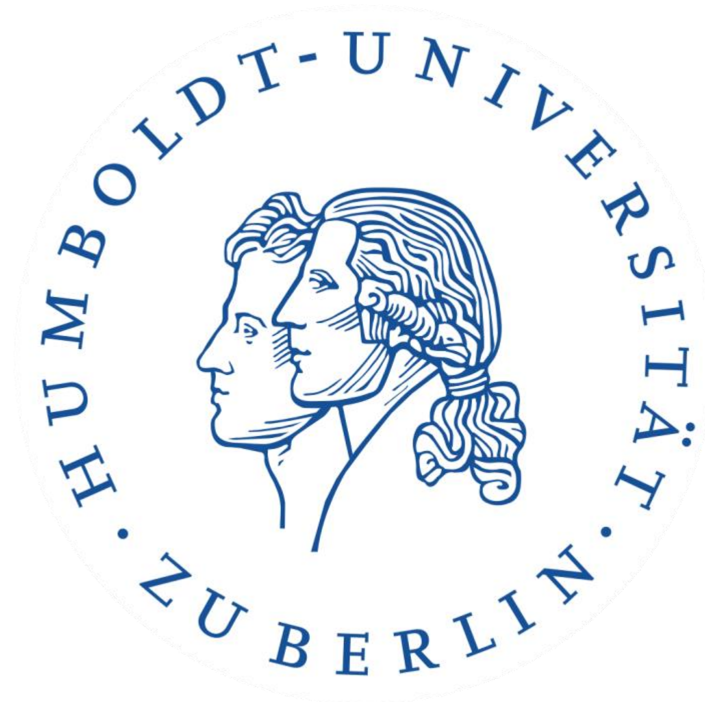
30th Annual Willem C. Vis International Commercial Arbitration Moot

MEMORANDUM FOR CLAIMANT



PCA CASE NO. 2022-76

On Behalf of:

Drone Eye plc

1899 Peace Avenue

Capital City, Mediterraneo

– CLAIMANT –

Against:

Equatoriana Geoscience Ltd

1907 Calvo Rd

Oceanside, Euqatoriana

– RESPONDENT –

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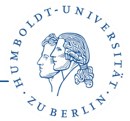

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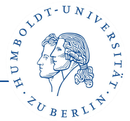

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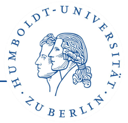
INDEX OF ABBREVIATIONS AND DEFINITIONS

AN	RESPONDENT's Answer to the Notice of Arbitration
Arbitration Agreement	Arbitration Agreement concluded between CLAIMANT and RESPONDENT
Art.	article
Arts.	articles
CEO	Chief Executive Officer
CLAIMANT	Drone Eye plc
Contract	The Purchase and Supply Agreement concluded between CLAIMANT and RESPONDENT
COO	Chief Operating Officer
ed.	editor
eds.	editors
ESC	Equatorianian Supreme Court
et al.	et alia; and others (Latin)
et seq.	et sequens; and the following one (Latin)
et seqq.	et sequentia; and the following ones (Latin, pl.)
EUR	Euro
Ex.	Exhibit
Hawk Drone	Hawk Eye 2020 Unmanned Air Vehicle
i.e.	id est; that is (Latin)
ibid.	ibidem; in the same place (Latin)
id.	idem; the same (Latin)
Kestrel Drone	Kestrel Eye 2010 Unmanned Air Vehicle
Minister	Minister of Natural Resources and Development, Mr Barbosa
Mio	Million
No.	Number



NA	CLAIMANT's Notice of Arbitration
p.	page
para.	paragraph
paras.	paragraphs
Parliament	Equatorianian Parliament
Parties	Parties to the arbitration PCA CASE NO. 2022-76
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
pp.	pages
PSA	Purchase and Supply Agreement
RESPONDENT	Equatoriana Geoscience Ltd
SOE	State-Owned Enterprise
Special Chamber	Special Chamber of the Equatorianian Criminal Court
Tribunal	Arbitral Tribunal
v	versus

INDEX OF LEGAL TEXTS

ACA	Equatorianian Anti-Corruption Act
ASA	Equatorianian Aviation Safety Act
CISG	UN Convention on Contracts for the International Sale of Goods
DAL	Danubian arbitration law (verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments)
EC	Equatorianian Constitution
ECL	Equatorianian Contract law
ICCA	International Commercial Contract Act of Equatoriana
Model Law	UNCITRAL Model Law on International Commercial Arbitration
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OHADA UAA	Uniform Act on Arbitration Law of the Organisation pour l'harmonisation en Afrique du droit des affaires
PCA Rules	Permanent Court of Arbitration Arbitration Rules 2012
Swiss PILA	Swiss Federal Act on Private International Law
UNCITRAL Expedited Rules	UNCITRAL Expedited Arbitration Rules 2021
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016

SUMMARY OF FACT

The parties to this arbitration (**Parties**) are Drone Eye plc (**CLAIMANT**) and Equatoriana Geoscience Ltd (**RESPONDENT**). CLAIMANT is a medium-sized producer of Unmanned Aerial Systems based in Mediterraneo. RESPONDENT is a State-Owned Enterprise (**SOE**) engaging in geoscience exploration.

The present arbitration revolves around the question whether the Parties' Purchase and Supply Agreement (**PSA**) for six of CLAIMANT's drones is valid.

Mar 2020	RESPONDENT opened a tender process for the supply and servicing of four drones to explore the natural resources of Northern Equatoriana. CLAIMANT's bid was successful.
Nov 2020	Following the contractual negotiations, the Parties drafted the PSA, agreeing on the sale and maintenance of six of CLAIMANT's Kestrel Eye 2010 model (**Kestrel Drones**). In their PSA the Parties included an arbitration agreement (**Arbitration Agreement**). They chose the PCA Rules to be the institutional rules and Danubia as their seat of arbitration. Danubia's arbitration law is a verbatim adoption of the Model Law.
27 Nov 2020	The Equatorianian Parliament was scheduled to approve the Parties' Arbitration Agreement. This vote was cancelled on short notice due to Covid.
1 Dec 2020	In a public ceremony, the PSA was signed by both Parties' CEOs and the responsible minister, Mr Barbosa (**Minister**).
Feb 2021	CLAIMANT presented its new drone model, the Hawk Eye 2020 (**Hawk Drone**). Thereafter, RESPONDENT accused CLAIMANT of misrepresentation.
27 May 2021	The Parties amended their Arbitration Agreement. During the next Equatorianian parliamentary debate this amended version was praised for its provisions on transparency and efficiency.
3 Jul 2021	RESPONDENT's COO at the time, Mr Field, was implicated in a corruption scandal surrounding Equatorianian government enterprises.
30 May 2022	RESPONDENT sent CLAIMANT a letter of termination regarding the PSA. RESPONDENT based this on allegations of misrepresentation and corruption.
Jul 2022	CLAIMANT commenced arbitral proceedings against RESPONDENT to obligate the latter to perform the PSA as agreed.

SUMMARY OF ARGUMENT

The PSA was supposed to establish a cross-border business relationship between two Parties from different countries, yet unified under one legal framework. To ensure that their relationship could outlast any national conflicts, the Parties agreed on an international dispute resolution mechanism and a unified sales law to govern their Contract. Regretfully, RESPONDENT now turns its back on these once shared values to circumvent its obligations under the Parties' Contract.

Issue 1: The Arbitral Tribunal has jurisdiction to hear the dispute

The Parties conferred jurisdiction to the Arbitral Tribunal (**Tribunal**) when they concluded a valid Arbitration Agreement. RESPONDENT now challenges this international Arbitration Agreement based on Equatorianian national law. In doing so, RESPONDENT, an entity controlled by government officials, seeks to rely on domestic law that its own representatives have influence on.

Issue 2: The proceedings should neither be stayed nor bifurcated

RESPONDENT tries to evade the dispute resolution by this international Tribunal in favour of its national courts. To this end, RESPONDENT unnecessarily requests to stay or bifurcate the proceedings to await a decision of Equatorianian courts. These criminal courts are investigating the corruption allegations against RESPONDENT's own former COO, Mr Field. Despite the Parties having empowered the Tribunal to settle their dispute in this international forum, RESPONDENT would rather have the facts reviewed by its own national courts. Conveniently, Equatorianian courts are known to decide in favour of state-owned companies. *Honi soit qui mal y pense*.

Issue 3: The Purchase and Supply Agreement is governed by the CISG

It is undisputed between the Parties that the present case constitutes an international dispute revolving around RESPONDENT's refusal to pay the purchase price for the Kestrel Drones. Instead of finally honouring the Parties' Contract, RESPONDENT resorts to technical discussion regarding the applicability of the CISG. Once again, RESPONDENT seeks to circumvent the international frameworks to settle this dispute in favour of its own national legislation.

Issue 4: RESPONDENT cannot rely on Art. 3.2.5 of the International Commercial Contract Act of Equatoriana to avoid the Contract

In case its erroneous attempt to displace the CISG fails, RESPONDENT seeks to apply its national provisions through the backdoor of Art. 4 CISG. To this end, RESPONDENT raises unsubstantiated allegations of fraudulent misrepresentation against CLAIMANT. These allegations are, however, misguided. Not only did CLAIMANT accurately describe all features of the Kestrel Drones to RESPONDENT, but also provided the drones at very favourable conditions. In fact, CLAIMANT waived additional profit just to supply RESPONDENT with the best suited drone model for the latter's needs.

ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE

1. On 1 December 2020, CLAIMANT and RESPONDENT consented to the Arbitration Agreement contained in Art. 20 PSA [*Ex. C2, p. 12, Art. 20*]. Thereafter, RESPONDENT assured CLAIMANT of this Agreement's validity on several occasions [*Ex. C7, p. 18, paras. 9, 13*]. In particular, on 27 May 2021, the Parties renewed their consent to arbitrate when mutually amending their Arbitration Agreement [*Ex. C9, p. 22*]. Despite this, RESPONDENT now suddenly contests the Tribunal's jurisdiction arguing that no valid arbitration agreement has ever been concluded [*AN, p. 30, paras. 20 et seqq.*]. However, the Tribunal has full jurisdiction to hear the dispute.

2. This jurisdiction arises from the Parties valid Arbitration Agreement of 1 December 2020 [**A.**]. Even if the Tribunal were to find otherwise, the Parties concluded a valid Arbitration Agreement on 27 May 2021 at the latest by amending their original dispute resolution clause [**B.**].

A. The Parties concluded a valid Arbitration Agreement on 1 December 2020

3. Under the competence-competence doctrine embodied in Art. 16(1) Danubian arbitration law (**DAL**), the Tribunal has the power to rule on its own jurisdiction. In determining whether its jurisdiction arises from a valid arbitration agreement, the Tribunal may recur to the law of the seat, i.e. DAL, as well as to the New York Convention (**NYC**). While the NYC generally governs the enforcement stage, the Tribunal should nonetheless consider the NYC's provisions to comply with its duty to render an enforceable award [*see Lew, p. 119; Platte, p. 312*]. Under these applicable laws, there are only limited grounds for challenging an arbitration agreement [*Arts. II(2)-(3), V(1) NYC; Arts. 7(1)-(2), 34(2)(b), 36(1)(b)(i) DAL*]. Thereunder, RESPONDENT might contest the Arbitration Agreement on three grounds: lack of authority, invalidity and non-arbitrability.

4. However, CLAIMANT will demonstrate that the Parties' Arbitration Agreement was concluded by fully authorised parties [**I.**], is substantively valid [**II.**] and governs an arbitrable dispute [**III.**].

I. RESPONDENT was fully authorised under any law this Tribunal may find applicable

5. On 1 December 2020, the Arbitration Agreement was signed by RESPONDENT's CEO as well as its chairman, the Equatorianian Minister for Natural Resources and Development [*Ex. C2, p. 12; PO2, p. 48, para. 37*]. RESPONDENT now suddenly asserts that its representatives lacked the authority to sign the Agreement [*AN, p. 30, para. 22*]. For this purpose, RESPONDENT relies on Art. 75 of the Equatorianian Constitution (**EC**) which stipulates that *"State-Owned Entities can only submit to foreign seated arbitration […] if there has been authorization by Parliament"* [*id., para. 21*]. Now, RESPONDENT argues that the Arbitration Agreement between the Parties is invalid as the Equatorianian Parliament (**Parliament**) provided no such authorisation.

6. However, RESPONDENT's entire argument hinges on the assumption that its domestic Equatorianian law, including its internal consent requirements, apply in the case at hand [*ibid.*]. In

fact, Equatorianian law is inapplicable because Danubian law applies instead [**1.**]. Even if the Tribunal were to find otherwise, RESPONDENT nonetheless had full authority to enter into the Arbitration Agreement under Equatorianian law [**2.**].

1. Under the applicable Danubian law, RESPONDENT had full authority

7. The Tribunal should find that Danubian law governs RESPONDENT's authority to conclude the Arbitration Agreement. Unlike Equatorianian law, the law of Danubia contains no *"limitations or consent requirements for the submission by an SOE to arbitration"* [*PO2, p. 48, para. 32*]. Thus, under Danubian law, RESPONDENT had full authority to enter into the Arbitration Agreement independent of any parliamentary approval. CLAIMANT will demonstrate that this Danubian law governs RESPONDENT's authority under the decisive choice of law rules. There exists no choice of law rule specifically pertaining to authority [*Born, p. 672; Fouchard/Gaillard/Goldman, p. 317; Ragno, p. 174*]. Therefore, authority is governed by the choice of law rules that apply to the matter most closely related to authority [*ibid.*]. As authority has to be characterised as related to arbitrability, Danubian law applies under the respective choice of law rules [**a.**]. By contrast, the Tribunal should not apply the choice of law rules on capacity [**b.**]. In any case, irrespective of which choice of law rules the Tribunal applies, the validation principle gives priority to Danubian law [**c.**].

a. Danubian law applies under the decisive choice of law rules on arbitrability

8. It is broadly acknowledged that the principles of subjective arbitrability govern the question whether state entities are allowed to enter into arbitration agreements [*Fouchard/Gaillard/Goldman, p. 317; Lew/Mistelis/Kröll, p. 187; Redfern/Hunter, para. 2.40*]. Accordingly, the choice of law rules on arbitrability apply to matters of authority [*Arts. II(1), V(2)(a) NYC, 34(2)(b)(i) DAL*]. Under these rules, the law governing subjective arbitrability depends on the procedural stage during which this concern is raised. While the NYC provides a rule for the enforcement stage [*Art. V(2)(a) NYC*], the NYC contains none for the pre-award stage [*M v M, p. 619; Lew/Mistelis/Kröll, p. 189*]. However, there exists broad consensus that, during the pre-award stage, arbitrability is governed by the law of the seat [*ICC Case 6162, p. 157*; *Matermaco Case, p. 675; Balthasar, p. 20; Lew/Mistelis/Kröll, p. 197*].

9. This is because, if the dispute was found non-arbitrable under the law of the seat, the award could be set aside by a court of that country [*Moses, p. 76*]. By contrast, it would be unreasonable to expect tribunals to consider the law of 170 possible enforcement jurisdictions under the NYC [*UN Information Service; Waincymer, p. 148*]. Thus, to ensure legal certainty, the Tribunal should determine RESPONDENT's authority under the law of the seat, i.e. Danubian law.

b. By contrast, the choice of law rules on capacity are inapplicable

10. RESPONDENT might submit that the Tribunal should not apply the choice of law rules on subjective arbitrability, but rather those on capacity, namely Art. V(1)(a) NYC. Under this provision, capacity

is governed by *"the law applicable to [the parties]"*. RESPONDENT might argue that this leads to its own national law, i.e. that of Equatoriana. However, choice of law rules on capacity do not apply in the present case. This is because capacity solely determines a party's ability to enter into legal relations *in general* [*Ragno, p. 172*]. Conversely, capacity does not govern cases where there are legal restrictions on concluding *special types* of contracts [*Hanotiau, p. 149; Ragno, p. 171*]. The rationales behind capacity and authority differ fundamentally: while the law of capacity protects the party itself, restrictions on authority only protect public interest [*Fouchard/Gaillard/Goldman, p. 317; Redfern/Hunter, para. 2.40*]. Thus, provisions serving public interest by limiting the authority of an SOE to conclude certain contracts do not concern the SOEs capacity [*ibid.; Ragno, p. 178*].

11. Accordingly, RESPONDENT's authority to conclude the Arbitration Agreement cannot be determined in accordance with the law governing capacity. Under RESPONDENT's national law, SOEs are not barred from validly entering into legal relations *in general*. Rather, SOEs merely are subject to restrictions when entering into *"administrative contracts"* [*AN, p. 30, para. 21*]. Therefore, Equatorianian law merely limits RESPONDENT's authority. By contrast, Equatorianian law does not restrict RESPONDENT's capacity. As such, RESPONDENT cannot invoke the choice of law rules on capacity to rely on its own national Equatorianian law.

c. In any case, Danubian law applies under the validation principle

12. Irrespective of whether the Tribunal applies the rules on subjective arbitrability or those on capacity, Danubian law applies. This is because, where several legal regimes may apply, priority should be given to the law that ensures the validity of the parties' arbitration agreement to the fullest extent [*Enka v Chubb, para. 95*; *ILI (1989), Art. 4; Tweeddale*, *p. 241*]. This is based on the validation principle, which protects the parties' true intentions to arbitrate from being undermined by formalistic and uncertain choice of law rules [*Bhattacharya/Rajurkar, p. 596; Born, p. 615*]. In accordance with this validation principle, both arbitrability and capacity must be determined under the law most favourable for the arbitration agreement [*Born, p. 670; Koepp/Turner, p. 389*].

13. Consequently, irrespective of which choice of law rule the Tribunal may find decisive, it should apply the most favourable legal regime. Danubian law, contrary to Equatorianian law, contains no limitation on RESPONDENT's authority to conclude arbitration agreements [*supra paras. 5, 7*]. Thus, Danubian law constitutes the most favourable legal regime. By applying this law, the Tribunal gives the broadest possible effect to the Parties' consent to arbitrate.

14. In conclusion, the Tribunal should apply Danubian law to determine RESPONDENT's authority. Under this law, RESPONDENT had full authority to enter into the Arbitration Agreement.

2. Alternatively, RESPONDENT had full authority under Equatorianian law

15. Even if the Tribunal were to apply Equatorianian law, RESPONDENT was nonetheless authorised to conclude the Arbitration Agreement. RESPONDENT contests this based on Art. 75 EC,

according to which *"State-Owned Entities can only submit to foreign seated arbitration […] in 'administrative contracts' if there has been authorization by Parliament"* [*AN, p. 30, para. 21*]. This is misconceived for four reasons: First, Art. 75 EC is inapplicable as the PSA is a non-administrative contract [**a.**]. Second, even if Art. 75 EC was applicable, Parliament validly approved the Parties' Arbitration Agreement [**b.**]. Third, RESPONDENT cannot invoke its own law to evade a consensual arbitration agreement [**c.**]. Fourth, RESPONDENT is estopped from invoking its own lack of authority [**d.**].

a. The Arbitration Agreement required no parliamentary approval

16. Art. 75 EC only requires parliamentary approval for arbitration agreements contained in *"administrative contracts"* concluded by SOEs [*AN, p. 30, para. 21*]. Equatorianian law only considers contracts to be administrative if they relate to *"public works"* [*PO2, p. 48, para. 31*]. However, such contracts differ from merely preparatory ones as no Equatorianian court has ever subjected a *"preparatory contract"* to the requirements of Art. 75 EC [*id., p. 47, para. 29*].

17. The Parties' PSA was precisely concluded for preparatory purposes. RESPONDENT's long-term objective was the construction of infrastructure [*NA, p. 5, para. 3*]. However, RESPONDENT first had to collect the necessary data to locate and evaluate the most promising areas [*AN, p. 28, para. 5*]. To do so, the Kestrel Drones were specifically purchased to prepare for such *"future activities"* [*ibid.*]. As such, the Kestrel Drones were never intended for the actual construction but only for the preparation of the infrastructure [*ibid.*]. As the PSA thus merely constitutes a preparatory contract, no parliamentary approval was necessary under Art. 75 EC.

b. Alternatively, Parliament validly approved the Arbitration Agreement

18. In case the Tribunal were to find that parliamentary approval was necessary, Parliament in fact validly approved the Arbitration Agreement. This is based on two considerations.

19. First, RESPONDENT might contest Parliament's approval on the ground of lack of form. While Equatorianian law asks for *"express [parliamentary] approval based on a formal vote"* [*PO2, p. 48, para. 34*], this national form requirement is superseded by the NYC. This is because contracting states of the NYC cannot subject arbitration agreements or the authorisation thereof to discriminatory form requirements [*Born, p. 761; Reiner, p. 90*]. Thus, national law cannot impose harsher form requirements than the NYC itself [*ibid.*]. The NYC only requires arbitration agreements to be *"in writing"* [*Art. II(2) NYC*], but allows their approval to be granted implicitly [*Born, p. 727*].

20. In the present case, Parliament consented in implicitly. On 27 November 2020, Parliament was scheduled to approve the Arbitration Agreement [*AN, p. 29, para. 13*]. Unfortunately, Parliament was unable to hold a formal vote as the plenary session had to be cancelled [*ibid.*]. On 1 December 2020, however, a government official publicly signed the Agreement of which Parliament was subsequently informed [*Ex. C7, p. 19, para. 12*]. In June 2021, Parliament discussed the submission of SOEs to arbitration [*id., para. 15*]. During this debate, the Parties' Arbitration

Agreement was explicitly praised for its transparency and efficiency [*ibid.*]. Thereby, Parliament recognised the Agreement's validity, retroactively granting its implied approval.

21. Second, RESPONDENT might submit that Art. 75 EC does not allow for such retroactive approval. However, *"approval may also be granted retroactively"* under extraordinary circumstances [*PO2, p. 48, para. 34*]. For example, Equatorianian case law has deemed this possible where a power outage occurred before a plenary session [*id., p. 47, para. 30*]. In the case at hand, the initial parliamentary debate had to be called off due to a significant number of parliamentarians being unable to attend because of Covid [*AN, p. 29, para. 13*]. Under such extraordinary circumstances, Parliament was forced to cancel the debate on short notice [*ibid.*]. Thus, parliamentary approval could be granted retroactively. Therefore, Parliament validly approved the Arbitration Agreement.

c. RESPONDENT cannot invoke its own law to evade the consensual Arbitration Agreement

22. It would be contrary to the international character of cross-border arbitration if RESPONDENT, a SOE, could evade contractual obligations by relying on its own legislation [*see Cour Cass. 2009; Born, pp. 770, 777; Kronke et al., p. 220*]. Thus, it is broadly recognised that SOEs cannot invoke their own national law to deny their authority to conclude arbitration agreements [*Fouchard/Gaillard/Goldman, p. 322; Ragno, p. 179; Redfern/Hunter, para. 2.39*]. This rule is recognised by statutory law [*see Art. 2(2) OHADA UAA; Art. 177(2) Swiss PILA*] and upheld by tribunals and state courts worldwide [*Aquitaine v N.I.O.C., para. 24; ICC Case 7236, para. 23; Arabe v Gemanco, para. 19*].

23. This was best exemplified in a similar case involving an Iranian SOE and a foreign private company [*ICC Case 4381*]. In this case, the Iranian Constitution required governmental approval of arbitration clauses with foreign companies. The tribunal, however, concluded that the SOE is barred from relying on such national restrictions [*id., p. 1106*]. In particular, no party should be able to disband an agreement to its own benefit based on reasons that it itself has control over [*ibid.*].

24. This rationale also applies in the case at hand: RESPONDENT, an Equatorianian SOE, invokes its own national law to the detriment of CLAIMANT, a foreign private company [*NA, p. 4, para. 1; AN, pp. 27, 30, paras. 3, 21*]. This holds all the more true as RESPONDENT is fully controlled by the Equatorianian state [*PO2, p. 44, para. 5*]. In particular, RESPONDENT's supervisory board is entirely composed by members appointed by the state [*ibid.*]. In light of this, RESPONDENT cannot invoke its own Equatorianian law to evade the Parties' consensual Arbitration Agreement.

d. In any case, RESPONDENT is estopped from invoking its own lack of authority

25. A party cannot contest an arbitration agreement if doing so amounts to contradictory behaviour [*Virgin Islands Case, p. 503; Bantekas, p. 75; Greenberg et al., p. 167*]. This is based on the principle of estoppel which prohibits parties to benefit from their inconsistent actions [*Wolff, p. 108*]. Thus, a party may not deny its authority to conclude an arbitration agreement if it has previously relied on this agreement's very validity [*Virgin Islands Case, p. 507; Born, p. 777*].

26. In the present case, RESPONDENT relied on the Arbitration Agreement's validity several times [*Ex. C7, p. 18, paras. 9, 13.*]. In particular, RESPONDENT did so when initiating re-negotiations to amend this Agreement in May 2021 and even provided a new draft itself [*Ex. C9, p. 22*]. Thereby, RESPONDENT wanted to maximise transparency and efficiency of potential arbitrations [*Ex. C7, p. 19, para. 14*]. Nonetheless, RESPONDENT now contests the validity of this very Agreement.

27. RESPONDENT further behaved inconsistently when stating that its own chairman *"does not consider the cancellation of the Parliamentary Debate […] to be an obstacle"* [*Ex. R4, p. 35*]. Thereby, RESPONDENT assured CLAIMANT that *"parliamentary approval was just a formality and would be forthcoming after the Christmas break"* [*Ex. C7, p. 18, para. 9*]. In light of these circumstances, RESPONDENT cannot unconscionably invoke its own lack of authority.

28. In conclusion, RESPONDENT had full authority to enter into the Arbitration Agreement under any law the Tribunal may find applicable.

II. The Arbitration Agreement is valid

29. Pursuant to Art. II(3) NYC, arbitration agreements are presumptively valid, unless they are *"null and void, inoperative or incapable of being performed"*. In the present case, RESPONDENT raised two of these grounds [*AN, p. 30, para. 20*]. However, contrary to RESPONDENT's submission, the Arbitration Agreement is neither invalid due to termination [**1.**] nor corruption [**2.**].

1. The Arbitration Agreement is unaffected by RESPONDENT's attempted termination

30. On 30 May 2022, RESPONDENT unsuccessfully attempted to terminate the PSA via e-mail [*see Ex. C8, p. 20; infra paras. 129 et seqq.*]. In this e-mail, RESPONDENT solely referred to the *"Purchase and Supply Agreement"* [*Ex. C8, p. 20*]. Now, RESPONDENT contends that its supposed termination of the PSA also extends to the Arbitration Agreement contained therein [*AN, p. 30, para. 20*].

31. However, the arbitration agreement is independent from the underlying main contract [*see Lew/Mistelis/Kröll, p. 102*]. This follows from the doctrine of separability [*Art. 16(1) DAL; Fiona Trust Case, para. 17; Banifatemi, para. 25*]. Thereunder, claims disputing the validity of the substantive contract do not affect the arbitration agreement [*Buckeye v Cardegna, p. 446; Born, p. 908*]. Accordingly, there exists broad consensus that an arbitration agreement survives even if the main contract is terminated [*ICC Case 7626, p. 137; Born, p. 485; Redfern/Hunter, para. 2.101*]. In light of this, the Arbitration Agreement is unaffected by RESPONDENT's attempted termination.

2. The Arbitration Agreement is unaffected by RESPONDENT's corruption allegations

32. RESPONDENT asserts that the PSA was concluded due to RESPONDENT's own COO Mr Field engaging in corruption [*Ex. C3, p. 13, para. 6; Ex. C8, p. 20*]. However, RESPONDENT has not established that these allegations refer to the Arbitration Agreement and failed to provide any evidence substantiating these allegations.

33. First, following the separability presumption [*supra paras. 30et seq.*], corruption allegations that pertain to the main contract generally leave the arbitration agreement unaffected [*NIOC Case, para. 9; Feehily, p. 368; Lew/Mistelis/Kröll, p. 102*]. Instead, a party challenging the arbitration agreement's validity can only invoke grounds directly relating to the arbitration agreement itself [*Fiona Trust Case, para. 17; Born, p. 908; Hwang/Lim, p. 62*]. However, RESPONDENT's allegations of corruption solely pertain to the PSA. Specifically, RESPONDENT only alleged that such illegal conduct took place during the meeting of 4 November 2020 [*AN, p. 28, para. 9*]. During this meeting, the Parties' representatives exclusively discussed the PSA. Namely, the PSA's scope and pricing were re-negotiated [*ibid.*]. By contrast, the Arbitration Agreement remained unchanged, thus, leaving it unaffected by any alleged corruption.

34. Second, no evidence substantiating the corruption allegations has been provided. It is on the party raising these allegations, i.e. RESPONDENT, to provide sufficient evidence [*see Born, p. 901; Greenberg/Foucard, para. 56*]. In light of the gravity of these allegations, a party must submit clear and convincing evidence of corruption [*Himpurna Case, p. 43 et seq; Hoepfner, p. 217; Hwang/Lim, p. 24*]. Otherwise, any party wishing to avoid its obligations could simply raise allegations of corruption to do so [*Garaud, p. 182*].

35. In the present case, however, RESPONDENT has only evidenced corruption with respect to contracts in which CLAIMANT was never involved but failed to submit any evidence concerning the Agreement between the Parties [*Ex. C8, p. 20; AN, p. 29, para. 16*]. In fact, RESPONDENT itself admits that *"there is no proof yet of any bribes in relation to this contract"* despite state authorities having investigated for almost a year [*ibid.*]. Thus, as RESPONDENT's allegations are unsubstantiated, the Tribunal should uphold the Arbitration Agreement.

III. The dispute is objectively arbitrable

36. Pursuant to Art. II(1) NYC or Art. 34(2)(b)(i) DAL, a tribunal's jurisdiction is limited to matters capable of *"settlement by arbitration"*. Thus, national legislation may refer certain subject matters exclusively to the jurisdiction of the courts [*Banifatemi, para. 12; Redfern/Hunter, para. 2.124*].

37. RESPONDENT might contest the present dispute's arbitrability on the basis of corruption allegations. To this end, RESPONDENT will likely submit the Lagergren Award of 1963. In this award, the sole arbitrator Lagergren reasoned that disputes involving corruption are non-arbitrable [*Lagergren Award, para. 16*]. In contrast, more recent arbitral awards and court decisions have rejected Lagergren's conclusions and consistently confirmed the competence of arbitral tribunals to rule on questions of corruption [*ICC Case 6474, p. 280; NPC Case, p. 385; Taller v SEAM, p.15; Westacre Case, p. 770et seq.*]. It is a tribunal's principal obligation to rule on the parties' commercial dispute, even if doing so necessitates reviewing allegations of corruption [*Taller v SEAM, p.15*]. Thus, denying the arbitrability of such matters would contradict the parties' consent to arbitrate [*id., p. 16*].

38. Conversely, settling such matters in arbitration does not undermine the state courts' exclusive competence to rule on matters of criminal liability [*Ship Owners Case, para. 78*]. Accordingly, the Tribunal has the power to rule on the present dispute's subject matter.

39. In conclusion, since the Parties concluded a valid Arbitration Agreement on 1 December 2020, the Tribunal has jurisdiction to hear the case.

B. Alternatively, the Parties concluded a valid Arbitration Agreement on 27 May 2021

40. In case the Tribunal were to find that the Arbitration Agreement concluded on 1 December 2020 is ineffective, the Parties alternatively concluded a valid Agreement on 27 May 2021. On this day, RESPONDENT sent CLAIMANT the draft of an amended arbitration clause [*Ex. C9, p. 22*]. This constitutes a sufficiently definite and binding offer to conclude a new arbitration agreement under any law the Tribunal may apply [*PO2, p. 49, para. 49; see Art. 14 CISG or Arts. 2.1.1, 2.1.2 ECL*]. CLAIMANT accepted this offer [*Ex. C7, p. 19, para. 14; see Art. 24 CISG or Art. 2.1.6(1) ECL*]. As modifying an arbitration agreement simultaneously results in the conclusion of a new one [*Garaud, p. 201*], the Parties consented to an Arbitration Agreement on 27 May 2021.

41. Contrary to what RESPONDENT might argue, this Arbitration Agreement provides an effective basis for the Tribunal's jurisdiction. This is because RESPONDENT had full authority [**I.**]. Furthermore, the Arbitration Agreement is both formally [**II.**] and substantively valid [**III.**].

I. RESPONDENT had full authority to conclude the Arbitration Agreement

42. RESPONDENT might assert that not all relevant authorities approved the Arbitration Agreement of 27 May 2021. However, CLAIMANT will demonstrate the contrary based on three considerations.

43. First, no parliamentary approval was required, as the rationale of Art. 75 EC does not apply in the present case. The *"majority of [Equatorianian] authors"* deems it unnecessary for Parliament to approve *"changes"* of an arbitration agreement, irrespective of their scope [*PO2, p. 48, para. 36*]. Accordingly, the scope of the initial clause can be extended in any conceivable way. Thus, the rationale of Art. 75 EC can only be to ensure Parliament's knowledge of the arbitration clause, rather than Parliament's approval of the content. Hence, Art. 75 EC's scope must be restricted to cases where Parliament could not intervene because it was unaware of the clause's existence.

44. In the present case, Parliament was aware that RESPONDENT signed an arbitration agreement on 1 December 2020 [*supra para. 20*]. Four days prior, the *"discussion about the arbitration clause [was on] the agenda of the Parliament"* [*PO2, p. 47, para. 29*]. As the discussion was postponed only hours before, Parliamentarians must have known of the Agreement's existence from their order papers [*AN, p. 29, para. 13*]. Moreover, press broadly reported on the Agreements' public signing [*Ex. C7, pp. 18 et seq., para. 12*]. Hence, Parliament knew of RESPONDENT's submission to arbitration, yet chose not to intervene. Thus, under Art. 75 EC's rationale, no parliamentary approval was needed.

45. Second, the Arbitration Agreement also required no ministerial approval. According to the statutes of RESPONDENT, contracts involving a financial liability higher than EUR 25 Mio are subject to approval [*PO2, p. 48, para. 37*]. This approval has to be granted by RESPONDENT's chairman, who is the Equatorianian Minister of Natural Resources and Development, Mr Barbosa [*ibid.*]. Under the doctrine of separability [*supra para. 31*], any statutory restrictions to conclude *"contracts over a certain monetary value […], may not apply to the arbitration agreement itself"* [*Born, p. 782*]. Thus, the statutory requirement solely pertains to the PSA which had already been approved [*Ex. C2, p. 12*]. Hence, no ministerial approval was needed for the conclusion of the Arbitration Agreement.

46. Third, irrespective of whether approval by Parliament or Minister was required, both have consented. During the same parliamentary debate in early June 2021, where Parliament implicitly approved the Agreement [*supra paras. 19 et seqq.*], the government announced that the Minister had given his approval of the Arbitration Agreement at hand [*Ex. C7, p. 19, para. 15*]. Based on these considerations, RESPONDENT had the necessary authority to conclude the Arbitration Agreement.

II. The Arbitration Agreement is formally valid

47. RESPONDENT might contend that the Arbitration Agreement's conclusion via e-mail is formally invalid under Art. II(2) NYC. Pursuant to this provision, arbitration agreements have to be concluded *"in writing"*, i.e. *"signed"* or *"contained in an exchange of telegrams and letters"*. However, the NYC was adopted in 1958 [*Balthasar, p. 77*]. Accordingly, it is recognised that Art. II(2) NYC has to be interpreted so as to be conform with today's business practices [*Buyer v Seller, p. 531; Born, p. 724; Moses, p. 23*]. To this end, a party may rely on more favourable form requirements under national law [*Owerri Case, p. 704; UNCITRAL Report 2006, paras. 82 et seqq.*]. In the present case, all relevant jurisdictions have adopted the more favourable provision of Art. 7(4) Model Law [*PO2, p. 49, para. 49*]. Thereunder, *"an electronic communication* […] *including* […] *electronic mail"* satisfies the writing requirement. As the conclusion via e-mail is hence formally valid [*Chloe Z Fishing, p. 924; Elbex Case, para. 8; Moses, p. 30*], the Arbitration Agreement complies with Art. II(2) NYC.

III. The Arbitration Agreement is substantively valid

48. Even if the Tribunal were to find that the Arbitration Agreement from 1 December 2020 was invalid [*supra paras. 29et seqq.*], the Arbitration Agreement of 27 May 2021 nonetheless remains effective. When a second arbitration agreement is concluded by different representatives at a later time, this new agreement is detached from any corruption suspicion concerning the first agreement [*Petrobras Case, para. 287; Garaud, p. 201*]. In the present case, the corruption allegations only affect the initial negotiations between Mr Bluntschli and Mr Field in 2020 [*Ex. C8, p. 20*]. By contrast, it had been Mr Cremer and Ms Queen who concluded the Arbitration Agreement in 2021 [*Ex. C9, p. 22*]. Neither of them is subject to any corruption allegations [*PO2, p. 49, para. 44*].

49. Similarly, by the time RESPONDENT initiated re-negotiations in spring 2021, RESPONDENT already knew of the facts underlying its allegations of misrepresentation [*Ex. C7, p. 19, paras. 13 et seq.*]. Hence, RESPONDENT cannot terminate the new Arbitration Agreement on this ground.

50. It follows that the Arbitration Agreement formed on 27 May 2020 is substantively valid.

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51. To summarise, the Parties entered into a valid Arbitration Agreement either on 1 December 2020 or at the latest on 27 May 2021. Both Agreements were concluded by fully authorised parties, are formally and substantively valid and the Agreement governs an arbitrable dispute. In conclusion, the Arbitral Tribunal has full jurisdiction to hear the case.

ISSUE 2: THE PROCEEDINGS SHOULD NEITHER BE STAYED NOR BIFURCATED

52. Despite the Parties' consent to arbitrate, RESPONDENT calls into question the Tribunal's power to autonomously discover and review the facts of the present case [*AN, p. 27, para. 1*]. To this end, RESPONDENT has requested the Tribunal to either stay or, alternatively, bifurcate the arbitral proceedings [*id., pp. 30 et seq., paras. 23, 25*]. Both submissions ask the Tribunal to await the results of ongoing Equatorianian criminal investigations centring around Mr Field, RESPONDENT's former COO. Currently, Mr Field is one of the lead suspects in a corruption scandal surrounding Equatorianian SOEs [*Ex. R2, p. 33*]. Mr Field's criminal culpability will be determined by an Equatorianian Special Chamber (**Special Chamber**) [*AN, p. 31, para. 24*]. RESPONDENT alleges that the Special Chamber in a *"much better position than the Arbitral Tribunal to investigate the underlying corrupt practice"* [*id., p. 27, para. 1*]. Thus, instead of having the facts fully reviewed by the designated Tribunal, RESPONDENT would rather have its national courts known for their *"bad reputation"* do so [*PO2, p 47, para. 28*]. However, the Tribunal is the best suited forum to rule on all facts of the case. Accordingly, the Tribunal should neither stay [**A.**] nor bifurcate the present proceedings [**B.**].

A. The arbitral proceedings should not be stayed

53. A tribunal is under no obligation to stay an arbitration in the face of ongoing criminal proceedings [*Mourre, pp. 114 et seq.; Naud, p. 515*]. Rather, a tribunal has broad procedural discretion under Art. 17(1) PCA Rules. When exercising its discretion, a tribunal *"shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process to resolve the parties' dispute"* [*Art. 17(1) PCA Rules*]. Accordingly, a tribunal has the duty to maximise the proceedings' efficiency [*Myers Case, para. 11; Daly et al., para. 5.04*; *Paulsson/Petrochilos, p. 126*].

54. To uphold this duty, the Tribunal should refuse to stay the present proceedings. This is based on three reasons: First, the findings of the Special Chamber are irrelevant for the present

arbitration [**I.**]. Second, staying the arbitral proceedings would be inefficient [**II.**]. Third, staying the proceedings is not required to ensure the enforceability of the final award [**III.**].

I. The Equatorianian Special Chamber's findings are irrelevant for the present arbitration

55. RESPONDENT asserts that, rather than investigating the facts itself, the Tribunal should base its decision on the findings of the Special Chamber which is better suited to discover the facts [*AN, pp. 30 et seq., para. 23*]. However, CLAIMANT will show that the Tribunal is competent to discover the facts of the present dispute [**1.**]. In doing so, the Tribunal should not rely on the criminal proceedings as they are immaterial to the commercial dispute at hand [**2.**]. In any case, the Tribunal should disregard the Special Chamber's findings as they are of reduced evidentiary value [**3.**].

1. The Tribunal is competent to discover the facts of the dispute

56. By consenting to arbitrate, the Parties excluded the national courts' jurisdiction in favour of private dispute resolution by the Arbitral Tribunal [*Ex. C2, p. 12, Art. 20; Art. 8(1) DAL*]. In accordance with this mandate, the Tribunal has broad investigative power to gather and evaluate relevant evidence [*Paulsson/Petrochilos, p. 238; Waincymer, p. 750*]. This power is embodied in the law of the seat. Under Art. 19(2) DAL, *"[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence"*. The institutional rules chosen by the Parties also recognise this power. Under Arts. 27 et seqq. PCA Rules, a tribunal can order evidence to be produced, to appoint experts and ensure the attendance of witnesses to the arbitral proceedings [*Bantekas et al., p. 726; Daly et al., paras. 5.107 et seqq.; Paulsson/Petrochilos, p. 238*]. Thus, contrary to RESPONDENT's assertions the Tribunal is equipped with the broad investigative powers, necessary to discover the facts of the dispute independent of the Special Chamber's findings.

2. The criminal proceedings are immaterial to the commercial dispute at hand

57. According to RESPONDENT, the Special Chamber's findings may be relevant to the outcome of the current arbitration [*AN, pp. 30 et seq., para. 23*]. However, this would only provide reason to stay the proceedings if the state court dealt with a subject matter that was relevant to the arbitral dispute [*ICC Case 8459, p. 41; Feris/Torkomyan, pp. 52 et seq.; Naud, p. 518*]. This is not the case if one of the proceedings focuses on criminal charges whereas the other deals with commercial matters [*Sanader Case, para. 258*]. In such cases, court findings are immaterial to an arbitration as both the governing law as well as the legal consequences of the proceedings differ drastically [*ibid.; Spoorenberg/Vinuales, p. 93*]. As one arbitral tribunal put it, *"there is no reason to consider that the outcome of the criminal proceedings, whatever it may be, might have an impact on the outcome of this arbitration"* [*ICC Case 11961, para. 14*].

58. In the case at hand, the trial before the Special Chamber and the arbitral proceedings focus on different subject matters governed by different legal regimes. The Special Chamber decides on the

criminal culpability of Mr Field [*AN, p. 31, para. 24*]. In contrast, the Tribunal deals with the commercial dispute between the Parties [*PO1, p. 42, para. III.1.*].

59. Furthermore, while the Special Chamber will decide on the basis of Equatorianian criminal law, the Tribunal will review its case based on commercial law [*ibid.; AN, p. 31, para. 24*]. Namely, as will be shown below, the CISG applies to the PSA [*infra paras. 96 et seqq.*]. Alternatively, RESPONDENT submits that the ICCA governs the merits of the dispute [*AN, p. 31, para. 28*]. Thus, as the two proceedings concern different subject matters under different legal regimes, the Special Chamber's findings are immaterial to the present arbitration.

3. The findings of the Equatorianian Special Chamber are of reduced evidentiary value

60. A tribunal has no duty to consider criminal proceedings in its decision-making process [*Fund v A Group, para. 6.1; Naud, p. 515*]. Thus, a tribunal should only stay its proceedings if a state court's ruling is indispensable for the evidentiary record [*Feris/Torkomyan, p. 58; Levy, p. 23; Naud, p. 518*].

61. RESPONDENT submits that the Tribunal should consider the Special Chamber's findings as relevant evidence in the present proceedings [*AN, p. 30, para. 23*]. However, this submission disregards that the findings' evidentiary value is limited in light of the *"bad reputation of the courts in Equatoriana"* [*PO2, p. 47, para. 28*]. A tribunal should disregard a criminal court's decision if it is rendered in *"a country with known judicial dysfunctions"* or if the court proceedings are biased towards SOEs to the detriment of foreign private companies [*Naud, p. 515*]. In the present case, CLAIMANT's concerns regarding the evidentiary value of the Special Chamber's findings are based on two considerations.

62. First, there are several factors which call the neutrality of the Equatorianian judiciary into question. In particular, *"it is well known that Equatoriana is […] amongst the 20 % most corrupt countries"* in the world [*Ex. C3, p. 14, para. 11*]. This was established by Transparency International in its Corruption Index, which takes into account to what extent *"government officials in the judicial branch […] use public office for private gain"* [*ibid; CPI 2021, p. 16*]. Moreover, *"courts in Equatoriana have the reputation of deciding in favor of the state and its entities"* [*PO2, p. 46, para. 18*]. The *"bad reputation of the courts in Equatoriana"* is so significant that even Equatorianian private companies choose to opt-out of state court proceedings to settle their disputes by arbitration [*id., p. 47, para. 28*].

63. Second, these concerns are particularly prominent in present case. After a change of government in Equatoriana, there is strong political interest in terminating all contracts concluded by the previous government [*Ex. C3, p. 13, para. 5*]. In fact, the Special Chamber was specifically set up to review the contracts concluded under the previous government [*AN, p. 31, para. 24*].

64. Similar concerns apply to the investigation preceding the Special Chamber's trial. The investigation is led by the special prosecutor, Ms Fonseca [*Ex. R2, p. 33*]. The Citizen, Equatoriana's leading investigative journal, has questioned her impartiality [*ibid.; AN, p. 29, para. 14*]. In particular, Ms Fonseca's brother-in-law is the CEO of one of CLAIMANT's competitors [*Ex. R2, p. 33*]. During

the tender process, RESPONDENT rejected the competitor's bid and contracted with CLAIMANT instead [*Ex. R1, p. 32, para. 5*]. Moreover, Ms Fonseca's son is engaged to Mr Field's former personal assistant, Leonida Bourgeois [*Ex. R2, p. 33*]. After she stopped working for RESPONDENT, Ms Fonseca ensured that she immediately joined the public prosecutor's office [*PO2, p. 49, para. 43*].

65. In contrast to all of this, the Arbitral Tribunal is composed of impartial and independent arbitrators who explicitly stated to have no relations to any of the Parties [*B. v. Suttner, p. 23; M. C. Asser, p. 39*]. As such, the Tribunal should rather conduct its own investigations instead of relying on the decision of a Special Chamber whose findings are of reduced evidentiary value.

66. For these reasons, the Special Chamber's decision is irrelevant to the outcome of the present arbitration. Accordingly, the Tribunal should refuse to stay the arbitral proceedings on such basis.

II. Staying the arbitral proceedings would be inefficient

67. Pursuant to Art. 17(1) PCA Rules, a tribunal *"shall conduct the proceedings so as to avoid unnecessary delay and expense"*. Awaiting the Special Chamber's findings would be *"unnecessary"* in the sense of this provision as the criminal proceedings are irrelevant for the present arbitration's outcome [*supra paras. 55 et seqq.*]. Thus, any delay or cost incurred by a stay is in violation of Art. 17(1) PCA Rules. CLAIMANT will demonstrate that staying the present proceedings would not only cause substantial delay and significantly increased cost, but also contradict the Parties' intentions.

68. First, staying the proceedings would require the Tribunal to await the Special Chamber's judgment that *"will not be obtained before July 2024 at best"* [*Letter by Langweiler, p. 40*]. Meeting this deadline would require the special prosecutor to complete her complex investigations on time [*AN, p. 31, para. 23*]. Even if the Special Chamber was to finalise its judgement by 2024, this decision could be appealed [*PO2, p. 49, para. 47*]. This, in turn, can cause further indeterminate delays.

69. Second, a yearslong delay of the award would put substantial strain on CLAIMANT's business. After having invested substantial time and resources to produce the Kestrel Drones, CLAIMANT now has to wait until the Tribunal obliges RESPONDENT to pay the purchase price to recoup the costs [*NA, p. 7, para. 23*]. In case RESPONDENT fails to pay, CLAIMANT could only resell the drones *"with difficulties and with considerable price reductions"* [*PO2, p. 46, para. 24*]. In light of these facts, a stay of proceedings would subject CLAIMANT to considerable legal and financial uncertainty. This holds all the more true because, unlike RESPONDENT as a state-funded SOE, CLAIMANT is merely a medium-sized private company [*NA, p. 4, para. 1; PO2, p. 44, para. 5*]. In fact, the award decides on the payment for Drones amounting to 60 % of CLAIMANT's yearly production [*id., p. 4, para. 1*].

70. Third, the Parties consented to conduct their arbitrations in a time- and cost-efficient manner. To this end, the Parties amended their Arbitration Agreement by including arbitration rules whose primary purpose is to increase efficiency: the UNCITRAL Expedited Rules [*Ex. C7, p. 19, para. 14; EAR Notes, para. 1*]. Despite the fact that these rules do not govern the present dispute [*Ex. C9,*

p. 22], their inclusion shows the Parties' intention to ensure time-and cost-efficiency. In fact, it was RESPONDENT who insisted on this modification [*ibid.*]. Nonetheless, RESPONDENT now requests that the proceedings should be unnecessarily prolonged. Therefore, a stay of the proceedings would contradict the Parties' fundamental expectations to have their dispute resolved efficiently.

III. The Tribunal's award could neither be set aside nor rendered unenforceable

71. A tribunal should only consider staying the proceedings if the party requesting such a stay was able to demonstrate that it would be beneficial to increase efficiency and fairness [*Myers Case, para. 12; PCA Case 2016-21 PO1, para. 6*]. RESPONDENT has failed to do so. While RESPONDENT might submit that staying the proceedings is required to uphold the Parties' right to be heard and public policy, this is misconceived. Irrespective of whether the arbitration is stayed, the present proceedings respect both the Parties' right to be heard [**1.**] as well as public policy [**2.**].

1. Staying the proceedings is not required to uphold the Parties' right to be heard

72. RESPONDENT might purport that it would contradict Art. V(1)(b) NYC and Art. 34(2)(a)(ii) DAL if RESPONDENT were unable to submit the Special Chamber's decision as evidence. Under these provisions, an award may be rendered unenforceable or set aside if a party *"was unable to present his case"*. However, a party is not deprived from this right merely because the party was unable to present key evidence [*License Case, p. 530; Balthasar, p. 153; Born, p. 3860*]. Rather, a party must prove that it would have materially altered the outcome of the arbitral proceedings if this additional evidence had been presented [*Baltic Harbour Case, para. 2.1; Wolff, p. 313*].

73. Accordingly, RESPONDENT is not hindered from presenting evidence that would materially alter the outcome of the present dispute. This is because awaiting the Special Chamber's decision would, as demonstrated above, not produce any evidence relevant to the outcome of the arbitral proceeding [*supra paras. 55 et seqq.*]. Beyond this, RESPONDENT is not hindered from submitting any other factual evidence relating to its corruption allegations. Thus, irrespective of a stay of proceedings, RESPONDENT will be able to present its case.

2. Staying the proceedings is not required to uphold public policy

74. As a last resort, RESPONDENT may call on the public policy exception of Art. V(II)(b) NYC or Art. 34(2)(b)(ii) DAL. To this end, RESPONDENT submits that an award ordering to perform a contract procured by corruption would put RESPONDENT in breach of its national law [*AN, p. 27, para. 2*]. Namely, Art. 15 of Equatoriana's Anti-Corruption Act (**ACA**) forbids the performance of a contract tainted by corruption [*ibid.*]. However, even if complying with the award required the breach of Equatorianian law, the future award would not violate international public policy [**a.**] In any case, state courts are barred from reviewing the Tribunal's substantive conclusions [**b.**].

a. The award would not violate international public policy

75. International arbitral awards generally cannot be challenged on the ground that the party's compliance with them would breach national law [*Sun Case, para. 31; Wolff, p. 450*]. Any other result would enable countries to arbitrarily frustrate international enforcement of awards [*Born, p. 4002; van den Berg, pp. 363 et seqq.*]. To prevent this, the NYC's drafters narrowed the scope of the public policy exception as far as possible [*UNCICA 17, p. 3*]. Hence, breaches of national law only give rise to public policy concerns in extraordinary cases [*Adviso Case, p. 614; Parsons Case, p. 548*; *Born, p. 4015*]. While this may hold true for criminal law [*Born, p. 4028; Wolff, p. 455*], scholars and case law alike recognise that national prohibitions against commercial corruption do not fall into the scope of the public policy exception [*Schneider Case, para. 4; Westacre Case, p. 773; Delanoy, p. 585*].

76. In the present case, the Tribunal's award would at most require RESPONDENT to contravene Art. 15 ACA. Rather than imposing criminal sanctions, this provision solely prohibits to *"directly or indirectly perform a contract"* [*AN, p. 27, para. 2*]. Thus, Art. 15 ACA constitutes a provision on commercial corruption. As such, any breach of this provision would not amount to a violation of public policy. Rather, in similar situations, courts across jurisdictions have upheld awards requiring parties to contravene national private law [*Heat Case, p. 321; Seoul High Ct., 1995; Sun Case, para. 31*].

b. Alternatively, courts are barred from reviewing the Tribunal's substantive conclusions

77. Even if the Tribunal's award was to breach public policy, the award would still neither be set aside nor rendered unenforceable. This is because state courts are prohibited from reviewing the merits of a tribunal's decision [*Renusagar Case, p. 691; Westacre Case, p. 771; Born, p. 4069; Moses, p. 231*].

78. In a recent case, the Privy Council confirmed that this principle also bars state courts from reviewing a tribunal's findings on corruption [*Betamax Case 2021*]. In this case, a SOE had invoked corruption in a setting-aside procedure before the Supreme Court of Mauritius [*ibid.*]. The latter set aside the award as it disagreed with the tribunal's findings on corruption [*Betamax Case 2019*]. However, the Privy Council upheld the principle of finality by ruling that the Supreme Court was barred from re-examining the tribunal's findings on the merits [*Betamax Case 2021, p. 1273*].

79. The same rationale applies in the case at hand. The Tribunal is required to review the merits of RESPONDENT's corruption allegations to render an award on the validity of the PSA [*AN, p. 30, para. 20*]. Consequently, state courts cannot invalidate the Tribunal's award on the ground of a public policy violation as this would require the Tribunal's substantive findings to be reviewed.

80. In result, neither the party's right to be heard nor public policy will be violated. Thus, irrespective of a stay of proceedings, the Tribunal's award will neither be set aside nor rendered unenforceable.

B. The arbitral proceedings should not be bifurcated

81. In case the Tribunal denies staying the proceedings, RESPONDENT alternatively submits that the arbitration should be bifurcated [*AN, p. 31, para. 25*]. This would lead to the proceedings being separated into two stages [*PO2, p. 50, para. 52*]. Those stages would deal with two subject matters at separate points in time [*ibid.*]. The first stage of such bifurcated proceedings would solely focus on issues that do not *"extend to the question of the invalidity of the contract due to corruption"* [*ibid.*]. Conversely, the second stage of proceedings would concern all matters related to the corruption allegations raised by RESPONDENT [*ibid.*]. This second stage of proceedings could only be commenced after the Special Chamber had announced its verdict [*AN, p. 31, para. 25*].

82. In light of a tribunal's efficiency obligation under Art. 17(1) PCA Rules, there exists *"a presumption against bifurcating the proceedings"* [*Greenwood, p. 425*]. This presumption can only be rebutted if a party requesting to bifurcate demonstrates that its request meets the criteria of the three-fold test [*Glencore Case, para. 39; Philip Morris Case para. 109; Daly et al., paras. 5.67, 5.71*].

83. This test has been widely adopted and considers three factors [*ibid.*]: First, a tribunal should consider whether the submission underlying the bifurcation request is *prima facie* invalid. Second, a tribunal should consider whether the stages of the proceedings are so closely linked that bifurcating is impractical. Third, a tribunal should consider whether bifurcation would be inefficient.

84. In the present case, RESPONDENT's request for bifurcation fails to meet any criterion of this test. First, RESPONDENT's allegations of corruption are *prima facie* insubstantial [**I.**]. Second, bifurcating this dispute would be impractical since the issues are too closely intertwined [**II.**]. Third, in light of this, bifurcating the proceedings would be inefficient [**III.**].

I. RESPONDENT's corruption allegations are *prima facie* insubstantial

85. Under the first step of the three-fold test, proceedings should only be bifurcated if the request is based on an argument which is *prima facie* substantial [*Daly et al., para. 5.67*]. This is the case if it is *"backed by extensive legal authorities and factual exhibits"* [*Glencore Case, para. 35*]. The corruption allegations underlying RESPONDENT's bifurcation request, however, fail to meet this standard.

86. In fact, there is no evidence that the PSA's conclusion was corruption-induced. In particular, internal investigations *"have not found any indication that"* CLAIMANT's employees granted benefits to government officials [*Ex. C3, pp. 13, 14, paras. 7, 11*]. Thus, there is no sign that any of CLAIMANT's employees did not comply with its company policy which sets forth *"clear ethical rules"* [*ibid.*].

87. RESPONDENT itself admits that *"there is no proof yet as to the payment of any bribes in relation to [the PSA]"* [*Ex. C8, p. 20*]. Rather, there only exists evidence of corruption with respect to two other contracts signed by Mr Field [*AN, p. 29, para. 16*]. Those contracts were not concluded with CLAIMANT but with Equatorianian companies owned by Mr Field's cousin [*Ex. R2, p. 33; PO2, p. 49, para. 45*].

These companies *"were obviously not able to provide the agreed services and have in the meantime filed for insolvency"* [*Ex. R2, p. 33*].

88. By contrast, CLAIMANT is an established drone producer operating since 2000 [*PO2, p. 44, para. 1*]. Thus, the facts underlying the allegations pertaining to these other contracts differ significantly from the circumstances of the present case. Hence, they are unrelated to the conclusion of the PSA. In conclusion, as no evidence of corruption pertaining to the PSA has been provided, RESPONDENT's submission fails to meet the *prima facie* test.

II. Bifurcating is impractical as the relevant issues are too closely intertwined

89. Under the second step of the three-fold test, a tribunal should not bifurcate if doing so would lead to two procedural stages addressing inextricably linked subject matters [*Glencore Case, para. 36; Paulsson/Petrochilos, p. 202*]. In such cases, bifurcating is impractical [*ibid.*]. Accordingly, proceedings should not be bifurcated if there is either a close link between the facts or the legal questions underlying the subject matters of the procedural stages [*PCA Case 2016-21 PO1, para. 47; Glamis Gold Case, para. 25; Sabahi et al., pp. 167 et seq.*]. In both respects, the subject matters of the present proceedings RESPONDENT seeks to bifurcate into two procedural stages are closely intertwined.

90. First, the two procedural stages would overlap regarding their underlying facts. According to RESPONDENT, the second procedural stage should only deal with the PSA's invalidity due to corruption [*PO2, p. 50, para. 52*]. RESPONDENT expects all other issues to be conclusively resolved at the first stage [*ibid.*]. However, this disregards that RESPONDENT's corruption allegations need to be reviewed at both stages. Specifically, for the Tribunal to establish its jurisdiction at the first procedural stage, it would have to rule on the Arbitration Agreement's validity. This Agreement is also subject to RESPONDENT's corruption allegations as it was also negotiated by Mr Field [*AN, pp. 28 et seqq., paras. 9, 16, 20*]. In case of bifurcation, evidence relating to the negotiations in general and Mr Field's conduct in particular would thus have to be considered at both procedural stages.

91. Second, the stages are also legally closely intertwined. This is because the findings of the second procedural stage are decisive for the Tribunal's conclusions at the first procedural stage. At this first stage, the Tribunal has to decide on whether RESPONDENT terminated the PSA [*infra paras. 129 et seqq.*]. More specifically, the Tribunal has to consider whether RESPONDENT is correct that CLAIMANT's alleged misrepresentation was causal for the conclusion of the PSA [*infra paras. 154 et seqq.*]. However, no such causality can established if instead Mr Field's alleged corruption was causal for the PSA's conclusion [*AN, p. 29, para. 16*]. Therefore, the second procedural stage is decisive for the legal reasoning at the first stage. In conclusion, the two procedural stages are both factually and legally too closely intertwined to be bifurcated.

III. Bifurcating the proceedings would be inefficient

92. In the light of the political criticism directed at RESPONDENT's *"slow and expensive means of dispute resolution wasting taxpayers' money"* [*AN, p. 7, para. 16*], RESPONDENT's request for bifurcation is highly surprising. Bifurcation carries a *"high risk of procedural inefficiency"* as it leads to a longer overall duration of proceedings [*Daly et al., para. 5.72*]. Thus, under the third step of the three-fold test, a tribunal should only bifurcate if it is likely that the results of the first procedural stage render the second stage unnecessary [*Philip Morris Case, para. 106*; *Greenwood, p. 425*].

93. In the present case, however, irrespective of the conclusion reached at the first stage, the second stage would still remain necessary. This is because the first stage would not come to a conclusion on the PSA's validity. Rather, this first stage would be limited to two issues: the Tribunal's jurisdiction which derives from a valid Arbitration Agreement [*supra paras. 1 et seqq.*] as well as the law applicable to the PSA and its termination [*PO2, pp. 49 et seq., para. 52*]. However, any such decision on the applicable law would not lead to a conclusive determination of the present case. Hence, the Tribunal would have to proceed to the second stage in any case. As a result, bifurcating would merely unnecessarily prolong the proceedings.

94. In light of this, RESPONDENT's bifurcation request fails to meet any criterion of the three-fold test.

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95. To summarise, RESPONDENT has failed to submit sufficient grounds to do stay or bifurcate: its corruption allegations are unsubstantiated and the findings of the Special Chamber are irrelevant for the present arbitration. Thus, a stay or bifurcation would only unduly prolong the proceedings to CLAIMANT's detriment. In conclusion, the Tribunal should neither stay nor bifurcate its proceedings.

ISSUE 3: THE PURCHASE AND SUPPLY AGREEMENT IS GOVERNED BY THE CISG

96. To evade its responsibilities under the applicable CISG in favour of its own national law, RESPONDENT denies that the CISG governs the PSA [*AN, p. 31, para. 26*]. However, all requirements for the applicability of the CISG are met. It is undisputed that the Parties are seated in different contracting states and that the Kestrel Drones sold under the PSA are goods in the sense of the CISG [*Art. 1(1)(a) CISG; NA, p. 4, para. 1; PO1, p. 43, para. 3*]. Thus, as the criteria of Art. 1(1)(a) CISG are met, the CISG in principle governs the sale of goods under the PSA [*Drescher et al., Art. 1, para. 57; Kröll/Mistelis/Perales Viscasillas, Art. 2, para. 1*]. It is on the party contesting this applicability of the CISG to demonstrate otherwise [*Huber/Mullis, p. 45*].

97. In the case at hand, however, RESPONDENT has failed to do so: first, the goods under the PSA are not excluded from the CISG's scope under Art. 2(e) CISG [**A.**]. Second, the CISG is not excluded

under Art. 3(2) CISG as the PSA is preponderantly a sales contract [**B.**]. Third, the Parties did not exclude the application of the CISG under Art. 6 CISG [**C.**].

A. The CISG is not excluded under Art. 2(e) CISG

98. Pursuant to Art. 2(e) CISG, the CISG *"does not apply to sales of ships, vessels, hovercraft or aircraft"* (*emphasis added*). According to RESPONDENT, the Kestrel Drones constitute aircraft in the sense of this provision [*AN, p. 31, para. 26*]. This submission hinges on the assumption that the term aircraft of the CISG can be interpreted in line with RESPONDENT's own national Aviation Safety Act (**ASA**). However, this is misconceived as, under the decisive autonomous interpretation of the CISG, *"drones should not be considered aircraft at all"* [*Schlechtriem/Schwenzer, Art. 2, para. 33*].

99. This follows from, Art. 7(1) CISG. Pursuant to this provision, it is one of the most basic principles that the CISG has to be interpreted independently from any domestic standards [*Ball, Art. 7, para. 7; Kröll/Mistelis/Perales Viscasillas, Art. 7, para. 18; Schlechtriem/Schwenzer, Art. 7, para. 9*]. Under such an autonomous interpretation of the CISG, any exception to its scope has to be construed narrowly [*AC Opinion 4, paras. 1.2, 4.4*]. Any other result would contradict the pro-convention principle of applying the CISG as broadly as possible [*Kröll/Mistelis/Perales Viscasillas, Art. 7, para. 65*].

100. This principle must also be considered when interpreting the term aircraft under Art. 2(e) CISG [*Brauner, p. 248; Ferrari et al., Art. 2, para. 11*]. Without such a narrow interpretation, even products clearly not intended to be excluded from the CISG's scope, such as paper planes or kites, would fall under the exception of Art. 2(e) CISG [*Drescher et al., Art. 2, para. 32*].

101. To avoid such absurd results, three criteria for the narrow definition of the term aircraft have been discussed: the vehicle's size, the existence of national registration requirements and whether the vehicle's purpose is to permanently carry goods and persons in the air [*Säcker et al., Art. 2, para. 23; Schlechtriem/Schwenzer, Art. 2, paras. 1, 28 et seqq.*].

102. However, both the size and registration criteria were discussed by the CISG's drafting commission, but intentionally not included in Art. 2(e) CISG [*UN YB VI, p. 51, para. 28*]. This is because both criteria increase legal uncertainty: while the size criterion fails to provide any concrete threshold, the registration requirement provides a backdoor for fragmented national legislation [*Flechtner/ Honnold, p. 67; Kröll/Mistelis/Perales Viscasillas, Art. 2, para. 44*]. Using these criteria to define the term aircraft would be impractical and lead to arbitrary results [*Säcker et al., Art. 2, para. 22*].

103. Instead, there is only one criterion suited to ensure a uniform application of the CISG as required by Art. 7(1) CISG, namely the purpose [*Schlechtriem/Schwenzer, Art. 2, para. 31*]. Under this decisive criterion, the Kestrel Drones do not qualify as aircraft in the sense of Art. 2(e) CISG [**I.**]. Even if the Tribunal were to consider a registration criterion [**II.**] or a size criterion [**III.**], the Kestrel Drones still do not constitute aircraft within the sense of Art. 2(e) CISG.

I. Under the decisive purpose criterion, the Kestrel Drones do not qualify as aircraft

104. Airborne vehicles are only considered aircraft if they serve transportation purposes [*Hau/Poseck, Art. 2 CISG, para. 11; Schlechtriem/Schwenzer, Art. 2, paras. 31, 33*]. To determine whether an aircraft serves transportation purposes, only its objective function should be considered [*CISG Case 1588*; *Säcker et al., Art. 2, para. 22*]. The Kestrel Drones solely serve surveillance purposes [*PO2, pp. 44 et seq., para. 9*]. Thus, when considering their objective function, the Kestrel Drones do not constitute aircraft in the sense of Art. 2(e) CISG [**1.**]. Even if the Tribunal were to apply a subjective test, the Parties still intended to use the Kestrel Drone for a purpose different to aircraft [**2.**].

1. The Kestrel Drones' objective purpose differs from the one of aircraft

105. An airborne vehicle qualifies as aircraft from an objective point of view if it primarily serves to transport goods and humans [*Säcker et al., Art. 2, paras. 22 et seq.*]. The Kestrel Drone, however, is *"clearly engineered towards the use for surveillance purposes"* [*PO2, pp. 44 et seq., para. 9*]. Specifically, the shape and location of the payload bays as well as the high flight stability guarantee the Kestrel Drones' suitability for surveillance missions [*ibid.*]. Moreover, once the surveillance equipment is installed, the Kestrel Drone is unable to carry any substantial payload [*ibid.*]. A removal of this surveillance equipment for delivery usage *"makes commercially little sense"* as the small payload bays of the Kestrel Drones render cargo delivery over shorter distances inefficient [*ibid.*]. This is demonstrated by the fact that the Kestrel Drone has barely ever been used for any other purpose than surveillance [*ibid.*]. Thus, the Kestrel Drone is objectively unsuited for transportation purposes.

2. The Kestrel Drones' subjective purpose differs from the one of aircraft

106. Contrary to what RESPONDENT might argue, even from a subjective perspective, the Kestrel Drones still does not qualify as aircraft. When interpreting the intention of a party, Art. 8 CISG is decisive [*Huber/Mullis, p. 12; Schlechtriem/Schwenzer, Art. 8, para. 1*]. According to Art. 8(3) CISG, *"due consideration is to be given to all relevant circumstances of the case including the negotiations […] and any subsequent conduct of the parties"*. Following this, three considerations demonstrate that it was never Parties' intention for the Kestrel Drones to be used for transportation purposes.

107. First, the PSA did not specify that the Kestrel Drones were intended to transport goods or persons. By contrast, the preamble of the PSA even explicitly refers to the Kestrel Drones' purpose as being *"the collection of geological and geophysical data"* [*Ex. C2, p. 10*]. Moreover, the PSA requires the Drones to be equipped with *"geological surveillance feature[s]"* [*id., Art. 2(a)*]. Thus, the PSA shows that the intended use of the Kestrel Drone is not transportation but surveillance.

108. Second, contrary to what RESPONDENT might argue, this purpose is not altered by the statement of CLAIMANT's former COO that the Kestrel Drones may be *"suitable for other purposes"* [*Ex. R4, p. 35*]. This is because the Parties agreed on a merger clause precisely to exclude such pre-contractual statements from influencing the PSA's interpretation [*Ex. C2, p. 12, Art. 21*]. This

merger clause stipulates that *"[t]his document contains the entire agreement between the Parties"* [*ibid.*]. Accordingly, by including this clause, the Parties agreed to exclude any statements outside of the agreed Contract [*see Müller, p. 185; Schlechtriem/Schwenzer, Art. 8, para. 36*].

109. Third, the mutually agreed purpose is similarly unaffected by the post-contractual statement of RESPONDENT's chairman that the Kestrel Drones may be used to transport *"spare parts or medicine"* [*Ex. R2, p. 33*]. While Art. 8(3) CISG does reference the subsequent conduct of the parties, this does not allow a party to unilaterally alter the parties' agreement after its conclusion [*CISG Case 767, para. 11; Huber/Mullis, p. 14*]. Rather, Art. 8(3) CISG merely expresses that subsequent conduct may be considered to interpret the original intention at the time of contract conclusion [*CISG Case 2521, para. 30; Kröll/Mistelis/Perales Viscasillas, Art. 8, para. 32*].

110. Thus, as neither the pre- nor post-contractual statements alter the PSA's initial meaning, the Parties intended for the Kestrel Drones to be used for purposes other than transportation. Hence, both under the objective and subjective purpose test, the Drones fall outside Art. 2(e) CISG's scope.

II. Even if a registration criterion was applied, the Kestrel Drones do not qualify as aircraft

111. RESPONDENT purports that *"[u]nder Equatorianian law, the drones have to be registered as air vehicles, which justifies considering them as 'aircrafts' in the sense of Art. 2(e) CISG"* [*AN, p. 31, para. 26*]. However, even if the Tribunal were to apply a registration criterion, the Kestrel Drone would still not fall under Art. 2(e) CISG. As the CISG's drafters expressed, any attempt to apply a registration requirement under Art. 2(e) CISG must be sourced from international practices [*UN YB VI, p. 90, para. 26; Schlechtriem/Schwenzer, Art. 7, para. 5*]. However, under international standards, there exists no registration requirement for the Kestrel Drones [**1.**]. Even if the Tribunal were to consider national Equatorianian standards, the Kestrel Drones would still not have to be registered [**2.**].

1. The Kestrel Drones do not fall under international registration requirements

112. The registration criterion must respect the principle of the CISG's uniform interpretation [*Ball, Art. 7, para. 8; Huber/Mullis, p. 7*]. To prevent fragmentation, a registration requirement rendering a vehicle an aircraft in the sense of Art. 2(e) CISG only exists if the vehicle *"in normal cause, would become subject to national legislation"* [*UN YB VI, p. 90, para. 26*]. However, the Kestrel Drones have not been subject to a registration requirement in any jurisdiction where they have been sold [*Ex. R1, p. 32, para. 7*]. In one half of these jurisdictions, there exists no registration requirement for the Kestrel Drones at all [*PO2, p. 46, para. 20*]. In the other half of jurisdictions, only Kestrel Drones sold to private entities must be registered, but not those sold to public entities like RESPONDENT [*ibid.*]. Thus, as the Kestrel Drones, in normal course, are not subjected to any national registration requirements, they do not qualify as aircraft.

2. The Kestrel Drones do not fall under an Equatorianian registration requirement

113. Even if the Tribunal were to consider national standards, RESPONDENT's assertion that the Kestrel Drones are subject to a registration requirement is still misconceived. While drones generally have to be registered under the Equatorianian Art. 10 ASA, this only applies to drones *"owned or operated by a private entity"* [*Ex. R5, p. 36, Art. 10*]. RESPONDENT, by contrast, is a fully state-owned company founded by the Equatorianian government [*PO2, p. 44, para. 5*]. RESPONDENT's supervisory board is solely composed of public officials, rendering RESPONDENT dependent on government representatives to operate [*ibid.*]. Thus, as RESPONDENT is not a *"private entity"*, RESPONDENT's own witness admits that *"no [registration] requirement existed in the present case"* [*Ex. R1, p. 32, para. 7*].

114. In conclusion, as the Kestrel Drones are not subject to registration requirements in the international or national sphere, they do not qualify as aircraft in the sense of Art. 2(e) CISG.

III. Even if a size criterion were to be applied, the Kestrel Drones do not qualify as aircraft

115. Even if the Tribunal were to apply a size criterion, Art. 2(e) CISG is still inapplicable as the Kestrel Drones are too small to qualify as aircraft. To avoid impractical results, it has been held that ultra-light aircraft do not fall under this provision [*Flechtner/Honnold, p. 68; Piltz, para. 2.53*]. Such ultra-light aircraft measure around seven meters, whereas an averagely sized transport aircraft is ten times bigger [*Aerospace Technology*]. Compared to this, the Kestrel Drone with its height of 2.35 meters and its length of 6.3 meters is too small to meet the size threshold of aircraft [*Ex. C4, p. 15*].

116. In conclusion, as the Kestrel Drones meet none of the three criteria which the Tribunal may deem relevant under Art. 2(e) CISG, their sale is not excluded pursuant to this provision.

B. The CISG is not excluded under Art. 3(2) CISG

117. RESPONDENT might point to the maintenance obligations set forth in the PSA to exclude the applicability of the CISG under Art. 3(2) CISG. According to this provision, the CISG *"does not apply to contracts in which the preponderant part of the obligations […] consists in the supply of labour or other services"*. Conversely, the CISG applies if service and sale obligations are included in one uniform contract whose preponderant part is the sale [*Roofing Materials Case, para. 1.2.1; Saltwater Case, para. III.1.c.*]. The PSA is such a uniform contract providing for a service obligation [*Ex. C2, p. 11, Art. 2(e)-(f)*].

118. However, the PSA's central obligations are the delivery of and the payment for the Kestrel Drones [*id., Arts. 2 et seq.*]. This follows from the fact that the preponderant part under Art. 3(2) CISG is determined by assessing the most valuable part of the contract [*CISG Case 1156, para. 24; CISG Case 2013, para. 5.2.1; Huber/Mullis, p. 46; Schlechtriem/Schwenzer, Art. 3 para. 18*].

119. Based on such an economic analysis, the sale constitutes the preponderant part of the PSA [**I.**]. Even if the Tribunal were to supplement this economic analysis with an evaluation of the Parties' intentions, the sale would still constitute the preponderant part of the PSA [**II.**].

I. Economically, the sale is the Purchase and Supply Agreement's preponderant part

120. It is decisive to compare the economic value of the sale obligations to that of the service obligations [*CISG Case 1156, para. 24; AC Opinion 4, para. 3.3*]. The sale makes up the preponderant part of the contract if its economic value equals or exceeds 50% of the overall contract price [*CISG Case 1780, p. 7; CISG Case 2026, para. 72; Huber/Mullis, p. 46; Kröll/Mistelis/Perales Viscasillas, Art. 3, para. 18*].

121. In the case at hand, the economic value of the sale amounts to EUR 44 Mio [*Ex. C2, p. 11, Art. 3(1)(a)*]. This value consists of the purchase price for the four equipped Kestrel Drones and the purchase price for the two unequipped Kestrel Drones [*ibid.*]. By contrast, the economic value of the maintenance obligation is a mere EUR 17.44 Mio This sum consists of the basic and additional service fees agreed upon in the PSA [*id., Art. 3(1)(b)-(c); PO2, p. 47, para. 27*]. Thus, while the service component amounts to a mere 28% of the overall Contract volume, the sales make up 72% of the latter. This difference in economic value is demonstrated in the chart below.

Total Contract Value: EUR 61.44 Mio

122. As shown by this chart, the economic value of the sale exceeds that of the services by far. As such, the sale constitutes the preponderant part of the PSA.

II. Subjectively, the sale is the Purchase and Supply Agreement's preponderant part

123. Even if the Tribunal were to supplement the economic analysis with an analysis of the Parties' intentions, the sale still constitutes the preponderant part of the PSA. To determine the parties' intentions, the essential aim of the contract as well as its wording and structure may be considered [*CISG Case 585, para. 17; Cylinder Case, p. 5; Säcker et al., Art. 3, para. 14*]. In the present case, all these criteria demonstrate that the Parties intended for the sale to be preponderant.

124. First, the PSA's essential aim is the delivery and acquisition of the Kestrel Drones. As demonstrated by its Call for Tender, RESPONDENT's primary interest was to acquire the equipment needed to fulfil its governmental obligations of collecting data [*Ex. C1, p. 9*]. In fact, before the PSA was

concluded, RESPONDENT was unable to perform this task because *"it lacked the necessary technical equipment"* to do so [*AN, pp. 27 et seq., para. 4*]. The importance of the drones' acquisition is further evidenced by RESPONDENT's supervisory board allocating more than four fifths of the overall project budget to this acquisition [*PO2, p. 44, para. 7*]. In light of these facts, the essential aim of the PSA was the delivery and acquisition of the Kestrel Drones. By contrast, the service element only serves to maintain the Kestrel Drones [*Ex. C2, p. 11, Art. 2(e)*]. Thus, the maintenance is a mere ancillary obligation that would serve no purpose if not for the delivery of the Kestrel Drones.

125. Second, the PSA's wording and structure similarly demonstrates the Parties' intention for the sale to be the preponderant part. In particular, the title characterises the Contract as a *"Purchase and Supply Agreement"* and the Parties as *"Seller"* and *"Buyer"* [*Ex. C2, p. 10*]. In fact, the entire structure of the PSA is akin to a typical sales contract. Specifically, the predominant part of CLAIMANT's obligations consists in the supply of goods [*id., Art. 2(a)-(d)*] whereas it is RESPONDENT's central obligation to pay the agreed purchase price [*id., p. 11, Art. 3(1)*]. By contrast, the service obligations are merely annexed in Art. 2(e)-(f) PSA [*id., Art. 2*].

126. It follows from both the economic analysis as well as the Parties' intention that the PSA's preponderant part is the sale. Consequently, the CSIG is not excluded under Art. 3(2) CISG.

C. The CISG is not excluded under Art. 6 CISG

127. In Art. 20(d) PSA, the Parties stipulated that *"[t]he agreement is governed by the law of Equatoriana"* [*Ex. C2, p. 12, Art. 20(d)*]. Contrary to what RESPONDENT might contend, choosing the law of a CISG's contracting state, such as Equatoriana [*PO1, p. 43, III.3*], does not exclude the CISG. While Art. 6 CISG allows parties to exclude the CISG's application, they have to express clear and unmistakable intent to do so [*Hau/Poseck, Art. 6, para. 4; Schlechtriem/Schwenzer, Art. 6, paras. 18*]. However, when selecting the law of a contracting state, the parties decide on a legal regime that has incorporated the CISG as a part of the respective state's law [*CISG Case 2793, para. 18; Drescher et al., Art. 6, para. 7*]. Accordingly, scholars and case law recognise that choosing the law of a CISG's contracting state constitutes no clear and unmistakable exclusion of the CISG [*Broilers Case, para. 19; ICC Case 9187 p. 1, pp. 93 et seq.; AC Opinion 16, para. 4.2; Kröll/Mistelis/Peralis Viscasillas, Art. 6, para. 18*]. By selecting Equatorianian law, the Parties therefore did not exclude the CISG, but rather chose the CISG to govern the PSA.

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128. To summarise, RESPONDENT has failed to prove that the CISG does not apply. Rather, the CISG is neither excluded by virtue of Art. 2(e) CISG, Art. 3(2) CISG nor Art. 6 CISG. In conclusion, to uphold the Parties' choice of law, the Tribunal should find that the CISG governs the PSA.

ISSUE 4: RESPONDENT CANNOT RELY ON ART. 3.2.5 OF THE INTERNATIONAL COMMERCIAL CONTRACT ACT OF EQUATORIANA TO AVOID THE CONTRACT

129. On 1 December 2020 the Parties mutually agreed to a long-term cooperation under the PSA [*Ex. C2, pp. 10 et seqq.*]. However, after a change of government in Equatoriana, RESPONDENT scrutinised all its contracts for options to *"terminate or at least renegotiate them to make them more favorable for Equatoriana"* [*Ex. C3, p. 13, para. 5*]. As RESPONDENT no longer had any use for the Kestrel Drones, RESPONDENT attempted to avoid the PSA [*ibid.; Ex. C8, p. 20*]. To this end, RESPONDENT raised allegations of *"serious misrepresentation"*, all of which are solely based on the fact that CLAIMANT released a new drone model, the Hawk Drone, after the PSA's conclusion [*Ex. C8, p. 20*].

130. These allegations came as a surprise to CLAIMANT as they had already been *"solved in May 2021"* [*Ex. C3, p. 13, para. 4*]. Even at that time, CLAIMANT explained that the Hawk Drone neither suited RESPONDENT's needs nor had been on the market at the time of the PSA's conclusion [*id., p. 14, para. 9*]. Thereafter, RESPONDENT did not press the issue any further and transferred the required advance payment of EUR 10 Mio to CLAIMANT [*PO2, p. 47, para. 30*].

131. Despite this, RESPONDENT now suddenly claims that it avoided the PSA under Art. 3.2.5 (Fraud) of the International Commercial Contract Act of Equatoriana (**ICCA**) [*AN, p. 30, para. 18*], which is a verbatim adoption of the UNIDROIT principles [*PO1, p. 43, para. 3*]. However, RESPONDENT cannot rely on its national law. This is because the CISG supersedes any national provisions [**A.**]. Should the Tribunal find otherwise, the Parties excluded national avoidance regimes by virtue of their party autonomy [**B.**].

A. RESPONDENT's national fraud provision is excluded under the CISG

132. As the CISG governs the PSA [*supra paras. 96 et seqq.*], the former supersedes any national law that would otherwise apply [*Kröll/Mistelis/Perales Viscasillas, Introduction, para. 12*]. Despite this, RESPONDENT attempts to rely on its national fraud provision, Art. 3.2.5 ICCA, to avoid the PSA [*AN, p. 31, para. 28*]. This submission hinges on the fact that this provision is applicable *"pursuant to the idea underlying Art. 4 CISG"* [*ibid.*]. Under Art. 4 CISG, certain subject matters are too highly influenced by values of national legislation to be regulated by international sales law [*Kröll/Mistelis/Perales Viscasillas, Art. 4, para. 12*]. However, Art. 4 CISG must be interpreted restrictively: the exception only applies to matters not *"expressly provided"* in the CISG [*ibid.*].

133. RESPONDENT relies on this provision to argue that fraudulent misrepresentation is a matter excluded from the CISG's scope. This is misconceived. Art. 4 CISG is inapplicable because there was no fraudulent misrepresentation. [**I.**]. Should the Tribunal find otherwise, RESPONDENT's national fraud provision is still superseded by the legal regime expressly provided in the CISG [**II.**].

I. There was no fraudulent misrepresentation

134. RESPONDENT could only invoke Art. 4 CISG if fraudulent misrepresentation could be established in the case at hand. RESPONDENT purport that CLAIMANT's conduct qualifies as such fraudulent misrepresentation in the sense of Art. 3.2.5 ICCA [*AN, p. 31, para. 27*]. This provision stipulates states that *"a party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation […] or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have been disclosed."*

135. However, in the case at hand, none of the requirements of Art. 3.2.5 ICCA are met: First, CLAIMANT accurately represented the features of the Kestrel Drones [**1.**]. Second, CLAIMANT complied with all disclosure obligations [**2.**]. Third, even if the qualities of the Kestrel Drones were not represented accurately, this would not have been causal for the conclusion of the PSA [**3.**]. Fourth, CLAIMANT had no fraudulent intention to mislead RESPONDENT [**4.**].

1. CLAIMANT accurately represented the features of the Kestrel Drones

136. Art. 3.2.5 ICCA only applies if there was a false representation of the facts [*Official Comment, p. 107*]. RESPONDENT alleges that CLAIMANT falsely represented facts during the contractual negotiations by describing the Kestrel Drone as its *"newest model"* and *"state-of-the-art technology, as required by the tender documents"* [*Ex. C9, p. 20; AN, p. 31, para. 27*]. However, contrary to this assertion, CLAIMANT portrayed the Kestrel Drones accurately by describing them as its *"newest model"* and *"state-of-the-art"*.

137. As the Parties never commonly defined these terms, they must be interpreted in accordance with the understanding of *"a reasonable person of the same kind"* [*Art. 4.2(2) ICCA*]. This standard is to be applied in the light of the factors set out in Art. 4.3 ICCA. Thereunder, it is decisive what *"meaning [is] commonly given to these terms and expressions in the trade concerned"* [*Art. 4(3)(e) ICCA*].

138. First, at the time of contract conclusion, the Kestrel Drone constituted CLAIMANT's only and *"newest model"* [*Ex. C3, p. 14, para. 9; Ex. R4, p. 35; PO2, p. 45, para. 15*]. This is because the development of the Hawk Drone had not yet been finalised when the Parties concluded their PSA [*Ex. C3, p. 14, para. 9*]. In fact, the Hawk Drone was still two years from being fit to be sold [*PO2, p. 45, para. 14*]. Thus, the Kestrel Drone was CLAIMANT's *"newest model"* at the time of contracting.

139. Second, CLAIMANT was correct in stating that the Kestrel Drone was *"state-of-the-art"*. A reasonable person would understand the term *"state-of-the-art"* to be in accordance with the *"the meaning commonly given"* to it [*Art. 4(3)(e) ICCA*]. Consequently, *"state-of-the-art"* is to be understood as *"relating to the latest and most sophisticated stage of technological development; having or using the latest techniques or equipment"* [*Oxford Dictionary*]. At the time of contracting, the Kestrel Drone was CLAIMANT's top-model suitable *"for state-of-the-art data collection"* [*Ex. R4, p. 35*]. CLAIMANT ensured that the Drone received several software updates since its release [*PO2, p. 45, para. 13*]. For instance, the Kestrel Drone's

flight stability was upgraded to an *"excellent"* level in 2018 [*ibid.*]. In light of this, the Kestrel Drone was CLAIMANT's *"newest model"* and *"state-of-the-art"* at the time of contracting.

2. CLAIMANT complied with all disclosure obligations

140. RESPONDENT asserts that CLAIMANT had to disclose the upcoming launch of its new drone [*AN, p. 29, para. 17*]. However, under Art. 3.2.5 ICCA, a party is only obliged to disclose information *"according to reasonable commercial standards of fair dealing"*. In the present case, CLAIMANT disclosed all information it was obliged to disclose under this provision. Already in 2017, CLAIMANT publicly announced that it was working on the development of a new drone model [*PO2, p. 45, para. 15*].

141. By contrast, under reasonable commercial standards of fair dealing, CLAIMANT was under no obligation to disclose any further information. Due to the information's confidential nature, CLAIMANT had a particular interest in non-disclosure [**a.**]. Furthermore, the information was of no apparent importance to RESPONDENT [**b.**]. Contrary to RESPONDENT's submission, the scope of CLAIMANT's disclosure obligations is also not altered by domestic case law [**c.**].

a. CLAIMANT was under no disclosure obligation as the information was confidential

142. CLAIMANT was not obliged to disclose the upcoming launch of the Hawk Drone in February 2021 under reasonable commercial standards of fair dealing. This is because the scope of disclosure obligations depends on the nature of the information [*Brödermann, Art. 3.2.5, p. 88*]. Where the information in question is of confidential nature, a disclosure obligation would force a party to harm itself and its business [*Cooker Case, para. 18*]. Therefore, it is standard business practice that information about the release date and characteristics of a new product are kept strictly secret until its release [*ibid.*]. This holds especially true if there is no *"special relationship of trust and confidentiality"* due to former contractual relations between the parties [*Vogenauer, Art. 3.2.5, p. 88*].

143. Following this, CLAIMANT could not be expected to disclose confidential information about the release of the Hawk Drone. At the time of the PSA's conclusion, the new Hawk Drone was still only in the test flight phase [*PO2, p. 45, para. 14*]. Furthermore, CLAIMANT had not even *"applied for any patents concerning the technology used in the Hawk Eye"* [*id., para. 15*]. In fact, the patents were only granted two and a half years later [*ibid.*]. Moreover, as there has been no former contractual relationship between the Parties [*PO2, p. 44, para. 2*], CLAIMANT could not rely on a special relation of trust and confidentiality. In light of these facts, a disclosure of the upcoming Hawk Drone could have forced CLAIMANT to harm itself and its business as all information on was highly confidential.

b. CLAIMANT was under no disclosure obligation as the information was of no apparent importance to RESPONDENT

144. Under reasonable commercial standards of fair dealing, a disclosure obligation can only exist if the information was of apparent importance to the other party [*Brödermann, p. 88*]. In the present case, however, the upcoming release of the Hawk Drone was of no such importance to RESPONDENT.

145. In its Call for Tender, RESPONDENT laid down a list of minimum requirements that the drones would have to meet to fulfil RESPONDENT's intended purpose [*Ex. C1, p. 9*]. As shown below, the Kestrel Drone succeeds in meeting all these requirements [*ibid.; Ex. C4, p. 15; PO2, p. 45, para. 12*].

	Service Ceiling	Communication Link	Endurance	Payload
Call for Tender	5 km	Radio	10 h	180 kg
Kestrel Drone	6 km	Radio	13 h	245 kg

146. Not only does the Kestrel Drone meet all of RESPONDENT's requirements, the Drone is also *"clearly engineered towards the use for surveillance purposes"* and thus suits RESPONDENT's purposes entirely [*PO2, p. 45, paras. 9, 12*]. Against this background, the information on the upcoming release of the Hawk Drone in 2021 was of no apparent importance to RESPONDENT. Thus, CLAIMANT disclosed all relevant information under reasonable commercial standards of fair dealing.

c. CLAIMANT's obligations were not extended by domestic case law

147. RESPONDENT asserts that CLAIMANT's disclosure obligations under Art. 3.2.5 ICCA were broadened by a judgement of the Equatorianian Supreme Court (**ESC**) from 2010. In this ruling, the ESC established *"far-reaching disclosure obligations"* for *"an experienced private party"* regarding planned improvements to a product [*AN, pp. 29, 30, para. 18*].

148. This is based on the idea that, in common law jurisdictions such as Equatoriana, the reasoning of a court is transferable if the facts of the cases are comparable [*PO1, p. 43, III.3; Gold, p. 183; Rutherford et al., p.* 204]. However, as the present case and the case decided by the ESC differ in three important aspects, the latter does not extend CLAIMANT's disclosure obligations.

149. First, the ESC's ruling addressed an experienced private party contracting with a newly formed SOE [*AN, p. 29, para. 18*]. However, RESPONDENT is not a newly formed government entity but has already been commercially active for several years [*PO2, p. 44, para. 4*]. Thus, the situation of the Parties differs from that of the parties in the case of the ESC.

150. Second, the ESC decided in a purely domestic setting [*AN, p. 29, para. 18*]. However, CLAIMANT is based in Mediterraneo whereas RESPONDENT is based in Equatoriana [*NA, p. 4, para. 1; AN, p. 27, para. 3*]. Thus, in contrast to the ESC's decision favouring a national SOE in a domestic setting, the presents case revolves around an international dispute.

151. Third, the ESC only extended disclosure obligations to product improvements. The Hawk Drone, however, is not an improvement to the Kestrel Drone but rather a different product. The Kestrel Drone is a helicopter-like vehicle able to start vertically, whereas the Hawk Drone's airplane-like technology requires an airfield to start [*NA, p. 5, para. 10; PO2, p. 45, para. 13*]. Moreover, the Hawk Drone differs significantly from the Kestrel Drone in size and weight [*Ex. C4, p. 15; Ex. R3, p. 35*].

152. In fact, as shown in the true-to-scale figure below, the Hawk Drone is three times longer, four times wider, and five times heavier than the Kestrel Drone [*ibid.*].

Kestrel Drone

Length: 6.30 m
Width: 7.55 m
Weight: 855 kg

Hawk Drone

Length: 15.80 m
Width: 28.45 m
Weight: 4050 kg

153. In light of these differences, the reasoning of the ESC case cannot be applied in the present case. Thus, CLAIMANT was not obliged to disclose the upcoming launch of the Hawk Drone in 2021. In conclusion, CLAIMANT complied with all its disclosure obligations.

3. Alternatively, CLAIMANT's omission was not causal for the Contract conclusion

154. Even if CLAIMANT had been obliged to disclose the launch of the Hawk Drone, CLAIMANT's conduct would still not qualify as fraud. This is because Art. 3.2.5 ICCA only applies if the omission of information by one party was causal for the other party to conclude the contract [*Brödermann, p. 88*]. Such causality has to be proven by the party invoking the misrepresentation [*Vogenauer, Art. 3.2.5, para. 24*]. RESPONDENT, however, failed to demonstrate that a disclosure of information on the future launch of the Hawk Drone would have impacted its decision to conclude the PSA.

155. Instead, the PSA would have still been concluded regardless. This is because the Kestrel Drone is perfectly suited for the purposes of RESPONDENT [*supra paras. 144 et seq.*]. Moreover, RESPONDENT could not have afforded the more expensive Hawk Drone since RESPONDENT's supervisory board limited RESPONDENT to spend a sum of EUR 45 Mio [*PO2, p. 44, para. 7*]. Within this budget, RESPONDENT acquired six Kestrel Drones under the PSA for the total price of EUR 44 Mio [*Ex. C2, p. 11, Art. 3(1)(a)*]. By contrast, the Hawk Drones, would have been more than twice as expensive [*Ex. C3, p. 14, para. 9*]. Thus, if RESPONDENT had purchased the Hawk Drone it could have only afforded three of the four drones RESPONDENT needed as a minimum [*ibid.; Ex. C1, p. 9*]. For these reasons, CLAIMANT's non-disclosure was not causal for the conclusion of the PSA.

4. In any case, CLAIMANT had no fraudulent intention

156. Even if the Tribunal were to find that the non-disclosure had been causal for the PSA's conclusion, CLAIMANT's conduct still does not qualify as fraudulent. Under Art. 3.2.5 ICCA, a fraudulent

misrepresentation requires the non-disclosure to be *"intended to lead the other party into error and thereby gain an advantage to the detriment of the other party"* [*Official Comment, p. 107; Vogenauer, Art. 3.2.5, para. 6*]. However, CLAIMANT neither intended to lead RESPONDENT into error [**a.**] nor to gain an advantage [**b.**] to the detriment of RESPONDENT [**c.**].

a. CLAIMANT did not intend to lead RESPONDENT into error

157. In cases of alleged non-disclosure, a party only has a fraudulent intent if it deliberately withholds information knowing that it is required to disclose them [*Mutual Energy Case, para. 81; Vogenauer, Art. 3.2.5, para. 6*]. However, CLAIMANT did not deliberately withhold any information as it could not have known that the Hawk Drones' upcoming launch was of any interest to RESPONDENT.

158. In its Call for Tender, RESPONDENT specified which kind of drone it sought to buy [*Ex. C1, p. 9*]. The requirements set forth by RESPONDENT indicated its interest in acquiring a drone akin to the Kestrel Drone. In particular, RESPONDENT stated that a drone with a payload weight of 180 kg, an operating altitude of 5 km and an endurance of 10 hours meets its expectations [*ibid.*].

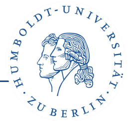
159. The Hawk Drone differs fundamentally from the Call for Tender's standards: it has a three time higher operating altitude, a four times longer endurance and more than twelve times higher payload capacity [*Ex. C1, p. 9; Ex. R3, p. 34*]. In view of these significant differences, the Call for Tender was in no way aimed at products such as the Hawk Drone.

160. This is also emphasised by the fact that none of the drone producers with models resembling the Hawk Drone participated in the tender process [*PO2, p. 45, para. 14*]. Hence, CLAIMANT could not have known that RESPONDENT would have been interested in acquiring the much more expensive Hawk Drone instead of the perfectly suited Kestrel Drone [*Ex. C3, p. 14, para. 9*]. Consequently, CLAIMANT did not intend to lead RESPONDENT into error.

b. In any case, CLAIMANT did not gain any advantage to the detriment of RESPONDENT

161. The requirements of Art. 3.2.5 ICCA are only fulfilled if the misrepresenting party intended to gain an advantage by purposefully omitting information [*Vogenauer, Art. 3.2.5, para. 9*]. CLAIMANT however, never intended to benefit from the non-disclosure of the upcoming launch of the Hawk Drone. Rather, as shown in the table below, CLAIMANT even waived additional profit by providing RESPONDENT with the more suitable Kestrel Drones [**Scenario 1**]. In fact, CLAIMANT would have gained a significantly higher profit by supplying RESPONDENT with the Hawk Drones [**Scenario 2**].

162. In **Scenario 1**, CLAIMANT earned EUR 5.4 Mio by selling six Kestrel Drones to RESPONDENT. This was possible because CLAIMANT had re-purchased three unused Kestrel Drones from another customer shortly before the PSA was concluded [*Ex. R4, p. 35*]. CLAIMANT did so to be able to make a favorable offer to RESPONDENT [*ibid.*]. All in all, CLAIMANT had to spend EUR 38.6 Mio to provide and equip the Kestrel Drones in exchange for the purchase price of EUR 44 Mio [*Ex. C2, p. 10 Art. 3(1)(a); PO2, p. 46, para. 25*].



163. By contrast, in **Scenario 2**, CLAIMANT would have gained at least EUR 7.14 Mio if it had sold three Hawk Drones to RESPONDENT [*Ex. C3, p. 14, para. 9; PO2, p. 46, para. 25*].

	Scenario 1 (Kestrel Drone)	Scenario 2 (Hawk Drone)
Purchase Price	**(+)** EUR 44 Mio	**(+)** EUR 42 Mio
Production Cost	**(–)** EUR 38.6 Mio	**(–)** EUR 34.86 Mio
	(–) EUR 21 Mio (Materials)	(83% of the purchase price)
	(–) EUR 5.6 Mio (Equipment)	
	(–) EUR 12 Mio (Repurchase)	
CLAIMANT's Profit	**EUR 5.4 Mio**	**EUR 7.14 Mio**

164. The table demonstrates that CLAIMANT would have gained a higher profit in **Scenario 2** if it had sold the Hawk Drones instead of the Kestrel Drones to RESPONDENT. Therefore, CLAIMANT did not gain an advantage when selling the Kestrel Drones under the PSA.

c. Even if CLAIMANT gained an advantage, this was not to the detriment of RESPONDENT

165. Even if the Tribunal were to find that CLAIMANT intended to gain an advantage by not disclosing the upcoming launch of the Hawk Drone, this advantage was not to the detriment of RESPONDENT. This would only be the case if the other party suffered a loss due to the conclusion of a fraudulently induced contract [*Vogenauer, Art. 3.2.5, para. 9*]. In the present case, RESPONDENT suffered no such loss because the Kestrel Drone perfectly suited RESPONDENT's needs [*supra paras. 144 et seq.*]. Thus, under the PSA, RESPONDENT was able to acquire suitable drones at a price within its budget [*id., p. 44, para. 7*]. Furthermore, the PSA enabled RESPONDENT to purchase even two more drones than it had initially set out as a minimum [*Ex. C1, p. 9*]. Therefore, by concluding the PSA, RESPONDENT did not suffer any detriment but even made an advantageous deal. Thus, CLAIMANT also had no intention to gain an advantage to the detriment of RESPONDENT.

166. In conclusion none of the requirements of fraudulent misrepresentation under Art. 3.2.5 ICCA are fulfilled. Accordingly, RESPONDENT cannot rely on Art. 4 CISG to invoke its own national law.

II. Alternatively, the regime of the CISG is conclusive

167. Even if the Tribunal were to find that there had been a misrepresentation, Art. 3.2.5 ICCA remains inapplicable as the requirements of Art. 4 CISG are not fulfilled. Under this provision, national law may only apply to matters which are not *"expressly provided"* in the CISG [*Säcker et al., Art. 4, para. 14*].

168. To prevent Art. 4 CISG from undermining the CISG's balance of rights and obligations, the term *"expressly"* must be interpreted broadly [*Kröll/Mistelis/Perales Viscasillas, Art. 4, para. 12*; *Schlechtriem/Schwenzer, Art. 4, para. 29*]. Accordingly, it is only decisive whether the CISG attempts to govern a certain matter, irrespective of the terminology used [*ibid.; Schroeter, pp. 555, 565*].

169. In the case at hand, Art. 3.2.5 ICCA is inapplicable because the CISG expressly provides a conclusive conformity regime governing the dispute [**1.**]. In any case, RESPONDENT cannot invoke Art. 3.2.5 ICCA to avoid the Contract as the CISG's avoidance regime is conclusive [**2.**].

1. The CISG's conformity regime conclusively governs this dispute

170. RESPONDENT's allegations pertain to *"the quality of the"* Kestrel Drone [*Ex. C8, p. 20*]. The CISG provides an exhaustive regime governing such questions of conformity in Arts. 35 et seqq. CISG. To determine whether these provisions govern a matter *"expressly"* in the sense of Art. 4 CISG, scholars have developed a two-step-approach [*Schlechriem/Schwenzer, Art. 4, para. 29; Schroeter, p. 563*]. Following this, the CISG supersedes national law if both sets of rules are triggered by the same factual situation and the national provision raises legal questions that the CISG seeks to regulate [*ibid.*]. CLAIMANT will demonstrate that the CISG seeks to regulate the present dispute under the conformity regime in Arts. 35 et seqq. CISG.

171. First, this is because both the CISG's conformity stipulations as well as national misrepresentation provisions cover the same factual situation: in both cases, the parties disagree on material facts revolving around the qualities of the goods sold [*Schroeter, p. 569*]. In the present case, RESPONDENT argues that the Kestrel Drones' qualities differ from CLAIMANT's description [*Ex. C8, p. 20*]. Specifically, RESPONDENT argues that the Drones are not in conformity with contractually-agreed characteristic of being *"state-of-the-art"* and CLAIMANT's *"newest model"* [*ibid.; Ex. C2, p. 10, Art. 2*].

172. Second, the CISG also seeks to regulate the matter at hand. Namely, Art. 35(1) CISG refers to the seller's obligation to deliver goods that match the *"description required by the contract"*. Thus, just like provisions on misrepresentation, the CISG encompasses rules on the *"distribution of informational risks"* [*Schroeter, p. 575*]. Hence, RESPONDENT's allegations pertaining to the qualities of the Drone are conclusively governed by Arts. 35 et seqq. CISG. Conversely, Art. 3.2.5 ICCA is inapplicable.

2. In any case, the CISG's avoidance regime conclusively governs this dispute

173. As a last resort, RESPONDENT might argue that the CISG's conformity regime does not generally govern matters of fraudulent misrepresentation. Even if this were the case, the CISG provides conclusive provisions on avoidance in Arts. 49, 25 CISG. Under the CISG's remedy scheme, avoidance is the *ultima ratio* [*Huber/Mullis, p. 199*]. In particular, the avoidance of a contract requires *"a fundamental breach"* [*Arts. 49, 25 CISG, Berger/Scholl, p. 161; Schlechtriem/Schwenzer, Art. 35, para. 46*]. Hence, if a party was entitled to rely on a national regime which forgoes this limitation, it would undermine the CISG's core objective *"to keep the contract alive and to avoid unnecessary transfers of goods"* [*Huber/Mullis, p. 199*]. Thus, the CISG supersedes all national avoidance regimes for misrepresentation [*Bridge, p. 244; Schroeter, p. 568*].

174. In conclusion, the CISG expressly provides conclusive stipulations both on questions of conformity as well as on the avoidance of a contract. Therefore, Art. 3.2.5 ICCA is inapplicable.

B. RESPONDENT's national fraud provision is excluded by virtue of the Parties' agreement

175. Even if the Tribunal were to hold that the CISG in principle does not govern cases of fraudulent misrepresentation, Art. 3.2.5 ICCA is still inapplicable. This is because the Parties agreed in the PSA that the CISG's regime should govern such matters conclusively. According to Art. 18 PSA, *"BUYER is entitled to avoid the agreement in case SELLER commits a fundamental breach of contract"* [*Ex. C2, p. 12, Art. 18(1), emphasis added*]. Within this contractual clause, the Parties exercised their party autonomy and extended the CISG's avoidance regime so as to govern the PSA conclusively.

176. Under Art. 6 CISG, the parties may *"derogate from or vary the effect"* of any provision. This allows parties to preclude all national, even mandatory, law, by a mutual agreement [*Filling Plant Case, para. 56; Schlechtriem/Schwenzer, Art. 6, para. 5*]. Whether the parties reached such an agreement has to be determined in accordance with parties' intention and, subsidiarily, the understanding of a reasonable third person [*Art. 8 CISG*]. A reasonable person would understand Art. 18 PSA to extend the CISG's avoidance regime so that it governs the PSA conclusively.

177. Art. 18(1) PSA incorporates the CISG's avoidance regime into the PSA. Specifically, Art. 18 PSA mirrors the requirement for a fundamental breach set out in Arts. 49(1)(a), 25 CISG [*Ex. C2, p. 12, Art. 18(1)*]. Thus, the Parties chose the CISG's avoidance regime to govern the PSA.

178. A reasonable person would understand this incorporated avoidance regime to apply conclusively. This supported by the PSA's drafting history [*Ex. C7, p. 19, para. 18*]. During the negotiations, the Parties narrowed Art. 18 PSA as to exclude broader avoidance regimes than that under the CISG [*ibid.*]. For this purpose, the broader term *"terminate"* was replaced by CISG-language, namely the term *"avoid"*. Likewise, the requirement of a *"fundamental non-performance"* was changed to the *"fundamental breach"* contained in Art. 25 CISG [*Ex. C2, p. 12, Art. 18; PO2, p. 48, para. 38*].

179. Consequently, by agreeing on Art. 18 PSA, the Parties contractually chose the CISG's avoidance regime to exclusively govern the PSA and thereby preclude from invoking national provisions.

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180. To summarise, RESPONDENT cannot rely on Art. 4 CISG to invoke its national fraud provision as there was no fraudulent misrepresentation. Rather, the CISG's provisions govern the dispute conclusively. In any case, the Parties excluded the application of Art. 3.2.5 ICCA by excluding national avoidance regimes in favour of the CISG. In conclusion, Art. 3.2.5 ICCA is inapplicable.

REQUEST FOR RELIEF

181. In light of the above, CLAIMANT respectfully requests the Arbitral Tribunal to find that:

1) the Arbitral Tribunal has jurisdiction to hear the case;

2) the arbitral proceedings should neither be stayed nor bifurcated;

3) the Purchase and Supply Agreement between the Parties is governed by the CISG;

4) RESPONDENT cannot rely on Art. 3.2.5 ICCA to avoid the contract.

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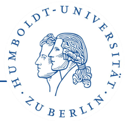

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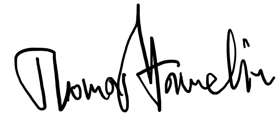
CERTIFICATE OF INDEPENDENCE

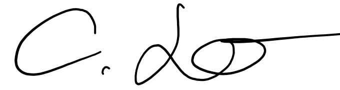
We hereby confirm that only the persons whose names are listed below have written this Memorandum.

Simon Ferel



Thomas Hamelin

Elisa Henke



Charlene Lorenz

Clemens Wendt

Liese-Lotte Wieprecht