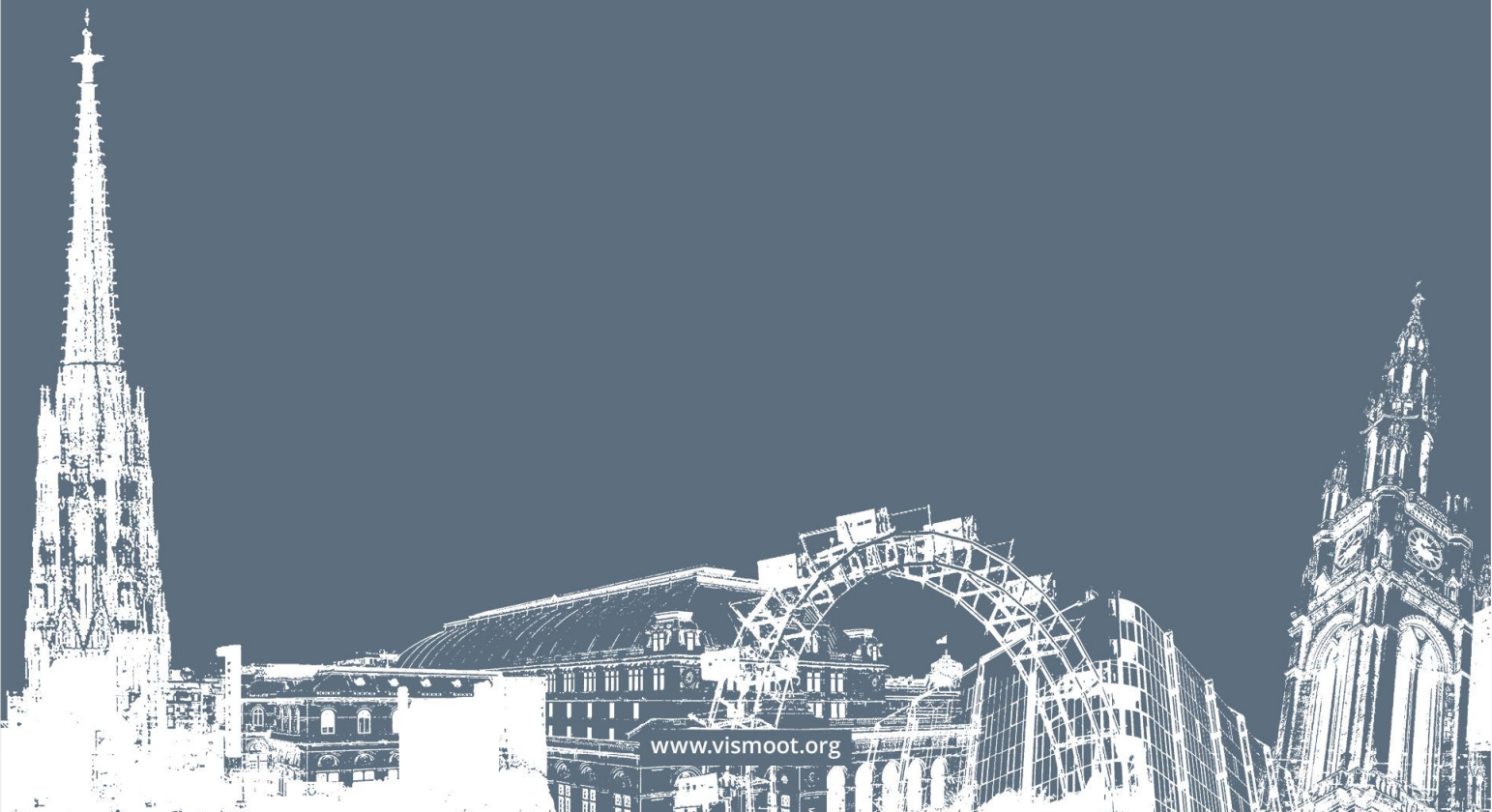




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# ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS



# ANALYSIS OF THE PROBLEM

## FOR USE OF THE ARBITRATORS

If you do not already have a copy of the Problem, it is available on the Vis Moot web site, [https://www.vismoot.org/wp-content/uploads/2023/11/31st-Vis-Moot-Problem\\_incl-PO2.pdf](https://www.vismoot.org/wp-content/uploads/2023/11/31st-Vis-Moot-Problem_incl-PO2.pdf). If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No. 2 (PO 2).

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are *strongly urged* not to communicate any of the ideas contained in this analysis to their teams *before* the submission of the Memorandum for Respondent.

The analysis will be sent to all teams after all Memoranda for Respondent have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem, in particular not all possible interpretations of the various contractual provisions or other communications.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

## INTRODUCTION

This year's case concerns a dispute in the automotive industry about the payment of sensors delivered by Claimant, SensorX plc, to Respondent, Visionic Ltd. The delivery occurred on the basis of two individual purchase orders made under a general Framework Agreement existing between the Parties.

The arbitration proceedings under the ICC Rules were originally initiated for the non-payment under Purchase Order No. 9601 of 17 January 2022. The order, relating the "standard" sensor S4-25899, also provides the background for the substantive issues to be discussed. They arise from a cyberattack on Claimant in which the hackers obtained detailed information about the transactions between the Parties. The hackers then used this information and the access to Claimant's email system to induce Respondent with a spoof email to pay to a new bank account managed by them instead to the account mentioned in the Framework Agreement. The issue is whether Claimant's failure to inform Respondent about the cyberattack excludes or limits its right to seek payment under the CISG.

The second Purchase Order No. A-15604 dated 4 January 2022 is relevant primarily for the procedural issues. It concerns a different sensor (L-1) for which, due to its dual use, a different person had been responsible on Claimant's side and for which inter alia special payment provisions were agreed. While the first payment for the delivery was made, the second payment was withheld due to alleged issues with the quality of the sensors. Due to internal problems created by the cyberattack and a change of personnel the non-payment was only discovered after the Terms of Reference in the present arbitration proceedings had already been agreed upon. Irrespective of that Claimant tries to add the payment claim under Purchase Order No. A-15604 to the arbitration proceedings originally initiated for claims under Purchase Order No. 9601. In case that should not be possible he makes the auxiliary request to join the arbitration proceedings for Purchase Order No. 15604, initiated conditionally, with the existing arbitral proceedings.

In their Case Management Conference on 5 October 2023 the Parties agreed on a bifurcation of the proceedings. The present first phase is intended to cover all claims under Purchase Order No. 9601 as well as the question of whether the claims under Purchase Order No. A-15604 should be added to the present arbitration or separate arbitration proceedings should be joined to the present proceedings.

Should one of Claimant's requests in relation to Purchase Order No. A-15604 be granted the second phase should then address the merits of the payment claim. That second phase is not part of the Moot.

## THE FACTS

### I. Parties and contractual history

Claimant, SensorX plc, based in Mediterraneo, is one of the leading Tier 2 producers of sensors used in various applications in the automotive industry, in particular for all types of autonomous driving applications.

Respondent, Visionic Ltd, based in Equatoriana, is a Tier 1 producer of optical systems which are used by many of the leading car manufacturers for their autonomous parking systems.

On 7 June 2019 the Parties entered into a Framework Agreement to regulate the future supply of Respondent with Claimant's sensors (**Claimant Exhibit C 1**). The Framework Agreement contained "*contractual terms for all S4-25899 sensors and possible other products (Contract Products) to be supplied by the SELLER to the BUYER ... which the Parties will agree upon in the respective individual contracts (referred to as "Individual Contract")*" (Article 1). According to Article 3 of the Framework Agreement Respondent was entitled to order up to 2,500,000 sensors per year. Individual Orders had to be placed three months in advance and could not exceed 800,000 sensors per quarter.

Payment was to be effected by transfer to one of the two bank accounts specified in the Framework Agreement (Article 7). According to Article 6 the prices were to be agreed in a semi-annual price fixing meeting by the Heads of Sale and Purchasing. In their first meeting in December 2019 the Parties agreed, however, upon an annual price fixing.

Between June 2019 and January 2022 Respondent submitted 22 different purchase orders under the Framework Agreement and Claimant delivered more than 5,000,000 sensors to Respondent without any problems. With two exceptions all orders submitted since June 2019 related to the S4-25899 model and were handled on Claimant's side by Ms. Audi, the account manager responsible for Respondent. The orders had been in the range of 200,000 – 400,000 units. In the price-fixing meeting on 2 December 2021 Claimant informed Respondent that it would prefer larger orders and was willing to give an additional discount of 1 % for any order above 1,000,000 units. Larger orders were easier to handle for Claimant and allowed for better production planning.

In January 2022, Respondent submitted the two orders which are the subject of the present arbitration proceedings.

On 4 January 2022, Respondent submitted Purchase Order No. A-15604 concerning 200,000 sensors of the model L-1 (**Claimant Exhibit C 7**). Due to the dual use options of that sensor the negotiation of the order and its processing were handled on Claimant's side by the special department for dual use sensors and not by Ms. Audi. The 200,000 L-1 LIDAR sensor were delivered in accordance with the order on 16 February 2022 and Respondent made the first payment as requested on 18 March 2022. The second payment

was, however, never made due to discussions about the quality of the sensors. For various reasons, set out in detail below, that was only discovered on 1 September 2023 and resulted in Claimant's request to include the claim into the present arbitration proceedings.

The second order, i.e. Purchase Order 9601, which led to present arbitration, was submitted by Respondent on 17 January 2022 (**Claimant Exhibit C 2**). It concerned 1,200,000 sensors of the S4-25899 model to be delivered in two instalments in April and May. The price agreed was USD 32 per unit. Claimant delivered both instalments in accordance with the contractual provisions, the first 600,000 sensors on 3 April 2022 and the second 600,000 on 30 May 2022.

According to Clause 6 of the Purchase Order No. 9601, payments for both deliveries were due 30 days after delivery, i.e., on 3 May 2022 and 30 June 2022 respectively. Respondent made both payments but not to one of the bank accounts mentioned in the Framework Agreement. Instead, it transferred the money to a different bank account in accordance with a request in a spoof email of 28 March 2022 allegedly coming from Ms. Audi (**Claimant Exhibit C 5**). However, the email, as well as a subsequent confirmation of the request, came from hackers which had infiltrated Claimant's IT-system via a sophisticated phishing attack on 5 January 2022.

On 5 January 2022, Ms. Audi – disregarding internal cybersecurity guidelines – had inadvertently downloaded a trojan horse and other malware. It allowed the hackers to access all communication between Claimant and Respondent. While Claimant had discovered the phishing attack on 23 January 2022, it had underestimated its scope at the time and had not informed Respondent or other customers about the attack. Consequently, Mr. Royce, the person responsible at Respondent's side, was not aware of the increased risk of an abuse when it received the spoof email from the hackers impersonating Ms. Audi on 28 March 2022 asking for the use of a different bank account.

When, finally, the true scope of the attack became apparent Claimant had to shut down its internal planning and accounting system from 15 May until 30 June 2022. Due to problems resulting from the shut down as well as the termination of Ms. Audi's employment contract it took until 25 August 2022 to realize that payment for the Purchase Order No. 9601 had not been received in Claimant's account. On 25 August 2022 Mr. Gustaf Gabrielsson, who was the successor of Ms. Audi from 1 August discovered that no payment had been made under Purchase Order No. 9601.

Discussions at the working level between Mr. Gabrielsson and his counterpart at Respondent revealed that Respondent had made the two instalment payments to the bank account given to them by the hackers impersonating Ms. Audi. In light of the payments made, Respondent did not want to pay the amount a second time to the correct bank account.

With the letter of 5 September 2022 (**Claimant Exhibit C 3**) Claimant complained to Respondent that the payments were not received and set a deadline for payment by the following week. Respondent replied on 8 September 2022 stating that the payments were made on the agreed dates “*in line with the instructions in the email of 28 March 2022, which must be attributed to Ms. Audi*” so that it considered to have fulfilled its payment obligation (**Claimant Exhibit C 4**). A meeting on 28 November 2022 between the CEOs of both companies, Claimant’s Mr. Enzo Isetta and Respondent’s Ms. Mercedes Ford, remained without any result concerning the resolution of the dispute relating to the payment (**Claimant Exhibit C 6**). Instead, Respondent informed Claimant that it would terminate the Framework Agreement, as it had planned to purchase sensors from 1 July 2023 onwards from one of Claimant’s competitors.

## **II. Initiation of arbitration and relief sought**

On the basis of the above facts, Claimant submitted its Request for Arbitration to the ICC on 9 June 2023. In that request Claimant asked the Arbitration Tribunal for the following orders:

- 1) Respondent is ordered to pay Claimant USD 38,400,000, with simple interest at the annual rate of 4 % on the amount of 19,200,000 from 4 May 2022 onwards, and on the amount of 19,200,000 from 1 July 2022 onwards;
- 2) Respondent is ordered to pay the cost of this arbitration and to reimburse Claimant for all costs incurred in connection with it.

On 10 July 2023, Respondent submitted its Answer to the Request for Arbitration. It asked the Arbitral Tribunal to issue the following orders:

- 1) To reject Claimant’s claims as unfounded;
- 2) To order Claimant to bear the costs of this arbitration.

In essence, Respondent submits that due to Claimant’s failure to inform Respondent about the phishing attack, the spoof email of 28 March 2022 impersonating Ms. Audi should be attributed to Claimant who should bear its consequences. Thus, Respondent’s payments to the new bank account should be considered as performance of its payment obligation.

Even if that were not the case Claimant should not be entitled to rely on Respondent’s failure to perform pursuant to Article 80 CISG, as the non-performance was in the end the result of the risk created by Claimant by not informing Respondent about the phishing attack. At least, Claimant’s behaviour should be treated as a violation of the obligation to mitigate the damages pursuant to Article 77 CISG.

On 30 August 2023, the Arbitral Tribunal, which had been constituted on 11 August, agreed with the Parties on Terms of Reference (ToR). The ToR contain the following description about the issues to be determined in the arbitral proceedings:

#### ***V. Issues to be determined***

*The issues to be determined are not limited by the above summaries of the Parties' respective positions. Subject to any new claims (Article 23(4) of the ICC Rules), which will only be authorized if they result in noticeable savings in cost and time, and any further allegations, arguments, contentions and denials contained in submissions as will be made in the course of this arbitration, the Arbitral Tribunal may have to consider, in particular, the issues listed in this paragraph (but not necessarily all of these or only these, and not necessarily in the following order):*

- i. Is Claimant entitled to payment under Purchase Order No. 9601 or was Respondent released by its payment to the new bank account in light of email received?*
- ii. Which Party bears the costs of the arbitration?*

On 1 September 2023, Claimant discovered that that the second payment of USD 12 million due under Purchase Order No. A-15604 had not been made. The belated discovery was caused by the fact that Ms. Peugeotroen, the account manager responsible for the dual use sensors, had to be taken to hospital on 15 April 2022 in an emergency and, following an early birth of her twins, no proper hand-over to her successor had taken place (PO 2 para. 30). In combination with the computer problems due to the cyberattack (PO 2 para. 29), Ms. Peugeotroen's successor only discovered the non-payment on 1 September 2023 and informed Claimant's Head of Sales, Ms. Bertha Durant, about it. Ms. Durant immediately contacted her counterpart on Respondent's side, Mr. Toyoda, and was informed by him that the non-payment had been due to quality issues (**Claimant Exhibit C 8**). Mr. Toyoda had apparently raised these quality complaints in an email with Ms. Peugeotroen and announced that Respondent would withhold payment until an amicable solution could be found on the quality issue (**Respondent Exhibit R 5**). The email, however, could not be found in Claimant's system and would – in Ms. Durant's view – not have complied with the requirements set out in Article 15 of the Framework Agreement. In

the end, Ms. Durant and Mr. Toyoda could not agree on Claimant's entitlement to the second payment under Purchase Order No. A-15604.

On 11 September 2023, Claimant then requested from the Arbitral Tribunal to include an additional claim for payment of USD 12 million under Purchase Order No. 15604 into the present arbitration proceedings. Claimant's primary request was to authorize the addition of the payment claim resulting from Purchase Order No. A-15604 as a new claim to the existing arbitral proceedings pursuant to Article 23 (4) ICC Rules. Alternatively, Claimant requested to consolidate the present arbitration proceedings with the arbitration proceedings for the payment claim under Purchase Order No. 15604 which were for that alternative conditionally initiated.<sup>1</sup>

On 2 October 2023, Respondent declared its objection to both the primary request as well as the alternative request. It considered the primary request to be inadmissible in light of the ToR and the origin of the additional payment claim in a different contract with a separate arbitration agreement. The alternatively requested consolidation could in its view only be declared by the ICC Court pursuant to Article 10 ICC and the requirements for a consolidation were not met.

## **THE ISSUES**

### **I. Overview**

In their Case Management Conference on 5 October 2023 the Arbitral Tribunal discussed with the Parties the consequences of Claimant's additional requests and Respondent's objections thereto, as well as the various options for structuring the arbitral proceedings in a cost and time-efficient manner, taking into account their conflicting interests. In light of this discussion, the Arbitral Tribunal has decided to limit the first part of the arbitration to the following issues:

- Is Claimant entitled to payments for the delivery of sensors under Purchase Order No. 9601 and if so in what amount?
- Can and should the additional payment claim raised under Purchase Order No. A-15604 be decided in this arbitration either as an extension or by way of consolidation?

In contrast, the merits of Claimant's additional payment claim under Purchase Order No. A-15604, namely the claim of defective sensors and the suitability of the notice, should not be dealt with in the Parties' submissions in the first part of the arbitration.

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<sup>1</sup> The requests can be found on p. 46 of the file.



As a consequence, the **following issues** are to be discussed by the students in the present phase of the arbitral proceedings:

- a. Can and should the addition of the new claim to the pending arbitration be authorized?
- b. Can and should the Arbitral Tribunal consolidate the arbitral proceedings, in case the new claim has to be raised in a separate arbitration?
- c. Is Claimant entitled to payment of either the full amount or parts of the amount due as payment under Purchase Order No. 9601 or can Respondent invoke a violation of a contractual (information) duty or obligation or rely on a provision of the CISG to
  - i. entirely or at least
  - ii. partially defend itself against the claim for payment.

## II. General considerations

The teams are in principle free to select the order in which they address the various issues. The majority of the teams will first deal with the procedural questions relating to the claim under Purchase Order No. 15604 before then addressing the merits which relate to Purchase Order No. 9601. There may, however, also be teams which want to rely on arguments relating to the merits in their discussion of the procedural issues of Purchase Order No. 15604. As there are no procedural objections to the claims under Purchase Order No. 9601 and since it had been raised first, teams may also start with that Purchase Order, i.e. with the merits.

Equally, also within each issue the teams may opt for different orders in which they treat the problems depending on which point they want to emphasize. That applies to the procedural as well as to the substantive issues. In relation to procedure, the arguments for the different issues may overlap and may be treated in depth either in connections with the admission of a new claim or with the consolidation of the arbitration, depending on the focus of the submission. Concerning the merits there are several different conceivable ways of addressing the central question of whether Claimant was under a duty to inform Respondent about the cyberattack, either as a stand-alone issue or within the discussion of other requirements.

Consequently, the primary guideline in evaluating the various submission is whether the relevant arguments are presented in a convincing way and not where they are presented.

## III. The addition of the payment claim under Purchase Order No. 15604 as a new claim to the pending arbitration (PO 1 para. 4 no. 1 a.)

## 1. Background

The request for the addition of the new claim arising from Purchase Order No. A-15604 raises a number of legal and strategic questions. Students will most likely argue that the additional claim is based on a different contract, i.e. Purchase Order No. A-15604, than the claim so far treated in the arbitral proceedings, which arises from Purchase Order No. 9601. Notwithstanding the existence of the Framework Agreement each of the two orders is to be classified as a separate contract. That is at least the concept underlying Article 1 of the Framework Agreement (“Individual Contract”).

The mere fact that the two claims are based on separate contracts does not exclude their treatment in a single arbitration. Article 9 ICC Rules explicitly states:

*“[s] subject to the provisions of Articles 6(3)-6(7) and 23(4) claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules”.*

In the present case the Terms of Reference have been signed by the Parties on 30 August 2023 and were sent to the ICC Court before the extension request came in on 11 September 2023. Thus, the case falls under Article 23 (4) which provides:

*After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.*

Consequently, the addition of the payment claim under Purchase Order No. A-15604 requires the authorization by the arbitral tribunal, unless one considers it to fall already inside “the limits of the Terms of Reference”.

These primarily “procedural” issues are to be decided against the background of an additional “jurisdictional” complication, that the Framework Agreement and the two Purchase Orders all contain arbitration agreements which are not identical and the interaction of which is not entirely clear. The Framework Agreement provides in its Article 41 as follows:

### Article 41: DISPUTE RESOLUTION

1. Disputes or disagreements arising under or in connection with this Framework Agreement (Disputes) shall be settled amicably either by negotiation between the Parties or mediation.

2. Arbitration. Any Dispute not finally resolved by any of the alternative dispute resolution procedures set forth in paragraph 1 shall be exclusively and definitively resolved through final and binding arbitration, it being the intention of the Parties that this is a broad form arbitration agreement designed to encompass all possible disputes arising in connection with the present agreement and the contracts concluded thereunder.
3. Rules. The arbitration shall be conducted in English in accordance with the following arbitration rules (as then in effect): Rules of Arbitration of the International Chamber of Commerce (ICC).
4. Number of Arbitrators. The arbitration shall be conducted by three arbitrators unless all parties to the Dispute agree to a sole arbitrator within thirty (30) Days after the filing of the arbitration. For greater certainty, for the purpose of this Article, the filing of the arbitration means the date on which the claimant's request for arbitration is received by the other parties to the Dispute.
5. Consolidation. If the Parties initiate multiple arbitration proceedings in relation to several contracts concluded under this framework agreement, the subject matters of which are related by common questions of law or fact and which could result in conflicting awards or obligations, the Arbitral Tribunal of the first arbitration proceedings has the power to consolidate all such proceedings into a single arbitral proceeding.
6. The place of arbitration is Danubia and this Framework Agreement and all Individual Contracts concluded hereunder are governed by the law of Danubia.

The arbitration clauses in the two Purchase Orders provide as follows:

**Purchase Order No. 9601**

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by *three arbitrators* appointed in accordance with the said Rules. The place of arbitration is Vindabona, Danubia, *English is the language of the arbitration* and the arbitrators shall apply the CISG.

**Purchase Order No. A-15604**

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by *one or more arbitrators* appointed in accordance with the said Rules. *The Rules on Emergency Arbitration are explicitly excluded.* The place of arbitration is Danubia and the arbitrators shall apply the CISG.

Conceptually, the question of whether the Arbitral Tribunal has jurisdiction over the payment claim arising from Purchase Order No. A-15604 is separate from and precedes the primarily procedural question of whether its addition to the present arbitration should be allowed. In the present case Respondent does not contest that the Arbitral Tribunal has jurisdiction over the payment claim arising from Purchase Order No. A-15604, which would obviously exist under the arbitration clause contained in the Order itself. Respondent,

merely challenges Claimant's submission that both claims are or can be based on the same arbitration clause, i.e. the clause in Article 41 of the Framework Agreement.

In light of that, many teams will not discuss the jurisdictional question separately up front. Instead, they may address the relevant issues as part of the procedural question of whether the payment claim under Purchase Order No. A-15604 should be admitted (or the arbitrations be consolidated). In that context it can make a difference of whether the two claims are based on one or on two arbitration agreements. In the latter case the separate arbitration agreements may have to be compatible.

## 2. Arguments

In its request of 12 September 2023 Claimant submits that the Arbitral Tribunal has jurisdiction over both claims under Article 41 of the Framework Agreement (p. 47, para. 6). The existence of a single base for the Tribunal's jurisdiction over both claims would directly exclude any arguments based on an alleged non-compatibility of the various arbitration agreements. At the same time, it would be an argument in favor of the treatment of the claims in one arbitration.

Claimant's argument presupposes that Article 41 of the Framework Agreement

- is not superseded by the later arbitration agreements in the Procedural Orders and
- also forms the basis of the present arbitral proceedings (or at least can do it).

Respondent, by stating that the "*new claim is based on a different arbitration agreement which deviates in several aspects from that on which the claims in the present arbitration are based*" (p. 55, para. 5), obviously contests Claimant's general proposition that both claims are based on Article 41 of the Framework Agreement – or at least can be based on it. Respondent gives, however, no indication why it considers the claims to be based on two different arbitration agreements. The conclusion could be based either on the first or the second of the above preconditions for the coverage of both claims by Article 41.

For the question of whether the Tribunal in the present arbitration can rely for its jurisdiction on Article 41 of the Framework Agreement the following facts and considerations may be relevant:

On the one hand, Claimant has invoked and quoted the arbitration clause in Purchase Order No. 9601 as the basis for the jurisdiction of the Arbitral Tribunal in its Request for Arbitration (para. 22). Consequently, that arbitration clause is also quoted in the ICC's Case Information (p. 45) and also in the ToR (PO 2 para. 35).

On the other hand, Claimant had already in its Request for Arbitration stated that "*a comparable arbitration clause is also contained in Article 41 of the Framework Agreement, so that there can be no doubt as to the Parties' will to submit to arbitration*". That reference

was also mentioned in the ToR (PO 2 para. 35). In addition, Claimant relies on the principle of *iura novit arbiter* which in its view requires the Tribunal “to apply the law independent of the Parties’ pleadings” as well as an entitlement “to provide a new legal justification of its claims including the Arbitral Tribunal’s jurisdiction”.

In relation to the procedural question of whether the payment claim arising from Purchase Order No. A-15604 should be allowed under Article 23 (4) ICC Rules the majority of teams will focus on subsuming the case under the criteria for the admission of new claims pursuant to Article 23 (4) ICC Rules and/or eventual additions or specifications by para. 85 of the ToR (“noticeable savings in cost and time”).

Some teams may, however, also try to argue that the claim is already covered by the ToR and thus no “new claim” in the sense of Article 23(4) ICC Rules. While the argument is difficult to make, it is not impossible, given the broadly worded ToR (“not limited by the above summaries”) and the non-exclusive nature of the listing of the payment claim under Purchase Order No. 9601. (“in particular”).

Article 23 (4) ICC Rules mentions the following factors which the Arbitral Tribunal should take into account when deciding on the admission of a new claim:

- the nature of such new claim,
- the stage of the arbitration, and
- other relevant circumstances.

In addition, the issue of authorization of new claims has also been addressed in the ToR. They provide in the relevant part the new claims “will only be authorized if they result in noticeable savings in cost and time, and any further allegations”. Depending on how teams interpret that provision (replacement, supplementation or specification of the criteria in Article 23 (4) ICC Rules) already at this stage a discussion as to the Parties ability to modify the ICC Rules may arise.

In determining, what “other relevant circumstances” the Arbitral Tribunal may take into account, guidance may be sought from Article 6 (4) ICC Rules. It regulates the criteria which the ICC Court should consider when exceptionally charged with the decision of determining whether claims arising from separate contracts should be treated in one arbitration. Article 6 (4) ICC Rules requires for the case that the claims are made under “more than one arbitration agreement” a prima facie satisfaction by the ICC Court

*“(a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.”*

These additional criteria naturally do not play a role if one follows Claimant that the Tribunal has jurisdiction over both claims based on the arbitration agreement in the Framework Agreement.

Should the Tribunal have to base its jurisdiction over the two claims on separate arbitration clauses, i.e. either those in the two Purchase Orders or those in Purchase Order No. 9601 and the Framework Agreement, they clearly differ from each other. That leads to the question whether the relevant arbitration clauses are “compatible” in the sense of Article 6 (4) ICC Rules despite the differences existing between them. In that context it has to be kept in mind that some of the obvious differences in wording may only have very limited effects in practice at the present stage of the proceedings. The applies to the law chosen for the merits (i.e. CISG is part of Danubian law), the number and appointment process for the arbitrators as well as the exclusion of the emergency arbitrator.

Further, it must be determined whether there is an agreement by the Parties that “*those claims can be determined together in a single arbitration*”. In that regard, the special consolidation provision in Article 41 (5) of the Framework Agreement might be used by both Parties to support their respective arguments.

Facts which may play a role in the discussion of the various criteria are:

In favor of admitting:

- the early stage of the arbitral proceedings,
- the submission of both orders under the same Framework Agreement,
- comparable legal questions concerning the relationship between the individual orders and Framework Agreement,
- the potential relevance of the cyberattack for both claims,
- absence of any negative consequences for the conduct of the proceedings on the original claim (bifurcation with no alteration of original timetable PO 2 para. 34),
- exclusion of the risk of conflicting decisions.

Against admitting:

- differences between claims (legal basis/product involved/persons involved),
- limited overlap of factual and legal questions to be treated,
- limited risk of conflicting decisions,
- Article 41 (5) Framework Agreement (consolidation and not addition as new claim).

#### IV. The consolidation of the arbitral proceedings initiated for Purchase Order No. A-15604 with the present arbitral proceedings (PO 1 para. 4 no. 1 b.)

##### 1. Background

In the alternative that the Arbitral Tribunal should allow the addition of the payment claim under Purchase Order No. A-15604 Claimant has made the following request for a consolidation it is submission of 12 September 2023:

- b. – subsidiarily and only in the unlikely event that the additional claim is not included and has to be brought in a new arbitration, the consolidation of the arbitration proceedings for the additional claim with the present proceedings.*

Claimant has based its subsidiary and conditional consolidation request on Article 41 (5) of the Framework Agreement which provides:

*Consolidation. If the Parties initiate multiple arbitration proceedings in relation to several contracts concluded under this framework agreement, the subject matters of which are related by common questions of law or fact and which could result in conflicting awards or obligations, then the Arbitral Tribunal of the first arbitration proceedings has the power to consolidate all such proceedings into a single arbitral proceeding.*

By granting the power to consolidate the arbitral proceedings to the Arbitral Tribunal Article 41 (5) of the Framework Agreement deviates from the consolidation provision in the ICC Rules. According to Article 10 the power to consolidate is vested in the ICC Court and is submitted to criteria and requirements which differ from those in Article 41 (5). Article 10 provides:

*The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:*

- a) the parties have agreed to consolidation; or*
- b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or*
- c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.*

*In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations*

*and, if so, whether the same or different persons have been confirmed or appointed.*

*When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.*

In practice, the subsidiary and conditional consolidation claim could raise the additional problem of whether the conditional initiation of the second arbitration is possible at all. That may be dependent not only on the cooperation of the ICC and the ICC Rules but also on the law applicable to the arbitration which has to allow for such conditional claims. For the purposes of the Moot that problem has been solved through the agreement of the Parties mentioned in PO 1 and Claimant's "*undertaking*" mentioned in PO 2 para 43 to take all necessary steps to properly initiate the second arbitration.

## **2. Argument**

In their arguments the teams may thus have to address the following issues:

First, is the arbitration agreement in the Framework Agreement superseded by the special arbitration agreements in the Purchase Orders? Should that be the case it might be difficult to establish any power of the Arbitral Tribunal to order a consolidation. Deducing such a power from the Arbitral Tribunal's general procedural powers under Articles 19 or 22 ICC Rules might be difficult, given that Article 10 ICC Rules grants the consolidation power to the Court.

Second, can the Parties change the allocation of powers under the ICC Rules, by vesting consolidation powers to the Arbitral Tribunal instead of the ICC Court. That raises the broader question of the relationship between party autonomy and arbitration rules where the latter do not explicitly state that they are subject to an agreement by the Parties. In the present case, the reaction of the ICC to the newly raised claim and its possible consolidation is deliberately vague. Neither has the ICC stated that it would not administer the arbitration if the Arbitral Tribunal decided about consolidation nor has it explicitly confirmed the acceptance of the deviation from the ICC Rules. In the past, there have been cases where the ICC has accepted deviation from its Rules even where they were not explicitly authorized and cases where it has refused to administer the case as an ICC Arbitration in light of the changes made by the parties (e.g. exclusion of scrutiny). There is a certain risk that cases relied upon by the teams do not support their respective position as students may not always draw the correct conclusions from the acceptance of deviations by other institutions and the subsequent use of the ICC Rules in ad-hoc arbitration as occurred for example in the *Insignia Technology v. Alstom Technology* decision.

Third, what are the relevant criteria for consolidation? If the Parties can transfer the power to consolidate, they can probably also change the criteria for consolidation as they seem to have done in the present case. The question then arises of whether the criteria set out in the arbitration clause are exhaustive or are supplementing or specifying the criteria in



Article 10 ICC Rules. While Respondent will probably argue for the former view Claimant has a strong interest in arguing that consolidation is also possible if the criteria of Article 10 ICC Rules are met which are in the present easier to argue.

Fourth, are the relevant requirements for a consolidation met? If they are defined exhaustively in the arbitration clause that would require that the different claims are “*related by common questions of law or fact ... which could result in conflicting awards or obligations*” if decided in separate arbitral proceedings. The only directly obvious possible joint legal questions of both claims are the relationship between the Framework Agreement and the individual Purchase Orders and whether and to what extent the writing requirement of any amendment has been superseded by the Parties’ agreement or practice.

**V. Is the Claimant entitled to payment of either the full amount or parts of the amount due as payment under Purchase Order No. 9601 (PO 1 para. 4 no. 1 c. i and ii)**

**1. Background**

In relation to the merits the teams have to discuss whether Claimant’s payment claim under Purchase Order No. 9601 is justified in its entirety or at least in part. That depends in essence on the answer to the question whether Claimant’s treatment of the cyberattack contributed in a legally relevant way to Respondent’s payment to the wrong account and if so, how the different contributions are to be weighed.

It is uncontested that Respondent paid the amounts due under Purchase Order No. 9601 to the bank account with the First Bank of Danubia given to Mr. Royce in the spoof email of 28 March 2022. The Parties are in dispute of whether with that payment Respondent has either even performed its legal duties under the Framework Agreement, or whether Claimant can at least not rely on Respondent’s non-performance under Article 80, respectively its claims are reduced under Article 77 CISG.

The teams will in their arguments have to deal in one way or another with the following three closely related but separate issues:

- the contractual provisions regulating payments and possible amendments of the Framework Agreement and their – eventual – modification by the Parties’ previous conduct;
- Respondent’s – eventual – negligence in complying with the request in the spoof email; and
- the existence of an obligation for Claimant to inform Respondent about the cyberattack and the increased risk resulting therefrom on the other side.

The primary relevant contractual provisions are Article 7 and 40 of the Framework Agreement (**Claimant Exhibit C 1**). Pursuant to Article 7 payments have to be made to one of the two accounts with banks in Mediterraneo where Claimant is based. Article 40 contains a typical non-oral modification clause which provides:

Article 40: AMENDMENTS

No amendment or waiver of any provision of this Agreement including this Article shall be valid unless the same is in writing and signed by the Parties.

In the past the Parties have, however, deviated on several occasions from the provisions of the Framework Agreement without complying with the form requirement in Article 40. These deviations include *inter alia*:

	Framework Agreement	Deviation	Where
<b>Fixing of price</b>	Art. 6: Semi-annual	Annually in December	Agree on 1 Dec 2019 - orally
<b>Size of order</b>	Art. 3: not exceeding 800,000 per quarter	Order 9601 – 1,200,000 to be delivered in Q2	Orally in Price Fixing Meeting 2 Dec 2021 with price reduction of 1%
<b>Payment date</b>	Art. 7: 15 days after delivery	Order 9601 – 30 days after delivery	Order 9601
		Order 15604 – 30 days after delivery	Order 15604
<b>Notice of defects-conformity</b>	Art. 15: Template in Annex 3 of	By mere email	(contested) oral agreement with Ms. Peugeotroen

While some of those and the other deviations may qualify as individual deviations in purchase orders pursuant to Article 5, which may not be subject to the form requirements, others are clearly amendments for which the form requirement would in principle apply.

The second crucial element for the evaluation of the merits is the cyberattack on Claimant. The relevant factual background for the cyberattack itself, Claimant's reaction to it as well as Respondent's expectations can be found primarily in the article from "Automotive Weekly" (**Respondent Exhibit R 3**) and the witness statement of Mr. Toyoda (**Respondent Exhibit R 4**). As reported in Automotive Weekly the automotive industry in Equatoriana and elsewhere has been the target of an increasing number of cyberattacks over the last few years. In 2020, Respondent had been the victim of a successful cyberattack and immediately informed its business partners about it. At the time Claimant had been one of the most concerned partners and closely monitored Respondent's investigations. In the end, it turned out that Claimant's data were not affected by the breach.

In contrast to that, the hackers which had launched the successful cyberattack on Claimant on 5 January 2022 got access to the entire communication between Claimant and Respondent. When Claimant discovered the attack on 25 January 2022 it did not inform Respondent about the attack though it had soon turned out that Ms. Audi, Claimant's account manager for Respondent, had been the entry point (PO 2 para. 5). Even when it later became apparent that the cyberattack had been much more severe than originally assumed, resulting in a shut-down of Claimant's IT-system from 15 May 2022 (there is a typo in PO 2 para. 26 referring to "15 March") onwards, Claimant did not inform Respondent about the cyberattack.

Mediterraneo, unlike Equatoriana, has no data protection law which imposes special information and notification duties in case of cyberattacks.

As Respondent was not aware of the cyberattack and the resulting risk of an infiltration of Claimant's IT-system when it received the spoof email on 28 March 2022 or when it made the payments on 3 May 2022 and 30 June 2022.

## 2. Arguments

In light of submissions made by Respondent so far in the case file Respondent teams will probably make an alternative argument that

- Respondent has fulfilled its payment obligations by paying to the bank account mentioned in the spoof email of 28 March 2022;
- alternatively, Claimant should be prevented pursuant to Article 80 CISG from invoking Respondent's failure to pay due to its failure to inform Respondent about the cyberattack;
- alternatively, Claimant's claims should be reduced pursuant to Article 77 CISG due to its failure to prevent or mitigate the loss by informing Respondent about the cyberattack.

In light of the difficulties in making the performance defence it may well be that many Respondents will concentrate on the two alternative defences under Articles 80 and 77.

### a. Performance defence

For the performance defense Respondent has to argue and prove that

- the spoof email and the subsequent communications validly amended the payment terms under the Framework Agreement, and
- that the spoof email can be attributed to Claimant due to its failure to inform Respondent about the cyberattack.

A valid amendment of the payment terms under the Framework Agreement would require that

- Respondent “justifiably” interpreted the spoof email to be an email coming from Ms. Audi;
- this impression can be attributed to Claimant due to its failure to inform Respondent about the cyberattack and
- that the amendment either complied with the form requirements of Article 40 of the Framework Agreement or that the Parties have amended or waived the form requirements.

The interpretation of the spoof email both in relation to its content as well as in relation to its originator is governed by Article 8 CISG. Thus, Respondent would have to show that a “reasonable person ... in the same circumstances” would have interpreted the request to come from Ms. Audi. There are a number of facts which the Parties may raise in that context.

Claimant’s strongest arguments are the wrong top-level domain as the email came from “semsorx.me” instead of “sensorx.me” as well as the size and nature of the transaction (transfer of USD 38,400,000). There are a number of further mistakes in the email such wrong numbers for the sensors SA-25899 (S4-25889) or Purchase Order No. A-15604 (No. 15605) as well as a wrong telephone number (Respondent’s number) which – in combination with the urgency – may be indications for a phishing email.

Respondent will primarily rely on the content of the email. It contains detailed information about the last two Purchase Orders (order numbers, quantities, delivery dates) which should only be known to Ms. Audi or other employees of Respondent. At the same time, the reason given for the change of the bank account (problems with sanctions) appears plausible and the bank account is with a bank which had been used in a past in a comparable transaction involving one of the LIDAR sensors (PO 2 paras 2, 12). In light of the content Respondent was not required to realize the above discrepancies, in particular the use of the top-level domain “semsorx.me” instead of “sensorx.me”. It looked sufficiently similar so that the difference could easily be overlooked, as is evidenced by the same mistake in the preamble of the Framework Agreement and the use of the correct email in the signature. There was a plausible reason for the urgency (agreed date of delivery) and

there were also a few mistakes in previous communications so that Respondent could interpret the email as coming from Ms. Audi.

Irrespective of its interpretation as an email from Ms. Audi, the spoof email obviously does not fulfill the form requirements of Article 40 for amendments – even in conjunction with Respondent’s subsequent communications with the hackers. There is no document signed by the Parties containing the amendment. Consequently, Respondent has to argue that the Parties have either abandoned the form requirement for amendments in its entirety, have established a practice between themselves allowing for oral modifications if both Parties agree or are for other reasons estopped from relying on the form requirement.

There are sufficient examples, some of which are listed above, where amendments were implemented and complied with though they did not comply with the form requirement. A further obstacle, which Respondent would have to overcome in this context is that pursuant to Article 29 (2) CISG the modification of a no oral modification has in principle to occur in writing. At the same time, at the one occasion where the amendment concerned the bank account to which payments had to be made the form requirements were complied with. In September 2020 Respondent had been asked to transfer parts of the payment for a deliver to a different bank account in Danubia, held by Claimant’s Danubian subsidiary, SensorDanube. In that transaction, which related to a different sensor (L-X Lidar sensor), the subsidiary had produced and delivered the relevant sensor. The change of the bank account had been part of a signed side letter by the Parties which provided that Respondent would pay 80% of the amount due directly to the bank account of the subsidiary (PO 2 para. 12)

Attribution of the spoof email to Claimant is probably the most difficult task. Whatever theory (agency, apparent authority, Article 2.2.5 UNIDROIT Principles or others) Respondent will invoke for such an attribution it requires in one way or another that Claimant had been under an obligation to inform Respondent about the cyberattack.

Neither the Framework Agreement, nor the data protection laws of Mediterraneo or Danubia, nor the CISG or the applicable Danubian contract law explicitly provide for such an obligation. Thus, an information obligation would have to be deduced either from the Parties’ behaviour or existing general duties such as the duty to act in good faith in the performance of the contract.

Factual elements which may play a role in the discussion are:

- the Parties’ conduct in the context of the cyberattack on Respondent in 2020 (direct information by Respondent / close monitoring by Claimant / request to be kept informed);
- communications by Claimant’s cybersecurity officer in December 2021 relating to the strengthening of the cybersecurity system;

- the origin (Ms. Audi) and seriousness of the cyberattack (shut down of entire IT-system from 15 May 2022 onwards);
- the involvement of the leading cybersecurity company CyberSec in the evaluation of the attack;
- Claimant’s internal order to notify business partners about the cyberattack after 15 May 2022;
- the decision by the legislator in Mediterraneo against the adoption of a data protection law including information duties (**Claimant Exhibit C 6 para. 7**).

Legal concepts which might be addressed by the teams in the discussion are:

- Information obligation as usage/practice pursuant to Article 9 CISG (single incident sufficient for usage?);
- Information obligation arising from the principle of good faith underlying the CISG (Article 7) as well as Danubian Contract Law (Articles 1.7 and 5.1.2 UNIDROIT Principles);
- Cooperation duty in Article 5.1.3 Danubian Contract Law (UNIDROIT Principles) as source of information obligation/duty;
- Information obligation existing under Article 34 Equatorian Data Protection Act as overriding mandatory provision.

#### **b. Exclusion under Article 80**

Largely the same considerations are relevant in the context of the Article 80 CISG- defence invoked by Respondent. Pursuant to Article 80 CISG Claimant “may not rely” on Respondent’s failure to perform its payment obligation “to the extent that such a failure was caused by ... [Claimant’s] omission.”

The relevant “omission” could be Claimant’s failure to inform Respondent about the cyberattack which in turn would require the existence of an information-obligation or at least an information duty. As stated before such an obligation may in principle arise from the contract, the Parties’ behavior or from the law.

Furthermore, Respondent would have to submit and prove that its failure to pay the amounts due to the correct account was “caused” by Claimant. There are different views and definition as to the causal nexus required which the teams may invoke to support their arguments. In this context Respondent’s – eventual – contribution to the failure to perform becomes relevant, i.e. an eventual negligence in paying to a new account without having directly spoken to Ms. Audi. While Mr. Royce first tried to contact Ms. Audi via phone he did not pursue his efforts when he could not reach her, in particular did not try to reach Ms. Peugeotroen. Instead, after having discussed that with Mr. Toyoda, Mr. Royce merely replied directly to the email and asked for a confirmation of the request and a waiver of the form requirement (PO 2 para. 4). Respondent’s behavior shows on the one hand a certain

awareness of the risk associated with the changes of the bank account. On the other hand, it may be seen as an appropriate step for risk mitigation by Respondent.

Other factual elements which may play a role in the discussion are:

- The frequency of cyberattacks in the automotive industry and Respondent's knowledge therefrom,
- Respondent's (constructive) knowledge about the article in the Automotive Weekly from 20 May 2022.

### **c. Reduction under Article 77**

In addressing the Article 77 CISG-defence the teams have to discuss first whether Article 77 CISG is at all applicable to claims for performance as raised in the present case (payment obligation) or is limited to damage claims – as its wording and drafting history seems to imply.

In a second step, fulfilment of the requirements of Article will have to be discussed. While the mitigation duty may not necessarily require a legal information obligation of Claimant the relevant considerations are largely the same as under Article 80 above.

In the discussion a teams may distinguish between the times when the cyberattack was still considered to be minor and times where its scope had become clear, i.e. after 15 May 2023. With an information after that date or at least a complaint that the first payment had not been received at least the second payment could have been prevented.