Twenty-First Annual Willem C. Vis (East) International Commercial Arbitration Moot

ALBERT LUDWIG
UNIVERSITY OF FREIBURG

Memorandum for
RESPONDENT

On Behalf Of

Visionic Ltd
Optronic Avenida 3
Oceanside, Equatoriana

– RESPONDENT –

Against

SensorX, plc
Atwood Lane 1784
Capital City, Mediterrano

– CLAIMANT –

JACK DONNELLY • ALLEGRA EGGELS • FRANZISKA GRAF • FLORIAN GRÜNEWALD
BENJAMIN KRABBES • MONA SEYL • JENS WEBER • BENJAMIN ZEECK

Freiburg, Germany

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STATEMENTS OF FACTS

The parties to this arbitration are SensorX plc [hereinafter: CLAIMANT] and Visionic Ltd [hereinafter: RESPONDENT].

CLAIMANT, based in Mediterraneo, is one of the leading Tier 2 producers of sensors used in various applications in the automotive industry.

RESPONDENT, based in Equatoriana, is a Tier 1 producer of optical systems used by many of the leading car manufacturers for autonomous parking systems.

7 Jun 2019 CLAIMANT and RESPONDENT [hereinafter: the Parties] enter into a Framework Agreement to outline the future supply of RESPONDENT with CLAIMANT's sensors.

4 Jan 2022 RESPONDENT uses the Additional Order Facility under the Framework Agreement to order L-1 Sensors under Purchase Order No. A-15604 [*Exhibit C7, p. 48*].

5 Jan 2022 An employee of CLAIMANT, Ms. Telsa Audi, clicks on a "discount link" in an unsolicited email, allowing trojan horse malware to infiltrate and infect CLAIMANT's system [*Exhibit C6, p. 17, paras. 5, 6; PO2, p. 61, para. 5*].

17 Jan 2022 RESPONDENT uses the order function within the Framework Agreement to order 1,200,000 units of S4-25899 Radar Sensors at the price of USD 38,400,000 payable in two equal instalments under Purchase Order No. 9601 [*Exhibit C2, p. 13, paras. 2, 4, 5*].

23 Jan 2022 CLAIMANT discovers the cyberattack from 5 January 2022, characterises it as "minor" and chooses not to inform any of its customers, including RESPONDENT, or the authorities [*Exhibit C6, p. 17, paras. 5, 6*].

28 Mar 2022 RESPONDENT receives an email containing private information which only CLAIMANT should have known, which purports to be Ms. Audi. 'She' notifies RESPONDENT of a change in the bank details for the payment of Purchase Order No. 9601 [*Exhibit C5, p. 16*].

4 Apr 2022	RESPONDENT informs CLAIMANT that the L-1 Sensors delivered under Purchase Order No. A-15604 are defective and that it withholds payment for the second instalment until the issue is resolved [*Exhibit R5, p. 56*].
3 May 2022	RESPONDENT makes the first payment due under Purchase Order No. 9601 to the bank account specified in the email [*PO2, p. 63, para. 14; Exhibit R4, p. 36, para. 4*].
15 May – 30 Jun 2022	CLAIMANT's customer relation management subsystem is encrypted. As such, CLAIMANT's, entire accounting, payment, and ordering system had to be handled manually [*Exhibit C6, pp. 17, 18, para. 10*].
30 Jun 2022	RESPONDENT makes the second payment [*PO2, p. 63, para. 14*].
5 Sep – 8 Sep 2022	CLAIMANT complains to RESPONDENT that no payment has been received under Purchase Order No. 9601. RESPONDENT replies that the email from 28 March 2022 must be attributed to Ms. Audi [*Exhibit C3, p. 14; Exhibit C4, p. 15*].
9 Jun 2023	CLAIMANT submits the Request for Arbitration [*Letter by Langweiler, p. 4*].
30 Aug 2023	The Terms of Reference are drawn up and signed by both Parties and the Arbitral Tribunal [*PO1, p. 58, para. 1*]
8 Sep 2023	CLAIMANT notices that the second instalment of Purchase Order No. A-15604 is missing, despite RESPONDENT having already informed it of the defect on 4 April 2022 [*Exhibit C8, p.49, para. 7; corrected in PO2, p. 66, para. 43 e*].
11 Sep 2023	CLAIMANT requests the addition of a new claim regarding the missing second payment of Purchase Order No. A-15604 into the current proceedings [*RfANC, p. 46*].

INTRODUCTION

"I must look. There is something beautiful. I will lift the lid and look!"

– *Pandora's Box,* Samuel Phelps Leland

As legend has it, when Pandora opened the box, all of life's miseries were released into the world. Nothing remained but Hope, which Pandora trapped inside when she hurriedly closed the lid. The Ancient Greek myth serves as a cautionary tale; one with contemporary relevance in this dispute.

Much like Pandora, CLAIMANT's employee, Ms. Audi, unleashed chaos upon the Parties. Her act of clicking on a 'discount' link within an unsolicited email allowed cyberattackers to infiltrate CLAIMANT's systems and gain access to sensitive data. At this point, all hope was not yet lost: CLAIMANT could have mitigated the damage by informing RESPONDENT of the cyberattack. Despite this, CLAIMANT tried to cover up its mistake and actively decided against informing RESPONDENT – thereby jamming the lid back on and trapping any hope of an amicable solution inside. As a result, RESPONDENT had no reason to question an email seemingly coming from CLAIMANT, containing confidential information, and specifying a change in CLAIMANT's bank account. As such, RESPONDENT naturally paid to this bank account.

Despite the fact that CLAIMANT opened the box, it now tries to shift the blame, demanding that RESPONDENT pays again. However, RESPONDENT's payment to the indicated bank account constitutes performance. Failing this, RESPONDENT is exempted from payment in accordance with Art. 80 CISG or, in the alternative, partially exempted in accordance with the underlying principles of Art. 7, 77, 80 CISG. Finally, RESPONDENT can claim damages and invoke a set-off **[Issue 3]**.

As if CLAIMANT had not caused enough chaos, it now seeks to further complicate the proceedings by introducing another claim from one and a half years ago, that it allegedly only found out about. The Arbitral Tribunal cannot and should not authorise CLAIMANT's request for addition of this new claim, as it arises under a different, incompatible arbitration agreement and doing so would disrupt and unduly delay the current proceedings **[Issue 1]**.

Failing this, CLAIMANT seeks to bypass the requirements for an addition by initiating a separate arbitration only to request its consolidation with the pending proceeding. However, the applicable arbitration agreement does not empower the Arbitral Tribunal to consolidate. According to Art. 10 ICC Rules, consolidation can only be decided by the ICC Court. This provision is mandatory under the ICC Rules and cannot be deviated from by the Parties. In any case, the requirements for consolidation are not met [**Issue 2**]. By refusing CLAIMANT's requests, the Arbitral Tribunal has the power to open the box and release Hope once and for all.

FIRST ISSUE: THE ADDITION OF THE NEW CLAIM TO THE PENDING ARBITRATION CANNOT AND SHOULD NOT BE AUTHORISED

1 CLAIMANT initiated the pending arbitration against RESPONDENT on 9 June 2023 [*Letter of Langweiler, p. 4*]. The claim arose out of Purchase Order No. 9601 and alleges non-performance of the purchase price obligation [hereafter: Original Claim] [*RfA, p. 7, para.* 25]. It was filed under the arbitration agreement in Purchase Order No. 9601 [*ICC Case Information File, p. 45; PO2, p. 65, para. 35*]. In the meeting on 30 September 2023, the Parties and the Arbitral Tribunal agreed on the Terms of Reference [*PO1, p. 58, para. 1*]. By signing the Terms of Reference, the framework of the pending arbitration, including the issues to be determined, was set [*ARfANC, p. 55, para. 4*].

2 Only nine days after signing the Terms of Reference, CLAIMANT started its attempt to impede the proceedings by insisting on the addition of another claim from back in 2022 [hereinafter: New Claim]. The New Claim originates from Purchase Order No. A-15604 [*RfANC, p. 46, para. 1*] and alleges a missing payment which CLAIMANT only noticed on 8 September 2023 [*RfANC, p. 47, para. 4*]. It is remarkable that after having apparently forgotten Purchase Order No. A-15604 for over one and a half years [*Exhibit C8, p. 49, para. 7*], CLAIMANT is able to bring this claim forward on 11 September 2023, with only three days of preparation [*RfANC, p. 46*]. However, CLAIMANT's attempt to unreasonably delay the proceedings with the addition of a new claim must not succeed.

3 The Arbitral Tribunal cannot and should not add the New Claim to the pending arbitration. First, the Arbitral Tribunal lacks jurisdiction under Art. 9 ICC Rules and Art. 6(3)-(7) ICC Rules to determine the New Claim alongside the Original Claim in the pending arbitration **[A]**. Second, even if the Arbitral Tribunal had jurisdiction, it should not authorise the request to add the New Claim to the pending arbitration pursuant to Art. 23(4) ICC Rules **[B]**.

A. The Arbitral Tribunal Lacks Jurisdiction to Hear the New Claim

4 The Arbitral Tribunal lacks jurisdiction to determine the New Claim together with the Original Claim in the pending arbitration. It is undisputed between the Parties that the ICC Rules apply to the proceedings [*Exhibit C1, p. 11, Exhibit C2, p. 13, para. 7, Exhibit C7, p. 48, para. 7*]. Pursuant to Art. 9 ICC Rules, multiple claims stemming from distinct contracts can only be jointly determined in one arbitration if they fulfil the requirements under Art. 6(3)-(7) ICC Rules and Art. 23(4) ICC Rules. According to Art. 6(3) ICC Rules, the arbitral tribunal itself shall decide on its jurisdiction. In case of more than one arbitration agreement, the arbitral tribunal has to apply the criteria set out in Art. 6(4)(ii) ICC Rules [*ICC Case No. 22423; Webster/Bühler, para. 9-15; Boller/Ohlrogge, p. 95; Whitesell/Silva Romero, p. 15*]. CLAIMANT argues that the Arbitral Tribunal is

authorised to hear the claims jointly as both claims are governed by a single arbitration agreement, the one laid out in Art. 41 FA [*Claimant, paras. 5-7*]. However, contrary to CLAIMANT's argument, the claims are based on separate arbitration agreements **[I].** Further, the two arbitration agreements on which the claims are based fail to meet the requirements set out in Art. 6(4)(ii) ICC Rules **[II]**.

I. The New Claim Is Based on a Different Arbitration Agreement Than the Original Claim

5 The Original and the New Claim are based on two separate contracts with independent arbitration agreements. Contrary to CLAIMANT's assertion [*Claimant, paras. 4, 5*], the pending arbitration is based on the arbitration agreement in Purchase Order No. 9601 **[1]**, and the New Claim is based on the arbitration agreement in Purchase Order No. A-15604 **[2]**.

1. The Arbitration Is Based on the Arbitration Agreement in Purchase Order No. 9601

6 The pending arbitration is based on the arbitration agreement in Purchase Order No. 9601. CLAIMANT filed the arbitration under this arbitration agreement. It was also reproduced in the ICC Case Information File and finally approved by the Parties when they signed the Terms of Reference [*ICC Case Information, p. 45; PO1, p. 58, para. 1*]. CLAIMANT argues that it can retroactively base the Original Claim on the arbitration agreement in Art. 41 FA [*RfANC, p. 47, para. 6*]. However, first, the arbitration agreement in Purchase Order No. 9601 replaces Art. 41 FA **[a]**. Second, CLAIMANT is precluded from changing the legal basis of the pending arbitration **[b]**.

a. The Arbitration Agreement in Purchase Order No. 9601 Replaces Art. 41 FA

7 The arbitration agreement in Purchase Order No. 9601 replaces the one in Art. 41 FA. CLAIMANT argues that all purchase orders concluded under the Framework Agreement are governed by the arbitration agreement in Art. 41 FA [*Claimant, para. 5; RfANC, p. 47, para. 6*]. However, if a new contract contains an arbitration agreement of its own, the parties are deemed to have intended that the new agreement replaces the former [*ICC Case No. 23077, para. 153; High Court of Justice (England), 22 January 2015, para. 42; Berger/Kellerhals, paras. 515, 516*]. The arbitration agreement in Purchase Order No. 9601 was concluded after the Framework Agreement and therefore replaces Art. 41 FA.

8 Further, the arbitration agreement in Art. 41 FA cannot be extended to Purchase Order No. 9601. It is recognised that the scope of an arbitration agreement in a contract does not extend to additional or accessory contracts if they contain specific, differing dispute resolution clauses [*Bundesgericht (Switzerland), 20 September 2011, para. 3.2.2; ICC Case No. 23077, para. 152; Girsberger/Voser, para. 589*]. The arbitration agreement in Purchase Order No. 9601 contains its own specific content and does not merely restate Art. 41 FA. Unlike Art. 41 FA, it provides for direct dispute resolution through arbitration without prior mediation, the application of the CISG,

and does not include a specific consolidation clause [*Exhibit C2, p. 13, para. 7*]. Therefore, the arbitration agreement in Art. 41 FA cannot be extended to Purchase Order No. 9601.

9 This result is confirmed by the Parties' order history. the Parties concluded several purchase orders without separate dispute resolution clauses, but also some purchase orders with specific arbitration agreements under the Framework Agreement [*PO2, pp. 62, 63, para. 11*]. It is to be concluded that the arbitration agreement in Art. 41 FA was intended to apply to orders where no other dispute resolution mechanism was specified. In the same sense, it must be assumed that for orders that specifically contained individual arbitration clauses, the Parties wanted those to apply instead of Art. 41 FA. Therefore, it is confirmed by the Parties' order history that the arbitration agreement in Purchase Order No. 9601 replaces the one in Art. 41 FA.

10 This is not changed by the form requirement in Art. 40 FA. CLAIMANT might argue that the arbitration agreement in Purchase Order No. 9601 could not replace Art. 41 FA because it does not meet the form requirement in Art. 40 FA. Art. 40 FA states that any amendment to the Framework Agreement has to be in writing and signed by the Parties. This line of argument however cannot be followed. It was not the Parties' intent to prevent the conclusion of individual arbitration agreements with Art. 40 FA, as it was common practice between the Parties that some purchase orders contained specific arbitration clauses. Several of them were individually negotiated at management level but none of them were ever signed by CLAIMANT [*PO2, p. 62, para. 11*]. At the very least, according to Art. 29(2)(2) CISG, this practice would therefore prevent CLAIMANT from invoking the form requirement.

11 In any case, the form requirement of Art. 40 FA was met when the Parties signed the Terms of Reference. Parties can agree on a valid arbitration agreement during the proceedings by signing the Terms of Reference [*BGH (Germany), 2 December 1982; Torggler et al. - Wegen/Eckert, p. 70, para. 550*]. In the Terms of Reference, signed by both Parties, the arbitration agreement of Purchase Order No. 9601 was reproduced [*PO2, p. 65, para. 35; PO1, p. 58, para. 1*]. By this time at the latest, the Parties validly agreed on the arbitration agreement in Purchase Order No. 9601, which would therefore, in any case, meet the form requirement to replace Art. 41 FA.

b. CLAIMANT Is Precluded From Changing the Legal Basis of the Arbitration

12 CLAIMANT is precluded from changing the legal basis of the pending arbitration. Contrary to CLAIMANT's argument [*RfANC, p. 47, para. 6*], the legal basis of the arbitration cannot be changed during the proceedings, as the very basis of the arbitral tribunals' jurisdiction is founded upon the applicable arbitration agreement [*Greenberg/Kee/Weeramantry, pp. 202-244*]. The arbitration agreement in Purchase Order No. 9601 is named and retained as the basis of the Tribunals'

jurisdiction in several documents. CLAIMANT filed the pending arbitration under the arbitration agreement in Purchase Order No. 9601 [*RfA, p. 7, para. 22*]. In its Case Information File, the ICC Secretariat determined this arbitration agreement to be the valid and binding arbitration agreement under which this arbitration is held [*ICC Case Information, p.* 45]. Moreover, the Arbitral Tribunal already applied said arbitration agreement to decide on its own jurisdiction for determining the Original Claim. CLAIMANT did not object to that arbitration agreement nor try to change it on any of these occasions. It only does so now as it wants to include its New Claim.

13 By doing this, CLAIMANT forgets that, at the latest, it is bound by the Terms of Reference. By signing the Terms of Reference, parties agree to be bound by the stipulated arbitration agreement [*ICC Case No. 24464, para. 18; ICC Case No. ICC-FA-2020-227, para. 83*]. The Parties have signed the Terms of Reference under the arbitration agreement in Purchase Order No. 9601, and in doing so, tasked the Arbitral Tribunal with resolving the issues contained therein under this agreement. This mutual agreement cannot be unilaterally revoked by CLAIMANT now deciding that it wants to arbitrate under different conditions. Thus, CLAIMANT is precluded from changing the legal basis of the pending arbitration, which is based on the arbitration agreement in Purchase Order No. 9601.

2. The New Claim Can Only Be Based on the Arbitration Agreement in Purchase Order No. A-15604

14 Like the Original Claim, the New Claim can only be based on the arbitration agreement contained in the underlying Purchase Order No. A-15604. The arbitration agreement in Purchase Order No. A-15604 also replaces Art. 41 FA. CLAIMANT argues that the jurisdiction of the Arbitral Tribunal to determine the New Claim arises out of Art. 41 FA as Purchase Order No. A-15604 has been concluded under it [*Claimant, pp. 4, 5*]. However, this is not the case.

15 First, the arbitration agreement in Purchase Order No. A-15604 is a new dispute resolution clause concerning all disputes arising out of that Purchase Order. Thus, it must be considered that it replaces the former arbitration agreement in Art. 41 FA [*cf. Supra para. 8*].

16 Second, the arbitration agreement in Art. 41 FA cannot be extended to Purchase Order No. A-15604 as it differs from it. In contrast to Art. 41 FA, the arbitration agreement in Purchase Order No. A-15604, among other things, explicitly excludes the rules on emergency arbitration [*Exhibit C7, p. 48, para. 7*]. Purchase Order No. A-15604 was negotiated by the Parties and the exclusion was specifically added at CLAIMANT's request [*Exhibit C8, p. 49, para. 5; PO2, p. 65, para. 33*]. Thus, it cannot be presumed that Art. 41 FA has implicitly been extended to

Purchase Order No. A-15604 [*cf. Supra, para. 8*]. Hence, the New Claim can only be based on the arbitration agreement in Purchase Order No. A-15604 as it replaces Art. 41 FA.

II. The Two Arbitration Agreements on Which the Claims Are Based Fail to Meet the Requirements of Art. 6(4)(ii) ICC Rules

17 The two arbitration agreements in the purchase orders underlying the claims fail to meet the requirements of Art. 6(4)(ii) ICC Rules. According to Art. 6(4)(ii) ICC Rules, the tribunal has jurisdiction to hear several claims under different arbitration agreements in one single arbitration if the arbitration agreements are both (a), compatible and (b), the hearing of both claims in one arbitration is covered by the parties' consent. Although Art. 6(4)(ii) ICC Rules only applies directly to the *prima facie* decision made by the ICC Court, the same requirements apply to the arbitral tribunal in its decision on its jurisdiction [*ICC Case No. 22423; Webster/Bühler, para. 9-15; Boller/Ohlrogge, p. 95; Whitesell/Silva Romero, p. 15*]. Both requirements are not met because first, the arbitration agreements in question are incompatible **[1]**, and second, there is no party consent towards a joint hearing of both claims **[2]**.

1. The Arbitration Agreements in Question Are Incompatible

18 The arbitration agreements in Purchase Order No. 9601 and No. A-15604 are incompatible with each other. CLAIMANT asserts that the arbitration agreement in the purchase orders are compatible as both purchase orders are governed by the Framework Agreement and were concluded between the Parties [*Claimant, paras. 68-70*]. However, as shown above, the Parties added the arbitration clauses to the purchase orders specifically to replace Art. 41 FA [*Supra, paras. 7,14*]. CLAIMANT furthermore argues that the *"slight changes"* in Purchase Order No. A-15604 from Art. 41 FA are not sufficient to make them incompatible [*Claimant, para. 6*]. However, CLAIMANT thereby overlooks that these differences are significant for their compatibility. Arbitration agreements are considered incompatible if they differ in their fundamental aspects like the place of arbitration, the number of arbitrators, the procedure for their appointment or whether the procedure is institutional or ad hoc [*Craig/Jaeger, pp. 15, 27; Fry/Greenberg/Mazza, para. 3-243*].

19 First, the arbitration agreements do not provide for an equal number of arbitrators. Whilst the arbitration agreement in Purchase Order No. 9601 prescribes three arbitrators [*Exhibit C2, p. 13, para. 7*], the one in Purchase Order No. A-15604 provides for one or more arbitrators [*Exhibit C7, p. 48, para. 7*]. This difference leads to incompatible results in the present case. According to Art. 12(2) ICC Rules, the ICC Court will appoint one sole arbitrator where parties do not specify a specific number of arbitrators. The ICC Court will appoint three arbitrators only as an exception if *"the dispute is such as to warrant the appointment of three arbitrators"*. In the present case, no such

exceptional circumstances are given. The Court's decision is centred upon the amount in dispute [*Webster/Bühler, para. 12-16*]. For amounts in dispute up to USD 10,000,000, the Court almost never appoints three arbitrators, and even for disputes up to USD 100,000,000, the Court only appoints three arbitrators in about 50% of the cases [*Fry/Greenberg/Mazza, para. 3-440*]. Considering the relatively low dispute value of USD 12,000,000 of the New Claim, the Court will most likely only appoint one arbitrator to determine the New Claim. The differing number of arbitrators thus renders the arbitration agreements incompatible.

20 Second, the arbitration agreements differ in the exclusion of emergency arbitration. The choice of emergency arbitration is another fundamental aspect for the compatibility of agreements, since it modifies the procedure for the appointment of arbitrators. An emergency arbitrator is appointed upon party request by an impartial third person to issue interim measures that cannot await the arbitral tribunal's constitution [*Horn, p. 40*]. In ICC arbitration, it leads to the applicability of a whole new set of rules [*ICC Rules Appendix V- Emergency Arbitrator Rules*]. Hence, Purchase Order No. A-15604 and Purchase Order No. 9601 differ in another fundamental aspect that makes the arbitration agreements in question incompatible.

2. There Is No Party Consent to Hear Both Claims Together in the Arbitration

21 There is no party consent to hear both claims together in the pending arbitration as required by Art. 6(4)(ii)(b) ICC Rules. This consent can be express or implied [*Fry/Greenberg/Mazza, para. 3-248*]. Where the express consent of all parties is not evident, objective factors must be examined to determine if parties to different arbitration agreements have agreed to hear the claims in one single arbitration [*Fry/Greenberg/Mazza, paras. 3-248, 3-249*]. However, no factors point to such consent in the present case.

22 Art. 41(5) FA cannot be used to derive a Parties' intent towards resolving disputes in one single arbitration. CLAIMANT argues that the Parties' intent in favour of an addition is shown by the consolidation clause in Art. 41(5) FA, even though the wording only refers to consolidation [*Claimant, paras. 8-9; Exhibit C1, p. 12*]. However, considering the fact that neither of the claims are raised under Art. 41 FA, the Parties' intentions when concluding Art. 41(5) FA are irrelevant. Art. 41(5) FA therefore cannot be used to construe a party agreement in favour of joint arbitration of the two claims.

23 In fact, the conclusion of new arbitration agreements, distinct from the one in the Framework Agreement, actively speaks against any consent towards determining the claims together. In the past, the Parties repeatedly entered into purchase orders under the Framework Agreement without agreeing on separate arbitration agreements [*PO2, pp. 62, 63, para. 11*]. However, Purchase Order

No. 9601 and No. A-15604 each contain separate arbitration agreements which are incompatible not only with each other but also the Framework Agreement [*Supra, paras. 18-20*]. This strongly suggests that the Parties did not want disputes arising from these purchase orders to be determined together. Both arbitration agreements do not display any intent towards an addition of new claims. Thus, there is no party consent to hear both claims together in the pending arbitration.

B. In Any Case, the Criteria for an Addition Under Art. 23(4) ICC Rules Are Not Met

24 Even if the Arbitral Tribunal had jurisdiction to determine the New Claim, it should not authorise its addition to the pending arbitration. As the Terms of Reference have already been signed [*PO1, p. 58, para. 1*] and the New Claim does not fall within their scope [*cf. ARfANC, p. 55, para. 4*], an addition would require the Arbitral Tribunal's authorisation pursuant to Art. 23(4) ICC Rules. According to this provision, the Arbitral Tribunal *"shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances"* when deciding on the addition of a new claim. CLAIMANT argues that the addition of the New Claim to the pending arbitration should be authorised because the different claims share a close connection and were raised at an early stage of the arbitration [*Claimant, paras. 21 et seq.*]. However, first, the Original and the New Claim are not substantially linked to each other **[I]**. Second, an addition of the New Claim at the current stage of the arbitration bears the risk of unduly delaying the proceedings **[II]**. Third, an addition would not lead to noticeable savings in cost and time as required by the Parties' agreement **[III]**.

I. The Original and the New Claim Are Not Substantially Linked to Each Other

25 Both claims are not substantially linked to each other. CLAIMANT argues that the claims are closely connected since they arise from the same commercial relationship governed by the Framework Agreement [*Claimant, para. 23*]. This assertion is not convincing as it disregards the main criteria for evaluating the link between two claims. The link between two claims can be determined by weighing their differences on a factual and legal basis [*ICC Case No. 20179, para. 63; ICC Case No. 20350, para. 70; Verbist/Schäfer/Imhoos, pp. 133-134; Fry/Greenberg/Mazza, para. 3-904*], and thereby ascertaining if the proceedings benefit from joint deliberation [*cf. Pryles/Waincymer, p. 37*].

26 On a factual basis, the issues that the Arbitral Tribunal has to establish are different from each other. For its decision on the merits in the present arbitration, the Arbitral Tribunal will have to establish the causal link between the cyberattack on CLAIMANT and the phishing email. For the New Claim, on the other hand, the Arbitral Tribunal has to determine whether the sensors were defective and whether RESPONDENT notified CLAIMANT [*ARfANC, p. 54, para. 2*]. The Original and the New Claim thus require the taking of evidence on different factual circumstances.

27 On a legal basis, too, the Original Claim and the New Claim concern unrelated questions. Regarding the Original Claim, the Arbitral Tribunal has to evaluate if CLAIMANT was obliged to inform RESPONDENT of the cyberattack and whether RESPONDENT performed by transferring the purchase price to the indicated bank account. The legal questions of the New Claim concern the consequences of CLAIMANT's failure to object to RESPONDENT's notice of defect for one and a half years and whether this notice was required to meet a certain form [*AfRANC, p. 54, para. 2*]. As the factual and legal question thus differ substantially, no benefits will arise from a joint hearing of the two claims. Therefore, the addition of the New Claim should not be authorised.

II. An Addition of the New Claim Bears the Risk of Unduly Delaying the Proceedings

28 An addition of the New Claim, at the current stage of the arbitration, bears the risk of unduly delaying the proceedings. CLAIMANT argues that the New Claim should be added as the pending arbitration is at an early stage and an addition would not considerably affect the timetable of the proceedings [*Claimant, para. 25*]. However, the reason for considering the *"stage of the arbitration"* is to avoid the proceedings becoming inefficient and unfair if a new claim is brought forward too late [*Pryles/Waincymer, p. 37*]. Since in the present case, both claims are not substantially linked to each other and the New Claim brings complex questions of evidence with it [*Infra, para. 32*], an addition of the New Claim would make the proceedings inefficient in spite of the early stage.

29 Furthermore, CLAIMANT's belated raising of the claim speaks against an addition at the current stage. An arbitral tribunal not only has to consider the extent of the disruption caused, but also whether a party would have been able to introduce the new claim earlier, or if the claim was withheld to delay the proceedings or to surprise the other side [*Fry/Greenberg/Mazza, para. 3*-906]. CLAIMANT has not given a convincing explanation for why it was not able to notice the missing payment for over one and a half years, only to raise it nine days after the signing of the Terms of Reference. CLAIMANT excuses its oversight with the hospitalisation of its account manager, Ms. Peugeotroen, from 15 April 2022 onwards [*Exhibit C8, p. 46, para. 6; PO1, p. 65, para. 30*]. However, CLAIMANT had over a year to organise a replacement before the request for arbitration was made on 9 June 2023. Either CLAIMANT withheld the claim for tactical reasons, or CLAIMANT failed to raise the claim earlier through its own negligence. Therefore, given that CLAIMANT had the opportunity to introduce the New Claim earlier, its addition at the current stage would unduly delay the proceedings and unfairly disadvantage RESPONDENT.

III. The Parties' Cost and Time Saving Standard Is Not Fulfilled

30 An addition would not result in noticeable savings in costs and time. CLAIMANT argues that the addition of new claims would be more economic and time efficient [*Claimant, paras. 28-30*]. CLAIMANT forgets that the Parties agreed on a higher standard in their Terms of Reference: *"any new claims […] will only be authorized if they result in noticeable savings in cost and time"* [*RfANC, p. 55, para. 4*]. New procedural agreements between the parties are possible in the Terms of Reference if the parties have signed them [*Nedden/Herzberg/Kopetzki, p. 372, para. 22*]. The Parties have signed the Terms of Reference. Thus, CLAIMANT, too, has agreed on raising the standard under Art. 23(4) ICC Rules. The standard is not fulfilled because an addition of the New Claim to the pending arbitration would not result in noticeable savings in time **[1]** and costs **[2]**.

1. An Addition Would Not Result in Noticeable Savings in Time

31 The addition of the New Claim to the pending arbitration would not result in noticeable savings in time. The addition of new claims might save time where the facts of the new claim are similar and can be established together [*Fry/Greenberg/Mazza, para. 3-904*]. However, in the present case, the differing subject matters of the claims would not allow for such benefit [*Supra, paras. 25-27*]. Realistically, the Arbitral Tribunal as well as the Parties and their counsel would first have to establish and deliberate the Original Claim before being able to focus on the New Claim. Therefore, no noticeable time advantage would be gained compared to running two arbitrations one after the other. Initiating a second arbitration could even be faster overall, since a new arbitral tribunal could directly start with establishing the facts of the New Claim and begin to take evidence.

32 Furthermore, the factual basis of the New Claim is significantly harder to establish than that of the Original Claim. The facts of the case in the pending arbitration are mostly undisputed and the Arbitral Tribunal will primarily have to decide on the legal questions [*Supra, paras. 26,27*]. Contrary to that, establishing the facts underlying the New Claim will be a time and cost-heavy procedure. To establish whether the sensors were defective, the Arbitral Tribunal will have to commission expert opinions and hear witnesses. As CLAIMANT did not raise any objections to the initial notice of defect for one and a half years, RESPONDENT has since resold most of the defective sensors [*ARfANC, p. 54, para. 3*]. It will therefore be difficult to obtain the delivered sensors to test their conformity with the contract. The proceedings regarding the New Claim will therefore require significantly more time.

2. An Addition Would Not Result in Noticeable Savings in Costs

33 An addition of the New Claim to the pending arbitration would also not result in noticeable savings in cost. CLAIMANT only states that an addition of new claims generally reduces costs [*Claimant, para. 28*]. It does not show, in the present case, that costs are actually being saved and disregards that the party standard requires the addition to save costs noticeably. CLAIMANT might argue that the advance on costs calculated by the ICC is lower for a combined dispute value, as opposed to treating the two claims separately [*ICC Cost Calculator*]. However, according to Art. 36(5) ICC Rules, the advance on costs is not final, as the costs of the pending arbitration will be adjusted according to the amount of work the arbitral tribunal exerts on the new claim. The fact that the New Claim is complex and therefore time intensive is likely to lead to increasing costs in the case of an addition of the New Claim. Finally, it cannot be said for certain how much time the New Claim will take to be decided by the Arbitral Tribunal and thus there is the risk of an unpredictable increase in costs in case of an addition.

34 The costs are also significantly increased by three arbitrators adjudicating the New Claim instead of just one. For determining the New Claim in a separate arbitration, only one arbitrator would, in all likelihood, be appointed by the ICC Court [*Supra, para. 19*]. For an amount in dispute of USD 12,000,000, the estimated average fee per arbitrator is USD 116,334 [*ICC Cost Calculator*]. Adding the New Claim to the pending arbitration would thus increase costs instead of saving costs. Hence, an addition of the New Claim would not result in noticeable savings in costs.

CONCLUSION OF THE FIRST ISSUE

35 The Arbitral Tribunal cannot and should not authorise the addition of the New Claim to the pending arbitration. Above all, the Arbitral Tribunal has no jurisdiction to decide on the Original and New Claim in one single arbitration, as the claims are based on separate and distinct arbitration agreements that are incompatible with each other. A joint hearing of both claims is furthermore not in line with the Parties' consent. Even if the Arbitral Tribunal had jurisdiction and could authorise the addition of the New Claim to the pending arbitration, the criteria under Art. 23(4) ICC Rules would not be met. Both claims are concerned with distinct factual and legal questions. An addition would thus bear the risk of unduly delaying the proceedings. Lastly, an addition would not fulfil the agreed upon standard for adding new claims, as it would not result in noticeable savings in costs and time. Hence, even if the Arbitral Tribunal had jurisdiction, it should not authorise the addition of the New Claim.

SECOND ISSUE: THE ARBITRAL TRIBUNAL CANNOT AND SHOULD NOT CONSOLIDATE THE ARBITRAL PROCEEDINGS

36 The Arbitral Tribunal cannot and, in any case, should not consolidate the arbitral proceedings. CLAIMANT states that in case the New Claim cannot be added to the pending arbitration, it would initiate a separate arbitral proceeding for the New Claim and request consolidation with the pending proceeding. CLAIMANT asserts that the Arbitral Tribunal is empowered to and should consolidate the proceedings [*Claimant, paras. 39, 61*]. However, only the ICC Court has the authority to consolidate the proceedings, not the Arbitral Tribunal **[A]**. In any case, the Arbitral Tribunal cannot consolidate the proceedings as the requirements for consolidation are not met **[B]**.

A. The Power to Consolidate Lies With the ICC Court and Not the Arbitral Tribunal

37 The ICC Court, and not the Arbitral Tribunal, has the power to consolidate proceedings. In the arbitration agreement of Purchase Order No. 9601, the Parties agreed to apply the ICC Rules [*Exhibit C2, p. 13, para. 7*]. Art. 10 ICC Rules authorises the ICC Court to consolidate proceedings. Contrary to that, CLAIMANT argues that the arbitral tribunal has the power to consolidate according to Art. 41(5) FA [*Claimant, para. 38*]. Thereby, CLAIMANT disregards that Art. 41(5) FA is not part of the applicable arbitration agreement **[I]**. Even if it was, CLAIMANT ignores that the Parties did not intend to deviate from Art. 10 ICC Rules **[II]**.

I. Art. 41(5) FA Is Not Part of the Applicable Arbitration Agreement

38 The consolidation clause in Art. 41(5) FA is not part of the applicable arbitration agreement, that is the one in Purchase Order No. 9601 [*Supra, para. 6*]. CLAIMANT asserts that, although Art. 41(5) FA and the ICC Rules were both agreed upon by the Parties, Art. 41(5) FA should prevail as it is the more specific party agreement [*Claimant, para. 38*]. However, CLAIMANT disregards the fact that the consolidation clause in the arbitration agreement of Art. 41 FA was not restated in the arbitration agreement on which the pending arbitration is based. This arbitration agreement replaced the general arbitration agreement in Art. 41 FA for disputes arising from this order. Thus, Art. 41(5) FA is not part of the applicable arbitration agreement.

II. In Any Case, the Parties Did Not Intend to Deviate From Art. 10 ICC Rules

39 Even if Art. 41(5) FA was part of the applicable arbitration agreement, the Parties did not intend to deviate from Art. 10 ICC Rules. Contrary to CLAIMANT's assumption [*Claimant, para. 52*], the ICC Court deems Art. 10 ICC Rules to be of such importance that it refuses to administer a case without it **[1]**. CLAIMANT asserts that, given the Parties still maintain a valid arbitration agreement,

they could continue the proceeding in an ad hoc arbitration [*Claimant, para. 57*]. However, the Parties could not change to ad hoc arbitration as it is not covered by the arbitration agreement **[2]**.

1. The ICC Court Refuses to Administer a Case Without Art. 10 ICC Rules

40 The ICC Court refuses to administer a case without Art. 10 ICC Rules. In institutional arbitration, certain rules are considered to be so important that arbitral institutions do not allow deviations from them [*Redfern/Hunter, para. 6.17; Arroyo, p. 205; Smit, p. 846; Schroeter, Arbitration, p. 170*]. When parties deviate from such rules, the arbitration agreement is not invalid, but the parties have to arbitrate without the institution as it refuses to administer those cases. In ICC arbitration, this concerns the rules that deprive the ICC Court of its role of safeguarding the proceedings [*Carlevaris, p. 119; Smit, p. 864*; *Fry/Greenberg/Mazza, para. 3-4*; *Arroyo, p. 205*; *Pryles, pp. 332, 333*].

41 CLAIMANT incorrectly presumes that Art. 10 ICC Rules is not a part of the ICC Court's supervisory function [*Claimant, para. 54*]. The ICC Rules themselves already highlight the importance of Art. 10 ICC Rules. There are only a few provisions in which the ICC Court is always called upon to decide, such as the challenge of arbitrators (Art. 14(3) ICC Rules), the scrutinisation of the award (Art. 34 ICC Rules), or the consolidation of proceedings (Art. 10 ICC Rules).

42 These provisions have in common that they contain mechanisms to ensure the enforceability of the award [*Nedden/Herzberg/Kopetzki, p. 190, para. 1; pp. 278, 280, para. 1; p. 591, para. 1*]. For instance, according to Art. 34 ICC Rules, the ICC Court scrutinises every final award [*Samsung v. Qimonda*; *Carlevaris, p. 119; Smit, p. 864*; *Fry/Greenberg/Mazza, para. 3-4*; *Arroyo, p. 205*; *Pryles, pp. 332, 333; Flecke-Giammarco, pp. 56, 57*]. This control mechanism, under which the ICC Court only approves 7 % of the awards in the submitted form, serves to ensure the enforceability of the award [*Fry/Greenberg/Mazza, paras. 3-1181, 3-1205*]. In deciding on the consolidation of proceedings according to Art. 10 ICC Rules, the ICC Court also seeks to ensure the enforceability of the award. The Versailles Court of Appeal refused to enforce an award according to Art. V(1)(d) NYC, because the proceedings were consolidated contrary to the party agreement [*CA Versailles (France), 7 March 1990*]. Therefore, consolidation decisions must be approached with utmost caution, a task with which the ICC Rules entrust the ICC Court. Thus, through Art. 10 ICC Rules and Art. 34 ICC Rules, the ICC Court seeks to ensure the enforceability of the award. Art. 10 ICC Rules must therefore be considered a mandatory provision for the ICC Court to administer the case.

43 CLAIMANT alleges that these arguments do not matter because the ICC Court already accepted the request for arbitration and it therefore impliedly accepted the deviation from Art. 10 ICC Rules [*Claimant, para. 55*]. In this respect, CLAIMANT cites the ICC acknowledgement

of the request for arbitration [*Claimant, para. 55*]. However, CLAIMANT fails to recognise the purpose of the request for arbitration. Requests for arbitration only serve to enable the ICC Court to verify whether there is a valid arbitration agreement and inform the respondent about the dispute [*ICC Case No. 15612, para. 102; Fry/Greenberg/Mazza, para. 3-80*; *cf. Webster/Bühler, paras. 4-66, 4-67*]. As the ICC Case Information File shows, the Framework Agreement is listed only under "other agreements", not in the part concerning the applicable arbitration agreement [*ICC Case Information File, p. 45*]. Therefore, when the ICC Court received the request for arbitration, Art. 41(5) FA was irrelevant for determining whether there was a valid arbitration agreement. Moreover, there was no proceeding with which the Original Claim could have been consolidated and thus, the ICC Court had no reason to examine Art. 41(5) FA. Hence, the ICC Court did not impliedly accept a deviation from Art. 10 ICC Rules. If the Arbitral Tribunal still consolidated according to Art. 41(5) FA, the ICC Court would refuse to administer the case.

2. The Arbitration Agreement Prohibits Continuation Through Ad Hoc Arbitration

44 The arbitration agreement does not allow to continue the proceeding through ad hoc arbitration. CLAIMANT asserts that in case the Parties could not apply Art. 41(5) FA under ICC arbitration, they could continue the arbitration without the ICC Court by way of ad hoc arbitration [*Claimant, para. 57*]. CLAIMANT incorrectly presumes that the mere existence of an arbitration agreement allows the Parties to arbitrate ad hoc [*Claimant, para. 59*]. However, the source CLAIMANT bases its assumption on provides the opposite, namely that ad hoc arbitration must explicitly be agreed in the arbitration agreement [*Kühner, p. 238; Nicholls/Bloch, p. 405*]. This is because the procedure would no longer be in accordance with the arbitration agreement and the enforceability of the award would be "*seriously at risk*" [*Nicholls/Bloch, p. 405*]. In their arbitration agreement, the Parties did not agree on ad hoc arbitration [*Exhibit C2, p. 13, para. 7*]. Therefore, it prohibits continuation without the ICC Court.

45 Furthermore, an arbitration without the ICC Court, the Parties would have to administer the case themselves. This is rarely in the interest of parties to an arbitration [*Redfern/Hunter, para. 1.163*]. The ICC as the largest arbitral institution has created bodies like the ICC Court and ICC Secretariat to fulfil administrative tasks required in the ICC Rules. In an arbitration without these bodies, it is impossible to administer a case according to the ICC Rules [*Fry/Greenberg/Mazza, para. 3-4*]. This bears the risk of the award being unenforceable under Art. V(1)(d) NYC. Thus, ad hoc arbitration was not intended in the arbitration agreement.

46 This is not changed by the wording of Art. 41(5) FA. In comparison to the Parties' intent to arbitrate with the ICC, the empowerment of the tribunal instead of the ICC Court was of no vital

importance to the Parties. Art. 41(5) FA was introduced in order to ensure that there is a legal basis to consolidate proceedings. This follows from prior experience of RESPONDENT, where it was unable to consolidate similar proceedings under an ad hoc arbitration due to the lack of a legal basis [*PO2, p. 63, para. 19*]. By contrast, there is no indication that the Parties put any consideration into the decision which body was to carry out the consolidation. It is quite likely that they empowered the arbitral tribunal because of the prior experience of RESPONDENT in ad hoc arbitration and simply did not adapt the clause to fit institutional arbitration. It must be assumed that the Parties intent, had they known of the mandatory nature of Art. 10 ICC Rules, would have preferred to stay with the ICC and leave the power to consolidate with the ICC Court rather than to go to ad hoc arbitration.

47 Therefore, the Parties could not continue under ad hoc arbitration. Consequently, the ICC Court and not the Arbitral Tribunal has the power to consolidate proceedings.

B. In Any Case, the Requirements for Consolidation Are Not Met

48 Regardless of whether the ICC Court or the Arbitral Tribunal were to decide on consolidation, the requirements for consolidation are not met in the present case. Consolidation pursuant to Art. 41(5) FA requires the subject matters to be related by common questions of law or fact and bear the risk of resulting in conflicting awards. CLAIMANT asserts that the requirements are met because both claims involve sensors and the payment of a purchase price [*Claimant, para. 73*]. However, this cannot be the appropriate benchmark, since every purchase order between the Parties involves sensors [*Exhibit C1, p. 9*]. The decisive questions the arbitral tribunals have to answer for both claims substantially differ, as already outlined in the First Issue [*Supra, para. 21-23*]. As the following table shows, the two claims deal with entirely different legal and factual questions.

	Original Claim	**New Claim**
Factual questions	Did the cyberattack cause the phishing email? [*ARfA, p. 31, para. 6*]	Were the sensors defective? [ARf*NC, p. 54, para. 2*]
	When did or could CLAIMANT have known about the cyberattack? [*ARfA, p. 31, para. 9*]	Did RESPONDENT send a notice of defect? [ARfA*NC, p. 54, para. 2*]

Legal questions	Was CLAIMANT obliged to inform RESPONDENT about the cyberattack? [*ARfA, p. 31, para. 9-11*]	Which consequences arise from the fact that CLAIMANT did not notice the missing payment? [*ARfNC, p. 54, para. 3*]
	Did RESPONDENT perform by transferring the money? [*ARfA, p. 31, para. 9*]	Did the notice of defect meet the form requirement? [*ARfNC, p. 54, para. 2*]

49 The two proceedings further do not bear the risk of conflicting awards. Awards are conflicting if the same legal or factual questions are answered differently [*ICC Case No. 15612, para. 97; CRCICA Case No. YYY/2013, para. 273; Romanelli/Naing/Moola/Freihat, para. 31*; *von den Berg, para. 173*]. CLAIMANT states that different answers to the same questions would lead to the unenforceability of the award [*Claimant, para. 76*]. However, CLAIMANT refers to an award that was set aside for a different reason. In the cited case the same arbitrator decided on the exact same issue differently in two distinct arbitrations which is contrary to the principle of fairness and thus against public policy in Hong Kong [*Court of First Instance (Hong Kong), 17 June 2021*]. An award is not unenforceable just because the same legal question is answered differently by two tribunals [*Redfern/Hunter, para. 1.113*]. In the present case, two arbitral tribunals would not only decide on different issues, the claims concerning different purchase orders, but do not even have to answer the same factual or legal questions. Therefore, there is no risk for conflicting awards. Hence, the requirements to consolidate according to Art. 41(5) FA are not met.

50 Furthermore, the requirements for consolidation under Art. 10 ICC Rules are also not met. According to Art. 10 ICC Rules consolidation may take place where (a), the parties have agreed, or (b), all of the claims in the arbitration are made under the same arbitration agreement or (c), the arbitrations are between the same parties, the dispute in the arbitrations arises in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible. None of these requirements are met. RESPONDENT does not agree with consolidation, the claims are made under different arbitration agreements [S*upra, para. 5*] and the arbitration agreements are not compatible [*Supra, para. 18*]. Therefore, none of the requirements of Art. 10 ICC Rules are met.

CONCLUSION OF THE SECOND ISSUE

51 In conclusion, Art. 10 ICC Rules empowers only the ICC Court to consolidate proceedings. The Parties did not intend to deviate from this rule, since this would result in the ICC Court refusing to administer the case. A change to ad hoc arbitration, in turn, is not covered by the arbitration agreement. Lastly, the requirements for consolidation under neither Art. 41(5) FA nor Art. 10 ICC Rules are met.

THIRD ISSUE: CLAIMANT IS NOT ENTITLED TO PAYMENT UNDER PURCHASE ORDER NO. 9601

52 In recent years, cyberattacks have plagued the commercial landscape and wreaked havoc on businesses in the automotive industry in Equatoriana and Mediterraneo [*Exhibit R3, p. 35*]. These cyberattacks often lead to the installation of ransomware or the use of sensitive data to impersonate a contractual partner. The issue of impersonation in this regard is novel; it is harder to detect than classic cases of impersonation because it benefits from the lack of human interaction in online communications and weaponises stolen data to create deceptively accurate scenarios. As such, it poses new and distinct legal questions, in particular as to who should bear the risk of a successful cyberattack and when parties should be obliged to inform each other of such breaches.

53 In the present case, both Parties fell victim to a cyberattack during their business relationship, however, there is a noticeable difference in how each party responded. On 27 August 2020, RESPONDENT discovered that it had become the victim of a cyberattack. The very next day, RESPONDENT informed CLAIMANT in line with the principles of good data governance [*Exhibit R1, p. 33*]. Naturally, CLAIMANT was appreciative of this and requested to be "*kept à jour*" [*Exhibit R2, p. 34*]. One year later, CLAIMANT unveiled and publicly praised its new cybersecurity initiative [*Exhibit R3, p. 35; Exhibit R4, p. 36, para. 3*]. This, however, was not enough to prevent one of its employees from clicking on an infected link. As a result, on 5 January 2022, CLAIMANT experienced a cyberattack resulting in RESPONDENT's sensitive data being leaked [*Exhibit C6, p. 17, para. 5*].

54 In light of CLAIMANT's past behaviour, one would expect CLAIMANT to reciprocate and inform RESPONDENT of this cyberattack. Yet, on 23 January 2022, CLAIMANT actively decided against informing RESPONDENT. As such, RESPONDENT had no reason to be in a heightened state of awareness when an employee of RESPONDENT, Mr. Henry Royce, received an email containing several pieces of accurate information impersonating an employee of CLAIMANT, Ms. Telsa Audi. With a voicemail confirming the scenario, and no reason to question the authenticity of the email, Mr. Royce changed CLAIMANT's bank details to match those in the email.

55 Despite the fact that CLAIMANT created the risk which materialised, it now tries to shift the blame and demands that RESPONDENT pays again. However, RESPONDENT has performed by paying to the third-party bank account **[A]**. Even if RESPONDENT did not perform, RESPONDENT would be fully exempted from payment in accordance with Art. 80 CISG **[B]**. In the alternative, RESPONDENT would be at least partially exempted in accordance with the underlying principles of Art. 7, 77, 80 CISG **[C]**. In any case, RESPONDENT can claim damages and invoke a set-off **[D]**.

A. RESPONDENT Has Performed by Paying to the Third-Party Bank Account

56 RESPONDENT's transfer to the third-party bank account constitutes performance. CLAIMANT argues that RESPONDENT is not discharged from its obligation because it did not pay to the bank account set out in Art. 7 FA and the contract was never amended so as to change the bank details [*Claimant, paras. 83, 86*]. RESPONDENT does not dispute that the contract was not amended; however, an amendment is not necessary for the payment to constitute performance.

57 In response to the particular problem of cyberattackers impersonating a contractual partner, it has been held that, under the CISG, a party can perform by paying to a third-party bank account in good faith [hereinafter: performance in good faith]. This was the approach of the Dutch Appellate Court in the case of *Mees van den Brink Haaksbergen B.V. v. SAS (Shanghai) Industrial & Trading Co. Ltd.* [*Gerechtshof Arnhem-Leeuwarden (Netherlands), 3 October 2017*] [hereinafter: *Mees van den Brink*]. In this factually similar case, Mees van den Brink (the buyer) and SAS (the seller) concluded a sales contract via email. During the parties' communication, a cyberattacker infiltrated the seller's servers, spoofed the email of one of its employees and impersonated them, directing the buyer to pay to another account. The Court ruled, on the facts, that a reasonable person in the position of the buyer would have noticed that the email was fraudulent. The reason for the Court's judgment was multifaceted. In particular, it focused on the fact that the email, which contained many factual errors and fictional details, directed the buyer to pay to a bank account held in the name of a private individual and in a country unrelated to the seller's business. Nevertheless, the Court held, in passing, that under the CISG, a party can perform in good faith if it could reasonably rely on its counterparty being the true creditor [*Ibid, para. 5.7*].

58 Following this ruling, RESPONDENT has performed its obligation by paying to the third-party bank account. The Arbitral Tribunal should adopt the Court's solution in *Mees van den Brink* and hold that a party can perform by paying to a third party under the CISG **[I]**, and that RESPONDENT paid in good faith, reasonably relying on the place of payment having been changed **[II]**.

I. A Party Can Perform by Paying to a Third-Party Bank Account Under the CISG

59 Under the CISG, payment to the bank account of a third party made in good faith can constitute performance. CLAIMANT could argue that such a concept does not exist under the CISG, since it does not expressly provide for it. However, according to Art. 7(2) CISG, matters governed by the Convention which are not expressly settled in it – so-called internal gaps – are to be settled in conformity with the general principles of the Convention. RESPONDENT can perform by paying to a third-party bank account because the CISG contains an internal gap regarding the consequences

of impersonation on performance **[1]**, and in accordance with the underlying principles of the CISG, this gap must be filled with the concept of performance in good faith **[2]**.

1. There Is an Internal Gap Concerning Performance in Cases of Impersonation

60 The CISG contains an internal gap concerning the performance of a contract in cases of impersonation. An internal gap, within the meaning of Art. 7(2) CISG, is a matter within the scope of the CISG which is not expressly settled by it [*Basedow, p. 135; Schwenzer/Atamer/Butler – Schwenzer, p. 115, para. 7.3.1; Paal, p. 67; Brunner – Wagner, Art. 7, para. 7*]. CLAIMANT assumes that there is no internal gap; it implies that Arts. 53, 54, and 59 CISG deal with performance comprehensively [*Claimant, para. 84*].

61 RESPONDENT does not dispute that these provisions deal with performance and that performance, in accordance with Art. 4 CISG, is therefore a matter within the scope of the CISG. However, the CISG, as a sales convention, as opposed to a convention on contract law, does not deal with performance exhaustively for all possible constellations. This is evidenced by comparison to the UNIDROIT Principles of International Commercial Contracts [hereinafter: PICC]. For example, matters such as partial performance, Art 6.1.3 PICC, and earlier performance, Art. 6.1.5 PICC, among others, are not explicitly regulated by the CISG. It therefore follows that the CISG does not regulate performance exhaustively [*cf. Gillette/Walt, p. 160*].

62 In particular, the CISG fails to provide any provision which addresses a situation in which a party reasonably believes that its actions will constitute performance. This is especially problematic when it comes to impersonation following a cyberattack. Although impersonation is not a new issue, cyberattacks are unlike classic cases of impersonation. This is because these attacks occur online, absent any face-to-face interaction, and utilise stolen data to steal another person's identity to a degree previously not imaginable, making them much more difficult to identify. This gap cannot be considered intentional, as the CISG was drafted in 1980 and the drafters of the CISG thus could not have considered the issue of cyberattacks. Therefore, as the consequences that impersonation has on performance fall within the scope of the CISG but are not settled by it, the CISG contains an internal gap concerning performance in cases of impersonation.

2. This Gap Is to Be Filled with the Concept of Performance in Good Faith

63 In accordance with the underlying principles of the CISG, the aforementioned internal gap should be filled with the concept of performance in good faith. According to Art. 7(2) CISG, internal gaps are to be settled in conformity with the general principles of the Convention. It is now commonly accepted that the principle of good faith, enumerated in Art. 7(1) CISG, is one of the underlying

principles of the CISG [*CA State of Rio Grande de Sul (Brazil), 30 March 2017; CCICA Case No. 4/2014, 31 January 2014; HG Zürich (Switzerland), 17 September 2014; Ad Hoc Award, 17 December 2019; US District Court for the District of New Jersey (United States), 25 October 2019; Supreme Court (Spain), 6 July 2020; OGH (Austria), 29 June 2017; Honsell – Melis, Art. 7, para. 13; van Alstine, p. 782; Achilles, Art. 7, para. 8; Lando, p. 1002*]. Another relevant general principle, referred to in Art. 8(2) CISG and, among others, Arts. 39, 43, 46, 70 CISG, is reasonableness [*Supreme Court of the State of New York (United States), 14 October 2015; ICC Case No. 18203; MKAC Case No. 54/1999, 24 January 2000; Magnus, p. 482; Enderlein/Maskow/Strohbach – Maskow, Art. 7, para. 9.1*]. The concept of performance in good faith can be derived from the combination of these two principles. It embodies the idea that the debtor's obligation is discharged when the debtor assumed in good faith that the third party was authorised to receive the payment [*Supra, para. 58; Atamer, p. 5*]. In determining whether the debtor was acting in good faith, one should apply the standard of reasonableness [*Supra, para. 58*].

64 CLAIMANT could argue that the concept of performance through good faith is too vague and therefore difficult to adjudicate. However, many CISG Contracting States, both common and civil law jurisdictions, use the principles of good faith and reasonableness to resolve this very particular problem of impersonation. On the common law side of things, US courts have applied the 'imposter rule', found in USC §3-404, analogously, holding that whichever party was in the best position to prevent the forgery, by exercising reasonable care, should suffer the loss [*US District Court Middle Florida Tampa Division (United States), 18 August 2015; US Court for Eastern District of Virginia Richmond Division (United States), 24 August 2016; US District Court Southern District of Ohio Western Division at Dayton (United States), 25 September 2017; State of West Virginia Supreme Court of Appeals (United States), 7 December 2020*]. A similar approach of assigning risk to the party which exposed the other party to the loss is taken in Canada [*Supreme Court of Canada (Canada), 6 December 1982; Ontario Superior Court of Justice (Canada), 5 July 2018; Supreme Court of British Columbia (Canada), 12 September 2019*].

65 In a number of civil law jurisdictions, the concept of performance in good faith is even codified, such as in the Netherlands [Art. 6:34 Dutch Civil Code], Spain [Art. 1164 Spanish Civil Code], France [Art. 1342–3 French Civil Code], and Italy [Art. 1189 Italian Civil Code]. Therefore, given that several Contracting States solve cases of impersonation following a cyberattack through good faith and reasonableness, the approach is common and not too vague to adjudicate. This is especially true given that the leading case of *Mees van den Brink* provides a standard contained within the CISG, Art. 8(2) CISG, by which to determine if a party is acting in good faith [*Supra, para. 58*].

Therefore, in accordance with the underlying principles of good faith and reasonableness, this internal gap should be filled through performance in good faith.

II. RESPONDENT's Payments Constitute Performance In Good Faith

66 RESPONDENT has performed in good faith. In accordance with the ruling of *Mees van den Brink,* a party performs in good faith if it acts in reasonable belief that its payment is made to the true creditor. CLAIMANT asserts that RESPONDENT should have recognised the errors in the email and other 'inconsistencies' [*Claimant, paras. 116 et seq.*]. It further argues that the form requirement in Art. 40 FA was not complied with [*Claimant, para. 91*]. However, RESPONDENT could reasonably rely on the email coming from CLAIMANT **[1]**, and it could reasonably believe that it paid to the correct bank account notwithstanding the form requirement in Art. 40 FA **[2]**.

1. RESPONDENT Could Reasonably Believe That the Email Came from CLAIMANT

67 RESPONDENT acted in reasonable belief that the email came from CLAIMANT. According to the ruling in *Mees van den Brink,* whether it is reasonable for one party to believe that an email is from the other party is to be determined by analogous application of Art. 8 CISG [*Supra, para. 58*]. Pursuant to Art. 8(2) CISG, statements and conduct are to be interpreted according to the hypothetical understanding of a reasonable person in the recipient's position and the same external circumstances [*Bundesgericht (Switzerland), 5 April 2005; Supreme Court (Slovakia), 30 April 2008; US Court of Appeal (11th Circuit) (United States), 12 September 2006; HG Aargau (Switzerland), 5 February 2008; HG St. Gallen (Switzerland), 15 June 2010*]. According to Art. 8(3) CISG, the term "circumstances" in particular includes knowledge of prior dealings, negotiations and practices established between the parties [*LG Mönchengladbach (Germany), 22 May 1992; LG Augsburg (Germany), 12 July 1994*]. It was reasonable for RESPONDENT to believe that the email came from CLAIMANT because the errors were not readily noticeable nor indicative of a phishing attempt **[a]**, and the email contained information known only to the Parties **[b]**.

a. The Errors in the Email Were Not Noticeable nor Indicative of a Phishing Attempt

68 The errors in the email were not readily noticeable nor indicative of a phishing attempt. CLAIMANT argues that RESPONDENT should have recognised a one-character difference in the email address, the purchase order number, and the model number [*Claimant, paras. 116-118*]. It points out that the email address is "*telsa.audi@semsorx.me*" and not "*telsa.audi@sensorx.me*", that "*Purchase Order. No. 15604*" is mistakenly written as "*Purchase Order No. 15605*", and that model number "*S4-25889*" is written as "*S4-25899*" [*Exhibit C5, p. 16*].

69 However, with regard to all three mistakes, a reasonable person cannot be expected to notice such minor, one-character mistakes. Even if it did, the reasonable person would not consider them to be indicative of a phishing attempt. As evidenced by the first line of the Framework Agreement which refers to CLAIMANT, "*Se**n**sorX*", as "*Se**m**sorX*" [*Exhibit C1, p. 9*], typographical errors are not just limited to phishing emails. As evidenced by CLAIMANT's request for arbitration which reads "*250,000*" and "*80,000*" instead of "*2,500,000*" and "*800,000*", "*Article 5*" instead of "*Article 7*", and "*2 December 2021*" instead of "*1 December 2021*" [*PO 2, p. 66, para. 44*], they are also prevalent in agreements and documents which should be reread by many people. To a reasonable person, small errors like these are thus not necessarily indicative of a phishing attempt.

70 Furthermore, a reasonable person in the position of Mr. Royce would not have noticed the email address being incorrect. Mr. Royce, who received the email on his phone [*PO2, p. 61, para. 4*], could only have identified the one-character difference in the email address if he had clicked on the sender's name, so as to display the full email address in the first place. A reasonable person in the position of Mr. Royce, who, in his role in a multi-billion-dollar business undoubtedly receives many emails every day, would not and could not click on every sender's name to verify every email address. As a reasonable person would not notice such errors nor consider them indicative of a phishing attempt, there was no reason for RESPONDENT to question the authenticity of the email.

b. The Email Contained Numerous Pieces of Information Known Only to the Parties

71 The email contained numerous pieces of confidential information which only could have been known by the Parties. CLAIMANT argues that the typographical errors should have been enough to raise RESPONDENT's suspicion [*Claimant, para. 118*]. However, a reasonable person in the position of Mr. Royce would not have questioned the authenticity of the email due to the numerous pieces of confidential information it contained. For example, the email contained accurate information about the timing of delivery – the fact that delivery for the first instalment of sensors was due the following week on 3 April 2022 – and the quantity of goods due in the first instalment of Purchase Order No. 9601 – 600,000 sensors [*Exhibit C5, p. 16; Exhibit C2, p. 13, para. 3*]. It also contained information about the potential military use of LIDAR sensors under Purchase Order No. A-15604 [*Exhibit C5, p. 16*]. Finally, it contained information about the banking partner of CLAIMANT's Danubian subsidiary – the First Bank of Danubia – and directed Mr. Royce to pay to an account held with the same bank due to sanctions in Mediterraneo [*Exhibit C5, p. 16*]. RESPONDENT had paid to this bank before in performance of a different purchase order for L-X sensors in September 2020 [*PO2, p. 63, para. 12*]. Unlike in *Mees van den Brink*, the email did not direct Mr. Royce to pay to a bank account held in the name of a private individual or in a

foreign country in which CLAIMANT had no business [*cf. Supra, para. 58*]. For these reasons, it was reasonable to believe that the email came from CLAIMANT.

72 In accordance with principles of good business practice [*cf. OLG München, 21 December 2016; Supra, para. 58*], Mr. Royce called Ms. Audi to confirm the change of bank account [*Exhibit R4, p. 36, para. 4*]. However, her voicemail stated that she was out of office due to illness [*PO2, p. 61, para. 4*]. This confirmed what was written in the email, namely that Ms. Audi was "*working from home due to health problems*" [*Exhibit C5, p. 16*]. Thus, there was no reason to question the authenticity of the email. The next reply from 'Ms. Audi' contained even more confidential information. It mentioned that the Parties had taken a pragmatic approach to the form requirement and referred to issues RESPONDENT was having with its insurance, which it had mentioned in its last email to Ms. Audi [*Exhibit R4, p. 36, paras. 4, 5*]. As CLAIMANT actively chose not to inform RESPONDENT of the cyberattack against it [*Exhibit C6, p. 17, para. 6*], RESPONDENT had no reason to believe that anyone other than CLAIMANT had access to this information. Therefore, as the email contained numerous pieces of information known only to the Parties, there was no reason for RESPONDENT to question who sent the email.

2. This Belief was Reasonable Notwithstanding the Form Requirement in Art. 40 FA

73 RESPONDENT could reasonably believe that it paid to the correct bank account notwithstanding the form requirement in Art. 40 FA. CLAIMANT implies that RESPONDENT should have known that the place of payment could not be changed because the form requirement in Art. 40 FA was not complied with [*Claimant, para. 91*]. Whilst Art. 40 FA states that all changes of the Framework Agreement need to be in writing and signed by both parties [*Exhibit C1, p. 1*], the Parties' prior conduct did not strictly follow this provision. According to Art. 29(2)(2) CISG, a party may be precluded by its conduct from asserting the form requirement to the extent that the other party has relied on that conduct. Therefore, it was not unreasonable for RESPONDENT to believe that a change of bank details could, in principle, be made via email.

74 In the present case, the Parties have always taken a pragmatic approach to the form requirement. This is evidenced by multiple occasions on which it was not followed. First, the Parties switched from a semi-annual to an annual determination of the price notwithstanding Art. 6 FA [*RFA, p. 6, para. 11; Exhibit C1, p. 10, Art. 6*]. Second, RESPONDENT was, on two occasions, able to place orders exceeding the maximum supply obligation in Art. 4 FA [*Exhibit C6, p. 17, para. 3*]. Both of these changes were made orally at the informal price fixing meetings in 2019 and 2021 [*cf. PO2, p. 62, para. 8*]. Third and most importantly, the Parties agreed on an amendment to Art. 7 FA to change payment terms from 15 days after delivery to 30 days after delivery, as stipulated in

paragraph 6 of Purchase Order No. 9601 [*Exhibit C1, p. 10, Art. 7; Exhibit C2, p. 13, para. 6*]. This change was made by the unilateral signature of Mr. William Toyoda – the CEO of RESPONDENT and nevertheless accepted by CLAIMANT [*Exhibit C3, p. 14*; *Exhibit C2, p. 13*]. This change is particularly significant as it demonstrates that the Parties had previously agreed to changes concerning the details of payments in contravention of the form requirement. These changes demonstrate that it was not unusual for the Parties to disregard the form requirement in Art. 40 FA. Therefore, a reasonable person in the position of RESPONDENT would believe that a change to the place of payment could be made notwithstanding Art. 40 FA.

75 In conclusion, RESPONDENT reasonably relied on the email coming from CLAIMANT and that it could pay to the specified bank account notwithstanding Art. 40 FA. Consequently, RESPONDENT made the payment in good faith, which under the CISG, constitutes performance.

B. Even if RESPONDENT Did Not Perform, RESPONDENT Would Be Exempted From Payment in Accordance With Art. 80 CISG

76 Even if RESPONDENT's payment did not constitute performance, RESPONDENT would be exempted from payment through Art. 80 CISG. According to Art. 80 CISG, a party cannot rely on the failure of the other party to perform if it was caused by its own action or omission. RESPONDENT is exempted from payment through Art. 80 CISG because CLAIMANT actively caused RESPONDENT's non-performance **[I]**. Even if one disregards this active causation, CLAIMANT caused RESPONDENT's non-performance by failing to inform RESPONDENT of the cyberattack **[II]**. Even if one assumes mutual causation, RESPONDENT is fully exempted according to Art. 80 CISG **[III]**.

I. CLAIMANT Actively Caused RESPONDENT's Non-Performance

77 CLAIMANT actively caused RESPONDENT's non-performance. Art. 80 CISG only requires mere factual causation under the 'but-for' rule, which is also known as the *conditio sine qua non* rule [*SCC, 30 April 2020; Supreme Court (Poland), 2 June 2017; Neumann, p. 158; Witz/Salger/Lorenz, Art. 80, para. 2*]. According to the 'but-for' rule, an act is considered causal if without it, the result would not have occurred [*Staudinger – Magnus, Art. 74, para. 28*]. CLAIMANT caused RESPONDENT's non-performance since its employee, Ms. Audi, clicked on an infected link whilst working [*PO2, p. 61, para. 5*]. Had Ms. Audi not clicked on this link, the cyberattacker would not have gained access to sensitive data contained within the email communication between the Parties. Without this information, the cyberattacker would never have been able to convince RESPONDENT to pay to a different bank account. Therefore, CLAIMANT caused RESPONDENT's non-performance.

78 CLAIMANT could have argued that it did not directly cause RESPONDENT to pay to the wrong bank account because the cyberattacker's actions constitute a more proximate cause. However, under Art. 80 CISG, indirect causation can also be sufficient [*Schlechtriem/Schwenzer/Schroeter – Schwenzer, Art. 80, para. 4; Neumann pp. 164, 165; Felemegas – Schäfer, p. 249*]. In cases of indirect causation, the aggrieved party must have created an unforeseeable and not easily surmountable risk for the non-performing party which falls within the aggrieved party's sphere of risk [*OLG Brandenburg (Germany); 5 February 2013; Honsell – Magnus, Art. 80, para. 12*]. It falls squarely within CLAIMANT's sphere of risk that its employee clicked on a link in a spam email enabling cyberattackers to infiltrate its system. This created the risk which materialised, namely that sensitive data contained therein could be used against the Parties. This risk was unforeseeable since just a month before the cyberattack in 2021, CLAIMANT had publicly praised its new cybersecurity concept [*cf. Exhibit R3, p. 35*]. Consequently, RESPONDENT could not foresee that an email containing many details that should only be known to the Parties, was sent by a third party. When RESPONDENT tried to call CLAIMANT, Ms. Audi's voicemail merely confirmed the information contained in the email [*Supra, para. 73*]. Thus, this risk was also not easily surmountable for RESPONDENT. Consequently, CLAIMANT actively caused RESPONDENT's payment to the wrong bank account.

II. Even if One Disregards This Active Causation, CLAIMANT's Failure to Inform RESPONDENT of the Cyberattack Caused the Non-Performance

79 Even if one disregards the aforementioned active causation, CLAIMANT's failure to inform RESPONDENT of the cyberattack caused the payment to the cyberattacker. Contrary to CLAIMANT's argument [*Claimant, para. 106*], an omission is also relevant under Art. 80 CISG even if it does not constitute a breach of contract [*Supreme Court (Poland), 2 June 2017; Supreme Court (Poland), 11 May 2007; BeckOK – Saenger, Art. 80, para. 2; Herber/Czerwenka, Art. 80, para. 3; Audit, p. 179*]. However, even if one were to require a breach of contract, the criteria of Art. 80 CISG would be fulfilled, since CLAIMANT was obliged to inform RESPONDENT of the cyberattack **[1]**. By failing to comply with this duty, CLAIMANT caused RESPONDENT to pay to the wrong bank account **[2]**.

1. CLAIMANT Was Obliged to Inform RESPONDENT of the Cyberattack

80 CLAIMANT was under an obligation to notify RESPONDENT of the cyberattack. First, CLAIMANT was contractually obliged to inform RESPONDENT of the cyberattack **[a]**. Second, even if CLAIMANT was not contractually obliged, it was statutorily obliged to inform RESPONDENT under the CISG **[b]**. Third, even if a general duty to inform did not exist under the CISG, CLAIMANT was obliged to inform RESPONDENT in accordance with Art. 5.1.3 of the Danubian Contract

Law **[c]**. Fourth, CLAIMANT was obliged to inform RESPONDENT due to the Equatorianian Data Protection Act [hereinafter: EDPA] **[d]**.

a. CLAIMANT Was Contractually Obliged to Inform RESPONDENT of the Cyberattack

81 CLAIMANT was under a contractual duty to inform RESPONDENT. CLAIMANT argues that the Parties' handling of the cyberattack in 2020 cannot establish a practice according to Art. 9 CISG which would oblige CLAIMANT to inform RESPONDENT [*Claimant, para. 104*]. RESPONDENT does not contest that a practice cannot be established by one occurrence. However, the Parties had contractually agreed on a duty to inform about cyberattacks. A contractual agreement requires the consent of both parties, which can either be express or implied [*OLG München (Germany), 8 March 1995; BeckOGK – Buchwitz, Art. 14, para. 7*]. Whether such consent was established between the parties has to be determined to the understanding of a reasonable person pursuant to Art. 8(2) CISG.

82 In 2020, RESPONDENT experienced a minor cyberattack. Even though it had established that likely no data relating to CLAIMANT had been affected, RESPONDENT immediately informed CLAIMANT [*Exhibit R1, p. 33*]. CLAIMANT states that RESPONDENT only disclosed this information because it was obliged to do so under the EDPA [*Claimant, para. 104*]. On the contrary, in the email notifying CLAIMANT of the cyberattack, RESPONDENT expressed that it did not consider itself to be legally required to inform CLAIMANT under the EDPA [*Exhibit R1, p. 33*]. It simply briefed CLAIMANT because it considered it to be good business practice [*Exhibit R4, p. 36, para. 2*].

83 In its reply email, CLAIMANT appreciated RESPONDENT's "*open and forward-looking communication*" [*Exhibit R2, p. 34*]. Despite the fact that RESPONDENT had assured CLAIMANT that no data had been obtained, CLAIMANT expressed its concern to RESPONDENT "*given the sensitive data you have about our company*" [*Exhibit R2, p. 34*]. As such, it stated that it "*naturally* […] *require[d] to be kept à jour*" about the investigation [*Exhibit R2, p. 34*]. A reasonable person in RESPONDENT's position would have understood that CLAIMANT considered the Parties obliged to inform the other if one fell victim to a cyberattack regardless of the investigations' result. RESPONDENT agreed with CLAIMANT's understanding of their contractual duties and communicated this to CLAIMANT by enabling it to closely monitor RESPONDENT's investigation [*Exhibit R4, p. 36, para. 2*].

84 Therefore, the Parties impliedly agreed that information about cyberattacks had to be shared between one another, irrespective of the cyberattack's extent. This agreement was validly concluded since Art. 40 FA only requires amendments of the provisions of the Framework Agreement to be in writing. As it contains no general provision regarding informational duties, the agreement between the Parties did not constitute an amendment. As such, the Parties validly agreed

on a contractual obligation to inform each other of cyberattacks. Thus, CLAIMANT was contractually obliged to inform RESPONDENT when it discovered the cyberattack in January 2022.

b. Even in Absence of a Contractual Duty, CLAIMANT Was Statutorily Obliged to Inform RESPONDENT Under the CISG

85 Even if CLAIMANT was not contractually obliged to inform RESPONDENT of the cyberattack, it was under a legal obligation to do so under the CISG. First, a general duty to inform arises from Art. 7 CISG **[aa]**. Second, this general duty had to be complied with by CLAIMANT **[bb]**.

aa. There Is a General Duty to Inform Under the CISG

86 A general duty to inform arises from Art. 7 CISG. CLAIMANT argues that the CISG does not contain a general informational duty since no provision expressly provides for it [*Claimant, para. 112*]. However, if the CISG does not provide a provision, it must be determined whether the lack thereof constitutes an internal gap that can be filled in accordance with the underlying principles of the CISG pursuant to Art. 7(2) CISG.

87 First, the lack of an explicit provision constitutes an internal gap. An internal gap exists if a matter, within the scope of the CISG, is not expressly settled by the Convention [*Kröll/Mistelis/Perales Viscasillas – Perales Viscasillas, Art. 7 para. 57; Schroeter, para 175*]. As there are many specific informational duties codified in the CISG, including but not limited to Art. 32(3), 43(1), 72(2) CISG, informational duties are a matter within the scope of the CISG. However, due to the complex nature of international sales law, the drafters of the CISG could not have foreseen every circumstance in which a duty to inform might reasonably arise [*Benedick, p. 277; Honnold/Fletchner, para. 100; Botzenhardt, pp. 149, 150*]. Therefore, the lack of a general duty to inform constitutes an internal gap.

88 Second, this gap should be filled in accordance with the duty to cooperate. The duty to cooperate is an underlying principle of the CISG [*Schlechtreim/Schwenzer/Schroeter – Ferrari, Art. 7, para. 54; cf. Linne, p. 40; Mather, p. 157; Enderlein/Maskow/Stargardt – Maskow, Art. 7, para. 10.1*]. It obliges the parties to act reasonably, to enable each other to perform their respective obligations under the contract, and to not endanger the contractual objective [*OLG Koblenz (Germany), 24 February 2011; Soergel – Kreße Art. 7, para. 10*]. It is expressly codified in Art. 60a CISG and underlies the aforementioned specific informational duties. However, as mentioned above, the drafters of the CISG could not have foreseen every circumstance under which a duty to inform might reasonably arise [*Supra, para. 88*]. Consequently, even if no specific provision of the CISG applies, a party can be obliged to disclose information to enable its contractual partner to fulfil its obligations under

the contract [*BGH (Germany), 31 October 2001; CA Lyon (France), 9 February 2017; OLG Celle (Germany), 24 July 2009; OLG Köln (Germany), 21 December 2005; LG Neubrandenburg (Germany), 3 August 2005; Kötz, p. 11; JurisPK – Münch, Art. 7, para. 61; Cohn, p. 527; Achilles, FS Schwenzer, p. 16*]. Therefore, there is a general duty to inform under the CISG.

bb. CLAIMANT was Obliged to Inform RESPONDENT Under the CISG

89 CLAIMANT was under an obligation to inform RESPONDENT under the CISG. According to the general duty to inform under the CISG, a party is obliged to inform its partner if the latter is visibly reliant on the information and the party can be reasonably expected to disclose the information [*Honnold/Flechtner, para. 100; Benedick, pp. 284, 286; Staudinger – Magnus, Art. 7, para. 48*]. A party is reliant on information that is relevant for fulfilling its contractual obligations and protecting its assets [*Benedick, pp. 286, 287; cf. Schlechtriem/Schwenzer/Schroeter – Ferrari, Art. 7, para. 54*]. CLAIMANT could argue that RESPONDENT was not visibly reliant on the information since its internal investigation found that no sensitive data was obtained [*cf. PO2, p. 64, para. 25*]. However, CLAIMANT itself had highlighted the potential implications of cyberattacks and considered itself reliant on the information of any cyberattack regardless of the extent [*Exhibit R2, p. 34*]. As such, CLAIMANT had to recognise that RESPONDENT was similarly reliant on the information and CLAIMANT was reasonably expected to inform RESPONDENT when the cyberattack was discovered in January 2022.

90 This applies all the more for the second payment. On the 15 May 2022, CLAIMANT's subsystem for customer relation management was encrypted and CLAIMANT became fully aware of the true extent of the cyberattack [*Exhibit C6, pp. 17, 18, para. 10*]. CLAIMANT implies that RESPONDENT should have known about the cyberattack due to an article in "*Automotive Weekly*" [*Claimant, para. 120*]. However, the article only reported that "*some data may*" have been leaked during a cyberattack on CLAIMANT and it also did not mention that the original attack occurred in January [*Exhibit R3, p. 35*].

91 In fact, CLAIMANT itself considered its business partners to rely on the information and internally ordered all account managers to notify their counterparts of the cyberattack [*PO2, p. 64, para. 26*]. However, it failed to inform RESPONDENT due to internal issues caused by Ms. Audi's sick leave and a general shortage of staff [*PO2, p. 64, para. 26*]. This falls squarely within CLAIMANT's sphere of risk and it was obliged to inform RESPONDENT, at the latest, before the second payment. Therefore, CLAIMANT was obliged to inform RESPONDENT of the cyberattack under the CISG.

c. Even if a General Duty to Inform Did Not Exist Under the CISG, CLAIMANT Was Obliged to Inform RESPONDENT According to Art. 5.1.3 DCL

92 Even if no general duty to inform exists under the CISG, CLAIMANT was obliged to inform RESPONDENT according to Art. 5.1.3 Danubian Contract Law [hereinafter: DCL]. The Parties agree that if a general duty to inform cannot be read into the CISG the domestic law applicable under international private law would govern this matter [*cf. Claimant, para. 113*]. The applicable domestic law is the DCL. Contrary to CLAIMANT's argument, the DCL also provides for a general duty to inform [*cf. Claimant, para. 113*]. According to Art. 5.1.3 DCL each party shall cooperate with the other party when such cooperation may reasonably be expected for the performance of that party's obligations. Similar to the legal framework under the CISG, this duty to cooperate obliges parties to inform each other about circumstances that are known to be material but not accessible to the other party [*cf. ACCRCS, 1 June 2003; Vogenauer, Art. 5.1.3, para. 9*]. As shown above, the Parties had established that any information about cyberattacks was considered material [*Supra, para. 83*]. Therefore, CLAIMANT was also obliged by Art. 5.1.3 DCL to inform RESPONDENT.

d. In Any Case, CLAIMANT Was Obliged to Inform RESPONDENT Under the EDPA

93 Even if CLAIMANT was not obliged to inform RESPONDENT under the CISG or the DCL, it was obliged to do so in accordance with the Equatorianian Data Protection Act. RESPONDENT is based in Equatoriana [*Exhibit C1, p. 9, Art. 1*], and the EDPA is a verbatim adoption of the European Union's General Data Protection Regulation (GDPR) [*PO1, p. 59, para.* 5] CLAIMANT argues, that the EDPA does not apply [*Claimant, paras. 94 et seq.*]. Contrary to what CLAIMANT argued, it was obliged to inform RESPONDENT under the EDPA because the EDPA is applicable to the Parties **[aa]** and a duty to inform arose under Art. 34 EDPA **[bb]**.

aa. The EDPA Applies to the Parties

94 The EDPA applies to the Parties. CLAIMANT argues that the EDPA does not apply to the Parties' relationship as it is not covered by the scope of application [*Claimant, paras. 94 et seq.*]. According to Art. 3(2) EDPA, the EDPA applies to companies outside of Equatoriana if they process data to offer goods or services to data subjects in Equatoriana. According to Art. 4(1) EDPA, data subjects are natural persons. RESPONDENT as a legal entity in Equatoriana is therefore not a data subject itself. However, the EDPA generally opens its scope of application when information concerning the legal entity also pertains to the natural person behind it [*on the GDPR: LG Hamburg (Germany), 11 February 2020*]. The employees of RESPONDENT have to share a considerable amount of their personal data to enable the communication between the Parties. Considering that according to Art. 1(1), (2) EDPA the sole purpose of the Data Protection Act is to protect the rights and

freedoms of natural persons, they still require the protection under the EDPA even if they work within companies. Therefore, RESPONDENT has to be able to invoke the EDPA in the name of its employees. Thus, the EDPA applies to the Parties.

bb. CLAIMANT Was Obliged to Inform RESPONDENT Pursuant to Art. 34 EDPA

95 CLAIMANT was under a duty to inform RESPONDENT about the cyberattack according to Art. 34(1) EDPA. According to Art. 34(1) EDPA, a breach of personal data must be communicated to the data subject if it is likely to result in a high risk to the rights and freedoms of natural persons. The risk arising from a data breach is high if it can be assumed that, if the events continue unhindered, there is a high probability of damage to the rights and freedoms of the data subject [*BeckOK Datenschutzrecht – Brink, Art. 34, para. 25*]. After it detected the cyberattack, CLAIMANT quickly established that Ms. Audi, CLAIMANT's account manager for RESPONDENT, had downloaded malware on her work computer [*PO2, p. 61, para. 5*]. Additionally, the cyberattack only was discovered 18 days after the download [*Exhibit C6, p. 17, para. 5*]. Therefore, there was a high risk that data of RESPONDENT's employees had been obtained by criminals.

96 This risk becomes even more apparent for the second payment. When CLAIMANT discovered the extent of the cyberattack on 15 May 2022, it had to be aware that sensitive data had been compromised and there was a high risk of damage to the rights and freedoms of data subjects. Contrary to CLAIMANT's argument [*Claimant, para. 102*], it is also not exempted according to Art. 34(3)(a) EDPA since the general update of its cybersecurity system did not encrypt nor render the data unintelligible for persons who are unauthorised to access them. Thus, CLAIMANT was obliged to inform RESPONDENT of the cyberattack pursuant to Art. 34(1) EDPA.

2. CLAIMANT's Omission to Inform Caused RESPONDENT's Non-Performance

97 By failing to comply with its informational duties, CLAIMANT caused the misguided payments. An omission causes the non-performance if it is highly probable that an act would have prevented the non-performance [*OLG Brandenburg (Germany), 5 February 2013; MüKoBGB – Huber, Art. 80, para. 5*]. If CLAIMANT had informed RESPONDENT, it would have been in a heightened state of awareness when it received the phishing email. Consequently, it would have questioned its authenticity despite the confidential information contained therein and would have confirmed the change with CLAIMANT's Head of Sales, which would have resolved the situation. Therefore, CLAIMANT's omission to inform RESPONDENT caused the non-performance.

III. RESPONDENT Is Fully Exempted Despite Potential Mutual Causation

98 Even in the case of mutual causation, RESPONDENT is fully exempted according to Art. 80 CISG. If both parties caused a non-performance the contribution of the aggrieved party must significantly outweigh the cause set by the non-performing party [*BGH (Germany), 26 September 2012; OLG Koblenz (Germany), 24 February 2011; MüKoHGB – Mankowski, Art. 80, para. 8*]. CLAIMANT argues that RESPONDENT acted negligently in trusting the phishing email and therefore set the main cause for the non-performance [*Claimant, paras. 116 et seq.*]. As emphasised above, RESPONDENT could not expect anyone but CLAIMANT to have sensitive information of its communication [*Supra, para. 72*]. Therefore, RESPONDENT acted in the reasonable belief that the email was sent by Ms. Audi. Furthermore, the whole issue was caused by Ms. Audi and CLAIMANT's deliberate decision to conceal that it fell victim to a cyberattack despite its obligation to inform RESPONDENT. This applies all the more for the second payment, when CLAIMANT failed to inform RESPONDENT of the cyberattack due to internal problems. Consequently, CLAIMANT's contribution to the non-performance significantly outweighs any assumed cause set by RESPONDENT. Thus, even in case of mutual causation, RESPONDENT is fully exempted according to Art. 80 CISG.

C. Even if RESPONDENT Was Not Fully Exempted From Payment Under Art. 80 CISG, It Would Be Partially Exempted in Accordance With Art. 7, 77, 80 CISG

99 Even if RESPONDENT was not exempted under Art. 80 CISG, it would still be partially exempted from performance. RESPONDENT agrees with CLAIMANT that Art. 77 CISG only applies to damage claims [*cf. Claimant, para. 123; OGH (Austria), 9 March 2000; Official Records, p. 397; Schwimann – Posch, Art. 77, para. 4*]. However, in case Art. 80 and 77 CISG are not directly applicable, a party can seek exemption in accordance with Art. 7(2) CISG and the underlying principles of Art. 77 and 80 CISG [*BGH (Germany), 26 September 2012; Staudinger – Magnus, Art. 80, para. 16a; cf. Lookofsky, p. 170*]. The principle underlying both provisions is that in cases of joint causation, the claim will be reduced according to each party's share of the fault [*BGH (Germany), 26 September 2012; Schlechtriem/Schwenzer – Schwenzer, Art. 80, para. 8; MüKoBGB – Huber, Art. 80, para. 6*]. RESPONDENT is at least partially exempted for the first **[I]** and the second payment **[II]**.

I. RESPONDENT Is Partially Exempted From the First Payment

100 RESPONDENT is at least partially exempted from the first payment in accordance with the underlying principles of Art. 7, 77, 80 CISG. To determine the degree of exemption, it has to be evaluated whether and to what extent both parties contributed to the non-performance by having regard to all circumstances of the case [*BGH (Germany), 26 September 2012; OLG Brandenburg*

(Germany), 5 February 2013; Huber/Mullis – Huber, pp. 267, 268]. RESPONDENT relied on the instructions it received in an email that it reasonably attributed to its business partner. Due to the pragmatic approach the Parties had taken in the past, RESPONDENT could reasonably consider that the bank account had been changed despite the written form requirement.

101 CLAIMANT, on the other hand, fell for a spam email that contained a "discount link" for a car race [*Exhibit C6, pp. 17-18, paras. 5-10*]. After being hacked, CLAIMANT deliberately decided to withhold the information about the cyberattack despite its contractual and statutory obligation to inform RESPONDENT [*Exhibit C6, p. 17, para. 8*]. If CLAIMANT had acted in accordance with its contractual obligations, the current situation would have been prevented. Consequently, CLAIMANT heavily contributed to RESPONDENT's non-performance. Therefore, RESPONDENT is at least partially exempted from the first payment.

II. RESPONDENT Is Partially Exempted From the Second Payment

102 RESPONDENT is at least partially exempted from the second payment. After 15 May 2022, CLAIMANT was still contractually and statutorily obliged to inform RESPONDENT. The fact that one news article briefly mentioned it had "sources" that there had been a cyberattack on CLAIMANT is not enough to release it from the duty to inform RESPONDENT. Even CLAIMANT knew that it had to inform its business partners but tries to avoid responsibility by emphasising how difficult the situation for its company was due to the cyberattack and the shortage of staff [*Claimant, para. 125*]. However, CLAIMANT's internal problems causing its failure to inform RESPONDENT fall in CLAIMANT's sphere of risk.

103 Furthermore, CLAIMANT had almost two months to notify RESPONDENT that it did not receive the first payment of USD 19,200,000 before the second payment became due [*Exhibit C2, p. 13*]. If CLAIMANT had not failed to notice the missing payments until the 25 August 2022, at least the second payment to the cyberattacker could have been prevented [*cf. RfA, p. 6, paras. 14, 15*]. Consequently, CLAIMANT's share of the Parties' fault is even greater for the second payment. Thus, RESPONDENT should be exempted to an even greater degree from the second payment.

D. Even if RESPONDENT Was Not Exempted From Payment, It Can Claim Damages Against CLAIMANT and Invoke a Set-Off

104 RESPONDENT can claim damages against CLAIMANT and invoke a set-off. Although the CISG does not explicitly codify set-offs, they are possible under the CISG if the monetary claims arise from the same contractual relationship [*Supreme Court (Sweden), 29 May 2020; BGH (Germany), 24 September 2014; Bundesgericht (Switzerland), 20 December 2006; OLG Hamburg (Germany),*

26 November 1999]. According to Art. 45(1)(b) CISG, the buyer can claim damages if the seller fails to perform any of its obligations under the contract or the Convention. As shown above, CLAIMANT was obliged to inform RESPONDENT of the cyberattack [*Supra, paras. 81 et seq.*]. If one assumes that RESPONDENT neither performed nor is exempted, RESPONDENT suffered a damage due to this breach of contract. In this case, RESPONDENT has a damage claim arising from the same contractual relationship as CLAIMANT's payment claim and RESPONDENT can invoke a set-off.

CONCLUSION OF THE THIRD ISSUE

105 CLAIMANT is not entitled to payment under Purchase Order No. 9601. RESPONDENT reasonably believed in the authenticity of the email and therefore, its payment made in good faith must constitute performance. Even if its payment did not constitute performance, RESPONDENT would be exempted from payment in accordance with Art. 80 CISG. This is because CLAIMANT caused the non-performance by allowing the cyberattacker to infiltrate its system and deliberately disregarding its duty to inform RESPONDENT of the cyberattack. Ultimately, even if RESPONDENT was not exempted under Art. 80 CISG, it would be partially exempted according to Art. 7, 77, 80 CISG. Alternatively, RESPONDENT sets off its damage claim against the CLAIMANT's payment claim.

REQUEST FOR RELIEF

106 In response to the Tribunal's Procedural Orders and the Memorandum for CLAIMANT, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the Tribunal to declare:

- The addition of the New Claim to the pending arbitration is not authorised **[Issue 1]**.
- The two proceedings will not be consolidated **[Issue 2]**.
- CLAIMANT is not entitled to any payment claim under Purchase Order No. 9601 **[Issue 3]**.
- CLAIMANT is ordered to pay to cost of this arbitration and to reimburse RESPONDENT for all costs incurred in connection with it.

CERTIFICATE

We hereby confirm that his Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team. Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.

Jack Donnelly

Allegra Eggels

Franziska Graf

Florian Grünewald

Benjamin Krabbes

Mona Seyl

Jens Weber

Benjamin Zeeck

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%	Percent
ARfANC	Answer to Request of Arbitration New Claim
Art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAA	Danubian Arbitration Act
ed.	editor/edition
et al.	et alii (and others)
et seq.	et sequens (and the following)
EUR	Euro, €
FS	Festschrift
HGB	Handelsgesetzbuch (German Commercial Code)
Inc.	Incorporation
LLC	Limited Liability Company
Ltd	Limited
No.	Number
Op.	Opinion
p./pp.	page/pages
plc	Private Limited Company
para.	paragraph
PO	Procedural Order
RfA	Request for Arbitration
RfANC	Request for Arbitration new Claim

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CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Danubian Arbitration Act	Verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
Danubian Contract Law	Verbatim Adoption of the UNIDROIT Principles of International Commercial Contracts 2016
Equatorianian Data Protection Act (EDPA)	Verbatim adoption of the European Union's general data protection regulation
ICC Rules	International Chamber of Commerce Rules of Arbitration with the 2021 amendments
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")