

**IN THE MATTER OF AN APPLICATION FOR EMERGENCY MEASURES UNDER  
THE EMERGENCY ARBITRATOR RULES COMMON TO THE 2017 ARBITRATION  
RULES OF THE STOCKHOLM CHAMBER OF COMMERCE AND TO THE 2017  
EXPEDITED ARBITRATION RULES OF THE STOCKHOLM CHAMBER OF  
COMMERCE**

**SCC EA 2021 099**

**BETWEEN:**

**MR. FERNANDO PEREZ LUIS**

**v.**

**PERMOBIL AB**

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**ORDER**

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**19 July 2021**

**Diana PARAGUACUTO-MAHEO**

**Emergency Arbitrator**

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This Order is rendered in connection with a dispute between Mr. FERNANDO PEREZ LUIS (the “**Applicant**” or “**Mr. Perez**”) and PERMOBIL AB (the “**Respondent**” or “**Permobil**”), each a “**Party**” and together the “**Parties**”, resolved under the Annex II emergency arbitrator rules (the “**Emergency Arbitrator Rules**”) which are common to the Arbitration Rules of the Stockholm Chamber of Commerce in force as from 1 January 2017 and to the Expedited Arbitration Rules of the Stockholm Chamber of Commerce in force as from 1 January 2017 (together the “**SCC Rules**”), specifically regarding the emergency arbitrator proceedings commenced under Article 37 of the Arbitration Rules of the Stockholm Chamber of Commerce and/or Article 38 Expedited Arbitration Rules of the Stockholm Chamber of Commerce and Appendix II of the SCC Rules (the “**Emergency Arbitrator Rules**”).

## **I. PARTIES**

### **A. APPLICANT**

1. The Applicant is a Spanish businessperson specialized in the Spanish retail market of electric wheelchairs, doing business under the trade name of “FPL Mobility”, as salesman. The Applicant’s professional contact details are as follows:

Mr. Fernando Perez Luis  
FPL MOBILITY  
Avenida Ciudad de la Habana, 7  
47014 Valladolid  
SPAIN

2. The Applicant is represented in these emergency arbitrator proceedings by:

Antonio Delgado  
**JVD ABOGADOS**  
c/ Moscatelar, 34  
28043 Madrid

SPAIN

Tel: +34 6 00 93 94 75

E-mail: [antonio.delgado@jvdabogados.com](mailto:antonio.delgado@jvdabogados.com)

The corresponding power of attorney was communicated as Exhibit 1.

**B. THE RESPONDENT**

3. The Respondent, is a company specialized in the supply of electric wheelchair. It is incorporated in accordance with the laws of Sweden. The Respondent's contact details are as follows, taken in the person of Markus Mauer, President of Permobil EMEA, and of Cecilia Von Heijne:

PERMOBIL AB

Jan Stenbecks Torg 17

Kista 164 40

SWEDEN

Tel: +4660595900

E-mail: [markus.mauer@permobil.com](mailto:markus.mauer@permobil.com)

Email: [cecilia.vonheijne@permobil.com](mailto:cecilia.vonheijne@permobil.com)

4. The Respondent is represented in these emergency proceedings by :

Erik Forsin

Christopher Isaksson

Fazad Niroumaud

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101 23 Stockholm

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The corresponding power of attorney was communicated on 19 July 2021.

## **II. THE PARTIES' DISPUTE**

5. These emergency proceedings arise out of a dispute regarding a distributorship contract concluded between Mr. Perez and Permobil on 17 December 2010 (the “**Contract**”) under which the Applicant was granted an exclusive right to market and sell the electric wheelchairs and accessories<sup>1</sup> listed in Appendix 1 of the Contract<sup>2</sup> (the “**Products**”) in Spain’s North-East territory as defined in Appendix 1<sup>3</sup> (the “**Territory**”).
6. The Parties’ dispute regards the alleged violation of the Contract by the Respondent and more specifically, the alleged eviction of the Applicant from Permobil’s online platforms; the alleged violation of the Applicant’s contractual territorial exclusivity and the alleged poaching of Mr. Perez’s business associate.
7. In these emergency arbitrator proceedings, the Applicant seeks an order to preserve its contractual rights and for Respondent to restore the Applicant’s access to the online platforms and re-establish its territorial exclusivity in the Northeast part of Spain, as agreed under the Contract until the end of the arbitral proceedings on the merits.

## **III. ARBITRATION AGREEMENT**

8. The Parties are signatories to the Contract whose arbitration agreement set out in Article 26 which provides:

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<sup>1</sup> Exhibit 4, Article 1

<sup>2</sup> Exhibit 4, Appendix 1 para 1

<sup>3</sup> Exhibit 4, Appendix 1, para 2

*“Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of a sole arbitrator.*

*The place of arbitration shall be Sundsvall.*

*The language(s) to be used in the arbitral proceedings shall be English”<sup>4</sup>.*

#### **IV. PLACE OF THE EMERGENCY ARBITRATOR PROCEEDINGS**

9. On 15 July 2021, the Parties and the Emergency Arbitrator confirmed that the place of these emergency arbitrator proceedings, pursuant to Article 5 of the SCC Emergency Arbitrator Rules and Article 26 of the Contract, without prejudice to the determination of the place of arbitration on the merit, is Sundsvall, Sweden.

#### **V. LANGUAGE OF THE PROCEEDINGS**

10. As agreed by the Parties in Article 26 of the Contract, the language of the arbitral proceedings shall be English.
11. In a motivated decision dated 15 July, 2021, which is hereby incorporated by reference<sup>5</sup>, the Emergency Arbitrator considered that the provision of the Contract does not necessarily mean that the documents shared in the arbitration ought to be translated in the language of the proceedings. Further, the terms of Article 27(2) of the SCC Expedited Rules are identical to the terms of Article 26 (2) of the SCC Arbitration Rules, and for that purpose are applicable to the present emergency proceeding regardless of what SCC Rules finally apply<sup>6</sup> and allow for the dichotomy between language of the proceedings and documents

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<sup>4</sup> Exhibit 4, Article 26

<sup>5</sup> See. Procedural order n°1, 15 July 2021

<sup>6</sup> **Article 27 (2) of the Expedited Arbitration Rules** provides that : “(2) The Arbitrator may request that any documents submitted in languages other than those of the arbitration be accompanied by a translation into the language(s) of the arbitration ”

submitted in the arbitration in languages other than those of the arbitration. Finally, considering that in their business relationship the Parties exchanged also in the Spanish language<sup>7</sup> and that the Respondent is represented by a global law firm with offices in Spain and in Latin America, she decided that the underlying documentation, which is in Spanish, ought not to be translated into English. This is without prejudice to the determination of the need for a translation of the documentation in Spanish in the arbitration on the merits.

12. Considering that nor the Applicant nor the Emergency Arbitrator speak or read Swedish and that Swedish was not a language used by the Parties in their relationship, the Emergency Arbitrator further decided that the documents that are in Swedish ought to be translated into English. Considering the urgency of the proceedings, such translation does not need to be an official translation. This is without prejudice to the determination of the need for a translation of the documentation in Swedish in the arbitration on the merits.

## **VI. LAW APPLICABLE**

Article 23 of the Contract provides: “*This agreement shall be construed with and be governed by the laws of Sweden*”<sup>8</sup>.

In spite of this provision, the Parties disagreed as regard to the law applicable to the Contract.

The Applicant, invoking the imbalanced relationship between the Parties, requested in its Application the replacement of Swedish material law with either the 2016 UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law<sup>9</sup>. During the teleconference, which was held between the Parties and the Emergency

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**Article 26 (2) of the Arbitration Rules** identically provides that: “(2) The Arbitral Tribunal may request that any documents submitted in languages other than those of the arbitration be accompanied by a translation into the language(s) of the arbitration”.

<sup>7</sup> Exhibits 6; 7

<sup>8</sup> See Exhibit 4, Article 3

<sup>9</sup> See the Application *for the appointment of an emergency arbitrator* (the “**Application**”), para 104.

Arbitrator on 15 July 2021, the Applicant further requested that common principles between Spanish and Swedish law apply, as well as the commercial agent directive n°86/653 of 18 December 1986<sup>10</sup>.

The Respondent supports that Swedish Law should govern, in accordance with Article 23 of the Contract.

After considering the arguments on both sides and in light of the clear terms of Article 23 of the Contract, the Emergency Arbitrator concludes that Swedish law is applicable to the Contract.

## **VII. EMERGENCY ARBITRATOR PROCEEDINGS**

13. The Applicant commenced these emergency arbitrator proceedings by way of an Application for the appointment of an emergency arbitrator (the “**Application**”) dated 13 July 2021, which the SCC secretariat received on the same day. The SCC secretariat notified the Respondent of the Application on 13 July 2021, which the Respondent received the same day by email and on 14 July 2021 by mail.

14. On 13 July 2021 the Applicant effected the payment of the costs for the emergency proceedings, as required by Article 2 (vi) of the Emergency Arbitrator Rules<sup>11</sup>.

15. On 14 July 2021, pursuant to Article 4(1) of the Emergency Arbitrator Rules, the SCC Board (the “**Board**”) appointed Diana PARAGUACUTO-MAHEO as Emergency Arbitrator (notified to the Parties on the same day):

Diana PARAGUACUTO-MAHEO

**Foley Hoag AARPI**

153 rue du Faubourg Saint Honoré

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<sup>10</sup> See Procedural Order n°1, 15 July 2021.

<sup>11</sup> Exhibit 22



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16. The Emergency Arbitrator received access to the file from the SCC secretariat on the evening of 14 July 2021.
17. On 15 July 2021, the Parties and the Emergency Arbitrator participated in a teleconference via zoom from 15:15 pm CET until 16:15 pm CET.
18. By a decision dated 15 July 2021, the Emergency Arbitrator established a partial procedural timetable for the emergency arbitrator proceedings, pursuant to Article 7 of the Emergency Arbitrator Rules, requesting that the Respondent files its Response to the Application by 17 July 2021 by noon CET.
19. The Respondent filed its Response to the Application on 17 July 2021 just before noon CET along with Exhibits R-1 to R-6.
20. As it had been agreed during the 15 July 2021 teleconference, the Emergency Arbitrator proposed a revised and completed procedural timetable as follows<sup>12</sup>:

<b>Deadline</b>	<b>Description</b>
17 July 2021 – by noon CET	Respondent response to Applicant's application for interim measures
18 July 2021 – By 9:00 AM CET	The Applicant's reply
18 July 2021 – By midnight CET	The Respondent's rejoinder
19 July 2021 – 12:00 PM CET	Second teleconference (if any)
19 July 2021 – By midnight (in principle)	Emergency Arbitrator's Order

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<sup>12</sup> See Procedural Order n°2, 17 July 2021

21. The Emergency Arbitrator also fixed a 5-page minimum for the Applicant's Reply and for the Respondent's Rejoinder, also stating that a second teleconference would only be held if both Parties so requested before 10 AM CET 19 July 2021.
22. On 18 July 2021 before the 9:00 AM CET deadline, the Applicant filed its Reply along with Exhibits 23 to 33.
23. The same day, the Applicant requested the holding of a second teleconference and the Respondent opposed it.
24. On 18 July 2021, the Emergency Arbitrator requested that the Parties provide the amounts that each party claims as its costs before 19 July 2021 at 15:00 PM CET.
25. On 18 July 2021, conforming to the revised timetable, the Respondent filed its Rejoinder before midnight along with Exhibits R-7 to R-16.
26. On 19 July 2021, the Parties submitted their statement of costs.
27. On 19 July 2021, the Emergency Arbitrator rejected the Applicant's request as to the holding of a second conference, considering that the Parties' submissions were sufficiently detailed to make a decision on the interim reliefs sought.
28. Pursuant to Article 8 of the Emergency Arbitrator Rules of the SCC Rules, the Emergency Arbitrator issued its Order within the 5 days from the date upon which the application was referred to it.

## **VIII. SUMMARY OF THE FACTS**

29. In 2005, the Respondent, a Swedish company specialized in the supply of electric wheelchairs decided to expand its market territory to Spain.

30. In line with its expansion strategy, the Respondent decided to hire the Applicant through a Dutch affiliate, Permobil Europe BV. Due to his experience in the Spanish paramedical industry and his connections with key commercial partners and rehabilitation institutions, the Applicant was designated as the person in charge of Permobil's operations in Spain.
31. In 2010, after several remodeling among the Respondent's principal investors, the company made substantial changes in its market strategies, among which the closing of "Permobil Surcursal en España" and the termination of the subsequent employment relationships, including with the Applicant.
32. Nevertheless, the Respondent offered the Applicant to remain and keep working for the Respondent as an independent but exclusive distributor for part of Spain.
33. Accordingly, on 17 December 2010, the Parties entered into a Distributorship Contract under which the Respondent granted the Applicant an exclusive right to market and sell electric wheelchairs and related accessories listed in Appendix 1 of the Contract<sup>13</sup>, in the Northeast part of the Spanish territory. This Territory includes the following regions: Galicia, Asturias, Cantabria, País Vasco, La Rioja, Navarra, Aragon, Castilla y León, Comunidad Valenciana, Cataluña, Murcia and Baleares<sup>14</sup>.
34. Article 1 of the Contract provides as follow:
- "the supplier hereby grants to the Distributor the exclusive right to market and sell the products listed in Appendix 1 including all accessories and spare parts thereto(...) The Parties shall not - through any act or omission to act - jeopardize the validity of any provision in this Agreement"*<sup>15</sup>.

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<sup>13</sup> Exhibit 4, Appendix 1, para 1

<sup>14</sup> See Exhibit 4, Appendix 1 para 2.

<sup>15</sup> See Exhibit 4, Article 1

35. Article 3 of the Contract provides that “*the Distributor shall buy the Products as an independent contractor and shall sell the Products in its own name, for its own account and on its own risk*”<sup>16</sup>.
36. Article 4 of the Contract further provides that Mr. Perez has to place purchase orders through Permobil’s online platforms or by using given order forms in order to be delivered Permobil’s Products<sup>17</sup>.
37. Article 8 of the Contract imposes an obligation on the Supplier not to “*retain the Distributor’s agents or other intermediaries for the marketing or sale of the Products*”<sup>18</sup>.
38. On 17 March 2020, the Applicant, which became aware that the Respondent was planning to invest in Spain, contacted Markus Mauer, the president of Permobil EMEA, and offered him a business plan to reinforce the cooperation between the Parties. Markus Mauer responded that he was not in charge and redirected the Applicant to Mr. Moreno.
39. On 4 November 2020, Permobil established a new company, headquartered in Madrid under the name of “Permobil Medical Devices and Services, SL” which was registered on 1 December 2020 in the Commercial Registry of Madrid<sup>19</sup>. On 16 December 2020, Permobil nominated Mr. Ignacio Manuel Barrera<sup>20</sup> then Miguel Alberto Ibarra Padilla<sup>21</sup>, as representatives of the new affiliate in Spain.
40. On 1 January 2021, Nacho Barrera, former employee of “Mobiltec Iberia, S.L”, sent an e-mail to various partners of the Applicant<sup>22</sup>, presenting the new Spanish Project and his transfer to Permobil’s new Spanish affiliate. He explains that during the first months of the project, he will dedicate his time to implement the project of the affiliate, preparing for

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<sup>16</sup> Ibid, Article 3

<sup>17</sup> Ibid Article 4 : “*The Distributor shall order the Products by Permobil Part Trap System or by using given order forms*”

<sup>18</sup> Ibid, article 8

<sup>19</sup> Exhibit 8

<sup>20</sup> Exhibit 9

<sup>21</sup> *Ibid.*

<sup>22</sup> Exhibits 23, 24

“everything that is coming”<sup>23</sup> and that Mobiltec will continue to support the company in the meantime.

41. On 19 May 2021, while the contractual relationship between the Parties had been going well until that date, the Applicant was allegedly cut off from the Respondent’s online platforms, which prevented him from making his orders and deliver the products to his intermediaries in Spain<sup>24</sup>.

42. The Applicant explains that he has been unable to place new sales orders with Permobil but for spare parts under warranty for electric wheelchairs sold by the Applicant in the past. The Applicant also points out that the Respondent has put his pending orders on stand-by until the Applicant filed as “new client”<sup>25</sup>.

43. On 21 May 2021, the Applicant received an e-mail from the customer service representative of the Respondent. The latter informed him that there had been changes in the placement of orders and attached forms so that the Applicant could register as “new client”<sup>26</sup>.

44. On 24 May 2021, the Applicant received another e-mail from the “Country manager – Spain sales” of Permobil EMEA, Miguel Ibarra, informing him that Permobil Spain had recently initiated direct commercial activities on the Spanish Market and that the Applicant should register as “new client” in order to access the platform<sup>27</sup>. He also explains that “*the activity of FPL should circumscribe to the supply of warranty parts ...*”<sup>28</sup>.

45. The Respondent allegedly engaged into “predatory attacks” against the Applicant, by trying to establish contact with the Applicant’s key partners<sup>29</sup>, including Mr. Milton

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<sup>23</sup> Ibid, “*seran semanas de preparacion de todo lo que nos viene*” (free translation)

<sup>24</sup> See Application, para 24

<sup>25</sup> Exhibit 7

<sup>26</sup> Exhibit 6

<sup>27</sup> Exhibit 7.

<sup>28</sup> Exhibit 7

<sup>29</sup> Notably Exhibits 23, 24, 25, 26

Giraldo<sup>30</sup> and appearing as a new contact in the Territory of the Applicant. The Respondent vehemently challenges this reading of the facts and asserts that Mr. Giraldo spontaneously approached the Respondent<sup>31</sup>. According to the Respondent, the different approaches of the intermediaries of M. Perez are limited to marketing the new Spanish market and products other than the Products.

46. The Parties agree that no notice of termination of the Contract was communicated by either Parties, as required by Article 22 of the Contract, and that therefore the Contract is still in force as of the date of this Order.

## **IX. THE PARTIES' ARGUMENTS**

### **A. SUMMARY OF THE APPLICANT'S ARGUMENTS**

47. The Applicant contends that the Respondent has committed a “*blatant breach of the Distributorship Contract*”<sup>32</sup> by blocking the access to the online platforms<sup>33</sup>, preventing him from ordering and delivering the Products<sup>34</sup>, by violating the Applicant's territorial exclusivity in the Northeast part of Spain, and by violating its obligation not to “poach” his key personnel, as agreed under the Contract<sup>35</sup>.

48. Regarding the online platforms, the Applicant asserts that without access to these platforms, the Applicant is treated like any other client and cannot benefit from the contractual 52% discount agreed with the Respondent.

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<sup>30</sup> Exhibits R7, R8, 30

<sup>31</sup> Respondent Reply, 18 July 2021, para 11.

<sup>32</sup> See Application, para 54

<sup>33</sup> Exhibit 29

<sup>34</sup> Exhibit 30

<sup>35</sup> Exhibit 4, Article 8 para 2

49. The Applicant also argues that the Respondent has not complied with the 12 months' notice requirement set out in Article 22 of the Contract, and, as a consequence, has an obligation not to retain his intermediaries during 12 months after termination.
50. According to the Applicant, the Respondent was never clear as regard to its intention to create a new Spanish affiliate. Contrary to what it is claimed by the Respondent, the Applicant considers that the e-mail dated 17 March 2020 is in no way explicit as regard to the Respondent's intention to create a new entity in charge of the distribution of Permobil's products in Spain.
51. The Applicant further contends that it will suffer irreparable harm on both its economic activity and on its business reputation if the emergency measures sought are not granted. As regard to its economic activity, the Applicant argues that his business activity is highly dependent on Permobil's distribution. Permobil's Products represent nearly 90% of the Applicant's activity and this percentage continues to increase each year<sup>36</sup>. This dependency on the Respondent's Products is because the Applicant has been working with the Respondent for years and that Mr. Perez professional relationships was built on the marketing of those Products. The Applicant asserts that by blocking him from ordering Products from the online platforms, the Respondent is "*basically pushing [him] into insolvency and closing his business activity*"<sup>37</sup>. As to the damages to the Applicant's reputation, the latter contends that his inability to serve its intermediaries and satisfy sales order from clients and patients<sup>38</sup> has undeniably marred his image as a reliable distributor. The Applicant adds that the alleged statements according to which the Applicant does no longer distributes the Respondent's product will continue to spread if the Respondent is not stopped from doing so. According to the Applicant, financial and reputational damages are already consequential and they will continue to impact the Applicant's business.
52. The Applicant is of the opinion that Respondent's compliance with its non-pecuniary obligations must necessarily be accompanied with pecuniary fines, without which it would

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<sup>36</sup> Exhibit 17

<sup>37</sup> See Application, para 69

<sup>38</sup> Exhibits 19, 20, 21, 30

be impossible to guarantee the respect of the interim measures that may granted by the Emergency Arbitrator. As regard to the sale of competing products by the Applicant, the latter indicates that the Contract does not prevent the Distributor from selling competing products. Moreover, the Applicant argues that Mobiltec, the Respondent's distributor in Portugal, itself sells products from competing suppliers, making the Respondent's allegations of breach of contract non-credible.

53. The Applicant finally argues that he suffered an irreparable harm to access justice, due to the presence of an arbitration clause in the Contract, arbitration being a difficult and expensive dispute resolution mechanism. Moreover, the Applicant points out that the clause is highly favorable to the Respondent as the chosen seat of arbitration is a neighboring town of the Respondent's head office. Being in a financial struggle, the Applicant perceives this arbitration clause as a legal tool that aims at discouraging him from asserting his rights.

## **B. SUMMARY OF THE RESPONDENT'S ARGUMENTS**

54. The Respondent contends that it never breached the Contract, which explains why no notice of termination was ever sent to the Applicant. There are "*new ways of distributing products*"<sup>39</sup> which is not in itself a breach of the Contract.

55. The Respondent argues that the Spanish new affiliate is located in Madrid and is, *de facto*, outside the Applicant's assigned territory of exclusivity. Furthermore, the Respondent claims that the products sold by the affiliate were not the Products included in the Distributorship Contract nor its Appendix I.

56. Regarding the nature of the Parties' contractual relationship, the Respondent explains that the Applicant never acted or operated as a commercial agent or commission agent for the

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<sup>39</sup> See. Respondent's response to the applicant's application for interim measures (the "**Response**"), para 10



Respondent. According to article 4 of the Contract, the Applicant was to buy the products from the Respondent at its own risk and for its own account<sup>40</sup>.

57. The Respondent strongly denies the accusations according to which he voluntarily “poached” the Applicant’s key partners or clients, including Mr. Giraldo. The Respondent acknowledges being in contact with local dealers on the Applicant’s territory but asserts that he never mentioned FPL in these interactions nor distributed products covered by the Contract. Regarding Mr. Giraldo, the Respondent argues that the Contract does not contain any non-solicitation clause preventing him from discussing potential employment situations with the Applicant’s partners. Moreover, the Respondent affirms that it is Mr. Giraldo who initially contacted Permobil and not Permobil that approached Mr. Giraldo.
58. The Respondent contends that the Applicant was not cut-off from the ordering system and was neither prevented from making orders. Permobil alleges that the changes in the order procedure on the online platform simply required the Applicant to file as “new client” of the Spanish affiliate, which is a new intermediary in the ordering process.
59. The Respondent further argues that the Applicant was informed of the coming Permobil’s Spanish affiliate in an e-mail dated 17 march 2020<sup>41</sup>.
60. The Respondent points out the lack of evidence regarding the economic and reputational damages suffered by the Applicant.
61. The Respondent also argues that it now has the right to terminate the Contract, as the Applicant has marketed and sold directly competing products, such as Dietz Power, which is “*contrary to the spirit of an exclusive distributor appointment of Permobil power wheelchair products*”<sup>42</sup>.
62. Regarding the requested *astreintes*, the Respondent indicates, by citing the preparatory works for the Swedish Arbitration Act and various doctrine, that Swedish law does not

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<sup>40</sup> Exhibit 4, Article 4

<sup>41</sup> See Exhibit R-1

<sup>42</sup> See Response, para 26.

permit an arbitral tribunal to order performance of a contract under the threat or sanction of fines or penalties, unless such penalties are contractual<sup>43</sup>.

63. Finally, as regard to the irreparable harm caused to the Applicant as to his right to access justice, the Respondent notes that arbitration enables the Applicant to have his case tried in a fair way and that the resort to the emergency arbitrator proceedings and the presence of a sole arbitrator are costs effective compared to other proceedings.

**X. RELIEF REQUESTED BY THE PARTIES**

64. The Applicant request that the Emergency Arbitrator:

“Declares that the Emergency Arbitrator is admissible pursuant to Article 38 of the SCC Arbitration Rules;

Declares that the Emergency Arbitrator has jurisdiction to order Emergency Measures as defined in Article 38 of the SCC Arbitration Rules;

- (a) Orders the Respondent to grant immediate access to the Applicant to both its online Part Trap System and its Permobil Order Portal (“Permoshop”) so that the Applicant can continue placing sales orders and serving his intermediaries and final customers under the Contract and the same commercial terms as usual between the Parties, until a final award is rendered.
- (b) Orders the Respondent to pay the Applicant an astreinte of EUR 30.000 for each day that access to its online shop Part Trap System or its Permobil Order Portal (“Permoshop”) is not allowed to the Applicant, or any other pecuniary amount that the Emergency Arbitrator deems appropriate to the circumstances, from the date of notification of the previous interim measure and until a final award is rendered.

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<sup>43</sup> See Response, paras 33 to 46.

- (c) Orders the Respondent to continue serving new sales orders placed by the Applicant under the Contract and the same commercial terms as usual between the Parties, until a final award is rendered.
- (d) Orders the Respondent to immediately serve any pending sales orders places by the Applicant under the Contract and the same commercial terms as usual between the Parties.
- (e) Orders the Respondent to refrain from directly selling the Products in the Territory (namely Galicia, Asturias, Cantabria, País Vasco, La Rioja, Navarra, Aragón, Castilla y León, Comunidad Valenciana, Cataluña, Murcia and Baleares) to any intermediaries or final customers or otherwise through any distributor different from the Applicant, until a final award is rendered.
- (f) Orders the Respondent to pay the Applicant an astreinte of EUR 30.000 for each transaction entered by the Respondent on the Products in the Territory (namely, Galicia, Asturias, Cantabria, País Vasco, La Rioja, Navarra, Aragón, Castilla y León, Comunidad Valenciana, Cataluña, Murcia and Baleares) with any counterparty different from the Applicant, or any other pecuniary amount that the Emergency Arbitrator deems appropriate to the circumstances, from the date of notification of the previous interim measures and until the final award is rendered.
- (g) Order the Respondent to provide security to guarantee the effectiveness of both the above primary non-pecuniary and accessory pecuniary arbitral interim measures (*astreintes*), in any amount the Emergency Arbitrator deems appropriate to the circumstances.
- (h) Order Permobil to comply with any other interim measure the Emergency Arbitrator deems appropriate to the purpose of the requested interim measures in the circumstances.
- (i) Orders the Respondent to pay the full costs of the emergency proceedings to the Applicant pursuant to Article 10 (5) of Appendix II of the SCC Expedited Arbitration rules and SCC Arbitration Rules.

65. The Respondent requests that:

- (a) The Emergency Arbitrator dismisses the Application in its entirety;
- (b) In the event any interim reliefs sought in the Application sec. 50 a), c), d), e) and/or h) are granted, the interim reliefs sought in sec. 50 b), the Emergency Arbitrator shall under all circumstances deny f) and g).
- (c) The Emergency Arbitrator admits the application of the Annexes to the SCC Arbitration Rules.
- (d) The Emergency Arbitrator orders the Applicant to compensate the Respondent for all costs of these emergency arbitration proceedings, including fees for counsels, internal work and expenses, and for default interests in accordance with section 6 of the Swedish Interest Act from the day of the Emergency Arbitrator's award until payment is made.

## **XI. ANALYSIS OF ISSUES FOR DECISION**

### **A. JURISDICTION AND ADMISSIBILITY**

66. The Parties are in disagreement as to the SCC Rules that apply to the arbitration. The Applicant submits that any dispute arising out of the Distributorship Contract shall be settled by arbitration in accordance with the 2017 SCC Expedited Arbitration Rules. The Respondent considers that the 2017 SCC Arbitration Rules apply.

67. Both Parties agree however that the Emergency Rules applicable to the emergency arbitrator proceedings apply. They further consider that these Emergency Arbitrator Rules are common to both set of SCC Rules so that the Emergency Arbitrator does not have to decide which set of SCC Rules apply to the arbitration on the merits.

68. For those reasons, it is enough for the Emergency Arbitrator to acknowledge that the arbitration provision in the Contract refers to “the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce” to conclude that in the context of the emergency arbitration, Annex II of the SCC Rules apply.

69. With respect to admissibility of the Application, as set out in Article 1.1 of Appendix 2 of both SCC Rules, “*A party may apply for the appointment of an Emergency Arbitrator until the case has been referred to the Arbitrator pursuant to Article [23 of the Rules for Expedited Arbitrations/22 of the Arbitration Rules].*” Therefore, pursuant to the SCC Rules, for the Application to be admissible it must be filed before the case has been referred to the Arbitrator or to arbitration.

70. In the present Application, the Parties are signatories to the arbitration agreement and the case has not yet been referred to an Arbitrator or to arbitration.

71. For the reason set out below, the Application also seeks measures, which are interim measures conforming to the powers attributed by the SCC Rules to the Emergency Arbitrator. Indeed, Article 1.2 of Appendix 2 of both SCC Rules reads “*The powers of the Emergency Arbitrator shall be those set out in Article [38(1)-(3) of the Rules for expedited Arbitrations/37 (1)-(3) of the Arbitration Rules]*”.

72. Accordingly, the Emergency Arbitrator considers that the Application is admissible.

73. With respect to jurisdiction, *Article [38(1)-(3) of the Rules for expedited Arbitrations/37 (1)-(3) of the Arbitration Rules]* in turn provide that “*The Arbitrator may, at the Request of a party, grant any interim measures the Arbitrator deems appropriate.*” Thereby granting the Emergency Arbitrator the power to order any interim measure that the Arbitrator deems appropriate. Furthermore, Article 8 of Annex II of the SCC Rules provide that “*Any emergency decision on interim measures shall be made no later than 5 days from the date the application was referred to the Emergency Arbitrator....*” , thereby stressing the need for the interim measure to be urgent.

74. The Applicants seeks measures that aim at not exacerbating the damages pending the resolution of the dispute as a measure that will allow it to continue to perform the Contract and at the same time preserve its financials and its reputation.

75. The Emergency Arbitrator considers that the relief sought falls within the jurisdiction of the Emergency Arbitrator to make in light of the broad and discretionary powers outlined above.

## **B. MERITS OF THE APPLICATION**

76. The Parties agreed in general terms that the Application must meet the following test in order to establish a case for granting the requested Emergency Measures:

- a. The measure should be urgent and necessary to prevent irreparable harm to the Applicant;
- b. There must exist a prima facie case on the merits, with the Emergency Arbitrator not having to go beyond what is a reasonable case;
- c. The measure should be effective to achieve the end sought and be proportional.

77. The Parties also seem to agree that irreparable harm and urgency can be understood in an economic and not a literal sense.

### **B.1. Prima Facie Case on the Merits**

78. The Applicant considers, and the Respondent does not challenge, that for a prima facie case to exist the Emergency Arbitrator “*need not go beyond whether a reasonable case is submitted which, where the facts alleged proven, might possibly lead to a favorable award for the Applicant*”<sup>44</sup>.

79. As mentioned above, there is no dispute that the Contract is still binding upon the Parties and that none of the Parties has effectively terminated it<sup>45</sup>. Accordingly, all of its provisions, including Article 1 (Mr. Perez’s exclusive right to market and sell the products listed in Appendix 1 in the Territory);<sup>46</sup> Article 4 (Mr. Perez’s obligation to order the Products through Permobil Part Trap System or by using order forms), Article 8 (During the Contract Permobil cannot retain Mr. Perez’s agents or other intermediaries for the marketing or the sale of the products); Article 9 (Mr. Perez’s purchase right at prices and discount as per Appendix 4); Article 22 (twelve months written notice before termination) are still in force.

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<sup>44</sup> Application para 55

<sup>45</sup> Applicant’s reply, 18 July 2021, para 2

<sup>46</sup> Exhibit 4, Appendix 1 para 2 : “The territory is defined as Part of Spain (Galicia, Asturias, Cantabria, País Vasco, La Rioja, Navarra, Aragon, Castilla y León, Comunidad Valenciana, Cataluña, Murcia and Balears)”

80. Yet the evidence adduced during these proceedings indicate that there is a reasonable case for Permobil to be violating various terms of the Contract to the detriment of Mr. Perez and his business in the Territory.
81. If the Respondent admits having sold products, other than the Products in the Territory<sup>47</sup> there is a reasonable case that Permobil went beyond the terms of the Contract through aggressive un-discriminated marketing of the Products in the Territory in violation of Article 1 of the Contract that provides Permobil “*hereby grants the Distributor the exclusive right to market and sell the products listed in Appendix 1 [in the Territory]*”.
82. First, there is evidence that M. Barrera, newly appointed as a representative of the new Permobil’s Spanish affiliate, contacted at least four of the Applicant’s intermediaries (Muevete Y Accede S.L., GRACARE, Garcia Toral S.L. and Mediatric) in the Territory explicitly sharing his contact information with intermediaries of Mr. Perez whom he did not know, as if he were their new and future contact for Permobil, without mentioning M. Perez or FPL Mobility nor distinguishing any of the products – those that purportfully would fall under the Contract and those which do not<sup>48</sup>.
83. The Respondent does not deny having sold products in the territory of exclusivity of FPL. However, it considers that those have been products, which were not included in the Contract, neither listed in its appendix nor included by express written agreement by the Parties<sup>49</sup>. This statement is unsupported however, and if it had been the intention of Permobil to preserve M. Perez’s exclusivity, it would have made it clear to the intermediaries of the Territory, which it failed to do. Indeed the language that Mr. Barrera used in his email is ambiguous, never referring to FLP<sup>50</sup>. The liflet<sup>51</sup> that has been marketed including in the Territory, lists products that overlap at least partially with the Products that

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<sup>47</sup> Exhibit R9 para 9 (“*Some distribution was made in the territory of FPL but only to th extent permitted under contractual obligation of Permobil.* »)

<sup>48</sup> Exhibits 23, 24, 25,26

<sup>49</sup> See Response at para 11

<sup>50</sup> Exhibit 23

<sup>51</sup> Exhibit 15 (F3 Corpus, F5 Corpus, F5 Corpus V5, M3 Corpus, My Permobil; Smart Drive, ROHO)



Mr. Perez sales, including F5 Corpus<sup>52</sup> and F3<sup>53</sup> Corpus and which the Respondent did not dispute fell within the list of exclusive Products. Mrs Aurora Cristina goes even as far as saying that “*Mr. Barrera told me that Permobil was going to be implanted in Spain and that I had to buy the products directly from them and not through Fernando ... this person was now telling me that I could not offer my clients products through Fernando, FPL mobility.*”<sup>54</sup> The Respondent further explains that new Permobil products do not automatically fall under the exclusivity of the Contract and in order to be added need to be agreed upon by the Parties. That would partially explain, according to Respondent, why some authorized products would be directly sold by Permobil in the Territory. Although recognizing that some new products such as ROHO and Smart Drive have been distributed in Spain under a contract with another distributor than Mr. Perez, Mr. Ibarra explains that “*to my knowledge a written agreement was always entered into with FPL whenever new products were added to the [Contract]*”<sup>55</sup>. It follows that there is a reasonable case to believe that most of the products marketed and sold by Permobil in Spain are actually Products that fall under the Contract.

84. There is also a reasonable case that Mr. Perez was cut-off from the ordering system and that this did not result from a simple misunderstanding after a change of ordering system as asserted by Respondent<sup>56</sup>. Exhibit 7 clearly shows that Mr. Perez is no longer allowed to buy products under a new procedure, but only spare parts covered by FPL’s commercial guarantee. By preventing Mr. Perez to access the ordering system, Permobil prevents M. Perez from acting as distributor in the Territory<sup>57</sup>. This is all the more unfortunate that the orders of clients, in dear need of equipment, are being taken hostage<sup>58</sup>, as well as Mr. Perez’ customer in special need of customer care<sup>59</sup>. Also, the Emergency Arbitrator finds that there cannot be any random coincidence between the impossibility for Mr. Perez to access

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<sup>52</sup> Exhibit 19

<sup>53</sup> Exhibit 23

<sup>54</sup> Exhibit 26

<sup>55</sup> Exhibit R-9 para 8

<sup>56</sup> See Response 18 and s; See Exhibit R-9

<sup>57</sup> Exhibit 4, Appendix 1 and 4, Applicant’s Reply at para 21

<sup>58</sup> Exhibits 19, 20, 21,

<sup>59</sup> Exhibit 30

the platform and the email that Mr. Perez received from the CEAPAT alerting M. Perez that M. Barrera told her that FPL had lost its authorization as distributor<sup>60</sup>. This unsolicited email further gives credibility to the statements of Mrs. Aurora<sup>61</sup>.

85. The fact that Mr. Perez could use order forms does not change the fact that, as communicated by Mr. Ibarra, the person in charge of the new Spanish market, that “*the activity of FPL should be circumscribed with providing the spare warranty parts of the chairs sold...*”<sup>62</sup>.

86. The Emergency Arbitrator disagrees with the Respondent’s Statement that the Contract does not contain any non-solicitation clause. A non-solicitation clause can be found in Article 8 of the Contract. With that in mind, the Emergency Arbitrator finds credible the testimony of Mr. Giraldo<sup>63</sup> according to which Permobil intended to poach him away from Mr. Perez in violation of Article 8 of the Contract. His testimony is corroborated by Exhibit 13 whose interpretation by the Respondent remains unsupported in these proceedings<sup>64</sup>. Further, the Emergency Arbitrator disagrees with the interpretation of the evidence provided by the Respondent in R-8. The Emergency Arbitrator reads this email of Mr. Giraldo as a thank you email for Mr. Bertrand Ouvry to have thought of him for the new Spanish Project<sup>65</sup>.

87. It follows from the above that there is a prima facie case that Permobil is breaching the Contract to the detriment of Mr. Perez.

## **B.2. Urgency and Irreparable Harm**

88. In the Emergency Arbitrator’s view the requirement of urgency is met.

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<sup>60</sup> Exhibit 14

<sup>61</sup> Exhibit 26

<sup>62</sup> Exhibit 7

<sup>63</sup> Exhibit 28

<sup>64</sup> Response, para 15

<sup>65</sup> Exhibit R8 (“Hello Bertrand, First of all I want to thank you for the meeting and above all that you have take me into account for your project.”)

89. There is agreement of the Parties as to the fact that in the international arbitration practice, the notion of substantial or irreparable harm must be understood in an economic and not a literal sense and that the damages only need to be substantial<sup>66</sup>. The Emergency Arbitrator agrees with the Parties' position on the meaning and application of irreparable harm.
90. In the present case, the particular harm would be the endangering of the financial position and possibly of the survival of Mr. Perez's business with FPL, as well as a reputational loss in a market that the Applicant describes as very small. The financial situation of Mr. Perez is already fragile. Further, there are aggravating factors to the situation that contributes to the irreparable character of the harm. First, although the Applicant also sales other products than those of Permobil, which seems allowed under the Contract, the Applicants credibly explains in light of the historical relationship between Mr. Perez and Permobil, that Permobil's sale represent 90%<sup>67</sup> of its sales. Also, Mr. Perez is identified on the market with Permobil, which will make it more difficult for him to transition from one day to the other towards different products and brand. Finally, it seems undisputed that the Territory served by Mr. Perez is small and that specialists in the field like him and his employee, Mr. Giraldo are scarce, and that a tentative to poach his only resource would be deadly to his business.
91. The business that Permobil and Mr. Perez are in, is very special in that it caters to people in need of special and expensive equipment. The Emergency Arbitrator can easily imagine that the lack of responsiveness from the distributor can not only frustrate the intermediary but also deeply affect the retail customer who is deprived of the gear he desperately needs. Therefore, the Emergency Arbitrator believes that Permobil not abiding by the terms of the Contract irreparably hurts the Applicant's reputation with the intermediaries, and with the final client. The urgency of the situation flows from all the above.

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<sup>66</sup> Application para 60, Response paras 28, 29

<sup>67</sup> Exhibits 17 18

92. The Emergency Arbitrator is not convinced however by the Applicant's argument as to M. Perez' fundamental right of access to justice. SCC arbitration is a cost efficient and resourceful way of resolving disputes among international commercial partners.

### **B.3 Proportionality of the Measure**

93. To the extent the Contract is still in force and that the measures requested by the Applicant are aimed at preserving that status quo, the measures requested (to the exclusion of the *astreinte* which we will address immediately below) are proportional. There can be no disproportion in asking a Party to abide by the terms of a Contract that it recognizes still as binding. This includes, *inter alia*, an obligation to respect an exclusivity of sale and marketing for the Products in the Territory, no poaching of key personnel, online access to the order platform, agreed discounted rates and prices. Therefore the interim measure thought at paragraph 50 (a); (c); (d); and (e) of the Application are proportional.

94. As a consequence of B1; B2; and B3 above the Emergency Arbitrator hereby grants the relief sought at paragraph 50 (a); (c); (d); and (e) of the Application.

### **B.4 Astreinte**

95. In his Application, dated 13 July 2021, the Applicant requests various pecuniary fines in order to ensure the Respondent's compliance with the primary non-pecuniary arbitral interim measures that may be granted by the Emergency Arbitrator.

96. The Applicant seeks in para 50 b) an *astreinte* of EUR 30,000 for each day that access to Mr. Perez Part Trap System and its Permobil Order portal ("Permoshop") is not allowed ... or any other pecuniary amount that the Emergency deems appropriate to the circumstances; and in para 50 f) he also seeks an *astreinte* of EUR 30,000 for each transaction entered by the Respondent on the Products and in the Territory contractually agreed<sup>68</sup> or any other pecuniary amount that the Emergency Arbitrator deems appropriate.

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<sup>68</sup> Exhibit 4, Appendix 1

97. In his Response to Application, dated 17 July 2021, the Respondent indicates that that Swedish law, the law of the seat of the emergency arbitrator proceedings, does not permit an arbitral tribunal to order performance of a contract under the threat or sanction of fines or penalties, unless such penalties are contractual.

98. To support its argument, the Respondent relies on a passage from the preparatory works for the Swedish Arbitration Act (SOU 1994: 81 s 284) which reads as follow: “ (...) *Welamson is of the opinion that existing law does not permit arbitrators such competence and argues that predominant reasons support that the existing order is kept. The committee agrees with that position*”<sup>69</sup>. The Respondent also produces doctrine on the Swedish Arbitration Act, including a commentary written by Stefan Lindskog, the former chief judge of the Swedish Supreme Court explain that “*the arbitral tribunal does not have the right to by means of executory penalties enforce a specific performance set out in the award*”<sup>70</sup>. The Respondent also shares a quote from a Swedish professor of procedural law at the University of Stockholm, Lars Heuman, according to which “*Arbitrators have the right to try disputes concerning contractual penalties, but not executory penalties*”<sup>71</sup>.

99. The Applicant considers that it is irrelevant whether Swedish law forbids *astreinte* since Article 37 (1) of the SCC rules and article 38 (1) of the Expedited Rules gives the Arbitral tribunal the power to grant “any interim measures it deems appropriate”.

100. Taking into consideration the Parties’ arguments and the various documents produced by the Respondent, the Emergency Arbitrator agrees with the Respondent that she lacks power under the law of the seat of the emergency arbitration to grant *astreintes* and considers that the formula “any interim measures it deems appropriate” does not mean that she can depart from the applicable law of the seat. It is clear from the evidence adduced that Swedish law does not give Arbitrator the right to grant fines or penalties such as *astreintes*.

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<sup>69</sup> Exhibit R2

<sup>70</sup> Exhibit R3

<sup>71</sup> Exhibit R4

101. It follows that the requests for the order of an *astreinte* made by the Applicant at para 50 b) f) and g) must be dismissed, the Emergency Arbitrator having no right to order such interim measure under Swedish Law.

102. The Emergency Arbitrator also dismissed the request of Respondent in para 50 g), where the Applicant requests that the Emergency Arbitrator order the Respondent to provide security to guarantee the effectiveness of both the primary non-pecuniary obligations and accessory pecuniary arbitral interim measures, for lack of particularity.

#### **B.5 Any Other Interim Measure that the Emergency Arbitrator Deems Appropriate**

103. The Applicant further requests that the Emergency Arbitrator orders Permobil to comply with any other interim measures the Emergency Arbitrator deems appropriate to the purpose of the requested interim measures in the circumstance. This request is consistent with the powers attributed to it by the SCC rules (article 37 of the SCC Arbitration Rules and article 38 of the SCC Expedited Rules). Flowing from the reasonable case for a breach by Permobil of the Contract notably as to its marketing on the Territory; keeping in mind that the Respondent did not object to the Emergency Arbitrator's power under the SCC Rules, the possible irreparable harm to Mr. Perez and the proportionality of the measure, the Emergency Arbitrator considers appropriate to order the Respondent to refrain from directly marketing the Products in the Territory to any intermediaries or final customers.

#### **B.6 No- Predjudgment on the Merits**

104. The Emergency Arbitrator emphasises that she is in no way predjudging this case on the merits. The Emergency Arbitrator is not deciding whether Permobil is in breach of the Contract. This will be for the arbitral tribunal to decide on the merits. However, until the arbitral tribunal's decision, the Emergency Arbitrator is of the view that in the circumstances of the present case the *status quo* should be preserved by granting access to

M. Perez to the online Part Trap System and its Permobil Portal (“Permoshop”) ; by securing supply of the products for new and old orders to the Applicant until a Final Award is rendered; and by ordering Permobil to refrain from directly selling and marketing the Products set forth in the Contract in the territory

## C. COSTS

105. According to Article 10(5) of Annex II of the SCC Rules, at the request of a party, the Emergency Arbitrator shall in the emergency decision apportion the costs of the emergency proceedings between the Parties.

106. The Emergency Rules do not set forth any criteria to apportion such costs. However, Article 49(6) of the SCC Rules provides that “*Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party’s contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.*”

107. Both the Applicant and the Respondent have requested that the Emergency Arbitrator apportion costs, Applicant by asking that the Emergency Arbitrator order the Respondent to pay the full costs of the emergency proceedings and Respondent by asking that the Applicant shall be ordered to compensate Permobil for all costs for these emergency proceedings, including fees to counsel, internal work and expenses, and for default interest on such amounts in accordance with sec. 6 of the Swedish Interest Act from the day of the emergency arbitrator’s award until payment is made.

108. According to Article 10(2) of Annex II of the SCC Rules, the costs of the emergency proceedings include the fee of the Emergency Arbitrator of EUR 16 000; the application fee of EUR 4 000; and the reasonable costs incurred by the Parties including costs for legal representation, excluding VAT.

109. The Applicant provided an amount including the fee of the Emergency Arbitrator, the application fee, its reasonable legal costs and expenses for a total of EUR 36.001.26.
110. The Respondent provided an amount for its reasonable legal costs, internal work and expense, which he estimates at SEK 626 216.73 plus EUR 6360 excluding VAT.
111. The Applicant has mostly succeeded in this Application and both Parties behaved in an exemplary manner in these proceedings. Accordingly, the Emergency Arbitrator decides that the Respondent shall bear the costs of EUR 20,000 for this Application as well as the reasonable legal fees to counsel of Applicant of 15 000 euro, for a total of 35 000 euros. The reimbursement of the other expenses of the Applicant is hereby dismissed.

## **XII. ORDER**

112. For the foregoing reasons, the Emergency Arbitrator **DECIDES** as follows:
- a. The Emergency Arbitrator Rules of Annex II common to the 2017 SCC Arbitration Rules and 2017 SCC Expedited Arbitration Rules apply to these proceedings;
  - b. The Emergency Arbitrator has jurisdiction under those Emergency Arbitrator Rules;
  - c. The Applicant's Application is admissible under those Emergency Arbitrator Rules;

### And **ORDERS** :

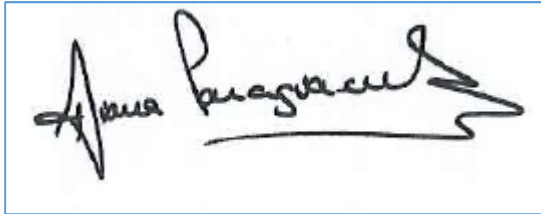
- d. the Respondent to grant immediate access to the Applicant to the online platforms so that he can continue placing sales;
- e. the Respondent to continue serving new sales order of the Products placed by the Applicant under the Contract; to immediately serve any pending order placed by the Applicant of the Product;
- f. the Respondent to refrain from directly selling the Products in the Territory to any intermediaries or final customers;



- g. the Respondent to refrain from directly marketing the Products in the Territory to any intermediaries or final customers;
- h. The Respondent to pay the Applicant's costs of these emergency proceedings of 35 000 euros.

All other requests for relief by the Parties are hereby dismissed.

Place of the emergency arbitrator proceedings: Sundsvall, Sweden

A handwritten signature in black ink, enclosed in a blue rectangular border. The signature appears to read "Diana Paraguacuto-Mahéo" and is written in a cursive style.

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Diana Paraguacuto-Mahéo

Emergency Arbitrator

Date: 19 July 2021