TWENTY-FIRST ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG – 10 TO 17 MARCH 2024

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF ZURICH

ICC CASE NO. MOOT-100/MM

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

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Index of Abbreviations

ARfA	Answer to the Request for Arbitration
ARfANC	Answer to the Request for Authorization of New Claim/Consolidation of Proceedings
ARIA	The American Review of International Arbitration
Art./Arts.	Article(s)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BRI	Belt and Road Initiative
cf.	confer (compare)
ch.	chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
CRM	customer relationship management
DAL	Danubian Arbitration Law
DGCL	Danubian General Contract Law
ed.	edition
Ed./Eds.	Editor/Editors
EDPA	Equatorianian Data Protection Act
EDPB	European Data Protection Board
et al.	et alii (and others)
et seq./et seqq.	et sequens (and the following one)/et sequentes (and the following ones)
EU	European Union
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FA	Framework Agreement

FRA	France
GDPR	EU General Data Protection Regulation, 2016
GER	Germany
i.e.	id est (in other words)
ibid.	ibidem (in the same source)
ICC	International Chamber of Commerce
Inc.	Incorporated
ISO	International Organization for Standardization
IT	information technology
Ltd	limited company
Mr.	Mister
Ms.	Miss
NLD	Netherlands
No.	number
p./pp.	page(s)
para./paras.	paragraph(s)
PICC	*See* UPICC
plc	public limited company
PO 1	Procedural Order 1
PO 2	Procedural Order 2
PO A-15604	Purchase Order A-15604
PO 9601	Purchase Order 9601
RfA	Request for Arbitration
RfANC	Request for Authorization of New Claim/Consolidation of proceedings

SAE	Society of Automotive Engineers International
SCC	Stockholm Chamber of Commerce
SchiedsVZ	Zeitschrift für Schiedsverfahren
SGP	Singapore
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/USA	United States of America
USD	United States Dollar(s)
v.	versus
Vol.	Volume

Index of Authorities

Cited as	Reference
ACHILLES	ACHILLES WILHELM-ALBRECHT, in: ACHILLES WILLHELM-ALBRECHT (Ed.), Kommentar zum UN-Kaufrechtsübereinkommen (CISG), Cologne 2019, Arts. 7, 80 *in paras. [137, 160]*
ATAMER	ATAMER YEŞIM M., in: KRÖLL STEFAN/MISTELIS LOUKAS A./PERALES VISCASILLAS PILAR (Eds.), UN Convention on Contracts for the International Sale of Goods (CISG), A Commentary, 2nd ed., Munich 2018, Art. 80 *in paras. [127, 130, 157, 168]*
BERGER/KELLERHALS	BERGER BERNHARD/KELLERHALS FRANZ, International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021 *in paras. [16, 36]*
BORN	BORN GARY B., International Commercial Arbitration, 3rd ed. (Kluwer Arbitration Update 2022), Alphen aan den Rijn 2021 *in paras. [21, 61]*
BOUT	BOUT PATRICK X., Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods, New York 1998 *in para. [147]*
BRÖDERMANN	BRÖDERMANN ECKART, in: BRÖDERMANN ECKART (Ed.), UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary, 2nd ed., Alphen aan den Rijn 2023, Arts. 2.2.2, 5.1.3 UPICC *in para. [152]*

BRÜGGEMANN/SMAHI	BRÜGGEMANN ROMANA/SMAHI NADIA, New Claims and Amended Claims in International Arbitration – Finding Landmarks in Navigating the Tribunal's Discretion, in: SchiedsVZ, Vol. 20 Issue 2, 2022, pp. 49-56 *in paras. [31, 36]*
BRUNNER/BOOG/SCHLÄPFER	BRUNNER CHRISTOPH/BOOG CHRISTOPHER/SCHLÄPFER BEAT, in: BRUNNER CHRISTOPH/GOTTLIEB BENJAMIN (Eds.), Commentary on the UN Sales Law (CISG), Alphen aan den Rijn 2019, Art. 80 *in para. [130]*
BRUNNER/DIMSEY	BRUNNER CHRISTOPH/DIMSEY MARIEL, in: BRUNNER CHRISTOPH/GOTTLIEB BENJAMIN (Eds.), Commentary on the UN Sales Law (CISG), Alphen aan den Rijn 2019, Art. 30 *in para. [137]*
COMMENT NR. 2 TO ART. 5.1.3 UPICC	UNIDROIT, UNIDROIT Principles of International Commercial Contracts, Rome 2016, Art. 5.1.3 *in para. [152]*
CRAIG/PARK/PAULSSON	CRAIG LAURENCE/PARK WILLIAM/PAULSSON JAN, International Chamber of Commerce Arbitration, 3rd ed., Paris 2000 *in paras. [3, 21, 59, 61]*
DERAINS/SCHWARTZ	DERAINS YVES/SCHWARTZ ERIC, in: DERAINS YVES/SCHWARTZ ERIC (Eds.), Guide to the ICC Rules of Arbitration, 2nd ed., The Hague 2005, Arts. 1, 4, 20, 23, 25 *in paras. [15, 31, 61, 78]*
EDPB GUIDELINES 9/2022	EDPB, Guidelines 9/2022 on personal data breach notification under GDPR, Version 2.0, Adopted on 28 March 2023 *in para. [144]*

ENDERLEIN/MASKOW	ENDERLEIN FRITZ/MASKOW DIETRICH, in: ENDERLEIN FRITZ/MASKOW DIETRICH (Eds.), International Sales Law, United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods, Commentary, New York 1992, Art. 7 *in para. [137]*
FERRARI	FERRARI FRANCO, in: SCHWENZER INGEBORG/SCHROETER ULRICH G. (Eds.), Kommentar zum UN-Kaufrecht (CISG), 7th ed., Munich 2019, Art. 7 *in para. [137]*
FRY/GREENBERG/MAZZA	FRY JASON/GREENBERG SIMON/MAZZA FRANCESCA, The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration, Paris 2012 *in paras. [3, 15, 16, 21, 28, 31, 44, 59, 78, 80, 84]*
GAILLARD	GAILLARD EMMANUEL, Coordination or Chaos – Do the Principles of Comity, Lis Pendens and Res Judicata Apply to International Arbitration?, in: ARIA, Vol. 29 Issue 3, 2018, pp. 205-242 *in para. [98]*
GRUBER	GRUBER URS, in: SÄCKER FRANZ JÜRGEN et al. (Eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 4/1: Schuldrecht – Besonderer Teil I, 1. Halbband: §§ 433-480, CISG, 8th ed., Munich 2019, Art. 7 *in para. [152]*
HACHEM	HACHEM PASCAL, in: SCHWENZER INGEBORG/SCHROETER ULRICH G. (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 5th ed., Oxford 2022, Art. 7 *in para. [174]*

HERBER/CZERWENKA	HERBER ROLF/CZERWENKA BEATE, in: HERBER ROLF/CZERWENKA BEATE (Eds.), Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf, Munich 1991, Art. 80 *in para. [170]*
HUBER	HUBER PETER, in: SÄCKER FRANZ JÜRGEN et al. (Eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 4/1: Schuldrecht – Besonderer Teil I, 1. Halbband: §§ 433-480, CISG, 8th ed., Munich 2019, Art. 80 *in paras. [130, 160]*
ICC COMMISSION	ICC COMMISSION, Report on Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin 2015, Issue 2, Paris 2015 *in para. [39]*
ISO/SAE 21434:2021	TECHNICAL COMMITTEE ISO 22/SAE VEHICLE CYBERSECURITY SYSTEMS ENGINEERING COMMITTEE, ISO/SAE 21434 Road Vehicles – Cybersecurity Engineering standard, Geneva 2021 *in para. [148]*
KOCK	KOCK ANETTE, Nebenpflichten im UN-Kaufrecht, Dargestellt am Beispiel der Pflichten des Verkäufers, Regensburg 1995 *in para. [137]*
JAISLI KULL	JAISLI KULL NADJA, in: ARROYO MANUEL (Ed.), Arbitration in Switzerland: The Practitioner's Guide, 2nd ed., Alphen aan den Rijn 2018, Art. 23 ICC Rules *in paras. [15, 16, 31]*

MAGNUS

MAGNUS ULRICH, in: MAGNUS ULRICH /DAGMAR KAISER (Eds.), Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Recht der Schuldverhältnisse, Wiener UN-Kaufrecht (CISG), Berlin 2018, Arts. 7, 9, 29, 80

in paras. [121, 130, 137, 147, 157]

MANKOWSKI

MANKOWSKI PETER, in: DRESCHER INGO/FLEISCHER HOLGER/SCHMIDT KARSTEN (Eds.), Münchener Kommentar zum Handelsgesetzbuch, 5th ed., Munich 2021, Art. 80 CISG

in para. [130]

MEIER

MEIER ANDREA, Chapter 17, in Arroyo Manuel (Ed.), Arbitration in Switzerland: The Practitioner's Guide, 2nd ed., Alphen aan den Rijn 2018, Arts. 9, 10 ICC Rules

in para. [86]

NEUMANN

NEUMANN THOMAS, The Duty to Cooperate in International Sales, The Scope and Role of Article 80 CISG, Munich 2012

in para. [177]

PETER

PETER ADOLF, Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities, in: Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 89 Issue 4, 2023, pp. 437-485

in para. [73]

PILTZ

PILTZ BURGHARD, Internationales Kaufrecht, Das UN-Kaufrecht in praxisorientierter Darstellung, 2nd ed., Munich 2008

in para. [157]

SÄNGER

SÄNGER INGO, in: HAU WOLFGANG/POSECK ROMAN (Eds.), Beck'scher Onlinekommentar BGB, 68th ed., Munich 2023, Arts. 29, 80 CISG

in paras. [121, 168]

SCHMIDT-KESSEL

SCHMIDT-KESSEL, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG/SCHROETER ULRICH (Eds.), Kommentar zum UN-Kaufrecht (CISG), 7th ed., Basel 2019, Art. 9

in paras. [142, 147]

SCHWENZER

SCHWENZER INGEBORG, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG/SCHROETER ULRICH (Eds.), Kommentar zum UN-Kaufrecht (CISG), 7th ed., Basel 2019, Art. 80

in paras. [127, 157, 160, 170]

SCHWENZER/MUÑOZ

SCHWENZER INGEBORG/MUÑOZ EDGARDO, Global Sales and Contract Law, Oxford 2022

in paras. [142, 143, 147]

SHARMA

SHARMA DANIEL H., The Revised New 2021 ICC Arbitration Rules, available at: https://www.dlapiper.com/en/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules

last accessed: 18 January 2024

in para. [73]

SHEPPARD

SHEPPARD AUDLEY, Res Judicata and Estoppel, in: CREMADES BERNARDO/LEW JULIAN D.M. (Eds.), Parallel State and Arbitral Procedures in International Arbitration - Institute Dossier III, Paris 2005, pp. 218-241

in para. [98]

UPSTREAM GLOBAL AUTOMOTIVE CYBERSECURITY REPORT 2022	UPSTREAM SECURITY INC., Global Automotive Cybersecurity Report, Ann Arbor 2022 *in para. [148]*
US: CYBERSECURITY BEST PRACTICES FOR THE SAFETY OF MODERN VEHICLES	NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Cybersecurity Best Practices for the Safety of Modern Vehicles, Washington D.C. 2022 *in para. [148]*
VERBIST/SCHÄFER/IMHOOS	VERBIST HERMAN/SCHÄFER ERIC/IMHOOS CHRISTOPHER, ICC Arbitration in Practice, 2nd ed., Alphen aan den Rijn 2015 *in paras. [21, 44, 61, 84]*
VOGENAUER	VOGENAUER STEFAN, in: VOGENAUER STEFAN (Ed.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), 2nd ed., Oxford 2015, Art. 5.1.3 UPICC *in para. [152]*
WEBSTER/BÜHLER	WEBSTER THOMAS/BÜHLER MICHAEL, in: WEBSTER THOMAS/BÜHLER MICHAEL (Eds.), Handbook of ICC Arbitration: Commentary and Materials, 5th ed., London 2021, Arts. 1, 10, 19, 23 ICC Rules *in paras. [3, 15, 21, 61]*
WELSER/MIMNAGH	WELSER IRENE/MIMNAGH SAMUEL, The Arbitrator and the Arbitration Procedure, „Too Late for This Arbitration?“ – Introducing New Claims in Arbitral Proceedings, in: KLAUSEGGER CHRISTIAN et al. (Eds.), Austrian Yearbook on International Arbitration 2022, Vienna 2022, pp. 27-45 *in para. [28]*

Index of Court Authorities

Cited as	Reference
France	
CISG-online 2823	*Palletizing robots case*
[FRA, 2017]	Decision of the Court of Appeal Lyon
	9 February 2017
	in para. [137]
CISG-online 4631	*Etablissements JR Maruani SAS v. Inmed*
[FRA, 2019]	Decision of the French Supreme Court
	9 July 2019
	in para. [168]
Germany	
CISG-online 617	*Machinery case*
[GER, 2001]	German Supreme Court
	31 October 2001
	in para. [137]
CISG-online 2348	*Clay case*
[GER, 2012]	Decision of the German Supreme Court
	26 September 2012
	in para. [168]

CISG-online 2400	*Beer case I*
[GER, 2013]	Decision of the Court of Appeal Brandenburg
	5 February 2013
	in para. [168]

Netherlands

CISG-online 2920	*Mees van den Brink Haaksbergen B.V. v. SAS (Shanghai) Industrial & Trading Co. Ltd.*
[NLD, 2017]	Court of Appeal Arnhem-Leeuwarden
	3 October 2017
	in para. [109]

Singapore

CAI v. CAJ case	*CAI and Claimant B v. CAJ and CAK*
[*SGP, 2021*]	Decision of the High Court of Singapore
	29 January 2021
	in para. [15]

United States

Arrow Truck Sales *[USA, 2015]*	*Arrow Truck Sales Inc. v. Top Quality Truck & Equipment Inc. and Joe Gelfo* Decision of United States District Court, M.D. Florida, Tampa Division 18 August 2015 *in para. [109]*
Ostrich *[USA, 2023]*	*Ostrich International Co. Ltd v. Michael A. Edwards Group International Inc., et al.* Decision of United States District Court, C.D. California 18 May 2023 *in para. [109]*

Index of Arbitral Awards

Cited as	Reference
ICC	
ICC Cases Nos. 2745 & 2762 *[ICC, 1977]*	*ICC Arbitration Cases No. 2745 & 2762* Final Award 1977 *in para. [98]*
ICC Case No. 5946 *[ICC, 1990]*	*ICC Arbitration Case No. 5946* Final Award 1990 *in para. [6]*
ICC Case No. 23526/FS *[ICC, 2020]*	*ICC Arbitration Case No. 23526/FS* Final Award 2020 *in para. [6]*
ICSID	
ICSID Case ARB/10/6 *[ICSID, 2010]*	*ICSID Arbitration Case No. ARB/10/6* Final Award 2010 *in para. [98]*

Index of Legal Acts and Rules

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
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
SCC Rules	SCC Arbitration Rules, 1 January 2023
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules, 2021
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 supply of RESPONDENT with CLAIMANT's sensors.

On **27 August 2020**, RESPONDENT became the victim of a cyberattack and immediately informed all its partners, including CLAIMANT, even though it was unlikely that data relating to CLAIMANT had been affected. CLAIMANT was quite concerned and appreciated the information.

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

On **5 January 2022,** Ms. Audi, CLAIMANT's account manager responsible for RESPONDENT, opened a link in a fraudulent advertising email to get a discount code for an upcoming car race, and thereby initiated the download and installation of a trojan horse malware. The malware entered CLAIMANT's technical infrastructure and allowed hackers to read all of Ms. Audi's previous emails, including the communication with Mr. Royce, RESPONDENT's account manager responsible for CLAIMANT.

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.

Only on **23 January 2022** did CLAIMANT discover the cyberattack. CLAIMANT decided not to inform RESPONDENT about the attack – unlike RESPONDENT in August 2020.

On **28 March 2022,** Mr. Royce received an email from a hacker posing as Ms. Audi. The email informed RESPONDENT that CLAIMANT had switched to a new bank and requested RESPONDENT to adjust the bank account details for future payments accordingly.

On **4 April 2022,** after RESPONDENT had already paid the first installment under PO A-15604 in the amount of USD 12,000,000, RESPONDENT discovered that a considerable number of the delivered sensors were defective. RESPONDENT informed CLAIMANT of the defective goods and

told CLAIMANT that it would withhold the payment for the second installment until they found an amicable solution. CLAIMANT never reacted to this email.

On **3 May** and **30 June 2022**, RESPONDENT fulfilled its payment obligation under PO 9601 in accordance with the instructions provided in the email of 28 March 2022.

On **15 May 2022**, the malware on CLAIMANT's systems that it had discovered on 23 January 2023 encrypted CLAIMANT's customer relation management system. The hackers demanded a ransom of USD 5,000,000 to decrypt the data again.

Between **15 May** until **30 June 2022**, CLAIMANT's entire planning and accounting system was shut down.

On **5 September 2022,** CLAIMANT requested the payment of the purchase price of PO 9601, despite RESPONDENT having already paid.

On **9 June 2023**, CLAIMANT initiated the Arbitration against RESPONDENT based on the arbitration agreement of PO 9601 to claim the purchase price thereunder by filing the Request for Arbitration ("**RfA**"). RESPONDENT submitted its Answer to the Request for Arbitration ("**ARfA**") on **10 July 2023**.

On **30 August 2023,** the Parties signed the Terms of Reference ("**ToR**").

On **11 September 2023,** CLAIMANT submitted a request for authorization of the additional claim ("**RfANC**") for payment for the second installment of the defective goods under PO A-15604, which contains its own arbitration agreement. RESPONDENT submitted its Answer to this request ("**ARfANC**") on **2 October 2023**.

Summary of Argument

Issue A: The arbitral tribunal ("Tribunal") cannot and should not authorize the addition of the new claim out of PO A-15604 as the Tribunal lacks jurisdiction over the new claim. The Tribunal's jurisdiction is limited to the scope of the arbitration agreement of PO 9601 since it prevails over the arbitration agreement in the FA as *lex specialis*. Should the Tribunal find that it has jurisdiction over the new claim of PO A-15604, the new claim cannot be added without authorization since it falls outside the ToR, and the Parties raised the standard of Art. 23(4) ICC Rules with the ToR. Further, it should not authorize the new claim based on the considerations of Art. 23(4) ICC Rules and the conditions in the ToR. First, the new claim is very different in nature to the initial claim. Second, authorizing the new claim does not result in noticeable savings in costs or time. Last, authorizing the new claim would be against the good administration of justice.

Issue B: The Tribunal cannot and should not consolidate the arbitrations. Firstly, CLAIMANT's request for the second arbitration regarding the new claim under PO A-15604 was invalid according to Art. 4 ICC Rules since the filing fee was not paid. Secondly, the Tribunal cannot consolidate as the power to consolidate lies exclusively with the ICC Court. In any event, the Tribunal should not consolidate since the conditions of Art. 10 ICC Rules are not met: The Parties did not agree to consolidate; the claims were not made under the same arbitration agreement(s); the disputes arise out of different legal relationships and the arbitration agreements are incompatible. Additionally, the Tribunal, taking into account Art. 10 second paragraph ICC Rules, should not consolidate the arbitrations. Moreover, the Tribunal should not consolidate pursuant to Art. 41(5) of the FA because the matters are not related by common questions of law or fact, and keeping the proceedings separate would not create a risk of conflicting awards or obligations.

Issue C: CLAIMANT is not entitled to the payment under PO 9601, since RESPONDENT fulfilled its payment obligation under PO 9601. RESPONDENT reasonably assumed that the email of 28 March 2022 originated from Ms. Audi and thus fulfilled its obligation by paying to the bank account indicated in the email. The form requirement of Art. 40 of the FA did not render RESPONDENT's assumption unreasonable. Alternatively, even if RESPONDENT did not fulfill its payment obligation, RESPONDENT would be fully exempted under Art. 80 CISG since CLAIMANT's omissions to inform caused RESPONDENT's non-performance. As an alternative to RESPONDENT's full exemption, RESPONDENT should be partially exempted from its payment obligation pursuant to Art. 80 CISG, since CLAIMANT preponderantly caused RESPONDENT's non-performance.

A. THE ADDITION OF THE NEW CLAIM CANNOT AND SHOULD NOT BE AUTHORIZED

1 The Arbitration was initiated by CLAIMANT with regard to the claim out of PO 9601. The Tribunal's jurisdiction is based on the arbitration agreement of PO 9601 (*Exh. C 2, para. 7; RfA, p. 7, para. 22; ARfA, p. 31, para. 8*), as agreed by the Parties in the ToR (*PO 1, p. 58, para. 1*). Only after the ToR were signed did CLAIMANT request the authorization of the addition of the new claim, which arises out of an entirely different contract and is subject to a different arbitration agreement (*Exh. C 7, para. 7*).

2 For the present proceedings, the Danubian Arbitration Law ("**DAL**"), a verbatim adoption of the UNCITRAL Model Law (*PO 1, p. 58, para. 4*), serves as *lex arbitri*. Moreover, the Arbitration is governed by the ICC Rules (*Exh. C 1, p. 11*).

3 The ICC Rules are silent on a time limit for jurisdictional objections, therefore, the *lex arbitri* has to be consulted (*cf. CRAIG/PARK/PAULSSON, pp. 185 et seq., 162 et seq.; FRY/GREENBERG/MAZZA, paras. 3-165 et seq., 3-1521, 3-1527; WEBSTER/BÜHLER, Art. 5 ICC Rules, para. 5-5*). Pursuant to Art. 16(2) DAL, such objections must be raised no later than the submission of the statement of defense.

4 RESPONDENT has already disputed the jurisdiction by stating that the new claim is based on a different arbitration agreement (*ARfANC, p. 55, para. 5*). RESPONDENT herewith formally objects to the jurisdiction and submits that the Tribunal cannot and should not authorize the addition of the new claim arising out of PO A-15604. It cannot authorize the addition of the new claim as its jurisdiction is limited to the arbitration agreement of PO 9601 [**I**]. In any event, the new claim cannot be added without Tribunal's authorization [**II**] and it should not authorize the addition of the new claim in light of Art. 23(4) ICC Rules and the conditions set out in the ToR [**III**].

I. The Tribunal Cannot Authorize the Addition of the New Claim Since Its Jurisdiction Is Limited to Claims Under the Arbitration Agreement of PO 9601

5 The Tribunal's jurisdiction is limited to the scope of the arbitration agreement of PO 9601 since it prevails over the arbitration agreement in the FA as *lex specialis*.

6 The rule of *lex specialis derogat legi generali* provides that more specific provisions take precedence over more general ones (*ICC Case No. 5946 [ICC, 1990], para. 17*). The principle of *lex posterior derogat legi priori* gives priority to a newer provision over an older one. In a recent

case, an arbitral tribunal examined two contracts and determined that the newer and more specific contract prevailed, resulting in the parties' obligations being modified (*ICC Case No. 23526/FS [ICC, 2020], para. 380*). This case shows that the principles of *lex specialis* and *lex posterior* are applicable to contract provisions.

7 In the case at hand, CLAIMANT argues that the arbitration agreement of the FA is the relevant arbitration agreement for the jurisdiction of the Tribunal (*RfANC, p. 47, para. 6*), after having explicitly invoked the arbitration agreement of PO 9601 as the basis for the Tribunal's jurisdiction in its RfA (*RfA, p. 7, para. 22*). However, the arbitration agreement in PO 9601 prevails over arbitration agreement of the FA. First, the preamble of PO 9601 states that the FA shall solely govern this contract "*unless agreed otherwise*" (*Exh. C 2, p. 13*). The Parties did indeed agree to regulate the dispute resolution differently from the FA by concluding the arbitration agreement in para. 7 of PO 9601. Second, the FA was concluded on 7 June 2019, whereas PO 9601 was concluded three years later, on 17 January 2022. This underlines that PO 9601 prevails both in light of the principle of *lex specialis* and of *lex posterior derogat legi priori* as the more specific and newer agreement.

8 Moreover, the arbitration clause in PO 9601 constitutes a *lex specialis* to the arbitration clause in the FA. Art. 41 of the FA encompasses "*all possible disputes arising in connection with the present agreement and the contracts concluded thereunder*" (*Exh. C 1, p. 11*), whereas para. 7 of PO 9601 is limited to disputes that arise "*out of or in connection with the present contract*" (*Exh. C 2, para. 7*). Additionally, the arbitration clause in PO 9601 specifies the place of arbitration as a particular city in Danubia, Vindobona (*Exh. C 2, para.* 7), and not merely Danubia (*cf. Exh. C 1, p. 11, Art. 41*). CLAIMANT characterizing the arbitration agreement of the FA as "*comparable*" (*RfA, p. 7, para. 23*) shows that it acknowledges the different wording of the arbitration clauses.

9 Finally, CLAIMANT implicitly acknowledged that the arbitration agreements of PO 9601 and PO A-15604 (together "**Purchase Orders**") prevail. The FA requires an attempt to resolve disputes amicably, i.e., through negotiation or mediation, before initiating arbitration proceedings (*Exh. C 1, p. 11, Art. 41(1)*), whereas para. 7 of PO 9601 imposes no such requirement.

10 If CLAIMANT were in fact convinced that the dispute resolution clause of the FA were relevant for the present dispute, it would have complied with the amicable settlement provision in Art. 41(1) of the FA (*Exh. C 1, p. 11*). However, CLAIMANT instead chose to disregard this provision by

neither replying to RESPONDENT's email of 4 April 2022 suggesting an amicable resolution of the dispute regarding PO A-15604 (*Exh. R 5; cf. Exh. C 8, para. 9*) nor initiating a negotiation or mediation on its own motion. Thus, CLAIMANT's assertion that RESPONDENT never tried to solve the dispute amicably (*MfC, para. 38*) is wrong.

11 In conclusion, the Tribunal's jurisdiction is limited to the *lex specialis* arbitration agreement of PO 9601 and cannot be extended with the arbitration agreement in the FA.

II. The New Claim Cannot Be Admitted to the Proceedings Without Authorization

12 CLAIMANT brings forward that no authorization pursuant to Art. 23(4) ICC Rules is required as the new claim falls within the ToR (*MfC, para. 53*). This is incorrect since the scope of the dispute was exhaustively defined for claims out of PO 9601 in the ToR.

13 Given that the new claim arises out of another contract, it falls outside of the limits of the ToR [**1**]. Moreover, the Parties raised the standard for the addition of new claims by agreeing on additional conditions to Art. 23(4) ICC Rules and thus requiring an authorization for any additions of new claims [**2**].

1. The New Claim Falls Outside of the Scope of the Terms of Reference

14 The Tribunal cannot add the new claim as it falls outside of the scope of the ToR, which limits the Arbitration to issues arising out of PO 9601.

15 Whenever a new claim falls outside of the limits of the terms of reference, its addition to the ongoing proceedings needs to be authorized by the arbitral tribunal (*Art. 23(4) ICC Rules*). As the terms of reference define the scope of the dispute by outlining the parties' claims (*FRY/GREENBERG/MAZZA, para. 3-890; DERAINS/SCHWARTZ, Art. 23 ICC Rules, p. 255*), they are crucial for defining the specific scope of the arbitral tribunal's mandate (*JAISLI KULL, Art. 23 ICC Rules, para. 2; WEBSTER/BÜHLER, Art. 23 ICC Rules, para. 23-86*). For this reason, it is essential that the arbitral tribunal carefully considers any admission of new claims (*cf. CAI v. CAJ Case [SGP, 2021], para. 218*).

16 A claim is "*new*" and does not fall within the terms of reference according to Art. 23(4) ICC Rules when there is a new cause of action, based on new grounds, rather than a correction or adjustment to the initial request (*FRY/GREENBERG/MAZZA, paras. 3-898, 3-900 et seq.*). This results in the new claim being independent and outside of the scope of the claims defined in the terms of reference

(*BERGER/KELLERHALS, para. 1218; JAISLI KULL, Art. 23 ICC Rules, para. 29*) and thereby requiring the presentation of new defenses (*FRY/GREENBERG/MAZZA, paras. 3-898, 3-900 et seq.*).

17 In the present case, the ToR were signed on 30 August 2023 (*PO 1, p. 58, para. 1*). At that point, the Parties agreed on the scope of the Arbitration when defining the issues to be decided as relating to the claim out of PO 9601 and the costs of the Arbitration (*ARfANC, p. 54, para. 4*). Thus, the Parties exhaustively limited the Arbitration to issues under PO 9601.

18 CLAIMANT argues that the list of issues to be determined in the ToR is not exhaustive by highlighting the first sentence in para. 85 ToR (*MfC, para. 46*). This interpretation is wrong because that sentence only concerns the summaries of the Parties' arguments. Otherwise, the Parties would not be allowed to bring forward new evidence and arguments. Further, CLAIMANT points to the last sentence in para. 85 ToR (*MfC, para. 47*), which states that anything brought up after the finalization of the ToR has to be considered in the light of the issues listed above, "*but not necessarily all of these or only these, and not necessarily in the following order*" (*ARfANC, p. 54, para. 4*). According to CLAIMANT, the Parties are following the more liberal approach of not adhering exclusively to the given list of issues (*MfC, paras. 49 et seqq.*). However, even if the Tribunal were to follow this practice, it would not result in a different outcome. The new claim arises out of a different contract (i.e., PO A-15604) and neither the new claim nor the contract were mentioned in the ToR or in any other submissions before signing the ToR. This means new submissions would be necessary to support the evidence of the new claim, which would result in RESPONDENT being forced to present new defences. Thus, it cannot fall within the scope of the ToR even in the light of a broad interpretation by the Tribunal.

19 Therefore, the Tribunal cannot add the new claim without authorization, as it falls outside of the scope of the ToR which limited the Arbitration to issues under PO 9601.

2. The Terms of Reference Raised the Standard for the Admission of New Claims

20 The Tribunal cannot add the new claim without authorization, as the Parties raised the standard of Art. 23(4) ICC Rules by validly setting out additional conditions in the ToR.

21 According to Art. 19(1) ICC Rules, the proceedings shall be governed by the Rules, and where they are silent, by any rules which the parties have settled on. As Art. 19 ICC Rules suggests, there are provisions of the ICC Rules which the parties are not permitted to alter (*BORN, ch. 15.02(D)*) that stipulate fundamental characteristics of ICC arbitration. Examples are Art. 1(2) (decisions by

the ICC Court), Art. 23(2) (establishment of the terms of reference) and Art. 34 ICC Rules (scrutiny of awards) (*cf. para. 61; ibid.; CRAIG/PARK/PAULSSON, p. 295*). Beyond these unalterable provisions, the principle of party autonomy allows parties to agree on the form they consider most appropriate for the arbitration (*FRY/GREENBERG/MAZZA, para. 3-723; cf. WEBSTER/BÜHLER, Art. 19 ICC Rules, para. 19-8*). Particularly, the wording of Art. 23(4) ICC Rules emphasizes flexibility since the arbitral tribunal may also consider "*other relevant circumstances*" (*VERBIST/SCHÄFER/IMHOOS, p. 135*). Moreover, Art. 23(4) ICC Rules is not a peculiarity of ICC arbitration, as the addition of a new claim also exists in other arbitration rules (*cf. Art. 30 SCC Rules; cf. Art. 22 UNCITRAL Rules*).

22 The Parties raised the standard for the admission of new claims in para. 85 ToR (*ARfANC, p. 54, paras. 4 et seq.*): First, for the admission of new claims under Art. 23(4) ICC Rules by making "*any new claim*s" – and not only new claims falling outside the limits of the ToR – subject to the authorization required by Art. 23(4) ICC Rules. Second, the Parties added two additional cumulative conditions for the authorization: The admission of the new claim has to result in (i) noticeable savings in cost and (ii) noticeable savings in time (*ibid., para. 4*). These are additional conditions to the other considerations of Art. 23(4) ICC Rules, as the Parties still mention Art. 23(4) ICC Rules (*ibid.*). CLAIMANT acknowledges that the Parties have raised the standard of Art. 23(4) ICC Rules with para. 85 ToR by stating that "*all*" required "*standards*" are met under Art. 23(4) **and** the ToR (*MfC, paras. 54 et seq.*). Thus, the Parties raised the standard for the admission of new claims.

23 There is no indication in the ICC Rules that such an addition of conditions would be prohibited or that Art. 23(4) ICC Rules is a fundamental characteristic of ICC arbitration. It neither influences the establishment of the ToR regulated in Art. 23(2) ICC Rules nor does it necessitate a decision by the ICC Court pursuant to Art. 1(2) ICC Rules. On the contrary, Art. 23(4) ICC Rules even emphasizes its open scope by including "*other relevant circumstances*". Thus, the Parties validly set out additional conditions in the ToR.

24 Lastly, according to Art. 9 ICC Rules, claims made under different arbitration agreements may be raised in a single arbitration. If CLAIMANT were to invoke the different arbitration agreements of PO 9601 and PO A-15604, which it has not done, the same raised standard would apply as Art. 9 ICC Rules is subject to Art. 23(4) ICC Rules.

25 Therefore, the Tribunal cannot add the new claim without authorization, as the Parties raised the standard of the authorization by validly setting out additional conditions in the ToR.

26 In conclusion, the Tribunal cannot add the new claim under PO A-15604 to the Arbitration without authorization, since it falls outside of the exhaustive scope of the ToR, and since the Parties raised the standard for admission of new claims in the ToR by adding new conditions.

III. The Tribunal Should Not Authorize the Addition of the New Claim Based on Art. 23(4) ICC Rules and the Conditions Set Out in the Terms of Reference

27 In the unlikely event that the Tribunal finds that it has jurisdiction over the new claim arising out of PO A-15604, it should not authorize the addition of the new claim to the Arbitration.

28 According to Art. 23(4) ICC Rules, the arbitral tribunal may authorize the addition of new claims to a pending arbitration upon request of one of the parties. The arbitral tribunal balances the relevant considerations and takes the most "*appropriate*" decision (*WELSER/MIMNAGH, p. 39*). Such considerations include the nature of the claims (*Art. 23(4) ICC Rules*), the good administration of justice, and conducting expeditious and cost-efficient proceedings under Art. 22(1) ICC Rules (*FRY/GREENBERG/MAZZA, para. 3-905*). Furthermore, as discussed above (*cf. paras. 20 et seqq.*), the Parties have raised the standard for authorization of new claims, as it must result in **noticeable** savings in costs **and** time (*ARfANC, p. 54, paras. 4 et seq.*).

29 CLAIMANT invokes the stage of arbitration as a consideration (*MfC, para. 57*). However, as will be demonstrated, all other considerations and conditions do not speak in favor of authorization of the addition of the new claim based on Art. 23(4) ICC Rules. Firstly, the new claim is considerably different in nature to the initial claim and therefore does not fit into this Arbitration [**1**]. Secondly, adding the new claim to the Arbitration would not result in noticeable savings in costs or time [**2**]. Thirdly, it would be against good administration of justice to authorize the new claim [**3**].

1. The New Claim Relates to Different Facts and Is Therefore Substantially Different in Nature to the Initial Claim

30 The new claim and the initial claim are considerably different in nature, as they relate to different underlying facts and as a result, the new claim should not be authorized.

31 Arbitral tribunals are more inclined to admit a new claim to the ongoing proceedings if it is related to the underlying dispute and would not change the direction of the proceedings (*FRY/GREENBERG/MAZZA, para. 3-904*). A claim is not related if it is based on new facts or arises

out of a different contract. Consequently, such a claim is rarely admitted (*ibid.; cf. JAISLI KULL, Art. 23 ICC Rules, para. 33*). Moreover, if the facts are different, the new claim potentially exceeds the scope and qualifications of the arbitrators. As the arbitrators are often chosen in relation to the particular issues of the case, they may not be suitable for other claims that require different expertise (*BRÜGGEMANN/SMAHI, p. 53; cf. DERAINS/SCHWARTZ, Art. 20 ICC Rules, p. 278*).

32 In the present case, CLAIMANT reduces the disputed matter to issues of similar sensors and sharing common witnesses and exhibits (*MfC, paras. 28 et seqq.; MfC para. 56*). In reality, the two claims arise out of two separate contracts, namely PO 9601 and PO A-15604. Moreover, the underlying question of the initial claim of PO 9601 relates to an information duty regarding a cyberattack (*RfA, p. 7, para. 27*), while the new claim is about non-conforming, defective goods purchased under PO A-15604 (*RfANC, p. 46, p. 1; Exh. C 8, p. 49, para. 8*). Lastly, the contracts relate to the purchase of different type of goods. The sensors purchased under the initial claim are S4 radar sensors, which are used in the automotive industry whereas the new claim concerns dual function L-1 sensors, which are also used for military purposes (*RfANC, p. 46, para. 2*). Significantly, CLAIMANT treated these sensors as a different type of good since it had assigned a special account manager, Ms. Peugeotroen, for their sale (*ibid., para. 3*). Thus, contrary to CLAIMANT's argument, while the two claims might share witnesses and exhibits, further evidence will be needed due to the significantly different nature of the new claim.

33 Furthermore, this Tribunal was appointed by the Parties regarding the matter of the initial claim (*PO 2, para. 36*), i.e., the cyberattack on CLAIMANT and the resulting information duty. As a consequence, RESPONDENT appointed an expert in the field of data privacy and cybersecurity as an arbitrator (*Letter by Fasttrack, p. 29*). On the other hand, the new claim relates to defective goods. Had the new claim been part of the initial request before the constitution of the Tribunal, it is likely that an arbitrator with additional expertise in non-conforming goods would have been appointed, given that defective goods and cybersecurity matters are different niches.

34 Therefore, the new claim under PO A-15604 and the initial claim under PO 9601 are based on different facts and thus are considerably different in nature.

2. Authorizing the New Claim to the Arbitration Would Not Result in Noticeable Savings in Costs or Time

35 The Tribunal should not authorize the new claim, as it would neither result in cost or time efficiency nor would any savings be noticeable.

36 According to Art. 22(1) ICC Rules, the parties and the arbitral tribunal are generally required to "*make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*". When considering a new claim, new allegations can require additional rounds of submissions and evidence to address possible new facts (*BRÜGGEMANN/SMAHI, p. 53*), which in turn considerably delay the arbitration proceedings (*BERGER/KELLERHALS, para. 1218*). As discussed above, the Parties required in the ToR that the savings in costs and time when authorizing a new claim be **noticeable** (*cf. para. 22*).

37 CLAIMANT alleges that PO 1 has extended the time frame of the final award (*MfC, para. 67*) beyond the six months contained in Art. 31(1) ICC Rules. This allegation is speculation, as the record it cites does not indicate this (*PO 1, p. 58, para. 1*). Additionally, RESPONDENT cannot be held to be in bad faith or to have waived any defence regarding time considerations (*MfC, para. 67*), as this is a matter which did not need to be addressed until now.

38 It would not be efficient to hear the two claims in the same proceedings since this part of the Arbitration does not yet consider the substantive issues of the new claim (*PO 1, p. 58, para. 2*). Thus, new evidence, new submissions, and hearings will in any event be needed at a later stage of the proceedings. Moreover, as the new claim relates to a new set of underlying facts, additional evidence regarding these distinguishing factors, such as the defectiveness of the goods, would have to be produced. As a result, further submissions by the Parties would be necessary, leading to increased legal fees and longer duration of the proceedings.

39 CLAIMANT further argues that adding the new claim would result in costs savings (*MfC, paras. 59 et seqq.*). However, the full costs of proceedings and not just the arbitrators' fees need to be taken into account. On average, the administrative fees represent 2 %, the arbitrators' fees 15 % and party costs such as legal representation 83 % of total costs of an arbitration (*ICC Commission, para. 2*).

40 The relevant arbitrators' fees would be USD 518,592 (*MfC, para. 64*). Based on the total amount in dispute of USD 50,400,000, assuming that the arbitrators' fees make up 15 % and the party

costs 83 % of the total respectively, the party costs would amount to approximately USD 2,869,542 (= USD 518,592 / 0.15 * 0.83).

41 Even when assuming costs savings due to slightly lower arbitrators' fees of USD 65,256, these savings do not satisfy the noticeable savings in costs requirement considering the amount in dispute of USD 50,400,000. Especially since there would be no savings in the party costs which represent a significant proportion of the total costs. Moreover, given that the two claims are factually different, hearing them in the Arbitration would not increase time efficiency.

42 Therefore, the admission of the new claim would not be cost or time efficient nor would it lead to noticeable savings in cost or time.

3. Authorizing the New Claim Would Be Against the Good Administration of Justice

43 Authorizing the new claim to the Arbitration would be against the good administration of justice since the new claim is not relevant to the present dispute and since, contrary to CLAIMANT's view (*MfC, para. 37*), it had no good reason to raise the claim late, i.e., after the signing of the ToR.

44 Another consideration for a tribunal when evaluating the authorization of a new claim under Art. 23(4) ICC Rules is the good administration of justice, based on whether the new claim is important to the initial dispute (*FRY/GREENBERG/MAZZA, para. 3-905*) and whether a good reason behind a delayed submission of a claim exists (*ibid., para. 3-906*). Such a reason exists if new evidence or information emerges which was not known at the time of the signing of the terms of reference (*VERBIST/SCHÄFER/IMHOOS, p. 134*).

45 The duty of an ICC tribunal to issue an enforceable award follows from Art. 42 ICC Rules. Further, under Art. V(1)(c) of the New York Convention, the recognition and enforcement of an arbitral award may be refused if it decides on a matter beyond the parties' submission or matters submitted to arbitration. Authorizing the new claim in the present case would make such an outcome a reality.

46 Given that the new claim is based on fundamentally different underlying facts (*cf. para. 32*), the new claim cannot be important to the present dispute.

47 Additionally, CLAIMANT had no reason for raising the claim after signing the ToR since no new evidence or information became known after the signing of the ToR. On the contrary, RESPONDENT explicitly informed CLAIMANT through a phone call after 20 March 2022, followed by an email sent on 4 April 2022 (*PO 2, p. 64, para. 27; Exh. R 5*). Moreover, the information

would have been available for CLAIMANT had it simply checked its accounts in the 17 months between the due date of the payment on 20 May 2022 (*RfANC, p. 46, para. 4*) and the signing of the ToR on 30 August 2023 (*PO 1, p. 58, para. 1*). Even if CLAIMANT's systems were down for one and a half months (*RfA, p. 6, para. 14*), it still had over 15 months to access its accounts and discover this information.

48 CLAIMANT further argues that the Tribunal would act *infra petita*, i.e., not ruling on a matter within its mandate, if it did not adjudicate the new claim (*MfC, para. 52*). However, the Tribunal lacks jurisdiction over the new claim (*cf. paras. 5 et seqq.*), and the new claim should not be authorized based on the considerations of Art. 23(4) ICC Rules. Thus, the Tribunal would rather act *ultra petita*, i.e., beyond its mandate, if it ruled on the new claim. This would lead to an unenforceable award pursuant to Art. V(1)(c) of the New York Convention, which would go against the good administration of justice. Additionally, it would also violate Art. 42 ICC Rules.

49 Therefore, authorizing the new claim would go against the good administration of justice and even result in an unenforceable award under the New York Convention.

50 In conclusion, the new claim is based on different facts and is thus different in nature from the initial claim, authorizing the new claim would not result in noticeable savings in costs or time, and good administration of justice would not be adhered to if the new claim were to be authorized.

51 **Conclusion Issue A**: The Tribunal cannot add the new claim under PO A-15604 to the Arbitration since the Tribunal does not have jurisdiction over it. This is because the arbitration agreement in PO 9601 prevails over the arbitration agreement of the FA, and therefore the jurisdiction is limited to PO 9601. Further, the Tribunal cannot add the new claim without authorization as it falls outside of the ToR and the Parties raised the standard of Art. 23(4) ICC Rules with the ToR. In any event, the Tribunal should not authorize the new claim based on Art. 23(4) ICC Rules and the ToR. Firstly, the new claim is very different in nature to the initial claim. Secondly, the new claim does not result in noticeable savings in costs or time. Lastly, authorizing the new claim would be against the good administration of justice.

B. THE TRIBUNAL CANNOT AND SHOULD NOT CONSOLIDATE THE ARBITRATIONS

52 If the new claim concerning PO A-15604 were raised in a separate arbitration, the Tribunal cannot and should not consolidate it with the Arbitration.

53 Firstly, CLAIMANT's request for a second arbitration concerning PO A-15604 was invalid according to Art. 4 ICC Rules [**I**]. Secondly, the Tribunal cannot consolidate the proceedings as the power to do so lies only with the ICC Court [**II**]. In any event, the Tribunal should not consolidate the proceedings under Art. 10 ICC Rules or Art. 41(5) of the FA as their conditions are not met [**III**].

I. CLAIMANT Submitted an Invalid Request for Arbitration for the New Claim

54 CLAIMANT's request for the second arbitration regarding the new claim under PO A-15604 was invalid according to Art. 4 ICC Rules since the filing fee was not paid.

55 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 request has to be submitted to the Secretariat (*Art. 4(1) ICC Rules*) and has to be made together with the payment of the filing fee (*Art. 4(4)(a) ICC Rules*).

56 CLAIMANT did not pay the filing fee after submitting its RfANC (*PO 2, p. 66, para. 41*). Moreover, the ICC Secretariat clearly did not recognize CLAIMANT's communication as a request for arbitration, as its response stated: "*Should a party wish to commence a new arbitration, said party should submit a Request for Arbitration with the Secretariat pursuant to Article 4 of Rules*" (*ICC Letter on Consolidation, p. 53*). Thus, CLAIMANT's request was invalid.

57 In conclusion, the request for the second arbitration regarding the new claim under PO A-15604 is not valid according to Art. 4 ICC Rules since the filing fee was not paid.

II. The Tribunal Cannot Consolidate the Proceedings as It Is a Power Reserved for the ICC Court

58 The Tribunal cannot consolidate the proceedings since the power to consolidate lies exclusively with the ICC Court.

59 According to Art. 19(1) ICC Rules, the proceedings shall be governed by the Rules, and where they are silent, by any rules which the parties settled on. This stipulates a clear precedence of the

rules governing the proceedings (*CRAIG/PARK/PAULSSON, p. 295; FRY/GREENBERG/MAZZA, para. 3-711*).

60 Art. 10 ICC Rules regulates consolidation of arbitral proceedings and provides the ICC Court the power to decide on consolidation.

61 ICC provisions which stipulate fundamental characteristics of ICC arbitration cannot be altered by parties (*BORN, ch. 15.02(D); CRAIG/PARK/PAULSSON, p. 295*). Pursuant to Art. 1(2) ICC Rules, the role of the ICC Court is to take administrative decisions, being "*the only body authorized to administer arbitrations*". The administration by the ICC Court is one of the most fundamental and distinctive features of ICC arbitration (*DERAINS/SCHWARTZ, Art. 1 ICC Rules, p. 11*). A decision on consolidation pursuant to Art. 10 ICC Rules is of an administrative nature and made exclusively by the ICC Court (*WEBSTER/BÜHLER, Art. 10 ICC Rules, para. 10-2*). The ICC Court refuses any substantial alteration of its powers and of the core features of ICC arbitration (*VERBIST/SCHÄFER/IMHOOS, p. 16*).

62 In the case at hand, Art. 41(5) of the FA attempts to provide the arbitral tribunal with the power to consolidate arbitral proceedings (*Exh. C 1, p. 12*). However, this transfer is invalid. The Parties may not deprive the ICC Court of its power to consolidate arbitration proceedings as this would constitute a substantial alteration of its powers. In addition, it is imperative that a neutral third party, i.e., the ICC Court, has the power to consolidate in order to avoid one arbitral tribunal being able to remove an arbitral tribunal from another arbitration.

63 CLAIMANT argues that the Parties can transfer the power to consolidate to the Tribunal as countless other arbitral institutions allow the arbitral tribunal to do so (*MfC, para. 72*). However, this further strengthens the argument that the power of the ICC Court to consolidate is a peculiarity and thus a fundamental characteristic of ICC arbitration.

64 In conclusion, the Tribunal cannot consolidate the proceedings since the power to consolidate lies exclusively with the ICC Court.

III. In Any Event, the Tribunal Should Not Consolidate the Proceedings

65 Even if the Parties validly transferred the power to consolidate to the Tribunal in Art. 41(5) of the FA, the Tribunal should not consolidate, since none of the conditions pursuant to Art. 10 ICC Rules are met [**1**]. Also, the additional conditions of Art. 41(5) of the FA are not met [**2**].

1. The Tribunal Should Not Consolidate as the Conditions of Art. 10 ICC Rules Are Not Met

66 The Tribunal should not consolidate the proceedings since none of the conditions of Art. 10 ICC Rules are met.

67 Firstly, the Parties did not consent to consolidate the arbitrations pursuant to Art. 10(a) ICC Rules [**a**]. Secondly, the claims were not made under the same arbitration agreement or agreements pursuant to Art. 10(b) ICC Rules [**b**]. Thirdly, consolidation is not possible under Art. 10(c) ICC Rules because the disputes arise out of different legal relationships and the arbitration agreements are incompatible [**c**]. Lastly, when considering the conditions of Art. 10(a)-(c) ICC Rules, the Tribunal, taking into account Art. 10 second paragraph ICC Rules, should not consolidate the arbitrations as the new claim could be handled by a sole arbitrator [**d**].

a) The Parties Did Not Agree to Consolidate Pursuant to Art. 10(a) ICC Rules

68 The Tribunal should not consolidate the proceedings pursuant to Art. 10(a) ICC Rules as the Parties did not agree to consolidate the proceedings.

69 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.

70 The Parties did not agree to consolidate the Arbitration with any possible second proceedings. The consolidation clause in Art. 41(5) of the FA is irrelevant for the proceedings at hand, because the arbitration agreements of the Purchase Orders prevail over the provisions regarding dispute resolution in Art. 41 of the FA as *lex specialis* (*cf. paras. 5 et seqq.*). Neither PO 9601 nor PO A-15604 include a consolidation clause (*Exh. C 2; Exh. C 7*). Furthermore, RESPONDENT immediately objected to consolidation after it was informed that CLAIMANT introduced a new claim (*ARfANC, p. 55, paras. 5 et seq.*).

71 Therefore, the Tribunal should not consolidate the proceedings pursuant to Art. 10(a) ICC Rules as the Parties have not agreed on consolidating them.

b) The Claims Were Not Made Under the Same Arbitration Agreement(s) Pursuant to Art. 10(b) ICC Rules

72 The Tribunal should not consolidate the proceedings pursuant to Art. 10(b) ICC Rules, as the claims were made under different arbitration agreements.

73 Consolidation is possible under Art. 10(b) ICC Rules when all claims of the dispute are made under the same arbitration agreement or agreements. In fact, the term "*same*" is to be understood as identical phrasing of the arbitration agreements (*PETER, p. 462; cf. SHARMA*). Thus, mere compatibility is not sufficient (*PETER, p. 462*).

74 In the case at hand, the two claims are not based on the same arbitration agreement in the FA (*cf. paras. 5 et seqq.*). They are also not based on the same arbitration agreements of the Purchase Orders, since they differ considerably in wording. First, PO 9601 provides for three arbitrators and PO A-15604 for "*one or more*" (*Exh. C 2, para. 7; Exh. C 7, para. 7*). Second, emergency arbitration rules (*cf. Art. 29(1) ICC Rules; Appendix V ICC Rules*) are excluded in the arbitration agreement of PO A-15604. Third, PO 9601 cites English as the language of the arbitration, whereas the language is not defined in PO A-15604 (*Exh. C 2, para. 7; Exh. C 7, para. 7*). Moreover, PO 9601 mentions "*Vindobona, Danubia*" as place of arbitration, while PO A-15604 only mentions "*Danubia*" (*ibid.*).

75 Therefore, the Tribunal should not consolidate the proceedings into a single arbitration according to Art. 10(b) ICC Rules since the claims were not made under the same arbitration agreement(s).

c) The Disputes Arise Out of Different Legal Relationships and the Arbitration Agreements Are Incompatible Pursuant to Art. 10(c) ICC Rules

76 The Tribunal should not consolidate the proceedings pursuant to Art. 10(c) ICC Rules as the disputes arise out of different legal relationships and the arbitration agreements in PO 9601 and PO A-15604 are incompatible.

77 In terms of Art. 10(c) ICC Rules, the consolidation of two proceedings is possible if the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes arise out of the same legal relationship, and the arbitration agreements are compatible.

78 The same legal relationship exists if all contracts relate to the same economic transaction (*FRY/GREENBERG/MAZZA, para. 3-357*). In an undisclosed ICC case, the ICC Court qualified two contracts as relating to the same economic transaction, which had identical arbitration clauses, and had been entered into by the same parties on the same date regarding an identical product and that had the same duration (*DERAINS/SCHWARTZ, Art. 4 ICC Rules, p. 61*).

79 In the present case, the disputes arise out of different legal relationships as the Purchase Orders relate to different economic transactions. In fact, PO 9601 and PO A-15604 were concluded on different dates (*Exh. C 2; Exh. C 7*) and encompass different products (*cf. para. 32*). While RESPONDENT mostly ordered S4 sensors such as in PO 9601 (*RfA, p. 5, para. 10*), it only once ordered L-1 sensors under PO A-15604 for a particular project (*Exh. C 8, para. 2*). These L-1 sensors are premium products (*RfANC, p. 46, para. 2*) sold for USD 120 per unit, whereas the S4 sensors only cost USD 32 per unit (*Exh. C 2, para. 5; Exh. C 7, paras. 2, 5*). All of these factors demonstrate that the Parties agreed on two distinct and different economic transactions.

80 Arbitration agreements are compatible if they contain the same place of arbitration and are not inconsistent regarding the constitution of the arbitral tribunal (*FRY/GREENBERG/MAZZA, paras. 3-243, 3-357*).

81 Presently, the arbitration agreements of the Purchase Orders are not compatible, as PO 9601 mentions "*Vindobona, Danubia*" as place of arbitration, while PO A-15604 only mentions "*Danubia*" (*Exh. C 2, para. 7; Exh. C 7, para. 7*). Furthermore, the agreements are inconsistent regarding the constitution of the arbitral tribunal since PO 9601 provides for three arbitrators and PO A-15604 for "*one or more*" (*Exh. C 2, para. 7; Exh. C 7, para. 7*) and the emergency arbitration rules (*cf. Art. 29(1) ICC Rules*) are excluded in the arbitration agreement of PO A-15604 (*Exh. C 7, para. 7*).

82 Therefore, the Tribunal should not consolidate the proceedings under Art. 10(c) ICC Rules as the disputes arise out of different legal relationships, and the arbitration agreements are incompatible.

d) The New Claim Could Be Handled by a Sole Arbitrator

83 The Tribunal, taking into account Art. 10 second paragraph ICC Rules, should not consolidate the arbitrations as the new claim could be handled by a sole arbitrator.

84 According to Art. 10 second paragraph ICC Rules, an additional factor to consider is whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations subject to consolidation. If the Parties have not agreed on the number of arbitrators, the ICC Court takes this decision according to Art. 12(2) ICC Rules, with the default being a sole arbitrator. For its decision, it considers the characteristics of the dispute, including its factual and legal complexity and economic value (*FRY/GREENBERG/MAZZA, para. 3-439*). If the dispute's amount exceeds

USD 30,000,000, the ICC Court is inclined to appoint three arbitrators (*FRY/GREENBERG/MAZZA, para. 3-440; VERBIST/SCHÄFER/IMHOOS, p. 41*).

85 In the case at hand, the new claim could be handled by a sole arbitrator. As the arbitration agreement of PO A-15604 allows for "*one or more*" arbitrators, RESPONDENT would insist on the appointment of a sole arbitrator. If the Parties would not reach an agreement on a sole arbitrator, the ICC Court would have to determine the number of arbitrators. Due to the relatively low complexity and considering the amount in dispute of USD 12,000,000 being far below USD 30,000,000, the ICC Court would most likely appoint a sole arbitrator.

86 Additionally, when the arbitrations to be consolidated involve the same parties but differ substantially regarding the nature of the disputes, a party may argue that it would wish to appoint a different arbitrator with specific expertise for the second arbitration (*MEIER, Art. 10 ICC Rules, para. 9*).

87 Since the disputes are substantially different in nature (*cf. paras. 30 et seqq.*), RESPONDENT could insist on the appointment of an arbitrator with specific expertise regarding the non-conformity of goods in a potential second arbitration, instead of an expert in the field of data privacy and cybersecurity it chose for the Arbitration (*cf. para. 33*).

88 Therefore, the Tribunal should not consolidate the arbitrations as the new claim could be handled by a sole arbitrator.

89 In conclusion, the Tribunal should not consolidate as the Parties did not agree to consolidate pursuant to Art. 10(a) ICC Rules, and the claims are not made under the same arbitration agreement(s) pursuant to Art. 10(b) ICC Rules. Moreover, since the disputes arise out of different legal relationships and the arbitration agreements are incompatible, the Tribunal should not consolidate pursuant to Art. 10(c) ICC Rules. Additionally, the Tribunal, taking into account Art. 10 second paragraph ICC Rules, should not consolidate the arbitrations.

2. The Tribunal Should Not Consolidate as the Conditions Pursuant to Art. 41(5) of the Framework Agreement Are Not Met

90 The conditions for consolidation set out in Art. 41(5) of the FA are not met. Firstly, the subject matters are not related by common questions of law and fact [**a**] and secondly, there is no risk of conflicting awards or obligations by keeping the arbitral proceedings separate [**b**].

a) The Matters Are Not Related by Common Questions of Law or Fact

91 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*). It has already been established under the considerations of Art. 23(4) ICC Rules that the matters are not related by common questions of fact (*cf. para. 32*).

92 Additionally, the underlying legal question of the initial claim for the merits of the dispute is whether RESPONDENT can be exempted from its payment obligation under Art. 80 CISG due to CLAIMANT violating its information duties following a cyberattack. On the other hand, the new claim is about defective goods, which would mainly be decided by applying Art. 35 CISG.

93 Therefore, the matters are not related by common questions of law or fact.

b) There Would be No Conflicting Awards or Obligations

94 Even though CLAIMANT invokes Art. 41(5) of the FA, it ignores that the claims must also create a risk of conflicting awards or obligations (*MfC, para. 80*). As will be illustrated, there would be no risk of conflicting awards or obligations according to Art. 41(5) of the FA if the two proceedings were not to be consolidated, since the claims are independent from each other.

95 According to Art. 41(5) of the FA, consolidation is only possible if keeping the claims in separate proceedings would create a risk of conflicting awards or obligations (*Exh. C 1, p. 12*).

96 It has been established that the two claims are substantially different in nature (*cf. paras. 30 et seqq.*). Thus, as the claims are substantially different and independent from each other, no conflicting awards or obligations could arise from separate proceedings.

97 Even if two different tribunals were to decide on the same contractual provision of the FA, their interpretations would not lead to conflicting awards or obligations.

98 The principle of *res judicata* is intended to avoid conflicting awards (*SHEPPARD, p. 219*). An arbitral tribunal has to recognize the binding effect of a prior arbitral award (*cf. ICSID Case ARB/10/6 [ICSID, 2010], para. 7.1.8.; cf. ICC Cases No. 2745 & 2762 [ICC, 1977]; GAILLARD, p. 225*). Such *res judicata* effect usually only covers the dispositive part of the award (*cf. GAILLARD, p. 227*).

99 Both tribunals would – at most – treat the same contractual provision as a preliminary question. The dispositive part would only contain the ruling on the obligations of the Parties under PO 9601 and PO A-15604. Consequently, no risk of conflicting awards or obligations would arise out of two separate decisions.

100 Therefore, no risk of conflicting awards or obligations would arise if the proceedings were not to be consolidated, since the claims are independent from each other. Even if they were interdependent, the dispositive parts of the awards would not be conflicting.

101 In conclusion, the conditions for consolidation set out in Art. 41(5) of the FA are not met, as the subject matters are not related by common questions of law or fact, and there is no risk of conflicting awards or obligations by keeping the arbitral proceedings separate.

102 **Conclusion Issue B**: First, CLAIMANT's request for the second arbitration regarding the new claim was invalid according to Art. 4 ICC Rules since the filing fee was not paid. Second, the Tribunal cannot consolidate as the power to do so lies exclusively with the ICC Court. In any event, the Tribunal should not consolidate as the conditions in Art. 10 ICC Rules are not met: The Parties did not agree to consolidate the proceedings; the claims were not made under the same arbitration agreement(s); the disputes arise out of different legal relationships and are based on incompatible arbitration agreements. Additionally, the Tribunal, taking into account Art. 10 second paragraph ICC Rules, should not consolidate the arbitrations. Further, the Tribunal should not consolidate, since the matters are not related by common questions of law or fact and no conflicting award or obligations would arise without consolidation pursuant to Art. 41(5) of the FA.

C. CLAIMANT IS NOT ENTITLED TO THE PAYMENT UNDER PO 9601

103 CLAIMANT has no payment claim since RESPONDENT already fulfilled its payment obligation out of PO 9601 [**I**]. Alternatively, RESPONDENT is exempted from its payment obligation pursuant to Art. 80 CISG [**II**]. In the alternative to RESPONDENT's full exemption, it is partially exempted from its payment obligation under Art. 80 CISG [**III**].

104 The relevant contractual relationship between the Parties for the merits of this dispute is governed by the FA and where PO 9601 differs, by its provisions (*Exh. C 2, preamble*). According to the choice of law clause of Art. 41(6) of the FA, the FA and all purchase orders concluded thereunder are governed by Danubian law (*Exh. C 1, p. 12*). Since Danubia is a Contracting State of the CISG (*PO 2, p. 58, para. 4*), it applies to the present dispute, which was reaffirmed by the Parties in PO 9601 (*Exh. C 2, para. 7*). If a gap in the CISG cannot be filled using its underlying principles, it shall be resolved by the applicable national law (*Art. 7(2) CISG*), i.e., Danubia's General Contract Law ("**DGCL**") which is a verbatim adoption of the UPICC (*PO 1, p. 59, para. 4*).

I. RESPONDENT Fulfilled Its Payment Obligation Under PO 9601

105 Contrary to CLAIMANT's allegations (*MfC, paras. 89 et seqq.*), RESPONDENT fulfilled its payment obligation pursuant to Art. 54 CISG by paying USD 38,400,000 to the bank account indicated in the email of 28 March 2022.

106 On 28 March 2022, RESPONDENT's account manager responsible for CLAIMANT, Mr. Royce, received an email seemingly from CLAIMANT's account manager, Ms. Audi (*Exh. C 5*). To RESPONDENT's surprise, after the payments under PO 9601 had been made, it turned out that the email was sent by a hacker who had gained access to Ms. Audi's email account. In violation of CLAIMANT's cybersecurity guidelines, Ms. Audi had clicked on a link in a spam email that had caused malware to be installed on CLAIMANT's servers. The malware allowed hackers access to Ms. Audi's entire email account (*PO 2, p. 64, para. 25*). The hackers subsequently used the gathered information regarding CLAIMANT's business relationship with RESPONDENT to pose as Ms. Audi in the email to RESPONDENT.

107 RESPONDENT reasonably assumed that the email came from CLAIMANT's Ms. Audi [**1**], and the form requirement of Art. 40 of the FA did not diminish the reasonableness of this assumption [**2**]. Therefore, RESPONDENT fulfilled its payment obligation towards CLAIMANT by paying to the account indicated in the email.

1. RESPONDENT Reasonably Assumed That the Email Originated From Ms. Audi

108 RESPONDENT reasonably assumed that the email of 28 March 2022 (*Exh. C 5*) originated from Ms. Audi, since a reasonable third party in its position would have come to the same conclusion.

109 A recent Dutch case (*CISG-online 2920 [NLD, 2017]*) involved fraudulent emails specifying bank account details which led to the buyer transferring the purchase price to the hacker's instead of the seller's bank account (*ibid., para. 13*). The Dutch Court of Appeal applied Art. 8(2) CISG to interpret the hacker's email (*ibid., para. 24*), in order to decide if the buyer could have reasonably interpreted the email as coming from the seller. In similar cases, US courts applying domestic law have considered whether the recipient of the email took the expected reasonable measures to verify the authenticity of the email (*Arrow Truck Sales [USA, 2015], p. 5; Ostrich [USA, 2023], p. 4*).

110 In the case at hand, RESPONDENT reasonably believed that the email of 28 March 2022 came from Ms. Audi for several reasons: First, RESPONDENT had no reason to be suspicious of emails from Ms. Audi, as CLAIMANT failed to notify RESPONDENT about the prior cyberattack of 5 January

2022, despite being aware of the gravity of Ms. Audi's violations of its cybersecurity guidelines – evidenced by her immediate suspension upon returning from sick leave (*PO 2, p. 61, para. 5*).

111 Second, the reason provided in the email regarding CLAIMANT's need to switch to a new banking partner in Danubia due to the sanctions regime in Mediterraneo was plausible. The L-1 sensors CLAIMANT was selling are also used in military applications (*RfANC, p. 46, para. 2*). Consequently, it would have been reasonable for CLAIMANT to switch its bank accounts to Danubia, which is known for its liberal export regime (*PO 2, p. 61, para. 2*). Additionally, RESPONDENT was already familiar with the bank mentioned in the email, having previously made direct payments to CLAIMANT's subsidiary via this bank (*PO 2, pp. 61 et seqq., paras. 2, 12*).

112 Third, the email contained very detailed information that only the Parties could have known, such as the planned delivery dates and amount of S4 sensors ordered under PO 9601 and the fact that RESPONDENT purchased L-1 sensors under PO A-15604 (*Exh. C 5*).

113 Fourth, the email stated that Ms. Audi was working from home due to health problems (*Exh. C 5*). This was consistent with both the notice of her sick leave RESPONDENT received one day before and Ms. Audi's voicemail which also stated she was on sick leave (*Exh. C 4; ARfA, p. 47, para. 6*).

114 Fifth, when RESPONDENT's Mr. Royce tried to contact Ms. Audi, he could only reach her voicemail (*ARfA, p. 46, para. 6*). This further confirmed the legitimacy of the email as it said that her mobile connection was bad and it was thus plausible that she had no service.

115 Sixth, the hacker's email of 28 March 2022 was in line with the Parties' practice of starting a new email chain for each specific issue (*PO 2, p. 61, para. 4*).

116 Finally, the incorrect telephone number in Ms. Audi's signature did not raise suspicion, since another employee of CLAIMANT, its former Head of Sales and Purchasing, also had a wrong email address in his signature (*@se**r**sorx instead of @se**n**sorx, Exh. R 2*). A reasonable third party in RESPONDENT's position would not have attached significance to minor typographical errors in the email, such as a single wrong digit in the purchase order number (*No. 1560**5** instead of A-1560**4**, Exh. C 5*) and in the sensor type number (*S4-258**8**9 instead of S4-258**9**9, Exh. C 5*).

117 In general, RESPONDENT had no reason to be suspicious or extraordinarily attentive given that CLAIMANT's cybersecurity officer had just recently, in December 2021, praised the new cybersecurity system implemented by CLAIMANT (*Exh. R 3; Exh. R 4, para. 3*).

118 Therefore, RESPONDENT reasonably assumed that the email came from Ms. Audi, since a reasonable third party in the position of RESPONDENT would have come to the same conclusion.

2. The Email Not Meeting the Form Requirement of Art. 40 of the Framework Agreement Did Not Make RESPONDENT's Assumption Unreasonable

119 The form requirement of Art. 40 of the FA did not prevent RESPONDENT from reasonably assuming that the email of 28 March 2022 came from Ms. Audi, since the Parties had previously disregarded the form requirement.

120 Even if CLAIMANT would argue that the email of 28 March 2022 did not meet the form requirement of Art. 40 of the FA, which requires amendments to the FA to bear the signature of both Parties, this would not prevent RESPONDENT from reasonably assuming that the email came from Ms. Audi. If an amendment to the FA were made without adhering to the form requirement, CLAIMANT could not invoke Art. 40 of the FA to contest the validity of the amendment (*Art. 29(2) second sentence CISG*). Consequently, the fact that the email did not meet the form requirement did not prevent RESPONDENT from reasonably assuming that it came from Ms. Audi.

121 Pursuant to Art. 29(2) second sentence CISG, a party is precluded by its conduct from asserting a form requirement to the extent that the other party has relied on that conduct. Thus, two conditions must be fulfilled. First, a party must behave in a way that allows the conclusion that it would accept contract modifications that would not adhere to the form requirement. Second, the other party must have relied on that conduct (*MAGNUS, Art. 29 CISG, para. 18; SÄNGER, Art. 29 CISG, para. 4*). This is the case if the parties deviated from the contract terms in multiple instances and adjusted their behavior accordingly (*MAGNUS, Art. 29 CISG, para. 19*).

122 The Parties disregarded the form requirement in their contractual relationship in several instances. Firstly, at their price fixing meeting on 1 December 2020, the Parties amended Art. 6 of the FA orally by shifting from semi-annual to annual price fixing meetings (*RfA, p. 6, para. 11*).

123 Secondly, at the beginning of 2022, the payment period of 15 days stipulated in Art. 7 of the FA was changed without the signatures of both Parties. The payment under PO 9601 was due 30 days after delivery (*Exh. C 2, para. 6; PO 2, p. 62, para. 9*), whereas under PO A-15604 the installments were due 30 and 90 days after delivery (*Exh. C 7, para. 6; Exh. C 8, para. 4*).

124 Additionally, on 4 April 2022, RESPONDENT's Head of Purchasing Mr. Toyoda sent a notice of defect to CLAIMANT via email (*Exh. R 5*), as agreed on in the previous phone conversation with CLAIMANT's Ms. Peugeotroen (*PO 2, p. 64, para. 27*). The email deviated from the notice of defect procedure laid down in Art. 5 of the FA. CLAIMANT did not react, leading RESPONDENT to believe that it had accepted the notice of defect via email (*ARfANC, p. 54, para. 3*).

125 Therefore, the form requirement in Art. 40 of the FA did not make RESPONDENT's assumption that the email of 28 March 2022 originated from Ms. Audi unreasonable.

126 In conclusion, RESPONDENT fulfilled its payment obligation pursuant to Art. 54 CISG since it reasonably paid to the bank account indicated in the email.

II. In the Alternative, RESPONDENT Is Fully Exempted From Its Payment Obligation Pursuant to Art. 80 CISG

127 According to Art. 80 CISG, a party may be exempted from its payment obligation if its non-performance was caused by an act or omission of the counterparty. The act or omission of one party needs to be causal for the failure to perform of the other party (*ATAMER, Art. 80 CISG, paras. 8 et seqq.; SCHWENZER, Art. 80 CISG, para. 4*). This exemption precludes the party which caused the non-performance from asserting any claims out of the counterparty's failure to perform (*SCHWENZER, Art. 80 CISG, para. 8*).

128 Contrary to CLAIMANT's view (*MfC, para. 83*), RESPONDENT can be exempted under Art. 80 CISG. CLAIMANT's omissions to inform RESPONDENT about the cyberattacks and the missing payments constitute violations of its legal and contractual obligations to inform [**1**], and there was a causal link between CLAIMANT's omissions and RESPONDENT's non-performance [**2**].

1. CLAIMANT Breached Its Contractual and Legal Duties by Omitting to Inform RESPONDENT About the Cyberattacks and the Missing Payment

129 Since CLAIMANT's failures to inform RESPONDENT about the cyberattacks and the missing payment constitute breaches of its contractual and legal duties, they were omissions under Art. 80 CISG.

130 The exemption under Art. 80 CISG encompasses any action or omission by one party that was causal to the non-performance of the counterparty (*BRUNNER/BOOG/SCHLÄPFER, Art. 80 CISG, p. 592*). Omissions are relevant when an obligation to cooperate or assist the other party's performance is not fulfilled (*ATAMER, Art. 80 CISG, para. 6; HUBER, Art. 80 CISG, para. 4; MAGNUS, Art. 80 CISG, para. 9; MANKOWSKI, Art. 80 CISG, para. 4*).

131 CLAIMANT omitted to disclose to RESPONDENT that hackers gained access to its systems on 5 January 2022 (*Exh. C 6, para. 5*). The cybersecurity firm hired by CLAIMANT incorrectly categorized this cyberattack as of minor relevance, failing to detect that the CRM was affected, and that the malware remained in CLAIMANT's systems (*PO 2, p. 64, para. 25*). CLAIMANT's omission to inform RESPONDENT about this cyberattack created a risk for RESPONDENT. This risk

materialized in the email received by RESPONDENT on 28 March 2022 (*Exh. C 5*), which contained significant information that the hackers had extracted from Ms. Audi's account. The extensive details could deceive a reasonable third person in the position of RESPONDENT (*cf. paras. 108 et seqq.*).

132 Furthermore, CLAIMANT also failed to notify RESPONDENT about the second cyberattack on 15 May 2022, when the malware in CLAIMANT's systems encrypted its CRM system and a ransom demand of USD 5,000,000 was made (*Exh. C 6, p. 17, para. 10*). This led to a major security check of CLAIMANT's systems until 30 June 2022 (*RfA, p. 6, para. 14*).

133 Finally, CLAIMANT omitted to inform RESPONDENT about the first missing payment. Due to an internal personnel shortage, CLAIMANT only discovered on 5 September 2022 that the payments of 3 May and 30 June 2022 were missing (*Exh. C 3*).

134 These omissions to inform RESPONDENT constituted breaches of CLAIMANT's contractual and legal information duties. Firstly, CLAIMANT violated its duty to inform arising from Art. 7(2) CISG, which constituted an ancillary duty under the FA [**i**]. Furthermore, CLAIMANT did not respect the established practice between the Parties to inform each other about cyberattacks [**ii**]. Moreover, CLAIMANT also failed to respect the usage in the automotive industry of informing business partners about cyberattacks [**iii**]. In any event, even if the CISG did not stipulate an information duty regarding cyberattacks, CLAIMANT violated its duty to cooperate under Art. 5.1.3. DGCL [**iv**].

i) CLAIMANT Violated Its Duty to Inform Under the CISG and the Framework Agreement

135 CLAIMANT violated its duty to inform arising from Art. 7(1) CISG, which also constituted an ancillary duty under the FA, by not informing RESPONDENT about the cyberattacks or the missing payment.

136 Contrary to CLAIMANT's view, it did not comply with its duties under the FA (*MfC, para. 83*). Although the Parties did not include an explicit provision in the FA, a duty to inform follows from Art. 7(1) CISG and in addition forms an ancillary duty under the FA.

137 The duty of good faith laid down in Art. 7(1) CISG is a fundamental principle underlying the CISG (*ENDERLEIN/MASKOW, p. 56; MAGNUS, Art. 7 CISG, para. 43*). It includes a duty to cooperate and a duty to inform the other party of circumstances relevant to the contract (*CISG-online 2823 [FRA, 2017], para. 51; CISG-online 617 [GER, 2001], para. 16; ACHILLES, Art. 7 CISG, para. 16; FERRARI, Art. 7 CISG, para. 55; MAGNUS, Art. 7 CISG, para. 48*). More specifically, it lays down

a duty to guard the interests of the other party insofar as necessary and appropriate to achieve the purpose of the contract (*FERRARI, Art. 7 CISG, para. 54; MAGNUS, Art. 7 CISG, para. 47*). Under the CISG, the duties deriving from Art. 7 CISG form ancillary duties to the contract, which are treated the same way as the primary contractual obligations mentioned in Art. 30 CISG (*BRUNNER/DIMSEY, Art. 30 CISG, paras. 15 et seq.; KOCK, paras. 30 et seq*).

138 CLAIMANT failed to safeguard RESPONDENT's interests by not informing it about the cyberattacks and thereby violating its ancillary duty under the FA. Such information was necessary to fulfill its primary obligation pursuant to the FA, namely the successful payment pursuant to PO 9601 (*Exh. C 6, p. 17, para. 2*). Informing RESPONDENT about the first cyberattack would have enabled it to identify the email of 28 March 2022 (*Exh. C 5*) as fraudulent, preventing the transfer of USD 38,400,000 to cybercriminals. Moreover, CLAIMANT should have informed RESPONDENT about the encryption of CLAIMANT's CRM system (*Exh. C 6, p. 17, para. 10*), since RESPONDENT's data, including information about its employees, was compromised (*ARfA, p. 30, para. 4*).

139 Further, CLAIMANT failed to guard the interests of RESPONDENT by not informing it about the first missing payment due on 3 May 2022 (*RfA, p. 6, para. 14*). Had CLAIMANT informed RESPONDENT about the first missing payment within the two months leading up to the second payment (*ibid.*), RESPONDENT would have avoided making the second payment to the wrong account.

140 Therefore, CLAIMANT violated its duty to cooperate and to inform pursuant to Art. 7 CISG by not informing RESPONDENT about the cyberattacks or the missing payment.

ii) CLAIMANT Violated the Practice Between the Parties to Inform About Cyberattacks

141 CLAIMANT violated its duty to inform RESPONDENT about the cyberattacks, which was practice between the Parties.

142 Under Art. 9(1) CISG, practices are binding on the parties if they explicitly or implicitly agreed to them (*SCHMIDT-KESSEL, Art. 9 CISG, para. 1a*). Practices, as well as usages, supplement the rights and obligations of the parties under the contract (*SCHWENZER/MUÑOZ, para. 27.01*).

143 The term "*practice*" refers to parties consistently conducting themselves in a certain manner in similar circumstances. Although a single instance of conduct is usually not sufficient to establish a practice, it may still constitute a practice if that conduct is significant enough for the parties that they can reasonably be expected to have anticipated the same conduct in the future (*SCHWENZER/MUÑOZ, para. 27.12*).

144 The previous instance of informing the other party about a cyberattack was extremely significant for the Parties, as evidenced by their behavior and reactions. When RESPONDENT became a victim of a cyberattack in August 2020, it immediately informed CLAIMANT about it (*Exh. R 1*). CLAIMANT was extremely appreciative of this information, requested the contact details of an employee of RESPONDENT to get further information, and wanted to be continuously updated on any new findings (*Exh. R 2*). RESPONDENT did not inform CLAIMANT only to comply with Art. 34 of the EDPA, but did so voluntarily, with the objective of reducing any potential risk arising from this cyberattack for CLAIMANT (*Exh. R 1*), so that CLAIMANT could act with appropriate caution. At that point in time, there was no established high risk, i.e., a high likelihood for the right to privacy and data protection of natural persons to have been affected, that would have required notification to CLAIMANT (*Exh. R 4, para. 2; EDPB Guidelines 9/2022, para. 102).* Indeed, CLAIMANT's enthusiastic response and request for continuous updates gave rise to the assumption that the Parties would act similarly in comparable instances in the future (*cf. Exh. R 2*).

145 Therefore, the Parties had established a practice between them, which CLAIMANT violated by not informing RESPONDENT about the cyberattacks.

iii) CLAIMANT Did Not Respect the Usage in the Automotive Industry to Inform the Counterparty About Cyberattacks

146 CLAIMANT disrespected the trade usages in the automotive industry by not informing RESPONDENT about the cyberattacks.

147 Unlike practice, which is an established conduct between two business parties, the term "*usage*" describes behavior that is widely known and regularly observed in a particular trade or industry, giving rise to the justifiable expectation of the parties that the behavior would be continued (*SCHWENZER/MUÑOZ, para. 27.31*). Usages are often established through guidelines published by leading industry bodies or institutions (*BOUT, Art. 9 CISG, p. 3*). The parties are bound by internationally observed usages even without their express consent, if they were aware or should have been aware of them (*Art. 9(2) CISG*). The usages then form an implied term to the contract, based on the presumed implicit intent of the parties (*MAGNUS, Art. 9 CISG, para. 1; SCHMIDT-KESSEL, Art. 9 CISG, paras. 12, 19*).

148 Multiple actors and organizations have published standards to which the automotive industry must adhere, which include the duty to inform in case of potential or actual cyberattacks (*Global*

standard: ISO/SAE 21434:2021, para. 8.4; US: Cybersecurity Best Practices for the Safety of Modern Vehicles, para. 4.2.9 [G.18]). Furthermore, the increased threat of cyberattacks in the automotive industry was widely reported (*cf. Upstream Global Automotive Cybersecurity Report 2022*).

149 CLAIMANT knew or at least ought to have known of these industry practices, given the prevalence of cyberattacks in the industry and the widespread reporting on it. This was especially true at the time the cyberattack occurred in January 2022 (*cf. Exh. C 6, p. 17, para. 8*). Thus, CLAIMANT was expected to inform RESPONDENT about the incidents in January and in May 2022. CLAIMANT even recognized that it had an information duty since it informed the authorities and all other business partners about its cyberattacks – except for RESPONDENT (*PO 2, p. 64, para. 26*).

150 Therefore, CLAIMANT failed to fulfill its obligation to inform RESPONDENT about the cyberattacks, which constituted a usage in the automotive industry.

iv) Even If There Was No Information Duty Under the CISG, CLAIMANT Violated Its Duty to Cooperate under Art. 5.1.3 DGCL

151 Even if the Tribunal found that the CISG did not contain a duty to inform RESPONDENT about the cyberattacks or the missing payment, CLAIMANT would have violated its duty to cooperate under Art. 5.1.3 DGCL.

152 In case of an internal gap in the CISG regarding a duty to inform that cannot be filled with its underlying principles, recourse is to be had to the applicable domestic law (*GRUBER, Art. 7 CISG, para. 40*). Art. 5.1.3 DGCL establishes a duty to cooperate, requiring parties to provide necessary information for the counterparty to perform its contractual obligations (*VOGENAUER, Art. 5.1.3 UPICC, paras. 5, 7*). The duty to cooperate is particularly important in the context of long-term contracts (*Comment Nr. 2 to Art. 5.1.3 UPICC*). This duty extends to what can reasonably be expected of a party (*Art. 5.1.3 DGCL*). When evaluating reasonableness, a possible information asymmetry between the parties involved must be considered (*BRÖDERMANN, Art. 5.1.3 UPICC, para. 3*). The greater the information asymmetry, the more likely an information duty is a reasonably expected measure (*VOGENAUER, Art. 5.1.3 UPICC, para. 9*).

153 In the case at hand, CLAIMANT did not cooperate to the extent reasonably expected. Despite becoming aware of the cyberattack after a mere two weeks on 23 January 2022 (*RfA, p. 7, para. 27*), CLAIMANT failed to inform RESPONDENT. The encryption of the CRM system in May

2022 constituted an additional instance where CLAIMANT was reasonably expected to inform RESPONDENT (*cf. para. 132*). The evident information asymmetry between the Parties regarding the cyberattacks underlines that CLAIMANT's information duty towards RESPONDENT was reasonable. There was an additional information asymmetry concerning the missing first payment, which CLAIMANT ought to have known but was not communicated to RESPONDENT until after it had paid the second installment (*Exh. C 3*). RESPONDENT needed this information to perform its contractual duties under PO 9601. It would have clarified that the email of 28 March 2022 with the changed bank account details was a byproduct of the cyberattack on CLAIMANT and to be disregarded, ensuring payment to the account specified in Art. 7 of the FA.

154 Therefore, CLAIMANT breached its duty to cooperate under Art. 5.1.3 DGCL, as it would have been reasonably expected of CLAIMANT to take the appropriate step of informing RESPONDENT.

155 In conclusion, CLAIMANT's omissions to inform RESPONDENT about two instances of breaches of its cybersecurity and the missing payment constitute relevant omissions under Art. 80 CISG.

2. CLAIMANT's Omissions to Inform RESPONDENT Were Causal for RESPONDENT's Non-Performance

156 CLAIMANT's omissions to inform RESPONDENT about its cyberattacks or the missing first payment were causal for RESPONDENT's failure to perform under PO 9601.

157 For a causal link under Art. 80 CISG, the act or omission must have been the *conditio sine qua non* for the non-performance *(ATAMER, Art. 80 CISG, para. 8; SCHWENZER, Art. 80 CISG, para. 4*). From an objective standpoint (*Art. 8(2) CISG*), the act or omission must further have been able to prevent the performance of the contract (*MAGNUS, Art. 80 CISG, para. 12; PILTZ, para. 4-224*). In the case of an omission, Art. 80 CISG requires that the party's non-performance would not have occurred had the counterparty fulfilled its duty properly (*MAGNUS, Art. 80 CISG, para. 12*).

158 CLAIMANT's failure to inform RESPONDENT directly caused RESPONDENT's non-performance. Had CLAIMANT communicated the impact of the cyberattack on Ms. Audi's business account to RESPONDENT, RESPONDENT would have been alerted to leaked data in their business relationship. This in turn would have prompted it to be extra careful regarding communication with CLAIMANT, and in particular regarding Ms. Audi. In such a case, RESPONDENT would have taken extra verification measures before confirming any alterations to the bank account details. Additionally, information about the encryption of CLAIMANT's CRM system or the missing first

payment would have enabled RESPONDENT to disregard the account indicated in the email and paid to the account of Art. 7 of the FA instead.

159 In any event, there was an indirect causation between CLAIMANT's failure to inform RESPONDENT and RESPONDENT's non-performance.

160 Indirect causation may suffice for an exemption under Art. 80 CISG if the creditor's conduct resulted in an impediment within the sphere of control of the creditor that was not easily overcome by the debtor and resulted in the debtor's non-performance (*ACHILLES, Art. 80 CISG, para. 3; HUBER, Art. 80 CISG, para. 5; MAGNUS, Art. 80 CISG, para. 12; SCHWENZER, Art. 80 CISG, para. 4*).

161 The impediment of the hacker's email was not easily overcome by RESPONDENT. As demonstrated above (*cf. paras. 108 et seqq.*), the hacker's email could not be easily detected as such, even by a reasonable third party in the position of RESPONDENT.

162 Finally, if CLAIMANT were to argue that the article published in Automotive Weekly on 20 May 2022 (*Exh. R 3*), which reported that there had been a cyberattack on CLAIMANT, sufficiently informed RESPONDENT, such argument would have to be dismissed. First, the article was published on 20 May 2022, i.e., *after* the first payment had already been effectuated on 3 May 2022. Second, it cannot be assumed that RESPONDENT ought to immediately be aware of any communication in a journal. In fact, Mr. Royce only noticed the article in July 2022 (*PO 2, p. 63, para. 17*).

163 Therefore, CLAIMANT's failure to inform RESPONDENT about the cyberattacks on CLAIMANT caused RESPONDENT's non-performance under PO 9601.

164 In conclusion, CLAIMANT's failure to inform RESPONDENT about the cyberattacks or the missing first payment constitute omissions under Art. 80 CISG because CLAIMANT did not respect its ancillary duty under the FA arising out of Art. 7(1) CISG, the Parties' established practice, the usage in the automotive industry, or its duty to cooperate pursuant to Art. 5.1.3 DGCL. These omissions directly or at least indirectly caused RESPONDENT's subsequent failure to perform.

III. In the Further Alternative, RESPONDENT Is Partially Exempted Pursuant to Art. 80 CISG

165 Should the Tribunal find that RESPONDENT were not fully exempted, RESPONDENT should be partially exempted based on Art. 80 CISG.

166 RESPONDENT's exemption should amount to more than half of the payment obligation under PO 9601 [**1**]. Moreover, CLAIMANT cannot invoke mixed causation to deny a partial exemption of RESPONDENT's payment obligation [**2**].

1. RESPONDENT Should Be Exempted From More Than Half of the Payment Due Under PO 9601

167 Given CLAIMANT's preponderant contribution to the non-performance, RESPONDENT should be exempted from more than half of the payment obligation under PO 9601.

168 An exemption pursuant to Art. 80 CISG may be partial if both parties' acts or omissions jointly caused the non-performance (*CISG-online 4631 [FRA, 2019], pp. 6 et seq.*). In that case, if the claim is divisible, it is adjusted according to each party's contribution to the non-performance (*CISG-online 2400 [GER, 2013], para. 72; CISG-online 2348 [GER, 2012], para. 36; ATAMER, Art. 80 CISG, para. 18; SÄNGER, Art. 80 CISG, para. 3*).

169 In the case at hand, RESPONDENT faces a claim for performance of the payment obligation under PO 9601, a divisible monetary claim. Therefore, the Parties' contributions to the non-performance should be considered to determine the extent of RESPONDENT's exemption.

170 For this determination, factors such as the probability of each party's conduct leading to non-performance and the severity of their respective contract breaches have to be considered (*HERBER/CZERWENKA, Art. 80 CISG, para. 7; SCHWENZER, Art. 80 CISG, para. 9*).

171 First of all, CLAIMANT did not notify RESPONDENT about its cyberattack of 5 January 2022 (*Exh. C 6, p. 17 para. 8; ARfA, p. 30, para. 4*) and thereby severely breached its contractual and legal duties (*cf. paras. 129 et seqq.*). The only slight negligence that one could argue was that RESPONDENT's employee, Mr. Royce, did not contact the person indicated in Ms. Audi's voicemail "*in urgent matters*", but instead replied to the email directly (*PO 2, p. 61, para. 4*).

172 Second, CLAIMANT's failure to inform RESPONDENT significantly increased the likelihood of RESPONDENT falling victim to the hacker's email of 28 March 2022 (*Exh. C 5*). CLAIMANT is wrong when asserting that it could not have foreseen RESPONDENT complying with the email instructions (*MfC, para.* 96). RESPONDENT was uninformed of any cybersecurity risk associated with communicating with Ms. Audi, which led to RESPONDENT complying with the email instructions and transferring the first payment on 3 May 2022 to the bank account indicated in it

(*ARfA, p. 31, para. 9*). Had CLAIMANT informed RESPONDENT about the cyberattack, RESPONDENT would have never transferred both payments to the third-party bank account.

173 Moreover, CLAIMANT not informing RESPONDENT about the missing first payment of 3 May 2022 until the second payment was made further increased the likelihood of RESPONDENT making the second payment to the same account, unaware that it did not belong to CLAIMANT. The same holds true regarding CLAIMANT's omission to inform RESPONDENT about the second cyberattack. Had RESPONDENT been made aware that the payment never arrived and that CLAIMANT was still under attack, it would have double-checked the veracity of the bank account details and would not have made the second payment to that bank account. RESPONDENT not double-checking the authenticity of an email, composed with a similar level of professionalism and collegiality as emails coming from CLAIMANT (*cf. Exh. R 2, first sentence*), may have marginally increased the likelihood of the first payment's non-performance. However, the same cannot be said for the second payment, which could have been avoided through a simple notification from CLAIMANT regarding the missing first payment.

174 In any event, despite the allegations of CLAIMANT (*MfC, para. 142*), it is not entitled to interest at the rate of 4 % from 22 May and 1 July 2022 onwards, respectively. CLAIMANT explicitly waived its right to claim interest until 5 September 2022 in the email from its Head of Sales, when it stated that it "*will not charge any interest (…) for the belated payment*" (*Exh. C 3*). CLAIMANT violates the prohibition of contradictory behavior, which is an underlying principle of the CISG (*Art. 7(2) CISG; HACHEM, Art. 7 CISG, para. 32*), by claiming interest before 5 September 2022.

175 Therefore, CLAIMANT preponderantly caused RESPONDENT's non-performance under PO 9601. Considering the Parties' unequal shares of responsibility, RESPONDENT should be exempted from substantially more than half of the USD 38,400,000 due. In any event, CLAIMANT may not claim interest before 5 September 2022.

2. CLAIMANT Cannot Invoke Mixed Causation to Deny a Partial Exemption for RESPONDENT

176 Contrary to CLAIMANT's assertions (*MfC, para. 164*), it cannot invoke mixed causation to deny a partial exemption for RESPONDENT.

177 Mixed causation of the non-performance by both parties would be affirmed if the multiple factors that caused the non-performance were independent from one another and could be treated

separately (*NEUMANN, pp. 150 et seqq.*). In contrast, there is joint causation if the parties' conduct was so closely connected that the specific consequence of each party's behavior cannot be delimited (*ibid., pp. 152 et seqq.*).

178 In the present case, there was a link between CLAIMANT's omissions to inform RESPONDENT and RESPONDENT's slight negligence to check the authenticity of email (*cf. paras. 171 et seqq.*). Thus, the factors that led to RESPONDENT's non-performance are interdependent and not clearly distinguishable.

179 Therefore, since the Parties' contributions are closely connected, mixed causation cannot be invoked in the present case.

180 In conclusion, RESPONDENT should be exempted from more than half of the payment due under PO 9601. Furthermore, CLAIMANT cannot invoke mixed causation to deny a partial exemption.

181 **Conclusion Issue C:** CLAIMANT is not entitled to the payment under PO 9601 since RESPONDENT fulfilled its payment obligation according to Art. 54 CISG. This is because RESPONDENT reasonably assumed that the email originated from Ms. Audi and thus fulfilled its payment obligation by paying to the account indicated in the email. Art. 40 of the FA did not hinder RESPONDENT's reasonable assumption. Alternatively, RESPONDENT would be exempted from its payment obligation pursuant to Art. 80 CISG since CLAIMANT's omissions to inform were relevant and causal to RESPONDENT's non-performance. In the alternative to RESPONDENT's full exemption, RESPONDENT should be partially exempted from its obligation to pay pursuant to Art. 80 CISG since CLAIMANT preponderantly caused RESPONDENT's non-performance.

Requests

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

a. To reject CLAIMANT's request for the authorization of the new claim to the present arbitration;
b. To reject CLAIMANT's request to consolidate the second arbitration regarding PO A-15604 with the present arbitration;
c. To reject CLAIMANT's claim for the payment of USD 38,400,000;
d. To order CLAIMANT to bear the costs of the present arbitration, including RESPONDENT's legal fees and other expenditures incurred.

Respectfully submitted on 18 January 2024 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.