21ST ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

ICC CASE NO. Moot-100/MM

SENSORX, PLC

~CLAIMANT

-V-

VISIONIC LTD

~RESPONDENT

MEMORANDUM FOR CLAIMANT

The West Bengal National University of Juridical Sciences

MUKUND GUPTA KUNAL KHILNANI

NUPUR GUPTA AKSHITA MUNDRA

Counsel for CLAIMANT

7 DECEMBER 2023

ACADEMIC INTEGRITY AND
ARTIFICIAL INTELLIGENCE DISCLOSURE STATEMENT

UNIVERSITY: WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES

COUNTRY: INDIA

ACADEMIC INTEGRITY	**YES**	**UNSURE**	**NO**
We confirm that this memorandum does not include text from any source, whether the source was in hard copy or online available, which has not been properly distinguished by quotation marks or citation.	✓		

USE OF AI			
We have used AI enhanced **search engines** for researching sources and (factual or legal) information on the Moot Problem.			✓
We have used AI-enhanced **proof-reading** tools.	✓		
We have used AI enhanced **translation tools** to translate sources relevant for our work on the Moot Problem.	✓		
We have used AI enhanced **translation tools** to translate parts of the text submitted in this Memorandum into English from any other language.			✓
We have used AI to **generate overviews or briefings on relevant factual and legal topics** which are not submitted as part of the memorandum but have been solely used to advance our own understanding.			✓

We have used AI tools to **generate statements that are now included in the memo**. Please tick yes even if you have altered or amended the text generated by AI before submission.			✓
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Other (please specify):			✓

We hereby certify the truthfulness of our statements, and confirm that we have not used AI-applications in any other way in preparing the submission of this memorandum.

DATE: **7 DECEMBER 2023**

NAME: MUKUND GUPTA SIGNATURE:

NAME: KUNAL KHILNANI SIGNATURE:

NAME: NUPUR GUPTA SIGNATURE:

NAME: AKSHITA MUNDRA SIGNATURE: Akshita Mundra

NAME: SAHAJ MATHUR SIGNATURE: Sahaj

NAME: SUVAROOP SAHA ROY SIGNATURE:

NAME: GHULAM MUHAMMAD ADNAN SIGNATURE:

NAME: VELISLAVA HRISTOVA SIGNATURE:

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INDEX OF ABBREVIATIONS

Abbreviation	Full text
%	Per cent
&	And
§, §§	Section(s)
¶, ¶¶	Paragraph(s)
AC	CISG Advisory Council
Ans ICC Not RfA	ICC Notification of the Answer to the Request for Arbitration
ARfA	Answer to Request for Arbitration
Art., Arts.	Article(s)
ASA	Swiss Arbitration Association
Authorisation Request	Request for authorisation of new claim/ subsidiarily of consolidation of conditionally initiated separate proceedings
CCO	Chief Cybersecurity Officer
CEO	Chief Executive Officer
CISG	United Nations Convention on contracts for the International Sale of Goods (1980)
CL. Memo	Memorandum for CLAIMANT
CLAIMANT	SensorX, plc
CLOUT	Case Law on UNCITRAL Texts
COO	Chief Operating Officer
Corp.	Corporation
DAL	Danubian Arbitration Law
DCA	Danubian Contract Act
Dist.	District

EDPA	Equatoriana's Data Protection Act
ed(s).	Editor(s)
est.	Estimate
Ex. C1-C8	CLAIMANT Exhibit 1 to CLAIMANT Exhibit 8
Ex. R1- R4	RESPONDENT Exhibit 1 to Respondent Exhibit 4
FA	Framework Agreement
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICC Not RfA	ICC Notification of a Request for Arbitration
ICC Not CD	ICC Notification of Court Decision
ICC Rules	Rules of Arbitration of the International Chamber of Commerce (2021)
Inc.	Incorporation
LLC	Limited Liability Company
Ltd.	Limited
MLEC	UNICTRAL Model Law on Electronic Commerce
MLES	UNICTRAL Model Law on Electronic Signatures
Mr.	Mister
Ms.	Miss
No(s).	Number(s)
NoD	Notice of Defect
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Ors.	Others
p., pp.	Page(s)

Parties	CLAIMANT and RESPONDENT
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
Plc	Public Limited Company
PO No. 9601	Purchase Order Number 9601
PO No. A-15604	Purchase Order Number A-15604
PO1	Procedural Order No. 1 of 6 October 2023
PO2	Procedural Order No. 2 of 6 November 2023
Pty Ltd.	Proprietary limited company
Rejection	Rejection of the Request for authorisation of new claim/consolidation of proceedings
RESPONDENT	Visionic Limited
RfA	Request for Arbitration
SCC	Stockholm Chamber of Commerce
SoF	Statement of Facts
The Agreements	The Framework Agreement, Purchase Order Number A-15604 and Purchase Order Number 9601
ToR	Terms of Reference
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
USD	United States Dollar
v	*Versus* (Latin); against
Vol.	Volume

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STATEMENT OF FACTS

Background and Disputing Parties

1. This memorandum ("**CL. Memo**") is submitted pursuant to Procedural Order No. 1 ("**PO1**") dated **6 October 2023** and in accordance with the procedural timetable contained in ¶4(2) therein.

CLAIMANT is:	RESPONDENT is:
SensorX, plc	**Visionic Ltd**
Atwood Lane 1784	Optronic Avenida 2
Capital City	Oceanside
Mediterraneo	Equatoriana

2. CLAIMANT is one of the leading Tier 2 producers of sensors that have various applications in the automotive industry, in particular for all types of autonomous driving. RESPONDENT is a Tier 1 producer of optical systems used by many leading car producers for their autonomous parking systems. (CLAIMANT and RESPONDENT are collectively referred to as "**Parties**").

The Framework Agreement and its Performance

3. On **7 June 2019**, the Parties entered into a Framework Agreement ("**FA**") to regulate the future supply of CLAIMANT's sensors to RESPONDENT.
4. Between **June 2019** and **January 2022**, RESPONDENT submitted 22 purchase orders under the FA, and CLAIMANT successfully delivered more than 5,000,000 sensors without encountering any issues.
5. CLAIMANT delivered 200,000 units of L-1 sensors to RESPONDENT under Purchase Order ("**PO**") No. A-15604 of **4 January 2022**. The payments were supposed to be made in two instalments.
6. On **17 January 2022**, through PO No. 9601, RESPONDENT ordered 1.2 million units of S4-25899 sensors. The payment under the PO was split into two equal instalments due on **3 May** and **30 June 2022** and was to be made into the bank accounts specified in Art. 7 of the FA.

The Cyberattack suffered by CLAIMANT

7. On **5 January 2022**, CLAIMANT was affected by a cyberattack. From **15 May** to **June 2022**, CLAIMANT'S internal planning and accounting system went down and underwent investigation and sanitization.

Non-Payment under PO No. 9601

8. On **28 March 2022**, an email was sent to RESPONDENT impersonating Ms. Telsa Audi, CLAIMANT'S account manager. The email requested a transfer of the amount due for deliveries under PO No. 9601 to a different bank account ("**Phishing email**"). The domain name for sending this email was

“se**m**sorX.com” instead of “se**n**sorX.com”. Illustration 1 below shows a comparison between the domain name used in the Phishing email and an authorised email sent to RESPONDENT on **28 August 2020** by the Head of Sales and Purchasing of CLAIMANT, Mr. Li Worry.

From:	**<li.worry@sensorx.me>**	**From:**	**<telsa.audi@semsorx.me>**
Sent:	28 August 2020, 12:25 p.m.	**Sent:**	28 March 2022, 8:25 am
To:	<william.toyoda@visionic.eq>	**To:**	<henry.royce@visionic.eq>
Cc:	<cybersecurity@sensorx.me>	**Subject:**	**Change of payment process for Order 9601**
Subject:	RE: Cyberattack warning!!		

Illustration 1: Comparison between the domain used in the Phishing email and the one typically used by CLAIMANT

9. On **30 June 2022**, RESPONDENT sent the payment under PO No. 9601 to the new bank account provided in the Phishing email.
10. On **25 August 2022**, CLAIMANT discovered that no payment had been made under PO No. 9601. With a letter of **5 September 2022**, it set RESPONDENT a deadline for payment.
11. On **8 September** 2022, RESPONDENT refused to make any further payment, asserting that the payment had been made to the new bank account. Illustration 2 below shows the chronology of relevant events.

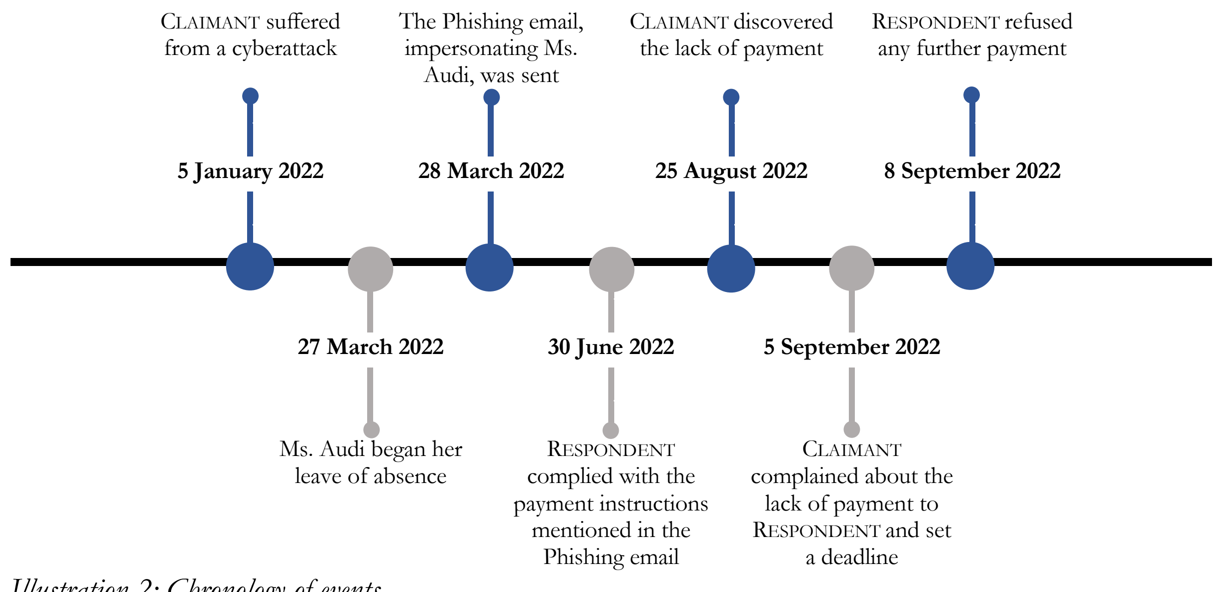

Illustration 2: Chronology of events

Procedural History

12. On **30 August 2022**, the Parties agreed upon the Terms of Reference (“**ToR**”).
13. On **11 September 2022**, CLAIMANT requested authorisation of a new claim related to the non-payment of the second instalment due under PO No. A-15604. It sought to either add the new claim to the present arbitral proceedings or consolidate the new proceedings with the pending

arbitration in the alternative. On **2 October 2023**, RESPONDENT rejected the requests made by CLAIMANT.

INTRODUCTORY REMARKS

14. RESPONDENT holds a significant position in the automotive industry as a Tier 1 firm, which is why CLAIMANT perceived it as an important business partner with great potential [*PO2, p. 61, ¶1*]. In light of the Parties' long-lasting relationship, when CLAIMANT first discovered the lack of payment under PO No. 9601, it chose not to charge interest or claim damages [*Ex. C3, p. 14*]. However, RESPONDENT refused to fulfil its payment obligation, disregarding CLAIMANT'S gesture of goodwill [*Ex. C4, p. 15*].
15. RESPONDENT attempted to avoid any responsibility and blamed CLAIMANT for the Phishing email. However, CLAIMANT had taken all necessary precautions to mitigate the negative consequences of the cyberattack it experienced [*Ex. C6, p. 17, ¶6*]. It is surprising that RESPONDENT, which has strict cybersecurity policies and a history of dealing with cyberattacks, fell for such a simple Phishing email [*Ex. R1, p. 33*].
16. RESPONDENT showed no interest in finding a mutually acceptable solution [*Ex. C6*, *p. 18*, ¶*12*]. Its failure to pay is not due to its inability to do so but rather its unwillingness [*RfA, p. 8, ¶29*]. RESPONDENT generated a revenue of USD 20 billion in 2022, which is five times that of CLAIMANT [*PO2, p. 61, ¶1*]. This clearly demonstrates that RESPONDENT had the financial capacity to make the payment. Nevertheless, RESPONDENT decided to terminate the FA starting 1 July 2023. This was not by chance, as RESPONDENT had planned to begin purchasing sensors from one of CLAIMANT'S competitors, IQ-View, from that date onwards [*RfA, p. 7, ¶21; Ex. C6, p. 18, ¶¶11,12*].
17. The present proceedings should be viewed in light of this context. RESPONDENT'S conduct clearly shows a disregard for the contractual obligations of the Parties. It is evident that RESPONDENT'S behaviour was not caused by any fault of CLAIMANT or RESPONDENT'S inability to pay the outstanding amount. On the contrary, it was heavily influenced by its lack of desire to continue its "mutually beneficial cooperation" with CLAIMANT [*Ex. C3, p. 14*].

INTRODUCTION TO THE APPLICABLE LAW

18. The dispute resolution clause in PO No. 9601, which is compatible with the arbitration clause in the FA, provides that the arbitral proceedings shall be conducted according to the Rules of Arbitration of the International Chamber of Commerce ("**ICC Rules**") [*Ex. C1, p. 12, Art. 41, ¶3*].

The place of arbitration is Vindobona, Danubia. The Danubian Arbitration Law ("**DAL**"), the *lex arbitri,* [*Ex. C1, p. 12, Art. 41, ¶6*] is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments [*PO1, p. 59, ¶4(4)*]. Moreover, Danubia, Mediterraneo and Equatoriana are all member states of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**") [*PO1, p. 59, ¶4(4)*].

19. Equatoriana, Mediterraneo, and Danubia are also contracting states to the Convention on the Contracts for the International Sale of Goods ("**CISG**") [*P01, p. 59, ¶4(4)*]. All individual contracts concluded under the FA are governed by the Law of Danubia [*Ex. C1, p. 12, Art. 41*].

20. Further, the general contract law of Danubia, Equatoriana and Mediterraneo is identical to the UNIDROIT Principles on International Commercial Contracts 2016 ("**PICC**") [*PO1, p. 59, ¶4(4)*]. Thus, the domestic law applicable to individual contracts, the Danubian Contract Act ("**DCA**"), refers to the PICC. Additionally, Equatoriana's Data Protection Act ("**EDPA**") is a verbatim adoption of the European Union's General Data Protection Regulation ("**GDPR**") [*PO1, p. 59, ¶4(5)*]. No such explicit law exists in Mediterraneo and Danubia.

SUMMARY OF ARGUMENTS

I. The Tribunal can and should authorise the addition of the new claim to the present proceedings

21. The Tribunal can authorise the addition of the new claim because it is within the scope of Art. 23(4) of the ICC Rules and falls under the jurisdiction of the Tribunal. The FA, PO No. A-15604 and PO No. 9601 are agreements between the same parties for a single economic transaction and include arbitration clauses that are consistent with each other. The Tribunal should exercise its jurisdiction in granting authorisation for the new claim, which was made in good faith at an early phase of the proceedings. The new claim is intricately linked to the existing claims, and its inclusion will be cost-effective. In addition, the inclusion of the new claim will enhance the efficiency of the proceedings and mitigate the risk of conflicting awards.

II. In the alternative, the Tribunal can and should consolidate the proceedings

22. The Tribunal can consolidate the claims since the principle of party autonomy supersedes institutional rules, and the power of consolidation is not an ICC-specific non-derogatable provision. In addition, if the proceedings are not consolidated, it could render the award unenforceable under the NYC. Consolidation of the proceedings by the Tribunal is warranted since all the criteria specified in Art. 10 of the ICC Rules have been met. The Parties

have mutually decided to consolidate the proceedings, regardless of whether the claims originate from different arbitration agreements. Consolidation would improve the procedural efficiency, fairness, and cost-effectiveness of the proceedings.

III. CLAIMANT is entitled to payment under PO No. 9601, and RESPONDENT cannot rely on a contractual duty violation or the CISG to defend itself

CLAIMANT is entitled to payment under PO No. 9601 as the Phishing email is not attributable to it. RESPONDENT was best suited to prevent the loss caused by the misguided payment. CLAIMANT is entitled to seek specific performance under Arts. 28 and 62 CISG. The Phishing email did not validly modify the agreement as it did not fulfil the form requirements under Art. 40 of the FA due to the absence of a valid signature. Furthermore, the Phishing email does not constitute a valid agreement to modify the FA. CLAIMANT was not obligated to inform RESPONDENT about the cyberattack as per the CISG, which is the applicable law, and Art. 5.1.3 DCA. Moreover, CLAIMANT'S conduct does not constitute an act or omission under Art. 80 CISG. Alternatively, the current case is about joint causation, which is beyond the scope of Art. 80 CISG. Lastly, the claim of payment cannot be partially reduced under Art. 77 CISG, as this is not a claim of damages, and CLAIMANT had no reasonable knowledge of an impending breach. In any case, reasonable measures had been taken by CLAIMANT to mitigate the losses.

ARGUMENTS ON PROCEDURE

ISSUE 1: THE TRIBUNAL CAN AND SHOULD AUTHORISE THE ADDITION OF THE NEW CLAIM TO THE PENDING ARBITRATION

I. The addition of the new claim to the pending arbitration can be authorised by the Tribunal

23. Art. 23(4) ICC Rules permits the authorisation of a new claim after the ToR have been signed. Additionally, a tribunal may choose to admit a new claim when it is within the scope of the arbitration agreement between the parties [*Fry/Greenberg/Mazza, p. 529, ¶3-909; Redfern/Hunter, p. 335, ¶5.91*].

24. CLAIMANT submits that the addition of the new claim can be authorised by the Tribunal because it falls under the scope of Art. 23(4) ICC Rules **(A)**, and the new claim is within the jurisdiction of the Tribunal **(B)**.

A. The new claim falls under the scope of Art. 23(4) ICC Rules

25. Art. 23(4) ICC Rules empowers the Tribunal to authorise a new claim. Any new claim must fall outside the scope of the ToR to be authorised [*Fry/Greenberg/Mazza, p. 528*]. Notionally, a 'new

claim' arises when new facts are asserted as the basis for a completely new relief [*ICC Case No. 10007*; *Arroyo*, *p. 2334*]. This is to ensure that the additional claim does not just submit a new legal argument for existing claims in the ToR [*Shwartz, p. 65; ICC Case No. 6647; NOC v Sun Oil, p. 3*].

26. In the current case, the existing claims in the ToR concern the outstanding payment due under PO No. 9601 for the S4-258999 sensors [*RfA*, ¶¶*19-20*]. The new claim, however, stems from non-payment of PO No. A-15604 and alleged defects in the quality of the goods. Consequently, new facts are asserted as the basis for a new relief by CLAIMANT. Further, CLAIMANT extends no legal argument regarding the existing claims under the ToR. Therefore, the new claim falls within the scope of Art. 23(4) ICC Rules.

B. The new claim is within the jurisdiction of the Tribunal

27. Art. 9 ICC Rules allows for claims arising out of or in connection with more than one contract to be submitted in a single arbitration, regardless of whether such claims are made under multiple arbitration agreements. Claims under Art. 9 ICC Rules can be raised when the conditions specified under Art. 6(4) ICC Rules are satisfied [*Fry/Greenberg/Mazza*, *p. 108*, ¶¶*3-340*]. Art. 6(4)(ii) ICC Rules requires that claims under multiple arbitration agreements may be raised when the agreements under which the claims have been made are compatible and the parties have consented to the claims being determined in a single arbitration.

28. There is a general consensus amongst legal scholars that for a single arbitration to move forward on the basis of multiple contracts, three criteria need to be fulfilled [*Craig/Park/Paulsson*, *p. 180; Waincymer, p. 553; Berg, p. 4488*]. Firstly, all the agreements must have been signed by the same parties. Secondly, the contracts must relate to the same economic transaction, and thirdly, the arbitration agreements must be compatible [*Whitesell/Romero, p. 15; Arroyo, p. 2199; Lew/Bor,* ¶¶*22-43; Koch, p. 385; Fry/Greenberg/Mazza, p .82,* ¶¶*3-249*].

29. CLAIMANT submits that the new claim falls within the jurisdiction of the Tribunal because the criteria mentioned above remain fulfilled. The FA, PO No. 9601, and PO No. A-15604 ("**Agreements**") were signed between the same parties **(1)**, concern the same economic transaction **(2)**, and contain compatible arbitration clauses **(3)**. Additionally, pursuant to the conditions laid down in Art. 6(4) ICC Rules, RESPONDENT consented to the claims being heard together in a single arbitration **(4)**.

1. The Agreements were signed by the same parties

30. A series of claims under separate but compatible agreements can be made in a single arbitration if they are made by the same parties [*Romero, p. 50,* ¶*66; Craig/Park/Paulsson, p. 180*]. This ensures that non-signatories are not being subjected to an arbitration clause they did not consent to

[*Hanotiau/Schwartz, p. 12; Fry/Greenberg/Mazza, p. 82, ¶¶3-249*].

31. In the current case, the existing claims in the ToR arise from the Agreements, which have been signed between CLAIMANT and RESPONDENT. Therefore, the Agreements have been signed by the same parties, and the first criterion is met.

2. The Agreements relate to the same economic transaction

32. Under the 'group of contracts doctrine', it is necessary to consider the economic link between different agreements because a close connection may allow disputes arising from different contracts to be decided within the same proceedings [*Baltag/Vasile, p. 56; Hanotiau/Schwartz, p. 12; Gerald Fitch v Baloncesto, ¶54; Paillardon v Archer-Daniels-Midland, ¶IV2.4*]. This is because the contracts may be so closely connected that they form a single, indivisible economic transaction, an operational unit that is essentially one fundamental relationship [*Leboulanger, p. 43; Hanotiau/Schwartz, p. 18*].
33. The transaction ought to be looked at in its entirety to determine its true economic reality [*Northern Gas Pipelines v Orient*, ¶*30*]. A strong economic link may be established by the presence of a head agreement that outlines the obligations undertaken by the parties, which are discussed in more detail in ancillary agreements. The close economic link becomes evident when ancillary agreements explicitly refer to the head agreement [*Leboulanger*, *p. 47*]. An economic link between agreements can also be established by the presence of a common origin and goal [*Leboulanger*, *pp. 52-53*]. The same economic transaction may be implied notwithstanding if the agreements involve unrelated items, so long as they are with respect to the same type of services between the parties and share the same economic background [*Consultants v Reynolds, ¶95*].
34. RESPONDENT contends that the new claim cannot be authorised because it arises from a completely different agreement from PO No. 9601 [*ARfA, p. 55, ¶5*]. However, a different purchase order does not automatically bar the jurisdiction of the Tribunal. While both the existing and new claims arise from PO No. 9601 and PO No. A-15604, respectively, the purchase orders were issued under the same general contract – the FA. The introduction of both the purchase orders expressly refers to the FA [*Ex. C2, p. 13; Ex. C7, p. 48*]. The obligations of CLAIMANT and RESPONDENT for any purchase order were outlined by the FA. Therefore, the new claim can be heard by the Tribunal in consonance with Art. 41 FA.
35. CLAIMANT invoked Art. 41 of the FA to justify the jurisdiction of the Tribunal for the existing claims in the ToR [*RfA, p. 7, ¶23*]. PO No. A-15604 states "making use of Additional Order Facility under the Framework Agreement" [*Ex. C7, p. 48*]. Therefore, PO No. A-15604 is an ancillary agreement under the FA. Even if PO No. A-15604 has its own arbitration agreement, the fulfilment of this purchase order is predicated on the rights and obligations of the Parties under the FA.

Consequently, PO No. A-15604 and the FA are closely connected in that they form one indivisible transaction and are a part of the same fundamental relationship. Hence, the arbitration agreements present in PO No. A-15604 and FA relate to the same economic transaction.

36. RESPONDENT may submit that the primary arbitration agreement invoked in the RfA is the one in PO No. 9601. Regardless, there exists a strong economic link even between PO No. 9601 and PO No. A-15604. PO No. 9601 and PO No. A-15604 have the same economic background even though they relate to the sale of different sensors. They both pertain to the same services being rendered, i.e., the delivery of sensors from CLAIMANT to RESPONDENT, under the obligations of the FA. Consequently, they have a common origin and goal. Hence, PO No. 9601 and PO No. A-15604 relate to the same economic transaction. Therefore, the second criterion stands fulfilled.

3. The Agreements have compatible arbitration clauses

37. Art. 6(4) ICC Rules allows tribunals to decide on claims made under more than one arbitration agreement if the arbitration agreements are compatible. Compatibility does not need the provisions to be identical. The arbitration agreements merely need to be substantively consistent [*Fry/Greenberg/Mazza*, *p. 81*; *Panama Canal case*, ¶*24*; *Romero*, *p. 34*, ¶*67*].

38. Tribunals typically look at differences in the applicable rules of arbitration, seat of arbitration, language, and number of arbitrators to determine the incompatibility of arbitration agreements [*Too Marker v Imagination, ¶89; Robert Bosch v Samsung, ¶157; Fry/Greenberg/Mazza, p. 81, Whitesell/Romero, p. 15*]. Minor variations do not impact the overall consistency between two agreements [*Consultants v Reynolds*, ¶*96*]. Incompatibility requires the presence of insurmountable inconsistencies which can materially affect the execution of the proceedings [*Panama Canal case, ¶24, Carlos v Jorge, ¶¶365, 368*].

39. In the current case, all the Agreements state that the dispute should be settled under the ICC Rules, Danubia should be the place of arbitration, and the substantive law shall be the CISG [*Ex. C 2, p. 13, ¶7; Ex. C7, p. 48, ¶7; Ex. C1, p. 11, Art. 41*]. Both PO No. 9601 and the FA provide that disputes should be settled by three arbitrators [*Ex. C1, p. 12, Art. 41; Ex. C2, p. 13*]. PO No. A-15604 states the requirement of one or more arbitrators [*Ex. C7*, *p. 48*, ¶*7*]. Thus, the composition of three arbitrators is consistent with PO No. A-15604 and does not violate it. Further, the overall constitution of the Tribunal remains the same since both Parties have consented to the ICC Rules. CLAIMANT and RESPONDENT each nominated one member [*ICC*, *Art. 12(4)*], and the ICC Court appointed the third member [*ICC*, *Art. 12(5)*]. Therefore, the arbitration agreements are substantively consistent with each other.

40. RESPONDENT has claimed that the arbitration agreements are incompatible because of the alleged deviations in 'several aspects' [*Rejection*, *p. 55*, ¶*5*]. However, the only difference between the

arbitration clauses is the express exclusion of emergency arbitration in PO No. A-15604. Emergency arbitration is irrelevant to the dispute as it has not been invoked in the present arbitration, and the parties are not in a position to invoke it now. Hence, the difference in the arbitration agreements is not significant and does not affect the arbitration. The exclusion of emergency arbitration does not affect the overall consistency between the agreements. It is merely a small variation. Thus, RESPONDENT'S argument, highlighting the material incompatibility between the agreements, should not be sustained. Consequently, the Agreements have compatible arbitration clauses. Therefore, the third criterion also stands fulfilled.

4. RESPONDENT had agreed to the claims being heard in a single arbitration

41. Art. 6(4)(ii) ICC Rules states that the parties should have agreed to hear the claims in a single arbitration. Such consent may be implied [*Fry/Greenberg/Mazza*, *p. 82*, ¶¶*3-248*; *Surpass v Bariven*, ¶*4.2*]. The will of the parties helps in assessing such consent [*Carlos v Jorge*, ¶*371*]. Any arbitration provision should be interpreted in good faith by accounting for the consequences that the parties may have reasonably and legitimately considered [*Amco v Indonesia*, *p. 359*].
42. A close economic link between the agreements raises a strong presumption that the parties had the implicit intention to extend the effects of one arbitration clause to all disputes [*Carlos v Jorge*, ¶*371*; *Sahélienne v Guinea*, ¶*181*; *Voestalpine Texas v PHB Weserhütte*, ¶*13.1*]. This is due to the presence of inseparable components that may arise during a dispute [*Glencore case*, *pp. 503-504*; *Uni-Kod as cited in Y.B of Carb Vol. 30*, *p. 1200*].
43. Any similarity or compatibility between the arbitration agreements is a *prima facie* indication of consent between the parties [*Fry/Greenberg/Mazza*, *p. 80*, ¶¶*3-242*; *Voestalpine Texas v PHB Weserhütte*, ¶*13.5*]. The inclusion of a new arbitration clause in an application agreement does not, on its own, show the intention of the parties to rule out the arbitral proceedings provided in the general agreement [*ICC Case No. 5898*, *p. 77*].
44. RESPONDENT may contend that the exclusion of the emergency arbitration clause in PO No. A-15604, and the confirmation letters for the same, prove that it did not consent to the claims being heard in a single arbitration. However, the current arbitration is not a case of emergency arbitration. Except for the deviation regarding emergency arbitration, the arbitration clauses in the Agreements are completely compatible [*CL. Memo, p. 8,* ¶¶*21-24*]. Additionally, the arbitration clause in the FA extends to all disputes "arising under or in connection with the FA" [*Ex. C2*, *p. 11*, *Art. 41*]. PO No. A-15604 expressly mentions that it has been issued "under the FA" [*Ex. C7*, *p. 48*]. Therefore, it can be concluded that the Parties reasonably and legitimately conceived the extension of the arbitration agreement present in the FA and PO No. 9601 to claims arising under PO No. A-15604

in proceedings that did not involve emergency arbitration.

45. Additionally, PO No. A-15604 shares a close economic link with both the FA and PO No. 9601 [*CL. Memo, pp. 6-7,* ¶¶*16-20*]. The new claim under PO No. A-15604 questions compliance with the Notice of Defect ("**NoD**") requirements under the FA [*Ex. C1, p. 11, Art. 15*]. Therefore, the presence of inseparable components between the FA and PO No. A-15604 in the dispute provide the implied intention that the Parties agreed to extend the arbitration clause of the FA to disputes under PO No. A-15604.

46. In order for disputes under PO No. A-15604 to have a separate arbitration proceeding, the Parties needed to expressly agree upon the precedence of such a separate arbitration agreement over the terms of the FA [*Ex. C2*, *p. 13,* ¶*2*]. However, such an agreement was only limited to the exclusion of emergency arbitration [*PO2,* ¶¶*11*, *33*]. The Parties did not have any specific agreement to exclude the extension of the arbitration agreement in the FA to regular proceedings. Therefore, there is no unequivocal intention of the Parties to rule out the arbitration agreement of the FA for the new claim.

47. Lastly, the arbitration agreement in PO No. 9601 is substantively consistent with the ones contained in the FA and PO No. A-15604 [*CL. Memo*, *p. 8*, ¶¶*21-24*]. There is a consistency in the *lex arbitri*, the place of arbitration, the number of arbitrators and the language of arbitration [*Ex. C2*, *p. 13*, ¶*7*; *Ex. C7*, *p. 48*, ¶*7*; *Ex. C1*, *p. 11*, *Art. 41*]. Therefore, RESPONDENT had consented to the claims being heard in a single arbitration.

II. The Tribunal should authorise the addition of the new claim to the pending arbitration

48. Art. 23(4) ICC Rules states that a tribunal may authorise a new claim after giving due regard to the nature of such a new claim, the stage of arbitration and other relevant circumstances.

49. CLAIMANT submits that the addition of the new claim to the pending arbitration should be authorised because the nature of the new claim is closely connected to the existing claims **(A)**; the new claim was made in good faith at an early stage of the arbitration **(B)**; and the addition of the new claim allows for greater efficiency in the conduct of the arbitral proceedings **(C)**.

A. The nature of the new claim is closely connected to the existing claims

50. Art. 23(4) ICC Rules states that a tribunal shall consider the nature of the new claim while determining its authorisation. A tribunal is more likely to authorise the addition of a new claim if it is related to similar questions of fact and law [*Fry/Greenberg/Mazza*, *p. 258*; *Petroleum v Energy*, ¶*161*]. The new claim arising from the same contract as the existing claims is an incentive to admit the new claim in the proceedings [*Verbist/Schäfer/Imhoos*, *p. 134*]. This is because such a claim would provide less disruption in the natural course of resolving the dispute [*Fry/Greenberg/Mazza*, *p. 259*].

51. RESPONDENT may contend that the claims arise from different purchase orders and, therefore, are unrelated. However, this argument should not be sustained because both claims stem from similar questions regarding non-compliance with payment terms according to the FA [*Ex. C1*, *p. 11*, *¶7*]. They are both claims of specific performance of RESPONDENT making the outstanding payments. Both PO No. A-15604 and PO No. 9601 are agreements made in the application of the FA [*Ex. C2*, *p. 13*; *Ex. C7*, *p. 48*]. The new claim relates to the non-fulfilment of the form requirements of the NoD according to the FA [*Ex. C8*, *p. 49, ¶9*; *Ex. C1*, *p. 11*, *Art. 15*]. Similarly, the existing claims stem from the non-compliance of payment terms mentioned in the FA [*Ex. C1*, *p. 11*, *¶7*]. RESPONDENT contends that the FA was modified without the written signature of the Parties in both instances [*Ex. R4, p. 36, ¶4; Authorisation Request, p. 54, ¶2*]. However, Art. 40 of the FA requires any modification to be written and signed by the Parties [*Ex. C1*, *FA*, *p. 11*, *Art. 40*]. Consequently, an important legal question to be decided in both claims is whether communication without written signatures can modify the terms of the FA. The nature of the new claim is, thus, closely connected to existing claims because they show similarity in questions of fact and law. Therefore, the new claim would provide minimal disruption in the natural course of resolving the dispute.

B. The new claim was made in good faith at an early stage of the arbitration

52. While determining the admission of a new claim, the tribunal ought to take into account the stage in the proceedings at which the request for the new claim has been made [*ICC Rules*, *Art. 23(4)*]. The time before drawing up a procedural timetable is generally considered an early stage [*Ragnwaldh/Andersson*, *p. 101*]. If the new claim is raised shortly after the signing of the ToR, it is more likely to be authorised as it helps maintain certainty and order throughout the entire arbitral process [*Bühler/Webster*, *¶17*; *Rajah*, *p. 176*]. Further, there is no reason not to authorise the claim if it is filed at a time that allows the other party to respond without seriously prolonging the agreed timeline [*Bühler/Webster*, *¶19*]. In some cases, tribunals have allowed new claims falling outside the ToR even as late as during the delivery of opening statements by the parties at the hearing [*Hidroeléctrica v AICSA, ¶317; Singapore v Xanadu, p. 73, ¶32*].
53. The tribunal also considers the motivation of the requesting property to prevent delay of proceedings in bad faith [*Berger/Pfisterer*, *p. 228*; *Petroleum v Energy*, *¶161*]. The parties' good faith must be accounted for to prevent a violation of public policy and non-recognition of the award [*Born*, *p. 113*]. The fact that the requesting party was unable to present the new claim earlier and that the claim is based on recently discovered facts strongly indicates that the party has acted in good faith. [*Berger/Pfisterer*, *p. 228*].

54. In the current case, the ToR were signed on 30 August 2023 [*PO1*, *p. 58*, *¶1*]. The request to authorise a new claim was made on 11 September 2023, before PO1 was issued, along with the procedural timetable [*Authorisation Request p. 46*; *PO1*, *p. 58*]. Thus, the request for the new claim was made immediately after the ToR were signed. Further, RESPONDENT was given enough time to respond to the Authorisation Request until 2 October 2023 [*Letter by Presiding Arbitrator*, *p. 51*]. Since the new claim came shortly after the signing of the ToR and at an early stage of the proceedings, the Tribunal will have time to deliver its award within the stipulated six months [*ICC Letter to the Arbitral Tribunal*, *p. 41*]. Thus, the Authorisation Request was made at an early stage of the proceedings.
55. Additionally, the information regarding the non-payment under PO No. A-15604 came to CLAIMANT'S knowledge only on 8 September 2023 [*Authorisation Request*, *p. 47*, *¶4*]. The new claim was initiated on 11 September 2023 [*Authorisation Request*, *p. 46*, *¶1*]. Hence, the new claim was requested after the establishment of the ToR since the facts relevant to the claim were only uncovered after its signing. Therefore, the new claim was made in good faith at an early stage of the arbitration.

C. The addition of the new claim allows for greater efficiency in the conduct of the arbitral proceedings

56. Art. 22(1) ICC Rules provides that the tribunal and the parties must make every effort to conduct the arbitration in a cost-efficient manner. The addition of the new claim enables this by making the proceedings cost-effective for the Parties **(1)** and allowing for fairness by preventing the possibility of a conflicting award **(2)**.

1. It is cost-effective for the parties

57. CLAIMANT submits that the authorisation of the new claim into the present proceedings will save costs for the Parties. The ICC Scales of arbitrators' fees and administrative expenses show that costs increase only at a declining rate as the amount in the dispute increases [*ICC Rules*, *Appendix III*, *Art. 3*]. Consequently, the overall costs associated with filing a claim before the ICC generally rise on a diminishing scale with respect to the amount of claims in the dispute [*Brueggemann/Smahi*, *¶5*]. Therefore, the cost of filing an additional claim in the same proceedings is less costly than filing a claim in a new proceeding.
58. Additionally, the ICC Rules require CLAIMANT to pay a non-refundable fee with the submission of the RfA [*ICC*, *Art. 4(4)*]. The ICC Court is empowered to fix an advance to cover additional expenses [*ICC Rules*, *Art. 36(5)*; *ICC Rules*, *Art. 37(2)*; *ICC Rules*, *Art. 1(4) of Appendix III*].
59. In the current case, CLAIMANT has already paid USD 5,000 as a non-refundable fee to the ICC

Court at the time of making the RfA [*ICC Letter on Consolidation*, *p. 53*]. The ICC Court fixed a provisional advance of USD 140,000 to cover the costs of arbitration until the ToR were established, which CLAIMANT paid entirely [*ICC Not RfA*, *p. 23*; *Ans ICC Not RfA*, *p. 28*].

60. The new claim has an amount worth USD 12,000,000 in dispute [*Ex. C7*, *p. 48*]. The ICC Costs Calculator provides an official estimation of the total advance on costs for initiating a fresh proceeding for the new claim at USD 408,517 [*ICC Costs Calculator*].

61. When the amount in dispute of the new claim is added to that of the existing claim, the total amount increases to USD 50,400,000. The estimated advance on costs for a proceeding for this amount in dispute is USD 614,147 [*ICC Costs Calculator*]. The Tribunal has already fixed an advance on costs at USD 610,000 for the existing claims [*ICC Not CD*, *p. 39*]. Therefore, if the new claim is authorised, the Parties will only have to pay approximately USD 4,147 more as opposed to paying USD 408,517 for a separate arbitration. The fees for parallel proceedings would be significant as the Parties would need to pay the costs again to the ICC Court for the establishment of a separate tribunal. The comparison of the costs is shown in Illustration 3 below.

	CLAIMANT'S Authorisation Request is rejected		CLAIMANT'S Authorisation Request is accepted
	Present proceedings for existing claim under PO No. 9601	Fresh proceedings for the new claim under PO No. A-15604	
Amount in dispute	38,400,000	12,000,000	50,400,000
Advance on costs	610,000	408,517 (est.)	614,147 (est.)
Total advance on costs	1,018,517		614,147
To be paid on top of what has already been paid	**408,517** (1,018,517 – 610,000)		**4,147** (614,147 – 610,000)

Illustration 3: Cost comparison

62. Consequently, the cost of filing an additional claim in the same proceedings leads to noticeable savings in costs. Therefore, the authorisation of the new claim is cost-effective for the Parties.

2. It allows fairness by preventing the possibility of a conflicting award

63. A balance has to be struck between the potential disruption in proceedings due to the addition of a new claim and the possible increase in the cost and time efficiency through such addition [*Singapore v Xanadu*, *p. 74*, *¶32*]. Consequently, principles of good administration often underline the reasoning of tribunals [*Welser/Mimnagh*, *p. 41*; *Hanotiau*, *p. 278*; *ICC Case No. 3879*].

64. Tribunals produce conflicting awards when they arrive at different conclusions for the same set of

facts [*Redfern/Hunter*, ¶*1.116*; *CME Award,* ¶*199*]. Conflicting awards by tribunals violate the principles of good administration and fairness [*Manuel*, *p. 134*]. Parties are obligated to enforce the final award of a tribunal [*NYC*, *Art. III*]. However, binding awards are not always carried out voluntarily, and enforcement by a court of law may be necessary [*Redfern/Hunter*, ¶*1.89*].

65. Recognition and enforcement of an award may be refused if it would be contrary to public policy [*NYC*, *Art. V(2)(b)*; *Model Law*, *Art. 34(2)(b)(ii)*]. Such policy favours final and binding arbitral awards for the resolution of disputes [*Chromalloy Award*, ¶*913*; *Cremades/Lew*, *pp. 269-304*]. It is a pro-arbitration policy [*Nicor v El Paso*, ¶*9*; *Cremades/Lew*, *pp. 269-304*] and seeks to balance the rights of both parties [*Browner/Sharpe*, *pp. 415-440*]. This would prove troublesome when tribunals give conflicting awards. Moreover, the second stage of enforcement of awards may lead to 'procedural wars' between the parties [*Cremades/Lew*, *pp. 269-304*]. It would also be in violation of public policy. Hence, the mere potential for a contradictory decision diminishes the effectiveness and reliability of arbitration processes [*David*, *p. 277*]. If a party is forced to start two proceedings in relation to inseparable facts, the arbitral proceedings would be rendered meaningless, and the public policy in favour of arbitration would be effectively thwarted [*Ryan*, *pp. 320-321*].

66. In the current case, the new and existing claims are factually closely related. Under PO No. 9601, RESPONDENT did not perform due diligence to ensure that the changes in the payment terms were in accordance with the terms of the FA before making the misguided payments [*Ex. C6,* ¶*9; Ex. C1, p. 11, Art. 40*]. Similarly, in PO No. A-15604, a valid NoD, as per Art. 15 of the FA [*Ex. C7*, *p. 48*; *Ex. C1*, *p. 11*, *Art. 15*] was not provided through the NoD form [*Ex. C8*, *p. 49*, ¶*9*]. In both these cases, RESPONDENT contends that sufficient waivers were obtained without the written signature of the Parties [*Ex. R4*, *p. 36*, ¶*4*; *Authorisation Request*, *p. 54*, ¶*2*]. However, this is contrary to Art. 40 of the FA which mandates all modifications to be in writing and signed by the Parties [*Ex. C1*, *p. 11*, *Art. 40*]. If the new claim is not authorised in the present proceedings, two separate Tribunals will each have to decide if the alleged communication satisfies the requirements specified under Art. 40 of the FA. If conflicting awards are given, this would undermine the principles of good administration and fairness. This might be avoided by authorising the new claim in the ongoing procedures, as the claims would be determined by the same Tribunal. Therefore, the addition of the new claim promotes fairness by averting the potential for contradictory judgements.

CONCLUSION TO ISSUE 1

67. The Tribunal can authorise the new claim under PO No. A-15604 pursuant to Art. 23(4) ICC Rules. The claim falls within the Tribunal's jurisdiction as the Agreements have been signed by the Parties, they relate to the same economic transaction, and their arbitration clauses are compatible. Further,

RESPONDENT has implicitly consented to such authorisation. Thus, the criteria mentioned under Art. 6(4) ICC Rules stand fulfilled, and the present multi-contract arbitration proceedings can be permitted by the Tribunal pursuant to Art. 9 ICC Rules. The new claim should be authorised by the Tribunal as its nature is closely connected to the existing claims in the ToR. It was submitted by CLAIMANT in good faith at an early stage of arbitration. Lastly, the authorisation of the new claim is cost-effective for the Parties and prevents the possibility of a conflicting award. Thereby, the Tribunal fulfils its duty under Art. 22(1) ICC Rules to make every effort to conduct the arbitration in a cost-efficient and expeditious manner by authorisation of the new claim.

ISSUE 2: ALTERNATIVELY, THE TRIBUNAL CAN AND SHOULD CONSOLIDATE THE CLAIMS

I. The Tribunal can consolidate the claims

68. CLAIMANT and RESPONDENT, by virtue of Art. 41 of the FA explicitly agreed to resolve all disputes that may arise directly from, or in relation to, the FA by way of institutional arbitration under the ICC Rules. Art. 41 of the FA further designates Danubia as the seat of arbitration, making the DAL the *lex arbitri* [*PO1, ¶4, (4)*].

69. CLAIMANT raised an additional claim on 11 September 2023, arising from non-payment by RESPONDENT for the purchase of L-1 Sensors [*Ex. C8, p. 49, ¶¶6,7*]. In its Authorisation Request, the alternate submission made by CLAIMANT was the consolidation of the arbitration proceedings [*Authorisation Request, ¶1, (b)*].

70. RESPONDENT has rejected the request for consolidation of the arbitration proceedings, citing a lack of power of the Arbitral Tribunal to consolidate the proceedings [*Rejection, p. 55, ¶6*]. Therefore, CLAIMANT submits that the Tribunal has the power to consolidate the proceedings as party autonomy and intention ought to be given primacy **(A)**. Moreover, non-consolidation may result in the award being held unenforceable **(B)**.

A. Party autonomy and intention ought to be given primacy

71. Party autonomy is the cornerstone of international commercial arbitration and is principally the ability of parties to mutually decide upon the applicable procedure for an arbitration [*Redfern/Hunter, p. 315*]. Art. 19 DAL codifies explicitly the principle of party autonomy, allowing the parties to mutually decide on the applicable procedure [*DAL, Art. 19*]. The autonomy of parties to mutually decide the arbitration regime and the applicable procedure is subject to few limitations at best [*Pryles, p. 2*].

72. Art. 41 of the FA reflects the mutual intention of CLAIMANT and RESPONDENT to have given the

power of consolidation to the Tribunal. Thus, CLAIMANT submits that party autonomy supersedes institutional rules **(1)**, and the power to consolidate the proceedings is not a non-derogatable provision **(2)**.

1. Party autonomy supersedes institutional rules

73. RESPONDENT'S contention of invalidity of the consolidation clause in Art. 41 FA is predicated on the supremacy of the ICC Rules over the Parties' arbitration agreement [*Rejection, p. 55, ¶6*]. However, it is a generally recognised principle that party autonomy takes precedence, even in institutional arbitration [*Schoeter, p. 169; Carlevaris, p. 103*]. The principle of *lex specialis derogate generali* (Special law prevails over general law) reflects the same position [*Carlevaris, p. 115*]. Therefore, an arbitration agreement and its provisions, expressly derogating from the provisions of the institutional rules, are not invalid [*Schroeter, p. 171; Habegger/Müller/Zuberbühler, ¶37*].
74. The *travaux* of the DAL reflects the continuing applicability of Art. 19 DAL [*SumRec, 316th Meeting, pp. 444-445, ¶¶51-67*]. Furthermore, when read with Art. 2(a) of the same, which makes it clear that arbitration means both *ad hoc* and institutional arbitration, it is evident that the autonomy of the parties to determine the applicable procedure subsists even in institutional arbitration [*DAL, Art. 2(a)*].
75. The principal responsibility of an arbitrator is to give effect to the intention of the parties [*Mits. v Chrys., ¶¶636-637*]. Therefore, CLAIMANT submits that in the present case, Art. 41 of the FA, which reflects party autonomy, supersedes Rule 10 ICC Rules insofar as the power to order consolidation of the proceedings has been delegated to the Tribunal itself.

2. The power to consolidate proceedings is not an ICC-specific non-derogatable provision

76. Party autonomy in institutional arbitration is not unlimited, and is subject to a few restrictions [*Schroeter, p. 170; Born, p. 2138*]. In particular, it is subject to two types of restrictions. The first is the mandatory provisions of the *lex arbitri* [*Bloch/Nicholls, p. 393, Schroeter, p. 170*], and the second, unique to institutional arbitration, are institution-specific non-derogatable rules [*Carlevaris, p. 115; Aksen/Böckstiegel, 845*].
77. Derogation from even the mandatory provisions of the institutional rules of arbitration does not invalidate that provision of the arbitration agreement [*CL. Memo, Issue 2, (I)(A)(1), p. 16, ¶73*]. To that end, institutions may refuse to administer a dispute in the event of derogation from the rules [*Carlevaris, p. 115; Craig/Park/Paulsson, p. 295*]. This refusal is only justified and exercised in very narrow circumstances [*Schroeter, p. 170*].
78. Those non-derogatable provisions, modification of which may invite the refusal of the institution

to administer the arbitration, are only those that reflect the core and fundamental characteristics of that institution's arbitration [*Kreindler, p. 45; Schroeter, p. 171; Pryles, p. 4*].

79. RESPONDENT contends that the power of the ICC Court to determine a question of consolidation cannot be deviated from [*Rejection, p. 55, ¶6*]. Therefore, RESPONDENT ought to establish that the power of the ICC Court to consolidate proceedings constitutes a core, non-derogatable characteristic of ICC-administered arbitration.

80. However, firstly, there is no clarity with respect to the core, institution-specific, non-derogatable rules, and they differ per institution [*Schroeter, p. 172; Kreindler, p. 45*]. Moreover, the power of the ICC Court to consolidate the proceedings is not considered a non-derogatable ICC provision [*Schroeter, p. 172; Carlevaris, pp. 120-126*]. Therefore, the ICC Rules affirm the supremacy of the Parties' procedural autonomy, including over the Tribunal's procedural discretion [*Born, § 15.02(D)*].

81. Furthermore, the ICC has seldom refused administration of cases with party-modified rules, and even where it has done so, it is with respect to provisions like scrutiny of awards, which are widely considered to be fundamental and distinct to ICC arbitration [*Samsung case, p. 571; Schroeter, p. 172*]. Importantly, the ICC Court takes a case-by-case approach to determine the validity of derogation from the ICC Rules as agreed upon by the parties [*Aksen/Böckstiegel, p. 851*]. Therefore, given the Parties' intention to refer questions of consolidation to the Tribunal, RESPONDENT'S contention of invalidity ought to be rejected.

B. Non- consolidation may result in the award being held unenforceable under Art. V (1)(d) NYC

82. As stated above, Equitoriana and Mediterraneo are contracting states to the NYC [*PO1, ¶4(4)*]. The award must, therefore, be enforceable as per Art. V NYC.

83. There is an independent duty upon the Tribunal to render an enforceable award [*Horvath p. 135*; *Weigand/Baumann ¶14.158; Redfern/Hunter, ¶¶9.14, 11.11*]. Non-compliance with the procedure specifically agreed upon by the Parties constitutes grounds to refuse enforcement under Art. V(1)(d) NYC [*NYC, Art. V(1)(d)*].

84. To that end, the original ICC draft on the recognition and enforcement of foreign arbitral awards did not contain non-compliance with the agreed-upon procedure as a ground to refuse enforcement but as a precondition to valid enforcement [*Prelim Draft Convention, Arts. III, IV*]. The specific addition of this non-compliance as a ground to refuse enforcement was noted as "perhaps one of the most far-reaching departures of the ICC Draft" [*Draft Convention, ¶43*]. Furthermore, a departure from the specifically agreed-upon procedure by the Parties, even in institutional arbitration, has

been viewed as fulfilling the conditions of Art. V(1)(d) NYC to refuse enforcement [*PepsiCo (China) cases*].

85. CLAIMANT has submitted that Art. 41(5) of the FA is an exercise of party autonomy in determining the applicable procedure without contravening a mandatory provision of the ICC Rules. This, thus, makes Art. 41(5) of the FA, the applicable, party-determined procedure. Therefore, if the Tribunal was to refuse consolidation, it would fulfil the grounds under Art. V(1)(d) NYC, and make the award susceptible to potentially being rendered unenforceable.

II. The Tribunal should consolidate the proceedings

86. The Tribunal should alternatively consolidate the proceedings because the claim fulfils the requirements under Art. 10 ICC Rules **(A)**, and consolidation promotes efficiency **(B)**.

A. The Authorisation Request fulfils the requirements under Art. 10 ICC Rules

87. Multiple arbitral proceedings may be consolidated into a single proceeding [*ICC Rules, Art. 10*]. The criteria for the same are laid out in the sub-clauses of Art. 10 ICC Rules [*ICC Rules, Art. 10*]. Consolidation is facilitated even if one criterion is met [*ICC Rules, Art. 10*].
88. In the present case, CLAIMANT'S Authorisation Request fulfils the requirements under Art. 10 ICC Rules because the Parties have agreed to consolidation **(1)**; the claims have been made under the same arbitration agreement **(2)**, and even if the claims arose from different arbitration agreements, they should be consolidated **(3)**.

1. The Parties have agreed to consolidation

89. The pending arbitrations can be consolidated into a single arbitration if the parties have agreed to consolidation [*ICC Rules, Art. 10(a); Ex. C1, p. 12, Art. 41(5)*]. This is facilitated when multiple contracts exist related to questions of law and fact, the parallel resolution of which would result in conflicting awards [*Ex. C1, p. 12, Art. 41(5)*].
90. The Parties have agreed to consolidation in Art. 41(5) of the FA. As such, consolidation ought to follow because multiple contracts were concluded under the FA **(a)**; the claims are related by question of law and fact **(b)**; and non-consolidation will lead to conflicting awards under the NYC **(c)**.

a. Multiple contracts were concluded under the FA

91. An individual contract is a two-way reciprocal agreement [*Nicklisch, pp. 70-71*]. Several individual contracts form multiple contracts [*Nicklisch, pp. 70-71*]. Art. 41(5) of the FA requires the conclusion of multiple contracts for the consolidation of claims [*Ex. C1, p. 12*]. Claims arising out of more than one contract may be made into a single arbitration [*ICC Rules, Art. 9*]. The FA governs the

contractual terms for all 'Contract Products' [*Ex. C1, p. 9, Art. 1*]. These terms apply to all 'Individual Contracts' under the FA [*Ex. C1, p. 9, Art. 1*]. The claims arise from PO No. 9601 and A-15604, each of which is an 'Individual Contract' under the FA [*Ex. C1, p. 9, Art. 1*]. Therefore, multiple contracts were concluded under the FA.

b. The claims are related by questions of law and fact

92. Questions of law are raised about a matter of law [*Travis,* ¶*297*]. These questions arise from material legal issues [*Travis,* ¶*297*]. Even a single question on law warrants consolidation [*Canfor Orders,* ¶¶*46, 115, 185*]. Questions of fact are the issues in legal proceedings concerning facts and events [*Nexbis Award,* ¶*61*]. Consolidation is viable when there is a common question of law and fact [*Canfor Orders,* ¶¶*115, 185; NAFTA, Art. 1126*].
93. Here, the non-payment for the sensors by RESPONDENT serves as the common question of law and fact [*Nexbis Award,* ¶*90*]. RESPONDENT failed to make payments for sensors purchased under PO No. 9601 and PO No. 15604. Further, RESPONDENT failed to make the payments to CLAIMANT even after notification of the same. Hence, the claims are related to the question of non-payment by RESPONDENT.

c. Non-consolidation will lead to conflicting awards under the NYC

94. When there are parallel proceedings of closely related claims, there is a high probability of conflicting awards [*Redfern/Hunter,* ¶*1.116*]. The claims in question are indeed 'closely related' [*CL. Memo, Issue 2(II)(A)(1)(b), p. 19,* ¶*94*]. Both claims deal with the non-fulfilment of contractual obligations and are related by questions of law and fact [*CL. Memo, Issue 2(II)(A)(1)(b), p. 19,* ¶*94*].
95. The central obligation imposed on Parties is to recognise all arbitral awards as binding and enforce them [*NYC, Art. III*]. However, when awards are conflicting, there is confusion as to which award must be enforced. In such a case, there are no commonalities in legislative standards and enforcement of awards. The lack of commonalities would render the award contrary to public policy [*Cremades/Lew, pp. 269-304*].
96. For instance, tribunal A holds that the proceedings need not be consolidated. Tribunal B's award is contrary to that of tribunal A. Here, there is an inconsistency in tribunals' awards. Hence, there will be irregularities and confusion in their enforcement. Subsequently, both parties will be forced to undergo the arbitral proceedings again. This will require the parties to incur costs over and above what they already would have. Further, under the NYC, the parties would have to enforce the awards of both the tribunals. This situation will lead to confusion as well as a waste of time, money and effort for the Parties [*CL. Memo, Issue 1(II)(C)(2), p. 14,* ¶*66*].

2. The claims have been made under the same arbitration agreement

97. Two claims may be consolidated into a single proceeding when they arise out of the same arbitration agreement [*ICC Rules, Art. 10(b)*]. The original and additional claims arise from PO No. 9601 and PO No. A-15604, respectively. Both the purchase orders were concluded under the FA [*Ex. C2, p. 13; Ex. C7, p. 48*]. Consequently, both the purchase orders, and subsequently the claims, refer to the terms of the FA. The FA explicitly states that its terms apply to the sale and purchase of all 'Contract Products' [*Ex. C1, p. 9, Art. 2*]. Additionally, dispute resolution clauses for both the purchase orders are substantively uniform and compatible [*CL. Memo, Issue 1(I)(B)(3), p. 9, ¶40*]. As such, it can be concluded that the claims have been made under the same arbitration agreement.

3. Even if the claims arose from different arbitration agreements, they should be consolidated

98. Arbitral proceedings can be consolidated even when they arise from separate arbitration agreements [*ICC Rules, Art. 10*]. The claims, however, must arise from the same legal relationship [*ICC Rules, Art. 10*]. Moreover, certain fundamental characteristics of the pending proceedings should be similar for their consolidation [*Fry/Greenberg/Mazza, p. 81*].

99. The two claims ought to be consolidated because the claims arise from the same legal relationship **(a)**, and the fundamental characteristics of the proceedings are the same **(b)**.

a. The claims arise from the same legal relationship between the Parties

100. Claims made under separate agreements are permitted by the tribunal if they concern the same legal relationship [*Craig/Park/Paulsson, p. 180*]. A 'same legal relationship' can be signified by an economic link between the agreements [*Derains/Schwartz, pp. 61-62*]. This implies that the relationship must be between the same parties.

101. If the two contracts overlap, a substantive connection is formed between them [*Heuman ¶674; Andersson ¶51*]. The closer the connection, the higher the chance of the legal relationship being the same [*Heuman, ¶674; Andersson, ¶51*]. The claims arise from the same economic transaction between the Parties. This interrelationship is explained in greater depth in [*CL. Memo, Issue 1(I)(B)(2)*].

b. The fundamental characteristics of the proceedings are substantively consistent with each other

102. Certain circumstances exist wherein claims should not be consolidated. These circumstances need not be exhaustive. They must, however, be substantively consistent [*Fry/Greenberg/Mazza, p. 81; Panama Canal case, ¶24*; *ICC Bulletin, p. 34, ¶67*]. Consolidation ought not to proceed when different arbitration agreements provide for different seats of arbitration, different numbers of arbitrators,

and different methods of appointing them [*FAI, CoA Helsinki, p. 2*]. The FA, PO No. 9601 and PO No. A-15604 contain dispute resolution clauses.

103. The FA, as well as the POs provide for arbitration under the ICC Rules. They also maintain the same stance on the place of arbitration and the number of arbitrators. The place of arbitration and the number of arbitrators have been decided as Danubia and three, respectively. To the extent that the fundamental characteristics of the two claims are the same, please refer to [*CL. Memo, Issue 1(I)(B)(3)*].

B. Consolidation promotes efficiency

104. A single arbitration is more efficient than two or more separate arbitrations [*Born, §1.02(A)(20)*]. The ICC Rules also emphasise the importance of effective arbitration [*ICC Rules, Art. 22(1)*]. Hence, the claims should be consolidated because consolidation promotes procedural efficiency and fairness **(1)**, and consolidation promotes time and cost efficiency **(2)**.

1. Consolidation promotes procedural efficiency and fairness

105. The efficient and fair conduct of the process is the cornerstone of international arbitration [*Lew, pp. 175-186*]. The procedural arrangements must be efficient and effective [*Lew, p. 175*]. Efficiency refers to the optimum utilisation of resources with minimum wastage [*Fortese/Hemmi, pp. 116-119*]. Effectiveness refers to the completion of tasks in a timely manner [*Gent/Shannon, pp 368-370*]. When the disputes are based on a common or closely related set of facts, they ought to be consolidated [*Lew II, p. 377*].

106. Consolidation will promote procedural efficiency owing to the nature of dispute resolution the parties have agreed to [*Ex. C2, p. 10, ¶7; Ex. C7, ¶7*]. The place of arbitration for both claims is Danubia [*FA, Art. 41(4)*]. The claims are also closely related by question of law and fact. As such, non-consolidation would lead to the duplication of efforts. Moreover, there is also the risk of the Tribunal giving an inconsistent and conflicting award [*CL. Memo, Issue 2(II)(A)(1)(c), p. 19, ¶96*].

2. Consolidation promotes cost-efficiency

107. Art. 22(1) ICC Rules states that the Tribunal and the parties must conduct the arbitration in a cost-effective manner. Non-consolidation of the claims would go against Art. 22(1) ICC Rules. This is due to the cascading fees and advances required to be paid by the Parties.

108. The ICC Rules necessitate a non-refundable fee to be paid before the proceedings begin [*ICC Letter on Consolidation, p. 53*]. The ICC Court may also fix an advance to cover administrative costs. CLAIMANT has already paid the provisional advance of USD 135,000 [*Ans ICC Not RfA, p. 28*]. Moreover, the advance costs have been fixed at USD 610,000 [*ICC Not CD, p. 39*]. The filing fee

of USD 5,000 has also been paid [*ICC Letter on Consolidation, p. 53*]. These costs can further be increased during proceedings at the ICC Court's discretion [*ICC Letter on Consolidation, p. 53*].

109. Fees for parallel proceedings would be even greater [*CL. Memo, Issue 1(II)(C)(1), p. 13, Illustration 3, ¶61*]. Parties would have to undergo these expenses doubly. Therefore, consolidation of claims would promote time and cost efficiency. Regarding the extent to which consolidation promotes time and cost-efficiency, refer to [*CL. Memo, Issue 1(II)(C)(1)*].

CONCLUSION TO ISSUE 2

110. The Tribunal has the authority to consolidate the claims as party autonomy and intention supersede institutional rules. Further, consolidation is not an ICC-specific non-derogatable provision. Non-consolidation may render the award unenforceable under Art. V(1)(d) NYC. Moreover, the consolidation requirements under Art. 10 ICC Rules stand fulfilled. The Parties had agreed to consolidation, and the claims have been made under the same arbitration agreement. Even otherwise, the claims should be consolidated as they stem from the same legal relationship, and the fundamental characteristics of the proceedings are consistent with each other. Lastly, consolidation of proceedings would promote procedural efficiency and cost-effectiveness.

ARGUMENTS ON MERITS

ISSUE 3: CLAIMANT IS ENTITLED TO PAYMENT UNDER PO NO. 9601, AND RESPONDENT CANNOT RELY ON A CONTRACTUAL DUTY VIOLATION OR THE CISG TO DEFEND ITSELF

I. CLAIMANT is entitled to payment of the amount due under PO No. 9601

111. RESPONDENT submits that the Phishing email can be attributed to CLAIMANT and transfers made to the account mentioned therein constitute performance of the former's payment obligations, thereby precluding CLAIMANT from claiming further payments from RESPONDENT [*ARfA*, *p. 31*, ¶¶*9*, *11*].

112. Instead, CLAIMANT argues that it is entitled to payment of the amount due under PO No. 9601 because the Phishing email cannot be attributed to it **(A)**. RESPONDENT was best suited to prevent the loss **(B)**, and CLAIMANT is allowed to seek payment under the CISG **(C)**.

A. The Phishing email cannot be attributed to CLAIMANT

113. While interpreting the finer details of electronic communication usage, regard should be given to uniform laws, including the UNCITRAL Model Law on Electronic Commerce ("**MLEC**") [*CISG, Art. 7(2); CISG-AC Opinion No. 1,* ¶*13*], which was drafted keeping the CISG in consideration, among other things [*Schwenzer/Spagnolo*, *p. 1*].

114. An email can be regarded to be that of and attributed to the sender if it has been received due to the actions of a person whose relationship with the sender is such that they had access to the information contained in it [*MLEC, Art. 13(3)(b)*]. However, this rule would be inapplicable if the recipient knew, or should have known if it exercised reasonable care, that the message was not that of the sender [*MLEC, Art. 13(4)(b)*].

115. Whether a party has undertaken a binding contractual action must be interpreted in accordance with Art. 8 CISG [*CISG-online 2920, ¶24*]. Due account must be taken of all relevant factors, including practices between the parties [*CISG, Art. 8(3); Schlechtriem/Schwenzer, p. 135, ¶31; Najork, pp. 61, 66*]. Communication originating from an email account never used before should give rise to suspicion, especially when the claims made in the email may not seem entirely credible [*CISG-online 2920; ¶28*]. If a party receives instructions to wire money which are completely different from the wiring details followed so far, it must conduct due diligence and confirm with the other party whether those instructions are valid [*Arrow v Top Quality, p. 13*].

116. In the current case, RESPONDENT received the Phishing email, purportedly from Ms. Audi, asking it to make payments due under PO No. 9601 to the new bank account specified in the email [*Ex. C5, p. 16*]. The top-level domain in this email was not of CLAIMANT [*CL. Memo, SoF, p. 2, Illustration 1, ¶8*]. Further, the reason given for the change in accounts was that increased sanctions by the authorities in relation to L-1 sensors having potential military use had caused banking troubles in the past [*Ex. C5, p. 16*]. However, PO No. 9601 concerned the sale of S4-25899 sensors, which did not have any potential military use [*PO2, p. 63, ¶15*]. Thus, PO No. 9601 would not be impacted by sanctions in any way.

117. Additionally, the signature of the Phishing email carried the telephone number "(0)214 6698053" [*Ex. C5, p. 16*]. This could not belong to Ms. Audi as she was based in Mediterraneo, whose area code is "(0)146" and not "(0)214", as it is also evident in the telephone number of Mr. Joseph Langweiler – "(0)146 9865" [*Letter by Langweiler, p. 4*] and Mr. Li Worry – "(0)146 9346355" [*Ex. R2, p. 34*]. On the other hand, the area code of Equatoriana is "(0)214". The sender of the Phishing email nonchalantly copied Mr. William Toyoda's telephone number, "(0)214 6698053" [*Ex. R1, p. 33*].

118. Furthermore, the Phishing email also referred to PO No. 1560<u>5</u>, which was clearly incorrect as the real number of the PO was A-1560<u>4</u> [*Ex. C5, p. 16*]. Furthermore, the Phishing email mentioned S4-25<u>889</u> sensors, while in reality, CLAIMANT delivered S4-25<u>899</u> sensors to RESPONDENT [*Ex. C5, p. 16*]. All these inconsistencies have also been reproduced in Illustration 4 below.

	Phishing email	Correct details
PO No.	15605	A-15604
Sensor type	S4-25889	S4-25899
Area code	0(146)	0(214)

Illustration 4: Table illustrating the incorrect area code and phone number in the Phishing email

119. RESPONDENT reached out to Ms. Audi over call, whose out-of-office voicemail reply instructed it to contact Ms. Peugeotroen in an emergency [*PO2, p. 61, ¶4*]. In contrast, RESPONDENT merely confirmed the banking details with the impostor by replying to the same email [*Ex. R4, p. 36*]. RESPONDENT also failed to acknowledge that if Ms. Audi was not at work, her email would have a default out-of-office reply, too, just like her voicemail. Mr. Royce showed one such out-of-office email of Ms. Audi to Mr. Gabrielson in a later meeting to further demonstrate that the email had been a spoof [*PO2, p. 62, ¶6*].

120. In light of so many glaring errors in the Phishing email, had RESPONDENT exercised reasonable care and contacted CLAIMANT directly, seeking confirmation of the contents of the email, it could have instantly figured that this email was a Phishing email and was not sent by CLAIMANT. Therefore, the Phishing email cannot be attributed to CLAIMANT.

B. RESPONDENT was best suited to prevent the loss

121. The party best suited to exercise reasonable care and prevent the loss has the duty to bear it in the event of a business email compromise [*Beau Townsend v Don Hinds, p. 357; Arrow v Top Quality, p. 12; St. Lawrence Testing v Landark Leeds, ¶57*]. When there has been no wilful misconduct or negligence on the part of the seller, the buyer, who made payment to the fraudster's account, is considered to be best suited to prevent the loss [*Lewisi, p. 2600*].

122. Considering all relevant factors, the reasonable person standard provided under Arts. 8(2) and 8(3) CISG is relevant for determining which party shall bear the loss arising from the fund transfer [*CISG-online 2920, ¶28*]. Such an inquiry is fact-intensive and depends on the particular facts of the case [*Bile v RREMC, p. 25*]. Hacking one of the parties' data systems does not automatically dispose of liability determination [*Jetcrete v Austin Trucks, p. 8*].

123. Emails calling for urgent attention or altering banking details must be looked at cautiously [*BEC Guide, FBI; Prevention Guide, Australian Cyber Security Centre, p. 7*]. The cybersecurity measures the seller has in place, instructions sent to the buyer, and the nature of the email are relevant for determining liability [*Oguntoye/Durst/Barnes, p. 2*]. Additionally, a failure to detect even the smallest alteration in the sender's address in the email strongly influences the determination of liability [*Sell Your Car With Us v Sareen, p. 48*].

124. In the current case, there are several discrepancies in the Phishing email, which were disregarded by RESPONDENT, indicating a lack of reasonable care [*CL. Memo, SoF, p. 2, Illustration 1, ¶8; Issue 3(I)(A), p. 5, p. 24, Illustration 4, ¶118*]. Further, the Phishing email characterised the nature of the change of the banking details as urgent and immediate, making it a prerequisite to authorising shipment [*Ex. C5, p. 16*]. In reality, the shipment of the delivery was not contingent on payment, as payment under PO No. 9601 was scheduled 30 days after delivery [*Ex. C2, p. 13*]. RESPONDENT should have been cautious by the emphasis on 'urgently' and 'immediately' [*Ex. C5, p. 16*]. RESPONDENT acted hastefully, authorising payment despite the offer to wait for a formal written amendment to change the banking details in the alternative [*Ex. R4, p. 36, ¶4*].

125. On the contrary, CLAIMANT had a fully functional cybersecurity defence system, strengthened in 2021 through regular employee training and additional firewalls [*Ex. C6, p. 17*]. CLAIMANT appointed its Chief Cybersecurity Officer ("**CCO**"), who ensured that all employees participated in a two-day intensive training and were automatically enrolled in monthly revision sessions [*PO2, p. 64, ¶24*]. Biweekly test emails are sent to randomly chosen employees, who had to identify and report any suspicious content to the CCO [*PO2, p. 64, ¶24*].

126. Moreover, when the cyberattack was detected, CLAIMANT engaged the services of CyberSec to assess the threat, which initially appeared to be of minor relevance [*Ex. C6, p. 17, ¶6*]. Therefore, it is CLAIMANT'S submission that RESPONDENT was best suited to prevent the loss.

C. CLAIMANT is entitled to seek specific performance under the CISG

127. CLAIMANT argues that Arts. 28 **(1)** and 62 CISG **(2)** entitle it to seek specific performance.

1. CLAIMANT is entitled to specific performance under Art. 28 CISG

128. There is no duty on a court to give a judgment for a specific performance unless it would do so under its domestic law [*CISG, Art. 28; Schlechtriem/Schwenzer, p. 488, ¶8; CISG-online 1192*]. Courts have, in the past, referred to their own domestic law to decide whether specific performance can be granted under Art. 28 CISG [*CLOUT Case No. 417, pp. 6, 7*]. A buyer is obligated to pay the price of goods purchased. Requiring him to make this payment is a specific performance [*Trietal, p. 46*]. Although Art. 28 CISG uses the term 'court', it shall be applied analogously to arbitral tribunals [*Enderlein/Maskow, Art. 28, ¶4; Schlechtriem/Schwenzer, p. 488, ¶8*].

129. If a party has failed to make payment, Art. 7.2.1 DCA entitles the other party to claim payment [*PICC, Art. 7.2.1*]. If this claim is not met, the aggrieved party may enforce its right to payment through legal action [*PICC Commentary, Art. 7.2.1, p. 243*].

130. In the current case, all individual contracts are governed by the DCA [*Ex. C1, FA, p. 12, Art. 41(6)*]. RESPONDENT did not pay the purchase price on the due dates. Further, when CLAIMANT

demanded the payment through its letter of 5 September 2022 [*Ex. C3, p. 14*], RESPONDENT refused to comply with its obligation through its reply of 8 September 2022 [*Ex. C4, p. 15*]. Therefore, CLAIMANT is entitled to seek specific performance under Art. 28 CISG.

2. CLAIMANT is entitled to seek specific performance under Art. 62 CISG

131. Paying the price of goods delivered by the seller is the principal obligation of the buyer [*CISG, Art. 53; UNCITRAL Digest, Art. 53, ¶1*]. If the purchase price is fixed, the seller can claim payment if this obligation is not met [*CISG, Art. 62; Schlechtriem/Schwenzer, p. 910, ¶12; CISG-online 1192; CLOUT Case No. 410; CISG-online 813*]. The seller will be granted specific performance, provided he does not resort to any remedy inconsistent with this claim, including avoidance of the contract [*CISG, Art. 62; Schlechtriem/Schwenzer, p. 910, ¶12*].

132. If the seller extends the time for the performance of the contract [*CISG, Art. 63(1)*], he cannot claim specific performance during this extended period [*CISG, Art. 62; Bianca/Bonell, Art. 62, ¶3.4*]. However, if the buyer refuses to perform the contract even in this additional period, the seller regains the right to seek payment [*CISG, Art. 63(2); Kröll, p. 839; UNCITRAL Digest, Art. 63, ¶10*]. If the seller clearly demands the performance of the buyer's obligations, it can rely on its rights under Art. 62 CISG without any prior notice of breach [*UNCITRAL Digest, p. 287, Art. 62, ¶7*].

133. In the current case, the amount to be paid by RESPONDENT to CLAIMANT was fixed and determined. Cumulatively, USD 38,400,000 had to be paid [*RfA, p. 8, ¶30*]. The payment had to be made in two instalments of USD 19,200,000 each on 3 May 2022 and 30 June 2022 [*Ex. C2, p. 13*]. However, CLAIMANT did not receive payment for the goods that it had delivered to RESPONDENT.

134. Here, CLAIMANT seeks specific performance, not a termination of the FA [*RfA, LE, p. 8, ¶29*]. Further, RESPONDENT refused to pay in the extended time CLAIMANT provided [*Ex. C3, p. 14; Ex. C4, p. 15*]. Thus, the remedy of extension of time was not employed by CLAIMANT. CLAIMANT'S letter constituted a clear demand of the amount due from RESPONDENT. Therefore, CLAIMANT is entitled to seek specific performance under Art. 62 CISG.

II. The Phishing email does not constitute a valid modification of the FA

135. CLAIMANT submits that the Phishing email does not constitute a valid modification of the FA because it does not fulfil the form requirement under Art. 40 of the FA due to the absence of a valid signature **(A)**, and the Phishing email does not constitute a valid agreement to modify the FA **(B)**.

A. The Phishing email does not fulfil the form requirement under Art. 40 of the FA due to the absence of a valid signature

136. When parties have incorporated form requirements into their agreement for its modification, agreements to modify that do not comply with those requirements are invalid and ineffective [*CISG, Art. 29(2); Schlechtriem/Schwenzer, p. 506*]. Consequently, when it has been agreed that writing would be mandatory to modify an agreement, it is necessary that all modifications comply with this requirement [*Ferrari/Flechtner/Brand, p. 208; UNCITRAL Digest, p. 123; CLOUT Case No. 86, p. 5*].

137. As per a joint reading of Arts. 6 and 29(2) CISG, freedom of form under Art. 11 CISG is superseded by any form requirements that the parties may have agreed to [*Schlechtriem/Schwenzer, p. 213*]. The CISG gives a very liberal interpretation to the requirement of writing [*CISG, Art. 13*], which would apply if the parties have not agreed otherwise [*CISG, Art. 8(1); Schlechtriem/Schwenzer, p. 220*]. Regard must be given to the practices between the parties *vis-à-vis* the use of emails and other modes of electronic communication [*Schlechtriem/Butler, p. 63*].

138. Under the MLEC, an electronic signature carried with a data message can be sufficient where the parties have imposed signature requirements [*MLEC, Art. 7*]. As per the UNCITRAL Model Law on Electronic Signatures ("**MLES**") an electronic signature is the data associated with an electronic message used to identify the signatory [*MLES, Art. 2(a)*]. A party that relies on an electronic signature bears the burden if it has failed to take reasonable steps to verify its reliability [*MLES, Art. 11(a)*]. The email address in the 'from' field is a symbol logically associated with the email and has the same authenticating function as a signature [*CLOUT Case No. 1833, p. 13*].

139. In the current case, the FA between the Parties mandates that any modification to it be in writing and signed by both Parties [*Ex. C1, FA, p. 11, Art. 40*]. The only past alteration of banking details was accomplished through a side letter signed by both Parties [*PO2, p. 63, ¶12*]. Parties have a practice of using emails for communication [*PO2, p. 61*, *¶4*]. Thus, an electronic signature would normally fulfil the requirements under Art. 40 of the FA. However, in this case, the 'from' field in the top-level domain of the Phishing email did not belong to CLAIMANT but was a spoof [*CL. Memo, SoF, p. 2, Illustration 1, ¶8*]. As a result, there was no valid signature with the email, due to which CLAIMANT cannot be said to have authenticated its contents. Therefore, the Phishing email does not fulfil the requirements under Art. 40 of the FA due to the absence of a valid signature.

B. The Phishing email does not constitute a valid agreement to modify the FA

140. A contract is modified, provided both parties reach an agreement to that effect [*CISG, Art. 29*]. A modification is an agreement in itself [*Schlechtriem/Butler, p. 87*]. The existence of such an agreement is made by relying on the provisions of CISG that govern the formation of contracts [*UNCITRAL*

Digest, p. 123, Art. 29, ¶4; CLOUT Case No. 120, ¶25; Kröll, p. 385; Secretariat Commentary, Art. 27, ¶4].

141. Under Art. 14 CISG, an offer is a proposal that is definite and indicates the offeror's intention to be bound by it [*CISG, Art. 14*]. It assumes that the identity of the offeror, i.e., the party who will be bound by the legal consequences of the acceptance, is determinable [*Schlechtriem/Schwenzer, p. 272*]. An interpretation of party intent under Art. 8 CISG can assist in ascertaining this identity [*CISG-online 1818*]. If that is insufficient, there is no valid offer for lack of minimum requirement under Art. 14(1) CISG [*Schlechtriem/Schwenzer, p. 272; CISG-online 594, ¶25*]. The burden of proof to establish the existence of a valid offer is on the party claiming such an offer [*CISG-online 1402*].

142. In the current case, the Phishing email was never sent by CLAIMANT [*RfA, p. 7, ¶19*]. CLAIMANT submits that the Phishing email cannot be attributed to it [*CL. Memo, Issue 3(I)(A), p. 24, ¶120*]. Hence, the identity of the offeror cannot be determined. Since CLAIMANT did not send the email, it cannot be said to have intended to be bound by its legal consequences. Thus, there is no valid offer to enter into an agreement modifying the FA. Therefore, there is no valid agreement to modify the FA.

III. RESPONDENT cannot invoke CLAIMANT'S violation of an information duty

143. CLAIMANT submits that RESPONDENT cannot invoke CLAIMANT'S violation of an information duty under applicable substantive law as CISG is the applicable law, rendering general rules of contract law inapplicable **(A)**. The duty to inform is not a standard business practice under Art. 9 CISG **(B)**. In any case, no information obligation is created by Art. 5.1.3 DCA **(C)**.

A. CISG is the applicable law, rendering general rules of contract law inapplicable

144. The law chosen by the parties primarily governs the contract [*Schlechtriem/Schwenzer, p. 208*]. Parties can directly select the CISG to apply to individual contracts under a framework agreement [*SCC Case No.156/2003, Kröll, p. 38*], even though the CISG may not apply to framework agreements [*ICC Case No. 16698, ¶21*].

145. When parties make reference to the law of a contracting state, it usually leads to the application of CISG [*Schlechtriem/Schwenzer, p. 208; CISG-online 730; BP Oil International v PetroEcuador*]. Art. 1(1)(a) CISG requires that parties must have their places of business in different contracting states, setting autonomous requirements for its application [*CISG, Art. 1; Schlechtriem/Schwenzer, p. 223*].

146. In the current case, CLAIMANT is based in Mediterraneo and RESPONDENT in Equatoriana respectively [*RfA, p. 5, ¶¶1, 3*]. As stated above, Equitoriana, Mediterraneo and Danubia are contracting states to the CISG [*PO1, p. 58, ¶4*]. Moreover, as per Art. 41 of the FA, all individual contracts concluded under the FA shall be governed by the law of Danubia [*Ex. C1, p. 12, ¶6*].

Since both Parties are located in different contracting states, and the law of Danubia, which is a contracting state, is relevant, the CISG becomes the applicable law. Moreover, PO No. 9601 explicitly selects CISG to be the governing law [*Ex. C2, p. 13,* ¶*7*]. Therefore, the CISG, which is part of Danubian law, governs PO No. 9601.

B. Art. 9 CISG does not impose a standard business practice of the duty to inform

147. CLAIMANT argues that Art. 9 CISG does not impose a standard business practice of the duty to inform as it is not a practice established or usage agreed to by the Parties under Art. 9(1) CISG **(1)**, or an internationally observed trade usage under Art. 9(2) CISG **(2)**.

1. The duty to inform is not a practice established or usage agreed to by the Parties under Art. 9(1) CISG

148. Parties are bound by any practices they have established between themselves [*CISG, Art. 9(1); Schlechtriem/Schwenzer, p. 401*]. 'Practice' means conduct or actions established between parties over time through a number of transactions that, due to their recurrence, have become binding and are thereby incorporated into the contract [*CISG, Art 9(1), Kröll, p. 165*]. For an activity to be recognised as a practice, it must occur with a certain frequency over a period of time [*CISG-online 659*]. The repeated occurrence of conduct must be such that it creates a legitimate expectation for its continuation in the future [*CISG, Art. 9; Schlechtriem/Schwenzer, p. 401; Honnold/Flechtner, p. 214*].

149. Further, parties are bound by any usages that they have agreed to [*CISG, Art. 9(1); Schlechtriem/Schwenzer, p. 401*]. The agreement can be express or implied [*CISG, Art 9(1); Kröll, p. 167*]. This question is answered by applying the general rules of interpretation under Art. 8 CISG [*CISG, Art. 9; Schlechtriem/Schwenzer, p. 401; Honnold/Flechtner, p. 207*].

150. In the current case, CLAIMANT was informed about the cyberattack suffered by RESPONDENT in 2020 [*Ex. R2, p. 34*] only because RESPONDENT was legally obligated under its domestic law – Art. 34 EDPA [*Ex. R4, p. 36,* ¶*2*]. Since the inception of the Parties' contractual relationship in 2019 when the FA was signed [*RfA, p. 5,* ¶*6; Ex. C1, p. 12*], this has been the only instance of one of the Parties informing the other about encountering a cyberattack. Despite RESPONDENT'S misbelief that this one instance would constitute 'good business practice' [*Ex. R4, p. 2,* ¶*2*], this was, and remains to be, an isolated occurrence.

151. Additionally, Mediterraneo, where CLAIMANT is located, rejected a data privacy regime based on the Europe Union and Equatoriana's Data Protection model due to the increased burden of mass claims [*RfA,* ¶*28, p. 8; Ex. C6, p. 17,* ¶*7*]. RESPONDENT'S email informing CLAIMANT about the potential data breach [*Ex R1, p. 33*] and CLAIMANT'S response requesting to be kept '*à jour*' [*Ex. R1, p. 34*] does not constitute an agreement to establish such a usage between the Parties. Therefore,

the duty to inform is not a practice established or usage agreed to by the Parties under Art. 9(1) CISG.

2. The duty to inform is not an internationally observed trade usage under Art. 9(2) CISG

152. Patterns of behaviour or rules of commerce customary in a particular industry are called trade usages [*CISG, Art. 9(2); Honnold/Flechtner, p. 206; Schlechtriem/Schwenzer, p. 401*]. Most practitioners in the industry use those trade usages [*CISG-online 641*], with no considerable group being unaware of them. The observation of such usages would be nullified by a difference in practice within the same industry [*Schlechtriem/Schwenzer, p. 403*]. There must be international knowledge about the usage, excluding usages developed for domestic transactions [*Schlechtriem/Schwenzer, p. 404*]. The burden of proof under Art. 9(2) CISG is on the party asserting a disputed trade usage [*Schlechtriem/Schwenzer, p. 404*].

153. In the current case, CLAIMANT received information about the potential data breach [*Ex. R2, p. 34*], only due to RESPONDENT'S domestic obligation under Art. 34 EDPA [*Ex. R4, p. 36, ¶4*]. There is no such legal obligation in Mediterraneo, where CLAIMANT is located [*RfA, p. 8, LE, ¶28*]. Although some companies inform customers about potential data breaches, this practice is purely discretionary [*Ex. R3, p. 35*]. Mediterraneo has explicitly rejected a data privacy initiative due to the additional burden of mass claims [*RfA*, *p. 8*, *¶28*; *Ex. C6*, *p. 17*, *¶7*].

154. Mediterraneo's rejection implies that the industry does not have a uniform practice. RESPONDENT'S actions, arising due to a domestic law, do not constitute international usage. There is no evidence of this practice being followed by a 'majority' group in the industry. In contrast, Mediterraneo's rejection indicates the existence of a significant group rejecting this practice. Consequently, RESPONDENT'S actions do not constitute an internationally observed trade usage. Therefore, the information obligation is not an internationally observed trade usage under Art. 9(2) CISG.

C. In any case, an information obligation does not arise under Art. 5.1.3 DCA

155. Art. 5.1.3 DCA specifies the duty of cooperation that each party can reasonably expect from the other in fulfilling its obligations. Each party has a duty not to hinder the other's performance but to take affirmative steps to facilitate it [*PICC, Art. 5.1.3*]. They must act in a manner that facilitates the other party's performance. Parties must not militate against or oppose the purpose of the contract [*Magnus*, *p.* 6]. This duty usually exists *vis-à-vis* joint tasks that parties undertake in pursuance of a common goal, requiring active coordination [*PICC, Art. 5.1.3, p. 153*].

156. A duty to inform, as part of the duty to cooperate, applies to a limited extent necessary for the other party to know while performing their contractual obligations [*PICC, Art. 5.1.3; Vogenauer, ¶7*].

This duty may arise from the CISG, the contract itself, any usage or practice agreed to by the parties, or under good faith in international trade. The exact extent of these duties has to be established on the basis of individual specifics [*SJHSC Artem v Gray Fox Aviation,* ¶*218*].

157. Art. 5.1.3 DCA applies the principle of fair dealing and good faith under Art. 1.7 [*PICC, Art. 1.7, p. 18*]. These principles need to be applied within the particular framework of international commerce. The application of domestic legal standards is restricted to the extent these principles are accepted across diverse legal systems [*PICC, Art. 1.7, p. 20*].

158. In the current case, when CLAIMANT discovered the cyberattack on 23 January 2022 [*RfA, p. 7,* ¶*27*], the incident was of minor relevance [*Ex. C6, p. 17*, ¶*6*]. CyberSec subsequently removed the malware after a careful risk evaluation [*Ex. C6, p. 17,* ¶*6; Ex. R3, p. 35*]. There was no legal obligation on CLAIMANT to inform any customers or authorities about the cyberattack [*RfA, pp. 7, 8,* ¶*27; Ex. C6, p. 17,* ¶*6*].

159. Quite the opposite, RESPONDENT only informed CLAIMANT about the cyberattack suffered by the former due to its domestic obligation under the EDPA [*ARfA, p. 30,* ¶*2; Ex. R4, p. 36,* ¶*2*]. A similar data privacy initiative was rejected in Mediterraneo, where CLAIMANT is located [*RfA, SoF, p. 8,* ¶*28; Ex. C6, p. 17,* ¶*7*].

160. This, and Mediterraneo's rejection, effectively demonstrate that RESPONDENT'S actions do not stem from a standard that is accepted across legal systems. Consequently, they cannot be said to originate from the principles of fair dealing and good faith in international commerce. CLAIMANT not informing RESPONDENT about what it considered to be an incident of 'minor relevance' does not hinder the latter's performance or oppose the FA's purpose. Consequently, it does not constitute a violation of the duty to cooperate. Further, CLAIMANT has displayed good faith in its conduct since the inception of this dispute. This is illustrated by CLAIMANT not charging interest or claiming damages from RESPONDENT [*CL. Memo, Introductory Remarks, p. 3,* ¶*14*]. Therefore, in any case, an information obligation does not arise under Art. 5.1.3 DCA.

IV. Art. 80 CISG cannot be invoked as a defence against the entire payment claim

161. RESPONDENT argues that it is exempt from performance because under Art. 80 CISG, its failure to perform has been caused by CLAIMANT [*ARfA,* ¶*12, p. 32*]. Instead, CLAIMANT submits that Art. 80 CISG cannot be invoked. To invoke this exemption, non-performance must be caused by an act or omission of the promisee, with a reasonable causal link between such act or omission and the non-performance [*CISG, Art. 80; Neumann, p. 179*]. CLAIMANT has not caused RESPONDENT'S failure to make payment because it has not committed an 'act' or an 'omission' under Art. 80 CISG **(A)**, and alternatively, this is a case of joint causation **(B)**.

A. CLAIMANT has not committed an 'act' or an 'omission' under Art. 80 CISG

162. When third-party actions cause failure to perform, it must be determined whether they are attributable to the promisee's sphere of risk as per Art. 79(1) CISG [*CISG, Art. 80; Schwenzer/Manner, p. 477*]. If an impediment is beyond a party's control and cannot be reasonably avoided or overcome, the party would not be responsible for it [*CISG, Art. 79(1)*].
163. For an omission to be relevant under Art. 80 CISG, the promisee must have a duty to act or cooperate [*Kröll, p. 1083*]. The act so omitted must be necessary and objectively suited to performance [*CISG, Art. 80; Schlechtriem/Schwenzer, p. 1156*].
164. In the current case, the threat of cyberattacks has been increasing across the automotive sector globally [*Ex. R3, p. 35*]. CLAIMANT has encountered multiple cyberattacks, thwarting most of them, which were detected by an extremely competent cybersecurity defence system [*Ex. C6, p. 17*]. It had also strengthened its cybersecurity defence system by installing additional firewalls, appointing a CCO, regularly training employees with monthly revision sessions and bi-weekly drills, randomly selecting employees and sending test emails to be flagged as potential threats [*Ex. C6, p. 17; PO2, p. 64, ¶24*].
165. Nevertheless, even the most competent cybersecurity defence system cannot entirely prevent the possibility of a successful cyberattack [*Ex. C6, p. 17*]. Despite multiple security measures in place, CLAIMANT was hit by a cyberattack, effectively demonstrating that it could not have been reasonably avoided by CLAIMANT.
166. Furthermore, when the cyberattack was detected, CLAIMANT engaged the services of CyberSec to evaluate the risks, which appeared to be of minor relevance [*Ex. C6, p. 17*]. Providing information on such an attack was not objectively suited to performance. Further, CLAIMANT was not under any legal or contractual duty to inform RESPONDENT of the cyberattack [*CL. Memo, Issue 3(III)*]. Therefore, CLAIMANT has not committed an 'act' or an 'omission' under Art. 80 CISG.

B. Alternatively, this is a case of joint causation

167. CLAIMANT argues that the all-or-nothing effect of Art. 80 CISG makes its application unsuitable for cases of joint contribution to causation [*Huber/ Mullis, p. 267; Soergel, Art. 80, ¶¶2, 3; Piltz, ¶¶4-224*]. In the current case, even if CLAIMANT'S failure to inform RESPONDENT about the cyberattack contributed to the latter's failure to pay, RESPONDENT failed to exercise reasonable care when transferring funds to the fraudster's account [*CL. Memo, Issue 3(I)(A), p. 24, ¶120; Issue 3(I)(B), p. 25, ¶126*]. This failure of RESPONDENT demonstrates its contribution to its failure to pay. Since joint causation is outside the scope of Art. 80 CISG, an exemption under Art. 80 CISG cannot be sought.

V. RESPONDENT cannot invoke Art. 77 CISG to partially defend itself against the payment claim

168. RESPONDENT contends that the payment claim should be partially reduced under Art. 77 CISG. To invoke such partial defence, the claim by the other party must be of damages, and the obligation to reduce loss is satisfied if the aggrieved party acts rationally [*CISG*, *Art. 77*]. CLAIMANT submits that RESPONDENT cannot invoke Art. 77 CISG to partially defend itself against the payment claim as this is a claim of specific performance, not damages or avoidance of contract **(A)**. The duty to mitigate the damages does not arise **(B)**. Alternatively, CLAIMANT has taken reasonable measures to mitigate the loss **(C)**.

A. This is a claim of specific performance, not damages or avoidance of contract

169. Art. 77 CISG provides that in the event of a breach, the aggrieved party is obligated to undertake reasonable measures to mitigate its damages [*CISG, Art. 77*]. The text of Art. 77 CISG, its position within the CISG, and its drafting history indicate that it is only applicable to a claim of damages [*UNCITRAL Digest, p. 356, Art. 77, ¶2; Schlechtriem/Schwenzer, p. 1106; Honnold/ Flechtner, Art. 77, ¶419.3; Huber/Mullis, p. 290; CLOUT Case No. 886*]. Art. 77 CISG is not applicable if the aggrieved party does not claim damages either as a positive claim or as a set-off [*Ferrari/Flechtner/Brand, p. 804; CLOUT Case No. 424*].
170. Consequently, the duty to mitigate does not exist in claims of specific performance [*Schlechtriem/Butler, p. 220; Kröll, p. 1017*]. Further, an obligation to mitigate does not exist before the contract is avoided because each party can still demand performance from the other party [*Ferrari/Flechtner/Brand, p. 805; UNCITRAL Case Digest, p. 356, Art. 77, ¶8; CLOUT Case No. 361; CLOUT Case No. 130*].
171. In the current case, CLAIMANT seeks to enforce the specific performance of RESPONDENT's payment obligations under PO No. 9601[*Letter by Langweiler, p. 4; RfA, p. 7, ¶25*] and not avoid the FA [*RfA, p. 8, ¶30(1)*]. Further, this is not a claim for damages [*RfA, p. 8, ¶29*]. Therefore, Art. 77 CISG is inapplicable.

B. The duty to mitigate the damages does not arise

172. RESPONDENT may contend that the obligation to mitigate damages arises not solely after the actual breach but as soon as a breach is reasonably anticipated [*Kröll, p. 1019; Saidov I, p. 131; Huber/Mullis, p. 290*]. However, Art. 77 CISG is relevant only if the aggrieved party has positive knowledge of the potential breach of contract [*Schlechtriem/Schwenzer, p. 1106; CISG-online 2348*]. No duty to mitigate the damages arises for an impending breach of contract if there are no particular indications that a breach will occur [*Schlechtriem/Schwenzer, p. 1108; Huber/Mullis, p. 290*]. The general principle

underlying Art. 77 CISG, through Art. 7(2) CISG, is that when both the parties have contributed to the damages, then loss must be shared proportionately by the parties [*UNCITRAL Case Digest, Art. 77, p. 256, ¶1; CISG-online 2348*].

173. In the current case, PO No. 9601 was issued on 17 January 2022 [*Ex. C2, p. 13*] while CLAIMANT discovered the Phishing attack on 23 January 2022 [*RfA, p. 7, ¶27*]. CLAIMANT employed CyberSec to evaluate the risks associated with the cyberattack, and the malware was removed [*Ex. C6, p. 17, ¶6*]. The cyberattack appeared to be of minor significance at that time [*Ex. C6, p. 17, ¶6*]. Further, the FA required changes to be made only in writing with the signature of both Parties [*Ex. C1, p. 11*]. Thus, the potential breach of the FA was not foreseeable by CLAIMANT and the duty to mitigate damages before such breach did not arise. CLAIMANT did not contribute towards the breach, and the consequent loss suffered [*CL. Memo, Issue 3(IV)(A), p. 32, ¶166*]. Therefore, the complete loss must be paid by RESPONDENT.

C. Alternatively, CLAIMANT has taken reasonable measures to mitigate the loss

174. The party aggrieved by a breach must take reasonable measures to mitigate the loss [*CISG, Art. 77*]. RESPONDENT may contend that CLAIMANT should have acquired cybersecurity insurance covering the cyberattack on its system and the potential data leak. However, an innocent party is not bound to take extraordinary or high-cost measures, nor does it need to undertake such measures that are the responsibility of the other party and can be undertaken by them easily [*Kröll, p. 1018; Saidov II, p. 354*]. A measure to mitigate the damages is reasonable if it can be expected as an action out of good faith from a prudent person in similar circumstances [*Kröll, p. 1019; CISG-online 224*]. The standard of reasonability is unique to each case and factual matrix [*Huber/Mullis, p. 290; UNCITRAL Case Digest, Art. 77, p. 356, ¶8*].

175. In the current case, CLAIMANT'S considerably strengthened cybersecurity defence system thwarted most of the cyberattacks in the past [*Ex. C6, p. 17, ¶4*]. In Mediterraneo, where CLAIMANT is located, insurance companies either ask for higher premiums or do not insure cyberattacks at all [*Ex. R3, p. 35*]. Further, even RESPONDENT did not have adequate cyber security insurance [*PO2, p. 64, ¶23*]. In such circumstances, acquiring a cybersecurity premium would be an extraordinary measure.

176. CLAIMANT discovered that payment had not been made on 25 August 2022 [*RfA, p. 7, ¶14*] and promptly sent a letter to RESPONDENT within ten days of such discovery demanding due payment [*RfA, p. 7, ¶17*]. Therefore, CLAIMANT took all reasonable measures within its sphere of responsibility, and RESPONDENT cannot invoke Art. 77 CISG to partially defend itself against the payment claim.

CONCLUSION TO ISSUE 3

177. CLAIMANT is entitled to specific performance of the payment under PO No. 9601. The Phishing email does not constitute a valid modification of the FA. RESPONDENT cannot invoke the violation of an information duty against CLAIMANT. Finally, RESPONDENT cannot invoke Arts. 77 and 80 CISG to partially defend itself against the payment claim. Therefore, CLAIMANT is entitled to payment under PO No. 9601, and RESPONDENT cannot rely on a contractual duty violation or the CISG to defend itself.

PRAYER FOR RELIEF

In light of the foregoing and as developed during the course of the present proceedings, CLAIMANT respectfully requests that the Tribunal:

1) Finds that the addition of the new claim to the pending arbitration can and should be authorised;
2) Or, in the alternative, the Tribunal can and should consolidate the arbitral proceedings in case the new claim has to be raised in separate proceedings;
3) Finds that CLAIMANT is entitled to payment of the amount due under PO No. 9601 and RESPONDENT cannot invoke a violation of a contractual duty or rely on a provision of CISG to defend itself against the claim of payment;
4) Orders RESPONDENT to pay CLAIMANT all costs related to these proceedings.

CLAIMANT reserves its right to amend the above relief as might be required up until the date of the final award. All other rights of CLAIMANT are also reserved.

Respectfully submitted on behalf of CLAIMANT.

CERTIFICATE OF AUTHENTICITY

We hereby submit that this memorandum was written only by the persons whose names are listed below and who signed this certificate.

MUKUND GUPTA

KUNAL KHILNANI

NUPUR GUPTA

AKSHITA MUNDRA

Kolkata, 7 December 2023