Thirty-First Annual
Willem C. Vis International Commercial Arbitration Moot

University of Lausanne

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 –

Counsels

Aurélien Meystre Shima-Océane Zimmer Amel Meziane Fatima Iuliano

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY: University of Lausanne

COUNTRY: Switzerland

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 available online, which has not been properly distinguished by quotation marks or citation.	✓		

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

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

DATE: 7 December 2023

NAME: Aurélien Meystre SIGNATURE:

NAME: Shima-Océane Zimmer SIGNATURE:

NAME: Amel Meziane SIGNATURE:

NAME: Fatima Iuliano SIGNATURE:

NAME: Jonas Zaugg (Coach) SIGNATURE:

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

§/§§	Paragraph/Paragraphs
ARfA	Answer to the Request for Arbitration, dated 10 July 2023
ARNC	Answer to the Request for authorization of new claim, dated 2 October 2023
Art./Arts.	Article/Articles
AIAA	Australian International Arbitration Act, 1974
CCO	Chief Cybersecurity Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
Claimant	SensorX plc
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
EDPA	Data Protection Act of Equatoriana
et al.	*Et alii/alia*; "and others"
EU	European Union
Ex.	Exhibit
fn.	Footnote(s)
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
HKIAC Rules	HKIAC Arbitration Rules, 2018
Ibid.	*Ibidem*; "in the same place"
ICC	International Chamber of Commerce

ICC Court	International Court of Arbitration of the ICC
ICC Rules	ICC Rules of Arbitration, 1 January 2021
Infra	See below
IT	Information technology
L-1 Order	Purchase Order No. A-15604
L-1 sensor	L-1 LIDAR Sensor
L-2 sensor	L-2 LIDAR Sensor
LIDAR	Light detection and ranging
Mr.	Mister
No.	Number
NOM clause	No-oral-modifications clause
NAFTA	North American Free Trade Agreement, 1 January 1994
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
p./pp.	Page/Pages
Parties	SensorX plc and Visionid Ltd
PO1	Tribunal's Procedural Order No. 1, dated 6 October 2023
PO2	Tribunal's Procedural Order No. 2, dated 6 November 2023
radar	Radio detection and ranging
Respondent	Visionic Ltd
RfA	Request for Arbitration, dated 9 June 2023
RNC	Request for authorization of new claim, dated 9 June 2023
S4 Order	Purchase Order No. 9601

S4 sensor	S4-25899 Radar Sensor
Supra	See above
Swiss Rules	Swiss Rules of International Arbitration, 1 June 2021
ToR	Terms of Reference
Tribunal	Arbitral Tribunal constituted under the under the ICC Rules and administered by the ICC in the dispute between SensorX plc and Visionic Ltd
UML	UNCITRAL Model Law on International Commercial Arbitration, Vienna, 1985 with the 2006 Amendments
UPICC	UNIDROIT Principles on International Commercial Contracts, Rome, May 2016
USD	United States Dollar(s)
v.	Versus; "against"
Vol.	Volume

STATEMENT OF FACTS

The parties to the present dispute are SensorX plc ("**Claimant**"), based in Mediterraneo, and Visionic Ltd ("**Respondent**"), based in Equatoriana, collectively referred to as the "**Parties**". Claimant is a leading Tier 2 manufacturer of various sensors used in multiple applications in the automotive industry, in particular autonomous driving. Respondent is a Tier 1 manufacturer of optical modules using such sensors.

On **7 June 2019**, the Parties entered into a Framework Agreement which governs the contractual terms for all sensors to be supplied by Claimant to Respondent. To that effect, individual contracts concluded on its basis are to take the form of "Purchase Orders" sent by Respondent to Claimant, and that all payments have to be made to one of the bank accounts specified in Art. 7 of the Framework Agreement. In addition, Art. 40 of the Framework Agreement provides that any amendment or waiver of terms in the Framework Agreement must be made in writing and signed by both Parties. Lastly, Art. 41 of the Framework Agreement provides that any dispute arising under or in connection with the Framework Agreement, which cannot be resolved through amicable means, will be resolved through arbitration administered by the International Chamber of Commerce ("**ICC**") under the ICC Rules of Arbitration ("**ICC Rules**").

On **17 January 2022**, Respondent ordered 1,200,000 units of S4-25899 Radar Sensors ("**S4 sensors**") under Purchase Order No. 9601 ("**S4 Order**"). The S4 Order provided for delivery of the sensors in two instalments in **April and May 2022**, with payment due 30 days after each delivery. While Claimant delivered the two instalments on **3 April** and **30 May 2022**, as of today, Claimant never received any payment for these sensors.

After massive cyberattacks in the industry, Claimant considerably reinforced its cybersecurity system and setup mandatory employee training. Nevertheless, on **5 January 2022**, hackers managed to successfully breach Claimant's defences by targeting one of its account managers, Ms. Telsa Audi. After the trojan horse's discovery on **23 January 2022**, Claimant immediately hired Mediterraneo's leading cybersecurity firm to neutralise the malware. Unfortunately, on **15 May 2022**, it became apparent that the sophisticated ransomware had managed to infiltrate and encrypt Claimant's customer relation management system, demanding a USD 5,000,000 ransom. In light of the massive scope of the attack, Mediterraneo's governmental cybersecurity unit supported Claimant in conducting a thorough security check, which led to a complete shutdown of its IT system for over a month. Throughout **summer 2022**, without any access to its data and despite an extreme shortage of personnel, Claimant nonetheless ensured delivery for existing and new orders. On **25 August 2022**, when the situation had

finally improved, Ms. Audi's successor, Mr. Gustaf Gabrielsson, discovered that CLAIMANT had not received any payment from RESPONDENT regarding the S4 Order.

Following his discovery, Mr. Gabrielsson discussed the issue of the outstanding payment with his counterpart at RESPONDENT, Mr. Royce. To his surprise, Mr. Royce replied that RESPONDENT had already paid both instalments on a bank account allegedly requested by Ms. Audi. In fact, RESPONDENT had received a phishing email impersonating her, using information collected during the cyberattack. While the email used CLAIMANT's logo and footer, RESPONDENT had not noticed numerous discrepancies, such as the email coming from "`semsorx.me`" or the incorrect designation of the product type. In that regard, RESPONDENT had already fallen for a similar phishing attack in **August 2020**. Yet, even though RESPONDENT was now aware that its payments had never reached CLAIMANT, RESPONDENT still refused to pay, blaming CLAIMANT for not disclosing the cyberattack. Consequently, on **9 June 2023**, CLAIMANT initiated arbitration.

On **8 September 2023**, 9 days after the Parties signed the Terms of Reference ("**ToR**"), CLAIMANT discovered that it had never received one of RESPONDENT's payments under Purchase Order No. A-15604 ("**L-1 Order**"). This purchase order was also concluded under the Framework Agreement and provided for the sale of 200,000 L-1 LIDAR Sensors ("**L-1 sensors**"). Indeed, on **4 April 2022**, RESPONDENT had emailed CLAIMANT— initially using a wrong address — that it would withhold payment in light of alleged defects with the sensors until the Parties found an amicable solution. However, shortly after receiving the email, its recipient, Ms. Peugeotroen, had to be hospitalized due to life-threatening complications related to her pregnancy. She was thus unable to inform her superiors of the email's contents, which was subsequently lost as part of the data encrypted by the ransomware. In any event, Art. 15 of the Framework Agreement required such notices of defects to use a dedicated form provided in Annex 3.

Thus, for the sake of efficiency, on **11 September 2023**, CLAIMANT filed a request for authorization of a new claim and, subsidiarily, a request for the new proceedings to be consolidated into the already pending arbitration. Even though both claims are related to the same cyberattack and Framework Agreement, RESPONDENT objected to both requests.

SUMMARY OF ARGUMENTS

The Tribunal has requested that the Parties address two procedural issues. First, whether the Tribunal should authorize the addition of CLAIMANT's new claim to this proceeding. Secondly, whether the Tribunal can and should consolidate the arbitral proceedings, in case the new claim has to be raised in a separate arbitration. The Parties are also required to address whether CLAIMANT is entitled to the payment of USD 38,400,000 due under the S4 Order or whether RESPONDENT can invoke a contractual information duty or provisions of the CISG to defend itself. In response to Procedural Order No. 1 of the Tribunal, CLAIMANT submits the following:

The Tribunal should authorize the addition of CLAIMANT's new claim. The Tribunal should allow the addition of CLAIMANT's second claim pursuant to Art. 23(4) ICC Rules. Indeed, both claims are closely related, in light of their nature. Furthermore, the request was filed early enough considering the stage of the proceedings. Lastly, other circumstances, such as considerations of time, cost, and the Parties' procedural rights, support the addition of CLAIMANT's new claim (**ISSUE I**).

In case the new claim has to be raised in a separate arbitration, the Tribunal should order the consolidation of both proceedings. Should the Tribunal deny CLAIMANT's request to add its new claim pursuant to Art. 23(4) ICC Rules, CLAIMANT would take the required steps to raise its new claim in a separate arbitration. In that regard, the Tribunal has authority to consolidate both arbitrations since at least one of the criteria set out in Art. 10 ICC Rules is met and the relevant circumstances support consolidation (**ISSUE II**).

RESPONDENT did not validly perform its payment obligation. Indeed, RESPONDENT was not entitled to pay the bank account indicated in the 28 March 2022 email, since that email cannot be imputed to CLAIMANT. In any event, the modification of the contract is not valid in light of the Framework Agreement's form requirements. Consequently, RESPONDENT breached its payment obligation by paying on the wrong account (**ISSUE III**).

RESPONDENT cannot invoke a contractual information obligation or provisions of the CISG to defend itself. RESPONDENT cannot rely on Art. 80 CISG to be exempted from performing its payment obligation. Indeed, CLAIMANT had no duty to disclose the cyberattack and, in any event, RESPONDENT's contribution to the failed performance outweighs CLAIMANT's. Alternatively, RESPONDENT cannot reduce the payment price pursuant to Art. 77 CISG, since this provision does not apply by analogy. Even if it was applicable, CLAIMANT did mitigate any loss resulting from the cyberattack (**ISSUE IV**).

ARGUMENT ON THE PROCEDURAL ISSUES

1 The disputes between the Parties arise out of two Purchase Orders for the sale and delivery of sensors used in autonomous driving applications, namely the S4 sensors and the L-1 sensors [*Ex. C2, p. 13; Ex. C7, p. 48*]. Both Purchase Orders, the S4 Order and the L-1 Order, were concluded under and are governed by the Parties' Framework Agreement [*Ex. C1, Art. 1, p. 9; Ex. C2, p. 13; Ex. C7, p. 48*]. The arbitration agreement included in Art. 41 of the Framework Agreement, provides for arbitration under the ICC Rules, in Danubia [*Ex. C2, Arts. 41(2)–(6), p. 11*]. Accordingly, the Danubian Arbitration Law ("**DAL**"), a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments ("**UML**"), is applicable to these proceedings as the *lex arbitri* [*PO1, § 4(4), p. 59*]. In addition, Danubia, Equatoriana and Mediterraneo are Contracting States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NY Convention**") [*Ibid.*]. Therefore, the ICC Rules, the DAL and the NY Convention form a set of procedural rules applicable to these proceedings [*Ibid.*].

2 After initiating the present set of proceedings, Claimant discovered on 8 September 2023 that it had never received Respondent's payment due under the L-1 Order [*Ex. C8, § 7, p. 49*]. Accordingly, Claimant requested the addition of another claim for the payment of the purchase price to the pending proceedings or, alternatively, to consolidate two separate arbitrations in that respect [*RNC, §§ 5–9, p. 47*]. However, Respondent argues that this new claim was filed after the ToR were signed and falls outside of their scope [*ARNC, §§ 4 & 5, pp. 54–55*]. On the contrary, Claimant submits that its second claim can and should be added to the present proceedings pursuant to Art. 23(4) ICC Rules (**Issue I**). Should the Tribunal deny Claimant's request to add its new claim to the present proceedings pursuant to Art. 23(4) ICC Rules, Claimant would take the required steps to raise its new claim in a separate arbitration [*PO2, § 41, p. 66*]. In that regard, Claimant requests that these separate proceedings be consolidated into the present ones (**Issue II**).

Issue I The Tribunal should authorize the addition of the new claim

3 Claimant respectfully requests that the Tribunal authorize the addition of the claim for payment of the second instalment under the L-1 Order to the pending arbitration. Respondent objects to the addition of the new claim, arguing that Claimant raised it after the signing of the ToR [*ARNC, §§ 4–5, pp. 54–55*]. On the contrary, Claimant submits that its new claim should be added since the conditions provided by Art. 23(4) ICC Rules are met.

4 In the ToR, the parties and the tribunal agree on a framework governing the proceedings, such as a summary of claims and defences, the applicable law, and the procedural law governing the arbitration

[*Art. 23(1) ICC Rules; Fry et al., § 3–827; Webster/Bühler, § 23–3; Weigand, § 15–680*]. Before signing the ToR, parties are free to amend their existing claims and raise new ones [*Schwartz, p. 55; SSK Award*]. Subsequently, Art. 23(4) ICC Rules allows the parties to add new claims outside the scope of the ToR after their signature, with the tribunal's authorization [*Webster/Bühler, § 23–97; Welser/Mimnagh, p. 39; SSK Award*]. In that regard, the tribunal's discretion to deny such a request is limited [*Webster/Bühler, § 23–92; Weigand, § 15–772; Welser/Mimnagh, p. 41*]. In particular, the tribunal shall consider the nature of the claims, the stage of the proceedings and other relevant circumstances [*Fry et al., § 3–904; Webster/Bühler, § 23–92; Welser/Mimnagh, p. 39*].

5 Thus, Claimant respectfully asks the Tribunal to authorize the addition of Claimant's second claim. Indeed, the two claims are closely related (**A**), the request was filed early enough considering the stage of the proceedings (**B**), and other circumstances support the addition of the new claim (**C**).

A. The two claims are closely related, considering their nature

6 Art. 23(4) ICC Rules provides that the tribunal, within its discretion, must consider the request in light of the nature of the new claims and admit them if they are closely related to the main claims, legally or factually [*Leboulanger, p. 52; Verbist et al., pp. 133–134; p. 15-758 Webster/Bühler, § 23–92; Weigand; ICC 19105 Award*].

7 To that effect, Claimant submits that the Tribunal should find that the new claim is linked to the main one both legally (**1**) and factually (**2**).

1. The two claims are legally linked

8 Claimant submits that both claims are legally linked since they arise out of interdependent contracts.

9 Claims are legally linked, for instance, when new claims arise out of the same contract as the main claims or out of interrelated contracts, such as those governed by the same framework agreement or sharing the same arbitration agreement [*Fry et al., § 3–904; Leboulanger, pp. 52–54; Espagnola Case; ICC 19581 Award*]. Conversely, the tribunal may only reject the addition of new claims where the lack of legal connection is clear, such as when the main claim arises from a purchase contract and the new claim arises from a licensing contract [*Verbist et al., p. 134*].

10 In the present case, the main claim is based on the S4 Order, and the new claim is based on the L-1 Order [*RfA, § 24, p. 7; Ex. C2, p. 13; RNC, § 1, p. 46; Ex. C7, p. 48*]. In addition, both contracts involve the same parties, Claimant and Respondent, and both expressly refer to the Framework Agreement, which governs all contracts between Claimant and Respondent for the supply of S4 sensors and "*other products*", including the L-1 sensors [*Ex. C1, Art. 1, p. 9; Ex. C2, p. 13; Ex. C7, p. 48*]. In particular, both orders were concluded by tacit acceptance as provided in Art. 5 of the Framework

Agreement and contribute to RESPONDENT's obligation to order at least 1,500,000 sensors per year [*Ex. C1, Arts. 4 & 5, p. 10; Ex. C2, p. 13; Ex. C7, p. 48*]. Lastly, the two contracts fall within the scope of the same arbitration clause contained in the Framework Agreement [*Infra § 63; Ex. C1, Art. 41, pp. 11–12; Ex. C2, p. 13; Ex. C7, p. 48*].

11 While RESPONDENT's defences differ for each claim, both claims are for the payment of the purchase price pursuant to Art. 62 CISG and relate to form requirements under the Framework Agreement [*RfA, §§ 24 & 26, p. 7; RNC, § 1, p. 46*]. Indeed, under the S4 Order, the Tribunal must examine whether the modification of the bank account requested by the hackers would "*be compliant with the form requirements for amendments*" provided in Art. 40 of the Framework Agreement [*Infra § 113; Ex. R4, § 4, p. 36*]. Likewise, under the L-1 Order, RESPONDENT relies on a notice of defect sent via email even though Art. 15 of the Framework Agreement expressly provides that a notice of defect is only valid if sent using the specific "*form attached as Annex 3*" [*Ex. C1, Art. 15, p. 11; ARNC, § 2, p. 54; Ex. R5, p. 56*]. In that regard, RESPONDENT alleges that this requirement was "*dropped*" even though the Parties did not do so in writing [*Ex. C8, § 9, pp. 49–50*].

12 In light of the above, the Tribunal should find that the claims are legally linked.

2. The two claims are factually linked

13 Since both claims share a common set of facts, CLAIMANT submits that they are also factually related.

14 The tribunal should assess a factual link in light of the nature of the goods involved and the circumstances surrounding the conclusion of the contracts on which the claims are based [*Derains/Schwartz, p. 268; Verbist et al., p. 133*]. For instance, claims present factual links when they involve the same parties, the same subject matter, or contracts negotiated at the same meetings [*Paris Award*].

15 As previously outlined, both claims arise out of contracts between CLAIMANT and RESPONDENT [*Supra § 10*]. In particular, the S4 sensors sold under the S4 Order use radio detection and ranging ("**radar**"), and the L-1 sensors sold under the L-1 Order use light detection and ranging ("**LIDAR**") [*Ex. C2, § 1, p. 13; Ex. C7, § 1, p. 48; Ex. C8, § 2, p. 49*]. Although these technologies use different wavelengths, both types of sensors are used for imaging purposes in the automotive sector and use the same principle of emitting and detecting electromagnetic waves to measure distance [*RfA, § 4, p. 5; Barbaresco, p. 14; Kingsley/Quegan, pp. 1–3; Weitkamp, pp. 3–4*]. Lastly, RESPONDENT's Account Manager, Mr. Royce, prepared both orders for the Head of Purchasing, Mr. Toyoda, who signed them only 13 days apart in January 2022 [*Ex. C2, p. 13; Ex. C7, p. 48; PO2, § 9, p. 62*].

16 In addition, both claims arise out of the cyberattack CLAIMANT suffered in early 2022. Indeed, the hackers' trojan horse enabled them to access information used in the phishing email sent to RESPON-

DENT and also caused the encryption of CLAIMANT's data in May [*ARfA, § 6, p. 31; PO2, §§ 25 & 29, pp. 64 & 65*]. In turn, the loss of data led to CLAIMANT's late discovery of the missing second payment for the L-1 Order [*Ex. C8, § 7, p. 49; PO2, § 25, p. 64*]. At the same time, CLAIMANT's sales department, in charge of both orders, was "*extremely short*" on personnel following Ms. Audi's nervous breakdown and Ms. Peugeotroen's hospitalization, worsening the consequences of the cyberattack [*Ex. C8, § 7, p. 49; PO2, § 7, p. 62*].

17 Thus, the Tribunal should find that both claims share the same underlying facts. In light of the above, considering the nature of the claims as well as their connections to the Framework Agreement and the cyberattack, the Tribunal should find that the claims are intricately related in law and fact.

B. CLAIMANT raised the new claim early enough given the stage of the proceedings

18 CLAIMANT submits that it filed its request for admission of the new claim sufficiently early, considering the stage of the proceedings.

19 Art. 23(4) ICC Rules provides that the tribunal must examine the request for addition of a new claim in light of the stage of the proceedings [*Born, § 15-08[S]; Weigand, § 15–773; Welser/Mimnagh, p. 41*]. In particular, on the one hand, the request must have been filed at an objectively appropriate time so as not to delay the proceedings, and on the other hand, the claimant should not have had the opportunity to file it earlier [*Fry et al., § 3–906; Webster/Bühler, §§ 23–92 & 23*].

20 Accordingly, the Tribunal should find that the time of filing is appropriate as the additional claim will not delay the proceedings (**1**) and because CLAIMANT had no opportunity to raise it earlier (**2**).

1. CLAIMANT filed the request at an objectively appropriate stage of the proceedings

21 CLAIMANT submits that it filed the request for authorization of a new claim at an objectively appropriate stage of the proceedings.

22 New claims made before the ToR's signature are allowed without restriction [*Derains/Schwartz, p. 267; SSK Award*]. Whereas new claims submitted shortly after the signature of the ToR are more easily admitted, they are often rejected when submitted "*shortly before the closing of the proceedings*", such as in a post-hearing brief [*Verbist et al., p. 134; Webster/Bühler, § 23–97; Welser/Mimnagh, p. 43; ICC 15634 Award; ICC 19105 Award; Sonera Award*]. For instance, in a case decided under the ICC Rules, the sole arbitrator held that introducing a new claim three months after they had received the case file was still a "*relatively early stage of the proceeding*" [*ICC 15634 Award*].

23 In the present case, CLAIMANT submitted the request for authorization of a new claim on 11 September 2023, exactly one month after the Tribunal received the case file [*Letter of 11 August 2023, p. 40; RNC,*

p. 46]. In that regard, the Tribunal and the Parties had already anticipated that new claims might be filed up to that date by setting the deadline for signing the ToR on 11 September 2023 [*Letter of 11 August 2023, p. 40*]. Moreover, while the Parties signed the ToR 12 days before that deadline, on 30 August 2022, the Parties and the Tribunal took no procedural action during that time [*PO1, p. 58*]. In particular, the case management conference took place nearly one month after CLAIMANT raised its new claim [*Ibid.*].

24 Accordingly, the only reason why CLAIMANT even has to rely on Art. 23(4) ICC Rules for its second claim is that the Parties finalised and signed the ToR earlier than needed. Hence, the Tribunal should find that the filing occurred objectively early enough.

2. CLAIMANT filed the claim at the earliest opportunity

25 It is CLAIMANT's submission that it filed the request to add its new claim at the earliest opportunity.

26 The tribunal must consider whether the party raising a new claim after the signature of the ToR had the opportunity to file it earlier [*Fry et al., § 3–906; Webster/Bühler, §§ 23-92 & 23-97; Welser/Mimnagh, pp. 41–42*]. This condition is not required if the request is "*filed at a time that allows the other side to respond to it without seriously delaying the timetable*" [*Supra § 22; Webster/Bühler, § 23–97*]. However, it should not dismiss the claim if the late filing depends on circumstances or facts unknown to the claimant at the time of signing the ToR [*Premium Petroleum Award*]. Rather, a request should be rejected if it is a dilatory measure intended to prolong the duration of the proceedings [*Webster/Bühler, §§ 23-92 & 23-97; ICC 19105 Award*].

27 In the case at hand, shortly after RESPONDENT paid the first instalment under the L-1 Order, Mr. Toyoda and Ms. Peugeotroen had a phone call about alleged defects to the L-1 sensors [*PO2, § 27, p. 64*]. They agreed that this matter needed to be escalated to a higher level manager on CLAIMANT's side, such as Ms. Durant [*Ibid.*]. Yet, instead of contacting Ms. Durant directly — as was his usual practice — Mr. Toyoda sent Ms. Peugeotroen an informal email on 4 April 2022, awaiting CLAIMANT's "*proposal for a proper way to address the issue*" [*Ex. C4, p. 15; Ex. R4, § 6, p. 36; Ex. R5, p. 56; PO2, § 28, p. 65*]. However, beginning 15 April 2022, Ms. Peugeotroen was hospitalized in an emergency due to pregnancy complications that seriously threatened her life and that of her twins, and she never returned to her position [*Ex. C8, §§ 6 & 7, p. 49; PO2, § 30, p. 65*]. Consequently, she never became aware of the lack of payment and never had the opportunity to communicate the matter of the alleged defects with Ms. Durant [*Ex. C8, § 6, p. 49*]. In addition, the trojan horse also affected CLAIMANT's accounting system and relevant information had to be "*provided by the account manager or [...] deduced from available email communication*" [*PO2, § 29, p. 65*]. Hence, since the informal email was destroyed

in the cyberattack and Ms. Peugeotroen was no longer available, the missing payment could not be detected during CLAIMANT's annual audit [*Ibid.; PO2, § 30, p. 65*]. Ms. Peugeotroen's successor — despite his busy schedule caused by the unexpected handover of the position, the launch of the new L-2 LIDAR sensors, and the IT system shutdown — realized the lack of payment on 8 September 2023 while inspecting unfinished old projects [*Ex. C8, § 7, p. 49; PO2, § 30, p. 65*]. While Ms. Durant first contacted Mr. Toyoda to find an amicable way to avoid a dispute, he reiterated that RESPONDENT would not pay [*Ex. C8, § 8, p. 49*]. Immediately thereafter, on 11 September 2023, CLAIMANT filed the request [*RNC, p. 46*]. In that regard, since CLAIMANT is the one seeking relief and payment in both claims, it would be unreasonable to allege that CLAIMANT is using dilatory tactics. In any case, the time at which CLAIMANT submitted the request was early enough to allow RESPONDENT to respond without delaying the timetable [*Supra § 23*].

28 Consequently, the Tribunal should find that CLAIMANT filed the request at the earliest opportunity, as the relevant facts were previously unknown to CLAIMANT. Therefore, the request to add a new claim was filed at an objectively and subjectively appropriate time so as not to delay the proceedings.

C. Relevant circumstances support the addition of the new claim

29 When deciding whether to admit new claims filed after the signature of the ToR, the tribunal must consider general principles of arbitration, in particular the principles of time and cost efficiency, fairness, and good administration of justice [*Fry et al., § 3–905; Webster/Bühler, § 23–92*].

30 In that regard, CLAIMANT submits that relevant circumstances also support the admission of the new claim because it is time- and cost-efficient (**1**), and upholds the Parties' right to be heard (**2**).

1. Admitting the new claim is time-saving and cost-efficient

31 CLAIMANT submits that allowing the new claim into the current proceedings would save time and reduce costs.

32 Art. 22(1) ICC Rules provides that the proceedings shall be conducted in an "*expeditious and cost-effective manner*", considering the complexity and value of the dispute [*Andersen et al., p. 7; Fry et al., § 3–795*]. To that effect, the addition of a new claim to the pending proceedings must be weighed against the initiation of separate proceedings [*Fry et al., § 3–905; Welser/Mimnagh, p. 41; Singapore Award*]. In this respect, appraising closely related claims in a single arbitration is generally considerably more efficient because the arbitrators are already familiar with the facts of the case and the same witnesses and experts only need to be heard once [*Leboulanger, pp. 54–55; Voser, p. 350; Waincymer, p. 546; Welser/Mimnagh, p. 40; ICC 19581 Award*]. In addition, since specialized arbitrators may better understand the technicalities of the case, they reduce the need for experts [*ICC Efficiency Report, § 13*].

33 Here, as previously outlined, since both claims arise out of interdependent contracts, the Tribunal is already familiar with the relationship between the Parties and most of the facts relating to both claims [*Supra §§ 6–17*]. In addition, all three members of the Tribunal have specific expertise in the automotive industry, sensor technology, and cybersecurity [*PO2, § 36, p. 65*]. Hence, constituting a second tribunal with comparable expertise to decide on common questions of law and fact would be highly inefficient.

34 In terms of cost-efficiency, the amount in dispute arising out of the two claims is USD 50,400,000, namely USD 38,400,000 under the S4 Order and USD 12,000,000 under the L-1 Order [*RfA, § 30, p. 8; Letter of 10 June 2023, p. 23; RNC, § 1, p. 46*]. Based on the ICC cost calculator, the estimated average costs of the current arbitration *with* the addition of the new claim would be USD 614,147, while the cost of two separate arbitrations with the same configuration would be USD 961,106 (USD 552,589 + USD 408,517), an increase of over 56 % [*PO2, § 41, p. 65; ICC Calculator*]. Hence, contrary to Respondent's statement, the difference in costs would definitely be "*noticeable*" [*ARNC, § 5, p. 55*]. Moreover, holding separate proceedings would significantly increase the arbitrators' travel expenses and *per diem* allowance, which are not included in the calculated costs, as well as legal costs [*ICC Note, §§ 235–245; ICC Calculator*].

35 Therefore, admitting the new claim in the present proceedings is both time- and cost-efficient.

2. The addition of Claimant's new claim would uphold both Parties' right to be heard

36 Claimant submits that the right to be heard would be best ensured by the addition of the new claim to the present proceedings.

37 Under Art. 23(4) ICC Rules, the tribunal must also consider the principles of fair trial and good administration of justice enshrined in Art. 22(4) ICC Rules, Art. 18 UML, and Art. V(1)(b) NY Convention, in particular, the parties' right to be heard [*Ferrari/Rosenfeld, et al., p. 19; Fry et al., § 3–905; Shroff, p. 800; Welser/Mimnagh, p. 41*]. On the one hand, the tribunal must provide the respondent the opportunity to prepare and present its defence — against the addition of the claim, as well as the claim itself — in particular by stating its position and presenting evidence [*Balthasar, pp. 38 & 150; Ferrari/Rosenfeld, et al., pp. 19–21; Webster/Bühler, § 23–92; Cairn Award; ICC 19105 Award*]. In this regard, a period of two months to submit a response prior to the hearings gives the respondent sufficient opportunity to defend itself against the claim [*ICC 19581 Award, § 9*]. On the other hand, the tribunal must provide the party raising the new claim the opportunity to fully present its case, including its new claim, and avoid purely procedural measures [*Cazala, pno 2; Linetzky et al., pp. 246–247; Rajoo, p. 376; Shroff, p. 800; UK Company Award*].

38 In the present case, on 2 October 2023, Respondent provided a reasoned response regarding the

authorization of new claims, presented new evidence, and concluded that CLAIMANT's request should be denied [*ARNC, pp. 54–55; Ex. R5, p. 56*]. In addition, RESPONDENT has until 18 January 2024 to file a memorandum to present its arguments against the addition of the new claim, and it will have the opportunity to present them during the pleadings in March 2024 [*PO1, p. 59*]. Moreover, if the Tribunal authorizes the addition of the new claim, both Parties will foreseeably have additional time after the first hearings to submit their positions on the merits of the new claim.

39 As previously established, CLAIMANT raised its new claim at the earliest opportunity, considering the exceptional circumstances related to the cyberattack and the departure of two account managers [*Supra § 27*]. Furthermore, as previously stated, CLAIMANT's request would have been filed within the deadline for signing the ToR, had the Parties not signed them earlier than needed [*Supra § 24*]. Consequently, rejecting CLAIMANT's request merely because it was submitted 12 days after the signature of the ToR would appear to be a purely procedural measure in breach of CLAIMANT's right to be heard.

40 Therefore, the addition of the new claim to the present case ensures RESPONDENT's right to defend itself and to present evidence as well as CLAIMANT's right to present its case.

41 Thus, considerations of time, cost, fair trial and good administration of justice, should impel the Tribunal to admit the new claim into the present proceedings.

42 **CONCLUSION TO ISSUE I**: Hence, CLAIMANT respectfully requests that the Tribunal authorize the addition of CLAIMANT's second claim pursuant to Art. 23(4) ICC Rules, in light of the nature of each claim, the stage of the proceedings and the relevant circumstances.

Issue II The Tribunal should consolidate the arbitral proceedings, in case the new claim has to be raised in a separate arbitration

43 Should the Tribunal reject Claimant's request to add its new claim pursuant to Art. 23(4) ICC Rules, Claimant would take the required steps to raise its new claim in a separate arbitration [*Supra Issue I PO2, § 41, p. 66*]. In that regard, Claimant requests that these separate proceedings be consolidated into the present ones. While Art. 10 ICC Rules gives the International Court of Arbitration of the ICC ("**ICC Court**") the power to consolidate arbitration proceedings, Claimant first submits that the Tribunal can, in principle, order consolidation (**A**). Secondly, the Tribunal, or the ICC Court, should consolidate the second arbitration into the already pending arbitration (**B**).

A. The Tribunal has authority to decide on consolidation

44 Whereas Respondent alleges that the Tribunal "*lacks the power*" to consolidate proceedings, Claimant submits that it has authority to do so [*ARNC, § 6, p. 55*].

45 Subject to the few mandatory provisions of the ICC Rules, parties can freely agree on the rules governing the arbitral procedure [*Art. 19 ICC Rules; Verbist et al., pp. 106–107; Schramm, Art. 19 ICC Rules, § 4*]. In all consolidation cases under the ICC Rules, the Secretariat takes care of the administrative consolidation steps and the ICC Court, exercising its scrutiny of draft awards, holds the final "*seal of approval*" [*Art. 10(3) ICC Rules; Art. 34 ICC Rules; Fry et al., §§ 3-361 & 3-1182*]. In that regard, while the default authority to decide on consolidation lies with the ICC Court, arbitral tribunals constituted under the ICC Rules can be and have been empowered to decide on consolidation [*AEC Case; Shell Case; Travis Coal Award; PDV Final Award; PDV Partial Award; YPF Award*]. For instance, in an ICC case, the arbitral tribunal rendered an "Order for consolidation" and held that it had authority to do so since the parties had agreed in their arbitration agreement that consolidation "*shall be determined by the first (1st) arbitration tribunal established*" [*PDV Final Award*]. Consequently, Art. 10 ICC Rules is not a mandatory provision of the ICC Rules.

46 In the case at hand, prior to the conclusion of the Framework Agreement, Respondent had requested consolidation of three arbitration proceedings initiated against another supplier, based on arbitration clauses incorporated in three separate contracts [*PO2, § 19, p. 63*]. However, the tribunals considered themselves "*without power*" to order such consolidation and rendered awards with different results [*Ibid.*]. Therefore, upon Respondent's insistence, the Parties expressly agreed in the Framework Agreement that for "*proceedings in relation to several contracts concluded under this framework agreement [...] the Arbitral Tribunal of the first arbitration proceedings* ***has the power*** *to consolidate all such proceedings into a single arbitral proceeding*" [*Ibid.; Ex. C1, Art. 41(5), p. 12, emphasis added*].

47 Accordingly, the Tribunal has the power to order consolidation in the present case.

B. The Tribunal (or ICC Court) should consolidate the arbitrations

48 In case the Tribunal considers that it does not have the power to order consolidation, the ICC Court would have the authority to order consolidation pursuant to Art. 10 ICC Rules [*Fry et al., § 3–352*]. In that regard, Art. 10 ICC Rules allows consolidation when one of the three scenarios in Art. 10(a)-(c) ICC Rules is fulfilled and the tribunal, or ICC Court, is satisfied that consolidation is appropriate pursuant to Art. 10(2) ICC Rules [*Grierson/Hooft, p. 123; Verbist et al., p. 62; Webster/Bühler, § 10–6*].

49 Accordingly, Claimant submits that the Tribunal, or the ICC Court, should order consolidation since at least one of the scenarios of Art. 10 ICC Rules is fulfilled (**1**) and the relevant circumstances support consolidation (**2**).

1. At least one of the criteria set out in Art. 10 ICC Rules is met

50 Claimant submits that at least one of the criteria set out in Art. 10(a-c) ICC Rules is met in the present case, since the Parties agreed to consolidate (**a**). Alternatively, both arbitrations involve the same arbitration agreement (**b**), or are closely linked pursuant to Art. 10(c) ICC Rules (**c**).

a. The Parties agreed to consolidate proceedings in the present circumstances

51 Pursuant to Art. 10(a) ICC Rules, multiple proceedings can be consolidated if all parties in all arbitrations have explicitly agreed to proceed in this manner [*Fry et al., § 3–353; Schütze/Aschauer, Art. 10 ICC Rules, § 196; Verbist et al., p. 62*]. To that effect, an arbitration clause in which the parties agree to consolidate proceedings subject to specific conditions satisfies the consent requirement of Art. 10(a) ICC Rules [*Webster/Bühler, § 10–7; AEC Case; PDV Partial Award; Travis Coal Award*].

52 Claimant submits that the Parties have anticipated the present circumstances and already agreed to consolidation under Art. 41(5) of the Framework Agreement [*Ex. C1, Art. 41(5), p. 12*]. Indeed, the Parties agreed to consolidate "*multiple arbitration proceedings in relation to several contracts concluded under this framework agreement, the subject matters of which are related by common questions of law or fact and which could result in conflicting awards or obligations*" [*Ibid.*]. Even though Respondent underlines that the claims arise under distinct contracts, namely the S4 Order and L-1 Order, it is undisputed that these were both concluded within the scope of the Framework Agreement [*Supra § 10; ARNC, § 5, p. 55*]. Further, Claimant submits that the remaining requirements of Art. 41(5) of the Framework Agreement are fulfilled, since the claims are related by common questions of law and fact (**i**) and parallel proceedings could result in conflicting awards (**ii**).

i. The subject matters of the proceedings are related by common questions of law or fact

53 Claimant submits that the subject matters of the proceedings to be consolidated are related by common questions of law and fact.

54 Tribunals and courts commonly refer to the existence of common questions of law or fact when considering consolidation [*Art. 28.1(c) HKIAC Rules; Art. 1126 NAFTA; Art. 24(1)(a) AIAA; Born, § 18.02[B][9]; Canfor Award*]. For instance, the Swiss Rules require the claims share a "*connected set of facts*" or "*similar legal issues*" [*Art. 7 Swiss Rules; Zuberbühler et al., Art. 27 § 7*].

55 In the present case, as previously established, both claims relate to the payment of the purchase price pursuant to Art. 62 CISG for purchase orders concluded between Claimant and Respondent under the Framework Agreement [*Supra § 10*]. In addition, the form requirements provided in Art. 40 of the Framework Agreement are relevant for both claims [*Supra § 11*]. Moreover, both claims are factually interrelated as both relate to the sale of optical sensors used within the automotive sector and arise out of the same cyberattack [*Supra §§ 15 & 16*]. In particular, the cyberattack not only led to the phishing email sent to Respondent, but also caused Claimant to lose access to relevant emails and accounting data [*Ibid.; Supra § 27*].

56 Consequently, Claimant requests the same relief in both claims, which relate to the same legal basis, the same cyberattack, and the same Framework Agreement. Accordingly, the subject matters of the proceedings are linked by a shared set of facts and by common legal questions.

ii. The arbitration proceedings could result in conflicting awards or obligations

57 Claimant submits that consolidation would avoid the risk of contradictory awards.

58 Addressing closely related claims in a single arbitration avoids conflicting decisions [*Leboulanger, p. 63; Mayer, §§ 29 & 35; Pair, p. 171; Voser, p. 350*]. Indeed, different tribunals may have differing opinions when claims raise "*substantially identical factual and legal issues*" [*Cremades/Madalena, p. 535; Mayer, § 29; Pair, p. 169*]. In particular, the risk of conflicting decisions increases when the contracts are closely intertwined [*Pair, p. 171*]. Moreover, conflicting awards may lead to enforcement issues under the NY Convention [*Leboulanger, p. 63; Pair, p. 169*].

59 In the case at hand, Art. 7 outlines the bank accounts available for payment and Art. 15 provides that any notice of defects must be made using the specific form attached as Annex 3 of the Framework Agreement [*Ex. C1, Arts. 7 & 15, pp. 10–11*]. In that regard, Art. 40 of the Framework Agreement requires that any amendment or waiver to provisions of the Framework Agreement be made in writing and signed by the Parties [*Ex. C1, Art. 40, p. 11*]. Yet, as previously established, Respondent relies on an email requesting a new bank account for the S4 Order and an email for a notice of defects for the L-1 Order [*Supra § 11*]. Therefore, each arbitral tribunal would need to ascertain the scope of the formalities set out in Art. 40 of the Framework Agreement. Thus, depending on their interpretation, parallel proceedings could result in conflicting awards.

60 Hence, the proceedings arise from contracts concluded under the Framework Agreement, share questions of law and fact, and may result in conflicting awards in the absence of consolidation. Accordingly, the requirements outlined in Art. 41(5) of the Framework Agreement are fulfilled, and the Parties should be deemed to have consented to consolidation pursuant to Art. 10(a) ICC Rules.

b. *Both claims are made under the same arbitration agreement*

61 Respondent alleges the new claim "*is based on a different arbitration agreement*" [*ARNC, § 5, p. 55*]. Yet, should the Tribunal consider that the requirements of Art. 41(5) of the Framework Agreement are not met, Claimant submits that consolidation is nevertheless possible under Art. 10(b) ICC Rules because all claims are made under the same arbitration agreement, namely Art. 41 of the Framework Agreement.

62 Under Art. 10(b) ICC Rules, where all the claims in the arbitration are made under the same arbitration agreement, the proceedings may be consolidated, even without prior consent [*Webster/Bühler, § 10–9; Verbist et al., p. 62*]. To that effect, an "*umbrella arbitration agreement*", to which the parties have agreed by reference in different contracts, satisfies this requirement [*Grierson/Hooft, p. 124*]. For instance, as held in an ICC case, the arbitration clause of an overarching framework agreement applies to each monthly contract concluded under it [*Taganrog Case*]. Where multiple arbitration agreements might be relevant, the party raising the claims must indicate the arbitration agreement applicable to each claim [*Fry et al., § 3–342; Grierson/Hooft, p. 79*].

63 In the present case, the Parties expressly included a dispute resolution clause in the Framework Agreement "*designed to encompass all possible disputes arising in connection with the [Framework Agreement] and the contracts concluded thereunder*" [*Ex. C1, Art. 41(1), p. 11*]. While each Purchase Order contains its own arbitration agreement, the provisions of the Framework Agreement govern both orders [*Supra § 10*]. In that regard, Claimant expressly referred to Art. 41 of the Framework Agreement in its request for arbitration, its request for consolidation and the ToR of the present proceedings [*RfA, § 23, p. 7; RNC, § 6, p. 47; PO2, § 35, p. 65*].

64 Therefore, both arbitrations involve the same Parties and are made under one and the same arbitration clause, namely Art. 41 of the Framework Agreement.

c. *Alternatively, the proceedings are sufficiently linked pursuant to Art. 10(c) ICC Rules*

65 Art. 10(c) ICC Rules allows consolidation when claims arising out of different arbitration agreements are between the same parties, arise within the same legal relationship and under compatible arbitration agreements [*Grierson/Hooft, p. 124–125; Verbist et al., p. 63; Webster/Bühler, § 10–12*].

66 Hence, should the Tribunal or ICC Court find that both arbitrations are not based on a single arbitra-

tion agreement, Claimant submits that the proceedings are sufficiently linked pursuant to Art. 10(c) ICC Rules. Indeed, it is undisputed that both arbitrations are between the same parties, Claimant and Respondent. In addition, the disputes arise in connection with the same legal relationship (**i**) and both arbitration agreements are compatible (**ii**).

i. The disputes arise in connection with the same legal relationship

67 Claimant submits that the disputes arise in connection with the same legal relationship.

68 Art. 10(c) ICC Rules requires that the proceedings to be consolidated arise out of the same "legal relationship" [*Fry et al., § 3–356; Grierson/Hooft, p. 124; Webster/Bühler, § 10–12*]. In that regard, the claims need not arise from one single contract, as it is sufficient that multiple contracts are linked to the "*same economic transaction*", "*constitute an indivisible whole*", or relate to an "*ongoing business, personal and legal relationship*" [*Derains/Schwartz, pp. 60–61; Schütze/Aschauer, Art. 6(4) ICC Rules, § 135; Verbist et al., p. 63; Whitesell/Silva-Romero, pp. 15–16; International Consultants Award*].

69 In the case at hand, Claimant delivered 5,000,000 sensors to Respondent between June 2019 and January 2022 under 22 different purchase orders, including the S4 Order and the L-1 Order [*RfA, § 10, pp. 5–6*]. While each sale is agreed upon in "*individual contracts*", as previously established, the Framework Agreement governs all contracts between Claimant and Respondent for the supply of S4 sensors and "*other products*" [*Supra § 10; Ex. C1, Art. 1, p. 9*]. As per Arts. 5 & 6 of the Framework Agreement, the Parties held annual meetings to fix the price of the sensors for the coming year and agree on non-binding "call-off plans" to facilitate Claimant's production planning [*RfA, § 11, p. 6; Ex. C1, Arts. 5–6, p. 10; PO2, § 20, pp. 63–64*]. Further, the provisions of the Framework Agreement cover individual contracts (Art. 1), applicable terms and conditions (Art. 2), the Parties' obligations (Arts. 3 and 4), validity of the respective purchase orders (Art. 5), price fixing for sales (Art. 6), terms of payment (Art. 7), insurance (Art. 8), and notice of defects (Art. 15) [*Ex. C1, Arts. 1–15, pp. 9–12*]. Thus, the Framework Agreement completes all purchase orders, which cannot be understood or upheld on their own, and need to rely on the provisions of the Framework Agreement.

70 Together, the S4 Order, the L-1 Order and the Framework Agreement constitute an indivisible whole and thus, the disputes arise in connection with the Parties' ongoing legal relationship.

ii. Both arbitration agreements are compatible

71 Respondent alleges that the arbitration agreement in the L-1 Order "*deviates in several aspects*" from the one in the S4 Order [*ARNC, § 5, p. 55*]. Although the clauses do differ on certain points, Claimant submits that they are nevertheless compatible.

72 Art. 10(c) ICC Rules does not require identical arbitration clauses, but merely ones that are compatible in terms of their content [*Fry et al., § 3–243*]. Arbitration agreements that differ on fundamental elements, such as the nature of the arbitration, arbitration rules, seat, language, number of arbitrators, and appointment procedure are generally regarded as incompatible [*Derains/Schwartz, pp. 100–101; Grierson/Hooft, pp. 124–125; Hanotiau et al., pp. 168–169*] . However, arbitration clauses are compatible if they only differ on secondary elements, such as the law applicable on the merits or the steps required before initiating the procedure [*Fry et al., § 3–245; Webster/Bühler, § 6–43; Whitesell/Silva-Romero, p. 15*]. The silence of a clause on a particular aspect, such as the language, should not be regarded as an incompatibility as the tribunal or the ICC Court can and should resolve such open issues to ensure compatibility [*Fry et al., § 3–244; Hanotiau et al., p. 169; Webster/Bühler, § 6–44*].

73 In the present case, both arbitration agreements included in the S4 Order and the L-1 Order provide for institutional arbitration administered by the ICC, under application of the ICC Rules [*Ex. C2, § 7, p. 13; Ex. C7, § 7, p. 48*]. Both provide for the appointment of the arbitrators "*in accordance with the said Rules*" and that they "*shall apply the CISG*" to the merits of the disputes [*Ibid.*]. While the L-1 Order does provide for "*one or more*" arbitrators, the Parties merely copied the ICC Model Clause in this respect and had no particular intent to appoint a sole arbitrator [*Ex. C7, § 7, p. 48; PO2, § 32, p. 65*]. Hence, this is compatible with S4 Order's requirement of "*three arbitrators*" [*Ex. C2, § 7, p. 13*].

74 Regarding the seat of arbitration, while the L-1 Order does not mention a specific city, both Orders designate the same country, namely "*Danubia*" [*Ex. C2, § 7, p. 13; Ex. C7, § 7, p. 48*]. Thus, the DAL is the *lex arbitri* for both agreements. Similarly, although the L-1 Order is silent on the language of the proceedings, the S4 Order designates English, which the Parties have used in all submissions and communications to date [*Ibid.*]. In any case, the ICC Court or the Tribunal would have the power to designate a specific city in Danubia and the applicable language under the L-1 Order pursuant to Arts. 18(1) & 20 ICC Rules [*Fry et al., §§ 3-677 & 3-728*].

75 Lastly, the L-1 Order excludes "*the Rules on Emergency Arbitration*", whereas the S4 Order does not [*Ex. C2, § 7, p. 13; Ex. C7, § 7, p. 48*]. This waiver arose from a suggestion made by a friend of an in-house counsel who lacked personal experience in arbitration, and not a particular wish of the Parties [*Ex. C8, § 5, p. 49; PO2, § 33, p. 65*]. In any event, parties can only apply for emergency arbitration before the transmission of the file to the arbitral tribunal [*Art. 29(1) ICC Rules; Fry et al., §§ 3-1058 & 3-1062; ICC Note, § 69*]. Accordingly, since neither of the Parties submitted any request for emergency measures to the ICC Secretariat before the transmission of the file on 11 August 2023, emergency arbitration is no longer available in the present proceedings [*Letter of 11 August 2023, p. 39*]. Therefore, its exclusion under the L-1 Order is not an obstacle to consolidation.

76 Thus, the arbitration agreements in the S4 Order and L-1 Order are compatible. Hence, since the arbitrations arise between the same Parties, within the same legal relationship, and out of compatible arbitration clauses, the Tribunal should find that they are closely linked as per Art. 10(c) ICC Rules.

77 In light of the foregoing, the Tribunal should find that the Parties agreed to consolidation, alternatively that both arbitrations are made under the same arbitration agreement, or that the disputes are sufficiently linked pursuant to Art. 10(c) ICC Rules. Accordingly, at least one of the criteria under Art. 10 ICC Rules is met in the present case.

2. The relevant circumstances support consolidation

78 Pursuant to Art. 10(2) ICC Rules, the tribunal must consider relevant circumstances when assessing whether consolidation is appropriate [*Fry et al., § 3–358; Meier, § 7; Verbist et al., p. 61*].

79 As previously established, the Parties expressly provided for consolidation in the Framework Agreement and joint proceedings would not harm the Parties' right to be heard [*Supra §§ 38, 39 & 52*]. In addition, Claimant submits that consolidation upholds the right of each party to equal participation in the constitution of the Tribunal (**a**) and would improve the efficiency of the proceedings (**b**).

a. *Consolidation preserves the Parties' right to equal participation in the constitution of the arbitral tribunal*

80 As only one tribunal has been appointed so far, Claimant submits that the Parties's right to equal participation in the constitution of the arbitral tribunal would not be affected.

81 Art. 10(2) ICC Rules advises tribunals to consider whether arbitrators have been appointed in "*more than one*" of the arbitrations to be consolidated [*Fry et al., § 3–358; Lew/Mistelis/Kröll, p. 16–93; Meier, § 8; Pair, pp. 172 & 173*]. Indeed, where multiple tribunals have been constituted with different arbitrators, consolidation cannot proceed without the arbitrators' revocation or resignation [*Derains/Schwartz, p. 62; Grierson/Hooft, p. 123; Schütze/Boguslavskij, Art. 4(6) ICC Rules, § 17*]. Further, when the parties are the same in both arbitrations, their right to equal participation in the tribunal's constitution is preserved [*Meier, § 9*].

82 In the case at hand, only the present Tribunal has been constituted so far and the Parties are the same in both proceedings [*Letter of 11 August 2023, pp. 38–39*]. As previously outlined, while Claimant will take the necessary steps to initiate separate proceedings, namely paying the filing fee, no further steps will be taken to establish a second tribunal [*Supra § 43*].

83 Therefore, by consolidating the second arbitration into the one that commenced first, the Parties' right to equal participation in the constitution of the Tribunal would be preserved.

b. *Consolidation would enhance the efficiency of the proceedings*

84 Claimant submits that consolidation would improve efficiency in the arbitration.

85 Whether consolidation would expedite or facilitate the resolution of the dispute is a relevant criterion, as for the addition of a new claim [*Supra § 32; Schütze/Aschauer, Art. 10 ICC Rules, § 191*]. In that regard, as previously established, joint proceedings increase efficiency when the claims are interrelated as they allow "*minimizing repetition*", in particular when they require arbitrators with specific expertise [*Supra § 32; Meier, § 9; Pair, p. 173; Schütze/Boguslavskij, Art. 4(6), ICC Rules § 17; Voser, p. 350*].

86 In this case, the Parties appointed arbitrators with in-depth knowledge in the area of autonomous driving, sensor technology, privacy, and cybersecurity [*Supra § 33; PO2, § 36, pp. 65–66*]. As outlined, since the claims are factually and legally intertwined, appraising them in a single arbitration instead of two would be considerably more efficient and would avoid a 56 % increase in arbitration costs [*Supra §§ 33 & 34*]. Compared to simply adding the new claim to the present proceedings, as Claimant requested, consolidation would only result in an additional filing fee of USD 5,000, which Claimant would cover even if consolidation were refused [*Supra § 43; Appendix III, § 1(1) ICC Rules*].

87 Accordingly, considering that consolidation would uphold the Parties' procedural rights and would enhance efficiency, the circumstances at hand support consolidation.

88 Thus, since at least one of the criteria of Art. 10 ICC Rules is met and the relevant circumstances support consolidation, the Tribunal or the ICC Court should order the consolidation of the proceedings.

89 **Conclusion to Issue II**: Claimant respectfully submits that the Tribunal has authority to order consolidation. In any case, the Tribunal or the ICC Court should consolidate the arbitrations since at least one of the criteria of Art. 10 ICC Rules is met and the relevant circumstances support consolidation.

90 **Conclusion to the Procedural Issues**: Claimant respectfully asks the Tribunal to authorize the addition of the new claim to the pending proceedings pursuant to Art. 23(4) ICC Rules. Alternatively, the Tribunal, or the ICC Court, should consolidate the arbitrations pursuant to Art. 10 ICC Rules. Accordingly, the Tribunal is empowered to address both of Claimant's claims.

ARGUMENT ON THE SUBSTANTIVE ISSUES

91 In **June 2019**, the Parties entered into a Framework Agreement governing the contractual conditions regarding the purchase of S4 sensors and other products [*Ex. C1, p. 9*]. In particular, Art. 7 of the Framework Agreement provides that all payments must be made by bank transfer to either "*Automotive Bank in Mediterraneo*" or "*First Bank of Mediterraneo*" [*Ex. C1, Art. 7, p. 10*]. In addition, Art. 40 of the Framework Agreement provides that any amendment or deviation to any provision of the Framework Agreement must be "*in writing and signed by the Parties*" [*Ex. C1, Art. 40, p. 11*].

92 On **17 January 2022**, Respondent placed the S4 Order for 1,200,000 units of the S4 sensor in two instalments [*Ex. C2, p. 13*]. The payment for each instalment was due 30 days after delivery for a total amount of USD 38,400,000 [*Ibid.*]. Claimant delivered the instalments on **3 April** and **30 May 2022**, yet never received any payment from Respondent [*RfA, § 13, p. 6*]. To Claimant's surprise, when it requested that Respondent pay the purchase price, the latter indicated that it had already made the payments to a bank account allegedly requested by Claimant's account manager — Ms. Audi — on **28 March 2022** [*Ex. C3, p. 14; Ex. C4, p. 15*]. Yet, the email Respondent had received turned out to be a phishing attack from cybercriminals impersonating Ms. Audi by using information gathered during the cyberattack on Claimant [*Ex. C6, § 5, p. 17*].

93 Respondent alleges that paying to the bank account requested by the hackers "*constitutes the performance of its payment obligation*" since Claimant should be treated "*as if*" it had made the request [*ARfA, § 11, p. 31*]. Alternatively, Respondent argues that due to its "*reckless behavior*", Claimant cannot rely on Respondent's failure to pay under Art. 80 CISG or that its payment obligation should be reduced in line with Art. 77 CISG [*ARfA, §§ 12–13, p. 32*]. However, contrary to Respondent's submission, Respondent did not validly perform its payment obligation (**Issue III**). In any event, Respondent is not excused from performing its payment obligation (**Issue IV**).

Issue III Respondent did not validly perform its payment obligation

94 As per Art. 62 CISG, when the buyer fails to pay the price, the seller has the right to ask for specific performance of the payment obligation [*Schlechtriem/Schwenzer, Art. 62 §§ 9 & 10; Staudinger et al., Art. 62 § 1; Cobalt Sulphate Case, p. 3; C&J Sheet Metal Case*].

95 In the present case, Respondent confirms that the payment was made to a bank account requested by a "*cybercriminal mimicking Claimant*" [*ARfA, § 9, p. 31*]. Yet, Respondent argues that Claimant has "*no payment claim*", considering that Claimant's failure to disclose the cyberattack increased the "*risk of unwanted interference*" and that the email sent by the hackers should thus be imputed to Claimant [*Ibid.; Ex. C4, p. 15; ARfA, § 11, p. 31*]. On the contrary, Claimant respectfully requests

the Tribunal to find that Respondent breached its payment obligation since it was not entitled to follow the hacker's request (**A**) and, as a result, Respondent paid on the wrong account (**B**).

A. Respondent was not entitled to pay to another bank account

96 Respondent argues that paying to the bank account indicated by the hackers validly fulfilled its payment obligation [*ARfA, §§ 11 & 13, pp. 31–32*]. In particular, Respondent alleges that Claimant should be treated "*as if*" it had made the request, thus imputing the hacker's instructions to Claimant [*Ibid.*]. However, Claimant submits that Respondent was not entitled to follow these instructions since the hacker's request cannot be imputed to Claimant (**1**) and would in any event not be valid in light of the no-oral-modifications clause ("**NOM clause**") provided in Art. 40 of the Framework Agreement (**2**).

1. Claimant cannot be treated as if it had made the request to change the bank account

97 Respondent alleges that in light of Claimant's "*reckless behavior*", Claimant should be treated as if it had sent the hacker's email of 28 March 2020 [*ARfA, §§ 11 & 13, p. 31*]. Conversely, Claimant submits that the instruction to pay to a different bank account cannot be imputed to Claimant.

98 Since the CISG does not govern the issue of agency, the domestic law chosen by the parties applies [*Honnold/Flechtner, § 91; Kröll et al., Art. 4 § 12 & 18; Schlechtriem/Schwenzer, Arts. 4 & 7 §§ 6, 9 & 42; Italian Fashion Case; Metal Covers Case; Spanish Case*]. In the case at hand, the Parties chose the Danubian Contract Law ("**DCL**") — a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts ("**UPICC**") — in the Framework Agreement [*Ex. C1, Art. 41, p. 12; PO1, § 4, p. 59*]. Pursuant to Art. 2.2.5(1) DCL, an agent acting without authority does not usually bind the principal [*Art. 2.2.5 UPICC, Comment 1; Brödermann, Art. 2.2.5 § 1; Vogenauer, Art. 2.2.5 § 1*]. Nevertheless, Art. 2.2.5(2) DCL protects the third party where it reasonably believed that the agent was entitled to act, even in cases of fraud [*Brödermann, Art. 2.2.5 § 2; Schwenzer et al., p. 13.12; Vogenauer, Art. 2.2.5 §§ 3 & 5 & 10*]. Nonetheless, in such a case, the principal's conduct must amount to an implicit representation that the purported agent was authorised [*Brödermann, Art. 2.2.5 § 2; Vogenauer, Art. 2.2.5 §§ 6 & 8*].

99 Accordingly, Claimant cannot be treated as if it had made the request to change the bank account, since Claimant did not act recklessly (**a**) and Respondent ought to have known that the e-mail did not come from Claimant (**b**).

a. The way Claimant addressed the cyberattack was not reckless

100 Contrary to Respondent's assertions, Claimant submits that not disclosing the cyberattack was not reckless and does not amount to an implicit representation that the hackers were authorised as agents.

101 A merely negligent omission by the principal to notice that a fraudster purports to represent it does not lead to apparent authority [*Vogenauer, Art. 2.2.5 § 17*]. Nevertheless, a court or tribunal may consider, on a case-by-case basis, that the principal's conduct amounts to an implicit representation that the fraudster is authorised [*Brödermann, Art. 2.2.5 § 2; Vogenauer, Art. 2.2.5 §§ 8 & 10*]. For instance, an Australian court held that an insurance company was liable for the actions of a fraudster because it had authorized the printing of the business cards he had used to impersonate the company [*Vogenauer, Art. 2.2.5 § 10; Derham Case*].

102 In the present case, following the rise of cyberattacks in the automotive industry and the cyberattack on Respondent in 2020, Claimant "*heavily invested*" in its cybersecurity infrastructure and training [*Ex. R1, p. 33; PO2, § 24, p. 64*]. First, Claimant installed additional firewalls in 2021 [*Ex. C6, § 4, p. 17*]. Secondly, in March 2021, Claimant hired a Chief Cybersecurity Officer ("**CCO**") in charge of a training program including mandatory two-day intensive training for all employees followed by quarterly revision sessions [*PO2, § 24, p. 64*]. Thirdly, to ensure the efficiency of the program, bi-weekly test emails were sent to "*randomly selected employees*", who had to report them to the CCO [*Ibid.*]. Lastly, Claimant planned to instate two-factor authentication for June 2022 [*Ibid.*]. All of these measures have successfully prevented serious cyberattacks [*Ex. C6, § 4, p. 17*]. Nevertheless, even the best cybersecurity system cannot completely prevent a breach [*Ibid.*].

103 Indeed, on 5 January 2022, Ms. Audi unwittingly let in a trojan horse by clicking on a link in an email, the same mode of entry used for the cyberattack targeting Respondent in August 2020 [*ARfA, § 2, p. 30; PO2, §§ 5 & 25, pp. 61 & 64*]. In response, Claimant hired Mediterraneo's leading cybersecurity firm, CyberSec, to eliminate the malware [*Ex. R3, p. 35*]. CyberSec quickly identified and neutralized the threat, and after a diligent risk assessment, concluded that the malware had not reached any of the servers where sensitive personal information or trade secrets were stored [*Ex. C6, § 6, p. 17; PO2, § 25, p. 64*]. In light of that, and since no competitors or foreign states were involved, the cyberattack was considered minor and Claimant decided not to notify customers or authorities at that time [*Ibid.; PO2, § 26, p. 64*]. Consequently, at the time Respondent received the phishing email, Claimant had no reason to disclose the attack.

104 Nevertheless, the hackers had successfully placed "*sophisticated malware*" in Claimant's customer relations management system, leading to the latter's encryption on 15 May 2022 and ransom demand of USD 5,000,000 [*Ex. C6, § 10, pp. 17–18; PO2, § 25, p. 64*]. Upon discovery, Claimant immediately ordered its account managers to inform their counterparts about the attack [*PO2, § 26, p. 64*]. However, due to the shutdown of Claimant's accounting and management systems as well as the exceptional circumstances leading to the absence of both Ms. Audi and Ms. Peugeotroen, Respondent was only

informed in August [*Ibid; Supra § 16*]. Indeed, CLAIMANT was only able to fully eliminate the malware through the joint efforts of CyberSec and Mediterraneo's governmental cybersecurity unit, as well as a month-long sanitization of its IT systems [*Ibid.*].

105 Hence, CLAIMANT acted appropriately and reasonably at every step of the way. Accordingly, its conduct was not reckless and cannot reasonably amount to an implicit representation that the hackers responsible for the cyberattack had authority to act as agents.

b. *RESPONDENT ought to have recognized that the email was a scam*

106 While RESPONDENT alleges that "*there was no reason whatsoever to question the authenticity and correctness of the email*", CLAIMANT submits that RESPONDENT could have easily recognized that it was a spoof [*ARfA, § 6, p. 31; PO2, § 6, pp. 61 & 62*].

107 The third party is not covered by apparent authority if it ought to have recognized that the agent had no authority [*Brödermann, Art. 2.2.5 § 2; Schwenzer et al., p. 13.12; Vogenauer, Art. 2.2.5 § 18*]. To that effect, the third party's reliance should be assessed from the perspective of a reasonable person in the same circumstances [*Brödermann, Art. 2.2.5 § 2; Vogenauer, Art. 1.8 § 10*]. In that regard, the simple use of a company's email address or letterhead is not sufficient for the third party to consider that the agent has authority [*Vogenauer, Art. 2.2.5 § 10; CSX Case; OLG Hamburg Case*].

108 In the case at hand, at first glance, the email might have appeared as if it had come from CLAIMANT [*Ex. C5, p. 16*]. Indeed, the hackers used information harvested during the cyberattack, such as Ms. Audi's role and name, CLAIMANT's logo, CLAIMANT's email footer containing CLAIMANT's address, telephone number and Ms. Audi's email address [*Ibid.*]. However, this impression does not withstand scrutiny, as the email is riddled with mistakes and discrepancies. First, the email mentions that the sensors ordered under the S4 Order were the "*S4-25889*" whereas their correct designation is "*S4-2589**9***" [*Ibid.*]. Secondly, in the email's footer, beyond differences in font and color, Ms. Audi's position within the company is missing and CLAIMANT's address is incomplete when compared to other emails from CLAIMANT [*Ibid.; Ex. R2, p. 34*]. Thirdly, the domain from which the email was sent is `sem`sorx.me instead of `sen`sorx.me [*Ibid.*]. Fourthly, the email's body refers to "*LIDAR sensors*" ordered under "*Purchase Order No. 15605*", whereas RESPONDENT actually ordered *radar* sensors under *Purchase Order No. 9601* [*Ibid.*]. Lastly, the email incorrectly states that the S4 sensors have military purposes and could therefore be subject to sanctions [*Ibid.; PO2, § 15, p. 63*]. Having doubts, Mr. Royce did try to call Ms. Audi and heard her voicemail indicating that Ms. Peugeotroen should be contacted for "*urgent matters*" [*PO2, § 4, p. 61*]. Instead, Mr. Royce simply replied to the forged email

asking for confirmation and showed the reply to his superior, Mr. Toyoda, neither of them noticing any of the discrepancies [*PO2, § 4, p. 61; Ex. R4, § 4, p. 36*].

109 In light of the above, especially since RESPONDENT had multiple purchase orders with CLAIMANT in 2022, a reasonable person with Mr. Royce's experience would at least have noticed that the references to the purchase order were entirely inaccurate before paying an instalment of USD 19,200,000. Hence, the Tribunal is respectfully requested to find that RESPONDENT could not reasonably believe that the hacker had authority to represent CLAIMANT.

110 Therefore, CLAIMANT cannot be treated as if it had made the request to change the bank account. Indeed, CLAIMANT did not act recklessly and, in any event, RESPONDENT could not reasonably believe that the email was from an authorised agent.

2. The request to change the bank account was not valid

111 The Parties included a NOM clause in Art. 40 of the Framework Agreement, providing that any amendment or waiver to the Framework Agreement would be valid only "*in writing and signed by the Parties*" [*Ex. C1, Art. 40, p. 11*]. As a part of the Framework Agreement, the list of acceptable bank accounts for payment provided in Art. 7 can therefore only be waived or extended by following the prescribed form [*Ex. C1, Art. 7, p. 10*]. Thus, should the Tribunal treat CLAIMANT as if it had requested the new bank account, that modification would not be valid.

112 Art. 29(2) CISG allows the parties to include a NOM clause in their contract, requiring the written form or other stricter requirements for all contractual amendments [*Honnold/Flechtner, § 282; Schroeter, § 368; Schlechtriem/Schwenzer, Art. 29 §§ 53 & 59; Graves Case; Steel Bars Case V; Talcum Blocks Case*]. However, a party may be prevented from relying on a NOM clause if its conduct led the other party to reasonably believe that it could ignore the form requirements [*Achilles, Art. 29 § 7; Brunner/Gottlieb, Art. 29 §§ 15 & 16; Witz et al., Art. 29 § 16*]. Nevertheless, in an ICC case, the tribunal held that the relevant conduct should "*reach the level of becoming legally binding between the parties*" [*Kröll et al., Art. 29 § 21; Russian-Canadian Sales Contract Case*].

113 In the present case, RESPONDENT affirms that the Parties have always taken a "*pragmatic approach*" about the form requirement of Art. 40 of the Framework Agreement for deviation [*Ex. R4, § 6, p. 36*]. The Parties did deviate from the strict requirements of Art. 40 of the Framework Agreement on three occasions. First, during the face-to-face price fixing meeting of 1 December 2019, the Parties orally agreed to switch from semi-annual to annual price fixing meetings [*PO2, § 8, p. 62; RfA, § 11, p. 6*]. Nonetheless, RESPONDENT circulated minutes of the meeting via email, expressly confirming their oral agreement [*Ibid.*]. In addition, the Parties' "*common understanding*" was that CLAIMANT would have

the opportunity to object to the record if it happened to be inaccurate [*Ibid.*]. Secondly, on 2 December 2021, again during a face-to-face price fixing meeting, the Parties increased the quantity limit of Art. 3 of the Framework Agreement from 800,000 sensors to 1,200,000 sensors per quarter [*RfA, §§ 12 & 13, p. 6; Ex. C1, Art. 3, p. 9*]. Yet, this amendment was again confirmed, albeit indirectly, in the S4 Order, a written document bearing RESPONDENT's signature [*Ex. C2, p. 13*]. Lastly, the Parties did change the bank account on a single occasion, in September 2020, for an order relating to the L-X LIDAR sensors [*PO2, § 12, p. 63*]. However, the Parties did so in a *signed* side letter, providing that RESPONDENT would pay 80 % of the purchase price directly to the bank account of CLAIMANT's subsidiary, SensorDanube, and 20 % to CLAIMANT's usual bank accounts [*Ibid.*].

114 Hence, while RESPONDENT relied on the hacker's confirmation that an "*exchange of emails*" would suffice, throughout the Parties' relationship, all relevant deviations were either negotiated face-to-face and confirmed in writing, or signed [*Ex. R4, § 4, p. 36*]. Thus, the few deviations from Art 40 of the Framework Agreement do not amount to an established practice and, in any event, would not support amending bank details without oral confirmation or signatures.

115 Therefore, CLAIMANT cannot be treated as if it had sent the instructions to pay to another bank account and said instructions would in any event be invalid in light of the Parties' NOM clause. Accordingly, the Tribunal should find that RESPONDENT was not entitled to follow the hackers' request to pay the purchase price to another bank account.

B. RESPONDENT paid on the wrong bank account pursuant to Art. 54 CISG

116 CLAIMANT submits that RESPONDENT paid the purchase price on the incorrect bank account pursuant to Art. 7 of the Framework Agreement.

117 Pursuant to Art. 54 CISG, the buyer only validly performs its payment obligation by exactly following the terms of the contract, including the price, means of payment, currency, and place of payment [*Ferrari/Kieninger, et al., Art. 54 § 3; Westermann, Art. 54 § 2; Schmidt/Grunewald, Art. 54 § 3*]. In particular, the buyer has to ensure that the payment is effectively credited to the seller's bank account [*Kröll et al., Art. 57 § 14; Leather Goods Case*].

118 In the present case, the Parties agreed in Art. 7 of the Framework Agreement that all payments must be made by bank transfer to one of two alternative bank accounts, "*Automotive Bank in Mediterraneo*" or "*First Bank of Mediterraneo*" [*Ex. C1, Art. 7, p. 10*]. In that regard, as previously established and contrary to RESPONDENT's allegations, RESPONDENT was not entitled to follow the hackers' instructions to pay the purchase price to a bank account of "*First Bank of Danubia*" [*Supra §§ 96–115*]. Hence, since

Claimant never received the USD 38,400,000 due under the S4 Order, Respondent failed to perform its payment obligation [*Ex. C3, p. 14*].

119 **Conclusion to Issue III**: Respondent did not perform its payment obligation as required by the S4 Order. Indeed, Respondent was not entitled to pay to a bank account other than those provided in Art. 7 of the Framework Agreement and therefore its payment to the hacker's account did not fulfil its payment obligation.

Issue IV Respondent cannot rely on Arts. 77 & 80 CISG to defend itself against the claim for payment

120 Respondent argues that its failure to pay the purchase price of the S4 Order should be excused pursuant to Art. 80 CISG as it was allegedly "*caused by Claimant*", or that the payment price should "*at least*" be reduced in light of Art. 77 CISG "*due to Claimant's reckless behavior*" [*ARfA, §§ 12–13, p. 32*]. However, Claimant submits that neither Art. 80 CISG (**A**), nor an application by analogy of Art. 77 CISG (**B**), excuse Respondent's non-performance.

A. Respondent is not excused pursuant to Art. 80 CISG

121 Pursuant to Art. 80 CISG a party may not rely on the other party's failure to perform a contractual obligation when the first party's act or omission caused the non-performance [*Brunner, Art. 80 §§ 1 & 3; Kröll et al., Art. 80 §§ 1 & 3; Schlechtriem/Schwenzer, Art. 80 §§ 1 & 3*]. However, in cases of omission, such as the failure to provide information, the party asserting a remedy must have been under a duty to act [*Benedick, § 1015; Kröll et al., Art. 80 §§ 6–7; Vogenauer, Art. 5.1.3 § 7*]. In addition, the party relying on Art. 80 CISG must prove that the act or omission caused its non-performance [*Kröll et al., Art. 80 § 21; Achilles, Art. 80 § 7; Schlechtriem/Schwenzer, Art. 80 § 12*].

122 In that regard, Respondent argues that Claimant "*should not be able to rely on the failure to pay*" pursuant to Art. 80 CISG [*ARfA, § 12, p. 32*]. In support, Respondent alleges that by not disclosing the cyberattack, Claimant created an "*avoidable risk*" that resulted in Respondent's payment to the wrong bank account [*Ibid.*]. On the contrary, Claimant submits that Respondent is not excused from performing its payment obligation since Claimant had no duty to disclose the cyberattack (**1**) and there is no causal link between the non-disclosure and the breach of contract (**2**).

1. Claimant had no duty to disclose the cyberattack

123 Respondent alleges that Claimant was "*required*" to disclose the cyberattack according to "*principles of good data governance*" and an alleged "*standard practice*" under the Framework Agreement [*Ex. C4, p. 15*]. However, Claimant had no duty to disclose the cyberattack to Respondent. It is undisputed between the Parties that there are no express disclosure requirements in the Framework Agreement or the S4 Order [*Ex. C1, pp. 9–12; Ex. C2, p. 13*]. Further, no such duty can be found under the Parties' national laws (**a**) or any "standard practice" between them (**b**) .

a. Claimant had no duty to disclose the cyberattack under relevant national laws

124 Whereas Respondent "*expected*" a disclosure from Claimant similar to the one required under the law of Equatoriana, Claimant submits that it had no duty to disclose the cyberattack under any relevant national law [*ARfA, §§ 2 & 4, p. 30; § 2, p. 36 Ex. R4, p. 15*].

125 Danubia and Mediterraneo have not enacted any regulation on data protection [*PO1, § 4(5), p. 59*]. In contrast, the Data Protection Act of Equatoriana ("**EDPA**") is "*nearly a verbatim adoption*" of the General Data Protection Regulation of the European Union ("**GDPR**"), with amendments relating to the territorial scope [*PO1, § 4(5), p. 59; PO2, § 37, p. 66*]. Art. 3(2)(a) EDPA extends the scope of the EDPA to data controllers established outside Equatoriana if they process the data of subjects within the country and specifically target their offers of goods and services at the Equatorianian market [*Gawronski, § 2.1.3, p. 18; Kuner et al., Art. 3, p. 89; Voigt/von dem Bussche, pp. 22 & 26*]. In case of a data breach, Art. 34(1) EDPA provides that the data controller shall notify the affected data subjects when there is a high risk to "*the rights and freedoms of **natural** persons*" [*Kuner et al., Art. 34, p. 654; Voigt/von dem Bussche, p. 69*]. However, pursuant to Art. 34(3) EDPA, no such communication is required when the controller has implemented appropriate technical and organisational protection measures (Art. 34(3)(a)) or has taken subsequent measures which ensure that the aforementioned risk is no longer likely to materialize (Art. 34(3)(b)) [*Gawronski, p. 258; Kuner et al., Art. 34, p. 654; Voigt/von dem Bussche, pp. 69–70*].

126 In the case at hand, as mentioned, neither the law of Danubia, chosen in the Framework Agreement, nor the law of Mediterraneo, Claimant's national law, include a duty to disclose data breaches [*Ex. C6, §§ 6–7, p. 17*]. In that regard, the Mediterranean legislator expressly excluded such duties [*Ibid.*]. Irrespective of whether Claimant would meet the definition of a data controller specifically targeting the Equatorianian market, the record does not show how the 2022 cyberattack would lead to a "*high risk to the rights and freedoms of natural persons*". Indeed, the direct consequences of the cyberattack were the encryption and subsequent shutdown of major parts of Claimant's IT systems [*Ex. C6, § 10, pp. 17–18; PO2, §§ 25–26, p. 64*]. In any event, even if the fact that the hackers collected data during the attack and used it in the phishing attack on Respondent amounted to a data breach within the meaning of Art. 34(1) EDPA, Claimant would not have had to disclose the cyberattack. Indeed, as previously established, Claimant has implemented a strong cybersecurity system which successfully averted multiple attacks [*Supra § 102*]. In addition, after the cyberattack took place, Claimant took all the necessary and appropriate measures to neutralize the threat, with the help of Mediterraneo's leading cybersecurity firm and governmental cybersecurity unit [*Supra §§ 103 & 104*].

127 Hence, Claimant had no duty to disclose the cyberattack under Danubian, Mediterranean or Equatorianian law.

b. *Claimant had no duty to disclose the cyberattack based on an alleged "standard practice"*

128 Respondent alleges that disclosing cyberattacks is "*standard practice [...] if not even an ancillary*

duty" under the Framework Agreement [*Ex. C4, p. 15*]. However, CLAIMANT submits that its duty to cooperate does not extend to disclosing data breaches in the case at hand.

129 While the CISG does not provide an express duty to disclose information, Art. 80 CISG implicitly provides a general duty of cooperation, as a subset of the principle of good faith [*Honnold/Flechtner, § 595; Neumann, pp. 92 & 110*]. Likewise, Art. 5.1.3 DCL, a verbatim adoption of Art. 5.1.3 UPICC, provides a duty to inform the other party in circumstances relating to the performance of its contractual obligations [*PO1, § 4(4), p. 59; Art. 5.1.3 UPICC, Comment 1; Vogenauer, Art. 5.1.3 § 7; Brödermann, Art. 5.1.3 § 1*]. However, a party is only required to share information when a reasonable person in the same circumstances would have expected a disclosure [*Art. 5.1.3 UPICC, Comment 1; Kröll et al., Art. 80 § 7; Vogenauer, Art. 5.1.3 §§ 7–8*]. To that effect, relevant circumstances include the parties' conduct, communications, expectations, and respective knowledge [*Art. 1.8 UPICC, Comment 2; Vogenauer, Art. 5.1.3 § 9*]. In that regard, pursuant to Art. 9(1) CISG, a conduct only amounts to a binding practice between the parties if repeated at a certain frequency, in time and in contracts [*Brunner/Gottlieb, Art. 9 § 3; Neumann, § 5.1.2, pp. 113–114*].

130 In the present case, RESPONDENT informed CLAIMANT that it had been the target of a cyberattack in August 2020 [*ARfA, § 4, p. 30; Ex. R1, p. 33*]. Indeed, RESPONDENT was quickly able to identify that cyberattackers had potentially accessed its clients' data [*Ex. R1, p. 33*]. Conversely, as previously stated, CLAIMANT initially considered the January 2022 cyberattack to be minor, in particular since the malware did not appear to have accessed "*personal data or any trade secrets*" [*Supra § 103; PO2, § 25, p. 64*]. In addition, the hackers were able to place sophisticated ransomware that went undetected until May 2022 [*Ibid.*]. Hence, the situation then must be distinguished from the present one in light of the scope and complexity of the cyberattacks. Therefore, RESPONDENT could not reasonably expect that a single notification in 2020 would bind CLAIMANT to do the same in the future. Likewise, the fact that CLAIMANT "*greatly appreciated*" that information does not constitute an intention to be legally bound by RESPONDENT's action, much less so a "*standard practice*" or "*ancillary duty*" practice under the Framework Agreement [*Ex. R4, p. 15; Ex. R2, p. 34*].

131 Consequently, CLAIMANT had no duty to disclose the cyberattack, be it under relevant national laws or in light of an alleged practice between the Parties.

2. CLAIMANT's non-disclosure did not cause RESPONDENT's failure to pay

132 Under Art. 80 CISG, the act or omission of the party asserting a remedy must have caused the other party's non-performance [*Brunner, Art. 80 § 5; Ferrari/Flechtner, et al., Art. 80 § 5; Kröll et al., Art. 80 § 8*]. In the case at hand, RESPONDENT asserts that CLAIMANT's non-disclosure of the cyberattack is

the reason it followed the instructions in the phishing email [*ARfA, § 10, p. 31*]. However, there is no causal link between Claimant's non-disclosure and Respondent's lack of payment since Respondent could have easily avoided its failure to pay the purchase price (**a**). In any event, even if the Tribunal considers that both Parties contributed to Respondent's failure, Respondent's contribution significantly outweighs that of Claimant (**b**).

a. *Respondent could have easily avoided non-performance*

133 Respondent asserts that there was no reason "*to be in heightened state of risk awareness*" without a disclosure from Claimant [*Ex. R4, § 4, p. 36*]. However, Claimant submits that Respondent could have easily avoided non-performance without that information.

134 Although Art. 80 CISG does not, in principle, impose a duty on the obligor to overcome the hindrance caused by the obligee, the duty of cooperation requires the obligor to at least attempt to do so [*Enderlein et al., Art. 80 § 3.3; Kröll et al., Art. 80 § 9; Schäfer, p. 249; Schlechtriem/Schwenzer, Art. 80 § 5*]. Consequently, if obligor could have easily avoided non-performance, or if the obligee's act or omission did not affect the possibility to perform, the obligor may not rely on Art. 80 CISG [*Koziol, p. 594, fn. 7; Piltz, § 4–224; Schlechtriem/Schwenzer/Schroeter, Art. 80 §§ 5 & 6*].

135 As previously outlined, in light of Respondent's past experience and numerous noticeable discrepancies, Respondent could and should have recognized that the email was a phishing attempt [*Supra § 108*]. In addition, when Mr. Royce, Respondent's account manager, tried to contact Ms. Audi regarding the request to pay to another bank account, he was told that Ms. Peugeotroen should be contacted "*in urgent matters*" [*Ibid.; PO2, § 4, p. 61*]. Yet, instead of contacting her, he replied to the original email, showed the hacker's reply to his superior, Mr. Toyoda, who then green-lit the payment [*Ibid.; Ex. R4, § 4, p. 36*]. Both of them failed to notice any oddity. Respondent's failure to recognize that it was paying instalments of USD 19,200,000 to cyberattackers is further compounded by the publication of an article disclosing the cyberattack in Automotive Weekly, a "*leading industry journal*" [*Ex. R3, p. 35*]. Indeed, even though Mr. Royce only read the article in July 2022, he had access to it as early as 20 May 2022, when the article was published, since Respondent has a subscription to this journal [*PO2, § 17, p. 63*]. Thus, even though Mr. Royce had knowledge of the article in July, he had access to it as early as 20 May 2022, before the delivery of the second instalment of S4 sensors on 30 May 2022 [*Ex. C3, p. 14; Ex. R3, p. 35*]. Lastly, that same article highlights the increasing prevalence of cyberattacks on the automotive industry in Equatoriana, such as the one Respondent was a victim of in 2020 [*Ex. C6, § 8, p. 17; Ex. R3, p. 35*].

136 Hence, Claimant's lack of disclosure did not cause Respondent's non-performance, since Respon-

DENT could and should have recognized that it was being targeted by a phishing attack, even without knowledge of the cyberattack on CLAIMANT.

b. *In any event, RESPONDENT's contribution outweighs CLAIMANT's*

137 Even if the Tribunal finds that CLAIMANT had a duty to disclose the cyberattack and did contribute to RESPONDENT's non-performance, CLAIMANT submits that RESPONDENT's contribution outweighs CLAIMANT's.

138 Art. 80 CISG encompasses shared or mixed liability [*Ferrari/Kieninger, et al., Art. 80 § 3; Schlechtriem/Schwenzer, Art. 80 § 7; Achilles, Art. 80 § 4; Kröll et al., Art. 80 § 10; Beer Case, § 72*]. Yet, the obligor can only invoke Art. 80 CISG when the obligee's contribution has at least predominantly caused the failure to perform [*Brunner/Gottlieb, Art. 80 § 12; Schmidt/Grunewald, Art. 80 § 10; Schlechtriem/Schwenzer/Schroeter, Art. 80 § 11*]. Hence, when the obligor's contribution to the failure of the performance outweighs the obligee's, the obligor is not excused under Art. 80 CISG [*Achilles, Art. 80 § 4; Kröll et al., Art. 80 § 20; Westermann, Art. 80 § 6; Staudinger et al., Art. 80 § 14*].

139 As previously outlined, despite CLAIMANT's multiple cybersecurity defences and intense training for its employees, the attackers managed to deceive Ms. Audi into downloading a trojan horse onto CLAIMANT's systems [*Supra §§ 102 & 103*; *PO2, § 5, p. 61*]. After the attack became apparent, CLAIMANT acted diligently in hiring CyberSec, the leading cybersecurity firm in Mediterraneo, and subsequently in requesting the help of Mediterraneo's governmental cybersecurity unit [*Ibid.; Ex. C6, § 10, pp. 17–18*]. Yet, as previously mentioned, due to the shutdown of CLAIMANT's IT systems as well as an exceptional shortage of personnel, CLAIMANT was only able to inform RESPONDENT in August [*Supra §§ 16 & 104*]. On the other hand, even though it had already been the victim of a similar phishing attack less than two years prior, RESPONDENT fell for the same stratagem, failing to recognize the email's fraudulent origin or to contact Ms. Peugeotroen as indicated in Ms. Audi's voicemail [*Supra § 108; ARfA, § 2, p. 30*]. Hence, as a result of RESPONDENT's lack of diligence, RESPONDENT paid USD 19,200,000 to the hacker's bank account, not only once but twice [*Ex. C4, p. 15*].

140 Therefore, even if the Tribunal considers that CLAIMANT's lack of disclosure interfered with RESPONDENT's obligation to pay the purchase price, it should find that RESPONDENT's contribution far outweighs CLAIMANT's, thus excluding partial liability. Therefore, RESPONDENT cannot rely on Art. 80 CISG to be exempted from its payment obligation. Indeed, CLAIMANT had no duty to disclose the cyberattack and, in any event, the lack of disclosure is not the cause of RESPONDENT's non-performance.

B. RESPONDENT is not excused pursuant to an application by analogy of Art. 77 CISG

141 As per Art. 77 CISG, a party claiming damages should take reasonable steps to mitigate its loss and,

failing to do so, the party's claim should be reduced or even denied entirely [*Westermann, Art. 77 § 13; Schlechtriem/Schwenzer, Art. 77 § 12; Witz et al., Art. 77 § 1; Vine Wax Case, § 27, p. 5*].

142 In that regard, RESPONDENT alleges that the principles of Art. 77 CISG should be applied by analogy due to "*CLAIMANT's reckless behaviour*" [*ARfA, § 13, p. 32*]. On the contrary, CLAIMANT submits that an application by analogy of this article to a claim for performance instead of damages is not possible (**1**) and, in any case, RESPONDENT would not be excused since CLAIMANT did mitigate the consequences of the cyberattack (**2**).

1. Art. 77 CISG only applies to damage claims

143 CLAIMANT submits that the Tribunal should not extend the scope of Art. 77 CISG to payment obligations. Indeed, in light of its wording, systematic position and drafting history, Art. 77 CISG applies exclusively to damage claims [*Brunner/Gottlieb, Art. 77 § 2; Staudinger et al., Art. 80 § 6*]. In fact, a proposal to broaden the scope of Art. 77 CISG to apply to remedies other than damages was rejected since "*it would have given exceptional discretionary powers to modify specific performance or avoidance of the contract*" [*Kröll et al., Art. 77 § 8; Westermann, Art. 77 § 3; Schlechtriem/Schwenzer, Art. 77 § 4; Secretariat Commentary, Art. 73 § 3*]. In addition, as previously stated, Art. 80 CISG already addresses "contributory negligence", namely when both parties contributed to a failure to perform [*Supra § 138; Neumann, p. 81*]. Accordingly, whereas Art. 80 CISG exclusively applies to cases of failure to perform the contract, including situations of partial liability, Art. 77 CISG exclusively applies to damage claims.

144 Therefore, since CLAIMANT requests the performance of the payment obligation and not damages, the Tribunal should not rely on Art. 77 CISG by analogy.

2. In any event, CLAIMANT did mitigate the consequences of the cyberattack

145 Even if Art. 77 CISG were applicable by analogy, the Tribunal should find that CLAIMANT did mitigate the consequences of the cyberattack.

146 Pursuant to Art. 77 CISG, the aggrieved party must have taken all reasonable measures to mitigate the loss caused by the other party's breach [*Brunner/Gottlieb, Art. 77 § 1; Neumann, p. 87; Schlechtriem/Schwenzer, Art. 77 § 7*]. Consequently, the claim for damages should be limited to those that the aggrieved party could not reasonably be expected to have mitigated [*Achilles, Art. 77 § 8; Brunner/Gottlieb, Art. 77 § 13; Kröll et al., Art. 77 § 1*]. In that regard, the appropriate measures should be determined on a case-by-case basis, in light of practices between the parties, trade usages and the reasonable person standard [*Kröll et al., Art. 77 § 11; Schlechtriem/Schwenzer, Art. 77 § 7; Achilles, Art. 77 § 5*].

147 In the case at hand, as previously established, CLAIMANT took appropriate and reasonable measures in response to the cyberattack and its personnel shortage. First, before the attack, CLAIMANT consider-

ably invested into its cybersecurity, implementing additional protections and employee training [*Supra § 102*]. Secondly, as soon as the attack was detected on 23 January 2022, Claimant hired leading experts in cybersecurity and malware removal, CyberSec, who analysed its IT system in depth and neutralized the detected threats [*Supra § 103*]. In particular, it appeared that "*neither direct competitors nor foreign states entities*" were involved, that the threat had been "*quickly detected and neutralized*" and no parts of the system containing "*sensitive data or any trade secrets*" were affected [*PO2, § 25, p. 64*]. Consequently, in light of the information at its disposal, Claimant classified the threat as minor [*Ibid.*]. Yet, unbeknownst to Claimant, the hackers had surreptitiously placed a trojan horse in Claimant's customer relations management system [*Ibid.*]. Thirdly, on 15 May 2022, when the threat turned out to be more severe than initially assessed, having encrypted Claimant's data, Claimant immediately requested the assistance of Mediterraneo's governmental cybersecurity unit and ordered its account managers to inform their counterparts [*Supra § 104; Ex. C6, § 10, pp. 17–18*]. However, at that time, the relevant account managers for Respondent, namely Ms. Audi and Ms. Peugeotroen were absent due to a severe mental breakdown for the former and life-threatening pregnancy complications for the latter [*Supra §§ 16 & 27*]. Adding to the already challenging situation, Claimant had to shut down its IT system to allow its complete sanitization [*Ibid.*]. Accordingly, Claimant's sales department "*just concentrated on ensuring delivery [...] and dealing with new orders coming in*" [*PO2, § 7, p. 62*].

148 Therefore, in light of the above, the Tribunal should find that Claimant acted reasonably and appropriately as a victim of a massive cyberattack and thus mitigated its consequences. Hence, Respondent is not excused pursuant to Art. 77 CISG since it is not applicable by analogy and, in any event, Claimant took all the reasonable measures to mitigate the consequences of the cyberattack.

149 **Conclusion to Issue IV**: Respondent cannot rely on Arts. 77 & 80 CISG to defend itself against the claim for payment under the S4 Order. Indeed, Claimant did not have to disclose the cyberattack and, in any event, Respondent's own conduct prevents its reliance on Art. 80 CISG. In addition, even if Art. 77 CISG were applicable, Claimant mitigated the consequences of the cyberattack.

150 **Conclusion to the Substantive Issues**: Claimant respectfully requests this Tribunal to find that Claimant is entitled to the payment price in full, since Respondent failed to perform its payment obligation and is not excused for its lack of performance. Indeed, Respondent did not perform its payment obligation as required by the S4 Order and Framework Agreement as it was not entitled to follow the instructions in the phishing email and Respondent cannot rely on a contractual information duty or provisions of the CISG to defend itself.

PRAYER FOR RELIEF

On the basis of the arguments above and CLAIMANT's prior written submissions, CLAIMANT respectfully asks this Tribunal to find that:

(1) The Tribunal should authorize the addition of the new claim to the pending arbitration;

(2) Alternatively, the Tribunal should consolidate the arbitral proceedings, in case the new claim has to be raised in a separate arbitration;

(3) CLAIMANT is entitled to the full amount of the purchase price under Purchase Order No. 9601 since

  (a) RESPONDENT did not validly perform its payment obligation;

  (b) RESPONDENT cannot rely on Arts. 77 & 80 CISG to defend itself against the claim for payment.

Lausanne, 7 December 2023

On behalf of CLAIMANT, **SENSORX PLC**

Aurélien Meystre

Shima-Océane Zimmer

Amel Meziane

Fatima Iuliano

INDEX OF AUTHORITIES

Statutes, Rules and Treaties

Cited as	Source	Cited in §§
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 27 April 2016.	125
HKIAC Rules	HKIAC Arbitration Rules, 2018.	54
ICC Rules	ICC Rules of Arbitration, 1 January 2021.	*Passim*
NAFTA	North American Free Trade Agreement, 1 January 1994.	54
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.	1, 37, 58
Swiss Rules	Swiss Rules of International Arbitration, 1 June 2021.	54
UML	UNCITRAL Model Law on International Commercial Arbitration, Vienna, 21 June 1985, with the 2006 amendments.	1, 37
UPICC	UNIDROIT Principles of International Commercial Contracts, Rome, May 2016.	98, 129

Books, Materials, Scholarly Works and Articles

Cited as	Source	Cited in §§
Brunner	Christoph Brunner, ed. *UN-Kaufrecht - CISG: Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980; unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht*. 2nd edition. Stämpflis Handkommentar SHK. Bern: Stämpfli Verlag, 2014.	121, 132
Brunner/Gottlieb	Christoph Brunner and Benjamin Gottlieb, eds. *Commentary on the UN Sales Law (CISG)*. Alphen aan den Rijn: Wolters Kluwer, 2019.	112, 129, 138, 143, 146
Cazala	Julien Cazala. "Good Administration of Justice". In: *Max PlanckEncyclopedias of InternationalLaw [MPIL]* (December 2019).	37
Cremades/ Madalena	Bernardo M. Cremades Sanz-Pastor (Sr) and Ignacio Madalena. "Parallel Proceedings in International Arbitration". In: *Arbitration International* 24.4 (December 2008). Ed. by William W. Park, pp. 507–540.	58
Derains/Schwartz	Yves Derains and Eric A. Schwartz. *A Guide to the ICC Rules of Arbitration*. 2nd edition. The Hague: Kluwer Law International, 2005.	14, 22, 68, 72, 81
Enderlein et al.	Fritz Enderlein, Dietrich Maskow, Fritz Enderlein, and Fritz Enderlein. *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*. New York, NY: Oceana Publ, 1992.	134

Cited as	Source	Cited in §§
Ferrari/Flechtner, et al.	Franco Ferrari, Harry M. Flechtner, Ronald A. Brand, and University of Pittsburgh, eds. *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention ; Papers of the Pittsburgh Conference Organized by the Center for International Legal Education (CILE)*. München: Sellier European Law Publishers, 2004.	132
Ferrari/Kieninger, et al.	Franco Ferrari, Eva-Maria Kieninger, Peter Mankowski, Karsten Otte, Ingo Saenger, et al. *Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ*. 3. Auflage. München: C.H. Beck, 2018.	117, 138
Ferrari/Rosenfeld, et al.	Franco Ferrari, Friedrich Rosenfeld, and Dietmar Czernich, eds. *Due Process as a Limit to Discretion in International Commercial Arbitration*. Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V, 2020.	37
Fry et al.	Jason Fry, Simon Greenberg, and Francesca Mazza. *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*. With a forew. by John Beechey. Paris: International chamber of commerce, 2012.	4, 9, 19, 26, 29, 32, 37, 45, 48, 51, 62, 68, 72, 74, 75, 78, 81
Gawronski	Maciej Gawronski, ed. *Guide to the GDPR*. English edition. Alphen aan den Rijn: Kluwer Law International B.V, 2019.	125
Grierson/Hooft	Jacob Grierson and Annet van Hooft. *Arbitrating under the 2012 ICC Rules: An Introductory User's Guide*. Alphen aan den Rijn : Frederick, MD: Kluwer Law International et al., 2012.	48, 62, 65, 68, 72, 81

Cited as	Source	Cited in §§
Hanotiau et al.	Bernard Hanotiau, Eric A. Schwartz, and International Chamber of Commerce, eds. *Multiparty Arbitration*. ICC Publication no. 701E. Paris, France: ICC Institute of World Business Law, 2010.	72
Honnold/Flechtner	John O. Honnold and Harry M. Flechtner. *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention*. 5th edition. Alphen aan den Rijn: Wolters Kluwer, 2021.	98, 112, 129
ICC Calculator	*Costs Calculator*. ICC - International Chamber of Commerce. Available at: `https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/costs-calculator/` (visited on 5 December 2023).	34
ICC Efficiency Report	ICC Commission on Arbitration and ADR. *ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration*. 861-2 ENG. Paris: International Chamber of Commerce, 1 March 2018, p. 20.	32
ICC Note	International Chamber of Commerce. *ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*. 2021.	34, 75
Kingsley/Quegan	Simon Kingsley and Shaun Quegan. *Understanding Radar Systems*. 1999.	15

Cited as	Source	Cited in §§
Koziol	Helmut Koziol. "Rechtsfolgen Der Verletzung Einer Schadensminderungspflicht: Rückkehr Der Archaischen Kulpalompensation?" In: *Zeitschrift für europäisches Privatrecht* (1998).	134
Kröll et al.	Stefan M. Kröll, Loukas A. Mistelis, and Maria del Pilar Perales Viscasillas. *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary*. 2nd edition. München and Oxford: C.H.Beck, 2018.	98, 112, 117, 121, 129, 132, 134, 138, 143, 146
Kuner et al.	Christopher Kuner, Lee A. Bygrave, and Christopher Docksey, eds. *The EU General Data Protection Regulation (GDPR): A Commentary*. Oxford, United Kingdom: Oxford University Press, 2019.	125
Leboulanger	Philippe Leboulanger. "Multi-Contract Arbitration". In: *Journal of International Arbitration* 13.4 (August 1996). Ed. by Maxi Scherer, pp. 43–97.	6, 9, 32, 58
Lew/Mistelis/Kröll	Julian D.M. Lew, Loukas A. Mistelis, and Stefan M. Kröll. *Comparative International Commercial Arbitration*. Kluwer Law International, 2003.	81
Linetzky et al.	Andrés Jana Linetzky, Angie Armer, and Johanna Klein Kranenberg. "Article V(1)(b)". In: *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port, 2010.	37
Mayer	Pierre Mayer. "Conflicting Decisions in International Commercial Arbitration". In: *Journal of International Dispute Settlement* 4.2 (July 2013). Ed. by Thomas Schultz, pp. 407–419.	58

Cited as	Source	Cited in §§
Meier	Andrea Meier. "Commentary on the ICC Rules, Article 10 [Consolidation of Arbitrations]". In: *Arbitration in Switzerland: The Practitioner's Guide*. Ed. by Manuel Arroyo. 2nd edition. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2018. Chap. 17, Part II, pp. 2225–2230.	78, 81, 85
Neumann	Thomas Neumann. *The Duty to Cooperate in International Sales: The Scope and Role of Article 80 CISG*. Beiträge Zum Internationalen Wirtschaftsrecht - Contributions on International Commercial Law 11. De Gruyter, 26 March 2012.	129, 143, 146
Pair	Lara M. Pair. *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules*. International Commerce and Arbitration volume 10. The Hague, The Netherlands: Eleven International Publishing, 2012.	58, 81, 85
Piltz	Burghard Piltz. *Internationales Kaufrecht: Das UN-Kaufrecht in Praxisorientierter Darstellung*. 2. Aufl. München: C.H. Beck, 2008.	134
Rajoo	Sundra Rajoo. *Law, Practice, and Procedure of Arbitration*. In collab. with Malaysia and LexisNexis Malaysia Sdn. Bhd. Second edition. Kuala Lumpur: LexisNexis, 2018.	37
Schäfer	Friederike Schäfer. "Failure of Performance Caused by Other Party: Editorial Remarks 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*. Ed. by John Felemegas. Cambridge: Cambridge University Press, 2007, pp. 246–252.	134

Cited as	Source	Cited in §§
Schlechtriem/ Schwenzer	Ingeborg Schwenzer and Ulrich G. Schroeter, eds. *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*. By Klaus Bacher, Christiana Fountoulakis, Pascal Hachem, Florian Mohs, Markus Müller-Chen, et al. 5th edition. Oxford: Oxford University Press, 2022.	94, 98, 112, 121, 134, 138, 141, 143, 146
Schlechtriem/ Schwenzer/ Schroeter	Peter Schlechtriem, Ingeborg Schwenzer, and Ulrich G. Schroeter, eds. *Kommentar zum UN-Kaufrecht (CISG): Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf*. By Klaus Bacher, Franco Ferrari, Christiana Fountoulakis, Pascal Hachem, Florian Mohs, et al. 7th edition. München: C.H. Beck, 2019.	134, 138
Schmidt/ Grunewald	Karsten Schmidt and Barbara Grunewald. *Münchener Kommentar zum Handelsgesetzbuch: §§ 373-406, Wiener UN-Übereinkommen über Verträge über den internationalen Warenkauf-CISG*. 2. Auflage. München: C. H. Beck F. Vahlen, 2007.	117, 138
Schramm	Dorothee Schramm. "Commentary on the ICC Rules, Article 19 [Rules Governing the Proceedings]". In: *Arbitration in Switzerland: The Practitioner's Guide (Second Edition)*. Ed. by Manuel Arroyo. Kluwer Law International, 2018. Chap. 17, Part II, pp. 2299–2302.	45
Schroeter	Ulrich G. Schroeter. *Internationales UN-Kaufrecht: ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)*. 7th edition. Mohr Siebeck Lehrbuch. Tübingen: Mohr Siebeck, 2022.	112

Cited as	Source	Cited in §§
Schütze/Aschauer	Rolf A. Schütze and Christian Aschauer, eds. *Institutional Arbitration: Article-by-Article Commentary ; [AAA, CIEDAC, DIAC, DIS, ICC, ICSID, KLRCA, LCIA, MKAS, SCC, SIAC, Swiss Rules, Uncitral Rules, Vienna Rules]*. München: Beck, 2013.	51, 68, 85
Schütze/ Boguslavskij	Rolf A. Schütze and Mark M. Boguslavskij, eds. *Institutionelle Schiedsgerichtsbarkeit: Kommentar*. Köln, Berlin, and München: Heymanns, 2006.	81, 85
Schwartz	Eric A. Schwartz. "'New Claims' in ICC Arbitration: Navigating Article 19 of the ICC Rules". In: *International Court of Arbitration Bulletin* 17.2 (2006).	4
Schwenzer et al.	Ingeborg H. Schwenzer, Pascal Hachem, and Christopher Kee. *Global Sales and Contract Law*. Oxford: Oxford University Press, 2012.	98, 107
Secretariat Commentary	*Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*. United Nations, 14 March 1979. Reprinted in United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees.	143
Shroff	Pallavi Shroff. "Due Process in International Arbitration: Balancing Procedural Fairness and Efficiency". In: *International Arbitration and the Rule of Law: Contribution and Conformity*. Vol. 19. ICCA Congress Series. Andrea Menaker, 2017, pp. 797–822.	37

Cited as	Source	Cited in §§
Staudinger et al.	Julius von Staudinger, Ulrich Magnus, and Dagmar Kaiser. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*. Neubearbeitung 2018. Berlin: Sellier - de Gruyter, 2018.	94, 138, 143
Verbist et al.	Herman Verbist, Erik Schäfer, and Christophe Imhoos. *ICC Arbitration in Practice*. 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2016.	6, 9, 14, 22, 45, 48, 51, 62, 65, 68, 78
Vogenauer	Stefan Vogenauer. *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. Second edition. Oxford New York, NY: Oxford University Press, 2015.	98, 101, 107, 121, 129
Voigt/von dem Bussche	Paul Voigt and Axel von dem Bussche. *The EU General Data Protection Regulation (GDPR): A Practical Guide*. 1st edition. Cham: Springer, 2017.	125
Voser	Nathalie Voser. "Multi-Party Disputes and Joinder of Third Parties". In: *ICCA Congress Series No. 14 (Dublin 2009): 50 Years of the New York Convention: ICCA International Arbitration Conference*. Ed. by Albert Jan van den Berg. ICCA & Kluwer Law International, 2009, pp. 343–410.	32, 58, 85
Waincymer	Jeffrey Waincymer. *Procedure and Evidence in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2012.	32
Webster/Bühler	Thomas H. Webster and Michael Bühler. *Handbook of ICC Arbitration: Commentary and Materials*. 5th edition. London: Sweet & Maxwell, 2021.	4, 6, 19, 22, 26, 29, 37, 48, 51, 62, 65, 68, 72

Cited as	Source	Cited in §§
Weigand	Frank-Bernd Weigand, ed. *Practitioner's Handbook on International Commercial Arbitration*. 2nd edition. Oxford and New York: Oxford University Press, 2009.	4, 6, 19
Weitkamp	Claus Weitkamp. *Lidar: Range-Resolved Optical Remote Sensing of the Atmosphere*. 2006.	15
Welser/Mimnagh	Irene Welser and Samuel Mimnagh. "The Arbitrator and the Arbitration Procedure, „too Late for This Arbitration?'– Introducing New Claims in Arbitral Proceedings'". In: *Austrian Yearbook on International Arbitration 2022*. Ed. by Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, et al. Manzsche Verlags- und Universitätsbuchhandlung, February 2022, pp. 27–45.	4, 19, 22, 26, 32, 37
Westermann	Harm Peter Westermann. *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Finanzierungsleasing, CISG*. 8. Auflage 2019. München: C.H. BECK, 2019.	117, 138, 141, 143
Whitesell/Silva-Romero	Anne Marie Whitesell and Eduardo Silva-Romero. "Multiparty and Multicontract Arbitration: Recent ICC Experience". In: *ICC International Court of Arbitration Bulletin* 2003 (Special Supplement 2003), pp. 7–18.	68, 72
Witz et al.	Wolfgang Witz, Hanns-Christian Salger, and Manuel Lorenz. *International einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*. 2nd edition. Wirtschaftsrecht international Kommentar. Frankfurt am Main: Fachmedien Recht und Wirtschaft, dfv Mediengruppe, 2016.	112, 141

Cited as	Source	Cited in §§
Zuberbühler et al.	Tobias Zuberbühler, Christoph Müller, and Philipp Habegger. *Swiss Rules of International Arbitration: Commentary*. 3rd edition. Arbitration. Zurich Geneva: Schulthess, 2023.	54

INDEX OF COURT DECISIONS

Cited as	Source	Cited in §§
C&J Sheet Metal Case	Higher People's Court Zhejiang Province C&J Sheet Metal Co. Ltd v. Wenzhou Chenxing Machinery Co. Ltd Case No. (2013) Zhe Shang Wai Zhong Zi No. 144 CISG-Online 2821 27 December 2013 China	94
Cobalt Sulphate Case	Landgericht Hamburg (District Court Hamburg) Case No. 404 O 175/92 CISG-Online 215 5 November 1993 Germany	94
CSX Case	United States District Court, D. Massachusetts CSX Transportation, Inc. v. Recovery Express, Inc. Case No. unavailable 1 February 2006 United States of America	107
Derham Case	Australian Capital Territory Supreme Court Case No. unavailable 19 November 1981 Australia	101

Cited as	Source	Cited in §§
Espagnola Case	United States Court of Appeals for the Second Circuit Case No. 527 F.2d 966 12 December 1975 United States of America	9
Graves Case	U.S. District Court for the Southern District of New York Graves Import Co. Ltd. v. Chilewich Intl Corp. Case No. 92 Civ. 3355 (JFK) CISG-Online 128 22 September 1994 USA	112
Italian Fashion Case	Landgericht Hamburg (District Court Hamburg) Case No. 5 O 543/88 CISG-Online 21 26 September 1990 Germany	98
Leather Goods Case	Oberlandesgericht München (Court of Appeal Munich) Case No. 7 U 2070/97 CISG-Online 282 9 July 1997 Germany	117

Cited as	Source	Cited in §§
Metal Covers Case	Landgericht Landshut (District Court Landshut) Case No. 43 O 1748/07 CISG-Online 1703 12 June 2008 Germany	98
OLG Hamburg Case	Case No. 1 U 83/63 27 December 1963 Germany	107
Russian-Canadian Sales Contract Case	ICC International Court of Arbitration Case No. 9117 (Final Award) CISG-Online 777 March 1998 Zurich (Switzerland)	112
Shell Case	Judgment of the High Court of Justice of England and Wales Shell Western Supply and Trading, Africa Finance Corporation, Ecobank Nigeria Limited, Fidelity Bank Plc, First Bank of Nigeria Limited, Guaranty Trust Bank Plc, Sterling Bank Plc, Union Bank of Nigeria Plc, and Zenith Bank Plc v. Aiteo Eastern E&P Company Limited Case No. [2022] EWHC 2912 17 November 2022 United Kingdom	45

Cited as	Source	Cited in §§
Spanish Case	Oberster Gerichtshof (Austrian Supreme Court) Case No. 1 Ob 49/01i CISG-Online 613 22 October 2001 Austria	98
Steel Bars Case V	Oberlandesgericht Innsbruck (Court of Appeal Innsbruck) Case No. 1 R 273/07t CISG-Online 1735 18 December 2007 Austria	112
Talcum Blocks Case	China International Economic & Trade Arbitration Commission (CIETAC) Case No. unavailable CISG-Online 1260 30 March 1993 Beijing (China)	112
Vine Wax Case	Bundesgerichtshof (German Supreme Court) Case No. VIII ZR 121/98 CISG-Online 396 24 March 1999 Germany	141

INDEX OF ARBITRAL AWARDS

Cited as	Source	Cited in §§
Paris Award	ICC International Court of Arbitration Case No. 7184 20 November 2023	14
PDV Final Award	ICC International Court of Arbitration PDV Sweeny, Inc. and PDV Texas, Inc. v. ConocoPhillips Company (formerly doing business as Phillips Petroleum Company) and Sweeny Coker Investor Sub, Inc. Case No. 16982/JRF/CA (C-17336/JRF) 18 August 2014 Final Award	45
PDV Partial Award	ICC International Court of Arbitration PDV Sweeny, Inc. and PDV Texas, Inc. v. ConocoPhillips Company (formerly doing business as Phillips Petroleum Company) and Sweeny Coker Investor Sub, Inc. Case No. 16982/JRF/CA (C-17336/JRF) 14 April 2014 Partial Award	45, 51
Premium Petroleum Award	ICC International Court of Arbitration Case No. 21574/RD/MK 19 July 2018	26
Singapore Award	ICC International Court of Arbitration Case No. 18625 2018	32

Cited as	Source	Cited in §§
Sonera Award	ICC International Court of Arbitration Case No. 13856/AVH/EC/GZ (Partial Award)	22
SSK Award	ICC International Court of Arbitration SSK Ingeniería y Construcción S.A.C v. Técnicas Reunidas de Talara S.A.C Case No. 23711/JPA 18 March 2021	4, 22
Travis Coal Award	ICC International Court of Arbitration Travis Coal Restructured Holdings LLC *v.* Essar Global Ltd. Case No. 18724/VRO/AGF 7 March 2014	45, 51
UK Company Award	ICC International Court of Arbitration Case No. 12944 16 December 2004	37
YPF Award	ICC International Court of Arbitration YPF, S.A. v. AES Uruguaiana Empreendimentos, S.A., Companhia de Gas do Estado do Rio Grande do Sul and Transportadora de Gas del MERCOSUR, S.A. Case No. 16232/JRF/CA 8 May 2013 Partial Award	45