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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

22 March to 28 March 2024, Vienna

MEMORANDUM FOR CLAIMANT

UNIVERSITÄT HAMBURG

ON BEHALF OF	AGAINST
SensorX plc	**Visionic Ltd**
Atwood Lane 1784	Optronic Avenida 3
Capital City, Mediterraneo	Oceanside, Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL FOR CLAIMANT

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UNIVERSITY: University of Hamburg

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.	[redacted]		

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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 December 2023

NAME: Charlotte Gleie SIGNATURE: 

NAME: Klara Grube SIGNATURE: 

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NAME: Liara Tamke SIGNATURE: 

NAME: Maximilian Boddin SIGNATURE: 

NAME: Maximilian Leste SIGNATURE: 

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INDEX OF ABBREVIATIONS

%	Percent
Answer	Answer to Request for Arbitration (10 July 2023)
Answer 2	Answer to Request for authorization of new claim / consolidation of proceedings (2 October 2023)
Art.	Article/Articles
AUT	Austria
avg.	average
BGH	Bundesgerichtshof (*German Federal Court of Justice*)
BRA	Brazil
BVBA	Besloten Vennootschap met Beperkte Aansprakelijkheid (Limited Liability Company)
CAL	Cour d'appel de Lyon (*Court of Appeal Lyon*)
CAM	Camera arbitrale nazionale ed internazionale di Milano (*Milan Chamber of Arbitration*)
CAN	Canada
CEO	Chief Executive Officer
cf.	Confer
CHE	Switzerland
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJG	Cour de Justice de Genève (*Court of Appeal Canton Geneva*)

Co.	Company
Corp.	Corporation
Cover	Coverpage
DEU	Germany
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
DIS-Scho	DIS-Schiedsordnung
e.g.	exempli gratia (*for example*)
ESP	Spain
et al.	et alia (*and others*)
et seq.	et sequens (*following*)
Ex.	Exhibit
FRA	France
GBR	United Kingdom of Great Britain and Northern Ireland
HDS	Högsta Domstolens Stockholm (*Swedish Supreme Court*)
HGK	Hongkong
ibid.	ibidem (*in the same place*)
ICC	International Chamber of Commerce
ICC Letter to the Tribunal	ICC Letter to the Arbitral Tribunal (11 August 2023)
ICC Notice	ICC Notification of Court decision (11 August 2023)
ICC-SchO	ICC-Schiedsordnung

Inc.	Incorporated
IND	India
ITA	Italy
k	Thousand
KCAB	Korean Commercial Arbitration Board
LCCI	Latvian Chamber of Commerce and Industry
LLC	Limited Liability Company
Ltd	Limited
LVA	Latvia
Mr	Mister
Ms	Miss
NCSC	National Cyber Security Center
NIST	National Institute of Standards and Technology
NLD	Kingdom of the Netherlands
No.	Number
OGH	Oberster Gerichtshof (*Austrian Supreme Court*)
OLG	Oberlandesgericht (*Higher Regional Court*)
p.	page/pages
para.	paragraph/paragraphs
plc	Public limited company

PO1	Procedural Order No. 1 (6 October 2023)
PO2	Procedural Order No. 2 (6 November 2023)
POL	Poland
Request	Request for Arbitration (9 June 2023)
Request 2	Request for authorization of new claim / subsidiarily of consolidation of conditionally initiated separate proceedings (11 September 2023)
SGP	Singapore
SN	Sąd Najwyższy (*Supreme Court of Poland*)
SWE	Sweden
TDP	Tribunale di Padova (*District Court Padova*)
TF	Tribunal fédéral (*Swiss Federal Supreme Court*)
TJRS	Tribunal de Justiça do Estado do Rio Grande do Sul (*Court of Appeal of the State of Rio Grande do Sul*)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut international pour l'unification du droit privé (*International Institute for Unification of Private Law*)
US	United States
USA	United States of America
USD	United States Dollar
v	versus
ZGB	Zivilgericht Basel-Stadt (*Court of First Instance Basel-Stadt*)

STATEMENT OF FACTS

1 *SensorX plc* (**'CLAIMANT'**), based in Mediterraneo, is a leading producer of sensors in the international automotive industry. *Visionic Ltd* (**'RESPONDENT'**), based in Equatoriana, uses CLAIMANT's sensors to produce optical systems for autonomous driving.

2 On **7 June 2019**, CLAIMANT and RESPONDENT (collectively **'the Parties'**) entered into the Framework Agreement (**'FA'**) to set the legal boundaries for their relationship. In the following four years, RESPONDENT placed more than 20 orders of sensors under the FA. CLAIMANT fulfilled all of them. In turn, RESPONDENT was obliged to make the respective payments to one of two Mediterranean bank accounts specified in the FA. Changes to these bank accounts, like any other changes to the FA, must be made in writing and signed by the Parties, as determined in Art. 40 FA. Further, the FA contains a dispute resolution clause referring all disputes in connection with the FA or individual orders to be ultimately resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (**'ICC Rules'**).

Initial Claim: Order No. 9601

3 On **17 January 2022**, RESPONDENT ordered S4-25899 sensors (**'S4 Sensors'**) for a total sum of USD 38,400,000 to be delivered and paid in two instalments. CLAIMANT delivered as requested. RESPONDENT made payment to neither of the agreed bank accounts. Instead, RESPONDENT fell for a phishing email and transferred the money to a bank account in a different country. In this phishing email, a fraudster pretended to be CLAIMANT's account manager, Ms Audi, and requested payment to a supposedly new bank account.

4 The fraudster had gained access to the relevant information in a cyberattack against CLAIMANT. This attack was discovered on **23 January 2022**. In an immediate reaction, CLAIMANT hired CyberSec, the leading cybersecurity company in Mediterraneo. After an extensive screening, CyberSec declared that it had neutralised all malware and assured that no sensitive data was affected. Contrary to CyberSec's assurance, the fraudster was able to gain access to the information contained in Ms Audi's emails. With this information, they were able to draft the phishing email.

5 Although RESPONDENT was concerned to transfer the money to a new bank account not listed in the FA, it only once tried to reach Ms Audi via phone. According to Ms Audi's voicemail, in urgent matters her substitute, Ms Peugeotroen, should be contacted. RESPONDENT did not contact Ms Peugeotroen, but directly replied to the phishing email. The fraudster reassured that emails would be sufficient to change the bank accounts in the FA. Thus, when the payments for

Order No. 9601 were due on **3 May 2022** and **30 June 2022** respectively, RESPONDENT transferred the money to the wrong bank account.

6 Shortly after the first payment was due, the fraudster extended their attack on CLAIMANT, by encrypting CLAIMANT's accounting system on **15 May 2022**. CLAIMANT immediately shut down its system and engaged in a thorough investigation and sanitisation, supported by the cybersecurity unit of the Mediterranean government. The measures lasted until the day on which the second payment was due. The fact that CLAIMANT was short on personnel and prioritised to fulfil old and new orders, led to a new account manager only discovering the lack of payments on **25 August 2022**.

7 CLAIMANT then tried to find an amicable solution in a meeting between the Parties' CEOs. RESPONDENT, however, considers its obligation to be fulfilled by having transferred the money to the fraudster's bank account. In order to receive its outstanding payments for the S4 Sensors, CLAIMANT initiated arbitration in front of the arbitral tribunal (**'the Tribunal'**) at the ICC on **9 June 2023**.

New Claim: Order No. A-15604

8 On **4 January 2022**, RESPONDENT ordered L-1 Sensors under the FA. The payment was agreed to be divided into two instalments of USD 12,000,000 each. Again, CLAIMANT delivered as requested. RESPONDENT withholds the second payment due to a deficiency of the sensors. On **4 April 2022**, after a phone call with Ms Peugeotroen, RESPONDENT sent an informal email to follow up on the discussion. Since Ms Peugeotroen was hospitalised shortly after and the email was lost in the cyberattack, the outstanding payment did not come up until the new account manager started to investigate older transactions on **8 September 2023**. Upon request, RESPONDENT declared that the informal email would suffice as notice of defect and that it would not pay the outstanding purchase price for Order No. A-15604.

9 In order to receive its outstanding payment for the L-1 Sensors, CLAIMANT submitted its request for adding this claim to the ongoing arbitration on **11 September 2023**. Subsidiarily, CLAIMANT requests consolidation of the hypothetically separate arbitral proceedings.

SUMMARY OF THE ARGUMENT

11 The tides are shifting in the automotive industry. Cyberattacks are flooding businesses – inevitably and at ever shorter intervals. To avoid being swept away, the Parties must adhere to the floodproof protection mechanism they agreed upon.

12 The FA is the lighthouse of the Parties' business relationship and guides the way for each individual purchase order and its payment. Therein the Parties agreed to efficient arbitration tailored to their needs. RESPONDENT chooses not to be guided by the beacon. It tries to avoid efficient arbitral proceedings by ignoring the possibility to add the new claim. It tries to prevent the Tribunal from exercising its power to consolidate. It ignores the Parties' agreement regarding how payments should be made and now even tries to shift the blame on CLAIMANT.

13 The flood now threatens to swamp the Parties' agreements. The Tribunal can provide guidance and lead the way back to shallow waters.

14 **The Tribunal can and should authorise the addition of the new claim [Part I]**. Both claims are made under the arbitration agreement in Art. 41 FA. Even if the claims were not made under the same arbitration agreement, the Tribunal has jurisdiction over both claims pursuant to Art. 6(4) ICC Rules. The claims are of the same nature and the addition is appropriate at the stage of arbitration. Adding the new claim ensures efficiency.

15 **Even if the new claim has to be raised in a separate arbitration, the Tribunal can and should consolidate the arbitral proceedings [Part II].** Party autonomy allows the Parties to empower the Tribunal to consolidate. Empowering the Tribunal to consolidate is compatible with the ICC system. The requirements of Art.41(5) FA, as well as Art. 10 ICC Rules are fulfilled. Consolidating the arbitral proceedings upholds efficiency.

16 **CLAIMANT is entitled to full payment under Order No. 9601 [Part III].** RESPONDENT cannot rely on Art. 80 CISG to refuse payment, as CLAIMANT had no duty to inform RESPONDENT about the cyberattack. Even if there had been a duty to inform, CLAIMANT would not have caused RESPONDENT's non-performance. Further, RESPONDENT cannot rely on Art. 77 CISG to refuse payment, as the principle of mitigation does not extend to RESPONDENT's payment obligation. Even if it did, CLAIMANT has always acted in accordance therewith.

ARGUMENT

PART I: THE ADDITION OF THE NEW CLAIM CAN AND SHOULD BE AUTHORISED

17 Years instead of months. USD 1,060,000 instead of USD 680,000. Two arbitrations instead of one. The Tribunal has the chance to turn two disputes into one efficient resolution by adding the new claim to the pending arbitration.

18 With efficiency in mind, the Parties have agreed to arbitration. Now that the automotive industry is under flood by cyberattacks, the Parties must remember this agreement. An efficient and final settlement is more needed than ever. Contrary to that, RESPONDENT decides to take the less efficient way and swims against the tide. The arbitral proceedings need to stay on course: The new claim has to be added.

19 The Tribunal is empowered to authorise the addition of the new claim [**A.**] and should do so [**B.**].

A. THE TRIBUNAL HAS THE POWER TO AUTHORISE THE ADDITION OF THE NEW CLAIM

20 The Tribunal can add the new claim to the pending arbitral proceedings, as it has jurisdiction over both the initial claim and the new claim. In order to combine claims from multiple contracts in one arbitration, the tribunal must have jurisdiction over all claims [*Webster/Bühler, Art. 9 para. 15*]. Under the principle of competence-competence, the tribunal decides upon its own jurisdiction [*ICC (NLD, 2020); ICC (X1, 2015); CAM (ITA, 2013); ICC (X, 1995); Ashford, p. 20; ICC Secretariat's Guide, Art. 4(6) para. 196*].

21 In the present case, the Tribunal has jurisdiction over the initial claim and the new claim, as they are both made under the arbitration agreement in Art. 41 FA [**I.**]. Even if the claims were not made under the same arbitration agreement, the Tribunal has jurisdiction over both claims, as the requirements of Art. 6(4) ICC Rules are met [**II.**].

I. BOTH CLAIMS ARE MADE UNDER THE ARBITRATION AGREEMENT IN ART. 41 FA

22 The initial claim and the new claim both are made under the arbitration agreement in Art. 41 FA. The tribunal has jurisdiction over both claims, if they are made under the same arbitration agreement [*Webster/Bühler, Art. 6 para. 42*].

23 Presently both claims are made under the arbitration agreement in Art. 41 FA, as all disputes arising from Order No. 9601 and Order No. A-15604 are governed by Art. 41 FA [**1.**]. The Parties did also not intend to deviate from Art. 41 FA by including arbitration agreements in these orders [**2.**].

1. THE DISPUTES ARISING FROM BOTH ORDERS ARE GOVERNED BY ART. 41 FA

24 The arbitration agreement in Art. 41 FA governs the disputes arising from both Order No. 9601 and Order No. A-15604. The purpose of a framework agreement is to stipulate provisions that govern all individual contracts concluded thereunder [*ICC (X, 1995); HDS (SWE, 2023) para. 16 et seq.; Commission European, p. 3*]. Generally, this cannot be directly applied to an arbitration agreement as, following the doctrine of separability, it is autonomous and juridically independent from the main contract in which it is included [*ICC (BEL, 2013); ICC (CHE, 2011); ICC (FRA, 1996); Privalov v Fiona Trust (GBR, 2006) para. 36; Prima Paint v Flood (USA, 1966); Choi, p. 106; Redfern/Hunter, para. 2.101*]. However, when parties conclude an overall contract containing an arbitration agreement and place individual orders thereunder, all disputes arising in connection with the individual orders may fall within the scope of that overall arbitration agreement [*HDS (SWE, 2020) para. 35; Webster/Bühler, Art. 6 para. 42; Welser/Molitoris, p. 19*].

25 This is exactly the case at hand, as the arbitration agreement in the FA specifically states that it is "a broad form arbitration agreement designed to encompass all possible disputes arising in connection with the present agreement and the contracts concluded thereunder" (*Ex. C1, p. 11*). This can be interpreted as the Parties' intention to arrange the arbitration agreement in the FA as an overarching agreement for all disputes arising out of any order under the FA. Presently, the Parties disputes regarding the initial claim and the new claim stem from Order No. 9601 and Order No. A-15604 respectively (*PO1, p. 58 para. 2; Request 2, p. 46 para. 1*). Both are concluded under the FA (*Ex. C2, p. 13; Ex. C7, p. 48*).

26 Consequently, both disputes are governed by the arbitration agreement in Art. 41 FA.

2. THE PARTIES DID NOT INTEND TO DEVIATE FROM ART. 41 FA

27 By including arbitration agreements in Order No. 9601 and Order No. A-15604, the Parties did not intend to deviate from Art. 41 FA. Interpreting the parties' intent is a question of the applicable contract law. Whether in the absence of an express choice of law, the law governing the arbitration agreement is to be determined by the law chosen by the parties or the law of the seat of arbitration [*ICC (ESP, 2019); Enka v Chubb (GBR, 2020); C v D (GBR, 2007); BGH (DEU, 2020); Born, p. 508; Redfern/Hunter, para. 3.12 et seq.*], is not decisive in the present case, as both are Danubian law (*Ex. C1, p. 12*). Thus, the Danubian Contract Act, which is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts, applies (*PO1, p. 59 para. 4(4)*). According to Art. 4.1(1) Danubian Contract Act, a contract shall be interpreted by the common intention of the parties. In the absence of such common intention regard is to be given

to the impression of a reasonable person in the same circumstances, pursuant to Art. 4.1(2) Danubian Contract Act [*cf. Brödermann, Art. 4.1 para. 3*]. As the Parties have not expressly stated their intention, the standard of a reasonable person is decisive. Applying this standard, the Parties did not intend to deviate from Art. 41 FA.

28 In **Order No. 9601**, the arbitration agreement is merely an incomplete reproduction of Art. 41 FA (*cf. Ex. C1, p. 11 et seq.; Ex. C2, p. 13 para. 7*). It lacks the preliminary stages of arbitration set forth in Art. 41(1) FA (*Ex. C1 p. 11*) and the consolidation clause of Art. 41(5) FA (*Ex. C1 p. 12*). The only information, which is contained in both arbitration agreements but differs, is that the FA sets forth Danubia as the seat of arbitration (*Ex. C1, p. 12*) whereas Order No. 9601 names Vind**a**bona, Danubia (*Ex. C2, p. 13 para. 7*).

29 From the post-contractual behaviour of the Parties, a reasonable person can conclude that the Parties intended to write Vind**o**bona, Danubia. This was also what they agreed on in the terms of reference (*PO2, p. 65 para. 35*). Therefore, the arbitration agreement in Order No. 9601 was not intended to deviate from the FA.

30 In **Order No. A-15604**, preliminary stages of arbitration and the consolidation clause are also missing (*Ex. C7, p. 48 para. 7*). Only an exclusion of emergency arbitration was added (*PO2, p. 65 para. 33; Ex. C7, p. 48 para. 7*). This, however, cannot be seen as the Parties' intention. For adding the exclusion, CLAIMANT only relied on its inexperienced inhouse counsel, who himself relied on the suggestion of a friend (*PO2, p. 65 para. 33*). Ms Durant, CLAIMANT's head of sales and responsible for adding the exclusion, does not even remember the reason for the addition in her witness statement (*Ex. C8, p. 49 para. 5*). In addition, RESPONDENT decided to undo these changes in the next order, not even two weeks later (*Ex. C2, p. 13; Ex. C7, p. 48*).

31 Moreover, while the arbitration clause in the FA provided for three arbitrators, Order No. A-15604 provides for "one or more arbitrators" (*Ex. C1, p. 11; Ex. C7, p. 48 para. 7).* A reasonable person would not consider this to be an intended deviation due to the following two reasons: First, this does not contradict the content of Art. 41 FA. Second, the Parties only copied the ICC-Model Clause in this regard (*PO2, p. 65 para. 32*). Hence, it is likely that an inattentive employee at RESPONDENT simply forgot to adapt the clause. Third, RESPONDENT also revoked this change when submitting the next order (*Ex. C2, p. 13 para. 7; Ex. C7, p. 48 para. 7*).

32 Therefore, the Parties did not intend to deviate from Art. 41 FA by including arbitration agreements in Order No. 9601 and Order No. A-15604.

33 Both claims are made under the arbitration agreement in Art. 41 FA.

II. EVEN IF THE CLAIMS WERE NOT MADE UNDER THE SAME ARBITRATION AGREEMENT, THE TRIBUNAL HAS JURISDICTION OVER BOTH CLAIMS PURSUANT TO ART. 6(4) ICC RULES

34 Even if the claims were made under multiple arbitration agreements, the Tribunal has jurisdiction over both claims, as the requirements of Art. 6(4) ICC Rules are met. To determine jurisdiction in cases where the initial claim is based on one arbitration agreement, and the new claim is based on another, the criteria set forth in Art. 6(4) ICC Rules are decisive [*Webster/Bühler, Art. 9 para. 15; ICC Secretariat's Guide, Art. 6(5) para. 263*]. Art. 6(4) ICC Rules addresses cases in which the International Court of Arbitration of the ICC (**'the Court'**) decides upon jurisdiction. The Court, however, can only decide until the tribunal has been seized with the case file [*Webster/Bühler, Art. 9 para. 15; ICC Secretariat's Guide, Art. 6(4) para. 205 et seq.*]. Presently, this has taken place (*ICC Letter to the Tribunal, p. 40*). Thus, it is solely on the Tribunal to decide upon jurisdiction. In doing so, it should also consider the criteria set forth in Art. 6(4) ICC Rules [*Webster/Bühler, Art. 9 para. 15; ICC Secretariat's Guide, Art. 6(5) para. 261 et seq.*]. Under Art. 6(4) ICC Rules, the tribunal should decide that it has jurisdiction over both claims, when the arbitration agreements are compatible and the parties may have agreed that claims can be determined together in a single arbitration.

35 This is exactly the case at hand, as the arbitration agreements are compatible [**1.**] and the Parties agreed to resolve both claims in one arbitration [**2.**].

1. THE ARBITRATION AGREEMENTS ARE COMPATIBLE

36 The arbitration agreements of Art. 41 FA, Order No. 9601 and Order No. A-15604 are compatible. As a basic requirement, the arbitration agreements are compatible if they all provide for the application of the ICC Rules [*Nedden/Herzberg, p. 134 para. 178; ICC Secretariat's Guide, Art. 6(4) para. 243*]. Further, they must not contradict each other in terms of content [*ICC Secretariat's Guide, Art. 6(4) para. 243*]. However, arbitration agreements do not need to be identical to be compatible: In the *P. R. Shah* case, the court approved an arbitration where the arbitration agreements provided for different selection processes of the arbitral tribunal [*P. R. Shah v M/S. B.H.H (IND, 2011) para. 11 et seq.)*]. In the *Chloro Controls* case, the court even approved an arbitration where some clauses referred disputes to arbitration while others referred them to state courts [*Chloro Controls v Severn Trent Water (IND, 2012)*]. The court relied on the agreements' compatibility since they consisted of a "mother agreement" to which all "ancillary agreements" relate [*Chloro Controls v Severn Trent Water (IND, 2012) para. 168*].

37 RESPONDENT might argue that there are three different arbitration agreements: the arbitration agreement from Art. 41 FA, Order No. 9601 and Order No. A-15604. They have the following content:

	Art. 41 FA	Order No. 9601	Order No. A-15604
Rules	*ICC (as then in effect)*	*ICC*	*ICC*
Language	*English*	*English*	-
Number of Arbitrators	*3*	*3*	*one or more*
Consolidation	*Tribunal has the power to consolidate*	-	-
Place of Arbitration	*Danubia*	*Vindabona, Danubia*	*Danubia*
Applicable Law	*Danubia*	*CISG*	*CISG*
Emergency Arbitration	-	-	*Excluded*

38 Both orders as well as Art. 41 FA provide for the application of the ICC Rules (*Ex. C1, p. 11; Ex. C2, p. 13 para. 7; Ex. C7, p. 48 para. 7*). In the FA the Parties have agreed to the rules "as then in effect" (*Ex. C1, p. 11*). The arbitration agreements in the orders do not specify the version of the ICC Rules (*Ex. C2, p. 13 para. 7; Ex. C7, p. 48 para. 7*). In the absence of such an agreement, Art. 6(1) ICC Rules, stipulates that the parties are bound by the ICC Rules in effect when the arbitration begins. Therefore, in any case, the arbitration agreements point to the same version of the ICC Rules.

39 According to Art. 41(3) FA and Order No. 9601 the arbitration is conducted in English (*Ex. C1, p. 11; Ex. C2, p. 13 para. 7*). Order No. A-15604 is worded in English and shows no indication that the arbitration should be conducted in a different language (*cf. Ex. C7, p. 48*). The Parties exclusively communicate in English (*cf. Ex. C3, p. 14; Ex. R1, p. 33*).

40 While Art. 41 FA and Order No. 9601 provide for three arbitrators, Order No. A-15604 provides for "one or more" (*Ex. C1, p. 11; Ex. C2, p. 13 para. 7; Ex. C7, p. 48 para. 7*). This does not contradict the appointment of three arbitrators. Art. 41 FA – the "mother contract" – provides the consolidation clause in Art. 41(5) FA as a basis which neither of the "ancillary" arbitration agreements in the orders contradict. They provide for application of the ICC Rules, which allows for consolidation in Art. 10 ICC Rules under similar requirements (*see para. 88*). All agreements contain the same place of arbitration: Danubia (*Ex. C1, p. 12; Ex. C2, p. 13 para. 7;*

Ex. C7, p. 48 para. 7). The specification of Vind**a**bona, Danubia in Order No. 9601 is in line with Danubia as the place of arbitration (*see para. 28*). The arbitration clause in the FA provides for the law of Danubia (*Ex. C1, p. 12*). The arbitration clauses in the orders declare the CISG to be applicable (*Ex. C2, p. 13 para. 7; Ex. C7, p. 48 para. 7*). Since the CISG is part of the law of Danubia (*PO2, p. 66 para. 38*), these provisions are not contradictory.

41 The exclusion of emergency arbitration in Order No. A-15604 (*Ex. C7, p. 48 para. 7*) constitutes a minor difference from the other agreements. However, according to Art. 29(1) ICC Rules, it is no longer possible to request emergency arbitration after the ICC has transmitted the case file to the arbitral tribunal. Presently, the Tribunal has received the case file (*ICC Letter to the Tribunal, p. 40*). Hence, emergency arbitration can no longer be exercised.

42 Consequently, there are no differences in the arbitration agreements which make them incompatible. The arbitration agreements are compatible.

2. THE PARTIES AGREED TO RESOLVE BOTH CLAIMS IN A SINGLE ARBITRATION

43 The Parties have agreed to arbitrate both claims in the same arbitral proceedings. Under Art. 6(4) ICC Rules, such agreement must not be explicit but can be deduced from all relevant circumstances pointing to the common intention of the parties [*ICC (CHE, 2021)*; *Oxford Health v Sutter (USA, 2013) p. 2; Webster/Bühler, Art. 6 para. 45; ICC Secretariat's Guide, Art. 6(4) para. 248*]. When claims arise from multiple contracts, such intention is especially apparent, if these contracts are concluded by the same parties, contain compatible arbitration agreements, and relate to one economic unit [*ICC Secretariat's Guide, Art. 6(4) para. 249*].

44 In the present case, the initial claim and the new claim stem from Order No. 9601 and Order No. A-15604 respectively (*PO1, p. 58 para. 2*). The parties to both orders are the same: CLAIMANT and RESPONDENT (*PO1, p. 58 para. 1*). The arbitration agreements in both orders are compatible (*see para. 36*). Both orders relate to the same economic unit. Such a relation exists when the contracts share a common origin [*Nedden/Herzberg, p. 194 para. 19; cf. Whitesell/Silva-Romero, p. 15*]. An economic unit can further be deduced from the purchase matter or the wording of the contracts [*Whitesell/Silva-Romero, p. 15; ICC Secretariat's Guide, Art. 6(4) para. 249*]. The more the contracts resemble one another, the more likely one economic unit is given [*ICC Secretariat's Guide, Art. 6(4) para. 249*].

45 Both orders were conducted under the FA into which the Parties entered to regulate the details of their co-operation (*Ex. C1, p. 9*). The FA serves as an overarching contract (*Ex. C1, p. 9*). Every order originates from the FA and expressly makes reference to it (*Ex. C1, p. 9;*

Ex. C2, p. 13; Ex. C7, p. 48). The purchase matter of both orders are sensors (*Ex. C2, p. 13 para. 1; Ex. C7, p. 48 para. 1).* In addition, Order No. 9601 and Order No. A-15604 highly resemble one another: they follow the exact same template, are equally structured and have a similar wording (*Ex. C2, p. 13; Ex. C7, p. 48*).

46 In any case, the intention of the Parties to conduct both claims in one arbitration is already reflected in the terms of reference (*Answer 2, p. 54 para. 4*). The terms of reference explicitly mention the possibility to add new claims to the pending arbitration (*Answer 2, p. 54 para. 4*). From this it can be concluded that the Parties anticipated possible new claims to arise and that they intended to add these claims to the pending arbitration regarding Order No. 9601. Consequently, the Parties intended to arbitrate both claims in the same arbitral proceedings.

47 Whether or not all claims are made under the same arbitration agreement, the Tribunal has jurisdiction over both claims and can authorise the addition of the new claim.

B. THE TRIBUNAL SHOULD AUTHORISE THE ADDITION OF THE NEW CLAIM

48 As all requirements of Art. 23(4) ICC Rules are met and it is the most efficient way: The Tribunal should authorise the addition of the new claim. When deciding on the addition of a new claim to a pending arbitration, the tribunal has broad discretion [*ICC (USA, 2020); ICC (X, 2014); Trividia v Nipro (USA, 2021); Arroyo, p. 2335*]. In exercising this discretion, Art. 23(4) ICC Rules requires the tribunal to consider "the nature of such new claims, the stage of the arbitration and other relevant circumstances*"*.

49 In the case at hand, the Tribunal should authorise the addition, as the initial claim and new claim are of the same nature [**I.**]. Further, adding the new claim is appropriate at the current stage of arbitration [**II.**] and provides for efficient arbitral proceedings [**III.**].

I. BOTH CLAIMS ARE OF THE SAME NATURE

50 The initial claim and the new claim are of the same nature. The assessment of the nature of two claims follows two factual considerations: Do the claims share the same underlying contract? And do the claims relate to the same set of facts? [*ICC (X, 2015) para. 68; Haas, p. 960*]

51 The initial claim and the new claim arise out of Order No. 9601 and Order No. A-15604 (*PO1, p. 58 para. 2*). For both orders, the underlying contract is the FA (*see para. 24*). Hence, the initial claim and the new claim share the same underlying contract.

52 The claims are also linked by the same set of facts. For both claims RESPONDENT failed to fulfil its contractual payment obligation. Additionally, both claims are related to the cyberattack on

CLAIMANT. Regarding the initial claim, RESPONDENT transferred money to a bank account requested by a fraudster in a phishing email (*Ex. C5, p. 16*). The fraudster was able to draft the phishing email with the relevant information obtained through the cyberattack (*PO2, p. 64 para. 25*). Regarding the new claim, RESPONDENT reported a defect of the L-1 Sensors to CLAIMANT via email (*Ex. R5, p. 56*). This email was lost due to the cyberattack (*PO2, p. 65 para. 29; Ex. C8, p. 49 para. 9*). Therefore, both claims revolve around the cyberattack on CLAIMANT. They are linked by the same set of facts.

53 Both claims share the same underlying contract and relate to the same set of facts. Consequently, both claims are of the same nature.

II. ADDING THE NEW CLAIM IS APPROPRIATE AT THE CURRENT STAGE OF ARBITRATION

54 At the current stage, it is appropriate to add the new claim to the pending arbitration. When considering the addition of a new claim after the signing of the terms of reference, the stage of arbitration must be taken into account. The sooner a new claim is raised, the more likely it is to be accepted, as it would hardly disrupt the pending arbitral proceedings [*Karaha v Pertamina (USA, 2002); Verbist et al., p. 134; Webster/Bühler, Art. 23 para. 92*]. Most importantly, the respondent must be given reasonable time to react to the new claim [*ICC (X, 2014); Shaughnessy/Tung, p. 61; Welser/Mimnagh, p. 42 et seq.*].

55 CLAIMANT requested the authorisation of the new claim on 11 September 2023 (*Request 2, p. 46*) and thereby only twelve days after the terms of reference had been signed (*PO1, p. 58 para. 1*). Later, at the case management conference, the Tribunal held that the addition of the new claim should be discussed at the first oral hearings from 22-28 March 2024 (*PO1, p. 58 para. 2; Cover, p. 1*). RESPONDENT has more than three months to adequately react to the new claim.

56 Therefore, adding the new claim is appropriate at the current stage of arbitration.

III. ADDING THE NEW CLAIM ENSURES EFFICIENCY

57 In order to ensure efficient arbitral proceedings, the Tribunal should add the new claim. Efficiency in arbitration is understood as "an arbitrator rendering a good award without wasting time or money" [*Shaughnessy/Tung, p. 58*]. Art. 22(1) ICC Rules urges the tribunal and the parties to conduct expeditious and cost-efficient arbitral proceedings. This is further reflected in Art. 23(4) ICC Rules, providing the option for adding a new claim [*Webster/Bühler, Art. 22 para. 1*]. In the case at hand, adding the new claim would not only save time [**1.**] but also costs [**2.**].

1. ADDING THE NEW CLAIM IS THE MOST TIME-EFFICIENT SOLUTION

58 It is the most time-efficient solution to add the new claim to the pending arbitration. What constitutes efficient arbitral proceedings must be decided on a case-by-case basis [*Webster/Bühler, Art. 22 para. 15*]. In this context, the complexity and value of the dispute should be taken into account [*Verbist et al., p. 346*]. The terms of reference state that new claims should be authorised if they result in noticeable savings in time (*Answer 2, p. 54 para. 4*).

59 In the present case, the Tribunal has decided that the questions whether to add the new claim or consolidate separate arbitral proceedings will be dealt with in the first oral hearings (*PO1, p. 58 para. 4(1)*). Should the Tribunal decide afterwards that adding is not admissible, completely new arbitral proceedings must be initiated. This would require the appointment of new arbitrators, new submissions, a new case management conference and a new hearing date. In the current arbitral proceedings these steps will have taken just under ten months (*Request, p. 5; Cover, p. 1*). Therefore, it is likely that this process will take just as long for the arbitration regarding the new claim. This would mean that a decision on the merits of Order No. A-15604 would be delayed until the end of next year.

60 In addition, both claims will involve a considerable number of evidence-gathering measures. Due to the cyberattack, experts will be needed to assess the evidence and its complex interrelations with both claims. If the new claim is not added, two tribunals have to deal with this complicated evidence. The Tribunal in the present case is composed of experts in the automotive industry, sensor technology and cybersecurity (*PO2, p. 65 para. 36*). Finding three new, equally experienced arbitrators would take time. Further, these new arbitrators would need even more time to familiarise themselves with the subject matter. Consequently, adding the new claim would be the most time-efficient way.

2. ADDING THE NEW CLAIM IS THE MOST COST-EFFICIENT SOLUTION

61 It is the most cost-efficient solution to add the new claim to the pending arbitration. The terms of reference state that new claims should be authorised if they result in noticeable savings in costs (*Answer 2, p. 54 para. 4*). The official website of the ICC [*iccwbo.org*] offers the possibility to calculate an average advance on costs for arbitral proceedings. Pursuant to Art. 37(2) ICC Rules, the Court shall fix the advance on costs in an amount sufficient to cover all fees and expenses of the arbitrators, the administrative costs of the ICC and all other costs related to the arbitration.

62 Comparing the average costs as calculated on the ICC website and the actual costs of the present arbitration fixed in the ICC Notice (*ICC Notice, p. 39*), the advance on costs in the present arbitration is about 10% more expensive than in average arbitral proceedings. Assuming the same for the new claim, its costs would look like this (*in USD*):

	Costs
Initial claim (38,400,000)	**610k** (*ICC Notice, p. 39*)
New claim (12,000,000)	**450k,** if also 10% above avg.
Combined total costs	**1,060k**

63 Separate arbitral proceedings with different tribunals would cost a total of approximately USD 1,060,000. Adding the new claim to the pending arbitral proceedings under the Tribunal already existing would put the amount in dispute at USD 50,400,000. Assuming that the costs here are also 10% above average, the advance on costs would amount to almost USD 680,000. Comparing the USD 680,000 (added claims) and the USD 1,060,000 (separate claims), it would spare the Parties at least USD 380,000 to resolve both claims in one arbitration.

64 Additionally, in most ICC arbitrations, the largest cost items are not even the arbitrators' fees or the ICC administrative costs, but lawyers' fees and costs for witnesses and experts [*Böckstiegel, p. 3; ICC Secretariat's Guide, Art. 22(1-2) para. 794*]. If the initial claim and the new claim relate to the same evidence, it is more cost-efficient to evaluate them in the same arbitral proceedings [*Webster/Bühler, Art. 23 para. 89*]. This is exactly the case at hand (*see para. 60*). Adding the new claim would spare the Parties unnecessary costs, as lawyers, witnesses and experts would only be needed for one arbitration. Combining the savings from the advance on costs and lawyers' fees shows, that the Parties could save at least a third of its costs.

65 Conducting both claims in a single arbitration is the most efficient solution.

66 The Tribunal should add the new claim to the pending arbitration.

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67 In arbitration, efficiency guides the way through unsteady waters of cost and time. The Tribunal should follow this guidance. It can and should authorise the addition of the new claim to the pending arbitration.

PART II: EVEN IF THE NEW CLAIM HAS TO BE RAISED IN A SEPARATE ARBITRATION, THE TRIBUNAL CAN AND SHOULD CONSOLIDATE BOTH ARBITRAL PROCEEDINGS

68 Party autonomy shapes this arbitration. With this autonomy, the Parties designed an arbitration agreement according to their will and needs. Differing from Art. 10 ICC Rules, the Parties implemented Art. 41(5) FA, to empower the Tribunal to consolidate arbitral proceedings. Art. 41(5) FA states:

> *"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".*

69 For the Parties, consolidation would function as follows: The Parties are already involved in arbitral proceedings regarding the initial claim. Since the new claim emerged, CLAIMANT seeks to add this new claim to the pending arbitration. If the Tribunal decides not to add the new claim, CLAIMANT must initiate a second arbitration. CLAIMANT would then request the Tribunal to consolidate the arbitral proceedings into one. This would mean that CLAIMANT had initiated two separate arbitral proceedings just to combine them in the end.

70 This would already be less efficient than adding the new claim to the pending arbitration. RESPONDENT now wants to take an even more inefficient course: It attempts to prevent consolidation by invoking the wording of Art. 10 ICC Rules – a mere formality. Facing floods of industry wide cyberattacks, RESPONDENT should let the Tribunal follow the Parties' agreement, resolve all disputes together and lead the way back to shallow waters. In contrast, RESPONDENT disregards Art. 41(5) FA and thus contradicts its own demands.

71 The Tribunal has the power to consolidate the arbitral proceedings [**A.**] and should do so [**B.**].

A. THE TRIBUNAL HAS THE POWER TO CONSOLIDATE THE ARBITRAL PROCEEDINGS

72 The Tribunal can consolidate the arbitral proceedings pursuant to Art. 41(5) FA, as the Parties made use of party autonomy to transfer the power to consolidate from the Court to the Tribunal [**I.**]. Empowering the Tribunal to consolidate is also compatible with the ICC system [**II.**].

I. PARTY AUTONOMY ALLOWS THE PARTIES TO EMPOWER THE TRIBUNAL TO CONSOLIDATE

73 Making use of party autonomy, the Parties agreed to transfer the power to consolidate arbitral proceedings from the Court to the Tribunal. Party autonomy is the basis of international commercial arbitration [*ICC (CHE, 2000); NCC v LTAS (SGP, 2008); Ashford, p. 81; Karton, p. 20; Sanchez Lorenzo, p. 271 para. 1*]. It is the freedom of the parties to agree on how to conduct their arbitral proceedings [*ICC (FRA, 1993); Insigma v Alstom (SGP, 2009) para. 26; Webster/Bühler, Intro. para. 45*]. The ICC Rules also recognise this principle [*Underwriters v Westchester Fire (USA, 2007)*]. Failure to comply with the parties' agreement may result in an arbitral award not being recognised and enforced [*Putrabali v Rena (FRA, 2007); Redfern/Hunter, para. 11.40 et seq.*].

74 By exercising their autonomy, the Parties put together an arbitration agreement in Art. 41 FA which rules the requirements for their arbitral proceedings (*Ex. C1, p. 11 et seq.*). Generally, the Parties decided to arbitrate under the ICC Rules (*Ex. C1, p. 11*). Art. 10 ICC Rules leaves the competence to consolidate arbitral proceedings to the Court. However, when stipulating the FA, the Parties decided to establish Art. 41(5) FA to empower the Tribunal to consolidate (*Ex. C1, p. 12*). This consolidation clause was included upon the insistence of RESPONDENT (*PO2, p. 63 para. 19*). By including arbitration agreements in the individual orders, the Parties did not intend to deviate from this clause either (*see para. 27*). The FA is the respective arbitration agreement for both claims (*see para. 24*) and is compatible with the arbitration agreements in the orders anyway (*see para. 36*).

75 In conclusion, the Parties made use of party autonomy and agreed to transfer the power to consolidate arbitral proceedings from the Court to the Tribunal.

II. EMPOWERING THE TRIBUNAL TO CONSOLIDATE IS COMPATIBLE WITH THE ICC SYSTEM

76 The ICC system as such allows the Parties to shift the power to consolidate to the Tribunal. The Court accepts deviations from the ICC Rules, if they are compatible with the ICC system as such [*Webster/Bühler, Art. 1 para. 34; ICC Secretariat's Guide, Art. 1 para. 18*]. In contrast, the Court refuses to administer arbitrations in which the parties deviate from one of the "core features" of the ICC Rules. The core features of the ICC Rules are for instance to establish the terms of reference, to ensure the independence of the arbitrator and the function of the Court to scrutinise awards and fix fees [*ICC Secretariat's Guide, Art. 1 para. 17 et seq.*].

77 The power of the Court to consolidate arbitral proceedings under Art. 10 ICC Rules is not a core feature of the ICC Rules. Over the last 25 years the ICC rule makers have significantly eased the requirements to consolidate [*Webster/Bühler, Art. 10 para. 1; Kim/Lee, para. 2*]. Both, the

2012 ICC Rules and the 2021 ICC Rules broadened the scope for consolidation [*Webster/Bühler, Art. 10 para. 1*]. Today, Art. 10 ICC Rules allows consolidation of cases where claims are based on more than one arbitration agreement [*Webster/Bühler, Art. 10 para. 12*]. This softening trend on Art. 10 ICC Rules continues so that the most recent Article-by-Article Commentary on the ICC Rules mentions a confidential ICC case in which the Court held that the parties to an arbitration may transfer the power to consolidate to their chosen tribunal [*Nedden/Herzberg, p. 198 para. 47*].

78 Therefore, consolidation does not constitute a specific function of the Court. It is no "core feature" of the ICC Rules. For the Tribunal, this means that being empowered to consolidate by the Parties is compatible with the ICC system as such.

79 The Tribunal has the power to consolidate the arbitral proceedings.

B. THE TRIBUNAL SHOULD CONSOLIDATE THE ARBITRAL PROCEEDINGS

80 The Tribunal should exercise its power to consolidate the arbitral proceedings. The Parties laid down clear requirements for consolidation in Art. 41(5) FA, which are fully met in the present case [**I.**]. Moreover, the requirements of Art. 10 ICC Rules are fulfilled [**II.**]. Above all, consolidating the arbitral proceedings upholds efficiency [**III.**].

I. THE REQUIREMENTS OF ART. 41(5) FA ARE FULFILLED

81 Pursuant to Art. 41(5) FA, the Tribunal should consolidate the arbitral proceedings. The Parties agreed in Art. 41(5) FA to consolidate arbitral proceedings when the subject matters of both arbitral proceedings are related by common questions of law or fact, and conducting two separate arbitral proceedings could result in conflicting awards or obligations (*Ex. C1, p. 12*). Hereby, the Parties have opted for standard requirements on consolidation, which are also considered by courts [*P/R Clipper Gas v PPG Indus. (USA, 1992); Rio v Hilton and Rio v CAP (USA, 1991); SADNP v Cia. De Petroles (USA, 1986); Born, p. 2594 et seq.*].

82 Presently, the subject matter of the arbitral proceedings are the initial claim and the new claim (*PO1, p. 58 para. 2*). The Tribunal should consolidate the arbitral proceedings, as both claims are related by common questions of law and fact [**1.**]. Furthermore, two separate arbitral proceedings would likely result in conflicting awards [**2.**].

1. BOTH CLAIMS ARE RELATED BY COMMON QUESTIONS OF LAW AND FACT

83 The initial claim and the new claim are related by common questions of law and fact. A link by common questions of law particularly exists if claims stem from the same

contract [*Verbist et al., p.134; Brüggemann/Smahi, p. 52; Lotfi/Lightbody, p. 223*]. At hand, the initial claim and the new claim arise from Order No. 9601 and Order No. A-15604 which are both concluded under the FA (*PO1, p. 58 para. 2; Ex. C2, p. 13; Ex. C7, p. 48*).

84 Claims may also be linked through common questions of fact [*Born, p. 2594*]. This implies that there must be a logical relationship between these claims [*Great Lakes v Cooper (USA, 1961)*]. Presently, both claims concern payment obligations (*PO1, p. 58 para. 2*). Both claims concern the same type of product – sensors (*Ex. C2, p. 13 para. 1; Ex. C7, p. 48 para. 1*). Both claims involve the same parties (*PO1, p. 58 para. 2*). Both claims revolve around the cyberattack on CLAIMANT (*see para. 52*). In conclusion, the arbitral proceedings are related by common questions of law and fact.

2. TWO ARBITRAL PROCEEDINGS WOULD LIKELY RESULT IN CONFLICTING AWARDS

85 Conducting the arbitral proceedings separately would likely result in conflicting awards. If several arbitral proceedings on the same subject and between the same parties are initiated, there is a risk that the tribunals will decide differently [*P. R. Shah v M/S. B.H.H (IND, 2011)*; *Verbist et al., p. 134*]. An award from another tribunal can thus contradict with the award of the first tribunal [*Verbist et al., p. 134*]. The existence of two conflicting awards may result in an award not being recognised and enforced [*W v AW (HGK, 2021) para. 56 et seq.*].

86 It was precisely because of the risk of conflicting awards that RESPONDENT insisted to include a consolidation clause in the FA (*PO2, p. 63 para. 19*). Now, however, RESPONDENT refuses to consolidate (*Answer 2, p. 55 para. 6*). This refusal could lead exactly to what RESPONDENT was afraid of: conflicting awards regarding in particular the responsibility for the cyberattack, the form requirements or the relationship of the arbitration agreements in the orders and the FA. The two arbitral proceedings lead to the risk of conflicting awards.

87 The requirements of Art. 41(5) FA are fulfilled.

II. THE REQUIREMENTS FOR CONSOLIDATION UNDER ART. 10 ICC RULES ARE MET

88 Contrary to what RESPONDENT argues (*Answer 2, p. 55 para. 7*), the requirements of Art. 10 ICC Rules are met. Art. 10 ICC Rules allows consolidation to take place in three alternative scenarios [*Grierson/van Hooft, p. 122; ICC Note 2021, p. 5 para. 19*]. All are met in the present case: The Parties agreed to consolidation, meeting the standard of Art. 10(a) ICC Rules [**1.**]. Further, the case at hand would also stand the test of Art. 10(b) ICC Rules, as all claims are made under the arbitration agreement in Art. 41 FA [**2.**]. Even if the claims were not made under the same arbitration agreement, the requirements of Art. 10(c) ICC Rules are met [**3.**].

1. THE STANDARD OF ART. 10(A) ICC RULES IS MET

89 The Parties have agreed on consolidation, meeting the standard of Art. 10(a) ICC Rules. Art. 10(a) ICC Rules is another expression of party autonomy throughout the ICC Rules [*Grierson/van Hooft, p. 123*]. According to the provision, two or more arbitrations pending under the ICC Rules may be consolidated if "the parties have agreed to consolidation". This agreement may either take place before or after the dispute arises [*Verbist et al., p. 62; Webster/Bühler, Art. 10 para. 7*]. Even a conditional agreement meets the requirements of Art 10(a) ICC Rules [*Webster/Bühler, Art. 10 para. 7*].

90 With Art. 41(5) FA, the Parties have agreed to consolidate if both arbitral proceedings are related by law and fact and the risk of conflicting awards is imminent (*Ex. C1 p. 12*). These conditions are fulfilled (*see para. 81*). Hence, the standard of Art. 10(a) ICC Rules is met.

2. THE STANDARD OF ART. 10(B) ICC RULES IS MET

91 As both the initial claim and the new claim are raised under the same arbitration agreement, the standard of Art. 10(b) ICC Rules is met. Art. 10(b) ICC Rules allows consolidation of two or more arbitral proceedings into a single arbitration where all claims are made under the same arbitration agreement. Art. 41 FA is the arbitration agreement under which both claims are raised (*see para. 24*). All claims are made under the same arbitration agreement. Hence, the standard of Art. 10(b) ICC Rules is met.

3. THE STANDARD OF ART. 10(C) ICC RULES IS MET

92 Even if the arbitrations were not made under the same arbitration agreement, the standard of Art. 10(c) ICC Rules is met. Pursuant to Art. 10(c) ICC Rules, consolidation is also possible when the claims are raised under more than one arbitration agreement. For this, both disputes must arise in connection with the same legal relationship, the parties to both arbitrations must be the same and the arbitration agreements must be compatible [*ICC Secretariat's Guide, Art. 10 para. 356*].

93 Disputes arise in connection with the same legal relationship, if the contracts from which they emerge, form one economic unit [*Grierson/van Hooft, p. 124; ICC Secretariat's Guide, Art. 10 para. 357; Whitesell/Silva-Romero, p. 15*]. This is the case at hand (*see para. 43*). Further, the parties to both disputes are the same (*PO1, p. 58 para. 2*) and the arbitration agreements are compatible (*see para. 36*). Hence, the standard of Art. 10(c) ICC Rules is met.

III. CONSOLIDATING THE ARBITRAL PROCEEDINGS UPHOLDS EFFICIENCY

94 The Tribunal should exercise its power to consolidate, as it would provide for efficient arbitral proceedings. Art. 22(1) ICC Rules inscribes the duty of the parties and arbitrators to conduct arbitral proceedings as expeditiously and cost-efficiently as possible [*Friedland/Brekoulakis, p. 24 et seq.; ICC Commission Report Controlling Time and Costs, p. 4*]. This duty is best met by adding the new claim to the pending arbitration (*see para. 57*). Compared to separate arbitrations, even with the additional steps of consolidation, one single arbitration saves time (*see para. 58*) and costs (*see para. 61*). Should the Tribunal decide not to add the new claim, it can only uphold the principle of efficiency if it consolidates the arbitral proceedings.

RESPONDENT itself insisted on a consolidation clause. Now that consolidation provides the efficient dispute resolution the Parties agreed to, RESPONDENT should be held to its word. Even if the new claim has to be raised in a separate arbitration, the Tribunal can and should consolidate the arbitral proceedings.

PART III: CLAIMANT IS ENTITLED TO FULL PAYMENT UNDER ORDER NO. 9601

95 The automotive industry is flooded by cyberattacks. The Parties' relationship faces uncertain times. Floodproof protection arrangements and skilled experts are required. By introducing Art. 40 FA into their agreement, the Parties established certainty: Changes to the FA should only be made in writing and signed by the Parties.

96 When falling victim to a cyberattack, CLAIMANT relied on this provision and further resorted to the most skilled experts to evaluate the risk. CLAIMANT hired CyberSec, which ensured that no sensitive personal data was affected and further worked together with governmental authorities to safeguard the data involved.

97 In contrast, RESPONDENT relied on the instructions in a phishing email to urgently change the banking details, to immediately confirm and transfer USD 38,400,000 to a dubious bank account. By that, RESPONDENT not only turned a blind eye to Art. 40 FA, but also acted upon an email covered in red flags.

98 The Tribunal should uphold the Parties' protection from the flood of cyberattacks. Falling for a phishing email cannot qualify as RESPONDENT fulfilling its payment obligation. CLAIMANT is still entitled to payment for Order No. 9601 [**A.**]. Further, RESPONDENT cannot shift the blame on CLAIMANT by applying Art. 80 CISG [**B.**] or Art. 77 CISG [**C.**] to entirely or partially defend itself against its payment obligation.

A. CLAIMANT IS ENTITLED TO FULL PAYMENT FOR ORDER NO. 9601 UNDER THE FA

99 CLAIMANT is entitled to full payment of USD 38,400,000 for Order No. 9601, as RESPONDENT did not fulfill its payment obligation. The CISG applies to Order No. 9601 and the FA [**I.**]. Under Art. 54 CISG, RESPONDENT is still obliged to pay as set forth in the FA [**II.**].

I. THE CISG APPLIES TO ORDER NO. 9601 AS WELL AS THE FA

100 Both, Order No. 9601 and the FA are governed by the CISG.

101 In resolving the dispute, the Tribunal shall apply the law chosen by the Parties pursuant to Art. 21(1) ICC Rules. In Art. 41(6) FA, the Parties stipulated that: "[T]his Framework Agreement and all Individual Contracts concluded hereunder are governed by the law of Danubia" (*Ex. C1, p. 12*). The CISG is part of the substantive law of Danubia (*PO1, p. 59 para. 4(4)*) and forms the rules on contracts for the international sale of goods pursuant to Art. 1(1) CISG. Such contracts include framework agreements for the sale of goods as

well as individual orders concluded thereunder [*HDS (SWE, 2020); CJG (CHE, 2011); SN (POL, 2006) p. 8; OLG Graz (AUT, 2000) p. 11 para. 37; Schlechtriem/Schwenzer, Art. 1 para. 15*]. Thus, the FA and Order No. 9601 are governed by the CISG.

II. UNDER ART. 54 CISG, RESPONDENT IS STILL OBLIGED TO PAY AS AGREED IN THE FA

102 Pursuant to Art. 54 CISG, RESPONDENT is still obliged to pay USD 38,400,000 for Order No. 9601 to one of the bank accounts set forth in the FA. Art. 53 CISG stipulates the buyer's duty to pay the purchase price. Under Art. 54 CISG, the buyer is further obliged to fulfill all agreed formalities in order for the seller to receive payment. By placing Order No. 9601, RESPONDENT ordered S4 Sensors at a total price of USD 38,400,000 (*Ex. C2, p. 13 para. 1, 2, 5*). In Art. 7 FA, the Parties agreed that all payments must be made by bank transfer to one of the two specified Mediterranean bank accounts (*Ex. C1, p. 10*). Until today, RESPONDENT has not paid for Order No. 9601 to one of the agreed bank accounts (*Ex. C3, p. 14*). Instead, RESPONDENT fell for a phishing email and transferred the money to a bank account not listed in the FA (*cf. Ex. C1, p. 10; Ex. C5, p. 16; Ex. R4, p. 36 para. 4*).

103 This does not constitute fulfilment of RESPONDENT's obligation to pay. According to Art. 40 FA, no amendment or waiver of the FA shall be valid unless it is in writing and signed by the Parties (*Ex. C1, p. 11*). One might think that, by conducting fairly informal price fixing meetings, the Parties have taken a pragmatic approach to this form requirement. However, bank details have only been changed by written and signed agreement (*PO2, p. 63 para. 12*). Thus, to amend the bank details in Art. 7 FA, the Parties must provide a document signed by both of them.

104 The Parties did not draft, let alone sign a document stating that RESPONDENT should transfer the purchase price for Order No. 9601 to another bank account. Hence, by transferring the money to a bank account not listed in the FA, RESPONDENT has disregarded the written form requirement of Art. 40 FA (*Ex. C4, p. 15*). RESPONDENT's payment cannot constitute fulfilment under Order No. 9601.

105 RESPONDENT is still obliged to pay USD 38,400,000 for Order No. 9601.

B. RESPONDENT CANNOT RELY ON ART. 80 CISG TO REFUSE PAYMENT

106 RESPONDENT cannot invoke Art. 80 CISG to defend itself against the claim for payment under Order No. 9601. Art. 80 CISG states:

> *"A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission".*

107 RESPONDENT submits that its failure to perform was caused by CLAIMANT's omission. It argues that CLAIMANT would have been under a duty to inform RESPONDENT about the cyberattack and its risk, as it would then not have fallen for the phishing email.

108 For an omission to be relevant under Art. 80 CISG, a duty to act must have existed in the first place [*OLG Koblenz (DEU, 2011); Schlechtriem/Schwenzer, Art. 80 para. 3*]. Such a duty may arise from the parties' contract, usages or practices established between the parties, the CISG or the principle of good faith in international trade [*CAM (ITA, 2001); Kröll et al., Art. 80 para. 6*].

109 CLAIMANT was on no legal basis required to inform RESPONDENT about the risk posed by the cyberattack [**I.**]. Even if CLAIMANT was required to inform RESPONDENT, any failure to do so would not have been causal for RESPONDENT's non-performance [**II.**].

I. CLAIMANT HAD NO DUTY TO INFORM RESPONDENT ABOUT THE CYBERATTACK

110 On no legal basis, CLAIMANT was required to inform RESPONDENT about the risk posed by the cyberattack. The Parties did not agree on any information duty concerning cybersecurity incidents [**1.**]. Further, neither the law chosen by the Parties [**2.**], nor the Equatorianian Data Protection Act (**'EDPA'**) [**3.**] require CLAIMANT to inform RESPONDENT about any risk posed by the cyberattack.

1. THE PARTIES DID NOT AGREE ON A DUTY TO INFORM ABOUT CYBERSECURITY INCIDENTS

111 An information duty concerning cybersecurity incidents was never agreed between the Parties. Party autonomy allows the parties to freely determine the content of their agreement [*UNCITRAL Digest, Art. 7 para. 12; TJRS (BRA, 2017); LCCI (LVA, 2010); Rock Advertising v MWB (GBR, 2018)*]. The overarching agreement, in which the Parties wanted to regulate all their future co-operation, is the FA (*Ex. C1, p. 9*). Neither the FA, nor the individual orders concluded thereunder, contain any information duty concerning cybersecurity incidents (*PO2, p. 64 para. 21; Ex. C2, p. 13; Ex. C7, p. 48*).

112 Moreover, a duty to inform about cybersecurity incidents does not arise from any practices established between the Parties [**a)**] or usages in the automotive industry [**b)**].

a) THE PARTIES NEVER ESTABLISHED A PRACTICE TO INFORM ABOUT CYBERSECURITY INCIDENTS

113 The Parties never developed a practice from which an information duty concerning cybersecurity incidents could be derived. Pursuant to Art. 9(1) CISG, parties are bound by any practices they have established. A practice requires carrying out a conduct more than once [*ZGB (CHE, 1997) para. 25; Kröll et al., Art. 9 para. 1; Schlechtriem/Schwenzer, Art. 9 para. 10*].

In the course of the business relationship between the Parties, there has only been one other incident in which one of the Parties, RESPONDENT, suffered a cyberattack (*Answer, p. 30 para. 2 et seq.; Ex. C6, p. 17 para. 8; Ex. R4, p. 36 para. 2*). Although RESPONDENT informed CLAIMANT about the cyberattack at that time, this singular incident does not reach the threshold of Art. 9 CISG. Thus, the Parties never developed a practice to inform about cybersecurity incidents.

b) THE AUTOMOTIVE INDUSTRY KNOWS NO USAGE TO INFORM ABOUT CYBERSECURITY INCIDENTS

114 No usage within the automotive industry provides a duty to inform a contracting party about cybersecurity incidents. Pursuant to Art. 9(1) CISG, parties can agree to implement a usage into their agreement. As the Parties have not agreed on a specific usage (*PO2, p. 64 para. 21*), such could only become part of their agreement pursuant to Art. 9(2) CISG.

115 Art. 9(2) CISG states that usages which the parties knew or ought to have known and which are widely known in their business, are considered to be part of their agreement. Usages are rules which are regularly observed within a certain industry [*BP Oil v PetroEquador (USA, 2003); Mankowski, Art. 9 para. 3; Schlechtriem/Butler, p. 59 para. 61*]. They are widely known if everybody within that industry implicitly includes them into their contracts and they are as certain as the written part of the contract [*Strathlorne v Baird (GBR, 1916); Gélinas, p. 17*].

116 The Parties are active in the automotive industry (*Ex. C1, p. 9*). Within this industry, not every company informs their customers and suppliers in the event of a cyberattack (*Ex. R3, p. 35*). Rather it depends on the consideration of the respective company (*Ex. R3, p. 35*). Hence, the industry lacks a consistent approach to handling cybersecurity incidents. There is no usage to inform about cybersecurity incidents in the automotive industry.

117 The Parties did not agree on any duty to inform about cybersecurity incidents.

2. UNDER THE LAW CHOSEN BY THE PARTIES, CLAIMANT HAD NO DUTY TO INFORM ABOUT THE CYBERATTACK

118 CLAIMANT was not required to inform RESPONDENT about the cyberattack under the law chosen by the Parties.

119 In the present case, the Parties chose Danubian law (*see para. 101*). In consequence one might apply the Danubian Contract Act. However, the CISG is part of Danubian law (*PO1, p. 59 para. 4(4)*). According to Art. 7(2) CISG, questions concerning matters governed by the CISG, which are not expressly settled in it – internal gaps – are to be settled under the CISG's

general principles [*CISG AC-Opinion No. 17 Rule 1.22*]. If the general principles provide for an answer, recourse to non-unified national law is banned [*CISG AC-Opinion No. 17 Rule 1.22; SN (POL, 2008); TDP (ITA, 2004); Schlechtriem/Schwenzer, Art. 7 para. 27*].

120 The Parties argue the question whether CLAIMANT had a duty to inform RESPONDENT about the cyberattack (*PO1, p. 58 para. 4(1)*). The CISG does not expressly provide for an information duty regarding cybersecurity incidents. However, the CISG does contain other information duties, for example in Art. 19(2), 21(2), 39(1) and 48(2) CISG [*Benatti et al., p. 545 para. 5.4; Honnold/Flechtner, Art. 7 para. 100*]. Thus, information duties are a matter governed by the CISG [*ibid.*]. Consequently, whether there is a duty to inform about cybersecurity incidents, is a question not expressly settled in, but governed by the CISG. The question constitutes an internal gap in the sense of Art. 7(2) CISG. The general principles of the CISG must be applied.

121 One of these general principles is good faith [*Industrial plants (ESP, 2019); OGH (AUT, 2017) para. 22; Ferrari, p. 190; Schlechtriem/Schwenzer, Art. 7 para. 6*]. Although the CISG does not provide for a definition, good faith can be defined as a standard of fairness, fair conduct and a spirit of solidarity [*ICC (CHE, 1997); Janssen/Meyer, p. 143; Keily, p. 18; Kröll et al., Art. 7 para. 23; Neumann, Art. 80 CISG, p. 175*]. For fairness to prevail in a business relationship, parties need to communicate the information that is important for the performance of their contract. Therefore, information duties are a manifestation of fairness and thus good faith [*CAL (FRA, 2017); TJRS (BRA, 2017); DiMatteo et al., p. 772 para. 99*].

122 The question whether CLAIMANT had to inform RESPONDENT about the cyberattack must be decided by applying the principle of good faith. Recourse to the Danubian Contract Act is banned. Under the principle of good faith in the CISG, CLAIMANT had no duty to inform RESPONDENT about the cyberattack [**a)**]. Even if the CISG did not apply, the Danubian Contract Act would not require CLAIMANT to inform about the cyberattack [**b)**].

a) A DUTY FOR CLAIMANT DID NOT ARISE FROM GOOD FAITH UNDER THE CISG

123 No duty to inform RESPONDENT about the cyberattack arises from good faith as a general principle of the CISG.

124 Both, the CISG's provisions and the principle of good faith establish that the execution of a sales contract requires communication (*see para. 121*). This, however, does not mean that the seller has to provide the buyer with all information they might possibly expect [*Honnold/Flechtner, Art. 7 para. 100; Schlechtriem/Schwenzer, Art. 7 para. 31; Ferrari/Gillette, p. 432; Kolb, p. 28*]. Hence, a duty to inform can only be established for situations which are closely analogous to those

mentioned in the CISG and in which a contracting party is in obvious need for information [*Honnold/Flechtner, Art. 7 para. 100*].

125 The situation at hand – the cyberattack on CLAIMANT – is not analogous to those mentioned in the CISG. The information duties arising from the provisions of the CISG in particular relate to two overarching topics: the conclusion of the contract (Art. 19, 21(2) CISG) and the delivery of defective goods (Art. 39(1), 48 CISG). The present situation does not relate to either of these topics. The cyberattack stands in no connection to the conclusion of the FA or the conclusion of any purchase order. As RESPONDENT had no complaints concerning the quality of the delivered S4 Sensors (*Ex. C3, p. 14*), the present situation is not a matter of defective goods either. The cyberattack on CLAIMANT is not analogous to the situations mentioned in the CISG.

126 Even if the situation at hand was closely analogous to those mentioned in the CISG, RESPONDENT was in no obvious need of information. An example of such obvious need can be seen in the *machinery case* in which the court decided that a party is in obvious need for information if it is unaware of contractual provisions [*BGH (DEU, 2001) para. 6*]. In the *machinery case*, two parties concluded a contract for the sale of a used gear cutting machine [*BGH (DEU, 2001) para. 1*]. The buyer was unaware of the seller's standard terms which excluded any liability of the seller for defects of used equipment [*ibid.*]. The court decided that holding the buyer liable if the seller breached its information duty by not making contractual provisions available to the buyer violates the principle of good faith [*BGH (DEU, 2001) para. 6*].

127 In the case at hand, RESPONDENT knew all contractual provisions set forth in the FA and the purchase orders concluded thereunder. Therefore, it was not obvious that RESPONDENT needed any additional information about the cyberattack in order to be able to pay the purchase price. The FA states in black and white to which bank account RESPONDENT has to pay the purchase price (*Ex. C1, p. 10*). Order No. 9601 shows when and how much RESPONDENT had to pay (*Ex. C2, p. 13*). Thus, the situation at hand is not comparable to that in the *machinery case* and an obvious need of RESPONDENT for information does not exist.

128 Consequently, under the principle of good faith, CLAIMANT had no duty to inform RESPONDENT about the cyberattack.

b) EVEN IF THE CISG DID NOT APPLY, ART. 5.1.3 DANUBIAN CONTRACT ACT WOULD NOT REQUIRE CLAIMANT TO INFORM ABOUT THE CYBERATTACK

129 Even if the Danubian Contract Act applied, it would not require CLAIMANT to inform RESPONDENT about the cyberattack.

130 Danubia has no specific data protection legislation (*PO1, p.59 para. 4(5)*). Therefore, the Tribunal must apply the Danubian Contract Act, a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (*PO1, p. 59 para. 4(4)*).

131 Pursuant to Art. 5.1.3 Danubian Contract Act, each party should co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligation. What can reasonably be expected, depends on whether there is an information asymmetry between the acting parties [*Brödermann, Art. 5.1.3 para. 3; Vogenauer, Art. 5.1.3 para. 9*].

132 RESPONDENT argues that there was an information asymmetry (*Answer, p. 31 para. 9 et seq.*). According to RESPONDENT, it would not have fallen for the phishing email if it had the necessary information about the concrete risk posed by the cyberattack (*Answer, p. 31 para. 9 et seq.; Ex. C4, p. 15*).

133 But neither regarding the first payment [**aa)**], nor regarding the second payment [**bb)**] there was an information asymmetry between the Parties.

aa) REGARDING THE FIRST PAYMENT, THERE WAS NO INFORMATION ASYMMETRY

134 At the time of the first payment for Order No. 9601, there was no information asymmetry between the Parties. CLAIMANT itself, as well as RESPONDENT, did not know about the concrete risk posed by the cyberattack to sensitive data concerning RESPONDENT.

135 When CLAIMANT fell victim to the cyberattack in January 2022, it carefully evaluated the risk posed by this attack with the help of CyberSec – the leading cybersecurity company in Mediterraneo (*Ex. C6, p. 17 para. 6; Ex. R3, p. 35*). CyberSec ensured, that the cyberattack was of minor relevance (*PO2, p. 64 para. 25*). This was supported by the fact that it appeared, that neither direct competitors nor foreign state entities were behind the attack (*PO2, p. 64 para. 25*). Furthermore, it seemed like the malware had not infiltrated parts of the system that store sensitive personal data (*PO2, p. 64 para. 25*). According to CyberSec's professional evaluation, the malware was quickly detected and neutralised (*PO2, p. 64 para. 25; Ex. C6, p. 17 para. 6*). CLAIMANT relied on CyberSec's expertise and was thus unaware of the actual risk the attack contained. Consequently, CLAIMANT was unable to inform RESPONDENT of this risk. This did not change until 15 May 2022, when CLAIMANT lost access to one of its subsystems and engaged in an extensive security check (*Ex. C6, p. 17 para. 10*). At this point however, the first payment had already been due and was already transferred by RESPONDENT to the wrong bank account.

136 CLAIMANT also had no reason to contact RESPONDENT immediately when the first payment did not arrive as agreed on 3 May 2022 (*Ex. C3, p. 14*). Firstly, CLAIMANT relied on its long-standing and steady business relationship with RESPONDENT and trusted that it would fulfill its contractual obligations (*Request, p. 5 para. 10*). Secondly, an unusual number of CLAIMANT's employees were absent due to ill health at the time in question (*PO2, p. 62 para. 7; Ex. C6, p. 17 para.10*). Unfortunately, this also affected the person responsible for RESPONDENT's customer account, Ms Audi, as well as her substitute (*PO2, p. 62 para. 7; Ex. C6, p. 17 para.10; Ex. C8, p. 49 para. 6 et seq.*). CLAIMANT's top priority was to continue to fulfill its contractual obligations punctually, which is why all available employees ensured this (*PO2, p. 62 para. 7*).

137 Thus, CLAIMANT could neither reasonably have been expected to inform RESPONDENT about the risk posed by the cyberattack, nor to ask why it did not receive the first payment immediately after it was due. There was no information asymmetry regarding the first payment.

bb) REGARDING THE SECOND PAYMENT, THERE WAS NO INFORMATION ASYMMETRY

138 At the time of the second payment for Order No. 9601, there was no information asymmetry between the Parties. By then, RESPONDENT could reasonably have been expected to know about the risk posed by the cyberattack.

139 The second payment was due on 30 June 2022 (*Ex. C3, p. 14*). On 20 May 2022, a newspaper article was published in Automotive Weekly the leading industry journal for which RESPONDENT has a subscription (*PO2, p. 63 para. 17*). The article reported that CLAIMANT fell victim to "a major cyberattack" (*Ex. R3, p. 35*). Shortly after reading the newspaper article, Mr Royce, the employee at RESPONDENT responsible for the business relationship with CLAIMANT, called Ms Audi on 7 July 2022 due to his concerns about the cyberattack (*PO2, p. 63 para. 17*). This shows that the article was sufficient to inform about the risk posed by the attack. It cannot be held against CLAIMANT that Mr Royce only read the newspaper article after his summer holiday (*PO2, p. 63 para. 17*). During this holiday, RESPONDENT should have chosen a substitute for Mr Royce to keep an eye on what was happening in the automotive industry, especially concerning RESPONDENT's business partners and, most importantly, in a time of widespread cyberattacks in this industry. RESPONDENT could reasonably have been expected to know about the risk posed by the cyberattack at the time of the second payment.

140 Thus, there was no information asymmetry at any time. This means that, under Art. 5.1.3 Danubian Contract Act, CLAIMANT could not reasonably have been expected to inform RESPONDENT about the risk posed by the cyberattack.

141 Neither under the CISG, nor under the Danubian Contract Act, CLAIMANT had any duty to inform RESPONDENT about the risk posed by the cyberattack.

3. UNDER THE EDPA, CLAIMANT HAD NO DUTY TO INFORM ABOUT THE CYBERATTACK

142 CLAIMANT was not required to inform RESPONDENT about the cyberattack under the EDPA. The EDPA is Equatoriana's data protection law and is a nearly verbatim adoption of the European Union's General Data Protection Regulation (*PO1, p. 59 para. 4(5)*). It imposes particular information duties upon parties which have been subject to a cyberattack involving a breach of data privacy (*PO1, p. 59 para. 4(5)*). In Mediterraneo no such law exists (*PO1, p. 59 para. 4(5)*). Although CLAIMANT is based in Mediterraneo (*Ex. C1, p. 9*), it might still be bound by the EDPA, since Art. 3(2)(a) EDPA also binds foreign entities that offer goods and services to Equatorianians.

143 However, RESPONDENT does not fall within the material scope of the EDPA. According to Art. 2 EDPA, it only applies to the processing of personal data. Art. 4(1) EDPA states that personal data means "any information relating to an identified or identifiable natural person". Legal entities therefore do not fall within the material scope of the EDPA [*cf. Döhmann et al., Art. 4(1) para.14*]. This also applies if the legal entity wishes to claim a breach of data relating to a natural person, such as employee data [*OLG Dresden (DEU, 2023) para. 22*]. While RESPONDENT might argue that employee data had been affected by the cyberattack (*Answer, p. 30 para. 4*), RESPONDENT is a legal entity (*Request, p. 5 para. 5*) and thus does not fall within the material scope of the EDPA. Under the EDPA, CLAIMANT has no duty to inform RESPONDENT.

144 On no legal basis, CLAIMANT had a duty to inform RESPONDENT about the risk posed by the cyberattack.

II. EVEN IF THERE HAD BEEN A DUTY TO INFORM, CLAIMANT WOULD NOT HAVE CAUSED RESPONDENT'S NON-PERFORMANCE

145 Even if CLAIMANT was required to inform RESPONDENT about the risk posed by the cyberattack, omitting to inform would not have been causal for RESPONDENT's non-performance.

146 RESPONDENT relies on Art. 80 CISG, which requires a causal act or omission. The wording "to the extent" shows, that Art. 80 CISG should also apply if both parties have jointly caused the non-performance [*OLG Brandenburg (DEU, 2013) para. 71 et seq.; Felemegas, p. 250; Schlechtriem/Schwenzer, Art. 80 para. 7*]. In the case of payment claims, Art. 80 CISG can be relied on to shorten the claim to the extent that the non-performance was caused by the seller themselves [*OLG Brandenburg (DEU, 2013) para. 71 et seq.; Bianca/Bonell, Art. 80 para. 2.5; Felemegas, p. 251 et seq.; Neumann, p. 198*]. In this case, RESPONDENT was the sole cause of the non-performance, which is why the purchase price is still due in full amount.

147 The **first payment** to the wrong bank account for Order No. 9601 could easily have been prevented. Apparently, Mr Royce thought it was strange to change the bank account stipulated in the FA by means of an email. Otherwise, he would not have tried to contact Ms Audi via phone right after receiving the phishing email (*Answer, p. 31 para. 6*). As RESPONDENT aptly summarised, Mr Royce then made the decisive mistake: "After being told by her voicemail that she was on sick leave and in urgent matters a colleague should be contacted, he then replied to her email asking for a confirmation of the order to pay to a different bank account" (*Answer, p. 31 para. 6*). A sudden change of bank details is such an urgent matter on which RESPONDENT should have contacted a colleague of Ms Audi – exactly as asked in the voicemail. Instead, RESPONDENT blindly replied to the phishing email (*Answer, p. 31 para. 6; Ex. R4, p. 36 para. 4*). If Mr Royce had contacted a colleague of Ms Audi as requested, the Parties would have stopped the fraudster in its tracks and RESPONDENT would never have transferred the money to a wrong bank account.

148 The **second payment** to the wrong bank account on 30 June 2022 could also easily have been prevented. At this time, RESPONDENT already could have known for over a month that CLAIMANT had been the victim of a serious cyberattack and that data may have been leaked in the process (*see para. 138*).

149 Moreover, at a time when the automotive industry is regularly hit by cyberattacks, general caution is required with any external email (*Ex. R3, p. 35*). As an experienced business entity that has itself been the victim of such an attack (*Answer, p. 30 para. 2; Ex. R1, p. 33*), RESPONDENT can be expected to exercise particular caution – especially when transferring money in the amount of USD 38,400,000. Still, RESPONDENT overlooked several red flags, that pointed to the characteristics of the fraud.

150 First, the fraudster used the top-level domain telsa.audi@se**m**sorx.me instead of telsa.audi@se**n**sorx.me as its email address (*Ex. C5, p. 16; Ex. R1, p. 33*). Second, the fraudster referenced the wrong purchase order – Order No. 1560**5** – for L-1 Sensors (*Ex. C5, p. 16*). Instead, RESPONDENT ordered this type of sensors under Order No. A-1560**4** (*Ex. C7, p. 48*). Third, the fraudster referred to the S4 Sensors as S4-258**8**9, although their correct name is S4-258**9**9 (*Ex. C1, p. 9; Ex. C5, p. 16*). Fourth, for whatever reason, the phone number of Mr Toyoda, the head of purchasing of RESPONDENT, is included in Ms Audi's signature at the end of the email (*Ex. C5, p. 16; Ex. R1, p. 33*). Lastly, RESPONDENT should have become suspicious at the latest after reading the last paragraph of the email, which states "Could you thus please urgently change the banking details and then immediately confirm such change […]" (*Ex. C5, p. 16*). An email effectively asking for the urgent transfer of USD 38,400,000 to an unknown bank account should always be read thoroughly with suspicion.

151 All in all, at least one of these many red flags should have set off RESPONDENT's alarm bells. With falling for the phishing email, RESPONDENT solely caused its own non-performance. Even if CLAIMANT was required to inform RESPONDENT about the risk posed by the cyberattack, this would not have caused RESPONDENT's non-performance.

152 RESPONDENT cannot rely on Art. 80 CISG to entirely or partially defend itself against its payment obligation under Order No. 9601.

C. RESPONDENT CANNOT RELY ON ART. 77 CISG TO REFUSE PAYMENT

153 CLAIMANT is entitled to full payment under Order No. 9601, since RESPONDENT can neither invoke Art. 77 CISG nor the general principle of mitigation underlying this article.

154 Under Art. 77 CISG a party who relies on a breach of contract by the other party, must take reasonable measures to prevent the loss resulting from that breach. By the wording "the party in breach may claim a reduction in the damages", Art. 77 CISG already indicates that the claim can only be for damages. This is also supported by the general consensus among commentators and practitioners [*Secretariat Commentary, Art. 73 (now Art. 77) para. 3; ICC (X, 1997); Solea v B&W (CAN, 2019) p. 6; Schlechtriem/Schwenzer, Art. 77 para. 4; Huber/Mullis, p. 290; Saidov, p. 350*].

155 As CLAIMANT does not claim damages (*PO2, p. 66 para. 40; Request, p. 8 para. 29*), Art. 77 CISG cannot be directly applied. Therefore, RESPONDENT tries to invoke a general principle of mitigation, contained in Art. 77 CISG (*Answer, p. 32 para. 13*). To reduce its payment obligation, RESPONDENT argues that CLAIMANT's behaviour in response to the cyberattack was insufficient to meet this principle (*Answer, p. 31 para. 10, p. 32 para. 13*).

156 But the general principle underlying Art. 77 CISG cannot be applied to RESPONDENT's payment obligation [**I.**]. And even if one concludes that such principle would be applicable, CLAIMANT has always acted in accordance with it [**II.**].

I. THE PRINCIPLE OF MITIGATION DOES NOT EXTEND TO RESPONDENT'S PAYMENT OBLIGATION

157 RESPONDENT cannot invoke the general principle of mitigation pursuant to Art. 77 CISG to reduce its payment obligation. During the drafting process of the CISG, the proposal of US representative Mr Honnold, to extend the duty to mitigate to other remedies [*Legislative History, Art. 73 (now Art. 77) para. 1*], was rejected by the vast majority of votes [*Official Records, p. 398 para. 78*]. This shows that limiting the scope of Art. 77 CISG to damages was precisely the intention of the drafters of the CISG [*30th meeting, Art. 73 (now Art. 77) para. 78; Legislative History, Art. 73 (now Art. 77) para. 1; Riznik, § 2; Schwenzer/Manner, p. 483 et seq.*]. It was feared that Art. 77 CISG would otherwise go too far and give exceptional discretionary powers to modify performance claims [*30th meeting, Art. 73 (now Art. 77) para. 73; Schlechtriem, p. 99; Schwenzer/Manner, p. 483*].

158 Only in one exceptional case, the principle of mitigation under Art. 77 CISG may also affect claims that are not, but merely relate to, claims for damages [*OLG Braunschweig (DEU, 1999); Brunner/Gottlieb, Art. 77 para. 2; Kröll et al., Art. 77 para. 9; Schwenzer/Manner, p. 487*]. This comes into play when a party speculatively delays the avoidance of a contract in order to increase the loss caused by the non-performance [*OLG Braunschweig (DEU, 1999); OLG München (DEU, 1995); TF (CHE, 2009); Brunner/Gottlieb, Art. 77 para. 2; Enderlein/Maskow, Art. 77 para. 2; Saidov, p. 351*]. In such case, as part of reasonable mitigation measures, the party is expected to avoid the contract and suspend performance when it is certain of the other party's non-performance [*OLG Braunschweig (DEU, 1999); OLG München (DEU, 1995); Brunner/Gottlieb, Art. 77 para. 2; Enderlein/Maskow, Art. 77 para. 2; Saidov, p. 351*].

159 CLAIMANT solely demands payment (*PO2, p. 66 para. 40*). There are no claims for damages in connection with the demanded claim (*PO2, p. 66 para. 40*). CLAIMANT cannot withhold performance in order to mitigate any loss, as CLAIMANT already fulfilled its delivery obligation under Order No. 9601 (*Request, p. 6 para. 13; Ex. C3, p. 14*). The exceptional case in which Art. 77 CISG can be extended, is not comparable to the case at hand.

160 RESPONDENT cannot apply the principle of mitigation underlying Art. 77 CISG to reduce its payment obligation.

II. EVEN IF A PRINCIPLE FROM ART. 77 CISG APPLIED, CLAIMANT HAS ALWAYS ACTED IN ACCORDANCE THEREWITH

161 Even if RESPONDENT was able to extend Art. 77 CISG and apply the principle of mitigation to the case at hand, CLAIMANT has always acted in accordance with this principle.

162 The principle underlying Art. 77 CISG states that reasonably avoidable loss should not be compensated [*Kröll et al., Art. 77 para. 1; Schlechtriem/Schwenzer, Art. 77 para. 1; Ferrari, p. 192; Liu, 14.5.1*]. What "reasonably avoidable" entails is to be derived from the circumstances of the individual case [*Riznik, § 4; Kritzer, p. 127; Opie, III.; Saidov, Law of Damages, p. 145*]. The behaviour of the party relying on the breach of contract must be compared with the behaviour of a reasonable person in the same position [*OGH (AUT, 1996); OLG Naumburg (DEU, 2019); OLG Brandenburg (DEU, 2013); Kröll et al.; Art. 77 para. 11; Ferrari, p. 193*].

163 The standard for behaviour in the present case must therefore be that of a prudent and competent CEO seeking to protect its company from damage caused by cyberattacks. Following governmental guidelines to establish a cybersecurity defence is reasonable. Five steps included in a cybersecurity framework by e.g. the New Zealand Government Communications Security Bureau and the United States Department of Commerce are: **(1) Identify** – Help determine the current cybersecurity risk to the organisation; **(2) Protect** – Use safeguards to prevent or reduce cybersecurity risk; **(3) Detect** – Find and analyse possible cyberattacks and compromises; **(4) Respond** – Take action regarding a detected cybersecurity incident; **(5) Recover** – Restore assets and operations that were impacted by a cybersecurity incident [*NCSC, p. 3; NIST, para. 201 et seq.*].

164 At which point in time the party must take steps to mitigate the loss, is widely disputed. According to one view, the party is only obliged to mitigate once it has actual knowledge of the loss [*BGH (DEU, 2012)*]. A second view states that mitigation measures must be taken already when a breach of contract is foreseeable [*Secretariat Commentary, Art. 73 (now Art. 77) para. 4; Bianca/Bonell, Art. 77 para. 3.11; Riznik, § 3.1*]. According to the broadest view, the duty to mitigate exists throughout the duration of the whole contract, irrespective of whether a breach of contract is foreseeable [*Schwenzer/Manner, p. 481; Weber, p. 205*].

165 Even under the broadest view, CLAIMANT has always acted in accordance with the principle of mitigation. CLAIMANT had taken reasonable measures to mitigate the risk of loss in connection with the cyberattack at the time the first payment [**1.**] and the second payment [**2.**] were due.

1. AT THE TIME OF THE FIRST PAYMENT, CLAIMANT HAD TAKEN REASONABLE MEASURES

166 When, on 3 May 2022, the first payment of Order No. 9601 became due, CLAIMANT had taken reasonable measures to mitigate the risk of any loss in connection with cyberattacks.

167 CLAIMANT has taken proactive measures to protect itself from cyberattacks and fulfilled all steps of governmental guidelines. By being aware that there had been a considerable increase in cyberattacks at all levels of the production chain (*Ex. C6, p. 17 para. 8*), CLAIMANT recognised the current risk within the industry and adhered to step one – **identify** – of the guideline. By strengthening its IT infrastructure (*PO2, p. 64 para. 24*) and improving its cybersecurity defence system with additional firewalls (*Ex. C6, p. 17 para. 4*), CLAIMANT fulfilled step two – **protect** – of the guideline. It heavily invested in its cybersecurity training and ensured that all employees were required to attend a two-day intensive training course and three monthly revision sessions (*PO2, p. 64 para. 24*).

168 CLAIMANT further followed step three – **detect** – of the guideline and appointed a chief cybersecurity officer (*PO2, p. 64 para. 24*). Thereby, CLAIMANT enhanced its efforts of mitigation, as a designated officer helps in monitoring the system for abnormal activity. This is why, although CLAIMANT was the target of serious cyberattacks in 2022, most of those were unsuccessful and detected by its cybersecurity defence system (*Ex. C6, p. 17 para. 4*). When CLAIMANT became aware of the cyberattack on 23 January 2022, it followed step four – **respond** – and hired CyberSec (*Ex. C6, p. 17 para. 6; Ex. R3, p. 35*). Thereby, it relied on the leading cybersecurity firm in Mediterraneo. According to the evaluation of CyberSec, all malware was detected and neutralised quickly (*PO2, p. 64 para. 25*). In view of this, step five – **recover** – was accordingly fulfilled.

169 At the time of the first payment, CLAIMANT had fully implemented and adhered to governmental cybersecurity guidelines. CLAIMANT thereby took reasonable measures to mitigate the risk of loss caused by cyberattacks.

2. AT THE TIME OF THE SECOND PAYMENT, CLAIMANT HAD TAKEN REASONABLE MEASURES

170 When, on 30 June 2022, the second payment of Order No. 9601 became due, CLAIMANT still had taken reasonable measures to mitigate the risk of loss in connection with the cyberattack. After CLAIMANT realised on 15 May 2022, that not all consequences of the attack had been averted initially, it again referred back to its cybersecurity policy. By continuously implementing

steps one to three (*see para. 167*), which includes monitoring the system, CLAIMANT noticed that one of its subsystems became encrypted (*Ex. C6, p. 17 para. 10*).

171 In order to **respond** as is required by step four, CLAIMANT engaged in a major security check of all of its systems, supported by the cybersecurity unit of the Mediterranean government (*Ex. C6, p. 17 para. 10*). By shutting down its system, CLAIMANT limited the threat of the fraudster to move between systems and gain access to more information.

172 During this time, the entire accounting, payment and ordering system was largely handled manually to investigate and sanitise it completely (*Ex. C6, p.17 para. 10*). Since there was also a high rate of employee absentees at the time, CLAIMANT was forced to prioritise its tasks in order to get its affected systems back to normal operation (*PO1, p. 62 para. 7; Ex. C6, p. 17 para. 10*). As RESPONDENT did not properly notify CLAIMANT about the phishing email (*Answer, p. 31 para. 6*), CLAIMANT was still unaware that the fraudster even contacted RESPONDENT. Given that the Parties share a long-term relationship, with both of them fulfilling their obligations in a reliable manner, CLAIMANT had no reason to worry about RESPONDENT not fulfilling its payment obligation.

173 After the successful thorough sanitisation process, CLAIMANT was able to **recover** its systems and begun to gauge the damage. CLAIMANT noticed the lack of payment as soon as a new account manager was assigned (*Ex. C3, p. 14*) and approached RESPONDENT on 5 September 2022 to inquest about the matter (*Ex. C3, p. 14*).

174 Under these circumstances, for CLAIMANT to focus on the major security check was reasonable by the standard of a prudent person in a similar situation. At the time the second payment was due, CLAIMANT still took reasonable measures to mitigate the risk of loss caused by the cyberattack by again adhering to its cybersecurity concept.

175 Thus, CLAIMANT behaved reasonably in accordance with the principle of mitigation underlying Art. 77 CISG. RESPONDENT cannot rely on Art. 77 CISG to refuse payment.

Having caused the Parties' floodproof protection mechanism to leak, RESPONDENT now attempts to shift the blame to CLAIMANT. But RESPONDENT's arguments run dry. CLAIMANT is entitled to full payment under Order No. 9601.

REQUEST FOR RELIEF

In the light of the above, CLAIMANT respectfully requests the Tribunal to grant the following relief:

(1) DECLARE that the addition of the new claim to the pending arbitration can and should be authorised;

(2) DECLARE that the Tribunal can and should consolidate the arbitral proceedings, in case the new claim has to be raised in a separate arbitration;

(3) DECLARE that CLAIMANT is entitled to full payment of the amount due under Order No. 9601 and DISMISS that RESPONDENT can invoke a violation of contractual (information) duty or obligation or rely on a provision of the CISG to

i. entirely or
ii. partially defend itself against the claim of payment.

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UNIVERSITÄT HAMBURG

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Hamburg, 7 December 2023

Charlotte Gleie

Klara Grube

Luzie Haacker

Leonie Kunkat

Johannes Lenz

Liara Tamke