THIRTY-FIRST ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

THE UNIVERSITY OF SYDNEY

MEMORANDUM FOR RESPONDENT

ON BEHALF OF
Visionic Ltd
Optronic Avenida 3
Oceanside
Equatoriana
RESPONDENT

AGAINST
SensorX plc
Atwood Lane 1784
Capital City
Mediterraneo
CLAIMANT

COUNSEL

Yijun Cui
Olivia Donovan
Thomas Martyn
Jason Zhu He

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY: University of Sydney

COUNTRY: Australia

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We confirm that this memorandum does not include text from any source, whether the source was in hard copy or online available, which has not been properly distinguished by quotation marks or citation.	X		

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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: 18 January 2024

NAME: Yijun Cui SIGNATURE: 

NAME: Olivia Donovan SIGNATURE: 

NAME: Thomas Martyn SIGNATURE: 

NAME: Jason Zhu He SIGNATURE: 

NAME (COACH): Peter Dougherty SIGNATURE: 

NAME (COACH): Calida Tang SIGNATURE: 

NAME (COACH): Prof. Chester Brown SIGNATURE: 

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Abbreviation	Term
/	And
§(§)	Section(s)
¶(¶)	Paragraph(s)
[#]-[#]	Page range from # to # of this memorandum
Answer to Request for Arbitration	Answer to the Request for Arbitration, dated 10 July 2023
App.	Appendix
Art(s).	Article(s)
cf	Compare
Ch.	Chapter
cl.	Clause
Cl Memo	Memorandum for CLAIMANT submitted by the University of Craiova
CLAIMANT	SensorX plc
Ex C#	CLAIMANT's Exhibit Number
Ex R#	RESPONDENT's Exhibit Number
fn	Footnote
FA	Framework Agreement
ICC	The International Court of Arbitration
Existing Claim	Claim arising from Request for Arbitration, dated 9 June 2023
New Claim	Claim stated in Request for Authorisation of New Claim, dated 11 September 2023
p(p).	Page(s)
PO1	Procedural Order Number 1, dated 6 October 2023
PO2	Procedural Order Number 2, dated 6 November 2023
PO 9601	Purchase Order No. 9601
PO A-15604	Purchase Order No. A-15604
RESPONDENT	Visionic Ltd
Request for Arbitration	Request for Arbitration, dated 9 June 2023
Request for Authorisation	Request for Authorisation of New Claim, dated 11 September 2023

Rejection of Request for Authorisation	Rejection of Request for Authorisationby Respondent, dated 2 October 2023
the Parties	CLAIMANT and RESPONDENT
this Tribunal	The Arbitral Tribunal
ToR	Terms of Reference
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars
Vol.	Volume

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SUMMARY OF FACT

1. On **7 June 2019**, SensorX plc (**CLAIMANT**), a company incorporated in Mediterraneo, entered into a Framework Agreement (***FA***) with Visionic Ltd (**RESPONDENT**) to regulate the future supply of CLAIMANT'S sensors to RESPONDENT. Article 41 *FA* provides for a dispute resolution process and requires the Parties attempt negotiation or mediation before submitting to arbitration.
2. RESPONDENT placed two purchase orders under the *FA* which are at issue in the current proceedings: *PO A-15604* on **4 January 2022** and *PO 9601* on **17 January 2022**. Each order contained an arbitration agreement, differing materially from each other including by the number of arbitrators, applicability of the rules for emergency arbitration and language requirements.
3. On **5 January 2022**, CLAIMANT'S employee Ms Audi clicked on an infected email that allowed malware to enter its system. Subsequently, on **23 January 2022**, CLAIMANT discovered that it had suffered a cyberattack but did not disclose it until **5 September 2022**. At the time, CLAIMANT erroneously concluded the cyberattack was minor however in reality the entire customer relations management system was infected, enabling malicious actors to read all of Ms Audi's emails. This led to RESPONDENT's account manager for CLAIMANT'S sensors, Mr Royce, receiving an email on **28 March 2022** containing large amounts of information that only someone intimately familiar with CLAIMANT's processes could have written. This email requested that payment for *PO 9601* be transferred to a First Bank of Danubia bank account.
4. Mr Royce attempted to call Ms Audi to confirm the email, however she went on sick leave from **25 March 2022**. Her employment was terminated **on 23 May 2022** but notice of her departure was not sent to business partners until **1 July 2022**. Further, her replacement was not appointed **until 1 August 2022**. Between **15 May 2022** and **30 June 2022**, CLAIMANT also shut down its internal planning and accounting systems. These events resulted in a failure to monitor RESPONDENT's account and inform RESPONDENT of the cyberattack, leading to two instalments of USD 19.2 million being transferred to the different bank account on **3 May 2022** and **30 June 2022** respectively.
5. On **25 August 2022**, non-payment of both these instalments for *PO 9601* was discovered. Consequently, CLAIMANT submitted a request for arbitration on **9 June 2023** (**Existing Claim**). The Terms of Reference (***ToR***) were agreed and signed by all parties on **30 August 2023**.
6. Despite the proceedings for *PO 9601* being well underway, CLAIMANT submitted a request for authorisation on **11 September 2023** (**New Claim**) in relation to the USD12 million outstanding under *PO A-15604*, or alternatively consolidation of the New Claim to the Existing Claim.

SUMMARY OF ARGUMENT

7. This dispute concerns two issues: whether CLAIMANT'S proceedings against RESPONDENT for non-payment of the second instalment under *PO A-15604* can be added to the Existing Claim and whether CLAIMANT is entitled to payment for both instalments under *PO 9601*. This Tribunal must decide on three questions: *first*, whether it can and should authorise the New Claim to the Existing Claim; *second* and alternatively, whether it can and should consolidate the proceedings; and *third*, whether RESPONDENT can invoke an information duty or obligation or rely on a provision of the *CISG* to defend itself against CLAIMANT's payment claim.

8. This Tribunal cannot and should not add the New Claim to the existing arbitration (**Issue A**). The New Claim falls outside the established *ToR*, preventing its inclusion in the current proceedings. Moreover, this Tribunal does not have jurisdiction to hear the New Claim as the Parties are yet to satisfy the prerequisite of negotiation or mediation as required under the *FA*. Alternatively, this Tribunal should not authorise the addition of the New Claim: the two claims are of a different legal and factual nature; authorisation would be in inappropriate at this stage of the arbitration; authorisation would cause unnecessary delay; authorisation would not result in 'noticeable savings in cost and time'; and the arbitration agreements fail the criteria in Arts. 9 and 6 *ICC Rules*.

9. Furthermore, this Tribunal cannot and should not consolidate the proceedings (**Issue B**). The consolidation power contained in Art. 41(5) *FA* is invalid because it modifies a mandatory rule of the *ICC Rules*, precluding this Tribunal from consolidating the proceedings. In any case, the requirements for consolidation under Art. 41(5) *FA* and Art. 10 *ICC Rules* are not met. Even if this Tribunal does find that it can exercise the power to consolidate, it should refuse to do so for the following discretionary reasons.

10. CLAIMANT is not entitled to payment under *PO 9601* because it caused RESPONDENT's non-performance and failed to mitigate its loss (**Issue C**). The Parties did not require conformity with Art. 40 *FA* requiring alterations to the *FA* to be written and signed. This, combined with CLAIMANT's improper management of the cyberattack, caused RESPONDENT's payment into the different bank account. If this Tribunal wishes to apportion causation under Art. 80 *CISG*, it should heavily place culpability on CLAIMANT as without its omissions, this payment would not have occurred. Further, CLAIMANT was required to mitigate under Art. 77 *CISG* and failed to do so. Finally, CLAIMANT must be refused relief, either entirely or in part. This is because it failed to warn RESPONDENT of the cyberattack in accordance with good faith, the duty to cooperate and established practices or trade usages in existence. In any event, it would be contrary to good faith for CLAIMANT to assert that RESPONDENT has not performed because CLAIMANT is bound by the email chain sent by 'Ms Audi' (**Issue D**).

ISSUE A: THIS TRIBUNAL CANNOT AND SHOULD NOT AUTHORISE THE ADDITION OF THE NEW CLAIM

11. CLAIMANT initiated arbitral proceedings for the Existing Claim arising out of *PO 9601* pursuant to the arbitration agreement contained in cl. 7 of that purchase order alongside the prevailing sections of Art. 41 of the *FA* [*Request for Arbitration* ¶¶22-23; *Ex C1*; *Ex C2; Answer to Request for Arbitration* ¶8; *ICC Case Information* p. 2].

12. While RESPONDENT accepts this Tribunal's jurisdiction to hear the Existing Claim, this Tribunal does not have jurisdiction to hear the New Claim arising out of *PO A-15604* that CLAIMANT now seeks to invoke [*Request for Authorisation* ¶2] for any one of four reasons. As CLAIMANT concedes, the New Claim falls outside the *ToR* which are concerned with CLAIMANT's entitlement to payment under *PO 9601* and requires the Tribunal's authorisation (**I**). Furthermore, this Tribunal cannot authorise the New Claim because the Parties have not attempted to mediate or negotiate the dispute which is a precondition to this Tribunal's jurisdiction as specified in Art. 41(1) *FA* (**II**). CLAIMANT can neither satisfy the considerations in Art. 23(4) *ICC Rules*, nor the threshold of 'noticeable savings in cost and time' imposed by the *ToR*, which are required for authorisation of the New Claim [cf *Cl Memo* §VII] (**III**). Finally, the compatibility and agreement requirements for multi-contract arbitration under Arts. 9 and 6(4) *ICC Rules* are not fulfilled (**IV**).

I. The New Claim falls outside the existing *ToR*

13. CLAIMANT concedes that the 'new claim (is) outside the terms of reference' [*Cl Memo* ¶20]. RESPONDENT agrees that this claim falls outside the existing *ToR* as it is 'based on new facts and/or new legal arguments' [*Webster/Bühler* ¶23-85]. Even if this Tribunal finds it necessary to inquire whether the New Claim falls under the existing *ToR* according to the principle of *iura novit arbiter* [*Welser/Mimnagh* p. 39; *Request for Authorisation* ¶6], there are three reasons why it does not.

14. *First*, the *ToR* excludes the New Claim. The *ToR* state that the question for this Tribunal is whether CLAIMANT is entitled to payment 'under Purchase Order No. 9601' [*ToR* ¶85; *Rejection of Request for Authorisation* ¶4]. Although the *ToR* anticipates that further issues to the core dispute of whether CLAIMANT is entitled to payment under *PO 9601* may arise, it does not permit the Tribunal to hear the unrelated issues in *PO A-15604*, concerning a distinct purchase order and category of complaint regarding defective sensors. Consequently, this New Claim does not fall within the current 'mission' of the Tribunal to consider the *PO 9601* claim [*Webster/Bühler* ¶23-86].

15. *Second*, the New Claim arises out of an 'entirely new complex of facts and circumstances' [*Kull* p. 2334; cf *Cl Memo* ¶21]. Factually, the Existing Claim concerns CLAIMANT's failure to disclose the cyberattack and the consequences that followed, whereas the New Claim focuses on negotiations

for a different range of product, purchase order, date, transaction, and a different payment claim [*Wesler/Mimnagh* p. 40]. Legally, the New Claim concerns liability for defective goods whereas the Existing Claim concerns issues of causation, mitigation and good faith [*Wesler/Mimnagh* p. 40].

16. *Third*, another indicator of the dispute arising under *PO A-15604* being a 'new' claim that falls outside the *To*R is the distinct range of defences available to RESPONDENT [*Fry/Greenberg/Mazza* ¶3-901; *Welser/Mimnagh* p. 39]. The New Claim considers contractual non-conformity (Arts. 35-40 *CISG*), whereas the Existing Claim requires analysis of causation (Art. 80 *CISG*), mitigation (Art. 77 *CISG*) and the prohibition of inconsistent conduct (Art. 29(2) *CISG*).

II. This Tribunal does not have jurisdiction to hear the New Claim as the Parties have not mediated or negotiated

17. Since the New Claim does not fall within the existing *ToR,* this Tribunal must establish an independent basis of jurisdiction. CLAIMANT asserts that all the arbitration agreements show a clear intention for the Parties to proceed to arbitration and therefore this Tribunal can hear both claims [*Cl Memo* §VII.1, ¶¶24, 29]. However, it fails to articulate whether Art. 41 *FA*, cl. 7 *PO 9601* or cl. 7 *PO A-15604* is the applicable arbitration agreement for the New Claim. CLAIMANT simultaneously asserts that both purchase orders are 'governed' by the *FA* [*Cl Memo* §VII.1 ¶23] and that cl. 7 of *PO A-15604* is 'subsidiary' to Art. 41 *FA* [*Cl Memo* ¶28] whilst quoting the two purchase order arbitration agreements [*Cl Memo* ¶¶26-27]. RESPONDENT does not deny that the Parties have evinced an intention to proceed to arbitration, however, that is a distinct question from whether this Tribunal has jurisdiction to hear the New Claim.

18. While the applicable arbitration agreement to the current proceedings in respect of the Existing Claim is cl. 7 *PO 9601* [*ICC Case Information* p. 2], Arts. 41(1) and 41(5) *FA* continue to be relevant as *PO 9601* explicitly provides that the provisions of the *FA* 'govern this order unless agreed otherwise' [*Ex C2*]. Clause 7 of *PO 9601* only specifies the governing rules, number of arbitrators, place of arbitration, language of arbitration and the applicable law. It does not address the pre-condition to arbitration in Art. 41(1) and the requirements for consolidation in Art. 41(5) *FA*. The same analysis applies to *PO A-15604* [*Ex C7*].

19. Thus, irrespective of CLAIMANT's position, this Tribunal does not have jurisdiction to authorise the New Claim as the requirement to mediate or negotiate per Art. 41(1) (**A**) is yet to occur (**B**).

A. Attempted mediation or negotiation is a precondition to arbitration

20. The Parties have used the mandatory language of 'shall' in Art. 41(1) *FA* to require that disputes or disagreements be amicably settled by mediation or negotiation [*Figueres* p. 72 citing *ICC Case 9984* ('shall'); cf. *ICC Case 4229* ('however') and *ICC Case 10256* ('may')] before the Parties can proceed to arbitration [Art. 41(2) *FA*]. This reflects the Parties' clear intention that attempted

negotiation or mediation is a precondition to arbitration [*Born* §5.08]. To have jurisdiction, this Tribunal must be satisfied mediation or negotiation occurred [*Figueres* p. 72 citing *ICC Case 9984*].

B. CLAIMANT cannot demonstrate that there has been mediation or negotiation

21. CLAIMANT cannot discharge the legal and evidentiary burden of establishing that the Parties mediated or negotiated per Art. 41(1) *FA* [*Born 2015* p. 48-50; *von Mehren* p. 124; *Garnett* p. 82]. While CLAIMANT cites the various arbitration agreements [*Cl Memo* ¶¶23-29], this is insufficient to evidence that this precondition is satisfied [*von Mehren* p. 126 citing *Devitt/Blackmar/Wolff* §IV(2)].

22. There is only evidence of two communications between the Parties in relation to the New Claim before the Request for Authorisation was filed: a call and an email [*Ex C8* ¶8; *Rejection of Request for Authorisation* ¶2]. During the call Mr Toyoda and Ms Peugeotroen agreed that 'Mr. Toyoda would send an informal email' which 'Ms Peugeotroen would then discuss with her superiors' [*PO2* ¶27]. In contrast to the previous negotiation for *PO 9601* where the CEOs of CLAIMANT and RESPONDENT held a meeting [*Ex C6* ¶11], the call, which explicitly contemplated that further discussion would follow, and the email which suggested that the Parties aim to find an "amicable solution" [*Ex R5*], were not negotiations or mediations. This is not a situation where it would be difficult for CLAIMANT to procure evidence to satisfy the standard of proof that a negotiation or mediation took place, such as emails or employee witness statements [*Born 2015* pp. 47, 48]. Its failure to do so means this Tribunal does not have jurisdiction as Art. 41(1) is not fulfilled.

III. This Tribunal should not authorise the New Claim as CLAIMANT neither satisfies Art. 23(4) *ICC Rules* nor the requirement of 'noticeable savings in cost and time'

23. RESPONDENT agrees with CLAIMANT that Art. 23(4) *ICC Rules* allows the Tribunal to authorise new claims that do not fall within the *To*R and that 'the arbitral tribunal will scrutinise such changes following' the signing of the *To*R [*Cl Memo* ¶22; *Welser/Mimnagh* p. 43].

24. However, CLAIMANT erroneously asserts that this Tribunal should authorise the New Claim under Art. 23(4). Having regard to the factors listed in Art. 23(4) *ICC Rules* [*Cl Memo* ¶20], RESPONDENT argues that the nature of the New Claim (**A**), stage of the arbitration (**B**), and the "other relevant circumstance" of delay (**C**), demonstrate that the New Claim should not be authorised.

A. The nature of the New Claim is different to the Existing Claim

25. CLAIMANT argues that there are three reasons why the nature of the claims warrants the authorisation of the New Claim [*Cl Memo* §VII.2]. None of these should be accepted.

1. The common origin of the *FA* is not sufficient to justify adding the New Claim

26. CLAIMANT first contends that the *FA* as the 'common origin' of *PO 9601* and *PO A-15604* is sufficient to authorise the New Claim [*Cl Memo* ¶¶30, 35]. CLAIMANT justifies this on the basis that 'numerous contractual documents relate to one organic relationship' [*Cl Memo* ¶31;

Craig/Park/Paulsson §7.02]. This is incorrect. The existence of a framework agreement does not mean that all disputes arising from contracts concluded under such an agreement are of the same nature. Rather, framework agreements exist to establish 'the terms by which purchases may or will be made over a period of time' [*Andrecka* p. 231]. They are only specific to the extent that they need to be for the parties to make call-offs [*Andrecka* p. 233; *Case C-340/02*; *Case C-299/08*; *Semple* p. 125]. Given the parties used the *FA* to conclude several different purchase orders for L-X, S4-25899 and L-1 Sensors, it cannot be said that the *FA* is of such specificity and the nature of all these orders is so similar that this Tribunal should add the New Claim [*PO2* ¶11].

27. CLAIMANT also erroneously relies on three cases, which are all distinguishable from the present circumstances. CLAIMANT'S reliance on *ICC Case 7929* for the proposition that all claims under various arbitration agreements - a Partnership Agreement and Co-operation Agreement - should be submitted to 'one, single judicial authority' is not applicable in this case [*Cl Memo* ¶32]. While in that case it applied because the Co-operation Agreement modified the Partnership Agreement, in the present case, the different purchase orders do not alter each other.

28. CLAIMANT also cites the ICSID case of *SOABI v Republic of Senegal* [*Cl Memo* ¶33] where the Tribunal found the Parties' Establishment Agreement could extend to their Concrete Plant Agreement as they were not for 'two independent projects' but rather for 'a single project consisting of two closely related parts'. CLAIMANT also cites the *Pyramid's Case* [*Cl Memo* ¶34], where the tribunal held that it could consider both an agreement establishing a joint venture and a second agreement regarding the construction of sites because they were a 'unified contractual scheme'.

29. Neither case is relevant to the current case. Here, the two purchase orders are unrelated in purpose, and neither agreement was dependent on the other. *PO A-15604* concerns different negotiations, a different product and a different transaction to *PO 9601* [*Ex C2* cl. 1; *Ex C7* cl. 1; *Ex C8* ¶4].

2. Compatibility of arbitration agreements is not a relevant factor for Art. 23(4) *ICC Rules*

30. CLAIMANT argues that the arbitration agreements contained in *PO 9601* and *PO A-15604* are compatible despite not being identical [*Cl Memo* ¶¶36, 40]. CLAIMANT situates its analysis of compatibility in its discussion about the 'nature of the claim' under Art. 23(4) *ICC Rules* [*Cl Memo* §VII.2], however CLAIMANT only cites Art. 6(4)(ii) *ICC Rules* [*Cl Memo* ¶37]. To the extent CLAIMANT is purporting to apply compatibility as a factor relevant to authorisation under Art. 23(4), this is incorrect. Compatibility is only applicable to establishing the requirements for multi-contract arbitrations pursuant to Art. 6 *ICC Rules* and is therefore addressed below at [49]-[54].

3. The dispute resolution clause indicates an intention to hear the claims separately

31. CLAIMANT argues that the intention for both claims to be heard together in a single arbitration is clear from including dispute resolution clauses in each purchase order, despite the differences in wording [*Cl Memo* ¶¶41-43, citing *Bundesgerichtshof's Decision of 27 February 1970* and *Fiona Trust*].

32. However, once again, this is not relevant to the nature of the New Claim for the purposes of authorisation under Art. 23(4) *ICC Rules* [cf *Cl Memo* ¶¶41-43]. Any intention and agreement of the Parties for multiple claims to be heard in a single arbitration is only relevant to the inquiry under Art. 6 *ICC Rules*, which will be canvassed in [55]-[57] below.

B. Authorising the New Claim would be inappropriate given the stage of arbitration

33. CLAIMANT argues that given the particular 'stage of the arbitration' [*Cl Memo* §VII.3] this Tribunal should authorise the New Claim as it will ensure a fair trial [*Cl Memo* ¶¶45-48] (**1**), uphold the good administration of justice [*Cl Memo* ¶¶49-51] (**2**), and help this Tribunal meet its obligation to proceed in a cost and time effective manner [*Cl Memo* ¶¶52-54] (**3**). Whilst RESPONDENT agrees the Tribunal should consider these factors, CLAIMANT'S reliance on them is misplaced.

1. Hearing the New Claim separately will not compromise a fair trial

34. RESPONDENT agrees that due process and fair hearing requirements, as well as the independence and impartiality of the tribunal, are universally applicable to ICC cases [Art. 11 *ICC Rules*; Art. 12 *Danubian Arbitration Law*; *Cl Memo* ¶45, citing Art. 6 *ECHR* and *Soh Beng Tee*; *Bantekas* pp. 123-126]. However, CLAIMANT's argument that principles of party equality and fair trial guarantees require this Tribunal to join the two claims [*Cl Memo* ¶¶46-48 citing Art. 18 *UNCITRAL Model Law*, *Noble China Inc*; *Iwona*] incorrectly assumes that failing to authorise the New Claim will cause unfairness in the separate proceedings, despite there being no indication of any lack of impartiality or independence [*Bantekas* pp. 123-126]. Additionally, these principles are broad grounds for how individual arbitrations are to be conducted and challenged, not factors which support adding new claims [*Bantekas* p. 124]. In fact, given the new factual and legal matrix, there is a greater risk of an unfair trial and contravention of the principle of party equality for RESPONDENT to have to address the issues now raised by the New Claim three months into the present arbitration.

2. Hearing the claims separately will uphold good administration of justice

35. RESPONDENT agrees with CLAIMANT that Art. 22(4) *ICC Rules* requires this tribunal to act fairly and impartially and give each party an opportunity to present its case [*Cl Memo* ¶49; *Wesler/Mimnagh* pp. 42-43]. However, CLAIMANT fails to demonstrate why this broad principle requires authorising the New Claim. CLAIMANT relies on *CBS v CBP* which can be distinguished [*Cl Memo* ¶49]. Unlike that case, there is no suggested danger that the arbitrators here would refuse to accept key evidence for the New Claim in a separate arbitration [*CBS v CBP* ¶64]. Consequently, there would be no

risk of unenforceability due to lack of necessary evidence if the claims were heard separately as the relevant evidence would be available in both claims [cf *Cl Memo* ¶¶50-51].

36. Further, given that appointment of arbitrators is a fundamental and inherent aspect of party autonomy [*d'Silva* pp. 605-606], RESPONDENT is prejudiced by CLAIMANT's assumption that RESPONDENT is content with the presently appointed arbitral tribunal also hearing the New Claim [*Bantekas* p. 114]. RESPONDENT appointed its arbitrator, Mr Klement, with only the Existing Claim in mind, given his background and expertise in data privacy and cybersecurity [*PO2* ¶36; *ICC Letter to Parties on Co-Arbitrator Nominated by Respondent* p. 37]. By contrast, the New Claim is concerned with defective goods, a technical subject requiring analysis of the sensors, and RESPONDENT may well decide that it is necessary to appoint a new expert with a broader field of expertise.

3. Authorising the New Claim will not result in cost and time efficiency

37. CLAIMANT asserts that time and cost efficiency is achieved by hearing the claims together due to them arising from the same commercial relationship governed by the *FA*, and the absence of any delay in authorising the New Claim due to the early stage of the proceedings [*Cl Memo* ¶54]. While RESPONDENT agrees that there is an obligation for this Tribunal to act in a cost and time efficient manner [*Cl Memo* ¶¶52-53; Art 22(1) *ICC Rules*], both justifications are unfounded.

38. *First*, whilst it is appropriate for the Existing Claim to be heard by a three-person tribunal, the dispute in relation to *PO A-15604* concerns a smaller deal, and therefore one arbitrator tribunal is sufficient. When drafting the arbitration clause in *PO A-15604* after extensive negotiations [*PO2* ¶1; *Ex C8* ¶¶2-5], the Parties deliberately chose to allow for a lesser number of arbitrators to hear any disputes ('one or more arbitrators') compared to the arbitration clause in *PO 9601* ('three arbitrators'). *PO 9601* was an order of 1.2 million S4-25899 sensors totalling USD 38.4 million [*Ex C2* cl. 2, 5; *Request for Arbitration* ¶10; *PO2* ¶3]. The scale of this order demonstrates why the Parties wanted to guarantee three arbitrators to oversee any disputes [*Ex C2* cl. 7]. In comparison, *PO A-15604* concerned a smaller order of 200,000 sensors [*Ex C7* cl. 2], totalling USD 24 million [*Ex C7* cl. 5], of an old model soon to be replaced [*Ex C8* ¶2] for use in a small project [*Ex C8* ¶2].

39. If this Tribunal refuses to add the New Claim to the Existing Claim, the ICC Court will determine the number of arbitrators [Art. 12(2) *ICC Rules*] as the exact number of arbitrators is not specified due to the range contained in cl. 7 of *PO A-15604*. If that were the case, it is likely that the ICC Court would order the New Claim be dealt with by a sole arbitrator as it concerns a lesser amount, being $10 million, and less complex legal questions regarding the validity of the defect notice and the non-conforming goods [*Webster/Bühler* ¶12-17].

40. The New Claim being heard separately by a sole arbitrator, rather than a tribunal of three if it were authorised, will allow for time and cost efficiencies to be achieved as there is no need to deliberate

with other members of the tribunal and only one fee needs to be paid [*Ågren/Åstenius* p. 68]. CLAIMANT cannot argue that legal fees for parties would be increased [*Ågren/Åstenius* p. 72; *Ulmer* p. 226; *ICC Costs Report* p. 11] because the amount of time spent by counsel preparing submissions would be equal regardless of whether the New Claim is heard with the Existing Claim or separately.

41. *Second*, adding a new claim disrupts the purpose of the *ToR*, being to clarify the issues before this Tribunal [*Bühler* p. 182]. The purpose of Art. 23(4) is to mark the 'time when the parties can no longer present new claims, so that the arbitration can be brought to the end'. [*Webster/Bühler* ¶23-82]. It would be uncommercial for this Tribunal to authorise the New Claim, which will contravene Art. 23(4)'s purpose and increase the time and cost of the proceedings since the arbitrators will need to familiarise themselves with the new factual and legal issues [*Bühler* p. 182].

42. Even if this Tribunal finds that there is a savings in cost and time, it would not be 'noticeable'. The Parties have raised the standard in the *ToR* by requiring that the authorisation of new claims results in 'noticeable savings in cost and time' [*Rejection of Request for Authorisation* ¶4]. The Parties may do so because, although Art. 23(4) is a mandatory rule [Art. 23(4) *ICC Rules*; *Fry/Greenberg/Mazza* ¶¶3-18, 3-19], the Parties are not derogating from the requirement for authorisation of new claims brought after the *ToR* have been settled. Rather, the Parties are adding a requirement within the *ToR* that this Tribunal is to apply as part of the normal inquiries stipulated within Art. 23(4).

43. The savings in time and cost would not be *noticeable* for the two reasons above, compounded by the fact that other than the *FA*, the evidence for the claims is distinct. Exhibits C2-C6 and R1-R4 exclusively concern the Existing Claim whereas Exhibits C7-C8 and R5 pertain to the New Claim. There is insufficient similarity that would result in any, let alone *noticeable,* savings in cost and time.

C. Delay is an 'other relevant circumstance' which demonstrates that this Tribunal should not authorise the New Claim

44. Pursuant to Art. 23(4) *ICC Rules* which requires consideration of 'other relevant circumstances,' this Tribunal should not add the New Claim as CLAIMANT has delayed in instigating proceedings. Rather than being *new events* that gave rise to the New Claim [*Verbist/Schäfer* p. 13], it was CLAIMANT's poor internal management following the cyberattack that it failed to prevent and adequately manage which caused the delayed discovery of the non-payment for the defective goods [*Request for Authorisation* ¶4; *Ex C8* ¶7; *Wesler/Mimnagh* p. 41; *Fry/Greenberg/Mazza* ¶3-906; *Verbist/Schäfer* p. 134; *Kull* p. 2336]. It would be prejudicial to require RESPONDENT to substantially alter its preparation in response to an issue that CLAIMANT failed to raise for months.

IV. The arbitration agreements do not satisfy the requirements for a multi-contract arbitration in Arts. 9 and 6(4) *ICC Rules*

45. CLAIMANT has failed to consider Art. 9 *ICC Rules* which provides that claims arising out of or in connection with more than one contract may be made in a single arbitration subject to the provisions of Arts. 6(3)-6(7) and 23(4). In any case, this Tribunal should not add the New Claim because the requirements of Art. 6(4)(ii) have not been met, therefore prohibiting the claims from being heard together in a single arbitration. First, this Tribunal is empowered to consider Art. 6(4)(ii) (**A**). Second, the test in Art. 6(4)(ii) is not satisfied (**B**).

A. The Tribunal is empowered to consider Art. 6(4)(ii) *ICC Rules*

46. On its face, the language of Art. 6(4)(ii) is directed at the ICC Court if there has been a referral by the Secretary-General [Art. 6(3) *ICC Rules*]. Referrals allow for the ICC Court to dismiss claims that clearly lack jurisdiction [*Webster/Bühler* ¶6-34*; Fry/Greenberg/Mazza* ¶3-196]. However, when there are claims brought under multiple contracts like this case, this Tribunal must make a 'positive finding of jurisdiction' and 'will have to consider the criteria' in Art. 6(4)(ii) [*Webster/Bühler* ¶9-15].

47. RESPONDENT first argues that this Tribunal does not have jurisdiction to determine the New Claim for the reasons set out at [17]-[22]. However, if this Tribunal finds it does have jurisdiction, RESPONDENT further submits that neither of the requirements under Art. 6(4)(ii) are satisfied.

B. CLAIMANT has not satisfied Art. 6(4)(ii)

48. Article 6(4)(ii) *ICC Rules* is not satisfied because the arbitration agreements are incompatible (**1**) and the Parties never agreed the claims should be determined together in a single arbitration (**2**).

1. The arbitration agreements are incompatible

49. The first requirement under Art. 6(4)(ii) *ICC Rules* is that for claims pursuant to Art. 9 made under more than one arbitration agreement, the arbitration shall only proceed if the arbitration agreements are compatible. The compatibility test for consolidation under Art. 10 *ICC Rules* is applied in the same manner under Art. 6 *ICC Rules* [*Işık* ¶15; *Webster/Bühler* ¶9-15].

50. CLAIMANT's argument that the arbitration agreements contained in *PO 9601* and *PO A-15604* are compatible despite not being identical [*Cl Memo* ¶¶36, 40] should be rejected for four reasons.

51. *First*, CLAIMANT's reliance on the cases of *Ragab v Howard* and *NAACP* should not be accepted [cf *Cl Memo* ¶¶38-40]. Neither of those cases are relevant in the present case except to the extent that they confirm that arbitral clauses must be compatible in order to be heard together. *Ragab v Howard* concerned a case where the Court held that inconsistencies between six arbitration clauses meant that all six could not be heard together in one arbitration. In *NAACP*, the court held that the arbitration provisions being 'plagued with confusing terms and inconsistencies' meant that arbitration could not occur [*NAACP* p. 227].

52. *Second*, the difference in the number of arbitrators in *PO 9601* of three in contrast to 'one or more' in *PO A-15604* is incompatible. While CLAIMANT may argue that these two clauses can be reconciled by appointing three arbitrators, it would be contrary to the principle of party autonomy to do so because it would require, in effect, this Tribunal to impermissibly alter the wording of the arbitration clause in *PO A-15604* to mean "only three" [*Greenberg/Feris* p. 169].
53. *Third*, the rules for emergency arbitration which are present in the arbitration agreement in *PO 9601* have been excluded in *PO A-15604*. This creates a fundamental incompatibility between the arbitration clauses because the possibility of emergency arbitration as a feature that improves quick access to justice in a private setting and allows for confidentiality and the appointment of decision-makers with special expertise is not possible for *PO A-15604* [*Bjorkquist/Morgan* pp. 1-4].
54. *Fourth*, the language requirements between the purchase orders varies with *PO 9601* specifying English but *PO A-15604* being silent as to the language is incompatible as reading down the clauses to only allow English precludes the possibility of non-English speaking arbitrators.

2. The Parties have not agreed to hear the New and Existing Claim together

55. Contrary to CLAIMANT's submissions, the mere fact that the Parties consented to the purchase orders is insufficient to fulfil this requirement in 6(4)(ii) that the Parties agreed that separate claims pursuant to Art. 9 can be determined together in a single arbitration [cf *Cl Memo* ¶29]. The case cited by CLAIMANT of *United Steelworkers* reaffirms the principle that consent is unlikely to be inferred [*United Steelworkers* pp. 636-637].
56. Rather, the relevant test to apply is whether the agreements relate to a single transaction/project [*Whitesell/Silva Romero* p. 15; *Pryles/Waincymer* pp. 446, 447]. That clearly fails in this case as, apart from both purchase orders arising from the *FA*, they concern unrelated to different purchase orders for different sensors that were not part of a single business transaction but were made at different points in time [*Ex C2* cl. 1; cf *Ex C7* cl, 1; *Pryles/Waincymer* pp. 446, 447]. There is no relationship between these orders that indicates they are part of a single process indicating these are therefore separate and are two distinct transactions.
57. Therefore, Art. 6(4)(ii) is not satisfied. The claims cannot and should not be heard together.

ISSUE B: THIS TRIBUNAL CANNOT AND SHOULD NOT CONSOLIDATE THE PROCEEDINGS

58. Furthermore, this Tribunal cannot consolidate the proceedings as consolidation cannot occur if the terms of reference have been signed, which is the case for the Existing Claim [*Bühler/Jarvin* p. 1186; *Speidel* p. 29; *Pair/Frankenstein* p. 1072; *Request for Authorisation* ¶4; *PO1* ¶1]. Hearing the New Claim will thus only be possible through authorisation per Art. 23(4) *ICC Rules* which, in

accordance with the analysis above in **Issue A**, cannot and should not occur [*Pair/Frankenstein* p. 1072]. This is a sufficient basis to conclude that this Tribunal cannot and should not consolidate the New Claim to the pending arbitration. However, if this Tribunal concludes that consolidation can occur after the signing of the *ToR*, this cannot and should not occur for the reasons below.

59. CLAIMANT contends that Art. 41(5) *FA* is evidence of the Parties' agreement to extend the ICC Court's existing power to consolidate arbitral proceedings under Art. 10 *ICC Rules* to this Tribunal [*Cl Memo* ¶56]. However, Art. 41(5) *FA* is invalid as the power to consolidate contained in Art. 10 *ICC Rules* is a mandatory rule which is exclusive to the ICC Court and cannot be vested in this Tribunal (**I**). Further, irrespective of which arbitration agreements are applicable, the requirements in Art. 41(5) *FA* and Art. 10 *ICC Rules* are not satisfied (**II**). Finally, this Tribunal should not consolidate the arbitral proceedings for discretionary reasons (**III**).

I. CLAIMANT cannot vest the power to consolidate in this Tribunal as Art. 10 *ICC Rules* is a mandatory rule that is exclusive to the ICC Court

60. Contrary to CLAIMANT's submissions, Art. 41(5) *FA* does not grant this Tribunal the power to consolidate as it invalidly attempts to alter Art. 10 *ICC Rules* [*Rejection of Request for Authorisation* ¶6; cf. *Cl Memo* ¶¶55-76]. Art. 10 *ICC Rules* states that '*The Court* may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration…' (emphasis added). This means that Art. 10 exclusively vests the power to consolidate in the ICC Court [*Webster/Bühler* ¶10-2; p. 194; *Born* §1.01(A)(4); *Grierson/van Hooft* p. 122].

61. The Court's exclusive power in Art. 10 cannot be altered as it is a mandatory provision [*Smit* pp. 846-847]. Art. 10 is mandatory on any of the following grounds: it is an essential administrative function of the ICC Court (**A**); it protects the enforceability of the award (**B**); and it upholds the integrity of the arbitral process (**C**). The consequence of attempting to alter a mandatory provision is that the ICC will refuse to administer to proceedings [*Fry/Greenberg/Mazza* ¶3-17].

62. It is irrelevant that RESPONDENT previously insisted on including the power to consolidate in Art. 41(5) *FA* [*PO2* ¶19]. While CLAIMANT may seek to rely on this as an indicator of the Tribunal's power to consolidate, an important function of mandatory provisions is safeguarding the Parties from themselves in agreeing to things that they cannot actually do [*Smit* pp. 846-847].

A. The power to consolidate contained in Art. 10 *ICC Rules* is an essential administrative function of the ICC Court

63. Art. 10 *ICC Rules* is a mandatory rule because consolidation is an 'essential administrative function' of the ICC Court [*Smit* p. 846]. When Parties agree to submit to ICC arbitration, they agree to the administrative oversight of the ICC Court. Therefore, while the Parties are free to determine their

own arbitral procedure [*Fortese/Hemmi* p. 113], they cannot modify the *ICC Rules* to take away these essential Court oversight powers [*Fry/Greenberg/Mazza* ¶3-17].

64. A core function of the ICC Court is to administer disputes, and it possesses all powers necessary to do so [Art. 1(2) *ICC Rules*; *Appendix I* Art. 1(1) *ICC Rules*]. Adopting the case-by-case approach in determining whether a rule is mandatory [*Smit* p. 848], it is essential that the Court exclusively carries out this function [*Fry/Greenberg/Mazza* ¶3-18] as only it has the necessary resources, specialised staff, and experience to determine issues such as consolidation [*Born* §§1.04(C)(3), 1.04(C)(6)(a)]. As an institution, there is a clear and efficient division in the ICC between the Court which deals with administrative issues [*Verbist/Schäfer* p. 61; *Giakoumelos* pp. 60-62; *Pair* p. 117] and the Tribunal who deals with the substantive merits of the claims. This would be compromised if the Tribunal were to exercise a consolidation power, which is purely an administrative matter.

65. By contrast, the ICC Court's expertise ensures that the proper procedure is followed, minimising any risks of a subsequent challenge in a domestic court [*Smit 2014* p. 67]. Further, the Court can render a single, *binding* decision for all potentially linked cases [*Giakoumelos* p. 60-62; *Pair* p. 117; *Verbist/Schäfer* p. 61]. Therefore, keeping the power to consolidate exclusive to the Court ensures that any decisions or obligations remain consistent.

66. This aligns with the multitude of arbitral institutions which have determined that the administering institution shall decide on the issue of consolidation as opposed to arbitral tribunals [*Giakoumelos* p. 60-62]. Such institutions contain comparative consolidation clauses to Art. 10 *ICC Rules* which vest the institutional Court/Board as the sole repository of the power to consolidate, such as Art. 7.1 *Swiss Rules*, Art. 15(1) *SCC Rules*, Art. 28 *HKIAC Rules* and Art. 16 *ACICA Rules*.

67. Whilst CLAIMANT may argue that RESPONDENT pushed for the inclusion of Art. 41(5) *FA* to allow this Tribunal to consolidate, RESPONDENT only did so after having to commence three separate proceedings relating to the *same issue* where it received inconsistent awards [*PO2* ¶19]. What RESPONDENT truly desires is therefore consistent, enforceable awards, which is better served by having the ICC Court determine consolidation.

B. Adherence to Art. 10 *ICC Rules* protects the enforceability of the award

68. Further, Art. 10 *ICC Rules* is a mandatory rule in ICC arbitration because maintaining the power to consolidate in the ICC Court is necessary for safeguarding the enforceability of awards [*Smit* p. 849]. ICC awards have the support of the ICC institution, which means courts and parties are more likely to adhere to and enforce them. Whilst the non-derogability of Art. 10 may infringe on party autonomy, it protects the administration of the award by the ICC.

69. CLAIMANT and RESPONDENT have clearly chosen the ICC to be their arbitral institution and to administer their proceedings under the *ICC Rules* [Art. 41 *FA*; *Ex C2* cl. 7; *Ex C7* cl. 7]. When a

request for arbitration is provided to an institution, a 'service contract' is created between the institution and the parties for the institution to administer the arbitration in line with its rules [*Derains/Schwartz* p. 15; *Berger* p. 340; *Smit* p. 846]. Given the overwhelming consensus that the power to consolidate in Art. 10 *ICC Rules* is exclusively vested in the ICC Court [*Webster/Bühler* ¶¶10-13, 10-14; *Grierson/van Hooft* p. 122], if this Tribunal were to find it has such a power, it would run the risk of the ICC Court concluding that there has been a breach of this 'service agreement'.

70. This is likely to result in the ICC refusing to administer the present proceedings because vesting the power to consolidate in the Tribunal reduces the essential procedural oversight of the ICC Court as contained in the *ICC Rules* [*Derains/Schwartz* pp. 15, 15 fn. 21, 17, 18, 388; *Smit* p. 846; *Fry/Greenberg/Mazza* ¶3-17]. The ICC can refuse to administer cases 'where the Parties have altered the Rules' [*Derains/Schwartz* p. 19; *Smit* p. 846; *Berger* p. 476] or contravened the 'spirit' of the rules because institutions have a 'legitimate expectation' that parties will arbitrate under its rules without derogation [*Berger* pp. 484, 485].

71. If the ICC Court refuses to administer these proceedings, it will operate as an ad hoc arbitration as opposed to an institutional arbitration [*Berger* pp. 351-352]. This is undesirable as awards that are administered and scrutinised by the ICC Court have the support of the ICC institution itself, which assists with voluntary compliance and enforcement [*Born* §1.04(C)(3); *Berger* pp. 342-345].

C. Adherence to Art. 10 *ICC Rules* is fundamental to the integrity of the arbitral process

72. Finally, Art. 10 *ICC Rules* is mandatory as it is upholds the integrity of arbitral proceedings and maintains faith in the ICC as an institution [*Smit* p. 848]. The integrity of the ICC institution is demonstrated through various provisions of the *ICC Rules*, including the independence of arbitrators [Arts. 11(2)-(3) *ICC Rules*], appointment of arbitrators [Art. 13(2) *ICC Rules*] and limitation of liability for the arbitrators [Art. 41 *ICC Rules*]. A mandatory-rule interpretation of Art. 10 further promotes this integrity by preventing the Parties from subverting a core ICC Court oversight power in providing the Tribunal with the power to consolidate. Permitting such subversions would undermine the specialised function of the Court and Tribunal on administrative and substantive issues respectively, thereby jeopardising the integrity of ICC proceedings.

II. In any case, the requirements in Art. 10 *ICC Rules* and Art. 41(5) *FA* are not satisfied

73. CLAIMANT discusses the requirements for consolidation in both Art. 10 *ICC Rules* and Art. 41(5) *FA* [*Cl Memo* ¶¶56-66, 72-73]. Even if this Tribunal finds it has the power to consolidate, CLAIMANT does not satisfy the conditions under either Art. 10 *ICC Rules* (**A**) or Art. 41(5) *FA* (**B**).

A. No category under Art. 10 *ICC Rules* is satisfied

74. Contrary to CLAIMANT's submissions [*Cl Memo* §VIII], neither Art. 10(a) (**1**), Art. 10(b) (**2**) nor Art. 10(c) (**3**) of the *ICC Rules* are satisfied.

1. The Parties have not agreed to consolidate the present proceedings per Art. 10(a)

75. Article 10(a) *ICC Rules* permits consolidation where the parties have agreed. However, this agreement must occur '*after* the dispute has arisen' [*Webster/Bühler* ¶10-7]. CLAIMANT's reliance on Art. 41(5) *FA* as evidence of this agreement is therefore incorrect [*Cl Memo* ¶55-56 incorrectly citing Art. 10(c)]. Art. 41(5) *FA* only concerns the general power to consolidate, whereas Art. 10(a) *ICC Rules* requires that the parties agreed to consolidate the *present* proceedings [*Webster/Bühler* ¶10-7]. Consequently, Article 10(a) is not made out as the Parties' agreement was entered into prior to the possibility of consolidation between the two *present* claims being raised [*FA*; *Request for Authorisation*] and does not constitute agreement in the current circumstances [cf *Cl Memo* ¶56].

76. Additionally, consolidating without party agreement increases the risk of unenforceability [*Craig/Park/Paulsson* §11.06(ii); *Sofidif* pp. 336-337]. Therefore, this Tribunal cannot 'amalgamate' two arbitration clauses and infer the consent of the Parties to consolidate without the Parties expressing their explicit intent to do so in relation to the New and Existing claims [*ibid*].

2. The Existing and New Claims have different arbitration agreements per Art. 10(b)

77. Article 10(b) *ICC Rules* is not satisfied as not 'all of the claims in the arbitrations are made under the same arbitration agreement or agreements.' Contrary to CLAIMANT's argument that the New Claim and Existing Claim arise under the same arbitration agreement [*Cl Memo* ¶¶72-73], the relevant arbitration agreement for the Existing Claim is contained in *PO 9601* [*ICC Case Information* p. 2]. This arbitration clause differs from the arbitration agreement contained in *PO A-15604* under which the New Claim arises.

3. The disputes arise under different legal relationships and the arbitration agreements are incompatible per Art. 10(c)

78. The requirement in Art. 10(c) *ICC Rules* that the Court may order consolidation if the 'arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the arbitration agreements are compatible' is not satisfied. While it is undisputed that the Existing Claim and New Claim are between the same parties, the disputes concern neither the same legal relationship nor are the arbitration agreements compatible.

79. *First*, the disputes do not arise in relation to the same legal relationship merely because the Parties are overarchingly governed by the *FA* [cf *Cl Memo* ¶66]. In the context of Art. 10(c), 'same legal relationship' means 'same economic transaction' [*Whitesell/Silva Romero* p. 15; *Greenberg/Ricardo Ferris/et al.* pp. 167-168; *Pair/Frankenstein* p. 1075; *Derains/Schwartz* p. 61]. However, the individual purchase orders are separate economic transactions. They arise from separate contracts, concern the sale of different sensors and were concluded at different times [*Whitesell/Silva Romero* p. 15; *Greenberg/Ricardo Ferris/et al.* pp. 167-168].

80. Furthermore, CLAIMANT erroneously relies on *Parker v Dimension Service Corporation* [*Cl Memo* ¶65] for the proposition that disputes arising from the same legal relationship can be consolidated. This case is inapplicable for three reasons. First, *Parker* concerned a different legal question relating to multi-party consolidation, not multi-contract consolidation. Second, in that case, the separate arbitration agreements under those disputes were identical, whereas here the arbitration agreements in *PO 9601* and *PO A-15604* are not identical. Finally, *Parker* was a domestic case in Ohio, neither applying the *ICC Rules* nor the *CISG*.

81. *Second*, contrary to CLAIMANT's submissions, the arbitration agreements are not compatible [*Cl Memo* ¶¶74-76]. As the compatibility test for Arts. 6 and 10 *ICC Rules* are substantively identical [*Pair/Frankenstein* pp. 1075-1077], RESPONDENT relies on the same analysis in [49]-[54].

B. The requirements necessary for consolidation under Art. 41(5) *FA* are not met

82. Further, contrary to CLAIMANT's submissions, the requirements for 'common questions of law or fact' and the potential for 'conflicting awards or obligations' under Art. 41(5) *FA* do not exist on the facts [*Cl Memo* ¶¶67-71].

83. *First*, there are no common questions of law or fact between the New Claim and the Existing Claim. The causes of non-payment between the two claims are distinct. Non-payment for the Existing Claim relates to the cyberattack whilst non-payment for the New Claim relates to defective goods [*Request for Arbitration* ¶¶17-19, 25; *Rejection of Request for Authorisation* ¶2; cf *Cl Memo* ¶69-71]. Further, the merits of the defective goods are not being considered in the present proceedings so there are no overlapping facts [*PO1* ¶3].

84. CLAIMANT's reliance on *Compania* to argue that arbitration agreements are to be interpreted liberally and that similar questions of law and fact give a tribunal the power to consolidate without party consent is incorrect [*Cl Memo* ¶68]. *Compania* did not concern consolidation of arbitration proceedings. Rather, it turned on the issue of appointing an additional arbitrator which was provided for under the relevant arbitration clause. In any case, the court denied the plaintiff's request for declaratory and injunctive relief.

85. *Second*, there is no risk of any conflicting awards or obligations. The two claims concern different issues and therefore any award would be separate and not overlap. RESPONDENT's previous experience with conflicting awards was in relation to three different proceedings which concerned the same defect [*PO2* ¶19]. This is not the case here as the New Claim concerns defects in the sensors whereas the Existing Claim concerns CLAIMANT's management of a cyberattack.

III. This Tribunal should not consolidate for discretionary reasons

86. Neither precondition to the power to consolidate is established. Namely, the *Tribunal* does not have the power to consolidate and the requirements under Art. 10 *ICC Rules* or Art. 41(5) *FA* are

not satisfied. Even if this Tribunal finds to the contrary, as a further alternative, this Tribunal should not exercise the discretion to consolidate the arbitral proceedings for four reasons: consolidation would violate party autonomy (**A**); RESPONDENT would be prejudiced by CLAIMANT's delay (**B**); consolidation does not create savings in time and cost (**C**); and a refusal to consolidate will not negatively impact the enforceability of the award (**D**).

A. Consolidation would violate party autonomy

87. In practice, if one party opposes consolidation, the ICC Court will be reluctant to permit it [*Craig/Park/Paulsson* §11.06(iii)]. Given the practice of the ICC Court, as well as previous ICC awards being rendered unenforceable due to ordering consolidation in the absence of consent [*Ibid*; *Sofidif* p. 336], this Tribunal should give effect to party autonomy and adopt the same reticence towards consolidation in the face of RESPONDENT's opposition.

88. While CLAIMANT may argue that RESPONDENT requested and signed a general consolidation provision [Art. 41(5) *FA*; *PO2* ¶19], that does not equate to RESPONDENT agreeing to consolidate the two different claims in the present proceedings for the same reasons that this does not satisfy agreement for the purposes of Art. 10(a) *ICC Rules* as set out at [75]-[76] above. Rather, it is more appropriate for this Tribunal to give effect to the party autonomy exercised in establishing the 'agreed-upon framework' of issues in the *ToR,* which limits the proceedings to the dispute arising under *PO 9601* [*Pair/Frankenstein* p. 1072; *Craig/Park/Paulsson* §11.06].

B. RESPONDENT would be prejudiced by CLAIMANT's delay in bringing the New Claim

89. Consolidation of the New Claim with the Existing Claim would prejudice RESPONDENT given the delay in CLAIMANT bringing the New Claim. A key consideration when determining whether to consolidate is the *reasons* for the delay in requesting consolidation [*Pair/Frankenstein* pp. 1071-1072]. RESPONDENT emailed CLAIMANT at the correct email address notifying it of the defective sensors on 4 April 2022 [*Ex R5*; *PO2* ¶28]. However, CLAIMANT only commenced the New Claim on 2 October 2023 [*Request for Authorisation*].

90. During this time, RESPONDENT was under the impression that CLAIMANT had accepted that there would be no further payment [*Rejection of Request for Authorisation* ¶3]. RESPONDENT has already now resold most of the affected sensors [*Rejection of Request for Authorisation* ¶3]. If RESPONDENT were now required to provide the sensors back to CLAIMANT or pay damages, that would unfairly punish RESPONDENT for taking mitigatory steps in line with Art. 77 *CISG* [*Schwenzer* Art. 77 ¶8].

C. Consolidation does not create savings in time and cost

91. CLAIMANT has not addressed that there are any savings in time and cost by consolidating. By contrast, hearing the claims separately, rather than consolidating them, would save time and cost.

This is because as set out at [38]-[40], the Parties have allowed for a single arbitrator to hear the New Claim, which is appropriate as it is factually and legally distinct.

D. Refusal to consolidate will not negatively impact the enforceability of the award

92. The language of Art. 41(5) *FA* is permissive in that it only provides that the 'Arbitral Tribunal of the first arbitration proceedings *has the power* to consolidate' (emphasis added) as opposed to mandating the consolidation of proceedings if certain conditions are met. This discretionary nature of the power means that any award rendered is unlikely to be unenforceable under the *New York Convention* on the basis that the Parties' agreement made provision for consolidation, but this did not occur [*Born* §26.04 (C)(5)(b)(vi) fn 1107]. Hence, this Tribunal should give minimal consideration to Art. 41(5) *FA*.

ISSUE C: RESPONDENT CAN RELY ON ARTS. 80 AND 77 *CISG* TO DEFEND ITSELF AGAINST THE CLAIM FOR PAYMENT

93. CLAIMANT further argues it is entitled to payment for *PO 9601* as it has fulfilled its obligation to deliver the sensors and RESPONDENT is yet to pay [*Cl Memo* ¶¶95, 97, 107]. RESPONDENT accepts that CLAIMANT has delivered the sensors and notes CLAIMANT has acknowledged that a payment has been made by RESPONDENT into a different account [*Cl Memo* ¶99]. The dispute between CLAIMANT and RESPONDENT is therefore whether this payment constitutes non-performance, obligating RESPONDENT to further pay CLAIMANT [*Cl Memo* ¶108].

94. While RESPONDENT acknowledges CLAIMANT's assertion of its further entitlement to payment with respect to *PO A-15604* [*Cl Memo* ¶¶110-127], this Tribunal has explicitly excluded the merits of the additional payment claim for the defective sensors from this stage of the arbitration [*PO1* ¶3]. As such, RESPONDENT does not respond to the merits of the New Claim in these submissions.

95. This Tribunal should refuse CLAIMANT's request for payment of the amount under *PO 9601* for two reasons. First, CLAIMANT caused RESPONDENT to pay into the different account within the meaning of Art. 80 *CISG* and therefore cannot rely on any failure to perform by RESPONDENT (**I**). Second, CLAIMANT failed to mitigate its loss as required by Art. 77 *CISG* (**II**).

I. CLAIMANT caused RESPONDENT's non-performance per Art. 80 *CISG*

96. If this Tribunal finds that RESPONDENT did not perform, RESPONDENT can invoke Art. 80 to defend itself against the claim for payment. Contrary to CLAIMANT's assertion that it did not *cause* RESPONDENT's failure to pay [*Cl Memo* ¶85], it was CLAIMANT's negligent omissions in its handling of the cyberattack that resulted in RESPONDENT paying to the different bank account.

97. Thus, pursuant to Art. 80 *CISG*, CLAIMANT indirectly caused RESPONDENT's non-performance due to its improper management of the risk of non-payment resulting from the cyberattack, which

fell within its 'sphere of control' (**A**). Further, CLAIMANT cannot assert that RESPONDENT caused non-performance by contravening the *FA* and paying into the different account since the Parties have previously not enforced Art. 40 *FA* (**B**). If this Tribunal finds that CLAIMANT only partially caused RESPONDENT's non-payment, CLAIMANT's actions and omissions nevertheless warrant apportionment of RESPONDENT's liability in accordance with Art. 80 *CISG* (**C**).

A. CLAIMANT's actions created a risk within its 'sphere of control' which caused RESPONDENT's non-payment

98. Article 80 *CISG* states that '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' (emphasis added). This embodies the principle of good faith as it prevents a party that caused another party's non-performance from claiming a remedy [*Neumann (2012)* p. 109, 116-117, 119; *Huber* pp. 265, 268]. RESPONDENT can invoke Art. 80 against CLAIMANT as indirect causation is sufficient and is tested by reference to CLAIMANT's 'sphere of control' (**1**). Moreover, CLAIMANT's sphere of control includes all internal operations (**2**); and CLAIMANT's sphere of control encompassed the risk of RESPONDENT paying into the wrong bank account (**3**).

1. Indirect causation is sufficient

99. To invoke Art. 80, there must be a degree of causation between CLAIMANT's acts or omissions and any failed performance by RESPONDENT [*Schwenzer* Art. 80 ¶12; *Neumann (2012)* p. 79; *Sachäfer* p. 249; *Atamer* Art. 80 ¶8]. CLAIMANT's acts or omissions are not required to have 'directly prevented the promisor's performance' [*Neumann (2012)* pp. 79, 158, 165; *Schwenzer* Art. 80 ¶4]. Similarly, the threshold for causation is 'low' as performance of the obligation need not be made impossible [*Neumann (2012)* p. 159]. For example, in the *Propane Case*, a buyer did not open a letter of credit to purchase the seller's goods because the seller failed to name a loading place [*Propane Case* ¶9]. Although it was still *possible* for the buyer to open a letter of credit, the Austrian Supreme Court found that on an indirect causation analysis, the seller's failure to name the place was what *caused* the non-performance pursuant to Art. 80 [*Propane Case* ¶40; *Neumann (2012)* p. 165].

100. Indirect causation is satisfied where a risk created by the promisee's conduct within their 'sphere of control' materialises [*Schwenzer* Art. 80 ¶4; *Neumann (2012)* p. 158; *Atamer* Art. 80 ¶¶4, 8]. Here, there is a causal connection between CLAIMANT's failure to warn RESPONDENT of the cyberattack - which created the risk that it would be vulnerable to the scammers - and RESPONDENT's payment into the different bank account [*Schwenzer* Art. 80 ¶12; *Neumann (2012*) pp. 91, 175-176].

101. CLAIMANT has not proposed a test for establishing causation, apart from claiming that the 'sole reason' for non-performance is RESPONDENT's unwillingness to pay [*Cl Memo* ¶85]. This is incorrect as RESPONDENT has already sent the money owed, evidencing its willingness to do so.

Further, CLAIMANT's analogy to *Clout-Case 166* strengthens RESPONDENT's position rather than supporting its own. In that case, the Claimant sought payment for previously delivered goods which the Respondent refused to pay. However, since the Claimant had caused this refusal to pay by failing to supply new goods, the tribunal held that failure to be the cause of non-performance. Similarly in this matter, RESPONDENT's non-performance was caused by CLAIMANT, as opposed to its mere refusal to pay.

2. CLAIMANT's sphere of control encompasses all its internal operations

102. It is a general principle under the *CISG* that the 'sphere of control' and therefore liability of an obligor under a contract includes the acts and omissions of its employees [*Brunner* pp. 185-186]. For example, CLAIMANT's sphere of control incorporates mistakes by its employees, such as Ms Audi, as this is not an 'external impediment over which the obligor has no influence' or an issue that falls outside an employer's 'typical' sphere of control [*Brunner* pp. 167-168]. This remains applicable even in the event that an employee fails to adhere to instructions provided by a superior, such as Ms Audi's failure to update her password for three years and use of her computer for private matters [*Brunner* p. 168]. Further, the obligator is responsible for sourcing replacements where employees are ill, on holiday, or their position becomes vacant [*Brunner* p. 168].

103. CLAIMANT's sphere of control also extends to the actions and omissions of third parties that it engages [*Brunner* p. 185]. In this respect, CLAIMANT cannot shift blame onto CyberSec for any mishandling or mischaracterisation of the severity of the situation in the wake of the cyberattack [*Ex C6* ¶6]. CLAIMANT obtained CyberSec's services to assist in ensuring that its accounting and customer management systems could continue operating in order to support existing transactions, and is therefore also responsible for its conduct.

3. The risk of RESPONDENT paying into the different bank account falls within CLAIMANT's sphere of control

104. As CLAIMANT's sphere of control extends to all internal matters, CLAIMANT had the ability to take precautions to mitigate the risk of RESPONDENT paying into the different bank account. As it was unaware of the occurrence of the cyberattack, this risk could therefore not be overcome by RESPONDENT itself in the absence of action by CLAIMANT [*Neumann (2012)* pp. 85, 88-89, 159-160; *Neumann (2009)* pp. 6-7; *Schwenzer/Manner* p. 475]. Conducting an 'evaluative contemplation of the causal link' [*Schäfer* p. 249], the following three factors, viewed either individually or cumulatively, sufficiently evidence CLAIMANT's control over the risk of non-payment.

105. *First*, CLAIMANT initially discovered the cyberattack on 23 January 2022, however failed to inform RESPONDENT [*Ex C6* ¶5]. Mr Royce had no knowledge of CLAIMANT's cyberattack, including when the email was received on 28 March 2022 [*Answer to Request for Arbitration* ¶6], until early July

when he read the Automotive Weekly article, by which time the payments had been made to the different bank account [*PO2* ¶¶14, 17]. It was within CLAIMANT's sphere of control to simply inform RESPONDENT that the cyberattack had occurred. If RESPONDENT had been aware of the cyberattack, Mr Toyoda would have personally called Ms Durant to confirm the contents of the email [*Ex R4* ¶6] [cf *Cl Memo* ¶92]. By failing to inform RESPONDENT, the risk of unknowing interference materialised in the form of RESPONDENT following the instructions in the scam email.

106. *Second*, it was CLAIMANT's employee, Ms Audi, who did not comply with internal cybersecurity guidelines, allowing CLAIMANT's IT systems to be compromised [*Answer to Request for Arbitration* ¶9; *PO2* ¶5]. Furthermore, staffing and IT issues meant that CLAIMANT's sales department was not well monitored during the period following the cyberattack [*PO2* ¶¶5-6, 13, 26].

107. Ms Audi, RESPONDENT's contact within CLAIMANT's company [*Request for Arbitration* ¶15; *Ex C8* ¶2], who was responsible for verifying payments made under *PO 9601* [*PO2* ¶13], was absent from 25 March 2022 [*Request for Arbitration* ¶15; *PO2* ¶5]. Thus, due to her absence and CLAIMANT's failure to organise a proper replacement, non-payment into the bank accounts specified in Art. 7 *FA* went undetected. Ms Audi's employment was informally terminated on 23 May 2022, but it was only officially effective from 1 July 2022 [*PO2* ¶5], falsely representing to RESPONDENT during this period that she was present and monitoring the accounts. CLAIMANT solely focused on delivering existing orders and accepting new orders [*PO2* ¶7]. This was an internal issue within its control that allowed the risk of interference with payment to materialise and go undetected.

108. *Third*, when CLAIMANT's accounting systems went down, an internal order requiring employees to inform its respective counterparts was issued. However, as Ms Audi was on leave, RESPONDENT was never contacted [*PO2* ¶26]. Further, an additional email was supposed to be sent in mid-June to counterparts foreshadowing Ms Audi's departure. This email was only sent on 1 July 2022 due to the IT issues [*PO2* ¶6]. This lack of communication, prior to both instalments being due under *PO 9601*, allowed for the risk that RESPONDENT would become victim to the scam email. This was a measure within CLAIMANT's control as it could have tasked another employee with informing RESPONDENT or used an alternative means of communication other than email.

109. Ultimately, this case is analogous to *Clout-Case 1638*, where the seller made a claim against the buyer for its failure to accept delivery of the goods and pay the remaining purchase price. The Russian International Court of Arbitration held, with respect to Art. 80 *CISG*, that since the seller had not provided the buyer with notice that the goods were at their disposal, following their usual practice, they could not rely on the buyer's non-performance as it resulted from their failure to inform [*Clout Abstracts 176* p. 10]. Similarly, CLAIMANT's failure to disclosure the cyberattack to RESPONDENT, manage its internal staffing and IT issues, and ensure prompt communication,

which were all matters within its sphere of control, resulted in the risk that RESPONDENT would pay into the different account being realised.

B. CLAIMANT cannot rely on Art. 40 *FA* to assert that RESPONDENT caused its own non-performance

110. CLAIMANT argues that RESPONDENT is responsible for its own non-performance given the presence of Art. 40 *FA* which requires amendments to the *FA* to be 'in writing and signed by the Parties' [*Cl Memo* ¶¶88, 91, 100, 108]. However, CLAIMANT fails to recognise the Parties' prior inconsistent conduct which demonstrates a lack of strict conformity with Art. 40 *FA*. Therefore, even if the alteration of Art. 7 *FA* to pay into the different bank account did not comply with Art. 40 *FA*, the principle of *venire contra proprium factum* ('the prohibition of inconsistent conduct') under Art. 29(2) *CISG* [*Neumann 2012* p. 115; *Rolled Metal Sheets Case*] precludes CLAIMANT from asserting that RESPONDENT caused its own non-performance.

111. Despite the presence of Art. 40 *FA*, Art. 29(2) *CISG* states that 'a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct'. This prevents parties from disregarding past conduct in the event that it no longer suits their interests [*Neumann* 2012 p. 113-5; *Rolled Metal Sheets Case*]. Article 29(2) embodies the principle of good faith, and reflects notions of estoppel, remediation, *missbrauchseinwand* and waiver [*Schroeter* Art. 29 ¶68; *Björklund* Art. 29 ¶19; *Neumann (2012)* p. 113; *Graves Import* p. 22].

112. There have been numerous instances where CLAIMANT has waived the need for compliance with the writing and signature requirements of Art. 40 when altering *individual provisions* of the *FA*. RESPONDENT has relied on this 'pragmatic approach' [*Ex R4* ¶6], as evidenced by the following three deviations, enlivening the prohibition of inconsistent conduct.

113. *First*, the Parties deviated from Art. 6 *FA* by orally agreeing to annual, as opposed to semi-annual, price fixing meetings [*Request for Arbitration* ¶11]. Whilst this oral agreement would have been reflected in the circulated minutes, those minutes were only prepared by RESPONDENT, with CLAIMANT merely having the option to object [*PO2* ¶8]. This alteration of the *FA* was therefore only summarised in writing, and in any event the signature of CLAIMANT is absent.

114. *Second*, as acknowledged by CLAIMANT [*Cl Memo* ¶114], the Parties deviated from Arts. 1 and 3(1) *FA* by placing numerous purchase orders for sensors other than the S4-25899 model and in quantities exceeding the maximum limits [*Ex C6* ¶3; *Request for Arbitration* ¶12]. Whilst a confirmation letter was sent in response to the three orders for non-S4-25899 sensors, the eight larger orders were simply performed [*PO2* ¶11]. Again, at least in relation to the larger orders, these deviations from the *FA* were not 'signed by the Parties' as specified in Art. 40 *FA*.

115. *Third*, the Parties had an oral telephone conversation discussing the defective nature of the L-1 LIDAR sensors where it was agreed that an email would be sufficient instead of the formal Notice of Defect form specified in Art. 15 *FA* [*Ex C8* ¶8; *Rejection of Request for Authorisation* ¶2; *PO2* ¶27]. As the email only discussed the defective nature of the sensors [*Ex R5*], the agreement that an email would be sufficient was reached over the telephone [*cf Cl Memo* ¶118]. Consequently, this oral agreement satisfies neither the writing nor the signature requirements of Art. 40 *FA*.

116. CLAIMANT argues that the Parties should have at least requested a signed letter in the present case as was done in a previous transaction involving SensorDanube [*Cl Memo* ¶102; *PO2* ¶12]. However, that transaction may be distinguished. The current alteration and each of the previous alterations described above concerned an amendment to only *one* article of the *FA*. By contrast, the SensorDanube transaction contained four deviations from the *FA* such that it was a substantially different agreement, which justified the appropriateness for written signed consent in that case. Those deviations were: (i) splitting the payments into different accounts, with 80% going to SensorDanube [Art. 7 *FA*; *PO2* ¶12]; (ii) agreeing to not count the units in the order towards the maximum delivery obligation, which would otherwise be exceeded [Art. 3 *FA*; *PO2* ¶12]; and (iii) altering the identity of the Parties as SensorDanube did not originally sign the *FA* and is now manufacturing and delivering the sensors as well as receiving payment [Art. 1 *FA*; *PO2* ¶12].

117. Notwithstanding the lack of further measures such as a signed company letter on this occasion [cf *Cl Memo* ¶102], or any lack of compliance with Art. 40 *FA* [cf *Cl Memo* ¶100], CLAIMANT's statements and inaction induced RESPONDENT into believing this deviation from the specified bank accounts in Art. 7 *FA* was permitted [*Schroeter* Art. 29 ¶¶69-70]. All such instances of prior reliance are reasonable [*Schroeter* Art. 29 ¶75; *Björklund* Art. 29 ¶22], and therefore CLAIMANT is precluded by the prohibition of inconsistent conduct in Art. 29(2) *CISG* from asserting that RESPONDENT caused its non-performance by any failed adherence to Art. 40 *FA*.

C. If CLAIMANT only partially caused RESPONDENT's failure to pay, it should nevertheless be apportioned with liability under Art. 80 *CISG*

118. RESPONDENT's primary position is that CLAIMANT wholly caused RESPONDENT's non-performance. However, if this Tribunal finds that CLAIMANT's contribution to any non-performance is only partial and therefore both CLAIMANT and RESPONDENT have varying degrees of fault, Art. 80 *CISG* remains applicable. This is because the language of Art. 80 allows for apportionment on a mixed causation basis (**1**), and RESPONDENT's reduction in liability under this approach should be substantial (**2**).

1. Art. 80 *CISG* allows for apportionment

119. Article 80 *CISG* applies even when both parties are responsible for the non-performance [*Schwenzer* Art. 80 ¶3; *Atamer* Art. 80 ¶10; *Neumann (2009)* pp. 2, 8, 10; *Neumann* (2012) pp. 79, 95]. Specifically, the words 'to the *extent* that' in Art. 80 clearly contemplate that apportionment is possible, which is consistent with the principle of good faith [*Neumann (2012)* pp. 84-85, 156, 158, 176; *Schwenzer/Manner* pp. 478, 487; *Neumann (2009)* p. 2; *Atamer* Art. 80 ¶¶10, 20; *Schäfer* p. 252].

120. In cases of apportionment of a monetary amount, here the purchase price, 'there is a broad consensus about the possibility of weighing both parties' share in the causal chain leading to non-performance' [*Atamer* Art. 80 ¶17-18]. The prevailing view is that the contributions to causation are apportioned on a pro-rata basis to reflect the Parties' relative share of the blame [*Atamer* Art. 80 ¶¶17-20; *Neumann (2012)* pp. 10-14, 84; *Neumann (2009)* p. 10; *Schwenzer/Manner* pp. 477-478].

2. Any liability of RESPONDENT should be significantly apportioned to CLAIMANT due its immense contribution to causation

121. Without CLAIMANT being subject to the cyberattack and failing to inform RESPONDENT due to its internal inadequacies, none of the subsequent issues would have arisen. The burden for them to take appropriate action as set out at [104]-[109], yet the issues that could have been avoided are immense. As the inadequacies and omissions by CLAIMANT are significant, it should be apportioned with a substantial amount of liability. Consequently, RESPONDENT should only be responsible for a nominal amount.

II. CLAIMANT has not satisfied the mitigation requirement in order to claim payment

122. Alternatively, if this Tribunal finds that Art. 80 does not apply, or that Art. 80 only partially reduces RESPONDENT's liability, CLAIMANT's entitlement to the purchase price should be further reduced because it failed to mitigate its loss. This is because Art. 77 *CISG* extends to claims for performance of payment obligations (**A**). In the current circumstances, CLAIMANT failed to sufficiently mitigate its loss due to its significant omissions following the cyberattack (**B**).

A. CLAIMANT was required to mitigate its loss as Art. 77 *CISG* is applicable to payment claims

123. Whilst CLAIMANT argues that Art. 77 *CISG* is inapplicable because it is merely seeking performance [*Cl Memo* ¶86], the mitigation requirement in Art. 77 equally applies to claims for performance of the payment obligation as well as claims for damages [*Schwenzer/Manner* p. 484; *Bridge* pp. 597-8; *Neumann (2009)* p. 6 fn 30; *Enderlein/Maskow* Art. 77 ¶4]. Although some commentators have argued to the contrary [*Schwenzer* Art. 77 ¶4; *Djordjević* Art. 77 ¶¶7, 10; *Huber* p. 290], it would be against good faith for a party to recover payment when they have failed to mitigate [*Propane Case*; *Huber* pp. 268, 289; *Djordjević* Art. 77 ¶1; *Schwenzer* Art. 77 ¶1; *Bridge* p. 598 ¶¶81-82; *Enderlein/Maskow* Art. 77 ¶4; *Schwenzer/Manner* p. 484; *Ferrari* pp. 224-225].

124. An overly rigid interpretation which limits Art. 77 to damages only would lead to the uncommercial result of CLAMANT not being required to mitigate simply because of the type of relief that it chose. Article 77's purpose is to prevent mere passivity and recognise that where a party fails to mitigate an avoidable loss, they do not deserve compensation [*Bridge* p. 597-8 ¶¶80, 82]. It would frustrate the purpose of Art. 77 if CLAIMANT could have mitigated but failed to do so knowing it would seek a claim for performance as opposed to damages [*Bridge* p. 597-598 ¶81].

125. CLAIMANT cites *Clout-Case 424* for the proposition that Art. 77 *CISG* does not apply if damages are not sought [*Cl Memo* ¶86]. However, the only reference to Art. 77 in the Austrian Supreme Court's decision was made in relation to dismissing its applicability in light of the defendant not claiming any form of compensation [*Clout-Case 424* ¶(c)]. Specifically, the comment upon which CLAIMANT relies was not made in the context of the purchase price being pursued by the Claimant in that case, which was the core claim at issue.

126. Consequently, the principle of good faith and the commercial purpose of Art. 77 prevents CLAIMANT from asserting that it is not required to mitigate in these circumstances merely because it is seeking performance of the payment obligation.

B. CLAIMANT failed to sufficiently mitigate its loss

127. There is significant evidence of CLAIMANT's failure to mitigate its loss and RESPONDENT can propose numerous precautions that CLAIMANT should have implemented [*Propane Case*; *Djordjević* Art. 77 ¶36; *Clothing Case*]. This is because CLAIMANT is required to mitigate prior to the breach occurring (**1**); and during this period, it failed to take all reasonable measures which could have prevented payment into the different bank account for one or both of the instalments (**2**).

1. CLAIMANT was required to mitigate prior to the breach occurring due to its awareness of the cyberattack

128. CLAIMANT was required to mitigate the potential harms resulting from the cyberattack prior to an actual breach eventuating. While some commentators suggest that Art. 77 does not require mitigation at this early stage [*Huber* p. 290; *Bridge* p. 596-597 ¶79], there is 'broad acceptance' that Art. 77 is applicable to anticipatory breach where there is knowledge of an impending serious breach [*Bridge* p. 596 fn 149, p. 597 ¶80; *Neumann (2012)* pp. 78, 81; *Schwenzer/Manner* p. 481; *Neumann (2009)* p. 4; *Lookofsky* p. 136; *Djordjević* Art. 77 ¶¶6, 12; *Schwenzer* Art. 77 ¶3].

129. This demonstrates that there was a requirement for CLAIMANT to mitigate before the payments were made to the different bank account. CLAIMANT was required to mitigate from 23 January 2022 when it discovered the cyberattack [*Ex C6* ¶5]. CLAIMANT failed to take any mitigatory steps in the following three-month period before RESPONDENT submitted its first instalment on 3 May 2022 [*Request for Arbitration* ¶¶14, 24; *Ex C3*; *PO2* ¶14].

2. CLAIMANT did not take all reasonable measures which could have prevented either one or both instalments being paid into the different account

130. In accordance with the time frame outlined above, CLAIMANT was required by Art. 77 *CISG* to mitigate by implementing all 'reasonable' measures that a 'prudent businessperson' would have done in the circumstances [*UNCITRAL Digest 2016* p. 356 ¶1; *Bridge* p. 596; *Schwenzer* Art 77 ¶¶1-2; *Djordjević* Art. 77 ¶¶7, 10; *Huber* pp. 289-290, 292; *Bridge* p. 598]. RESPONDENT points to four reasonable measures that CLAIMANT should have taken.

131. *First*, CLAIMANT should have disclosed the cyberattack to RESPONDENT as this would have caused RESPONDENT to conduct further checks when receiving the email on 28 March 2022 [*Answer to Request for Arbitration* ¶6; *Ex R4* ¶6]. *Second*, CLAIMANT should have provided a public statement on behalf of the company to put its business partners on notice to take further precautions. In the absence of this statement, the first time CLAIMANT's business partners heard of the cyberattack was through media articles reporting from anonymous sources [*PO2* ¶¶17, 26]. *Third*, CLAIMANT should have organised a suitable replacement for Ms Audi's role both during her initial leave and when it became apparent that she would be terminated. Ms Audi was absent from 25 March 2022 until 23 May 2022 [*Request for Arbitration* ¶15; *PO2* ¶5]. As Ms Audi was responsible for verifying payments [*PO2* ¶13] and communicating with counterparts [*PO2* ¶26], her absence should have been promptly addressed to manage these core business responsibilities.

132. *Finally*, CLAIMANT should have monitored its accounts through alternative methods to check for payments despite the IT and accounting system shutdown. Payments under *PO 9601* were due and were paid on 3 May 2022 and 30 June 2022 [*PO2* ¶14]. Despite CLAIMANT's accounting system being down from 15 May 2022 to 30 June 2022, it had ample opportunity and alternative means to become aware of lack of receipt of the 3 May 2022 payment, which would have prevented the further USD 19.2 million being paid to scammers on 30 June [*Request for Arbitration* ¶¶14, 24; *Ex C3*; *PO2* ¶14]. In any event, the ransom demand in relation to the encrypted data communicated on 15 May 2022 should have prompted CLAIMANT to be on high alert and take action to investigate other aspects of its systems for further compromised data [*Ex C6* ¶10].

133. This Tribunal should find that CLAIMANT failed to mitigate against the risk that both instalments would be paid into a different account and therefore it is not entitled to any further payment. In any event, at best, CLAIMANT is entitled to half of the purchase price because, had it acted reasonably, it would have recognised that at least the first payment was not received.

ISSUE D: RESPONDENT CAN INVOKE A VIOLATION OF AN INFORMATION DUTY, OR GOOD FAITH TO DEFEND AGAINST THE PAYMENT CLAIM

134. In any event, RESPONDENT can invoke a breach of CLAIMANT's obligation to inform of the cyberattack, or a breach of the duty to act in good faith, to defend itself against the claim for payment. CLAIMANT asserts it did not have to inform RESPONDENT of the cyberattack [*Cl Memo* ¶79]. It argues that the obligations contained in Art. 34 of the *Equatorianian Data Protection Act* do not also exist as laws of Danubia, the seat of arbitration, nor as laws of Mediterraneo in which CLAIMANT operates [*Cl Memo* ¶¶80-86]. While RESPONDENT accepts that no obligations arise from the law of Danubia or Mediterraneo, CLAIMANT was still under a duty to disclose the cyberattack.

135. In 2020, upon discovering a cyberattack, RESPONDENT informed CLAIMANT the very next day [*Ex R1*]. CLAIMANT expressed its gratitude to the open communication and disclosure; requested further information about RESPONDENT's cybersecurity officer and cybersecurity insurance; and importantly, asked to be '*kept à jour*' about the investigation and to be informed immediately if any data related to it was leaked during the cyberattack [*Ex R2*]. CLAIMANT further expressed that it 'take[s] cybersecurity and data protection very seriously' [*Ex R2*]. However, after being subject to a cyberattack itself, CLAIMANT failed to act in accordance with the standards it expressed gratitude for and did not disclose the cyberattack to RESPONDENT.

136. This breach of information duty can be established on any one of three grounds for either a full or partial defence against payment. *First*, Claimant was under a duty of good faith to disclose the cyberattack [cf *Cl Memo* §IX.3] (**I**). *Second*, disclosure of the cyberattack was required based on general principles of the *CISG* (**II**). *Third*, there was an established practice or international trade usage to disclose cyberattacks (**III**). Finally, in any event, it would be contrary to the principle of good faith to hold that RESPONDENT has not performed (**IV**).

I. CLAIMANT breached its good faith duty to disclose the cyberattack per Art. 7(1) *CISG*

137. RESPONDENT accepts in broad terms the characterisation of good faith proposed by CLAIMANT who argues that good faith entails proper conduct, honest and rational belief, and the observance of reasonable standards of fair dealing [*Cl Memo* ¶93; *Powers* p. 334; *Klein* pp. 124-133; *Sheehy* p. 7]. RESPONDENT also embraces CLAIMANT's acceptance that it is 'a settled principle…that a contracting party must perform [its] contractual duties in good faith' [*Cl Memo* ¶93]. The issue RESPONDENT contends is that CLAIMANT's legal justification of good faith is incorrect (**A**); and CLAIMANT breached the duty of good faith by not disclosing the cyberattack (**B**).

138. CLAIMANT does not state the basis upon which it derives the duty of good faith [*Cl Memo* ¶¶87-94]. RESPONDENT argues that good faith can be sourced either through Art. 7(1) or 7(2) *CISG*. RESPONDENT will engage with CLAIMANT's argument in relation to good faith in this section under Art. 7(1), however this analysis is applicable in the same way should CLAIMANT intend good faith be derived as a general principle under Art. 7(2).

A. CLAIMANT's legal justification of good faith is incorrect

139. Whilst RESPONDENT accepts the substance of what CLAIMANT outlines is the content of good faith, this Tribunal should reject CLAIMANT's arguments because the legal basis that CLAIMANT relies on for good faith is incorrect.

140. *First*, CLAIMANT erroneously relies on non-CISG commentary as authority for good faith, citing Eisenburg's commentary on American contract law [*Cl Memo* ¶93]. This Tribunal should find that CLAIMANT's domestic commentary, which is its only source of authority, is insufficient to substantiate its claims as the *CISG* should be interpreted independent of domestic law [*Fish Case* ¶4.5; *Perales Viscasillas* Art. 7 ¶33]. As will be detailed at [160]-[170] below, even adopting the substance of this definition, CLAIMANT breached its duty to act in good faith.

141. *Second*, CLAIMANT's use of case law is misguided. CLAIMANT cites *Thoroughbred* in support of its argument that RESPONDENT cannot invoke a breach of good faith [*Cl Memo* ¶90]. That judgment has no relevance to the current proceedings. *Thoroughbred* does not concern arbitration, domestic or international, nor does it mention good faith at all. It primarily concerns damages in the context of South African common law and considerations of causation and remoteness which are completely different legal bases from the present case [*Thoroughbred* ¶¶11, 41, 46].

B. CLAIMANT has breached the duty imposed by Art. 7(1) *CISG* to act in good faith

142. The first source from which good faith can be derived is Art. 7(1) *CISG*, which RESPONDENT argues imports a standalone obligation on CLAIMANT to act in good faith [*Malkawi* p. 4]. RESPONDENT recognises that this question is subject to significant debate with one perspective stating that the text and drafting history of Art. 7(1) render it a mere interpretive provision that does not create a separate duty to act in good faith [*Keily* p. 23; *Ferrari* pp. 224-225; *ICC Case 8611*]. However, this Tribunal should instead favour the case law and commentary which support the approach that Art. 7(1) imposes a standalone duty to act in good faith (**1**). CLAIMANT has breached this duty of good faith by failing to disclose the cyberattack (**2**).

1. According to case law and commentary, Art. 7(1) imposes a standalone duty of good faith

143. *First*, this Tribunal should interpret Art. 7(1) as imposing a standalone duty to act in good faith as this is consistent with case law [*Bonaventure*; *Car Delivery Case*; *Alexandridis*; *Poppy Seed Case; Malkawi* p. 7; *Saba* pp. 84-85; *Keily* pp. 24-27]. Case law is a primary mechanism for the interpretation of the *CISG* and facilitates consistency of decisions [*Perales Viscasillas* Art. 7 ¶¶40-44].

144. RESPONDENT directs this Tribunal to two further cases. In the *Machine Case*, the German Supreme Court referred to Art. 7(1) not as an 'interpretive provision' but as 'the principle of good faith in international trade' [*Machine Case* ¶16]. Similarly, in the *Clay Case,* after holding that Arts. 80 and 77

CISG did not apply, the German Supreme Court applied the principle of good faith in Art. 7(1) to apportion liability given the role both parties had played in causing their respective losses.

145. *Second*, commentators support the view that Art. 7(1) imposes an obligation to act in good faith as it 'promote[s] the observance of good faith in international trade' [*Povrzenic* §3(B); *Bonell* p. 84; *Saba* p. 85; *Keily* p. 19]. Interpreting Art. 7(1) to impose a direct duty to act in good faith further accords with the 'dynamic and progressive' approach that the *CISG* encompasses [*Perales Viscasillas* Art. 7 ¶¶40, 42-43].

2. CLAIMANT breached its duty to act in good faith by not informing RESPONDENT of the cyberattack

146. Therefore, there exists a duty to act in good faith which entails the conduct that is proper, honest, rational and reasonable. CLAIMANT has breached this good faith for five reasons.

147. *First*, when RESPONDENT was victim of a cyberattack in August 2020, it immediately informed CLAIMANT before it was even aware of its domestic obligations to do so. CLAIMANT 'greatly' appreciated RESPONDENT's 'open and forward-looking communication concerning the cyberattack on Visionic' [*Ex R2* ¶1]. It would not be against good faith for CLAIMANT to fail to reciprocate now that it is the victim of a cyberattack [*Ex C6* ¶8].

148. *Second*, it is clear from CLAIMANT's actions that it was aware it should inform RESPONDENT of the cyberattack. CLAIMANT had an internal order that required the relevant account manager to warn RESPONDENT of the cyberattack, however this did not come through due to poor internal staffing and management [*PO2* ¶26]. This internal policy evidences that CLAIMANT viewed it as 'moral and proper' to warn RESPONDENT [*Sheehy* p. 7; *Cl Memo* ¶93, citing *Eisenburg* p. 707] and a failure to issue the warning constitutes a breach of good faith.

149. *Third*, the burden of informing CLAIMANT was incredibly low. An email, as RESPONDENT previously did [*Ex R1*], text, or telephone call would have sufficed. It was therefore unreasonable for CLAIMANT not to have warned RESPONDENT.

150. *Fourth*, it would be honest of CLAIMANT to disclose the cyberattack to maintain transparency with its business partners. Such transparency would also mitigate the potential consequences that inevitably arise with cyberattacks, including the present situation. For example, it ensures RESPONDENT is on alert and implements pre-emptive measures when dealing with CLAIMANT. These reasons are also why disclosure of the cyberattack should be in good faith, reasonably expected from CLAIMANT.

151. *Fifth*, it was not rational nor reasonable for CLAIMANT to not warn RESPONDENT of the cyberattack given how important fulfilling a payment obligation is, and additionally, to not check and ensure that the message was delivered to RESPONDENT especially given the known staff absences and

shortages. Warning RESPONDENT would have facilitated proper communication between the Parties, whereby they are kept 'abreast of information necessary for the smooth completion of [a] contract,' which is a requirement under the duty of good faith [*Klein* pp. 124-133].

152. This Tribunal is entitled to apply the principle of good faith in order to determine liability. The consequence of CLAIMANT's failure to act in good faith is that its liability for payment is reduced either in full or partially [*Clay Case* ¶35].

II. General principles of the *CISG* create various duties requiring CLAIMANT to disclose the cyberattack which it failed to do

153. Alternatively, if this Tribunal does not find that Art. 7(1) imposes an obligation to act in good faith, RESPONDENT argues that this Tribunal should have recourse to the general principles of the *CISG* under Art. 7(2). Article 7(2) imports the general principles of the duty to act in good faith (**A**) and the duty to cooperate (**B**), both of which required CLAIMANT to disclose the cyberattack, which it failed to do.

154. Article 7(2) states that 'questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based'. The duty to act in good faith and the duty to cooperate are clearly matters governed by the *CISG* as they are embodied in relevant articles of the *CISG* [*Perales Viscasillas* Art. 7 ¶27, 64; *Zeller* pp. 7-9; *Sim* p. 20; *Keily* pp. 28-29]. The gap however is that their exact scope is not expressly settled, meaning this Tribunal should consider the relevant articles upon which these duties are derived to settle this gap.

A. CLAIMANT breached the duty to act in good faith when it failed to disclose the cyberattack

155. The second source from which this Tribunal can derive good faith is Art. 7(2) *CISG*. It is well accepted that good faith is a general principle of the CISG that 'permeates the whole text of the Convention' [*Perales Viscasillas* Art. 7 ¶¶25, 64; *Graffi* p. 290; *Keily* pp. 28-29]. Despite commentators who argue against good faith being a general principle [*Sim* §VI; *Ferrari* p. 225; *Hachem* Art. 7 ¶19; *Farnsworth* p. 56], the preponderance of commentators agree that it is [*Komarov* pp. 83-84].

156. For the same reasons outlined at [146]-[151], CLAIMANT has breached its obligation to act in good faith.

B. CLAIMANT breached the duty to cooperate when it did not disclose the cyberattack to RESPONDENT

157. Furthermore, contrary to CLAIMANT's contention that there is no duty to cooperate given Art. 5.1.3 *Danubian Contract Act* does not apply [*Request for Arbitration* ¶28; *Cl Memo* ¶82], the duty to cooperate is a general principle of the *CISG* and creates an obligation upon CLAIMANT to disclose the cyberattack. This general principle of cooperation is embodied in various *CISG* articles

including Arts. 19(2), 21(2), 39(1), 48(2), 68, 79(4) and 88(1) [*Perales Viscasillas* Art 7 ¶64; *Neumann (2012)* p. 110, citing *Honnold/Flechtner* pp. 144-145, p. 424, pp. 428-430; *Bleached Pizza Paper*; *ACBU v. AABU and AWSC*; *Steel Wire Case*; *Machine Case* ¶16]. CLAIMANT breached the duty to cooperate for two reasons.

158. *First*, CLAIMANT failed to warn RESPONDENT of the cyberattack, which is a situation that would 'endanger the performance of the contract' [*Vogenauer* Art. 5.1.3 ¶2]. By cooperating and informing RESPONDENT of the cyberattack, RESPONDENT would have been put on notice of potential scams and would have acted more cautiously. RESPONDENT did not detect the scam signs because the email was so detailed and had specific pieces of information that only Ms Audi would have known. If RESPONDENT was aware of the cyberattack, this email would have been less convincing, and Mr Toyoda would have confirmed before paying [*Ex R4* ¶¶4, 6]. Despite needing the shipment urgently, RESPONDENT as a sensible commercial actor would have contacted CLAIMANT before payment of a large sum of money due to the known risk of a scam [cf *Cl Memo* ¶92; *Ex R4* ¶4].

159. *Second*, the duty to cooperate covers actions that can be 'reasonably expected' of one party [*Vogenauer* Art. 5.1.3 ¶¶8-9]. It can reasonably be expected for CLAIMANT to inform RESPONDENT of the cyberattack for the reasons outlined at [149]-[151].

III. CLAIMANT breached its duty to disclose the cyberattack based on established practice between themselves and/or an international trade usage per Art. 9 *CISG*

160. Further, CLAIMANT was required to disclose the cyberattack based on an established practice (**A**), and/or through an international trade usage (**B**).

A. CLAIMANT failed to act in accordance with the Parties' established practice of disclosing cyberattacks

161. The Parties established a practice which required CLAIMANT to disclose cyberattacks [Art. 9(1) *CISG*]. A practice refers to behaviours established between parties, rather than wider observations [*Graffi* p. 275; *Schmidt-Kessel* Art. 9 ¶9].

162. Although some commentators argue a practice should be repeated to be established [*Perales Viscasillas* Art. 9 ¶11; *Graffi* p. 275], the *CISG* does not state how many instances are necessary to create a practice [*Schmidt-Kessel* Art. 9 ¶10; *Graffi* p. 279], and practices performed in goodwill can be binding [*Schmidt-Kessel* Art. 9 ¶10]. For example, in the *Mattresses Case*, the seller engaged in a practice whereby it took back and replaced defective mattresses in goodwill without acknowledgement of legal obligation. The tribunal held that this amounted to a practice that was binding upon the parties when the seller attempted to renege on the practice [*Mattresses Case* ¶IV(3)(b)(bb)].

163. In the present case, a similar practice has been established. When RESPONDENT suffered a cyberattack in August 2020, it 'immediately informed' all its partners in good faith even before determining what type of data had been breached and if it had a legal obligation to disclose [*Ex R4* ¶2]. Only later did RESPONDENT confirm that it had an actual legal requirement to do so under the *Equatorianian Data Protection Act* [*Ex R4* ¶2]. Here, CLAIMANT has benefited from RESPONDENT'S goodwill, subsequently demanded a higher level of disclosure for cyberattacks from RESPONDENT, and publicly implemented an allegedly sophisticated cyber defence system [*Ex R2; Ex*]. CLAIMANT now unfairly seeks to deny RESPONDENT from expecting the same sensible cybersecurity practices [*Cl Memo* ¶¶79, 80].

164. Further, RESPONDENT warned CLAIMANT it had suffered a cyberattack on 27 August 2020 [*Ex R1*]. CLAIMANT expressed its appreciation and requested that '*naturally, we require to be kept à jour about your investigation* and to be *informed immediately* should data relating to us and our people have been obtained by the criminals' (emphasis added) [*Ex R2*]. CLAIMANT's request that it be 'informed immediately' establishes a practice to inform about cyberattacks. Additionally, CLAIMANT's use of the word 'naturally' demonstrates the Parties' understanding that it was an expectation that cyberattacks would be disclosed [*Ex R2*], supporting that this practice exists between the Parties.

165. This Tribunal should find that the Parties had established a practice between them which CLAIMANT breached when it failed to disclose the cyberattack.

B. CLAIMANT breached an international trade usage to disclose cyberattacks

166. Alternatively, the Parties were also bound by an international trade usage to inform the other party of cyberattacks [Art. 9(2) *CISG*]. An international trade usage is a practice 'regularly observed by those involved in a particular industry or marketplace' [*Schmidt-Kessel* Art. 9 ¶15; *Perales Viscasillas* Art. 9 ¶20]. A trade usage is to be interpreted 'without recourse to preconceived domestic notions' [*Schmidt-Kessel* ¶9-15; *Perales Viscasillas* Art 9 ¶20; *Staudinger/Magnus* Art. 9 ¶7; *Graffi* p. 276]. Thus, the fact that Danubia and Mediterraneo have not implemented a data protection law [*PO1* ¶5; *Cl Memo* ¶¶82, 83] is immaterial. There is a widely known and regularly observed international usage of informing affected parties of data breaches.

167. *First*, disclosure by data holders of security breaches is widely known. This is because a wide range of jurisdictions have implemented data protection legislation [Art. 34 *EU GDPR*; §1798.82(a) *Californian Civil Code*; §112 *New Zealand Privacy Act*; §26B *Singapore PDPA;* Art. 48 *Brazil LGPD*; Art. 26 *Malabo Convention*]. Further industry professionals recommend disclosure of cyberattacks on the basis that it reduces damage to company trust and risk of fraud, supporting that this practice is widely known [*Knight/Nurse* p. 8; *Thomas et al.* p. 2].

168. *Second*, disclosure of cyberattacks is regularly observed. As outlined above, worldwide data protection from a range of jurisdictions mandates disclosure. This practice is also observed in practice in Mediterraneo, where despite a lack of regulation, 'many companies inform their customers and suppliers' [*Ex R3*].

169. The Parties knew or ought to have known about this practice of disclosing cyberattacks given how widely and regularly observed it is. Further, CLAIMANT itself was put on notice of this trade usage when RESPONDENT notified it of the cyberattack it experienced in 2020 [*Ex R1*].

170. Finally, CLAIMANT cannot invoke the entire agreement clause contained in Art. 42(1) *FA* as it does not exclude trade usages, Art. 9 specifically, or any of the usages or practices discussed above [*CISG-AC Opinion No 3* ¶4.7; *Schmidt-Kessel* Art. 9 ¶20; *Perales Viscasillas* Art. 9 ¶19].

IV. It would be against good faith for CLAIMANT to assert that RESPONDENT has not performed

171. RESPONDENT received an email on 28 March 2022 from 'Ms Audi' [*Ex C5*]. From RESPONDENT's perspective, the email appeared to be genuine. CLAIMANT's significant omissions following the cyberattack, including failing to alert RESPONDENT, rectify staff shortages and adequately monitor its systems, all cumulated in the scam email being sent. Therefore, since RESPONDENT was led to believe that everything was in order, it would be contrary to good faith, which requires proper and reasonable conduct (see [137]), for CLAIMANT to assert that RESPONDENT has not performed its payment obligation by transferring into the different bank account [cf *Cl Memo* ¶108].

172. Contrary to CLAIMANT's submissions, RESPONDENT was not required to confirm if CLAIMANT received the payments under the contract or the *CISG* [*Cl Memo* ¶¶103-105]. Even if there were such an unrealistic intention under Art. 8 *CISG* to avoid the payment through 'strategic delay' as proposed by CLAIMANT [*Cl Memo* ¶105], which RESPONDENT denies, Art. 4(1)(c) *FA* merely obligates RESPONDENT to pay the price for the sensors, which it did. Therefore, pursuant to principle of good faith, CLAIMANT is bound by the acts of 'Ms Audi' (**A**), the written email which appeared to have been sent by CLAIMANT (**B**), and the electronic signatures (**C**).

A. CLAIMANT can be bound by the actions of 'Ms Audi'

173. Although not specifically addressed in its memorandum, CLAIMANT may argue that the email sent on 28 March 2022 [*Ex C5*] cannot bind CLAIMANT as it was not sent by the real Ms Audi. However, this can still be attributed to CLAIMANT.

174. The *CISG* does not deal with cases regarding apparent authority. Therefore, pursuant to Art. 7(2) *CISG*, whilst the *CISG* 'governs' the obligations of parties and the remedies, it does not 'expressly settle' whether the conduct of others can be attributed to one of the parties for the purpose of establishing whether there has been valid performance [*Andersen* pp. 13-33]. No 'general principle'

of the *CISG* is applicable to resolve this gap, and therefore, the *PICC* applies as the applicable rules of private international law [Art. 7(2) *CISG*; *PO1* ¶4(4)].

175. Article 2.2.5(2) *PICC* relevantly provides that 'where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent'. This is seen as an embodiment of good faith in recognising that if one party leads another, here RESPONDENT, to believe that an action is binding, it cannot later renege by citing the agent's lack of authority [*Paraguay Land Dispute Case*]. By not disclosing the cyberattack, CLAIMANT caused RESPONDENT to believe that any emails from 'Ms Audi' was from the true Ms Audi who had the authority to amend the payment details for a particular order [*PO2* ¶18]. RESPONDENT's belief was reasonable as the email contained Ms Audi's name and signature block, and discussed information only she would have access to [*Ex C5*]. As CLAIMANT caused this belief by not warning of the cyberattack, it cannot assert 'Ms Audi's' lack of authority as a basis upon which it is not bound to the deviation from the *FA* for payment into the different account.

B. The written email appeared to be sent by CLAIMANT

176. Further, the change to the bank account details was in writing and appeared to be sent by CLAIMANT [*Ex C5*]. It was sent from an email address containing Ms Audi's name and details, the contact RESPONDENT always dealt with [*Request for Arbitration* ¶15; *Ex C8* ¶2]. Neither the 'semsorx.me' typo in the email address, nor the slight numerical errors (in relation to the purchase order number and sensor model) in the body of the email are sufficient to raise any concern by RESPONDENT without disclosure by CLAIMANT of the cyberattack, given past conduct between the Parties [*Ex C5*].

177. Specifically, the 'SemsorX' typo is also contained in the recitals to the *FA* which was signed by both Parties, with a further typo of 'sersorx.me' contained in the signature block of a previous email from 2020 sent by another CLAIMANT employee [*Ex R2*]. These show how CLAIMANT regularly made typos in emails and documentation which had not previously posed any issue, evidencing the reasonableness of RESPONDENT's belief that CLAIMANT personally sent the email.

178. Further, the email itself was not suspicious. *First*, it was normal communication practice between the Parties to create separate email chains for new issues [*PO2* ¶4]. *Second*, as acknowledged by CLAIMANT, on a previous occasion, a bank account other than those contained in Art. 7 of the *FA*, being the bank account of SensorDanube, was used for payment of 80% of the purchase price of an order [*Cl Memo* ¶102; *PO2* ¶12]. SensorDanube has its bank account with the First Bank of Danubia, which is the same bank stated in the email [*PO2* ¶2; *Ex C5*]. Consequently, it was not

out of the ordinary for the First Bank of Danubia to appear in the scam email, nor expected that RESPONDENT would take further precautions [cf *Cl Memo* ¶102].

179. Finally, the exchange of emails explicitly discussed how they would comply with the writing requirement contained in Art. 40 *FA* [*Ex R4* ¶4]. The change to the bank account thus constitutes a valid deviation from Art. 7 *FA*. Hence, there is no lack of good faith in RESPONDENT asserting that its payment into the different bank account was valid performance. Rather, it would be against good faith for CLAIMANT to not recognise performance.

C. Electronic signatures are sufficient in this context

180. Art. 40 *FA* provides no specific requirements in relation to the signature, other than being 'signed by the Parties'. In the email chain, the Parties sign off with their respective names and signature blocks [*Answer to Request for Arbitration* ¶6; *Ex R4* ¶4; *PO2* ¶4]. This constitutes a signature for the purposes of Art. 40 *FA* as electronic signatures are a recognised as a legal signature in practice.

181. Typing the name 'Tesla Audi' falls within the recognised definition of an electronic signature as it is affixed to the email, which is a data message, and can be used to identify Ms Audi as the signatory of the email and indicates her purported approval of the information contained within it [see e.g. *Model Law on Electronic Signatures* Art. 2(a)]. Further, it is recognised in commercial practice that a signature block, although it may appear automatically, is still a legal signature [*Neocleous v Rees*]. It indicates that the contents of the email are approved by the sender and the sender is attaching their name and responsibility to it.

CONCLUSION

182. This Tribunal cannot and should not authorise or consolidate the New Claim to the pending proceeding in respect of the Existing Claim. RESPONDENT can invoke Art. 80 or 77 as a defence to its payment obligation. In any event, RESPONDENT can invoke a violation of an information duty or obligation to defend itself against the claim for payment.

REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT requests that this Tribunal order that:

(1) This Tribunal cannot and should not authorise the New Claim to the pending arbitration;
(2) In the alternative, where the New Claim has to be raised in a separate arbitration, this Tribunal should not consolidate the arbitral proceedings; and
(3) RESPONDENT can invoke a violation of a contractual duty or obligation or rely on Arts. 77 and 80 *CISG* to defend itself against the claim for payment.

CERTIFICATE OF VERIFICATION

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

Respectfully submitted

Sydney, 18 January 2024


Yijun Cui


Olivia Donovan


Thomas Martyn


Jason Zhu He