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Table of Contents

INDEX OF ABBREVIATIONS AND DEFINITIONS	V
INDEX OF LEGAL NORMS	VIII
FACTS	1
ARGUMENTS	2
I. THE TRIBUNAL SHOULD CONTINUE THE ARBITRAL PROCEEDINGS	4
A. MEDIATION IS NOT A MANDATORY PRE-CONDITION FOR THE PROCEEDINGS	4
B. THE PARTIES ARE NOT REQUIRED TO MEDIATE IRRESPECTIVE OF ANY MANDATORY CHARACTER	5
1. Compliance with pre-arbitral steps is a matter of admissibility	5
2. As mediation would be futile, arbitration is the appropriate forum	7
C. STAYING THE PROCEEDINGS WOULD LEAD TO UNNECESSARY COSTS AND DELAYS	7
II. CLAIMANT'S EXHIBIT C7 IS ADMISSIBLE	8
A. THE TRIBUNAL HAS BROAD EVIDENTIARY DISCRETION	8
B. EXHIBIT C7 DOES NOT FULFIL ANY GROUNDS FOR EXCLUSION	9
1. Exhibit C7 is not subject to the confidentiality obligation under Art 15 FAI Med Rules	9
2. Exhibit C7 does not constitute a without-prejudice offer	11
3. CLAIMANT can rely on RESPONDENT'S commitment to transparency	12
C. THE EXCLUSION OF EXHIBIT C7 WOULD VIOLATE DUE PROCESS	13
III. THE TRIBUNAL SHOULD EXCLUDE RESPONDENT'S EXHIBIT R3	14
A. EXHIBIT R3 IS SUBJECT TO ATTORNEY-CLIENT PRIVILEGE	14
1. Exhibit R3 contains legal advice	14
2. Exhibit R3 contains in-house counsel communication which is covered by attorney-client privilege under Equatorianian law	15
B. EXHIBIT R3 WAS OBTAINED ILLEGALLY	16
1. The Tribunal must connect the dots indicating RESPONDENT'S unlawful acts	16
2. Claimant fulfils the burden of proof for the illegal obtention	18
3. RESPONDENT has unclean hands resulting in the inadmissibility of Exhibit R3	18
4. Alternatively, RESPONDENT must clarify the path of Exh R3 into their hands	18
C. RESPONDENT CIRCUMVENTS THE FORMAL DOCUMENT PRODUCTION PROCEDURE AND THEREBY ACTS IN BAD FAITH	19
IV. THE CISG APPLIES TO THE PSA	20
A. THE PSA IS AN INTERNATIONAL CONTRACT	20
1. Volta Transformer does not constitute a place of business of CLAIMANT	20
2. Even if Volta Transformer qualified as a place of business, it would not have had the closest connection to the PSA and its performance	22



B. THE PSA IS A SALE-OF-GOODS CONTRACT WITH ANCILLARY SERVICE ELEMENTS	23
1. The PSA contains sale-of-goods elements	23
2. The economic value test shows the preponderance of the sales elements	24
3. The sales elements are preponderant when taking into account the will and interest of the Parties	26
C. THE PSA IS NOT A SALE BY AUCTION	26
V. THE PARTIES HAVE NOT EXCLUDED THE CISG	28
A. EXCLUSION MUST BE ASSESSED UNDER ART 8 CISG	28
B. UNDER THE SUBJECTIVE TEST, THE CISG IS NOT EXCLUDED	29
1. CLAIMANT was unaware of RESPONDENT's alleged intent to exclude the CISG	29
2. RESPONDENT was aware of CLAIMANT's intent to apply the CISG	30
C. UNDER THE OBJECTIVE TEST, THE CISG IS NOT EXCLUDED	30
1. The choice-of-law clause does not exclude the CISG	31
2. A systematic interpretation of the PSA does not support an exclusion of the CISG	32
3. The negotiation history does not permit the assumption of exclusion	32
VI. ART 7.3.8 ECC DOES NOT APPLY	33
A. ART 7.3.8 ECC COVERS A MATTER GOVERNED BY THE CISG	33
B. RESPONDENT WAIVED ALL TERMINATION RIGHTS IN ART 28 PSA	34
C. THE INCLUSION OF ART 7.3.8 INTO THE ECC DEFEATS THE OBJECT AND THE PURPOSE OF THE CISG	34
REQUESTS FOR RELIEF	35
INDEX OF AUTHORITIES	XI
INDEX OF CASES	XLVI

Index of Abbreviations and Definitions

§(§)	Paragraph(s)
&	and
Arb	Arbitration
ARfA	Answer to the Request for Arbitration
Art(s)	Article, articles
CEO	Chief Executive Officer
cf	conferatur, compare
CoL	Conflict of laws
CPR	International Institute for Conflict Prevention and Resolution
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
ECC	Equatorianian Civil Code
eg	exemplum gratia, for example
EPC	Engineering, Procurement, and Construction
et al	et alii / et aliae / et alia, and others
et seq	et sequens, and the following
EU	European Union
EUR	Euro
Exh C1	Claimant Exhibit C1
Exh C2	Claimant Exhibit C2
Exh C3	Claimant Exhibit C3
Exh C4	Claimant Exhibit C4



Exh C5	Claimant Exhibit C5
Exh C6	Claimant Exhibit C6
Exh C7	Claimant Exhibit C7
Exh C8	Claimant Exhibit C8
Exh R1	Respondent Exhibit R1
Exh R2	Respondent Exhibit R2
Exh R3	Respondent Exhibit R3
Exh R4	Respondent Exhibit R4
FAI	Arbitration Institute of the Finland Chamber of Commerce
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ie	id est, that is
infra	See below
LCIA	London Court of International Arbitration
Ltd	Limited
Med	Mediation
MM	million
Mr	Mister
Ms	Miss
ObjLang	Objection of Mr Langweiler to the transmission of Exhibit R3 of 14 August 2024
p(p)	Page, pages



para(s)	Paragraph, paragraphs
plc	Public limited company
PO1	Procedural Order No 1 of 11 October 2024
PO2	Procedural Order No 2 of 13 November 2024
PoB	Place of business
PSA	Purchase and Service Agreement
RfA	Request for Arbitration
SCC	Stockholm Chamber of Commerce
Sec	Section
supra	See above
UNCITRAL	United Nations Commission on International Trade Law
USSR	Union of Soviet Socialist Republics
v	versus, against
VT	Volta Transformer

Index of Legal Norms

CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
CPR Med Procedure	International Institute for Conflict Prevention and Resolution Mediation Procedure 1998
FAI Arb Rules	Arbitration Rules of the Finland Chamber of Commerce 2024
FAI Med Rules	Mediation Rules of the Finland Chamber of Commerce 2024
German BGB	German Civil Code 1896
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2020
ICC Med Rules	ICC Mediation Rules 2014
Korean PILA	Korean Act on Private International Law 2022
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014
ML	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
SCC Med Rules	SCC Mediation Rules 2023
Swiss CPC	Swiss Civil Procedure Code 2008
Swiss PILA	Swiss Federal Act on Private International Law 1987
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014
ULF	Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1964



ULIS	Convention Relating to a Uniform Law on the International Sale of Goods 1964
UNCITRAL Model Law on Mediation	UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018
VCLT	Vienna Convention on the Law of Treaties 1969

INTRODUCTION

- 1 *In the process of hydrogen electrolysis, the negatively charged electrode pulls the positively charged hydrogen ions (H^+) towards it. CLAIMANT, positively charged with hope for a greener future, entered the once promising business relationship with RESPONDENT. However, RESPONDENT quickly revealed themselves to be the negatively charged electrode.*

The Parties' relationship played out against the following

Facts

- 2 GreenHydro Plc ("CLAIMANT") is a medium-sized engineering company based in Mediterraneo and a pioneer in the field of renewable green hydrogen. Equatoriana RenPower Ltd ("RESPONDENT") is a 100 % state-owned energy company, controlled by the State of Equatoriana, and the primary vehicle for implementing Equatoriana's Green Energy Strategy.
- 3 For this purpose, RESPONDENT planned to build a state-of-the-art green hydrogen plant in Greenfield, Equatoriana. In competitive tender proceedings, initiated by the Request for Quotation on **3 January 2023**, CLAIMANT was selected due to their proven capabilities in the field and their ability to fulfil RESPONDENT's wish for a swift and seamless realisation of the project: CLAIMANT had already ordered a suitable transformer from their Equatorianian supplier Volta Transformer.
- 4 During the promising contract negotiations between CLAIMANT and RESPONDENT ("Parties"), CLAIMANT agreed on a significant price reduction. They accepted a loss of EUR 15 million as the project presented an irresistible opportunity to showcase their innovative technology and to serve as a reference project for future orders. On **17 July 2023**, the Parties finally concluded the Purchase and Service Agreement ("PSA") including a multi-tier arbitration clause ("Arbitration Clause").
- 5 Suddenly, the Parties' promising relationship took a setback. Following local elections in Equatoriana in **October 2023**, the government changed – and with it RESPONDENT's stance on the PSA. Ms Vent was appointed Minister of Energy. A vocal opponent of the Green Energy Strategy, she promptly called for its revision and the review of all contracts relating to the strategy, including the PSA. CLAIMANT was baffled when they received the notice of termination of the PSA on **29 February 2024**. Mr la Cour, RESPONDENT's newly government-appointed CEO and a member of the governing party ("ENP"), justified the termination with the mentioned change of policy.
- 6 CLAIMANT's subsequent attempts to reconcile were not only brushed aside by RESPONDENT but also took a dismaying turn. Mr la Cour raised serious allegations against CLAIMANT's main negotiator,



Mr Deiman. Based on false suspicions and Mr la Cour's "*very close contact*" to Equatorian prosecutors, a criminal investigation was initiated. In the course of this, police raided Mr Deiman's office, confiscated all his documents, and detained him. The charges were dropped within a month.

- 7 In spite of all this, CLAIMANT made every effort to amicably settle the matter, but fell on deaf ears. In a so-called "*Without-prejudice Offer*" dated **25 May 2024**, RESPONDENT's ulterior motive finally came to light. They demanded a price reduction of yet another 15 % and made clear that there was no room for discussion without agreement to a significant discount. This was obviously unacceptable for CLAIMANT as the suggested conditions were beyond any commercial common sense.
- 8 When CLAIMANT embarked on a final attempt to bring RESPONDENT back to the negotiating table, RESPONDENT did not react in any way. CLAIMANT was left with no other choice but to initiate these arbitral proceedings ("**Proceedings**") and file the Request for Arbitration ("**RfA**") with the Finland Arbitration Institute ("**FAI**") on **31 July 2024**.
- 9 In their Answer to the Request for Arbitration ("**ARfA**") on **14 August 2024**, RESPONDENT suddenly, after continuously blocking every attempt to find a compromise, requests that the arbitral tribunal ("**Tribunal**") reject the claim without any substantive basis.

In the Proceedings, CLAIMANT presents the following

Arguments

I. The Tribunal should continue the Arbitral Proceedings

- 10 The Parties agreed on an Arbitration Clause containing a non-mandatory mediation element. Even if compulsory, not conducting a mediation would neither affect the jurisdiction of the Tribunal nor the admissibility of the claim. In any event, staying the Proceedings and referring the Parties to mediation would be detrimental to both Parties. Irrespective of RESPONDENT's resistance, CLAIMANT thus rightfully initiated the Proceedings.

II. CLAIMANT's Exhibit C7 is admissible

- 11 RESPONDENT requests to exclude Exh C7. Exh C7 neither constitutes a privileged without-prejudice offer nor fulfils any other grounds for exclusion. Despite being labelled a "*Without-prejudice Offer*", it was nothing more than an attempt to hide crucial evidence from the Tribunal. RESPONDENT disregards their own transparency commitments on which CLAIMANT could reasonably rely. Exh C7 must remain in the file.



III. The Tribunal should exclude RESPONDENT'S Exhibit R3

- 12 Exh R3 is CLAIMANT'S internal attorney-client communication and is therefore protected by attorney-client privilege under the applicable Equatorianian law. Further, the facts of the case file reveal RESPONDENT'S illegal obtention of said document. By obtaining and sending Exh R3 directly to the not-yet appointed arbitrators, RESPONDENT bypassed the formal document production procedure. Exh R3 must be excluded.

IV. The CISG applies to the PSA

- 13 The PSA is an international sale-of-goods contract governed by the CISG. The Parties had their places of business in different Contracting States at the time of contract conclusion. The PSA preponderantly concerns the sale of goods. Finally, what RESPONDENT called a "*reverse auction*" does not fall under the exception of Art 2(b) CISG for sales by auction.

V. The Parties have not excluded the CISG

- 14 The Parties never intended to exclude the CISG. RESPONDENT never declared their alleged intent to do so. Conversely, CLAIMANT evidently insisted on the application of the CISG. Not even a reasonable third party would have understood the terms of the PSA and the negotiations between the Parties as an exclusion of the CISG.

VI. Art 7.3.8 ECC does not apply

- 15 RESPONDENT cannot invoke Art 7.3.8 Equatorianian Civil Code ("ECC"), a non-harmonised termination provision. This provision governs a matter that falls within the scope of the CISG and is therefore superseded by it. In any case, RESPONDENT waived their right to terminate for convenience in the PSA. Finally, Art 7.3.8 ECC frustrates the purpose of the CISG and must be disregarded by the Tribunal.

PART I: PROCEDURAL ISSUES

I. THE TRIBUNAL SHOULD CONTINUE THE ARBITRAL PROCEEDINGS

- 16 CLAIMANT initiated the Proceedings by submitting the RfA [*RfA pp 11 et seq*]. In the ARfA, RESPONDENT objected to the Tribunal's jurisdiction and the admissibility of the claim based on a purely formalistic reason: the alleged non-compliance with a mediation requirement [*ARfA p 27 para 16*].
- 17 However, mediation is not a mandatory pre-condition for this arbitration (A.). In any event, such a mediation requirement would neither affect the jurisdiction of the Tribunal nor the admissibility of the claim, as the Parties are not obliged to conduct an evidently futile mediation (B.). Furthermore, the Tribunal should refrain from exercising its discretionary power to stay the arbitration as a mediation would be detrimental to both Parties (C.).

A. MEDIATION IS NOT A MANDATORY PRE-CONDITION FOR THE PROCEEDINGS

- 18 Art 30 PSA [*Exh C2 pp 12 et seq*] stipulates the Parties' Arbitration Clause. Art II(1) NYC and Art 7 ML establish the internationally recognised requirements of an arbitration agreement: show the parties' intent to submit their dispute to arbitration in writing, have a subject matter capable of being settled by arbitration, and deal with existing or future disputes arising out of a defined legal relationship [*Blackaby et al para 2.13*]. Art 30 PSA fulfils all these requirements.
- 19 The Arbitration Clause contains a mediation element. However, the latter does not have any mandatory character. As a basic rule, pre-arbitral steps are non-binding and primarily aspirational. This is the prevailing opinion both in the mediation sector, as evidenced by the FAI Med Guidelines declaring mediation a “voluntary process” [*Arts II(10) and VIII(31) FAI Med Guidelines*], and in arbitral practice [*ICC Case 10256; Lotamblau Case; Born/Šćekić p 234; Koller para 3/33*]. To deviate from this presumption, parties must express an unambiguous intent [*ICC Case 8073; Fiona Trust Case; Fluor Case; SCC Case 1992; Westco Case*]. Yet, the Parties never intended a mandatory nature.
- 20 Consistent jurisprudence in Equatoriana, Danubia, and Mediterraneo has established that, in contracts governed by the CISG (*infra IV., paras 100–135*), the latter also applies to the interpretation of arbitration agreements contained in such contracts [*PO1 p 50 para III(5)*]. Under Art 8(1) CISG, the parties' apparent intent is the primary consideration. Here, in absence of such, interpretation defaults to the understanding of a reasonable third party in the same circumstances pursuant to Art 8(2) CISG. Accordingly, a mandatory mediation element would require additional clarifications. This corresponds to mediation elements in comparable proceedings: multi-tier clauses included a clear term like “condition precedent” [*Builders Case; Golden State Foods Case*] or at least described the threshold

to go from one step to the other [*Ohpen Operations Case; Lew et al para 8-69*], eg by prescribing a time limit [*NWA Case: “If the dispute is not settled by mediation within 30 days [...]”*] or a specified number of mediation sessions [*Kamper Case: “[...] not less than two negotiation sessions prior to seeking any resolution of any dispute [...]”*]. This corresponds to Art IX(32) FAI Med Guidelines: in absence of a contrary agreement, mediation does not constitute a bar to arbitral proceedings.

- 21 In contrast, the mediation element in Art 30 PSA reads as follows: “*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall first be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce.*” [*Exh C2 pp 12 et seq*]. This mediation element does not contain any of the mentioned indications typically associated with a mandatory character: a clarifying term, a time limit, or a specified number of mediation sessions. Instead, it merely contains “*shall first*”, which does not reflect the high standard usually applied to enforceable mediation agreements. After all, the mentioned cases all contain highly detailed multi-tier clauses with additional hierarchical links in between their steps.
- 22 A hierarchical link cannot be derived from the arbitration element either. The phrase “*shall finally be settled by arbitration*” [*Exh C2 p 13 Art 30*] does not establish a hierarchical link to mediation but precludes appeals against arbitral awards [*Baffinland Case*]. In this regard, arbitration model clauses without a mediation element typically also contain the same wording (eg ICC and DIS: “*finally settled*”; LCIA and HKIAC: “*finally resolved*”). Therefore, the Parties did not intend a binding mediation element and said element cannot be construed as a condition precedent to arbitration.

B. THE PARTIES ARE NOT REQUIRED TO MEDIATE IRRESPECTIVE OF ANY MANDATORY CHARACTER

- 23 As shown, the mediation element is not mandatory. Even if it were, it would not affect the Tribunal’s jurisdiction as the Arbitration Clause remains fully operable. Compliance with an obligatory mediation requirement is a matter of admissibility, not jurisdiction (1.). The claim is admissible as CLAIMANT cannot be obliged to conduct a mediation which is futile due to RESPONDENT’S actions (2.).

1. Compliance with pre-arbitral steps is a matter of admissibility

- 24 RESPONDENT claims that non-compliance with the mediation requirement renders the Arbitration Clause inoperative in order to argue that the Tribunal lacks jurisdiction [*PO2 p 56 para 36*]. If non-compliance with a mandatory mediation requirement affects the jurisdiction of the Tribunal, the matter is referred to state courts. When qualifying it as a matter of admissibility, the Tribunal is the competent authority [*Born/Šćekić p 243*]. Ultimately, the qualification depends on the parties’

intentions [*C v D Case; Westco Case*]. These can be ascertained through an interpretation of the Arbitration Clause under Art 8 CISG [*cf Camilleri p 172*].

- 25 Pursuant to Art 8(1) CISG, the Parties did not agree on the qualification. First and foremost, the Arbitration Clause lacks any reference to jurisdiction or admissibility. Second, Ms Ritter, RESPONDENT'S main negotiator, mentions the possibility of having told Mr Deiman, CLAIMANT'S main negotiator, about Equatorianian case law establishing mediation as a condition precedent for jurisdiction. However, she herself is unsure whether she ever transmitted this information to him [*Exh R1 p 30 para 9*]. The unilateral statement of Ms Ritter is certainly not sufficient to establish party agreement.
- 26 The absence of apparent intent necessitates an objective interpretation under Art 8(2) CISG, based on the expectation of a reasonable party. A reasonable interpretation of the Arbitration Clause confirms that compliance with the mediation element falls under the purview of admissibility, not jurisdiction. First, procedural steps before submitting a dispute to arbitration do not change the parties' intent to arbitrate [*Railway Case*] and consequently cannot render an arbitration agreement inoperative, which would default jurisdiction to state courts [*BG v Argentina Case; Blackaby et al para 2.15; Mitrovic p 576; Santacroce p 556*]. Rather, parties to an arbitration agreement intend to have questions on pre-arbitral procedure finally resolved by an arbitral tribunal [*BG v Argentina Case; Mitrovic p 577; Paulsson p 616*]. Second, qualifying mediation requirements as a matter of admissibility limits the scope for review of an award extensively [*Born I §5.08[C][1]; Santacroce p 564*] and thus ensures that the arbitration leads to an effective and final result. This interpretation corresponds to the Parties' commercial common sense [*cf Fiona Trust Case; NWA Case; Born I §5.08[C][1]*]. This rationale was amply discussed in the *Westco Case*. In this case, the court confirmed the arbitration agreement's operability, holding that compliance with pre-arbitral steps pertains to admissibility. As a consequence, it referred the parties back to arbitration [*Westco Case*]. Both common and civil law authorities uphold this distinction, ensuring that jurisdiction remains unaffected by non-compliance with pre-arbitral steps [*BG v Argentina Case; C v D Case; MCBA Case; NWA Case; Sierra Leone Case; Insolvency Case; Vijay Case; Born I §5.08 [C][1]; Camilleri p 168*].
- 27 Concluding, mediation requirements aim to facilitate settlement. They should not counteract the parties' arbitration agreement and thereby obstruct the very forum for dispute settlement to which the parties agreed. Consequently, mediation cannot function as a condition precedent for the Tribunal's jurisdiction, thus, the Arbitration Clause remains operable [*cf BG v Argentina Case; Mitrovic p 576; Santacroce p 556*]. Compliance with the mediation element pertains to admissibility.

2. As mediation would be futile, arbitration is the appropriate forum

- 28 The negotiations between the Parties have reached a deadlock. As the futility of mediation was evident, CLAIMANT was entitled to forgo mediation and submit to arbitration, which was intended by the Parties to be the last resort.
- 29 By referencing arbitration as “*the last resort*” in their correspondence [Exh R2 p 31], the Parties clarified that the dispute shall finally be resolved by arbitration if mediation is impossible or pointless. In addition, international arbitration practice generally does not force parties to engage in fruitless endeavours [Biwater Case; Cumberland Case; Lotamblau Case; Scrubs Case; Sierra Leone Case].
- 30 In the case at hand, the actions of RESPONDENT and the Equatorianian government made the futility of the mediation objectively evident. After the power shift in Equatoriana, the government publicly conveyed a negative attitude towards its previous Green Energy Strategy [RfA p 5 para 17]. RESPONDENT’s newly appointed CEO, Mr la Cour, clarified that the government’s support of the project depended on a significant price reduction [Exh C5 p 18 para 15]. CLAIMANT’s efforts to negotiate resulted in a 30 minute-meeting, abruptly ended by Mr la Cour as there was apparently no room for further discussion [Exh C5 p 18 para 15; PO2 p 54 para 23]. RESPONDENT’s lack of cooperation was amplified by the so-called “*Without-Prejudice Offer*” [Exh C7 p 20] demanding a price reduction of 15 %. At the time, RESPONDENT stated that “*further discussion [...] only makes sense*” if CLAIMANT was willing to negotiate about a two-digit reduction [Exh C7 p 20]. RESPONDENT was aware that CLAIMANT had already incurred high financial losses to conclude the PSA [RfA pp 4 et seq para 13] and that such pre-conditions would prevent further negotiations.
- 31 Mediation provides a neutral setting for dispute resolution, but only if a mediator is still able to facilitate an agreement between the parties [Alexander p 39]. In the present case, RESPONDENT’s actions show their persistent and final stance, leaving CLAIMANT with the sole conclusion that a deadlock had occurred. Mediation cannot achieve its benefits anymore and is thus futile. As a last resort, CLAIMANT rightfully initiated the Proceedings.

C. STAYING THE PROCEEDINGS WOULD LEAD TO UNNECESSARY COSTS AND DELAYS

- 32 RESPONDENT requests that “[c]ompliance with the mediation requirement [...] should guide the Arbitral Tribunal in exercising its procedural discretion” [ARfA p 27 para 16]. It is not entirely clear what RESPONDENT insinuates with such a request – most conceivably a request for a stay [cf Mitrovic p 566]. However, this is not justified as it would contradict the principle of efficient arbitration.



- 33 When submitting to arbitration, reasonable parties expect time and cost-effective decision-making [Born I §1.02[B][7]]. Art 26(3) FAI Arb Rules requires “[a]ll participants [...] to avoid unnecessary costs and delays.”
- 34 In the present case, mediation will not only create unnecessary costs (under Art 13 FAI Med Rules, eg administrative and mediators’ fees) but also a delay of proceedings. This would significantly weaken CLAIMANT’S business operations. From the completion of the project in 2026 onwards, CLAIMANT expects an increase in orders and market growth [RfA p 4 para 9]. The success of the project was intended to serve as a reference for future customers and silence critical voices within the renewable energy community [RfA p 4 para 9; PO2 p 54 para 22]. For this reason, CLAIMANT accepted a loss of EUR 15 MM [RfA pp 4 et seq para 13]. As there is no prospect of settlement (*supra* I.B.2., paras 28–31) and the complexity of the case is undisputed [RfA p 7 para 32], mediation is a vicious circle that causes unnecessary delay, especially as the Proceedings have already commenced.
- 35 In brief, CLAIMANT would suffer immensely from a stay of proceedings and the conduct of a mediation. RESPONDENT, to the contrary, is not exposed to any disadvantages if arbitration continues, as it provides a suitable forum for RESPONDENT’S submissions resulting in a final decision [cf Lew et al para 8-66]. The Tribunal should therefore not stay the Proceedings.

* * *

- 36 Concluding I., the Parties did not establish a mandatory mediation requirement. Even presuming such a requirement, non-compliance would affect neither the jurisdiction of the Tribunal nor the admissibility of the claim. Further, as mediation would not yield any benefits for the Parties, the Tribunal should refrain from staying the Proceedings.

II. CLAIMANT’S EXHIBIT C7 IS ADMISSIBLE

- 37 RESPONDENT’S so-called “Without-prejudice Offer” was entered into the Proceedings as CLAIMANT’S Exh C7 [Exh C7 p 20]. Based on an alleged extension of the confidentiality obligation under Art 15 FAI Mediation Rules to communication preceding mediation, RESPONDENT requests the Tribunal to exclude Exh C7 from the file [ARfA p 28 para 23].
- 38 The Tribunal has broad evidentiary discretion to decide on the admissibility of evidence (A.). However, RESPONDENT’S allegations lack a legal basis and do not fulfil any grounds for exclusion (B.). Further, the non-consideration of Exh C7 would violate due process, making an award unenforceable (C.).

A. THE TRIBUNAL HAS BROAD EVIDENTIARY DISCRETION

- 39 The Tribunal’s evidentiary discretion is stipulated in Art 34(1) FAI Arb Rules, which is a near-verbatim copy of Art 9(1) IBA Rules on the Taking of Evidence (“IBA Rules”) [cf Savola p 289]. The IBA Rules

have become a universally recognised standard in international arbitration [*Noble Ventures Case; Railroad Case; Born II p 45; Demeyere p 249; El Ahdab/Bouchenaki p 90; Schumacher para 20; Kühner p 667; Nettelau et al p 317; Rivkin p 212; Welser/De Berti p 80*]. Due to this textual identity and their accepted authority, the IBA Rules serve as guidance for the Tribunal's evidentiary discretion. They allow for exclusion of evidence subject to without-prejudice privilege (*infra II.B.2., paras 51–57*), attorney-client privilege (*infra III.A., paras 68–79*), and evidence illegally obtained (*infra III.B., paras 80–93*).

- 40 The IBA Rules further include commercial and political confidentiality considerations in Art 9(2)(e) and 9(2)(f). Both do not give rise to a basis for exclusion of Exh C7. The purpose of Art 9(2)(e) is to shield trade secrets (eg price calculations) from being brought to light [*IBA Commentary p 29; Zuberbühler et al p 218*]. In contrast, Exh C7 is official correspondence in the course of the business relationship between RESPONDENT and CLAIMANT and does not contain commercial secrets. The same applies to political confidentiality, Art 9(2)(f). This provision aims to protect state, diplomatic, or military secrets that are not covered by evidentiary privileges [*Khodykin et al para 12.294*]. This consideration for confidentiality does not apply either.
- 41 For CLAIMANT'S Exh C7, RESPONDENT bears the burden of proving grounds for exclusion [*cf Shaughnessy p 467*]. CLAIMANT therefore focuses on certain grounds that may appear applicable. However, none of them justify excluding Exh C7.

B. EXHIBIT C7 DOES NOT FULFIL ANY GROUNDS FOR EXCLUSION

- 42 The Tribunal should establish that no grounds for exclusion apply. Exh C7 is not subject to the confidentiality provision set out in the FAI Med Rules (1.). Despite being labelled "*Without-prejudice Offer*", it does not constitute such an offer and is thus not subject to legal privilege (2.). CLAIMANT can reasonably measure RESPONDENT'S conduct against their commitment to transparency (3.).

1. Exhibit C7 is not subject to the confidentiality obligation under Art 15 FAI Med Rules

- 43 RESPONDENT argues that CLAIMANT, by submitting Exh C7, breached the confidentiality obligation set out in Art 15 FAI Med Rules [*ARfA p 27 para 17*]. However, the FAI Med Rules are not applicable in the first place as there was no mediation (a.). Even if they were applicable, the scope of Art 15 does not extend to documents preceding a mediation (b.).

a. The FAI Med Rules do not apply as there was no mediation

- 44 CLAIMANT could only be in breach of the FAI Med Rules if a mediation governed by them had ever commenced. This is demonstrated by all potentially applicable legal instruments.



- 45 First and foremost, according to Art 3 FAI Med Rules, an FAI Mediation only commences on the date on which the relevant Request for Mediation is received by the FAI. This provision is in line with the considerations of the UNCITRAL Notes on Mediation, which are universal guidelines for international mediation [*UNCITRAL Notes para 1; Alexander et al para 0.14*]. According to these Notes, a mediation confidentiality obligation only takes effect with the commencement of the mediation proceedings [*UNCITRAL Notes para 25*]. In the present dispute, there was no Request for Mediation. In fact, there was no mediation at all. Since the FAI Med Rules were never applicable in the first place, RESPONDENT cannot rely on a confidentiality provision contained therein.
- 46 The same considerations apply to the UNCITRAL Model Law on Mediation, which both Equatoriana and Danubia have adopted [*PO2 p 55 para 34*]. Art 5 clarifies that “*mediation proceedings*” commence when the parties agree to engage in such and not when they enter into the mediation agreement [*UNCITRAL Guide para 50*]. Art 11(1), the provision regulating the admissibility of evidence from mediation in arbitral proceedings, requires “*mediation proceedings*”. This is sensible as it provides a clear dividing line between documents that are covered by confidentiality and those that are not.

b. Art 15 FAI Med Rules does not extend to pre-mediation correspondence

- 47 Even if the FAI Med Rules were applicable, RESPONDENT’S argument is predicated on an extension of Art 15 FAI Med Rules so as to include communication preceding mediation [*ARfA p 27 para 17*]. This conclusion is not supported by the text of the provision or the facts of the case.
- 48 First, the wording of Art 15 does not justify such an extension from the outset. Art 15(1), on the one hand, clearly states that “*any statement or information made or obtained during the mediation*” [*emphasis added*] is to be kept confidential [*see also Art II(11) FAI Med Guidelines*]. Black’s Law Dictionary defines “*during*” as “*after the commencement and before the expiration of*” [*Black’s Dictionary p 504*]. This underlines that Art 15(1) refers to the period of time in which a formal FAI Mediation takes place. Art 15(2), on the other hand, bars information obtained “*in the context of FAI Mediation*” [*emphasis added*] from being invoked as evidence in subsequent legal proceedings. Albeit semantically more extensive, this formulation also requires “*FAI Mediation*” proceedings to have commenced for confidentiality to apply. Thus, the wording of Art 15 does not allow for an extension of confidentiality.
- 49 Second, the Parties did not agree to extend the scope of confidentiality beyond Art 15. This is supported by the Parties’ intentions. CLAIMANT referred to Art 15 in response to concerns of RESPONDENT regarding the confidentiality of ADR mechanisms. However, they only do so in connection to communication made “*therein*” [*Exh R2 p 31*]. CLAIMANT therefore considered no need for the



confidentiality of pre-mediation documents. As for RESPONDENT, in her Witness Statement, Ms Ritter mentions that, to her, it was allegedly clear that Art 15 extended to all negotiations preceding mediation [Exh R1 p 30 para 10]. There is no indication that she ever communicated this view to CLAIMANT. While CLAIMANT does not contest the Parties' freedom to extend the confidentiality provisions, this would require concurrent party intentions. Subsequent assertions made in a Witness Statement, however, cannot change the Parties' agreement.

50 In brief, even if the FAI Med Rules were applicable, the wording of Art 15 FAI Med Rules and the Parties' intentions show that it does not extend to communication preceding mediation.

2. Exhibit C7 does not constitute a without-prejudice offer

51 Exh C7 is entitled "*Without-prejudice Offer*" [Exh C7 p 20]. RESPONDENT might therefore try to invoke without-prejudice privilege. However, there is no basis for reliance on this privilege.

52 Without-prejudice privilege aims to exclude communications made during settlement negotiations from subsequent legal proceedings [Sun/Willems p 267]. Its purpose is to ensure an uninhibited flow of information between parties and is rooted in the principle of good faith [Berger I p 273].

53 Originally derived from and prevalent in common law systems [Hall Case; Mariwu Case; Rush Case; Alexander p 266], this legal privilege does not exist in most civil law jurisdictions [IBA Report Annex 5 pp 1 et seq; Heitzmann p 212; Khodykin et al para 12.177]. The IBA Rules acknowledge without-prejudice privilege in Art 9(4)(b) [IBA Report pp 11 et seq]. To level the playing field and apply a high standard of protection for the sake of both Parties, CLAIMANT is therefore willing to apply the without-prejudice privilege. Notwithstanding this, RESPONDENT's offer is simply not covered.

54 At superficial inspection, Exh C7 is labelled "*Without-prejudice Offer*". However, the substance – not form – of the letter must be considered [cf Khodykin et al para 12.184]. For the without-prejudice privilege to apply, the communication must be carried by a genuine intention to reach a settlement [Bradford & Bingley Case; Cook Case; DirecTV Case; Ernest Ferdinand Case; Rush Case; Unilever Case; Alexander pp 267 et seq; Altaras p 485; Berger I p 267].

55 A closer look at the content of the letter reveals that RESPONDENT offers a price reduction by 15 % in exchange for the realisation of the project. In the paragraph immediately following, RESPONDENT makes clear to CLAIMANT that there is no room for further negotiations without agreement to a price reduction [Exh C7 p 20]. The offer's wording is coercive and uncompromising – a non-negotiable demand rather than a genuine offer.

56 This intransigent nature is underlined by RESPONDENT's conduct. The actions preceding the letter leave no room for interpretation. Upon entering office, Minister Vent announced the revision of the Green

Energy Strategy, the very basis of the PSA [*RfA p 5 para 18*]. In a meeting between the Parties' CEOs, RESPONDENT stated the demands then made in Exh C7 [*Exh C5 p 18 para 15*].

- 57 The wording and background of the document reveal that it did not in any way constitute a good-faith attempt to negotiate as RESPONDENT had no genuine intention to reach a settlement (*cf* IBA Rules Preamble 3) [*cf Haller p 314*]. It should not be tolerated that RESPONDENT tags a crucial document "*Without-prejudice*" solely to hide it from the Tribunal in eventual arbitral proceedings [*cf Ashford para 9-42; Berger II p 308; Khodykin et al para 12.182; Zuberbühler et al p 214*]. In the words of the late Lord Walker, RESPONDENT cannot invoke privilege solely to immunise an act from its normal legal consequences [*cf Unilever Case*]. Thus, without-prejudice privilege does not apply as Exh C7 does not constitute such an offer.

3. CLAIMANT can rely on RESPONDENT's commitment to transparency

- 58 Art 26(3) FAI Arb Rules unequivocally states that "*[a]ll participants in the arbitral proceedings shall act in good faith*". Due to their commitments to transparency in international dispute settlement, RESPONDENT breaches their good faith obligation in requesting the exclusion of Exh C7.
- 59 RESPONDENT is a 100 % state-owned entity [*RfA p 3 para 2; PO2 p 52 para 3*] and the driving force behind Equatoriana's Green Energy Strategy [*RfA p 3 para 2; Exh C2 p 10; Exh C5 p 16 para 5; ARfA p 25 para 3*]. Equatoriana's involvement is reiterated in the preamble of the PSA [*Exh C2 p 10*], which is based on a model contract for state entities drawn up by the Equatorianian Ministry of Justice [*ARfA p 27 para 19; Exh R1 p 29 para 7*]. The government heavily influences RESPONDENT's decision-making processes [*RfA p 6 para 21; Exh C5 p 18 para 15; Exh C7 p 20; ARfA p 26 para 5*] and is competent to appoint its leadership [*Exh C5 p 18 para 13; PO2 p 52 para 3*]. RESPONDENT's new CEO, Mr la Cour, and Minister Vent are both members of the ENP [*RfA p 5 para 18*]. Due to the various intertwinings, it is unsurprising that RESPONDENT describes themselves as a "*government(al) entity*" in several of their own correspondence and submissions [*Exh C6 p 19; ArfA pp 27 et seq paras 21 et seq; Exh R1 p 30 para 11*]. Their conduct can thus be measured against the commitments of the Equatorianian government.
- 60 Equatorianian ministers claimed on multiple occasions that all of Equatoriana's arbitrations would be in line with the UNCITRAL Rules on Transparency [*ObjLang pp 34 et seq*], which Equatoriana accepted as binding by ratifying the Mauritius Convention [*ObjLang pp 34 et seq; PO2 p 55 para 34; cf Born I §20.11[A][5]*]. Art 3(3) Transparency Rules provides for the disclosure of exhibits to the general public, if the tribunal decides so [*Born I §20.11[A][4]; Paulsson/Petrochilos p 434*]. Hence, Equatoriana has committed to a rigid regime of transparency in arbitral proceedings. Albeit



instruments of investor-state dispute settlement, both documents are unquestionably relevant for CLAIMANT's expectation of the conduct of arbitral proceedings. They show a commitment of the Equatorianian government in dispute settlement more broadly and paint an overall picture of transparency. CLAIMANT could rely on RESPONDENT committing to transparency in line with the assertions of Equatorianian officials.

- 61 This was enhanced by the atmosphere surrounding the transaction as RESPONDENT was aware of the danger of appearing secretive [*Exh R1 p 30 para 10*]. By doing exactly what they strived not to do, RESPONDENT violates their duty to act in good faith under Art 26(3) FAI Arb Rules [*cf ICC Case 2020-008; Cremades p 34; Henriques p 518; Pearson-Wenger p 193*].

C. THE EXCLUSION OF EXHIBIT C7 WOULD VIOLATE DUE PROCESS

- 62 Exh C7 is a central document for the Tribunal's assessment of the admissibility of the claim (*supra I.B.2., paras 28–31*). Excluding it would violate due process, exposing a subsequent award to an increased risk of refusal of recognition and enforcement under Art V(1)(b) NYC. Art 52 FAI Arb Rules stipulates that the Arbitral Tribunal shall make every effort to render a legally enforceable award, clarifying the outer boundaries of evidentiary discretion [*cf Godhe I p 15*].
- 63 Due process is a magna-carta principle of international arbitration [*Lew et al p 95*], superseding tribunal discretion [*Godhe II p 80*]. Art 18 ML stipulates that parties are to be treated with equality and shall be given a full opportunity to present their case. This provision has been likened to the due process clause of international arbitration [*Holtzmann et al Art 18 p 550*].
- 64 The exclusion of relevant evidence violates due process if it actually deprived a party of a fair hearing [*Generica Case; Hoteles Condado Case*]. This rationale was discussed in the *Hoteles Condado Case*. Although acknowledging the tribunal's broad evidentiary discretion, the court held that the exclusion of evidence constitutes a violation of due process if the evidence is unquestionably relevant to determine a party's position, and decisive. In the present case, Exh C7 is an unquestionably **relevant** piece of evidence to determine CLAIMANT's arguments on the futility of mediation (*supra I.B.2., paras 28–31*). It is further **decisive** in the sense that Exh C6 and C7 are the only documents indicating RESPONDENT's intent at the time of the contract negotiations. RESPONDENT has not submitted any evidence that would further depict their intention during this time. Excluding Exh C7 would thus fulfil the requirements set out in *Hoteles Condado* and violate due process.
- 65 In conclusion, the evidentiary discretion of the Tribunal is limited in the present Proceedings. The exclusion of Exh C7 would violate due process, making a subsequent award unenforceable.



66 To conclude II., Exh C7 is a piece of official, high-level corporate correspondence between
RESPONDENT’S CEO, Mr la Cour, and CLAIMANT’S CEO, Mr Cavendish. The document does not fulfil
any grounds for exclusion. RESPONDENT’S attempt to exclude the letter is only aimed at making it
impossible for the Tribunal to consider a central piece of evidence. This cannot be accepted. Exh C7
must remain in the case file.

III. THE TRIBUNAL SHOULD EXCLUDE RESPONDENT’S EXHIBIT R3

67 The Tribunal is called upon to assess the admissibility of yet another exhibit, RESPONDENT’S Exh R3.
Like CLAIMANT’S Exh C7 (*supra II., paras 37–66*), it can be categorised under the umbrella of
documentary evidence. That is, however, where the similarities end. Exh R3 is a purely internal email
sent by CLAIMANT’S Head of Legal, Ms Smith, to representatives of CLAIMANT – and only CLAIMANT.
RESPONDENT was not among the recipients of this email. RESPONDENT is now trying to introduce this
privileged (A.) and illegally obtained (B.) communication into the Proceedings, thereby circumventing
orderly document production (C.). As will be shown, Exh R3 can under no reasonable considerations
remain in the case file.

A. EXHIBIT R3 IS SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

68 Exh R3 contains privileged legal advice by an admitted attorney (1.). As in-house counsel
communication, it is protected under the applicable Equatorianian law (2.).

1. Exhibit R3 contains legal advice

69 The Tribunal has evidentiary discretion to exclude documents and should use the IBA Rules as best
practice guidance in this regard (*supra II.A, paras 39–41*). Arts 9(2)(b) and 9(4)(a) IBA Rules permit
the exclusion of evidence to protect “*privilege under the legal or ethical rules*”, including attorney-
client privilege [*IBA Commentary p 28*]. All possibly applicable regimes recognise attorney-client
privilege, either through their legal (Equatoriana) or ethical rules (Mediterraneo and Danubia) [*Exh
R4 p 33*].

70 The purpose of attorney-client privilege is to encourage and protect open and candid communication
between lawyer and client [*Mökesch p 2*]. Therefore, legal advice stemming from an attorney must
remain confidential [*de Boissésón p 705; Born I §16.02[E][8][c]*].

71 In the case at hand, Exh R3 contains legal advice. Providing drafting suggestions, Exh R3 not only
pertains to a question about Equatorianian law but aims to ensure CLAIMANT’S compliance with said



law during the negotiations with RESPONDENT. The legal advice stems from an admitted attorney, Ms Smith, who is also the Head of CLAIMANT's legal department [*PO2 p 53 para 11*].

72 Exceptions from this privilege (eg fiduciary, breach in duty, or crime-fraud) [*cf Bittaker Case; Delaney et al p 25; O'Connell p 3; Parisi pp 453 et seq*] are to be interpreted narrowly, as once information has been disclosed, loss of confidentiality is irreversible [*Paxton Case; Andrews/Zorn p 18*]. No such exception applies in the present case. On the contrary, constituting precisely the type of attorney-client correspondence that privilege aims to protect, Exh R3 is subject to attorney-client protection.

2. Exhibit R3 contains in-house counsel communication which is covered by attorney-client privilege under Equatorianian law

73 The question whether in-house counsel communication is covered by attorney-client privilege differs depending on the jurisdiction. The case file holds no information on in-house counsel communication in Mediterraneo and Danubia [*Exh R4 p 33*]. However, common law jurisdictions explicitly protect in-house counsel communication [*Berger II p 306; Gore para [II][2][c]*], while civil law jurisdictions follow a clear trend to also extend attorney-client privilege in that manner [*Swiss Amendment: Sec 167a Swiss CPC (as of 1 January 2025); French Proposal*]. In the present case, legal advice by in-house counsel is protected under the applicable Equatorianian law.

74 The Tribunal should determine the applicable standard for attorney-client communication through a choice-of-law analysis. Therefore, a closest connection test should be applied to identify the legal framework most closely associated with the issue at hand [*Berger II pp 312 et seq; Gregoire p 137; Henriksen et al pp 151 et seq; Kuitkowski p 92; Meyer-Hauser/Sieber pp 184 et seq*]. One should not only focus on isolated factors like the attorney's place of admission or where the attorney-client relationship was established. Instead, an array of relevant factors pointing to the same legal order should be considered [*Henriksen et al p 152*]. Consequently, the intended use of the document, the location of the project in dispute, the substantive law of the contract, or the law about which the relevant advice was sought must be taken into account [*Arrow Case; Henriksen et al p 152*].

75 While Exh R3 has connections with all involved jurisdictions, the closest one points to Equatoriana. This is already evident as the Parties chose Equatorianian law to govern their contractual relationship in Art 29 PSA [*Exh C2 p 12*], demonstrating a close commitment to the law of Equatoriana. Further, CLAIMANT specifically sought advice about Equatorianian law in relation to a project in Equatoriana.

76 RESPONDENT's attorney-client communication, on the other hand, is inevitably most closely connected to Equatoriana since they commissioned the project in Equatoriana – their place of operation and



communication. Consequently, Equatorianian law on in-house counsel communication applies to both Parties.

- 77 In case the Tribunal rejected Equatoriana as the closest connection for CLAIMANT's attorney-client communication, equality and fairness concerns arise due to different applicable standards for each Party [*cf IBA Commentary p 28; Zuberbühler et al p 212*]. Those fundamental principles are anchored in Art 18 ML, Art 26(2) FAI Arb Rules, and – in the context of different applicable standards – Arts 9(2)(g) and 9(4)(e) IBA Rules. Since they are explicitly mentioned in the *lex arbitri*, any violation would create a risk of ultimately having the award set aside [*Alvarez p 686; Berger III p 517*]. Therefore, the Tribunal is called upon to ensure a level playing field by applying the same standard to both Parties [*cf Berger III pp 517 et seq; Mökesch p 262*]. Following the most favourable privilege approach, widely promoted by authorities from different jurisdictions, the Tribunal should only apply the standard that provides the broadest protection to both Parties [*Cavassin Klamas pp 176, 179; de Boissésou pp 713 et seq; Kubalczyk p 103; Marghitola pp 78 et seq; Rubinstein/Guerrina pp 598 et seq*].
- 78 This results in the application of Equatorianian law, as it protects in-house counsel communication if the attorney is admitted to the bar and the advice was given in relation to a specific legal question [*Exh R4 p 33; PO2 p 55 para 29*]. Since Ms Smith is an in-house counsel, an admitted attorney, and her legal advice concerns a specific legal question, all requirements of Equatorianian law are fulfilled.
- 79 In brief, Exh R3 is privileged as in-house communication under Equatorianian law. Equatoriana constitutes the closest connection and the most favourable privilege for both Parties. The application of the Equatorianian standard cannot come as a surprise for RESPONDENT as it is the high standard of their own jurisdiction.

B. EXHIBIT R3 WAS OBTAINED ILLEGALLY

- 80 Returning to the Tribunal's evidentiary discretion, one can again refer to the IBA Rules. Art 9(3) allows the exclusion of illegally obtained evidence. The differentiation to the wording of Art 9(2) (*supra II.A., paras 39–41*) – “may” instead of “shall” exclude – allows the tribunal to take greater account of the particularities of the individual case [*IBA Commentary p 30; Machherndl/Milacher p 99*]. The origin of Exh R3 is highly dubious. The facts point at RESPONDENT's illegal obtention of Exh R3 (1.). CLAIMANT fulfils the burden of proof for illegality (2.). As RESPONDENT has unclean hands, Exh R3 should not be admitted (3.). In any case, they must clarify the path of Exh R3 into their hands (4.).

1. The Tribunal must connect the dots indicating RESPONDENT's unlawful acts

- 81 Numerous facts (dots) indicate RESPONDENT's unlawful obtention of Exh R3. The Tribunal should link them using the connecting the dots approach developed by case law.



- 82 In the *Methanex Case*, the tribunal held that certain individual pieces of evidence have to be seen in context with each other in order to provide the “*most compelling of possible explanations of events*” [*Methanex Case para III(B)(2)*; cf *ECE Case*; *Glencore Case*]. The use of circumstantial evidence is accepted especially when obtaining evidence in another state is difficult and where the evidence is in control of the adverse party [*Corfu Channel Case*; *Betz p 279*; *Sourgens et al pp 96, 107*; *Waincymer p 793*]. This is even further aggravated when states or state-controlled enterprises have an advantage in obtaining evidence by having access to state power, potentially damaging the integrity of arbitral proceedings [*cf Lao Case*; *Masser et al p 251*; *Mirzayev pp 101, 103 et seq*; *Ng p 759*; *Wälde pp 19, 36*].
- 83 CLAIMANT’S main negotiator, Mr Deiman, mentions two possibilities on how Exh R3 ended up in RESPONDENT’S possession: they either received it directly from the prosecution office or, less likely, from someone within his office [*Exh C8 p 36 paras 7 et seq*; *ObjLang p 34*]. Mr Deiman’s assessment is confirmed by the behaviour of RESPONDENT’S representatives. RESPONDENT’S CEO, Mr la Cour, raised unsubstantiated allegations against Mr Deiman and CLAIMANT’S management. He threatened to initiate investigations by the prosecution office, invoking his “*very close*” connections [*Exh C8 p 36 paras 3, 7*; *PO2 p 55 para 27*]. Said investigations commenced exactly two weeks later, based on Mr la Cour’s information [*ARfA p 27 para 13*; *Exh R1 p 29 para 6*; *ObjLang p 34*; *PO2 p 55 para 27*]. Equatorianian police raided Mr Deiman’s office, confiscated his documents, and detained him for two days. In the end, none of Mr la Cour’s allegations could be proven and the investigation was quickly terminated [*Exh C8 p 36 para 6*; *PO2 p 55 para 27*]. All of this is underpinned by the close relationship between RESPONDENT and the Equatorianian State. Mr la Cour was a member of the current governing party [*RfA p 5 para 18*]. Furthermore, Equatoriana is the only shareholder of RESPONDENT and is competent to appoint their management [*RfA p 3 para 2*; *PO2 p 52 para 3*].
- 84 By contrast, a leak by CLAIMANT’S employees remains unlikely. All of CLAIMANT’S employees signed confidentiality agreements with the company [*PO2 p 55 para 28*] and the consequences of confidentiality violations have been drastically demonstrated by Mr Law’s leaks (which have no connection to Exh R3), whose contract was immediately terminated and against whom criminal investigations were initiated [*PO2 p 53 para 11*].
- 85 The circumstances under which Exh R3 ended up in RESPONDENT’S hands are highly dubious. Put figuratively, numerous dots have been painted on the canvas of illegality. Now all that is left for the Tribunal is to pick up the paint brush and connect them. By doing that, the whole picture of Exh R3’s origin will reveal itself.

2. Claimant fulfils the burden of proof for the illegal obtention

- 86 All the above-outlined dots taken together show that RESPONDENT was involved in the procurement of Exh R3. Exh R3 was, in fact, illegally obtained. CLAIMANT fulfils the applicable standard of proof.
- 87 The Proceedings at hand are not a criminal trial. CLAIMANT is not pursuing a conviction of RESPONDENT or their employees [*cf Alftar pp 150 et seq; Betz pp 278 et seq*] but merely seeks the exclusion of evidence. Therefore, the Tribunal should stick to the predominantly favoured standard of proof in international arbitration [*ICC Case 12732; Glencore Case; Alftar p 150; Betz p 279; cf Born I §15.09[B]; Bertrou/Alekhin p 53*], which is widely held to be a balancing of probabilities [*Alftar p 147; Blackaby et al para 6.83; Born I §15.09[B]; Ortner/Novak p 66; Sourgens et al p 80*]: this standard of proof is met where “*an allegation is more likely to be true than to be false*” [*Bickmann para 3.170*].
- 88 Acknowledging RESPONDENT’s advantages in introducing Exh R3 as evidence (*supra III.B.1., para 82*), CLAIMANT should not be burdened by further disadvantages through an excessive evidentiary standard. Instead, the Tribunal should offset the asymmetry between CLAIMANT and RESPONDENT and conduct a balancing of probabilities. In the present case, all dots point to RESPONDENT’s unlawful obtention: Exh R3 was more likely than not obtained during criminal investigations, not through an internal leak [*Exh C8 p 36 para 8*]. A higher standard of proof is not justified.

3. RESPONDENT has unclean hands resulting in the inadmissibility of Exhibit R3

- 89 Having established that RESPONDENT drew all the dots and that Exh R3 was illegally obtained, RESPONDENT is left with unclean hands.
- 90 The unclean hands doctrine, as a derivative of good faith, states that no advantage may be gained from one’s own wrong and is recognised in doctrine and case law alike [*Libananco Case; Methanex Case para II(1)(58); Amerasinghe p 179; Bertrou/Alekhin p 53*]. The duty to arbitrate in good faith is further recognised by the applicable institutional rules (Art 26(3) FAI Arb Rules) and best practice standards (IBA Rules Preamble 3). It is infringed when using illegally obtained evidence [*Cremades p 34*]. The above-mentioned dots indicate a significant breach of RESPONDENT’s good faith obligations by obtaining internal communication through illicit means and using it as evidence. This in itself fulfils the standard of inadmissibility [*cf Libananco Case; Methanex Case para II(1)(58); Rutz para 165*].

4. Alternatively, RESPONDENT must clarify the path of Exh R3 into their hands

- 91 Even if the Tribunal rejected that the evidence put forward by CLAIMANT satisfies the necessary standard of proof, it is on RESPONDENT to prove the lawful obtention of Exh R3.
- 92 In the *Parker Case*, the tribunal stated that a party cannot merely sit in silence when it is reasonable for them to speak [*Parker Case*]. Therefore, the burden to produce evidence shifts to the other party which



has access to the relevant documents to resolve the matter when a *prima facie* case is established [*Alftar p 57; Sourgens et al p 62; Wälde p 38 et seq*]. This shifting principle has been widely recognized by tribunals [*Asian Agricultural Case; Methanex Case II(I)(55); Parker Case; R. S. Malek Case*].

- 93 CLAIMANT has established *prima facie* that the obtention of Exh R3 must have been through criminal investigations of the Equatorianian prosecution office. Therefore, it is now upon RESPONDENT to rebut the circumstantial evidence provided by CLAIMANT [*cf Alftar p 57 et seq; Sourgens et al p 62*].

C. RESPONDENT CIRCUMVENTS THE FORMAL DOCUMENT PRODUCTION PROCEDURE AND THEREBY ACTS IN BAD FAITH

- 94 RESPONDENT acts in breach of their good faith obligation under Art 26(3) FAI Arb Rules, as they sent Exh R3 to the not-yet-appointed party-nominated arbitrators [*ARfA p 24; ObjLang p 34*]. Thereby, they circumvented the formal document production procedure.
- 95 Following orderly procedure, RESPONDENT would have to formally request production of a document to obtain internal communication from CLAIMANT. Under Art 3(5) IBA Rules, parties can object to such a request if the requested document is privileged (Art 9(2)) or was obtained illegally (Art 9(3)). The admissibility of the objection would then be assessed without review or only by review of a neutral expert (Arts 3(6), 3(7), and 3(8)). The tribunal should not take part in examining the document since it cannot eliminate its knowledge once it has seen its content [*Zuberbühler et al p 85*].
- 96 In the case of Exh R3, both reasons to object (privilege and illegality) apply. However, RESPONDENT frustrated CLAIMANT's possibility to rely on confidentiality objections as a reason for the refusal of document production. Instead, they chose to illegally obtain and submit Exh R3 directly to the not-yet-appointed party-nominated arbitrators [*ARfA p 24; ObjLang p 34*]. This shows that RESPONDENT was in fact aware of the inadmissibility of the document and foresaw the risk that the Tribunal could refuse to order the production. Otherwise, there would have been no need to circumvent ordinary production procedure.
- 97 By not excluding Exh R3, the Tribunal would set a questionable example allowing future parties to introduce confidential documents into proceedings through a circumvention of document production rules. The Tribunal should refrain from condoning such bad faith conduct and exclude Exh R3.

- 98 Concluding III., Exh R3 is subject to attorney-client privilege. As the dots have shown, the procurement of CLAIMANT's internal communication must have been through illicit means. In any case, by sending the document directly to not-yet-confirmed arbitrators, RESPONDENT acts in bad faith and shows disregard for the formal document production procedure.

PART II: SUBSTANTIVE ISSUES

99 RESPONDENT has been inconsistent in their conduct surrounding the PSA and their later allegations. First, they concluded the PSA, which is an international sale-of-goods contract. Now, they claim that the CISG is not applicable (IV.). Second, RESPONDENT has not used any of the multiple opportunities to declare their intent to exclude the CISG. Yet, they insist they have excluded it (V.). On top, RESPONDENT waived their rights to terminate for convenience to get the best possible deal. Still, they base their termination on a waived right that does not even apply in contracts governed by the CISG (VI.). Put simply, RESPONDENT is trying to paint over their own shortcomings. However, they are trying to cover an oil painting with watercolours.

IV. THE CISG APPLIES TO THE PSA

100 The CISG applies by default to international sale-of-goods contracts by virtue of Art 1(1). The PSA is an international contract for the sale of goods and is governed by the CISG. RESPONDENT incorrectly asserts that the CISG does not apply [ARfA p 28 para 20]. These allegations are without merit. Since the Parties have their places of business in different Contracting States, the PSA is an international contract (A.). As it preponderantly concerns goods, the PSA is a sale-of-goods contract within the meaning of the CISG (B.). Finally, the PSA is not excepted as a sale by auction (C.).

A. THE PSA IS AN INTERNATIONAL CONTRACT

101 Under Art 1(1)(a), the CISG applies to international contracts. These are contracts concluded by parties with places of business (“PoBs”) in different Contracting States. In an attempt to dispute the applicability of the CISG, RESPONDENT alleges that Volta Transformer (“VT”) constituted a “*place of business of CLAIMANT*” in Equatoria [ARfA p 28 para 20], the same state as RESPONDENT [RfA p 2]. However, CLAIMANT’s only PoB was in Mediterraneo (1.). Even if CLAIMANT had a PoB in Equatoria, it would not have the closest connection to the contract and its performance (2.).

1. Volta Transformer does not constitute a place of business of CLAIMANT

102 First, RESPONDENT alleges that VT was a PoB of CLAIMANT [ARfA p 28 para 20]. However, VT is not a party to the PSA and cannot be considered a PoB for this reason alone (a.). In any event, CLAIMANT engaged VT solely as a supplier, a role that cannot result in a PoB (b.).

a. As Volta Transformer is not a party to the PSA, it cannot constitute a place of business of CLAIMANT

103 For the CISG to apply under Art 1(1)(a), parties to the contract must have their PoBs in different Contracting States. For the internationality of a contract, only the contractual parties’ and not other



legal entities' PoBs are relevant [*Münch Art 1 para 52*]. Hence, it is necessary to determine the parties to the PSA [*cf Gillette/Walt p 28*].

- 104 The parties to the PSA are unambiguously RESPONDENT and CLAIMANT alone. Not only were they the actual signatories to the PSA but were also explicitly identified as the “Parties”. Only CLAIMANT and RESPONDENT were bound by obligations under the PSA, including the delivery of the plant and payment of the purchase price [*Exh C2 p 10 et seq*].
- 105 VT is a separate legal entity. Such entities qualify as parties to a contract only if they independently use their power to enter into a contract [*Honnold/Flechtner para 47*]. In theory, VT could have become a party, had it actually negotiated with RESPONDENT and used its power to enter into the PSA, or had CLAIMANT represented it [*cf Gillette/Walt p 27*]. This was not the case. CLAIMANT participated in the tender in their own name and for their own account [*cf Dalhuisen p 222*]. Therefore, VT is not a party to the PSA. Based on this alone, it cannot be considered a PoB of CLAIMANT.

b. CLAIMANT did not conduct their commercial activity through Volta Transformer

- 106 In any event, CLAIMANT engaged VT in a role that was inherently different from the one of a PoB. VT is contracted to supply electrolyser stacks to CLAIMANT, used for the construction of the plant. This supply relationship is neither close nor strong enough for VT to constitute a PoB.
- 107 A PoB is a place used by a party to openly participate in trade [*Ferrari I p 963; Hachem I Art 1 para 24*]. First, it has to be an establishment through which the party in question primarily and actually conducts its trading activity [*Floor Coverings Case; Royal Feinspritz Case; Bell p 245*]. Second, such an establishment must have a durable business connection, meaning it serves as the party's permanent and stable business organisation abroad [*ICC Case 9781; Siehr I Art 1 para 12*]. Third, this establishment must have the party's autonomous power, entailing an authority to influence a deal [*Floor Coverings Case, Siehr I Art 1 para 12*]. Autonomous power exists when an establishment can negotiate and perform a contract [*cf Floor Coverings Case*]. These requirements are usually met by headquarters or branches of a party [*Zykin Art 1 para 2*]. A third entity, used by a party only to fulfil the contract, is not a PoB of the latter as it lacks such autonomous power [*Witz Art 10 para 2*].
- 108 VT fulfils none of these criteria. First, CLAIMANT did not conduct their trading activity through VT, which was fully independent as CLAIMANT did not exert any control over it [*PO2 p 52 para 8*]. Second, VT and CLAIMANT did not have a durable business connection. VT always produced on the basis of existing orders and prioritised one client at a time. Only when CLAIMANT ordered the transformer, did VT start prioritising the production for CLAIMANT [*PO2 p 52 para 5*]. Their relationship was temporary, for the purpose of one specific project. It only became permanent when CLAIMANT acquired



VT, after the conclusion of the PSA [*RfA p 4 para 11; PO2 p 52 para 7*]. Yet, factors after contract conclusion are irrelevant [*Electricity Meters Case; Rajski Art 10 para 2.2.*]. Finally, VT never had autonomous power, contrary to CLAIMANT's administrative centre in Mediterraneo, which negotiated the PSA. CLAIMANT used VT as a supplier of electrolyser stacks to deliver the plant. It was merely a part of CLAIMANT's supply chain. Thus, Mediterraneo is CLAIMANT's only PoB.

2. Even if Volta Transformer qualified as a place of business, it would not have had the closest connection to the PSA and its performance

109 Even if VT were a PoB of CLAIMANT, it would not be the only one as CLAIMANT's administrative centre in Mediterraneo also constituted a PoB [*cf Zykin Art 1 para 2*]. Of both PoBs, VT would have a looser connection. To determine the applicability of the CISG, however, only the PoB with the closest connection to the contract and its performance is relevant.

110 The closest connection under Art 10(a) CISG exists with the PoB that, at the time of contract conclusion, was seen to exert the most influence on the contractual relationship [*Asante Case; Hachem II p 34; Honnold/Flechtner para 158*]. Such influence is the power to react to complaints and make decisions regarding the contract and its performance [*Asante Case; Hachem I Art 10 para 7*]. CLAIMANT's PoB in Mediterraneo was the only one that could influence the contractual relationship with RESPONDENT. It was CLAIMANT who decided on crucial issues, such as the price reduction and the choice of specific subcontractors [*RfA p 4 para 13*].

111 In cases of doubt, the relevant PoB is the one responsible for contract conclusion [*Herber/Czerwenka Art 10 para 4; Meier Art 10 para 1*]. This is where the seller's communication concerning the contract, the goods, and the price comes from [*Artificial Fish Case; Vision Systems Case*]. CLAIMANT's communication came from Mediterraneo and included their headquarters' address [*Exh C4 p 15; Exh R2 p 31*]. The PSA, including the same address, was later concluded by delegates from Mediterraneo [*Exh C2 p 10; PO2 p 56 para 35*]. Therefore, CLAIMANT's PoB in Mediterraneo was responsible for the conclusion of the PSA.

112 In brief, CLAIMANT's PoB in Mediterraneo had the closest connection to the contract and its performance. Therefore, even if CLAIMANT had multiple PoBs, only the administrative centre in Mediterraneo would be relevant under Art 10(a) CISG.

113 CLAIMANT has their PoB in Mediterraneo. Since VT is not a party to the PSA, it cannot be considered a PoB. Regardless, VT's supply relationship with CLAIMANT was not sufficient to qualify it as a PoB. Moreover, VT lacks the closest connection to the PSA. As both Mediterraneo and Equatoriana are



Contracting States to the CISG [*PO1 p 50 para III(4)*], the PSA is an international contract under Art 1(1)(a) CISG.

B. THE PSA IS A SALE-OF-GOODS CONTRACT WITH ANCILLARY SERVICE ELEMENTS

- 114 RESPONDENT alleges that the CISG does not apply to the PSA, as a “*considerable part of the Agreement consisted of planning and engineering work*” [*ARfA p 28 para 20*]. Seemingly, RESPONDENT believes that the PSA is not a sale of goods.
- 115 A contract must constitute a sale of goods to be governed by the CISG. CLAIMANT acknowledges that the PSA is a mixed contract because it contains sale-of-goods elements (“**sales elements**”), as well as works and service elements (“**service elements**”). However, RESPONDENT misunderstands the sphere of application of the CISG. A mixed contract is governed by the CISG so long as it contains a certain degree of sales elements and they are the preponderant obligation. First, it will be shown that the PSA contains sales elements (1.). Then, it will be shown that the sales elements are preponderant under the applicable economic value test (2.). Even if the will and interest of the Parties were considered, the sales elements would remain preponderant (3.). Thus, the CISG applies.

1. The PSA contains sale-of-goods elements

- 116 In the PSA, CLAIMANT sold to RESPONDENT ten electrolyser stacks, a transformer, as well as other electrical and plant equipment [*PO2 p 54 para 17*]. These constitute goods within the meaning of the CISG, although they will eventually be installed in an immovable plant. The CISG must be interpreted autonomously. Neither movability nor tangibility at the time of delivery are relevant criteria. Instead, all transportable objects that are part of the commercial trade constitute goods.
- 117 What qualifies as a good has to be interpreted autonomously under Art 7 CISG [*cf Ferrari II Art 7 para 7; Mistelis Art 1 para 36*]. The drafters of the CISG intentionally used terms without preconceived domestic notions to define central terms such as that of a “*good*” [*Ferrari III Art 1 para 34*].
- 118 Tangibility and movability are not relevant factors. This is particularly apparent in the French authentic version of the CISG. While the English version refers to “*goods*”, the French version employs “*marchandises*”. Historically, the term “*marchandises*” was a significant change [*Kreße Art 1 para 21*]. The ULIS and ULF, the precursors to the CISG [*Bergsten p 8; Schlechtriem/Butler para 1*], still used the term “*objets mobiliers corporels*”, which translates to “*movable tangible objects*”. This definition was also considered for the CISG but intentionally discarded in favour of a less technical approach [*Kahn pp 956 et seq*]. In fact, the change signifies a broader understanding of what constitutes a good [*Huber I p 41; Piltz para 2-48*]. It must be regarded as an extension to all objects that are part of the commercial trade [*Karollus p 21*].



- 119 Particularly movability at the time of delivery cannot be considered a necessary criterion. In line with this, the ancillary obligation of the seller to install goods in an immovable object does not affect the applicability of the CISG [*Feit Art 3 paras 11 et seq*]. This was clarified in the *Spinning Plant Case*, where the Swiss seller was obligated to deliver machinery and other parts needed for a spinning plant to Indonesia and install the goods in an immovable building. The Swiss Federal Supreme Court neither took issue with the fact that the goods were to be connected to an immovable object, nor that those services were to be provided by the seller under a uniform contract [*Spinning Plant Case*]. This understanding reflects well-established case law, under which courts frequently do not even consider the issue of installation or construction duties worthy of discussion [*ICC Case 15313/JEM/GZ; Premier Steel Case; Window Plant Case*]. Therefore, it is irrelevant that CLAIMANT was obliged to install the goods.
- 120 While CLAIMANT does not dispute that the PSA contains some service elements [*Exh C5 p 17 para 11*], they are contracted to deliver various goods. They are obligated to deliver ten **electrolyser stacks** (the core system) [*RfA pp 3 and 4 paras 5 and 11; Exh C5 p 17 para 11*], a **transformer**, and **electrical equipment** directly to the building site [*Exh C5 p 17 para 11; PO2 p 53 et seq para 16*]. They are to be connected to the plant there, but remain transportable as they can easily be removed for maintenance [*PO2 p 53 et seq para 16*]. CLAIMANT further delivers **compressors, pipes, cable installation, connections, and other equipment**. They are to be treated as delivery of goods [*PO2 p 54 para 17*]. Consequently, the contract for the delivery of the green hydrogen plant contains sales elements.

2. The economic value test shows the preponderance of the sales elements

a. The sales elements are preponderant for the base plant

- 121 Pursuant to Art 3(2), the CISG is applicable to mixed contracts when the sales elements are preponderant. The preponderance of the sales or service elements is determined by comparison of the respective economic values [*Fire Trucks Case; Spinning Plant Case; Tube Case; Kreße Art 3 para 4; Maskow Art 3 para 5; Mistelis/Raymond Art 3 para 18*]. When the sales are preponderant, the CISG governs the entire contract, not just the portion attributable to the sale of goods [*Centerless Grinding Machine Case; ICC Case 7153; Officine Case; Window Plant Case; Feit Art 3 para 7; Gillette/Walt p 60; Hachem I Art 3 para 11; Magnus I Art 3 para 21*].
- 122 Case law and literature support the applicability of the CISG to plant construction contracts [*Industrial Plants Case; Spinning Plant Case; Window Plant Case; Feit Art 3 para 12*]. In *ICC Case 9781*, a German company was contracted to deliver a recycling plant to an Italian company; the sole arbitrator decided that the CISG was applicable to the plant construction contract. The reasoning was that the economic

value test showed the preponderance of the sales elements [*ICC Case 9781*]. Although not formally binding, the Tribunal should take this rationale into account under the duty of uniform application provided for by Art 7(1) CISG [*cf Rheinland Case; Gruber Art 7 para 46*].

- 123 If RESPONDENT argues that the CISG applies to mixed contracts but not to plant construction contracts specifically, this is unjustified. During the drafting of the CISG, the USSR delegate to the Working Group even suggested an explicit exception for plant construction contracts. The exception was never included; it was decided that courts should determine the applicability of the CISG to such contracts on the basis of the general rules [*Kahn pp 954 et seq; Mahnken p 242; UNCITRAL YB p 41*].
- 124 Under the economic value test, when the parties explicitly consider economic values, only they are relevant for the determination of preponderance [*Huber II Art 3 para 13*]. In pre-contractual correspondence, CLAIMANT and RESPONDENT discussed the individual value of CLAIMANT's obligations [*Exh C5 p 17 para 11*]. The total value of the sales elements amounts to EUR 190 MM, compared to a value of only EUR 110 MM for the service elements. This is undisputed by RESPONDENT. They admit that the service elements are merely "considerable" [*ARfA p 28 para 20*]. The total percentage of the sales elements equates to over 63 %, in comparison to less than 37 % for the service elements [*data obtained from Exh C5 p 17 para 11*]. This ratio remains unchanged after the 5 % discount.

	Sales (EUR / %)	Services (EUR / %)
Electrolyser stacks	100 MM / 33.33 %	– / –
Transformer; electrical equipment	40 MM / 13.33 %	– / –
Goods for the EPC work	50 MM / 16.66 %	– / –
Other obligations (ie service elements)	– / –	110 MM / 36.66 %
Total	190 MM / 63.33 %	110 MM / 36.66 %

Thus, the sales are preponderant for the base plant.

b. The sales elements remain preponderant including the extension options

- 125 The sales elements remain preponderant even considering the options. Since the value of the entire contract is EUR 460 MM [*Exh C5 pp 16 et seq para 9*] for the sales elements to be preponderant, they have to exceed EUR 230 MM (50 %). CLAIMANT has shown that a total value of EUR 190 MM is already accounted for, irrespective of the options (*supra IV.B.2.a., para 124*). Consequently, the value of the options only has to amount to EUR 40 MM. While the exact values of the sales elements of the options cannot be determined, the total value of the options makes up EUR 160 MM. For the sales elements to be preponderant, only 25 % of options' value has to pertain to sales elements.



126 The obligations out of the options and the base plant are similar in nature. Both options would have encompassed the delivery of valuable items, namely the electrolyser stacks and the eAmmonia module [RfA p 4 paras 11 and 12]. Therefore, it is close at hand that the value ratios are going to be similar as well. As the sales elements of the base plant are more than 63 % (*supra* IV.B.2.a., para 124), it is inconceivable that the sales elements of the options do not surpass 25 %. Thus, it becomes apparent that the sales elements are preponderant when considering the options.

3. The sales elements are preponderant when taking into account the will and interest of the Parties

127 When the economic value test is inappropriate or impossible, the will and interest of the parties have to be considered as a secondary criterion [*Park Plus Case*; *Steel Bars Case*; *AC Opinion No 4 para 3.4*; *Karner/Koziol para 28*; *Piltz para 2-37*]. As shown above, the application of the economic value test to the PSA is neither inappropriate nor impossible. Even if it were, the sales elements would still be preponderant.

128 First, CLAIMANT was able to adhere to RESPONDENT's preferred timeline because they already had a suitable transformer which was so integral to the final plant that many other potential bidders could not possibly meet this requirement [RfA pp 3 et seq para 8; *Exh C3 p 14*]. Second, the central machinery of the plant is the essential part of the PSA. RESPONDENT needs it to produce green hydrogen. This does not primarily happen because the building itself is constructed, but rather because the respective machinery is installed within it [*Exh C2 p 11*]. Thus, the will and interest of the Parties support the preponderance of the sales elements.

* * *

129 Even though RESPONDENT paints a picture in which the PSA is not a sales contract, this simply has no merit. The PSA is a mixed contract that contains sales elements. Since the total value of the sales elements amounts to over 63 % of the obligations for the base plant, the sales are preponderant. A consideration of the will and interest of the Parties results in the same conclusion. As a result, the CISG applies to the PSA pursuant to Art 3(2).

C. THE PSA IS NOT A SALE BY AUCTION

130 Art 2(b) CISG excepts sales by auction from its application. The Parties concluded the PSA as a result of public procurement proceedings. Although the second step of the process was a so-called "reverse auction", the transaction still does not qualify as a "sale by auction" within the meaning of Art 2(b) CISG [*cf IWB Case*; *Magnus I Art 2 para 33*; *Pereira p 211*; *Poljanec et al pp 149 et seq*; *Schroeter I*



p 134]. On the one hand, the tender did not have the characteristics of an auction. On the other hand, it would not correspond to the purpose of Art 2(b) CISG to extend the exception to the PSA.

- 131 The autonomously interpreted term “*auction*” includes public, publicised sales awarding the contract to the best bidder [*Ferrari III Art 2 para 28; Magnus I Art 2 para 33*]. The main characteristic of such sales is the transparency of the competitive bidding process: participants know the most recent bid – or the current price – and can react to it [*Mankowski Art 2 para 7; Poljanec p 26*].
- 132 In line with this, the nature of the tender conducted by RESPONDENT does not qualify it as an auction. Participants submitted their bids without knowing any other offers or the price. After the submission deadline, the bids were opened by RESPONDENT. During the so-called “*reverse auction*”, RESPONDENT ranked the bidders according to the overall economic value of the bids. No bidder could react at any point [*PO2 pp 52 et seq para 9*]. A true reverse auction is transparent because the auctioneer openly communicates the price, which decreases if nobody bids; the first and only bidder becomes the buyer [*Poljanec pp 17 et seq, 26*]. Instead, what RESPONDENT called a “*reverse auction*” was actually a sealed-bid auction, in which bidders simultaneously submit confidential bids. This is not considered an auction under Art 2(b) exactly because it lacks transparency [*cf Poljanec p 17*]. Thus, the only auction-like feature of this procedure was its name.
- 133 Furthermore, sales by auction are excepted from the CISG due to their unpredictability [*Bell p 250*]. They are automatically concluded by knockdown, prior to which it is impossible to know the future parties to the contract and their places of business. By virtue of Art 1(2), for the CISG to apply, internationality has to be apparent prior to or at the time of contract conclusion. This requirement is generally not met in auctions [*Honnold/Flechtner para 64; Magnus I Art 2 para 32; Spohnheimer Art 2 para 30*]. Contrary to that, procuring entities in procurement proceedings already know all potential bidders and their places of business when concluding the contract [*Spohnheimer Art 2 para 20*]. Hence, excluding such transactions is contrary to the rationale behind Art 2(b) CISG [*Poljanec et al p 150*].
- 134 In fact, the procurement proceedings conducted by RESPONDENT had no issue of unpredictability. RESPONDENT already knew that no local entities would participate due to the lack of development in the green hydrogen sector [*ARfA p 25 para 4*]. In addition, RESPONDENT even had an opportunity to negotiate with two final bidders and could decide on the conclusion of the PSA based on the negotiations. All of this enabled RESPONDENT to foresee the internationality of the PSA. To conclude, Art 2(b) CISG does not apply to the PSA.



- 135 Concluding IV., the CISG applies to the PSA. The Parties have their places of business in different Contracting States. Furthermore, the PSA is a mixed contract with a preponderance of sales elements. Last, the exception for sales by auction does not cover the PSA.

V. THE PARTIES HAVE NOT EXCLUDED THE CISG

- 136 CLAIMANT has demonstrated that the CISG applies (*supra IV., paras 100–135*). RESPONDENT asserts that the Parties opted out of the CISG under its Art 6 [*ARfA p 27 para 19*]. This is unjustified. CLAIMANT will show that an exclusion of the CISG must be assessed pursuant to Art 8 CISG (A.). An interpretation neither of the Parties' subjective intent (B.) nor under the objective test (C.) permits an assumption of exclusion. Thus, the CISG applies.

A. EXCLUSION MUST BE ASSESSED UNDER ART 8 CISG

- 137 Under Art 6 CISG, any opt-out from the CISG requires a consensual declaration of exclusion [*Saenger Art 6 para 2; Siehr I Art 6 para 2*]. Whether the CISG has been excluded is governed by its provisions on the interpretation of statements, thus Art 8 [*Citroen Case; AC Opinion No 16 Rule 3; Ferrari III Art 6 para 18; Gillette/Walt p 68; Schmitt Art 6 para 6; Magnus I Art 6 para 20*]. Art 8 contains two separate tests (*supra I.A., para 20*). The primary test under Art 8(1) relies on the parties' apparent intent. The secondary test under Art 8(2) relies on the understanding of a reasonable third party.
- 138 Under the primary test of Art 8(1), the will of the parties determines the interpretation of a contract, provided it was known by or could not be unknown to a recipient [*Hanwha Case; TeeVee Case*]. This knowledge threshold is reached when the real intent of a party could have easily been recognised [*Hurni Art 8 para 4*], ie when a party could not ignore evident, obvious, and striking facts [*Fogt p 94*].
- 139 Only if neither party could have recognised the intent of their counterpart will Art 8(2) be applied. Its standard relies on the understanding of a reasonable person in the position of the other party [*Treibacher Case; Schmidt-Kessel Art 8 para 12; Zuppi Art 8 para 23*].
- 140 Circumstances relevant for the determination of the party's real intent and the understanding of a reasonable person are listed in Art 8(3) CISG. CLAIMANT will address these in the subsequent sections. Generally, a "government entity" – as RESPONDENT describes themselves – can especially be expected to apply the CISG, as accession of a state to the CISG creates legitimate expectations that contracts will be governed by the Convention. Thus, the standards for the exclusion of the CISG in contracts with government entities are particularly high [*Pereira p 218*].

B. UNDER THE SUBJECTIVE TEST, THE CISG IS NOT EXCLUDED

141 Under the subjective test of Art 8(1), it was impossible for CLAIMANT to be aware of RESPONDENT'S alleged intent to exclude the CISG (1.). By contrast, RESPONDENT knew or at least could not have been unaware of CLAIMANT'S real intent to apply the CISG (2.).

1. CLAIMANT was unaware of RESPONDENT'S alleged intent to exclude the CISG

142 RESPONDENT alleges that they intended to exclude the CISG [*ARfA p 27 para 19*]. If this intent even existed, it cannot be taken into account: first, RESPONDENT never expressed their true intention with the necessary clarity; second, CLAIMANT could not have recognised RESPONDENT'S intent.

143 First, reliance on the real intent is subject to limitations. If the party relying on Art 8(1) has not even seized an opportunity to express their true intention with the necessary clarity, it cannot be considered [*Achilles Art 8 para 2*]. RESPONDENT never explicitly declared their intent to exclude the CISG to CLAIMANT, although they had every opportunity to do so. In a meeting between Mr Cavendish, CLAIMANT'S CEO, and Ms Faraday, RESPONDENT'S CEO, only CLAIMANT actively addressed the issue of the applicable law [*Exh R1 p 30 para 11*]. RESPONDENT intentionally avoided any discussion as a whole, as openly admitted by their own witness [*Exh R1 pp 29 et seq paras 7, 11*]. Even though CLAIMANT took a step towards RESPONDENT, they did not seize the opportunity to express any intent [*Exh R1 p 30 para 11*]. For this reason alone, RESPONDENT cannot rely on the subjective test.

144 Second, nothing indicated RESPONDENT'S supposed real intent. RESPONDENT refers to a change in the model clause used by Equatorianian state entities. It had been amended as a result of a campaign in 2022 led by the Equatorianian Ministry of Justice [*Exh R1 p 30 para 11*] and aimed at strengthening the role of Equatorianian law [*Exh R1 p 29 para 7*]. This revised model clause was included into the PSA as Art 29 [*ARfA p 29 para 19*]. As a foreign entity with no business in Equatoriana at the time [*RfA p 3 para 5*], CLAIMANT had no reason to follow local developments there and thus would not have seen the official press release concerning the amended model contract.

145 CLAIMANT'S legal team only realised during contract negotiations that the wording of the choice-of-law clause differed from previous contracts. Their Head of Legal at the time was Mr Law. He compared the contracts and subsequently put the applicable law on the list of issues to be discussed by the CEOs [*Exh R1 p 30 para 11; PO2 p 53 para 11*]. It was reasonable that, as an expert in international contracting [*PO2 p 53 para 11*], Mr Law would focus specifically on the applicable law clause. Any expert in this field would make similar enquiries if they noticed the slightest change in such clauses. Most likely, he put the applicable law issue on the agenda to discuss the meaning of this change and to reiterate the applicability of the CISG.



- 146 In early May 2023, Ms Smith took over the negotiations as CLAIMANT's new Head of Legal [*PO2 p 53 para 11*]. RESPONDENT has attempted to introduce a document authored by Ms Smith in the Proceedings which discusses potentially applicable legal systems to the PSA [*ObjLang p 34*]. CLAIMANT has shown this document is subject to privilege, has been obtained illegally and must not be admitted as an exhibit (*supra III., paras 67–98*). They will therefore not discuss the content of said document as this may be construed as a waiver of privilege [*cf Glamis Gold Case; Pittston Case*].
- 147 Since CLAIMANT could not have known the alleged real intent of RESPONDENT to exclude the CISG, no exclusion of the CISG can be drawn from the subjective test under Art 8(1).

2. RESPONDENT was aware of CLAIMANT's intent to apply the CISG

- 148 Contrary to RESPONDENT, CLAIMANT unambiguously expressed their intent to apply the CISG to the PSA. RESPONDENT could not have been unaware of it and therefore could not have relied on any other interpretation.
- 149 On multiple occasions, CLAIMANT made their intent to apply the CISG clear. CLAIMANT even discussed the applicable law at the CEO level [*Exh R1 p 30 para 11*]: Mr Cavendish explicitly mentioned the role of the CISG in international transactions as a “gold standard” [*Exh R1 p 30 para 11*]. Although RESPONDENT's main negotiator, Ms Ritter, assumes that Mr Cavendish “merely mentioned” this fact [*Exh R1 p 30 para 11*], this qualification is meaningless under the standard of Art 8(1) CISG. Rather, this was an obvious expression of CLAIMANT's intent to apply the CISG. In addition, Mr Deiman, CLAIMANT's main negotiator, shared with Ms Ritter his positive view of the old model clause, which had explicitly called for the CISG [*Exh R1 p 30 para 11*].
- 150 Such an expression of CLAIMANT's intent to apply the CISG was so conspicuous that RESPONDENT could not have ignored it [*cf Fogt p 94*]. RESPONDENT therefore knew CLAIMANT's real intent, or, at the very least, could not have been unaware. For this reason, RESPONDENT would have needed to explicitly demand the exclusion of the CISG. Therefore, CLAIMANT's evident will is decisive.

C. UNDER THE OBJECTIVE TEST, THE CISG IS NOT EXCLUDED

- 151 As RESPONDENT was aware of CLAIMANT's subjective intent at the time of the contract conclusion, they cannot rely on the objective test of Art 8(2) [*cf Gillette/Walt p 68; Hurni Art 8 para 3*]. Even if they could, no reasonable person would have understood the relevant provisions of the PSA as an exclusion of the CISG. Neither an interpretation of the choice-of-law clause (1.) nor of the Request for Quotation (2.) permit an assumption of exclusion.

1. The choice-of-law clause does not exclude the CISG

152 RESPONDENT argues that the CISG is excluded because Art 29 PSA provides for a choice of “*the law of Equatoriana to the exclusion of its conflict of laws principles*” [Exh C2 p 12]. However, that choice-of-law clause cannot fulfil this purpose. First, the CISG is part of Equatoriana’s law (a.). Second, it is not a part of Equatoriana’s conflict-of-laws principles (b.).

a. The CISG is part of the law of Equatoriana

153 The Parties’ choice of the law of Equatoriana in Art 29 PSA refers to the entirety of Equatorianian law. The CISG is part of the law of Equatoriana.

154 The choice of the law of a Contracting State entails a choice of the CISG [*Electricity Meters Case; Gramercy Holdings Case; ICC Case 9781; ICC Case 2023-052; Kröll et al para 11*]. Therefore, RESPONDENT’S general reference to the law of Equatoriana in itself cannot be considered an exclusion of the CISG [*cf ICC Case 7565; Lingerie Case; Musgrave Case; Rheinland Case*]. This is particularly apparent when the parties to a contract are aware of the CISG [*Cybernetix Case; Gramercy Holdings Case; Park Plus Case; Wheel Loader Case; Kröll p 362*], as CLAIMANT and RESPONDENT were [Exh R1 p 30 para 11]. The assumption that the CISG is not a part of the law of Equatoriana – a Contracting State – would be counterintuitive. For illustration, the assumption that the choice of an EU Member State’s law would not simultaneously relate to EU law is equally counterintuitive.

155 RESPONDENT would have had to define the law of Equatoriana more specifically for a reasonable person to interpret the clause as an exclusion. For instance, the choice of the “*law of Equatoriana, excluding the CISG*” or a reference to specific Equatorianian provisions or statutes governing the same subject matter as the CISG [*cf Twisted Yarn Case*] would provide for an exclusion of the CISG. However, the simple choice of “*the law of Equatoriana*” does not exclude the CISG.

b. The CISG is not part of Equatoriana’s conflict of laws principles

156 The Parties have excluded the application of the “*conflict of laws principles*” of Equatoriana in Art 29 PSA [Exh C2 p 12]. The CISG is not a part of them.

157 Unlike the CISG, conflict-of-laws (“CoL”) rules dictate what substantive law applies to an international matter. For instance, the Tribunal would rely on CoL rules to determine which substantive provisions apply to contractual claims in the first place. To that end, CoL principles rely on connecting factors, such as the habitual residence of a party (eg Art 117(3)(a) Swiss PILA, Art 46(1) Korean PILA) or “*the most real and substantive connection to the contract*” [*Bonython Case*]. Only after determining the applicable law would the Tribunal apply substantive provisions (eg Sec 433 *et seq* German BGB).



158 Due to the existence of various connecting factors in different domestic systems, CoL rules create uncertainty that unified substantive law, such as the CISG, aims to eradicate. To achieve this, the CISG itself applies to international matters as substantive law. Its provisions, such as Art 45 concerning remedies for breach of contract by the seller, apply directly to the sales contract. The diverging purposes of CoL principles and uniform substantive law can be distinguished from one another [*Protective Masks Case; Kröll et al para 11*]. Consequently, an understanding of the CISG as conflict-of-laws rules lacks any foundation [*Siehr II p 398*]. The CISG remains applicable.

2. A systematic interpretation of the PSA does not support an exclusion of the CISG

159 Art 31 PSA provides for the interpretation of the PSA in light of the Request for Quotation, which initiated the tender proceedings [*Exh C2 p 13*]. According to Art 8 of the Request for Quotation, the applicable law to both the “*bidding process*” and the “*award of the contract*” is the Public Procurement Law of Equatoria [*RfQ p 9*]. According to the understanding of a reasonable third person, this designation did not extend to any eventual purchase agreement concluded with the successful bidder.

160 Neither the “*bidding process*” nor the “*award of the contract*” encompass contractual issues [*Exh C1 p 9 para 8*]. The “*award of the contract*” simply describes the method used in procurement proceedings to evaluate the tender offers [*Kunzlik p 183*]. Further, the Public Procurement Law does not regulate contractual matters at all [*PO2 p 55 para 32*]. Therefore, no reasonable person would have understood it as a replacement of the CISG. In fact, the application of the CISG to public procurement contracts is “*commonplace*” [*Pereira p 214*]. To conclude, Art 31 PSA read in conjunction with Art 8 of the Request for Quotation does not exclude the CISG.

3. The negotiation history does not permit the assumption of exclusion

161 According to Art 8(3), negotiations are also relevant for the interpretation under the objective test of Art 8(2) CISG. This includes drafts of the agreement and correspondence between the parties [*Austrian Cloth Case*]. As stated, CLAIMANT described the CISG as the “*gold standard*” (*supra V.B.2., para 149*). It would have been an obvious inconsistency for CLAIMANT to mention their fondness of the CISG, yet to exclude it later. The case law has already clarified that the lack of further negotiations cannot be understood as consent to exclude [*cf Citroen Case*]. Therefore, no reasonable person could have interpreted the Parties’ conduct in the negotiations as an exclusion.

162 Concluding V., the Parties have not excluded the CISG under Art 6. Under the subjective test, CLAIMANT’S apparent intent was the application of the CISG. Under the objective test, RESPONDENT’S



statements and conduct could not have been reasonably understood as an exclusion of the CISG. Therefore, the CISG is the applicable law to the PSA.

VI. ART 7.3.8 ECC DOES NOT APPLY

- 163 As directed by the Tribunal in PO1 [*PO1 p 50 para III(1)*], CLAIMANT has demonstrated the applicability of the CISG to the PSA (*supra IV., paras 100–135*) and lack of its exclusion (*supra V., paras 136–162*). The CISG does not govern all questions that arise in connection with the sale of goods. If a matter is not within the scope of the CISG, domestic non-harmonised law applies.
- 164 RESPONDENT relies on such a non-harmonised provision, namely termination for convenience pursuant to Art 7.3.8 Equatorianian Civil Code (“ECC”), in their allegations [*ARfA p 28 para 21*]. This provision allows governmental entities to terminate contracts for convenience if they were concluded in pursuance of a particular strategy and said strategy has changed [*PO1 pp 50 et seq para III(4)*].
- 165 As a matter of the applicable law, it will be demonstrated that this provision does not apply in the Proceedings because Art 7.3.8 ECC covers a matter governed by the CISG (A.). In any case, RESPONDENT waived their right to terminate for convenience (B.). In addition, Art 7.3.8 ECC discriminates in favour of government entities and must be ignored by the Tribunal (C.).

A. ART 7.3.8 ECC COVERS A MATTER GOVERNED BY THE CISG

- 166 Art 7.3.8 ECC is inapplicable as it concerns a matter that falls within the scope of the CISG. Pursuant to Art 4 CISG, the subject matters of the Convention explicitly include the formation of the contract and the rights and obligations of the parties. This is not an exhaustive list; crucially, the CISG also contains provisions on termination [*Djordjević Art 4 para 6; Hachem I Art 4 para 2; Schlechtriem/Butler para 41; Schroeter II para 151*].
- 167 A subject matter is governed only by the CISG if the same issues are addressed by both the CISG and the corresponding domestic provision and they serve a similar purpose [*AC Opinion No 23 Rule 3; Honnold/Flechtner para 96; Schroeter II paras 161 et seq*].
- 168 The purpose of Art 7.3.8 ECC is to give governmental entities the right to terminate for convenience due to external changes. This issue is covered by Art 79 CISG, which clarifies the circumstances under which a party is freed from fulfilling their contractual obligations because of external aggravating circumstances [*Schroeter II para 800*]. Considering this, Art 79 supersedes domestic doctrines such as “frustration of purpose” or “hardship” [*AC Opinion No 20 para 2.3; cf Hearing Implants Case; Piltz para 4-220; Schroeter II para 800; Siehr I Art 4 para 20*]. One recognised example of aggravating circumstances governed by Art 79 CISG is changes of government [*Lorenz Art 4 para 13*]. Thus, termination because of government changes is a matter that falls within the scope of the CISG.



169 Furthermore, Art 7.3.8 ECC concerns the unilateral termination of a contract, which the CISG governs within its provisions on avoidance (Arts 49 and 64 CISG). The Convention allows such unilateral termination only as a last resort [*Cobalt Sulfate Case*; *Designer Clothes Case*; *Ferrari IV p 4*; *Magnus II p 424*; *Schroeter III Art 25 para 22*]. Art 29 CISG even clarifies that termination without cause must be mutually agreed between the parties [*Schroeter IV Art 29 para 47*]. Consequently, the lack of a provision allowing termination for convenience fits within the overall system of the CISG. Art 7.3.8 ECC disrupts the intended balance of interests between the buyer and the seller within the CISG. Thus, Art 7.3.8 ECC is superseded by the CISG as it concerns a matter governed by the CISG.

B. RESPONDENT WAIVED ALL TERMINATION RIGHTS IN ART 28 PSA

170 Even if Art 7.3.8 ECC were applicable, RESPONDENT waived their right to terminate for convenience in Art 28(2) PSA [*Exh C2 p 12*]. In return, CLAIMANT granted RESPONDENT a price reduction of 5 % [*Exh C5 p 17 para 10*]. RESPONDENT might now attempt to argue that they could not effectively waive their right to terminate for convenience, framing Art 7.3.8 ECC as mandatory. However, it is the prevailing opinion in Equatoriana that Art 7.3.8 ECC is not a mandatory provision [*PO2 p 55 para 33*]. Thus, Art 7.3.8 ECC was waived effectively by RESPONDENT.

171 Even if it were considered mandatory, this issue is to be settled by an arbitral tribunal and not a state court. In arbitral proceedings, parties can deselect mandatory provisions of the governing law [*Bermann p 18*; *Lenz p 94*; *Lew et al para 17-27*]. After all, the Parties could have chosen any governing law, including jurisdictions without equivalent provisions [*cf Barraclough/Waincymer p 219*]. The only limit to this is public policy [*Lew et al para 17-32*], as that would constitute a basis for setting aside or denial of the enforcement of the award under Art 34(2)(b)(ii) ML or Art V(2)(b) NYC. This is not the case for Art 7.3.8 ECC, as it is not considered to be part of Equatoriana's public policy, the state that the award would most likely be enforced in [*PO2 p 55 para 33*].

172 The Parties chose Equatoriana law but agreed to waive all rights to terminate for convenience. Thus, Art 7.3.8 ECC is inapplicable by virtue of the Parties' exclusion.

C. THE INCLUSION OF ART 7.3.8 INTO THE ECC DEFEATS THE OBJECT AND THE PURPOSE OF THE CISG

173 The Tribunal must ignore Art 7.3.8 ECC because it frustrates the purpose of the CISG. The CISG is an international treaty, creating obligations for the Contracting States. According to the Preamble, its purpose is the "removal of legal barriers in international trade" and to "promote the development of international trade".

174 Similar to other treaties, *pacta sunt servanda* applies to the CISG. According to this principle, every treaty in force is binding upon its parties and must be performed in good faith. This fundamental principle of customary international law is also codified in Art 26 VCLT [*Aust para 1; Pert/Couzens p 70*], to which both Mediterraneo and Equatoriana are Contracting States [*PO2 p 55 para 31*]. The Contracting States are obliged to apply the treaty in a reasonable way and in such a manner that its purpose can be realised [*Salmon Art 26 para 35*]. When entering into the CISG, Equatoriana consented to the adoption of uniform rules for the purpose of the development of international trade. The CISG does not provide for any privileges for state-owned entities because it “*aims for fairness across the board*” [*cf Pereira et al*]. Such provisions would create an imbalance that impedes the development of international trade. They defeat the purpose of the CISG as a treaty and violate the international obligations of Equatoriana. For this reason, Art 7.3.8 must not be applied in the Proceedings.

* * *

175 Concluding VI., Art 7.3.8 ECC is not applicable in the Proceedings. Art 7.3.8 ECC governs a matter within the scope of the CISG. Additionally, RESPONDENT waived their right to terminate for convenience under Art 7.3.8 ECC. Last, the Tribunal must not consider a non-harmonised provision that frustrates the purpose of the CISG.

Requests for Relief

In light of the above, CLAIMANT upholds their requests that the Tribunal:

- 1) Declare that the Agreement is governed by the CISG.
- 2) Declare that the Agreement has not been validly terminated by Equatoriana RenPower.
- 3) Order Equatoriana RenPower to fulfil the Agreement by using its best effort to have the necessary construction and operation permits issued and allowing CLAIMANT to start with the construction works on the Greenfield site, as well as taking all further steps agreed upon under the Purchase and Service Agreement and necessary to ensure the realization of the project, including but not limited to making the relevant payments.
- 4) Order Equatoriana RenPower to bear the costs of the arbitration.
- 5) Make any other order the Arbitral Tribunal considers appropriate.

Varvara Artiukh
Agnes Oppitz

Sophie Hannah Egger
Jonas Schneider-Beron

Lukas Hellmayr
Alina Waldenberger

On behalf of CLAIMANT



Certificate

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

A stylized, cursive signature in black ink.

Varvara Artiukh

A cursive signature in black ink, appearing to read 'Sophie Egger'.

Sophie Hannah Egger

A cursive signature in black ink, appearing to read 'L. Hellmayr'.

Lukas Hellmayr

A cursive signature in black ink, appearing to read 'Agnes Oppitz'.

Agnes Oppitz

A cursive signature in black ink, appearing to read 'Jonas Schneider-Beron'.

Jonas Schneider-Beron

A cursive signature in black ink, appearing to read 'Alina Waldenberger'.

Alina Waldenberger

Vienna, 12 December 2024

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Tube Case

Obergericht des Kantons Zug
Court of Appeal Canton Zug
19 December 2006
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CISG-online No 1427
Cited in: para 121

Wheel Loader Case

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Court of Appeal Canton Zug
1st department for civil matters
23 February 2023
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CISG-online No 6313
Cited in: para 154

The Netherlands

Lotamblau Case

Hoge Raad der Nederlanden
Supreme Court of the Netherlands
12 July 2024
Case No. 22/04619
LOTAMBLAU INVESTMENTS B.V., formerly Capabel Solutions Works
B.V. v PROJECT PARTNER SEARCH BEHEER B.V.
Cited in: paras 19, 29

England & Wales

Bradford & Bingley Case

House of Lords

Opinions of the Lords of Appeal for Judgement

12 July 2006

[2006] UKHL 37

Bradford & Bingley plc v Rashid (FC)

Cited in: para 54

Fiona Trust Case

House of Lords

Opinions of the Lords of Appeal for Judgement

17 October 2007

[2007] UKHL 40

Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others
under name of Premium Nafta Products Ltd (20th Defendant) & Others v
Fili Shipping Co Ltd (14th Claimant) & Others

Cited in: paras 19, 26

Hall Case

High Court of Justice

27 June 2005

[2005] EWHC 3110 (Ch)

Hall and Another v Pertemps Group Limited and Another

Cited in: para 53

NWA Case

High Court of Justice

8 October 2021

[2021] EWHC 2666 (Comm)

NWA & FSY v NVF & others

Cited in: paras 20, 26



Ohpen Operations Case	High Court of Justice 16 August 2019 [2019] EWHC 2246 Ohpen Operations UK Ltd. v Invesco Fund Cited in: para 20
Rush Case	House of Lords Opinions of the Lords of Appeal for Judgement 3 November 1988 [1989] AC 1280 Rush & Tompkins Ltd v Greater London Council Cited in: paras 53, 54
Sierra Leone Case	High Court of Justice 15 February 2021 [2021] EWHC 286 (Comm) SL Mining Ltd. v Republic of Sierra Leone Cited in: paras 26, 29
Unilever Case	Court of Appeal 28 October 1999 [2000] 1 W.L.R. 2436 Unilever Plc. v The Procter & Gamble Co. Cited in: paras 54, 57



United States

Asante Case

U.S. District Court for the Northern District of California
30 July 2001
C 01-20230 JW
Asante Technologies, Inc. v PMC-Sierra, Inc.
CISG-online No 616
Cited in: para 110

BG v Argentina Case

Supreme Court of the United States
5 March 2014
Case No 134 S.Ct. 1198(2014)
BG Group PLC v Republic of Argentina
Cited in: paras 26, 27

Bittaker Case

U.S. Court of Appeals for the Ninth Circuit
6 June 2003
331 F.3d 715
Bittaker v Woodford
Cited in: para 72

Builders Case

U.S. Court of Appeals for the First Circuit
17 January 2003
Case No. 02-1955
HIM Portland LLC v Devito Builders Inc.
Cited in: para 20

Cook Case

U.S. District Court of the Eastern District of California
5 September 1990
132 F.R.D. 548 (E.D. Cal. 1990)
Cook v Yellow Freight System, Inc.
Cited in: para 54



Cumberland Case	<p>United States District Court for the District of Maine</p> <p>7 February 2002</p> <p>No. 01-244-P-H</p> <p>Cumberland York Distributors v Coors Brewing Company</p> <p>Cited in: para 29</p>
DirecTV Case	<p>U.S. District Court of the District of Kansas</p> <p>23 November 2004</p> <p>224 F.R.D. 677 (D. Kan. 2004)</p> <p>DirecTV, INC v Robert Puccinelli, et al.</p> <p>Cited in: para 54</p>
Fluor Case	<p>U.S. District Court of the District of Texas</p> <p>18 May 2001</p> <p>147 F. Supp. 2d 648 (2001)</p> <p>Fluor Enterprises Inc. v Solutia Inc.</p> <p>Cited in: para 19</p>
Generica Case	<p>U.S. Court of Appeals for the Seventh Circuit</p> <p>29 September 1997</p> <p>125 F.3d</p> <p>Generica Ltd. v Pharm. Basics, Inc.</p> <p>Cited in: para 64</p>
Golden State Foods Case	<p>U.S. District Court for the Central District of California</p> <p>26 June 2014</p> <p>Case No. CV 13-8150 RSWL (VBKx)</p> <p>Golden State Foods Corp. v Columbia/Okura LLC</p> <p>Cited in: para 20</p>



Gramercy Holdings Case	<p>U.S. District Court for the Southern District of New York</p> <p>11 September 2023</p> <p>20 Civ. 3937 (JPC), 20 Civ. 4136 (JPC)</p> <p>CISG-online No 6477</p> <p>Gramercy Holdings I, LLC v Matec S.r.l. et al.</p> <p>Cited in: para 154</p>
Hanwha Case	<p>U.S. District Court for the Southern District of New York</p> <p>18 January 2011</p> <p>09 Civ. 10559 (AKH)</p> <p>CISG-online No 2178</p> <p>Hanwha Corp. v Cedar Petrochemicals, Inc.</p> <p>Cited in: para 138</p>
Hoteles Condado Case	<p>U.S. Court of Appeals for the Sixth Circuit</p> <p>31 May 1985</p> <p>763 F.2d 34</p> <p>Hoteles Condado Beach, La Concha & Convention Center v Union De Tronquistas Local 901</p> <p>Cited in: para 64</p>
Kamper Case	<p>Connecticut Supreme Court</p> <p>31 May 1994</p> <p>Case No 229 Conn. 465 (Conn. 1994) 641 A.2d 1381</p> <p>White v Kamper</p> <p>Cited in: para 20</p>
Lingerie Case	<p>U.S. District Court for the Southern District of New York</p> <p>23 August 2016</p> <p>14cv10246-FM</p> <p>CISG-online No 1667</p> <p>Shantou Real Lingerie Manufacturing Co., Ltd. v Native Group Int'l, Ltd.</p> <p>Cited in: para 154</p>



Paxton Case	Supreme Court of Texas 3 February 2017 509 S.W.3d 247 Ken Paxton v City of Dallas Cited in: para 72
Pittston Case	U.S. District Court, D. New Jersey. 4 August 1992 143 F.R.D. 66 (D.N.J. 1992) Pittston Company v Allianz Insurance Co. et al. Cited in: para 146
TeeVee Case	U.S. District Court for the Southern District of New York 23 August 2006 00 Civ. 5189 (RCC) CISG-online No 1272 TeeVee Toons, Inc. v Gerhard Schubert GmbH Cited in: para 138
Treibacher Case	U.S. Court of Appeals for the Eleventh Circuit 12 September 2006 05-13995 CISG-online No 1278 Treibacher Industrie AG v Allegheny Technologies, Inc. et al. Cited in: para 139
Vision Systems Case	Superior Court of the State of Massachusetts 28 February 2005 034305BLS CISG-online No 1005 Vision Systems, Inc. v EMC Corp Cited in: para 111