TWENTY FIRST ANNUAL
WILLEM C. VIS EAST INTERNATIONAL ARBITRATION MOOT

Memorandum for Respondent

The University of Hong Kong

Case reference: ICC Case No. Moot-100/MM

On behalf of:	Against:
Visionic Ltd	**SensorX, plc**
Optronic Avenida 3	Atwood Lane 1784
Oceanside	Capital City
Equatoriana	Mediterraneo
RESPONDENT	CLAIMANT

Du Zhuoman · Fung Hiu To · Su Kexin · Sun Qiwei · Lau Yi Ching Raphael
Ng Wai · Law Chin Yuet Maxine · Leung Ka Yan

2023/2024 · Hong Kong

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JURISDICTION: Common Law

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DATE: 17 Jan 2024

NG Wai

FUNG Hiu To

LAW Chin Yuet Maxine

LEUNG Ka Yan

SUN Qiwei

SU Kexin

LAU Yi Ching Raphael

DU Zhuoman

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INDEX OF ABBREVIATION

Art., Arts.	Article, Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
DCA/PICC	Danubian Contract Act/Unidroit Principles of International Commercial Contracts
EDPA	Equatoriana Data Protection Act
Email	The Email from "Ms. Audi" dated 28 March 2022
Exh C1	CLAIMANT Exhibit C1
Exh C2	CLAIMANT Exhibit C2
Exh R1	RESPONDENT Exhibit R1
Exh R2	RESPONDENT Exhibit R2
Exh R3	RESPONDENT Exhibit R3
Exh R4	RESPONDENT Exhibit R4
Exh C3	CLAIMANT Exhibit C3
Exh C4	CLAIMANT Exhibit C4
Exh C5	CLAIMANT Exhibit C5
Exh C6	CLAIMANT Exhibit C6
FA	Framework Agreement (7 June 2019)
GDPR	European Union's General Data Protection Regulation

ICC	International Chamber of Commerce
ICC Court	ICC International Court of Arbitration
ICC Rules	ICC Rules of Arbitration entered into force on 1 January 2021
New Account	Bank account specified in the Email from Email from "Ms. Audi" dated 28 March 2022
New Claim	The additional claim raised in the Request for Authorization of New Claim/Consolidation of Proceedings
NoReqArb	ICC Notification of a Request for Arbitration (12 June 2023)
Original Claim	The original claim raised in the Request for Arbitration
p, pp	Page, pages
para, paras	Paragraph, paragraphs
Parties	SensorX plc and Vision Ltd
PO 1	Procedural Order 1
PO 15604	Purchase Order A-15604
PO 2	Procedural Order 2
PO 9601	Purchase Order 9601
RANC	Request for Authorization of New Claim/Consolidation of Proceedings (11 September 2023)
RfA	Request for Arbitration (9 June 2023)
RR	Rejection by RESPONDENT in Request for Authorization of New Claim/Consolidation of Proceedings (2 October 2023)

ToR	Terms of Reference (30 August 2023)
Tribunal	Arbitral Tribunal
UNICITRAL	The United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
1998 ICC Rules	ICC Rules of Arbitration entered into force on 1 January 1998
2012 ICC Rules	ICC Rules of Arbitrationentered into force on 1 January 2012

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STATEMENT OF FACTS

07 Jun 2019 The parties entered into the FA to regulate transaction of sensors.

27 Aug 2020 RESPONDENT was under a cyberattack.

28 Aug 2020 RESPONDENT notified CLAIMANT of the cyberattack under EDPA Art. 34.

04 Jan 2022 The parties entered into PO A-15604.

05 Jan 2022 CLAIMANT's IT system was under a cyberattack.

17 Jan 2022 CLAIMANT and RESPONDENT entered into PO 9601.

23 Jan 2022 CLAIMANT discovered the cyberattack but concealed it from RESPONDENT.

28 Mar 2022 RESPONDENT received the Email which requested to change the bank account.

Late Mar 2022 Mr. Royce cannot reach Ms. Audi and asked for a confirmation via email.

30 Mar 2022 "Ms. Audi"'s reply confirmed that the parties had normally treated the form requirement pragmatically and the change would be compliant with the formal procedures.

03 Apr 2022 CLAIMANT delivered the first installment under PO 9601 after Ms. Peugeotroen agreed with RESPONDENT that an email would be sufficient for the notice of defect.

30 Apr 2022 RESPONDENT paid PO 9601's first installment to the New Account.

15 May 2022 CLAIMANT delivered the second installment under PO 9601.

30 Jun 2022 RESPONDENT paid the second installment for PO 9601 to the New Account.

25 Aug 2022 CLAIMANT discovered non-payment by RESPONDENT pursuant to PO 9601.

09 Jun 2023 The arbitration commenced upon request of CLAIMANT.

30 Aug. 2023 The parties and the Tribunal signed the ToR.

01 Sep 2023 CLAIMANT discovered the non-payment under PO A-15604.

11 Sep 2023 CLAIMANT requested for addition, or alternatively, consolidation.

SUMMARY OF ARGUMENTS

ISSUE I: The Tribunal can not and should not authorize the addition of the New Claim

Firstly, the new submission amounts to a New Claim falling outside the limits of the ToR, especially when it leads to an additional request for relief. ***Secondly***, the Tribunal CANNOT authorize the addition of the New Claim as it would not save time, or that even if it saves costs, the saving is not noticeable. ***Thirdly***, the Tribunal SHOULD NOT authorize the addition of the New Claim, as its nature is different from that of the existing claims, it was raised at an inappropriate stage and other relevant circumstances do not support authorization under Art.23(4) of the ICC Rules.

ISSUE II: The Tribunal cannot and should not consolidate

Firstly, the Tribunal CANNOT consolidate, as is not competent to consolidate, as such power only vests in the Court. ***Secondly,*** assuming but not conceding the Tribunal is competent to consolidate as the power is conferred by the Court, the Tribunal CANNOT consolidate because the requirements under ICC Rules Art.10 and FA Art. 41(5) are not met. ***Thirdly***, the Tribunal SHOULD NOT authorize the consolidation, as it will be against time and cost-effectiveness.

ISSUE III: RESPONDENT can entirely or at least partially defend itself against the claim for payment

Firstly, RESPONDENT has already fulfilled its obligation to pay under Art. 53 CISG. ***Secondly,*** RESPONDENT can rely on CISG Art. 80 to fully or at least partially defend itself from CLAIMANT's payment claim, because CLAIMANT's omission to perform its information duty and obligation under DCA and EDPA caused RESPONDENT to pay the two installments under PO 9601 to the false bank account. ***Thirdly***, RESPONDENT can alternatively fully or at least partially defend itself by invoking CISG Art. 77 to reduce the amount claimed by CLAIMANT (i.e., USD 38,400,000) down to zero.

I. THE TRIBUNAL CAN NOT AND SHOULD NOT authorize THE ADDITION OF THE NEW CLAIM

1. After the signing of the ToR, CLAIMANT filed a new submission, requesting it be added into this ongoing arbitration proceeding, or alternatively, be consolidated. CLAIMANT's new submission falls outside the scope of the ToR and hence has to be authorized by the Tribunal **(I.A)**. Yet, the tribunal neither can **(I.B)** nor should **(I.C)** authorize the addition of the New Claim into this pending arbitration.

A. The New Submission is a New Claim falling outside the limits of ToR

2. A "new submission" would amount to a "New Claim" when it falls outside the scope of ToR. When Tribunal deals with the request of new submission, it has to resort to the ICC Rules Art. 23(4), since it supplements the requirements of the ICC Rules regarding the ToR [*Schwartz, p.55*]. A new submission only has to be authorized by the Tribunal when it amounts to a "New Claim" falling outside of the ToR. C's memo did not address the point that the new submission is within the ToR. Moreover, by requesting the Tribunal's authorization for the addition of the New Claim, the CLAIMANT essentially agreed with the RESPONDENT that the new submission falls outside of the limits of ToR.

3. Although the CLAIMANT is not challenging that the new submission falls outside the limits of ToR, still, for the sake of clarity, the RESPONDENT will address this point that the new submission is out of the scope of ToR and hence it amounts to a New Claim that requires authorization by the Tribunal for its addition.

4. ***Firstly***, the "limits" of the ToR shall be interpreted in accordance with the ordinary meaning of its wording and the purpose pursuant to Art.31 of VCLT. The ToR exhaustively confined CLAIMANT's request for payment to PO 9601 [*ToR, para.85*]. The new submission does not fall within the scope of the ToR as it is not under PO 9601. ***Secondly***, the new submission leads to an additional request for relief based on the contract "PO A-15604" on top of the original "PO 9601" as in the ToR, hence it amounts to a New Claim that falls outside the ToR [*Handbook, p.364*]. In sum, the tribunal should hold that the new submission amounts to a New Claim falling outside the limits of ToR as it leads to

an additional request for relief.

B. The New Claim CANNOT be authorized by the Tribunal

5. The Tribunal CAN ONLY authorize the addition of the New Claim when the relevant requirements under the ToR are conformed with, i.e. it has to result in "noticeable savings" in BOTH cost and time, as the ToR provides an additional "noticeable" requirement on top of ICC Rules Art. 22(1). Also, under ICC Rules Art. 22(1), the Tribunal should also make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

6. The Tribunal also has to decide whether it SHOULD authorize the New Claim. Requirements of ICC Rules Art. 23(4) on such authorization will be discussed later in ***Part I.C*** on whether New Claim SHOULD be authorized by the Tribunal — as the elements provided by the ICC is just for consideration and are not binding on the tribunal. In contrast, the aforementioned requirement stated in the ToR are compulsory — authorization cannot be given if the requirement is not met.

7. It is undisputed that with ICC Rules Art. 6(3), the Tribunal has the jurisdiction to determine whether the claims should be heard together. However, the CLAIMANT erred in using Art. 6 (4)(ii) when arguing for the authorization of the New Claim, as the Secretary General never referred this matter to the ICC Court. ICC Rules Art. 6 (4) is therefore irrelevant, so are the considerations to be considered by the Court under Art. 6 (4)(ii).

8. The RESPONDENT submits that the Tribunal cannot add the New Claim as it would not save time but eventually only cost **(I.B.1)** . Furthermore, even if it could save both time and cost, the savings are not "noticeable" **(I.B.2)**.

1. Adding the New Claim would not save any time

9. Adding the New Claim would not save time having regard to the value and complexity of the dispute. The value of the dispute refers to the amount in dispute [*Secretariat's Guide, p.383*]. Adding the New Claim would increase the total value in dispute, and therefore the parties and arbitrators would be more cautious as the worth of the case increases. The case

will be slowed down. Moreover, the complexity of the dispute refers to the legal, factual and/or procedural complexity of the case [*Secretariat's Guide, p.395*]. The existing claims only dealt with PO 9601, while the New Claim deals with another irrelevant transaction. The two Purchase Orders concern completely different issues: with PO 9601 about the breach of duty and payment of price, which is more straightforward; while PO A-15604 is about conformity of the goods. In assessing conformity, there is a need to establish the relevant standard and whether that was conformed with, and is likely to involve experts in doing so. Hence, it is going to be more time-consuming and complex. Authorising the new claim could hardly save, but rather greatly increased, the time all parties spent in arbitral proceedings. It is evidenced that allowing the New Claim would not save time.

10. ***Assuming but not conceding*** there is any saving in time, such saving will not be noticeable. An average arbitration took between 17 and 20 months [*CIArb, p.3*]. Combined with facts presented in the above arguments, even when the Tribunal agrees that adding the New Claim could potentially save some time, time saved as alleged is proportionally insignificant compared to the entire duration of arbitration.

2. Even if both time and cost are saved, savings as such are not noticeable

11. Even if the RESPONDENT concedes that by adding the New Claim, there is likely to be a saving in arbitrators' fees and administrative fees when the value of arbitration increases pursuant to ICC Rules Art. 38 (giving around 33% decrease on average in arbitrators' and administrative fees according to the Scales provided by the ICC) and that allowing the New Claim might potentially save administrative and arbitrators' fees – STILL, these would not be NOTICEABLE having regard to the value and complexity of the dispute.

12. The aforementioned savings on arbitrators' and administrative fees are NOT NOTICEABLE when compared to other arbitration costs, predominantly the lawyers' fees, which take up a much larger portion of the arbitration costs. On average, 83% of the overall arbitration costs goes to lawyers' fees, expenses for calling witnesses and experts and other expenses [*ICC Bulletin, p.3*]. In contrast, arbitrator's and administrative fees account for a much smaller portion in the overall arbitration costs, taking up only around 15% and 2%

respectively. This is reasserted by the CIArb that external legal fees take up around 74% of the overall party costs [*CIArb, p.10*].

13. The New Claim which concerns conformity issue is likely to involve the use of experts. It is also based entirely on new sets of facts and legal issues, which inevitably results in a more complex arbitration. Therefore, even if the savings in arbitrators' and administrative fees are noticeable, those savings would amount to at most 17% of the overall arbitration costs. Hence, such savings are NOT NOTICEABLE as opposed to the overall cost of arbitration, especially when the New Claim is going to incur more lawyer and expert fees, which takes up way more of the overall cost of arbitration. It has been statistically proven that saving in costs by adding the New Claim would NOT BE NOTICEABLE.

14. Furthering on that, as discussed in ***Part I.B.1***, the average length of arbitration is around 17-20 months, which is sometimes slower than litigation [*CIArb, p.12*]. The length factor, coupling with the small savings on arbitrator and administrative fees, makes any saving of such even less significant or noticeable. Taking into account the average time and overall costs of ICC arbitration, the New Claim cannot be authorized, as time and cost saved, if any, would not be "noticeable" as required in the ToR as mutually agreed and entered into.

C. The New Claim SHOULD NOT be authorized by the Tribunal

15. Pursuant to ICC Rules Art. 23(4), when considering whether to authorize the addition of the New Claim, the Tribunal should consider: the nature of such New Claim, the stage of the arbitration, and other relevant circumstances. Only when considerations of the three elements justified the addition should the New Claim be authorized. Here, the nature of the New Claim is different from the existing claims **(I.C.1)**. The New Claim was raised at an inappropriate stage of arbitration **(I.C.2)**. Other relevant circumstances do not justify the authorization of the New Claim **(I.C.3)**.

1. The New Claim is of a DIFFERENT NATURE

16. Only if the New Claim and the existing claims are of a similar nature that the Tribunal will authorize the New Claim [*Handbook, p.422*], as it makes proceedings more expeditious and

cost-effective as required under ICC Rules Art. 22(1). The RESPONDENT submits that the New Claim is unrelated to the existing claims, by commercial transactions **(I.C.1.a)** and by facts **(I.C.1.b).** Hence, its addition should not be authorized.

a. The New Claim rests on different commercial transactions

17. Whether a dispute is of the same commercial transaction rests on whether these transactions are "indivisible whole or very closely connected" [*Hanotiau, p.351; Schwartz/Derains, p.61*]. RESPONDENT submits that the claims are of different commercial transactions. ***Firstly*****,** as illustrated in ***Part I.A.2***, the claims arose from unrelated and wholly different contracts. The New Claim arises from a contract that does not fall under the FA. ***Secondly*****,** the products sold in the two contracts are different, with one of them involving products for military application, which is highly sensitive. In sum, the New Claim is commercially unrelated to the existing claims.

b. The New Claim is unrelated by facts

18. The factual bases of the existing claims are that, due to CLAIMANT employee's breach of internal cybersecurity guidelines, cybercriminals gained access to all of CLAIMANT's emails and misled RESPONDENT into making all payments under PO 9601 to the New Account. The New Claim does not concern any of these and is grounded on entirely new issues, predominantly the refusal of payment of a second tranche by RESPONDENT as CLAIMANT failed to deliver goods of a satisfactory standard, and whether RESPONDENT served a proper notice of defect. Hence, the New Claim rests on entirely different facts and is unrelated to the existing claims.

19. A claim that is related to the underlying dispute which fits into the proceedings is more likely to be authorized by the Tribunal than a claim that requires the proceedings to take a significantly different direction [*Secretariat's Guide, p.258*]. A sufficient link could only be found where the new claim arises out of the same transaction and facts described in the ToR [*Schwartz, p.69; ICC Case No.16240*], or alternatively, being a case of dependence of one issue from the other [*ICC Case No.19105*]. In this case, the New Claim is based on

different transactions and unrelated facts, the lack of a sufficiently close enough connection renders the New Claim to be of a completely different nature to the existing claims.

20. ***In conclusion***, the connection between the New Claim and the existing claims is not strong enough, it is therefore unlikely to be authorized by the Tribunal as it fails to bring about the outcome which could facilitate the proceedings to be conducted in a more expeditious and cost-effective manner. Therefore, the New Claim should not be authorized.

2. The New Claim was raised at an inappropriate stage

21. The Tribunal shall consider the stage of arbitration when deciding whether to authorize the addition of the New Claim. The Tribunal should not authorize the New Claim because it was raised at an "inappropriate stage", as adding the New Claim would significantly disrupt the natural course of the arbitration and the schedule of the proceedings.

22. The Tribunal should always be mindful of its commitment to fostering expeditious and cost-effective arbitral proceedings as prescribed by the ICC Rules Art. 22(1) [*Secretariat's Guide, p.259*]. RESPONDENT submits that the appropriate point for raising a New Claim would be no later than the signing of the ToR i.e. before 30 Aug, 2023. This is on the basis that the fundamental purpose of ToR is to create an agreed framework for an ICC arbitration by indicating the nature and subject matter of the dispute and the claims [*Handbook, p.419*]. It is fundamentally aimed at setting out the claims of the parties and issues to be decided at an early stage in the proceedings, such that the provisional timetable for the proceedings is created having assessed the limit on what has to be discussed as stated in the signed ToR [*Handbook, p.404*]. It is when the ToR is finalised can the Tribunal plan its work efficiently and the parties can initiate their actions accordingly to fulfill duties of conducting the arbitration in an expeditious and cost-effective manner under ICC Rules Art. 22(1). Therefore, when the New Claim is introduced after ToR is signed, it will inevitably disrupt the original planning and schedule of the arbitration's procedures which fundamentally frustrates the very purpose of creating a ToR. Therefore, the purpose of Art. 23(4) is to avoid disruption or delay by preventing one of the parties unilaterally changing the agreed framework, as there must be a point in time when the parties cannot present new

claims for an arbitration to proceed accordingly with eventual conclusion [*Handbook, p.419*]. When a New Claim is raised after that, it is raised at an inappropriate stage.

23. "Stage of arbitration" has to be considered together with the "nature" of the claims discussed in ***Part I.C.1*** under ICC Rules Art. 23(4). It remains the case that if the New Claim is raised shortly after the ToR is signed, it is more likely to be authorized [*Handbook, p.422*]. However, as discussed in the previous paragraph, the ToR's purpose is to create an agreed framework that sets out the claims and issues at an early stage in the proceedings, such that the provisional timetable for the proceedings can be settled to conduct the arbitration more expeditiously and cost-effectively. The Tribunal should only authorize the addition of the New Claim if it helps saves time and cost for the proceedings. Hence, when considering the element of "nature" together with "stage of arbitration", taking into account the completely different nature of New Claim and the existing claims as discussed in ***Part I.C.1***, adding the New Claim after signing the ToR is even more inappropriate.

24. Since the New Claim is based on new facts and legal issues, both parties will reasonably ask for extension of time for preparation. The disruption inevitably prolongs the length of arbitration that could have been shortened had the Claim been raised at a suitable, earlier stage. The request for adding the New Claim is raised at an inappropriate stage which is contrary to their duty to conduct proceedings in an expeditious way. Therefore, the New Claim should not be authorized as it was raised at an inappropriate stage of proceeding.

3. No relevant circumstances support authorization

25. The Tribunal should not authorize the New Claim because adding the New Claim would cause recognition and enforcement difficulties. An arbitral award might be refused recognition or enforcement under NYC Art.5 on the grounds of "Excess of Authority", and also under UNCITRAL Model Law Arts. 35 and 36 applicable where the award contains decisions on matters beyond the scope of the submission to arbitration.

26. Here, the scope of the "submission to arbitration" is set out in the ToR. By allowing the addition of the New Claim, the arbitral award would contain decisions on matters beyond

the scope of the submission to arbitration. Thus, adding a New Claim falling outside the ToR might lead to "Excess of Authority", an element which could lead to recognition or enforcement problems.

27. ***In conclusion***, the Tribunal should not authorize the addition of the New Claim, otherwise, the final award might risk being challenged at the court where enforcement is sought with NYC Art.5, or UNCITRAL Model Law Arts. 35 and 36. The award might be refused recognition or enforcement at the court of enforcement due to 'Excess of Authority'.

CONCLUSION of ISSUE I

28. To summarize aforementioned arguments, the Tribunal should reject CLAIMANT's request for addition of the New Claim into this ongoing arbitration. The new submission amounts to a New Claim falling outside the limits of the ToR as it leads to an additional request for relief. Besides, the Tribunal CANNOT authorize the addition of the New Claim, as it would not save time and cost, or alternatively, such savings would not be "noticeable". Even if the Tribunal could authorize, it SHOULD NOT authorize the addition of the New Claim, as the nature, stage and other relevant circumstances to be considered as prescribed under ICC Rules Art. 23(4) do not support such authorization.

II. THE Tribunal CANNOT AND SHOULD NOT Consolidate

29. Alternatively, if CLAIMANT raises the new claim in a different arbitration proceeding, the Tribunal CANNOT consolidate the proceedings as the Tribunal has no competence **(II.A)**, and even if it has, the requirements for consolidation are not satisfied **(II.B)**. In any case, the Tribunal SHOULD NOT consolidate **(II.C)**.

A. The Tribunal CANNOT consolidate as the Tribunal has no competence

30. The Tribunal is not competent to decide on consolidation, as ICC Rules do not permit any derogation based on the parties' agreement regarding the Tribunal's competence to consolidate **(II.A.1)**, and the filing of the Request for Arbitration by the Secretariat to

RESPONDENT does not equate to ICC's acceptance of the derogation **(II.A.2)**.

1. ICC Rules do not permit any derogation regarding the Tribunal's competence

31. The Court's exclusive power to decide on consolidation under ICC Rules Art. 10 is a mandatory provision [*Smit, p.850; Mourre, p.8*]. This is supported by ICC Rules Art. 19, which stipulates that the Tribunal may only settle at its discretion when ICC Rules are silent. ICC Rules Art. 10(1) empowers the Court to decide, and there is no room for the Tribunal to settle on consolidation issues. CLAIMANT's arguments that ICC Rules permit the conferral of competence from the Court to the Tribunal lacks justification.

32. ***Firstly***, CLAIMANT contended that the 1998 ICC Rules Art. 4(6) exclusively conferred the Court with the power to include additional claims to the pending proceeding because the Tribunal did not exist prior to the signing of the ToR. However, as provided by the 1998 ICC Rules Art. 18, the ToR is drawn up by the Tribunal, which indicates that the Tribunal had been formed before the signing of the ToR. Thereby, the retention of power within the Court in the 1998 ICC Rules was not due to the non-existence of the Tribunal.

33. ***Secondly***, CLAIMANT misinterpreted the ICC Rules contextually. CLAIMANT invoked ICC Rules Arts. 5(5), 7(5), and 23(4) to illustrate that the Tribunal possesses the power to consolidate. However, certain provisions can only be derogated by the parties' mutual agreement if it is expressly stated in ICC Rules with wordings like "unless agreed by the Parties" as in Arts. 6(9) and 18(2). Notably, such wordings not only exist in other provisions but also exist in ICC Rules Art. 10 itself. Its third paragraph used "*unless otherwise agreed by all Parties*" which determines which arbitration they should be consolidated into when proceedings are to be consolidated. However, no similar words are deployed in the first paragraph of ICC Rules Art. 10, which determines when ***the Court*** can consolidate. This strongly suggests that the parties are not allowed to alter the consolidation power.

34. ***Thirdly***, there is no persuasive case to support CLAIMANT's submission. CLAIMANT wrongfully relied on *ICC Case No. 16982*, which is inapplicable as it was commenced in

2010 and was administered by the arbitration rules in effect at that time, i.e. the 1998 ICC Rules, where no provision of consolidation equivalent to Art. 10 of the current ICC Rules was enacted [*ICC Case No. 16982, paras.20-22*]. Therefore, *ICC Case No. 16982* cannot be used to support CLAIMANT's submission on the Tribunal's competency to consolidate.

35. ***Fourthly***, the institutional rules listed by CLAIMANT are irrelevant to ICC arbitration. Once the parties agree on settling the dispute with ICC Rules, it shall be the ***only*** applicable institutional rules governing the procedure and the rules of other arbitral institutions cannot be applied [*Berger, p.349*]. The approaches of other institutions are irrelevant to the interpretation of ICC Rules, as the structure and the functions of different authorities vary. Consequently, CLAIMANT cannot merely rely on the rules of any other institutions to prove that ICC Rules permit the conferral of competence to the Tribunal to consolidate.

36. ***To conclude***, the power of consolidation solely rests on the Court. The Tribunal is not competent to consolidate in this regard.

2. The Notification of the Request for Arbitration does not equal the ICC's acceptance of the derogation

37. CLAIMANT argued that its filing of the Request for Arbitration constitutes an offer for the derogation, and the Notification of a Request for Arbitration qualifies as ICC's acceptance of that offer. This argument is unsound.

38. ***Firstly***, the offer and acceptance theory raised by CLAIMANT, involving both parties and the ICC, is against the long-established common law principle of privity and has no legal basis [*Price v Easton*]. In any event, it cannot be an authorization for CLAIMANT to make an offer on behalf of RESPONDENT, *infra* ***Part II.B.1.a***.

39. ***Secondly***, the Notification of the Request for Arbitration by the Secretariat to RESPONDENT is not the acceptance of the derogation by the ICC [*NoReqArb, p.21*]. Generally, the Secretariat is not the adjudicating authority in ICC and will ***only*** have decision-making power through the conduct of the Secretariat General in limited circumstances as provided in ICC Rules Art. 13(2) and Art. 36(1) [*Secretariat's Guide, p.*

21, para. 3-24]. However, the notification to RESPONDENT in pursuance of the ICC Rules Art. 4(5) is made by the Secretariat rather than the Secretary General, which indicates that the notification will not have any decision-making effect and cannot be assumed as an acceptance made by the Secretariat on behalf of the ICC.

40. ***Therefore***, CLAIMANT cannot rely on any alleged parties' agreement or notification to confer the Court's competence to the Tribunal and the power only rests on the Court

B. Assuming but not conceding that the Tribunal has the power to consolidate, the Tribunal CANNOT consolidate as the requirements for consolidation are not met

41. CLAIMANT argued that the requirements for consolidation as set out in FA Art. 41(5) do not apply to the present case. However, RESPONDENT contends that both ICC Rules Art. 10(1) requirements and FA Art. 41(5) requirements shall be applied for deciding consolidation. The purpose of FA Art. 41(5) is not simply to facilitate the consolidation as submitted by CLAIMANT. Instead, it aims to provide a mechanism to determine consolidation during an *ad hoc* arbitration where there is no institutional rule [*PO2, p.63*]. Thereby, CLAIMANT's argument on ruling out the more restrictive FA Art. 41(5) is ill-founded. Moreover, CLAIMANT is relying on FA Art. 41(5) to infer that both parties have agreed to transfer the power of consolidation from the Court to the Tribunal while at the same time, arguing to replace the requirements listed in FA Art. 41(5) with broader consolidation requirements set out in ICC Rules Art. 10. Such cherrypicking should not be allowed. ***Therefore***, FA Art. 41(5) cannot be ruled out.

42. ***Consequently***, assuming but not conceding the Tribunal can consolidate because FA Art. 41(5) confers the competence of consolidation to the Tribunal, still, the Tribunal cannot consolidate when the requirements under ICC Rules Art. 10(1) **(II.B.1)** and FA Art. 41(5) **(II.B.2)** are not met.

1. The requirements under ICC Rules Art. 10(1) have not been met

43. Under ICC Rules Art. 10(1), the Court may consolidate the arbitral proceedings if any of the three requirements can be met: (a) the parties agreed to consolidation; or (b) all claims

are made under the same arbitration agreement(s); or (c) the arbitrations are between the same parties, concerning the same legal relationship, and the Court finds the arbitration agreements to be compatible. However, here, the parties have not agreed to consolidation **(II.B.1.a)**; the claims are not made under the same arbitration agreement(s) **(II.B.1.b)**; and the legal relationships in the arbitral proceedings are different, and the arbitration agreements are not compatible **(II.B.1.c)**.

a. The parties have not agreed to consolidation

44. Under ICC Rules Art. 10(1)(a), the Court may consolidate the proceedings if both parties have agreed. ***Firstly,*** a qualified agreement to consolidation shall only be conclusively reached after the dispute has arisen [*Handbook, p.192; Grierson/Hooft, p.123; Secretariat's Guide, p.13*]. However, there is no such post-dispute agreement here, and hence the Tribunal cannot consolidate. ***Secondly***, even if the Tribunal considers pre-dispute agreements to consolidate and hence FA Art. 41(5) may be relevant, yet, the requirements for consolidation set in FA Art. 41(5) are unfulfilled as explained later in ***Part II.B.2***. Thus, there have never been any parties' agreement to consolidation.

b. The arbitration claims are not made under the same arbitration agreements

45. The claims of the two arbitration proceedings are not made under the same arbitration agreement(s) under ICC Rules Art. 10(1)(b). ***Firstly***, the claims are not based on the same arbitration agreement. CLAIMANT's New Claim is arising out of the arbitration clause included in PO A-15604 which states "*making use of the Additional Order Facility under the FA*" [*Ehx C7, p.48*]. Since the content of the "*Additional Order Facility*" under the FA is non-existent, PO A-15604 shall not be regarded as governed by FA, *infra* ***Part II.B.2.a***. ***Secondly***, the claims are not based on the same arbitration agreement**s** but instead, are based on different arbitration agreements stipulated in the two contracts. They differ in core features, including the place of arbitration, the number of arbitrators, and the express exclusion of Emergency Arbitrator (which is only present in PO A-15604, but not in PO 9601) [*Exh C2, p.13; Exh C7, p.48*]. CLAIMANT mistakenly viewed the FA as an umbrella agreement for PO A-15604. Therefore, ICC Rules Art. 10(1)(b) is not met.

c. The legal relationships in two arbitrations are not the same, and the arbitration agreements are incompatible

46. ICC Rules Art. 10(1)(c) is not met in the current case since the legal relationships in the two arbitrations are not the same, and the arbitration agreements are incompatible.

47. ***Firstly,*** the legal relationships in the two arbitrations are not the same as the disputes do not relate to the "*same economic transaction*" [*Bond et al, p.372; Born/Prasad, p.74; Secretariat's Guide, para.3-357; Hanotiau, p.351*], as the two purchase orders are NOT "indivisible whole or very closely connected" [*Hanotiau, p.351; Schwartz/Derains, p.61*]. *Supra* ***Part I.C.1.a****,* the difference in the type and nature of the products shows the two orders cannot be possibly indivisibly connected, and related to the same economic transaction [*Exh C2, p.13; Exh C7, p.48*].

48. ***Secondly***, the arbitration agreements are incompatible due to the different numbers of arbitrators stipulated in the two arbitration agreements. The arbitration clause contained in PO 9601 provided for "three arbitrators" [*Exh C2, p.13*], while the arbitration clause in PO A-15604 provided for "one or more arbitrators" [*Exh C7, p.48*]. ICC Rules Art. 12(2) stipulated that "*[w]here the Parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator...*" Here, there was no agreement between parties upon the number of arbitrators for PO A-15604 claim, and RESPONDENT insists on appointing a sole arbitrator in the second proceeding. The number of arbitrators under PO A-15604 will be one according to ICC Rules Art. 12(2) instead of three as analyzed by CLAIMANT. Therefore, ICC Rules Art. 10(1)(c) cannot be met and the Tribunal cannot consolidate.

49. ***Therefore***, none of the threefold requirements under ICC Rules Art. 10(1) has been satisfied. Hence, even if assuming but not conceding the Court transferred its competence in consolidation to the Tribunal, the Tribunal still cannot consolidate.

2. The requirements under FA Art. 41(5) have not been satisfied

50. None of the three cumulative requirements for consolidation in FA Art. 41(5) is satisfied. Specifically, PO A-15604 is not governed by FA **(II.B.2.a)**; the subject matters of the two

claims are not related by common questions of law or fact **(II.B.2.b)**; and there is no possibility of resulting in conflicting awards or obligations **(II.B.2.c)**.

a. PO A-15604 is not governed by FA

51. CLAIMANT held that both purchase orders are governed by FA. RESPONDENT does not question the relationship between FA and PO 9601 but insists that PO A-15604 is not governed by FA. ***Firstly***, PO A-15604 expressly excludes the operation of an emergency arbitrator while FA does not. Although some differences may be fixed practically with ICC Rules (i.e., the place and the language for arbitration), the exclusion of the emergency arbitrator shows PO A-15604 is not governed by FA which allows the appointment of the emergency arbitrator. ***Secondly***, *ICC Case No. 5989* provided by CLAIMANT should be distinguished from the present case. In *ICC Case No. 5989*, the Purchase Contract (equivalent to PO A-15604) made a reference to the Basic Agreement (equivalent to FA) by stating "*the Purchase Contract has been concluded 'in application of Art. 4.3 of the Basic Agreement'*". Yet, there is no such language contained in PO A-15604 connecting it with the FA. Also, the "*Additional Order Facility*" mentioned in PO A-15604 is non-existent in FA. To conclude, PO A-15604 is not governed by FA. Thus, the Tribunal already CANNOT consolidate as the first requirement is not met.

b. The subject matters are not related by common questions of law or fact

52. The second requirement stipulated in FA Art. 41(5) is "*the subject matters of which are related by common questions of law or fact*". *Supra* ***Part I.C.1****,* both the fact and the legal issues under the two claims are NOT related by common questions of law or fact. More specifically, the question of <u>fact</u> under PO 9601 is RESPONDENT's payments to the New Account due to CLAIMANT employee's break of the cybersecurity guidelines, while, the New Claim concerns a factually different order, PO A-15604. Also, the question of <u>law</u> under the existing claims concerns CLAIMANT's duty to inform the cyberattack and CLAIMANT's duty to inform and to mitigate loss. Whereas, the New Claim raises legal issues on conformity, i.e. whether CLAIMANT's delivery was defective. Hence, the subject matters of the two claims are not related by common questions of law or fact. Hence, the

second requirement of FA Art. 41(5) also failed and the Tribunal again cannot consolidate.

c. There is no possibility of resulting in conflicting awards or obligations

53. Under FA Art. 41(5), the subject matters also have to result in conflicting awards or obligations for consolidation. Yet, this requirement is not met and the Tribunal cannot consolidate. The issue to be resolved in the original proceeding under PO 9601 is payment liability, which is influenced by the cyberattack; while the issue to be resolved in the new proceeding concerning PO A-15604 is different, which is about the breach of contract obligation based on the quality of the product. Therefore, the awards or obligations in the proceedings concerning PO 9601 will only concern whether payment has to be made, while the proceeding concerning PO A-15604 would produce judgment related to the quality of the sensor product and relevant awards and obligations concerning the non-conformity. Therefore, there will be no conflicting awards or obligations by consolidating the two proceedings concerning PO 9601 and PO A-15604, so the Tribunal cannot consolidate.

54. ***In conclusion, assuming but not conceding that*** the Tribunal has the competency to consolidate, it cannot consolidate as the requirements for consolidation under ICC Rules Art. 10 and FA Art. 41(5) are not satisfied.

C. The Tribunal SHOULD NOT consolidate

55. Considering "*any circumstances it considers to be relevant*" [*ICC Rules Art. 10(2)*], even though the Tribunal is competent and can consolidate the proceedings, the Tribunal SHOULD NOT do so as the consolidation is neither more expeditious nor cost-effective, as required by ICC Rules Art. 22(1).

56. ***Firstly***, the consolidation will complicate the arbitral proceedings, as *Supra* ***Part I.B.1***, the New Claim likely involves experts when assessing conformity issues. Also, the consolidation will impose a three-member tribunal on the New Claim, posing procedural difficulties.

57. ***Secondly***, referring to ***Part I.B.1***, the consolidation will lead to a delay. According to ICC Rules Art. 31(1), the Tribunal shall render its final award in six months and the time limit shall start to run from the date of the last signature of the ToR by the Tribunal (i.e., 30

August 2023). Namely, the final award of the present proceeding shall be made by 29 February 2024. Thus, the consolidation will disrupt the current proceeding, which is against ICC Rules Art. 22(1).

58. ***Thirdly***, the consolidation is not cost-effective. As discussed in ***Part I.B.2***, it is recognized that the largest cost item in arbitration is the other costs relating to the parties' presentation of their cases [*Secretariat's Guide, para.3-794; CIArb, p.13*], especially when the New Claim involves conformity issues, more expert fees will be incurred.

59. ***Thus, assuming but not conceding*** that the Tribunal has the competence to consolidate, still, it SHOULD NOT consolidate as it is neither more expeditious nor cost-effective.

CONCLUSION of ISSUE II

60. ***In conclusion***, the Tribunal CANNOT consolidate the proceedings as the Tribunal has no competence. Assuming but not conceding the Tribunal can consolidate, it still CANNOT consolidate as the consolidation requirements are not met. Even if the Tribunal can, it SHOULD NOT consolidate as it is neither more expeditious nor cost-effective to do so.

III. RESPONDENT can entirely or at least partially defend itself against the claim for payment.

61. RESPONDENT can fully defend itself against CLAIMANT's payment claim because it has already fulfilled its payment obligation under CISG Art. 53 (**III.A**). Alternatively, RESPONDENT can invoke CISG Art. 80 (**III.B**), or CISG Art. 77 (**III.C**) to fully or at least partially defend itself.

A. RESPONDENT has already fulfilled its payment obligations

62. RESPONDENT has already performed its payment obligations in accordance with CISG Art. 53 by making payment to the New Account specified in the Email [*Exh C5, p.16*]. The Email had apparent authority from CLAIMANT **(III.A.1)**. Furthermore, FA Art. 40 does not prevent the Email from having binding effects as to the bank account payment is to be made to **(III.A.2)**.

1. The Email has apparent authority from CLAIMANT

63. The parties agreed to be governed by the Danubian law in the FA Art. 6, and DCA is a verbatim adoption of the UNIDROIT Principles [*Exh C1, p.12; PO 1, p.59*]. Under DCA Art. 2.2.5(2), CLAIMANT is prevented from invoking against RESPONDENT the lack of authority of the author of the Email, since CLAIMANT's conduct and representation caused RESPONDENT to reasonably believe that the Email had been sent by an agent who has authority to act on behalf of CLAIMANT [*UNIDROIT, p.84, paras.6-7*].

64. As will be submitted in ***Part.III.B.2***, CLAIMANT's representation of actively praising its cybersecurity system and the response to RESPONDENT's notification of a previous attack constituted a representation that the system was safe and RESPONDENT would be notified if any cyberattack occurred [*Exh R1, p.33; Exh R2, p.34*]. Nevertheless, CLAIMANT did not inform RESPONDENT of any cyberattack, despite learning of a phishing attack on 23 January 2022 [*RfA p.7, para. 27*]. Consequently, it was reasonable for RESPONDENT to be less suspicious of emails apparently from CLAIMANT. Hence, CLAIMANT has made an implied representation that emails appearing to be from CLAIMANT had authority from CLAIMANT, and in particular that RESPONDENT need not be skeptical of emails as there had not been a cyberattack. Contrary to what CLAIMANT submits, RESPONDENT is arguing that maintaining weak cybersecurity on its own is the basis for apparent authority. Rather, it is the understanding that the parties would inform each other of cyberattacks and CLAIMANT's failure to do so which constitutes the implied representation.

65. RESPONDENT reasonably relied on CLAIMANT's representation. ***Firstly,*** the Email included considerable details of the exclusive information, such as the identities of the parties, names of their representatives, order numbers (i.e., 9601 and 15605), specification of sensors (i.e., S4-25889), quantity of the supply (i.e., 600,000 sensors), military function of products, two installments, and location of the existing bank account [*Exh C3, p. 16*]. The reasons provided for the change of bank account were credible, given that CLAIMANT does have a subsidiary in Danubia and a Danubian bank account was used in

a previous transaction [*PO 2, p. 61, para. 2; PO 2, p. 63, para. 12*]. Thus, RESPONDENT reasonably took the information as evidence that the Email did come from CLAIMANT, in the absence of warning of a cyberattack [*Exh R4, p. 36, para. 5*].

66. ***Secondly***, CLAIMANT's allegation that RESPONDENT failed to spot the errors in the Email is meaningless, given that the parties frequently made similar typos in previous communications without any objection raised by either party. For instance, "*SensorX*" was misspelled as "*SemsorX*" at the start of the FA, and Li Worry's email was misspelled as "*li.worry@sersorx.me*" at the end of his email [*Exh C1, p.9; Exh R2, p.34*]. Hence, it is unrealistic to expect RESPONDENT to scour the Email looking for mistakes.

67. ***Thirdly***, it was not reasonable to expect RESPONDENT to have read the news article reporting on the cyberattack because the article was posted after the first installment was due and was published in Mediterraneo [*Exh R3, p. 35, para. 1*].

68. Hence, CLAIMANT has made an implied representation that emails appearing to be from CLAIMANT had authority from CLAIMANT and that RESPONDENT need not be skeptical of emails as there had not been a cyberattack. RESPONDENT reasonably relied on this representation, establishing apparent authority under DCA Art.2.2.5(2).

2. The form requirements under FA Art. 40 are not applicable

69. FA Art. 40 only concerns amendments to the FA itself rather than deviations under Individual Contracts. As the Email concerned a deviation rather than an amendment, FA Art. 40 does not apply (**III.A.2.a**). Alternatively, FA Art. 40 has been waived by the parties' conduct, such that CLAIMANT cannot rely on FA Art 40 (**III.A.2.b**).

a. Art. 40 is inapplicable as the Email concerned a deviation, not an amendment

70. FA Art. 1 expressly provides for deviations from the FA in the Individual Contracts agreed under the FA [*Exh C1, p.9*]. In contrast, FA Art. 40 governs amendment or waiver of the FA, and so is not concerned with deviations in Individual Contracts. As such, changes which do not relate to the FA in general, but are limited in scope to an Individual Contract

are not governed by FA Art. 40.

71. The Email does not trigger FA Art. 40 since it was titled "Change of payment process for Order 9601" as a deviation, rather than an amendment. Although there is reference to "all payments", PO 9601 involves two installments. Considering the urgency and the reference to PO 9601, the only interpretation of the Email is that there should be a deviation from FA Art. 7 in relation to PO 9601 immediately, regardless of any amendments to be made.

b. Alternatively, FA Art. 40 has been waived in favor of a pragmatic approach

72. RESPONDENT has relied on CLAIMANT's conduct to form an understanding that there will not be reliance on FA Art. 40 in part or in whole and therefore CLAIMANT can no longer invoke FA Art. 40, pursuant to CISG Art. 29(2). Furthermore, the parties are bound by the practice they have established between themselves, pursuant to CISG Art. 9(1). The parties have previously agreed orally to amend FA Art. 6 in the formal annual meeting to have the price for the sensors fixed annually rather than semi-annually [*RfA, p.6, para.11*]. CLAIMANT's engagement in this arrangement constitutes conduct indicating that FA Art. 40 will not be relied upon. Even if the amendment took effect via the meeting minutes, the minutes of the agreement bore no signatures [*PO2, p.62, para.8*] and so FA Art. 40 was not fulfilled, but the amendment was nevertheless treated as valid by both parties. Hence, there would nevertheless be a waiver of the requirement as to signature.

73. ***Consequently***, RESPONDENT had relied on CLAIMANT's conduct that a pragmatic approach towards the form required for amendments generally [*Exh R4, p.36*], and therefore Art. 40 in general cannot be invoked by CLAIMANT to deny the validity of an amendment of the FA. Alternatively, FA Art. 40 was modified by the parties' practice of making changes in writing without signature by both parties, such that the Email in writing without signature fulfills the form requirements.

B. Alternatively, RESPONDENT can rely on CISG Art. 80 to entirely or at least partially defend itself against the claim for payment

74. In the unlikely event if the Tribunal finds that RESPONDENT failed to perform its

payment obligations, RESPONDENT can defend itself relying on CISG Art. 80. ***Firstly,*** CLAIMANT omitted its information duty imposed by DCA and EDPA (**III.C.1**). ***Secondly***, CLAIMANT's omission caused the non-performance of RESPONDENT and consequently triggered CISG Art. 80 (**III.C.2**). ***Thirdly***, RESPONDENT can rely on CISG Art. 80 even if CLAIMANT had no legal obligation for the communication (**III.C.3**). ***Additionally,*** RESPONDENT should be attributed to no liability for the non-performance (**III.C.4**). ***Alternatively***, RESPONDENT can at least be exempted from a considerable amount of payment under CISG Art. 80. (**III.C.5**)

1. CLAIMANT omitted its information duty and obligation under DCA and EDPA

75. As illustrated in ***Part III.A***, DCA is applicable to the present case on the basis of the parties' selection to Danubian law. CLAIMANT omitted to perform its duty to inform RESPONDENT of the cyberattack imposed by DCA Arts. 1.7 and 1.8 (**III.B.1.a**), DCA Art. 5.1.3 (**III.B.1.b**), and EDPA Art. 34 (**III.B.1.c**).

a. CLAIMANT omitted its duty of good faith under DCA Arts. 1.7 and 1.8

76. CLAIMANT has a duty of good faith pursuant to DCA Art. 1.7. The principle of good faith is also encapsulated in DCA Art. 5.1.2 and CISG Art. 7, and specifically concretized in DCA Art. 1.8 to protect reasonable and detrimental reliance against inconsistent behavior [*Vogenauer, p.227, para.2; Kotzur, p.2, para.23*]. CLAIMANT acted in bad faith by causing RESPONDENT to have an understanding that CLAIMANT would notify RESPONDENT of any cyberattack, and acting inconsistently with it [*Matresses Case II*].

77. An international standard of good faith and fair dealing should be applied so CLAIMANT cannot argue that Mediterraneo does not have explicit data protection laws to avoid its responsibility to communicate the cyberattack [*Vogenauer, p.212, para.16; Brödermann, p.31, para.3*]. Instead, informing customers of cyberattack that creates increased risks to contractual performance is good business practice followed by many companies [*Exh R3, p. 35, para. 4*]. It is only fair and reasonable to hold the parties on the same standard.

78. ***Firstly***, CLAIMANT caused RESPONDENT to have an understanding that it would be notified by CLAIMANT if any cyberattack occured, and CLAIMANT's system was sufficiently safeguarded. "*Understanding*" may include any subject matter, and it can be "*caused*" by any conduct [*Vogenauer, p.624, paras.5-6; UNIDROIT, p.21, para.4*]. CLAIMANT expressed concerns about the cyberattack, requested for detailed information and immediate follow-up *à jour*, and expressed appreciation towards RESPONDENT's open and forward-looking communication, after RESPONDENT took the initiative to inform it of the cyberattack in August 2020 [*Exh R2, p.34*]. It was not known to RESPONDENT whether the criminals accessed data relating to CLAIMANT at the time. Thus, CLAIMANT's argument that it "*saw no real benefit*" and was not expected to inform RESPONDENT of "*what seemed like a minor incident*" does not stand [*Exh C6, p. 17, para. 8*]. Furthermore, CLAIMANT's officer actively praised their strengthened cybersecurity system with RESPONDENT in December 2021 [*Exh R4, p. 36, para. 3*]. As such, CLAIMANT's conduct induced RESPONDENT to believe that the parties shall update each other on data security matters and CLAIMANT's system was highly secured.

79. ***Secondly***, after receiving the Email, RESPONDENT has reasonably acted in reliance on the abovementioned understanding to its detriment, having regard to the circumstances and the expectation it entertained of CLAIMANT [*UNIDROIT, p.21, para.4; Vogenauer, p.229, paras.9-10*]. Had RESPONDENT knew that CLAIMANT was under a cyberattack, RESPONDENT would have called Ms. Bertha Durant of CLAIMANT for a confirmation of the change of bank account [E*xh R4, p.36, para.6*]. Also, the element of detriment was fulfilled as RESPONDENT had to take additional steps to confirm the Email and this requirement does not mandate any harmfulness [*Study-L, p.52, para.500*].

80. ***Consequently***, CLAIMANT's acted inconsistently with the understanding it has caused RESPONDENT to have, and omitted its duty of good faith under DCA Arts. 1.7 and 1.8.

b. CLAIMANT omitted its duty to cooperate under DCA Art. 5.1.3

81. Pursuant to DCA Art. 5.1.3, CLAIMANT has a duty to cooperate, which is particularly important due to the long term contractual relationship provided in the FA [*UNIDROIT,*

p.154, para.3]. Contrary to CLAIMANT's argument that the scope of this duty limited to enabling RESPONDENT's performance, and CLAIMANT has already completed the duty by disclosing their bank account details in FA Art. 7, RESPONDENT submits that it is objectively reasonable to expect CLAIMANT to inform RESPONDENT of the cyberattack, absence of the first installment and Ms. Audi's leave, because these events are vital to, and might endanger the performance of PO 9601 [*Vogenauer, p.624, paras.7-9; Machinery case*]. Notably, CLAIMANT would only have to incur minimal costs to fulfill its duty, and there is an information asymmetry [*Brödermann, p.124, para.3*].

82. ***Firstly***, the cyberattack creates additional risks for non-performance of PO 9601 because the criminals took over Ms. Audi's email account and the leaked information, such as contact information of RESPONDENT's employees and transaction details, is highly relevant to the business relationship with RESPONDENT. Criminals may easily, and in fact did, make use of this information to defraud RESPONDENT and led RESPONDENT to pay the installments under PO 9601 to the New Account.

83. ***Secondly***, CLAIMANT would only have to bear minimal costs to fulfill its duty, since it could reduce risks of non-performance by merely sending RESPONDENT an email with minimal information about the cyberattack, such as that the fact that CLAMANT became the victim of a successful cyberattack and when it was discovered, just as how RESPONDENT notified CLAIMANT of the cyberattack in August 2020 [*Exh R1, p.33*].

84. ***Thirdly***, the information is asymmetric between the parties as the fact that CLAIMANT was attacked by malware was not accessible to RESPONDENT. As discussed in ***Part III.A.2***, it is reasonable for RESPONDENT to trust the "official" Email from "Ms. Audi" instead of the Automotive Weekly news article, particularly when there had not been any unusual conditions that raised special attention, nor complaints from CLAIMANT.

85. Additionally, there was an internal order that all account managers should contact their counterparts and inform them about the cyberattack, while RESPONDENT was not contacted merely because of Ms. Audi's absence and the general shortage of personnel [*PO 2, p.64, para.26*]. This indicates that CLAIMANT also believed that it was reasonable and

necessary to inform RESPONDENT about the cyberattack.

86. Furthermore, CLAIMANT should have noted the absence of payment of the first installment and communicated with RESPONDENT after the payment was due, so that RESPONDENT's payment of the second installment to New Account may be prevented.

87. Therefore, CLAIMANT omitted the duty to cooperate pursuant to DCA Art. 5.1.3, given its failure to inform RESPONDENT of the cyberattack, the absence of the first installment, and Ms. Audi's leave.

c. CLAIMANT omitted its information obligation under EDPA Art. 34

88. RESPONDENT submits that CLAIMANT omitted the obligation to communicate the cyberattack under EDPA Art. 34. EDPA is applicable to CLAIMANT under EDPA Art. 3 (**III.B.1.c.i**). The cyberattack results in high risk to the rights and freedoms of RESPONDENT's employees under EDPA Art. 34(1) (**III.B.1.c.ii**). CLAIMANT cannot rely on exceptions under EDPA Art. 34 (**III.B.1.c.iii**). CLAIMANT failed to communicate the cyberattack according to requirements under EDPA Art. 34(1) and 34(2) (**III.B.1.c.iv**).

i. EDPA is applicable to CLAIMANT under EDPA Art. 3

89. Contrary to CLAIMANT's assertion that EDPA is inapplicable because the parties opted for Danubian law and CLAIMANT cannot be expected to be aware of Equatorianian law, RESPONDENT submits that it is applicable as EDPA Art. 3 states its territorial scope.

90. CLAIMANT should be regarded as an "*establishment"* in Equatoriana in light of its effective and real exercise of activity through stable arrangements, pursuant to EDPA Art. 3(1) [*Guidelines 3/2018, p.7; Svantesson, p.87*]. CLAIMANT's significant revenue and income earned from regular transactions with RESPONDENT since 2019 in Equatoriana are "*stable arrangements*" [*Exh C1, pp.9-12*; *Guidelines 3/2018, p.8; Soriano, p.542, para.B*].

91. Alternatively, assuming but not conceding that EDPA Art. 3(1) is not established, CLAIMANT is still bound by EDPA despite it not being established in Equatoriana, as provided in EDPA Art. 3(2), which intended to bring a fair competition in a globalized

world [*Svantesson, p.76; Guidelines 3/2018, p.4*]. While any domestic law that creates cross-border obligations should be applied and interpreted in light of international law restrictions [*Svantesson, p. 76*], arguing that businesses are not expected to be aware of relevant cross-border obligations is stretching the restrictions too far [*Geigy, paras.10-12; Air Transport, para.123*]. Legislative intentions and expectations in the international trade market would be defeated, and cross-border provisions would become meaningless.

92. Furthermore, RESPONDENT raised the obligations imposed under EDPA Art. 34 when it informed CLAIMANT of the cyberattack in August 2020 [*Exh R1, p.33*]. CLAIMANT has the resources [*PO 2, p. 61, para.1*] and is reasonably expected to understand legal obligations that arise from the long-standing business relationship with RESPONDENT. Therefore, EDPA is applicable to CLAIMANT with reference to EDPA Art. 3.

ii. EDPA Art. 34(1) is applicable as the cyberattack is likely to result in a high risk to the rights and freedoms of RESPONDENT's employees

93. Contrary to CLAIMANT's assertion that EDPA Art. 34 is inapplicable because it only applies to personal data and excludes RESPONDENT as a legal person, RESPONDENT submits that the cyberattack is a "*personal data breach*" in light of its "*high risk to the rights and freedoms*" of RESPONDENT's employees under EDPA Art. 34(1).

94. The cyberattack is a "*personal data breach*", as defined in EDPA Art. 4(12). The criminals accessed information available on Ms. Audi's email account without authorization [*PO 2, p.64, para.25*], and even encrypted the customer relation management system [*Exh C6, p. 17, para.10*], thus violating CLAIMANT's cybersecurity system and compromising the confidentiality and availability of data [*Tosoni, p.191*]. As such, Mr. Royce's email address [*Exh C5, p.18*] and possibly the contact information of RESPONDENT's other employees were leaked. One can identify Mr. Royce with his email address because it contains his name and RESPONDENT's company, thus the information leaked is "*personal data*" according to EDPA Art. 4(1) [*Determann, paras.0.32-0.33*]. Protection for RESPONDENT thus flows from EDPA [*Bygrave/Tosoni, p.11; Digital Rights Ireland and Others, pp.32-37*].

95. The degree of risks should be ascertained by considering both its likelihood and severity [*Guidelines 9/2022, p.23, para.103*], nature, sensitivity and volume of personal data, and ease of identification of data subjects [*Burton, p. 659; Guidelines 9/2022, pp.24-25*]. Situations with identity fraud and financial loss often result in high risks [*Burton, p.659*].

96. Having access to the contact information of RESPONDENT's employees and confidential details on relevant transactions, criminals could easily, and actually did, contact RESPONDENT's employees in CLAIMANT's name and abuse the trust between the parties to defraud RESPONDENT and gain economic benefits. They could also send infected emails to RESPONDENT's employees, thus endangering RESPONDENT's cybersecurity and resulting in widespread risks to rights and freedoms.

97. Therefore, the cyberattack amounts to a personal data breach that is likely to result in high risk to the rights and freedoms of RESPONDENT's employees under EDPA Art. 34(1).

iii. The exceptions under EDPA Art. 34 are not applicable to CLAIMANT

98. The case does not fall within the exceptions under EDPA Art. 34(3) that exempt CLAIMANT's duty to communicate personal data breach under EDPA Art. 34(1).

99. ***Firstly***, CLAIMANT did not implement appropriate protection measures under EDPA Art. 34(3)(a). CLAIMANT established a cybersecurity defense system with firewalls and regular training of employees [*Exh C6, p.17, para.4*], which cannot render personal data unintelligible [*Burton, pp.659-660; Guidelines 9/2022, p.22, para.97*]. For instance, a firewall only sets up a barrier from unprotected networks, and even CLAIMANT acknowledged that employees might act carelessly [*Exh C6, p.17, para.4*]. CLAIMANT neglected to implement appropriate measures, such as state-of-the-art encryption or tokenization, to protect data prior to the breach [*Burton, pp. 659-660; Guidelines 9/2022, p.22, para.97*].

100. ***Secondly***, CLAIMANT did not take subsequent measures to ensure that the high risk is no longer likely to materialise under EDPA Art. 34(3)(b). Although CLAIMANT quickly detected and neutralized the malware as stated in C's memo, CLAIMANT failed to acknowledge that the customer relations management system took a hit [*PO 2, p.64,*

para.25]. CLAIMANT also failed to make any public announcements and properly execute its internal order to inform RESPONDENT of the cyberattack [*PO 2, p.64, para.26*]. The high risk to the rights and freedoms of RESPONDENT's employees materialized, as RESPONDENT paid to the New Account after removal of the malware.

101. ***Thirdly***, it would not involve disproportionate effort under EDPA Art. 34(3)(c). As detailed in ***Part III.B.1.a***, CLAIMANT would only have to provide minimal information on the cyberattack to RESPONDENT and incur minimal costs.

102. Therefore, CLAIMANT cannot rely on the exceptions under EDPA Art. 34 to avoid its obligation to communicate the cyberattack to RESPONDENT.

iv. CLAIMANT omitted to communicate the cyberattack in accordance with the requirements under EDPA Art. 34(1) and 34(2)

103. EDPA Art. 34(1) requires CLAIMANT to communicate the personal data breach to the data subject "*without undue delay*" which means as soon as possible [*Burton, p.660; Guidelines 9/2022, p.20, para.83*]. Despite CLAIMANT's discovery of the cyberattack on 23 January 2022 and realization of its severity on 15 May 2022 [*Exh C6, p.17, paras.5-10*], it never informed RESPONDENT until 5 September 2022 [*Exh C3, p.14*].

104. Furthermore, the main objective of notification under EDPA Art. 34(2) is to provide specific information about how data subject can protect themselves [*Guidelines 9/2022, p.20, para.83*]. However, CLAIMANT did not include any description of the nature and likely consequences of the breach, the name and contact details of person-in-charge, nor any measures to address the breach [*Burton, p.661; Guidelines 9/2022, p.20, para.86*].

105. CLAIMANT omitted to communicate the cyberattack with RESPONDENT as soon as possible and provide details to help RESPONDENT protect itself. Thus, CLAIMANT violated its obligation under EDPA Arts. 34(1) and 34(2).

106. ***In conclusion***, CLAIMANT's failure to inform RESPONDENT of the cyberattack amounts to omission of duty and obligation under DCA and EDPA.

2. CLAIMANT's omission caused RESPONDENT's non-performance

107. As an objective element of invoking CISG Art. 80, the causal link between CLAIMANT's conduct and RESPONDENT's performance is well established [*CLOUT case No. 1080*]. ***Firstly***, as explained in ***Part III.A.1***, CLAIMANT caused RESPONDENT to believe that the author of the Email has the authority to act on behalf of CLAIMANT. CLAIMANT's failure to effectively defend its system opened the entrance for the cyberattack, and enabling the cybercriminals to collect and contain the confidential information in the Email. ***Secondly***, the FA between the parties implies that the parties had a common goal and were under a duty to make performance-enabling steps as well as not impairing performance [*Kröll et al, p.1083*]. However, as illustrated in ***Part III.B.1***, CLAIMANT's omission to inform RESPONDENT of the cyberattack was in breach of its duty and obligation, demonstrating a lack of co-operation in achieving the common goal of the contract are relevant under CISG Art. 80 [*Exh R1, p.33; Exh R3, p.35; Neumann, p.162; Golecki, paras.1-29*]. ***Additionally***, as illustrated in ***Part III.B.1***, CLAIMANT's omission to notify RESPONDENT of the leave of Ms. Audi, and to be aware of the absence of the payment of first installment after it was due, also contributed to RESPONDENT's second payment to the New Account.

108. ***Consequently***, CLAIMANT created essential risks and broke the *synallagma* contained in CISG Art. 80 [*Schwenzer I, p.1090; Neumann, p.167*]. It is sufficiently clear that CLAIMANT's omissions caused RESPONDENT's reliance on the Email and its payment to the New Account, leading to the non-performance.

3. RESPONDENT can rely on CISG Art. 80 even if DCA and EDPA are inapplicable

109. CISG Art. 80 requires only that one party's failure to perform be caused by the other party's act or omission, whether or not that act or omission was wrongful [*Schwenzer I, Art.80, para.3; Kröll et al, para.1100*]. ***Assuming but not conceding*** that the information duty and obligation under DCA and EDPA are inapplicable, RESPONDENT can still invoke CISG Art. 80 if only the non-performance was caused *de facto* by CLAIMANT's

omissions, as illustrated in ***Part.III.A.1***. Additionally, in light of the mutual reasonable expectation that each party will perform as promised, CLAIMANT's omission under CISG Art. 80 is not mandated to be unforeseeable or unavoidable, so long as it can be considered a *conditio sine qua non* for the non-performance [*SCC Case No. 2019, para.219*]. It is "less worse" that the promisor fails in his performance compared to the promisee's causation of the failure and subsequent attempt to derive a benefit from it [*Kröll et al, p.1083; SCC Case No. 2019, para.219*]. In a leading case, the court found that even a grossly negligent buyer deserved more protection than a seller who conceals, and applied Art. 80 CISG to uphold the entire defense [*Used Car Case, para.7*]. Therefore, it is clear that RESPONDENT's failure to discover that CLAIMANT had been cyberattacked in the present case cannot affect the application of Art. 80 CISG as an entire defense.

110. Consequently, CLAIMANT's omission is established even if DCA and ECPA are inapplicable. RESPONDENT can be exempted from all the applicable legal remedies in light of CISG Art. 80, which prevents CLAIMANT from relying on RESPONDENT's non-performance [*CLOUT Case No. 176*].

4. RESPONDENT should not be attributed to non-performance

111. As illustrated in ***Part.III.B.2***, RESPONDENT's non-performance was entirely caused by CLAIMANT's omission which directly made the performance unachievable [*Neumann, p.158*]. While RESPONDENT's payment was prepared in full and paid on time, the only impediment to the performance was the fact that CLAIMANT concealed the cyberattack.

112. Only CLAIMANT's omission contributed to the non-performance. Contrary to CLAIMANT's untenable allegation that RESPONDENT was negligent in checking the Email and thus failed to identify it, it is telling that RESPONDENT has given adequate consideration and taken measures to verify the Email. The level of care or consideration that RESPONDENT is mandated should be adjusted in conjunction with the circumstances.

113. ***Firstly***, it is unreasonable to require RESPONDENT to examine every details when receiving the Email while the information included was correct and confidential within the parties. RESPONDENT could never foresee the cyberattack or other likewise possibilities

that the detailed information was leaked and acquired by a third party while RESPONDENT had never been informed about the event of cyberattack. ***On the other hand***, given that some mistakes have appeared in previous communication between the parties, it would be unrealistic to expect RESPONDENT to suspect the authenticity of the email even if RESPONDENT had detected the minor mistakes in its content.

114. ***Consequently,*** it is clear that RESPONDENT is fully exempted from the payment obligation because the non-performance was solely from CLAIMANT's omission.

5. Alternatively, RESPONDENT can at least partially defend itself under CISG Art. 80

115. ***Assuming but not conceding*** that RESPONDENT contributed to the non-performance, contrary to CLAIMANT's assertion that CISG Art. 80's "*all-or-nothing*" effect is not suitable for cases of dual responsibility, RESPONDENT can still rely on CISG Art. 80 [*Brunner, et al, p. 593*]. The "*weighing and balancing*" approach to applying CISG Arts. 80 and 77 entails that both parties' contribution to the non-performance (which RESPONDENT does not have) should be assessed to distribute the loss among them accordingly [*Kröll et al, pp. 1105-1106; Clay Case pp. 52-54*].

116. ***In conclusion***, RESPONDENT can fully or at least partially defend itself and CLAIMANT should bear the consequence in any case, since CLAIMANT caused the non-performance and had forfeited its rights to claim for the payment against RESPONDENT under CISG Art. 80.

C. Alternatively, RESPONDENT can fully or at least partially defend itself under CISG Art. 77

117. RESPONDENT can fully defend itself against CLAIMANT's payment claim under CISG Art. 77 (**III.C.1**) to reduce the amount which could have been but failed to be reasonably mitigated by CLAIMANT (**III.C.2**). Alternatively, RESPONDENT can at least partially defend itself (**III.C.3**).

1. RESPONDENT can rely on CISG Art. 77

118. Contrary to CLAIMANT's submission that CISG Art. 77 is only applicable to damages, RESPONDENT submits that CISG Art. 77 can be applicable to payment claims (**III.C.1.a**), and is applicable to the present case as a necessary implication (**III.C.1.b**).

a. CISG Art. 77 can be applicable to payment claims

119. The duty to mitigate under CISG Art. 77 can apply to payment claims according to its literal reading and legislative purpose. A general rule requiring reasonable mitigation is laid down by CISG Art. 77's first sentence [*Honnold, p.462*]. Moreover, the drafters intended to prevent the aggrieved party from sitting back passively for being compensated the loss which could have been reasonably reduced [*Kröll et al., p.1033*]. Since CLAIMANT indeed passively waited and directly caused the total loss of price under PO 9601 (analyzed in ***Part III.C.2***), RESPONDENT should not be denied the protection of CISG Art. 77.

b. CISG Art. 77 must apply as a necessary implication

120. CISG Art. 77 must be applicable to the case at hand. CLAIMANT's payment claim can be treated as a claim for damages, and this case presents specific circumstances which would unreasonably hold RESPONDENT to the payment claim if it cannot apply.

121. ***Firstly***, CLAIMANT's payment claim can be treated as a claim for damages because doing so creates no practical difference. It is recognised that for reciprocal contracts, there can be no practical difference between the right to performance and the right to claim damages [*Schwenzer II, p.293*]. The amount claimed by CLAIMANT is the total price under PO 9601, *i.e.*, the amount of the total loss of CLAIMANT under PO 9601, which equals the amount of damages under CISG Art. 74. Thus, there is no practical difference between treating CLAIMANT's payment claim as an action for price or a claim for damages.

122. ***Secondly and more importantly***, it is unreasonable to hold RESPONDENT to the payment claim. The duty to mitigate under CISG Art. 77 may bar an action for price in specific circumstances when the buyer would unreasonably hold to the contract [*Schwenzer I, p.832*]. To be exact, the unreasonableness is caused by the conflicts between the

mitigation principle and the aggrieved party's right to performance [*Honnold, pp.460-462; Riznik, p.9*]. The conflict is created when the seller unreasonably increased the costs and raised a payment claim against the buyer and the rules of the jurisdiction are more favorable to an action to require performance [*Honnold, p.461*].

123. Here, the mitigation principle and the performance also conflicts. ***Firstly***, as analyzed in ***Part III.C.2***, CLAIMANT's unreasonableness in withholding the information about the January cyberattack and managerial problem caused RESPONDENT's payment to the New Account and the loss of price under PO 9601. ***Secondly***, DCA provides a right to performance of monetary obligation under Art. 7.2.1. Therefore, allowing CLAIMANT to claim performance conflicts with the mitigation principle, as it would unfairly transfer the consequence of CLAIMANT's failure to reasonably mitigate the loss to RESPONDENT. As a conclusion, CISG Art. 77 should bar CLAIMANT's payment claim.

2. CLAIMANT could have taken reasonable steps to mitigate the loss but failed

124. CISG Art. 77 requires reasonable mitigation measures which can be expected under the circumstances to be taken by the aggrieved party, and the mitigation duty can arise before the loss has already occurred [*Schwenzer I, paras.1105-1107*]. CLAIMANT submits that it did not know about RESPONDENT's wrong payment so could not have gone any further in preventing it. However, CLAIMANT could have prevented RESPONDENT's wrong payment, because CLAIMANT knew that (i) it was cyber-attacked in January 2022, (ii) cybercriminals would very likely email to the customers requiring immediate action or authorization [*Exh R3 p.35; PO 2, p.63, para.17*], and (ii) RESPONDENT had two payments to made under PO 9601. Therefore, CLAIMANT had the knowledge to anticipate such payment and could have reasonably prevented the loss of the first installment (**III.C.2.a**) and the second installment (**III.C.2.b**), but failed to do so.

a. Loss of payment of the first installment could have been prevented

125. Practices between the parties are to be considered in determining the extent of the mitigation duty [*Schwenzer I, p.1107*]. Since RESPONDENT had immediately informed CLAIMANT about a cyberattack in August 2020 even when it was uncertain whether

CLAIMANT would be affected [*Exh R1 p.33*]. As illustrated in ***Part.III.A.1.a.***, it is reasonably expected that a reasonable person in the same position as CLAIMANT would have done the same, sharing cyberattack information immediately after the discovery. If RESPONDENT had been informed of CLAIMANT's cyberattack, it would never have paid the first installment to the New Account [*Exh R4 p.36 para.6*]. Therefore, by withholding the information of the cyberattack in January 2022, CLAIMANT unreasonably increased RESPONDENT's risk to cyberattack and caused payment loss.

126. ***As a conclusion***, by failing to take a reasonable step to inform RESPONDENT the cyberattack, CLAIMANT had failed to mitigate under CISG Art. 77, RESPONDENT is thus entitled to reduce the amount claimed from USD 38,400,000 to USD 19,200,000.

b. Loss of payment of the second installment could have been prevented

127. The second installment was agreed to and had indeed been made on 30 June 2022 [*Exh C2 p.13*]. Even though CLAIMANT had been maintaining their internal control and accounting system during 15 May 2022 to 30 June 2022 , the first installment was agreed to be and had indeed been made on 3 May 2022, [*RfA p.6 para 14*]. Moreover, CLAIMANT must have realized the severity of the cyberattack on 15 May 2022 [*Exh C6 p.17 para 10*]. Therefore, there had been a sufficient time of 12 days for CLAIMANT to take up reasonable measures such as sending a notice to RESPONDENT for communicating the outstanding payment, which would draw both parties' attention to the Email and prevent the loss of the payment of the second installment to the New Account.

128. ***Consequently***, by failing to take up any reasonable measures to notify RESPONDENT, CLAIMANT failed to fulfill its duty to mitigate under CISG Art. 77. RESPONDENT is thus entitled to reduce the amount claimed by CLAIMANT down to zero.

3. Alternatively, RESPONDENT can partially defend itself under CISG Art. 77

129. ***Assuming but not conceding*** that the loss of payment of the first installment could not have been mitigated, the loss of payment of the second installment must be capable of being mitigated because it was lost solely because of CLAIMANT's own managerial problem

which ought not to be reasonably expected by RESPONDENT. CLAIMANT is entitled to at most USD 19,200,000.

CONCLUSION of ISSUE III

130. CLAIMANT is not entitled to any payment because RESPONDENT has satisfied its payment obligation to the New Account provided in the Email. Alternatively, RESPONDENT can rely on CISG Art. 80 to fully or at least partially defend itself against the claim for payment. RESPONDENT can also rely on CISG Art. 77 to fully or at least partially defend itself against the claim for payment.

REQUEST FOR RELIEF

For the above reasons, RESPONDENT respectfully requests the Tribunal to find that:

(a) The Tribunal cannot and should not authorize the addition of the New Claim into this pending arbitration;

(b) In the unlikely event that a new arbitration is commenced, the Tribunal cannot and should not consolidate the arbitral proceedings;

(c) CLAIMANT is not entitled to any payment under PO 9601. RESPONDENT can invoke a violation of a contractual duty or obligation or rely on a provision of the CISG to entirely defend itself against the claim for payment.

(d) In the unlikely event that the Tribunal finds that CLAIMANT is entitled to partial payment, the amount should be reduced to at most USD 19,200,000.

And to order that:

(e) CLAIMANT bears the costs of this arbitration.

CERTIFICATE

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

NG Wai

FUNG Hiu To

LAW Chin Yuet Maxine

LEUNG Ka Yan

SUN Qiwei

SU Kexin

LAU Yi Ching Raphael

DU Zhuoman