THIRTY-SECOND ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

11 April to 17 April 2025, Vienna

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF FRIBOURG

Case No. FAI Moot 100/2024

ON BEHALF OF	AGAINST
GreenHydro Plc	**Equatoriana RenPower Ltd.**
1974 Russell Avenue	1 Russell Square
Capital City, Mediterraneo	Oceanside, Equatoriana
– CLAIMANT –	– RESPONDENT –

COUNSEL

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DATE: 12 December 2024

NAME: Viviane Molletta SIGNATURE: 

NAME: Selda Barcedogmus SIGNATURE: 

NAME: Tim Hogg SIGNATURE: 

NAME: Vera Bykova (Coach) SIGNATURE: 

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INTRODUCTION

"*How puzzling all these changes are! I'm never sure what I'm going to be, from one moment to the next.*"

Lewis Carroll, "Alice in Wonderland"

1. All successful projects are alike, each unsuccessful project is unsuccessful in its own way: some are hindered by the seller's failure to deliver the goods, others – by the buyer's financial struggles. None of this, however, has happened in the present case: the seller has delivered the goods and the buyer can perform its payment obligations.

2. The RESPONDENT ("**RESPONDENT**"), the buyer, has simply changed its mind: it has lost interest in a green hydrogen plant, designed to produce clean energy and lead Equatoriana towards a brighter greener future. Once the new government of Equatoriana removed protection of environment from its agenda, RESPONDENT found no better solution than to terminate the contract with the CLAIMANT ("**CLAIMANT**") "*for convenience*", to borrow its own words.

3. Not only did the RESPONDENT change its mind about the project, but it is now trying to change the rules of the game. Having agreed to arbitration under the Arbitration Rules of the Finnish Arbitration Institute ("**FAI Rules**"), under which mediation is not binding, RESPONDENT is now making a U-turn by insisting that the Tribunal has no jurisdiction, and that the claim is not admissible, since the Parties did not have recourse to mediation [**Issue I**].

4. The unpredictable metamorphoses did not stop there. RESPONDENT has also requested the Tribunal to remove Exhibit C7 (the RESPONDENT'S own settlement offer showing that any mediation would be futile) from the record, even though there are no legal grounds for granting this request: the applicable rules do not protect settlement negotiations from disclosure [**Issue 2**]. What is more, RESPONDENT submitted on the record Exhibit R3 (legal advice by CLAIMANT'S In-House lawyer to CLAIMANT'S employees). How did RESPONDENT get hold of this CLAIMANT'S internal communication? By recourse to force: the document was obtained by way of a raid on the CLAIMANT's offices in Equatoriana [**Issue 3**].

5. The final straw is RESPONDENT'S change of mind about the applicable law. The fact that the Parties have agreed to the application of the law of Equatoriana, including the CISG, was no barrier to RESPONDENT's *post factum* attempt to exclude the application of the CISG. To no avail, the Parties' consent cannot be magically distorted: the CISG does apply [**Issue 4**].

STATEMENT OF FACTS

6. The Parties to this arbitration are GreenHydro Plc, CLAIMANT, and Equatoriana RenPower Ltd, RESPONDENT ("**the Parties**").

7. CLAIMANT, based in Mediterraneo, is a medium-sized engineering company specializing in green hydrogen plants and related services. This type of plants produce hydrogen, a clean fuel, using renewables energies sources.

8. RESPONDENT, based in Equatoriana, is a fully government-owned company operating in the renewables sector and a major player in the Equatoriana market.

9. In 2019, Equatoriana launched its "Green Energy Strategy" to achieve Net-Zero 2040 by investing in the creation of sustainable green hydrogen infrastructures to decarbonize Equatoriana's large steel and transport industry. In 2022, CLAIMANT applied to be listed as a potential seller and RESPONDENT approved this request.

10. On **3 January 2023**, RESPONDENT published a Request for Quotation ("**RfQ**") on the official tender platform for the delivery of a green hydrogen production plant ("**the Plant**") and invited CLAIMANT to participate in the tender.

11. In early May 2023, CLAIMANT was declared one of the two final bidders, based on its highly innovative technology. However, no agreement was yet concluded as a result of the bidding process. Instead, RESPONDENT entered into direct negotiations with two most successful bidders that lasted two and a half months.

12. The delivery and construction of the Plant presented itself as a unique opportunity for CLAIMANT to showcase its new technology of green hydrogen production at a larger scale. CLAIMANT estimated exponential growth of the clean fuel market, both in Equatoriana and worldwide. Because of the great prospects of the contract, CLAIMANT agreed to make to a significant 5% price reduction (with the final total price being EUR 285 million instead of EUR 300 million), in return for exclusion of the clause allowing to terminate the Agreement for convenience. RESPONDENT accepted these conditions.

13. During the negotiations, the Parties discussed the issue of applicable law. CLAIMANT explicitly stated its strong preference for the application of the CISG, as the gold standard for international sales transactions. RESPONDENT made no objections. As a result, the Parties agreed to apply the law of a Contracting State to the CISG, Equatoriana.

14. On **17 July 2023**, the Parties' CEOs signed the Purchase and Service Agreement ("**PSA**" or "**Agreement**"), setting the terms for the sale. According to the Agreement, CLAIMANT has an obligation to deliver the Plant to RESPONDENT until **2 January 2026**.

15. In **October 2023**, local elections in Equatoriana led to a shift in the power balance within the Government of Equatoriana. The new Minister for Energy and Environment, Ms. Theresa Vent, a member of the Equatoriana National Party, is strongly opposed to the Green Energy Strategy. In **November 2023**, this change in the composition of the government led to the nomination of a new RESPONDENT's CEO, Mr. Henry La Cour ("**RESPONDENT'S CEO**"), a well-known critic of hydrogen energies.

16. On **29 February 2024**, RESPONDENT's CEO unilaterally terminated the Agreement, citing as the primary reason for termination that the project is incompatible with the new governmental policy.

17. CLAIMANT made several attempts to resolve the dispute amicably. However, these efforts were undermined by RESPONDENT's insistence on adding an additional price reduction of 15% or "*at least a two-digit number*". In concrete terms, RESPONDENT would only continue the Agreement with a colossal reduction of at least EUR 28.5 million.

18. On **28 April 2024**, RESPONDENT's CEO threatened that, if CLAIMANT does not accept a 15% price reduction, RESPONDENT will request Equatoriana's prosecution office to conduct a general thorough investigation of CLAIMANT's activities.

19. Two weeks later, the police raided the office of Mr. Deiman, CLAIMANT'S previous Head of Contracting, located in Equatoriana. The police confiscated all documents, including confidential internal correspondence between Mr. August Wilhelm Deiman ("**Claimant's previous Head of Contracting**") and other CLAIMANT'S employees. Two days later, after confiscating all the documents, the prosecutor of Equatoriana released Mr. Deiman and acquitted him. All allegations of fraud were based solely on the words of RESPONDENT's CEO. Mr. Deiman had to leave Equatoriana due to concerns for his safety.

20. On **25 May 2024**, Respondent sent its final settlement offer repeating the same request for a significant reduction and stating that it will not continue negotiations otherwise: "[a]*ny further discussion between us or our lawyer only makes sense if* [you are] *willing to accept a serious price reduction of 15% or at least a two-digit number*".

21. As any further negotiations appeared to be futile, on **31 July 2024**, CLAIMANT submitted the Request for Arbitration ("**R*f*A**") to the Arbitration Institute of the Finland Chamber of Commerce ("**FAI**").

22. On **14 August 2024**, RESPONDENT submitted its Answer to the Request for Arbitration (**"Answer to R*f*A"**), objecting to the jurisdiction of the Tribunal on the basis that the Parties did not have recourse to mediation. Notably, no request for mediation has been filed by RESPONDENT as of today.

23. In its Answer to RfA, RESPONDENT also requested to remove Exhibit C7 from the record. This exhibit contains the final settlement offer by RESPONDENT of **25 May 2024**, in which RESPONDENT reiterated its ultimatum: either CLAIMANT accepts a 15% price reduction or no further negotiations would be conducted.

24. On the same day, **14 August 2024**, CLAIMANT requested to remove Exhibit R3 from the record. This exhibit contains confidential internal correspondence of CLAIMANT: the legal advice given by CLAIMANT'S attorney to CLAIMANT'S senior management. The only plausible way how RESPONDENT could have obtained access to Exhibit R3 is by receiving them from the Equatoriana's prosecution office: Exhibit R3 was among the documents confiscated by the police.

25. On **11 October 2024**, the Tribunal issued Procedural Order No. 1 ("**PO1**") and bifurcated the proceedings. In accordance with the Tribunal's directions, the present Memorandum for Claimant will deal with the following issues:

    I. Jurisdiction and admissibility.

    II. Request for admission of Exhibit C7.

    III. Request for exclusion of Exhibit R3.

    IV. Applicable law.

26. The merits of the dispute will be addressed in a separate stage of the proceedings.

PART I : PROCEDURAL ISSUES

I. THE TRIBUNAL HAS JURISDICTION AND THE CLAIM IS ADMISSIBLE

27. To set the record straight, RESPONDENT'S challenge to jurisdiction and admissibility must be put into context. Even though the Parties did not agree on any mandatory pre-arbitration steps, CLAIMANT made a genuine attempt to settle the dispute amicably by way of negotiations.

28. Despite several offers made by CLAIMANT, the negotiations have reached a deadlock when RESPONDENT gave an ultimatum: CLAIMANT must make an exorbitant reduction of 15%, which is not based on any legal grounds and would make the entire project unprofitable for CLAIMANT. End of discussion. This RESPONDENT's approach – heads I win, tails you lose – resulted in the failure to settle the dispute amicably.

29. Inspired by the saying – all means are good at war (and, apparently, in arbitration) – RESPONDENT suddenly remembered about the possibility to settle the dispute amicably via mediation, only once the present arbitration has started. This is not surprising, as forcing the Parties to mediate at this stage would result in significant delay in resolving the dispute and, ultimately, in paying CLAIMANT for the delivered goods.

30. The Tribunal shall not be swayed by this dilatory tactic, as (**A**) the Parties consented to the jurisdiction of this Tribunal without subjecting their consent to prior mandatory mediation. (**B**) Furthermore, the Tribunal should find the claim admissible, as any forced mediation at this stage would be futile.

A. The Tribunal has jurisdiction over the present dispute

31. The Tribunal should dismiss RESPONDENT's objection to jurisdiction, since (**1**) both Parties have validly consented to arbitration and (**2**) the Agreement does not provide that mediation is a mandatory prerequisite to initiating arbitration proceedings.

1. The Parties have consented to arbitration under the FAI Arbitration Rules

32. The starting point of the Tribunal's jurisdictional analysis is to determine whether the Parties have concluded a valid arbitration agreement [*First Media TBK v. Astro BV*; *Court of Justice of England and Wales*; *Volt Inc. v. Stanford University*; *Girsberger/Voser*, p. 3, para. 5; *Lim/Uson*; *Sornarajah*, p. 173; *Steingruber*, p. 13, para. 2.10].

33. In the present case, Art. 30 PSA provides:

"*any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitration of the Finland Chamber of Commerce.*" (emphasis added) [Art. 30 PSA].

34. Under the law of the seat, Danubia, an arbitration agreement is valid, if it complies with the formal requirement to be made in writing [*Art. 7(2) UNCITRAL Model Law*; *Holtzmann et al.*, p. 32; *Kumar,* p. 2; *Blackaby et al.*, para. 2.04].

35. In the present case, the arbitration agreement is valid, as the requirement for its validity is satisfied.

2. Recourse to mediation is not mandatory

36. RESPONDENT's argument that the Parties agreed to arbitrate only after attempting mediation does not withstand closer scrutiny. In particular, RESPONDENT invokes the following mediation clause:

"*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall first be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce*" (emphasis added) [Art. 30 PSA].

37. According to RESPONDENT's view, in the absence of an attempt to mediate, the Tribunal would not have jurisdiction.

38. CLAIMANT strongly opposed this erroneous interpretation, as (*a*) the interpretation of the arbitration agreement based on the Danubian law (*lex arbitri*) (*b*) confirms that the Parties did not have a subjective intent to elevate mediation to the level of a condition precedent to arbitration. (*c*) Alternatively, if the Tribunal finds that the Parties' subjective intent cannot be established, the objective interpretation leads to the very same conclusion: a reasonable person would conclude that "*mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce*" is not a mandatory step prior to arbitration.

a. The Parties' arbitration agreement shall be interpreted in accordance with Art. 4.1 UNIDROIT Principles

39. When the Parties disagree about the meaning of the arbitration agreement, the Agreement must be interpreted [*XL Insurance Case*; *Born*, p. 508; *Blackaby et al.*, para. 3.12 *et seq*]. The law of the seat governs the interpretation [*Court of Appeal of UK and Wales*; *Koller*, p. 142; *Haugeneder*, p. 397; *Tarawali/Gerardy*, p. 213]. This is because, while drafting their contract,

the parties rarely choose specific law applicable separately to their arbitration agreement [*Born*, p. 526; *Nazzini*, p. 1]. Thus, when parties select the seat of arbitration, there is an implied agreement that the law of this seat will govern the arbitration agreement [*Sulamerica Case*; *Born*, p. 829; *Flannery*, p. 11; *Lew et al.*, p. 416; *Miles/Goh*, p. 390; *Nazzini*, pp. 11, 18].

40. In the present case, the Parties chose Danubia as the seat of arbitration [*Art. 30 PSA*]. In the absence of any provisions on the interpretation of arbitration agreements in the Danubian Arbitration Law, based on UNCITRAL Model Law, the Tribunal shall apply the rules of interpretation contained in the general contract law of Danubia, which is a *verbatim adoption* of the UNIDROIT Principles on International Commercial Contracts [*PO1*, para. 3(4)].

41. Art. 4.1 UNIDROIT Principles provides a two-step approach to interpretation. First, the Tribunal shall rely on subjective interpretation, focusing on the intentions and mutual understanding of the Parties [*Potato chip plant case*; *Brödermann*, p. 211, para. 1; *Vogenauer*, p. 575, para. 3]. Second, if this analysis fails to provide a clear answer, the objective interpretation comes into play: the Tribunal shall analyze how a reasonable person would interpret the arbitration clause [*Brödermann*, p. 212, para. 3; *Vogenauer*, p. 576, para. 5].

42. In the present case, as will be shown below, (*b*) based on the subjective interpretation, the Parties did not intend to make mediation a mandatory pre-arbitration step. (*c*) Similarly, based on the objective interpretation, any reasonable person interpreting the clause would conclude the same: mediation in accordance with the FAI Mediation Rules is not mandatory.

b. Subjectively, the Parties did not intend to render mediation a mandatory pre-arbtration step

43. All circumstances surrounding the conclusion of the Agreement indicate that the Parties did not intend mediation to be a mandatory step. Under Art. 4.1(1) UNIDROIT Principles, the Agreement between the Parties, including its arbitration clause, shall be interpreted based on their mutual intention [*Cylinder case*; *Gente Oil Pte. v. Republic of Ecuador*; *Brödermann*, p. 211, para. 1; *Vogenauer*, p. 575, para. 3].

44. To determine the Parties' intentions, the relevant circumstances may be considered, such as the Parties' statements during the negotiations [*Brödermann*, p. 211, para. 1; *Säcker et al.*, para. 14; *Vogenauer*, p. 576, para. 4]. Importantly, the Party challenging the Tribunal's jurisdiction by alleging the mandatory character of mediation must prove that such an intention existed at the time the arbitration agreement was formed [*Boussabaine/O'Reilly*; *Brödermann*, p. 211, para. 1; *Komuczky/Ghaffari*, para. 2].

45. In the present case, at no point during the negotiations of the Agreement, did the Parties express an intention to make mediation a mandatory pre-arbitration step.

46. The sole proof brought forward by RESPONDENT is not convincing. RESPONDENT relies on the Witness Statement of its Head of Contracting, Ms. Johanna Ritter [*Ex. R1*, para. 9]. However, she acknowledged that she is "*not entirely certain*" whether she had informed CLAIMANT that mediation is usually a mandatory step in Equatoriana (RESPONDENT's place of business), nor that RESPONDENT would prefer a mandatory mediation [*Ex. R1*, para. 9]:

"*In Equatoriana, there is consistent case law that in case of a multi-tier clause providing first for mediation and then for arbitration under the rule of an institution, the conduct of mediation is a condition precedent for the jurisdiction of the arbitral tribunal. I think I also told Mr. Deiman about that jurisprudence. I am however, not entirely certain about that.*" (emphasis added) [*Ex. R1*, p. 30, para. 9].

47. The Tribunal should treat this statement with caution. In the context of commercial disputes, when a witness is pressured to discuss an event they do not recall, they may be inclined to speculate in a way that favors their employer [*ICC Report*, p. 39, para 42(b); *Saunders et al.*; *Strong/Dries*, p. 370]. The potential influence of bias on such testimony should be carefully considered [*ICC Report*, p. 14, para. 2.26; *Khodykin et al.*, p. 242, para. 7.89; *Paralika*; *Sanchez*, para. 5].

48. This rule is also contained in the IBA Rules on Evidence on the Taking of Evidence ("**IBA Rules on Evidence**"), which shall be considered by the Tribunal as non-binding but highly persuasive rules [*Noble v. Romania*; *Railroad v. Guatemala*; *Ali et al.*, p. 37; *Born*, p. 191; *Demeyere*, p. 249; *Kröll*, p. 24]. According to Art. 4(5) lit.b of the IBA Rules on Evidence, a witness statement should contain a full and detailed description of facts, without any speculations [*Bühler/Dorgan*, p. 14; *Emanuele et al.*, p. 64; *Kantor*, p. 329; *Khodykin et al.*, p. 241, para. 7.93; *Müller,* p. 85; *Strong/Dries,* p. 307; *Zuberbühler et al.*, p. 119, para. 47].

49. In the present case, RESPONDENT's only piece of evidence in support of the mandatory character of mediation is a witness statement of its own employee who does not remember whether the issue in dispute was discussed.

50. Consequently, RESPONDENT failed to discharge its burden of proof. The evidence on the record does not confirm that the Parties had a shared intention to conduct a mandatory mediation prior to arbitration at the time they concluded the Agreement.

c. *Objectively, a reasonable person would also consider mediation to be non-binding.*

51. As demonstrated above (paras. 43-50), the Parties did not have a subjective intention to make mediation a pre-condition for access to arbitration. In the absence of any such intention, as a second step, the Tribunal should have recourse to objective interpretation in accordance with the understanding of a reasonable person [*Art. 4.2 Unidroit Principles*]. Due consideration must be given to "*all relevant circumstances*" of the case, including the language used by the Parties [*Art. 4.3 Unidroit Principles*; *CLOUT case*; *Brödermann*, p. 212, para. 3].

52. In the present case, any reasonable person would conclude that mediation is not a mandatory prerequisite to arbitration. First, the Parties agreed to apply the FAI Rules and included the FAI Model Clause [*Answer to RfA*, para. 14]. According to FAI Mediation Guidelines, interpreting its Model Clause, mediation is not a mandatory prerequisite to initiating arbitration, unless otherwise agreed by the parties:

*"**Does agreeing to FAI Mediation constitute a bar to judicial, arbitral or similar proceedings?***

Unless otherwise agreed by the parties, an agreement on FAI Mediation does not constitute a bar to any judicial, arbitral or similar proceedings." [*FAI Mediation Guidelines*, p. 6, para. 32].

53. The FAI Mediation Guidelines further clarify that mediation may occur before or in parallel to arbitration, or not at all [*Ibid.*]. Therefore, based on the objective interpretation, mediation is not a condition precedent for arbitration.

54. Second, even though the FAI Mediation Guidelines state that the Parties can "*agree otherwise*" – *i.e.* make mediation a mandatory prerequisite for arbitration – they did not do so in the present case. In the context of multi-tier clauses, when Parties intend to make mediation a mandatory prerequisite for arbitration, the Agreement must do so with sufficient clarity to create a binding obligation, such as a deadline for completing mediation [*Art. 14 UNCITRAL Model law on Mediation*; *ICC Case No 4230; Sushil Kumar Sharma v. Union of India*; *Balthasar*, p. 18, para. 32; *Berger I*, p. 22; *Cairns*, p. 321; *Golden/Lamm*, p. 73, para. 3.05; *Gomm Ferreira dos Santos*, p. 12; *Kayali*, p. 552; *McIlwrath/Savage*, p. 85, para. 1-198: *Pryles*, p. 26; *Wolrich*]. For instance, the following multi-tier clause would be sufficient to make mediation a mandatory first step prior to arbitration:

"*In the event of any dispute* […]*, the parties shall first refer their dispute to proceedings under the ICC Mediation Rules.* ***If the dispute has not been settled pursuant to the said Rules within***

***[45] days* […]**, *such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce* […]" (emphasis added) [*ICC Mediation Clause*].

55. The inclusion of a time frame within which claims must be mediated emphasizes the mandatory nature of mediation and provides clearer guidance to a reasonable businessperson [*X GmbH v. Y Sàrl*; *Alexander*, p. 187, para. 3.4; *Carter I*, p. 446; *Chapman*, p. 89; *Jolles*, p. 336; *Guideline on Mediation*, p. 4, para. 4.1]. This approach is also supported by the FAI Mediation Guidelines, the UNCITRAL Model law on Mediation [*PO2*, p. 55, para. 34], and several prominent arbitral institutions, which standard model clauses for binding mediation consistently include time limits [*Art. 14 UNCITRAL Model la on Mediation*; *FAI Mediation Guidelines*, p. 6, para. 31; *ASA Mediation Model Clause*; *HKIAC Model Clauses*; *LCIA Model Clauses*; *Paris ICC Rules*; *SMC Model Clauses*].

56. In the present case, the mediation clause in Art. 30 PSA lacks a time limit necessary to make mediation a condition precedent for having access to arbitration [*Ex. C2*].

57. For all the aforesaid, in the absence of any subjective intention to make mediation mandatory and based on the objective interpretation of Art. 30 PSA, the Tribunal has jurisdiction to resolve the present dispute.

B. The claim is admissible

58. Sensing that its jurisdictional objection is bound to fail, RESPONDENT raises an alternative argument: even if the Tribunal has jurisdiction, the claim is inadmissible until the Parties attempt to resolve their dispute via mediation [*Answer to RfA*, p. 27, para. 16]. However, such a dilatory tactic, which would require CLAIMANT to go through a pointless mediation process only to file the claim again afterwards, should be rejected.

59. In the context of arbitration, "*admissibility*" refers to whether a claim is suitable to be heard by the tribunal [*Bay View LLC v. Rwanda*; *İçkale İnşaat v. Turkmenistan*; *Born*, p. 798]. While some tribunals considered mediation as part of their jurisdictional analysis (see above paras. 32, 39, 54), others took it into account in deciding whether the claim is admissible [*ICC Case No 16083*; *ICC Case No* 16155; *Born*, p. 801]. The choice between analyzing this objection as an issue of jurisdiction or admissibility depends on the wording of the arbitration clause: if the Parties rendered mediation mandatory by including a time limit (see para. 54 et seq.), then prior mediation is a condition of jurisdiction [*X GmbH v. Y Sàrl*; *Alexander*, p. 187, para. 3.4; *Chapman*, p. 89]. In other cases, tribunals declare that they have jurisdiction, but they retain discretion to invite the Parties to mediate as part of its admissibility analysis: the claim may be

declared inadmissible, but only if mediation does not appear to be futile [*Fi Chen*, p. 4; *Jolles*, p. 332; *Kumar*, p. 2].

60. In the present case, there are no grounds to declare the claim inadmissible, since recourse to mediation would have been futile. First, (**1**) RESPONDENT's behavior shows that it would be impossible to reach a mutual agreement. Second, (**2**) conducting mediation would go against the principle of efficiency.

1. RESPONDENT's conduct demonstrates that any mediation would be futile

61. In the context of multi-tier arbitration clauses, a claim can be declared inadmissible only if mediation holds a genuine possibility of having the dispute resolved without the need for subsequent arbitration [*Siemens Limited v. Jindal Thermal Power*; *Lufthansa v. International Research Corporation*; *Elizabeth Bey v. Boral Building*; *McCarthy v. Madigan*; *ICC Award No. 6276*; *Berg*, p. 119; *Berger*, p. 132, paras. 6-45; *Brown/Mariott*, p. 124; *Witzleb*, p. 517].

62. However, if one party has already made it clear before mediation that it will not alter its stance, mediation is deemed futile [*ICC Case No. 26290*; *Sun Security Services v. Babasaheb University*; *Delaney/Hendricks; Filler*, p. 40]. In such cases, requiring mediation would result in unnecessary expenses and delays, with no realistic prospect of achieving a settlement [*Delhivery v. Kare Prv*; *Demera Pvt v. Demera*; *Visa v. Contiental USA*].

63. In the present case, mediation would be futile since RESPONDENT has repeatedly demonstrated its unwillingness to any make concessions to resolve the dispute. In its final settlement offer, RESPONDENT reiterated that CLAIMANT must accept a significant price reduction of "*at least two-digit number*" [*Ex. C7*], with no other alternative. Such a reduction of a two-digit number would result in an additional multi-million-dollar loss for CLAIMANT (at least, EUR 28.5 million) [R*f*A, p. 6, para. 25]. Thus, RESPONDENT's insistence on a two-digit reduction as a precondition for continuing negotiations was unreasonable and obstructed any constructive dialogue [*PO2*, p. *55*, para. 24]. Moreover, during a meeting between CLAIMANT's CEO, Mr. Cavendish, and RESPONDENT's new CEO, Mr. la Cour, the latter demonstrated a lack of inclination to compromise, as the meeting lasted only half an hour due to RESPONDENT's insistence on a price reduction [*PO2*, para. 23].

64. Therefore, as any further mediation would result only in a loss of time and resources, the Tribunal should declare the claim admissible and proceed to resolve it on the merits.

2. Conducting mediation would go against the principle of efficiency

65. Considering RESPONDENT's inflexible insistence on an exorbitant two-digit price reduction, mediation would be time-consuming and costly, which goes against the principle of efficiency. According to Art. 26.3 FAI Rules, the Tribunal shall conduct the proceedings efficiently and "*avoid unnecessary costs and delay*" [Art. 26.3 FAI Rules].

66. In the present case, RESPONDENT has demonstrated no genuine interest in initiating mediation. According to the FAI Mediation Guidelines, mediation begins when a party submits a formal request to the FAI Secretariat [*FAI Mediation Guidelines*, p. 5, para. 26]. Additionally, they explicitly allow mediation and arbitration to proceed simultaneously, emphasizing that one is not a prerequisite for the other [*FAI Mediation Guidelines*, p. 6, para. 32]. Despite this, RESPONDENT neither requested mediation nor showed any willingness to engage in the process, either before or after CLAIMANT filed its request for arbitration [*PO2*, para. 14]. This demonstrates that RESPONDENT lacks a genuine interest in pursuing mediation and instead seeks to use it as a delaying tactic.

67. All these factors point to the conclusion that RESPONDENT did not intend to negotiate, but rather aimed to completely alter the contract solely on its own terms, leaving CLAIMANT with no option but to either accept or terminate the contract.

***

68. **Conclusion on Issue I:** CLAIMANT respectfully requests the Tribunal to declare, first, that it has jurisdiction. Both subjective and objective interpretations of the arbitration clause indicate that mediation cannot be considered a mandatory pre-arbitration step in this case. Second, the claim is admissible, as conducting mediation would have been futile in light of RESPONDENT's persistent refusal to make any concessions during several months of negotiations.

II. THE TRIBUNAL SHOULD DISMISS RESPONDENT'S REQUEST TO REMOVE EXHIBIT C7 FROM THE RECORD

69. In a final desperate attempt to deprive the Tribunal of its jurisdiction, CLAIMANT is now requesting the Tribunal to exclude Exhibit C7 – RESPONDENT's settlement offer – from the record [*Answer to RfA,* para. 7; *Ex. C7*].

70. The reasoning behind this procedural manoeuvre is clear: Exhibit C7 contains irrefutable proof that any further mediation would be futile, and the Tribunal shall proceed to resolve the dispute on the merits. This exhibit shows that RESPONDENT is not willing to engage in any additional discussions unless CLAIMANT accepts an exorbitant 15% reduction of the initially agreed-upon price [*Ex. C7*; *RfA*, para. 2; *PO2,* para. 23]. This request is not even based on allegations of any contractual breach on CLAIMANT's side. The only motivation for this request is RESPONDENT's new government policy aiming to reduce expenses on renewable energy contracts [*Answer to RfA,* para. 3; *RfA,* para. 18; *Ex. C5,* para. 14; *Ex. C6. para. 5*].

71. This attempt to derail the proceedings shall fail. CLAIMANT respectfully asks the Tribunal to dismiss RESPONDENT's request to exclude Exhibit C7 from the record, since (**A**) neither the applicable law nor (**B**) the IBA Rules on Evidence provide any grounds for such exclusion.

A. The applicable law does not provide any grounds to exclude Exhibit C7 from the record

72. In order to find a legal ground to justify its request for exclusion, RESPONDENT invokes the common law doctrine known as "*without prejudice privilege*" (United Kingdom) or "*settlement privilege*" (United States) [*Ramsay Sales v. Typhoo Tea*; *Cutts v. Head*; *Goodyear Tire v. Chiles power*; *Khodykin et al*., para. 12.174, p. 454; *Zuberbühler et al.*, p. 213]. This doctrine safeguards the statements made during settlement negotiations from disclosure in subsequent court or arbitration proceedings [*Rush and Tompkins v. GLC; Khodykin et al.*, para. 12.178, p. 454; *Berger II*, para. 81, p. 172].

73. Yet, the RESPONDENT has conveniently omitted to mention that neither the applicable arbitration rules, the FAI Rules, nor the law of the seat, Danubian law, provides for any similar rule allowing the exclusion of settlement offers.

74. Regarding the applicable arbitration rules, Art. 34.1 FAI Rules provides: "*The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence*". The leading Commentary on the FAI Rules clarifies that, in the absence of any strict rules on the

admissibility of evidence, each FAI tribunal will determine this issue based on the law of the seat:

"*For example, in arbitration proceedings seated in Finland, parties are generally free to submit virtually any type of evidence* […] *Counsel for the parties should be aware that* [tribunals sited in civil law jurisdictions] *are ill-disposed to accept any restrictive, common-law type technical rules concerning the admissibility of evidence that may prevent them from establishing the facts they deem necessary for deciding the dispute*" (emphasis added) [*Savola*, p. 289].

75. In the present case, the law of the seat does not contain rules on settlement privilege that would protect statements made during settlement negotiations from disclosure [*Ex. R4*]. Notably, RESPONDENT's own Exhibit R4 confirms CLAIMANT's position that Danubian law does not protect settlement offers from disclosure:

"*offers made in* […] *negotiations* [in Danubia] *are regularly used and admitted as evidence in subsequent court and arbitration proceedings*" (emphasis added) [*Ex. R4*].

76. Therefore, RESPONDENT's attempt to exclude Exhibit C7 from the record, based on the common law doctrine that protects settlement offers from disclosure, is groundless and stands to be dismissed.

B. The IBA Rules on Evidence also do not provide for any grounds to exclude Exhibit C7 from the record

77. RESPONDENT may argue, as its last resort, that the IBA Rules on Evidence provide some protection of settlement offers from disclosure, regardless of whether the seat of arbitration is a common law or a civil law jurisdiction.

78. While CLAIMANT does not contest that the IBA Rules on Evidence, as non-binding "*best practices*", can provide helpful guidance to the Tribunal, a closer look into these Rules reveals that they are of no assistance to RESPONDENT. In particular, Art. 4(b) IBA Rules on Evidence reads as follows:

"[…] *insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal* ***may*** *take into account:* [...] *any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations*" (emphasis added) [Art. 4(b) IBA Rules on Evidence]

79. As will be demonstrated below, two elements of this rule render it of no avail to RESPONDENT. First, (**1**) the IBA Rules on Evidence do not contain a substantive rule of inadmissibility of without prejudice offers, but rather make a *renvoi* to the applicable law to be determined by the Tribunal. The applicable law, in turn, does not allow for the exclusion of settlement offers from the record. (**2**) Second, the term "*may*" indicate that the Tribunal has some discretion in deciding whether to exclude evidence from the record. However, CLAIMANT will show that this discretionary power is not unlimited and that there are no valid grounds to exercise this discretion to exclude Exhibit C7.

1. The IBA Guidelines do not contain a substantive rule of inadmissibility of without prejudice offers

80. According to Art. 4(b) IBA Rules on Evidence, the Tribunal may only exclude a without prejudice offer from the record "*insofar as permitted by any mandatory or ethical rules*". According to the *travaux préparatoires*, the drafters of the IBA Rules on Evidence deliberately omitted to provide any substantive rule on the inadmissibility of without prejudice offers [*IBA Task Force I*, p. 28; *Gottlieb*, para. 8, p. 8; *Zuberbühler et al.*, para. 33, p. 213]. The reason for this omission is "*because it was impossible to find a short common denominator for the standards in the various jurisdictions*" (emphasis added) [*Carter II*, p. 179; *von Segesser*, p. 751; *Zuberbühler et al.*, para. 36, p. 215]. According to the leading commentators, the preferable approach is to apply the law of the seat as the law most closely connected to evidentiary issues, since violations of this law may potentially put the award at risk of annulment [*Khodykin*, p. 441, para. 12.118].

81. In the present case, as demonstrated above (see paras. 72-76), the applicable rules – the FAI Rules and the Danubian law – do not allow for the exclusion of settlement offers from the record. Similarly, as regards the relevant ethical rules, the "*Danubian ethical rules for lawyers*" do not provide for protection of settlement negotiations from disclosure [*Ex. R4*].

82. Therefore, the Tribunal should dismiss RESPONDENT's request to exclude Exhibit C7, in accordance with the Danubian law and the "*Danubian ethical rules for lawyers*".

2. The IBA Guidelines give only limited discretion to the Tribunal in the matters of admission of evidence

83. Finally, RESPONDENT may venture to argue that, under the IBA Rules on Evidence, the Tribunal has broad discretion to decide on the admissibility of evidence, which can even go against the applicable law. The basis for such an erroneous position can be mistakenly derived from (*a*) the

use of the permissive wording "*may*": "*the Arbitral Tribunal **may** take into account* [the need to protect confidentiality of settlement negotiations]" (emphasis added), together with (*b*) the recourse to an allegedly existing "*transnational privilege principle*", which, in RESPONDENT's view, would allow to exclude settlement offers in all arbitration proceedings, regardless of the applicable rules.

84. However, RESPONDENT's position does not withstand closer scrutiny on both grounds.

a. The Tribunal's discretion is limited by the applicable law

85. First, while it is true that the term "*may*" reflect the intention of the drafters of the IBA Rules on Evidence that "*arbitral tribunals should continue to be afforded a certain amount of flexibility and discretion in matters of legal privilege*" [*Zuberbühler et al.*, para. 36, p. 215], this discretion is not unlimited: it shall be exercised within the limits of the applicable legal and ethical rules [*Gottlieb*, para. 8, p. 8; *Khodykin et al.*, para. 12.83, p. 430]. Only when the applicable law or ethical rules provide for a possibility to exclude certain evidence, the Tribunal will have discretion to order such exclusions of evidence by balancing all relevant factors [*Blair/Gojković*, p. 256; *IBA Task Force I*, p. 30; *Kläsener et al.*, p. 126].

86. Conversely, when the applicable law or ethical rules do not allow for the exclusion of settlement offers, as in the present case (see above paras. 72-76), the Tribunal should not go against the applicable law.

b. The Tribunal cannot rely on the "transnational privilege principle"

87. Second, the only way for RESPONDENT to bypass the applicable law, is to invoke the concept of "*transnational privilege principle*" [*Berger III*, p. 173; *Gaillard*, p. 29; *Gregoire*, p. 158]. According to this concept, the inadmissibility of privileged evidence obtained during settlement negotiations should become a universal principle in arbitration to encourage peaceful dispute settlement [*Berger I*, p. 501; *Heitzmann*, p. 212; *Khodykin et al.*, para. 12.179, p. 455].

88. However, it is trite to observe that, as of today, there is discrepancy in States' approaches to the issue of privilege: some jurisdictions do not recognize settlement negotiations as privileged (e.g. Danubia, Mediterraneo, China, United Arab Emirates) [*Ex. R4*; *Meshulam et al.*]. As put by the IBA Task Force on Privilege in International Arbitration ("**IBA Task Force**"):

"*Settlement privilege is a concept that emanates from English and Welsh law… Settlement privilege is absence from civil law jurisdictions*… [For instance]*, Germany, Switzerland, Italy,*

and Japan have no specific provisions regarding settlement privilege" [*IBA Task Force II*, pp. 1 *et seq.*].

89. Therefore, no matter how laudable some propositions might seem *de lege ferenda*, it does not raise them to the level of the applicable *de lege lata* rules.

90. Finally, acknowledging the absence of any transnational principle of privilege, the IBA Task Force even provided guidance to the Parties wishing to protect the confidentiality of their negotiations in the absence of any existing transnational legal principle:

"*Nothing prevents parties from entering into confidentiality agreements during settlement negotiations, whose breach would entail liability. However, this is not a default mechanism.*" [*IBA Task Force II*, p. 2].

91. In the present case, the Parties did not enter into confidentiality or non-disclosure agreement: the term "*confidential*" is absent from the Parties' exchanges. Therefore, any RESPONDENT's attempt to impose such an obligation *post factum* is bound to fail.

3. Even if the Tribunal were to apply the common law rule of "*without prejudice privilege*", the conditions for its application are not met

92. Merely for the sake of completeness, CLAIMANT will demonstrate that, even if the Tribunal were to apply the common law rule of "*settlement privilege*", the conditions for its application are not met.

93. Common law has imposed several limitations on when communications cannot be protected by "*without prejudice privilege*": one of such limitations is the absence of a genuine attempt to resolve the dispute [*BAL leadership in law*; *Nicholls*, p. 2; *Sneddon*]. If one Party merely gives an ultimatum to another, without any good faith intention to make concessions, such "*settlement offers*" will not be protected [*ICC Award No. 6653*; *Lohano*; *Nicholls*, p. 2]. Illustratively, in one leading case, the House of Lords of the United Kingdom ruled that the without prejudice rule has no application to communications, in which the defendant was simply asking for a concession rather than giving one, even if these exchanges bore the label "*Without Prejudice*" [*Bradford & Bingley v. Rashid*].

94. In the present case, CLAIMANT submitted Exhibit C7 to prove the futility of any further mediation, as RESPONDENT made crystal clear that it will not make any further concessions.

95. As a final remark, the rationale behind the "*settlement privilege*" rule in common law is to encourage the parties to discuss their differences frankly and make good faith offers of

settlement "*without fear of being embarrassed by these exchanges if, unhappily, they do not lead to a settlement*" [*Cutts v. Head*]. When one Party makes no good faith offer to settle, as in the present case, it cannot later hide behind the alleged "*settlement privilege*" to derail the proceedings by insisting on fruitless mediation.

96. For all these reasons, the Tribunal shall dismiss RESPONDENT's request to remove Exhibit C7 from the record.

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97. **Conclusion on Issue II**: The Tribunal should dismiss RESPONDENT's request to exclude Exhibit C7 from the record. The applicable law, including the FAI Rules and Danubian law, provides no grounds to justify such an exclusion, and the IBA Rules on Evidence offer no support for RESPONDENT's position. Furthermore, even under the common law doctrine of settlement privilege, RESPONDENT's procedural manoeuvre fails as Exhibit C7 does not meet the conditions for privilege protection. Admitting Exhibit C7 is necessary to ensure procedural integrity, as it provides critical evidence of RESPONDENT's unwillingness to engage in genuine settlement negotiations and the futility of further mediation efforts.

III. THE TRIBUNAL SHOULD ORDER THE EXCLUSION OF EXHIBIT R3 FROM THE RECORD

98. Since the political shift in Equatoriana, RESPONDENT has continuously sought to avoid performing its part of the bargain under the Agreement. As part of these efforts, RESPONDENT now attempts to submit on the record Exhibit R3, a confidential document obtained illegally during an orchestrated police raid on CLAIMANT's office in Equatoriana [*Answer to RfA*, para. 7].

99. CLAIMANT will show that the Tribunal (**A**) has the power to exclude Exhibit R3 from the record and (**B**) should do so in order to protect the principle of equal treatment, (**C**) the integrity of the proceedings and (**D**) the attorney-client privilege.

A. The Tribunal has the power to order exclusion

100. As a preliminary remark, the Tribunal has the power to exclude evidence from the record. According to Art. 34(1) FAI Rules, the tribunal has the power to determine the admissibility, materiality, and weight of the evidence. This includes its discretion to admit evidence on the record or to order its exclusion [*Born*, p. 213; *Park*, p. 52; *Godhe*, p. 7; *Waincymer*, p. 752; *Lew et al.*, para. 21-65; *Gaillard/Savage*, para. 1226; *Ali et al*, p. 279].

101. Hence, the Tribunal has the power to exclude Exhibit R3.

B. Admitting Exhibit R3 would compromise the principle of equal treatment

102. The Tribunal should exclude Exhibit R3 from the record, as its inclusion would result in a violation of the principle of equal treatment: a State-owned entity shall not be allowed to use sovereign powers of the State in order to procure evidence for arbitration proceedings.

103. According to Art. 26.2 FAI Rules: "*In all cases, the Arbitral Tribunal shall ensure that the parties are treated with equality*". The principle of equal treatment plays a significant role in determining whether evidence shall be admitted on the record [*Savola*, p. 243; *Taylor et al.*, p. 50; *Nicole NG*, para. 29]. Importantly, when a state-owned entity is involved in the arbitral proceedings, the tribunal must prevent it from exploiting governmental powers to gain an unfair advantage in obtaining evidence [*Ahern*, para. 12; *Campbell*, para. 293]. Admitting evidence obtained by recourse to State's sovereign powers – *e.g.* in the course of criminal investigations – would result in "*inequality and imbalance of power*" [*Libananco v. Turkey*; *Campbell*, para. 293; *O'Malley*, p. 322; *Sourgens*, p. 259].

104. The IBA Rules on Evidence contain an analogous rule:

> "[t]*he Arbitral Tribunal shall… exclude from evidence any Document* [based on] *considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*" (emphasis added) [Art. 9(2) lit. g IBA Rules on Evidence; *Kläsener et al.*, pp. 126, 129; *Zuberbühler*, p 202].

105. In the present case, RESPONDENT could not have gained access to CLAIMANT's confidential internal document, submitted by RESPONDENT as Exhibit R3, without having recourse to the sovereign powers of Equatoriana, RESPONDENT's full owner. This is because Exhibit R3 contains strictly internal communication between CLAIMANT's employees only: a legal advice sent by Ms. Smith, CLAIMANT's Head of Legal Department, to two CLAIMANT's employees – Mr. Deiman, CLAIMANT's previous Head of Contracting, and Mr. Cavendish, CLAIMANT's CEO).

106. The only way RESPONDENT could have obtained access to this confidential correspondence is through the police raid conducted by the authorities of Equatoriana in mid-May 2024 [*Ex. C8*, para. 5; *PO2*, p. 55, para. 27]. During the raid, the police confiscated all of the documents of CLAIMANT's Head of Contracting, including the legal advice given by CLAIMANT's In-House

lawyer to CLAIMANT's senior management, which RESPONDENT now purports to submit as Exhibit R3 [*Ex. C8*, para. 5].

107. Even if these criminal investigations had been initiated lawfully, which CLAIMANT strongly contests, allowing RESPONDENT to submit evidence obtained by its owner, the State of Equatoriana, through the use of State's sovereign powers would undermine the principle of equal treatment. CLAIMANT, as a private company, has no similar powers to obtain any evidence from RESPONDENT, without its consent, by way of criminal investigations or other sovereign acts.

108. Therefore, the Tribunal shall exclude Exhibit R3 from the record in order to preserve the equality of arms.

C. The Tribunal should exclude Exhibit R3 from the record, as RESPONDENT obtained the document illegally

109. Under Art. 9(3) IBA Rules on Evidence, "[t]*he Arbitral Tribunal may... exclude evidence obtained illegally*" (emphasis added) [*John*, para. 6; *Khodykin et al*, Art. 9 para. 12.28].

110. In taking the decision on exclusion, the tribunal should assess whether the party submitting the evidence was involved, directly or indirectly, in the illegal acts, as opposed to having obtained evidence leaked into the public domain without any involvement of the party in question [*IBA Review Task Force 2020*, p. 30]. When the party submitting evidence was involved in its unlawful acquisition, the tribunal should exclude such evidence in order to preserve the integrity of the proceedings [*Blair/Gojković*, p. 256; *Nicole NG*, para. 12,]. Allowing such evidence on the record would amount to giving *carte blanche* to this party to "[benefit] *from its own misconduct*" [*Caratube v. Kazakhstan*; *Nicole NG*, para. 12]. It would encourage the parties to obtain evidence illegally creating an expectation that it will be admissible [*Bertrou/Alekhin*, pp 11, 13; *Nicole NG*, para. 34].

111. In the case at hand, RESPONDENT obtained Exhibit R3 illegally. The circumstances surrounding this criminal investigation confirm that RESPONDENT orchestrated it put pressure on CLAIMANT and to advance RESPONDENT's interests in renegotiating terminating the Agreement.

112. First, after RESPONDENT terminated the Agreement on 29 February 2024 [*Ex. C6*], CLAIMANT proposed to resolve the dispute amicably by way of negotiations [*Ex. C8*, para 3]. However, when the Parties scheduled a meeting to negotiate, on 28 April 2024, RESPONDENT's CEO blackmailed CLAIMANT: either CLAIMANT settles on RESPONDENT's terms, or RESPONDENT will

request Equatoriana's prosecution office to conduct a thorough investigation of CLAIMANT's activities [*Ex. C8*, para 3; *PO2*, para. 28].

113. Second, just two weeks after this explicit threat by RESPONDENT's CEO, the Equatoriana police, indeed, raided CLAIMANT's Head of Contracting office [*Ex. C8*, para 5; *PO2*, para. 27]. During the raid, the police confiscated all CLAIMANT's negotiator's documents [*Ex. C8, para 5*], including Exhibit R3 [*Ex. R3*]. Importantly, after confiscating all the documents, the prosecutor of Equatoriana released Mr. Deiman after only two days of detention [*Ex. C8*, para. 5] and acquitted him within one month: all allegations were based solely on the words of RESPONDENT's CEO, who accused Mr. Deiman of fraud through misrepresentations during the ongoing negotiations of the Agreement (*i.e.* during the negotiations in which RESPONDENT was insisting on an exorbitant 15% reduction without any legal justification and CLAIMANT was not making any representations, let alone misrepresentations) [*Ex. C7, Ex. C8*, para. 5; *PO2*, p. 55, para. 27].

114. Third, RESPONDENT's CEO has a "*very close contact with the prosecution office*" [*Ex. C8*, para. 7], making it highly probable, considering the suspicious timing and an unusually quick acquittal of Mr. Deiman, that RESPONDENT orchestrated the criminal investigation to put pressure on CLAIMANT.

115. Therefore, the close timing between RESPONDENT's CEO's threats and the subsequent raid on CLAIMANT's offices in Equatoriana, combined with the lack of valid justification for the arrest, strongly suggests that the arrest and the raid were intentionally planned to benefit RESPONDENT.

116. For all the above, the Tribunal should order the exclusion of Exhibit R3, as this internal confidential document belonging to CLAIMANT was obtained unlawfully.

D. Admitting Exhibit R3 on the record would violate the attorney-client privilege

117. Exhibits R3 is protected by attorney-client privilege, making it inadmissible evidence. This document contains legal advice given by Claimant's Head of Legal Department, Ms. Heidi Smith, admitted to the Bar of Mediterraneo [*Ex. C7*].

118. According to Art. 9(2) lit. b IBA Rules on Evidence, "[t]*he Arbitral Tribunal shall… exclude from evidence any Document* [based on] *legal impediment or privilege under the legal or ethical rules determined... to be applicable*" [*Art. 9(2) lit. b IBA Rules on Evidence*].

119. As discussed about in paras. 118 , the Tribunal shall apply the legal and ethical rules of the seat to the issues regarding admission of evidence. In the present case, the Danubian ethical rules

for legal practitioners explicitly protect attorney-client privilege [*Ex. R4*]. In particular, these ethical rules provide that "*communication between counsel and client is to be kept confidential*" [*Ex. R4*].

120. In taking its decision on exclusion, the Tribunal shall analyze whether (1) the attorney giving legal advice acted in a professional capacity and (2) the advice was provided in respect of specific legal question [*Gregoire*, p. 49; *Gupta*, pp 97-98; *Zuberbühler*, p. 213].

121. In this case, all the requirements for the application of attorney-client privilege are met. First, CLAIMANT's Head of Legal Department is admitted to the bar of Mediterraneo and acted in her professional capacity, when giving legal advice to CLAIMANT'S senior management [*PO2*, para. 11].

122. Second, CLAIMANT's Head of legal Department was providing advice in respect of specific legal questions concerning the interpretation of several provisions of the Agreement. Hence, Exhibit R3 is protected by attorney-client privilege as it contains confidential legal advice provided by a qualified lawyer addressing a specific legal question.

123. To conclude, admitting Exhibit R3 would violate the ethical standards of the seat of arbitration. Accordingly, the Tribunal must exclude Exhibit R3 from the record.

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124. **Conclusion on Issue III:** The Tribunal should order the exclusion of Exhibit R3. Excluding this evidence is fully compliant with the Tribunal's authority under the FAI Rules and the IBA Rules on Evidence and is necessary to uphold equality between the parties. Admission of Exhibit R3 by RESPONDENT would violate attorney-client privilege and undermine procedural integrity of these proceedings.

PART II : APPLICABLE LAW

IV. THE CISG APPLIES TO THE AGREEMENT

125. During the negotiations of the Agreement, the Parties did not have any disagreement on the applicable law: CLAIMANT made it clear that CISG shall apply as the "gold standard for international sales transactions" and RESPONDENT did not emit any objections. As a result, the Parties agreed to apply the law of one of the Contracting Parties to the CISG – the law of Equatoriana. However, RESPONDENT is now trying to alter the applicable law post factum, as it seems fit. The goal pursued by this maneuver is hard to conceal: the CISG does not allow to terminate the contract merely "for convenience", without any fundamentally breach. Only the law of Equatoriana could give RESPONDENT a way out of its contractual obligations.

126. This RESPONDENT' attempt to avoid performing its contractual obligations shall not succeed. CLAIMANT requests the Tribunal to apply the CISG to the merits of the dispute, since (A) the Parties agreed to the application of the CISG, (B) the dispute falls within its scope and, (C) the Agreement was not concluded "by auction" in the sense of Art. 2(b) CISG

A. The Parties agreed to apply the CISG

127. First, CLAIMANT will demonstrate that the CISG applies in this case, as (**1**) it is part of the domestic law of Equatoriana and (**2**) the Parties did not exclude its application.

1. The CISG applies to the Agreement as part of the law of Equatoriana

128. RESPONDENT alleges that the Civil Code of Equatoriana governs the Agreement rather than the CISG [*Answer to RfA*, para. 19]. However, this position is irreconcilable with both the Agreement and the CISG.

129. The Tribunal shall determine the applicable law based on the relevant provisions of the applicable arbitration rules [*Huber/Mullis*, pp. 66-67; *Schwenzer/Jaeger*, pp. 313-316]. In this case, the FAI Rules apply [*Art. 30 PSA*]. Under Art. 29(1) FAI Rules, the Tribunal must apply "*the law or rules of law that the Parties have agreed upon to the substance of the dispute*". Here, the Parties explicitly agreed in Art. 29 PSA that the Agreement is governed by the law of Equatoriana, excluding its conflict of laws principles.

130. It is undisputed that Equatoriana has ratified the CISG [*PO1*, para. 4]. According to leading cases and commentaries, the CISG becomes part of the national law *ipso jure* from the ratification [*Potato chips plant case*, para. 38; *CISG-AC Opinion No. 16*, para. 5.5; *Lookofsky*,

p. 14]. Since Equatoriana ratified the CISG, it forms an integral part of its domestic law and thus automatically governing the Parties Agreement.

2. The Parties did not exclude the application of the CISG

131. RESPONDENT may argue that the Parties agreed to exclude the application of the CISG. While Art. 6 CISG allows the Parties to exclude its application [*Gilette/Walt*, p. 66; *Kröll et al.,* p. 103, para. 8], the requirements for a valid exclusion are not met in this case.

132. CLAIMANT will demonstrate that the CISG applies as the Parties did not exclude it (*a*) either subjectively or (*b*) objectively.

a. There is no subjective exclusion of the CISG

133. First, the Parties can exclude the application of the CISG subjectively [*Art. 6 CISG, Art. 8(1) CISG*] when there is a clear intent to do so [*Ferrari II*, p. 12; *Manner/Schmitt*, p. 78]. To determine the intentions of the Parties, the Tribunal (*i*) shall look into the wording of the Agreement (*ii*) and the negotiations of the Parties.

i) The Agreement does not exclude the CISG

134. RESPONDENT may assert that the Parties excluded the CISG when they agreed to apply the Law of Equatoriana [*Art. 29 PSA*; *Answer to RfA*, para. 19]. However, Art. 29 PSA is not a valid exclusion of the CISG.

135. To exclude the CISG under Art. 6 CISG, the parties must express a clear and unambiguous intent to do so [*Park Plus Inc. v. Sotefin SA*; *Electronic case*, p. 6, para. 27; *CISG-AC Opinion No. 16*, para. 4.2]. Such a clear intent is present in the following cases: (a) the Parties exclude the CISG expressly, (b) choose the law of a non-Contracting State or (c) indicate a specific domestic law – e.g. Civile Code of particular State [*ICC Case 9187*; *Used printing machines case I*; *Kröll et al.*, p. 104, para. 12; *Manner/Schmitt*, p. 78].

136. A simple choice of the national law of a CISG Contracting State, without further clarification, is not sufficient to exclude the CISG [*Cardboard coffins case*, para. 85; *A/CONF.97/11, Art. 5*, p. 86, para. v; *CISG-AC Opinion No. 16*, para. 4.2; *Ferrari I*, p. 157; Schwenzer/Jaeger, p. 315]. Illustratively, as one tribunal applying the CISG stated: "*a general reference to domestic law should not be interpreted as silent exclusion of the CISG*" [*ICC Case 9187*].

137. In the present case, Art. 29 PSA provides that "*the Agreement is governed by the law of Equatoriana to the exclusion of its conflict of laws*". The Parties did not expressly exclude the

CISG, choose the law of a non-Contracting State or indicate a specific Equatorianan law. As such, Art. 29 PSA is not sufficient to exclude the CISG and the Tribunal should apply it.

ii) The negotiations of the Parties did not exclude the CISG

138. The negotiations history also confirm that the Parties did not have an intention to exclude the CISG. Art. 6 CISG also permits the exclusion of the CISG based on the Parties' implicit intentions if there is a clear and mutual intent to exclude it [*Ferrari II*, p. 121*; Manner/Schmitt*, p. 78]. However, all the evidence supports that both Parties indented to apply the CISG.

139. During the first meeting between the Parties CEO's, CLAIMANT conveyed to RESPONDENT that the CISG shall apply, as it is the gold standard for international sales contract [Ex. R1, para. 11]. RESPONDENT did not make any objections and proposed to rely on RESPONDENT's standard Model Contract clause, which, to the Claimant's knowledge based on previous transactions with other governmental entitles of Equatoriana, provided that "*[t]he Agreement is governed by the CISG, for all issues not regulated by the CISG the law of Equatoriana should apply*" [*PO2*, para. 10; Ex. R1, para. 11]. CLAIMANT was not informed that this clause of the Model Contract was changed in 2022 and did not cite the CISG explicitly anymore [Ex. R1, para. 11]. Had RESPONDENT truly wanted to exclude the CISG, it should have clearly communicated it to CLAIMANT, or, at the very least, specified the exclusion when signing the Agreement.

140. Here, RESPONDENT not only stayed passive during the discussions about the law governing the Agreement, but it is now trying to create a false narrative that both Parties somehow agreed to exclude the CISG.

141. Therefore, all the evidence supports that both Parties rather had the intention to apply the CISG to the Agreement.

b. <u>A reasonable person in the same situation would apply the CISG</u>

142. Further, if the conduct of the Parties does not indicate any intent to exclude the CISG, Art. 8(2) CISG allows the exclusion under an objective test, considering how a reasonable person in the same situation would interpret the Parties' intentions.

143. As demonstrated above, the wording of the applicable law clause [*Art. 29 PSA*] does not support that the Parties indented to exclude the CISG. Therefore, a reasonable third party would conclude that the Parties did not exclude the CISG as they did not exclude its application explicitly, chose the law of a Contracting State or chose a specific national law. Based on these

factors, a reasonable third party would naturally conclude that the Parties, through their negotiations and Art. 29 PSA, intended for the CISG to apply as part of the law of Equatoriana.

144. Therefore, the Tribunal should apply the CISG to the substance of the dispute, rather than the Civile Code of Equatoriana, as the CISG has not been excluded neither under Art. 6 CISG nor Art. 8(2) CISG.

B. The dispute falls within the scope of application of the CISG

145. Further, CLAIMANT will show that the Agreement is governed by the CISG, as (**1**) the Agreement is an international contract (**2**) for the sale of goods in the sense of Art. 3(2) CISG.

1. The Agreement is an international contract

146. RESPONDENT argues that the contract is not international [*Answer to RfA*, para. 20].

147. According to Art. 1(1) CISG, a sale contract is considered international when the Parties have their place of business in different countries when concluding the contract or afterwards [*Ostroznik Savo*, paras. 15, 25; *A/CONF. 97/5*, Art. 1, p. 15, para. 2; *DiMatteo*, p. 142*; Schlechtriem/Schroeter*, para. 25]. The international performance of the contract is irrelevant to determine the internationality [*Gilette/Walt*, p. 27].

148. In the present case, CLAIMANT has his headquarters in Mediterraneo [*Art. 4 PSA*] and RESPONDENT in Equatoriana [*Arts. 2*,*4 PSA*]. Thus, the cross-border nature requirement is met, and the Agreement qualifies as an international contract.

2. The Agreement is a sale of goods under Art. 3(2) CISG

149. RESPONDENT argues that the preponderant part of CLAIMANT's obligations consists in the provision of services [*Answer to RfA*, para. 20], which would exclude the applicability of the CISG under Art. 3(2) CISG. According to this provision, the CISG does not apply to *"contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services*" [*Art. 3(2) CISG*].

150. In the case at hand, the Agreement covers both services and sale of goods obligations [*Art. 2 PSA*]. It is not contested that CLAIMANT is responsible for providing the materials and utilities for the Plant, building it and handing over the infrastructure in RESPONDENT's site. The following elements relates to sale of goods: core system – electrical equipment – transformer of the electrolyser, compressor, pipes, cable installation and connection equipment [*Ex. C5*, para. 11]. The following elements consist of services: packaging of the electrolyser,

management and engineering of the project, site works and know-how at the Plant site, physically building the Plant and providing training and maintenance to it [*Ex. C5*, para. 11].

151. These combined obligations qualify the Agreement as a mixed contract, as it includes the transfer of goods, along with additional services obligations [*Park Plus Inc. v. Sotefin SA*, para. 146; *Brunner/Feit*, para. 2; *Hachem*, para. 11; *Huber/Mullis*, p. 45].

152. CLAIMANT will demonstrate that the Agreement is a sale of goods as (*a*) the Agreement is a uniform contract covering both sale and services obligations and (*b*) the sale of goods is the preponderant part of the Agreement.

a. The Agreement is a uniform contract covering both sales and services

153. When a contract involves both sales and services obligations, before asserting which part is the preponderant one, the Tribunal must first define whether the Agreement is a single contract or if the Parties' intended to create two separate contracts - one for the services and another for the sale of goods[]. This step is essential because the CISG applies only when the Parties intended a single contract to cover both obligations [*Park Plus Inc. v. Sotefin SA*, para. 147; *CISG-AC Opinion No. 4*, para. 3.1; *Hachem*, para. 12; *Honnold/Flechtner*, p. 79].

154. To make this determination, the Tribunal must analyse the Parties' intentions [*Brunner/Feit*, para. 9; *Huber/Mullis*, p. 46]. A global price for sale and services typically indicates a unified contract [*Hachem*, para. 15]. Notably, Art. 7 PSA provides a single price of EUR 285 Mio for the sale of materials to build the Plant and the related services obligations, and a global price for sale and services typically indicates a unified contract [*Hachem*, para. 15]. Moreover, the Agreement is titled "Purchase and Service Agreement". This strongly indicates that Agreement is a single contract both for the sales of goods and services.

155. Based on this, the Tribunal should treat the Agreement as a unified contract and can move forward to analysing the preponderant part of the Agreement.

b. The sale of goods is the preponderant part of the Agreement

156. Under Art. 3(2) CISG, first the Tribunal analyses the preponderance of the sale of goods under an objective interpretation. It must compare the economic value of the sale of goods and of the services. Alternatively, if the economic preponderance does not reflect the Parties'

interpretation of what is preponderant for them, the Tribunal can further complement its analysis under a subjective interpretation.

157. In this case, CLAIMANT will show that (*i*) economically and (*ii*) subjectively the sale of goods is the preponderant part of the Agreement.

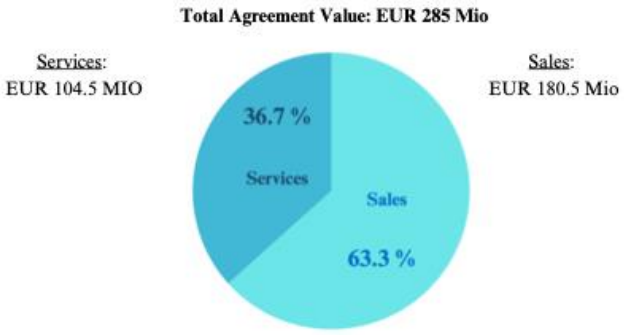
i) Based on the objective economic analysis test, the sale of goods is preponderant

158. First, under Art. 3(2) CISG, for the CISG to apply, the economic value of the sale must exceed the value of the services obligations [*Punching line case*, para. 39; *Spinning plant case*, para. 2.2; *CISG-AC Opinion No. 4*, para. 1.1; *Huber/Mullis*, p. 46].

159. There is no strict percentage that defines predominance. Some authorities suggest that goods shall exceed 50% of the total contract value [*Officine Maraldi case*, p. 12; *Brunner/Feit*, para. 8; *Gilette/Walt*, p. 61], while others argue a more significant margin above 50% [*Park Plus Inc. v. Sotefin SA*, para. 152; *Huber/Mullis*, p. 47].

160. In the present case, the Parties' total Agreement value is EUR 285 million [*Ex. C5*, para. 10]; the sale of goods amounts EUR 180.5 million, while the services part costs EUR 104.5 million [*Ex. C5*, para. 11].

161. The chart below indicates that the sales account for 63.3 % of the overall Agreement value, while labor and services represent 36.7% of it.



162. Therefore, since the economic value of the sale of goods significantly exceeds that of the services, the sale of goods constitutes the preponderant part of the Agreement.

ii) Based on the Parties' intentions analysis test, the sale of goods is also preponderant

163. Alternatively, the Parties' intentions can deviate from the objective price allocation. Under Art. 3(2) CISG, the predominance of the obligations can also depend on the buyer's specific interest [*Window case*, para. 16]. Relevant factors to assess the parties' intentions include the essential aim of the contract, its structure, its negotiation and the price allocation [*Coplass v. Rudos case*, para. 6; *Brunner/Feit*, para. 14; *CISG-AC Opinion No. 4*, para. 3.4].

164. In this case, even if the Tribunal supplement its analyse with the Parties' intentions, the sale still constitutes the predominant part of the Agreement.

165. The primary interest of RESPONDENT was the materials used to construct the Plant. It awarded the contract to CLAIMANT due to "*the amount of parts produced locally in Equatoriana*" and not because of his know-how [*Ex. C5*].

166. According to Art. 31 PSA, the Agreement "*should be interpreted in light of the Request for Quotation RFQ 1/2023*". Art. 5 of the Request for Quotation indicates that RESPONDENT puts a bigger interest in the sale of goods than in the services. This provision is titled "product and prices" and omits a reference to the services and maintenance part. This omission strongly suggests that RESPONDENT's primary interest lies in the supply of goods.

167. It follows from both economic and subjective analysis that the relevant two tests for preponderance does not support RESPONDENT's argument. The preponderant part of the Agreement is the sale of goods. Therefore, the Agreement is not excluded by Art. 3(2) CISG.

V. THE EXCLUSION OF ART. 2(B) CISG COVERING "SALES BY AUCTION" DOES NOT APPLY TO THE AGREEMENT

168. As a final attempt to avoid the application of the CISG and instead benefit from domestic law provisions, RESPONDENT argues that the Agreement resulted from a reverse auction and is therefore excluded by Art. 2(b) CISG. This provision explicitly excludes "*sales made by auction*".

169. However, RESPONDENT's qualification of the Agreement as a "sale by auction" in the sense of Art. 2(b) CISG must fail. CLAIMANT will show that the rationale for excluding auctions from the CISG does not apply in this case. Specifically, CLAIMANT will show that (**1**) the Agreement was not concluded by auction. (**2**) Even if the Tribunal considers the Agreement to result from

an auction, CLAIMANT will demonstrate that it qualifies as a government procurement contract, which, under the CISG, does not fall under the exclusion of sales by auction.

1. The Agreement was not concluded by auction

170. Art. 2(b) CISG excludes sales by auction. In this case, the conclusion of the Agreement involved two separate phases. First, an auction-like phase to submit the offer. Second, a distinct negotiation phase that led to the Agreement [*RFQ*, para. 1(c)].

171. Initially, CLAIMANT submitted its offer via RESPONDENT's official tender platform [*Ex. C1*]. Following this, Respondent analysed each offer submitted during the tender process and selected the two best bidders [*RFQ*, para. 1(c)]. This marked the conclusion of the auction-like process and started a separate phase: the negotiations. They were conducted through physical meetings and e-mail exchanges over a period of two and a half months [*RfA*, para. 14; *Ex. C1*, para. 1.c.1; *Ex C2*, p. 13]. Ultimately, the Agreement was concluded.

172. Therefore, the process of concluding the Agreement was bifurcated: first, the submission of the offer through the tender process, and second, the direct negotiations between the Parties [*RFQ*, para. 1(c)]. This shows that the Agreement is the product of the negotiations and not the result of the auction process. CLAIMANT's initial bid amounted to EUR 300 million, but after negotiations, the Agreement was concluded for EUR 285 million. If the Agreement resulted from the auction process, its price would not have changed.

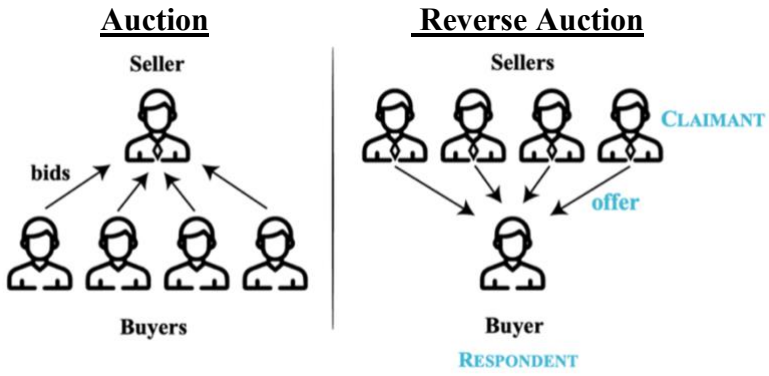
2. The Agreement is a government procurement contract

173. In the alternative, even if the Tribunal considers that the auction process relevant to awarding the contract, CLAIMANT submits that the Agreement was a reverse auction within the framework of a government procurement contract, and thus falls within the scope of the CISG.

174. First, the Agreement qualifies as a government procurement contract, because RESPONDENT, through its tender process, aimed to conclude a contract with a supplier in order to develop a Plant as part of Equatoriana's Net-Zero-2040 project [*RfA*, p. 3 para. 2].

175. Second, the process involved a reverse-auction rather than an auction. In a typical sale by auction, the seller sells a good to multiple buyers, while in reverse auctions the buyer seeks a good from multiple sellers. This is what happened in this case. RESPONDENT opened a tender

process to identify the most suitable supplier for Equatoriana's project, and CLAIMANT was among all potential suppliers. Art. 31 PSA



176. Leading scholars and cases confirm the CISG does not exclude government procurement contracts involving reverse auctions [*Electronic Case I*, para. 32; *Hachem*, Art. 2(b) CISG para. 2; *Pereira et al., Government Contracts and Article 2 Exclusions*, para. 1]. In the *Electronic Case I*, the Tribunal concluded that processes such as public procurement or international tenders, where multiple offers are solicited and the most favorable is accepted, do not qualify as auctions [*Electronic Case I*, para. 32]. These contracts remain within the scope of the CISG [*Electronic Case I*, para. 32]. The determining factor is that, by the time the contract is awarded, the buyer knows the identity of the bidders and can therefore anticipate whether the successful bidder is based abroad [*Schroeter*, p. 29].

177. Normally, in a typical auction, the buyer's identity and location remain unknown until the process concludes, creating uncertainty as to whether the CISG applies [*Electronic case I*, para. 30; *Hachem*, para. 20; *Honold*, para. 51; *Pereira et al.*, *Government Contracts and Article 2 Exclusions*, para. 3].

178. However, when concluding the Agreement, it was already clear that the CISG would apply in case of dispute. RESPONDENTknew the foreign location of CLAIMANT. Over 3 months and 20 days occurred between the start of the auction process and the signing of the Agreement [*Ex. C1*, para. 1.c.1; *Ex C2*, p. 13]. During that time, RESPONDENT examined CLAIMANT's initial offer, which contained all relevant details about CLAIMANT [*PO2*, para. 9]. From June onward, RESPONDENT entered deep negotiations with CLAIMANT, making it impossible not to recognize CLAIMANT foreign location. At the latest, this became clear when signing the Agreement [*Ex C2*, p. 13]. By choosing an international supplier, RESPONDENT effectively accepted that

international rules and obligations would govern their Agreement. Therefore, the "surprise-effect" that the CISG tries to avoid in auctions does not exist in this case.

***

179. **Conclusion on Issue IV & V:** The Tribunal should apply the CISG to the substance of the dispute. The Convention applies to the Agreement as it forms part of the proper law of Equatoriana and as the Parties did not intend to exclude its application. The CISG applies to the Agreement as it is an international mixed contract where the preponderant part is the sale of goods. The CISG applies to the Agreement as it does not satisfy the underlying reasons that would justify its exclusion under Art. 2(b) CISG.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to:

1. Declare that it has jurisdiction and that the claim is admissible (**Issue I**).
2. Admit Exhibit C7 on the record (**Issue II**).
3. Order the exclusion of Exhibit R3 from the record (**Issue III**).
4. Find that the CISG applies to the Agreement of the Parties (**Issue IV & V**).

And to order that:

5. RESPONDENT bears the costs of this arbitration.

CERTIFICATE FOR AUTHENTICATION

We hereby confirm that this Memorandum was written only by the people whose names are listed below.

Viviane Molletta

Selda Barcedogmus

Tim Hogg

INDEX OF ABBREVIATIONS AND DEFINITIONS

%	Percent
Abs.	Absatz (=paragraph)
ADR	Alternative Dispute Resolution
AG	Aktiengesellschaft (public limited company)
Answer to RfA	Answer to the Request for Arbitration (14 August 2024)
Art.	Article / Articles
ASA	Swiss Arbitration Association
BAL	Bradley Allen Love Lawyers
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	United Nations Convention on Contracts for the International Sale of Goods – Advisory Council
Co.	Company
CONF.	Conference
COO	Chief Operating Officer
CVIM	Convention des Nations Unies sur les contrats de vente internationale de marchandises (= CISG)
e.g.	exampli gratia (for example)
Ed.	Edition
edit(s).	editor(s)
et al.	et alii / et aliaea (and others)
et seq.	et sequens (and the following/ paragraph)
etc.	et cetera
EUR	Euro

Ex. C1	CLAIMANT's Exhibit : Request for Quotation
Ex. C2	CLAIMANT's Exhibit : Purchase and Service Agreement
Ex. C3	CLAIMANT's Exhibit : Transition News
Ex. C4	CLAIMANT's Exhibit : E-mail on Updated on supplier
Ex. C5	CLAIMANT's Exhibit : Witness Statement Poul Cavendish
Ex. C6	CLAIMANT's Exhibit : Termination of the Purchase and Service Agreement
Ex. C7	CLAIMANT's Exhibit : Without-prejudice Offer
Ex. C8	CLAIMANT's Exhibit : Witness Statement of August Wilhelm Deiman
Ex. R1	RESPONDENT's Exhibit : Witness Statement of Johanna Ritter
Ex. R2	RESPONDENT's Exhibit : E-mail about Local Content
Ex. R3	RESPONDENT's Exhibit : E-mail about Local Content
Ex. R4	RESPONDENT's Exhibit : Vindobona Legal News from the Bar (1-4)
FAI	The Arbitration Institute of the Finland Chamber of Commerce
FAI Mediation Rules	Mediation rules of the Finland Chamber of Commerce
FAI Rules	Arbitration rules of the Finland Chamber of Commerce, version 2024
GmbH	Gesellschaft mit beschränkter Haftung (limited liability Company)
GOC	Government owned Company
HTML	Hypertext Markup Language
HKIAC	Hong Kong International Arbitration Center
i.e.	id est (that is)
IBA	International Bar Association
Ibid.	Ibidem

ICC	International Chamber of Commerce
ICCA	International Congress and Convention Association
ICSID	International Centre for Settlement of Investment Disputes
infra	Below
l.	line(s)
LCIA	The London Court of International Arbitration
lit.	litera(s)
Llc	Limited liability company
Ltd	Limited Company
Mr.	Mister
Ms.	Miss
No.(s)	Number(s)
para(s).	paragraph(s)
Plc	public limited company
PO1	Procedural Order No. 1 of (11 October 2024)
PO2	Procedural Order No. 2 of (13 November 2024)
p(p).	page(s)
PPLE	Public Procurement Law of Equatoriana
PSA	Purchase and Service Agreement of (17 July 2023)
Pvt	Private Company
RfA	Request for Arbitration of (31 July 2024)
RFQ	Request for Quotation of (3 January 2023)
Sàrl	Société à responsabilité limitée (= Ltd)
Schieds VZ	Zeitschrift für Schiedsverfahren (= German Arbitration Journal)
SMC	Singapore Mediation Center
supra	Above

UKHL	United Kingdom House of Lords Court
UN	United Nations
USA	United States of America
v.	versus
VIAC	Vienna International Arbitration Center
Vol.	volume
ZEuP	Zeitschrift für Europäisches Privatrecht

LEGAL SOURCES AND MATERIALS

Cited as:	
A/CONF. 97/5	Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat 14 March 1979
A/CONF.97/11	Report of the First Committee 7 April 1980
CISG	United Nations Convention on Contracts for the International Sale of Goods Vienna, 1980
CISG-AC Opinion No. 4	CISG-AC Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG) Madrid, 24 October 2004
CISG-AC Opinion No. 16	CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6 Pretoria, 30 May 2014

FAI Rules	Arbitration rules of the Finland Chamber of Commerce, version 2024 Helsinki, 2024
FAI Guidelines	The Mediation Rules of the Finland Chamber of Commerce Helsinki, 2016
Global Practice Guide	Lex Mundi Litigation Arbitration and Dispute Resolution Group In-House Counsel and the Attorney-Client Privilege Global Practice Lex Mundi, 2014
Guideline on Mediation	CIArb Professional Practice Guideline on the Use of Mediation in Arbitration London, 2021
IBA Task Force I	IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration / Consolidated Amendments **Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration** January 2021

IBA Task Force II	IBA Task Force on Privilege in International Arbitration **Report on Uniform Guidelines on Privilege in International Arbitration** September 2020
ICC Report	ICC Commission on Arbitration and ADR **The Accuracy of Fact Witness Memory in International Arbitration** DRS890 ENG International Chamber of Commerce, Paris 2020
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation Vienna, 2002
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts Rome, 2016

LIST OF AUTHORITIES

Cited as:	
Ahern	Ahern, William **Admissibility of Evidence** In: Duggal Kabir A.N. et al. (edits.), Investment Law and Arbitration Jus Mundi 2024 Cited in para.: 103
Alexander	Alexander, Nadja **International and comparative Mediation** Kluwer Law International 2009 Cited in para.: 55
Ali et al.	Ali, Hyder / Wessel, Jane / de Gramont, Alexandre / Mellske, Ryan **The International Arbitration Rulebook: A Guide to Arbitral Regimes** Kluwer Law International 2019 Cited in para.: 48

BAL	BAL, Genuine leadership in law **"Without Prejudice"– Not A Catch-All Confidentiality Term** Available at: https://ballawyers.com.au/article/without-prejudice-not-a-catch-all-confidentiality-term//#:~:text=What%20is%20a%20"Without%20Prejudice,communications%20facilitate%20confidentiality%20within%20negotiations. [Last visited on 6 December 2024] Cited in para.: 93
Balthasar	Balthasar, Stephan **Best practice in international arbitration: comparative reflections on the UNCITRAL Model Law** In: International Commercial Arbitration 2nd Ed., Bloomsbury Publishing 2021 Cited in para.: 54
Berg	Berg, Alan **Promises to Negotiate in Good Faith** In: Law Quarterly Review Peter Mirfield 1993 Cited in para.: 11

Berger I	Berger, Klaus Peter **Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration** 3rd Ed., Kluwer Law International 2015 Cited in para.: 54
Berger II	Berger, Klaus Peter **Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion** In: Arbitration International Vol. 22, Issue 4 Oxford University Press 2006 Cited in paras.: 72, 87
Berger III	Berger, Klaus Peter **The Settlement Privilege: A General Principle of International ADR Law** In: Arbitration International Vol. 24, Issue 2 Oxford University Press 2008 Cited in para.: 87

Bertrou/Alekhin

Bertrou, Grégoire / Alekhin, Sergey

The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?

In: The Paris Journal of International Arbitration Vol. 4

Les Cahiers de l'Arbitrage 2018

Cited in para.: 110

Blackaby et al.

Blackaby, Nigel / Partasides, Constantine / Redfern, Alan / Hunter, Martin

Redfern and Hunter on International Arbitration

6th Ed., Oxford University Press 2015

Cited in paras.: 34, 39

Blair/Gojković

Blair, Cherie / Gojković, Ema Vidak

WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence

In: ICSID Review - Foreign Investment Law Journal Vol. 33, Issue 1

Winter 2018

Cited in paras.: 85, 110

Born	Born, Gary **International Commercial Arbitration** 3rd Ed., Alphen aan den Rijn 2021 Cited in para.: 39, 48, 59, 100
Brödermann	Brödermann, Eckart J. **UNIDROIT Principles of International Commercial Contracts** 2nd Ed., Baden-Baden 2023 Cited in paras.: 41, 43, 44, 51
Brown/Mariott	Brown, Henry J. / Marriott, Arthur L. **ADR Principles and Practice** 4th Ed., Sweet & Maxwell 2019 Cited in para.: 61
Brunner/Feit	Brunner, Christoph / Feit, Michael **Article 3 [Goods to be Manufactured; Services]** In: Brunner, Christoph / Gottlieb, Benjamin (edits.), Commentary on the UN Sales Law (CISG) Haywards Heath 2019 Cited in paras.: 151, 154, 159, 163

Bühler/Dorgan	Bühler, Michael / Dorgan, Carroll **Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration: Novel or Tested Standards?** In: Journal of International Arbitration Vol. 1, Issue 1 Kluwer Law International 2000 Cited in para.:
Cairns	Cairns, David J. A. **Mediating International Commercial Disputes: Differences in U.S. And European Approaches** In: American Arbitration Association, Handbook on International Arbitration & ADR 2nd Ed., JurisNet LLC 2010 Cited in para.: 48
Carter I	Carter, James H. **Issues Arising from Integrated Dispute Resolution Clauses** In: New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series No. 12 A.J. van den Berg Ed. 2005 Cited in para.: 55
Carter II	Carter, James H. **Privilege Gets a New Framework**

	In: International Arbitration Law Review 2010 Holloway 2010 Cited in para.: 80
Chapman	Chapman, Simon **Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith** In: Journal of International Arbitration Vol. 27, Issue 1 Kluwer Law International 2000 Cited in para.: 55,
Delaney/Hendricks	Delaney, Jo / Hendriks, Charlotte **Multi-tiered dispute resolution clauses: a reminder of the Court of Appeal's split decision** Available at: https://www.globalarbitrationnews.com /2020/08/11/multi-tiered-dispute-resolution -clauses-a-reminder-of-the-court-of-appeals -split-decision/ [Last visited on 24 November 2024] Cited in para.: 62

Demeyere

Demeyere, Luc

The Search for the "Truth": Rendering Evidence under Common Law and Civil Law

In: Zeitschrift für Schiedsverfahren Vol. 6

SchiedsVZ 2003

Cited in para.: 48

DiMatteo

DiMatteo, Larry A.

International Sales Law – A Global Challenge

Cambridge University Press, New York 2014

Cited in para.: 147

Emanuele et al.

Emanuele, C. Ferdinando / Jedrey, Nathaniel E./Molfa, Milo

Evidence in International Arbitration: The Italian Perspective and Beyond

Thomson Reuters, London 2016

Cited in para.: 48

Ferrari I

Ferrari, Franco

International Sale of Goods: Applicability and Applications of the 1980 United Nations Convention on Contracts for the International Sale of Goods

Martinus Nijhoff Publishers, Basle, Geneva [etc.] 1999

Cited in para.: 136

Ferrari II	Ferrari, Franco **Contrat de vente internationale: applicabilité et applications de la Convention de Vienne sur les contrats de vente internationale de marchandises** Basle, Geneva [etc.] 2005 Cited in para.: 138
Filler	Filler, Ewald A. **Commercial Mediation in Europe: An Empirical Study of the User Experience** In: Filler, Ewald A. (edit.), Commercial Mediation in Europe: An Empirical Study of the User Experience, Global Trends in Dispute Resolution Vol. 5 Kluwer Law International 2012 Cited in para.: 62
Flannery	Flannery, Louis **The Law Applicable to the Arbitration Agreement** In: Paper for International Arbitration Conference Eleven International Publishing 2016 Cited in para.: 39

Gaillard	Gaillard, Emmanuel **Trente ans de Lex mercatoria. Pour une méthode sélective de la méthode des principes généraux du droit.** In: Journal du Droit international „Clunet“ Lyon 1995 Cited in para.: 39
Gaillard/Savage	Gaillard, Emmanuel / Savage, John **Fouchard Gaillard Goldman on International Commercial Arbitration** Kluwer Law International 1999 Cited in para.: 87
Gilette/Walt	Gilette, Clayton P. / Walt, Steven D. The UN Convention on Contracts for the International Sale of Goods – Theory and Practice 2nd Ed., Cambridge University Press 2016 Cited in paras.: 131, 147, 159
Girsberger/Voser	Girsberger, Daniel / Voser, Nathalie **International Arbitration: Comparative and Swiss Perspectives** 5th Ed., Schulthess Juristische Medien AG 2016 Cited in para.: 32

Godhe

Godhe, Aleksander

Tribunal duties and the exclusion of evidence in international arbitration: the tug-of-war of fairness and efficiency

In: Arbitration international

Oxford University Press 2024

Cited in para.: 100

Golden/Lamm

Golden, Jeffrey / Lamm, Carolyn

International Financial Disputes – Arbitration and Mediation

Oxford University Press 2016

Cited in para.: 54

Gomm Ferreira dos Santos

Gomm Ferreira dos Santos, Mauricio

The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements

In: Revista Brasileira de Arbitragem, Vol. X, Issue 38

Comitê Brasileiro de Arbitragem CBAr & IOB 2013

Cited in para.: 54

Gottlieb

Gottlieb, Clearly

2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration

Cleary Gottlieb Steen & Hamilton LLP, 2021

Cited in para.: 80

Gregoire

Gregoire, Nicolas

Evidentiary privileges in international arbitration : a comparative analysis under English, American, Swiss and French law

Schulthess Juristische Medien AG, Genève 2016

Cited in para.: 87, 120

Gupta

Gupta, Kartik

Admissibility of unlawfully obtained evidence in international arbitration

In: National Law Institute University, Vol. 6, Issue II

NLIU Law Review 2022

Cited in para.: 120

Hachem

Hachem, Pascal

Article 3 CISG: Contracts for goods to be manufactured or for services

In: Schwenzer, Ingeborg / Schroeter, Ulrich G (edits.), Commentary on the UN Convention on the International Sale of Goods (CISG)

5th Ed., Oxford University Press 2022

Cited in paras.: 151, 153, 154, 176, 177

Haugeneder

Haugeneder, Florian

A 05 – Objective Arbitrability

In: Vienna International Arbitral Centre Selected Arbitral Awards, Vol. 1

Verlag WKÖ Service GmbH 2015

Cited in para.: 39

Heitzmann

Heitzmann, Pierre

Confidentiality and Privilege in Cross-Border Legal Practice: The Need for a Global Standard ?

In: ASA Bulletin, Vol. 26, Issue 2

Wolters Kluwer 2008

Cited in para.: 87

Helmer

Helmer, Elena V.

International Commercial Arbitration: Americanized, "Civilized," or Harmonized?

In: Ohio State Journal on Dispute Resolution Vol. 19, Issue 2

Ohio State University 2003

Cited in para.:

Holtzmann et al.

Holtzmann, Howard / Neuhaus, Joseph / Kristjansdottir, Edda / Walsch, Thomas

UNCITRAL Model Law, Chapter II (Article 7) – as amended [Interim measures and preliminary orders]
In: A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary

Wolter Kluwers 2015

Cited in para.: 34

Honnold/Flechtner

Honnold, John O / Flechtner, Harry

Uniform law for international sales under the 1980 United Nations Convention

5th Ed., Wolters Kluwer 2021

Cited in para.: 153

Huber/Mullis

Huber, Peter / Mullis, Alastair

The CISG: A new textbook for students and practitioners

European law publisher, Munich 2007

Cited in para.: 129

Jolles

Jolles, Alexander

Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement

Sweet & Maxwell Limited 2006

Cited in paras.: 55, 59

Kantor

Kantor, Mark

A Code of Conduct for Party: Appointed Experts in International Arbitration – Can One be Found?

In: Arbitration International Vol. 26, Issue 3

Oxford University Press 2010

Cited in para.: 48

Kayali

Kayali, Didem

Enforceability of Multi-Tiered Dispute Resolution Clauses

In: Journal of International Arbitration, Vol. 27

Kluwer Law International 2010

Cited in para.: 54

Khodykin et al.	Khodykin, Roman Mikhailovich / Mulcahy, Carol / Fletcher, Nicolas **Article 4: Witnesses of Fact** In: Roman Mikhailovich Khodykin / Carol Mulcahy et al. (edits.), A Guide to the IBA Rules on the Taking of Evidence in International Arbitration Oxford University Press 2019 Cited in paras.: 47, 48 109,
Khodykin et al.	Khodykin, Roman Mikhailovich / Mulcahy, Carol / Fletcher, Nicolas **Article 9: Admissibility and Assessment of Evidence** In: Roman Mikhailovich Khodykin / Carol Mulcahy et al. (edits.), A Guide to the IBA Rules on the Taking of Evidence in International Arbitration Oxford University Press 2019 Cited in paras.: 72, 85
Kläsener et al.	Kläsener, Amy C / Magál, Martin / Neuhaus, Joseph E. **Evidence in Internation Arbitration** Law Business Research Ltd 2023 Cited in paras.: 85, 104

Koller	Koller, Christian **Die Schiedsvereinbarung** In: Liebscher, Christoph / Oberhammer, Paul / Walter, H U. (edits.), Rechberger Schiedsverfahrensrecht Band I Verlag Österreich 2011 Cited in para.: 39,
Komuczky/Ghaffari	Komuczky, Michael / Ghaffari, Sima **Drafting multi-tiered dispute resolution clauses** Kluwer Arbitration Blog 2021 Cited in para.: 44
Kröll	Kröll, Stefan M. **Chapter 2: The Normative Framework on the Taking of Evidence** In: Ferrari, Franco / Rosenfeld, Friedrich Jakob (edits.), Handbook of Evidence in International Commercial Arbitration – Key Concepts and Issues Kluwer Law International, 2022 Cited in para.: 48
Kröll et al.	Kröll, Stefan M. / Mistelis, Loukas / Perales Viscasillas, María

UN Convention on Contracts for the International Sale of Goods (CISG) – A commentary

2nd Ed., Munich 2018

Cited in paras.: 131, 135

Kumar

Kumar, Chendhil

The Governing Law of Arbitration Agreement: Settling the Unsettled

SCC Times 2021

Available at:

https://www.scconline.com/blog/post/2021/05/13/the-governing-law-of-arbitration-agreement-settling-the-unsettled/

[Last visited on 4 December 2024]

Cited in paras.: 34, 54, 59

Lew et al.

Lew, Julian David Mathew / Mistelis, Loukas A. / Kröll, Stefan

Comparative International Commercial Arbitration

Kluwer Law International 2003

Cited in paras.: 39, 100

Lim/Uson

Lim, Benson / Uson, Adriana

Relooking at Consent in arbitration

	Kluwer Arbitration Blog Available at: https://arbitrationblog.kluwerarbitration.com/2019/02/12 relooking-at-consent-in-arbitration/ [Last visited on 2 November 2024] Cited in para.: 32
Lohano	Lohano, Sanjay **Without Prejudice Privilege** Available at: Bcplaw.com [Last visited on 2 December 2024] Cited in para.: 93
Manner/Schmitt	Manner, Simon Cornelius / Schmitt Moritz **Article 6** [The Contract and the Convention (Primacy of the Contract)] In: Christoph Brunner / Benjamin Gottlieb (edits.), Commentary on the UN Sales Law (CISG) Haywards Heath 2019 Cited in para.: 133, 135
McIlwrath/Savage	McIlwrath, Michael / Savage, John **International Arbitration and Mediation** – A Practical Guide

Kluwer Law International 2010

Cited in para.: 54

Miles/Goh

Miles, Wendy / Goh, Nelson

Chapter 24: A Principled Approach Towards the Law Governing Arbitration Agreements

In: Neil Kaplan / Michael Moser (eds.) Jurisdiction, Admissibility and Choice of Law in International Arbitration

Kluwer Law International, The Hague 2018

Cited in para.: 39

Müller

Müller, Christoph

The Sense and Non-Sense of Guidelines, Rules and other Para-regulatory Texts in International Arbitration - Importance and Impact of the First PRT, the IBA Evidence Rules

JURIS Arbitration Law 2008

Cited in para.: 48

Nazzini

Nazzini, Renato

The Law Applicable to the Arbitration Agreement: Towards Transnational Principles

In: International and Comparative Law Quarterly, Vol. 65, No. 3

Cambridge University Press 2016

Cited in para.: 39

Nicholls

Nicholls, David

Without prejudice: Dos and Don'ts

Landmark Chambers 2018

Cited in para.: 93

O'Malley

O'Malley, Nathan D.

Rules of Evidence in International Arbitration: An annotated Guide

Informal Law 2019

Cited in para.: 103

Paralika

Paralika, Malika

Lest we forget: Addressing the accuracy of witness memory in international arbitration

Fieldfisher 2021

Available at:

https://www.fieldfisher.com/en/insights/lest-we-forget-addressing-the-accuracy-of-witness

[Last visited on 4 December 2024]

Cited in para.: 47

Park

Park, William W

Arbitration of International Business Disputes

Oxford University Press

2nd Ed., Oxford 2012

Cited in para.: 100

Pereira et al.

Pereira, Cesar / Souza-McMurtrie, Leonardo F. / Galan, Lorenzo

CISG and Government Contracts: Regulating International Public Procurement

18 November 2024

Available at:

https://dailyjus.com/legal-insights/2024/11/cisg-and-government-contracts-regulating-international-public-procurement

[Last visited on 2 December 2024]

Cited in paras.: 176, 177

Poljanec

Poljanec, Kristijan

Auctions and Actionlike Selling Mechanisms in International Sale of Goods: A Call for Revisiting Article 2(b) CISG?

In: Slakoper, Zvonimir / Tot, Ivan (edits.), EU Private Law and the CISG: The Effects for National Law

Routledge, London 2021

Cited in para.: 168

Pryles

Pryles, Michael

International Arbitration and National Courts: The Never Ending Story

In: International Arbitration and National Courts: The Never Ending Story, ICCA Congress Series, Vol. 10

Kluwer Law International 2024

Cited in para.: 54

Säcker et al.

Säcker, Franz Jürgen / Rixecker, Roland / Oetker, Hartmut m/ Limperg, Bettina

Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 4

8th Ed., C.H.Beck, Munich 2021

Cited in para.: 44

Sanchez

Sanchez, Juan Manuel

New ICC Report on The Accuracy of Fact Witness Memory in International Arbitration

Linklaters 2021

Available at:

https://www.linklaters.com/insights/blogs/arbitrationlinks/2021/january/new-icc-report-on-the-accuracy-of-fact-witness-memory-in-international-arbitration

[Last visited on 4 December 2024]

Cited in para.: 47

Saunders et al.	Saunders, Matthew / Johnson, Emma / Haran, Harsh Hari **Re-examining the Approach to Factual Witness Evidence in International Arbitration** Ashurst 2024 Cited in para.: 47
Savola	Savola, Mika **Guide to the Finnish Arbitration rule** Kauppakamari 2015 Cited in para.:
Schlechtriem/Schroeter	Schlechtriem, Peter / Schroeter, Ulrich G. **Internationales UN-Kaufrecht: Ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über des internationalen Warenkauf (CISG)** Tübingen 6th Ed., Mohr Siebeck 2016 Cited in para.: 147

Schroeter

Schroeter, Ulrich G.

Introduction to Articles 14–24 CISG: General Questions Regarding the Formation of the Contract

In: Schwenzer, Ingeborg/ Schroeter, Ulrich G. (edits.), Commentary on the UN Convention on the International Sale of Goods (CISG)

5th Ed., Oxford University Press London 2022

Cited in para.: 176

Schwenzer/Jaeger

Schwenzer, Ingeborg / Jaeger, Florence

Chapter 30: The CISG in International Arbitration

In: Shaughnessy, Patricia Louise / Tung, Sherlin (edits.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer

Alphen aan den Rijn 2017

Cited in paras.: 129, 136

Sneddon

Sneddon, Lianne

Without Prejudice

Ashurst 2021

Cited in para.: 93

Sornarajah

Sornarajah, Muthucumaraswamy

Consent in international Arbitration

	Kluwer Law International 2000 Cited in para.: 32
Sourgens	Sourgens, Frédéric **Evidence in International Investment Arbitration** Oxford University press 2018 Cited in para.: 103
Strong/Dries	Strong, James / Dries, James J. **Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?** In: Arbitration International Vol. 21, Issue 3 Oxford university press 2005 Cited in paras.: 47, 48
Tarawaldi/Gerardy	Tarawali, Naomi / Gerardy, Patrick **The Law Governing the Arbitration Agreement–A Fresh Look at an Old Debate after the UK Supreme Court's *Enka* Judgement and Recent Clarification by the German Federal Court of Justice** In: Berger, Peter / Böckstiegel, Karl-Heinz (edits.), Zeitschrift für Schiedsverfahren, Vol. 19 Munich 2021 Cited in para.: 39

Taylor et al.

Taylor, Patrick / Aren, Shreya / Mozetic, Alma M.

Chapter 4: Harmonising Cultural Differences in International Arbitration: The Role of Parties' Reasonable Expectations and Counsels's Ethical Rules

In: Calissendorff, Axel / Schlödström, Patrik (edits.), Stockholm Arbitration Yearbook 2020, Vol. 2

Wolter Kluwer 2020

Cited in para.: 103

Vogenauer

Vogenauer, Stefan

Commentary on the UNIDROIT Principles of International Commercial Contracts

2nd Ed., Oxford University Press 2015

Cited in para.:

Waincymer

Waincymer, Jeffrey

Procedure and Evidence in International Arbitration

Kluwer Law International 2012

Cited in paras.: 41, 43, 44

Wolrich

Wolrich, Peter M.

Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules

Available at:

	<www.cm-p.com/pdf/multi_tiered_clauses.pdf> [Last visited on 23 November 2024] Cited in para.: 54
Zuberbühler et al.	Zuberbühler, Tobias / Hofmann, Dieter / Oetiker, Christian / Rohner, Thomas **Article 4: Witnesses of Fact** In: Zuberbühler, Tobias / Hofmann, Dieter (edits.) IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration 2nd Ed., Schulthess Juristische Medien AG, Zurich 2022 Cited in para.: 48
Zuberbühler et al.	Zuberbühler, Tobias / Hofmann, Dieter / Oetiker, Christian / Rohner, Thomas **Article 9: Admissibility and Assessment of Evidence** In: Zuberbühler, Tobias / Hofmann, Dieter (edits.), IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration 2nd Ed., Schulthess Juristische Medien AG, Zurich 2022 Cited in paras.: 72, 80, 85

INDEX OF CASES

Germany

CLOUT Case	Oberlandesgericht Hamm (Higher Regional Court) ***CLOUT case*** 8 February 1995 Case No. 132 Available at: http://www.uncitral.org/clout/clout/data/deu/ clout_case_13 2_leg-1335.html [Last visited on 10 November 2024] Cited in para.: 51
Potato chips plant case	Bundesgerichtshof (German Supreme Court) ***Potato chips plant case*** 07 December 2017 Case No. VII ZR 101/14 CISG-online 2961 Cited in para.: 41

Cylinder case	District Court of Mainz (Landgericht Mainz) ***Cylinder for the production of tissue-paper case*** 26 November 1998 Case No. 12 HKO 70/97 Available at: https://cisgw3.law.pace.edu/cases/ 981126g1.html [Last visited on 9 November 2024] Cited in para.: 43
Used printing machines case I	Oberlandesgericht Celle (Court of Appeal Celle) ***Used printing machines case I*** 24 May 1995 Case No. 20 U 76/94 CISG-online 152 Cited in para.: 135
Window case	Oberlandesgericht München (Court of Appeal Munich) ***Window production plant case*** 03 December 1999 Case No. 23 U 4446/99 CISG-online 585 Cited in para.: 163

India

Delhivery v. Kare Prv	Dillī uchcha nyāyālaya (*High Court of Delhi*)

	Delhivery Limited v. Kare Entreprise Private Limited 10 September 2024 Case No. 121/2024 Cited in para.: 62
Demera Pvt v. Demera	Bhārata kā Sarvōcca Nyāyālaya (*Supreme Court of India*) **Demerara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd** 24 November 2014 Case No. 11/2013 Cited in para.: 62
Siemens v. Jindal Thermal Power	Dillī uchcha nyāyālaya (*High Court of Delhi*) ***Siemens Limited v. Jindal India Thermal Power Limited*** 30 Janvier 2018 Case No. 4378/2017 Cited in para.: 61
Sun Security Services v. Babasaheb University	Uchch nyaayaalay, ilaahaabaad (*High Court of Judicature at Allahabad*) ***Sun Security Services v. Babasaheb Bhimrao Ambedkar Univeristy***

	19 December 2014 Case No. 4/2013 Cited in para.: 62
Visa v. Continental USA	Bhārata kā Sarvōcca Nyāyālaya (*Supreme Court of India*) ***Visa International Ltd v. Continental Resources USA Ltd*** 2 December 2008 Case No. ARB.P. 16/2007 Cited in para.: 62

Italy

Ostroznik Savo	Tribunale di Padova (District Court Padova) ***Ostroznik Savo et al. v. La Faraona soc. coop. a.r.l. et al.*** 11 January 2005 CLOUT No. 651 CISG-online 967 Cited in para.: 147
Officine Maraldi case	Tribunale di Forlì (District Court Forlì)

Officine Maraldi S.p.A. v. Intessa BCI S.p.A. et al.

16 February 2009

CISG-online 1780

Cited in para.: 159

Singapore

First Media TBK v. Astro BV

Court of Appeal of Singapore

PT First Media TBK v. Astro Nusantara International BV and others and another appeal

31 October 2013

Case No. CA 150, 151/2012

Available at:

https://www.uncitral.org/docs/clout/SGP

/SGP_311013_FT_1.pdf

[Last visited on 2 November 2024]

Cited in para.: 32

Lufthansa v. International Research Corporation	High Court of Singapore ***Lufthansa Systems Asia Pacific v. International Research Corporation and Datamat*** 31 May 2010 Case No. ARB 61 of 2010 Available at: https://jusmundi-com.peacepalace.idm.oclc.org/en [Last visited on 23 November 2024] Cited in para.: 61

Slovak Republic

Coplass v. Rudos case	Krajský súd v. Žiline (Court of Appeal Zilina) ***Coplass di Gianni Cortini e C. S.a.s. v. Rudos Ružomberok s.r.o.*** 30 May 2018 Case Nos. 13Cob/145/2017 / 5914204394 CISG-online 4010 Cited in para.: 163

Switzerland

X GmbH v. Y Sàrl	Bundesgericht (The Federal Supreme Court of Switzerland**)** ***X GmbH v. Y Sàrl*** 16 Mai 2011 Case No. 4A_46/2011 Cited in para.: 55
Cardboard coffins case	Cour civile du Tribunal Cantonal de Vaud (Court of First Instance Canton Vaud) ***Cardboard coffins case*** 08 December 2000 Case No. 476/2000/FJO CISG-online 1841 Cited in para.: 163
Electronic case I	Appellationsgericht Basel-Stadt (Court of Appeal Canton Basel-Stadt) *Electronic electricity meters case* 24 August 2018 Case No. ZB.2017.20 (AG.2018.557) CISG-online 3906 Cited in paras.: 176, 177

Electronic case II	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court) ***Electronic electricity meters case*** 28 May 2019 Case No. 4A_543/2018 CISG-online 4463 Cited in para.: 135
Punching line case	Bezirksgericht Willisau (Court of First Instance Willisau) ***Punching line case*** 12 June 2023 Case No. 14A 18 9 CISG-online: 7179 Cited in para.: 158
Spinning plant case	Bundesgericht / Tribunal fédéral (Swiss Federal Supreme Court) ***Spinning plant case*** 16 July 2012 Case No. 4A_753/2011 CISG-online 2371 Cited in para.: 158

United Kingdom

Enka v. Chubb	Supreme court of the United Kingdom

	Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb 9 October 2020 Case No. A4/2020/0068 Cited in para.:
Elizabeth Bey. v. Boral Building	Supreme Court of the United Kingdom **Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd** 28 March 1995 Case No. 36 NSWLR 709 Cited in para.: 61
Sulamerica Case Sulamerica v. Enesa	Court of Appeal of Justice of England and Wales **Sulamérica Cia Nacionale De Seguros v. Enesa Engenharia** 20 March 2012 Case No. [2012] EWCA Civ 638 Cited in para.: 39
Court of Appeal of UK and Wales	Court of Appeal of Justice of England and Wales ***C v. D*** 5 December 2007

Case No. [2007] EWCA Civ 1282

Cited in para.: 39

Cutts v. Head

Court of Appeal of Justice of England and Wales

Olivier Alfred Sidney Cutts v. Albert Head

7 December 1983

Case No. [1984] 2 WLR 349

Cited in paras.: 72, 95

Court of Justice of England and Wales

High Court of Justice of England and Wales

H v. L

03 February 2017

Case No. CL-2016-000807

Available at:

https://vlex.co.uk/vid/h-v-l-and-793336657

[Last visited on 2 November 2024]

Cited in para.: 32

XL Insurance Case	High Court of Justice of Justice Queen's Bench division **Xl Insurance Ltd v Owens Corning** 28 July 2000 Case No. 2000 Folio 694 Available at: https://vlex.co.uk/vid/xl-insurance-ltd-v-793033561 [Last visited on 10 Decembre 2024] Cited in para.: 39
Rush & Tompkins v. GLC	House of lords **Rush & Tompkins Ltd v. Greater London Council** 3 November 1988 Case No. [1988] UKHL J1103-3 Cited in para.: 72

United States of America

Volt Inc. v. Stanford Univesity	U.S. Supreme Court ***Volt Information Sciences, Inc. v. Board of Trustees of Stanford University*** 6 March 1989 Case No. 87-1318 Available at: https://supreme.justia.com/cases/federal/us/489/468/ [Last visited on 2 November 2024] Cited in para.: 32
McCarthy v. Madigan	U.S. Supreme Court ***McCarthy v. Madigan*** 4 March 1992 Case No. 90-6861 Available at: https://supreme.justia.com/cases/federal/us/503/140/ [Last visited on 23 November 2024] Cited in para.: 61
Goodyear Tire v. Chiles power	United States Court of Appeals **Goodyear Tire Rubber v. Chiles Power Supply** 16 June 2003 Case No. 332 F.3d 976 (6th Cir. 2003) Cited in para.: 72

INDEX OF ICC AWARDS

ICC Case No. 26290	**ICC Case No. 26290** 2 June 2021 Available at: https://jusmundi-com.peacepalace.idm.oclc.org/fr/document/decision/en-cardno-me-limited-v-central-bank-of-iraq-procedural-order-no-2-new-request-for-interim-relief-monday-27th-september-2021?su=%2Ffr%2Fsearch%3Fquery%3DICC%2520Case%2520No.%252026290%26page%3D1%26lang%3Dfr [Last visited on 6 December 2024] Cited in para.: 62
ICC Case No 16083	**ICC Case No. 16083 Interim Award** June 2015 Available at: https://jusmundi.com/en/document/publication/en-interim-award-in-case-16083-extract

	[Last visited on 9 December 2024] Cited in para.: 59
ICC Case No 16155	**ICC Case 16083 Interim Award** June 2015 Available at: https://jusmundi.com/en/document/decision/en-icc-case-ndeg-16155-interim-award-in-case-16155-extract [Last visited on 9 December 2024] Cited in para.: 59
ICC Case No.4230	**ICC Case No. 4230** 17 November 2001 Available at: https://jusmundicom.peacepalace.idm.oclc.org/fr/document/decision/en-icc-case-ndeg-4230-partial-award-in-case-4230-extract [Last visited on 6 December 2024] Cited in para.: 54
ICC Case 9187	**ICC Case No. 9187** 2000 Available at: https://jusmundicom.peacepalace.idm.oclc.org/en/document/publication/en-final-award-in-

case-9187-extracts

[Last visited on 6 December 2024]

Cited in para.: 135

INDEX OF ARBITRAL AWARDS

Bay View LLC v. Rwanda	**Bay view group LLC and the Spalena Company LLC v. Republic of Rwanda** 30 March 2022 ICSID Case No. ARB/18/21 Cited in para.: 59
İçkale İnşaat v. Turkmenistan	**İçkale İnşaat Limited Şirketi v. Turkmenistan** 4 October 2016 ICSID Case No. ARB/10/24 Cited in para.: 59
Libananco v. Turkey	**Libananco Holdings CO Ltd v. Republic of Turkey** 23 June 2008 ICSID Case No. ARB/06/8 Cited in para.: 103

Noble v. Romania	**Noble Ventures, Inc v. Romania** 12 October 2005 Case No. ARB/01/11 Cited in para.: 48
Park Plus Inc. v. Sotefin SA	Final Award in Case No. 500146-2022 **Park Plus Inc. v. Sotefin SA** 22 September 2023 Case No. 500146-2022 CISG-online 7020 Cited in paras.: 135, 151, 153, 159
Railroad v. Guatemala	**Railroad Development Corporation v. Republic of Guatemala** 15 October 2008 Case No. ARB/07/23 Cited in para.: 48