Nova University of Lisbon - School of Law

Work Project: 30th Annual Willem C. Vis International Commercial Arbitration Moot

31st March – 6th April 2023 in Vienna, Austria

Work Project submitted for the obtainment of the Master's degree in Law:

Master's in Litigation and Arbitration:

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Anti-Plagiarism Statement

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

Lisbon, 14th June 2023

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Index of Abbreviations and Definitions

¶	paragraph
¶¶	paragraphs
AA	Arbitration Agreement
ASA	Aviation Safety Act
Art./Arts.	Article/Articles
Claimant	Drone Eye plc
DAL	Danubian Arbitration Law
Ex. C	Claimant's Exhibit
Ex. R	Respondent's Exhibit
ICCA	International Commercial Contract Act
i.e.	*Id est*
NoA	Notice of Arbitration
NPDP	Northern Part Development Program
p./pp.	page/pages
Parties	Drone Eye plc and Equatoriana Geoscience Ltd
PO1	Procedural Order number 1
PO2	Procedural Order number 2
PSA	Purchase and Supply Agreement

Respondent	Equatoriana Geoscience Ltd
RNoA	Response to the Notice of Arbitration
SOE	State-owned enterprise
v.	Versus

Form of citation and bibliography

- Every citation made with reference to "The Problem" is part of the Problem released by the Association for the Organisation and Promotion of the Willem C. Vis International Commercial Arbitration Moot for the 30th Willem C. Vis Moot.
- The first citation of each literary work is made by the author's name, full title, year of publication and page cited. Subsequent citations are made with reference to the author's name, op. cit., and page cited. If two works written by the same author are cited, the second and following citations will be made with reference to the author's name, part of the title of the work or article, cit. and page cited.
- The first citation of each journal or magazine article is made by the author´s name, full title, name of publication, volume/number, year of publication, page cited. If two articles written by the same author are cited, the second and following citations will be made with reference to the author's name, part of the title of the article, cit., and page cited.
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- The bibliography is ordered alphabetically by the last name of each author and is made according to Norma Portuguesa 405-1 and 405-4 of the Portuguese Quality Institute.

Introduction

In the scope of the Master's degree in Law and for the purpose of its conclusion, we submit the present "Work Project" Report whose aim is to outline the various phases of work that the team representing NOVA School of Law in the 30th Willem C. Vis International Commercial Arbitration Moot competition of 2023 went through during the course of the seven months of this project.

In the following report, in its first part, a thorough explanation of the Willem C. Vis Moot's history and competition model will be provided. This will be followed by a close examination of the Memoranda drafting procedure and the preparation for the Pre-Moots and Oral Rounds. Then, the issues raised by this year's Problem will be objectively and critically analysed. Finally, and to fully understand how helpful this experience is for law students who are about to start their professional careers, the competition's impact on each of the team members will also be examined.

It is important to note that, with the exception of the individual analysis of the issues highlighted by the Arbitral Tribunal, which were drafted independently according to each member's research conducted during the competition, this report was written collaboratively by the four members of the team.

The Willem C. Vis International Commercial Arbitration Moot

Moot courts are mockups of real court proceedings in which law students act as counsels of the parties in a simulated case created by law professionals. By participating, the students have the opportunity to develop and demonstrate their legal skills and knowledge. Usually, they are required: to analyze the simulated case; to conduct a legal research (in order to support their position); to draft written submissions; and lastly to prepare and present oral arguments before a mocked tribunal.

The **Willem C. Vis International Commercial Arbitration Moot** is a renowned international moot court competition that, as the name suggests, is centered on International Commercial Arbitration. Therefore, its main purpose, amongst others, is to "foster the study and practice of international commercial sales law and arbitration"[1]. The Vis Moot is organized by the Association for the Organization and Promotion of the Willem C. Vis International Arbitration Moot, whose president is Prof. Dr. Eric E. Bergsten, and it is directed by Prof. Dr. Christopher Kee, Prof. Dr. Stefan Kröll and Mag. Patrizia Netal.

This Competition gathers thousands of people in Vienna, including students, coaches, previous "mooties" and arbitrators. It is the largest moot competition on arbitration and the second largest moot in the world, bringing together every year almost 400 participating teams of various jurisdictions. In this year's edition, a total of **372 teams** took part in the oral arguments.

Before the oral rounds in Vienna, several **Pre-moots** (usually organized by universities, law firms and arbitration institutions) take place in many cities worldwide. The students have the opportunity to practice in a very similar environment to the one they will face in competition.

The **case** follows the same pattern every year. There is a dispute between companies located in different jurisdictions. The countries where the companies are based are always parties to the United Nations Convention on Contracts for the International Sale of Goods (CISG). The contract signed by the parties contains an Arbitration Agreement that establishes that the seat of arbitration will be Danubia, a fictitious country, signatory of the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") and a party to the Convention

[1] https://www.vismoot.org/

on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Moreover, the Agreement always refers to the application of the arbitral rules of co-sponsoring institutions of the Moot, which differ every year. This year, the rules of the Permanent Court of Arbitration (PCA) Rules applied.

Our experience

Our experience with the Vis Moot started even before the release of this year's case. Every year the best four students enrolled in the Master's course "Moot Courts" are given the opportunity to represent NOVA School of Law in next year's Willem C. Vis Moot. Thus, the problem of the 29th Willem C. Vis Moot was presented to the class and all of the students, organized in teams of 4, drafted a Memorandum for Claimant and pleaded in the oral rounds, being judged by experienced lawyers and arbitrators. From all of the class, Ana Moura Dias, Andréa Sousa, Carolina de Esmeriz Garcia and Inês Graça were the ones chosen by the team coaches, Ana Coimbra Trigo, Ana Sousa and Carolina Apolo Roque.

We were naturally very excited to be part of the team and to be able to take part in this once-in-a-lifetime experience. Even though the enthusiasm remained throughout the competition, the initial phase was quite complicated. We were still trying to understand the case and analyze all its details, having to study the legal issues in question and to conduct legal research in order to support our arguments. The argumentation had to be built from scratch, and sometimes we ended up realizing that what we thought was a strong and well-structured argument, turned out not to be the most reasonable approach. Writing is also not an easy process. So, even though we discussed the arguments as a team and with the coaches, this phase is lonelier and not as exciting. The oral phase of the competition, while equally challenging and laborious, is very rewarding. Preparing arguments that we know we will present to an audience that we must persuade is very stimulating. In addition, the interaction between the team and with new people increases exponentially at this stage, with the training sessions, the pre-moots and finally with the competition. As for the team, we went from being 4 colleagues to becoming 4 great friends.

Moreover, we felt that this was a very special year, since the Vis Moot commemorated its 30th anniversary and given that this year the competition was held in person again, after 3 years of taking place virtually.

Finally, having the opportunity to complete our master's degree by participating in the Vis Moot was definitely a motivating factor and has certainly enriched our journey. We realize that we have grown immensely professionally, having improved our legal skills and also personally, by experiencing new things and coming into contact with so many people and cultures. We are very

honoured to have been able to represent NOVA School of Law and we are very proud of our performance.

Memorandum for Claimant

The first step in drafting the Memorandum was to organize the work and divide tasks among the team members. Undoubtedly, the complexity of the issues presented by the Vis Moot Problem, along with time management and resource optimisation, are crucial factors to consider in this competition. With this in mind, we started by assigning each of the four issues that needed to be addressed to a team member.

Establishing a strategy was fundamental to make a clear division of tasks and, consequently, ensure greater effectiveness in writing the Memorandum. Additionally, by considering the personal preferences and expertise of each team member, we were able to allocate tasks in a way that motivated each individual and, at the same time, facilitated more thorough research on each specific subject, which ultimately resulted in an overall increase in the quality of the Memoranda.

In light of the above, Carolina Garcia dedicated herself to Issue A[2], Andréa Sousa to Issue B[3], Ana Dias to Issue C[4] and Inês Graça to Issue D[5].

In any case, we have consistently maintained involvement in each other's issues. This is because the problem at hand is interconnected, and it is crucial to have a comprehensive understanding of all aspects, including the procedural and substantive issues. Moreover, these issues are often interdependent, and it is imperative to avoid any contradictions or inconsistencies between them.

In addition to that decision, we ensured to hold team meetings at least once a week. These meetings served to share our progress, discuss ideas, address problems, and engage in critical analysis of our research.

At the beginning of this process, we encountered challenges in gathering relevant legal materials, including texts, jurisprudence, and books. However, our coaches provided invaluable assistance by offering valuable tips on conducting research effectively. Additionally, our coaches organized online sessions with invited guests to enhance our knowledge and skills. In the first session, we had the opportunity to learn about "*Legal research for the Vis Moot*" from Catarina Cerqueira,

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[2] *Does the Arbitral Tribunal have jurisdiction to hear the dispute?*

[3] *If the Tribunal's jurisdiction can be established should the proceedings be stayed until the investigations against Mr. Field have been concluded or, alternatively, bifurcated?*

[4] *Is the Purchase and Supply Agreement governed by the CISG?*

[5] *In case the Purchase and Supply Agreement is governed by the CISG, can Respondent rely on Art. 3.2.5 of the International Commercial Contract Act of Equatoriana to avoid the contract as stated in its letter of 30 May 2022 or is Claimant correct that this is excluded in light of the facts invoked?*

who participated in the Vis Moot in 2018 as a mootie and currently works as a paralegal at CMS Portugal. A couple weeks later, we were fortunate to have Anamaria Marin as our guest speaker for a session on "*Legal writing for the Vis Moot*". Anamaria is a Senior Associate at SLCG and also acts as a counsel in international commercial arbitration proceedings. Having the opportunity to learn from her expertise was definitely highly productive and beneficial for our team.

Following that, the research process became more efficient, and within a few weeks, we completed the initial draft of the arguments for the CLAIMANT's Memoranda. During this stage, we found it extremely helpful to establish internal deadlines to ensure timely completion of tasks. This strategy proved especially crucial as two of our team members were simultaneously working in law firms or associations, making time management a significant challenge.

Despite our weekly meetings, significant challenges arose when we attempted to merge the four drafts of the memorandum, since the diverse writing styles of each team member resulted in a lack of coherence throughout the Memoranda.

Consequently, we collectively invested our efforts into thoroughly reviewing the Memorandum, seeking to harmonise and standardise the writing style. This involved identifying and rectifying any mistakes, discussing our strategy, and rewriting the sections as necessary. Furthermore, we diligently ensured the absence of legal and logical inconsistencies among the different issues addressed.

Ultimately, our collective efforts proved fruitful when we successfully submitted CLAIMANT's Memorandum within the designated time frame, and as CLAIMANT, it was upheld that:

The Tribunal has jurisdiction to hear the case since the parties concluded a valid arbitration agreement (a); The arbitral proceedings should continue in all circumstances and not be stayed nor bifurcated (b); The CISG governs the PSA (c); and, finally, Respondent cannot rely on Art. 3.2.5 of the International Commercial Contract Act of Equatoriana to avoid the contract (d).

Memorandum for Respondent

Once we completed the Memorandum for Claimant, we took a moment to reflect on our previous process. Our objective was to identify any mistakes or inefficiencies and implement new solutions to avoid similar issues in the future. In particular, we realised that there were areas for improvement in our work methods and research approaches to enhance the writing process for Respondent's Memorandum.

Moreover, we introduced some changes, including improving communication and collaboration among team members, especially between those working on procedural issues and those handling the merits, to ensure a more cohesive Memorandum and facilitate a smooth transition to the oral phase. To achieve this goal, we organised separate meetings with our coaches, specifically focusing on the procedural or merits aspects of the case. These additional meetings were held in addition to our two regular weekly team meetings - one within the team and the other involving our coaches.

The abovementioned adjustments helped us during the drafting process for Respondent's Memoranda. However, representing Respondent posed new and distinct challenges. The most difficult aspect was presenting our case in opposition to the arguments put forth by our counterpart, Pennsylvania University.

This phase of the competition decidedly proved to be more demanding and challenging, as we needed to devise a strategy to counter and refute the opposing team's arguments. Ensuring a responsive approach was one of our primary concerns.

In this sense, we thoroughly reviewed and analysed their Claimant's Memorandum, which adopted a significantly different approach from ours. Through this revision, we observed that, particularly in the procedural issues, the opposing team occasionally emphasised non-contentious details within the dispute, which resulted in them overlooking crucial legal arguments. This provided us with an opportunity to effectively counter their arguments and introduce additional points they had missed. On the merits, their arguments were more structured and persuasive, requiring us to focus more on identifying the weaknesses in Claimant's position.

Therefore, as Respondent, it was upheld that: The Arbitral Tribunal does not have jurisdiction to hear the case (a); However, if the Tribunal decides that it has jurisdiction, it should stay or, alternatively, bifurcate the proceedings (b); The Purchase and Supply Agreement is governed by

the Equatorianian International Commercial Contract Act (c); and lastly, Respondent can rely on Art. 3.2.5 of the International Commercial Contract Act of Equatoriana to avoid the contract (d).

Pre-Moots and Training Sessions

One key phase of the Vis Moot journey of any team is the phase of preparation that precedes the oral rounds. In this phase, teams are able to test arguments, take note of what other teams are putting into practice and develop what will be their final speeches. For this, and for the overall success of the team, it is essential to enter into contact with other teams, through the participation in pre-moots and training sessions.

As it happened already in the last year, and given the pandemic is now completely overcome, the Nova School of Law team for the 30th Vis Moot had the opportunity to attend several in-person pre-moots. However, and as a result of the confinement felt for the past years, several online pre-moots were also available. Taking that into consideration, the team decided to apply to several virtual and in-person pre-moots and, according to their availability, ultimately chose four to participate in, three in-person and one online.

The first pre-moot attended by the team was the VIII AIA-CAM Pre-Moot, which was held in Rome between the 23rd and 24th of February 2023. In this pre-moot, our team ranked 8th place amongst 16 teams from all over Europe.

Two weeks later, the team travelled to Madrid, to participate in the VIII Madrid Vis Pre-Moot, which took place on the 2nd and 3rd of March. In this pre-moot the team ranked 1st place, and won the awards for Best Team and 1st and 2nd Best Oralists.

Just a few days after, on the 9th of March, the team participated in the II PCA Mauritius Pre-Moot, which was held online. Due to the difference between the time zones in Portugal and Mauritius, this pre-moot started at 6:30 am. This time factor in conjunction with some technical issues made this pre-moot the most challenging for the team.

Finally, from the 15th to the 17th of March, the team participated in the V Lisbon Vis Pre-Moot. After qualifying to the final rounds, the team ended the competition in the semi-final.

Throughout this phase of preparation, our team also scheduled several Training Sessions with teams from all over the world, such as Al-Nahrain University (Iraq), WU Wien (Austria), Universidad Nacional de Rosario (Argentina), Duke University (USA), University of Belgrade (Serbia), Universittá Cattolica Milano (Italy), University of South Carolina (USA), Faculdade Baiana de Direito (Brazil) and Faculdade de Direito da Universidade de Lisboa (Portugal).

By participating in the pre-moots and training sessions, the team was able to test arguments already developed and develop new ones, gain knowledge of the arguments that were being mostly used, train compliance with the formal rules of oral pleadings, and have a first contact with arbitrators and teams from different backgrounds.

Oral Rounds

The oral rounds, the final and only in-person stage of the competition, occurred from the 31st of March to the 6th of April, in Vienna. This year, which marked the 30th anniversary of the Vis Moot, was the first time the oral phase of the competition was held in-person in Vienna, since 2019, as the past three editions of the competition were held virtually due to the COVID-19 pandemic.

The first event of the 30th Vis Moot was the Opening Ceremony which took place at the Wiener Konzerthaus, on the evening of the 30th of March. The ceremony included speeches by the directors of the competition, Christopher Kee, Stefan Kroll, and Patrizia Netal, as well as several speakers, including Patricia Shaughnessy, Sherlin Tung, Marcin Czepelak, Friedrich Ruffler, José Angelo Estrella Faria, and Harry Flechtner. To mark the special occasion of the 30th anniversary of the Vis Moot, Her Excellency Dr. Vjosa Osmani, President of the Republic of Kosovo, who is a former *mootie*, was invited to speak.

The General Rounds of the final competition, the rounds where the goal is to accumulate as many point as possible in order to move to the final rounds, occurred from the 1st to the 5th of April, and our team had the opportunity to plead in these rounds 4 times, two as Claimant and two as Respondent.

Our first session took place on Saturday, the 1st of April, at 10:30am at Baker McKenzie's office in Vienna. Our team went up against the Pontifical Catholic University of Rio de Janeiro and the round was arbitrated by Mr. Nicolò Minella, Mrs. Iva Zothova and Professor Petra Butler. In this round, our team pleaded as Claimant with Carolina Garcia on the procedural issues and Inês Graça on the Merits.

Our second session happened that same day, at 4:30pm, and it was, again, Counsel for Claimant who pleaded. This session, which also took place at Baker McKenzie's office, was against Team 389 and was arbitrated by Ms. Rose Rameau, Mr. Artem Rodin and Mr. Pedro Bandeira. In terms of our opponents, this was the only session of the Vis Moot where we, exceptionally, did not know who they were. Firstly, we were supposed to go against an Iranian team, from the University of Isfahan, who, due to complications in getting their visa, were not able to travel to Vienna and take part in the competition. And then, the team that replaced our supposed opponents, Team 389, had numbers as its name and no university name disclosed, so we had no

way of knowing who they were. Finally, before the session, we were able to discover that the team was from the University of Moscow and that a number had been attributed to them because of the war and the fact that teams representing Russian universities were not allowed to compete under their university name. Another setback was the fact that, also due to the war, only one member of the team was able to get their visa and travel to Vienna, so another student, from a German team, had to volunteer to replace the missing oralist.

The third pleading took place on the 2nd of April at 4:30pm, at the Juridicum building. This session was against the team from the University of Pennsylvania and was arbitrated by Ms. Dimitra Tsakiri, Mr. Omair Bajwa and Professor Ulrich Schroeter. In this session, our team was Respondent, and so, it was Andréa Sousa and Ana Dias who spoke. Andréa Sousa was responsible to address the procedural issues and Ana Dias was responsible for the merits.

Our last round of the General Rounds was, again, pleaded by the Counsel for Respondent, on the 4th April at 10 am, at the Juridicum building, and was against Duke University. The Arbitrators for the session were Ms. Débora Fiszman, Ms. Karoline MeyerRavenstein and Mr. Jeffrey Elkinson. This was an atypical session, since we had done, prior to the General Rounds, a training session with the team from Duke University, and it is normally not advised for a team to do a training session with the teams they will plead against on the Vis Moot. However, our opponent for this round was replaced at the last minute, and Duke took its place.

On that same day, at 6pm, was the Announcing Ceremony, where the teams moving on to the final rounds would be announced. The members of all 378 teams were reunited at the big auditorium of the Austria Center in the hopes of hearing their university name being called. Luckily, we heard “Nova University of Lisbon" being called and our team went through to the Round of 64.

Our session of the Round of 64, which was our last session in the Vis Moot, was pleaded by our Counsel for Respondent, Ana and Andréa, on the 5th April at 8:30am. Our team went up against the team from Singapore Management University, which is one of the universities with the best track record in the Vis Moot. In the end, and rightfully so, they were the team chosen to move on to the Round of 32.

The team finished the competition by ranking 33rd and was awarded with the APA – Associação Portuguesa de Arbitragem Prize for best Portuguese Team in the competition.

We are very happy with our performance and, although we would have liked to go even further in the competition, we did our very best and are proud of our achievements.

The Problem

The Problem of the 30th Willem C. International Commercial Arbitration Vis Moot edition, released on October 7th, 2022, emerges linked to a contract for the purchase and supply of Unmanned Aerial Systems (UAS) ("Agreement").

The contracting parties are Drone Eye, the seller, and Equatoriana Geoscience, the buyer.

The dispute concerns the following companies:

Drone Eye ("CLAIMANT"), is a medium-sized producer of Unmanned Aerial Systems based in Mediterraneo. Its systems are also referred to as "drones" and are mainly used for geo-science exploration. Claimant has an annual output of around 5 drones per year.

Equatoriana Geoscience ("RESPONDENT"), is a private company entirely owned by the Ministry of Natural Resources and Development of Equatoriana ("MND"). It was set up in 2016 when the socialist government announced its "Northern Part Development Program" ("NP Development Program").

To better understand the case, it is necessary to give context as to why this dispute occurred.

The north region of Equatoriana is the least developed area. And this is because it is a thickly forested mountain region which is sparsely populated and lacks a well-developed infrastructure. However, it is believed to be a region rich in various minerals and also other natural resources.

Therefore, one of Respondent's main objectives was to find a way to use the resources that this area has to offer, as well as to develop the infrastructures present there.

In March 2020, Respondent opened a tender process in connection with the NP Development Program, originally for the delivery of 4 drones primarily for earth surveillance and exploration purposes.

Claimant submitted a successful bid and was selected to enter into further negotiations with Respondent.

As a result of the e insolvency of another customer which had led to the cancellation of a partly paid order, Claimant was to deliver the first 3 drones in a short period of time but also with a favourable price.

The parties entered into a Purchase and Supply Agreement ("Agreement") for the sale of 6 of Claimant's Kestrel Eye 2010 drones.

In light of that, on 1 December 2020, the Agreement was signed by Claimant´s CEO, Mr. William Cremer, Respondent's CEO, Ms. Wilhelmina Queen, and Equatoriana's then Minister of Natural Resources and Development, Mr. Rodrigo Barbosa at a formal ceremony.

The Agreement provided for the delivery of 6 Kestrel Eye 2010 drones in 2022 for an overall price of EUR 44 million with an additional service and maintenance element for four years. An instalment of the purchase price in the amount of EUR 10 million had to be paid two weeks after signing and the delivery of the first three drones was to occur in January 2022.

Respondent made the advanced payment so that Claimant could acquire the material for the first drones.

At the time of contracting, Claimant had approximately 3 largely finished Kestrel Eye 2010 drones in stock. The Kestrel Eye 2010 drones are characterized by having more than six meters long and can carry a load of up to 245 kg. Its helicopter-like design allows maximum flexibility when it operates in remote territory. The communication link via radio which limits operations to line-of-sight flights, which is entirely sufficient for the purposes of Respondent.

In February 2021, Claimant released its newest drone model, the Hawk Eye 2020, at the air show held in Mediterraneo. This drone model was based on a different technology and is considerably larger than the Kestrel Eye 2010. Its new features make it possible to have a wider reach and greater payload than the Kestrel Eye 2010 but calls for a small airfield to start and land the drone. The Hawk Eye 2020 had been under development for the past three years, after the acquisition of Drone-Aircraft in 2017, an insolvent UAV manufacturer which had been active in that type of aircraft-like technology.

As one would expect, the market launch of this new model gave rise to a discussion between the parties which has lasted since March 2021.

On one side, Respondent accused Claimant of not informing about the new drone and alternatively sold an outdated drone model and therefore threatened to terminate the Agreement.

From Claimant's point of view these discussions represented an attempt to keep the Agreement and find a solution so that both parties were satisfied. Especially since Respondent asked to amend the arbitration clause at the end of May 2021.

The Citizen, Equatoriana's well-known investigative journal, and which is possessed by the leader of the Liberal Party, on the 3rd of July 2021, began to print headline articles around an enormous corruption arrangement around the NP Development Program and various high-profile

members of the ruling Socialist Party. Due to this scandal, the socialist Prime Minister was forced to resign and call for early elections on the 3rd of December 2021. A new government was elected and was formed by a coalition of assorted parties and the Liberal Party.

The new government opted to take the decision to declare a moratorium on all contracts concluded within the NP Development Program or that could be related to it.

And thus, Respondent sent an email to Claimant, on the 27 of December 2021 to inform that the Agreement was put on hold until further notice.

Claimant gathered with Respondent's representatives to try to find a resolution for this inconvenience but it was apparent that the new government no longer wanted to buy the drones as a result of a political change.

Respondent argued that the Agreement was void since it was a product of corruption and tainted by Claimant's misrepresentation of the characteristics of the drones.

Further, Respondent refused any obligation to have disputes arising in connection with the Agreement resolved by arbitration by invoking a provision in the Constitution of Equatoriana which stated that a state and state-owned entities can only submit to arbitration if they have the approval of the Parliament. In this case it did not exist, since the Minister of Natural Resources never signed the Agreement.

It was a complete surprise to Claimant when Respondent terminated the Agreement in May 2022.

In view of the facts described above, the teams were requested to address, both in their memorandum and oral arguments, the following questions:

A. Does the Arbitral Tribunal have jurisdiction to hear the dispute?
B. If the Tribunal's jurisdiction can be established should the proceedings be stayed until the investigations against Mr. Field have been concluded or, alternatively, bifurcated?
C. Is the Purchase and Supply Agreement governed by the CISG?
D. In case the Purchase and Supply Agreement is governed by the CISG, can Respondent rely on Art. 3.2.5 of the International Commercial Contract Act of Equatoriana to avoid the contract as stated in its letter of 30 May 2022 or is Claimant correct that this is excluded in light of the facts invoked?

The teams were free to select the order in which they address the various issues.

However, in the present case the challenge of the Tribunal's jurisdiction as well as the request for a stay or a bifurcation make it advisable to deal with the procedural questions first before addressing the two more abstract legal questions concerning the merits.

Issue A: The first issue regards, as usual in the Vis Moot, the jurisdiction of the arbitral tribunal, which is being challenged by Respondent. On this topic, and since the source of the Tribunal's jurisdiction is the AA, the Parties had to analyze the underlying issues that were susceptible to making the AA invalid. Therefore, under issue A, the Parties explore the alleged corruption affecting the PSA, and its effect on the AA, and whether or not the lack of parliamentary approval, foreseen in art.75 of Equatoriana's constitution, can be invoked.

Issue B: This year's competition discusses a new subject in its second procedural issue: the possibility of a stay or, alternatively, a bifurcation of the proceedings, which has been requested by Respondent in the event that the Tribunal assumes jurisdiction over this dispute. In addressing this matter, the parties were required to analyse the factors that would justify or oppose a stay or bifurcation of the proceedings. These considerations included discussing, among other factors, the potential impact of the ongoing criminal investigations taking place in Equatoriana on the arbitral proceedings, as well as assessing the balance of interests and rights of both parties.

Issue C: The first issue of the substantive part of the case regards the applicability of the CISG to the PSA, which is being challenged by Respondent. On this subject, the Parties were expected to mainly elaborate on the exclusion provided by Art.2(e) CISG, specifically the exclusion of aircrafts from the scope of application of the CISG. As mentioned above, the Parties' PSA regarded the sale of drones. The applicability of the CISG depends on whether or not these drones are considered aircrafts for the purpose of the CISG. If it is concluded that they are not aircrafts, then the CISG governs the PSA and vice versa. This issue also covers applicability through Art. 1 CISG and the possibility of exclusion by means of Art.6 CISG, although this is not the central debate of Issue C.

Issue D: This underlying issue is related to Respondent's possibility to terminate the Agreement giving as a reason the misrepresentation of the quality of the Kestrel Eye 2010 drone, which is in principle a question connected to the validity of the contract. According to Article 4 (a) CISG, the CISG does not regulate issues of validity and instead these have to be governed by the national law. Claimant argues that Article 35 CISG is applicable since this is a question of conformity of the goods, governed by the CISG, excluding the application of the national law.

The point of question to be discussed here is whether this is an issue associated with misrepresentation and thus applied Article 3.2.5 ICCA or a question concerned to the conformity of the goods, and Article 35 CISG would be applied and possibly Article 39 CISG.

Procedural Issues

ISSUE A - Does the Arbitral Tribunal have jurisdiction to hear the case?

Carolina de Esmeriz Garcia

Introduction

The first disagreement between the Parties is on the jurisdiction of the Arbitral Tribunal.

The Parties' representants signed a contract, the PSA, which contained, in its article 20, a dispute resolution clause that stated that "*(a)ny dispute, controversy or claim arising out of or in relation to this agreement (...) shall be settled by arbitration (...)*". Therefore, Claimant initiated the arbitral proceedings on the basis of such clause, an arbitration agreement, since in its view such agreement was validly concluded under the requirements prescribed by the law of Danubia, the seat of arbitration, and since the AA is not susceptible to be infected by the PSA's alleged invalidity. On the other hand, Respondent challenges the jurisdiction of the Arbitral Tribunal on the grounds that the AA is invalid due to the PSA's invalidity and because the AA does not meet a requirement that is obligatory in Equatoriana's law, the parliamentary approval.

In this sense, in order to efficiently analyze the issue at hand, it is important to discuss the following two main topics:

- The possibility that the underlying PSA was concluded through corruption and, consequently, the possibility of the AA being affected by said corruption.
- The lack of parliamentary approval and its effects on the validity of the AA.

Under the first topic, it is necessary to address the Doctrine of Separability and (in)existence of evidence regarding corruption. In regards to the second topic, the law applicable to the AA, the classification or not of the PSA as administrative contract and whether Respondent can invoke the lack of parliamentary approval to invalidate the AA shall be addressed.

1. Corruption

As already demonstrated, the PSA was concluded between Claimant, a private foreign company, and Respondent, a state-owned company of Equatoriana, created by the socialist government as part of the Northern Part Development Program. This governmental program, and all contracts concluded through it, were never well accepted by the other political parties, as they believed the

program only served the socialist party's interests. Therefore, after The Citizen began to uncover the enormous corruption scheme involving the NP Development Program and various high-profile members of the Socialist Party, including Respondent's former COO, Mr. Field, contracts concluded within the framework of the program started being investigated.

Consequently, and after the new government was ruling, Respondent raised concerns about the parties' PSA, arguing there was a high probability that the contract was concluded through corruption. In Respondent's view, the corruption affecting the PSA would make the whole contract invalid, including the PSA.[6] On the contrary, for Claimant, corruption was not a concern and any invalidity affecting the PSA would not invalidate the AA.

1.1 Doctrine of Separability

The Doctrine of Separability is a generally accepted doctrine, a "cornerstone" of international arbitration, that applies the presumption that the arbitration agreement is separate from the commercial contract within which it is found.[7] [8] The application of the Separability Doctrine enables the potential legality of an AA, regardless of the non-existence, illegality or invalidity of the underlying contract.[9] This doctrine emerged in order to address the practical impediment to arbitration of disputes when one party, in this case Respondent, challenges the overall validity of the contract.[10]

The AA concluded between the Parties in the case at hand is a clause within the PSA, more specifically in its article 20. However, according to the Doctrine of Separability, the AA would presumably be separate from the PSA, meaning their validities would also be independent from each other.

a. Claimant's position- the AA and the PSA are separate

[6] *The Problem, Ex. C8, p.20, para.4; p.27, para. 1; p.30,* ¶ 3

[7] *Gary Born, Chapter 3: International Arbitration Agreements and Separability Presumption, International Commercial Arbitration, 3rd edition, Kluwer International Law (2022), p.1*

[8] *Klára Drlicková, Cofola International 2018 Conference Proceedings, Acta Universitatis Brunensis Iuridica, Editio Scientia, Volume 633 (2018) pp.26-27*

[9] *Ilijana Todorovic, A closer look at the Doctrine of Separability in Arbitration, IUS Law Journal, Vol.1, No.1 (2022) p.7*

[10] *Gary Born, International Commercial Arbitration, op.cit., p.1*

It was in Claimant's interest to argue that the AA was valid, despite a possible invalidity of the underlying PSA, because only that way could it convince the arbitral tribunal of its own jurisdiction. Thus, it was necessary for Claimant to demonstrate the existence and applicability of the doctrine of separability.

For this, Claimant wants the Tribunal to know that it is very common, when a foreign contractor initiates arbitration against a state-owned company, for the state-owned company to raise objections alleging that corruption taints the whole contract and should be declared null and void[11], which is exactly what happens in the present case, as Respondent uses this weapon to try to dismiss Claimant's claim.

With these statistics in the Tribunal's mind, Claimant argues that, even though the Parties' AA is included in the PSA as a clause, it must be considered by the Tribunal as a separate contract, whose validity is not dependent on the underlying Agreement's validity.[12]

Claimant even adds that the *lex arbitri*, in this case the law of the seat, Danubian Law, recognizes the presumptive separability of the parties' AA, by foreseeing that the arbitration clause shall be treated as an agreement independent of the other terms of the contract and providing that the invalidity of the underlying contract does not invalidate the arbitration clause.

By exposing these data, Claimant leads the Tribunal to the conclusion that, since nullity of the main contract cannot imply the nullity of the AA, such scenario seems to be possible when a main contract is tainted by corruption[13], meaning the validity of an AA cannot be contested on the ground that the main contract is null and void on the ground of a violation of good moral and public policy[14] [15], as the separability presumption retains its full vigour even where corruption taints the underlying contract.[16]

Thus, for Claimant, even if the PSA is tainted by corruption, and is declared null and void, that invalidity would not affect the validity of the AA, and so the Tribunal shall confirm its jurisdiction, as it happens in most instances where there is alleged corruption.

Claimant's argument is easier to make, since the Doctrine of Separability is so ingrained in international arbitration. The members of the Tribunal most likely already agree with this

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[11] *Inan Uluc, Corruption in International Arbitration, Wildy, Simmonds and Hill Publishing (2018) p.1 and 6*
[12] *See supra notes 3, 4 and 5*
[13] *Supra note 4, p.31*
[14] *ICC Case No. 6248, 1990*
[15] *ICC Case No. 5943, 1990*
[16] *Kevin Lim and Michael Hwang, "Corruption in Arbitration- Law and Reality", Asian International Arbitration Journal (2012) p.43*

doctrine, as it is one of the main principles of arbitration, so it is probable that they accept this argument.

b. Respondent's position- the PSA's invalidity affects the AA

Contrary to Claimant, Respondent wants to undermine the Tribunal's jurisdiction, as a lawsuit in the national courts of Equatoriana would be more favourable for its interests. The first step Respondent has to take, and a difficult one at that, is to disprove the Doctrine of Separability. Thus, as Counsel for Respondent, while recognizing the existence and importance of such doctrine, one has to convince the Tribunal that it is not applicable to the case at hand.

Respondent would argue that said doctrine does not invariably apply in all cases, emphasising the fact that, according to authors like Uluc, in specific sets of circumstances the doctrine of separability shall be disregarded.[17]

Theories brought by Born and sustained by case law, clarify that there is only a mere presumption of separability of the AA, which suggests that it can be rebutted in specific cases[18], for instance "where parties otherwise intend"[19], in other exceptional circumstances[20], and when there are defects that "go to the root" of the underlying agreement[21] [22] [23].

Another very useful argument for Respondent is the fact that both Equatorianian and Mediterranean national arbitration laws, which are a verbatim adoption of the Model Law[24], enhance the propensity to rebut the separability presumption, as art.16(1) of the Model Law states "*a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*"[25]. Consequently, Respondent argues that these laws

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[17] *Inan Uluc, Corruption in International Arbitration, op.cit., p.23*
[18] *Gary Born, International Commercial Arbitration, 3rd edition, Kluwer International Law (2022), pp.398-399*
[19] *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 12 June 1967, U.S. Supreme Court*
[20] *Société Gosset v. Société Carapelli, 7 May 1963, Cour de Cassation*
[21] *See supra note 14, pp.404 and 409*
[22] *Weixia Gu, "China's search for complete separability of the Arbitral Agreement", Asian International Arbitration Journal and Kluwer Law International, Vol. 3, Issue 2 (2007) p.163*
[23] *Westinghouse and Burns & Roe v. National Power Company and the Rep. of the Philippines, 19 September 1991, ICC*
[24] *The Problem, PO1, p.52*
[25] *UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration, art.16(1)*

simply state that the invalidity of the underlying contract does not entail *ipso jure*[26] the invalidity of the parties' AA, leaving open the hypothesis that it might happen.

According to authors, such as Uluc, one of the exceptional circumstances that deem the presumption of separability not applicable is when corruption infects the underlying contract[27]. In fact, several arbitral tribunals have suggested a limitation of the separability presumption in cases involving corruption of great magnitude[28], because "*if the nature of the controversy is such that the main contract (...) was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void*"[29] [30]

Using these arguments, Respondent has the objective of leading the Tribunal to the conclusion that, in the case at hand, where the PSA was procured through bribes paid by Claimant's COO to Respondent's COO and fraudulent representation of the drones by Claimant, in the midst of one of the biggest corruption schemes ever seen in Equatoriana, the AA is exceptionally not separate from the PSA and is, consequently, infected by its invalidity.

1.2 Existence of evidence of corruption

In the present case, the only reason Respondent uses to claim the invalidity of the AA, and consequent lack of jurisdiction of the court, is the existence of corruption in the origin of the PSA. The Parties are only discussing the validity of the AA, because Respondent insists the PSA was procured by corruption and was void from the beginning and that Claimant is benefitting from an unduly favourable contract[31], which, as previously analyzed, would, in Respondent's opinion lead to the invalidity of the AA.

Therefore, it is in the interest of the Parties to plead on the (in)existence of said corruption: Claimant has to convince the Tribunal of the unlikelihood of corruption and Respondent has to convince them of the contrary.

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[26] *Ipso jure means by the automatic effect of the law.*
[27] *Inan Uluc, Corruption in International Arbitration, op.cit, p.116*
[28] *India Household and Healthcare Ltd. v. Lg Household and Healthcare Ltd., 8 March 2007, Supreme Court of India*
[29] *Mulheim Pipecoatings Gmbh v. Welspun Fintrade Ltd. & Anr, 16 August 2013, Bombay High Court*
[30] *Elf Aquitaine Iran v. National Iranian Oil Company, 14 January 1982, Ad Hoc*
[31] *The Problem, Ex. C8, p.20, para.20 and p.27, ¶1*

a. Claimant's position- Respondent has not provided evidence of corruption

As Counsel for Claimant, one has to take advantage of the fact that Respondent has no physical and direct evidence to support its corruption allegations, basing all of its accusations in illicit evidence, rumors and probabilities.

Claimant must convince the Tribunal that Respondent's accusations alone do not suffice, and supports its position in cases that state that "*such grave accusations must be proven (...)*[, as] *rumours or innuendos will not do*"[32].

For this, Claimant centers its argumentation on the established international standard that the seriousness of the accusation of corruption demands "clear and convincing evidence".[33] [34] [35] [36]

At the oral rounds, arbitrators from civil law jurisdictions would sometimes get confused when hearing this type of standard of proof, making it necessary to clarify. The clear and convincing evidence is a medium level burden of proof, higher than the standard used in a simple civil trial and lower than the standard used for more serious criminal cases.[37] Clear and convincing means that the evidence is substantially more likely to be true than untrue.

With this argumentation, as Counsel for Claimant we want to make the Tribunal conclude that, in fact, the seriousness of Respondent's accusations require more demanding proof than what has been provided by Respondent.

In sum, since it is Respondent who has the burden of proving the existence of corruption[38] [39], and given that it provided no evidence supporting that claim, the Tribunal has to disregard the allegations.

b. Respondent's position- there is enough evidence of corruption

[32] *Himpurna California Energy v. PT (Persero) Perusahaan Listruik Negara, 4 May 1999, Ad Hoc*
[33] *EDF (Services) Limited v. Republic of Romania, 8 October 2009, ICSID*
[34] *Dadras International and Per-Am Construction Corporation v. The Islamic Republic of Iran and Tehran Redevelopment Company, 7 November 1995, Iran-US Claims Tribunal*
[35] *Aryeh v The Islamic Republic of Iran, 25 September 1997, Iran-US Claims Tribunal*
[36] *African Holding Company of America Inc and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo, 29 July 2008, ICSID*
[37] *Legal Information Institute, Cornell Law School*
[38] *Permanent Court of Arbitration Rules, art.21*
[39] *Metal-Tech Ltd v Uzbekistan, 4 October 2014, ICSID*

Respondent's position was not explored as deeply, as that topic was not raised in Respondent's memorandum. However, in the oral rounds, Counsel for Respondent usually uphold the "red flags" standard and tries to convince the Tribunal that, as corruption is a very difficult crime to prove, a lower standard of proof should be allowed, relying on the existence of indicia or 'red flags' of corruption, rather than direct evidence, when evaluating whether a contract has been obtained through corruption.

2. Lack of Parliamentary Approval

Another central issue of The Problem, regarding the validity of the AA and jurisdiction of the Tribunal, is the failure to meet the constitutional requirement of parliamentary approval of the AA.

Article 75 of Equatoriana's constitution foresees a special regime for administrative contracts. It provides that "*in contracts relating to public works or other contracts concluded for administrative purposes the State of Equatoriana or its entities may submit to arbitration only with consent of the respective minister. If the other party is a foreign entity or the arbitration is seated in a different state Parliament has to consent to this submission*", meaning "*State and State-Owned Entities can only submit to foreign seated arbitration or litigation in "administrative contracts" if there has been authorization by Parliament*".[40]

The fact is that the PSA celebrated by the Parties was not object of any approval by the Parliament, so this raises a question both Parties will inevitably need to answer: is article 75 applicable?

The PSA was concluded by a state owned-company and has been submitted to foreign seated arbitration. In this sense, there were some topics worth exploring by the Parties:

- The law applicable to the AA;
- Whether the PSA qualifies as an administrative contract;
- Good faith.

2.1 Law applicable to the AA

[40] *The Problem, p.30, ¶21*

As already mentioned, arbitration between the parties is based on the arbitration clause found in art.20 of the PSA. However, although this clause refers to the law governing the main contract, the law of Equatoriana, there is no choice of law applicable to the AA.

The issue of the law applicable to the AA, especially when these are in the form of an arbitration clause, is a very controversial topic and one of the most explored in international arbitration. It is no coincidence that, almost every year, this issue is the subject of analysis in the Vis Moot Problem. Since in international arbitration several legal systems come into contact with the arbitration process, the question of which law governs the AA is essential, because, depending on the applicable law, the arbitration may or may not be viable and, if so, its results may be different.

In the case under analysis, 3 laws are in contact with the arbitration, and two of them, that of the seat of arbitration, Danubia, and that of the place where the PSA is being put into practice, Equatoriana, are the ones with the closest connection, being the two candidates for applicable law.

Unsurprisingly, each Party wants a different law to apply. Claimant wants the law that validates the AA to apply, and Respondent wants its national law to apply, the one that invalidates the AA and favors the national courts.

a. Claimant´s position- Danubian law is applicable

Since it is Equatoriana's law that provides for the requirement of parliamentary approval, it is in Claimant's interest to rule out the application of this law, because if the law does not apply the requirement, also, does not apply.

Therefore, as Counsel for Claimant, one has to argue that the Parties did not intend the law of Equatoriana to apply. Claimant argues that, even though there is no choice as to the law applicable to the AA, there still is another choice that implies the parties' will: the choice of the seat of arbitration, Danubia.

In Claimant's position, when deciding the seat of arbitration, the parties made an implicit choice on the law applicable to the AA.[41] [42]

[41] *Alan Redfern, Martin Hunter et. al., Chapter 3, Redfern and Hunter on International Arbitration, 6th edition (2015), p.3*

[42] *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb, 9 October 2020, England Supreme Court*

The seat theory is generally understood to be an authoritative conflict rule to determine the proper law of the AA, when there is no explicit choice.[43] [44] [45] That argument is an easy one to make, since many authors recognize that the law of the seat is applicable to the place where the award will be rendered, and determines the validity of the AA, the arbitrability of the dispute and the jurisdiction[46]. Because of this, Claimant argues that according to Danubian law, which follows the Model Law, the law applicable to each arbitration should be that of the place where that arbitration takes place, and the selection of a particular seat of arbitration results in the arbitration being conducted in accordance with that jurisdiction's legal framework.[47] [48]

With this argumentation, Counsel for Claimant wishes to convince the Tribunal that, since Danubian law does not require parliamentary approval[49], that this requirement should not apply.

In the oral rounds, and since this is the majority view, the only questions made by arbitrators was regarding the Sulamerica case[50], that advocates for the applicability of the law of the contract. This question was easy to answer in favor of Claimant, since, at the end, the Tribunal in that case decided to apply the law of the seat, as the law of the contract would make the AA invalid.

b. Respondent's position- Equatoriana law is applicable

Unlike Claimant, Respondent has an interest in the application of Equatoriana law, as this would render the AA invalid, due to the absence of parliamentary approval.

Therefore, as Counsel for Respondent, one has to demonstrate that the validity of the AA is not governed by the law of the seat, Danubian law, as the Parties never agreed that that would be the law applicable to the AA.

As Respondent, one has to take advantage of the only choice of law made by the Parties, the choice of law clause that states that the PSA is governed by the law of Equatoriana[51]. For that,

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[43] Maxi Scherer and Ole Jensen, "Towards a harmonized theory of the law governing the arbitration agreement", Indian Journal of Arbitration, Vol.10, Issue 1 (2021), p.5

[44] Gary Born, International Commercial Arbitration, op. cit., p.528

[45] Alan Redfern, Martin Hunter et. al., Redfern and Hunter on International Arbitration, op. cit., p.173

[46] Alastair Henderson, "Lex Arbitri, Procedural Law and Seat of Arbitration- Unravelling the Laws of the Arbitration Process", Singapore Academy of Law Journal, Vol.26 (2014) p.887

[47] See above citation, p.890

[48] UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration, art.1 (2)

[49] The Problem, PO2, p.48, ¶¶ 32 and 33

[50] Sulamerica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A., 16 May 2012, U.S. Court of Appeal

[51] The Problem, p.12, art.20

Respondent has to suggest that the Tribunal makes use of the increasingly recognised, by authors and case law, "three step test"[52] [53]. Under this test, if there is no explicit choice of the law applicable to the AA, the TRIBUNAL shall consider the implicit choice of the Parties, and if even an implicit choice does not exist, the TRIBUNAL shall consider the law bearing the closest connection to the arbitration agreement.[54]

Respondent can even make use of the law proposed by Claimant, the law of Danubia, and demonstrate that under that law the AA shall be governed by the Parties' implied choice of lawm the law of Equatoriana[55]. Respondent argues that when entering into a contract, businesspersons likely expect that the law they choose to govern their contract will also apply to the AA contained therein.[56] [57] Consequently, Respondent tries to convince the Tribunal that, by choosing the law for the PSA, the Parties agreed on Equatorianian law as governing the AA as well.

This line of argumentation is much more difficult to make than Claimant's. In the oral rounds, when Respondent's Counsel would use this argument, arbitrators would always refute it and, sometimes, even be outraged by it. That is because this argument goes against the doctrine of separability analyzed above, since, according to Respondent, the Parties would mean to treat the PSA and AA as a single contract.

Since this was a fragile argument, Counsel for Respondent would need to have a subsidiary argument, to further convince the Tribunal in case the first one was not well received. Thus, even if the Tribunal would not agree that the Parties impliedly chose the law of Equatoriana to apply to their AA, the law of Equatoriana, as Respondent's personal law, would still apply on the matter of the AA's validity, as there is an issue relating to its capacity to enter into an AA[58], as the constitutional requirement of parliamentary approval is not fulfilled.

Respondent argues that States and SOEs may be constrained by national constitutional or legislative provisions that restrict their capacity to enter into AAs.[59] If the domestic law requires an SOE to obtain parliamentary approval before entering into an AA and that approval is not

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[52] First Link Investments Corp Ltd v. GT Payment Pte Ltd and others, 19 June 2014, Singapore High Court
[53] Sulamerica case, cit.
[54] Neil Kaplan and Michael Moser, Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles, Wolters Kluwer (2018) ¶¶134-135
[55] Model Law, arts. 34(2)(a)(i) and 36(1)(a)(i)
[56] Adrien Briggs, Agreements on Jurisdiction and Choice of Law, 1st Edition (2008) p.1007
[57] Sonatrach Petroleum Corporation v. Ferrell International Ltd, 2001, UK High Court Commercial Court Division
[58] Neeraj Grover, "Dilemma of the Proper Law of the Arbitration Agreement: An Approach towards Unification of Applicable Laws", Singapore Law Review, Vol.32 (2014) p.248
[59] Tai-heng Cheng and Ivo Entchev, "State Incapacity and Sovereign Immunity in International Arbitration", Singapore Academy of Law Journal, Vol.26 (2014) p.944

observed, then the SOE will lack capacity to enter the AA.[60] Consequently, that may warrant application to the AA of the party's personal law irrespective of what the parties chose, as the parties' personal laws may override their choice of law when the question of their capacity to arbitrate is concerned.[61] [62] [63]

In the present case, according to Respondent's interpretation of the law, the constitutional provision in force in Equatoriana restricts its capacity to enter into the AA, as it requires the parliament's approval. As the required parliamentary approval was never given, Respondent wants to convince the Tribunal that it lacks capacity to execute such AA, and its personal law, the law of Equatoriana, will have to be applied.

This argument was also not very well received, as most arbitrators considered that the capacity of Respondent was not in question, and the requirement of parliamentary approval was just an additional requirement.

2.2 Classification as administrative contract

Another argument that the parties can explore, which The Problem seems to encourage, is the classification of the PSA as an "administrative contract," that is, as a contract "*relating to public works or other contracts concluded for administrative purposes*"[64], since the constitutional requirement of parliamentary approval only applies to this type of contract.

Thus, Claimant uses this argument as a subsidiary one, in case the court finds that Equatorianian law applies to the AA, because even if this law applies if the PSA is a non-administrative contract, then the parliamentary approval requirement will not apply. Respondent, in turn, uses this argument as a way to confirm that the constitutional requirement actually applies.

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[60] *Latham and Watkins, Guide to International Arbitration, p.22*

[61] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), art.V(1)(a)*

[62] *Neeraj Grover, "Dilemma of the Proper Law of the Arbitration Agreement: An Approach towards Unification of Applicable Laws", op. cit., p.248*

[63] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina, 2000, ICSID*

[64] *The Problem, p.30, ¶21*

This is a matter for the Parties to convince the Tribunal, since Equatorianian law does not provide any definition for administrative contract, making only a small mention in its jurisprudence to contracts "for the actual construction of infrastructure"[65].

a. Claimant's position- the PSA is not an administrative contract

As Claimant's counsel, one has to take advantage of the fact that Equatoriana's law has no established definition contract and that the case law covers only cases for the actual construction of infrastructure, trying to convince the Tribunal that Respondent has no justification for wanting art,75 of its Constitution to apply.

For that, Claimant has to make use of international law and case law. In international law, an international administrative contract has been defined as "[*a]n agreement held by the administrative party on one hand, and an ordinary or juridical foreign person on the other hand. Its aim is to transfer the economic and financial values across the boundaries in order to establish permanent facilities or massive investments in any of the public utilities. This agreement includes exceptional terms that are unfamiliar in the private law*"[66]. Moreover, arbitral tribunals have understood that administrative contracts in general must fulfill three elements: one of the parties must be a public authority, the object of the contract must prosecute public utility, and the contract must contain exceptional or highly unusual clauses that are not found in civil contracts.[67] [68] [69] The object of the administrative contract is the enhancement of public domain goods, provision of public services or the execution of public works, through contracts such as concessions of public services, execution of public construction and assembly works.[70] Administrative contracts are not related to ordinary transactions as sale or lease.[71]Also, the authority party would be in a position of superiority and unlike normal commercial contracts,

[65] *The Problem, PO2, p.47, ¶29*
[66] *Chenoy Ceil, Arbitration in Administrative Contracts and Saudi Government (2015) p.7*
[67] *Malicorp Limited v. Arab Republic of Egypt, 7 February 2011, ICSID*
[68] *Mohamed Abdulmohsen Al-Kharafi & Sons Co v. Libya and others, 22 March 2013, Ad Hoc Arbitration*
[69] *Huntington Ingalls Incorporated v. The Ministry Of Defense Of The Bolivarian Republic Of Venezuela, 19 February 2018, Ad Hoc Arbitration*
[70] *Adriana Sandu and Maria Pagarin, Study on Administrative Contracts, in Contemporary Readings in Law and Social Justice (2012) p.905*
[71] *Malicorp Limited v. Arab Republic of Egypt, cit.*

the administrative contract would include clauses conferring privileges to the authority party that are not conferred to the other party, for example directive and surveillance powers.[72]

With this information, Counsel for Claimant made four points: first, that the PSA was a mere commercial contract for the sale of drones; second, that the Parties are not in a position of inequality; third, that the PSA is just a preparatory contract; and fourth, and pushing a bit further, that Respondent, in the PSA, is a private company and not a public party.

Claimant argues that although the PSA was concluded with Respondent, a state owned company, owned by the Ministry of Natural Resources and Development of Equatoriana, the object of the contract is not the creation, development or maintenance of public utilities, as the object of the PSA is the mere sale of drones. In fact, according to Equatorianian arbitration law, the term "commercial" shall cover matters arising from all relationships of a commercial nature, which include "any trade transaction for the supply or exchange of goods"[73], so Equatorianian arbitration law determines that the PSA, which involves a trade transaction, should be considered a commercial contract as opposed to anything else.

Additionally, Claimant argues that the Parties in the PSA are not in a position of inequality, as the contract does not include unusually favorable clauses giving powers to Respondent.

One of the counter arguments used by most Counsels for Respondent, and a question made by many arbitrators, was that the drones were bought by Respondent to collect data on the northern part of Equatoriana, to then develop that area and eventually construct infrastructure. An easy answer for Counsel for Claimant to use would be exactly the fact that all of those objectives were eventual and not directly related to the PSA, which would make the PSA a preparatory contract and the law of Equatoriana does not foresee these contracts as administrative contracts.[74]

Finally, the last and perhaps the hardest argument to make was that Respondent was acting as a private party when concluding the PSA. Claimant took advantage of the fact that there was no public financing involved, as the drones were bought with Respondent's own revenue, which Respondent has been generating through the sale of data to other private companies, since 2019.[75] These drones would probably only serve to collect data, which would then be sold to

[72] *Adriana Sandu and Maria Pagarin, Study on Administrative Contracts, op.cit., pp.904 and 908*
[73] *Model Law, art.1(1),2*
[74] *The Problem, PO2, p.47, ¶29*
[75] *The Problem, PO2, p.44, ¶7*

other companies to generate revenue, and so the drones had no public utility, but only allowed a company to pursue its corporate purpose.

With a quick analysis of these 4 points, Claimant hopes to take the Tribunal to the conclusion that the PSA did not comply with any requisites of an administrative contract, falling outside of the scope of art.75 of Equatoriana's constitution.

This argument concerning the concept of administrative contract was the most complicated to use in Claimant's entire speech, as it created many questions and misunderstandings on the part of the arbitrators. So, since there was a time limit in the oral part of the competition, we decided to leave this argument out of the main speech, and only use it if the opposing party brought it up during their pleading.

b. Respondent's position- the PSA is an administrative contract

Contrary to Claimant, Respondent wants the Tribunal to consider the PSA as an administrative contract, so that it falls on the scope of application of the parliamentary approval requirement.

As Counsel for Respondent one can take advantage of the definition proposed by Claimant that defines an international administrative contract as "[*a]n agreement held by the administrative party on one hand, and an ordinary or juridical foreign person on the other hand. Its aim is to transfer the economic and financial values across the boundaries in order to establish permanent facilities or massive investments in any of the public utilities. This agreement includes exceptional terms that are unfamiliar in the private law*"[76] and of the three elements that administrative contracts must fulfill, (i) one of the parties must be a public authority, (ii) the object of the contract must prosecute public utility, and (iii) the contract must contain an exceptional clause that is not found in civil contracts. For example, according to relevant doctrine, this exceptional clause might be the possibility for the contracting authority to unilaterally terminate the contract.[77]

With this, Respondent only needs to demonstrate that the PSA meets all these elements.

Respondent argues that, firstly, one of the parties of the PSA is an administrative authority, a state owned company, part of a governmentally run program. Secondly, the PSA prosecutes

[76] *Chenoy Ceil, Arbitration in Administrative Contracts and Saudi Government , op.cit., p.7*

[77] *Ibrahim Shehata, "The Ministerial Approval Requirement for Arbitration Agreements in Egypt: Revisiting the Public Policy Debate", Journal of International Arbitration, Vol.37, No.3 (2020) p.392*

public utility, as the objective of the contract is the purchase of drones to explore and develop the northern part of Equatoriana, the least developed part of the country. And finally, what most Counsels for Claimant missed, the PSA includes an exceptional clause that elevates Respondent to a position of superiority by foreseeing the possibility of it unilaterally terminating the contract.[78]

By simply demonstrating that, in fact, all the elements proposed by Claimant are met, Respondent wishes to convince the Tribunal that the Parties' PSA qualifies as an administrative contract, falling within the scope of application of the constitutional requirement of parliamentary consent.

This argument is easier to make as Respondent, since most arbitrators, who have not studied The Problem in depth or made research, are already inclined to believe that Respondent is a public authority, being part of the state, and that the drones have a public utility.

2.3 Good Faith

One of the issues that is also pertinent to appreciate, within the topic of the parliamentary approval requirement, is good faith.

In the contractual relationship between two companies, as is the case here, the expectations created by each party in the other cannot be contradicted by the subsequent actions of the parties, under penalty of violating the principle of good faith.

In The Problem, both parties invoke the principle of good faith against the other party, saying that their respective actions are in violation of this principle.

Claimant invokes this principle, saying that after the expectations created, Respondent cannot now invoke its domestic law. For its part, Respondent argues that Claimant has always known of all the requirements, so it cannot now say otherwise.

a. Claimant's position- Respondent cannot invoke its own internal law

[78] *The Problem, Ex. C2, p.11, art.18*

Claimant argues that Respondent, as a state owned company, cannot rely on any restrictions that exist under the law of Equatoriana.

Claimant invokes that when there is a contract between a state owned company and a foreign company, containing an AA, and the applicable law to the contract is the law of the State party, and subsequently a dispute arises and the foreign company wishes to submit the dispute to arbitration and invokes the AA and the state owned company responds that the AA is invalid on the basis of mandatory requirements in its own internal law, the so called "Internal Law Principle" will apply.[79] [80] According to this principle, State entities cannot invoke its own internal law to frustrate an arbitration it has previously agreed to, as that would be against good faith.[81] [82]

Claimant demonstrates how this principle applies to the case at hand: Claimant, a foreign company, and Respondent, a company owned by the State of Equatoriana, celebrated a PSA, that contains an AA, and the Parties chose the law of Equatoriana to govern the contract. The AA was validly concluded and Respondent consented to arbitrate. Then, when Claimant attempts to resolve a dispute through arbitration, Respondent invokes an internal provision of the law of Equatoriana, the requirement of Parliament's authorization, in an attempt to invalidate the AA and avoid arbitration.

Therefore, Claimant has to convince the Tribunal that Respondent will not be able to invoke its own internal law to escape its contractual obligation to arbitrate.

Additionally, and this was asked frequently by arbitrators, Respondent was responsible for getting the approval by the parliament, and so Claimant should not have to bear the consequences of Respondent's failure to fulfill its duties. Under art.6.1.14 of Equatoriana´s ICCA[83], it is Respondent's obligation to seek this parliamentary approval, so Claimant trusted that Respondent would make all efforts to seek this approval.

Even more, the Minister Rodrigo Barbosa guaranteed that the parliamentary approval was just a formality and that the lack of approval would not pose an obstacle for the conclusion of the PSA and AA. The Minister even said that the approval would be forthcoming after the Christmas break. So, on December 1st 2020, both Parties and the Minister signed the contract, which made

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[79] *David Cairns, Transnational Public Policy and the Internal Law Principle (2007) p.1*
[80] *Jan Paulsson, "May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?", Arbitration International (1986) p.90*
[81] *Benteler and others v. Belgian State, 18 November 1983, Ad Hoc Arbitration*
[82] *Balkan Energy Limited v. Republic of Ghana, 22 December 2010, PCA*
[83] *UNIDROIT Principles of International Commercial Contracts, art.6.1.14*

Claimant even more certain that the approval was in fact just a formality that could still be granted afterwards. Moreover, Respondent proceeded to ask for an amendment to the AA and even made payments under the PSA.

Therefore, Claimant has to demonstrate that even though it was aware of the missing authorization, it trusted the word of Minister Rodrigo Barbosa and Claimant is entitled to rely on his affirmed authority[84].

With all this, Claimant wished to take the Tribunal to the conclusion that there was a legitimate expectation created in the sphere of Claimant by the actions of Respondent and the Minister. And so, after so many months, and after Respondent signed the PSA and amended it, Respondent cannot invoke a lack of a requirement present in its internal law to invalidate the AA.

b. Respondent's position- Claimant knew of the requirement

Respondent's position is rather simpler than Claimant's.

Respondent needs only emphasize the fact that Claimant has always, throughout The Problem, recognized the need for parliamentary approval. Thus, being that, in fact, this approval was not achieved, then the AA is invalid, and Claimant cannot invoke the principle of good faith to evade this reality.

Furthermore, Respondent argues that the minister's signature is irrelevant, since Claimant knew that this was no substitute for the formal vote of parliament.

Although Respondent's position is simpler to state, the argument is more difficult to make, since the Tribunal is aware that obtaining parliamentary approval was Respondent's responsibility and Respondent made his situation even more difficult when he signed the PSA, ignoring, itself, the constitutional requirement.

[84] *The American Independent Oil Company v. The Government of the State of Kuwait, 29 March 1982, Ad Hoc Arbitration*

Conclusion

In conclusion, with regards to Issue A, about the jurisdiction of the arbitral tribunal, the main discussion was whether the AA was valid, due to the alleged existence of corruption affecting the PSA and, also, the non-fulfilment of the constitutional requirement of parliamentary approval, present in the Constitution of Equatoriana.

Regarding the first argument, about the presence of corruption and its effect on the AA, its reception by the arbitrators was peaceful and unanimous, as it is notorious that there is a lack of credible evidence. Moreover, all arbitrators, being experts in arbitration, were strong advocates of the doctrine of separability, and therefore believed that any corruption in the PSA would never affect the AA.

As for the second argument, concerning the requirement for parliamentary approval, this is a bit more complicated and generates a lot more questions and disagreements among the arbitrators. Since there are many more topics to be explored, both parties have to do more in-depth research to find key elements of their speech.

As someone who had the opportunity to get familiar with both positions, my view is that, regarding issue A, the details of the case, doctrine and case law, in general, make it easier to support Claimant's side. Given that Respondent was a company owned by the state, part of a governmental program, who had deep knowledge of its constitution and the responsibility to fulfill its requirements, who was involved in a situation of political turmoil, arbitrators are naturally more inclined to take Claimant's side, as a foreign company, strange to all the political and constitutional aspects of the contractual relationship. It is certainly possible to defend Respondent's side, indeed, that is the purpose of the Vis Moot - to be able to argue in favor of both Claimant and Respondent.

ISSUE B - If the Tribunal's jurisdiction can be established should the proceedings be stayed until the investigations against Mr. Field have been concluded or, alternatively, bifurcated?

Andréa Sousa

Introduction

To provide some background, Respondent's primary defence against the claims raised by Claimant revolves around the assertion that the Agreement is null and void due to the fact that the conclusion of the Agreement was obtained through corruption. Claimant vehemently denies any allegations of corruption and highlights the lack of evidence. However, in Respondent's view, the negotiation history of the Agreement and the reputation of Respondent's COO, Mr. Field, who represented Respondent during the negotiations, at the very least warrant further inquiry into the allegations of corruption. In this sense, Equatoriana's public prosecution office is conducting a broader investigation in the context of a major corruption scandal surrounding the Northern Part Development Program, under which the PSA was signed.

In light of the above, Respondent raises Issue B with two different legal questions to be discussed, although it is important to note that these are only posed by Respondent if the Tribunal decides that it has jurisdiction to hear the present case.

The questions to be regarded are: i) if the proceedings should be stayed until the investigations against Mr. Field have been concluded; or ii) if the proceedings should at least be bifurcated to address only abstract legal issues which do not depend on the outcome of the corruption allegations[85].

In this regard, this discussion is inevitably divided between the request for a stay of the proceedings and, alternatively, a request for the bifurcation of the proceedings. However, the stay of proceedings assumes greater significance as it is the primary request of issue B.

Regarding the stay of the proceedings, the discussion will primarily focus on the arbitral tribunal's discretion to stay the proceedings, the (lack of) evidence of corruption, the tribunal's power to investigate corruption, the parties' rights and interests and also questions surrounding the enforceability of the award.

[85] *The Problem, PO1, p.52*

When considering the matter of bifurcation, the central focus lies in examining the advantages and benefits that it would bring to the overall efficiency of the proceedings and the fulfilment of necessary requirements. Nonetheless, it should be noted that most of the arguments provided on the issue of stay also suit the matter of bifurcation, as it will be further addressed.

1. Discretion of the arbitral tribunal

The first relevant topic that needed to be addressed, irrespective of the parties position, was whether the Tribunal had the power to decide on a stay or bifurcation of the proceedings. This issue was crucial to ensure a logical and coherent argumentation.

In this sense, it is important to consider that the parties concluded the Purchase and Supply Agreement, which establishes in Article 20 its dispute resolution clause, that was settled in accordance with the PCA Arbitration Rules 2012[86]. In accordance, it is necessary to turn to Section III of the PCA Rules, since it specifically addresses and regulates the conduct of the arbitral proceedings. Article 17(1) PCA Rules establishes the general rule which provides the following: "*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*".

Hence, the Arbitral Tribunal has wide discretion as to the conduct of the proceedings within the broad limits set by the abovementioned legal rule, allowing both parties to invoke it in their favour.

a. Claimant's position

As Claimant's counsel, one must recognize that the Tribunal has the power to effectively decide on a potential stay or bifurcation, following its broad procedural discretion provided by Art. 17(1) PCA Rules.

[86] *The Problem, Cl. Ex. C 2, p.12*

However, it is essential to underline that the Tribunal is under no obligation to stay or bifurcate the proceedings in light of ongoing criminal investigations. Instead, the focus should be directed to the relevant part of Article 17(1) PCA Rules, which aligns with Claimant's position and states that "*the arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay [...]*".

While advocating for Claimant, it is also imperative to argue that the Tribunal has a duty to maximise the efficiency of the proceedings, a viewpoint that finds support among several legal scholars[87] [88] and precedent in case law[89].

b. Respondent's position

Contrary to Claimant's position, Respondent's counsel has to place significant emphasis on the discretionary power of the arbitral tribunal to stay or bifurcate the proceedings. Unlike Claimant, Respondent needs to highlight the first part of Art. 17(1) PCA Rules, which provides that the tribunal shall "*conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and […] each party is given a reasonable opportunity of presenting its case*".

In light of the above, Respondent seeks to persuade the tribunal that the circumstances of the case constitute compelling reasons to stay or, alternatively, bifurcate the proceedings and that this approach is crucial for Respondent to effectively present its case.

2. Stay of the proceedings

2.1. Evidence of corruption

Given that the request for a stay of the proceedings is based on allegations of corruption, it is essential to evaluate the nature and quality of the evidence supporting these claims. This analysis

[87] *Théobald Naud, International Commercial Arbitration and Parallel Criminal Proceedings, in Carlos González-Bueno, 40 under 40 International Arbitration, Dykinson S.L. (2018), pp 517–518*

[88] *Jean-François Poudret / Sébastian Besson, Comparative Law of International Arbitration, 2nd Edition, Sweet & Maxwell (2007), pp 500–506*

[89] *Glamis Gold Ltd v United States of America, 31 May 2005, Ad hoc Arbitration (UNCITRAL/NAFTA)*

will assist the Tribunal in determining whether the evidence justifies granting a stay of proceedings, taking into account the respective positions of Claimant and Respondent.

When assessing the evidence, the tribunal must consider two factors: the burden of proof and the standard of proof, as these factors play a significant role in guiding the tribunal's decision-making process in this case.

The burden of proof refers to the responsibility placed on Respondent of providing convincing evidence that substantiates its claims. The standard of proof is the level of certainty required to establish Respondent's allegations. It is crucial for the tribunal to determine the applicable standard of proof, which could range from circumstantial evidence ("red flags" standard) to a higher standard such as convincing evidence or even beyond a reasonable doubt[90].

a. Claimant's position

When arguing for Claimant, the primary argument revolves around the burden of proof, placing the responsibility on Respondent to provide substantiating evidence for the corruption allegations. Accordingly, Claimant has to assert that Respondent has failed to present any compelling evidence, which in turn does not justify a stay of the proceedings.

The central contention put forth by Claimant is that there are no credible allegations or proof that the PSA is tainted by corruption.

Furthermore, one can support Claimant's position by denying the existence of corruption based on the statement that Claimant has thoroughly reviewed all payments made to Equatorianian accounts and found no evidence of suspicious expenditures[91]. Additionally, Claimant can assert that it has established clear ethical rules to prevent corruption in its business operations[92], further reinforcing its stance against the corruption allegations.

For Claimant's defence, it is crucial to establish that the relevant standard of proof in this case is the higher standard, which demands clear and convincing evidence of corruption[9394]. This higher

[90] *Assad Bishara, The Standard of Proof for Corruption in International Arbitration, in: Manchester Journal of International Economic Law, Vol. 16, No. 3 (2019), pp. 441–470*
[91] *The Problem, Cl. Ex. C 3, p. 13*
[92] *Supra note 91, p. 14*
[93] *Kevin Lim and Michael Hwang, Corruption in Arbitration - Law and Reality, Asian International Arbitration Journal, 2012, p. 600*
[94] *EDF (Services) Ltd v. Romania, 8 October 2009, ICSID - International Centre for Settlement of Investment Disputes*

standard emphasises the need for a compelling evidentiary basis to support Respondent's allegations. By invoking this higher standard, Claimant aims to demonstrate that circumstantial evidence is insufficient to meet the standard of proof and, consequently, justify a stay of proceedings.

b. Respondent's position

On the contrary, Respondent will highlight that it does not have to prove the allegations conclusively for a stay to be granted. The very reason for Respondent's request to stay the proceedings is to await the prosecution's uncovering of evidence that substantiates the corruption allegations. If a stay of the proceedings is requested due to parallel proceedings, tribunals only need to consider whether the outcome of these proceedings is material to its decision[95] [96]. In this case, Respondent needs to argue that whether Claimant bribed Mr. Field to conclude the Agreement is material to the decision of the Tribunal and that several indications substantiate this allegation.

In this regard, and contrary to Claimant, Respondent wants the Tribunal to apply a lower standard of proof and reach its conclusion regarding the likely existence of corruption based on the presence of red flags in the present case. Respondent can base its application on case law[97] [98], which supports the notion that the standard of proof criteria have evolved to reflect the inherent complexity of proving corruption.

When it comes to the red flags that Respondent can refer to, there are numerous examples present in the case. Firstly, Mr. Field's involvement in multiple cases of corruption surrounding the Northern Part Development Program stands out. The public prosecutor has already been able to prove that Mr. Field accepted payments for awarding contracts to two companies on behalf of Respondent, leading to charges being pressed against him. Additionally, Mr. Field received significant payments to his offshore accounts shortly before major contracts negotiated by him were concluded.

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[95] *Patel Engineering Ltd v Republic of Mozambique, 3 November 2021, Permanent Court of Arbitration (PCA)*
[96] *Cairn Energy PLC and Cairn UK Holdings Ltd v Republic of India, 31 March 2017, Permanent Court of Arbitration (PCA)*
[97] *Metal-Tech V. Republic of Uzbekistan, 4 October 2013, ICSID*
[98] *Supra note 94*

Furthermore, the Mediterranean tax authorities have discovered two offshore accounts belonging to Claimant's negotiator, Mr. Bluntschli. These accounts have shown transfers of substantial sums to other offshore accounts, with Mr. Bluntschli remaining silent about the purpose of these transfers.

Moreover, there have been two previous incidents of corruption involving Claimant's company in the past, which are known to the public.

These examples of red flags, among many others, highlight the presence of suspicious activities and raise concerns about potential corruption within the parties' operations. Respondent can argue that these red flags, when considered collectively, provide reasonable grounds to suspect the involvement of corruption and thus, justifying a stay of the proceedings.

2.2. Tribunal's power to investigate corruption

Another crucial matter that requires discussion pertains to the tribunal's power to investigate the alleged corruption surrounding the contract in question, considering the stark contrast between the criminal nature of corruption and the civil nature of arbitration.

In navigating this intersection of criminal and civil adjudication, it is paramount to determine the extent to which the tribunal has the authority to investigate and gather evidence related to corruption matters.

In accordance, the subsequent discussion will examine the relevant legal principles and provisions that inform the tribunal's powers to investigate corruption from the perspective of both parties.

a. Claimant's Position

When presenting arguments in favour of Claimant, one has to argue that the findings of ongoing investigations are irrelevant and immaterial for the present arbitration because the tribunal is competent to discover the facts of the dispute. Plus, it can also focus on the lack of evidentiary value of ongoing investigations due to the fact that there is a likely scenario that the current investigations are biassed.

One of the relevant institutional rules chosen by Parties, which is favourable to Claimant's position, is Article 27 of the PCA Rules, according to which a tribunal can order evidence to be produced, appoint experts, and ensure attendance of witnesses to arbitral proceedings. In light of this, Claimant can argue that the Tribunal is actually equipped with investigative powers necessary to discover the facts of the dispute independent of public prosecution findings.

It also rules in favour of Claimant the fact that tribunals should disregard a criminal court's decision if it is rendered in "a country with known judicial dysfunctions" or if court proceedings are biassed[99] towards SOEs to the detriment of foreign private companies.

In the present case, is its favourable for Claimant to comment on its concerns regarding the evidentiary value of the ongoing investigations. The facts of the case[100] tell us that the investigation is led by the special prosecutor, Ms. Fonseca, who's impartiality has been questioned by The Citizen, Equatoriana's leading investigative journal. Of particular concern is the fact that Ms. Fonseca's brother-in-law serves as the CEO of one of Claimant's competitors. During the tender process, Respondent rejected the competitor's bid and instead entered into a contract with Claimant. Furthermore, Ms. Fonseca's son is engaged to Mr. Field's former personal assistant, Leonida Bourgeois. After leaving her position with Respondent, Ms. Fonseca ensured that Ms. Bourgeois immediately joined the public prosecutor's office. These connections can be argued as raising doubts about the fairness and independence of the investigation.

In this regard, Claimant should highlight in its favour that, contrary to the above mentioned scenario, the Arbitral Tribunal is composed of impartial and independent arbitrators who have explicitly stated that they have no affiliations with any of the parties involved.

As such, one can argue in favour of Claimant that the Tribunal should conduct its own investigations instead of relying on the decision of an investigation whose findings hold reduced evidentiary value.

b. Respondent's position

When arguing for Respondent, it is essential to highlight the limited powers and resources of the Tribunal compared to national criminal authorities, which hinders its ability to investigate

[99] *Supra note 87, p. 515*
[100] *The Problem, Ex. R 2, p. 33*

corruption comprehensively[101] [102]. Therefore, Respondent has to argue that it is crucial to seek the involvement of the national authorities, which are equipped with coercive powers to produce the relevant evidence and that this is only possible through a stay of the proceedings.

In this sense, it is very favourable for Respondent to mention that certain key witnesses, such as Mr. Bluntschli, Claimant's former COO, have refused to testify before the arbitral tribunal[103]. Additionally, the incarceration of Mr. Field[104], Respondent's former COO, further limits the availability of essential witness statements that would materially help to uncover the corruption allegations.

In highlighting the Tribunal's limited means to obtain evidence, it should be emphasised that while it can request the production of documents, exhibits, or other evidence[105], it lacks the power to compel the production of such evidence.[106] This further strengthens the argument for involving the national authorities, which possess the necessary coercive measures to ensure the submission of relevant evidence.

Addressing Claimant's argument regarding alleged bias within the public prosecution office, Respondent should counter that there are no indications of Ms. Fonseca violating her professional obligations. On the contrary, she is renowned as one of Equatoriana's leading criminal lawyers and has earned the trust of the head of public prosecution. Therefore, it can be argued that it is implausible to assume that she would jeopardise her career or face legal consequences to secure the conviction of someone with whom she has no personal connection.

2.3. Length of the investigations - Balance of parties' rights

Another subject disputed between the parties is the duration of the ongoing investigations and proceedings in Equatoriana. The investigations led by Ms. Fonseca are supposed to end by the

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[101] *Alexandre De Fontmichel, Procédure pénale et arbitrage commercial international; quelques points d'impact, Les Cahiers de l'Arbitrage, 2012-2, pp.309-319*

[102] *Karen Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto, ICCA Congress Series No. 11, 2003, p.295*

[103] *The Problem, Ex. C3, p. 14*

[104] *Supra note, p. 13*

[105] *Article 27 PCA Rules*

[106] *Supra notes 101, 102*

end of 2023[107]. However, if it results in charges against Mr. Field, the subsequent first instance criminal proceedings will typically take approximately 6 months, with a potential judgement expected in June 2024 at the earliest. Furthermore, while there may have been an initial expectation that the proceedings would be finalised by June 2024, it is important to recognize that there are no guarantees regarding the timeline. The duration of the investigations and any future criminal proceedings is uncertain, and it cannot be assumed that the proceedings will be completed within the anticipated time frame.

In light of the above, we return to the discussion regarding Article 17(1) PCA Rules and will examine it more thoroughly from the perspectives of both parties.

a. Claimant's Position

Reiterating the previously mentioned idea, Claimant needs to emphasise that pursuant to Article 17(1) of the PCA Rules, a tribunal "*shall conduct the proceedings so as to avoid unnecessary delay and expense*".

In line with this provision, Claimant must demonstrate that waiting for the public prosecution's findings would be deemed "unnecessary", as the criminal investigations are irrelevant to the outcome of the present arbitration. Furthermore, Claimant must establish that a stay of the proceedings would not only cause substantial delays but also result in significantly increased costs[108]. While these arguments have been previously discussed, the aspects of delay and expenses still require attention.

Firstly, granting a stay of the proceedings would require the tribunal to await for the conclusion of the investigations, which are anticipated to conclude only by the end of 2023. Meeting this deadline would rely on Ms. Fonseca successfully completing the investigations within the given time frame. Therefore, one could argue that the delay in receiving the award would impose substantial strain on Claimant's business, since Claimant has already invested significant time and resources in producing the Kestrel Drones.

[107] *The Problem, RNoA., p. 29*

[108] *Lucy Greenwood, Journal of International Arbitration, Kluwer Law International, Volume 28, Issue 2 (2011), p. 107*

As such, Claimant now faces the challenge of waiting until the tribunal compels Respondent to pay the purchase price in order to recoup the costs. Besides, in the event that Respondent fails to make the payment, Claimant would encounter difficulties and significant price reductions when attempting to resell the drones. In light of these circumstances, a stay of proceedings would subject Claimant to considerable legal and financial uncertainty.

b. Respondent's Position

As counsel for Respondent, one should argue that a stay of proceedings is required so that Respondent is treated with equality and given a reasonable opportunity to present its case pursuant to Art. 17(1) PCA Rules. In this sense, it has to be argued that, contrary to Claimant's position, the need for celerity should not prevail over Respondent's right of presenting its case.

While arguing for Respondent, it is key to establish that Respondent will only have a reasonable opportunity to present its case if it has the opportunity to bring all the relevant evidence before the arbitral tribunal. Continuing the proceedings as planned would mean that the evidence obtained by the prosecution would never reach the Tribunal and would not be considered when rendering an award. Moreover, given the nature of corruption cases, the claiming party often lacks the ability to produce reliable evidence independently[109]. Consequently, Respondent needs to argue that it must rely on the evidence gathered during the investigations in order to present its case effectively.

Nevertheless, even taking into account the need for expediency raised by Claimant, Respondent can contend that the resulting delay would be insignificant. The procedural timetable has set the first hearing for March 2023, while the investigations by Ms. Fonseca are expected to conclude no later than the end of 2023. Thus, in Respondent's view, the delay would only extend for a few months and could be argued to be insignificant. Moreover, in terms of costs, having the public prosecution office investigating the central factual disputes may also be more efficient and save expenses that would otherwise be incurred by the Parties, which rules in favour of Respondent.

[109] *Carsten Wendler, Corruption in Investment Treaty Arbitration: A Balanced Approach to Corruption Issues, Cologne (2016), p. 123*

2.4. (Un)enforceability of the award

Another relevant issue revolves around the potential violation of international public policy due to the award in question. Specifically, if Mr. Field is found guilty of accepting undue payments in connection with the conclusion of the Agreement, enforcing an award that contradicts this finding and upholds a contract obtained through bribery would clash with the public policy of Equatoriana, where the award is likely to be enforced.

a. Claimant's Position

When arguing for Claimant, one should emphasise that Respondent's invocation of the public policy exception under Art. V(II)(b) of the New York Convention or Art. 34(2)(b)(ii) of the Domestic Arbitration Law (DAL) is not applicable to challenge international arbitral awards. In general, awards cannot be challenged based on the argument that compliance with them would breach national law[110] [111]. Allowing such challenges would undermine the effectiveness of international award enforcement and enable countries to arbitrarily frustrate the enforcement process[112].

Furthermore, even if the Equatorianian criminal court found indications of benefits granted for the conclusion of the PSA, it does not constitute a breach of Art. 15 of the Equatoriana's Anti Corruption Act (hereinafter "ACA"). This is because the Equatorianian ACA must be interpreted in light of Article 34 of the UN Convention against Corruption, to which Equatoriana and Danubia are Contracting Parties. Article 34 emphasises that when addressing the consequences of corruption, due regard must be given "to the rights of third parties acquired in good faith."

In this case, any potential acts of corruption would have occurred between individuals acting on behalf of the Parties, but Claimant itself entered into the PSA in good faith. From the beginning of their dealings with Respondent, Claimant took proactive measures to prevent any form of corruption. In this regard, Claimant has implemented a compliance system and clear ethical rules explicitly prohibiting the granting of benefits to governmental employees. Additionally, Claimant

[110] *K Ltd v (1) S GmbH and (2) H, 17 February 2016, Supreme Court of Austria*
[111] *Reinmar Wolff, New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Article-byArticle Commentary, 2nd edition, Munich, 2020, p. 450*
[112] *Gary Born, International Commercial Arbitration, 3rd edition, p. 4002*

promptly conducted internal investigations upon learning about the allegations against Respondent, having determined that no suspicious payments were made from Claimant's bank accounts.

Therefore, Claimant can reasonably rely on the contractual rights it acquired by entering into the PSA in good faith. As such, Art. 15 of the ACA must be applied and interpreted accordingly.

b. Respondent's Position

As Respondent's counsel, one must argue for a stay of proceedings to prevent conflicting decisions and potential enforcement challenges. If evidence of corruption is found by Equatoriana's national authorities while the arbitral tribunal denies its existence, the resulting award would contravene public policy and violate Article (5)(2)(b) of the NY Convention.

Under Article (5)(2)(b), a contract procured through corruption is deemed against public policy, rendering any arbitral award affirming the validity of the arbitration agreement unenforceable[113]. Consequently, if the Tribunal proceeds to issue an award despite the evidence of corruption, there is a significant risk that the award will not be enforceable[114].

To mitigate this risk and uphold the integrity of the arbitration process, it is crucial for Respondent to request a stay of the arbitral proceedings until the criminal investigations related to corruption allegations are completed.

Furthermore, the argument of unenforceability also strengthens Respondent's position in relation to the previous argument invoked by Claimant regarding costs and efficiency of the proceedings. If the Tribunal decides that the contract is valid, but in reality, the contract was obtained through corruption, the award issued by the tribunal would be unenforceable.

In such a scenario, the expenditures and time invested in the proceedings would have been wasted. This waste can be avoided by requesting a stay of the proceedings. Therefore, a stay of the proceedings will promote efficiency.

3. Bifurcation of the proceedings

[113] *Supra note 110, p. 3860*
[114] *Sorelec v. State of Libya, 10 April 2018, ICC*

The alternative request of issue B is the bifurcation of the proceedings, which is requested by Respondent. A bifurcation would lead to the proceedings being separated into two stages[115]. The first stage of such bifurcated proceedings would solely focus on issues that do not "extend to the question of the invalidity of the contract due to corruption". Conversely, the second stage of proceedings would concern all matters related to the corruption allegations raised by Respondent, which could only begin after the investigations are concluded.

It is worth noting that the reasons put forth in favour of a stay also support the argument for bifurcation. However, considering the tribunal's obligation to ensure efficiency under Article 17(1) of the PCA Rules, there is a presumption against bifurcating the proceeding[116]. This presumption can only be overcome if the party requesting bifurcation can demonstrate that its request satisfies the criteria established by the three-fold test.

This test has been widely adopted[117] [118] [119] and considers three factors: First, a tribunal should consider whether the submission underlying the bifurcation request is prima facie invalid. Second, a tribunal should consider whether the stages of the proceedings are so closely linked that bifurcating is impractical. Third, a tribunal should consider whether bifurcation would be inefficient.

a. Claimant's Position

Contrary to Respondent's position, Claimant must argue that Respondent's request for bifurcation fails to meet the criteria of the three-fold test. Firstly, it can state that Respondent's allegations of corruption lack substantial evidence. Secondly, that the the issues in this dispute are closely intertwined, making bifurcation impractical. Thirdly, that bifurcating the proceedings would be inefficient.

In Claimant's view, there is no evidence suggesting that the conclusion of the PSA was influenced by corruption. Internal investigations conducted by Claimant have found no

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[115] *The Problem, PO1, p. 40*
[116] *Supra note 106, p. 425*
[117] *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia, 31 January 2018, PCA - Permanent Court of Arbitration*
[118] *Philip Morris v. Australia, 14 April 2014, PCA - Permanent Court of Arbitration*
[119] *Glamis Gold v. United States, 31 May 2005, Ad hoc Arbitration*

indications of improper benefits being granted to government officials, highlighting the company's adherence to clear ethical rules and policies.

Respondent itself admits that there is no proof yet as to the payment of any bribes in relation to the PSA. Rather, there only exists evidence of corruption with respect to two other contracts signed by Mr Field. Those contracts were not concluded with Claimant.

According to the principle that closely linked facts and legal questions should not be bifurcated, it becomes apparent that the procedural stages in this case are legally interconnected. The findings of the second stage are crucial for the Tribunal's conclusions at the first stage, making bifurcation inappropriate.

Moreover, bifurcation poses a high risk of procedural inefficiency, leading to a lengthier overall duration of the proceedings. It should only be considered if it is likely that the results of the first stage render the second stage unnecessary.

In conclusion, Claimant assertion is that Respondent's request for bifurcation does not meet the necessary criteria. The lack of substantial evidence regarding corruption, the intertwined nature of the issues, and the potential inefficiency all argue against granting the request.

b. Respondent's Position

As counsel for Respondent, one should argue that bifurcation aims to promote efficiency in the resolution of disputes, and that Respondents' objections meet all the necessary requirements.

Firstly, Respondent's objections should not be dismissed as frivolous but rather recognized as fundamental questions regarding the validity of the Arbitration Agreement. These objections suggest the possibility that the agreement may have been obtained through corrupt means. It is crucial to emphasise that these objections are raised in good faith, demonstrating Respondent's prompt action upon becoming aware of the underlying corrupt practices[120] [121] [122].

Furthermore, if the corruption allegations prove to be true, as indicated by the gathered evidence, the ongoing criminal investigations will have a significant influence on the present arbitration. This highlights the risk of conflicting decisions between the arbitral tribunal and state courts, as well as potential discrepancies with the findings of the criminal investigations, as previously

[120] *The Problem, NoA., pp. 5-6, ¶12*
[121] *The Problem, Ex. C3; p. 13; ¶¶5, 6*
[122] *The Problem, Ex. C6, p. 17*

mentioned. In accordance, Respondent's request for a stay of proceedings aims to avoid such conflicts and to ensure a coherent and harmonised outcome.

While arguing for Respondent, it is important to note that Respondent's request does not seek to disrupt the entire proceedings but rather to focus on a specific question: the invalidity of the contract due to corruption. This limited scope allows for a more efficient and streamlined examination of the jurisdictional challenge without unduly prolonging the proceedings.

In summary, Respondent's position is that bifurcating the proceedings would contribute to the efficient resolution of the dispute, and it is appropriate where Respondent's objections are serious and substantial; raise issues not intertwined with the merits; and, if granted, would dispose of an essential part of the claims.

Conclusion

While arguing for Claimant, the main point of issue B is that a stay or bifurcation of the proceedings would result in unfair treatment of Claimant, unnecessary delays, and reliance on unreliable investigations. Consequently, the Tribunal should reject Respondent's request to stay or bifurcate the proceedings which not only are not legally required but also do not promote procedural and economic efficiency. Prolonging the proceedings in this manner would deprive Claimant of its fundamental procedural rights and pose a significant risk to Claimant's business.

Contrary to Claimant, Respondent supports the position that the ongoing criminal investigations and the potential dismissal of certain claims underscore the importance of a stay or bifurcation of the proceedings to ensure a fair and consistent resolution of the case. By addressing these critical issues first, Respondent wants to highlight that its approach aligns with the principles of justice, fairness, and efficiency. Furthermore, in Respondent's view, the issue does not revolve around the impediment of the Arbitral Tribunal from continuing the proceedings, but rather, if the Tribunal is not fully armed to establish corruption allegations, it should not wait for the outcome of the criminal investigations.

Unlike issue A, issue B better suited Respondent's concerns regarding the evidence of corruption. While there is no specific case law where an arbitral tribunal has stayed the proceedings solely based on criminal investigations and allegations of corruption, tribunals, in general, have found such a decision reasonable in light of the specific circumstances of the case and the seriousness

of the corruption allegations. The argument of unenforceability, which strongly favours Respondent, has significantly influenced this consideration

On the other hand, Claimant always had a relatively strong position due to the fact that it represented a weaker party at first sight, as a foreign private company. Additionally, the principle of celerity is a fundamental aspect of arbitration, as it recognizes the importance of efficiency and timely resolution in maintaining the integrity and effectiveness of the arbitration process.

In conclusion, it can be stated that, overall, issue B carries more weight in favour of Respondent, unlike issue A.

Substantive issues

ISSUE C – Is the Purchase and Supply Agreement governed by the CISG?

Ana Moura Dias

Introduction

The issue at hand regards the applicability of the CISG to the PSA and it entails the debate of two main points.

First, it is pertinent to determine if, by inserting a choice of law clause on the PSA (choosing the law of Equatoriana to govern their contract), the Parties intended to apply the CISG or, on the other hand, to exclude its application. Although in the memoranda this issue was widely debated, as time progressed, especially in the oral phase, it was gradually left aside. In fact, in the few pleadings that I participated in or observed, when this matter was raised, Claimant's position was never contested by Respondent, that always conceded on this point. This is due to the fact that there is actually not much room for doubt as to which position is more defensible, but I shall address this further on.

Secondly, and most importantly, it is necessary to find whether or not the goods being sold (the Kestrel Eye 2010 drones) are excluded from the scope of application of the CISG. Indeed, Article 2 (e) CISG expressly excludes the sale of aircrafts from its scope of application. The issue is to determine if the drones in question are considered aircrafts, and under which criteria we should assess that.

1. The effects of choosing Equatorianian Law to govern the PSA - Art.1 CISG + Art.6 CISG

The PSA celebrated between the Parties contains in its Art. 20(d) a choice-of-law clause, where the Parties expressly choose the Law of Equatoriana to govern their dispute. [123] Furthermore, both Parties to the Agreement have their places of business in Contracting States of the CISG.[124] It is necessary to understand: if the CISG automatically applies (and in case it does, if the Parties

[123] *The Problem, Ex. C2, p.12, ¶Art.20 (d)*
[124] *The Problem, PO1, p. 43, ¶ 3*

implicitly excluded its application); and if the Parties, by adding a choice-of-law provision to the contract, intended to apply the CISG.

It is a fact that the CISG is directly applicable according to its Art. 1(1)(a), that states that the CISG applies when the parties to a sale of goods contract have their places of business in (different) Contracting States, which is the case, as mentioned above. Indeed, the CISG is "directly" or "autonomously" applicable without the need to resort to contracting Parties' mutual agreement upon its application[125], according to Art.1(1)(a), if, of course, the Parties don't exclude its application, pursuant to Art.6 CISG.

a. Claimant's position - The choice-of-law clause makes the CISG applicable.

Claimant holds that the Agreement is governed by the CISG, according to its Art.1. [126] In order to defend Claimant's position, we must argue that, by choosing the law of Equatoriana to govern their contract, the Parties intended to apply the CISG. This argument is supported by the fact that, since Equatoriana is a Contracting State of the CISG, the CISG is a part of Equatorianian domestic law. This position is widely supported by case law. For example, a Court held that the choice of law of a Contracting State includes the CISG, which is a part of that State's legal system.[127]

Regarding the possibility of an intent to implicitly exclude the CISG, to support Claimant's position (that the Parties did not implicitly exclude the application of the CISG) we should follow the most accepted approach. It holds that if the parties want to exclude the application of the CISG according to its Art.6, the intent to exclude must be clearly manifested.[128] In fact, it is widely recognized that an intent to exclude "should not be inferred merely from, for example, the choice of the law of a Contracting State"[129]. Also, renowned authors, such as Ingeborg Schwenzer, are in favor of Claimant's argumentation by advocating that the choice of law of a Contracting State in itself, if without particular reference to the domestic law of that State, does

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[125] *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, p.5, ¶9*
[126] *The Problem, NoA, p.7,¶20*
[127] *Case Ob 77/01g, 22 October 2001, Oberster Gerichtshof (Austrian Supreme Court)*
[128] *CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6, Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia. Adopted by the CISG Advisory Council following its 19th meeting, in Pretoria, South Africa on 30 May 2014, p.2, ¶3*
[129] *CISG-AC Opinion No. 16, p.2, ¶4(b)*

not amount to an exclusion of the CISG.[130] Moreover, an Arbitral Tribunal stated that "when a law is chosen from a jurisdiction that has acceded to the CISG, the CISG will apply unless expressly excluded". [131]

As clearly shown, Claimant's argumentation on this aspect is highly supported by the law and by authors/jurisprudence. Therefore, in this specific topic it is not difficult to prove Claimant's point. However, this does not mean that Claimant's case for the entirety of issue C is stronger than Respondent's argument. Indeed, the fact that the CISG is applicable through Art. 1 does not rule out the possibility of its application being precluded by the exclusions set forth in Art. 2 CISG, as will be addressed further.

In any case, despite it being very clear that Claimant has the law in its favor on this matter, occasionally, in some pleadings, Counsel for Claimant would start by reminding the Tribunal of this fact. In my opinion, this is a smart approach for two reasons. First, since the applicability of the CISG is being debated, it is important to guide the Tribunal through the line of thought that in the first place leads to its application. And secondly, if Respondent decided to contest this matter in its pleading (although, as already mentioned, this would be a very difficult task), then Claimant would have already briefly stated and supported its position concerning this issue.

b. Respondent's Position - The application of the CISG is implicitly excluded.

Contrary to Claimant, regarding issue C, Respondent defends that the CISG does not govern the PSA[132]. In its Response to the Notice of Arbitration, Respondent did not argue that, according to Art. 6 CISG, the Parties implicitly excluded the application of the CISG, only making reference to the exclusion of Art.2(e). Nonetheless, in the Memorandum for Respondent, it was decided to put forward this argument, albeit subsidiarily (to the argument that the CISG does not apply because of Art. 2(e)). The Memorandum for Claimant that we were responding to heavily focused on this argument, thus, in order to be responsive and to contend Claimant's arguments (which is the exercise that we are expected to do) it was important to address this question.

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[130] Ingeborg Schwenzer and Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (CISG), Second (English) Edition, 2005, pp.90-91; UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, p.34, ¶11

[131] Chumboon Metal Packing and others v. Apex Tool 121 Works, ICDR Case No. 01-16-0005-5206, Procedural Order No.2, 03 August 2017, AAA-ICDR (International Centre for Dispute Resolution)

[132] The Problem, RNoA, p. 31, ¶26

Besides, although challenging, trying to find a basis to support that there was, in this case, an implicit exclusion was an interesting task.

To support this argument, Respondent may rely on court decisions that have recognized implicit exclusions. Some courts have held that the choice of law clause constitutes an implicit exclusion.[133] However, they usually relied on some further, even if minor, detail of the clause or the contract. In this case, in order to try to prove an implicit exclusion, Counsel for Respondent should take advantage of a very strong fact of the case in its favor: the mention of the word "aircraft" in the PSA and in the Call for Tender.[134] It is possible to build an argument around this fact by stating that, since the Parties were aware from the beginning that the goods being sold were excluded from the scope of application of the CISG (pursuant to Art.2(e)), when including the choice-of-law clause, they never intended to apply it. In fact, there is jurisprudence supporting this approach, that when a sale falls into the Art. 2(e) exclusion, the choice of law provision cannot be understood as a reference to the CISG.[135] It is true that this is a very favorable fact for Respondent's side, however, this evidence does not, at all, end the debate of whether these drones are aircrafts.

In the oral phase of the competition, this argument was not brought up since, as noted above, it would be unlikely to be able to persuade the Tribunal on this point. For this reason, and also for strategic purposes in terms of time management, whenever this subject came up, we conceded and immediately moved on to the debate that surrounds Art. 2(e) CISG.

2. The sphere of application of the CISG - scope of the term "aircraft" for the purpose of the Convention - Art.2(e)

The sphere of application of the CISG, in particular the scope of the term "aircraft", is the main topic being debated in issue C. Art. 2(e) of the CISG stipulates that the Convention does not apply to sales of ships, vessels, hovercraft or aircraft. In the case at hand, the contract signed between the Parties regards the sale of 6 drones (Kestrel Eye 2010 drones).[136] To determine whether the sale of these goods is under the scope of the CISG, it is crucial to understand if these

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[133] *See, for example: CLOUT case No. 1057, 2 April 2009, Austrian Supreme Court of Justice (Oberster Gerichtshof); Case No. 6 R 160/05z, 23 January 2006, Linz Higher Regional Court (Oberlandesgericht Linz)*

[134] *The Problem, Ex. C1, p.9, ¶4; Ex. C2, p.10, ¶3; Ex. C2, p.10, ¶5; Ex. C2, p.10; ¶6; Ex. C2, p.11, Art.3 (b)*

[135] *Case No. T-23/97 - Fishing Boat Case, 15 April 1999, Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce*

[136] *The Problem, NoA, p.5, ¶5*

drones are considered aircrafts. The issue is that the scope of the term "aircraft" is not defined in the CISG. In the preparatory works of the CISG, the meaning of "aircraft" is also not clarified.[137] Therefore, it was the Parties' duty to propose a way to define this term for the purpose of the CISG. In order to do so, throughout the competition, Claimant and Respondent focused their argumentation on several criteria or definitions. Claimant's goal was to prove that the Kestrel Eye 2010 drones do not classify as aircrafts, and for that it relied, for example, on: internationally recognized definitions of the term "aircraft"; the purpose of these specific drones and the registration requirement. On the other hand, Respondent's strategy was to demonstrate that these drones are in fact aircrafts, basing its argumentation on: the transportation criterion (mainly from an objective perspective); the registration requirement, and sometimes even on the appearance of the drones, and the definition of "aircraft" set forth in Equatorianian domestic law.

2.1. CISG's interpretation and gap-filling mechanism - Art. 7 CISG

There has to be a logical reasoning associated with the application of the proposed criteria. As such, before suggesting the Tribunal to apply certain criteria, it is crucial to provide context, pointing out the limits that the convention itself imposes for these cases and explain why the suggested criteria/definitions are in line with the CISG. Art. 7 CISG specifies, in its subparagraph 1, considerations that must be taken into account when interpreting the CISG. Art. 7(2) explains the approach that should be followed in case of need to gap-fill. In the present case, we can view this issue as a matter of interpretation, but it is also possible to consider it as a gap, even though this second approach was not often applied in the competition. Art. 7 (1) CISG states that the Convention should be interpreted with regard to its international character and the need to promote uniformity in its application. And, according to Art. 7 (2), doubts about matters governed by the CISG which are not expressly settled in it should be settled in conformity with the general principles on which the CISG is based, for example, party autonomy and good faith. Mainly, this is the legal basis that Parties use to justify the adoption of the following criteria by the Tribunal.

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[137] *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (Secretariat Commentary), p.16, ¶9; UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, p.18, ¶10*

2.2. Definition of "aircraft"

As stated above, issue C mainly entails a discussion about the definition or the appropriate criteria to define "aircraft" in accordance with the CISG. In the following I will explore the main approaches addressed throughout the competition.

Regarding the debate of whether or not these drones are aircrafts it is worth mentioning a fact of the case often raised by Respondent, although this is not exactly an argument nor a way to define aircraft. In the PSA, which was signed by both Parties, and also in the Call for Tender, the word "aircraft" can be read several times.[138] In this context, Respondent should emphasize that Claimant applied for a tender that specifically asked for aircrafts and that it also signed a contract that mentioned the word "aircraft", referring to the Kestrel Eye 2010 drones, four times. When Claimant was confronted with this fact, since it knew that this was its weak spot, it usually tried to argue that the Parties also used the terms "drones", "UAVs" and "UASs" when referring to the Kestrel Eye, and that, therefore, the Tribunal should not give credit to this fact. In my view, this argument is not very reasonable since the truth is that if the Kestrel Eye was considered an aircraft, it would still be a drone, an Unmanned Aerial Vehicle or an Unmanned Aerial System. So it is only natural that the Parties used all of these terms when referring to them. For example, an airplane does not stop being an airplane because it is an aircraft (it is an aircraft, more specifically, an airplane). With this in mind, indeed, Claimant's role in contending this fact is not an easy one. However, this is nothing but a fact of the case through which it is not exactly possible to build a logical and structured argument with a legal basis (it would only be if one wanted to make the argument of an implicit exclusion which, as mentioned, was not a good strategy). To conclude, in my opinion, it was still worth it for Respondent to mention it (for example, at the end of the argumentation or in the surrebuttal) even if only to imprint the idea that the Parties called the drones "aircrafts" on the arbitrator's minds.

2.2.1. Transportation criterion

The transportation was, from what I observed, the main criterion in which the Parties based their argumentation regarding the classification or non classification of the drones as aircrafts. It is quite versatile as it works for both sides, depending on the approach the Parties decide to take.

[138] *The Problem, Ex. C1, p.9, ¶4; Ex. C2, p.10, ¶3; Ex. C2, p.10, ¶5; Ex. C2, p.10; ¶6; Ex. C2, p.11, Art.3 (b)*

This criterion complies with the interpretation boundaries imposed by the Convention, in its Art.7(1) - international character and uniformity - as it is based on the opinions of renowned scholars[139] and on the ordinary meaning of the term "aircraft". According to the Oxford dictionary, "aircraft" means "any vehicle that can fly and carry goods or passengers".[140] The transportation criterion has an objective and a subjective perspective.

a. Claimant's position

As it is in Claimant's interest to apply the CISG, and given that the CISG excludes aircrafts from its scope of application, Claimant must prove that the Kestrel Eye 2010 drones are not aircrafts. In order to do that, Claimant's counsels often relied on the transportation criterion, specifically on the primary purpose standard. Scholars[141] defend that a vehicle should be considered an aircraft when it is primarily destined for air transportation. With this in mind, if one proceeds to analyze the purpose intended for the Kestrel Eye 2010, taking a subjective approach, the conclusion is that transportation is not the primary purpose of these goods. Instead, the purpose of the Kestrel Eye, in this case, is surveillance and data collection. The Parties made it clear on the PSA, by mentioning in the preamble, that Respondent decided to purchase the drones "to collect the relevant geological and geophysical data"[142]. Also, it is important for Claimant to mention that the features of the Kestrel Eye "are clearly engineered towards the use for surveillance purposes" and that, therefore, the use of these drones for carrying cargo "makes commercially little sense."[143] On the other hand, regarding the possibility discussed between the Parties of the drones transporting "urgently needed spare parts or medicine"[144], Claimant should try to devalue this secondary purpose by emphasizing that this only occurred in emergency exceptional cases.[145]

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[139] Such as: Franco Ferrari, Pascal Hachem, Ingeborg Schwenzer, Ulrich Schroeter and Stefan Kroll.
[140] https://www.oxfordlearnersdictionaries.com/definition/english/aircraft
[141] See, for example: Ingeborg Schwenzer and Pascal Hachem, 'Article 2', Ingeborg Schwenzer (ed), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), 4th Ed, Oxford University Press, 2016, ¶30; Franco Ferrari, Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Convention, BRILL, 2011, pp. 146–8
[142] The Problem, Ex. C2, p.10, ¶3
[143] The Problem, PO2, pp.44-45, ¶9
[144] The Problem, Ex. R2, p. 33
[145] The Problem, PO2, p.44, ¶9

Claimant would also sometimes rely on the objective criteria but taking a different approach than Respondent. In order to invoke that according to the objective criteria the Kestrel Eye is an aircraft, Claimant should resort to common sense by mentioning that drones are usually designed to collect data through surveillance equipment and not to transport goods. However, throughout the competition Claimant mainly based its argumentation on the subjective element of the transportation criterion.

b. Respondent's position

As mentioned above, this criterion fits both Parties' argumentation strategy, as such, Respondent can also take advantage of this argument. In order to do so, it should base its reasoning in an objective approach by defending that the purpose of an aircraft must be accessed in accordance with abstract and objective criteria, so the capacity of the carrying cargo, instead of the use assumed in the negotiations or in the contract. Authors such as Pascal Hachem support this approach.[146] To prove that the Tribunal should follow the objective criterion, Respondent should argue that this is crucial to assure the universal application of the CISG, according to its Art.7(1). This is because if one would only look at the subjective criteria, meaning the intended use, the very same drone could once, in one contract, fall within the scope of the CSG (if it was used for transportation purposes) and, the exact same drone, would fall outside of the scope of the CISG (if it was, for example, only used for surveillance purposes). This argument is very persuasive because it is in line with the need to promote certainty and uniformity on the application of the CISG. With this in mind, if we rely on the objective approach of the transportation criterion to classify aircrafts as such, then the Kestrel Eye 2010 drones are easily considered aircrafts. The Kestrel Eye is objectively able to carry goods within weight of up to 245 Kg.[147] Also, Respondent should emphasize that these drones are "able to carry other cargo fitting into the payload bays instead of surveillance equipment"[148] since it is removable, and that they have even been used for purposes other than carrying surveillance equipment, such as transporting goods (medicine and small crucial pieces of equipment).

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[146] *Ingeborg Schwenzer and Pascal Hachem, 'Article 2', Ingeborg Schwenzer (ed), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), 4th Ed, Oxford University Press, 2016*

[147] *The Problem, Ex. C4, p. 15*

[148] *The Problem, PO2, p.44, ¶9*

Furthermore, Respondent could even mention that if the Tribunal relies on the subjective criterion, so the intention of the Parties, these drones still fulfil the transportation criterion. The following fact supports this view: Mr. Bluntschli, Claimant's former COO mentioned in the email of November 29 that the Kestrel Eye 2010 was also "suitable for other purposes in particular to bring high value and sensitive other loads to the remote areas of the northern provinces."[149] This is an interesting point but it is not a very strong argument since this intended purpose is not the intended primary purpose. Therefore, throughout the competition Respondent mainly based its argumentation on the objective approach of the transportation criterion.

2.2.2. Internationally recognized definitions of the term "aircraft" - The Cape Town Treaty

Another possible way to define "aircraft" is to resort to internationally recognized definitions of this term. This argument was exclusively used by Claimant, since the main Treaty that clarified the term "aircraft", defined it according to criteria that were in line with its position that the Kestrel Eye 2010 drones are not aircrafts.

a. Claimant's position - The "aircraft" definition set forth in the Cape Town Treaty should be considered.

In order to build this argument, Claimant strongly relies on Art.7(1), basing the suggestion to consider this Treaty on the international character of the CISG and the need to promote uniformity in its application. In that context, Claimant defends that the Tribunal should apply the UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment – also known as the Cape Town Treaty. Although the Parties to this dispute are not Contracting States of the mentioned Convention, Claimant should prove its international relevance by emphasizing that this is an international Treaty that has 83 Contracting States (including the European Union, Canada, USA, China, United Kingdom and Australia). Moreover, the Cape Town Treaty adopted the definition of the term "aircraft" settled on by the Chicago Convention, which has 193 Contracting States. According to the Cape Town Treaty,

[149] *The Problem, Ex. R4, p. 35, ¶4*

aircrafts are "either airframes with aircraft engines installed thereon or helicopters"[150]. Furthermore, airframes are considered to be so when they are type certified by the competent aviation authority to transport (i) at least eight persons or (ii) goods in excess of 2 750 kilograms (Art.I(2)(e))[151]. When analysing the characteristics of the Kestrel Eye, we come to the conclusion that they do not meet the requirements recognized by this Convention. The Kestrel Eye 2010 drones have a capacity (payload) of 245 kilograms[152]. In addition, these drones do not have the ability to carry humans and are not appropriate to carry cargo[153].

If Claimant is able to convince the Tribunal to consider this definition, it can easily demonstrate that these drones are in fact not aircrafts, and that, therefore, the CISG applies. This is a good argument, yet, the previous one, regarding the transportation criterion is better grounded and is, therefore, more convincing.

b. Respondent's position - The Tribunal cannot apply the "aircraft" definition set forth in the Cape Town Treaty.

When this argument was raised by Claimant, as it is not in Respondent's interest to apply this definition that does not suit its argumentation, it was necessary to find grounds to undermine its enforcement in the present case. The most compelling basis for not applying this definition is that the Parties in the present case are not Contracting States of this Treaty. So Respondent should and highlight that they never agreed to enforce it, and that they are not bound by it or the definitions set forth in it. It is also worth mentioning that this Treaty has no connection with the present case. Additionally, Respondent could state that this understanding of the term "aircraft" should not be used outside the scope of the Treaty in which it was established, resorting to author Bariatti's opinion "that terms are attributed a particular meaning that is different from one convention to another"[154].

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[150] *UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Art.I (2) (a)*
[151] *UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Art.I (2) (e)*
[152] *The Problem, Ex. C4, p. 15*
[153] *The Problem , PO2, p.44, ¶9*
[154] *Stefania Bariatti, L'interpretazione delle convenzioni internazionali di diritto uniforme, CEDAM, 1986 (non-official translation, emphasis added)*

2.2.3. Registration requirement

The registration of the UAVs (Unmanned Aerial Vehicles) was, in some occasions, addressed. This argument relies on the legislative history of the CISG that indicates that the exclusion of aircrafts is attributable to the special registration rules frequently applicable to these goods.[155] The 1964 Hague Conventions (specifically, Art. 5 (1)(b) of the ULIS) excluded sales "of any ship, vessel or aircraft, which is or will be subject to registration."

a. Claimant's position

As a way to support its position, that these drones are not aircrafts, Claimant has to make use of the fact that there is no registration requirement for the Kestrel Eye 2010. Although the need for registration was addressed and questioned by the Parties, they came to the conclusion that, in the present case, no such requirements existed for the Kestrel Eye 2010 drones.[156] Also, it is worth mentioning that in other cases where the Kestrel Eye 2010 drones were exported, no registration was required[157]. So, in Claimant's view, since the reason for this exclusion is to not include goods with special registration requirements, the fact that there is no such requirement in this case is further confirmation that the exclusion set forth in Art. 2 (e) should not apply.

b. Respondent's position

To counter this argument, Respondent can follow two different paths. The first one is to explain that this criterion is not relevant and that it should not be considered by the Tribunal. This is because the mention to registration was only present in the previous wording of the provision, namely, Art. 5(1)(b) of the ULIS. Since the CISG did not adopt this provision as a whole, excluding the reference to registration, registration should not be considered. In fact, according to Professor Ferrari, "the scope of the CISG's Article 2(e) exclusion is different and broader than the ULIS' Article 5(1)(b)"[158], since "whereas the ULIS merely excluded (...) aircrafts that were

[155] *Joseph O. Lookofsky, The 1980 United Nations Convention on Contracts for the International Sale of Goods, Published in Blanpain gen. ed., International Encyclopaedia of Laws-Contracts (Kluwer Law International 1993), p.25, ¶60*

[156] *The Problem, Ex. R1, p.32, ¶7*

[157] *The Problem, Ex. R1, p.32, ¶7; PO2, p.46,¶20*

[158] *Franco Ferrari, Harry Flechtner, Ronald A. Brand (Ed.), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, European Law Publishers, 2003, p.92, ¶2*

subject to registration by virtue of national law, the CISG, by eliminating this criterion, broadened the exclusion(...)."[159] This argument is more effective and straight to the point.

Subsidiarily, Respondent can defend that, even if the Tribunal decides to consider the mention to registration, these drones still classify as aircrafts. Indeed, according to the Secretariat Commentary, as "the rules specifying which ones must be registered differ widely"[160], aircrafts were excluded from the CISG "in order not to raise questions of interpretation"[161] as to which ones were subject to the Convention. It can be concluded that the purpose of excluding aircrafts was to avoid complications with differing registration requirements. In the case at hand, the Parties talked about the registration requirement several times, and there was confusion regarding the possible need for registration. While a registration requirement existed for UAVs of this size in Equatoriana, there was no need to register the drones, because they were sold to and operated by a state-owned company.[162] Contrary to the Equatorianian regulation, there were no registration requirements for the Kestrel Eye in "Mediterraneo and the other four countries into which the Kestrel Eye 2010 had been exported so far"[163]. The variation of registration requirements for these same drones depending on the legal system to where they are exported to, leads to the complications that are intended to be avoided by not applying the CISG. So, Respondent should argue that this shows that the underlying purpose of excluding sales of aircrafts from the sphere of application of the CISG is implicated in the present case. This could lead the Tribunal into deciding in favor of Respondent, that the Kestrel Eye 2010 drones are aircrafts, pursuant to Art.2 (e) CISG.

2.2.4. Domestic law of Equatoriana - the Equatorianian ASA (Aviation Safety Act)

This argument is evidently only appropriate for Respondent's strategy. In order to comply with the CISG's international character and the goal to promote uniformity (Art. 7(1) of the CISG), it

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[159] *Franco Ferrari, Harry Flechtner, Ronald A. Brand (Ed.), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, European Law Publishers, 2003, p.92, ¶2*

[160] *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (Secretariat Commentary), p. 16, ¶9*

[161] *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (Secretariat Commentary), p. 16, ¶9*

[162] *The Problem, Ex. C7, p.18, ¶5, Ex. R1, p.32, ¶7*

[163] *The Problem, Ex. R1, p.32, ¶7*

is important to avoid differing constructions of the provisions of the CISG depending on the concepts used in the legal systems of different countries.[164] If we consider that, in the present case, the lack of context regarding the term aircraft is a gap, it is possible to use the mechanism provided by Art.7(2) to fill that gap. According to this provision, in order to guarantee uniformity in its application, when possible, gaps in the CISG should be filled without resorting to domestic law but instead in conformity with the CISG's general principles.[165] Nonetheless, despite being the last resort, when no general principles can be identified, Art.7(2) CISG allows "reference to the applicable national".[166] This approach is also supported by case law.[167] In addition, even if Respondent decides to support the argument of the application of domestic law by resorting to general principles of the CISG, there is a possibility to do so. One of the general principles of the CISG is party autonomy. [168] Since the Parties agreed that Equatorianian Law would govern their contract, using domestic law to clarify this concept is in line with the general principles of party autonomy and good faith. If Respondent succeeds in proving that domestic law can exceptionally be applied in this case, it can resort to the definition of aircraft set forth in the Equatorianian Aviation Safety Act (ASA). Art.1 of the Equatorianian ASA specifies two requirements, which are fulfilled[169], accordingly, the Kestrel Eye 2010 drones are undoubtedly considered aircrafts under domestic law.

Nevertheless, this argument can easily be refuted because, although party autonomy is a very important principle of the CISG, ultimately, the need to promote uniformity is more prominent and I believe that the international character of the CISG wins this battle against party autonomy. Furthermore, despite being debatable, it is more agreed that this situation is a case of interpretation and not of gap-filling, and is thus within the scope of Art.7(1). Since this argument proved to be controversial, I would no longer mention it and I would focus on the ones that are more persuasive.

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[164] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (Secretariat Commentary), p.17, Art.6, ¶1

[165] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, p.43, ¶10

[166] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, p.43, ¶10

[167] CLOUT Case no. 961, 10 April 2008, Economic Court of the City of Minsk; Case No. 167/2003, 28 June 2004, The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry

[168] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, p.43, ¶12

[169] The Problem, Ex. R5, Art. 1; Ex. C4

Conclusion

In conclusion, with regards to Issue C, about the applicability of the CISG, the main discussion was whether this sale was excluded from the scope of application of the CISG because of the exclusion set forth in Art.2(e) CISG.

The first topic, concerning the effects of choosing Equatorianian Law to govern the PSA (applicability/non applicability of the CISG), was subject of debate in the written phase, but that was not the case in the oral phase. This is because, in the oral phase of the competition, it was crucial for the oralists to focus on stronger points of their side and consequently, weaker ones of the other side. And the fact that, in the hearings, this topic was not contested proves that Counsel's for Respondent were aware that there was little room for discussion and decided to move on to a topic that could tip the scales in Respondent's favor.

With respect to the main issue, of determining whether the application of CISG was excluded by virtue of Art.2(e), the debate was more balanced. The challenge was to define the term "aircraft" for the purpose of the CISG and the Parties focused on several criteria in order to do so. There were more popular arguments and more creative ones. Undoubtedly, the transportation criterion was the most commonly used and it is the strongest since it is widely supported by authors and it is very straightforward. Moreover, this was the argument where, when associated with the facts, it was easier to build the case on both sides, due to the particularities that the drafters of The Problem included in the case.

To conclude, as someone who had the opportunity to get familiar with both positions, my view is that, regarding issue C, in general, the details of the case make it easier to support Claimant's side. It is certainly possible to defend Respondent's position, indeed, that is the purpose of the Vis Moot - to be able to argue in favour of both Claimant and Respondent. Nonetheless, in building Respondent's case, it is necessary to truly pay attention to small details of the case and to further elaborate on the arguments.

ISSUE D - Can Respondent rely on Art. 3.2.5 of the International Commercial Contract Act of Equatoriana to avoid the contract?

Inês Bizarro Pisani da Graça

Introduction

In order to determine if the CISG is applicable it is crucial to understand the underlying problem highlighted by Respondent's termination letter which indicates as a cause for termination of the contract the "*serious misrepresentation of the quality of the Kestrel Eye 2010 drone*"[170]. The issue of misrepresentation is an issue of validity of the contract. Therefore, according to Article 4 (a) CISG is excluded from the scope of the CISG and is governed by the national law.

However, the topic of conformity/non-conformity is regulated by the CISG under Article 35, in this manner, Respondent can not invoke his domestic law if the CISG is considered to be the applicable law to this case.

In this sense, for a better understanding of the issue at hand and its importance we will firstly discuss:

- The applicability of the CISG and the possible application of Equatoriana's law;
- The interpretation of the term "*state-of-the-art*";
- Compliance with the requirements of Art. 3.2.5 ICCA;
- Conformity of the drones;
- The time when the first complaints were raised and the timing of the termination notice.

1. Applicability of the CISG and the applicability of domestic law

This years' Vis Moot Problem offered some adversities on this matter, given that the parties considered that different laws were applicable to their dispute. For Claimant, the CISG was the applicable law to the contract. And for Respondent, the law applicable was the International Commercial Contract Act of Equatoriana. What is discussed is whether or not this is a question of conformity of the goods or validity of the contract, a matter excluded from the scope of the CISG.

[170] *The Problem, Ex. C8, p.20*

1.1 Interpretation of the parties' statement

a. Claimant's Position - interpretation of the term "state-of-the-art", Art.8 CISG

Pursuant to Article 8 CISG, for the purpose of the CISG: "*statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*.".

To follow such a position, Claimant needed to argue that the meaning of "*state-of-the-art*" requires interpretation and must be interpreted via Article 8 CISG.

Contrary to Respondent's claims, the term "*state-of-the-art*" does not pertain to a representation that is unrelated to the PSA[171].

Authors such as Schlechtriem and Schwenzer argue that this article concerned with the interpretation of contracts[172].

To determine whether Claimant's goods are truly "*state-of-the-art*", one must first establish the contractually defined definition of "*state-of-the-art*."

Mr. Bluntschli's representations of the Kestrel Eye 2010 should also be interpreted in accordance with Article 8 of the CISG. The description of the drones as the "*top model*" or the "*latest model*"[173] is crucial in interpreting and elucidating the meaning behind the term under discussion.

Article 8 (3) CISG states that: "*In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties*.".

Considering Mr. Bluntchli's representations of the drones made during the ongoing negotiations between the Parties it is crucial to take them into account in order to determine the intended meaning of the term "*state-of-the-art*" in the contract.

b. Respondent's Position - interpretation of the term "state-of-the-art", Art.4 ICCA

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[171] *The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20*

[172] *Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), 4th Edition. 2016*

[173] *The Problem, Ex. R4, p.35, ¶3*

Article 4.1 (2) ICCA stipulates that a contract must be interpreted based on how a reasonable person, similar to the Parties would interpret in under identical circumstances[174]. To ascertain what is considered "*reasonable*" the pertinent circumstances outlined in Article 4.3 ICAA are significant. Specifically, this includes: *"the meaning commonly given to terms and expressions in the trade concerned*"[175].

The term being discussed is not defined in the PSA[176]. To ascertain Respondent's understanding of the expression, it is essential to consider the level of awareness that a reasonable person, similar to Respondent, would possess[177].

Respondent would argue that a reasonable person in their position lacks the expertise to determine the intended meaning of "*state-of-the-art*" as intended by Claimant. Moreover, they are likely to have a different interpretation of the definition, given that their area of expertise does not align with the subject matter.

Considering representations such as "*top model*" or "*latest model*" to aid in the interpretation of the meaning of "*state-of-the-art*" would be highly unfair, as Respondent, being a state owned company, operates completely outside the realm of this business area.

Respondent's main purpose, according to its statute, is to ensure that the geological, geophysical and other scientific data necessary for the development of the area covered by the Northern Part Development Program.

Respondent would have to demonstrate that in the letter of 30 May 2022[178], sent by Ms. Wilhelmina Queen, there is proof of Respondent's perception of the term as being a type of technology used in drones when she mentioned that: "*The Kestrel Eye 2010 by no means represents "state-of-the-art technology*"[179].

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[174] *UNIDROIT Principles of International Commercial Contracts, 4th Edition, p.187-190*
[175] *The Problem, Ex. C8, p.20*
[176] *The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20*
[177] *The Problem, Ex. C8, p.20*
[178] *The Problem, Ex. C8, p.20*
[179] *UNIDROIT Principles of International Commercial Contracts, 4th Edition, p.187-190*

1.2 Applicability of Article 3.2.5 International Commercial Contract Act of Equatoriana

According to Article 3.2.5 ICCA, avoidance is permissible when a contracting party has been induced to enter into the contract by the other party's fraudulent representation or fraudulent non-disclosure of circumstances that, based on reasonable commercial standards of fair dealing, should have been disclosed.

In analysing fraud, it is essential to examine the requirements outlined in Article 3.2.5 of the ICCA. According to *Eckart Brödermann*[180], this provision fundamentally requires:

i. Firstly, a **state of mind,** a fraudulent intention which includes deliberate misrepresentation, as well as a goal to gain an advantage to the detriment of the other party.
ii. Secondly, it requires **that the intention must be substantiated in some conduct**. Generally, there is an omission, fraudulent non-disclosure.
iii. And the third requirement is that **the fraudulent act must have a causal link to contract conclusion**.

a. Claimant's Position

In order for Claimant to assert such a claim, it would be firstly necessary to establish that the element of fraud is not present in his conduct. This can be demonstrated by the fact that: "*What entitles the defrauded party to avoid the contract is the "fraudulent" representation or non-disclosure of relevant facts. Such conduct is fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party*"[181].

To follow such a position, Claimant needed to argue that Respondent was not defrauded and is, therefore, not entitled to avoid the contract since the requirements for fraud under the mentioned article are not verified.

The first requirement is not fulfilled considering that Claimant had to have a fraudulent intention which involved a deliberate misrepresentation or reckless representations and a goal to obtain an

[180] *Eckart Brödermann, Chapter 3 - Validity, UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary*
[181] *UNIDROIT Principles of International Commercial Contracts, 4th Edition, p.187-190*

advantage to the detriment of Respondent. Claimant ensured that Respondent received the most suitable drones for their needs and purposes and aligned with their requirements[182].

The Kestrel was indeed the newest model and top model available and sold by Claimant at the time of contracting. The new drone model was not even on the market. Besides, the contract was for the sale of the Kestrel Eye 2010 drone model[183].

The second requirement presumes an intention substantiated in some conduct and it is not satisfied. Claimant did not engage in a false representation about the drones. The drones have the quality agreed between the Parties in the contract and that will be analysed further. The requirement to provide the newest model of the Kestrel Eye 2010 was fulfilled.

Thirdly, fraud must have a causal link to the contract conclusion and generally induces in mistake. There is no causal link between the contract conclusion at hand and fraud[184]. Since Respondent was fully aware of the specific nature of the purchase, based on the contract[185] and the information provided by Claimant regarding the technical specifications of the Kestrel Eye[186], it is evident that the element of fraud is not present..

In conclusion, Respondent cannot avoid the contract and rely on Article 3.2.5 ICCA.

b. Respondent's Position

In this scenario, and taking into consideration the requirements mentioned above, Respondent could argue, on the contrary, that the requirements are fulfilled.

The first requirement is fulfilled due to Claimant's misrepresenting the drones in order to obtain an advantage to the detriment of Respondent, by inducing the purchase of the oldest drone model, whose value was going to decrease a lot once the new model was released. Claimant knew that a new and most suitable drone for Respondent's needs was going to be released in February 2021, shortly after the contract conclusion.

The second requirement is also satisfied, because of Claimant's conduct of misrepresenting the drones and of not informing Respondent about the launch of the Hawk Eye 2020.

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[182] *The Problem, NoA, p.5, ¶¶8-9*
[183] *The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20*
[184] *The Problem, Ex. C7, p.19, ¶¶13-16*
[185] *The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20*
[186] *The Problem, Ex. C4, p.15*

As to the third requirement, this is also verified as well since if it was not for this fraudulent non-disclosure and misrepresentation, Respondent would not have concluded the PSA.
Following this rationale, Respondent is entitled to avoid the PSA due to Claimant's description of the drones being a serious misrepresentation. Since Respondent's claims are concerned with the validity of the contract, the CISG is not applicable pursuant to Article 4 CISG: "*This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract.*". Issues related to the validity of the contract do not fall within the scope of application of the CISG and should therefore be regulated by domestic law. Respondent claims misrepresentation, which falls under the domain of the validity of the contract[187].

1.3 Conformity of the Goods – Article 35 CISG

Chapter II of Part III of the Convention includes provisions regarding the most significant seller obligations, respectively, the obligation to deliver goods that are in accordance with what was contracted between the parties, namely: quality, quantity, description and packaging. This Article determines the seller's obligations with regard to contractual requirements.
Article 35 CISG clarifies the principle of freedom for the parties to contract by stating that: "*The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*".

a. Claimant's Position

Claimant contends that, at most, Respondent could raise concerns regarding the conformity of the drones under Article 35 of the CISG. However, it is important to note that this dispute pertains to the quality of the goods and not the validity of the contract. Therefore, Article 4(a) CISG is not applicable in this case.
It is Claimant's position that the Kestrel Eye 2010 drones were conformed to contractual requirements and thus Claimant did not violate Article 35 of the CISG.

[187] *The Problem, Ex. C8, p.20*

Furthermore, this article is also applicable since the expression "*state-of-the-art*" is considered a qualitative description of the Kestrel Eye 2010 drones since it refers to the quality of the drone being sold[188].

Claimant is only required to supply to Respondent "*6 of its newest model of Kestrel Eye 2010 UAS out of which 4 are equipped with state-of-the-art geological surveillance feature further specified in Annex A to this Agreement*"[189] and this is present under Article 2: Seller's Obligations[190].

In order to determine whether the seller has fulfilled its obligation, Article 35(1) of the CISG emphasizes the significance of the agreement reached by the parties, as expressed in the contract[191]. Villy De Luca supports that: "*Goods are deemed to be conforming not when they meet abstract and objective standards, but rather when they correspond to the concrete description contained in the contractual agreement*"[192]. The conformity of the contracted goods is analogous to the agreement[193].

Based on this interpretation, the obligation to deliver the newest model of the Kestrel Eye 2010 as stipulated in the contract, has been met. The document in question was signed by both parties, on December 1, 2020[194]. There is reference to the sale of any other new drone model. The contract specifically pertains to the sale of a particular model, which was the most recent model developed by Claimant at the time of the contract.

Furthermore, in the Call for Tender issued by the Equatoriana's Northern Part Development Program, the drones simply had to satisfy with minimum requirements: in terms of the payload weight of 180 kg and volume of 0,8 m3, operating altitude of 5000 m and endurance of 10 hours, communication links via radio and dispatch reliability[195]. As the Kestrel Eye 2010 UAS have a capacity of 245 kg which is more than 180 kg, operating attitude of 6000 m, also more than

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[188] UNIDROIT Principles of International Commercial Contracts, 4th Edition, p.187-190
[189] The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20
[190] The Problem, Ex. R4, p.35, ¶3
[191] Villy, De Luca, The Conformity of the Goods to the Contract in International Sales, Pace International Law Review, Vol.27, Issue 1, Commercial Edition, April 2015, Article 4 Maastricht University, European Private Law Institute, pp.167-190
[192] UNIDROIT Principles of International Commercial Contracts, 4th Edition, p.187-190
[193] The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20; Ana Barbara Baide, CISG Through the Willem C Vis Moot Casebook - Seventeen Years of the CISG Evolution Explored Through Annual Global Discussion Victoria Law School, 2009, p.38
[194] The Problem, RNoA, p.28, ¶12
[195] The Problem, Ex.C1, p.9

5000m and endurance of 13 hours, more than 10 hours, the drones clearly satisfy the quality requirements[196].

It is Respondent's argument that the drones do not align with what the Parties agreed upon.

Consequently, Claimant maintains that the burden falls on Respondent, as the buyer, to demonstrate that the goods fail to meet the contractual specifications. This entails the need for Respondent to substantiate their claim of non-conformity with supporting evidence, which did not occur in the present case.

In summary, Claimant must demonstrate that the Kestrel Eye 2010 drones are in conformity with agreed features, while Respondent has failed to provide evidence to support their claim that they are not.

b. Respondent's Position

On the other hand, Respondent must argue that, alternatively, if Arbitral Tribunal determines that Respondent's claims are related to the non-conformity of the goods and the CISG is applicable, Claimant's goods are indeed non-conforming under Article 35 of the CISG.

For author Villy De Luca, goods are deemed to be conforming when they correspond to the concrete description contained in the contractual agreement[197]. In this case, since the drones are not state-of-the-art, and the contract mentioned state-of-the-art technology, the drones are non-conforming.

Claimant, as the seller, has failed to fulfil his obligations as stipulated in the signed contract, as the Kestrel Eye 2010 drones does not possess the features agreed upon by the Parties[198]. It is important to not that this particular drone model was originally developed in 2010[199].

The parties explicitly agreed on the specific characteristics that the drones must have to operate effectively in the challenging conditions found in northern provinces of Equatoriana including densely forested mountains, strong winds and volatile weather pattern[200]. These requirements

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[196] *The Problem, Ex.C4, p.15*
[197] *The Problem, Ex. C8, p.20*
[198] *The Problem, RNoA, p.29, para 17; The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20*
[199] *The Problem, Ex. C8, p.20*
[200] *The Problem, RNoA, p.28, ¶5*

included the use of new model drones equipped with state-of-the-art geological surveillance features[201]. Both the tender documents and PSA clearly indicated these specifications[202].

Moreover, Respondent would greatly benefit from the functionalities offered by the Hawk Eye 2020, particularly its extended endurance and satellite communications system that enable missions beyond the line of sight. This new drone model is better suited for operations in the remote areas of Northern Equatoriana[203]. Enhanced features such as a higher service ceiling and greater payload would significantly improve the quality of the surveillance outcomes[204].

In conclusion, Respondent must substantiate his claim that the Kestrel Eye 2010 drones did not meet the contractual specifications, thereby asserting that Claimant has breached Article 35 of the CISG.

1.3.1. Burden of Proof - Article 35 (1) CISG

Pursuant to Article 35 (1) CISG, the buyer bears the burden of proving that the goods do not fulfil the contractual requirements. Thus when the buyer intends to invoke non-conformity must also substantiate the existence of the facts that uphold the claim[205]. It is also accepted in doctrine and courts that: "*The party deriving legal benefit from a legal provision, or an exemption has to prove the existence of the factual prerequisites of the provision*."[206]. In the *Tribunale de Vigevano* case, the Court affirmed that a party who raises a claim also bears the burden of proof by stating that "*The burden of proof rests upon the one who affirms, not the one who denies*"[207].

2. Notice of the Lack of Conformity - Article 39 CISG

Article 39 CISG states that: "*[t]he buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it*.".

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[201] *The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20*
[202] *Ana Barbara Baide, CISG Through the Willem C Vis Moot Casebook - Seventeen Years of the CISG Evolution Explored Through Annual Global Discussion Victoria Law School, 2009, p.38; The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20*
[203] *The Problem, PO2, pp.45-46, ¶17*
[204] *The Problem, Ex.R3, p.34*
[205] *Thomas Neumann, Features of Article 35 in the Vienna Convention: Equivalence, Burden of Proof and Awareness Vindobona Journal of International Commercial Law and Arbitration, 2007, pp.3,10*
[206] *The Problem, Ex. C8, p.20*
[207] *CLOUT Case No. 378, Tribunale di Vigevano, Italy, 12 July, 2000*

According to this Article, when a buyer intends to claim lack of conformity, they must provide a notice to the seller regarding the said lack of conformity[208].

2.1 Nature of the Lack of Conformity

Under Article 39 CISG, the notice required has to "*specify the nature of the lack of conformity*"[209]. The buyer has the burden of specifying the lack of conformity.

Courts have required the notice to be sufficiently detailed to eliminate any possibility of misunderstanding by the seller enabling them to unmistakably comprehend the buyer's intended meaning[210]. And this was also understood by the Court of Landgericht Hannover, Germany[211]. The notice: "*should indicate both the nature and the extent of the lack of conformity, and should convey the results of the buyer's examination of the goods[212]; that notice should be specific enough to allow the seller to comprehend the buyer's claim and to take appropriate steps in response[213], (...)*" and " *that notice should be sufficiently detailed that misunderstanding by the seller would be impossible and the seller could determine unmistakably what the buyer meant[214]; that the notice should be sufficiently specific to permit the seller to know what item was claimed to lack conformity and what the claimed lack of conformity consisted of*."[215].

However, according to the CISG-AC Opinion 2 and some authors, the notice should include the information available to the buyer[216]. The Federal Supreme Court of Germany decided that is important to avoid placing the burden of specifying the non-conformity on the buyer in a strict manner[217]. The Bundesgericht considered that in case the seller was not content with the notice

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[208] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, p.123
[209] The Problem, Ex. C2, pp.10-12; The Problem, Ex. C8, p.20
[210] CLOUT Case No. 229, Bundesgerichtshof, 4 December 1996
[211] Regional Court Hannover (Landgericht Hannover), Case No. 22 O 107/93,1993
[212] CLOUT Case No. 344, Landgericht Erfurt, 29 July, 1998
[213] CLOUT Case No. 593, Oberlandesgericht Karlsruhe, 6 March 2003; CLOUT Case No. 541, Austrian Supreme Court of Justice (Oberster Gerichtshof), 14 January 2002
[214] CLOUT Case No. 229, Bundesgerichtshof, 4 December 1996; CLOUT Case No. 282, Oberlandesgericht Koblenz, 31 January 1997
[215] CLOUT Case 319, German Federal Court of Justice (Bundesgerichtshof), 3 November 1999
[216] CISG-AC Opinion No.2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39 June 2004, Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York
[217] CLOUT Case No. 319, German Federal Court of Justice (Bundesgerichtshof), 3 November 1999

given by the buyer, or in case the nature or extent of the lack of conformity was ambiguous, the seller could question the buyer[218].

a. Claimant's Position

For Claimant to argue such fact, he had to prove that Respondent's only notice relating to the quality of drones was the 30 May 2022 letter[219].

In its assertions regarding the non-conformity of Kestrel Eye 2010 drones with the "*state-of-the-art,*" requirement, Respondent neglected to provide specific details regarding the particular qualities that the Kestrel Eye 2010 drone disregarded. The complaints made by Respondent in the letter were predominantly limited to mentioning that Claimant had developed other drones capable of "*carry much higher loads and have a longer range*."[220].

Claimant must contend that this, however, cannot be deemed as adequate notice regarding the misunderstandings between Claimant and Respondent, particularly because Respondent did not claim that Claimant's drones failed to meet the specifications outlined in Annex A of the Agreement. Furthermore, Claimant was not afforded the opportunity to amend the misunderstanding.

b. Respondent's Position

Respondent has to argue that the notice explicitly stated both the nature and extent of the lack of conformity, as it clearly informed Claimant that : "T*he Kestrel Eye 2010 by no means represents "state-of-the-art" technology, as required by the tender documents, and assured by Mr. Bluntschli who had described it as Drone Eye's "latest model" or "top model*"[221].

The nature of the non-conformity regards the features of the drones to them not being state-of-the-art, nor the latest model, nor the top model.

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[218] *CLOUT Case No. 87, Bundesgericht, Switzerland, 13 November 2003*
[219] *The Problem, Ex. C8, p.20*
[220] *The Problem, Ex. C8, p.20*
[221] *The Problem, Ex. C8, p.20*

The Kestrel Eye 2010 drones are not in line with what was contractually agreed upon. It was known that Claimant had been developing a new generation of drones for several years[222].

Furthermore, Respondent may also argue that Claimant could easily comprehend the lack of conformity to which Respondent was referring. This is because Claimant was aware that it had sold a product that did not possess the agreed-upon characteristics, as evidenced by Mr. Field was concern regarding the sale of an outdated model[223]. This matter was discussed in relation to the Kestrel Eye 2010 drones not meeting Respondent's expectations.

To summarise, Respondent must argue that if Claimant was uncertain about the nature or extent of the lack of conformity, he had the opportunity to inquire about it with Respondent. to have questioned Respondent about it. In conclusion, Respondent's position is that the notice was sufficient.

2.2 Notice Provided in a Reasonable Time

Article 39(1) CISG requires that the notice of the lack of conformity has to be issued within a reasonable period of time after the buyer has discovered or ought to have discovered the lack of conformity.

The CISG, in case of non-conformity, does not establish a fixed period of time. So there is a need to take into consideration the opinion of doctrine and jurisprudence.

One of the contributions made on this topic and which has received the greatest acceptance is Professor Schwenzer's "N*oble Month doctrine*". What contributed to the diffusion of this theory was its application by the German Bundesgerichtshof.

Most of the arbitral tribunals "*refer to the one-month period or at least emphasise that a contractually agreed time frame of one month is not to be overridden*."[224]. Even though the CISG Advisory Council Opinion No.2 has doubts about the one month period, this timeframe is

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[222] *The Problem, Ex. C2, pp.10-12; Ana Barbara Baide, CISG Through the Willem C Vis Moot Casebook - Seventeen Years of the CISG Evolution Explored Through Annual Global Discussion Victoria Law School, 2009, p.38; The Problem, Ex.C4, p.15*

[223] *The Problem, Ex. C7, p.19, ¶¶13-16*

[224] *Ingeborg Schwenzer, The Noble Month (Article 38, 39 CISG) - The Story Behind the Scenery 7 Eur.J.L. Reform, 2005, pp. 353-366*

flexible and not absolutely fixed[225]. The "*Noble Month*" can be used as a guideline for adjustable timeframes to become somewhat more predictable[226].

According to Schwenzer, "*According to Article 39(1) CISG, the buyer loses the right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it or ought to have discovered it*"[227]

The District Court in Stuttgart in the case from 2009 considers the "*Noble Month*" as the more compelling one. The Court contributed with a meticulous citation: "*[i]t is disputed how to measure the 'reasonable time' regarding the defect determined under Article 39 CISG, however, according to jurisprudence and the leading doctrine, the gross average is approximately one month*."[228]. This last quote from Stuttgart condenses the overall assessment of the current German state of law as to Article 39 timeframes in cases from 2005 and onwards. Based on these cases, the "*Noble Mont*h" emerges as the clear leader in setting a benchmark for reasonable time.

However, according to CISG-AC Opinion 2, "*the reasonable time for giving notice after the buyer discovered or ought to have discovered the lack of conformity varies depending on the circumstances (...) No fixed period, whether 14 days, one month or otherwise, should be considered as reasonable in the abstract without taking into account the circumstances of the case*"[229]. When it comes to durable goods, the reasonable period has to be established in a more flexible approach[230].

For instance, in the USA or France, the Courts provide in their domestic laws tolerant notification periods or none at all, and also admit longer notification periods in relation to the CISG. In some cases, eleven months were held within the time limit[231].

a. Claimant´s Position

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[225] The Problem, Ex. C8, p.20

[226] Camilla B. Andersen, Article 39 of the CISG and Its "Noble Month" for Notice-Gining; A (Gracefully) Ageing Doctrine? Journal of Law and Commerce, 2012, pp.185-190

[227] The Problem, Ex. C8, p.20

[228] District Court of Stuttgart, (Germany), 2009, Case No. 39 O 31/09 KfH

[229] The Problem, Ex. C8, p.20

[230] Ingeborg Schwenzer, National Preconceptions That Endanger Uniformity Pace International Law Review, Volume 19, Issue 1, 2007, p.121

[231] Kentucky District Court, 18 March 2008, Case No. 07-161-JBT; Cour d'Appel de Versailles, 12éme chambre, 1ére section, 29 January 1998, Case No. 56

Although Article 39 is usually applied after the delivery of goods takes place, Respondent's claims in the letter dated 30 May 2022 regarding the quality defects of Kestrel Eye 2010 demonstrate that Respondent's understanding of the defect could be discerned without actual delivery of individual drones[232].

As stated *supra*, according to the scenario introduced by Schwenzer, the time period for notification commenced from the day in which the buyer (Respondent) detected the non-conformity. Since March 2021 that Claimant had been in discussions with Mr.Field about the possible effects of the presentation of the Hawk Eye 2020 on their contractual relationship[233]. Respondent terminated the negotiation on the 30th of May 2022, and as can be observed, a lot of time has passed, approximately one year and two months.

If the second scenario is considered, the reasonable period of time begins on the day when the buyer ought to have discovered the lack of conformity. Assuming it is the month of March 2021, that the time has elapsed as well.

Other courts have construed "*reasonable time*" very tightly. Even in cases where notice concerned goods that are not perishable, courts have only allowed a couple of months for the buyer to provide notice to the seller on the high end. In *Axle Spindles*, the Court determined that two months taken to provide notice was not unreasonable because the goods were durable and required period of time to discover the defect[234]. Further, the Austrian Supreme Court has allowed only 14 days for durable goods in the *Austrian Wood case*[235], a decision reaffirmed in a number of cases after[236].

According to Schlechtriem and Schwenzer's Commentary on the CISG, they advocate for a period to give notice of one month as an average for durable goods[237].

Claimant has to prove that Respondent's 30 May 2022 letter was not provided in a reasonable time to Claimant. Although drones are durable goods, Respondent should have and did in fact discover the alleged defect that Kestrel Eye 2010 did not conform to "*state-of-the-art*" for many months before the letter was sent to Claimant. In fact, after Claimant debuted the Hawk Eye

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[232] *The Problem, Ex. C2, pp.10-12; Ana Barbara Baide, CISG Through the Willem C Vis Moot Casebook - Seventeen Years of the CISG Evolution Explored Through Annual Global Discussion Victoria Law School, 2009, p.38*

[233] *The Problem, Ex. C7, p.19, ¶¶13-16*

[234] *Navarra Provincial High Court (Spain), 27 December 2007, Case No. 1039*

[235] Austrian Supreme Court (Oberster Gerichtshof), 15 October 1998, Case No. 2 Ob 191/98x

[236] Austrian Supreme Court (Oberster Gerichtshof), 27 August 1999, Case No. 1 Ob 223/99x*;* Austrian Supreme Court (Oberster Gerichtshof), 14 October 2002, Case No. 7Ob 301/01t

[237] *Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), 4th Edition. 2016*

2020 in February 2021, CEO of Drone Eye William Cremer was told that "t*here had been discussions with [Respondent]…after the presentation of our new Hawk Eye 2020, but the issue was apparently resolved in May 2021.*"[238]. These discussions about the presentation of Hawk Eye 2020 on the contract between Claimant and Respondent began in March 2021[239]. At the latest, Respondent knew about the fact that there may have been a more advanced or "*state-of-the-art*" model in May 2021. However, Respondent more likely knew about the alleged defect in March 2021.

Respondent's 30 May 2022 letter intended the remedy for the alleged defect to be a rejection of goods[240]. The remedy requested by the buyer in case of non-conformity affects the period of time deemed reasonable[241]. And "*If the buyer is rejecting the goods, a more prompt communication may be required.*"[242].

Respondent did not notify Claimant until May 2022, despite having discovered the alleged defect already in March 2021. Should be taken into account that a period of 14 months after Respondent discovered the alleged defect is no longer reasonable, especially since Claimant was preparing to deliver Respondent the drones in January 2022. If Respondent had notified Claimant earlier, Claimant may have been able to rectify the defect.

To conclude this argument, it is Claimant's position that Respondent has forfeited his claims of non-conformity.

b. Respondent's Position

Respondent could argue that Article 39 CISG is not applicable in this case since the goods in question, the drones, were never delivered to Respondent. This Article is typically applied when the goods have been delivered to the buyer[243].

On the other hand, if Article 39 CISG is considered applicable to the present case, Respondent has to uphold that the CISG does not provide a specific definition of what is considered

[238] *The Problem, Ex. C3, p.13, ¶4*
[239] *The Problem, Ex. C7, p.18, ¶13*
[240] *The Problem, Ex. C2, pp.10-12; Ana Barbara Baide, CISG Through the Willem C Vis Moot Casebook - Seventeen Years of the CISG Evolution Explored Through Annual Global Discussion Victoria Law School, 2009, p.38; The Problem, Ex.C4, p.15*
[241] *Camilla Andersen, Reasonable Time in Article 39(1) of the CISG, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Michael Maggi ed., 2004)*
[242] *The Problem, Ex. C8, p.20*
[243] *The Problem, Ex. C2, pp.10-12*

"*reasonable*". To fully comprehend what should be recognized as reasonable, the circumstances of the case and their particular aspects need to be taken into account.

In light of the particular circumstances of the case, Respondent took 14 months to notify Claimant about the lack of conformity. The circumstances were marked by uncertainty, as a moratorium was declared on all contracts within the Northern Part Development Program in December 2021[244], and contracts were under analysis. Given these circumstances, 14 months can be considered a reasonable time since Respondent did not wish to terminate the contract before having reliable and substantive reasons to do so. After establishing the existence of serious grounds for contract termination, such as corruption allegations and misrepresentation, Respondent decided to terminate the contract on May 30, 2022.

In this regard, Respondent must argue that it has not forfeited its right to raise such claims because the letter dated May 30, 2022, was provided within a reasonable time after Respondent discovered the defect.

Conclusion

The fourth and final issue of this year's Willem C. Vis International Commercial Arbitration Moot, regarding the termination for misrepresentation, raised a discussion about the underlying problem since the line of argumentation was divided between two distinct routes: one advocating for the applicability of domestic law and the other for the applicability of the CISG. This is because the case was drafted to elaborate on whether the issue is to be classified as a misrepresentation or as a question relating to the conformity of the goods.

Conclusion

Our participation in the Vis Moot was an incredibly amazing experience.

From a learning standpoint, as law students, our participation in the Vis Moot provided us with invaluable opportunities to explore and engage with subjects and matters that were previously unfamiliar to us. Additionally, we acquired a wide range of skills, including organization,

[244] *The Problem, Ex. C6, p.17*

collaborative teamwork, assimilating and implementing feedback, meeting deadlines, enhancing our English skills, and perfecting our memo writing abilities.

It was also a valuable opportunity to connect with colleagues from all over the world and establish contact with professionals in the field of arbitration, including experienced arbitrators.

Working as a team presented us with a challenge that we successfully overcame. One of our members skillfully managed to balance her internship as a trainee lawyer while actively participating in the moot.

The remarkable results we have achieved this year would not have been possible without the unwavering support, guidance, and teachings provided by our coaches, Ana Coimbra Trigo, Ana Sousa and Carolina Apolo Roque to whom we express our appreciation for the considerable time and effort they have devoted to us during these arduous months of work. We are truly grateful for their unwavering commitment and support.

We achieved the 33rd position in the competition, received an honourable mention for Best Team Orals (Eric E. Bergsten Award), and were also awarded the Best Team Prize in the Vis Moot by the APA - Portuguese Arbitration Association.

Furthermore, we would like to thank our sponsors PLMJ and CEDIS - NOVA School of Law for making our participation in the Vis Moot possible and also, APA - Portuguese Arbitration Association, for the support given to us.As well as we thank to Professor Francisco Pereira Coutinho, without them this experiment would not have been possible.

Lastly, we are also very appreciative for the help, encouragement and guidance given by Professor Fabrizio Esposito, the previous coaches, Rute Alves and André Fonseca, the former team members who dedicated their time to assist us in training sessions and gave us precious advice. We cannot forget to thank our family and friends, who offered us unwavering support throughout.

In conclusion, we are immensely thankful for the opportunity to have had this experience, which has not only facilitated our professional growth but also nurtured our personal development.

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Appendix

Appendix I

30th Willem C. Vis International Commercial Arbitration Moot

MEMORANDUM FOR CLAIMANT

On behalf of

Drone Eye plc

1899 Peace Avenue
Capital City
Mediterraneo

- CLAIMANT -

Against

Equatoriana Geoscience Ltd

1907 Calvo Rd
Oceanside
Equatoriana

- RESPONDENT -

COUNSEL

Ana Moura Dias | Andréa Sousa | Carolina de Esmeriz Garcia | Inês Graça

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LIST OF ABBREVIATIONS

¶	paragraph
¶¶	paragraphs
AA	Arbitration Agreement
ASA	Aviation Safety Act
Art./Arts.	Article/Articles
CLAIMANT	Drone Eye plc
DAL	Danubian Abitration Law
Ex. C	Claimant's Exhibit
Ex. R	Respondent's Exhibit
ICCA	International Commercial Contract Act
i.e.	*Id est*
NoA	Notice of Arbitration
NPDP	Northern Part Development Program
p./pp.	page/pages
Parties	Drone Eye plc and Equatoriana Geoscience Ltd
PO1	Procedural Order number 1
PO2	Procedural Order number 2
PSA	Purchase and Supply Agreement
RESPONDENT	Equatoriana Geoscience Ltd

RNoA	Response to the Notice of Arbitration
SOE	State-owned enterprise
v.	Versus

TABLE OF CONVENTIONS, ARBITRAL RULES AND LEGAL TEXTS

Cited as	Text
Chicago Convention	Chicago Convention on International Civil Aviation
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
ECICA	European Convention on International Commercial Arbitration 1961
Geneva Protocol	Geneva Protocol on Arbitration Clauses 1923
Model Law	UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985, amended in 2006
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958
PCA Rules	Permanent Court of Arbitration Rules 2012
SAL	Swiss Private International Law Act, Chapter 12 (Swiss Arbitration Law) 1987
UNCAC	United Nations Convention Against Corruption 2004
UNCITRAL Arbitration Rules	UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules (2021 revised version)

UNCITRAL Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Convention	UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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7 February 2011	ICSID-International Centre for	Malicorp Limited v Arab Republic of Egypt, ICSID Case No. ARB/8/10	41, 42, 44

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31 March 2017	PCA-Permanent Court of Arbitration	Cairn Energy PLC, Cairn UK Holdings Limited v The Republic of India (Procedural Order No. 3) Cited as: *Cairn v India*	66
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19 February 2018	Ad Hoc Arbitration	Huntington Ingalls Incorporated V. The Ministry Of Defense Of The Bolivarian Republic Of Venezuela Cited as: *Huntington Ingalls v. Venezuela*	41

STATEMENT OF FACTS

CLAIMANT
Drone Eye plc

Is a medium-sized private company, producer of Unmanned Aerial Systems (or drones), based in Mediterraneo.

Capital City
Mediterraneo

RESPONDENT Equatoriana Geoscience Ltd Oceanside Equatoriana	Is a State owned company, held in its entirety by the Ministry of Natural Resources and Development of Equatoriana, based in Equatoriana, and created in 2016 as part of the Northern Part Development Program (NPDP).

March 2020	RESPONDENT opened the tender process in connection with the NPDP for the delivery of 4 drones for earth surveillance and exploration purposes and CLAIMANT submitted a successful bid and was selected as one of the two bidders with which RESPONDENT entered into further negotiations.
1 December 2020	Parties signed the PSA at a formal ceremony by CLAIMANT's CEO, Mr.William Cremer, RESPONDENT's CEO, Ms. Wilhelmina Queen, and Equatoriana's then Minister of Natural Resources and Development, Mr.Rodrigo Barbosa, that provided for the delivery of 6 Kestrel Eye 2010 drones in 2022 for an overall price of EUR 44 million. At the time of the tender and the contract conclusion, the Kestrel Eye 2010 was CLAIMANT's top model available on the market, which contained all the entirely sufficient features for the purposes of RESPONDENT. The PSA contained an AA.
February 2021	CLAIMANT launched its newest drone model the Hawk Eye 2020 which is based on a different technology and is noticeably larger than the Kestrel Eye 2010, at the air show in Mediterraneo.
3 July 2021	The Citizen, Equatoriana's leading investigative journal, owned by the leader of the Liberal Party, started to publish a series of headlines articles about a massive corruption scheme surrounding the NPDP and several high-profile members of the ruling Socialist Party.

3 December 2021	As a consequence of the public outcry, the socialist Prime Minister had to resign and call for early elections. The new government is elected in Equatoriana and as one of the first steps, declares a moratorium on all contracts concluded within the NPDP.
27 December 2021	RESPONDENT sent CLAIMANT an email to inform that the PSA would be put on hold until further notice. Claimant tried to find a solution to the problem in calls and meetings with representatives of RESPONDENT and the MND.
30 May 2022	RESPONDENT declares the PSA avoided and the negotiations terminated, as it was obtained by corruption and misrepresentation by registered letter.

I.THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THE CASE

3. The Parties to these arbitration proceedings are bound by an AA that provides for arbitration under the 2012 PCA Arbitration Rules, having its seat in Danubia [Ex. C2, p.12, art.2; NoA, p.6, ¶16]. RESPONDENT alleges that the Arbitral Tribunal does not have jurisdiction since there is no valid AA [Records, p.26], arguing that the PSA concluded by the parties resulted from corruption, being void from the beginning [Ex. C8, p.20,¶4; RNoA, p.27, ¶1; RNoA, p.30, ¶3].
4. Furthermore, RESPONDENT claims that the AA is invalid because Parliament's approval for its conclusion was never obtained, as required under Equatoriana's Constitution [RNoA, p.30, ¶¶3-5].
5. Contrary to RESPONDENT's baseless claims, CLAIMANT will demonstrate that the Arbitral Tribunal does, indeed, have jurisdiction to hear the case. In order to sustain the Tribunal's jurisdiction, CLAIMANT will establish that the AA has been validly concluded by the Parties, and originates an obligation to arbitrate in their legal sphere, as it meets all essential elements of an AA, according to the *lex arbitri*, the Danubian arbitration law **(A.)**. Secondly, there was no corruption related to the PSA and the AA. CLAIMANT will even go as far as to establish that eventual corruption would not affect the AA's validity **(B.)**. Finally, the claimed inexistence of Parliament approval has no effect on the validity of the AA, as will be demonstrated **(C.)**.

A. The Parties concluded a valid Arbitration Agreement

6. CLAIMANT will demonstrate that, according to the *lex arbitri*, the AA was validly concluded by the Parties. Firstly, the DAL is the law applicable to the assessment of the AA's validity (**1.**). Secondly, the AA meets all elements required by DAL (**2.**), namely written form (**a.**), mutual consent demonstrated by signature (**b.**), arbitrability of the subject matter (**c.**) and contractual capacity of the Parties (**d.**).

1. Danubian Arbitration Law is the *lex arbitri* that governs the Arbitration Agreement's validity

7. When deciding the seat of arbitration, parties make an implicit choice on the law applicable to the AA [REDFERN, Ch.3, p.3, ¶3.15, Enka v. Chubb].
8. The seat theory is generally understood to be an authoritative conflict rule to determine the proper law of the AA [SCHERER, p.5; BORN, Ch.4, p.528; REDFERN, p,173]. The law of the seat is fundamental as it governs the place where the award will be rendered, determines the validity of the AA, the arbitrability of the dispute and jurisdiction [SCHERER, p.7; HENDERSON, p.887, ¶3].
9. Parties do frequently make alternative provisions for matters of procedure by specifying rules of arbitration to apply to their dispute. When parties adopt institutional rules, as was done in this case with the selection of the PCA Rules [NoA, p.6, ¶Ex. C9, p.22, ¶3] they are, in fact, selecting a more detailed procedural code to supplement the *lex arbitri* [HENDERSON, pp.888-889, ¶7].
10. In this case, the Parties agreed the seat of arbitration would be Danubia [NoA, p.6, ¶16, (b); Ex.C2, p.12, art.20(b)]. And even according to Danubian law, which follows the Model Law, the law applicable to each arbitration should be that of the place where that arbitration takes place, and the selection of a particular seat of arbitration results in the arbitration being conducted in accordance with that jurisdiction's legal framework [HENDERSON, p.890; Model Law, art.1(2)].
11. Thus, it is evident that DAL is the law that governs the AA and according to which its validity should be assessed.

2. The Arbitration Agreement was validly concluded, as it meets all essential elements according to the DAL

12. As mentioned in ¶5, CLAIMANT will establish the AA's validity according to the DAL, by verifying the compliance with the law's required elements for arbitration agreements.
13. For the AA to be valid, it must meet the requirements as to its form provided by the DAL, the parties must have agreed to arbitrate by mutual consent, the subject matter must be susceptible to

arbitration, and the parties must be able to enter into an arbitration agreement on their own behalf or on behalf of another entity [VOSER, p.77, ¶275; GUPTA, pp.43-44].

14. It is important to note that Danubia's arbitration law is based on the NYC and Model Law [PO1, p.43, 3].

a.) Written form

15. The DAL requires an agreement in writing, that may be in the form of an arbitration clause in the main contract [NYC, Art.2; Model Law, Art.7 Option 1]. Also, if the parties choose the arbitration clause form, the contract in which the clause is contained must be signed by both parties [NYC, Art.2]. Thus, it is clear that the written form requirement is satisfied by a written contract which both parties sign, that contains as one of its terms a written arbitration clause encompassing future disputes [BORN, p.719].
16. In the present case, the Parties opted for an AA in the form of an arbitration clause, included in the Parties' PSA [Ex. C2, p.12, Art.20] and this contract also displays the signatures of both Parties [Ex. C2, p.12].

b.) Mutual consent

17. For the AA to be valid the parties' mutual consent must exist. The parties need to have common intention at the time of the conclusion of the contract [HANOTIAU, p.547, ¶4] and the parties' signature is one of the means to express consent [HANOTIAU, p.548, ¶2].
18. As mentioned above, the PSA was signed by both Parties at a formal ceremony on the 1st December 2020 [NoA, p.5, ¶6; RNoA, p.28, ¶12]. The Parties' common intention to arbitrate is notorious through the communications between them regarding the arbitration clause, and mainly the request for modifications made by RESPONDENT [Ex. C9, p.22; Ex. C2, p.12]. By requesting amendments to the clause, the RESPONDENT acknowledges its existence and confirms its validity, as it is only possible to modify something that exists, and so expresses a will to arbitrate.

c.) Arbitrability of the subject matter

19. According to the DAL, the arbitrability of matters is decided according to the *lex arbitri*, the law of the seat of arbitration [NYC, Art.V(2)(a); VOSER, p.91, ¶319], therefore the arbitrability of the case's subject matter is to be decided according to DAL.

20. As the object of the AA is the disputes arising from a commercial contract, and being Danubia signatory of conventions on that matter, it is easy to conclude the object is arbitrable under the DAL [Ex. C2, p.12, Art.20; PO1, p.43, 3].

d.) Contractual capacity of the Parties

21. The contractual capacity to validly enter into an AA is required under the DAL [NYC, Art.V(1)(a); Model Law, Arts.34-36]. The general rule is that the capacity to enter into a contract means the capacity to enter into an AA [KIMANI, p.4, ¶2; VOSER, p.92, ¶¶323-325].
22. In this case, no contractual incapacity is mentioned throughout the records.

23. In conclusion, The AA was validly concluded between CLAIMANT and RESPONDENT, since all key elements are met. Parties agreed to arbitrate, and expressed their common intention by writing and signing the AA [Ex. C2, p.12, Art.20]. There is no reason to call the AA's validity into question.

B. Claims raised by the RESPONDENT on alleged corruption affecting the validity of the PSA and of the Arbitration Agreement must fail

24. The issues of jurisdiction and the validity of the AA are only being addressed by CLAIMANT, because RESPONDENT repeatedly argues these are not observed, as the PSA as a whole, including the AA, is invalid, as it was procured by corruption [Ex. C9, p.20, ¶2; RNoA, p.27, ¶1; RNoA, p.30, ¶2]. Thus, CLAIMANT will demonstrate that all allegations but be disregarded, as RESPONDENT presentes absolutely no evidence to back these claims **(1.)**. And once again, CLAIMANT will go even further and establish that, even in the case the Arbitral Tribunal considers there is proven corruption, this would not affect the AA's validity, and consequently the Arbitral Tribunal's jurisdiction **(2.)**.

1. The Tribunal must not take into account any corruption allegations, as RESPONDENT failed to present any credible evidence

25. In the present case, RESPONDENT insists the PSA was procured by corruption and was void from the beginning and that Claimant is benefitting from an unduly favorable contract [Ex. C8, p.20, ¶3; RNoA, p.27, ¶1]. However, accusations alone do not suffice, "*such grave accusations must be proven. (...) Rumours or innuendo will not do*" [Himpurna v. PT case]. And CLAIMANT agrees with the established international standard that "*the seriousness of the accusation of corruption (...) demands clear and convincing*

evidence" [EDF v. Romania case; Westinghouse v. Philippines case; Dadras International v. Iran case; Aryeh v. Iran case; AHCA v. DRC case; ULUC, pp.161-162].

26. In international arbitration, it is widely recognized that each party shall have the burden of proving the facts relied on [PCA Rules, Art.21, 1; UNCITRAL, Art.27(1); Metal-Tech v. Uzbekistan; ICC case No.7047]. This principle is also applied in the context of corruption, where if the respondent affirms that the claimant's rights arising from a contract are null and void due to corruption [REA, ¶4], it is up to the respondent to present evidence [ICC case No.7047].
27. Thus, it is up to RESPONDENT to prove corruption concerning the Parties' contractual relationship. However, RESPONDENT has not been able to provide evidence regarding any corruption [Ex. C8, p.20, ¶23]. RESPONDENT accused CLAIMANT of bribing government officials, i.e. RESPONDENT's COO Mr.Field, but failed to present any proof. CLAIMANT has even gone out of its way to investigate, and confirmed the inexistence of any suspicious payments related to the conclusion of the Agreement [Ex. C3, p.13, ¶7].
28. Furthermore, all accusations made by Ms. Fonseca, the public prosecutor investigating the NPDP, and the statements given by RESPONDENT's key witness, Ms. Bourgeois, former assistant of Mr.Field, must also not be taken into account by the Tribunal, as they are completely one-sided, since the personal relationship between these figures and the case has been disclosed. Although no connection between the Parties' PSA and corruption scheme has been made, Ms. Fonseca insists on investigating the contract, perhaps because she is the sister-in-law of the tender process' losing bidder's CEO, according to a trustworthy source [Ex. R2, p.33, ¶6]. The veracity of Ms. Bourgeois declarations, RESPONDENT's only witness, is also very questionable, as the former assistant of Mr.Field is engaged to Ms. Fonseca' son and has, since Mr.Field's arrest, climbed the career ladder and secured a position in Ms.Fonseca's office.
29. As there is no evidence, the Tribunal must disregard all claims regarding corruption. There is so far not even any credible allegation that the PSA is tainted by corruption, let alone any proof.

2. In any case, even if the PSA was proved to be corrupt, such corruption would not affect the Arbitration Agreement's validity, as both agreements are considered to be separate contracts

30. RESPONDENT raises the corruption allegations only regarding the PSA, and only as a consequence of that does RESPONDENT conclude on the invalidity of the AA [RNoA, p.30, ¶20].

So, CLAIMANT will demonstrate how that is a wrong conclusion, as the eventual invalidity of the underlying PSA will not affect the already established validity of the AA.

31. As it happens in the present case, corruption is generally alleged when the respondent seeks to dismiss claimant's claim [ULUC, p.6, ¶1]. It is very common, when a foreign contractor initiates arbitration against a state-owned company, for the state-owned company to raise objections alleging that corruption taints the whole contract and should be declared null and void [ULUC, p.1 (b)].
32. However, although the AA celebrated by the parties is a clause within the PSA, that clause shall be treated as separate from the commercial contract within which it is found [BORN, p.1, ¶1; DRLIČKOVÁ, pp.26-27: Westacre Invs. Inc. case]. The application of the Separability Doctrine enables the potential legality of an AA, regardless of the non-existence, illegality or invalidity of the underlying contract [TODOROVIC, p.7, ¶2 (2)]. This doctrine emerged in order to address the practical impediment to arbitration of disputes when one party, in this case RESPONDENT, challenges the overall validity of the contract [RUDZKA, p.27, ¶1].
33. Also the DAL, the law applicable to the arbitration as was established, recognizes the presumptive separability of the parties' AA. It recognizes the presumption by foreseeing that the arbitration clause shall be treated as an agreement independent of the other terms of the contract and it provided that the invalidity of the underlying contract does not invalidate the arbitration clause [Model Law, Art.16; NYC, Art.II, TODOROVIC, p.15, ¶2].
34. In the present case, the parties' AA is included in the PSA as a clause, in its Art.20 [Ex. C2, p.12, Art.20]. Although the AA is part of the contract, it must be considered by the Tribunal as a separate contract, whose validity is not dependent on the underlying Agreement's validity.
35. Consequently, since nullity of the main contract cannot imply the nullity of the AA, such scenario seems to be possible when a main contract is tainted by corruption [RUDZKA, p.31, ¶2]. The validity of an AA cannot be contested on the ground that the main contract is null and void on the ground of a violation of good moral and public policy [ICC Case No. 6248; ICC Case No.5943], as the separability presumption retains its full vigor even where corruption taints the underlying contract [LIM, p.43, ¶91, DRLIČKOVÁ, p.33].
36. Additionally, being the AA valid even if the underlying contract is null and void, arbitrators will in most instances accept jurisdiction over contractual disputes allegedly tainted by corruption [KHAN, p.79, ¶14].
37. All things considered, CLAIMANT affirms that, even in the case the PSA would be tainted by corruption, and be declared null and void from the beginning, as RESPONDENT describes it, that

invalidity would not affect the validly concluded AA. Therefore, the Arbitral Tribunal must confirm its own jurisdiction to hear the case.

C. The lack of approval by the Parliament has no effect on the validity of the Arbitration Agreement

38. Another argument RESPONDENT uses to reject the AA's validity, is the fact that there was no consent by the Parliament for a submission to arbitration under the PSA, as was supposedly required by a constitutional provision of Equatoriana [RNoA, p.29, ¶12; RNoA, p.30, ¶21]. RESPONDENT also argues that, consequently, Minister Rodrigo Barbosa acted without authority [RNoA, p.28, ¶12; RNoA, p.30, ¶22].
39. Therefore, CLAIMANT will establish, firstly, that the PSA concluded is not as administrative contact and the constitutional provision does not apply **(1.)**. Secondly, that the DAL, the only law that must be invoked by the Tribunal to assess the AA's validity, does not require the Parliament's approval, so this requirement must, again, not apply **(2.)**. And finally, that RESPONDENT cannot invoke Equatoriana's internal provisions to avoid its obligation to arbitrate **(3.)**.

1. The PSA is not an administrative contract, falling outside the Parliament's consent requirement

40. RESPONDENT argues that there should have been authorization by the Parliament. However, this special legal regime, foreseen on Equatoriana's Constitution only applies to so called administrative contracts [RNoA, p.30, ¶21].
41. According to PO2, although RESPONDENT considers the PSA to fall within the consent requirement, the PSA was never formally defined as such, and as far as CLAIMANT knows, the law of Equatoriana has no established definition of administrative contract. Quite the opposite, the existing case law covers only cases for the actual construction of infrastructure [PO2, p.47, ¶29].
42. In international law, an International Administrative Contract has been defined as "[*a]n agreement held by the administrative party on one hand, and an ordinary or juridical foreign person on the other hand. Its aim is to transfer the economic and financial values across the boundaries in order to establish permanent facilities or massive investments in any of the public utilities. This agreement includes exceptional terms that are unfamiliar in the private law*" [CEIL, p.7].

43. Arbitral Tribunals have understood that administrative contracts in general must fulfil three elements: one of the parties must be a public authority, the object of the contract must prosecute public utility, and the contract must contain exceptional or highly unusual clauses that are not found in civil contracts [Malicorp v. Egypt case; Al-Kharafi v. Libya case; Huntington Igalis v Venezuela case].
44. The object of the administrative contract is the enhancement of public domain goods, provision of public services or the execution of public works, through contracts such as concessions of public services, execution of public construction and assembly works [SANDU, p.905, 1.2]. Administrative contracts are not related to ordinary transactions as sale or lease [Malicorp v Egypt].
45. Also, the authority party would be in a position of superiority [SANDU, p.904, 1.1]. And unlike normal commercial contracts, the administrative contract would include clauses conferring privileges to the authority party that are not conferred to the other party. For example, the authority party would exercise directive and surveillance powers [SANDU, p.908; Al-Kharafi v Libya case].
46. Although the PSA was celebrated with RESPONDENT, an SOE, owned by the Ministry of Natural Resources and Development of Equatoriana, the object of the contract is not the creation, development or maintenance of public utilities [Malicorp v Egypt], as the object of the PSA is the mere sale of drones [Ex. C2, pp.10-11, Arts. 2-3]. Moreover, the Parties in the PSA are not in a position of inequality, as the contract does not include unusually favorable clauses giving powers to RESPONDENT.
47. Thus, CLAIMANT argues that the PSA celebrated between the Parties does not qualify as an administrative contract.

2. The DAL does not foresee consent requirements for the submission by an SOE to arbitration, therefore no consent but the Parties' is required

48. It has already been clarified in PO2 that Danubian law has no limitations or consent requirements for the submission by an SOE to arbitration or for the conclusion of AAs by an SOE [PO2, p.¶¶32-33]. Therefore, having CLAIMANT already established DAL as the *lex arbitri* competent for the evaluation of the AA's validity, a provision of another law will not apply.
49. Equatoriana law was elected by the Parties to govern the contract [Ex. C2, p.12, Art.20] and this law will govern existence, validity and interpretation of the main contract [ACERIS, ¶7].
50. However, and as consequence of the separability principle, there is no link between the law applicable to the merits of the dispute and the law governing the arbitral procedure [GAILLARD,

¶¶1173-1174; Diefenbacher case; ARAMCO case; ICC case No.5029], so the law of Equatoriana will not be applied by the Arbitral Tribunal to determine the validity of the AA.

51. As demonstrated, the validity of the AA is governed by DAL, and, consequently, Equatoriana's constitutional requirement of Parliament's authorization has no relevance.

3. RESPONDENT cannot invoke internal Equatorianian law in order to avoid arbitration, therefore any internal requirement is irrelevant and RESPONDENT must fulfil its obligation to arbitrate

52. As CLAIMANT stated in the NoA, RESPONDENT, as a SOE, cannot rely on any restrictions that exist under the law of Equatoriana [NoA, p.7, ¶18].
53. When there is a contract between a SOE and a foreign company, containing an AA, and the applicable law to the contract is the law of the State party, and subsequently a dispute arises and the foreign company wishes to submit the dispute to arbitration and invokes the AA and the SOE responds that the AA is invalid on the basis of mandatory requirements in its own internal law the so called "Internal Law Principle" will apply [CAIRNS, p.1, ¶2; PAULSSON, p.90, ¶1]
54. According to this principle, State entities cannot invoke its own internal law to frustrate an arbitration it has previously agreed to, as that would be against international public order and good faith [Benteler v. Belgium case; Balkan Energy v. Ghana case; CAIRNS, p.3, ¶5; PAULSSON, p.97, ¶1; Art.II(1) ECICA; Art.177(2) SAL].
55. The description in point 50. matches the present case perfectly. CLAIMANT, a foreign company, and RESPONDENT, a company owned by the State of Equatoriana, celebrated a PSA, that contains an AA, and the Parties chose the law of Equatoriana to govern the contract. The AA was validly concluded and RESPONDENT consented to arbitrate. Then, when CLAIMANT attempts to resolve a dispute through arbitration, RESPONDENT invokes an internal provision of the law of Equatoriana, the requirement of Parliament's authorization, in an attempt to invalidate the AA and avoid arbitration.
56. Therefore, the principle will apply to this case, as RESPONDENT will not be able to invoke its own internal law to escape its contractual obligation to arbitrate.
57. Furthermore, RESPONDENT argues that CLAIMANT was aware of the missing authorization. However, CLAIMANT trusted the word of Minister Rodrigo Barbosa [Ex. R4, p.35, ¶1], who

guaranteed the Parliament's approval was just a formality [Ex. C7, p.18, ¶9], and is entitled to rely on his affirmed authority [Aminoil v. Kuwait case; PAULSSON, p.98, ¶2].

II. THE ARBITRAL PROCEEDINGS SHOULD CONTINUE IN ALL CIRCUMSTANCES

58. In relation to RESPONDENT's incomprehensible request to stay, or bifurcate, the proceedings, CLAIMANT asks the Arbitral Tribunal to respond negatively to such request and continue the arbitration in all circumstances. CLAIMANT will demonstrate that the ongoing investigations against Mr. Field cannot justify a staying of the proceedings, and such stay unnecessary and detrimental to the arbitration **(A.)**. Secondly, CLAIMANT will also demonstrate the alternative of bifurcation is equally inefficient and brings no advantage to the proceedings **(B.)**. However, CLAIMANT believes that if the Arbitral Tribunal decides to stay or bifurcate the proceedings, the Tribunal should opt for bifurcation **(C.)**.

A. The ongoing investigations against Mr. Field do not justify the stay of proceedings

59. To request the stay of proceedings, RESPONDENT relies on the mere fact that there are ongoing investigations against Mr. Field, RESPONDENT's former COO [RNoA., p. 30, ¶23].
60. However, RESPONDENT fails to acknowledge that **(A.)** the criminal investigations do not justify the stay of proceedings, in view of the fact that **(1.)** the Arbitral Tribunal has discretion to conduct the proceedings as it deems appropriate; **(2.)** the stay of proceedings is an exceptional remedy which would endanger CLAIMANT's rights; **(3.)** criminal investigations do not interfere with arbitration proceedings; and **(4.)** even if they did, the ongoing criminal investigations are biased and therefore null and void.
61. Therefore, CLAIMANT submits that the Tribunal should reject RESPONDENTS' request to stay the proceedings.

1. The Arbitral Tribunal has discretion to conduct the proceedings as it deems appropriate

62. RESPONDENT filed a request for the stay of proceedings due to the fact that there are ongoing investigations against Mr. Field, RESPONDENT 's former COO [RNoA., p 30. , ¶23]. Nevertheless, the stay of proceedings does not constitute a legal obligation or a procedure to follow whenever

criminal investigations arise in relation to the respective arbitral proceedings. In fact, Arbitral Tribunals exercise a broad discretion when deciding whether or not to stay the proceedings [3]. In this regard, CLAIMANT points out the need to look into the law applicable to these proceedings.

63. As previously mentioned, both CLAIMANT and RESPONDENT are Parties to the PSA [Ex. C2, p.10, Art. 1], the *lex arbitri* is the DAL, [Po1, p. 43, ¶3] and both Parties agreed that the present dispute shall be settled in accordance with the PCA Rules [NoA.; p. 6; ¶16; Ex. C9]. Likewise, the UNCITRAL Rules on Transparency were also agreed to apply to any arbitration between the Parties.
64. According to the PCA Rules, there is no requirement for arbitrators to stay arbitral proceedings pending the outcome of criminal investigations which are said by RESPONDENT to be relevant for the arbitration. Similarly, the DAL and the UNCITRAL Rules on Transparency are silent in this respect.
65. As a matter of fact, all the applicable legal texts to the current arbitration explicitly provide for The Tribunal's discretion to conduct the process as it deems appropriate. [Art.17(1) PCA Rules; Art.19(b) DAL; Art. 4 UNCITRAL Rules on Transparency]. Thus, the Tribunal has discretion to manage the proceedings, there being no mandatory rule or duty requiring their stay.
66. Needless to say, the Tribunal remains at liberty to stay the arbitral proceedings, if it considers appropriate to do so. [DE FONTMICHEL, p. 309; RACINE, p. 106]. It is a matter of assessment of the situation, which CLAIMANT will clarify below. In this sense, CLAIMANT is certain that the following explanation will escort the Tribunal to realise that the stay of proceedings is not a suitable option for the present case and that would lead to unreasonable consequences.

2. The stay of proceedings is an exceptional remedy which would endanger CLAIMANT's rights

67. When filling its request, RESPONDENT fails to recall that the stay of proceedings is an exceptional remedy. In this sense, there is a legal presumption to the effect that arbitration proceedings will move on unless exceptional circumstances or reasons require a stay [Cairn v. India].
68. As a result, there are fundamental considerations that the Tribunal should take into account when deciding on a stay and what could constitute exceptional reasons or circumstances: (i) whether the external facts and circumstances have a concrete impact on the issues to be decided in the arbitration; (ii) assessment of the Parties' respective interests, on the basis of overriding procedural principles such as fairness and due process; (iii) whether the requested stay would impinge on procedural efficiency and economy, and (iv) as a general rule, the decision of the arbitrators will be

guided by the principle that arbitral proceedings be conducted without unreasonable delay. [GROSELJ, p. 576]

69. In conclusion, the Tribunal's grant for a stay should not be resorted to since it would endanger CLAIMANT's rights. Thus, it will be demonstrated below that a stay of proceedings (a) would unnecessarily prolong the proceedings and increase costs and (b) they would violate the equal treatment of the Parties.

i. Staying the proceedings would unnecessarily prolong the proceedings

70. The public prosecutor has reported that his investigations will be completed by the end of 2023 and charges will be brought by then [RNoA., p. ¶23, X; Ex. R2]. On the same matter, Equatoriana's new government has also set up a special chamber in the criminal court to deal with all the charges relating to the NPDP, stating that a decision of first instance proceedings can be expected until July 2024 [RNoA, p. 40, ¶24].

71. Firstly, both criminal investigations and criminal court discussions are likely to last longer than promised which means the probability to have a decision on the matter will only occur around July 2024 or later. Furthermore, there is the possibility to appeal against a judgement of the special chamber of the criminal court [PO2., p. 49, ¶47], which will further delay a final decision.

72. As it was already stated by CLAIMANT, a stay can only be ordered in exceptional circumstances and the conflicting interests of the Parties have to be balanced against each other. In the event there is any space for doubt, arbitration should give priority to an expeditious conduct of the proceedings, meaning the principle of celerity should prevail and no stay should be ordered [19, 20].

73. Also, case law has argued that the impact of the criminal proceedings and the lack of clarity as to when a decision of the public prosecutor could be expected weighed against granting a stay of the arbitral proceedings. In fact, the Swiss Federal Tribunal has observed, upon the request of one party to stay the proceedings that a stay can ultimately result in a denial of justice, mentioning that "*Putting the question raises the spectre of endless arbitral proceedings that are paralyzed forever because of dilatory criminal proceedings carried before slow, or worse biased, judges*" [BESSON, p. 4, ¶14].

74. Staying this Arbitration would deprive CLAIMANT of its right to pursue its affirmative claims for a long amount of time, which will be very detrimental for CLAIMANT.

ii. A stay of proceedings would violate the equal treatment of the Parties

75. With its petition for the stay of proceedings, RESPONDENT is depriving CLAIMANT of its right to have their dispute resolved by this Tribunal.
76. The Model Law foresees the discretionary power of the tribunal, yet it made this power conditional on the equal treatment of Parties [Art. 18 Model Law] which means the Parties shall be treated with equality and each party shall be given a full opportunity of presenting their case.
77. As important as efficiency may be, as has been stated above, the good administration of justice also requires loyalty and fairness, which is intrinsically connected to the equality of the parties [ARROYO and RODRIGUES, p. 41; UNESCO ICJ Advisory Opinion, p. 77].
78. Accordingly, is it the arbitral tribunal's duty to control any abuse of procedural rights, such as fairness and efficiency.
79. Granting RESPONDENT's Application would deprive CLAIMANT of its right to have its claims heard by the only Tribunal with jurisdiction to decide them, causing material prejudice to CLAIMANT and creating an imbalance between the Parties, thereby violating CLAIMANT's right to equal treatment.

3. Criminal investigations do not interfere with arbitration proceedings

80. RESPONDENT alleges that the Tribunal should wait until the investigations are concluded in order to avoid rendering an incorrect decision in a field with serious public policy implications [RNoA., p. 30, ¶23]. The rationale behind RESPONDENT's claim appears to be that if the arbitral proceedings continue, RESPONDENT might be acting in breach of the Anti-Corruption Act. [RNoA., p. 30, ¶23]. That understanding, however, does not match the reality and CLAIMANT will proceed to demonstrate why.
81. The arbitral procedure is autonomous and has its own rules, having no obligation to stay the arbitration proceedings pending the outcome of the criminal investigations which might be relevant for the arbitration [SGS S.A. v. Pakistan]. Besides, as it was already stated [¶¶ 32 to 36], according to the doctrine of separability, the AA is distinct from the main contract and will not perish even if there are allegations of corruption pertaining to the main contract [TODOROVIC, p.7, ¶2].
82. Moreover, no general principle of international law prevents criminal and arbitral proceedings from being conducted in parallel [TRAIN, p. 18].

83. In this regard, French case law had long decided that the rule le criminel tient le civil en état (i.e. criminal proceedings take precedence over civil proceedings) does not apply to international arbitration [11]. The reasoning behind this understanding is directly connected to the autonomy of international arbitration [RACINE, p. 110] and the fact that this rule does not amount to international public policy and hence does not constitute a ground for setting aside an award [TRAIN, p. 18]. Following this line of thought, criminal verdicts are not deemed to have binding effects on a Tribunal [GOJKOVIC; Inceysa Vallisoletana v El Salvador]. Likewise, criminal proceedings do not take precedence over civil proceedings in the context of international arbitration proceedings seated in Switzerland [Swiss Supreme Case].
84. Therefore, the outcome of the dispute between the Parties is not dependent upon the investigations regarding Mr. Field and the current arbitral proceedings must continue without any constraints.

4. In any case, the criminal investigations are biased and should not be considered

85. Ms. Fonseca was appointed as special public prosecutor by the new government to investigate the corruption surrounding the NPDP and by now she has made several accusations against Mr. Field [RNoA., p.29, ¶16]. However, Ms. Fonseca is not impartial and these investigations are biased.
86. In its article of 22 May 2022, "The Citizen" refers that the CEO of the other bidder for that contract had been Ms. Fonseca's brother-in-law. Moreover, it reveals the close relationship between Leonida, the former personal assistant of Mr. Field, and Ms. Fonseca, as Leonida is Ms. Fonseca's son's fiancé, and is now working at her office. To be precise, at her future mother-in-law's office. [Ex. R2, p.33, ¶6]. As stated in PO2, The Citizen is considered a credible source of information, which means all the information is trustworthy [PO2. p. 49; ¶42].
87. The disclosed information calls into question the integrity and impartiality of Ms. Fonseca, as well as the trustworthiness of Leonida's testimony and consequently the accuracy of the charges pressed against Mr. Field.
88. There is clearly a conflict of interests inside the ongoing criminal investigations which prevents them from being considered by the Tribunal. [BESSON, p.5, ¶19].
89. In the event the Tribunal considered to stay the proceedings, that decision would be unlawful, since the decision would be a result of investigations carried out by biased authorities which are likely to favour RESPONDENT and even worse, to harm CLAIMANT.

B. Even alternatively, the arbitral tribunal should not order bifurcation

90. Alternatively, RESPONDENT requests that the proceedings be at least bifurcated, so that the Tribunal may solely decide on those issues which do not depend on the result of the criminal investigations [RNoa., p. 31, ¶25].
91. Upon the videoconference of 6th October 2022, the scope of a bifurcation was discussed at length between the Tribunal and the Parties, noting that CLAIMANT continues to not agree nor with the stay of proceedings nor with RESPONDENT's request for bifurcation. The agreement dictated that the bifurcation request, if granted, would only extend to the question of the invalidity of the contract due to a suspicion of corruption, which means that only the merits, 1c and 1d, would be addressed in the first phase of the arbitration [PO2., p. 49, ¶50].
92. In reference to what was previously said concerning RESPONDENT's request for the stay of proceedings in Section II [¶60], the law applicable provides a sufficient basis for the existence of the Tribunal's power to also decide whether to bifurcate. Once more, it is a matter of assessment of the situation, being that the alternatively request for bifurcation is linked to a jurisdictional challenge.
93. On this understanding, CLAIMANT will proceed to demonstrate how bifurcation would be inefficient to the proceedings.

1. Bifurcation would be inefficient to the proceedings

94. To conclude if bifurcation would be efficient to the proceedings, Tribunals must consider all circumstances, namely whether bifurcation would materially reduce the time and cost of the proceedings as well as whether jurisdiction can be determined separately or whether the issues are intertwined, making it impossible to deal with them separately [CIArb Guidelines, p. 47].
95. In this sense, the ICSID working group has contributed to the discussion with their approach to the issue of bifurcation [ICSID Working Group.]. In accordance, the group defined two issues to consider in relation to requests to bifurcate proceedings: the timing of the request and any deadlines for the tribunal's decision whether to permit bifurcation or not and; the factors that the tribunal should take into account in reaching its decision [ICSID Working Group]. Likewise, case law has also established that the tribunal should only exercise its discretion to bifurcate proceedings after considering whether bifurcation would preserve or improve fairness and procedural efficiency. [32; 33]

96. Therefore, the Tribunal has to make an assessment regarding the likely span of the investigations and the potential benefit of such investigations for assessing the corruption allegations in the arbitration.

97. Following the above guidelines, CLAIMANT will show the Tribunal how bifurcation would be inefficient to the proceedings since (i) it would increase time and costs and (ii) would lead to significant overlap of evidence.

i. Bifurcation would increase time and costs

98. When deciding to bifurcate proceedings, some of the key issues to analyse are economic efficiency and eventual costs. In this sense, one of the best ways to understand bifurcation's effectiveness implies looking at statistical evidence [GREENWOOD 2011, p. 107].

99. Several studies carried out to date have focused on evaluating bifurcation efficiency [GOTANDA; CASTAGNA]. Firstly, a study has found that only 45 out of 174 ICSID tribunals have bifurcated proceedings between jurisdiction, merits and quantum when faced with a bifurcation challenge [GREENWOOD 2011, p. 107]. Another study has shown that where jurisdiction was upheld in bifurcated proceedings and there was a final award, the conclusion of proceedings took approximately two years longer than non-bifurcated proceedings and eighteen months longer than the general average. [GREENWOOD 2019, p. 425] Additionally, these studies have concluded that bifurcation has not generally contributed to the efficient resolution of disputes.

100. In the case at hand, the second phase of bifurcation would even rely on the outcome of the criminal investigations which, as we know, are not expected to end before 2024 [¶63]. Even though RESPONDENT is willing to delay and increase the costs to provide a burden for CLAIMANT, CLAIMANT is certain that jurisdictional challenge will be upheld, which means the Tribunal would have to unnecessarily add two years or more to the length of the proceedings which can be expensive to litigate.

101. Therefore, CLAIMANT rejects RESPONDENT's alternatively request to order the bifurcation since it would lead to a reduction of time and costs and would most likely be inefficient to the proceedings.

ii. Bifurcation would lead to significant overlap of evidence

102. RESPONDENT will most likely raise the fallacious argument in regards to the jurisdictional questions not raising issues intertwined with the merits, which contributes to justify the bifurcation

of proceedings. However, bifurcating the arbitral proceedings would lead to a substantial overlap of evidence because the same witnesses would have to testify more than once.

103. When arbitral tribunals exercise their discretion to bifurcate, factors to be considered cover whether jurisdiction can be determined separately or whether the issues are so intertwined as to make it impossible to deal with jurisdiction as a separate issues as well as the complexity of the jurisdictional challenge and the likelihood of success [CIArb Guidelines, p. 47].

104. In this regard, case law shows the same reasoning but goes further in depth, since it considers that "even a partial overlap of evidence" between merits and jurisdictional issues is sufficient to deny bifurcation [Mesa Power v. Canada]. Moreover, case law shows that tribunals confronted with allegations of fraud typically decide to join such objections to the merits [Minnotte and Lewis v. Poland].

105. In the case at hand, all the witnesses, Mr. William R. Cremer [Ex. C3], Ms. Horacia Porter [Ex. C7] and Ms. Leonida Bourgeois [Ex. R1], testify both as to circumstances of what prompted the investigations and questions concerning the merits.

106. Consequently, the witnesses would need to appear twice during this arbitration if the Tribunal were to bifurcate the proceedings, which would lead to the repetition of witness evidence, counteracting the objective of bifurcation's efficiency.

C. In the unlikely event that the Arbitral Tribunal decides to stay or bifurcate the proceedings, the Tribunal should opt for bifurcation

107. The previous analysis on RESPONDENT's requests (A and B) warrant that the facts presented and proven so far do not justify a stay of proceedings, nor even a bifurcation. Likewise, it is also clear that the Tribunal has sufficient powers to establish and decide on the facts presented, as it should.

108. Accordingly, granting the request to stay or bifurcate the proceedings would be detrimental to CLAIMANT as well as to the very essence of arbitration and party autonomy as any party who desired not to be governed by the AA could then make allegations of corruption to wriggle out of it, without investigations having been completed. Furthermore, it would go against Arbitration's reputation of providing effective and speedy proceedings.

109. However, in the unlikely event that the Arbitral Tribunal decides to stay or bifurcate the proceedings, the Tribunal should opt for bifurcation as being the less harmful option to CLAIMANT. Whereas staying the proceedings puts every CLAIMANT's right at risk, bifurcation

would be the option that would least interfere with CLAIMANT's rights since it would allow the analysis and judgement of the PSA's validity as well as RESPONDENT's breach of the PSA by refusing to take delivery of the drones and paying for them. Furthermore, it would assure CLAIMANT's compensation for damages.

110. Thus, but without conceding RESPONDENT's request, bifurcation would be the less harmful option if the Tribunal decides to alter the natural course of the proceedings.

III. THE CISG GOVERNS THE PSA

111. In the present case, although the CISG is applicable due to the Parties' choice, RESPONDENT is trying to mislead the Tribunal by stating that "*the contract is governed in its entirety by the Equatorianian ICCA"* [RNoA, p. 31, ¶26]. The law governing the PSA, contrary to what RESPONDENT claims, is the CISG. The CISG is indeed applicable through the law of Equatoriana, the law chosen by the parties, pursuant to Art. 1(1)(b) **(A.)**. Additionally, since both Parties have their places of business in Contracting States, the CISG is also applicable by virtue of Art. 1(1)(a) CISG **(B.)**. Furthermore, the sale of the 6 Kestrel Eye 2010 drones falls under the scope of the CISG, since this is not a sales transaction for an aircraft pursuant to Art. 2(e) CISG **(C.)**.

A. The Parties agreed that the CISG would govern the PSA

1. The choice of law of a Contracting State leads to the application of the CISG, pursuant to Art. 1 (1) (b) CISG

112. The Parties' PSA contains an Arbitration Clause which includes a choice of law provision [Ex. C2, Art.20(d)]. The PSA was signed on 1 December 2020 by both Parties [RNoA, p.28, ¶12]. Furthermore, the first draft of the PSA was provided by RESPONDENT [Ex C.7, p.19, ¶18]. Art. 20 of the PSA was later amended, on 27 May 2021, but point d), which stipulates that the law of Equatoriana governs the PSA, remained untouched [Ex. C9, p.22, ¶1].

113. In an attempt to prove that CLAIMANT's claims lack any merit, even though both parties agreed on the application of the CISG, now RESPONDENT states that the contract is governed in its entirety by the Equatorianian ICCA [RNoA, p. 31, ¶26]. This position can never succeed since both Parties have agreed on the application of the CISG.

114. Art. 1(1)(b) states that the CISG applies "*when the rules of private international law lead to the application of the law of a Contracting State*."

115. Regarding the relevant rules of private international law, the Arbitral Tribunal should consider the applicable arbitration rules, thus the PCA Rules. Party autonomy is the cornerstone of arbitration and the Parties' choice was to apply these rules. Art. 35 of the PCA Rules states that "*the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute*".

116. Accordingly, this provision upholds the Parties' choice of Equatorianian substantive law. Therefore, these rules lead to the application of the law of a Contracting State (Equatoriana) within the meaning of Article 1(1)(b).

117. In the ICC Case No. 15313 Award, it was stated that *"since the CISG is part of the law to which the choice of law refers, such reference also includes the CISG"*. Court decisions predominantly support this approach [Trading v. Vadotex; Zhejiang Henghao v. Trio Selection; Adhesive Foil Covers Case; Smits v. Quetard]. The Austrian Supreme Court, for example, held that the choice of law of a Contracting State includes the CISG, which is a part of that State's legal system. In addition, it also sustained that the CISG takes precedence over the non-unified law which would otherwise be applicable [Oil & Gas Case].

118. RESPONDENT may argue that the CISG was never mentioned by the Parties. This statement is correct. However, the designation of the law of a Contracting State leads to the application of the CISG, even though the Parties have not specifically mentioned the CISG [SECRETARIAT COMMENTARY, p.15, ¶8].

119. In the present case, because the CISG is Equatorianian law, a provision designating Equatorianian law as the law applicable leads to the application of the CISG.

120. Finally, the CISG would not apply by virtue of its Art. 1(1)(b) if Equatoriana had declared that it would not be bound by this provision, pursuant to the reservation set forth in Art. 95 CISG. Since Equatoriana did not make that declaration, Art. 1(1)(b) applies. Therefore, the CISG governs the PSA by virtue of Art. 1(1)(b) CISG.

i. The Parties never excluded nor intended to exclude the application of the CISG, pursuant to Art.6 CISG

121. According to Art.6 CISG, the parties are allowed to exclude the application of the CISG. The intent to exclude should be clearly manifested and must be determined in accordance with Art. 8 CISG [CISG-AC-O No. 16, p.2, ¶3]. Art. 8 states that "*statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*".

122. A clear intent to exclude should be inferred, for example, from express exclusion of the CISG or from choice of the law of a non-Contracting State [CISG-AC No. 16, p.2, ¶4 (a)].

123. On the other hand, an intent to exclude should not be inferred merely from the choice of the law of a Contracting State [CISG-AC-O No. 16, p.2, ¶4 (b)], without more, this will not exclude the CISG [CISG-AC-O No. 16, p.11, ¶4.2]. Thus,"*when a law is chosen from a jurisdiction that has acceded to the CISG, the CISG will apply unless expressly excluded*" [ICDR Case No. 01-16-0005-5206, respective PO2, p.2, ¶7]. Furthermore, scholars corroborate that the choice of law of a Contracting State in itself, if made without particular reference to the domestic law of that State, does not amount to an exclusion of the CISG [SCHLECHTRIEM/ SCHWENZER, pp.90-91; UNCITRAL DG, p.34, ¶11]].

124. Regarding implicit exclusion, it has even been stated that this is not a possibility, considering that the exclusion must always be explicit [CISG-AC-O No. 16, p.11, ¶4.2; Sporting Clothes Case].

125. Even in the cases in which the possibility of implicit exclusion was admitted, it was stated that "*in order for the parties to implicitly exclude CISG, a clear intent to this effect is to be proven. The mere reference to the rules of non unified domestic law of a contracting State is thereto not sufficien*t" [Delicatessen Case; Oil & Gas Case; Ceramique Culinaire v. Musgrave; BP Oil & BP Exploration v. Equator State Company].

126. In this case, it can be stated, with certainty, that there is no evidence in the case file that an exclusion was made nor that there was any intent to exclude the application of the CISG. The PSA, for example, does not contain any exclusion of the application of the CISG [Ex. C2]. Furthermore, based on the above legal submission, the parties' choice of Equatorianian law as the law governing the PSA [Ex. C2, Art.20(d)] cannot imply an exclusion of the CISG.

127. Even in the unlikely scenario that the Arbitral Tribunal finds that the choice of law could constitute an implicit exclusion, in this case, there is no single fact, i. e. in emails exchanged by the Parties, that would make it reasonable to affirm that there was a clear intention to exclude.

128. Since no exclusion was made either explicitly or implicitly and clearly, the application of the CISG is not excluded pursuant to Art.6 CISG.

B. The CISG is directly applicable, pursuant to Art. 1 (1) (a) CISG

1. Both parties have their places of business in Contracting States, therefore, the CISG is applicable by virtue of Art. 1 (1) (a)

129. RESPONDENT affirms that the PSA is not governed by the CISG, however, in addition to the application of the CISG due to the Parties' choice, Art. 1 (1) (a) CISG also supports its applicability in this case.

130. Art.1 (1) (a) states that the CISG applies when the parties to a sale of goods contract have their places of business in (different) Contracting States.

131. According to the criterion set forth in this article, the CISG is "directly" or "autonomously" applicable without the need to resort to contracting Parties' mutual agreement upon its application [UNCITRAL DG, p.5, ¶9]. Furthermore, concerning this article, John Honnold recalls that the main goal of the CISG was to bring legal certainty to international trade. Thus, applicability based on this provision ensures this purpose. After all, applicable domestic law, even if chosen by agreement, is likely to be unknown to at least one of the parties. By applying the CISG, a "*single uniform law to which both states have agreed*", this instability ceases to exist [HONNOLD, p.15, ¶45]. The US Court of Appeal supports this approach by stating that the application of this provision promotes uniformity (according to Art.7 CISG) and good faith in international trade [BP Oil & BP Exploration v. Equator State Company].

132. In this case, both Equatoriana and Mediterraneo, the parties' places of business, are Contracting States of the CISG [PO1, p.43, ¶3]. Hence, the CISG is also applicable to the PSA by virtue of Art. 1 (1) (a) of the CISG.

133. In addition, the applicability of the CISG based on Art. 1 (1) (a) is cumulative to the application based on private autonomy (the Parties' choice). Even though it is clear that the CISG is automatically applicable, CLAIMANT acknowledges that questions may arise regarding the effect of a clause choosing the law of a Contracting State [Ex. C2, Art.20 (d)], when the CISG is already applicable.

134. When the CISG is applicable due to Art. 1 (1) (a), the choice of law clause "*determines the domestic law applicable to issues outside the sphere of application of the CISG*" [ICC Case No. 15313; SCHLECHTRIEM/ SCHWENZER, pp. 90-91].

135. Likewise, most court decisions and arbitral awards, mainly reason that the "*Parties' choice remains meaningful because it identifies the national law to be used for filling gaps in the Convention*" [UNCITRAL DG, p.34, ¶11].

136. For the reasons explained above, the Tribunal should find that the Parties' inclusion of a choice of law clause was (1) a clarification regarding the applicable domestic law to matters not addressed by the CISG; and (2) a reference to the application of the CISG, since Equatoriana is a Contracting State of the Convention.

i) There are no grounds for excluding the CISG in the present case

137. The CISG is directly applicable "*unless the parties have designated a given law with the intention to exclude the Convention*", pursuant to Art.6 CISG [UNCITRAL DG, p.5, ¶10]. Bearing in mind all that was stated above regarding Art. 6, it can be safely stated that the Parties never excluded nor intended to exclude the application of the CISG.

138. In addition, when applying the CISG by virtue of Art. 1 (1) (a), it is important to consider if the States in which the parties have their relevant place of business have declared an Art. 92 reservation [UNCITRAL DG, p.5, ¶11]. Under this reservation, a Contracting State can declare that it is not bound by a specific part of the Convention, which results in the impossibility of applying the Convention as a whole by virtue of Art.1 (1) (a). Neither Mediterraneo, Equatoriana nor Danubia (in CLAIMANT's understanding, the reference to Ruritania in the PO2 is a clear error, since this State has no connection with this case, so, it should be read Danubia instead of Ruritania) declared any reservation according to Art. 92 CISG [PO2, p.49, ¶48]. In this case, since no reservation was declared, there is no impediment to the application of the CISG pursuant to Art. 1 (1) (a).

C. The sale of the Kestrel Eye 2010 drones falls under the scope of the CISG, therefore, the PSA is governed by the CISG

1. The Kestrel Eye 2010 does not qualify as an aircraft pursuant to Art. 2(e) CISG

139. RESPONDENT argues that the PSA for the Kestrel Eye 2010 drones falls outside of the CISG's sphere of application, pursuant to Art. 2 (e) CISG. Furthermore, it indicates the need for registration as an argument for qualifying drones as aircrafts [RNoA, ¶26]. However, this claim can never succeed since the Kestrel Eye 2010 drones are not considered aircrafts.

140. The main issue of this topic is to clarify the definition of "aircraft", pursuant to Art. 2 (e).

141. Art. 2 (e) CISG states that the Convention does not apply to sales of aircrafts. The CISG does not define the scope of this concept. In the preparatory works of the CISG, the meaning of "aircraft" is also not clarified [SECRETARIAT COMMENTARY, p.16, ¶9; UNCITRAL DG, p.18, ¶10]. CLAIMANT hereby explains the approach that the Arbitral Tribunal must follow to fill this gap.

i. In the absence of clarification by the CISG, the Arbitral Tribunal may resort to internationally recognized definitions of "aircraft", in order to ensure uniformity on the interpretation of the CISG

142. Art. 7 (1) CISG states that the Convention should be interpreted with regard to its international character and to the need to promote uniformity in its application. Hence, it is important to avoid differing constructions of the provisions of the CISG depending on the concepts used in the legal systems of different countries [SECRETARIAT COMMENTARY, p.17, ¶1].

143. Furthermore, according to Art. 7 (2), doubts about matters governed by the CISG which are not expressly settled in it should be settled in conformity with the general principles on which the CISG is based. Accordingly, in order to guarantee uniformity in its application, when possible, gaps in the CISG should be filled without resorting to domestic law but instead in conformity with the CISG's general principles [UNCITRAL DG, p.43, ¶10; ALSTINE, p. 788, ¶2].

144. It is recognized that "*The UNIDROIT Principles are principles in the sense of Art.7 (2)*" [Dutch Seller Case; Scafom v. Lorraine]. Since these principles are of great importance for the Vienna Convention, we can assume that other relevant instruments developed by this International Institute should also be taken into consideration. Moreover, UNIDROIT'S purpose is to harmonize commercial law between States and to formulate uniform law instruments to achieve this objective. Therefore, it is "*obvious that UNIDROIT is the right institution to offer global concepts*" [HEUTGER, p.896, ¶8].

145. Additionally, it is true that each convention gives life to an autonomous system. However, this should not happen "*when the convention has been drawn up by an international body which uses a certain expression always with the same meaning*" [BARIATTI].

146. The UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment adopts the definition of the term "aircraft" settled on by the Chicago Convention (which has 193 Contracting States) [UNIDROIT Convention, Art.1 (2) (a)].

147. For the reasons explained above, the Arbitral Tribunal should consider this definition of aircraft.

a. According to the Aircraft definition adopted by UNIDROIT, the Kestrel Eye 2010 drone does not qualify as an aircraft

148. According to the UNIDROIT Convention, aircrafts are "*either airframes with aircraft engines installed thereon or helicopters*". Moreover, airframes are considered to be so when they are type certified by the competent aviation authority to transport (i) at least eight persons or (ii) goods in excess of 2 750 kilograms [UNIDROIT Convention, Art.1 (2) (e)].

149. The Kestrel Eye 2010 drones have a capacity (payload) of 245 kilograms [Ex. C4]. In addition, these drones do not have the ability to carry humans and are not appropriate to carry cargo [PO2, p.44, ¶9].

150. These characteristics clearly do not meet the requirements recognized by the UNIDROIT Convention for an object to be qualified as an aircraft.

151. Finally, CLAIMANT understands that RESPONDENT may argue that, according to the Equatorianian ASA, the Kestrel Eye 2010 drones qualify as aircrafts. However, this claim is irrelevant since, when interpreting the CISG, domestic law is only applied as a last resort, as shown above.

152. On the basis of the above-mentioned facts, according to an internationally recognized definition of the term "aircraft", it can be stated that the Kestrel Eye 2010 drones do not qualify as aircrafts. Therefore, the sale of the drones falls under the scope of application of the CISG, pursuant to Art.2 (e) CISG.

2. The underlying reason for the exclusion of aircrafts does not arise in this case, since there is no need for registration of the Kestrel Eye 2010 drones in Equatoriana

153. In the event that the Arbitral Tribunal is still doubtful it is important to address the background that led to the exclusion of sales of aircrafts from the scope of the CISG.

154. "*The 1964 Hague Conventions excluded sales "of any ship, vessel or aircraft, which is or will be subject to registration." ULIS 5 (1)(b); ULF 1(6)(b)*" [HONNOLD, p.23, ¶54]. Thus, it can be understood that the exclusion of aircrafts is attributable to the special registration rules frequently applicable to these goods [LOOKOFSKY, p.25, ¶60].

155. In other cases where the Kestrel Eye 2010 drones were exported, no registration was required [Ex. R1, ¶7; PO2, p.46, ¶20]. Similarly, in the present case, no registration requirement existed [Ex. R1, ¶7]. Even though the drones needed to have clearly visible product numbers on the tail, that does not qualify as a registration [Ex. R1, ¶7; PO2, p.46, ¶21].

156. Since the purpose of this exclusion is related to the registration requirement, the fact that there is no such requirement in this case is further confirmation that the exclusion set forth in Art. 2 (e) should not apply.

157. Consequently, the Arbitral Tribunal must find that the sale of the Kestrel Eye 2010 drones falls within the scope of the CISG.

3. The PSA includes the sale of drone parts, which also falls under the scope of application of the CISG

158. Even in the unlikely scenario that the Arbitral Tribunal is unsure about the non-qualification of the drones as aircrafts, the sale contained in the PSA still falls under the scope of the CISG.

159. In this case, the PSA not only regulates the sale of the 6 Kestrel Eye 2010 drones, but it also includes the supply of: basic maintenance services [Ex. C2, Art. 2 (e)]; additional and comprehensive maintenance services [Ex. C2, Art 2 (f)] and all spare parts needed for a proper operation of the UAS [Ex. C2, Art 2 (f)].

160. The part of the PSA that concerns the drones has a value of EUR 44,000,000 (EUR 8,000,000 x 4 UAS + EUR 6,000,000 x 2 UAS) [Ex. C2, Art.3 (1) (a)]. The maintenance part of the PSA has a value of EUR 11,520,000 (EUR 480,000 x 8 UAS x 4 years) [Ex. C2, Art.3 (1) (b); Ex. R1, ¶6; PO2, p.47, ¶27]. In addition, Ms. Bourgeois "*assumed that an additional EUR 1,480,000 would be spent annually for the six UAS to purchase additional services at the customary fixed prices listed in Annex C*" [PO2, p.47, ¶27]. Therefore, the maintenance part of the PSA (where the supply of spare parts is included) has an estimated value of EUR 17,440,000 (EUR 11,520,000 + EUR 1,480,000 x 4 years). This amount corresponds to almost 30% of the total value of the PSA, which is a very substantial part.

161. Additionally, exclusions from the CISG's sphere of application must be interpreted restrictively [UNCITRAL DG, p. 18, ¶10]. With this in mind, despite the exclusion of sales of aircrafts from the scope of the CISG, sales of parts of aircrafts may be governed by the CISG [MALEV v. U. Technologies; HONNOLD, p.23, ¶54].

162. Therefore, since a substantial part of the PSA concerns the sale of parts of the drones (for maintenance purposes), the PSA must be governed by the CISG.

163. For all the reasons explained above, the Arbitral Tribunal must find that the PSA is governed by the CISG.

IV. RESPONDENT CANNOT RELY ON ART. 3.2.5 OF THE INTERNATIONAL COMMERCIAL CONTRACT ACT OF EQUATORIANA TO AVOID THE CONTRACT

164. RESPONDENT cannot rely on Art. 3.2.5 (Fraud) of its International Commercial Contract Act which is identical to the UNIDROIT Principles of International Commercial Contracts since this argument is only invoked by RESPONDENT as a way to avoid the valid PSA in an unfair approach. For there to be fraud a number of requirements must be met and we will see they are not complied with **(A)**. Fraud entails misrepresentation **(A, 1.)** and fraudulent non-disclosure **(A, 2.)**, in light of this CLAIMANT's conduct was conform to fair dealing in international trade, good faith and reasonable commercial standards of fair dealing according to Art. 1.7 of the Unidroit Principles **(A, 2., i.)**. CLAIMANT's conduct was lawful and does not encounter what is argued by RESPONDENT considering the drones are in consonance with the contract, according to Art.35(1) CISG **(A, 1., i. and ii.)**. Even if they were not, RESPONDENT cannot now argue the non-conformity since its time has elapsed pursuant to Art.39(1) CISG **(A, 1, iii.)**.

A. The PSA was validly concluded, and thus any claims of fraudulent representation or non-disclosure against CLAIMANT under Art. 3.2.5 of ICCA must fail

165. RESPONDENT submits that he is entitled to avoid the PSA because CLAIMANT's description of the drones as its newest model and state-of-the-art is a serious misrepresentation in the sense of Art. 3.2.5 ICCA.

166. According to Art.3.2.5 ICCA avoidance is possible when one contracting party has been led to conclude the contract by the other party's fraudulent representation or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the party should have disclosed.

167. In the view of Eckart Brödermann [BRÖDERMANN, pp.87 and 88], Art.3.2.5 requires: first, a state of mind, namely a fraudulent intention which includes - deliberate misrepresentation or 'reckless representations' - as well as a goal to gain an advantage to the detriment of the other party. Second, the intention must be substantiated in some conduct. So, there is an act that can be a false representation either expressed or implied by words or actions. Generally, there is an omission (fraudulent non-disclosure) in violation of reasonable commercial standards of fair dealing (Art.1.7

Unidroit Principles). Thirdly, the fraudulent act must have a causal link to contract conclusion and generally induce a mistake. And this understanding is also shared by Barton [BARTON, p.80, ¶2].

168. Fraud and misrepresentation are types of conduct which evidently portray the *culpa in contrahendo principle*. The person guilty of fraud or misrepresentation either creates or takes advantage of a mistake, which according to RESPONDENT is CLAIMANT but this is completely distorted and deceptive

169. The notion of fraud is not present in the CLAIMANT's behaviour since: "*What entitles the defrauded party to avoid the contract is the "fraudulent" representation or non-disclosure of relevant facts. Such conduct is fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party"* [Comment Unidroit Principles 2016, p.105, ¶1].

170. RESPONDENT was not defrauded and therefore has no right to avoid the contract since on CLAIMANT behalf there was no fraudulent representation or non-disclosure of relevant facts, every information was made available to RESPONDENT. RESPONDENT was aware that the Kestrel Eye 2010 was the newest model and available in the market since that was clarified by J.C. Bluntschli in the email exchanged with Mr.Field on the 29th of november 2020 [Ex. R4, p.35] and it was precisely what the parties agreed upon them [Ex. C2, p.10; Ex. C3, p.14; Ex. C4, p.15].

171. RESPONDENT's termination of the contract is completely unreasonable and dissonant with ICCA.

1. The Kestrel Eye 2010 was Claimant's latest model and top model at the time of contracting therefore the Agreement was not obtained by misrepresentation

172. RESPONDENT alleges that the PSA must be avoided due to CLAIMANT's misrepresentation about the specification of the drones in its letter of 30 May 2022 [Ex. C8, p.20]. The facts presented by RESPONDENT in that letter do not qualify as misrepresentation.

173. In light of Art.3.2.5 of the ICCA avoidance is only possible when a party has been led to enter and conclude the contract by the other party's fraudulent representation. This article calls for a number of requirements which are mentioned above. The first one is not fulfilled since CLAIMANT needs to have a fraudulent intention which involves: deliberate misrepresentation or reckless representations and a goal to obtain an advantage to the detriment of RESPONDENT.

174. CLAIMANT ensured that RESPONDENT received the most suitable drone for their needs and purposes and aligned with their requirements [NoA, p.5, ¶8]. This was always a concern of the

CLAIMANT as it can be seen in the email exchanged between J.C. Bluntschli and Mr. David Field [Ex. R4 , p.35, ¶¶1-3].

175. Mr. Bluntschli explained in the email that the version of the Kestrel Eye 2010 constituted CLAIMANT's present top model for RESPONDENT's purposes. The advanced technology guarantees its suitability for state-of-the-art data collection and aerial surveillance and its ability to endure the difficult weather conditions in the northern provinces of Equatoriana in particular, the strong wind and heavy rain [NoA, p.5, ¶9; Ex. C3, p.14, ¶9; Ex. R4, p. 35]. By selling these drones to RESPONDENT, CLAIMANT did not gain an advantage due to the special circumstances that made it possible for CLAIMANT to do such a favourable offer for the Kestrel Eye 2010 [Ex. C3, p.14, ¶9].

176. The discussion about the Kestrel Eye 2010 being the newest model available on the market and state-of-the-art is misleading. The Hawk Eye 2020 was undergoing final tests flights therefore it was not ready to be sold on the market [Ex. C8, p.20]. The Hawk Eye was only released in February 2021, two months after the PSA was signed.

177. The second requirement presumes an intention substantiated in some conduct and it is not satisfied. CLAIMANT did not engage in a false representation about the drones, CLAIMANT [NoA, p.5, ¶9; Ex. C3, p.14, ¶9]. The drones have the quality agreed between the Parties in the contract and that will be analysed in the next section [Ex. C2, p.10].

178. Thirdly, fraud must have a causal link to the contract conclusion and generally induces in mistake. There is no causal link between the contract conclusion at hand and fraud [Ex. C7, p.19, ¶¶13-16].

179. For all the reasons explained, RESPONDENT cannot avoid the contract by relying on the misrepresentation accusation.

i. The drones are conforming to the contract according to Art.35 of the CISG since the goods have the characteristics contracted between the parties

180. RESPONDENT may argue questions as to the conformity of the drones in the sense of Art.35 CISG. However, it is CLAIMANT's position that the drones are conforming to the contract. The facts presented by RESPONDENT disclose the characteristics of the drones agreed between the Parties.

181. Art. 35(1) CISG illustrates the principle of freedom for the parties to contract by stating: "*The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*".

182. To determine if the seller has complied with its conformity obligation, Art.35(1) CISG lays elementary importance on the agreement of the parties as expressed in the contract [DE LUCA, p.183, ¶1]. This author also states: "*Goods are deemed to be conforming not when they meet abstract and objective standards, but rather when they correspond to the concrete description contained in the contractual agreement*" [DE LUCA, p.183, ¶1]. The conformity of the goods with the contract is closely related to the agreement between the parties [NEUMANN, p.10, ¶41; BAIDE, p.38, ¶1]. The rules on the conformity of goods are an essential part of sales law and they also contain the core of the seller's primary obligations by being inextricably linked to its obligation to deliver the goods [SAIDOV, p.529, ¶1]. "*The intention of a party will be interpreted in accordance with the understanding that a reasonable receiver of the information would have. This follows from Art. 8 of the CISG*" [NEUMANN, p.3, ¶4]. It is also confirmed in case law that this article is helpful to interpret the agreement under Art.35(1). In the *Textile printing case* is shown the duties of the Seller according to section (1) of Art.35, that must be seen in the light of Art.8 [*Textile printing case*].

183. The first paragraph of Art.35 provides that the goods must comply with the requirement of the contract, and be specifically of the quantity, quality and description enforced by the contract. The parties agreed explicitly on the features of the goods (drones) [Ex. C2, p.10]. The implied requirements of the contract are expressly agreed upon by the parties in the PSA (contract) [Ex. C2, p.10].

184. The parties have celebrated a PSA under TPDP which contains the rights and obligations of the seller (CLAIMANT) and the buyer (RESPONDENT) arising from such a contract [Ex. C2, p.10. Therefore, the seller must deliver goods that comply with what is established in the contract and that was precisely what was accomplished by CLAIMANT when preparing the drones with the features agreed upon [NoA, p.5, ¶8; Ex. C4, p.15].

185. The PSA [Ex. C2, p. 10] determined the delivery of 6 drones which were the newest model of Kestrel Eye 2010 UAS. The PSA was signed on 1 December 2020 by the CEOs of both companies and Mr. Rodrigo Barbosa, the Minister of Natural Resources and Development [RNoA, ¶12]. For this reason, CLAIMANT has the duty to deliver the goods required by the contract [HENSCHEL, p.3, ¶ 3].

186. Statements made by RESPONDENT were interpreted according to his intention and CLAIMANT was aware of it [NoA, p.5, ¶ 5; Ex. C2, p.10]. Given the difficult environment in which the UAS were to operate, they had to be state-of-the-art and based on the newest technology, which they were [Ex. C2, p.10].

187. The Kestrel Eye 2010 had all the features agreed between the parties[Ex. R4, p.35; Ex. C3, p.14, ¶9] and CLAIMANT as the seller was ready to deliver the drones, as required [Ex. R4, p.33]. In light of this, Kestrel Eye 2010 was in consonant with the contract.

ii. RESPONDENT, according to Art.35(1) has to prove the drones are not in accordance with the features contracted with CLAIMANT

188. RESPONDENT argues that the drones are not in accordance with what the parties agreed.

189. An additional point to consider under Art.35(1) CISG, it is the buyer who must prove that the goods do not fulfill the contract [NEUMANN, p.10, ¶38]. When someone claims non-conformity, he has to prove the existence of facts supporting his claim.

190. Also, the general principles regarding burden of proof are identified in case law as follows: "*The party deriving legal benefit from a legal provision, or an exemption has to prove the existence of the factual prerequisites of the provision.*"[NEUMANN, p.10, ¶36]. In the *Tribunale de Vigevano case*, the Court confirmed that a party who raises a claim also bears the burden of proof by stating that "*The burden of proof rests upon the one who affirms, not the one who denies*" [*Vigevano case*].

191. Pursuant to Art.35(1), RESPONDENT must prove that the drones do not fulfill the contract [NEUMANN, p.10, ¶38] since, "*Claiming non-conformity will be a legal benefit to the Buyer and therefore he has to prove the existence of facts supporting his claims*" [NEUMANN, p.10, ¶38].

192. RESPONDENT did not demonstrate the non-conformity because he is aware that the goods are conforming and found no proof as to the non-conformity.

iii. Even if the Arbitral Tribunal decides that the drones did not comply with the characteristics agreed between the parties, such claims of non-conformity would be forfeited as they should been raised much earlier by RESPONDENT

193. RESPONDENT may try to raise questions as to the conformity of the drones according to Art. 35 CISG. In any event, such claims of non-conformity would be strayed as it will be demonstrated below.

194. In case of lack of conformity, the buyer must give notice to the seller to inform him about the non-conforming good in accordance with Art.39 CISG.

195. The CISG does not grant any guidelines so naturally scholarly opinions and international practice dictate what is intended by a "reasonable" period of time and how to apply Art.39(1) CISG [DE LUCA, p.245].

196. One of the contributions made on this topic and which has received the greatest acceptance is Professor Schwenzer's "*Noble Month doctrine*". What contributed to the diffusion of this theory was its application by the German *Bundesgerichtshof* [DE LUCA, p.245, ¶1]

197. Most of the arbitral tribunals "*refer to the one-month period or at least emphasize that a contractually agreed time frame of one month is not to be overridden.*" [SCHWENZER, p.363, ¶1]. Even though the CISG Advisory Council Opinion No.2 has doubts about the one month period, this timeframe is flexible and not absolutely fixed. The "Noble Month" is meant to be a yardstick for adjustable timeframes to become somewhat more predictable [ANDERSON, p.199, ¶2].

198. According to Schwenzer, "*According to Article 39(1) CISG, the buyer loses the right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it or ought to have discovered it*" [SCHWENZER, p.353].

199. The District Court in Stuttgart in the case from 2009 considers the "Noble Month" as the more compelling one. The Court contributed with an exquisite citation: "[*i*]*t is disputed how to measure the 'reasonable time' regarding the defect determined under Article 39 CISG, however, according to jurisprudence and the leading doctrine, the gross average is approximately one month.*"[*Printing Machine case*]. This last quote from Stuttgart condenses the overall assessment of the current German state of law as to Art.39 timeframes in cases from 2005 and onwards. Based on these cases, the "*Noble Month*" emerges as the clear leader in setting a benchmark for reasonable time [ANDERSON, p.195, ¶3].

200. RESPONDENT as the buyer has the obligation to notify CLAIMANT (seller) to allow him to become aware of the non-conformity and, ultimately, cure the repair the defect or provide an alternate delivery [DE LUCA, p.244].

201. According to the first alternative introduced by Schwenzer, the time period for notification commenced from the day in which the buyer (RESPONDENT) detected the non-conformity. Since March 2021 that CLAIMANT had been in discussions with Mr.Field about the possible effects of the presentation of the Hawk Eye 2020 on their contractual relationship [Ex. C7, p.19, ¶43]. RESPONDENT terminated the negotiation on the 30th of May 2022, and as it is verifiable a lot of time has passed, approximately one year and two months. This solution is aligned with the principle

of good faith in international trade because RESPONDENT could have made a conscious choice on whether to continue with the negotiations or to stop them.

202. If the second alternative is considered, the reasonable period of time initiates on the day on which the buyer ought to have discovered the lack of conformity. This solution encourages the buyer to inspect the goods and to prompt the remedies in the shortest time possible and protects the seller from unfavourable outcomes arising from claims filed after a long period of time has passed. [DE LUCA, pp.247-248, ¶¶1-2].If it is considered the month of March 2021, the time has elapsed as well.

203. Even if the one-month period to invoke non-conformity is not applied by the arbitral tribunal, it is unreasonable that RESPONDENT can invoke the non-conformity of the goods one year after discovery of their non-conformity, it is not fair to CLAIMANT as a buyer to be confronted with this allegation after so much time as passed. RESPONDENT found out about the alleged non-conformity of the drones in March 2021 and did nothing about it because it allegedly did not seem to be a major problem for him and now has decided to take advantage of it .

204. And in light of this CLAIMANT would like to quote this from the Author Villy de Luca: "(…) *as of today, the "noble month" doctrine seems a viable compromise which is flexible enough to cover all the specificities of an individual case"* [DE LUCA, p.246].

205. For all the reasons explained above, RESPONDENT is not able to invoke the non-conformity.

2. RESPONDENT cannot avoid the contract based on Art.3.2.5 ICCA since CLAIMANT disclosed all relevant facts

206. There had been no obligation for CLAIMANT under the CISG to disclose any business secrets to RESPONDENT when negotiating the contract.

207. According to Kessler, courts have been well aware of the antagonism of interests between seller and buyer and have refrained from imposing a duty to disclose indiscriminately and wholesale. The scope of the duty differs with the type of transaction concerned and also with the circumstances of the individual case. Scrupulous demands of frankness are expected in transactions of a fiduciary nature such as a mandate, partnership, and insurance [KESSLER, p.438, ¶2].

208. Consequently, since the PSA is not any of the mentioned above, CLAIMANT had no duty to disclose the release of the new drone model Hawk Eye 2020 [KESSLER, pp.438-439]. There is no rule under CISG that forces CLAIMANT to do so [Ex. C7, p.19, ¶13]. Even if the Arbitral Tribunal considers there was some missing information, that situation cannot be premeditated as fraudulent

non-disclosure since a business secret is considered to be information designated as a general act of a business enterprise and whose disclosure would cause detrimental consequences for the economic interests of CLAIMANT. A contract cannot be avoided for failure to disclose information unless the non-disclosure was made with fraudulent intent [BARNES, p.10, ¶1].

209. Also, nothing definite is said about the facts and circumstances which, according to a reasonable commercial standard of fair dealing, must be disclosed at the time of the formation of the contracts [KRAMER, p.279, ¶1].

210. RESPONDENT was not defrauded therefore has no right to avoid the contract since on CLAIMANT behalf there was no fraudulent non-disclosure of relevant facts, every information was made available to RESPONDENT. RESPONDENT was aware that the Kestrel Eye 2010 was the newest model and available in the market, since that was clarified by J.C. Bluntschli in the email exchanged with Mr.Field on the 29th of november 2020 [Ex. R4, p.35] and it was precisely what the parties agreed upon them [Ex. C2, p.10; Ex. C3, p.14; Ex. C4, p.15; Ex. R4, p.35].

211. CLAIMANT did not lie about the release of a new drone model, there were some discussions with Mr.Field about the possible effects of the presentation of the Hawk Eye 2020 in the contractual relationship since March 2021 because Mr.Field had accused CLAIMANT of cheating RESPONDENT by not disclosing that the Hawk Eye 2020 would be on the market soon. RESPONDENT discussed the issue of alleged misrepresentation in May 2021 in a meeting. The discussion about this situation with Mr.Field and his assistant was solved in May 2021 once they realised that CLAIMANT was in fact selling the newest drone and CLAIMANT's statements had been correct [Ex.C3, p.13, ¶4].Until it suddenly resurfaced out of nowhere a year later, in May 2022 [Ex. C7, p.19, ¶¶13-14]

i. Claimant acted according to fair dealing in international trade, good faith and reasonable commercial standards of fair dealing according to Art. 1.7 of the Unidroit Principles

212. RESPONDENT cannot invoke any good faith argument as CLAIMANT acted according to this principle.

213. Art. 1.7 expresses that the parties must act in conformity with good faith and fair dealing in international trade.

214. According to Bonell, good faith is linked with the denomination "fair dealing", and it is supposed to be presumed as a synonym for "reasonable commercial standard of fair dealing" [BONELL, pp.1121-1122].

215. Good faith is a notion that is challenging to define. Several definitions have been pointed out, this particular one has its core: (1) concepts of morality [*Schaller, v. Marine National Bank of Neenah*]; (2) expected benefits (defining bad faith as behaviour that interferes with reasonable expectations); [FARNSWORTH, p.669]; (3) excluder analysis (listing types of bad faith behaviour) [SUMMERS, pp.200-207]; (4) discretion and foregone opportunities [BURTON, p.369].

216. Litvinoff explains: "*an assertion that good faith is the abstention from recapturing foregone opportunities does not have greater definitional value than the assertion that a party's good faith is the duty to do whatever is necessary not to deprive the other of the benefit of the contract*" [LITVINOFF, p.1668]. Others consider good faith as a moral concept that includes the notion of fairness [BARNES, p.1].

217. Nonetheless, the assumption that good faith means the absence of bad faith is not a circular redundancy, according to Nedzel [NEDZEL, p.154, ¶2]. "*One cannot make any specific demands of good faith. It is only the absence of good faith – bad faith*", as it is portrayed in the Sons *of Thunder* case [*Sons of Thunder case*].

218. The parties have the duty to act in accordance with good faith and fair dealing, and that was precisely what CLAIMANT did during the negotiation process and also in the contract conclusion by disclosing the information needed for RESPONDENT to enter into the contract [Ex. R4, p.35].

REQUEST FOR RELIEF

In light of the submission above, counsel for CLAIMANT respectfully invites the Tribunal to declare that:

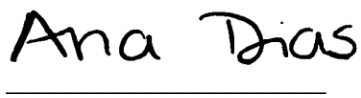
I. The Arbitral Tribunal has jurisdiction to hear the case;
II. The arbitral proceedings should continue in all circumstances;
III. The CISG governs the PSA;
IV. RESPONDENT cannot rely on Art. 3.2.5 of the International Commercial Contract Act of Equatoriana to avoid the contract;

In addition, counsel for CLAIMANT respectfully invites the Tribunal to order RESPONDENT to bear the costs of the Arbitration and cover CLAIMANT's legal fees.

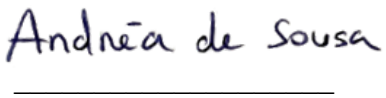
Lisbon, 8 December 2022

CERTIFICATE OF VERIFICATION

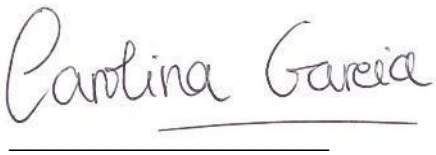
We hereby confirm that only the persons whose names are listed below have written this memorandum.



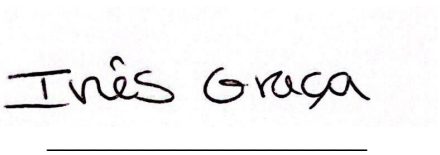
Ana Moura Dias



Andréa Sousa



Carolina de Esmeriz Garcia



Inês Graça

Appendix II

30th Willem C. Vis International Commercial Arbitration Moot

MEMORANDUM FOR RESPONDENT

On behalf of

Equatoriana Geoscience Ltd
1907 Calvo Rd
Oceanside
Equatoriana

- RESPONDENT -

Against

Drone Eye plc
1899 Peace Avenue
Capital City
Mediterraneo

- CLAIMANT -

COUNSEL

Ana Moura Dias | Andréa Sousa | Carolina de Esmeriz Garcia | Inês Graça

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LIST OF ABBREVIATIONS

¶	paragraph
¶¶	paragraphs
AA	Arbitration Agreement
ASA	Aviation Safety Act
Art./Arts.	Article/Articles
CLAIMANT	Drone Eye plc
DAL	Danubian Arbitration Law
Ex. C	Claimant's Exhibit
Ex. R	Respondent's Exhibit
ICCA	International Commercial Contract Act
i.e.	*Id est*
NoA	Notice of Arbitration
NPDP	Northern Part Development Program
p./pp.	page/pages
Parties	Drone Eye plc and Equatoriana Geoscience Ltd
PO1	Procedural Order number 1
PO2	Procedural Order number 2
PSA	Purchase and Supply Agreement
RESPONDENT	Equatoriana Geoscience Ltd

RNoA	Response to the Notice of Arbitration
SOE	State-owned enterprise
v.	Versus

TABLE OF CONVENTIONS, ARBITRAL RULES AND LEGAL TEXTS

Cited as	Text
Cape Town Treaty	Protocol to the Convention on international interests in mobile equipment on matters specific to aircraft equipment
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
EAL	Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters (Egyptian Arbitration Law) 1994
ECICA	European Convention on International Commercial Arbitration 1961
Geneva Protocol	Geneva Protocol on Arbitration Clauses 1923
Model Law	UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985, amended in 2006
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958
PAL	Legislative Decree No. 1071 (Peruvian Arbitration Law) 2008
PCA Rules	Permanent Court of Arbitration Rules 2012
SAL	Swiss Private International Law Act, Chapter 12 (Swiss Arbitration Law)

	1987
UNCAC	United Nations Convention Against Corruption 2004
UNCITRAL Arbitration Rules	UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules (2021 revised version)
UNCITRAL Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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	16 August 2013	Bombay High Court	Mulheim Pipecoatings Gmbh vs Welspun Fintrade Limited & Anr Cited as: *Mulheim pipecoatings*	5
Italy	14 January 1993	Monza District Court	Nuova Fucinati S.p.A. v. Fondmetall International A.B. Cited as: *Nuova Fucinati v. Fondmetall International*	131, 132
Singapore	19 June 2014	High Court	First Link Investments Corp Ltd v GT Payment Pte Ltd and others Cited as: *Firstlink*	29
	9 November 2016	High Court	BCY v. BCZ [2016] SGHC 249 Cited as: *BCY v BCZ*	29
Spain	17 January 2008	Tribunal Supremo	18/2008 Cited as: *CLOUT 802*	171

Switzerland	23 November 1998	Weinfelden District Court	N.a. Cited as: *Milking-machines case*	128
	13 November 2003	Federal Supreme Court of Switzerland (Bundesgericht)	4C.198/2003 Cited as: *CLOUT 885*	185
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	2001	High Court, Commercial Court Division	Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd Cited as: *Sonatrach v Ferrell*	30
	24 January 2007	Court of Appeal	Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others Cited as: *Fiona Trust*	3
	16 My 2012	Court of Appeal	Sulamerica Cia Nacional De Seguros S.A. V. Enesa Engenharia S.A. Cited As: *Sulamerica*	29
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	1974	Court of Appeals	Parsons and Whittemore Overseas Co. v. Societé Generale de L'Industrie du Papier	16

		Cited as: *Parsons*	
21 February 2006	U.S. Supreme Court	Buckeye Check Cashing, Inc. V. Cardegna Cited as: *Buckeye*	3
18 March 2008	Kentucky District Court	Sky Cast, Inc. v. Global Direct Distribution, LLC Cited as: *Sky Cast, Inc v Global Direct Distribution*	198
21 June, 2010	U.S. Supreme Court	Rent-A-Center, West, Inc. *V* . Jackson Cited as: *Rent-a-Center*	3

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Date	Institution	Case	Cited in ¶/¶¶:
14 January 1982	Ad Hoc Arbitration	Elf Aquitaine Iran v. National Iranian Oil Company Cited as: *Elf Aquitaine Iran*	5
19 September 1991	ICC-International Chamber of Commerce	Westinghouse and Burns & Roe v National Power Company and the Republic of the Philippines, ICC Case No. 6401 Cited as: *Westinghouse*	8
1992	ICC-International Chamber of Commerce	ICC Case No.6474 Cited as: *ICC Case No.6474*	8
20 May 1992	ICSID-International Centre for Settlement of Investment Disputes	Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No. ARB/84/3 Cited as: *Southern Properties v. Egypt*	69
15 April 1999	Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce	Case No. T-23/97 Cited as: *Fishing Boat case*	136, 140
2000	ICSID-International Centre for Settlement of Investment Disputes	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/97/3 Cited as: *Vivendi*	33

29 January 2004	ICSID-International Centre for Settlement of Investment Disputes	SGS Société Générale de Surveillance S.A. v Republic of the Philippines, ICSID Case No. ARB/02/6 Cited as: *SGS v. Philippines*	69
28 June 2004	The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry	167/2003 Cited as: *ICACRF case no. 167/2003*	103
31 May 2005	Ad Hoc Arbitration	Glamis Gold, Ltd., v. United States Cited as: *Glamis Gold v. United States*	80, 81
8 October 2009	ICSID-International Centre for Settlement of Investment Disputes	EDF (Services) Ltd v. Romania Cited as: *EDF v Romania*	60
16 November 2010	Ad Hoc Arbitration	E Holding (Claimant) and Z Ltd., First Respondent, Mr. A, Second Respondent, Mr B, Third Respondent Cites as: *E Holding v. Z Ltd Po. 3*	52, 71
7 February 2011	ICSID-International Centre for Settlement of Investment Disputes	Malicorp Limited v Arab Republic of Egypt, ICSID Case No. ARB/8/10 Cited as: *Malicorp v Egypt*	25

18 January 2013	Permanent Court of Arbitration	Mesa Power v. Canada, PCA Case No. 2012-17 Cited as: *Mesa Power v. Canada*	82
22 March 2013	Ad Hoc Arbitration	Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya and others Cited as: *Al-Kharafi v Libya*	25
14 April 2014		Philip Morris v. Australia, Procedural Order No. 8 Cied as: *Philip Morris v. Australia*	80, 81, 82
24 October 2014	Permanent Court of Arbitration	Valeri Belokon v Kyrgyz Republic Cited as: *Valeri v Kyrgyz Republic*	65
18 November 2016	Permanent Court of Arbitration	Resolute Forest Products Inc. v Government of Canada, PCA Case No. 2016-13 Procedural Order No. 4 Cited as: *Resolute v. Canada*	81
31 January 2018	Permanent Court of Arbitration	Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia, PCA Case No. 2016-39 Cited as: *Glencore v. Bolivia*	80
19 February 2018	Ad Hoc Arbitration	Huntington Ingalls Incorporated V. The Ministry Of Defense Of The Bolivarian Republic Of Venezuela Cited as: *Huntington Ingalls v. Venezuela*	25
27 June 2018	Permanent Court of Arbitration	Pey Casado v. Chile II, PCA Case No. 2017-30 Cited as: *Pey Casado v. Chile*	82
2021	ICSID-International Centre for Settlement of	Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case	15

Investment Disputes

No. ARB/10/18

Cited as: *Niko v Bangladesh*

STATEMENT OF FACTS

CLAIMANT Drone Eye plc Capital City Mediterraneo	Is a medium-sized private company, producer of Unmanned Aerial Systems (or drones), based in Mediterraneo.
RESPONDENT Equatoriana Geoscience Ltd Oceanside Equatoriana	Is a State owned company, held in its entirety by the Ministry of Natural Resources and Development of Equatoriana, based in Equatoriana, and created in 2016 as part of the Northern Part Development Program (NPDP).

March 2020	RESPONDENT opened the tender process in connection with the NPDP for the delivery of 4 state-of-the-art aircrafts for surveillance and exploration purposes. CLAIMANT submitted a successful bid and entered into further negotiations with RESPONDENT.
1 December 2020	Parties' representatives and Minister Rodrigo Barbosa signed the PSA at a formal ceremony. The PSA provided for the delivery of 6 Kestrel Eye 2010 drones in 2022 for an overall price of EUR 44 million. At the time of the tender and the contract conclusion, the Kestrel Eye 2010 was not CLAIMANT's top model available on the market and did not contain all the features for the RESPONDENT's purposes. The PSA contained an AA.
February 2021	CLAIMANT launched its newest drone model the Hawk Eye 2020 which is based on a different technology and is noticeably larger than the Kestrel Eye 2010, at the air show in Mediterraneo.
3 July 2021	The Citizen, Equatoriana's leading investigative journal, owned by the leader of the Liberal Party, started to publish a series of headlines articles about a massive corruption scheme surrounding the NPDP and several high-profile members of the ruling Socialist Party.

3 December 2021	As a consequence of the public outcry, the Prime Minister of Equatoriana resigned and there were early elections. The new government issued a moratorium for all contracts concluded under the NP Development Program.
27 December 2021	RESPONDENT sent CLAIMANT an email to inform that the PSA would be put on hold until further notice.
30 May 2022	RESPONDENT declares the PSA avoided and the negotiations terminated, as it was obtained by corruption and misrepresentation by registered letter.

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE CASE

1. Contrary to CLAIMANT's arguments, the Arbitral Tribunal lacks jurisdiction under the 2012 PCA Arbitration Rules or any other arbitration rules, as no AA was validly concluded [Cl. memo, p.4, 1.]. One of the contributing factors to the AA's invalidity is the fact that the doctrine of separability is inoperative in the present case, making the PSA's invalidity contagious to the AA **(A)**. Additionally, the parliamentary approval, as required by Equatoriana's constitution, is applicable to the Parties' PSA since it qualifies as an administrative contract, and because Equatoriana's law will apply to the AA **(B)**. Also, this applicable constitutional requirement is not supposed to be met with the implied consent of Parliament as a non-signatory party to the AA, as it has no intention to arbitrate or be bound by the AA **(C)**. In any case, no arbitral obligations ever emerged from a validly concluded AA, which means RESPONDENT is not bound by any legitimate arbitration proceedings **(D)**.

A. The doctrine of separability is inoperative as the PSA was formed through corruption, thus the AA is prejudiced by the PSA's invalidity

2. As correctly noted by CLAIMANT, and pursuant to Art. 21(2) of the 2012 PCA Rules, the doctrine of separability is a founding principle of international arbitration which stipulates that an arbitration clause is a separate contract whose validity and existence are independent from the substantive contract that contains it [Cl. Memo., p.5, ¶¶19-20].

3. However, said doctrine does not invariably apply in all cases. In fact, in specific sets of circumstances, the doctrine of separability shall be disregarded [ULUC, p.23, ¶3]. Truly, a mere presumption of separability of the AA exists, which means that it can be rebutted in specific cases [emphasis added; BORN, pp.398, 396,399; *Prima Paint case*; *Rent-a-Center case*; *Buckeye case*; *Gosset v Carapelli case*]. For instance, the separability presumption does not operate "*where parties otherwise intend*" [*Prima Paint case*] or in other "*exceptional circumstances*" [*Gosset v Carapelli case*] regarding defects "*going to the root*" of the underlying contract [*Gosset v Carapelli case*; BORN, p.404; *Westinghouse case*; *Fiona Trust case*; BORN, p.409; GU, p.163].
4. Since it is undisputed that Equatorianian and Mediterranian national arbitration laws are a verbatim adoption of the Model Law, as CLAIMANT noted [Cl. Memo., p.5, ¶21; PO1, p.43], the Tribunal should bear in mind that the Model Law enhances the propensity to rebut the separability presumption. Its Art.16(1) states " *a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*" [emphasis added]. Therefore, the Model Law does not state that the invalidity of the parties' underlying contract has no bearing on the AA. It simply states that the invalidity of the underlying contract does not entail *ipso jure* the invalidity of the parties' AA, acknowledging that there may be circumstances in which such a result may still occur, even if not *ipso jure*. That is, while the invalidity of the underlying contract does not necessarily or automatically invalidate the associated AA, there may be exceptional circumstances in which this result occurs, due to either the parties intentions or the nature of the reasons for the underlying contract's invalidity [BORN, p.404; Model Law, Art.16(1)].
5. One of the exceptional circumstances that deem the presumption of separability not applicable is when corruption infects the underlying contract [ULUC, p.116]. In fact, several arbitral tribunals have suggested a limitation of the separability presumption in cases involving fraud of great magnitude [*India Household case*; BORN, 415], as "*if the nature of the controversy is such that the main contract (...) was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void*", since it is "*clearly indicated by facts and circumstances that there never existed a valid contract between the parties*" [*Mulheim Pipecoatings case*; *Elf Aquitaine Iran case*; BORN, p.470; English Arbitration Act, Art.7].
6. This precisely the case at hand, as the PSA was concluded with corruption [RNoA, p.27, ¶1; p.30, ¶20]. Contrary to CLAIMANT's arguments [Cl. Memo., p.6, ¶22], in the existence of corruption, the AA may not be insulated from the PSA's invalidity. According to the prevalent doctrine and relevant case law, corruption is a grave public interest violation that shall deem the presumption of separability inoperative, and the Tribunal should adopt a "zero tolerance approach" towards the

effect of corruption on the doctrine of separability [ULUC, pp.117, 129, 133; DRLICKOVÁ, pp.29 and 34].

7. Given the circumstances relating to PSA's formation [RNoA, p.28, ¶¶8-11; p.29, ¶¶16-17; Ex. R1, p.32, ¶¶5-6], the contract was procured through bribes paid by CLAIMANT's COO to RESPONDENT's COO and fraudulent representation of the drones by CLAIMANT, in the midst of one of the biggest corruption schemes ever seen in Equatoriana [RNoA, p.27, ¶1], which ultimately culminated with the termination of negotiations [Ex. C8, p.20].
8. ICC case No.6474 presents a similar situation to the one of the Parties', as it deals with a contract, concluded with a public entity, that was tainted by corruption. The arbitrator of the case was prepared to deny the arbitral tribunal's jurisdiction over the case if the AA had been entered into "*solely because of corruption and fraud*" [ULUC, p.122; *ICC case No.6474*], as bribery can invalidate both the underlying contract and the AA [*Westinghouse case*; SAYED, p.79]. In this case the arbitrator ended up not doing it only because of unrelated circumstances.
9. The underlying rationale also applies to the present case, as RESPONDENT is certain the PSA and the AA would not have been concluded but for the bribes paid and the misrepresentation by Claimant [RNoA, p.30, ¶20]. That is because the other bidder, Air Systems, had a much better offer and cheaper drones and there is no other explanation for Mr. Field to cease the negotiations and for Drone Eye to suddenly make a much better offer [Ex. R1, p.32, ¶¶3-6].
10. As the PSA was the result of bribery and fraud of great magnitude, it is invalid and RESPONDENT was rightfully acting when it decided to terminate it [LIM, pp.44-45; Ex. C8, p.20]. Moreover, the special circumstances surrounding the PSA's invalidity, deem the presumption of separability inoperable in this case and make the AA contaminated by said invalidity.
11. For all the above, and contrary to what CLAIMANT states in ¶22 of the memo., the AA is, in this case, exceptionally not "held separately" from the PSA and is, consequently, infected by its invalidity. The Arbitral Tibunal must declare the AA invalid.

B. The requirement of parliamentary consent does not violate international public policy and it is CLAIMANT who is evading responsibilities and violating party autonomy

12. CLAIMANT incorrectly submits that the constitutional requirement of parliamentary approval of the submission to arbitration by a SOE "*undermines international order*" [Cl. memo, p.6, 1.3], arguing that RESPONDENT is usinrg its internal law to avoid its arbitral responsibilities.

13. Firstly, RESPONDENT will assume that CLAIMANT is referring to the concept of "international public policy" or "*ordre public international*".
14. International public policy is constituted by the "*issues of domestic public policy that the country feels so strongly about*" "*that it will insist on applying in an international relationship*" [LO, p.77], in other words the most basic notions of morality and justice [BUCHANAN, p.513; LO, p.77] that the state is not willing to let go of when in contact with other states.
15. International public policy is constituted by the norms considered necessary to maintain minimum standards of conduct in international commercial arbitration [emphasis added; BRABANDERE, 851; *Niko v Bangladesh case*]. Thus, the international public policy exception would apply in cases of "*infringements of mandatory rules/lois de police; breaches of fundamental principles of law; actions contrary to good morals; and actions contrary to national interests/foreign relations"* [PRODROMOU, pp.153-154].
16. As to maintain the said minimum standards in the international community, the concept of international public policy must be subject to a narrow interpretation, and only a very limited number of cases fit in this defence [*Parsons case*; LO, pp.78-81; BRABANDERE, p.852; MADDEN, p.5].
17. Furthermore, when making a decision on the application of the international public policy defence, the Tribunal should consider the international presence of the practice that allegedly violates international public policy [LO, p.81].
18. Now, the practice CLAIMANT wants the tribunal to consider a violation of international public order is the Equatorianian constitutional provision that requires the approval of Parliament for the submission to arbitration of an SOE [Cl. Memo., p.6, 1.3; Cl. Memo., p.7, ¶27; NoA, p.6, ¶14].
19. However, the requirement of a parliamentary validation of an AA does not offend the fundamental notions of justice and morality of any state, neither Equatoriana nor Danubia or Mediterraneo, or of the international community, and so, being the international public policy a very narrow concept, this situation does not fall under the scope of application of the exception.
20. Moreover, various state's laws also require governmental entities to obtain parliamentary approval before entering into an AA [LATHAM, p.22]. By way of example, Egyptian arbitration law requires the approval of the competent minister to agree to arbitration in the case of administrative contracts [EAL; SALAH, p.2]. In addition, the public policy issue has been raised and the approval requirement was declared not to be a "*public policy violation*" by the Egyptian Higher Courts [*Supreme Court 2017*; *Court of Cassation 2015*; *Supreme Court 2018*].

21. In conclusion, contrary to CLAIMANT's submission, the constitutional requirement of parliamentary approval is not a violation of international or transnational public policy as it falls outside of the very narrow scope of application of these concepts [Cl. Memo., p.6, 1.3; Cl. Memo., p.7, ¶27]. Consequently, public policy exception is not operable in this case, there is no valid agreement, and party autonomy remains prevalent. Therefore, it is CLAIMANT that is evading its agreed upon responsibilities, since the Parties chose the law of Equatoriana to govern the AA [Ex. C2, p.12, Art. 20 (d)] and CLAIMANT knew of the requirement prior to signing the AA [Ex.C7, p.18, ¶6].
22. In addition to all of the above, RESPONDENT will even go as far as to argue that CLAIMANT is violating party autonomy by denying the requirement of parliamentary approval. According to the party autonomy principle, parties in international arbitration are free to choose the law that will be applicable to the arbitration [FAGBEMI, p.228; NYC art. V(1)(d); Model Law Art.19 (1)]. Therefore, it is CLAIMANT that is evading its agreed upon responsibilities, and violating party autonomy by denying the application of the law of Equatoriana, the law chosen by the parties in their choice of law clause [Ex. C2, p.12, Art. 20(d)] and CLAIMANT knew of the requirement prior to signing the AA [Ex. C7, p.18, ¶6].

1. The PSA is an administrative contract

23. As CLAIMANT correctly notes, the constitutional requirement of parliamentary consent only applies to administrative contracts [Cl. Memo., p.8, ¶29]. CLAIMANT argues that the PSA concluded between the Parties is a commercial contract, as opposed to an administrative contract, waiving the necessity to acquire the mentioned parliamentary approval [Cl. Memo., p.8, 1.3.1; ¶31]. However, RESPONDENT submits that the PSA is indeed an administrative contract and is subjected to the consent requirement.
24. Although Equatorianian law provides no definition of the concept of administrative contract [PO2, p.47, ¶20], international legal scholars propose that an international administrative contract be defined as "[*a]n agreement held by the administrative party on one hand, and an ordinary or juridical foreign person on the other hand. Its aim is to transfer the economic and financial values across the boundaries in order to establish permanent facilities or massive investments in any of the public utilities. This agreement includes exceptional terms that are unfamiliar in the private law*" [CEIL, p.7].
25. Arbitral Tribunals have understood that administrative contracts in general must fulfil three elements: (i) one of the parties must be a public authority, (ii) the object of the contract must prosecute public

utility, and (iii) the contract must contain an exceptional clause that is not found in civil contracts [*Malicorp v. Egypt case*; *Al-Kharafi v. Libya case*; *Huntington Igalis v Venezuela case*]. This exceptional clause might be, for example, the possibility for the contracting authority to unilaterally terminate the contract [SHEHATA, p.392].

26. Taking this into account, RESPONDENT submits the PSA concluded is an administrative contract. Firstly, one of the parties of the PSA is an administrative authority, an SOE, RESPONDENT. Then, the PSA prosecutes public utility, as the objective of the contract is the purchase of drones to explore and develop the northern part of Equatoriana, the least developed part of the country [NoA, p.4, ¶3; Ex. C2, p.10, ¶¶1-3]. Finally, the PSA includes an exceptional clause that elevates RESPONDENT to a position of authority by foreseeing the possibility of it unilaterally terminating the contract [Ex. C2, p.11, Art.18].
27. In conclusion, and contrary to CLAIMANT's argument [Cl. Memo., p.8, ¶31], the Parties' PSA fulfils all the requirements to qualify as an administrative contract, and the Tribunal must find it falls within the scope of application of the constitutional requirement of parliamentary consent.

2. Equatorianian law, the law applicable to the contract, governs the AA

28. Contrary to CLAIMANT's argument, the validity of the AA is not governed by the law of the seat, Danubian law [Cl. Memo., p.9, ¶32], as the Parties never agreed that that would be the law applicable to the AA. However, as CLAIMANT itself noted, the AA concluded by the Parties contains a choice of law clause that states that the PSA is governed by the law of Equatoriana [Cl. Memo., p.9, ¶32].
29. As the Parties made no explicit choice regarding the law applicable to the AA, the Tribunal should use the increasingly recognised "three step test" [*Firstlink case*; *Sulamérica case*; *BCY v BCZ case*]. Under this test, if there is no explicit choice to be analysed, the TRIBUNAL shall consider the implicit choice of the Parties, and if even an implicit choice does not exist, the TRIBUNAL shall consider the law bearing the closest connection to the arbitration agreement [KAPLAN, pp. 134-135].
30. As noted by CLAIMANT, the Parties have made an express choice of law for the PSA. In such circumstances, under the *lex arbitri*, the law of Danubia, the AA shall be governed by their implied choice of law [Arts. 34(2)(a)(i), 36(1)(a)(i) DAL; BORN, p.3466], the law of Equatoriana. This is because, when entering into a contract, businesspersons likely expect that the law they choose to govern their contract will also apply to the AA contained therein [BRIGGS, p. 1007; BORN, p. 827; Sonatrach v. Ferrell case; Enka v. Chubb case]. This scenario is perfectly illustrated by the case at

hand where the Parties made numerous references [NoA, p.7, ¶20; Ex. C7, ¶¶3-6; Ex. R4, p.35; ¶1] to their relationship being governed by the law of Equatoriana.

31. Consequently, by choosing the law for the PSA, the Parties agreed on Equatorianian law as governing the AA as well.
32. Even if the Tribunal does not agree that the Parties impliedly chose the law of Equatoriana to apply to their AA, the law of Equatoriana, as the RESPONDENT's personal law, would still apply on the matter of the AA's validity, as there is an issue relating the RESPONDENT's capacity to enter into an AA [GROVER, p.248].
33. States and SOEs may be constrained by national constitutional or legislative provisions that restrict their capacity to enter into AAs [CHENG, p.944]. If the domestic law requires an SOE to obtain parliamentary approval before entering into an AA and that approval is not observed, then the SOE will lack capacity to enter the AA [LATHAM, p.22]. Consequently, that may warrant application to the AA of the party's personal law irrespective of what the parties chose, as the parties' personal laws may override their choice of law when the question of their capacity to arbitrate is concerned [NYC, Art.V(1)(a); GROVER, p.248; *Vivendi case*].
34. In the present case, the constitutional provision in force in Equatoriana restricts RESPONDENT's capacity to enter into the AA, as it requires the Parliament's approval. In fact, CLAIMANT recognizes this, as it is its normal *modus operandi* to "examine whether there are any special requirements for contracting" when the customer is a SOE [Ex. C7, p.18, ¶3 and ¶6]. As the required parliamentary approval was never given, RESPONDENT lacks capacity to execute such AA, and its personal law, the law of Equatoriana, will have to be applied.
35. In conclusion, contrary to CLAIMANT's submission, the Tribunal must find the law of Equatoriana is applicable to the AA and, consequently, so is the provision regarding the parliamentary consent requirement.

C. Parliament is not a party bound by the AA and it cannot invoke implied consent

36. CLAIMANT erroneously suggests that the Parliament of Equatoriana might become a party to the AA [Cl. Memo., p.10, 1.4]. However, CLAIMANT's contention is both legally and logically unsupported and RESPONDENT submits the Parliament showed no intention to be bound by the AA, and is only an external entity needed to provide an authorization.
37. "*The parties to an arbitration agreement are – and are only – the entities that formally executed, and expressly assumed the status of parties to, the underlying contract containing the arbitration clause"* [BORN, 10.01(B)].

Accordingly, the DAL defines the parties to an AA as the persons able to submit to arbitration their disputes which have arisen from a certain legal relationship [NYC Art.II(1); Model Law, Art.7(1)]. If an entity is unable to initiate arbitration or participate in the arbitral proceedings, then it is not a party to the AA, even if they are closely connected to one of the parties [YIFEI, p.122; SMYTH, ¶2].

38. Some national arbitration laws have even supplemented the NYC and the Model Law. For instance, Peruvian arbitration law defines parties as "*those who consent to submit to arbitration (...) as determined by their active and decisive participation in the negotiation, execution (...) of the contract that contains the arbitration agreement*" [BORN, 10.01(B); PAL, Art.14].
39. In the present case, the PSA identifies CLAIMANT and RESPONDENT as its only parties [Ex. C2, p.10, Art.1], and taking this into account, as well as the tender process, negotiations and initial execution of the contract, only RESPONDENT and CLAIMANT seem to be parties of this particular legal relationship. The Parliament has clearly not signed the AA, nor has it participated in any stages of the formation of the PSA. It is not a party to the PSA and has no rights or obligations arising from it. Thus, the Parliament will not have any disputes arising from the PSA that could be settled by arbitration and would not be able to initiate the arbitration, falling outside of the scope of application of the AA, the art.20 of the PSA [Ex. C2, p.12, 20].
40. Nonetheless, CLAIMANT correctly states that "*there are times when the AA can be extended to a non-signatory party*", and invokes "*implied consent*" as the possible way for Parliament to do it in the present case [Cl. Memo., p.10, ¶36]. However, in the context of implied consent, the intention of the other parties to be bound by the AA with the non-signatory party is necessary [BORN, 10.02(C)].
41. Considering this, the Parties never intended to be bound to arbitrate with the Parliament. While CLAIMANT correctly states that "*both the Claimant and the Respondent intended the Parliament to sign off on the arbitration clause*" [Cl. Memo., p.10, ¶37], the Parties only intended the Parliament to approve the document, as did the Minister Rodrigo Barbosa, as the constitutional requisite ordered, and did not intend to be a "*partial signatory party*" [Cl. Memo., p.10, ¶37]. Although the AA was "*concluded by the Parties*" it was only supposed to be authorised by the Minister and the Parliament [Ex. C2, p.12]. Furthermore, one can even notice the difference between the signatures of the Parties to the PSA and the ones of the persons who are simply approving the document [Ex. C2, p.12, 20].
42. Thus, it is not possible for the Parliament to invoke implied consent as it does not share the common intention to arbitrate, and neither did the signatory Parties intend for it to be part of the AA.
43. In conclusion, not only was CLAIMANT wrong when it submitted the Parliament could become a bound party to the AA, but also when it argued the Parliament could now invoke implied consent.

RESPONDENT submits that the Parliament could never invoke implied consent and be bound by the AA, as Parliament's actions never evidenced intention to arbitrate.

D. The doctrine of estoppel is not applicable, as there is no valid AA, and consequently RESPONDENT is not bound by any legitimate arbitration proceedings

44. Following the line of thought followed so far, there is not much left for RESPONDENT to argue, as the whole last argument of CLAIMANT starts from the premise that there is a validly concluded AA [Cl. Memo., p.10, 1.5]. However, RESPONDENT has demonstrated that there is no valid AA and, consequently, no legitimate arbitration proceedings were started.
45. Responding to CLAIMANT's allegation that it legitimately relied on the word of the Minister, on what concerns the lack of parliamentary approval, RESPONDENT submits that Mr. Barbosa was acting *ultra vires* and that CLAIMANT, as a company that, as noted by itself, has experience contracting with SOE [Ex. C7, p.18,¶3] , should have not relied on the word on Mr. Barbosa and should have made a better prerequisite check. However, even if CLAIMANT had no knowledge of such requisite, RESPONDENT would still be able to rely on the lack of formal signature from the Parliament to preclude itself from arbitration, because without it the AA is invalid.
46. In conclusion, the doctrine of estoppel, invoked by CLAIMANT, precludes a party from denying that they are a party to an AA and avoiding the obligation to arbitrate [BORN, 10.02(K)]. Thus, as there is no valid AA, no obligations were acquired by the Parties, and, as a result, the doctrine of estoppel cannot operate. RESPONDENT is, indeed, not a party to a valid AA and has no arbitral obligations to avoid.

II. THE ARBITRAL TRIBUNAL SHOULD STAY OR, ALTERNATIVELY, BIFURCATE THE PROCEEDINGS

47. Contrary to CLAIMANT's argument, the Arbitral Tribunal should stay the proceedings until the ongoing investigations against Mr. Field are concluded **(A)**. However, if the Arbitral Tribunal does not see fit to stay the arbitration, RESPONDENT requests, in the alternative, that the proceedings be bifurcated so that the Tribunal may solely decide on those issues which do not depend on the result of the criminal investigations **(B)**.

A. The ongoing investigations against Mr. Field justify the stay of proceedings

48. The Arbitral Tribunal has clear authority and discretion to stay the proceedings, particularly when considering the public interest and the Parties' interest **(1)**. In this regard, the Tribunal should stay the proceedings until the ongoing investigations against Mr. Field are concluded, as Equatoriana's criminal authorities are best placed to handle any evidence of corruption **(2)**. In fact, criminal proceedings have warranted a stay of proceedings in several cases **(3)**. Moreover, in the event the Tribunal does not stay the proceedings and ends up rendering a decision, the completed criminal investigations may lead to the annulment of the award and the eventual reopening of the case **(4)**.

1. The Tribunal has clear authority and discretion to stay the proceedings, particularly when considering the public interest and the parties' interest

49. As correctly stated by CLAIMANT [Cl. Memo., p.11. , ¶43], and pursuant to the law applicable to these proceedings, the Arbitral Tribunal has discretion to conduct the proceedings as it deems appropriate [Art.17(1) PCA Rules; Art.19(b) DAL; Art.1(4) UNCITRAL Rules on Transparency]. Accordingly, there is no impediment imposed on the Tribunal concerning the stay of proceedings.
50. Nevertheless, the UNCITRAL Rules on Transparency, which were agreed by the Parties to apply to the current proceedings, add that the Arbitral Tribunal, when exercising its discretion, shall take into account the public interest in transparency in the particular arbitral proceedings as well as the disputing parties' interest in a fair and efficient resolution of their dispute. [UNCITRAL Rules on Transparency, Art.1(4), (a) and (b); NoA, p.6, ¶16].
51. In the current proceedings, no doubts arise concerning the public interest in transparency. Recalling that Equatoriana, Mediterraneo and Danubia are Contracting Parties of the UN Convention against Corruption, the claims at stake are of interest to many public and private actors, such as Equatoriana's criminal authorities, Equatoriana's citizens and taxpayers, governmental agencies, NGOs and other concerned elements of civil society, including the Parties themselves [PO1, p.43, ¶3; RNoA, p.30, ¶23; Opinion 14 CCPE, p.2, ¶5]. Thus, the Tribunal must take into account the public interest when exercising its discretion, which is why it should stay the proceedings.
52. Moreover, the Tribunal should consider the parties interest in a fair and efficient resolution of the dispute. As noted by CLAIMANT, "*a stay should only be granted in "exceptional circumstances" where "the conflicting interest of the parties had to be balanced (...) and if there is any doubt, priority should be given to "an expeditious conduct of proceedings*" [Cl. Memo., p.11, ¶43]. As such, the decision to stay is fundamentally a question of weighing the interest of the parties, in the present case, between the risk of unnecessary

operations and costs or, worse, of conflicting decisions, and the necessity of continuing the arbitration expeditiously. [POUDRET/BESSON, p.506, ¶581; *E Holding v. Z Ltd Po. 3*, p.645, ¶44]. However, contrary to CLAIMANT's assertion [Cl. Memo., p.12 , ¶43], the above mentioned elements should prevail over the need for celerity, given that the stay of the proceedings is required for reaching an efficient resolution of the dispute.

53. In light of the above, RESPONDENT is confident that the Tribunal will conclude that staying the proceedings is the most appropriate and prudent route to take.

2. Equatoriana's authorities are best placed to handle any evidence of corruption

54. Considering CLAIMANT's attempt to devalue the seriousness of the issue surrounding the present case [Cl. Memo., p.14 , ¶53], it is of utmost importance to stress that RESPONDENT's request to stay the proceedings is intimately connected to the ongoing investigation of one of the largest corruption scandals in Equatoriana. [Ex. C5, p.16; RNoA; p.27, ¶1] Presently, charges have been brought against Mr. Field, RESPONDENT's former COO, in relation to two contracts concluded by him in his capacity as COO of Equatoriana Geoscience [RNoA, p.28; ¶11; RNoA, p.30; ¶23; Ex. R2; p. 33].

55. If the Tribunal decides to continue the proceedings, it will have to deal with corruption allegations, which means that it will have to take evidence concerning acts of corruption. While CLAIMANT argues that evidence of corruption can be introduced during the arbitral proceedings, it fails to mention that the problem with the taking of evidence in this field is that corruption conducts usually do not materialise in direct evidence and are very difficult to prove **(i.)** [Cl. Memo., p.13, ¶49]. Moreover, contrary to courts and domestic criminal authorities, not only do arbitrators have limited resources to investigate corruption, but also have no coercive powers **(ii.)** [Cl. Memo., pp.12-13, ¶¶46, 49] .

56. For the above mentioned reasons, which will be analysed below, it is generally agreed that state authorities are best placed to unearth criminal activities [ROSE p.220].

57. Therefore, Equatoriana's authorities are best placed to handle any evidence of corruption, specially when considering that there is already an appointed Public Prosecutor investigating the case as well as a special chamber set in Equatoriana's criminal court to deal with all corruption charges related to the NPDP [RNoA, pp.30-31, ¶¶]23-24].

i. Corruption demands a high standard of proof

58. An undeniable fact that will affect the proceedings if a stay is not granted is the difficulty in proving the crime of corruption, which is due, in particular, to its innately covert nature [HART-ARMSTRONG/SLADE/LANDICHO, p 154.].
59. Further, the prevailing arbitral practice subjects corruption defenses to a high level of proof, given the gravity of the allegation and its consequences [LIM, p. 600].
60. *EDF v. Romania* reveals some of these difficulties. In the mentioned case, EDF (the Investor) alleged that it was a victim of Romanian officials' demands for bribes. EDF relied on the testimony of its employees, who received the bribe requests, in its attempt to prove corruption by the respondent in the proceedings. However, respondent's witnesses, who were accused of soliciting bribes, denied it. Even though the tribunal expressed sympathy for the Investor's position, observing that corruption is difficult to prove, it still raised the evidentiary bar, declaring that "*the seriousness of the accusation of corruption demands clear and convincing evidence*". To no surprise, the tribunal held that the evidence adduced by EDF was "*far from being clear and convincing*" [*EDF v. Romania*, p.221].
61. Similarly, in the case at bar, the Tribunal is dependent on the testimonies of the actors who interacted in the negotiations, namely of Mr. Bluntschli, Drone Eye's COO at the time, who is not even willing to testify [Ex. C3, p.14, ¶11]. Interestingly, Mr. Bluntschli was arrested for tax evasion for having two offshore accounts containing several USD million which he had not declared, besides having transferred larger sums from one of his accounts to other unknown offshore accounts [Ex. C3, p.13, ¶2; Po. 2, p.49, ¶40].
62. From the reasons provided so far alone, it is clear that there are several key facts to establish which are difficult to prove. Hence, the Tribunal should stay the proceedings and wait until the criminal investigations are concluded.

ii. Arbitral tribunals have limited powers to investigate corruption contrasted with domestic criminal authorities' investigatory resources and powers

63. In addition to the high level of proof which corruption is subjected to, arbitrators also face difficulties in the evidentiary process. There are specific rules on the procedural issue of evidence and the extent of arbitrators' investigative powers according to each arbitration institution rules. In the case at hand, these are provided in Art. 27 of the PCA Rules [NoA, p.6, ¶16; PSA, Art. 20(a)].
64. Nevertheless, although arbitrators have jurisdiction to deal with corruption allegations, their position remains uncomfortable and problematic, as they are private individuals with no coercive powers, in

addition to not being well resourced to establish corruption activities. [DE FONTMICHEL, pp.309-319, ¶315; MILLS, p.295]. In this context, it only makes sense that arbitral proceedings and criminal investigations go in tandem, as these interact and may influence one another [BESSON, ICC Dossiers, ¶4]. In *Thomson-CSF v Frontier AG*, the Court stayed its decision on the challenge to the award pending conclusion of criminal investigations into the facts, thus allowing a maximal de novo review of the merits. [*Thomson-CSF v. Frontier AG*]. This decision was ultimately vindicated by the findings of the criminal investigations.

65. Likewise, as noted by Sayed, when scrutinising matters of corruption, the evaluation must be displaced to the State which has the interest and the resources to pursue meaningful examination. In his words, "*the State judge applying a maximal review approach may ultimately be better equipped to grasp duplicity and, for that matter, unmask it using the full potential of the State's investigatory resources*" [SAYED, p. 410]. As a result of the limited powers of arbitral tribunals to investigate corruption, contrasted with domestic criminal authorities' investigatory resources and powers, tribunals often look to domestic findings regarding an alleged corrupt act in assessing corruption defenses [HART-ARMSTRONG /SLADE/LANDICHO, p. 2]. Similarly, in *Valeri v. Kyrgyz Republic*, the Tribunal's decision established that "*State authorities are in a much better position that an international body to investigate allegedly criminal activities, including money laundering, by a subject of that state*" [*Valeri v Kyrgyz Republic*, ¶]162].
66. Hence, RESPONDENT reinforces its request regarding the stay of proceedings, as only after Equatoriana's authorities terminate the criminal investigations and proceedings will the Tribunal be fully equipped to efficiently solve the present dispute.

3. Criminal proceedings have warranted a stay of proceedings in several cases

67. As recognized by CLAIMANT itself, there are circumstances where a stay in the proceedings is warranted, and that decision should take into account the link between the criminal and the arbitral proceedings [Cl. Memo., p.12, ¶47]. However, contrary to CLAIMANT's view, the contentious point is whether the Tribunal is fully equipped to establish corruption allegations where these are fundamental to the efficient resolution of the dispute, since they are directly connected to the PSA - object of the current proceedings [Cl. Memo., p.13, ¶48].
68. Accordingly, it is undisputed that there is a tension between the private nature of arbitration and the criminal nature of corruption [BESSON/ICC Dossiers, ¶4]. Looking at international and domestic case law, the coexistence of these two procedural natures has resulted in the stay of proceedings for several times.

69. In international arbitration, arbitrators are viewed to have the discretion to stay the proceedings in the case where a criminal complaint may affect them. [DRAYE, p.326; CAPRASSE, p.191; KEUGTEN/DAL, p. 414.]. In *Southern Properties v. Egypt* and *SGS v. Philippines*, the arbitral tribunals agreed to stay the proceedings pending the outcome of parallel proceedings [*Southern Properties v. Egypt; SGS v. Philippines*].
70. In Belgium, for instance, case law and legislation require that civil proceedings be stayed in a situation where a criminal decision may contradict or bear influence on the civil lawsuit. (Cass 66, p.483; Cass 12, p.670; Cass 13, p. 91; Art.4(1) of the Belgian Code of criminal procedure) Similarly, French law also provides that a criminal action takes precedence over a civil action ("*le criminel tient le civil en état*"), while establishing the stay of civil proceedings until a final decision is made on the merits of the public prosecution where such a prosecution has been initiated [Art.4 of the French Code of criminal procedure].
71. Still in the domestic sphere, in *E Holding v. Z Ltd*, the tribunal referred to case law of the Swiss Federal Supreme Court (119 II 3861, cons. 1b), according to which "*a stay of the arbitration proceedings may be justified until a decision is rendered in other proceedings where the latter concerns a preliminary question which the arbitral tribunal would otherwise have to decide itself*" or where "*certain issues, which are determining for the outcome of the dispute and which are beyond the scope of competence of the arbitral tribunal must be clarified*" [*E Holding v. Z Ltd Po. 3*, ¶26].
72. The present case falls within the circumstances in which the Swiss Supreme Court has admitted the appropriateness of a stay, thus adding a further reason for the Tribunal to decide in favour of staying the proceedings.

4. The completed criminal investigations may lead to the annulment of the award rendered by the Arbitral Tribunal and, consequently, the reopening of the case

73. The outcome of the criminal investigations in Equatoriana can have a tremendous impact on the current proceedings. Particularly, the completed criminal investigations can severely affect the present arbitration after the final award has been rendered by the Arbitral Tribunal.
74. According to scholars, a subsequent verdict of corruption may be the basis for a request for a revision of the award. Revisions are extraordinary remedies resulting in the annulment of the award and the reopening of the case, which can occur when the arbitration has been influenced by a criminal offense or in the event of discovery of crucial evidence or facts after the issuance of the award. [POUDRET/BESSON, p. 786].

75. In this sense, CLAIMANT relies on a decision of the International Court of Arbitration, which, ironically, despite denying a request for a stay of proceedings, favours RESPONDENT's submission [Cl. Memo., p.14, ¶54]. Firstly, the case concerns the crime of false statements, the reality of which is completely distinct from the crime of corruption. Further, as stated by the Sole arbitrator, an arbitral tribunal may consider factors other than its obligation to act expeditiously, "*such as the risk that the award may turn out to be inconsistent with the findings in the criminal case, and the question whether the arbitral tribunal has access to the evidence that is relevant to the determination of factual issues that are also before the criminal court*" [ICC Po. 9, ¶12]. In that particular case, it happens that the arbitrator considered that there were no matters to be clarified which were decisive for the outcome of the case, and beyond the jurisdiction of the arbitral tribunal, which is far from comparable to the case at hand [*idem*, ¶15].
76. As previously mentioned, there are various key facts to ascertain and analyse which are extremely difficult to prove [¶¶54, 61]. Consequently, if the Tribunal decides to continue the proceedings, there is a likely scenario that the outcome of the criminal investigations will be conflicting with the decision resulting from the arbitral proceedings. In this context, contrary to CLAIMANT's assertion [Cl. Memo., p.14, ¶52], the Tribunal may indeed be wasting resources and unnecessary time if it decides to continue the proceedings before the investigations are completed, which also runs contrary to CLAIMANT's argument regarding the request for a stay being used as a dilatory tactic [Cl. Memo., p.12, ¶44].
77. If the revision of the arbitral is requested, the prejudice suffered will be far greater than a delay of a few months. Thus, it is critical for the Tribunal to balance the interests at stake and realise that the most prudent route to take in the present case is the stay of proceedings until the criminal proceedings are terminated.

B. Alternatively, the Arbitral Tribunal should bifurcate the proceedings and solely decide on those issues which do not depend on the result of the criminal investigations.

1. Bifurcation would promote the efficiency of the proceedings since it would dispose part of the claims until the end of the criminal investigations

78. Firstly, as previously mentioned, the Tribunal has the discretion to conduct the proceedings as it deems appropriate, there being no impediment to the bifurcation of proceedings pursuant to the law applicable [¶49]. Accordingly, the Tribunal has authority to bifurcate the proceedings.

79. Like so, it is undisputed that bifurcation aims to promote efficiency in the resolution of disputes. [KINNEAR; GREENWOOD, p. 105]. Particularly, in the case at hand, bifurcating the proceedings would allow the Parties and the Tribunal to focus first on the merits of the case, which do not depend on the result of the criminal investigations [Po. 1, p. 42, ¶1 (c),(d)].

80. Having established the above, the issue of whether or not to bifurcate a proceeding must be looked at in the light of all information available to the tribunal. [GREENWOOD p.109]. In this regard, there are several factors commonly considered by tribunals when deciding to bifurcate the proceedings based on the objections brought by the parties, these being: (i) prima facie serious and substantial; (ii) not intertwined with the merits; and (iii) disposing all or part of the claims [*Philip Morris v. Austria*, ¶109; *Glamis Gold v. United States*, ¶12; *Glencore v. Bolivia*, ¶39].

81. The first factor (i) is satisfied where the preliminary objection is credible and brought in good faith, rather than frivolous or vexatious, and where the tribunal is not able to "*prima facie exclude that the objection might be successful*" [*Resolute v. Canada*, ¶4; *Philip Morris v. Austria*, ¶111]. In the present case, RESPONDENT's objections are serious and substantial. They raise fundamental questions as whether the AA is effectively an unduly favorable contract obtained by corruption [RNoA, p. 27 ,¶1]. Moreover, the objections are brought in good faith. Indeed, RESPONDENT have responsibly addressed the problem at stake and raised the objections regarding the contract to CLAIMANT as soon as it became aware of underlying corrupt practices [NoA., pp. 5-6, ¶12; Ex. C3; p. 13; ¶¶5, 6; Ex. C6, p. 17; Ex. C8, p. 20].

82. On the other hand, factor (ii) is met where the "*facts involved in determining the objection in issue are distinct from those likely to be involved in determining the merits of the claims*" [*Philip Morris v. Austria*, ¶109; *Mesa Power v. Canada*, ¶20]. Accordingly, RESPONDENT's bifurcation request would only extend to the question of the invalidity of the contract due to corruption, applied to a limited set of facts, which are distinct from the more abstract legal questions 1c and 1d. [Po. 1, p. 42, ¶1; Po. 2, pp. 50-51, ¶52]. In this regard, CLAIMANT might allege that it will be necessary to hear evidence more than once, there being an overlap of evidence. However, according to a PCA Case, the existence of some degree of overlap of evidence is not an obstacle to bifurcation [*Pey Casado v. Chile*].

83. Lastly, factor (iii) is met where a request for bifurcation which would dispose an essential part of the claims results in a substantial reduction of the proceedings at the next stage or is likely to narrow the scope of the issues to be addressed at the next phase [*Philip Morris v. Austria*, ¶109; *Mesa Power v. Canada*, ¶19]. Consequently, RESPONDENT's request could result in the outright dismissal of the claims regarding the law applicable to the PSA as well as the interpretation of Art. 3.2.5 of the ICCA.

84. The present case meets all the factors and thus, a bifurcation of the proceedings is warranted. However, it would not even be necessary for all the factors to be satisfied for the Tribunal to bifurcate the proceedings. Bifurcation is warranted where the potential benefits of efficiency outweigh any risks of delay or wasted expense [WAINCYMER, p. 720]. In the present case, as previously analysed, there is no question regarding the prevalence of efficiency over celerity [¶¶52, 73-77].
85. As such, bifurcating the proceedings would contribute to the efficient resolution of the dispute, and is appropriate where the RESPONDENT's objections are serious and substantial; raise issues not intertwined with the merits; and, if granted, would dispose of an essential part of the claims.
86. In conclusion, although RESPONDENT recognizes that the Arbitral Tribunal has a large discretionary power when deciding whether the existence of criminal investigations should lead to the stay, or alternatively, the bifurcation of arbitration proceedings, it is also RESPONDENT's understanding that, in the present case, the criminal nature of corruption, the serious allegations which need to be ascertained, and the public interest in transparency are of major relevance and, therefore, should prevail over the need for celerity. Furthermore, it is RESPONDENT's view that the issue does not revolve around the impediment of the Arbitral Tribunal of continuing the proceedings, but rather if, not being fully armed to establish corruption allegations, the Tribunal should not wait for the outcome of the criminal investigations and proceedings.

III. THE PSA IS GOVERNED BY THE EQUATORIANIAN ICCA

87. In the present case, even though it is clear that the CISG does not apply, CLAIMANT is trying to mislead the Tribunal into deciding otherwise [Cl. Memo., p.16, ¶59]. The law governing the PSA, contrary to what CLAIMANT suggests, is the Equatorianian ICCA. Firstly, the PSA for the Kestrel Eye 2010 drones is clearly a sales transaction for aircrafts pursuant to Art.2(e) CISG, falling outside of the CISG's sphere of application **(A)**. Additionally, the Parties agreed that the law of Equatoriana would govern the PSA **(B)** and it was never the Parties' intention to apply the CISG.

A. The PSA for the Kestrel Eye 2010 drones is a sales transaction for aircrafts pursuant to Art. 2(e) CISG, falling outside of the CISG's sphere of application

88. CLAIMANT mainly argues that "*the Kestrel Eye 2010 does not fall under CISG aircraft exclusion because it does not qualify as an aircraft under the Cape Town Treaty*" [Cl. Memo., p.19, ¶66]. Furthermore, it mistakenly indicates that the Kestrel Eye 2010 does not meet Equatoriana domestic law aircraft

criteria. However, CLAIMANT's contentions are both legally and factually unsupported. Therefore, these claims can never succeed.

1. The Kestrel Eye 2010 qualifies as an aircraft pursuant to Art. 2(e) CISG

89. Art.2 CISG sets out types of sales which are excluded from the application of the CISG. One of the exclusions is based on the kinds of goods sold [SECRETARIAT COMMENTARY, p.16, ¶1]. Aircrafts are one of the excluded goods in Art.2(e) CISG.

90. In order to understand if the Kestrel Eye 2010 is considered an aircraft, it is necessary to clarify this term. The CISG does not define the scope of this concept and, in the preparatory works of the CISG, the meaning of "aircraft" is also not clarified [SECRETARIAT COMMENTARY, p.16, ¶9; UNCITRAL DG, p.18, ¶10]. Therefore, in the present case, the preparatory works are not a very relevant and reliable source for the Arbitral Tribunal to base its decision on.

91. RESPONDENT hereby addresses why CLAIMANT's approach is not feasible and explains the approach that the Arbitral Tribunal must follow to fill this gap.

i. The Cape Town Treaty cannot be enforced in this case, therefore, the "aircraft" definition stipulated in it cannot be taken into consideration by the Arbitral Tribunal

92. CLAIMANT is suggesting that the Arbitral Tribunal should adopt the "aircraft" definition stipulated in the Cape Town Treaty. Furthermore, it advocates that the Kestrel Eye 2010 drone "*does not qualify as an aircraft under the Cape Town Treaty*". In fact, CLAIMANT is correct when stating that the Kestrel Eye 2010 drones do not qualify as aircrafts under the requirements established by the Cape Town Treaty. These drones cannot carry "*at least eight persons*" [Art.1(2)(e) of the Cape Town Treaty] since they do not have the ability to carry humans [PO2, p.44, ¶9], and they have a payload of 245Kg [Ex. C4], much lower than the minimum established by the Cape Town Treaty (2 750 Kg) [Art.1(2)(e) of the Cape Town Treaty]. However, this is completely irrelevant, since this Treaty and, consequently, the "aircraft" definition set forth in it, cannot be enforced in this case.

93. Initially, CLAIMANT submits that *"private international law can be used to interpret and gap-fill"* [Cl. Memo., p.20, ¶68]. However, Art.7(2) does not foresee this option. Instead, this provision stipulates the possibility of filling a gap in the CISG *"in conformity with the law applicable by virtue of the rules of private international law"* (Art.7(2)). In other words, this provision establishes that the rules of private international law are to be used in order to determine which law to apply. Regarding the relevant rules of private international law, the Arbitral Tribunal should consider the applicable arbitration

rules, thus the PCA Rules. Art.35 of the PCA Rules states that "*the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute*". Accordingly, this provision upholds the Parties' choice of Equatorianian substantive law.

94. Further on, CLAIMANT states that *"the Cape Town Treaty provides the applicable private international law that is relevant"*. According to Art.7, the only way to enforce the definition of "aircraft" settled by the Cape Town Treaty would be to prove its international relevance, in accordance with the international character of the CISG and its goal to promote uniformity.
95. However, CLAIMANT merely argues that it is an international treaty [Cl. Memo., p.20, ¶69], with no further grounds for applying it. This argumentation is clearly insufficient for many reasons.
96. Firstly, the Parties in the present case are not Contracting States of this Treaty. One can read on the Treaty "The States Parties to this protocol (...) have agreed upon the following provisions". Since neither Equatoriana nor Mediteraneo agreed on the application of this Treaty, its application cannot be considered by the Arbitral Tribunal. Contrary to CLAIMANT's submission, these "aircraft" standards are not part of the private international law of these States [Cl. Memo., p.20, ¶71].
97. Secondly, in a Convention, the *"terms are attributed a particular meaning that is not only autonomous (...) but it is also different from one convention to another and is independent of any systematic general reconstruction."* [BARIATTI, non-official translation, emphasis added]. Therefore, since this understanding of the term "aircraft" is autonomous, it should never be used outside the scope of the Treaty in which it was established.
98. Finally, this definition of "aircraft" is not recognized by leading international institutions, which makes it internationally irrelevant.
99. In light of the above, the Arbitral Tribunal does not have justifiable grounds to adopt the "aircraft" definition established by the Cape Town Treaty.

ii. In order to define terms not expressly settled in the CISG, and in its general principles, the Arbitral Tribunal may resort to the applicable law (Equatorianian Law)

100. Having established that CLAIMANT's allegations cannot proceed, RESPONDENT will explain the approach that the arbitral tribunal must follow to fill this gap, in accordance with Art.7 CISG.
101. According to Art.7(2), doubts about matters governed by the CISG which are not expressly settled in it should be settled in conformity with the general principles on which the CISG is based.
102. As noted by CLAIMANT itself, when interpreting the CISG, one must do so with regard to its "international character," "need to promote uniformity", and the observance of "good faith" [CISG

Art.7(1)]. Furthermore, "*the purpose of the convention is to have a uniform set of standards for international disputes*" [Cl. Memo., p.19, ¶67]. Nonetheless, CLAIMANT erroneously suggests that *"domestic laws and interpretation methods should not be used"* [Cl. Memo., p.19, ¶67].

103. Indeed, when no general principles can be identified, Art.7(2) CISG allows *"reference to the applicable national law to solve those questions"* [UNCITRAL DG, p.43, ¶10]. This position was upheld in a Russian Federation arbitration proceeding, in which, by virtue of Art.7(2), domestic law was applied subsidiarily to issues not directly regulated in the CISG and not addressed by the general principles on which the CISG is based [*ICACRF case no. 167/2003*]. The Economic Court of the City of Minsk also followed this approach [*Belarusian company v. Russian company*].

104. Thus, it can be stated that in order to define terms not expressly settled in the CISG and in the absence of clarification by its general principles, the Arbitral Tribunal may resort to the applicable law, i.e., Equatorianian Law. Therefore, one must consider the "aircraft" definition settled in the Equatorianian Aviation Safety Act.

iii. In addition, the Parties' agreed that Equatorianian law would govern the PSA, therefore, according to the party autonomy principle, domestic law must be used to fill this gap

105. The Parties' agreed on the application of Equatorianian law [Ex. C2, Art.20(d)]. Thus, because of this choice, and according to the party autonomy principle, domestic law must be used by the Arbitral Tribunal in order to clarify the concept of "aircraft".

106. In fact, *"according to several courts, one of the general principles upon which the Convention is based is party autonomy"* [UNCITRAL DG, p.43, ¶12]. In this sense, "*the parties may be satisfied that a particular national system of law would best govern their dispute*" [LIVINGSTONE, p.530, ¶5]. With this in mind, even though it is important that, as mentioned above, the CISG is interpreted with regard to its international character, the party autonomy principle is equally important. Thus, this principle, confirmed in Art.7 *"allows the parties to agree upon provisions which derogate from the provisions of the Convention or even to completely exclude its application"* [*Bullet-proof vests cas*e].

107. In the present case, contrary to CLAIMANT's submission [Cl. Memo., p.20, ¶67], since both Parties agreed to apply Equatorianian law to the PSA, using domestic law to fulfil this gap is in line with the general principles of party autonomy and good faith [UNCITRAL DG, p.43, ¶13].

iv. The Kestrel Eye 2010 drone has the ability to carry people and objects

108. Moreover, CLAIMANT mistakenly argues that *"drones do not constitute aircrafts because they cannot carry people or objects"* [Cl. Memo., p.21, ¶3.2.2] and states that, because of that, the Kestrel Eye 2010 drones should not be considered aircrafts.

109. However, the Kestrel Eye 2010 drones are totally capable of carrying cargo. These drones are "*able to carry other cargo fitting into the payload bays instead of the surveillance equipment"* [PO2, p.44, ¶9]. They have even been used for other purposes other than carrying surveillance equipment [PO2, p.44, ¶9].

110. Considering the above, CLAIMANT's submission, that "*if one looks at the aircraft exclusion from a functionalist argument (...) the drones do not constitute aircrafts*"[Cl. Memo., p.21, ¶3.2.2], is unfounded and can not be taken into account.

v. The primary purpose of excluding sales of aircrafts from the scope of application of the CISG (i.e., to avoid complications with differing registration requirements) is implicated in the present case

111. As noted by CLAIMANT itself, *"the legislative history of article 2 of the CISG indicates that the primary purpose for excluding aircrafts, ships, and vessels was to avoid the confusion that surrounds domestic registration requirements for these products"* [Bailey, p.306; Cl. Memo., p.21, ¶74]. CLAIMANT correctly adds that "*Since each nation has different registration requirements for aircrafts, the CISG excludes them to avoid complications.*" [Cl. Memo., p.21, ¶74]

112. Furthermore, in most legal systems, aircrafts are subject to special registration requirements and the rules that determine which ones must be registered "*differ widely*". "*In order to not raise questions of interpretation*" as to which aircrafts were subject to the CISG, they were excluded from the application of the CISG [SECRETARIAT COMMENTARY, p.16, ¶9]. Hence, the purpose of excluding aircrafts was to avoid complications with differing registration requirements. The goal was never not to apply the CISG when the registration was required, which is what CLAIMANT is trying to portray.

113. In the present case, contrary to what CLAIMANT argues, this exact question, the need for registration, is addressed.

114. Horacia Porter refers that, when selling the drones, "*the legal department routinely checks the relevant Aviation Safety rules for potential registration*" [Ex. C7, p.12, ¶3]. In addition, Leonida Bourgeois states that, according to Drone Eye, there were no registration requirements for these drones in "*Mediterraneo and the other four countries into which the Kestrel Eye 2010 had been exported so far*" [Ex. R1,

p.32, ¶7]. Nonetheless, according to Art.10 of the Equatorianian ASA, these drones need to be registered, when owned or operated by private entities.

115. This shows that the need for registration of the Kestrel Eye 2010 drones varies from legal system to legal system, which leads to the complications that are intended to be avoided by not applying the CISG.

116. Despite the apparent need for registration (Art.10, Equatorianian ASA), in fact, as CLAIMANT points out, in this specific sale, the Kestrel Eye 2010 drones did not require registration, since "they were sold to and operated by a state-owned company." [Cl. Memo., p.22, ¶74; Ex. C.7, p.18, ¶5; Ex. R1, p.32, ¶7]. However, this detail is irrelevant, since the underlying reason for excluding aircrafts from the scope of application of the CISG is to avoid the complications that arise from differing registration requirements, as mentioned above.

117. In conclusion, since the underlying purpose of excluding sales of aircrafts from the sphere of application of the CISG is implicated in the present case, the Arbitral Tribunal has an additional reason to consider that the Kestrel Eye 2010 drones are aircrafts, pursuant to Art.2 (e) CISG.

2. According to the Equatorianian ASA, the Kestrel Eye 2010 qualifies as an aircraft

118. Lastly, regarding the meaning of aircraft to be adopted, CLAIMANT wrongly submits that according to Equatorianian law, namely the Equatorianian ASA,"*the Kestrel Eye 2010 will still not be excluded as an aircraft under the CISG"* [Cl. Memo., p.22, ¶75]. This statement does not reflect, by any means, the wording nor the meaning of Art.1 of the Equatorianian ASA.

119. According to Art.1 of the Equatorianian ASA, the only (alternative) requirements to consider UAVs as aircrafts are the length (exceeding 90 cm) and the payload (being higher than 50 Kg) [Ex. R5, Art. 1, last sentence]. CLAIMANT was fully aware of the Equatorianian ASA's provisions, since "*the legal department routinely checks the relevant Aviation Safety rules*" [Ex. C7, p.18, ¶3]. However, the requirement mentioned by CLAIMANT, i.e., the fact that it is "*intended to be used to move people or objects*", refers to *"any vehicle with or without an engine, heavier or lighter than air"* and does not concern the UAVs [Cl. Memo., p.22, ¶75; Ex. R5, Art.1].

120. The Kestrel Eye 2010 drones' length is 630 cm (much higher than 90 cm) and their payload is 245 Kg (significantly higher than 50 Kg). Therefore, in accordance with Art.1 of the Equatorianian ASA, the Kestrel Eye 2010 drones are considered aircrafts.

121. In addition, the definition of "aircraft" in Art.1 of the Equatorianian ASA "*was changed in 2010 to explicitly include UAVs into the scope of application of the Act.*" [PO2, p.49, ¶51].

122. Since, as explained above, the Arbitral Tribunal must consider the "aircraft" definition given by Equatorianian law, namely, the Equatorianian ASA, it can only conclude that the Kestrel Eye 2010 drones are aircrafts. Consequently, the PSA for the Kestrel Eye 2010 drones is a sales transaction for aircrafts, pursuant to Art.2(e) CISG, falling outside of the CISG's sphere of application.

123. Therefore, the Arbitral Tribunal must find that the CISG does not apply to the PCA.

B. The Parties agreed that the law of Equatoriana would govern the PSA

124. Even if, in a very unlikely scenario, the Arbitral Tribunal finds that the sale of the Kestrel Eye 2010 drones falls under the scope of application of the CISG, according to Art.2(e), the CISG would still not govern the PSA.

125. In fact, as mentioned above [A, 1, iii], the Parties agreed that Equatorianian Law would govern the PSA [Ex. C2, Art.20(d)], and they never intended to apply the CISG. However, CLAIMANT is trying to mislead the Arbitral Tribunal by stating that, because of that choice of law clause, the CISG governs the PSA.

1. The PSA is not governed by the CISG because Art.1 CISG operates only in the absence of a choice of law by the Parties

126. CLAIMANT submits that the PSA is governed by the CISG because the requirements of Art.1 CISG are fulfilled. However, RESPONDENT will demonstrate that there are no grounds for applying the CISG, since the choice of law clause excludes the application of the CISG and it was never the intention of the Parties to apply it.

i. The Parties' choice of law clause implicitly excludes the application of the CISG through Art. 1(1)(a) and (b) CISG

127. CLAIMANT correctly states that the Parties have their places of business in different Contracting States of the CISG [Cl. Memo., p.16, ¶61; PO1, p.43, ¶3]. This fact could have justified the application of the CISG through Art.1(1)(a). Nevertheless, in this case, the application through Art. 1(1)(a) is implicitly ruled out by the Parties' choice of law.

128. Courts have been upholding implicit exclusions [CISG-AC-O No.16, p.5, ¶3.1]. In this regard, the Federal Court of Australia, in *Olivaylle v. Flottzsweg,* held that the choice of law clause in the contract

revealed the parties' intention to exclude the application of the CISG, in accordance with Art.6. This decision was made even though both parties had their places of business in Contracting States and the CISG had been incorporated into Australian law [*Olivaylle v. Flottweg*]. Likewise, the Weinfelden District Court understood that the choice of law clause constituted a common intention of the parties to not apply the CISG to the contract [*Milking-machines case*].

129. In addition, according to some courts, *"the Convention is implicitly excluded by the parties' choice of "the law of a contracting state insofar as it differs from the law of the national law of another Contracting State.""* [CISG-AC-O No.16, p.11, ¶4.6; UNCITRAL DG, p.34, ¶12; *Boiler Case*; *Automobile Case 1*]

130. Similarly, in the present case, despite the fact that both Parties have their places of business in Contracting States, the choice of law clause must be interpreted by the Arbitral Tribunal as an implicit exclusion of the CISG, according to Art.6 CISG.

131. In addition, concerning the application of the CISG through Art.1(1)(b), a District Court in Italy decided not to apply the CISG because of the parties' choice of Italian law as the law governing their contract. This court held that Art.1(1)(b) CISG "*operates only in the absence of a choice of law by the parties"* [*Nuova Fucinati v. Fondmetall International*].

132. In the case at hand, just like in *Nuova Fucinati v. Fondmetall International*, the choice of Equatorianian law derogates the application of Art.1(1)(b) CISG.

133. Consequently, even though RESPONDENT recognizes that, as correctly stated by CLAIMANT [Cl. Memo., p.17, ¶63], the CISG is part of Equatorianian law, , because of the above mentioned, the CISG does not apply.

ii. The Parties never intended to apply the CISG

134. Even if the Arbitral Tribunal finds that the choice of law clause does not constitute an implicit exclusion, there is an implicit intent by the Parties to exclude the CISG.

135. The intent of the Parties to exclude must be, "*clearly manifested*", according to Art.8 CISG [CISG-AC-O No.16, p.5, ¶3]. Therefore, it is necessary to "*determine whether a clear inference arises from the (...) conduct of the parties to the effect that they intended to exclude the CISG, in the sense that these would be reasonably understood as manifesting such an intent: Art. 8(2)*"[CISG-AC-O No.16, p.7, ¶3.6].

136. Case law shows that when a sale falls into the Art. 2(e) exclusion, the choice of law provision cannot be understood as a reference to the CISG, as the arbitral tribunal found in the *Fishing Boat case*. In that case, the arbitral tribunal held that, even though both parties were Contracting States of the CISG, since that sale was the sale of a ship (following the exception provided in Art. 2(e)), "*the*

reference to Yugoslav law should not be understood as a reference to the CISG, but rather as a reference to the internal substantive law of Yugoslavia." [CUCAVAK] In the end, the arbitral tribunal decided that the dispute should be governed by the Yugoslav substantive law, found in Yugoslav domestic laws, and not by the CISG [*Fishing Boat case*].

137. In the present case, both Parties were aware that the application of the CISG was excluded by virtue of Art. 2(e) CISG. Horacia Porter, CLAIMANT's lawyer, stated that the "*drones are in many features comparable to aircrafts*" [Ex. C7, p.18, ¶1]. Furthermore, the word "aircraft", referring to the Kestrel Eye 2010 drones, appears in documents that CLAIMANT had the opportunity to read and even sign [Ex. C1, p.9, ¶4; Ex. C2, p.10, ¶3; Ex. C2, p.10, ¶5; Ex. C2, p.10; ¶6; Ex. C2, p.11, Art.3 (b)].

138. RESPONDENT obviously did not intend to apply the CISG by adding the choice of law clause, since it was completely aware that its application was excluded by virtue of Art. 2(e). Moreover, CLAIMANT's conduct of agreeing with the choice of law clause, even though it was aware that the CISG would be excluded beforehand, can only indicate that it was never its intention to apply it, but instead, it intended to exclude it.

139. Therefore, in the present case, since both CLAIMANT and RESPONDENT knew that this is a sale of aircrafts, and that it is excluded from the scope of application of the CISG, they never intended to apply the CISG. Instead, the Parties added a choice of law clause in order to establish which law to apply, since it was clear that the CISG would not apply.

140. In conclusion, in the case at hand, just like in the *Fishing Boat case*, the Arbitral Tribunal must find that the PSA is not governed by the CISG, but instead by the Equatorianian ICCA.

IV. RESPONDENT CAN RELY ON ART. 3.2.5 OF THE INTERNATIONAL COMMERCIAL CONTRACT OF EQUATORIANA TO AVOID THE CONTRACT

141. It was already shown that the CISG does not apply and therefore it is crucial to look at the ICCA, which applies instead. The Convention explicitly determines its own applicability only to the formation of the contract of sale and the rights and obligations of both seller and buyer arising from such a contract [Art.4 CISG]. The present dispute is concerned with the validity of the contract. Therefore the CISG is not applicable [Art. 4(a) CISG].

142. RESPONDENT is entitled to apply Equatoriana's domestic law since the CISG is not applicable, since claims made by RESPONDENT constitute matters of validity of the contract due to CLAIMANT's misrepresentation of the features of the drones **(A)**. CLAIMANT's goods are not

conformed to contractual requirements **(B)**. Further, Art.39 CISG is not applicable considering the goods were never delivered **(C)**.

A. RESPONDENT is entitled to avoid the PSA under Art.3.2.5 ICCA because of CLAIMANT's fraudulent representation of the drones

143. The Parties are not in agreement in relation to the application of the CISG to this PSA, as claims made by RESPONDENT constitute matters of validity of the contract, not of conformity of goods since CLAIMANT's description of the drones is a serious misrepresentation [RNoA, p.31, ¶27].

144. According to Art.3.2.5 ICCA avoidance is possible, when: one party had been led to conclude by the other party's fraudulent representation or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the party should have disclosed.

145. In the understanding of Eckart Brödermann, Art.3.2.5 requires [BRÖDERMANN]:

146. a) First, a state of mind, namely a fraudulent intention which includes - deliberate misrepresentation or "reckless representations" - as well as aiming to gain an advantage to the detriment of the other party.

147. b) Second, the intention must be substantiated in some conduct. Thus, there is an act that is a false representation either expressed or implied by words or actions. Generally, there is an omission (fraudulent non-disclosure) in violation of reasonable commercial standards of fair dealing (Art.1.7 Unidroit Principles).

148. c) Thirdly, the fraudulent act must have a causal link to contract conclusion and generally induce a mistake [BRÖDERMANN, pp.87-88]. This understanding is also shared by Barton [BARTON, p.80, ¶2]. The person guilty of fraud or misrepresentation either creates or takes advantage of a mistake.

149. The first requirement is fulfilled as CLAIMANT had a fraudulent intention which involved: deliberate misrepresentation or reckless representations and a goal to obtain an advantage to the detriment of RESPONDENT by inducing the purchase of the oldest drone model when the new and most suitable drone to operate in the difficult weather conditions in the northern provinces of Equatoriana was released in February 2021 [PO2, p.45, ¶15], shortly after the contract conclusion. In fact, Mr. Field was worried about this situation and threatened to terminate the contract after finding out that CLAIMANT omitted information about the release [Ex. C7, p.19, ¶13].

150. The second requirement presumes an intention substantiated in some conduct and it is satisfied. CLAIMANT engaged in a false representation about the drones, [NoA, p.5, ¶9; Ex. C3, p.14, ¶9].

The drones do not have the features agreed between the Parties in the contract [Ex. C2, p.10] but this will be discussed further **(B)**.

151. The third requirement is verified as well. There is a causal link between the contract conclusion and fraud [Ex. C7, p.19, ¶¶13-16], if it were not for this misrepresentation RESPONDENT would not have concluded the PSA.

152. The notion of fraud is clearly portrayed in CLAIMANT's behaviour: "*What entitles the defrauded party to avoid the contract is the "fraudulent" representation or non-disclosure of relevant facts. Such conduct is fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party*" [Comment Unidroit Principles 2016, p.105, ¶1].

153. Thus, CLAIMANT was aware that the 2010 drone was obviously neither state-of-the-art nor its newest model, as required under the PSA. Instead of disclosing that fact, Mr. Bluntschli went even further by reinforcing the impression that the Kestrel Eye was CLAIMANT's newest model in its email of 29 November 2020 [Ex. R4, p.35].

154. On the basis of the above-mentioned facts, according to the notion of fraud laid out in Art.3.2.5 ICCA, it can be stated that RESPONDENT is entitled to avoid the PSA due to Claimant's description of the drones being a serious misrepresentation. Since RESPONDENT's claims are concerned with the validity of the contract, the CISG is not applicable pursuant to Art.4(a) CISG (**3**).

1. The meaning of "state-of-the-art" requires interpretation under Article 4.1.-4.3 ICCA

155. CLAIMANT submits that the meaning of "state-of-the-art" entails an interpretation via Art.8 CISG. However, it is RESPONDENT submission that Art.4.1-4.3 ICCA must be taken into consideration to understand the meaning of the expression. Presently, the Tribunal does not have grounds to apply Art.8 CISG. Art.4.1(2) ICCA requires that the contract must be interpreted according to what a reasonable person, similar to the parties would interpret in an equivalent situation [Comment Unidroit Principles 2016, p.187]. To establish what is "*reasonable*" the pertinent circumstances presented in Art.4.3 ICCA are to be taken into consideration. In particular: "*the meaning commonly given to terms and expressions in the trade concerned*" [Comment Unidroit Principles 2016, p.190].

156. The term in discussion is not described in the PSA [Ex. C2, p.10]. The standard when determining RESPONDENT's perception of the expression analysed is the understanding a reasonable person of the same kind as RESPONDENT would have [Comment Unidroit Principles 2016, p.190]. A reasonable person in the place of RESPONDENT does not have the knowledge to understand what

CLAIMANT meant by "state-of-the-art" and would probably have a different perception of what it means since their field of practice is not the same.

157. If the Tribunal were to consider representations such as: "top model" or "latest model" to interpret the meaning of "state-of-the-art" would be very unfair since RESPONDENT is a state owned company that is completely outside of this area of business since it was set up by the former Government of Equatoriana in connection with its NPDP in 2016. RESPONDENT's main purpose, according to its statute, is to ensure that the geological, geophysical and other scientific data necessary for the development of the area covered by the Northern Part Development Program is generated and available.

158. In the letter of 30 May 2022 [Ex. C8, p.20], sent by Ms. Wilhelmina Queen, there is proof of RESPONDENT's perception of the term as being a type of technology used in drones when she mentioned that: "*The Kestrel Eye 2010 by no means represents "state-of-the-art"*". Here, it could not have been reasonably expected that RESPONDENT would have been aware of the meaning of the term in discussion.

2. The use of "state-of-the-art" in the PSA does not constitute a qualitative description of CLAIMANT's drones but rather a generic term, simply adopted to label the technology used in the drones

160. Art.8 CISG should not be applied by the Tribunal to interpret the term "state-of-the-art" and Art.35 CISG is also not applicable since the term is not a qualitative description of CLAIMANT's drones but alternatively a generic term. This should not even be discussed as RESPONDENT's claims related to the validity of the contract and not the quality of the drones.

161. In the call for tender [Ex. C1, p.10], RESPONDENT planned to contract "*four state-of-the-art unmanned aircraft systems* (…)", it did not mention the word "quality". This should be evidence that not only RESPONDENT thought this was a generic term adopted to name the technology used in the drones and that this dispute is in fact over misrepresentation and fraud.

162. Contrary to CLAIMANT's view [Cl. Memo., p.24, ¶87],"state-of-the-art" does not constitute a qualitative description of the drones. In the email exchanged between Mr. Field and Mr. Bluntschli, the latest mentioned that the advanced technology of the Kestrel Eye 2010 guarantees its suitability for state-of-the-art data collection and aerial surveillance [Ex. R4, p.35].

163. Therefore, the Tribunal should find that this dispute falls outside the scope of the CISG, and the domestic law has to be applied.

3. Mr. Bluntschli's representations of the drones trigger domestic remedies as they represent issues related to the validity of the PSA, thus falling within the scope of Art.4(a) CISG

165. CLAIMANT incorrectly asserts that RESPONDENT cannot claim that Mr. Bluntschli's representations of the Kestrel Eye 2010 as its "latest model" or "newest model" constituted issues relating to the validity of the contract [Cl. Memo., p.4, ¶93].

166. The CISG only governs: a) formation of the contract of sale and b) rights and obligations of the seller and the buyer arising from the contract [Art.4 CISG]. According to Art.4(a), the CISG does not regulate issues regarding the validity of the contract.

167. The domestic remedies can be triggered by the breach of pre-contractual information duties if these duties are not related to the features, quality of the goods, obligations of the parties, as a result of these matters being addressed by the CISG [BRUNNER & GOTTLIEB, p.50; SCHLECHTRIEM & SCHWENZER, pp.80-81], as noted by CLAIMANT itself [Cl. Memo., p.41, ¶93].

168. The jurisprudence of the Equatorianian Supreme Court requires a disclosure obligation, covering all information potentially relevant for the government entity, including planned improvements to the product. The Court considers that an intentional violation of the disclosure obligation forms a situation tainted by misrepresentation allowing the governmental party to avoid the contract pursuant to the equivalent of Art. 3.2.5 of the ICCA [RNoA, pp.30-31, ¶18]. CLAIMANT not only misrepresented the features of the drones, but also did not disclose the release of the new drone model, even went as far to assure RESPONDENT that the drones had the contracted characteristics [RNoA, p.29, ¶17].

B. Alternatively if the Arbitral Tribunal deems that the CISG is applicable to this PSA, CLAIMANT's goods are non-conforming as required by Art.35 CISG

169. Even if this dispute is considered to be concerned with the quality of the goods, CLAIMANT as the seller, has failed its obligation to deliver conforming drones.

170. Art.35 CISG expresses standards for ascertaining if the goods delivered by the seller comply with the contract in terms of type, quantity, quality, and packaging. This provision also details the seller's obligations with respect to particular elements of contractual performance.

171. The Supreme Court of Spain considered that: "(…) *under the CISG, delivery of goods of a different type from those required by the contract, constitutes delivery of goods that lack conformity*" [UNCITRAL DG, CLOUT 802].

172. Art.35(1) CISG lays elementary importance on the agreement of the parties as expressed in the contract [DE LUCA, p.183, ¶1]. This author states: "*Goods are deemed to be conforming not when they meet abstract and objective standards, but rather when they correspond to the concrete description contained in the contractual agreement*" [DE LUCA, p.183, ¶1]. The rules on the conformity of goods are an essential part of sales law and they also contain the seller's primary obligations [SAIDOV, p.529, ¶1].

173. The parties agreed explicitly on the features of the goods: new model drones; equipped with state-of-the-art geological surveillance feature [Ex. C2, p.10]. The parties have celebrated a PSA which contains the rights and obligations of the seller and the buyer arising from such a contract [Ex. C2, p.10]. Therefore, the seller must deliver goods that comply with what is established in the contract.

174. Contrary to CLAIMANT's assertion [Cl. Memo., p.41, ¶96], his obligations were not fulfilled since the 2010 drone does not have the features agreed upon by the parties [RNoA, p.29, ¶17; Ex. C2, p.10; Ex. C8, p.20]. The Hawk Eye 2020 was undergoing final test flights and was presented to the market shortly thereafter, in February 2021 (only 2 months after the contract was signed) [Ex. C3, p.13; Ex. C8, p.20; NoA, p.5, ¶10].

175. The PSA determined the delivery of 6 drones of the newest model of Kestrel Eye 2010 UAS, but this drone model was developed originally already in 2010 [Ex. C8, p.20]. Given the difficult environment in which the UAS were to operate (thickly forested mountains, strong winds and rough and quickly changing weather) [RNoA, p.28, ¶5] they had to be state-of-the-art and based on the newest technology. The tender documents and the PSA made this clear [Ex. C1, p.9; Ex. C2, p.10]. Mr. Bluntschli was in charge of the negotiations with RESPONDENT and on the email of 29 November 2020 [Ex. R4, p.35] demonstrated knowledge of RESPONDENT's requirements and needs when he told Mr. Field that the 2010 drone was suitable to face the difficult weather conditions.

176. RESPONDENT would have profited from the additional functionalities of the Hawk Eye 2020, in particular, the longer endurance and the satellite communications system that allows missions beyond the line of sight. This clearly shows that the new drone model is more suitable for missions in the remote parts of Northern Equatoriana [PO2, pp.45-46, ¶17]. Characteristics such as: higher service ceiling and greater payload would enhance the quality of the surveillance results [Ex. R3, p.34]. In the tender documents, RESPONDENT stated that the aircrafts had to comply with minimum requirements [Ex. C1, p.9; Ex. C2, p.10]. If CLAIMANT was preparing a drone that exceeded these minimums, should have informed RESPONDENT.

177. The Kestrel Eye 2010 does not conform to contractual requirements and thus Claimant did indeed violate Art.35 CISG.

C. RESPONDENT submits that Art.39 CISG is not applicable since the goods were never delivered

178. Contrary to what is argued by CLAIMANT, Art.39 CISG is not applicable. Indeed, it would be against faith to withdraw RESPONDENT's right to avoid the contract since the goods were never delivered and this article is only applicable when delivery takes place.

179. Art.39 CISG declares that: "*The notice obligation imposed by article 39 if the buyer claims that delivered goods suffer from a lack of conformity, regardless of the cause of such non-conformity*" [UNCITRAL DG p.171] and CLAIMANT is aware that this article applies after the delivery of goods because CLAIMANT mentioned it himself [Cl. Memo., p.28, ¶103].

180. In any case, if the court finds that the article is applicable, RESPONDENT is entitled to plead the non-conformity of the goods.

1. On the other hand, if the Arbitral Tribunal considers the CISG to be applicable, RESPONDENT can raise questions of non-conformity because proper notice was provided as required under Art.39 CISG

181. It is RESPONDENT submission that CLAIMANT was fully aware of the nature of lack of conformity of the drones since March 2021, there had been discussions about the presentation of the Hawk Eye [Ex. C7, p.19, ¶13].

182. Doctrine and the Courts have understood these elements as structuring in a notice: a) nature of the lack of conformity, b) its specificity and c) possibility of cure.

183. The notice required by Art.39(1) CISG must specify the nature of the lack of conformity [KENNEDY, p.331, ¶3]. The description of the non-conformity has to be as precisely as possible [UNCITRAL DG, p.174, CLOUT 597], although there is no demand to specify the defects in detail [*J.B. and G.B. v. BV H.V. case*]. The notice shall indicate both the nature and the extent of the lack of conformity [UNCITRAL DG, p.174, CLOUT 344].

184. Also, the notice has to be reasonably specific in order for the seller to perceive the buyer's claim [*Frozen vegetables case*] and to give the seller an idea of the lack of conformity and take necessary actions [*Automobile case 2*]. The buyer has to provide sufficient information to the seller about the good's non-compliance with the contractually agreed qualities [*Plants case*].

185. According to the CISG-AC Opinion 2 and some authors, the notice should include the information available to the buyer [CISG-AC-O No.2; NWAFOR, p.7]. The Federal Supreme Court of Germany considered that it is preferable to try to avoid placing burden on the buyer with the need to specify the non-conformity in such a strict way [*Machine for producing hygienic tissues case*]. If the seller is not satisfied with the notice provided by the buyer or if the nature or extent of lack of conformity was unclear, the seller can inquire the buyer [UNCITRAL DG, p.175, CLOUT 885].

186. In this case, the notice relating to the quality of drones was the 30 May 2022 letter [Ex. C8, p.20]. Contrary to CLAIMANT's submission [Cl. Memo., p.43, ¶101], the notice indicated both nature and extent of the lack of conformity: "*The Kestrel Eye 2010 by no means represents "state-of-the-art" technology, as required by the tender documents, and assured by Mr. Bluntschli who had described it as Drone Eye's "latest model" or "top mode*l" [Ex. C8, p.20]. The nature of the non-conformity lies in the features of the drones.

187. The 2010 drones are not compatible with what was contractually agreed. CLAIMANT had already started several years ago to develop a new generation of drones [Ex. C8, p.20, RNoA, p.29, ¶17]. Further, CLAIMANT could easily determine the nature of the lack of conformity. Besides, if CLAIMANT was not satisfied with the notice provided by RESPONDENT, or if it was unclear the nature or extent of lack of conformity, CLAIMANT could have inquired RESPONDENT.

188. Therefore, the Arbitral Tribunal should find that RESPONDENT's notice is sufficient.

2. RESPONDENT provided to CLAIMANT a notice in a reasonable time after the defect was detected

189. Contrary to CLAIMANT's view [Cl. Memo., p.44, ¶105] , RESPONDENT provided the notice in a reasonable time after RESPONDENT found out about the defect, per Art. 39(1) CISG.

190. The CISG does not provide a notion of "*reasonableness*". To understand what is reasonable one must take into account the circumstances of the case and the singular aspects of each individual case [GIRSBERGER, p.242, ¶2].

191. According to CISG-AC Opinion 2, "*the reasonable time for giving notice after the buyer discovered or ought to have discovered the lack of conformity varies depending on the circumstances* (…) *No fixed period, whether 14 days, one month or otherwise, should be considered as reasonable in the abstract without taking into account the circumstances of the case*". In the case of durable goods, the reasonable period has to be established in a more flexible approach [CISG-AC-O No.2; SCHWENZER, p.121].

192. The ICCA does not incorporate a duty to examine and to notify the seller if there is a situation of non-conformity. Overly short periods are designated as unacceptable [CISG-AC-O No.2]. For

example, in Belgium, France or the USA, the respective Courts provide in their domestic laws tolerant notification periods or none at all, and also admit longer notification periods in relation to the CISG. In some cases, eleven months were held within the time limit [*Sky Cast, Inc v Global Direct Distribution*; *Société Giustina International v. Société Perfect Circle Europe*].

193. RESPONDENT has not forfeited its right to make such claims because the 30 May 2022 letter was not only a proper notice but specified the nature of the lack of conformity and was provided in a reasonable time after RESPONDENT discovered the defect.

194. Bearing in mind the circumstances of the particular case, RESPONDENT took 14 months to notify CLAIMANT about the non-conformity. This period of time is justified by the fact that there is an ongoing investigation of a major corruption scheme involving the award of public work contracts under the NPDP and the new government issued a moratorium for all contracts concluded under this program in January 2022 [RNoA, p.29, ¶15]. Soon after the investigations started, the first charges were brought against Mr.Field. It was very likely that the PSA was procured by corruption **(I, A; II, A)**, [Ex. C8, p.20].

195. In conclusion, RESPONDENT did not want to form a decision, lose all the effort made by the parties to conclude the PSA or harm CLAIMANT's business without first being sure that the decision was the most suitable one.

3. CLAIMANT is not entitled to rely on the provision of Art. 39 CISG as the lack of conformity relates to fact of which they knew, according to Art.40 CISG

196. CLAIMANT's assertions fail to acknowledge the application of Art.40 CISG, which can be understood as an acknowledgement that it can not benefit from Art.39 CISG. For clarity's sake, RESPONDENT will explain why CLAIMANT can not rely on that article.

197. Art.40 CISG establishes the non-entitlement of the seller to rely on Art.39 CISG if the lack of conformity pertains to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer. This article protects the buyer who did not fulfil the requirements of Art.39 CISG and acts as a "*safety valve*" [UNCITRAL DG, p.198]. This means that the obligation to notify the seller when the goods are nonconforming no longer exists if the seller knew or could not have been unaware of the lack of conformity.

198. The buyer has the burden of proof under Art.40 CISG. There has to be proof of the seller's awareness of non-conformity [GARRO, p.254, ¶2]. Although, according to the German Courts, the

burden of proof can be shifted to the seller, if he is in a better position to explain what happened due to his expertise [*Paprika case*].

199. According to this provision, CLAIMANT has a duty of disclosure which mirrors the principle of good faith and fair dealing [JANSSEN, p.490, ¶74]. RESPONDENT submits that CLAIMANT is not entitled to rely on Art.39 CISG because the lack of conformity of the drones relates to facts of which he knew, and which were not disclosed [Ex. C7, p.18, ¶13; Ex. C8, p.20]. At the time of contracting, not only was CLAIMANT aware that within a few months its new model, the Hawk Eye 2020, would be launched, which would serve much better RESPONDENT's requirements [Ex. C1, p.9] but also the non-conformity of the drones.

200. Consequently, RESPONDENT respectfully appeals the Tribunal to consider this provision.

REQUEST FOR RELIEF

In light of the submission above, counsel for RESPONDENT respectfully invites the Tribunal to declare that:

I. The Arbitral Tribunal has no jurisdiction to hear the case;

II. Subsidiarily, to stay the arbitral proceedings until the investigations against Mr. Field concerning the taking of bribes in connection with the conclusion of the PSA are concluded or, alternatively, to bifurcate the proceedings into two phases;

III. The PSA is governed by the Equatorianian ICCA and not by the CISG;

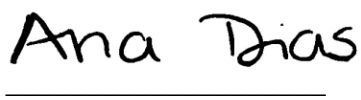
IV. RESPONDENT can rely on Art.3.2.5 ICCA to avoid the contract.

In addition, counsel for RESPONDENT respectfully invites the Tribunal to order CLAIMANT to bear the costs of the Arbitration and cover RESPONDENT's legal fees.

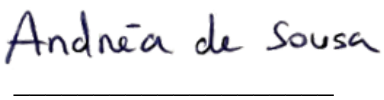
Lisbon, 26 January 2023

CERTIFICATE OF VERIFICATION

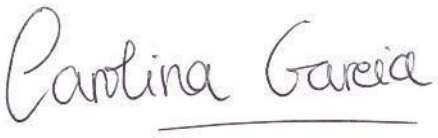
We hereby confirm that only the persons whose names are listed below have written this memorandum.



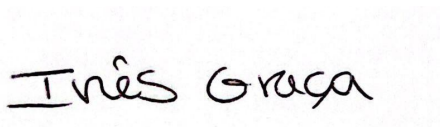
Ana Moura Dias



Andréa Sousa



Carolina de Esmeriz Garcia



Inês Graça