Thirty-Second Annual

Willem C. Vis International Commercial Arbitration Moot

UNIVERSITY OF LUCERNE

Memorandum for CLAIMANT

CASE NO. FAI MOOT 100/2024 – GreenHydro Plc v. Equatoriana RenPower Ltd.

On behalf of	**Against**
GreenHydro Plc	Equatoriana RenPower Ltd.
1974 Russell Avenue	1 Russell Square
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	RESPONDENT

MIA KAUFMANN • PAULA SOMM • DORIAN TROGU

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TABLE OF ABBREVIATIONS

Abbreviation	**Explanation**
ADR	Alternative Dispute Resolution
Answer	Answer to the Request for Arbitration (14 August 2024)
Art.	Article
ASA	Swiss Arbitration Association (Zurich, Switzerland)
AUS	Australia
AUT	Austria
BEL	Belgium
BGB	Bürgerliches Gesetzbuch
C	CLAIMANT's exhibit
CEO	Chief Executive Officer
cf.	confer (*compare*)
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
CISG-AC	CISG Advisory Council
COO	Chief Operating Officer
Corp.	Corporation
D.C.	District of Columbia
e.g.	exempli gratia (*for example*)
et al.	et alii/et aliae/et alia (*and others*)
et seq.	et sequens (*and the following page/paragraph*)
et seqq.	et sequentes (*and the following pages/paragraphs*)
etc.	et cetera (*and so on*)

EUR	Euro
EWHC	England and Wales High Court
FAI	The Finland Arbitration Institute (Helsinki, Finland)
FRA	France
GBR	United Kingdom of Great Britain and Northern Ireland
GER	Germany
H	Hydrogen
H_2O	Water
HKCA	Hong Kong Court of Appeal
HKG	Hong Kong
IBA	International Bar Association
ibid.	ibidem (*in the same place*)
ICAC	International Commercial Arbitration Court (Moscow, Russia)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes (Washington, D.C., United States of America)
incl.	including
ITA	Italy
Letter	Letter by Langweiler to Arbitral Tribunal (14 August 2024)
Ltd.	Limited
MM	million/millions
Mr.	Mister
Ms.	Female title – married status unknown Miss/Misses

MW	Megawatt
NED	The Netherlands
No.	Number
NSWSC	Supreme Court of New South Wales
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
O	Oxygen
OR	Schweizerisches Obligationenrecht (*Swiss Code of Obligations*)
p./pp.	page/pages
para.	paragraph
PEM	proton exchange membrane
PICC	UNIDROIT Principles for International Commercial Contracts, 2016
Plc	public limited company
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Pty	Proprietary Company in Australia and South Africa
R	RESPONDENT's exhibit
Request	Request for Arbitration (31 July 2024)
RUS	Russia
SGCA	Singapore Court of Appeal
SGP	Singapore
SRB	Republic of Serbia
SUI	Switzerland

UN/U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA/U.S.	United States of America
v.	versus (*against*)
Vol.	Volume

STATEMENT OF FACTS

1 In **2019**, the Government of Equatoriana introduced its Green Energy Strategy which included the ambitious goal to achieve a net-zero balance by 2040. Achieving this goal is only possible if Equatoriana's large steel and transport industry is decarbonized. To do so, *Equatoriana RenPower Ltd.* ("**RESPONDENT**"), which is an Equatorianian state-owned company, operating in the renewable energy sector, was tasked with investing in the establishment of a sustainable green hydrogen infrastructure in Equatoriana. In contrast to hydrogen, green hydrogen is produced by using renewable green energy sources.

2 In line with this task, on **3 January 2023**, RESPONDENT invited bids through a Request for Quotation for the construction and delivery of a 100 MW plant to produce green hydrogen ("**Plant**"). The Plant had to be constructed and fully operational in a relatively short amount of time – by 2026. This strict timeline was difficult for most bidders to meet.

3 However, as *GreenHydro Plc* ("**CLAIMANT**") already had a suitable transformer available, it was able to meet this timeline and submitted a bid. CLAIMANT is a Mediterraneo based company specialized in the construction and sale of plants to produce green hydrogen. It has developed a highly effective, innovative, and patent-protected green hydrogen production process based on PEM-electrolysis. PEM-electrolysis is a production method that splits water (H_2O) into pure hydrogen (H_2) and oxygen (O) through a proton exchange membrane.

4 CLAIMANT saw the sale of the Plant as a unique opportunity to showcase its patent-protected green hydrogen production technology on a larger scale since it had only sold smaller plants until then. Thus, CLAIMANT calculated the bid on a cost-only basis and communicated this to RESPONDENT.

5 Because of CLAIMANT's low-cost offer, the promptly available transformer, and its wide-ranging expertise, RESPONDENT selected CLAIMANT in **early May 2023** as one of two bidders with which it entered into detailed negotiations. In these negotiations, CLAIMANT and RESPONDENT (collectively the "**Parties**") agreed on a 5% price reduction. This price reduction meant that CLAIMANT would incur a loss with the sale of the Plant. However, CLAIMANT was willing to agree to this as it wanted to use the Plant as a reference project to attract further clients.

6 After thorough negotiations, the Parties concluded the Purchase and Service Agreement ("**Sales Agreement**") on **17 July 2023**. The Sales Agreement includes a minimum local content requirement. To fulfill this, CLAIMANT subcontracted **Volta Transformer** on **25 August 2023** to perform parts of the Sales Agreement.

7 A few months later, in **October 2023**, elections led to a shift in power within the Government of Equatoriana. The new Minister of Energy and Environment was opposed to the Green Energy Strategy, and particularly its strong quota for green hydrogen. Thus, the Green Energy Strategy was revised and did no longer focus on green hydrogen production. On **29 February 2024,** RESPONDENT sent a letter to CLAIMANT , in which it purportedly terminated the Sales Agreement due to a minor delay caused by a subcontractor and based on Equatorianian domestic law. CLAIMANT firmly rejected the termination and suggested holding meetings to find a solution to continue the project, whereas RESPONDENT's goal was to either terminate the Sales Agreement or at least receive a substantial price reduction.

8 In the first meeting conducted on **28 April 2024**, RESPONDENT's new CEO Mr. la Cour raised serious allegations against RESPONDENT's former CEO Ms. Faraday, CLAIMANT's CEO Mr. Cavendish, and CLAIMANT's former Head of Contracting Mr. Deiman.

9 After this first meeting, indeed a criminal investigation was launched against Mr. Deiman. In the course of this investigation, the police raided Mr. Deiman's office and confiscated all his documents, including an internal email between CLAIMANT's employees and their in-house counsel. In the end, the criminal investigation against Mr. Deiman was terminated within one month and Mr. Deiman was acquitted.

10 On **12 May 2024**, Mr. Cavendish and Mr. la Cour had another meeting which lasted only 30 minutes. In this meeting, RESPONDENT set a condition to proceed with the Plant's realization, requiring a price reduction of 15% or at least a two-digit number.

11 Following the meeting, on **25 May 2024**, RESPONDENT sent a letter to CLAIMANT titled "*Without-prejudice Offer*". In this letter, RESPONDENT made clear that unless CLAIMANT agreed to a price reduction of 15% or at least a two-digit number price reduction, RESPONDENT would not engage in any further negotiations.

12 On **26 May 2024**, CLAIMANT firmly rejected RESPONDENT's offer and announced that it will initiate arbitration proceedings. RESPONDENT never reacted to CLAIMANT's letter.

13 On **31 July 2024**, CLAIMANT submitted a Request for Arbitration ("**Request**") to the FAI.

14 In the Answer to the Request for Arbitration ("**Answer**"), RESPONDENT requested to exclude Exhibit C7, its purported without prejudice offer. RESPONDENT further introduced Exhibit R3, an internal email between CLAIMANT's employees and CLAIMANT's in house counsel.

15 On **14 August 2024**, CLAIMANT objected to the inclusion of Exhibit R3.

SUMMARY OF ARGUMENTS

16 In a world in which 81% of the energy comes from unsustainable energy sources, CLAIMANT's unwavering commitment to a highly effective technology stands at the center of a fast-developing renewable green energy environment worldwide. However, RESPONDENT, swayed by political tides and newfound priorities, unjustly terminated the Sales Agreement under the guise of delays and based on the purported applicability of its own – biased – domestic law. To avoid arbitral proceedings, RESPONDENT claims that the Parties agreed to mandatory pre-arbitral mediation. In truth, this is a calculated attempt to evade its responsibilities, to force further concessions from CLAIMANT, and to unfaithfully lower the price even more.

17 CLAIMANT now calls upon the Arbitral Tribunal to hear and decide the case and submits the following in line with the issues to be discussed according to PO1 of the Arbitral Tribunal:

18 **The Arbitral Tribunal has jurisdiction, and the claim is admissible [PO1, Issue I].** While concluding the Sales Agreement, the Parties agreed on a dispute resolution clause which includes a multi-tier mediation and arbitration clause. However, the Parties never intended for mediation to be a mandatory pre-arbitral step. This is evidenced by the interpretation of the wording of the dispute resolution clause and the Parties' negotiations. Even if mediation were mandatory, the Arbitral Tribunal still has jurisdiction and should use its discretion to declare the claim admissible because insisting on pre-arbitral mediation would be against good faith.

19 **The Arbitral Tribunal should exclude Exhibit R3 and admit Exhibit C7 using its discretion [PO1, Issue II].** Exhibit R3 is protected by the attorney-client privilege under Equatorianian law and was most likely obtained illegally. Conversely, Exhibit C7, which is labeled as a "*Without-prejudice Offer*", is not confidential. Confidentiality pursuant to Art. 15 FAI Mediation Rules does not extend to pre-mediation negotiations as the Parties did not agree to such an extension. Also, the without-prejudice privilege does not cover Exhibit C7, because it was not sent in a genuine attempt to settle the dispute. For these reasons, the Arbitral Tribunal should use its discretion to exclude Exhibit R3 and to admit Exhibit C7.

20 **The CISG applies to the Parties' Sales Agreement [PO1, Issue III].** RESPONDENT cannot rely on its domestic law to terminate the contract because the CISG applies to the Sales Agreement. The Sales Agreement is a sale of goods as defined in Art. 1 CISG because, first, it preponderantly concerns the sale and delivery of goods. Second, as the Parties of the Sales Agreement have their places of business in two different contracting states, it is an international sale of goods pursuant to Art. 1(1)(a) CISG. The Equatorianian subcontractor involved in the fulfillment of the Sales Agreement does not constitute a place of business for CLAIMANT. Finally, the Sales Agreement is

not excluded by virtue of Art. 2(b) CISG as the Sales Agreement was not concluded as a reverse auction, but only after thorough negotiations.

21 **The Parties did not validly exclude the applicability of the CISG pursuant to Art. 6 CISG [PO1, Issue IV].** In the Sales Agreement's choice of law clause, the Parties chose Equatorianian law to the exclusion of the Equatorianian conflict of laws principles to govern the Sales Agreement. However, this clause does not exclude the applicability of the CISG. The interpretation of this choice of law clause leads to the conclusion that the Parties neither explicitly nor implicitly excluded the CISG's applicability. To the contrary, the Parties' statements and conduct show that they knew and wanted the CISG to apply to the Sales Agreement.

ARGUMENT

I. The Arbitral Tribunal has jurisdiction, the claim is admissible and should not be rejected as part of the Arbitral Tribunal's discretion

22 One side urges the other to cross a bridge that was not required to be built in the first place. The Arbitral Tribunal now has the chance to decide not to force CLAIMANT into a mediation which is only optional and would be inefficient, fruitless, and a waste of time. To understand why CLAIMANT should not be forced to cross this bridge, one must first understand how the Parties ended up on opposite ends of the bridge:

23 While concluding the Sales Agreement, CLAIMANT proposed to include a dispute resolution clause which foresees mediation and arbitration under the FAI Rules (*R1, p. 30 para. 8*). RESPONDENT agreed to this suggestion and the Parties incorporated it into Art. 30 Sales Agreement (*C2, p. 12 et seq. Art. 30; R1, p. 30 para. 8*). A few months later, RESPONDENT purportedly terminated the Sales Agreement. CLAIMANT rejected the termination and wanted to continue realizing the Plant since its objective is to use it as a reference project as soon as possible (*PO2, p. 54 para. 22*). To still be able to achieve this goal, CLAIMANT initiated a meeting between the Parties' CEOs (*PO2, p. 54 et seq. para. 23*). However, in this meeting, RESPONDENT solely dictated its conditions and left no room for any further discussions (*C5, p. 18 para. 16*). As a result of these fruitless discussions, CLAIMANT initiated arbitration. RESPONDENT now claims that mediation is a mandatory pre-arbitral step before commencing arbitration, thereby objecting to the jurisdiction of the Arbitral Tribunal and the admissibility of the claim (*Answer, p. 27 para. 16*).

24 However, CLAIMANT will demonstrate that the Arbitral Tribunal can hear and decide the claim because the Parties did not agree to make pre-arbitral mediation a mandatory step (**A**), and even if

it were mandatory, the Arbitral Tribunal would still have jurisdiction to hear the case, and to admit the claim (**B**).

A. The Parties did not agree to mandatory pre-arbitral mediation and, therefore, mediation is no bar for arbitration pursuant to Art. 11.1 FAI Mediation Rules

25 Although the Parties agreed on a multi-tier dispute resolution clause under the FAI Mediation Rules and the FAI Arbitration Rules, they never intended to set out a mandatory obligation to mediate prior to initiating arbitration. Art. 11.1 FAI Mediation Rules states that, unless the parties have agreed otherwise, an agreement on FAI mediation does not constitute a bar to any arbitral proceeding. This means that if the parties wanted mediation as a mandatory step before initiating arbitral proceedings, they would have to specifically agree to it. To determine whether the parties agreed on mandatory pre-arbitral mediation, the dispute resolution clause has to be interpreted [*Born, §5.08 [A][2]; Figueres, p. 81; ECLI:NL:HR:2024:1078 (NED 2024); 4A_18/2007 (SUI 2007)*]. However, before interpreting the dispute resolution clause, it must first be determined which law applies to the interpretation.

26 There is consistent jurisprudence in all countries involved confirming that the CISG applies to the interpretation of arbitration clauses when contained in sales contracts governed by the CISG (*PO1, p. 51 para. 5*). Therefore, in view of the fact that the CISG applies to the Sales Agreement (*see below para. 79 et seqq.*), it equally applies to the interpretation of the dispute resolution clause in Art. 30 Sales Agreement. Should the Arbitral Tribunal find that the CISG does not apply to the Sales Agreement, the general contract law of Equatoriana would apply (*Answer, p. 27 para. 19*). The general contract law of Equatoriana is largely a verbatim adoption of the UNIDROIT Principles (*PO1, p. 50 para. 4*) which contain identical rules for the interpretation of contracts as the CISG. In the following, CLAIMANT will interpret the dispute resolution clause in Art. 30 Sales Agreement in line with the CISG and the UNIDROIT Principles respectively to prove that the Parties did not agree to make mediation a mandatory step and, thus, it is no bar to arbitration.

27 Pursuant to Art. 8(1) CISG (and Art. 4.1(1) PICC respectively), the actual, common intention of the parties must be determined [*Brödermann, Art. 4.1 PICC para. 1; Schmidt-Kessel, Art. 8 CISG para. 8; ICC Case No. 17020 (2011)*]. Where this is not possible, the dispute resolution clause must be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (Art. 8(2) CISG and Art. 4.1(2) PICC respectively). To determine the intent of the parties or the understanding of a reasonable person, all relevant factual circumstances, such as the wording of the clause and the parties' negotiations, must be considered [*Brödermann, Art. 4.3 PICC para. 3; Witz, Art. 8 CISG para. 11 et seq.*].

28 CLAIMANT will demonstrate that the Parties' common intention as well as the understanding of a reasonable person can only have been that the foreseen mediation step is non-mandatory. This interpretation is corroborated by the dispute resolution clause's wording itself and by the Parties' negotiations. For the interpretation the following facts are relevant: The Parties did not define a clear procedure for mediation (**1**), they did not implement any time limits for mediation (**2**), and did not agree on a conditional connection between the mediation and the arbitration clause (**3**).

1. The dispute resolution clause in Art. 30 Sales Agreement merely refers to the FAI Mediation Rules, lacking a clear definition of the mediation procedure

29 Pre-arbitral mediation can only be mandatory if the parties explicitly state so or at least define the procedure for the conduct of the mediation within their clause [*Born, 5.08 [A][2]; ICC Case No. 6276 (2003)*]. The key question is whether the parties have included sufficient criteria in their multi-tier clause to enable the arbitral tribunal to determine when and how the pre-arbitral procedure would have to be treated as successful, exhausted, or properly terminated [*Tang Chung Wah & others v. Grant Thornton International Ltd. (GBR 2012)*].

30 In the present case, the mediation clause in Art. 30 Sales Agreement simply states that any dispute shall be submitted to "*mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce*" (*C2, p. 12 Art. 30*). The FAI Mediation Rules regulate the process only lightly, leaving the parties broad room to tailor the process to their needs [*cf. Preamble FAI Mediation Rules*]. Therefore, it would be up to the parties to further define the mediation procedure. However, in the case at hand, the Parties have neither defined the mediation procedure explicitly nor the point at which the pre-arbitral requirement should be considered properly fulfilled. The mere reference to the FAI Mediation Rules contained in Art. 30 Sales Agreement is not sufficient to determine whether there are any mandatory pre-arbitral requirements and whether they have been met.

31 Additionally, during the Parties' negotiations of the Sales Agreement, they neither indicated that they wanted to define the mediation procedure in more detail nor stated that mediation should be mandatory. RESPONDENT just agreed to CLAIMANT's proposition regarding the dispute resolution clause without raising objections or seeking clarifications (*R1, p. 30 para. 8*). Had RESPONDENT intended to impose a mandatory mediation requirement, it should have made this intention clear and insisted on inserting sufficient criteria into the clause to define a clear mediation procedure. It did not.

32 Since the Parties did not include sufficient criteria to enable the Arbitral Tribunal to determine the mediation procedure, any reasonable person would understand that, in the case at hand, mediation under the FAI Mediation Rules would constitute no bar to arbitration proceedings.

2. The dispute resolution clause in Art. 30 Sales Agreement lacks set time limits

33 The lack of an agreed time limit within which the mediation process must be completed is a strong indication that a pre-arbitral step is non-mandatory [*Jolles, p. 336; Savola, p. 134; ICC Case No. 6276 (2003)*]. This would require for the clause to state that, if the parties cannot reach an amicable settlement through mediation within a defined number of days or weeks, the dispute shall be submitted to arbitration [*Born, §5.08 [A][4]*]. This lapse of defined time would grant an objective criterion to ensure the safe transition from the pre-arbitral steps to arbitration [*Kayali, p. 574*]. A similar possibility to make mediation mandatory would be to include a time limit within which mediation needs to be initiated once a dispute arose [*Baizeau, p. 2788 para. 34; 4A_18/2007 (SUI 2007)*].

34 The Parties did not introduce any of these time limits in their dispute resolution clause. In particular, they did not declare how long the mediation process should last or within how many days they would have to submit a request for mediation (*C2, p. 12 et seq. Art. 30*). In fact, during their negotiations the Parties never even discussed imposing a specific period of time within which mediation would need to take place (*PO2, p. 53 para. 12*). Consequently, it was the Parties' common intention not to include any time limits which would make mediation a mandatory step.

35 As the setting of specific time limits is a strong indication to make mediation mandatory, its absence must cause any reasonable person to believe that the Parties did not wish to make mediation a mandatory step before initiating arbitration.

3. The dispute resolution clause in Art. 30 Sales Agreement lacks a conditional connection between the pre-arbitral step and arbitration

36 A conditional connection between a pre-arbitral step and arbitration, e.g. by using the words "only if" in the dispute resolution clause, would indicate the parties' intent to make pre-arbitral mediation mandatory [*Berger I, p. 5; Lein, p. 310*]. The Parties did not make such a link in Art. 30 Sales Agreement:

37 Rather, the mediation clause in the first paragraph of Art. 30 Sales Agreement merely states that disputes "*shall first be submitted to mediation*" (*C2, p. 12 Art. 30*). The second paragraph contains an arbitration clause which states that disputes "*shall be finally settled by arbitration*" (*C2, p. 13 Art. 30*). The use of the words "*first*" and "*finally*" does not change the fact that the mediation and the arbitration clause are independent from each other because they were not connected by a conditional link such as "only if" or the like. Moreover, just like Art. 30 Sales Agreement, the FAI standard arbitration clause also contains the word "*finally*" and does not connect to pre-arbitral proceedings in any way. Thereby, the word "*finally*" only emphasizes the fact that arbitration is meant to be the last resort to resolve a dispute without stating any mandatory steps beforehand.

38 This is also supported by the Parties' negotiations of the Sales Agreement when both Parties expressed their strong interest in resolving future disputes amicably and agreed that arbitration should remain a last resort (*R1, p. 30 para. 9; R2, p. 31 para. 2*). However, given that mediation naturally precedes arbitration in any tiered dispute resolution process and is a voluntary process, the interest in having arbitration as a last resort cannot be interpreted as an intention to impose mediation as a mandatory pre-arbitral step. Rather, it simply underscores the Parties' willingness to explore mediation if there was reason to believe that it would lead to a settlement, without binding them to exhaust the mediation step in any case before proceeding to arbitration.

39 Consequently, it was the Parties' common intention to have a mediation clause and an arbitration clause, but no conditional connection between these clauses. They both wanted arbitration as a last resort with the possibility to mediate if reasonable (*R1, p. 30 para. 9; R2, p. 31 para. 2*). Any reasonable person would understand that the lack of any conditional connection between mediation and arbitration means that the Parties want mediation to be optional before initiating arbitration.

40 To summarize the preceding paragraphs, the Parties had no common intention, according to Art. 8(1) CISG and Art. 4.1(1) PICC, to make mediation a mandatory step as they did not introduce elements that make mediation mandatory. Even if one were to conclude that the common intention of the Parties cannot be determined, any reasonable person acting under the same circumstances as the Parties (Art. 8(2) CISG and Art. 4.1(2) PICC) would have considered the pre-arbitral mediation as an optional step in the present case. The Parties, therefore, did not agree to make mediation a mandatory step before initiating arbitration. Accordingly, pursuant to Art. 11.1 FAI Mediation Rules, the Parties' agreement to mediate does not constitute a bar to arbitration. For this reason, the Arbitral Tribunal has jurisdiction.

B. Even if mediation were mandatory, the Arbitral Tribunal still has jurisdiction and should use its discretion to declare the claim admissible

41 Even if the Arbitral Tribunal should find that the Parties agreed to mandatory pre-arbitral mediation, it can still hear and decide the claim. Insisting on conducting a futile mediation would only delay the proceedings and cause unnecessary costs. Since it is up to the Arbitral Tribunal to ensure efficient proceedings [*FAI Arbitration Guidelines, p. 4 para. 3.1*], it should not force CLAIMANT to go through a futile mediation. Rather, it should use its discretion to declare the claim admissible.

42 In the following, CLAIMANT will demonstrate that even if mediation were mandatory, the Arbitral Tribunal still has jurisdiction (**1**) and should use its discretion to declare the claim admissible (**2**).

1. The Arbitral Tribunal has jurisdiction since complying with mandatory pre-arbitral requirements is a matter of admissibility

43 If mediation is a mandatory pre-arbitral step in a dispute resolution clause, the question arises whether compliance with the mandatory pre-arbitral step is a condition for the tribunal's jurisdiction or an issue of admissibility. In the recent *C v. D case*, the Hong Kong Court of Appeal explicitly confirmed that "*non-compliance with procedural pre-arbitration conditions […] goes to admissibility of the claim rather than the tribunal's jurisdiction*" [*C v. D (HKG 2022), para. 43*]. Various scholars, courts, and the Chartered Institute of Arbitrators have come to the same conclusion and also consider that failure to satisfy a mediation requirement does not affect the arbitral tribunal's jurisdiction, unless the parties have explicitly provided otherwise [*Flannery/Merkin, p. 105 et seq.; International Arbitration Practice Guideline, p. 15 et seq.; Jolles, p. 335; Mills, p. 6 et seq.; NWA v. NVF (GBR 2021); Republic of Sierra Leone v. SL Mining Ltd. (GBR 2021); BTN v. BTP (SGP 2023); ICC Case No. 16083 (2015); BG Group Plc v. Republic of Argentina (USA 2014)*]. The rationale behind these conclusions is that state courts would remain competent until mandatory mediation is conducted if pre-arbitral requirements were jurisdictional [*Jolles, p. 335*]. The arbitral tribunal would only gain jurisdiction after the parties unsuccessfully attempted mandatory pre-arbitral mediation [*Stacher, p. 63 et seq.*]. To characterize it as a jurisdictional matter would lead to the paradox and unwanted situation that the parties could still resort to state court litigation until mediation is unsuccessfully attempted [*cf. Jolles, p. 335; Stacher, p. 63 et seq.*].

44 Considering this rationale, which is supported by a substantial number of scholars and case law, and the fact that the Parties did not explicitly state in the clause that pre-arbitral mediation is a jurisdictional condition precedent, the Arbitral Tribunal should find that compliance with pre-arbitral mediation is a matter of admissibility. It cannot have been the true intention of the Parties to allow them to go to a biased state-court in either Equatoriana or Mediterraneo rather than conducting an unbiased arbitration in Danubia. Complying with mandatory pre-arbitral mediation can, therefore, only be a matter of admissibility and does not affect the Arbitral Tribunal's jurisdiction.

2. The Arbitral Tribunal should exercise its discretion and declare the claim admissible because insisting on pre-arbitral mediation would be against good faith

45 Since compliance with pre-arbitral mediation concerns an issue of admissibility, the Arbitral Tribunal has discretion and should use it to declare the claim admissible because insisting on mediation would be against good faith. In questions of admissibility, the arbitral tribunal has wide procedural discretion [*McErlaine/Allsop, p. 1*]. It would even have the discretion to stay proceedings if parties have not complied with pre-arbitral steps, but is not obliged to do so [*Groselj, p. 576;*

Lal/et al., p. 797; Pearson-Wenger, p. 474 para. 1699 et seqq.; ECLI:NL:HR:2024:1078 (NED 2024)]. When exercising its discretion and deciding on staying the proceedings, the arbitral tribunal should balance the parties' legitimate interests considering all relevant facts of the case [*Hwang/Cheng Lim, p. 267*]. In the case at hand, the Arbitral Tribunal should especially consider the following: On the one hand, in accordance with Art. 8.5 FAI Mediation Rules, all participants in FAI mediation shall act in good faith and make sincere efforts to reach an amicable settlement [*FAI Mediation Guidelines, p. 7 para. 40*]. This requires the parties to be open-minded, meaning to be willing to consider and propose settlement terms [*Aiton Australia Pty Ltd. v. Transfield Pty Ltd. (AUS 1999)*]. On the other hand, if the circumstances indicate that pre-arbitral steps would be futile or go against the principle of good faith, the arbitral tribunal should not stay the arbitral proceedings, but rather proceed with them [*cf. Cable & Wireless Plc v. IBM United Kingdom Ltd. (GBR 2002)*].

46 In the case at hand, insisting on pre-arbitral mediation would go against the principle of good faith and be futile for the following reasons:

47 **First**, RESPONDENT tried to force CLAIMANT into an "*amicable*" settlement. On 29 February 2024, RESPONDENT purportedly terminated the Sales Agreement (*C6, p. 19 para. 1 et seqq.*). After the purported termination, the Parties continued to negotiate at first (*Request, p. 5 et seq. para. 19 et seqq.*). On 28 April 2024, CLAIMANT's then Head of Contracting, Mr. Deiman, and RESPONDENT's new CEO, Mr. la Cour, had a meeting during which Mr. la Cour raised serious allegations against Mr. Cavendish, Ms. Faraday, and Mr. Deiman concerning the conclusion of the Sales Agreement (*C8, p. 36 para. 3; PO2, p. 54 et seq. para. 23*). Mr. la Cour threatened that he would report these allegations to the prosecution office for investigation, should there be no settlement (*C8, p. 36 para. 3; PO2, p. 54 et seq. para. 23*). Later on, Mr. la Cour indeed reported the allegations against Mr. Deiman to the prosecution office (*C8, p. 36 para. 3*). He accused Mr. Deiman of fraud through misrepresentations during the negotiations of the Sales Agreement and collusion with unspecified employees of RESPONDENT to the detriment of RESPONDENT (*PO2, p. 55 para. 27*). However, none of the allegations could be proven and Mr. Deiman was acquitted within one month (*PO2, p. 55 para. 27*). By instigating this criminal investigation, RESPONDENT only attempted to enforce its own interest and tried to pressure CLAIMANT into settling the dispute on favorable terms for RESPONDENT (*Letter, p. 34 para. 2*). By insisting on mediation after having failed to pressure CLAIMANT into an "*amicable*" settlement, RESPONDENT is acting against good faith.

48 **Second**, during the renegotiations, RESPONDENT set an unacceptable condition for CLAIMANT by demanding a further price reduction by 15% or at least a two-digit number. It was not willing to consider any other solution to settle the dispute. Therefore, mediation would simply be a waste of

time and resources. This is evidenced by the following behavior of RESPONDENT: On 12 May 2024, CLAIMANT's CEO, Mr. Cavendish, arranged a personal meeting with Mr. la Cour, RESPONDENT's new CEO, hoping they would be able to resolve the existing issues regarding the Sales Agreement (*C5, p. 18 para. 15; PO2, p. 54 et seq. para. 23*). During this meeting, Mr. la Cour made clear that further support from the government was necessary for the continuation of the Sales Agreement. However, such support would require a significant price reduction, otherwise the new Minister for Energy and Environment would not approve the continuation of the project. The meeting quickly ended after 30 minutes as there was apparently no room for further discussion (*C5, p. 18 para. 15; PO2, p. 54 et seq. para. 23*). In the letter dated 25 May 2024, RESPONDENT again stated several times that any further discussion would be futile unless CLAIMANT was willing to reduce the price by 15% or at least a two-digit number (*C7, p. 20 para. 2 et seqq.*). RESPONDENT knew that this condition was and remains unacceptable for CLAIMANT, especially since it had already agreed to a EUR 15 MM loss in the original Sales Agreement (*Request, p. 4 et seq. para. 13; Request, p. 7 para. 25; C5, p. 18 para. 16*). RESPONDENT's condition requiring CLAIMANT to significantly reduce the price even further unequivocally indicated that it was not open to considering a settlement below this condition. By not being open to considering a settlement below its undoubtedly unacceptable condition but nevertheless invoking a futile mediation, RESPONDENT is acting against good faith.

49 **Third**, in the present case, sending the Parties back to mediation would serve no practical purpose. According to Art. 10.1(b) FAI Mediation Rules, a party can unilaterally terminate the mediation at any time. RESPONDENT has already made it clear that it has no genuine interest and no intent to mediate as it is unwilling to engage in further settlement discussions without any preconditions (*C5, p. 18 para. 15; C7, p. 20 para. 2 et seqq.; PO2, p. 54 et seq. para. 23*). Considering that mediation can be unilaterally terminated at any time and that CLAIMANT is ostensibly unable to meet RESPONDENT's preconditions, initiating mediation would be a purely formal exercise.

50 **Fourth**, RESPONDENT never asked for a mediation even when it knew that CLAIMANT would directly submit the dispute to arbitration. CLAIMANT rejected the preconditions contained in RESPONDENT's letter dated 25 May 2024 on the following day. At the same time, CLAIMANT threatened to initiate arbitration proceedings if RESPONDENT was not willing to engage in further discussion without any preconditions (*PO2, p. 55 para. 24*). RESPONDENT did not react to this notification and, most importantly, did not point out that CLAIMANT should first submit the dispute to mediation (*ibid.*). To this day, RESPONDENT has not submitted a request for mediation. By invoking a mediation requirement only now, after having had several months to do so and being fully aware that CLAIMANT would proceed with arbitration directly, RESPONDENT is acting against good faith.

51 **Fifth**, conducting the mediation would place CLAIMANT at a significant disadvantage. The Parties agreed that the Plant was to be finished by the beginning of January 2026 (*C2, p. 11 Art. 4*). The very ambitious timeline makes the Plant extremely attractive for CLAIMANT as it provides an opportunity to showcase its new technology (*C5, p. 16 para. 7; PO2, p. 54 para. 22*). To conclude the Sales Agreement and to use the Plant as a reference project, CLAIMANT had already accepted a 5% price reduction amounting to a loss of EUR 15 MM (*Request, p. 4 et seq. para. 13; C5, p. 17 para. 10*). Therefore, it is of utmost importance for CLAIMANT not to lose any further time to realize the Plant. A futile pre-arbitral mediation would even further delay the realization of the Plant, which is still possible. Invoking a futile pre-arbitral mediation places CLAIMANT at a significant disadvantage and is against good faith.

52 In summary, insisting on mediation without making sincere efforts to reach an amicable settlement is against good faith. The Arbitral Tribunal should use its discretion and declare the claim admissible to not further delay the proceeding given that mediation would be futile.

CONCLUSION ISSUE I

53 While concluding the Sales Agreement, the Parties never agreed to mandatory pre-arbitral mediation, leaving the path open to immediately submitting their dispute to arbitration. As a result, the Arbitral Tribunal has jurisdiction. Even if the Arbitral Tribunal should find that pre-arbitral mediation is a mandatory step, it still has jurisdiction to hear the case because complying with it is a matter of admissibility. Since complying with pre-arbitral mediation concerns admissibility, the Arbitral Tribunal has discretion and should use it to admit the claim because RESPONDENT did not leave any room for mediation as its only goal was to achieve a significant price reduction. Insisting on mediation now contradicts the principle of good faith. Therefore, the Arbitral Tribunal should use its discretion and not force CLAIMANT into a mediation which would be inefficient, fruitless, and a waste of time.

II. The Arbitral Tribunal should order the exclusion of Exhibit R3 and admit Exhibit C7

54 Exercising their autonomy, the Parties chose to settle their dispute based on the FAI Arbitration Rules (*C2, p. 12 et seq. Art. 30*). Art. 34.1 FAI Arbitration Rules states that "*the arbitral tribunal shall determine the admissibility […] of the evidence*". Since the FAI Arbitration Rules do not contain any further rules about the admissibility of evidence, and the Parties have not agreed on more specific evidentiary rules either, the Arbitral Tribunal has evidentiary discretion. When exercising its discretion, the Arbitral Tribunal should use the IBA Rules on Taking of Evidence in International

Arbitration ("**IBA Rules**") as guidance because they reflect a worldwide best practice standard and are widely used by international arbitral tribunals and even courts [*Born, §15.07 [E]; Girsberger/Voser, para. 1105; O'Malley, para. 1.15; Railroad Development Corp. v. Republic of Guatemala (USA 2008)*].

55 On this basis, the Arbitral Tribunal should exclude the confidential Exhibit R3 (**A**). Conversely, the Arbitral Tribunal should admit Exhibit C7 as the document is not confidential (**B**).

A. The Arbitral Tribunal should exclude Exhibit R3

56 During the investigation which had been initiated against Mr. Deiman, the police confiscated all documents in his office, including an internal email from CLAIMANT's in-house counsel, Ms. Smith, to Mr. Deiman and Mr. Cavendish (*Letter, p. 34 para. 2; C8, p. 36 para. 5*). This email is neither publicly available nor did CLAIMANT knowingly provide it to RESPONDENT. Nonetheless, RESPONDENT, gained possession of this highly confidential internal email, and submitted it as evidence in the current proceedings. In the email, Ms. Smith provided legal advice to CLAIMANT's management regarding the Sales Agreement, the Request for Quotation, and a draft email. The Arbitral Tribunal should exclude this document from the evidence because it is protected by the attorney-client privilege (**1**) and was most likely obtained illegally (**2**).

1. Exhibit R3 falls under the attorney-client privilege

57 According to Art. 9(2)(b) IBA Rules, the arbitral tribunal shall, upon a party's request, exclude documents protected by privilege under legal or ethical rules that it considers applicable. In doing so, it may also protect the attorney-client privilege, as suggested by Art. 9(4)(a) IBA Rules. When considering issues of privilege, in a first step, the arbitral tribunal has to establish which law applies to determine the privileges mentioned in Art. 9 IBA Rules [*Berger II, p. 312*]. In a second step, it has to establish whether these privileges should be applied to the case in question [*Berger II, p. 318*].

58 CLAIMANT will show that the law of Equatoriana, which protects attorney-client communications, applies to the determination of the privileges mentioned in Art. 9(2)(b) IBA Rules (**a**), and that the communication between CLAIMANT and Ms. Smith falls under the attorney-client privilege (**b**).

a) The law of Equatoriana should apply to CLAIMANT's attorney-client relation

59 Equatorianian law provides a more detailed regulation of the attorney-client privilege than Mediterraneo. This detailed regulation should apply in the instant case based on the "most favored nation" standard. According to this standard, the arbitral tribunal is required to consider the laws of the home jurisdictions of both parties and apply the law that offers the broadest protection to privileged information [*Berger II, p. 318; Kuitkowski, p. 95 et seq.; Rubinstein/Guerrina, p. 598 et seq.*].

This is because the parties may adhere to differing notions of attorney-client privilege with different standards of protection [*Berger II, p. 318; Kuitkowski, p. 95 et seq.; Rubinstein/Guerrina, p. 598 et seq.*]. If one of these jurisdictions grants greater protection to certain categories of privileged information than the other, that protection should be accorded equally to both parties, ensuring fairness and equality [*ibid.*]. This is particularly the case when one of the parties is from a common law jurisdiction where in-house counsel communications are privileged, and the other party comes from another legal system where these types of communications are not privileged [*Kirby, p. 153*].

60 CLAIMANT has its seat in Mediterraneo and RESPONDENT in Equatoriana. Mediterraneo and Equatoriana regulate the attorney-client privilege differently (*R4, p. 33 para. 3*). Equatoriana has followed the U.S.-American approach which provides detailed rules on the attorney-client privilege. In contrast, the situation in Danubia, which is comparable to Mediterraneo, is different because only the ethical rules for lawyers require communications between counsel and clients to be kept confidential (*R4, p. 33 para. 3*). However, Danubia's and Mediterraneo's provisions cannot be compared with the detailed rules in Equatoriana (*R4, p. 33 para. 3*). As applying the law of Mediterraneo to CLAIMANT and the law of Equatoriana to RESPONDENT would result in a major inequality between the Parties, the Arbitral Tribunal should apply the "most favored nation" standard and grant the privileges of Equatorianian law to both Parties.

b) Exhibit R3, the email between CLAIMANT and its in-house counsel, Ms. Smith, is covered by the attorney-client privilege

61 Equatorianian law extends the attorney-client privilege to in-house lawyers if he or she is a member of the bar and the advice was given in relation to a specific legal question (*PO2, p. 55 para. 29*). The attorney-client privilege relates to communications made between attorneys and their client(s) for the purposes of giving or receiving legal advice in the course of the representation. It covers all communications that were disclosed under the belief of confidentiality as long as they concern legal advice and not general business or strategic matters [*Berger II, p. 304; Gore, chapter II.2.c*].

62 As her signature in Exhibit R3 makes evident, Ms. Smith is not only CLAIMANT's Head of Legal Department and, thus, its in-house lawyer, but she is also admitted to the bar in Mediterraneo. Therefore, any communication between Ms. Smith and CLAIMANT falls under the attorney-client privilege if it relates to a specific legal question. In her email, Ms. Smith answered several questions, namely concerning the Sales Agreement, the Request for Quotation, and she provided drafting suggestions regarding an email that was to be sent from Mr. Deiman to Ms. Ritter, RESPONDENT's main negotiator (*R3, p. 32 para. 1 et seqq.*). The advice was given in relation to specific legal questions regarding the contractual relationship between the Parties, the binding effect of an email draft,

and some aspects of an eventual accusation for misrepresentation. This advice is undoubtedly of legal nature because it refers to various legal aspects of contract law. The fact that a legal intern of Ms. Smith undertook part of the research for the content of the email does not change that, because the communication was exchanged between Ms. Smith, a lawyer and member of the bar, and CLAIMANT, her client (*PO2, p. 53 para. 11*). Consequently, the attorney-client privilege is applicable to this communication, and the Arbitral Tribunal should exclude Exhibit R3 from the proceeding.

2. In any case, Exhibit R3 was most likely obtained illegally and should be excluded

63 While there is no worldwide uniform standard for determining the admissibility of illegally obtained evidence [*Blair/Vidak-Gojkovic, p. 239; Khodykin/Mulcahy/Fletcher, Art. 9 IBA Rules para. 12.27*], an arbitral tribunal must always weigh the interest in finding the truth against the protection of a party that was harmed when the evidence was obtained [*Blair/Vidak-Gojkovic, p. 257; 4A_362/2013 (SUI 2014)*; *4A_448/2013 (SUI 2014*)]. Important considerations thereby are whether the evidence is material to the case and whether the party presenting and relying on the evidence was involved in the illegality or rather if it was obtained by a disinterested third party [*Blair/Vidak-Gojkovic, p. 256; IBA Commentary, Art. 9 IBA Rules p. 30; Khodykin/Mulcahy/Fletcher, Art. 9 IBA Rules para. 12.28; ConocoPhillips v. Bolivarian Republic of Venezuela (USA 2019)*]. In the oft-cited *Methanex v. United States case*, the arbitral tribunal also took these considerations into account. It had to decide whether evidence that Methanex obtained unlawfully, through trespassing and "dumpster diving", was admissible. The arbitral tribunal found the evidence inadmissible since Methanex itself engaged in unlawful activities, and since the evidence was only of "*marginal evidential significance*" [*Methanex v. United States (USA 2005) para. 56 et seqq.*]. Moreover, it found Methanex's behavior a violation of the basic principle of fairness [*Machherndl/Milacher, p. 89; Methanex v. United States (USA 2005)*].

64 The present case is comparable to the *Methanex v. United States case*: RESPONDENT submitted Exhibit R3 as evidence. However, it is unclear how RESPONDENT came into possession of CLAIMANT's internal document, which is not publicly available. RESPONDENT most likely obtained it through a leak in the Equatorianian prosecution office with which RESPONDENT's CEO, Mr. la Cour, has close connections (*Letter, p. 34 para. 3; C8, p. 36 para. 7*). Alternatively, RESPONDENT may have obtained it by inducing an employee of CLAIMANT to unlawfully disclose it (*Letter, p. 34 para. 3*). Either way, the means by which Exhibit R3 was obtained are illicit. In the first alternative (received through the Equatorianian prosecution office), it must be noted that the Equatorianian prosecution office is certainly not a third, disinterested party to the arbitral proceedings. RESPONDENT is a 100% state-owned company of Equatoriana and RESPONDENT's CEO has very

close connections to Equatoriana's prosecution office (*C8, p. 36 para. 7*). In the second alternative (received by inducement), RESPONDENT itself would have engaged in the illegal activity. In both alternatives, RESPONDENT itself would have acted illicitly and violated the principle of fairness.

65 In addition to RESPONDENT's unfair behavior, Exhibit R3 is not material evidence. In its Answer, RESPONDENT uses this document to show that CLAIMANT allegedly knew, prior to concluding the Sales Agreement, that negotiations with a subcontractor in Equatoriana will most likely fail (*Answer, p. 26 para. 7*). With this RESPONDENT, insinuates that CLAIMANT has engaged in misrepresentation during the conclusion of the Sales Agreement. However, this proceeding on the merits concerns the question whether the CISG is applicable and if the Sales Agreement has been validly terminated. Submitting a document solely for the purpose of insinuating misrepresentation neither proves if the CISG is applicable nor does it prove if the Sales Agreement has been validly terminated. Hence, the alleged misrepresentation is outside of the scope of this arbitral proceeding and the document is not material evidence for the present dispute.

66 Considering the fact that Exhibit R3 is not material to the outcome of the case and RESPONDENT's involvement in the illegal obtainment of the document, just as in the *Methanex v. United States case*, it would ultimately be contrary to the principle of procedural fairness to let RESPONDENT benefit from its wrongdoing. Therefore, the Arbitral Tribunal should exclude Exhibit R3.

67 In conclusion, Exhibit R3 is protected by the attorney-client privilege. The Arbitral Tribunal should protect CLAIMANT's strong interest in upholding its right to freely communicate with its attorney and exclude Exhibit R3 already on this ground alone. On top of that, the circumstances in which RESPONDENT obtained Exhibit R3, and its lack of materiality give even more reason to exclude it.

B. The Arbitral Tribunal should admit Exhibit C7

68 During the renegotiations of the Sales Agreement, RESPONDENT sent a letter to CLAIMANT titled as "*Without-prejudice Offer*" (*C7, p. 20 para. 1 et seqq.*). In this letter, RESPONDENT made abundantly clear that further negotiations only made sense if CLAIMANT would further reduce the price by 15% or at least a two-digit number (*C5, p. 18 para. 16; C7, p. 20 para. 4*). RESPONDENT requests to exclude this letter from the record because, according to its view, CLAIMANT breached the confidentiality of the negotiations between the Parties by submitting Exhibit C7 as evidence (*Answer, p. 27 para. 17*).

69 CLAIMANT will demonstrate that the Arbitral Tribunal should admit Exhibit C7, as confidentiality pursuant to Art. 15 FAI Mediation Rules does not extend to prior negotiations (**1**), and the without-prejudice privilege does not apply to Exhibit C7 (**2**). Furthermore, the exclusion of Exhibit C7 would violate CLAIMANT's right to present its case (**3**).

1. Confidentiality according to Art. 15 FAI Mediation Rules does not extend to prior negotiations

70 According to Art. 15 FAI Mediation Rules, any statement or information made or obtained during the mediation shall be kept confidential. However, this provision does not foresee an extension of the confidentiality obligation to prior negotiations. If parties wish to extend the scope of Art. 15 FAI Mediation Rules, they must agree on such an extension, making use of their party autonomy. Contrary to what RESPONDENT argues, the Parties have not agreed to extend Art. 15 FAI Mediation Rules to negotiations preceding mediation (*R1, p. 30 para. 10*).

71 During the negotiation of the Sales Agreement, CLAIMANT's then Head of Contracting, Mr. Deiman, sent an email to RESPONDENT's Head of Contracting, Ms. Ritter. In this email, Mr. Deiman addressed RESPONDENT's concerns regarding the confidentiality of the foreseen ADR mechanisms and the communications made therein. He expressed the view that communications made within the agreed ADR mechanisms were covered by the confidentiality obligation pursuant to Art. 15 FAI Mediation Rules and Art. 51 and 52 FAI Arbitration Rules (*R2, p. 31 para. 2*). The foreseen ADR mechanisms, on which the Parties agreed in the dispute resolution clause, are mediation and arbitration (*C2, p. 12 et seq. Art. 30*). However, the letter at issue here (*C7, p. 20 para. 1 et seqq.*) was not part of these agreed ADR mechanisms because it was sent in connection with the renegotiation between the Parties (*C5, p. 18 para. 15*). Since the Parties have not agreed to extend Art. 15 FAI Mediation Rules to negotiations preceding mediation or arbitration, Exhibit C7 is not covered by the confidentiality obligation. Thus, CLAIMANT did not violate any confidentiality obligation by submitting Exhibit C7 as evidence and the Arbitral Tribunal should admit it.

2. The without-prejudice privilege does not apply to Exhibit C7

72 According to the without-prejudice privilege to which Art. 9(4)(b) IBA Rules specifically refers, statements made by one party without prejudice during settlement negotiations cannot be submitted as evidence in arbitral proceedings [*Berger II, p. 307 et seq.; Khodykin/Mulcahy/Fletcher, Art. 9 IBA Rules para. 12.178*]. The purpose of this privilege is to encourage open settlement discussions between the parties to resolve disputes without having to resort to arbitration or litigation, and to free the parties from fear that statements or admissions made during settlement negotiations might later be used against them [*Berger III, p. 272 et seqq.; Cutts v. Head (GBR 1984)*]. Communications made in good faith to reach a compromise in a dispute, whether written or oral, fall under the privilege [*Haller, p. 316; Khodykin/Mulcahy/Fletcher, Art. 9 IBA Rules para. 12.182*]. However, in light of the purpose of the privilege, it can only apply if negotiations are genuine; simply labeling

communications as "*without-prejudice*" is insufficient if the intent to negotiate is absent [*Rush & Tompkins Ltd. v. Greater London Council (GBR 1988)*].

73 The instant case is a typical example for this: While RESPONDENT marked Exhibit C7 as "*without-prejudice*", RESPONDENT did not send that letter in a genuine attempt to settle the dispute. It was clear to RESPONDENT that CLAIMANT would never be able to accept the proposed price reduction of 15%, because the initial offer of CLAIMANT was calculated on a cost-only basis (*Request, p. 4 para. 9*). A further price reduction of 15%, in addition to the 5% already granted during the negotiation of the Sales Agreement, would evidently have resulted in a multi-million loss for CLAIMANT (*Request, p. 6 para. 25*). This was clearly unacceptable for CLAIMANT from the outset. In its letter, RESPONDENT did not make any admissions, nor did it propose an offer in a genuine attempt to settle the dispute, but rather dictated its own conditions. Merely dictating its own conditions in a letter which is labeled a "*Without-prejudice Offer*" is not in line with the purpose of the without-prejudice privilege and, thus, is insufficient to be protected by it. For this reason, the privilege cannot apply to Exhibit C7.

74 Additionally, RESPONDENT's behavior prior to sending the letter further shows that it never genuinely attempted to settle the dispute and did not act in good faith by sending the letter. After purportedly terminating the Sales Agreement, RESPONDENT showed no genuine interest in engaging in settlement negotiations until CLAIMANT firmly rejected the termination twice, and clearly explained the legal situation and its potential claims (*PO2, p. 54 et seq. para. 23*). Later on, RESPONDENT engaged in renegotiations, but instead of negotiating in good faith, RESPONDENT resorted to coercive tactics. During the renegotiation between the Parties, Mr. la Cour made serious allegations against Mr. Deiman, Mr. Cavendish, and Ms. Faraday concerning the conclusion of the Sales Agreement and threatened to hand this information over to the prosecution office should there be no amicable settlement (*C8, p. 36 para. 3*). During the final meeting between the Parties' CEOs, RESPONDENT made very clear that it was only willing to negotiate further if CLAIMANT would be ready to make another significant price reduction (*C5, p. 18 para. 15*). This statement was subsequently confirmed in Exhibit C7 (*C5, p. 18 para. 16; C7, p. 20 para. 4*). This behavior demonstrates that RESPONDENT's interest in a settlement was reactive and insincere, motivated only by CLAIMANT's unwavering legal position and not by any serious intent to resolve the matter amicably.

75 In conclusion, RESPONDENT never made a sincere effort to resolve the dispute through mutual compromise. Exhibit C7 cannot be protected under any settlement privilege, as RESPONDENT's approach lacked good faith, which is the essential element for privileged settlement discussions.

3. Excluding Exhibit C7 would violate CLAIMANT's right to present its case

76 Art. 26.2 FAI Arbitration Rules provides the parties with a right to present their case. Failure to ensure this not only risks an annulment of the award by the courts at the seat of the arbitration (Art. 34(2)(a)(ii) UNCITRAL Model Law), but also that the award cannot be enforced pursuant to Art. V(1)(b) NYC [*Born, §15.04 [B][3]*]. To avoid these risks, evidence should not be excluded in a way that might unfairly limit a party's ability to present their case [*O'Mally, para. 9.116; Zuberbühler/Hofmann/Oetiker/Rohner, Art. 9 IBA Rules para. 6*]. Arbitral tribunals generally tend to give more probative value to evidence contained in documents than testimonial evidence [*Blackaby/Partasides/Redfern, para. 6.134; Pietrowski, p. 391*]. This is particularly significant in the present case for the following reason:

77 By excluding Exhibit C7, the Arbitral Tribunal would limit CLAIMANT's representatives to relying solely on the testimony of rather partial witnesses (e.g., a party's manager) to demonstrate that mediation would be futile. Therefore, CLAIMANT would be limited to a form of evidence with less probative value than the written letter provided in Exhibit C7. As it is a material piece of evidence for CLAIMANT, its exclusion would severely obstruct CLAIMANT's ability to present its case and place it at an undue disadvantage. To uphold procedural fairness, and not violate CLAIMANT's right to present its case, the Arbitral Tribunal should exercise its discretion to admit Exhibit C7.

CONCLUSION ISSUE II

78 Exhibit R3 and Exhibit C7 tell two contradicting stories about confidentiality. Exhibit R3 is a document written by CLAIMANT's in-house counsel and covered by the attorney-client privilege. RESPONDENT unrightfully came into possession of this document and submitted it as evidence. Allowing RESPONDENT to benefit from the submission of a highly confidential, most likely illegally obtained document would lead to a violation of CLAIMANT's right to freely communicate with its lawyer. Considering these circumstances, the Arbitral Tribunal should exclude Exhibit R3. Conversely, Exhibit C7, including a purported "*Without-prejudice Offer*" from RESPONDENT, is not a confidential document. The Parties did not agree to any confidentiality obligation regarding negotiations. Additionally, RESPONDENT tried to benefit from the without-prejudice privilege without making a genuine attempt to reach an amicable settlement. Since Exhibit C7 is not confidential, the Arbitral Tribunal should admit it and, thereby, preserve CLAIMANT's right to present its case.

III. The CISG applies to the Sales Agreement

79 In the pursuit of the Green Energy Strategy, RESPONDENT wanted to construct a plant to produce green hydrogen. RESPONDENT knew that it had to look for a contractor abroad because there was no suitable contractor in Equatoriana that could achieve the ambitious goal of constructing a 100 MW plant in a relatively short amount of time (*Request, p. 3 para. 7; Answer, p. 25 para. 4*). Nevertheless, RESPONDENT wanted to support local green energy businesses and required that 25% of the materials, works, and services had to be supplied by an Equatorianian entity (R*equest, p. 3 para. 3; C1, p. 9 para. 9*).

80 To find a suitable foreign contractor, RESPONDENT designed a tender process which was split up into three phases (*PO2, p. 52 et seq. para. 9*). First, RESPONDENT invited and gathered bids from different contractors who were all located abroad (*Request, p. 3 para. 2; PO2, p. 52 et seq. para. 9*). Second, a reverse auction took place in which RESPONDENT selected the best bidders (*Request, p. 3 para. 3; PO2, p. 52 et seq. para. 9*). And third, RESPONDENT conducted individual and specific negotiations with two selected bidders (*Request, p. 3 para. 10; PO2, p. 52 et seq. para. 9*).

81 CLAIMANT was one of the two final bidders, with which RESPONDENT entered into negotiations (*Request, p. 3 para. 10*). At this point, RESPONDENT knew that CLAIMANT had its place of business in Mediterraneo, a contracting state of the CISG (*Request, p. 2 front page*). It also knew that CLAIMANT planned to subcontract Volta Transformer in Equatoriana to fulfill the 25% local content requirement (*C4, p. 15 para. 1 et seq.*). After settling all hurdles through negotiations, the Parties finally concluded the Sales Agreement on 17 July 2023 (*C2, p. 10 et seqq. Art. 1 et seqq.*).

82 CLAIMANT was the one to convince RESPONDENT because its state-of-the-art technology and long-standing expertise in the field of green hydrogen production were best suited to realize the project (*Request, p. 4 para. 10*). Furthermore, the Plant was extremely important to CLAIMANT since it wanted to use it as a reference project to showcase its new technology and to disprove the critics of the PEM-electrolysis technology (*Request, p. 4 para. 9*). Thus, CLAIMANT offered a very favorable price (*Request, p. 4 para. 9; Request, p. 7 para. 29*). On top of that, CLAIMANT was even able to deliver a suitable transformer very swiftly as it had ordered one already for a different project which was later canceled (*Request, p. 3 et seq. para. 8*). A stroke of luck for RESPONDENT, one might think.

83 But the political winds in Equatoriana changed. In October 2023, the government revised the Green Energy Strategy, shifting its focus away from green hydrogen production (*Request, p. 5 para. 17 et seq.*). On 29 February 2024, RESPONDENT purported to terminate the Sales Agreement for convenience (*C6, p. 19 para. 4).* Since neither the CISG nor the Sales Agreement grant RESPONDENT a right to terminate for convenience, RESPONDENT tries to argue that the Equatorianian

Civil Code, which is very favorable to governmental entities, should apply (*C2, p. 12, Art. 28(2)*). Thus, RESPONDENT claims that the sales transaction between the Parties is not international, although the Parties have their places of business in different countries. Furthermore, it claims that the Sales Agreement resulted from a reverse auction, although it was specifically negotiated and concluded between the Parties *after* the reverse auction.

84 RESPONDENT's behavior is inconsistent and disappoints the trust that CLAIMANT had placed in the business relationship – one that held the promise of advancing to a groundbreaking milestone in the field of green hydrogen production.

85 This milestone, however, can still be achieved, if the Arbitral Tribunal decides that the CISG applies to the Sales Agreement. The Arbitral Tribunal should indeed find that the CISG applies to the Sales Agreement for the following reasons: The Sales Agreement is a sale of goods (**A**) between Parties with their places of business in two different contracting states of the CISG (**B**). The CISG's applicability is also not excluded because the Sales Agreement was not concluded in an auction in the sense of Art. 2(b) CISG (**C**).

A. The sales obligations are the preponderant part of the Sales Agreement in the sense of Art. 3(2) CISG

86 A sale of goods according to the CISG requires that the preponderant part of the contract is a sale of goods in the sense of Art. 3(2) CISG. Goods under the CISG are items that are at the time of delivery moveable and tangible [*Digest, Art. 1 CISG p. 7 para. 28; CISG-online Case No. 1780 (ITA 2009); CISG-online Case No. 1047 (AUT 2005)*]. In the case at hand, the core system (meaning the electrolyzer stacks), the transformer and electrical equipment as well as the compressor, pipes, cables and other equipment needed for the construction of the Plant qualify as goods because these are moveable and tangible at the time of delivery. This is further supported by the *spinning plant case* and the *filling and packaging plant case*: The objective was similarly the construction and delivery of a plant by using items (such as fans, the air conditioning system, and different machines) which were at the time of the delivery moveable and tangible [*cf. CISG-online Case No. 2371 (SUI 2012); CISG-online Case No. 1900 (SUI 2009)*].

87 The Sales Agreement contains obligations regarding the sale of goods and other non-sales obligations, such as site works as well as training and maintenance services. If a contract provides for non-sales obligations (e.g., obligations regarding cooperation, regulatory approvals, permits, procurement, commissioning, etc.) in addition to typical sales obligations for the seller and/or buyer, it is a mixed contract [*Digest, Art. 3 CISG p. 21 para. 5; Piltz, para. 2.34 et seq.; Schwenzer/Hachem/Kee, para. 8.46 et seq.; CISG-online Case No. 2026 (SUI 2009); CISG-online Case No. 726 (SUI 2002)*].

According to Art. 3(2) CISG, 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 labor and other services. It follows that the CISG applies to these mixed contracts, including so-called turn-key contracts, if the sales obligations are preponderant compared to the non-sales obligations, meaning that they constitute a majority in value and purpose [*Brunner/Feit, p. 43 para. 13; Piltz, para. 2.37; Schwenzer/Hachem/Kee, para. 8.47; CISG-online Case No. 2026 (SUI 2009); CISG-online Case No. 35 (FRA 1992)*]. The majority in value is the primary criterion and is determined by comparing the economic values of the different obligations [*CISG-AC No. 4, para. 3.3; Ferrari I, Art. 3 CISG para. 13; Huber, Art. 3 CISG para. 13*]. The majority in purpose is another criterion and considers which obligations the parties subjectively intended to prioritize [*Ferrari I, Art. 3 CISG para. 13; Magnus, Art. 3 CISG para. 21*].

88 CLAIMANT will show in the following that the preponderant part of the mixed contract is the sales obligations when using the economic value test (**1**) as well as the subjective test (**2**).

1. The sales obligations are economically the preponderant part of the Sales Agreement

89 The economic value of the sales obligations, including the delivery of the Plant, outweigh the non-sales obligations of the Sales Agreement. The economic value test is the primary factor used to determine whether the sales or the non-sales obligations are preponderant [*CISG-AC No. 4, para. 3.3; Huber/Mullis, p. 46; Lorenz, Art. 3 CISG para. 4; Piltz, para. 2.37; CISG-online Case No. 1908 (BEL 2008); CISG-online Case No. 1731 (SUI 2006)*]. According to that test, at the time of contract conclusion, the economic value of the sales obligations must be compared to the economic value of the non-sales obligations [*CISG-AC No. 4, para. 3.1; Digest, Art. 3 CISG p. 20 para. 4; Ferrari I, Art. 3 CISG para. 13; Huber/Mullis, p. 46; Schlechtriem II, p. 18; CISG-online Case No. 1077 (RUS 2000)*]. Sales obligations are obligations which relate to the transfer of ownership and the delivery of a good [*Piltz, para. 2.34; CISG-online Case No. 652 (AUT 2001)*].

90 In the present case, the Parties agreed that CLAIMANT had the obligation to deliver the Plant, including some extension options for the Plant, and to provide training and maintenance services (*C2, p. 10 et seq. Art. 2*). The following table contains CLAIMANT's internal calculations for the project. CLAIMANT shared this table with RESPONDENT's main negotiator, Ms. Ritter, long before the dispute between the Parties arose (*C5, p. 17 para. 11; R1, p. 29 para. 4*). Neither Ms. Ritter nor any other representative of RESPONDENT ever questioned the correctness of the calculations.

	Total Investment		Green Hydrogen (Mediteranneo)		Volta Transformer (Equatoriana)	
Electrolyser	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**
Core system	100	50%	60	60%	40	40%
Trafo and electrical equipment	40	20%	0	0%	40	40%
Packaging	20	10%	0	0%	20	20%
Project managment and engineering	15	7.5%	15	15%	0	0%
Site works	15	7.5%	15	15%	0	0%
Training and maintenance	10	5%	10	10%	0	0%
Subtotal	**200**	**100%**	**100**	**100%**	**100**	**100%**
EPC-Work	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**
Compressor, pipes, cable installation, connections, and other equipment	50	50%	50	50%	0	0%
Buildings and foundations for the facility	25	25%	25	25%	0	0%
Remaining "EPC" services for constructing the turnkey facility	25	25%	25	25%	0	0%
Subtotal	**100**	**100%**	**100**	**100%**	**0**	**0%**

Screenshot taken from C5, p. 17 para. 11

91 According to PO2, the yellow highlighted core system, trafo and electrical equipment, the compressor, pipes, cable installation, connections and other equipment constitute sales obligations (*C5, p. 17 para. 11; PO2, p. 54 para. 17*). These sales obligations already make up 63,33% of the economic value of the Sales Agreement and amount to EUR 190 MM. Therefore, they are economically the preponderant part of the Sales Agreement.

2. The sales obligations are subjectively the preponderant part of the Sales Agreement

92 Besides the economic value test, the subjective test which takes the parties' intentions and interests into account must be considered [*Ferrari I, Art. 3 CISG para. 14; Saenger, Art. 3 CISG para. 6; CISG-online Case No. 2026 (SUI 2009); CISG-online Case No. 1716 (GER 2008)*]. The question is whether the sales or the non-sales obligations were more important to the parties [*Hachem, Art. 3 CISG para. 19; CISG-online Case No. 585 (GER 1999)*]. The answer requires a case-by-case analysis in consideration of all relevant circumstances [*CISG-AC No. 4, para. 3.4; Ferrari I, Art. 3 CISG para. 14; Huber/Mullis, p. 47; Mistelis/Raymond, Art. 3 CISG para. 19; Schlechtriem I, p. 347*].

93 In line with its ambitious Green Energy Strategy, the Equatorianian government instructed RESPONDENT to create a "sustainable hydrogen infrastructure covering the entire value chain needed to decarbonize Equatoriana's large steel and transport industry" (*Request, p. 3 para. 2*). To achieve this goal, RESPONDENT had to find a contractor with expertise in the field of green hydrogen. CLAIMANT has such an expertise (*Request, p. 2 para. 1*): CLAIMANT has developed a patent-protected technology, consisting of a core system and electrolyzers, to produce green hydrogen using PEM-electrolysis (*Request, p. 3 para. 5*). This innovative technology allows plants to achieve an efficiency

rate of over 85% (*Request, p. 3 para. 6*). In comparison, the average plant using the same method reaches an efficiency rate of only 65% [*Boretti, p. 5*]. CLAIMANT's highly effective technology would assist and speed up RESPONDENT's objective to reach its Net-Zero-2040 goal (*Request, p. 3 para. 2*). Thus, the sale of the core system and the electrolyzers was the most important element to RESPONDENT.

94 In turn, the sale of the core system and the electrolyzers was the most important part of the Sales Agreement for CLAIMANT. The Plant would have been CLAIMANT's biggest plant using its patent-protected PEM-electrolysis (*Request, p. 3 para. 5*). The project would have showcased its innovative technology on a larger scale, attracted other potential clients, and proved to critics that their concerns about the PEM-electrolysis lacked any basis (*Request, p. 3 para. 5; Request, p. 4 para. 9; C3, p. 14 para. 2; C5, p. 16 para. 7*). To achieve this, it was important for CLAIMANT to sell the core system and electrolyzer stacks.

95 Moreover, RESPONDENT's aim was to achieve the Net-Zero-2040 goal for which it wanted to acquire an operational green hydrogen plant, at the latest by 2 January 2026 (*Request, p. 3 para. 2; C2, p. 11 Art. 3*). CLAIMANT was amongst the only entities able to ensure the availability of a transformer in time because it had ordered one in 2020 for a different project in Ruritania which later had to be canceled (*Request, p. 3 et seq. para. 8; C5, p. 16 para. 8*). This, combined with CLAIMANT's highly effective technology, which would have ensured the Net-Zero-2040 goal, was exactly the reason why RESPONDENT awarded the contract to CLAIMANT (*Request, p. 4 para. 10*). Consequently, these circumstances show that the Parties' primary intention and interest was the speedy delivery of the transformer as well as the unique and efficient core system of CLAIMANT.

96 Following the economic value and the subjective test, the sales obligations are the preponderant part and, therefore, the Sales Agreement is a sale of goods in the sense of the CISG.

B. The Parties have their places of business in different contracting states in the sense of Art. 1(1)(a) CISG

97 The Sales Agreement is an international sale of goods because, at the time of the Sales Agreement's conclusion, CLAIMANT's place of business is in Mediterraneo and RESPONDENT's place of business is in Equatoriana. These are both contracting states of the CISG (*PO1, p. 50 para. 4*). Art. 1(1)(a) CISG states that the parties must have their places of business in different contracting states. RESPONDENT denies that this is the case and claims that Volta Transformer in Equatoriana was producing at the time nearly exclusively for CLAIMANT and thus already constituted a place of business of CLAIMANT before its later formal acquisition by CLAIMANT in November 2023 (*Answer, p. 28 para. 20*).

98 However, CLAIMANT will prove that its contractual relationship with Volta Transformer does not establish a place of business in Equatoriana for the Sales Agreement (**1**). Even if one were to conclude that CLAIMANT had a second place of business at Volta Transformer in Equatoriana, the decisive place of business for the Sales Agreement would still be in Mediterraneo (**2**).

1. CLAIMANT's sole place of business according to Art. 1(1)(a) CISG is in Mediterraneo

99 Contrary to what RESPONDENT tries to argue, CLAIMANT's contractual relationship with Volta Transformer is not sufficient to constitute a place of business for CLAIMANT regarding the Sales Agreement (*Answer, p. 28 para. 20*).

100 The CISG does not explicitly define the place of business as the drafters of the CISG could not agree on a definition [*Ferrari I, Art. 1 CISG para. 45*]. However, this lack of a definition does not imply a reference to national law [*Mankowski, Art. 1 CISG para. 26*]. Instead, the concept of the place of business must be interpreted autonomously [*Huber, Art. 1 CISG para. 26; Saenger, Art. 1 CISG para. 11*]. For a proper interpretation, the time of the conclusion of the contract is decisive [*Saenger, Art. 1 CISG para. 14; CISG-online Case No. 819 (ITA 2004)*].

101 To determine the place of business, it is irrelevant where any third parties involved in the performance of the contract have their place of business [*Brauner, p. 124; Huber, Art. 1 CISG para. 29; Magnus, Art. 1 CISG para. 6.7*]. For example, the place of business of subcontractors is irrelevant, as they are not a party to the relevant sales contract.

102 RESPONDENT concluded the Sales Agreement with CLAIMANT – and only CLAIMANT – on 17 July 2023. Before that, CLAIMANT only negotiated with Volta Transformer before it subcontracted Volta Transformer to perform parts of the Sales Agreement on 25 August 2023, more than a month after the conclusion of the Sales Agreement (*Request, p. 4 para. 11*). Therefore, Volta Transformer never was and is not a party to the Sales Agreement. Its place of business is simply irrelevant, as Volta Transformer is only one of CLAIMANT's subcontractors.

103 In addition, further factors show that the work performed by Volta Transformer does not render Equatoriana a place of business for CLAIMANT under the Sales Agreement. Generally, the place of business is where there is an outward participation in commercial activities [*Saenger, Art. 1 CISG para. 10; CISG-online Case No. 583 (GER 2000)*]. These activities must be characterized by a certain autonomy to act and stability [*Digest, Art. 1 CISG p. 4 para. 5; Ferrari II, p. 47; CISG-online Case No. 819 (ITA 2004); CISG-online Case No. 583 (GER 2000)*]. Autonomy to act means that the place of business can make independent decisions, such as negotiating, concluding, changing, and terminating contracts. Stability refers to the relationship between the place of business which actually and mainly carries out the commercial activities and the potential other place of business.

104 Volta Transformer had no autonomy in negotiating, concluding, changing, and terminating the Sales Agreement. CLAIMANT was the one which negotiated and concluded the Sales Agreement with RESPONDENT (*C5, p. 17 para. 10; R1, p. 29 para. 4; C8, p. 36 para. 1*). CLAIMANT also agreed with RESPONDENT to reduce the purchase price by 5% (*Request, p. 5 et seq. para. 20; C5, p. 17 para. 10*), meaning that CLAIMANT had the power to influence the Sales Agreement. And lastly, the Sales Agreement included a right for both Parties to terminate the Sales Agreement for cause under certain circumstances (*C2, p. 12 Art. 28(1)*). Volta Transformer, in turn, had no such right. Instead, CLAIMANT retained full autonomy.

105 At the time the Sales Agreement was concluded, the contractual relationship between Volta Transformer and CLAIMANT was not stable. Volta Transformer, along with its 100% subsidiary, Volta Electrolyser, operated as an entirely independent entity before its acquisition by CLAIMANT (*Request, p. 4 para. 11*). CLAIMANT acquired Volta Transformer only in November 2023, several months after the Sales Agreement was concluded on 17 July 2023 (*Request, p. 5 para. 14; C8, p. 36 para. 2*). Before the acquisition, Volta Transformer and CLAIMANT had no formal or informal agreements which guaranteed CLAIMANT any control or operational influence over Volta Transformer or vice versa (*PO2, p. 52 para. 8*). Volta Transformer's independence is further shown by two facts: First, Volta Transformer had the capacity to produce two transformers of the size acquired by CLAIMANT at a time (*C5, p. 16 para. 8; PO2, p. 52 para. 5*). CLAIMANT's order only made up 50% of its production. This shows that Volta Transformer had capacity for other business partners. Second, the electrolyzer stacks provided by Volta Electrolyser account for 60% of its annual production capacity only for one year (*PO2, p. 52 para. 6*). Before and after CLAIMANT's orders, Volta Transformer and Volta Electrolyser produces transformers and electrolyzers for other customers. Thus, Volta Transformer's independence and ability to operate without relying on CLAIMANT shows that its contractual relationship with CLAIMANT is unstable.

106 In conclusion, CLAIMANT does not have a place of business in Equatoriana, because Volta Transformer is not a party to the Sales Agreement. In any case, Volta Transformer does not carry out its commercial activities for the performance of the Sales Agreement with autonomy and stability. Hence, CLAIMANT has its sole place of business in Mediterraneo.

2. In any case, the closest relationship to the Sales Agreement in the sense of Art. 10(a) CISG is CLAIMANT's place of business in Mediterraneo

107 Even if one were to conclude that Volta Transformer in Equatoriana was a place of business for CLAIMANT, the decisive one with the closest relationship to the Sales Agreement remains CLAIMANT's place of business in Mediterraneo.

108 If a party has more than one place of business, Art. 10(a) CISG states that the decisive place of business is the one which has the closest relationship to the contract and its performance. Having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract, the following factors must be considered when determining which place of business is the decisive one:

109 **First**, the place of business that has the most power to influence the contractual relationship between the parties [*Hachem, Art. 10 CISG para. 7; CISG-online Case No. 616 (USA 2001)*]. Volta Transformer had no power to influence the relationship between the Parties. Volta Transformer was, at the time of the Sales Agreement's conclusion, merely a potential subcontractor of CLAIMANT and as such, not a party to the Sales Agreement. In fact, CLAIMANT only concluded its subcontract with Volta Transformer one month after the conclusion of the Sales Agreement. For this reason, Volta Transformer had no say in the conclusion and performance of the Sales Agreement. CLAIMANT's headquarters in Mediterraneo was negotiating the terms and conditions of the Sales Agreement (*C5, p. 17 para. 10; R1, p. 29 para. 4; C8, p. 36 para. 1*). This is evident from the fact that CLAIMANT alone had the power to negotiate a 5% price reduction (*Request, p. 5 et seq. para. 20; Request, p. 7 para. 29*). In conclusion, the place with the most authority to influence the contractual relationship was CLAIMANT's place of business in Mediterraneo.

110 **Second**, the place where correspondence was sent to and from [*Hachem, Art. 10 CISG para. 5; Schwenzer/Fountoulakis/Dimsey, p. 84; CISG-online Case No. 4234 (USA 2019)*]. The communications were consistently sent to and from CLAIMANT's address in Mediterraneo. Throughout the entire time leading up to the signing of the Sales Agreement, RESPONDENT communicated with CLAIMANT's employees, who had CLAIMANT's address in Mediterraneo in their email signatures (*C4, p. 15; C6, p. 19; R2, p. 31*). There was no communication between RESPONDENT and Volta Transformer in Equatoriana in the course of the negotiations. Therefore, the place of correspondence was CLAIMANT's place of business in Mediterraneo.

111 **Third**, the place where the persons representing the company in the negotiations of the contract came from [*Hachem, Art. 10 CISG para. 5; Schwenzer/Fountoulakis/Dimsey, p. 84*]. The person representing CLAIMANT in the negotiations of the Sales Agreement was Mr. Deiman, CLAIMANT's then Head of Contracting, who operates from CLAIMANT's headquarters in Mediterraneo (*C8, p. 36 para. 1*). Throughout the entire time leading up to the signing of the Sales Agreement, RESPONDENT negotiated with Mr. Deiman, who became COO of Volta Transformer only months after the conclusion of the Sales Agreement (*C5, p. 17 para. 10; C8, p. 36 para. 1; PO2, p. 56 para. 36(b)*). There were no negotiations between RESPONDENT and Volta Transformer. In short, the persons

representing CLAIMANT in the negotiations came from CLAIMANT's place of business in Mediterraneo.

112 **Fourth**, the place where the goods are provided from [*cf. Hachem, Art. 10 CISG para. 5*]. In the case at hand, most of the goods are provided from Mediterraneo. The goods that CLAIMANT had to provide are part of the core system (meaning the electrolyzer stacks) at a value of EUR 60 MM as well as the compressor, pipes, cable installation, connections, and other equipment at a value of EUR 50 MM (*C5, p. 17 para. 11*). Thus, the goods that CLAIMANT had to provide amount to a total of EUR 110 MM. The goods that Volta Transformer had to provide are the transformer at a value of EUR 40 MM (*C4, p. 15 para. 2; C5, p. 17 para. 11*) and 40% of the core system at a value of EUR 40 MM (*Request, p. 4 para. 11; C4, p. 15 para. 2; C5, p. 17 para. 11*). In total, the goods Volta Transformer had to provide amount to EUR 80 MM. Hence, most of the goods were to be provided from CLAIMANT's place of business in Mediterraneo.

113 **Finally**, Art. 10 CISG requires mutual knowledge or contemplation of those factors [*Ferrari I, Art. 10 CISG para. 7; Hachem, Art. 10 CISG para. 10*]. The circumstances to be considered are limited to those which *both* parties knew or contemplated [*Melis, Art. 10 CISG para. 5*]. Any circumstance that becomes known after the contract conclusion is irrelevant [*Ferrari I, Art. 10 CISG para. 7*].

114 The acquisition of Volta Transformer by CLAIMANT in November 2023 (*C8, p. 36 para. 2*) has no effect on the decisive place of business for the Sales Agreement. CLAIMANT decided to subcontract Volta Transformer to deliver the transformer as well as to provide and package some of the electrolyzer stacks (*Request, p. 4 para. 11*). The tasks related to the electrolyzer stacks were to be undertaken by Volta Transformer's 100% subsidiary, Volta Electrolyser (*C4, p. 15 para. 2; C5, p. 17 para. 11*). Before the subcontract between CLAIMANT and Volta Transformer was signed, CLAIMANT received an offer on 29 June 2023 to buy Volta Transformer (*Request, p. 4 para. 11*). After thorough negotiations, several months later, in November 2023, CLAIMANT acquired Volta Transformer (*Answer, p. 28 para. 20; C8, p. 36 para. 2*). While CLAIMANT had already contemplated on 17 July 2023, when the Sales Agreement was signed, that it might buy Volta Transformer, the potential acquisition was neither known to the public (*C3, p. 14 para. 1 et seqq.*) nor to RESPONDENT (*C4, p. 15 para. 1 et seqq.; R2, p. 31 para. 1 et seqq.; PO2, p. 52 para. 7*). CLAIMANT did not disclose its negotiations because of the risk that the potential acquisition could have failed on several unknown grounds between the offer in June 2023 and the acquisition in November 2023 (*PO2, p. 52 para. 7*). Therefore, the potential and later formal acquisition of Volta Transformer does not suffice to

constitute a place of business. In any case, only one but not both Parties, namely CLAIMANT, knew about the potential acquisition, which does not suffice.

115 To conclude the matter regarding the place of business, CLAIMANT's sole place of business is in Mediterraneo. Mediterraneo also has the closest relationship to the Sales Agreement, so that even if Volta Transformer were a place of business for the Sales Agreement, the place of business in Mediterraneo remains the decisive one. Consequently, the Sales Agreement concerns an international sale of goods in the sense of Art. 1(1)(a) CISG.

C. The Sales Agreement was concluded subsequently to a reverse auction and, thus, does not fall under the exclusion of Art. 2(b) CISG

116 The CISG does not apply to sales by auction in the sense of Art. 2(b) CISG. RESPONDENT's assertion that the Sales Agreement was concluded as part of a reverse auction is incorrect (*Answer, p. 28 para. 20*). On the contrary, RESPONDENT concluded the Sales Agreement with CLAIMANT *after* a tender process and *after* thorough negotiations between the Parties.

117 Auctions under Art. 2(b) CISG describe a procedure in which the bidders successively increase their prices [*Beyeler, p. 95*]. In contrast, a reverse auction describes a procedure in which the bidders successively lower their prices, until the lowest bid remains unchallenged [*ibid*]. Auctions are excluded from the CISG as they are generally governed by specific national rules and practices (e.g. Art. 229 et seqq. OR or Art. 57 Sale of Goods Act 1979) [*Hachem, Art. 2 CISG para. 20*]. The exclusion from the CISG is justified by two main factors: In an auction sale, it is unclear until the bid is accepted whether the transaction is national or international, and the parties are usually unaware if the other's place of business is in a different contracting state. To avoid this legal uncertainty, the CISG does not apply to auctions, so that, especially the seller, is not unexpectedly subjected to the application of the CISG [*Mankowski, Art. 2 CISG para. 16; Spohnheimer, Art. 2 CISG para. 27*].

118 In the case at hand, part of the tender process was conducted as a reverse auction in which various bidders, including CLAIMANT, had to present their best bid (*Request, p. 3 para. 3*). The tender process was conducted in three different steps of which the reverse auction itself constituted the second step (*PO2, p. 52 et seq. para. 9*). In a first step, RESPONDENT gathered the different bids which had to be submitted according to the Request for Quotation (*PO2, p. 52 et seq. para. 9*). For the sake of comparability of the various bids, RESPONDENT developed a complex formular to weigh the different technologies, the efficiency of the plant, and other factors to arrive at the calculated price (*PO2, p. 52 et seq. para. 9*). As a second step, the reverse auction took place in that RESPONDENT selected the best bidders based on that formular and the calculated price (*PO2, p. 52 et seq. para. 9*). The best offer was not immediately followed by an acceptance and the conclusion of a contract.

Rather, in the third step of the process, RESPONDENT then conducted individual and specific negotiations with two final bidders, of which CLAIMANT was one (*Request, p. 4 para. 10; PO2, p. 52 et seq. para. 9*). In those negotiations, the Parties discussed the price and agreed on a reduction of 5% to arrive at a calculated price of EUR 285 MM (*Request, p. 4 et seq. para. 13; Request, p. 5 et seq. para. 20; PO2, p. 56 para. 35(b)*). This kind of negotiation would not be possible in a reverse auction. It was only after these negotiations that RESPONDENT chose to conclude the Sales Agreement with CLAIMANT due to its innovative technology, available transformer, and calculated price (*Request, p. 4 para. 10*).

119 To summarize, the Sales Agreement does not fall under the exclusion of Art. 2(b) CISG because the reverse auction was only one part of the tender process. The final stage of the tender process which ultimately led to the conclusion of the Sales Agreement was separate and specific negotiations between the Parties.

IV. The Parties did not exclude the CISG's applicability under Art. 6 CISG

120 As the Sales Agreement is governed by the CISG, the Parties are free to exclude its applicability in line with the principle of party autonomy. That is exactly what RESPONDENT claims in its Answer, stating that the Parties excluded the CISG as the governing law in the choice of law clause in Art. 29 Sales Agreement (*Answer, p. 27 para. 19*). This claim, however, does not hold water.

121 The wording of the choice of law clause does not mention that the CISG is excluded; in fact, it does not mention the CISG at all. However, it would have been easy for RESPONDENT to explicitly exclude the CISG. RESPONDENT knew that CLAIMANT had a very high economic interest in completing the Plant in a timely manner and that CLAIMANT was even willing to make a loss by offering the Plant at a price that did not even cover CLAIMANT's costs (*Request, p. 4 et seq. para. 13*). This left RESPONDENT in a very favorable bargaining position, making it easy to suggest a choice of law clause that excludes the CISG. Not only did RESPONDENT not suggest so, but when CLAIMANT described the CISG as the gold standard during the negotiations, RESPONDENT never said that it wanted to exclude the CISG although it had opportunity to do so (*R1, p. 30 para. 11*). Consequently, CLAIMANT could trust that the CISG would apply to the Sales Agreement.

122 RESPONDENT damaged that trust when it purportedly terminated the Sales Agreement – not based on the CISG, but based on its one-sided domestic law, which grants state-owned entities a termination right for convenience.

123 However, CLAIMANT's trust can still be restored if the Arbitral Tribunal finds that the Parties did not exclude the CISG from the Sales Agreement. In the following, CLAIMANT will demonstrate

that the Parties neither explicitly (**A**) nor implicitly (**B**) excluded the CISG's applicability to the Sales Agreement.

A. The Parties did not explicitly exclude the applicability of the CISG

124 The CISG applies because the Sales Agreement, including the Parties' choice of law clause, does not explicitly exclude the CISG. Based on Art. 6 CISG and the principle of party autonomy, the parties can explicitly exclude the application of the CISG. An explicit exclusion of the CISG requires an agreement in which the parties include the term "CISG" or an equivalent synonym, such as "Vienna Convention on Contracts for the International Sale of Goods" or "Vienna Convention", and unanimously express that they want to exclude it [*Ferrari I, Art. 6 CISG para. 12; Huber, Art. 6 CISG para. 6; Lorenz, Art. 6 CISG para. 3; Piltz, para. 2.112; CISG-online Case No. 2809 (GER 2017); CISG-online Case No. 2791 (NED 2016); CISG-online Case No. 2790 (NED 2016); CISG-online Case No. 2757 (SUI 2016); CISG-online Case No. 2039 (SRB 2009)*].

125 The Sales Agreement, particularly Art. 29, does not mention the term "CISG", nor does it refer to it by using any synonyms. The Parties, thus, did not explicitly and unanimously agree to exclude the CISG as the governing law of the Sales Agreement.

B. The Parties did not implicitly exclude the applicability of the CISG

126 In general, scholars and courts recognize the possibility of an implicit exclusion under Art. 6 CISG [*Manner/Schmitt, Art. 6 CISG para. 2; Siehr, Art. 6 CISG para. 6; CISG-online Case No. 1098 (FRA 2005); CISG-online Case No. 819 (ITA 2004)*]. However, in line with the Convention's goal to unify the law applicable to international sales, courts are hesitant to assume an implicit exclusion of the CISG [*Ferrari I, Art. 6 CISG para. 18; Schroeter, para. 71; CISG-online No. 730 (USA 2003); CISG-online Case No. 616 (USA 2001)*]. They require evidence of statements and conduct which clearly and unambiguously indicate that the parties intended to exclude the CISG [*CISG-online No. 2178 (USA 2011); CISG-online Case No. 1560 (AUT 2007)*]. The party invoking the exclusion bears the burden of proof [*Huber, Art. 6 CISG para. 38; Manner/Schmitt, Art. 6 CISG para. 11; CISG-online Case No. 1377 (AUT 2006)*].

127 Whether there is an implicit exclusion of the CISG must be determined on a case-by-case basis by interpreting the parties' statements and conduct in light of Art. 8 CISG [*CISG-AC No. 16, para. 3.6; Ferrari I, Art. 6 CISG para. 19; Gillette/Walt, p. 68*]. All relevant circumstances pursuant to Art. 8(3) CISG must be considered, including the parties' statements and conduct in the negotiation process [*Schroeter, para. 71; Witz, Art. 8 CISG para. 12*].

128 Art. 8(1) CISG states that a party's statements and conduct must be interpreted according to their intent where the other party knew or could not have been unaware of what that intent was. In interpreting the parties' statements or conduct, their actual subjective intention is the starting point [*Schwenzer/Fountoulakis/Dimsey, p. 60*]. This intent, however, is only relevant if the recipient knew or could not have been unaware of it [*Schwenzer/Fountoulakis/Dimsey, p. 60*]. If the parties' mutual intent cannot be determined, Art. 8(2) CISG must be applied [*Magnus, Art. 8 CISG para. 17; Witz, Art. 8 CISG para. 7*]. According to Art. 8(2) CISG, the statements and conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. A reasonable person is a hypothetical person from the same business who has an objective view [*Ferrari I, Art. 8 CISG para. 24; Mankowski, Art. 8 CISG para. 13; Zuppi, Art. 8 CISG para. 25*].

129 CLAIMANT will show in the following that, when the choice of law clause is interpreted according to Art. 8 CISG, the CISG is not implicitly excluded either by the exclusion of the Equatorianian conflict of laws principles (**1**) or by the choice of Equatorianian law (**2**).

1. The exclusion of the Equatorianian conflict of laws principles does not implicitly exclude the CISG

130 The CISG is a substantive law that governs the obligations of parties in international sales transactions, addressing matters such as the applicability of the CISG, the contract formation, and performance [*Ragno, p. 258*]. In particular, Art. 1(1)(a) CISG is part of the CISG's provisions on applicability because it determines under which circumstances it applies directly and autonomously [*Digest, Art. 1 CISG p. 5 para. 9; Ferrari I, Art. 1 CISG para. 63; CISG-online Case No. 1728 (SUI 2008); CISG-online Case No. 1015 (ITA 2004)*]. This means that it is not part of Equatoriana's or any other country's conflict of laws principles.

131 In the case at hand, Art. 29 Sales Agreement states that "*[Equatorianian] conflict of laws principles*" are excluded (*C2, p. 12 Art. 29*). Their exclusion (as the exclusion of domestic, rather than conventional, conflict of laws principles) does not imply an exclusion of the CISG.

2. The choice of Equatorianian law does not implicitly exclude the CISG

132 According to the prevailing opinion of scholars and virtually all case law, a choice of law clause that explicitly chooses the law of a contracting state of the CISG without adequately referring to the specific domestic law (e.g., civil code of Austria) is not sufficient to exclude the CISG implicitly [*CISG-AC No. 16, para. 4.2; Gillette/Walt, p. 68; Lorenz, Art. 6 CISG para. 9; Schroeter, para. 73; CISG-online Case No. 1045 (AUT 2005); CISG-online Case No. 730 (USA 2003); CISG-online Case No. 594 (GER 2000)*]. Rather, the parties' choice includes the CISG since it forms an integral part

of each contracting state's domestic law [*CISG-AC No. 16, para. 4.2; Lorenz, Art. 6 CISG para. 9; Schroeter, para. 73; CISG-online Case No. 730 (USA 2003); CISG-online Case No. 614 (AUT 2001)*].

133 The choice of law clause in Art. 29 Sales Agreement states that the Sales Agreement is "*governed by the law of Equatoriana [...]*" (*C2, p. 12 Art. 29*). RESPONDENT took this choice of law clause from a model contract used by Equatorianian state entities for all their public procurement contracts ("**Model Contract**"; *Answer, p. 27 para. 19*). In 2022, the Equatorianian Ministry of Justice apparently revised the Model Contract and, in the context of this revision, also changed the wording of the choice of law clause. The previous version explicitly provided for the application of the CISG (*Answer, p. 27 para. 19; R1, p. 30 para. 11*). The revised version refers to "*the law of Equatoriana*". While the wording of the clause has changed, its meaning stayed the same. This is because Equatoriana is a contracting state to the CISG (*PO1, p. 50 para. 4*). The CISG, thus, forms an integral part of Equatoriana's law. Choosing Equatorianian law – without specific reference to the Equatorianian Civil Code – means choosing the CISG. Therefore, neither the wording of Art. 29 Sales Agreement nor the change of wording in the new Model Contract support an implicit exclusion of the CISG.

134 Furthermore, the Parties' statements and conduct speak against an implicit agreement to exclude the CISG:

135 **First**, CLAIMANT expected the CISG to apply as it is the gold standard for international transactions. CLAIMANT's CEO told RESPONDENT's then CEO that its then Head of Legal at CLAIMANT had described the CISG as the "*gold standard*" for international sales transactions (*R1, p. 30 para. 11; PO2, p. 52 para. 2*). Indeed, the CISG is universally recognized to be the gold standard for international sales transactions [*cf. Schwenzer, para. 1 et seqq.*]. With 84 contracting states, the CISG provides a neutral and global legal framework that does not favor any particular party or jurisdiction [*Schroeter, para. 16 et seq.; Schwenzer, para. 1 et seqq.*]. In contrast, the Equatorianian domestic law clearly favors state-owned entities by providing them with a broad right to terminate binding agreements for convenience, whereas no such right is granted to the counterparty (*PO1, p. 50 et seq. para. 4; PO2, p. 55 para. 33*). RESPONDENT could not have been unaware that CLAIMANT would want to have the unbiased gold standard, which does not allow termination for convenience, to apply to the Sales Agreement.

136 **Second**, CLAIMANT expected the CISG to apply due to its previous experience with the Model Contract. It had used the old Model Contract on two previous occasions with other Equatorianian state-owned entities (*R1, p. 30 para. 11; PO2, p. 52 para. 2*). In both cases, the CISG applied. CLAIMANT told RESPONDENT during the negotiations that it had made positive experiences with the *old*

Model Contract and that, therefore, it did not object to using the new Model Contract as a basis for the Sales Agreement (*R1, p. 30 para. 11*). Given this, it was recognizable for RESPONDENT that CLAIMANT expected the CISG to apply to the Sales Agreement, just as it did in the previous two contracts which CLAIMANT had concluded based on the Model Contract. If RESPONDENT had not agreed with this expectation, it should have pointed this out to CLAIMANT in the negotiations.

137 **Third**, RESPONDENT never mentioned any allegedly significant changes to the Model Contract's choice of law clause to CLAIMANT. Instead, RESPONDENT's Head of Contracting simply assumed that "*Claimant was aware of the change to the choice of law clause in the 2022 version*" (*R1, p. 30 para. 11*). While CLAIMANT was aware of the changed wording of the choice of law clause, it was not aware of any effect the new wording should allegedly have on the applicable law. Rather, the choice of Equatorianian law and the complete absence of any wording implying an exclusion of the CISG confirmed CLAIMANT's understanding that the CISG, as an integral part of Equatorianian law, would govern the Sales Agreement.

138 In any case, if the Arbitral Tribunal should decide that the wording of the choice of law clause is ambiguous, then it should apply an interpretation against RESPONDENT, according to the *contra proferentem* rule. This rule states that if a clause in a contract appears ambiguous, it should be interpreted against the party that provided it [*CISG-AC No. 13, para. 9; CISG-online Case No. 2513 (GER 2014)*]. In the present case, the choice of law clause of the Sales Agreement was taken from the new Equatorianian Model Contract, which RESPONDENT regularly uses (*Answer, p. 27 para. 19; PO2, p. 53 para. 11*). RESPONDENT was the one who provided the choice of law clause. Thus, it must be interpreted against RESPONDENT, meaning that the choice of law clause does not exclude the CISG.

139 In conclusion, neither the choice of Equatorianian law nor any other statements and conduct of the Parties show a clear and unambiguous intention of the Parties to exclude the CISG from the Sales Agreement pursuant to Art. 6 CISG.

CONCLUSIONS ISSUE III AND IV

140 In conclusion, the CISG applies to the Sales Agreement. First, the Sales Agreement is a sale of goods. In the Sales Agreement, the Parties agreed on various obligations, some of which are sales obligations, others are not. When the sales obligations are compared to the non-sales obligations, the sales obligations make up for 63,33% of the Sales Agreement's economic value. Also, from the perspective of the Parties, the sales obligations were the focal point of the Sales Agreement. Second, the Sales Agreement is an international sale of goods. CLAIMANT is placed in Mediterraneo and RESPONDENT in Equatoriana. The fact that Volta Transformer in Equatoriana performs parts

of the Sales Agreement does not change that it is an international transaction. Third, the Sales Agreement was not concluded right after the reverse auction. After CLAIMANT was selected as one of the two final bidders, the Parties had thorough and specific negotiations. Only after those negotiations, the Parties concluded the Sales Agreement. Thus, the CISG applies to the Sales Agreement.

141 The Parties also did not exclude the CISG from the Sales Agreement. The wording of the choice of law clause in the Sales Agreement does not expressly state that the CISG is excluded. Furthermore, RESPONDENT overlooks that by choosing Equatorianian law to apply, it chose the CISG as well. Throughout the negotiations, RESPONDENT knew that CLAIMANT wanted the CISG to apply and had ample opportunity to inform CLAIMANT that the CISG should not apply. However, RESPONDENT never said or showed that it wanted to exclude the CISG. Finally, the CISG is not part of the conflict of laws principles. So, when the Parties excluded those from the Sales Agreement, they did not exclude the CISG. Consequently, the CISG it not excluded from the Sales Agreement.

PRAYER FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Arbitral Tribunal to:

I. Declare that the Purchase and Service Agreement is governed by the CISG.

II. Declare that the Purchase and Service Agreement has not been validly terminated by Equatoriana RenPower.

III. Order Equatoriana RenPower to fulfil the Purchase and Service Agreement by using its best effort to have the necessary construction and operation permits issued and allowing CLAIMANT to start with the construction works on the Greenfield site, as well as taking all further steps agreed upon under the Purchase and Service Agreement and necessary to ensure the realization of the project, including but not limited to making the relevant payments.

IV. Order Equatoriana RenPower to bear the costs of the arbitration.

V. To make any other order the Arbitral Tribunal considers appropriate.

Respectfully submitted,

Lucerne, 12 December 2024

INDEX OF LEGAL AUTHORITIES

Cited as:	Citation:
Baizeau	BAIZEAU DOMITILLE Chapter 18, Part XVI: Multi-tiered and Hybrid Arbitration Clauses, in: Arroyo Manuel (editor), Arbitration in Switzerland: The Practitioner's Guide, 2nd edition, pp. 2781-2797, Kluwer Law International, Alphen aan den Rijn 2018 Cited in: para. 33
Berger I	BERGER KLAUS PETER Law and Practice of Escalation Clauses, in: Park William W. (editor), Arbitration International, Vol. 22 (2006), Issue 1, pp. 1-17 Cited in: para. 36
Berger II	BERGER KLAUS PETER Chapter 13: Evidentiary Privileges, in: Ferrari Franco/Rosenfeld Friedrich Jakob (editors), Handbook of Evidence in International Commercial Arbitration, Key Concepts and Issues, pp. 301-320, Kluwer Law International, Alphen aan den Rijn 2022 Cited in: para. 57; 59; 61; 72
Berger III	BERGER KLAUS PETER The Settlement Privilege, in: Park William W. (editor), Arbitration International, Vol. 24 (2008), Issue 2, pp. 265-276 Cited in: para. 72

Beyeler
BEYELER MARTIN
Öffentliche Beschaffung, Vergaberecht und Schadenersatz, Ein Beitrag zur Dogmatik der Marktteilnahme des Gemeinwesens, Schulthess Juristische Medien, Zurich 2004
Cited in: para. 117

Blackaby/Partasides/Redfern
BLACKABY NIGEL/PARTASIDES CONSTANTINE/REDFERN ALAN
Redfern and Hunter on International Arbitration, 7th edition, Oxford University Press, Oxford 2023
Cited in: para. 76

Blair/Vidak-Gojkovic
BLAIR CHERIE/VIDAK-GOJKOVIC EMA
WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence, in: ICSID Review – Foreign Investment Law Journal, Vol. 33 (2018), No. 1, pp. 235-259
Cited in: para. 63

Boretti
BORETTI ALBERTO
Estimating the Efficiency of a PEM Electrolyzer Fed by a PV Plant in NEOM City, Solar Energy Advances, Vol. 4 (2024)
Available at:
https://www.sciencedirect.com/science/article/pii/S2667113124000226?ref=pdf_download&fr=RR-7&rr=8f10bbb2dd3f3b52
[last visited on 12 December 2024]
Cited in: para. 93

Born

BORN GARY B.
International Commercial Arbitration, 3rd edition, Kluwer Law International, Alphen aan den Rijn 2021
(Kluwer Arbitration updated January 2023 and March 2024)
Cited in: para. 25; 33; 54; 76

Brauner

BRAUNER DANIEL
Die Anwendungsbereiche von CISG und PR CESL im Vergleich, in: von Hoffmann Bernd/Jayme Erik/Mansel Heinz-Peter/Budzikiewicz Christine/Stürner Michael/Thorn Karsten/Weller Marc-Philippe (editors), Studien zum vergleichenden und internationalen Recht – Comparative and International Law Studies, Band 196, Peter Lang, Berlin 2019
Cited in: para. 101

Brödermann

BRÖDERMANN ECKART
Chapter 4: Interpretation, in: Brödermann Eckart, UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary, 2nd edition, pp. 207-226, Kluwer Law International, Alphen aan den Rijn 2023
Cited in: para. 27

Brunner/Feit

BRUNNER CHRISTOPH/FEIT MICHAEL
Commentary on Art. 3 CISG, in: Brunner Christoph/Gottlieb Benjamin (editors), Commentary on the UN Sales Law (CISG), Kluwer Law International, Alphen aan den Rijn 2019
Cited in: para. 87

Ferrari I	FERRARI FRANCO Commentary on Art. 1; 3; 6; 10 CISG, in: Schlechtriem Peter/Schwenzer Ingeborg/Schroeter Ulrich G. (editors), Kommentar zum UN-Kaufrecht (CISG), 7th edition, C.H. Beck, Munich 2019 Cited in: para. 87; 89; 92; 100; 113; 124; 126; 127; 128; 130
Ferrari II	FERRARI FRANCO Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention, Martinus Nijhoff Publishers, Leiden 2012 Cited in: para. 103
Figueres	FIGUERES DYALÁ J. Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, in: ICC International Court of Arbitration Bulletin, Vol. 14 (2003), No. 1, pp. 71-88 Cited in: para. 25
Flannery/Merkin	FLANNERY LOUIS/MERKIN ROBERT Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?, in: Arbitration International, Vol. 31 (2015), Issue 1, pp. 63-106 Cited in: para. 43
Gillette/Walt	GILLETTE CLAYTON P./WALT STEVEN D. The UN Convention on Contracts for the International Sale of Goods: Theory and Practice, 2nd edition, Cambridge University Press, Cambridge 2016 Cited in: para. 127; 132

Girsberger/Voser
GIRSBERGER DANIEL/VOSER NATHALIE
International Arbitration, Comparative and Swiss Perspectives, 5th edition, Schulthess Juristische Medien AG, Zurich/Geneva 2024
Cited in: para. 54

Gore
GORE KIRAN NASIR
Practical Insights on Attorney-Client Privilege, Practical Insights on Arbitral Procedure, Kluwer Law International, Alphen aan den Rijn 2024
(last updated June 2024)
Cited in: para. 61

Groselj
GROSELJ LUKA
Stay of arbitration proceedings – Some examples from arbitral practice, in: Scherer Matthias (editor), ASA Bulletin, Vol. 36 (2018), Issue 3, pp. 560-577
Cited in: para. 45

Hachem
HACHEM PASCAL
Commentary on Art. 1; 2; 3; 6; 10 CISG, in: Schwenzer Ingeborg/Schroeter Ulrich G. (editors), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), 5th edition, Oxford University Press, Oxford 2022
Cited in: para. 92; 109; 110; 111; 112; 113; 117

Haller
HALLER HEIKO
The Without Prejudice Privilege, in: Risse Jörg/Pickrahn Guenter/Wolff Reinmar/Netzer Antonida (editors), SchiedsVZ German Arbitration Journal, Vol. 9 (2011), Issue 6, pp. 313-319
Cited in: para. 72

Huber
HUBER PETER
Commentary on Art. 1; 3; 6 CISG, in: Oetker Hartmut (editor), Münchener Kommentar zum BGB, Vol. 4/1, 9th edition, C.H. Beck, Munich 2024
Cited in: para. 87; 100; 101; 124; 126

Huber/Mullis
HUBER PETER/MULLIS ALASTAIR
The CISG: A new textbook for students and practitioners, European Law Publishers, Luxemburg 2007
Cited in: para. 89; 92

Hwang/Cheng Lim
HWANG MICHAEL/CHENG LIM SI
Chapter 16: The Chimera of Admissibility in International Arbitration, in: Kaplan Neil/Moser Michael J. (editors), Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles, pp. 265-288, Kluwer Law International, Alphen aan den Rijn 2018
Cited in: para. 45

Jolles
JOLLES ALEXANDER
Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement, in: Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 72 (2006), Issue 4, pp. 329-338
Cited in: para. 33; 43

Kayali
KAYALI DIDEM
Enforceability of Multi-Tiered Dispute Resolution Clauses, in: Journal of International Arbitration, Vol. 27 (2010), Issue 6, pp. 551-577
Cited in: para. 33

Khodykin/Mulcahy/Fletcher
KHODYKIN ROMAN MIKHAILOVICH/MULCAHY CAROL/FLETCHER NICHOLAS
A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, Oxford University Press, Oxford 2019
Cited in: para. 63; 72

Kirby
KIRBY JENNIFER
Evolution and the Discoverability of In-House Counsel Communications, in: Scherer Maxi (editor), Journal of International Arbitration, Vol. 35 (2018), Issue 2, pp. 147-156
Cited in: para. 59

Kuitkowski
KUITKOWSKI DIANA
The Law Applicable to Privilege Claims in: International Arbitration, in: Journal of International Arbitration, Vol. 32 (2015), Issue 1, pp. 65-106
Cited in: para. 59

Lal/et al.
LAL HAMISH/CASEY BRENDAN/KAIDING JOSEPHINE/DEFRANCHI LÉA
Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence, in: Scherer Matthias (editor), ASA Bulletin, Vol. 38 (2020), Issue 4, pp. 796-820
Cited in: para. 45

Lein

LEIN EVA
Chapter 12, Multi-tiered Dispute Resolution Clauses, An English Perspective, in: Anselmo Reyes/Weixia Gu (editors), Multi-Tier Approaches to the Resolution of International Disputes, A Global and Comparative Study, Cambridge University Press, Cambridge 2021, pp. 294-314
Cited in: para. 36

Lorenz

LORENZ MANUEL
Commentary on Art. 3; 6 CISG
In: Witz Wolfgang/Salger Hanns-Christian/Lorenz Manuel (editors), Internationales Einheitliches Kaufrecht, 2nd edition, Recht und Wirtschaft, Frankfurt am Main 2016
Cited in: para. 89; 124; 132

Machherndl/Milacher

MACHHERNDL PETER/MILACHER LENA
Chapter II: The Arbitrator and the Arbitration Procedure, Of Unclean Hands and Forbidden Fruits: Shielding Secrets and Safeguarding Confidentiality in the Taking of Evidence in Arbitration, in: Klausegger Christian/Klein Peter/Kremslehner Florian/Petsche Alexander/Pitkowitz Nikolaus/Welser Irene/Zeiler Gerold (editors), Austrian Yearbook on International Arbitration, pp. 85-106, Manz'sche Verlags- und Universitätsbuchhandlung, Vienna 2024
Cited in: para. 63

Magnus
MAGNUS ULRICH
Commentary on Art. 1; 3; 8 CISG, in: von Staudinger Julius/Magnus Ulrich/von Staudingers J., Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG). Buch 2: Recht der Schuldverhältnisse, Berlin 2018
Cited in: para. 87; 101; 128

Mankowski
MANKOWSKI PETER
Commentary on Art. 1; 2; 8 CISG, in: Commercial Law: Article-by-Article Commentary, C.H. Beck, Munich 2019
Cited in: para. 100; 117; 128

Manner/Schmitt
MANNER SIMON/SCHMITT MORITZ
Commentary on Art. 6 CISG, in: Brunner Christoph/Gottlieb Benjamin (editors), Commentary on the UN Sales Law (CISG), Kulwer Law International, Alphen aan den Rijn 2019
Cited in: para. 126

McErlaine/Allsop
MCERLAINE MICHAEL/ALLSOP JAMES
Trends in Questions of Jurisdiction and Admissibility in International Arbitration, in: Kluwer Arbitration Blog, 2 November 2021
Available at:
https://arbitrationblog.kluwerarbitration.com/2021/11/02/trends-in-questions-of-jurisdiction-and-admissibility-in-international-arbitration/
[last visited on 12 December 2024]
Cited in: para. 45

Melis
MELIS WENER
Commentary on Art. 10 CISG, in: Honsell Heinrich (edotir), Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinigten Nationen über Verträge über den Internationalen Warenkauf (CISG), 2nd edition, Springer-Verlag, Salzburg/Zurich 2009
Cited in: para. 113

Mills
MILLS ALEX
Arbitral Jurisdiction, in: Schultz Thomas/Ortino Federico (editors), The Oxford Handbook of International Arbitration, Oxford University Press, Oxford 2020
Cited in: para. 43

Mistelis/Raymond
MISTELIS LOUKAS A. / RAYMOND ANJANETTE
Commentary on Art. 3 CISG, in: Kröll Stefan/Mistelis Loukas A./Perales Viscasillas Pilar (editors), UN Convention on Contracts for the international Sale of Goods (CISG), A Commentary, 2nd edition, C.H. Beck, Munich 2018
Cited in: para. 92

O'Malley
O'MALLEY NATHAN D.
Rules of Evidence in international arbitration: an annotated guide, 2nd edition, Informa Law, New York/Oxon 2019
Cited in: para. 54

Pearson-Wenger
PEARSON-WENGER SABRINA
Part V, Chapter 18: Good Faith and the Performance of Pre-arbitration Requirements, in: Sabrina Pearson-Wenger (editor), Good Faith in International Commercial Arbitration: Its Application by Arbitral Tribunals to the Parties' Contract and the Arbitration Agreement, Vol. 70 (2024), pp. 443-492
Cited in: para. 45

Pietrowski
PIETROWSKI ROBERT F.
Evidence in International Arbitration, in: Park William W. (editor), Arbitration International, Vol. 22 (2006), Issue 3, pp. 373-410
Cited in: para. 76

Piltz
PILTZ BURGHARD
Internationales Kaufrecht: Das UN-Kaufrecht in praxisorientierter Darstellung, 2nd edition, C.H. Beck, Munich 2008
Cited in: para. 87; 89; 124

Ragno
RAGNO FRANCESA
The CISG and the Choice of Law: Two wordls apart?, in: Journal of Law and Commerce, Vol. 38/245 (2020), pp. 245-727
Cited in: para. 130

Rubinstein/Guerrina
RUBINSTEIN JAVIER H./GUERRINA BRITTON B.
The Attorney-Client Privilege and International Arbitration, in: Journal of International Arbitration, Vol. 18 (2001), Issue 6, pp. 587-602
Cited in: para. 59

Saenger
SAENGER INGO
Commentary on Art. 1; 3 CISG, in: Ferrari Franco/Kieninger Eva-Maria/Mankowski Peter (editors), Internationales Vertragsrecht, C.H. Beck, Munich 2018
Cited in: para. 92; 100; 103

Savola
SAVOLA MIKA
Guide to the Finnish Arbitration Rules, Helsingin Kamari Oy, Helsinki 2015
Cited in: para. 33

Schlechtriem I
SCHLECHTRIEM PETER
Anwendungsvoraussetzungen und Anwendungsbereich des UN-Übereinkommens über Verträge über den internationalen Warenkauf (CISG), in: Aktuelle Juristische Praxis, Vol. 3 (1992), Zurich 1992, pp. 339-357
Cited in: para. 92

Schlechtriem II
SCHLECHTRIEM PETER
Einheitliches UN-Kaufrecht: Das Übereinkommen der Vereinten Nationen über internationale Warenkaufverträge – Darstellung und Texte, Mohr Siebeck, Tübingen 1981
Cited in: para. 89

Schmidt-Kessel
SCHMIDT-KESSEL MARTIN
Commentary on Art. 8 CISG, in: Schlechtriem Peter/Schwenzer Ingeborg/Schroeter Ulrich G. (editors), Kommentar zum UN-Kaufrecht (CISG), 7th edition, C.H. Beck, Munich 2019
Cited in: para. 27

Schroeter
SCHROETER ULRICH GERD
Internationales UN-Kaufrecht: Ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG), 7th edition, Mohr Siebeck, Tübingen 2022
Cited in: para. 126; 127; 132; 135

Schwenzer
SCHWENZER INGEBORG
The CISG: A Fair Balance of Interests Around the Globe, OUPblog, Oxford University Press's Academic Insights for the Thinking World, 2016
Available at:
https://blog.oup.com/2016/02/cisg-fair-balance-of-interests/
[last visited on 12 December 2024]
Cited in: para. 135

Schwenzer/Fountoulakis/Dimsey
SCHWENZER INGEBORG/FOUNTOULAKIS CHRISTIANA/DIMSEY MARIEL
International Sales Law: A Guide to the CISG, 2nd edition, Hart Publishing, Oxford 2012
Cited in: para. 110; 111; 128

Schwenzer/Hachem/Kee
SCHWENZER INGEBORG/HACHEM PASCAL/KEE CHRISTOPHER
Global Sales and Contract Law, Oxford University Press, Oxford 2012
Cited in: para. 87

Siehr

SIEHR KURT
Commentary on Art. 6 CISG, in: Honsell Heinrich (editor), Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG), 2nd edition, Springer, Berlin 2010
Cited in: para. 126

Spohnheimer

SPOHNHEIMER FRANK
Commentary on Art. 2 CISG, in: Kröll Stefan/Mistelis Loukas A./Viscasillas Pilar Perales (editors), UN Convention on Contracts for the international Sale of Goods (CISG): A Commentary, 2nd edition, C.H. Beck, Munich 2018
Cited in: para. 117

Stacher

STACHER MARCO
Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope, in: Scherer Matthias (editor), ASA Bulletin, Vol. 38 (2020), Issue 1, p. 55-74
Cited in: para. 43

Witz

WITZ WOLFGANG
Commentary on Art. 8 CISG, in: Witz Wolfgang/Salger Hanns-Christian/Lorenz Manuel (editors), Internationales Einheitliches Kaufrecht, 2nd edition, Recht und Wirtschaft, Frankfurt am Main 2016
Cited in: para. 27; 127; 128

Zuberbühler/Hofmann/Oetiker/Rohner	ZUBERBÜHLER TOBIAS/HOFMANN DIETER/OETIKER CHRISTIAN/ROHNER THOMAS Commentary on Art. 9 IBA Rules, in: Zuberbühler Tobias/Hofmann Dieter/Oetiker Christian/Rohner Thomas, IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration, 2nd edition, Schulthess Juristische Medien AG, Zurich 2022 Cited in: para. 76
Zuppi	ZUPPI ALBERTO Commentary on Art. 8 CISG, in: Kröll Stefan/Mistelis Loukas/Viscasillas Pilar Perales (editors), UN Convention on Contracts for the international Sale of Goods (CISG): A Commentary, 2nd edition, C.H. Beck, Munich 2018 Cited in: para. 128

INDEX OF CASES

Cited as:	**Citation:**
Austria	
CISG-online Case No. 1560 (AUT 2007)	Oberster Gerichtshof (*Austrian Supreme Court*) 4 July 2007 Case No. 2 Ob 95/06v CISG-online 1560 Cited in: para. 126
CISG-online Case No. 1377 (AUT 2006)	Oberlandsgericht Linz (*Court of Appeal Linz*) 23 January 2006 Case No. 6 R 160/05z CISG-online 1377 Cited in: para. 126
CISG-online Case No. 1047 (AUT 2005)	Oberster Gerichtshof (*Austrian Supreme Court*) 21 June 2005 Case No. 5 Ob 45/05m CISG-online 1047 Cited in: para. 86
CISG-online Case No. 1045 (AUT 2005)	Oberster Gerichtshof (*Austrian Supreme Court*) 26 January 2005 Case No. 3 Ob 221/04b CISG-online 1045 Cited in: para. 132

CISG-online Case No. 614 (AUT 2001)	Oberster Gerichtshof (*Austrian Supreme Court*) 22 October 2001 Case No. 1 Ob 77/01g CISG-online 614 Cited in: para. 132
CISG-online Case No. 652 (AUT 2001)	Oberster Gerichtshof (*Austrian Supreme Court*) 5 July 2001 Case No. 6 Ob 117/01a CISG-online 652 Cited in: para. 89

Australia

Aiton Australia Pty Ltd. v. Transfield Pty Ltd. (AUS 1999)	Aiton Australia Pty Ltd. V. Transfield Pty Ltd., 153 FLR 236 New South Wales Supreme Court 1 October 1999 Case No. NSWSC 996 Cited in: para. 45

Belgium

CISG-online Case No. 1908 (BEL 2008)	Hof van Beroep Gent (*Court of Appeal Ghent*) 14 November 2008 Case No. 2008/AR/912 CISG-online 1908 Cited in: para. 89

France

CISG-online Case No. 1098 (FRA 2005)	Jurisdiction France Tribunal Cour de Cassation (*French Supreme Court*) 25 October 2005 Case No. 99-12.879 CISG-online 1098 Cited in: para. 126
CISG-online Case No. 35 (FRA 1992)	ICC International Court of Arbitration 1992 Case No. 7153/1992 CISG-online 35 Cited in: para. 87

Germany

CISG-online Case No. 2809 (GER 2017)	Oberlandesgericht Hamm (*Court of Appeal Hamm*) 18 May 2017 Case No. 28 U 134/16 CISG-online 2809 Cited in: para. 124
CISG-online Case No. 2513 (GER 2014)	Bundesgerichtshof (*German Supreme Court*) 28 May 2014 Case No. VIII ZR 410/12 CISG-online 2513 Cited in: para. 138

CISG-online Case No. 1716 (GER 2008)	Oberlandesgericht Karlsruhe (*Court of Appeal Karlsruhe*) 12 June 2008 Case No. 19 U 5/08 CISG-online 1716 Cited in: para. 92
CISG-online Case No. 585 (GER 1999)	Oberlandesgericht München (*Court of Appeal Munich*) 3 December 1999 Case No. 23 U 4446/99 CISG-online 585 Cited in: para. 92
CISG-online Case No. 594 (GER 2000)	Oberlandesgericht Frankfurt am Main (*Court of Appeal Frankfurt am Main*) 30 August 2000 Case No. 9 U 13/00 CISG-online 594 Cited in: para. 132
CISG-online Case No. 583 (GER 2000)	Jurisdiction Germany Tribunal Oberlandesgericht Stuttgart (*Court of Appeal Stuttgart*) 28 February 2000 Case No. 5 U 118/99 CISG-online 583 Cited in: para. 103

Hong Kong

C v. D (HKG 2022)	C v. D The High Court of the Hong Kong Special Administrative Region Court of Appeal 6 June 2022 Case No. HKCA 729 Cited in: para. 43

Italy

CISG-online Case No. 1780 (ITA 2009)	Tribunale di Forlì (*District Court Forlì*) 16 February 2009 Case No. unavailable CISG-online 1780 Cited in: para. 86
CISG-online Case No. 1015 (ITA 2004)	Corte Suprema di Cassazione (*Italian Supreme Court*) 20 September 2004 Case No. 18902/04 CISG-online 1015 Cited in: para. 130
CISG-online Case No. 819 (ITA 2004)	Tribunale di Padova (*District Court Padova*) 25 February 2004 Case No. 40552 CISG-online 819 Cited in: para. 100; 103; 126

Serbia

CISG-online Case No. 2039 (SRB 2009)	Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije (*Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia*) 17 August 2009 Case No. T-15/07 CISG-online 2039 Cited in: para. 124

Singapore

BTN v. BTP (SGP 2023)	BTN v. BTP Court of Appeal of the Republic of Singapore 23 October 2023 Case No. SGCA 105 Cited in: para. 43

Switzerland

CISG-online Case No. 2757 (SUI 2016)	Tribunal de Première Instance de Genève (*Court of First Instance Geneva*) 24 June 2016 Case No. C/1733/2014-20 - JTPI/8370/2016 CISG-online 2757 Cited in: para. 124
4A_362/2013 (SUI 2014)	Bundesgericht (*Swiss Federal Supreme Court*) 27 March 2014 Case No. 4A_362/2013 Cited in: para. 63

4A_448/2013 (SUI 2014)	Bundesgericht (*Swiss Federal Supreme Court*) 27 March 2014 Case No. 4A_448/2013 Cited in: para. 63
CISG-online Case No. 2371 (SUI 2012)	Bundesgericht (*Swiss Federal Supreme Court*) 16 July 2012 Case No. 4A_753/2011 CISG-online 2371 Cited in: para. 86
CISG-online Case No. 2026 (SUI 2009)	Kantonsgericht Zug (*Court of First Instance Canton Zug*) 14 December 2009 Case No. A2 2001 105 CISG-online 2026 Cited in: para. 87; 92
CISG-online Case No. 1900 (SUI 2009)	Bundesgericht (*Swiss Federal Supreme Court*) 18 May 2009 Case No. 4A_68/2009 CISG-online 1900 Cited in: para. 86
CISG-online Case No. 1728 (SUI 2008)	Amtsgericht Sursee (*Court of First Instance Sursee*) 12 September 2008 Case No. 11 07 4 CISG-online 1728 Cited in: para. 130
4A_18/2007 (SUI 2007)	Bundesgericht (*Swiss Federal Supreme Court*) 6 June 2007 Case No. 4A_18/2007 Cited in: para. 25; 33

CISG-online Case No. 1731 (SUI 2006)	Zivilgericht Basel-Stadt (*Court of First Instance Basel-Stadt*) 8 November 2006 Case No. P 2004 152 CISG-online 1731 Cited in: para. 89
CISG-online Case No. 726 (SUI 2002)	Handelsgericht des Kantons Zürich (*Commercial Court Canton Zurich*) 9 July 2002 Case No. HG000120/U/zs CISG-online 726 Cited in: para. 87

The Netherlands

ECLI:NL:HR:2024:1078 (NED 2024)	Hoge Raad der Nederlanden (*Supreme Court of the Netherlands*) ECLI:NL:HR:2024:1078 12 July 2024 Case No. 22/04619 Cited in: para. 25; 45
CISG-online Case No. 2791 (NED 2016)	Gerechthof 's-Hertogenbosch (*Court of Appeal 's-Hertogenbosch*) 6 December 2016 Case No. 200.169.701_01 CISG-online 2791 Cited in: para. 124

CISG-online Case No. 2790 (NED 2016)	Rechtbank Midden-Nederland (*District Court Midden-Nederland*) 16 November 2016 Case No. C/16/412611 / HA ZA 16-252 CISG-online 2790 Cited in: para. 124

United Kingdom

NWA v. NVF (GBR 2021)	NWA v. NVF High Court of Justice of England and Wales 8 October 2021 Case No. EWHC 2666 Cited in: para. 43
Republic of Sierra Leone v. SL Mining Ltd. (GBR 2021)	Republic of Sierra Leone v. SL Mining Ltd. High Court of Justice of England and Wales 15 February 2021 Case No. EWHC 286 Cited in: para. 43
Tang Chung Wah & others v. Grant Thornton International Ltd. (GBR 2012)	Tang Chung Wah & others v. Grant Thornton International Ltd. High Court of Justice of England and Wales 14 November 2012 Case No. EWHC 3198 (Ch) Cited in: para. 29

Cable & Wireless Plc v. IBM United Kingdom Ltd. (GBR 2002)	Cable & Wireless Plc v. IBM United Kingdom Ltd. High Court of Justice of England and Wales 11 October 2002 Case No. EWHC 2059 Cited in: para. 45
Rush & Tompkins Ltd. v. Greater London Council (GBR 1988)	Rush & Tompkins Ltd. v. Greater London Council House of Lords 3 November 1988 Case No. UKHL J1103-3 Cited in: para. 72
Cutts v. Head (GBR 1984)	Cutts v. Head (GBR 1984) England and Wales Court of Appeal 7 December 1984 Case No. CH 290 Cited in: para. 72

United States

CISG-online Case No. 4234 (USA 2019)	U.S. District Court for the Eastern District of Texas 23 April 2019 Case No. 4:17-cv-00410-ALM-KPJ CISG-online 4234 Cited in: para. 110
BG Group Plc v. Republic of Argentina (USA 2014)	BG Group Plc v. Republic of Argentina Supreme Court of the United States 5 March 2014 Case No. 134 S. Ct. 1198 Cited in: para. 43

CISG-online Case No. 2178 (USA 2011)	U.S. District Court for the Southern District of New York 18 January 2011 Case No. 09 Civ. 10559 (AKH) CISG online 2178 Cited in: para. 126
CISG-online Case No. 730 (USA 2003)	U.S. Court of Appeals (5th Circuit) 11 June 2003 Case No. 02-20166 CISG-online 730 Cited in: para. 126; 132
CISG-online Case No. 616 (USA 2001)	U.S. District Court for the Northern District of California 30 July 2001 Case No. C 01-20230 JW CISG-online 616 Cited in: para. 109; 126

INDEX OF ARBITRAL AWARDS

Cited as:	Citation:
Ad-hoc	
Methanex v. United States (USA 2005)	Methanex Corporation v. United States of America UNCITRAL Arbitration Rules 1976 Final Award 3 August 2005 Cited in: para. 63
ICAC Awards	
CISG-online Case No. 1077 *(RUS 2000)*	Seller (Germany) v. Buyer (Russia) Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 30 May 2000 Case No. 356/1999 CISG-online 1077 Cited in: para. 89
ICC Awards	
ICC Case No. 16083 (2015)	Claimant(s) v. Respondent(s) International Chamber of Commerce Interim Award in: ICC Dispute Resolution Bulletin 2015, No. 1 ICC Case No. 16083 Cited in: para. 43

ICC Case No. 17020 (2011)	Seller (Austria) v. Buyer (Sri Lanka) International Chamber of Commerce Final Award in: Yearbook Commercial Arbitration 2015 (Vol. XL) ICC Case No. 17020 Cited in: para. 27
ICC Case No. 6276 (2003)	Claimant(s) v. Respondent(s) International Chamber of Commerce Partial Award in: ICC Dispute Resolution Bulletin 2003, Vol. 14, No. 1 ICC Case No. 6276 Cited in: para. 29; 33
CISG-online Case No. 35 (FRA 1992)	ICC International Court of Arbitration 1992 Case No. 7153/1992 CISG-online 35 Cited in: para. 87

ICSID Awards

ConocoPhillips v. Bolivarian Republic of Venezuela (USA 2019)	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V., and ConocoPhillips Company v. Bolivarian Republic of Venezuela International Center for Settlement of Investment Disputes 8 March 2019 ICSID Case No. ARB/07/30 Cited in: para. 63

Railroad Development Corp. v. Republic of Guatemala (USA 2008)	Railroad Development Corp. v. Republic of Guatemala International Center for Settlement of Investment Disputes 15 October 2008 ICSID Case No. ARB/07/23 Cited in: para. 54

SOURCES AND MATERIAL

Cited as:	Citation:
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
CISG-AC No. 16	CISG Advisory Council Opinion No. 16, Exclusion of the CISG under Article 6 30 May 2014 Cited in: para. 127; 132
CISG-AC No. 13	CISG Advisory Council Opinion No. 13, Inclusion of Standard Terms under the CISG 20 January 2013 Cited in: para. 138
CISG-AC No. 4	CISG Advisory Council Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG) 24 October 2004 Cited in: para. 87; 89; 92
Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods Vienna, 2016 Cited in: para. 86; 87; 89; 103; 130

FAI Arbitration Guidelines	FAI Arbitration Guidelines Available at: https://arbitration.fi/wp-content/uploads/arbitrators-guidelines-2024.pdf [last visited 12 December 2024] Cited in: para. 41
FAI Arbitration Rules	Arbitration Rules 2024 of the Finland Chamber of Commerce of 1 January 2024
FAI Mediation Guidelines	FAI Mediation Guidelines Available at: https://arbitration.fi/wp-content/uploads/fai-mediation-guidelines-28-november-2016-15-6-2024.pdf [last visited on 12 December 2024] Cited in: para. 45
FAI Mediation Rules	Mediation Rules 2024 of the Finland Chamber of Commerce of 15 June 2024
IBA Commentary	Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration January 2021 Cited in: para. 63
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration of 17 December 2020

International Arbitration Practice Guideline	International Arbitration Practice Guideline, Jurisdictional Challenges, Chartered Institute of Arbitrators Available at: https://www.ciarb.org/media/mbqjzdyi/3-jurisdictional-challenges-2015.pdf [last visited on 12 December 2024] Cited in: para. 43
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958
OR	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligation) of 1 January 2024
Sale of Goods Act 1979	Sale of Goods Act 1979 of 6 December 1979
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna 21 June 1985
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of the UNIDROIT International Institute for the Unification of Private Law 2016, Rome 2016

CERTIFICATE

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

Lucerne, 12 December 2024

Mia Kaufmann | Paula Somm | Dorian Trogu

Vivienne Buzzi | Jara Scheuber | Berkant Kocyigit