THIRTY-SECOND ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Memorandum for Claimant

University of Vienna

Case No: FAI MOOT 100/2024

On behalf of:	Against:
Green Hydro Plc	**Equatoriana RenPower Ltd**
1974 Russel Avenue	1 Russel Square
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	RESPONDENT

Varvara Artiukh • Sophie Hannah Egger • Lukas Hellmayr

Agnes Oppitz • Jonas Schneider-Beron • Alina Waldenberger

2024/2025 • Vienna, Austria

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NOTE

If you are reading this Memorandum in **hardcopy format**, the following remarks are of no further importance to you. We kindly refer you to the beginning of our Memorandum and sincerely hope you will enjoy our submissions.

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We hope you enjoy your reading!

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Table of Contents

Index of Abbreviations and Definitions

§(§)	Paragraph, paragraphs
&	and
Arb	Arbitration
ARfA	Answer to the Request for Arbitration
Art(s)	Article, articles
CEO	Chief Executive Officer
cf	conferatur, compare
CoL	Conflict of laws
CPR	International Institute for Conflict Prevention and Resolution
DIS	Deutsche Institution für Schiedsgerichtsbarkeit, German Arbitration Institute
ECC	Equatorianian Civil Code
eg	exemplum gratia, for example
EPC	Engineering, Procurement, and Construction
et al	et alii / et aliae / et alia, and others
et seq	et sequens, and the following
EU	European Union
EUR	Euro
Exh C	Claimant's Exhibit
Exh R	Respondent's Exhibit

FAI	Keskuskauppakamarin välityslautakunta, Arbitration Institute of the Finland Chamber of Commerce
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ie	id est, that is
infra	see below
LCIA	London Court of International Arbitration
Ltd	Limited
Med	Mediation
MM	Million
Mr	Mister
Ms	Miss
ObjLang	Objection of Mr Langweiler to the transmission of Exhibit R3 of 14 August 2024
p(p)	Page, pages
para(s)	Paragraph, paragraphs
Plc	Public limited company
PO1	Procedural Order No 1 of 11 October 2024
PO2	Procedural Order No 2 of 13 November 2024
PoB	Place of business
PSA	Purchase and Service Agreement
R	Respondent

RfA	Request for Arbitration
SCC	Stockholm Chamber of Commerce
Sec	Section
supra	see above
UNCITRAL	United Nations Commission on International Trade Law
USSR	Union of Soviet Socialist Republics
v	versus, against
VT	Volta Transformer

Index of Legal Norms

CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
CPR Med Procedure	International Institute for Conflict Prevention and Resolution Mediation Procedure 1998
FAI Arb Rules	Arbitration Rules of the Finland Chamber of Commerce 2024
FAI Med Rules	Mediation Rules of the Finland Chamber of Commerce 2024
German BGB	Bürgerliches Gesetzbuch, German Civil Code 1896
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2020
ICC Med Rules	ICC Mediation Rules 2014
Korean PILA	Korean Act on Private International Law 2022
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014
ML	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
SCC Med Rules	SCC Mediation Rules 2023

Swiss CPC	Swiss Civil Procedure Code 2008
Swiss PILA	Swiss Federal Act on Private International Law 1987
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014
ULF	Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1964
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods 1964
UNCITRAL Model Law on Mediation	UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018
VCLT	Vienna Convention on the Law of Treaties 1969

INTRODUCTION

1 *Every painting tells a story. With colours and shapes it forms an overall picture.* RESPONDENT *painted an overall picture of a joint project, a joint contract, a long-lasting business relationship. With a single brushstroke, they painted over this seemingly eternal painting. What remains are* CLAIMANT'S *efforts to restore it in the present proceedings.*

The Parties' relationship played out against the following

Facts

2 GreenHydro Plc ("**CLAIMANT**") is a medium-sized engineering company based in Mediterraneo and a pioneer in the field of renewable green hydrogen. Equatoriana RenPower Ltd ("**RESPONDENT**") is a 100 % state-owned energy company, controlled by the State of Equatoriana, and the primary vehicle for implementing Equatoriana's Green Energy Strategy.

3 For this purpose, RESPONDENT planned to build a state-of-the-art green hydrogen plant in Greenfield, Equatoriana. In competitive tender proceedings, initiated by the Request for Quotation on **3 January 2023**, CLAIMANT was selected due to their proven capabilities in the field and their ability to fulfil RESPONDENT'S wish for a swift and seamless realisation of the project: CLAIMANT had already ordered a suitable transformer from their Equatorianian supplier Volta Transformer.

4 During the promising contract negotiations between CLAIMANT and RESPONDENT ("**Parties**"), CLAIMANT agreed on a significant price reduction. They accepted a loss of EUR 15 MM as the project presented an irresistible opportunity to showcase their innovative technology and to serve as a reference project for future orders. On **17 July 2023**, the Parties finally concluded the Purchase and Service Agreement ("**PSA**"), including a multi-tier arbitration clause ("**Arbitration Clause**").

5 Suddenly, the Parties' promising relationship took a setback. Following local elections in Equatoriana in **October 2023**, the government changed — and with it RESPONDENT'S stance on the PSA. Ms Vent was appointed Minister of Energy. A vocal opponent of the Green Energy Strategy, she promptly called for its revision and the review of all contracts relating to the strategy, including the PSA. CLAIMANT was baffled when they received the notice of termination of the PSA on **29 February 2024**. Mr la Cour, RESPONDENT'S newly government-appointed CEO and a member of the governing party ("**ENP**"), justified the termination with the mentioned change of policy.

6 CLAIMANT'S subsequent attempts to reconcile were not only brushed aside by RESPONDENT but also took a dismaying turn. Mr la Cour raised serious allegations against CLAIMANT'S main negotiator,

Mr Deiman. Based on false suspicions and Mr la Cour's *"very close contact"* to Equatorianian prosecutors, a criminal investigation was initiated. In the course of this, police raided Mr Deiman's office, confiscated all his documents, and detained him. The charges were dropped within a month.

7 In spite of all this, CLAIMANT made every effort to amicably settle the matter, but fell on deaf ears. In a so-called *"Without-prejudice Offer"* dated **25 May 2024**, RESPONDENT'S ulterior motive finally came to light. They demanded a price reduction of yet another 15 % and made clear that there was no room for discussion without agreement to a significant discount. This was obviously unacceptable for CLAIMANT as the suggested conditions were beyond any commercial common sense.

8 When CLAIMANT embarked on a final attempt to bring RESPONDENT back to the negotiating table, RESPONDENT did not react in any way. CLAIMANT was left with no other choice but to initiate these arbitral proceedings ("**Proceedings**") and file the Request for Arbitration ("**RfA**") with the Finland Arbitration Institute ("**FAI**") on **31 July 2024**.

9 In their Answer to the Request for Arbitration ("**ARfA**") on **14 August 2024,** RESPONDENT suddenly, after continuously blocking every attempt to find a compromise, requests that the arbitral tribunal ("**Tribunal**") reject the claim without any substantive basis.

In the Proceedings, CLAIMANT presents the following

Arguments

I. The Tribunal should continue the Arbitral Proceedings

10 The Parties agreed on an Arbitration Clause containing a non-mandatory mediation element. Even if mandatory, not conducting a mediation would neither affect the jurisdiction of the Tribunal nor the admissibility of the claim. In any event, staying the Proceedings and referring the Parties to mediation would be detrimental to both Parties. Irrespective of RESPONDENT'S resistance, CLAIMANT thus rightfully initiated the Proceedings.

II. CLAIMANT'S Exhibit C7 is admissible

11 RESPONDENT requests to exclude Exh C7. Exh C7 neither constitutes a privileged without-prejudice offer nor fulfils any other grounds for exclusion. Despite being labelled a *"Without-prejudice Offer"*, it was nothing more than an attempt to hide crucial evidence from the Tribunal. RESPONDENT disregards their own transparency commitments on which CLAIMANT could reasonably rely. Exh C7 must remain in the file.

III. The Tribunal should exclude RESPONDENT'S Exhibit R3

12 Exh R3 is CLAIMANT'S internal attorney-client communication and is therefore protected by attorney-client privilege under the applicable Equatorianian law. Further, the facts of the case file reveal RESPONDENT'S illegal obtention of said document. By obtaining and sending Exh R3 directly to the not-yet-appointed arbitrators, RESPONDENT bypassed the formal document production procedure. Exh R3 must be excluded.

IV. The CISG applies to the PSA

13 The PSA is an international sale-of-goods contract governed by the CISG. The Parties had their places of business in different Contracting States at the time of contract conclusion. The PSA preponderantly concerns the sale of goods. Finally, what RESPONDENT called a *"reverse auction"* does not fall under the exception of Art 2(b) CISG for sales by auction.

V. The Parties have not excluded the CISG

14 The Parties never intended to exclude the CISG. RESPONDENT never declared their alleged intent to do so. Conversely, CLAIMANT evidently insisted on the application of the CISG. Not even a reasonable third party would have understood the terms of the PSA and the negotiations between the Parties as an exclusion of the CISG.

VI. Art 7.3.8 ECC does not apply

15 RESPONDENT cannot invoke Art 7.3.8 Equatorianian Civil Code ("**ECC**"), a non-harmonised termination provision. This provision governs a matter that falls within the scope of the CISG and is therefore superseded by it. In any case, RESPONDENT waived their right to terminate for convenience in the PSA. Finally, Art 7.3.8 ECC frustrates the purpose of the CISG and must be disregarded by the Tribunal.

PART I: PROCEDURAL ISSUES

I. THE TRIBUNAL SHOULD CONTINUE THE ARBITRAL PROCEEDINGS

16 CLAIMANT initiated the Proceedings by submitting the RfA [*RfA pp 2 et seq*]. In the ARfA, RESPONDENT objected to the Tribunal's jurisdiction and the admissibility of the claim based on a purely formalistic reason: the alleged non-compliance with a mediation requirement [*ARfA p 25 para 16*].

17 However, mediation is not a mandatory pre-condition for this arbitration (**A.**). In any event, such a mediation requirement would neither affect the jurisdiction of the Tribunal nor the admissibility of the claim, as the Parties are not obliged to conduct an evidently futile mediation (**B.**). Furthermore, the Tribunal should refrain from exercising its discretionary power to stay the arbitration as a mediation would be detrimental to both Parties (**C.**).

A. MEDIATION IS NOT A MANDATORY PRE-CONDITION FOR THE PROCEEDINGS

18 Art 30 PSA [*Exh C2 pp 12 et seq*] stipulates the Parties' Arbitration Clause. Art II(1) NYC and Art 7 ML establish the internationally recognised requirements of an arbitration agreement: show the parties' intent to submit their dispute to arbitration in writing, have a subject matter capable of being settled by arbitration, and deal with existing or future disputes arising out of a defined legal relationship [*Blackaby et al para 2.13*]. Art 30 PSA fulfils all these requirements.

19 The Arbitration Clause contains a mediation element. However, the latter does not have any mandatory character. As a basic rule, pre-arbitral steps are **non-binding and primarily aspirational**. This is the prevailing opinion both in the mediation sector, as evidenced by the FAI Med Guidelines declaring mediation a *"voluntary process"* [*Arts II(10) and VIII(31) FAI Med Guidelines*], and in arbitral practice [*ICC Case 10256; Lotamblau Case; Born/Šćekić p 234; Koller para 3/33*]. To deviate from this presumption, parties must express an unambiguous intent [*ICC Case 8073; Fiona Trust Case; Fluor Case; SCC Case 1992; Westco Case*]. Yet, the Parties never intended a mandatory nature.

20 Consistent jurisprudence in Equatoriana, Danubia, and Mediterraneo has established that, in contracts governed by the CISG (*infra IV., paras 98–136*), the latter also applies to the interpretation of arbitration agreements contained in such contracts [*PO1 p 50 para III(5)*]. Under Art 8(1) CISG, the parties' apparent intent is the primary consideration. Here, in absence of such, interpretation defaults to the understanding of a reasonable third party in the same circumstances, pursuant to Art 8(2) CISG. Accordingly, a mandatory mediation element would **require additional clarifications**. This corresponds to mediation elements in comparable proceedings: multi-tier clauses included a clear term like *"condition precedent"* [*Builders Case; Golden State Foods Case*] or at least described the threshold

to go from one step to the other [*Ohpen Operations Case; Lew et al para 8-69*], eg by prescribing a time limit [*NWA Case: "If the dispute is not settled by mediation within 30 days [...]"*] or a specified number of mediation sessions [*Kamper Case: "[...] not less than two negotiation sessions prior to seeking any resolution of any dispute [...]"*]. This corresponds to Art IX(32) FAI Med Guidelines: in absence of a contrary agreement, mediation does not constitute a bar to arbitral proceedings.

21 In contrast, the mediation element in Art 30 PSA reads as follows: *"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall first be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce."* [*Exh C2 pp 12 et seq*]. This mediation element does not contain any of the mentioned indications typically associated with a mandatory character: **a clarifying term, a time limit, or a specified number of mediation sessions**. Instead, it merely contains *"shall first"*, which does not reflect the high standard usually applied to enforceable mediation agreements. After all, the mentioned cases all contained highly detailed multi-tier clauses with additional hierarchical links in between their tiers.

22 A hierarchical link cannot be derived from the arbitration element either. The phrase *"shall finally be settled by arbitration"* [*Exh C2 p 13 Art 30*] does not establish a hierarchical link to mediation but precludes appeals against arbitral awards [*Baffinland Case*]. In this regard, arbitration model clauses without a mediation element typically also contain the same wording (eg ICC and DIS: *"finally settled"*; LCIA and HKIAC: *"finally resolved"*). Therefore, the Parties did not intend a binding mediation element and said element cannot be construed as a condition precedent to arbitration.

B. THE PARTIES ARE NOT REQUIRED TO MEDIATE IRRESPECTIVE OF ANY MANDATORY CHARACTER

23 As shown, the mediation element is not mandatory. Even if it were, it would not affect the Tribunal's jurisdiction as the Arbitration Clause remains fully operable. Compliance with an obligatory mediation requirement is a matter of admissibility, not jurisdiction (**1.**). The claim is admissible as CLAIMANT cannot be obliged to conduct a mediation which is futile due to RESPONDENT'S actions (**2.**).

1. Compliance with pre-arbitral steps is a matter of admissibility

24 RESPONDENT claims that non-compliance with the mediation requirement renders the Arbitration Clause inoperative to argue that the Tribunal lacks jurisdiction [*PO2 p 56 para 36*]. If non-compliance with a mandatory mediation requirement affects the jurisdiction of the Tribunal, the matter is referred to state courts. When qualifying it as a matter of admissibility, the Tribunal is the competent authority [*Born/Šćekić p 243*]. Ultimately, the qualification depends on the parties' intentions [*C v D Case;*

Westco Case]. These can be ascertained through an interpretation of the Arbitration Clause under Art 8 CISG [*cf Camilleri p 172*].

25 The Parties did not agree on an explicit qualification as a matter of jurisdiction or admissibility. Pursuant to Art 8(2) CISG, a **reasonable interpretation** of the Arbitration Clause confirms that compliance with the mediation element **falls under the purview of admissibility**, not jurisdiction. First, procedural steps before submitting a dispute to arbitration do not change the parties' intent to arbitrate [*Railway Case*] and consequently cannot render an arbitration agreement inoperative, which would default jurisdiction to state courts [*BG v Argentina Case; Blackaby et al para 2.15; Mitrovic p 576; Santacroce p 556*]. Rather, parties to an arbitration agreement intend to have questions on pre-arbitral procedure finally resolved by an arbitral tribunal [*BG v Argentina Case; Mitrovic p 577; Paulsson p 616*]. Second, qualifying mediation requirements as a matter of admissibility limits the scope for the review of an award extensively [*Born I §5.08[C][1]; Santacroce p 564*] and thus ensures that the arbitration leads to an effective and final result. This interpretation corresponds to the Parties' commercial common sense [*cf Fiona Trust Case; NWA Case; Born I §5.08[C][1]*].

26 This rationale was amply discussed in the *Westco Case*. In that case, the court confirmed the arbitration agreement's operability, holding that compliance with pre-arbitral steps pertains to admissibility. As a consequence, it referred the parties back to arbitration [*Westco Case*]. Both common and civil law authorities uphold this distinction, ensuring that jurisdiction remains unaffected by non-compliance with pre-arbitral elements [*BG v Argentina Case; C v D Case; MCBA Case; NWA Case; Sierra Leone Case; Insolvency Case; Vijay Case; Born I §5.08 [C][1]; Camilleri p 168*].

27 If RESPONDENT claims a contrary party agreement under Art 8(1) CISG, this is not justified. Ms Ritter, RESPONDENT'S main negotiator, mentions the possibility of having told Mr Deiman, CLAIMANT'S main negotiator, about Equatorianian case law establishing mediation as a condition precedent for jurisdiction. Yet, she herself is unsure whether she ever transmitted this information to him [*Exh R1 p 30 para 9*]. The unilateral statement of Ms Ritter is **not sufficient to establish a joint intention** of the Parties. In any event, RESPONDENT bears the burden of substantiating any agreement on this matter.

28 Concluding, mediation requirements aim to facilitate settlement. They should not counteract the parties' arbitration agreement and thereby obstruct the very forum for dispute settlement to which the parties agreed. Consequently, mediation cannot function as a condition precedent for the Tribunal's jurisdiction, thus, the **Arbitration Clause remains operable** [*cf BG v Argentina Case; Mitrovic p 576; Santacroce p 556*]. Compliance with the mediation element pertains to admissibility.

2. As mediation would be futile, arbitration is the appropriate forum

29 The negotiations between the Parties have reached a deadlock. As the futility of mediation was evident, CLAIMANT was entitled to forgo mediation and submit to arbitration, which was intended by the Parties to be the last resort. RESPONDENT acts in bad faith by insisting on a futile mediation which is detrimental to both Parties.

30 By referencing arbitration as *"the last resort"* in their correspondence [*Exh R2 p 31*], the Parties clarified that the dispute shall finally be resolved by arbitration if mediation is impossible or pointless. In addition, international arbitration practice generally does not force parties to engage in fruitless endeavours [*Biwater Case; Cumberland Case; Lotamblau Case; Scrubs Case; Sierra Leone Case*].

31 In the case at hand, the actions of RESPONDENT and the Equatorianian government made the **futility of mediation objectively evident**. After the power shift in Equatoriana, the government publicly conveyed a negative attitude towards its previous Green Energy Strategy [*RfA p 5 para 17*]. RESPONDENT'S newly appointed CEO, Mr la Cour, clarified that the government's support of the project depended on a significant price reduction [*Exh C5 p 18 para 15*]. CLAIMANT'S efforts to negotiate resulted in a 30-minute meeting, abruptly ended by Mr la Cour as there was apparently no room for further discussion [*Exh C5 p 18 para 15; PO2 p 54 para 23*]. RESPONDENT'S lack of cooperation was amplified by the so-called *"Without-Prejudice Offer"* [*Exh C7 p 20*] demanding a price reduction of 15 %. At the time, RESPONDENT stated that *"further discussion […] only makes sense"* if CLAIMANT was willing to negotiate about a two-digit reduction [*Exh C7 p 20*]. RESPONDENT was aware that CLAIMANT had already incurred high financial losses to conclude the PSA [*RfA pp 4 et seq para 13*] and that such pre-conditions would prevent further negotiations.

32 Mediation provides a neutral framework for dispute resolution, but only if a mediator is still able to facilitate an agreement between the parties [*Alexander p 39*]. In the present case, RESPONDENT'S actions show their persistent and final stance, leaving CLAIMANT with the sole conclusion that a deadlock had occurred. Mediation cannot achieve its benefits anymore and is thus futile. As a last resort, CLAIMANT rightfully initiated the Proceedings.

33 Moreover, common and civil law jurisdictions both recognise the duty to act in good faith when conducting pre-arbitral mediation [*Coffee Machine Case; Emirates Case; George p 120*]. Consistently refusing to participate in any further negotiations and then suddenly insisting on futile mediation is a breach of this duty [*George p 122; Oetiker/Walz p 878*]. This is exactly what RESPONDENT does. Already aware of the evident futility of mediation, CLAIMANT tried to bring RESPONDENT back to the negotiating table without their unattainable pre-conditions. Further, they informed RESPONDENT that otherwise

arbitration would be commenced. To CLAIMANT'S efforts of cooperation, RESPONDENT did not react in any way [*PO2 p 55 para 24*]. RESPONDENT cannot rely on a breach of the mediation requirement while simultaneously being in breach of the duty to cooperate themselves [*cf NWA Case; Opel France Case*].

C. STAYING THE PROCEEDINGS WOULD LEAD TO UNNECESSARY COSTS AND DELAYS

34 RESPONDENT requests that *"[c]ompliance with the mediation requirement [...] should guide the Arbitral Tribunal in exercising its procedural discretion"* [*ARfA p 27 para 16*]. It is not entirely clear what RESPONDENT insinuates with such a request — most conceivably a request for a stay [*cf Mitrovic p 566*]. However, this is not justified as it would contradict the principle of efficient arbitration.

35 When submitting to arbitration, reasonable parties expect time and cost-effective decision-making [*Born I §1.02[B][7]*]. Art 26(3) FAI Arb Rules requires *"[a]ll participants [...] to avoid unnecessary costs and delays."*

36 In the present case, mediation will not only create **unnecessary costs** (under Art 13 FAI Med Rules, eg administrative and mediators' fees) but also a delay of proceedings. This would significantly weaken CLAIMANT'S business operations. CLAIMANT expects an increase in orders and market growth from the completion of the project onwards [*RfA p 4 para 9*]. The success of the project was intended to serve as a reference for future customers and silence critical voices within the renewable energy community [*RfA p 4 para 9; PO2 p 54 para 22*]. For this reason, CLAIMANT accepted an initial loss of EUR 15 MM [*RfA pp 4 et seq para 13*]. As there is no prospect of settlement (*supra I.B.2., paras 29–33*) and the complexity of the case is undisputed [*RfA p 7 para 32*], mediation is a vicious circle that causes **unnecessary delay**, especially as the Proceedings have already commenced.

37 In brief, CLAIMANT would suffer immensely from a stay of proceedings and the conduct of a mediation. RESPONDENT, to the contrary, is not exposed to any disadvantages if arbitration continues, as it provides a suitable forum for RESPONDENT'S submissions resulting in a final decision [*cf Lew et al para 8-66*]. The Tribunal should therefore not stay the Proceedings.

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38 Concluding **I.**, the Parties did not establish a mandatory mediation requirement. Even presuming such a requirement, non-compliance would affect neither the jurisdiction of the Tribunal nor the admissibility of the claim. Further, as mediation would not yield any benefits for the Parties, the Tribunal should refrain from staying the Proceedings.

II. CLAIMANT'S EXHIBIT C7 IS ADMISSIBLE

39 RESPONDENT'S so-called *"Without-prejudice Offer"* was entered into the Proceedings as CLAIMANT'S Exh C7 [*Exh C7 p 20*]. Based on an alleged extension of the confidentiality obligation under Art 15 FAI Med Rules to communication preceding mediation, RESPONDENT requests the Tribunal to exclude Exh C7 from the file [*ARfA p 28 para 23*].

40 The Tribunal has broad evidentiary discretion to decide on the admissibility of evidence (**A.**). However, RESPONDENT'S allegations lack a legal basis and do not fulfil any grounds for exclusion (**B.**). Further, the non-consideration of Exh C7 would violate due process, making an award unenforceable (**C.**).

A. THE TRIBUNAL HAS BROAD EVIDENTIARY DISCRETION

41 The Tribunal's evidentiary discretion is stipulated in Art 34(1) FAI Arb Rules, which is a near-verbatim copy of Art 9(1) IBA Rules on the Taking of Evidence [*cf Savola p 289*]. The **IBA Rules** have become a **universally recognised standard** in international arbitration [*Noble Ventures Case; Railroad Case; Born II p 45; Demeyere p 249; El Ahdab/Bouchenaki p 90; Schumacher para 20; Kühner p 667; Nettlau et al p 317; Rivkin p 212; Welser/De Berti p 80*]. Due to this textual identity and their accepted authority, the IBA Rules serve as guidance for the Tribunal's evidentiary discretion. They allow for the exclusion of evidence subject to without-prejudice privilege (*infra II.B.2., paras 53–59*), attorney-client privilege (*infra III.A., paras 69–80*), and evidence illegally obtained (*infra III.B., paras 81–91*).

42 For CLAIMANT'S Exh C7, RESPONDENT bears the burden of proving grounds for exclusion [*cf Shaughnessy p 467*]. CLAIMANT therefore focuses on certain grounds that may appear applicable. However, none of them justify excluding Exh C7.

B. EXHIBIT C7 DOES NOT FULFIL ANY GROUNDS FOR EXCLUSION

43 The Tribunal should establish that no grounds for exclusion apply. Exh C7 is not subject to the confidentiality provision set out in the FAI Med Rules (**1.**). Despite being labelled *"Without-prejudice Offer"*, it does not constitute such an offer and is thus not subject to legal privilege (**2.**). CLAIMANT can reasonably measure RESPONDENT'S conduct against their commitment to transparency (**3.**).

1. Exhibit C7 is not subject to the confidentiality obligation under Art 15 FAI Med Rules

44 RESPONDENT argues that CLAIMANT, by submitting Exh C7, breached the confidentiality obligation set out in Art 15 FAI Med Rules [*ARfA p 27 para 17*]. However, the FAI Med Rules are not applicable in the first place as there was no mediation (**a.**). Even if they were applicable, the scope of Art 15 does not extend to documents preceding a mediation (**b.**).

a. The FAI Med Rules do not apply as there was no mediation

45 CLAIMANT could only be in breach of the FAI Med Rules if a mediation governed by them had ever commenced. This is demonstrated by all potentially applicable legal instruments.

46 First and foremost, according to Art 3 FAI Med Rules, an FAI Mediation only commences on the date on which the relevant Request for Mediation is received by the FAI. This provision is in line with the considerations of the UNCITRAL Notes on Mediation, which are universal guidelines for international mediation [*UNCITRAL Notes para 1; Alexander et al para 0.14*]. According to these Notes, a mediation confidentiality obligation only takes effect with the commencement of the mediation proceedings [*UNCITRAL Notes para 25*]. In the present dispute, there was no Request for Mediation. In fact, there was no mediation at all. Since the **FAI Med Rules were never applicable** in the first place, RESPONDENT cannot rely on a confidentiality provision contained therein.

47 The same considerations apply to the UNCITRAL Model Law on Mediation, which both Equatoriana and Danubia have adopted [*PO2 p 55 para 34*]. Art 5 clarifies that *"mediation proceedings"* commence when the parties agree to engage in such and not when they enter into the mediation agreement [*UNCITRAL Guide para 50*]. Art 11(1), the provision regulating the admissibility of evidence from mediation in arbitral proceedings, requires *"mediation proceedings"*. This is sensible as it provides a clear dividing line between documents that are covered by confidentiality and those that are not.

b. Art 15 FAI Med Rules does not extend to pre-mediation correspondence

48 Even if the FAI Med Rules were applicable, RESPONDENT'S argument is predicated on an extension of Art 15 FAI Med Rules so as to include communication preceding mediation [*ARfA p 27 para 17*]. This conclusion is not supported by the text of the provision or the facts of the case.

49 First, the **wording of Art 15 does not justify such an extension** from the outset. Art 15(1), on the one hand, clearly states that *"any statement or information made or obtained <u>during</u> the mediation"* [*emphasis added*] is to be kept confidential [*see also Art II(11) FAI Med Guidelines*]. Black's Law Dictionary defines *"during"* as *"after the commencement and before the expiration of"* [*Black's Dictionary p 504*]. This underlines that Art 15(1) refers to the period of time in which a formal FAI Mediation takes place. Art 15(2), on the other hand, bars information obtained *"<u>in the context</u> of FAI Mediation"* [*emphasis added*] from being invoked as evidence in subsequent legal proceedings. Albeit semantically more extensive, this formulation also requires *"FAI Mediation"* proceedings to have commenced for confidentiality to apply. Thus, the wording of Art 15 does not allow for an extension of confidentiality.

50 Second, the **Parties did not agree to extend the scope of confidentiality** beyond Art 15. This is supported by the Parties' intentions. CLAIMANT referred to Art 15 in response to concerns of RESPONDENT regarding the confidentiality of ADR mechanisms. However, they only do so in connection to communication made *"therein"* [*Exh R2 p 31*]. CLAIMANT therefore considered no need for the confidentiality of pre-mediation documents. As for RESPONDENT, Ms Ritter's Witness Statement mentions that, to her, it was allegedly clear that Art 15 extended to all negotiations preceding mediation [*Exh R1 p 30 para 10*]. There is no indication that she ever communicated this view to CLAIMANT. While CLAIMANT does not contest the Parties' freedom to extend the confidentiality provisions, this would require concurrent party intentions. Subsequent assertions made in a Witness Statement, however, cannot change the Parties' agreement.

51 Last, the confidentiality standard established by the FAI Med Rules should be viewed in **comparison to other mediation rules** from different internationally authoritative institutions. Art 9(2)(a) ICC Med Rules, for example, only bars communication made *"in or for the Proceedings"* from being produced as evidence, thereby also requiring a mediation for confidentiality to take effect. Art 3 SCC Med Rules refers — exactly like Art 15(2) FAI Med Rules — to information learned *"in the context of the mediation"*. The SCC Mediation Practice Note clarifies that this equally refers to the *"proceedings"* [*SCC Note para 3.1*]. The scope of the FAI Med Rules is narrower from the outset, covering information obtained *"in the context of FAI Mediation"* [*emphasis added*]. The SCC's interpretation must therefore apply all the more. By contrast, a small number of institutional rules explicitly include pre-mediation communication (eg Art 9 CPR Med Procedure). The FAI Med Rules do not.

52 In brief, even if the FAI Med Rules were applicable, the wording, the Parties' intentions, and a comparative analysis of Art 15 FAI Med Rules show that it does not extend to communication preceding mediation.

2. Exhibit C7 does not constitute a without-prejudice offer

53 Exh C7 is entitled *"Without-prejudice Offer"* [*Exh C7 p 20*]. RESPONDENT might therefore try to invoke without-prejudice privilege. However, there is no basis for reliance on this privilege.

54 Without-prejudice privilege aims to exclude communications made during settlement negotiations from subsequent legal proceedings [*Sun/Willems p 267*]. Its purpose is to ensure an uninhibited flow of information between parties and is rooted in the principle of good faith [*Berger I p 273*].

55 Originally derived from and prevalent in common law systems [*Hall Case; Mariwu Case; Rush Case; Alexander p 266*], this legal privilege does not exist in most civil law jurisdictions [*IBA Report Annex 5 pp 1 et seq; Heitzmann p 212; Khodykin et al para 12.177*]. The IBA Rules acknowledge without-

prejudice privilege in Art 9(4)(b) [*IBA Report pp 11 et seq*]. To level the playing field and apply a high standard of protection for the sake of both Parties, CLAIMANT is therefore willing to apply the without-prejudice privilege. Notwithstanding this, RESPONDENT'S offer is simply not covered.

56 At superficial inspection, Exh C7 is labelled *"Without-prejudice Offer"*. However, the substance — not form — of the letter must be considered [*cf Khodykin et al para 12.184*]. For the without-prejudice privilege to apply, the communication must be carried by a genuine intention to reach a settlement [*Bradford & Bingley Case; Cook Case; DirecTV Case; Ernest Ferdinand Case; Rush Case; Unilever Case; Alexander pp 267 et seq; Altaras p 485; Berger I p 267*].

57 A closer look at the content of the letter reveals that RESPONDENT offers a price reduction by 15 % in exchange for the realisation of the project. In the paragraph immediately following, RESPONDENT makes clear to CLAIMANT that there is no room for further negotiations without agreement to a price reduction [*Exh C7 p 20*]. The **offer's wording is coercive and uncompromising** — a non-negotiable demand rather than a genuine offer.

58 This intransigent nature is underlined by RESPONDENT'S conduct. The actions preceding the letter leave no room for interpretation. Upon entering office, Minister Vent announced the revision of the Green Energy Strategy, the very basis of the PSA [*RfA p 5 para 18*]. In a meeting between the Parties' CEOs, RESPONDENT stated the demands then made in Exh C7 [*Exh C5 p 18 para 15*].

59 The wording and background of the document reveal that it did **not in any way constitute a good-faith attempt to negotiate**, as RESPONDENT had no genuine intention to reach a settlement (IBA Rules Preamble 3) [*cf Haller p 314*]. It should not be tolerated that RESPONDENT tags a crucial document *"Without-prejudice"* solely to hide it from the Tribunal in eventual arbitral proceedings [*cf Ashford para 9-42; Berger II p 308; Khodykin et al para 12.182; Zuberbühler et al p 214*]. In the words of the late Lord Walker, RESPONDENT cannot invoke privilege solely to immunise an act from its normal legal consequences [*cf Unilever Case*]. Thus, without-prejudice privilege does not apply, as Exh C7 does not constitute such an offer.

3. CLAIMANT can rely on RESPONDENT'S commitment to transparency

60 Art 26(3) FAI Arb Rules unequivocally states that *"[a]ll participants in the arbitral proceedings shall act in good faith"*. Due to their commitments to transparency in international dispute settlement, RESPONDENT breaches their good faith obligation in requesting the exclusion of Exh C7.

61 RESPONDENT is a 100 % state-owned entity [*RfA p 3 para 2; PO2 p 52 para 3*] and the driving force behind Equatoriana's Green Energy Strategy [*RfA p 3 para 2; Exh C2 p 10; Exh C5 p 16 para 5; ARfA p 25 para 3*]. Equatoriana's involvement is reiterated in the preamble of the PSA [*Exh C2 p 10*], which

is based on a model contract for state entities drawn up by the Equatorianian Ministry of Justice [*ARfA p 27 para 19; Exh R1 p 29 para 7*]. The government heavily influences RESPONDENT'S decision-making processes [*RfA p 6 para 21; Exh C5 p 18 para 15; Exh C7 p 20; ARfA p 26 para 5*] and is competent to appoint its leadership [*Exh C5 p 18 para 13; PO2 p 52 para 3*]. RESPONDENT'S new CEO, Mr la Cour, and Minister Vent are both members of the ENP [*RfA p 5 para 18*]. Due to the various intertwinings, it is unsurprising that RESPONDENT describes themselves as a *"government(al) entity"* in several of their own correspondence and submissions [*Exh C6 p 19; ArfA pp 27 et seq paras 21 et seq; Exh R1 p 30 para 11*]. Their conduct can thus be **measured against the commitments of the Equatorianian government**.

62 Equatorianian ministers claimed on multiple occasions that all of Equatoriana's arbitrations would be in line with the UNCITRAL Rules on Transparency [*ObjLang pp 34 et seq*], which Equatoriana accepted as binding by ratifying the Mauritius Convention [*ObjLang pp 34 et seq; PO2 p 55 para 34; cf Born I §20.11[A][5]*]. Art 3(3) Transparency Rules provides for the disclosure of exhibits to the general public, if the tribunal decides so [*Born I §20.11[A][4]; Paulsson/Petrochilos p 434*]. Hence, Equatoriana has committed to a **rigid regime of transparency** in arbitral proceedings. Albeit instruments of investor-state dispute settlement, both documents are unquestionably relevant for CLAIMANT'S expectations of the conduct of arbitral proceedings. They show a commitment of the Equatorianian government in dispute settlement more broadly and paint an overall picture of transparency. CLAIMANT could rely on RESPONDENT committing to transparency in line with the assertions of Equatorianian officials.

63 This was enhanced by the atmosphere surrounding the transaction, as RESPONDENT was aware of the danger of appearing secretive [*Exh R1 p 30 para 10*]. By doing exactly what they strived not to do, RESPONDENT violates their duty to act in good faith under Art 26(3) FAI Arb Rules [*cf ICC Case 2020-008; Cremades p 34; Henriques p 518; Pearson-Wenger p 193*].

C. THE EXCLUSION OF EXHIBIT C7 WOULD VIOLATE DUE PROCESS

64 Exh C7 is a central document for the Tribunal's assessment of the admissibility of the claim (*supra I.B.2., paras 29–33*). Excluding it would violate due process, exposing a subsequent award to an increased risk of refusal of recognition and enforcement under Art V(1)(b) NYC. Art 52 FAI Arb Rules stipulates that the Arbitral Tribunal shall make every effort to render a legally enforceable award, clarifying the outer boundaries of evidentiary discretion [*cf Godhe I p 15*].

65 Due process is a magna-carta principle of international arbitration [*Lew et al p 95*], superseding tribunal discretion [*Godhe II p 80*]. The **exclusion of relevant evidence violates due process** if it

actually deprived a party of a fair hearing [*Generica Case; Hoteles Condado Case*]. This rationale was discussed in the *Hoteles Condado Case*. Although acknowledging the tribunal's broad evidentiary discretion, the court held that the exclusion of evidence constitutes a violation of due process if the evidence is unquestionably relevant to determine a party's position, and decisive. In the present case, Exh C7 is an unquestionably **relevant** piece of evidence to determine CLAIMANT'S arguments on the futility of mediation (*supra I.B.2., paras 29–33*). It is further **decisive** in the sense that Exh C6 and C7 are the only documents indicating RESPONDENT'S intent at the time of the contract negotiations. RESPONDENT has not submitted any evidence that would further depict their intention during this time. Excluding Exh C7 would thus fulfil the requirements set out in *Hoteles Condado* and violate due process.

66 In conclusion, the evidentiary discretion of the Tribunal is limited in the present Proceedings. The exclusion of Exh C7 would violate due process, making a subsequent award unenforceable.

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67 To conclude **II.**, Exh C7 is a piece of official, high-level corporate correspondence between RESPONDENT'S CEO, Mr la Cour, and CLAIMANT'S CEO, Mr Cavendish. The document does not fulfil any grounds for exclusion. RESPONDENT'S attempt to exclude the letter is only aimed at making it impossible for the Tribunal to consider a central piece of evidence. This cannot be accepted. Exh C7 must remain in the case file.

III. THE TRIBUNAL SHOULD EXCLUDE RESPONDENT'S EXHIBIT R3

68 The Tribunal is called upon to assess the admissibility of yet another exhibit, RESPONDENT'S Exh R3. Like CLAIMANT'S Exh C7 (*supra II., paras 39–67*), it can be categorised under the umbrella of documentary evidence. That is, however, where the similarities end. Exh R3 is a purely internal email sent by CLAIMANT'S Head of Legal, Ms Smith, to representatives of CLAIMANT — and only CLAIMANT. RESPONDENT was not among the recipients of this email. RESPONDENT is now trying to introduce this privileged (**A.**) and illegally obtained (**B.**) communication into the Proceedings, thereby circumventing orderly document production (**C.**). As will be shown, Exh R3 can under no reasonable considerations remain in the case file.

A. EXHIBIT R3 IS SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

69 Exh R3 contains privileged legal advice by an admitted attorney (**1.**). As in-house counsel communication, it is protected under the applicable Equatorianian law (**2.**).

1. Exhibit R3 contains legal advice

70 The Tribunal has evidentiary discretion to exclude documents and should use the IBA Rules as best practice guidance in this regard (*supra II.A., para 41*). Arts 9(2)(b) and 9(4)(a) IBA Rules permit the exclusion of evidence to protect *"privilege under the legal or ethical rules"*, including attorney-client privilege [*IBA Commentary p 28*]. All possibly applicable regimes recognise attorney-client privilege, either through their legal (Equatoriana) or ethical rules (Mediterraneo and Danubia) [*Exh R4 p 33*].

71 The purpose of attorney-client privilege is to encourage and protect open and candid communication between a lawyer and their client [*Mökesch p 2*]. Therefore, legal advice stemming from an attorney must remain confidential [*de Boisséson p 705; Born I §16.02[E][8][c]*].

72 In the case at hand, Exh R3 contains legal advice. Providing drafting suggestions, Exh R3 not only pertains to a question about Equatorianian law but aims to ensure CLAIMANT'S compliance with said law during the negotiations with RESPONDENT. The legal advice stems from an admitted attorney, Ms Smith, who is also the Head of CLAIMANT'S legal department [*PO2 p 53 para 11*].

73 Exceptions from this privilege (eg fiduciary, breach in duty, or crime-fraud) [*cf Bittaker Case; Delaney et al p 25; O'Connell p 3; Parisi pp 453 et seq*] are to be interpreted narrowly, as once information has been disclosed, loss of confidentiality is irreversible [*Paxton Case; Andrews/Zorn p 18*]. No such exception applies in the present case. On the contrary, constituting precisely the type of attorney-client correspondence that privilege aims to protect, **Exh R3 is subject to attorney-client protection**.

2. Exhibit R3 contains in-house counsel communication which is covered by attorney-client privilege under Equatorianian law

74 The question whether in-house counsel communication is covered by attorney-client privilege differs depending on the jurisdiction. The case file holds no information on in-house counsel communication in Mediterraneo and Danubia [*Exh R4 p 33*]. However, common law jurisdictions explicitly protect in-house counsel communication [*Berger II p 306; Gore para [II][2][c]*], while civil law jurisdictions follow a clear trend to also extend attorney-client privilege in that manner [*Swiss Amendment: Sec 167a Swiss CPC (as of 1 January 2025); French Proposal*]. In the present case, legal advice by in-house counsel is protected under the applicable Equatorianian law.

75 The Tribunal should determine the applicable standard for attorney-client communication through a choice-of-law analysis. Therefore, a **closest connection test** should be applied to identify the legal framework most closely associated with the issue at hand [*Berger II pp 312 et seq; Gregoire p 137; Henriksen et al pp 151 et seq; Kuitkowski p 92; Meyer-Hauser/Sieber pp 184 et seq*]. One should not only focus on isolated factors like the attorney's place of admission or where the attorney-client

relationship was established. Instead, an **array of relevant factors** pointing to the same legal order should be considered [*Henriksen et al p 152*]. Consequently, the intended use of the document, the location of the project in dispute, the substantive law of the contract, and the law about which the relevant advice was sought must be taken into account [*Arrow Case; Henriksen et al p 152*].

76 While Exh R3 has connections with all involved jurisdictions, the **closest one points to Equatoriana**. This is already evident as the Parties chose Equatorianian law to govern their contractual relationship in Art 29 PSA [*Exh C2 p 12*], demonstrating a close commitment to the law of Equatoriana. Further, CLAIMANT specifically sought advice about Equatorianian law in relation to a project in Equatoriana.

77 RESPONDENT'S attorney-client communication, on the other hand, is inevitably most closely connected to Equatoriana since they commissioned the project in Equatoriana — their place of operation and communication. Consequently, Equatorianian law on in-house counsel communication applies to both Parties.

78 In case the Tribunal rejected Equatoriana as the closest connection for CLAIMANT'S attorney-client communication, **equality and fairness** concerns arise due to different applicable standards for each Party [*cf IBA Commentary p 28; Zuberbühler et al p 212*]. Those fundamental principles are anchored in Art 18 ML, Art 26(2) FAI Arb Rules, and — in the context of different applicable standards — Arts 9(2)(g) and 9(4)(e) IBA Rules. Since they are explicitly mentioned in the *lex arbitri*, any violation would create a risk of ultimately having the award set aside [*Alvarez p 686; Berger III p 517*]. Therefore, the Tribunal is called upon to ensure a level playing field by applying the same standard to both Parties [*cf Berger III pp 517 et seq; Mökesch p 262*]. Following the **most favourable privilege approach**, widely promoted by authorities from different jurisdictions, the Tribunal should only apply the standard that provides the broadest protection to both Parties [*Cavassin Klamas pp 176, 179; de Boisséson pp 713 et seq; Kubalczyk p 103; Marghitola pp 78 et seq; Rubinstein/Guerrina pp 598 et seq*].

79 This results in the application of Equatorianian law, as it protects in-house counsel communication if the attorney is admitted to the bar and the advice was given in relation to a specific legal question [*Exh R4 p 33; PO2 p 55 para 29*]. Since Ms Smith is an in-house counsel, an admitted attorney, and her legal advice concerns a specific legal question, all requirements of Equatorianian law are fulfilled.

80 In brief, Exh R3 is privileged as in-house communication under Equatorianian law. Equatoriana constitutes the closest connection and provides the most favourable privilege for both Parties. The application of the Equatorianian standard cannot come as a surprise for RESPONDENT, as it is the high standard of their own jurisdiction.

B. EXHIBIT R3 WAS OBTAINED ILLEGALLY

81 Returning to the Tribunal's evidentiary discretion, one can again refer to the IBA Rules. Art 9(3) allows the exclusion of illegally obtained evidence (*supra II.A., para 41*). The differentiation to the wording of Art 9(2) — *"may"* instead of *"shall"* exclude — allows the tribunal to take greater account of the particularities of the individual case [*IBA Commentary p 30; Machherndl/Milacher p 99*]. In the present case, the origin of Exh R3 is highly dubious. The facts of this individual case point at RESPONDENT'S illegal obtention of Exh R3 (**1.**). CLAIMANT fulfils the burden of proof for illegality (**2.**). As RESPONDENT has unclean hands, Exh R3 should not be admitted (**3.**).

1. The Tribunal must connect the dots indicating RESPONDENT'S unlawful acts

82 Numerous facts (dots) indicate RESPONDENT'S unlawful obtention of Exh R3. The Tribunal should link them using the **connecting the dots approach** developed by case law.

83 In the *Methanex Case*, the tribunal held that certain individual pieces of evidence have to be seen in context with each other in order to provide the *"most compelling of possible explanations of events"* [*Methanex Case para III(B)(2); cf ECE Case; Glencore Case*]. The use of circumstantial evidence is accepted especially when obtaining evidence in another state is difficult and where the evidence is in control of the adverse party [*Corfu Channel Case; Betz p 279; Sourgens et al pp 96, 107; Waincymer p 793*]. This is even further aggravated when states or state-controlled enterprises have an advantage in obtaining evidence by having access to state power, potentially damaging the integrity of arbitral proceedings [*cf Lao Case; Masser et al p 251; Mirzayev pp 101, 103 et seq; Ng p 759; Wälde pp 19, 36*].

84 CLAIMANT'S main negotiator, Mr Deiman, mentions two possibilities on how Exh R3 ended up in RESPONDENT'S possession: they either received it **directly from the prosecution office** or, less likely, from someone within his office [*Exh C8 p 36 paras 7 et seq; ObjLang p 34*]. Mr Deiman's assessment is confirmed by the behaviour of RESPONDENT'S representatives. RESPONDENT'S CEO, Mr la Cour, raised unsubstantiated allegations against Mr Deiman and CLAIMANT'S management. He threatened to instigate investigations by the prosecution office, invoking his *"very close"* connections [*Exh C8 p 36 paras 3, 7; PO2 p 55 para 27*]. Said investigations commenced exactly two weeks later, based on Mr la Cour's information [*ARfA p 27 para 13; Exh R1 p 29 para 6; ObjLang p 34; PO2 p 55 para 27*]. Equatorianian police raided Mr Deiman's office, confiscated his documents, and detained him for two days. In the end, none of Mr la Cour's allegations could be proven and the investigation was quickly terminated [*Exh C8 p 36 para 6; PO2 p 55 para 27*]. All of this is underpinned by the **close relationship between RESPONDENT and the Equatorianian State**. Mr la Cour was a member of the current governing

party [*RfA p 5 para 18*]. Furthermore, Equatoriana is the only shareholder of RESPONDENT and is competent to appoint their management [*RfA p 3 para 2; PO2 p 52 para 3*].

85 By contrast, a leak by CLAIMANT'S employees remains unlikely. All of CLAIMANT'S employees signed confidentiality agreements with the company [*PO2 p 55 para 28*] and the consequences of confidentiality violations have been drastically demonstrated by Mr Law's leaks (which have no connection to Exh R3), whose contract was immediately terminated and against whom criminal investigations were initiated [*PO2 p 53 para 11*].

86 The circumstances under which Exh R3 ended up in RESPONDENT'S hands are highly dubious. Put figuratively, numerous dots have been painted on the canvas of illegality. Now all that is left for the Tribunal is to pick up the paint brush and connect them. By doing that, the whole picture of Exh R3's origin will reveal itself.

2. Claimant fulfils the burden of proof for the illegal obtention

87 All the above-outlined dots taken together show that RESPONDENT was involved in the procurement of Exh R3. **Exh R3 was, in fact, illegally obtained.** CLAIMANT fulfils the applicable standard of proof.

88 The Proceedings at hand are not a criminal trial. CLAIMANT is not pursuing a conviction of RESPONDENT or their employees [*cf Alftar pp 150 et seq; Betz pp 278 et seq*] but merely seeks the exclusion of evidence. Therefore, the Tribunal should stick to the predominantly favoured standard of proof in international arbitration [*ICC Case 12732; Glencore Case; Alftar p 150; Betz p 279; cf Born I §15.09[B]; Bertrou/Alekhin p 56*], which is widely held to be a **balancing of probabilities** [*Alftar p 147; Blackaby et al para 6.83; Born I §15.09[B]; Ortner/Novak p 66; Sourgens et al p 80*]: this standard of proof is met where *"an allegation is more likely to be true than to be false"* [*Bickmann para 3.*].

89 Acknowledging RESPONDENT'S advantages in introducing Exh R3 as evidence (*supra III.B.1., para 83*), CLAIMANT should not be burdened by further disadvantages through an excessive evidentiary standard. Instead, the Tribunal should offset the asymmetry between CLAIMANT and RESPONDENT and conduct a balancing of probabilities. In the present case, all dots point to RESPONDENT'S unlawful obtention: Exh R3 was more likely than not obtained during criminal investigations, not through an internal leak [*Exh C8 p 36 para 8*]. A higher standard of proof is not justified.

3. RESPONDENT has unclean hands resulting in the inadmissibility of Exhibit R3

90 Having established that RESPONDENT drew all the dots of illegality and that Exh R3 was therefore illegally obtained, RESPONDENT is left with unclean hands.

91 The **unclean hands doctrine**, as a derivative of good faith, states that **no advantage may be gained from one's own wrong** and is recognised in doctrine and case law alike [*Bertrou/Alekhin p 53; cf Libananco*

Case; Methanex Case para II(1)(58); Amerasinghe p 179]. The duty to arbitrate in good faith is further recognised by the applicable institutional rules (Art 26(3) FAI Arb Rules) and best practice standards (IBA Rules Preamble 3). It is infringed when using illegally obtained evidence [*Cremades p 34*]. The above-mentioned dots indicate a significant breach of RESPONDENT'S good faith obligations by **obtaining internal communication through illicit means and using it as evidence**. This in itself fulfils the standard of inadmissibility [*cf Libananco Case; Methanex Case para II(1)(58); Rutz para 165*].

C. RESPONDENT CIRCUMVENTS THE FORMAL DOCUMENT PRODUCTION PROCEDURE AND THEREBY ACTS IN BAD FAITH

92 RESPONDENT acts in breach of their good faith obligation under Art 26(3) FAI Arb Rules, as they sent Exh R3 to the not-yet-appointed party-nominated arbitrators [*ARfA p 24; ObjLang p 34*]. Thereby, they circumvented the formal document production procedure.

93 Following orderly procedure, RESPONDENT would have to formally request production of a document to obtain internal communication from CLAIMANT. Under Art 3(5) IBA Rules, parties can object to such a request if the requested document is privileged (Art 9(2)) or was obtained illegally (Art 9(3)). The admissibility of the objection would then be assessed without review or only by review of a neutral expert (Arts 3(6), 3(7), and 3(8)). The tribunal should not take part in examining the document since it cannot eliminate its knowledge once it has seen its content [*Zuberbühler et al p 85*].

94 In the case of Exh R3, both reasons to object (privilege and illegality) apply. However, **RESPONDENT frustrated CLAIMANT'S possibility to rely on confidentiality objections** as a reason for the refusal of document production. Instead, they chose to illegally obtain and submit Exh R3 directly to the not-yet-appointed party-nominated arbitrators [*ARfA p 24; ObjLang p 34*]. This shows that RESPONDENT was in fact aware of the inadmissibility of the document and foresaw the risk that the Tribunal could refuse to order the production. Otherwise, there would have been no need to circumvent the ordinary production procedure.

95 By not excluding Exh R3, the Tribunal would set a questionable example allowing future parties to introduce confidential documents into proceedings through a circumvention of document production rules. The Tribunal should refrain from condoning such bad faith conduct and exclude Exh R3.

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96 Concluding **III.**, Exh R3 is subject to attorney-client privilege. As the dots have shown, the procurement of CLAIMANT'S internal communication must have been through illicit means. In any case, by sending the document directly to not-yet-confirmed arbitrators, RESPONDENT acts in bad faith and shows disregard for the formal document production procedure.

PART II: SUBSTANTIVE ISSUES

97 RESPONDENT has been inconsistent in their conduct surrounding the PSA and their later allegations. First, they concluded the PSA, which is an international sale-of-goods contract. Now, they claim that the CISG is not applicable (**IV.**). Second, RESPONDENT has not used any of the multiple opportunities to declare their intent to exclude the CISG. Yet, they insist that they have excluded it (**V.**). What is more, RESPONDENT waived their rights to terminate for convenience to get the best possible deal. Still, they base their termination on a waived right that does not even apply in contracts governed by the CISG (**VI.**). Put simply, RESPONDENT is trying to paint over their own shortcomings. However, they are trying to cover an oil painting with watercolours.

IV. THE CISG APPLIES TO THE PSA

98 The CISG applies by default to international sale-of-goods contracts by virtue of its Art 1(1). The PSA is an international contract for the sale of goods and is governed by the CISG. RESPONDENT asserts that the CISG does not apply [*ARfA p 28 para 20*]. These allegations are without merit. Since the Parties have their places of business in different Contracting States, the PSA is an international contract (**A.**). As it preponderantly concerns goods, the PSA is a sale-of-goods contract within the meaning of the CISG (**B.**). Finally, the PSA is not excepted as a sale by auction (**C.**).

A. THE PSA IS AN INTERNATIONAL CONTRACT

99 Under Art 1(1)(a), the CISG applies to international contracts. These are contracts concluded by parties with places of business ("**PoBs**") in different Contracting States. In an attempt to dispute the applicability of the CISG, RESPONDENT alleges that Volta Transformer ("**VT**") constituted a *"place of business of CLAIMANT"* in Equatoriana [*ARfA p 28 para 20*], the same state as RESPONDENT [*RfA p 2*]. However, CLAIMANT's only PoB was in Mediterraneo (**1.**). Even if CLAIMANT had a PoB in Equatoriana, it would not have the closest connection to the contract and its performance (**2.**).

1. Volta Transformer does not constitute a place of business of CLAIMANT

100 RESPONDENT alleges that VT was a PoB of CLAIMANT [*ARfA p 28 para 20*]. However, VT is not a party to the PSA and cannot be considered a PoB for this reason alone (**a.**). In any event, CLAIMANT engaged VT solely as a supplier, a role that cannot result in a PoB (**b.**).

a. As Volta Transformer is not a party to the PSA, it cannot constitute a place of business of CLAIMANT

101 For the CISG to apply under Art 1(1)(a), parties to the contract must have their PoBs in different Contracting States. For the internationality of a contract, **only the contractual parties'** and not other

legal entities' **PoBs are relevant** [*Münch Art 1 para 52*]. Hence, it is necessary to determine the parties to the PSA [*cf Gillette/Walt p 28*].

102 The parties to the PSA are unambiguously RESPONDENT and CLAIMANT alone. Not only were they the actual signatories to the PSA but were also explicitly identified as the *"Parties"*. Only CLAIMANT and RESPONDENT were bound by obligations under the PSA, including the delivery of the plant and payment of the purchase price [*Exh C2 p 10 et seq*].

103 VT is a **separate legal entity**. Such entities qualify as parties to a contract only if they independently use their power to enter into a contract [*Honnold/Flechtner para 47*]. In theory, VT could have become a party, had it actually negotiated with RESPONDENT and used its power to enter into the PSA, or had CLAIMANT represented it [*cf Gillette/Walt p 27*]. This was not the case. CLAIMANT participated in the tender in their own name and for their own account [*cf Dalhuisen p 222*]. Therefore, VT is not a party to the PSA. Based on this alone, it cannot be considered a PoB of CLAIMANT.

b. CLAIMANT did not conduct their commercial activity through Volta Transformer

104 In any event, CLAIMANT engaged VT in a role that was inherently different from the one of a PoB. VT is contracted to supply electrolyser stacks to CLAIMANT, used for the construction of the plant. This supply relationship is neither close nor strong enough for VT to constitute a PoB.

105 A PoB is a place **used by a party to openly participate in trade** [*Ferrari I p 963; Hachem I Art 1 para 24*]. First, it has to be an establishment through which the party in question primarily and actually conducts its trading activity [*Floor Coverings Case; Royal Feinsprit Case; Bell p 245*]. Second, such an establishment must have a durable business connection, meaning it serves as the party's permanent and stable business organisation abroad [*ICC Case 9781; Siehr I Art 1 para 12*]. Third, this establishment must have the party's autonomous power, entailing an authority to influence a deal [*Floor Coverings Case, Siehr I Art 1 para 12*]. Autonomous power exists when an establishment can negotiate and perform a contract [*cf Floor Coverings Case*]. These requirements are usually met by headquarters or branches of a party [*Zykin Art 1 para 2*]. A third entity, used by a party only to fulfil a contract, is not a PoB of the latter as it lacks such autonomous power [*W. Witz Art 10 para 2*].

106 VT fulfils none of these criteria. First, CLAIMANT did not conduct their trading activity through VT, which was fully independent, as CLAIMANT did not exert any control over it [*PO2 p 52 para 8*]. Second, VT and CLAIMANT did not have a durable business connection. VT always produced on the basis of existing orders and prioritised one client at a time. Only when CLAIMANT ordered the transformer did VT start prioritising the production for CLAIMANT [*PO2 p 52 para 5*]. Their relationship was temporary, for the purpose of one specific project. It only became permanent when CLAIMANT acquired VT, after

the conclusion of the PSA [*RfA p 4 para 11; PO2 p 52 para 7*]. Yet, factors after contract conclusion are irrelevant [*Electricity Meters Case; Rajski Art 10 para 2.2.*]. Finally, VT never had autonomous power, contrary to CLAIMANT'S administrative centre in Mediterraneo, which negotiated the PSA. CLAIMANT used VT as a supplier of electrolyser stacks to deliver the plant. It was merely a part of CLAIMANT'S supply chain. Thus, Mediterraneo is CLAIMANT'S **only PoB**.

2. Even if Volta Transformer qualified as a place of business, it would not have the closest connection to the PSA and its performance

107 Even if VT were a PoB of CLAIMANT, it would not be the only one, as CLAIMANT'S administrative centre in Mediterraneo also constituted a PoB [*cf Zykin Art 1 para 2*]. Comparing both PoBs, VT would have a looser connection. To determine the applicability of the CISG, however, only the PoB with the closest connection to the contract and its performance is relevant.

108 The closest connection under Art 10(a) CISG exists with the PoB that, at the time of contract conclusion, was seen to exert the **most influence on the contractual relationship** [*Asante Case; Hachem II p 34; Honnold/Flechtner para 158*]. Such influence is the power to react to complaints and make decisions regarding the contract and its performance [*Asante Case; Hachem I Art 10 para 7*]. CLAIMANT'S PoB in Mediterraneo was the only one that could influence the contractual relationship with RESPONDENT. It was CLAIMANT who decided on crucial issues, such as the price reduction and the choice of specific subcontractors [*RfA p 4 para 13*].

109 In cases of doubt, the relevant PoB is the one **responsible for contract conclusion** [*Herber/Czerwenka Art 10 para 4; Meier Art 10 para 1*]. This is where the seller's communication concerning the contract, the goods, and the price comes from [*Artificial Fish Case; Vision Systems Case*]. CLAIMANT'S communication came from Mediterraneo and included their headquarters' address [*Exh C4 p 15; Exh R2 p 31*]. The PSA, including the same address, was later concluded by delegates from Mediterraneo [*Exh C2 p 10; PO2 p 56 para 35*]. Therefore, CLAIMANT'S PoB in Mediterraneo was responsible for the conclusion of the PSA.

110 In brief, CLAIMANT'S PoB in Mediterraneo had the closest connection to the contract and its performance. Therefore, even if CLAIMANT had multiple PoBs, only the administrative centre in Mediterraneo would be relevant under Art 10(a) CISG.

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111 CLAIMANT has their PoB in Mediterraneo. Since VT is not a party to the PSA, it cannot be considered a PoB. Regardless, VT's supply relationship with CLAIMANT was not sufficient to qualify it as a PoB. Moreover, VT lacks the closest connection to the PSA. As both Mediterraneo and Equatoriana are

Contracting States to the CISG [*PO1 p 50 para III(4)*], the PSA is an international contract under Art 1(1)(a) CISG.

B. THE PSA IS A SALE-OF-GOODS CONTRACT WITH ANCILLARY SERVICE ELEMENTS

112 RESPONDENT alleges that the CISG does not apply to the PSA, as a *"considerable part of the Agreement consisted of planning and engineering work"* [*ARfA p 28 para 20*]. Seemingly, RESPONDENT believes that the PSA is not a sale of goods.

113 A contract must constitute a sale of goods to be governed by the CISG. CLAIMANT acknowledges that the PSA is a mixed contract because it contains sale-of-goods elements ("**sales elements**"), as well as works and service elements ("**service elements**"). However, RESPONDENT misunderstands the sphere of application of the CISG. A mixed contract is governed by the CISG so long as it contains a certain degree of sales elements and they are the preponderant obligation. First, it will be shown that the PSA contains sales elements (**1.**). Second, it will be shown that the sales elements are preponderant and the CISG therefore applies (**2.**). The two extension options must not be considered. Even if they were, the sales elements would still be preponderant (**3.**).

1. The PSA contains sale-of-goods elements

114 In the PSA, CLAIMANT sold to RESPONDENT ten electrolyser stacks, a transformer, as well as other electrical and plant equipment [*PO2 p 54 para 17*]. These constitute goods within the meaning of the CISG, although they will eventually be installed in an immovable plant. The CISG must be interpreted autonomously. Neither movability nor tangibility at the time of delivery are relevant criteria. Instead, all transportable objects that are part of the commercial trade constitute goods.

115 What qualifies as a good has to be interpreted autonomously under Art 7 CISG [*cf Ferrari II Art 7 para 7; Mistelis Art 1 para 36*]. The drafters of the CISG intentionally used terms without preconceived domestic connotations to define central terms such as that of a *"good"* [*Ferrari III Art 1 para 34*].

116 **Tangibility and movability are not relevant factors.** This is particularly apparent in the French authentic version of the CISG. While the English version refers to *"goods"*, the French version employs *"marchandises"*. Historically, the term *"marchandises"* was a significant change [*Kreße Art 1 para 21*]. The ULIS and ULF, the precursors to the CISG [*Bergsten p 8; Schlechtriem/Butler para 1*], still used the term *"objets mobiliers corporels"*, which translates to *"movable tangible objects"*. This definition was also considered for the CISG but intentionally discarded in favour of a less technical approach [*Kahn pp 956 et seq*]. In fact, the change signifies a broader understanding of what constitutes a good [*Huber I p 41; Piltz para 2-48*]. It must be regarded as an extension to all objects that are part of the commercial trade [*Karollus p 21*].

117 Particularly movability at the time of delivery cannot be considered a necessary criterion. In line with this, the seller's ancillary obligation to install goods in an immovable object does not affect the applicability of the CISG [*Feit Art 3 paras 11 et seq*]. This was clarified in the *Spinning Plant Case*, where a Swiss seller was obligated to deliver machinery and other parts needed for a spinning plant and to install the goods in an immovable building. The Swiss Federal Supreme Court neither took issue with the fact that the goods were to be connected to an immovable object, nor that those services were to be provided by the seller under a uniform contract [*Spinning Plant Case*]. This understanding reflects well-established case law, under which courts frequently do not even consider the issue of installation or construction duties worthy of discussion [*ICC Case 15313/JEM/GZ; Premier Steel Case; Window Plant Case*]. Therefore, it is irrelevant that CLAIMANT was obliged to install the goods.

118 Concluding, while CLAIMANT does not dispute that the PSA contains some service elements [*Exh C5 p 17 para 11*], they are contracted to deliver various goods directly to the building site [*PO2 p 53 et seq para 16*]: ten **electrolyser stacks** (the core system) [*RfA pp 3 et seq paras 5, 11; Exh C5 p 17 para 11*], a **transformer**, and **electrical equipment** [*Exh C5 p 17 para 11*]. They are to be connected to the plant there, but remain transportable as they can easily be removed for maintenance [*PO2 p 53 et seq para 16*]. CLAIMANT further delivers **compressors, pipes, cables, connections, and other equipment**. They are to be treated as a delivery of goods [*PO2 p 54 para 17*]. Consequently, the contract for the delivery of the green hydrogen plant contains sales elements.

2. The economic value test shows the preponderance of the sales elements

119 Pursuant to Art 3(2), the CISG is applicable to mixed contracts when the sales elements are preponderant. The preponderance of the sales or service elements is determined by comparison of the respective economic values [*Fire Trucks Case; Spinning Plant Case; Tube Case; Kreße Art 3 para 4; Maskow Art 3 para 5; Mistelis/Raymond Art 3 para 18*]. When the sales are preponderant, the CISG governs the entire contract, not just the portion attributable to the sale of goods [*Centerless Grinding Machine Case; ICC Case 7153; Officine Case; Gillette/Walt p 60; Magnus I Art 3 para 21*].

120 Case law and literature support the applicability of the CISG to plant construction contracts [*Industrial Plants Case; Spinning Plant Case; Window Plant Case; Feit Art 3 para 12*]. In *ICC Case 9781*, a German company was contracted to deliver a recycling plant to an Italian company. The sole arbitrator decided that the CISG was applicable to the plant construction contract. The reasoning was that the economic value test showed the preponderance of the sales elements [*ICC Case 9781*]. Although not formally binding, the Tribunal should take this rationale into account under the duty of uniform application provided for by Art 7(1) CISG [*cf Rheinland Case; Gruber Art 7 para 46*].

121 If RESPONDENT argues that the CISG applies to mixed contracts but not to plant construction contracts specifically, this is unjustified. During the drafting of the CISG, the USSR delegate to the Working Group even suggested an explicit exception for plant construction contracts. The exception was never included; it was decided that courts should determine the applicability of the CISG to such contracts on the basis of the general rules [*Kahn pp 954 et seq; Mahnken p 242; UNCITRAL YB p 41*].

122 Under the economic value test, when the parties explicitly consider economic values, only these are relevant for the determination of preponderance [*Huber II Art 3 para 13*]. In pre-contractual correspondence, the Parties discussed the individual value of CLAIMANT's obligations [*Exh C5 p 17 para 11*]. The total value of the sales elements amounts to EUR 190 MM, compared to a value of only EUR 110 MM for the service elements. This is undisputed by RESPONDENT. They admit that the service elements are merely *"considerable"* [*ARfA p 28 para 20*]. The **total percentage of the sales elements equates to over 63 %**, in comparison to less than 37 % for the service elements [*data obtained from Exh C5 p 17 para 11*]. This ratio remains unchanged after the 5 % discount.

	Sales (EUR / %)	**Services (EUR / %)**
Electrolyser stacks	100 MM / 33.33 %	– / –
Transformer; electrical equipment	40 MM / 13.33 %	– / –
Goods for the EPC work	50 MM / 16.66 %	– / –
Other obligations (ie service elements)	– / –	110 MM / 36.66 %
Total	190 MM / 63.33 %	110 MM / 36.66 %

Thus, the sales are preponderant for the base plant.

3. The extension options do not affect the applicability of the CISG

123 CLAIMANT has granted RESPONDENT two extension options in Art 2(2) and (3) PSA [*Exh C2 p 11*]. However, they do not form a uniform contract with the base plant. Consequently, the options are not relevant for the determination of the preponderance of sales or service elements (**a.**). Even if the options were considered, the sales elements would remain preponderant (**b.**).

a. The extension options are irrelevant for the Proceedings

124 While the Tribunal has directed the Parties to discuss whether the CISG applies to the PSA in PO1 [*PO1 p 50 para III(1)*], the CISG's applicability to the extension options is not relevant for the Proceedings: CLAIMANT does not request any relief on the basis of the options. Indeed, the options are not even indirectly relevant for the CISG's applicability to the base plant. This would only be the case

if they were part of a uniform contract with the base plant and thus affected the overall preponderance of the sales elements. However, the extension options are separate contracts.

125 Whether a contract is uniform has to be interpreted pursuant to Art 8 CISG. The primary factor taken into account is the intent of the parties [*Ferrari III Art 3 para 12; Hachem I Art 3 para 12*]. Specific indicators of such intent include separate pricing [*Huber II Art 3 para 11; C. Witz para 112.131*] and different purposes [*cf Magnus I Art 3 para 10*].

126 Indeed, **the Parties did not intend to conclude one single contract** for both the base plant and the options. Initially, they did not agree on a total price for the entire project, but rather, separate prices for the different obligations. They agreed on a price of EUR 285 MM for the base plant, including maintenance and training services (Art 7 PSA) [*Exh C2 pp 11 et seq; PO2 p 56 para 35b*]. The options are neither included in that price nor in its payment plan (Art 7 PSA) [*cf Exh C2 pp 11 et seq*]. Rather, Annexes 2 and 3 contain the details regarding the options (Art 2 PSA) [*Exh C2 p 11*]. The eAmmonia option did not even concern the same technology [*RfA p 4 para 12*]. Further, the options are not part of the strict schedule for the delivery of the base plant [*Exh C2 p 11*], but rather, it was uncertain to CLAIMANT if the options had to be realised.

127 Neither of the extension options has been exercised by RESPONDENT. In fact, a comparative analysis shows that options have to be perfected to even constitute a contract [*Spain: Carmelitas Case; Philippines: Dockyard Case; Switzerland: Farm Transfer Case; Canada: Jones Case; England & Wales: Sudbrook Case; Italy: Heinrich pp 51 et seq*]. Their conclusion is separate from the main contract. Thus, sales obligations do not even exist and cannot form part of any preponderance test.

b. The sales elements would remain preponderant if the extension options were considered

128 Even if the options were considered, the sales elements remain preponderant. As the value of the entire contract is EUR 460 MM [*Exh C5 pp 16 et seq para 9*], for the sales elements to be preponderant, their value only has to exceed EUR 230 MM (50 %). CLAIMANT has shown that a total value of EUR 190 MM is already accounted for, irrespective of the options (*supra IV.B.2., para 122*). Consequently, the value of the sales elements only has to amount to EUR 40 MM. While the exact values of the sales elements of the options cannot be determined, the total value of the options makes up EUR 160 MM. For the sales elements to be preponderant, only **25 % of the options' value** has to pertain to sales elements.

129 The obligations out of the options and the base plant are similar in nature. Both options would have encompassed the delivery of valuable items, namely the electrolyser stacks and the eAmmonia module [*RfA p 4 paras 11 et seq*]. Therefore, it is close at hand that the value ratios are similar. As the value

ratio of the sales elements in the base plant is more than 63 % (*supra IV.B.2., para 122*), it is inconceivable that the sales elements of the options do not surpass 25 %. Thus, it is apparent that the sales elements are preponderant even if the options are considered.

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130 Even though RESPONDENT paints a picture in which the PSA is not a sales contract, this has no merit. The PSA is a mixed contract that contains sales elements. Since the total value of the sales elements amounts to over 63 % of the obligations for the base plant, the sales are preponderant. As a result, the CISG applies to the PSA pursuant to Art 3(2).

C. THE PSA IS NOT A SALE BY AUCTION

131 Art 2(b) CISG excepts sales by auction from the CISG. The Parties concluded the PSA as a result of public procurement proceedings. Although the second step of the process was a so-called *"reverse auction"*, the transaction still does not qualify as a *"sale by auction"* within the meaning of Art 2(b) CISG [*cf IWB Case; Magnus I Art 2 para 33; Pereira p 211; Poljanec et al pp 149 et seq; Schroeter I p 134*]. On the one hand, the tender did not have the characteristics of an auction. On the other hand, it would not correspond to the purpose of Art 2(b) CISG to extend the exception to the PSA.

132 The autonomously interpreted term *"auction"* includes public, publicised sales awarding the contract to the best bidder [*Ferrari III Art 2 para 28; Magnus I Art 2 para 33*]. The main characteristic of such sales is the transparency of the competitive bidding process: participants know the most recent bid — or the current price — and can react to it [*Mankowski Art 2 para 7; Poljanec p 26*].

133 In line with this, the nature of the tender conducted by RESPONDENT does not qualify as an auction. Participants submitted their bids without knowing any other offers or the price. After the submission deadline, the bids were opened by RESPONDENT. During the so-called *"reverse auction"*, RESPONDENT ranked the bidders according to the overall economic value of the bids. No bidder could react at any point [*PO2 pp 52 et seq para 9*]. A true reverse auction is transparent because the auctioneer openly communicates the price, which decreases if nobody bids — the first and only bidder becomes the buyer [*Poljanec pp 17 et seq, 26*]. Instead, what RESPONDENT called a *"reverse auction"* was actually a sealed-bid auction, in which bidders simultaneously submit confidential bids. **This is not considered an auction under Art 2(b) exactly because it lacks transparency** [*cf Poljanec p 17*]. Thus, the only auction-like feature of this procedure was its name.

134 Furthermore, sales by auction are excepted from the CISG due to their unpredictability [*Bell p 250*]. They are automatically concluded by knockdown, prior to which it is impossible to know the future parties to the contract and their places of business. By virtue of Art 1(2), for the CISG to apply,

internationality has to be apparent prior to or at the time of the contract conclusion. This requirement is generally not met in auctions [*Honnold/Flechtner para 64; Magnus I Art 2 para 32; Spohnheimer Art 2 para 30*]. By contrast, procuring entities in procurement proceedings already **know all potential bidders and their places of business** when concluding the contract [*Spohnheimer Art 2 para 20*]. Hence, excluding such transactions is contrary to Art 2(b) CISG's rationale [*Poljanec et al p 150*].

135 In fact, the procurement proceedings conducted by RESPONDENT had no issue of unpredictability. RESPONDENT already knew that no local entities would participate due to the lack of development in the green hydrogen sector [*ARfA p 25 para 4*]. In addition, RESPONDENT even had an opportunity to negotiate with two final bidders and could decide on the conclusion of the PSA based on the negotiations. All of this enabled RESPONDENT to foresee the internationality of the PSA. In brief, Art 2(b) CISG does not apply to the PSA.

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136 Concluding **IV.**, the CISG applies to the PSA. The Parties have their places of business in different Contracting States. Furthermore, the PSA is a mixed contract with a preponderance of sales elements. Last, the exception for sales by auction does not cover the PSA.

V. THE PARTIES HAVE NOT EXCLUDED THE CISG

137 CLAIMANT has demonstrated that the CISG applies (*supra IV., paras 98–136*). RESPONDENT asserts that the Parties opted out of the CISG under its Art 6 [*ARfA p 27 para 19*]. This is unjustified. CLAIMANT will show that an exclusion of the CISG must be assessed pursuant to Art 8 CISG (**A.**). An interpretation neither of the Parties' subjective intent (**B.**) nor under the objective test (**C.**) permits an assumption of exclusion. Thus, the CISG applies.

A. EXCLUSION MUST BE ASSESSED UNDER ART 8 CISG

138 Under Art 6 CISG, any opt-out from the CISG requires a consensual declaration of exclusion [*Saenger Art 6 para 2; Siehr I Art 6 para 2*]. Whether the CISG has been excluded is governed by its provisions on the interpretation of statements, thus Art 8 [*Citroen Case; AC Opinion No 16 Rule 3; Ferrari III Art 6 para 18; Gillette/Walt p 68; Schmitt Art 6 para 6; Magnus I Art 6 para 20*]. Art 8 contains two separate tests (*supra I.A., para 20*). The primary test under Art 8(1) relies on the parties' apparent intent. The secondary test under Art 8(2) relies on the understanding of a reasonable third party.

139 Under the primary test of Art 8(1), the will of the parties determines the interpretation of a contract, provided it was known by or could not be unknown to a recipient [*Hanwha Case; TeeVee Case*]. This knowledge threshold is reached when the real intent of a party could have easily been recognised [*Hurni Art 8 para 4*], ie when a party could not ignore evident, obvious, and striking facts [*Fogt p 94*].

140 Only if neither party could have recognised the intent of their counterpart will Art 8(2) be applied. Its standard relies on the understanding of a reasonable person in the position of the other party [*Treibacher Case; Schmidt-Kessel Art 8 para 12; Zuppi Art 8 para 23*].

141 Circumstances relevant for the determination of the party's real intent and the understanding of a reasonable person are listed in Art 8(3) CISG. CLAIMANT will address these in the subsequent sections. Generally, a *"government entity"* — as RESPONDENT describes themselves — can especially be expected to apply the CISG, as accession of a state to the CISG creates legitimate expectations that contracts will be governed by the Convention. Thus, the standard for the exclusion of the CISG in contracts with government entities are particularly high [*Pereira p 218*].

B. UNDER THE SUBJECTIVE TEST, THE CISG IS NOT EXCLUDED

142 Under the subjective test of Art 8(1) CISG, it was impossible for CLAIMANT to be aware of RESPONDENT'S alleged intent to exclude the CISG (**1.**). By contrast, RESPONDENT knew or at least could not have been unaware of CLAIMANT'S real intent to apply the CISG (**2.**).

1. CLAIMANT was unaware of RESPONDENT'S alleged intent to exclude the CISG

143 RESPONDENT alleges that they intended to exclude the CISG [*ARfA p 27 para 19*]. If this intent even existed, it cannot be taken into account: first, RESPONDENT never expressed their true intention with the necessary clarity; second, CLAIMANT could not have recognised RESPONDENT'S intent.

144 First, reliance on the real intent is subject to limitations. If the party relying on Art 8(1) has not even seized an opportunity to express their true intention with the necessary clarity, it cannot be considered [*Achilles Art 8 para 2*]. **RESPONDENT never explicitly declared their intent to exclude the CISG** to CLAIMANT, although they had every opportunity to do so. In a meeting between Mr Cavendish, CLAIMANT'S CEO, and Ms Faraday, RESPONDENT'S CEO, only CLAIMANT actively addressed the issue of the applicable law [*Exh R1 p 30 para 11*]. RESPONDENT intentionally avoided any discussion as a whole, as openly admitted by their own witness [*Exh R1 pp 29 et seq paras 7, 11*]. Even though CLAIMANT took a step towards RESPONDENT, they did not seize the opportunity to express any intent [*Exh R1 p 30 para 11*]. For this reason alone, RESPONDENT cannot rely on the subjective test.

145 Second, **nothing indicated RESPONDENT'S supposed real intent**. RESPONDENT refers to a change in the model clause used by Equatorianian state entities. It had been amended as a result of a campaign in 2022 led by the Equatorianian Ministry of Justice [*Exh R1 p 30 para 11*] and aimed at strengthening the role of Equatorianian law [*Exh R1 p 29 para 7*]. This revised model clause was included into the PSA as Art 29 [*ARfA p 29 para 19*]. As a foreign entity with no business in Equatoriana at the time

[*RfA p 3 para 5*], CLAIMANT had no reason to follow local developments there and thus would not have seen the official press release concerning the amended model contract.

146 CLAIMANT'S legal department only realised during contract negotiations that the wording of the choice-of-law clause differed from previous contracts. Their Head of Legal at the time was Mr Law. He compared the contracts and subsequently put the applicable law on the list of issues to be discussed by the CEOs [*Exh R1 p 30 para 11; PO2 p 53 para 11*]. It was reasonable that, as an expert in international contracting [*PO2 p 53 para 11*], Mr Law would focus specifically on the applicable law clause. Any expert in this field would make similar enquiries if they noticed the slightest change in such clauses. Most likely, he put the applicable law issue on the agenda to discuss the meaning of this change and to reiterate the applicability of the CISG.

147 In early May 2023, Ms Smith took over the negotiations as CLAIMANT'S new Head of Legal [*PO2 p 53 para 11*]. RESPONDENT has attempted to introduce a document authored by Ms Smith in the Proceedings, which touches upon potentially applicable legal systems to the PSA [*ObjLang p 34*]. CLAIMANT has shown that this document is subject to privilege, has been obtained illegally and must not be admitted as an exhibit (*supra III., paras 68–96*). They will therefore not discuss the content of said document, as this may be construed as a waiver of privilege [*cf Glamis Gold Case; Pittston Case*].

148 Since CLAIMANT could not have known the alleged real intent of RESPONDENT to exclude the CISG, no exclusion of the CISG can be drawn from the subjective test under Art 8(1).

2. RESPONDENT was aware of CLAIMANT'S intent to apply the CISG

149 Contrary to RESPONDENT, CLAIMANT unambiguously expressed their intent to apply the CISG to the PSA. RESPONDENT could not have been unaware of it and therefore could not have relied on any other interpretation.

150 On multiple occasions, **CLAIMANT made their intent to apply the CISG clear**. CLAIMANT even discussed the applicable law at the CEO level [*Exh R1 p 30 para 11*]: Mr Cavendish explicitly mentioned the role of the CISG in international transactions as a *"gold standard"* [*Exh R1 p 30 para 11*]. Although RESPONDENT'S main negotiator, Ms Ritter, assumes that Mr Cavendish *"merely mentioned"* this fact [*Exh R1 p 30 para 11*], this qualification is meaningless under the standard of Art 8(1) CISG. Rather, this was an obvious expression of CLAIMANT'S intent to apply the CISG. In addition, Mr Deiman, CLAIMANT'S main negotiator, shared with Ms Ritter his positive view of the old model clause, which had explicitly called for an application of the CISG [*Exh R1 p 30 para 11*].

151 Such an expression of CLAIMANT'S intent to apply the CISG was so conspicuous that RESPONDENT could not have ignored it [*cf Fogt p 94*]. RESPONDENT therefore knew CLAIMANT'S real intent, or, at the

very least, could not have been unaware of it. For this reason, RESPONDENT would have needed to explicitly demand the exclusion of the CISG. As they did not, CLAIMANT'S evident will is decisive.

C. UNDER THE OBJECTIVE TEST, THE CISG IS NOT EXCLUDED

152 As RESPONDENT was aware of CLAIMANT'S subjective intent at the time of the contract conclusion, they cannot rely on the objective test of Art 8(2) [*cf Gillette/Walt p 68; Hurni Art 8 para 3*]. Even if they could, no reasonable person would have understood the relevant provisions of the PSA as an exclusion of the CISG. Neither an interpretation of the choice-of-law clause (**1.**) nor of the Request for Quotation (**2.**) permits an assumption of exclusion.

1. The choice-of-law clause does not exclude the CISG

153 RESPONDENT argues that the CISG is excluded because Art 29 PSA provides for a choice of *"the law of Equatoriana to the exclusion of its conflict of laws principles"* [*Exh C2 p 12*]. However, that choice-of-law clause cannot fulfil this purpose. First, the CISG is part of Equatoriana's law (**a.**). Second, it is not a part of Equatoriana's conflict-of-laws principles (**b.**).

a. The CISG is part of the law of Equatoriana

154 The Parties' choice of the law of Equatoriana in Art 29 PSA refers to the entirety of Equatorianian law. **The CISG is part of the law of Equatoriana.**

155 The choice of the law of a Contracting State entails a choice of the CISG [*Electricity Meters Case; Gramercy Holdings Case; ICC Case 9781; ICC Case 2023-052; Kröll et al para 11*]. Therefore, RESPONDENT'S general reference to the law of Equatoriana in itself cannot be considered an exclusion of the CISG [*cf ICC Case 7565; Lingerie Case; Musgrave Case; Rheinland Case*]. This is particularly apparent when the parties to a contract are aware of the CISG [*Cybernetix Case; Gramercy Holdings Case; Park Plus Case; Wheel Loader Case; Kröll p 362*], as CLAIMANT and RESPONDENT were [*Exh R1 p 30 para 11*]. The assumption that the CISG is not a part of the law of Equatoriana — a Contracting State — would be counterintuitive. For illustration, the assumption that the choice of an EU Member State's law would not simultaneously relate to EU law is equally counterintuitive.

156 RESPONDENT would have had to define the law of Equatoriana more specifically for a reasonable person to interpret the clause as an exclusion. For instance, the choice of the *"law of Equatoriana, excluding the CISG"* or a reference to specific Equatorianian provisions or statutes governing the same subject matter as the CISG [*cf Twisted Yarn Case*] would provide for an exclusion of the CISG. However, the simple choice of *"the law of Equatoriana"* does not exclude the CISG.

b. The CISG is not part of Equatoriana's conflict of laws principles

157 The Parties have excluded the application of the *"conflict of laws principles"* of Equatoriana in Art 29 PSA [*Exh C2 p 12*]. The CISG is not a part of them.

158 Unlike the CISG, conflict-of-laws ("**CoL**") rules dictate what substantive law applies to an international matter. For instance, the Tribunal would rely on CoL rules to determine which substantive provisions apply to contractual claims in the first place. To that end, CoL principles rely on connecting factors, such as the habitual residence of a party (eg Art 117(3)(a) Swiss PILA, Art 46(1) Korean PILA) or *"the most real and substantive connection to the contract"* [*Bonython Case*]. Only after determining the applicable law would the Tribunal apply substantive provisions (eg Sec 433 *et seq* German BGB).

159 Due to the existence of various connecting factors in different domestic systems, CoL rules create uncertainty that unified substantive law, such as the CISG, aims to eradicate. To achieve this, the **CISG itself applies to international matters as substantive law**. Its provisions, such as Art 45 concerning remedies for breach of contract by the seller, apply directly to the sales contract. The diverging purposes of CoL principles and uniform substantive law can be distinguished from one another [*Protective Masks Case; Kröll et al para 11*]. Consequently, an understanding of the CISG as conflict-of-laws rules lacks any foundation [*Siehr II p 398*]. The CISG remains applicable.

2. A systematic interpretation of the PSA does not support an exclusion of the CISG

160 Art 31 PSA provides for the interpretation of the PSA in light of the Request for Quotation, which initiated the tender proceedings [*Exh C2 p 13*]. According to Art 8 of the Request for Quotation, the applicable law to both the *"Bidding Process"* and the *"award of the contract"* is the Public Procurement Law of Equatoriana [*Exh C1 p 9 para 8*]. According to the understanding of a reasonable third person, this designation did not extend to any eventual purchase agreement with the successful bidder.

161 Neither the *"Bidding Process"* nor the *"award of the contract"* encompass contractual issues [*Exh C1 p 9 para 8*]. The *"award of the contract"* simply describes the method used in procurement proceedings to evaluate the tender offers [*Kunzlik p 183*]. Further, the Public Procurement Law of Equatoriana does not regulate contractual matters at all [*PO2 p 55 para 32*]. Therefore, no reasonable person would have understood it as a replacement of the CISG. In fact, the application of the CISG to public procurement contracts is *"commonplace"* [*Pereira p 214*]. To conclude, Art 31 PSA read in conjunction with Art 8 of the Request for Quotation does not exclude the CISG.

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162 Concluding **V.**, the Parties have not excluded the CISG under Art 6. Under the subjective test, CLAIMANT'S apparent intent was the application of the CISG. Under the objective test, RESPONDENT'S

statements and conduct could not have been reasonably understood as an exclusion of the CISG. Therefore, the CISG is the applicable law to the PSA.

VI. ART 7.3.8 ECC DOES NOT APPLY

163 As directed by the Tribunal in PO1 [*PO1 p 50 para III(1)*], CLAIMANT has demonstrated the applicability of the CISG to the PSA (*supra IV., paras 98–136*) and the lack of its exclusion (*supra V., paras 137–162*). The CISG does not govern all questions that arise in connection with the sale of goods. If a matter is not within the scope of the CISG, domestic non-harmonised law applies.

164 RESPONDENT relies on such a non-harmonised provision, namely termination for convenience pursuant to Art 7.3.8 Equatorianian Civil Code ("**ECC**"), in their allegations [*ARfA p 28 para 21*]. This provision allows governmental entities to terminate contracts for convenience if they were concluded in pursuance of a particular strategy and said strategy has changed [*PO1 pp 50 et seq para III(4)*].

165 As a matter of the applicable law, it will be demonstrated that this provision does not apply in the Proceedings because Art 7.3.8 ECC covers a matter governed by the CISG (**A.**). In any case, RESPONDENT waived their right to terminate for convenience (**B.**). In addition, Art 7.3.8 ECC discriminates in favour of government entities and must be ignored by the Tribunal (**C.**).

A. ART 7.3.8 ECC COVERS A MATTER GOVERNED BY THE CISG

166 Art 7.3.8 ECC is inapplicable as it concerns a matter that falls within the scope of the CISG. Pursuant to Art 4 CISG, the subject matters of the Convention explicitly include the formation of the contract and the rights and obligations of the parties. This is not an exhaustive list; crucially, the CISG also contains provisions on termination [*Djordjević Art 4 para 6; Hachem I Art 4 para 2; Schlechtriem/Butler para 41; Schroeter II para 151*].

167 A subject matter is governed only by the CISG if the same issues are addressed by both the CISG and a corresponding domestic provision and they serve a similar purpose [*AC Opinion No 23 Rule 3; Honnold/Flechtner para 96; Schroeter II paras 161 et seq*].

168 The purpose of Art 7.3.8 ECC is to give governmental entities the right to terminate for convenience due to external changes. This issue is covered by Art 79 CISG, which clarifies the circumstances under which a party is freed from fulfilling their contractual obligations because of external aggravating circumstances [*Schroeter II para 800*]. Considering this, Art 79 supersedes domestic doctrines such as *"frustration of purpose"* or *"hardship"* [*AC Opinion No 20 para 2.3; cf Hearing Implants Case; Piltz para 4-220; Schroeter II para 800; Siehr I Art 4 para 20*]. One recognised example of aggravating circumstances governed by Art 79 CISG is changes of government [*Lorenz Art 4 para 13*]. Thus, **termination because of government changes is a matter that falls within the scope of the CISG**.

169 Furthermore, Art 7.3.8 ECC concerns the unilateral termination of a contract, which the CISG governs within its provisions on avoidance (Arts 49 and 64 CISG). The Convention allows such unilateral termination only as a last resort [*Cobalt Sulfate Case; Designer Clothes Case; Ferrari IV p 4; Magnus II p 424; Schroeter III Art 25 para 22*]. Art 29 CISG even clarifies that termination without cause must be mutually agreed between the parties [*Schroeter IV Art 29 para 47*]. Consequently, the lack of a provision allowing termination for convenience fits within the overall system of the CISG. Art 7.3.8 ECC disrupts the intended balance of interests between the buyer and the seller within the CISG. Thus, Art 7.3.8 ECC is superseded by the CISG, as it concerns a matter governed by the CISG.

B. RESPONDENT WAIVED ALL TERMINATION RIGHTS IN ART 28 PSA

170 Even if Art 7.3.8 ECC were applicable, RESPONDENT waived their right to terminate for convenience in Art 28(2) PSA [*Exh C2 p 12*]. In return, CLAIMANT granted RESPONDENT a price reduction of 5 % [*Exh C5 p 17 para 10*]. RESPONDENT might now attempt to argue that they could not effectively waive their right to terminate for convenience, framing Art 7.3.8 ECC as mandatory. However, it is the prevailing opinion in Equatoriana that Art 7.3.8 ECC is not a mandatory provision [*PO2 p 55 para 33*]. Thus, **Art 7.3.8 ECC was waived effectively** by RESPONDENT.

171 Even if it were considered mandatory, this issue is to be settled by an arbitral tribunal and not a state court. In arbitral proceedings, **parties can deselect mandatory provisions of the governing law** [*Bermann p 18; Lenz p 94; Lew et al para 17-27*]. After all, the Parties could have chosen any governing law, including jurisdictions without equivalent provisions [*cf Barraclough/Waincymer p 219*]. The only limit to this is public policy [*Lew et al para 17-32*], as that would constitute a basis for setting aside or refusal of the enforcement of the award under Art 34(2)(b)(ii) ML or Art V(2)(b) NYC. This is not the case for Art 7.3.8 ECC, as it is not considered to be part of Equatoriana's public policy, the state that the award would most likely be enforced in [*PO2 p 55 para 33*].

172 The Parties chose Equatorianian law but agreed to waive all rights to terminate for convenience. Thus, Art 7.3.8 ECC is inapplicable by virtue of the Parties' exclusion.

C. THE INCLUSION OF ART 7.3.8 INTO THE ECC DEFEATS THE OBJECT AND THE PURPOSE OF THE CISG

173 The Tribunal must ignore Art 7.3.8 ECC because it frustrates the purpose of the CISG. The CISG is an international treaty, creating obligations for the Contracting States. According to the Preamble, its purpose is the *"removal of legal barriers in international trade"* and to *"promote the development of international trade"*.

174 Similar to other treaties, *pacta sunt servanda* applies to the CISG. According to this principle, every treaty in force is binding upon its parties and must be performed in good faith. This fundamental principle of customary international law is also codified in Art 26 VCLT [*Aust para 1; Pert/Couzens p 70*], to which both Mediterraneo and Equatoriana are Contracting States [*PO2 p 55 para 31*]. The Contracting States are obliged to apply the treaty in a reasonable way and in such a manner that its purpose can be realised [*Salmon Art 26 para 35*]. When entering into the CISG, Equatoriana consented to the adoption of uniform rules for the purpose of the development of international trade. The CISG does not provide for any privileges for state-owned entities because it *"aims for fairness across the board"* [*cf Pereira et al*]. Such provisions would create an imbalance that impedes the development of international trade. They defeat the purpose of the CISG as a treaty and violate the international obligations of Equatoriana. For this reason, Art 7.3.8 ECC must not be applied in the Proceedings.

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175 Concluding **VI.**, Art 7.3.8 ECC is not applicable in the Proceedings. Art 7.3.8 ECC governs a matter within the scope of the CISG. Additionally, RESPONDENT waived their right to terminate for convenience under Art 7.3.8 ECC. Last, the Tribunal must not consider a non-harmonised provision that frustrates the purpose of the CISG.

Request for Relief

In light of the above, CLAIMANT upholds their requests that the Tribunal:

1) Declare that the Agreement is governed by the CISG;
2) Declare that the Agreement has not been validly terminated by Equatoriana RenPower;
3) Order Equatoriana RenPower to fulfil the 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;
4) Order Equatoriana RenPower to bear the costs of the arbitration;
5) Make any other order the Arbitral Tribunal considers appropriate.

Varvara Artiukh	Sophie Hannah Egger	Lukas Hellmayr
Agnes Oppitz	Jonas Schneider-Beron	Alina Waldenberger

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On behalf of CLAIMANT

Certificate

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. Only those sources were used which are listed in indices.

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Vienna, 12 December 2024

Index of Authorities

Alexander et al	Nadja Alexander / Shouyu Chong / Vakhtang Giorgadze **The Singapore Convention on Mediation: A Commentary** 2nd Edition Kluwer Law International (2022) Cited in: para 46
Alftar	Philipp Alftar **Das Beweismaß in der internationalen Handelsschiedsgerichtsbarkeit – Auswirkungen der best practice der document production auf den Beweis** Springer Verlag (2024) Cited in: para 88
Altaras	David Altaras **The Without-Prejudice Rule in England** Arbitration: The International Journal of Arbitration, Mediation and Dispute Management Volume 76 Issue 3 (2010) pp 474–487 Cited in: para 56
Alvarez	Henri C. Alvarez **Evidentiary Privileges in International Arbitration** in Albert Jan van den Berg International Arbitration 2006: Back to Basics? ICCA Congress Series No 13 Kluwer Law International (2007) Cited in: para 78
Amerasinghe	Chittharanjan F. Amerasinghe **Evidence in International Litigation** Martinus Nijhoff Publishers (2005) Cited in: para 91

Andrews/Zorn	Jeffrey A. Andrews / Matthew Zorn **Demystifying the Crime-Fraud Exception** The Advocate Volume 101 (2022) pp 16–19 Cited in: para 73
Ashford	Peter Ashford **The IBA Rules on the Taking of Evidence in International Arbitration: A Guide** Cambridge University Press (2013) Cited in: para 59
Aust	Anthony Aust **Pacta sunt servanda** in Max Plank Encyclopedia of Public International Law (MPEPIL) Max Planck Institute for Comparative Public Law and International Law (2007) Cited in: para 174
Barraclough/Waincymer	Andrew Barraclough / Jeffrey Waincymer **Mandatory Rules of Law in International Commercial Arbitration** Melbourne Journal of International Law Volume 6 Issue 2 (2005) pp 205–244 Cited in: para 171

Bell	Kevin Bell **The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods** Pace International Law Review Volume 8 Issue 1 (1996) pp 237–258 Cited in: paras 105, 134
Berger I	Klaus Peter Berger **The Settlement Privilege - A General Principle of International ADR-Law** Arbitration International Volume 24 Issue 2 (2008) pp 265–276 Cited in: paras 54, 56
Berger II	Klaus Peter Berger **Chapter 13: Evidentiary Privileges** in Franco Ferrari / Friedrich J. Rosenfeld Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues Kluwer Law International (2022) Cited in: paras 59, 74, 75
Berger III	Klaus Peter Berger **Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion** Arbitration International Volume 22 Issue 4 (2006) pp 501–520 Cited in: para 78

Bergsten	Eric E. Bergsten **Thirty-five years of the United Nations Convention on Contracts for the International Sale of Goods: Expectations and Deliveries** in United Nations Commission on International Trade Law Thirty-five Years of Uniform Sales Law: Trends and Perspectives UNCITRAL (2015) Cited in: para 116
Bermann	George A. Bermann **Introduction: Mandatory Rules of Law in International Arbitration** in George A. Bermann / Loukas A. Mistelis Mandatory Rules in International Arbitration Juris (2011) Cited in: para 171
Bertrou/Alekhin	Grégoire Bertrou / Sergey Alekhin **The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?** Les Cahiers de l'Arbitrage Volume 4 (2018) pp 11–59 Cited in: paras 88, 91
Betz	Kathrin Betz **Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence** Cambridge University Press (2017) Cited in: paras 83, 88

Bickmann	Julian Bickmann **Fact-Finding in International Arbitration: The Emergence of a Transnational Lex Evidentiae** Kluwer Law International (2022) Cited in: para 88
Black's Dictionary	Joseph R. Nolan / Jacqueline M. Nolan-Haley **Black's Law Dictionary** 6th Edition West Publishing Co. (1990) Cited in: para 49
Blackaby et al	Nigel Blackaby / Constantine Partasides / Alan Redfern **Redfern and Hunter on International Arbitration** 7th Edition Oxford University Press (2022) Cited in: paras 18, 25, 88
Born I	Gary B. Born **International Commercial Arbitration** 3rd Edition Kluwer Law International (2021) Cited in: paras 25, 26, 35, 62, 71, 88
Born II	Gary B. Born **International Arbitration: Law and Practice** 3rd Edition Kluwer Law International (2021) Cited in: para 41

Born/Šćekić	Gary B. Born / Marija Šćekić **Pre-Arbitration Procedural Requirements 'A Dismal Swamp'** in David D. Caron / Stephan W. Schill / Abby Cohen Smutny / Epaminontas E. Triantafilou Practising Virtue: Inside International Arbitration Oxford University Press (2015) Cited in: paras 19, 24
Camilleri	Simon P. Camilleri **Arbitration: The Line Between Admissibility and Jurisdiction** Asian Dispute Review Volume 24 Issue 4 (2022) pp 168–172 Cited in: paras 24, 26
Cavassin Klamas	Caroline Cavassin Klamas **Finding a Balance Between Different Standards of Privilege to Enable Predictability, Fairness and Equality in International Arbitration** Revista Brasileira de Arbitragem Volume XII Issue 45 (2015) pp 159–179 Cited in: para 78
Cremades	Bernardo M. Cremades **La Buena fe en el Arbitraje Internacional** Arbitraje: Revista de Arbitraje Comercial y de Inversiones Volume 5 Issue 1 (2012) pp 13–36 Cited in: paras 63, 91

Dalhuisen	Jan H. Dalhuisen **Transnational and Comparative Commercial, Financial and Trade Law: Transnational Contract Law** 8th Edition Hart Publishing (2022) Cited in: para 103
de Boisséson	Matthieu de Boisséson **Evidentiary Privileges in International Arbitration** in Albert Jan van den Berg International Arbitration 2006: Back to Basics? ICCA Congress Series No 13 Kluwer Law International (2007) Cited in: paras 71, 78
Delaney et al	Nancy E. Delaney / Michael S. Schwartz / Jonathan Byer **"Fiduciary Exception" to the Attorney-Client Privilege** Estate Planning Volume 42 Issue 2 (2015) pp 25–31 Cited in: para 73
Demeyere	Luc Demeyere **The Search for the "Truth": Rendering Evidence under Common Law and Civil Law** SchiedsVZ Volume 1 Issue 6 (2003) pp 247–253 Cited in: para 41

Djordjević	Milena Djordjević **Art 4 CISG** in Stefan Kröll / Loukas A. Mistelis / Pilar Perales Viscasillas UN Convention on Contracts for the International Sale of Goods (CISG) 2nd Edition C. H. Beck (2018) Cited in: para 166
El Ahdab/Bouchenaki	Jalal El Ahdab / Amal Bouchenaki **Discovery in International Arbitration:** **A Foreign Creature for Civil Lawyers?** in Albert Jan van den Berg Arbitration Advocacy in Changing Times ICCA Congress Series No 15 Kluwer Law International (2011) Cited in: para 41
FAI Med Guidelines	The Finland Arbitration Institute (FAI) **FAI Mediation Guidelines** 2024 Cited in: paras 19, 49
Feit	Michael Feit **Art 3 CISG** in Christoph Brunner UN-Kaufrecht – CISG Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980. Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht 2nd Edition SHK – Stämpflis Handkommentar (2014) Cited in: paras 117, 120

Ferrari I

Franco Ferrari

Overview of Case Law on the CISG's International Sphere of Application and Its Applicability Requirements (Articles 1(1)(a) and (b))

International Business Law Journal

Volume 8 (2002)

pp 961–975

Cited in: para 105

Ferrari II

Franco Ferrari

Art 7 CISG

in Barbara Grunewald

Münchener Kommentar zum Handelsgesetzbuch

5th Edition Volume 5

C. H. Beck (2021)

Cited in: para 115

Ferrari III

Franco Ferrari

Arts 1, 2, 3, 6 CISG

in Ingeborg Schwenzer / Peter Schlechtriem / Ulrich Schroeter

Kommentar zum UN-Kaufrecht (CISG)

7th Edition

C. H. Beck (2019)

Cited in: paras 115, 125, 132, 138

Ferrari IV

Franco Ferrari

Wesentliche Vertragsverletzung nach UN-Kaufrecht – 25 Jahre Artikel 25 CISG

Internationales Handelsrecht

Volume 5 Issue 1 (2005)

pp 1–9

Cited in: para 169

Fogt	Morten M. Fogt **The Knowledge Test under the CISG – a Global Threefold Distinction of Negligence, Gross Negligence and de Facto Knowledge** Journal of Law and Commerce Volume 34 Issue 1 (2015) pp 23–111 Cited in: paras 139, 151
French Proposal	French National Assembly **Bill, No 133** Assemblée Nationale Proposition de loi, n° 133 23 July 2024 Cited in: para 74
George	Anya George **Chapter 8: Good Faith and Pre-arbitral Alternative** Dispute Resolution Requirements ASA Special Series Volume 49 (2024) pp 117–128 Cited in: para 33
Gillette/Walt	Clayton P. Gillette / Steven D. Walt **The UN Convention on Contracts for the International Sale of Goods: Theory and Practice** 2nd Edition Cambridge University Press (2016) Cited in: paras 101, 103, 119, 138, 152

Godhe I	Aleksander Godhe **Tribunal Duties and the Exclusion of Evidence in International Arbitration: the Tug-of-War of Fairness and Efficiency** Arbitration International Volume XX Issue XX (2024) pp 1–15 Cited in: para 64
Godhe II	Aleksander Godhe **Chapter 5: Exclusionary Rules of Evidence in International Arbitration** in Patrik Schöldström / Christer Danielsson Stockholm Arbitration Yearbook 2024 Kluwer Law International (2024) pp 75–98 Cited in: para 65
Gore	Kiran N. Gore **Practical Insights on Arbitral Procedure** Kluwer Law International (2024) Cited in: para 74
Gregoire	Nicolas Gregoire **Evidentiary privileges in International Arbitration: A Comparative Analysis under English, American, Swiss and French law** Schulthess Verlag (2016) Cited in: para 75

Gruber	Urs P. Gruber **Art 7 CISG** in Hartmut Oetker Münchener Kommentar zum Bürgerlichen Gesetzbuch 9th Edition Volume 4/1 C. H. Beck (2024) Cited in: para 120
Hachem I	Pascal Hachem **Arts 1, 3, 4, 10 CISG** in Peter Schlechtriem / Ingeborg Schwenzer Commentary on the UN Convention on the International Sale of Goods 5th Edition Oxford University Press (2022) Cited in: paras 105, 108, 125, 166
Hachem II	Pascal Hachem **Applicability of the CISG – Articles 1 and 6** in Yesim Atamer / Petra Butler / Ingeborg Schwenzer Current Issues in the CISG and Arbitration Eleven International Publishing (2014) Cited in: para 108
Haller	Heiko Haller **The Without Prejudice Privilege** SchiedsVZ Volume 9 Issue 6 (2011) pp 313–319 Cited in: para 59

Heinrich	Dieter Heinrich **Vorvertrag, Optionsvertrag, Vorrechtsvertrag : Eine dogmatisch-systematische Untersuchung der vertraglichen Bindungen vor und zu einem Vertragsschluß** De Gruyter (2020) Cited in: para 127
Heitzmann	Pierre Heitzmann **Confidentiality and Privileges in Cross-Border Legal Practice: The Need for a Global Standard?** ASA Bulletin Volume 26 Issue 2 (2008) pp 205–240 Cited in: para 55
Henriksen et al	Søren Henriksen / Catherine Schutz / Alexandra M. O. Junge **Chapter 8: Legal Privilege Disputes in International Arbitration in Denmark: A Practical Introduction** in Patrik Schöldström / Christer Danielsson Stockholm Arbitration Yearbook 2024 Kluwer Law International (2024) Cited in: para 75
Henriques	Duarte G. Henriques **The Role of Good Faith in Arbitration: Are Arbitrators and Arbitral Institutions Bound to Act in Good Faith?** ASA Bulletin Volume 33 Issue 3 (2015) pp 514–532 Cited in: para 63

Herber/Czerwenka	Rolf Herber / Beate Czerwenka **Art 10 CISG** Internationales Kaufrecht – Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf C. H. Beck (1991) Cited in: para 109
Honnold/Flechtner	John Honnold / Harry Flechtner **Honnold's Uniform Law for International Sales under the 1980 United Nations Convention** 5th Edition Kluwer Law International (2021) Cited in: paras 103, 108, 134, 167
Huber I	Peter Huber **§ 3. Rules on the scope of application** in Peter Huber / Alastair Mullis The CISG: A New Textbook for Students and Practitioners Sellier. European Law Publishers (2007) Cited in: para 116
Huber II	Peter Huber **Art 3 CISG** in Hartmut Oetker Münchener Kommentar zum Bürgerlichen Gesetzbuch 9th Edition Volume 4/1 C. H. Beck (2024) Cited in: paras 122, 125

Hurni	Christoph Hurni **Art 8 CISG** in Christoph Brunner UN-Kaufrecht – CISG Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980. Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht 2nd Edition SHK – Stämpflis Handkommentar (2014) Cited in: paras 139, 152
IBA Commentary	IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration **Commentary on the revised text of the** **2020 IBA Rules on the Taking of Evidence in International Arbitration** International Bar Association (2021) Cited in: paras 70, 78, 81
IBA Report	IBA Arbitration Committee Task Force on Privilege in International Arbitration **Report on Uniform Guidelines on** **Privilege in International Arbitration** International Bar Association (2024) Cited in: para 55
IBA Report Annex 5	IBA Arbitration Committee Task Force on Privilege in International Arbitration **Report on Uniform Guidelines on** **Privilege in International Arbitration, Annex 5 – Settlement Privilege** International Bar Association (2024) Cited in: para 55

Kahn

Philippe Kahn

La Convention de Vienne du 11 avril 1980 sur les contrats de vente internationale de marchandises

Revue internationale de droit comparé

Volume 33 Issue 4 (1981)

pp 951–986

Cited in: paras 116, 121

Karollus

Martin Karollus

UN-Kaufrecht. Eine systematische Darstellung für Studium und Praxis

Springer Verlag (1991)

Cited in: para 116

Khodykin et al

Roman M. Khodykin / Carol Mulcahy / Nicholas Fletcher

A Guide to the IBA Rules on the Taking of Evidence in International Arbitration

Oxford University Press (2019)

Cited in: paras 55, 56, 59

Koller

Christian Koller

3. Kapitel: Die Schiedsvereinbarung

in Christoph Liebscher / Paul Oberhammer / Walter H. Rechberger

Schiedsverfahrensrecht Band I

Springer Verlag (2011)

Cited in: para 19

Kreße

Bernhard Kreße

Artikel 1, 3 CISG

in Hans T. Soergel / Bernhard Kreße

BGB Schuldrecht CISG

14th Edition Volume 11

Verlag W. Kohlhammer (2020)

Cited in: paras 116, 119

Kröll	Stefan Kröll **German Country Analysis: Good Faith, Formation, and Conformity of Goods** in Larry A. DiMatteo International Sales Law: A Global Challenge Cambridge University Press (2014) Cited in: para 155
Kröll et al	Stefan Kröll / Loukas A. Mistelis / Pilar Perales Viscasillas **Introduction to the CISG** in Stefan Kröll / Loukas A. Mistelis / Pilar Perales Viscasillas UN Convention on Contracts for the International Sale of Goods (CISG) 2nd Edition C. H. Beck (2018) Cited in: paras 155, 159
Kubalczyk	Anna Magdalena Kubalczyk **Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation** Groningen Journal of International Law Volume 3 Issue 1 (2015) pp 85–109 Cited in: para 78
Kühner	Detlev Kühner **The Revised IBA Rules on the Taking of Evidence in International Arbitration** Journal of International Arbitration Volume 27 Issue 6 (2010) pp 667–677 Cited in: para 41

Kuitkowski	Diana Kuitkowski **The Law Applicable to Privilege Claims in International Arbitration** Journal of International Arbitration Volume 32 Issue 1 (2015) pp 65–106 Cited in: para 75
Kunzlik	Peter Kunzlik **Making the Market Work for the Environment: Acceptance of (some) "Green" Contract Award Criteria in Public Procurement** Journal of Environmental Law Volume 15 Issue 2 (2003) pp 175–201 Cited in: para 161
Lenz	Sebastian Lenz **Die Zulässigkeit der Abwahl zwingenden nationalen Rechts in Schiedsvereinbarungen – Eine Untersuchung am Beispiel der §§ 305–310 BGB** 2017 Cited in: para 171
Lew et al	Julian D. M. Lew / Loukas A. Mistelis / Stefan Kröll **Comparative International Commercial Arbitration** Kluwer Law International (2003) Cited in: paras 20, 37, 65, 171
Lorenz	Manuel Lorenz **Art 4 CISG** in Wolfgang Witz / Hanns-Christian Salger / Manuel Lorenz Internationales Einheitliches Kaufrecht Verlag Recht und Wirtschaft (2000) Cited in: para 168

Machherndl/Milacher	Peter Machherndl / Lena Milacher **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 Christian Klausegger / Peter Klein / Florian Kremslehner / Alexander Petsche / Nikolaus Pitkowitz / Irene Welser / Gerold Zeiler Austrian Yearbook on International Arbitration 2024 Manz'sche Verlags- und Universitätsbuchhandlung (2024) Cited in: para 81
Magnus I	Ulrich Magnus **Arts 2, 3, 6 CISG** in Julius von Staudinger / Ulrich Magnus J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht Otto Schmidt (2018) Cited in: paras 119, 125, 131, 132, 134
Magnus II	Ulrich Magnus **The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases** Journal of Law and Commerce Volume 25 Issue 423 (2005) pp 423–436 Cited in: para 169
Mahnken	Volker Mahnken **Anlagenverträge und UN-Kaufrecht** Internationales Handelsrecht Volume 20 Issue 6 (2020) pp 237–246 Cited in: para 121

Mankowski	Peter Mankowski **Article 2 CISG** in Peter Mankowski Commercial Law: Article-by-Article Commentary Nomos (2019) Cited in: para 132
Marghitola	Reto Marghitola **Document Production in International Arbitration** Kluwer Law International (2015) Cited in: para 78
Maskow	Dietrich Maskow **Art 3 CISG** in Fritz Enderlein / Dietrich Maskow / Heinz Strohbach Internationales Kaufrecht Haufe (1991) Cited in: para 119
Masser et al	Anna Masser / Kendall Pauley / Peter Plachy / Lucia Raimanova **Special Mechanisms for Obtaining Evidence** in Amy C. Kläsener / Martin Magál / Joseph E. Neuhaus The Guide to Evidence in International Arbitration 2nd Edition Global Arbitration Review (2023) Cited in: para 83

Meier	Fabian Meier **Art 10 CISG** in Christoph Brunner UN-Kaufrecht – CISG Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980. Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht 2nd Edition SHK – Stämpflis Handkommentar (2014) Cited in: para 109
Meyer-Hauser/Sieber	Bernhard F. Meyer-Hauser / Philipp Sieber **Attorney Secrecy v Attorney–Client Privilege in International Commercial Arbitration** Arbitration: The International Journal of Arbitration, Mediation and Dispute Management Volume 73 Issue 2 (2007) pp 148–188 Cited in: para 75
Mirzayev	Ruslan Mirzayev **International Investment Protection Regime and Criminal Investigations** Journal of International Arbitration Volume 29 Issue 1 (2012) pp 71–105 Cited in: para 83

Mistelis	Loukas A. Mistelis **Art 1 CISG** in Stefan Kröll / Loukas A. Mistelis / Pilar Perales Viscasillas UN Convention on Contracts for the International Sales of Goods (CISG) 2nd Edition C. H. Beck (2018) Cited in: para 115
Mistelis/Raymond	Loukas A. Mistelis / Anjanette Raymond **Art 3 CISG** in Stefan Kröll / Loukas A. Mistelis / Pilar Perales Viscasillas UN Convention on Contracts for the International Sales of Goods (CISG) 2nd Edition C. H. Beck (2018) Cited in: para 119
Mitrovic	Milivoje Mitrovic **Dealing with the Consequences of Non-Compliance with Mandatory Pre-Arbitral Requirements in Multi-Tiered Dispute Resolution Clauses. The Swiss Approach and a Look Across the Border** ASA Bulletin Volume 37 Issue 3 (2019) pp 559–579 Cited in: paras 25, 28, 34
Mökesch	Annabelle Mökesch **Attorney-Client Privilege in International Arbitration** Oxford University Press (2017) Cited in: paras 71, 78

Münch	Joël B. Münch **Art 1 CISG** in Maximilian Herberger / Michael Martinek / Helmut Rüßmann / Stephan Weth / Markus Würdinger juris PraxisKommentar BGB 10th Edition Juris (2023) Cited in: para 101
Nettlau et al	Harry Nettlau / Zachary O'Dell / Till Hackstein **An Examination of the 2020 Revision of the IBA Rules of Evidence** SchiedsVZ Volume 19 Issue 6 (2021) pp 315–322 Cited in: para 41
Ng	Nicole S. Ng **Illegally Obtained Evidence in International Arbitration: Protecting the Integrity of the Arbitral Process** Singapore Academy of Law Journal Volume 32 Issue 2 (2020) pp 747–770 Cited in: para 83
O'Connell	W. Scott O'Connell **Privilege Pierced by Ongoing or Future Wrongful Conduct: The Crime-Fraud Privilege Exception is Broader Than You Think** Defense Counsel Journal Volume 91 Issue 1 (2024) pp 1–7 Cited in: para 73

Oetiker/Walz	Christian Oetiker / Claudia Walz **Non-Compliance with Multi-Tier Dispute Resolution Clauses in Switzerland** ASA Bulletin Volume 35 Issue 4 (2017) pp 872–887 Cited in: para 33
Ortner/Novak	Helmut Ortner / Marion Novak **Chapter II: The Arbitrator and the Arbitration Procedure, Determining the Standard of Proof in International Arbitration Guidance for a Tailored Approach** in Christian Klausegger / Peter Klein / Florian Kremslehner / Alexander Petsche / Nikolaus Pitkowitz / Irene Welser / Gerold Zeiler Austrian Yearbook on International Arbitration 2024 Manz'sche Verlags- und Universitätsbuchhandlung (2024) Cited in: para 88
Parisi	Sabrina Parisi **Shedding Light on Shady Suits: Applying the Crime-Fraud Exceptions to the Attorney-Client Privilege and Work Product Doctrine to Bad-Faith Litigation** The American Criminal Law Review Volume 60 Issue 2 (2023) pp 447–479 Cited in: para 73

Paulsson	Jan Paulsson **Jurisdiction and Admissibility** in Gerald Aksen Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner ICC Publishing (2005) Cited in: para 25
Paulsson/Petrochilos	Jan Paulsson / Georgios Petrochilos **UNCITRAL Arbitration** Kluwer Law International (2018) Cited in: para 62
Pearson-Wenger	Sabrina Pearson-Wenger **Good Faith in International Commercial Arbitration:** **Its Application by Arbitral Tribunals to the Parties' Contract and the Arbitration Agreement** Kluwer Law International (2024) Cited in: para 63
Pereira	Cesar Pereira **Application of the CISG to International Government Procurement of Goods** in Ingeborg Schwenzer 35 Years CISG and beyond Eleventh International Publishing (2015) Cited in: paras 131, 141, 161

Pereira et al	Cesar Pereira / Leonardo F. Souza-McMurtrie / Lorenzo Galan **CISG and Government Contracts:** **Regulating International Public Procurement** https://dailyjus.com/world/2024/11/cisg-and-government-contracts-regulating-international-public-procurement (last retrieved: 12 December 2024) Cited in: para 174
Pert/Couzens	Alison Pert / Meda Couzens **The Law of Treaties** in Emily Crawford / Alison Pert / Ben Saul Public International Law Cambridge University Press (2023) Cited in: para 174
Piltz	Burghard Piltz **Internationales Kaufrecht.** **Das UN-Kaufrecht in praxisorientierter Darstellung** 2nd Edition C. H. Beck (2008) Cited in: paras 116, 168
Poljanec	Kristijan Poljanec **Legal Theory of Auction** 1st Edition Routledge (2023) Cited in: paras 132, 133

Poljanec et al

Kristijan Poljanec / Ivan Tot / Zvonimir Slakoper

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

in Zvonimir Slakoper / Ivan Tot

EU Private Law and the CISG

Routledge (2022)

Cited in: paras 131, 134

Rajski

Janusz Rajski

Art 10 CISG

in Massimo Bianca / Michael J. Bonell

Commentary on the International Sales Law:

The 1980 Vienna Sales Convention

Giuffrè (1987)

Cited in: para 106

Rivkin

David Rivkin

The Revised IBA Rules on the Taking of Evidence

Contemporary Issues in International Arbitration and Mediation:

The Fordham Papers

Volume 5 (2012)

pp 212–219

Cited in: para 41

Rubinstein/Guerrina

Javier H. Rubinstein / Britton B. Guerrina

The Attorney-Client Privilege and International Arbitration

Journal of International Arbitration

Volume 18 Issue 6 (2001)

pp 587–602

Cited in: para 78

Rutz	Fabien V. Rutz **Admissibility of Unlawfully Obtained Evidence in International Arbitration in Switzerland** Arbitration Essay Series SAA (Swiss Arbitration Academy) CAS (2020) Cited in: para 91
Saenger	Ingo Saenger **Art 6 CISG** in Franco Ferrari / Eva-Maria Kieninger / Peter Mankowski / Karsten Otte / Ingo Saenger / Götz Schulze / Ansgar Staudinger Internationales Vertragsrecht 3rd Edition C. H. Beck (2018) Cited in: para 138
Salmon	Jean Salmon **1969 Vienna Convention: Article 26 Pacta sunt servanda** in Oliver Corten / Pierre Klein The Vienna Conventions on the Law of Treaties Oxford University Press (2011) Cited in: para 174
Santacroce	Fabio G. Santacroce **Navigating the Troubled Waters between Jurisdiction and Admissibility: An Analysis of which Law should govern Characterization of Preliminary Issues in International Arbitration** Arbitration International Volume 33 Issue 4 (2017) pp 539–570 Cited in: paras 25, 28

Savola	Mika Savola **Guide to the Finnish Arbitration Rules (English)** Kauppakamari (2015) Cited in: para 41
SCC Note	Yi Ting Sam **SCC practice note on Mediation Proceedings 2017–2022** SCC Arbitration Institute (2024) Cited in: para 51
Schlechtriem/Butler	Peter Schlechtriem / Petra Butler **UN Law on International Sales.** **The UN Convention on the International Sale of Goods** Springer Verlag (2009) Cited in: paras 116, 166
Schmidt-Kessel	Martin Schmidt-Kessel **Art 8 CISG** in Peter Schlechtriem / Ingeborg Schwenzer Commentary on the UN Convention on the International Sale of Goods 5th Edition Oxford University Press (2022) Cited in: para 140

Schmitt	Moritz Schmitt **Art 6 CISG** in Christoph Brunner UN-Kaufrecht – CISG Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980. Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht 2nd Edition SHK – Stämpflis Handkommentar (2014) Cited in: para 138
Schroeter I	Ulrich G. Schroeter **Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG) –** **Zugleich Anmerkung zu Appellationsgericht Basel-Stadt vom 24.8.2018– ZB.2017.20 (AG.2018.557)** Internationales Handelsrecht Volume 19 Issue 4 (2019) pp 133–136 Cited in: para 131
Schroeter II	Ulrich G. Schroeter **Internationales UN-Kaufrecht** 7th Edition Mohr Siebeck (2022) Cited in: paras 166, 167, 168

Schroeter III	Ulrich G. Schroeter **Art 25** in Ingeborg Schwenzer / Peter Schlechtriem / Ulrich G. Schroeter Kommentar zum UN-Kaufrecht (CISG) 7th Edition C. H. Beck (2019) Cited in: para 169
Schroeter IV	Ulrich G. Schroeter **Art 29 CISG** in Peter Schlechtriem / Ingeborg Schwenzer Commentary on the UN Convention on the International Sale of Goods 5th Edition Oxford University Press (2022) Cited in: para 169
Schumacher	Hubertus Schumacher **Beweiserhebung im Schiedsverfahren** Manz'sche Verlags- und Universitätsbuchhandlung (2011) Cited in: para 41
Shaughnessy	Patricia Shaughnessy **Dealing with Privileges in International Commercial Arbitration** Scandinavian Studies in Law Volume 51 (2007) pp 451–470 Cited in: para 42

Siehr I	Kurt Siehr **Arts 1, 4, 6 CISG** in Heinrich Honsell Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG) 2nd Edition Springer Verlag (2010) Cited in: paras 105, 138, 168
Siehr II	Kurt Siehr **Internationales Privatrecht – Deutsches und europäisches Kollisionsrecht für Studium und Praxis** C. F. Müller Verlag (2001) Cited in: para 159
Sourgens et al	Frédéric G. Sourgens / Kabir Duggal / Ian A. Laird **Evidence in International Investment Arbitration** Oxford University Press (2018) Cited in: paras 83, 88
Spohnheimer	Frank Spohnheimer **Art 2 CISG** in Stefan Kröll / Loukas A. Mistelis / Pilar Perales Viscasillas UN Convention on Contracts for the International Sales of Goods (CISG) 2nd Edition C. H. Beck (2018) Cited in: para 134
Sun/Willems	Wei Sun / Melanie Willems **Arbitration in China** Kluwer Law International (2024) Cited in: para 54

Swiss Amendment	Amending Decree of the Swiss Federal Assembly **Art 167a ZPO (Swiss Civil Procedure Code)** Änderungserlass der Schweizerischen Bundesversammlung **Art 167a ZPO (Schweizerische Zivilprozessordnung)** 17 March 2023 Cited in: para 74
UNCITRAL Guide	United Nations Commission on International Trade Law (UNCITRAL) **Guide to Enactment and Use of the** **UNCITRAL Model Law on International** Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) 2022 Cited in: para 47
UNCITRAL Notes	United Nations Commission on International Trade Law (UNCITRAL) **UNCITRAL Notes on Mediation** 2021 Cited in: para 46
UNCITRAL YB	United Nations Commission on International Trade Law (UNCITRAL) **Yearbook, Volume II** 1971 Cited in: para 121
C. Witz	Claude Witz **Champ d'application matérielle** **Vente internationale de marchandises** 2nd Edition Dalloz (2023) Cited in: para 125

W. Witz

Wolfgang Witz

Art 10 CISG

in Wolfgang Witz / Hanns-Christian Salger / Manuel Lorenz

Internationales Einheitliches Kaufrecht

Verlag Recht und Wirtschaft (2000)

Cited in: para 105

Waincymer

Jeffrey Waincymer

Procedure and Evidence in International Arbitration

Kluwer Law International (2012)

Cited in: para 83

Wälde

Thomas W. Wälde

Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State-Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms

Arbitration international

Volume 26 Issue 1 (2010)

pp 3–42

Cited in: para 83

Welser/De Berti

Irene Welser / Giovanni De Berti

Best Practices in Arbitration:

A Selection of Established and Possible Future Best Practices

in Christian Klausegger / Peter Klein / Florian Kremslehner / Alexander Petsche / Jenny Power / Irene Welser /Zeiler Gerold

Austrian Yearbook on International Arbitration 2010

Manz'sche Verlags- und Universitätsbuchhandlung (2010)

Cited in: para 41

Zuberbühler et al	Tobias Zuberbühler / Dieter Hofmann / Christian Oetiker / Thomas Rohner **IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration** 2nd Edition Schulthess Juristische Medien AG (2022) Cited in: paras 59, 78, 93
Zuppi	Alberto Zuppi **Art 8 CISG** in Stefan Kröll / Loukas A. Mistelis / Pilar Perales Viscasillas UN Convention on Contracts for the International Sales of Goods (CISG) 2nd Edition C. H. Beck (2018) Cited in: para 140
Zykin	Ivan Zykin **Art 1 CISG** in Mark Boguslavsky [Марк Богуславский] Vienna Convention on on Contracts for the International Sale of Goods Moscow Legal Lit [Москва Юридическая литература] (1994) Cited in: paras 105, 107

Index of Cases

ICJ

Corfu Channel Case	ICJ (International Court of Justice) Judgment 9 April 1949 ICJ Reports 1944, p 4 United Kingdom of Great Britain and Northern Ireland v Albania Cited in: para 83

Arbitral Awards

Biwater Case	ICSID (International Centre for Settlement of Investment Disputes) Final Award 24 July 2008 ICSID Case No ARB/05/22 Biwater Gauff Ltd v Tanzania Cited in: para 30
ECE Case	PCA (Permanent Court of Arbitration) Award 19 September 2013 PCA Case No 2010-5 ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic Cited in: para 83

Glamis Gold Case	ICSID (International Centre For Settlement of Investment Disputes) Decision on Requests for Production of Documents and Challenges to Assertions of Privilege 21 April 2006 Glamis Gold Ltd v The United States of America Cited in: para 147
Glencore Case	ICSID (International Centre For Settlement of Investment Disputes) Award 27 August 2019 ICSID Case No ARB/16/6 Glencore International AG and C.I. Prodeco SA v Republic of Colombia Cited in: paras 83, 88
ICC Case 10256	ICC (International Chamber of Commerce) Interim Award 8 December 2000 ICC Case No 10256 Cited in: para 19
ICC Case 12732	ICC (International Chamber of Commerce) Partial Award ICC Case No 12732 Cited in: para 88
ICC Case 15313/JEM/GZ	ICC (International Chamber of Commerce) Final Award 16 January 2009 Publishing Group "Expres" Ltd v Solna Offset AB ICC Case No 15313/JEM/GZ CISG-online No 4185 Cited in: para 117

ICC Case 2020-008	ICC (International Chamber of Commerce) Final Award 2016 ICC Case No 2020-008 Cited in: para 63
ICC Case 2023-052	ICC (International Chamber of Commerce) Partial Award 2023 ICC Case No PA 2023-052 Cited in: para 155
ICC Case 7153	ICC (International Chamber of Commerce) Award 1992 ICC Case No 7153 Cited in: para 119
ICC Case 7565	ICC (International Chamber of Commerce) Award 1994 ICC Case No 7565 Cited in: para 155
ICC Case 8073	ICC (International Chamber of Commerce) Final Award 27 November 1995 ICC Case No 8073 Cited in: para 19

ICC Case 9781	ICC (International Chamber of Commerce) Interim Award 2000 ICC Case No 9781 Cited in: paras 105, 120, 155
Industrial Plants Case	Ad hoc Arbitration 17 December 2019 CISG-online No 5221 Cited in: para 120
Lao Case	ICSID (International Centre for Settlement of Investment Disputes) Ruling on Motion to Amend the Provisional Measures Order 30 May 2014 ICSID Case No ARB(AF)/12/6 Lao Holdings NV v Lao People's Democratic Republic Cited in: para 83
Libananco Case	ICSID (International Centre For Settlement of Investment Disputes) Decision on Preliminary Issues 23 June 2008 ICSID Case No ARB/06/8 Libananco Holdings Co Ltd v Republic of Turkey Cited in: para 91
Methanex Case	Ad-hoc Arbitration Final Award of the Tribunal on Jurisdiction and Merits 3 August 2005 Methanex Corporation v The United States of America Cited in: paras 83, 91

Noble Ventures Case	ICSID (International Centre For Settlement of Investment Disputes) Final Award 12 October 2005 ICSID Case No ARB/01/11 Noble Ventures Inc v Romania Cited in: para 41
Park Plus Case	Swiss Arbitration Centre Final Award 21 September 2023 500146-2022 CISG-online No 7020 Park Plus Inc v Sotefin SA Cited in: para 155
Railroad Case	ICSID (International Centre For Settlement of Investment Disputes) Decision on Provisional Measures 15 October 2008 ICSID Case No ARB/07/23 Railroad Development Corporation v Republic of Guatemala Cited in: para 41
SCC Case 1992	SCC (Stockholm Chamber of Commerce) Interim Award 17 July 1992 Cited in: para 19

Australia

Arrow Case	Federal Court of Australia 1 September 2004 [2004] FCA 1131 Arrow Pharmaceuticals Ltd v Merck & Co Inc Cited in: para 75
Bonython Case	Privy Council on appeal from the High Court of Australia 30 October 1950 165 CLR 197 Bonython and Others Plaintiffs v The Commonwealth of Australia Defendant Cited in: para 158

Austria

Citroen Case	Oberster Gerichtshof (OGH) Austrian Supreme Court 4 July 2007 2 Ob 95/06v CISG online 1560 Cited in: para 138

Canada

Baffinland Case	Court of Appeal of Ontario 13 April 2023 2023 ONCA 245 (CanLII) Baffinland Iron Mines LP v Tower-EBC GP/SENC Cited in: para 22

Jones Case	Court of Appeal for Ontario 29 April 2024 COA-22-CV-0053 Jones v Quinn Cited in: para 127
Railway Case	Supreme Court of Canada 21 January 1997 [1997] 1 SCR 5 Burlington Northern Railroad Co v Canadian National Railway Co Cited in: para 25

England & Wales

Bradford & Bingley Case	House of Lords Opinions of the Lords of Appeal for Judgement 12 July 2006 [2006] UKHL 37 Bradford & Bingley Plc v Rashid (FC) Cited in: para 56
Emirates Case	High Court of Justice 1 July 2014 [2014] EWHC 2014 Prime Mineral Exports Ltd v Emirates Trading Agency LLC Cited in: para 33

Fiona Trust Case	House of Lords Opinions of the Lords of Appeal for Judgement 17 October 2007 [2007] UKHL 40 Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others under name of Premium Nafta Products Ltd (20th Defendant) & Others v Fili Shipping Co Ltd (14th Claimant) & Others Cited in: paras 19, 25
Hall Case	High Court of Justice 27 June 2005 [2005] EWHC 3110 (Ch) Hall and Another v Pertemps Group Ltd and Another Cited in: para 55
NWA Case	High Court of Justice 8 October 2021 [2021] EWHC 2666 (Comm) NWA & FSY v NVF & others Cited in: paras 20, 25, 26, 33
Ohpen Operations Case	High Court of Justice 16 August 2019 [2019] EWHC 2246 Ohpen Operations UK Ltd v Invesco Fund Cited in: para 20
Rush Case	House of Lords Opinions of the Lords of Appeal for Judgement 3 November 1988 [1989] AC 1280 Rush & Tompkins Ltd v Greater London Council Cited in: para 55, 56

Sierra Leone Case	High Court of Justice 15 February 2021 [2021] EWHC 286 (Comm) SL Mining Ltd v Republic of Sierra Leone Cited in: paras 26, 30
Sudbrook Case	House of Lords Opinions of the Lords of Appeal for Judgement 8 July 1982 [1983] 1 AC 444 Sudbrook Trading Estate Ltd v Eggleton Cited in: para 127
Unilever Case	Court of Appeal 28 October 1999 [2000] 1 W.L.R. 2436 Unilever Plc v The Procter & Gamble Co Cited in: paras 56, 59

France

Artificial Fish Case	Cour d'appel de Paris Paris Court of Appeal First Chamber 3 July 2018 16/21302 CISG-online No 5622 Cited in: para 109

Cybernetix Case	Cour d'appel d'Aix-en-Provence Court of Appeal Aix-en-Provence Second Chamber 4 June 2015 2015/210 / 13/18045 CISG-online No 2705 Cybernetix SA v CD Systems de Columbia SA Cited in: para 155
MCBA Case	Cour de Cassation Court of Cassation of France First Civil Chamber 1 February 2023 75 F-D MCBA Holding, HHDU Holding, THDU Holding and others v HD Holding and others Cited in: para 26
Musgrave Case	Cour de Cassation French Court of Cassation Commercial, Financial and Economic Chamber 17 December 1996 95-20.273 CISG-online No 220 Musgrave Ltd v Ceramique Culinaire de France SA Cited in: para 155
Opel France Case	Cour de Cassation French Court of Cassation Commercial, Financial and Economic Chamber 8 June 1999 96-18108 Cited in: para 33

Vijay Case	Cour d'appel de Paris Paris Court of Appeal First Chamber 28 June 2016 15/03504 Société Vijay Construction Ltd v Société Eastern European Engineering Ltd Cited in: para 26

Germany

Cobalt Sulfate Case	Bundesgerichtshof (BGH) German Supreme Court 3 April 1996 BGH VIII ZR 51/95 CISG-online No 135 Cited in: para 169
Designer Clothes Case	Oberlandesgericht Köln Court of Appeal Cologne 14 October 2002 16 U 77/01 CISG-online No 709 Cited in: para 169
Fire Trucks Case	Oberlandesgericht Stuttgart Court of Appeal Stuttgart 18 April 2011 5 U 199/10 CISG-online No 2226 Cited in: para 119

Floor Coverings Case	Oberlandesgericht Stuttgart Court of Appeal Stuttgart 28 February 2000 5 U 118/99 CISG-online No 583 Cited in: para 105
Hearing Implants Case	Landgericht Aachen District Court Aachen 14 May 1993 43 O 136/92 CISG-online No 86 Cited in: para 168
Insolvency Case	Bundesgerichtshof (BGH) German Supreme Court 9 August 2016 BGH I ZB 1/15 Cited in: para 26
Protective Masks Case	Landgericht Bonn District Court Bonn First Chamber for Civil Matters 19 October 2022 1 O 188/21 CISG-online No 6384 Cited in: para 159

Twisted Yarn Case	Oberlandesgericht Frankfurt am Main Court of Appeal Frankfurt am Main 30 August 2000 9 U 13/00 CISG-online No 594 Cited in: para 156
Window Plant Case	Oberlandesgericht München Court of Appeal Munich 3 December 1999 23 U 4446/99 CISG-online No 585 Cited in: paras 117, 120

Hong Kong

C v D Case	Hong Kong Court of Final Appeal 30 June 2023 [2023] HKCFA 16 C v D Cited in: paras 24, 26
Westco Case	High Court of the Hong Kong Court of First Instance 3 February 1998 [1998] HKCFI 946 Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd Cited in: paras 19, 24, 26

Italy

Officine Case	Tribunale di Forlì District Court Forlì 16 February 2009 CISG-online No 1780 Officine Maraldi SpA v Intessa BCI SpA, National Bank of Egypt, H.U. Gas Filling Plant Aswan-Usama Abdallah and Co Cited in: para 119
Premier Steel Case	Corte Suprema di Cassazione Italian Supreme Court 19 June 2000 448 CISG-online No 1317 Premier Steel Service Sdn Bhd v Oscam SpA Cited in: para 117
Rheinland Case	Tribunale di Vigevano District Court Vigevano 12 July 2000 405 CISG-online No 493 Rheinland Versicherungen v Atlarex Srl and Allianz Subalpina SpA Cited in: paras 120, 155

Philippines

Dockyard Case	Kataas-taasang Hukuman ng Pilipinas Supreme Court of the Philippines 25 July 2019 G.R. No. 202050 Philippine National Oil Company and PNOC Dockyard & Engineering Cooperation v Keppel Philippines Holdings Inc Cited in: para 127

Singapore

Ernest Ferdinand Case	Court of Appeal of Singapore 22 March 2018 [2018] SGCA 16 Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar SA and others and other appeals Cited in: para 56
Mariwu Case	Court of Appeal of Singapore 10 October 2006 [2006] SGCA 37 Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and Another Cited in: para 55

Spain

Carmelitas Case	Tribunal Supremo Supreme Court of Spain First Chamber 25 November 2011 STS 878/2011 MV Morillo Velarde Asesores SL v Monasterio de Carmelitas Descalzas de San Jose de Medina de Riosce Cited in: para 127

Switzerland

Centerless Grinding Machine Case	Obergericht des Kantons Bern Court of Appeal Canton Bern 17 March 1999 CISG-online No 702 Cited in: para 119
Coffee Machine Case	Schweizerisches Bundesgericht / Tribunal fédéral / Tribunale federale / Tribunal federal Swiss Federal Supreme Court 6 June 2007 4A_18/2007 Cited in: para 33

Electricity Meters Case	Schweizerisches Bundesgericht / Tribunal fédéral / Tribunale federale / Tribunal federal Swiss Federal Supreme Court 28 May 2019 4A_543/2018 CISG-online No 4463 Cited in: paras 106, 155
Farm Transfer Case	Schweizerisches Bundesgericht / Tribunal fédéral / Tribunale federale / Tribunal federal Swiss Federal Supreme Court 4 August 2005 5C_39/2005 Cited in: para 127
IWB Case	Schweizerisches Bundesgericht / Tribunal fédéral / Tribunale federale / Tribunal federal Swiss Federal Supreme Court 28 May 2019 4A_543/2018 CISG-online No 4463 IWB Industrielle Werke Basel v Iskraemeco dd et al Cited in: para 131
Royal Feinsprit Case	Bezirksgericht der Saane / Tribunal d'arrondissement de la Sarine Court of First Instance Saane 20 February 1997 T 171/95 CISG-online No 426 Cited in: para 105

Scrubs Case	Schweizerisches Bundesgericht / Tribunal fédéral / Tribunale federale / Tribunal federal Swiss Federal Supreme Court 16 May 2011 4A_46/2011 Cited in: para 30
Spinning Plant Case	Schweizerisches Bundesgericht / Tribunal fédéral / Tribunale federale / Tribunal federal Swiss Federal Supreme Court 16 July 2012 4A_753/2011 CISG-online No 2371 Cited in: paras 117, 119, 120
Tube Case	Obergericht des Kantons Zug Court of Appeal Canton Zug 19 December 2006 OG 2006/19 CISG-online No 1427 Cited in: para 119
Wheel Loader Case	Obergericht des Kantons Zug Court of Appeal Canton Zug 1st Department for Civil Matters 23 February 2023 Z1 2022 6 CISG-online No 6313 Cited in: para 155

The Netherlands

Lotamblau Case	Hoge Raad der Nederlanden Supreme Court of the Netherlands 12 July 2024 22/04619 Lotamblau Investments BV, formerly Capabel Solutions Works BV v Project Partner Search Beheer BV Cited in: paras 19, 30

United States

Asante Case	United States District Court for the Northern District of California 30 July 2001 164 F.Supp.2d 1142 CISG-online No 616 Asante Technologies Inc v PMC-Sierra Inc Cited in: para 108
BG v Argentina Case	Supreme Court of the United States 5 March 2014 134 S.Ct. 1198 BG Group Plc v Republic of Argentina Cited in: paras 25, 26, 28
Bittaker Case	United States Court of Appeals for the Ninth Circuit 6 June 2003 331 F.3d 715 Bittaker v Woodford Cited in: para 73

Builders Case	United States Court of Appeals for the First Circuit 17 January 2003 211 F.Supp.2d 230 HIM Portland LLC v Devito Builders Inc Cited in: para 20
Cook Case	United States District Court of the Eastern District of California 5 September 1990 132 F.R.D. 548 Cook v Yellow Freight System Inc Cited in: para 56
Cumberland Case	United States District Court for the District of Maine 7 February 2002 2002 WL 193323 Cumberland York Distributors v Coors Brewing Company Cited in: para 30
DirecTV Case	United States District Court of the District of Kansas 23 November 2004 224 F.R.D. 677 DirecTV Inc v Robert Puccinelli et al Cited in: para 56
Fluor Case	United States District Court of the District of Texas 18 May 2001 147 F. Supp. 2d 648 Fluor Enterprises Inc v Solutia Inc Cited in: para 19

Generica Case	United States Court of Appeals for the Seventh Circuit 29 September 1997 125 F.3d 1123 Generica Ltd v Pharmaceutical Basics Inc Cited in: para 65
Golden State Foods Case	United States District Court for the Central District of California 26 June 2014 2014 WL 2931127 Golden State Foods Corp v Columbia/Okura LLC Cited in: para 20
Gramercy Holdings Case	United States District Court for the Southern District of New York 11 September 2023 2023 WL 5917624 CISG-online No 6477 Gramercy Holdings I LLC v Matec Srl et al Cited in: para 155
Hanwha Case	United States District Court for the Southern District of New York 18 January 2011 2010 WL 11713072 CISG-online No 2178 Hanwha Corp v Cedar Petrochemicals Inc Cited in: para 139
Hoteles Condado Case	United States Court of Appeals for the Sixth Circuit 31 May 1985 763 F.2d 34 Hoteles Condado Beach, La Concha & Convention Center v Union De Tronquistas Local 901 Cited in: para 65

Kamper Case	Connecticut Supreme Court 31 May 1994 229 Conn. 465 White v Kamper Cited in: para 20
Lingerie Case	United States District Court for the Southern District of New York 23 August 2016 2016 WL 4532911 CISG-online No 1667 Shantou Real Lingerie Manufacturing Co Ltd v Native Group International Ltd Cited in: para 155
Paxton Case	Supreme Court of Texas 3 February 2017 509 S.W.3d 247 Ken Paxton v City of Dallas Cited in: para 73
Pittston Case	United States District Court for the District of New Jersey 4 August 1992 143 F.R.D. 66 Pittston Company v Allianz Insurance Co et al Cited in: para 147
TeeVee Case	United States District Court for the Southern District of New York 23 August 2006 2006 WL 2463537 CISG-online No 1272 TeeVee Toons Inc v Gerhard Schubert GmbH Cited in: para 139

Treibacher Case	United States Court of Appeals for the Eleventh Circuit 12 September 2006 464 F.3d 1235 CISG-online No 1278 Treibacher Industrie AG v Allegheny Technologies Inc et al Cited in: para 140
Vision Systems Case	Superior Court of the State of Massachusetts 28 February 2005 464 F.3d 123 CISG-online No 1005 Vision Systems Inc v EMC Corp Cited in: para 109