TWENTY-FIRST ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG – 10 TO 17 MARCH 2024

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF ZURICH

ICC CASE NO. MOOT-100/MM

ON BEHALF OF:	AGAINST:
SensorX plc	Visionic Ltd
Atwood Lane 1784	Optronic Avenida 3
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

FRANCO FISCHER • GIOVANNI MARIA GIUSTI • MILA GRÖNROS

NATHALIE KNEISEL • ANNALENA SCHLÄPFER • ANDREA STAUDENMANN

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UNIVERSITY: University of Zurich

COUNTRY: Switzerland

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Art./Arts.	Article(s)
AUT	Austria
ARfA	Answer to the Request for Arbitration
ARfANC	Answer to the Request for Authorization of New Claim/Consolidation of Proceedings
BDSG	Bundesdatenschutzgesetz, 2017 (Federal Data Protection Act)
BEL	Belgium
BGB	Bürgerliches Gesetzbuch, 1900 (German Civil Code)
B.V.	Besloten Vennootschap (plc)
cf.	confer (compare)
ch.	chapter
CHN	China
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
CLOUT	Case Law on UNCITRAL Texts
co.	company
Corp.	Corporation
CRM	customer relationship management
DAL	Danubian Arbitration Law
DGCL	Danubian General Contract Law
DS-GVO	Datenschutz-Grundverordnung, 2016 (GDPR)
ed.	edition
Ed./Eds.	Editor/Editors
e.g.	exempli gratia (for example)

et al.	et alii (and others)
et seq./et seqq.	et sequens (and the following one)/et sequentes (and the following ones)
EDPA	Equatorianian Data Protection Act
EDPB	European Data Protection Board
EU	European Union
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FA	Framework Agreement
FRA	France
FRED	Federal Reserve Economic Data
GDPR	EU General Data Protection Regulation, 2016
GER	Germany
GmbH	Gesellschaft mit beschränkter Haftung (plc)
ibid.	ibidem (in the same source)
ICC	International Chamber of Commerce
ICCWBO	ICC World Business Organization
i.e.	id est (in other words)
IT	information technology
ltd	limited company
Mr.	Mister
Ms.	Miss
NLD	the Netherlands
No.	number
NV	Naamloze Vennootschap (ltd)

NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958
p./pp.	page(s)
para./paras.	paragraph(s)
plc	public limited company
PO 1	Procedural Order 1
PO 2	Procedural Order 2
PO 9601	Purchase Order 9601
PO A-15604	Purchase Order A-15604
RfA	Request for Arbitration
RfANC	Request for Authorization of New Claim/Consolidation of proceedings
SchiedsVZ	Zeitschrift für Schiedsverfahren
SFT	Swiss Federal Tribunal
SUI	Switzerland
ToR	Terms of Reference
UK	United Kingdom
UN	United Nations
UNCITRAL	UN Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles on International Commercial Contracts, 2016
US	United States of America
USD	United States Dollar(s)

v.	versus
Vol.	Volume

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Cited as	Reference
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
DAL	Danubian Arbitration Law (verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration, Vienna, 21 June 1985, with the 2006 amendments)
DGCL	Danubian General Contract Law (verbatim adoption of UNIDROIT Principles on International Commercial Contracts, 2016)
EDPA	Equatorianian Data Protection Act (nearly verbatim adoption of the EU GDPR)
GDPR	General Data Protection Regulation (EU) 2016/679, 27 April 2016
ICC Rules	ICC Rules of Arbitration, 1 January 2021
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
UPICC	UNIDROIT Principles of International Commercial Contracts, 2016

Statement of Facts

The parties to the present arbitration ("**Arbitration**") are SensorX plc ("**CLAIMANT**"), a Tier 2 producer of sensors used in the automotive industry based in Mediterraneo, and Visionic Ltd ("**RESPONDENT**"), a Tier 1 manufacturer of optical systems used for autonomous parking systems based in Equatoriana (together "**Parties**").

On **7 June 2019**, the Parties entered into a Framework Agreement ("**FA**") to regulate the contractual terms to secure the future supply of sensors to RESPONDENT.

Between **June 2019** and **January 2022**, RESPONDENT submitted 22 different purchase orders under the FA and CLAIMANT delivered more than 5,000,000 sensors to RESPONDENT without any problems.

On **4 January 2022**, RESPONDENT ordered 200,000 units of L-1 sensors with a price of USD 24,000,000 under Purchase Order A-15604 ("**PO A-15604**") for delivery in mid-February 2022.

On **17 January 2022**, RESPONDENT ordered 1,200,000 S4-25899 sensors under Purchase Order 9601 ("**PO 9601**") for delivery in two installments in April and May 2022. The Parties agreed on a total purchase price of USD 38,400,000.

On **23 January 2022,** CLAIMANT discovered that despite its newly strengthened cybersecurity defense system, it had suffered from a cyberattack on **5 January 2022**.

On **16 February 2022,** CLAIMANT performed its obligations under PO A-15604 by delivering the 200,000 units of L-1 sensors.

On **28 March 2022,** RESPONDENT received an email from a hacker posing as Ms. Audi, CLAIMANT's account manager responsible for RESPONDENT. In the email, RESPONDENT was asked to transfer all future payments to a different bank account from the one indicated in the FA. Even though it did not come from Ms. Audi's email address, RESPONDENT followed the hacker's request without verifying the authenticity of the email.

On **3 April 2022** and on **30 May 2022**, CLAIMANT fulfilled its obligations under PO 9601 through the delivery of two installments of S4-25899 sensors.

On **20 May 2022**, the leading journal in the automotive industry, Automotive Weekly, published an article reporting on the increased number of cyberattacks in the industry and the typical warning signs of a cyberattack.

Until the due dates of the payment installments on **3 May** and **30 June 2022**, CLAIMANT did not receive the purchase price under PO 9601 from RESPONDENT.

On **5 September 2022,** CLAIMANT requested RESPONDENT to pay the purchase price of PO 9601 and granted RESPONDENT a grace period of one additional week. However, RESPONDENT continued to refuse to make the payment owed under PO 9601 within the additional time frame.

On **28 November 2022,** the Parties met find a resolution to RESPONDENT's refusal to pay the purchase price of PO 9601. However, RESPONDENT never indicated interest in an amicable solution.

On **9 June 2023**, CLAIMANT initiated the Arbitration against RESPONDENT by filing the Request for Arbitration ("**RfA**"). The RfA seeks the payment of the purchase price in accordance with PO 9601, invoking the arbitration agreements of PO 9601 and the FA. RESPONDENT submitted its Answer to the Request for Arbitration ("**ARfA**") on **10 July 2023**.

On **8 September 2023,** CLAIMANT discovered that RESPONDENT had not made the payment of the second installment in the amount of USD 12,000,000 under PO A-15604.

On **11 September 2023,** only 12 days after signing the Terms of Reference ("**ToR**"), CLAIMANT submitted a request for authorization of the additional claim ("**RfANC**") for payment under PO A-15604. RESPONDENT filed its answer to the request for authorization of the additional claim ("**ARfANC**") on **2 October 2023**.

Summary of Argument

Issue A: The arbitral tribunal ("Tribunal") has jurisdiction and can and should hear both claims in the Arbitration. The jurisdiction should be based on the FA, as both claims are exclusively governed by the arbitration agreement of the FA. The Parties agreed on a broad arbitration agreement in Art. 41(2) of the FA which prevails over the arbitration agreements of PO 9601 and PO A-15604 (together "**Purchase Orders**"). In any event, according to the principle of *iura novit arbiter,* the Tribunal can determine its jurisdiction independently from the Parties' submissions. Furthermore, the Tribunal should authorize the addition of the new claim pursuant to Art. 23(4) ICC Rules. This authorization is justified because the new claim is similar in nature to the initial claim and there would be substantial savings in cost and time since the proceedings are still at a very early stage. Furthermore, the authorization of the new claim would preserve the fairness of the proceedings and the Parties' right to be heard. Alternatively, the Tribunal could and should hear both claims together in the Arbitration pursuant to Art. 9 ICC Rules.

Issue B: Subsidiarily, the Tribunal should consolidate the two claims. CLAIMANT submitted a valid request for a second arbitration with all the necessary information pursuant to Art. 4 ICC Rules, and the filing fee will be paid by CLAIMANT once it becomes due. Further, the Parties transferred the power to consolidate two arbitration proceedings under Art. 41(5) of the FA from the ICC Court to the Tribunal. Moreover, the Tribunal should consolidate pursuant to Art. 10(a) ICC Rules, because the Parties agreed to consolidate. Alternatively, the Tribunal could consolidate pursuant to Art. 10(b) ICC Rules as the claims are made under the same arbitration agreement. If not, the Tribunal could consolidate as the arbitration agreements in PO 9601 and PO A-15604 are compatible pursuant to Art. 10(c) ICC Rules.

Issue C: CLAIMANT is entitled to payment of the purchase price under PO 9601. RESPONDENT failed to fulfill its payment obligation under Art. 53 CISG, as the agreed-upon place of payment was never changed. Moreover, the Parties did not amend the bank account details of the FA. In addition, CLAIMANT is entitled to the full amount due under PO 9601, since not informing RESPONDENT about the cyberattack was neither relevant nor causal to RESPONDENT's non-performance as per Art. 80 CISG. Further, RESPONDENT's payment obligation cannot be reduced, because Art. 77 CISG does not apply to specific performance. Lastly, should the Tribunal find for a joint causation of the Parties, RESPONDENT overwhelmingly caused its own failure to perform. Thus, its payment obligation should at most be slightly reduced.

A. THE TRIBUNAL HAS JURISDICTION OVER BOTH CLAIMS, THE NEW CLAIM IS ADMISSIBLE AND ITS ADMISSION IS JUSTIFIED

1 The Tribunal has jurisdiction over the claims arising from PO 9601 and PO A-15604 under the arbitration agreement in Art. 41 of the FA, which was concluded by CLAIMANT and RESPONDENT on 7 June 2019 (*Exh. C 1, pp. 11 et seq.*).

2 The place of arbitration is Vindobona, Danubia (*Exh. C 1, p. 12, Art. 41(6)*; *Exh. C 2, para. 7*; *Exh. C 7, para. 7*). Thus, the Danubian Arbitration Law ("**DAL**"), a verbatim adoption of the UNCITRAL Model Law (*PO 1, p. 59, para. 4*), serves as *lex arbitri*. Moreover, the present Arbitration shall be governed by the ICC Rules (*Exh. C 1, p. 11*).

3 CLAIMANT can invoke the arbitration agreement of the FA as the basis for the Tribunal's jurisdiction since the Tribunal has not yet ruled on its jurisdiction [**I**]. The Tribunal has jurisdiction to hear both claims in the dispute because both are governed by the arbitration agreement of the FA [**II**]. Moreover, the Tribunal should authorize the new claim pursuant to Art. 23(4) ICC Rules [**III**]. Alternatively, the Tribunal could and should hear both claims together in the Arbitration pursuant to Art. 9 ICC Rules [**IV**].

I. CLAIMANT Can Submit a Basis for the Tribunal's Jurisdiction in the Present Submission

4 CLAIMANT can submit the arbitration agreement of the FA as the basis for the Tribunal's jurisdiction over both claims in the Arbitration since the Tribunal has not yet determined its jurisdiction.

5 An arbitral tribunal is competent to rule on its own jurisdiction (*Art. 16(1) DAL*), which includes deciding on the basis for its mandate (*UNCITRAL Secretariat, para. 26*), i.e., the arbitration agreement relevant for its jurisdiction. Moreover, arbitral tribunals are not limited by the terms of reference as they define the issues to be determined in the arbitration (*CRAIG/PARK/PAULSSON, p. 276*) and do not per se confer jurisdiction on the arbitral tribunal (*RAJAH, p. 175*).

6 Submissions of legal authorities often take place throughout the proceedings, even after a procedural order has been issued. An important consideration when allowing such submissions is whether the parties have the possibility to address the new legal authority (*HARRIS/ALI, p. 268*).

7 At the current stage of proceedings, the Tribunal has not yet evaluated the basis of its jurisdiction. This is demonstrated by the ICC Secretariat: The case information on the first claim serves merely an informative purpose and "*is not intended to affect any assessment or decision*" taken by the

Tribunal (*pp. 44 et seq.*). Additionally, the ToR are not a determination of the Tribunal's jurisdiction. Submitting the arbitration agreement of the FA as a legal authority is warranted, given that both Parties have the possibility to address it in the proceedings which are still at an early stage. In any event, the FA was already referred to in the RfA (*RfA, p. 7, para. 23*), as well as in the ToR signed by the Parties (*PO 2, p. 65, para. 35*).

8 In conclusion, CLAIMANT can submit the arbitration agreement of the FA as a basis for the Tribunal's jurisdiction as its jurisdiction has not yet been determined.

II. Both Claims in the Present Dispute Are Based on the Arbitration Agreement of the Framework Agreement

9 The Tribunal should base its jurisdiction on the arbitration agreement of the FA. Both the claim from PO 9601 and the new claim from PO A-15604 fall under the arbitration agreement in Art. 41 of the FA and thus do not arise from different arbitration agreements.

10 Firstly, the Parties agreed on a broad scope arbitration agreement in Art. 41 of the FA, which exhaustively governs all disputes between the Parties [**1**]. Secondly, as the Purchase Orders are individual contracts concluded under the FA, the arbitration agreement of the FA prevails [**2**]. In any event, the principle of *iura novit arbiter* allows the Tribunal to base its jurisdiction on the arbitration agreement of the FA [**3**].

1. The Broad Arbitration Agreement of the Framework Agreement Exhaustively Governs All Disputes Between CLAIMANT and RESPONDENT

11 The Tribunal has jurisdiction over both claims because the Parties agreed on the broad arbitration agreement of the FA, which encompasses all disputes regarding PO 9601 and PO A-15604.

12 Based on the overriding principle of party autonomy, parties have broad discretion to decide on the extent of an arbitration agreement (*CIRLIG, p. 51*; *GIRSBERGER/VOSER, para. 923*). When it comes to the interpretation of arbitration agreements, they are interpreted by seeking the real and common intent of the parties, guided by the wording of the clause and the principle of good faith (*BORN, ch. 9.02[D][1]*). Additionally, using the phrasing "*all disputes*" in arbitration clauses is usually interpreted as the intent to extend the arbitration agreement to all disputes with any plausible legal relation to the parties' agreement (*Fiona Trust Case [UK 2007], para. 27*; *BORN, ch. 9.02[E]*).

13 The Parties intentionally worded the arbitration agreement of the FA broadly by stating that it was "*the **intention** of the Parties that this is a **broad** form arbitration agreement designed to **encompass***

all possible disputes arising in connection with the present contract and the contracts concluded thereunder" (*Art. 41(2) of the FA, emphasis added*). The common intent of the Parties clearly was to include an arbitration agreement with a broad scope, encompassing all disputes under the FA, as well as under the respective Purchase Orders. Both Purchase Orders were concluded under the FA (*Exh. C 2, first sentence; Exh. C 7, first sentence*), which directly indicates the legal relation to the FA.

14 Therefore, the Parties agreed on the arbitration agreement of the FA to exhaustively govern all disputes between them, including any disputes arising out of PO 9601 and PO A-15604.

2. The Arbitration Agreement of the Framework Agreement Prevails Over the Arbitration Agreements of the Purchase Orders

15 The Tribunal has jurisdiction to hear both claims based on Art. 41 of the FA as the arbitration agreement of the FA applies to disputes arising from individual contracts concluded under the FA, namely the Purchase Orders.

16 Contracts are deemed linked to each other when they exhibit a relationship of economic or functional dependence. This occurs when several contracts coexist to reach a common goal, e.g., a framework agreement and contracts implementing it (*HANOTIAU, para. 503*). Where contracts are linked, the arbitration clause of a framework agreement applies to all disputes arising from it, including those emerging from contracts concluded under it (*ICC Case 7929 [ICC, 1995], para. 31*; *ICC Case 5989 [ICC, 1989], paras. 5, 8*).

17 The arbitration agreement of a framework agreement remains applicable even if the contracts concluded under it contain another arbitration agreement. This fact alone does not sufficiently indicate the parties' intent to rule out arbitral proceedings under a framework agreement (*cf. ICC Case 22423/FS [ICC, 2019], para. 474*; *ICC Case 5989 [ICC, 1989], para. 5*). Uncertainties would only arise if such a new clause contained significantly conflicting applicable rules or seats of arbitration (*cf. SFT 4A_390/2014 [SUI 2015], para. 3.4*; *HANOTIAU, paras. 667 et seq.*).

18 According to Art. 1 of the FA, the FA applies to all individual contracts agreed thereunder. Both CLAIMANT's initial claim under PO 9601 and CLAIMANT's new claim under PO A-15604 arise from the same commercial relationship between the Parties, which was concluded through and is regulated by the FA (*RfA, p. 7, paras. 22 et seq.*; *RfANC, p. 47, para. 5*). In fact, both Purchase Orders acknowledge Art. 1 of the FA, affirming that they are governed by the provisions of the FA

unless otherwise agreed in the respective Purchase Orders (*Exh. C 2, first sentence*; *Exh. C 7, first sentence*). In addition, both Purchase Orders were concluded pursuant to Art. 5 of the FA, which establishes the basis for any subsequent contracts under the FA. Therefore, both PO 9601 and PO A-15604 are closely linked to the FA.

19 Since the Purchase Orders are individual contracts concluded under the FA, disputes arising out of these are covered by the arbitration agreement in Art. 41 of the FA. The fact that they contain arbitration agreements is not sufficient to exclude arbitration proceedings under the FA. Furthermore, both arbitration agreements specify the same seat, as well as the same applicable rules to the arbitration, Danubia and the ICC Rules, respectively (*Exh. C 2, para. 7*; *Exh. C 7, para. 7*). Therefore, no conflict between the arbitration agreements exists, and the arbitration agreement of the FA is applicable. Thus, the arbitration agreement in Art. 41 of the FA prevails over the arbitration agreements of the Purchase Orders.

20 In conclusion, the Tribunal should base the jurisdiction on the arbitration agreement of the FA since the initial claim under PO 9601 and the new claim under PO A-15604 fall under the arbitration agreement in Art. 41 of the FA and thus do not arise from different arbitration agreements.

3. In Any Event, the Principle of *Iura Novit Arbiter* Allows the Tribunal to Accept Jurisdiction Over Both Claims Under the Arbitration Agreement of the Framework Agreement

21 In any event, the principle of *iura novit arbiter* allows the Tribunal to accept jurisdiction over both claims based on the arbitration agreement of the FA independently of the Parties' submissions.

22 The principle of *iura novit arbiter* enables an arbitral tribunal to apply the law proactively and potentially independently from the parties' submissions (*ABDEL WAHAB, p. 3*; *ÖHLBERGER/PINKSTON, p. 103*). Furthermore, arbitral tribunals decide on their own jurisdiction pursuant to Art. 16(1) DAL. They derive their powers and jurisdiction from arbitration agreements (*GIRSBERGER/VOSER, para. 14*; *IGBOKWE, p. 102*). Tribunals face certain limitations when following *iura novit arbiter*, such as foreseeability, the principle of *ne ultra petita*, i.e., not going beyond the request of the parties, and the right to be heard (*ABDEL WAHAB, p. 18*).

23 In the present case, the Tribunal assesses which arbitration agreement applies as the legal basis for its jurisdiction. Irrespective of the Parties' submissions, the Parties clearly agreed on a broad scope

of the arbitration agreement in Art. 41 of the FA that covers all disputes arising from the FA and any contracts concluded thereunder (*Exh. C 1, p. 11*). This scope extends to PO 9601 and PO A-15604, both of which specifically refer to the FA (*Exh. C 2, first sentence; Exh. C 7, first sentence*). Crucially, the Parties' right to be heard would not be violated, since the Parties can address the basis for jurisdiction in their submissions. Moreover, the Tribunal would not go beyond the request of the Parties because the Parties have agreed to the broad scope of the FA. Thus, basing the Tribunal's jurisdiction on the arbitration agreement of the FA would be foreseeable and also respect the other limitations of *iura novit arbiter*.

24 Therefore, the *iura novit arbiter* principle permits the Tribunal to base its jurisdiction on the arbitration agreement in Art. 41 of the FA independently from the Parties' submissions, as all of the limitations of *iura novit arbiter* would be respected.

25 In conclusion, the Tribunal should base its jurisdiction on the arbitration agreement of the FA for two reasons. Firstly, because of the broad scope of the arbitration agreement and secondly, as the Purchase Orders are contracts concluded under the FA. In any event, the principle *iura novit arbiter* allows the Tribunal to base its jurisdiction on the arbitration agreement of the FA.

III. The Tribunal Should Authorize the Addition of the New Claim Pursuant to Art. 23(4) ICC Rules

26 The Tribunal should authorize the addition of the new claim under PO A-15604 pursuant to Art. 23(4) ICC Rules as requested by CLAIMANT (*RfANC, pp. 46 et seq.*).

27 According to Art. 23(4) ICC Rules, after the terms of reference have been signed, the arbitral tribunal may authorize the addition of new claims to a pending arbitration upon request of one of the parties. The aim of this authorization requirement is to avoid undue disruption of the proceedings (*FRY/GREENBERG/MAZZA, para. 3-890*; *WEBSTER/BÜHLER, Art. 23 ICC Rules, para. 23-83*). The arbitral tribunal generally enjoys wide discretion in authorizing new claims (*KULL, Art. 23 ICC Rules, para. 33*), and their admission merely needs to be "*appropriate*" (*WELSER/MIMNAGH, p. 39*). The admission is appropriate if the addition of the new claim to the ongoing proceedings would cause less disruption than the inefficiencies caused by initiating a second, separate arbitration (*FRY/GREENBERG/MAZZA, para. 3-905*).

28 In the case at hand, the considerations under Art. 23(4) ICC Rules justify the admission of the new claim. Firstly, the new claim is similar in nature to the initial claim [**1**]. Secondly, given that the

present proceedings are still at an early stage, admitting the new claim would be more cost and time efficient [**2**]. Lastly, the admission of the new claim would preserve the fairness of the proceedings and the Parties' right to be heard [**3**].

1. The New Claim Is Similar in Nature to the Initial Claim

29 The new claim under PO A-15604 and the initial claim under PO 9601 are similar in nature, as they deal with similar matters. Furthermore, they are both based on Purchase Orders under the FA, and therefore relate to similar questions of law and fact.

30 Arbitral tribunals are more inclined to admit a new claim to the ongoing proceedings if it is related to the underlying dispute and fits into the proceedings. The admission will likely be accepted if the claims, e.g., relate to similar questions of law and fact or are based on the same contract and the same facts (*cf. FRY/GREENBERG/MAZZA, para. 3-904*; *cf. KULL, Art. 23 ICC Rules, para. 33*).

31 Both claims relate to similar questions of law, as CLAIMANT is seeking fulfillment of the payment obligations from RESPONDENT arising out of Purchase Orders (*RfA, p. 5; RfANC, p. 46*). Although the initial claim relates to the payment to the incorrect bank account, and the new one to the non-payment of allegedly defective goods, the underlying legal question is the same. Both claims concern the invalidity of an amendment of the FA which did not comply with the form requirement in Art. 40 of the FA. Moreover, since the Purchase Orders were concluded under Art. 5 of the FA, the same contractual provisions, and the same law (CISG) applies.

32 Both claims also relate to similar questions of fact as the underlying Purchase Orders were concluded between the same Parties and arise from the same commercial relationship. Both Purchase Orders were concluded within a time span of less than two weeks (*Exh. C 2*; *Exh. C 7*). Moreover, the products in both cases were sensors intended for applications in the automotive industry. Lastly, in both Purchase Orders, the Parties agreed on the payment for the goods in two installments after their delivery (*ibid.*). These circumstances demonstrate the factual similarity of the claims.

33 Therefore, the new claim under PO A-15604 and the initial claim under PO 9601 are similar in nature, as both relate to similar questions of law and fact.

2. The Arbitration Proceedings Are at a Very Early Stage

34 Since the proceedings are still at a very early stage, adding the new claim to the Arbitration would result in substantial savings in cost and time.

35 Considering the stage of arbitration is crucial since the addition of a new claim at a late stage often results in inefficiencies such as unavoidable additional cost and delay (*cf. FRY/GREENBERG/MAZZA, para. 3-905*). When new claims are introduced early in the proceeding, i.e., shortly after signing the terms of reference, they are generally admitted (*KULL, Art. 23 ICC Rules, para. 33*; *VERBIST/SCHÄFER, p. 134*). Dealing with both claims in the same proceedings is generally more cost effective if the new claim arises out of the same contract and shares the same facts as the initial claim (*WEBSTER/BÜHLER, Art. 23 ICC Rules, para. 23-89*; *WELSER/MIMNAGH, p. 40*).

36 In the present case, the proceedings have only reached the stage of the first written submission by CLAIMANT and are therefore still at a very early stage. Adding the new claim would not disrupt the procedure, especially since RESPONDENT can still address the claim in writing. Handling both claims in one arbitration is more time efficient since two separate arbitrations would necessitate the repetition of the same steps such as administrative organization and all the submissions. Moreover, given the significant overlap of facts in both claims, a subsequent arbitral tribunal would have to assess remarkably similar issues, requiring the application of the same legal considerations under the CISG. This is especially relevant considering the Parties appointed three arbitrators with extensive experience in the automotive industry (*PO 2, p. 65, para. 36*). The same arbitrators might not be available for a second arbitration, and it might prove difficult to find other equally experienced arbitrators, resulting in further delays.

37 Not initiating separate proceedings for the additional claim would result in noticeable cost savings. The Parties initially paid a provisional advance on costs for the Tribunal's fees and ICC administrative expenses of USD 140,000 (*ICC Notification of a Request for Arbitration, p. 23*), which later increased to USD 610,000 (*ICC Notification of Court Decision, p. 39*). The calculation is based on the amount in dispute of USD 38,400,000, and three arbitrators (*ibid.*). If the new claim were added to the present Arbitration, only an additional amount of USD 61,558 would be due (*ICC Costs calculator: median cost for an amount in dispute of USD 50,400,000 compared to USD 38,400,000*). In contrast, submitting the claim of PO A-15604 to a new arbitral tribunal would incur costs of USD 408,517 (*median costs according to ICC Costs calculator for an amount in dispute of USD 12,000,000*). Additionally, a second tribunal examining the same facts would double the costs of legal representation, as twice as many submissions, hearings, etc. would be needed.

38 Contrary to RESPONDENT's claim, the Parties have not raised the standard in their ToR for admitting new claims under Art. 23(4) ICC Rules (*cf. ARfANC, p. 55, para. 5*). The conditions in para. 85 ToR (*ibid., p. 54, para. 4*), noticeable savings in cost and time, align with Art. 23(4) ICC Rules (*cf. paras. 35 et seqq.*) and do not elevate the standard. Even if they were deemed to raise the standard, such a heightened standard would be fulfilled due to noticeable savings in cost in the amount of about USD 350,000 in ICC costs alone (*cf. para. 37*).

39 Therefore, there would be substantial savings in cost and time if the new claim were added to the Arbitration since the proceedings are still at a very early stage.

3. The Admission of the New Claim Would Preserve Fairness and the Right To Be Heard

40 The Tribunal should authorize the admission of the new claim since that would preserve fairness and the Parties' right to be heard.

41 The arbitral tribunal has to ensure the parties' right to be heard by giving them a reasonable opportunity to present their case (*Art. 22(4) ICC Rules*; *Art. 18 DAL*). Therefore, the right to be heard is crucial for the considerations under Art. 23(4) ICC Rules (*FRY/GREENBERG/MAZZA, para. 3-906*; *KULL, Art. 23 ICC Rules, para. 36*). The right to be heard is violated if the parties are not able to file new evidence and to defend themselves, or if the arbitral tribunal refuses to rule on a new claim, notwithstanding legitimate grounds for its admission (*BRUEGGEMANN/SMAHI, p. 54*).

42 In the present case, RESPONDENT's right to be heard will not be violated by admitting the new claim. The Arbitration is still at a very early stage and RESPONDENT was already able to position itself on the admission of the new claim (*ARfANC, pp. 54 et seq.*). It is neither prevented from filing new evidence, nor from defending itself in any upcoming submissions or hearings. Importantly, CLAIMANT's right to be heard would be violated if the new claim were not admitted to the present proceedings because all considerations under Art. 23(4) ICC Rules legitimize the admission of the new claim, as already explained in detail (*paras. 26 et seqq.*).

43 Furthermore, due to RESPONDENT's disregard of the contractually agreed notification procedure in Art. 15 of the FA (*Exh. C 1, p. 11*) CLAIMANT only discovered the missing payment on 8 September 2023 (*Exh. C 8, para. 7*). Had RESPONDENT sent the notice of defect form via post as required instead of email (*cf. Exh. R 5*), CLAIMANT would have raised both claims at the same time.

44 Therefore, the Tribunal should authorize the admission of the new claim since doing so would preserve fairness and the right to be heard.

45 In conclusion, the admission is justified according to Art. 23(4) ICC Rules. Firstly, the new claim is similar in nature to the initial claim. Secondly, since the present proceedings are still at an early stage, it would be more cost and time efficient to admit the new claim. Lastly, the fairness of the proceedings and the Parties' right to be heard will be preserved if the new claim is admitted.

IV. Alternatively, the Tribunal Could and Should Hear Both Claims Pursuant to Art. 9 ICC Rules

46 Alternatively, as RESPONDENT does not dispute the Tribunal's jurisdiction over the initial claim under the arbitration agreement of PO 9601 (*ARfA, p. 31, para. 8*), the Tribunal could hear both claims together in the Arbitration pursuant to Art. 9 ICC Rules.

47 Art. 9 ICC Rules allows claims arising out of or in connection with more than one contract to be determined in a single arbitration. Those claims can be based on one or multiple arbitration agreements (*EMANUELE/MOLFA/GOSI, p. 109)*. A common example of multi-contract claims is a framework agreement and contracts concluded under it (*MEIER, Art. 9, para. 4*). Art. 9 ICC Rules is subject to Arts. 6(3)-(7) and 23(4) ICC Rules.

48 As already demonstrated above (*paras. 26 et seqq.*), the considerations of Art. 23(4) ICC Rules justify hearing both claims in a single arbitration.

49 Art. 6(3) ICC Rules regulates the situation when a party raises a plea "*concerning whether all of the claims made in the arbitration may be determined together in a single arbitration*". Any objection against such a joint determination of claims is decided by the arbitral tribunal, except when the ICC Secretariat refers the matter to the ICC Court (*Art. 6(3) ICC Rules*).

50 As the ICC Secretariat has not referred the matter to the ICC Court after receipt of CLAIMANT's RfANC (*cf. ICC Letter on Consolidation, p. 53*), the Tribunal decides whether or not to hear the new claim of PO A-15604 together with the claim of PO 9601.

51 To continue the proceedings, the respective arbitration agreements must be compatible, and the parties must have agreed to hear the claims in a single arbitration (*Art. 6(4)(ii) ICC Rules*). Arbitration agreements are compatible under Art. 6(4)(ii) ICC Rules if they provide the same place of arbitration and are not inconsistent regarding the constitution of the arbitral tribunal (*FRY/GREENBERG/MAZZA, para. 3-243*). Parties can implicitly agree to determine claims together in a single arbitration, which is assumed when the contracts that contain the arbitration agreements have a common goal or where they are functionally or economically related (*GIRSBERGER/VOSER,*

paras. 588 et seqq.; *cf. paras. 11 et seq.*). Such economic relation can be assessed through the purpose, parties, and dates of the contracts (*FRY/GREENBERG/MAZZA, para. 3-249*).

52 Additionally, prior to the constitution of an arbitral tribunal, an emergency arbitrator can be called to grant interim relief to the parties pursuant to Art. 29(1) ICC Rules. Interim relief serves to secure immediate and temporary protection of rights or property when a decision on the merits is still pending (*SANTACROCE, p. 300*; *WAGONER, p. 131*).

53 In the present case, the Parties concluded the Purchase Orders under the FA. Each contract contains an arbitration agreement, which both refer to ICC Rules and name Danubia as the place of arbitration (*Exh. C 2, para. 7*; *Exh. C 7, para. 7*). The arbitration agreements are also consistent regarding the constitution of the Tribunal since PO 9601 provides for three arbitrators and PO A-15604 for "*one or more*". In the proceedings where emergency arbitration would be possible, i.e., under PO 9601, the Tribunal has already been constituted. Furthermore, RESPONDENT agreed to exclude emergency arbitration in PO A-15604 (*PO 2, p. 65, para. 33*; *Exh. C 7, para. 7*). Therefore, the arbitral clauses are compatible. In addition, the Purchase Orders have a clear functional connection and common purpose since they were both concluded to implement the FA. The same Parties concluded both Purchase Orders within 13 days (*Exh. C 2*; *Exh. C 7*). For these reasons, the Parties implicitly agreed to deal with any claims arising from the Purchase Orders in a single arbitration. Therefore, the conditions for hearing both claims under Art. 6(4)(ii) ICC Rules are met.

54 In conclusion, the Tribunal could and should hear both claims together in the Arbitration pursuant to Art. 9 ICC Rules.

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55 **Conclusion Issue A**: The Tribunal has jurisdiction over both claims because both are based on the arbitration agreement of the FA. The Tribunal should authorize the addition of the new claim pursuant to Art. 23(4) ICC Rules since the ToR do not raise the standard for the admission of the new claim and because the considerations under Art. 23(4) ICC Rules are met. Alternatively, the Tribunal could and should hear both claims together pursuant to Art. 9 ICC Rules.

B. SUBSIDIARILY, THE TRIBUNAL CAN AND SHOULD CONSOLIDATE THE ARBITRATIONS

56 If the Tribunal does not authorize the new claim, the Tribunal can and should consolidate the Arbitration with the second arbitration concerning PO A-15604 based on Art. 41(5) of the FA and Art. 10 ICC Rules. Firstly, CLAIMANT submitted a valid request under Art. 4 ICC Rules for a second arbitration concerning PO A-15604 through the RfANC [**I**]. Secondly, the Tribunal has the power to consolidate the arbitration proceedings pursuant to Art. 41(5) of the FA [**II**]. Lastly, the Tribunal should consolidate the arbitrations in accordance with Art. 10(a), (b) or (c) ICC Rules [**III**].

I. CLAIMANT Submitted a Valid Request for Arbitration Regarding PO A-15604 Pursuant to Art. 4 ICC Rules

57 CLAIMANT submitted a valid request pursuant to Art. 4 ICC Rules for a second arbitration regarding the new claim of PO A-15604 through its RfANC.

58 According to Art. 4 ICC Rules, a request for arbitration must contain all necessary elements, such as party information (*Art. 4(3)(a), (b) ICC Rules*), description of the dispute and any relevant agreements (*Art. 4(3)(c)-(f) ICC Rules*). The purpose of the requirements for a request for arbitration in Art. 4 ICC Rules is to ensure that the respondent has sufficient information and time to prepare itself for the arbitration (*FRY/GREENBERG/MAZZA, para. 3-80*). If a sufficient request is filed without an accompanying filing fee, the ICC Secretariat may set a time limit for payment (*ibid., paras. 3-109, 3-124*).

59 In the present case, the RfANC contained all necessary information for RESPONDENT to prepare for the arbitration as it filed a rejection to CLAIMANT's additional request (*ARfANC, pp. 54 et seq.*). The missing filing fee did not influence RESPONDENT's ability to familiarize itself sufficiently with the procedural and substantive aspects of the second claim.

60 CLAIMANT asked the ICC Secretariat to treat its submission as a request for a second arbitration if the new claim were not authorized in the Arbitration (*RfANC, p. 46, para. 7*). If the request for a second arbitration would become relevant, CLAIMANT would then pay the required filing fee (*cf. PO 2, p. 66, para. 41*). In addition, the ICC Secretariat notified both Parties of its receipt and stated, "*we understand that no further action is required of the Secretariat **at this time***" (*ICC Letter on*

Consolidation, p. 53, emphasis added). This shows that it recognized CLAIMANT's conditional nature of the request.

61 In conclusion, CLAIMANT's RfANC was a valid conditional request for a second arbitration under Art. 4 ICC Rules. CLAIMANT would pay the filing fee should the Tribunal decide not to include the new claim in the first proceedings.

II. The Parties Transferred the Power to Consolidate Arbitration Proceedings to the Tribunal in Art. 41(5) of the Framework Agreement

62 The transfer of power to the Tribunal to consolidate arbitration proceedings is valid as it is in accordance with the principle of party autonomy [**1**], and since the Parties may deviate from Art. 10 ICC Rules [**2**].

1. The Transfer of Power to the Tribunal to Rule on Consolidation Is Justified Due to the Principle of Party Autonomy

63 The transfer of power to the Tribunal to consolidate arbitration proceedings in Art. 41(5) of the FA is justified due to the principle of party autonomy.

64 Although as per Art. 10 ICC Rules, it is generally the ICC Court which may consolidate two separate ICC arbitrations, the principle of party autonomy is emphasized in ICC arbitration. Hence, Parties may agree on the form they consider most appropriate for the case, which is an indication of the general flexibility of the ICC Rules (*FRY/GREENBERG/MAZZA, para. 3-723*; *cf. WEBSTER/BÜHLER, Art. 19 ICC Rules, para. 19-8*). This flexibility is only limited by a mandatory provision (*ICCWBO, Arts. 19, 22, 25, 26*).

65 Furthermore, the New York Convention ("**NY Convention**") protects party autonomy in Art. V(1)(d) by stating that the procedure has to be "*in accordance with the agreement of the parties*". If an arbitral tribunal disregards this fundamental principle, the recognition and the enforcement of the arbitral award may be refused in all of the Contracting States of the NY Convention (*Art. V(1) NY Convention*), particularly Mediterraneo and Equatoriana (*PO 1, p. 59, para. 4*).

66 In the case at hand, the Parties explicitly agreed under Art. 41(5) of the FA to grant the power to consolidate arbitrations to the Tribunal, thereby making use of their party autonomy. Moreover, the Tribunal should apply Art. 41(5) of the FA, as an omission to do so could jeopardize the recognition and enforcement of the award in Mediterraneo and Equatoriana.

67 Therefore, the transfer of power to the Tribunal to consolidate arbitration proceedings in Art. 41(5) of the FA was justified due to the principle of party autonomy and should be applied to secure the recognition and enforcement of the arbitral award.

2. The Parties Can Deviate from Art. 10 ICC Rules Because It Is Not a Fundamental Characteristic of ICC Arbitration

68 The Parties can deviate from Art. 10 ICC Rules since it is not a fundamental characteristic of ICC arbitration, and the core of the provision is still preserved.

69 ICC provisions which are fundamental characteristics of ICC arbitration, namely the establishment of the terms of reference and the scrutiny of the award, cannot be altered by parties (*BORN, ch. 15.02(D)*; *CRAIG/PARK/PAULSSON, p. 295*). These provisions are the cornerstones of an ICC arbitration (*BERGER, p. 350*; *WEBSTER/BÜHLER, Art. 1 ICC Rules, paras. 1-31, 1-32*). Art. 23(2) ICC Rules plays a fundamental role in organizing the arbitration through the establishment of the terms of reference (*FRY/GREENBERG/MAZZA, para. 3-862*). The ICC Court's scrutiny of the award pursuant to Art. 34 ICC Rules guarantees the issuance of formally correct awards (*LENGGENHAGER, Art. 34 ICC Rules, para. 2*). By contrast, Art. 10 ICC Rules aims for procedural efficiency and lower costs (*FRY/GREENBERG/MAZZA, para. 3-348*). Since the consolidation according to Art. 10 ICC Rules pursues the facilitation of proceedings, it is not a fundamental characteristic, as Arts. 23(2) and 34 ICC Rules are. Furthermore, if a deviation from the ICC Rules were considered too significant by the ICC Court, it would intervene or even decline to administer a case (*WEBSTER/BÜHLER, Art. 1 ICC Rules, paras. 1-28, 1-30*).

70 The possibility to deviate from Art. 10 ICC Rules was confirmed by an award issued in an ICC arbitration (*ICC Case 16982 [ICC, Final Award, 2014]*) where the arbitral tribunal, not the ICC Court, consolidated two proceedings under the ICC Rules (*ibid., para. 37*). The consolidation was subject to conditions agreed by the parties, i.e., common questions of law and fact, and the risk of conflicting awards or obligations in case of separate arbitrations (*ICC Case 16982 [ICC, Partial Award, 2014], paras. 22, 23, 25*). The validity of the transfer of power was accepted by the ICC Court because all these conditions were fulfilled.

71 In the present case, the ICC Court could have intervened or declined to administer the Arbitration if it considered that the Parties had significantly deviated from Art. 10 ICC Rules. The arbitration agreement containing the consolidation clause in Art. 41(5) of the FA was mentioned in the RfA

(*RfA, p. 7, para. 23*) as well as the ToR (*PO 2, p. 65, para. 35*). However, the ICC Court decided not to act, thereby tacitly accepting the Parties' deviation. Furthermore, the additional conditions for consolidation are identical to the ones in the ICC case mentioned in para. 70. As these conditions are also fulfilled, the Parties transferred the power to consolidate to the Tribunal.

72 Therefore, the Parties can deviate from Art. 10 ICC Rules since it is not a fundamental characteristic of the ICC Rules and the core of the rule is still preserved.

73 In conclusion, the transfer of power to the Tribunal to consolidate arbitration proceedings is valid due to the principle of party autonomy and since the Parties may deviate from Art. 10 ICC Rules.

III. The Tribunal Should Consolidate the Arbitrations Pursuant to Art. 10 ICC Rules

74 The Tribunal should consolidate the arbitral proceedings as the Parties have agreed to the consolidation pursuant to Art. 10(a) ICC Rules, and the conditions under Art. 41(5) of the FA are met [**1**]. Alternatively, the claims are based on the same arbitration agreement according to Art. 10(b) ICC Rules [**2**]. If the Tribunal would come to the decision that the claims were raised under different arbitration agreements, it should nevertheless consolidate the proceedings, since the arbitrations are between the same parties, the disputes arise from the same legal relationship, and the arbitration agreements are compatible under Art. 10(c) ICC Rules [**3**].

1. The Parties Have Agreed to the Consolidation Pursuant to Art. 10(a) ICC Rules in Art. 41(5) of the Framework Agreement

75 The Tribunal should consolidate the proceedings pursuant to Art. 10(a) ICC Rules as the Parties have explicitly agreed on consolidation in Art. 41(5) of the FA.

76 According to Art. 10(a) ICC Rules, two or more arbitrations pending under the ICC Rules may be consolidated into a single arbitration where the parties have agreed to consolidation. If, prior to the proceedings, the parties expressly agreed on conditions applicable to consolidation in an arbitration agreement, the arbitration proceedings may be consolidated pursuant to Art. 10(a) ICC Rules if these conditions are met (*WEBSTER/BÜHLER, Art. 10 ICC Rules, para. 10-7*).

77 The Parties explicitly agreed on the consolidation of multiple arbitration proceedings in Art. 41(5) of the FA (*Exh. C 1, p. 12*). Noticeably, it was at RESPONDENT's insistence that the consolidation clause be included in the FA (*PO 2, p. 63, para. 19*). According to Art. 41(5) of the FA, the Tribunal should consolidate the arbitration proceedings if the conditions enumerated in this article apply. As will be shown, all conditions are fulfilled.

78 Firstly, the arbitrations relate to contracts concluded under the FA, as discussed above (*cf. paras. 11 et seqq.*). Secondly, the subject matters are related by common questions of law and fact [**a**] and thirdly, there is a substantial risk of conflicting awards in case of separate arbitral proceedings [**b**].

a) The Matters Are Related by Common Questions of Law and Fact

79 Pursuant to Art. 41(5) of the FA, the claims need to be related by "*common questions of law **or** fact*" (*Exh. C 1, p. 12, emphasis added*). It has already been established under the considerations of Art. 23(4) ICC Rules that the matters are related by common questions of law *and* fact (*cf. paras. 29 et seqq.*).

b) Conflicting Awards Would Be Avoided Through Consolidation

80 Art. 41(5) of the FA foresees that the risk of "*conflicting awards **or** obligations*" (*Exh. C 1, p. 12, emphasis added*) would justify consolidation. As will be demonstrated, a substantial risk of conflicting awards could be avoided through consolidation.

81 Conflicting awards arise if the underlying questions of the two decisions are resolved in different ways, e.g., based on different, logically incompatible interpretations of the same contract (*DEBOURG, para. 22*; *cf. MAYER, para. 8*).

82 Under the circumstances at hand, the outcome of two separate arbitral awards would predominantly depend on whether the FA can be amended without the Parties' signatures as required in Art. 40 of the FA (*Exh. C 1, p. 11*). Indeed, the main issue in the claim of PO 9601 revolves around whether the hacker's email of 28 March 2022 amended Art. 7 of the FA (*cf. paras. 104 et seqq.*). Similarly, the outcome of the claim under PO A-15604 depends on whether the Parties deviated from Art. 15 of the FA, which required that a notice of defect be sent by post (*cf. paras. 43 et seqq.*). In both cases, the critical question for both arbitral tribunals to assess would be whether the FA can be amended by email correspondence.

83 Hence, if two different arbitral tribunals were to decide on the same underlying question, a risk of conflicting awards would arise. This is exactly the situation the Parties, and in particular RESPONDENT, intended to avoid by including Art. 41(5) in the FA. RESPONDENT insisted on introducing a consolidation clause because it had to initiate three separate proceedings against another supplier in the past, which led to different results (*PO 2, p. 63, para. 19*).

84 Therefore, a substantial risk of conflicting awards could be avoided through consolidation.

85 In conclusion, the Tribunal should consolidate the proceedings pursuant to Art. 10(a) ICC Rules as the Parties have explicitly agreed on consolidation under Art. 41(5) of the FA.

2. The Claims Are Made Under the Same Arbitration Agreement Pursuant to Art. 10(b) ICC Rules

86 Alternatively, the Tribunal could consolidate the proceedings into a single arbitration according to Art. 10(b) ICC Rules since the claims are made under the same arbitration agreement contained in the FA.

87 As outlined above, both claims are made under the arbitration agreement of the FA because the broad scope of the arbitration agreement of the FA exhaustively governs all disputes between the Parties (*cf. paras. 11 et seqq.*), and the arbitration agreement of the FA prevails over the arbitration agreements of the Purchase Orders (*cf. paras. 15 et seqq.*).

88 In conclusion, the Tribunal could consolidate the proceedings into a single arbitration according to Art. 10(b) ICC Rules since the claims are made under the same arbitration agreement.

3. Even if the Tribunal Held That the Claims Were Made Under Different Arbitration Agreements, the Conditions Pursuant to Art. 10(c) ICC Rules Would Be Fulfilled

89 Even if the Tribunal decided that the claims were raised under different arbitration agreements, it should consolidate the proceedings pursuant to Art. 10(c) ICC Rules. This is because the arbitrations are between the same Parties, the disputes arose in connection with the same legal relationship and the arbitration agreements in PO 9601 and PO A-15604 are compatible.

90 The same legal relationship exists if all contracts relate to the same economic transaction (*FRY/GREENBERG/MAZZA, para. 3-357*; *cf. MEIER, Art. 10, para. 7*). When considering the compatibility of arbitration agreements, the condition of Art. 6(4)(ii) ICC Rules apply (*FRY/GREENBERG/MAZZA, para. 3-357*).

91 Under the circumstances at hand, the arbitrations are between the same parties, namely CLAIMANT and RESPONDENT. Further, both disputes arise from the same legal relationship, as both claims are based on Purchase Orders concluded under the same FA. Finally, as established (*cf. paras. 51 et seqq.*), the arbitration agreements are compatible.

92 In conclusion, even if the Tribunal considers that the claims were raised under different arbitration agreements, it could nevertheless consolidate the proceedings pursuant to Art. 10(c) ICC Rules.

93 **Conclusion Issue B**: Firstly, the request for arbitration validly initiated the second arbitration pursuant to Art. 4 ICC Rules should the Tribunal not authorize the new claim. Secondly, the Parties vested the Tribunal with the power to consolidate two ICC arbitrations in Art. 41(5) of the FA. Lastly, the Tribunal should consolidate under Art. 10(a) ICC Rules as the Parties agreed to consolidate. Alternatively, the Tribunal could consolidate pursuant to Art. 10(b) ICC Rules as the claims are made under the same arbitration agreement. If not, the Tribunal could consolidate as the arbitration agreements in PO 9601 and PO A-15604 are compatible pursuant to Art. 10(c) ICC.

C. CLAIMANT IS ENTITLED TO PAYMENT OF THE AMOUNT DUE UNDER PO 9601

94 CLAIMANT is entitled to payment of USD 38,400,000 with interest at the annual rate of 4 % from 12 September 2022 onwards due to RESPONDENT not fulfilling its payment obligation under PO 9601 [**I**]. Moreover, RESPONDENT cannot rely on Art. 80 CISG to be exempted from its payment obligation [**II**]. Additionally, RESPONDENT cannot invoke Art. 77 CISG to reduce its payment obligation [**III**]. In any event, RESPONDENT's payment obligation could at most be slightly reduced [**IV**].

95 In Art. 41(6) of the FA, the Parties chose Danubian law as the governing law for the FA and all purchase orders concluded thereunder (*Exh. C 1, p. 12*). Danubia is a Contracting State of the CISG (*PO 1, p. 58, para. 4*). The Parties reaffirmed the applicability of the CISG to disputes arising in connection with PO 9601 and PO A-15604 (*Exh. C 2, para. 7*; *Exh. C 7, para. 7*). Danubia's General Contract Law ("**DGCL**"), which is a verbatim adoption of the UPICC (*PO 1, p. 59, para. 4*), applies to fill the gaps in the CISG.

I. RESPONDENT Did Not Perform Its Payment Obligation

96 In violation of Art. 53 CISG, RESPONDENT failed to perform its payment obligation under PO 9601 because the agreed-upon place of payment was never changed [**1**]. Furthermore, the Parties did not amend the banking details laid down in the FA [**2**].

1. RESPONDENT Failed to Perform Its Payment Obligation Under Purchase Order 9601 Because the Place of Payment was Never Changed

97 RESPONDENT failed to perform its payment obligation under PO 9601 because it did not pay the purchase price within the specified period [**a**]. Moreover, the place of payment in Art. 7 FA was never changed [**b**].

a) RESPONDENT Failed to Perform Within the Specified Period Under PO 9601

98 RESPONDENT failed to fulfil its payment obligation under PO 9601 as it did not make the payment within the specified period.

99 Art. 53 CISG prescribes the buyer's obligation to pay the price for the goods as required by the CISG and the parties' contract. The place of payment is the place of business of the seller's bank (*MOHS, Art. 57 CISG, para. 5*) and payment must be credited to the specified bank account (*CISG-online 346 [SUI, 1997], para. 20*; *CISG-online 281 [GER, 1997], para. 10*; *MOHS, Art. 57 CISG, para. 5*). Any payment to an account other than the agreed one constitutes a breach of the buyer's duty to pay (*PILTZ, p. 186*).

100 Additionally, Art. 78 CISG allows a party to claim interest on the price owed. The gap left in the CISG regarding interest rate calculation is determined by the law governing the contract (*CISG-online 1258 [BEL, 2006], para. A.5.1.a*). According to Art. 7.4.9(2) DGCL, in the absence of a rate at the place of payment, the rate of interest shall be the "*rate in the State of the currency of payment*", which, for USD, corresponds to the average annual US prime interest rate (*CISG-online 1712 [CHN, 2005], para. 45*).

101 Under PO 9601, RESPONDENT ordered 1,200,000 units of S4-899 sensors for USD 38,400,000, with two installments due 30 days after the respective deliveries on 3 April and 30 May 2022 (*RfA, p. 6, para. 13*). RESPONDENT was thus obliged to pay USD 19,200,000 each on 3 May and on 30 June 2022 (*Exh. C 2, para. 6*). Art. 7 of the FA defines two bank accounts to which "*all payments have to be made*" (*Exh. C 1, p. 10*). CLAIMANT delivered the sensors on schedule (*RfA, p. 6, para. 13*) but RESPONDENT failed to pay to either bank account indicated in Art. 7 of the FA within the initial timeframe and the additional one-week period granted by CLAIMANT (*ibid., para. 14*; *Exh. C 3*). The obligation – a simple money transfer – makes it reasonable to expect fulfillment within a week.

102 Furthermore, CLAIMANT is entitled to 4 % interest on the USD 38,400,000 due under PO 9601. The currency of USD and the due date in 2022 result in the average US prime interest rate in 2022 of 4 % (*FRED Bank Prime Loan Rate*). Interest calculation starts on 12 September 2022, as CLAIMANT waived interest until the additional one-week period for payment had expired (*cf. RfA, p. 6, para. 17*; *Exh. C 3*).

103 In conclusion, RESPONDENT failed to perform its payment obligation by not paying the purchase price of PO 9601 to the bank account indicated in Art. 7 of the FA.

b) The Place of Payment Was Not Changed

104 The place of payment in Art. 7 of the FA was not changed since RESPONDENT should have realized that the email did not come from CLAIMANT.

105 The Parties' explicit choice of a place of payment is binding under Art. 57 CISG (*cf. para. 99*). According to Art. 8(1) CISG, statements or conduct are to be interpreted according to the subjective intent of a party. If the subjective intent cannot be determined, Art. 8(2) CISG lays down an objective standard for a party's intentions, i.e., the understanding of a party's intentions that a reasonable third party of the same kind as the counterparty would have had.

106 In a recent Dutch case applying the CISG (*CISG-online 2920 [NLD, 2017], paras. 27 et seqq.*), a third party's fraudulent emails from a different domain tricked the buyer into transferring the purchase price to a new bank account. The court, adopting the perspective of a reasonable person (*Art. 8(2) CISG*), and considering all relevant circumstances of the case (*Art. 8(3) CISG*), found that a reasonable third person would not have attributed the hacker's emails to the seller. The conclusion was based on the implausible reasoning for the change in the bank account, the email address not belonging to the seller, and inconsistencies in the emails (*CISG-online 2920 [NLD, 2017], para. 28*). The buyer should have inquired about the email with the seller and therefore, the seller was not to bear the consequences of the buyer's actions and the buyer was not released from its payment obligation.

107 In the present case, the Parties agreed on the place of payment to one of CLAIMANT's bank accounts at the seat of Automotive or First Bank (*Art. 7 of the FA*). RESPONDENT received an email from a hacker posing as Ms. Audi, requesting payments to a different bank account than in Art. 7 of the FA (*Exh. C 5*). The hacker justified the urgency of the need to change the bank details by threatening that no further delivery would be authorized until the change was confirmed. However, payment would contractually be due only *after* the delivery of the sensors (*Exh. C 2, para. 6*), which was not due for another two months. This attempt to pressure RESPONDENT aligns with common tactics used by scammers (*cf. Exh. R 3*). All prior correspondence between RESPONDENT and CLAIMANT had been professional, calm and non-threatening (*cf. Exh. C 3*; *Exh. R 2*). The hacker's email was an outlier and a warning sign that a reasonable third party would have recognized.

108 Likewise, the hacker's email came from a different domain, not containing CLAIMANT's name (se**m**sorx instead of sensorx). Moreover, it contained several inconsistencies: The signature used

by "Ms. Audi" differs from other emails sent by CLAIMANT (*cf. Exh. R 2*); the job title of "Ms. Audi" is missing, and the font matches RESPONDENT's (*cf. Exh. R 1*) and not CLAIMANT's signatures; moreover, the street address is not mentioned, and the telephone area code 214 is from Equatoriana, even though CLAIMANT is situated in Mediterraneo; lastly, the email refers to a non-existing purchase order "*No. 1560**5***" and sensor types "*S4-258**8**9*", the actual ones being PO **A**1560**4** and S4-258**9**9. All these inaccuracies should have prompted due diligence from RESPONDENT. However, RESPONDENT's recipient of the email, Mr. Royce, lacked attentiveness, as shown by the fact that he replied using the reply function on his phone (*PO 2, p. 61, para. 4*) rather than using a computer.

109 In conclusion, since a reasonable third party would have realized that the email did not come from CLAIMANT, the place of payment in Art. 7 of the FA was not changed.

2. The Parties Did Not Amend the Bank Account Details in the Framework Agreement

110 The bank account details in the FA were not amended as the email of 28 March 2022 did not fulfill the form requirement of Art. 40 of the FA [**a**]. Moreover, RESPONDENT cannot rely on CLAIMANT's previous conduct to circumvent the form requirement of the FA [**b**].

a) The Email of 28 March 2022 Did Not Respect the Form Requirement of Art. 40 of the Framework Agreement

111 The Parties did not amend the bank account details stipulated in Art. 7 of the FA, since the email of 28 March 2022 (*Exh. C 5*) did not fulfill the form requirement for amendments according to Art. 40 of the FA.

112 Pursuant to Art. 29(2) first sentence CISG, parties may foresee in a written contract that any contract amendments must be made in writing. Furthermore, parties may agree on an even stricter form requirement that goes beyond the written form requirement as defined in Art. 13 CISG (*SCHROETER, Art. 29 CISG, para. 28*). If both parties agree to the form requirement, any amendment not complying with the form requirement is invalid (*BRUNNER/BRAND, Art. 29 CISG, p. 192*). Because of the non-mandatory nature of Art. 29(2) CISG, parties may later agree to disregard the form requirement (*Art. 6 CISG*), but their intent to set aside the form requirement must be clear and unambiguous (*SCHROETER, Art. 29 CISG, para. 24*).

113 In the case at hand, the Parties included in Art. 40 of the FA a so-called no oral modification clause that states that "*no amendment […] of this Agreement […] shall be valid unless […] in writing and*

***signed** by the Parties*" (*Exh. C 1, p. 11, emphasis added*). Therefore, the Parties' form requirement set a stricter standard than Art. 13 CISG. On 28 March 2022, RESPONDENT received an email from a hacker posing as CLAIMANT's account manager, Ms. Audi. The email introduced a new bank account to which all future payments by RESPONDENT should be made, which deviated from the two bank accounts provided in Art. 7 of the FA. As the email of 28 March 2022 lacked the necessary signature of CLAIMANT, the form requirement of Art. 40 of the FA was not met (*Exh. C 5*). Since the subsequent hacker's email of 30 March 2022 (*Exh. R 4, para. 4*) attempting to set aside the form requirement did not actually come from CLAIMANT, the Parties never clearly and unambiguously agreed to set aside their form requirement. Thus, Art. 7 of the FA was never amended.

114 Therefore, the hacker's email did not satisfy the form requirement of Art. 40 of the FA, and thus the FA was not amended.

b) RESPONDENT Cannot Circumvent the Form Requirement of Art. 40 of the Framework Agreement by Relying on CLAIMANT's Previous Conduct

115 RESPONDENT is precluded from invoking Art. 29(2) second sentence CISG since it could not rely on CLAIMANT's previous conduct to circumvent the form requirement of Art. 40 of the FA.

116 The abuse of rights defense under Art. 29(2) CISG states that a party cannot insist on an agreed-upon form requirement if its conduct misleads the other party to rely on a waiver of the form requirement. In order to invoke the abuse of rights defense, there must be reliance-inducing conduct by one party and subsequent actions based on that conduct by the other party. Reliance-inducing conduct refers to a party's behavior that, by a reasonable third party (*Art. 8(2) CISG*), would be understood as accepting a contract modification not meeting the agreed-upon form requirements. A single instance of disregarding the form requirement for one amendment does not imply an intention to waive that clause, but rather that the parties overlooked the form requirement once (*CISG-online 3078 [UK, 2018], para. 15*).

117 In the case at hand, RESPONDENT cannot rely on the abuse of rights defense in Art. 29(2) CISG. In the price-fixing meeting on 1 December 2019, the Parties orally amended the meeting intervals (*Art. 6 of the FA*) from semiannual to annual (*RfA, p. 6, para. 11*), and agreed on the price and other changes. RESPONDENT then circulated written minutes, detailing the oral agreements (*PO 2, p. 62, para. 8*). This isolated non-compliance with the form requirement under Art. 40 of the FA

does not suggest the Parties' intent to discard the form requirement entirely. Indeed, the Parties adhered to Art. 40 of the FA again when deviating from Art. 7 of the FA for a delivery of LIDAR sensors in September 2020 via a **signed** side letter (*ibid., p. 63, para. 12*). Given that the change in bank account details in that instance was specific to one delivery, produced and delivered by CLAIMANT's subsidiary, a reasonable third party would assume that an email would not suffice for a broader change for "*all payments*" (*cf. Exh. C 5*). Notably, even RESPONDENT's Mr. Royce, after receiving the hacker's email of 28 March 2022, was uncertain about whether the form requirement had been waived (*Exh. R 4, para. 4*).

118 Moreover, RESPONDENT is wrong when it asserts that the phone discussion between CLAIMANT's Ms. Peugeotroen and RESPONDENT's Mr. Toyoda following 20 March 2022 constituted a waiver of the form requirement for all future amendments (*PO 2, p. 64, para. 27; ARfANC, p. 54, para. 2*). In that discussion, CLAIMANT did not even agree to disregard the form requirement of Art. 40 of the FA to amend Art. 15 of the FA. CLAIMANT merely agreed that Mr. Toyoda would send an informal email and that it would discuss the email internally (*PO 2, p. 64, para. 27*). It is therefore inconceivable that CLAIMANT would have agreed to waive the form requirement altogether.

119 Therefore, there was no previous conduct by CLAIMANT that RESPONDENT could rely on to circumvent the form requirement of Art. 40 of the FA.

120 In conclusion, the bank account details in the FA were not amended as the email of 28 March 2022 did not fulfill the form requirement of Art. 40 of the FA and RESPONDENT could not rely on CLAIMANT's previous conduct to circumvent the form requirement.

II. RESPONDENT Cannot Rely on Art. 80 CISG to Be Exempted From Its Payment Obligation

121 Art. 80 CISG lays down the possibility for a party to be exempted from the legal consequences of its failure to perform. The criteria necessary for an exemption under Art. 80 CISG are a relevant act or omission by one party, a subsequent failure to perform by the other party and a causal link between the two.

122 RESPONDENT is not exempted from its payment obligation because CLAIMANT's conduct not to inform RESPONDENT about the cyberattack it suffered is not relevant under Art. 80 CISG [**1**]. Furthermore, there was no causal link between CLAIMANT's conduct and RESPONDENT's non-performance [**2**].

1. CLAIMANT Not Informing RESPONDENT Was Not Relevant Under Art. 80 CISG

123 The fact that CLAIMANT did not inform RESPONDENT about the cyberattack CLAIMANT experienced in January 2022 does not constitute a relevant omission under Art. 80 CISG. For an omission to be relevant under Art. 80 CISG, a party must have a duty to act or cooperate (*ATAMER, Art. 80 CISG, para. 6*; *MANKOWSKI, Art. 80 CISG, para. 4*).

124 Contrary to RESPONDENT's allegations, the Parties did not agree on an information duty [**a**]. Moreover, CLAIMANT complied with its duty to cooperate under the CISG [**b**]. Further, the DGCL is not applicable regarding information duties between the Parties [**c**]. In addition, CLAIMANT had no obligation to notify RESPONDENT's employees under Art. 34(1) of the Equatorianian Data Protection Act ("**EDPA**") [**d**]. In any event, CLAIMANT was exempted from informing RESPONDENT pursuant to Art. 34(3) EDPA [**e**].

a) The Parties Did Not Agree on an Information Duty

125 RESPONDENT cannot rely on an omission of CLAIMANT since the Parties did not agree on an information duty. The FA does not provide for an information duty for either Party [**i**], nor is informing the other Party about cyberattacks an established practice between the Parties [**ii**].

i. The Framework Agreement Does Not Provide for an Information Duty

126 CLAIMANT fulfilled its contractual obligations towards RESPONDENT under the FA, because the FA does not provide for an information duty.

127 By including a so-called entire agreement clause, the parties can agree that all contractual terms should be exhaustively defined in the contract, thereby excluding further obligations that are not explicitly stipulated (*CISG-online 3078 [UK, 2018], para. 14*).

128 Art. 3 of the FA regulates the seller's obligations, all of which are related to the delivery of the ordered goods (*Exh. C 1, p. 9*). Beyond that, the FA does not include other clauses dealing with information duties of either Party (*PO 2, p. 64, para. 21*).

129 In the present case, the Parties agreed in Art. 42(1) of the FA that "*this document contains the entire agreement between the Parties"* (*Exh. C 1, p. 12*). By adding this entire agreement clause, the Parties decided to exhaustively regulate the obligations of the Parties in one single document, namely the FA. There is no express information duty stipulated anywhere in the FA, and Art. 42(1) of the FA leaves no room for an alleged unwritten ancillary duty to inform (*cf. Exh. C 4*).

130 Therefore, since the FA does not provide for an information duty for either party, CLAIMANT fulfilled its contractual obligations towards RESPONDENT.

ii. Informing about Cyberattacks Did Not Constitute a Practice Between the Parties in the Sense of Art. 9(1) CISG

131 RESPONDENT cannot rely on the Parties' past behavior in order to assume the existence of an information duty as established practice in the sense of Art. 9(1) CISG.

132 According to Art. 9(1) CISG, the parties are bound by any practice established between them (*PERALES VISCASILLAS, Art. 9 CISG, para. 8*; *SCHLECHTRIEM/BUTLER, Art. 9 CISG, p. 59*; *SCHMIDT-KESSEL, Art. 9 CISG, para. 10*). This provision addresses situations where parties have either expressly agreed to a trade usage or have implicitly established a usage through prior dealings (*LOOKOFSKY, p. 87*; *SCHMIDT-KESSEL, Art. 9 CISG, para. 3*). For conduct to be recognized as well-established practice, thus being binding upon the parties and incorporated into the contract, multiple repetitions of the relevant circumstances by the parties are required (*CISG-online 329 [SUI, 1997], para. 70*; *CISG-online 519 [GER, 1997], para. 1*; *SCHMIDT-KESSEL, Art. 9 CISG, para. 8*). On several occasions, a twofold repetition of the same conduct was considered insufficient (*CISG-online 1093 [AUT, 2005], paras. 15 et seq.*; *CISG-online 659 [GER, 2000], para. 3*; *CISG-online 346 [SUI, 1997], para. 25*).

133 There was no standard practice of a duty to inform between the Parties. RESPONDENT only informed CLAIMANT once, back in 2020, about becoming a victim of a cyberattack (*Exh. R 1*). Unilateral conduct in response to a single event cannot establish a practice between the Parties. Additionally, RESPONDENT did not voluntarily inform CLAIMANT but was obliged to do so because of its domestic data protection law (*ARfA, p. 30, para. 2*; *Exh. R 1*).

134 Therefore, RESPONDENT cannot rely on the Parties' past behavior as an established practice between the Parties regarding an information duty.

b) CLAIMANT Complied With Its Duty to Cooperate Under the CISG

135 Since CLAIMANT complied with its duty to cooperate under the CISG, RESPONDENT cannot argue a relevant omission of CLAIMANT thereunder.

136 No explicit provision can be found in the CISG that imposes an information duty on CLAIMANT. Where the CISG does not provide for a specific provision to an issue falling within its scope of application, the applicable gap-filling rule depends on the type of gap. In the case of an internal

gap, i.e., a matter governed by the CISG which is unintentionally not expressly settled in it, the gap is to be filled according to Art. 7(2) CISG in conformity with the general principles underlying the Convention (*FERRARI, Art. 7 CISG, para. 42*; *HACHEM, Art. 7, para. 30*; *MAGNUS, Art. 7, para. 38; PERALES VISCASILLAS, Art. 7 CISG, para. 62*). In contrast, in case of an external gap, i.e., a matter not governed by the CISG at all, recourse is to be made to the applicable domestic law (*FERRARI, Art. 7 CISG, para. 43*; *GRUBER, Art. 7 CISG, para. 35*; *HACHEM, Art. 7, para. 27*).

137 One of the underlying principles of the CISG is the principle of good faith stated in Art. 7(1) CISG (*ENDERLEIN/MASKOW, p. 56*; *MAGNUS, Art. 7, para. 43*). From this principle, a duty to inform as part of a general duty to cooperate is implied (*CISG-online 2823 [FRA, 2017], para. 51*; *PERALES VISCASILLAS, Art. 7 CISG, para. 64*). The duty to cooperate lays down the duty of both parties to guard the interests of the other party insofar as this is necessary and appropriate to achieve the purpose of the contract (*FERRARI, Art. 7 CISG, para. 54*; *MAGNUS, Art. 7 CISG, para. 47*).

138 CLAIMANT considered both Parties' interests when deciding whether or not to inform RESPONDENT about the cyberattack it suffered. In fact, by not informing its commercial partners of what appeared in the beginning to be a minor incident (*Exh. C 6, p. 17, para. 8*), CLAIMANT intended to prevent the enormous reputational damage it would have risked if information about the cyberattack it suffered had spread uncontrollably. Moreover, CLAIMANT assumed that RESPONDENT had no real interest in receiving the information, as everyone in the automotive industry was already aware of the increase in cyberattacks at all levels of the production chain in January 2022 and the risks associated with them (*ibid.*). RESPONDENT was especially aware of such risks as it had previously been attacked in 2020 (*ARfA, p. 30, para. 2*; *Exh. R 1*).

139 In addition, by including the stricter form requirement for amendments under Art. 40 of the FA (*Exh. C 1, p. 11*), the Parties protected RESPONDENT's interests. By including such a clause, situations where RESPONDENT paid to a wrong bank account without previously reaching out to CLAIMANT should have been prevented (*Exh. C 6, para. 9*).

140 Therefore, since CLAIMANT complied with its duty to cooperate under the CISG, RESPONDENT cannot argue a relevant omission of CLAIMANT thereunder.

c) The DGCL Is Not Applicable Regarding Information Duties Between the Parties

141 The DGCL is not applicable regarding information duties between the Parties and therefore did not impose an information duty on CLAIMANT.

142 Generally, Art. 7(2) CISG is interpreted in the sense that if an internal gap of the CISG cannot be filled through internal principles, external principles such as the UPICC may be used for guidance (*FERRARI, Art. 7 CISG, para. 66*; *PERALES VISCASILLAS, Art. 7 CISG, para. 67*). Only subsidiarily, domestic law may be used to fill the gap (*FERRARI, Art. 7 CISG, para. 6*; *PERALES VISCASILLAS, Art. 7 CISG, paras. 52, 57*).

143 As previously mentioned (*cf. para. 136*), the duty to inform is not expressly regulated under the CISG despite falling within its scope of application. Since the resulting internal gap can be filled by recurring to internal principles of the CISG (*cf. paras. 136 et seqq.*), neither external principles nor domestic law are applicable. The DGCL, and its duty to cooperate in Art. 5.1.3 DGCL, is not of relevance for an information duty between the Parties.

144 Therefore, the DGCL is not applicable regarding information duties and, thus, did not impose an information duty on CLAIMANT.

d) CLAIMANT Had No Obligation to Notify in the Sense of Art. 34(1) EDPA

145 CLAIMANT had no obligation to notify RESPONDENT about the cyberattack in the sense of Art. 34(1) EDPA since the cyberattack did not pose a high risk to the rights and freedoms of data subjects.

146 Art. 34(1) EDPA states that the controller must communicate any personal data breach to the data subject only if the personal data breach is **likely** to result in a **high** risk to the rights and freedoms of natural persons. This obligation arises when the controller becomes aware that the breach is likely to result in a high risk to the rights and freedoms of natural persons (*MARTINI, Art. 34 GDPR, para. 28*). The controller has to rely on the knowledge available at the time of the risk assessment (*MARTINI, Art. 33 GDPR, para. 26*; *REIF, Art. 34 GDPR, para. 6*; *REIF, Art. 33 GDPR, para. 45*).

147 Factors to consider include the type and sensitivity of the personal data (*Art. 9(1) EDPA*), the number of affected persons, and the severity of the consequences for the natural persons (*MARTINI, Art. 33 GDPR, para. 36*; *REIF, Art. 33 GDPR, para. 49*). Possible damage includes discrimination, identity theft or financial loss (*Recitals 75, 85 GDPR*). Nevertheless, damage resulting from the disclosure of personal data already publicly available, such as the name and the address of an individual, is unlikely to be substantial (*EDPB Guidelines 9/2022, para. 107*).

148 CLAIMANT conducted a thorough risk assessment right after it discovered malware in its technical infrastructure (*Exh. C 6, p. 17, para. 5*) on 23 January 2022. The assessment, based on information

from the leading cybersecurity firm in Mediterraneo, confirmed that no part of the systems storing sensitive personal data had been infiltrated (*PO 2, p. 64, para. 25*).

149 Even after the CRM system encryption on 15 May 2022 (*Exh. C 6, p. 17, para. 10*), there was no high risk to the rights and freedoms of natural persons. As a Tier 2 sensor producer in the automotive industry, CLAIMANT's CRM system likely contained limited data on natural persons (names, business email addresses and business phone numbers of employees of the respective companies). Most of that data is already publicly available on company websites. Additionally, CLAIMANT did not store any financial data, or sensitive data, such as health data of natural persons (*Art. 9(1) EDPA*), and the compromised business email account of Ms. Audi only held very limited personal data about a limited number of natural persons. Thus, given the type, the non-sensitive character and limited scope of the personal data concerned, the potential damage to data subjects was not high.

150 Therefore, the cyberattack did not pose a high risk to rights and freedoms of data subjects under Art. 34(1) EDPA, relieving CLAIMANT of the obligation to notify RESPONDENT about the cyberattack.

e) In Any Event, CLAIMANT Was Exempted From Informing RESPONDENT Pursuant to Art. 34(3) EDPA

151 Should the Tribunal find that there was a high risk to the rights and freedoms of data subjects, CLAIMANT would be exempted from its obligation to notify pursuant to Art. 34(3) EDPA.

152 Art. 34(3) EDPA outlines two exemptions from the notification obligation in Art. 34(1) EDPA. Art. 34(3)(a) EDPA states that a notification is not required if the controller has implemented appropriate technical and organizational security measures prior to the data breach. Examples of preventive measures include official instructions, up-to-date measures to prevent unauthorized access to personal data (e.g., password protection), and regular employee training on data security (*Recital 78 GDPR*; *DIX, Art. 34, para. 13*; *EDPB Guidelines 01/2021, para. 18*; *MARTINI, Art. 34 GDPR, para. 38*). The EDPB also recommends designating an internal person for cybersecurity-related reports (*EDPB Guidelines 01/2021, para. 49*).

153 The controller may also qualify for an exemption pursuant to Art. 34(3)(b) EDPA if subsequent measures are taken to ensure the high risk for the rights and freedoms of the affected person is no longer very likely, without it being required to eliminate all risk (*DIX, Art. 34, para. 15*).

Subsequent measures can be repressive, e.g., by preventing the spread of the malware and thereby the infection of more data, or preventive, averting future breaches (*ibid.*). Notably, isolating data systems to prevent the spread of the malware and multi-factor authentication for access to IT systems are recommended (*EDPB Guidelines 01/2021, para. 49*).

154 In the present case, being aware of the increased cyberattacks in the automotive industry, CLAIMANT implemented a wide range of technical and organizational measures to prevent cyberattacks on its systems. Specifically, CLAIMANT appointed a new chief cybersecurity officer in 2021, ensuring all employees took part in intensive trainings and revision sessions *(PO 2, p. 64, para. 24*). Moreover, CLAIMANT had cybersecurity guidelines for its employees and instructed them to update their passwords regularly (*cf. PO 2, p. 61, para. 5*). Furthermore, CLAIMANT reduced the likelihood of cybersecurity breaches by sending simulated suspicious emails to randomly chosen employees, thereby training them on how to classify and report possible threats to the chief security officer (*PO 2, p. 64, para. 24*).

155 After the cyberattack, CLAIMANT worked closely with a leading cybersecurity firm and national authorities to mitigate further risks to the compromised personal data. This involved isolating the account, payment and ordering systems for an in-depth cybersecurity check and immediately removing all malware (*Exh. C 6, p. 18, para. 10*). During the security check, these systems were handled using an isolated accounting software and spreadsheets, thus removing any risk of further data leakage (*ibid.*). Moreover, CLAIMANT implemented a two-factor authentication in July 2022 to prevent future cybercriminals from gaining access to the systems (*PO 2, p. 64, para. 24*).

156 Therefore, CLAIMANT adopted appropriate security measures to prevent and tackle the data breach, thus fulfilling both exemptions under Art. 34(3)(a) and (b) EDPA.

2. In Any Event, CLAIMANT's Omission Was Not Causal for RESPONDENT's Non-performance

157 Even if there was an omission on the part of CLAIMANT, that omission was not causal for RESPONDENT's non-performance of the payment obligation under PO 9601.

158 The creditor's omission must have been, from an objective point of view, the cause of the non-performance of the contract, thus being a *conditio sine qua non* for the non-performance of the debtor (*MAGNUS, Art. 80 CISG, para. 12*). If the debtor's ability to perform was not impaired by the conduct of the creditor, e.g., if the creditor's conduct was the motivation or the occasion,

but not the cause of the non-performance, an exemption under Art. 80 CISG is excluded (*SCHWENZER, Art. 80 CISG, para. 6*; *BRUNNER/BOOG/SCHLÄPFER, Art. 80 CISG, para. 5*). Indirect causation can also be sufficient if the creditor created an additional risk for the debtor that materialized and could not be easily overcome by the latter (*ACHILLES, Art. 80 CISG, para. 3*; *ATAMER, Art. 80 CISG, para. 8*; *SAENGER, Art. 80 CISG, para. 3*).

159 First, CLAIMANT's omission to inform RESPONDENT about the January 2022 cyberattack on CLAIMANT did not hinder RESPONDENT's ability to duly perform under PO 9601. After receiving the hacker's email on 28 March 2022, RESPONDENT could have easily verified the new bank account details with another employee of CLAIMANT before making payments on 3 May and 30 June 2022. By this time, everyone in the automotive industry was aware of increased cyberattacks, especially after the article of 20 May 2022 of the leading journal in the automotive industry – that RESPONDENT was subscribed to (*cf. PO 2, p. 63, para. 17*) – emphasized the need for caution when responding to emails that "*appear to require immediate or urgent action"* and where "*recipients are asked to authorize certain actions or reply to questions*" (*Exh. R 3*).

160 Second, RESPONDENT's gross negligence after receiving the fraudulent email interrupted any causal link between CLAIMANT's omission to inform RESPONDENT about the cyberattack and RESPONDENT's subsequent non-payment. Given that over USD 38,400,000 were at stake and the numerous inconsistencies in the hacker's email, a reasonable third party would have taken additional steps before following the email's instructions. Additionally, RESPONDENT received an out-of-office reply from Ms. Audi on 27 March 2022 (*Exh. C 4*), indicating her sick leave until 11 April 2022. When RESPONDENT, only one day later, received an email from "Ms. Audi", this should have been an additional reason to confirm the email actually came from her. Instead, RESPONDENT's employee Mr. Royce considered it sufficient to call Ms. Audi one single time (*ARfA, p. 31, para. 6*), without trying again after she was unreachable. Her voicemail clearly instructed to contact Ms. Peugeotroen, CLAIMANT's special account manager, in urgent matters (*PO 2, p. 61, para. 4*). Despite the urgency pointed out in the hacker's email, Mr. Royce failed to follow the instructions provided by Ms. Audi's voicemail.

161 Third, even an indirect causation cannot be affirmed, since the hacker targeting RESPONDENT did not lie within the sphere of control of CLAIMANT. In fact, the behavior of third party cybercriminals cannot be attributed to CLAIMANT, and thus CLAIMANT did not create an additional risk for RESPONDENT. Finally, the causal link is especially not given for the second payment of 30 June

2022. By that point, it was public knowledge that there had been a cyberattack on CLAIMANT and that some data "*may have been leaked or irretrievably lost*" (*Exh. R 3*). Notifying RESPONDENT about the January 2022 cyberattack would have conveyed the same information as contained in the Automotive Weekly article.

162 Therefore, there was no direct or indirect causal link between CLAIMANT's omission and RESPONDENT's failure to perform.

163 In conclusion, the Parties did not agree on an information duty and CLAIMANT complied with its duty to cooperate under the CISG. Furthermore, the DGCL is not applicable regarding information duties between the Parties. In addition, CLAIMANT had no obligation to notify RESPONDENT's employees under Art. 34(1) EDPA and, in any event, was exempted from informing RESPONDENT pursuant to Art. 34(3) EDPA. Lastly, there was no direct or indirect causal link between CLAIMANT's omission and RESPONDENT's failure to perform.

III. RESPONDENT Cannot Rely on Art. 77 CISG to Reduce Its Payment Obligation

164 Contrary to RESPONDENT's position (*ARfA, p. 32, para. 13*), Art. 77 CISG cannot be applied to reduce RESPONDENT's payment obligation.

165 Art. 77 CISG gives the party in breach of the contract the possibility to reduce its obligation to pay damages because of the conduct of the other party. A minority of scholars applies Art. 77 CISG when adjusting the remedies for a failure to perform that was jointly caused by both parties (*LÜDERITZ/DETTMEIER, Art. 80 CISG, paras. 2 et seq.*). Nevertheless, the majority view is that Art. 77 CISG is only applicable to damages claims (*CISG-online 573 [AUT, 2000], para. 10*; *BRUNNER/SCHÄFER, Art. 77 CISG, para. 2*; *HUBER/MULLIS, pp. 290, 324*; *SCHLECHTRIEM/BUTLER, Art. 77 CISG, p. 220*).

166 In the case at hand, CLAIMANT seeks performance (*Art. 62 CISG*) and not damages. Any possible joint causation of RESPONDENT's failure to perform thus cannot be reduced under Art. 77 CISG.

167 In conclusion, Art. 77 CISG cannot be applied to reduce the payment obligation of RESPONDENT.

IV. In Any Event, RESPONDENT's Payment Obligation Should at Most Be Slightly Reduced

168 Should the Tribunal find that CLAIMANT's conduct of not informing RESPONDENT contributed to RESPONDENT's non-performance, RESPONDENT's conduct would still be predominantly causal for its non-performance and therefore its payment obligation should at most be slightly reduced.

169 The legal basis to consider the joint causation of the parties for the failure of one of the parties to perform can be found either in Art. 80 CISG, which refers to the extent to which the non-performance was caused (*SCHWENZER, Art. 8 CISG, para. 7*) or alternatively, in the general principles underlying the CISG contained in Art. 7 CISG (*HUBER/MULLIS, pp. 276 et seq.*).

170 The legal consequences of joint causation depend on the nature of the creditor's remedy (*SCHWENZER, Art. 80 CISG, para. 10*). For divisible monetary claims, the amount is adjusted based on each party's contribution to the non-performance (*CISG-online 2348 [GER, 2012], para. 36*).

171 In the case at hand, CLAIMANT is seeking performance of a payment obligation; therefore, its claim is divisible. Thus, the causal contribution of each Party would have to be considered. CLAIMANT did not inform RESPONDENT about what initially appeared to be a minor cyberattack on its IT systems (*Exh. C 6, p. 17, para. 6*). By contrast, RESPONDENT paid USD 38,400,000 to a new bank account without properly ensuring that the instructions really came from CLAIMANT. Had RESPONDENT paid more attention to the domain of the email address or at least followed Ms. Audi's voicemail instruction to contact Ms. Peugeotroen (*cf. para. 160*), it would have paid to the right bank account. RESPONDENT was thus preponderantly responsible for paying to the wrong account.

172 In conclusion, RESPONDENT's behavior is predominantly causal for its non-performance and therefore its payment obligation should at most be slightly reduced.

173 **Conclusion Issue C**: CLAIMANT is entitled to payment of the purchase price under PO 9601 because RESPONDENT breached its obligation under Art. 53 CISG by paying to the wrong bank account, following a hacker's email of 28 March 2022 that did not amend the bank details of Art. 7 of the FA. Moreover, RESPONDENT cannot rely on Art. 80 CISG to be exempted from its payment obligation because CLAIMANT's conduct to not inform RESPONDENT was both irrelevant and lacked causality to RESPONDENT's non-performance. In addition, CLAIMANT is demanding specific performance, thereby excluding the possibility for RESPONDENT to rely on Art. 77 CISG to reduce its payment obligation. Finally, since RESPONDENT overwhelmingly caused its own non-performance, its payment obligation should at most be slightly reduced.

Requests

In light of the submissions above, on behalf of CLAIMANT, we herewith respectfully request the Tribunal:

a) to add the new claim to the present Arbitration;
b) in case the new claim is not admitted and has to be raised in a separate arbitration, to consolidate this newly commenced second arbitration with the present arbitration proceedings;
c) to order RESPONDENT to pay CLAIMANT USD 38,400,000 with interest at the annual rate of 4 % from 12 September 2022 onwards;
d) to order RESPONDENT to bear the costs of this Arbitration, including CLAIMANT's legal fees and other expenditures incurred.

Respectfully submitted on 7 December 2023 by

FRANCO	GIOVANNI MARIA	MILA
FISCHER	GIUSTI	GRÖNROS
NATHALIE	ANNALENA	ANDREA
KNEISEL	SCHLÄPFER	STAUDENMANN

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