ALBERT LUDWIG UNIVERSITY OF FREIBURG

Memorandum for CLAIMANT

On Behalf Of	**Against**
GreenHydro Plc	Equatoriana RenPower Ltd.
1974 Russell Avenue	1 Russell Square
Capital City	Oceanside
Mediterraneo	Equatoriana
– CLAIMANT –	– RESPONDENT –

THERESA HAGEDORN • MORITZ HUBER • ANN-KRISTIN KAISER • JULIAN KRAMER
PETER KUBE • MICHEL PIEGSA • LAURIDS PIETRAß • SVENJA SCHNEIDER

Freiburg im Breisgau, Germany

APPENDIX 3

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY:

COUNTRY:

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

USE OF AI			
We have used AI enhanced **search engines** for researching sources and (factual or legal) information on the Moot Problem.			
We have used AI-enhanced **proof-reading** tools.			
We have used AI enhanced **translation tools** to translate sources relevant for our work on the Moot Problem.			
We have used AI enhanced **translation tools** to translate parts of the text submitted in this Memorandum into English from any other language.			
We have used AI to **generate overviews or briefings on relevant factual and legal topics** which are not submitted as part of the memorandum but have been solely used to advance our own understanding.			
We have used AI tools to **generate statements that are now included in the memo**. Please tick yes even if you have altered or amended the text generated by AI before submission.			
We have **trained an AI tool** on Vis Moot documents.			
We have **used an AI tool that has been trained on Vis Moot documents** to generate text that is part of our Memorandum			
Other (please specify):			

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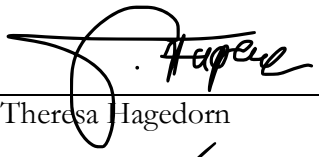
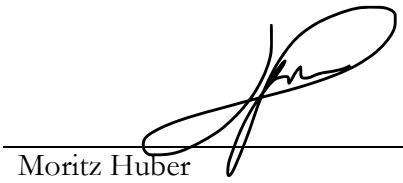
CERTIFICATE

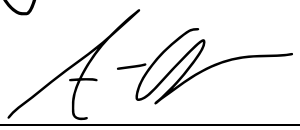
We hereby confirm that this Memorandum was written only by the person whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team. Our university is competing in both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



Theresa Hagedorn



Moritz Huber



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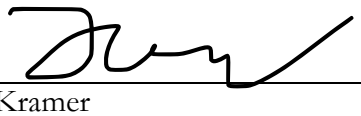

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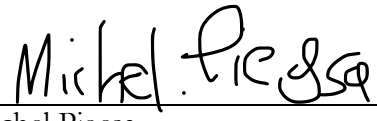
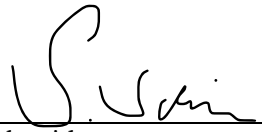
Peter Kube



Michel Pigesa

Laurids Pietraß



Svenja Schneider

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%	Percent
AC	Advisory Council
ADR	Alternative Dispute Resolution
Answer	Answer to the Request for Arbitration
Art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CEO	Chief Executive Officer
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
ed.	editor/edition
EPC	Engineering Procurement Construction
et al.	et alii (and others)
EUR	Euro, €
FAI	Finland Arbitration Insititute
HGB	Handelsgesetzbuch (German Commercial Code)
i.e.	id est (that is)
IBA	International Bar Association
Ltd	Limited
mio	Million
Mr.	Mister
Ms.	Miss
MW	Megawatt
No.	Number

Opt.	Option
p./pp.	page/pages
para./paras.	paragraph/paragraphs
plc	Public Limited Company
PO	Procedural Order
Request	Request for Arbitration
The Agreement	Purchase and Service Agreement
UNCITRAL	United Nations Commission on International Trade Law
v	versus
Vol.	Volume

INDEX OF LEGAL SOURCES

CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Danubian Arbitration Law	Verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (1985) with the 2006 amendments
Danubian Mediation Law	UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)
FAI Arbitration Rules	Arbitration Rules 2024 of the Finland Chamber of Commerce
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2020)
FAI Mediation Rules	Mediation Rules 2024 of the Finland Chamber of Commerce
NYC	United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

STATEMENT OF FACTS

The parties to this arbitration are GreenHydro Plc (*hereafter:* CLAIMANT) and Equatoriana RenPower Ltd. (*hereafter:* RESPONDENT).

CLAIMANT is a medium sized engineering company based in Mediterraneo specialized in the delivery of plants for the production of green hydrogen.

RESPONDENT is a fully state-owned company based in Equatoriana operating in the field of renewable energies.

3 Jan 2023	RESPONDENT initiates a tender process for the construction and delivery of a plant to produce green hydrogen and potential derivatives [Exhibit *C1, p. 8*].
May 2023	CLAIMANT is among the two final participants with whom RESPONDENT enters into specific negotiations [*Exhibit C5, p. 16 et seq., para. 9*].
13 Jul 2023	In the final negotiations, the interpretation of the choice of law clause provided by RESPONDENT is left undiscussed [*Exhibit R1, p. 30, para. 11*]. In return for a waiver of RESPONDENT's right to terminate the contract for convenience, CLAIMANT agrees to reduce the purchase price by 5% - EUR 15 Mio, failing to cover the costs of the delivery of the facility [*Exhibit C5, p. 17, para. 10*].
17 Jul 2023	CLAIMANT and RESPONDENT (hereafter: *the Parties*) conclude the Agreement [*Exhibit C2, pp. 10–13*].
Oct 2023	The strongest supporter of the Green Energy Strategy, the minister of energy and environment, Mr. Positive, is ousted from government and replaced by an outspoken opponent of the strategy and green hydrogen in particular [*Exhibit C5, p. 18, para. 13*].
Nov 2023	CLAIMANT acquires one of the subcontractors involved in the project, Volta Transformer [*Exhibit C8, p. 36, para. 2*].

Dec 2023	The CEO of RESPONDENT, Ms. Faraday, is replaced by the well-known critic of hydrogen energy Mr. Henry la Cour [*RfA, p. 5, para. 18; Exhibit C5, p. 18, para. 14*], who is notorious for being a disruptive force [*Exhibit C5, p. 18, para. 14*].
29 Feb 2024	RESPONDENT issues a notice of termination of the Agreement. In this notice, RESPONDENT communicates for the first time that it considers the Equatorianian Civil Code to be applicable [*Exhibit C6, p. 19*].
12 May 2024	The Equatoranian Police raids the office of Mr. Deiman, confiscating confidential documents and imprisoned him. None of the allegations made against him turned out to be substantiated and led to his acquittal shortly afterwards [*Exhibit C8, p. 36, paras. 5, 6*].
25 May 2024	RESPONDENT declares that it would only consider the continuation of the project if CLAIMANT agrees to a price reduction of 15 % or at least by a double-digit number [*Exhibit C7, p. 20*].
26 May 2024	CLAIMANT rejects RESPONDENT'S offer and notifies RESPONDENT that it would initiate arbitral proceedings if RESPONDENT does not engage in further discussions without preconditions. RESPONDENT does not replay to this letter [*PO 2, p. 55, para 24*].
31 Jul 2024	CLAIMANT files for arbitration [*RfA, p. 2*].

INTRODUCTION

If wishes were fishes, we'd all cast nets…

Gurney Halleck in *Dune*

By Frank Herbert

Following a political shift in Equatoriana, RESPONDENT desperately casts its "nets" in search of an easy way to avoid its contractual commitments. Yet, such imaginary "fish" cannot be caught, as the Agreement provides no basis for RESPONDENT's claims.

In 2023, the Parties concluded their Agreement for the sale of a hydrogen plant [*Exhibit C2, p. 10-13*], driven by RESPONDENT commitment to the Equatorianian Green Energy Strategy and the state's transition towards renewable energy [*Exhibit C3, p. 14*]. Unfortunately, after a shift in government, the Agreement was deemed to "no longer [fit] into Equatoriana's energy strategy" and therefore into RESPONDENT's agenda as a state-owned entity [*Exhibit C6, p. 19*]. In an act of wishful thinking, RESPONDENT now relies on farfetched lines of argument, accompanied by predictable attempts of procedural obstruction to evade the Agreement. However, RESPONDENT cannot be allowed to shift the consequences of Equatoriana's policy changes onto CLAIMANT.

RESPONDENT seeks to drive CLAIMANT into financial ruin by seeking to impose a further price reduction of 15% – equalling a loss of EUR 82 mio. Thereby RESPONDENT obstructs CLAIMANT's efforts to find an amicable solution, while simultaneously insisting mediation was mandatory (**Issue 1**).

Distorting the scope of the Parties' confidentiality obligations to its benefit, RESPONDENT tries to exclude material evidence. Yet, with regard to its own Exhibit, RESPONDENT blatantly ignores the attorney-client privilege and CLAIMANT's rights to procedural fairness and equality (**Issue 2**).

Sinking even further into wishful-thinking, RESPONDENT claims it could terminate the Agreement for convenience under the Equatorianian Civil Code. However, RESPONDENT fails to realise that the CISG is applicable to the present dispute (**Issue 3**) and was not excluded by the Parties (**Issue 4**).

ISSUE 1: THE TRIBUNAL HAS JURISDICTION AND SHOULD EXERCISE ITS DISCRETION TO FIND THE CLAIM ADMISSIBLE

1 The Arbitral Tribunal has jurisdiction to hear the case and should exercise its discretion to find the claim admissible. On 17 July 2023, the Parties concluded the Agreement containing the following dispute resolution clause in Art. 30, which includes a mediation as well as an arbitration clause:

> *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. […]*
>
> *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitration of the Finland Chamber of Commerce. […] The seat of arbitration shall be Vindobona, Danubia.*

2 The Parties did not initiate mediation before CLAIMANT requested arbitration [*Exhibit C5, p. 18, para. 16*]. RESPONDENT now claims that conducting mediation is a mandatory pre-arbitral condition [*Answer, p. 27, para. 16*]. However, under Art. 30 of the Agreement, mediation is not mandatory in the present case, as RESPONDENT undermined any basis for mediation by setting terms that exacerbated CLAIMANT's already unprofitable position [*cf. Exhibit C8, p. 36, para. 3*]. CLAIMANT informed RESPONDENT that arbitration would be initiated if RESPONDENT did not engage in amicable negotiations. Yet, RESPONDENT failed to respond, demonstrating its unwillingness to find an amicable solution [*PO2, p. 55, para. 24*].

3 RESPONDENT seeks to delay the proceedings, alleging that the Tribunal lacks jurisdiction, or, alternatively, the claim would be inadmissible, solely on the basis of non-compliance with the Mediation Clause [*Answer, p. 27, para. 16*]. In the present case, however, compliance with the Clause is not mandatory, as mediation is futile (**A.**). Consequently, non-compliance does not affect the Tribunal's jurisdiction or the claim's admissibility. Even if the Parties' Mediation Clause was deemed to be mandatory in any circumstance, the Tribunal has jurisdiction to hear the case and should exercise its discretion to admit the claim (**B.**).

A. Mediation Is Futile and Thus Not Mandatory Under Art. 30 of the Agreement

4 Mediation is not mandatory under the Parties' Mediation Clause in Art. 30 of the Agreement, as conducting mediation is futile in the case at hand. Art. 30 of the Agreement does not mandate mediation where it is futile (**I.**). In the present case, RESPONDENT's unwillingness to pursue an amicable settlement renders mediation futile (**II.**).

I. Under Art. 30 of the Agreement, Mediation Is Not Mandatory Where It Is Futile

5 Under Art. 30 of the Agreement, mediation is not mandatory where it is futile. Both, Equatoriana and Mediterraneo, are Contracting States to the CISG, which applies to the interpretation of arbitration agreements [*PO1, p. 51, III.4, 5*]. Thus, Art. 30 must be interpreted according to the CISG. Pursuant to Art. 8(1) CISG, a clause is interpreted based on the parties' actual intent. If the parties' intent cannot be determined, the clause must be interpreted in line with Art. 8(2) CISG to the "understanding [of] a reasonable person of the same kind […] in the same circumstances". Arbitral tribunals' interpretations of whether and to what extent parties intended pre-arbitral conditions to be mandatory are binding [*BGer 30 Oct 2024*]. Thus, the Tribunal's interpretation of the Parties' Mediation Clause cannot be reviewed by national courts in enforcement or set-aside proceedings.

6 As the Parties did not explicitly or implicitly address the possibility of futile mediation, Art. 30 of the Agreement must be interpreted according to Art. 8(2) CISG. Considering the Mediation Clause's objective and practical implications, a reasonable person would not regard the Mediation Clause to be mandatory where mediation is futile. Mediation clauses are generally included to encourage the amicable resolution of disputes, to save costs and preserve relationships [*Cremades lib am/Piñeiro, p. 733; Johnsen, UMLR, p. 328; Lal et al., ASA Bulletin, p. 817; Mehta/Ghosh, NLS Bus L Rev, p. 5*]. The very essence of mediation depends on the parties' willingness to engage in good-faith negotiations [*cf. Johnsen, UMLR, p. 328*]. Where parties are unwilling to negotiate, mediation is destined to fail from the outset. Thus, forcing parties into mediation defeats the purpose of negotiation [*McIlwrath/Savage, p. 85, para. 1.198*].

7 Moreover, requiring mediation where one party is unwilling to negotiate is a mere formality under the Mediation Rules 2024 of the Finland Chamber of Commerce (hereinafter: *FAI Mediation Rules*). Art. 10(1)(b) FAI Mediation Rules allows either party to unilaterally terminate the mediation proceeding at any time without providing reasons. As a result, a party may commence mediation proceedings only to terminate them immediately after and proceed directly to arbitration. Given the considerable expenses associated with mediation, as outlined in Art. 13 FAI Mediation Rules, it would be in the best interests of all parties to bypass mediation and proceed directly to arbitration.

8 Mediation offers no benefit to the Parties and only imposes unnecessary burdens where conducting it is futile. Thus, a reasonable person would undoubtedly not presume that conducting mediation is mandatory in such circumstances. Therefore, Art. 30 of the Agreement should be interpreted to not mandate mediation where it is futile.

II. In the Present Case, Conducting Mediation Is Futile

9 In the present case, mediation is futile. Conducting mediation is futile if it forces parties to enter negotiations where they are unwilling to find an amicable solution [*ICSID 8 Feb 2013, para. 582; Berger, RIW, p. 13*]. RESPONDENT is unwilling to find an amicable solution due to the political shift in Equatoriana (**1.**). This unwillingness becomes evident through RESPONDENT's conduct (**2.**).

1. RESPONDENT Is Unwilling to Find an Amicable Solution Due to the Political Shift

10 Due to the political shift in Equatoriana, RESPONDENT is unwilling to find an amicable solution. RESPONDENT – a 100% state-owned entity – follows the Equatorianian government's political agenda [*cf. PO2, p. 52, para. 3*]. The previous Equatorianian government used RESPONDENT as its main instrument to implement the Green Energy Strategy focused on green hydrogen [*Exhibit C2, p. 10; Answer, p. 25, para. 3*]. However, a change in government led to a revision of said strategy [*Exhibit C5, p. 18, para. 13*]. Consequently, the new Minister for Energy and Environment replaced the former CEO of RESPONDENT with Mr. la Cour, a vocal opponent of green hydrogen [*Exhibit C5, p. 18, para. 13; Request, p. 5, para. 18*]. Mr. la Cour terminated the Agreement only two months later using a belated delivery as a pretext to cover up RESPONDENT's actual reason – the political shift. Later, RESPONDENT admitted the Agreement "no longer fits into Equatoriana's energy strategy" [*Exhibit C6, p. 19*]. Considering the government's strong disapproval of green hydrogen and its influence on RESPONDENT, it is impossible to find an amicable solution with RESPONDENT.

2. RESPONDENT's Conduct Demonstrates Its Unwillingness

11 RESPONDENT's conduct demonstrates its unwillingness to find an amicable solution. On 28 April 2024, RESPONDENT started undermining any basis for mediation by pressuring CLAIMANT to agree to an intolerable price reduction, threatening to otherwise involve the prosecution office [*Exhibit C8, p. 36, para. 3*]. In a brief meeting on 12 May 2024, Mr. la Cour reiterated that government support was contingent on "a significant deduction of the price" and there was thus "no room for any further discussions" [*Exhibit C5, p. 18, para. 15*].

12 Thereafter, on 25 May 2024, RESPONDENT sent an "offer" imposing unreasonable conditions for the continuation of the Agreement. Therein, RESPONDENT stated that "any further discussion between us or our lawyers only makes sense if [CLAIMANT] is willing to accept a serious price reduction of 15% or at least a two-digit number" [*Exhibit C7, p. 20*]. The demanded 15% price reduction would compel CLAIMANT to sell at a price, EUR 82 mio below its costs. RESPONDENT's proclaimed bare minimum of a 10% price reduction would still result in an unbearable loss of

EUR 60 mio. Furthermore, Mr. la Cour insisted on the inclusion of a first demand guarantee for the performance of the obligations "in the value of 10% of the reduced price" [*Exhibit C7, p. 20*]. Such a guarantee would only incur more costs for CLAIMANT, placing CLAIMANT, a medium-sized company, in an untenable financial position.

13 RESPONDENT knew of CLAIMANT's particularly difficult financial position [*Request, p. 5, para. 13*]. CLAIMANT had already agreed on a 5% price reduction to accommodate RESPONDENT, turning the Agreement into a loss-contract [*Request, p. 5, para. 13*]. Thus, RESPONDENT was fully aware that no reasonable businessperson in CLAIMANT's position could agree to the proposed terms. CLAIMANT rejected RESPONDENT's unbearable "offer", inviting RESPONDENT to engage in further discussion without any preconditions [*PO2, p. 55, para. 24*]. RESPONDENT left CLAIMANT's letter unanswered [*PO2, p. 55, para. 24*].

14 RESPONDENT's coercive threats, unreasonable demands, and outright refusal to genuinely negotiate, demonstrate a consistent unwillingness to settle things amicably. Therefore, conducting mediation is futile in the present case and thus not mandatory under Art. 30 of the Agreement. Consequently, RESPONDENT's objections regarding the Tribunal's jurisdiction and the claim's admissibility are unfounded.

B. Even If Mediation Is Deemed Mandatory Under Art. 30 of the Agreement, the Tribunal Has Jurisdiction and Should Exercise Its Discretion to Find the Claim Admissible

15 Even if the Tribunal interprets the Mediation Clause in Art. 30 of the Agreement to be mandatory under any circumstances, the Tribunal has jurisdiction to hear the case (**I.**) and should exercise its discretion to find the claim admissible (**II.**).

I. The Tribunal Has Jurisdiction

16 The Tribunal has jurisdiction to hear the case. Whether an arbitration clause grants jurisdiction is determined by the procedural law governing the arbitration [*Bělohlávek lib am, p. 427*]. The procedural law is the law of the country where arbitration takes place, i.e., *lex loci arbitri* [*Blackaby et al., para. 2.05*]. Pursuant to Art. 30 of the Agreement, the seat of arbitration is Vindobona, Danubia [*Exhibit C2, p. 13*]. Danubia adopted the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: *Danubian Arbitration Law*) as its arbitration act [*PO1, p. 51, III.4*].

17 According to Art. 8(1) Danubian Arbitration Law, an arbitral clause grants jurisdiction, if it is valid, operative and capable of being performed. It is undisputed by the Parties that the Arbitration Clause in Art. 30 of the Agreement is valid and capable of being performed. However,

RESPONDENT argues that Art. 30 of the Agreement is inoperative due to non-compliance with the Parties' Mediation Clause [*Answer, p. 27, para. 16*]. This assertion is unsubstantiated, as compliance with pre-arbitral conditions does not pertain to a claim's jurisdiction [*Fiona v Privalov, UKHL 17 Oct 2007; C v D, HKCA 7 Jun 2022, para. 117; Matos, Modern LR, p. 717; Mitrovic, ASA Bulletin, p. 578*].

18 This is reinforced by the UNCITRAL Model Law on International Commercial Mediation (hereinafter: *Danubian Mediation Law*), adopted by Danubia [*PO2, p. 55, para. 34*]. Art. 14 Danubian Mediation Law stipulates "where the parties have agreed to mediate, such an undertaking shall be given effect by the arbitral tribunal". This implies that the tribunal's jurisdiction is not affected by non-compliance since otherwise, the tribunal would lack the authority to enforce a mediation agreement.

19 Furthermore, it is generally presumed that parties intend the question of compliance with pre-arbitral conditions to be a matter of admissibility instead of jurisdiction [*NVF v NWA, EWHC 8 Oct 2021; Kruppa v Bendetti, EWHC 11 Jun 2014; Born, ICA, § 5.08 (A4); Danielsson/Schöldström/Fortese, pp. 186, 190; Garimella/Siddique, IIUMLJ, p. 190; Jolles, IJAMDM, p. 335; Matos, Modern LR, pp. 717, 721; Mitrovic, ASA Bulletin, p. 570, 579; Rotstein, GEO J Int'l L, p. 106*]. If treated as a jurisdictional issue, the proceedings would have to be terminated in case of non-compliance [*Gonzáles-Bueno/Grañadeiro, p. 123*]. By contrast, if considered an admissibility issue, the proceedings would merely have to be stayed [*BG Group v Argentine, SCOTUS 5 Mar 2014; NVF v NWA, EWHC 8 Oct 2021, paras. 45, 53; SL Mining v Sierra Leone, EWHC 16 Apr 2021, para. 18; C v D, HKCFI 29 Dec 2021, para. 53; Danielsson/Schöldström/Fortese, p. 190; Cepani lib am/Kohl/Rigolet, pp. 433-439; Zhao, ADR-HKIAC, p. 93*]. Staying the proceedings reflects the parties' intent to resolve disputes efficiently [*cf. Fiona v Privalov, UKHL 17 Oct 2007; cf. BGH 27 Feb 1970*]. This avoids the costs and delays of initiating new proceedings [*ICSID 4 Aug 2011, para. 248; Born, ICA, § 5.08 (B3); Danielsson/Schöldström/Fortese, p. 184; Flannery/Merkin, JLCIA, p. 102; González-Bueno/Grañadeiro, p. 124*].

20 Furthermore, it is in the parties' intent to safeguard the award's enforceability, as "obtaining a final and binding decision" is a main objective of arbitration [*Blackaby et al., para. 1.03*]. Admissibility rulings – unlike jurisdictional decisions – are not reviewable by national courts in set-aside and enforcement proceedings [*Born, ICA, § 5.08 (B3); Chan/Soon/Booysen, Sing JLS, pp. 456-457*]. If treated as a matter of admissibility, courts may refuse the enforceability of the award under Art. V(1)(a) New York Convention (hereinafter: *NYC*) or set it aside for lack of jurisdiction under Art. 34(2)(a)(i) Danubian Arbitration Law [*cf. Pearson-Wenger, p. 474*]. Such a review would

undermine the finality and efficiency parties seek by choosing arbitration. Thus, it is generally presumed that parties intend for the compliance with pre-arbitral conditions to be a question of admissibility.

21 Parties can, however, deviate from this presumption by explicitly agreeing to the contrary [*NVF v NWA, EWHC 8 Oct 2021, para. 53; Born, ICA, § 5.08 (C1); Chan/Soon/Booysen, Sing JLS, p. 458; Danielsson/Schöldström/Fortese, p. 190*]. This requires definitive evidence that the pre-arbitral mediation condition was intended to be a jurisdictional matter [*NVF v NWA, EWHC 8 Oct 2021, para. 49; SL Mining v Sierra Leone, EWHC 16 Apr 2021; Born, ICA,* § 5.08 (C1)*; Caron et al./Born/Šćekić, p. 258; Chan/Soon/Booysen, Sing JLS, p. 461; Danielsson/Schöldström/Fortese, p. 190*]. The burden of proof for such a deviation rests with the party seeking to diverge from the presumed standard [*Rosenfeld/Ferrari/Garnett, p. 50*].

22 In the present case, Equatorianian case law stipulates that compliance with pre-arbitral conditions is a jurisdictional issue [*Exhibit R1, p. 30, para. 9*]. However, RESPONDENT fails to provide evidence that this understanding was communicated much less agreed upon [*Exhibit R1, p. 30, para. 9*]. Therefore, the general presumption of pre-arbitral conditions being a matter of admissibility prevails.

23 This Tribunal's view should not be influenced by the fact that Equatorianian courts treat pre-arbitral conditions as a jurisdictional issue and a potential award may thus not be enforceable there. As demonstrated above, pre-arbitral conditions are generally treated as issues of admissibility. Since RESPONDENT retains assets in several other countries [*PO2, p. 52, para. 4*], CLAIMANT will be able to enforce the award elsewhere. Thus, the risk of unenforceability in Equatoriana should not be a guiding factor.

24 Therefore, the Tribunal should treat compliance with the Mediation Clause of Art. 30 of the Agreement as a matter of admissibility. Hence, the Tribunal has jurisdiction.

II. The Tribunal Should Exercise Its Discretion to Find the Claim Admissible

25 The Tribunal should exercise its discretion to find the claim admissible. In principle, a tribunal has discretion to admit a claim [*Cable v IBM, EWHC 27 Feb 2003, para. 38; Söderlund/Burova, ICSID Review, p. 531*]. Several provisions in the Arbitration Rules 2024 of the Finland Chamber of Commerce (hereinafter: *FAI Arbitration Rules*), which the Parties agreed upon, grant a tribunal wide discretion [*PO1, p. 50, II.*]. Art. 26(1) FAI Arbitration Rules allows a tribunal to "conduct the proceedings in such a manner it considers appropriate." Furthermore, a tribunal has discretion to

decide on all matters not expressly provided for in the FAI Arbitration Rules according to Art. 52 FAI Arbitration Rules.

26 The Tribunal should exercise its discretion to apply the "Futility Exception" and find the claim admissible (**1.**). Admitting the claim despite non-compliance with the Parties' Mediation Clause does not endanger the enforceability of the award (**2.**).

1. By Exercising Its Discretion, the Tribunal Should Apply the "Futility Exception"

27 The Tribunal should exercise its discretion to apply the "Futility Exception" admitting the claim, even if conducting mediation was mandatory according to the Parties' Mediation Clause. In exercising its discretion, a tribunal should be guided by the principle of good faith [*Cremades, Am U Int'l L Rev, pp. 761, 765*]. The "Futility Exception" allows arbitral proceedings to be initiated even if not all pre-arbitral conditions have been fulfilled, provided that compliance with those would be futile [*ICSID 7 Jan 2015; ICSID 8 Feb 2013; ICSID 21 Dec 2012; PCA 22 Dec 2015; PCA 18 Mar 2015; SCC 31 Jan 2021*; *SCC 30 May 2016; BGer 6 Jun 2007; BG Group v Argentine, SCOTUS 5 Mar 2014; Cable v IBM, EWHC 27 Feb 2003; Halifax v Intuitive, EWHC 21 Dec 1998; Alexander, p. 174; Berg/Bull, p. 145; Born, ICA, § 5.08 (B3); Caron et al./Born/Šćekić, pp. 253-257; Flannery/Merkin, JLCIA, pp. 98-100; Kayali, JIA, p. 565; Klausegger et al./Vetulli/Kaufman, AY Int. Arb., pp. 67-68; Quek, CJCR, p. 494*]. This exception derives from the *bona fide* obligation of both parties not to abuse pre-arbitral conditions to artificially delay the proceedings [*ICC 1 Jan 1996; ICC 1 Jan 1995; Born, ICA, § 5.08 (B3)*]. Although this exception is most often invoked in investor-state dispute settlement, it has also been recognised in commercial arbitration [*Ad hoc 24 Dec 2007; Ad hoc 4 May 1999*; *ICC 1 Jan 1996; ICC 1 Jan 1995; Born, ICA, § 5.08 (B3)*].

28 In the present case, conducting mediation is futile (supra: *paras. 9-14*). Thus, RESPONDENT insisting on mediation is contrary to good faith. Therefore, the Tribunal should exercise its discretion to apply the "Futility Exception" and admit the claim.

2. Admitting the Claim Does Not Endanger the Enforceability of the Award

29 Admitting the claim does not endanger the award's enforceability or risk it being set aside. Even if the pre-arbitral mediation condition is considered mandatory, non-compliance does not constitute grounds for refusal of enforcement under the NYC or for setting aside the award under the Danubian Arbitration Law. Pursuant to Art. V(1)(d) NYC, enforcement may be denied if the "arbitral procedure was not in accordance with the agreement of the parties". Art. 34(2)(a)(iv) Danubian Arbitration Law allows courts to set aside an award on the same

grounds, since the standards under the Danubian Arbitration Law are consistent with those of the NYC [*cf. Born, ICA, § 26.05 (B)*].

30 The wording of both provisions refers exclusively to the "arbitral procedure" itself. Pre-arbitral mediation, by definition, precedes arbitration and thus, cannot be considered part of the "arbitral procedure". Consequently, non-compliance with such a condition does not constitute a violation of the agreed arbitral procedure under Art. V(1)(d) NYC or justify setting aside the award pursuant to Art. 34(2)(a)(iv) Danubian Arbitration Law.

31 Even if a pre-arbitral mediation condition were deemed to fall within the scope of Art. V(1)(d) NYC and Art. 34(2)(a)(iv) Danubian Arbitration Law, the award remains enforceable and cannot be set aside. Both provisions require that deviations from the agreed procedure must significantly and materially impact the outcome of the proceedings to justify refusal of enforcement or annulment [*Born, ICA, § 26.05 (C5)*]. They are not "hair-trigger" provisions that invalidate awards for minor procedural deviations [*Born, ICA, § 26.05 (C5)*].

32 In the present case, not conducting mediation prior to arbitration does not impact the outcome of the proceedings. RESPONDENT's unwillingness to engage in good-faith negotiations rendered mediation futile from the outset (supra: *paras. 9-14*). As the dispute could solely be resolved through arbitration, not mediation, the non-compliance did not materially affect the outcome of the arbitration.

33 Consequently, the award is neither endangered of being refused enforcement under Art. V(1)(d) NYC, nor of being set aside under Art. 34(2)(a)(iv) Danubian Arbitration Law. Thus, the Tribunal should exercise its discretion to apply the "Futility Exception" to admit the claim.

CONCLUSION OF THE FIRST ISSUE

34 The Tribunal has jurisdiction to hear CLAIMANT's admissible claim. Art. 30 of the Agreement does not require mediation where it is futile. In the present case, mediation is futile since RESPONDENT is unwilling to pursue an amicable settlement. Thus, the Parties complied with Art. 30 of the Agreement. Hence, RESPONDENT's challenge to jurisdiction and admissibility is unfounded.

35 Even if the Tribunal interprets the Mediation Clause as mandatory, the Tribunal has jurisdiction. Compliance with the Mediation Clause is a non-jurisdictional matter not affecting the operability of the Arbitration Clause. Accordingly, the Tribunal has jurisdiction to hear the case. Furthermore, the Tribunal should exercise its discretion by applying the "Futility Exception" to admit the claim, as RESPONDENT was acting in bad faith by insisting on mediation. Moreover, by admitting the claim, the Tribunal does not endanger the award being set aside or its enforcement being refused.

ISSUE 2: THE ARBITRAL TRIBUNAL SHOULD NOT EXCLUDE EXHIBIT C7 AND ORDER THE EXCLUSION OF EXHIBIT R3

36 During the arbitral proceedings, both CLAIMANT and RESPONDENT have presented evidence that is being contested by the respective other party. *Exhibit C7* was submitted by CLAIMANT to clarify on the issues of jurisdiction and admissibility, whereas RESPONDENT attached *Exhibit R3*, which contains privileged internal communication of CLAIMANT, to its Answer to the Request for Arbitration

37 The Arbitral Tribunal must assess both documents. In the proceedings the Arbitral Tribunal has the power to determine the admissibility of evidence, pursuant to Art. 34(1) FAI Arbitration Rules. Lacking detailed provisions on the assessment of evidence, the Tribunal should apply the IBA Rules on the Taking of Evidence in International Arbitration 2020 (hereinafter: *IBA Rules*) regarding the exclusion of evidence. In international arbitration, the IBA Rules are commonly used by tribunals to supplement the applicable rules in the proceedings [*Ad hoc 23 Nov 2022; ICC 17 Jul 2018; ICC 10 Jul 2015; ICC 12 Dec 2014; ICC 25 Jan 2013; LCIA 10 Mar 2023; LCIA 5 Nov 2014; Goeler, p. 168; Margitola, p 33; Roth/Geistlinger/Markowetz, p. 312*].

38 Considering both the FAI Arbitration Rules and the IBA Rules the Arbitral Tribunal should not exclude *Exhibit C7* (**A.**). It should, however, order the exclusion of *Exhibit R3* (**B.**).

A. The Arbitral Tribunal Should Not Exclude Exhibit C7

39 The Arbitral Tribunal should not exclude *Exhibit C7*. In *Exhibit C7*, RESPONDENT declared it would only refrain from a termination of the contract in exchange for a price reduction of "at least a two-digit number" demonstrating its unwillingness to find an amicable solution. Since *Exhibit C7* contains vital information regarding the jurisdiction of the Tribunal and the admissibility of the claim (supra: *paras. 12-14*), it must be considered material to the dispute.

40 RESPONDENT now demands the removal from the file based on an alleged confidentiality breach [*Answer, p. 27, para. 17*]. Notwithstanding the fact that RESPONDENT deliberately refrained from including a full-fledged confidentiality agreement in the contract [*Exhibit R1, p. 30, para. 10*]. While Art. 27 of the Agreement provides confidentiality solely for data produced during the operation of the hydrogen plant, there is no clause prohibiting the use of other documents in the proceedings. Nonetheless, RESPONDENT tries to invoke confidentiality for *Exhibit C7* by referring to Art. 15 FAI Mediation Rules and to the documents' title "Without-prejudice Offer" [*Answer, p. 27, para. 17*].

41 Contrary to RESPONDENT's assumptions, *Exhibit C7* should be admitted. Firstly, Art. 15 FAI Mediation Rules is not applicable (**I.**). Secondly, *Exhibit C7* is not protected by the "Without-Prejudice" Privilege (**II.**).

I. Art. 15 FAI Mediation Rules Is Inapplicable

42 Art. 15 FAI Mediation Rules is inapplicable. The Parties only agreed on an application of the FAI Mediation Rules in the conduct of a mediation [*Exhibit C2, p. 12, Art. 30*]. Art. 15(1) FAI Mediation Rules stipulates confidentiality for the existence and outcome of mediation as well as information obtained during the mediation. Art. 15(2) FAI Mediation Rules specifies those obligations regarding the utilisation of information in subsequent legal proceedings. RESPONDENT argues Art. 15 FAI Mediation Rules would apply to documents issued in "negotiations preceding mediation" [*Answer, p. 27, para. 17*], hence rendering *Exhibit C7* inadmissible in the arbitral proceedings. Only Art. 15(2) FAI Mediation Rules could pertain to RESPONDENT's assumptions. However, Art. 15(2) FAI does not apply if there is no mediation (**1.**). Furthermore, the provision does not apply beyond its scope (**2.**).

1. Art. 15(2) FAI Mediation Rules Does Not Apply If There Is No Mediation

43 Art. 15(2) FAI Mediation Rules does not apply if there is no mediation. The provision stipulates:

> *The parties, the mediator and any other person participating in the proceedings shall not invoke or produce as evidence any information (including, but not limited to, any statements made regarding the possibility to settle the dispute) obtained in the context of FAI Mediation in any subsequent legal proceedings.*

44 The applicability of the provision explicitly requires the attainment of the document "in the context of FAI Mediation". It is undisputed by the Parties that mediation has not been initiated. Hence, CLAIMANT did not receive RESPONDENT's message in connection to FAI Mediation. Thus, the scope of Art. 15(2) FAI Mediation Rules does not cover the Parties' communication contained in *Exhibit C7*.

2. Art. 15(2) FAI Mediation Rules Does Not Apply Beyond Its Scope

45 Art. 15(2) FAI Mediation Rules does not apply beyond its scope. Art. 30 of the Agreement contains the choice of the FAI Mediation Rules The interpretation of this choice of procedural law is governed by Art. 8 CISG (supra: *para. 5*). According to Art. 8(1) CISG, a statement is to be interpreted based on the parties' intent where the other party knew or could not have been unaware what that intent was.

46 Before signing the contract, RESPONDENT never mentioned any confidentiality concerns regarding the use of documents in legal proceedings. It only stressed the importance of keeping "any potential dispute within the project out of the press" [*Exhibit R1, p. 30, para. 10*]. In response to this, CLAIMANT referred RESPONDENT to the confidentiality obligations in Art. 15 FAI Mediation Rules and Art. 51, 52 FAI Arbitration Rules, stating they would govern the foreseen ADR mechanisms and the communication made therein [*Exhibit R2, p. 31*]. Thereby, CLAIMANT made its understanding clear, that the confidentiality obligations only apply in ADR proceedings, i.e., mediation and arbitration.

47 Subsequently, RESPONDENT neither addressed the topic of confidentiality nor did it request any modifications to CLAIMANT's proposed confidentiality provisions. Since RESPONDENT was only concerned with keeping any dispute out of the press, there is no evidence that it intended to exclude any communication outside of mediation from the arbitral proceedings and thus extend the scope of Art. 15(2) FAI Mediation Rules. In any event, CLAIMANT could not have been aware of RESPONDENT's alleged intent. Hence, Art. 15(2) FAI Mediation Rules is not applicable beyond its scope.

II. Exhibit C7 Is Not Protected by the "Without-Prejudice" Privilege

48 *Exhibit C7* is not protected by the "Without-Prejudice" privilege. In some jurisdictions, this privilege protects communication during genuine settlement negotiations by rendering all statements made during negotiations inadmissible in subsequent proceedings [*Rush & Tompkins v GLC, UKHL 3 Nov 1988; Cutts v Head, EWCA 7 Dec 1984*]. If deemed applicable, the privilege can lead to an exclusion of the document under Art. 9(2)(b), (4)(b) IBA Rules. However, the "Without-Prejudice" privilege does not apply in the present case (**1.**). Even if considered applicable, the "Without-Prejudice" privilege does not protect *Exhibit C7* (**2.**).

1. The "Without-Prejudice" Privilege Does Not Apply in the Present Case

49 The "Without-Prejudice" privilege does not apply in the present case. According to Art. 9(2)(b) IBA Rules, questions of legal privilege shall be decided in line with the legal or ethical rules the tribunal determines to be applicable. Thereby, the tribunal should consider the parties' expectations [*Art. 9(4)(c) IBA Rules; Goeler, p. 166; Rosenfeld/Ferrari/Berger, p. 302; Sindler/Wüstemann, ASA Bulletin, p. 621; Zuberbühler et al./Zuberbühler, p. 211*] as well as the national legal or ethical rules the parties are subject to [*Art. 9(4)(e) IBA Rules; Ashford, para. 9-58; Berger, p. 605; Born, ICA, § 16.02 (E8)*].

50 In the present case, the Parties neither have agreed on the applicability of the "Without-Prejudice" privilege nor have they chosen a law that acknowledges this privilege. Furthermore, both Parties are not accustomed to the privilege, since Equatorianian, Danubian and Mediterranian case law and jurisprudence lack any precedents on what the term "Without-Prejudice" means [*PO2, p. 55, para. 30*]. RESPONDENT merely titled the offer "Without-Prejudice" without including a phrase like "not for use in court". Hence, CLAIMANT could not have known, what the term "Without-Prejudice" might entail. Therefore, it would detrimentally contradict CLAIMANT's expectations to suddenly apply rules, which would provide for the privilege in the arbitral proceedings.

51 Additionally, RESPONDENT deliberately refrained from including a full-fledged confidentiality agreement in the contract [*Exhibit R1, p. 30, para. 10*]. It is highly inconsistent that RESPONDENT now tries to invoke confidentiality unilaterally. Thus, RESPONDENT cannot legitimately expect the privilege to apply in the proceedings. Hence, the "Without-Prejudice" privilege does not apply in the present case.

2. In Any Case, the "Without-Prejudice" Privilege Would Not Apply to Exhibit C7

52 In any case, the "Without-Prejudice" privilege would not apply to *Exhibit C7*. Merely labelling a document "without-prejudice" does not lead to protection by the privilege [*Shepherd v Berners, QBD 25 Mar 2010*; *Unilever v Procter & Gamble, EWCA 28 Oct 1999*]. The "Without-Prejudice" privilege only protects genuine settlement negotiations [*A&A v Petroleum Co., CATT 3 Nov 2022; Ofulue v Bossert, UKHL 11 Mar 2009; Rush & Tompkins v GLC, UKHL 3 Nov 1988; Berkley v. Lancer, EWCA 15 Apr 2021; Cutts v Head, EWCA 7 Dec 1984*]. An offer made in such negotiations must contain a compromise, requiring concessions made in exchange for reciprocal benefits to achieve a resolution [*W v Smith, SCOTUS 22 Dec 1879*; *cf. Hoover v American Fire, SCOI 23 Jun 1934*].

53 RESPONDENT's offer, however, does not constitute an attempt to genuinely negotiate. In its message to CLAIMANT, RESPONDENT demands a price reduction of 15% or at least a two-digit number in exchange for the continuation of the contract [*Exhibit C7, p. 20*]. Accepting these terms would result in significant and unbearable losses up to EUR 82 mio for CLAIMANT (supra: *para 12*), RESPONDENT, on the other hand, would still be entitled to demand full performance of CLAIMANT [*Exhibit C7, p. 20*], as foreseen in the original contract [*Exhibit C2, p. 11, Art. 2*]. This so-called "offer" is solely beneficial to RESPONDENT, involving no concession on its part and shifting the financial burden onto CLAIMANT. Emphasising that its terms are non-negotiable [*Exhibit C7, p. 20*], RESPONDENT prevents any compromise. Thus, RESPONDENT's

"Without-prejudice offer" does not constitute a genuine attempt to negotiate. Therefore, even if the "Without-Prejudice" privilege was applicable, *Exhibit C7* would not be protected.

54 Since no confidentiality obligations of the Parties protect *Exhibit C7*, the Arbitral Tribunal should not exclude the document from the file.

B. Exhibit R3 Should Be Excluded From the File

55 *Exhibit R3* should be excluded from the file. The document contains privileged internal communication by CLAIMANT's in-house lawyer, which was confiscated by Equatorianian authorities during a criminal investigation [*Exhibit C8, p. 36, para. 5*]. The Arbitral Tribunal should order the exclusion of *Exhibit R3*, since it is protected by the attorney-client privilege (**I.**) and its admission would violate the equality of the Parties and fairness in the proceedings (**II.**).

I. The Tribunal Should Exclude Exhibit R3 Because of the Attorney-Client Privilege

56 The Arbitral Tribunal should declare *Exhibit R3* inadmissible because it is protected by the attorney-client privilege. The attorney-client privilege protects communication between lawyers and their clients seeking legal advice, thereby ensuring this communication cannot be revealed to or used by a third party [*ICC 2 Jun 2015; ICC 3 Jul 2009; Mosk/Ginsburg, ICLQ, p. 346; Shehata, CJCR, p. 2*]. Evidence protected by this privilege must be excluded from proceedings [*ICC 3 Jul 2009*; *ICSID 23 Jun 2008; Berger, p. 604; Mosk/Ginsburg, ICLQ, p. 346*]. This is also recognised under the IBA Rules as a reason to exclude evidence [*Art. 9(2)(b), Art. 9(4)(a) IBA Rules*]. The Tribunal should exclude *Exhibit R3*, since the attorney-client privilege is applicable in the proceedings (**1.**), extends to in-house lawyers (**2.**) and protects *Exhibit R3* (**3.**).

1. The Attorney-Client Privilege is Applicable

57 The attorney-client privilege is applicable in the present case. Pursuant to Art. 9(2)(b) IBA Rules, the arbitral tribunal shall decide questions of legal privilege according to the legal or ethical rules it determines to be applicable. Thereby, it should consider the Parties' expectations as well as national standards, which the Parties are subject to (supra: *para. 50*).

58 Neither Danubian Arbitration Law nor the FAI Arbitration Rules chosen by the Parties' address legal privilege. Considering national rules, however, it is undisputed that the protection of communication between lawyers and clients is recognised in Danubia as well as Equatoriana and Mediterraneo [*Exhibit R4, p. 33*]. Therefore, it must be concluded that the Parties' expected for rules acknowledging the attorney-client privilege to be applicable. Thus, the attorney-client privilege is applicable in the proceedings.

2. The Attorney-Client Privilege Extends to In-House Lawyers

59 The attorney-client privilege extends to in-house lawyers. Since the national rules of the Parties deviate concerning the scope of the privilege [*Exhibit R4, p. 33*], the Arbitral Tribunal must determine its reach. An extension of the attorney-client privilege to inhouse-lawyers is stipulated in Equatorianian law [*PO2, p. 55, para. 29*]. The Equatorianian standards, providing for the extension to in-house lawyers, must apply to *Exhibit R3* according to the "closest connection test" (**a.**). Even if the "closest connection test" was not applied, the Arbitral Tribunal should extend the scope of the privilege to in-house lawyers (**b.**).

a. According to the "Closest Connection Test", Equatorianian Standards Must Apply

60 According to the "closest connection test", Equatorianian standards must apply to *Exhibit R3*. Arbitral tribunals can use the "closest connection test" to determine the scope of the attorney-client privilege [*ICC Feb 2006; Rosenfeld/Ferrari/Berger, pp. 312, 313; Born, ICA, § 16.02 (E8); Franck, ASLJ, p. 989; Goeler, p. 167; Redfern et al., para. 3.251; Zuberbühler et al./Zuberbühler, pp. 210, 211*]. The test allows for the objective determination of the applicable law [*ICC 1 Jan 1995; SAC 14 Jan 2022; Franck. ASL, p. 989*]. According to the "closest connection test", relevant factors for deciding on the law governing the issue of legal privilege are the seat of arbitration, the law governing the merits of the dispute, the place where the document was received, the place where the attorney is admitted to the bar as well as the place where the document was stored [*Franck, ASLJ, p. 989; Goeler, p. 168; Rosenfeld/Ferrari/Berger, p. 313; Zuberbühler et al./Zuberbühler, p. 211*].

61 In the present case, Equatorianian law has the closest connection to *Exhibit R3*. While the place of arbitration is Danubia [*Exhibit C2, p. 13, Art. 30*] and the lawyer issuing the document, Ms. Smith, is admitted to the bar in Mediterraneo [*Exhibit R3, p. 32*], all factors concerning the specific document point towards Equatorianian law. The advice contained in *Exhibit R3* assesses Equatorianian law [*Exhibit R3, p. 32*]. CLAIMANT stored the document in Equatoriana [*Exhibit C8, p. 36, paras. 5, 7*]. Further, RESPONDENT gained possession of the document in Equatoriana [*Exhibit C8, p. 36, paras. 7, 8*]. Moreover, the Parties agreed on Equatorianian law to be applicable to the merits of the dispute [*Exhibit C2, p. 12, Art. 29*]. Therefore, the law closest to the document at hand is the law of Equatoriana. Thus, Equatorianian standards, providing for an extension of the attorney-client privilege to in-house lawyers, should be applied to *Exhibit R3*.

b. In Any Case, the Arbitral Tribunal Should Extend the Scope of the Privilege

62 Even if the "closest connection test" was not applicable, the Arbitral Tribunal should extend the scope of the attorney-client privilege to in-house lawyers as stipulated in Equatorianian law. This

is necessary, as both external and in-house lawyers can only give reliable advice if full disclosure is possible without any threat to confidentiality [*PCA 3 May 2002; Dethloff-Wieland, ZEuP, p. 120; Rice, AULR, p. 968; Zuberbühler et al./Zuberbühler, p. 210; cf. Shehata, CJCR, pp. 387, 388*]. Furthermore, it allows for more efficient counselling, as companies do not have to commission an external lawyer just for the sake of protection [*Buntschek/Biermann, Wistra, p. 462; Dethloff-Wieland, ZEuP, p. 119; Power, IJ, p. 202*]. Since in-house lawyers admitted to a bar are bound by professional rules of conduct, there is no lack of independence that would justify a different treatment [*Pike, LUCILR, pp. 69, 70*]. Extending the scope of the privilege is also line with international practice [*ICSID 24 Feb 2017; ICSID 27 May 2014; PCA 3 May 2002; Martin v Norton Rose Fullbright, FCA 11 Feb 2019, Pritchard v Ontario, CSC 14 May 2004; Upjohn Co. v US, SCOTUS 13 Jan 1981; Astex v Astrazeneca, EWHC 8 Nov 2016; Alfred Crompton v Customs and Excise, EWCA 17 Feb 1972; Shehata, CJCR, p. 387*].

63 Taking this into consideration, the Arbitral Tribunal should conclude that the scope of the attorney-client privilege extends to in-house lawyers admitted to a bar.

3. Exhibit R3 Is Protected by the Attorney-Client Privilege

64 *Exhibit R3* is protected by the attorney-client privilege. To benefit from the privilege, the communication issued by the lawyer must constitute legal advice [*Mosk/Ginsburg, ICLQ, p. 352; PO2, p. 55, para. 29*]. *Exhibit R3* contains instructions given by CLAIMANT's Head of Legal Department, who is admitted to the Bar in Mediterraneo, regarding CLAIMANT's communication with RESPONDENT. In the message, legal risks concerning potential misrepresentation are assessed and recommendations on legally correct conduct are given [*Exhibit R3, p. 32*]. Therefore, the message constitutes legal advice and is protected by the attorney-client privilege. Thus, the Arbitral Tribunal should exclude *Exhibit R3* from the file.

II. An Admission of Exhibit R3 Would Violate Fairness and the Equality of the Parties

65 An admission of *Exhibit R3* would violate the fairness of and equality of the Parties. When assessing evidence, the Arbitral Tribunal can exclude documents based on considerations of fairness and equality [*Art. 9(2)(g) IBA Rules*]. In the arbitral proceedings, the parties must be treated equally [*Art. 26(2) FAI Arbitration Rules; Art. 18 Danubian Arbitration Law*]. This includes equality of arms [*IACAC 13 Sep 2013; ICC 7 Sep 2020; ICC 15 Aug 2018; ICC 22 Jul 2015; ICC 23 Dec 2011; LCIA 12 Mar 2018; VIAC 29 Aug 2016; BGer 31 Jan 2012*], which mandates that both parties benefit from the same opportunities in the proceedings, preventing one party from utilising unmatched resources unattainable for the other [*Bantekas, ICLQ, p. 1003; Khodykin/Mulcahy, para. 2.18*].

66 The case *Libananco Holdings Co Ltd. v Republic of Turkey* serves as a precedent [*ICSID 23 Jun 2008*]. In this case, Turkish authorities intercepted e-mail communication of the claimant (Libananco) while conducting criminal investigations [*ICSID 23 Jun 2008, para. 72*]. In this context, the tribunal stressed the importance of fairness in the proceedings [*ICSID 23 Jun 2008, para. 78*]. It acknowledged that "a sovereign State does indeed have a right and duty to pursue the commission of serious crime" but stated it must "ensure the strict separation of its criminal investigations, on the one hand, from the prosecution of this arbitration, on the other" [*ICSID 23 Jun 2008, para. 79*]. Therefore, the tribunal ordered that the state cannot provide its representatives in the arbitration with any of the information obtained in the investigation [*ICSID 23 Jun 2008, orders 1.1.4, 1.2*].

67 In the present instance, RESPONDENT accused CLAIMANT of fraud, which led to a criminal investigation [*PO2, p. 55, para. 27*]. During said investigation, the office of Mr. Deiman, CLAIMANT's Head of Contracting, was raided and all documents, including *Exhibit R3,* were confiscated [*Exhibit C8, p. 36, para .5*]. Predictably, the investigations were terminated without any results [*PO2, p. 55, para. 27*]. Later, *Exhibit R3* was submitted to the file by RESPONDENT, even though no public leak of this document had occurred. It is highly improbable RESPONDENT could have obtained this document through CLAIMANT. Mr. Deiman stated that he has never shown the document to RESPONDENT and that it is very unlikely employees of CLAIMANT handed over the confidential and privileged document [*Exhibit C8, p. 36, paras. 7, 8*]. RESPONDENT itself, however, has admitted its very close contact with the prosecution office [*Exhibit R1, p. 29, para. 6; Exhibit C8, p. 36, para. 7*] and later conveniently gained access to a confiscated document. Therefore, it must be concluded that RESPONDENT received the document directly from the prosecution office.

68 An admission of *Exhibit R3* would significantly penalise CLAIMANT, since it had no access to governmental investigative power. RESPONDENT relying on evidence confiscated by Equatorianian authorities, violates the fairness of the proceedings and disregards the principle of equality of arms. Therefore, the Arbitral Tribunal should exclude *Exhibit R3* from the file.

CONCLUSION OF THE SECOND ISSUE

69 CLAIMANT requests the Arbitral Tribunal to admit *Exhibit C7* into evidence, since there are no opposing confidentiality obligations. Art. 15 FAI Mediation Rules does not apply to *Exhibit C7*. Additionally, the "Without-Prejudice" privilege is not applicable and does not protect *Exhibit C7*.

70 Concerning *Exhibit R3*, the Tribunal should order its exclusion. *Exhibit R3* contains communication protected by the attorney-client privilege. Further, an admission would violate fairness and equality, since it must be assumed RESPONDENT received the document from Equatorianian authorities. All these circumstances demand an exclusion of *Exhibit R3*.

ISSUE 3: THE AGREEMENT IS GOVERNED BY THE CISG

71 Following a major political change in Equatoriana and the resulting shift away from its "Green Energy Strategy", RESPONDENT's leadership has been replaced. Its new CEO, Mr. la Cour, is a well-known critic of hydro energy [*Request, p. 5, para. 18*]. Adhering to the policy of the new administration, RESPONDENT now attempts to terminate the Agreement under all costs by applying Art. 7.3.1 of the Equatorianian Civil Code. However, the Agreement is governed by the CISG. In Art. 29 of the Agreement, the Parties declared that the contract would be governed by the "law of Equatoriana to the exclusion of its conflict of laws principles" [*Exhibit C2, p. 12, Art. 29*]. The CISG is incorporated into the law of the Contracting State, in this case Equatorianian law, by virtue of its ratification [*ThyssenKrupp v Energy Coal, SCNY 14 Oct 2015; Nucap v Bosch, NDIll 31 Mar 2017; Custom Polymers v Gamma Meccanica, DSC 3 May 2016; Schroeter, para. 7*]. Thus, the Convention is applicable whenever the conditions of its scope of application are met. In an attempt to dispose of its contractual obligations towards CLAIMANT, RESPONDENT fishes in troubled waters trying to prevent the application of the CISG. However, this attempt is futile as the Agreement falls within the territorial scope of the CISG (**A.**). The Agreement further constitutes a sales transaction (**B.**) and was not concluded by auction (**C.**).

A. The Agreement Falls Within the Territorial Scope of the CISG

72 The territorial scope of the CISG encompasses the Agreement. Pursuant to Art. 1(1)(a) CISG, the Convention applies to contracts for the sale of goods between parties whose places of business are in different states if those states are Contracting States. According to Art. 10(a) CISG, if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance. The place of business refers to the place from which the business activity is actually and primarily conducted [*Somafer v Saar-Ferngas, ECJ 22 Nov 1978; OGH 10 Nov 1994; OLG Hamm 2 Apr 2009*; *OLG Stuttgart 28 Feb 2000; Trib Padova 11 Jan 2005; Trib Rimini 26 Nov 2002; Staudinger/Magnus, Art. 1 CISG, para. 63*]. The relevant point in time to determine the Parties' places of business is the date on which the contract was concluded [*OLG Dresden 27 Dec 1999; Trib Forlì 6 Mar 2012; Trib Padova 25 Feb 2004*].

73 While RESPONDENT manages its commercial operations in Equatoriana [*Exhibit C2, p. 10*], CLAIMANT conducted its negotiations with RESPONDENT exclusively from its office in Mediterraneo where its administrative centre is located [*PO2, p. 52, para. 1; Exhibit C6, p. 19; Exhibit R2, p. 31*]. Consequently, the place from which CLAIMANT primarily manages its business activities is located in Mediterraneo. CLAIMANT's acquisition of Volta Transformer in November 2023 [*Exhibit C8, p. 36, para. 2; PO2, p. 52, para. 8*] does not constitute another place of

business in accordance with Art. 10(a) CISG. Most importantly, as the Agreement was concluded on 17 July 2023, several months before the acquisition of Volta Transformer [*Exhibit C2, p. 13*], Volta Transformer was not yet part of CLAIMANT at the relevant point in time. Contrary to RESPONDENT's argument [*Answer, p. 28, para. 20*], the mere fact that Volta Transformer supplied CLAIMANT prior to the conclusion of the contract does not result in a different outcome. Considering all places of business of any member within the supply chain would be unsuitable to precisely determine the applicability of the CISG. Hence, not the places of business of any or all members of the party's supply chain, but solely the place of business of the party itself is the relevant criterium of Art. 10(a) CISG. In any case, CLAIMANT had no control or operational influence over Volta Transformer prior to the acquisition [*PO2, para. 8*]. Consequently, CLAIMANT's place of business is in Mediterraneo and RESPONDENT's place of business is in Equatoriana. Mediterraneo and Equatoriana are both Contracting States of the CISG [*PO1, p. 50, III.4*]. Thus, the Agreement falls within the territorial scope of the CISG.

B. The Agreement Constitutes a Sales Transaction

74 The Agreement constitutes a sales transaction. According to Art. 1(1) CISG, the Convention applies to contracts for the sale of goods. Furthermore, mixed contracts which, in addition to sales obligations, include other service obligations are governed by the CISG according to Art. 3(2) CISG, unless the non-sales obligations constitute the preponderant part. Turnkey contracts in particular require a case-by-case analysis to determine whether the sales or service obligations prevail [*HG Zürich 9 Jul 2002; Achilles, Art. 3 CISG, para. 9; Brunner/Feit, Art. 3 CISG, para. 12; Karner/Koziol, p. 21, para. 36; Schlechtriem, JZ, p. 1039*]. CLAIMANT agreed to deliver the plant (turnkey) in Art. 2 of the Agreement [*Exhibit C1, p. 8, 1.; Exhibit C2, p. 10, Art. 2*] including the necessary components. In addition to the base contract, CLAIMANT grants RESPONDENT two options to expand the plant [*Exhibit C2, p. 11, Art. 2(2), (3)*]. In determining whether the delivery of goods constitutes the preponderant part of the Agreement, the options must not be considered (**I.**). The delivery of goods constitutes the preponderant part of the Agreement (**II.**). Even if the options are considered, the sales obligations still predominate (**III.**).

I. In Determining Whether the Delivery of Goods Constitutes the Preponderant Part of the Agreement the Options Must Not Be Considered

75 The options to expand the plant shall not be considered when determining whether the delivery of goods constitutes the preponderant part of the Agreement. Taking values into account, they should be determined as of the contract's date of formation, because it is of that date that the parties must know which law governs the contract to prevent legal uncertainty [*CISG-AC Opinion No. 4,*

para. 3.3; Achilles, Art. 3 CISG, para. 12; Mankowski/Mankowski, Art. 3 CISG, para. 11; Martin-Davidson, Mich. St. J. Int'l, p. 678; Schlechtriem/Schwenzer, Art. 3 CISG, para. 19].

76 On the day of the conclusion of the contract, no option to expand the plant was exercised. Especially as RESPONDENT had the choice to exercise either option only in part [*PO2, p. 54, para. 18*], there are dozens of possibilities for the value of the options and the corresponding value ratios between the delivery of goods and services. It was therefore impossible to determine the value of the options at the time the contract was concluded. Consequently, to avoid legal uncertainty regarding the governing law, the relevant calculation must be based solely on the values of the base contract. Thus, to determine whether the delivery of goods portrays the preponderant part of the Agreement, the options must not be considered.

II. The Delivery of Goods Constitutes the Preponderant Part of the Agreement

77 The delivery of goods constitutes the preponderant part of the Agreement. CLAIMANT delivers goods in accordance with Art. 1(1) CISG (**1.**). The delivery of goods outweighs the supply of labour and other services (**2.**).

1. CLAIMANT Delivers Goods in Accordance with Art. 1(1) CISG

78 CLAIMANT delivers goods in accordance with Art. 1(1) CISG. Under Art. 1(1) CISG, goods are moveable, tangible objects. This includes parts which are to be connected to the ground but are moveable at the time of delivery. [*BGer 16 Jul 2012; ORB Gent 29 Apr 2021; Trib di Forlì 6 Mar 2012; Schlechtriem/Schwenzer/Schroeter, Art. 1 CISG, para. 35*] As such, the CISG covers cases in which goods were used for the construction of prefabricated houses, roundabouts and roofs [*OG Aargau 3 Mar 2009; KG Zug 25 Feb 1999; Trib Padova 10 Jan 2006*].

79 CLAIMANT delivers all parts necessary for the assembly of the hydrogen facility. This includes the core system, the transformer and electrical equipment as well as the compressor, pipes, cables, connections, and other equipment [*Exhibit C5, p. 17, para. 11*]. These components are to be delivered to the Greenfield construction site [*cf. Exhibit C2, p. 10, Art. 1*] and are therefore moveable at the time of delivery. Thus, CLAIMANT delivers goods in accordance with Art. 1(1) CISG.

2. The Delivery of Goods Outweighs the Supply of Labour and Other Services

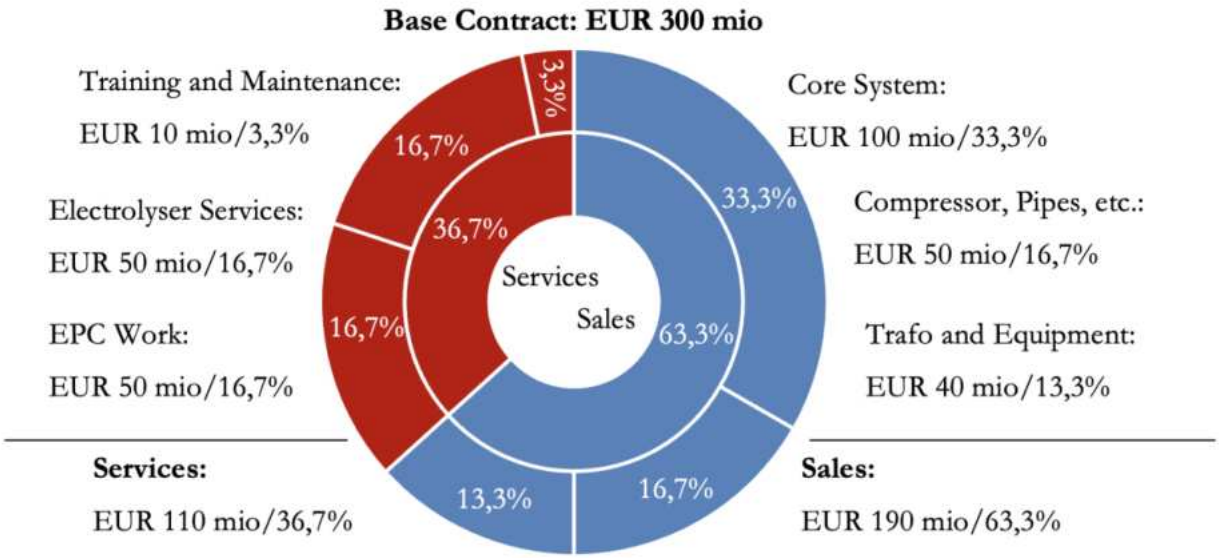
80 The delivery of goods outweighs the supply of labour and other services. The preponderant part is determined by the economic values of the goods [*SAC 21 Sep 2023; SCC 17 Jun 1998; CC 27 Apr 2011; CC 9 Mar 2011; RB Noord-Neederland 6 Nov 2019*]. Additionally, the parties'

intentions are to be considered [*ICC 20 Jan 2016; BGH 7 Dec 2017; OGH 2 May 2023; OGH 8 Nov 2005; Richards, Iowa LR, p. 233; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 3 CISG, para. 14*]. The delivery of goods constitutes the preponderant part of the Agreement both in terms of the economic values (**a.**) and according to the Parties' intentions (**b.**).

a. According to the Value Ratios, the Delivery of Goods Constitutes the Preponderant Part

81 According to the ratio between the economic value of the goods and the economic value of the services, the delivery of goods constitutes the preponderant part of the base contract. A share of more than 50% of the value of the services is to be considered preponderant [*CISG-AC Opinion No. 4, para. 3.4; CAM Milano 30 Jan 2019; ICAC 30 May 2000; LAT 9 Mar 2012; OGH 22 Nov 2011; OGer Zug 19 Dec 2006; KS Žiline 30 May 2018; Gramercy v Matec, SDNY 11 Sep 2023; Karner/Koziol, p. 21, paras. 34--36; Schroeter, para. 101*].

82 The total value of the base contract amounts to EUR 300 mio [*Exhibit C5, p. 17 para. 11*]. CLAIMANT delivers the core system, the transformer, electrical equipment, as well as the compressor, pipes, cables, connections and other equipment. The delivery of these goods amounts to a total of EUR 190 mio – 63,3% of the total value of the base contract [*Exhibit C5, p. 17, para. 11; Exhibit R1, p. 29, para. 4*]. In contrast, the assembly work consists of packaging, project management, engineering and site works (i.e., Electrolyser Services). Additionally, the base contract includes EPC-Work (i.e., Engineering, Procurement and Construction) such as buildings and foundations and some training and maintenance. The value of these services results in a total of EUR 110 mio – 36,7% of the value of the base contract [*Exhibit C5, p. 17, para. 11*].



83

[*Exhibit C5, p. 17, para. 11*]

84 Taking these economic values into account, the sales obligations outweigh the supply of services, so that the delivery of goods portrays the preponderant part of the base contract.

b. According to the Parties' Intent the Delivery of Goods Constitutes the Preponderant Part

85 The delivery of goods also constitutes the preponderant part when considering the Parties' intent. Additionally to the economic values, the parties' intentions as expressed in the contract and surrounding circumstances may be consulted to determine whether the crucial aspect of the contract is the supply of labour or the delivery of goods [*CISG-AC Opinion No. 4, para. 3.4; OLG Innsbruck 18 Dec 2007; OLG Dresden 11 Jun 2007; OLG München 3 Dec 1999; LG Mainz 26 Nov 1998; MüKoBGB/Huber, Art. 3 CISG, para. 14*].

86 Looking at the importance of individual contractual points, the only clear indication of the Parties' intentions pertains to the importance of the transformer. It was crucial for RESPONDENT that a suitable transformer would be delivered in time. Only CLAIMANT was capable of providing such a transformer within the requested time frame [*Exhibit C3, p. 14; Exhibit C5, p. 16, para. 8*]. This was the decisive factor for RESPONDENT to conclude the contract with CLAIMANT rather than with one of its competitors [*Exhibit C5, p. 16, para. 8*]. This showcases that the delivery of goods was considered the pivotal aspect of the Agreement by the Parties.

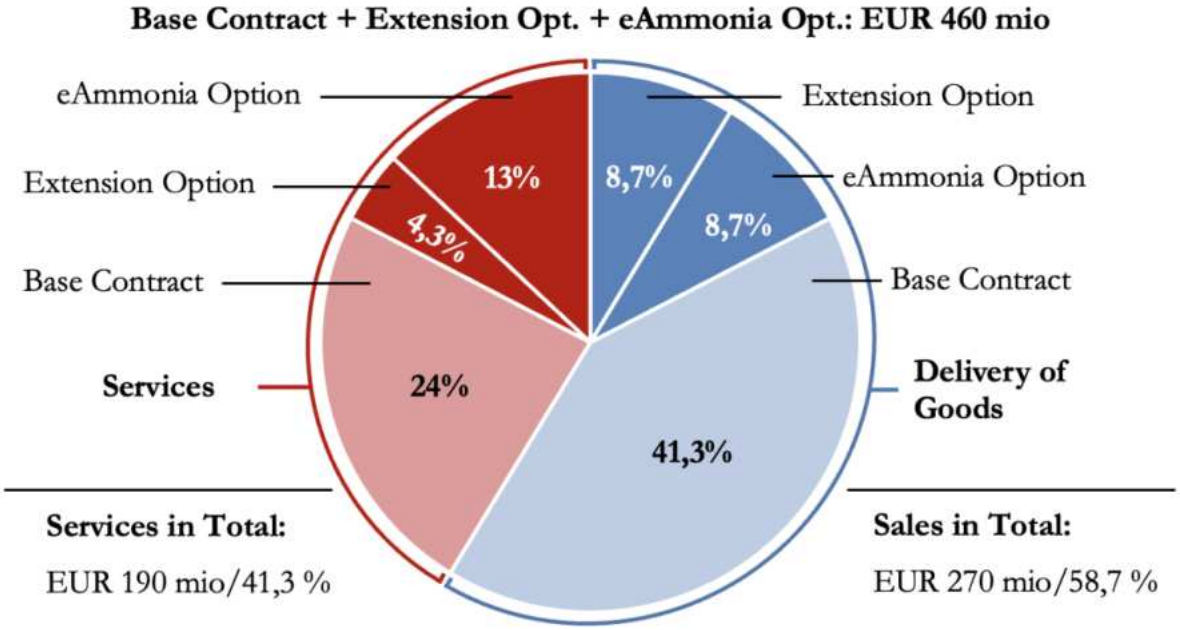
III. Even If the Options Are Considered, the Sales Obligations Predominate

87 The delivery of goods would still constitute the preponderant part of the Agreement, even if the options are considered. CLAIMANT granted RESPONDENT two options – the Extension-Option and the eAmmonia-Option [*Exhibit C2, p. 10, Art. 1*]. The Extension-Option costs EUR 60 mio and covers a mere expansion of capacity to double the contractually fixed capacity of the base plant [*Exhibit C2, p. 10, Art. 1*]. The eAmmonia-Option, on the other hand, costs EUR 100 mio and covers the addition of a module to base plant for the production of eAmmonia [*Exhibit C5, p. 16, para. 9*]. Combined with the base contract, the two options would have had a total value of EUR 460 mio [*Exhibit C2, p. 11, Art. 2(2), (3); Exhibit C5, p. 16, para 9*]. Since no specific breakdown for either option was provided, the base contract must be the primary point of reference to avoid inaccuracies.

88 The Extension-Option is similar to the base plant. The exercise of the option most likely only included the delivery of another set of electrolyser stacks and their installation in the existing facility. This is in line with the modular design of the facility as further stacks can easily be added at a later time [*Request, p. 3, para. 5; PO2, pp. 53, 54, para. 16*]. As the option only costs

EUR 60 mio – 20% of the value of the base contract – but generates the same output, it can be assumed that the cost of the extension exclusively covers the core system and the related electrolyser services. Only these parts are essential for production. Regarding the base contract, the core system accounted for 33,3% of its value, while the "Electrolyser Services" accounted for 16,7%. The value of the option is therefore primarily derived from the delivery of the core system. Subsidiarily, some packaging, project management, engineering and site works (i.e., services) are included. Under these circumstances, the value ratio of the Extension-Option would be similar to the ratio of the base contract. Consequently, the delivery of goods accounts for EUR 40 mio – 66,6% of the total value of the Extension-Option. Any other conclusion would be speculative in nature and therefore cannot be upheld.

89 Furthermore, it can be assumed that the value ratio of the eAmmonia-Option is structurally comparable to that of the green hydrogen plant. Both require a core system for the production of their respective renewable energies, as well as other materials such as pipes, cables, connections and other equipment. Regarding the value of the eAmmonia-Option – EUR 100 mio – the breakdown is as follows: supplies and works account for 80% of the eAmmonia module, while planning and engineering account for 20% [*Exhibit R1, p. 29, para. 4*]. There is no further information on the breakdown. In particular, it is not clear, how much of the 80% relates to the deliveries of goods and how much to works. Thus, it can only be assumed that the deliveries and works each make up EUR 40 mio while planning and engineering add up to EUR 10 mio respectively. Therefore, the delivery of goods constitutes at least 40% – EUR 40 mio of the eAmmonia-Option.



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91 The base contract includes EUR 190 mio worth of delivery of goods (supra: *para. 83*). The first option adds EUR 38 mio worth of deliveries while the second option adds at least EUR 40 mio. This means that the total value of the delivery of goods would have been at least EUR 270 mio – 58,7% of the total value. No more than 41,3% of the contract's value would have consisted of services. Therefore, even if the options are considered, the delivery of goods still constitutes the preponderant part.

C. The Agreement Was Not Concluded by Auction

92 The Agreement was not concluded by auction and is thus not excluded through Art 2(b) CISG. Pursuant to Art. 2(b) CISG, the Convention does not apply to sales by auction.

93 The Agreement was concluded following a four-phase tender process [*Exhibit C1, p. 8, 1c; Exhibit R1, p. 29, para. 2*]. In the first phase, participants submitted their initial proposals online [*Exhibit C1, p. 8, 1c; PO2, p. 52, para. 9*]. In the second phase, RESPONDENT evaluated the proposals based on the economic viability of the proposals [*PO2, pp. 52, 53, para. 9*]. The third phase was a so-called "Reverse Bid Auction" in which the participants presented a single, final offer. The fourth phase consisted of detailed negotiations with the two most promising participants [*Exhibit C1, p. 8, para. 1c*]. In the end, the final Agreement was neither settled by auction (**I.**), nor does the tender process constitute an auction (**II.**).

I. The Final Agreement Was Not Settled by Auction

94 The final Agreement was not concluded by auction but following negotiations. Art. 2(b) CISG only precludes the application of the CISG if the auction directly led to the conclusion of an agreement [*ARB Arnhem 17 Jul 1997; Trib Vaud 17 May 1994; Schroeter, ZeuP, p. 26*]. The Agreement was concluded after extensive negotiations between CLAIMANT and RESPONDENT [*Exhibit C1, p. 8, 1c; Exhibit R1, p. 29, para. 2*]. Moreover, the initially proposed price was reduced by EUR 15 mio during these negotiations [*Request, p. 7, para. 29*]. Therefore, the Agreement was not concluded by auction.

II. The Tender Process Is Not an Auction

95 The Tender Process is not an auction. To interpret the term "auction" autonomously in accordance with Art. 7(1) CISG, it is necessary to consider both the wording and its drafting history [*Forestal v Daros, US CoA 21 July 2010; Schroeter, para. 140; Staudinger/Magnus, Art. 7 CISG, paras. 32--35*].

96 The Russian word аукцион (auktsion) and the English word *auction* derive from the Latin root *augere*, *augeo*, *auxi*, *auctus* which means "to increase" [*Komlev, p. 111; Krishna, p. 2*]. Similarly, the French word used in Art. 2(b) CISG *l'enchère* shares its origin with the verb *enchérir*, meaning "to increase in price" or "to make a higher bid than somebody" [*Rey-Debove/Rey, p. 861*]. Furthermore, the Arabic word for auction, مزاد (mazād), derives from the root ز-ي-د (z-y-d), which conveys the meaning of "to make a higher bid", "outbid someone" [*Wehr, pp. 388, 389*]. This shows that most of the official texts of Art. 2(b) CISG refer to a process in which bidders offer increasingly more, thereby raising the final purchase price. Such a process is not reflected in the tender at hand. In none of the four phases of the tender process was the aim to reach the highest possible offer but rather the lowest [*Exhibit C1, p. 8, para. 1.c*]. Thus, the tender process does not correspond to the term "auction" in the sense of Art. 2(b) CISG.

97 This interpretation is reinforced by the drafting history of Art. 2(b) CISG. Auctions were excluded from the CISG to protect sellers from the uncertainty of not knowing the identity of the buyer, and consequently, whether the Convention applies pursuant to Art. 1(1) CISG [*Honnold, p. 48; MüKoHGB/Mankowski, Art. 2 CISG, para. 16; Schroeter, ZeuP, p. 23; Staudinger/Magnus, Art. 2 CISG, para. 32; YB II 1971, para. 58*].

98 This uncertainty cannot occur in the case at hand. In the first and second phase the awarding procedure was organised in detail (e.g., the registration of all potential participants [*PO2, p. 52, para. 9*]). Accordingly, RESPONDENT knew the identity and the nationality of each participant several months before the contract was awarded [*Exhibit C1, p. 8, para. 1.c; Exhibit C1, p. 9, para. 3*]. Therefore, RESPONDENT was aware of the potential application of the CISG. Consequently, excluding the Agreement of the scope of the CISG would neither serve the purpose of Art. 2(b) CISG nor corresponds to the wording of this provision.

CONCLUSION OF THE THIRD ISSUE

99 The Arbitral Tribunal is respectfully requested to declare that the Agreement is governed by the CISG. The Agreement falls within the sphere of application in accordance with Art. 1(1)(a) CISG since CLAIMANT's and RESPONDENT's places of business are in different Contracting States. Furthermore, the delivery of goods constitutes the preponderant part of the base contract so that the Agreement constitutes a sales transaction. This does not change even if the two options were to be considered. Finally, the application is not excluded by Art. 2(b) CISG as the Agreement was not concluded by auction but following negotiations.

ISSUE 4: THE PARTIES DID NOT EXCLUDE THE CISG

100 The Parties did not exclude the CISG in Art. 29 of the Agreement. This choice-of-law clause states that "[t]he Agreement is governed by the law of Equatoriana to the exclusion of its conflict of laws principles." [*Exhibit C2, p. 12, Art. 29*]. In an attempt to selectively apply the most favourable law, RESPONDENT claims that this clause constitutes an exclusion of the CISG in favour of the Equatorianian Civil Code [*Answer, p. 27, para. 19*]. It assumes that the application of the latter would allow for a termination for convenience. This strategy must be understood in light of the changing political majorities in Equatoriana and their effects on RESPONDENT's agenda as a state-owned corporation. Following the recent elections in Equatoriana, a new energy strategy was established that no longer focuses on hydrogen production (supra: *para. 10*). While regrettable, this development neither allows RESPONDENT to abandon a contract that it validly concluded, nor to change the applicable law to re-introduce the previously excluded right to terminate for convenience.

101 Under Art. 6 CISG, parties to a contract may exclude the CISG or derogate from any of its provisions if they express their agreement to that effect [*CISG-AC Opinion No. 16, pp. 6-7, para. 3.5; NY Health v Rusi, SCNY 25 Jan 2022; JNPC 6 Oct 1994; Fertilizantes v Agriculture, MDFla 6 Feb 2023; Strategy Ent. v Zigi USA, SDFla. 29 Dec 2021; Gramercy v Matec, SDNY 11 Sep 2023; Nantong Sanhai v Fab Mill, SDNY 23 Feb 2022; Shenzen v Mingtel, EDTex 29 Mar 2022; Smith v Kruse, SDTex 10 Oct 2023; U. Huber, RabelsZ, p. 426*; *jurisPK-BGB/Münch, Art. 6 CISG, para. 8*]. Whether the parties have reached an agreement to exclude the CISG must be interpreted according to Art. 8 CISG [*ICC 1 Jan 1995; BGH 11 Dec 1996; MCC Marble v Ceramica, US CoA 29 Jun 1998; ZG BS 8 Nov 2006*].

102 Contrary to RESPONDENT's assertions, the Parties had no common intent to exclude the CISG through Art. 29 of the Agreement (**A.**). Instead, CLAIMANT even communicated its intent to include the CISG (**B.**).

A. The Parties Had No Common Intent to Exclude the CISG

103 The Parties had no common intent to exclude the CISG through Art. 29 of the Agreement. It is common practice that clauses purporting the exclusion of the CISG explicitly state this intent with phrases such as "The Parties hereby expressly opt out of the CISG" [*Butler, VUWLRP, p. 387; Girard, MRLCE, pp. 31, 32; Johnson, BLR, p. 260; cf. Busrel v Dotton, WDNY 1 Nov 2022*]. Yet, the Agreement does not contain a clause explicitly excluding the CISG.

104 Further, the Parties did not implicitly exclude the CISG. While implicit exclusions are possible [*OGH 4 Jul 2007; CA Rouen 3 Oct 2013; OLG Köln 24 Apr 2013; Enderlein/Maskow/Strohbach, Art. 6 CISG, p. 57, para. 1.2*], strict requirements must be adhered to, since readily assuming implicit intent would render the concept of uniform sales law ineffective [*CISG-AC Opinion No. 16, pp. 6, 7, para. 3.5; Travelers v Saint-Gobain, DMinn 31 Jan 2007; Enderlein/Maskow/Strohbach, Art. 6 CISG, p. 57, paras. 1.2, 1.3*]. Therefore, provisions of the Convention can only be implicitly excluded when it is clearly implied or certain that this had been the common intent of both parties [*CISG-AC Opinion No. 16, pp. 5, 6, para. 3.1; BGH 7 Dec 2017*; *OGH 22 Oct 2001; Asante Tech. v PMC-Sierra, NDCal 30 Jul 2001; RBK Hasselt 18 Oct 1995; Pohl-Michałek, CJCL, p. 12*].

105 The Parties, however, did not share such a common intent towards excluding the CISG, as neither the phrasing of Art. 29 of the Agreement (**I.**), nor the conduct of the Parties indicates an exclusion of the CISG (**II.**).

I. The Phrasing of Art. 29 of the Agreement Does Not Provide for an Exclusion of the CISG

106 The Parties did not convey an intent to exclude the CISG through the phrasing of Art. 29 of the Agreement. The interpretation of the parties' intent ought to commence with the wording of the agreement itself [*BVU v BVX, HCRS 13 Mar 2019*]. Art. 29 of the Agreement expresses that "[t]he Agreement is governed by the law of Equatoriana to the exclusion of its conflict of laws principles." [*Exhibit C2, p. 12, Art. 29*].

107 The CISG forms part of the Equatorianian Law chosen in Art. 29 of the Agreement. Through its ratification, the CISG is integrated into the law of the Contracting State [*ThyssenKrupp v Energy Coal, SCNY 14 Oct 2015; Nucap v Bosch, NDIll 31 Mar 2017; Custom Polymers v Gamma Meccanica, DSC 3 May 2016; Schroeter, para. 73*]. Whenever the parties choose the law of a Contracting State, this choice-of-law includes the CISG. Thus, the mere choice of the specific national law is not sufficient for an exclusion. [*BGH 11 May 2010; BP v PetroEcuador, US CoA 11 Jun 2003; Schroeter, para. 73*] If the parties aim to exclude the CISG in favour of the non-uniform domestic law, it is common practice to specify a domestic statute or code as choice of law [*CISG-AC Opinion No. 16, pp. 7, 9, paras. 4, 4.4; OGH 4 Jul 2007*]. However, the Parties chose the law of Equatoriana as the applicable law instead of the Equatorianian Civil Code [*Exhibit C2, p. 12, Art. 29*]. Equatoriana is a Contracting State of the CISG [*PO1, p. 50, III.4*]. Therefore, by choosing Equatorianian law, the Parties also chose the CISG.

108 Consequently, the only section of Art. 29 of the Agreement that RESPONDENT's alleged exclusion of the CISG could pertain to is the exclusion of the "conflict of laws principles". However, the

CISG does not form part of the conflict of laws principles (**1.**) the purpose of excluding conflict of laws principles is not attained by excluding the CISG (**2.**).

1. The CISG Does Not Form Part of the Conflict of Laws Principles

109 In excluding "conflict of laws principles" in Art. 29 of the Agreement, the Parties did not exclude the CISG, as it does not form part of the conflict of laws principles. Conflict of laws principles are independent rules of national origin that govern interjurisdictional cases by regulating jurisdiction, applicable law and the enforcement of the court's decision [*Collins/Harris, para. 1.001; Hay et al., p. 1; Junker, pp. 1, 2; Newman/Parisi/O'Hara, p. 387; Rauscher p. 1*]; yet do not contain substantive law themselves.

110 The CISG, by contrast, is an international convention that, apart from Art. 1(1) CISG, pr substantive contract law in its dispositive part [*OGH 23 May 2005; Cass. 5 Oct 2009; OLG Graz 22 Nov 2012; Trib Padova 25 Feb 2004; Trib Rimini 26 Nov 2002; Trib Padova 10 Jan 2006; Trib Forlì 16 Feb 2009; OGer Aargau 3 Mar 2009; McDowell v Sabaté, NDCal 1 Nov 2005; Global v Dazheng, NDIll 20 Mar 2014; Caterpillar v Usinor, NDIll 30 Mar 2005; Usinor v Leeco Steel, NDIll 28 Mar 2002; Trib Com. Bruxelles 5 Oct 1994; Art. 89-101 CISG are not dispositive as they refer to governments: Trib Vigevano 12 Jul 2000; Schlechtriem/Schwenzer/Schroeter/Hachem, Intro Art. 89-101 CISG, para. 2*]. It does not decide between multiple potentially applicable rules but establishes them in the first place. Consequently, the CISG as substantive law does not form part of the excluded conflict of laws principles.

111 This classification is not precluded by Art. 1(1) CISG which determines the applicability of the CISG. Within the Convention, Art. 1(1) CISG acts as a specific provision regulating the territorial, personal, and material scope of the unified law. It depicts a so-called delimitation or application norm and is characterised by its unilateral nature, as it solely defines the scope of application of the unified law without invoking other laws. [*Martiny lib am./v. Hein, pp. 365, 369; MüKoBGB/v. Hein, Intro IPR, para. 98*] Accordingly, neither Art. 1(1) CISG nor the Convention in its entirety can be regarded as conflict of laws principles.

2. The Purpose Behind Excluding Conflict of Laws Principles Is Not Attained by Excluding the CISG

112 An exclusion of the CISG is also inconsistent with the general purpose behind excluding conflict of laws principles. Such an exclusion aims to prevent legal uncertainty resulting from a chain of legal references – i.e. the doctrine of "renvoi" [*Gruson, Int'l L, p. 1032*]. The issue of "renvoi" arises whenever a rule of the conflict of laws refers to the law of a foreign country but the conflict rule

of this foreign country would refer the question back to the law of the first country (remission) or further to the law of a third country (transmission) [*Collier, p. 20; Collins/Harris, p. 83, paras. 2.100, 2.101; Gruson, Int'l L, p. 1032; Scoles/Hay, p. 138, para. 3.13*]. Since the parties to a choice-of-law agreement usually choose the law of a specific country because they consider its substantive law suitable, they seek to prevent a constant referral – "renvoi" – to the often unknown law of another country.

113 However, the Convention, through Art. 1(1) CISG, refers exclusively to itself and does not include references to another legal system. On the contrary, the CISG abolishes legal uncertainty resulting from conflict of law principles through the unification of international commercial law [*Honnold, p. 34, para. 45*]. Moreover, the CISG even forms part of the Equatorianian Law chosen in Art. 29 of the Agreement and cannot be considered foreign law (supra: *para. 106*).

114 Thus, the general purpose of excluding conflict of laws rules opposes an exclusion of the CISG and rather calls for its application. Considering all of this, the purpose behind the exclusion of the "conflict of laws principles" of Equatoriana neither relates to the CISG nor to one of its provisions.

II. The Conduct of the Parties Does Not Suggest Any Intent to Exclude the CISG

115 The Parties' conduct does not suggest a common intent to exclude the CISG. To determine a shared intent, the parties' declarations of intent must be interpreted separately [*with direct reference to Art. 8 CISG: Commentary on UNIDROIT, Art. 4.2(1); Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel, Art. 8 CISG, para. 4*]. The burden of proof lies with the party referring to its intent [*HGer Zürich 17 Sep 2014; Alstine, Va J Int'l L, p. 61; Ferrari, IHR, p. 15; Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel, Art. 8 CISG, para. 61; Witz/Salger/Lorenz, Art. 8 CISG, para. 5*].

116 Considering this, RESPONDENT did not prove that it had any intent to exclude the CISG. The change of the "Model Contract for the Purchase of Goods and Services by Equatorianian State Entities" (hereinafter: *Model Contract*), for once, is not an expression of RESPONDENT's intent to exclude the CISG (**1.**). Even if RESPONDENT had the intent to exclude the CISG, CLAIMANT could not have been aware of such an intent (**2.**). In any case, any remaining ambiguity of Art. 29 of the Agreement is to be interpreted against RESPONDENT (**3.**).

1. The Change of the Model Contract Is Not an Expression of RESPONDENT's Intent

117 The change of the Model Contract is not an expression of RESPONDENT's intent to exclude the CISG. Intent in the context of the CISG must be understood as distinctive subjective

intent [*HGer Aargau 26 Nov 2008; HGer Aargau 5 Feb 2008; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8 CISG, para. 10*].

118 The choice-of-law provision in Art. 29 of the Agreement originates from the 2022 version of the Model Contract which was provided by the government of Equatoriana [*Exhibit R1, pp. 29, 30, paras. 7, 11*]. In 2022, the government changed the choice-of-law clause of the Model Contract to strengthen the role of Equatorianian Law [*Answer, p. 27, para. 19; Exhibit R1, p. 30, para. 11*]. While the original Model Contract established that

> *The Agreement is governed by the CISG. For all issues not regulated by the CISG the law of Equatoriana shall apply* [*PO2, p. 53, para. 10*],

the choice-of-law clause in the recent version used for the Agreement, states that

> *The Agreement is governed by the law of Equatoriana to the exclusion of its conflict of law principles* [*Exhibit R1, p. 30, para. 11*].

119 RESPONDENT simply implemented the Model Contract provided by the Equatorianian government without specifying the choice-of-law itself. Consequently, any intent behind the change of the choice-of-law clause must be considered the government's intent and cannot be attributed to RESPONDENT as an expression of the intent to exclude the CISG.

2. CLAIMANT Could Not Have Been Aware of Any Intent to Derogate From the CISG

120 Even if RESPONDENT had the intent to derogate from the CISG, CLAIMANT could not have been aware of this intent. Pursuant to Art. 8(1) CISG, statements or conduct of a party are to be interpreted to its intent if the other party knew or could not have been unaware what that intent was. In determining the parties' intent, all relevant circumstances, including negotiations, must be considered according to Art. 8(3) CISG. Actual knowledge of the intent of a party can only be inferred if the intent was easily recognisable for the other party [*BGer 5 Apr 2005*; *CdJ Genève 12 May 2006; BeckOGK/Bodenheimer, Art. 8 CISG, para. 7; Kröll/Mistelis/Perales Viscasillas/Zuppi, Art. 8 CISG, para. 8*]. Thus, the declaring party must make itself understood; it is its risk to convey the intended message correctly [*Mankowski/Mankowski, Art. 8 CISG, para. 3*].

121 RESPONDENT did not articulate its alleged intent in a manner that CLAIMANT could have been aware of it. On the contrary, RESPONDENT showed no reaction when CLAIMANT brought up the CISG during negotiations [*Exhibit R1, p. 30, para. 11*]. Its only conduct concerning the choice-of-law was providing the pre-adjusted Model Contract. If RESPONDENT wanted to adopt the changes to the Model Clause to show an intent to exclude the CISG, it would have had to communicate this. It is unreasonable to assume that RESPONDENT's lack of reference to the CISG

would be in any way recognisable as an intent for excluding the CISG. Therefore, it is not surprising that no specific intent behind the changes was apparent when Mr. Law, the former head of CLAIMANT's legal department, conducted an evaluation of the different versions of the Model Contract [*PO2, p. 53, para. 11*]. Moreover, while CLAIMANT's CEO, Mr. Cavendish, gave RESPONDENT the chance to clarify its preferred law in the meeting of the CEOs [*Exhibit R1, p. 29, para. 11*], the Parties left this decision to the lawyers. RESPONDENT hereby demonstrated its disinterest in clarifying the choice-of-law clause. Since the alleged intent to exclude the CISG was not communicated to any individual from CLAIMANT's sphere of influence, CLAIMANT could not have been aware of any intent behind the changes before it signed the contract.

122 Finally, this lack of recognisability of the intent is also not compensated for by the official press release mentioning the changes of the Model Contract aimed at strengthening Equatorianian Law [*PO2, p. 53, para. 10*]. For once, it cannot be assumed that CLAIMANT actually saw the press release, since CLAIMANT cannot be expected to monitor government announcements of all countries it conducts business in. Secondly, even if CLAIMANT had seen the press release, it could not have therefrom deduced that the CISG was meant to be excluded in its own contract with RESPONDENT. The press release stated that the choice-of-law clause was supposed to strengthen Equatorianian law and Equatoriana as a place of dispute resolution [*PO2, p. 53, para. 10*]. This purpose is not impeded since the CISG is part of Equatorianian law. Moreover, the Parties chose Vindobona, Danubia as place of arbitration [*Exhibit C2, p. 13, Art. 30*], thus explicitly diverging from the goals stated in the press release. If nothing else, this made it impossible for CLAIMANT to discern that RESPONDENT could have intended to partially implement the government's directive by excluding the CISG.

123 Overall, considering RESPONDENT's conduct surrounding the negotiations, CLAIMANT could not have been aware of any intent to exclude the CISG.

3. Any Remaining Ambiguity of Art. 29 of the Agreement Would Have to Be Interpreted Against RESPONDENT

124 Any remaining ambiguity of Art. 29 of the Agreement must be construed to the detriment of RESPONDENT. In cases of doubt, the meaning of an unclear clause is to be interpreted in a way which is unfavourable for its provider (so-called *contra proferentem* rule) [*CISG-AC Opinion No. 13, Rule 9; BGH 28 May 2014; Kröll/Mistelis/Perales Viscasillas/Zuppi, Art. 8 CISG, para. 26*]. When no clear intent is discernible, the CISG is to be applied, since "the burden is on parties to make their choice-of-law plain enough that it would be reasonably understood as bearing the purpose of exclusion" [*Spagnolo, ITBLR p. 512*]. As demonstrated above, Art. 29 of the Agreement does not

provide for an exclusion of the CISG. In any case, as it was RESPONDENT that supplied the clause in question as part of the Model Contract [*Exhibit C2, p. 12, Art. 29; Exhibit R1, pp. 29, 30 paras. 7, 11*], any remaining ambiguity of Art. 29 of the Agreement is to be interpreted against RESPONDENT. Thus, Art. 29 of the Agreement cannot be understood as an exclusion of the CISG.

125 Considering all of this, as not even RESPONDENT itself had any recognisable intent to exclude the CISG, a shared intent cannot be inferred. Consequently, the Parties had no common intent to exclude the CISG.

B. CLAIMANT Communicated Its Intent to Include the CISG

126 On the contrary, CLAIMANT even communicated its intent to include the CISG, so that RESPONDENT must have been aware of this intent. When drawing legal consequences from the conduct of a party, due consideration should be given to their pre-contractual negotiations, as indicated by Art. 8(3) CISG [*ICC 1 Jan 2003*].

127 During negotiations, CLAIMANT referred to the CISG as the "gold standard" for international sales transactions [*Exhibit R1, p. 30, para. 11; PO2, p. 52, para. 2*]. This leaves no doubt that it considered the CISG suitable for the Parties' business relation. Further, CLAIMANT provided the termination clause in Art. 28 of the Agreement that is nearly identical to Art. 49 CISG [*Exhibit C5, p. 17, para. 10*]. While Art. 28 of the Agreement states that

> *Both Parties may terminate [the] Agreement for cause in case of failure of the other Party to perform any of its obligations resulting from the Agreement that amounts to a serious and fundamental non-performance,*

Art. 49(1)(a) CISG correspondingly stipulates that

> *The buyer may declare the contract avoided if the failure by the seller to perform any of its obligations under the contract or this Convention amounts to a fundamental breach of contract.*

128 This substantive similarity to the CISG indicates CLAIMANT's intent for an inclusion thereof. Lastly, CLAIMANT's willingness to lower its already competitive price by another 5% in return for the exclusion of the right to terminate the Agreement for convenience must be understood as a direct reference to the CISG [*Request, p. 4, para. 13*]. Since the Convention also does not provide for a termination for convenience, it is apparent that CLAIMANT wanted to apply the legal consequences of the CISG.

129 Taking all of this into account, CLAIMANT has directly expressed its intent to include the CISG, even referring to it as the "gold standard" in the discussion on the applicable law, so that RESPONDENT could not have been unaware of it. As there were no further discussions on the issue

of the applicable law [*Exhibit R1, p. 30, para. 11*], this statement remained a clear reflection of CLAIMANT's intent. Thus, CLAIMANT communicated its intent to include the CISG.

CONCLUSION OF THE FOURTH ISSUE

130 In conclusion, the Parties did not exclude the CISG, since a common intent between the Parties to derogate from the CISG is not apparent. In comparison to CLAIMANT's definite statements expressing its desire to operate the contract under the Convention, the points cited by RESPONDENT in its attempt to construe an intent to derogate seem vague at most. RESPONDENT's position would require the CISG – the Convention on the International Sale of Goods – to be conceptualized as a body of conflict of laws rules, rather than as substantive sales law. As RESPONDENT's interpretation opposes the usual understanding of conflict of laws principles, CLAIMANT could not have been aware of any intended exclusion without express communication to that effect. In this case, any uncertainty concerning RESPONDENT's intent behind the clause of Art. 29 of the Agreement is to be interpreted against it. Whereas CLAIMANT thus could not have been aware of RESPONDENT's alleged intention of an exclusion of the CISG, RESPONDENT had to know about CLAIMANT's intent to apply the CISG. Therefore, the Parties did not exclude the CISG.

REQUEST FOR RELIEF

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

- Declare it has jurisdiction to hear the dispute and finds the claim admissible (**Issue 1**).
- Object to the request for exclusion of *Exhibit* C7 and order the exclusion of *Exhibit* R3 (**Issue 2**).
- Declare the CISG is applicable to the Agreement (**Issue 3**).
- Declare the Parties did not exclude the application of the CISG (**Issue 4**).