale, Ex. 9 in Volume I of the Witness Book.

[80] Ex. 9 in Volume I of the Witness Book.

[81] Section 5.3 of the Agreement pertains to that action for settlement of accounts.

below.

• That the National Civil Aviation Agency ["ANAC"] grant its Certificate of Airline Company Authorization ["CHETA"]. [82]

129. On December 15, 2006, almost six months after the auction, VRG received ANAC's CHETA and Air Transportation Concession [Franchise] Agreement, which on the one hand marked the end of the so-called UPV period (from the judicial auction date to the CHETA granting date), and consequently the takeover of Old Varig's passenger transportation business by the MatlinPatterson Fund.

3. VRG'S SALE TO THE GOL GROUP

130. Gol is an airline created by the Áurea Group (a Brazilian group engaged in roadway transportation), which started its operations in 2001, and had as its main goal to be a passenger transportation company.

131. Immediately after VRG obtained the CHETA, in December of 2006, negotiations were started with the MatlinPatterson Fund, in the person of Mr. Lap Chan, [83] and the Gol Group, in the person of Mr. Constantino de Oliveira Júnior, for the acquisition by such group of all VRG shares.

132. Those negotiations led to the signing, on March 28, 2007, by Respondents 1 and 2 and GTI (initial Claimant and a member company of the Gol Group), of the Agreement whereby VLog and Volo DB sold to GTI all VRG shares for the total price of US$ 275 million. Part of the stipulated price was paid in Brazilian currency and the balance in preferred shares issued by Gol, GTI's controlling party. [84]

133. The price of US$ 275 set by the parties included all the air passenger transportation business inherited by UPV, including VRG's operating capacity at São Paulo's Congonhas Airport, namely the number of "slots" (takeoff and landing times) held by the latter company. So much so that the parties signed an addendum to the Agreement whereby a loss of each one of the 124 "slots" operated by VRG at Congonhas would imply a deduction of US$ 2,241,935 from the agreed price. [85]

ANAC's Approval of VRG's Sale to the Gol Group

134. The transfer of shares under the Agreement was subject to the condition precedent that ANAC's prior approval be granted. [86] By contract, only on the day ANAC granted its prior authorization, pursuant to CBA articles 184 and 185, would GTI be responsible for the company's management.

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[82] Section 2.1.1 of the Legal Notice.

[83] Esc. R432, p. 12.

[84] Pursuant to section 4.2 of the Agreement.

[85] Addendum No. SL/VRG/2006, of March 28, 2006. Esc. R432, p. 27

[86] Section 9.2 of the Agreement.

Price Adjustment Mechanism Established by the Agreement

135. In Section 5 of the Agreement the parties agreed to a complex price adjustment mechanism.[87]

136. Attached to the Agreement itself was Appendix III with a balance sheet that according to said Agreement had been "reviewed" by PricewaterhouseCoopers ["PwC"], which ascertained a working capital, as of March 15, 2007, of R$ 40,750,774 [the "Initial Balance Sheet"]. The Agreement provided for the working capital to be recalculated on the day prior to the date ANAC granted its prior approval for the transaction. Such date turned out to be April 8, 2007, only three weeks after the Agreement was signed [hereinafter the "Consummation Date"], and on such date a new balance sheet should be drawn up [the "Reviewed Balance Sheet"] to recalculate the working capital as of the Consummation Date.[88]

137. In accordance with what the Agreement provided for, on November 12, 2007 PwC submitted a Reviewed Balance as of the Consummation Date,[89] and which ascertained a total working [capital] for VRG of R$ 35,380,544. Such balance sheet was not audited, as will be better analyzed in paragraphs 189 *et seq.* below. Claimant, not having agreed to the Reviewed Balance Sheet submitted by PwC, retained the services of Ernst & Young ["E&Y"] to have the PwC Reviewed Balance Sheet analyzed.

138. And so, on December 4, 2007, E&Y submitted a report called independent auditors' assurance report, in which it showed its disagreement regarding the balance sheets previously submitted by PwC. In the opinion of E&Y, VRG's working capital, as of April 8, 2007, was negative by R$ (123,149,597).[90]

139. The two audit firms were unable to come to an agreement on a third audit firm to be appointed under Section 5.1.3.1 of the Agreement, which is why this dispute has arisen.

4. CHANGES THE SELLERS' CORPORATE GROUP UNDERWENT AFTER VRG'S SALE

140. The Sellers' corporate group, controlled by the MatlinPatterson Fund, and better described in paragraph 113 above, underwent various corporate changes after the VRG company was sold, which must now be addressed.

Volo DB

141. As regards Volo DB, before VRG's sale it was held 80% by the Brazilian Partners and 20% by Volo Logistics. As a result of the Brazilian Partners' ouster, Respondent 3, which in turn is fully

[87] Section 5 of the Agreement.

[88] Section 5.1.1 of the Agreement.

[89] Ex. 50 of CD A5.

[90] Parentheses around figures means they have a negative value.

controlled by the MatlinPatterson Fund, took over the company's management.

142. Such ouster resulted from a long-drawn and complicated dispute between the Brazilian Partners and the MatlinPatterson Fund, which in February 2008 led to the Court of the 17th Civil Division of the São Paulo Judicial District ordering the company partially dissolved and the Brazilian Partners ousted due to charges of "reckless management" leveled against them.[91]

VLog's Judicial Reorganization

143. In March 2009 VLog, still owned by Respondent 2, by reason of the harsh economic problems felt by the company, filed an application for protection under the LRJ Act, in which it acknowledged having R$ 370 million in operating liabilities.

VLog's Sale to Mr. Lap Chan's Sister

144. Just four months after the application for judicial reorganization was filed, in July 2009 Ms. Lup Wai Ohira, sister of Mr. Lap Chan, executive officer of the MatlinPatterson Fund, purchased from Volo DB (a company fully controlled by the MatlinPatterson Fund) all VLog shares for the token amount of US$ 100.[92] One should recall that historically VLog was Old Varig's subsidiary engaged in air cargo transportation, and that on the date of its sale to Ms. Lup Wai Ohira it was still engaged in such business.

145. Such sale was conditional upon ANAC's approval, and to this date the Arbitration Tribunal does not know whether such approval has been granted or not.

146. It was upon VLog's sale that the MatlinPatterson Fund lost control both of air passenger transportation, because it had already sold VRG to the Gol Group in December 2006, and of air cargo transportation, because of VLog's sale to Ms. Lup Wai Ohira, sister of the MatlinPatterson Fund's executive officer.

147. The current corporate structure is the following:

5. CHANGE IN THE GOL GROUP

148. It should also be mentioned that during this arbitration VRG was merged into GTI, a Gol Group company that acquired VRG's control, and initial Claimant in this arbitration. This gave rise to the curious event that Claimant and the company subject to sale and purchase coincide.

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[91] Ex. CD 15 of the Motion for Preliminary Order.

[92] Esc. R427.

IV. THE PARTIES' MOTIONS

1. CLAIMANT

149. In the AdM,[93] Claimant moved on merit as follows:

> *"* [That] *the Arbitration Tribunal make the price adjustment as provided for in Section 5.1 of the Agreement, and order Respondents pay such amount as shall be ascertained by the Arbitration Tribunal (...);*
>
> *"As a subsidiary motion, should the Arbitration Tribunal rule that the price adjustment must be ascertained outside the scope of this arbitration, which it is not expected to do, petitioner moves the Arbitration Tribunal hold Respondents 3 and 4 liable to GTI for the credit resulting from the price adjustment, and appoint a third independent audit firm for the latter to make the price adjustment as provided for in Section 5.1 of the Agreement, resolving the divergences between the PwC balance sheet (a GTI credit of R$ 5,370,229.56) and the E&Y balance sheet (a GTI credit of R$ 163,900,270.04), and ascertaining the adjustment amount;*
>
> *Order Respondents pay all charges of this arbitration, including administrative expenses and expert-witness fees, as well as the arbitrators' fees, and such legal fees as are awarded the prevailing party in accordance with article 31 of the ICC Rules."*

150. In its closing arguments,[94] Claimant reiterated the motion to order Respondents pay such amount as shall be determined by the Arbitration Tribunal, which according to expert examination corresponds to R$ 114,450,597, plus statutory interest due, as provided under art. 406 of the Brazilian Civil Code [the "CC"] and pursuant to the Agreement, in addition to all costs incurred by Claimant in this arbitration.

151. They [sic] likewise move to hold Respondents 2 and 4 collectively and jointly liable with Respondent 1 for the price adjustment.[95]

2. RESPONDENTS 1 AND 2

152. In the AdM, Respondents 1 and 2 assert that Claimant failed to submit the Reviewed Balance Sheet in the manner and according to such criteria as agreed upon (Section 5.1.3.1 of the Agreement), which is to say, *"observing only and solely the same items, the same methodology";* it only went as far as to submit an "Independent Auditors' Assurance Report" furnished by E&Y, which does not contemplate any analysis or validation of the PwC Reviewed Balance Sheet, which is not backed by the Agreement, and which does not observe the criteria elected by the parties; for this reason [the Reviewed Balance Sheet] *drawn up PwC, which is unopposed by Respondents 1 and 2, shall prevail*

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[93] Paragraph 29 of the Terms of Reference.

[94] Esc. C 50, p. 66.

[95] Esc. C 50, p. 66.

for price adjustment purposes."

153. In their closing arguments,[96] Respondents 1 and 2 reiterate that the price adjustment was already made even before the commencement of this arbitral proceeding, and that they hold a credit of R$ 35,380,544 against Claimant, so that the Arbitration Tribunal must:

- acknowledge Claimant's having no right of action or, further,

- acknowledge such credit in favor of Respondents 1 and 2.

154. As a subsidiary motion, Respondents 1 and 2 claim that if the Arbitration Tribunal finds that the price adjustment should not be defined by the PwC Reviewed Balance Sheet, then it should take into consideration the technical analysis performed during the course of this arbitration, with Respondents 1 and 2 being creditors to the amount of R$ 36,298,593.[97]

155. Also as a subsidiary motion, and if the Tribunal admits the case for balance sheet changes, and accepts albeit in part such "superseding facts" as alleged by Claimant, Respondents 1 and 2 point out that this will imply amendment to contractual provisions, wherefore a superseding fact attributable to the financial position as of April 8, 2007 must necessarily take into consideration the accrual basis *[competencia temporal]* of the financial position as of March 15, 2007, subject to creating an economic and financial imbalance upon comparing amounts and values of a different nature. In this case, the working capital amount to be restituted in favor of Respondents 1 and 2 is R$ 19,975,048.85.[98]

156. Respondents 1 and 2 move further[99] to order Claimant pay Arbitration Charges and the penalties arising from bad-faith litigation, taking into account Claimant's payment of such legal fees as awarded the prevailing party, and taking into account Claimant's distortion of facts and its attempt to obstruct an investigation into material truth.

3. RESPONDENT 4

157. In the Terms of Reference, Respondent 4 claimed, summing up, to believe[100] *"it was joined in this arbitral proceeding despite the fact that [it was] not [a signatory] to the arbitration agreement on which it is based,"* and said "*it does not recognize the Arbitration Tribunal's jurisdiction and reserves the right to oppose any rulings issued by it, and the signing of the Terms of Reference*[101] *or any action performed in connection with the arbitral proceeding in question does not imply a waiver of such right."*

158. And it adds[102] that *"the* prima facie *lack of standing of Respondents* [...] *4 to appear in the arbitral*

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[96] Esc. R1261, p. 122.
[97] Esc. R1261, p. 122.
[98] Esc. R1261, p. 123.
[99] Esc. R1261, p. 118.
[100] Paragraph 36 of the Terms of Reference.
[101] Respondents ultimately decided not to sign the Terms of Reference.

proceeding in reference [must] *be acknowledged," reiterating further "that* [it is] *not* [a] *party to the agreement containing the arbitration clause, and therefore the arbitration tribunal has no jurisdiction over Respondents 3 and 4, and Respondents 3 and 4 do not agree to having the issue of arbitral jurisdiction be decided by the arbitrators."*

159. Finally, Respondent 4 argued [103] that is should "*be immediately dismissed from this arbitration proceeding,"* and further, reasserted that despite its briefing, it "*in no way waives* [...], *and hereby expressly reserve* [s] *the right to apply to the courts for their examination of the issue of the Arbitration Tribunal's jurisdiction in any future legal proceeding* [...]."

160. In closing arguments, [104] Respondent 4 says it expects this Tribunal to hold it not liable for the price adjustment, and to dismiss Claimant's claim. It states further that it expects the Tribunal to acknowledge that Claimant has no right to any adjustment favorable to the latter under the Agreement. [105]

161. As a result of Claimant's claim being dismissed, Respondent 4 moves to order Claimant pay all expenses borne by Respondent 4, plus the arbitrators' fees, legal fees, and a fine for bad-faith litigation.

162. Respondent 4 focuses its defense on issues relating to the Arbitration Tribunal's jurisdiction, and submits a defense on merit which coincides with that of Respondents 1 and 2. Wherefore, upon referring to the defense of Respondents 1 and 2, the Tribunal shall regard such defense as extending to Respondent 4, except whenever it refers expressly to Respondent 4's position.

V. LEGAL GROUNDS

163. After a brief analysis of the facts, the Arbitration Tribunal must perform a legal analysis, which shall be structured according to the questions [106] contained in Procedural Order No. 2 and in Procedural Order No. 5.

164. Accordingly, the Tribunal shall answer the following questions:

Question No. 1 :

Whether the price adjustment provided for in Section 5.1 of the Agreement has already been determined or, otherwise, is yet to be determined;

Question No. 2 :

If the answer to question # 1 is that the price adjustment has already been determined, the question is asked by whom, and what is the adjustment amount resulting therefrom?

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[102] Esc. R3-47.
[103] Esc. R3-410.
[104] Esc. R432.
[105] Esc. R432, p. 105.
[106] Article 18 of the ICC Rules.

Question No. 3 :

If the answer to question # 1 is that the price adjustment is yet to be determined, the question asked is who shall make such adjustment: a third party designated by the Arbitration Tribunal or the Arbitration Tribunal itself?

Question No. 4 :

If the answer to question # 3 is that the Arbitration Tribunal shall be the one to determine the price adjustment, what is the price adjustment amount?

Question No. 5 :

In case the Arbitration Tribunal determines the price adjustment, how shall the accrual of interest on the price adjustment amount be determined?

Question No. 6 :

To what extent are Respondents 2 and 4 liable for Respondent 1's obligations?

Question No. 7 :

How shall the Arbitration Tribunal set the Arbitration Charges?

165. The Arbitration Tribunal shall answer the questions in the aforementioned order.

V.1 WHETHER THE PRICE ADJUSTMENT PROVIDED FOR IN SECTION 5.1 OF THE AGREEMENT HAS ALREADY BEEN DETERMINED OR, OTHERWISE, IS YET TO BE DETERMINED.

166. The Tribunal shall begin by summarizing the parties' position, and then it shall rule.

1. CLAIMANT'S POSITION

167. Claimant alleges [107] that the price adjustment is yet to be determined. According to it, the procedure was started but was not completed because Claimant did not agree to the Reviewed Balance Sheet drawn up by PwC, and submitted a critical analysis prepared by E&Y.

168. However, according to Claimant, PwC refused to appoint a third audit firm which, pursuant to Section 5.1.3.1, should resolve any divergences between the two reports (PwC Reviewed Balance Sheet and E&Y's critical analysis), giving rise to this arbitral proceeding.

[107] Esc. C 10, p. 17.

2. POSITION OF RESPONDENTS 1 AND 2

169. Respondents 1 and 2 have a position which is opposite the one defended by Claimant; according to them, the price adjustment has already been determined.[108] To Respondents 1 and 2, the price adjustment was completed pursuant to the work done through the Reviewed Balance Sheet drawn up by PwC under Section 5.1.1 of the Agreement, which was not validly challenged by Claimant, since the technical report submitted by E&Y does not meet the requirements under Section 5.1.3.1 of the Agreement.

170. According to Respondents 1 and 2, they are Claimant's creditors for the amount of R$ 35,380,544, as attested by the PwC Reviewed Balance Sheet.

3. RULING BY THE ARBITRATION TRIBUNAL

171. To answer this question, the Arbitration Tribunal shall analyze the clause of the Agreement pertaining to the price adjustment mechanism, followed by a concrete analysis of each report submitted by the audit firms involved in the case, in order to be able to conclude whether the price adjustment has been determined or not.

172. Section 5 of the Agreement is named "Event of Acquisition Price Adjustment." Its meaning, therefore, leaves no room for doubt: in Section 4 the parties had agreed on the acquisition price, and in the next clause they desired to set the requirements and conditions whereby such price might be modified subsequently to the execution of the Agreement. Its verbatim text is as follows:

> Section 5.1. *"Attached to this Agreement (Appendix III) is a balance sheet reviewed by* [PwC] *reflecting the items agreed upon by the Parties on this date for this transaction, which shall be considered solely for price adjustment purposes, indicating the following:*
>
> (...).
>
> Section 5.1.1. *"No later than one hundred eighty (180) days from the base-date of the balance sheet provided for in Section 5.1 above,* [PwC] *shall submit a new balance sheet, duly audited, observing only the same items, the same methodology as referred to in Section 5.1, taking as its base-date the day prior to the event under Section 9.2*
>
> *(...)*
>
> *Section 5.1.3.1. GTI may nominate, in five (5) business days from submission of the balance sheet provided for in section 5.1, a top audit firm to validate said balance sheet so as to gauge the ascertained amounts. Such validation shall be done no later than forty-five (45) days from delivery of the balance sheet with proper attachments by* [PwC] *to GTI, indicating forthwith whether or not there are any divergences with the balance sheet submitted by* [PwC]*. If there is any divergence as to said amounts, the two audit firms shall choose by mutual agreement a third top audit firm, supported in equal parts by GTI and* [VLog]*, to resolve said divergences. Such third audit firm shall*

[108] Esc. R1213, p. 12.

have a period of at most twenty (20) days from its retainer to submit a conclusive report, which the parties hereby accept as final.

Section 5.2. Within five (5) business days from the completion of the audit provided for in Section 5.1.1 above:

(a) once it is verified that the difference in the balances of the specific balance sheet provided for in Section 5.1 and the specific balance sheet provided for in Section 5.1.1 above have a positive balance, such balance shall be fully paid by GTI to [VLog] *within three (3) business days;*

(b) once it is verified that the difference of the balances in the specific balance sheet provided for in Section 5.1 and the specific balance sheet of Section 5.1.1 above have a negative balance, such balance shall be fully paid by [VLog] *to GTI, in national currency, into an account to be indicated by GTI, within three (3) business days.*

173. The Tribunal shall break up its analysis as follows:

- first, it shall describe the substantive content of Section 5 of the Agreement (A);

- second, it shall analyze the drawing up of the Initial Balance Sheet attached to the Agreement (B);

- third, it shall describe the work done by PwC (C), and then the work done by E&Y (D);

- lastly, the Tribunal shall present its conclusions (E).

A. Substantive Content

174. How is it that one determines the price adjustment amount?

175. The starting point is the Initial Balance Sheet attached to the Agreement itself, from which it can be deduced that the working capital as of March 15, 2007, i.e., 13 days before signature, amounted to R$ 40,750,874. Section 5 provides that that same working capital would be determined again on the Consummation Date, April 8, 2007, as it was on such date that ANAC approved VRG's takeover by the Gol Group. The parties are in agreement that there is an addition error in the liabilities of the Initial Balance Sheet, which makes the working capital figure as of March to vary from R$ 40,750,774 to R$ 40,750,874. [109]

176. In other words: according to the content of Section 5.2 of the Agreement, the price adjustment could result in a payment benefiting Respondent 1 or in a payment benefiting Claimant, depending on whether the working capital as of the Consummation Date were higher or lower than the sum of R$ 40,750,874.

177. The price adjustment would, thus, be equal to the difference between the working capital warranted in the Initial Balance Sheet attached to the Agreement and the working capital that

[109] First Simonaggio Expert Report, p. 4 and R1261, p. 8.

actually existed as of the Consummation Date, such as it might show up on the Reviewed Balance Sheet on that date. If VRG's actual working capital as of the Consummation Date turned out to be higher than R$ 40,750,874, the Purchaser should increase the price by the amount equal to the difference, and if it turned out to be lower, the Seller should return it.

178. It should be underscored that the working capital amounts to be compared were to be calculated on different dates: one on March 15th and the other on April 8th. For that, it was almost certain that an adjustment would be produced: as VRG is an ongoing company, its working capital calculated on different dates, it seemed predictable that different results would be reached [sic].

Counter-argument of Respondents 1 and 2

179. Respondents do not agree with that construction of the Agreement, and have defended to the end that *"the parties agreed that* [the working capital] *would not be taken into consideration in the price setting. It would be, in reality, restituted to Respondents 1 and 2 through a price adjustment procedure conducted by one or more audit firms."* [110]

180. The argument cannot be accepted.

181. The allegation of Respondents 1 and 2 is totally inconsistent with the literal language of Section 5. From its very language it can be deduced that the Seller, upon attaching the Initial Balance Sheet as Appendix III to the Agreement, represented that the working capital as of March 15, 2007 amounted to R$40,750,874, and in Section 5.2 it accepted that if the working capital as of the Consummation Date turned out to be lower than said amount, it would be obligated to return the difference in a price reduction concept (of if it were higher, it could demand such difference as additional payment).

182. The statement by Mr. Lap Chan, Respondent 4's chief executive, explaining the economic aspects of the transactions, confirms the Tribunal's conclusion. [111]

B. Drawing up of the Initial Balance Sheet

183. The price adjustment mechanism stipulated by the parties included four consecutive stages:

- The first one consisted of determining the initial working capital, which was done with the Initial Balance Sheet being attached;

- In up to 180 days from March 15, 2007, PwC was supposed to submit the Reviewed Balance Sheet, calculated as of the Consummation Date and duly audited, observing the same items and the same methodology used in the Initial Balance Sheet;

- If Claimant disagreed with the Reviewed Balance Sheet drawn up and audited by PwC, it must

[110] Esc. R1261, p. 10; underscoring in the original.

[111] Per transcript of Mr. Lap Chan's testimony, p. 182.

then appoint, in five business days, a top audit firm to validate PwC's report; such validation must be submitted no later than 45 days from delivery of the Reviewed Balance Sheet by PwC;

- In the event of a disagreement as to the working capital amounts calculated by PwC and by the audit firm appointed by Claimant, then the two audit firms must, by mutual agreement, appoint a third audit firm to resolve said disagreements, which was supposed to submit a conclusive report no later than within 20 days.

184. The starting point for the entire price adjustment process is the Initial Balance Sheet, which was attached to the Agreement as Appendix III, and which - as indicated in Section 5.1 - was *"reviewed by* [PwC]." Despite such assertion, the reality was quite different. Mr. Humberto Tognelli, executive officer at PwC, and the individual responsible for the report inside PwC, stated that *"PwC was not retained to perform a review or any other auditing work or accounting analysis of the* [Initial Balance Sheet] *and therefore no reviewing procedure, accounting audit was done. Therefore he clarifies that he has not confirmed and has no way of confirming whether the information contained in said* [Initial Balance Sheet] *is accurate.*" [112] Which is to say, PwC denies having done any work regarding the Initial Balance Sheet. The assertion contained in Section 5.1, that the Initial Balance Sheet (Appendix III to the Agreement) was reviewed by the audit firm, is most clearly false.

185. On the other hand, and as shall be better explained, it has been proven that the Initial Balance Sheet was drawn up by the Seller, particularly in the person of Mr. Lap Chan.

186. Was the Purchaser aware of such falsehood?

187. The evidence produced shows that the Gol Group and its advisors were not aware of such deception, and believed in good faith that a review by PwC had been done, and that the mention included in the Agreement was accurate and corresponded to reality. Mr. Flavio Tamura, executive officer at KPMG, which was the firm advising the Purchaser, stated - unaware of the statements by Mr. Tognelli from PwC - that in his opinion the Initial Balance Sheet had not only been reviewed but also drawn up by PwC itself. [113]

188. The Arbitration Tribunal cannot but underscore the malicious nature of the Seller's conduct (the issue shall be analyzed in greater detail in paragraphs 609 *et seq.* below): it created in the counterparty and also in the Purchaser's accounting advisors the illusion that the Initial Balance Sheet had been reviewed by PwC, and therefore enjoyed a presumption of authenticity. Mr. Lap Chan, the Seller's chief executive, again insisted during the hearing that the Initial Balance Sheet *"was submitted to them... by Price staff, who were advising us.*" [114] In view of the strong statement by PwC, the Tribunal has concluded that Mr. Lap Chan's assertion is not attuned to reality. When VLog signed the Agreement, and represented that the Initial Balance Sheet had been reviewed by PwC, VLog was perfectly aware that it had not ordered such work from PwC, and that consequently it was impossible for said audit firm to have performed the corresponding work.

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[112] H. Tognelli's letter of October 29, 2009, p. 2.

[113] Per transcript of testimony given by Mr. Flávio Tamura, from KPMG, p. 215.

[114] Per transcript of testimony given by Mr. Lap Chan, p. 184.

C. The drawing up of the "Reviewed Balance Sheet"

189. The Initial Balance Sheet should be reviewed within 180 days, followed by a second balance sheet [the Reviewed Balance Sheet] *"observing only and solely the same items, the same methodology"* used for drawing up the Initial Balance Sheet. That new balance sheet should take as a base-date April 8, 2007, the Consummation Date on which the transaction was authorized by ANAC. Section 5.1.1 provides explicitly for the requirement that the balance sheet should be audited (not only reviewed but also audited) by PwC.

190. The Reviewed Balance Sheet drawn up by PwC is dated November 12, 2007, and as such the 180-day term was not met. The parties did not ask the Arbitration Tribunal to be heard on the imputation of such delay, and therefore the Tribunal shall not rule on it. In any event, the Arbitration Tribunal has determined that the delay has no impact on the issues being debated in this arbitration, and which are a part of the ruling for this award.

191. In that Balance Sheet, PwC ascertained that VRG's working capital, as of April 8, 2007, was R$ 35,380,544 (for memory's sake: according to the Initial Balance Sheet, the working capital amounted to R$ 40,750,874).

192. In analyzing the report submitted by PwC, which includes the Reviewed Balance Sheet, the Tribunal has determined the following:

- The cover sheet for the report contains the expression *"Draft for Discussion subject to Change,"* conveying the idea that it was not a final report;

- Page 6 contains the following expression: *"The scope limitations herein described substantially impact the result of our report;"*

- Page 12 contains the following sentence: *"With a view to the description in the above paragraph, the Balance Sheet as of April 8, 2007 presented next may require significant adjustments and/or contain material errors;"*

- Page 13 contains the statement that *"with a view to the description in page 12, this balance sheet may require significant adjustments and/or contain material errors*."

- Page 28 contains the following title: *"Adjustments proposed by VRG's Management -unaudited."*

193. Let us recall that such Section required PwC to *"submit a new balance sheet, duly audited."* There seems to be no doubt that, otherwise than as the Agreement expressly provided, PwC did not submit a *"duly audited"* balance sheet and, in addition to that fact, PwC itself assumed that material errors possibly existed in its report and/or that necessarily the latter would require significant adjustments.

194. When the parties covenanted in the Agreement that the Reviewed Balance Sheet should have been audited by PwC, what they wanted was for the audit firm to be responsible for it. The parties wanted to make sure that the calculation of the working capital was right and accurately

represented VRG's equity position.

195. The Tribunal has already pointed out that PwC denies having reviewed the Initial Balance Sheet. And as regards the Reviewed Balance Sheet, even if PwC had even delivered a document, there is no doubt whatsoever that the firm radically refused to be held responsible: the document is self-styled as simply a "*draft for discussion subject to change*," says it is subject to "*scope limitations*," and expressly indicates that the Reviewed Balance Sheet attached thereto "*may require significant adjustments and/or contain material errors*."

196. The work done by PwC is therefore light-years away from the requirements of the Agreement: the latter called for an audit, i.e., an auditor's opinion assuming responsibility for the truthfulness of the Reviewed Balance Sheet. and what PwC issued was simply a draft, to which it attached a balance sheet that might require "*significant adjustments and/or contain material errors*." PwC assumes no responsibility for the Reviewed Balance Sheet submitted by it: instead, it admits that the latter may present significant errors. As a consequence, PwC's report did not fulfill the objective the parties had agreed to in Section 5.1.1 of the Agreement. The parties wished to have a renowned firm like PwC certifying the calculation of the working capital as of the Consummation Date, and being responsible for its calculation. And such wish would not come true, as PwC expressly refused to audit the Reviewed Balance Sheet and to be responsible for it - a very serious sign that PwC, a company retained by the Seller, had major doubts about the truthfulness of the Reviewed Balance Sheet.

197. The Tribunal concludes that PwC's actions did not suit the provision under Section 5.1.1 of the Agreement. And given the fact that PwC was VLog's financial advisor, PwC's actions on the Seller's account are attributable to it.[115] The price adjustment process could not be carried out in the manner provided for in the Agreement because, for causes attributable to VLog, PwC never even submitted a Reviewed Balance Sheet audited by it, or for which it would at least accept responsibility.

D. Report submitted by E&Y

198. Having received the report prepared by PwC, Claimant did not agree with its result and appointed E&Y, an audit firm, to validate the Reviewed Balance Sheet, apprising Respondents 1 and 2 of such fact through a letter dated November 19, 2007.[116] E&Y sent its report to Respondents 1 and 2 on December 4, 2007,[117] and according to such report VRG's working capital as of April 8, 2007 was negative by R$ (123,149,597).

199. In regard to that report prepared by E&Y, Respondents complain that it is unsupported by the price

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[115] Per Ex. 38 in vol. III of the Witness Book: the balance sheet drawn up by PwC is addressed to VLog's board of directors, and says that "As you requested, we performed certain analyses of the balances in certain bookkeeping accounts of the balance sheet of VRG Linhas Aéreas S.A. as of April 8, 2007 ... The sufficiency of the procedures applied by us is the sole responsibility of [VLog], as is any decision in connection with the proposed transaction." The assertion made by PwC shows that the latter was acting at the request and for the account of the Seller, VLog, and that therefore the effects of the work done by the PwC audit firm must be attributable to its principal, i.e., the Seller. This conclusion is reinforced if we take into account Section 5.1.2 of the Agreement, which provides that the cost of PwC's audit is to be borne by VLog.

[116] Ex. CD 80.

[117] Ex. CD 4.

adjustment procedure provided for in the Agreement, since assurance reports involve no auditing procedure or review of historical financial information.

200. Now, under the Agreement, what was required by Section 5.1.3.1 was for E&Y to submit a *"validation of* [PwC's Reviewed Balance Sheet]," indicating whether or not there were any divergences with said balance sheet.

201. Under analysis, the report submitted by E&Y shows that this audit firm, instead of analyzing and diverging from the PwC Reviewed Balance Sheet, seemingly examined *"the specific balance sheet of VRG Linhas Aéreas S.A. drawn up as of April 8, 2007 by GTI's Management,"* thus straying from what had been agreed to in the Agreement, and failing to present such divergences as called for in Section 5.3.3.1 of the Agreement. Summing up: neither Respondents nor Claimant made their actions suit the provisions agreed to in Section 5 of the Agreement.

E. Appointment of a Third Audit Firm

202. In accordance with Section 5.1.3.1 of the Agreement, in the event of a disagreement as regards the result reached by PwC and the result reached by the audit firm appointed by the Purchaser, both of them by mutual agreement should have appointed a third audit firm.

203. It is indisputable that said third audit firm has never been appointed. According to Claimant, this is due to the fact the PwC responded by indicating that it was not its obligation to choose what firm might be retained to resolve the divergences, while Respondents say that, because Claimant did not submit a valid challenge under the Agreement, the price adjustment was determined by PwC with the result reached in its Reviewed Balance Sheet, and therefore the appointment of a third audit firm was inadmissible.

204. The Tribunal is not going to rule on who is to blame for not appointing a third top audit firm, because such a ruling does not seem relevant to decide this litigation. What is relevant to mention is that the mechanism the parties agreed upon for determining the price adjustment amount has been foiled. And it has been foiled ever since the first stage, because the work done by PwC did not comply with contractual stipulations. PwC should have audited the Reviewed Balance Sheet as of April 8, 2007, and it never did, having submitted a report titled *"Draft for Discussion Subject to Change,"* in which they expressly indicated that the balance sheet submitted *"may require significant adjustments and/or contain material errors."* In the second stage, E&Y did not do exactly what the Agreement provided for either. It should *"validate"* PwC's report, and what it did was to review an altogether different balance sheet prepared by GTI's management - acting quite differently than as provided for in the Agreement.

205. Wherefore, the Arbitration Tribunal concludes that the price adjustment mechanism agreed upon by the parties in Section 5 of the Agreement has been foiled, first because of a breach attributable to Respondents 1 and 2, and then because of a breach attributable to Claimant, which consequently has caused the price adjustment not to be determined yet.

V. IF THE ANSWER TO THE QUESTION (No. 1) IS THAT THE PRICE ADJUSTMENT HAS ALREADY BEEN DETERMINED, THE QUESTION TO BE ASKED IS BY WHOM, AND WHAT IS THE ADJUSTMENT AMOUNT RESULTING THEREFROM ?

206. By virtue of the answer given by the Tribunal to the first question, the answer to this question is prejudiced.

V.3 IF THE ANSWER TO THE QUESTION (No. 1) IS THAT THE PRICE ADJUSTMENT IS YET TO BE DETERMINED, THE QUESTION ASKED IS WHO SHOULD MAKE SUCH ADJUSTMENT: A THIRD PARTY DESIGNATED BY THE ARBITRATION TRIBUNAL OR THE ARBITRATION TRIBUNAL ITSELF ?

1. CLAIMANT'S POSITION

207. According to Claimant, the parties have established that any disputes *"arising out of or in connection with"* the Agreement should be resolved by arbitration as provided for in Section 14 of the Agreement.[118] Thus, and irrespective of the legal nature of the price adjustment, pursuant to Section 14 the parties have authorized the Arbitration Tribunal to rule on the dispute arisen between the parties, which in this case concerns the making of the price adjustment.

208. According to Claimant, we have before us a modality of transaction *per relationem,*[119] according to which the parties have set the price, but determined to have an audit subsequently conducted to verify whether the accounting that served as a basis for setting the price was accurate.

209. Claimant says, in connection with one of Respondents' arguments, that this case is far removed from the event under CC article 485,[120] according to which if the price setting is subject to a third party's discretion, should the third party not accept such charge, the contract would be void; in the Agreement the price was set, as provided for in Section 14 thereof, at US$ 275 million.

210. According to Claimant, a systematic construction of the Agreement, with a joint analysis of Section 5.1.3.1 and Section 14, would allow for the conclusion that the parties have defined two consecutive solutions to such an impasse: (i) a "pre-arbitral" solution - the two audit firms should nominate a third audit firm to resolve the impasse, or (ii) in the impossibility of carrying out the pre-arbitral

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[118] Esc. C 10, p. 18.

[119] Esc. C 10, p. 14.

[120] Article 485 – "Price setting may be left up to the discretion of a third party whom the contracting parties soon designate or promise to designate. If the third party does not accept such charge, the contract shall be void, unless the contracting parties agree to designate someone else."

mechanism, the solution to the impasse should be resolved by the Arbitration Tribunal. [121]

211. Claimant has attached to the case records, for such purposes, a legal opinion by Professor Antonio Junqueira de Azevedo. [122]

2. POSITION OF RESPONDENTS 1 AND 2

212. Respondents cite for such purposes CC article 112, [123] concluding that in the case at hand the will of the parties in the price adjustment procedure leaves no room for any discussion.

213. To Respondents 1 and 2, the price adjustment procedure established in Section 5.2 could only have two possible outcomes:

- Either the Reviewed Balance Sheet drawn up by PwC suffered no valid challenge, as provided for in Section 5.1.3.1 of the Agreement, and should prevail solely to ascertain the final balance, as provided for in Section 5.2 of the Agreement;

- Or it must be understood that such balance sheet was validly challenged by GTI and, in such event, a third audit firm needs to be appointed to submit a conclusive report.

214. According to Respondents 1 and 2, the Arbitration Tribunal cannot be the one to decide the price adjustment, because this would imply a disregard of something contracted between the parties, and the Brazilian legal system therefore would be violated; moreover, in such event, Section 5.1.1 of the Agreement would be voided, which would subject its judgment to being declared null and void.

215. In the second event, Respondents 1 and 2 assert that the Arbitration Tribunal should appoint a third independent audit firm to resolve the divergences between the PwC Reviewed Balance Sheet and the balance sheet unilaterally submitted by GTI itself and attributed to E&Y.

216. Respondents therefore conclude that if the Arbitration Tribunal rules that GTI's challenge to the PwC Reviewed Balance Sheet is valid, the Tribunal itself could not be the one to rule on the merit of the price adjustment, because the procedure agreed upon by the parties has not been completed. And it would be inadmissible for the Tribunal to modify something agreed upon by the parties.

3. THE ARBITRATION TRIBUNAL'S RULING

217. The Arbitration Tribunal has concluded in this award that the price adjustment is yet to be made, because the mechanism agreed upon by the parties in Section 5 of the Agreement was foiled by a breach attributable both to Respondents 1 and 2 and to Claimant itself. This situation offers two alternatives: either the Tribunal designates a third auditor to be in charge of calculating the price

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[121] Esc. C 10, p. 16.

[122] Ex. CD 98.

[123] Article 112 – "In statements of will the intention evidenced in them shall be attended to more than the literal meaning of the language."

adjustment, or let the Tribunal itself be the one to calculate it.

218. The Tribunal rules for that second option: let the Tribunal itself be the one to determine the price adjustment amount, because it believes that this is a solution grounded in the Law, and one that most faithfully fulfills the will of the parties. But in making its determination, the Tribunal shall not act discretionarily, rather, it shall adjust to the procedure designed by the parties themselves in Section 5 of the Agreement.

219. The Tribunal's ruling is based on the following grounds:

A. The Will of the Parties on such Designation

220. In Section 5 of the Agreement, the parties established a mechanism to implement the price adjustment. In summary, after ANAC's authorization, Respondents, as Sellers, should submit a Reviewed Balance Sheet to be audited by the PwC audit firm. Claimant, in turn, within a short time from Respondents' submission of the new balance sheet, could nominate an audit firm to validate said balance sheet. In the event of a disagreement as to said amounts,

"the two audit firms shall choose by mutual agreement a third top audit firm... to resolve such disagreements." [124]

221. The Agreement therefore allows for the freedom of having a third audit firm designated to resolve a divergence between the two audit firms chosen by the parties (PwC and E&Y), which necessarily shall act by mutual agreement, and shall limit their choice to other top audit firms.

222. According to the very literalness of the Agreement, the only ones having the freedom to designate a third auditor are the parties, through their audit firms (Section 5.1.3.1 of the Agreement).

223. The Tribunal finds that the audit firms failed to designate a third auditor, such as provided for in the Agreement, which gave rise to the question of knowing whether the Arbitration Tribunal should make such designation (as Respondents and Claimant have moved in subsidiary motions) or whether it should determine the price adjustment directly (as Respondent has moved in its primary motion).

224. In this case, the failure to appoint a third audit firm does not give rise to a "*dispute* [s] *arising out of or in connection with this instrument*," [125] which must resolved by the Arbitration Tribunal. The failure to appoint a third audit firm has given rise to a foiling of the appointment mechanism agreed upon by the parties, which gave them - and only them, through their audit firms - the freedom to appoint a third auditor. Such foiling is a factual issue that has occurred, and the Arbitration Tribunal may not otherwise go back and interfere in a stage of an already totally foiled mechanism.

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[124] Section 5.1.3.1 of the Agreement.

[125] Per Section 14.1 of the Agreement.

B. The Price Adjustment is a Dispute submitted to Arbitration

225. What does indeed constitute a *"dispute[s] arising out of or in connection with this instrument,"* [126] is such determination of the price adjustment. There is effectively a subsisting underlying issue. As a result of Claimant's primary motion, the Arbitration Tribunal shall ascertain the liabilities resulting from the alleged deficit in VRG's working capital. This is the issue on merit to be decided in this award.

C. Providing Jurisdictional Relief

226. Furthermore, otherwise, the effectiveness of the arbitral proceeding and therefore of jurisdictional relief would be compromised. Going to court is a constitutional assurance, [127] and every citizen has the right to have its claims reviewed by a court and, based on Law 9,307/1996 ["Arbitration Act"], by an arbitration tribunal, provided that in the latter case the dispute involves only disposable property rights, and the parties have agreed pursuant to an arbitration agreement to submit their litigation to an arbitral proceeding.

227. If the Arbitration Tribunal, instead of determining the right adjustment amount, were to go only as far as to appoint a third audit firm to do so, arbitral relief might turn out ineffective. This is because the commencement of arbitration belies the parties' will to have their disputes resolved, which might not be resolved with the simple nomination of a third party, to the extent that the premises established in the Agreement for its work to be done would not be present. As neither auditor has fulfilled its worked, and the mechanism provided by the parties has been foiled, the only solution assuring jurisdictional relief is for the Tribunal itself to be the one taking on the resolution of such disputes are created by the alleged deficit in VRG's working capital.

D. The Will of the Parties on Methodology

228. To determine whether deficit exists in VRG's working capital, the Tribunal shall prepare a Reviewed Balance Sheet as of the Consummation Date. And the question arises as to how to prepare such Reviewed Balance Sheet.

229. Section 5.1.1 of the Agreement provides that the Reviewed Balance Sheet should observe *"only and solely the same items and the same methodology"* used in the Initial Balance Sheet.

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[126] Per Section 14.1 of the Agreement.

[127] "The constitutional principle of the right to sue assures the party subject to jurisdiction the right to obtain proper jurisdictional relief from the court system. Proper jurisdictional relief is understood as that which is provided with such effectiveness and efficacy as is expected of it." (Nery Jr. and Andrade Nery: Código de Processo Civil Comentado e Legislação Processual Civil Extravagante em vigor [Code of Civil Procedure, Commented, and Maverick Civil Procedure Legislation in Effect] (2001), p. 21.) Along the same lines, according to the lesson of Rogério Cruz e Tucci: "It is only appropriate for the right of access to a fair legal system, as proclaimed under article 5 (XXXV) of the Federal Constitution, to express not only that everyone may go to court, but also that everyone has the right to proper jurisdictional relief or, better put, 'to effective, proper and timely jurisdictional relief.'" (Rogério Cruz e Tucci (coord.): Garantia do Processo sem Dilações Indevidas in Garantias Constitucionais do Processo Civil [Assured Procedure without Unduly Delayed Constitutional Assurances in Civil Procedure] (1999), p. 237).

230. The Arbitration Tribunal has concluded that the price adjustment mechanism under Section 5.1.3.1 has been foiled, but the will of the parties as far as the guidelines to be followed in the preparation of the Reviewed Balance Sheet have [*sic*] not been impacted and, as such, they [*sic*] survive.

231. Therefore, in its preparation of the Reviewed Balance Sheet, the Tribunal shall not act with absolute discretion, but shall adjust to the procedure designed by the parties.

232. In applying this principle, the Tribunal has instructed each party to designate an accounting expert that might provide what must be, in the latter's opinion, the Reviewed Balance Sheet as of the Consummation Date - such as mandated in Section 5.1.1 - *"only and solely the same items, the same methodology"* already used in the calculation of the Initial Balance Sheet.

233. Having explained the grounds on which the Tribunal has based its ruling, one's attention needs to turn now to a counterargument Respondents have offered.

E. Alleged Application of CC Article 485

234. Furthermore, application of CC article 485 [128] to this case will not hold.

235. According to said statutory provision, whenever price setting in a sale and purchase contract is left up to the discretion of a third party who does not accept such charge, the contract will be void. Said article addresses an event where the parties put a third party in charge of establishing the very criteria for price determination. In that event, the third party is acting as an arbiter of the contract amount, and because price is an essential requirement in a sale and purchase contract, its non-existence invalidates the agreement. As Prof. Junqueira de Azevedo says: [129]

"Article 485 must be construed restrictively, as it places a sanction on the parties by rendering their contract ineffectual if a third party fails to determine the price... Inefficacy is the exception, efficacy the rule."

236. In this case, contrariwise, the price has already been defined in the Agreement and, according to Section 4.1, it amounts to US$ 275 million. In our case, what the parties have put a third party in charge of was just to adjust the price either up or down, hinging upon whether the working capital was, as of the Consummation Date, higher or lower than R$ 40,750,874. And the parties established the price adjustment criteria in their contract, with the third party expected to act only within such limitations as established by those criteria. Calculating the price was not made subject only to third-party discretion, and it can be perfectly determined. CC article 485 only applies if the third party does not accept the charge of setting the price. There is a contractually defined price here that can be adjusted by a third party or, in the latter's stead, by the Arbitration Court - the route chosen by the parties to resolve any disputes arising out of their contractual relationship - according to guidelines ensuring its conformity to the stated will of the parties.

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[128] CC article 485: "Price setting may be left up to the discretion of a third party whom the contracting parties soon designate or promise to designate. If the third party does not accept such charge, the contract shall be void, unless the contracting parties agree to designate someone else."

[129] Ex. CD 98: Opinion of Prof. Antônio Junqueira de Azevedo, p. 11.

Summary

237. The Arbitration Tribunal believes that it shall be the one to determine the price adjustment, but that it must do so based on the criteria established by Claimant and Respondents 1 and 2 in Section 5.1 of the Agreement: based on the accounting expert examinations provided by each party as regards what, in their opinion, the Reviewed Balance Sheet should be as of the Consummation Date, the Tribunal shall determine such adjustment by applying *"only and solely the same items, the same methodology"* already used in the drawing up of the Initial Balance Sheet.

V.4 IF THE ANSWER TO THE QUESTION (No. 3) IS THAT THE ARBITRATION TRIBUNAL SHOULD BE THE ONE TO DETERMINE THE PRICE ADJUSTMENT: WHAT IS THE PRICE ADJUSTMENT AMOUNT?

238. The Arbitration Tribunal has already ruled that it shall be the one to determine the price adjustment.

239. In resolving the issues submitted to it, the Arbitration Tribunal must take into account what the parties agreed upon - to the extent that what they agreed upon has not been foiled.

240. The Arbitration Tribunal has construed, from the contents of the Agreement, that the parties have shown their joint will to be that the price adjustment should abide by the following guidelines:

- The base-balance sheet is the Initial Balance Sheet;

- Said Initial Balance Sheet has to be compared to a later balance sheet, as of the Consummation Date; the latter has to be drawn up with the parties' participation, and using the *"same items and the same methodology"* as the Initial Balance Sheet;

- The balance between the Initial Balance Sheet and the Reviewed Balance Sheet as of the Consummation Date shall determine which party must be the creditor or debtor to the other and for what amount.

1. THE INITIAL BALANCE SHEET

241. The price adjustment should be made by comparing the working capital in the Initial Balance Sheet, Appendix III to the Agreement, to the working capital in the Reviewed Balance Sheet. This Reviewed Balance Sheet should be drawn up, as mandated by Section 5.1.1, *"observing only and solely the same items, the same methodology"* applied to draw up the Initial Balance Sheet. Such work, to be done, first of all requires a detailed analysis of the Initial Balance Sheet by the Tribunal.

242. The Initial Balance Sheet resides in Appendix III of the Agreement and, from a reference contained in a footnote, one can surmise that it was issued through VRG's accounting services on March 18, 2007, at 4:36 p.m. - i.e., 10 days before the Agreement was signed. The title of such document is "VRG Balance Sheet - March 15, 2007," and it is divided into two major sections, "Assets" and "Liabilities:"

- "Assets" is comprised of two sections, "Current" and "Long-Term Assets," which are in turn divided into several chapters, and the latter into items, which together add up to R$ 132,996,718;

- "Liabilities" is contained in a single section, called "Current," where the amount is R$ 92,245,845, [130] likewise divided into chapters, and the latter into many items.

243. The items included in the Initial Balance Sheet are quite diverse in nature: some reflect the balance of one bookkeeping account, while others reflect the accumulated balance of several accounts. [131]

244. The difference between Assets and Liabilities amounts to R$ 40,750,874. And such figure should reflect the working capital available to VRG as of the Initial Balance Sheet date. As expert witness Simonaggio convincingly explained:

"the way it was proposed in Section 5.1, it is meant to show what [net] *capital surplus or shortfall was left in the company operationswise. Both assets, asset accounts, and liability accounts were accounts having the same characteristics of realizable rights or payable obligations of an operations nature.* " [132]

Description of the Initial Balance Sheet in Section 5.1

245. Section 5.1 of the Agreement provides a very detailed description of what the composition of the Initial Balance Sheet should be, with a breakdown into four major sections, divided into multiple chapters, and the latter into items:

(a) Current Assets

(b) Long-Term Assets

(c) Current Liabilities

(d) Long-Term Debt

246. The first thing one's attention is drawn to is that the Initial Balance Sheet, effectively attached to the Agreement as Appendix III, includes certain items Section 5.1 did not provide for:

- In Assets: "Prepayments - Fuel-BR" and "Prepayments - Serv. Bordo BAHIA;"

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[130] The figure stated in the Initial Balance Sheet was R$ 92,245,945.

[131] First Simonaggio Expert Report, p. 4.

[132] Per transcript of Mr. Simonaggio's testimony, p. 27.

- And in Liabilities: "Vendors - Law Firm" and "Related Companies -LOGISTICA."

247. On the other hand, Section 5.1 includes a section (d), "Long-Term Debt," but such section does not appear on the Initial Balance Sheet.

248. Consequently, even though Section 5.1 says that the only items to be taken into account for calculating the price adjustment shall be "*solely*" those mentioned therein, such assertion is contradicted by Appendix III to the Agreement itself, which does not adjust precisely to what is provided for in the "corpus" of the Agreement.

249. Another particular feature of the Initial Balance Sheet is contained in the three columns with figures: the first one is named "VRG SAP," the second one "VRG and UPV," and the third one is the sum of the first two. Some items have amounts in both columns, others only in either one or the other. Expert witness Simonaggio [133] explained that the "VRG SAP" column reflected the figures showing in the company's accounting system, while "VRG and UPV" reflected the balances [showing] with UPV's National Register of Legal Entities ["CNPJ"], but which in reality corresponded to VRG. It seems like, after December 15, 2006, transactions continued to be made under UPV's CNPJ [number], and this is why such activities were recorded in UPV's books, but were identified as corresponding to VRG. [134]

How was the Initial Balance Sheet prepared?

250. From the evidence produced, it can be surmised that the Initial Balance Sheet was prepared by the Seller itself and by Respondent 4, during the last phase of the negotiating process. Its preparation started on March 15, 2007, when Mr. Lap Chan, MatlinPatterson's chief executive, asked Mr. Márcio Antônio Nobre, then in charge of VRG's accounting, to prepare a complete balance sheet for said company, which was drawn from its accounting system at 7:42 p.m. A copy of said balance sheet has been attached to the case records, [135] with handwritten notes, which Mr. Lap Chan has acknowledged to be his own. [136] A few minutes later (at 8:25 p.m. and at 8:54 p.m.), following Mr. Lap Chan's instructions, Mr. Nobre prepared a second balance sheet, of which a copy has also been submitted, with notes likewise in Mr. Lap Chan's handwriting. In this second balance sheet, *vis-à-vis* the previous one, liabilities were unchanged, but certain items were excluded from assets. [137]

251. The second balance sheet as of March 15th unquestionably served as a basis for the preparation of the Initial Balance Sheet included in Appendix III. It has been proven that Mr. Lap Chan was the one who ordered, based on the balance sheets, certain modifications introduced so as to obtain the Initial Balance Sheet (this issue shall be analyzed in greater detail in paragraph 590 *et seq.* below). With such modifications as were introduced, a balance sheet representing faithfully a picture of the entire equity became a balance sheet showing only the working capital relevant to the price

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[133] Per transcript of Mr. Simonaggio's testimony, p. 174.

[134] Per transcript of Mr. Márcio Antônio Nobre's testimony, p. 31.

[135] Ex. CD 160.

[136] Per transcript of Mr. Lap Chan's testimony, p. 189.

[137] With the particular detail that now liabilities and assets do not reflect the same figure.

adjustment.

Submission to the Purchaser

252. Once prepared, following Mr. Lap Chan's instructions, the Initial Balance Sheet was delivered to GTI.

253. KPMG, the Purchaser's advisors, explained in detail the Initial Balance Sheet discussion process between the two parties. This stage lasted one day, and consisted of a meeting between Claimant, and its advisors, and VRG's representatives, which - as far as KMPG's executive officers recalled - was also attended by PwC.[138] It is possible that PwC actually attended the meeting, but if it did, it does not seem like PwC made it clear to KPMG that it had not done any work reviewing the numbers (as today we know per paragraph 184 above).

254. From the evidence made, it cannot be surmised that the Purchaser had the opportunity to perform a detailed analysis of the figures presented in the Initial Balance Sheet - but on the contrary, its work seems to have been limited to receiving information through its advisor. Good evidence that the Initial Balance Sheet was not the subject of careful review is that it shows evident numerical errors.[139] The Purchaser's attitude is justifiable, because according to what had been agreed, the Initial Balance Sheet constituted only an interim calculation, which was yet be audited by PwC and, as the case may be, by one or two additional auditors.

255. Summing up: the Initial Balance sheet was prepared, following Mr. Lap Chan's instructions, based on data contained in VRG's accounting system. The Initial Balance Sheet form was submitted to the Purchaser and its advisors at a single working meeting, with nothing on record showing that, as a result of such meeting, any modification was introduced in the form proposed by the Seller.

2. PREPARATION OF THE REVISED BALANCE SHEET

256. The Tribunal has the difficult job of drawing up the Revised Balance Sheet for the Effective Date. In order to carry out this task, the Tribunal asked the parties to appoint accounting experts (A). The tribunal will study the items and methodology agreed upon by the parties pursuant to contract (B) and, finally, decide on an item-by-item basis the actual configuration of the Revised Balance Sheet.

A. The evidence submitted by the parties

257. The Agreement set forth that the price was to be set by means of preparation of a Revised Balance Sheet, with data as of April 8, 2007, which was to be audited by PwC, and which, should there be any discrepancy, would be submitted for a procedural review by an auditor designated by the Purchaser and by a third audit company appointed by means of mutual agreement. This signified

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[138] Per transcript of Mr. Flávio Tamura's testimony, p. 215.

[139] Per First Simonaggio Expert Report, p. 4.

the willingness of the parties to give both parties the chance to participate in the mechanism for setting the price.

258. Given that the procedure set out by Agreement had been disregarded, the Arbitration Tribunal decided to respect the volition of the parties and asked each to submit individually its expert report. For this purpose, it asked the parties to appoint an accounting expert in which each had confidence, leading the expert appointed by the Claimant to conclude:

"(i) if it is in agreement or disagreement with the balance sheet annexed as attachment III to the Agreement drawn up by PwC ("the Revised Balance Sheet") and in the event of disagreement to identify and justify each and every item and sum with which it is in disagreement, with due regard for—just as required pursuant to Clause 5.1.1.— "only and exclusively the same items, the same methodology which is referred to in Clause. 5.1, having as the base date the day preceding the event mentioned in Clause 9.2."

and in order to have the expert appointed by the Respondents answer

"(i) the allegations of the Claimant as to any disagreement that it may have had with the balance sheet annexed as attachment III to the Agreement, with due regard for—just as required by Clause 5.1.1.— "only and exclusively the same items, the same methodology which is referred to in Clause 5.1, having as the base date the day preceding the event mentioned in Clause 9.2"; (ii) the liability referring to the liability of Respondent 4 in light of any price adjustment."

259. The Claimant designated as its expert Mr. Silvio Simonaggio and the Respondents designated as their expert Mr. Milton Rodrigues de Sá. Both experts did an excellent job, and they were able to engage in a dialogue between them, thereby being able to establish exactly the scope of any discrepancies, and their work was very well looked upon by the Tribunal.

Expert reports of the Experts

260. The First Simonaggio Expert Report is dated June 8, 2009. In this report, the expert based himself on the equity balance sheet for VRG on the Effective Date and taking this balance sheet as a point of departure, he calculated a financial balance sheet, analogous to the Initial Balance Sheet dated March 15, 2007, but dated April 8, 2007. The current assets on this financial balance sheet were shown to be negative, being as much as R$ (99,226,212). Given that the Initial Balance Sheet attached to the Agreement had shown positive current assets of R$ 40,750,874, the price adjustment in favor of the Claimant would amount to R$ 139,977,086 in the opinion of the expert Mr. Simonaggio.

261. The First Simonaggio Expert Report was revised by the expert appointed by the Respondents, Mr. Rodrigues de Sá, in the First Rodrigues de Sá Expert Report dated August 10, 2009. In this report, Mr. Rodrigues arrives at the conclusion that the financial balance sheet as of April 8, 2007 was correctly calculated, showing positive current assets of R$ 25,807,430.[1] Comparing this figure with the positive current assets, guaranteed in the Initial Balance Sheet, of R$ 40,750,874, one sees that

[1] Please see page 34 of the First Rodrigues de Sá Expert Report.

the current assets diminished between March 15 and April 8, and as a consequence a price adjustment had to be made, which was favorable to the Purchaser, and equal to this same reduction (specifically R$ 14,943,444).

262. Both experts appeared together at the hearing held on 9, 10, and September 11, 2009, and they went into great detail regarding the respective stances they had taken. Taking into account their statements, the Tribunal asked at the evidentiary hearing for both experts to submit an additional report consisting of:

(i) first, [they were to submit] *an exposition of the arguments both pro and con as regards their position in connection to each difference between them, putting greater emphasis on the differences pertaining to more than one million Brazilian reais and lesser emphasis to the smaller differences;*

(ii) as to the liabilities, at least as to the large sums [to *] specify whether these were or were not paid, and in the latter case, why;*

(iii) as to the information regarding the time period referring to the origin of the debts and the assets, the Tribunal feels that it is a great cost and effort to set out to the very last Brazilian real the exact description of the time when the expenditures actually originated; for this reason, if that information could be given this would be a help, but if it is too complicated to obtain it, the Tribunal reserves the right to, should it be necessary, draw up its decision or procedural order so as to obtain this information."[2]

263. The expert Mr. Simonaggio filed on November 17, 2009 his Second Simonaggio Expert Report, and, when reviewing the conclusions reached in his First Report, concluded that the current assets as of the Effective Date had increased to R$ (73,699,724), which entailed a price adjustment in favor of the Purchaser of R$ 114,450,597.[3]

264. The expert Mr. Rodrigues de Sá also submitted on this very same date (November 17) a Second Expert Report, in which he concluded that the currents assets as of April 8, 2007 had risen to R$ 36,298,593. In addition, just in case the Tribunal were to feel that this balance should reflect the adjustments resulting from supervening events, with which position the expert does not agree, the current assets would then increase to R$ 19,975,049. The price adjustment in favor of the Claimant would in the first case be on the order of R$ 4,452,281 and in the second case, R$ 20,775,825.[4]

265. As we see, based on the four reports submitted by the experts, it is set out in every single case that the actual current assets of VRG as of April 8, 2007 were less than the amount established in the Initial Balance Sheet, due to which throughout the case it occurs that a negative price adjustment is being made, that is, that the Seller may return to the Purchaser the excess price paid. The experts do not agree on the figures for this price adjustment, which varies between:

- R$ 139,977,086 in the Simonaggio First Report and R$ 114,450,597 in his Second Report; and

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[2] Page 18 of the Minutes of the Evidentiary Hearing dated September 21, 2009.

[3] Please see pages 55 and 56 of the Second Simonaggio Expert Report.

[4] Please see page 36 of the Second Rodrigues de Sá Expert Report.

- And R$ 14,943,444, R$ 4,452,281 and subsidiarily R$ 20,775,825 in the First and Second Rodrigues de Sá Reports.

B. Explanation as to the discrepancies

266. It is important to understand just how these discrepancies between the two experts, and especially between the Second Simonaggio Expert Report and the Second Rodrigues de Sá Expert Report came to be. These discrepancies have nothing whatsoever to do with the numbers, given that, after working together, they were capable of establishing just one data source. The discrepancies, in fact, are of a contractual and/or conceptual nature. And they result from a principle set out in Clause 5.1 of the Agreement: the Reviewed Balance Sheet as of April 8, 2007 should be drawn up *"with due regard for only and exclusively the same items, the same methodology"* applied in the Initial Balance Sheet. The construction of this principle allows for two types of discrepancies, which in good part explain the different results achieved by the two experts.

267. Let us look at this in detail:

(a) *"Same items"*

268. The expert Rodrigues de Sá, and, along with him, the Respondents, hold that the expression the *"same items"* means that only exactly the same accounts and subaccounts selected can be included in the balance sheet as of April 8. In their opinion, the Initial Balance Sheet represents:

> "*a "gathering": "when examining what is set out in the agreement (Clause 5.1) it is clear that the equity balance sheet for the company was not taken into consideration, but rather when setting out the "financial balance sheet" certain specific accounts were taken into account. A "gathering" of accounts represented by sums from the assets and liabilities previously selected by the parties at the time of negotiation of the contract [* was used *]. There was however a decision on the part of the parties involved to refrain from consideration of certain accounts, although these accounts might exist both in the assets and the liabilities."*[5]

269. In fact, in the opinion of the Tribunal, the situation is more complex than set out in the description provided by the Respondents. On the one hand, there is quite a bit of confusion as to just what concrete items should go into the Initial Balance Sheet: Clause 5.1 offers a detailed list, but then Attachment III to the Agreement includes items not previously mentioned, and does not mention others that are indeed set out in the body of the Agreement. It seems quite clear that under these circumstances, any and all attempts to resort to a literal construction should be abandoned.

270. The facts show that it was the executive officer of Respondent 4 (controlling party of the Sellers), Mr. Lap Chan, who decided to provide the accounts that were to make up a portion of the Initial Balance Sheet, and that the witnesses were not in agreement as to the scope of the agreement with

[5] Second Rodrigues de Sá Expert Report.

regard to inclusion or exclusion of certain items.

271. In summation, it is not feasible to adopt an *a priori* position that will be valid in each case, so as to determine whether a certain account or subaccount should or should not be part of the Revised Balance Sheet as of April 8, 2007; it will be necessary to look into various factors in an attempt to decide just what the volition of the parties in fact was.

(b) *"Same methodology"*

272. Mr. Rodrigues de Sá explains that

> *"When the balance sheet was drawn up on the date of March 15, 2007 (attached to the agreement), only the accounting balances were taken into consideration, without there being made any reference whatsoever to "supervening facts," that is, sums predating this that had perchance not yet been accounted for"... "Of course, if all these sums, predating December 15, 2006 or from that date up to March 15, 2007, had been taken into consideration when drawing up the balance sheet attached to the agreement, the balance of R$ 40.75 million would not stand. The basis for comparison with the balance as of April 8, 2007 would therefore be different."*[6]

273. In this respect, the stance taken by the Tribunal cannot coincide with that taken by the expert.

274. The procedure agreed to in Clause 5.1 of the Agreement when adjusting the price demanded that the balance sheet as of the Effective Date, which was to serve as the basis for its calculation, be audited by PwC. And every due diligence carried out in Brazil requires that the auditors show that the accounts that it is certifying also have been prepared in accordance with Brazilian Accounting Principles and Guidelines. Therefore, the criterion for including or excluding a supervening fact on the Revised Balance Sheet as of the Effective Date, cannot be the inclusion or exclusion of the Initial Balance Sheet, but instead the conformance to Brazilian Basic Accounting Principles. If on the Initial Balance Sheet a supervening fact was excluded, but this exclusion represents a violation of the Brazilian Basic Accounting Principles, the error should be corrected and the fact should be included on the balance sheet as of April 8. And to the contrary: if the exclusion did not violate the Brazilian Accounting Principles and Guidelines, the fact will have been correctly excluded on the Initial Balance Sheet, and this situation should continue on the Revised Balance Sheet.

C. Configuration of the Revised Balance Sheet

275. In order to prepare the Revised Balance Sheet, the Tribunal decided to compare on an item-by-item basis the Revised Balance Sheets contained in the Simonaggio and Rodrigues de Sá Expert Reports. This comparison could give rise to two results:

276. In the first, the items contained in the Revised Balance Sheets prepared by the experts coincide, and the Tribunal considers them to have been ratified, approving their having been carried out in

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[6] *According to the Rodrigues de Sá Expert Report, pp. 6 and 7.*

compliance with the methodology agreed on (a). In the second case, the items contained in each one of the balance sheets drawn up by the experts are not in compliance, and in this case the Tribunal will scrutinize on a case-by-case basis each discrepancy, will study the stance taken by both parties and their experts, deciding as to the value of each item that should be included in the Revised Balance Sheet as of the date of effectiveness (b). All of this will go into the Revised Balance Sheet.

(a) Items that both experts agree on

Revised Balance Sheets as of the Effective Date (April 8, 2007)

	Respondents	Claimant
CURRENT		
ASSETS		
Availabilities		
Cash	2,872,292,49	2,872,292,4
Banks	3,933,103,82	3,933,103,8
BSP Receivables	69,186,798,35	69,186,798,3
Credit Cards	91,852,196,13	91,852,196,1
Client Accountholders	(464,777,47)	(464,777,47)
Government Agencies	4,034,442,87	4,034,442,8
Smiles	4,846,757,59	4,846,757,5
Balance Sheet Adjustments	(162,883,679,39)	(162,883,679,39)
Advance Payments - Supplier Advance - VEM	5,885,621,29	5,685,521,20
Advance Payments -Supplier Advance-Fuel -BR	803,211,08	803,211,00
Adv.Payments -Suppl. Advance-Fuel-GATE	3,047,000,00	3,047,000,0
Adv.Pay. -Suppl. Advance-Onb. Serv. BAHIA	-	
Adv.Pay. -Suppl. Advance-Onb. Serv. Others	-	
Advance Payments - Others	911,608,61	9.11.608,61

Company Related (Lease-Basements-Logistics)	-	
LONG-TERM REALIZABLES	-	
Deposit by way of guarantee		
Deposit/guarantee - Euroatlantics	1,010,765,38	1,010,765,30
Deposit/guarantee -Sojitz	362,921,00	362,921,00
Deposit/guarantee- Aeroturb. Aircraft	6,391,642,00	8,391,642,00
Deposit/guarantee-SR Stecnics Aircraft	261,720,00	251,720,00
Deposit/guarantee-Wells Fargo	8,611,680,00	8,611,680,00
Deposit/guarantee -ACTS Technical	1,599,312,00	1,599,312,00
Deposit/guarantee-Pegasus	283,980,00	283,980,00
Deposit/guarantee BSP (US$16,000,000.00)	38,726,783,83	38,725,783,83
Other Credits	-	
CURRENT		
LIABILITIES		
Suppliers		
Suppliers- Law firms	(743,576,49)	(743,578,49)
Suppliers - IBM	-	-
Charges, taxes and contributions		
Charges, taxes and cont. - IR W/O PAYROLL	(1,161,731,85)	(1,161,731,85)
Charges, taxes and cont. - OTHERS	1,080,365,40	1,080,385,40
(-) Credit request - INFRAERO	2,646,544,25	2,646,544,25
Wages and social charges	(8,358,667,15)	(8,358,687,16
Leasing payable - Maintenance reserve	84,501,91	84,501,91
Related companies	-	-
Related companies - LOGISTICS	-	-
Accounts payable - insurance	399,884,20	399,884,20

Accounts payable - crew per diems	(183,988,14)	(183,968,14)
Transports to be executed	(38,792,082,10)	(38,792,082,10)
Vacation and social charges provisions	(8,199,026,98)	(8,199,026,98)

(b) Detailed study of the discrepancies

277. In full agreement as to these general guidelines, it is necessary for the Tribunal to scrutinize each and every one of the discrepancies that the expert for the Respondents, Mr. Rodrigues de Sá, indicated with regard to the report of the expert of the Claimant, Mr. Simonaggio. In order to do so, the Tribunal will follow the same order as the exposition followed by Expert Rodrigues de Sá and, in each case, will decide which criterion adopted by one or the other expert it prefers, taking the discrepancies under examination on an individual basis.

I. DISCREPANCIES WITH REGARD TO THE ASSETS

3.1. ACCOUNTS RECEIVABLE: OTHERS

278. On the Initial Balance Sheet, the item "Accounts receivable: Others" showed a balance of R$ 849,802. For reasons that none of the experts can explain, this item from the assets increased quite significantly between March 15 (date of the Initial Balance Sheet) and April 8 (date of the Revised Balance Sheet). The discrepancy entails the fact that the expert for the Claimant holds that on April 8 this item amounted to R$ 44,826,009, while the expert for the Respondents reduces this sum to R$ 43,371,369. The difference comes to R$ 1,454,640. Please note further that as regards this point the positions of the experts are reversed: the expert for the Claimant holds that the assets are greater than the expert for the Respondents.

A. Position of the Claimant

279. The Claimant alleges that when scrutinizing the agreement, the party making this scrutiny should cleave to the volition of the parties and not go by the literal text. According to the Claimant, the parties created a method for carrying out the price adjustment that pertains to all accounts and subaccounts of the same accounting type.[7] Therefore, the Claimant concludes by stating that the accounts and subaccounts that, pursuant to generally accepted accounting guidelines, have the accounting nature of accounts receivable should be part of the Revised Balance Sheet for purposes of price adjustment.[8] And this would include credits arising from transactions carried out at the Varig stores, entailing payment by means of electronic cards.[9]

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[7] Esc. C 50, page 61.

[8] Esc. C 50, page 62.

[9] According to the Simonaggio Expert Report, page 47.

B. Position of the Respondents

280. According to the Respondents, the subaccounts specifically chosen by the parties to compose the item "Accounts receivable: Others" are those existing on the Initial Balance Sheet, and the scrutiny of the financial balance sheets of VRG on March 15, 2007 and April 8, 2007[10] allows for the correct identification of these subaccounts.

281. According to Respondents 1 and 2, even though the account is described under the heading"others," this fact does not mean that any other accounts receivable could be included in the price adjustment.

282. Respondents 1 and 2 allege that three of the subaccounts in this discrepancy (pertaining to group 1141) included in the main account "accounts receivable: others" are in fact pertinent, that is, there is a link to the other group 1141 accounts that were included in the Initial Balance Sheet and ascribed the value of R$ 0 (zero),[11] according to which they should not be taken into account for purposes of determining the price adjustment.

C. Analysis of the Arbitration Tribunal

283. In order to perfectly understand this discrepancy, it is necessary to start with an analysis of the Initial Balance Sheet on which, under the assets, mention is made of an item called "Accounts receivable: Others" with the sum of R$ 849,802. This item does not represent an account in and of itself, but it is the result of a series of accounts that have been added together.[12]

284. When it became necessary to calculate this same item on the Effective Date, the expert Mr. Rodrigues de Sá added the five accounts highlighted in the chart below, which on March 15 had a balance of zero, but on April 8 these accounts reportedly had a balance:

285. The expert Mr. Simonaggio is in agreement with this addition, but he also further proposes that three more accounts be added, which all together total the R$ 1,454,640 that is under discussion, and which are as follows:

286. The expert Mr. Rodrigues de Sá does not agree with this inclusion, and his argument is as follows: in the total balance sheet for VRG, attached by PwC to its report and reproduced by Mr. Rodrigues de Sá in his First Expert Report, the Assets are divided into the following headings:

- Banks

- Cash remittances

- Accounts receivable

[10] Doc. 2 attached to PWC [sic] Revised Balance Sheet, document R1213 of Esc. R1244.

[11] Esc. R1261, page 66.

[12] Attachment 5.1.8 of the First Rodrigues de Sá Expert Report describes quite precisely just which accounts were added as per March 15, 2007 for the balance mentioned.

- Related companies

- Inventory

- Taxes to be reimbursed

- Deposits by way of guarantee

- Prepayments

- Advance expenses

- Other credits

287. The five accounts that Mr. Rodrigues de Sá accepted having added to the original accounts included for purposes of calculating the item "Accounts receivable: Others" are all subaccounts covered under the heading "Accounts receivable." However, the three accounts that the expert Simonaggio intends to add do not pertain to this heading, but rather to a different heading called "Other credits." This heading has 13 subheadings, and three of these are precisely the ones that are the subject matter of this discrepancy.

288. Having described what happened, it is easy to understand the stance taken by the experts: Mr. Simonaggio holds that his three accounts in reality represent "Accounts Receivable" and therefore should be a part, just as the five subaccounts accepted by the expert for the Respondent were added. On the other hand, Mr. Rodrigues de Sá does not deny that the three accounts actually represent business credits pending receipt, but he alleges that, when being included under the heading "Other credits" and not under the heading "Accounts receivable" they should not be taken into account.

289. In this respect, the Tribunal takes the same position as the expert for the Respondents. It is a fact that on the Initial Balance Sheet certain accounts that were part of the current assets were not included. And among the accounts not included one finds precisely that account "Other Credits." And there is no discussion that on the Initial Balance Sheet the item "Accounts receivable: others" is included.

290. Clause 5.1.1. says that the Revised Balance Sheet of April 8 should be prepared "*only and exclusively* [with the] *same items*" used for the Initial Balance Sheet. This wording sought exactly to avoid the problem that we are now encountering: that there might arise discussions as to the inclusion or exclusion of certain accounts. And in order to avoid this, the Agreement states that the Revised Balance Sheet is drawn up with exactly the same items, that is, with the same accounts as those included on the Initial Balance Sheet.

Decision

291. For the reasons now discussed, the Tribunal concludes that the correct sum to be included in the

item "Accounts receivable: others" on the Revised Balance Sheet as of the Effective Date amounts to R$ 43,371,369.

3.2. AMEX AND VISA DEPOSIT[S] BY WAY OF GUARANTEE

292. The Initial Balance Sheet showed, under the heading Current Assets, two deposits by way of guarantee, one in favor of American Express (Amex) for the sum of R$ 1,271,186 (equivalent to United States $ 605,615) and the other in favor of Visa in the amount of R$ 4,796,155 (equivalent to United States $ 2,116,436). These assets came from Old Varig, and had been transferred to VRG as a consequence of an auction.

293. Visa and Amex normally are debtors to an airline, because the price for the airfare paid by way of credit card owes. But Old Varig had the practice of canceling its flights frequently, and consequently the final consumers asked for return of the tickets paid, and Visa and Amex finally demanded that Old Varig make deposits by way of guarantee to ensure return of the sums paid up front. These deposits were then transferred to VRG together with the other assets that were part of the auction.

A. Position of the Claimant

294. As to the first deposit by way of guarantee (Amex), the expert for the Claimant states that the discrepancy is R$ 1,229,398, which was reimbursed by Amex on March 21, 2007 to the Old Varig current account.[13] It stated that these assets no longer existed as of the base date of April 8, 2007, as this money was returned to the depositary before this date.

295. With regard to the second deposit by way of guarantee (Visa), there is a discrepancy of R$ 4,296,365; the expert for the Claimant alleges that the background as to the transactions with Visa shows that these deposits were absorbed thereby so as to repay obligations of the Old Varig, which had been occurring since the UPV period, and it was ratified that this asset was never at the disposal of VRG.[14]

296. The Claimant argues, basing itself on its expert, that, if only by way of a hypothesis, if one holds that the asset should be computed into the Revised Balance Sheet, even then it could never be for the amount mentioned, given that on April 8, 2007 the balance of the deposit was R$ 3,692,000.[15]

297. In response to the arguments of the Respondents, the Claimant states that as to the accounting techniques an asset ceases to be an asset if its realization depends on handing down of a decision in a court suit, without there being any immediate perspective of repayment.[16]

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[13] According to the Simonaggio Expert Report, page 48 and Esc. C 50, page 64.

[14] According to Simonaggio Expert Report, pages 50 through 52, and Attachment 14.

[15] According to Simonaggio Expert Report, page 52. The expert Simonaggio, in his expert reports, rounds numbers off to thousands. This practice was not challenged by any of the parties. The Arbitration Tribunal verifies that this rounding off at times benefits one party, and at times, another. The result is that the overall result is balanced.

[16] Esc. C 50, page 62.

B. Position of the Respondents

298. According to Respondents 1 and 2, the documentation attached by the Claimant does not allow one to conclude that the money paid by Amex refers exactly to the amounts arising from UPV (the Varig Business Unit).[17]

299. The Respondents state that the procedures carried out by their expert did not enable them to obtain reliable information on the VRG accounting records that would allow them to make the correlation between the amounts deposited by Amex and the rights adjudicated to VRG pursuant to the UPV auction.

300. They conclude that, even should Amex have erroneously transferred this money to Old Varig, it fell to the Claimant to claim such right based on the Public Notice. Respondents 1 and 2 feel that VRG should take such action as is needed to recover the money and not include these amounts for price adjustment purposes.

301. Now, with regard to the deposits by way of Visa guarantee, Respondents 1 and 2 affirm that the discrepancy is similar, and that their expert cannot, based on the documentation used, conclude that Visa had used up the deposit by way of guarantee to repay Old Varig debts.

302. Once again, Respondents 1 and 2 state that, if it were so, then VRG should take such measures as are necessary to obtain the assets and not to charge Respondents 1 and 2 for this.

303. The Respondents end by saying that the conclusions reached in the Second Simonaggio Expert Report do not take into account the directives set by the Arbitration Tribunal for drafting of this document, as the expert took into consideration "*information that was not made available to the* [expert] *retained by Respondents 1 and 2.*"[18] Respondents 1 and 2 therefore ask that the Second Simonaggio Expert Report in relation to this item be disregarded.

304. According to Respondent 4, there is no way of showing via documentation that the fact alleged by the Claimant actually occurred, that is, that the Amex deposit was returned to Old Varig.[19] However, Respondent 4 states in tandem with Respondents 1 and 2 that even were it to be true that Amex had returned the deposit by way of guarantee to Old Varig, we would still have a situation whereby VRG would have purportedly opted to not claim its right. Now, with regard to the Visa deposits, according to Respondent 4 there is no proof whatsoever that these deposits were used up.[20]

C. Analysis of the Arbitration Tribunal

305. The Arbitration Tribunal finds itself with a triple decision before it: in the first place, it must

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[17] Esc. R1261, page 67.

[18] Esc. R1264, page 69.

[19] Esc. R432, page 51 et seq.

[20] Esc. R432, page 55 et seq.

resolve a procedural incident posed by Respondents 1 and 2, whereby they allege that for procedural reasons the Second Simonaggio Expert Report should be disregarded (a); in the second place, it will look into whether VRG benefited from the deposits by way of guarantee (b); and in the third place it will examine the subsidiary arguments posited by the Respondents, according to which VRG should have filed against Old Varig due to lack of compliance with the Public Notice (c).

(a) The procedural issue formulated by Respondents 1 and 2

306. The Respondents submitted to the Tribunal a communication [21] whereby they requested that the heading referring to the "Deposit by way of guarantee – Visa" in the Second Simonaggio Expert Report be disregarded, under the penalty of violation of due legal process. This was requested because it is stated in said expert report that Mr. Silvio Simonaggio had the opportunity of having "*interviews with VRG employees.*"[22]

307. In light of this argument, the Claimant alleged that the information provided by the VRG management had already been presented in the first expert examination that was fully debated at the discovery hearing. Furthermore, the Claimant stated that the expert for Respondents 1 and 2 did not make any objection whatsoever as to the deficiency of information during the 57 days that went between the Tribunal Order dated September 21 and the delivery of his opinion on November 17.

308. It behooves mentioning that, in light of the decision of the Arbitration Tribunal, the discussion with regard to partial disregard of the Second Simonaggio Expert Report loses its practical relevance, given that the claim will be partially rebuffed by the Arbitration Tribunal: the Arbitration Tribunal will disregard proven facts that the expert says he knows only due to interviews with VRG employees. Consequently, it is not essential for the Tribunal to adopt a formal stance with regard to the procedural issue filed by the Respondents.

(b) What actually happened to the deposits by way of guarantee

309. In order to learn just what happened to the deposits by way of guarantee, it is necessary to differentiate between the Amex deposit and the Visa deposit.

310. With regard to the Amex deposit, the expert Mr. Simonaggio convincingly demonstrated in his Second Expert Report [23] that on March 21, 2007 Amex returned the deposit, not to VRG but rather to Old Varig. As this occurred, there is no doubt that the Revised Balance Sheets as of the Effective Date should not include the Amex deposit by way of guarantee, given that it already had ceased to exist.

311. The situation with regard to the Visa deposit by way of guarantee is totally different.

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[21] Esc. R1259.

[22] Please see page 51 of the Second Simonaggio Expert Report.

[23] Second Simonaggio Expert Report, page 49.

312. This deposit was made to a bank account opened in the name of Visa, and it was Visa that had full access to the funds. Visa used this deposit to repay the indebtedness of Old Varig that was continually arising. On the Effective Date, Visa had already used up a significant part of this and—in accordance with the proof submitted by the expert Mr. Simonaggio[24]—there only remained R$ 3,692,000 in the account. According to the expert, this remaining balance was used by Visa, subsequent to the Effective Date, in order to offset debts of Old Varig. And the proof on which the expert bases his conclusion is the simple statements made by the VRG directors, without citing any back-up documentation.

313. The problem raised by this last affirmation by the expert is that it seems odd that after the Effective Date Visa continued offsetting indebtedness incurred by Old Varig, which by definition had to have arisen before December 15, 2006 (the date on which VRG took over the company) against a deposit made by New Varig. In this regard, the Tribunal thinks that the statement made by the expert is not sufficiently substantiated by the proof and, in view of this, the Tribunal will accept that the Visa deposit by way of guarantee as of the Effective Date be set at R$ 3,692,000.

(c) The possibility of VRG's making a claim against Old Varig

314. Subsidiarily, the Respondents argue that even were Amex and Visa mistakenly to have used the deposits for Old Varig, VRG in any case would have the possibility of filing a claim against it based on the Public Notice. Respondents 1 and 2 further stated:[25]

"This is moreover a case of yet another topic to be resolved in the court suit targeting the settling of accounts between VRG and Old Varig, now underway at the In-court Reorganization Court (the 1st Commercial (Court) division in Rio de Janeiro)."

315. This argument has no grounds.

316. The very Respondents recognized that the claim against Old Varig should be handled via a settling of accounts as set out in Clause 5.3 of the Agreement. And in accordance with what was set out, the result—whether positive or negative—of this settling of accounts corresponds to VLog, not VRG. As a result, and as the Respondents correctly argued (please see paragraph 300 above), in order to avoid *bis in idem* (literally, not twice for the same, avoiding repetition) the entire claim that is dealt with in the settling of accounts should be excluded from this present litigation. Therefore, VLog will be able to file a claim vis-à-vis Old Varig, and to maintain that as a result of the offsets made by Visa and Amex, the deposits adjudicated by way of auction were negatively affected. All sums that the Respondents succeeded in charging in the settling of accounts will be for their account. Consequently, in order to avoid unjust enrichment on the part of the Respondents, in the relationship between the Respondents and the Claimant, the sums subject to the account settlement should not be a part of the Revised Balance Sheet.

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[24] Second Simonaggio Expert Report, page 52 and doc. 14 attached to the Second Simonaggio Expert Report.

[25] R1261, page 67.

Decision

317. For the reasons now mentioned, the Tribunal concludes that as per the Revised Balance Sheet as of the Effective Date:

- The correct sum for the item "Deposits by way of Guarantee – Amex" should be increased to R$ 0 (zero); and

- The correct sum for the item "Deposits by way of Guarantee – Visa" should be increased to R$ 3,692,000.

3.3 DEPOSITS BY WAY OF GUARANTEE – AIRCRAFT – FOCUS

318. Focus Aviation Ltd. ("FOCUS") is a company specializing in leasing aircraft. The discussion as regards the "Deposit by way of Guarantee – Aircraft – FOCUS" is quite similar to that regarding the Amex and Visa Deposits by way of Guarantee. The Assets shown on the Initial Balance Sheet show an account called "Deposit by way of Guarantee – Aircraft – FOCUS" with a value of R$ 2,368,980. In the opinion of the Claimant, the amount of this deposit shown on the Revised Balance Sheet as of the Effective Date should be zero, because VRG never took advantage of this deposit. The Respondents, on the other hand, hold that the correct sum is R$ 2,192,400.

A. Position of the Claimant

319. The Claimant holds that FOCUS was justified in withholding the Advance,[26] as the deposit was used up to repay the obligations that arose as a result of aircraft leased by VRG, which were sent for maintenance under the management of the Respondents.

320. According to the expert Silvio Simonaggio[27] the depositary of the money (FOCUS) used the sums on deposit for the purpose of repaying indebtedness related to maintenance of the engines of the PP–VTI, PP–VTK, and PP–VTP aircraft. The first aircraft was sent for maintenance before April 8, 2007 and the others had already been returned to the lessors before that date.

321. In this manner, the Claimant concludes that said money, before April 8, 2007, had already been used up for repairs and maintenance that had already occurred or were underway before this date, and they should not be taken into account for the price adjustment, as they already did not exist as of April 8, 2007.

B. Position of the Respondents

[26] Esc. C, page 64.

[27] Second Simonaggio Expert Report, page 52.

322. According to the Respondents, this is yet another example of negligence with regard to defending the rights of VRG.[28] They state that this negligence should be defrayed by the Claimant, and not by the Respondents. In any event, if the deposit were used to repay expenditures for replacement parts, these expenditures should not now be requested of Respondents 1 and 2.

323. According to the Respondents, the denial of payment on the part of FOCUS occurred in November 2007, when VRG was already under the management of the GoI Group. The Respondents conclude by stating that the asset in question should have been taken into account for purposes of price adjustment.

C. Analysis of the Tribunal

324. Old Varig had made on July 24, 2006 a deposit by way of guarantee, in the amount of United States $ 1,080,000 with a view to guaranteeing the replacement parts for three aircraft under maintenance.

325. As shown by the expert Simonaggio[29]

- One of the three aircraft had been returned after repair on January 15, 2007;

- Another was returned on February 15 of the same year; and

- The third was sent for maintenance before the Effective Date, but had not yet been returned.

326. The three aircraft were therefore sent for maintenance during the period in which VRG was controlled by the Sellers and by March 15 two aircraft had already been repaired and returned.

327. And that is a fact that FOCUS, depositary of the funds, never returned the deposit, and that it used it for payment of three repairs.

328. The key question for the Arbitration Tribunal is who was responsible for payment of these repairs. The response is clear: the aircraft had been repaired or sent for repair before the Effective Date. On this date, in order for the deposit by way of guarantee to continue to be considered as an asset *in rem* it was necessary that they had been liquidated (or at least that they had had provision made in the liabilities). If this occurred, VRG would have had a right to ask for return of the deposit.

329. The Respondents did not attach any proof whatsoever that during their term of office the expenses for repair of the three aircraft had been paid or provision made for payment. As a result, the deposit by way of guarantee truthfully speaking constituted an imaginary asset, because it had already been used up by the outlays for the maintenance that had occurred and was not paid (or provision made for), and there was no possibility whatsoever that VRG could get this deposit back. As the deposit by way of guarantee is an imaginary asset, its correct value is R$ 0 (zero).

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[28] R1261, page 72.

[29] Second Simonaggio Expert Report, page 53

Decision

330. For the reasons mentioned, the Tribunal concludes that on the revised balance sheet as of the Effective Date the correct amount for the item "Deposits by way of Guarantee – Aircraft- FOCUS" amounts to R$ 0 (zero).

II. DISCREPANCIES RELATED TO THE LIABILITIES

3.4 SUPPLIERS: OTHERS

331. On the Initial Balance Sheet the account "Suppliers: Others" showed a sum of R$ 3,565,524. It does not seem that there is any doubt that on the Effective Date, this amount was significantly higher. According to the expert for the Respondents, it went as high as R$ 33,069,928 and according to the Claimant, it was R$ 47,261,088. None of the experts explains how this can happen in merely three weeks—the weeks between the date of the Initial Balance Sheet and the Revised Balance Sheet—that the balance of the account be multiplied by nine (in the opinion of the expert Rodrigues de Sá) or by 13 (in the opinion of the expert Simonaggio). The details on the discrepancies[30] that only affect 12 subaccounts within the account "Suppliers: Others" are as follows:

Accounts	Claimant Expert	Respondents Expert	Discrepancy
Maintenance of engine/aircraft	6,641,946,73	2,240,536,93	4,401,409,80
Wells Fargo invoices	4,663,335,68	-	4,663,335,68
OAG Invoices	299,795,04	-	299,795,04
Suppliers - Germany	1,566,705,37	799,673,05	767,032,32
Suppliers - Argentina	31,342,54	3,625,23	27,717,31
Suppliers - Brazil	10,012,849,61	6,359,538,67	3,653,310,94
Suppliers - Colombia	61,736,95	867,67	60,869,28
Suppliers - Venezuela	11,316,76	6,981,77	4,334,99
Suppliers - Hong Kong	24,023,78	-	24,023,78
Suppliers - United States	210,458,23	7,273,66	203,184,57
Arinc Invoices	28,134,81	2,938,82	25,195,99

[30] According to the chart shown on Esc. C 50, page 49.

FRB Invoices	80,083,33	19,133,33	60,950,00
	23,631,728,83	**9,440,569,13**	**14,191,159,70**

A. Position of the Claimant

332. The Claimant alleges that this grouping shows the liabilities accounts related to supply of goods and services linked to the company operating and management activities that only actually occurred after the UPV arose. According to the Claimant, these obligations resulted from the UPV management by the Respondents and were needed so that UPV could continue its business activities and preserve the assets until the transfer of VRG occurred. The Claimant states that there are no legal or economic grounds for the intended exclusion.

333. It states that the actual payment with funds generated during the management of the Claimant corroborates the existence of these liabilities and that the absence of any record as to these obligations on the Initial Balance Sheet resulted in underappraisal of the liabilities, with the consequential undervaluation of the Current Assets.

334. The Claimant states that the lack of inclusion on the Initial Balance Sheet does not modify the existence of the obligation as of April 8, 2007. The fact of being settled at the subsequent period corroborates the existence of said liabilities.

B. Position of the Respondents

335. The expert for the Respondents drew up a spreadsheet[31] on which he justified—set out in alphabetical order—the reasons according to which he did not accept the adjustments suggested by the expert acting for the Claimant. These reasons were as follows:

- Some amounts correspond to invoices predating December 15, 2006 and were not included on the Initial Balance Sheet, which would make it impossible to post them on the Revised Balance Sheet ("Reason A");

- Other amounts entail obligations referring to the period between December 15, 2006 and March 15, 2007, and were not included on the Initial Balance Sheet ("Reason B");

- Certain sums should be excluded due to their being based on documents issued after the Effective Date, which documents do not specify the period of application nor is there any proof that they correspond to liability of the Respondents ("Reason C"); and

- Finally, the Respondents allege that there are amounts in regard to which it will not be possible on or before the date of submission of the supplementary opinions to prove the existence of accounting records as regards liabilities and their related liquidation ("Reason F");

[31] Second Rodrigues de Sá Expert Report, page 15 et seq.

336. The chart that follows goes into detail as to the various discrepancies, the reasons for the objection, and the amounts in question:

SUPPLIER ACCOUNT - OTHERS			
SUB ACCOUNTS Maintenance	Name	**Paid**	**Unpaid**
AB	**594,865,463,293,740,91**	**508,638,094,165,34**	
Total da Conta		**3,888,606,37**	**512,803,42**
Account Total			
Wells Fargo	C	**4,563,335,68**	-
Total da Conta		**4,663,335,68**	-
Account Total			
OAG	A F	--	**17,452,06282,342,98**
Total da Conta		-	**299,795,04**
Account Total **Fornecedores - AlemanhaSuppliers Germany**	A B F	**3,040,76521,257,1645,198,06**	**201,92197,223,59**
Total da Conta		**569,495,97**	**197,425,50**
Account Total **Fornecedores -** Argentina	A	**79,54**	-
B	**22,693,07**	-	**22,693.07**
F	**3,709,67**	**1,106,18**	**4,815,75**
Suppliers - Argentina		**26,482,18**	**1,106,18**
Fornecedores - C olombia Account Total	**F**		**60,869,27**

Total da Conta			60,869,27
Suppliers - Colombia			
Fornecedores - Venezula Account Total	**B**	**4,334,99**	-
Total da Conta		**4,334,99**	-
Suppliers - **Venezula**			
Fornecedores - Hong Kong	**A**	**24,023,78**	-
Total da Conta Account Total		**24,023,78**	-
Suppliers - Hong Kong **Fornecedores - United States** Account Total	B F	**10,506,83**	**192,445,40**
Total da Conta		**10,506, 83**	**192,445,40**
Suppliers - United States **Fornecedores - Brasil** Account Total	A B C F	**173,804,821,832,213,89751,636,9163,906,38**	**832,220,89**
Total da Conta		**2,821,561,90**	**832,220,89**
Suppliers - Brazil **Arinc**	A F	**16,140,889,055,11**	
Total da Conta Account Total		**25.95,99**	
FRB	A	**60,950,00**	-
Total da Conta		**60,950,00**	
Account Total		**12,094,493,69**	**2,096,665,71**

TOTAL GERAL

337. In summary, the Respondents propose exclusion of the sum of R$ 14,191,159 from the item "Suppliers: Others," for reasons A, B, D [sic], F, which was already explained in paragraph 335.

C. Analysis of the Tribunal

338. As explained by the expert Mr. Simonaggio, the liabilities included in the account "Suppliers: Others" correspond in general to debts related to the supply of goods and services intended for operating and management activities pertaining to the company that were entered into only after the UPV had come on the scene.[32] Specifically:

- Brazil Suppliers : this subaccount with a balance of R$ 10,013,000 is composed of 2,364 documents and covers transactions such as fuel purchase, airport and catering services, legal services, maintenance materials purchasing, cleaning materials, and other products and services of the most various types;

- Engine and Aircraft Maintenance : these are debts pertaining to maintenance of operating and terminal reserve systems;

- Wells Fargo : the invoices comprising the balance still open as of April 8, 2007 refer to the cost of the aircraft parts and pieces that were lacking or damaged and that were charged by Wells Fargo in light of return of the aircraft;

- Germany Suppliers : the liabilities indicated are for the operation base of the Old Varig, UPV and then VRG in Frankfurt (Germany); and

- Other Suppliers : these subaccounts include a series of items that are similar to the items already commented on.

339. A question of immense importance regards knowing whether VRG did or didn't actually pay the debts owing these suppliers. The Tribunal asked the experts to provide proof as to this point, which they did, excluding only from the scope of their efforts the individual sums of less than R$ 1,000.00.

340. The result showed that 88.4% of the debts mentioned in regard to this discrepancy were actually repaid by VRG to their suppliers; with respect to 10.4% one cannot demonstrate actual payment; and 1.2% were not looked into (this of course was because the debt entailed less than R$ 1,000.00). Taking this data into account, the Tribunal accepts as proven that the amount of the indebtedness that is shown as of the Effective Date in the account "Suppliers: Others" was properly defrayed thereafter by VRG to the respective creditors. This fact is a very strong indication that these were valid and demandable obligations, incurred by VRG in the normal course of its business activities.

341. Having reached this undeniable conclusion at the outset, one must scrutinize whether one of the four reasons, A, B, C, and F, as submitted by the Respondents, has sufficient authority to

[32] Second Simonaggio Expert Report, page 25

contaminate this conclusion. The Tribunal will look into each of these reasons on a successive basis.

(a) Reason A: Invoices predating the concession of CHETA

(i) Position of the Respondents

342. According to Respondents 1 and 2, during the period from July 21, 2006 to December 14, 2006, the UPV assets continued to be operated by the companies undergoing court reorganization, and VRG had to bear the costs of this operation, pursuant to Clause 3.2, subitem "e" of the Public Notice [33] up to the ceiling of United States $ 75,000,000. [34]

343. According to the Respondents, the creation of VRG on December 15, 2006 and the complete absence of any liability whatsoever for the monies for the UPV period is set out in the actual financial statements of the GoI Group. [35]

344. They conclude saying that it is impossible to attribute any value in the proceeding of price adjustment prior to the period from December 15, 2006 and any decision to the contrary would go against the Public Notice, the LRJ, the facts and the very statements conveyed by the GoI Group to its shareholders with regard to VRG.

345. Respondents 1 and 2 affirm that a *"great part of the liabilities that are being taken into account by the Claimant stem very precisely from the debts of Old Varig—which were expressly set aside by LRJ and which, in any event, are being discussed in the mentioned court proceedings."* [36]

(ii) Analysis of the Tribunal

346. The Tribunal does not agree with the allegations of the Respondents.

347. Let us briefly review the facts of the case: on July 19, 2006 there was an auction by UPV of the business involving passenger transport from Old Varig to VRG. But this auction did not generate immediate effects, because as this involved an airline being auctioned off, it was necessary for the purchaser to have the correct documentation, known as CHETA, which would be granted by ANAC [Brazilian Civil Aviation Agency]. As a consequence, pursuant to Clause 7.1 of the Public Notice, the auction was suspended until ANAC ratification could be obtained. This was granted by ANAC on December 14, 2006, on which date it was considered that the condition precedent applying to the auction had been complied with.

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[33] Esc. R1261, page 28

[34] Esc. R1261, page 23

[35] Doc. 7 attached to the Second Rodrigues de Sá Expert Report

[36] Esc. R1261, page 28

348. What is being discussed now are the obligations incurred by UPV, during the period from July 19 and December 15, 2006, which could be taken over by VRG and—if on April 8 they were still owing—should be reflected on the Revised Balance Sheet.

349. The assets described in the Public Notice—in essence, the Old Varig aircraft intended for passenger transport—were fully operative, and therefore each day they generated revenue, from the sale of tickets, but also operating liabilities (fuel, crew, catering, and so on). When obtaining CHETA in December 2006, the assets were taken over by VRG, which continued to operate with the aircraft.

350. What in fact happened to the operating liabilities, arising throughout the UPV period, which on December 15, 2006 were still pending payment? Did they remain at Old Varig, or were they taken over by VRG?

351. The response to this question, from the factual point of view, leaves no room for doubt: the expert Simonaggio showed that VRG paid operating debts arising throughout the UPV period including after the Effective Date. If VRG paid these expenses, it is because it was obliged to do so, as no company voluntarily pays debts that it does not owe. And if VRG was so obligated, in order to have the Revised Balance Sheet as of the Effective Date faithfully reflecting this situation, it would be necessary to have the debts in point appear in the books as liabilities.

352. From the outset, it would seem that if VRG in fact paid the debts stemming from the UPV period after April 8, 2007, such debts should be reflected in the Revised Balance Sheet as of the Effective Date.

An additional argument

353. The previous conclusion is seen to be confirmed by the existence of the suit for rendering of accounts set forth in Clause 5.3 of the Agreement.

354. The purpose of the rendering of account was to correctly distribute certain costs incurred and the funds received during the interim period until such time as VRG were to take over control of the company. Attachment IV to the Agreement contains a list of the items that are to be agreed upon. Pursuant to the Public Notice, VRG had agreed to make a transfer of no more than 75,000,000 USD in order to cover expenditures between the auction date and the date of concession of CHETA. The very existence of this settlement of accounts shows that the Seller believes that VRG should take over certain operating obligations during the UPV period, which debts are reflected in the VRG balance sheet, and that afterwards VRG would seek reimbursement of any such amounts from Old Varig through a suit for rendering of accounts.

355. In Clause 5.3 of the Agreement, it was agreed that the positive or negative result of the rendering of accounts would in any event correspond to VLog—that is, it would be VLog that could go after Old Varig for the sum owed that had arisen during the UPV period. The other side of this coin is that the sum regarding the debts of the GoI - VLog relationship should be taken into account at the time of calculation of the price adjustment. If not, VLog would be unjustly benefiting financially.

Counterarguments of the Respondents

356. In light of this conclusion, the Respondents intended to rebut three arguments:

357. In its first argument [37] the Respondents state that the GoI Group in its very financial statements had accepted that VRG had not assumed any liability whatsoever for the UPV debts.

358. In truth, the financial statements for the GoI Group do not contain any statements from which one might conclude that the GoI Group would be violating what was set out by its own acts. The only mention that said statements make is as follows: [38]

> *"VRG started its operations as a concessionaire for rendering of air transport services on December 14, 2006 and in light of its background process and recent history, there is no information for drawing up the* pro forma *financial statements for the previous periods for comparison purposes."*

359. Based on this, one cannot in any way deduce that the GoI Group would accept that VRG accepted no liability whatsoever for the preexisting debts.

360. In the second place, the respondents purport that the very Public Notice set forth the principle that VRG would not assume liability for any debts incurred by UPV during the period up to such time as the condition precedent was satisfied.

361. The Public Notice, nonetheless, seems to set out exactly the opposite.

362. Pursuant to Clause 7.1 of the Public Notice, the auction was subject to the condition precedent of obtainment of CHETA. Pursuant to Brazilian law, the general principle is that, once a condition precedent has been performed, the effects of the deal are retroactive to the date the contract was actually entered into. [39] Thus, unless the Public Notice was to set out something to the contrary, the normal solution under Brazilian law would be that the effects of the UPV acquisition were retroactive to the date of the auction. And that, as a consequence, VRG would be held liable for any business indebtedness that may have arisen while the condition precedent was pending.

363. Does the Public Notice establish a special certain rule that might contradict this general principle?

364. In its Attachment II, the Public Notice expressly regulates the "subrogation of contracts" and establishes the following guidelines:

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[37] Esc. R1261, page 26

[38] Doc. 7 attached to the Second Rodrigues de Sá Expert Report, page 11

[39] Please see Peluso: "The Brazilian Civil Code – Comments: Jurisprudence and Case Law" (2008), page 106, the comments made by Nestor Duarte on art. 125 of the CC: "The condition precedent, while not performed, prevents the acquisition and, as a consequence, the exercise of the right. It is in this different from the initial instrument, which only suspends the exercise, but not the acquisition of the right (art. 131) and of the duty that, unless it is imposed as a condition precedent by the party making such disposal, does not suspend acquisition or the exercise of the right (art. 136). Nevertheless preventing the acquisition of the right until its implementation, once the condition has been performed, the right is deemed to have existed as from the performance of the deal, if intervivos or from the opening of the succession, if deceased parties are involved (causa mortis)"

"*Contracts that are not personal by nature, or that do not require consent for assignment of the contractual position, will be automatically subrogated pursuant to art. 1,148 of* [CC [Brazilian Civil Code]]. *The bidder for the VARIG business unit - UPV (the Bidder) will not take over the obligation in arrears with regard to the contracts whereby it is subrogated, pursuant to the provisions set out in Art. 60 of [LRJ], with due regard to the provisions set out by the Public Notice."*

365. The Public Notice says nothing whatsoever as regards to whether the effects of subrogation are produced on the date of the auction or on the date of performance of the condition. By saying nothing, one should assume that the general principle established under Brazilian law would prevail, and recognize the retroactive effects as per performance of the condition precedent. [40]

366. The Respondents, in the end, filed a third argument : art. 60 LRJ would make it unfeasible for an auction of a business unit, in the course of court reorganization, to produce subrogation as per the purchaser as regards preexisting obligations.

367. In good truth, art. 60 LRJ does not support the position of the Respondents—throughout the case, its failure to establish anything reinforces the opposite position. Let us then see:

368. Art. 60 LRJ establishes the following:

"If the approved plan for court reorganization were to involve court transfer of branches or of isolated business units of the debtor, then the court will order this to be done, with due regard for the provisions set out in art. 142 of this Law.

Sole Paragraph. The object of the transfer will be free and clear of any encumbrances whatsoever, and there will be no succession of the bidder as per the obligations of the debtor, including obligations involving taxes, with due regard for the provision set out in Para. 1 of art. 141 of this Law."

369. The precept set forth above in fact establishes that a UPV transferred *"will be free from any encumbrances and there will be no succession of the bidder as regards the obligations of the debtor."* Please note just what this precept regulates and what it does not regulate. As worded, the article merely refers to any obligations that may have arisen before transfer, meaning, before the auction was carried out. With regard to these obligations, there is no doubt whatsoever that VRG is not liable. Art. 60 LRJ, nonetheless, does not regulate the event whereby a transfer is made pending a condition precedent, and does not establish the regimen for the obligations that might arise while performance of the condition is pending. As a consequence, as there is an oversight in the regulations, this lacuna should be resolved by appealing to the general principles of Brazilian law. And the general principle applicable to conditions precedent is that they are effective retroactively.

370. As a consequence, the Tribunal estimates that the correct construction of art. 60 LRJ underlines the conclusion already reached: that VRG is liable [41] for the debts incurred throughout the UPV period.

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[40] The argument is strengthened because the aircraft lease agreements—which are not the agreements we are now looking into—the Public Notice expressly sets forth that any debts that may arise during the UPV period are for Old Varig (please see Attachment II). Inclusio unius, exclusio alterius [the inclusion of one is the exclusion of another]

With the corollary that, if on April 8, 2007 these debts were to remain payable, they should appear on the Revised Balance Sheet as of the Effective Date.

(b) Reason B: invoices postdating concession of CHETA

371. Reason B, which the Respondents put forth in order to propose that certain suppliers' debts be excluded from the calculations, is based on the fact that these are obligations referring to the period between December 15, 2006, the date of CHETA, and March 15, 2007, the date of the Revised Balance Sheet, which sum is not included on this Balance Sheet.

372. The argument cannot prevail.

373. The item "Suppliers: Others" was one of the items that had to be included in the Initial Balance Sheet and the Revised Balance Sheet.

374. The only thing shown by the fact that on March 15, 2007 there were certain debts to various suppliers, and that the Respondents had not included these when calculating the item "Suppliers: Others" on the Initial Balance Sheet is that said balance sheet was not well calculated, and did not give a true image of the actual financial situation. Therefore, one cannot deduce that certain debts, if they even existed as of April 8, should also be excluded from the Revised Balance Sheet. As already mentioned, the Revised Balance Sheet on the Effective Date should have been an audited balance sheet that might give a true calculation of the items set out in Clause 5.1 and in Attachment III. And in order for this image to be true, it is essential that all debts as per the suppliers be duly reflected.

(c) Reason C: other invoices

375. Reason C refers to a series of invoices that in the opinion of the Respondents should be excluded as they were portrayed in the documents issued after the Effective Date, which documents did not specify the period of application, nor is there any proof that the liability corresponds to the Respondents.

(i) Wells Fargo

376. The first group of invoices that are said to involve discrepancies are the invoices pertaining to Wells Fargo. Well Fargo reportedly had leased to VRG two MD 11 aircraft, and the invoices are as follows:

377. The invoices with respect to PP-VTI aircraft came about as follows: before the Effective Date, the aircraft was no longer in service. There was no evidence whatsoever that the Sellers had decided prior to the date of the Initial Balance Sheet, that is, March 15, to return the aircraft to the lessor.

[41] Except for the debts that arise in aircraft lease agreements

On the other hand, there is likewise nothing in the case record indicating the decision to return the aircraft to Wells Fargo had been taken between March 15 and April 8, the Effective Date, while still under the management of the Sellers. The only evidence that exists in the case record shows that the aircraft went to maintenance before the Effective Date [42]—but not that the decision was to definitively return the aircraft.

378. It further appears that it was later, once under GoI control, that the decision was taken to return the aircraft to the lessor. And it was in fact on July 19, 2007 that VRG returned the plane to Wells Fargo, thereby terminating the lease. At this point, the aircraft was incomplete, as two engines and some auxiliary equipment were lacking. As a consequence, Wells Fargo issued on July 19, 2007 two invoices in the name of VRG billing the sum owed by the parties due to what was lacking in the plane. [43]

379. The Tribunal concluded that, when on April 8, 2007 the Revised Balance Sheet was being prepared, the aircraft was undergoing repairs but the VRG directors had not yet made the decision to return the plane. As a consequence, it was not foreseeable that Wells Fargo would require payment of the equipment that was missing. In light of this, the Tribunal rules that the invoices for the PP-VTI aircraft, totaling R$ 4,609,030 and issued by Wells Fargo, do not constitute operating liabilities as of the Effective Date and should not be taken into consideration under "Suppliers: Others."

380. The status of the PP-VTJ aircraft is similar. In this case, the case record shows that on March 28, 2007 the aircraft was released for return to service, after carrying out the maintenance, [44] and as a consequence it seems that it returned to operations. Subsequently, at some point, it must have been subject to maintenance once again, and on June 13 it was again released to return to service. [45] On June 6 the aircraft was returned to Wells Fargo. [46] In this case, the evidence submitted seems to show that on April 8, 2007 the aircraft was in service, and therefore it could not have been foreseen that subsequently it would be returned to the lessor and that said lessor would then submit a bill for the parts that were missing.

381. As a result, the Tribunal has decided to reject all Wells Fargo invoices totaling the sum of R$ 4,663,336 [47] as "Suppliers: Others".

(ii) Other invoices

382. The remaining invoices in point refer to cases whereby the document was issued subsequent to the Effective Date, that is, April 8, 2007, but the expenditure was incurred before that time. In accordance with the accrual basis of accounting, these sums should be included on the Revised Balance Sheet, as they referred to obligations that occurred before this date. Mr. Rodrigues de Sa did not submit any argument whatsoever that would refute this conclusion [48] and as a consequence

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[42] Document from SR Techinics [sic], Doc. 7 attached to the Second Simonaggio Expert Report

[43] Return Acceptance Certificate dated July 17, 2007; Doc. 7 attached to the Second Simonaggio Expert Report

[44] Release Certificate for return to service dated March 28, 2007, Doc. 8 attached to the Second Simonaggio Expert Report

[45] Release Certificate for return to service dated June 13, 2007, Doc. 8 attached to the Second Simonaggio Expert Report

[46] Return acceptance certificate dated June 6, 2007, Doc. 8 attached to the Second Simonaggio Expert Report

[47] Sum of R$ 4,277,229 + R$ 331,801

[48] Second Rodrigues de Sá Expert Report, page 16

the Tribunal accepts the inclusion of these invoices in the amount of R$ 751,636 under the heading "Suppliers: Others."

(d) Reason F: lack of proof of liabilities

383. According to what is alleged by the expert designated by the Respondents, Mr. Rodrigues de Sa, there are sums relating to which it has not been possible up to the date of submission of the supplementary opinions to prove the existence of the accounting entries for liabilities and their related settlement; consequently, the expert suggests that these sums be excluded.

384. In this case, the Arbitration Tribunal shares the opinion stated by Mr. Rodrigues de Sa.

385. The burden of proof falls to the Claimant; and in the case of these invoices, the Claimant and its expert were not able to demonstrate the existence of the indebtedness that they are seeking to group along with the liabilities in the Revised Balance Sheet. As a consequence, the Tribunal is of the opinion that said sums are not to be included with the "Other Suppliers" account.

Summary

386. As a consequence, the Tribunal has reached the conclusion that from the total of R$ 14,191,160 in point the sums indicated below should be excluded as follows:

- Reason A: R$ zero;

- Reason B: R$ zero;

- Reason C: R$ 4,663,336; and

- Reason F: R$ 1,688,074.

387. As a result of these exclusions, totaling the sum of R$ 6,351,410, the sum of the item "Other Suppliers" comes to (R$ 40,909,678). [49]

3.5 CHARGES, TAXES AND CONTRIBUTIONS – INFRAERO

388. The account "Charges, taxes and contributions – INFRAERO" represents liabilities linked to the charges levied by the authorities managing the airports—in the case of Brazil, INFRAERO—for embarkation of passengers, use of the landing strips and similar services.

389. On the Initial Balance Sheet the account appears among the liabilities with a zero balance. What is being discussed in the present controversy is just what the correct amount of this account should

[49] (47,261,087 – 6,351,410)

be at the Effective Date. In the opinion of the expert for the Claimant, the correct sum is R$ 15,450,963, while the expert for the Respondents, although he does admit that the sum calculated by Mr. Simonaggio is numerically correct, feels that there has been a decision on the part of the parties involved to not include this account, and that therefore the sum posted to the account should be zero.

A. Position of the Claimant

390. According to the Claimant, and according to its expert, the airport charges are an integral part of the ordinary operations of VRG, having the same nature as the other obligations of supply, services, taxes and related items [50]189 and therefore they should be included as a liability on the Revised Balance Sheet.

391. According to the expert for the Claimant, the expert for the Respondent[s] included, when adjusting the price of a subaccount of a similar nature, the outstanding balance of R$ 9,653 million for the account "Charges for Embarkation – INFRAERO," which figures in the group "Charges, Taxes and Contributions – Others."

392. The Claimant concludes that "*should the account not refuted in the* [First Rodrigues de Sá Expert Opinion [sic]] *be maintained and the account refuted in the* [First Rodrigues de Sá Expert Opinion [sic]] *be rejected, the result will entail an unjust gain, as only the balance that involves the price adjustment in favor of* [VLog] *would be maintained, of the two accounts that are being offset at the time of the financial settlement*". [51]

B. Position of the Respondents

393. According to the expert for the Respondents, the accounts taken into consideration for attaining the amount of R$ 15,450,963 were not taken into account by the parties in the Agreement, even though they had a balance as of March 15, 2007, for which reason the balance should be zero on April 8, 2007. [52]

394. According to the expert Rodrigues de Sá, this discrepancy results from the fact that the expert for the Claimant mistakenly called the account "Charges, Taxes and Contributions" by the name "Airport Charges," which allowed the inclusion of various subaccounts in this account, which, according to the expert for the Respondents, did not have any relevance whatsoever to the amounts owed INFRAERO.

395. On the other hand, the discrepancy also results from the fact that the only account from the VRG accounts plan that could be taken into consideration for this specific item concerning the price adjustment would be account 2183000001, called "Airport Tariffs – INFRAERO." However, and according to the Respondents, this account, notwithstanding its having a balance of R$ 10,977,288

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[50] Esc. C 50, page 55 and Second Simonaggio Expert Report, page 23

[51] Esc. C 50, page 55

[52] Esc. R1261, page 81

as of March 15, 2007, is shown in Attachment III to the Agreement with a value of zero.[53] This leads us to conclude that the parties had agreed that, independently of whatever balance that this account might be showing as of April 8, 2007, it would not be taken into consideration.

396. The Respondents conclude by alleging that should the Tribunal feel that subaccount 2183000001 corresponding to Airport Tariffs – INFRAERO should be used for purposes of determining the working capital as of April 8, 2007, even so the amount would be only R$ 628,588 and not R$ 15,450,963 as suggested by the Claimant, based on the Simonaggio Expert Reports.[54]

397. According to Respondent 4, INFRAERO would only allow VRG to operate at Brazilian airports if it paid the corresponding charge up front, for which reason there could be no liabilities in this regard in the account.[55]

C. Analysis of the Arbitration Tribunal

398. The expert for the Claimant determined that as of the Effective Date there were certain liabilities arising from use of the airport infrastructure, for domestic and international flights, which agree with the collection reports issued by each one of the airport authorities involved.[56] In its opinion, the amount of these debts should go in the item "Charges, Taxes and Contributions – INFRAERO" and as of April 8, 2007 it totaled R$ 15,450,963.

399. The expert also showed the payment of said debts, differentiating between INFRAERO debts and the rest:

400. The debts pertaining to INFRAERO are the object of a special payment system, given the large volume of passengers concerned. INFRAERO issues invoices from time to time, which the company pays, showing timely payment in the assets account "Embarkation Charges – INFRAERO." This account showed an outstanding balance as of April 8, 2007 of R$ 9,653,449, which was not the subject of any refutation by VLog and which was allowed without reservation. While the liabilities include the account "Charges, Taxes and Contributions – INFRAERO" in which VRG noted debts to INFRAERO insofar as it incurred this indebtedness. From time to time it offset the liabilities and assets accounts. The balances payable in the liabilities account were transferred to the assets account in December 2007, and in this way were settled.[57]

401. With regard to the remaining debts under scrutiny, the expert for the Claimant showed that they were actually repaid.

402. The Tribunal accepts the argument of the expert of the Claimant that the debt "Charges, taxes and contributions – INFRAERO" is part of the current liabilities that existed as of the Effective Date, and that it was subsequently paid by VRG and should be included in the Initial Balance Sheets.

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[53] Esc. R1261, page 83
[54] Esc. R1261, page 84
[55] Esc. R432, page 57
[56] Second Simonaggio Expert Report, page 20
[57] Second Simonaggio Expert Report, page 21

Counterarguments of the Respondents

403. In light of this conclusion, the Respondents have essentially two arguments: [58]

404. In the first place, the Respondents allege that the expert Mr. Simonaggio erroneously included in the item "Charges, Taxes and Contributions – INFRAERO" various subaccounts with regard to airport charges owed agencies other than INFRAERO (for example, the equivalent foreign agencies).

405. The argument is invalid.

406. In the Initial Balance Sheets there are two distinct accounts:

- "Charges, taxes and contributions – INFRAERO" with a zero balance; and

- "Charges, taxes and contributions – OTHERS" with a balance of R$ 1,355,250.

407. The liabilities for use of the airport infrastructures are typical and habitual for airlines: it is impossible to engage in passenger air transport without paying the airport charges required. And these charges are due INFRAERO in Brazil, and other similar agencies in other countries. The Tribunal does not harbor any doubt whatsoever that the volition of the parties at the time of granting the agreement was that all liabilities relating to use of airport infrastructures be reflected in the Initial Balance Sheet—either in the account "INFRAERO" or in the account "Others." One cannot assume that the two parties, both operators with experience in airlines, could want to design a system for calculation of the current capital of an airline, in which they have certain airport charges—such as those for INFRAERO—in the account and not the others.

408. In the second place, the Respondents argue that the account "Charges, taxes and contributions – INFRAERO" had a balance of zero on the Initial Balance Sheet, and from this fact deduce that the parties agreed that independently of the balance of this account as of April 8, 2007, such balance would not be taken into consideration. They then deduce that the correct balance at the Effective Date should be zero.

409. This argument is rejected.

410. The lack of a specific balance does not have to necessarily mean that the parties have agreed to exclude this item from review of the balance sheet. The material way of excluding the item would have been to not mention it on the Initial Balance Sheet. The inclusion with a zero balance seems to mean that the parties either believe that as of March 15 all debts would be paid, or they wanted the balance to be revised subsequently.

Summary

[58] Please see R1261, page 82

411. In brief, the Tribunal decides that the correct sum for the account "Charges, taxes and contributions - INFRAERO" on the Revised Balance Sheet as of the Effective Date should amount to (R$ 15,450,963).

3.6 ACCOUNTS PAYABLE IATA/ICH

412. Under this account title, Claimant claims that the Revised Balance should include a liability account entitled "Miscellaneous accounts payable—ICH/IATA," in the amount of R$ 51,797,387. In the Buyer's opinion, this account represents operations connected with the code IATA RG/042/042 (previously pertaining to Old Varig) ["Code 042"], corresponding to the period from June 2006 to March 2007 and later liquidated on April 8, 2007.

413. For a better understanding of this difference, the Arbitration Tribunal will begin with a summary of the facts that occurred (A), then summarize Claimant's position (B), Respondents' position (C) and conclude with the Arbitration Tribunal's legal analysis (D).

A. The Facts that Occurred

414. IATA is an association that the major airlines of the world belong to which has, among other things, the function of designating the code used by the airlines, also offering various other services to its clients. [198] These services include:

- IATA Billing and Settlement Plans ["BSP"]: a system created to facilitate and simplify the fare and cargo sales process via IATA's accredited agents; there is generally a BSP for each country;

- IATA Multilateral Interline Traffic Agreements ["MITA"]: an agreement by which passengers and cargo use a standard air cargo document (ex.: departure document or air waybill) to travel using various forms of transportation on a given route and to reach a final destination;

- IATA Clearing House ["ICH"]: a place where accounts are settled between airlines and where all the members launch their respective airfare debits and credits against other airlines for clearance and payment of the resulting balance.

415. Old Varig was a member of IATA since 1945 under Code RG 042 and participated in the BSPs of Brazil and various foreign countries for the purpose of billing airfare and cargo sales made by travel agents who are members of IATA. In 1955, Old Varig became a member of the ICH to facilitate the collection and payment of obligations and credits between airlines that were members of this multilateral clearance system.

416. Prior to June 2005 [199] Old Varig had faulted on its obligations to numerous creditors, including IATA, and the association's reaction was to suspend the airline from the different systems: the ICH on June 19 and all the BSPs except Brazil on August 18, 2005. [200]

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[198] Clarif. R1261, p. 93, Clarif. R432, p. 65 et seq and transcripts of the deposition of Mrs. Roula Zaarour on September 11, p. 171 et seq.

[199] When it filed for [bankruptcy] protection under the LRJ [Law of Judicial Reorganization].

417. On July 14, 2005—after being suspended from the ICH and before being suspended from the BSPs—Old Varig and IATA signed an agreement by which the Brazilian association member deposited US$ 54 million with IATA to pay off (among other things) its ICH and BSP obligations. In June 2006 it signed a special clearance (namely, an "extraordinary clearance") in which a major portion of Old Varig's ICH debt was paid off. [201]

418. On November 23, 2006, IATA and Old Varig signed a second agreement and the Brazilian company was reinstated to certain BSPs. [202]

419. In March of 2007, after these clearances and payments were made, approximately US$ 17 million of the original US$ 54 million still remained deposited with IATA. [203] That deposit became the property of VRG because it was one of the assets that made up the UPV and, as a result of the auction, was transferred to the buyer, forming part of its assets.

420. Effectively: in the Initial Balance Sheet of March 15, 2007, included among the items that made up the Current Assets is the "BSP Guarantee Deposit (US$ 16,000,000)," which is equivalent to R$ 33,454,400. Included among the assets in the Initial Balance Sheet, therefore, were the deposits that Old Varig had made to IATA, which had been allocated to the UPV and transferred to VRG. [204]

The Agreement with IATA dated March 30, 2007

421. It is a well-known fact that on March 28, 2007 the VRG Purchase and Sale Agreement was entered into between Respondents 1 and 2, as Sellers, and GTI, as Buyer, but the Agreement was subject to a condition precedent and VRG's management remained in the hands of the Sellers until the condition was met. In this situation, while still under the management of the Sellers, Old Varig, VRG and IATA signed a new agreement ["the IATA Agreement"] on March 30, 2007. [205]

422. What VRG had hoped to achieve with the signing of the IATA Agreement was for IATA to agree to transfer Old Varig's Code, RG 042, to VRG and for the latter to be admitted to the BSPs of 40 countries (to facilitate the sale of its airfares via the travel agencies located in those countries). [206] Thus, in order to succeed in getting IATA to consent to the transfer and to be admitted to the 40 BSPs, VRG assumed an important commitment: it agreed to become liable for all of Old Varig's past debts to IATA. It should be noted that the signing of this agreement led only to participation in the BSPs, not to membership in the ICH (IATA's clearance system).

The "Novation" of August 28, 2007

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[200] Whereas Clause No. 8 of the IATA Agreement dated March 28, 2007.

[201] Clause 3 of the IATA Agreement dated March 28, 2007.

[202] Whereas Clause no. 9 of the IATA Agreement dated March 28, 2007.

[203] Whereas Clause no. 7 of the IATA Agreement dated March 28, 2007.

[204] While the IATA Agreement says "approximately 17 million USD," the Initial Balance Sheet gives the precise figure of US$ 16,000,000.

[205] IATA signed on April 4.

[206] Clause 1 of the IATA Agreement.

423. After the Buyer took over the management of VRG, there are no indications that the latter was in default of the IATA Agreement dated March 30, 2007, which was signed when the Sellers were still managing VRG.

424. Good evidence of this is the fact that on August 28, 2007—already under the Buyer's management—VRG signed with IATA (and with Old Varig) an *Amendment* to the IATA Agreement [the "Novation"].[207] The purpose of this Novation was to provide a second step to VRG's admittance to IATA. According to the IATA Agreement, VRG had already received [IATA's] consent for the 40 BSPs and could sell its airfares via that system. What the Novation dealt with was permission for VRG to enter the ICH.

425. For this purpose the parties agreed to the following:

- VRG should make a guarantee deposit with IATA in the amount of US$ 45 million to cover its responsibilities derived from the ICH;

- The deposit of US$ 17 million to cover the BSPs would be reduced by US$ 9 million and that amount would be transferred to the Deposit of US$ 45 million to cover the ICH responsibilities;

- VRG agreed to make an advanced payment of US$ 20 million for the payment of post-suspension debts, namely, debts arising after March 30, 2007; it is important to emphasize that this payment referred to debts incurred after suspension, not before it.

B. Claimant's Position

426. In its final written arguments, Claimant divided this difference into (a) an accounting discussion and (b) a legal discussion.

(a) Accounting Discussion

427. According to Claimant's expert, the balance of this account is composed of the following:

"... services rendered (credits) or services received (debits) to/from other airlines or airport infrastructure agents, collection of which is performed by the International Air Transport Association (IATA) and ... refer to operations connected with code RG 042 conducted in the period of June 2006 to March 2007, liquidated later on April 8, 2007 and refers to the net amount resulting from the offsetting of debts and credits resulting from the operations occurring between various companies and VRG, in its current capacity as holder of code RG 042, based on the information contained in invoices issued and received that were known as of that date."[208]

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[207] This Novation states that the IATA Agreement was signed on April 10, 2007; this seems incorrect because the IATA Agreement clearly establishes that it was signed by the Brazilian parties on March 30 and by IATA on April 4, 2007; none of the parties gave that discrepancy in the dates any importance.

[208] According to Expert Simonaggio's Report, page 13.

428. According to Claimant, this amount could not have been included in the Initial Balance Sheet of March 15 because its collection could only have been admissible after the agreement with IATA.

(b) Legal Discussion

429. According to Claimant, the signing of the IATA Agreement on March 30, 2007 resulted in VRG's express assumption of all debts related to that code. This is the document that generates the obligation. [209]

430. Claimant states that the IATA Agreement Novation signed in August of 2007 merely formalized the return of Code RG 042 to IATA's ICH, giving the other members of the ICH the right to use that clearance system to receive their credits.

431. Thus, Claimant concludes that the debts related to Code RG 402 were taken over on March 30, 2007 and should be part of the adjustment with the base date of the following 8th of April. Admission to the ICH merely facilitates the liquidation of that liability via clearance in that environment.

432. Claimant concludes by stating that nothing in the Agreement authorizes anyone to assume that the assumption of obligations derived from the Novation would be excluded from the price adjustment or that Claimant had agreed to this.

C. Position of Respondents

433. Respondents 1 and 2 begin by alleging that, in addition to designating the airline's code, IATA also offers its clients a series of other services, explaining that these [services] include IATA BSP, [210] IATA MITA [and] IATA ICH.

434. According to Respondents 1 and 2 a company can have an IATA code without being part of the BSP or the ICH, and VRG was not part of the ICH until the "*Novation*" that was signed on August 28, 2007. [211]

435. Respondents 1 and 2 state that this account is not included on the list of accounts described in detail in Clause 5.1 and in Annex III of the Agreement, even though it was a known account. Therefore, respecting "*the same items and methodology*," it cannot be included in the price adjustment [sic].

436. They argue that, when Claimant took over VRG's management, it adopted a negligent approach, which frustrated the negotiations for reducing bilateral debts with the airlines that being conducted outside the ICH.

437. According to Respondents 1 and 2, the liability in question in this claim originated in the second semester of 2007 when Claimant joined the ICH and, therefore, those amounts should have been

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[209] Clarif. C 50, page 44

[210] As per transcript of deposition given by Mrs. Roula Zaaour, page 172.

[211] Clarif. R1261, p. 94 and transcript of deposition given by Mrs. Roula Zaaour, page 174.

collected in a specific proceeding for the settlement of accounts.

438. As a subsidiary argument, Respondents also allege that even if VRG had assumed any debt with ICH before the GoI Group took control of the company, in that case Claimant would not be able to include that liability now in the price adjustment, since the signing of that agreement would be classified as a "business judgment" and the parties expressly agreed that any strategic or commercial decision made by Respondents 1 and 2 in the management of VRG "*would not be susceptible to compensation or deduction from the Purchase Price*." [212]

439. As a third argument, Respondents 1 and 2 allege that their expert demonstrated that there is no effective proof of the composition of the amounts [213] and that it is impossible from the documentation submitted to the proceedings to reconstruct and understand the how the balance of R$ 51,797,387 was composed.

440. They go on to state that Claimant still had the burden to prove the composition of debt, limiting itself to providing spreadsheets showing that during the second semester of 2007 various "special clearances" were carried out supposedly to determine the debt, but failed to correspond to the documentation provided by the airlines.

441. According to Respondents 1 and 2, Code RG 042 had been suspended from the ICH since June 2006, when it still belonged to Old Varig and VRG did not even exist. Thus, from June 2006 to March 15, 2007, the only debts incurred by Old Varig were incurred outside the ICH, resulting from bilateral agreements between Old Varig and other airlines. This liability was prior to December 15, 2006 and was excluded from the UPV by the Bidding Instructions and the LRJ [Law of Judicial Reorganization] and, therefore, cannot be attributed to the Sellers.

442. In summary, Claimants allege that:

- According to the methodology of Clause 5.1 of the Agreement, the IATA ICH liabilities cannot be part of the price adjustment; the parties elected in Clause 5 of the Agreement to take into account in the working capital to be determined the "other" sub-account under "accounts receivable" in the assets, but did not choose for the working capital the "other" sub-account under "accounts payable" in liabilities.

- On the other hand, the improper understanding of the UPV concept led VRG to take over several of Old Varig's liabilities that were not VRG's responsibility and cannot be attributed to the Sellers now.

- Finally, Respondents 1 and 2 allege that Claimant did not succeed in demonstrating composition of the balance and, therefore, it would be frivolous, to say the least, to allow such a large amount of money to be included in the price adjustment.

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[212] Clause 7.4 of the Agreement.

[213] Clarif. R1244, Exhibit R1211, pp. 26 to 31.

D. The Arbitration Tribunal's Analysis

443. To resolve this controversy, which is the item of greatest economic relevance submitted by Claimant, the Tribunal will first answer the question of whether VRG took over Old Varig's past obligations (a), then explain why the parties' arguments are groundless (b), and, finally, present the correct accounting of the Revised Balance Sheet of April 8, 2007 (c).

(a) Did VRG assume Old Varig's past obligations?

444. Respondents emphatically affirm that the IATA Agreement "*did not represent any assumption or transfer of Old Varig's IATA ICH debts to VRG or the assumption or transfer of bilateral debts (in other words, Old Varig's debts to other airlines) that could become debts to ICH.*" [214]

445. The Tribunal does not share that opinion.

446. In its opinion, there is no doubt that, upon signing the IATA Agreement, VRG took over the obligation to pay all of Old Varig's past debts to IATA. This is what one can conclude without a doubt from Clause 2 of said Agreement, which establishes the following:

> "*Assumption of Rights and Liabilities. VRG undertakes to assume all rights and benefits associated with CODE RG/042/042 and all liabilities for all outstanding and future tickets plated with CODE RG/042/042, and other debts, costs and liabilities incurred by VARIG (1) in IATA's Settlement Systems worldwide, and in the IATA Clearing House (ICH); and (2) to other departments of IATA, including those where such debts are collected on behalf of third parties in accordance with the rules and procedures of IATA.*" [215]

447. And Clause 2 a) is even more specific, whereas it mentions that debts that were assumed include both the BSP and ICH systems.

448. In addition, there is an acknowledgment by VRG itself—while still under the control of the Sellers—that it was fully aware it would become responsible for Old Varig's past debt. On the same day, March 30 2007, Old Varig and VRG signed a supplemental agreement, [216] to govern the relations that arose between them as a consequence of the signing of the IATA Agreement. In that agreement, VRG acknowledges that the signing of that Agreement with IATA assumed:

> "*VRG's assumption to IATA in that agreement of all current and future obligations derived from the utilization of Code RG/042/042, including those incurred with other airlines, partners, passengers, clients, agents, the latter's agents or third parties, and the assumption of all debts, costs and*

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[214] Clarif. R1261, p. 96.

[215] "Assumption of Rights and Liabilities. VRG undertakes to assume all rights and benefits associated with code RG 042 and all the obligations derived from all outstanding and future tickets under code RG 042 and other debts, costs and liabilities incurred by VARIG (1) in IATA's clearance system, and IATA ICH, and (2) in other departments of IATA, including where such debts are collected on behalf of third parties in accordance with the rules and procedures of IATA." (free translation to Portuguese).

[216] Annex P 4; this had the purpose of making it clear that VRG was not waiving the rights derived from art. 60 of the LRJ.

expenses incurred by VARIG with IATA, including all of its departments, IATA settlement systems (IATA Settlement Systems worldwide), and the IATA Clearing House (ICH) and indemnification of IATA ..."

449. The IATA Agreement was not limited to establishing the general principle that VRG was assuming the debt relative to Old Varig's pre-suspension period, but went much further and developed a specific regulation regarding how VRG's assumption and payment of these debts would be performed:

- IATA would perform one or several "special clearances"(namely, out-of-ordinary clearances), to offset against Old Varig's debts originating prior to the suspension and not yet paid; these debts would also include debts to ICH; [217]

- IATA had already performed a "special clearance" of former Varig's past debts in July 2006; nevertheless, new debts emanated from the period prior to that date and the IATA Agreement quantified these new debts as US$ 1,400,952, stipulating that they must be paid;

- As a system of payment, the Agreement established that debts would be offset against the deposits constituted in IATA and, if these [deposits] were insufficient, [they would be] deducted from money owed to VRG by virtue of the BSPs, except for the one in Brazil (the BSPs have a general balance that is in the airline's favor because they collect payments from the travel agencies for the sale of tickets and cargo);

- The amount of the existing deposit was calculated as approximately US$ 17 million; [218] the above-mentioned amount of US$ 1,400,952 was to be deducted from that deposit, and the remainder utilized for "special clearances" and for the payment of the remaining obligation for which VRG was liable and any others that might originate in the future;

- VRG agreed to replace the amounts withdrawn by IATA from the guarantee deposit, so that there would always be an amount of US$ 17 million on deposit; [219]

- The deposit would be returned to VRG whenever the latter operated during the six-month period after the transfer of the code within the different BSPs without incurring any default. [220]

450. In compliance with the IATA Agreement, effectively in June of 2007, a "special clearance" of past debts took place involving the amount of US$ 8,162,478. [221] The deposit of US$ 17 million was being consumed with the deduction of the "special clearances" and the ordinary clearances in the months of October, November and December of 2007 and January of 2008. Also, US$ 9 million was transferred to the guarantee deposit as an ICH guarantee (as we will explain in detail below). By the end of January 2008, the deposit had been totally consumed and its balance was zero.

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[217] Clause 2 in fine: "In this connection, IATA will be carrying out special clearance(s) of VARIG's debts to the ICH that arose pre-suspension (the ICH will request claims where these had not been submitted), and will set-off these debts either from the deposit held by IATA and described at para. 3(b) below, or from the amounts transiting the IATA BSPs, except BSP Brazil, and owed by IA TA to VRG".

[218] Clause 3 b.

[219] Clause 3 b and 4.

[220] Clause 9.

[221] According to the Report of Expert Rodrigues de Sá, p. 30.

Additional Argument

451. It is important to mention the e-mail contained in the proceedings[222] sent by a representative of IATA itself to Mrs. Roula Zaarour, who was at the time the VRG employee responsible for the process of transferring the RG 042 Code, in which IATA makes it very clear that in order for IATA to agree to transfer the code it would be necessary for VRG to assume Old Varig's past debts relative to code RG 042:

"*We have already discussed that an essential precondition for IATA to agree to transfer the RG/042/042 codes from old Varig to VRG will be the acceptance by VRG of all the liabilities attaching to the codes. These liabilities are fully described in the Jul. 14, '05 and Nov. 23, '06 agreements (the "2005 and 2006 Agreements") to which Old Varig and Iata are parties.*"[223] (emphasis added)

452. Summary : VRG's re-admittance to IATA occurred in two stages, the first under the management of the Sellers and the second under the management of the Buyer. In the first stage, VRG recovered Old Varig's historical code and succeeded in being admitted to the BSPs of major countries in which IATA operates. In exchange, VRG had to become liable for the debt relative to Old Varig's pre-suspension period and to constitute a deposit of US$ 17 million. In the second phase, VRG succeeded in being admitted to the ICH. To do so it had to constitute a guarantee deposit of US$ 45 million and to make an advanced payment of US$ 20 million to cover any debts related to the post-suspension period.

(b) Groundless nature of the parties' arguments

453. It is necessary to analyze the arguments presented by Claimant and Respondents.

(i) Claimant

454. Claimant argues that VRG had to pay IATA for the pre-suspension debts an amount as high as US$ 25,474,394. As proof of this amount, Claimant's expert utilized the following table based on the information provided by IATA in the e-mail of October 16, 2009;[224]

Accounting date	ICH Date	US$	Reference
10/25/2007	10/24/2007	(1,495)	Pmt. ICH balance 1st P Oct/07
10/31/2007	10/31/2007	(8,162)	Special Clearance Inv. Received

[222] Witness Book, Vol. V, Exhibit 94.

[223] "We have already discussed that an essential precondition for IATA to agree to transfer the codes from old Varig to VRG is the acceptance by VRG of all the liabilities related to the codes. These liabilities are described in the July 14, 2005 and November 23, 2006 agreements (the "2005 and 2006 Agreements") to which Old Varig and IATA are parties." (free translation to Portuguese).

[224] Exhibit 5, annex to the Second Report by Expert Rodrigues de Sá.

10/25/2007	10/31/2007	(11,582)	Pmt. ICH balance 2nd P Oct/07
10/31/2007	11/09/2007	(319)	Pmt. ICH balance 3rd P Oct/07
11/12/2007	11/16/2007	(670)	Pmt. ICH balance 4th P Oct/07
11/19/2007	11/23/2007	(1,749)	Pmt. ICH balance 1st P Nov/07
11/28/2007	11/30/2007	(346)	Pmt. ICH balance 2nd P Nov/07
11/30/2007	12/07/2007	(23)	Pmt. ICH balance 3rd P Nov/07
12/13/2007	12/18/2007	(33)	Pmt. ICH balance 4th P Nov/07
12/27/2007	01/03/2008	(1,115)	Pmt. ICH balance 2nd P Dec/07
12/31/2007	01/10/2008	(81) **(25,576)**	Pmt. ICH balance 3rd P Dec/07

455. The table raises two problems: the first is that it adds up to US$ 25,576,000, not US$ 25,474,394, which is the amount being claimed; and the second is that it refers to both a "special clearance" and to ordinary clearances for the months of October to December 2007. What is certain is that the "special clearances" refer exclusively to pre-suspension debts, but in the ordinary clearances, payments of pre-suspension historical debts must be mixed with the new debts that arose after the signing of the Agreement, without Claimant showing evidence that would allow one to separate them from each other. Therefore, in the opinion of the Tribunal, the amount of US$ 25,474,394 being claimed has not been proven.

456. In any event, this is not a case of proving and determining the cost incurred in paying off the pre-suspension debts, but rather, to know the estimated amount of those debts on the Consummation Date and, thus, how much should have been provisioned in VRG's accounting. The Tribunal will return to and develop this matter in deciding what the correct accounting should be for this account.

(ii) Respondents

457. Respondents presented a series of arguments to justify excluding the item "Accounts Payable IATA," but the Tribunal does not agree with those arguments for the following reasons:

458. In the first place, Respondents argue that the item "Accounts Payable: IATA" is not on the list of accounts described in detail in Clause 5.1 of the Agreement and Annex III to the Agreement.

459. This argument cannot be accepted, first, because the item "BSP Guarantee Deposits (US$ 16,000,000)" is listed under assets. The inclusion of this item clearly shows that it was the will of the parties that the adjustment of accounts between IATA and VRG would form part of the calculation of the company's current capital. There is a second argument: the list of accounts in the Initial

Balance Sheet includes the general concept of "Accounts Payable" among the liabilities. The inclusion of this item shows that it was the will of the parties to include in the adjustment any accounts payable that VRG could incur. In the Initial Balance Sheet of March 15, the item—correctly—shows a balance of zero because on that date the assumption of the IATA debt did not yet exist. On April 8 that item cannot have a zero balance but must contain the amount of debt that VRG had meanwhile assumed with IATA.

460. Second, Respondents make extensive allegations regarding VRG's admission to the ICH, which took place after the signing of the Novation, in August 2007. In the opinion of Respondents, that VRG decision, made while under the control of GoI, was a mistake and eliminated any possibility of negotiating private agreements with the various airlines that were creditors of the pre-suspension debt.

461. In fact, for purposes of this claim, VRG's signing of the Novation and admission to the ICH are totally indifferent facts. They occurred after the Date of Consummation and, consequently, the Balance Sheet cannot be affected by these events. What the Revised Balance Sheet should have included—and, in reality, did not—was the impact of the debt assumption on the projected amount of US$ 19 million caused by the signing of the IATA Agreement.

462. Third, Respondents attribute to Claimant the fact that [225] "instead of collecting those amounts from Old Varig, in the settlement of accounts procedure itself, VRG decided to include those amounts improperly in the price adjustment that is the object of this arbitration."

463. This argument is pure sophism.

464. In reality, what the parties agreed to is that the benefit or loss resulting from the settlement of accounts with VRG would correspond exclusively to Respondents. Consequently, the Respondents have the right to claim the amount of pre-suspension debt assumed by VRG with IATA. Respondents have the possibility of being reimbursed. Thus, it seems reasonable that, in the relationship between Respondents and Claimant, they should be the ones who assume that debt. If this were not so, Respondents would benefit from unjust enrichment (Claimant, VRG's owner, would suffer a loss, while Respondents are being reimbursed by Old Varig for the debts that caused VRG's losses).

465. Fourth, Respondents argue that the signing of the IATA Agreement is inserted in the business judgment rule concept. And they allege that the parties clearly established in the Agreement that any strategic or commercial decision made by Respondents 1 and 2 in managing VRG *"would not be subject to indemnification or a discount off the Purchase Price."* [226]

466. The Tribunal also does not agree with Respondents' argumentation regarding this point.

467. Respondents have based their argument on Clause 7.4 of the Agreement, which states as follows:

"Vlog and Volo DB declare that they conducted VRG's business in compliance with the principles and duties of diligence, loyalty and good faith (business judgment rule) established by Law.

[225] Clarif. R1261, p. 99.

[226] Clause 7.4 of the Agreement.

Without detriment to the provisions of Clause 8.3 c), any eventual loss resulting from the strategic or commercial decisions made by Vlog and Volo DB in following these parameters will not be subject to indemnification or a discount off the Purchase Price."

468. The Clause, which was inserted in the *"Representations, Warranties and Obligations assumed* [by the Sellers] *with* [Vlog] *and* [Volo DB]," do not refer, in reality, to the allegation that, in fact, is under analysis.

469. What the Clause establishes is the principle that the Sellers will not indemnify the Buyer for any losses derived from acts performed under their management, whenever the facts comply with the "business judgment rule."

470. That principle has nothing to do with this price adjustment obligation set forth in Clause 5 of the Agreement: according to that stipulation, if the company's current capital increases or decreases before the condition precedent has been complied with, that modification produces an *ipso facto* price adjustment. Under these terms, the fact of whether or not the acts that caused that modification complied with the "business judgment rule" is totally irrelevant—what is important is that they cause a change in the Current Assets or Liabilities, as defined in Clause 5.1. If the acts are contrary to the "business judgment rule" they will also invoke the Sellers' liability, according to Clause 7.4. Otherwise, such fact will not prevent those acts from causing a price adjustment.

471. It is quite possible that the signing of the IATA Agreement was a wise decision, which was adapted to the business judgment rule. Good evidence of this lies in the fact that, even though it was adopted under the management of the Sellers, the Buyer accepted and continued to negotiate with IATA until the Novation was signed. Well now, this was not the only decision that was adapted to the business judgment rule that VRG adopted under the management of the Sellers: the aircraft kept flying, the crews continued to be paid, tickets were sold, products were purchased, the IATA Agreement was signed. And all these operations should be reflected in the company's accounting and form part of the Initial Balance Sheet and Revised Balance Sheet. And, if they caused a change in the current capital, they should lead to the price adjustment stipulated in Clause 5.

472. Having analyzed the preceding arguments, we shall now determine what the correct balance in the Revised Balance Sheet should be.

(c) Correct Accounting in the Revised Balance Sheet

473. The Tribunal already pointed out that the only reference in the Initial Balance Sheet to IATA was the inclusion under assets of an account entitled "BSP Guarantee Deposits," of a REAL currency amount equivalent to US$ 16 million. The Initial Balance Sheet was dated March 15, 2007. Therefore, it could not reflect what was agreed in the IATA Agreement of March 30 of that year.

474. Well now: the Revised Balance Sheet was prepared on April 8, 2007, in other words, after the IATA Agreement was signed. In order for this Balance Sheet to reflect a true and appropriate image of VRG's asset situation it was necessary to include the economic impact of the IATA Agreement that

VRG had just signed and according to which VRG was obliged to pay all of Old Varig's past debts. A balance on April 8, 2007 had to reflect the past debt that VRG was about to assume with IATA.

475. However, the accounting of the past debt raises a problem: the Agreement does not provide a total figure for the assumed past debt.[227] Does this mean that debt assumption should not be recorded in the accounting?

476. The answer is clearly 'no,' as expert Simonaggio convincingly affirms.[228]

"The existence and payable nature of the liability were clear and, if the amount could be estimated—in this case, it can be determined—it should be recorded as a payable obligation. The position adopted in [Expert Rodrigues de Sa's First Report] does not comply with Brazilian accounting principles because it would result in the omission of a significant liability based on the argument that the amount is imprecise but, even so, its estimated value has to be recorded."

477. The appropriate thing to have done on April 8, 2007, when preparing the Revised Balance Sheet, would have been to make an estimate of the reasonable amount VRG had to pay IATA for the pre-suspension debts. The amount to be included would be an estimate of the cost—not the actual cost incurred, since that amount could only be determined at a later date, after the "special clearances" occurred.

478. The Seller did not do so and the Revised Balance Sheet did not include the historical IATA debt. Well now, there is information in the proceedings that could serve as a guide to prepare that estimate: we have an available communication from IATA itself that details the deposits VRG should make to cover "pre-suspension debts," amounting to US$ 19,000,000.[229] That figure—provided by IATA—seems to be a reasonable calculation of the debts that VRG assumed when it signed the IATA Agreement.

479. Consequently, the Tribunal estimates that, in order to prepare the Revised Balance Sheet, the impact that the signing of this document has on VRG's asset situation must be taken into account. And the impact is that VRG had agreed to pay some amounts historically owed by Old Varig and that the amount of these debts can be reasonably estimated as US$ 19 million. That sum should have been reflected in VRG's accounting in order to provide a true and appropriate image of its asset situation.

480. In accounting terms, what would have been the correct way to show the IATA debt? Please remember that IATA reserved the right to collect debts by deducting them from the guarantee deposit constituted by VRG. Therefore, there were two alternatives for VRG to properly show the debt in its Revised Balance Sheet:

- On the one hand, the deposit amount could be reduced to zero when fully utilized for the payment of historical debts;

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[227] Clause 3 a) contains a reference to US$ 1,400,952, but this amount clearly constitutes a part of the assumed debt.

[228] Expert Simonaggio's Second Report, p. 17

[229] See e-mail from IATA employee Nicholas Coote dated October 16, 2009; Exhibit 5, annex to Second Rodrigues de Sá Expert Report.

- Also, or as an alternative, a current liability account could be created in the same amount and included under "Accounts Payable" within current liabilities.

481. Both alternatives lead to the same result: VRG's current capital is over-valued and it is necessary to reduce it by the amount mentioned above, US$ 19,000,000, which corresponds to R$ 40,850,000. [230]

Summary

482. In summary, the Tribunal has decided that the Revised Balance Sheet on the Date of Consummation should contain, under the liabilities item "Accounts payable" a balance of (R$ 40,850,000), (equivalent to US$ 19,000,000), to reflect correctly the debt assumed by VRG as a result of the signing of the IATA Agreement.

3.7 ACCOUNTS PAYABLE: OTHER

483. After the Evidence Hearing, according to Expert Simonaggio's Second Report, Claimant reduced the amount of the difference relative to this account, excluding three items it had previously claimed. Thus, Claimant mentions that there is a remaining difference of R$ 3,930,250 related to the cancellation of plane tickets that results in an obligation to refund the amount received.

A. Claimant's Position

484. Claimant's expert considered the inclusion of this item pertinent due to its similarity to the group of "Accounts Payable" accounts included under liabilities. [231]

485. Claimant alleges that any restrictive interpretation of this account title ("Accounts Payable") would be "directly contrary" to the parties' intent, which was to include the greatest possible number of similar accounts. Claimant ends by pointing out that the amount of difference is related to the cancellation of plane tickets and there is no doubt that this account shows the effect of VRG's operations on the airline's working capital.

B. Respondents' Position

486. According to Respondents 1 and 2, this difference is derived from the fact that this account is not included in the Initial Balance Sheet, since the item "Accounts Payable" covered only two sub-accounts: "Accounts payable—Insurance" and "Accounts Payable Crew Per Diem."

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[230] The Tribunal accepts the exchange rate of US$ 1 = R$ 2.15 utilized by IATA to convert the BSP guarantee deposit to the real currency on April 8, 2007. That rate was assumed as valid by the two experts and is contained in exhibit G 7 together with Claimant's Exhibit C 33.
[231] Clarif. C 50, p. 56

487. Finally, they allege that they did not locate the accounting records corresponding to those amounts, a fact that alone was enough to prevent the collection—since the documentation provided is composed of an Excel spreadsheet—and most of them refer to the period prior to December 15, 2006 or already existed on March 15, 2007 and were disregarded by the parties when the Initial Balance Sheet was prepared. [232]

C. Arbitration Tribunal's Analysis

488. In this claim, the parties discuss two different issues: first, whether the debts resulting from the refunding of plane tickets reflected in the account "Accounts Payable" must be included in the Revised Balance Sheet (a) and second, whether the balance claimed by Claimant is duly justified (b).

(a) Inclusion of the item "Accounts Payable"

489. Respondents 1 and 2 allege that Clause 5.1 of the Agreement and Annex III mention the item "Accounts Payable" solely as a title, which includes two sub-accounts: "Accounts payable -Insurance" and "Accounts Payable—Crew per Diem." As expert Rodrigues de Sa explained during the Evidence Hearing, [233] the wording of Clause 5.1 and Annex III clearly indicates that of all the accounts payable, the parties only wanted to include in the Initial Balance Sheet and Revised Balance Sheet those that appeared under "Insurance" and "Crew Per Diem." Given the fact that Claimant seeks in this claim to be reimbursed for airplane tickets and that the debt cannot be defined either as "Insurance" or as "Crew Per Diem," Respondents argue that it cannot be taken into account for purposes of the price adjustment in the Revised Balance Sheet—because, as Clause 5.1 of the Agreement stipulates, the Revised Balance Sheet can only include "the same items" as the Initial Balance Sheet.

490. Respondents' allegation leads to a difficult question of interpretation of the Agreement and its Annex III, which the Tribunal will approach by analyzing first Annex III and then Clause 5.1 of the Agreement and, finally, by asking what the real intent of the parties was.

491. When a balance sheet is prepared (whether of assets or financial), chapters are frequently defined, with their corresponding title—a title that does not represent *per se* an accounting value, but only serves to structure the presentation. [234]

492. Usually the structure of the chapters and accounts in the balance sheet is totally maintained, namely, all the assets and all the liabilities are divided in the same manner. The question is whether the Initial Balance Sheet contained in Annex III to the Agreement failed to obey that principle but strayed from it by creating a mixture of chapters divided into items, with independent accounts that do not belong to any chapter.

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[232] Clarif. R1261, p. 92

[233] As per transcript of the deposition of expert Rodrigues de Sá, p. 60

[234] An example would be:Availabilities Banks 100 Cash 30

The Initial Balance Sheet

493. Thus: the Initial Balance Sheet contains three chapters: "Availabilities," "Accounts Receivable" and "Guarantee Deposit," which are divided into several sub-accounts. One can see this because "Availabilities" and "Accounts Receivable" have no balance, and under them, indented one space to the right, are several sub-accounts. But, at the same time, there are five accounts that, without belonging to any specific chapter, present a certain balance (these are: "Guarantee deposits-Amex," Guarantee Deposit—Visa," "Related Companies (Leasing of Cargo Space—Logistica)," "Guarantee deposits - BSP" and "Other Credits").

494. The same thing happens under liabilities: there are two chapters ("Vendors" and "Loans, financings and debentures") that together have seven sub-accounts, all of which are duly indented below; and there are also eleven accounts that are not part of any chapter, because they are neatly lined up on the left. One can see in the Initial Balance Sheet the difference between the chapters ("Vendors") and the list of independent accounts that do not belong to any chapter:

Vendors	
Vendors- Law Office	640,167.66
Vendors- IBM	1,172,530.02
Vendors- Other	3,565,523.54
Loans, financings and debentures	
Fees, taxes and contributions	
Fees, taxes and contributions - INFRAERO	
Fees, taxes and contributions—Payroll	
Income Tax Payment	1,551,733.20
Fees, taxes and contributions—OTHER	1,355,249.80
Salaries and social charges	9,057,867.78
Commercial Leasing payable—Leasing	11,050,665.99
Commercial Leasing payable—Maintenance Reserve	9,686,613.45
Related Companies	
Related Companies—LOGISTICA	952,416.79
Accounts Payable	

Accounts Payable -Insurance	666,028.78
Accounts Payable—Crew per Diem	205,898.46
Future Transport Obligations	31,756,380.76
Provisions for vacation and social charges	3,357,978.66
Provisions for flight equipment maintenance	17,226,889.70

495. At first glance, it appears that "Vendors" is a chapter, while "Accounts Payable" is one of the 11 independent accounts. Well now: it is surprising that "Accounts Payable" also appears without any specific balance. This also occurs with other items, for example "Fees, taxes and contributions—INFRAERO." One can easily imagine why: it is perfectly possible that an account was zeroed out on March 15 but that the parties foresaw that it could show another result on the Date of Consummation. In these cases it is totally coherent to include the account in the Initial Balance Sheet, but with a zero balance. It appears that one could conclude, therefore, that in the Initial Balance Sheet "Accounts Payable" is an individual account and not a chapter, that had a zero balance on March 15.

496. Were this interpretation acceptable, what figures should have been used in "Accounts Payable"? Because all accounts payable of a general nature that VRG had on the Date of Consummation as a result of their ordinary activities (with the exception of accounts payable relative to "Insurance" and "Crew Per Diem," which should have been in their specific items[sic]

497. Let us see now whether this interpretation can be confirmed or eliminated if we analyze Clause 5.1 of the Agreement.

Clause 5.1 of the Agreement.

498. Clause 5.1 offers us—as already mentioned—a table with the accounts that must be included in the Initial Balance Sheet (but without quantifying them). In this table, can the chapters be distinguished from the individual accounts? The answer must be 'yes:' there are clearly chapters and individual accounts. And how are they distinguished from each other? The chapters are invariably found above the sub-accounts that make up the chapters and are separated from the latter by a colon, whereas the individual accounts are numbered and separated by semi-colons.

Choosing the same example as above, [we have]:

Current liabilities

Vendors: Vendors- IBM; Vendors- Other

Loans, financings and debentures: Fees, taxes and contributions;

Fees, taxes and contributions—INFRAERO; Fees, taxes and contributions—Payroll

Income Tax Payment; Fees, taxes and contributions—OTHER

Salaries and social charges

Commercial Leasing payable—leasing

Commercial Leasing payable—Maintenance Reserve

Related Companies; Accounts payable

Accounts payable—Insurance

Accounts payable—Crew Per Diem

Future Transport Obligations

Provisions for vacation and social charges

Provisions for flight equipment and maintenance

499. The wording of Clause 5.1 confirms the same interpretation we already arrived at upon analyzing the literal nature of Annex III: the item "Accounts payable" does not represent the name of a chapter, but rather an independent account in which all the accounts payable that VRG had on April 8, 2007 must be reflected, as a consequence of its normal business activities.

An additional argument

500. Well then: as article 112 CC mentions *"in declarations of will [of the parties], the parties' intent will be complied with more than the literal meaning of the language."* Does the literal interpretation of the Agreement coincide with the intent of the parties?

501. The real will of the parties when they signed Clause 5 of the Agreement was that the Revised Balance Sheet should give a true and appropriate image of VRG's current capital on the Date of Consummation—and if a difference exists relative to the Initial Balance Sheet, the price should be adjusted. Respondents argue that the debts owed to clients for plane ticket refunds, which unquestionably existed on the Date of Consummation, should never be taken into account in calculating the price adjustment. That line of argument is contrary to the financial reasoning [that should be used] when calculating an airline's current capital. All debts incurred by the company in the normal performance of its activity must be included in the current capital, reducing it, because these are funds that the company has committed to its clients.

502. Consequently, one must assume that the Buyer and the Sellers, which are experienced companies dedicated to air transportation, wanted to include under the item "Accounts payable" any debts assumed by the airline in the exercise of its normal activity— including debts involving the

refunding of plane tickets. The literal interpretation is plainly congruent with the intent of the parties—always presumed—when they signed the Agreement.

(b) Justification for the balance claimed

503. Respondents also alleged that the balance claimed by Claimant would not be sufficiently proved.

504. That allegation cannot be justified, since Claimant's expert, Mr. Simonaggio, not only confirmed the existence of the balance, in the amount of R$ 3,930,250, but also proved that these ticket refunds were paid—based on the large number of claims.[235] Having proved that the amounts were duly paid by VRG, the Tribunal estimates that there is no doubt that they should be properly included in the Revised Balance Sheet on the Date of Consummation.

Summary

505. In summary, the Tribunal has decided that the liability item "Accounts Payable" in the Revised Balance Sheet on the Date of Consummation should include a [negative] balance of (R$ 3,930,250), to reflect the debts assumed by VRG under the concept of plane-ticket refunds.

3.8 COMMERCIAL LEASING PAYABLE-LEASING

506. The experts did not agree on the correct balance in the liability account entitled "Commercial leasing payable—Leasing." Claimant's expert estimates that the correct amount is R$ 10,949,588, while Respondents' expert gives the [correct] amount as R$ 9,660,712. The difference of R$ 1,288,876 corresponds to three invoices issued by leasing companies Wells Fargo, Sunrock and Pegasus in the amounts of R$ 1,117,875, R$ 95,934 and R$ 75,067, respectively.

A. Claimant's Position

507. According to Claimant, the difference of R$ 1,288,876 has to do with three aircraft-leasing agreements:

- Wells Fargo;

- Sunrock;

- Pegasus.

508. Relative to the Wells Fargo invoice, based on Expert Simonaggio's Report, Claimant[236] claims that

[235] Expert Simonaggio's Second Report, p. 45

[236] Clarif. C 50, page 59

aircraft PP-VTI was transferred to the lessor on April 2, 2007 for maintenance, to be returned later. That transfer led to the obligation to make certain repairs to the aircraft. For that reason, it must be included for purposes of the price adjustment.

509. Relative to the other two invoices (Sunrock and Pegasus), in response to Respondents' arguments, Claimant alleges that all the invoices were duly submitted to the proceedings. [237]

B. Respondents' Position

510. According to Respondents 1 and 2, the Wells Fargo invoice [238] refers to an expense incurred prior to December 15, 2006 and, consequently, it is the responsibility of Old Varig, and it is also being disputed in a specific account-settlement proceeding. [239]

511. According to Respondents, the Sunrock invoices are derived from the leasing of aircraft for the period after April 2007 and, therefore, are outside the period attributed to the Sellers. Furthermore, the documentation relative to these amounts was allegedly not furnished to Respondents' expert.

512. Finally, Respondents conclude that, even if return of the aircraft were a strategic decision on the part of VRG while still under Respondents' management, according to clause 7.4 the corresponding amount could not be taken into account.

C. The Arbitration Tribunal's Analysis

513. Given the fact that three different invoices are being discussed in this claim, it is necessary to analyze them separately, starting with Wells Fargo (a), followed by Sunrock and Pegasus together (b).

(a) Wells Fargo

514. The Wells Fargo invoice refers to, again, aircraft PP-VTI, an aircraft that was sent to maintenance on April 2, namely, prior to the Date of Consummation, for repairs. Paragraph 377 above already describes what happened with the aircraft: on July 19, after maintenance, the aircraft was effectively returned to Wells Fargo, which demanded two payments:

- One in the amount of R$ 4,609,030, since the aircraft was returned with some missing parts, including two engines; that payment was already analyzed in paragraph 379 above.

- And a second [invoice] in the amount of R$ 1,117,875, which is the object of this claim item.

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[237] Clarif. C 50, page 59 and Expert Simonaggio's Second Report, page 39.

[238] Invoice no. 484566RC-0607

[239] Clarif. R1260, p. 87

515. This second payment is documented in an invoice issued by Wells Fargo on May 21, under the description *"Return Compensation Payment as per VRG/Wells Fargo Use Agreement dated November 30, 2006."* [240]

516. Should this payment have been taken into account when the Revised Balance Sheet was prepared on April 8, 2007?

517. *Prima facie,* the answer should be 'no' because the invoice is dated May 21 and, therefore, it could not be taken into account in a balance sheet prepared six weeks prior to that date. Only one exception could be allowed: if on April 8 VRG had already adopted the decision to return the aircraft; in that case perhaps one could argue that the payment—based on an agreement dated November 30, 2006—should have been provisioned. Nevertheless, Claimant did not submit any evidence that would allow the Tribunal to assume that, on the Date of Consummation, when VRG was still under the management of the Sellers, the decision was already made to stop leasing aircraft PP-VTI and return it to the lessor.

518. Thus, the Tribunal estimates that the Wells Fargo invoice should not be taken into account under the item "Commercial leasing payable—Leasing" in the Revised Balance Sheet issued on the Date of Consummation.

(b) Sunrock and Pegasus

519. In the case of Sunrock and Pegasus, there are two invoices for the leasing of certain aircraft corresponding to the month of April, 2007. [241] They amount to US$ 177,000 and 138,500 respectively. As expert Rodrigues de Sa correctly states, [242] since the invoices refer to the entire month of April, the Revised Balance Sheet should only include the proportional part of the invoices. Consequently, the Tribunal feels that the item "Commercial Leasing Payable—Leasing" should be increased by the amount of US$ 84,133, [243] which equals, at the uncontested [244] exchange rate, R$ 180,886.

Summary

520. In summary, the Tribunal has decided that the Revised Balance Sheet on the Date of Consummation should only include the proportional part of the invoices. Consequently, the Tribunal feels that the item "Commercial Leasing Payable—Leasing" should include a balance of R$ 175,914, to reflect the debts assumed by VRG with Sunrock and Pegasus up to April 8, 2007. Given the fact that both experts agree that this account presents an undisputed balance of R$ 9,661,000, [245] the Tribunal has

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[240] Exhibit 10 annex to Expert Simonaggio's Second Report.

[241] Exhibit 10 annex to Expert Simonaggio's Second Report.

[242] According to Rodrigues de Sá Expert Report, p. 23.

[243] (177,000 + 138,500) x 8/ 30.

[244] The Tribunal accepts the exchange rate of US$ 1 = R$ 2.15 utilized by IATA to convert the BSP guarantee deposit to R$ on April 8, 2007. That rate was assumed as valid by the two experts and is contained in Exhibit G 7 along with Claimant's written document C 33.

[245] According to Expert Simonaggio's Second Report, page 37. In his expert reports, Expert Simonaggio rounds off the figures to the thousands. That practice was not challenged by either of the parties. The Arbitration Tribunal notes that this rounding-off sometimes favors one party and sometimes favors the other party. Therefore the overall result is balanced.245. Esc. C 50, page 62.

decided that this balance should be increased to (R$ 9,841,886) to reflect the increase referred to.

3.9 PROVISION FOR MAINTENANCE OF FLIGHT EQUIPMENT

521. Under dispute in this claim item is correct balance of the account "Provision for Maintenance of Flight Equipment." Claimant's expert believes that the correct balance is R$ 16,777,264, while Respondents want to reduce that amount to R$ 16,218,326. The difference is represented by a Wells Fargo invoice relative to aircraft PP VTI in the amount of R$ 558,938.

A. Claimant's Position

522. According to Claimant, the difference is R$ 558,938 relative to Wells Fargo's billing of the provision for the maintenance of aircraft PP-VTI.[246] Claimant affirms that the invoice refers to the provision relative to part of the expenses involved in the maintenance of aircraft PP-VTI, which was sent for maintenance by VRG during Respondents' management period on April 2, 2007, the liability having been liquidated on May 2, 2007.

523. Claimant concludes by alleging that, although this aircraft was part of VRG's assets, it was never utilized by VRG under Claimant's management, since it was returned to the lessor.

B. Respondents' Position

524. Respondents 1 and 2 affirm that the amount of R$ 558,938 relative to invoice no. 4856R40-0507 issued by Wells Fargo cannot be accepted because it is relative to November 2006 and, therefore, before the UPV was awarded to VRG.[247]

C. The Tribunal's Analysis

525. This difference is similar to what was formulated in the preceding chapter relative to the Wells Fargo invoice involving the concept "Return Compensation payment as per VRG/Wells Fargo Use Agreement dated November 30, 2006." At that time, the Wells Fargo invoice[248] is dated May 1 and its concept is "Maintenance Reserves for May 2007." Therefore, this is the maintenance reserve that the lessee has to pay each month for all aircraft being leased, corresponding to the month of May 2007. In the opinion of the Tribunal, there can be no doubt that this periodic debt for the month of May 2007 should not have been included in the Revised Balance Sheet of April 8.

526. In summary, the Tribunal has decided that the Revised Balance Sheet on the Date of Consummation should not include under the liability account "Provision for Maintenance of Flight Equipment" a

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[246] Clarif. C 50, page 59.

[247] Clarif. R1261, p. 108

[248] Exhibit 12 annexed to Expert Simonaggio's Second Report

balance relative to the invoice issued by Wells Fargo. Since both experts agree that said account shows an undisputed balance of (R$ 16,218,326), the Tribunal has adopted that figure.

3.10 LOANS, FINANCING AND DEBENTURES (CURRENT LIABILITIES) AND LONG-TERM LIABILITIES

527. On February 26, 2007, VRG signed an agreement to lease a Toyota armored vehicle for its president. The automobile continued to be used and the lease was paid until the vehicle suffered an accident on June 24, 2007 and, as a result, was retired from service.

528. In this claim, what is being questioned is the proper accounting [to be adopted] for a vehicle utilized by VRG's president.

A. Claimant's Position

529. According to Claimant, the doubt lies in how each of the experts interprets the leasing agreement.

530. Claimant's expert bases his interpretation on the accounting manual for shareholding corporations, which considers the leasing of motor vehicles as being the same as a financial operation. [249]

B. Respondents' Position

531. Respondents 1 and 2 do not accept the fact that these amounts are being taken into account for purposes of the price adjustment because the parties chose via an Agreement the item "loans and financing" and did not include the debt relative to that lease in the books on March 15, 2007. This occurred because, according to Respondents, these amounts represent a "loan" and/or "financing" for purposes of recording working capital in the books.

532. According to Respondents 1 and 2, the leasing agreement is a commercial lease and if it had been taken into account by the parties it would have been inserted in the "Commercial Leasing" account, which is part of the price adjustment, but that fact did not occur.

533. They add that the automobile in question continued to be utilized until it became involved in an accident on June 24, 2007.

C. The Arbitration Tribunal's Analysis

534. Claimant's expert estimates that the leasing operation was improperly recorded in the Revised

[249] Expert Simonaggio's Second Report, page 41.

Balance Sheet and that, consequently, changes should be made to that Balance Sheet amounting to a total of R$ 260,000:

- One change in the current liability account "Loans, financing and debenture;"

- Another one in the account "Long-Term Liability"

535. The request cannot be granted.

536. In reality, the item "Loans, financing and debentures" does not represent in Clause 5.1 of the Agreement an independent account, but rather, the title of a chapter (regarding this distinction see paragraph 498 above), which covers four accounts:

"Loans, financings and debentures

Fees, taxes and contributions;

Fees, taxes and contributions—INFRAERO; Fees, taxes and contributions— Payroll Income Tax Payment; Fees, taxes and contributions—Other"

537. Given the fact that it is a title, "Loans, financing and debentures" cannot have its own specific balance—only the accounts can have a balance. And among the four accounts included under that title, none of them refer to any debts from leasing operations (all of them refer to fees, taxes and contributions). Consequently, given the fact that the Revised Balance Sheet should be prepared applying "the same items" and "the same methodology" as the Initial Balance Sheet, it is not possible to include in the chapter "Loans, financing and debentures" obligations emanating from the leasing agreement. The intent of the parties was that short-term obligations emanating from vehicle leasing agreements should not be taken into account when calculating the current capital.

3.11 TAX CREDITS

538. In this claim, a small amount of taxes is being disputed, adding up to a total of R$ 66,453, which is offset against computed payable items, for purposes of the balance adjustment, in such a way that their exclusion would result in an imbalance in the proper determination of VRG's tax liability,[250] according to Claimant's expert. In response to this argument, expert Rodrigues de Sa simply argues that the accounts make up part of group 114500000, which was not taken into consideration in the Initial Balance Sheet.[251]

A. Claimant's Position

539. According to Claimant, it is necessary to take tax credits into account for purposes of price

[250] Expert Simonaggio's Second Report, p. 47

[251] Expert Rodrigues de Sá's Report, p. 22

adjustment; otherwise, there would be imbalance in determining VRG's tax liaibility. [252]

540. Claimant's expert affirms that due to the insignificance of this amount in relation to the total amount under dispute, the effective recovery or offsetting of such taxes (credits) in subsequent periods was not the object of analysis. [253]

B. Respondents' Position

541. According to Respondents, since this item is not listed in the Initial Balance Sheet or among the items contained in Clause 5.1.1, it cannot be taken into account for purposes of the price adjustment, because it does not comply with the "same items and same methodology" determination.

C. The Arbitration Tribunal's Analysis

542. In this item, the Tribunal agrees with Claimant.

543. The Initial Balance Sheet contains an account entitled "Fees, taxes and contributions— Other" and this account should contain all the amounts owed as a result of taxes incurred in the fiscal year by VRG related to its normal activities. Claimant's expert concludes as follows: "that since they are amounts to be recovered or offset and that, depending on the legal norms applicable to each case, will be offset by payable amounts of these same or other taxes." [254] Therefore, this account should be increased by the amount of R$ 66,453.

3.12 Determination of the price adjustment

544. After having analyzed the differences between Claimant's expert and Respondents' expert, the Tribunal is already able to establish the Revised Balance Sheet on the Date of Consummation:

Revised Balance Sheet on the Date of Consummation (April 8, 2007)

	Respondents	Claimant	Tribunal
ASSETS			
CURRENT			
Available			

[252] Clarif. C 50, pp. 61 and 62

[253] Expert Simonaggio's Second Report, p. 46

[254] Expert Simonaggio's Second Report, p. 46

Cash	2,872,292.49	2,872,292.49	2,872,292
Banks	3,933,103.82	3,933,103.82	3,933,104
Accounts Receivable			
BSP receivables	69,186,798.35	69,186,798.35	69,186,798
Credit Cards	91,852,196.13	91,852,196.13	91,852,196
Accountholder clients	(464,777.47)	(464,777.47)	(464,777)
Government Agencies	4,034,442.87	4,034,442.87	4,034,443
SMILES	4,846,757.59	4,846,757.59	4,846,758
	43,371,369.20	44,826,008.90	43,371,369
Other	(162,883,679.39)	(162,883,679.39)	(162,883,679)
Balance Adjustments	5,685,521.29	5,685,521.29	5,685,521
Advance Payments - Vendor - VEM	803,211.08	803,211.08	803,211
Advance Payments - Vendor - Fuel-BR	3,047,000.00	3,047,000.00	3,047,000
Advance payments - Vendor - GATE			
Advance Payments - Vendor - Onboard Serv. - BAHTA			
Advance Payments- Vendors - Onboard Serv. - Other			
Advance Payments - Other	911,608.61	911,608.61	911,609
Guarantee Deposits - AMEX (US$ 605,615.00)	1,229,398.00	-	-
Guarantee Deposits - VISA (US$ 2,113,436.13)	4,296,365.00	-	3,692,000
Related Companies (Leasing of Stowage - Logistics)	-		-
Total Current Assets	**72,721,607.57**	**68,650,484.27**	**70,887,845**
LONG TERM ASSETS			
Guarantee Deposits			

Guarantee Deposits - Euroatlantics	1,010,765.38	1,010,765.38	1,010,765
Guarantee Deposits - Sojitz	362,921.00	362,921.00	362,921
Guarantee Deposits - Aircraft - Aeroturbine;	6,391,642.00	6,391,642.00	6,391,642
Guarantee Deposits - Aircraft-SR Stechnics;	251,720.00	251,720.00	251,720
Guarantee Deposits - Aircraft - FOCUS	2,192,400.00	-	-
Guarantee Deposits - Wells Fargo	8,611,680.00	8,611,680.00	8,611,680
Guarantee Deposits - ACTS Technical	1,599,312.00	1,599,312.00	1,599,312
Guarantee Deposits - Pegasus	283,980.00	283,980.00	283,980
Guarantee Deposits - BSP (US$ 16,000,000.00)	38,725,783.83	38,725,783.83	38,725,784
Other Credits	-	-	-
Total Long term Assets	**59,430,204.2** 1	**57,237,804.21**	**57,237,804**
TOTAL FINANCIAL ASSETS	**132,151,811.78**	**125,888,288.48**	**128,125,649**
CURRENT			
LIABILITIES			
Vendors			
Vendors—Law Office	(743,576.49)	(743,576.49)	(743,576)
Vendors—IBM	-	-	-
Vendors - Other	(33,069,928.31)	(47,261,087.71)	(40,909,678)
Loans, financings and debentures	-	(122,970.01)	-
Fees, taxes and contributions			
Fees, taxes and contributions—TNFRAERO		(15,450,962.81)	(15,450,963)
Fees, taxes and contributions—Payroll Income Tax	(1,161,731.85)	(1,161,731.85)	(1,161,732)
Fees, taxes and contributions—OTHER	1,080,365.40	(1,080,365.40)	1,080,365
(-) Credit Request—Infraero	2,646,544.25	2,646,544.25	2,646,544

(-) Tax Credits	-	66,452.98	66,453
Salaries and social charges;	(8,358,687.15)	(8,358,687.15)	(8,358,687)
Commercial leasing payable—Leasing;	(9,660,711.85)	(10,949,587.85)	(9,841,886)
Commercial leasing payable—Maintenance Reserve	84,501.91	84,501.91	84,502
Related companies	-	-	-
Related Companies - LOGÍSTICA	-	-	-
Accounts Payable			(44,780,250)
Accounts Payable - Insurance [255]	399,884.20	399,884.20	399,884
Accounts Payable - Crew per diem;	(183,988.14)	(183,988.14)	(183,988)
Accounts Payable - Other	-	(3,930,250.29)	-
Provision - ICH - IATA	-	(51,797,387.36)	-
Transport services to be provided	(38,792,082.10)	(38,792,082.10)	(38,792,082)
Provisions for vacation and social charges;	(8,199,026.98)	(8,199,026.98)	(8,199,027)
Provisions for maintenance of flight equipment.	(16,218,326.02)	(16,777,263.52)	(16,218,326)
Long Term liabilities			
Financial Leasing - LP Vehicles		(137,588.58)	
TOTAL FINANCIAL LIABILITY	**(112,176,763.13)**	**(199,588,012.10)**	**(180,362,447)**
CREDIT (DEBIT) BALANCE	**19,975,048.65**	**(73,699,723.62)**	**(52,236,798)**

545. The current capital on the Date of Consummation, as determined by the Tribunal according to the price adjustment methodology agreed to in Clause 5, is negative and amounts to R$ 52,236,798.

546. As already referred to above, in order for the Tribunal to be able to determine the total price adjustment amount, it becomes necessary to resort to what was agreed to by the parties, and what the parties agreed to was as follows:

- Once it has been determined that the difference in the Initial Balance Sheet balance and the

[255] (40,850,000) + (3,930,250).

balance of the Revised Balance Sheet on the Date of Consummation has a positive balance, VRG must pay Vlog that amount in full; or otherwise

- Once it has been determined that the difference in the Initial Balance Sheet balance and the balance of the Revised Balance Sheet on the Date of Consummation has a negative balance, VLog must pay GTI that amount in full.

547. The current capital determined on March 15, 2007 in the Initial Balance Sheet was, therefore, R$ 40,750,874.

548. In the Revised Balance Sheet on the Date of Consummation, as better explained in paragraph 544, the current capital was R$ (52,236,798).

549. Thus, applying what the parties had agreed to, there is a credit in favor of the Buyer in the amount of R$ 92,987,672. [256]

550. The Tribunal concludes that this is the price adjustment, which amounts to R$ 92,987,672 and that this balance is in favor of Claimant.

551. In compliance with Clause 5.2 of the Agreement (b)—as interpreted by this Arbitration Tribunal in paragraph 175 *et seq* above—if a negative balance is ascertained "this will be paid in full by [Vlog] to GTI." Thus, the Tribunal orders Respondent 1 to pay Claimant the full price-adjustment amount of R$ 92,987,672. With respect to eventual liability on the part of Respondents 2 and 4, this will be the object of analysis in a specific section of this report.

V. 5 IN CASE THE TRIBUNAL RULES FOR A PRICE ADJUSTMENT, HOW SHALL THE DUE DATES BE DETERMINED FOR INTEREST ON THE PRICE ADJUSTMENT AMOUNT ?

1. CLAIMANT'S POSITION

552. Claimant has stated that such amount as may be ascertained by the Arbitration Tribunal for price adjustment purposes *"must accrue late interest as provided by law, to be ascertained in accordance with the criteria under Section 5.1 of the Agreement, plus any statutory interest due pursuant to* [CC] *article 406 and the Agreement*." [257]

2. POSITION OF RESPONDENTS 1 AND 2

[256] R$ 40,750,874 - (52,236,798) = R$ 92,987,672

[257] Esc. C 50, p. 66.

553. Respondents 1 and 2 have stated[258] that under Section 5.2 of the Agreement the final price adjustment amount should be paid "*in up to five (5) business days after an audit under section 5.1.1 is completed.*"

554. Respondents 1 and 2 have stated that if the Arbitration Tribunal concludes that the price adjustment is already defined under the terms of the PwC Revised Balance Sheet, then Claimant would be in arrears on payment since December 10, 2007. Accordingly, the amount of R$ 35,380,544 should accrue statutory interest of 1% per month, as provided under CC articles 406 and 407.

555. If the Arbitration Tribunal concludes that the price adjustment has not yet been determined, then Respondents 1 and 2 allege there is no case to be made for collecting late interest, inasmuch as no amount has yet become payable pursuant to Sections 5.1.1 and 5.2 of the Agreement.

3. RULING BY THE ARBITRATION TRIBUNAL

556. The Tribunal already ruled that Respondent 1 must satisfy Claimant in the amount of R$ 92,987,672 as a price adjustment. Claimant moved such amount shall accrue interest.

557. The Tribunal agrees.

558. The whole claim for late interest formulates a triple question: (A) the day from which the time period is computed *[dies a quo],* (B) the day to which the time period is computed *[dies ad quem],* and (C) interest rate.

A. *Dies a quo*

559. *Dies a quo* is the date interest starts coming due.

560. On this concrete point, Claimant has not indicated for the record when interest would start being computed. Taking into account that the CC provides, under art. 405[259], for the principle of Brazilian law that interest starts being computed from the beginning of the proceeding, and article 4(2) of the ICC Rules deems beginning of the arbitration to be the date the Secretariat receives the Request, late interest starts accruing from December 31, 2007.

B. *Dies ad quem*

561. *Dies ad quem* presents no doubt: it is the date Claimant is effectively paid compensation for losses and damages.

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[258] Esc. R1261, p. 110.

[259] CC article 405: "Late interest is computed from service of summons on the complaint."

C. Interest Rate

562. The Agreement contains no provision regarding interest rate. In such case, the provision under CC article 406 comes into play, as it provides that interest *"shall be fixed according to the rate which is in effect for late payment of taxes owed the National Treasury."*

563. Claimant also makes no allegation regarding applicable interest rate.

564. Interest rate in effect for the payment of taxes to the National Treasury is the rate of the Special Settlement and Custody System ["SELIC"],[260] extensively accepted by the Brazilian Courts as a hybrid index comprising both adjustment for inflation and interest,[261] and in the Arbitration Tribunal's opinion it applies to our arbitration.

Summary

565. The Tribunal rules that price adjustment at the amount of R$ 92,987,672 owed by Respondent 1 to Claimant shall accrue interest at the SELIC rate from December 31, 2007 to the day it is paid.

566. Upon the enforcement of this award, it shall be up to the parties to make the applicable calculations: this is purely an arithmetic question that requires no intervention by the Tribunal.

V.6 TO WHAT EXTENT ARE RESPONDENTS 2 AND 4 LIABLE FOR RESPONDENT 1'S OBLIGATIONS ?

567. Who should be held liable for payment of the offsetting amount pertaining to the deficit in VRG's working capital? The principal obligor of such debt must be Respondent 1, since it is to this company that Section 5.2 refers ("[price adjustment]" *shall be fully paid by* [Respondent 1] *to GTI in national currency").* Nonetheless, it should be mentioned that Claimant made an additional claim for joint liability by Respondents 2 and 4.[262]

1. CLAIMANT'S POSITION

568. Claimant seeks to hold Respondents 2 and 4 liable for their allegedly fraudulent conduct during the

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[260] It is the basic rate published by the Monetary Policy Committee and used by the Finance Ministry.

[261] Special Appeal filed directly to the Superior Justice Court, national high court for non-constitutional matters [REsp (Recurso Especial)] 823,228/SC, 5th Panel, Justice Gilson Dipp delivered the Court's Opinion, DJU [official publication] of August 1, 2006, Superior Justice Court [STJ], REsp 710,385/RJ, 1st Panel, Justice Denise Arruda wrote the 1st Opinion, Justice Teori Albino Zavascky delivered the Opinion for the Ruling, judged on November 28, 2006, Regulatory Opinion based on the court's internal rules [AgRg (Agravo Regimental)] in REsp 1105873/SC, Justice BENEDITO GONÇALVES, FIRST PANEL, delivered the Court's Opinion, judged on March 18, 2010, DJe [official publication] of March 25, 2010, AgRg in REsp 515,301/PR, Justice MAURO CAMPBELL MARQUES, SECOND PANEL, delivered the Court's Opinion, judged on February 2, 2010, DJe of February 18, 2010.

[262] Esc. C 50, p. 66.

course of the negotiation of the Agreement and its performance.

Allegation of Fraud by Respondent 4

569. According to Claimant, Respondent 4 manipulated the numbers that were provided to Claimant upon setting the price for the agreed deal.[263] Respondent 4 thereby (albeit indirectly) received an amount greater than reasonable for the VRG shares than if the numbers had been provided in a proper manner.

570. The doctored numbers were provided to KPMG, the Purchaser's financial advisor, which was unable to detect such fraud because it was not given the opportunity to conduct a complete preliminary financial audit in VRG.

571. The fraud was perpetrated by Mr. Lap Chan, Respondent 4's executive officer *[diretor],* since the definition of the purchase price, the inclusion of the price adjustment clause, and the specification of Appendix III to the Agreement were devised and carried out by Mr. Lap Chan, as Respondent 4's direct representative.[264]

572. The existence of a commingling of assets and abuse of control between Respondent 4, as controlling party, and the Sellers, as subsidiaries *[filiais],* contributed to such fraud.

573. Consequently, Respondent 4's bad-faith actions ended up *"maliciously misleading Claimant, its counsel and consultants into believing that the company was in a financial position which was very different from reality."*[265]

Qualifying Respondents' Actions

574. Claimant qualified Respondent 4's conduct as follows:

- *"The conduct... illegal;"*[266]

- *"Clear case of abuse of right and a violation of objective good faith;"*[267]

- *"Truly a wrongful act;"*[268]

- *"A contradictory behavior on Claimant's good faith noted in both the pre-contractual and post-contractual phases;"*[269]

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[263] Esc. C 50, p. 2.
[264] Esc. C 50, p. 9.
[265] Esc. C 50, p. 14.
[266] Esc. C 6, p. 20.
[267] Esc. C 6, p. 20.
[268] Esc. C 6, p. 20.
[269] Esc. C 33, p. 29.

- *"audacity in performing unlawful actions;* "[270]

- *"* [which] *is repulsive to everyone who had access to the facts being discussed;*"[271]

- *"Respondent 4 admittedly manipulated, doctored, defrauded;*"[272]

- *"a falsification of numbers;*"[273]

- *"repeated omissions and falsehoods;*"[274]

- *"a clear accounting fraud;*"[275]

- *"an omission of* [...] *adjustments caused a purposeful and highly detrimental distortion to the final result;*"[276]

- *"unequivocally shows bad faith;*"[277]

- *"changes that ended up maliciously misleading Claimant;* "[278]

- *"Deliberately adulterated such numbers with the sole purpose of deceiving Claimant;*"[279]

- *"A manifestly malicious omission of information and facts.* "[280]

575. Claimant attributes such conduct directly to Respondent 4, and extends it to all other Respondents: Claimant argues that bad faith and malice manifested itself in all Respondents,[281] and that such malicious and fraudulent misconduct was only made possible through Respondents' joint actions[282] and the corporate structure created.[283]

2. RESPONDENTS' POSITION

576. The Arbitration Tribunal, before describing Respondents' position, wants to state for the record that the allegations of bad faith and the attribution of such conduct to all Respondents are, as evidenced from previous paragraphs, continuously contained in Claimant's writings, ever since the

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[270] Esc. C 50, p. 2.
[271] Esc. C 50, p. 2.
[272] Esc. C 50, p. 2.
[273] Esc. C 50, p. 3.
[274] Esc. C 50, p. 3.
[275] Esc. C 50, p. 11.
[276] Esc. C 50, p. 13.
[277] Esc. C 50, p. 14.
[278] Esc. C 50, p. 14.
[279] Esc. C 50, p. 15.
[280] Esc. C 50, p. 15.
[281] Esc. C 50, pp. 14 and 16, Esc. C 6, p. 20 and Motion for Preliminary Relief, p. 14.
[282] Esc. C 50, p. 11 refers to "Respondent 1's intermediation."
[283] Esc. C 50, pp. 3, 8 and 14.

beginning of this arbitration. Therefore, Respondents had ample opportunity to respond to such allegations.

Allegations by Respondent 2

577. Respondent 2 alleged that Claimant failed to present the slightest argument, failed to show any *"factual and legal grounds"* to hold Respondent 2 liable,[284] and that any liability for the price adjustment would arise from the provision under Section 5.2 of the Agreement, and such section only provides as possible creditors either GTI or Respondent (depending on the negative or positive balance of the adjustment).[285]

Allegations by Respondent 4

578. On its part, Respondent 4 begins its defense by alleging that it *"never used the legal personality of either Respondent 1 or 2 to defraud any third party. What has been proven is that Respondent 4 indirectly invested US$ 400 million in VRG, and in Respondents 1 and 2, and nothing has been recovered. Such corporate entities at all times had their own equity, management, employees, ultimately, a separate existence as between each other. Nor could their existence be intermingled with that of* [Volo Logistics], *already excluded from this arbitration, or that of Respondent 4.*"[286]

579. Subsequently, Respondent 4 analyzes in detail how the negotiations of the Agreement developed. It acknowledges that Mr. Lap Chan, Respondent 4's representative, "[has] *been the main intermediary in negotiations with the GoI Group,*"[287] but that *"such negotiations, though conducted primarily by Mr. Lap Chan, were never conducted by him alone."* In addition, it alleges that Mr. Lap Chan had been traveling since March 17 and did not take part in the execution of the Agreement on March 28, 2007.[288]

580. As regards the Initial Balance Sheet included in Appendix III to the Agreement, Respondent 4—supported by Mr. Lap Chan's own assertions—believes it was prepared by Mr. Márcio Nobre with PwC's assistance and checked by KPMG, the Purchaser's advisor, note by note. No number pertaining to the Agreement was imposed upon the GoI Group.[289] The GoI Group's top management received and analyzed the reports before making the decision to move forward with the deal.

581. KPMG exerted—as described by Respondent 4—some extensive work checking on VRG's accounts and even issued three reports, a first one on February 24, a second one on March 16, and a third one in April, all of them in 2007. KPMG and GoI held at least one meeting to discuss the final draft and KPMG's impressions regarding the analyzed documents. GoI was aware of the conditions for the deal upon receiving the reports issued by KPMG, and was satisfied with the information

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[284] R1261, p. 113.
[285] R1261, p. 113.
[286] Esc. R432, p. 6.
[287] Esc. R432, p. 12.
[288] Esc. R432, p. 16.
[289] Esc. R432, p. 32.

provided by KMPG, and went on to close the deal. [290]

3. ANALYSIS BY THE ARBITRATION TRIBUNAL

582. Claimant requested that the Tribunal order that *"Respondents pay such amount as may be ascertained by the Arbitration Tribunal,"* [291] and in its final allegations moved Respondents 2 and 4 "[be] *held with Respondent 1 jointly and collectively liable for payment of the price adjustment.*" [292]

583. To rule, the Arbitration Tribunal preliminarily shall recall that it has jurisdiction over Respondent 4 (3.0). Next, the Tribunal shall determine what facts are proven (3.1) to subsume them in Brazilian law (3.2). The Tribunal shall ascribe legal consequences to such facts (3.3), and shall analyze a possibly joint liability assumed between Respondents (3.4).

3.0 THE ARBITRATION TRIBUNAL'S JURISDICTION

584. The Tribunal already had the opportunity to affirm in its Partial Award, issued on April 7, 2009, its own jurisdiction over Respondent 4.

585. In that ruling, the Tribunal affirmed its jurisdiction over Respondent 4 because the latter is bound by the arbitration agreement contained in Addendum 5 to the Agreement, which submits to arbitration all disputes pertaining to any topics *"arising from or relating to"* the contractual relationship formed by the original Agreement and its addenda.

586. Claimant seeks in this arbitration to have the characterization of fraud in the negotiation and performance of the Agreement cause Respondent 4 to be held liable for Respondent 1's obligation to pay Claimant the price adjustment provided for in the Agreement. The dispute is therefore an issue related to the main Agreement, which falls fully under the scope of the Arbitration Tribunal's jurisdiction as affirmed in the Partial Award. [293]

587. The Tribunal next shall proceed to analyze the claim made by Claimant.

3.1 THE PROVEN FACTS

Mr. Lap Chan's Person

588. Mr. Lap Chan was an executive officer of and partner in the MatlinPatterson Fund. Such fund controlled Vlog, the company owning VRG, and which acted as Seller in the Sale and Purchase

[290] Esc. R432, p. 38.
[291] Paragraph 29 of the Terms of Reference.
[292] Esc. 50, p. 67.
[293] Paragraph 60 of the Partial Award.

Agreement. Mr. Lap Chan, acting as the MatlinPatterson Fund's representative, was the main intermediary with the Gol Group during the negotiations prior to execution of the Agreement.[294]

589. Mr. Lap Chan was the person who prepared and/or ordered the preparation of the Initial Balance Sheet. Such preparation used as its basis a balance sheet, i.e., a complete balance sheet, drawn from VRG's official books of account on the very day of March 15, 2007.[295]

Manipulation of VRG's Bookkeeping

590. Upon preparing the Initial Balance Sheet, Mr. Lap Chan ordered two significant changes introduced, arbitrarily altering the figures of two bookkeeping entries that appeared in VRG's official books of accounts:

591. (i) According to VRG's official bookkeeping, the amount of R$ 40,783,150 appeared in the balance sheet item "Commercial leasing payable." However, Mr. Lap Chan ordered the figure reduced to R$ 20,737,278 in the Initial Balance Sheet. The only reason for rejecting the original figure was that Mr. Lap Chan understood that the original figure was not reliable, and therefore he made an approximate calculation, taking as its basis the fleet of nineteen 737 and three MD-11 aircraft that the company then had[296] to estimate the amount that should be inserted in the Initial Balance Sheet.

592. (ii) The balance sheet item "Fees, taxes and contributions - INFRAERO" had, as of March 15, 2007, an amount of R$ 10,512,166. However, Mr. Lap Chan ordered the figure in the Initial Balance Sheet reduced to zero R$. Mr. Lap Chan explained that he *"imagined it had to be zero, INFRAERO won't let you fly if you don't pay on time."*[297] With this simple argument he decided to reduce an account balance, which in the bookkeeping as of March 15 was more than R$ 10 million, to zero R$.

593. During the Evidentiary Hearing, Mr. Lap Chan sought to justify his actions with the supposedly low quality of VRG's accounting information (at the Evidentiary Hearing Mr. Lap Chan used the expression "*garbage in, garbage out*).[298] Mr. Lap Chan's explanations could not be more unconvincing, and his actions have to be qualified as sheer manipulation:

594. VRG was a major airline that had sophisticated accounting systems based on the SAP program—one of the most complex in the market—controlled by experienced professionals. In spite of this, Mr. Lap Chan in the first case reduced the figure, which was the result of official bookkeeping, to half, using as his basis a crude and unempirical calculation of what the balance of such account should be, based on the number of leased aircraft, and in the second case, he reduced the balance

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[294] Expressly acknowledged by MatlinPatterson: per Esc. R432, p. 12.

[295] Per transcript of Mr. Lap Chan's testimony, at pp. 182 et seq., and transcript of Mr. Márcio Nobre's testimony, at pp. 12 et seq.

[296] Per transcript of Mr. Lap Chan's testimony, at p. 196: "What's the value of each 737 aircraft for leasing at the time? 150 thousand dollars, right? My maintenance reserve, probably, the leasing price, 150 thousand dollars. That's 300 thousand dollars you would have to put into each aircraft. Three hundred thousand dollars times 20 aircraft, I mean, at the time there were nineteen 737 [aircraft], we're talking 6 million dollars. Six million dollars, that's about 12 million. We had three MD-11s at the time too. Leasing for an MD-11: 450 thousand dollars a month. Maintenance reserve: 450 thousand dollars for each MD-11. So you're talking, basically, something around that amount you're saying, you're ..."

[297] Per transcript of Mr. Lap Chan's testimony, at p. 200.

[298] Per transcript of Mr. Lap Chan's testimony, at p. 200.

completely to zero.

595. If it were right, in the specific case of the item "Fees, taxes and contributions -INFRAERO," as Mr. Lap Chan stated, that the account had been fully paid during the same day of March 15, the right thing to do would be to reduce liabilities by R$ 10,512,166, and at the same time to reduce the cash and banks accounts by the same amount. Because if Infraero's debt had been paid, it would have been paid in cash, and cash would have left assets. It constitutes a manifest manipulation—of which Mr. Lap Chan, as someone with financial experience, was fully aware—to eliminate an account from liabilities because it has been paid, and not to reduce assets by the corresponding amount.

596. In short, even assuming that the quality of VRG's accounting information for the month of March was less than optimal, low quality absolutely does not justify the two interventions Mr. Lap Chan made in the official bookkeeping numbers upon preparing the Initial Balance Sheet: by reducing two major liabilities accounts, that of "Commercial leasing payable," amounting to R$ 40 million, to exactly half, R$20 million, and that of "Fees, taxes and contributions - INFRAERO," amounting to R$ 10 million, to zero. This is why such conducts are deemed a conscious and voluntary falsification of VRG's bookkeeping in order for the Initial Balance Sheet to show a working capital higher than as stated in official bookkeeping.

Misrepresentation that the Initial Balance Sheet was revised by PwC

597. The Agreement includes an express warranty that PwC had prepared and validated the figures of the Initial Balance Sheet (Sections 5.1 and 5.1.1).[299] Mr. Lap Chan himself (with no knowledge of Mr. Humberto Tognelli's written statements) stated at the hearing that the Initial Balance Sheet was revised by PwC.[300] Such statements are most plainly untrue, because PwC itself stated that it never either prepared or revised the figures of the Initial Balance Sheet.[301] GTI was, thus, led into believing that the figures shown in the Initial Balance Sheet had the approval of a prestigious audit firm. And this caused GTI to be unable to cast any doubt on the truthfulness of the Initial Balance Sheet.

The Misinformation facilitated to GTI

598. The Sellers also warranted in the Agreement that *"no information provided by* [the Sellers] *and VRG contains any misrepresentation or omission of any fact that might lead* [the Purchaser] *into any misjudgment in connection with the information provided"* (Section 7.14 of the Agreement).

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[299] Section 5.1. "Attached to this Agreement (Appendix III) is a balance sheet revised by [PwC] reflecting the items agreed upon by the Parties on this date for this transaction, which shall be considered solely for price adjustment purposes, indicated as follows: (...)"Section 5.1.1. "No later than 180 (one hundred eighty) days from the base-date of the balance sheet provided for in Section 5.1 above, [PwC] shall submit a new balance sheet, duly audited, observing only the same items, the same methodology as referred to in Section 5.1, taking as its base-date the day prior to the event under Section 9.2."

[300] Per transcript of Mr. Lap Chan's testimony, at p. 182.

[301] Per H. Tognelli's letter of October 29, 2009, at p. 2.

599. It has been proven that the information contained in Appendix III to the Agreement (Initial Balance Sheet) did not reflect a true and proper image of VRG's accounting. From the Initial Balance Sheet attached to the Agreement, it could be deduced that VRG's working capital, as of March 15, amounted to R$ 40,750,874. In reality, it was inflated by the two item changes ordered by Mr. Lap Chan - by more than R$ 30 million.[302] And with VRG's accounting duly revised, the Tribunal has come to the conclusion that the true working capital, as of the Consummation Date, amounted to R$ (52,236,798). Which is to say: instead of a positive working capital of R$ 40 million, the company in reality had, as of the Consummation Date, a working capital deficit of R$ 52 million.

Effects on the Sellers

600. Mr. Lap Chan's and the Sellers' joint actions, described in detail above, engendered in Claimant an error about VRG's working capital. GTI signed the Agreement convinced that such working capital amounted to R$ 40 million, uninformed that it was artificially inflated by more than R$ 30 million.

601. But there is more: the assertion that a company as renowned as PwC had revised and, consequently, supported the figures of the Initial Balance Sheet, created in Claimant the confidence that such figures were accurate, and that they reflected a true image of the equity position. It is to be presumed that, without PwC's warranty, Claimant would not have accepted the Initial Balance Sheet, but would have submitted it to a careful review by its own financial advisors. Consequently, the Purchaser could not realize that the Initial Balance Sheet gave a totally distorted image of VRG's working capital.

602. The misinformation facilitated to GTI is directly attributable to Respondent 4, as it was its representative, Mr. Lap Chan, who ordered figures manipulated and current liabilities artificially increased. Respondents 1 and 2, in turn, as the main interested parties in the deal and controlled by Respondent 4, were aware of or at least should be acquainted with the financial statements which were the basis for the deal, and therefore were aware of the information erroneously provided to Claimant.

3.2 FITTING THE FACTS INTO BRAZILIAN LAW

603. Once the proven facts are established, it is necessary to determine how they fit into Brazilian law.

CC Article 50: Lifting the Corporate Veil

604. Claimant has repeatedly indicated throughout its briefs that this is a case of fraud. In its opinion, the manipulation of balance sheets and commingling of assets between Respondent 4 and Respondent 1 reflect, in the first place, an abuse of legal personality under CC article 50.[303]

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[302] Exactly by R$ 30,558,036 (40,783,149 – 20,737,278) + 10,512,165.

[303] Esc. C 50, pp. 23 and 24.

605. CC article 50 provides:

"In the event of abuse of legal personality characterized by a diversion of purpose, or commingling of assets, the judge may, upon a motion by the party or by the Attorney General, whenever the latter is authorized to intervene in the case, rule to extend the effects of certain and determined obligational relations to the personal assets of a legal entity's officers or partners."

606. This provision in fact regulates a presumed lifting of the corporate veil: CC article 50 describes a situation where the independent corporate entities of a controlling party and a controlled entity may be disregarded, with their independent equity liabilities not being acknowledged, and the liability for the controlled entity's debts being consequently extended to the controlling party. In order for such effects to be produced, the CC requires the existence of an *"abuse of legal personality"* characterized by a *"diversion of purpose"* or a *"commingling of assets."* As affirmed in Brazilian case law, in order for lifting the corporate veil to be authorized, "*an actual manipulation of the company's independent equity in favor of third parties must be present.* "[304]

607. None of these requirements are present in our case: the MatlinPatterson Fund has not used Respondents 1 and 2 for any purpose other than the corporate purpose for which they were organized, their assets have not been commingled, and they have not caused the controlled companies' independent equities to be manipulated.

608. In the Tribunal's opinion, CC article 50 and the lifting the corporate veil doctrine regulated therein do not constitute an appropriate legal basis for grounding Respondent 4's liability as sought. Let the record show that the companies' personalities and their resulting independence are of great value in the Brazilian legal system, and are therefore a rule of Brazilian Law.

CC articles 145 et seq.: Malice

609. Having ruled out the application of CC article 50, the Tribunal has to rule on any liability by Respondent 4 regarding Claimant's allegations of the former's presumably malicious actions.

610. Claimant effectively argued that in the "*manipulation of numbers*" "*there was a manifestly malicious omission of information and facts,* "[305] that Respondent 4's conduct presumed a violation of good faith,[306] and that such malicious behavior was channeled through the corporate structure which was created.

611. In that respect, Prof. Álvaro de Villaça de Azevedo[307] concluded in his opinion[308] that such malicious actions by Respondent 4 fit into the breach of objective good faith doctrine (CC article 422), and into the third party's malice doctrine (CC article 148).

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[304] Supreme [sic] Justice Court, special appeal No. 876,974 – SP (2006/0180671-8): Ex. R34D3.

[305] Esc. C 50, p. 15.

[306] Esc. C 6, p. 20.

[307] Prof. Álvaro Villaça de Azevedo issued a legal opinion, attached by Claimant, dated October 24, 2007, on the agreement for call option and put option on VoloDB shares signed by the Brazilian Partners and Volo Logistics.

[308] Ex. C 4, question 9, attached to the response to the "prima facie" issue.

612. Respondents had ample opportunity to defend themselves from Claimant's allegations, but they focused their defense on allegations of a factual nature, and chose not to analyze the specific legal aspects of the allegations of malice made by Claimant against them.

613. As charges of malicious conduct have been made, it is up to the Arbitration Tribunal, in accordance with the general principles of Brazilian Procedural Law, to analyze and rule on this issue; and to do so the Tribunal (A) shall look into the concept and regulation of malice under Brazilian law, and then (B) shall analyze whether such actions fit into the legal concept of malice.

A. Regulation of Malice under Brazilian Law

614. Brazilian Law does not contain a definition of malice. But there is a unanimous opinion that it consists of:

> *"any suggestion or ruse anyone employs with the intention or awareness of misleading the maker of a statement* [of will], *or of keeping the latter misled, as well as any disguising, by the recipient of a statement or by a third party, of an error by the maker of such statement.*" [309]

615. Or using Clovis' classic definition: [310]

> *"Malice is a crafty ruse or device employed to mislead someone into performing a transaction harmful to the latter, to the benefit of the one engaging in malice or of a third party.*"

Causal Malice and Incidental Malice

616. The CC makes a differentiation between two major categories in the concept of malice:

- Causal malice, which is equivalent to a serious mistake, and allows for the annulment of any transaction the cause of which is for this reason flawed, or compensation for losses and damage sustained (CC article 145: *"Transactions may be annulled for malice whenever the latter was the cause of the former");*

- Incidental malice, representing a less transcendental mistake, which does not cause the transaction to be annulled, and only requires a satisfaction of losses and damages (CC article 146: *"Incidental malice only requires the payment of losses and damages.").*

617. A distinction between the two types of malice depends on the effect of deception on the victim: it is Incidental *"whenever, as far as the victim is concerned, the transaction would be made, though in another way*," and it is causal whenever, in the absence of deception, the transaction would never have been made. To choose the example of a sale and purchase transaction, if malice affects its

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[309] De Salvo Venosa: Civil Law [Direito Civil], vol. 1 (2004), p. 455.

[310] Clóvis Bevilaqua: Civil Code of the United States of Brazil, Commented [Código Civil dos Estados Unidos do Brasil Comentado], vol. I (1956), p. 273.

price, and the purchaser has made the purchase, but for a lower price, malice will be Incidental; otherwise, if it affects the essence of the thing, and the purchaser never entered into contract, malice would be deemed causal and—if this were of interest to the purchaser—allow for annulment of the transaction.

618. It should be noted that the distinction between the two types of malice has a subjective element: in essence it depends on the victim's attitude and what the latter claims in the lawsuit wherein such a claim is made. Also in the case of causal malice, the victim has the option of moving either for losses and damages or for annulment. [311]

619. In the case at hand, an allegedly malicious conduct is attributed to Respondent 4. But the latter does not participate in the Agreement either as Purchaser or Seller. Can its conduct, albeit originating from a third party, be qualified as malicious? The answer is yes.

Third-Party M alice

620. There is a second distinction that is greatly important to this arbitration: malice is usually committed by someone seeking to be counterparty to the transaction. Such counterparty makes a mistake precisely to mislead the lawful party into accepting the deal. But it is also possible to have a third party break such pre-contractual relationship, make the mistake, and mislead the parties into closing on the contract. In that case, we are talking about third-party malice.

621. Brazilian Law, which on this point is more developed than other legal systems surrounding it, contains the following regulation under CC article 148:

"A transaction may also be annulled upon a third party's malice if the party benefiting from the transaction knew or should have known about such malice; otherwise, even if the transaction subsists, the third party shall be liable for all the deceived party's losses and damages."

622. Which is to say: Brazilian Law expressly provides that deception characterizing malice can be engaged in not only by the counterparty, but also by a third party. And the effects of deception again depend on whether malice is causal or Incidental: in the first case, they cause the transaction to be annulled; in the second, "*even if the transaction subsists, the third party shall be liable for all the deceived party's losses and damages."* Which is to say, *"if A, because of malice by C—which B, another party, knew about—signed the contract, it may not file an action for annulment against B, but instead, only an action for damages"* against C. [312]

623. Sílvio de Salvo Venosa gives the following example of a third-party malice situation: [313]

"*Imagine hypothetically that someone intends to acquire some jewelry, imagining it to be gold, when in reality it is not. The fact that it is not gold is not discussed by the seller, much less by the*

[311] Pontes de Miranda: A Treatise on Private Law [Tratado de Direito Privado], vol. IV (1970), p. 328.
[312] Pontes de Miranda: Tratado de Direito Privado, vol. IV (1970), p. 345
[313] Salvo Venosa: Direito Civil, vol. I (2004), p. 463.

buyer. A third party, who has nothing to do with the deal, gives his opinion exalting the object as made out of gold. Thereupon, the buyer is misled into making the purchase. There is clear third-party malice *therein*."

624. In the above example, the third party engaged in ploy to convince the buyer that the product was made out of gold. Third-party malice is characterized by a fraudulent collusion between the contracting party and a third party with the intent of maliciously misleading the other contracting party into closing the deal. In our case, Respondent 4 engaged in a ploy to convince the Purchaser that the working capital in the Initial Balance Sheet was right and much higher than actual. And Respondents 1 and 2, aware of such ploy, stated that the working capital had been proved by PwC—thus covering up such a ploy.

B. How the Facts fit into the Concept of Malice

625. Brazilian case law finds the necessary elements for the existence of malice to be the following: [314]

(i) The malicious party's intention to mislead the contracting party into performing a legal act;

(ii) Usage of seriously fraudulent resources;

(iii)That such ruses be the determinant cause of a fundamental element to the transaction;

(iv) That they originate from another contracting party or from a third party;

626. Let us analyze each element separately.

(i) Intention to mislead into the performance of a legal act

627. The MatlinPatterson Fund was no doubt greatly interested in getting GoI to acquire VRG. That coincides precisely with Respondent 4's corporate purpose, since the fund's purpose is to acquire distressed companies, and to resell them after their recovery. MatlinPatterson had acquired VRG in 2006, and obtained the company's control on December 15 of that year. It paid the price of US$ 24 million and, furthermore, has made maximum investments of US$ 75 million into the company itself. Only three months after the purchase was consummated, the possibility arose of VRG being resold to the GoI Group for the amount of US$ 275 million (as stated in Section 4.1 of the Agreement). VRG's sale to GoI promised to be a transaction that would bring great benefits to the MatlinPatterson Fund, and therefore the latter was highly interested in having the transaction concluded successfully.

628. In its interest of obtaining a successful transaction, MatlinPatterson authorized a top-level executive, Mr. Lap Chan, to play a major role in the negotiation process and in the preparation of

[314] Barros Monteiro: "Course on Civil Law" [Curso de Direito Civil], vol. I (2007), pp. 235 to 242, and Serpa Lopes: "Curso de Direito Civil," vol. I (1962), pp. 437 to 446.

the Initial Balance Sheet attached to the Agreement.

(ii) Usage of Seriously Fraudulent Resources

629. The Arbitration Tribunal has already ruled that Respondent 4 meddled in the preparation of the Initial Balance Sheet and maliciously manipulated VRG's bookkeeping.

630. Additionally, the Sellers, controlled by Respondent 4, warranted to GTI that the Initial Balance Sheet had been revised by PwC—which is untrue, since PwC itself denies having done such work. That falsehood is an aggravating factor to a conduct already malicious in itself.

(iii) A Determinant Cause of a Fundamental Element to the Transaction

631. Upon signing the Agreement, GTI undertook to pay US$ 275 million for a company that seemingly had a positive working capital of R$ 40 million, such as stated on the Initial Balance Sheet, which purportedly had been revised by PwC. In the reality of the facts, its working capital had not been revised by the audit firm and, duly calculated as of the Consummation Date, turned out to be negative by an amount of R$ 52 million.

632. Existence of a positive and sufficient working capital constitutes an essential element of the transaction. Good evidence of that is that the parties agreed on a price adjustment, R$ by R$, in case the actual working capital as of the Consummation Date were higher or lower than the figure of R$ 40,750,874 warranted in Appendix III.

633. If GTI had known upon signing the Agreement that VRG's working capital was not surplus, positive by R$ 40 million, but instead deficit of R$ 52 million, such knowledge would undoubtedly have impacted the agreed price; and such impact would be to lower the price by the capital amount it would have to inject into VRG to reinstate its working capital of (R$ 52 million) to R$ 40 million.

(iv) Knowledge of the Manipulation by the Sellers

634. The bookkeeping manipulation was not done directly by the Sellers, but by its controlling party MatlinPatterson.

635. The Sellers in the Agreement had (or should have had) a perfect knowledge of MatlinPatterson's actions. Respondents 1 and 2 were companies controlled by MatlinPatterson, which directly benefited from VRG's sale. Engaged in air transportation, the Sellers were industry professionals, and therefore it must be assumed that they knew perfectly well what its controlled company VRG's equity position was. When they signed the Agreement, they were or should have been aware that the working capital being warranted was unreal, and that PwC had never validated the figures.

636. All necessary requirements, therefore, have been met for the third-party malice doctrine to occur: Respondent 4's actions allowed Vlog and Volo DB to sell VRG to GTI for a much higher price than would have been agreed if such conduct had not taken place.

637. Under CC article 148,[315] third-party malice, if essential, constitutes defective consent, and can lead to the annulment of the transaction. In the case at hand, because the parties' interest is circumscribed to a price adjustment, this is incidental malice, which does not imply contract annulment. If incidental malice occurs, it gives rise to tort [*ilícito extracontratual*—extracontractual wrongdoing], for which the legal consequence is contained in CC article 146:[316] Such conduct leads to the obligation to repair any losses and damage caused.

638. The Arbitration Tribunal has already determined that Respondent 4's malicious behavior made the transaction more onerous for Claimant. And the Tribunal shall dedicate the following section to determining the damage sustained by Claimant.

3.3 THE LEGAL CONSEQUENCE OF RESPONDENTS' BEHAVIOR

639. The Tribunal has come to the conclusion that both Respondents 1 and 2 and Respondent 4 have incurred wrongdoings: the first two, by having breached the Agreement, and the latter by having incurred incidental third-party malice. All such wrongdoings have the same legal consequence: Respondents are liable for the damage sustained by Claimant.

640. And what was the damage sustained?

641. Claimant alleges that the deceptions it suffered *"impl[ied] a much greater initial outlay by VRG."*[317]

642. The Arbitration Tribunal agrees with Claimant. The damage sustained by the Purchaser is clear: because of Respondents' anti-legal conduct, Claimant acquired a company convinced that the latter's working capital was R$ 40,750,874 and, in reality, it encountered a negative working capital of (R$ 52,236,786). To be able to take the company to the position Claimant thought it had acquired such company in, Claimant had to inject into the latter capital in an amount equal to R$ 92,987,672. This figure quantifies the damage incurred by it.

643. The damage coincides in its quantification with the price adjustment amount. This was not by chance: the compensatory principle is common and consists of repairing the deficit created in VRG's working capital.

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[315] CC article 148: "A transaction may also be annulled upon a third party's malice if the party benefiting from the transaction knew or should have known about such; otherwise, even if the transaction subsists, the third party shall be liable for all the deceived party's losses and damages."

[316] CC article 146: "incidental malice only requires a satisfaction of losses and damages, and it is incidental whenever, as far as the victim is concerned, the transaction would be made, though in another way."

[317] Esc. C 33, p. 18.

3.4 RESPONDENTS' JOINT LIABILITY

644. Claimant moves to hold Respondents 2 and 4 collectively and jointly liable with Respondent 1 for payment of the price adjustment.

645. The Arbitration Tribunal concludes that Respondents' unlawful conduct was perpetrated jointly. The harm caused to Claimant is derived both from bookkeeping manipulation and from the misrepresentations contained in the Agreement.

646. Whenever harm is committed by more than one agent, the sharing of liability is clear: all agents shall be jointly liable for reparation. CC article 942 provides as such: "... *if the harm has more than one agent, everyone shall be jointly liable for reparation."*

647. Granting such motion, the Arbitration Tribunal declares Respondents 2 and 4 collectively and jointly liable with Respondent 1 for the sum of R$ 92,987,672, which figure equals the damage sustained by Claimant, as it does the price adjustment provided for in the Agreement.

V.7 HOW SHALL THE ARBITRATION TRIBUNAL SET ARBITRATION CHARGES ?

1. CLAIMANT'S POSITION

648. One of the motions entered by Claimant in this arbitration was to order that Respondents [318] pay all costs incurred by Claimant in this arbitration, [319] totaling R$ 4,474,925 [320] and described as follows:

Arbitration Charges	Invoice Numbers	Amount
ICC charges	N/A	R$ 275,504.00 [1]
Costs of bond posted in a pre-arbitration injunctive proceeding (issuer's fee—Banco Bradesco—1.80% of the bond amount—R$ 5,000,000.00 per annum, and an issuing fee)	N/A	R$ 180,130.00
Legal fees of the law firm of Mattos Filho	86095, 89294, 90513, 90619, 92730,	R$ 2,191,988.16

[318] Until the Partial Award was rendered, this motion also included Respondent 3.

[319] Esc. C 50, p. 66.

[320] Esc. C 51. Calculation for converting the amount of US$ 160,000 into R$ was done on the basis of the closing quote for the selling US$ rate posted on the website of the Central Bank of Brazil on April 5, 2010 (buying rate: 1.7219).

Advogados, Veiga Filho, Marrey Jr. e Quiroga	94113, 95351, 98266, 105588,	
Advogados	106332, 107940, 113102, 114699, 115856	
Expenses relating to services rendered by the law	84495, 87103, 91602, 93421, 95574,	R$ 517,569.76
firm of Mattos Filho Advogados, Veiga Filho,	97291, 97918, 98502, 99936,	
Marrey Jr. e Quiroga Advogados (copies,	100635, 100636, 102904, 104349,	
transportation expenses, lodging in Rio de Janeiro	105662, 107447, 108865, 110519,	
during the December 2008 hearing, bookbinding,	111937, 112547, 113984, 114773,	
telephone calls, etc.)	115839	
Reimbursement for Advancements of Unused Expenses	N/A	- R$ 144,198.00
Legal fees of the law firm of Shearman & Sterling	2924205, 2917344, 2914844, 2913083, 2910585, 2908590, 2906266, 2901812, 2900023, 2812054, 2814525, 2816989, 2821224, 2824080, 2825597, 2730696, 2800278, 2818746	R$ 901,761.59 [2]
Legal opinions	10221, 200096	R$ 248,953.88
Accounting Expert's fees	1,000,001, 7, 382/09, 001186/A- 02415/ 07, 382/09, 001151/A - 02379/07, 001130/A-02359/07	R$ 303,215.94
Total		**R$ 4,474,925.33**

2. POSITION OF RESPONDENTS 1, 2 AND 3

649. On their side, Respondents 1 and 2 move to take into account Claimant's partial payment of awarded legal fees and costs at close to 30%—it started this arbitration moving to order

Respondents pay R$ 163,900,270, and ended up moving to order Respondents pay, pursuant to the Second Simonaggio Expert Opinion, R$ 114,450,597. They move to take such fact into consideration in the ruling on Arbitration Charges [321] and in the legal fees and costs awarded the prevailing party. Furthermore, Respondents move for an award against Claimant for bad-faith litigation pursuant to article 18 of the Code of Civil Procedure. [322]

650. Respondent 3, after the Partial Award was rendered, moved the Tribunal order a refund to it of Arbitration Charges pursuant to article 31 of the ICC Rules. The Tribunal stated [323] that any ruling on Arbitration Charges would appear in this Final Award.

651. According to Respondents 1, 2 and 3, Arbitration Charges, which shall include arbitrators' fees, arbitrators' expenses, ICC's administrative expenses, and any expenses incurred with legal fees, expert witness' fees, and other arbitration costs, at this time add up to US$ 350,000 plus R$ 1,160,583, itemized as follows:

ARBITRATORS' FEES	**Amount to be determined.**
ARBITRATORS' EXPENSES	**Amount to be determined.**
ICC'S ADMINISTRATIVE COSTS	**US$ 350,000** paid by VarigLog to the ICC Secretariat according to a letter dated June 24, 2008.
EXPENSES INCURRED BY THE PARTIES	TOTAL: **R$ 1,160,582.70**
Legal Fees (Respondents 1, 2, 3 and 4)	R$ 1,018,352.47
Fees of Expert Witness Milton Rodrigues de Sá	R$ 90,000.00
Expenses incurred (Respondents 1, 2, 3 and 4)	R$ 52,230.23

3. RESPONDENT 4'S POSITION

652. Respondent 4, too, moved [324] to order Claimant pay all Respondent 4's arbitration expenses (US$ 26,163), plus arbitrators' fees and legal fees (US$ 801,449). It should be mentioned that such expenses pertain to the period after the Partial Award was rendered, at which point Respondent 4 changed its counsel.

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[321] Esc. R1260, p. 117.

[322] Esc. R1261, p. 118.

[323] Page 38, paragraph 3 of the Partial Award ruling, and paragraphs 62 and 74 of the ruling on motions to clarify the Partial Award.

[324] Esc. R432, p. 105.

4. THE ARBITRATION TRIBUNAL'S RULING

653. Article 31(3) of the ICC Rules provides that the Arbitration Tribunal shall set Arbitration Charges in its final award, to include arbitrators' fees and expenses, ICC's administrative expenses, as well as reasonable expenses incurred by the parties for their defense in the arbitration. It shall also rule on which party shall bear their payment, or at what ratio they shall be shared among the parties.

654. ICC's administrative costs, as determined by the Court, were set at US$ 88,800, and arbitrators' fees and expenditures were set at US$ 611,200, for a total of US$ 700,000.

655. Attending to the fact that neither the parties nor the ICC Rules lay down any criteria which the Tribunal must follow upon awarding Arbitration Charges, in light of such silence, the Arbitration Tribunal has a broad discretion to rule on this issue. The Arbitration Tribunal's absolute freedom to rule on how to allot among the parties any amounts accepted as Arbitration Charges is a principle affirmed by all legal scholars and expressly reflected in article 31(3) of the ICC Rules.

656. To that effect, Fouchard/Gaillard/Goldman say that "*it is well established—and is perfectly legitimate —for the arbitrators to determine in their award who must ultimately pay for arbitration charges. A majority of arbitration rules so provide, and an order to pay all or a part of arbitration charges is frequently found in awards, grounded in the success and conduct of each party to the arbitration*." [325]

657. Based on such criteria, the Tribunal shall rule on (A) which parties are entitled to being reimbursed for Arbitration Charges, and then (B) shall set the amount of such Arbitration Charges.

A. The Parties to be reimbursed for Arbitration Charges

The Motion for an Award against Claimant

658. Regarding Respondents' motion for an award against Claimant for bad-faith litigation, the Tribunal rejects said motion outright, because at no time during this arbitration did the Tribunal find any conduct in bad faith by Claimant, nor did Respondents effectively show any material fact otherwise characterizing such conduct.

659. Having ruled out bad-faith litigation, the Arbitration Tribunal warns that Claimant (i) saw its claim denied to extend the arbitration agreement to Respondent 3, and that (ii) it partially prevailed in its claim for a price adjustment: it started out by moving to order Respondents pay R$ 163,900,270, and ended the arbitration by moving to order Respondent 1 pay R$ 114,450,597, and to hold Respondents 2 and 4 jointly liable for the price adjustment. The Tribunal, however, has deemed the motion partially grounded, and ordered Respondent 1 pay R$ 92,987,672, and held Respondents 2

[325] Free translation from English: "It is well established—and perfectly legitimate—that the arbitrators, in their award, should determine who should ultimately pay the costs. Most arbitration rules so provide, and an order to pay all or part of the costs of the arbitration is commonly found in the award, based on the success and conduct of each party in the arbitration." From P. Fouchard, E. Gaillard and B. Goldman: Fouchard, Gaillard, Goldman on International Arbitration (1999), p. 626. (underscoring added) [sic]

and 4 liable for the performance of such obligation.

660. The Tribunal finds it reasonable, in an arbitral proceeding like this one, where disputes of an economic nature arise, to apply success rate criteria in order to determine which party should bear Arbitration Costs. Thus, having deemed the motions entered by Claimant grounded in part, the Tribunal rules that Respondents 1, 2 and 4 shall satisfy to Claimant a part of such reasonable expenditures as incurred in this arbitration for its defense.

Motion for an Award against Respondents

661. Applying the same criteria, the Arbitration Tribunal reaffirms that Respondents 1 and 2 saw the motion in their counterclaim deemed totally ungrounded, and Respondent 4 saw its jurisdictional objections deemed ungrounded, in addition to their behavior being proven fraudulent. Therefore, the Tribunal rejects the motion entered by Respondents 1, 2 and 4 for an award against Claimant ordering payment of Arbitration Charges.

662. Respondent 3's case is different. As regards Respondent 3, it has been excluded from this arbitration and, as such, it saw its claim of jurisdictional objection deemed totally grounded by the Arbitration Tribunal in its Partial Award. This can be deemed a success for which it should be reimbursed, and Claimant should contribute toward the payment of Arbitration Charges incurred by Respondent 3.

663. Once the parties to be reimbursed have been determined, the Arbitration Tribunal shall, next, set the amount of reimbursement.

B. Amount of Arbitration Charges to be reimbursed

664. International arbitration practices require a differentiation between two basic categories within the comprehensive concept of Arbitration Charges: (a) Administrative Expenses (sometimes referred to as arbitration expenses),[326] which encompass ICC's administrative costs and arbitrators' fees and expenses, and (b) Defense Expenses, which correspond to *"reasonable expenses incurred by the parties in the arbitration for their defense"* (article 31(1) of the ICC Rules). The Tribunal shall determine, as regards both categories of Arbitration Charges claimed by Claimant and by Respondent 3, at what ratio Respondents 1, 2 and 4 shall satisfy Claimant, and at what ratio Claimant shall satisfy Respondent 3.

(a) Administrative Expenses

665. ICC's Administrative Expenses, as determined by the Court, were set at US$ 88,800, and arbitrators' fees and expenses at US$ 611,200, for a total of US$ 700,000, which has been paid 50% by Claimant (US$ 350,000) and 50% by Respondents (US$ 350,000). As the parties have advanced provisions for

[326] See Teoría y prática del Arbitraje Comercial Internacional [Theory and Practice in International Commercial Arbitration], Alan Redfern/ Martin Hunter/Nigel Blackaby/Constantine Partasides (2006), p. 549.

Arbitration Charges in equal parts, there shall be no room for reimbursement by the ICC.

666. The Arbitration Tribunal tends to consider that such expenses should be reimbursed solely by the counterparty whenever the claim is frivolous or whenever there is any conduct with procedural bad faith.

667. The Arbitration Tribunal underscores that none of the parties showed any conduct with procedural bad-faith in this arbitration, and that the parties' claims cannot be qualified as frivolous. The Arbitration Tribunal made its decision after an in-depth factual and legal analysis, as the case to be resolved was neither obvious nor evident.

668. Additionally, ICC's Administrative Expenses are set with a view to the arbitration amount, and are intended to cover the entire arbitral proceeding, including the jurisdiction-related proceeding.

669. The Arbitration Tribunal finds that, with respect to the jurisdiction-related proceeding, it does not affect the amount of ICC's Administrative Expenses and, furthermore, to the extent that the Partial Award has affirmed jurisdiction over Respondent 4, such proceeding was necessary.

670. In situations like this, the international practice is to apportion Administrative Expenses among the parties in identical amounts. As Administrative Expenses were advanced in identical parts, none of the parties shall have anything to reimburse the other party by reason of this concept.

(b) Defense Expenses

671. The parties ask in their conclusion briefs for reimbursement of a series of Defense Expenses.

672. The first task the Tribunal has to tackle is that of defining the categories of expenditures that can validly be claimed under the caption of Defense Expenses. In that respect, Redfern/Hunger say that:

> *"The parties' expenditures comprise not only the fees and expenses of counsel retained to represent them in the arbitral proceeding* (...) *Other expenses and professional fees shall also be paid to accountants or experts, for instance: lodging and transportation expenses of lawyers, witnesses and other intervening parties; expenses with copies and communications by telephone, fax or e-mail, among others. All this will be a part of the parties' so-called "expenses."* [327]

673. Attorneys' and experts' fees must therefore be reimbursed, but solely if their participation has proven necessary for the Arbitration Tribunal to rule on the matter under litigation, and if the fee amount is proportional; which is to say, that the type of expenses is necessary and reasonable.

674. Each party's Defense Expenses are contained in the tables appearing in paragraphs 648 and 651 above, and consist of legal fees, accounting experts' fees, and expenses in connection with the performance of legal services. And, in the case of Claimant, they also include the costs of posting bond in the injunctive proceeding, and the legal opinions.

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[327] Free translation from Spanish: "[See original for Spanish version.]." From Hunter/Nigel Blackaby/Constantine Partasides: Teoría y prática del Arbitraje Comercial Internacional, Alan Redfern/Martin (2006), p. 549. (underscoring added)

675. The Tribunal finds that all Defense Expenses submitted by the parties were necessary to this arbitration and constitute reasonable expenses.

676. The issue to be decided now is one of knowing at what ratio Claimant and Respondents 1, 2 and 4, respectively, should contribute toward the Arbitration Charges accepted by the Tribunal.

Claimant's Expenses

677. Taking into account Claimant's success ratio of about 50% (it obtained an award of R$ 92,987,672 as compared to the R$ 163,900,270 initially petitioned), and the overruling of the counterclaim of Respondents 1 and 2, and of Respondent 4's jurisdictional objections, the Arbitration Tribunal rules that Respondents shall bear 50% of the Defense Expenses, and therefore the Tribunal sets at 50% the Defense Expenses which Respondents 1, 2 and 4 shall satisfy to Claimant. The full amount claimed by Claimant is R$ 4,199,421; [328] therefore, half the amount is R$ 2,099,711.

678. As the Tribunal awarded payment of the price adjustment against Respondent 1, and held Respondents 2 and 4 jointly liable for such obligation, and since such obligation of awarded Arbitration Charges is an obligation ancillary to the primary obligation, the joint liability of the primary obligations is extended to such ancillary obligation.

679. Accordingly, the Arbitration Tribunal awards against Respondent 1 the payment to Claimant of the amount of R$ 2,099,711 as reimbursement of Arbitration Charges. And it holds Respondents 2 and 4 jointly liable for such obligation.

Respondent 3's Expenses

680. Taking into account the total success of its jurisdictional objection, and its subsequent exclusion from this arbitration, the Arbitration Tribunal rules that Claimant must bear 100% of Respondent 3's Defense Expenses.

681. Respondents submitted the amount of R$ 1,160,583 as the aggregate amount of expenses incurred by the four Respondents, [329] without itemizing how such expenses are individualized among them, or how such expenses are allocated to the relevant procedural phase.

682. In this situation, the Arbitration Tribunal rules to divide the aggregate expenses into two parts: one corresponding to the phase prior to the Partial Award, and the other corresponding to the phase on merit, ascribing an equal amount to each phase. Accordingly, the expenses incurred up until the Partial Award are quantified at R$ 580,292.

683. This amount corresponds to the four Respondents' defense, and therefore it needs to be divided into four equal parts. Thus, Respondent 3's Defense Expenses amount to R$ 145,073.

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[328] Per table contained in paragraph 648 above, less the amount of R$ 275,504 pertaining to Administrative Expenses.

[329] This amount does not include Respondent 4's expenses incurred in its defense as to merit.

684. Thus, Claimant must reimburse to Respondent 3 R$ 145,073 as Arbitration Charges.

VI. SUMMARY

685. The Arbitration Tribunal has ruled on the motions by the parties by analyzing seven questions. Summing up, it has come to the following conclusions:

Question No. 1 : *Has the price adjustment provided for in Section 5.1 of the Agreement already been determined? Or on the contrary, is yet to be determined?*

686. The price adjustment device agreed upon by the parties in Section 5 of the Agreement was foiled for reasons attributable to both parties.

687. The Sellers breached contractual obligations and representations: the Initial Balance Sheet attached to the Agreement does not consist of a *"balance sheet revised by PriceWaterhouseCoopers"* (Section 5.1), and PwC did not provide a *"new duly audited balance sheet"* (Section 5.1.1).

688. Claimant too contributed to foiling the price adjustment device, as it failed to submit a validation of the *"balance sheet with proper attachments by PriceWaterhouseCoopers"* within the term and manner provided for in the Agreement (Section 5.1.3.1).

689. Because of such foiling, the price adjustment is yet to be determined.

Question No. 2 : *If the answer to question No. 1 is that the price adjustment has already been determined, the question is asked by whom, and what is the adjustment amount resulting therefrom?*

690. The answer to the preceding question was that the price adjustment has not been determined; consequently, the answer to the question is prejudiced.

Question No. 3 : *If the answer to question No. 1 is that the price adjustment is yet to be determined, the question asked is who should make such adjustment: a third party designated by the Arbitration Tribunal or the Arbitration Tribunal itself?*

691. The Tribunal has ruled that it should be the one to determine the price adjustment. Its grounds are as follows:

692. The power to appoint a third audit firm pertains, "ex contractu," solely to the parties through their audit firms (Section 5.1.3.1 of the Agreement).

693. The lack of appointment of a third audit firm has not given rise to a *"conflict[s] arising from or related to this instrument*" that should be resolved by the Arbitration Tribunal. Such foiling did not constitute an occurring matter of fact, and the Arbitration Tribunal could in no way interfere in the already foiled mechanism.

694. But the Tribunal has verified that an underlying conflict subsisted, which was the determination of the price adjustment, which actually constituted a *"conflict[s] arising from or related to this instrument."*

695. Having established the preceding conclusions, the Arbitration Tribunal has deemed the sole solution to ensure jurisdictional relief to be that the Tribunal itself undertakes to resolve such conflict.

696. The Tribunal has also ruled that to resolve the conflict it would resort to the criteria established by the contracting parties, based for such purposes on the accounting expert examinations, offered by each contracting party, of the Revised Balance Sheet as of the Consummation Date, and determining the adjustment by applying *"only and solely the same items, the same methodology."*

Question No. 4 : *If the answer to question No. 3 is that the Arbitration Tribunal should be the one to determine the price adjustment: what is the price adjustment amount?*

697. Checking those items on which the experts appointed by parties coincided, the Tribunal ratified them and proceeded to analyze those items on which the experts diverged.

698. The Tribunal decided, item by item, on the amount each item should have in the Revised Balance Sheet as of April 8, 2007. The Arbitration Tribunal's Revised Balance Sheet is contained in paragraph 544 above.

699. The Revised Balance Sheet as of April 8, 2007 shows a negative working capital of (R$ 52,236,798). Upon a comparison with the working capital in the Initial Balance Sheet as of March 15, 2007, which amounted to R$ 40,750,874, the resulting balance is R$ 92,987,672 in Claimant's favor.

Question No. 5 : *In case the Arbitration Tribunal determines the price adjustment, how shall the accrual of interest on the price*

adjustment amount be determined?

700. Under CC article 405, and article 4(2) of the ICC Rules, the amount owed for the price adjustment accrues interest from December 31, 2007, the date the Court's Secretariat received the Request for Arbitration, to the date of actual and full payment.

701. The interest rate is the SELIC rate pursuant to CC article 406.

Question No. 6 : *To what extent are Respondents 2 and 4 liable for Respondent 1's obligations?*

702. The Arbitration Tribunal has deemed the facts alleged and proven by Claimant regarding Respondents to constitute unlawful conduct: a contract violation for Respondents 1 and 2, as they breached the Agreement and are obligated to pay the price adjustment, and a tort *[ilícito extracontratual*— an extracontractual wrongdoing] in the case of Respondent 4, as it committed incidental third-party malice.

703. All such wrongdoings have the same legal consequence: Respondents are liable for the damage sustained by Claimant. The damage coincides in its quantification with the price adjustment amount, i.e., R$ 92,987,672.

704. The Arbitration Tribunal has also ruled that, because Respondents' malicious conduct was perpetrated jointly, the liability of Respondents 2 and 4 for payment of the price adjustment is a joint liability with Respondent 1 pursuant to CC article 942.

Question No. 7 : *How shall the Arbitration Tribunal set Arbitration Charges?*

705. The Arbitration Tribunal underscores that it enjoys ample freedom to determine Arbitration Charges.

706. Given such discretionary berth, the Arbitration Tribunal has differentiated, in Arbitration Charges, between Administrative Expenses and Defense Expenses, and followed the international practice of awarding Administrative Expenses whenever a party is proven to have acted in bad faith, or the party's motions were frivolous, and of awarding Defense Expenses with a view to the degree of success in the parties' principal claims.

707. As regards Administrative Expenses, the Arbitration Tribunal has ruled to have each party bear such expenses in equal parts.

708. As regards Defense Expenses, the Arbitration Tribunal has confirmed that solely Claimant and Respondent 3 have been successful in their claims. Therefore, Respondents 1, 2 and 4 should

reimburse Claimant's expenses, and the latter should reimburse Respondent 3's expenses.

709. The amount of Defense Expenses to be reimbursed depends on success in claims. In the case of Claimant, success was about 50%, and in that of Respondent 3 it was total. Thus, Respondents 1, 2 and 4 must reimburse to Claimant half its expenses, and Claimant must reimburse to Respondent 3 all its expenses.

710. Accordingly, Respondents 1, 2 and 4 must reimburse to Claimant the amount of R$ 2,099,711, and Claimant must reimburse to Respondent 3 the amount of R$145,073.

711. Because the obligation to reimburse Arbitration Charges is ancillary in nature with respect to the primary obligation to pay the price adjustment, the joint liability of Respondents 2 and 4, as verified in the primary obligation, is also extended to such ancillary obligation.

VII. RULING BY THE ARBITRATION TRIBUNAL

Taking into account the grounds set forth above, the Arbitration Tribunal hands down this Award unanimously and enters the following ruling:

1. Varig Logística S.A. is ordered to pay VRG Linhas Aéreas S.A. (i) the amount of R$ 92,987,672 as a price adjustment corresponding to the negative working capital according to the Revised Balance Sheet as of the Consummation Date, (ii) plus late interest computed at the SELIC rate from December 31, 2007 to the date of actual and full payment;

2. Varig Logística S.A. is ordered to pay VRG Linhas Aéreas S.A. the amount of R$ 2,099,711 as a reimbursement for Arbitration Charges;

3. Respondents Volo do Brasil S.A., MatlinPatterson Global Opportunities Partners II L.P., and MatlinPatterson Global Opportunities Partners (Cayman) II L.P., collectively and jointly liable, are ordered to pay the amounts assessed on Varig Logística S.A. in preceding items 1 and 2;

4. VRG Linhas Aéreas S.A. is ordered to pay Volo Logistics LLC the amount of R$ 145,073 as a reimbursement for Arbitration Charges;

5. All other motions by Claimant and Respondents are dismissed;

6. The injunctions entered during the course of the arbitration proceeding are revoked; the originals of the bank guarantees posted by Claimant shall be returned upon its request.