20th Annual Willem C. Vis East International Commercial Arbitration Moot

MEMORANDUM FOR RESPONDENT

PCA CASE NO. 2022-76

On Behalf of:	Against:
Equatoriana Geoscience Ltd	**Drone Eye plc**
1907 Calvo Rd	1899 Peace Avenue
Oceanside, Equatoriana	Capital City, Mediterraneo
– RESPONDENT –	– CLAIMANT –

Counsel for RESPONDENT

Simon Ferel • Thomas Hamelin • Elisa Henke

Charlene Lorenz • Clemens Wendt • Liese-Lotte Wieprecht

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INDEX OF ABBREVIATIONS AND DEFINITIONS

Aircraft	Aircraft in the sense of Art. 2(e) CISG
Arbitration Agreement	Arbitration Agreement concluded between CLAIMANT and RESPONDENT
Art.	article
Arts.	articles
CEO	Chief Executive Officer
CLAIMANT	Drone Eye plc
Convention	UN Convention on Contracts for the International Sale of Goods
COO	Chief Operating Officer
ed.	editor
eds.	editors
ESC	Equatorianian Supreme Court
et al.	et alia; and others (Latin)
et seq.	et sequens; and the following one (Latin)
et seqq.	et sequentia; and the following ones (Latin, pl.)
EUR	Euro
Ex.	Exhibit
Hawk Drone	Hawk Eye 2020 Unmanned Air Vehicle
i.e.	id est; that is (Latin)
ibid.	ibidem; in the same place (Latin)
id.	idem; the same (Latin)
Kestrel Drone	Kestrel Eye 2010 Unmanned Air Vehicle
kg	Kilogram
m	meter
Minister	Minister of Natural Resources and Development at the time of contracting, Mr Barbosa

Mio	Million
NA	CLAIMANT's Notice of Arbitration
No.	Number
p.	page
para.	paragraph
paras.	paragraphs
Parliament	Equatorianian Parliament
Parties	Parties to the present arbitration (PCA CASE NO. 2022-76)
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
pp.	pages
PSA	Purchase and Supply Agreement
RESPONDENT	Equatoriana Geoscience Ltd
RNA	RESPONDENT's Answer to the Notice of Arbitration
SOE	State-owned entity
Special Chamber	Special Chamber of the Equatorianian Criminal Court
Tribunal	Arbitral Tribunal
UAS	Unmanned Aerial Systems
v	versus

INDEX OF LEGAL TEXTS

14 CFR	Title 14 Aeronautics and Space of the U.S. Code of Federal Regulations
2019/947	2019/947 EU Regulation on the rules and procedures for the operation of unmanned aircraft
ASA	Equatorianian Aviation Safety Act
BJC	Belgian Judicial Code
CAAV	Commercial Arbitration Act of Venezuela
CAR	Civil Aviation Regulation of South Africa
CASR	Brazilian Civil Aviation Special Regulation No. 94
CG	Constitution of Ghana
CISG	United Nations Convention on Contracts for the International Sale of Goods
Code Civil	French Code Civil
DAL	Danubian arbitration law (verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments)
EAL	Egyptian Arbitration Law
ECA	Equatorianian Contract Act
EC	Equatorianian Constitution
Hague Evidence Convention	Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, 1970
IC	Iranian Constitution as adopted in 1979 and amended on 28 July 1989
ICCA	International Commercial Contract Act of Equatoriana
Model Law	UNCITRAL Model Law on International Commercial Arbitration
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

PCA Rules	Permanent Court of Arbitration Rules 2012
RAR	Chinese Regulations on the Administration of real-name Registration of Civil Unmanned Aircraft
UNCAC	United Nations Convention against Corruption
PICC	UNIDROIT Principles of International Commercial Contracts 2016
VCLT	Vienna Convention on the Law of Treaties

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STATEMENT OF FACT

The parties to this dispute are Drone Eye plc (**CLAIMANT**) and Equatoriana Geoscience Ltd (**RESPONDENT**), jointly referred to as the **Parties**. CLAIMANT is a producer of Unmanned Aerial Systems (**UAS**) founded and based in Mediterraneo. RESPONDENT is an Equatorianian state-owned entity (**SOE**) engaging in geo-science exploration as a prerequisite for future development in Northern Equatoriana. The present dispute revolves around the question whether the Parties concluded a valid Purchase and Supply Agreement (**PSA**).

2010	CLAIMANT developed the Kestrel Eye 2010 (**Kestrel Drone**).
2017	CLAIMANT started developing the Hawk Eye 2020 (**Hawk Drone**).
Mar 2020	RESPONDENT opened a tender process for the supply and servicing of state-of-the-art drones to explore the natural resources of Northern Equatoriana. CLAIMANT was one of two bidders entering contract negotiations.
Sep 2020	CLAIMANT repurchased three Kestrel Drones from an insolvent customer.
Nov 2020	The PSA was negotiated. The leading negotiators were CLAIMANT's former COO, Mr Bluntschli, and RESPONDENT's former COO, Mr Field.
3 Nov 2020	The two COOs finalised terms of the PSA during a meeting at Mr Bluntschli's private beach house. During this meeting, the terms of the PSA were drastically altered. In the end, CLAIMANT undertook the delivery of six drones of its newest model and to provide extensive maintenance services for them.
29 Nov 2020	Mr Bluntschli was arrested for private tax evasion after his private offshore accounts were revealed. These accounts were used to transfer large sums to three other unknown offshore accounts.
1 Dec 2020	The PSA was signed by CLAIMANT, RESPONDENT and Mr Barbosa, the Minister of Natural Resources and Development as the responsible minister. The PSA included an arbitration clause (**Arbitration Agreement**) referencing the arbitration rules of the Permanent Court of Arbitration (**PCA Rules**).
Feb 2021	CLAIMANT launched its new drone model, the Hawk Drone.
28 Feb 2022	Mr Field was arrested by Equatorianian authorities. He has become one of the key figures in one of the largest corruption scandals in Equatorianian history. He is scheduled to be brought before a special chamber of the Equatorianian criminal court next year.
30 May 2022	Following these events, RESPONDENT terminated the PSA for misrepresentation and corruption.

SUMMARY OF ARGUMENT

RESPONDENT was tricked into concluding the PSA by corruption and fraudulent misrepresentation. RESPONDENT launched a Call for Tender for state-of-the art drones to explore the natural resources in the Northern Part of Equatoriana. CLAIMANT saw this as an opportunity to sell its deprecated Kestrel Drones, which were the last remaining stock of Kestrel Drones. CLAIMANT was already developing the Hawk Drone, a far more sophisticated model, but misled RESPONDENT into buying its outdated Kestrel Drones. Moreso, the Parties COOs negotiated the PSA's final terms in a private meeting at the Beach House of CLAIMANT's COO. Both CLAIMANT's and RESPONDENT's COO were later arrested for private tax evasion and corruption respectively.

Issue 1: The Arbitral Tribunal has no jurisdiction to hear the dispute

The Parties never concluded a valid Arbitration Agreement. RESPONDENT has always made clear that it was not authorised to enter into arbitration without the required parliamentary approval pursuant to Art. 75 Equatorianian Constitution (**EC**). Despite lacking approval, CLAIMANT now forces a valid Arbitration Agreement where there is none.

Issue 2: The proceedings should be stayed or bifurcated

Even if the Tribunal's jurisdiction could be established, the arbitral proceedings should be stayed or bifurcated. The Equatorianian Special Chamber (**Special Chamber**) is better suited to uncover the facts regarding corruption. Staying the proceedings to await the Special Chamber's findings is necessary to produce an enforceable award in line with public policy.

Issue 3: The CISG does not govern the Purchase and Supply Agreement

The PSA is not governed by the CISG. CLAIMANT seems to fully disregard the CISG's exclusion of aircraft and instead submits arbitrary criteria to determine what constitutes the term Aircraft. However, Aircraft means all airborne vehicles. The CISG further excludes the PSA under Art. 3(2) CISG, as the PSA is preponderantly a service agreement. Lastly, the Parties chose to exclude the CISG in accordance with Art. 6 CISG by choosing Equatorianian law to govern the PSA.

Issue 4: RESPONDENT can rely on Equatorianian law to avoid the PSA

The avoidance of the PSA is governed by Art. 3.2.5 of the International Commercial Contract Act of Equatoriana (**ICCA**). CLAIMANT cannot hide its fraudulent misrepresentation behind the provisions of the CISG, as they are excluded pursuant to Art. 4(a) CISG. Art. 4 CISG excludes matters concerning the validity of a contract from the CISG's scope and refers them to national law. CLAIMANT must be held liable for its fraudulent conduct under the applicable Equatorianian ICCA. Moreover, the contractual avoidance regime in Art 18 PSA is irrelevant for the present case, as the Parties never intended to govern cases of fraud in the PSA and were in any case not capable of doing so.

ISSUE 1: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION TO HEAR THE DISPUTE

1. The road to arbitration is paved by the consent of the parties. Until both Parties have agreed to walk down this road, the Tribunal must deny its jurisdiction in line with the competence-competence doctrine in Art. 16(1) Danubian Arbitration Law (**DAL**) [*Born, p. 275*]. In the present case, the Parties never validly consented to arbitration. Despite this, CLAIMANT now tries to elbow its way into this arbitration and thereby violates fundamental principles of law. CLAIMANT alleges that the Parties concluded a valid Arbitration Agreement on 1 December 2020 [*MfC, para. 16*]. However, Parliament never approved the Arbitration Agreement, rendering it invalid. CLAIMANT was aware that *"parliamentary approval was required"* [*ibid.*]. Furthermore, any Arbitration Agreement would be tainted by corruption. Additionally, another CLAIMANT might have construed the amendment on 27 May 2021 as a new Arbitration Agreement. This is misconceived as such an Arbitration Agreement would lack parliamentary approval and would be formally invalid. Thus, the Tribunal should deny its jurisdiction as the Parties neither concluded a valid Arbitration Agreement on 1 December 2020 [**A**] nor on 27 May 2021 [**B**].

A. No valid Arbitration Agreement was concluded on 1 December 2020

2. The Arbitration Agreement contained in Art. 20 PSA states that *"[t]he place of arbitration shall be […] Danubia"* [*Ex. C2, p. 12*]. To render an enforceable award, the Tribunal must adhere to the provisions of the arbitral seat and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**NYC**) [*Born, pp. 255 et seq.; Platte, p. 312*]. Under these provisions, the award may be set aside or its enforcement denied if the Tribunal lacks jurisdiction [*Arts. 34(2), 36(1) DAL; Art. V(1)(a) NYC*]. Presently, the Tribunal lacks jurisdiction as the Parties did not conclude a valid Arbitration Agreement. The Arbitration Agreement is invalid as it lacks the necessary parliamentary approval [**I**]. Additionally, the Arbitration Agreement is invalid as CLAIMANT induced the conclusion of the Arbitration Agreement by bribery [**II**].

I. The Arbitration Agreement is invalid as it lacks parliamentary approval

3. CLAIMANT's legal counsel agrees that Art. 75 EC requires parliamentary approval for arbitration agreements to be valid but deems the provision inapplicable. [*Ex. C7, p. 18, para. 6*]. However, contrary to what CLAIMANT argues, Art. 75 EC is applicable as Equatorianian law governs the dispute [**1**]. Even if Danubian Law would be applicable, Art. 75 EC would apply as an overriding mandatory provision [**2**]. Further, Parliament never validly approved the Arbitration Agreement as required under Art. 75 EC [**3**]. Lastly, RESPONDENT is not barred from invoking Art. 75 EC [**4**].

1. Art. 75 EC applies under any conflict-of-law rules the Tribunal may apply

4. CLAIMANT argues that *"the law of Danubia as the lex loci arbitri applies and governs the arbitration agreement"* [*MfC, para. 39*]. There is no requirement for parliamentary approval of arbitration agreements

under Danubian law [*PO2, p. 48, para. 32*]. In light of this, it is pivotal for the Tribunal to determine the applicable law. There are no conflict-of-law rules specifically pertaining to matters of authority [*Born, p. 672; Fouchard/Gaillard/Goldman, pp. 316 et seq.; Ragno, p. 174*]. CLAIMANT argues that the applicable conflict-of-law rule is that of substantive validity, i.e. the law of the Arbitration Agreement [*MfC, para. 42*]. However, the adequate conflict-of-law rule is that of capacity [**a**]. Even if the Tribunal were to apply the conflict-of-law rules governing substantive validity or subjective arbitrability, Equatorianian law would apply [**b**].

a. Equatorianian law applies under the conflict-of-law rule governing capacity

5. The approval requirement set out in Art. 75 EC is a matter of capacity. It is broadly recognised that provisions restricting the ability of certain types of entities to enter into contracts must be characterised as capacity [*Born, p. 776; Kronke et al., p. 218; Redfern/Hunter, paras. 2.38 et seq.; cf. Wolff, p. 284*]. Art. 75 EC prohibits specific kinds of parties, i.e. SOEs from concluding arbitration agreements [*RNA, p. 30, para. 21*]. Thus, Art. 75 EC is a provision dealing with capacity.

6. Therefore, the applicable provision for determining the applicable law is Art. V(1)(a) NYC. It stipulates that the law governing the capacity of the parties is the law *"applicable to them"*. Applying each party's national law, ensures legal certainty and protects the parties from unexpectedly being subjected to foreign law [*Fouchard/Gaillard/Goldmann, p. 24; Ragno, p. 166*]. With respect to companies, the law *"applicable to them"* is the law of their seat or incorporation [*Blessing, p. 181; Kronke et al., p. 220; Wolff, p. 286; cf. Ragno, p. 165*]. Both the seat as well as the incorporation of RESPONDENT are in Equatoriana [*cf. NA, p. 4, para. 2*]. Therefore, the Tribunal should apply Equatorianian law including Art. 75 EC.

b. Even if the Tribunal were to apply the conflict-of-law rules governing either substantive validity or subjective arbitrability, Equatorianian law would apply

7. CLAIMANT submits that *"since the Parties only chose the law that governs the contract and not the law that will govern the Arbitration Agreement, the Tribunal should apply the law of Danubia"* [*MfC, para. 42*]. At the pre-award-stage, both the substantive validity and subjective arbitrability are determined by the law governing the arbitration agreement [*M v M, p. 619; NTPC Case, pp. 4 et seq.; San Carlo Case; Born, pp. 523 et seqq.; Hanotiau, p. 155; Moses, p. 76; cf. Redfern/Hunter, para. 3.11*]. The law of the arbitration agreement is the law the parties expressly or impliedly chose [*Enka v Chubb, para. 35; Born, p. 554; Lew, p. 143; Redfern/Hunter, paras. 3.13 et seq.; cf. Cruz City Case, para. 19*]. Unless the contrary is indicated, a choice of law governing the substantive contract is presumed to extend to the arbitration agreement [*Enka v Chubb, paras. 40, 170, 224; Insurance Case, para. 12; Kabab-Ji , para. 35; Sulamérica Case, paras. 11, 26; Lew/Mistelis/Kröll, p. 120; Redfern/Hunter, para. 3.12*]. Even though the arbitration clause is legally separate from the substantive contract, commercial business parties

generally do not make this distinction [*Enka v Chubb, para. 53; Kabab-Ji , para. 35; Sulamérica Case, para. 11; Bantekas, p. 2; Lew, p. 143*]. This is because both contracts are contained in one uniform contractual document [*ibid.*]. The presumption that the choice-of-law extends to the arbitration agreement ensures legal certainty and clarity for all parties involved [*Enka v Chubb, para. 53*].

8. According to Art. 20(d) PSA, the *"agreement is governed by the law of Equatoriana"* [*Ex. C2, p. 12*]. This, undisputedly, does not constitute an explicit choice-of-law for the Arbitration Agreement [*MfC, para. 40*]. As there are no indications to the contrary, the Parties impliedly chose the law of the PSA to govern the Arbitration Agreement. This is because the Arbitration Agreement and the choice of law clause are both contained in one provision named *"Dispute Resolution and Applicable Law"* [*Ex. C2, p. 12*]. Thus, even if the Tribunal were to apply the conflict-of-law rules governing either substantive validity or subjective arbitrability, Equatorianian law would apply.

2. Even if Danubian law applied, Art. 75 EC applies as an overriding mandatory provision

9. Art. 75 EC is an overriding mandatory provision applying even in case Danubian law governs the Arbitration Agreement. Overriding mandatory provisions supersede any applicable law in order to protect important political or economic interests of a state [*Born, pp. 2897 et seq.; Renner, p. 49; Shehata, p. 383*].

10. In principle, overriding mandatory provisions of the *lex fori* are binding to state courts due to public policy [*Fouchard/Gaillard/Goldman, p. 848*]. Contrary to state courts, arbitral tribunals have no binding *lex fori* which would be relevant for determining overriding mandatory provisions [*Bentolila, p. 120*; *Renner, p. 102*]. Rather, tribunals rely solely on the choices made by the parties [*Bentolila, p. 120; Shehata, p. 397*]. Therefore, it is broadly acknowledged that a tribunal has to apply overriding mandatory provisions of the law chosen by the parties to govern the merits [*Framework Case, p. 251; Bentolila, p. 120; Bermann, p. 7; Fouchard/Gaillard/Goldman, p. 848; Shehata, p. 396*].

11. Art. 75 EC is an overriding mandatory provision. To protect essential national interests, Art. 75 EC requires SOEs to obtain parliamentary approval before entering into foreign seated arbitration agreements concerning administrative contracts [*RNA, p. 30, para. 21*]. This is evidenced by Art. 75 EC being part of the Equatorianian Constitution [*PO2, p. 48, para. 31*]. Provisions similar to Art. 75 EC also protect essential national interests [*Naftchali/Soltanzadeh, p. 9; Shahri et al., pp. 758, 763*]. Considering this, Art. 75 EC applies as it is an overriding mandatory provision.

3. Parliament never granted the necessary approval required by Art. 75 EC

12. RESPONDENT did not validly enter into the Arbitration Agreement with parliamentary approval. Art. 75 EC requires *"express [parliamentary] approval based on a formal vote"* [*PO2, p. 48, para. 34*]. However, Parliament never voted to approve the Parties' Agreement [*PO2, p. 47, para. 30*]. Despite this, CLAIMANT argues that the *"arbitration clause is […] valid notwithstanding the fact that there has been*

no explicit approval by the Parliament" [*NA, p. 7, para. 17*]. However, approval was necessary under Art. 75 EC [**a**] and Parliament never validly approved the Agreement [**b**].

a. The Arbitration Agreement required parliamentary approval

13. Under Art. 75 EC, SOEs require parliamentary approval for arbitration agreements concerning *"administrative contracts"* [*RNA, p. 30, para. 21*]. Another CLAIMANT may contend that the PSA is not an *"administrative contract"* and thus, no approval would be necessary.

14. However, the PSA is an administrative contract. Such contracts are defined as *"contracts relating to public works or other contracts concluded for administrative purposes"* [*ibid.*]. The PSA is not concerned with actual construction of infrastructure, but is a necessary step for the construction of public infrastructure in Northern Equatoriana [*RNA, p. 28, para. 5*]. RESPONDENT planned to collect data with the Kestrel Drones to explore that region [*Ex. C1, p. 9*]. By selling data to third parties, RESPONDENT would enable the exploitation of Northern Equatoriana's resources, thereby aiding the region's development [*ibid*]. The funds procured would be invested in the development of infrastructure in that region [*Ex. C5, p. 16; RNA, p. 28, para. 5*]. This step is central for the state's task of aiding structural development in Northern Equatoriana [*Ex. C5, p. 16; RNA, p. 28, para. 5*]. Consequently, the PSA constitutes an administrative contract.

b. Parliament did not validly approve the Arbitration Agreement

15. Another CLAIMANT might argue that Parliament validly approved the Arbitration Agreement impliedly or retroactively. However, Parliament could not give its approval impliedly [**aa**]. Even if the Tribunal were to find otherwise, Parliament failed to give valid approval as it cannot retroactively approve to submit to arbitration in the present case [**bb**].

aa. Parliament could not approve the Arbitration Agreement impliedly

16. Another CLAIMANT might invoke Art. II NYC alleging that the provision's requirements for the form of arbitration agreements supersede the form requirement set out in Art. 75 EC.

17. Art. II(2) NYC states that *"an arbitration clause contained in a contract or an arbitration agreement shall be in writing"*. In contrast, Art. 75 EC requires *"express approval based on a formal vote"* [*PO2, p. 48, para. 34*]. CLAIMANT argues that the in-writing requirement supersedes the express approval requirement in Art. 75 EC. Its argument hinges on the presumption that Art. 75 EC is a form requirement for the arbitration agreement. However, Art. 75 EC instead applies to the approval to conclude arbitration agreements. In contrast, Art. II(2) NYC applies only to the conclusion of arbitration agreement itself [*Kronke et al., p. 9; Wolff, p. 148; cf. FCN v Rocco, p. 380*]. It is national law that governs approval or authorisation necessary for the conclusion of arbitration agreements [*ibid.*]. Hence, Art. II(2) NYC does not supersede the formal vote requirement in Art. 75 EC.

bb. Alternatively, Parliament could not approve the Arbitration Agreement retroactively

18. Parliament did not approve the Arbitration Agreement retroactively because it was not able to do so. Under Art. 75 EC, Parliament has to grant its approval prior to the conclusion of the arbitration agreement [*PO2, p. 47, para. 30*]. Retroactive approval can only be granted in exceptional cases [*PO2, p. 48, para. 34*]. This high threshold has been met only once, when a power outage forced a debate to be cancelled right before the signature ceremony in an *"uncontroversial matter"* [*PO2, p. 47, para. 30*].

19. Unlike this exceptional case, no extraordinary circumstances were present in the case at hand. One week prior to the scheduled debate on 27 November 2020 some parliamentarians had contracted Covid [*RNA, p. 29, para. 13*]. Moreso, the power outage compelled Parliament to reschedule on short notice, whereas the Covid-infections occurred a week prior to the planned debate [*id., para. 13; PO2, p. 47, para. 30*]. Following this, the debate on the Arbitration Agreement was deliberatly withdrawn due to uncertainty of whether a majority could be secured [*RNA, p. 29, para. 13*]. This is fundamentally different to the impossibility to hold a debate as it was not unforseen.

20. Furthermore, the Arbitration Agreement is not an *"entirely uncontroversial matter"* [*PO2, p. 47, para. 30*]. Parliament had already heavily criticised foreign arbitration as *"decisions of foreign private persons without any democratic legitimization"* [*Ex. C7, p. 15, para. 19*]. This reflects the critical stance of Parliament regarding the participation of SOEs in foreign arbitration [*RNA, p. 29, para. 13; NA, p. 6, para. 16*]. Therefore, the matter was not uncontroversial. Thus, as the present case is dissimilar to the exceptional case, retroactive approval could not be granted.

4. RESPONDENT is not barred from invoking Art. 75 EC

21. CLAIMANT submits that *"the Tribunal should not allow the RESPONDENT to invoke its national law to render the arbitration agreement invalid."* [*MfC, para. 57*]. However, contrary to CLAIMANT's submission, RESPONDENT is not estopped from invoking Art. 75 EC [**a**]. Further, RESPONDENT is not barred from invoking Art. 75 EC by the principle that a state cannot invoke its own law [**b**]. Lastly, RESPONDENT is not bound under the principle of apparent authority [**c**].

a. RESPONDENT is not estopped from invoking the lack of parliamentary approval

22. CLAIMANT submits that *"RESPONDENT is estopped from asserting that parliamentary approval is needed to validate the arbitration clause"* as *"there is a contradiction between the statements made by the RESPONDENT"* [*MfC, para. 44*]. However, RESPONDENT never confirmed the Arbitration Agreement's validity but rather emphasised the need for parliamentary approval [*Ex. C7, p. 18, para. 9*]. For a party to be estopped from questioning an arbitration agreement's validity, it must have made a clear, unconditional and unambiguous statement to the contrary [*Green Power Case, para. 325*]. Furthermore, nobody can *"have confidence in representations or statements coming from an organ which manifestly lacks the competence to make them"* [*Duke Energy Case, para. 247*].

23. CLAIMANT's argument lacks merit on two grounds. First, it is correct that the Minister expressed to Mr Bluntschli *"that the parliamentary approval was merely a formality and would be granted"* [*MfC, para. 45*]. However, the Minister at no point unambiguously stated the Arbitration Agreement's validity. Rather, he emphasised that approval was necessary and had not yet been granted [*Ex. C7, p. 18, para. 9*]. Moreover, the Minister is not a member of Parliament and is thus manifestly incapable of replacing parliamentary approval [*PO2, p. 48, paras. 35, et seq.*]. Second, it is correct that RESPONDENT asked to include the UNCITRAL Transparency Rules on 27 May 2021 [*NA, p. 6, para. 16*]. However, this request is not a clear unambiguous statement that the Arbitration Agreement is valid since RESPONDENT reminded CLAIMANT of *"the remaining outstanding issues"* with the Arbitration Agreement [*Ex. C9, p. 22*]. RESPONDENT did not clearly and unambiguously state that the Arbitration Agreement was valid and is therefore not estopped from contesting its validity.

b. RESPONDENT is not barred from invoking Art. 75 EC by the principle that a state cannot invoke its own law

24. CLAIMANT contends that *"an SOE might not invoke its own law to contest"* the validity of the Arbitration Agreement [*MfC, paras. 54 et seq.*]. There exists no provision that prohibits this in the jurisdictions in the present case [*PO2, p. 48, para. 33*] Despite this, CLAIMANT invokes the principle that a state may not invoke its own law [*MfC, paras. 54 et seq.*]. The principle derives from the idea that allowing a state to invoke its own law would constitute an abuse of rights contrary to *pacta sunt servanda* and good faith [*Born, pp. 777 et seq.; cf. Cheng/Entchev, para. 30*]. While this principle may persuasively apply to a state itself, SOEs are recognised as independent entities [*Böckstiegel, p. 100; Notes, p. 101*]. Only under specific circumstances may this principle apply to SOEs [*Böckstiegel, pp. 100 et seq.*].

25. Accordingly, RESPONDENT cannot be treated as a state for the purposes of this principle [**aa**]. Furthermore, RESPONDENT invoking Art. 75 EC is not an abuse of rights contrary to good faith [**bb**]. Even if the principle were to apply to RESPONDENT, the exceptions of Art. 46 Vienna Convention on the Law of Treaties (**VCLT**) would allow RESPONDENT to rely on Art. 75 EC [**cc**].

aa. RESPONDENT cannot be treated as a state for the purposes of the principle

26. SOEs are treated as part of the state if they are *"mantled by the cloak of sovereignty"* and entitled to the same *"privileges and immunities"* as the state [*Notes, p. 101; cf. Böckstiegel, p. 101*]. This is only the case if the SOE acts with sovereign authority on behalf of the state, i.e. in matters of taxation, policing or expropriation [*Böckstiegel, p. 101*]. RESPONDENT does not enjoy any special privileges nor is it tasked with state functions exercising sovereign power [*PO2, p. 44, para. 6*]. RESPONDENT is collecting data and selling it equally to private and governments entities [*id., para. 7*]. Just as other private companies, RESPONDENT does so for profit [*ibid.*]. In conclusion, RESPONDENT cannot be treated like a state as it does not act with sovereign authority.

bb. RESPONDENT invoking its domestic law is not an abuse of rights

27. RESPONDENT invoking Art. 75 EC does not constitute an abuse of rights and thus is in line with *pacta sunt servanda* and good faith. The rationale behind the principle that a state may not invoke its own law is that it would be an *"abuse [of] legal forms and rights to avoid its obligations"* [*Böckstiegel, p. 101*]. When it comes to applying this to state corporations such a case of abuse of rights occurs when *"a state makes use of its powers of control and of legislation [...] in order to evade the obligations of that state enterprise in a contract and an arbitration clause"* [*ibid.*]. The relevant provision is Art. 75 EC which stipulates that SOEs require special authorisation to submit to foreign litigation or arbitration when the disputes concern administrative contracts [*RNA, p. 30, para. 21*].

28. First, provisions such as Art. 75 EC are not aimed at avoiding arbitration agreements in general but to protect the states interest in supervising SOEs when entering foreign seated litigation and arbitration [*Fouchard/Gaillard/Goldman, p. 317*; *Art. 139 IC, supra paras. 9 et seqq.*].

29. Second, the provision only provides for invalidity of agreements under narrow criteria. Parliament must approve the submission to arbitration only if it is an administrative contract relating to public works [*PO2, p. 47, para. 29*]. Therefore, Art. 75 EC is not contrary to *pacta sunt servanda* as arbitration agreements with SOEs are still generally binding.

30. RESPONDENT relying on Art. 75 EC is not an abuse of rights as the state did not legislate in order to avoid the obligations of SOEs. Therefore, the principle invoked by CLAIMANT is inapplicable.

cc. Even if the principle were to apply, Art. 46 VCLT would exclude it in this case

31. Even if the principle that a state may not invoke its own law were to apply in the case at hand, in accordance with Art. 46 VCLT RESPONDENT could nonetheless rely on Art. 75 EC. If the Tribunal were to apply this principle, it must be the case that RESPONDENT is to be treated like a state for the purposes the VCLT. The VCLT has been ratified in all relevant jurisdictions [*PO2, p. 49, para. 50*]. Art. 46 VCLT stipulates that a state may be barred from invoking its own law *"unless that violation was manifest and concerned a rule of its internal law of fundamental importance"* (*emphasis added*). As this exception is met, Art. 46 VCLT empowers RESPONDENT to invoke its domestic law. It was manifestly obvious to CLAIMANT that Art. 75 EC was violated [**i**] and Art. 75 EC is a provision of fundamental importance [**ii**].

i. The violation of Art. 75 EC was manifestly obvious

32. Art. 46 VCLT allows state entities to invoke their own national law if the violation of the latter was evident for any reasonable contractual partner [*Paulsson, p. 98*; *Villiger, p. 590*].

33. Art. 75 EC is not a mere administrative regulation, ordinary statutory or customary law, but a prominent constitutional provision, which is evidenced by state practice. In Equatoriana, there is a history of Parliament insisting on this formal approval procedure [*NA, p. 7, para. 16; RNA, p. 29, para. 13; PO2, p. 47., para. 30*]. Moreover, the approval process is and has been subject to broad

press coverage [Ex. *C7, pp. 18 et seq., para. 12*]. Therefore, it is commonly known that arbitration agreements with foreign seats are subject to the requirements under Art. 75 EC. This is further evidenced by the fact that even a foreign company, such as CLAIMANT, was *"aware of the requirement in the Equatorian Constitution that requires parliamentary approval"* [*MfC, para. 45*] and knew about a lack of approval [*Ex. C7, p 18*]. Thus, it is obvious to any reasonable contractual partner that withheld parliamentary approval manifestly violates Art. 75 EC.

ii. Art. 75 EC is a provision of fundamental importance

34. A state may rely on provisions of its own law which are of fundamental importance [*Paulsson, p. 98; Villiger, p. 592*]. Internal democratic approval requirements, such as Art. 75 EC, constitute provisions of fundamental importance [*Korzilius, p. 611*]. They protect a state's sovereignty and special public interests in SOEs [*supra paras. 9 et seqq., 27 et seqq.*]. This strategy to protect state interests is mirrored in common law and civil law jurisdictions alike [*Art. 1676(2) BJC; Art. 1 EAL; Art. 181(5) CG; Art. 139 IC; Art. 4 CAAV*].

35. In light of this, Art. 75 EC is a recognised provision of fundamental importance. Thus, even if the principle that a state may not invoke its own law were to apply, the exception of Art. 46 VCLT is met. Accordingly, the principle does not bar RESPONDENT from relying on Art. 75 EC.

c. RESPONDENT is not bound by apparent authority

36. CLAIMANT contends that the Arbitration Agreement is valid as it was signed by the relevant Minister [*NA, p. 7, para. 17*]. However, the Minister lacks any power to replace parliamentary approval [*PO2, p. 48, para. 34*]. Now, CLAIMANT attempts to rely on apparent authority, arguing that the Ministers signature renders the parliamentary approval superfluous [*cf. MfC, para. 52*].

37. Apparent authority only binds a party to the act of an unauthorised representative if the latter has created the appearance of authorisation [*Soerni v ASB, p. 358; Born, p. 1538; Fouchard/Gaillard/Goldman, p. 252*]. No such appearance is created where the other party could not have been unaware of the lack of authority [*Lizardi Case; Fouchard/Gaillard/Goldman, p. 252*].

38. In the present case, CLAIMANT knew that the Arbitration Agreement would require parliamentary approval under Art. 75 EC to be valid [*Ex. C7, p. 18, paras. 6 et seq.*]. CLAIMANT entered into the PSA on 1 December 2020 with full knowledge that the Minister signed the PSA *"without a previous approval by Parliament"* despite knowing it to be necessary [*ibid.*]. Consequently, CLAIMANT knew about the lack of authority. Thus, it cannot invoke apparent authority.

39. Contrary to CLAIMANT's allegations, RESPONDENT can rely on Art. 75 EC.

II. The Arbitration Agreement is substantively invalid

40. After CLAIMANT's COO was arrested, RESPONDENT learned that CLAIMANT engaged in corruption [*Ex. C3, p. 13, para. 2*]. Nonetheless, CLAIMANT contends that *"regardless of whether there is corruption,*

the Tribunal has jurisdiction since there is no evidence" [*MfC, para. 24*]. Grasping at straws, CLAIMANT submits that *"despite the corruption, the arbitration clause will remain unaffected due to the separability doctrine"* [*ibid.*]. However, the Arbitration Agreement is invalid due to corruption [**1**]. This result is not contradicted by the doctrine of separability [**2**].

1. The Arbitration Agreement is invalid due to corruption

41. Already in RESPONDENT's Call for Tender, it specified that *"any unauthorized payments or promised other benefits to anyone involved in this tender process"* would entitle RESPONDENT *"to terminate the contract"* [*Ex. C1, p. 9*]. This was repeated in Art. 18 PSA [*Ex. C2, p. 11*]. CLAIMANT now submits that due to a lack of evidence RESPONDENT could not have terminated the PSA for corruption, which would lead to its invalidity [*MfC para. 24*]. However, due to its clandestine nature, comprehensive evidence of corruption is hard to come by. Exploiting this, CLAIMANT tries to dismiss evidence of its corruption by alleging that RESPONDENT bears the burden of proof but failed to provide evidence [*ibid.*]. Instead, it is CLAIMANT who bears the burden of proof.

42. The bribing party is the only one capable of providing direct evidence of corruption [*Mills, pp. 295 et seq.*; *cf. Lamm/Pham/Moloo, p. 701*]. The bribed individual typically acts independently and seeks to conceal the undue payments resulting in a lack of evidence [*WDF v Kenya, para. 169*; *Llamzon, p. 21; Mills, pp. 295 et seq.*]. Not remedying this evidentiary imbalance would seriously risk fighting corruption [*Lagergren Award, p. 52; Lamm/Pham/Moloo, p. 701*]. Therefore, circumstantial evidence for probable corruption is sufficient to invalidate the arbitration agreement [*ICC Case 6497, p. 72; Greenberg/Foucard, para. 57; Horvath/Khan, p. 132; Hwang/Lim, pp. 22, 28*]. If the presenting party has fulfilled this requirement, the burden of proof then lies on the other party to disprove corruption [*ICC Case 6497, p. 72; Karkey Case, para. 497; Hwang/Lim, p. 28; Lamm/Pham/Moloo, p. 701; Rose, p.* 213]. In the present case, RESPONDENT has provided sufficient evidence to support its claims of corruption.

43. First, Mr Field arranged for RESPONDENT to enter into the contract despite another bidder offering better terms [*Ex. R1, p. 32, para. 3*]. During the negotiations by Mr Field, the original scope of the contract was drastically increased [*id., para. 5*]. The maintenance fees were also *"completely overpriced"* [*id., para. 6*]. These unfavourable changes occurred only after Mr Field had spent the weekend at Mr Bluntschli's beach house, the latter being CLAIMANT's chief negotiator [*id., para. 4*].

44. Second, since the conclusion of the PSA, both main negotiators have been arrested. CLAIMANT's Mr Bluntschli has been found to own secret offshore accounts from which multiple payments were made [*RNA, p. 29, para. 16; PO2, p. 49, para. 40*]. Mr Field also owns offshore accounts which have previously been used to receive bribes and are the reason for his arrest [*Ex. C5, p. 16; Ex. R2, p. 33*].

45. As this evidence makes it probable that the contract was induced by corruption, it is on CLAIMANT to prove that there was no corruption. Yet, CLAIMANT has failed to do so [*MfC, para. 30*]. Thereby

RESPONDENT had cause to terminate the Arbitration Agreement and did so in its letter of 30 May 2022 [*Ex. C8 pp. 20 et seq.*]. Therefore, the Arbitration Agreement is invalid due to corruption.

2. This result is not contradicted by the doctrine of separability

46. As a last resort, CLAIMANT relies on the doctrine of separability to argue that the contract's invalidity due to corruption does not affect the Arbitration Agreement [*MfC, para. 12*]. While RESPONDENT generally recognises the independence of arbitration agreements, CLAIMANT's use of the doctrine would violate the Parties' intention and international principles of law.

47. Using the doctrine of separability to uphold arbitration clauses tainted by corruption is *"offensive to justice"* [*Tswaing Consulting Case, para. 13*]. Case law as well as scholars have confirmed that corruption affecting the main contract invalidates the arbitration agreement notwithstanding the doctrine of separability [*Heyman v Darwins, p. 392, North East Finance Case, para. 23; Tswaing Consulting Case, para. 13*]. This was recently affirmed by the South African Supreme Court of Appeal in the *Namasthethu Case*. There, a public entity had initiated a tender process for a contract regarding public infrastructure [*Namasthethu Case, para. 2*]. The public entity concluded a contract containing an arbitration clause with a private party which later was found guilty of corruption [*id., paras. 6, 28*]. The public entity had required any bidders to warrant that they had not recently been convicted of corruption [*id., para. 23*]. In light of this assurance, the court held that the arbitration agreement was invalid due to the main contract's termination for corruption [*id., para. 30*].

48. In the present case, just like in the *Namasthethu Case* RESPONDENT indicated the importance of CLAIMANT not engaging in corruption [*Ex. C1, p. 9*]. Just like in the *Namasthethu Case*, CLAIMANT likely engaged in corruption despite its assurances to the contrary [*supra, paras. 43 et seq.*] Therefore, the Tribunal should apply the reasoning of the *Namasthethu Case* and find the Arbitration Agreement is invalid by virtue of the termination of the PSA by RESPONDENT.

B. No valid Arbitration Agreement was concluded on 27 May 2021

49. To circumvent the invalidity of the Arbitration Agreement concluded on 1 December 2020. CLAIMANT asserts that the Parties concluded an agreement on 27 May 2021 [*cf. MfC, para. 50*]. However, the Parties did not validly conclude an agreement to arbitrate on 27 May 2021.

50. First, no parliamentary approval complying with Art. 75 EC was granted to any agreement rendering it invalid [*supra, paras. 15 et seqq.*]. This still holds true for the supposed agreement of 27 May 2021. Second, if the changes of the arbitration clause would be seen as amendments, they lack a valid agreement to amend [*supra, paras. 2 et seqq.*]. Thereby, the exception allowing for amendments without parliamentary approval is inapplicable, as an amendment would require an agreement to amend [*PO2, p. 48, para. 36*]. In any case, the new agreement would be formally invalid. It does not comply with the *"in writing"* requirement of Art. II(2) NYC since the acceptance

of the Arbitration Agreement would need to have been in writing [*Robobar Case, p. 740; Tracomin Case, p. 513; cf. Born, p. 725*].

51. For the reasons set out, no valid arbitration agreement was concluded on 27 May 2021, nor was any agreement validly amended.

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52. To summarise, the Tribunal lacks jurisdiction as the Parties never validly agreed to arbitrate. CLAIMANT nonetheless tries to force the Parties into arbitration disregarding the Arbitration Agreement's lack of parliamentary approval and invalidity due to corruption. In conclusion, the Arbitral Tribunal has no jurisdiction to hear the dispute.

ISSUE 2: THE PROCEEDINGS SHOULD BE STAYED OR BIFURCATED

53. It was Mr Field who negotiated the PSA for RESPONDENT. It was Mr Field who went to visit CLAIMANT's COO at his beach house. Now, it is Mr Field who is accused of corruption. Equatoriana's prosecution office has made it its top priority to uncover the corruption thriving within Equatorianian SOEs [*Ex. R2, p. 33*]. To this end, a special chamber in the Equatorianian criminal court (**Special Chamber**) was set up [*RNA, p. 31, para. 24*]. Mr Field is expected to be brought before it to be held accountable for his role in the corruption scandal [*Ex. R2, p. 33*].

54. RESPONDENT believes in shining light on corruption. CLAIMANT, however, would prefer for it to remain in the dark. CLAIMANT outright dismisses the possibility of its own corruption and therefore rejects waiting for a full examination of the facts [*MfC, para. 74*]. RESPONDENT seeks to stay or bifurcate the present proceedings to await the Special Chamber's decision. To be able to shed light on the corruption allegations, the Tribunal should follow this request and stay [**A**] or, alternatively, bifurcate the present arbitral proceedings [**B**].

A. The arbitral proceedings should be stayed

55. The Tribunal should stay the proceedings until the Special Chamber has announced its decision next year. In fact, the Tribunal has the duty to stay the arbitration [**I**]. Even if the Tribunal would find otherwise, it should nonetheless use its procedural discretion to stay the arbitration [**II**].

I. The Tribunal has the duty to stay the arbitration

56. CLAIMANT denies the Tribunal's duty to the stay the present proceedings in the face of the pending parallel criminal proceedings [*MfC, para. 84*]. It is recognised across jurisdictions, including Equatoriana, that criminal proceedings generally take precedence over civil proceedings [*Art. 44 Spanish LOPJ; English PD 23A para. 11A; Cour Cass. 68-13.669; PO2, p. 49, para. 46*]. Following this, scholars and case law agree that parallel criminal proceedings provide a mandatory ground to stay arbitration, if their outcome is material to the arbitration and the overlapping

questions are beyond the tribunal's competence [*Bank Case, para. 3.2; Arroyo, p. 1466*]. The Special Chamber's findings are material to the arbitration's outcome [**1**]. Contrary to the Special Chamber, the Tribunal is incapable of discovering all essential facts itself [**2**].

1. The Special Chamber's findings are material to this arbitration's outcome

57. CLAIMANT agrees that the arbitration must be stayed if the outcome of the criminal proceedings is material to the arbitration but denies that this is the case here [*MfC, para. 85*]. An arbitration must be stayed if the subject matter of the criminal proceedings goes to the core of the arbitration and vice versa [*ICC Case 8459, p. 41; Besson, p. 106; Feris/Torkomyan, pp. 52 et seq.; Naud, p. 518*].

58. The Equatorianian criminal proceedings go to the core of this arbitration. The Special Chamber investigates the bribery scandal revolving around Mr Field [*Ex. R2, p. 33*]. Mr Field, as RESPONDENT's former COO, is one of *"the key figures in the bribery scandal"* [*Ex. C3, p. 13, para. 6*]. Likewise, the present arbitration also deals with the bribery scandal with regard to the Arbitration Agreement's invalidity due to corruption [*supra, para. 43*].

59. Accordingly, both the criminal as well as the arbitral proceedings focus on the same facts underlying the same bribery suspicions regarding the same contract. Thus, the Special Chamber's findings are material to the Tribunal's decision in this matter.

2. Unlike the Special Chamber, the Tribunal is incapable of discovering all facts itself

60. CLAIMANT asserts that "*the arbitral tribunal has [...] power to investigate allegations of corruption*" [*MfC, para. 86*]. This is incorrect. It is recognised *"that arbitral tribunals are simply not equipped to investigate […] corruption allegations"* [*Baizeau/Hayes, p. 247; cf. F-W Oil Case, para. 211*]. Arbitral tribunals have no coercive power to compel witnesses [*Baizeau/Hayes, p. 248; Moses, p. 92*]. In particular, a tribunal is unable to obligate third-party witnesses to testify [*ibid.; Redfern/Hunter, para. 7.32; Waincymer, p. 817*].

61. In the present case, the fact that the Tribunal has no coercive power to compel witnesses to testify renders it incapable of discovering all essential facts itself. This is because the key witness, Mr Bluntschli, is unwilling to testify [*Ex. C3, p. 14, para. 11*]. Mr Bluntschli was CLAIMANT's main negotiator in the negotiations leading to the PSA's conclusion [*Ex. C7, p. 18, para. 7*]. Besides Mr Field, he is the only person able to give insight on what happened during the beach house meeting all corruption suspicions centre around [*supra paras. 43 et seq.; Ex. R1, p. 32, para. 4*]. The Tribunal, however, has no independent power to compel the witness.

62. Further, the Tribunal is incapable of discovering the essential facts because it cannot request assistance to compel Mr Bluntschli as a witness. While the Tribunal is generally able to request court assistance under Art. 27 DAL, this provision only allows to request assistance from the courts at the arbitral seat [*Lew/Mistelis/Kröll, p. 580; Moses, p. 119*]. Conversely, Art. 27 DAL does not allow requesting the assistance of foreign courts [*Moses, p. 119; Waincymer, p. 817*]. The seat of Arbitration is Danubia [*Ex. C2, p. 12*]. Since the PSA's conclusion, Mr Bluntschli has been arrested

for tax evasion in Mediterraneo [*Ex. C3, p. 13, para. 2*]. Thus, the Tribunal also cannot rely on court assistance to compel Mr Bluntschli to testify since Art. 27 DAL does not allow the tribunal to request of Mediterranean Courts in the present case.

63. The Special Chamber, by contrast, is able to secure the assistance of foreign courts [*cf. Hague Convention on Taking Evidence Abroad; cf. Redfern/Hunter, para. 6.131*]. Moreover, it has access to broader means of gathering evidence such as police investigations, wiretapping or surveillance recordings [*F-W Oil Case, para. 211; Baizeau/Hayes, p. 248; Naud, p. 519*]. For these reasons, the Special Chamber is significantly better equipped to investigate the bribery scandal. Therefore, the Tribunal is under a duty to stay the arbitration to await the Special Chamber's decision.

II. Alternatively, the Tribunal should use procedural discretion to stay the arbitration

64. CLAIMANT has opposed a stay of proceedings on the ground that it would disadvantage CLAIMANT [*MfC, para. 76*]. However, continuing the proceedings would only disadvantage RESPONDENT [**1**] while CLAIMANT would suffer no disadvantage [**2**]. Lastly, continuing the proceedings risks violating public policy [**3**].

1. Continuing the proceedings would unduly disadvantage RESPONDENT

65. When deciding on the application to stay the proceedings, the Tribunal should respect RESPONDENT's right to be heard [**a**] and avoid the risk of conflicting decisions [**b**].

a. Continuing the proceedings would violate RESPONDENT's right to be heard

66. Not staying the proceedings would violate RESPONDENT's right to be heard. Article 18 DAL provides that each party must be given a full opportunity to present its case [*Born, p. 2334; Holtzmann/Neuhaus, p. 550; Kurkela/Turunen, p. 38; Wolff, p. 310*]. To uphold this right, a tribunal should stay its proceedings if continuing them hinders a party from introducing evidence that might have been obtained otherwise [*SpA v M, para. 1b; Arroyo, p. 1466*]. Depriving a party from presenting all relevant evidence violates its right to be heard if this evidence could have influenced the outcome of the proceedings [*Istanbul Case, p. 648; Lew/Mistelis/Kröll, p. 675; Wolff, p. 313*].

67. The Special Chamber can produce evidence that cannot be produced by the Tribunal, namely Mr Bluntschli's testimony [*supra para. 62*]. Mr Bluntschli's statements influence the outcome of the arbitration, because it is contingent upon his testimony whether or not corruption during the negotiations can be proven [*supra para. 61*] Not waiting for this evidence would deprive RESPONDENT of introducing findings that are central to proving corruption. Consequently, the Tribunal should await the Special Chambers decision.

b. Continuing the proceedings poses the risk of conflicting decisions

68. If the Tribunal refuses to grant a stay, there is a risk that the Special Chamber's verdict conflicts with the Tribunal's award. Conflicting findings by different courts or tribunals undermine the law's

predictability and thus, its capability to offer effective guidance [*Incitec v Alkimos, para. 62; Hildebrandt, p. 2; Lowe, p. 48*]. Accordingly, a tribunal should grant a stay if parallel proceedings pose the risk of conflicting decisions [*De Ly/Sheppard, p. 32; ILA Report, para. 3; Naud, p. 514*]. Such a risk arises under three conditions: a similar set of facts, the same governing law and conflicting legal conclusions [*Mayer, pp. 408 et seq.; Spoorenberg/Vinuales, p. 93*].

69. First, the Tribunal and the Special Chamber examine the same set of facts surrounding the potential bribery of Mr Field when negotiating the PSA [*supra paras. 43 et seq.*].

70. Second, both proceedings are governed by the same provision in Equatorianian law. The Special Chamber decides on Mr Field's culpability under Equatorianian criminal law [*RNA, p. 31, para. 24*]. The Tribunal applies Equatorianian civil law to rule on the PSA's illegality, which renders a contract void if it violates the mandatory rules of Equatoriana such as criminal provisions on corruption [*Ex. C2, p. 12; PO1, p. 43, para. III.3; Official Comment, Art. 1.4, para. 2*].

71. Third, if the Tribunal does not stay the proceedings, the Special Chamber and it may render contradictory rulings regarding the same matter. The Tribunal may find that the PSA was invalid due to corruption while the Special Chamber may not and vice versa. As RESPONDENT alone is seated within the Special Chamber's jurisdiction, it alone would suffer the severe legal uncertainty and risks of the different rulings as it is unclear which of the decisions must be followed.

72. Consequently, the Tribunal should stay the proceedings to avoid any risk of conflicting decisions.

2. Staying the proceedings would not unduly disadvantage CLAIMANT

73. CLAIMANT asserts that staying the proceedings would be to its disadvantage [*MfC, para. 79*]. However, contrary to CLAIMANT's submissions, staying the proceedings is efficient [**a**] and does not violate CLAIMANT's right to equal treatment [**b**].

a. Staying the proceedings increases efficiency

74. CLAIMANT asserts that staying the proceedings does not ensure that the arbitration is conducted in the most efficient way [*MfC, paras. 79 et seq.*] However, staying the proceedings does ensure the arbitration be conducted in the most efficient way. Pursuant to Art. 17(1) PCA Rules, the tribunal shall conduct its proceedings in an efficient manner *"so as to avoid unnecessary delay and expense"*.

75. First, staying the proceedings saves time and cost. This is because it enables the tribunal to rely on the fact-findings of state courts [*Naud, p. 514*]. This reduces the time the Parties and arbitrators would need to invest to gather evidence and the overall complexity of the proceedings. Thus, it also reduces the arbitrator and counsel fees incurred by both parties [*Arts. 40 et seqq. PCA Rules*].

76. Second, any delay and expense would be necessary. This is because the evidence gathered by the Special Chamber is material to the outcome of the arbitration, ensures RESPONDENT's right to be heard and avoids conflicting decisions [*supra paras. 58, 67, 69 et seqq.*]. Further, the delay will only last until the Special Chamber has concluded its analysis of the facts, which will be done by the end

of this year [*RNA, p. 31, para. 24*]. Thus, staying the proceedings would not cause any *"unnecessary delay and expense"* in the sense of Art. 17(1) PCA Rules.

b. The Special Chamber's findings do not disadvantage CLAIMANT

77. CLAIMANT asserts that the Tribunal should completely disregard the criminal proceedings as it is *"concerned about the impartiality of Ms. Fonseca"* [*MfC, para. 75*]. Specifically, CLAIMANT has pointed to the personal ties between Ms Fonseca and Ms Bourgeois [*MfC, paras. 75 et seq.*]. However, Ms Fonseca is not biased against CLAIMANT. Art. 17(1) PCA Rules states that the Tribunal should consider the parties right to equal treatment in exercising its discretion. Ms Fonseca personally removed Ms Bourgeois the same month after Ms Fonseca decided to bring charges against Mr Field [*Ex. R2, p. 33; PO2, p. 49, para. 43*]. Thus, Ms Fonseca undertook all necessary steps to ensure her impartiality. In light of these facts, CLAIMANT has failed to substantiate its allegations that Ms Fonseca lacks impartiality. Hence, the Tribunal should stay the proceedings until the Special Chamber has rendered its verdict.

3. Continuing the proceedings risks violating public policy

78. If the Tribunal does not await the Special Chamber's decision, the final award risks violating public policy. Under Art. V(II)(b) NYC and Art. 34(2)(b)(ii) DAL, state courts may set aside or render unenforceable any award contrary to public policy of that country. To fulfill its duty to render an enforceable award, the Tribunal should stay the proceedings [*Platte, p. 312*]. Otherwise, the Tribunal's ruling risks violating transnational public policy [**a**]. Contrary to what CLAIMANT argues, courts would not be barred from reviewing the Tribunal's findings on corruption [**b**].

a. The final award risks violating transnational public policy

79. No matter where the enforcement of the final award is sought, an award upholding a contract tainted by corruption violates public policy across jurisdictions. This is recognised worldwide by scholars, state courts as well as arbitral case law [*Cotton Case, p. 669; European Gas Turbines Case, p. 202; Grand Pacific Case, para.* 92; *Lagergren Award, para. 20; Hwang/Lim, p. 75; ILA Report, p. 257; Okoli, p. 140*]. The international community has universally denounced corruption by adopting the United Nation Convention Against Corruption (**UNCAC**). Currently, the UNCAC has been ratified by 192 countries across the world, including Equatoriana, Mediterraneo and Danubia [*PO1, p. 43, para. III.3; UN Office on Drugs and Crime*]. This was also held by the tribunal in *World Duty Free v Kenya* which concluded that *"bribery is contrary to the international public policy of most, if not all, States"* [*WDF v Kenya, para. 157*].

80. Not awaiting the Special Chamber's findings would risk upholding a contract tainted by corruption. Thus, its award would violate transnational public policy and be unenforceable.

b. State courts are not barred from reviewing the Tribunal's findings

81. Another CLAIMANT might argue that even if the PSA is tainted by corruption and the Tribunal would render an award upholding its validity, this would not hinder its enforcement. It might argue that this is because courts are generally barred from reviewing the merits of the award. CLAIMANT's argument is correct insofar as misapplication of the law in itself is no valid ground for challenging an award [*Arts. 34, 36 DAL; Art. V NYC*]. However, presently courts are able to review the merits due to two reasons.

82. First, courts across jurisdictions have held that they must reassess a tribunal's findings on the merits to uphold transnational public policy [*Antilles Cement Case, p. 851; DST v Rakoil, paras. 29 et seqq.; Kúria Case, paras. 14 et seqq.; Licencee v Licencor, p. 318*]. Particularly, courts have the power to review merits of an award if they suspect that a tribunal erroneously concluded that a contract was not procured by corruption [*AJU v AJT, para. 62; Soleimany v Soleimany, pp. 793 et seqq.*].

83. Second, a court may also review the merits if fresh evidence is presented [*EEE v Vijay, paras. 131 et seq.; Westacre Case, paras. 40 et seq., 69; Born, p. 4029; Hwang/Lim, p. 79*]. This is the case if the evidence was not available or reasonably obtainable during the arbitration proceedings but could have materially influenced the outcome [*Westacre Case, paras. 40, 69; Born, p. 4029*].

84. In the present case, such fresh evidence would become available after the Special Chamber's proceedings have been concluded [*supra paras. 43 et seq., 58*]. Thus, if the Tribunal does not stay the proceedings until the Special Chamber has announced its verdict, the award will be vulnerable to subsequent review by national courts.

85. Consequently, the Tribunal should stay its proceedings as the award otherwise risks being set aside or rendered unenforceable under Art. V(II)(b) NYC and Art. 34(2)(b)(ii) DAL.

B. Alternatively, the arbitral proceedings should be bifurcated

86. In case the Tribunal denies staying the proceedings, RESPONDENT submits that the proceedings should be bifurcated [*RNA, p. 31, para. 25*]. This bifurcation divides the proceedings into two stages [*PO2, pp. 49 et seq., para. 52*]. The first stage of the proceedings would concern all questions that do not govern *"the invalidity of the contract due to corruption"* [*ibid.*]. The second stage of proceedings would decide on all matters regarding the bribery seemingly underlying the PSA [*ibid.; supra paras. 43et seq.*]. In principle, the second stage is not commenced if the first stage leads to a conclusive result that renders any further proceedings irrelevant [*Philip Morris Case, para. 106; Greenberg et al., p. 330*].

87. Despite having repeatedly emphasised its desire to save time and cost, CLAIMANT now opposes this effort [*MfC, paras. 94 et. seqq.*]. Precisely to protect all Parties from investing resources in issues irrelevant to the arbitration's outcome, RESPONDENT requests to bifurcate the proceedings. This decision should follow the three-fold test which determines when bifurcating the proceedings is

necessary [*Glencore Case, para. 39; Renco Case, para. 22; Philip Morris Case para. 109; Daly et al., paras. 5.67, 5.71; Mosquera, pp. 71 et seqq.*].

88. RESPONDENT's request for bifurcation meets all criteria: First, the request for bifurcation is substantiated [**I**]. Second, bifurcating the proceedings is efficient [**II**]. Third, bifurcating the present dispute is practical as the two procedural stages can be easily separated [**III**].

I. The request for bifurcation is substantiated

89. Under the first step of the three-fold test, a tribunal should bifurcate if it cannot *prima facie* exclude that the argument underlying the request for bifurcation is justified [*Renco Case, para. 27; Philip Morris Case para. 111*]. This does not require that the argument is likely to be true but only that it is not frivolous [*Renco Case, para. 27; Resolute Forest Case, para. 4.4*].

90. CLAIMANT argues that *"RESPONDENT's jurisdictional objection is frivolous"* [*MfC, para. 89*], However, RESPONDENT's submission is not frivolous as it has been previously shown that the PSA is likely tainted by corruption [*supra paras. 43 et seq.*]. Everything happened in a private beach house, where the Parties' former COOs, who are now under investigations concerning corruption, met [*Ex. R1, p. 32, para. 4, Ex. R2, p. 32 PO2, p. 49, para. 40*]. Considering these facts, CLAIMANT errs when asserting that RESPONDENT's submission is frivolous [*cf. MfC, para. 89*].

II. Bifurcating the proceedings is efficient

91. Under the second step of the three-fold test, a tribunal should bifurcate if this is not detrimental to procedural efficiency [*Renco Case, para. 27; Greenwood, p. 425*]. CLAIMANT submits that *"bifurcation would lead to inefficiency"* [*MfC, para. 97*] This fails to consider that bifurcation in fact is procedurally efficient on two accounts.

92. First, bifurcating is efficient if it narrows the scope of subject matters dealt with at the second procedural stage [*Emmis Case, para. 37; Mesa Power Case, para. 19; Renco Case, para. 27*]. Presently, a bifurcation would lead to such a result as key issues would be conclusively settled at the first stage, namely the CISG's applicability as well as CLAIMANT's fraudulent conduct. These questions will not have to be re-evaluated at the second stage which would only focus on issues of corruption [*PO2, p. 50, para. 52*]. Thus, bifurcation would significantly reduce the scope and complexity of the second stage [*cf. Accession Case, para. 39*].

93. Second, bifurcating is efficient if it is possible that the results of the first procedural stage render the second stage unnecessary [*Philip Morris Case, para. 106; Greenwood, p. 425*]. If the Tribunal follows RESPONDENT's submission on the fraudulent inducement of the PSA [*infra paras. 143 et seqq.*], the Parties' dispute over the PSA's validity will be conclusively settled at the first stage. Therefore, rendering a second stage on the potential invalidity of the PSA due to

corruption unnecessary, saving time. Accordingly, bifurcation in the present case increases procedural efficiency.

III. Bifurcating the proceedings is practical

94. Under the third step, bifurcation is appropriate if the facts and legal questions underlying the two stages are distinct from one another making bifurcation practical [*Glamis Gold Case, para. 12, Mesa Power Case, para. 20; Pey Casado Case, para. 106; Renco Case, para. 27*].

95. Presently, CLAIMANT asserts that the subject matter of the second stage is too closely linked to the jurisdictional questions to be addressed at the first stage [*MfC, para. 97*]. However, the Tribunal's procedural orders clarify that its jurisdiction is determined prior to the material questions assessed at the first and second stages [*PO1, p. 42, para. III.1.b; PO2, p. 50, para. 52*]. Thus, bifurcation would only separate the following questions: first, the applicability of the CISG and the PSA's invalidity due to fraud and second, the contracts invalidity due to corruption [*ibid.*].

96. Under the proposed bifurcation schedule, there would be no overlap in facts and legal questions to be considered at the different stages. Questions of corruption have no effect on the applicability of the CISG [*DiMatteo, p. 197; MüKo BGB, Art. 4, para. 17*]. The legal requirements for fraud are entirely different than the those for corruption [*Arts. 3.3.1, 3.2.5 ICCA, UNCAC*]. Similarly, the facts to be reviewed to decide on fraud and corruption do not intersect. For uncovering the corruption, it is of key importance to investigate what occurred during the private beach house meeting [*supra paras. 43 et seq.*]. To this end, the Tribunal needs to rely on the findings of the Special Chamber [*supra para. 61*]. By contrast, the fact that CLAIMANT fraudulently misrepresented the qualities of the Kestrel Drones can be determined based on the evidence already submitted. In particular, the Tribunal's evidentiary record already contains the PSA, the Parties' e-mail correspondence, product information on the drone models and the relevant witness statements [Ex. *C2, pp. 10 et seqq.; Ex. C3, pp. 13 et seq.; Ex. C4, p. 15; Ex. C7, pp. 18 et seq.; Ex. R3, p. 34; Ex. R4, p. 35*]. Consequently, as there is neither legal nor factual overlap between the two procedural stages, the present proceedings can be bifurcated.

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97. To summarise, the Tribunal should stay or alternatively bifurcate the present proceedings to await the findings of the Special Chamber. Only this allows for the corruption suspicions tainting this entire case to be appropriately investigated. CLAIMANT argues that *"justice delayed is justice denied"* [*MfC, para. 79*]. But justice hurried is justice buried.

ISSUE 3: THE PURCHASE AND SUPPLY AGREEMENT IS NOT GOVERNED BY THE CISG

98. CLAIMANT attempts to evade its liability under domestic fraud provisions by trying to hide behind the CISG [*MfC, para. 98*]. CLAIMANT falsely claims the applicability of the CISG as it does not contain any provisions addressing CLAIMANT's liability. While the criteria of Art. 1(1) CISG are met, the Kestrel Drones are aircraft in the sense of Art. 2(e) CISG (**Aircraft**) rendering the CISG inapplicable [**A**]. CLAIMANT still submits inadequate criteria to artificially narrow the definition of Aircraft [*MfC, para. 118*]. Moreover, CLAIMANT disregards that the PSA's service part is preponderant and the CISG is thus excluded pursuant to Art. 3(2) CISG [**B**]. In any case, the Parties excluded the applicability of the CISG in accordance with Art. 6 CISG [**C**].

A. The CISG does not apply according to Art. 2(e) CISG

99. Pursuant to Art. 2(e) CISG, the *"Convention does not apply to sales of […] aircraft"*. CLAIMANT argues that the Kestrel Drones are not Aircraft and that in any case, Equatorianian law is irrelevant [*cf. MfC, paras. 111 et seqq.*]. CLAIMANT submits that the definition of Aircraft must be restricted according to different criteria trying to exclude the Kestrel Drones from the term Aircraft [*cf. MfC, paras. 102 et seqq.*]. CLAIMANT then concludes that the PSA is governed by the CISG [*ibid.*].

100. However, this is misconceived. The Kestrel Drones are Aircraft under the Convention [**I**]. Even if the term Aircraft would not cover all airborne vehicles, none of the suggested restrictive criteria apply to the Kestrel Drones [**II**]. Moreover, the Kestrel Drones are Aircraft according to the Equatorianian Aviation Safety Act (**ASA**) [**III**].

I. The Kestrel Drones are Aircraft in the sense of Art. 2(e) CISG

101. CLAIMANT submits that the definition of Aircraft must be restricted by the criteria of registration and purpose [*cf. MfC, paras. 103 et seqq.*]. Another CLAIMANT might have raised size as an additional criterion. This is based on the concern that otherwise, vehicles would be extensively excluded from the CISG's scope [*cf. MfC, para. 105*]. However, CLAIMANT's submission lacks merit. In fact, Art. 2(e) CISG excludes all airborne vehicles, including the Kestrel Drones.

102. The main purpose of Art. 2(e) CISG is to avoid conflicts with national registration requirements for airborne vehicles [*Kröll/Mistelis/Perales Viscasillas, Art. 2, para. 41; MüKo HGB, Art. 2, para. 27*]. Excluding Aircraft from the CISG ensures its uniform application and legal certainty [*Schlechtriem/Schwenzer, Art. 2, para. 28; UN YB VI, p. 51, para. 28*]. Thus, allowing any form of airborne vehicle to fall within the scope of the Convention jeopardises the aim of Art. 2(e) CISG. The three restricting criteria of registration requirements, purpose and size were discussed by scholars and the CISG's drafters but fail to offer a viable solution to the issue of domestic registrations requirements [*Schlechtriem/Schwenzer, Art. 2, paras. 28, 33; UN YB VI, p. 74, paras. 12 et seqq, p. 90, para. 26*].

103. First, the presence or lack of a registration requirement is irrelevant to define Aircraft. The predecessor of the CISG, the Uniform Law for the International Sale of Goods (**ULIS**), made explicit reference to a registration requirement in Art. 5 ULIS. The CISG's drafters consciously decided against including this criterion as it led to legal uncertainty in its application [*id., p. 51, para. 28*]. This legal uncertainty derives from the fact that it might be unknown which domestic law governs a possible registration requirement [*Kröll/Mistelis/Perales Viscasillas, Art. 2, para. 41; Secretariat Commentary, p. 16, para. 9; UN YB VI, p. 74, paras. 12 et seqq., p. 90, para. 26; cf. Honnold/Flechtner, p. 67*].

104. Second, using purpose as a restricting criterion does not introduce a clear and uniform standard as the issue of contradictory national registration requirements remains unsolved [*MüKo HGB, Art. 2, paras. 28, 32*]. Purpose was neither considered during the drafting of the CISG nor is it deducible from the wording of the provision [*cf. Secretariat Commentary, p. 16 para. 9; cf. UN YB VI, pp. 51, 74, 90*].

105. Third, a size criterion is unfeasible as it is inherently too vague to establish a reliable definition and would lead to conflicting results in the application of the CISG [*Flechtner/Honnold, p. 68; Schlechtriem/Schwenzer, Art. 2, para. 31*]. This contravenes the CISG's uniformity obligation in Art. 7(1) CISG [*Kröll/Mistelis/Perales Viscasillas, Art. 7, para. 1; Schlechtriem/Schwenzer, Art. 7, para. 7*].

106. Thus, since all three restricting criteria are unsuitable, Aircraft must be given its literal meaning, referring to all airborne vehicles [*Flechtner/Honnold, p. 68; cf. Secretariat Commentary, p. 16, para. 9*]. Hence, Aircraft is any kind of airborne vehicle, including helicopters and drones [*Kröll/Mistelis/Perales Viscasillas, Art. 2, para. 41; MüKo BGB, Art. 2, para. 23; Staudinger, Art. 2, para. 48*].

107. In the present case, the Kestrel Drones are airborne vehicles of a helicopter like technology [*Ex. C4, p. 15; PO2, p. 45, para. 13*]. Thus, they are Aircraft in the sense of Art. 2(e) CISG.

II. Even if CLAIMANT's criteria were applied, the Kestrel Drones would be Aircraft

108. CLAIMANT submits that both the *"need to register the Drones in Equatoriana"* as well as the Kestrel Drones being *"intended to carry humans or cargo"* are criteria necessary for the definition of Aircraft [*NA, p. 7, para. 21*]. Furthermore, another CLAIMANT might have argued that the Kestrel Drones should not be considered Aircraft due to their size. Even if these criteria were applicable [quod non], the Kestrel Drones remain Aircraft. This is because the Kestrel Drones are Aircraft due to their purpose [**1**], their registration requirement [**2**] and their size [**3**].

1. The Kestrel Drones are Aircraft due to their purpose

109. CLAIMANT submits that an Aircraft must have the purpose of transporting goods or humans [*MfC, para. 105*]. To determine whether an Aircraft serves such a specific purpose, its objective function

should be considered [*Submarine Case; MüKo BGB, Art. 2, para. 22*]. In this regard, CLAIMANT argues that the *"purpose of the [Kestrel Drone] was to obtain the necessary data"* [*MfC, para. 107*].

110. However, the Kestrel Drones are *"able to carry other cargo […] instead of the surveillance equipment"* [*PO2, p. 44, para. 9*]. The Kestrel Drones are equipped with additional payload bays for further capacities to transport cargo [*id., para. 8*]. They have been used for this purpose in the past, e.g. the transport of technical equipment [*id., para. 9*].

111. In case the purpose were to be determined subjectively, the parties' intention would be decisive [*Schlechtriem/Schwenzer, Art. 8, para. 1*]. The parties' intention must be interpreted in accordance with Art. 8 CISG [*ibid.*]. Following Art. 8(3) CISG, *"consideration is to be given to all relevant circumstances of the case including negotiations […] and any subsequent conduct of the parties"*.

112. During the negotiations, CLAIMANT stated that the Kestrel Drones are *"suitable for other purposes in particular to bring high value and sensitive other loads to the remote areas"* [*Ex. R4, p. 35*]. RESPONDENT agrees that they are *"able to transport urgently needed spare parts or medicine"* [*Ex. R2 p.33*]. Accordingly, the PSA's preamble refers to *"possible additional use of the aircrafts"* [*Ex. C2, p. 10*].

113. Both the objective purpose of the Kestrel Drones as well as the common party intention show that the purpose of the Kestrel Drones is to transport cargo. Thus, the Kestrel Drones fulfil the purpose requirement set out by CLAIMANT and must be considered aircraft.

2. The Kestrel Drones are Aircraft since they need to be registered

114. CLAIMANT argues that the Kestrel Drones are not subject to a registration requirement and thus, are not Aircraft [*MfC, para. 115; NA, p.7, para. 21*]. Art. 2(e) CISG excludes Aircraft to avoid conflicts with national registration requirements [*supra paras. 101 et seqq.*]. Here, the Kestrel Drones are Aircraft as they are subject to registration both in normal course [**a**] and in Equatoriana [**b**].

a. The Kestrel Drones are Aircraft, as they need to be registered in normal course

115. When considering the vast majority of international legal systems, the Kestrel Drones would be subject to registration requirements in normal course. Therefore, they are Aircraft.

116. The rationale of the proposed registration requirement [*which was rejected, supra para. 102*], was to only exclude vehicles *"which in normal course would become subject to national legislation"* [*UN YB II, p. 56, para. 55; UN YB VI, p. 90, para. 26*]. The normal course must be assessed in accordance with the international character of the CISG [*Schlechtriem/Schwenzer, Art. 7, para. 8*].

117. CLAIMANT argues that the Kestrel Drones *"do not need to be registered"* [*MfC, para. 115*]. However, registration requirements for drones such as the Kestrel Drone exist in various legal systems. The Kestrel Drones were exported to four countries other than Equatoriana [*Ex. R1, p. 32, para. 7*]. In two of these countries, the Kestrel Drones were generally subject to registration requirements [*PO2, p. 46, para. 20*]. Other jurisdictions around the world also require drones such as the Kestrel Drone to be registered. For instance, Brazil, China, the EU, South Africa and the USA have similar

requirements [*§ 19 CASR Brazil; § 1.3. RAR China; Art. 5(5) 2019/947 EU; § 101 CAR South Africa; 14 CFR; 107 USA*]. CLAIMANT's own witness admits that the Drones *"are generally subject to the rules of the Aviation Safety regulations in the different jurisdictions"* [*Ex.C7, p. 18, para. 2*].

118. Therefore, as the Kestrel Drones are in normal course subject to registration, they are Aircraft.

b. The Kestrel Drones are Aircraft, as they need to be registered in Equatoriana

119. The Kestrel Drones are Aircraft as they are subject to a registration requirement under the ASA. Art. 10 ASA stipulates that *"[a]ny aircraft owned or operated by a private entity in the territory of Equatoriana shall be registered"* [*Ex. R5, p. 36*]. Aircraft in the sense of Art. 1 ASA, is *"any vehicle […] that is used or intended to be used for moving persons or objects in the air […]. Unmanned Aerial Vehicles are treated accordingly as aircrafts if they overall length exceeds 90 cm or if their payload is over 50 kg"* [*ibid.*]. Exceptions were only made where the police or armed forces acquired UAS [*PO2, p. 46, para. 19*].

120. The Kestrel Drones are intended to be operated in the air space of Equatoriana and exceed the ASA's size and weight limit [*Ex. C1, p. 9; Ex. C2, p. 10; Ex. C4, p. 15*]. Furthermore, contrary to public actors like the police or armed forces, RESPONDENT is a private entity [*supra para. 26*]. It can therefore not be compared to exceptional cases, in which Art. 10 ASA does not apply. Consequently, as the Kestrel Drones must be registered pursuant to Art. 10 ASA, they are Aircraft.

3. The Kestrel Drones are Aircraft due to their size

121. Another CLAIMANT might have argued that the Kestrel Drones are not Aircraft considering their size. However, this is incorrect. The size criterion was aimed at allowing small aircraft to fall within the CISG's scope [*MüKo BGB, paras. 22, 23; Piltz I, Art. 2 CISG, para. 53; Staudinger, Art. 2, para 48*]. The Kestrel Drone is 6.3 m long, 2.35 m high and its rotor diameter is 7.55 m [*Ex C4, p. 15*]. Even the largest model aircraft ever built is far smaller than the Kestrel Drones [*MFI*]. Thus, the Kestrel Drones are sizable enough to be defined as Aircraft.

III. Even if solely the Equatorianian ASA applies, the Kestrel Drones remain Aircraft

122. CLAIMANT alleges that the Kestrel Drones are not Aircraft pursuant to Art. 1 ASA [*MfC, paras. 112 et seq.*]. This is misconceived. If the Tribunal were to find, that the CISG does not provide for a definition of the term Aircraft, Art. 7(2) CISG opens recourse to national law [*MüKO HGB, Art. 7, para. 58; Schlechtriem/Schwenzer/Schroeter, Art. 7, para. 57*]. The decisive law in the present case is the ASA [*supra paras. 7 et seq.*]. As shown above, the Kestrel Drone meets all criteria set out in Art. 1 ASA [*supra paras. 119 et seq.*]. Therefore, the Kestrel Drones are Aircraft.

B. The CISG does not apply according to Art. 3(2) CISG

123. Another CLAIMANT might have argued that the CISG is not excluded pursuant to Art. 3(2) CISG. The PSA contains both maintenance and sales obligations [*Ex. C2, p. 10*]. It is thus a mixed

contract containing service and sales elements. According to Art. 3(2) CISG, the Convention *"does not apply to contracts in which the preponderant part of the obligations […] consists in the supply of labour or other services"*. In the present case, the service part of the PSA is preponderant, thus excluding the application of the CISG according to Art. 3(2) CISG. CLAIMANT seeks to apply the economic criterion test to argue that the sales part of the PSA is preponderant. However, the economic criterion test is inoperable, since some prices are yet to be determined [**I**]. Instead, the essential criterion test must be applied. According to this test, the service part is preponderant [**II**].

I. The economic criterion test is inoperable since some prices are yet to be determined

124. Another CLAIMANT could try to apply the economic criterion test in order to determine the preponderant part of the Agreement. However, the economic criterion test is inoperable in the case at hand as numerous variables of the PSA's price structure are still to be determined. The economic criterion test cannot be applied in cases where the value of parts of the contract is unknown [*AC Opinion 4, para. 3.3; cf. Schlechtriem/Schwenzer/Schroeter, Art.3, para. 14; cf. Cylinder Case, pp.4 et seq.*]. Several prices of the PSA are yet to be determined by the Parties:

125. First, the value of the sales part of the PSA is yet undetermined since pursuant to Art. 2(d) PSA, the price of one third of the Kestrel Drones is subject to further negotiations [*Ex. C2, pp. 11, et seq.*].

126. Second, the value of the service part is also undetermined. Pursuant to Art. 3(1)(c) PSA, RESPONDENT must pay for all additional comprehensive maintenance services and spare parts [*ibid.*]. The full price and extent of these services remain unclear [*ibid.*]. This is because the necessary number and extent of additional maintenance is undetermined and can only be estimated [*PO2, p. 47, para. 27*]. Knowing the full price of these services is essential as much of the necessary maintenance must be paid for additionally, rather than being included in the annual flat fee [*RNA, p. 28, para. 10*]. Therefore, as the total volume of the service part depends on uncertain variables, the economic criterion test is inoperable. It thus cannot be used to determine the preponderant part of the PSA pursuant to Art. 3(2) CISG.

II. Under the essential criterion test, the PSA's service part is preponderant

127. When the economic criterion test is inoperable, the essential criterion test must be applied to determine the preponderant part [*AC Opinion 4, paras. 3, 4; Cylinder Case, p. 5; Kröll/Mistelis/Perales Viscasillas, Art. 3, para. 1*]. The essential criterion test compares the importance the parties attached to the sales part and the service part respectively, at the time of contracting [*Cylinder Case, pp. 4, et seq.; Kröll/Mistelis/Perales Viscasillas, Art. 3, para. 19; Schlechtriem/Schwenzer, Art. 3, para. 19*]. The part more important to the parties is the preponderant part [*ibid.*]. Relevant factors are the contractual negotiations, the significance of the service part as such and the nature of the

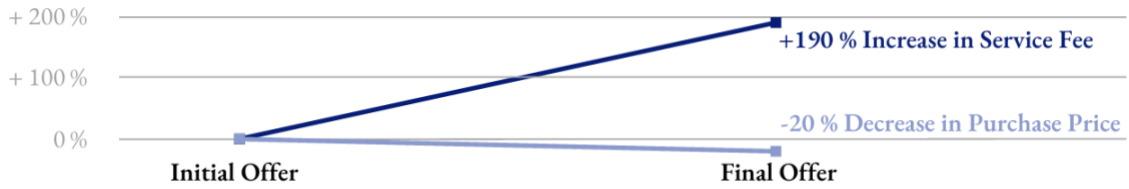
performances [*Grinding Machine Case, pp. 9 et seq., para. 35; Pizzeria Equipment Case, p.3; Recycling Machine Case, p. 6; cf. MüKo BGB, Art. 3, para. 14*].

128. The contractual negotiations of the PSA show that the Parties intended for the service part to be preponderant [**1**]. Additionally, ensuring the continuous operability of the Kestrel Drones as a service, is the PSA's main purpose [**2**].

1. The PSA's service part is preponderant according to the contractual negotiations

129. To determine the preponderant part of a contract, the circumstances of the formation of the contract must be considered [*Cylinder Case, p. 5, Kröll/Mistelis/Perales Viscasillas, Art. 3, para. 19*].

130. CLAIMANT's initial offer contained a service period of two years for an annual flat fee [*PO2, p. 47, para. 27*]. Through CLAIMANT's initiative, this period was extended to four years. Due to the exclusion of several services from the flat fee, the overall annual maintenance cost increased [*Ex. R1, p. 32, para. 6; PO2, p. 47, para. 27*]. In contrast, the sales price of the individual Kestrel Drone was reduced by 20 % [*Ex. R1, p. 32, para. 5*]. This is shown in the table below.



131. Furthermore, CLAIMANT itself admits that without the extended service part and the new price structure, the PSA would not have been viable [*Ex. R4, p. 35*]. Moreover, at the end of the negotiations, the service fees were listed separately in Art. 3(b)(c) PSA and the corresponding annexes [*Ex. C2, p. 11*]. Different service levels are linked to independent pricing mechanisms [*ibid.; PO2, p. 47, para. 27*]. The fact that the Parties incorporated such independent pricing structures reveals that they recognised the independent value of the services. During the contractual negotiations, the Parties significantly extended the service part thereby demonstrating their intention for the service part to be preponderant.

2. The PSA's service part is preponderant according to the PSA's main purpose

132. A contractual obligation is a service in the sense of Art. 3(2) CISG, if it consists of the supply of labour [*Schlechtriem/Schwenzer, Art. 3, para 11*]. The characteristic obligation of a sale is *"the transfer of property in the goods"* [*MüKo HGB, Art. 30, para. 1*]. If there is a particular interest in the service part, the service part outweighs the sales part [*Grinding Machine Case, pp. 9 et seq., para. 35, Schlechtriem/Schwenzer/Schroeter, Art 3, para 14*]. Further, there is a bias towards one obligation, if the time required to perform this obligation outweighs the other [*MüKo BGB, Art. 3, para. 14*].

133. CLAIMANT transfers the property in the Kestrel Drones. However, the pivotal obligation is the maintenance of the Kestrel Drones as provided in the PSA [*Ex. C2, p. 11*]. RESPONDENT was planning to collect data as part of the Northern Part Development Programme [*Ex. C2, p. 10*].

Thus, the main purpose of the PSA was the availability of operable drones. The transfer of ownership, however, is not necessary to fulfil this purpose. Leasing the Kestrel Drones would be equally viable. Furthermore, based on the maintenance interval of 100 hours and the annual average of 1.500 flight hours per drone, the combined servicing of all drones, amount to at least 360 maintenance operations [*id., p. 11, Ex. C4, p. 15*]. Thus, the continuous operability of the Kestrel Drones as a service is the PSA's main purpose. Consequently, the service part is preponderant.

C. In any case, the Parties excluded the CISG pursuant to Art. 6 CISG

134. In Art. 20(d) PSA, the Parties stipulated that *"[t]he agreement is governed by the law of Equatoriana"* [*Ex. C2, p. 12*]. Contrary to what CLAIMANT submits [*MfC, para. 123*], by explicitly choosing the law of Equatoriana to govern the PSA, the Parties excluded the CISG.

135. Art. 6 CISG allows parties to agree on the exclusion of the CISG [*Kröll/Mistelis/Perales Viscasillas, Art. 6, para. 15*]. As *"[p]arty autonomy and freedom of contract are essential features of the CISG",* the exclusion of the CISG can even be made impliedly [*id., paras. 1, 7; cf. Gasoline Case, para. 14; cf. Machines Case I, para. 8; cf. Czerwenka, p. 171; cf. Ferrari, p. 741*]. Without a choice of law clause, the CISG would be applicable by virtue of Art. 1(1) CISG [*Neumayer, p. 102; Vékás, p. 346*]. If parties have nonetheless expressly chosen the law of a specific country, their intent to apply that country's domestic law becomes apparent [*Construction Case, para. 18; Karollus, p. 381*]. Based on this, the parties' choice of a national law must be interpreted as an implied exclusion of the CISG [*Biophysics Case, para. 15; Milking Machine Case, para. 10; Karollus, p. 381; Neumayer, p. 102*].

136. It is undisputed that the requirements of Art. 1(1) CISG are met [*MfC, para. 118*]. However, the Parties chose the domestic Equatorianian law to govern the PSA [*Ex. C2, p. 12*]. Thus, the Parties excluded the CISG from governing the PSA in favour of Equatorianian domestic law.

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137. To summarise, the CISG does not apply according to both Art. 2(e) and Art. 3(2) CISG. In any case, the Parties excluded the Convention pursuant to Art. 6 CISG. In conclusion, the CISG does not apply to the case at hand.

ISSUE 4: RESPONDENT CAN RELY ON ART. 3.2.5 ICCA TO AVOID THE CONTRACT

138. In its Call for Tender, RESPONDENT sought drones best suited for high quality data collection in the difficult environment of Northern Equatoriana [*Ex. C1, p. 9*]. As such it was pivotal that the drones were state-of-the-art [*Ex. C8, p. 20*]. To win the Call for Tender, CLAIMANT repeatedly ensured the Kestrel Drone to be state-of-the-art and best suited for the purposes of RESPONDENT [*Ex. C2, p. 12; Ex. R4, p. 35*]. In reality, the Kestrel Drone is neither state-of-the-art nor best suited for RESPONDENT's purpose. Accordingly, CLAIMANT did not disclose the imminent launch of the

better suited Hawk Drone [*cf. NA, p. 5, para. 10*]. This is nothing short of fraudulent behaviour. To shield itself from the ramifications of such fraud, CLAIMANT misconstrues the CISG to govern fraudulent misrepresentation [*MfC, para. 147*]. CLAIMANT submits that the CISG would take precedence denying RESPONDENT's right to avoid the contract under the applicable Equatorianian law [*NA, p. 7, para. 22*]. However, CLAIMANT's submission lacks merit. Pursuant to Art. 4(a) CISG, the CISG does not govern fraudulent misrepresentation, but instead refers to Art. 3.2.5 ICCA. This provision is also not excluded by virtue of party autonomy. Parties, even if they wanted to, cannot circumvent mandatory national law.

139. Contrary to CLAIMANT's assertion [*MfC, para. 147*], the CISG is excluded under Art. 4 CISG regarding the misrepresentation of the Kestrel Drone [**A**]. Furthermore, the contractual avoidance stipulation in Art. 18 PSA does not exclude Art. 3.2.5 ICCA [**B**].

A. Art. 3.2.5 ICCA is applicable pursuant to Art. 4(a) CISG

140. CLAIMANT asserts that *"the CISG […] excludes any additional remedies under national laws for matters governed by it"* [*Ex. C7, p. 19, para. 17*]. It argues that recourse to domestic law is not possible as the CISG exclusively governs the PSA [*MfC, paras. 147 et seq.*]. However, CLAIMANT's argument is misconceived, as the general exclusivity of the CISG is limited by Art. 4 CISG.

141. Art. 4 CISG stipulates that *"[t]his Convention governs only the formation of the contract of sale […]. In particular, except as otherwise expressly provided in this Convention, it is not concerned with the validity of the contract"* (emphasis added). Art. 4 CISG lists subject matters not governed by the CISG [*Kröll/Mistelis/Perales Viscasillas, Art. 4, para. 12; MüKo BGB, Art. 4, para. 4*]. These matters are influenced by national values that significantly differ between countries and thus, should not be governed by international sales law [*UN YB VIII, p. 93, paras. 25 et seqq.*]. If a contract is induced by fraudulent misrepresentation, this is a case of the validity exception pursuant to Art. 4 (a) CISG which leads to the application of domestic law [*CISG Online 1291, para. 149; Used Car Case, para. 77; Hartnell, p. 70; Schlechtriem/Schwenzer, Art. 4, para. 18*]. However, the exception does not apply, if pursuant to Art. 4 Sent. 2 CISG, the Convention expressly provides for the matter in question. This is the case, if the Convention has the same regulatory content as the national law. To determine this, scholars have proposed a two-step test [*Schroeter, p. 563*].

142. The present case falls under the validity exception of Art. 4(a) CISG as CLAIMANT committed a fraudulent misrepresentation pursuant to Art. 3.2.5 ICCA [**I**]. Furthermore, the CISG remains inapplicable as it does not expressly provide for the present matter [**II**].

I. The present case falls under the validity exception of Art. 4(a) CISG

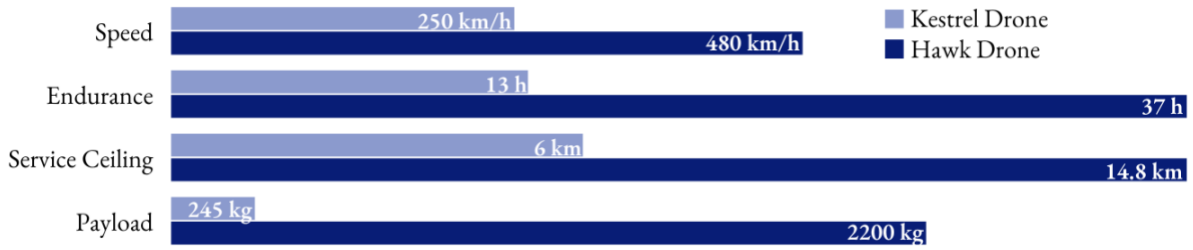
143. Art. 3.2.5 ICCA is applicable as the CISG does not govern the present dispute. Cases of fraudulent misrepresentation fall under the validity exception of Art. 4(a) CISG [*CISG Online 1291, para. 149;*

Electrocraft Case, para. 26; Hartnell, p. 70; Kröll/Mistelis/Perales Viscasillas, Art. 4, para. 23; Schlechtriem/Schwenzer, Art. 4, para. 18]. The CISG itself does not define the term fraudulent misrepresentation [*Kröll/Mistelis/Perales Viscasillas, Art. 4, para. 21; Schlechtriem/Schwenzer, Art. 4, para. 37*]. Therefore, it must be defined by the applicable national law [*CISG Online 1291, para. 149; Electrocraft Case, para. 26; Used Car Case, para. 77; Schlechtriem/Schwenzer, Art. 4, para. 18*]. The PSA is governed by Equatorianian law [*Ex. C2 p. 12*]. Hence, fraudulent misrepresentation is defined by Art. 3.2.5 ICCA, the Equatorianian international fraud provision. Pursuant to this provision, a party may avoid the contract, if the other party's false representation or non-disclosure was causal and was committed with fraudulent intention. Contrary to what CLAIMANT argues, its conduct constitutes a fraudulent misrepresentation [*cf. MfC, para. 141*]. CLAIMANT falsely represented the features of the Kestrel Drones [**1**] and violated its obligation to disclose the imminent release of the Hawk Drone [**2**]. CLAIMANT's conduct was causal for the conclusion of the PSA [**3**] and CLAIMANT acted with fraudulent intention [**4**].

1. CLAIMANT falsely represented the Kestrel Drones

144. CLAIMANT argues that its statements regarding the Kestrel Drones are correct [*MfC, para. 157*]. However, CLAIMANT's description of the Kestrel Drones as state-of-the-art were incorrect and constitute a misrepresentation pursuant to Art. 3.2.5 ICCA. In line with Arts. 4.2(2) and 4.3 ICCA, parties' statements and conduct must be interpreted according to the understanding of *"a reasonable person of the same kind"*. Following Art. 4.3(e) ICCA, regard must be had to the *"meaning [which is] commonly given to these terms and expressions"*.

145. Since the Parties did not define the term state-of-the-art, it must be interpreted according to the understanding of a reasonable person of the same kind. State-of-the-art is commonly understood as *"the most recent stage in the development of a product, incorporating the newest ideas and features"* [*Oxford Dictionary, p. 1741*]. Possible indicators of a drone's technological development are its speed, endurance, service ceiling and payload. As indicated below, the Hawk Drone is more advanced in all of these criteria [*Ex. C4, p. 15; Ex. R3, p. 34*].



146. At the time of negotiations the Hawk Drone was market ready, incorporating the newest ideas and features. It was undergoing final test flights and was launched less than two months after the contract conclusion [*Ex. C8, p. 20; NA, p. 5, para. 10*]. Conversely, the Kestrel Drone was initially developed a decade ago and has since received only minor updates [*Ex. C8, p. 20; PO2, p. 45,*

para. 13]. Drones are a rapidly developing technology – a reasonable person of the same kind would hardly qualify a decade old model as state-of-the-art. Thus, CLAIMANT's description of the Kestrel Drone as state-of-the-art is a misrepresentation in the sense of Art. 3.2.5 ICCA.

2. CLAIMANT violated its obligation to disclose the launch of the Hawk Drone

147. CLAIMANT states that it did *"not have the duty to disclose the Hawk Drones"* [*MfC, para. 153*]. However, CLAIMANT's omission to disclose the release constitutes a fraudulent non-disclosure under Art. 3.2.5. ICCA. Pursuant to this provision, the defrauded party can avoid a contract for *"fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, […] should have been disclosed"* (emphasis added). This provision must be interpreted according to the Equatorianian Supreme Court's (**ESC**) 2010 ruling regarding disclosure obligations [*RNA, pp. 29 et seq., para. 18*]. Following this, CLAIMANT violated its disclosure obligation under Art. 3.2.5 ICCA as interpreted by the ESC [**a**]. In any case, CLAIMANT violated *"reasonable commercial standards of fair dealing"* [**b**].

a. CLAIMANT violated the disclosure obligations established by the ESC's ruling

148. CLAIMANT stipulates that *"[the ESC's] decision is completely irrelevant for our Agreement"* [*Ex. C7, p. 19, para. 17*]. CLAIMANT argues that the facts of the ESC case are incomparable to the present case, rendering the ruling inapplicable [*ibid.*]. However, the Tribunal should apply the ESC's ruling on the basis that Equatoriana is a common law jurisdiction, making the ESC's ruling binding law in Equatoriana for cases with similar facts [*PO1, p. 43, III(3); PO2, p. 46, para. 18*].

149. In 2010, the ESC decided whether the conduct of a private party contracting with an SOE constituted fraud under the Equatorianian Contract Act (**ECA**) [*RNA, pp. 29 et seq., para. 18*]. It held that in cases where a private party was experienced and a SOE was newly formed, the private party was subject to *"far reaching disclosure obligations covering all information potentially relevant"* [*ibid.*]. A breach of these disclosure obligations amounts to fraudulent non-disclosure under the ECA [*ibid.*].

150. The case at hand is comparable to the facts of the 2010 ruling. CLAIMANT is an experienced private party, as it is a drone manufacturer with over two decades of experience in the trade [*NA, p. 4, paras. 1 et seq.; PO2, p. 44, para. 1*]. Conversely, RESPONDENT is a SOE set up only in 2016 and with no experience of operating drones [*id. para. 4; PO2, p. 46, para. 19; cf. PO2, p. 44, para. 7; cf. RNA, pp. 27 et seq., para. 4*]. RESPONDENT was interested in acquiring state-of-the-art UAS with maintenance for the exploration of Northern Equatoriana [*Ex. C1, p. 9*]. As the Hawk Drone is state-of-the-art, the imminent release of CLAIMANT's Hawk Drone is potentially relevant to RESPONDENT [*PO2, pp. 45 et seq., para. 17; supra paras. 144 et seqq.*].

151. Furthermore, the ESC's ruling is applicable even though it was not based on Art. 3.2.5 ICCA, but rather on its domestic equivalent, the ECA [*cf. Ex.C7, p. 19, para. 17; RNA, pp. 29 et seq., para. 18*]. The ECA is also an adoption of Art. 3.2.5. UNIDROIT Principles of International Commercial Contracts 2016 (**PICC**) [*ibid.*]. Adoptions such as these are to be interpreted in accordance with

the PICC. Article 1.6(1) PICC stipulates that all provisions based on it must be interpreted to ensure *"uniformity in their application"*. Accordingly, application to similar facts must lead to similar results [*Brödermann, p. 8; Vogenauer, Art. 1.6, para. 9*]. This is only achievable if different courts and tribunals give the same meaning to all different adoptions of the same PICC provision [*ibid.*]. Therefore, the Tribunal must attach the same meaning to Art. 3.2.5 ICCA as the ESC attached to its national equivalent.

152. Taking into consideration the ruling of the ESC, CLAIMANT breached its disclosure obligations.

b. In any case, CLAIMANT violated reasonable commercial standards of fair dealing

153. Irrespective of whether the Tribunal were to apply the ESC's ruling in the present case, CLAIMANT'S submission that no *"fraudulent non-disclosure can be discovered"* is misconceived [*MfC, para. 141*]. CLAIMANT was, in fact, obliged to disclose the imminent launch of the Hawk Drone, as it was of apparent importance to RESPONDENT and the launch was not confidential. Art. 3.2.5. ICCA sets out that disclosure obligations must be in accordance with *"reasonable commercial standards of fair dealing"*. The scope and existence of such obligations depend on the nature of the information [*Brödermann, p. 88; Vogenauer, Art. 3.2.5, paras. 16 et seq.*]. A party is obliged to disclose information that is of apparent importance to the other party unless the publication would risk decreasing the prospects of sale [*Brödermann, p. 88, cf. Cooker Case, para. 18*].

154. First, the imminent launch of the Hawk Drones is of apparent importance to RESPONDENT [*supra paras. 150 et seq.*]. The importance of the Hawk Drone's launch to RESPONDENT is not refuted by the fact that the Hawk Drone is *"more expensive than the [Kestrel Drone]"* [*MfC, para. 149*]. This is because RESPONDENT's budget of EUR 45 million would have allowed to acquire three Hawk Drones [*PO2, p. 44, para. 7*]. It was therefore perfectly fitting the desired number of UAS [*Ex. C1, p. 9*, *PO2, p. 44, para. 7*].

155. Second, disclosing the imminent launch would not risk decreasing the prospect of sale for the Hawk Drone. It was publicly known that CLAIMANT was working on a new drone model [*NA, p. 5, para. 10; PO2, p. 45, para. 15*]. Only the exact launch date was unknown. Rather, CLAIMANT would only have had to disclose the launch date of the Hawk Drone for RESPONDENT to make an informed choice. There was no need for CLAIMANT to disclose precise technical details about the functioning of the Hawk Drone. Additionally, the disclosure obligation only existed towards RESPONDENT. There is little risk of RESPONDENT releasing the information to CLAIMANT's competitors. Therefore, CLAIMANT violated its disclosure obligation by not disclosing the imminent launch of the Hawk Drone to RESPONDENT.

3. CLAIMANT's conduct was causal for the conclusion of the PSA

156. In the present case, RESPONDENT has relied on CLAIMANT's fraudulent conduct relating to the Kestrel Drone to conclude the PSA. Art. 3.2.5 ICCA requires the misrepresentation or non-

disclosure to be causal for the other party to conclude the contract [*Brödermann, p. 88; Vogenauer, Art. 3.2.5, para. 23*]. Causality can be established if *"the party seeking avoidance has relied on the fraudulent act or omission"* [*Brödermann, p. 88; Vogenauer, Art. 3.2.5, para. 24*].

157. RESPONDENT wanted to purchase state-of-the-art drones [*Ex. C1, p. 9*]. The Kestrel Drones are not state-of-the-art [*supra paras. 144 et seqq.*]. RESPONDENT would *"have profited from the additional functionalities"* of the Hawk Drones, which are *"state-of-the-art"* [*supra paras. 144 et seqq.; PO2, pp. 45 et seq., para. 17*]. Accordingly, had RESPONDENT known about the imminent launch of the more advanced Hawk Drone, it would not have concluded the PSA in its current form. In fact, RESPONDENT confronted CLAIMANT with the Hawk Drone's launch shortly after discovering it [*Ex. C7, p. 19, para. 13*]. CLAIMANT's conduct was causal for the conclusion of the PSA as RESPONDENT relied on CLAIMANT's conduct.

4. CLAIMANT acted with fraudulent intention

158. CLAIMANT contests that it acted fraudulently when misrepresenting the Kestrel Drones [*MfC, para. 150*]. This is misconceived. CLAIMANT intended to lead RESPONDENT into error thereby gaining an advantage. According to Art. 3.2.5 ICCA, a party has fraudulent intention when it *"intended to lead the other party into error and thereby gain an advantage to detriment of the other party"* [*Official Comment, p. 107; Vogenauer, Art. 3.2.5, para. 6*]. CLAIMANT intended to lead RESPONDENT into error [**a**] to gain an advantage [**b**] to the detriment of RESPONDENT [**c**].

a. CLAIMANT intended to lead RESPONDENT into error

159. CLAIMANT, being aware of the truth, deliberately made false representations with the purpose of leading RESPONDENT into believing them. A party has fraudulent intention in the sense of Art. 3.2.5 ICCA, if it *"knows that its representation is false, yet makes it deliberately, with the purpose of leading the other party into believing it"* [*Vogenauer, Art. 3.2.5, para. 6; cf. Mutual Energy Case, para. 81*]. To determine the parties' intention, Art. 4.2(2) ICCA stipulates that their statements and conduct must be interpreted *"according to the meaning that a reasonable person of the same kind as the other party would have given to it in the same circumstances"*. It is sufficient, if a party did not directly intend to induce an error but rather readily accepted that the other party be led into error [*Brödermann, pp. 87 et seq.*].

160. CLAIMANT knew that the representation of the Kestrel Drones as state-of-the-art was false and yet made it deliberately with the purpose of leading RESPONDENT into believing it. CLAIMANT knew that the Hawk Drone was superior and knew of its imminent launch [*Ex. C4, p. 15; Ex. R3, p. 34; supra para. 154*]. Therefore, CLAIMANT could not have been unaware that only the Hawk Drones are state-of-the-art. Yet, it still offered the outdated Kestrel Drones to RESPONDENT [*NA, p. 5, para. 5*]. Thereby, according to the understanding a reasonable third person would have had, CLAIMANT acted with fraudulent intention. This cannot be circumvented by CLAIMANT stating that the information was not relevant for RESPONDENT [*supra para. 154*].

161. Hence, CLAIMANT intended to lead RESPONDENT into error.

b. CLAIMANT intended to gain an advantage

162. CLAIMANT submits that it obtained *"no unjust advantage"* [*MfC, para. 150*]. However, by purposefully omitting the launch of the Hawk Drone and misrepresenting the Kestrel Drone, CLAIMANT intended to gain an advantage. In determining a party's intention, their conduct must be interpreted in accordance with Art. 4.2(2) ICCA [*supra para. 159*]. According to Art. 4.3(a) ICCA, relevant circumstances for interpretation include the preliminary negotiations.

163. CLAIMANT intended to gain an advantage by escaping a lengthy and uncertain cross-border insolvency dispute with its former customer [*PO2, p. 46, para. 25*]. This is because the repurchase of the Kestrel Drones from the customer allowed CLAIMANT to profit from the drones that would have otherwise been subject to the insolvency dispute [*Ex. R4, p. 35, NA, p. 5, para. 5, PO2, p. 46, para. 25*]. Moreover, by clearing out its inventory, CLAIMANT was able to make bigger profits compared to a Hawk Drone's sale [*EX. C2, p. 10; PO2, p. 46, para. 25*].

164. CLAIMANT intended to gain an advantage through escaping a lengthy insolvency dispute and profit from selling the repurchased Kestrel Drones.

c. This was to the detriment of RESPONDENT

165. The advantage CLAIMANT gained by inducing RESPONDENT to buy the Kestrel Drones was to the detriment of the latter. This is because RESPONDENT was deprived of his freedom of choice when concluding the PSA. Fraudulent misrepresentation protects a party's freedom of choice in the formation of a contract [*Edwards v Ashik, para 19; Vogenauer, Art. 3.2.5, para. 14; cf. MüKo BGB, § 123, para. 1*] If a party intentionally induces an error, the defrauded party cannot properly exercise its freedom of choice when contracting [*Vogenauer, Art. 3.2.5, para. 11; cf. Brödermann, p. 88*].

166. Presently RESPONDENT sought to purchase state-of-the-art drones for cutting edge data collection [*Ex. C1, p. 9*]. CLAIMANT withheld information about the launch of the Hawk Drones and stated the Kestrel Drones to be state-of-the-art [*supra paras. 144 et seqq.*]. Thereby, CLAIMANT deprived RESPONDENT of the options to either purchase the Hawk Drones or to not enter into the contract with CLAIMANT at all. This is because RESPONDENT did not receive the information to act in accordance with its Call for Tender regarding the Kestrel Drones' stage of development [*supra paras. 144 et seqq.*]. Thus, CLAIMANT deprived RESPONDENT of his freedom of choice during the contract formation to RESPONDENT's detriment.

II. The CISG does not expressly provide otherwise in the sense of Art. 4 CISG

167. CLAIMANT asserts that *"RESPONDENT could raise questions as to the conformity of the drones in the sense of Art. 35 CISG"* [*AN, p. 7, para. 22*]. Contrary to this assertion, Art. 35 CISG does not govern the same subject matter as Art. 3.2.5 ICCA and thus, the CISG does not expressly provide otherwise.

168. The exception of Art. 4 CISG does not apply in cases where the CISG *"expressly provide[s]"* for that matter. [*MüKo BGB, Art. 4, para. 14*]. To determine whether the CISG expressly provides for a matter, scholars have developed the two-step test consisting of a factual and legal criterion [*Schlechriem/Schwenzer, Art. 4, para. 29; Schroeter, p. 563*]. The factual criterion is met if the national law and the CISG govern the same factual situation [*Schroeter, p. 564*]. The legal criterion is fulfilled if the national law and the CISG have the same regulatory purpose [*id, p. 566*].

169. Even though the factual criterion is met, as both Art. 3.2.5 ICCA and Art. 35 CISG deal with situations where *"the seller is positively aware of the goods' non-conformity, but nevertheless concludes the contract"*, the legal criterion is not met [*id, p. 584*]. Art. 3.2.5 ICCA and Art. 35 CISG do not have the same regulatory purpose [*ibid; cf. CISG Online 1362, p. 3; Lookofsky, p. 280*]. This is because Art. 3.2.5 ICCA deals with violations of an *"obligation of honesty"* [*Schroeter, p. 585; cf. MüKO BGB, Art. 4, para. 28*]. In contrast, Art. 35 CISG deals with *"mere breaches of contractual obligations"* regarding the owed quality of the goods [*MüKo BGB, Art. 35, para. 1; Schroeter, p. 584*]. Additionally, a fraudulent misrepresentation contains an element of reprehensibility which is absent in Arts. 35 et seqq. CISG [*Schluchter, p. 107*].

170. Therefore, the CISG does not expressly provide for the dispute as Art. 35 CISG does not govern the same matter as Art 3.2.5 ICCA. Thus, Art. 3.2.5 ICCA is applicable pursuant to Art. 4 CISG.

B. The Parties did not agree on excluding Art. 3.2.5 ICCA

171. Contrary to what another CLAIMANT might argue, the contractual avoidance provision in Art. 18 PSA does not preclude Art. 3.2.5 ICCA. The Parties only intended to specify the scope of the CISG's avoidance provisions [**I**]. In any case, the Parties are barred from excluding mandatory national provisions [**II**].

I. The Parties only intended to specify the scope of the CISG's avoidance provisions

172. CLAIMANT states that *"RESPONDENT has forfeited its right to invoke the non-conforming clause based on the agreement between the Parties"* [*MfC, para. 169*]. However, RESPONDENT has not forfeited its right to rely on Art. 3.2.5 ICCA by Art. 18 PSA. It is assumed for the purpose of this issue that the CISG would generally apply to the PSA [*PO1, p. 42, para. III. 1. d)*]. Therefore, pursuant to Art. 6 CISG, the Parties are free *"to derogate from or vary the effect of any of its provisions"*. If and how the parties intended to derogate from the Convention, must be interpreted in accordance with Art. 8 CISG [*Schlechtriem/Schwenzer, Art. 8, para. 1*]. According to Art. 8(2) CISG, the intent of parties is *"to be interpreted to the understanding that a reasonable person […] would have had […]"*.

173. Art. 18 PSA states that the buyer may avoid the contract if a fundamental breach occurred [*Ex. C2, p. 12*]. Art. 18(2)(a)/(b)/(c) PSA gives examples of fundamental breaches i.e. bribes to RESPONDENT, delay in delivery and other breaches [*ibid.*]. By adopting a similar wording to Arts. 49

and 25 CISG, Art. 18(2)b PSA is a concretisation of these provisions. Both Art. 18(2)(b) PSA and Arts. 49, 25 CISG deal with fundamental violations of contractual obligations, entitling a party to avoid the contract. Art. 18(2)(b) PSA merely provides for a clarification of what constitutes such a violation. This is shown by Art. 18(2)(c) PSA which refers to *"other breaches"*, implying that the preceding two grounds for avoidance are also fundamental breaches [*Ex. C2, p. 12*].

174. Consequently, these provisions do not show the Parties' intend to regulate the matter of fraudulent misrepresentation but merely their intend to specify the CISG´s provisions on avoidance.

II. In any case, the Parties could not exclude Art. 3.2.5 ICCA

175. In cases where the validity exception of Art. 4(a) CISG applies, the Parties cannot exclude mandatory national law by virtue of Art. 6 CISG [*Schlechtriem/Schwenzer/Schroeter, Art. 6, para. 7*; *Piltz II, p. 4*]. The validity exception of Art. 4(a) CISG applies [*supra paras. 143 et seqq.*]. According to Art. 3.1.4 ICCA, Art. 3.2.5 ICCA is a mandatory national provision [*Vogenauer, Art. 3.1.4, para. 1*]. Furthermore, even if the parties tried rendering Art. 4(a) CISG inapplicable pursuant to Art. 6 CISG [quod non], they could not do so, as Art. 4(a) CISG is also a mandatory provision [*Bianca/Bonell, Art. 6, para. 3.4; Schelechtriem/Schwenzer, Art. 6, para. 7*]. Therefore, the Parties could not have excluded Art. 3.2.5 ICCA, even if they had intended to do so.

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176. To summarise, CLAIMANT fraudulently misrepresented the Kestrel Drones. CLAIMANT cannot rely on the CISG to circumvent its liability under Art. 3.2.5 ICCA as the CISG does not govern fraudulent misrepresentation. Besides, the Parties did not choose the CISG to govern the PSA. In conclusion, RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the contract.

REQUEST FOR RELIEF

177. In light of the above, RESPONDENT respectfully requests the Tribunal to make the following orders:

1) to decline its jurisdiction to hear the case;
2) subsidiarily, to stay or to bifurcate the proceedings into two phases;
3) subsidiarily, to reject all claims;
4) to award RESPONDENT the costs of these proceedings including legal costs, with interest.

CERTIFICATE OF INDEPENDENCE

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

Simon Ferel

Thomas Hamelin

Elisa Henke

Charlene Lorenz

Clemens Wendt

Liese-Lotte Wieprecht

Berlin, 26 January 2023