Thirty-First Annual Willem C. Vis International Commercial Arbitration Moot

ALBERT LUDWIG
UNIVERSITY OF FREIBURG

Memorandum for
CLAIMANT

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

JACK DONNELLY • ALLEGRA EGGELS• FRANZISKA GRAF • FLORIAN GRÜNEWALD
BENJAMIN KRABBES • MONA SEYL • JENS WEBER • BENJAMIN ZEECK

Freiburg, Germany

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY: Albert Ludwig University of Freiburg

COUNTRY: Germany

ACADEMIC INTEGRITY	YES	UNSURE	NO
We confirm that this memorandum does not include text from any source, whether the source was in hard copy or online available, which has not been properly distinguished by quotation marks or citation.	X		

USE OF AI			
We have used AI enhanced **search engines** for researching sources and (factual or legal) information on the Moot Problem.	X		
We have used AI-enhanced **proof-reading** tools.			X
We have used AI enhanced **translation tools** to translate sources relevant for our work on the Moot Problem.	X		
We have used AI enhanced **translation tools** to translate parts of the text submitted in this Memorandum into English from any other language.			X
We have used AI to **generate overviews or briefings on relevant factual and legal topics** which are not submitted as part of the memorandum but have been solely used to advance our own understanding.			X
We have used AI tools to **generate statements that are now included in the memo**. Please tick yes even if you have altered or amended the text generated by AI before submission.			X
We have **trained an AI tool** on Vis Moot documents.			X
We have **used an AI tool that has been trained on Vis Moot documents** to generate text that is part of our Memorandum			X
Other (please specify):			X

We hereby certify the truthfulness of our statements, and confirm that we have not used AI-applications in any other way in preparing the submission of this memorandum.

DATE: 07.12.23

NAME:
Jack Donnelly

SIGNATURE: 

NAME:
Allegra Eggels

SIGNATURE: 

NAME:
Franziska Graf

SIGNATURE: 

NAME:
Florian Grünewald

SIGNATURE: 

NAME:
Benjamin Krabbes

SIGNATURE: 

NAME:
Mona Seyl

SIGNATURE: 

NAME:
Jens Weber

SIGNATURE: 

NAME:
Benjamin Zeeck

SIGNATURE: 

NAME:
Hauke Schneider

SIGNATURE: 

NAME:
David Weitz

SIGNATURE: 

NAME:
Tosca Schwehn

SIGNATURE: 

TABLE OF CONTENTS

STATEMENT OF FACTS

The parties to this arbitration are SensorX plc [hereinafter: CLAIMANT] and Visionic Ltd [hereinafter: RESPONDENT].

CLAIMANT, based in Mediterraneo, is one of the leading Tier 2 producers of sensors used in various applications in the automotive industry.

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

7 Jun 2019	CLAIMANT and RESPONDENT [hereinafter: the Parties] enter into a Framework Agreement [hereinafter: FA] to outline the future supply of RESPONDENT with CLAIMANT's sensors.
4 Jan 2022	Under the FA, RESPONDENT orders 200,000 units of L-1 Sensors for USD 24,000,000 with Purchase Order No. A-15604 [*Exhibit C7, p. 48*].
17 Jan 2022	Under the FA, RESPONDENT orders 1,200,000 units of S4-25899 Sensors for USD 38,400,000 with Purchase Order No. 9601, which were to be paid in two instalments [*Exhibit C2, p. 13*].
23 Jan 2022	CLAIMANT discovers malware in its systems and hires a leading cybersecurity firm to neutralise the malware [*Exhibit C6, p. 17, paras. 5, 6*].
28 Mar 2022	RESPONDENT receives a phishing email from the cyberattacker purporting to be CLAIMANT. In the email, the cyberattacker requests all future payments to be made to a different bank account [*Exhibit C5, p. 16*].
3 April 2022	CLAIMANT delivers the first instalment of sensors under Purchase Order No. 9601 [*Exhibit C3, p. 14*].
3 May 2022	The first payment is due under Purchase Order No. 9601 [*Exhibit C2, p. 13*]. RESPONDENT transfers the payment to the cyberattacker's bank account [*Exhibit C4, p. 15*].

30 May 2022	CLAIMANT delivers the second instalment of sensors under Purchase Order No. 9601 [*Exhibit C3, p. 14*].
15 May – 30 Jun 2022	The cyberattacker encrypts CLAIMANT's internal accounting system. As a result, CLAIMANT's IT systems go down and have to be thoroughly investigated [*Exhibit C7, p. 22*].
30 Jun 2022	The second payment is due under Purchase Order No. 9601 [*RfA, p. 6, para. 14*]. RESPONDENT transfers the payment to the cyberattacker's bank account [*Exhibit C4, p. 15*].
25 Aug 2022	CLAIMANT discovers that no payment has been made by RESPONDENT regarding Purchase Order No. 9601 [*RfA, p. 6, para. 15*].
8 Sep 2022	RESPONDENT informs CLAIMANT that the payments under Purchase Order No. 9601 were made to a different bank account [*Exhibit C4, p. 15*].
9 Jun 2023	CLAIMANT's Request for Arbitration is received by the ICC Secretariat [*Letter by Langweiler, p. 4*].
30 Aug 2023	The Parties and the Arbitral Tribunal sign the Terms of Reference [*PO 1, p. 58, para. 1*].
8 Sep 2023	CLAIMANT discovers that Purchase Order No. A-15604 has also not been fully paid [*PO 2, p. 66, para. 43 e*].
11 Sep 2023	CLAIMANT requests the authorisation of the new claim regarding the missing payment under Purchase Order No. A-15604 [*RfNC, p.46*].

INTRODUCTION

"Come Little Red Riding Hood… Behave yourself on the way, and do not leave the path!"

If only Little Red Riding Hood had heeded her mother's warning, the disaster could have been avoided. By the time Little Red Riding Hood arrived at her Grandmother's house, the Wolf was already lying in bed, with a wig, a hideous disguise, and Grandmother in its belly.

"Oh Grandmother, what big teeth you have!" One might have forgiven Little Red Riding Hood her naivety, had the warning signs not been so obvious. Not for one second did RESPONDENT question whether the person demanding 'urgent' transferral of USD 38,400,000 to an unknown bank account was really its trusted business partner CLAIMANT. And even then – had RESPONDENT not strayed from the path, had it stuck to the written form requirement in the Parties' Framework Requirement – it would not have had to suffer the loss.

RESPONDENT now tries to unload the responsibility for its mistake onto CLAIMANT and refuses to pay the purchase price under Purchase Order No. 9601. Since RESPONDENT did not show interest in an amicable solution, CLAIMANT had no choice but to bring its claim for payment to arbitration, in line with the arbitration agreement contained in the Parties' Framework Agreement. The Arbitral Tribunal is kindly requested to find that CLAIMANT is entitled to payment of USD 38,400,000 under the contract. RESPONDENT's payment to the third-party bank account cannot constitute performance, since the phishing email cannot be attributed to CLAIMANT, nor can payment in 'good faith' discharge RESPONDENT of its obligation. RESPONDENT is also not entitled to an exemption from its payment obligation under the applicable law **[Issue 3].**

In the fairy tale, the Huntsman comes to the rescue. He slits open the Wolf's belly and both Little Red Riding Hood and Grandmother jump out unharmed. Before addressing the merits of the case, however, the Arbitral Tribunal must decide on whether to admit a second claim for payment under another purchase order not paid by RESPONDENT. Since both claims arise from the same Framework Agreement and the underlying legal questions are closely connected, the Tribunal can and should authorise the addition of the new claim **[Issue 1]**. If the new claim has to be brought in a separate arbitration, the same result can be reached by consolidating the proceedings **[Issue 2]**. Like in the fairy tale, it would make little sense to leave Grandmother inside and not deal with both issues in one fell swoop.

FIRST ISSUE: THE ADDITION OF THE NEW CLAIM TO THE PENDING ARBITRATION CAN AND SHOULD BE AUTHORISED

1 The claim originally raised by CLAIMANT concerns the non-performance of the purchase price obligation by RESPONDENT regarding Purchase Order No. 9601 [hereinafter: Original Claim]. This purchase order was made on 17 January 2022 for the delivery of sensors under the FA [*Exhibit C2, p. 13*]. The FA had been concluded by the Parties on 7 June 2019 to regulate the details of their future cooperation [*Exhibit C1, p. 9*]. Therein, the Parties had decided on the arbitration agreement contained in Art. 41 FA.

2 Shortly after the start of the present arbitral proceedings, CLAIMANT discovered that RESPONDENT had also not fully paid the purchase price of another order, namely Purchase Order No. A-15604 [*Exhibit C7, p. 48*]. Just like Purchase Order No. 9601, this second purchase order concerns the delivery of sensors under the FA. Accordingly, CLAIMANT has raised an additional payment claim to the amount of USD 12,000,000 for the second outstanding payment [hereinafter: New Claim]. Thus, CLAIMANT requests the addition of the New Claim to the pending arbitration.

3 Instead of abiding by the mutual agreement to resolve all claims arising from the FA together, RESPONDENT now seeks to obstruct the proceedings by objecting to the addition of the New Claim. However, Art. 9 ICC Rules confirms that claims arising from different contracts may be brought in one arbitration. Since all requirements under Art. 9 ICC Rules are met, the Arbitral Tribunal has jurisdiction to determine the New Claim together with the Original Claim **[A]**. Accordingly, the Arbitral Tribunal should authorise the addition of the New Claim to the pending arbitration **[B]**.

A. The Arbitral Tribunal Has the Jurisdiction to Hear Both Claims

4 The Arbitral Tribunal has the jurisdiction to determine the New Claim together with the Original Claim in the present arbitration. Regarding the jurisdiction over several claims, Art. 9 ICC Rules provides that the conditions of Art. 6(3)-6(7) ICC Rules must be met. In accordance with Art. 6(3) ICC Rules, the Arbitral Tribunal may directly decide on whether the two claims can be determined in one arbitration, since the Secretary General did not refer the matter to the ICC Court. In the present scenario, the jurisdiction of the Arbitral Tribunal for both claims arises from the arbitration agreement in Art. 41 FA **[I]**. In any case, the jurisdiction of the Arbitral Tribunal can also be derived from two compatible arbitration agreements **[II]**.

I. The Jurisdiction for Both Claims Can Be Derived From Art. 41 FA

5 The jurisdiction of the Arbitral Tribunal to determine both claims together can be derived from the arbitration agreement in Art. 41 of the Parties' FA. If different claims are based on the same arbitration agreement, there is no conflict of jurisdiction [*Nedden/Herzberg/Kopetzki – Schmidt-Ahrendts, p. 185, para. 10*]. In the present case, both the Original Claim **[1]** and the New Claim **[2]** can be based on the same arbitration agreement in Art. 41 FA.

1. The Original Claim Can Be Based on Art. 41 FA

6 The Arbitral Tribunal may base its jurisdiction for the Original Claim on Art. 41 FA. Whether a claim falls within the scope of an arbitration agreement must be determined by interpretation of the arbitration agreement [*ICC Case No. 21398, Dissenting Opinion, para. 3; Born, p. 1426; Torggler et al. – Wegen/Eckardt, p. 185*]. In the arbitration agreement in Art. 41 FA, the Parties agreed that any unresolved dispute arising under or in connection with the FA shall be exclusively resolved through arbitration. According to Art. 1 FA, the FA shall govern all individual contracts for the sale of sensors between the Parties. Thus, Purchase Order No. 9601 is governed by the FA and the Original Claim is covered by the arbitration agreement in Art. 41 FA.

7 This is not changed by the existence of a separate arbitration clause in Purchase Order No. 9601 **[a]**. Neither does the fact that a different arbitration agreement was named in the Request for Arbitration limit the Arbitral Tribunal in its jurisdiction **[b]**.

a. Art. 41 FA Applies Regardless of the Arbitration Clause in Purchase Order No. 9601

8 Art. 41 FA applies regardless of the separate arbitration clause contained in Purchase Order No. 9601. By concluding the FA, the Parties wanted to regulate the details of their future cooperation in one agreement [*Exhibit C1, p. 9*]. It was the Parties' intention that only the FA governs the rules for arbitration. This intention is demonstrated in the broad arbitration agreement in Art. 41 FA which encompasses all disputes arising "in connection with the present agreement and the contracts concluded thereunder" [*Exhibit C1, p. 11, Art. 41(2)*]. It was thus the intention of the Parties to have this arbitration agreement apply to all individual purchase orders under the FA.

9 The Parties did not intend to agree on a new dispute resolution mechanism with every purchase order. The purchase orders were only meant to contain order specific details. This is evidenced by Art. 5 FA stating that individual orders should specify only the exact product and the amount requested, special packaging and deviating place of delivery [*Exhibit C1, p. 10, Art. 5*]. Therefore, the arbitration clause was not meant to be an order specific detail. The arbitration clause was not

deliberately added by the Parties. It was merely part of the sample purchase order form used by RESPONDENT for all its suppliers and it is simply a reproduction of the ICC Standard Arbitration Clause [*PO 2, p. 62, para. 9*]. In contrast, the arbitration agreement in Art. 41 FA was individually negotiated and agreed upon by the Parties. Absent any indication to the contrary, a differing dispute resolution mechanism in every purchase order was not intended by the Parties, because it would make the arbitration agreement in Art. 41 FA, governing all individual orders, obsolete. Therefore, the arbitration agreement in Art. 41 FA applies.

b. The Tribunal's Jurisdiction Is Not Limited to the Arbitration Clause in the Request for Arbitration

10 In determining its jurisdiction, the Arbitral Tribunal is not limited to the arbitration clause listed in the Request for Arbitration. In the Request for Arbitration, CLAIMANT referred primarily to the arbitration clause in the Purchase Order No. 9601 [*RfA, p. 7, para. 22*]. RESPONDENT has raised its concerns as to validity of this arbitration clause [*ARfA, p. 31, para. 8*]. However, the Arbitral Tribunal is not limited to the arbitration agreement listed in the Request for Arbitration and may base its jurisdiction on a different valid arbitration agreement: the one contained in Art. 41 FA.

11 The fact that the pending arbitration was filed under the wrong arbitration agreement is not an obstacle. The reason why the ICC Rules require naming an arbitration agreement in the Request for Arbitration is to enable the ICC Court to examine if there is a *prima facie* agreement to arbitrate and inform the parties whether the arbitration may proceed [*ICC Case No. 15612, para. 102; cf. Webster/Bühler, paras. 4-66, 4-67*]. This does not preclude the arbitral tribunal from later basing its jurisdiction on a different arbitration agreement, as long as the party also relied on that agreement in its submissions [*ICC Case No. ICC-FA-2020-227, para. 83; Nedden/Herzberg/Kopetzki –Schilling, p. 63, para. 37*]. Already in its Request for Arbitration, CLAIMANT relied upon the arbitration agreement in Art. 41 FA as an alternative basis for the Tribunal's jurisdiction [*RfA, p. 7, para. 23*]. The Arbitral Tribunal may thus base its jurisdiction for the Original Claim on Art. 41 FA.

2. The New Claim Can Be Based on Art. 41 FA

12 The New Claim can also be based on Art. 41 FA. The relevant Purchase Order No. A-15604 is governed by the FA as it concerns L-1 Sensors [*Exhibit C7, p. 48, para. 1*], which fall into the category of "other products" named in Art. 1 FA. The preamble of the order also explicitly states that the order is made "under the Framework Agreement" [*Exhibit C7, p. 48*]. Therefore, Purchase Order No. A-15604 is governed by the FA and the arbitration agreement in Art. 41 FA applies. The request for the addition of the New Claim is explicitly made under Art. 41 FA [*RfNC, p. 47,*

para. 6]. This is in line with the Parties' intent of settling disputes under the FA. In its answer, RESPONDENT has not objected to this basis of the New Claim, only to its addition to the proceedings [*ARfNC, pp. 56, 57*]. Consequently, the New Claim can be based on the arbitration agreement in Art. 41 FA.

13 Once more, this is not changed by the separate arbitration clause in the relevant purchase order. As shown above, the Parties did not intend to deviate from the arbitration agreement in Art. 41 FA with the individual purchase orders [*Supra, paras. 8, 9*]. In any case, the separate arbitration clause could not have validly amended Art. 41 FA, because it was not signed by both Parties and thus does not meet the form requirement of Art. 40 FA [*cf. Exhibit C7, p. 48*]. Therefore, Art. 41 FA applies regardless of the separate arbitration clause.

II. In Any Case, the Jurisdiction Can Be Derived From Two Compatible Agreements

14 Even if the Tribunal were to find that the Original Claim was raised under the arbitration clause in Purchase Order No. 9601, the New Claim could still be determined together with the Original Claim in the present arbitration. According to Art. 6(4)(ii) ICC Rules, where claims arise from several arbitration agreements, they may be determined together in one arbitration if the arbitration agreements are compatible and there is at least an implied agreement by the parties to determine them together. Although Art. 6(4)(ii) ICC Rules only applies directly to the *prima facie* decision made by the ICC Court, the same criteria apply for the decision of the arbitral tribunal on its own jurisdiction [*ICC Case No. 22423; Webster/Bühler, para. 9-15; Boller/Ohlrogge, p. 95; Whitesell/Silva Romero, p. 15*].

15 The Arbitral Tribunal thus has jurisdiction to decide on both claims in one arbitration. The relevant arbitration agreements would in any case be compatible **[1]**. There is an implied agreement between the Parties to determine the claims together in one arbitration **[2]**.

1. The Relevant Arbitration Agreements Are Compatible

16 The relevant arbitration agreements are compatible. Arbitration agreements are compatible if their differences do not materially impact the effective running of the proceedings [*ICC Case No. 22466; Fry/Greenberg/Mazza, para. 3-243; Webster/Bühler, para. 6-43; Nedden/Herzberg/Kopetzki – Bassiri/Kopetzki, p. 134, para. 177; Boller/Ohlrogge, p. 95*]. The arbitration agreements contained in Purchase Order No. 9601 and Art. 41 FA are compatible. They do not deviate from each other except in wording. Both provide for arbitration in Danubia with three arbitrators under the ICC Rules, with English as the language of arbitration. Therefore, they are compatible.

17 Even if one were to disregard the arbitration agreement in Art. 41 FA completely, the arbitration clauses contained in the individual purchase orders would be compatible with each other. The two clauses only differ in two aspects: Purchase Order No. A-15604 requires "one or more arbitrators" and explicitly excludes emergency arbitration, while Purchase Order No. 9601 requires three arbitrators and does not mention emergency arbitration. In both cases, the difference does not make the clauses incompatible.

18 First, the arbitration clauses do not materially differ as to the number of arbitrators. The phrasing of "one or more arbitrators" includes three arbitrators. Therefore, the current arbitration with three arbitrators does not conflict with the arbitration clause in Purchase Order No. A-15604. This is supported by the fact that the New Claim, like the Original Claim, has a substantial dispute value. In practice, the amount in dispute is the most important criterion for determining the number of arbitrators [*Webster/Bühler, para. 12-17; Fry/Greenberg/Mazza, para. 3-440*]. Thus, it does not seem disproportionate to have the New Claim decided by three arbitrators.

19 Second, for the claims at hand, it does not matter whether emergency arbitration is excluded. According to Art. 29 ICC Rules, emergency arbitration only takes place if a party needs urgent measures that cannot await the constitution of an arbitral tribunal. In the present case, a tribunal is already constituted and neither Party has indicated a need for urgent measures. The exclusion of emergency arbitration is thus of no effect for the purposes of this arbitration.

20 In conclusion, even if one were to completely disregard Art. 41 FA, the arbitration clauses of the respective purchase orders would be compatible with each other.

2. There Is an Implied Agreement to Determine the Claims Together

21 There is an implied agreement between the Parties to determine the claims together in one arbitration. The only decisive point in time for determining such consent is the conclusion of the arbitration agreement [*Nedden/Herzberg/*K*opetzki-Bassiri – Kopetzki, p. 137, para. 193*]. An explicit agreement is not required [*CA The Hague (Netherlands), 2 March 2021; Fry/Greenberg/Mazza, para. 3-248; Boller/Ohlrogge, p. 95; Platte, p. 69*]. Where parties conclude contracts under a common contractual framework, it can be assumed that they have agreed to solving arising disputes together [*ZCC Case No. 2273/95; Aynès, p. 137; Hanotiau, p. 123; Boog et al./Heckel/Sessler, p. 276; Whitesell/Silva Romero, p. 15*]. All purchase orders were made under the FA. The arbitration agreement in Art. 41 FA encompasses all disputes arising under the FA. In Art. 41(5) FA, the Parties even agreed on requirements for consolidation of multiple claims in one proceeding. Therefore, at the time of the conclusion of the FA, the Parties impliedly agreed that claims under the FA should be determined together. A diverging intent is not indicated in the arbitration clauses

of the individual purchase orders. The New Claim could thus be determined in the pending arbitration even if it was based on a separate arbitration agreement.

B. The Criteria for Authorisation Under Art. 23(4) ICC Rules Are Fulfilled

22 The Arbitral Tribunal should authorise the New Claim pursuant to Art. 23(4) ICC Rules. This provision lays out the relevant considerations to be made when authorising a new claim after the Terms of Reference have already been signed. According to Art. 23(4) ICC Rules, the Arbitral Tribunal "shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances". The Arbitral Tribunal has broad discretion in deciding to authorise new claims [*ICC Case No. 13101, para. 1346; ICC Case No. 23464, p. 18; Webster/Bühler, para. 23-92; Verbist/Schäfer/Imhoos, p. 135; Kull, p. 2335*]. The Arbitral Tribunal should authorise the New Claim under Art. 23(4) ICC Rules because the pending arbitration is in an early stage **[I]**, both claims share a close connection **[II]**, and an addition of the New Claim results in noticeable savings in costs and time **[III]**.

I. The New Claim Is Raised at an Early Stage in the Pending Arbitration

23 The New Claim is raised at an early stage in the pending arbitration. The addition of a new claim shortly after signing the Terms of Reference does not disturb the proceedings as it usually does not impede the opposing side's ability to defend itself against the new claim without undue delay [*cf. ICC Case No. 22790; Fry/Greenberg/Mazza, para. 3-906; Bond/Paralika/Secomb, Art. 23, para. 11; Kull, p. 2336; Webster/Bühler, para. 23-92*]. In the current case, the Terms of Reference have been signed just 13 days before the filing of the New Claim. No oral hearing has been held and no facts have been presented yet. The oral hearings are planned for 22-28 March 2024 in Vindabona, Danubia [*PO 1, p. 58, para. 4*]. Therefore, even with the addition of the New Claim, the proceedings can continue uninterrupted and RESPONDENT is still able to defend itself without undue delay. Consequently, the arbitration is still at an early stage and the New Claim does not disturb the proceedings.

II. The Original and the New Claim Share a Close Connection

24 The Original and the New Claim share a close connection. A new claim should be added if there is a close relation to the underlying dispute of the pending arbitration and it fits into the proceedings [*ICC Case No. 20179, para. 63; ICC Case No. 20350, para. 70; Verbist/Schäfer/Imhoos, pp. 133-134; Fry/Greenberg/Mazza, para. 3-904*]. The New Claim shares a particularly close connection with the Original Claim on a commercial basis, regarding the factual circumstances and the timeline of events.

25 First, the New Claim and the Original Claim are based on the same commercial and legal basis. The Parties share a long-lasting business relationship, which has its foundation in their FA. The FA governs both purchase orders [*Exhibit C1, p. 13, Art. 1*]. Thus, the same rules and conditions apply to both contracts. Notably, the requirements for a derogation from the FA under the form requirement of Art. 40 FA are a common legal issue. Regarding the Original Claim, a crucial question is if the Parties could derogate from Art. 40 FA by amending the FA through an email [*Exhibit R4, p. 36, para. 6; RfA, p. 7, para. 26*]. For the New Claim, the very related question is whether the Parties could amend the contract via phone call [*RfNC, p. 54, para. 2*]. Therefore, the claims share the same commercial and legal basis.

26 Second, both claims are closely connected with regard to the factual circumstances and the timeline of events. The New Claim is based on Purchase Order No. A-15604 from 4 January 2022. The Original Claim of the pending arbitration is based on Purchase Order No. 9601 from 17 January 2022. Both purchase orders were placed within 13 days of each other. The cyberattack on CLAIMANT took place on 5 January 2022 and was discovered on 23 January 2022 [*Exhibit C6, p. 17, para. 5*]. Thereby, these events fall within the same month of the placement of the purchase orders. Further, the investigation and sanitisation of CLAIMANT's internal accounting system affected the payments of both purchase orders. From 15 May 2022 until 30 June 2022, CLAIMANT's internal accounting system went down and needed to be investigated and sanitised [*Exhibit C6, pp. 17, 18, para. 10*]. During that time, both second payments of RESPONDENT regarding the purchase orders became due, namely on 20 May 2022 regarding Purchase Order No. A-15604 and on 30 June 2022 regarding Purchase Order No. 9601. Therefore, both claims are also closely connected with regard to the factual circumstances and the timeline of events.

27 Third, the New Claim fits into the proceedings. The arbitrators are particularly qualified to decide on the New Claim. They have extensive experience in the automotive industry. Dr. Chevy has particular expertise with sensors and Mr. Klement has a background in data privacy and cybersecurity [*PO 2, p. 65, para. 36*]. Thus, they are highly qualified to assess the facts that connect both claims in their specific depth. It is uncertain if equally skilled arbitrators could be found for a second arbitration. Therefore, the new claim fits into the proceedings.

28 In conclusion, due to being affected by these same events and being based on the same commercial and legal basis, both claims share a close connection.

III. An Addition of the New Claim Saves Costs and Time

29 An addition of the New Claim would result in noticeable savings in costs and time. Art. 22(1) ICC Rules states that proceedings must be conducted "in an expeditious and time

efficient manner". The Parties agreed with this general notion under the ICC Rules. In their Terms of Reference, they agreed that New Claims shall only be added "if they result in noticeable savings in cost and time" [*RfNC, p. 55, para. 4*]. These requirements are met, as the authorisation of the New Claim saves noticeable costs **[1]** and time **[2]**.

1. An Addition of the New Claim Saves Costs

30 The addition of the New Claim into the pending arbitration saves noticeable costs. First, the addition of the New Claim would save the non-refundable filing fee of USD 5,000 which would have to be paid according to Art. 4(4)(a) ICC Rules [*ICC Case No. 25644, para. 10*].

31 Second, the overall costs of the proceedings are substantially reduced. This is reflected by the ICC's calculation of the advance on costs, which is based on the amount in dispute on a degressive scale. Thus, in proportion to the value, the costs decrease as the value of the claim increases. For the pending arbitration, the advance on costs is USD 610,000 [*E-Mail on 25 July, p. 39*]. Since the New Claim has an amount in dispute of USD 12,000,000, the approximate advance on costs for the second arbitration alone would amount up to USD 524,851 [*RfNC, p. 46, para. 1; Cost Calculator of the ICC*]. Therefore, if both claims were arbitrated separately, this would result in a total advance on costs of USD 1,134,851. If the Arbitral Tribunal however authorises the addition of the New Claim to the pending arbitration, the advance on costs can be adapted to approximately USD 787,001, having regard to the total dispute value of both claims [*Cost Calculator of the ICC*]. Thus, based on the average values of the ICC, an addition of the New Claim saves at least USD 347,850 in costs.

32 Third, an addition of the New Claim saves extra legal fees in hours for both Parties. A duplication of labour arises if a second arbitration is needed. The Terms of Reference would have to be drawn up again. A new case management conference and the constitution of another Arbitral Tribunal would also be necessary. Further the preparation of the timeline for submissions and the holding of another hearing would be required. The authorisation of the New Claim therefore reduces the administrative effort considerably by avoiding these procedural steps.

33 Thus, the addition of the New Claim into the pending arbitration saves a considerable amount of legal fees.

2. An Addition of the New Claim Saves Time

34 The addition of the New Claim results in noticeable savings in time. In the current case, the counsel of both Parties would save a lot of working hours. As already shown the factual timelines of the cases are closely related and would only have to be compiled once. The counsel furthermore save

time for another drafting of the Terms of Reference, as well as for another case management conference and another hearing. Also, the witnesses of both Parties, especially their CEOs, Mr. Toyoda and Ms. Durant, which are involved in both claims, would not have to attend the hearings a second time. Therefore, the addition of the New Claim results in noticeable savings in time.

CONCLUSION OF THE FIRST ISSUE

35 In summary, the Arbitral Tribunal has jurisdiction arising from Art. 41 of the Parties' FA to decide on both the New and the Original Claim in one arbitration. Thus, it can authorise the addition of the New Claim to the pending arbitration. The relevant criteria for the exercise of the Arbitral Tribunals' discretion outlined in Art. 23(4) ICC Rules have been duly met in the present case: the pending arbitration is at an early stage, both claims share a close connection and therefore an addition results in noticeable savings in costs and time for both Parties.

SECOND ISSUE: IN CASE THE NEW CLAIM HAS TO BE RAISED IN A SEPERATE ARBITRATION, THE ARBITRAL TRIBUNAL CAN AND SHOULD CONSOLIDATE THE ARBITRAL PROCEEDINGS

36 In case the New Claim has to be raised in a separate arbitration, the Arbitral Tribunal can and should consolidate the arbitral proceedings. If the Arbitral Tribunal does not consider the requirements for an addition of the New Claim to be given, CLAIMANT's filing of the New Claim is to be treated as the request for the commencement of a second arbitration [*RfNC, p. 46, para. 1*]. The two arbitral proceedings shall then be consolidated by the Arbitral Tribunal of the first proceeding in accordance with the Parties' explicit agreement in Art. 41(5) FA.

37 RESPONDENT seeks to complicate the current proceedings by evading consolidation in the misguided hope that it would make it harder for CLAIMANT to proceed with its claims. This behaviour of RESPONDENT is highly contradictory, since it was the one who insisted on adding a consolidation clause into the FA [*PO 2, p. 63, para. 19*]. In an attempt to invalidate its own clause, RESPONDENT argues that the Arbitral Tribunal lacks the power to consolidate by invoking Art. 10 ICC Rules, which vests the power to consolidate in the ICC Court. Alternatively, it contends that the requirements for consolidation under Art. 41(5) FA are not met. However, the Parties have explicitly empowered the Arbitral Tribunal to consolidate in Art. 41(5) FA **[A]**. Such a deviation from Art. 10 ICC Rules is possible **[B]**. Finally, the requirements of Art. 41(5) FA are met **[C]**.

A. The Parties Have Empowered the Arbitral Tribunal to Consolidate in Art. 41(5) FA

38 The Parties have empowered the Arbitral Tribunal to consolidate arbitrations in Art. 41(5) FA. In Art. 41(5) FA, the Parties have agreed on the following clause:

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

39 The Parties decided that the arbitral tribunal of the first arbitral proceeding has the power to consolidate. The pending arbitration is the first proceeding. Thus, the Parties have empowered the Arbitral Tribunal to consolidate.

B. The Parties May Deviate From Art. 10 ICC Rules

40 The Parties may deviate from Art. 10 ICC Rules. RESPONDENT asserts that a deviation from Art. 10 ICC Rules, which gives the power to consolidate to the ICC Court is not possible and that the agreement in Art. 41(5) FA is invalid. However, Art. 41(5) FA is applicable as individual party agreements supersede institutional rules **[I]** and Art. 10 ICC Rules is not a mandatory provision **[II].**

I. Individual Party Agreements Supersede Institutional Rules

41 Individual party agreements supersede institutional rules. According to Art. 19 Danubian Arbitration Act, which applies to the procedure as law of the seat of arbitration, "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Accordingly, the parties can choose institutional rules but also set up individual agreements differing from those institutional rules [*Carlevaris, p. 114; Supreme Court (India), 15 December 2016, para. 38; Landolt/García, p. 6, para. 2.2; Holtzmann/Neuhaus/Kristjansdottir/Walsch, paras. 444, 445; cf. ICC Case No. 19359; ICC Case No. 18848; Supreme Court (Sweden), 12 November 2010*]. The application of institutional rules is just as much an expression of the parties' will as an individual agreement between the parties deviating from those chosen institutional rules. Thus, the resulting conflict is not one between the will of the parties and the law but rather a conflict between two different expressions of the parties' will [*Schroeter, p. 171; Carlevaris, p. 114*]. This conflict is solved by application of the principle that more specific clauses will prevail. Particular agreements arranged between the parties prevail over the chosen rules of an institution since they are the more specific rule [*ICC Case No. 19222, para. 265; Carlevaris, p. 114; cf. also Art. 832(2) Italian Code of Civil Procedure; Nicholls/Bloch, para. 45*]. Therefore, individual party agreements supersede institutional rules.

II. Art. 10 ICC Rules Is Not a Mandatory Provision

42 Art. 10 ICC Rules is not a mandatory provision. In the ambit of institutional rules, a 'mandatory provision' is a rule that the arbitral institution deems so important that it would refuse to administer the arbitration in case of a violation [*Schroeter, p. 171; Arroyo, p. 204; Smit, p. 846; Carlevaris, p. 114*]. Art. 10 ICC Rules is not one of the provisions typically considered mandatory [*Schroeter, p. 169; Nedden/Herzberg/Kopetzki, – Schmidt-Ahrendts, p. 198, para. 47*]. This is also showcased in the current case, where the ICC Secretariat has accepted the claim and constituted the Arbitral Tribunal. It did not refuse to administer the case. It even lists the FA as a relevant agreement upon which the Request for Arbitration is based [*Case Information, p. 45*]. Thereby, the ICC has acknowledged and accepted the derogation of Art. 10 ICC Rules. Had it considered Art. 41(5) FA to be problematic,

the ICC Court would not have proceeded with the appointment of the Arbitral Tribunal. This is also in line with previous ICC practice. In the past, the ICC has explicitly accepted that parties may grant the power to consolidate to the arbitral tribunal [*Unpublished ICC document referenced in Nedden/Herzberg/Kopetzki – Schmidt-Ahrendts, p. 198, para. 47*]. By allowing the arbitration to proceed, the ICC has shown that it does not consider Art. 10 ICC Rules a mandatory provision.

43 Furthermore, a comparison with other institutional rules shows that no compelling reasons speak against the empowerment of the arbitral tribunal to consolidate. It is not uncommon that arbitral tribunals are empowered to consolidate proceedings. For example, Art. 8.7-8.9 SIAC Rules vests the power to consolidate in the arbitral tribunal. Additionally, Art. 22.7 LCIA Rules also states that it is in general the arbitral tribunal which can consolidate arbitral proceedings. Hence, arbitral tribunals are often empowered to consolidate proceedings. Consequently, Art. 10 ICC Rules is not a mandatory provision. In conclusion, the Parties may deviate from Art. 10 ICC Rules and Art. 41(5) FA is therefore valid.

C. The Requirements for Consolidation Are Met

44 The Arbitral Tribunal should consolidate the arbitral proceedings because the requirements of Art. 41(5) FA are met. The arbitral tribunal is required to comply with the will of the parties to the greatest extent possible [*Nedden/Herzberg/Kopetzki – Schmidt-Ahrendts, p. 194, para. 24*]. Art. 41(5) FA provides the standard for the consolidation of two arbitrations. According to this provision, arbitrations shall be consolidated if they are "related by common questions of law or fact and which could result in conflicting awards or obligations" [*Exhibit C1, p. 12, Art. 41*]. Contrary to the allegations of RESPONDENT those requirements are met. The subject matters of the proceedings are related by common questions of law and fact **[I]** and could result in conflicting awards **[II]**.

I. The Subject Matters of the Proceedings Are Related by Common Questions of Law and Fact

45 The subject matters of the proceedings are related by common questions of law and fact. As previously established, both claims concern the same legal questions and factual circumstances [*Supra, paras. 24 et seq.*]. In particular, the Arbitral Tribunal must in both claims examine the form requirement for amendments of the FA stipulated in Art. 40 FA. Furthermore, as the purchase order of the Original and the New Claim were made within 13 days of each other, the surrounding circumstances of both claims are similar. Both purchase orders were affected by the cyberattack of which CLAIMANT became a victim. Since both claims address the same legal

questions and factual circumstances, the subject matters of both proceedings are related by common questions of law and fact.

II. The Subject Matters of the Proceedings Could Result in Conflicting Awards

46 In case two separate arbitrations need to be commenced, a risk of conflicting awards would arise. Awards are conflicting if the same legal or factual questions are answered differently [*ICC Case No. 15612; CRCICA Case No. YYY/2013, para. 273; Romanelli/Naing/Moola/Freihat, para. 31*; *von den Berg, para. 173*]. In the current case, the Parties agreed that the mere possibility of conflicting awards is sufficient to consolidate proceedings. This intent is shown in Art. 41(5) FA which states that proceedings are to be consolidated if they "could" result in conflicting awards. This also is supported by the drafting history of Art. 41(5) FA. In the past, RESPONDENT had to initiate three different proceedings against another supplier. Despite the fact that all three arbitrations concerned the same product, the question of whether this product had a defect was decided differently and led to conflicting awards [*PO 2, p. 63, para. 19*]. To prevent such a situation from happening again, RESPONDENT insisted on including Art. 41(5) FA.

47 In the present case, there is a risk of conflicting awards. A common legal question to be answered in both proceedings is whether the Parties could dispose of the written form requirement in Art. 40 FA. Regarding the Original Claim, RESPONDENT argues that an email is sufficient to amend Art. 7 FA and change the bank account details notwithstanding the form requirement in Art. 40 FA [*Exhibit R4, p. 36, para. 4*]. Likewise, concerning the New Claim, RESPONDENT alleges that the agreed-upon procedure for giving notice of defects was validly changed in an oral discussion [*ARfNC, p. 54, para. 2*]. This could lead to diverging decisions. The present Arbitral Tribunal could decide that the Parties are bound by the form requirements in Art. 40 FA, whereas the tribunal hearing the New Claim could find that the Parties have validly disposed of Art. 40 FA. Ultimately, this would lead to conflicting answers to the same legal question.

48 Through separate proceedings, two arbitral tribunals could reach contrasting conclusions regarding CLAIMANT's obligations arising from the cyberattack. Concerning the Original Claim, RESPONDENT alleges that CLAIMANT was obliged to inform RESPONDENT of the cyberattack [*ARfA, p. 31, para. 9*]. Regarding the New Claim, RESPONDENT similarly argues that CLAIMANT, due to the cyberattack, was obliged to take actions to continue receiving defect notifications [*ARfNC, p 54, para. 3*]. Assuming this Arbitral Tribunal comes to the conclusion that the cyberattack did not affect CLAIMANT's contractual obligations, the risk remains that the arbitral tribunal hearing the New Claim could answer this question differently. In conclusion, in case two separate arbitrations need to be commenced, the risk of conflicting awards would arise.

CONCLUSION OF THE SECOND ISSUE

49 The Arbitral Tribunal can and should consolidate the arbitral proceedings. The Parties agreed autonomously in Art. 41(5) FA to empower the Arbitral Tribunal to consolidate. Instead of Art. 10 ICC Rules, Art. 41(5) FA is to be applied because it constitutes the more specific party agreement. Accordingly, the Arbitral Tribunal should consolidate the arbitrations, as the requirements under which the Parties agreed on consolidation in Art. 41(5) FA are met. The two proceedings are related by common questions of law and fact and there is a risk of conflicting awards if the cases were decided by two different arbitral tribunals. In conclusion, the Arbitral Tribunal should seek to give full effect to the Parties' intent and consolidate the proceedings.

THIRD ISSUE: CLAIMANT IS ENTITLED TO PAYMENT OF USD 38,400,000 FROM RESPONDENT

50 In January 2022, RESPONDENT ordered 1,200,000 sensors from CLAIMANT under the FA. As agreed, CLAIMANT delivered the sensors in two separate shipments in April and May. CLAIMANT has therefore fulfilled its contractual obligations. RESPONDENT, on the other hand, has failed to perform, as it did not pay the purchase price. In March 2022, before the sensors were delivered, RESPONDENT fell for an obvious phishing mail. Because of this, RESPONDENT did not transfer the purchase price to the bank account agreed upon in Art. 7 FA, but rather to an unknown bank account in Danubia. After noticing its mistake, RESPONDENT should have realised that it still owed the purchase price to CLAIMANT and paid to the right bank account. Instead of taking responsibility for its own mistakes, however, RESPONDENT tries to shift the blame onto CLAIMANT. Nevertheless, the sole reason for RESPONDENT's failure to perform is its own negligence. RESPONDENT cannot distract from the relevant fact of the case, which is that RESPONDENT did not fulfil its contractual obligation. Therefore, CLAIMANT is entitled to payment of USD 38,400,000. Despite the transfer to the wrong bank account, RESPONDENT insists that it has fulfilled its contractual duty.

51 Contrary to these allegations, CLAIMANT is entitled to full payment as RESPONDENT has not performed **[A]**. RESPONDENT cannot rely on exemption from payment under Art. 80 CISG **[B]**. RESPONDENT also cannot rely on partial exemption from payment **[C].** RESPONDENT cannot claim for damages and invoke a set-off **[D]**.

A. RESPONDENT Did Not Perform Its Obligation to Pay the Purchase Price

52 RESPONDENT did not perform its obligation to pay the purchase price under Art. 53 CISG. It is undisputed between the Parties that the CISG applies to the Parties' obligations [*AtRfA, p. 30, para. 1*]. According to Art. 53 CISG, the buyer must pay the price for the goods in accordance with the contract and the Convention. Furthermore, the buyer is responsible for ensuring that payment arrives in full and on time, thus the buyer bears the risk for any loss or delay [*Gerechtshof Arnhem-Leeuwarden (Netherlands), 3 October 2017; MüKoHGB/Wertenbruch, Art. 57, para. 9*]. RESPONDENT argues that it performed by paying to the wrong bank account because the phishing email has to be attributed to CLAIMANT [*Exhibit C4, p. 15*]. Alternatively, it asserts that the transfer to the unknown third party constitutes performance through the principle of good faith [*ARfA, p. 31, para. 11*].

53 However, this payment cannot constitute performance, as it was not in accordance with Art. 7 FA **[I]**. RESPONDENT also did not perform by paying to the bank account of the cyberattacker, since the phishing email did not modify Art. 7 FA **[II].** Neither did the payment to the third-party bank account constitute performance through good faith **[III]**.

I. RESPONDENT Has Not Performed as It Did Not Pay in Accordance With the Framework Agreement

54 RESPONDENT has not performed as it did not pay in accordance with the contractual agreement in Art. 7 FA. The CISG applies to framework agreements if they specify the goods, prices, and quantities and these obligations form the main part of the contract [*CA Genève (Switzerland), 20 May 2011; OLG München (Germany), 22 September 1995; cf. Supreme Court (Poland), 27 January 2006; District Court for the Western District of Pennsylvania (United States), 20 June 2019*]. In the present case, the FA defines the goods and a mechanism for price fixing. It also sets out a minimum purchase obligation of RESPONDENT [*Exhibit C1, pp. 9, 10*]. It therefore already constitutes a contract of sale, which makes the CISG applicable.

55 According to Art. 57 CISG, the buyer has to pay at the place of payment agreed upon by the parties. In Art. 7 FA, the Parties agreed that all payments had to be made to either of two bank accounts. Both accounts are located in Mediterraneo, where CLAIMANT is based [*Exhibit C1, pp. 9, 10*]. Under Purchase Order No. 9601, RESPONDENT was obliged to pay two instalments of USD 19,200,000 each. The payments were due 30 days after delivery, namely on 3 May 2022 and 30 June 2022 [*Exhibit C3, p. 14*]. It is undisputed between the Parties that RESPONDENT has not paid the two instalments to either of the bank accounts named in Art. 7 FA. Therefore, RESPONDENT has not performed.

II. The Phishing Email Did Not Modify the Framework Agreement

56 RESPONDENT did not perform by paying to the bank account of the cyberattacker because the phishing email did not modify Art. 7 FA to change the place of payment. This is because the cyberattacker did not modify the contract by impersonating CLAIMANT **[1]**. In any case, the phishing email did not meet the form requirements for amendments of the Framework Agreement that the Parties agreed upon in Art. 40 FA **[2]**.

1. The Cyberattacker Did Not Modify the Contract by Impersonating CLAIMANT

57 The cyberattacker did not modify the contract by impersonating CLAIMANT. RESPONDENT argues that that the phishing email must be attributed to CLAIMANT, however, it provides no legal

reasoning for this assertion [*ARfA, p. 31, para. 11; Exhibit C4, p. 15*]. In the present case, the cyberattacker tried to impersonate CLAIMANT.

58 Whether the cyberattacker could have amended the contract by impersonating CLAIMANT has to be determined under domestic law. The CISG does not govern cases of impersonation [*Ferrari, p. 70; Schluchter, p. 117*]. Both mistake of identity and agency, the legal doctrines commonly relied upon to examine cases of impersonation, fall outside of the scope of the CISG [*cf. CA Lugano (Switzerland), 12 February 1996; Obergericht Thurgau (Swtizerland), 19 December 1995; KG Berlin (Germany), 24 January 1994; Kröll, p. 39; Schwenzer/Atamer/Butler – Schwenzer, para. 7.3.2; Honnold/Flechner, para. 98; McMahon, pp. 1002-1003; Piltz, para. 2-149*]. In this case, national law must be resorted to [*OGH (Austria), 22 October 2001; CA Lugano (Switzerland), 12 February 1996; AG Alsfeld, 12 May 1995, paras. 16, 17*]. Regardless of what rules of international private law would apply, the general contract law of all involved jurisdictions is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts [hereinafter: PICC] [*PO 1, p. 59, para. 4(4)*]. Therefore, the PICC are applicable for determining whether the cyberattacker modified the contract by impersonating CLAIMANT.

59 Under the PICC, the cyberattacker did not validly modify the contract by impersonating CLAIMANT. In Chapter 2 Section 2, the PICC deal with agency and in this context address one very particular case of impersonation. Art. 2.2.4(2) PICC deals with the case of an undisclosed agent impersonating the owner of a business. However, this provision requires the impersonator to be an actual agent of the business acting within its authority [*Vogenauer – Krebs, Art. 2.2.4, paras. 10-14; Brödermann, Art. 2.2.4, para. C*]. Since the cyberattacker was not an agent of CLAIMANT, the requirements of Art. 2.2.4(2) PICC are not met. Further, the provision shows that the drafters of the PICC were aware of the issue of impersonation. From the fact that only one particular case was regulated, it can be inferred that no other cases of impersonation were deemed to have binding legal effects for the impersonated party.

60 That, in general, impersonators cannot legally bind a party is further supported by the drafting history of the PICC. Regarding unauthorised agency, the drafters agreed that a principal should only be held responsible if the principal itself actively caused the third party to believe in the agent's authority [*UNIDROIT Working Group, (1999) Study L – Misc 21, paras. 127, 138, 139*]. Therefore, silence or mere omissions on the principal's part cannot create a legally relevant belief in the authority of an unauthorized agent [*Vogenauer – Krebs, Art. 2.2.5, para. 17; Brödermann, Art. 2.2.5, para. B*]. Transferring this logic, it becomes apparent that under the PICC, an impersonator cannot bind the impersonated party, except for the very unlikely case that the party itself actively caused the third party to believe the impersonator. In the present case, CLAIMANT did not actively cause

RESPONDENT to believe the cyberattacker. CLAIMANT did not inform RESPONDENT about the cyberattack, which at best could be considered an omission. Therefore, the cyberattacker could not legally bind CLAIMANT and modify the contract.

2. The Phishing Email Did Not Meet the Form Requirements for Amendments

61 In any case, even if the cyberattacker had authority to amend the contract, the phishing email did not meet the form requirements for amendments of the FA. In the present case, the phishing email did not comply with Art. 40 FA **[a]** and RESPONDENT was not justified in assuming that no form was required **[b]**.

a. The Phishing Email Did Not Comply With Art. 40 FA

62 The phishing email did not comply with Art. 40 FA. The Parties agreed in Art. 40 FA that: "No amendment or waiver of any provision of this Agreement including this Article shall be valid unless the same is in writing and signed by the Parties". According to Art. 29(2) CISG, a contract in writing which contains a provision requiring any modification by agreement to be in writing may not otherwise be modified. Even though Art. 29(2) CISG only refers to "writing", it is commonly accepted that if the parties agree on stricter standards, such as the need for signatures, then Art. 29(2) CISG also requires these standards to be met to modify the contract [*ICAC Award, 25 November 2002; OLG Innsbruck (Austria), 18 December 2007; US District Court for the Southern District of New York (United States), 22 September 1994; Perales Viscasillas, p. 176; Eiselen, p. 381*]. The phishing email did not contain a signature [*Exhibit C5, p. 16*] and thus did not meet the form required by Art. 40 FA. Even RESPONDENT itself has recognised that the phishing email did not comply with the form requirement [*Exhibit R4, p. 36, para. 4*]. Art. 7 FA, which regulates the place of payment, could thus not have been modified by the cyberattacker's attempt to change the bank account.

b. RESPONDENT Was Not Justified in Assuming That No Form Was Required

63 RESPONDENT was not justified in assuming that no form was required. According to Art. 29(2)(2) CISG, a party may be precluded by its conduct from asserting form requirements to the extent that the other party has relied on that conduct. Art. 29(2)(2) CISG therefore requires reliance inducing conduct by the opposing party [*OLG Hamm, 30 November 2010; Schlechtriem/Schwenzer – Schroeter, Art. 29 CISG, para. 69; DiMatteo/Janssen/Magnus/Schulze – Eiselen, Art. 29, para. 210*; *Kröll/Mistelis/Perales Viscasillas, Art. 29, para. 19*]. It also requires that the deviation from the form requirement is reasonable under the specific circumstances [*Schlechtriem/Schwenzer/Schroeter – Schroeter, Art. 29, para. 54; Kröll/Mistelis/Perales Viscasillas, Art. 29, para. 22*].

64 RESPONDENT argues that the Parties had always taken a 'pragmatic approach' to the form requirement [*Exhibit R4, p. 33, para. 6*]. To support this assertion, RESPONDENT cites two occasions. The first was where the Parties switched from a semi-annual to annual determination of the price notwithstanding Art. 6 FA [*RfA, p. 6, para. 11; cf. PO 2, p. 62, para. 8*]. The second change allowed RESPONDENT to exceed the number of sensors requested in one order notwithstanding Art. 3 FA [*RfA, p. 6, para. 12; cf. Exhibit C2, p. 13, para. 5*]. Both changes were made orally and in person at the price fixing meetings in 2019 and 2021 [*cf. PO 2, p. 62, para. 8*].

65 However, these changes have to be distinguished from that proposed by the cyberattacker via email. This is because the mentioned amendments were always made orally and in person [*PO 2, p. 62, para. 8*], thus the Parties could be certain that their counterpart agreed. This cannot be compared to the situation in the present case where the purported amendment was made via email. Furthermore, when the Parties changed the bank account in the past, they had done so in compliance with the form requirement. The amendment was made in writing and with the signatures of both Parties [*PO 2, p. 62, para. 12*]. Therefore, it was not reasonable for RESPONDENT to believe that any subsequent change of the bank account would be made contrary to the form requirement.

66 Even Mr. Royce, the responsible account manager for RESPONDENT, was aware that the attempt to change the bank account via email was highly unusual. This is proven by his attempt to call Ms. Audi after receiving the phishing email [*Exhibit R4, p. 36, para. 4*]. He was told by her voicemail that she was on sick leave until 11 April 2022 and that Ms. Peugeotroen should be contacted in urgent matters [*PO 2, p. 61, para. 4*]. Instead of following these instructions, he answered directly to the phishing email and asked whether the change of bank accounts was valid [*Exhibit R4, p. 36, para. 4*]. Naturally, the cyberattacker confirmed this [*Exhibit R4, p. 36, para. 4*]. Therefore, RESPONDENT did not rely on CLAIMANT's past conduct but rather on the confirmation email by the cyberattacker. Considering Ms. Audi's known sick leave, this was also unreasonable. Thus, RESPONDENT was not justified in assuming that no form was required.

67 In conclusion, the phishing email did not modify the FA and RESPONDENT did not perform in accordance with the contract.

III. Payment to the Third-Party Bank Account Does Not Constitute Performance

68 RESPONDENT's payment to the cyberattacker's bank account does not constitute performance through good faith. RESPONDENT argues that CLAIMANT is to be treated as if it had made the request to pay to the new bank account itself. RESPONDENT further argues that it would be against the principles of good faith if its payment to the wrong bank account did not constitute

performance [*ARfA, p. 31, para. 11*]. However, this claim is without legal basis; no provision in the CISG indicates that payment in good faith could constitute performance. Therefore, under the CISG, a party cannot perform by payment to a third party through good faith **[1]**. Even if one were to assume that such a principle could be read into the CISG, RESPONDENT did not pay to the third-party bank account in good faith **[2]**.

1. Under the CISG, Payment to a Third Party Cannot Constitute Performance Through the Principle of Good Faith

69 Under the CISG, payment to a third party cannot constitute performance through the principle of good faith. Such a concept could only be read into the CISG in accordance with Art. 7(2) CISG. This provision requires an internal gap in the Convention which is to be filled in accordance with the underlying principles of the CISG. A concept of "performance through payment in good faith" cannot be read into the CISG in accordance with Art. 7(2) CISG for the following three reasons:

70 First, there is no internal gap in the CISG. An internal gap according to Art. 7(2) CISG only exists if a matter is governed by the CISG but not explicitly settled by it. The CISG exhaustively regulates performance through payment in Art. 53 and Art. 57 CISG. From Art. 57 CISG, the general notion can be derived that the buyer must bear the risk that the payment does not arrive [*OLG München (Germany), 9 July 1997; BeckOK – Fountoulakis, Art. 57, para. 27; MüKoBGB – Huber, Art. 5, para. 17; Herber/Czerwenka, Art. 57, para. 3*]. The CISG also addresses the allocation of risk in case the seller causes the non-performance of the buyer. In this case, the buyer can be exempted from performance under Art. 80 CISG [*cf. Bianca/Bonell – Masow, Art. 57, para. 2.*5]. Therefore, the CISG exhaustively regulates performance and allocates the risk in each case. Hence, there is no gap in the CISG. Even if one assumes that a gap exists, it is more consistent to fill that gap by exempting a party in accordance with Art. 7, 80 CISG instead of referring to performance through good faith.

71 Second, the idea of performance through good faith is inconsistent with the purpose of the CISG. Despite the principle of good faith being mentioned in Art. 7(1) CISG, the purpose of the CISG is to provide a uniform legal system which creates legal predictability in international trade [*Preamble CISG; Schlechtriem/Schwenzer/Schroeter – Ferrari, Art. 7, para. 10a; Praštalo, p. 31, para. 2.02; Baasch Andersen, p. 35*]. The principle of good faith is by its very nature unpredictable, and its application depends heavily on the adjudicator's understanding of 'good faith' [*UNCITRAL Yearbook IX (1978), p. 35, para. 44; Walt, p. 68; Bridge, pp. 98-115; Gilette/Walt, p. 136*]. It opens the door for adjudicators to alter results in accordance with their domestic understanding of justice [*ICC Case No. 19574; Schroeter, CISG, p. 62, para. 137*]. This is because their understanding

of good faith will depend on their domestic law. Thus, the concept of performance through good faith would create an uncertain legal framework whereby the result of the dispute depends on the legal background of the adjudicator. Therefore, the concept of performance through good faith is too imprecise to be applied consistently in international sales law, and is thus incompatible with the purpose of the CISG.

72 Third, these issues are showcased in *Mees van den Brink v SAS*. In this case, the buyer paid to the wrong bank account after falling for a cyberattacker impersonating the seller [*Gerechtshof Arnhem-Leeuwarden (Netherlands), 3 October 2017*]. Although ruling against the buyer, the court applied Art. 8 CISG analogously to assess whether the emails from the cyberattacker could be attributed to the seller and indicated, that if so, the buyer's payment to the third party could have constituted performance. This analogy to Art. 8 CISG is questionable at best, as impersonation is not governed by the CISG [*Supra, para. 58*]. However, the approach of the Court can be explained through its own explicit reference to Art. 6:34(1) of the Dutch Civil Code. Therein, the concept of performance in good faith is codified. Therefore, the ruling showcases the above-mentioned tendency of adjudicators to interpret international conventions in light of their own national law. The Court in *Mees van den Brink* thus did not limit itself to interpreting the CISG but instead adjusted it to imitate its own national law. This so-called homeward trend is a known problem in the field of uniform sales law [*Ferrari, Autonomous Interpretation, p. 245*]. Consequently, the Arbitral Tribunal should avoid taking guidance from the decision of the Dutch Appellate Court.

73 In conclusion, under the CISG, a payment to a third party cannot constitute performance through the principle of good faith.

2. In Any Case, RESPONDENT Did Not Act in Good Faith

74 RESPONDENT could not rely on the change of the bank account in good faith. If one follows the Dutch Court in *Mees van den Brink*, Art. 8 CISG can be applied analogously to determine whether the email can be attributed to CLAIMANT. This attribution has to be reasonable, having due regard to all surrounding circumstances in accordance with Art. 8(2), (3) CISG. A reasonable person would have realised that the email was not from CLAIMANT. The phishing email contained substantial errors **[a]**. Further, the phishing email contained all characteristics of a cyberattack **[b]** and the circumstances expose the email to be a phishing attack **[c]**.

a. The Phishing Email Contained Substantial Errors

75 RESPONDENT failed to realise that the phishing email contained patent errors. It is common knowledge that spelling mistakes are one of the key indicators for phishing attacks [*Wang et al.,*

p. 349] and that cyberattackers will spoof email addresses to impersonate others [*Alkhalil et al., p. 8*]. The phishing email sent by the cyberattacker contained many spelling mistakes. The first is found in the email address itself. It reads "telsa.audi@se**m**sorX.me" instead of "telsa.audi@se**n**sorX.me" [*Exhibit R3, p. 35*]. Such an error is archetypal of phishing emails.

76 The second and third mistakes are found in the body of the email. The cyberattacker, when referring to a previous order, wrongly states that the order falls under "Purchase Order No. 1560**5**" [*Exhibit C5, p. 16*] instead of "Purchase Order No. **A-**1560**4**" [*Exhibit C7, p. 48*]. They also wrongly cite the serial number as being "S4-258**89**" [*Exhibit C5, p. 16*] as opposed to the actual number "S4-258**99**" [*Exhibit* C2*, p. 13, para. 1*]. It has to be noted that Mr. Royce was the person responsible for the relationship with CLAIMANT [*Exhibit R4, p. 36, para. 4*]. He therefore had specialised knowledge and more experience with the subject matter. A reasonable person in Mr. Royce's position could have recognised these mistakes.

b. The Phishing Email Contained All Characteristics of a Cyberattack

77 RESPONDENT failed to realise that the email contained further tell-tale signs that it was a phishing attempt. One of the most common tell-tale signs of a phishing attempt is the demand of immediate action backed up by a consequence or threat [*Agazzi, p. 2*]. In fact, this features in an overwhelming majority of phishing emails [*Rosenthal/Oberly, pp. 6-8*]. The email highlighted that the bank account should be changed "urgently" and that this should be confirmed "immediately" [*Exhibit C3, p. 14*]. Otherwise, the first shipment of 600,000 sensors due under Purchase Order No. 9601 [*Exhibit C2, p. 13, para. 3*] would not be authorised [*Exhibit C5, p. 16*]. Further, the email sought to control the flow of information by demanding confirmation of the change being made via reply email. Alternative means of communication were described as impossible [*Exhibit C5, p. 16*]. Had Mr. Royce acted reasonably, he would have questioned why a long-term business partner was demanding immediate action in such a dubious manner. This is especially true since the payment was only due 30 days after the delivery, which meant that there would have been plenty of time to change the bank account [*Exhibit C2, p. 13*]. Furthermore, RESPONDENT itself had been a victim of a cyberattack two years ago [*Exhibit R1, p. 33*]. It can be assumed that afterwards, its personnel received training to be aware of these common features of phishing attacks. Thus, a reasonable person in the position of Mr. Royce would have recognised these tell-tale signs.

c. The Circumstances Expose the Email as a Phishing Attempt

78 By now, RESPONDENT should have recognised the phishing attempt due to the surrounding circumstances. After receiving the phishing email, even Mr. Royce was apparently irritated by the way the amendment was proposed and immediately tried to call Ms. Audi [*Exhibit R4, p. 36,*

para. 4]. He was told by her voicemail that she was on sick leave and that in urgent matters Ms. Peugeotroen should be contacted [*PO 2, p. 61, para. 4*]. This voicemail showed that Ms. Audi was no longer responsible for CLAIMANT's business for the time of her sick leave, but instead Ms. Peugeotroen would fill in for her. Contrary to this, the cyberattacker's email claimed that Ms. Audi was working from home [*Exhibit C5, p. 16*]. The voicemail thus contradicted the information given by the phishing email. Therefore, a reasonable person would at least have questioned why this apparently urgent email still came from Ms. Audi. Considering the mentioned spelling mistakes and the tell-tale signs, a reasonable person would have followed the instruction of the voicemail and called Ms. Peugeotroen. In particular, a reasonable person would have taken issue with the fact that the place of payment of a sum of USD 38,400,000 was about to be changed contrary to the written form requirement. One phone call would have revealed that the email was a phishing attempt and did not come from CLAIMANT.

79 Therefore, a reasonable person would not have attributed the email to CLAIMANT. Consequently, RESPONDENT could not reasonably have relied on the change in bank account to perform in good faith.

B. RESPONDENT Cannot Rely on Exemption From Payment Under Art. 80 CISG

80 RESPONDENT cannot invoke Art. 80 CISG because its requirements are not met. According to Art. 80 CISG, a party may not rely on a failure to perform to the extent that such failure was caused by its own act or omission. RESPONDENT argues that by omitting to inform it about the cyberattack, CLAIMANT caused the non-performance [*ARfA, p. 32, para. 12*]. However, there is no relevant omission on CLAIMANT's part under Art. 80 CISG **[I]**. Even if there was a relevant omission, CLAIMANT did not cause an impediment to RESPONDENT's performance **[II]**. In fact, CLAIMANT did not even cause RESPONDENT's payment to the wrong bank account **[III]**.

I. There Is No Relevant Omission by CLAIMANT

81 CLAIMANT did not act or omit an action in the sense of Art. 80 CISG. CLAIMANT did not send the phishing email itself, therefore it did not act in the sense of Art. 80 CISG. In the absence of an act, Art. 80 CISG requires a legally relevant omission. For an omission to be relevant under Art. 80 CISG, a party must be under a duty to inform or cooperate [*OLG Koblenz (Germany), 24 February 2011, MüKoHGB-Mankowski, Art. 80, para. 4; Kröll/Mistelis/Perales Viscasillas, Art. 80, para. 6*]. CLAIMANT was not obliged to inform RESPONDENT about the cyberattack. A duty to inform did not arise under the CISG **[1].** Even if the CISG did not contain a general duty to inform, CLAIMANT was also not obliged to inform RESPONDENT under the PICC **[2]**. Further, such an obligation did not arise under the Equatorianian Data Protection Act [hereinafter: EDPA] **[3]**. This evaluation does not change for the second instalment of RESPONDENT's payment **[4]**.

1. A Duty to Inform RESPONDENT of the Cyberattack Did Not Arise Under the CISG

82 CLAIMANT was not obliged to inform RESPONDENT under the CISG. RESPONDENT argues that because it informed CLAIMANT about a cyberattack against it in the past, CLAIMANT should have done the same [*Exhibit C4, p. 15*]. However, this past conduct did not establish a practice in accordance with Art. 9(1) CISG **[a].** CLAIMANT also was not generally obliged to inform RESPONDENT under the CISG **[b]**.

a. A Duty to Inform Did Not Arise From a Practice Between The Parties

83 The past conduct between the Parties did not establish a practice in accordance with Art. 9(1) CISG. According to Art. 9(1) CISG, the parties are bound by any practices which they have established between themselves. A practice requires a certain duration and frequency of the relevant conduct [*HG Aargau (Switzerland), 26 September 1997; CA Grenoble (France), 13 September 1995*]. In terms of frequency, one occurrence is not sufficient, especially in longer business relationships [*AG Duisburg (Germany), 13 April 2000; ZG Basel (Switzerland),*

3 December 1997; LG Frankenthal (Germany), 17 April 1997; Metropolitan Court Budapest (Hungary), 24 March 1992]. RESPONDENT only once informed CLAIMANT of a cyberattack against it. This singular occurrence cannot establish a practice. Therefore, the Parties did not establish a practice in accordance with Art. 9(1) CISG.

b. A Duty to Inform Did Not Arise From Art. 7 CISG

84 CLAIMANT had no duty to inform RESPONDENT of the cyberattack under Art. 7 CISG. Art. 7 CISG establishes a general duty to cooperate and inform for the parties to a contract [*BGH (Germany), 31 October 2001; Court of Appeal Lyon (France), 9. February 2017; OLG Köln (Germany), 21 December 2005; OLG Celle (Germany), 24. July 2009; Staudinger-Magnus, Art. 7, para. 48; Schlechtriem-Ferrari, Art. 7, para. 54*]. Under the CISG, a party is obliged to inform its contractual partner to the extent that the latter is visibly reliant on the information and the disclosure can reasonably be expected [*Honnold, Uniform Law, para. 100; Benedick, pp. 284, 286; Staudinger-Magnus, Art. 7, para. 48*]. A party is only considered reliant on information that it requires to fulfil its contractual obligations and protect its assets [*Benedick, p. 286*]. CLAIMANT discovered the cyberattack on 23 January 2022 and immediately tasked the leading cybersecurity firm in Mediterraneo, CyberSec, to assess the significance of the attack [*Exhibit C6, p. 17, para. 6*]. CyberSec reported to CLAIMANT that it had neutralised the malware and the cyberattack did not pose a risk anymore [*PO 2, p. 64, para. 25*]. Like any reasonable person, CLAIMANT trusted that information. Consequently, CLAIMANT had no reason to assume RESPONDENT would require any information about the cyberattack. Therefore, no duty to inform arose under Art. 7 CISG.

2. A Duty to Inform Did Not Arise Under the PICC

85 Even if the PICC were applicable to information duties, CLAIMANT was not obliged to inform RESPONDENT under the PICC. According to Art. 5.1.3 PICC, each party shall cooperate with the other party when such cooperation may reasonably be expected. Regarding the duty to inform, this standard of reasonableness leads to similar requirements as under the CISG [*cf. Vogenauer, Art. 5.1.3 PICC, para. 8 et seq.*; *Benedick, pp. 284, 286*]. Therefore, a duty to inform can only arise if a party is visibly reliant on the information. As shown, RESPONDENT was not visibly reliant on the information. Thus, even if the PICC applied, CLAIMANT would not be obliged to inform RESPONDENT.

3. A Duty to Inform Did Not Arise Under the Equatorianian Data Protection Act

86 The EDPA does not give rise to a duty to inform for CLAIMANT. RESPONDENT is based in Equatoriana [*Exhibit C1, p. 9*]. The EDPA is a verbatim adoption of the European Union's General

Data Protection Regulation [*PO 1, p. 59, para. 5*]. However, obligations under the EDPA are irrelevant with regard to Art. 80 CISG **[a]**. Even if obligations under the EDPA affected the contractual obligations of the Parties, the EDPA would not apply in this case **[b]**.

a. Obligations Under the EDPA Are Irrelevant With Regard to Art. 80 CISG

87 Obligations under the EDPA are irrelevant with regard to Art. 80 CISG because the EDPA does not influence contractual duties. For an omission to be relevant under Art. 80 CISG, a party must be under a duty to inform or cooperate with the other party [*OLG Koblenz (Germany), 24 February 2011, MüKoHGB – Mankowski, Art. 80, para. 4; Kröll/Mistelis/Perales Viscasillas, Art. 80, para. 6*]. These duties have to arise out of the contract or must have some connection to the contract of the parties [*cf. Kröll/Mistelis/Perales Viscasillas, Art. 80, para. 6; MüKoHGB – Mankowski, Art. 80, para. 4*]. Obligations under the EDPA arise independently from contractual relationships. According to Art. 1(2) EDPA, the EDPA intends to protect fundamental rights and freedoms of natural persons, in particular their right to the protection of personal data. The Protection Act is therefore not concerned with and does not intend to modify or constitute contractual obligations between parties. Hence, obligations under the EDPA do not constitute relevant duties in the sense of Art. 80 CISG.

b. Even if the EDPA Did Affect the Contractual Obligations of the Parties, the EDPA Would Not Be Applicable

88 The EDPA does not apply in the current case. For the EDPA to be applicable, the requirements of Art. 3 EDPA must be met. According to Art. 3(2)(a) EDPA, the EDPA applies to a company without an establishment in Equatoriana only if the data processing is related to offering goods or services to data subjects in Equatoriana. Pursuant to Art. 4(1) EDPA, only natural persons are data subjects. The purpose of the EDPA is to protect the fundamental rights of natural persons [*Council document 8004/13, p. 50, fn. 57; Taylor, p. 246*]. It would not be compatible with this purpose if the provision was extended so far that companies could also invoke it. Therefore, legal entities are not protected by the EDPA [*cf. ECJ (European Union), 9 November 2010; Ehmann/Selmayr – Klabunde, Art. 4, para. 14*] RESPONDENT is a legal entity and consequently not a natural person. As a Tier 2 producer of sensors, CLAIMANT only supplies companies and was never interested in offering goods or services to natural persons [*RfA, p. 5, para. 5*]. Therefore, the EDPA does not apply to the current case.

4. A Duty to Inform Did Not Arise for the Second Payment

89 A duty to inform also did not arise for the second payment of RESPONDENT. Under the CISG, a party is only obliged to inform its counterpart if the latter is visibly reliant on the information. A party is not deemed visibly reliant, if the information is publicly available and the party may be reasonably expected to access this information [*Benedick, p. 283; cf. for the similar standard under the PICC Vogenauer, Art. 5.1.3 PICC, para. 9*]. After the first payment, one of CLAIMANT's IT-subsystems was encrypted by the cyberattacker on 15 May 2022 [*Exhibit C6, p. 17, para. 10*]. CLAIMANT then informed the authorities of the cyberattack [*Exhibit R3, p. 35; PO 2, p. 64, para. 26*]. Five days later, the leading industry journal, Automotive Weekly, published an article which reported that CLAIMANT suffered from a major cyberattack [*Exhibit R3, p. 35*]. RESPONDENT had a subscription to this magazine [*PO 2, p. 63, para. 17*]. Thus, this information was publicly available and RESPONDENT could reasonably be expected to take note of this information. Thus, RESPONDENT was not visibly reliant and no duty to inform existed for CLAIMANT.

90 In conclusion, CLAIMANT was not obliged to inform RESPONDENT about the cyberattack. Therefore, CLAIMANT did not omit in a way that is relevant for the purposes of Art. 80 CISG.

II. CLAIMANT Did Not Impede RESPONDENT's Ability to Perform

91 Even if CLAIMANT was obliged to inform RESPONDENT of the cyberattack, CLAIMANT did not impede RESPONDENT from performing. In order to be exempted under Art. 80 CISG, the party's ability to perform must have been impeded by the other party [*OLG Brandenburg (Germany), 5 February 2013, para. 80; Kröll/Mistelis/Perales Viscasillas – Atamer, Art. 80, para. 9; Schlechtriem/Schwenzer/Schroeter – Schwenzer, Art. 80, para. 6; Enderlein/Maskow/Strohabch, Art 80, para. 3.2*]. If a party was not prevented from performing, but did not perform for other reasons, the other party cannot be said to have caused the non-performance [*BeckOGK – Bach, Art. 80, para. 12; Schlechtriem/Schwenzer/Schroeter – Schwenzer, Art. 80, para. 6; Brunner – Boog/Schläpfer, Art. 80, para. 5*; *Honnold/Flechtner, Art. 80, para. 436.5*]. In the present case, RESPONDENT did not perform since it decided to follow the instructions of the phishing mail. However, RESPONDENT possessed all the necessary information to make the payment in accordance with Art. 7 FA. Its ability to perform by paying to either bank account was never impeded. In fact, RESPONDENT is still able to perform to this day, and is merely unwilling to do so. Therefore, while RESPONDENT's non-performance may be caused by its own decisions, it was never hindered from performing. Thus, CLAIMANT did not impede RESPONDENT's ability to perform.

III. RESPONDENT's Payment to the Wrong Bank Account Was Not Caused by CLAIMANT

92 Even if CLAIMANT's omission to inform RESPONDENT was seen as an impediment to RESPONDENT's performance, the payment to the wrong bank account was not caused by CLAIMANT. In the current case, CLAIMANT, at most caused RESPONDENT'S failure to perform indirectly, because of the intervening acts of the cyberattacker and RESPONDENT. In cases of indirect causation, the failure of one party to perform must represent the realisation of a risk that is within the other party's sphere of risk [*ICC Case No. 18981; OLG Brandenburg (Germany), 5 February 2013; MüKoBGB – Huber, Art. 80, para. 5; Staudinger – Magnus, Art. 80, para. 12; Schlechtriem/Schwenzer – Schwenzer, Art. 80, para. 4; Honsell – Magnus, Art. 80, para. 12; cf. Neumann, p. 158*]. The risk of not identifying a fraudulent email is a day-to-day risk of online communication and therefore falls into the sphere of risk of the user. Thus, CLAIMANT cannot be said to have caused RESPONDENT's payment to the wrong bank account.

93 Furthermore, in case of indirect causation, the risk must be insurmountable and unforeseeable to the party failing to perform [*OLG Brandenburg (Germany), 5 February 2013; Staudinger – Magnus, Art. 80, para. 16*]. RESPONDENT had been the victim of a cyberattack itself before and there was an increasing number of cyberattacks in the automotive industry at the time [*Exhibit R1, p. 33; Exhibit R3, p. 35*]. Thus, the possible risk CLAIMANT could have created by not informing RESPONDENT of the cyberattack was foreseeable for RESPONDENT. A reasonable person would further have realised that the email was a phishing attack [*Supra, paras. 74 et seq.*]. Thus, the risk was not unsurmountable for RESPONDENT. Therefore, even if CLAIMANT acted or omitted in an unlawful way, Art. 80 CISG would not be applicable since CLAIMANT's action was not causally linked to RESPONDENT's failure to perform.

C. RESPONDENT Cannot Rely on Partial Exemption From Payment

94 RESPONDENT cannot rely on partial exemption from payment. In cases where Art. 80 and 77 CISG are not applicable, partial exemption can be sought in accordance with Art. 7(2) CISG and the underlying principles of Art. 77 and 80 CISG [*BGH (Germany), 26 September 2012; Staudinger – Magnus, Art. 80, para. 16a; cf. Lookofsky, p. 170*]. These provisions are manifestations of the principle that in cases of joint causation of non-performance, the claim will be reduced according to each share of the parties' fault [*cf. BGH (Germany), 26 September 2012; Schlechtriem/Schwenzer/Schroeter – Schwenzer, Art. 80, para. 7; MüKoBGB – Huber, Art. 80, para. 6*]. In the present case, the requirements of Art. 80 CISG are not met for the aforementioned reasons [*Supra, paras. 80 et seq.*]. Art. 77 CISG only applies to damage claims and not to performance claims [*Official Records, p. 397; Achilles, Art. 77, para. 3; MüKoHGB – Mankowski, Art. 77, para. 5; Schwimann – Posch, Art. 77, para. 4*]. Therefore, RESPONDENT could only be exempted in accordance with the principles underlying Art. 7, 77 and 80 CISG. However, RESPONDENT is neither partially exempt from the first payment **[I]**, nor from the second **[II].**

I. RESPONDENT Is Not Partially Exempted From the First Payment

95 RESPONDENT is not partially exempted from the first payment. To determine whether a party can be partially exempted, it has to be determined whether and to what extent both parties contributed to the non-performance by having regard to all circumstances of the case [*BGH (Germany), 26 September 2012; OLG Brandenburg (Germany), 5 February 2013; MüKoBGB – Huber, Art. 80, para. 6; Huber/Mullis – Huber, pp. 267, 268*]. In the present case, RESPONDENT argues that the non-performance was caused by CLAIMANT's omission to inform it of the cyberattack. However, RESPONDENT's contribution to its own mistake heavily outweighs CLAIMANT's share.

96 On the one hand, CLAIMANT acted as any reasonable party in its position would have. Apart from the fact that it was not legally obliged to inform its clients, CLAIMANT also had no reason to believe that knowledge of the cyberattack was of any interest to its clients. CLAIMANT had hired the leading cybersecurity firm in Mediterraneo, CyberSec, to assess the consequences of the detected malware in January 2022 [*Exhibit C6, p. 17, para. 6*]. CyberSec assured CLAIMANT that the malware was quickly detected and removed [*PO 2, p. 64, para. 25; Exhibit C6, p. 17, para. 6*]. It also told CLAIMANT that the infiltrated systems contained no sensitive data or trade secrets [*PO 2, p. 64, para. 25*]. CLAIMANT thus had no reason to warn RESPONDENT and did not act in a negligent manner.

97 RESPONDENT, on the other hand, failed to recognise an obvious phishing attack despite patent errors in the email, the circumstances indicating the sick leave of the person in charge, and in breach

of the written form requirement. If RESPONDENT had simply acted in accordance with the contract or at least followed the instructions of Ms. Audi's voicemail, the current situation would have been avoided. Therefore, RESPONDENT solely caused its own non-performance and cannot be partially exempted from the first payment.

II. RESPONDENT Is Not Partially Exempted From the Second Payment

98 RESPONDENT is neither partially exempted from the second payment. CLAIMANT was not obliged by its national law to inform the authorities or its customers that it had fallen victim to a cyberattack [*Exhibit R3, p. 35*]. RESPONDENT easily could have become aware that CLAIMANT suffered from a severe cyberattack since this fact was published in the leading industry journal over a month before RESPONDENT transferred money to a bank account in Danubia for the second time [*PO 2, p. 63, para. 14; Exhibit R3, p. 35; Exhibit C2, p. 13*]. RESPONDENT also has a subscription to this journal [*PO 2, p. 63, para. 17*]. Consequently, RESPONDENT was not visibly reliant on being informed by CLAIMANT and thus CLAIMANT was not obliged to inform RESPONDENT. Considering the public knowledge of the cyberattack and all the mentioned instances of inattentiveness on RESPONDENT's part, RESPONDENT's actions completely negate CLAIMANT's omission to inform RESPONDENT. Therefore, RESPONDENT is also not partially exempted from the second payment.

D. RESPONDENT Cannot Claim for Damages Against CLAIMANT and Invoke a Set-off

99 RESPONDENT cannot claim for damages against CLAIMANT and invoke a set-off. Although the CISG does not explicitly codify set-offs, it is widely accepted that if monetary claims arise from the same contractual relationship, the set-off is governed by the CISG [*BGH (Germany), 24 September 2014; Bundesgericht/Tribunal fédéral (Switzerland), 20 December 2006; Supreme Court (Sweden), 29 May 2020*]. Therefore, a set-off would require RESPONDENT to have a monetary claim against CLAIMANT. In the present case, only a damage claim is conceivable. According to Art. 45(1)(b) CISG, the buyer can claim damages if the seller fails to perform any of his obligations under the contract or the Convention. As shown above, however, CLAIMANT was not obliged to inform RESPONDENT of the cyberattack [*Supra, paras. 82 et seq.*]. Hence, CLAIMANT did not fail to perform any of its obligations and RESPONDENT does not have a damage claim against CLAIMANT. Accordingly, RESPONDENT cannot invoke a set-off.

CONCLUSION OF THE THIRD ISSUE

100 CLAIMANT is entitled to receive the agreed upon purchase price of USD 38,400,000. RESPONDENT has not performed because it has not paid the purchase price to the bank account the Parties agreed upon. The phishing email could not modify the place of payment as it cannot be attributed to CLAIMANT and did not meet the form requirements of Art. 40 FA. The payment to the wrong bank account cannot constitute performance through payment in good faith as the CISG does not know such a concept. In any case, RESPONDENT could not reasonably have relied upon the phishing email in good faith. Furthermore, RESPONDENT cannot invoke Art. 80 CISG to be exempted from payment entirely or in part. This is because RESPONDENT did not act or omit in a relevant way under Art. 80 CISG. In any case, CLAIMANT did not cause the incorrect payment. Finally, CLAIMANT did not cause any damage for RESPONDENT. Thus, RESPONDENT cannot invoke the principles underlying Art. 7, 77 and 80 CISG nor set off its payment obligation against a damage claim. CLAIMANT is still entitled to payment of the full purchase price in the amount of USD 38,400,000.

REQUEST FOR RELIEF

101 In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the Tribunal to declare:

- The authorisation of the addition of the New Claim to the pending arbitration **[Issue 1]**.
- Subsidiarily, the consolidation of the arbitral proceedings commenced by CLAIMANT against RESPONDENT **[Issue 2]**.
- RESPONDENT is ordered to pay CLAIMANT USD 38,400,000 with simple interest at the annual rate of 4% on the amount of USD 19,200,000 from 4 May 2022 onwards, and on the amount of 19,200,000 from 1 July 2022 onwards **[Issue 3]**.
- RESPONDENT is ordered to pay the cost of this arbitration and to reimburse CLAIMANT for all costs incurred in connection with it.

CERTIFICATE

We hereby confirm that his Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team. Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.

Jack Donnelly

Allegra Eggels

Franziska Graf

Florian Grünewald

Benjamin Krabbes

Mona Seyl

Jens Weber

Benjamin Zeeck

INDEX OF LITERATURE

Achilles, Wilhelm-Albrecht	Kommentar zum UN-Kaufrechtsübereinkommen (CISG) Cologne (2019), 2nd ed. cited as: *Achilles* in para: 94
Agazzi, Alessandro	Business Email Compromise (BEC) and Cyberpsychology Department of Computing and Informatics (2020) cited as: *Agazzi* in para: 77
Alkhalil, Zainab, **Hewage,** Chaminda, **Nawaf**, Liqaa, **Khan,** Imtiaz	Phishing Attacks: A Recent Comprehensive Study and a New Anatomy published in: Frontiers in Computer Science, Volume 3 (2021) pp. 1-23 cited as: *Alkhalil et al.* in para: 75
Aynès, Laurent	Note - Cass. com., 5 mars 1991 - Pepratx v. Fichou; 29 mars 1990 - Société Sofremines v. société Samin in: Revue de L'Arbitrage (1992) pp. 71-72 cited as: *Aynès* in para: 21
Baasch Andersen, Camilla	Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG Aalphen aan den Rijn (2007) cited: *Baasch Andersen* in para: 71
Benedick, Gilles	Die Informationspflicht im UN- Kaufrecht (CISG) und ihre Verletzungen

München (2008)
cited as: *Benedick*
in paras: 84, 85, 89

Berger, Klaus Peter (ed.)
Franzen, Martin (ed.)
Gruber, Urs Peter (ed.)
Huber, Peter (ed.)
Koch, Jens (ed.)
Lorenz, Stephan (ed.)
Weber, Christoph Andreas (ed.)
Westermann, Harm Peter (Vol. ed.)
Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 4: §§ 433-534, CISG
Munich (2019), 8th ed.
cited as: *MüKoBGB – Author*
in para: 70, 92, 94, 95

Bianca, Cesare Massimo
Bonell, Michael Joachim
Commentary on the International Sales Law The 1980 Vienna Sales Convention
Milan (1987)
cited as: *Bianca/Bonell*
in para: 70

Boller, Urs
Ohlrogge, Leonardo
Multi-Contract Arbitration Arising from Contracts and Subcontracts: Where to set the Threshold for Finding Consent?
In: YAR - Young Arbitration Review (2021)
pp.: 94-98
cited as: *Boller/Ohlrogge*
in para: 14,16, 21

Bond, Stephen **Paralika,** Marily **Secomb,** Matthew	ICC Rules of Arbitration, 2012 in: Loukas Mistelis (ed.) Concise International Arbitration, 2nd edn, Kluwer Law International (2015) Cited as: Bond/Paralika/Secomb in para: 23
Boog, Christopher **Flecke-Giammarco**, Gustav	The DIS Arbitration Rules – An Article-by-Article Commentary The Hague (2020) cited as: *Boog et al. – Author* in para: 21
Born, Gary	International Commercial Arbitration The Hague (2021), 3rd ed. cited as: *Born* in para: 6
Bridge, Michael	Good Faith, the Common law, and the CISG, Published in: Uniform Law Review, Vol. 22, No. 1 (2017) pp. 98-115 cited as: *Bridge* in para: 71
Brödermann, Eckart J.	UNIDROIT Principles of International Commercial Contracts Baden-Baden (2023), 2nd ed. cited as: *Brödermann* in paras: 59, 60
Brunner, Christoph **Gottlieb**, Benjamin	Commentary on the UN Sales Law (CISG) Alphen aan den Rijn (2019), 2nd ed. cited as: *Brunner – Author* in para: 91

Carlevaris, Andrea	The Bounds of Party Autonomy in Institutional Arbitration in: International Arbitration under Review: Essays in honour of John Beechey (2015) pp. 103-125 cited as: *Carlevaris* in para: 41, 42
Council of the European Union	Council Document 8004/13 Brussels (2013) cited as: *Council Document 8004/13* in para: 89
DiMatteo, Larry A.AG **Janssen**, André **Magnus**, Ulrich **Schulze**, Reiner	International sales law: a handbook Baden-Baden/ Oxford/ Munich (2021) 2nd ed. cited as: *DiMatteo/Janssen/Magnus/Schulz – Author* in para: 63
Drescher, Ingo (ed.) **Fleischer**, Holger (ed.) **Schmidt**, Karsten (ed.) **Grunwald**, Barbara (Vol. ed.)	Münchener Kommentar zum Handelsgesetzbuch, Band 5: §§ 343-406, CISG Munich (2021), 5th ed. cited as: *MüKo-HGB – Author* in paras: 52, 81, 87, 94
Ehmann, Eugen **Selmayr**, Martin	Datenschutz-Grundverordnung: DS-DGVO München (2018) 2nd ed. cited as: *Ehmann/Selmayr – Author* in para: 89

Eiselen, Sieg	Remarks on the Manner in Which the UNIDROIT Principles of the International Commercial Contracts May be Used to Interpret of Supplement Art. 29 of the CISG published in: Pace International Law Review, Vol. 14, No. 2 (2002) cited as: *Eiselen* in para: 62
Enderlein, Fritz **Maskow**, Dietrich **Strohbach**, Heinz	Internationales Kaufrecht Berlin (1991) 1st ed. Cited as: *Enderlein/Maskow/Strohbach* in para: 91
Fernández Arroyo, Diego P.	Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy? In: Limits to Party Autonomy in International Commercial Arbitration (2016) pp. 199-231 cited as: *Arroyo* in para: 42
Ferrari, Franco	Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law in: Unif. L. Rev., 2017 pp. 244–257 cited as: *Ferrari, Autonomous Interpretation* in para: 72
Ferrari, Franco	The Interaction between the United Nations Convention on Contracts for the International Sale of Goods and Domestic Remedies published in: Rabels Zeitschrift für ausländisches und internationals Privatrecht, Vol. 71 (2007) pp. 52-80 cited as: *Ferrari* in para: 58

Fry, Jason **Greenberg,** Simon **Mazza,** Francesca	The Secretariat's Guide to ICC Arbitration Paris (2012) cited as: *Fry/Greenberg/Mazza* in para: 16, 18, 21, 23, 24
Gilette, Clayton **Walt**, Steven D.	The UN Convention on Contracts for the International Sale of Goods: Theory and Practice New York (2016) 2nd ed. cited as: *Gilette/Walt* in para: 71
Gsell, Beate (ed.) **Krüger**, Wolfgang (ed.) **Lorenz**, Stephan (ed.) **Reymann**, Christop (ed.) **Ball**, Wolfgang (ed.)	Beck-online.Grosskommentar CISG Munich (2023) cited as: *BeckOGK – author* in para: 91
Hanotiau, Bernard	Complex Arbitrations. Multiparty, Multicontract, Multi-issue and Class Actions The Hague (2005) cited as: *Hanotiau* in para: 21
Hau, Wolfgang (ed.) **Poseck**, Roman (ed.)	Beck-online.Kommentar-CISG: Übereinkommen der Verenigten Nationen über Verträge über den internationalen Warenverkauf Munich (2023), 68th Edition cited as: *BeckOK – Author* in paras: 70

Saenger, Ingo (ed.) **Ball,** Wolfgang (ed.)	
Herber, Rolf **Czerwenka,** Beate	Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf München (1991) cited as: *Herber/Czerwekna* in paras: 70
Holtzmann, Howard **Neuhaus,** Joseph **Kristjansdottir,** Edda **Walsch,** Thomas	UNCITRAL Model Law, Chapter IV.A (Articles17 – 17J) – as amended [Interim measures and preliminary orders] in: A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary Alphen aan den Rijn (1985) cited as: *Holtzmann/Neuhaus/Kristjansdottir/Walsch* in para: 41
Honnold, John(ed.) **Flechtner**, Harry M. (ed.)	Honnold's Uniform Law for International Sales under the 1980 United Nations Convention Alphen aan den Rijn (2021), 5th ed. cited as: *Honnold/Flechtner* in para: 58, 91
Honsell, Heinrich (vol. ed.) **Brunner**, Christoph (ed.)	Kommentar zum UN-Kaufrecht: Übereinkommen der vereinten Nationen über Verträge über den internationalen Warenkauf (CISG) Berlin, Heidelberg (2010), 2nd ed. cited as: Honsell – *author* in para: 92

Huber, Peter **Mullis**, Alastair	The CISG München (2007) Cited as: *Huber/Mullis* in para: 95
Kröll, Stefan	Selected Problems Concerning the CISG Scope of Application published in: Journal of Law and Commerce, Volume 25 (2006) pp. 39-58 cited as: *Kröll* in para: 58
Kröll, Stefan (ed.) **Mistelis**, Loukas (ed.) **Perales Viscasillas**, María Pilar (ed.)	UN Convention on Contracts for the International Sale of Goods (CISG) Munich (2018), 2nd ed. cited as: *Kröll/ Mistelis/ Perales Viscasillas* in paras: 63, 81, 87, 91
Kull, Nadja Jaisle	Chapter 17, Part II: Commentary on the ICC Rules, Article 23 [Terms of Reference] in: Arbitration in Switzerland: The Practitioner's Guide (Second Edition) pp.: 2325- 2337 cited as: *Kull* in para: 22, 23
Landolt, Philipp **García**, Alejandro	Commentary on WIPO Arbitration Rules Geneva (2017) cited as: *Landolt/García* in para: 41
Lookofsky, Joseph	Understanding the CISG Alphen aan den Rijn (2022), 6th ed. cited as: *Lookofsky*

in para: 94

McMahon, Anthony — Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7
published in: Columbia Journal of transnational law, Vol. 44, No. 3 (2006) pp. 992-1031
cited as: *McMahon*
in para: 58

Nedden, Jan Heiner
Herzberg, Axel Benjamin
Kopetzki, Ulrich — ICC-SchO, DIS-SchO: Praxiskommentar zu den Schiedsgerichtsordnung
Cologne (2022)
cited as: *Nedden/Herzberg/Kopetzki – Author*
in paras: 5, 11, 16, 21, 42, 44

Neumann, Thomas — The Duty to Cooperate in International Sales, the Scope and Role of Article 80 CISG
Munich (2012)
cited as: *Neumann*
in para: 92

Nicholls, Anthony Cheah
Bloch, Christopher — ICC Hybrid Arbitrations Here to Stay: Singapore Courts' Treatment of the ICC Rules Revisions in Articles 1(2) and 6(2)
in: Journal of International Arbitration (2014)
pp. 393-412
cited as: *Nicholls/Bloch*
in para: 41

Perales Viscasillas, Pilar — Modification and termination of the contract (Art. 29 CISG)
Published in: the journal of law and commerce, pp. 167,
22 September 2005
cited as: *Perales Viscasilla*s
in para: 62

Piltz, Burghardt
Internationales Kaufrecht
München (2008) 2nd ed.
cited as: *Piltz*
in para: 58

Platte, Martin
When Should an Arbitrator Join Cases?
in: Arbitration International, Vol. 18, No. 1 (2002)
pp. 67-81
cited as: *Platte*
in para: 21

Praštalo, Boris
Uniformity in the Application of the CISG: Analysis of the Problem and Recommendations for the Future
Alphen aan den Rijn (2020)
cited as: *Praštalo*
in para: 71

Romanelli, Alexa
Naing, Rose
Moola, Nooree
Freihat, Siham
Case Comments on PJSC National Bank Trust and another v. Boris Mints and others - Judgment of the High Court of England and Wales, 11 April 2022
cited as: *Romanelli/Naing/Moola/Freihat*
in para: 46

Rosenthal, Jeffrey,
Oberly, David
FBI Warns Companies to Be Vigilant as COVID-19-Themed BEC Scams Continue to Grow
published in: Computer and Internet Lawyer, 2020, Volume 37(8), pp. 6-8
cited as: *Rosenthal/Oberly*
in para: 77

Schlechtriem, Peter
Schwenzer, Ingeborg (ed.)
Commentary on the UN Convention on the International Sale of Goods (CISG)
Oxford (2022), 5th ed-
cited as: *Schlechtriem/ Schwenzer – Author*

Schroeter, Ulrich (ed.)	in para: 63
Schlechtriem, Peter **Schwenzer**, Ingeborg (ed.) **Schroeter**, Ulrich (ed.)	Kommentar zum UN-Kaufrecht (CISG) Munich (2019), 7th ed. cited as: *Schlechtriem/ Schwenzer/ Schroeter – Author* in paras: 63, 71, 84, 91, 94
Schluchter, Anne-Kathrin	Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht Baden-Baden (1996) cited as: *Schluchter* in para: 58
Schroeter, Ulrich	Internationales UN-Kaufrecht Tübingen (2022), 7th ed. cited as: *Schroeter, CISG* in para: 71
Schroeter, Ulrich G.	Ad hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (2017) cited as: *Schroeter* in para: 41, 42
Schwenzer, Ingeborg **Atamer**, Yesim (ed.) **Butler**, Petra (ed.)	Current Issues in the CISG Arbitration Hague (2014), 11th ed. Cited as: *Schwenzer/Atamer/Butler – autho* in para: 58
Schwimann, Michael (vol. ed.)	Praxiskommentar zum ABGB samt Nebengesetzen, Band 5, §§ 859-1089 ABGB, WucherG, UN-Kaufrecht

Apathy, Peter (ed.) **Binder**, Martin (ed.) **Posch**, Willibald (ed.)	Cited as: *Schwimann – Author* in para: 94
Smit, Robert H.	Mandatory ICC Arbitration Rules in: Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Birner (2005) pp. 844-870 cited as: *Smit* in para: 42
Staudinger, Julius von **Kaiser**, Dagmar (Vol. ed.) **Magnus**, Ulrich	Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, Wiener UN-Kaufrecht: (CISG) Berlin (2017) cited as: *Staudinger – Magnus* in para: 84, 92, 93, 94
Taylor, Mistale	The EU's human rights obligations in relation to its data protection laws with extraterritorial effect in: International Data Privacy Law, Volume 5, Issue 4, November 2015 pp. 246–256 cited as: *Taylor* in para: 89
Torggler, Hellwig **Mohs**, Florian **Schäfer**, Friederike	Handbuch Schiedsgerichtsbarkeit Vienna (2017) cited as: *Torggler et al. – Author* in para: 6

Wong, Venus Valentina (eds.)

Unidroit International Institute for the Unification of Private Law
Working Group for the preparation of principles of international commercial contracts – Summary Records of the meeting held in Bolzano/Bozen
Rome (1999)
cited as: *UNIDROIT working group*
in para: 60

United Nations Conference on Contracts for the International Sale of Goods
United Nations Conference for the International Sale of Goods – Official Records
New York (1981)
cited as: *Official Records*
in para: 94

Verbist, Herman
Schäfer, Erik
Imhoos, Christophe
ICC Arbitration in Practice
Bern (2016)
cited as: *Verbist/Schäfer/Imhoos*
in para: 22, 24

Vogenauer, Stefan (ed.)
Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)
Oxford (2015), 2nd ed.
cited as: *Vogenauer/Author*
in para: 59, 60, 85, 89

Von den Berg, Albert
ICCA Yearbook Commercial Arbitration 2013 – Volume XXXVIII
The Hague
cited as: *von den Berg*

in para: 46

Walt, Steven — The modest role of good faith in uniform sales law
published in: Boston University International Law Journal, Vol. 33, No. 37 (2015)
cited as: Walt
in para: 71

Wang, Xinyuan, **Zhang**, Ruishan, **Yang**, Xiaohui, **Jiang,** Xuxian, **Wijesekera**, Duminda — Voice Pharming Attack and The Trust of VoIP
published in: SecureComm 08', Proceeding sof the 4th International Conference on Security and Privacy in Communication Networks, September 2008, pp. 1-11
cited as: *Wang et al.*
in para: 75

Webster, Thomas H. **Bühler,** Michael W. — Handbook of ICC Arbitration
London (2018)
cited as: *Webster/Bühler*
in paras: 11, 14, 16, 18, 22, 23

Whitesell, Anne Marie **Silva Romero,** Eduardo — Multiparty and Multicontract Arbitration: Recent ICC Experience
in: Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications, ICC 2003
pp. 15-18
cited as: *Whitesell/Silva Romero*
in para: 14, 21

INDEX OF CASES

Case No. 93/4126

cited as: *CA Grenoble (France), 13 September 1995*

in para: 83

CA Lyon

9 Febuary 2017

CISG-online 2823

Case No. 11/01518

cited as: *CA Lyon (France), 9. February 2017*

in para: 84

Germany

Bundesgerichtshof

31 October 2001

CISG-online 617

Case No. VIII ZR 60/01

cited as: *BGH (Germany), 31. October 2001*

in para: 84

Bundesgerichtshof

26 September 2012

CISG-online 2348

Case No. VIII ZR 100/11

cited as: *BGH (Germany), 26 September 2012*

in paras: 94, 95

Bundesgerichtshof

24 September 2014

CISG-online 2545

Case No. VIII ZR 394/12

cited as: *BGH (Germany), 24 September 2014*

in para: 99

OLG München

22 September 1995

CISG-online 208

Case No. 23 U 3750/95

cited as: *OLG München (Germany), 22 September 1995*

in para: 54

OLG München

9 July 1997

CISG-online 281

Case No 7 U 2246/97

cited as: *OLG München, 9 July 1997*

in para: 70

OLG Köln

21 December 2005

CISG-online 1201

Case No 16 U 47/05

cited as: *OLG Köln, 21 December 2005*

in para: 84

OLG Celle

24 July 2009

CISG-online 1906

Case No. 13 W 48/09

cited as: *OLG Celle (Germany), 24 July 2009*

in para: 84

OLG Hamm

30 November 2010

CISG-online 2217

Case No I-19 U 147/09

cited as: *OLG Hamm, 30 November 2010*

in para: 63

OLG Koblenz

24 February 2011

CISG-online 2301

Case No. 6 U 555/07

cited as: *OLG Koblenz (Germany), 24 February 2011*

in paras: 81, 87

OLG Brandenburg

5 February 2013

CISG-online 2400

Case No. 6 U 5/12

cited as: *OLG Brandenburg (Germany), 5. February 2013*

in paras: 91, 92, 93, 95

Kammergericht Berlin

24 January 1994

CISG-online 130

Case No. 2 U 7418/92

cited as: *KG Berlin (Germany), 24 January 1994*

in para: 58

LG Frankenthal

17 April 1997

CISG-online 479

Case No. 8 O 1995/95

cited as: *LG Frankenthal (Germany), 17 April 1997*

in para: 83

AG Alsfeld

12 May 1995

CISG-online 170

Case No. 31 C 534/94

cited as: *AG Alsfeld (Germany), 12 May 1995*

in para: 58

AG Duisburg

13 April 2000

CISG-online 659

Case No. 49 C 502/00

cited as: *AG Duisburg (Germany), 13 April 2000*

in para: 83

Hungary

Fővárosi Bíróság (Metropolitan Court Budapest)

24 March 1992

CISG-online 61

Case No. 12.G.41471/1991/21

cited as: *Metropolitan Court Budapest (Hungary), 24 March 1992*

in para: 83

India

Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited

Supreme Court of India

15 December 2016

cited as: *Supreme Court (India), 15 December 2016*

in para: 41

Netherlands

Gerechtshof Arnhem-Leeuwarden

3 October 2017

CISG-online 2920

Case No. 200.187.131

cited as: *Gerechtshof Arnhem-Leeuwarden (Netherland), 3 October 2017*

in paras: 52, 72

The Hague Court of Appeal

2 March 2021

Surpass Commercial Corp. Ltd. v. Bariven S.A., ICC Case No. 22423/FS, Judgment of the Hague Court of Appeal

cited as: *CA The Hague (Netherlands), 2 March 2021*

in para: 21

Poland

Supreme Court

27 January 2006

CISG-online 1399

Case No. IIICSK103/05

cited as: *Supreme Court (Poland), 27 January 2006*

in para: 54

Sweden

Högsta domstolen

29 May 2020

CISG-online 5500

Case No. T 6032-16

cited as: *Supreme Court (Sweden), 29 May 2020*

in para: 100

Supreme Court

12 November 2010

SCC Case No. 079/205

cited as: *Supreme Court (Sweden), 12 November 2010*

in para: 41

Switzerland

Bundesgericht/Tribunal fédéral

20 December 2006

CISG-online 1426

Case No 4C.314/2006

cited as: *Bundesgericht/Tribunal fédéral (Switzerland) 20 December 2006*

in para: 100

Obergericht Thurgau

19 December 1995

CISG-online 496

Case No. ZB 95 22

cited as: *Obergericht Thurgau (Switzerland), 19 December 1995*

in para: 58

Tribunale d'appello de Lugano

12 Febuary 1996

CISG-online 233

Case No. 12.95.0030

cited as: *CA Lugano (Switzerland), 12 February 1996*

in para: 58

Handelsgericht des Kantons Aargau

26 Febuary 1997

CISG-online 329

Case No. OR.96.00013

cited as: *HG Aargau (Switzerland), 26 September 1997*

in para: 83

ZG Basel

3 December 1997

CISG-online 346

Case No. P4 1996/00448

cited as: *ZG Basel (Switzerland), 3 December 1997*

in para: 83

Cour de Justice de Genève

20 May 2011

CISG-online 2429

cited as: *CA Genève (Switzerland), 20 May 2011*

in para: 54

United States of America

US District Court for the Southern District of New York

22 September 1994

CISG-online 128

Case No. 92 Civ. 3355 (JFK)

cited as: *US District Court for the Southern District of New York (United States), 22 September 1994*

in para: 62

District Court of the Western District of Pennsylvania

20 June 2019

CISG-online 4425

cited as: *District Court of the Western District of Pennsylvania (United States), 20 June 2019*

in para: 54

INDEX OF AWARDS

Cairo Regional Center for International Commercial Arbitration

Utopian Buyer v. Xanadu First Entity
7 January 2020
Case No. YYY/2013
cited as: *CRCICA Case No. YYY/2013*
in para: 46

Zurich Chamber of Commerce (ZCC)

Russian raw material supplier v. Argentine processing group
31 May 1996
Case No. 2273/95
Cited as: *ZCC Case No. 2273/95*
in para: 21

International Chamber of Commerce (ICC)

Hidroélectrica v. AIC and Novacom
2017
Case No. 21398
cited as: *ICC Case No. 21398*
in para: 6

Surpass Commercial v. Bariven
2019
Case No. 22423
cited as: *ICC Case No. 22423*
in para: 14

Let's Go Aero v. Forcome
2022
Case No. 25644

cited as: *ICC Case No. 25644*
in para: 30

Magotteaux International v. Bhadresh K. Shah an Aia Engineering
2018
Case No. 22790
cited as: *ICC Case No. 22790*
in para: 23

Trividia Health v. Nipro Corporation
2020
Case No. 23464
cited as: *ICC Case No. 23464*
in para: 22

Kaiser v. Nova Hut
2006
Case No. 13101
cited as: *ICC Case No. 13101*
in para: 22

GUPC v. ACP (IV) (Disruption, Unforeseeable physical conditions and other claims Arbitration)
2017
Case No. 22466
cited as: *ICC Case No. 22466*
in para: 16

International Consultants Inc. v. Reynolds Construction Company (Nigeria) Limited
2010
Case No. 15612
cited as: *ICC Case No. 15612*
in paras: 11, 46

General Dynamics United Kingdom Ltd. v. The State of Lybia
2016
Case No. 19222
cited as: *ICC Case No. 19222*
in para: 41

Glispa v. Turkticaret.Net
2015
Case No. 20350
cited as: *ICC Case No. 20350*
in para: 24

Deutsche Telekom v. Network Enhanced Technologies
2015
Case No. 20179
cited as: *ICC Case No. 20179*
in para: 24

Subcontractor (Finland) v. Contractor (Italy) (Partial Final Award)
2020
Case No. ICC-FA-2020-227
cited as: *ICC Case No. ICC-FA-2020-227*
in para: 11

Petro-Chem Development v. Pangang Group International Economic & Trading and Pangang Group Congqing Titanium Industry
2013
Case No. 19574
cited as: *ICC Case No. 19574*
in para: 71

India v. Turkey
2014
Case No. 18981

cited as: *ICC Case No. 18981*
in para: 93

ICAC Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC)

25 November 2002
CISG-online 1267
cited as: *ICAC Award, 25 November 2002*
in para: 62

INDEX OF ABBREVIATIONS

ARfA	Answer to the Request for Arbitration
ARfNC	Answer to the Request for Authorisation of the New Claim
Art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
ed.	editor/edition
et al.	et alii (and others)
et seq.	et sequens (and the following)
Fn.	footnote
HGB	Handelsgesetzbuch (German Commercial Code)
ICC	International Chamber of Commerce
Inc.	Incorporation
Ltd	Limited
No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
plc	Private Limited Company
para.	paragraph
PO	Procedural Order
RfA	Request for Arbitration
RfNC	Request for Authorisation of New Claim
USD	United States Dollar

INDEX OF LEGAL SOURCES

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Danubian Arbitration Act	Verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
Danubian Contract Act	Verbatim Adoption of the UNIDROIT Principles of International Commercial Contracts 2016
Equatorianian Data Protection Act (EDPA)	Verbatim adoption of the European Union's general data protection regulation
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980