ALINE VALENCE GONÇALVES

CAROLINA PEREIRA PINELA GONÇALVES

MARIA INÊS SÁ SOLDADO CARAPETA

WORK PROJECT: 31ST ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

22nd March – 28th March 2024 in Vienna, Austria

Work Project submitted for the obtainment of the Master's degree in Litigation and Arbitration.

SUPERVISOR:

Dr. Francisco Pereira Coutinho – Professor at NOVA School of Law

June 2024

Anti-Plagiarism Statement

We declare that the essay presented is of our exclusive authorship and that all use of contributions or texts from others are duly identified. We are aware that the use of extraneous elements constitutes a serious ethical and disciplinary breach.

Lisbon, 14th June 2024

Table of Contents

Index of Abbreviations and Definitions **5**

Form of Citation and Bibliography **7**

Introduction **8**

The Willem C. Vis International Commercial Arbitration Moot **9**

The Experience **11**

Team Organization **13**

The Written Phase **15**

1. Memorandum for CLAIMANT 17
2. Memorandum for RESPONDENT 18

The Oral Phase **20**

1. Pre-Moots and Training Sessions 21
2. Oral Rounds 22

The Problem **24**

Procedural Issue **28**

Issue A: Can and should the addition of the new claim to the pending arbitration be authorized? 28

A. New Claims 28

1. New claims as a concept 28
2. Requirements outlined in Art. 23(4) ICC Rules for the addition of new claims 30

a. CLAIMANT's position 32
b. RESPONDENT's position 33

B. Multiple Contracts 34

1. Multiple contracts in arbitration 34

a. CLAIMANT's position 36
b. RESPONDENT's position 37

Substantive Issues **39**

Issue C1: Is CLAIMANT entitled to payment of either the full amount or parts of the amount due as payment under Purchase Order No. 9601? 39

A. The performance of the payment obligation 40

1. The amendment of the payment terms under Art. 29 CISG 40

2. The obligation to pay the price 41

a. CLAIMANT's position 41

b. RESPONDENT's position 43

B. The mitigation of the payment of the price 44

1. Article 77 CISG 45

a. CLAIMANT's position 46

b. RESPONDENT's position 48

Issue C2: Can RESPONDENT invoke a violation of a contractual (information) duty or obligation or rely on a provision of the CISG to entirely or at least partially defend itself against the claim for payment? 50

A. The existence of a duty to inform 50

1. Good faith 51

i. Good faith as a duty and as a principle 52

ii. Good faith as an interpretative mechanism 53

2. The duty to inform 55

i. In the CISG 55

ii. In the subsidiary law 57

a. CLAIMANT's position 57

b. RESPONDENT's position 59

B. The failure to perform 60

1. Art. 80 CISG 60

i. Act or Omission 61

a. CLAIMANT's position 62

b. RESPONDENT's position 63

Conclusion 66

Bibliography 67

Web Pages 69

Case Law 70

Annexes 72

Index of Abbreviations and Definitions

Abbreviation	*Explanation*
&	And
AA	Arbitration Agreement
Art.	Article
Arts.	Articles
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	SensorX, plc.
DCA	Danubian Contract Act
e.g.	*Exempli Gratia*
FA	Framework Agreement
i.e.	*Id est*
ICC	International Chamber of Commerce
Mr.	Mister
Ms.	Miss
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OMP	Oskar-Morgenstern-Platz
Op. cit.	*Opere Citato*
p.	Page
Para.	Paragraph
Paras.	Paragraphs
Parties	CLAIMANT and RESPONDENT
PO No. 9601	Purchase Order Number 9601
PO No. A-15604	Purchase Order Number A-15604
pp.	Pages

RESPONDENT	Visionic Ltd.
RfA	Request for Arbitration
RfANC	Request for the addition of a new claim
The Problem	Case of the 31st edition of the Willem C. Vis International Commercial Arbitration Moot
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UPPIC	UNIDROIT Principles on International Commercial Contracts
Vis Moot	Willem C. Vis International Commercial Arbitration Moot

Form of Citation and Bibliography

Every citation regarding "The Problem" is part of the Problem released by the Association for the Organisation and Promotion of the Willem C. Vis International Commercial Arbitration Moot for the 31st Willem C. Vis Moot.

The first citation of each literary work is made by the author's name, full title, year of publication and page cited. If the text is part of a literary work, the chapter on which it is mentioned is followed by the full citation. Subsequent citations are made with reference to the author's name, op. cit., and page cited. If two works written by the same author are cited, the second and following citations will be made with reference to the author's name, part of the title of the work or article, cit. and page cited.

The first citation of each journal or magazine article is made by the author's name, full title, name of publication, volume/number, year of publication, and page cited. If two articles written by the same author are cited, the second and following citations will be made with reference to the author's name, part of the article's title, cit., and page cited.

The first citation of each academic work is made by the author's name, full title, type of work, university name, year of publication and page cited. Subsequent citations are made with reference to the author's name, op. cit., and page cited.

Case law citation is made by the name of the court, name of the case, date, and name of the parties if known.

Legal texts or rules are cited by the full name of the diploma and article cited. Subsequent citations are made with reference to part of the name and article cited.

The bibliography is ordered alphabetically by the last name of each author and is made according to Norma Portuguesa 405-1 and 405-4 of the Portuguese Quality Institute.

Introduction

As part of the master's degree in Litigation and Arbitration and for the purpose of its conclusion, the present "Work Project" Report is submitted to outline the different phases of the work completed by the team representing NOVA School of Law in the 31st Willem C. Vis International Commercial Arbitration Moot (hereinafter, "Vis Moot") competition of 2023/2024 during the six months of the project.

In its first part, a brief description of the Vis Moot model, as well as the team members' experience, organization, and workflow throughout the phases of the competition will be provided. In the second part, the fictional case for this year (hereinafter, the "Problem") will be critically analysed and deconstructed, with the individual issues raised being scrutinized separately. In this part, the team will also assess the impact of this competition on their academic and professional career. Finally, in the third part, the Memoranda submitted by the team will be attached for consultation in Annex 1 and 2.

With the exception of the individual analysis of the issues raised in this year's Problem, which were independently drafted by each team member based on their research during the competition, this report was written by only three of the four team members. Issue B, authored by our colleague Juliana Trivoli, will not be addressed, as the present Work Project only concerns the work of Aline Gonçalves, Carolina Gonçalves and Maria Inês Carapeta.

The Willem C. Vis International Commercial Arbitration Moot

The word "moot" as an adjective, means open to discussion or debate, debatable, doubtful; as a noun, it started by meaning an argument or discussion, especially of a hypothetical legal case[1] – however, nowadays, the predominant definition found in dictionaries is precisely "*a trial or discussion dealing with an imaginary legal case, performed by students in exactly the same way as a real case, as part of their legal training – a moot court*"[2].

Moot courts are mock proceedings of real court sessions and are popular amongst law schools. They allow students to work and engage with a simulated case and serve as counsels before a mock Tribunal, typically comprised of legal professionals. Usually encompassing various aspects of real legal proceedings, including written submissions and oral hearings, the primary goal of moot courts is to help students develop hard skills in persuasive advocacy and soft skills like time management, teamwork and oratory.

The Willem C. Vis International Commercial Arbitration Moot received its name after Dutch scholar Willem Cornelis Vis, an expert in international commercial transactions and dispute settlement procedures, and was founded by Prof. Dr. Eric E. Bergsten, whose vision of what moot courts should be and contribute to law students influenced and characterises the model of the Vis Moot. It stands as the most renowned and participated international arbitration moot court (and the second largest moot court in the world), gathering more than 300 teams in each edition. This year, it counted 373 teams from 89 different jurisdictions, amounting to more than 2,500 students and 1,000 arbitrators to "*foster the study and practice of international commercial sales law and arbitration*"[3].

The Vis Moot is organised by the Association for the Organization and Promotion of the Willem C. Vis International Arbitration Moot and presided over by Dr. Patricia Shaughnessy, after the passing of Prof. Dr. Eric E. Bergsten in 2023, who acted as honorary president until his death. The organisation also counts with Prof. Dr. Christopher Kee, Prof. Dr. Stefan Kröll and Mag. Patrizia Netal as directors.

---

[1] Dictionary.com, Moot Definition. Available at: https://www.dictionary.com/ (*consulted on 17th April 2024*).

[2] Cambridge Dictionary, Moot Definition. Available at: https://dictionary.cambridge.org/ (*consulted on 17th April 2024*).

[3] Official webpage of The Annual Willem C. Vis International Commercial Arbitration Moot. Available at: https://www.vismoot.org/ (*consulted on 18th April 2024*).

Every year, the competition is held in Vienna, Austria, and thousands of people – not only participants and arbitrators, but also coaches and previous Mooties[4] – gather to attend the various events happening in one week.

The Problem is designed every year according to "*hot topics*" and challenges both the world and arbitration face at the time. This year, it concerned a cyberattack and information duties, a contemporary topic that raises issues concerning law interpretation and the adaptability of arbitration to the evolution of times and legal issues. It follows, however, the same structure every year: a dispute between two companies based in different fictional countries, but signatories to the same international conventions. It always concerns a transaction of goods under the United Nations Convention on Contracts for the International Sale of Goods (hereinafter, "CISG"). The contract signed by the parties contains an Arbitration Agreement establishing the seat of the arbitration to be Danubia – another fictional country signatory of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter, "UNCITRAL Model Law") and to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "NY Convention").

The Vis Moot is usually sponsored each year by a different Arbitration Institute, and in this edition, to celebrate the 100th anniversary of the International Chamber of Commerce (hereinafter, "ICC"), the Arbitration Agreement signed by the parties provided that these rules applied.

During the six months of the competition, law students become Mooties, diving into the intricacies of international arbitration through a hands-on approach. The Vis Moot is essential in promoting arbitration as an alternative dispute resolution method, and it deeply contributes to the training of young adults and future law specialists in the field.

[4] Nickname given to participants of the Vis Moot.

The Experience

For the master's students at NOVA School of Law, the experience of the Vis Moot traditionally starts one year prior to the beginning of the competition. Each year, four students enrolled in the course "Moot Courts" are given the opportunity to represent NOVA School of Law in the upcoming Vis Moot. The selection process for the team members involves a simulation of the original Vis Moot and the current year's Problem, In our case, the course entailed drafting the Memorandum for CLAIMANT and participating in two oral hearings related to the 30th edition of the Vis Moot and the specific problem at hand. From said course, Aline Gonçalves, Carolina Gonçalves, Juliana Trivoli and Maria Inês Carapeta were selected by the team coaches, Ana Coimbra Trigo, Ana Sousa and Carolina Apolo Roque.

Being selected to be part of the team was an exciting achievement for all of us, as it aligned with our individual goals as students of the Master's Programme. Nonetheless, this year presented itself as an atypical year for the NOVA Team: three of four members were working full-time, two of them as Trainee Lawyers, while the fourth member was simultaneously participating in the Vis Moot and writing her master thesis. This dynamic significantly impacted our time management and organisation, skills that we consider to have mastered during this experience.

The preparation of the 31st Vis Moot began in July of 2023 with an online meeting held by the coaches, providing us with the opportunity to come together as teammates, despite having known each other as classmates for the past year. Then, in October, the work officially commenced with the release of this year's Problem, with the first step being to read and analyse the Problem attentively.

The Vis Moot unfolds in two distinct phases: the **written phase**, spanning from October 6th 2023, to January 18th, 2024, and the **oral phase**, which extends from January, 18th, 2024 until the conclusion of the competition, on March 28th, 2024. As with previous years, our team can attest that while our enthusiasm remained unwavering throughout the entire experience, the oral phase was in general more appealing in comparison with the written phase, as the latter tends to be less captivating as it is characterized by extensive research, reading and study, making it a lonely process – despite being in constant communication with each other and the coaches. It was also during this phase that the vulnerabilities and stress of each team member began to manifest, as is common in all activities that involve

teamwork. Fortunately, we were able to deal with these adversities smoothly and help each other every step of the way.

The oral phase is equally demanding but presents a different type of pressure and challenges. Characterized by being more interactive and rewarding, this phase strengthens the team both as a unit and as co-counsels. This phase is where the competition truly materialises and the "spirit of the Moot" gains the relevance that is so often discussed, with extensive contact with teams and people from other countries, cultures and backgrounds.

After six months, we have come to realize that the Vis Moot has made us grow immensely at a professional and personal level. This is certainly an experience that we wholeheartedly recommend and are incredibly grateful that NOVA School of Law supports and encourages. Completing our master's degree while participating in the Vis Moot has enriched our legal skills and prepared us for the reality and challenges of Arbitration in the contemporary world.

Despite not achieving our desired goal of making it to the Top 64 teams, we are immensely proud of our performance and the obstacles that we overcame as a team during this journey. It has been both an honour and a pleasure to represent NOVA School of Law in the largest Moot Court of International Commercial Arbitration.

Team Organization

The team adopted different organizational approaches for the two phases of the competition: the written and the oral phases.

During the written phase, it was essential to distribute responsibilities and allocate tasks, given the need to thoroughly comprehend the Problem and unravel its intricacies. In this regard, organising and assigning issues among the team members was one of the first steps. The structure of the defence can be divided into two axes: Procedural and Merits. The Procedural axis encompasses the questions raised by the Arbitral Tribunal pertaining to the jurisdiction and authority of the Arbitral Tribunal, as well as procedural matters. The Merits axis, on the other hand, addresses the substantive legal questions raised by the Arbitral Tribunal.

Given this division, and considering each member's expertise and personal preferences, there was unanimous agreement among the team regarding the allocation of the major issue groups. With this settled, the team decided that, for the Memoranda, Aline Gonçalves would address Issue A – can and should the addition of the new claim to the pending arbitration be authorized?; Juliana Trivoli dedicated herself to Issue B – can and should the Arbitral Tribunal consolidate the arbitral proceedings, in case the new claim has to be raised in a separate arbitration?; and Carolina Gonçalves, alongside Maria Inês Carapeta, would analyse Issue C – is Claimant entitled to payment of either the full amount or parts of the amount due as payment under PO No. 9601 or can Respondent invoke a violation of a contractual (information) duty or obligation or rely on a provision of the CISG to defend itself partially or at least against the claim for payment?[5].

For clarity purposes, Issue C was divided into two questions: Carolina Gonçalves analysed if Claimant is entitled to payment of the full or parts of the amount due as payment under PO No. 9601 and Maria Inês Carapeta discussed if Respondent can invoke a violation of a contractual (information) duty or obligation or rely on a provision of the CISG to defend itself against the payment claim.

Nonetheless, and despite this division, it is important to emphasize that we remained engaged with each other's issues and consistently provided support to each other, as the questions often intertwined and were interdependent. This collaboration was essential to

[5] The Problem, p. 58, para. 4.

avoid inconsistencies or contradictions in our arguments and within our positions. With this formal aspect sorted, the written phase progressed regularly and evenly.

After the oral phase commenced, the next decision to be made the team was selecting sides – the team had to be divided into pairs, with each pair representing either Claimant or Respondent. Ultimately, it was decided that Aline Gonçalves and Maria Inês Carapeta would act as co-counsels for CLAIMANT, and Juliana Trivoli and Carolina Gonçalves would advocate for RESPONDENT.

Claimant		**Respondent**	
Aline Gonçalves	Maria Carapeta	Juliana Trivoli	Carolina Gonçalves
Procedural	Merits	Procedural	Merits

In the written phase, the chosen method of organization allowed us to focus entirely on specific aspects of this year's Problem, and to tailor our research to benefit our client and position. In the oral phase, establishing sides enabled us to fully immerse ourselves in the roles of counsels for Claimant and Respondent – fostering a belief that our respective client was right.

To ensure that everyone stayed informed about the progress of each team member's work, the team met frequently with the coaches and with each other, particularly between the members working on the same part (Procedure and Merits). Additionally, deadlines were set to ensure the timely completion of tasks and to maintain a consistent pace throughout the process.

The Written Phase

The written phase of the competition is usually the less attractive to the Mooties. Though equally important as the oral phase, as it sets the foundations for the oral hearings and argumentations, it is often the most challenging to overcome.

After reading this year's Problem, our first step was to make a timeline, and a *dramatis personae* and showcase it to the coaches in a brief presentation, which focused mainly on the Parties, the facts and our first impressions of the case. Following this, it was crucial to identify what was essential and what was ancillary in the case, which can sometimes be dubious. Certain pieces of information are included in the case simply to divert our attention from what is significant to the Parties' positions. The Problem is traditionally full of "*easter eggs*" – hidden features or aspects that are not immediately apparent and often go unnoticed.

In the meantime, we sent our Request for Clarification – questions that the teams can ask the Vis Moot organization about the case or parts of it that are not clear. Then, gradually, it was time to start building our defence and structure the arguments.

The team faced significant challenges in the early stages of the drafting process, particularly with structuring and assembling the case. Contrary to our experience in our "Moot Courts" course, and even during our academic studies in Law, where the case under analysis reached us in its final stages, this was our first time deconstructing a case to its core and identifying the questions that needed to be addressed, assessed and, eventually, answered. This process often led us to rethink our positions and arguments, which, as a consequence, were regularly changed until we arrived at the final results.

To facilitate the beginning of the writing stage, the coaches organised a session with Anamaria Marin, team coach of the University of Florence, in which we learned about legal and persuasive writing, as well as how to start drafting our Memorandums. Once we had a clear understanding of what a Memorandum should be and our positions solidified, the next challenge was gathering relevant legal materials. Most platforms that provide texts, books and jurisprudence are limited to paid subscriptions or in foreign languages (other than English). However, the coaches were essential in assisting in this matter, and in this regard arranged a session on "*Legal research in the Vis Moot*" with Catarina Cerqueira, former Mootie and Trainee Lawyer at CMS Portugal.

The domestic legal system also creates obstacles to the drafting of the Memorandums. Coming from a civil law country, and as the Problem is built broadly as to be comprehensive to both Civil and Common Law countries, there is also a work of adaptation to be done. This required us to shift our Civil Law understanding to a Common Law perspective, not only to comprehend the materials, positions and texts of different authors, but also to develop our arguments in a way that would be intelligible and persuasive in both legal systems.

Having drafted both Memorandums while focusing on one individual issue, we were aware of the fragilities and strengths of our arguments, leading us to build strong walls in our defences. However, this process also led to a common challenge when documents are written by multiple people: the inconsistencies and incoherencies in language. With different writing styles and varying levels of fluency in English, the team had to meticulously review both Memorandums to guarantee that the text was cohesive in language and argumentation, making them appear as if it was written by only one individual, demonstrating our teamwork. Consequently, each section had to be rewritten multiple times with one of the team members assigned to review and harmonise spelling mistakes and inconsistencies.

This was, however, a positive remark and advantage of the written phase: it significantly enhanced our vocabulary both in Portuguese and English (and also in both everyday and legal language) as there was an effort to be made to not be repetitive, dull and difficult to understand. Memorandums are, by nature, texts meant to be easily understood and read, and we are taught from the outset that we must capture the Arbitrator's attention through the text – especially since Memorandums have a limit of 35 pages. Therefore, our goal was to be concise and engaging.

1. Memorandum for CLAIMANT

The drafting process of the Memorandum for CLAIMANT proved to be the most challenging phase to overcome, as previously mentioned. Here, we became aware of the Problem's complexities and worked diligently to formulate our arguments. After understanding the material and form requirements for the memorandum, we began our research, gathering doctrinal perspectives and case law on the key points of the Problem.

This proved to be our biggest challenge: finding our way through the extensive bibliography and selecting what was beneficial for our position from what was not. Research was a very lengthy and time-consuming process, demanding a significant effort from all of us, especially considering that the subject matter of each year's case is often understudied by authors and arbitral and judicial decisions as they are quite recent, finding doctrine regarding cyberattacks – a modern and new issue – was arduous.

We started by submitting to the coaches a draft of what our main arguments were going to be, which developed over time. This process also reflected in the formulation of sub-arguments that, given our line of thought, had to be addressed. Our strategy with the Memorandum for CLAIMANT was to evidence to the Tribunal that it was unreasonable for CLAIMANT to be left without the goods that it delivered and the due payment for said goods. Contrary to RESPONDENT's circumstance in the case, CLAIMANT had the law on its side, and from that point, CLAIMANT's defence was straightforward.

Given that the merits part of the case embodied distinct aspects of the case that we felt should be addressed separately, in order to be more detailed and explicit to the Tribunal, we opted to divide this issue between Carolina Gonçalves and Maria Inês Carapeta. Carolina was tasked with arguing that the payment made by RESPONDENT had no legal effect, and that RESPONDENT was still obliged to perform the payment under PO No. 9601. Meanwhile, Maria Inês focused her research on demonstrating that CLAIMANT was not responsible for RESPONDENT's failure to perform as it had no information duty.

Finally, we reached the following definitive structure: (I) The additional payment claim raised under PO No. A-15604 must be decided in this arbitration; (II) Subsidiarily, in the unlikely event that the additional claim has to be raised in separate proceedings, the arbitral tribunal must consolidate both arbitrations; (III) CLAIMANT is entitled to payment of the price of PO No. 9601 in full; and (IV) CLAIMANT did not cause RESPONDENT's failure to perform.

2. Memorandum for RESPONDENT

After the completion of the Memorandum for CLAIMANT, we had a meeting with the team and the coaches to evaluate this process and reflect on areas for improvement, as well as identify practices that were beneficial and should be maintained in the drafting of the Memorandum for RESPONDENT. In this session, we were able to identify our flaws to make the writing and research phase more efficient.

We continued to hold meetings with the team members and the coaches to discuss our approach to the arguments and positions. However, we aimed to make these meetings more fruitful by bringing debatable questions to each session. We realised that, as for the writing process of the Memorandum for CLAIMANT, we did not take full advantage of the meetings as we were still understanding what writing a memorandum implied. By agreeing to be more attentive and respectful with deadlines, we were able to review the Memorandum for RESPONDENT in much more detail and submit it with some lead time.

However, the Memorandum for RESPONDENT writing process was different from the Memorandum for CLAIMANT. This time, we were not independently formulating arguments, but rather had to follow the structure and argumentation of the received Memorandum for CLAIMANT, from the Federal University of Paraná. This entailed that, as for the writing of the Memorandum for RESPONDENT, we were actively responding to a counterpart and addressing the questions raised by it, regardless of whether we presented the same or similar arguments or not. Therefore, ensuring that we were responsive and incisive was our main focus.

After careful assessment of the received Memorandum for CLAIMANT, we realised that even if the core of the arguments was the same as ours, the approach and argument organisation were substantially different. On the procedural side, the main difficulty we encountered was the fact that the counterpart often contradicted itself. For instance, it was argued that the decision on consolidation was of administrative nature, which contradicts the aim of the CLAIMANT's argument. On the merits, the counterpart merged what were two of our independent arguments – leading us to rethink our prejudices on CLAIMANT's position.

Eventually, as RESPONDENT, it was upheld that: (I) The new claim cannot be included in the arbitration; (II) The Tribunal also cannot consolidate the proceedings; (III) CLAIMANT is not entitled to payment in full of PO No. 9601; and (IV) CLAIMANT

was bound by a duty to inform and caused RESPONDENT's failure to perform the contract.

Our strategy was to demonstrate to the Tribunal that the organisation and argumentation of the Memorandum for CLAIMANT was confusing and vague, and that, as counsels for RESPONDENT, we aimed to guide the Tribunal in understanding why CLAIMANT's claims and arguments were unfounded. This strategy proved to be effective, as the Arbitrator's feedback for the Memorandum for RESPONDENT was highly positive.

The Oral Phase

The oral phase is the phase where "the magic happens", and where we get to see our arguments come to life. It is characterized by a different type of pressure as we are no longer protected by the cover of our Memoranda, but rather start to be seen as the faces of the team and counsels representing a client.

In this phase, it is crucial to test arguments and grasp the directions each team is taking. Our speech often evolve throughout this phase as we observe other teams taking different approaches to certain arguments and understand that there may be an easier way to convey certain points to the Tribunal. Therefore, the oral phase is one to gather as much information as possible, building upon the knowledge acquired during the written phase.

The first step of this phase was to write a first version of our speeches and present it to the coaches as if it were a real Oral Hearing. In this practice, we tried to use and allocate the time correctly and tested our capability of staying within the 14-minute time limit. It was also an opportunity to test what elements worked best for our speech before starting Training Sessions in terms of expressions, vocabulary, catchiness and pace. We quickly understood that it boils down to form as much as content.

Being captivating plays a big role in the oral phase. While it may sometimes go unnoticed, confidence, wit and an engaging presentation are essential to captivate the audience's attention. Psychology and the way we present ourselves have an impact in this phase as each arbitrator is different and may have distinct perceptions of the speakers. This diversity of perception is reflected in the scores and feedback, which can vary based on the individual preferences and interpretations of each member of the arbitral tribunal.

The model of the Vis Moot is not a confrontational one, which means that teams are not encouraged to view Oral Hearings as a competition against a team, but rather as opportunities to score points. This approach is also important before and during the Oral Hearing: showing respect and being pleasant towards the other team and the arbitrators.

At the end, and before starting real Training Sessions and Pre-Moots, we each had already a speech prepared according to the recommendations of our coaches: which expressions and puns to keep, how much time we should allocate to each issue, questions that arbitrators might ask and what worked for the rebuttals and surrebuttals.

Then, at the Training Sessions and Pre-Moots, it was time to practice with other teams, which entailed more strain, but also more amusement.

1. Pre-Moots and Training Sessions

Considering that at this time, two of four team members were working full time, we had to be selective in choosing which Pre-Moots we wanted to attend and with which teams we wanted to have private Training Sessions – which was challenging since our availability was limited. With that in mind, we decided to select three Pre-Moots to participate in person and several Training Sessions both online and in person.

Before starting Pre-Moot season, we had an in-person Training Session at PLMJ on February 19th, 2024. We assumed our positions as counsels for CLAIMANT and RESPONDENT and debated against each other. This was also our first time seeing each other in person and as a team, as we worked online until then. This session also marked our first time practising in person. We were fortunate to have former coaches of the NOVA School of Law Vis Moot team, André Fonseca and Rute Alves, as well as former Mootie, Catarina de Pedro, act as arbitrators.

The first Pre-Moot attended was the London Pre-Moot, which took place on the 24th and 25th of February 2024. Although the overall rankings were not disclosed by the organisation, our individual scores were positive and gave us the confidence necessary for the next Pre-Moots.

The second Pre-Moot we attended was the VI Lisbon Vis Pre-Moot, happening from the 6th to the 9th of March, 2024. We ranked 9th with positive feedback from the arbitrators and having faced high-level teams.

The third and last Pre-Moot attended was the ICC Vis Pre-Moot, in Paris, which happened from the 14th to the 16th of March, 2024. In this Pre-Moot we ranked 31st from 44 teams, and soon realised that the level for this year's Vis Moot had increased. While attending this Pre-Moot, the team also had an in-person Training Session with the University of Rio de Janeiro (Brazil) at the offices of Squire Patton Boggs in Paris.

Besides attending Pre-Moots, the team held several online Training Sessions with teams from a variety of countries, such as the University of São Paulo-Ribeirão Preto (Brasil), Fordham University (USA), Belgrade University (Serbia), Hong Kong University (China), Mainz University (Germany), Charleston University (USA), University of International Business and Economics (China) and University of São Paulo (Brazil).

This was the ultimate preparation for the Oral Hearings in Vienna and allowed us to have our first contact with arbitrators and teams from different backgrounds.

2. Oral Rounds

The final stage of the competition – the Oral Rounds – took place in Vienna, from the 22nd of March to the 28th, 2024. The first event was the Opening Ceremony and, as tradition dictates, it happened at the Wiener Konzerthaus on the evening of the 22nd of March. This was an emotional edition for Christopher Kee, Stefan Kroll, and Patrizia Netal, directors of the competition, as it was the first one after the passing of Prof. Dr. Eric E. Bergsten, and in their speeches, Professor Eric was honoured.

Several other speakers took the stage to open the 31st edition of the Vis Moot, such as Alexender Fessas, Secretary General of the ICC, José Faria, Principal Legal Officer of UNCITRAL, Brigitta Zöchling-Jug, Professor at the University of Vienna and Ipek Ince, President of the Moot Alumni Association.

The General Rounds of the competition occurred between the 23rd and the 26th of March, as the team pleaded four times: twice as CLAIMANT and twice as RESPONDENT. We knew in advance which teams we were going against, and had access to their Memoranda in order to prepare for their arguments.

The first session took place on Saturday, the 23rd, at 8:30 am at the Faculty Building of the University of Vienna of Mathematics, Business and Statistics (hereinafter, "OMP"). This session was arbitrated by Dr. Vangel Dokovski, Mr. Keeghan Urmann and Ms. Sara Darnot, and the team went as RESPONDENT – represented by Juliana Trivoli on the procedural and Carolina Gonçalves on the merits – against the Federal University of Paraná (Brazil), from which we received the Memorandum for CLAIMANT.

The second session happened on Sunday, the 24th, at 10:30 am, also at the OMP. This time, the team pleaded as CLAIMANT – represented by Aline Gonçalves on the procedural and Maria Inês Carapeta on the merits – against the University of Münster (Germany), and with Mr. Grant Hanessian, Dr. Tímea Csajági and Ms. Marion Smith as arbitrators.

Our third session was against ADA University (Azerbaijan), at 4:30 pm on Monday, the 25th, and took place at the Juridicum building. This time, the team pleaded as RESPONDENT and had Ms. Katrina Annija Rocane, Mr. Anders Trab and Mr. Karl Peter Puszkajler as arbitrators.

At the fourth and final session, which happened at noon on the 26th at the OMP against the University of Fribourg (Switzerland), the team pleaded as CLAIMANT. This was an

atypical pleading, as one arbitrator was missing and both teams had to wait one hour for a replacement. Eventually, the Tribunal was constituted by Ms. Julie Skovbo Erhardsen, Mr. Peter Langrock and Ms. Luisa Eberle. It was also the first time we encountered a disagreement with the proposed order for the proceedings from the other team, and so, after consulting with our coaches, we decided to ask the Tribunal to make a decision. The Tribunal ended up deciding to adopt the order our team proposed.

At 6 pm on the same day, the teams gathered at the auditorium of the Austria Center for the Announcing Ceremony, where the 64 teams moving on to the elimination rounds were announced. Unfortunately, NOVA School of Law was not called, and our journey in the Vis Moot ended there. While we were disappointed with the results, we remained proud of our performance, as it marked a significant milestone in our professional careers and personal lives.

The Problem

The Problem of the 31st edition of the Willem C. International Commercial Arbitration Vis Moot was released on the 5th of October, 2023, and concerns a Framework Agreement (hereinafter, "FA") for the supply of sensors. The Parties to said FA are SensorX plc., the seller, and Visionic Ltd., the buyer.

SensorX plc. (hereinafter, "CLAIMANT") is a Tier 2 producer of sensors based in Mediterraneo. These sensors are used in various applications in the automotive industry, in particular for all types of autonomous driving applications.

Visionic Ltd. (hereinafter, "RESPONDENT") is a Tier 1 producer of optical systems based in Equatoriana. Its optical systems are used by many of the leading car manufacturers for autonomous parking systems.

In June of 2019, the Parties entered into a FA to regulate the future supply of sensors. This contract stipulated, for instance, and amongst other aspects of the Parties' relationship, that payment should be made to one of the bank accounts specified in the FA within 15 days upon delivery (Art. 5 of the FA), that the price of the sensors should be fixed semi-annually (Art. 6 of the FA), and that all alterations to the FA had to be made in writing and signed by the Parties (Art. 40 of the FA). Art. 6 of the FA was, however, later amended, and agreed to an annual fixing of the price, instead of a semi-annual.

This FA contained an Arbitration Agreement (hereinafter, "AA") in its Art. 41, according to which disputes arising in connection to the contract were to be resolved through arbitration and applying the ICC rules. Furthermore, this AA also stipulates that the arbitration should be conducted by three arbitrators (or a sole arbitrator if the Parties agree so), that the Arbitral Tribunal has de power to consolidate different proceedings concerning the FA, and that the law and place of the arbitration is Danubia. The FA was signed by the CEO's of both Parties – Mr. Enzo Isetta for CLAIMANT and Ms. Mercedes Ford for RESPONDENT.

Between June of 2019 and January of 2022, 22 different purchase orders were placed, amounting to more than 5,000,000 sensors delivered. On CLAIMANT's side, the Account Manager in charge of RESPONDENT's account was Ms. Telsa Audi; her counterpart, and Account Manager for RESPONDENT in charge of CLAIMANT's account, was Mr. Henry Royce.

In August of 2020, RESPONDENT fell victim to a cyberattack and immediately informed its business partners as required by Art. 34 of the Equatoriana Data Protection Act, with CLAIMANT asking to be kept *à jour* and being one of their most concerned counterparties. This reflected the increase in successful cyberattacks targeting the automotive industry for the past years.

On January 4th, 2022, RESPONDENT placed Purchase Order No. A-15604 (hereinafter, "PO No. A-15604") for the purchase of 200,000 units of the model L-1 sensors. Due to the specifications of this sensor and its dual use, the order was handled by a special department on CLAIMANT's side, and not Ms. Audi as usual. The payment was to be effected in two instalments; RESPONDENT made the first one on March 18th, 2022, however, it did not make the second payment.

The last purchase order under the FA was Purchase Order No. 9601 (hereinafter, "PO No. 9601"), made on January 17th, 2022, and was to be delivered in two instalments in April and May. According to Art. 6 of said PO, and as a deviation from the FA, both payments were to be effected 30 days after delivery, i.e., on May 3rd and June 30th. However, neither payments were received in CLAIMANT's bank accounts.

CLAIMANT had fallen victim to a cyberattack on January 5th, 2022, and, as a consequence, RESPONDENT received an email on March 28th from someone portrayed as Ms. Telsa Audi, requesting the change of payment details to a different account – one that was owned by the cyber criminals. Since the Parties had treated prior deviations to the stipulations of the FA pragmatically, and Mr. Royce was not aware of an increased risk, RESPONDENT did not suspect this communication and adhered to the alteration, ending up paying both instalments of PO No. 9601 to the bank account specified in the spoof mail.

On January 5th, 2022, Ms. Audi disregarded internal cybersecurity guidelines and downloaded malware into her computer, which infiltrated CLAIMANT's IT system and allowed the hackers to access the correspondence between the Parties. As a result, she was later laid off from her functions and replaced by Mr. Gustaf Gabrielsson from August 1st, 2022, onwards.

CLAIMANT was aware of the occurrence of the cyberattack from January 25th, however, it did not inform RESPONDENT of this circumstance. Contrary to RESPONDENT's domestic law (Equatorianian law) which specifically provides for information duties, the

law chosen by the Parties (the law of Danubia), and the law of Mediterraneo, where CLAIMANT is located, do not require to inform in such matter. Therefore, and because the cyberattack was deemed of minor relevance by the leading cybersecurity firm in Mediterraneo, CyberSec, CLAIMANT did not inform any of its counterparties immediately.

After shutting down its accounting system and internal planning on March 15th, 2022, due to the recognition that the cyberattack had been more serious than expected, CLAIMANT discovered that it had not received any payment regarding PO NO. 9601, on August 25th and contacted RESPONDENT.

At first, CLAIMANT sent a letter on the 5th September, 2022, complaining to RESPONDENT that the payments were not received and establishing a deadline for the payment. RESPONDENT replied 3 days later, stating that the obligation was fulfilled since the payments were made in line with the instructions of the email received on the 28th March, and that this email must be attributed to Ms. Audi.

The CEO's of both Parties met on November 28th, 2022, to discuss the outstanding payment, but the meeting did not yield any results as RESPONDENT did not want to pay a second time. It also informed that it would terminate the FA and start buying the sensors from one of CLAIMANT's competitors. In this context, CLAIMANT submitted the Request for Arbitration (hereinafter, "RfA") on June 9th, 2023.

On September 1st, 2023, after the commencement of the arbitration and the Terms of Reference had been agreed upon by the Parties, which occurred on August 30th, 2023, CLAIMANT discovered that the second payment under a different purchase order, PO No. A-15604, had not been made. The delay in the discovery was due to Ms. Peugeotroen's (Account Manager on CLAIMANT's side responsible for the L-1 sensors) emergency childbirth, which made it impossible to hand over the accounts to her successor, and the consequences of the cyberattack. CLAIMANT's Head of Sales, Ms. Bertha Durant, then informed Mr. Toyoda and was informed that the payment was not made due to concerns regarding the quality of the sensors. Apparently, this information was given via an email which could not be found in CLAIMANT's system and that in CLAIMANT's view, did not comply with Art. 15 of the FA – which binds the Parties to give a notice of defect.

Subsequently, on September 11th, CLAIMANT submitted a Request for authorization of a new claim (hereinafter, "RfANC") to the proceedings, relating to the payment of PO No. A-15604.

In light of the facts depicted above, the Tribunal requested the teams to address the following issues[6] in their Memoranda and Oral Hearings:

a. Can and should the addition of the new claim to the pending arbitration be authorized?
b. Can and should the Arbitral Tribunal consolidate the arbitral proceedings, in case the new claim has to be raised in a separate arbitration?
c. Is Claimant entitled to payment of either the full amount or parts of the amount due as payment under Purchase Order No. 9601 or can Respondent invoke a violation of a contractual (information) duty or obligation or rely on a provision of the CISG to
    i. entirely or at least
    ii. partially defend itself against the claim for payment.

[6] The Problem, p. 58, para. 4.

Procedural Issue

Issue A: Can and should the addition of the new claim to the pending arbitration be authorized?

Aline Gonçalves

The first procedural issue raised by the Arbitral Tribunal is whether the second claim can and should be added to the proceedings. The procedural issue of this year's Problem is essentially related to new claims that are raised after the Terms of Reference have been approved by the Court. However, it also allows us to analyse two other aspects: the multiple contracts rules, given that the claims were brought under different contracts, and the compatibility among the arbitration agreements since it can be considered that the claims were also raised under different agreements.

In the present case, CLAIMANT requests the Tribunal to include the additional claim in line with Art. 23(4) ICC Rules in the present proceedings. On the other hand, RESPONDENT claims that the additional claim should be rejected since the requirements set forth by the Parties in the Terms of Reference are not met.

In this sense, the addition of new claims that are brought under multiple contracts and multiple arbitration agreements will be analysed accordingly.

A. New Claims

CLAIMANT submitted a new claim after the Terms of Reference were signed between the Parties and approved by the Court. Therefore, the Arbitral Tribunal's main question is whether this new claim should be admitted in the current proceedings.

In this section, new claims as a concept will be analysed, as well as the requirements that should be complied with for the addition of new claims to be granted and the respective positions of CLAIMANT and RESPONDENT.

1. New claims as a concept

Art. 23(4) ICC Rules establishes that "*after the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances*".

The article indicates no party shall make "*new claims*". However, questions often arise as to what constitutes a "*new claim*" under Art. 23(4) ICC Rules. A change in argument is not usually considered a new claim by the ICC Arbitral Tribunals. The Parties are allowed to make new legal arguments to support their claims or to change their legal qualifications[7]. Usually, a new claim implies that the relief requested is based on an entirely new ground. However, that new ground needs to be more than a mere correction or adjustment to the language of an existing request for relief[8]. Therefore, it has been suggested that a new claim under Art. 23(4) ICC Rules requires a party to present an additional cause of action, which leads to its own distinct and independent claim, separate from the original claim based on the initial cause of action[9].

Art. 23(4) ICC Rules also specifies that the new claims that should not be made are the ones that "*fall outside the limits of the Terms of Reference".* This is explained by the fact that the Terms of Reference's purpose is to define the scope of the dispute and contain the parties' claims which the Arbitral Tribunal is required to decide[10]. A claim that does change or add to the key aspects outlined in the Terms of Reference by the Parties, will not be considered a claim that falls outside the limits of the Terms of Reference[11]. The new claims need to deal with quite different matters from the ones outlined in the Terms of Reference.

In the final part of the article, an exception is made for cases in which the Arbitral Tribunal authorizes the new claims. However, it has not always been like that. Art. 23(4) ICC Rules has been modified over the years. Early versions of the ICC Rules required the consent of both parties to submit a new claim after the approval of the Terms of Reference, as a reflection of the initial function of the Terms of Reference. In the 1988 ICC Rules, Art. 16 established that "*The parties may make new claims or counter-claims before the arbitrator on condition that these remain within the limits fixed by the Terms of Reference provided for in Art. 13 or that they are specified in a rider to that document, signed by*

---

[7] SMAHI, Nadia and BRUEGGEMANN, Romana, *New Claims and Amended Claims in International Arbitration – Finding Landmarks in Navigating the Tribunal's Discretion*, 2022, p. 50.

[8] FRY, Jason, GREENBERG, Simon and MAZZA, Francesca, *The Secretariat's Guide to ICC Arbitration, a practical commentary on the 2012 ICC rules of arbitration from the secretariat of the ICC International Court of Arbitration,* 2012, para. 3-897.

[9] MEIER, Andrea, *Arbitration in Switzerland: The Practitioner's Guide (Second Edition),* 2017, para. 2334.

[10] VERBIST, Herman and SCHÄFER, Erik, *ICC Arbitration in Practice, 2nd Edition*, 2015, p. 75, para. 133.

[11] Jason Fry, Simon Greenberg and Francesca Mazza, *op. cit,* 2012, para. 3-897-902.

the parties and communicated to the Court"[12]. In the subsequent ICC Rules, Art. 23(4) replaced the previous rigid provisions, to allow greater flexibility, dismissing the agreement of both parties on the addition. Therefore, the previous function of the Terms of Reference has been abandoned showing a clear intention to simplify the application of this article because it was considered that there are cases in which it should be allowed to add a new claim, regardless of the other party's authorization.

Nowadays, the Rules leave much to the Arbitral Tribunal's discretion and allow for more flexibility than was possible under the previous versions of the Rules.[13] In addition to the "nature" of the claims and the "stage of the arbitration", the Arbitral Tribunal may also consider "other relevant circumstances" when deciding on the admissibility of new claims. Thus, the Arbitral Tribunal has both the power to decide on the admission of new claims and broad discretion to do so, since the provision arms the Arbitral Tribunal with sufficient flexibility to permit new claims where appropriate[14].

2. Requirements outlined in Art. 23(4) ICC Rules for the addition of new claims

As stated above, it is up to the Arbitral Tribunal to determine whether the requirements for the new claim to be granted are met.

First, the Tribunal considers the nature of such new claims. This means that the Tribunal will verify if there is a factual relationship between the new claims and the ones contained in the Terms of Reference[15]. The Arbitral Tribunal may accept the addition of new claims when they fit into the proceedings and relate to the dispute at hand *(e.g.* because it relates to similar questions of fact and law)[16]. Otherwise, if the new claims deal with different matters from those mentioned in the Terms of Reference and are unrelated to the initial RfA, they will probably not be accepted because it requires the proceedings to take a significantly different direction[17].

Art. 23(4) ICC Rules also mentions that the Tribunal should consider the stage of the proceedings reached before authorizing such new claims. This means that the Tribunal's

[12] BORN, Gary B.*, International Commercial Arbitration (Third Edition)*, para. 15.08(S).

[13] Herman Verbist and Erik Schäfer, *op. cit,* 2015, p. 76, para. 135.

[14] Jason Fry, Simon Greenberg and Francesca Mazza, *op. cit*, 2012, para. 3-890.

[15] Herman Verbist and Erik Schäfer, *op. cit,* 2015, p. 76, para. 133-134.

[16] Jason Fry, Simon Greenberg and Francesca Mazza, *op. cit,* 2012§ para. 3-904.

[17] Herman Verbist and Erik Schäfer, *op. cit,* 2015, p. 76, para. 134.

decision could differ depending on whether the claim is filed just before the proceedings are concluded or shortly after the Terms of Reference are signed[18]. The further the stage of the proceedings, the more difficult it will be for a Tribunal to admit new claims.

According to Art. 22(1) ICC Rules, the Arbitral Tribunal is committed to fostering expeditious and cost-effective Arbitral proceedings. Therefore, the addition of the new claims will only be granted, if it does not require the proceedings to take a significantly different direction, nor does it disrupt the natural course of resolving the dispute. A new claim introduced late in the arbitration process may cause unreasonable delays and increased costs[19]. The opposing Party must be allowed to respond to the new claim, which may require a fresh round of submissions and evidence addressing those new facts. Therefore, the Tribunal must consider whether the potential delay in the arbitration is justified and why the claims were submitted late. A Party may be acting in bad faith and introducing new claims just to slow down the proceedings and delay the moment at which the award is rendered. Therefore, the Party's motivation to submit a new claim must be legitimate[20]. However, the late submission of new claims is not always a dilatory tactic by one of the parties. There are cases where the Party simply did not have the opportunity to submit the claim earlier in the proceedings because the case evolved, and new information came to light[21].

Another circumstance that the Tribunal considers is the risk of conflicting awards. If the Arbitral Tribunal refuses to authorize the new claims, separate Arbitral proceedings will have to commence. Therefore, there is a risk that the new Arbitral Tribunal, which may be composed differently, will render a different decision from the initial Tribunal and this could lead to two contradictory awards. The Tribunal needs to consider this risk when presented with new claims during the proceedings and balance it against the need for a prompt decision on the claims outlined in the Terms of Reference[22].

[18] Herman Verbist and Erik Schäfer, *op. cit,* 2015, p. 76, para. 134.

[19] Jason Fry, Simon Greenberg and Francesca Mazza *op. cit,* 2012, para. 3-906.

[20] Nadia Smahi and Romana Brueggemann, *op. cit,* 2022, p. 52.

[21] Herman Verbist and Erik Schäfer, *op. cit,* 2015, p. 76, para. 134.

[22] *Ibid,* p. 76, para. 134.

a. CLAIMANT's position

CLAIMANT's position is that the Arbitral Tribunal must decide the claim on the present arbitration since the requirements for authorising new claims under Art. 23(4) ICC Rules are fulfilled.

The first argument CLAIMANT addresses is that the Arbitral Tribunal has the power to decide on the admission of new claims and broad discretion to do so. It supports this argument by stating that the wording chosen in Art. 23(4) ICC Rules grants the Arbitral Tribunal broad discretion when deciding on the admissibility of new claims since the Tribunal decides which circumstances are relevant in the case, other than the ones given as examples in the provision.

Secondly, CLAIMANT analyses the requirements outlined in Art. 23(4) ICC Rules for the authorization to be granted.

Regarding the nature of the claims, CLAIMANT argues that the new claim is connected to the previous one given that they both arise from the same FA that governs the Parties' relationship. It is also CLAIMANT's argument, that there is a relationship between the first claim and the new one since they both relate to the same legal dispute arising from the purchase and supply of sensors and they were made due to payment problems in the commercial relationship between the Parties.

Regarding the stage of the proceedings, CLAIMANT argues that they are in an early stage which means that the new claim does not jeopardise the course of the proceedings, especially since there have been no written submissions yet. On this point, CLAIMANT mentions ICC Case No. 21574[23], where the Tribunal considered that Claimant was left with limited ability to submit their defences to the new claims, given that the new claims were only filled by Respondent when submitting its Memorial of Reply. Therefore, CLAIMANT requested the Tribunal to decide otherwise in this case since CLAIMANT submitted its request before the written submissions, which gave RESPONDENT the possibility to submit its defence.

[23] ICC Case No. 21574, *Premium Petroleum Services Corp. v. Superior Energy Services Colombia, S.A.S. & Superior Energy Services, Inc. v. Victor Augusto Palacio Gaitán & María Eugenia Hernández Rojas*, ICC Case No. 21574/RD/MK, Final Award, 19 July 2018

CLAIMANT also requires the Tribunal to consider that CLAIMANT had no opportunity to make the claim earlier since the case evolved during the proceedings, and the information about the lack of payment was unknown when the Terms of Reference were signed.

Lastly, CLAIMANT points out that deciding on the new claim in the arbitration would be much more efficient than separating the two claims since this would require a new RfA that takes more time and more costs.

b. RESPONDENT's position

On the other hand, RESPONDENT's position is that the Arbitral Tribunal should not authorize the new claims since the requirements outlined in Art. 23(4) ICC Rules are not met.

Contrary to CLAIMANT's argument, RESPONDENT argues that the first requirement is not met because the claims arise from different arbitration agreements and do not relate to the same dispute. RESPONDENT states that the original claim is made under the AA included in PO No. 9601, while the new claim is made under the one included in PO No. A 15604. Moreover, it states that the original claim derives from RESPONDENT´s payment to the account specified in an email compromised by the cyberattack while the new claim is based on the non-compliance of the L1 Sensors with the contractual requirements and the consequent withholding of payment by RESPONDENT. Lastly, RESPONDENT points out that Arbitral Tribunals often refuse new claims if they diverge from the issues outlined in the Terms of Reference and lack a connection to the original claim. Therefore, RESPONDENT's argument is that the same rationale shall be applied to the present case, given the distinctive nature of the claims at hand.

Regarding the stage of the proceedings, RESPONDENT admits that they are in an early stage but requests the Tribunal to ascertain why CLAIMANT did not include the claim in its RfA. In RESPONDENT's view, it was CLAIMANT's lack of diligence that led to the situation only being discovered later. RESPODENT points out that CLAIMANT assumed that the cyberattack had minor relevance, neglecting to conduct a thorough security check, resulting in a month-long shutdown of CLAIMANT´s IT operations. RESPONDENT's argument is that if CLAIMANT had treated the cyberattack with due importance from the start, it would have discovered the cyberattack much earlier. Therefore, RESPODENT states that the reasons invoked by CLAIMANT do not

sufficiently justify the delay in presenting the new claim and that CLAIMANT cannot take advantage of its own lack of due diligence by submitting a new claim and should have done so at the RfA.

It also points out that the addition of the new claim requires the proceedings to take a significantly different direction and disrupts the natural course of the dispute given that the new claim is based on entirely new facts and on a different dispute that is not related to the cyberattack. Therefore, the inclusion of the new claim would also be inefficient in terms of costs and time.

B. Multiple Contracts

CLAIMANT did not only submit a new claim after the Terms of Reference were signed but the new claim was also brought under a different contract, which means that the Arbitral Tribunal will have due regard to Art. 9 and 6(4), subparagraph (ii) of the ICC Rules besides the requirements of Art. 23(4) ICC Rules.

In this section, the concept of multiple contracts in arbitration will be analysed, as well as the requirements that should be complied with in this type of situation.

1. Multiple contracts in arbitration

International Arbitral proceedings may involve multiple parties as well as multiple contracts.

Multi-contract claims typically arise where there are groups of contracts that are connected to a single economic transaction. A common scenario involves a framework agreement accompanied by sub-agreements that regulate particular aspects of the project. Often, the framework agreement includes an arbitration clause to which all other contracts explicitly or implicitly refer[24].

Art. 9 ICC Rules is an entirely new provision that stipulates a new principle regarding multi-contract arbitration, which confirms a practice that had developed in the past and was adopted by the Court under the 1998 Rules, which granted the possibility of multi-contract Arbitral proceedings, subject to certain limitations[25].

This article confirms that claims may be brought under different contracts and different arbitration agreements in the same arbitration and applies to all claims, irrespective of the

[24] Andrea Meier, *op. cit,* 2017*,* para. 2223.

[25] Jason Fry, Simon Greenberg and Francesca Mazza, *op. cit,* 2012, para. 3-340.

number of the parties. It states that "*subject to the provisions of Articles 6(3)-6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules*".

The limits of Arts. 6(3)-6(4) ICC Rules are essential to the operation of Art. 9 ICC Rules because it guarantees that the article is not used as a jurisdictional or contractual basis for hearing together in a single arbitration, claims made under more than one arbitration agreement where there is no consent[26].

The reference to Art. 23(4) ICC Rules means that although it is possible for claims arising out of or in connection with different contracts to be submitted in the same arbitration if those claims are new, they must always comply with the requirements of Art. 23(4), already explained above.

Therefore, provided that those limits are met along with the ones settled in Arts. 6(3)-6(7), the claims can be heard in one arbitration, saving the claimant from having to commence two separate arbitrations.

When claims pursuant to Art. 9 ICC Rules are made under more than one arbitration agreement, Art. 6(4)(ii) ICC Rules establishes that those claims can be made in a single arbitration if the Court is '*prima facie*' satisfied that two conditions are fulfilled. The first condition concerns the compatibility of the arbitration agreements, while the second requires that all parties to the arbitration have agreed that those claims can be determined together in a single arbitration.

Regarding the first requirement, on the compatibility of the arbitration agreements, in the ICC framework, the Secretariat verifies whether all the agreements connect with a single transaction or project and if the dispute resolution provisions align. Additionally, it also assesses whether the agreements all involve the same Parties in the arbitration[27].

Incompatibilities may arise from arbitration clauses with different rules regarding the constitution of the Arbitral Tribunal, the seat of the arbitration, languages, time limits, or

[26] *Ibid*, para. 3-343.

[27] Gary B. Born, *op. cit,* 2021, para. 18.03.

other procedural aspects[28]. It is also considered if one contract contains provisions for ICC arbitration and the other national jurisdiction[29].

Regarding the requirement of the agreement, the wording of the article indicates that an explicit agreement is not required. All that is required is that the Parties may have agreed on including the claims in a single arbitration. When an explicit agreement does not exist, the Tribunal must look at the circumstances of the case to understand the intention of the Parties and whether they could have agreed to include those claims in the same arbitration.

a. CLAIMANT's position

CLAIMANT starts by arguing that both claims are subjected to the same AA contained in the FA since the Parties wanted to conclude a broad agreement that applies to both PO No. 9601 and PO No. A-14604.

However, CLAIMANT makes a subsidiary argument in case the Tribunal considers that there are two arbitration agreements. CLAIMANT argues that even in that case, the requirements of Art. 6(4)(ii) ICC Rules are fulfilled, and the extension of the claim is still possible.

In CLAIMANT's view, the AA's in PO No. 9601 and PO No. A 14604 are compatible because they involve the same Parties and pertain to a singular project outlined in the FA, the supply of sensors. It also adds that both AA's in the present case contained provisions for ICC arbitration, selected the same place of Arbitration, and established the application of the CISG therefore the dispute resolution provisions are compatible. On that point, CLAIMANT requests the Arbitral Tribunal to consider ICC Case No. 22423[30] since that Tribunal also had to decide whether a single arbitration under Art. 9 ICC Rules was admissible. In that case, Claimant and Respondent entered into various supply contracts through 26 POs. The Tribunal considered that all the claims were based on common issues of fact and law, involved the same two Parties, under purchase orders concluded through the same regulated bidding process, incorporating either of the same two Terms and Conditions that include the same relevant articles on price and payment terms, under the same governing law. There, the Tribunal decided that a single arbitration was admissible since the arbitration agreements under the 26 Purchase Orders were compatible.

[28] Herman Verbist and Erik Schäfer, *op. cit,* 2015, p. 26, para. 60.

[29] Gary B. Born*, op. cit,* 2021, para. 18.03.

[30] ICC Case No. 22423, *Surpass Commercial Corp. Ltd. v. Bariven S.A.*, ICC Case No. 22423/FS, Final Award, 27 May 2019.

CLAIMANT's argument is that the same rationale applies to the case at hand because the claims also involve the same two Parties, under POs concluded through the same approach and provisions including the same relevant articles, under the same governing law. Therefore, in CLAIMANT's view, the Tribunal should decide in the same way and conclude that the first requirement on the compatibility of the arbitration agreements has been verified.

Regarding the second requirement of Art. 6(4)(ii) ICC Rules, CLAIMANT's position is that as the wording of the article indicates, an explicit agreement is not required. All that is required is that the Parties may have agreed on including the claims in a single arbitration. Since there was no explicit agreement in the case, CLAIMANT requested the Tribunal to look to the circumstances of the case to understand the intention of the Parties and whether they could have agreed to include those claims in the same arbitration. On this point, CLAIMANT requests the Tribunal to consider again ICC Case No. 22423 because that Tribunal also settled that the circumstances of "*the 26 Purchase Order did not only mean that the arbitration agreements were compatible, but also that the Parties clearly intended that disputes arising thereunder should be determined together in a single arbitration*". Therefore, CLAIMANT's argument is that the Tribunal should consider that the Parties intended that both claims were made under the same arbitration given that the circumstances of the POs in the ICC Case mentioned are similar to the ones in the case at hand.

b. RESPONDENT's position

Contrary to CLAIMANT, RESPONDENT's argument is that the claims are made under two different arbitration agreements and the requirements of Art. 6(4)(ii) ICC Rules are not complied with.

Regarding the requirement of compatibility among the arbitration agreements, RESPONDENT argues that the arbitration agreements contain different dispositions regarding the composition of the Arbitral Tribunal and the applicability of the Rules on Emergency which makes them incompatible. On that point, RESPONDENT invites the Tribunal to reconsider ICC Case No. 22423[31] because that Tribunal also had to decide whether a single arbitration under Art. 9 ICC Rules was admissible. The Claimant and Respondent of the mentioned case entered into various supply contracts through 26 POs

[31] ICC Case No. 22423, *Surpass Commercial Corp. Ltd. v. Bariven S.A.*, ICC Case No. 22423/FS, Final Award, 27 May 2019.

and RESPONDENT pointed out that one of the reasons that led the Tribunal to consider that the POs were compatible under Art. 6(4)(ii) ICC Rules was that the provisions in the arbitration agreements were identical. It also adds that the claims in the mentioned case involved common issues of fact and law, which was also not the case at hand. Therefore, RESPONDENT requests the Tribunal to decide otherwise in the present case since the arbitration agreements were not identical and the claims related to completely different facts.

RESPONDENT also bases its argument on the party autonomy principle that allows the parties to arrange their AA freely with minimum control, arguing that the Court must respect and follow the parties' intentions as expressed in the arbitration agreements when deciding on compatibility. Therefore, in RESPONDENT's view, that intention was to individualize each AA with different provisions, which must be respected.

Lastly, regarding the second requirement, RESPONDENT claims that there was no express consent of the parties to have a single arbitration and no implicit consent can be inferred either because the Parties concluded different arbitration agreements for each PO, which proves their intention to have separate arbitrations.

Substantive Issues

Issue C1: Is CLAIMANT entitled to payment of either the full amount or parts of the amount due as payment under Purchase Order No. 9601?

Carolina Gonçalves

The first substantive issue raised by the Arbitral Tribunal concerns whether RESPONDENT performed its payment obligation and, correspondingly, if CLAIMANT is entitled to payment or the repetition of the payment due, either in full or in a mitigated amount, under PO No. 9601.

This issue can be divided into two main parts: 1) the performance of the obligation of payment, in which it will be addressed whether the email received by RESPONDENT validly amended the FA entered into by the Parties, and consequently, if the payment made to the new bank account relieved RESPONDENT from its payment obligation and 2) the mitigation of damages, in which it will be discussed if, should the Tribunal find that the RESPONDENT needs to make a repeat payment, the amount due under PO No. 9601 should be mitigated.

On these matters, CLAIMANT claims that it is entitled to the payment of the price in the full amount since RESPONDENT failed to perform its payment obligation under the FA and PO No. 9601, as the FA was not validly amended. Additionally, CLAIMANT contends that, in any case, RESPONDENT cannot rely on Art. 77 CISG to mitigate its obligation to pay.

RESPONDENT, on the other hand, argues that CLAIMANT is not entitled to the payment in full under PO No. 9601 since RESPONDENT fulfilled its payment obligation in full as the FA was validly amended and the RESPONDENT transferred the funds the the amended place of payment. Furthermore RESPONDENT claims the right to rely on Art. 77 CISG to obtain proportional payment.

In this context, this section will analyse the performance of the payment obligation, the modification of a contract under Art. 29 CISG, and the principle of mitigation of Art. 77 CISG, as well as the position and arguments presented by the Parties.

A. The performance of the payment obligation

This year's Problem does not raise any questions regarding the applicability of the CISG to the dispute held between the Parties. In fact, it is recognized by RESPONDENT that the CISG applies to the Parties' obligations[32].

In this sense, considering that the Parties did not consider different laws applicable to their dispute, the main question before the Arbitral Tribunal is to determine whether RESPONDENT fulfilled its payment obligation under PO No 9601, as the non-fulfilment of such obligation dictates the payment of the amount due to CLAIMANT, shaping the outcome of the dispute.

As a result, this subsection will delve into the amendment of the payment terms under Art. 29 CISG, alongside analysing the obligation to pay the price under Arts. 53 and 54 CISG, as well as the position of the Parties.

1. The amendment of the payment terms under Art. 29 CISG

Art. 29 CISG governs the amendment and termination of the contracts concluded between parties. However, while paragraph 1 of the provision sets out the general rule, by establishing that the mere agreement of the parties is sufficient for the modification and termination of the contract, paragraph 2 applies when there is a clause requiring written form for such modification[33].

Paragraph two of Art. 29 CISG establishes a "no oral modification" clause, according to which if a contract contains a provision requiring that the modification or termination complies with a form requirement, the parties cannot modify or terminate the contract in a different form[34]. Moreover, and to prevent the abuse of rights of the "on oral modification" clause, the provision also provides, in its second sentence, that a party "may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct"[35].

When analysing situations in which a party may be precluded from relying on the form requirement established by the parties in the contract they entered into, in accordance

[32] The Problem, p. 30, para. 1.

[33] VISCASILLAS, Pilar Perales, *Modification and Termination of the Contract (Art. 29 CISG)* in Journal Of Law And Commerce, Vol 25:167, 2005-2006, pp. 169-170.

[34] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 2016 Edition, p. 143, para. 7.

[35] CISG, Art. 29(2).

with the legal provision set out in the second sentence of Art. 29(2) of the CISG, it is crucial to examine the requirements outlined therein. According to Christoph Brunner and Domenic Oliver Brand, this provision has two prerequisites[36]:

1. Firstly, there must be a reliance-inducing conduct by one of the parties, which must have generated trust in the opposing party that it would accept a modification or termination of the contract, which does not meet the form requirements stipulated in the contract's provision.
2. Secondly, the opposing party must have acted in reliance of the reliance-inducing conduct in a justifiable manner.

2. The obligation to pay the price

The CISG, in Arts. 30 and 53, outlines the obligations of the parties in a contract for the sale of goods: while the seller must deliver the goods, the buyer must pay the price for the goods and take delivery of them.

However, when it comes to the buyer's obligation to pay the price, Art. 54 CISG establishes that the buyer's obligation to pay the price for the goods also includes taking any necessary steps and fulfilling all agreed formalities to ensure that the payment is effectively made[37].

a. CLAIMANT's position

CLAIMANT's stance regarding RESPONDENT's non-performance of its payment obligation, and CLAIMANT's subsequent entitlement to the amount due as payment under PO No. 9601 is based on two main arguments: 1) The place of payment stipulated in the FA was not validly amended and 2) RESPONDENT's failure to pay for the agree-upon for the sensors.

Concerning the first argument, CLAIMANT contends that since the alleged amendment to the place of payment was made without adhering to the formal requirements outlined in Art. 40 FA, the amendment was not valid.

---

[36] Christoph Brunner and Oliver Brand. "Article 29 [Modification of Contract; Writing Requirement]" in BRUNNER, Christoph, GOTTLIEB, Benjamin eds., *Commentary on the UN Sales Law (CISG)*, 2019, pp. pp. 195-196.

[37] GABRIEL, Henry Deep, *The Buyer's Performance Under The CISG: Articles 53-60 Trends In The Decisions* in Journal of Law and Commerce, Vol. 25:273, 2005-2006, p. 274.

According to Art. 40 FA, no amendment or waiver of the FA shall be valid unless it is in writing and signed by the Parties[38]. Thus, the Parties established a non-oral modification clause to govern any future amendments.

In this context, Art. 29(2) CISG is applicable to the dispute as it addresses situations where parties have agreed in writing that an amendment to the contract is subject to a form requirement and, in the present case, in Art 40 FA, CLAIMANT and RESPONDENT stipulated that amendments had to follow form requirements.

On this matter, and in anticipation of RESPONDENT's argument, CLAIMANT also evidences that the prerequisites for Art. 29(2) second sentence CISG, which preclude a party from invoking the non-oral modification clause, are also fulfilled. CLAIMANT did not engage in a reliance-inducing conduct since the email requesting the transfer of the amount due under PO No. 9601 to a different bank account was not sent by CLAIMANT, hence the conduct was not to be attributed to it. Additionally, the Parties never adopted an informal or pragmatic approach to the form requirement when it came to amending the banking details. In prior instances, when the Parties decided to change banking details, it was by a "signed side letter"[39], thus complying with the formal requirements set forth in Art. 40 FA.

Since CLAIMANT did engage in a reliance-inducing conduct, RESPONDENT could not have acted in reliance of such conduct, thereby failing to meet the requirements of the second sentence of Art. 29(2) CISG.

Consequently, CLAIMANT asserts that the formalities established by the Parties must be upheld as the FA was not validly amended.

Regarding the second argument, CLAIMANT argues that RESPONDENT did not pay the price agreed upon for the sensors, pursuant to Art. 53 and 54 CISG, as the funds were not placed at CLAIMANT's disposal[40]. In this sense, CLAIMANT demonstrates that the Parties, in Art. 7 FA, had specified the dates and bank accounts for payment[41], thereby establishing formalities in line with Art. 54 CISG.

---

[38] The Problem, p. 11, para. 40.

[39] The Problem, p. 63, para. 12.

[40] CISG Case No. 207, Automatic diffractometer case, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (MKAC), 17 October 1995.

[41] The Problem, p. 10, para. 7.

Considering that the funds never reached CLAIMANT's designated bank accounts, RESPONDENT did not comply with the formalities outlined in Art. 7 FA and, consequently, did not fulfil its payment obligation.

Therefore, CLAIMANT is entitled to exercise its right to be paid by RESPONDENT under Art. 62 CISG, as it has not resorted to inconsistent remedies[42], thus complying with the requirements of Art. 29 CISG.

b. RESPONDENT's position

It is RESPONDENT's contention that CLAIMANT is not entitled to the repetition of the payment in full under PO No. 9601 as the FA was validly amended by the Parties in accordance with Art. 29(2) CISG and, consequently, the payment to the amended bank account released the RESPONDENT of its payment obligation.

With regard to the argument that the FA was validly amended by the Parties, initially, in the written memorandum, we argued that the requirements set forth in Art. 40 FA were met. However, during the oral phase of the Vis Moot, we realized that this position was not easily defensible, as it was challenging to argue that all requirements were present.

Although the written form requirement is satisfied by the email received, pursuant to Art. 13 CISG[43], the requirement for the signature of both Parties posed a significant challenge due to the lack of a legal basis. In this sense, it was decided that the defense of the RESPONDENT's position should focus solely on Art. 29(2) second sentence CISG.

Accordingly, RESPONDENT argues that the requirements of Art. 29(2) second sentence CISG are met since CLAIMANT engaged in conduct that induced reliance, and RESPONDENT reasonably relied on this conduct when transferring the funds concerning PO No. 9601 to the amended bank account.

Regarding CLAIMANT's reliance-inducing conduct, RESPONDENT points out CLAIMANT did not raise a complaint about the non-receipt of the payment under PO No. 9601 until September[44]. Until then, CLAIMANT continued to perform the FA. Furthermore, throughout the Parties' long-lasting business relationship, amendments to

[42] UNCITRAL, Digest of Case Law, *op. cit*., p. 287, para. 5.

[43] CISG Case No. 2749, Ideal Bike Corp. v. IMPEXO spol. s r.o., Supreme Court of the Czech Republic (Nejvyšší soud České republiky), 17 December 2013.

[44] The Problem, p. 14.

the FA were treated pragmatically and informally, without complying with the formal requirements set in Art. 40 FA.

Moreover, although not mentioned in the written memorandum for RESPONDENT, we agreed that in RESPONDENT's defence, RESPONDENT argues that the received email is attributable to CLAIMANT, as the acts of an employee are attributable to the employer[45]. In the present case, Ms. Audi, CLAIMANT's Account Manager responsible for Respondent´s account, was the entryway for the cyber criminals. If it was not for her actions and her disregard for her company's cybersecurity guidelines, the cybercriminals would not have gathered the detailed information that was used in the email received by the RESPONDENT on the 28th of March[46]. Consequently, since the purported Ms. Audi's email and the subsequent correspondence are causally linked to Ms. Audi's misconduct as CLAIMANT's employee, the received email is attributable to CLAIMANT.

Furthermore, RESPONDENT reasonably relied on CLAIMANT's conduct when transferring the funds to the account mentioned in the email, as the content of the email was plausible, containing precise pieces of information known only to the Parties and the changes and typos were subtle. Additionally, to confirm the request present in the email was real, two attempts to contact Ms. Audi were made by RESPONDENT[47]. Consequently, a reasonable person – in accordance with the reasonable person standard of Art. 8 CISG – in the position of RESPONDENT would have believe this email to be sent by CLAIMANT and paid to a new bank account.

Therefore, as the preconditions of Art. 29(2) second sentence CISG are fulfilled, the FA was validly amended, and the RESPONDENT by paying to the amended bank account, complied with the formalities of the FA and performed in full its payment obligation, in accordance with Arts. 53 and 54 CISG.

B. The mitigation of the payment of the price

The obligation to mitigate the loss resultant from a breach of contract emerges from RESPONDENT's assertion that, should RESPONDENT be required to make a repeat

[45] Ingeborg Schwenzer. "Part III Sale of Goods, Ch.V Provisions Common to the Obligations of the Seller and of the Buyer, IV. Exemptions, Article 79" in SCHLECHTRIEM, Peter, SCHWENZER, Ingeborg eds., *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, 4th Edition, 2016, p. 1138

[46] The Problem, p. 61, para. 5 and The Problem, p. 64, para. 25.

[47] The Problem, p. 31, para. 6.

payment, its payment obligation should be reduced in accordance with the mitigation principle underlying Art. 77 CISG, considering CLAIMANT's behaviour.

The Arbitral Tribunal's must determine whether RESPONDENT can invoke Art. 77 and its underlying principles to reduce its payment obligation, given Claimant's behaviour.

In this subsection, Art. 77 CISG, its applicability and the position of both Parties will be analysed.

1. Article 77 CISG

According to Art. 77 CISG, the aggrieved party seeking to claim damages is obligated to take reasonable measures to mitigate losses. If the aggrieved party fails to do so, the party in breach may claim a reduction in damages equal to the amount by which the loss should have been mitigated[48].

Taking into consideration the Parties' contractual equilibrium[49], the CISG in Art. 77 sets forth a principle of mitigating loss. This principle aims to prevent and discourage the aggrieved party from remaining inactive and passively waiting for a loss to occur, when such loss could have been avoided or at least mitigated[50].

To analyse the applicability of Art. 77 CISG to a particular situation, two main criteria must be considered: 1) the scope of application of Art. 77 and 2) the extent of the duty to mitigate damages.

Regarding the scope of application of Art. 77 CISG, the wording of the provision, systematic position, and drafting history of Art. 77 suggest that the duty to mitigate damages applies solely to claims for damages, however, there is a division among scholars regarding such scope[51].

As to the extent of the duty to mitigate damages, Art. 77 CISG requires the aggrieved party to take measures that are "reasonable in the circumstances"[52]. To determine what

---

[48] CISG, Art. 77.

[49] KRÖLL, Stefan, MISTELIS, Loukas, VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): a Commentary*, 2nd edition (2018), p.1016.

[50] SAIDOV, Djakhongir, *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, para. 4.

[51] Ingeborg Schwenzer. "Part III, Sale of Goods, Ch. V, Provisions Common to the Obligations of the Seller and of the Buyer, S. II, Article 77" in SCHLECHTRIEM, Peter, SCHWENZER, Ingeborg eds., *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, 4th Edition, 2016, pp. 1105-1106.

[52] CISG, Art. 77.

constitutes a reasonable measure to reduce losses, one should consider what would have been expected from a reasonable person of the same kind and under the same circumstances as the party who suffered the losses, taking into account usages and practices, between the parties as well as international trade usages[53]. Consequently, the mitigation of damages should not impose unreasonable costs on the parties[54].

a. CLAIMANT's position

CLAIMANT's contention that there is no place for mitigation of the payment of the price under PO No. 9601 as RESPONDENT cannot rely on Art. 77 CISG to mitigate its payment obligation is twofolded: 1) Art. 77 CISG exclusively governs situations concerning compensatory damages and 2) in any case, RESPONDENT is not entitled to a reduction of the amount due as payment under PO No. 9601.

Firstly, CLAIMANT asserts that the duty to mitigate damages enshrined in Art. 77 CISG applies exclusively to claims for compensatory damages, excluding a direct application of Art. 77 to other remedies.

For such, CLAIMANT evidences various reasons scholars advance to support this argument: from the systematic position of Art 77 in a section dedicated to damages, to the wording of the provision and the drafting history of the article.[55]

Considering that CLAIMANT is requesting specific performance in the current proceedings, this request falls outside the scope of application of Art. 77 CISG, as it does not constitute a claim for damages.

Secondly, RESPONDENT could never be entitled to a reduction in damages since a) CLAIMANT was unaware of the impending breach of the FA and b) RESPONDENT forfeited any potential right of mitigation of damages because CLAIMANT took reasonable measures to mitigate losses, and imposing additional measures would result in unreasonable costs and effort.

---

[53] Petra Butler. "Damages Principles under the Convention on Contracts for International Sale of Goods" in TRENOR, John A., *The Guide to Damages in international arbitration*, 2020, p.72.

[54] OVIEDO-ALBÁN, Jorge, *Mitigation of Damages for Breach of Contract for the International Sale of Goods* in: Vniversitas, 2018, no. 137, July-December, p.7; CISG Case No. 224, Propane gas case, Austrian Supreme Court (Oberster Gerichtshof), 6 February 1996.

[55] Victor Knapp. "Comments on Article 77" in BIANCA, Cesare Massimo, BONELL, Michael Joachim eds., *Bianca-Bonell Commentary on the International Sales Law*, 1987; and VISCASILLAS, Pilar Perales, *El Contrato de Compraventa Internacional de Mercancías (Convención de Viena de 1980)*, 2001.

The duty to mitigate arises when there is a positive knowledge of an already occurred or imminent and impending loss[56], and it is limited to reasonably foreseeable losses[57].

Considering that, CLAIMANT became aware of RESPONDENT's failure to fulfil its payment obligations only on 25 August 2022[58], a full two months after both instalments regarding PO No. 9601 had been made to a bank account that was not specified or communicated by CLAIMANT, in the present case, RESPONDENT's breach of contract and resultant losses could not have been foreseen by CLAIMANT.

Furthermore, CLAIMANT argues RESPONDENT could have easily avoided the loss by taking simple measures, such as contacting another employee of CLAIMANT who was not Ms. Audi, as directed by the voicemail. Thus, Art. 77 CISG is not applicable in the present case.

In any event, it is CLAIMANT stance that it took reasonable measures to mitigate the consequences of the cyberattack. In 2021, CLAIMANT strengthened its cybersecurity defence system by implementing additional firewalls and regular training of its employees[59], aiming to protect itself and its customers from cyberattacks. Moreover, after discovering that it had been a victim of a successful cyberattack, CLAIMANT hired CyberSec, Mediterraneo's leading cybersecurity firm, to perform an evaluation of the risks connected with the trojan horse, resulting in the categorization of the incident as of minor relevance and in the removal of the malware[60].

However, if these measures are not deemed reasonable, CLAIMANT evidences that other measures, such as the resale of goods as a common example of scholars as a reasonable measure, would impose unreasonable costs on CLAIMANT, exceeding the duty to mitigate damages. Therefore, it is CLAIMANT's position that it acted reasonably to mitigate the losses and that RESPONDENT cannot invoke Art. 77 CISG to reduce its payment obligation.

---

[56] CISG Case No. 2348, Clay Case, German Supreme Court (Bundesgerichtshof), 26 September 2012; CHENGWEI, Liu, *Perspectives from CISG, UNIDROIT Principles & PECL,* 2003, para. 14.5.1.

[57] CISG Case No. 6272, Diammonium phosphate case, Cairo Regional Centre for International Commercial Arbitration, 19 February 2023.

[58] The Problem, p. 6, para. 15

[59] The Problem, p. 17, para. 4.

[60] The Problem, p. 17, para. 6.

b. RESPONDENT's position

With regard to the mitigation of the payment of the price, RESPONDENT contends that if the Tribunal determines that it must make a repeated payment, such payment should be reduced in accordance with the mitigation principle underlying Art. 77 CISG as 1) the action for the purchase price falls under the scope of Art. 77 CISG and 2) no reasonable measures were taken by CLAIMANT to mitigate the losses.

With respect to the first argument, RESPONDENT relies on the recognition by scholars that the duty to mitigate losses applies[61] or has an indirect impact[62] on other remedies apart from damages but also on the fact that the duty to mitigate damages stems from the principle of good faith[63], which suggests that there should be no compensation for loss that could have been mitigated[64].

Therefore, if in an action for the purchase price, the aggrieved party could claim reimbursement for a loss that it could have reasonably avoided, the principle of good faith, enshrined in Art. 7(1) CISG would be breached[65]. Consequently, CLAIMANT's claim regarding specific performance of the payment obligation falls within the scope of application of Art. 77 CISG.

As for the second argument, Art. 77 upholds an obligation to take reasonable measures to mitigate the losses. Failing to do so, may preclude the the aggrieved party from recovering such losses[66].

In the present case, RESPONDENT claims that no reasonable measures were taken by CLAIMANT, as it adopted an inactive behaviour, by not informing RESPONDENT about

---

[61] Florian Mohs. "Ch.III Obligations of the Buyer, s.III Remedies for Breach of Contract" in SCHLECHTRIEM, Peter, SCHWENZER, Ingeborg eds., *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, 4th Edition, 2016, p. 1106.

[62] Peter Huber. "Vol. 4, United Nations Vienna Convention on Contracts for the International Sale of Goods (CISG), Part III, Chapter V, II, Art 77" in SÄCKER, Franz Jürgen, RIXECKER, Roland, OETKER, Hartmut, LIMPERG, Bettina eds., *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th edition, 2019, para. 3.

[63] CISG Case No. 4506, PVC foil case, Court of Appeal Naumburg (Oberlandesgericht Naumburg), 24 April 2019; Florian Mohs. *op. cit.*, pp. 1104

[64] RIZNIK, Peter, *Some Aspects Of Loss Mitigation In International Sale Of Goods*, 14 VJ 267 – 282, 2010, p. 269.

[65] Christoph Brunner and Friederike Schäfer. "Article 77 [Mitigation of Damages]" in BRUNNER, Christoph, GOTTLIEB, Benjamin eds., *Commentary on the UN Sales Law (CISG)*, 2019, pp. 545-546.

[66] Liu Chengwei, *op.cit.*, 14.5.

the cyberattack it suffered and not taking any preventive measures to mitigate the losses, contradicting the principles underlying Art. 77 CISG.

Moreover, the duty to mitigate losses and take reasonable measures applies even in cases of anticipatory breach of contract, in which there was only a "*prospective failure to perform*"[67] but where the loss is foreseeable. In this case, as soon as CLAIMANT became aware that it had been a victim of a cyberattack, it was foreseeable that the cybercriminal could access confidential information and use it for malicious purposes.

Consequently, if the Tribunal were to find that the RESPONDENT could not defend itself entirely, CLAIMANT's claims should be reduced in accordance with Art. 77 CISG due to CLAIMANT's failure to mitigate the losses by not informing RESPONDENT about the cyberattack.

In this sense, although not mentioned in the written memorandum for RESPONDENT, but agreed upon during the oral rounds, RESPONDENT argues that there should be a mitigation of at least 75% considering that with regard to the first instalment, CLAIMANT bears at least the same responsibility as RESPONDENT for not receiving the funds and for the second instalment, CLAIMANT bears full responsibility for the misdirected payment since on May 15, 2022 CLAIMANT realized that the cyberattack was more serious than anticipated[68] and the payment due date for the second instalment of PO No. 9601 was only on June 30, 2022[69], giving CLAIMANT more than enough time to inform RESPONDENT about the cyberattack and prevent the transfer of the second instalment.

[67] Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas, *op. cit.*, p.1017.

[68] The Problem, p. 17, para 10.

[69] The Problem, p. 13, para 6.

Issue C2: Can RESPONDENT invoke a violation of a contractual (information) duty or obligation or rely on a provision of the CISG to entirely or at least partially defend itself against the claim for payment?

Maria Inês Carapeta

The last substantive issue raised by the Arbitral Tribunal can be divided into two questions. With the first one addressed above, the final debatable topic is who, if any Party, caused the failure to perform, and under which provision – which is related to the obligations of the Parties and whether new obligations can arise in the CISG through the principle of good faith.

The CISG regulates the rights and obligations of the parties, covering most part of this aspect of contractual relationships. However, given that the CISG was drafted in the last century, and certain issues arise from the evolution of times and trade itself, the question remains of whether new obligations can be derived from the text of the Convention, or if there was an intent to be silent regarding obligations not contemplated.

On this matter, CLAIMANT is requesting the Tribunal to declare that it did not cause RESPONDENT's failure to perform by not informing about the cyberattack since the CISG does not enforce a duty to inform regarding this circumstance. RESPONDENT, in contrast, claims that had it known about the cyberattack, it would have not made the payments to the wrong bank account, and, therefore, the failure to perform was caused by CLAIMANT in the sense of Art. 80 CISG due to the breach of a duty to inform.

In this sense, good faith, the duty to inform, Art. 80 CISG and the stance of both Parties in the present issue will be analysed accordingly.

A. The existence of a duty to inform

The Arbitral Tribunal's main question is if CLAIMANT is bound by a duty to inform, as the existence of said duty determines the responsibility for the failure to perform. For that purpose, the principle from which such obligation can arise is the principle of good faith, and this principle, for its part, is also not explicit in the CISG or the FA. In this section, good faith as a concept will be analysed, as well as the existence of a general duty to act in good faith in the CISG. Then, Art. 7 CISG – the interpretative provision on which good faith is mentioned – and the subsidiary law will be addressed to assess if collateral obligations can derive from good faith provisions.

1. Good faith

The definition of good faith is the key element of this year's Problem, as the main question is whether collateral duties may arise from good faith. Moreover, one of the implicit questions is whether there is a duty to act in good faith in the CISG that CLAIMANT breached when it did not inform RESPONDENT about the cyberattack.

Good faith is mentioned in the CISG in Art. 7(1), which states that "*in the interpretation of this Convention, regard is to be had to its* ***international character*** *and to the* ***need to promote uniformity*** *in its application and the observance of* ***good faith*** *in international trade.*"[70] This Art. is probably the most important one[71] and clarifies that in matters not governed by the CISG, it must be interpreted according to three concepts, since national rules on sales differ in conception and approach[72]. The first two concepts are clear and unambiguous: the reference to the international character implies that the CISG must be interpreted autonomously from domestic laws[73], and the uniformity in application translates into the aim to develop a common interpretation of the CISG[74].

The concept of good faith and interpretation with regard to good faith is, however, dubious and the subject of much debate. Not only does its scope vary in Civil and Common Law systems, but also its function is widely discussed – some argue that good faith in the CISG is merely an interpretation mechanism, while others find it a contractual obligation.

Where most European civil codes contain some explicit provision to the effect that contracts must be performed and interpreted per the requirements of good faith, English law is opposed to such broad concepts[75]. In most Common Law jurisdictions, good faith

---

[70] CISG, Art. 7(1).

[71] FELEMEGAS, John, describes Art. 7 as "*probably the most important one since it not only stresses the character of the Convention and its all-important goal of uniform application, but it also describes the process (...) (to) ascertain the meaning and legal effect to be given to its individual articles.*" See FELEMEGAS, John, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), June of 2000, p. 100.

[72] UNCITRAL Digest of Case Law, *op.cit.*, p. 42, para. 2.

[73] Ingeborg Schwenzer. "Interpretation and Gap Filling under the CISG". SCHWENZER, Ingeborg, ATAMER, Yesim and BUTLER, Petra eds., *Current Issues of the CISG*, 2014 Edition, p. 110.

[74] Ingeborg Schwenzer and Pascal Hachem. "Part I, Sphere of Application and General Provisions, Ch. II, General Provisions, Article 7" in SCHLECHTRIEM, Peter, SCHWENZER, Ingeborg eds., *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, 4th Edition, 2016.

[75] MACQUEEN, Hector L., *Good Faith in the Scots Law of Contract; An Undisclosed Principle?*, Hart Publishing Oxford, 1999, p. 2.

plays a much minor role, as "*the traditional attitude within common law is to give the parties an absolute freedom to draft their contractual agreement*"[76].

Good faith in the CISG can be *"1) an aid to interpret the CISG itself; (...) 3) a direct, positive obligation imposed upon parties; (...) and 6) an independent source of rights and obligations which may contradict or extend the CISG*"[77] – which will be addressed.

i. Good faith as a duty and as a principle

Good faith can be seen as a duty that requires the parties to cooperate "*in carrying out the interlocking steps of an international sales transaction*"[78] and it may arise from Art. 7(1) CISG. It is argued that while the CISG does not contain an express maxim of good faith, the good faith principle, in addition to the parties' contractual relationship, applies to the interpretation of the individual contract[79].

While Art. 7(1) CISG is an interpretative mechanism, authors argue the mandate is primarily directed to the judiciary to interpret the CISG in good faith, and such interpretation covers the formation of the contract and the rights and obligations of the buyer and seller[80]. However, good faith can simultaneously be a general principle underlying the CISG. The placement of Art. 7 CISG at the head of all substantive sections and its wording evidence that good faith can also be one of three principles to guide in the interpretation of the CISG, and to be applied to specific instances[81].

This understanding follows the idea that from the principle of good faith, a duty to act in good faith can be drawn, with Art. 7 being referred to as its source[82], which has also been

---

[76] ALMUTAWA, Obaid Khalfan, *The Role of Good Faith in the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, University of Leicester, Faculty of Law, 2015, p. 42.

[77] SPAGNOLO, Lisa, *Opening Pandora's Box: Good faith and Precontractual Liability in the CISG*, in Temple International and Comparative Law Journal, 2008, p. 274.

[78] ZELLER, Bruno, *Good Faith: Is it a Contractual Obligation?* in Bond Law Review, Volume 15, Issue 2, 2003, p. 221.

[79] MAGNUS, Ulrich, *Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts* in Pace International Law Review Volume 10, Issue 1, 1998, p. 90.

[80] Bruno Zeller, *op. cit.*, p. 222;

[81] SHEEHY, Benedict, *Good Faith in the CISG: The Interpretation Problems of Article 7*, in Review of the Convention on Contracts for the International Sale of Goods (CISG), ed. by Pace International Law Review, University of Canberra, 2007, pp. 18-19. See also ICC Case No. 7331, ICC International Court of Arbitration, 1994, where the Tribunal identified and recognized good faith as a general principle of the CISG.

[82] ANDERSEN, Camilla Baasch, *Good Faith? Good Grief!*, in International Trade and Business Law Review 17, 2014, p. 310 and BRIDGE, Michael, *Good Faith, the Common Law, and the CISG* in Uniform Law Review 22, 2017, p. 98.

shared by courts and arbitral panels. An example is the Mushroom Case[83], where the Hungarian arbitral tribunal declared that Art. 7(1) CISG is not solely an interpretation mechanism, but a standard of behaviour for the parties.

In addition, in order to find a duty to act in good faith in the CISG, recourse to other bodies of law may also be necessary – such as the UNIDROIT Principles (hereinafter, "UPPIC"). Some commentators maintain that when the CISG lacks guidance, the interpreter may resort to the UPPIC[84] as its successor since they have "*been conceived in the same spirit and style, and in many cases by the same personnel, as the CISG*"[85]. Recently, in the Scafom v. Lorraine Case, the UPPIC were used by the Belgian Supreme Court to interpret the CISG, which considered that Art. 7 CISG must be uniformly applied, concerning the "*general principles which govern the law of international trade*"[86]. The court declared that the UPPIC provide for such principles, with the reasoning that, as the UPPIC provide for an explicit duty to act in good faith in its Art. 1.7[87], it can clarify the object of the good faith principle in the CISG[88].

Then, good faith, as well as an interpretative mechanism, is also viewed by several authors as a duty itself that the CISG provides for, even if not explicitly.

ii. Good faith as an interpretative mechanism

The common opposite perspective is that the CISG does not provide for a duty to act in good faith, and that its mention in Art. 7(1) serves merely interpretative purposes[89]. Then, "*(…) good faith in the CISG plays a limited role, both as a matter of the CISG's content and its application by courts. The CISG does not mandate that good faith be an implied term of agreement between parties governed by the CISG. A good faith principle may confirm an interpretation of a sales contract under the CISG or increase support for*

[83] Hungarian Chamber of Commerce and Industry Court of Arbitration, Case No. VB/94124, 17th November 1995, parties unknown.

[84] VENEZIANO, Anna, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to The Belgium Supreme Court*, in Uniform Law Review, 2010, p. 141.

[85] BRIDGE, Michael, "Chapter F: Role of Unidroit Principles", *The International Sale of Goods*, 5th Edition, 2023, para. 10.36.

[86] Hof van Cassatie van België/Cour de cassation de Belgique (Belgian Supreme Court), 19th June 2009.

[87] Art. 1.7 UPPIC reads: *"(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty.*"

[88] BONELL, Joachim M., *An International Restatement Of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3rd Edition, 2005, on Art. 7, para. 2.4.2.

[89] Ingeborg Schwenzer and Pascal Hachem, *op. cit.*, para. 17.

interpretations that are reached on other grounds. Good faith, however, does not impose obligations on the contracting parties unless their contract provides for good faith."[90]

This often leads to the counter-argument that according to this understanding, the parties can act in bad faith in their contracts. However, the reasoning and motivation behind it is not to allow parties to act in bad faith; rather, good faith does not require loyalty to the other party. As it was found in a case by the Supreme Court of Canada, "*the organizing principle of good faith is a standard that parties must perform their contractual duties honestly and reasonably (...). This principle of good faith is the notion that a contracting party should have regard to the (..) interests of their contracting partner and not seek to undermine those interests in bad faith. However, (...) it does not require loyalty to the other party or a duty to put their interests first.*"[91]

The very wording of Art. 7(1) CISG can demonstrate that the intent was not to apply to the contractual relationship of the parties and their conduct[92], as, read literally, it requires regard for good faith only in the interpretation of the CISG's provisions; not a duty to act in good faith on the Parties[93]. Moreover, according to this interpretation, recourse to the UPPIC to find a standard of good faith disregards the CISG's requirement to be interpreted autonomously, and, as the CISG was drafted fourteen years prior to the UPPIC, the drafters did not have this instrument in mind to interpret it[94]. Looking into the drafting history of the CISG, it also does not show an intent to enforce a duty to act in good faith. The delegates did not reach an agreement in this regard[95], which shows the nuclear but doubtful character of this concept.

Thus, good faith is a controversial concept and still debated. The next step is to understand if, regardless of being an interpretative mechanism or a duty itself, collateral obligations can derive from good faith in the CISG and the subsidiary law.

---

[90] WALT, Steven D., *Modest Role of Good Faith* in Boston University International Law Journal, Vol. 33:37, 2015, p. 41.

[91] Supreme Court of Canada, Case No. 35380, 13th November 2013, Harish Bhasin v. Larry Hrynew and Heritage Education Funds Inc..

[92] Ingeborg Schwenzer, *op. cit.*, p. 112.

[93] Steven D. Walt, *op. cit.*, pp. 41-42, Ingeborg Schwenzer and Pascal Hachem, *op. cit.*, Art. 7, para. 18, Art. 7(1), paras. 6, 16; ICC Award No. 8611, International Court of Arbitration, Arbitral Award No. 7402, 1992.

[94] *Ibid*.

[95] NEUMANN, Thomas, *The Duty to Cooperate in International Sales: The Scope and Role of Article 80 CISG*, 2012, p. 123.

2. The duty to inform

The principle of party autonomy allows the Parties to insert their own clauses into their contracts. In this regard, the FA does not impose a duty to inform. However, even if this duty cannot be enforced on the Parties through the FA, the laws that govern the contract may provide for additional obligations. Then, a look must be taken into the CISG, as the convention that governs the FA, to determine how to depict good faith – and if specific obligations can be extracted in the present case.

Moreover, as the interpretation and extent of this concept vary between jurisdictions, and the CISG, as explained above, is silent as to how to perceive it, recourse to domestic law may be necessary secondarily. The Problem refers to three different domestic laws: the law of Mediterraneo (where CLAIMANT is based), the law of Equatoriana (where RESPONDENT is based), and the law of Danubia (the place of the arbitration).

The CISG applies to the contract and all individual orders – an undisputed point between the Parties. Regarding the domestic law to apply in matters not governed by the CISG, the Parties chose to apply the law of Danubia. Therefore, the possibility of extracting a duty to inform from the CISG and the subsidiary law will be addressed below as well.

i. In the CISG

The existence of a duty to inform in the CISG depends on the understanding adopted: either that collateral obligations can arise from Art. 7 or that the absence of this duty is deliberate and the interpreter cannot draw additional obligations through interpretation.

Regarding the first view, indeed the CISG does not provide explicitly for a duty to inform. However, according to several authors, and based on the assumption that it enforces a duty to act in good faith, additional obligations can derive from Art. 7(1) and underly said duty. The argument is that "*in international law good faith must be a concept capable of treading a middle ground that is acceptable to all. For that reason its definition must be a general practical duty rather than a specific one.*[96]", meaning that "*under the CISG, additional obligations can be implied and, in particular, a general duty to cooperate*"[97].

[96] Bruno Zeller, *op. cit.*, p. 221.

[97] Ulrich Magnus, *op. cit.*, p. 94.

This understanding is not foreign to jurisprudence: in the Filanto Case[98], the court recognised that parties in a long-term relationship – as the Parties were in the Problem – owe each other a duty to communicate, which ultimately may derive from the duty to act in good faith[99]. Another example is the Car Phones Case[100], where the German court invoked duties of good faith, cooperation and information under the CISG to determine that the seller was not collaborative and transparent towards the buyer.

Analysing Art. 7(2) in light of this perspective, it may be argued that the lack of an information duty is a gap that can be filled. It applies to questions governed by the CISG but not expressly settled in it – which "*are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*[101] Then, Art. 7(2) makes the CISG adaptable to new issues related to contracts for the sale of goods that are within its scope[102] – leading to the argument that the absence of a stipulation on information duties regarding data breaches is not intentional.

Regarding the second understanding that collateral obligations cannot be derived from Art. 7, it must be analysed if the CISG provides for additional obligations implicitly or explicitly. As previously mentioned, the Convention does not provide for a duty to inform explicitly; then, to understand if this duty can be found implicitly, both the interpretation mechanism of Art. 7(1) and the gap-filling mechanism of Art. 7(2) must be approached.

As to the criteria of the "*observance of good faith*" in Art. 7(1), some authors argue that it is merely an interpretative rule that imposes a duty to interpret CISG's provisions in good faith[103], and not to extrapolate to collateral duties. The conclusion is that the interpreter must at first refer to the text of the CISG to see if a provision applies directly,

---

98 U.S. District Court for the Southern District of New York, 14th April 1992, Filanto, S.p.A. v. Chilewich International Corp..

99 WINSHIP, Peter, *The UN Sales Convention and the Emerging Case Law*, in Emptio Venditio Internationales, Neumayer ed., 1997, p. 228.

100 Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf), Case No. 915, 21st April 2004, parties unknown.

101 CISG, Art. 7(2).

102 HONNOLD, John O., *Documentary History of the Uniform Law for International Sales*, Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1989, p. 476, and LOOKOFSKY, Joseph, *Understanding the CISG*, 6th Edition, Alphen aan den Rijn, Kluwer Law International, 2022, pp. 43, 47-48.

103 Steven D. Walt, *op. cit.*, p. 42.

and, if not, there may be an omission that falls within Art. 7(2)[104] or on the domain of the applicable national law – which will be addressed further on.

As to Art. 7(2) CISG, the questions to which it refers are the ones specified in Art. 4 CISG (the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from said contract). Since the CISG provides an answer regarding these questions, each case has to be analysed separately, as the lack of a provision may not embody a gap, but rather an intentional omission.

ii. In the subsidiary law

Regarding the Danubian law, particularly the Danubian Contract Act (hereinafter, "DCA"), it is a *verbatim* adoption of the UPPIC[105] which establishes a duty to cooperate in Art. 5.1.3.[106]. Authors contend that cooperation requires mutual communication of information between the parties[107] within a standard of reasonableness – which is assessed by the level of information asymmetry[108]. Therefore, if looking at the domestic law applicable in this year's Problem, regard must be taken to the specific case and circumstances to evaluate if the other party is reasonably expecting to be informed of any matter related to the contract[109].

a. CLAIMANT's position

CLAIMANT's stance regarding the (non)existence of a duty to inform is based on the law itself. As this matter is subject to interpretation and not consensual, CLAIMANT's main argument is that a duty to inform cannot be extracted in any way from the CISG, and the recourse to Danubian Law is not legitimate.

Firstly, CLAIMANT evidences that the CISG does not provide for a duty to inform either explicitly, or implicitly, and emphasizes that no cases, awards or authorities support the existence of an explicit information duty in the CISG.

---

[104] QUINN, James P., *The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods*, in International Trade & Business Law, 2005, p. 227.

[105] The Problem, p. 59, para. 4.

[106] Art. 5.1.3. DCA reads: "*Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.*"

[107] BRÖDERMANN, Eckart J., *UNIDROIT Principles of International Commercial Contracts*, 2nd Edition, Baden-Baden, Nomos, 2023, Art. 5.1.3., para. 1.

[108] *Ibid*, Art. 5.1.3., para. 3.

[109] KLIMAS, Evaldas, *A General Duty to Co-Operate in Construction Contracts? An International Review*, Vilnius University, Law Faculty, 2011, p. 300.

It also claims that a duty to inform is not implicit in the CISG through Art. 7, neither by interpretation [Art. 7(1)] nor gap-filling [Art. 7(2)]. Accordingly, the mention of good faith in Art. 7(1) can only be understood in an interpretative context and the Tribunal is not allowed to establish rights and additional obligations outside the interpretation of such provisions; as to Art. 7(2), since the CISG governs the FA exclusively, it sets out the obligations of the Parties, and the recourse to the general principles or the subsidiary law is not necessary as the CISG had no intent to enforce obligations other than the ones already stipulated (namely, the obligation to inform).

Moreover, and since RESPONDENT informed CLAIMANT when faced with a cyberattack, it is anticipated that it will argue that the Parties established a practice to inform in said circumstances in the sense of Art. 9(1) CISG. However, regardless of the Parties' long-lasting business relationship, a practice is characterized by a certain frequency and duration[110] – which does not exist in the present case as the information regarding a cyberattack had only been given by one of the Parties once.

Secondly, anticipating RESPONDENT's argument that CLAIMANT is still under a duty to inform via the duty to cooperate in Art. 5.1.3. of the DCA, it contends that the CISG exclusively governs the contract since the rights and obligations of the parties is a matter governed by it and no recourse to domestic laws is needed. Authors argue that the choice of a law of a contracting state should be interpreted not as a reference to domestic law, but as a reference to the CISG, which is part of the law of that state[111].

However, CLAIMANT alternatively upholds that, in case the Tribunal finds that the DCA applies, it does not provide for a duty to inform. Art. 5.1.3 DCA reflects a main purpose to enable the debtor to perform his obligation[112], and RESPONDENT could not reasonably expect to be informed of the cyberattack as it did not represent any risk to the contract due to the no-oral modification of Art. 40 FA.

CLAIMANT also addresses the bad faith allegations and upholds that the CISG does not provide for a duty to act in good faith. Yet, if it did, CLAIMANT did not act in bad faith towards RESPONDENT, as it undertook all the steps to guarantee the fulfilment of each

---

[110] BOUT, Patrick X., *Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods*, Pace University Essay Submission, 1998, pp. 2-3.

[111] ISLAM, Md. Zahidul, *Applicability of the Convention on Contracts for International Sale and Goods (CISG)*, IOSR Journal Of Humanities And Social Science (IOSR-JHSS), Volume 14, Issue 3, Jul.-Aug. 2013, p. 79. See also ICC Case No. 7656, ICC International Court of Arbitration Arbitral Award, 1994.

[112] Eckart J. Brödermann, *op. cit.*, para. 1.

Parties' contractual obligations – namely, it hired CyberSec, the leading cybersecurity firm in Mediterraneo, which evaluated the cyberattack as of minor relevance and promptly removed the malware found. The recommendations of this third party were followed, cautious actions were taken and a message was left in Ms. Audi's voicemail informing that in urgent matters, Ms. Peugeutron was to be contacted[113] – information that RESPONDENT disregarded. In sum, as to the first question, CLAIMANT withstands it had no information duty according to the law.

b. RESPONDENT's position

RESPONDENT's stance on this matter is that CLAIMANT was bound by a duty to inform regarding the cyberattack. First and foremost, it sustains that the CISG implies a duty to act in good faith in Art. 7, not just on an interpretative level, and that from said article, additional obligations, such as the duty to inform, are implied in the CISG.

Accordingly, RESPONDENT argues that good faith is a general principle underlying the CISG[114], and many authors, courts and arbitral panels[115] have implied additional good faith obligations in international sales contracts[116], with the concept being applied to the parties' conduct[117]. Therefore, the CISG provides a general principle of good faith and a duty to act in good faith. RESPONDENT further evidences that even if the Arbitral Tribunal found that the CISG does not provide a duty of good faith, it can arise from the UPPIC.

It is also RESPONDENT's argument that CLAIMANT breached this duty severely when it did not inform about the cyberattack. The Parties' relationship had been previously affected by a similar circumstance in August of 2020, when RESPONDENT fell victim to a cyberattack. However, it informed CLAIMANT of such immediately as required by Art. 34 of the Equatorianian Data Protection Act, which created an expectation that, in the reverse circumstances, RESPONDENT would be informed. This seemed good

---

[113] The Problem, p. 61, para. 4.

[114] Lisa Spagnolo, *op. cit.*, p. 275.

[115] Bonaventure Case, Cour d'appel de Grenoble, 22nd February 1995; Automobile Case, Oberlandesgericht München, 8th February 1995; CLOUT Case No. 1580, Girona Provincial High Court (Sentencia de la Audiencia Provincial de Girona) Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC, 21st January 2016.

[116] Larry DiMatteo and André Janssen, "Interpretive Methodologies in the Interpretation of the CISG", DIMATTEO, Larry ed., *International Sales Law: A Global Challenge*, 2014, p. 95.

[117] Francesco G. Mazzotta, "Good Faith Principle: *Vexata Quaestio*", DIMATTEO, Larry ed., International Sales Law: A Global Challenge, 2014, p. 132.

business practice in the context of the long-lasting business relationship of the Parties – and a legal obligation to cooperate. With the automotive industry being increasingly the target of cyberattacks, this additionally questions CLAIMANT's decision not to inform RESPONDENT. It is RESPONDENT's stance that having been informed about the cyberattack, the mispayment would have been avoided.

From the CISG and the UPPIC, a duty to inform can be drawn. Amongst some jurisdictions, the principle of good faith has been seen as an autonomous source of distinct and additional obligations implied into the CISG, with additional information duties being the primary field of application of the principle[118].

Yet, even if there was no information duty on the CISG or the UPPIC, CLAIMANT would still be under such duty from Art. 5.1.3 DCA as part of the duty to cooperate. Informing RESPONDENT can be understood as a positive action to assist in the performance of the obligation.

Therefore, regarding this issue, RESPONDENT maintains that CLAIMANT was under not only a duty to act in good faith, but also a duty to cooperate and inform, which were breached and ultimately caused the failure to perform.

B. The failure to perform

The failure to perform is related to the previous issue as RESPONDENT invokes information duties on CLAIMANT's part. Art. 80 CISG requires the existance of a duty in order to transfer the risk from the non-performance of an obligation to the party that performed, but caused the other party's failure to do so. The Arbitral Tribunal's question is then if RESPONDENT can invoke the violation of an information duty to rely on a provision of the CISG and defend itself from the payment claim. In this section, Art. 80, its requirements and each Party's responsibility will be addressed.

1. Art. 80 CISG

Art. 80 CISG is a safeguard for a party's failure to perform when this failure is caused by an act or omission of the other party[119] that expresses a common duty to cooperate with

[118] Larry DiMatteo and André Janssen, *op. cit.*, p. 592.

[119] SCHÄFER, Friederike, *Failure Of Performance Caused By Other Party: Editorial Remarques On Whether And The Extent To Which The UNIDROIT Principles May Be Used To Help Interpret Article 80 Of The CISG*, in An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, 2007, p. 246 and HUBER, Peter, MULLIS, Alaistair, *The CISG: A new textbook for students and practicioners*, Sellier European Law Publishers, 2007, p. 265.

the other party[120] – which can be described as duties to take positive action to help the other party perform[121]. Examples of such positive action include acts that are necessary for the other party's performance, and sharing all relevant information between parties[122].

It provides three requirements for its applicability: there must be non-performance by the promisor; the failure to perform is causally linked to the promisee; and the existence of an act or omission by the promisee[123]. As RESPONDENT did, in fact, not perform[124], the first requirement is fulfilled; however, further analysis of the other two requirements must be taken.

The question relies on whether there is a causal link between the failure to perform and CLAIMANT and if an act or omission on its behalf caused it. As the first point concerns the perspective of the Parties concerning the facts, it will be addressed in each position. The focus will remain on the concepts of act or omission in the scope of Art. 80 CISG.

i. Act or Omission

An omission occurs when a party is under a duty or must engage in an act rather than staying passive, and "*will only be sufficient if the promisee had a duty to act, for instance because the act was necessary in order to enable the promisor to perform*"[125]. The provision stems from good faith and implies a duty to cooperate[126], however, it is not unlimited. Rather, it may require the promisee to attempt to overcome the impediment if it is easily remediable[127].

[120] HONNOLD, John O. And FLECHTNER, Harry, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention*, 2021, p. 595.

[121] FALLA, Laureano F. Gutierrez, *Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts*, in Penn State International Law Review, Volume 23, Number 3, 2005, pp. 508-509.

[122] Thomas Neumann, *op. cit.*, pp. 110-111.

[123] *Ibid*, pp. 143-172.

[124] The Problem, p. 14.

[125] Peter Huber and Alaistair Mullis, *op. cit.*, p. 266.

[126] *Ibid*; Thomas Neumann, *op. cit.*, p. 113.

[127] Ingeborg Schwenzer, "Part III, Sale of Goods, Ch. V, Provisions Common to the Obligations of the Seller and of the Buyer, S. IV, Exemptions, Article 80", *op. cit.*, para. 1, and Peter Huber and Alaistair Mullis, *op. cit.*, pp. 266-267.

Neither Art. 80 nor the CISG describe "*in detail how causation is to be established or which acts or omissions that can lead to exemption*"[128] – yet, it is agreed by several authors that it covers violations of obligations following from law or contract[129] and does not apply when the promisee's act or omission was due to an impediment beyond control[130].

a. CLAIMANT's position

CLAIMANT's stance regarding the failure to perform is threefold: firstly, RESPONDENT caused its failure to perform; second, CLAIMANT did not breach its duty to cooperate; and third, in any case, the requirements of Art. 80 CISG are not fulfilled.

As to the first argument, CLAIMANT sustains that RESPONDENT caused its failure to perform since Art. 40 FA determines that all alterations must be made in writing, and, for that reason, CLAIMANT's behaviour did not hinder RESPONDENT's performance. Art. 80 should apply only when one party's actions created an impediment or obstacle that prevented or interfered with the other party's performance[131] and in the present case, CLAIMANT had no interference.

The consequences of the cyberattack only occurred because of RESPONDENT's disregard not only for the characteristics of such engineering traps, but also for the instructions that CLAIMANT left to contact Ms. Pegeutroen in urgent matters. Because of the latter, the impediment was easily remediable and RESPONDENT was obliged to attempt to overcome it.

As to the second argument, Art. 80 CISG provides for a duty to cooperate that CLAIMANT did not breach. The duty to cooperate is described, as seen above, by positive actions to help the other party perform, for example, sharing relevant information. Even though CLAIMANT did not inform immediately about the cyberattack, it sent an internal note to all of its business partners informing them of these circumstances, regardless of the fact it was not obliged to do so[132]. The fact that it

[128] Thomas Neumann, *op. cit.*, p. 143.

[129] *Ibid*, p. 163.

[130] *Ibid*, p. 146.

[131] John O. Honnold and Harry Flechtner, *op. cit.*, p. 596.

[132] The Problem, p. 64, para. 26.

safeguarded a second line of contact for urgent queries also demonstrates that this duty to cooperate was not infringed.

As to the third argument, the requirements for the applicability of Art. 80 are not cumulatively fulfilled. Since RESPONDENT did not perform at its own cost and fault, the causal link between CLAIMANT and the failure to perform is not present. Furthermore, there was not an act or omission that CLAIMANT was obliged to do, as there was no duty to inform. The omission of the information regarding the cyberattack could not hinder the performance as the FA forced RESPONDENT to pay to the bank account specified thereunder.

In any case, if the TRIBUNAL found that RESPONDENT could rely on Art. 80 CISG, then CLAIMANT argues that both Parties should share the responsibility. Then, two requirements must be fulfilled: the promisor's failure to perform must be caused by both parties, and it must not be possible to delimit the consequences of each party's causation, as their conducts are closely interwoven[133].

If the Tribunal found that CLAIMANT is also responsible for the failure to perform, the first requirement is fulfilled; as to the second one, it is not possible to delimit the consequences of each Party's conduct, as it is uncertain whether RESPONDENT would still make the payment to the fake bank account if CLAIMANT had informed, since it did not notice the phishing signs of the email.

Then, in the absence of a duty to inform, RESPONDENT cannot rely on Art. 80 CISG as it caused the failure to perform.

b. RESPONDENT's position

From RESPONDENT's viewpoint, this is not a case of non-performance since the price for PO No. 9601 was paid; however, if the Arbitral Tribunal finds that there is a failure to perform, then CLAIMANT caused it in the sense of Art. 80 CISG.

This provision refers to three requisites to be applied: (a) there must be an act or omission on behalf of one party that (b) caused (causally linked) (c) the other parties' failure to perform. RESPONDENT submits that by omitting the occurrence of the cyberattack, CLAIMANT hindered the performance, since, if informed, RESPONDENT would have

[133] Thomas Neumman, *op. cit.*, pp. 152-153 and ENDERLEIN, Fritz and MASKOW, Dietrich, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods Commentary*, 1992, p. 339.

been able to revoke the payment authorization for PO No. 9601. The requirements are then, fulfilled.

Firstly, this circumstance should embody an omission in the sense of Art. 80 CISG as the duty of good faith and to cooperate require that a party informs in such serious circumstances. CLAIMANT was aware of the cyberattack for months before this fact was known to RESPONDENT, and, even if it was characterized as of "minor relevance", in the beginning, soon it was noticeable how much more disruptive and severe it was[134]. CLAIMANT had six months to inform RESPONDENT about the cyberattack, and several occasions to do so. However, even with a duty to do so, CLAIMANT opted to omit such important information from RESPONDENT.

Secondly, CLAIMANT's omission and RESPONDENT's payment to a different bank account are causally linked. If CLAIMANT had informed RESPONDENT, it would, with the highest probability, have paid to the correct bank account. By the time the alleged Ms. Audi sent the email providing a new bank account, on the 28th March 2022[135], CLAIMANT was already aware of the severity of the cyberattack for almost two weeks[136].

Had CLAIMANT informed RESPONDENT, it would have been in a state of alert when receiving such email. Furthermore, even if the payment authorization was given on the 30th March 2022, the actual payment was only due (and made) on the 3rd May 2022. Therefore, after realizing the severity of the cyberattack, CLAIMANT had almost two months to inform RESPONDENT. Therefore, it was this chain of events, caused by CLAIMANT, that led to the failure to perform.

The impediment was not easily remediable as RESPONDENT did not have any other way to be aware of the cyberattack other than through CLAIMANT, and even if the voicemail left in Ms. Audi's mobile phone said that Ms. Peugeutroen was to be contacted in urgent matters, RESPONDENT opted to follow the instructions in the email of the 28th March 2022, which was in line with the Parties' practices.

Then, in the present case, CLAIMANT's omission to inform about the cyberattack is the only cause that led to RESPONDENT's failure to perform. RESPONDENT's acts or

[134] The Problem, p. 64, para. 25.

[135] The Problem, p. 16.

[136] The Problem, p. 64, para. 26.

omissions were not the cause for such failure as it followed what was in line with the Parties' previous behaviours and was led to believe that this was another circumstance of altering the FA pragmatically. Similarly, in the Kalpesh V. Fintex case[137], the buyer received two phishing emails requesting the change of the place of payment to both Hong Kong and Turkey respectively. The court held that because of both the personal and business-sensitive information within the phishing email, the recipient was entitled to trust this email.

Therefore, the case falls squarely in Art. 80 CISG scope and CLAIMANT may not rely on RESPONDENT's failure to perform.

[137] The Hague District Court, Case No. C/09/475774/ HA ZA 14-1201, 27th May 2015, Kalpesh Enterprise LLC vs. Fintex Chemie S.R.O..

Conclusion

None of us anticipated that we would spend the past six months engaged on this incredible experience. Taking part in the Vis Moot has enriched us professionally and personally. It has also allowed us to develop our skills as lawyers at an early stage of our careers, as well as contact with some of the most experienced and well-known lawyers in the field, who gave us valuable advice.

In addition, the Vis Moot also prepared us for our future careers by instructing us in a variety of tools, raging from legal writing and research to public speaking, but most importantly, confidently defending our positions. Moreover, for non-native English speakers, this was a particular a challenge that pushed us out of our comfort zone, allowing us to develop our language skills, by working in an international environment.

The Vis Moot is a unique experience as it brings together students from all over the world, with different cultures and, especially, different ways of approaching law. Each student has a different point of view on the same case and a different way of presenting their arguments, which makes the whole experience more interesting and challenging.

Beyond the professional opportunities the Vis Moot afforded us, we have also significant personal development. Teamwork is the key to success in this type of experience and it is not always easy to work with team members who were once strangers. This journey, however, transformed strangers into collaborators and a united team, and by doing so, has enhanced our social skills and teamwork capabilities.

This experience would not have been possible and as enriching without the guidance and support of our coaches, Ana Coimbra Trigo, Ana Sousa, and Carolina Apolo Roque, to whom we sincerely thank for dedicating their time to accompany us throughout these hard

We are also grateful to PLMJ and CEDIS – NOVA School of Law for providing us with this opportunity and enabling our team to travel and participate in the Pre-Moots and the actual Vis Moot. Appreciation goes also to the previous coaches (André Fonseca and Rute Alves) who helped us with their best advice, but also the previous Mooties who took the time, whenever we needed, to be arbitrators in our training sessions, and to help us in various ways through this journey. Last but not least, we wish to thank our families and friends, who supported us during these six months, which were not always easy.

We are deeply thankful for this experience and what it has contributed to each one of us and wish the best of luck for next year's Mooties.

Bibliography

ALMUTAWA, Obaid Khalfan, *The Role of Good Faith in the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, University of Leicester, Faculty of Law, 2015.

ANDERSEN, Camilla Baasch, *Good Faith? Good Grief!*, in International Trade and Business Law Review 17, 2014.

BIANCA, *Cesare Massimo, BONELL, Michael Joachim eds., Bianca-Bonell Commentary on the International Sales Law, 1987; and VISCASILLAS, Pilar Perales, El Contrato de Compraventa Internacional de Mercancías (Convención de Viena de 1980)*, 2001.

BONELL, Joachim M., *An International Restatement Of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3rd Edition, 2005.

BORN, Gary B., *International Commercial Arbitration* 3rd Edition, 2009.

BOUT, Patrick X., *Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods*, Pace University Essay Submission, 1998.

BRIDGE, Michael, *Good Faith, the Common Law, and the CISG*, in Uniform Law Review 22, 2017.

BRIDGE, Michael, *The International Sale of Goods*, 5th Edition, 2023.

BRÖDERMANN, Eckart J., *UNIDROIT Principles of International Commercial Contracts*, 2nd Edition, Baden-Baden, Nomos, 2023.

BRUNNER, Christoph, GOTTLIEB, Benjamin eds., *Commentary on the UN Sales Law (CISG)*, 2019.

DIMATTEO, Larry ed., *International Sales Law: A Global Challenge*, 2014.

ENDERLEIN, Fritz and MASKOW, Dietrich, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods Commentary*, 1992.

FALLA, Laureano F. Gutierrez, *Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts*, in Penn State International Law Review, Volume 23, Number 3, 2005.

FELEMEGAS, John, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), June of 2000.

FRY, Jason, GREENBERG, Simon and MAZZA, Francesca, *The Secretariat's Guide to ICC Arbitration, a practical commentary on the 2012 ICC rules of arbitration from the secretariat of the ICC International Court of Arbitration,* 2012.

GABRIEL, Henry Deep, *The Buyer's Performance Under The CISG: Articles 53-60 Trends In The Decisions* in Journal of Law and Commerce, Vol. 25:273, 2005-2006.

HONNOLD, John O. And FLECHTNER, Harry, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention*, 2021.

HONNOLD, John O., *Documentary History of the Uniform Law for International Sales*, Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1989.

HUBER, Peter, MULLIS, Alaistair, *The CISG: A new textbook for students and practicioners*, Sellier European Law Publishers, 2007.

ISLAM, Md. Zahidul, *Applicability of the Convention on Contracts for International Sale and Goods (CISG)*, IOSR Journal Of Humanities And Social Science (IOSR-JHSS), Volume 14, Issue 3, Jul.-Aug. 2013.

KLIMAS, Evaldas, *A General Duty to Co-Operate in Construction Contracts? An International Review*, Vilnius University, Law Faculty, 2011.

KRÖLL, Stefan, MISTELIS, Loukas, VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): a Commentary*, 2nd edition (2018).

LOOKOFSKY, Joseph, *Understanding the CISG*, 6th Edition, Alphen aan den Rijn, Kluwer Law International, 2022.

MACQUEEN, Hector L., *Good Faith in the Scots Law of Contract; An Undisclosed Principle?*, Hart Publishing Oxford, 1999.

MAGNUS, Ulrich, *Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts* in Pace International Law Review Volume 10, Issue 1, 1998.

MEIER, Andrea, *Arbitration in Switzerland: The Practitioner's Guide (Second Edition),* 2017.

NEUMANN, Thomas, *The Duty to Cooperate in International Sales: The Scope and Role of Article 80 CISG*, 2012.

OVIEDO-ALBÁN, Jorge, *Mitigation of Damages for Breach of Contract for the International Sale of Goods* in: Vniversitas, 2018, no. 137, July-December.QUINN, James P., *The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods*, in International Trade & Business Law, 2005.

RIZNIK, Peter, *Some Aspects Of Loss Mitigation In International Sale Of Goods*, 14 VJ 267 – 282, 2010.

SÄCKER, Franz Jürgen, RIXECKER, Roland, OETKER, Hartmut, LIMPERG, Bettina eds., *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th edition, 2019.

SAIDOV, Djakhongir, *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*.

SCHÄFER, Friederike, *Failure Of Performance Caused By Other Party: Editorial Remarques On Whether And The Extent To Which The UNIDROIT Principles May Be Used To Help Interpret Article 80 Of The CISG*, in An International Approach to the

Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, 2007.

SCHLECHTRIEM, Peter, SCHWENZER, Ingeborg eds., *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, 4th Edition, 2016.

SCHWENZER, Ingeborg, ATAMER, Yesim and BUTLER, Petra eds., *Current Issues of the CISG*, 2014 Edition.

SHEEHY, Benedict, *Good Faith in the CISG: The Interpretation Problems of Article 7*, in Review of the Convention on Contracts for the International Sale of Goods (CISG), ed. by Pace International Law Review, University of Canberra, 2007.

SMAHI, Nadia and BRUEGGEMANN, Romana, *New Claims and Amended Claims in International Arbitration – Finding Landmarks in Navigating the Tribunal's Discretion*, 2022.

SPAGNOLO, Lisa, *Opening Pandora's Box: Good faith and Precontractual Liability in the CISG*, in Temple International and Comparative Law Journal, 2008.

TRENOR, John A., *The Guide to Damages in international arbitration*, 2020.

UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 2016 Edition.

VENEZIANO, Anna, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to The Belgium Supreme Court*, in Uniform Law Review, 2010.

VERBIST, Herman and SCHÄFER, Erik, *ICC Arbitration in Practice, 2nd Edition*, 2015.

VISCASILLAS, Pilar Perales, *Modification and Termination of the Contract (Art. 29 CISG)* in Journal Of Law And Commerce, Vol 25:167, 2005-2006.

WALT, Steven D., *Modest Role of Good Faith* in Boston University International Law Journal, Vol. 33:37, 2015.

WINSHIP, Peter, *The UN Sales Convention and the Emerging Case Law*, in Emptio Venditio Internationales, Neumayer ed., 1997.

ZELLER, Bruno, *Good Faith: Is it a Contractual Obligation?*, in Bond Law Review, Volume 15, Issue 2, 2003.

Web Pages

Dictionary.com, Moot Definition. Available at: https://www.dictionary.com/ (*consulted on 17th April 2024*).

Cambridge Dictionary, Moot Definition. Available at: https://dictionary.cambridge.org/ (*consulted on 17th April 2024*).

Official webpage of The Annual Willem C. Vis International Commercial Arbitration Moot. Available at: https://www.vismoot.org/ (*consulted on 18th April 2024*).

Case Law

Automobile Case, Oberlandesgericht München, 8th February 1995.

Bonaventure Case, Cour d' appel de Grenoble, 22nd February 1995.

CISG Case No. 207, Automatic diffractometer case, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (MKAC), 17 October 1995.

CISG Case No. 224, Propane gas case, Austrian Supreme Court (Oberster Gerichtshof), 6 February 1996CISG Case No. 2348, Clay Case, German Supreme Court (Bundesgerichtshof), 26 September 2012; CHENGWEI, Liu, *Perspectives from CISG, UNIDROIT Principles & PECL,* 2003.

CISG Case No. 2749, Ideal Bike Corp. v. IMPEXO spol. s r.o., Supreme Court of the Czech Republic (Nejvyšší soud České republiky), 17 December 20.

CISG Case No. 4506, PVC foil case, Court of Appeal Naumburg (Oberlandesgericht Naumburg), 24 April 2019.

CISG Case No. 6272, Diammonium phosphate case, Cairo Regional Centre for International Commercial Arbitration, 19 February 2023.

CLOUT Case No. 1580, Girona Provincial High Court (Sentencia de la Audiencia Provincial de Girona) Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC, 21st January 2016.

Hof van Cassatie van België/Cour de cassation de Belgique (Belgian Supreme Court), 19th June 2009.

Hungarian Chamber of Commerce and Industry Court of Arbitration, Case No. VB/94124, 17th November 1995, parties unknown.

ICC Award No. 8611, International Court of Arbitration, Arbitral Award No. 7402, 1992.

ICC Case No. 21574, Premium Petroleum Services Corp. v. Superior Energy Services Colombia, S.A.S. & Superior Energy Services, Inc. v. Victor Augusto Palacio Gaitán & María Eugenia Hernández Rojas, ICC Case No. 21574/RD/MK, Final Award, 19 July 2018.

ICC Case No. 22423, Surpass Commercial Corp. Ltd. v. Bariven S.A., ICC Case No. 22423/FS, Final Award, 27 May 2019.

ICC Case No. 7331, ICC International Court of Arbitration, 1994.

ICC Case No. 7656, ICC International Court of Arbitration Arbitral Award, 1994.

Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf), Case No. 915, 21st April 2004, parties unknown.

Supreme Court of Canada, Case No. 35380, 13th November 2013, Harish Bhasin v. Larry Hrynew and Heritage Education Funds Inc..

The Hague District Court, Case No. C/09/475774/ HA ZA 14-1201, 27th May 2015, Kalpesh Enterprise LLC vs. Fintex Chemie S.R.O..

U.S. District Court for the Southern District of New York, 14th April 1992, Filanto, S.p.A. v. Chilewich International Corp..

Annexes

31st Willem C. Vis International Commercial Arbitration Moot

MEMORANDUM FOR CLAIMANT

ICC Case No. Moot-100 / MM

On behalf of

SensorX, plc

Atwood Lane 1784
Capital City
Mediterraneo

• **Claimant** •

Against

Visionic Ltd

Optronic Avenida 3
Oceanside
Equatoriana

• **Respondent** •

COUNSEL

Aline Gonçalves | Carolina Gonçalves | Juliana Trivoli | Maria Inês Carapeta

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY: NOVA University of Lisbon, School of Law

COUNTRY: Portugal

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.	X		

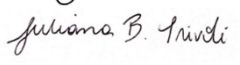
USE OF AI			
We have used AI enhanced **search engines** for researching sources and (factual or legal) information on the Moot Problem.		X	
We have used AI-enhanced **proof-reading** tools.	X		
We have used AI enhanced **translation tools** to translate sources relevant for our work on the Moot Problem.			X
We have used AI enhanced **translation tools** to translate parts of the text submitted in this Memorandum into English from any other language.	X		
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.			X
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.			X
We have **trained an AI tool** on Vis Moot documents.			X
We have **used an AI tool that has been trained on Vis Moot documents** to generate text that is part of our Memorandum			X
Other (please specify):			

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

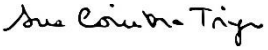
DATE: December 7th, 2023

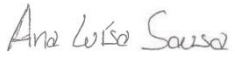
NAME: ALINE GONÇALVES SIGNATURE: 

NAME: CAROLINA GONÇALVES SIGNATURE: 

NAME: JULIANA TRIVOLI SIGNATURE: 

NAME: MARIA INÊS CARAPETA SIGNATURE: 

NAME: ANA COIMBRA TRIGO SIGNATURE: 

NAME: ANA LUÍSA SOUSA SIGNATURE: 

NAME: CAROLINA ROQUE SIGNATURE: 

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS IV

TABLE OF LITERATURE VI

TABLE OF CASES XIX

TABLE OF ARBITRAL AWARDS AND DECISIONS XXII

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

PART I: THE ADDITIONAL PAYMENT CLAIM RAISED UNDER PO NO. A-15604 MUST BE DECIDED IN THIS ARBITRATION 3

A. ART. 9 ICC RULES ALLOWS BOTH CLAIMS TO BE RAISED IN A SINGLE ARBITRATION 3

1. The POs are multiple contracts under Art. 9 ICC Rules 3

2. The claims are made under one arbitration agreement 4

3. The arbitrations agreements in both POs are compatible under Art. 6(4)(ii) ICC Rules 4

B. THE REQUIREMENTS FOR AUTHORIZING NEW CLAIMS UNDER ART. 23(4) ICC RULES ARE ALSO FULFILLED 7

1. The Arbitral Tribunal has both the power to decide on the admission of new claims and broad discretion to do so 7

2. The new claim is closely connected to the existing one 8

3. The arbitral proceedings are still in an introductory phase 9

4. Hearing both claims in the same arbitration proceedings is time and cost- efficient 10

C. CONCLUSION 10

PART II: SUBSIDIARILY, IN THE UNLIKELY EVENT THAT THE ADDITIONAL CLAIM HAS TO BE RAISED IN SEPARATE PROCEEDINGS, THE ARBITRAL TRIBUNAL MUST CONSOLIDATE BOTH ARBITRATIONS 11

A. THE ARBITRAL TRIBUNAL HAS THE POWER TO CONSOLIDATE BOTH ARBITRATIONS 11

1. The Parties made a valid procedural agreement granting the Arbitral Tribunal powers to consolidate arbitrations 12

2. The Arbitral Tribunal cannot override the Parties´ procedural agreement 13

B. THE REQUIREMENTS FOR CONSOLIDATION UNDER ART. 10 ICC RULES ARE FULFILLED 14

1. The arbitration agreement contains an express agreement allowing for consolidation 14

2. Even in the absence of such agreement, consolidation would still remain viable 15

D. A CONSOLIDATION WOULD AVOID UNNECESSARY DELAYS AND EXPENSES 16

E. CONCLUSION 17

PART III: CLAIMANT IS ENTITLED TO PAYMENT OF THE PRICE IN FULL 17

A. RESPONDENT FAILED TO PERFORM ITS PAYMENT OBLIGATION UNDER THE FA 17

1. The FA and PO No. 9601 are governed by the CISG 18

2. RESPONDENT did not pay the price agreed-upon for the sensors, pursuant to Art. 53 CISG 18

3. CLAIMANT is entitled to exercise its right to be paid by RESPONDENT under Art. 62 CISG 19

B. THE FA WAS NOT EFFECTIVELY AMENDED 19

1. The Tribunal must uphold the formalities established by the Parties in the FA 20

a) RESPONDENT cannot rely on the modification of the contract enshrined in Art. 29(1) CISG 20

b) The application of Art. 29(2) CISG has not been excluded by CLAIMANT's actions 20

2. The formalities agreed-upon on the FA are upheld following Art. 40 of the FA..... 22

3. RESPONDENT must fulfill its legal duty to ensure the completion of the payment as outlined in Art. 54 CISG 22

C. IN ANY CASE, RESPONDENT CANNOT RELY ON ART. 77 CISG TO MITIGATE ITS OBLIGATION TO PAY 22

1. Art. 77 CISG is only applicable to situations dealing with compensatory damages.... 23

2. In any case, RESPONDENT is not entitled to a reduction in damages 23

a) CLAIMANT was unaware of the impending breach of contract 23

b) RESPONDENT forfeited any potential right of mitigation of damages pursuant to Art. 77 CISG 24

c) Unreasonable costs would be imputed to CLAIMANT in pursuance of the mitigation of damages of Art. 77 CISG 25

D. CONCLUSION 25

PART IV: CLAIMANT DID NOT CAUSE RESPONDENT'S FAILURE TO PERFORM 26

A. NEITHER THE FA, NOR THE LAW GOVERNING THE FA PROVIDE FOR AN INFORMATION DUTY 26

1. The FA does not set forth an information duty 26

2. The CISG exclusively governs the FA 26

a) No duty to inform arises according to the CISG 27

i. The CISG does not explicitly provide for an information duty 27

ii. The CISG does not implicitly provide for an information duty..... 27

iii. There is no practice between the Parties that enforces a duty to inform 29

iv. CLAIMANT did not act in bad faith 29
3. The Danubian law does not govern the FA; but in case the Tribunal finds so, it does not provide for a duty to inform 30
4. The domestic law applicable to CLAIMANT does not provide for a duty to inform .. 31
B. IN THE ABSENCE OF AN INFORMATION DUTY, RESPONDENT CANNOT RELY ON ART. 80 CISG 31
1. RESPONDENT caused its failure to perform 32
2. CLAIMANT did not breach its duty to cooperate 32
3. The requirements of Art. 80 for RESPONDENT to be excused from the performance are not fulfilled 33
a) In case the Tribunal finds that RESPONDENT can rely on Art. 80, the responsibility for the failure to perform is shared by both Parties 33
C. CONCLUSION 34
REQUEST FOR RELIEF 35
CERTIFICATE OF AUTHENTICATION 35

TABLE OF ABBREVIATIONS

Abbreviation	*Explanation*
&	And
§	Paragraph
§§	Paragraphs
ARA	Answer to Request for Arbitration
Art.	Article
Arts.	Articles
ASC	Austrian Supreme Court
C. Ex.	CLAIMANT Exhibit
CA	Contract Act
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
CISG Digest	UNCITRAL Digest on the United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	CISG Advisory Council
CLAIMANT	SensorX, plc
Court	International Court of Arbitration of the International Chamber of Commerce
CS	Contracting State
FA	Framework Agreement
ICC	International Chamber of Commerce
Mr.	Mister
Ms.	Miss
No.	Number
p.	Page
Parties	CLAIMANT and RESPONDENT

PO No. 9601	Purchase Order Number 9601
PO No. A-15604	Purchase Order Number A-15604
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
POs	Purchase Orders
pp.	Pages
R. Ex.	RESPONDENT Exhibit
RESPONDENT	Visionic Ltd
RFA	Request for Arbitration
RfANC	Request for Authorization of New Claim
S.	Section
Secretariat	Secretariat of the International Court of Arbitration
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UPPIC	UNIDROIT Principles on International Commercial Contracts
V.	Versus, against
Vol.	Volume

TABLE OF LITERATURE

Author(s)	*Citation*	*Cited in §*
***Albano**, Gian Luigi* ***Nicholas**, Caroline*	The Law and Economics of Framework Agreements (2015) cited as: *Albano & Nicholas*	**15**
***Ashford,** Peter*	The Power to Join Parties or Consolidate Separate Arbitrations in International Arbitration In: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 87, Issue 3 (2021) cited as: *Ashford*	**57**
***Azzali,** Stefano*	Comment to Art. 832 In: Commentario Breve al Diritto Dell'arbitrato Nazionale ed Internazionale (2017) cited as: *Azzali*	**64**
***Benedettelli,** Massimo*	International Arbitration in Italy (2020) cited as: *Benedettelli*	**64**
***Berger,** Klaus P.*	Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox" In: Revista de Arbitraje Comercial y de Inversiones, Vol. 11, Issue 2 (2018) cited as: *Berger*	**67**
***Blackaby,** Nigel* ***Partasides,** Constantine* ***Redfern,** Alan* ***Hunter,** Martin*	Redfern and Hunter on International Arbitration, 6th Edition (2015) cited as: *Redfern & Hunter*	**63, 64**

Born, *Gary B.*	International Commercial Arbitration, 3rd Edition (2021) cited as: *Born* International Arbitration Law and Practice, 3rd Edition (2021) cited as: *Born II*	**19, 21, 36, 63, 65, 66, 70** **57, 77, 88**
Bortolotti*, Fabio*	Remedies Available To The Seller And Seller's Right To Require Specific Performance (Articles 61, 62 And 28) In: Journal of Law and Commerce Vol. 25:225, 2005-06 pp. 335-338 cited as: *Bortolotti*	**105**
Bout*, Patrick X.*	Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods (1998) Pace University Essay Submission cited as: *Bout*	**171**
Bridge*, Michael*	The International Sale of Goods, 5th edition (2023) cited as: *Bridge*	**153**
Briner*, Robert*	Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications In: Special Supplement to the ICC International Court of Arbitration Bulletin (2003) cited as: *ICC Supplement on Complex Arbitrations*	**89**
Brödermann*, Eckart*	UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary (2023)	**183, 184**

	cited as: *Brödermann*	
***Brueggemann**, Romana* ***Smahi**, Nadia*	New Claims and Amended Claims in International Arbitration - Finding Landmarks in Navigating the Tribunal's Discretion (2022) Available here: https://media.baerkarrer.ch/karmarun/image/upload/baer-karrer/hyxdj2dbugmdi8jn8ty1.pdf (Last accessed: 1 December 2023) cited as: *Brueggemann & Smahi*	**49, 51**
***Brunner**, Christoph* ***Brand**, Domenic Oliver*	Article 29 [Modification of Contract; Writing Requirement] In: Christoph Brunner and Benjamin Gottlieb (eds.), Commentary on the UN Sales Law (CISG) (2019) pp. 187-197 cited as: *Brunner & Brand*	**124**
***Brunner**, Christoph* ***Lerch**, Matthias*	Article 53 [Payment of the Purchase Price; Acceptance of the Goods] In: Christoph Brunner and Benjamin Gottlieb (eds.), Commentary on the UN Sales Law (CISG) (2019) pp. 393-394 cited as: *Brunner & Lerch*	**100**
***Craig,** W. Lawrence* ***Park,** William W.* ***Paulsson,** Jan*	International Chamber of Commerce Arbitration, 3rd Edition (2000) cited as: *Craig, Park & Paulsson*	**67**
***Cremades**, Bernardo* ***Lew**, Julian D. M.*	Parallel State and Arbitral Procedures in International Arbitration	**77**

	In: ICC Institute of World Business Law Dossier III (2005) cited as: *ICC Institute Dossier III*	
Date-Bah, *Samuel K.*	Comments on Article 29 In: Bianca-Bonell, Commentary on the International Sales Law (1987) cited as: *Date-Bah*	**114, 124**
Duffy*, James P.*	The Rise of Emergency Arbitration in Life Sciences Disputes In: Gregory Kochansky (ed), Dispute Resolution Journal, (© Kluwer Law International; AAA-ICDR 2022, Volume 76, Issue 2) Cited as: *Duffy*	**24**
Enderlein*, Fritz* ***Maskow****, Dietrich*	International Sales Law United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods Commentary (1992) cited as: *Enderlein & Maskow*	**114, 130, 209**
Falla*, Laureano F. Gutierrez*	Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts In: Penn State International Law Review, Volume 23, Number 3 (2005) pp. 507-520 cited as: *Falla*	**176**

Fry, *Jason* ***Greenberg,*** *Simon* ***Mazza,*** *Francesca*	The Secretariat's Guide to ICC Arbitration (2012) cited as: *Secretariat's Guide*	**23, 39, 40, 57, 65, 68, 73, 84, 89**
Gabriel*, Henry Deep*	The Buyer's Performance Under The CISG: Articles 53-60 Trends In The Decisions In: Journal of Law and Commerce Vol. 25:273, 2005-06 pp. 273-283 cited as: *Gabriel*	**100, 126**
Grierson, *Jacob* ***van Hooft,*** *Annet*	Arbitrating under the 2012 ICC Rules (2012) cited as: *Grierson & van Hooft*	**76**
Hachem*, Pascal*	Applicability of the CISG – Articles 1 and 6 In: Ingeborg Schwenzer, Yesim Atamer & Petra Butler (eds.), Current Issues of the CISG (2014) pp. 31-41 cited as: *Hachem*	**152**
Hillman*, Robert A.*	Article 29 (2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses. In: Cornell International Law Journal, No. 21 (1988) pp. 459-460 cited as: *Hillman*	**114**
Hobér, *Kaj*	Parallel Arbitration Proceedings – Duties of the Arbitrators: Some Reflections and Ideas	**81**

	In: ICC Institute of World Business Law Dossier III (2005) cited as: *Hobér*	
***Honnold**, John O.* ***Flechtner**, Harry M.*	Honnold's Uniform Law for International Sales under the 1980 United Nations Convention (2021) cited as: *Honnold & Flechtner*	**192, 195, 200**
***Huber**, Peter* ***Mullis**, Alastair*	The CISG: A New Textbook for Students and Practitioners Part II: Scope of Application of the Convention (2007) cited as: *Huber & Mullis*	**97**
***Islam**, Zahidul*	Applicability of the Convention on Contracts for International Sale and Goods (CISG). In: IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Vol. 14, Issue 3 (Jul. - Aug. 2013) pp. 78-81 cited as: *Islam*	**152**
***Knapp,** Victor*	Comments on Article 77 In: Bianca-Bonell Commentary on the International Sales Law (1987) cited as: *Knapp*	**130, 141, 142**
***Kröll**, Stefan* ***Mistelis**, Loukas* ***Viscasillas**, Pilar Perales*	UN Convention on Contracts for the International Sale of Goods (CISG): a Commentary, 2nd edition (2018) cited as: *Kröll et all*	**97**
***Lazerow,** Herbert I.*	Uniform Interpretation of CISG In: The International Lawyer, Vol. 52, No. 3 (2019)	**162**

	pp. 369-392 cited as: *Lazerow*	
Leboulanger, *Philippe*	Multi-Contract Arbitration In: Journal of International Arbitration, Vol. 13, Issue 4 (1996) cited as: *Leboulanger*	**89, 91**
Lew, *Julian D. M.* ***Mistelis,*** *Loukas* ***Kröll,*** *Stefan*	Comparative International Commercial Arbitration (2003) cited as: *Lew, Mistelis & Kröll*	**57**
Lookofsky*, Joseph*	Understanding the CISG, 6th Edition (2022) cited as: *Lookofsky*	**105**
Magnus*, Ulrich*	Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International In: Pace International Law Review Volume 10, Issue 1 (1998) pp. 89-95 Institute for the Unification of Private Law, Principles of International Commercial Contracts cited as: *Magnus*	**174, 184**
Mayer, *Pierre*	Conflicting Decisions in International Commercial Arbitration In: Journal of International Dispute Settlement, Vol. 4, Issue 2 (2013) cited as: *Mayer*	**81**

***Mohs**, Florian*	Ch.III, Obligations of the Buyer, S.III, Remedies for Breach of Contract In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, 4th Edition (2016) cited as: *Mohs*	**102, 105, 126**
***Neumann**, Thomas*	The Duty to Cooperate in International Sales: The Scope and Role of Article 80 CISG (2012) cited as: *Neumann*	**179, 197, 200, 201, 204, 209**
***Ng**, Melissa*	Recognising The Duty To Cooperate In International Commercial Contracts (June 1, 2018) In: Lexicon Available here: https://smulexicon.com/2018/06/01/recognising-the-duty-to-cooperate-in-international-commercial-contracts/ (Last accessed: 1 December 2023) cited as: *Ng*	**157**
Official Record	United Nations Conference on Contracts for the International Sale of Goods, Vienna (10 March-11 April 1980) A/CONF.97/19 - Official Records (United Nations publication, Sales No. E.81.IV.3 Cited as: *Official Record*	**131**
***Opie**, Elisabeth*	Mitigation of Losses: Remarks On The Manner In Which The UNIDROIT Principles May Be Used To Interpret Or Supplement Article 77 Of The CISG In: An International Approach to the Interpretation of the United Nations Convention on Contracts for the	**130, 142**

	International Sale of Goods as Uniform Sales Law (1980) cited as: *Opie*	
***Oviedo-Albán**, Jorge*	Mitigation of Damages for Breach of Contract for the International Sale of Goods In: Vniversitas, 2018, No. 137, July-December cited as: *Oviedo-Albán*	**141**
***Platte,** Martin*	When Should an Arbitrator Join Cases? In: Arbitration International, Vol. 18, Issue 1 (2002) cited as: *Platte*	**90**
***Quinn**, James P.*	The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods In: International Trade & Business Law (2005) pp. 221-242 cited as: *Quinn*	**163**
***Riznik**, Peter*	Article 77 CISG: Reasonableness of the Measures Undertaken to Mitigate the Loss cited as: *Riznik I*	**130, 131, 132, 142**
***Riznik**, Peter*	Some Aspects Of Loss Mitigation In International Sale Of Goods 14 VJ 267 – 282 (2010) cited as: *Riznik II*	**131, 132**
***Rogers**, Vikki, **Lai**, Kaon*	History of the CISG and Its Present Status: Structure of the CISG	**154**

	In: Larry DiMatteo, André Janssen, Ulrich Magnus, Reiner Schulze (eds.), International Sales Law: A Handbook, 2nd edition (2021) cited as: *Rogers & Lai*	
***Schäfer**, Friederike*	Failure Of Performance Caused By Other Party: Editorial Remarques On Whether And The Extent To Which The UNIDROIT Principles May Be Used To Help Interpret Article 80 Of The CISG In: An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law (2007) pp. 246-252 cited as: *Schäfer*	**191**
***Schlechtriem**, Peter*	Requirements of Application and Sphere of Applicability of the CISG Victoria University of Wellington Law Review (December 2005) pp. 781-794 cited as: *Schlechtriem*	**154**
***Schmidt-Kessel**, Martin*	Part I, Sphere of Application and General Provisions, Ch.II, General Provisions, Article 9 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (4th Edition) (2014) cited as: *Schmidt-Kessel*	**170, 171**
***Schroeter**, Ulrich G.*	Ch.I, General Provisions	**113, 124**

	In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, 4th Edition (2016) cited as: *Schroeter*	
***Schwenzer**, Ingeborg*	Interpretation and Gap-Filling under the CISG In: Ingeborg Schwenzer, Yesim Atamer & Petra Butler (eds.), Current Issues of the CISG (2014) pp. 109-118 cited as: *Schwenzer I*	**177, 178**
***Schwenzer**, Ingeborg*	Part III, Sale of Goods, Ch. V, Provisions Common to the Obligations of the Seller and of the Buyer, S. IV, Exemptions, Article 80 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (4th Edition) (2014) cited as: *Schwenzer II*	**191, 197, 204**
***Schwenzer**, Ingeborg* ***Hachem**, Pascal*	Part I, Sphere of Application and General Provisions, Ch. II, General Provisions, Article 7 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (4th Edition) (2014) cited as: *Schwenzer & Hachem*	**162, 163, 174, 177**
Secretariat of UNCITRAL	Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat Secretariat of the United Nations Commission on International Trade Law (1979) cited as: *Secretariat's Commentary*	**113, 131**

Smit, *Robert H.*	Mandatory ICC Arbitration Rules In: Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner (2005) cited as: *Smit*	**65, 67**
Smith, *Gordon*	Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules In: Journal of International Arbitration, Vol. 35, Issue 2 cited as: *Smith*	**88**
Stoll*, H.* ***Gruber****, G.*	Article 77 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, 2nd Edition (2005) cited as: *Stoll & Gruber*	**138**
Trenor*, John A.*	The Guide to Damages in international arbitration, 4th edition (2020) cited as: *Trenor*	**142**
UNCITRAL	Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016) Cited as: *CISG Digest*	**105, 110, 124, 150, 161**
Verbist, *Herman* ***Schäfer,*** *Erik*	ICC Arbitration in Practice, 2nd Edition (2015) cited as: *Verbist & Schäfer*	**11, 21, 36, 38, 47, 50, 52, 54, 57, 60, 67, 73**

Viscasillas, *Pilar Perales*	El Contrato de Compraventa Internacional de Mercancías (Convención de Viena de 1980) cited as: *Viscasillas*	**131**
Waincymer, *Jeffrey M.*	Procedure and Evidence in International Arbitration (2012) cited as: *Waincymer*	**60, 71**
Walt*, Steven D.*	Modest Role of Good Faith In: Boston University International Law Journal, Vol. 33:37 (2015) pp. 37-73 cited as: *Walt*	**162, 174, 177, 178**
Webster, *Thomas H.* ***Buhler,*** *Michael*	Handbook of ICC Arbitration: Commentary and Materials, 5th Edition (2021) cited as: *Webster & Buhler*	**57, 60, 63, 70, 71, 77, 84, 88**
Zeller*, Bruno*	Good Faith - Is it a Contractual Obligation? In: Bond Law Review, Volume 15, Issue 2 (2003) pp. 215-239 cited as: *Zeller*	**192**

TABLE OF CASES

Cited as	*Citation*	*Cited in §*
	Australia	
CISG Case No. 587	*Downs Invest P/L v. Perwaja Steel SDN BHD* Supreme Court of Queensland 17 November 2000	**126**
	Austria	**124**
CISG Case No. 1735	*Steel bars case V* Court of Appeal Innsbruck 18 December 2007	
CLOUT Case No. 541	*Cooling machine case* Austrian Supreme Court 14 January 2002	**142**
	Canada	
Bhasin v. Hrynew	Case Number: 35380 *Harish Bhasin v. Larry Hrynew and Heritage Education Funds Inc.* Supreme Court of Canada 13 November 2013	**175**
	Croatia	
CLOUT Case No. 915	*Rondine S.p.A. v. Larva d.o.o.* High Commercial Court of the Republic of Croatia 20 February 2007	**102**

	France	
Samsung v. Qimonda case	Samsung Electronics v Qimonda AG Tribunal de Grande Instance de Paris 22 January 2010	**67**
	Germany	
CISG Case No. 176	*Used printing machines case I* District Court Lüneburg 01 July 1994	**110**
CLOUT Case No. 318	*Vacuum cleaners case* Court of Appeal Celle 02 September 1998	**132**
CISG Case No. 2348	*Clay Case* German Supreme Court 26 September 2012	**135, 137**
	Serbia	
CISG Case No. 1856	*Medicaments case* Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia 28 January 2009	**105**
	Spain	
CLOUT Case No. 1387	*Ransomes Jacobsen Ltd. v. Elumina Ibérica S.A.* Court of Appeal Valencia 12 May 2008	**102**

	Russia	
CISG Case No. 207	*Automatic diffractometer case* Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (MKAC) 17 October 1995	**126**
	Ukraine	
CLOUT Case No. 1023	*Food stuff case* International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry 23 September 2004	**102**
	United States of America	
CLOUT Case No. 580	*Schmitz-Werke GmbH + Co. v. Rockland Industries, Incorporated* U.S. [Federal] Court of Appeals, Fourth Circuit 21 June 2002	**166**
CLOUT Case No. 86	*Graves Import Co. Ltd. v. Chilewich Int'l Corp.* U.S. District Court for the Southern District of New York 22 September 1994	**124**

TABLE OF ARBITRAL AWARDS AND DECISIONS

Cited as	*Citation*	*Cited in §*
ICC Case No. 6719	International Court of Arbitration, Arbitral Award Number 6719, 1994	**76**
ICC Case No. 7385	International Court of Arbitration, Arbitral Award Number 7385, 1992	**76**
ICC Case No. 7402	International Court of Arbitration, Arbitral Award Number 7402, 1992	**76**
ICC Award No. 8611	International Court of Arbitration, Arbitral Award Number 8611/HV/JK, 1997	**177**
ICC Award No. 9593	International Court of Arbitration, Arbitral Award Number 9593, 1998	**175**
ICC Case No. 22423	*Surpass Commercial Corp. Ltd. v. Bariven S.A.*, ICC Case No. 22423/FS, Final Award, 27 May 2019	**25, 29**
ICC Case No. 21574	*Premium Petroleum Services Corp. v. Superior Energy Services Colombia, S.A.S. & Superior Energy Services, Inc. v. Victor Augusto Palacio Gaitán & María Eugenia Hernández Rojas*, ICC Case No. 21574/RD/MK, Final Award, 19 July 2018	**45**
ICC Case No. 11849	ICC International Court of Arbitration Arbitral Award Number 11849, 2003	**126**
ICC Case No. 7565	ICC International Court of Arbitration Arbitral Award Number 7565, 1994	**152**
ICC Case No. 97	ICC International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation Arbitral Award Number 97, 2003	**210**

STATEMENT OF FACTS

1 The parties to this Arbitration ("**Parties**") are SensorX plc ("**CLAIMANT**"), based in Mediterraneo, and Visionic Ltd ("**RESPONDENT**"). CLAIMANT is a top Tier 2 producer of sensors used in various applications in the automotive industry. RESPONDENT is a Tier 1 producer of optical systems used by many of the leading car manufacturers for their autonomous parking systems.

7 Jun 2019	The Parties entered into a FA ("Framework Agreement").
4 Jan 2022	The Parties agreed that RESPONDENT could submit Purchase Order No. A-15604 ("PO No. A-15604") which would be covered by the FA in all respects not specifically regulated differently by the Parties [*C. Ex. 7*].
5 Jan 2022	Despite CLAIMANT's heavy investment its information technology infrastructure and cybersecurity training [PO2, p. 64, §24], it is victim of a successful cyberattack.
17 Jan 2022	In PO No. 9601, RESPONDENT ordered 1,200,000 sensors.
23 Jan 2022	CLAIMANT discovers it was targeted by a cyberattack.
16 Jan 2022	CLAIMANT fulfilled its obligation under PO No. A-15604 [*C. Ex. 7*].
28 Mar 2022	RESPONDENT receives the phishing email from "telsa.audi@se**m**sorx.me" [*C. Ex. 5*].
25 Aug 2022	CLAIMANT discovers no payment had been made under PO No. 9601.
9 Jun 2023	Request for Arbitration ("RfA") and commencement of arbitration.
1 Set 2023	CLAIMANT discovers the second payment under PO No. A-15604 had not been made.
11 Set 2023	Request for authorization of new claim ("RfANC") relating to PO No. A-15604.

SUMMARY OF ARGUMENT

PART I: THE ADDITIONAL PAYMENT CLAIM RAISED UNDER PO NO. A-15604 MUST BE DECIDED IN THIS ARBITRATION

2 CLAIMANT's additional claim must be decided in this arbitration. Article ("Art.") 9 ICC Rules allows both claims to be raised in a single arbitration **(A)**. Even if the Arbitral Tribunal ("Tribunal") considers that there are two different arbitration agreements, the limits imposed by Art. 6(4)(ii) ICC Rules are surpassed and the extension of the claim is still possible. Moreover, the limits outlined in Art. 23(4) ICC are met **(B)**. Therefore, the Tribunal not only can extend the claim, but must do so considering the circumstances of the case.

PART II: SUBSIDIARILY, IN THE UNLIKELY EVENT THAT THE ADDITIONAL CLAIM HAS TO BE RAISED IN SEPARATE PROCEEDINGS, THE ARBITRAL TRIBUNAL MUST CONSOLIDATE BOTH ARBITRATIONS

3 The procedural agreement designed by the Parties in their arbitration clause [*FA, Art. 41, p. 12, §5*] not only expressly mentions consolidation, but also grants the Tribunal the authority to carry it out. Therefore, the proceedings can be consolidated, since the Tribunal has the powers to do so (**A**), and all requirements outlined in Art. 10 ICC Rules are fulfilled (**B**). In addition, the proceedings must be consolidated to avoid unnecessary delays and expenses (**C**).

PART III: CLAIMANT IS ENTITLED TO PAYMENT OF THE PRICE IN FULL

4 It is undisputed that the Parties entered into a FA from which obligations derive: whilst CLAIMANT fulfilled its obligations, RESPONDENT failed to perform its payment obligation (**A**). RESPONDENT resorts to an incorrect analysis of the law and relies on an exchange of emails with someone other than CLAIMANT to justify a wrongful transfer of funds (**B**). In any case, RESPONDENT would not be eligible for a reduction in damages (**C**).

PART IV: CLAIMANT DID NOT CAUSE RESPONDENT'S FAILURE TO PERFORM

5 CLAIMANT argues that the full responsibility for the non-performance of the FA derives from RESPONDENT itself. No legal obligation arises from the CISG, Danubian Law or Mediterranean Law to inform RESPONDENT about the cyberattack CLAIMANT suffered (**A**). In the absence of said information duty, RESPONDENT caused the failure to perform by not complying with what was agreed between the Parties in the FA. Therefore, it cannot rely on Art. 80 CISG to evade its obligations (**B**).

ARGUMENT

PART I: THE ADDITIONAL PAYMENT CLAIM RAISED UNDER PO NO. A-15604 MUST BE DECIDED IN THIS ARBITRATION

6 CLAIMANT's additional claim must be decided in this arbitration. Art. 9 ICC Rules allows both claims to be raised in a single arbitration (**A**) since they stem from multiple contracts and fall under one arbitration agreement. Even if the Arbitral Tribunal considers that there are two different arbitration agreements, the limits imposed by Art. 6(4)(ii) ICC Rules are surpassed and the extension of the claim is still possible. Moreover, the requirements outlined in Art. 23(4) ICC Rules are met (**B**). Therefore, the Arbitral Tribunal not only can extend the claim but must do so considering the circumstances of the case.

A. ART. 9 ICC RULES ALLOWS BOTH CLAIMS TO BE RAISED IN A SINGLE ARBITRATION

7 The additional claim may be settled in the same arbitration given that the POs are multiple contracts under Art. 9 ICC Rules **(1)** and the claims are made under one arbitration agreement **(2)**. Even if the Tribunal considers that the claims are made under two arbitration agreements, they are compatible under Art. 6(4)(ii) ICC Rules and can be solved in a single arbitration **(3)**.

1. The POs are multiple contracts under Art. 9 ICC Rules

8 The Parties entered a FA to regulate the future supply of sensors between RESPONDENT and CLAIMANT [*C. Ex. 1* (*CLAIMANT Exhibit), pp. (pages) 9-12*]. Under this FA, several POs were placed [*RfA, pp. 5-6, §10; C. Ex. 2, p. 13; C. Ex. 7, p. 48*].

9 In Art. 41(3) of the FA [*C. Ex. 1, p. 11*] and in the dispute resolution clauses of each PO [*C. Ex. 2, p. 13; C. Ex. 7, p. 48*], the Parties chose the ICC Rules to conduct the arbitration. Therefore, the Arbitral Tribunal must follow the mentioned set of rules, including Art. 9 ICC Rules.

10 Art. 9 ICC Rules provides that "subject to the provisions of Arts. 6(3)-6(7) and 23(4) ICC Rules, claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules".

11 This article applies to different types of situations. For instance, Art. 9 ICC Rules is applicable "where a claimant makes claims against a respondent under different contracts between the same parties" [*Verbist & Schäfer, p. 25, §59*]. This is precisely the case at hand.

12 As mentioned above, CLAIMANT raises allegations against RESPONDENT under two different contracts, PO No. 9601 [*C. Ex. 2, p. 13*], and PO No. A-14604 [*C. Ex. 7, p. 48*].

13 In this sense, each PO is a singular contract between the same Parties, even though they are submitted to the same FA. Since the ICC Rules are the ones chosen by the Parties and the at hand deals with multiple contracts, Art. 9 ICC Rules must be applied.

2. The claims are made under one arbitration agreement

14 Art. 9 ICC Rules applies to multiple contracts irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules. In the present case, all claims are subjected to the same arbitration agreement contained in the FA.

15 A framework agreement is settled when the Parties do not know the exact quantities, nature, or timing of the supply of a good or service over a given period. It works as a master contract for the future supply [*Albano & Nicholas, p. 4*]. One of its advantages is it allows for greater time and cost efficiency of the transactions. Framework Agreements aggregate different purchases "so that some procedural steps (…) are concluded once for the group of purchases, rather than individually for each purchase" [*Albano & Nicholas, pp. 4-5*]. It defines general terms that apply to all contracts, but each singular contract can always have specific provisions.

16 This was the intention of the Parties when they entered into the FA and included the arbitration clause in Art. 41 [*C. Ex. 1, p. 11*]. Both RESPONDENT and CLAIMANT wanted arbitration to resolve all possible disputes arising in connection with the FA and the contracts concluded thereunder. In fact, the Parties wanted to conclude a broad arbitration agreement, as its wording indicates [*C. Ex. 1, p. 11*]. There should be no doubt that the Arbitration Agreement applies to both PO No. 9601 and PO No. A-14604. Under the terms of Art. 9 ICC Rules, it must therefore be understood that we are dealing with a claim made under one arbitration agreement, the one included in the FA as Art. 41.

3. The arbitrations agreements in both POs are compatible under Art. 6(4)(ii) ICC Rules

17 Even if the Tribunal considers that this is a case with two different arbitration agreements, the requirements of Art. 6(4)(ii) ICC Rules for these situations are fulfilled and the extension of the claim is still possible.

18 Art. 6(4)(ii) ICC Rules states that when claims pursuant to Art. 9 ICC Rules are made under more than one arbitration agreement, "the arbitration shall proceed as to those claims if the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration".

19 Regarding the first requirement, on the compatibility of the arbitration agreements, in the ICC framework, the Secretariat verifies whether all the agreements connect with a single transaction or project and if the dispute resolution provisions align. Additionally, it also assesses whether the agreements all involve the same Parties in the arbitration [*Born, §18.03*].

20 It is clear that the arbitration agreements in PO No. 9601 and PO No. A-14604 involve the same Parties and pertain to a singular project outlined in the FA – specifically, the supply of S4-25899 sensors between RESPONDENT and CLAIMANT, possibly extending to other products [*C. Ex. 1, p. 9*]. Both POs arise in connection with the same legal relationship. The Parties concluded the FA to regulate the details of their future cooperation on a project that would be the supply of sensors. All the POs that resulted from the FA were the development of this project.

21 Incompatibilities may arise from arbitration clauses with different rules regarding the constitution of the arbitral tribunal, seat of the arbitration, languages, time limits, or other procedural aspects [*Verbist & Schäfer, p. 26, §60*]. It is also taken into account if one contract contains provisions for ICC arbitration and the other national jurisdiction [*Born, §18.03*].

22 Both arbitration agreements in the present case contained provisions for ICC arbitration, selected the place of Arbitration in Danubia, and established the application of the CISG [*C. Ex. 2, p. 13; C. Ex. 7, p. 48*]. Thus, the dispute resolution provisions are compatible.

23 The compatibility requirement, however, does not mean that the arbitration agreements must be identical [*Secretariat's Guide, §3-243].* The only difference that stands out between the two arbitration agreements is the inclusion of a provision that excludes the Rules on Emergency Arbitration in the second agreement [*C. Ex. 7, p. 48*]. The only reason for this exclusion was the advice given to CLAIMANT regarding the problems of enforcing measures ordered by an emergency arbitrator, which led CLAIMANT to exclude this possibility, with RESPONDENT's agreement [*PO2, p. 65, §33*]. It is possible that if this advice had been given earlier, the first arbitration agreement in PO No. 9601 would probably also exclude the emergency rules. This shows that a new provision was only added due to the circumstantiality described and not to distinguish the two arbitration agreements.

24 Additionally, the emergency rules offer a short-term solution for parties that are unable to wait for the constitution of an arbitral tribunal [*Duffy, p. 6*]. In the present case, the Tribunal has already been settled, therefore it could not be a case of an emergency arbitration nor be the cause of any incompatibility. Thus, this exclusion raises no question of incompatibility.

25 On this point, CLAIMANT invites the Tribunal to consider ICC Case No. 22423. In that case, the Tribunal had to decide whether a single arbitration under the Art. 9 ICC Rules was admissible. Claimant and Respondent entered into various supply contracts through 26 POs. The Tribunal considered that all the claims were based on common issues of fact and law, involved the same two Parties, under purchase orders concluded through the same regulated bidding process, incorporating either of the same two Terms and Conditions that include the same relevant articles on price and payment terms, under the same governing law. There, the Tribunal decided that a single arbitration was admissible since the arbitration agreements under the 26 Purchase Orders were compatible.

26 The same rational applies to the case at hand. The claims also involve the same two Parties, under POs concluded through the same approach and provisions including the same relevant articles, under the same governing law. Thus, the Tribunal must decide in the same way and conclude that the first requirement on the compatibility of the arbitration agreements has obviously been verified.

27 Regarding the second requirement of Art. 6(4)(ii) ICC Rules, the Court must be satisfied that all Parties to the arbitration may have agreed to include those claims in the same arbitration. As the wording of the article indicates, an explicit agreement is therefore not required. All that is required is that the Parties may have agreed on including the claims on a single arbitration.

28 Since there was no explicit agreement in this case, the Tribunal must look to the circumstances of the case in order to understand the intention of the Parties and whether they could have agreed to include those claims in the same arbitration.

29 In the ICC Case No. 22423, stated above, the Tribunal also settled that the circumstances of "the 26 Purchase Order did not only mean that the arbitration agreements were compatible, but also that the Parties clearly intended that disputes arising thereunder should be determined together in a Single Arbitration". Given that the circumstances of the POs in this case are similar to the ones in the case at hand, the Tribunal must consider that the Parties intended that both claims were made under the same arbitration.

30 In addition, the Tribunal in the mentioned case stated that there was no evidence to the contrary. Not even the Purchase Orders being independent contracts could allow this conclusion. There was no reason to believe that the parties wanted the disputes over the different Purchase Orders to be decided in different arbitrations, given that they adopted the same approach and provisions for all Purchases. The Tribunal also considered the fact that respondent never made a reservation about the possible application of Art. 9 ICC Rules.

31 In the present case, the Parties adopted the same approach and almost identical provisions in both POs. RESPONDENT never, in any of the POs, made a reservation about the possible application of Art. 9 ICC Rules. By concluding the FA, the Parties showed their intention to be more cost and time effective, as mentioned, which also supports the conclusion that they would want the claims to be dealt in a single arbitration.

32 Therefore, the second requirement is fulfilled given that the connection between the contracts and all the other relevant circumstances stated above show an intention of the Parties that the claims arising thereunder can be determined together in a single arbitration.

33 For that reason, even if it is considered that there are two arbitration agreements, they are compatible under Art. 6(4)(ii) ICC Rules and therefore do not preclude the application of Art. 9 ICC Rules. Consequently, the claims can be made in a single arbitration.

B. THE REQUIREMENTS FOR AUTHORIZING NEW CLAIMS UNDER ART. 23(4) ICC RULES ARE ALSO FULFILLED

34 As previously stated, Art. 9 ICC Rules is subject to the limits of Art. 6(3)-(7) ICC Rules, already analyzed, and Art. 23(4) ICC Rules, dealing with when a new claim is to be added after the Terms of Reference have been approved by the Court. The requirements for authorizing new claims under Art. 23(4) ICC Rules are fulfilled since the Tribunal has a broad discretion to decide on the addition of new claims (**1**); the new claim is closely connected to the existing one (**2**); the arbitral proceedings are still in an introductory phase (**3**); and hearing both claims in the same arbitration is time and cost-efficient (4).

1. The Arbitral Tribunal has both the power to decide on the admission of new claims and broad discretion to do so

35 Art. 23(4) ICC Rules states that "after the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."

36 This article has been amended over time. In the early versions of the ICC Rules, both parties needed to approve the submission of a new claim after the approval of the Terms of Reference. In the 1988 ICC Rules, Art. 16 stated that "the parties may make new claims or counter-claims before the arbitrator on condition that these remain within the limits fixed by the Terms of Reference provided for in Art. 13 or that they are specified in a rider to that document, signed by the parties and communicated to the Court". The function of the Terms of Reference has clearly changed over the years. [*Born, §15.08(S)*]. Under 1998 ICC Rules the new claims could

only be added by doing an amendment to the Terms of Reference. Therefore, one of the parties could stop the other one from adding a new claim, given that the amendment needed to be signed by both of them [*Verbist & Schäfer, p. 76, §135*].

37 In the subsequent ICC Rules, Art 23(4) replaced the previous rigid provisions, to allow greater flexibility, dismissing the agreement of both parties on the addition. This shows a clear intention to simplify the application of this article because it was considered that there are cases in which new claims should be allowed regardless of the other party's authorization. This is precisely one of those cases.

38 The wording chosen in Art. 23(4) ICC Rules grants the Arbitral Tribunal broad discretion when deciding on the admissibility of new claims since the Tribunal decides which circumstances are relevant in the case, other than the ones given as examples in the provision. This is a subjective analysis that shows that the current rules leave much more flexibility and discretion to the arbitral tribunal than was possible under the previous versions. [*Verbist & Schäfer, p. 76, §135*].

39 Thus, the Arbitral Tribunal has both the power to decide on the admission of new claims and broad discretion to do so, since "the provision arms the arbitral tribunal with sufficient flexibility to permit new claims where appropriate" [*Secretariat's Guide, §3-890*].

2. The new claim is closely connected to the existing one

40 Regarding the nature of the new claim, scholars propose that the tribunal focus on a factual relationship between the new claims and the ones contained in the Terms of Reference [*Secretariat's Guide, §133*]. The arbitral tribunal may accept the addition of new claims when they fit into the proceedings and relate to the dispute at hand [*Secretariat´s Guide, §§3-904*].

41 In fact, CLAIMANT's new claim is connected to the previous one given that they both arise from the same FA that governs the Parties relationship, which are also the same in both claims. All contracts concluded under the FA follow the same rules and are therefore connected. Given that both claims arise from connected contracts, the claims must naturally also be connected.

42 There is clearly a relationship between the first claim and the new one since they both relate to the same dispute – a dispute between CLAIMANT and RESPONDENT arising from the purchase and supply of sensors [*C. Ex. 1, pp. 9-12*]. claims are the result of disputes arising from the same legal relationship.

43 In addition, both claims were made due to payment problems in the commercial relationship between the Parties. The first claim is made because the payments for both deliveries under PO No. 9601 were never received [*RfA, p. 6, §14*]. The additional claim is made because

RESPONDENT failed to comply with the second payment under PO No. A-15604 [*RfANC, pp. 46-47, §4*]. Therefore, given the nature of the new claim, it makes perfect sense for both claims to be dealt with in the same arbitration.

3. The arbitral proceedings are still in an introductory phase

44 To authorize the new claim, the Tribunal should also take into account the timing of the claim and the stage the proceedings have reached, pursuant to Art. 23(4) ICC Rules.

45 Whenever a request for additional claim is made at a later stage than the one in the case at hand, the new claim is not authorized. Pursuant to ICC Case No. 21574, the Tribunal considered that "claimant was left with limited ability to submit their defenses to the new claims, given that the new claims were only filled by respondent when submitting its Memorial of Reply". CLAIMANT urges the Tribunal to decide otherwise in this case since CLAIMANT submitted its request before the written submissions, which gives RESPONDENT the possibility to submit its defense.

46 In the present case, the proceedings are in an early stage which means that the new claim does not jeopardize the course of the proceedings, especially since there have been no written submissions yet. The addition of the new claim does not require the proceedings to take a significantly different direction, nor does it disrupt the natural course of resolving the dispute.

47 Another point to consider is that the tribunals will deny the request of the additional claims when there is a clear intention of one of the parties to slow down the proceedings and delay the award [*Verbist & Schäfer, p. 76, §134*]. This usually happens on the respondent side which, naturally, has an interest in delaying the proceedings, especially if the claim regards a payment.

48 In this case, CLAIMANT has obviously no interest in adding a new claim to delay the moment at which the award is rendered. In fact, it is in CLAIMANT's best interest for the proceedings to be carried out as quickly as possible so that, if its request is successful [*RfA, p. 8, §30*], CLAIMANT can be paid for the deliveries it has already made.

49 The Tribunal should also consider if CLAIMANT had the opportunity to make the claim earlier in the proceedings. There is a distinction "between cases where a party failed to advance such claims previously in a grossly negligent manner and scenarios where a party was prevented from asserting new or amended claims for reasons not attributable to it" [*Brueggemann & Smahi, p. 52*].

50 Moreover, it is possible that a case evolves during the proceedings, with new events and new information that can lead to the need for an additional claim [*Verbist, p. 76, §134*]. In the case

at hand, the information about the lack of payment was unknown when the Terms of Reference were signed. It was only during the proceedings that CLAIMANT found out about this new information [*RfANC, pp. 46-47, §4; C. Ex. 8, p. 49, §7*]. As a result, CLAIMANT did not have the opportunity to make the claim earlier.

51 All of these circumstances demonstrate that CLAIMANT's motivation for submitting the new claim is legitimate. CLAIMANT is only requesting the addition of a new claim since new facts had come to light during the proceedings. In this sense, CLAIMANT is clearly acting in good faith, which is a relevant consideration for the tribunal to determine whether to allow new claims [*Brueggemann & Smahi, p. 52*]. Therefore, due to the introductory phase of the proceedings, the extension of the claim should be allowed.

4. Hearing both claims in the same arbitration proceedings is time and cost-efficient

52 According to Art. 22(1) ICC Rules, the Arbitral Tribunal shall make every effort to conduct the arbitration expeditiously and cost-effectively. This article requires the Tribunal to "see the proceedings through to their successful conclusion and to make an award covering all the claims as quickly as possible" [*Verbist & Schäfer, p. 76, §134*].

53 Deciding the new claim in this arbitration would be much more efficient than separating the two claims, since this would require a new request for arbitration that takes more time and more costs. Given the Arbitral Tribunal's commitment to time and cost efficiency, the additional claim must be authorized.

54 The need to commence a separate arbitral proceeding with the additional claim could also bring more risks. If CLAIMANT starts a new arbitral proceeding, the additional claim will be decided by another arbitral tribunal. Therefore, there is a risk that the new arbitral tribunal, which may be composed differently, will render a different decision from the initial tribunal. This could lead to two contradictory awards. [*Verbist & Schäfer, p. 76, §134*]. To avoid this inconvenience, the Arbitral Tribunal should authorize the additional claim in order to rent one single award pursuant to all claims.

C. CONCLUSION

55 The addition of the new claim relating to PO No. A-15604 can and should be authorized. Each POs is an independent contract under Art. 9 ICC Rules and both claims were made under one arbitration agreement, Art. 41 of the FA. In the event that the Tribunal considers that each contract has its own arbitration agreement, both agreements are compatible under the requirements settled in Art. 6(4)(ii) ICC Rules. The limits to Art. 9 ICC Rules established in

Art. 23(4) ICC Rules when a new claim is to be added are also fulfilled which leads to the conclusion that Art. 9 ICC Rules is fully applicable and there must be an extension of the claim.

PART II: SUBSIDIARILY, IN THE UNLIKELY EVENT THAT THE ADDITIONAL CLAIM HAS TO BE RAISED IN SEPARATE PROCEEDINGS, THE ARBITRAL TRIBUNAL MUST CONSOLIDATE BOTH ARBITRATIONS

56 Due to RESPONDENT´s reiterate breaches of its obligations under the Framework Agreement, CLAIMANT was forced to raise an additional claim in the present arbitration [*RfANC, pp. 46-47*]. Only in the unlikely case that this claim is not allowed to be settled in the proceedings, CLAIMANT requests the Secretariat to consider the RfANC as a RfA for a new arbitration relating to PO No. A-15604. This request must be followed by the consolidation of both proceedings.

57 Art. 10 ICC Rules expressly provides for the possibility of consolidation of two or more proceedings into a single arbitration. By opting to subject this arbitration to the ICC Rules, the Parties jointly accepted the possibility of consolidation [*Lew, Mistelis & Kröll, §§16-44; Ashford, p. 403*]. The latest version of the ICC Rules broadens the cases where consolidation is admitted [*Secretariat´s Guide, §§3-349; Verbist & Schäfer, p. 61; Webster & Buhler, §§10-1; Born II, p. 272*]. In addition, the Parties equipped with the autonomy granted to them by Art. 19 ICC Rules, crafted a procedural agreement that expands the application of the consolidation rules even further [*FA, Art. 41, p. 12, §5*].

58 The procedural agreement designed by the Parties in their dispute resolution clause not only expressly mentions consolidation, but also grants the Arbitral Tribunal the authority to carry it out. Therefore, the proceedings can be consolidated, since the Arbitral Tribunal has the powers to do so (**A.**), and all requirements outlined in Art. 10 ICC Rules are fulfilled (**B.**). In addition, the proceedings must be consolidated in order to avoid unnecessary delays and expenses (**C.**).

A. THE ARBITRAL TRIBUNAL HAS THE POWER TO CONSOLIDATE BOTH ARBITRATIONS

59 Besides expressly providing for the possibility of consolidation, Art. 41(5) FA validly departs from the ICC Rules by conferring the Arbitral Tribunal the authority to consolidate proceedings.

60 Not all provisions within the ICC Rules are mandatory. The parties' autonomy enables them to enter into procedural agreements that deviate from the established Rules [*Waincymer, pp. 384-385; Webster & Buhler, §§19-8*]. This means that the Parties´ agreement is only limited by the

mandatory provisions of the ICC Rules, which mainly seek to safeguard the principle of due process [*Verbist & Schäfer, pp. 107-108*].

61 In the present case, the Parties incorporated a procedural agreement within their dispute resolution clause, on Art. 41(5) FA. This agreement does not violate any due process provision and was made prior to the nomination of the arbitrators. In this sense, the Arbitral Tribunal has the power to consolidate both arbitrations, because it is granted through a valid procedural agreement made by the Parties (**1**), which cannot be overridden by the Tribunal (**2**).

1. The Parties made a valid procedural agreement granting the Arbitral Tribunal powers to consolidate arbitrations

62 Upon RESPONDENT´s insistence, the Parties entered into a procedural agreement endowing the Arbitral Tribunal with the authority to consolidate arbitrations [*PO2, p. 63, §19*]. Such agreement is valid because, firstly, it respects the mandatory provisions of the ICC Rules, and secondly, the Court did not raise objections when agreeing to administer this arbitration.

63 Regarding the compliance with the mandatory provisions, it is relevant to mention that Art. 19 ICC Rules historically upholds the principle of party autonomy [*Redfern & Hunter, p. 355, §6.08*]. As a result, the rules do not provide a complete and strict procedural code for ICC arbitration. Instead, they empower the Parties to, within a framework, agree on a procedure that best adapts to their case [*Webster & Buhler, §§0-42*]. According to the mentioned article, the exercise of this procedural autonomy is only limited by the mandatory provisions of the rules [*Born, §15.02[D]*].

64 Examples of mandatory rules are often identifiable through the language used, notably characterized by imperative expressions such as "must" [*Redfern & Hunter, p. 357, §6.16*]. However, in the absence of explicit provisions, the presumption is that institutional rules will yield to the preferences of the parties [*Azzali, p. 457; Benedettelli, p. 144*].

65 In the specific case of the ICC Rules, the analysis of whether a rule is mandatory is made on a case-by-case basis [*Smit, p. 847*]. It is generally accepted, however, that the purpose of these mandatory rules is to ensure the fairness and efficiency of the arbitration process [*Born, §15.02[D]; Secretariat´s Guide, p. 209*].

66 Art. 10 ICC Rules is not a mandatory provision, and the modifications introduced by the Parties do not compromise the fairness or efficiency of the proceedings. On the contrary, by empowering the Arbitral Tribunal to consolidate arbitrations, the Parties enhanced the overall effectiveness of the proceedings. The choice to consolidate is primarily influenced by the

unique features of each case [*Born, §18.02[B][9]*]. Due to the Arbitral Tribunal´s continuous engagement in the proceedings, a nuanced understanding of the specific facts and circumstances is cultivated. This familiarity equips the Arbitral Tribunal to render a tailored decision that aligns with the details of the case.

67 Additionally, according to Art. 1, Appendix I ICC Rules, the Court holds ultimate authority in ensuring the application of the ICC Rules. Consequently, it is also the body responsible for determining the acceptability of provisions deviating from the rules [*Verbist & Schäfer, p. 107*]. In cases where such provisions are included in the arbitration agreement, and the Court deems the alterations to be unacceptable, it will decline to administer the arbitration. [*Berger, p. 350; Craig, Park & Paulsson, p. 295; Smit, pp. 845-846; Samsung v. Qimonda case*].

68 For efficiency reasons, the decision of the Court to administer or not the arbitration must be made as soon as possible. After the decision is made, the Court will allow the Secretariat to transmit the case file to the Arbitral Tribunal [*Secretariat´s Guide, §3-209*]. In the present case, the Secretariat has already transmitted the file to the Tribunal on 11 August 2023 [*ICC Letter to the Arbitral Tribunal, p. 40*]. No objections to the Parties´ procedural agreement were raised. In this sense, the Parties´ alteration to Art. 10 ICC Rules is valid and the Arbitral Tribunal has the authority to consolidate the proceedings.

2. The Arbitral Tribunal cannot override the Parties´ procedural agreement

69 The Arbitral Tribunal cannot refuse to decide on the matter of consolidation. Firstly, the agreement made by the Parties takes precedence over the Tribunal´s procedural discretion. Secondly, all members of the Tribunal have willingly accepted the arbitration with full awareness of the relevant procedural agreement.

70 Art. 19 ICC Rules, when determining the hierarchy of rules governing the proceedings, recognizes party autonomy and places it above the arbitral tribunals´ procedural discretion [*Born, §15.02[D]*]. As a result, the procedural agreement reached by the Parties must be followed by the Arbitral Tribunal [*Webster & Buhler, §19-12*].

71 In the unlikely event that the Arbitral Tribunal renders that the agreement contained in Art. 41(5) FA is invalid, it still will not be able to override it. When the Parties reach an agreement before the nomination of the Tribunal, its members are in the position of not accepting the arbitration. However, if they willingly accept the nomination, the arbitrators are generally required to give effect to the Parties´ agreement [*Waincymer, p. 388*; *Webster & Buhler, §19-12*].

72 In the present case, the procedural agreement was entered by the Parties on 7 June 2019 [*FA, pp. 11-12*]. After the commencement of the arbitration on 1 January 2021, all members of the Tribunal accepted their nominations [*Case Information, p. 45*]. As a consequence, the procedural agreement made by the Parties cannot be overridden by the Tribunal and it must decide on the matter of consolidation.

B. THE REQUIREMENTS FOR CONSOLIDATION UNDER ART. 10 ICC RULES ARE FULFILLED

73 Not only does the Tribunal have the power to consolidate the proceedings, but also, all prerequisites for consolidation are met in the present case. In previous versions of Art. 10 ICC Rules, consolidation could only take place before the signature of the Terms of Reference [*Secretariat's Guide §3-350*]. Such limitation, however, no longer exists. In fact, the current rule grants more autonomy to the Tribunal by setting three requirements for consolidation and taking specific circumstances of the case into consideration. The requirements, as the language of the article indicates, are alternative [*Verbist & Schäfer, p. 63*] and encompass the following: the existence of a mutual agreement; all claims being made under the same arbitration agreement; or in case of different agreements, common factors being shared in both arbitrations.

74 In the present case, the procedural agreement outlined in Art. 41(5) FA explicitly demonstrates that the Parties have agreed to consolidation (**1**). Additionally, even in the absence of such agreement, consolidation would remain viable (**2**).

1. The arbitration agreement contains an express agreement allowing for consolidation

75 The Parties not only agreed to the possibility of consolidation when selecting the ICC Rules to govern their arbitration, but also decided to make an express provision to this end on Art. 41 FA. This provision fulfills the requirement of Art. 10(a) ICC Rules; therefore, the proceedings can be consolidated.

76 Art. 10(a) ICC Rules lists the agreement of the Parties as one of the possible reasons for consolidation. In such scenarios, the ICC (or in this case, the Arbitral Tribunal) is likely to automatically exercise its power, prioritizing party autonomy [*Grierson & van Hooft, p. 123; ICC case no. 6719, ICC case no. 7385; ICC case no. 7402*].

77 The mentioned article does not specify when the consolidation agreement must be reached, but it is commonly understood that it could be included in the arbitration agreement [*ICC Institute Dossier III, p. 289; Webster & Buhler, §10-7*]. In most cases, however, arbitration agreements do not expressly mention consolidation [*Born II, p. 269*]. This means that the Parties deemed

consolidation so important in their specific case, that they opted for the unusual practice of including it in their arbitration agreement. RESPONDENT itself was the advocate for this approach [*PO2, p. 63, §19*].

78 For consolidation to happen under Art. 41(5) FA, two main requirements should be met: the proceedings must relate to contracts concluded under the FA; both disputes must be related by common questions of law or fact, which could result in conflicting awards or obligations.

79 The first requirement is clearly fulfilled, since the proceeding relate to PO No. 9601 [*C. Ex. 2, p. 13*] and PO No. A-15604 [*C. Ex. 7, p. 48*]. Both orders expressly mention their submission to the FA, recognizing it as the primary contract governing the relationship between the Parties [PART I(A)(2), p. 4, §§14-16].

80 The second agreement is also fulfilled, since, as already demonstrated, both disputes are closely connected in terms of law and fact [PART I(B)(2) pp. 8,9, §§40-43]. And, as required by Art. 41(5) FA, there is a real danger of conflicting decisions arising in case the proceedings are not consolidated.

81 Conflicting decisions are characterized by logically incompatible statements, whether in their dispositive part or in their reasoning [*Mayer, p. 409*]. The mentioned risk of conflicting findings can pertain to both legal and factual matters [*Hobér, p. 243*]. In this sense, even if the obligations under the awards are not inherently incompatible, their rationales might be. In the present case, the main example of possible conflicting decisions would relate to the interpretation of Art. 40 FA, regarding amendments. Claimant relies on this clause for the current claims [PART III(B), pp. 19-22, §§109-128; PART IV(A)(1), p. 27, §157] and will most likely also rely on it for the new claim [*C. Ex. 8, p. 50, §9*].

82 Therefore, since the Parties expressly provided for consolidation under Art. 41(5) FA and the requirements of this provision are fulfilled, the proceedings can be consolidated under Art. 10(a) ICC Rules.

2. Even in the absence of such agreement, consolidation would still remain viable

83 In the unlikely event that the Tribunal understands that the requirements under Art. 10(a) are not fulfilled, consolidation would remain viable under paragraphs b) and c) of the same article.

84 Under paragraph b), in order for consolidation to happen, all claims in the arbitrations must be made under the same "arbitration agreement or agreements" (emphasis added). This provision represents an expansion from the previous versions of this rule and admits the arbitration agreement to be inserted in different contracts [*Webster & Buhler, §10-10*]. This is precisely the

case at hand [PART I(A)(2), p.4, §§14-16]. It is also relevant to point out that under this requirement, there is no need for the subject matters of the arbitrations to be related [*Secretariat´s Guide, §3-355*].

85 Under paragraph c), on the other hand, there is no need for the claims of both arbitrations to be made under the same arbitration agreement. Nevertheless, there must exist: an identity of parties; an identity of legal relationships; and compatibility among the arbitration agreements. The identity of parties is evident, as both proceedings would involve CLAIMANT and RESPONDENT, with no further parties mentioned in the new claim [RfANC, pp. 46-47]. Secondly, the identity of legal relationship is also present, as already demonstrated [PART I (B)(2), pp. 8,9, §§40-43]. Lastly, both arbitration agreements are compatible [PART I (A)(3), pp. 4-7, §§17-33].

86 In this sense, even in the absence of an explicit agreement by the Parties for the consolidation of proceedings, the alternative requirements specified in Art. 10 ICC Rules would still be met, allowing for the possibility of consolidation.

D. A CONSOLIDATION WOULD AVOID UNNECESSARY DELAYS AND EXPENSES

87 CLAIMANT has already incurred significant losses as a result of RESPONDENT's failure to pay PO Nos. 9601 and A-15604. Therefore, a proceeding that is both cost-effective and time-efficient is of utmost importance. The best solution, in this sense, would be to consolidate the proceedings.

88 Consolidation is a desirable solution in cases involving multiple contracts, presenting various advantages to the proceedings [*Smith, p. 174; Born II, pp. 265-266*], especially when both proceedings involve the same Parties [*Leboulanger, p. 44*]. This becomes evident when analyzing the statistics of accepted consolidation requests submitted to the ICC in recent years. In 2020, for instance, 17 out of the 25 applications submitted for this purpose were approved [*Webster & Buhler, §10-5*].

89 This instrument allows a single arbitral tribunal to decide all the pertinent issues for the case, which creates procedural efficiency and reduced costs under the ICC´s costs scale [*ICC Supplement on Complex Arbitrations, p. 17; Secretariat´s Guide, §3-348*].

90 The advantages, however, are not merely theoretical; the current case serves as an illustration of proceedings that would benefit from consolidation. Given the early stage of the ongoing

arbitration, the costs and time that would be spent to constitute a second Arbitral Tribunal would be saved [*Platte, §III(i)*].

91 Furthermore, the costs relating to the presentation of evidence would also be reduced, due to testimonies being brought before the same Tribunal [*Leboulanger, pp. 62-63*]. This is particularly relevant, because in the present case, many of the same witnesses would have to be consulted for both proceedings. Mr. Toyoda, for example, as the Head of Purchasing for RESPONDENT, was the one who signed off both PO No. 9601 [*C. Ex. 2, p. 13*] and PO No. A-15604 [*C. Ex. 7, p. 48*]. Dr. Durant, CLAIMANT´s Head of Sales, like many others, would also need to be heard in both proceedings. She was in direct contact with RESPONDENT on the occasion of its first [*C. Ex. 3, p. 14*] and second breaches of obligations [*C. Ex. 8, p. 49, §8*].

92 In this sense, due to the general advantages and the concrete situation of the proceedings, the Arbitral Tribunal must consolidate both arbitrations in order to avoid unnecessary costs and delays.

E. CONCLUSION

93 The additional claim relating to PO No. A-15604 must be settled in this arbitration. In the unlikely event that this claim has to be raised in separate proceedings, it is essential that both arbitrations are consolidated. Such consolidation is not only legally viable, meeting the prerequisites outlined in Art. 41(5) FA and Art. 10 ICC Rules, but also indispensable. The savings in costs and time offered by this solution are necessary considering the losses incurred by CLAIMANT due to RESPONDENT´s failure to comply with its obligations under PO Nos. 9601 and A-15604. Therefore, the proceedings must be consolidated.

PART III: CLAIMANT IS ENTITLED TO PAYMENT OF THE PRICE IN FULL

94 CLAIMANT requests the Tribunal to hold RESPONDENT accountable for its breach of payment obligations. To this end, CLAIMANT will demonstrate that (**A**) RESPONDENT did not comply with the payment obligation set-upon on the FA, (**B**) the exchange of emails with a fraudulent individual cannot constitute a valid amendment to the FA, and (**C**) RESPONDENT could never be eligible for a reduction in damages.

A. RESPONDENT FAILED TO PERFORM ITS PAYMENT OBLIGATION UNDER THE FA

95 The Parties entered into a contractual agreement, consisting of a FA and a PO No. 9601, governed by the CISG (**1**). The CISG imposes obligations on both Parties: only RESPONDENT

has failed to comply with them (**2**). As a result, CLAIMANT has the right to be paid by RESPONDENT according to Art. 62 CISG (**3**).

1. The FA and PO No. 9601 are governed by the CISG

96 The CISG governs the FA concluded between the Parties, as well as PO No. 9601, as it satisfies the criteria foreseen in its Art. 1(1)(a) and falling within its scope.

97 According to Art. 1, the CISG is applicable if the following criteria are met: there must be 1) a contract for the sale of goods; 2) the contract must be international; and 3) either the States are Contracting States ("CS's") or the rules of private international law leads to the application of the law of a CS [*Kröll et all, pp. 22- 23; Huber & Mullis, pp. 41-44*].

98 The FA concluded between the Parties on 7 June 2019 [*C. Ex. 1, p. 9-12*] is a standard contract of sales of goods. Moreover, both CLAIMANT and RESPONDENT have their places of business in Mediterraneo and Equatoriana, CS's of the CISG [*PO 1, p.59, §4*]. It was also agreed and commonly accepted by the Parties that the CISG applies specifically to PO No. 9601 [*C. Ex. 2, p. 13, § 7*].

99 Accordingly, as a result of the fulfilment of the necessary requirements of Art. 1(1)(a) CISG, the FA and PO No. 9601 are governed by the CISG.

2. RESPONDENT did not pay the price agreed-upon for the sensors, pursuant to Art. 53 CISG

100 The CISG establishes primary obligations for the Parties in its Arts. 30 and 53 [*Gabriel, p. 273; Brunner & Lerch, p. 393*]. Per Art. 53 CISG, RESPONDENT, acting in the capacity of the buyer, bears the primary obligation to take delivery and remit payment for the goods. CLAIMANT, as the seller, in pursuance of Art. 30 of the CISG, is obligated to deliver the goods.

101 CLAIMANT, in compliance with Art. 30 CISG and Art. 3 of the FA, fulfilled its obligations by delivering the 2 instalments of sensors on the agreed dates [*C. Ex. 2, p. 13, §7; C. Ex. 3, p. 14*].

102 According to Art. 7 FA, the Parties mutually agreed that all payments were to be executed through bank transfers to accounts specified therein. Scholars and courts have understood that a bank transfer must translate in a credit entry into the creditor's account at the designated bank and placement of the funds at the disposal of the creditor [*Mohs, Art. 53, §§10-12; CISG Case No. 282*]. In this sense, the lack of entry of the credit into the creditor's account, and subsequent lack of payment to the creditor, results in a breach of the debtors' obligations [*CLOUT Case No. 1387; CLOUT Case No. 1023; CLOUT Case No. 915*].

103 Thus, as CLAIMANT did not receive the payment of USD 38,400,000 [*C. Ex. 2, p. 13; C. Ex. 3, p. 14*] on the agreed-upon due dates, and has yet to receive the stipulated funds, RESPONDENT, although taking delivery of the goods, did not comply with its payment obligation [*PO2, p. 6, §14; C. Ex. 3, p. 14*].

104 Consequently, RESPONDENT's non-compliance constitutes a breach of the obligation set in Art. 53 CISG.

3. CLAIMANT is entitled to exercise its right to be paid by RESPONDENT under Art. 62 CISG

105 Art. 62, *ex vi* Art. 61 CISG, grants the seller the right to demand specific performance of the buyer's payment of the price. This right is exercised when the buyer fails to fulfil its payment obligation, within the limitations provided in the provision [*CISG Digest p. 287 §§1-2; Lookofsky, p. 171-172; Mohs, Art 62, §§9-10; Bortolotti, p. 337; CISG Case No. 1856*].

106 After discovering the lack of payment, CLAIMANT, sent an email to RESPONDENT requesting the transfer of USD 38,400,00 to the agreed-upon bank account at the Automotive Bank in Mediterraneo [*C. Ex. 3, p. 14*], requiring RESPONDENT to perform its payment obligations in a clear and unequivocal manner.

107 In compliance with the requirements of Art. 29 CISG, CLAIMANT refrained from resorting to inconsistent remedies, only requesting the performance of the contract given the Parties' long-lasting relationship [*PO2, p. 66 §38; PO2, p. 8, §30; C. Ex. 3, p. 14*]. More so, the provision of Art. 28 CISG is met. This is due to the fact that Art. 7.2.1. of the Danubian Contract Act ("Danubian CA"), as the general contract law of Danubia, provides for the right to performance of monetary obligations.

108 Therefore, CLAIMANT is entitled to exercise its right to demand payment from RESPONDENT, pursuant to Art. 62 CISG, given the failure to fulfil its payment obligation.

B. THE FA WAS NOT EFFECTIVELY AMENDED

109 RESPONDENT may argue that the payment was effectively completed by claiming that the FA was amended through the exchange of emails with someone it believed to be Ms. Audi. However, any amendment to the FA must comply with the formalities set therein (**1**). Thus, under Art. 40 FA, no alterations were made to the FA (**2**). Furthermore, RESPONDENT must take all steps necessary to guarantee payment, in pursuance of Art. 54 CISG. Hence, RESPONDENT is obligated to ensure the completion of the payment (**3**).

1. The Tribunal must uphold the formalities established by the Parties in the FA

a) RESPONDENT cannot rely on the modification of the contract enshrined in Art. 29(1) CISG

110 Art. 29(1) CISG, which states that the mere consent of the Parties is sufficient to effect a modification or termination. However, this provision applies only in the absence of a prior written agreement between the parties requiring written form for such modifications or terminations, as outlined in Art. 29(2) CISG [*CISG Digest p. 123 §1; CISG Case No. 176*].

111 In the present case, the Parties explicitly established in Art. 40 FA that any amendment or waiver of its provisions must be made in writing and signed [*C. Ex. 1, p. 11*].

112 Consequently, RESPONDENT is precluded from relying on the provisions of Art. 29(1) CISG due to the contractual stipulation established by Art. 40 of the FA.

b) The application of Art. 29(2) CISG has not been excluded by CLAIMANT's actions

113 To meet the criteria of the second sentence of Art. 29(2), it would be essential that CLAIMANT's actions initiated or communicated a modification to the contract, which would lead RESPONDENT to rely on these actions [*Schroeter, Art 29, §34; Secretariat's Commentary, Art. 27, p. 28, §8*]. However, such actions never took place.

114 The CISG does not specify what behaviour is to be regarded as reliance-inducing [*Hillman, pp. 459-460*]. While some authors agree that the proposal of or consent to a modification (made without observing the agreed requirements as to form) can be a sufficient conduct [*Date-Bah, p. 242 §2.5*], others require additional acts that induce reliance [*Enderlein & Maskow, p. 123*].

115 CLAIMANT's actions did not induce such reliance. Even if the Tribunal understood that a proposal or a consent to a modification was sufficient, the email requesting the transfer of the amount due for the deliveries under PO No. 9601 to a different bank account was not sent by CLAIMANT, but by someone else with a similar domain: "se**m**sorX.com" [*C. Ex. 5, p. 16*].

116 This was not the first time the Parties discussed changes to the bank accounts specified by CLAIMANT. In fact, in September 2020, a prior alteration to the bank account occurred. This modification was explicitly agreed upon by the Parties and adhered to the provisions of Art. 40 FA: "(t)he Parties had agreed in a signed side letter" [*PO2, p. 63, §12*].

117 The Parties' prior experience with the alteration to the bank account indicates that RESPONDENT should have expected that any subsequent modifications would comply with

the same provision. It was only reasonable for CLAIMANT to expect that RESPONDENT would not rely on an email requesting the transfer of funds in other terms.

118 After receiving the email, RESPONDENT deemed it necessary to contact Ms. Audi, the account manager responsible on CLAIMANT's side for RESPONDENT's account. RESPONDENT, sought confirmation [*PO2, p. 31, §6*], because the request could only be perceived as unusual.

119 RESPONDENT claims that it decided to transfer the money after two attempts to contact Ms. Audi. However, there was only one genuine attempt made to contact Ms. Audi: Mr. Royce, the person responsible for the relationship with CLAIMANT, tried to contacted her to her mobile. The other "attempt" was merely a direct reply to the phishing email [*R. Ex. 4, p. 36 §4*]. Also, Ms. Audi's voicemail clearly stated that she was out of office on sick leave. This message was also repeated in an out-of-office-reply from an email on 25th March sent by Mr. Royce to Ms. Audi [*PO2, p. 62 §6*]. This further demonstrates that had RESPONDENT been careful, it would realize that the reply from someone impersonating Ms. Audi was a spoofmail.

120 Additionally, given that all the contracts concluded by CLAIMANT contained a clause that established that any amendments to the contracts had to be in writing with the signature of both Parties, CLAIMANT was "confident that no situation like the present one could happen, where a customer, without approaching us, would pay to the wrong account" [*C. Ex. 6, p. 17 § 9*]. This clause was also established in the FA signed by RESPONDENT as a customer.

121 Besides, RESPONDENT itself had suffered a cyberattack [*R. Ex 3, p. 33*] and as it displays, the automotive industry in Equatoriana, its place of business, witnessed an increasing number of cyberattacks over the last few years [*R. Ex. 3, p. 35*]. This further evidences the lack of awareness and care regarding warning signs of this kind of criminal action, such as the variation in the top-level domain [*C. Ex. 5, p. 7*].

122 Had RESPONDENT been more careful on the analysis of the phishing email, it would have noticed that the bank account proposed originated from Vindobona, Danubia, which distinctly differs from Mediterraneo, the actual place of business of CLAIMANT [*C. Ex. 5, p. 7*].

123 Therefore, CLAIMANT did not engage in any conduct that could be considered as reliance-inducing and RESPONDENT failed to take reasonable steps to confirm the change and ensure that the transfer was being made to the correct account. As such, RESPONDENT cannot rely on Art. 29(2) CISG to modify the FA.

2. The formalities agreed-upon on the FA are upheld following Art. 40 of the FA

124 Art. 40 FA mandates that any amendment or waiver must be in writing and signed by the Parties, precluding the Parties from altering or terminating the contract through any alternative means [*CISG Digest p. 123 §7*]. Art. 40 has a constitutive effect [*Schroeter, Art. 29, §22*], and alterations that do not comply with the requirements are invalid [*Brunner & Brand, p. 192; CISG Case No. 1735*] or ineffective [*Date-Bah, p. 241 §2.3; CLOUT Case No. 86*].

125 The alteration to the bank account did not comply with the formalities set by Art. 40 of the FA, given that the emails were not exchanged by the Parties and did not comply with the signature requirement. Accordingly, the alterations made to Art. 7 of the FA are ineffective and not legally binding to the Parties, failing to produce the intended result.

3. RESPONDENT must fulfill its legal duty to ensure the completion of the payment as outlined in Art. 54 CISG

126 The obligation of Art. 54 CISG places the responsibility on RESPONDENT, as the buyer, to guarantee the actual completion of payment, encompassing all necessary steps, formalities and costs, complies with these measures [*CISG Digest p. 256 §3, Gabriel, p. 274, CISG Case No. 587*]. Consequently, the buyer must ensure that the payment is made to the correct bank account and that the money corresponding to the purchase price of the goods is placed unconditionally at the seller's disposal [*CISG Case No. 207*]. Failure to guarantee the completion of payment constitutes a breach of the contract itself [*Mohs, Art 54, §6; ICC Case No. 11849*].

127 In the present case, RESPONDENT, by transferring the amount to another account that did not belong to CLAIMANT [*C. Ex. 3, p. 14*], failed to facilitate all necessary steps to effect payment in accordance with Art. 54 CISG, as demonstrated in subsection B (1)(b) of the current issue.

128 Therefore, CLAIMANT is entitled to invoke any of its remedies for breach of contract by the RESPONDENT, as stipulated in Art. 61 CISG.

C. IN ANY CASE, RESPONDENT CANNOT RELY ON ART. 77 CISG TO MITIGATE ITS OBLIGATION TO PAY

129 RESPONDENT may argue that under Art. 77 CISG, CLAIMANT had the obligation to mitigate the damages [*PO2, p. 32, §13*]. However, RESPONDENT's reliance on the provision is merely the result of an incorrect legal analysis. RESPONDENT's error relates to the subject matter of Art. 77, as it exclusively governs situations concerning compensatory damages (**1**). Even if the Tribunal were to consider that CLAIMANT's request falls within the scope of Art. 77 CISG, RESPONDENT would not be eligible for a reduction in damages (**2**).

1. Art. 77 CISG is only applicable to situations dealing with compensatory damages

130 Despite the various possible interpretations of Art. 77 CISG, CLAIMANT submits the most persuasive one: the duty to mitigate damages only applies to claims for compensatory damages, excluding a direct application of Art. 77 to other remedies [*CISG Digest p. 356 §1; Riznik I, §2, Knapp, p. 563 §3.1; Opie, p. 227; Enderlein & Maskow, p. 307*].

131 Scholars advance several reasons to support this position. Firstly, Art. 77 is inserted in Section II, Chapter V, of the CISG, which concerns the compensation of damages, a concept that is defined in Art. 74 CISG [*Riznik I, §3.2; Viscasillas, §174*]. Furthermore, the wording and the drafting history [*Secretariat's Commentary, Art. 73, p.71 §3; Riznik II, p. 270 §2*] of Art. 77 CISG also indicate that the exclusion of other remedies to the scope of the provision was deliberate. At the Vienna Diplomatic Conference, the United States delegation proposed to extend the text of Art. 77 to other remedies, namely the right to claim performance, in the scope of the Art. 77, and was rejected [*Official Record, pp. 396-398*].

132 Therefore, the prevailing view is that Art. 77 CISG only applies to claims for damages, and a seller claiming performance cannot invoke the mitigation of the payment of the price [*Riznik I, §3.2; CLOUT Case No. 318*]. Even in instances where one party neglects to mitigate losses resulting from the other party's breach, generally the entitlement to pursue alternative remedies remains unaffected [*Riznik II, p. 270 §2*].

133 As a result, the right to claim other remedies remains unaffected, which entails that Art. 77 CISG cannot be invoked against the claim of specific performance, falling beyond its scope.

2. In any case, RESPONDENT is not entitled to a reduction in damages

a) CLAIMANT was unaware of the impending breach of contract

134 In the event that the Tribunal considers that CLAIMANT's request to exercise its right to be paid by RESPONDENT falls within the scope of Art. 77 CISG, it is imperative to recognize that this article applies only in the event that the party who relies on the breach and should mitigate the loss has "positive knowledge about the impending breach of contract" [*Schwenzer II, Art. 77, §1*].

135 The decision of the German Supreme Court in *Clay Case* can be helpful to illustrate what is a positive knowledge of an impending breach. In this case, a sale of ground clay (kaolinite), between parties with places of business in Germany and the Netherlands was at stake. The court found that the seller was obligated to indemnify the buyer as, among other reasons, there was no indication that the seller was unaware of the "circumstances of the (imminent) occurrence

of the damage" [*CISG No. 2348*]. In this sense, this court considered that the provision of Art. 77 "only covers those cases in which the party entitled to compensation, after becoming aware of the circumstances of the (imminent) occurrence of the loss, has failed to take reasonable measures to minimize the loss caused by a breach of contract by the other party".

136 CLAIMANT did what was reasonable in the circumstances. It hired the leading cybersecurity firm in Mediterraneo, CyberSec, to remove the malware and perform a "careful evaluation of the risks", conducting a thorough risk assessment. Based on the findings, CyberSec concluded that the cyberattack was of minor relevance [*C. Ex. 6, p. 17 §6*]. Therefore, CLAIMANT could not reasonably have been aware that RESPONDENT had received misleading emails purportedly from Ms. Audi, resulting in the erroneous transfer of funds to an unauthorized account.

137 Therefore, and given the decision of the German Supreme Court in the *Clay Case*, considering that CLAIMANT could not have anticipated the current situation, much less be aware of the circumstance of the "(imminent) occurrence" [*CISG No. 2348*] of the breach, Art. 77 CISG cannot be deemed applicable in the current case.

b) RESPONDENT forfeited any potential right of mitigation of damages pursuant to Art. 77 CISG

138 Furthermore, some authors argue that the party seeking compensation, or, in the present case, performance, is not obligated to take actions that fall under the responsibility of the other party and can be easily accomplished by them [*Stoll & Gruber, p. 791*].

139 As previously established, RESPONDENT opted to transfer USD 38,400,000 to a different account without adhering to the agreed-upon terms by the Parties after only one real attempt to contact Ms. Audi. Furthermore, considering that, the attempt of contacting Ms. Audi via her mobile was unsuccessful with the indication that "in urgent matters a colleague should be contacted" [*PO2, p. 31, §6*], RESPONDENT could have easily contacted another employee of CLAIMANT, as the address of both Parties is established on the FA [*C. Ex. 1, p. 9*]. Had RESPONDENT proceeded by the voicemail left by Ms. Audi, it could have easily confirmed the true sender of the email and determined that it was a fraudulent message.

140 As a result, it would not be reasonable to require CLAIMANT to undertake additional efforts to reduce the damages, as RESPONDENT could have taken simple measures to mitigate them.

c) Unreasonable costs would be imputed to CLAIMANT in pursuance of the mitigation of damages of Art. 77 CISG

141 In order to reduce damages, any measures expected to be taken by the injured party should be reasonable. Hence, CLAIMANT, should not be obliged or expected to take measures that are excessively costly or unreasonable [*Oviedo-Albán, p. 7; Knapp, p. 559 §2.3*].

142 The CISG does not provide a definition for "reasonable in the circumstances" [*Opie, p. 229*]. Nevertheless, scholars and case law suggest that measures are deemed reasonable if a reasonable person of the same kind and in the same circumstances would have undertaken them [*Trenor, p. 72; Riznik I §4; CLOUT Case No. 541*]. A common example of a reasonable measure would be the resale of the goods by the seller [*Knapp, p. 559 §2.2*]. However, "a party who has already suffered the consequences of non-performance of the contract cannot be required in addition to take time-consuming and costly measures", as stated in the commentary accompanying Art. 7.4.8. UPPIC, which bears similarities to Art 77 CISG.

143 Since CLAIMANT delivered the 2 instalments of sensors on the agreed upon dates and RESPONDENT took delivery of them [*PO2, p. 6, §13; C. Ex. 3, p. 14*], CLAIMANT cannot resell the goods to mitigate the damages. Moreover, RESPONDENT's payment obligation amounts to USD 38,400,000, which is a substantial sum that cannot merely be pardoned or reduced as the economic impact of such a loss would be significant for CLAIMANT. In light of this, it is safe to state that a reasonable person in the position of the CLAIMANT would not have acted differently, given the high burden of the circumstances.

144 Thereupon, RESPONDENT is not entitled to a reduction in damages as the CLAIMANT cannot be expected to undertake unreasonable or extravagant measures to mitigate them.

D. CONCLUSION

145 In conclusion, CLAIMANT rightfully demands full payment from RESPONDENT due to the latter´s failure to meet its payment obligations under the FA. RESPONDENT´s failed attempt to amend the FA though an exchange of emails contravenes the formalities of Art. 40 FA. Additionally, RESPONDENT neglected its duty under Art. 54 CISG to ensure proper payment. Finally, the reliance on Art. 77 CISG by RESPONDENT for mitigating payment obligations is misplaced, as this provision deals exclusively with compensatory damages. Even if it was applicable, RESPONDENT´s failure to take reasonable measures invalidates any claim for mitigation. As a result, CLAIMANT is entitled to payment of the price in full.

PART IV: CLAIMANT DID NOT CAUSE RESPONDENT'S FAILURE TO PERFORM

146 RESPONDENT may argue that CLAIMANT was bound to inform it about the cyberattack suffered, deeming it as the cause for its failure to perform [*ARA, p. 31, §§9, 10*].

147 However, CLAIMANT will demonstrate that (**A**) neither the FA nor the law governing the FA provide for a legal obligation or duty to inform. (**B**) Since there is no duty to inform, RESPONDENT cannot rely on Art. 80 CISG, as no act or omission on CLAIMANT's behalf caused the failure to perform.

148 Thus, CLAIMANT will ultimately demonstrate that the sole reason for RESPONDENT'S failure to perform is its unwillingness to do so.

A. NEITHER THE FA, NOR THE LAW GOVERNING THE FA PROVIDE FOR AN INFORMATION DUTY

149 Contrary to what RESPONDENT may argue, not only there is no reference to an information duty in the FA (**1**), but also neither the CISG, as the law governing the FA (**2**), nor the Danubian law (**3**), the otherwise applicable law, provide for an information duty. More so, the domestic law applicable to CLAIMANT, the law of Mediterraneo, regardless of whether it applies to the present case, does not provide for a duty to inform as well (**4**).

1. The FA does not set forth an information duty

150 The principle of party autonomy allows the Parties to stipulate their own clauses. As the FA does not impose a duty to inform [*C. Ex. 1, pp. 9-12; PO2, p. 64, §21*], nor does PO No. 9601 [*C. Ex. 2, p. 13*], the Parties had no intent to set a duty to inform in the FA.

2. The CISG exclusively governs the FA

151 As demonstrated in §§96-99 the CISG governs the FA and the contractual relationship of the Parties. The fact that the Parties chose to apply the law of Danubia to their contract does not imply an explicit exclusion of the CISG's applicability. In fact, it reinforces that the Tribunal must find that the CISG exclusively applies and governs the FA.

152 Choosing the law of a contracting state, which has ratified the CISG, without any further specifications, leads to the application of the CISG [*Hachem, p. 38*]. This choice of law should not be interpreted as a reference to domestic sales law but as a reference to the CISG, which is part of the law of that state [*Islam, p. 79; ICC Case No. 7565*].

153 It is true that the CISG, however, does not encompass all types of international sales contracts or all aspects relevant to both international and domestic sales agreements [*Bridge, §1.04*]. Even

so, Tribunal must disregard the applicability of the law of Danubia, since the CISG answers the problem faced in the present case.

154 The CISG applies to contracts for the sale of goods and governs four types of legal aspects, one of them being the rights and obligations of the parties [*Rogers & Lai, p. 15; Schlechtriem, pp. 786-788*]. Given the FA is a contract for the sale of goods, and the analysis at hand relies on whether CLAIMANT has an information duty, it falls squarely within the scope of the CISG and its applicability. Moreover, as the CISG provides for an answer, the recourse to the domestic law is not valid [*Schlechtriem, p. 788 a contrario sensu*].

155 Therefore, the CISG applies exclusively to the FA prevailing over the otherwise applicable law.

a) No duty to inform arises according to the CISG

156 As CLAIMANT will demonstrate, the CISG explicitly lays down various duties of the Parties, yet, the duty to inform, specifically on data protection matters, is not one of them (**i**), the opposite conclusion cannot be reached through interpretation of the CISG (**ii**). Additionally, there was no practice between the Parties regarding an information duty (**iii**), and RESPONDENT cannot rely on the good faith principle underlying the CISG, as CLAIMANT did not act in bad faith (**iv**).

i. The CISG does not explicitly provide for an information duty

157 The CISG does not explicitly provide for a duty to inform. The Convention provides for a duty to disclose in Art. 40, but only in the sense and relating to the conformity of the goods. No provision enforces a duty to inform about the circumstances of a cyberattack or other comparable circumstances on CLAIMANT.

158 To the best knowledge of CLAIMANT, there are no cases, awards or authorities that support an argument according to which the CISG provides for an explicit information duty.

159 Consequently, the Tribunal must find that the CISG does not explicitly foresee an information duty regarding data protection breaches, and such duty cannot be enforceable on CLAIMANT.

ii. The CISG does not implicitly provide for an information duty

160 Anticipating RESPONDENT'S argument that even if an explicit information duty does not exist, an implicit one does, CLAIMANT will demonstrate that a duty to inform cannot be construed as arising from Art. 7(1) and (2) CISG through interpretation (**a**) or gap-filling (**b**).

a. The duty to inform does not arise through interpretation of the CISG

161 Interpretations of the CISG must be made per three concepts specified in Art. 7(1), since national rules on sales diverge sharply in conception and approach [*CISG Digest, p. 42, §2*].

The mentioned concepts are: international character of the CISG, the need to promote uniformity in its application and the observance of good faith in international trade.

162 The reference to the international character implies that the CISG must be interpreted autonomously from domestic laws [*Schwenzer I, p. 110*]. The uniformity in application translates into the aim to develop a common interpretation of the CISG [*Schwenzer & Hachem, Art. 7, §§8, 10; Lazerow, p. 389*]. As to the observance of good faith, it is merely an interpretative rule that imposes a duty to interpret CISG's provisions in good faith [*Walt, p. 42*].

163 Art. 7(1), thus, requires that a judge first refer to the text of the CISG itself to see whether there is a particular provision that applies directly. If not, there may be an omission that falls within Art. 7(2) [*Quinn, p. 227*] or it must be interpreted according to the national law applicable to the FA. In this sense, Art. 7(1) cannot be used to establish rights and (additional) obligations outside the interpretation of such provisions [*Schwenzer & Hachem, Art. 7(1) §19*]. Therefore, the Tribunal is not authorized to draw an additional obligation from the absence of a stipulation.

164 Since no provision enforces a duty to inform on data protection matters, there is no interpretative understanding of a duty to inform reachable through Art. 7(1).

b. The duty to inform does not arise through gap-filling in the CISG

165 Regarding Art. 7(2), RESPONDENT may argue that there is a gap to be filled. This provision states that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law".

166 This Art. applies to questions concerning matters governed by the CISG, which are specified in Art. 4. In the event of a gap, it is to be filled by the CISG and the general principles on which it was based, or by the domestic law [*CLOUT Case No. 580*]. The pivotal issue in the present case revolves around the rights and obligations of the parties as outlined in Art. 4, since RESPONDENT may argue that the duty to inform is an obligation in the sense of the CISG.

167 As the CISG governs the FA exclusively [*§§151-155*], it sets out the obligations of the Parties. However, the absence of a stipulation regarding information duties does not imply the existence of a gap. Art. 7(2) is only relevant to matters governed by the CISG, and the duty to inform on data breaches is not one of those matters.

168 The absence of this stipulation is not a gap, but an intention. Consequently, it is not necessary to resort to the general principles of the CISG, nor to the applicable domestic law.

iii. There is no practice between the Parties that enforces a duty to inform

169 It is anticipated that RESPONDENT may argue that there was a practice between the Parties which has established a duty to inform regarding data protection matters.

170 Art. 9(1) states that the parties are also bound by any practices they have established between themselves as a general element of trust and prohibition of venire contra factum proprium [*Schmidt-Kessel, Art. 9, §8*].

171 Regardless of the Parties' long business relationship, a practice must be recognized as a conduct and a certain frequency and duration is necessary [*Schmidt-Kessel, Art. 9, §8; Bout, pp. 2-3*]. As RESPONDENT demonstrates, there was only one situation where a successful cyberattack affected the Parties' relationship [*R. Ex. 4, p. 36, §2*], lacking the frequency requirement.

172 Thus, there was no practice between the Parties that imposes the obligation to inform on data breaches.

iv. CLAIMANT did not act in bad faith

173 CLAIMANT foresees RESPONDENT'S stance that not informing it about the cyberattack was an intentional act of bad faith.

174 The CISG does not contain an express maxim of good faith [*Magnus, p. 90; Schwenzer & Hachem, Art.7, §17*]. Good faith in the CISG plays a limited role as a matter of content and application by courts. In that sense, good faith is not an implied agreement between parties governed by the CISG [*Walt, p. 41*].

175 The obligation to cooperate in good faith in the performance of a contract amounts to a general principle in international trade [*ICC Award No. 9593*]. Good faith is a broader concept encompassing notions of honesty and loyalty between parties and often functions in a way that prevents parties from acting in bad faith [*Bhasin v. Hrynew; Ng, p. 2*].

176 The duty to cooperate, on the other hand, is often defined as the duty to take positive actions to help the other party perform the contract [*Falla, pp. 508-509*], which is not a synonym for the much broader concept of good faith.

177 The wording of Art. 7(1) clearly shows the intent not to apply to the contractual relationship of the parties and their conduct [*Schwenzer I, p. 112*]. Read literally, Art. 7(1) requires regard for good faith only in the interpretation of the CISG's provisions; not a duty to act in good faith on the Parties unless their contract provides for good faith [*Walt, pp. 41-42; Schwenzer & Hachem, Art. 7, §18; Art. 7(1), §§6, 16; ICC Award No. 8611*].

178 Recourse to other international treaties such as UPPIC to supply a good faith standard disregards CISG's requirement to be autonomously interpreted [*Walt, pp. 44, 47*]. The CISG was drafted fourteen years prior to the CISG; its drafters certainly did not have the UPICC in mind as an instrument for interpretation [*Schwenzer I, p. 17*]. Therefore, in the present case, the Tribunal must exclusively uphold the CISG and its intent by not raising obligations to the Parties that are not expressly settled.

179 RESPONDENT also cannot rely on the drafting history of the CISG to justify the existence of a general good faith duty between the Parties, as the delegates have not reached an agreement in this regard [*Neumann, p. 123*]. This demonstrates the uncertain and controversial character of good faith in the CISG.

180 Even if the CISG imposed good faith as a conduct, CLAIMANT did not act in bad faith towards RESPONDENT. As evidenced in §136, at the time of the cyberattack, its consequences were unclear. In addition, all the measures to ensure that the obligation would be fulfilled were undertaken. The goods were delivered in conformity [*C. Ex. 3, p. 14; PO2, p. 6, §13; R. Ex. 4, p. 36, §4*] and a duly agreed-upon bank account for payment was provided.

181 CLAIMANT's lack of information about the cyberattack was not intentional or malicious. The circumstances surrounding the attack and the inclusion of a contractual clause determining that alterations to the contract must be in writing [*RfA, p. 5, §9*] created an expectation for CLAIMANT that situations such as this would not be an issue.

182 Therefore, Art. 7 does not impose a duty to act in good faith in the contractual relationship of the Parties, and, even if it did, CLAIMANT acted in good faith towards RESPONDENT.

3. The Danubian law does not govern the FA; but in case the Tribunal finds so, it does not provide for a duty to inform

183 Since the general contract law of Danubia is a *verbatim* adoption of the UPPIC [*PO1, p. 59, §4*], RESPONDENT may argue that CLAIMANT breached the principle of good faith provided in Art. 1.7, as a mandatory principle that governs all phases of the contract [*Brödermann, p. 90, §2*]. Another rule relevant to the question under analysis is Art. 5.1.3. Danubian CA, as it is anticipated that RESPONDENT may rely on it to deduce a duty to inform from Danubian Law.

184 Art. 1.7 of the UPPIC addresses good faith as a mandatory principle directed to the parties of international contracts, which must be driven by a commercial spirit of good faith and fair dealing [*Magnus, p. 91; Brödermann, p. 89, §1*]. Art. 5.1.3, on the other hand, reflects a main purpose to enable the debtor to perform his obligation [*Brödermann, p. 230, §1*].

185 Neither Art. 1.7 UPPIC nor Art. 5.1.3 Danubian CA provide for a duty to inform. Good faith and fair dealing do not entail an obligation to inform, as much broader concepts relating to the misleading of the parties. The UPPIC are specific regarding rules on cooperation in its articles, however, a duty to inform under the present circumstances does not exist.

186 Therefore, the Danubian law not only does not apply to the FA, but also, if it did, it would not enforce a duty to inform on CLAIMANT.

4. The domestic law applicable to CLAIMANT does not provide for a duty to inform

187 RESPONDENT may refer to further laws relevant in the present case to sustain the existence of a duty to inform. However, the law from Mediterraneo as the domestic law applicable to CLAIMANT, does not provide for a duty to inform.

188 This is a deliberate decision from the legislator to achieve uniformity within businesses and company duties, as it would mirror an increase in claims for alleged violations of data protection [*RfA, p. 8, §29*]. The domestic law from RESPONDENT, the law from Equatoriana, does not apply to CLAIMANT, hence its irrelevance.

189 Therefore, no other law relevant to the present case enforces on CLAIMANT a duty to inform.

B. IN THE ABSENCE OF AN INFORMATION DUTY, RESPONDENT CANNOT RELY ON ART. 80 CISG

190 Based on all considerations made above, it is anticipated that RESPONDENT may argue that CLAIMANT caused the failure to perform in the sense of Art. 80 CISG [*ARA, p. 32, §13*]. RESPONDENT cannot rely on this provision as it is the one responsible for the failure to perform.

191 Art. 80 CISG provides an excuse for a party's failure to perform when this failure is caused by an act or omission of the other party [*Schäfer, p. 246*], and many authors argue that it originates from good faith [*Schwenzer II, Art. 80, §1*].

192 However, even if it is impossible to apply good faith to the Convention as a whole without influencing or affecting the behaviour of the parties [*Zeller, p. 102*], Art. 80, in this specific circumstance, only expresses a common duty to cooperate with the other party [*Honnold & Flechtner, p. 595*].

193 As will be demonstrated, RESPONDENT caused its failure to perform (**1**), CLAIMANT did not breach its duty to cooperate (**2**), and the requirements of Art. 80 for RESPONDENT to be excused from the performance are not fulfilled (**3**).

1. RESPONDENT caused its failure to perform

194 It is CLAIMANT's stance that RESPONDENT caused the failure to perform.

195 Art. 80 should apply only when one party's actions created an impediment or obstacle that prevented or interfered with the other party's performance [*Honnold & Flechtner, p. 596*]. As demonstrated in §§124-125, the FA determines all alterations to the agreement must be made in writing [*C. Ex. 1, p. 11; RfA, p. 7, §26*]. Therefore, the bank account was never altered.

196 RESPONDENT cannot, therefore, rely on this Art., as CLAIMANT never prevented or interfered with performance. The absence of notice did not directly impact the contract. However, the potential for such an impact exists only because of RESPONDENT's actions, specifically its lack of diligence and consideration regarding the characteristics of cyberattacks and the circumstances in which they occur.

197 Most authors argue that if the impediments are easily remediable, the promisor may be obliged to attempt to overcome and give notice of such [*Schwenzer II, Art. 80, §1; Neumann, pp. 159, 178*]. As evidenced in §119, RESPONDENT was not diligent enough when ascertaining the legitimacy of the phishing email [*R. Ex. 4, p. 36, §6*].

198 The above-mentioned facts lead to the conclusion that the cause for RESPONDENT's failure to perform was not CLAIMANT, but rather RESPONDENT itself.

2. CLAIMANT did not breach its duty to cooperate

199 As will be evidenced, CLAIMANT did not breach its duty to cooperate arising from Art. 80 CISG.

200 RESPONDENT may argue that the duty to communicate information needed by the other party underlies some provisions of the CISG [*Honnold & Flechtner, p. 128*]. Art. 80, nonetheless, merely provides for duties of cooperation, fairness and reasonableness [*Neumann, p. 138*], which are defined as duties to take positive actions to help the other party perform [*§176*].

201 Examples of such positive actions include acts that are necessary for the other party's performance, and the sharing of all relevant information between parties [*Neumann, pp. 110-111*]. CLAIMANT undertook said actions, as evidenced in §180.

202 In the *Propane Case*, the Austrian Supreme Court ("ASC") held that the seller could not rely on the buyer's non-performance to avoid the contract, since it was the seller's acts that affected the buyer's ability to carry out its obligations by omitting to name the place of loading as agreed. Similarly, in the present case, RESPONDENT failed to comply with what was agreed between the Parties.

203 Thus, CLAIMANT cooperated to the best of its capability and obligations. If it were not for RESPONDENT's indiscretion, the obligation would be fulfilled successfully.

3. The requirements of Art. 80 for RESPONDENT to be excused from the performance are not fulfilled

204 Three requirements arise from Art. 80 for the application of the provision: non-performance by the promisor; the failure to perform is causally linked to the promisee; and the existence of an act or omission by the promisee [*Neumann, pp. 143-172; Schwenzer II, Art. 80, §§3-6*].

205 RESPONDENT indeed did not perform, as it did not make the payments in due time [*C. Ex. 3, p. 14*]. However, RESPONDENT´s failure to perform was not caused by CLAIMANT's act or omission, as was evidenced in (**1**) and (**2**). The second and third requirements are, therefore, not fulfilled.

206 RESPONDENT may also argue that the omission of information regarding the cyberattack was the cause for the failure to perform. However, this omission never created an impediment on RESPONDENT's performance, as it was obligated to make the payment to the bank account specified in the FA [*C. Ex. 1, p. 10, Art. 7*]. No other alterations to the bank account were made through email, but through agreement in a signed side letter [*PO2, p. 63, §12*].

207 As the requirements are not fulfilled, RESPONDENT cannot rely on Art. 80.

a) In case the Tribunal finds that RESPONDENT can rely on Art. 80, the responsibility for the failure to perform is shared by both Parties

208 In case the Tribunal finds that Art. 80 applies in the present case, CLAIMANT will demonstrate that it is not solely responsible for the non-performance.

209 For the responsibility to be shared, two requirements must be fulfilled: the promisor's failure to perform must be caused by both parties, and it must not be possible to delimit the consequences of each party's causation, as their conducts are closely interwoven [*Neumann, pp. 152-153; Enderlein & Maskow, p. 339*].

210 Regarding the first requirement, if the Tribunal finds that CLAIMANT has also caused the failure to perform, RESPONDENT's responsibility was already evidenced in §§194-198 As to the second requirement, it is not possible to delimit the consequences of each Party's conduct, as it is not clear whether the failure to perform was due to CLAIMANT's omission or RESPONDENT's disregard of the FA. In the ICC Case No. 97, the parties to the dispute agreed that the delivered goods were defective but disagreed regarding what had caused the defects.

The Tribunal decided that both parties failed to perform their obligations under the contract since they failed to set an inspection procedure.

211 Similarly, in the present case, if the Tribunal finds that CLAIMANT did have a duty to inform RESPONDENT about the cyberattack, both Parties would share responsibility for the non-performance. RESPONDENT, as demonstrated, lacked diligence by not complying with the FA, and this failure contributed to the overall failure to perform.

C. CONCLUSION

212 RESPONDENT'S assertion that CLAIMANT caused the failure to perform is an obvious attempt to avoid its contractual obligations. Accordingly, no duty to inform arises from the FA or the CISG, as the treaty governing the contractual relationship of the Parties. Therefore, and in the absence of said violation of a contractual obligation duty, RESPONDENT cannot rely on Art. 80 CISG to excuse itself from performing the obligation.

REQUEST FOR RELIEF

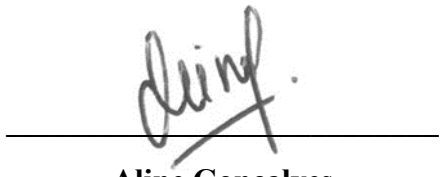
In light of the submissions made above, CLAIMANT respectfully requests the Tribunal to:

1. Authorize the inclusion of the new claim into the present arbitration;
2. Subsidiarily, consolidate the arbitration proceedings regarding the additional claim in the present arbitration;
3. Order RESPONDENT to pay PO No. 9601 in its entirety;
4. Declare that CLAIMANT has no information duty, and, therefore, RESPONDENT cannot rely on Art. 80 CISG;
5. Declare that RESPONDENT is ordered to bear the costs of the arbitration.

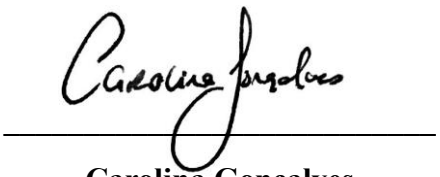
CERTIFICATE OF AUTHENTICATION

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. No assistance during the writing process was received from any person who is not a member of this team.

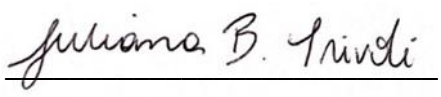
Lisbon, December 7th 2023



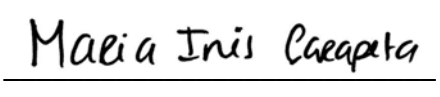
Aline Gonçalves



Carolina Gonçalves



Juliana Trivoli



Maria Inês Carapeta

31st Willem C. Vis International Commercial Arbitration Moot

MEMORANDUM FOR RESPONDENT

ICC Case No. Moot-100 / MM

On behalf of	*Against*
Visionic Ltd	**SensorX, plc**
Optronic Avenida 3 Oceanside Equatoriana	Atwood Lane 1784 Capital City Mediterraneo
• **Respondent** •	• **Claimant** •

COUNSEL

Aline Gonçalves | Carolina Gonçalves | Juliana Trivoli | Maria Inês Carapeta

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY: NOVA University of Lisbon, School of Law

COUNTRY: Portugal

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.	X		

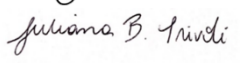
USE OF AI			
We have used AI enhanced **search engines** for researching sources and (factual or legal) information on the Moot Problem.		X	
We have used AI-enhanced **proof-reading** tools.	X		
We have used AI enhanced **translation tools** to translate sources relevant for our work on the Moot Problem.			X
We have used AI enhanced **translation tools** to translate parts of the text submitted in this Memorandum into English from any other language.			X
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.			X
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.			X
We have **trained an AI tool** on Vis Moot documents.			X
We have **used an AI tool that has been trained on Vis Moot documents** to generate text that is part of our Memorandum			X
Other (please specify):			

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

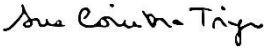
DATE: January 18th, 2024

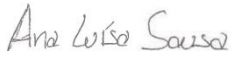
NAME: ALINE GONÇALVES SIGNATURE: 

NAME: CAROLINA GONÇALVES SIGNATURE: 

NAME: JULIANA TRIVOLI SIGNATURE: 

NAME: MARIA INÊS CARAPETA SIGNATURE: 

NAME: ANA COIMBRA TRIGO SIGNATURE: 

NAME: ANA LUÍSA SOUSA SIGNATURE: 

NAME: CAROLINA ROQUE SIGNATURE: 

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS ..... **IV**

TABLE OF LITERATURE ..... **VI**

TABLE OF CASES ..... **XXI**

TABLE OF ARBITRAL AWARDS AND DECISIONS ..... **XXV**

STATEMENT OF FACTS **1**

SUMMARY OF ARGUMENT **3**

ARGUMENT **4**

ISSUE I: THE NEW CLAIM SHALL NOT BE INCLUDED IN THIS ARBITRATION **4**

A. THE ADDITIONAL CLAIM QUALIFIES AS A NEW CLAIM AND FALLS OUTSIDE THE LIMITS OF THE TERMS OF REFERENCE 4

B. THE REQUIREMENTS OUTLINED IN ART. 23(4) ICC RULES ARE NOT MET 5

1. The claims are not connected 5

2. The early stage of the proceeding does not justify the admission of the new claim 6

3. The inclusion of the new claim would be inefficient 8

C. THE REQUIREMENTS SET FORTH IN ART. 9 ICC RULES FOR THE CLAIMS TO BE MADE IN A SINGLE ARBITRATION ARE NOT MET 9

1. The arbitration agreements are not compatible 9

2. The Parties did not agree on the claims to be determined in the same arbitration 10

D. CONCLUSION 11

ISSUE II: THE ARBITRAL TRIBUNAL CANNOT AND SHOULD NOT CONSOLIDATE THE PROCEEDINGS **11**

A. THE ARBITRATION PERTAINING TO PO NO. A-15604 HAS NOT YET COMMENCED 11

B. THE ARBITRAL TRIBUNAL LACKS THE POWER TO CONSOLIDATE THE ARBITRATIONS 12

C. THE REQUIREMENTS FOR CONSOLIDATION ARE NOT FULFILLED 14

1. The Parties did not agree to the consolidation of the current arbitration with the new one 14

2. The claims are not made under the same arbitration agreements 15

3. The disputes are not raised in connection with the same legal relationship and the arbitration agreements are incompatible 15

D. THE DISADVANTAGES OF CONSOLIDATION OUTWEIGH POTENTIAL BENEFITS 16

E. CONCLUSION 17

ISSUE III: CLAIMANT IS NOT ENTITLED TO PAYMENT IN FULL UNDER PO. No. 9601 18

A. RESPONDENT FULFILLED ITS PAYMENT OBLIGATION UNDER THE FA 18

1. The FA was effectively amended by the Parties in accordance with Art. 29 CISG 18

a. The requirements set forth in Art. 40 FA are met 18

b. Alternatively, if the Tribunal finds that the requirements of Art. 40 FA are not met, CLAIMANT's actions have excluded the application of Art. 29(2) CISG 21

2. RESPONDENT made the payment adhering meticulously to the procedural steps and formalities mandated by the FA 23

a. RESPONDENT has fulfilled its payment obligations upon transferring the specified amount to the designated bank account 23

b. RESPONDENT completed the payment under Art. 54 CISG 24

B. IN ANY CASE, RESPONDENT IS ENTITLED TO RELY ON ART. 77 CISG TO OBTAIN PROPORTIONAL PAYMENT 25

1. The action for the purchase price falls under the scope of Art. 77 CISG 25

2. No reasonable measures were taken by CLAIMANT 25

C. CONCLUSION 26

ISSUE IV: CLAIMANT WAS BOUND BY A DUTY TO INFORM AND CAUSED RESPONDENT'S ALLEGED FAILURE TO PERFORM THE CONTRACT 27

A. CLAIMANT HAD A DUTY TO INFORM RESPONDENT ABOUT THE CYBERATTACK 27

1. The CISG implies a duty to act in good faith 27

a. A good faith obligation can also be drawn from the UPPIC 29

2. A duty to inform must be drawn from the good faith obligations arising from the CISG and UPPIC 30

3. CLAIMANT has breached its good faith obligations 31

B. RESPONDENT FULFILLED ITS PAYMENT OBLIGATION; HOWEVER, IF THE TRIBUNAL CONSIDERS OTHERWISE, CLAIMANT CAUSED THE FAILURE TO PERFORM IN THE SENSE OF ART. 80 CISG 32

1. CLAIMANT hindered the performance, causing the failure to perform 32

a. The requirements of Art. 80 CISG for CLAIMANT to not rely on the failure to perform are fulfilled 33

2. CLAIMANT cannot address the additional claim of non-conformity of the goods, as the Tribunal did not order for that matter to be discussed in these pleadings 34

C. CONCLUSION 34

REQUEST FOR RELIEF 35

CERTIFICATE OF AUTHENTICATION 35

TABLE OF ABBREVIATIONS

Abbreviation	*Explanation*
&	And
§	Paragraph
§§	Paragraphs
Arbitral Tribunal	Arbitral Tribunal of Case Moot-100/MM
Art.	Article
Arts.	Articles
C. Ex.	CLAIMANT Exhibit
Ch.	Chapter
CISG	International Sale of Goods Convention
CISG DIGEST	CISG Digest on Case Law
CISG-AC	CISG Advisory Council
CLAIMANT	SensorX, plc
Court	International Court of Arbitration of the International Chamber of Commerce
FA	Framework Agreement
ICC	International Chamber of Commerce
MfC	Memorandum for Claimant
Mr.	Mister
Ms.	Miss
No.	Number
P.	Page
Parties	CLAIMANT and RESPONDENT

PO No. 9601	Purchase Order Number 9601
PO No. A-15604	Purchase Order Number A-15604
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
POs	Purchase Orders
Pp.	Pages
R. Ex.	RESPONDENT Exhibit
RESPONDENT	Visionic Ltd
RfA	Request for Arbitration
RfANC	Request for Authorization of New Claim
S.	Section
SC	Supreme Court
Secretariat	Secretariat of the International Court of Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCUECIC	United Nations Convention on the Use of Electronic Communications in International Contracts
UPPIC	UNIDROIT Principles on International Commercial Contracts
V.	Versus, against
Vol.	Volume

TABLE OF LITERATURE

Author(s)	*Citation*	*Cited in §*
***Albano**, Gian Luigi* ***Nicholas**, Caroline*	The Law and Economics of Framework Agreements (2015) cited as: *Albano & Nicholas*	**27**
***Andersen**, Camilla Baasch*	Good Faith? Good Grief! International Trade and Business Law Review 17 (2014) cited as: *Andersen*	**177**
***Berger**, Klaus P.*	Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox" cited as: *Berger*	**73, 74**
***Bond**, Stephen R.*	Chapter 2. Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: The Role of the Arbitrator In: ICC Dossier No. 7: Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law, Vol. 7 (2010) cited as: *Bond*	**98**
***Bond**, Stephen R.* ***Paralika**, Marily* ***Secomb**, Matthew*	ICC Rules of Arbitration, Multiple Parties, Multiple Contracts and Consolidation, Article 10 [Consolidation of Arbitrations] In: Concise International Arbitration, 2nd edition (2015) cited as: *Bond, Paralika & Secomb*	**81, 91, 94**

***Bonell**, Joachim M.*	An International Restatement Of Contract Law: The UNIDROIT Principles of International Commercial Contracts 3rd ed. (2005) cited as: *Bonell*	**184**
***Bonell**, Michael Joachim* ***Bianca**, C. Massimo*	Commentary on the International Sales Law: the 1980 Vienna Sales Convention, Bianca, C. M, & Bonell, M.J. (eds.) (1987) cited as: *Bianca & Bonell*	**174**
***Born**, Gary B.*	International Commercial Arbitration, 3rd edition (2021) cited as: *Born* International Arbitration Law and Practice, 3rd edition (2021) cited as: *Born II*	**98** **73, 74**
***Bridge**, Michael*	The International Sale of Goods, 5th edition (2023) cited as: *Bridge I*	**182**
***Bridge**, Michael*	Good Faith, the Common Law, and the CISG Uniform Law Review 22 (2017) cited as: *Bridge II*	**177**
***Brueggemann**, Romana* ***Smahi**, Nadia*	New Claims and Amended Claims in International Arbitration - Finding Landmarks in Navigating the Tribunal's Discretion (2022) Available at: https://media.baerkarrer.ch/karmarun/image/upload/baer-karrer/hyxdj2dbugmdi8jn8ty1.pdf	**44**

	(Last accessed: 6th January 2024) cited as: *Brueggemann & Smahi*	
***Brunner**, Christoph* ***Brand**, Domenic Oliver*	Article 29 [Modification of Contract; Writing Requirement] In: Christoph Brunner and Benjamin Gottlieb (eds.), Commentary on the UN Sales Law (CISG) (2019) cited as: *Brunner & Brand*	**112, 113, 130, 132, 135**
***Brunner**, Christoph* ***Hurni**, Christoph* ***Kissling**, Michael*	Article 8 [Interpretation of Statements or Other Conduct of a Party] In: Christoph Brunner and Benjamin Gottlieb (eds.), Commentary on the UN Sales Law (CISG) (2019) cited as: *Brunner et al.*	**118**
***Carlevaris**, Andrea*	The Bounds of Party Autonomy in Institutional Arbitration In: International Arbitration Under Review: Essays in Honour of John Beechey (2015) cited as: *Carlevaris*	**73, 75**
***Chengwei**, Liu*	Perspectives from CISG, UNIDROIT Principles & PECL (2003) cited as: *Chengwei*	**156, 158**
***Darwazeh**, Nadia* ***Johnson**, Pierre Marc*	The more the merrier or how different arbitral institutions tackle multi-party and multi-contract disputes In: Liber Amicorum CEPANI (1969- 2019): 50 Years of Solutions (2019) cited as: *Darwazeh & Johnson*	**65, 72**

***DiMatteo**, Larry* ***Janssen**, André*	Interpretive Methodologies in the Interpretation of the CISG In: International Sales Law: A Global Challenge (2014) cited as: *DiMatteo & Janssen*	**177**
***Dursun**, Ar. Gör. Şeyda*	A critical examination of the role of party autonomy in international commercial arbitration and an assessment of its role and extent Available at: Microsoft Word - 8_Dursun.docx (yalova.edu.tr) (Last accessed: 14 January 2024) cited as: *Dursun*	**56**
***Eiselen**, Sieg*	Remarks on the Manner in Which the UNIDROIT Principles of International Commercial Contracts May Be Used Interpret or Supplement Article 29 of the CISG Pace International Law Review Volume 14, Issue 2 Fall (2002) cited as: *Eiselen I*	**113**
	Art. 29 CISG–UP, by Sieg Eiselen In: An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law cited as: *Eiselen II*	**113, 128**
***Enderlein**, Fritz* ***Maskow**, Dietrich*	International Sales Law United Nations Convention on Contracts for the International Sale of Goods	**174**

	Convention on the Limitation Period in the International Sale of Goods Commentary (1992) cited as: *Enderlein & Maskow*	
***Fagbemi**, Sunday A*	The doctrine of party autonomy in International Commercial Arbitration: myth or reality? Available at: The doctrine of party autonomy in international commercial arbitration: myth or reality? | Journal of Sustainable Development Law and Policy (The) (ajol.info) (Last accessed: 14 January 2024) cited as: *Fagbemi*	**56**
***Falla**, Laureano F. Gutierrez*	Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts In: Penn State International Law Review, Volume 23, Number 3, pp. 50-520 (2005) cited as: *Falla*	**194**
***Fry**, Jason* ***Greenberg**, Simon* ***Mazza**, Francesca*	The Secretariat's Guide to ICC Arbitration (2012) cited as: *Secretariat's Guide*	**20, 39, 60, 65, 67, 69, 72, 84, 89, 91, 103**
***Gabriel**, Henry Deep*	The Buyer's Performance Under The CISG: Articles 53-60 Trends In The Decisions In: Journal of Law and Commerce Vol. 25:273, 2005-06 pp. 273 - 283 cited as: *Gabriel*	**141**
***Gilliéron**, Philippe* ***Pittet**, Luc*	Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties	**65**

	In: Swiss Rules Of International Arbitration: Commentary (2005) cited as: *Gilliéron & Pittet*	
***Greenberg**, Simon* ***Feris**, José Ricardo* ***Albanesi**, Christian*	Chapter 9. Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience In: ICC Dossier No. 7: Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law, Vol. 7 (2010) cited as: *Greenberg, Feris & Albanesi*	**53, 65, 76**
***Grierson**, Jacob* ***Van Hooft**, Annet*	Arbitrating under the 2012 ICC Rules (2012) cited as: *Grierson & Van Hooft*	**72, 80, 103**
***Hobér**, Kaj*	Parallel Arbitration Proceedings – Duties of the Arbitrators: Some Reflections and Ideas In: ICC Institute of World Business Law Dossier III (2005) cited as: *Hobér*	**103**
***Honnold**, John O.* ***Flechtner**, Harry M.*	Honnold's Uniform Law for International Sales under the 1980 United Nations Convention (2021) cited as: *Honnold & Flechtner*	**207**
***Honnold**, O. John*	Uniform Law for International Sales under the 1980 United Nations Convention, 3rd edition (1999) cited as: *Honnold*	**135**
***Huber**, Peter*	Vol. 4, United Nations Vienna Convention on Contracts for the International Sale of Goods (CISG), Part III, Chapter V, II, Art 77	**152**

	In: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8th edition (2019) cited as: *Huber*	
***Işık**, Fatih*	Complex Arbitrations: An Overall View of the ICC Rules - III Available at: Complex Arbitrations: An Overall View of the ICC Rules - III | Erdem&Erdem (erdem-erdem.av.tr) (Last accessed: 14 January 2024) cited as: *Fatih Isik*	**59**
***Knapp**, Victor*	Comments on Article 77 In: Bianca-Bonell Commentary on the International Sales Law (1987) cited as: *Knapp*	**159**
***Kritzer**, Albert. H.*	Guide to Practical Application of the United Nations Convention on Contracts for the International Sale of Goods Deventer; Boston: Kluwer Law and Taxation Publishers (1989) cited as: *Kritzer*	**169**
***Kröll**, Stefan*	German Country Analysis: Good Faith, Formation, and Conformity of Goods In: International Sales Law: A Global Challenge (2014) cited as: *Kröll*	**191**
***Leboulanger**, Philippe*	Multi-Contract Arbitration In: Journal of International Arbitration, Vol. 13, Issue 4 (1996)	**103**

	cited as: *Leboulanger*	
***Magnus**, Ulrich*	Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International In: Pace International Law Review Volume 10, Issue 1 (1998), pp. 89-95 Institute for the Unification of Private Law, Principles of International Commercial Contracts cited as: *Magnus I*	**189**
	General Principles of UN-Sales Law In: Max-Planck-Institute for foreign and international Private Law Rabels Zeitschrift for foreign and international Private Law Hein Kötz in honor of his 60th Birthday Part I, Volume 59 Issue 3-4 (1995) cited as: *Magnus II*	**132**
	Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation In: International Sales Law: A Global Challenge (2014) (ed. Larry DiMatteo) cited as: *Magnus III*	**213**
***Marsman**, Albert*	12. Joinder, Consolidation and Multi-Party Disputes In: International Arbitration in the Netherlands, with a Commentary on the NAI and PCA Arbitration Rules (2021) cited as: *Marsman*	**100, 103**
***Martin**, Charles H.*	The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law	**124**

	In: Tulane Journal of International and Comparative Law, Vol. 16:467 (2008) Available at: https://cisg-online.org/files/commentFiles/Martin_16_TulJIntl&CompL_2008_467.pdf (Last accessed: 12 January 2024) cited as: *Martin*	
***Mason**, Stephen*	Chapter 3: The signatures In: Electronics Signatures in Law (2016) Avaiilable at: https://www.jstor.org/stable/j.ctv5137w8.7 (Last accessed: 16 January 2024) cited as: *Mason*	**122**
***Mazzotta**, Francesco G.*	Good Faith Principle: *Vexata Quaestio* In: International Sales Law: A Global Challenge (2014) (ed. Larry DiMatteo) cited as: *Mazzotta*	**177**
***Meier**, Andrea*	Chapter 17, Part II: Commentary on the ICC Rules, Article 10 [Consolidation of arbitrations] In: Arbitration in Switzerland: The Practitioner's Guide, 2nd edition (2018) cited as: *Meier*	**65, 72, 80, 89, 91**
***Mohs**, Florian*	Ch.III Obligations of the Buyer, s.III Remedies for Breach of Contract	**152**

	in: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, 4th Edition (2016) cited as: *Mohs*	
***Neumann**, Thomas*	The Duty to Cooperate in International Sales: The Scope and Role of Article 80 CISG (2012) cited as: *Neumann*	**209**
***Osuna-González**, Alejandro*	Buyer"s enabling steps to pay the price: article 54 of the United Nations Convention on Contracts for the International Sale of Goods In: The Journal of Law and Commerce, Vol. 25, Issue 1 (2005) cited as: *Osuna-González*	**142**
***Pair**, Lara M.* ***Frankenstein**, Paul*	The New ICC Rule on Consolidation: Progress or Change? In: Emory International Law Review, Vol. 25, Issue 3 (2011) cited as: *Pair & Frankenstein*	**65, 81, 91, 94**
***Platte**, Martin*	When Should an Arbitrator Join Cases? In: Arbitration International, Vol. 18, Issue 1 (2002) cited as: *Platte*	**103**
***Riznik**, Peter*	Some Aspects Of Loss Mitigation In International Sale Of Goods 14 VJ 267 – 282 (2010) cited as: *Riznik*	**153**
***Rostila**, Onni*	Application of the good faith principle under the CISG	**169**

***Lampinen**, Jussi*	In: Merkurius Available at: https://merkuriuslaw.fi/en/application-good-faith-principle-cisg/ (Last accessed 7th January 2024) cited as: *Rostila & Lampinen*	
***Schmidt-Kessel**, Martin*	Part I, General Provisions, Ch. II, General Provisions Article 13 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (7th Edition) (2019) cited as: *Schmidt-Kessel*	**113**
***Schroeter**, Ulrich G.*	Interpretation of "Writing": Comparison Between Provisions of CISG (Article 13) and Counterpart Provisions of the Principles of European Contract Law In: Vindobona Journal of International Commercial Law and Arbitration, Vol. 6, Issue 2 (2002) cited as: *Schroeter I*	**113**
	Part III, Purchase of Goods, Ch. I, General Provisions Article 29 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (7th Edition) (2019) cited as: *Schroeter II*	**129, 130, 132, 135**
***Schwenzer**, Ingeborg*	Part III, Sale of Goods, Ch. V, Provisions Common to the Obligations of the Seller and of the Buyer, S. II, Article 77	**152**

	in: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, 7th Edition (2019) cited as: *Schwenzer I*	
	Part III, Sale of Goods, Ch. V, Provisions Common to the Obligations of the Seller and of the Buyer, S. II, Article 77 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (4th Edition) (2014) cited as: *Schwenzer II*	**152, 154**
	Part III, Sale of Goods, Ch. V, Provisions Common to the Obligations of the Seller and of the Buyer, S. IV, Exemptions, Article 80 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (4th Edition) (2014) cited as: *Schwenzer III*	**209**
***Schwenzer**, Ingeborg* ***Hachem**, Pascal*	Part I, Sphere of Application and General Provisions, Ch. II, General Provisions, Article 7 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (4th Edition) (2014) cited as: *Schwenzer & Hachem*	**170, 171**
Secretariat of UNCITRAL	Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat	**110**

	Secretariat of the United Nations Commission on International Trade Law (1979) cited as: *Secretariat's Commentary*	
***Sheehy**, Benedict*	Good Faith in the Cisg: The Interpretation Problems of Article 7 Review of the Convention on Contracts for the International Sale of Goods (CISG) ed. by Pace International Law Review, pp. 153-196, (2007) University of Canberra cited as: *Sheehy*	**175**
***Smit**, Robert H.*	Mandatory ICC Arbitration Rules In: Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner (2005) cited as: *Smit*	**73, 75, 76**
***Smith**, Gordon*	Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules In: Journal of International Arbitration, Vol. 35, Issue 2 cited as: *Smith*	**81, 94**
***Spagnolo**, Lisa*	Opening Pandora's Box: Good faith and Precontractual Liability in the CISG Temple International and Comperative Law Journal, pp. 161-310, (2008) cited as: *Spagnolo*	**173, 176**
***Spoorenberg**, Frank*	Conflicting Decisions in International Arbitration	**48**

***E. Viñuales**, Jorge*	In: The Law & Practice of International Courts and Tribunals cited as: *Spoorenberg & Viñuales*	
***Stoll**, H.* ***Gruber**, G.*	Article 77 In: Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, 2nd Edition (2005) cited as: *Stoll & Gruber*	**158**
UNCITRAL	Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016) cited as: *CISG Digest*	**110, 113, 130, 156**
***Veneziano**, Anna*	UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to The Belgium Supreme Court Uniform Law Review, pp. 137-151 (2010) cited as: *Veneziano*	**181**
***Verbist**, Herman* ***Schäfer**, Erik*	ICC Arbitration in Practice, 2nd Edition (2015) cited as: *Verbist & Schäfer*	**25, 33, 67, 76, 85, 91, 98**
***Webster**, Thomas H.* ***Buhler**, Michael*	Handbook of ICC Arbitration: Commentary and Materials, 5th Edition (2021) cited as: *Webster & Buhler*	**67, 72, 73, 74, 76, 80, 85**
***Whitesell**, Anne Marie* ***Silva Romero**, Eduardo*	Multiparty and Multicontract Arbitration: Recent ICC Experience In: Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications (2003)	**56, 104**

	cited as: *Whitesell & Silva Romero*	
***Winship**, Peter*	The UN Sales Convention and the Emerging Case Law In: Emptio-Venditio Internationales, Neumayer ed. (1997) cited as: *Winship*	**190**
***Zeller**, Bruno*	Good Faith - Is it a Contractual Obligation? In: Bond Law Review, Volume 15, Issue 2 (2003) pp. 215-239 cited as: *Zeller*	**169, 174, 188**

TABLE OF CASES

Cited as	*Citation*	*Cited in §*
	Austria	
CLOUT Case No. 176	Propane Gas Case Austrian Supreme Court 6th February 1996	**157**
	Belgium	
Scafom v. Lorraine Case	Scafom International BV v. Lorraine Tubes S.A.S. Hof van Cassatie van België/Cour de cassation de Belgique (Belgian Supreme Court) 19th June 2009	**183**
	Czech Republic	
CISG Case No. 2749	Ideal Bike Corp. v. IMPEXO spol. s r.o. Supreme Court of the Czech Republic 17th December 2013	**112**
	Egypt	
CISG Case No. 4430	Italian Marble Case Egyptian Supreme Court 11th April 2006	**113**
	France	
Samsung v. Qimonda case	Samsung Electronics v Qimonda AG Tribunal de Grande Instance de Paris 22nd January 2010	**77**

Cubic case	Société Cubic Defense Systems Inc v Chambre decommerce internationale Cour de Cassation, 1st Civil Chamber, Case No. 99-12.574 20th February 2001	**76**
Bonaventure Case	Cour d' appel de Grenoble CLOUT Case 154 22nd February 1995	**178**
	Germany	
Automobile Case	Oberlandesgericht München Parties unknown CLOUT Case 133 8th February 1995	**178**
CISG Case No. 2477	Hiking Guidebooks Case German Supreme Court 7th January 2014	**113**
CISG Case No. 2217	Pigs Case Court of Appeal Hamm 30th November 2010	**130**
CLOUT Case No. 236	Benetton II Case German Supreme Court 23rd July 1997	**142**
Car Phones Case	CISG-online 915 Oberlandesgericht Düsseldorf	**192**

	21st April 2004	
CISG Case No. 368	Tetracycline HCL case Local Court Munich 23rd June 1995	**157**
	Spain	
CLOUT Case No. 1580	Girona Provincial High Court (Sentencia de la Audiencia Provincial de Girona) Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC Case No. 1580 21st January 2016	**178**
	The Netherlands	
Amsterdam case	Frames Process Systems B.V. and others v. Vulcanic UK LTD. Rechtbank Amsterdam, Case no. C/13/681627 / KG RK 20-432 9th December 2020	**100**
	United Kindgom	
Abu Dhabi v. Eastern Bechtel	Abu Dhabi Gas Liquefaction Company Ltd v. Eastern Bechtel Corporation London Court of Appeal, EWCA Civ J0623-1 23rd June 1982	**103**
	United States	
Filanto Case	Filanto, S.p.A. v. Chilewich International Corp.	**190**

U.S. District Court for the Southern District of New York

14 th April 1992

TABLE OF ARBITRAL AWARDS AND DECISIONS

Cited as	*Citation*	*Cited in §*
CISG Case No. 120	Cold-rolled Metal Sheets Case I Arbitral Tribunal Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) 15 June 1994 Case No. 120	**130**
Hamburg case	Hamburg friendly Arbitration Award 27th May 2002 In: Yearbook Commercial Arbitration XXX (2005)	**98**
ICAC Case No 218/2012	Case No 218/2012 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation 1 July 2013	**142**
CLOUT Case No. 142	Automatic diffractometer case International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation 17 October 1995	**141**
ICC Case No. 22423	International Chamber of Commerce Surpass Commercial Corp. Ltd. v. Bariven S.A.A., ICC 27th May 2019 Case No. 22423/FS, Final Award	**57**
ICC Case No. 7331	International Chamber of Commerce 1994 Parties unknown	**176**

	Case No. 7331/1994	
Mushroom Case	Hungarian Chamber of Commerce and Industry Court of Arbitration 17th November 1995 Parties unknown Case No. VB/94124	**178**

STATEMENT OF FACTS

1 The parties to this Arbitration ("Parties") are SensorX plc ("CLAIMANT"), based in Mediterraneo, and Visionic Ltd ("RESPONDENT"), based in Equatoriana. CLAIMANT is a top Tier 2 producer of sensors used in various applications in the automotive industry. RESPONDENT is a Tier 1 producer of optical systems used by many of the leading car manufacturers for their autonomous parking systems.

2 The Parties entered into a Framework Agreement ("FA") on June 7th, 2019 [*CLAIMANT Exhibit ("C. Ex.") 1, pages ("pp.") 9-12*], which would determine the general terms and conditions for CLAIMANT to supply RESPONDENT with S4-25899 sensors and other products. The first two years of collaboration went seamless and the Parties' business relationship was solid.

3 On December 1st, 2019, an amendment to the FA occurred. The Parties agreed to shift the frequency of the meetings to fix the prices of the sensors, from a semi-annual basis to an annual basis. This change departs from the previously agreed requirements of Article ("Art.") 40 FA, which called for alterations to be written and signed by both Parties [*Purchase Order No.2 ("PO2"), ("p".) 62, Paragraph ("§")8; C. Ex. 1, p. 40*]. Neither party expressed objection to the fact that the amendment did not adhere to the formal requirements.

4 In early 2020, like most automotive industry companies, RESPONDENT was targeted with a cyberattack, an event which was taken seriously from the beginning. At this time, RESPONDENT immediately informed its counterparts, namely CLAIMANT [*RESPONDENT Exhibit ("R. Ex.") 1, p. 33*], who was very appreciative of such attention and information [*R. Ex. 2, p. 34*].

Amidst several successful ransom attacks on competitor companies in the automotive industry, in December 2021, CLAIMANT's cybersecurity officer gave an interview in which he praised the new cybersecurity system implemented by CLAIMANT [*R. Ex. 4, p. 36*].

5 Purchase Order No. A-15604 ("PO No. A-15604"), for the supply of L-1 sensors, was placed on January 4th, 2022. The arbitration agreement contained in the order explicitly excluded the Rules on Emergency Arbitration and determined that eventual disputes shall be settled by one or more arbitrators.

6 One day later, on January 5th, 2022, CLAIMANT suffered a successful cyberattack. RESPONDENT was not informed about this security breach.

7 In contrast, a few days later, on January 17th, 2022, and unknowingly of this event, RESPONDENT placed Purchase Order No. 9601 ("PO No. 9601") for the supply of S4-25899 Radar Sensors. The accompanying arbitration agreement determined that potential disputes would be settled by three arbitrators. It did not exclude the Rules on Emergency Arbitration.

8 RESPONDENT received an email regarding the change of the payment process for PO No. 9601 on March 28th, 2022. This email contained information regarding previous orders between the Parties and was sent directly to RESPONDENT´s representative from an account that signed as Telsa Audi, CLAIMANT' account manager. This would be the second time throughout the Parties' relationship that the bank account specified in the FA would suffer alterations, following a previous modification made in September 2020.

9 On April 4th, 2022, RESPONDENT informed CLAIMANT about the defects of the L-1 LIDAR sensors and announced that no further payments would be made relating to PO No. A-15604.

10 In May and June 2022, RESPONDENT paid the first and second installment of PO No. 9601 to the bank account agreed on March 28th, 2022.

11 The Parties and the Arbitral Tribunal of Case Moot-100/MM ("Arbitral Tribunal") agreed on the Terms of Reference on August 30th, 2023, which reproduced the arbitration agreement of PO No. 9601.

12 More than a year after RESPONDENT´s communication regarding the defective sensors and the ceasing of payments, on September 11th, 2023, CLAIMANT raised a claim regarding PO No. A-15604.

SUMMARY OF ARGUMENT

ISSUE I: THE NEW CLAIM SHALL NOT BE INCLUDED IN THIS ARBITRATION

13 Art. 23(4) International Chamber of Commerce ("ICC") Rules grants the Tribunal with broad discretion to decide whether to authorize the addition of new claims. In this case, the Arbitral Tribunal must refuse this new claim that falls outside the limits of the Terms of Reference **(A)** given that the requirements outlined in Art. 23(4) ICC Rules are not met (**B**). Additionally, while the claims arise from more than one contract, Art. 9 ICC Rules is not applicable since its requirements are not fulfilled (**C**).

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

14 If the Arbitral Tribunal rightfully denies the inclusion of the new claim, the consolidation request must also be rejected. The arbitration for PO No. A-15604 is ineligible for consolidation as it has not started (**A**). Even if the Request of Authorization of New Claim ("RfANC") could act as a request for arbitration, consolidation would remain unattainable. The Arbitral Tribunal lacks the power to determine it (**B**), and the consolidation criteria are not met (**C**). Additionally, consolidation is unwarranted, as its disadvantages outweigh perceived benefits (**D**).

ISSUE III: CLAIMANT IS NOT ENTITLED TO PAYMENT IN FULL UNDER PO. No. 9601

15 RESPONDENT complied with the payment obligation outlined in both the FA and PO No. 9601, as the FA was amended in accordance with Art. 29 CISG and RESPONDENT diligently followed the payment procedures as set forth in the FA (**A**). In any case, should the Tribunal find that RESPONDENT must repeat payment, CLAIMANT resorts to an incorrect analysis of the law and facts by asserting that RESPONDENT's payment obligation should not be reduced in line with the principles underlying Art. 77 CISG (**B**).

ISSUE IV: CLAIMANT WAS BOUND BY A DUTY TO INFORM AND CAUSED THE FAILURE TO PERFORM THE CONTRACT

16 It is RESPONDENT's stance that CLAIMANT had a duty to inform regarding the cyberattack (**A**), as the CISG implies a general principle and duty to act in good faith – a duty which implies information obligations. Furthermore, RESPONDENT fulfilled its obligation; however, if the Tribunal finds otherwise (**B**), CLAIMANT caused the failure to perform in the sense of Art. 80 CISG by violating said duty to inform. RESPONDENT will additionally respond to CLAIMANT's claim of non-conformity of the goods.

ARGUMENT

ISSUE I: THE NEW CLAIM SHALL NOT BE INCLUDED IN THIS ARBITRATION

17 CLAIMANT argues that the additional claim is within the scope of the Terms of Reference, under Art. 23(4) ICC Rules and that the requirements outlined in the Article are met. CLAIMANT also relies its arguments on Art. 9 ICC Rules, stating that when claims arise out with more than one contract, they may be made in a single arbitration.

18 However, as RESPONDENT will demonstrate, the additional claim qualifies as a new one that falls outside the limits of the Terms of Reference and therefore requires the Arbitral Tribunal's authorization under Art. 23(4) ICC Rules **(A)**. This authorization, however, should not be granted because the requirements outlined in Art. 23(4) ICC Rules are not met **(B)**. The Arbitral Tribunal should also refuse the addition of the new claim given that the requirements set forth in Art. 9 ICC Rules are also not met **(C)**. Therefore, the new claim shall not be included in this arbitration and must be brought in a separate proceeding.

A. THE ADDITIONAL CLAIM QUALIFIES AS A NEW CLAIM AND FALLS OUTSIDE THE LIMITS OF THE TERMS OF REFERENCE

19 The wording chosen in Art. 23(4) ICC Rules grants the Arbitral Tribunal broad discretion to decide whether to authorize the addition of new claims. The Tribunal decides which circumstances are relevant in the case, other than the ones given as examples in the provision. Therefore, in the present case, the Arbitral Tribunal has the power to refuse the addition of the new claim into this arbitration and should do so.

20 A new claim under Art. 23(4) ICC Rules implies that the relief requested is based on an entirely new ground. As a result, this new ground should go beyond a mere correction or adjustment to the language of an existing request for relief [*Secretariat's Guide, §3-898*].

21 In the present case, CLAIMANT grounds the new claim on a PO other than the one on which it grounded its first claim [*Request for Arbitration* ("*RfA"), pp. 5; RfANC, p. 46*]. In PO No. A-15604, CLAIMANT ordered a different type of sensors and different quantities [*C. Ex. 7, p.48*], which further indicates the contrasting bases for each of the claims. Therefore, it should be considered that the claim under PO No. A-15604 constitutes a new claim under Art. 23(4) ICC Rules.

22 Moreover, contrary to CLAIMANT´s assertions, the new claim falls outside the Terms of Reference. The Terms of Reference explicitly mention PO No. 9601, while the newly introduced claim pertains to PO No. A-15604 [*RfANC, p. 46; ARfANC, p. 55*]. CLAIMANT

argues that the new claim falls within the scope of the Terms of Reference by alleging that it constitutes a supplementary allegation connected to PO's governed by the same FA [*Memorandum for Claimant ("MfC"), p. 5, §32*].

23 Therefore, as in the case at hand, the new claim falls outside the Terms of Reference, Art. 23(4) ICC Rules requires the Arbitral Tribunal's authorization for the addition of the new claim in the proceedings. However, this authorization must not be granted.

B. THE REQUIREMENTS OUTLINED IN ART. 23(4) ICC RULES ARE NOT MET

24 The Arbitral Tribunal should not authorize the new claims since the requirements set forth in Art. 23(4) ICC Rules are not met given that the claims are not connected **(1)** and the early stage of the proceedings does not justify the inclusion **(2)**. Moreover, the inclusion of the new claim in this arbitration would also be inefficient given that it would delay the proceedings **(3)**.

1. The claims are not connected

25 According to Art. 23(4) ICC Rules, the Arbitral Tribunal should consider the nature of the claims when deciding whether to authorize or refuse the new claim. To do so, the Arbitral Tribunal should focus on the relationship between the claims [*Verbist and ("&") Schäfer, p. 76, §133*].

26 CLAIMANT argues that the arbitration clause in the FA refers to all individual orders [*MfC, p. 5, §36*]. This is incorrect.

27 One of the advantages of a framework agreement is that it allows for greater time and cost efficiency of the transactions [*Albano & Nicholas, pp. 4-5*]. The framework agreements in general achieve this by establishing general terms applicable to all contracts within its terms. Therefore, when parties intend to have the same arbitration agreement, they conclude a Framework Agreement with an arbitration agreement that regulates all contracts.

28 However, this is not the case in these contracts. Despite the FA´s inclusive terms, the Parties opted to include distinct arbitration agreements in each PO. This deliberate choice demonstrates their clear intent to differentiate and assign a specific arbitration agreement to each PO, attending to their varied needs.

29 Therefore, the original claim is made under the arbitration agreement included in PO No. 9601, while the new claim is made under the one included in PO No. A-15604 [*C. Ex 2, p. 13; C. Ex 7, p. 48*]. As the Parties' intent was to have each PO with its arbitration agreement, this shows that there cannot be any connection between the claim under PO No. 9601 and PO No. A-15604.

30 CLAIMANT submits that the arbitral tribunal may consider admitting new claims if they are related to the same contract [*MfC, p. 6, §40*]. However, the claims in question stem from entirely distinct contracts that lack relevant connection. The first contract pertains to PO No. 9601, involving the sale of S4-25899 Radar Sensors [*C. Ex 2, p. 13*]. In contrast, the second contract, PO No. A-15604, involves the sale of L-1 Sensors, which is a different model of Sensors [*C. Ex 7, p. 48*]. Not only are the models distinct but the quantities and prices also exhibit significant variations. The first PO entails an order of 1,200,000 units at USD 32.00 per unit [*C. Ex 2, p. 13*] The second PO involves an order of 200,000 units at USD 120.00 per unit [*C. Ex 7, p. 48*]. Given these substantial differences and the absence of any inherent connection between the contracts, it logically follows that the claims cannot be considered connected either.

31 Moreover, CLAIMANT incorrectly assumes that the original claim and the new claim refer to the same dispute, specifically the cyberattack experienced by CLAIMAINT [*MfC, p. 8, §64*]. This assumption is inaccurate.

32 The original claim in fact derives from RESPONDENT´s payment to the account specified in an email compromised by the cyberattack. In contrast, the new claim is based on the non-compliance of the L-1 Sensors with the contractual requirements, and the consequent withhold of payment by RESPONDENT [*R. Ex. 5, p. 56*]. As a result, the new claim has no relation to the cyberattack.

33 Arbitral Tribunals often refuse new claims if they diverge from the issues outlined in the Terms of Reference and lack a connection to the original claim [*Verbist & Schäfer, p. 76, §134*]. Therefore, the same rationale shall be hereby applied, given the distinctive nature of the claims at hand.

2. The early stage of the proceeding does not justify the admission of the new claim

34 According to Art. 23(4) ICC Rules, the Arbitral Tribunal should also consider the stage of the proceedings before authorizing the inclusion of a new claim. Despite the proceedings being at an early stage, the new claim should not be admitted because the Arbitral Tribunal must ascertain why CLAIMANT did not include the claim in its RfA.

35 As acknowledged by CLAIMANT, the Arbitral Tribunal must consider the reasons behind the delay in presenting the new claim and assess its legitimacy [*MfC, p. 4, §24; p. 7, §54*].

36 The reasoning provided by CLAIMANT for the delay revolves around the delayed awareness of the alleged lack of payment due to the cyberattack *[MfC, p. 5, §29, §33; p. 8, §62; p. 10,*

§76]. However, it was CLAIMANT's lack of diligence that led to the situation only being discovered in August 2023.

37 Initially, CLAIMANT assumed that the cyberattack had minor relevance, neglecting to conduct a thorough security check. It was only later revealed that the cyberattack on its IT-system was far more severe, resulting in a month-long shutdown of CLAIMANT´s IT operations [*C. Ex. 6, p. 17*]. If only CLAIMANT had treated the cyberattack with due importance from the start, it would have discovered the cyberattack much earlier. Consequently, the reasons invoked by CLAIMANT do not sufficiently justify the delay in presenting the new claim. CLAIMANT cannot take advantage of its own lack of due diligence by submitting a new claim and should have done so at the RfA.

38 Additionally, RESPONDENT informed CLAIMANT about the defects relating to the Sensors provided by PO NO A-15604 by email on April 4th, 2022. In the same email, RESPONDENT rightfully announced that no further payment would be made [*R. Ex. 5, p. 56*]. However, CLAIMANT only raised this new claim on 11 September 2023, more than a year later *[RfANC, p. 46*]. In this sense, contrary to what CLAIMANT invokes, it had the opportunity to bring the claim earlier.

39 As CLAIMANT states, the Tribunal must balance the potential disruption to the proceedings against any inefficiency caused by necessitating separate proceedings for the claim [*MfC, p. 4, §27*]. Arbitral Tribunals are more prone to accept a claim that relates to the original dispute and fits into the proceedings than a claim that requires the proceedings to take a significantly different direction [*Secretariat's Guide, Paragraphs ("§§")3-904*].

40 In this case, the new claim jeopardizes the course of the proceedings. The addition of the new claim requires the proceedings to take a significantly different direction and disrupts the natural course of the dispute, given that the new claim is based on entirely new facts and on a different dispute that is not related to the cyberattack [ISSUE I(B)(1), p. 6, §§31-32].

41 CLAIMANT also submits that the new request is a consequence of an act of RESPONDENT [*MfC, p. 4, §26*]. However, this is clearly not the case. CLAIMANT did not comply with its obligation and provided defective sensors which led RESPONDENT to withhold the payment. In fact, RESPONDENT tried to find an amicable solution and waited for CLAIMANT's response [*R. Ex. 5, p. 56*]. Yet CLAIMANT never responded to it and now claims that RESPONDENT is responsible for the new claim.

42 For all these reasons, the early stage does not justify the admission of the new claim.

3. The inclusion of the new claim would be inefficient

43 Pursuant to Art. 22(1) ICC Rules, the Arbitral Tribunal shall make every effort to conduct the arbitration expeditiously and cost-effectively.

44 CLAIMANT may argue that compelling the Parties to litigate closely related claims, through distinct arbitration proceedings, would be inefficient [*MfC, p. 8, §57*]. However, as mentioned above, the claims do not relate to the same dispute [ISSUE I(B)(1), p. 6, §§31-32]. If the Arbitral Tribunal were to accept the new claim, it would require a new round of taking of evidence [*Brueggemann & Smahi, p. 52*]. This imperative step would be caused by the significantly different facts presented by the new claim, potentially resulting in a delay in the proceedings.

45 Therefore, if the disputes were related, it would be more time-efficient to hear both claims in the same arbitration. However, the new claim requires RESPONDENT to defend itself from an entirely distinct issue associated with a different PO. As a result, this would disrupt the proceedings and extend their duration.

46 Secondly, CLAIMANT argues that this case involves a complex-level subject matter requiring expert testimony regarding both claims. This, according to CLAIMANT, would result in more costs if the new claim were brought in a new arbitration [*MfC, p. 9, §64*]. However, this is incorrect. The first claim, related to the cyberattack, is the only claim that would benefit from expert testimony. Therefore, the costs would never be doubled.

47 CLAIMANT also states that the failure to include the new claim could result in the non-recognition and enforcement of the arbitral award. This is because, according to CLAIMANT, the separation of the proceedings could lead to conflicting decisions [*MfC, p. 9, §66*]. Nevertheless, there is no risk of conflicting decisions in the present case [ISSUE II(D), p. 17, §§102-105].

48 Conflicting decisions arise when two awards are based on similar facts and legal backgrounds. To establish this contradiction, three requirements must be fulfilled: similarity in facts, application of the same governing law, and existence of conflicting legal conclusions [*Spoorenberg & Viñuales, p. 93*]. In the current case, the first requirement is not fulfilled since the claims relate to different and independent Purchase Orders ("POs"). Moreover, the non-payments on which the claims are based arise due to different reasons. Consequently, it is implausible for conflicting decisions to arise or for a violation of public policy to occur under the New York Convention, contrary to the assertions made by CLAIMANT [*MfC, p. 9, §67, §68, §69*].

C. THE REQUIREMENTS SET FORTH IN ART. 9 ICC RULES FOR THE CLAIMS TO BE MADE IN A SINGLE ARBITRATION ARE NOT MET

49 As CLAIMANT states, claims arising out or in connection with more than one contract can be made in a single arbitration, irrespective of whether the claims are made under one or more arbitration agreements, under Art. 9 ICC Rules [*MfC, p. 6, §39*].

50 As mentioned above [ISSUE I(B)(1), p. 5, §§28-29], the claims are made under two different arbitration agreements, and as a result the requirements of Art. 6(4)(ii) ICC Rules must be fulfilled.

51 Art. 9 ICC Rules is subject to the provisions of Articles 6(3)-6(7) ICC Rules. Therefore, Art. 6(4)(ii) states that when claims according to Art. 9 ICC Rules are made under more than one arbitration agreement, "*the arbitration shall proceed as to those claims if the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration*". These requirements are not met since the arbitration agreements are not compatible **(1)** and the Parties did not agree on the claims to be determined in the same arbitration **(2)**.

1. The arbitration agreements are not compatible

52 The first requirement for the claims under multiple contracts to be made in a single arbitration is the compatibility between the arbitration agreements.

53 Incompatibility is present when the parties establish different numbers of arbitrators or different methods for the constitution of the arbitral tribunal, for example [*Greenberg, Feris & Albanesi, p. 4, §§168-169*]. This is precisely the case at hand. The arbitration agreements contain different dispositions regarding (i) the composition of the arbitral tribunal and (ii) the applicability of the Rules on Emergency.

54 First, the PO No. 9601 establishes that the Arbitral Tribunal shall be composed of three arbitrators [*C. Ex. 2, p. 13, §7*]. On the other hand, the arbitration agreement in the PO No. A-15604 chooses "*one or more arbitrators*" [*C. Ex. 7, p. 48, §7*].

55 Second, the PO No. A-15604 excludes the application of the Rules on Emergency Arbitration [*C. Ex. 7, p. 48, §7*], while this is not mentioned in the PO No. 9601 [*C. Ex. 2, p. 13, §7*].

56 When deciding on the compatibility of the arbitration agreements, the International Court of Arbitration of the International Chamber of Commerce ("Court") must "*respect and follow the parties' intentions as expressed in their arbitration agreements*" [*Whitsell & Romero, p 16*]. In

fact, the main reason for the parties to choose arbitration is the principle of party autonomy. The parties are allowed to conduct arbitral proceedings by taking into account their needs and preferences, including when selecting the arbitrators [*Dursun, p. 2*]. Therefore, party autonomy allows the parties to arrange their arbitration agreement freely with minimum control [*Fagbemi, p. 3*]. In this case, the Parties intention was to individualize each arbitration agreement with different provisions, which should be respected given the autonomy that is granted by arbitration.

57 In this regard, RESPONDENT invites the Tribunal to consider ICC Case No. 22423. In that instance, the tribunal had to decide whether a single arbitration under the Art. 9 ICC Rules was admissible. The Claimant and Respondent of the mentioned case entered into various supply contracts through 26 POs. One of the reasons that led the tribunal to consider that the POs were compatible under Art. 6(4)(ii) ICC Rules was that the provisions in the arbitration agreements were identical. Furthermore, the claims involved common issues of fact and law. This is evidently not the case at hand. Therefore, RESPONDENT urges the Tribunal to decide otherwise in this case, since the arbitration agreements are not identical and the claims relate to completely different facts, as stated above [ISSUE I(B)(1), p. 6, §§31-32].

2. The Parties did not agree on the claims to be determined in the same arbitration

58 Regarding the second requirement of Art. 6(4)(ii) ICC Rules, the Court must be satisfied that all Parties to the arbitration may have agreed to include those claims in the same arbitration.

59 In this case, there is no express consent of the parties to have a single arbitration. In any case, no implicit consent can be inferred either. This determination is at the discretion of the Arbitral Tribunal, but some elements should be taken into consideration to ascertain whether the parties may have agreed or not to have a single arbitration. In this sense, "*it is asserted that identical arbitration agreements would be a sign for constructive consent, and different arbitration agreements may lead to the opposite*" [*Fatih Isik*]. In this case, the Parties concluded different arbitration agreements for each PO, which proves their intention to have separate arbitrations. Therefore, it is not possible to conclude that the Parties may have agreed to settle both claims in a single arbitration.

60 Moreover, the Arbitral Tribunal cannot conclude that it has jurisdiction over a claim made under a new arbitration agreement without the consent of all the parties, "*given that the arbitral tribunal will not have been constituted under that arbitration agreement*" [*Secretariat´s Guide, §3-910*].

D. CONCLUSION

61 To conclude, neither the requirements outlined in Art. 23(4) ICC Rules nor the ones in Art. 9 ICC Rules are fulfilled. The requirements set forth in Art. 23(4) ICC Rules are not met given that the claims are not connected and the early stage of the proceedings does not justify the inclusion. Additionally, the inclusion of the new claim in this arbitration would also be inefficient given that it would delay the proceedings. Regarding Art. 9 ICC Rules, the requirements are not met since the arbitration agreements are incompatible and the Parties did not agree on the claims to be determined in the same arbitration. Therefore, the Tribunal must refuse the addition of the new claim in the arbitration.

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

62 Anticipating that the Arbitral Tribunal will likely dismiss the inclusion of the new claim, CLAIMANT attempts to achieve the same result by filing a subsidiary request to consolidate the ongoing proceedings with those not yet commenced [*MfC, pp. 10-15, §§79-117*]. However, consolidation in the present case is neither feasible nor advisable, and shall not be granted by the Arbitral Tribunal.

63 The arbitration pertaining to PO No. A-15604 has not yet commenced, rendering it ineligible for consolidation with the current proceedings **(A)**. Even if the RfANC could act as a request for arbitration, consolidation would remain unattainable, since the Arbitral Tribunal lacks the power to determine it **(B)**, and the requirements for consolidation are not met **(C)**. Additionally, consolidation is not warranted, as its disadvantages outweigh perceived benefits **(D)**.

A. THE ARBITRATION PERTAINING TO PO NO. A-15604 HAS NOT YET COMMENCED

64 CLAIMANT seeks to consolidate the present proceedings with an arbitration relating to PO No. A-15604. However, this arbitration has not yet commenced, given that the RfANC fails to satisfy the criteria necessary for its recognition as a valid request for arbitration. Consequently, the current proceedings cannot be consolidated with the arbitration pertaining to PO No. A-15604.

65 As set forth in Art. 10 ICC Rules, the mechanism of consolidation applies only to "*arbitrations pending under the Rules*" (emphasis added). The existence of separate pending ICC arbitrations is the key factor that sets consolidation apart from other procedural tools [*Greenberg, Feris & Albanesi, p. 163; Gilliéron & Pittet, pp. 36-37; Pair & Frankenstein, pp. 1063-1064; Meier, p.*

2225], such as the one outlined in Art. 9 ICC Rules [*Secretariat´s Guide, §3-347; Darwazeh & Johnson, p. 93*].

66 CLAIMANT incorrectly applies Art. 10 ICC Rules by requesting consolidation with proceedings that have not yet commenced. CLAIMANT´s contention that the RfANC could act as a request for arbitration for the new claim is unfounded [*RfANC, p. 47, §7*]. The necessary requirements for the commencement of a new arbitration are not fulfilled.

67 Art. 4(3) ICC Rules sets obligatory requirements for the request for arbitration [*Webster & Buhler, §4-22*]. This article outlines key aspects, such as party details, the applicable arbitration agreement, and pertinent selections concerning the composition of the arbitral tribunal [*Verbist & Schäfer, pp. 27-38, Webster & Buhler, §§4-22-4-94*]. It enables RESPONDENT to comprehend the claims brought in the arbitration and provides the Court with the necessary information for the initiation of the proceedings [*Secretariat´s Guide, §3-80*].

68 The RfANC lacks multiple of the mentioned requirements and as a result, cannot be considered a request for a new arbitration. Firstly, CLAIMANT fails to indicate and provide the relevant arbitration agreement for the case. A brief reference is made to the FA [*RfANC, p. 47, §7*], however, the documents attached include the agreement of PO No. A-15604 [*C. Ex. 7, p. 48, §7*]. No specification is made to which arbitration agreement is to be applied.

69 Secondly, there is no selection of the number of arbitrators for the tribunal. If the arbitration agreement from PO No. A-15604 is applicable, an indication relating to the number of arbitrators should have been made, as it refers broadly to "*one or more arbitrators*" [*Secretariat´s Guide, §3-103*]. However, if the arbitration agreement from the FA is applicable, CLAIMANT should have nominated a co-arbitrator [*Secretariat's Guide, §3-103*]. Furthermore, there is no indication that the payment of the filing fee described in Art. 4(4)(a) ICC Rules was ever made.

70 In this sense, consolidation cannot take place, since the RfANC cannot act as a request for arbitration, and as a result there is no pending arbitration to consolidate with the present one.

B. THE ARBITRAL TRIBUNAL LACKS THE POWER TO CONSOLIDATE THE ARBITRATIONS

71 Contrary to CLAIMANT's assertions [*MfC, p. 10, §80*], the effort to confer the Arbitral Tribunal with the necessary powers to consolidate the proceedings was unsuccessful. As a result, consolidation can only be ordered by the Court.

72 Art. 10 ICC Rules expressly determines that the authority to order consolidation rests exclusively with the Court [*Meier, pp. 2226-2227; Webster & Buhler, §10-2; Secretariat´s Guide, §3-348*]. This decision is final and cannot be reviewed by the Arbitral Tribunal [*Grierson & Van Hooft, p. 122; Darwazeh & Johnson, p. 95*]. The Parties´ procedural agreement [*FA, Art. 41, p. 12, §5*], however, seeks to grant this authority to the Arbitral Tribunal. This alteration is not possible, since Art. 10 ICC Rules is a mandatory provision.

73 Contrary to CLAIMANT's allegations, the Parties´ procedural autonomy is not only limited by the applicable national law [*MfC, p. 11, §85*], but also, by the mandatory dispositions of the relevant institutional rules. By agreeing to submit their dispute to the ICC, the Parties implicitly consent to the application of the mandatory provisions of the ICC Rules and cannot unilaterally amend them [*Carlevaris, p. 115; Smit, p. 847; Born II, §15.02[C]; Webster & Buhler, §§1-29 – 1-30; Berger, pp. 350-351*].

74 In this sense, Art. 19 ICC Rules established the hierarchy of rules governing the proceedings and places the ICC Rules above the Parties´ discretion. Consequently, the Parties´ procedural agreements cannot override the mandatory provisions of the ICC Rules [*Berger, pp. 350-351; Born II, §15.02[D]; Webster & Buhler, §1-30*].

75 Mandatory rules are not only those relating to the fairness and efficiency of the proceedings, but also, those that constitute essential and distinctive features of an ICC arbitration [*Smit, pp. 849-850; Carlevaris, p. 119*]. Art. 10 ICC Rules falls within the second category.

76 A distinctive feature of ICC arbitrations is precisely the Court´s supervisory and administrative role under the Rules [*Greenberg, Feris & Albanesi, p. 161; Smit, p. 850*]. The decision to grant consolidation is of administrative nature [*Verbist & Schäfer, p. 61; Webster & Buhler, §10-2*], as acknowledged by CLAIMANT [*MfC, p. 11, §90*]. Allowing for the Arbitral Tribunal to determine this matter would be unacceptable, as the Court is the only body authorized to take administrative decisions under Art. 1(2) ICC Rules [*Cubic case, Webster & Buhler, §1-18; Verbist & Schäfer, p. 16*].

77 As seen in cases such as Samsung versus ("v.") Qimonda, the Parties´ insistence on unilaterally modifying mandatory provisions of the ICC Rules may lead to the ICC refusing to administer the arbitration.

78 In sum, the Arbitral Tribunal lacks the authority to consolidate arbitrations, since according to the mandatory provision of Art. 10 ICC Rules, this decision rests with the Court.

C. THE REQUIREMENTS FOR CONSOLIDATION ARE NOT FULFILLED

79 Even if the Arbitral Tribunal had the power to consolidate the proceedings, the prerequisites established by Art. 10 ICC Rules are not fulfilled.

80 Art. 10 ICC Rules allows the consolidation of an arbitration case with an already pending proceeding under specific and limited conditions [*Webster & Buhler, §10-1*]. However, even if the alternative conditions are satisfied, the Court is not required to order consolidation, as it has broad discretion to consider other relevant circumstances of the case [*Grierson & Van Hooft, p. 122; Meier, p. 2227*].

81 The criteria for consolidation include: the existence of a mutual agreement **(1)**; all claims arising under the same arbitration agreement **(2)**; or, in the case of different agreements, common factors being shared in both arbitrations along with compatible arbitration agreements **(3)** [*Bond, Paralika & Secomb, pp. 372-373; Smith, pp. 177-179; Pair & Frankenstein, pp. 1065-1066*]. None of the mentioned requirements are met.

1. The Parties did not agree to the consolidation of the current arbitration with the new one

82 Under Art. 10(a) ICC Rules, consolidation can be ordered based on an agreement made by the Parties for this purpose. CLAIMANT suggests that Art. 41(5) FA could be considered as an agreement satisfying this requirement [*MfC, p. 11, §§84-87*]. Nonetheless, the drafting history of the mentioned clause does not support this contention.

83 The inclusion of Art. 41(5) in the FA is solely to safeguard RESPONDENT in cases where the possibility of consolidation is not explicitly stated in the relevant arbitration rules, given that Danubian Law lacks provisions in this regard [*PO2, p. 63, §19*]. As the general wording of the clause indicates, it does not refer to the present arbitration, but merely to the possibility of consolidation.

84 However, even if Art. 41(5) FA could be deemed an agreement under Art. 10(a) ICC Rules, consolidation would not be automatic. When the agreement to consolidate is made in the relevant arbitration agreement, the Court retains the authority to decide whether to consolidate the proceedings or not [*Secretariat's Guide, §3-353*].

85 As a result, this decision would remain subject to the discretion of the Court, particularly regarding circumstances that could deem consolidation inappropriate [*Verbist & Schäfer, p. 62*]. Notably, this includes situations where the relevant arbitration agreements prove incompatible

[*Webster & Buhler, §10-8*]. This is precisely the case at hand [ISSUE I(C)(1), pp. 9-10, §§52-57; ISSUE II(C)(3), p. 16, §§93-96]

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

86 CLAIMANT does not mention Art. 10(b) ICC Rules. Notwithstanding, RESPONDENT agrees that this requirement is not met, as the claims are made under different arbitration agreements.

87 The Terms of Reference of the present proceedings reproduce the arbitration agreement in PO No. 9601, with a brief reference to Art. 41 FA [*PO2, p. 65, §35*]. In contrast, the only arbitration agreement reproduced in the alleged new request for arbitration is the one from PO No. A-15604 [*C. Ex. 7, p. 48, §7*].

88 As noted by CLAIMANT, these agreements are not identical [*MfC, p. 12, §95*]. Beyond this, they are fundamentally different, containing diverse dispositions regarding the composition of the Arbitral Tribunal and the Rules on Emergency Arbitration [ISSUE I(C)(1), p. 9, §§53-55].

89 However, even if both agreements were the same, consolidation would remain unfeasible. In instances where the claims arise under the same arbitration agreement, the Court may still refuse consolidation due to the absence of common aspects between the claims [*Meier, p. 2226; Secretariat's Guide, §3-355*]. As will be demonstrated, this is the current scenario.

3. The disputes are not raised in connection with the same legal relationship and the arbitration agreements are incompatible

90 The third requirement outlined in Art. 10(c) ICC Rules is also not satisfied. Said article requires not only for the Parties to be the same, but also, for the disputes to arise in connection with the same legal relationship. Additionally, the arbitration agreements must be compatible. In the present case, the Parties are in fact the same, but the other conditions are not met.

91 Within the ICC framework, the requirement of the same legal relationship implies that all claims must be related to the same economic transaction [*Secretariat's Guide, §3-357; Bond, Paralika & Secomb, pp. 372-373; Verbist & Shäfer, p. 63*]. Typically, fulfillment of this condition is indicated by the products traded being the same and the contracts being signed on the same day [*Pair & Frankenstein, p. 1075; Meier, p. 2227*].

92 In the present case, PO No. 9601 involves the sale of S4-25899 Radar Sensors and was placed on 17 January 2022 [*C. Ex. 2, p. 13*]. PO No. A-15604, on the other hand, dealt with the sale of L-1 Sensors and was placed on 4 January 2022 [*C. Ex. 7, p. 48*]. Furthermore, as already demonstrated, the claims raised are not connected [ISSUE I(B)(1), pp. 5-6, §§25-33].

93 As to the compatibility of the arbitration agreements in PO No. 9601 and PO No. A-15604, crucial aspects of their texts render them fundamentally incompatible, as already demonstrated [ISSUE I(C)(1), pp. 9-10, §§52-57].

94 Incompatibility arises when the Arbitral Tribunals have different compositions, particularly when they consist of a different number of arbitrators [*Smith, p. 198; Bond, Paralika & Secomb, pp. 372-373; Pair & Frankenstein, p. 1077*]. In the present case, not only the procedural choices in both agreements prove incompatible, with one expressly excluding the application of the Rules on Emergency Arbitration, but also, there is a disparity in the number of arbitrators.

95 While PO No. 9601 explicitly determines that the Arbitral Tribunal shall be composed by three arbitrators [*C. Ex. 2, p. 13, §7*], PO No. A-15604 mentions "*one or more arbitrators*" [*C. Ex. 7, p. 48, §7*].

96 In conclusion, the requirements for consolidation under Art. 10 ICC Rules are not fulfilled. There is no valid agreement to this effect and the claims do not originate from the same arbitration agreement. Even if they did, consolidation would remain unfeasible due to the absence of a shared legal relationship among the disputes, coupled with the incompatibility of the arbitration agreements.

D. THE DISADVANTAGES OF CONSOLIDATION OUTWEIGH POTENTIAL BENEFITS

97 Despite CLAIMANT´s general assertions that consolidation would enhance procedural efficiency [*MfC, pp. 13-15, §§101-117*], its drawbacks would outweigh potential advantages. This becomes evident when examining the specific circumstances of the case, including the duration of the proceedings, associated costs, and the absence of potential conflicting decisions.

98 The Parties and the Arbitral Tribunal are required to conduct the arbitration in an expeditious and cost-effective manner under Art. 22(1) ICC Rules [*Verbist & Schäfer, p. 121*]. Consequently, consolidation should not be ordered in a way that causes undue delays or imposes unreasonable expenses on any of the Parties [*Born, §18.02[B][9]; Bond, pp. 43-44; Hamburg case*].

99 In this particular case, the absence of shared elements between the two claims [ISSUE I(B)(1), pp. 5-6, §§25-33] could lead to unreasonably long proceedings and compromise the possibility of a unified presentation of evidence.

100 Moreover, one of the main drawbacks of consolidating the current case is the potential delays that the new arbitration could impose on the ongoing proceedings. Consolidation is particularly

unjustified when one case lacks jurisdictional objections, while the other presents such objections [*Amsterdam case; Marsman, pp. 341-342*]. Currently, the ongoing proceedings face no jurisdictional challenges. However, there is a high likelihood that the new arbitration faces irregularities regarding the composition of the arbitral tribunal.

101 As already demonstrated, the arbitration agreement of PO No. A-15604 fails to specify the exact number of arbitrators to be appointed, and as of now, no selection has been made in this regard [ISSUE II(C)(3), p. 16, §§94-96].The uncertainties surrounding this provision are poised to trigger procedural discussions, potentially leading to delays in resolving the claims on the merits of the ongoing arbitration.

102 Additionally, there is no basis for apprehension regarding conflicting decisions, given the lack of common elements between the claims in both arbitrations [ISSUE I(B)(1), pp. 5-6, §§25-33]. Nonetheless, even in a hypothetical scenario where such concerns existed, alternatives to consolidation would remain viable.

103 For example, the same Arbitral Tribunal could be appointed for the second arbitration, providing for a greater harmonization of the proceedings [*Secretariat´s Guide, §3-360; Platte, p. 76; Leboulanger, p. 74; Abu Dhabi v. Eastern Bechtel*]. The proceedings could even be conducted in a synchronized manner, providing the practical benefits of consolidation without its associated disadvantages [*Hobér, p. 255; Marsman, p. 339; Grierson & Van Hooft, pp. 125-126*]

104 Concerning the costs of the proceedings, there is no indication that conducting the arbitrations in parallel would result in an unreasonable increase in expenses. In fact, the Parties would not be excused from the provisional advances of the second arbitration even in case of consolidation. But rather, a "*consolidated provisional advance*" could be fixed [*Whitesell & Silva Romero, p. 17*].

105 In this sense, the relevant circumstances of the current case argue against consolidation, as it is likely to introduce delays in the proceedings without substantial benefits in terms of costs. Furthermore, any concerns regarding conflicting decisions could be addressed through alternative approaches that avoid the disadvantages associated with consolidation.

E. CONCLUSION

106 In sum, the arbitration pertaining to PO No. A-15604 cannot be consolidated with the current proceedings, as it has not yet commenced. The RfANC cannot act as a request for arbitration, and as a result, there is no pending arbitration to consolidate with the present one. Even if the

RfANC could act as a request for arbitration, consolidation would remain unattainable. The Arbitral Tribunal lacks the power to determine it, and the requirements for consolidation are not met. Additionally, consolidation is not warranted, as it is likely to introduce delays in the proceedings without substantial benefits in terms of costs.

ISSUE III: CLAIMANT IS NOT ENTITLED TO PAYMENT IN FULL UNDER PO. No. 9601

107 CLAIMANT has argued that it is entitled to payment in full under PO No. 9601, stating that it was not made in conformity with the FA. Moreover, CLAIMANT stated that RESPONDENT cannot rely on a provision of the CISG to partially defend itself against the claim of payment of PO No. 9601. However, CLAIMANT's position fails on the facts and the law, as RESPONDENT fulfilled its payment obligation under the FA **(1)** and nevertheless, RESPONDENT is entitled to rely on Art. 77 CISG to obtain proportional payment **(2)**.

A. RESPONDENT FULFILLED ITS PAYMENT OBLIGATION UNDER THE FA

108 Opposing the assertions made by CLAIMANT regarding the non-conformity of the payment with the FA provisions [*MfC, §154-177, pp. 20-22*], RESPONDENT will demonstrate its compliance with the payment obligation outlined in both the FA and PO No. 9601. The amendments made to the FA are in harmony with Art. 29 CISG **(1)**. As a result of these modifications, RESPONDENT followed diligently the payment procedures as set forth in the FA **(2)**, thereby executing the agreed-upon payment between the Parties.

1. The FA was effectively amended by the Parties in accordance with Art. 29 CISG

109 Contrary to the contentions presented by the CLAIMANT in its submission, the amendment of Art. 7 FA concerning payment of the sensors stands as valid, as it meets the stipulated criteria of written documentation and signature **(a)**. Should the Tribunal entertain any doubt regarding the complete fulfilment of these requirements, it is imperative to note that CLAIMANT's actions induced reliance by initiating a modification to the FA. Consequently, RESPONDENT relied on CLAIMANT's conduct and is now precluded from relying on the previously agreed-upon requirements **(b).**

a. The requirements set forth in Art. 40 FA are met

110 In accordance with Art. 29(2) CISG, if a written contract contains a "no oral modification" clause, which requires the modification or termination of the contract to be made in writing,

then the parties cannot modify or terminate the contract through alternative means. [*CISG Digest, p. 123, §7; Secretariat's Commentary, Art. 27, p.27 §6*].

111 In this sense, the Parties agreed in the FA, in its Art. 40, that for any alterations to hold validity, they must be both documented in writing and accompanied by signatures [*C. Ex. 1, p. 11, §7*].

112 To fulfil the written requirement, especially in cases where a specific form has not been established by the parties, it is crucial that their intentions are documented and conveyed in a manner that is clear and understandable to the recipient. This includes mediums such as emails [*Brunner & Brand, p. 193, §12; CISG Case No. 2749*].

113 Legal commentators acknowledge a gap in Art. 13 CISG as it only refers to older means of communication, namely telegram and telex [*Eiselen I, p. 382*]. Consequently, there is a consensus, both in case law and between scholars, that the concept of "written" in Art. 13 CISG must be extended to encompass more recent forms of electronic communication, such as emails and other internet communications [*Eiselen II, p. 165; CISG Digest, p. 76, §1; CISG Case No. 4430*], capable of fulfilling the same functions as a handwritten message and therefore meeting the requirements of Art. 13 CISG [*Schroeter I, p. 273; Schmidt-Kessel, Art. 13 §7; Brunner & Brand, p. 19, §12; CISG Case No. 2477*].

114 In fact, CISG Advisory Council ("CISG-AC") considers that the "*prerequisite of 'writing' is fulfilled as long as the electronic communication is able to fulfil the same functions as a paper message. These functions are the possibility to save (retrieve) the message and to understand (perceive) it.*" [*CISG-AC Opinion No. 1, §13.1*].

115 In the present case, the FA celebrated between the Parties only stipulated that any amendments had to be made "*in writing*" [*C. Ex. 1, p. 11, §7*] without specifying the particular form. Consequently, an exchange of emails complies with the formal requirement set in Art. 40 FA.

116 Moreover, the emails exchanged between RESPONDENT and telsa.audi@semsorx.me, from the 28th to the 30th of March 2022, identified the involved parties and outlined their intentions to modify the designated bank account for all forthcoming payments, initiating the application of this amendment to PO No. 9601 [*C. Ex. 5, p. 16*].

117 Therefore, considering that the emails exchanged between RESPONDENT and telsa.audi@semsorx.me, reproduce the Parties' intentions and fulfils the same functions as a handwritten statement, it unequivocally meets the written requirement.

118 Concerning the signature requirement, it is crucial to interpret the concept of signature through the lens of Art. 8 CISG, which addresses the interpretation of the parties' declarations. Art. 8

CISG establishes a hierarchical approach, wherein the primary objective is to discern the true intent of the parties, and if such intent cannot be established, the determinant factor becomes the objective content of the parties' statements [*Brunner et al., p. 90 §§1-2*].

119 In this sense the CISG-AC asserts that Art. 8 CISG "*mandates that all facts and circumstances of the case, including the parties' negotiations, are to be considered during the course of contract interpretation*" [*CISG-AC Opinion No. 3, §3.2*].

120 Accordingly, RESPONDENT will present three elements to be considered by the Tribunal when analyzing the signature requirement.

121 Firstly, PO No. 9601 was sent via electronic means of communication by RESPONDENT [*PO2, p. 62, §10*], without CLAIMANT reciprocating with a confirmation letter acknowledging receipt of the PO [*PO2, p. 62, §11*]. Consequently, despite the FA stipulating the necessity of signatures from both Parties [*C. Ex. 2, p. 13*], PO No. 9601 bears only the signature of William Toyoda, RESPONDENT's head of purchasing. The Parties' willingness to accept binding communications without signatures, while never questioning the validity of the resulting contracts, demonstrates that they do not strictly adhere to the signature requirement.

122 Secondly, the majority of communications between Miss ("Ms.") Audi, the account manager responsible on CLAIMANT's side for RESPONDENT's account, and Mister ("Mr.") Royce, the person responsible on RESPONDENT's side for the relationship with CLAIMANT [*PO2, p. 62, §10*], as well as other employees of CLAIMANT and RESPONDENT, occurred via email. These emails, while identifying the sender, lacked a handwritten signature. In this context, RESPONDENT argues that the identification of the sender, as well as its details, namely the name of the company, its address, logo and the information contained in the email, are sufficient to fulfil the signature requirement as it adequately identifies and certifies the authenticity of the sender and recipient of the declaration, as well the integrity of the content, which satisfies the purpose of a signature [*Mason, pp. 1-3*].

123 Thirdly, and attending to the international character of the FA, it is imperative to highlight the relevance of the United Nations Convention on the Use of Electronic Communications in International Contracts ("UNCUECIC") as a source of soft law. This convention, ratified by numerous countries that are also signatories to the CISG, aims to facilitate the use of electronic communications in international trade. Furthermore, its overarching objective is to promote uniformity and harmonization in international commercial transactions, aligning with the principles on which the CISG is based as outlined in Art. 7 CISG.

124 Art. 9(3) UNCUECIC recognizes the fulfilment of a signature requirement through electronic communication provided that it identifies the party, denotes its intention concerning the information within the electronic communication, and the communication's reliability aligns with the purpose for which it was generated or communicated, considering all relevant circumstances [*Martin, p. 476*].

125 In the email received by RESPONDENT on the 28th of March 2022, several identifying features were present: it indicated the sender, showcased the CLAIMANT's logo alongside its address and contact details, included specific details known only by the Parties, and clearly expressed the intention of the sender for RESPONDENT to transfer payments to an alternative account [*C. Ex. 5, p. 16*].

126 Thus, the signature requirement is also fulfilled, given the Parties' practice of absence of signatures in several declarations and the flexible use of signatures, which entails that the FA was effectively amended in accordance with Art. 40 FA.

b. Alternatively, if the Tribunal finds that the requirements of Art. 40 FA are not met, CLAIMANT's actions have excluded the application of Art. 29(2) CISG

127 Should the Tribunal determine that the agreed-upon requirements of written documentation and signature to amend the FA are not met, Article 29(2) CISG, in addition to establishing a "no oral modification" clause, sets forth that "*a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct*".

128 Although the CISG, in regard to the abuse exception contained in Art. 29(2) CISG, does not expressly address situations where parties stipulate additional formalities, such as requiring a signature, scholars assert the provision is also applicable to them [*Eiselen II, p. 166*]. Consequently, the written requirement as well as the signature requirement are governed by Art. 29 (2) CISG.

129 As asserted by CLAIMANT, and not disputed by RESPONDENT, the establishment of a defense under Art 29(2) CISG necessitates the demonstration of reliance-inducing conduct by the opposing party [*Schroeter II, §47*]. The analysis of such conduct should be interpreted, as CLAIMANT submits, in accordance with the Art. 8(2) CISG, accounting for all pertinent circumstances [*MfC, p. 20, §§167-169*]. CLAIMANT fails, however, to submit all relevant circumstances for the case under consideration.

130 Article 29(2) CISG, which prevents a party from invoking a "no oral modification" clause when the other party relied on the first party's conduct, is acknowledged by scholarly works and case law as an embodiment of the principle of good faith that governs the CISG [ISSUE IV (A)(1), pp. 27-29, §§161-179], as RESPONDENT will further evidence [*CISG Digest, p. 123, §9; Schroeter II, §54; Brunner & Brand, p. 195, §14; CISG Case No. 120; CISG Case No. 2217*].

131 In this regard, and as RESPONDENT will analyze in paragraph X, both Parties must act in accordance with the principle of good faith.

132 The continual provision of services without objection or the acceptance of goods in accordance with the amendment is deemed as a reliance-inducing conduct [*Schroeter II, §48; Brunner & Brand, p. 195, §14*]. This aligns with the principle of forfeiture, deriving from the principle of good faith and the prohibition of inconsistent behaviour, which establishes that a party cannot contest the validity of a contract after fulfilling its contractual obligations over an extended period of time [*Magnus II, §5*].

133 In this case, CLAIMANT executed the FA and PO No.9601 without raising any objections. It was not until September, after the delivery of both instalments [*C. Ex. 2, p. 13*], that CLAIMANT raised a complaint regarding the non-receipt of payment [*C. Ex. 3, p. 14*].

134 Therefore, considering the consistent provision of services, CLAIMANT's right to demand payment repetition has been precluded due to the passage of time and the fulfilment of contractual obligations without prior objections.

135 Moreover, a reliance-inducing conduct must generate trust in the other party, indicating its willingness to accept the contractual amendment and the party which relied on that conduct would do it in a justifiable discernable manner [*Honnold, p. 230; Brunner & Brand, p. 196, §16; Schroeter II, §51-54*].

136 In prior instances, the Parties modified the FA without adhering to the requirement of Art. 40 FA. During a meeting on the 1st of December 2019, the Parties decided to transition from a semi-annual fixing of the prices, as stipulated in Art. 6 FA [*C. Ex. 1, p. 10, §6*], to an annual determination of the prices [*PO2, p. 6, §11*]. The decision regarding price fixing and other changes was "*agreed orally*" during the meeting. Subsequently, a minutes of the meeting was circulated via "*email summarizing the results of the meeting in particular the oral agreements reached*" which "*bore no signature though it was clear from the email who prepared them*" [*PO2, p. 62, §8*].

137 It was a mutual understanding between the Parties that if CLAIMANT found any discrepancies in the minutes, it would raise objections; otherwise, no further action was deemed necessary concerning these alterations [*PO2, p. 62, §8*]. Consequently, it would be reasonable for RESPONDENT, or any reasonable party in its position, to presume that future modifications to the FA could follow a similar protocol: conveyed via email, with validation assumed if the other party, in this case, RESPONDENT, did not express objections to the email.

138 In this sense, RESPONDENT acted in reliance of CLAIMANT's conduct in a reasonable and justifiable manner transferring the funds to the account mentioned in the email.

139 Consequently, invoking a "no oral modification" clause, as per Art. 29 CISG and Art. 40 FA, would be abusive, considering RESPONDENT's reliance on CLAIMANT's conduct. This reliance effectively prevents CLAIMANT from relying on the protection provided by such provisions.

2. RESPONDENT made the payment adhering meticulously to the procedural steps and formalities mandated by the FA

140 CLAIMANT contends that RESPONDENT's payment does not qualify as performance due to its transfer to the wrong account and invokes RESPONDENT's lack of diligence [*MfC, pp. 15-17, §119-135*]. However, RESPONDENT will demonstrate that it has fulfilled its obligations. The transfer, made to the amended bank account, effectively discharges RESPONDENT from its obligations **(a)**. Furthermore, RESPONDENT ensured the completion of the payment in accordance with Art. 54 CISG **(b)**.

a. RESPONDENT has fulfilled its payment obligations upon transferring the specified amount to the designated bank account

141 Art. 54 CISG provides that the buyer's obligation to pay the price also encompasses the steps necessary to ensure that the payment is made [*Gabriel, p. 274; CLOUT Case No. 142*]. Consequently, the buyer is required to comply with the formalities stipulated in the contract, which CLAIMANT asserted [*MfC, p. 15, §121*].

142 To help with the interpretation of Art 54 CISG, and given that the general contract law of both Parties involved in the dispute is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts ("UPPIC"), as well as the fact that the UPPIC is a soft law mechanism attending its harmonization and unification purpose, it is possible to consider its Art. 6.1.8., which establishes that the "*obligor is discharged when the transfer to the obligee's financial institution becomes effective*". As a result, the buyer is relieved from its obligation

when the funds are debited to the bank account [*Osuna-González, p. 317; ICAC Case No 218/2012; CLOUT Case No. 236*].

143 In the current scenario, and as previously established in §§ 85-112, Art. 7 FA was effectively amended and, as a result, the bank account to which the payment had to be made was the correct one.

144 Consequently, since the payment was unconditionally placed at CLAIMANT's disposal, the fulfilment of the payment is assured.

b. RESPONDENT completed the payment under Art. 54 CISG

145 CLAIMANT mistakenly argues that RESPONDENT did not act in a diligent form [*MfC, p. 17, §135*]. However, RESPONDENT acted diligently, undertaking all necessary steps to effectuate the payment as stipulated in Art. 54 CISG.

146 As asserted by CLAIMANT and not disputed by RESPONDENT, the buyer must have a diligent conduct and "*use reasonable or best efforts to accomplish the necessary preparatory steps for payment*" [*MfC, pp. 15-16, §124*].

147 Contrary to CLAIMANT's argument, RESPONDENT's alteration of Art. 7 FA was not solely reliant on a mere email. Apart from containing precise information known only to CLAIMANT's employees – such as previously discussed matters, namely insurance issues [*R. Ex. 4, p. 34, §4*] – RESPONDENT attempted to contact Ms. Tesla Audi via her mobile and by reply to the email [*PO2, p. 31, §6*], to which it received a response confirming that "*in the past the Parties had normally treated the form requirement pragmatically*" [*R. Ex. 4, p. 34, §4*], as had happened before, regarding the price adjustments, and stated that "*Claimant would consider the exchange of emails to be sufficient to fulfil the writing requirement*" [*R. Ex. 4, p. 34, §4*].

148 Additionally, contrary to CLAIMANT's assertion, the "semsorX.com" domain did not correspond to "shallow look," indicating an apparent phishing attack. In the initial clause of the FA, CLAIMANT is identified as "SemsorX" [*C. Ex. 1, p. 10*]. Hence, it would not have been unreasonable for RESPONDENT to presume that the email received from the "semsorX.com" domain belonged to CLAIMANT.

149 Thus, RESPONDENT used its best efforts to contact CLAIMANT and fulfilled its payment obligation, exhibiting diligence throughout the payment process to ensure its correct completion.

B. IN ANY CASE, RESPONDENT IS ENTITLED TO RELY ON ART. 77 CISG TO OBTAIN PROPORTIONAL PAYMENT

150 Even if the Tribunal determines that RESPONDENT must make a repeated payment, RESPONDENT's payment obligation should be reduced in line with the principles underlying Art. 77 CISG.

151 CLAIMANT argues that RESPONDENT cannot rely on Art. 77 CISG to partially reduce the payment since the claim is not for damages and because CLAIMANT took the necessary measures to mitigate losses. However, RESPONDENT will demonstrate that the scope of Art. 77 CISG encompasses remedies beyond the mere claim for damages **(1)** and that CLAIMANT failed to take reasonable measures to mitigate the damages **(2)**.

1. The action for the purchase price falls under the scope of Art. 77 CISG

152 Contrary to what CLAIMANT argued [*MfC, pp. 22-23, §§178-184*], it is recognized by both doctrinal studies and case law, as well as in international trade, that the principle to mitigate damages has implications in other remedies [*Huber, §3; Schwenzer I, §4; Mohs, §16; Schwenzer II, §4*].

153 Even scholars that suggest that the duty to mitigate damages normally applies solely to the claims for damages recognize that there are situations in which there is a possibility to apply Art. 77 CISG to claims for performance as it would be more reasonable [*Riznik, p. 282, §5*].

154 In this sense, Schwenzer asserts that the application of Art. 77 CISG to other damages can be twofold: either it is "*directly applied to the claim for specific performance and the insistence on this remedy is regarded as violation of the duty to mitigate damages or the right of the seller to claim specific performance is recognized but reduced by his unnecessary production costs*" [*Schwenzer II, §4*].

155 Since CLAIMANT's request concerns specific performance, its claim falls within the scope of Art. 77 CISG regarding the mitigation of damages.

2. No reasonable measures were taken by CLAIMANT

156 Considering the application of Article 77 CISG to the present case, it is crucial to acknowledge that the aggrieved party holds an obligation to undertake reasonable measures to alleviate the losses incurred [*CISG Digest, p. 356, §1; Chengwei, §14.5*].

157 Determining reasonableness in this context aligns with the principle of good faith [*CISG Case No. 368; CLOUT Case No. 176*], further analyzed by RESPONDENT in paragraph X.

158 Failure to mitigate losses may preclude the aggrieved party from recovering avoidable losses, as per Article 77 CISG, which is based on the principle that compensation should not cover loss that could have been prevented, especially in its entirety *[Chengwei Liu, §14.5; Stoll & Gruber p. 787*].

159 In this context, adopting a passive conduct and waiting for the occurrence of loss is not acceptable by commentators in the field [*Knapp, p. 560*].

160 Despite the arguments presented by CLAIMANT [*MfC, p. 25, §205 - 210*], it did not take the necessary and sufficient measures to mitigate the losses.

161 Just as RESPONDENT promptly informed the CLAIMANT about the cyberattack it suffered [*PO2, p. 63, §19*], the least CLAIMANT could have done was reciprocate by notifying the RESPONDENT of the incident. Such communication, in the form of a simple email or phone call, would not have imposed an undue cost or inconvenience on the CLAIMANT, yet it could have entirely averted the current situation. A reasonable person in the position of the same kind and in the same circumstances of CLAIMANT, having received an email from the RESPONDENT during their own cyberattack ordeal, would likely reciprocate by sending an email when faced with a similar cyber threat.

162 The only action taken by CLAIMANT that could somehow contribute to partially mitigating the losses is the update to its cybersecurity defence system [*MfC, p. 25, §205 - 210*]. Nevertheless, it is imperative to recognize that such an update is a standard industry expectation, especially in the context of heightened cyberattack risks targeting companies within the automotive sector [*C. Ex. 6, p. 17, §4; R. Ex. 1, p. 33*]. This highlights the insufficiency of this specific measure, considering the well-documented vulnerabilities and cyber threats prevalent in the automotive industry.

163 Had CLAIMANT acted in good faith and taken preventive measures, such as informing RESPONDENT of the cyberattack – which would not require unreasonable efforts by CLAIMANT, – the loss could have been entirely averted, as RESPONDENT would have sought additional direct oral confirmation before transferring the amounts to another bank account.

164 Consequently, since CLAIMANT did not undertake reasonable measures to mitigate the loss, CLAIMANT's right to recover any loss under loss under Art. 77 CISG is precluded.

C. CONCLUSION

165 In conclusion, RESPONDENT diligently fulfilled its payment obligation, as the Parties effectively amended Art. 7 FA, in accordance with Art. 29 CISG, pertaining to the modification

of contracts. Furthermore, CLAIMANT's failed attempt to circumvent its obligation to take reasonable measures to mitigate the damages, precludes them from recovering any loss under Art. 77 CISG. As a result, RESPONDENT is not obliged to repeat the payment, and even if the Tribunal were to find otherwise, RESPONDENT's payment obligation should be reduced in line with the principles underlying Art. 77 CISG.

ISSUE IV: CLAIMANT WAS BOUND BY A DUTY TO INFORM AND CAUSED RESPONDENT'S ALLEGED FAILURE TO PERFORM THE CONTRACT

A. CLAIMANT HAD A DUTY TO INFORM RESPONDENT ABOUT THE CYBERATTACK

166 CLAIMANT submits throughout §§136-153 [*MfC, pp. 17-18*] that it was not bound by a duty to inform RESPONDENT about the phishing attack suffered. It fails, however, to render a plausible and logical explanation for the absence of such duty.

167 RESPONDENT will assist the Tribunal in rectifying CLAIMANT's submissions, ultimately advocating for three key arguments: the CISG – as the law governing the FA – provides for a duty to act in good faith **(1)**; a duty to inform can be drawn from said duty of good faith **(2)**; and, by remaining silent to what the cyberattack concerned, CLAIMANT violated this duty and acted in bad faith towards RESPONDENT **(3)**.

1. The CISG implies a duty to act in good faith

168 Contrary to CLAIMANT's stance [*MfC, p. 18, §144*], RESPONDENT will demonstrate that the CISG implies a duty to act in good faith to the Parties.

169 Good faith can be described as a general contract law principle [*Rostila & Lampinen*] and requires the parties to cooperate "*in carrying out the interlocking steps of an international sales transaction*" [*Zeller, p. 221; Kritzer, p. 115*].

170 CLAIMANT discreetly mentions that Art. 7 CISG bears an interpretation mechanism [*MfC, p. 17, §§140-144*]. This Art. contains two rules serving different purposes: while Art. 7(1) seeks to secure an autonomous interpretation of the CISG, free from preconceptions of domestic laws, Art. 7(2) serves as a basis for gap-filling [*Schwenzer & Hachem, Art. 7, §5*].

171 In what Art. 7(1) concerns, it requires the CISG to be interpreted with regard to three principles: the origin of the rules (their "international character"), the aim of promoting uniformity, and the promotion of good faith in international trade [*Schwenzer & Hachem, Art. 7, §7*]. CLAIMANT correctly describes the first two principles, evidencing that the CISG must be

understood independently [*MfC, pp. 17-18 §§141, 150*]. However, regarding good faith, it reaches the wrong conclusion that it must not apply to the Parties' behaviour.

172 Art. 7(2) CISG, for instance, provides that certain matters are to be settled based on the general principles on which the CISG is based.

173 A range of arguments correctly propose that good faith in the CISG is an aid to interpret the CISG itself; a general principle; a direct, positive obligation imposed upon parties; and an independent source of rights and obligations which may contradict or extent the CISG [*Spagnolo, p. 274*].

174 Good faith in the CISG has an interpretative role, as Art. 7(1) recognizes that good faith is applied in the interpretation of the totality of the CISG and its provisions. The mandate is primarily directed to the judiciary to interpret the CISG in good faith, and such interpretation covers the formation of the contract and the rights and obligations of the buyer and seller [*Zeller, p. 222; Bianca & Bonell, p. 84; Enderlein & Maskow, p. 54*].

175 Furthermore, it is simultaneously a general principle underlying the CISG. The placement of Art. 7 CISG at the head of all substantive sections, and the generality of its wording, evidence that good faith is one of three interpretive principles to not only guide in the interpretation of the CISG, but also a principle to be applied to specific instances [*Sheehy, pp. 18-19*]. It is commonly held amongst international commentators that the concept of good faith has inspired so many provisions in the CISG that it must be considered as a general principle underlying it [*Ström, p. 39*].

176 Other tribunals have even identified and recognized good faith as a general principle of the CISG [*ICC Case No. 7331*]. Good faith is then, first and foremost, a general principle underlying the CISG [*Spagnolo, p. 275*], as reflected in Art. 7.

177 From this principle of good faith, an obligation to act in good faith can be drawn. Despite some restrictive views considering that it is limited to the interpretation of the CISG, Art. 7 has been cited as an authority for the proposition that contracting parties are indeed obligated to act in good faith [*Andersen, p. 310; Bridge II, p. 98*]. Many courts and arbitral panels have expanded the use of good faith to imply good-faith obligations in international sales contracts [*DiMatteo & Janssen, p. 95*], and the concept has been applied, de facto, to the conduct of contracting parties [*Mazzotta, p. 132*].

178 In the Mushroom Case, the hungarian arbitral tribunal declared that Art. 7(1) is not merely an interpretation tool, but also a standard of behaviour the parties must respond to. The same

understanding was reached in other tribunals amongst several jurisdictions [*Bonaventure Case, Automobile Case; CLOUT Case No. 1580*].

179 Therefore, the CISG not only explicitly provides for a general principle of good faith, but also imposes a positive duty to act in good faith on the contracting parties.

a. A good faith obligation can also be drawn from the UPPIC

180 RESPONDENT will further evidence that, in case the Tribunal finds that the CISG does not provide for a duty of good faith, the UPPIC, as its successor, bears a good faith duty and standard enforceable on the Parties.

181 The above reasoning focuses on whether the CISG provides for a general duty of good faith. However, some commentators go further and argue that when the CISG lacks guidance, the interpreter may resort to the UPPIC [*Veneziano, p. 141*].

182 RESPONDENT has already evidenced the applicability of the UPPIC [ISSUE III(A)(2)(a), p. 23, §142]. These principles were drafted in the same spirit and style as the CISG, and were designed to assist arbitrators and courts in settling disputes in accordance with the general principles [*Bridge I, §§10.36, 10.37*].

183 Indeed, the UPPIC have recently been used for this purpose. In the Scafom v. Lorraine Case, the Belgian Supreme Court ("SC") considered that Art. 7 CISG must be uniformly applied, and regard must be taken to "*general principles which govern the law of international trade*". The court declared that the UPPIC provide for such principles and therefore may be used to interpret the CISG.

184 Art. 1.7 of the UPPIC reads: *"(1) Every party must act in accordance with good faith and dealing in international trade. (2) The parties may not exclude or limit this duty.*". As the CISG intends that sales contracts are governed by the good faith principle, the UPPIC can clarify the object of the good faith principle contained in it [*Bonell, Art. 7, §2.4.2*].

185 The UPPIC expressly state that contractual obligations may be implied under the maxim of good faith in its Articles ("Arts.") 1.7 and 4.8, which reads "*(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. (2) In determining what is an appropriate term regard shall be had, among other factors, to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness*.". The CISG does not contain a comparable rule.

186 Therefore, because the CISG does not have a provision similar to the one found in the UPPIC regarding good faith, these principles can and must be used in the interpretation of the CISG, as soft law designed to assist in such purpose.

2. A duty to inform must be drawn from the good faith obligations arising from the CISG and UPPIC

187 The CISG, as the law governing the FA, does not explicitly provide for a duty to inform regarding data protection considerations. However, CLAIMANT reaches the wrong conclusion that no collateral obligations can be drawn from Art. 7 CISG [*MfC, p. 17, §152*], as RESPONDENT will demonstrate that a duty to inform underlies the duty to act in good faith.

188 As previously evidenced, Art. 7 CISG and Arts. 1.7 and 4.8 UPPPIC provide for a general principle of good faith and for a duty to act accordingly on the contracting parties [ISSUE IV(A)(1)(2), pp. 27-30, §§168-186]. In international law, good faith must be a concept capable of treading a middle ground that is acceptable to all. For that reason, its definition must be a general practical duty rather than a specific one [*Zeller, p. 221*].

189 It is widely accepted that under the CISG, additional obligations can be implied, and in particular, a general duty to cooperate [*Magnus I, p. 94*], as RESPONDENT will evidence.

190 The formation of collateral obligations from good faith is proeminent in the jurisprudence of the CISG – in the Filanto Case, the key ruling of the court may be read as saying that parties in a long-term relationship owe each other a duty to communicate, a duty which ultimately may be derived from the duty to act in good faith [*Winship, p. 228*].

191 Amongst some jurisdictions, the principle of good faith has been seen as an autonomous source of distinct and additional obligations implied into the CISG, with additional information duties being the primary field of application of the principle. [*Kröll, p. 362*]. Good faith constitutes a discipline that is equal to the contract terms themselves, necessary to fill the inevitable legal gaps that occur and create other prohibitions and obligations not imposed by the law, thus completing the contractual system [*Francesco, pp. 702-703*].

192 In the Car Phones Case [*CISG Online No. 915*], an israeli buyer requested the court to order a german seller to repay the price of mobile phones as contracted between the parties. The buyer had avoided the contract because of late delivery. The German court eventually invoked duties of good faith, cooperation, and information under the CIGS to hold the seller accountable for not being collaborative and transparent towards the buyer, declaring that the latter did not breach the contract.

193 Similarly, the Tribunal must find that CLAIMANT had a duty to inform RESPONDENT about the cyberattack, and by not doing so, the duties of good faith and information underlying the CISG were breached.

194 Other tribunals have recognized that the obligation to cooperate in good faith in the performance of a contract amounts to a general principle in international trade [*ICC Award No. 9593*], an obligation often defined as the duty to take positive actions to help the other party perform the contract [*Falla, pp. 508-509*]. The rightful conclusion in the present case is to consider that informing about the cyberattack was a positive action that would assist RESPONDENT in fulfilling its obligation.

195 As CLAIMANT itself evidences, the Parties had a long-lasting business relationship of three years and 22 different PO's prior to the dispute under analysis [*C. Ex. 3, p. 14, RfA, p. 5, §§6, 10*], which implies certain collateral obligations, such as the duty to inform.

196 For all the above-mentioned, the good faith duty provided for in the CISG underlies collateral and implicit duties, namely, information duties regarding circumstances likely to influence the Parties' relationship or the contract.

3. CLAIMANT has breached its good faith obligations

197 CLAIMANT fails to address RESPONDENT's main claim that there was an act of bad faith on its behalf. And does so for a reason: because it is aware that not informing it about the cyberattack was a negligent and damaging decision.

198 The Parties' relationship had been previously affected by another phishing attack in August 2020. At the time of this event, RESPONDENT, the victim, diligently and immediately informed CLAIMANT in this regard, as required by Art. 34 of the Equatorianian Data Protection Act [*R. Ex. 1, p. 33*]. It was later concluded that no data from CLAIMANT had been affected, but, irrespective of that, it was highly appreciative of such attention from RESPONDENT [*R. Ex. 1, p. 33; R. Ex. 2, p. 34*].

199 This event created an expectation on RESPONDENT that CLAIMANT, being in similar circumstances, would act with the same standards of care, diligence, and contractual good faith. By not informing RESPONDENT about the cyberattack, CLAIMANT violated its duties of good faith, cooperation and information, as described above [ISSUE IV(A)(1)(2), pp. 27-31, §§168-196].

200 As CLAIMANT itself admits [*C. Ex. 6, p. 17, §8*], the automotive industry has been increasingly the target of successful cyberattacks, which additionally calls into question CLAIMANT's decision to not inform its clients.

201 Furthermore, CLAIMANT was aware of the contradiction that would emerge if, after demonstrating such care and consideration regarding cybersecurity and data protection [*R. Ex. 2, p. 34*] and praising the new cybersecurity concept implemented [*C. Ex. 6, p. 17; R. Ex. 3, p. 35*], a successful phishing attack affected its structure. This event would not only have consequences on a business level, but also on a public relations one.

202 Thus, CLAIMANT's behaviour was one of bad faith and contrary to what was standard procedure between the Parties.

B. RESPONDENT FULFILLED ITS PAYMENT OBLIGATION; HOWEVER, IF THE TRIBUNAL CONSIDERS OTHERWISE, CLAIMANT CAUSED THE FAILURE TO PERFORM IN THE SENSE OF ART. 80 CISG

203 As previously demonstrated [ISSUE III(A), pp. 18-24, §§108-149], the present case is not one of non-performance, as RESPONDENT paid the price of PO No. 9601 accordingly. However, if one were to consider the opposite view, and a failure to perform does exist, it falls squarely under Art. 80 CISG.

204 RESPONDENT will then demonstrate that CLAIMANT caused the alleged failure to perform, as it prevented RESPONDENT from paying **(1)**, and the requirements of Art. 80 CISG are fulfilled **(a)**. RESPONDENT will additionally address CLAIMANT's stance that RESPONDENT cannot rely on Art. 39 CISG if the new claim is integrated into the present arbitral proceeding **(2)**.

1. CLAIMANT hindered the performance, causing the failure to perform

205 CLAIMANT argues it did not cause the failure to perform since it was not bound by an information duty [*MfC, p. 17, §136*].

206 Art. 80 CISG states that "*a party can rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission*". It applies even when the conduct was foreseeable and when the debtor could overcome its consequences. This ground of exemption is warranted under the general principle of good faith and of the broader maxim that no party should profit from its own wrongdoing [*Magnus II, p. 258*].

207 This Art. should apply when one party's actions created an impediment or obstacle that prevented or interfered with the other party's performance [*Honnold & Flechtner, p. 596*]. As

Art. 80 also mentions omissions, and the omission of the occurrence of the cyberattack led RESPONDENT to pay to the wrong bank account, CLAIMANT directly hindered RESPONDENT's performance.

208 RESPONDENT will further demonstrate that the requirements of Art. 80 CISG are fulfilled.

a. The requirements of Art. 80 CISG for CLAIMANT to not rely on the failure to perform are fulfilled

209 Art. 80 CISG provides three requirements for its applicability: there is non-performance by the promisor; the failure to perform is causally linked to the promisee; and the existence of an act or omission by the promisee [*Neumann, pp. 143-172; Schwenzer III, Art. 80, §§3-6*].

210 RESPONDENT fulfilled its obligation, however, if the Tribunal finds otherwise, the first requirement is fulfilled as the payment of PO No. 9601 is considered ineffective and, therefore, RESPONDENT, as the promisor of the obligation to pay, failed to perform.

211 The second requirement is fulfilled as well since the failure to perform is causally linked to the promisee of the obligation to deliver, or CLAIMANT. RESPONDENT was not able to perform solely because of the lack of regard from CLAIMANT, which is mirrored in the breach of the duty to inform arising from the duty of good faith.

212 Lastly, CLAIMANT correctly evidences that "*for an omission to be relevant (…), the obligee must be under a duty to act or cooperate (…) result(ing) from the contract, the CISG, any usage or practices established between the parties or from the principle of good faith in international trade*" [*MfC, p. 17, §139*]. As previously demonstrated, CLAIMANT has, indeed a duty to cooperate and to inform arising from the general principle of good faith foreseen in the CISG.

213 The word "omission" in Art. 80 implies that a duty must have been neglected in an imputable way [*Magnus III, p. 280*]. As CLAIMANT abstained from informing RESPONDENT about the cyberattack, violating its duty to inform, this circumstance embodies an omission, which, by definition, falls within the scope of Art. 80 CISG.

214 As the requirements of Art. 80 CISG are fulfilled, the rightful conclusion is that CLAIMANT caused the non-performance, and, therefore, RESPONDENT's failure to perform. The latter can, in this sense, rely on said Art..

2. CLAIMANT cannot address the additional claim of non-conformity of the goods, as the Tribunal did not order for that matter to be discussed in these pleadings

215 RESPONDENT respectfully refrains from responding to CLAIMANT's argument C.2.3. [*MfC, pp. 26-28*] at this time, as the Tribunal did not require the Parties to address this issue in their submissions [*Procedural Order No. 1* ("*PO1"), p. 58, § 4(1)*]. The only question under dispute in the present section of this Memorandum is whether RESPONDENT can invoke a violation of an information duty, which has been addressed accordingly in the above-made submissions.

C. CONCLUSION

216 In conclusion, good faith is an underlying principle of the CISG with multiple roles. It must be used in its interpretation, to regulate the parties' behaviour and, ultimately, to create collateral duties and obligations. The duty to inform is drawn from the concept and duty of good faith present in the CISG, and is, in the case under analysis, an obligation of the Parties. CLAIMANT violated both the duty to act in good faith and the duty to inform by deliberately omitting RESPONDENT the circumstances of the cyberattack. Furthermore, if the Tribunal finds that the payment of PO No. 9601 is ineffective, CLAIMANT is responsible for the failure to perform in the sense of Art. 80 CISG due to the violation of said duties.

REQUEST FOR RELIEF

In light of the submissions made above, RESPONDENT respectfully requests the Tribunal to:

1. Not include the new claim into the present arbitration, nor consolidate the arbitration proceedings regarding the additional claim in the present arbitration;
2. Declare that RESPONDENT fulfilled its obligation and the payment of PO No. 9601 is effective under the FA;
3. Alternatively, in case the Tribunal determines that RESPONDENT must make a repeat payment, such payment should be mitigated in accordance with Art. 77 of the CISG;
4. Subsidiarily, in the event the Tribunal considers otherwise, declare that CLAIMANT caused the failure to perform in the sense of Art. 80 CISG;
5. Declare that CLAIMANT is under a duty to act in good faith and, subsequently, an information duty;
6. Declare that RESPONDENT is ordered to bear the costs of the arbitration.

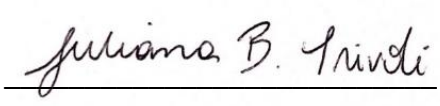
CERTIFICATE OF AUTHENTICATION

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. No assistance during the writing process was received from any person who is not a member of this team.

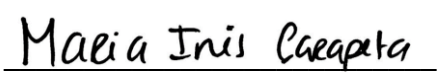
Lisbon, January 18th 2024

Aline Gonçalves

Carolina Gonçalves



Juliana Trivoli



Maria Inês Carapeta