

YOUR HONOR JUDGE OF THE FIRST CIVIL COURT OF THE CITY OF SÃO MIGUEL DOS CAMPOS, ALAGOAS

Case no. 0700751-57.2017.8.02.0053

EARLY PRODUCTION OF EVIDENCE LAWSUIT

M&G FINANZIARIA S.p.A. ("M&G" or "Respondent"), a legal entity incorporated under Italian law, established in Italy, in Tortona, Province of Alessandria, by its duly constituted lawyers (**Docs. 1 and 2**), hereby, in light of the court order contained in page 563, on the grounds of articles 381 *et seq.* of the Civil Procedure Code ("CPC"), hereby submits its **DEFENSE**, in view of the claim for an early production of evidence filed by **GRANBIO LLC** ("GranBio"), **GRANBIO INVESTIMENTOS S.A.** ("GranBio Investimentos") and **BIOFLEX AGROINDUSTRIAL S.A.** ("Bioflex Agroindustrial"), all duly qualified in this proceeding, (together "Plaintiffs"), embodied in the reasons of fact and of law summarized below:

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I. THE CASE RECORD OUGHT TO BE CLASSIFIED, FOR IT RELATES TO AN ONGOING ARBITRATION (CPC, ART. 189)

1. First of all, M&G requests this Court to **classify the case record**, pursuant to item "iv" of article 189 of the CPC¹, since, as will be shown throughout this submission, the subject matter discussed herein is subjected to a **confidential and currently ongoing arbitration**.

II. THE CASE SHOULD BE REMITTED TO THE CIVIL COURTS OF MACEIÓ, FOR THEY HOLD EXCLUSIVE AUTHORITY TO DECIDE CASES RELATING TO ARBITRATION (STATE LAW Nº 7,773/16)

2. In 2015, the National Counsel of Justice ("CNJ") set the goal that all State Courts in the country should specialize in matters pertaining to arbitration, considering *"the advance in the adoption of arbitration in the country; the level of complexity the subject requires; the significant increase in the conflicts arising out of the arbitration law as a means of effectively settling conflicts; the duty of the Judiciary to participate and incentivize this alternative method of dispute resolution, decisively collaborating its efficiency; and that the capacitation of the judge is a means of accelerating proceedings."*²

3. Based on those premises, the CNJ required *"the attribution of jurisdiction to two civil courts, among those installed in the capitals, to process and judge conflicts arising from the arbitration law, making them specialized courts in the matter"*³.

4. In the following year, in 2016, fulfilling the CNJ's goals, the Alagoas Legislative Branch enacted Law No. 7.773/2016, which amended the Alagoas State Judicial

¹ CPC, article 189: "Procedural acts are public, except if: [...] IV – the case refers to an arbitration, or to the enforcement thereof, as long as the confidentiality agreed on the arbitration is proven in court"

² See the official document from the National Council of Justice, available at: <http://www.cnj.jus.br/files/conteudo/destaques/arquivo/2015/05/4b745d50b26aeb6683d0756c632f20d6.pdf>

³ *Idem*.

Organization Code⁴, assigning specific jurisdiction to the 1st and 2nd Civil Courts of Maceió to decide "*actions related to conflicts arising from the Arbitration Law*"⁵.

5. As it will be demonstrated, this suit results from a contractual relationship subject to the jurisdiction of an arbitral tribunal, by virtue of valid arbitration clauses, in respect of which there is an ongoing arbitration before a fully constituted arbitral tribunal, currently adjudicating the same claims brought by Plaintiffs in their Complaint (See Sections III, IV.2 and IV.4).

6. For this reason, the Defendant will object to the jurisdiction of the Judiciary, based on articles 337, "x" and 485, "vii" of the CPC (See Section IV.2), thus constituting a negative conflict of competence between state and arbitral jurisdiction.

7. Consequently, the present action clearly concerns a conflict related to arbitration, thereby meeting the threshold for the exclusive competence of the courts of the Alagoas State capital.

8. From the outset, therefore, the Defendant requires that the case be remitted to the 1st or 2nd civil courts of Maceió, which holds exclusive authority to decide cases relating to arbitration, under the terms of State Law no. 7,773/2016.

III. CLARIFICATION ON THE RELATIONSHIP BETWEEN THE PARTIES

9. Respondents urge the court to realize that Plaintiffs are attempting to mislead it, by deliberately mischaracterizing and omitting the underlying facts of the matter, using the Judiciary as an instrument for maneuvering and obtaining undue advantage in an ongoing arbitration, taking place in another jurisdiction.

⁴ State Law No. 6,564., Article 1: ("Art. 1: The first and second courts of the capital shall also have exclusive authority to hear cases related to arbitration disputes")

⁵ http://sapl.al.al.leg.br/sapl_documentos/norma_juridica/1160_texto_integral.

10. It is not otherwise that Plaintiffs chose to bring this claim before M&G and not against Beta Renewables and Biochemtex, precisely because the evidence they seek is evidently related to the arbitration instituted against them.

11. It is very convenient that Plaintiffs omitted from their report the fact that **there is already an ongoing arbitration proceeding between the parties concerning the same contractual framework and all the supposed breaches that the advanced production of evidence aims to prove.**

12. In fact, the dispute has been going on for nearly 18 months in an arbitration seated in London, England, before the International Court of Arbitration of the International Chamber of Commerce – ICC (ICC procedure 21856/TO) ("Arbitration"), as evidenced by the attached Request for Arbitration ("Request for Arbitration", **doc. 03**), and the respective Terms of Reference ("Terms of Reference", **doc. 04**), where GranBio and Bioflex Agroindustrial are also claimants.

13. In the present suit for early production of evidence, based on article 381 of the CPC, Plaintiffs intend to carry out a technical expert inspection in the cellulosic bioethanol production plant belonging to the Applicant, Bioflex Agroindustrial ("Plant"). The technical expert evidence sought by Plaintiffs, as they themselves acknowledge⁶, is intended to corroborate, *inter alia*, the alleged failure to fulfill obligations provided in the contractual relationship between Plaintiffs and Beta Renewables S.p.A ("Beta Renewables") and Biochemtex S.p.A ("Biochemtex"), within the performance of the three contracts attached to the complaint (together denominated "Contracts"):

- (i) the **Proesa Technology Licensing Agreement** ("Licensing Agreement", pages 359/360);
- (ii) the **Technical Services and Basic Engineering Agreement** ("Services Rendering Agreement, pages 397/360); and
- (iii) the **Supply of Equipment Agreement** ("Supply of Equipment Agreement" pages 424/446).

⁶ Complaint, p. 4.

14. It is noted that the Contracts establish the terms of the legal regime agreed upon between Plaintiffs and the companies Beta Renewables and Biochemtex in relation to three aspects of the construction and development of the Plant: (i) the licensing and use of biomass ethanol production technology called "Proesa", belonging to Beta Renewables (Licensing Agreement); (ii) the provision of technical and basic engineering services by Biochemtex, for the construction of the Plant (Service Agreement); and (iii) the supply of specific critical equipment and machinery for the production of bioethanol, also by Biochemtex (Supply Contract).

15. It is true that the early production of evidence intended by Plaintiffs is aimed at verifying compliance with the terms and obligations set forth in the Contracts, in order to subsidize the grounds for the claim relating to them. In fact, **each of the technical questions submitted to the Experts by Plaintiffs correspond to the execution of a specific obligation established in the Contracts**, as shown in the following table:

Question No.	Issue	Related contractual provision
1	Upon entering the PROESA Technology Licensing Agreement, the Basic Engineering and Technical Services Agreement, and the Equipment Supply Agreement (the "Contracts"), the parties have determined that the BIOFLEX I PLANT project to be implemented would have a certain nominal production capacity. Based on the [Contracts] already in place, and in particular on the technical specifications of the plant, would the court-appointed expert please inform what is this nominal production capacity.	Annex 1 of the License Agreement, article 1.1 ⁷ ; Annex 5 of the License Agreement, article 1.1 ⁸ ; Annex 1 of the Basic Engineering and Technical Services Agreement, article 1 ⁹ .
2	Based on the "Measured Test Run" carried out in November 2015 at the request of both parties, would the court-appointed expert please inform whether the BIOFLEX I PLANT	Annex 1 of the License Agreement, article 1.1 ¹⁰ ; Annex 5 of the License Agreement, article 1.1 ¹¹ ;

⁷ Licensing Agreement, Annex 1, Section 1.1, pages 368/369.

⁸ Licensing Agreement, Annex 5, Section 1.1, pages 378.

⁹ Services Rendering Agreement, Annex 1, Section 1, page 418.

¹⁰ Licensing Agreement, Annex 1, Section 1.1, pages 368/369

	reached, during such tests, the nominal production capacity identified in response to item 1 above. Based on the data of the BIOFLEX I PLANT, would the court-appointed expert please inform if said nominal production capacity has ever been reached.	Annex 1 of the Basic Engineering and Technical Services Agreement, article 1 ¹² .
3	would the court-appointed expert please inform, based on the [Contracts] that have been signed, what should be (i) the total concentration of solids with which the plant should operate; and (ii) the residence time of the enzymatic hydrolysis process required for the plant to reach the contracted nominal production capacity.	Annex 1 of the License Agreement, article 1.3 ¹³ .
4	Based on the "Measured Test Run" conducted in November 2015 at the request of both parties, would the court-appointed expert please inform what were (i) the total concentration of solids; and (ii) the residence time of the enzymatic hydrolysis process during the operation of the BIOFLEX I PLANT in such tests.	Annex 1 of the License Agreement, article 1.3 ¹⁴ .
5	Would the court-appointed expert please inform the impact, in terms of production capacity, of the difference between the total concentration of solids and residence time of the hydrolysis process provided for in the [the Contracts] and those actually achieved during the Measured Test Run, which demonstrated the limit of the total ethanol production capacity in the BIOFLEX I plant.	Annex 1 of the License Agreement, articles 1.1 e 1.3 ¹⁵ ; Annex 5 of the License Agreement, article 1.1 ¹⁶ ; Annex 1 of the Basic Engineering and Technical Services Agreement, article 1 ¹⁷ .
6	Would the court-appointed expert please inform if (i) the total concentration of solids; and (ii) the residence time of the enzymatic hydrolysis process warranted in the Contracts would lead to the hydrolysis efficiency warranted in said instruments, on a laboratory scale.	Annex 1 of the License Agreement, articles 1.1 e 1.3 ¹⁸ ; Annex 5 of the License Agreement, article 1.1 ¹⁹ ; Annex 1 of the Basic Engineering and Technical

¹¹ Licensing Agreement, Annex 5, Section 1.1, pages 378.

¹² Services Rendering Agreement, Annex 1, Section 1, page 418.

¹³ Licensing Agreement, Annex 1, Section 1.3, page 369.

¹⁴ Licensing Agreement, Annex 1, Section 1.3, page 369.

¹⁵ Licensing Agreement, Annex 1, Sections 1.1 and 1.3, pages 368/369.

¹⁶ Licensing Agreement, Annex 1, Section 1.1, page 369.

¹⁷ Services Rendering Agreement, Annex 1, Section 1, page 418.

¹⁸ Licensing Agreement, Annex 1, Sections 1.1 and 1.3, pages 368/369.

¹⁹ Licensing Agreement, Annex 5, Section 1.1, page 378.

		Services Agreement, article 1 ²⁰ .
7	Would the court-appointed expert please inform the causes for which the content (concentration) of solids and the residence time warranted in the Contracts have not been achieved. In addition, would he/she please confirm whether, according to the documents provided in the "Basic Engineering Package" ("BEP"), these parameters should be achieved at the BIOFLEX I PLANT. Finally, would he/she please confirm that if the plant were to operate under the conditions set forth in the BEP, it would have achieved the nominal capacity of production and efficiency (mainly in terms of consumption and yield) planned for the project.	Annex 1 of the License Agreement, article 1.1 ²¹ ; Annex 5 of the License Agreement, articles 1.1, 1.2 e 1.3 ²² ; Annex 1 of the Basic Engineering and Technical Services Agreement, article 1 ²³ .
8	Would the court-appointed expert please describe the production steps and the production process of the second-generation ethanol fuel in the BIOFLEX I PLANT, as provided for in the [Contracts] concluded with the owner of the PROESA technology.	Annex 2 of the License Agreement ²⁴ .
9	Would the court-appointed expert please identify what is the equipment that M&G dubbed as critical or "Black Box" equipment, and what was the importance of this equipment for the second-generation ethanol fuel production process in the BIOFLEX I PLANT.	Annex 3 of the License Agreement ²⁵ ; Annex 1 of the Equipment Supply Agreement ²⁶ .
10	Would the court-appointed expert please inform if the critical equipment Liquid Separation Reactor (Y-1205-Inclined Screw): (i) works as expected in the production process; (ii) presented failures in the process function for the separation of solids and liquids; and (iii) causes limitations or disruptions in the pre-treatment system of the BIOFLEX I PLANT. Based on the answers to the previous sub	Equipment Supply Agreement, article 5.1 (a) ²⁷ and Annex 2 ²⁸ .

²⁰ Services Rendering Agreement, Annex 1, Section 1, page 418.

²¹ Licensing Agreement, Annex 1, Sections 1.1 and 1.3, pages 368/369.

²² Licensing Agreement, Annex 5, Sections 1.1, 1.2 and 1.3, pages 378/379.

²³ Services Rendering Agreement, Annex 1, Section 1, page 418.

²⁴ Licensing Agreement, Annex 2, pages 371/375.

²⁵ Licensing Agreement, Annex 3, page 376.

²⁶ Supply of Equipment Agreement, Annex 1, pages 441/442.

²⁷ Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

²⁸ Supply of Equipment Agreement, Annex 2, pages 442/446.

	items, Would the court-appointed expert please confirm if such failures with the equipment could prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	
11	With regard to the critical equipment Low Pressure Reactor (R-1201), would the court-appointed expert please inform: (i) what were the pressure and temperature conditions provided for in the BEP; (ii) under what conditions of pressure and temperature the equipment ran on until the end of the "Measured Test Run"; (iii) what is the impact caused by the differences in pressure and temperature mentioned above in the operation of the BIOFLEX I PLANT; and (iv) whether "C5" sugar separation was achieved at this stage as expected. Based on the answers to the previous sub items, would the court-appointed expert please confirm if the limitations or failures with this equipment could prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	Annex 1 of the License Agreement, article 1.5.1 ²⁹ ; Equipment Supply Agreement, article 5.1(a) ³⁰ and Annex 2 ³¹ .
12	Would the court-appointed expert please inform if the critical equipment Biomass Feeder (Y-1202 M01): (i) works as expected in the production process; (ii) presented failures during its operation; (iii) presented excessive wear and tear; and (iv) causes limitations to or shutdowns of the pre-treatment system of the BIOFLEX I PLANT. Based on the answers to the previous sub items, would the court-appointed expert please confirm if the limitations or failures with this equipment could (v) represent additional maintenance costs; and (vi) prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	Equipment Supply Agreement, article 5.1 (a) ³² and Annex 2 ³³ .
13	Would the court-appointed expert please inform if the critical equipment Stuffing Screw (Y-1202 M02): (i) works as expected in the production process; (ii) presented failures during its operation; (iii) has an electrical motor or drive	Equipment Supply Agreement, article 5.1 (a) ³⁴ and Annex 2 ³⁵ .

²⁹ Licensing Agreement, Annex 1, section 1.5.1, pages 370/371.

³⁰ Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

³¹ Supply of Equipment Agreement, Annex 2, pages 442/446.

³² Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

³³ Supply of Equipment Agreement, Annex 2, pages 442/446.

³⁴ Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

³⁵ Supply of Equipment Agreement, Annex 2, pages 442/446.

	system with sufficient torque to fulfill its function; and (iv) causes limitations to or shutdowns of the pre-treatment system of the BIOFLEX I PLANT. Based on the answers to the previous sub items, would the court-appointed expert please confirm if the limitations or failures with this equipment could prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	
14	Would the court-appointed expert please inform if the critical equipment Blow Lines and Blow Cyclone (F-1202): (i) work as expected in the production process; (ii) presented failures during their operation; (iii) presented erosion and holes; (iv) in case they suffered with erosion and holes, how frequently did this occur; and (v) cause limitations to or shutdowns of the pre-treatment system of the BIOFLEX I PLANT. Based on the answers to the previous sub items, would the court-appointed expert please confirm if the limitations or failures with this equipment could (vi) represent additional maintenance costs; and (vi) prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	Equipment Supply Agreement, article 5.1 (a) ³⁶ and Annex 2 ³⁷ .
15	Would the court-appointed expert please inform if the critical equipment Biomass Compressor (Y-1207): (i) works as expected in the production process; (ii) presented failures during its operation; (iii) has sufficient capacity to fulfill its function in the process; and (iv) causes limitations to or shutdowns of the pre-treatment system of the BIOFLEX I PLANT. Based on the answers to the previous sub items, would the court-appointed expert please confirm if the limitations or failures with this equipment could prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	Equipment Supply Agreement, article 5.1 (a) ³⁸ and Annex 2 ³⁹ .
16	Would the court-appointed expert please inform if the critical equipment Plate Heat Exchangers (E-1301, E-2102 A/B/C, E-2101 A/B, E-3101, E-	Equipment Supply Agreement, article 5.1 (a) ⁴⁰ e Annex 2 ⁴¹ .

³⁶ Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

³⁷ Supply of Equipment Agreement, Annex 2, pages 442/446.

³⁸ Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

³⁹ Supply of Equipment Agreement, Annex 2, pages 442/446.

⁴⁰ Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

⁴¹ Supply of Equipment Agreement, Annex 2, pages 442/446.

	3102, E-3103, E-3104, E-3105 e E-3106): (i) work as expected in the production process, promoting the reduction of the temperature of the process fluid to the levels indicated in the BEP; (ii) presented failures during their operation; and (iii) caused limitations to or shutdowns of the pretreatment and/or hydrolysis systems of the BIOFLEX I PLANT; and (iv) are suitable for the use with the solids content provided for in the BEP. Based on the answers to the previous sub items, would the court-appointed expert please confirm if the limitations or failures with this equipment could prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	
17	Would the court-appointed expert please inform if the critical equipment – Lignin Filters (Z-5101 A/B/C/D/E): (i) perform as expected in the production process, producing the amount of lignin in the specification contained in the BEP; and (ii) presented failures in its operation. Based on the answers to the previous sub items, would the court-appointed expert please confirm if the limitations or failures with this equipment could prevent operation of the BIOFLEX I PLANT in accordance with the BEP.	Equipment Supply Agreement, article 5.1 (a) ⁴² and Annex 2 ⁴³ .
18	Would the court-appointed expert please inform if: (i) the yield provided for in the Contracts was achieved during the Measured Test Run; and if (ii) a yield that is higher than that provided for in the Contracts would increase the use of biomass, enzymes and chemicals for the production of the same quantity of ethanol.	Annex 1 of the License Agreement, articles 1.4.1, 1.4.2 and 1.4.3 ⁴⁴ ; Annex 5 of the License Agreement, articles 1.3, 1.4 and 1.5 ⁴⁵ and 3 ⁴⁶ ; Annex 1 of the Basic Engineering and Technical Services Agreement, articles 3, 4 and 5 ⁴⁷ .
19	Would the court-appointed expert please inform if (i) the steam consumption provided for in the Contracts for the BIOFLEX I PLANT was achieved during the "Measured Test Run"; (ii)	Annex 1 of the License Agreement, article 1.4 ⁴⁸ ; Annex 1 of the Basic Engineering and Technical

⁴² Supply of Equipment Agreement, Section 5.1(a), pages 429/430.

⁴³ Supply of Equipment Agreement, Annex 2, pages 442/446.

⁴⁴ Licensing Agreement, Annex 1, sections 1.4.1, 1.4.2 and 1.4.3, pages 369/370.

⁴⁵ Licensing Agreement, Annex 5, sections 1.3, 1.4 and 1.5, pages 369/370.

⁴⁶ Licensing Agreement, Annex 5, section 3, pages 381/384.

⁴⁷ Services Rendering Agreement, Annex 1, Sections 3, 4, and 5, pages 418/419.

⁴⁸ Licensing Agreement, Annex 1, section 1.4, pages 369/370.

	the power consumption provided for in the Contracts was achieved during the Measured Test Run; and if (iii) the chemicals consumption provided for in the Contracts was achieved during the "Measured Test Run".	Services Agreement, article 6 ⁴⁹ .
20	Would the court-appointed expert please inform which enzyme was to be used and its expected consumption (measured in kilograms per ton of ethanol produced) in accordance with Annex 1 of the PROESA Technology License Agreement. P Would the court-appointed expert please inform the average enzyme consumption per ton of ethanol produced during the Measured Test Run. Would the court-appointed expert please inform if such expected enzyme consumption has ever been achieved in the BIOFLEX I PLANT.	Annex 1 of the License Agreement, article 1.4.3 ⁵⁰ ; Annex 5 of the License Agreement, articles 1.4 ⁵¹ and 3 ⁵² ; Annex 1 of the Basic Engineering and Technical Services Agreement, article 4 ⁵³ .
21	Would the court-appointed expert please inform, based on the projects, if the BIOFLEX I PLANT had the capacity to operate continuously. Would the court-appointed expert please inform the number of hours of operation per year provided for in the project prepared by M&G so that the BIOFLEX I PLANT could reach its nominal production capacity of 65,000 tons per year of ethanol. Would the court-appointed expert please inform the maximum continuous operating time that the BIOFLEX I PLANT achieved by the end of the "Measured Test Run".	Annex 1 of the License Agreement, article 1 ⁵⁴ ; Annex 5 do License Agreement, article 1.1 ⁵⁵ ; Annex 1 of the Basic Engineering and Technical Services Agreement, article 1 ⁵⁶ .
22	Would the court-appointed expert please inform the monthly volume of second-generation ethanol fuel to be produced by BIOFLEX I PLANT in accordance with the BEP. Would the court-appointed expert please inform how much second-generation ethanol fuel was	Annex 1 of the License Agreement, article 1 ⁵⁷ ; Annex 5 of the License Agreement, article 1.1 ⁵⁸ ; Annex 1 of the Basic Engineering and Technical

⁴⁹ Services Rendering Agreement, Annex 1, Section 6, pages 419/420.

⁵⁰ Licensing Agreement, Annex 1, section 1.4.3, page 370.

⁵¹ Licensing Agreement, Annex 5, section 1.4, page 379.

⁵² Licensing Agreement, Annex 5, section 3, pages 381/384.

⁵³ Services Rendering Agreement, Annex 1, Section 4, pages 418/419.

⁵⁴ Licensing Agreement, Annex 1, pages 368/371.

⁵⁵ Licensing Agreement, Annex 5, Section 1.1, page 378.

⁵⁶ Services Rendering Agreement, Annex 1, Section 1, page 418.

⁵⁷ Licensing Agreement, Annex 1, Section 1, page 368.

⁵⁸ Licensing Agreement, Annex 5, Section 1.1, page 378.

	produced on a monthly-basis by the BIOFLEX I PLANT, from the moment it was put into operation until the end of the Measured Test Run.	Services Agreement, article 1 ⁵⁹ .
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16. In the Arbitration, Plaintiffs seek damages from Beta Renewables and Biochemtex in respect of alleged defaults on the Contracts, precisely because they acknowledge that arbitration is the only way agreed between the parties to settle the underlying controversy. In such a way, the parameters of the evidence that they intend to produce in this action serve exclusively for the instruction of that arbitral proceeding

17. In filing the present suit, Plaintiffs "overlooked" a series of impediments that do not allow the processing of this suit, or the participation of the Defendant as a respondent.

18. As will be shown, the Judiciary is not competent to hear and process the advanced production of evidence for the purpose of investigating disputes arising out of the Contracts, since there are valid arbitration agreements in which the contracting parties expressly chose to withdraw from State jurisdiction and granted arbitrators absolute jurisdiction to resolve any related claims (See Section IV.2).

19. If that were not enough, it remains that the **Respondent is not and has never been a party to the legal relationship established in the Contracts**. As it will be discussed (See Section IV.2), Respondent lacks standing to be sued, since the Contracts being discussed have been concluded exclusively with Respondent's subsidiaries Beta Renewables and Biochemtex; distinct legal entities, which Respondent does not respond for or succeed in any capacity.

20. As a precautionary measure, it should also be noted that the participation of M&G in this action is solely for the purpose of presenting the objections below, and is not, and

⁵⁹ Services Rendering Agreement, Annex 1, Section 1, page 418.

should not be construed as a recognition of legitimacy or authorization to represent Beta Renewables or Biochemtex in relation to lawsuits arising out of or in connection with the Contracts.

21. Finally, it should be stressed that Beta Renewables and BioChemtex have distinct shareholders and legal personalities and entered into separate contracts with GranBio and BioFlex to reflect their separate and distinct roles in the development of the Alagoas plant.

22. In the above-referenced ICC proceedings, GranBio and BioFlex have ignored those crucial corporate distinctions and brought one proceeding despite the existence of three distinct contracts with two distinct sets of counterparties. Beta Renewables and BioChemtex have objected to this illegitimate attempt to bring a unitary proceeding. Clearly, GranBio's failure to respect these corporate distinctions extends to its treatment of M&G.

23. In this case, this Court should not allow GranBio to ignore either the dispute resolution requirements of the above-described contracts or the corporate distinction between and amongst M&G, Beta Renewables and BioChemtex.

IV. PRELIMINARILY: PUBLIC ORDER QUESTIONS THAT ENTAIL THE IMMEDIATE REJECTION OF THE SUIT

IV.1. THE COMPLAINT IS INEPT: THE FACTS ALLEGED BY THE PLAINTIFFS ARE UNRELATED TO THE RELIEF REQUESTED (CPC, ART. 330 "III")

24. The complaint must be rejected in accordance with article 330, "iii" of the CPC⁶⁰, since it is not capable of producing the desired legal effects. This is because the facts narrated by Plaintiffs – which largely relate to an alleged breach of contractual representation and alleged willful misconduct that Plaintiffs themselves had already

⁶⁰ CPC, article 330, iii ("Art. 330. *The complaint will be dismissed when [...] III- from the description of the facts does not logically arise the conclusion*").

attributed to Beta Renewables and BioChemtex (See Section III) do not logically lead to the requested measures: the early production of evidence to be used in a future damages claim against a person alien to that contractual relationship, i.e., M&G⁶¹.

25. Put differently, as seen above (See Section III), the facts alleged and the technical issues contained in the Complaint do not relate, nor could ever relate, to a claim for damages in a future lawsuit against M&G. Since the present controversy is grounded on the Contracts, any claims relating thereto may only be resolved within the scope of the ongoing Arbitration.

26. There is, therefore, no connection between what Plaintiffs intend, and their grounds in the present suit. This is precisely the reason why Plaintiffs' complaint is inept.

27. Indeed, Plaintiffs deliberately omit from their narrative crucial factual aspects of the underlying controversy, such as the fact that there is already an ongoing arbitration to resolve the very same issue. Obviously, this is not a casual omission, but a deliberate attempt to induce this Judge to error in relation to the logical conclusion that any indemnity lawsuit relating to the Contracts may only be filed through an arbitration and against the actual parties to the Contracts.

28. This results in the total disconnection of Plaintiffs' claims vis-à-vis the facts of the case.

29. In that sense, the lesson of Humberto Theodoro Júnior states that in the absence of a connection between the ground of the claims and the very claims formulated by the party, the complaint is to be rendered inept, and should be preliminarily dismissed:

"In addition to being certain and determined, the claim must be conclusive, i.e., it must be in accordance with the fact and law set forth by the applicant, which are the grounds of the request. The

⁶¹ Complaint, fl. 8, §27 ("27. It is for the purpose of filing a damages claim against M&G and in light of the circumstances described below that Claimants submit this request for the advanced production of technical evidence, to be carried out in BioFlex Agroindustrial's plant.").

structuring of the request must be logical and legal, so that the motivation necessarily leads to the conclusion reached by the claim. When there is no connection between the *causa petendi* and *petitum*, the complaint becomes inept and must be dismissed without further considerations."⁶²

30. In fact, Calmon de Passos has an identical position:

"156. Ineptitude: logical or legal incompatibility between the claim and the grounds of such claim – In addition to the lack of a claim or the grounds for the claim, the law contemplates, as a kind of ineptitude, the incompatibility, disharmony or mismatch between the claim and its grounds.

The complaint contains a syllogism. It's an old lesson. In it there are a major premise (legal grounds), a minor premise (*de facto* grounds) and a conclusion (the claim). Consequently, among the three members of this syllogism there must be, for it to be presented as such, a logical nexus. Therefore, if the fact does not authorize the legal consequences, the conclusion is flawed; if the legal consequences are not coherent with the facts, equally so; and, finally, if the conclusion is in disharmony with the premises, it is inconsequential."⁶³

31. It is evident, therefore, that Plaintiffs' claims are not logically derived from the fact of the matter. In view of its patent ineptitude, it is necessary to reject the complaint without further considerations, pursuant to article 330, paragraph 1, "iii" of the CPC.

IV.2. JURISDICTIONAL OBJECTION: STATE COURTS UTTERLY LACK JURISDICTION TO ADJUDICATE THE MATTER (CPC ART 337, X; ART 485, VII)

⁶² THEODORO JÚNIOR, Humberto, "*Curso de Direito Processual Civil*", vol. 1, 57th ed. Forense (2017), p. 785.

⁶³ CALMON DE PASSOS, "*Comentários ao Código de Processo Civil*", 8th Ed., Ed. Forense (2000), p. 215.

32. The present dispute is of a contractual nature. It is entirely based on the Contracts, which, in turn, are subject to perfectly valid arbitration clauses, based on which there is an ongoing arbitral proceeding, before a fully constituted arbitral tribunal. This entails the **absolute incompetence** of the Judiciary and demands **the summary rejection of the suit, under the terms of article 485, section VII of the CPC**.

33. As Plaintiffs, themselves, admit in the complaint (page 4)⁶⁴, the present claim derives from the contractual relationship between them and the companies Beta Renewables and Biochemtex, under the three Contracts: (i) the Licensing Agreement (pages 359/360); (ii) the Service Agreement (pages 397/422); and (iii) the Equipment Supply Agreement (pages 424/446).

34. As mentioned (See Section III), each of the Contracts contains a valid arbitration clause, in which the parties have chosen arbitration as the only means for the settlement of disputes. Specifically, in its "Article 19", the Licensing Agreement establishes an arbitration choice, as follows (pages 359/360):

"19.1 Dispute Settlement: Any dispute, controversy, difference, or claim of any kind arising out of or relating to this Agreement (including, but not limited to, breach, termination, interpretation, execution, operation, effect, or invalidity of this Agreement) (a **"Dispute"**) should be resolved through a friendly consultation

⁶⁴ Complaint, pages 4/5, §§ 9/11 ("9. With this purpose, on 05.15.2012 the Claimants, with M&G, through the subsidiaries also belonging to the M&G Group – BETA RENEWABLES S.P.A. ("BETA RENEWABLES") and BIOCHEMTEX S.P.A. ("BIOCHEMTEX") (new name of CHEMTEX ITÁLIA S.P.A) – signed (i) a PROESA technology User License Agreement (attached document 3); (ii) the Basic Engineering and Technical Services Agreement (attached document 4); and (iii) the Equipment Supply Agreement (collectively referred to as "M&G CONTRACTS", attached document 5). 10. In accordance with these agreements, the M&G Group committed itself to licensing PROESA technology to GRANBIO, and also to supply the PDP and BEP, as well as all critical equipment so that the BIOFLEX AGROINDUSTRIAL plant could operate on an economic, competitive and commercial scale, according to the technological and industrial processing and yields promised. 11. However, in reality, the technology of the M&G Group was not ready for commercial scale, despite representations made by M&G to GRANBIO prior to signing the M&G CONTRACTS and reiterated during construction and following the start-up of the BIOFLEX AGROINDUSTRIAL plant."

between the two Parties. If the Dispute cannot be settled by consultation within thirty (30) days from the time the Dispute was first notified to the other Party, the Dispute shall be finally, exclusively and definitively settled by binding arbitration as provided in this Article 19. [...]"⁶⁵

35. The same is reflected in Article 15 of the Service Agreement (pages 410/411):

"15.1 Dispute Settlement: Any dispute, controversy, difference, or claim of any kind arising out of or relating to this Agreement (including, but not limited to, breach, termination, interpretation, execution, operation, effect, or invalidity of this Agreement) (a "**Dispute**") should be resolved through a friendly consultation between the two Parties. If the Dispute cannot be settled by consultation within thirty (30) days from the time the Dispute was first notified to the other Party, the Dispute shall be finally, exclusively and definitively settled by binding arbitration as provided in this Article 15. [...]"⁶⁶

36. Similarly, Article 12 of the Equipment Supply Agreement (pages 435/436) provides:

"12.1 Dispute Settlement: Any dispute, controversy, difference, or claim of any kind arising out of or relating to this Agreement (including, but not limited to, breach, termination, interpretation, execution, operation, effect, or invalidity of this Agreement) (a "**Dispute**") should be resolved through a friendly consultation between the two Parties. If the Dispute cannot be settled by consultation within thirty (30) days from the time the Dispute was first notified to the other Party, the Dispute shall be finally,

⁶⁵ Licensing Agreement, Section 19.1, p. 359.

⁶⁶ Licensing Agreement, Section 15, p. 357.

exclusively and definitively settled by binding arbitration as provided in this Article 12. [...] " ⁶⁷

37. Arbitration agreements completely set aside state court jurisdiction to settle matters relating to the contracts in which they are found. In effect, the scope of the clauses agreed upon in the Contracts is broad, establishing the jurisdiction of the arbitrators to resolve "[a]ny dispute, controversy, or claim of any kind arising out of or relating to [the Contracts]."

38. Therefore, in submitting to this court a pre-trial claim, that is admittedly justified only in the context of the Contracts (and in relation to which an arbitration proceeding is ongoing), Plaintiffs try to usurp the jurisdiction of the arbitral tribunal, which is exclusively competent to decide on any jurisdictional measure claimed, even those of incidental nature in relation to the case.

39. The submission of the matter to arbitration (competence) leads to the **absolute incompetence** of the Judiciary, as Nelson Nery teaches:

"If there is an arbitration agreement (LARb 3º, ss.), the parties renounce state jurisdiction, preferring to appoint arbitrator or arbitral tribunal to resolve any dispute between them. In this case, denunciation of the existence of the arbitral agreement entails the dismissal of the proceeding without resolution of its merits. In addition, with the news that the arbitral tribunal has established its own jurisdiction, the judicial proceeding must be dismissed without resolution of its merits. It concerns the application of the Kompetenz-Kompetenz rule (LARb. 8) according to which it is for the arbitrator or court to determine its own jurisdiction. In case of any irregularity in arbitrability or arbitration, it can only be later syndicated, by means of a suit for the annulment of the arbitration

⁶⁷ Licensing Agreement, Section 12, p. 353.

award (LARb. 32). There is no *a priori* control of the arbitral competence, but only *a posteriori*. Hence, reason why there cannot be a conflict of competence between an arbitral tribunal and a state court. [...]”⁶⁸

40. This understanding is based on already firm jurisprudence, which recognizes that the conclusion of an arbitration clause constitutes a waiver by the parties to the possibility of submitting controversies arising from it to the Judiciary. Thus, for example, the following judgment of the São Paulo Court of Justice elucidates:

“Agreement – Incorporation of a Partnership – Arbitration commitment clause – Termination, by the parties, of the right to settle the issues and disputes arising from the contract before the Judiciary – Pact of a binding nature and of a mandatory observance – Impossibility of substitution of arbitration by the Judicial procedure for the settlement of the dispute – No affront to Article 5, XXXV of the CF – Constitutionality of the said clause recognized by the Federal Supreme Court – Dismissal of the suit without the analysis of its merits upheld – Appeal rejected.”⁶⁹

41. If that were not enough, Plaintiffs try to induce this Judge to error, since they deliberately omit the fact that they themselves initiated the Arbitration, to resolve the same causes of action and facts that are comprised in the request for the early production of evidence sought in this suit.

42. And it is not to be alleged that the object of this suit diverges from that of the Arbitration. Comparing the facts contained in the Complaint, *vis a vis* GranBio and Bioflex

⁶⁸ NERY, Nelson, MARIA DE ANDRADE NERY, Rosa, “*Comentários ao Código de Processo Civil*”, Ed. Revista dos Tribunais (2015), p. 1114 (emphasis added).

⁶⁹ TJSP, Apel. 0015713-69.2008.8.26.0152, Rel. Des. José Reynaldo, Câmara Reservada de Direito Empresarial, v. 27.09.2011 (emphasis added).

Agroindustrial's claims presented in the Arbitration Terms of Reference (**doc. 04**) and in the Arbitration Request made by Plaintiffs' Request for Arbitration (**doc. 03**), it is easy to see that the two controversies deal with exactly the same dispute:

<u>TERMS OF REFERENCE (DOC. 04)</u>	<u>COMPLAINT</u>
"53. The controversies in this arbitration arise from the defective PROESA technology of the Respondents and other material services that the Respondents provided in connection with the design, construction, and attempted operation of the second-generation Claimant's bioethanol plant in Alagoas, Brazil ('Plant'). 54. Plaintiffs entered into a discussion with the Respondents in 2011 regarding their PROESA technology. During the discussions, Respondents stated that PROESA technology: (i) was mature, was already up and running, was reliable and was in operation; (ii) was ready for commercial-scale operation; (iii) would require low operating and capital expenses; (iv) did not require addition of (expensive) chemicals and limited consumption of enzymes; (v) provided for the liquefaction of the biomass feedstock in less than eight hours, even with limited consumption of enzymes; and (vi) was capable of producing the specified amounts of ethanol. [...]"	"3. [...] During the negotiations, M&G repeatedly assured Plaintiffs that the PROESA technology was ready for immediate use on a commercial scale. [...] 5. With regard to the Bioflex Agroindustrial plant, M&G ensured that, once built, it would be able to produce approximately 65,000 tons of cellulosic ethanol per year at a very competitive cost because of the innovative two-way pretreatment technology Stages of operation without chemical use, with a low consumption of enzymes. 6. Throughout the negotiations for the acquisition of the technology [...] the parties considered four main factors that would determine the economic viability of the cellulosic ethanol production project: (i) the cost of biomass; (ii) the cost of construction of the industrial plant, including PDP and BEP, [...]; (iii) the yield and the total cost of the enzymes used in the process, [...]; and finally (vi) the conversion efficiency of biomass to ethanol, which depends essentially on the quality of the pretreatment system as well as the enzymes in the hydrolysis phase and the yeasts in the fermentation phase, which had their yields guaranteed by M&G."

"56. Trusting in these false statements, Plaintiffs entered into the License Agreement, the Engineering Agreement and the Equipment Agreement with the Respondents (Beta Renewables and Biochemtex) on May 15, 2012 (collectively, the 'Contracts'). The Contracts prescribed the respective obligations of the parties in relation to the design, construction and operation of the Plant: (a) under the License Agreement between GranBio and Beta, Beta was obliged to provide the 'Basic Design Package' (PDP) required for Biochemtex to prepare the 'Basic Engineering Package' (BEP) to obtain the PROESA technology to be used in the Plant; (b) under the Engineering Agreement between BioFlex and Biochemtex, Biochemtex was obliged to develop the PDP and transform it into BEP, which would form the basic engineering design of the Plant; and (c) under the Equipment Agreement between BioFlex and Biochemtex, Biochemtex was obliged to provide certain 'Critical Equipment' for use in the Plant."	8. In light of Respondent's representations, Granbio decided to approve and carry out an investment that should have been close to US \$ 150 million (one hundred and fifty million US dollars) to establish the first ever built second generation ethanol plant in Brazil. 9. To this end, on 5.15.2012, Plaintiffs entered into an agreement with M&G through its subsidiaries, also belonging to the M&G Group – Beta Renewables S.p.A ("Beta Renewables") and BioChemtex S.p.A ("BioChemtex") (new name of Chamtex Italia S.p.A) – (i) the Proesa Technology License Agreement (attachment 3); (ii) the Technical and Basic Engineering Service Agreement (attachment 4); and (iii) the Equipment Supply Agreement (collectively, the "M&G Contracts") (attachment 5). 10. Under these contracts, the M&G Group undertook to license the Proesa technology to Granbio, as well as to provide the PDP and BEP, as well as all critical equipment so that the Bioflex Agroindustrial plant could operate on an economic, competitive and commercial scale, according to the promised industrial process and technological performance.
"57. In addition to making false statements, the Respondents violated their contractual obligations and/or were grossly negligent in relation to the PDP, BEP and Critical Equipment. Among other things, due to the inadequacy of Respondents' PROESA technology, Biochemtex issued some 400 BEP reviews, which significantly increased GranBio's capital expenditure. In addition, many of the Critical Equipment provided by BioChemtex were defective and/or unfit for their intended purposes."	"13. Following the signing of the M&G Contracts, the PDP and BEP provided by the M&G Group – which are the basis for the construction of the plant – were absolutely flawed and inefficient, which was later recognized and accepted by Respondent and its subsidiaries, thus making hundreds of revisions and amendments to the engineering design. The failure of the M&G Group to provide the minimally adequate PDP and BEP caused enormous additional costs, which were exclusively borne by Granbio."
"45. In October 2015, the parties	"24. [...] After a lengthy negotiation

contracted two independent third parties to conduct a 'measured run test' at the Plant . Unlike the Performance Test, the measured run test used protocols that, if they had been met, would not demonstrate that the Plant could function at the technical performance levels guaranteed in the Contracts. "	between the parties regarding the test protocol, the measurement test was finally carried out in September 2015 ('Measured Run Test') . The results of the above test were disastrous, making it clear that the plant is not minimally capable of continuously operating at a commercially viable volume with the PROESA technology (attachment 6). "
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43. The Request for Arbitration submitted by GranBio and Bioflex Agroindustrial in the Arbitration, when compared with the Complaint in this lawsuit, further demonstrate the extent to which this case is merely duplicative of the claims already submitted to Arbitration:

<u>REQUEST FOR ARBITRATION</u> <u>(DOC. 03)</u>	<u>COMPLAINT</u>
"21. As the Respondents continued to try to develop their PROESA technology, they presented totally flawed design plans, followed by hundreds of design revisions for the GranBio Plant. The Respondents' gross negligence regarding their design of the Plant and the attempt to develop the PROESA technology resulted in huge deviations in capital expenditures, far above what had been negotiated between the parties in relation to the construction of the Plant prior to the signing of the Contracts, and produced a plant that is unable to function in commercially viable format. 22. GranBio spent more than US \$ 300 million in capital expenditures to build the Plant using the PROESA technology, fundamentally by a Respondents' failure. Because of false statements and serious incompetence of Respondents, the GranBio Plant is unable to perform stable operations and does not function even at a fraction of the capacity	"26. The widespread negligence on both the engineering and manufacturing and delivery of faulty equipment, the fact that they are fundamentally of the wrong sizes and configurations (mainly in the pre-treatment system) and the numerous process failures have been proven by the measurement tests in the plant. Even so, M&G – which induced GranBio to invest millions in a totally inoperative plant through false representations – refused to offer an adequate solution and to compensate GranBio for the realized losses."

promised by Respondents."	
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44. That is to say, in filing for an early production of evidence related to matters subject to the Arbitration, Plaintiffs attempt to subvert the contractual mechanism for the resolution of controversies, which gives the **arbitrators absolute jurisdiction to decide any aspects relating to the execution and/or interpretation of the Contracts.**

45. In addition, the arbitral tribunal in question is fully constituted, and is prepared to hear the matter and any incidental or precautionary requests thereto, including the production of evidence and discovery.

46. The confirmations of appointment of the arbitrators issued by the International Chamber of Commerce (**doc. 05**) and the Terms of Reference (**doc. 04**, pp. 4 and 5) confirm that the arbitral tribunal has been in operation since November 10, 2016.⁷⁰

47. With the appointment and confirmation of the members of the panel, a prevention was carried out for the issuance of any measures for the instruction and investigation of the case, according to the Sole Paragraph of article 22-B of Law no. 9,307/96 ("Brazilian Arbitration Law"), which establishes that "[o]nce the arbitration has already been instituted, the precautionary or emergency measure will respond directly to the arbitrators."⁷¹

48. The determination of the competence of the arbitral tribunal and its exclusive authority for granting incidental measures, after confirmation of all arbitrators, is a criterion unanimously acknowledged by the Superior Court of Justice, which, for example, can be seen in the following decision by Justice Nancy Andrighi, rendered for the judgement of the REsp 1,297,974-RJ:

⁷⁰ Terms of Reference, p. 362: ("49. On November 10, the Secretariat informed the Parties and the co-arbitrators that the ICC Court's Secretary General confirmed Mr. Fry as President of the Tribunal and transmitted the case file to the Tribunal on 16 November 2016.")

⁷¹ Brazilian Arbitration Law, article 22-B (emphasis added).

"Equally based on the doctrine and jurisprudence is the possibility that, pending the appointment of the arbitrator(s), a party may seek relief in the Judiciary, by means of a precautionary measure, to ensure the useful outcome of the arbitral procedure."

[...]

However, the issue raised in these proceedings goes further, requiring that it be determined whether the state court is competent to proceed with the **processing of the injunction after the Arbitral Tribunal is formally constituted**.

In this situation, once the temporary circumstances justifying the contingency intervention of the Judiciary have been overcome, and considering that the conclusion of the arbitration agreement implies, as a rule, the derogation of the state jurisdiction, it is reasonable that the case-file must be promptly forwarded to the arbitral tribunal, for it to take the processing of the suit, and, if applicable, to review the tutelage granted, maintaining or revoking the respective decision."⁷²

49. In the present case, it must be borne in mind that Arbitration is based in the City of London, subject to the 1996 English Arbitration Act ("English Arbitration Act", **doc. 06**). In line with the provisions of the Brazilian Arbitration Law, Article 44 (v) of the English Arbitration Act provides that judicial measures that are precautionary or incidental to arbitration (such as the early of the production of evidence) may only be determined by the competent authority if the competent arbitral tribunal does not have

⁷² STJ, REsp 1.297.974-RJ, Rap. Justice Nancy Andrighi, v. 6.12.2012 (emphasis added).

powers or is unable to make the necessary determinations⁷³ - which does not occur in the Arbitration.

50. In order to prove the content of the alleged foreign law and comply with Article 14 of the Law of Introduction to the Brazilian Legal System⁷⁴ and Article 337 of the Brazilian Code of Civil Procedure⁷⁵, as well as with Article 409 of the Havana Convention on Private International Law – the ‘Bustamante’ Code⁷⁶, which represents the standard of proof in terms of foreign law, the attached statements of Timothy L. Foden and Matthew Bunting, English lawyers of the renowned law firm Quinn Emanuel Urquhart & Sullivan LLP, are thereto attached, clarifying the content and scope of the English Arbitration Act in relation to the instructional competence of the arbitrators and the possibility of judicial assistance in the procedure (“Quinn Emanuel Declarations”) **docs 06 and 07**).⁷⁷

51. As can be seen, it is solely for the arbitral tribunal to assess and decide on the adequacy of measures of investigation relating to the Arbitration or the matter submitted to it by virtue of an arbitration agreement. In the present case, the matter becomes all the more absurd since Plaintiffs themselves initiated the Arbitration against Beta Renewables and Biochemtex and took all necessary steps to enforce the arbitration agreement provided in the Contracts.

⁷³ English Arbitration Act, Section 44(5): “If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties”)

⁷⁴ Article 14: “If the court is not versed in foreign law, it may demand proof of the legal text and date of entry into force.”

⁷⁵ Article 373: “The party that argues municipal, state, foreign or customary law may prove its content and entry into force, if the court so determines”.

⁷⁶ Bustamante Code, Article 409: “The party that claims the application of another law, or objects it, may prove the legal text, its entry into force and meaning, when properly notarized and signed by two practicing lawyers in the country in question”.

⁷⁷ Quinn Emanuel’s statements, item 8: (“[...] furthermore, according to Section 44(5) [of the English Arbitration Act]”, English courts may hear the matter has no powers or is unable for the time being to act effectively), **docs. 06 and 07**.

52. Thus, in the face of the incompetence of the State jurisdiction to intervene in the present dispute, the immediate dismissal of the suit of the act is requested, grounded on article 485, "vii" of the CPC.

IV.3. LACK OF PROCEDURAL INTEREST: THE EARLY PRODUCTION OF EVIDENCE IS AN INADEQUATE PROCEEDING TO SATISFY CLAIMANTS' REQUESTS (CPC. ART. 485, VI).

53. As demonstrated above (See Section III), the Plaintiffs' request for the early production of evidence before the Judiciary took place in the context of an **already established dispute** between Plaintiffs and Beta Renewables and Biochemtex in the context of the Arbitration.

54. The present suit of early production of evidence is grounded on a request for the production of a technical expertise in a bioethanol production plant belonging to Plaintiffs, in order to verify the occurrence of alleged violations of their subjective rights, arising from the legal relationship established the Contracts.

55. As demonstrated (See Section III), legally, the purpose of the evidence requested to be produced in this action is of no use other than to corroborate Plaintiffs' cause of action in the Arbitration⁷⁸, for which reason this dispute clearly has an ancillary nature to the arbitration. Therefore, despite Claimant's inferences, it is clear that Arbitration, grounded the arbitration agreements contained in the Contracts, *is, in fact, the main action competent to determine and analyze the technical evidence sought.*

⁷⁸ The factual and cause of action is verified between the present action and the Arbitration, inter alia, in the description of the GranBio itself included in the Arbitration Terms of Reference. ("53. The disputes in this arbitration arise from the defective PROESA technology of the Respondents [Beta Renewables and Biochemtex] and other material services that the Respondents provided in connection with the design, construction and attempted operation of the Bioethanol plant [of] second-generation of Plaintiffs in Alagoas, Brazil ('Plant'). 54. Plaintiffs entered into discussions with the Respondents in 2011 regarding their PROESA technology. During such discussions, Respondents stated that PROESA: (i) was mature, functioning, reliable and operational; (ii) ready for a commercial scale operation, (iii) would require low capital and operating expenses, (iv) would not require the addition of chemical products (expensive) and entailed limited consumption of enzymes; (v) predicted the liquefaction of the biomass feedstock in less than eight hours, even with limited consumption of enzymes; and (vi) was able to produce the specified quantities of ethanol.")

56. Very well. As it is well known, the early production of evidence with fulcrum in article 381 of the CPC has an **ancillary** nature to the filing of the principal suit, since its admissibility is conditioned by law (i) "pending the [principal] suit"⁷⁹ (article 381, "i" CPC); (ii) to "enable self-composition [of the conflict]"⁸⁰ (article 381, "ii" CPC); or (iii) to "justify or avoid the filing of an action"⁸¹ (article 381, "iii" CPC).

57. Therefore, in the event of disputes subject to arbitration, the early production of evidence is only admissible before the constitution of the arbitral tribunal is admissible. After that, once the court (the natural judge of the suit) is constituted, it is solely competent to conduct the investigation of the case. In other words, with the filing of the main action (*in casu*, the Arbitration), the early production of evidence before the Judiciary becomes an inadequate procedural means to satisfy the Plaintiffs' instruction objectives, from which results their **lack of procedural interest in such a suit**.

58. As Nelson Nery teaches:

"2. **Hypothesis of anticipation of evidence.** The rule mentions the cases that lead to the anticipation of evidence, that is, **in which the procedural interest in the application is present**. No more is there an impervious exposition of the cases that lead to anticipation, but the **delineation of situations in which it is considered that it is appropriate, which can cause the risk of the impossibility or extreme difficulty to produce proof of the pending action, the Possibility of the evidence leading the parties to the realization of the self-**

⁷⁹ CPC, article 381 "i" ("Art. 381 the early production of evidence shall be allowed in cases where: I - there is a fear that it is impossible or very difficult to verify certain facts **pending the suit**; [...]") (emphasis added).

⁸⁰ CPC, article 381 "ii" ("[...] II - the evidence to be produced is capable of facilitating auto-settlement or other appropriate means of conflict resolution; [...]").

⁸¹ CPC, article 381 "iii" ("[...] III - the prior knowledge of the facts may justify or avoid the filing of a lawsuit."

composition, or justify/avoid the filing of action for the termination of the dispute.⁸²

59. As recently decided by the São Paulo Court of Justice, on the occasion of Conflict of Competence no. 0052237-55.2016.8.26.0000, having as Rapporteur the Appellate Judge Lídia Conceição, the early production of evidence has a "*clearly ancillary*" character in relation to the main dispute, thus attracting the prevention of this in relation to the object of that one:

"Conflict of competence. Action for the early production of evidence and enforcement action between the same parties. Distribution bounded to a specific judge. Appropriateness. Ancillary nature. Incidental claim to a main claim previously filed. Article 61 of the CPC. Conflict upheld to declare competent the MM. Judge who has raised the conflict [...] in the early production of evidence lawsuit, the Plaintiff bank aims to display documents that, "depending on their content, have the ability to create important effects in the enforcement" [...], previously filed before the MM. Judge who has raised the conflict. In this way, the provisions of article 381, paragraph 3, of the Code of Civil Procedure are inapplicable, since, as we have seen, the hypothesis presented herein does not refer to the prevention rule applicable to "suits yet to be filed". **On the contrary, it is possible to discern the clearly incidental (ancillary) character of the early production of evidence suit in relation to the enforcement suit, so that, according to the rule mentioned in article 61 of the Code of Civil Procedure, revealing the prevention of**

⁸² NERY JR., Nelson, ANDRADE NERY, Rosa Maria de, "*Commentaries to the Code of Civil Procedure – New CPC – Law 13,105/2015*", Ed. Revista dos Tribunais (2015), p. 1012.

the Judge who has raised the conflict for their joint judgment. "(Emphasis added)⁸³

60. Moreover, that understanding has already been settled by that Court, in judging the conflicts of competence no. 0024272-68.2017.8.26.0000 and 0052237-55.2016.8.26.0000, respectively, having as Rapporteurs Appellate Judges Salles Abreu and Lídia Conceição.

61. See:

"NEGATIVE CONFLICT OF COMPETENCE. INDEMNIFICATION SUITS AND PRECAUTIONARY MEASURE FOR THE EARLY PRODUCTION OF EVIDENCE. CONNECTION. OCCURRENCE. IDENTITY OF THE PARTIES, AND THE **ISSUES THAT WILL BE SUBJECT TO THE ANALYSIS IN BOTH SUITS ARE INTERTWINED**, THUS PRESENT THE RISK OF CONFLICTING DECISIONS. **REQUEST MADE IN THE SUIT WHICH GAVE RISE TO THE CONFLICT HAS AN ANCILLARY NATURE IN RELATION TO THE INDEMNIFICATION SUIT IN PROGRESS BEFORE THE RAISING JUDGE.** COMPETENCE OF THE JUDGE WHO RAISED THE CONFLICT."⁸⁴

"Conflict of competence. Early production of evidence and divorce cumulated with custody and regulation of visits lawsuits between the same parties. Free distribution. Inapplicability. Ancillary nature. Incidental claim to a main claim previously filed. Article 61 of the CPC. Conflict upheld to declare the competence of the MM. Judge who raised the conflict. (...) in the early production of

⁸³ TJSP, Special Chamber, Conflict of Competence nº 0052237-55.2016.8.26.0000, rap. Des. Lídia Conceição, j. 6.12.2017.

⁸⁴ TJSP, Special Chamber, Conflict of Competence nº 0024272-68.2017.8.26.0000, rap. Des. Salles Abreu, j. 7.10.2017 (emphasis added).

evidence suit, the author (parent of infant K.) aims to perform medical examination in the daughter for eventual finding of genetic disease that would affect her. In its view, such evidence is essential to the discussion of the establishment of the custody or the regulation of parental visits, which is part of the divorce proceedings (in particular, regarding the need for immunization of the child, page 11) previously filed before the MM. Judge who raised the conflict. In this way, the provisions of article 381, paragraph 3, of the Code of Civil Procedure are inapplicable, since, as we have seen, the hypothesis herein does not refer to a prevention rule regarding a "suit that may be proposed". On the contrary, it is possible to discern the clearly incidental (ancillary) character of the early production of evidence suit to the divorce cumulated with custody and regulation of visits suit, so that, according to the rule mentioned in article 61 of the Code of Civil Procedure, reveals the prevention of the Judge who raised the conflict for joint trial.⁸⁵

62. In addition, as the heading of Article 299 of the CPC⁸⁶ provides, once the main action has been initiated, jurisdiction to grant precautionary or urgent measures related to the investigation of the facts is solely for the competent court that is incumbent on deciding on the merits of the case.

63. In the present case, the production of requested evidence relates to the dispute already submitted to a duly constituted arbitration tribunal, which is responsible for assessing the appropriateness of incidental or preliminary injunctions.

⁸⁵ TJSP, Special Chamber, Conflict of Competence nº 0052237-55.2016.8.26.0000, rap. Des. Lidia Conceição, j. 6.12.2017 (emphasis added).

⁸⁶ CPC, article 299 ("Art. 299. *The provisional protection shall be requested to the trial judge of the case and, when antecedent to the competent court to know the main request. Sole paragraph. Subject to special provision, in the action of original jurisdiction of an Appellate Court and in the appeals the provisional protection shall be requested to the Court competent to examine the merits.*").

64. By the way, in relation to arbitration, judicial early production of evidence is not admissible even as an emergency measure, as explained by the lawyer and professor of civil procedure, Eduardo Talamini:

"If there is an arbitration commitment, would the party also be authorized to request before the Judiciary the production of early evidence, prior to the arbitration? In other words, does pre-arbitration judicial jurisdiction extend to non-urgent preparatory measures?

In principle, the autonomous evidential actions related to a certain litigation are covered by the arbitration commitment stipulated for it. Therefore, **since there is no urgency to prevent the awaiting of the start of the arbitration proceeding, the early production of evidence for non-precautionary purposes should normally be done in a specific arbitration proceeding. [...] Once the arbitration proceeding has begun, the probative competence is always of the arbitrators**, and the judiciary has only coercive support."⁸⁷

65. In addition, the absolute competence of the arbitral tribunal for the assessment of precautionary measures incidental to the procedure – including instruction measures – is recognized in the sole paragraph of article 22-B of the Arbitration Law, which states that *"[b]eing the Arbitration already constituted, the precautionary or emergency measures will be requested directly to the arbitrators"*⁸⁸. This rule is also reflected in Article 44 (5) of the English Arbitration Act (**doc. 06**), which governs the Arbitration, which provides that:

⁸⁷ TALAMINI, Eduardo, "Produção antecipada de prova no código de processo civil de 2015", Revista de Processo, vol. 260/2016, p. 75 – 101 (emphasis added).

⁸⁸ Arbitration Law, article 22-B ("Art. 22-B. *Once the arbitration has been instituted, it is up to the arbitrators to maintain, modify or revoke the precautionary or emergency measure granted by the Judiciary. Sole paragraph. **Once the arbitration has been instituted, the precautionary or emergency measure shall be requested directly to the arbitrators.***") (emphasis added).

"the court shall act only if and to the extent that the arbitral tribunal, and any other arbitral or other institution or person vested with power in that regard, has no power or is unable to act effectively".⁸⁹

66. In order to make it clear that Plaintiffs do, in fact, have broad access to anticipatory measures in the field of Arbitration, it should also be noted that Article 28 of the 2012 ICC Arbitration Rules, applicable to the case, (**doc. 07**) allow the parties to petition for precautionary or provisional measures directly to the arbitral tribunal.⁹⁰ It is should also be noted that any provisional or protective measure granted by the Arbitral Tribunal in the Arbitration is enforceable as a matter of English law under articles 38(4) and 42 of the English Arbitration Act⁹¹ (**doc. 06**), which, in this sense, is similar to Article 22-B of the Brazilian Arbitration Law.

67. Indeed, Article 38(3) of the English Arbitration Act specifically allows a tribunal seated in London, such as the one in the above-referenced ICC proceedings, to "give directions in relation to any property which is the subject of the proceedings ... and which is owned by or is in the possession of a party to the proceedings – (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party ...". Notably, GranBio, as expected, has made no such application for provisional or protective measures of this type in the ICC proceedings. Rather, it has sought to burden this court with an inadmissible claim in Brazil, despite access to an equivalent remedy that could be given by the Arbitral Tribunal.

⁸⁹ English Arbitration Act, p. 168, section 44 (5), **doc. 06**.

⁹⁰ Arbitration Regulations, article 28 ("Article 28 – Precautionary and provisional measures – Unless the parties have agreed differently, the arbitral tribunal may, as soon as it is in possession of the file, and at the request of one of the parties, determine the adoption **of the arbitral tribunal may determine the adoption of any precautionary or provisional measures it deems appropriate**. The Tribunal may make such a measure subject to the lodging of guarantees by the requesting party. As it is adopted, it will take the form of a duly substantiated procedural order, or the form of an arbitral award, as the arbitral tribunal deems appropriate.") (emphasis added), **doc. 09**.

⁹¹ English Arbitration Act, section 38(4): ("The Tribunal may give directions (...); section 42(1): "Unless otherwise agreed (...)" **Doc. 06**.

68. In view of this, Plaintiffs' claim in this suit is groundless, since the early production of evidence is inadmissible, due to the Arbitration already instituted (**lack of procedural interest**). For this reason, the Arbitral Tribunal elected by the parties is prevented and has exclusive competence to grant the required technical expertise.

69. This fact demands the dismissal of the suit, under the terms of article 485, "iv" of the CPC.

IV.4. M&G FINANZIARIA LACKS STANDING TO BE SUED (CPC. ART. 485, "VI")

70. The immediate dismissal of the proceeding under Article 485, "iv" of the CPC⁹², is also necessary, since M&G is an illegitimate party to appear on the merits of the action.

71. It is noted that Plaintiffs attempt to mislead this Judge by suggesting that M&G would be entitled to participate in the suit, suggesting that M&G would have entered into the underlying contractual relationship through its subsidiaries Beta Renewables and BioChemtex (page 4), which is false.

72. Notwithstanding the hermeneutic efforts of Plaintiffs, their arguments all fail. As they themselves acknowledge⁹³, this dispute arises out of the contractual relationship between them and the companies Beta Renewables and BioChemtex, in the context of the Contracts, of which M&G is neither a party nor has intervened in any capacity.

⁹²

⁹³ Complaint, §§ 9 e 10, **pages 4/5** ("9. To this end, on May 15, 2012, Plaintiffs entered into an agreement with M&G, through its subsidiaries also belonging to the M&G Group – Beta Renewables S.p.A ('Beta Renewables') and BioChemtex S.p.A ('Biochemtex') (new denomination of Chemetx Italia S.p.A) – (i) Proesa Technology License Agreement (attached document 3); (ii) the Technical and Basic Engineering Services Agreement (Annex 4); and (iii) the Equipment Supply Agreement (collectively, the "M&G Contracts", attached document 5). **Under these contracts, the M & G Group was obliged to license the Proesa technology to Granbio, as well as to provide the PDP and BEP, as well as all critical equipment so that the Bioflex Agroindustrial plant could operate on an economic, competitive and According to the promised technological and industrial process and yield.**") (emphasis added).

73. Indeed, M&G is a totally different legal entity from Beta Renewables and Biochemtex, which are the only companies that are parties to the Contracts. By bringing M&G as a defendant on this suit, Plaintiffs propose an effective overrun of the principle of separation of legal entities, attempting, obliquely, a maneuver that would in fact constitute an incident of disregard of legal entity, without having any cause to justify it, and without having fulfilled the legal requirements for such disregard. In short, the Plaintiffs seek to pierce the corporate veil with this early production of evidence.

74. In addition, Plaintiffs' suggestion that there would be a legal relationship between M&G and themselves, on the grounds that M&G entered into the Agreements by means of Beta Renewables and Biochemtex, besides being unlawful, contradicts Plaintiffs' own claims in the Arbitration, in flagrant breach of objective good faith and the prohibition against *venire contra factum proprium*, being, moreover, one of the reasons why they should be convicted of bad faith litigation (See Section VI).

The measures requested by Plaintiffs arise out of a relationship to which M&G is not a party.

75. As mentioned before, Plaintiffs try to induce this Judge to commit an error, by deliberately conflating M&G with those of the companies that effectively contracted with the Plaintiffs: Beta Renewables and Biochemtex.

76. This is a tricky move, since, as Plaintiffs know well, although it belongs to the same industrial conglomerate as Beta Renewables and Biochemtex, M&G is a distinct and autonomous legal entity and does not exercise, in relation to Beta Renewables and Biochemtex, any judicial substitution or mandate. Each one of them is solely responsible for its rights and obligations, within the limits of its constitutive acts and the applicable legislation.

77. It is clear from the Contracts that the legal relationships in question binds only and exclusively each of their signatory parties. In addition, the Contracts expressly prohibit the assignment or succession of the rights and obligations, except through

written authorization of the parties⁹⁴ (License Agreement, clause 20.2, page 361, Service Agreement, clause 16.2, page 412; Supply of Equipment Agreement, clause 13.2, page 436).

78. It is therefore obvious that a party that has no standing to participate in the Contracts also has no standing to participate in a dispute relating to the Contracts.

79. Relevant, in this sense, is the understanding set forth by the **Superior Court of Justice**, at the time of the judgment of AREsp no. 173,553/SP, which determined that controlling companies with a presence in the country, such as M&G, cannot be legitimated to respond to the contractual relationship involving only its subsidiaries, such as Beta Renewables and BioChemtex:

"It should be noted that the judgment under appeal is inconsistent with the case-law of this Court, in that **it is not possible to recognize the liability of aggravating parties for the payment of compensation due to termination of a contract of which they were not a party to**, since join liability is not to be presumed, but result from the law or from the will of the parties. " (Emphasis added)⁹⁵.

⁹⁴ License Agreement, clause 20.2, fl. 361 ("Provider may not transfer or assign, including by operation of law or otherwise, its rights or performance of its obligations under this Agreement to any Person, without the prior written consent of the Receiver, consent of which shall not Be denied for no reasonable reason. ") (Emphasis added); Contract for services"); Contract of Provision of Services, Clause 16.2, fl. 412 ("Provider may not transfer or assign, including by operation of law or otherwise, its rights or performance of its obligations under this Agreement to any Person, without the prior written consent of the Receiver, consent of which shall not Be denied without reasonable cause, provided that no provision of this Agreement shall be construed as limiting any right of the Provider to otherwise freely contract or subcontract, without the consent of the Receiver, any third party with respect to the performance of its scope of work. ") (Emphasis added); Equipment Supply Agreement, clause 13.2, fl. 436 ("Provider may not transfer or assign, including by operation of law or otherwise, its rights or performance of its obligations under this Agreement to any Person, without the prior written consent of the Receiver, consent of which shall not Be denied without reasonable cause, provided that no provision of this Agreement shall be construed as limiting any right of the Provider to otherwise freely contract or subcontract, without the consent of the Receiver, any third party with respect to the performance of its scope of work.") (emphasis added).

⁹⁵ STJ, AgRG No. 173,553/SP, Rap. Justice Massami Uyeda, j. October 5, 2012.

80. A similar rationale was used by the Superior Court of Justice upon judgment of REsp 1002811/SP, whereby it stated that a company does not have standing to sue and make claims on behalf of another company, simply because it is part of the same group of companies. This rationale, albeit discussed in the context of standing to sue, is obviously applicable to the opposite situation, i.e., the standing to be sued:

"The company that in the country represents another, even belonging to the same economic group, cannot file suit on its own behalf in relation to a right belonging to a party it represents" ⁹⁶

81. In a similar case, the State of Pernambuco Court of Justice set out a relevant understanding, in Civil Appeal n. 140976-3, which considered that the separation of the legal entities of companies belonging to the same group does not allow the legitimacy of the parent company to answer on behalf of the subsidiaries in matters of civil liability:

"The next step is to examine the legitimacy of General Electric do Brasil Ltd. to appear as a defendant in the proceeding, on the grounds that the contractual relationship was entered into with General Medical System, a separate company, although belonging to the same economic conglomerate.

Indeed, the preliminary injunction is to be accepted.

Yes, **although belonging to the same economic group, General Electric do Brasil Ltd. and General Medical Systems are distinct legal entities, one based in Brazil and another in the United States**, which does not allow to recognize, in a suit which is grounded in commercial representation contract, the position of a defendant of any of them.

⁹⁶ STJ, REsp 1002811/SP, Rap. Justice Humberto Gomes de Barros, r. for the decision Justice. Ari Pargendler, j. 8.7.2008.

It is worth noting, for it is relevant, that **it is not a consumer relation, where the diffuse legitimacy of any company belonging to the same economic conglomerate, privileging the theory of appearance, given the nature of the agreement, the position and ignorance of the consumer, and to preserve the principle of instrumentality of the process.**

Thus, while acknowledging that General Electric do Brasil Ltd., throughout the commercial representation relationship, acted as a genuine interlocutor of General Medical Systems, this does not mean that it assumed the rights and obligations of the company it represented.

The author, by virtue of exists in the case-file, was fully aware that she represented General Medical Systems, both because of the aforementioned written agreement signed on January 20, 2001, and because of the invoices issued and payments received from the said company (pages 286/310). [...]

The author's option to direct the action against General Electric do Brasil Ltd., therefore, is justified a lot more for convenience, than for lack of knowledge of the organizational structure of the GE Group. [...]" ⁹⁷

Proceeding with this suit against M&G would entail a de facto disregard of the legal personality of Beta Renewables and Biochemtex

82. Although M&G is, in fact, the majority shareholder in both Beta Renewables and Biochemtex, it does not respond on their behalf, nor does it succeed them in contractual or procedural standing before third-parties.

⁹⁷ TJPE, Civil Appeal nº. 140976-3, Rap. Des. Eduardo Augusto Paurá Peres, j. 3.31.2008 (emphasis added).

83. To assume, as Plaintiffs frivolously do, that by simply belonging to the same economic group, M&G, as the parent company, would have standing to succeed its subsidiaries, in any legal suit, would be tantamount to declaring the *de facto* disregard of the legal entity of Beta Renewables and Biochemtex, although absent and not argued the legal requirements established in article 50 of the Civil Code⁹⁸, namely (i) abuse of rights; or (ii) fraud⁹⁹.

84. In addition, it should be pointed out that in the present case, although the disregard is an implicit consequence of the Plaintiffs' attempt to bring M&G as a defendant in the proceedings, a claim for disregard of legal entity has not been expressly requested, at any time, in the form of the procedural incident contained in article 133 of the CPC¹⁰⁰, and therefore this court is barred from granting it *ex-officio*.

85. As Joaquim Otávio Rodrigues Filho teaches:

"The affirmation of the facts that give rise to the application of the disregard doctrine, before such claim is judged, presupposes the commitment with those to whom the measure will eventually benefit, and it is precisely the impersonality of the magistrate, the absence of any connection with the parties, which makes it impartial, committed solely to the resolution of the dispute. **There is no way to admit, in this way, the *ex-officio* declaration**

⁹⁸ Civil Code, article 50 ("Art. 50. In the case of abuse of legal personality, characterized by a misuse of purpose or a combination of assets, the court may decide, at the request of the party or of the Public Prosecutor, when it may intervene in the proceedings, that the effects of certain and certain obligations Are extended to the private assets of the administrators or partners of the legal entity").

⁹⁹ Regarding the disregard of the extensive application of the institute of disregard of legal personality, Otávio Joaquim Rodrigues Filho writes: "It is not a question of combating mere material damage inherent in the risk of commercial activity. It is the abuse, excess, fraud to the law or the contract that dissociate the action of the legal person from its social function, producing the violation of law that the legal order is considered more valuable than that related to the personification, being it unavailable or even available. In this sense, it would not be necessary to consider the personification, mainly to recognize the limitation of responsibility, when the company violates, for example, norms of protection to the environment and or to the consumer. See RODRIGUES FILHO, Otávio Joaquim, "*Desconsideração da Personalidade Jurídica e Processo de acordo com o Código de Processo Civil de 2015*", Ed. Malheiros (2016), p. 87

¹⁰⁰ [cite]

of the disregarding of legal personalities, given the disposable nature of the protected good and the necessity of the impartiality of the judge."¹⁰¹

86. In this way, M&G has absolutely no standing in these proceedings, since such a measure would characterize the *de facto* disregard of the legal entities of Beta Renewables and Biochemtex.

Declaring that M&G has standing to be sued is contradictory to previous statements of Plaintiffs themselves, which violates the objective good-faith and the prohibition against venire contra factum proprium

87. Lastly, it is reiterated that, in bringing proceedings against M&G, Plaintiffs are acting in bad faith, and contradicting their own statements and representations in the Arbitration where they expressly acknowledged that Beta Renewables and Biochemtex are legitimately responsible for that case.

88. The attached Request for Arbitration reveals that, contrary to what was suggested in the Complaint, GranBio and Bioflex Agroindustrial initiated the Arbitration on grounds that the legal relationship in question had been constituted *vis à vis* to Beta Renewables and Biochemtex, in such a way that the violations they alleged would also be attributable to them (**doc. 03**):

"15. The controversies to which this arbitration relates to **arise from the repeated false declarations of Respondents [Beta Renewables and Biochemtex] to GranBio in relation to the "Proesa" technology** and other services and materials provided by them in relation to the design and construction, and the attempt to operate GranBio's second-generation bioethanol plant

¹⁰¹ RODRIGUES FILHO, Otávio Joaquim, "*Desconsideração da Personalidade Jurídica e Processo de acordo com o Código de Processo Civil de 2015*", Ed. Malheiros (2016), p. 255 (emphasis added).

in Alagoas, Brazil ('Plant'). Among other things, **the Respondents [Beta Renewables and Biochemtex] falsely assured Granbio that its PROESA technology was mature, effective, reliable and ready for commercial-scale operations¹⁰².**" (doc. XX)

89. In the present action, Plaintiffs maliciously attempted to circumvent the fact that M&G clearly lacks standing to be sued, by attributing and linking Respondent directly to the facts and obligations that they previously attributed to Beta Renewables and Biochemtex¹⁰³, or referring to the generic heading "M&G Group"¹⁰⁴.

90. Plaintiffs' strategy is clear: they have brought the present suit against M&G in Brazil, in order to avoid recognition of its relationship [and *lis pendens*] with the Arbitration in England. And they did so grounded on absolutely generic claims regarding the legitimacy of the parties, hoping that this Court would allow itself to be misled, and would not perceive the use of misleading nomenclature, aiming at concealing the fact that the conduct and facts described in this action do not relate to the Respondent, but to other companies of the same conglomerate, for which M&G has no standing to respond on behalf of.

91. Incidentally, Plaintiffs deliberately contradictory conduct, in attributing facts and causes of action that they had previously attributed to different companies, whether during the execution of the Contracts or in the arbitration, violates the principle of objective good faith provided in articles 114 and 182 of the Civil Code¹⁰⁵. It also

¹⁰² Arbitration Requirement, **doc. XX**, § 15, p. 33 (emphasis added).

¹⁰³ Complaint, pg. 5 ("15. It is worth noting that **M&G has never informed** Granbio of the technical specifications and equipment suppliers [...] However, **M&G assured** in the Equipment Supply Agreement that they would be 'free of defects' [...]") (emphasis added).

¹⁰⁴ Complaint, page 4 ("10. According to this agreement, the M&G Group has undertaken to license Proesa technology to Granbio [...]"); pg. 5. However, in reality, the technology of the M&G Group was not ready for commercial scale [...] 13. Following the signing of the M&G Contracts, the PDP and the BEP supplied by the M&G Group – which constitute the basis for the construction of the plant – became absolutely flawed and inefficient [...]") (emphasis added).

¹⁰⁵ [cite]

configures an emblematic case of *venire contra factum proprium*, which is vehemently rejected by the Brazilian legal system, which this Court will certainly not tolerate. As will be discussed later (See Section VI), this is one of the reasons why Plaintiffs are to be condemned for bad faith litigation.

92. Given Defendants' obvious lack of standing to be sued, the court should immediately **dismiss the proceeding** as an obvious and necessary measure, pursuant to Article 485 (vi) of the CPC. That is what is being required herein.

V. THE REQUEST FOR PRODUCTION OF EVIDENCE IS INADMISSIBLE: THE PLAINTIFF'S CLAIM DOES NOT FULFILL THE PROCEDURAL REQUIREMENTS FOR THE EARLY PRODUCTION OF EVIDENCE

V.1. THERE IS NO URGENCY (CPC, ART. 381, "I")

93. Plaintiffs, in their first attempt to justify this lawsuit, allude to article 381, "i" of the CPC, stating that early production of evidence is necessary because of the "urgent nature" of the changes that will be implemented at the Plant. They claim that they depend on technical expertise "at this moment, before the implementation of definitive changes", because there would be "risk of the evidence perishing", reason why "they cannot wait too long"¹⁰⁶.

94. That is false.

95. Although they boast about the urgency of the claim, Plaintiffs do not even attempt to meet the burden of proving their claim. At no point do they present any concrete elements that allow us to establish the imminence of the alleged adjustments.

96. And what is even worse: Plaintiffs recognize that the Plant was inaugurated in November 2014, that is, approximately 3 years ago. They also acknowledge that, 10

¹⁰⁶ Complaint, paragraphs 28 a 33, pages **XX/XX**.

months after the inauguration, the so-called "Measured Test Run" was carried out, which would have revealed – in September 2015 – the alleged deficiencies in the project.

97. Almost **two years** after the test, Plaintiffs never attempted urgent or precautionary measure to remedy the alleged deficiencies, which clearly indicates that their current claim is not due to urgency, but rather to the desirability of suing in Brazil, to gain an advantage in the Arbitration.

98. If that were not enough, Claimants also omit – likely imbued by bad-faith – the fact that they have already implemented much more than "adaptations" to the Plant. Contrary to what Claimants argue in their Complaint, in the sense that they have not yet implemented "*definitive changes that alter the technology and equipment sold by the Respondent*"¹⁰⁷, as a matter of fact, Claimants have been adopting profound changes to the Plant, testing new engineering solutions and even unduly appropriating technology from third parties.

99. This is evidenced by the fact that Claimants are all defending from a lawsuit filed in the United States of America, which complaint – publicly available in a redacted form – informs that Claimants have used third-parties' technology for the production of second-generation ethanol at the Plant, without even obtaining proper licensing (**Doc. 10**):

105. On August 23 and 26, 2016, after learning that the Bioflex1 plant was scheduled to become operational in October 2016 using API's GP3+ Technology, API wrote to GranBio and requested that it execute a license as required under Section 11.14 of the ESA. Specifically, the signatories to the license were to be Bioflex1 S.A., American Green, and API-IP.

106. On September 12, 2016, GranBio responded and claimed that "all services supplied in connection with the Quick Fix Interim Solution," including Options C-F, constituted "Improvement[s] with regards to the existing technology at the plant" under Section 8.4

¹⁰⁷ Complaint, paragraph 30, page 9.

of the ESA, that GranBio is the exclusive owner of all relevant intellectual property rights, and that no license agreement with API is required.

107. On September 17, 2016, outside counsel for API sent a letter to GranBio's counsel explaining that the interim solution project resulted in the implementation of API Technology (...)"

100. Regardless of the changes being definitive or interim, the fact remains that, at this stage, the difference is merely linguistic. Claimants have already considerably changed the Plant, therefore there is absolutely no urgency in carrying out the production of expert evidence.

101. For this reason, they are unable to overcome the burden of demonstrating the alleged urgency, not complying with article 38 (1) (c) of the CPC, which requires a "*well-founded*" justification for the existence of "fear that it will *become impossible* or very difficult to verify certain *facts pending* the suit." Therefore, they are not entitled to the measures on the ground of urgency.

V.2. THE INTENDED EVIDENCE ARE NOT JUSTIFIED BASED ON THE APPLICATION OF ITEMS "II" AND "III" OF ARTICLE 381

102. Plaintiffs, in their second attempt to justify their claim, alluded to items "ii" and "iii" of article 381 of the CPC¹⁰⁸ as authorizing the requested evidence, even if this Court considers that there is no urgency in the claim¹⁰⁹.

103. It occurs that Plaintiffs did not resort to items "ii" and "iii" of article 381 of the CPC because their intention is genuinely to make an agreement feasible, or to justify or avoid the filing of a future legal suit.

¹⁰⁸ Complaint, page 9, §30: "30. Considering the improvements that are being implemented by Claimants, and in order not to jeopardize their claim against M&G, the Claimants rely on expert evidence to be produced now, before the implementation of definitive changes that alter the technology and equipment sold by the Respondent.")

¹⁰⁹ Copy of the publicly available copy of the complaint filed against the Plaintiffs in the U.S. by companies that implemented changes to the plant: Doc. 10, §§105-107, page 263 of the sworn translation.

104. On the contrary, Plaintiffs do so because they lack urgency in their request, and thus attempt to raise the other clauses of article 381 of the CPC as a panacea for all evil, something capable of authorizing the production of complex evidence under any hypothesis, as absurd as they may be.

105. As it will be seen in detail below, none of the assumptions contained in items "ii" and "iii" are present in this suit.

The intended evidence is not aimed at facilitating a settlement or other means of conflict resolution

106. The finding that the hypothesis contained in item "ii" of article 381 of the CPC does not apply is immediate because Plaintiffs themselves contradict and deny this possibility.

107. Section II authorizes the early production of evidence if *"the evidence to be produced [is] capable of enabling auto-settlement or other appropriate means of conflict resolution"*.

108. However, Plaintiffs, in paragraph 27 of its complaint¹¹⁰, explain that *"[it is] for the purposes of filing a claim against M&G, and in the light of the circumstances described below, that Plaintiffs submit this claim for an early production of evidence."*

109. As seen above, it is not because the CPC article 381 article encapsulates the possibility of an autonomous suit dealing with evidences that Plaintiffs are authorized to require the production of evidence under any circumstance.

¹¹⁰ CPC, article 381(ii) and (iii): "Early production of evidence shall only be admitted if: (...) II – the evidence to be produced is able to allow a settlement or another adequate dispute resolution method; III – previous knowledge of the facts may justify or prevent the filing of a lawsuit."

110. Therefore, if they themselves acknowledge that the evidence will serve as the basis for an indemnification claim, only item "iii" of article 381 would remain, which is also not admissible as described below.

The intended evidence does not lend itself to justify and resolve an action against M&G. It serves only for a contractual relationship and for an arbitration to which the defendant is not a party.

111. The last hypothesis that could authorize the production of the evidence would be that of article 381, item "iii", which refers to *"prior knowledge of the facts [which] may justify or avoid the filing of a legal suit."*

112. However, this hypothesis is also inapplicable to the situation in these proceedings, since, as has already been shown herein (See Sections IV.1, IV.2, IV.3, IV.4 and V.1), there are numerous elements that point to the total impossibility of Plaintiffs relying on the Brazilian Judiciary to exercise an unreasonable claim against the Respondent.

113. In fact, as noted above, Plaintiffs abuse their right of access to the Judiciary, alleging grounds to a claim against the Respondent, in frontal contradiction with the Contracts they signed themselves with Beta Renewables and BioChemtex, the actual holders of the underlying legal relationship.

114. In addition, any dispute involving alleged inducement to error, deceit, false representations and alleged damages that Plaintiffs may attribute to M&G is already *sub judice* in the Arbitration¹¹¹.

115. There is no possibility that Respondent has standing to respond for damages when it has never been directly involved in the viability and implementation of the Bioflex Agroindustrial plant.

¹¹¹ Complaint, page 10, §§ 34/37.

116. In addition, the purpose of item "iii" of article 381 is essentially *"to justify or avoid"* the filing of an action, must be considered.

117. It follows that, even without that evidence, Plaintiffs have already initiated the Arbitration against the parties who actually executed the Contracts. That is, they did not need this evidence as a justification for the filing of the main suit. And this is due to an obvious reason, and that it is even contained in the Complaint. As Plaintiffs themselves report¹¹², the Measured Test Run, although conducted on questionable grounds, was apparently enough to substantiate their claims in the Arbitration.

118. There is no indication that Plaintiffs intend to avoid the filing of a future suit on the basis of the requested expert evidence. On the contrary, throughout their Complaint Plaintiffs make it clear that the purpose of such expert evidence is to avoid the perishing of the evidence, which would prevent their future claim for damages.

119. In summary, even if Article 381 of the CPC represented a breakthrough in the system of early production of evidence, its assumptions of propriety should not be ignored in order to permit the production of any evidence in any circumstance, such as the situation herein.

VI. CLAIMANTS OUGHT TO BE FINED FOR BAD-FAITH LITIGATION

120. At this point, it has already become evident that the claim is totally unfounded and does not fulfill basic procedural requirements.

121. This situation, however, is not an error arising from inexperience or inattention. After all, Plaintiffs are assisted by renowned and experienced lawyers.

122. What is very clear is that Plaintiffs devised this suit in order to try to circumvent the clauses limiting the indemnification contained on the Contracts entered into with third parties. In fact, the main purpose of Plaintiffs is to create a background that would

¹¹² Complaint, § 25, page 8; Request for Arbitration, § 22, **Doc. 03**.

enable them to seek compensation greater than they would be entitled to, going after assets of a party that has nothing to do with the contractual relationship in question.

123. In analyzing this context, it is also clear that Plaintiffs' act in a reckless and knowingly contradictory manner, since they have already initiated the Arbitration, on the very same grounds for claiming used in this case-file, precisely against the only parties that are truly legitimate: Beta Renewables and BioChemtex.

124. It is clear that Plaintiffs have initiated international arbitration without including M&G because they know that it is not a party to the relevant contractual relationship; they know that M&G is clearly an illegitimate party, and they know that they have little chance of success in the merits of the lawsuit, which is why they now resort to procedural devices to gain some advantage in Arbitration.

125. Despite all this, it is undoubtful that, at the very least, Plaintiffs started this legal adventure in Brazil to produce evidence that only matters to the Arbitration.

126. There is no doubt that such conduct should be promptly framed as bad faith litigation under Article 80 (v) of the CPC¹¹³, as Plaintiffs proceed in a highly reckless manner seeking compensation in a contradictory manner against a clearly illegitimate party.

127. In this regard, see Celso Agrícola Barbi's comments:

"In section V, the Code represses reckless conduct in any act or incident of the proceeding. Based on Carnelutti's theory, José Olimpio de Castro Filho teaches that recklessness can result from fraud or guilt. That is translated into the conscience of one's own reason, for whom he claims to be right, when the litigant hopes to win the claim more by an error on the judge's part than by the

¹¹³ CPC, article 80, v ("A bad-faith litigator is one who: (...) proceeds with recklessness in the proceedings or any parallel proceedings").

true merits of the case. The temerity of guilt exists when the party does not sufficiently weigh the grounds for its claim (...) "¹¹⁴

128. It should also be noted that the verification of bad faith litigation under this subsection is independent of an analysis of its subjective aspect.

"It is important to register, specifically for the application of Art. 80 of the CPC, that not all cases of bad faith litigation provided for therein require "subjective malfeasance"; there are cases where "bad faith" is examined objectively, as in the cases of items V, VI, VII and VIII of the same article "¹¹⁵

129. In addition, it must be noted that Claimants misrepresented the truth of the matter by omitting extremely relevant facts from its Complaint.

130. Claimants omitted that they implemented considerable changes to the Plant, by utilizing third-party engineering and technologies, testing new engineering solutions and even unduly utilizing technologies from other companies, as shown in the complaint of the legal action initiated by Claimants in the United States (**doc. XX**).

131. Said condemnable conduct was clearly and deliberately conceived to fabricate an non existent urgency to their request, clearly meeting the threshold of bad faith litigation in article 80 "ii" of the CPC¹¹⁶

132. Therefore, and considering all the factual and legal-procedural context elucidated by the Respondent, it is necessary that this Court declares that Plaintiffs are litigating in bad faith, and condemn them to the payment of the fine provided in the article. 81 of

¹¹⁴ Comments on the Code of Civil Procedure, vol. I, 3rd ed., Forensic Publishers, page 174.

¹¹⁵ Fredie Didier Jr., *Course of Civil Procedural Law* 17th Ed., Vol. 1 Salvador: Jus Prolivm, 2015, p. 110. In this same sense: José Carlos Barbosa Moreira, *A responsabilidade das partes por dano processual no direito brasileiro*, in *Temas de Direito Processual*, São Paulo: Saraiva, 1977, p. 26.

¹¹⁶ CPC, article 80, "ii" ("Art. 80. A bad faith litigator is considered as one who [...] II – misrepresents the truth of the facts.")

the CPC¹¹⁷, as well as the payment of compensation for losses, expenses and fees borne by Respondent in this proceeding.

VII. SUBSIDIARY: M&G COUNTERCLAIM

VII.1. THE SCOPE OF THE EXPERT EVIDENCE MUST BE EXPANDED TO ANALYZE ASPECTS OF CIVIL ENGINEERING AS WELL

133. In the remote hypothesis of this Court understanding overrules all of the preliminary arguments and the inexcusable defects contained Plaintiffs' request, it is important to consider that their description of the facts of the matter is biased and partial, and could lead to a similarly incomplete expert evidence.

134. This is due to the fact that although Beta Renewables and BioChemtex (never Respondent) have licensed the technology, supplied basic engineering and equipment, respectively, they did not perform the detailed design of the plant, its construction of the plant or other civil works.

135. For a plant that will operate with state-of-the-art technology, construction accuracy is absolutely necessary, since any deviations or constructive defects can affect the effectiveness of the equipment and, ultimately, the plant's own productivity.

136. That is why it is essential that the expert evidence does not focus only on aspects of chemical or mechanical engineering, **but also on its civil engineering** aspect, as permitted by article 382, paragraph 3 of the CPC¹¹⁸. It should be noted that this provision has two simple requirements which would be fully satisfied in the present case: (i) the civil engineering test is related to the same fact, i.e., to the productivity of the plant; and (ii) it will not entail excessive delay, since inspections can be used to carry out

¹¹⁷ CPC, article 81 ("Art. 81. Whether ex-officio or by request, the judge will condemn a bad faith litigator to pay a fine, which shall be superior to one per cent but inferior to ten percent of the updated value of the cause, and indemnify the opposing party for the losses it incurred and reimburse legal fees and all expenses incurred. ").

¹¹⁸ Art. 382, § 3º: "The interested parties may request the production of any evidence in the same procedure, provided that it relates to the same event, unless their joint production causes excessive delay."

the necessary analyzes for any branch of plant engineering, whether chemical, mechanical or civil.

137. Without a complete analysis of all possible causes of the Plant's alleged inefficiencies, the expert assessment loses its purpose. There would be no condition to assess the liability of one party or another for alleged defects without a full picture of the possible causes.

138. Thus, if the production of evidence is allowed, Respondent requires the **production of additional evidence on civil engineering** in order to respond to the technical requirements indicated in the **Annex II** to this statement, **with the indication of an additional judicial expert, with a specialization in the matter.**

VIII. ON THE EXPERTS APPOINTED BY PLAINTIFFS

139. By way of conclusion, it is necessary to make a final comment to the petition at pages 559/562, in which Plaintiffs presented a list of professionals who could potentially act as experts in this suit. This tactic causes utter astonishment.

140. As if the present action were not sufficiently inappropriate, Plaintiffs go as far as completely subverting the logic of producing expert evidence, by trying to influence the appointment of the expert by the court, arguing that there is a supposed shortage of qualified professionals in the market.

141. It is well known that the expert appointed by the court must necessarily be impartial, independent and totally devoid of any relationship with the parties. This is not just a judicial practice, but also a basic principle of our procedural law, inscribed in article. 467 of the CPC¹¹⁹.

142. The fact is that neither Respondent, nor this Court can be assured that such professionals are actually independent and that they were not previously contacted by Plaintiffs. This is exacerbated by the fact that Plaintiffs actually noted that some of those

¹¹⁹ Art. 467. "The expert may be quashed or refused on the ground of impediment or suspicion."

professionals want to act on the case, something that shows sufficient doubt to challenge all of them.

143. In this case, if the expert evidence request is upheld, Respondent requires this Court to make its own inquiries and indicate *ex officio* the professional(s) that it deems qualified to assess the Plant's chemical, mechanical and civil engineering aspects¹²⁰.

**IX. SUBSIDIARILY: RESPONDENT'S APPOINTED EXPERT AND QUESTIONS
TO BE ADDRESSED BY THE COURT-APPOINTED EXPERT**

144. As a last consequence of the non-acceptance of Respondent's defense arguments, Respondent hereby submits its list of issues related to the chemical engineering aspects in [Annex I] of this statement, and additional questions related to the extension of the scope of the test to verify issues of Civil engineering, in [Annex II].

145. Respondent also appoints Mr. Celso Procknor as its technical assistant. His qualifications are the following: brazilian, married, engineer, bearer of identity card no. 3.293.063, enrolled with the taxpayer's register under no. 381.087.988-68, with a professional address at Rua Teodoro Sampaio, 1020, 7th floor, São Paulo - SP, CEP 05406-050, Phone (11) 3898-1511, email: celso.procknor@procknor.com.br.

X. REQUEST FOR RELIEF

146. Based on all of the foregoing, Respondent requests:

- a. that the case be remitted to the specialized civil courts of the City of Maceló, since there are issues related to arbitration that must be resolved by such courts, which have proper authority over the matter pursuant to State Law 7,773/16;

¹²⁰ Recalling that the CPC authorizes that, in cases of complex expertise, more than one expert be appointed. See Art. 475: "In the case of complex expertise covering more than one area of specialized knowledge, the judge may appoint more than one expert, and the party, appoint more than one technical assistant."

b. that the case be dismissed without entering a judgment on the merits, since:

- i. the complaint is inept, pursuant to Article 330 of the CPC;
- ii. the Brazilian Judiciary lacks jurisdiction, as this is a matter exclusively related to arbitration, pursuant to articles 337, "x" and 485 "vii" of the CPC;
- iii. Plaintiffs lack procedural interest in their case, due to the inadequacy of the procedural route chosen, according to article 485, "vi" of the CPC; and
- iv. Respondent lacks standing to be sued, according to article 485, "vi" of the CPC;

c. Alternatively:

- i. The case should be dismissed for not fulfilling the requirements authorizing the early production of evidence, listed in Article 38 I of the CPC;

d. Subsidiarily:

- i. That Plaintiffs be fined for bad-faith litigation, according to articles 80 "v" and 81 of the CPC;
- ii. If the production of expert evidence is granted, Respondent requests:
 1. The admission of its counterclaim in order to determine that the scope of the expert assessment be enlarged pursuant to article 382 of the CPC, so that it also encompasses civil engineering aspects of the plant, in which

case the court should appoint an additional expert with expertise in this area;

2. That the experts be appointed by the court without relying on the list provided by Plaintiffs;
 3. That the expert appointed by Respondent be notified of the commencement of the evidence production in the address mentioned above, so that he can participate in all relevant inspections, meetings, and discussions;
 4. That the questions submitted by Respondent in Annexes I and II be duly answered by the court-appointed expert(s).
- e. Upon dismissal of the case, Respondent requests the court to order Plaintiffs to reimburse all of its costs, expenses and legal fees. Respondent further requests the court to order Claimant to pay reasonable contingency fees at the maximum amount permitted by the CPC.
- f. The granting of an additional term, based on Articles 104 and 104, sole paragraph, for the filing of apostilles that certify the authenticity of docs. 01 and 02, as provided in the Apostille Convention¹²¹. Please note that the power of attorney (doc. 01) and corporate documents (doc. 02) have already been submitted with this defense, with their sworn translation and notarization, which means that the request for an additional term is necessary only for the apostilles.

147. Lastly, based on article 272, paragraph 5 of the CPC, Respondents request that all notifications relating to this case be made on behalf of the following attorneys, under penalty of nullity: (i) **Eduardo Damião Gonçalves, OAB/SP 132.234**; (ii) **Fabio Teixeira Ozi, OAB/SP 172.594**; and (iii) **Pedro Bento de Faria, OAB/SP 343.622**,

¹²¹ The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, promulgated by Federal Decree n. 8.660/2016.

all having their professional address at Alameda Joaquim Eugênio de Lima, n. 447, São Paulo - SP, CEP 01403-001.

From São Paulo to São Miguel dos Campos, 20 of September of 2017.

Eduardo Damião Gonçalves
OAB/SP 132.234

Fabio Teixeira Ozi
OAB/SP 172.594

Pedro Bento de Faria
OAB/SP 343.622

Rafael Bittencourt Silva
OAB/SP 329.268

Nayara Ferreira Araujo Alves
OAB/SP 373.811

Fábio Costa de Almeida Ferrario
OAB/AL 3.683

Annex I**RESPONDENT'S TECHNICAL QUESTIONS REGARDING CHEMICAL
ENGINEERING ISSUES**

1. Would the expert please determine what were the characteristics of the biomass and other feedstock used at the Plant and if this biomass and feedstock meet the standards established by the basis of the project – Item 2.3 of the System Design Specification – which specifies that the “feedstock shall be cleaned, in order to remove sand and dirt, then ground to ensure the following specification at the plant’s battery limit”. Would the expert also clarify how important it is to clean the feedstock and meet the technical specifications related to the biomass and raw material in order to achieve the production goals of the Plant.
2. Would the expert please determine if the biomass used as feedstock by GranBio at the biomass feeder is free from unwanted materials and debris such as sand, dirt or gravel, which could have worn out or caused damages to the equipment, or even caused the numerous interruptions of the biomass feeder or other critical equipment, such as the stuffing screw, the instant decompression device and the blow cyclone.
3. Would the expert please analyze the process and production records of the Plant’s operation and determine during which periods was the feedstock (biomass) supplied according to the technical requirements for the Plant’s operation, as well as what were the periods in which this biomass was supplied on a continuous and uninterrupted basis.
4. Would the expert please analyze the process and production records of the Plant’s operation and determine the number of interruptions and startups that occurred during the Plant’s operation and, especially, during the Measured Test Run, indicating the cause(s) of each interruption. In what way did the interruptions during the Measured Test Run could have affected its results and the credibility of the test as a whole?
5. Would the expert please estimate the time necessary, after the Plant start-up, for it to achieve stable operational conditions and what was the basis for this estimate. Would the expert also inform what was the maximal stable operation time during the Measured Test Run and how, in the expert’s opinion, the time of stable operation could have affected the validity and utility of the information obtained during the Measured Test Run.

6. Based on the process and production records of the Plant, would the expert please determine what were the levels of vapor, cooling water and other feedstock listed in item 2.6 – Specification of Utilities and Consumption – of the System Design Specification.
7. Would the expert please determine if the levels of vapor, cooling water and other feedstock referred to in the preceding question met the operational requirements of the Plant and of the critical equipment. Furthermore, please determine how an eventual non-compliance with the operational requirements could have affected the Plant's productivity and/or the results of the Measured Test Run.
8. Would the expert please determine if the biomass boiler could have been affected by the feedstock supply referred to above and what would be the impacts of the biomass not operating properly over the Plants' operational results.
9. Would the expert please determine if, during the Measured Test Run, the total concentration of solids and the residence time of the enzymatic hydrolysis process were identified as limiting factors of the Plant's yield, and if the increase in the total concentration of solids could have led to a larger yield during the test.
10. Would the expert please clarify if, during the Measured Test Run, the lignin filters were identified as a limiting factor of the Plant's output.
11. Would the expert please clarify what were the modifications, alterations or alleged improvements implemented in the Plant between 2014 and nowadays, including those carried out by third parties (such as American Process Inc., see **Doc. 10**), also identifying when these modifications occurred.
12. Would the expert please determine, based on the communications exchanged with GranBio, when was GranBio offered to modify the plated heat exchangers after they became clogged (failed to meet the necessary requirements for operation), and what was the answer GranBio gave in regard to the proposed modification of the equipment?

Annex II

RESPONDENT'S TECHNICAL QUESTIONS REGARDING CIVIL ENGINEERING ISSUES

1. Would the expert please identify what were the main contractors and subcontractors hired for the Plant's construction, and what were their qualifications.

2. Would the expert please determine which companies were hired for carrying out the detailed engineering designs for the construction of the Plant, in what concerns the process, civil, mechanical and electrical engineering, as well as installation of equipment and controls. Would the expert also clarify the experience of such companies in projects of this complexity and magnitude.
3. Would the expert please determine if the civil engineering and the construction works were carried out in accordance with the market's best practices, as well as determine the extent in which the problems and issues that arose during the detailed engineering and construction phases affected the Plant's yield.
4. Would the expert analyze the proceedings applicable to the repair and maintenance of the critical equipment of the Plant and also determine, based on the maintenance records of the critical equipment from 2015 and 2016, if the repair and maintenance proceedings were duly carried out.
5. Would the expert clarify how, and in what way, did failures in the repair and maintenance of critical equipment could have affected the Plant's yield and the results of the Measured Test Run.
6. Would the expert analyze the Plant's operational records after the Measured Test Run in order to identify the causes for the interruptions that the Plant underwent after the Measured Test Run, and also to identify if such interruptions could have been attributed to issues of expertise and qualifications of the Plant's operators, insufficient maintenance, clean biomass availability, vapor supply availability, cooling water and other feedstocks, or other issues attributable to GranBio.

