THIRTY-FIRST ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, JANUARY 2024

MEMORANDUM FOR RESPONDENT

CASE NO. MOOT-100/MM

CHARLES UNIVERSITY

On behalf of	Against
Visionic Ltd	**SensorX plc**
Optronic Avenida 3	Atwood Lane 1784
Oceanside, Equatoriana	Capital City, Mediterraneo
RESPONDENT	**CLAIMANT**

COUNSELS FOR RESPONDENT

Filip Choděra • Veronika Dybová • Adam Kořínek • Marie Nová

Simon Puchý • Jasmína Pustaiová • Matěj Rösner • Dagmar Smetanová

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DATE: 18 January 2024

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NAME: Lucie Kolačkovská SIGNATURE:

NAME: Martin Horák SIGNATURE:

NAME: Vojtěch Sůva SIGNATURE

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LIST OF ABBREVIATIONS

Answer to RArb	Answer to the Request for arbitration from 10 July 2023 sent by RESPONDENT
Answer to RAuth	Answer to the Request for the authorization of the New Claim / consolidation of proceedings from 2 October 2023 sent by RESPONDENT
App	Appendix
Art	Article
Arts	Articles
C *number*	CLAIMANT's exhibit
CIETAC	China International Economic and Trade Arbitration Commission
CJEU	Court of Justice of the European Union
CLAIMANT	SensorX plc, one of the leading Tier 2 producers of sensors used in various applications in the automotive industry
Claims	Initial Claim and New Claim

Current Arbitration	ICC Case No. Moot-100/MM commenced on 9 July 2023
Cyberattack	Cyberattack on CLAIMANT from 5 January 2022 which CLAIMANT discovered on 23 January 2022
Cybercriminal	Person of unknown identity who impersonated Ms Audi when conducting a spoofing attack against RESPONDENT
FA Arbitration Agreement	Arbitration Clause included in the Framework Agreement in Art 41
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC
ICSID	International Centre for Settlement of Investment Disputes
Initial Claim	Claim in the amount of USD 38,400,000 arising from the delivery under the Order S4

LIDAR Sensor	Sensors produced by CLAIMANT and ordered by RESPONDENT under the Order LIDAR
MoC	Memorandum of CLAIMANT
New Claim	Additional payment claim in the amount of USD 12 million arising from the delivery under the Order LIDAR
NOM	No-oral-modification
Notice of Defect	Notice of defect sent on 4 April 2022 by RESPONDENT
Order LIDAR	Purchase Order No. A-15604 placed on 4 January 2022 by RESPONDENT
Order S4	Purchase Order No. 9601 placed on 17 January 2022 by RESPONDENT
Orders	Order LIDAR and Order S4
p	page
para	paragraph
paras	paragraphs

Party/Parties	CLAIMANT and RESPONDENT
Phishing Email	Email sent to CLAIMANT by the Cybercriminal on 5 January 2022, containing malware disguised as a discount code for car race tickets
PO1	Procedural Order No. 1 of 6 October 2023
PO2	Procedural Order No. 2 of 6 November 2023
pp	pages
R *number*	RESPONDENT's exhibit
RArb	Request for Arbitration sent on 9 June 2023 by CLAIMANT
RAuth	Request for the authorization of the New Claim / consolidation of proceedings sent on 2 October 2023 by CLAIMANT
RESPONDENT	Visionic Ltd, a Tier 1 producer of optical systems which are used by many of the leading car manufactures for their autonomous parking systems

S4 Sensors	Sensors produced by CLAIMANT and ordered by RESPONDENT under the Order S4
SCC	Stockholm Chamber of Commerce Arbitration Institute
Secretariat	Secretariat of the ICC Court
SIAC	Singapore International Arbitration Centre
Spoofing Email	Email sent to RESPONDENT by the Cybercriminal impersonating Ms Audi on 28 March 2022
ToR	Terms of Reference in the Current Arbitration
Tribunal	Arbitral tribunal in the Current Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States dollar
VIAC	Vienna International Arbitral Centre

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STATEMENT OF FACTS

1. Visionic Ltd ("**RESPONDENT**") is a producer of optical systems which are used by many of the leading car manufacturers for autonomous parking systems. SensorX plc ("**CLAIMANT**") is a producer of sensors used in various applications in the automotive industry.
2. On **7 June 2019**, the Parties entered into the Framework Agreement ("FA") to regulate the future supply of CLAIMANT's sensors to RESPONDENT.
3. In **August 2020** RESPONDENT suffered a cyberattack. RESPONDENT immediately informed CLAIMANT about the attack and the potential data breach. CLAIMANT was alarmed by the risk and highly appreciative of the information.
4. With its Purchase Order No. A-15604 ("Order LIDAR") of **4 January 2022**, RESPONDENT ordered 200,000 units of LIDAR sensor L-1 in two instalments, with the payments being due on **20 March 2022** and **20 May 2022,** respectively.
5. On **5 January 2022**, CLAIMANT suffered a cyberattack ("Cyberattack") due to CLAIMANT's employee clicking on a link in a fraudulent email ("Phishing Email"). Resultantly, confidential data of CLAIMANT's and RESPONDENT's business relationship was compromised.
6. With Purchase Order No. 9601 ("Order S4") of **17 January 2022** RESPONDENT ordered 1,200,000 sensors to be delivered in two instalments, which CLAIMANT did.
7. On **28 March 2022**, RESPONDENT, unaware of the Cyberattack, received an email seemingly sent by CLAIMANT demanding a change in payment details, which later turned out to be sent by the Cybercriminal ("Spoofing Email").
8. On **4 April 2022**, RESPONDENT informed CLAIMANT about the defect of LIDAR sensors.
9. It was not until **25 August 2022** that CLAIMANT discovered that no payments in relation to Order S4 were received and contacted RESPONDENT, demanding payment to the account originally stipulated in the FA.
10. On **9 June 2023**, CLAIMANT submitted the Request for Arbitration based on Order S4 ("RArb"), on **30 August 2023**, the Tribunal and the Parties signed the Terms of Reference ("ToR").
11. On **8 September 2023**, more than a year after the due date, CLAIMANT discovered the missing payment for the second instalment of LIDAR Sensors.
12. On **11 September 2023**, CLAIMANT submitted the Request for Authorization of the New Claim regarding Order LIDAR ("RAuth").

SUMMARY OF ARGUMENTS

Issue I: Contrary to the CLAIMANT's arguments, the Tribunal lacks jurisdiction over the New Claim. However, even if the Tribunal were to assume jurisdiction, it should reject the authorization of the New Claim. First, The New Claim does not fall within the scope of the ToR and, therefore, cannot be added automatically without the Tribunal's authorisation. Second, since the New Claim falls outside the scope of the ToR, it would require authorisation pursuant to Art 23(4) ICC Rules. However, this authorisation should not be granted, as the New Claim fails to meet the criteria outlined in Art 23(4) ICC Rules. After considering the nature of the New Claim, the stage of proceedings and other relevant circumstances, the Tribunal should refuse the addition of the New Claim to the Current Arbitration.

Issue II: The Tribunal cannot and should not consolidate the proceedings, in case the New Claim has to be raised in a separate arbitration. As opposed to CLAIMANT's assumption, the Tribunal lacks the power to consolidate the proceedings. First, Art 10 ICC Rules vests the power to consolidate with the ICC Court and not with the Tribunal. Second, even if CLAIMANT argued that Parties deviated from ICC Rules, this assertion must be rejected. Art 10 ICC Rules is a provision related to administrative duties of ICC Court, which is a core and distinctive feature of ICC arbitration, and such considered mandatory and non-derogable. In the unlikely case that the Tribunal concluded it had the power to consolidate the proceedings, it should not do so. The proceedings do not meet the conditions set out in FA or Art 10(c) ICC Rules. Finally, RESPONDENT does not act in bad faith by insisting on the originally intended meaning of the conditions in FA.

Issue III: RESPONDENT treated the Spoofing Email as if it was sent by CLAIMANT. Since CLAIMANT did not discover for months that the payment was missing, RESPONDENT assumed the payment was conforming. Because of CLAIMANT's role in RESPONDENT's reasonable reliance on the conformity of the payment, it is estopped from claiming performance. Even if the Tribunal did not apply estoppel, RESPONDENT should be exempted fully or at least partially under Art 80 CISG because its non-performance was caused by CLAIMANT. It enabled the Cyberattack and subsequently failed to inform RESPONDENT about the threat despite being under a duty to do so. Even if the Tribunal did not exempt RESPONDENT under Art 80 CISG, its obligation should at least be reduced pursuant to the principles underlying Art 77 CISG. These principles can be applied directly and should be invoked in the present case since CLAIMANT violated its duty to mitigate loss.

ARGUMENTS

I. THE TRIBUNAL CANNOT ADD THE NEW CLAIM TO THE CURRENT ARBITRATION, AND EVEN IF IT COULD, IT SHOULD NOT DO SO

1. CLAIMANT is bringing uncertainty to a proper resolution of the dispute stemming from the Order S4, which was initially submitted to this Tribunal, by trying to add an unrelated claim to the Current Arbitration. The New Claim is largely dissimilar to the Initial Claim, and its addition will significantly prolong and complicate the proceedings.

2. The Parties entered into multiple contracts to ensure a long-term supply of sensors. Purchase orders for S4 Sensors and LIDAR Sensors were issued under the FA and each have their own distinct arbitration clause [*C2, p 13; C7, p 48*]. On 9 June 2023, CLAIMANT requested arbitration due to the dispute arising under Order S4 [*RArb, p 5*]. Only after the ToR for the Initial Claim were signed did CLAIMANT discover the missing payment relating to Order LIDAR [*RAuth, p 46, para 4*]. Now, CLAIMANT is trying to add this claim to Current Arbitration solely based on another agreement. Furthermore, the issue relating to the addition of the New Claim would not have even emerged if CLAIMANT had been responsibly managing all its transactions. In conclusion, as opposed to CLAIMANT's submission, the Tribunal does not have jurisdiction over the New Claim (**1.**). Moreover, even if the Tribunal had the jurisdiction, it should not authorise the New Claim, as the conditions of Art 23(4) ICC Rules were not met (**2.**).

1. The Tribunal does not have jurisdiction over the New Claim and cannot authorise its addition

3. CLAIMANT asserts that the Tribunal has jurisdiction over the New Claim based on the mere similarity of arbitration clauses in the Orders [*MoC, p 26, paras 99, 100*]. However, this assumption must be rejected. The Tribunal does not have jurisdiction over the New Claim and cannot authorise its addition to the Current Arbitration. This arbitration is based solely on a specific arbitration clause found in Order S4 [*RArb, p 7, para 22*], while the New Claim arises out of Order LIDAR, a contract with its own unique arbitration clause [*C7, p 48*].

4. Every arbitration is consensual and requires an agreement to arbitrate [*Born, Chapter 2; Fouchard et al., p 298; Hanotiau, p 201; Dell v Union; Granite v International*]. Consequently, the consent of the parties is required for a single arbitration based on multiple arbitration agreements [*Art 6(4)(ii) ICC Rules; Boller/Ohlrogge p 95; Delvolvé et al., p 72; Greenberg et al., p 165; Platte, pp 67-82; Serrano, pp 18, 19*]. When assessing the consent to arbitration, the intent of the parties is analysed [*Hanotiau, p 201;*

Pryles/Waincymer, p 479]. Accordingly, pursuant to Art 8 CISG, which applies to the interpretation of all relevant contracts as both Orders are governed by the CISG [*C2, p 13, para 7; C7, p 48, para 7*], primarily the real subjective intent should be analysed and subsidiarily the objective intent of a reasonable person of the same kind [*Art 8(1)(2) CISG; Kröll, pp 147, 155; Schwenzer, p 171, para 22; Tichý, pp 68, 69*].

5. From the subjective perspective, in the Current Arbitration, there is a distinct arbitration clause in the Order LIDAR, which differs from the arbitration clause of the Order S4. Compared to one in the Order S4, it proposes *"one or more arbitrators"*, not a three-member tribunal [*C2, p 13, para 7; C7, p 48, para 7*]. Further, Order LIDAR explicitly excludes the emergency arbitrator which is not present in the FA or the Order S4 arbitration clause [*C7, p 48, para 7*]. The deliberate exclusion of an emergency arbitrator, advocated for by the CLAIMANT's legal department [*PO2, p 65, para 33*], proves intent for a particular dispute resolution method that is different from the Order S4.

6. From the objective analysis, in case multiple contracts contain an identical arbitration clause, it could be assumed that parties intended to have disputes settled in one unified arbitration [*Born, Chapter 9; Hanotiau, p 283; Pryles/Waincymer, p 447; ICC Case 7184; ICC Case 10526*]. However, in a situation when dispute resolution clauses in related contracts are not identical, as is the case in the Current Arbitration, arbitral tribunals and courts interpret it as evidence for the will of the parties to have separate tribunals for each agreement [*Born, Chapter 9; Leboulanger, p 82; ICC Case 4392; ICC Case 6829; ICC Case 6768; ICC Case 8035; HKZ Case 273/95; Nordin v Nutri/Sys.; Curacao v Kenton; Software France v Kiabi*]. Since the Parties drafted a unique arbitration clause in Order S4, it cannot be concluded that the jurisdiction of this Tribunal derives from any other agreement.

7. Since the essential characteristics of the two clauses are so different, it may not be concluded that the arbitration clauses are similar and even less identical. Consequently, CLAIMANT's argument that the Tribunal has jurisdiction because the Order LIDAR arbitration clause is "*fairly similar*" to that of Order S4 [*MoC, p 26, para 99*] will not stand as the existence of a non-identical arbitration clause indicates the intent for separate tribunals. Ultimately, CLAIMANT only attempts to further complicate arbitration proceedings that are based solely on the arbitration agreement in Order S4.

2. The Tribunal should not authorise the New Claim even if it had jurisdiction

8. Even if the Tribunal had jurisdiction over the New Claim, it should not authorise it since the requirements of Art 23(4) ICC Rules were not met. This provision allows arbitral tribunals to add new claims falling outside the scope of the ToR after considering *"... the nature of such new claims, the stage of the arbitration and other relevant circumstances"*. The ToR provide the procedural framework for

ICC arbitration proceedings and specify the claims that the Tribunal should resolve [*Craig et al., p 274; Fouchard et al., p 666; Fry et al., p 240, para 3-827; Webster/Bühler, para 23-3*]. Moreover, the terms of reference prevent an undue delay when parties add new claims at later stages of arbitration [*Craig et al., p 278; Fry et al., para 3-890; Schwartz, p 71; ICC Case 10660; ICC Case 11365*]. Therefore, RESPONDENT submits that the New Claim does not fall within the limits of the ToR (**2.1**). In addition, as the New Claim is outside the scope of the ToR, it would require the authorisation of the Tribunal, which should however not be granted (**2.2**).

2.1 The New Claim does not fall within the scope of the ToR

9. CLAIMANT is incorrect in assuming that it *"is … entitled to include that additional claim* (the New Claim, note added) *in the present proceedings as it is in the ToR's scope"* [*MoC, p 26, para 97*]. The New Claim does not fall within the scope of the ToR as the wording of the ToR is not broad enough for the New Claim to be added automatically without the Tribunal's authorisation. Neither is there a close connection between the New Claim and the Initial Claim.

10. A new claim can be added to a pending arbitration after the signing of the terms of reference without authorisation but only when it falls within its scope [*Berger/Kellerhals, para 1218; Derains/Schwartz, p 268; Reiner/Aschauer, para 499; Schäfer et al., p 133*]. When determining the limits of the terms of reference, tribunals mainly consider the wording used and the connection of the new claim to already existing claims [*Webster/Bühler, para 23-84; ICC Case 4462; ICC Case 16240; ICC Case 10007; ICC Case 6197*]. Tribunals, therefore, do not accept new claims without authorisation if these claims stem from different contracts or arbitration clauses, unless there is a strong connection between such claims [*Fry et al., p 260, para 3-910; Webster/Büher, para 23-90*].

11. CLAIMANT's assertion that "*the limits for the admissibility of a new claim are mentioned in paragraph … about* ***issues to be determined***" (emphasis added) [*MoC, p 25, para 93*] is without merit. The *issues to be determined* contained in the ToR, do not set the limits for the admissibility of the New Claim because they are not the same as the summary of *claims* [*Art 23(1)(c),(d) ICC Rules*]. The list of issues is adjustable and only prescribes the main factual and legal questions that the tribunal shall resolve before deciding on actual claims [*Practical Guide, p 35; Schäfer et al., p 128; Webster/Bühler, para 29-49*]. Thus, unlike the list of claims, issues to be determined do not limit the scope of arbitration [*Derains/Schwartz, p 253; Fry et al., p 245, para 3-849; Farhat v Daewoo; ECO v Eurotech].* Therefore, CLAIMANT is erroneous in stating that the list of claims is subject to evolution or modification in the same way as the list of issues [*MoC, p 27, para 103*; *Derains/Schwartz, p 253; Fouchard, p 668; Fry et al., p 245, para 3-849; ICC Case 7661*].

12. Moreover, the New Claim arises out of a separate contract, Order LIDAR, with a distinct arbitration clause [*C7, p 48*]. The ToR and the RArb contain no reference to the arbitration clause of Order LIDAR [*PO2, p 65, para 35; RArb, pp 5-8*]. Consequently, the Current Arbitration is solely based on the claim arising out of Order S4. In addition, the Claims do not share common questions of law or fact (see Issue I, section **2.2.2**). Hence, the Claims are not closely connected and cannot be automatically heard together in one proceeding, contrary to CLAIMANT's assertion [*MoC, p 25, para 95*].

13. To conclude, the New Claim does not fall within the scope of the ToR due to the wording of the ToR and the distinct nature of the New Claim. CLAIMANT merely attempts to complicate the proceedings by bringing an unrelated claim, which could have and should have been brought before the signing of the ToR.

2.2 Additionally, the New Claim should not be authorised by the Tribunal under Art 23(4) ICC Rules

14. Tribunal's authorisation is required for the addition of new claims falling outside the scope of the terms of reference. In the Current Arbitration, the Tribunal should refuse the authorisation of the New Claim, as the Orders do not form one commercial relationship (**2.2.1**). Moreover, the Claims are not connected by common questions of fact or law (**2.2.2**) and the arbitration clauses in Order S4 and Order LIDAR are not compatible (**2.2.3**). Additionally, CLAIMANT does not have valid reasons for the belated raising of the New Claim (**2.2.4**). Lastly, opposing CLAIMANT's assertions, the addition of the New Claim would be contrary to the expeditious and cost-effective conduct of arbitration (**2.2.5**).

2.2.1 The Order S4 and Order LIDAR do not form one commercial relationship

15. The Tribunal should not authorise the New Claim as it is different in nature compared to the Initial Claim. CLAIMANT omitted that it was the will of both Parties to arbitrate disputes arising under different purchase orders in separate proceedings, because the Orders do not form a unified commercial relationship.

16. When authorising new claims, tribunals consider whether they arise out of or in connection with the same contract, same facts, same economic transaction, or bears another link to the claims in the terms of reference [*Derains/Schwartz, p 268; Fry et al., p 258, para 3-904; Haas, p 960; Schäfer et al., pp 133, 134; Webster/Bühler, para 23-92; ICC Case 16240*]. Therefore, it is the contractual interconnection between new and initial claims that allows tribunals to authorise new claims according to Art 23(4) ICC Rules [*Fry et al., p 258, para 3-904; Haas, p 960; ICC Case 16240*].

17. Contractual interconnection is present where there are reciprocal obligations between the contracts [*Ammar, p 257; Leboulanger, pp 47, 48*]. The analysis of the intent of the parties, the nature of the contract and the wording of contractual instruments is used by tribunals when determining contractual interconnection [*Leboulanger, p 53; ICC Case 6829; PCC Case 122/85; Klöckner v Cameroon; Holiday Inn v Morocco*]. As stated above, pursuant to Art 8 CISG, when interpreting contracts, the tribunals primarily analyse the real subjective intent and subsidiarily the objective intent of a reasonable person of the same kind.

18. First, the factual background indicates there was no intent to create an indivisible commercial relationship between the Orders. The Orders represent two transactions for different goods concluded on different dates [*C2, p 13; C7, p 48*]. Moreover, different personnel were responsible for each transaction due to the distinct nature of the LIDAR Sensors with potential military use, while the S4 Sensors can only be used in automotive driving devices [*PO2, p 62, para 15*]. Consequently, factual differences prove that the Claims do not come from the same commercial relationship.

19. Second, the nature of the Order LIDAR is different from that of Order S4, as there is no interdependence between them. There are no reciprocal obligations between the Orders and a termination of one purchase order does not alter obligations stemming from other purchase orders under the FA. This is further evident in the fact that the only link is between the individual purchase orders and the FA, and no formal link exists directly between the Orders themselves.

20. In conclusion, due to the wording of the contracts and the nature of the Orders, the Tribunal should reject CLAIMANT's position that unrelated claims need to be heard together at all costs, as this approach could result in the disruption of the proceedings. The Tribunal should instead conclude that the Parties did not intend to create a unified commercial relationship between the Orders.

2.2.2 The New Claim and the Initial Claim are not connected by common questions of fact or law

21. CLAIMANT's assumption that the Claims are connected by common question of fact is not correct, as the factual and legal connection between them is insufficient [*MoC, p 27, para 102*]. Arbitral tribunals allow new claims when they are connected to initial claims by common question of law or fact [*Fry et al., p 259, para 3-904; Schäfer et al., p 133; ICC Case 10188; ICC Case 10916; ICC Case 11195; ICC Case 22423; ICC Case 7184; ICC Case 7047*]. That is because admitting an unrelated

claim to a pending arbitration results in the disruption and prolongation of proceedings [*Derains/Schwartz, p 268; Fry et al., p 258, para 3-904; Webster/Bühler, para 23-83*].

22. The factual background to the New Claim is not identical or similar to the Initial Claim. The Initial Claim was prompted by the Cybercriminal sending fake banking details, while the New Claim follows the dispute arising after CLAIMANT has allegedly not received an email containing the Notice of Defect [*C5, p 15; R5, p 56*]. Therefore, CLAIMANT is misinterpreting the facts by stating that both disputes arose as a result of a cyberattack, because the disputes leading to the claims were not caused by a single act of the cybercriminal [*MoC, p 27, para 102*].

23. Moreover, as compared to LIDAR Sensors, S4 Sensors do not have dual use with a potential for military use [*PO2, p 62, para 15*]. This is one of the reasons why there were designated special personnel to oversee the LIDAR transaction on behalf of the Parties, which CLAIMANT conveniently omitted in its memorandum [*C8, p 49, para 3*]. Consequently, CLAIMANT is inaccurately asserting that the Orders are connected, when in fact the two Orders have different factual backgrounds. There is, therefore, no reason to assume that having a unified arbitration would result in a better possibility of analysing complex and unrelated factual questions, as distinct factual occurrences could very well be managed by distinct tribunals.

24. Furthermore, the dispute relating to the New Claim arose after it was discovered that LIDAR Sensors were defective and RESPONDENT sent a proper Notice of Defect to CLAIMANT, who did not register it in time [*Answer to RAuth, p 54, paras 2, 3*]. CLAIMANT asserts that this Notice of Defect did not fulfil the form requirement as agreed in the FA [*C8, p 49, para 9*]. Therefore, the main provisions of CISG applicable to the New Claim are Art 39 CISG regarding the fulfilment of the form requirement for the notice of defect, and Arts 35 to 44 CISG on conformity of goods.

25. On the contrary, the initial dispute relating to the Order S4 did not entail any defective goods and therefore no notice of defect was ever sent. The initial dispute arose after RESPONDENT was misled into making payment for S4 Sensors to the Cybercriminal's account [*C5, p 16*]. The Tribunal will therefore primarily determine what role CLAIMANT played in the Spoofing Email being sent to RESPONDENT, evaluating the presence of an information duty concerning the Cyberattack, and assessing the relevance of exemptions outlined in Arts 77 and 80 CISG. Thus, the two disputes relate to entirely different legal questions, the New Claim relates to defective goods and the Initial Claim deals with alleged non-performance of payment.

26. As a result, the Tribunal should not authorise the addition of the New Claim to the Current Arbitration, because the New Claim and the Initial Claim do not share common questions of fact or law.

2.2.3 Arbitration clauses in Order S4 and Order LIDAR are not compatible

27. Even though omitted by CLAIMANT, the addition of the New Claim should not be authorised, as arbitration agreements in the Orders are not compatible. The different number of arbitrators constitutes a key element that must be identical to prove compatibility. Furthermore, the Parties intended to alter dispute resolution clauses in each Order so to make the dispute resolution as cost and time effective as possible.

28. Incompatible arbitration clauses prove that parties intended separate arbitration proceedings for claims arising under different contracts [*Born, Chapter 9; Fry et al., p 80, para 3-242; Hanotiau, p 375; ICC Case 6829*]. The number of arbitrators is the key difference between two arbitration clauses [*Fry et al., p 81, para 3-243; Greenberg et al., pp 168-169; Leboulanger, pp 81-82; Pryles/Waincymer, p 440; Schnyder, p 2200, para 27*].

29. Arbitration clauses in the Orders are clearly different as they call for distinct numbers of arbitrators. The arbitration clause in the Order LIDAR calls for "*one or more arbitrators*" [*C7, p 48, para 7*]. On the contrary, Order S4 calls for "*three arbitrators*" [*C2, p 13, para 7*]. If new separate proceedings would be initiated under Order LIDAR, a sole arbitrator could be nominated by the ICC Court under Art 12(2) ICC Rules.

30. The longstanding practice of the ICC Court has been to appoint a three-member tribunal in arbitrations where the claims exceed USD 30,000,000 [*Feris; Fry et al., p 140, para 3-440; ICC Note to the parties and tribunals*]. As the amount of the New Claim is USD 12,000,000 [*RAuth, p 46, para 1*], the ICC Court would likely nominate a sole arbitrator. Nomination of a sole arbitrator would save the Parties a considerable amount of money, as the costs associated with a three-member tribunal are significantly higher than the costs associated with a sole arbitrator [*Fry et al., p 137, para 3-431; ICC Report; ICC Website*]. Furthermore, the arbitration led by a sole arbitrator is less time-demanding [*Fry et al., p 137, para 3-431, ICC Report*].

31. By changing the key element relevant for the compatibility of the arbitration clauses, the number of arbitrators, the Parties clearly intended to have disputes arising out of different purchase orders settled in separate proceedings. Additionally, it cannot be presumed that when the Parties agreed on the condition of "*one or more arbitrators*" in Order LIDAR, RESPONDENT would automatically be willing to accept the additional costs arising from an arbitration conducted by three arbitrators.

This would also be contrary to the requirement for a "*cost and time-efficient*" arbitration agreed to by the Parties [*PO1, p 58, para 2*].

2.2.4 CLAIMANT lacks valid reasons for the belated raising of the New Claim

32. CLAIMANT failed to bring the New Claim prior to the signing of the ToR and lacks valid justification for this omission. CLAIMANT's failure to bring the New Claim sooner was caused solely by the CLAIMANT's internal issues, which should not cause harm to RESPONDENT.

33. As the belated raising of a new claim disrupts the arbitration, tribunals should consider the reasons for the delay in bringing the new claim after signing of the terms of reference and whether such reasons were beyond the control of the submitting party [*Brueggemann/Smahi, p 53; Fry et al., p 259, para 3-906; Kull, p 2336; Mimnagh/Welser, p 41; Webster/Bühler, para 23-92; Naftogaz v Gazprom; ICC Case 21574*].

34. This consideration works as a precaution against abusive tactics of a counterparty, such as intentionally submitting the claim later when it could pose an unfair disadvantage to the other party [*Born, Chapter 15; Brueggemann/Smahi, p 53; Fry et al., p 259, para 3-906; Kull, p 2336; Webster/Bühler, para 23-92; Harris v Iran; SA Thalès v GIE Euromissile; ICC Case 15634*].

35. CLAIMANT's late discovery of the facts leading to the addition of the New Claim was caused by its omission to act [*C6, p 17, para 5; C8, p 49, paras 3,6; RArb, p 5*]. The late submission of the New Claim cannot be justified by the internal issues presented by CLAIMANT, namely the cyberattack and the absence of an account manager, Ms Peugeotroen, who was internally responsible for the sale of LIDAR Sensors [*MoC, p 28, para 107; PO2, p 65, para 29*].

36. CLAIMANT had sufficient time to discover the missing payment for the LIDAR Sensors before the signing of the ToR, one year and a half since the Cyberattack in January 2022 [*C6, p 17, para 5; PO1, p 58, para 1*]. Moreover, it was one of the CLAIMANT's employees who, through her carelessness, allowed trojan horse malware to infect CLAIMANT's data system [*C6, p 17, para 5*]. Additionally, CLAIMANT should have appointed a new account manager for the LIDAR transaction right after it was clear that Ms Peugeotroen was not capable to hold that position [*C8, p 49, para 3*]. If that were to happen, the new manager would be able to notice the missing second payment for the LIDAR Sensors [*C8, p 49, para 6*].

37. CLAIMANT failed to discover the New Claim earlier due to its omission to act. CLAIMANT's internal issues do not justify the admission of claims post-signing of the ToR as it was CLAIMANT who was responsible for carefully detecting and fixing damages after the cyberattack.

2.2.5 The addition of the New Claim would be contrary to the procedural efficiency

38. Contrary to CLAIMANT's allegations, adding the New Claim would result in an increase in cost and prolong the envisioned procedural timetable, which would go against the "*cost and time-efficient*" arbitration agreed to by the Parties [*MoC, p 28, para 107; PO1, p 58, para 2*].

39. The tribunal should conduct expeditious and cost-effective proceedings which is also ensured by the restriction on parties to bring additional claims after signing of the terms of reference [*Art 22(1) ICC Rules; Andersen et al., p 6; Brueggemann/Smahi, p 53; Fry et al., p, 259, para 3-905; Kull, p 2336; Miles, p 279; Mimnagh/Welser, pp 41-42; Reiner/Aschauer, p 121, para 473; ICC Case 21177; ICC Case 23221*]. Therefore, at a certain moment, new claims should no longer be allowed to avoid undue delay and disruption of proceedings [*Kull, p 2333; Löf et al., p 255, para 154; Schäfer et al., p 134; Webster/Bühler, para 23-83; ICC Case 10621*].

40. Adding the New Claim would not only result in the modification of the procedural timetable and overall extension of the Current Arbitration (**A**), but it would also lead to an increase in costs (**B**).

(A) The addition of the New Claim would prolong the Current Arbitration

41. The tribunal should consider the effectiveness of the arbitration, as the new claim may prolong the proceedings by requiring a fresh round of submissions and evidence addressing new facts arising out of the addition [*Born, Chapter 15; Brueggemann/Smahi, p 53; Mimnagh/Welser, pp 31, 32; ICC Case 10188*].

42. Additionally, upholding the parties' ability to defend themselves against new claims results in the modification of the procedural timetable, due to parties' preparation for the defence against new claims [*Born, Chapter 15, Brueggemann/Smahi, p 54; Fry et al., p 259, para 3-906; Mimnagh/Welser, p 43; Reiner/Aschauer, p 126, para 504; Webster/Bühler, para 23-97; STLD v PRIDE; ICC Case 19581; ICC Case 21574*].

43. The Parties agreed on a procedural timetable in the ToR [*PO2, p 65, para 34*]. In case the New Claim is authorised, RESPONDENT would need sufficient time to equally prepare itself for the next part of the proceedings. Therefore, to maintain the equal ability of the Parties to get familiar with the New Claim, a new procedural timetable would have to be established [*PO2, p 65, para 34; MoC, p 28, para 110*]. This would result in the extension of the time limits and overall length of the arbitration.

(B) The addition of the New Claim would increase costs in the Current Arbitration

44. CLAIMANT omitted the impact on costs associated with adding the New Claim. As the addition of the New Claim would add to the complexity of the issue, the costs of the Current Arbitration would increase. This would involve new legal evaluations, additional lawyers' fees, expert evidence, and exchange of pleadings addressing new facts arising out of the addition [*Born, Chapter 15; Brueggemann/Smahi, p 53; Mimnagh/Welser, pp 31, 32; ICC Case 10188*]. Moreover, new witness statements would be requested from employees supervising the Order LIDAR, as the personnel responsible for each of the Orders were different [*RArb, p 6, para 15; C8, p 46, para 3*].

45. In addition, ICC's administrative expenses and the arbitrators' fees are fixed according to the monetary value of the claims [*Pryles/Waincymer, pp 485, 486; Schäfer et al., p 33; ICC Website*]. By authorising the New Claim, the overall value of the dispute will increase by USD 12,000,000 [*RAuth, p 46, para 1*].

46. RESPONDENT acknowledges that in case the New Claim is not authorised, CLAIMANT would have to raise it in separate proceedings, which will be associated with additional costs and time. Yet, the foremost duty of the Tribunal should be the efficient resolution of the Initial Claim in light of the desired procedural efficiency. However, this would be endangered by the authorisation of the New Claim.

47. In conclusion, contrary to CLAIMANT's allegations, authorising the New Claim would prolong the Current Arbitration and increase the costs of the proceedings. Therefore, adding the New Claim would be against the "*expeditious and cost-effective*" conduct of the proceedings.

48. **Conclusion I:** Opposed to CLAIMANT's assertions, the Tribunal cannot add the New Claim, and even if it did, it should still deny the authorisation as the New Claim does not fall within the ToR and additionally does not fulfil the requirements under Art 23(4) ICC Rules. The Orders do not form one commercial relationship and are not connected by common questions of law or fact. Additionally, arbitration agreements are incompatible and CLAIMANT lacks valid justification for raising the New Claim at this stage of proceedings. Above all, adding the New Claim would prolong the proceedings and would result in an increase in costs.

II. THE TRIBUNAL CANNOT CONSOLIDATE THE PROCEEDINGS, AND EVEN IF IT COULD, IT SHOULD NOT DO SO

49. Contrary to CLAIMANT's submission [*MoC, p 29, para 114*], the applicable arbitration clause to the dispute is the one in Order S4 and not in the FA (see Issue I, section **1**). However, in case the Tribunal found the provision in the FA relevant, it nevertheless lacks the power to consolidate the

proceedings. First, the consolidation provision in the FA Arbitration Agreement is a substantial deviation from the mandatory provision of ICC Rules and as such is not allowed (**1.**). Second, even if the Tribunal did have the power to consolidate, it should not exercise it because neither the conditions under FA nor Art 10 ICC Rules are met (**2.**). Third, RESPONDENT does not act in bad faith by opposing the consolidation (**3.**).

1. The Tribunal lacks the power to consolidate the proceedings

50. CLAIMANT erroneously asserts that the Tribunal has the power to consolidate the proceedings pursuant to Art 10(a) ICC Rules and Art 41(5) FA [*MoC, p 30, para 117*]. However, RESPONDENT submits that CLAIMANT's argument is wrong for two reasons.

51. First, CLAIMANT fails to distinguish between the Tribunal and the ICC Court by claiming that the Tribunal has the power to consolidate because the Parties opted for ICC Rules [*MoC, p 30, para 121*]. This must be rejected as ICC Rules make a clear distinction between ICC Court's and Tribunal's role in the ICC arbitration (**1.1**). Second, CLAIMANT's argument cannot stand even if it stated that the consolidation provision represents an allowed deviation from ICC Rules. Art 10 ICC Rules is a provision related to the administrative powers of the ICC Court and therefore is a core and distinctive feature of ICC arbitration that cannot be deviated from (**1.2**).

1.1 Art 10(a) ICC Rules does not apply because ICC Rules distinguish between the ICC Court and the Tribunal

52. Contrary to CLAIMANT's argument, ICC Rules do not empower the Tribunal to decide on consolidation of proceedings. ICC Rules give this power to the ICC Court and make obvious differentiation between the Tribunal and the ICC Court. Therefore, the role of the Tribunal and the ICC Court is not interchangeable and Art 10 ICC Rules does not apply.

53. In the present case, CLAIMANT tries to shape the ICC Rules to its advantage by stating that "*...Art. 10.a of the ICC rules* ***authorises the Tribunal*** *to consolidate the two (2) pending arbitrations…"* (emphasis added) [*MoC, p 30, para 117*]. However, this is contrary to Art 10 ICC Rules which states *"****The Court may****, at the request of a party, consolidate two or more arbitrations…"* (emphasis added).

54. Moreover, ICC Rules maintain a distinction between the administrative function, which is exercised by the ICC Court, and the judicial function exercised by the Tribunal. While the Tribunal decides the procedure and the merits of disputes, ICC Court is responsible for supervisory and administrative decisions [*Derains/Schwartz, pp 18,19; Schnyder, p 2163; Webster/Bühler, para 1-18; Cubic Case*]. Consequently, ICC Court's decisions are not equivalent to those of tribunals and are binding

not only upon the parties, but also upon the members of the tribunal [*Schäfer et al., pp 15, 61; Webster/Bühler, para 10-2*].

55. In conclusion, ICC Rules vest the power to consolidate only to the ICC Court, whose function is not interchangeable with the function of the Tribunal. Thus, CLAIMANT's argument is incorrect and the Tribunal cannot decide on consolidation pursuant to Art 10 ICC Rules.

1.2 Deviation from Art 10 ICC Rules is not possible

56. CLAIMANT asserts that the consolidation provision in the FA is merely an expression of consent towards the use of consolidation and not a deviation from Art 10 ICC Rules [*MoC, p 30, para 118*]. However, this assumption should be rejected, because such consent would vest the power to consolidate in the Tribunal rather than in the ICC Court, making it a deviation from ICC Rules. Even if CLAIMANT were to argue that such deviation shall be allowed, this argument would fail as Art 10 ICC Rules is a mandatory provision and cannot be deviated from. Therefore, the Tribunal does not have the power to consolidate the proceedings.

57. By opting for ICC Rules, the Parties agreed to conduct the proceedings in accordance therewith and to limit their autonomy by the provisions that the institution considers mandatory [*Berger, pp 476, 477; Born, para 15.02[C]; Carlevaris, p 115; Derains/Schwartz, pp 7, 8; Schroeter, p 169*].

58. ICC Rules do not have a general provision addressing their modification and neither does Art 10 ICC Rules. Consequently, the contractual relationship between the ICC and the Parties gives the ICC Court the right to determine which provisions are mandatory and thus cannot be deviated from [*Derains/Schwartz, p 8; Fry et al., pp 17,18, para 3-17; Schäfer et al., p 16; Smit, p 846; Webster/Bühler, para 1-28*]. On the contrary, the members of the tribunal are bound to carry out their responsibilities in accordance with ICC Rules and may settle on other rules only in case ICC Rules are silent or explicitly allow them to do so [*Art 11(5) ICC Rules, Art 19 ICC Rules; Schäfer et al., p 71*]. Finally, the provision is mandatory if it is regarded as a cornerstone of ICC arbitration, being its core and distinctive feature [*Carlevaris, p 119; Schroeter, pp 171, 172; Smit, p 848; Webster/Bühler, para 1-32*].

59. ICC Court plays a vital role in the ICC arbitration because it supervises the proceedings and ensures proper application of ICC Rules [*App 1, Art 1(1) ICC Rules; Bond et al., p 349; Derains/Schwartz, p 19*]. Therefore, ICC Rules vest ICC Court with strong powers to intervene in arbitration proceedings, which distinguishes ICC arbitration from both ad hoc arbitration and arbitration under other institutional rules [*Schäfer et al., p 5; Webster/Bühler, para 1-20*]. Consequently, provisions entrusting the ICC Court with powers necessary to fulfil its functions have been identified as

mandatory, such as the scrutiny of awards, confirmation of arbitrators and the ICC Court's powers to fix fees and expenses [*Carlevaris, p. 119; Fry et al., p 18, para 3-17; Schroeter, p 172; Smit, p 849*].

60. In *Samsung v Qimonda*, the parties agreed to have disputes resolved by ICC arbitration, however without the ICC Court's confirmation of arbitrators and the scrutiny of awards. When the dispute arose, the ICC refused to administer the case unless the parties removed these derogations and because the parties declined to do so, the ICC terminated the proceedings. The *Tribunal de Grande Instance de Paris* subsequently confirmed that the ICC's refusal to administer the case was justified [*Samsung Electronics v Qimonda*]. This confirms that ICC can identify mandatory provisions of ICC Rules that the Parties cannot deviate from.

61. The issue of mandatory rules is also known to other institutional rules. In a similar case, albeit arbitrated under SIAC Rules, the Singapore High Court upheld an award in which the President of SIAC exercised its administrative power and appointed a sole arbitrator in the expedited procedure. This was contrary to the parties' arbitration agreement opting for a three-member tribunal. Similarly to the Current Arbitration, the issue was whether the default rule, which gives the power to choose the number of arbitrators in the expedited procedure to the SIAC-President, can override the parties' agreement. The Singapore High Court held that in the event of a conflict between the institutional rules chosen by the parties and their intention to have the proceedings arbitrated by a three-member tribunal, the rules should prevail [*AQZ v ARA*]. The same approach was also adopted during enforcement by the Supreme Court of Thailand [*Thai SIAC Case*].

62. In the Current Arbitration, CLAIMANT requests the Tribunal to decide on the consolidation and alleges that the consolidation provision is not a deviation from ICC Rules [*MoC, pp 30,31 paras 118-123*]. However, this argument is wrong because the consolidation provision gives the power to consolidate to the Tribunal, while ICC Rules vest it in the ICC Court. Moreover, CLAIMANT's argument would fail even if it claimed that the consolidation provision is an allowed deviation. The decision on consolidation is one of the administrative powers of the ICC Court which is binding on both the Parties and the Tribunal and is connected to ICC Court's supervisory function [*Fry et al., p 114, para 3-356; Grierson/Hooft, p 122; Webster/Bühler, para 10-2*]. Art 10 ICC Rules consequently vests one of the vital administrative powers to the ICC Court, hence it is core and distinctive to the ICC arbitration.

63. In conclusion, allowing the deviation would interfere with the strong administrative role of the ICC Court. Because this role is considered a core and distinctive feature of ICC arbitration, it is

mandatory and cannot be deviated from. Thus, the Tribunal lacks the power to consolidate the proceedings.

2. Even if the Tribunal had the power to consolidate the proceedings it should not do so

64. In the unlikely event that the Tribunal concludes it can consolidate the proceedings it should not exercise such power. Although in some instances the consolidation may be an effective measure, under given circumstances it is highly unsuitable. The consolidation proposed by CLAIMANT is based on Art 41(5) FA, and in case it would not be sufficient, CLAIMANT attempts to support it by Art 10(c) ICC Rules [*MoC, p 29, para 114*]. However, CLAIMANT's motion meets neither the conditions set forth in Art 41(5) FA (**2.1**) nor the conditions under Art 10(c) ICC Rules (**2.2**). Under these circumstances, the request for consolidation has no legal nor factual grounds.

2.1 The conditions for consolidation under Art 41(5) FA are not met

65. CLAIMANT argues for consolidation under Art 41(5) FA, however, it does not assess whether the conditions are met [*MoC, p 29, para 114*]. Conversely, RESPONDENT submits that Claims are connected neither by common questions of law nor fact and there is no risk of conflicting awards. Thus, the conditions in Art 41(5) FA are not met and the proceedings should not be consolidated.

66. The question of law in the Initial Claim consists of attributability of the Spoofing Email to CLAIMANT, information duty regarding the Cyberattack and applicability of exemptions in Arts 77 and 80 CISG. Contrary to that, legal questions in the New Claim will evaluate Arts 35 to 44 CISG on conformity of goods, and Art 39 CISG on the form of the Notice of Defect. The legal questions are therefore different and consequently the legal provisions to be evaluated differ as well (see Issue I, section **2.2.2**).

67. Regarding the question of facts, the sensors in question are different in both proceedings. Both serve different purposes, have different specifications and are connected to different purchase orders (see Issue I, section **2.2.2**). Additionally, as already described (see Issue I, para **23**) the personnel responsible for each purchase order are different. Thus, the proceedings are not connected by common questions of law or fact and the first condition in the FA is not met.

68. Conflicting awards appear when two closely related claims are brought in front of different tribunals, which have different views on the same facts or legal questions in both proceedings. Consequently, the separate tribunals issue awards that are legally exclusive of each other, thereby conflicting [*Brekoulakis, p 14; Mayer, p 416; Spoorenberg/Viñuales, p 100; Hoffmann Case*]. That is, the condition of possible conflicting awards applies to the situation when one of the awards would prevent the respective party from fulfilling the other award. In the case at hand, there is no risk of

the separate tribunals adopting different views on the same facts, because the Initial and New Claims are not related both factually or legally.

69. Contrary to CLAIMANT's assertion, the legal questions in each of the Claims are different, the facts of each vary heavily and the Claims cannot result in conflicting awards. Therefore, the conditions stated in Art 41(5) FA are not met and the consolidation of the proceedings is not possible.

2.2 The consolidation under Art 10(c) ICC Rules by the Tribunal is not possible

70. In support of its argument for consolidation, CLAIMANT incorrectly states that the proceedings also comply with the conditions set out in Art 10(c) ICC Rules [*MoC, pp 29, 30, section A*]. As already described, the Tribunal does not have the power to consolidate the proceedings under Art 10(c) ICC Rules and the deviation from this provision is not allowed (see Issue II, section **1**). The conditions listed in Art 10(c) ICC Rules are therefore irrelevant. Nevertheless, even if the Tribunal decides that the conditions under Art 10(c) ICC Rules apply, they are not met anyway.

71. Art 10(c) ICC Rules stipulates three cumulative conditions. First, both arbitrations need to be between the same Parties. RESPONDENT does not contest CLAIMANT's argument that this condition is fulfilled [*MoC, p 32, section B(1)*]. However, this does not alter the fact that the two remaining conditions have not been met.

72. Second, pursuant to Art 10(c) ICC Rules both disputes need to arise from the same legal relationship. Legal relationships are the same when related to the same economic transaction that might be based on different contracts, however, concluded on or about the same day, regarding the same products and ideally with the same arbitration agreements [*Derains/Schwartz, p 61; Fry et al., p 114, para 3-357; Webster/Bühler, para 22*]. The Orders are individual contracts, concluded on the 4 and 17 of January, concerning different types of products and include different arbitration agreements [*C2, p 13, C7, p 48*]. Moreover, there is no reciprocity between the two Orders, they do not create a joint-venture operation and consequently there is no intent for a unified arbitration under the Orders. (see Issue I, section **2.2.1**). Thus, the Orders do not arise from the same legal relationship.

73. Third, the last condition is the compatibility of arbitration clauses. Compatible arbitration clauses are defined as identical or concurring, meaning the clauses are not different in their core features [*Berger/Kellerhals, p 61; Kröll, p 394, para 41*]. This definition is also in line with the one stated by CLAIMANT: "… *arbitration agreements could be* ***deemed incompatible*** *if there are* ***disparities in their fundamental terms and aspects of the procedure***" (emphasis added) [*MoC, p 33, para 138*].

Such difference can be the number of arbitrators [*Fry et al., p 81, para 3-243; Greenberg et al., pp 168-169; Leboulanger, pp 81-82; Pryles/Waincymer, p 440; Schnyder, p 2200, para 27*].

74. Therefore, the arbitration clauses in both Orders are incompatible because they differ in their core features, the number of arbitrators [*C2, p 13, C7, p 48*]. If the new separate proceedings was initiated, a sole arbitrator could be nominated saving the parties a considerable amount of money and time (see Issue I, para **30**). Hence the last condition of Art 10(c) ICC Rules is not met as well.

75. Furthermore, when deciding on consolidation under Art 10(c) the ICC Court should also take other relevant circumstances into consideration [*Fry et al., p 114, para 3-358*]. One of these factors is the efficiency and cost-effectiveness of the proceedings, which is also an obligation imposed on the Tribunal by Art 22(1) ICC Rules [*Andersen et al., p 6; Fry et al., p 232, paras 3-793, 3-795; Miles, p 279; Reiner/Aschauer, paras 442-443; ICC Case 21177; ICC Case 23221, P4*]. However, consolidating the proceedings would result in a modification of the procedural timetable as well as increase in costs given the new legal evaluations, additional lawyers' fees, expert evidence, and exchange of submissions (see Issue, section **2.2.5**). Thus, consolidation is not an efficient procedural measure under the circumstances.

76. In conclusion, the two of the conditions set out in the Art 10(c) ICC Rules are met, therefore, the Tribunal cannot consolidate the proceedings even if it had the power to do so.

3. RESPONDENT did not act in bad faith

77. CLAIMANT unfoundly states that RESPONDENT acts in bad faith when refusing consolidation as agreed in Art 41(5) FA [*MoC, p 31, paras 124-128*]. RESPONDENT is not acting in bad faith since the motivation for the inclusion of the consolidation provision was based on entirely different circumstances regarding multi-order consolidation. Consequently, RESPONDENT only rightfully insists on fulfilment of the conditions for consolidation upon which the Parties have agreed in Art 41(5) FA.

78. Although not stating it directly, CLAIMANT is probably alluding to the *estoppel* doctrine by pointing out alleged inconsistencies of RESPONDENT, specifically its suggestion to include a consolidation option in FA and now refusing it [*MoC, p 31, para 126*]. The *estoppel* doctrine is derived from the principle of good faith and precludes the party from acting in a manner inconsistent with its previously taken stance, thus protecting the legitimate expectations of other parties [*Bowett, p 176; Charis/Gavin, paras 1-7; Bankswitch v Ghana; ICC Case 21537*]. Thus, if CLAIMANT attempts to rely on *estoppel*, it shall prove that RESPONDENT's current position is contradictory to the one formerly assumed [*Charis/Gavin, paras 14-16; Sheppard, p 218; Amco v Indonesia; Bankswitch v Ghana*].

79. The rationale for including the consolidation provision was to avoid a situation similar to RESPONDENT's past experience. This involved three separate arbitration proceedings based on orders of the same goods and with the same defect which led to different results [*PO2, p 63, para 19*]. Thus, to ensure that the purpose of the consolidation provision in Art 41(5) FA is fulfilled as intended by the Parties, the conditions of common questions of law and facts and the risk of possible conflicting awards must be met.

80. In the Current Arbitration, the conditions set out in Art 41(5) FA were not fulfilled (see Issue II, section **2.1**), hence the true purpose of the consolidation provision is not fulfilled either. RESPONDENT's refusal to consolidate is therefore in good faith and is not inconsistent with its previous position. Thus, the doctrine of *estoppel* is not applicable.

81. **Conclusion II:** In conclusion, CLAIMANT incorrectly assumes that ICC Rules give the power to consolidate the proceedings to the Tribunal. However, Art 10 ICC Rules clearly vests this power in the ICC Court. Moreover, this provision is mandatory and as such cannot be deviated from. Even if the deviation was allowed, neither the conditions under Art 41(5) FA nor Art 10(c) ICC Rules are met. Thus, CLAIMANT's argument only brings uncertainty to the proceedings and the Tribunal cannot and should not consolidate the proceedings.

III. CLAIMANT IS ENTITLED TO NEITHER FULL NOR PARTIAL PAYMENT OF THE PURCHASE PRICE

82. On 5 January 2022, CLAIMANT's employee Ms Audi clicked on a link she received in a non-work-related Phishing Email. By prioritising discounted car race tickets over the cybersecurity of her company, she opened the gates for the Cybercriminal to install malware in CLAIMANT's system [*PO2, p 64, para 25; PO2, p 61, para 5*]. This enabled him to access sensitive information about the Parties' relationship. Using that information, the Cybercriminal managed to convincingly impersonate Ms Audi and forge a trustworthy Spoofing Email requesting a change of the payment instructions for all future transactions. After taking steps to verify its authenticity, RESPONDENT ultimately complied as nothing indicated the need for heightened attention. Thus, CLAIMANT created an additional risk for RESPONDENT and now seeks to benefit from its own wrongdoing.

83. Hence, CLAIMANT is estopped from requesting performance due to its own conduct (**1.**). Even if CLAIMANT is not estopped, RESPONDENT should be exempt under Art 80 CISG fully or at least partially because CLAIMANT is the one who caused the non-performance (**2.**). Should the Tribunal not exempt RESPONDENT, its obligation should be reduced according to Art 77 CISG and its underlying principles (**3.**).

1. CLAIMANT is estopped from requesting performance of payment obligation

84. CLAIMANT argues that RESPONDENT's payment obligation under Order S4 persists because the Spoofing Email was not a valid modification of the FA, since it did not comply with Art 40 FA [*MoC, p 5, para 2; MoC p 6, para 5*]. Whether there was an obligation and whether a party might be discharged from fulfilling it are two different legal questions. Relying on a strictly formalistic approach, CLAIMANT only addresses the first one, disregarding the principles of the CISG.

85. The principle of *estoppel* is embodied in the CISG as an extension of good faith and precludes the party from acting inconsistently with its previously taken stance (see Issue II, para **78**). *Estoppel* encompasses situations in which a party claims a remedy despite "*creating the impression with the other party that it would not exercise that right*" [*Brunner I, p 71, para 53; Kee/Opie, p 242; Uçarylmaz, p 169; Bank Notes Case*]. Conduct leading to the application of *estoppel* includes "*simply having missed a reasonable notice period*" after the delivery, in such case the buyer "*forfeits its right to require performance"* [*Brunner I, p 71, para 53; Bank Notes Case*]. For the *estoppel* to apply, the following conditions must be met. Firstly, a party failed to notify the other party about the non-performance. Secondly, the reliance on conformity of the performance was reasonable [*Kee/Opie, p 242*]. Lastly, the impression made by one party led to a detriment of the other [*Kee/Opie, p 232; Uçarylmaz, p 162*].

86. All of these conditions were met. RESPONDENT's reliance on the Spoofing Email was reasonable since it complied with the FA's formal requirements (**1.1**) and it was reasonable to treat the Spoofing Email as sent by CLAIMANT (**1.2**). Finally, RESPONDENT's reliance upon the conformity of the payment obligation was induced by CLAIMANT's omission (**1.3**).

1.1 RESPONDENT reasonably expected the formal requirements of Art 40 FA to be met

87. CLAIMANT argues that an exchange of emails does not fulfil the requirements for a valid modification of the FA: written form and a signature [*MoC, p 6, para 5*]. CLAIMANT states that the no oral modification, NOM, clause contained in the Art 40 FA remained binding in its original form since there was no established practice that would lower its formal requirements [*MoC, p 5, para 2; MoC, p 10, para 29*]. However, no established practice was required since emails fulfil the written form requirement and signing an email with a name constitutes a signature. Although these requirements were met, RESPONDENT does not claim that the Spoofing Email constitutes a valid amendment, rather, RESPONDENT submits that its reliance on Spoofing Email's validity was reasonable and therefore protected by the doctrine of *estoppel*.

88. As CLAIMANT correctly notes, Art 29(2) CISG mandates parties to follow a NOM clause when modifying a contract in case the clause is contained in it [*MoC, p 22, para 81*]. The Art 40 FA states

that "*no amendment … shall be valid unless [it] is* ***in writing*** *and* ***signed*** *by the Parties*" (emphasis added). CLAIMANT, however, does not expand on the terms "*writing*" and "*signed*". Interpretation of the FA is governed by CISG as it also applies to framework agreements [*Metallurgical Sand Case*]. Pursuant to Art 8(2)(3) CISG, party's statements must be interpreted by its intent or understanding of a reasonable person. Parties' subsequent conduct is considered to determine their intent.

89. Pursuant to Art 13 CISG, email satisfies the written form requirement [*Honnold, p 241, para 169; Lookofsky, p 75; Martin, p 473; Czech Bicycles Case*]. Moreover, the intent of the Parties to consider text in electronic form a *"writing"* is illustrated by their conduct as they often communicated and concluded orders via email [*R1, p 33; R2, p 34; R4, p 36, para 5; R5, p 56; PO2, p 62, paras 8, 10*]. Additionally, a reasonable person would not exclude electronic means of communication since it plays a pivotal role in the current business world, especially in international trade [*Forbes*].

90. As to the signature, the binding nature of a name of a sender typed at the bottom of an email is recognized by various jurisdictions [*Cloud Corp v Hasbro, Inc.; Neocleous v Rees; Nilesh Mehta v J Pereira Fernandes S.A*]. Similarly, the legal framework of the European Union regarding electronic signatures also recognizes a simple name typed at the end of an email as a valid electronic signature [*European Parliamentary Research Service*].

91. Nothing indicates that the Parties intended to impose stricter requirements regarding the form of the signature. They did not stipulate any requirements to which the signature must adhere in case of electronic communication, such as encryption [*C1, p 11*]. Since the Parties regularly relied on electronic means of communication as illustrated above, they evidently did not intend to limit the term *"signature"* to only a handwritten one.

92. CLAIMANT notes that the conditions were set cumulatively and both must be satisfied [*MoC, p 6, para 7*]. Email satisfies the written form requirement and the name of Ms Audi typed at the end of the email constitutes a signature. Therefore, RESPONDENT complied with FA when it treated the Spoofing Email as a modification of FA.

1.2 RESPONDENT was reasonable in treating the Spoofing Email as if it was sent by CLAIMANT

93. CLAIMANT argues that the payment to the Cybercriminal's account constituted a unilateral modification of the FA [*MoC, p 7, para 12*]. However, RESPONDENT was not acting on its own accord as it was prompted by the Cybercriminal impersonating CLAIMANT. RESPONDENT's compliance with the demands was in good faith and not an attempt to alter the contract unilaterally, fulfilling the second condition of *estoppel*.

94. Firstly, RESPONDENT had no reason to question the authenticity of the Spoofing Email because it contained confidential information available only to Parties. The Spoofing Email precisely mentioned order numbers, types of sensors as well as the exact amount of sensors to be delivered according to Order S4 [*C5, p 16*]. Additionally, it contained the name, phone number, email and other personal data of the account manager Ms Audi who handled the business relationship with RESPONDENT [*C5, p 16*]. Further, upon Mr Royce's unsuccessful attempt to reach Ms Audi by phone call, he replied to the Spoofing Email in an attempt to authorise the instruction contained in it. The Cyberattacker followed with additional confidential information previously communicated between the Parties [*R4, p 36, para 5*]. Moreover, RESPONDENT had no reason to suspect fraud since CLAIMANT did not inform it of the Cyberattack (see para **101**) and the Spoofing Email satisfied formal requirements needed to amend the FA (see Issue III, section **1.1**).

95. Secondly, the Spoofing Email provides a credible explanation for switching banking partners. The Spoofing Email states that due to issues stemming from dual military use of LIDAR Sensors and "*heightened attention under the existing sanction regime in Mediterraneo*", CLAIMANT switched to a different banking partner in Danubia [*C5, p 16*]. This explanation is completely reasonable since LIDAR Sensors in fact have dual military use [*Answer to RAuth, p 46, para 2*]. Moreover, RESPONDENT was not expected to be aware of the specificities regarding the public law provisions, including the sanctions regime in Mediterraneo [*CLOUT Case 418; CLOUT Case 426; Zealand Mussels Case*].

96. RESPONDENT's reliance on the Spoofing Email was reasonable, given the confidential details contained in the Spoofing Email, as well as the believable justification of the demands in the email by the perceived sanctions in Mediterraneo.

1.3 CLAIMANT's lack of notice precludes it from seeking performance

97. The payment for the first instalment of sensors was due on 3 May 2022, notice about the missing payment was sent with much delay on 5 September 2022, 4 months and 2 days later [*C2, p 13; C3, p 14*]. Since there were two instalments of delivery and two corresponding payments, the reliance of RESPONDENT on the conformity was solidified by the fact that CLAIMANT did not issue any notice informing RESPONDENT of the missing payment after the first payment was made.

98. A party is precluded from seeking a remedy if it creates the impression with the other party that it would not exercise this right (see para **85**). By missing a reasonable notice period, CLAIMANT renounced its rights to seek remedy under Art 62 CISG. Analogously, RESPONDENT would be obliged to give notice of the defect of the goods within a reasonable time according to Art 15 FA.

Under Art 15 FA, "*non-compliance with the notice obligation results in the loss of any rights for the deficiency of the goods*" [*C1, p 11*]. It would be contrary to good faith for CLAIMANT to exercise its rights despite inducing reliance that the payment was conforming and it would not exercise its rights.

99. CLAIMANT became aware of the Cyberattack on 23 January 2022. Given that cyberattacks have been a frequent phenomenon in the automotive industry, CLAIMANT should have been familiar with the consequences of the attack on its business partners [*R3, p 35; C6, p 17, para 8*]. CLAIMANT regularly boasts about its cutting-edge cybersecurity [*C6, p 17, para 4*]. When RESPONDENT suffered a similar situation in August 2020 and informed CLAIMANT, CLAIMANT immediately required a follow-up and closely monitored the investigation, which eventually discovered no data was leaked [*Answer to RArb, p 30, para 2; R1, p 33; R2, p 34*].

100. However, even more than 2 months after discovering the Cyberattack, CLAIMANT did not live up to its cybersecurity reputation and failed to notify RESPONDENT. On 28 March 2022, the Cybercriminal weaponized this and used the leaked sensitive information against RESPONDENT by impersonating CLAIMANT and requesting payment details change in a Spoofing Email.

101. Even after CLAIMANT's internal systems were completely encrypted by the Cybercriminal, RESPONDENT received no information about the situation. CLAIMANT issued an internal order that all account managers should contact their counterparts. However, it did not pay attention to the fact that Ms Audi, who was responsible for communicating with RESPONDENT and verifying that the payments arrived, was on sick leave for the past two months. CLAIMANT did not find a proper replacement or secure a handover of her responsibilities. Had CLAIMANT done so, it would have noticed the outstanding payment right after its due date [*PO2, p 63, para 13; PO2, p 62 para 7; PO2, p 64, para 26*]. It did not discover the missing payment even in its annual audit [*PO2, p 65, para 29*] and only became aware of the issue on 25 August 2022.

102. By not informing RESPONDENT even after being publicly accused in the May 2022 issue of Automotive weekly of enduring and then concealing the data breach, CLAIMANT only strengthened RESPONDENT's reasonable reliance on the fact that both payments were received in order and there were no complications in the business relationship [*R3, p 35; PO2, p 64, para 26*].

103. To conclude, CLAIMANT is estopped from enforcing its right to seek performance by failing to give notice. The principle of *estoppel* applies to the dispute at hand and precludes CLAIMANT from asserting its right to request the performance of the payment duty as it would be unjust to award CLAIMANT the payment after it caused RESPONDENT's reliance that it performed in conformity with the FA.

2. If the Tribunal did not consider RESPONDENT's payment as performance, RESPONDENT should be exempted under Art 80 CISG

104. If CLAIMANT were not estopped from requesting performance (see Issue III, section **1**), RESPONDENT should be exempted under Art 80 CISG. After suffering the Cyberattack, CLAIMANT was expected to address it properly. Instead, by series of errors and misjudgements CLAIMANT has put RESPONDENT at risk which ultimately resulted in a cybertheft. Rather than taking responsibility, CLAIMANT wants RESPONDENT to bear the loss [*MoC, p 12, para 31*]. Contrary to CLAIMANT's assertion, Art 80 CISG shields RESPONDENT from such claim [*MoC, p 14, para 42*]. As an extension of good faith, Art 80 CISG seeks to prevent a party from benefiting from its wrongdoing by exempting debtor's non-performance if it was caused by the creditor. It applies under three main conditions, all of which are fulfilled. First, debtor did not perform, second, creditor committed an act or an omission and third, there is a causal link between the two.

105. After the Cyberattack resulting from Ms Audi's recklessness, CLAIMANT was under a duty to inform RESPONDENT (**2.1**). By violating this duty, CLAIMANT caused the non-performance in two ways: by the conduct of Ms Audi and omission to inform RESPONDENT (**2.2**). Even if RESPONDENT will not be exempted fully, it should be exempted at least partially (**2.3**).

2.1 CLAIMANT was under an information duty

106. CLAIMANT created unnecessary risk for RESPONDENT. This risk could have been easily avoided if CLAIMANT informed RESPONDENT about the Cyberattack. Not only would informing RESPONDENT be reasonable and in line with the general principles of CISG, but it was also required by the duty to cooperate incorporated in Art 80 CISG (**2.1.1**), obligatory as a result of practice established between the Parties under Art 9(1) CISG (**2.1.2**) and lastly required by the notification duty imposed on CLAIMANT by Art 34 EDPA (**2.1.3**).

2.1.1 CLAIMANT was under an information duty pursuant to the underlying principles of Art 80 CISG

107. CLAIMANT admits that Art 80 CISG imposes a duty of loyalty and its underlying principle of good faith mandates cooperativeness and communicative manner [*MoC, p 15, para 44; MoC, p 31, paras 124, 126*]. RESPONDENT submits that by not informing RESPONDENT about the Cyberattack when it was reasonably expected, CLAIMANT breached this duty to cooperate.

108. One of the general principles underlying CISG is that the purpose of any contract is to achieve a common goal and cooperate in the process of doing so [*Neumann I, pp 69, 110; Schwenzer, p 1397, para 1*]. Art 80 CISG is an expression of good faith and a common duty to cooperate with the other

party, since otherwise, a party would be able to benefit from its wrongdoing [*Flechtner, p 87; Honnold, pp 849, 850, para 595; Neumann I, pp 110, 168; Hot-rolled Coils Case*]. The general cooperation duty presupposed by Art 80 CISG can take the form of an obligation to inform [*Honnold, p 180, para 128; Kröll, p 1083, para 6; Neumann I, p 178*].

109. Specific duties stemming from Art 80 CISG represent a matter governed by the CISG which is not expressly settled in it and therefore must be interpreted in line with Art 7 CISG [*Brunner I, pp 86, 87, paras 10-11; Honnold, p 166, para 120; Neumann I, p 35*]. Art 7(1) CISG provides that CISG should be read in an international context, hence to interpret it, it is necessary to include sources beyond the text itself [*Kröll, p 117, paras 16, 17; Neumann I, p 21*]. For such interpretation, PICC is the most significant international sales law instrument since it is a clear expression of the general principles that Art 80 CISG represents [*Brunner I, p 87, para 11; Felemegas, p 34; Honnold, p 166, para 120; Neumann I, pp 21, 40; French-Japanese License Agreement Case*].

110. Pursuant to Art 5.1.3 PICC, concerning the duty to cooperate, a party is obliged to inform the other party of circumstances that might endanger the performance of the contract, in particular of highly relevant information not accessible to the other party [*Vogenauer, p 545, para 7*]. The stronger the information asymmetry between the parties, the more reasonable it is to expect the cooperation of the party with superior knowledge [*Vogenauer, p 546, para 9*]. Moreover, the duty to inform the affected subjects about their data compromise is supported by extensive soft law instruments and national legal acts [*Jackson et. al., p 1277; Prictor; EU Guidelines; ISO Standards; OECD Guidelines; GDPR*].

111. After the Cyberattack (see Issue III, section **1.3**), CLAIMANT was the only subject with knowledge that could have prevented the resulting loss but, presumably in an effort to protect its reputation, kept this vital information to itself for several months. The loss of USD 38,400,000 could have easily been prevented if CLAIMANT sent a single email about the risk it created for its business partner. Hence, CLAIMANT breached the cooperation principle underlying Art 80 CISG and expressed in Art 5.1.3 PICC.

112. CLAIMANT created a risk for RESPONDENT and consequently did not even inform RESPONDENT. CLAIMANT was under a duty to cooperate since it could have easily prevented the loss that occurred. It would be contrary to the general principles of CISG expressed in Art 80 CISG to allow CLAIMANT to benefit from its wrongdoing, especially when it was the only Party with knowledge of the Cyberattack.

2.1.2 CLAIMANT was under an information duty stipulated by an established practice

113. After RESPONDENT suffered a cyberattack in 2020, it informed CLAIMANT out of goodwill. CLAIMANT then unusually closely monitored the situation and required to be kept informed. By creating justified expectations of how similar situations should be handled, the Parties created an established practice between themselves.

114. Art 9(1) CISG mandates that parties are bound by their previous conduct if it creates justified expectations that it will be repeated in the future [*Brunner I, p 99, para 1; Honnold, p 214, para 153; Schwenzer, p 205, para 9*].

115. CLAIMANT submits that a single repetition of conduct will not "*normally*" suffice to create an established practice [*MoC, p 12, para 33*]. However, the repetition of conduct is only one of the circumstances that may be taken into account when considering the binding power of a practice. Primarily, the purpose of established practices is to protect justified expectations created between the parties, which may (but do not have to) be established by repetitive conduct [*Schwenzer, p 204, para 9*]. As such, it has been previously adjudicated that under Art 9(1) CISG, a single act of goodwill is sufficient to create justified expectations and therefore stipulate an established practice [*Schwenzer, p 205, para 10; Mattresses Case II*].

116. In 2020, RESPONDENT informed CLAIMANT about falling victim to a cyberattack despite concluding that CLAIMANT's data was unlikely to be affected [*R1, p 33; R4, p 36*]. CLAIMANT asserts that RESPONDENT was obliged to inform pursuant to Art 34 EDPA, however, that is not correct [*MoC, p 29, para 106*]. EDPA only obliges to notify about high risk of a data breach, which was not the case, as proven by the subsequent investigation confirming that no data was leaked [*R1, p 33; R4, p 36, para 2*]. Even then, CLAIMANT clearly considered this initial notice to be reasonable, as CLAIMANT immediately demanded more information and closely, more than any other RESPONDENT's business partners, monitored the investigation [*R1, p 33; R4, p 36, para 2*].

117. By its insistence on regular, detailed updates, CLAIMANT created a justified expectation in RESPONDENT that if any cyberattack occurs, CLAIMANT will act consistently with its own demands and inform RESPONDENT accordingly.

2.1.3 CLAIMANT was under an information duty constituted by EDPA

118. EDPA imposes information duty on subjects in the event of a high risk of breach of personal data. Pursuant to Art 3 EDPA, EDPA has an extraterritorial scope, meaning it also applies to subjects

outside of Equatoriana. CLAIMANT does not dispute the extraterritorial application of EDPA, i.e. that EDPA applies also to CLAIMANT. CLAIMANT's only objections concern the nature of the processed data, claiming that it has not processed personal data and, as such, EDPA cannot apply [*MoC, pp 18, 19, paras 61-67*]. However, alongside the communication with RESPONDENT's employees, CLAIMANT naturally processed also their personal data.

119. Art 34 EDPA states that a breach of personal data must be communicated when it is likely to result in a high risk to the rights and freedoms of natural persons. CLAIMANT tries to disprove this by referencing the *Camera di Commercio v Salvatore Manni* Case, stating that "*only information relating to sole proprietorships may constitute personal data*", overlooking the fact that personal data of employees, therefore natural persons was leaked [*MoC, p 19, para 61*]. Under EDPA, emails or telephone numbers of employees are considered to be personal data [*European Commission; Camera di Commercio v Salvatore Manni*]. The case referenced by CLAIMANT further states that "*the fact that (that) information was provided as part of a professional activity does not mean that it cannot be characterised as personal data.*" This is confirmed by extensive case law [*ClientEarth and PAN Europe v EFSA; Commission v Bavarian Lager; Österreichischer Rundfunk and Others; Worten Case*].

120. In 2022, the Cyberattacker gained access to email communication of Ms Audi which regularly contained not only the email addresses but also other personal data of natural persons protected by EDPA, such as telephone numbers of RESPONDENT's employees [*C5, p 16; R1, p 33*]. CLAIMANT was therefore under information duty constituted by the EDPA.

2.2 CLAIMANT caused the non-performance in the sense of Art 80 CISG

121. As CLAIMANT agrees, Art 80 CISG exempts debtor's non-performance if there is a causal link between creditor's act or omission and debtor's non-performance [*MoC, p 15, para 44*]. For establishing a causal link, it must be probable that performance would occur, had it not been for creditor's interference. Ms Audi enabling the Cyberattack and CLAIMANT's subsequent failure to inform RESPONDENT constitutes an act and omission in the sense of Art 80 CISG.

122. CLAIMANT disputes the presence of a causal link on three grounds: insufficient intensity of its interference with performance, the strength of the causal link and RESPONDENT's alleged duty to overcome the risk created by CLAIMANT [*MoC, p 15, paras 44, 45; MoC, p 17, paras 51*]. Contrary to CLAIMANT's assertions, performance does not have to be made impossible to establish causality (**2.2.1**) and the causal link is strong enough to apply Art 80 CISG (**2.2.2**). Additionally, it was not expected of RESPONDENT to overcome the risk created by CLAIMANT (**2.2.3**).

2.2.1 Performance does not have to be made impossible for Art 80 CISG to apply

123. According to CLAIMANT, causal link only exists where creditor makes debtor's performance impossible [*MoC, p 15, paras 43-45*]. In fact, the threshold for activating Art 80 CISG is much lower and has been reached in the present case.

124. It is uncontested between the Parties that an omission is relevant in terms of Art 80 CISG if it was "*necessary and objectively suited to enable the performance*" [*MoC, p 15, para 43*]. Contrary to CLAIMANT's assertions, this does not mean that the creditor must make performance impossible [*MoC, p 15, para 44*; *Neumann I, p 159; Schwenzer, p 1158, para 5; Automobiles Case; CLOUT Case 273; Soinco v NKAP Case*]. In general, causing inconvenience to the debtor meets the intensity required for at least partial exemption under Art 80 CISG [*Neumann I, p 160; Yellow Phosphorus Case*]. Specifically, where creditor is under a duty to cooperate, failure to comply with that duty is enough to fully exempt the debtor, even if performance remains possible [*Brunner II, p 114; Felemegas, pp 247, 249; Neumann I, p 160; Acrylic Blankets Case*]. For instance, the Austrian Supreme Court held that creditor did not comply with its duty to send debtor information relevant for opening a letter of credit. This omission was considered a cause of the non-performance even though the creditor could have opened the letter of credit without that information [*Propane Gas Case*].

125. CLAIMANT had a simple task to inform RESPONDENT about the Cyberattack (see Issue III, section **2.1**). Yet, CLAIMANT decided against it and even as the situation worsened, due to a series of errors and misjudgements CLAIMANT never got around to warning RESPONDENT, breaching its information duty, breaking the reciprocity of the contract and hence, triggering Art 80 CISG (see paras **99**-**102**).

126. To conclude, by not complying with its information duty, CLAIMANT's interference with performance reached the necessary intensity under Art 80 CISG even if RESPONDENT could have discovered the nature of the Spoofing Email otherwise.

2.2.2 The causal link between CLAIMANT's conduct and non-performance is strong enough

127. CLAIMANT caused the non-performance. Firstly, by the conduct of Ms Audi who enabled the Cyberattack and secondly, by its omission to inform RESPONDENT about it. CLAIMANT's contradicting defence that not informing RESPONDENT was reasonable and unintentional at the same time does not manage to break the causal link.

128. A causal link is strong enough for full exemption if it is probable that non-performance would not occur without it [*Kröll, p 1084, para 8; Neumann I, p 146*; *German Beer Case; Italian Shoes Case XXIII*].

The conduct can be carried out by the party itself or by a person whose actions are imputable to the party, namely its employees [*Brunner II, pp 114, 168; Enderlein/Maskow, p 508; Schwenzer, p 1157, para 3; Records from 1980 Conference, p 430; Art 1:305 PECL; German Equipment Case*]. Indirect causation is sufficient if a risk which the creditor created by its conduct and which falls within its sphere of risk has materialised [*Neumann I, p 164; Kröll, p 1084, para 8; Schwenzer, p 1157, para 4; German Beer Case; ICC Case 18981*].

129. Firstly, RESPONDENT's payment to the Cyberattacker's account was indirectly caused by Ms Audi, whose actions are imputable to and within the sphere of risk of CLAIMANT. By opening the door for the Cybercriminal, she created a risk which materialised in a successful spoofing (see para **82**). Without the sensitive information obtained during the Cyberattack, RESPONDENT would not have relied on the Spoofing Email and the Cybercriminal would almost certainly not have known about Order S4 at all [*PO2, p 64, para 25; C5, p 16*]. Although CLAIMANT omits the actions of Ms Audi in MoC, it is a cause of the non-performance and ground for application of Art 80 CISG.

130. Secondly, CLAIMANT caused the non-performance by failing to inform RESPONDENT about the Cyberattack. CLAIMANT's assertion that knowledge of the Cyberattack would not have prevented RESPONDENT's payment to the Cybercriminal's account is entirely unsubstantiated [*MoC, p 15, para 44*]. As CLAIMANT agrees, performance would be enabled, had RESPONDENT sought CLAIMANT's oral confirmation [*MoC, p 17, paras 54-56*]. However, email communication was in line with the Parties' practice [*PO 2, p 61, para 4*]. Oral confirmation would only be reasonable in exceptional circumstances which RESPONDENT did not foresee (see Issue III, sections **1.1**, **1.2**). RESPONDENT has always treated cybersecurity responsibly and awareness of the threat would flip the situation entirely, encouraging caution in every dealing with CLAIMANT (see para **99**). Hence, informing about the Cyberattack would have enabled performance with certainty.

131. CLAIMANT's further defence is twofold. Firstly, it states it was reasonable not to notify RESPONDENT since the Cyberattack was initially qualified as a minor threat [*MoC, pp 15, 16, paras 46-49*]. However, informing RESPONDENT was not only reasonable but also obligatory (see Issue III, section **2.1**). Moreover, CLAIMANT's failure to notify RESPONDENT was not a decision but a mistake due to staff shortages and other issues in CLAIMANT's internal functioning [*MoC, p 16, para 48; PO2, p 64, para 26*].

132. CLAIMANT stating that the failure to inform RESPONDENT was due to staff shortages, thus unintentional, not only contradicts the claim that it was a reasonable decision but is also irrelevant

[*MoC, pp 15, 16, paras 46-49*]. Any kind of conduct, regardless of the fault, is relevant in terms of Art 80 CISG if it causes non-performance [*Brunner II, pp 114, 115; Neumann I, pp 161, 162*].

133. CLAIMANT's efforts to dispute the strength of the causal link between its conduct and RESPONDENT's non-performance must fail because without CLAIMANT's omission and its act RESPONDENT would have paid to the correct bank account. Whether CLAIMANT's conduct was reasonable or unintentional does not influence the causal link.

2.2.3 RESPONDENT was not expected to overcome the risk created by CLAIMANT

134. Based on a single case governed by US substantive law, CLAIMANT states that RESPONDENT was obliged to notice the discrepancies in the Spoofing Email and seek oral confirmation from CLAIMANT [*MoC, p 16, para 51*]. However, in line with the uniform interpretation of the Art 80 CISG, the Tribunal must use a standard rooted in the CISG [*Diedrich, p 310; Ferrari, p 204; Schwenzer; Explanatory Note on CISG, p 36, para 13*]. Using this standard, a causal link is present.

135. Where creditor creates a risk that endangers performance, causation is established if debtor can be expected to overcome the risk [*Neumann I, p 161; Felemegas, p 249; Schwenzer, p 1157, para 4; German Beer Case; ICC Case 18981*]. The exact threshold is determined case by case using reasonableness, as a general principle of the CISG [*Mimoso, p 72; Ishida, p 261; Saidov, pp 96, 97; Felemegas, p 249; ICC Case 18203*]. Nevertheless, since the creation of a risk breaks the reciprocity of the contract the requirement as to the duty to overcome the risk is rather benevolent [*Kröll, 1084, para 9; Neumann I, p 88; Schwenzer, p 1158, para 5*]. For instance, in the *German Beer Case*, the court held that this is expected only in regards to the risk that "*can be overcome without further ado*" [*German Beer Case*].

136. CLAIMANT created a risk for RESPONDENT firstly by Ms Audi making the Cyberattack possible and secondly, by not informing RESPONDENT about the threat (see paras **82, 100, 101, 102**). According to CLAIMANT, RESPONDENT was expected to overcome this risk by seeking oral confirmation of the email from CLAIMANT [*MoC, pp 16-18, paras 50-57*]. However, email communication was the normal practice between the Parties and oral confirmation would only be reasonable in exceptional circumstances which RESPONDENT reasonably did not foresee (see Issue III, sections **1.1**, **1.2**). In fact, unlike some easily recognisable cyberattacks, such as the Phishing Email sent to Ms Audi, sophisticated spoofing emails which use sensitive information are incredibly difficult to discover, and thus clearly not something that can be overcome "*without further ado*" [*Cranor; Robinson; Varsheney, pp 6266, 6267*].

137. To conclude, noting that performance does not have to be made impossible, CLAIMANT caused the non-performance since it is at least probable that performance would occur without its conduct. Moreover, RESPONDENT was not expected to overcome the risk created by CLAIMANT.

2.3 Even if the Tribunal did not exempt RESPONDENT fully, it should do so at least partially

138. Although CLAIMANT does not mention splitting the loss as an option, it is possible under Art 80 CISG and should the Tribunal choose it, RESPONDENT should be exempted at least partially for the first payment and fully for the second payment.

139. Art 80 CISG exempts non-performance "*to the extent*" it was caused by the creditor. Where both parties contributed to non-performance, instead of exemption, debtor's obligation is reduced to the extent creditor contributed to it [*Brunner I, p 594, para 8; Schwenzer, p 1181, para 10; Records from the 1980 Conference, p 393, para 7; Art 7.1.2, 7.4.7 PICC; Steel Channels Case*].

140. The possibility of apportioning a claim under Art 80 CISG stems from its wording and its purpose. The wording "*to the extent*" suggests that partial exemption is possible and is allowed only to the extent of each party's contribution to non-performance [*Kröll, p 1084, para 10; Neumann II, p 2; Schwenzer, p 1159, para 7*]. The purpose of Art 80 CISG, as an extension of the good faith principle, is to prevent parties from benefiting from their wrongdoing (see para **108**). Since it would be irrational to make one party bear the loss completely in the name of fairness if the other party also contributed to it, it is possible to exempt debtor from non-performance only partially under Art 80 CISG [*Neumann I, p 158*]. If the tribunal decides to apportion the claim, it should consider the severity of the breach and reasonableness as a general principle of the CISG [*Brunner I, p 321; Felemegas, p 249; Saidov, pp 96-97; Schwenzer, p 1181, para 10, p 1400, para 5; ICC Case 18203; Used Car Case*].

141. RESPONDENT should be exempted fully or at least prevalently from the first payment because CLAIMANT's conduct was more severe than RESPONDENT's. In the *Used Car Case*, the seller did not disclose to the buyer that a car was of worse quality than indicated. Although the buyer should have detected these facts himself, the fact that the seller did not notify the buyer was considered more severe. A similar result should be adopted in this case in regards to the breach of information duty, even more so because while the buyer had an obligation to discover non-conformity, RESPONDENT was under no such obligation (see Issue III, section **2.2.3**).

142. Regarding the second payment, RESPONDENT claims full exemption for the following reasons. Firstly, CLAIMANT should not have sent the second instalment while the first payment was missing. Paying for a delivery when the previous deliveries were not made is seen as unreasonable

[*Neumann I, p 159; Soinco v NKAP Case*]. The result should be the same if the roles were reversed, it would be unreasonable to deliver a second instalment if the first was not paid for. It is irrelevant that CLAIMANT did not know that the payment was missing because of staff shortages (see para **101**). Holidays, vacancies, illnesses or deaths of employees fall into the party's sphere of risk and thus, are not exonerating events [*Brunner II, p 168; DiMatteo, p 36*].

143. Finally, without CLAIMANT's poor management of Ms Audi's departure, the payment would have been discovered by her successor right after it was due and RESPONDENT would have never made the second payment (see para **101**). Therefore, even if RESPONDENT contributed to non-performance by not recognising the Spoofing Email as a fraud, CLAIMANT caused non-performance in regards to the second instalment fully.

144. To conclude, Art 80 CISG should be applied to exempt RESPONDENT from performance since RESPONDENT's non-performance was caused by CLAIMANT. There is a clear connection between CLAIMANT's employee falling for the Phishing Email and the eventual loss, establishing a causal link to CLAIMANT. Moreover, CLAIMANT did not inform RESPONDENT about the Cyberattack, even though it was obliged to both by the principles underlying CISG, by practice established between the Parties and by EDPA. Therefore, RESPONDENT should be exempt fully pursuant to Art 80 CISG. Even if the Tribunal found that RESPONDENT partially contributed to the loss, CLAIMANT still behaved recklessly and undoubtedly caused the majority of incurred loss, therefore the remedies should be reduced accordingly.

3. Even if RESPONDENT were not exempt from performance based on Art 80 CISG, RESPONDENT's obligation should be reduced pursuant to Art 77 CISG

145. Art 77 CISG obliges the party claiming damages for a breach of contract to undertake reasonable measures to mitigate its loss, otherwise it cannot claim compensation. It would contradict the principle of good faith if a party would be reimbursed for a loss which it itself could have avoided. Despite RESPONDENT invoking Art 77 CISG in its Answer to RArb [*Answer to RArb, p 32, para 13*], CLAIMANT failed to address or counter its application in MoC. Considering the relevance of Art 77 CISG to the present dispute, RESPONDENT will still elaborate on its argument.

146. Art 77 CISG is applicable through the principles underlying it (**3.1**). Given that CLAIMANT failed to fulfil its obligation to prevent loss, stemming from Art 77 CISG, RESPONDENT's obligation to pay the purchase price should be reduced (**3.2**).

3.1 Art 77 CISG is applicable through the principles underlying it

147. Although the wording of Art 77 CISG expressly mentions only damages, given the circumstances of the present case and in view of the main interpretative principles of CISG, the principles of Art 77 CISG apply analogously to the payment obligation.

148. Art 77 CISG states that a party relying on a breach of contract must take reasonable measures to mitigate loss resulting from the breach. Otherwise, the party in breach can seek a reduction in damages corresponding to the extent of the mitigable loss. Art 7 CISG further provides that in interpretation of CISG, good faith in international trade and general principles of CISG are to be observed. Application of Art 77 CISG is not constrained by the literal wording of the provision. Instead, Art 77 CISG is to be applied through the principles underlying it, namely, mitigation of loss and good faith [*Kröll, p 124, para 27; Schwenzer, p 1344, para 6; German Clay Case*].

149. The duty to mitigate loss can thus be applied even when claiming performance; even more so considering that the principle of mitigation of loss is generally accepted to also have implications for other remedies [*Andersen/Schroeter, pp 470, 485; Enderlein/Maskow, p 308; Neumann I, p 94*].

150. Given CLAIMANT's recklessness and lack of precaution (see Issue III, section **1.3**), it would go not only against the mitigation principle but also against good faith, to award CLAIMANT remedies related to loss that it could have prevented or at least mitigated for example by sending a simple email informing RESPONDENT of a potential threat [*Kröll, p 113, para 2; UNCITRAL Digest, p 45, para 24*] (see Issue III, section **3.2**).

151. To exclude application of Art 77 CISG based on mere literal interpretation, omitting the principles underlying it and forcing RESPONDENT to pay, would go against good faith. Therefore, in the present dispute, Art 77 CISG has to be interpreted in line with Art 7 CISG which leads to the application of the good faith principle and the principle of mitigation of loss as its manifestation.

3.2 CLAIMANT was under an obligation to prevent loss pursuant to Art 77 CISG

152. Given the fact that cyberattacks pose an imminent threat to business partners of the aggrieved party, CLAIMANT could have and should have expected the attack on RESPONDENT and thus the loss stemming from it. Therefore, CLAIMANT breached its prevention duty in the sense of Art 77 CISG when it did not take reasonable measures to prevent the avoidable loss. As a result, RESPONDENT's obligation to pay should be reduced accordingly in line with Art 77 CISG.

153. According to Art 77 CISG, the party which relies on a breach of contract is required to take reasonable measures to mitigate the loss resulting from the breach. Pursuant to Art 8 CISG,

reasonable are measures, which can be expected from a reasonable person under the same circumstances having regard to the principle of good faith, as well as measures stemming out of the practice between the parties and duty to cooperate [*Neumann I, p 87; Schwenzer, p 1344, para 7; UNCITRAL Digest, p 356, para 7; German PVC Foil Case; Sizing Machine Case*] (see Issue III, sections **2.1.1**, **2.1.2**).

154. Beyond the literal wording of Art 77 CISG, a prevention duty, i.e. a duty to mitigate loss even before that loss has been incurred, is derived from Art 77 CISG [*Kröll, p 1017, para 6; Neumann I, p 78; Schwenzer, p 1342, para 3*]. For the prevention duty to arise, the occurrence of loss must be seriously impending or foreseeable, the promisee is even required to draw promisor's attention to the risk of a particularly high loss [*Brunner I, p 546, para 2; Huber/Bach, p 227, para 5; Kröll, p 1019, para 12; Schwenzer, p 1342, para 3; German Clay Case*].

155. CLAIMANT should have been familiar with the potential consequences of the Cyberattack on its business partners and therefore should have informed RESPONDENT (see para **99**). The staff shortages that CLAIMANT presents as an excuse for its failure to inform RESPONDENT are of no relevance (see paras **101**, **142**). Had CLAIMANT informed RESPONDENT of the Cyberattack, RESPONDENT would have never authorised the change in payment instructions, thus preventing the loss. In any case, had CLAIMANT exhibited at least a basic level of diligence when monitoring the payment status on its accounts, it would have discovered that the payment had not been made in time for RESPONDENT to withhold at least the second payment upon CLAIMANT's notification (see para **101**). Failing to do so deprived RESPONDENT of any chance to recover the funds from the Cybercriminal. A swift reaction is essential in recovering assets from cybertheft [*Asset Recovery Handbook, p 135; CSO; FBI Recommendation*]. As little as three days can make a difference between recovering 90% of the assets and none, hence, even more intense cooperation is expected in case of a cyberattack [*CSO*].

156. CLAIMANT could have and should have expected the occurrence of a Cyberattack on RESPONDENT and thus also the loss stemming from it. Therefore, since the condition of impending and foreseeable loss has been met, giving rise to prevention duty pursuant to Art 77 CISG which CLAIMANT failed to abide by, RESPONDENT's obligation to pay should be reduced pursuant to Art 77 CISG.

157. To conclude, if RESPONDENT will not be exempted from performance based on Art 80 CISG, its obligation to pay should be reduced in line with the principles underlying Art 77 CISG, namely mitigation of loss and principle of good faith. The application of Art 77 CISG is not constrained

by the literal wording of the provision. Since the loss was impending and foreseeable, CLAIMANT breached its prevention duty in the sense of Art 77 CISG by not informing RESPONDENT. Hence, RESPONDENT's obligation to pay should be reduced accordingly.

158. **Issue III conclusion:** The principle of *estoppel* precludes CLAIMANT from asserting its right to request the performance as it would be unjust to award CLAIMANT the payment after it did not issue a notice of missing payment in time. Art 80 CISG fully exempts RESPONDENT from performance because it was caused by CLAIMANT in two ways. After Ms Audi enabled the Cyberattack, CLAIMANT did not inform RESPONDENT about it, even though it was obliged to by the principles underlying CISG, by practice established between the Parties and by EDPA. Even if the Tribunal does not exempt RESPONDENT fully, it should do so at least partially due to the severity of CLAIMANT's conduct and additional grounds for exemption in regards to the second payment. Lastly, since CLAIMANT failed to inform RESPONDENT about the Cyberattack, it breached its prevention duty stemming out of Art 77 CISG. Therefore, in the event that it will not be exempted fully, RESPONDENT's obligation to pay should at the very least be reduced in line with Art 77 CISG.

REQUEST FOR RELIEF

In light of the above, RESPONDENT hereby respectfully requests the Tribunal:

a. To refuse the addition of the New Claim to the Current Arbitration;

b. To refuse the consolidation of the proceedings in case the New Claim is raised in a separate arbitration;

c. To find that CLAIMANT is not entitled to payment of either the full amount or parts of the amount due as payment under Order S4, since RESPONDENT can invoke a violation of the information duty and rely on a provision of the CISG to entirely or at least partially defend itself against the claim for payment.

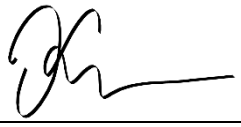
CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons who have signed below.

Respectfully signed and submitted by Counsels on 18 January 2024.

Filip Choděra

Veronika Dybová

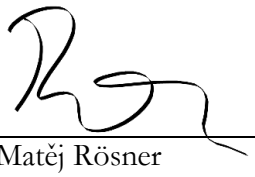


Adam Kořínek

Marie Nová

Simon Puchý

Jasmína Pustaiová



Matěj Rösner

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