ELEVENTH ANNUAL
VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG – 31 MARCH TO 5 APRIL 2014

INNOVATIVE CANCER TREATMENT LTD, *CLAIMANT*

v.

HOPE HOSPITAL, *RESPONDENT*

MEMORANDUM FOR CLAIMANT

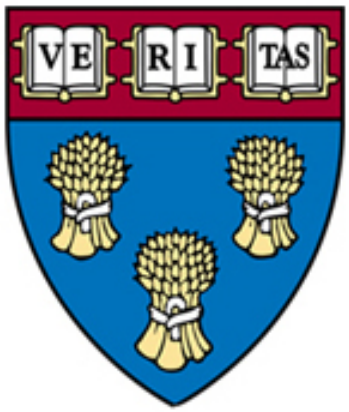

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Brekoulakis/Shore	Brekoulakis, Stavros L. & Shore, Laurence UNCITRAL Model Law, Chapter V, Article 19 [Determination of rules of procedure] in Loukas A. Mistelis (ed.), Concise International Arbitration Kluwer Law International (2010)	¶ 41
CISG-AC Op. 4	CISG-AC Opinion no 4 Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004. Rapporteur: Professor Pilar Perales Viscasillas	¶¶ 105, 114, 115, 119, 124
CISG-AC Op. 13	CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, 20 January 2013 Rapporteur: Professor Sieg Eiselen	¶¶ 75, 77, 78, 84, 85, 86, 88, 89, 90
CISG Leg. Hist., Rep. 1st Comm.	Legislative History Report of the First Committee Vienna Diplomatic Conference (1980)	¶ 98
CISG Secr. Comm. Art. 6	Secretariat Commentary Guide to CISG Article 6, 1978 Draft	¶ 104
CPR Arbitration Appeal	CPR Arbitration Appeal Procedure and Commentary International Institute for Conflict Prevention & Resolution (Revised 2007)	¶ 31
Crawford	Crawford, B. Blair Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods 8 Journal of Law and Commerce 187-205 (1988)	¶ 99
Diedrich	Diedrich, Frank The CISG and Computer Software Revisited 6 Vindobona Journal of International Commercial Law and Arbitration, Supplement 55-75 (2002)	¶¶ 111, 114
DiMatteo	DiMatteo, Larry, et. al. An Interpretive Turn in International Sales: An Analysis of Fifteen Years of CISG Jurisprudence 34 Northwestern Journal of International Law and Business 299-440 (2004)	¶¶ 75, 82

Drago/Zocolillo	Drago, Thomas J., & Zoccolillo, Alan F. Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts The Metropolitan Corporate Counsel (May 2002)	¶ 98
Dutton	Dutton, Kristin P. Risky Business: The Impact of the CISG on the International Sale of Goods – A Guide for Merchants to Limit Liability and Increase Certainty Inside and Outside of the CISG 7 Eur. J.L Reform 239 (2005)	¶ 99
Fairlie	Fairlie, David A Commentary on Issues Arising under Articles 1 to 6 of the CISG (with special reference to the position in Australia) in Celebrating Success: 25 Years United Nations Convention on Contract for the International Sale of Goods UNCITRAL-SIAC Conference (2005)	¶ 111
Ferrari	Ferrari, Franco Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention Martinus Nijhoff Publishers (2012)	¶¶ 98, 99
FGG	Gaillard, Emmanuel & Savage, John Fouchard Gaillard Goldman on International Commercial Arbitration Kluwer Law International (1999)	¶¶ 18, 22 53
Graves	Graves, Jack The ABCs of the CISG American Bar Association (2013)	¶ 96
Green/Saidov	Green, Sarah, & Saidov, Djakhongir Software as Goods Journal of Business Law 161-181 (March 2007)	¶¶ 108, 110, 112
Hanotiau	Hanotiau, Bernard Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues: An Analysis 18 Journal of International Arbitration 253 (2001)	¶ 63

Huber	Huber, Peter Standard Terms under the CISG 13 Vindobona Journal of International Commercial Law & Arbitration 123-134 (2009)	¶ 82
Huber/Mullis	Huber, Peter & Mullis, Alastair The CISG: A New Textbook for Students and Practitioners Sellier European Law Publishers (2007)	¶¶ 97, 98
IBA Guidelines	International Bar Association Guidelines for Drafting International Arbitration Clauses (2010)	¶¶ 29, 34
Klepper	Klepper, Caroline D. The Convention for the International Sale of Goods: A Practical Guide for the State of Maryland and Its Trade Community 15 Md. J. Int'l L. & Trade 235 (1991)	¶ 99
Lautenschlager	Lautenschlager, Felix Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG - The Reasonable Third Person, Language Problems and Standard Terms and Conditions 11 Vindobona Journal of International Commercial Law & Arbitration 259-290 (2007)	¶ 82
Leboulanger	Leboulanger, Phillipe Multi-Contract Arbitration 13(4) Journal of International Arbitration 43 (1996)	¶ 62
Leon/Karimi	Leon, Barry & Karimi, Laila The Canadian Position: Can Parties to an Arbitration Agreement Vary the Statutory Scope of Judicial Review of the Award? ILSA Journal of International and Comparative Law 451 (2008)	¶ 41
Lew/Mistelis/Kröll	Lew, Julian, Mistelis, Loukas, & Kröll, Stefan Comparative International Commercial Arbitration Kluwer Law International (2003)	¶ 49
Platt	Platt, Rowan The Appeal of Appeal Mechanisms in International Arbitration: Fairness Over Finality? 30(5) Journal of International Arbitration 531-560 (2013)	¶ 28

Pryles/Waincymer	Pryles, Michael & Waincymer, Jeffrey Multiple Claims in Arbitrations Between the Same Parties ICCA (2008)	¶ 62
Redfern/Hunter	Blackaby, Nigel, Partasides, Constantine, et al. Redfern and Hunter on International Arbitration Oxford University Press (2009)	¶¶ 20, 26, 40
Rendell	Rendell, Robert S. The New U.N. Convention on International Sales Contracts: An Overview 15 Brook. J. Int'l L. 23 (1989)	¶ 99
Schlechtriem 1986	Schlechtriem, Peter Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods Manz, Vienna (1986)	¶¶ 98, 124
Schlechtriem 2005	Schlechtriem, Peter Requirements of Application and Sphere of Applicability of the CISG Victoria University of Wellington law Review 781-794 (2005)	¶ 109
Schlechtriem/Butler	Schlechtriem, Peter & Butler, Petra UN Law on International Sales: the UN Convention on the International Sale of Goods Springer (2009)	¶¶ 109, 111, 124
Schlechtriem/Schwenzer	Schlechtriem, Peter & Schwenzer, Ingeborg Commentary on the UN Convention on the International Sale of Goods Oxford University Press, 3d ed. (2010)	¶¶ 78, 84, 105, 107, 109, 112, 113, 114, 115, 119, 121
Schmitthoff	Schmitthoff, Clive Finality of Arbitral Awards and Judicial Review in Lew, Julian (ed.), Contemporary Problems in International Arbitration Springer Netherlands (1987)	¶ 28
Sherwin/Aldous	Sherwin, Peter & Aldous, Kenneth E. Proskauer Guide on International Litigation and Arbitration: Managing, Resolving and Avoiding Cross-Border Business or Regulatory Disputes, Chapter 20	¶ 54

Sono	Sono, Hiroo The Applicability and Non-Applicability of the CISG to Software Transactions in Andersen, Camilla B. & Schroeter, Ulrich G. (ed), Sharing International Commercial law Across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday Wildly, Simmonds & Hill Publishing (2008)	¶¶ 110, 114, 123
Waincymer	Waincymer, Jeffrey Procedure and Evidence in International Arbitration Kluwer Law International (2012)	¶¶ 29, 44
Winship	Winship, Peter Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners 29 International Lawyer 525-554 (1995)	¶ 99
Working Group Report	A/CN.9/246 - Report of the Working Group on International Contract Practices on the work of its seventh session UNCITRAL Yearbook, Vol. XV, p. 189 (1984)	¶ 49

INDEX OF CASES AND ARBITRATION AWARDS

Ob. 80/78.	Supreme Court (Oberster Gerichtshof) 9 September 1987 [Cited in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 1990, Volume XV, Kluwer Law International (1990) pp. 367 – 369]	¶ 44
Propane Case	Supreme Court (Oberster Gerichtshof) 6 February 1996 http://cisgw3.law.pace.edu/cases/011022a3.html	¶¶ 75, 86, 87
Rolled Metal Sheets Case	Vienna Arbitration proceeding SCH-4366 15 June 1994 http://cisgw3.law.pace.edu/cases/940615a3.html	¶ 93
Roofing Material Case	Supreme Court (Oberster Gerichtshof) 9 March 2000 http://www.cisg.law.pace.edu/cases/000309a3.html	¶ 80
Spacers for Insulation Glass Case	Appellate Court Linz 8 August 2005 http://cisgw3.law.pace.edu/cases/050808a3.html	¶ 97
Software Case	Supreme Court (Oberster Gerichtshof) 21 June 2005 http://cisgw3.law.pace.edu/cases/050621a3.html	¶ 112
Tantalum Case	Supreme Court (Oberster Gerichtshof) 31 August 2005 http://cisgw3.law.pace.edu/cases/050831a3.html	¶ 75
Tantalum Powder Case	Supreme Court (Oberster Gerichtshof) 17 December 2003 http://cisgw3.law.pace.edu/cases/031217a3.html	¶¶ 90, 92
	BELGIUM	
Tomatoes Case	District Court Mechelen 18 January 2002 http://cisgw3.law.pace.edu/cases/020118b1.html	¶ 90
Vulcanization Case	*Gantry v. Research Consulting Marketing* District Court Nivelles 19 September 1995 http://cisgw3.law.pace.edu/cases/950919b1.html	¶ 85

BERMUDA

Skandia	*Skandia International Insurance Company and Mercantile & General Reinsurance Company et al.* Supreme Court of Bermuda CLOUT Case No. 127 21 January 1994	¶¶ 22, 49

BULGARIA

BCCI 60/1980	Award in Bulgarian Chamber of Commerce and Industry Case No. 60/1980 1 October 1980	¶ 59

CANADA

Food Services of America	*Food Services of America Inc. v. Pan Pacific Specialties Ltd* British Columbia Supreme Court 24 March 1997	¶ 41
ICAO	*International Civil Aviation Organization (ICAO) v. Tripal Systems Pty. Ltd.* Superior Court of Quebec CLOUT Case No. 182 9 September 1994	¶ 22
Noble China Inc.	*Noble China Inc. v. Lei* Ontario Supreme Court 4 November 1998	¶ 41
Schiff Food Products	*Schiff Food Products Inc. v. Naber Seed & Grain Co.* Saskatchewan Court of Queen's Bench, CLOUT Case No. 365 1 October 1996	¶ 34

FRANCE

Aluminium and Light Industries Company	*Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitrerie* Supreme Court (Cour de cassation) 24 September 2003 http://cisgw3.law.pace.edu/cases/010614f1.html	¶ 114

Glencore Grain	*Société Glencore Grain Rotterdam v Société Afric* Appeal Court (Paris Cour d'appel) 2000 Rev. Arb. 501 23 November 1999	¶ 63
Angers Appeal Judgment	*Judgment of 25 September 1972* Appeal Court (Angers Cour d'appel) 1973 Rev. arb. 164 25 September 1972	¶ 46
Marques Roque Joachim	*Marques Roque Joachim v. Manin Rivière* Appeal Court (Grenoble Cour d'appel) 26 April 1995 http://cisgw3.law.pace.edu/cases/950426f2.html	¶ 118
Céramique Culinaire	*Céramique Culinaire v. Musgrave* Supreme Court (Cour de cassation) 17 December 1996 http://cisgw3.law.pace.edu/cases/961217f1.html	¶ 96

GERMANY

Computer Chip Case	Appellate Court (OLG Koblenz) 17 September 1993 http://cisgw3.law.pace.edu/cases/930917g1.html	¶¶ 108, 112
Cylinder Case	District Court (LG Mainz) 26 November 1998 http://cisgw3.law.pace.edu/cases/981126g1.html	¶¶ 114, 116
Film Coating Machine Case	District Court (LG Heilbronn) 15 September 1997 http://cisgw3.law.pace.edu/cases/970915g1.html	¶ 75
Germany No. 34	*German assignee of a (German) shipping Company v. Japanese shipyard* Appellate Court (OLG Hamburg) 17 February 1989 [Cited in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 1990 - Volume XV, Volume XV, Kluwer Law International (1990) pp. 455 - 464]	¶ 34
Machinery Case	Federal Supreme Court (Bundesgerichtshof) 31 October 2001 http://cisgw3.law.pace.edu/cases/011031g1.html	¶¶ 75, 77, 82, 88

Marble Slab Case	District Court (LG Kassel) 15 February 1996 http://cisgw3.law.pace.edu/cases/960215g1.html	¶ 96
Printed Goods Case	Appellate Court (OLG Frankfurt) 26 June 2006 http://cisgw3.law.pace.edu/cases/060626g1.html	¶ 75
Printing System and Software Case	Federal Supreme Court (Bundesgerichtshof) 4 December 1996 http://cisgw3.law.pace.edu/cases/961204g1.html	¶¶ 109, 114
Shoes Case 1991	Appellate Court (OLG Frankfurt) 17 September 1991 http://www.cisg.law.pace.edu/cases/910917g1.html	¶¶ 114, 123
Shoes Case 1994	Lower Court Nordhorn 14 June 1994 http://cisgw3.law.pace.edu/cases/940614g1.html	¶ 83
Sport Clothing Case	District Court (LG Landshut) 5 April 1995 http://cisgw3.law.pace.edu/cases/950405g1.html	¶ 97
Stolen Automobile Case	Appellate Court (OLG Dresden) 21 March 2007 http://cisgw3.law.pace.edu/cases/070321g1.html	¶ 109
Surface Protective Film Case	Federal Supreme Court (Bundesgerichtshof) 25 November 1998 http://cisgw3.law.pace.edu/cases/981125g1.html	¶¶ 93, 96
Vine Wax Case	Federal Supreme Court (Bundesgerichtshof) 24 March 1999 http://www.cisg.law.pace.edu/cases/990324g1.html	¶ 75
Windows Production Plant Case	Appellate Court (OLG München) 3 December 1999 http://cisgw3.law.pace.edu/cases/991203g1.html	¶ 120, 121
Yarn Case	Appellate Court (OLG Frankfurt) 30 August 2000 http://cisgw3.law.pace.edu/cases/000830g1.html	¶ 98

HUNGARY

Waste Container Case	Arbitration Court of the Chamber of Commerce and Industry of Budapest 5 December 1995 http://cisgw3.law.pace.edu/cases/951205h1.html	¶ 97

ICC

Coke Case	ICC Case No. 7565 of 1994 http://cisgw3.law.pace.edu/cases/947565i1.html	¶ 96
Engines Case	ICC Case No. 8482 of 1996 http://cisgw3.law.pace.edu/cases/968482i1.html	¶ 99
Hotel Materials Case	ICC Case No. 7153 of 1992 http://cisgw3.law.pace.edu/cases/927153i1.html	¶¶ 106, 121
ICC 5971	ICC Case No. 5971 of 1995 13 ASA Bulletin 728 (1995)	¶ 61
ICC 5989	ICC Case No. 5989 of 1990 XV Y.B. Comm. Arb. 74 (1990)	¶ 71
ICC 8420	ICC Case No. 8420 of 2000 XXV Y.B. Comm. Arb. 328 (2000)	¶ 59
Industrial Product Case	ICC Case No. 10329 of 2000 http://cisgw3.law.pace.edu/cases/000329i1.html	¶ 80
Scaffold Fittings Case	ICC Case No. 7531 of 1994 http://cisgw3.law.pace.edu/cases/947531i1.html	¶ 105
Steel Bars Case	ICC Case No. 6653 of 1993 http://cisgw3.law.pace.edu/cases/936653i1.html	¶ 96
Waste Recycling Plant Case	ICC Case No. 9781 of 2000 http://cisgw3.law.pace.edu/cases/009781i1.html	¶¶ 115, 123

ICSID

Klöckner	*Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* ICSID Case No. ARB/81/2 3 May 1985	¶ 62

ITALY

Alfred Dunhill	*Alfred Dunhill Ltd. v. Tivoli Group S.r.l.* Supreme Court (Corte di Cassazione) 9 June 1995 http://cisgw3.law.pace.edu/cases/950609i3.html	¶ 120
1970 Giustizia Civile Mass. 1103	*Judgment of 22 October 1970* 1970 Giustizia Civile Mass., 1103 Supreme Court (Corte di Cassazione) 22 October 1970	¶ 46
Merry-go-rounds Case	*Pessa Luciano v. W.H.S. Saddlers International* District Court (Tribunale di Padova) 10 January 2006 http://cisgw3.law.pace.edu/cases/060110i3.html	¶ 121
Mirror Case	*Takap B.V. v. Europlay S.r.l.* District Court (Tribunale di Rovereto) 21 November 2007 http://cisgw3.law.pace.edu/cases/071121i3.html	¶¶ 75, 81, 86

NETHERLANDS

Shoe Delay Case	*Melody BV v. Loffredo, h.o.d.n. Olympic* District Appeal Court (Hof's-Hertogenbosch) 26 February 1992 http://cisgw3.law.pace.edu/cases/920226n1.html	¶ 93
Silicon Biomedical Instruments	*Silicon Biomedical Instruments BV v. Erich Jaeger GmbH* District Court (Rb Arnhem) 28 June 2006 http://cisgw3.law.pace.edu/cases/060628n1.html	¶ 123
Reverse Sheet Case	Netherlands Arbitration Institute (interim award) 10 February 2005	¶¶ 87, 93

NEW ZEALAND

Gallaway Cook Allan	*Gallaway Cook Allan v. Carr* Court of Appeal 15 February 2013	¶ 44

RUSSIA

RF CCI 105/2005	Arbitration Proceeding 105/2005 Russian Federation Chamber of Commerce and Industry 13 April 2006	¶ 96
RF CCI 302/1996	Arbitration Proceeding 302/1996 Russian Federation Chamber of Commerce and Industry 27 July 1999	¶ 93

SINGAPORE

Daimler South East Asia	*Daimler South East Asia Pte Ltd. v. Front Row Investment Holdings (Singapore) Pte Ltd.* High Court 31 July 2012	¶ 37

SLOVAK REPUBLIC

Glass Chaton Case	District Court in Bardejov 29 October 2007 http://cisgw3.law.pace.edu/cases/071029k1.html	¶ 109

SWITZERLAND

Art Books Case	Commercial Court (HG Zürich) 10 February 1999 http://cisgw3.law.pace.edu/cases/990210s1.html	¶ 123
Computer Hardware Devices Case	Commercial Court (HG St. Gallen) 5 December 1995 http://cisgw3.law.pace.edu/cases/951205s1.html	¶ 80
Computer Software and Hardware Case	Commercial Court (HG Zürich) 17 February 2000 http://cisgw3.law.pace.edu/cases/000217s1.html	¶¶ 108, 109, 118
Fruits and Vegetables Case	Commercial Court (HG Aargau) 26 November 2008 http://cisgw3.law.pace.edu/cases/080205s1.html	¶ 75

Roofing Materials Case	District Court (KG Zug) 25 February 1999 http://cisgw3.law.pace.edu/cases/990225s1.html	¶ 115
Saltwater Isolation Tank Case	Commercial Court (HG Zürich) 26 April 1995 http://cisgw3.law.pace.edu/cases/950426s1.html	¶ 121
Sliding Doors Case	Judicial Commission (Kanton St. Gallen, Gerichtskommission Oberrheintal) 30 June 1995 http://cisgw3.law.pace.edu/cases/950630s1.html	¶ 121
Stove Case	Appellate Court (Obergericht Zug) 19 December 2006 http://cisgw3.law.pace.edu/cases/061219s1.html	¶ 115
Windmill Drives Case	Commercial Court (HG Zürich) 8 April 1999 http://cisgw3.law.pace.edu/cases/990408s1.html	¶ 122

UNITED KINGDOM

C v D	*C v D* High Court, Queen's Bench Division, Commercial Court 28 June 2007	¶ 40
HMV UK	*HMV UK v. Propinvest Friar Ltd Partnership* Court of Appeal, Chancery Division 10 November 2011	¶ 30
Kershaw Mechanical	*Kershaw Mechanical Ltd v. Kendrick Construction Ltd* Technology and Construction Court 2 March 2006	¶ 30
Lesotho Highlands	*Lesotho Highlands Development Authority v. Impreglio SpA and others* House of Lords 30 June 2005	¶ 37
Shell	*Shell Egypt West Manzala GmbH & Anor v Dana Gas Egypt Ltd* High Court, Queen's Bench Division, Commercial Court 7 August 2009	¶ 30

UNITED STATES

Allendale Mutual	*Allendale Mutual Insurance Co. v. Excess Insurance Co. Ltd.* District Court, Southern District of New York 19 August 1997	¶ 51
Asante	*Asante Technologies v. PMC-Sierra* District Court, Northern District of California 27 July 2001	¶¶ 97, 98
Barker	*Barker v. Golf U.S.A. Inc.* Court of Appeals, Eighth Circuit 29 September 1998	¶ 46
BP Oil	*BP Oil International v. Empresa Estatal Petroleos de Ecuador* Court of Appeals, Fifth Circuit 11 June 2003	¶ 97
Brower	*Brower v Gateway 2000* Appellate Division of the Supreme Court of the State of New York 13 August 1998	¶ 47
Cedar Petrochemicals	*Cedar Petrochemicals Inc. v Dongbu Hannong Chemical Co. Ltd.* District Court, Southern District of New York 19 July 2007	¶ 97
Eastwood Nursing	*Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare* Commonwealth Court of Pennsylvania 3 November 2006	¶ 48
Grape Centrifuge Case	*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation* District Court, Eastern District of California 21 January 2010 http://cisgw3.law.pace.edu/cases/100121u1.html	¶¶ 86, 87, 92
Hall Street	*Hall Street Associates L.L.C. v. Mattel Inc.* Supreme Court 25 March 2008	¶ 43

Kyocera	*Kyocera Corporation v. Prudential-Bache Trade Services Inc.* Court of Appeals, Ninth Circuit 29 August 2003	¶ 44
Lawrence	*Lawrence v. Comprehensive Business Services Co.* Court of Appeals, Fifth Circuit 15 December 1987	¶ 46
Progressive Casualty Ins.	*Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela* Court of Appeals, Second Circuit 6 April 1993	¶ 49
St. Paul Guardian Ins.	*St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al.* District Court, Southern District of New York 26 March 2002	¶¶ 96, 97

INDEX OF RULES AND LEGAL SOURCES

Cited As	Full Citation
Austl. Comm. Arb. Act	Australian Commercial Arbitration Act 2012 (No. 23 of 2012)
CEPANI	CEPANI Arbitration Rules (2013) Belgian Centre for Arbitration and Mediation
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Eng. Arb. Act	English Arbitration Act 1996
HK Arb. Ord.	Hong Kong Arbitration Ordinance (2011)
HKIAC Rules	2013 HKIAC Administered Arbitration Rules
ICC Rules	2012 ICC Arbitration and ADR Rules
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
LCIA Rules	London Court of International Arbitration Rules (1998)
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments adopted in 2006)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)
UCC	Uniform Commercial Code (1952)
N.Z. Arb. Act 1996	New Zealand Arbitration Act 1996

ABBREVIATIONS

&	And
§	Section
¶ / ¶¶	Paragraph / paragraphs
AAA	American Arbitration Association
Ans.	Answer to Request for Arbitration
Arb.	Arbitration
Arg.	Argentina
Art./Arts.	Article/Articles
Austl.	Australia
BCCI	Bulgarian Chamber of Commerce and Industry
Bel.	Belgium
Berm.	Bermuda
Can.	Canada
CD ROM	Compact Disk Read-Only Memory
CEPANI	Belgian Centre for Mediation and Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Ex.	Claimant's Exhibit
CPR	International Institute for Conflict Prevention and Resolution
Dr.	Doctor
Eng.	England
Ed.	Edition
ed./eds.	Editor/Editor
e.g.	*exempli gratia* [for example]
Fr.	France
FSA	Framework and Sales Agreement
Ger.	Germany
H.K.	Hong Kong
Hung.	Hungary
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes

It.	Italy
Id.	*idem* [the same]
i.e.	*id est* [that is]
LCIA	London Court of International Arbitration
Lex arbitri	Law of the place where arbitration is to take place
Ltd.	Limited
Neth.	Netherlands
N.Z.	New Zealand
NYC	New York Convention
p./pp.	Page/pages
Proc. Ord. 2	Procedural Order No. 2
Req. Arb.	Request for Arbitration
Res. Ex.	Respondent's Exhibit
Rus.	Russia
Sec.	Section
Sing.	Singapore
SLA	Sales and Licensing Agreement
Slovk.	Slovak Republic
Switz.	Switzerland
UCC	Uniform Commercial Code
U.K.	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States of America
USD	United States Dollars
v.	Versus

STATEMENT OF FACTS

1. Innovative Cancer Treatment Ltd. ("CLAIMANT") is one of the few manufacturers of particle therapy equipment [*Req. Arb., ¶ 1, p. 4*]. CLAIMANT specializes in proton therapy and is the market leader for facilities using a passive beam scattering technique [*Id.*]. CLAIMANT is incorporated and based in Mediterraneo [*See Fasttrack to CEPANI, p. 3; Req. Arb., p. 4*].

2. Hope Hospital ("RESPONDENT") is a general university teaching hospital and Equatoriana's national center for cancer research [*Id. at ¶ 2*]. RESPONDENT has significant experience treating tumors through conventional methods of surgery and radiotherapy [*Id.*].

3. On 11 January 2007, RESPONDENT expressed to CLAIMANT its interest in purchasing or renting a proton treatment facility [*Cl. Ex. 1, p. 9*]. After more than a year of intensive negotiations, the Parties concluded a Framework and Sales Agreement ("FSA") [*Req. Arb., ¶ 4, p. 5*]. The agreement governed the purchase of a proton therapy facility for USD 50 million [*Id. at ¶¶ 4-5; Cl. Ex. 2, pp. 10-12*]. The FSA contained provisions regarding the Parties' relationship, including a specially negotiated CEPANI arbitration clause, and also was intended to cover "further cooperation of the Parties" [*Cl. Ex. 2, pp. 10-12*].

4. As per the FSA, CLAIMANT successfully delivered the building structures, particle accelerator, treatment rooms, software, and staff training necessary for the proton treatment facility by 15 April 2010 [*Req. Arb., ¶ 7, p. 5*]. RESPONDENT initially was satisfied with the facility, calling the facility's results "very promising" [*Cl. Ex. 4, p. 16*].

5. The FSA called for five separate payments totaling USD 50 million [*Cl. Ex. 2, Art. 3, p. 11*]. RESPONDENT paid the initial payment of USD 10 million on 1 February 2008 and made four semi-annual installment payments of USD 7.5 million by 2012 [*Cl. Ex. 7, pp. 21-22*].

6. RESPONDENT's satisfaction with the proton facility's performance led RESPONDENT to approach CLAIMANT on 6 May 2011 to discuss the possibility of purchasing an additional treatment room using active scanning technology [*Cl. Ex. 4, p. 16*]. This possibility had been raised during FSA negotiations but RESPONDENT deferred any decision, citing budget issues and management hesitance [*Req. Arb., ¶ 10, p. 5*].

7. Reflecting the cooperative nature of the Parties' relationship, CLAIMANT offered RESPONDENT the heavily reduced price of USD 3.5 million for the purchase of an active scanning room [*Cl. Ex. 6, Art. 3, p. 19*]. In return, RESPONDENT was to provide CLAIMANT with medical data

for the fine-tuning of the active-scanning technology [*Id. at Art. 10*]. During negotiations, CLAIMANT issued timely notice to RESPONDENT of its 2011 Standard Terms and Conditions ("2011 Standard Terms"), which would be included in the final contract [*Cl. Ex. 5, ¶ 3, p. 17; Res. Ex. 2, ¶ 4, p. 37*].

8. On 20 July 2011, RESPONDENT accepted CLAIMANT's offer and the Parties concluded the Sale and Licensing Agreement ("SLA") [*Cl. Ex. 6, pp. 18-20*]. In the SLA, the Parties acknowledged that the FSA provided the cooperative framework for the SLA [*Id. at p. 18*]. Consistent with its product delivery after the FSA, CLAIMANT promptly delivered the third treatment room on 13 January 2012 [*Req. Arb., ¶ 13, p. 6*].

9. As agreed upon in the SLA, RESPONDENT made an initial payment of USD 2 million on 2 February 2012 for the additional treatment room [*Id.*]. However, on 15 August 2012, RESPONDENT informed CLAIMANT that it would not make the payment of the outstanding USD 1.5 million for the balance of its obligation under the FSA [*Cl. Ex. 7, pp. 21-22*] and would withhold payment of the outstanding USD 10 million for the balance of its obligation for the proton treatment facility under the SLA [*Id. at p. 21*].

10. RESPONDENT had previously expressed no complaint about CLAIMANT's products. The two other facilities using CLAIMANT's active scanning products have also had no complaints [*Req. Arb., ¶ 17, p. 7*]. One facility praised CLAIMANT's technology [*Cl. Ex. 8, p. 23*].

11. While RESPONDENT has alleged various inadequacies regarding CLAIMANT's product, especially relating to cost [*Req. Arb., ¶ 16, p. 7*], RESPONDENT failed to include a contingency for cost in either of the two contracts or negotiations [*See Cl. Ex. 2, p. 10-12; Cl. Ex. 6, p. 18-20*]. CLAIMANT submits the real reason for RESPONDENT's sudden hostility is RESPONDENT's new Medical Director, who is a conventional radiotherapist and a vocal critic of proton therapy [*Req. Arb., ¶ 19, p. 7*].

12. Despite performing all of its obligations under the SLA and FSA, CLAIMANT was forced to bring the present arbitration on 6 July 2013 to recover a total of USD 11.5 million in damages arising from RESPONDENT's failure to complete its obligations under the FSA and SLA [*Req. Arb., ¶ 26, p. 8*].

SUMMARY OF ARGUMENT

14. CLAIMANT, a leading manufacturer of cancer treatment equipment, and RESPONDENT, a renowned cancer treatment center, entered into two contracts to foster a mutually beneficial long-term relationship. To ensure their relationship would be fruitful for years to come, CLAIMANT consistently made concessions to RESPONDENT to accommodate its needs during the negotiations and later fulfilled all of its obligations under the contracts. RESPONDENT, however, tries to take advantage of those accommodations to avoid its responsibilities.

15. In the FSA, the contract founding the relationship between CLAIMANT and RESPONDENT, the parties evinced a clear intent to submit their disputes to arbitration. The arbitration agreement also meets all the requirements for validity under the applicable laws. Allowing for court challenges of "obviously wrong decisions," as the FSA does, neither negates the Parties' intent nor is incompatible with the principles of arbitration. RESPONDENT agreed to arbitration and now attempts to use a provision it negotiated to avoid its commitment. The arbitration agreement also meets all the requirements for validity under the applicable laws. Lastly, the scope of the arbitration agreement in the FSA covers claims arising under the SLA, as the FSA served as the foundational contract for the parties' relationship and future related dealings. Consequently, the Tribunal has jurisdiction over the payment claims [**I**].

16. To promote efficiency and avoid contradictory awards, CLAIMANT seeks to have its two claims heard in a single arbitration. The CEPANI Rules permit such action, as both contracts submit to CEPANI arbitration and the parties intended to have all disputes arising out of both contracts resolved in a single arbitration [**II**].

17. RESPONDENT tries to disregard its obligations by arguing against the applicability of the CISG to the SLA. The SLA, however, has a choice of law provision that ensures the CISG governs that contract. This choice of law provision was validly incorporated into the SLA with the 2011 Standard Terms, of which CLAIMANT twice informed RESPONDENT and to which RESPONDENT did not object upon signing the contract. Furthermore, the SLA constitutes a sale of goods within the scope of the CISG, as the preponderant part of CLAIMANT's obligations under the SLA concerns a sale of goods rather than services and because CLAIMANT has provided all the manufacturing materials necessary. Therefore, the CISG governs the claims arising out of the SLA [**III**].

ARGUMENT

I. THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE PAYMENT CLAIMS

18. An arbitral tribunal derives its jurisdiction to decide a particular dispute from the agreement between the parties [*FGG, ¶ 44, p. 28*]. Here, the Tribunal has jurisdiction over the present payment claims pursuant to Art. 23 of the FSA, concluded between CLAIMANT and RESPONDENT on 13 January 2008 to govern the sale of an accelerator and two treatment rooms, as well as to provide a framework for future cooperation [*Req. Arb., ¶ 4, p. 5*]. The Parties agreed upon Art. 23 FSA to establish procedures for the settlement of "[a]ll disputes arising from or in connection with this Agreement [the FSA]" [*Cl. Ex. 2, p. 11*]. In particular, Art. 23(3) FSA contains an arbitration clause referring all unresolved disputes to final arbitration under the CEPANI Rules of Arbitration, to be conducted in English before three arbitrators in Vindobona, Danubia [*Id.*].

19. As contemplated in the FSA, the parties subsequently concluded another agreement—the SLA—for the acquisition of a third treatment room on 20 July 2011 [*Cl. Ex. 6, p. 18-20*]. By virtue of Art. 45 FSA, making the terms of the framework agreement applicable to further contracts [*Cl. Ex. 2, p. 12*], and the preamble to the SLA [*Cl. Ex. 6, p. 18*], the arbitration clause of the FSA also governs claims arising out of the SLA.

20. Since Danubia is the seat of arbitration, its arbitration law governs this arbitration [*Redfern/Hunter, § 3.51, p. 179; Art. V(1)(a),(d),(e) NYC*]. Danubia's international arbitration law is an exact adoption of the UNCITRAL Model Law ("Model Law") with the 2006 amendments and Art. 7 Option I [*Proc. Ord. 2, ¶ 13, p. 59*]. As Danubia (like the Parties' home states of Mediterraneo and Equatoriana) is a party to the New York Convention [*Id. at ¶ 12*], the Convention is also applicable to the arbitration [*Art. II NYC*].

21. RESPONDENT has raised erroneous objections to the Tribunal's jurisdiction with regard to the intention, validity, and scope of the arbitration agreement in Art. 23 FSA [*Ans., ¶¶ 6-11, p. 32*]. Pursuant to the principle of competence-competence, the Tribunal has the authority to rule on these objections to its jurisdiction [**A**]. The Tribunal should find that, in agreeing to Art. 23 FSA, the Parties intended to submit all disputes to arbitration [**B**]. Furthermore, the arbitration agreement is valid under the applicable law and rules [**C**]. Finally, the arbitration agreement in the FSA covers claims arising out of both the FSA and the SLA [**D**].

A. The Tribunal Has the Authority to Rule on Its Own Jurisdiction and Competence

22. It is a "fundamental principle" of arbitration that "arbitrators have the power to rule on their own jurisdiction" [*FGG, ¶ 416, p. 212,*]. This precept of *Kompetenz-Kompetenz* is borne out by the applicable rules and laws in the present case [*Art. 16(1) Model Law; Art. 7(3) CEPANI; ICAO (Can.), Enrique C. Wellbers (Arg.)*]. Moreover, the Tribunal has the authority to determine the scope of the arbitration clause [*Art. 16(2) Model Law; Skandia (Berm.)*]. Accordingly, the Tribunal has the authority to rule on Respondent's objections to jurisdiction.

B. In Agreeing to the Arbitration Clause in Art. 23 FSA, the Parties Intended to Submit Disputes Arising Thereunder to Arbitration

23. Art. 23 FSA reproduces the "Standard Arbitration Clause" proposed by CEPANI [*CEPANI, p. 6*], which is a classic tiered dispute resolution clause, moving through negotiation [*Art. 23(1)*], then mediation [*Art. 23(2)*], and finally arbitration [*Art. 23(3)*]. Art. 23 FSA only differs from CEPANI's Standard Arbitration Clause in the provision in Art. 23(4) allowing judicial appeals of awards that are "obviously wrong in fact or in law" [*Cl. Ex. 2, Art. 23(4), p. 11*]. RESPONDENT insisted upon this review mechanism in deference to government policy and public sentiment [*Ans., ¶ 8, p. 32; Proc. Ord. 2, ¶ 10, p. 59*] and CLAIMANT accepted in an effort to accommodate its business partner's needs [*Cl. Ex. 3, pp. 14-15*]. Nothing in the record suggests that either RESPONDENT or CLAIMANT believed that they were renouncing arbitration by including a review mechanism.

24. It is evident from Art. 23 FSA and the negotiating history that the Parties intended to agree to arbitration [**1**]. The review mechanism provided for in Art. 23(4) FSA is compatible with the principles of international arbitration and does not call into question the Parties' intent to submit disputes to arbitration [**2**].

1. The Text and History of Art. 23 FSA Support the Parties' Intent to Arbitrate

25. In determining the existence of consent to arbitration, it is essential to "consider the parties' real intentions and to address the question as to the parties' fair and reasonable expectations" [*Blessing, p. 171*]. The terms, context, and history of the arbitration agreement all indicate that the Parties intended to arbitrate, and their "fair and reasonable expectations" would be frustrated if RESPONDENT could avoid its prior consent to arbitrate.

26. In adopting nearly verbatim the CEPANI model arbitration clause, providing for institutional "arbitration" [*Art. 23(3) FSA*] that "shall be final and binding" [*Art. 23(4) FSA*], the Parties' logical expectation was arbitration, the principal mode of dispute resolution between

international commercial parties today [*Redfern/Hunter, p. 1*], widely preferred for flexibility, as well as for providing a neutral forum and an internationally enforceable judgment [*Id. at pp. 30-33*].

27. Had the Parties not specially negotiated Art. 23 FSA, the arbitration clause in CLAIMANT's 2000 Standard Terms and Conditions would automatically govern pursuant to Art. 46 FSA [*Cl. Ex. 2, p. 12*]. The 2000 Standard Terms and Conditions also provide for CEPANI arbitration [*Cl. Ex. 2, Ann. 4, § 21, p. 13*]. Where the default contractual provision provided for arbitration and the express terms of the negotiated dispute resolution clause also provide for arbitration, it is absurd to imagine that the Parties had anything else in mind but arbitration.

2. The Review Mechanism Complies With the Principles of Arbitration and Does Not Negate the Parties' Intent to Arbitrate

28. Although arbitration awards are typically considered final and binding, absolute finality is not a necessary characteristic. By way of illustration, the major treaties on international arbitration provide for some level of review: the New York Convention provides for annulment by the courts of the seat [*Art. V NYC*] and the ICSID Convention provides an institutional process for reviewing and setting aside awards [*Art. 52 ICSID*]. The principle of party autonomy, codified in Art. 19(1) Model Law, demands respect for parties' choices about finality (subject, of course, to any mandatory provisions of the applicable law) [*Platt, p. 559*]. "So long as parties agree to prioritize correctness or fairness over finality, this accords with the spirit of arbitration" [*Id.*]. As arbitration is a creature of contract, it "follows that it should be left to the parties to determine whether they do or do not want judicial review on the merits" [*Schmitthoff, p. 237*].

29. The weight of commentary and guidance interprets finality as not being an absolute requirement. Representing international best practices, the 2010 IBA Guidelines for Drafting International Arbitration Clauses are cautious about expanding the possibilities of review, but never suggest that review on the merits is incompatible with the nature of arbitration [*IBA Guidelines, Option 7: Finality, pp. 29-30*]. Indeed, the IBA Guidelines offer a model clause for the "exceptional case" where "the parties wish to expand the scope of judicial review and allow appeals on the merits" [*Id.*]. Commentator Waincymer takes the view that "[i]n addition to *lex arbitri* that establish some appellate mechanism, the parties themselves could establish one if they wish," as long as the national courts are willing to hear the appeal [*Waincymer, pp. 180-81; see also, Born 2013, p. 110*].

30. A number of arbitration laws offer the possibility of review on the merits, demonstrating that it is consistent with the arbitral process. For instance, the English Arbitration Act 1996 provides

that parties may bring an appeal to a court on a point of law, and the court may grant leave to appeal if, among other things, "the decision of the tribunal on the question is obviously wrong" [*Eng. Arb. Act, § 69; Kershaw Mechanical (Eng.); HMV UK (Eng.)*]. Even if the arbitration agreement provides that the award shall be "final, conclusive, and binding," "such words, by themselves and absent any other contextual indicators, are not sufficient . . . to amount to an agreement to exclude rights of appeal under section 69 of the 1996 Act" [*Shell (Eng.)*]. Where the English system has an "opt out" system of appeal, the Hong Kong Arbitration Ordinance offers the same possibility for judicial appeals on an "opt in" basis [*Sched. 2 § 5 HK Arb. Ord.; see also, Sched. 2 N.Z. Arb. Act 1996*]. Like Australia [*See Austl. Comm. Arb. Act*], Equatoriana has adopted the Model Law with an "Art. 34A" allowing "[a]ppeals on points of Equatorianean law" [*Proc. Ord. 2, ¶ 13, p. 59*]. Danubia offers the same provision, *mutatis mutandis*, in its domestic arbitration law [*Id.*]. All of these respected jurisdictions – including those of the seat and the likely place of enforcement in this case – permit some sort of appeal.

31. Certain arbitration institutions also provide mechanisms for appellate review. Notably, the AAA recently adopted a set of "Optional Appellate Arbitration Rules" permitting parties to appeal any underlying award to an arbitral panel "on the grounds that the underlying award is based on errors of law that are material and prejudicial and/or on determinations of fact that are clearly erroneous" [*AAA Press Release, 1 Nov. 2013*]. The CPR has long provided an option for arbitral appeals of "material and prejudicial errors of law" and "factual findings clearly unsupported by the record" [*Rule 8.1 CPR Arbitration Appeal*].

32. All of these examples demonstrate that there is nothing intrinsically incompatible between arbitration and judicial review of a first-instance arbitration award. Consequently, the Parties clearly intended arbitration, and the review process is compatible with that choice.

C. There is No Doubt as to The Validity of the Arbitration Clause in Art. 23 FSA

33. Art. 23 FSA meets all the relevant criteria for a valid arbitration agreement [**1**]. Contrary to Respondent's assertion, the review mechanism in Art. 23(4) FSA does not render the arbitration agreement void [**2**]. Furthermore, the unilateral choice between arbitration and litigation presented by Art. 23(6) FSA was fairly negotiated and does not vitiate the arbitration agreement [**3**].

1. Art. 23 FSA is Valid

34. Art. 23 FSA fulfills all the recommended criteria of an arbitration agreement, including establishing the governing rules, broad scope of disputes, constitution of the tribunal, language, and

seat of arbitration [*IBA Guidelines, p. 9 (Contents of "Basic Drafting Guidelines")*]. Far less is required for a valid arbitration agreement. The Model Law, as adopted by Danubia, defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship," with the simple requirement that it "shall be in writing" [*Art. 7 Option I Model Law*]. Art. 7 Model Law is interpreted broadly, and "[c]ourts generally have held that the spirit of an agreement to arbitrate will prevail over technical limitations on the scope" [*Alvarez/Kaplan/Rivkin, p. 37; Schiff Food Products (Can.)*]. The New York Convention presents these same minimal requirements [*Art. II(1) NYC; Germany No. 34 (Ger.) (analyzing Art. II NYC and adhering to "the general opinion that in case of doubt an arbitration clause is not to be interpreted restrictively, but rather extensively")*]. Art. 23 FSA meets those requirements, as it is in writing and shows intent to settle disputes arising out of a particular legal relationship by arbitration.

35. Furthermore, Art. 23 FSA is essentially a verbatim adoption of the CEPANI model arbitration clause. The Tribunal should be particularly reluctant to deem invalid a clause promulgated by a respected arbitration institution.

2. The Review Mechanism Does Not Vitiate the Agreement to Arbitrate

36. Just as the review mechanism in Art. 23(4) FSA is compatible with the principles of international arbitration, it is also permissible under the applicable arbitration rules [**i**] and law [**ii**]. Furthermore, even if the review mechanism were not valid, the arbitration agreement would still be enforceable [**iii**].

i. The arbitration agreement is compatible with the CEPANI Rules

37. Although the CEPANI Rules provide by default for automatic waiver of all recourse, such waiver is by no means absolute or mandatory. Therefore, the Parties here could derogate from the default provisions, as they did in Art. 23(4) FSA. The CEPANI Rules provide that awards are "not subject to appeal" [*Art. 32(1) CEPANI*] and that "[b]y submitting their dispute to arbitration under the CEPANI Rules and except where an explicit waiver is required by law, the parties waive their right to any form of recourse insofar as such a waiver can validly be made" [*Art. 32(2) CEPANI*]. First, this provision anticipates circumstances in which a waiver cannot be made. Second, Art. 32 CEPANI contains no mandatory language. By contrast, the LCIA Rules and ICC Rules use compulsory language, providing respectively that the parties "irrevocably" waive their right to any recourse [*Art. 26.9 LCIA Rules*] and that the parties "shall be deemed" to have waived all right to

recourse [*Art. 34(6) ICC Rules; Lesotho Highlands (Eng.); Daimler South East Asia (Sing.)*]. Given the lack of mandatory language, Art. 32 CEPANI should be understood to permit derogation.

38. Furthermore, in light of Equatorianean government policy, it is doubtful whether RESPONDENT could have validly waived its right to "any form of recourse." Equatoriana has issued a circular stipulating that "[g]overnment entities *must not* forego the right of review of *manifestly erroneous* decisions of courts or tribunals" (emphasis added) [*Res. Ex. No. 1, p. 36*]. Although this policy does not, strictly speaking, constitute a binding legal requirement upon RESPONDENT, RESPONDENT is nonetheless expected to comply with it [*Proc. Ord. 2, ¶ 9, p. 58*]. Additionally, under the administrative law "binding norm" test applied by some courts, a formally non-binding statement of policy can nonetheless have binding effect if (1) the provision's "plain language" and its manner of implementation so indicate, and "the agency's discretion is restricted by the provision" [*Eastwood Nursing, p. 144 (U.S.)*]. Consequently, it should be considered that RESPONDENT could not validly waive its right to all recourse. In providing for judicial review only of "obviously wrong" (the equivalent of "manifestly erroneous") awards, the Parties preserved a right of recourse only to the minimum extent prescribed by the government of Equatoriana.

39. In any case, the Parties' choice to expressly derogate from the default exclusion of waiver is a valid exercise of party autonomy and should be respected as such.

ii. The arbitration agreement is valid under the Model Law

40. An arbitration agreement must be valid "under the laws to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made" [*Art. V(1)(a) NYC; Art. 34(2)(a)(i) Model Law*]. Where, as here, the parties have not expressly chosen another law to govern the arbitration clause (as distinct from the contract itself), it may be debated whether the law of the seat or the substantive law of the contract is applicable [*Redfern/Hunter, § 3.11, p. 155*]. CLAIMANT submits that the law of the seat, i.e. Danubia, governs the arbitration agreement, in light of the separability of the arbitration clause and considering that the submission of questions about the arbitration process to the law of the arbitral seat includes "also issues concerning the formal validity of the arbitration clause and the jurisdiction of the arbitral tribunal" [*Redfern/Hunter, § 3.2, p. 168 (discussing the English Court of Appeal's holding in C v D)*]. In this case, however, the outcome is the same either way, as the international arbitration laws of the seat and of the contract are in fact identical, both Danubia and Mediterraneo having adopted the 2006 Model

Law with Art. 7 Option I [*Proc. Ord. 2, ¶ 13, p. 59*]. Consequently, the law applicable to the arbitration agreement is the Model Law.

41. While Art. 34 of the Model Law provides for "[a]pplication for setting aside as exclusive recourse," the Parties are free to deviate from this provision. With regard to the Model Law, "procedural party autonomy is only limited by due process" [*Brekoulakis/Shore, p. 625*]. The principles of due process are the "established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing" [*Black's Law Dictionary*], enshrined in the Model Law under Art. 18, "Equal treatment of parties" [*Art. 18 Model Law*]. The decision to diverge from Art. 34 Model Law by expanding or limiting the possibilities of recourse cannot be said to infringe upon those fundamental rights; rather, it is a legitimate expression of party autonomy. As reasoned by the Ontario Supreme Court (a Model Law jurisdiction), the Secretary-General's Analytical Commentary to the Model Law "enumerates other articles in the Model Law which are mandatory provisions and from which the parties may not derogate. Article 34 is not among them" [*Noble China Inc. (Can.); see also, Food Services of America (Can.); Leon/Karimi*]. Consequently, parties may depart from the terms of Art. 34 Model Law, establishing the availability of another type of review as they see fit, subject only to due process.

42. The arbitration laws of several Model Law jurisdictions allow appeals on the merits under certain circumstances. Hong Kong, a major center for international arbitration, now expressly allows parties to "opt in" in their arbitration agreements to permit appeals of awards that are "obviously wrong" on a point of law [*Sched. 2 § 5 HK Arb. Ord.*], just as the Parties provided in Art. 23(4) FSA. Equatoriana's Art. 34A allows appeals on questions of Equatorianean law by consent of the parties or by leave of the court, "[n]otwithstanding the limitations in article 34" [*Proc. Ord. 2, ¶ 13, p. 59*]. Danubia already offers a nearly identical provision in its domestic arbitration law [*Id.*]. Art. 23(4) FSA goes beyond the express provisions in these arbitration laws, providing for appeals on points of fact and points of law, but the principle remains the same: Art. 34 Model Law, providing for setting aside as sole recourse, is not exclusive, and the Parties validly departed from it by providing for limited appeals in Art. 23(4) FSA.

iii. Even if the review mechanism were not compatible with the applicable law and rules, the arbitration agreement would still be enforceable

43. Even if, contrary to CLAIMANT's submissions, Art. 34 Model Law and Art. 32 CEPANI were non-derogable and the Parties could not have recourse to judicial review on the merits, this

should not invalidate the Parties' agreement and thwart the Parties' intent to arbitrate. Instead, it would fall to a state court to decide whether or not to hear an appeal once the award had been rendered [*See Waincymer, p. 181 ("[W]hile the parties can adopt their own appeal mechanisms, they have no rights to bind national courts to such a function, absent government agreement to allow them to do so.")*]. In *Hall Street Associates*, for instance, the U.S. Supreme Court ruled that the grounds for challenges under the U.S. Federal Arbitration Act were exhaustive and excluded the parties' stipulated type of review, but it did not find this to vitiate the arbitration agreement. On the contrary, the decision tended to favor enforcement of the resulting award [*Hall Street (U.S.)*]. Here, the agreement to arbitrate in Art. 23(3) FSA should be given effect regardless of the ultimate effectiveness of the review mechanism.

44. Alternatively, the Tribunal could sever the offending language [*Kyocera (U.S.) (unlawful expanded scope-of-review terms to be severed, with the rest of the arbitration clause left intact); Gallaway Cook Allan (N.Z.)*]. The review mechanism in Art. 23(4) FSA is "collateral to the main purpose" to arbitrate [*Kyocera (U.S.), p. 1001 (citation omitted)*] and, as in the *Kyocera* case, "the flaw manifest in the terms of appellate review does not permeate any other portion of the arbitration clause" [*Id.*]. As the Austrian Supreme Court has held, it is essential "to distinguish between the real arbitration agreement and a possible additional agreement on the arbitral procedure" [*Ob. 80/878, pp. 367-69 (Austria)*]. "Only if the void parts concerned the entire character of the agreed arbitration, would this also entail the nullity of the entire arbitration agreement" [*Id.*]. Here, the "real arbitration agreement" is contained in Art. 23(3) FSA and must be given effect. Whether it should be severed by the Tribunal or ultimately rejected by a court, an invalid review mechanism would not render the arbitration agreement any less enforceable.

3. The Arbitration Agreement Is Not Unconscionable

45. Art. 23(6) FSA gives CLAIMANT the right to bring claims in the courts of Mediterraneo, by which RESPONDENT agreed to submit to the jurisdiction of Mediterranean courts [*Cl. Ex. 2, p. 12*]. RESPONDENT's assertion that "the invalidity of the arbitration agreement follows also from the fact that it is completely one-sided, giving Claimant a unilateral choice between arbitration and court proceedings" [*Ans., ¶ 9, p. 32*] is refuted by the relevant commentary and jurisprudence.

46. As a rule, "mutuality of obligation is not required for arbitration clauses" [*Barker (U.S.), p. 792*]. "[E]ven where an arbitration agreement is asymmetrical or non-mutual, and only one party is initially obligated to arbitrate, there is nonetheless an exchange of promises about the arbitral process that would satisfy traditional consideration requirements (subject to claims of

unconscionability)" [*Born 2009, p. 722*]. Courts in Australia, France, Germany, Italy, and the United States have all held asymmetrical clauses to be valid [*See PMT Partners (Austl.*); *Angers Appeal Judgment (Fr.)*; *1970 Giustizia Civile Mass. 1103 (It.); Lawrence (U.S.) (all cited in Born 2009, FN 829, FN 878-81)*].

47. Here, RESPONDENT negotiated and agreed to the unilateral choice between arbitration and litigation in Mediterraneo. The notion of unconscionability, the principle of which is "the prevention of oppression and unfair surprise" [*as expressed in UCC § 2-302 cmt. 1*], is inapplicable. CLAIMANT wrote to RESPONDENT, detailing the favorable staggered payment plan, and added, "[*i*]*n return* we have included the option, *as agreed by you*, that Innovative Cancer Treatment Ltd has the right to initiate court proceedings in Mediterraneo in case of any dispute concerning payments" (emphasis added) [*Cl. Ex. 3, p. 14*]. Given that RESPONDENT not only was aware of this provision, but also received something in return, this clause cannot be considered unconscionable. To the extent that authority exists for the invalidity of an arbitration agreement on grounds of unconscionability, it is typically limited to consumer protection [*See Brower (U.S.), discussed in Bishop, pp. 13-14 (arbitration clause unenforceable where ICC advance fee of $4000 exceeded the cost of most of the defendant's products, effectively deterring consumers from arbitration)*]. In a commercial deal between sophisticated parties, there is no such concern. RESPONDENT's effort to evade its agreement to arbitrate by invoking Art. 23(4) FSA, a clause for which it bargained, must fail.'

D. Art. 23 FSA Applies to Claims Arising Out of the SLA

48. CLAIMANT brings claims under both the FSA and SLA. Art. 23 FSA encompasses all claims "arising from or in connection with" the framework agreement [*Cl. Ex. 2, Art. 23(1), p. 11*]. Pursuant to Art. 45 FSA and the SLA's own preamble, Art. 23(3) FSA, providing for CEPANI arbitration, applies to claims arising under the SLA.

49. In determining the admissibility of all the claims brought by the parties to arbitration, tribunals generally recognize parties' consent to arbitration of claims arising under related subsequent contracts where they have entered into a framework agreement with an arbitration clause governing their future relationship and any such subsequent contracts [*Lew/Mistelis/Kröll, 3.1(b), p. 144; Progressive Casualty Ins. (U.S.)*]. "In general, so long as the parties to the contracts are the same, and the underlying contracts relate to a single project, courts have usually held that an arbitration clause in one agreement extends to related agreements" [*Born 2012, pp. 90-91*]. Art. 7 of the Model Law covers such multi-contract situations, providing that "the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided

that the reference is such as to make that clause part of the contract" [*Art. 7(6) Model Law*]. A "specific mention of the arbitration clause therein is not necessary" [*Binder, 2-032, p. 86; Working Group Report, ¶ 19, p. 192; see also, Skandia (Berm.)*].

50. Here, not only are the parties and project the same, but the FSA expressly anticipates future contracts and the SLA explicitly incorporates by reference the terms of the FSA. Art. 45 FSA provides that "[t]he provisions of this Agreement shall also govern all further and future contracts concluded by the Parties in relation to the Proton Therapy Facility purchased . . ." [*Cl. Ex. No. 2, p. 12*]. There is no doubt that the SLA is a "further contract" within the meaning of Art. 45 FSA. It was contemplated as a follow-up to the first project at the time of the FSA [*Cl. Ex. 4, p. 16*]. The preamble to the SLA adds that "the general relationship between the Seller and the Buyer is governed by [the FSA] providing also the framework for the present contract" [*Cl. Ex. 6, p. 18*].

51. The FSA terms apply unless the later contract contains a "specific provision to the contrary" [*Id.*], which is not the case here, as the SLA contains no specific provision that would displace the FSA arbitration clause. A "specific provision to the contrary" should be construed as one that is substantively irreconcilable with a previous term, while giving as much effect as possible to provisions of the framework agreement [*Allendale Mutual (U.S.)*]. Art. 23 SLA labeled "Dispute resolution" is not a "specific provision" that is "contrary" to the whole of Art. 23 FSA and therefore does not displace the entirety of Art. 23 FSA. Rather, Art. 23 SLA is contrary to, and replaces, only Art. 23(5) and (6) FSA regarding interim measures and court access. A comparison of the FSA and SLA provisions reveals that Art. 23 SLA is a straightforward replacement of Art. 23(5) and (6) FSA only:

> (5) The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo.
>
> (6) In addition, the Seller has the right to bring any and all claims relating to payments in the courts of Mediterraneo. The Buyer herewith submits to the jurisdiction of the courts of Mediterraneo.
>
> [*Cl. Ex. 2, Art. 23(5)-(6), p. 11*]

> (1) The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo or Equatoriania as applicable.
>
> (2) In addition, both Parties shall have the right to bring any and all claims in the courts of Mediterraneo or Equatoriania to the jurisdiction of which they hereby submit.
>
> [*Cl. Ex. 6, Art. 23, p. 19*]

Art. 23 SLA merely adds the option of the courts of Equatoriana and thereby removes the contractually agreed asymmetry of the earlier provisions. The Parties could not have intended to wipe out the negotiated arbitration agreement from the FSA with the addition Art. 23 SLA. Indeed, Art. 23(1) SLA loses meaning without an underlying arbitration agreement: the provision for interim measures has no purpose if not in the context of an arbitral proceeding.

52. Even if the FSA arbitration agreement did not apply to the SLA, the Tribunal would still have jurisdiction under the arbitration clause in Sec. 21 of CLAIMANT's 2011 Standard Terms and Conditions [*Cl. Ex. 9, p. 24*]. The Standard Terms and Conditions apply to the SLA pursuant to Art. 46 SLA [*Cl. Ex. 6, p. 20*] and also provide for CEPANI arbitration. Incorporation of the Sec. 21 arbitration clause would be necessary to avoid leaving the Parties with a meaningless provision for interim measures and recourse only to state courts, in contravention of CLAIMANT's standard practice and both Parties' demonstrated intent to arbitrate.

53. That different substantive laws govern the FSA and the SLA is irrelevant to the applicability of the arbitration clause. Nothing is unusual about the presence of multiple applicable laws in a single dispute [*See, e.g., FGG, p. 793 ("Applying different laws to different aspects of a dispute is becoming increasingly accepted")*]. The relevant question for jurisdiction is only whether the arbitration agreement in the FSA extends to the SLA. In the proven absence of any "specific provision to the contrary," it does. Accordingly, the Tribunal should find all claims arising out of both the FSA and SLA admissible.

II. THE TRIBUNAL SHOULD HEAR ALL CLAIMS ARISING OUT OF BOTH CONTRACTS IN A SINGLE ARBITRATION

54. CLAIMANT submits its claims arising out of the FSA and SLA in a single arbitration for more efficient and less costly dispute resolution [*Req. Arb., ¶¶ 20-22, pp. 7-8; Sherwin/Aldous*]. CLAIMANT also wishes to avoid any risk of contradictory awards.

55. Like other arbitration rules [*Art. 9 ICC Rules; Art. 29 HKIAC Rules*], Art. 10 CEPANI allows for claims arising out of multiple contracts to be heard in a single arbitration when the claims are made pursuant to various arbitration agreements [*Art. 10(1) CEPANI*]. In order to hear multiple claims in a single arbitration, the Parties must have agreed to arbitrate the claims under the CEPANI Rules in both contracts [*Art. 10(1)(a) CEPANI*]. As mentioned above, this condition is met. Second, the Parties must have agreed to have their claims decided within a single set of proceedings [*Art. 10(1)(b) CEPANI*]. The Tribunal may hear claims arising out of both contracts because the Parties

expressly agreed to resolve all disputes arising out of the FSA and SLA in a single arbitration [**A**]. Alternatively, and without prejudice to the previous submission, the contracts show that the Parties intended to have their claims decided within a single set of proceedings [**B**].

A. The Parties Expressly Agreed to Resolve All Disputes Arising Out of the FSA and SLA in a Single Arbitration

56. Art. 45 FSA states that the agreement "shall also govern all further and future contracts concluded by the Parties in relation to the Proton Therapy Facility purchased where such contracts do not contain a specific provision to the contrary" [*Cl. Ex. 2, p. 12*]. The FSA provided the framework for the entire transaction and all claims fall under that framework. As argued above [*supra Part I.D., ¶ 51*], the dispute resolution provision in the SLA is not "contrary" to the arbitration agreement in the FSA. Therefore, in accordance with Art. 10(1)(b) CEPANI, the Parties agreed to a single arbitration of all claims arising out of both the FSA and SLA under the dispute resolution procedures of the FSA.

B. In the Alternative, the Contracts Show That the Parties Intended to Have Their Claims Decided Within a Single Set of Proceedings

57. The language of the agreements shows that the Parties intended to have all claims resolved in a single arbitration. First, the Parties' conception of the contractual relationship shows that they intended to combine all disputes in a single arbitration [*1*]. Second, the contracts and claims are closely related [*2*]. Finally, the arbitration clauses create materially equivalent procedures [*3*].

1. The Parties' conception of the contractual relationship shows that they intended to combine all disputes in a single arbitration

58. At the time the Parties entered into the FSA, they intensively discussed the possibility of adding a third treatment room and thereby anticipated that they would enter into a subsequent contract [*Req. Arb.*, *¶ 9, p. 5; Cl. Ex. 4, p. 16*]. In the preamble to the FSA, the Parties state that they "see the potential for further cooperation" [*Cl. Ex. 2, p. 10*]. Furthermore, in the preamble to the SLA, the Parties mention the previous purchase and explicitly provided that the FSA was to govern the SLA [*Cl. Ex. 6, p. 18*].

59. In a similar situation, the Arbitration Court of the Bulgarian Chamber of Commerce and Industry found it had jurisdiction, based on the arbitration clause in a sales contract, over a dispute relating to a loan agreement, which financed the purchase under the sales contract and had no arbitration clause [*BCCI 60/1980*]. The tribunal emphasized that the loan agreement had been contemplated at the same time the sales contract was concluded and therefore could be considered a clause of the sales contract, though in a different document [*BCCI 60/1980*]. The same reasoning

applied in *ICC Case No. 8420*, where, conversely, the tribunal did not include secondary contracts, which had no arbitration clause, in an arbitration under a principal contract [*ICC 8420, pp. 337-40*]. The tribunal concluded that when multiple contracts had been heard in a single arbitration based on an implicit relationship between the contracts, "the subsequent 'secondary' contracts were just an implementation, amendment or fulfillment of the previous 'principal' contractual relationship, or constituted the necessary consequence of the first principal contract, a consequence already known at the signing of the latter" [*ICC 8420, p. 338*].

60. Here, the Parties view the SLA and FSA as related agreements and contemplated the SLA at the time they entered into the FSA. The SLA was a direct consequence of the FSA and the relationship the FSA created. The connection between the contracts and the Parties' conception of that relationship shows they intended to combine all disputes into a single arbitration.

2. The contracts and claims are closely related

61. Art. 10(3) CEPANI states that "[a]rbitration agreements concerning matters that are not related to one another give rise to a presumption that the parties have not agreed to have their claims decided in a single set of proceedings" [*Art. 10(3) CEPANI*]. Commentator Born writes that claims arising out of different contracts are unlikely to be heard together "where the relevant agreements lack a sufficiently close commercial or temporal relationship, or involve distinct matters" [*Born 2009, p. 1112*]. Here, however, the FSA and SLA concern interconnected matters and form the same economic transaction [*See ICC 5971, pp. 738-39*]. Furthermore, given the close connection between the contracts, entered into only three years apart, both claims likely require the same witnesses and testimony [*See, e.g., Res. Ex. 2, p. 37 (Witness Statement of Dr. Excell discusses entire commercial relationship)*].

62. Commentator Leboulanger writes that contracts are related "whenever there were regular and reciprocal commercial transactions, that is, whenever the concomitant purchases and sales of goods, and the successive agreements which gave rise to these balanced exchanges, are commercially and economically tied" or "whenever there is a framework contract expressly agreed upon" [*Leboulanger, p. 49; see also Klöckner (ICSID) (cited in Pryles/Waincymer, p. 10)*]. In the preamble to the SLA, the Parties mention how the FSA provides the "framework" for the SLA [*Cl. Ex. 6, p. 18*].

63. In discussing whether to combine disputes based on a series of agreements, Commentator Aynès states that contracts constitute an indivisible whole "if each of the partial agreements exists only by the preceding and calls on the following" [*Hanotiau, pp. 311-12*]. The Paris Court of Appeals

similarly found two contracts were connected when the second was "the continuation and the consequence" of the first [*Glencore Grain (Fr.), p. 503*]. Here, there would be no third treatment room and no need for the SLA without the preexisting relationship created in the FSA. RESPONDENT accepts this interdependence when it claims that the termination of the FSA made the SLA obsolete because the active scanning technology was useless without the Proton Therapy Facility [*Ans., ¶ 23, p. 34*].

64. The contracts both concern the same subject matter: the Proton Therapy Facility. The FSA "is intended to cover the initial purchase of a Proton Therapy Facility as well as the further cooperation of the Parties in its use and further development" [*Cl. Ex. 2, Preamble, p. 10*]. The Parties entered into the SLA because the buyer "wants to acquire an additional third treatment room" [*Cl. Ex. 6, Preamble, p. 18*]. In a letter to Dr. Vis proposing the purchase of a third room, Professor Account wrote that the hospital was "extremely interested in extending our treatment option" [*Cl. Ex. 4, p. 16*]. That the third treatment room was "additional" to the first two treatment rooms and "extend[ed]" the hospital's treatment options shows that the SLA comprised the same commercial transaction as the FSA.

3. The dispute resolution clauses in the FSA and SLA create materially equivalent procedures

65. Under both contracts, the Parties agreed to resolve disputes under the CEPANI Rules. Furthermore, both contracts grant the Parties the right to access local courts for certain measures. The dispute resolution clauses therefore show a clear intent to have all disputes resolved together.

66. In the FSA, the Parties agreed to resolves disputes by arbitration under the CEPANI Rules, before three arbitrators in Danubia [*Cl. Ex. 2, Art. 23(3), p. 11*]. The SLA incorporates the 2011 Standard Terms, which states the Parties shall settles disputes under the CEPANI Rules by one or more arbitrators in Mediterraneo [*Cl. Ex. 9, § 21, p. 24*]. The similarity between the clauses and same institutional choice shows the Parties' intended to resolve disputes in a single proceeding.

67. Both the FSA and SLA allow application to courts for interim and provisional urgent measures [*Cl. Ex. 2, Art. 23(5), p. 11; Cl. Ex. 6, Art. 23(1), p. 19*]. The FSA allows the seller the right to bring claims relating to payments to the courts of Mediterraneo, while the SLA similarly allows both Parties to bring all claims to the courts of Mediterraneo and Equatoriana [*Cl. Ex. 2, Art. 23(6), p. 12; Cl. Ex. 6, Art. 23(2), p. 19*]. The similarity in judicial supervision shows that the Parties did not intend to create distinct arbitration schemes.

68. The difference in seat is immaterial with respect to combining the claims in a single dispute. Seat is relevant for judicial supervision; however, as both Danubia and Mediterraneo have adopted the UNCITRAL Model Law [*Proc. Ord. 2, ¶¶ 12-13, p. 59*], there should be no difference. The Model Law exists to avoid disparities in national treatment of arbitration and provide uniform grounds for judicial supervision [*Model Law, ¶ 5, p. 24; ¶ 44, p. 35*].

69. That the claims involve different laws is irrelevant for determining whether to combine disputes. Art. 10(2) of the CEPANI Rules states that "[d]ifferences concerning the applicable rules of law or the language of the proceedings do not give rise to any presumption as to the incompatibility of the arbitration agreements" [*Art. 10(2) CEPANI*]. The manner in which CLAIMANT pleads its case is fully consistent with the CEPANI Rules. The Tribunal therefore should apply the national law of Mediterraneo to the FSA and the CISG to the SLA in a single arbitration.

70. That the FSA first requires negotiation and mediation [*Cl. Ex. 2, Art. 23(1)-(2), p. 11*], while the 2011 Standard Terms does not, is irrelevant at this stage. Because the Parties have already made efforts to amicably settle the dispute as required by the FSA [*Proc. Ord. 2, ¶ 11, p. 58*], both clauses now direct arbitration under the CEPANI Rules.

71. In *ICC Case No. 5989*, the tribunal found it had jurisdiction over all disputes arising out of two contracts when one contract required that a committee first attempt to amicably resolve the dispute, while the second required that the parties first attempt to agree on a sole arbitrator [*ICC 5989, p. 74*]. The tribunal emphasized that it was seized of the dispute after the amicable resolution procedures had been exhausted, leaving only clauses referring to the ICC operable [*Id. at p. 76*]. The tribunal concluded that the connection between the claims and contracts illustrated that the parties intended to have disputes resolved together, despite minor differences between the clauses [*Id.*].

72. Because the dispute resolution procedures in the FSA and 2011 Standard Terms provide for arbitration under the CEPANI Rules, and any amicable dispute resolution limitations have become irrelevant on the facts, the Tribunal should conclude that the parties intended to combine both contracts in a single arbitration.

III. THE CISG GOVERNS CLAIMS ARISING UNDER THE SLA

73. The Parties agree that the Mediterranean Sale of Goods Act applies to the FSA [*Proc. Ord. 2, ¶ 20, p. 60*]. However, the Tribunal should apply the CISG to the claims arising out of the SLA. The Parties validly incorporated the 2011 Standard Terms into the SLA [**A**]. Those terms include a

choice of law clause in favor of Mediterranean law, which directs this Tribunal to find that the CISG is the applicable law to the contract [**B**]. Furthermore, the SLA falls within the scope of application of the CISG [**C**].

A. The 2011 Standard Terms Were Validly Incorporated Into The SLA

74. The Parties validly incorporated the 2011 Standard Terms into the SLA. Pursuant to CISG provisions, both Parties evinced clear intent to incorporate the 2011 Standard Terms. The issue of incorporation of the 2011 Standard Terms should be resolved according to the CISG's rules for the formation and interpretation of contracts [**1**]. An analysis in accordance with the CISG shows that the Parties agreed to incorporate CLAIMANT's 2011 Standard Terms and that RESPONDENT had reasonable opportunity to take notice of the 2011 Standard Terms [**2**].

1. The CISG's rules for the formation and interpretation of contracts determine whether the 2011 Standard Terms were incorporated

75. For purposes of determining the inclusion of the 2011 Standard Terms, it should be considered that the CISG governs SLA [*Proc. Ord. 2, ¶ 1(2), p. 57*]. It is well settled that the question of whether standard terms are incorporated "falls squarely within the scope of the CISG" [*CISG-AC Op. 13, ¶ 1.4; Mirror Case (It.); Tantalum Case (Austria)*]. Although the issue is not specifically addressed in the CISG, national courts have used the CISG's provisions on interpretation to govern the statements and conducts of parties regarding standard terms [*Machinery Case (Ger.); Printed Goods Case (Ger.); Vine Wax Case (Ger.); CISG Arts. 8, 9; CISG-AC Op. 13, ¶ 1.5*]. CISG provisions on interpretation, offers, and acceptance also apply to the formation and acceptance of standard terms [*Arts. 8, 14, 18 CISG; CISG-AC Op. 13, ¶ 1.5; see also DiMatteo, p. 346; see, e.g., Fruits and Vegetables Case (Switz.); Propane Case (Austria)*]. Accordingly, the CISG, and not any national law, governs standard terms and contract formation [*See Cooling System Case (Austria); Film Coating Machine Case (Ger.); Machinery Case (Ger.); Mirror Case (It.)*].

2. The Parties agreed to incorporate CLAIMANT's 2011 Standard Terms into the SLA and RESPONDENT had reasonable opportunity to take notice of the 2011 Standard Terms

76. As part of the negotiations of the SLA, CLAIMANT notified RESPONDENT at least twice that the 2011 Standard Terms would apply to the SLA [*Res. Ex. 2, ¶ 3, p. 37; see also Cl. Ex. 5, ¶ 3, p. 17*]. RESPONDENT now denies their applicability because it never received an English version of the 2011 Standard Terms [*Ans., ¶ 17, p. 33*]. However, RESPONDENT failed to inquire further about the availability of these terms [*Res. Ex. 2, ¶ 3, p. 37–38*] when, in fact, they were available on

CLAIMANT's website throughout the negotiations [*Id.*]. RESPONDENT registered no objection to CLAIMANT's 2011 Standard Terms before or after signing the SLA [*Proc. Order 2, ¶ 33, p. 63*].

77. Proper incorporation of standard terms occurs when parties "have expressly or impliedly agreed to the terms' inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms." [*Art. 8, 14, 18 CISG; CISG-AC Op. 13, ¶ 2; Machinery Case (Ger.)*]. Both Parties demonstrated clear assent to the 2011 Standard Terms' inclusion through their conduct and legal actions [**i**]. CLAIMANT gave RESPONDENT a reasonable opportunity to take notice of the terms [**ii**]. Finally, RESPONDENT took actual notice of the 2011 Standard Terms when it viewed the 2011 Standard Terms on several occasions. RESPONDENT's lack of prior objection unfairly undermines CLAIMANT's reasonable reliance and suggests that its present objections are improperly motivated [**iii**].

i. The Parties agreed to the inclusion of the 2011 Standard Terms at the time of the formation of the SLA

78. The 2011 Standard Terms were incorporated into the SLA. A contract includes not only terms specifically negotiated by the parties, such as the price and quantity, but also extrinsic standard terms if both parties agree to their inclusion [*CISG-AC Op. 13, ¶ 1; Schlechtriem/Schwenzer 2010, p. 275*]. The 2011 Standard Terms were effectively included because CLAIMANT and RESPONDENT properly formed the underlying SLA [**a**], CLAIMANT conveyed its intention to include the 2011 Standard Terms to RESPONDENT [**b**], and RESPONDENT accepted the 2011 Standard Terms [**c**].

a. CLAIMANT and RESPONDENT properly formed the underlying SLA

79. The Parties properly formed the underlying SLA, which included a provision explicitly referencing CLAIMANT's Standard Terms [*Cl. Ex. 6, Art. 46, p. 20*]. In response to RESPONDENT's invitation to offer on 6 May 2011 [*Cl. Ex. 4, p. 16*], CLAIMANT sent an offer letter to RESPONDENT with an attached draft contract [*Cl. Ex. 5, p. 17*], which stated that "[t]his Agreement is subject to the Seller's Standard Terms and Conditions for Sale" [*Cl. Ex. 6, Art. 46, p. 20*].

80. The letter and draft contract constituted an offer under Art. 14 CISG, which provides that an offer is formed as long as it objectively indicates the intention of the offeror to be bound in the event of acceptance [*Computer Hardware Devices Case (Switz.); Roofing Material Case (Austria)*] and the proposal is sufficiently definite [*Industrial Product Case (ICC), ¶ 52*]. CLAIMANT's 5 July 2011 letter and attached draft contract to RESPONDENT [*Cl. Ex. 5, p. 17*] fulfill these requirements. By attaching a signable draft contract in their 5 July 2011 letter and including a specific description and price of the

goods to be sold [*Cl. Ex. 6, Preamble, pp. 18-19*], CLAIMANT's actions conform to the CISG's requirements for an offer.

81. Art. 18 CISG provides that a party accepts an offer when it indicates assent by statement or conduct, which can take effective form in a variety of ways, including signing a draft contract [*Mirror Case (It.)*]. By signing the proposed contract on 22 July 2011 [*Cl. Ex. 6, p. 18*], RESPONDENT bound itself to the terms of the contract and fulfilled the requirements for an acceptance.

b. CLAIMANT conveyed its intention to incorporate the 2011 Standard Terms to RESPONDENT

82. For successful incorporation of standard terms into an offer, the CISG requires CLAIMANT to intend for the standard terms to be included in the offer and for RESPONDENT to understand CLAIMANT's intent [*See Art. 8, 14 CISG; Huber, p. 125; Lautenschlager, p. 275; DiMatteo, p. 347; Machinery Case (Ger.) ("effective inclusion of general terms . . . first requires that the intention of the offeror that he wants to include his terms . . . be apparent to recipient of the offer")*].

83. Courts have determined that clear reference to standard terms is one way to effectively incorporate them into an offer [*Shoes Case 1994 (Ger)*]. CLAIMANT expressed its intent to incorporate the 2011 Standard Terms into its SLA offer during both the 2 June 2011 meeting with RESPONDENT [*See Res. Ex. 2, ¶ 3, p. 37*] and its draft contract letter on 5 July 2011, which referenced the 2011 Standard Terms [*Cl. Ex. 6, Art. 49, p. 19*].

84. In its 5 July 2011 letter, CLAIMANT underlined and italicized the word "*new*" preceding the words "Standard Terms and Conditions of Sale," which highlighted Claimant's intent to include the new Terms [*Cl. Ex. 5, footer, p. 17*]. CLAIMANT also informed RESPONDENT that the 2011 Standard Terms were available on CLAIMANT's website [*Id.*]. Dr. Excell, one of RESPONDENT's negotiating agents, acknowledged that CLAIMANT informed him of the existence of the 2011 Standard Terms in both the 2 June 2011 meeting and 5 July 2011 letter [*Res. Ex. 2, ¶ 3, p. 37*]. RESPONDENT was well aware of CLAIMANT's intent to include new updated terms. Each notification to RESPONDENT constituted independently sufficient reference to the 2011 Terms – and, taken together, they present an unquestionable manifestation of CLAIMANT's intent and evidence of RESPONDENT's awareness [*CISG-AC Op. 13, ¶ 5.1; Schlechtriem/Schwenzer, p. 277*].

c. RESPONDENT accepted the 2011 Standard Terms

85. Successful incorporation of standard terms requires both parties' agreement on their inclusion and for the offeree to take reasonable notice of the terms [*CISG-AC Op. 13, ¶ 2-3*]. In the *Vulcanization Case (Bel.*), an offeror made multiple references to standard terms and the offeree clearly knew of the references. Because intent, understanding, and reasonable notice were all present, the Belgian court ruled that when the offeree accepted the underlying contract, it also accepted the standard terms. RESPONDENT not only understood CLAIMANT's intent to incorporate the 2011 Standard Terms, but also agreed to the incorporation of the 2011 Standard Terms through its statements and conduct. RESPONDENT signed the SLA with the knowledge that the 2011 Standard Terms were included and demonstrated its assent to the 2011 Standard Terms [*Cl. Ex. 6, pp. 18–20*],

86. The acceptance and inclusion of standard terms can also be accomplished through behavior indicating that the offeree has accepted the standard terms [*CISG-AC Op. 13, ¶ 2.13; Propane Case (Austria)*]. In the *Grape Centrifuge Case (U.S.)*, an offer electronically incorporating standard terms was validly accepted through conduct when a buyer paid for an item. Here, RESPONDENT accepted the 2011 Standard Terms through two independently sufficient avenues: statements (signing the SLA) [*See Mirror Case (It.) (signature is sufficient to be bound)*] and conduct (paying money to CLAIMANT, which signaled an affirmation of their prior intent to be bound by the SLA and its provisions).

87. Like the *Grape Centrifuge Case* (*U.S.*) and *Reverse Sheet Case (Neth.)*, where offerees accepted offers through conduct indicating assent, CLAIMANT reasonably interpreted and relied on RESPONDENT's conduct during the SLA negotiations and after the SLA's signing. Art. 8(2) CISG provides that "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances." Accordingly, courts have found that when pre-contractual behavior signals acceptance of standard terms to a reasonable person, those terms are fairly incorporated [*See, e.g., Propane Case (Austria)*]. Given that RESPONDENT had actual knowledge of CLAIMANT's intent to incorporate the 2011 Terms, did not object to their inclusion, and signed the SLA, CLAIMANT had every reason to believe that RESPONDENT accepted its new Terms. Any reasonable person would have concluded the same.

ii. CLAIMANT gave RESPONDENT a reasonable opportunity to take notice of the terms

88. For effective incorporation of standard terms, CISG law also requires CLAIMANT to have made the extrinsic document—here, the 2011 Standard Terms—reasonably available to the offeree [*CISG-AC Op. 13, ¶ 2, Machinery Case (Ger.)*]. This task can be achieved in a number of ways,

including making the terms available electronically or in person [*Machinery Case (Ger.) ("the user of general terms and conditions is required to transmit the text to the other party or* make it available in another way*") (emphasis added)*].

89. For electronic terms, an offeror gives reasonable notice where there is a reference to the availability of standard terms on a website [*CISG-AC Op. 13, ¶ 3.4*]. RESPONDENT argues that effectual incorporation of the updated terms required CLAIMANT to make them physically available [*See Ans. ¶ 17, p. 33*], but this argument is inconsistent with existing case law and commentary. Here, CLAIMANT referred RESPONDENT to a website containing the 2011 Standard Terms and accordingly, gave RESPONDENT a reasonable opportunity to take notice of the Terms [*Cl. Ex. 5, ¶ 3, p. 17*].

90. The 2011 Standard Terms were available at all times on the website in Mediterranean and were intermittently available in English during the negotiation period and permanently thereafter [*Res. Ex. 2, ¶ 3, pp. 37-38*]. CISG case law provides that a reference to standard terms is effective in providing a reasonable opportunity to take notice of them when they are available in a language that the offeree could reasonably understand [*CISG-AC Op. 13, ¶ 6.2; Tomatoes Case (Bel.)*]. Under this approach, standard terms can include languages used in the contract or negotiations, language ordinarily used by the offeree, or other languages that could reasonably be understood by the offeree [*See CISG-AC Op. 13, ¶ 6.2; Tantalum Powder Case (Austria)*]. Other CISG case law allocates the burden of understanding the language onto the offeree [*See Marble Ceramic Case (U.S.)*]. Under either standard, CLAIMANT met its burden. As a result, the fact that the Terms were only continuously available online in Mediterraneo does not undermine CLAIMANT's argument.

91. Negotiations were conducted partly in Mediterranean [*Proc. Ord. 2, ¶ 35, p. 63*], and CLAIMANT reasonably believed that RESPONDENT could make commercial decisions in Mediterranean. Although RESPONDENT stipulates that its Mediterranean-speaking negotiator was on holiday when the Mediterranean terms were available on CLAIMANT's website [*Res. Ex. 2, ¶ 5, pp. 37-38*], CLAIMANT had no duty to know that negotiator's schedule or availability. Given that CLAIMANT fulfilled its duty to provide the Terms in a negotiating language, the onus was on RESPONDENT to request an English version. If RESPONDENT had truly wanted an English copy, it could have simply asked CLAIMANT for the 2011 Standard Terms. Even after it saw that the 2011 Terms were available in only Mediterranean on 14 July 2011 [*Proc. Ord. 2, ¶ 35, p. 63*], RESPONDENT failed to make this modest inquiry or take the easy step of using an online translation service. RESPONDENT nonetheless signed the SLA containing a reference to the 2011 Terms. CLAIMANT could reasonably expect that

RESPONDENT understood the Terms and would have informed CLAIMANT if there were any problems.

92. There is also strong evidence showing that RESPONDENT took *actual* notice of the 2011 Standard Terms. RESPONDENT checked the 2011 Standard Terms twice on CLAIMANT's website—once before the SLA's signing when the Terms were in Mediterranean and once ten days after the SLA's signing when the Terms were in English [*Proc. Ord. 2, ¶ 33, p. 63*]. Given that RESPONDENT had actual notice of the Terms' contents, fairness concerns are significantly less relevant. The notice afforded to RESPONDENT here far outstrips the notice given in cases like the *Grape Centrifuge Case (U.S.)* and the *Tantalum Powder Case (Austria)*, where the courts only found constructive notice and yet, still agreed that the standard terms in those cases were properly incorporated.

iii. RESPONDENT's lack of prior objection unfairly undermines CLAIMANT's reasonable reliance

93. Given CLAIMANT's fair reliance, failure to incorporate the 2011 Standard Terms would contravene the CISG's principle of good faith [*Art. 7 CISG*]. Courts applying Art. 7 CISG have determined that when one party fairly relies on the other party's conduct, untimely objections by the other party will not be considered [*See Art. 7 CISG; Surface Protective Film Case (Ger.); Rolled Metal Sheets Case (Austria); Shoe Delay Case (Neth.); RF CCI 302/1996 (Rus.)*]. In *Reverse Sheet Case (Neth.)*, a court determined that, under the principle of good faith, an offeror fairly relied on the offeree's acceptance of standard terms when the offeree did not object to standard terms over the course of the parties' business relationship. Such is the case here. As previously established [*supra ¶ 87*], CLAIMANT reasonably relied on RESPONDENT's lack of objection and other behavior in assuming the successful incorporation of the 2011 Standard Terms. Under CISG's principle of good faith, this Tribunal should reject RESPONDENT's untimely objection to the 2011 Terms and allow CLAIMANT's fair reliance on RESPONDENT's behavior by incorporating the Terms.

B. The Choice of Law Clause in the 2011 Standard Terms Ensures that the CISG Governs the SLA

94. Having established that the 2011 Standard Terms, which include a choice of law clause, were incorporated into the SLA [*supra Part III.A., ¶¶ 74-93*], the Tribunal must apply "the rules of law…chosen by the parties as applicable to the substance of the dispute" [*Art. 28(1) Model Law, enacted in Danubia (Proc. Ord. 1, ¶ 3(3), p. 54); Born 2012, p. 233*]. A choice of law clause should be "construed…as directly referring to the substantive law of that State and not to its conflict of laws rules" [*Art. 28(1) Model Law*]. Sec. 22 of the 2011 Standard Terms requires that the SLA "…is

governed by the law of Mediterraneo" [*Cl. Ex. 9, p. 24*]. Unlike the SLA's arbitration agreement [*See supra ¶ 51*], this clause specifically contradicts the choice of law clause governing the FSA [*Cl. Ex. 2, Ann. 4, § 22, p. 13*]. Thus, pursuant to Art. 45 FSA, this substantive choice of law clause governs the rights and obligations of the SLA [*Cl. Ex. 2, p. 12*].

95. The designation of the law of Mediterraneo as the applicable law indicates that the CISG governs the SLA because the CISG is an integral part of Mediterranean law and no language in the SLA indicates the Parties intended to exclude it [**1**]. Furthermore, nothing in the negotiating history of the SLA amounts to an agreement between the Parties to exclude the CISG [**2**].

1. The choice of law clause in the SLA directs this Tribunal to apply the CISG

96. The choice of law clause in the SLA referencing the law of Mediterraneo must lead the Tribunal to apply the CISG, as it has been integrated into the Mediterranean legal order to apply to international sales contracts such as the SLA. Parties need not "opt in" to the CISG through an explicit reference in the choice of law clause [*Graves, p. 7*]. The CISG is an "integral part" of the national law of its Contracting States [*RF CCI 105/2005; St. Paul Guardian Ins. Co. v. Neuromed (U.S.)*], and Mediterraneo is a Contracting State to the CISG [*Proc. Ord. 1, ¶ 3(3), p. 54*]. The SLA deals with a "sale of goods" in the sense of the CISG [*Arts. 1 & 3 CISG; see infra Part III.C., ¶¶ 74-93*], and CLAIMANT and RESPONDENT have their places of business in different States, Mediterraneo and Equatoriana, which are both Contracting States to the CISG [*Art. 1 CISG; Cl. Ex. 6, p. 18; Proc. Ord. 1, ¶ 3(3), p. 54*]. Therefore, to stipulate that the law of Mediterraneo governs the SLA is, in these circumstances, to ensure that the CISG governs the contract [*Coke Case (ICC); Marble Slab Case (Ger.); Céramique Culinaire (Fr.); Steel Bars Case (ICC); Surface Protective Film Case (Ger.)*].

97. Art. 6 CISG provides that "parties may exclude [its] application" [*Boiler Case (Austria); Jewelry Case (Austria); Huber/Mullis, p. 60*]. Courts in a variety of countries have held that parties must *clearly* opt out of the CISG [*E.g. BP Oil (U.S.); Cedar Petrochemicals (U.S.); Spacers for Insulation Glass Case (Austria); Sport Clothing Case (Ger.); St. Paul Guardian Ins. (U.S.)*]. They specifically emphasize that the contract should contain "clear language" conveying the parties' intention to exclude the application of the CISG to their contract [*Asante (U.S.), p. 1150*]. CLAIMANT and RESPONDENT did not include any clear language in Sec. 22 of the 2011 Standard Terms that would exclude the CISG, which is necessary to prevent its application in situations where it would otherwise apply [*Gasoline and Gas Oil Case (Austria); Waste Container Case (Hung.)*].

98. Specifying the general law of a contracting state is not sufficient to exclude the CISG [*Asante (U.S.), p. 1150; Yarn Case (Ger.); Bonell/Liguori, p. 391; Drago/Zoccolillo, p. 9*; *Ferrari, p. 165; Huber/Mullis, pp. 63-64*]. The legislative history of the CISG supports such a position [*CISG Leg. Hist., Rep. 1st Comm. 1980*]. During the drafting process, amendments to Art. 6 suggesting otherwise were rejected, with a majority of delegates favoring the French position that "the parties' choice of a national law means that the [CISG] applies if that state has adopted the [CISG]" [*Id.; Schlechtriem 1986, p. 35*].

99. Tribunals and courts have required more precision that just the "law of a contracting state" to indicate an intention not to apply the CISG [*Ferrari, pp. 165-67*]. Tribunals have found the CISG to be implicitly excluded only when language such as "governed exclusively by Italian law" is present [*E.g. Leather/Textile Wear Case (Ad hoc arb.)*] or where the choice of law clause specifies the commercial code of the country, such as the "Swiss Code of Obligations" [*E.g. Engines Case (ICC)*]. Commentators also support the view that opting out of the CISG must be overt [*Born 2013, p. 167; Dutton, p. 247; Klepper, p. 238; Rendell, p. 25*]. Commentator Ferrari states that tribunals must find that the parties showed a "clear indication" that they intended to exclude the CISG [*Ferrari, p. 161*]. Other commentators have suggested examples of how the CISG can be excluded in practice [*McMahon; Crawford, pp. 192-93; Winship*]. For example, choice of law provisions can read "the law of France excluding the CISG," "Art. 2 of the UCC as enacted in New York," or "the laws of Pennsylvania not including the 1980 U.N. CISG" [*Id.*].

100. No such language exists in the SLA, and RESPONDENT can point to no language in the 2011 Standard Terms or the SLA that would suggest the Parties intended to exclude the CISG. CLAIMANT and RESPONDENT agreed to have the "law of Mediterraneo" govern the contract—not "exclusively" Mediterranean law or specifically the Mediterranean Commercial Code [*Cl. Ex. 9, § 22, p. 24*]. The language chosen in the 2011 Standard Terms shows that the application of the CISG to the SLA is precisely what the Parties wanted. Furthermore, the word choice of Sec. 22 of the 2011 Standard Terms differs from the choice of law provision in the 2000 Standard Terms, which stated, "The contract shall be governed by the national law of Mediterraneo as set out in the statutes of Mediterraneo and developed by its courts" [*Cl. Ex. 2, Ann. 4, § 22, p. 13*]. The difference in language shows that CLAIMANT and RESPONDENT, two sophisticated parties advised by lawyers [*Proc. Ord. 2, ¶ 10, p. 58*], knew how to exclude the CISG in favor of the domestic law of a country and did not do so with regard to the 2011 Standard Terms.

2. Nothing in the negotiating history of the SLA amounts to an exclusion of the CISG as the governing law

101. RESPONDENT argues that Sec. 22 of the 2011 Standard Terms must be read in light of the exclusion of the CISG in the 2000 Standard Terms and Dr. Vis's statement that there would be no "major change" in the new terms [*Ans., ¶ 18, pp. 33-34*]. As a result, RESPONDENT submits that the 2011 Standard Terms "provide for the non-harmonized law of Mediterraneo to the exclusion of the CISG" or at least that this was RESPONDENT's understanding [*Id.*]. However, Dr. Vis's statements have no legal effect on the question as to what law governs the contract.

102. These pre-contractual conversations between Dr. Vis and RESPONDENT are superseded by an executed contract. RESPONDENT ultimately agreed to the inclusion of the 2011 Standard Terms [*supra Part III.A., ¶¶ 74-93*], so Dr. Vis's statements hold no relevance to interpreting the clear language of the choice of law clause contained therein [*Cl. Ex. 9, p. 24*]. Given that RESPONDENT had actual notice of the 2011 Standard Terms [*See supra ¶ 92*], the onus was on RESPONDENT to use its commercial judgment to analyze the proposed terms and agree to them as written.

103. Moreover, in his letter to RESPONDENT attaching a draft version of the SLA, Dr. Vis merely informed RESPONDENT that the changes were "of a minor nature" and that they would "hardly affect [the] relationship" between the Parties [*Cl. Ex. 5, p. 17; see also Res. Ex. 2, p. 37*]. However, in the same letter, he referred to the 2011 Standard Terms as an "overhaul" of the 2000 Standard Terms [*Cl. Ex. 5, p. 17*]. Such statements in no way amount to an agreement between CLAIMANT and RESPONDENT that nothing would change between the 2000 and 2011 Standard Terms. RESPONDENT would be unreasonable to interpret his general statements to mean that the choice of law clause specifically did not change between the different versions of the Standard Terms. Dr. Vis's assurance that it would not lead to important changes in the relationship between the Parties referred to the commercial relationship between the two Parties. The change in the choice of law clause, on the other hand, simply changed the legal standard to be applied in dispute resolution. Therefore, its change poses no contradiction with Dr. Vis's statements.

104. Art. 6 CISG is intended to promote party autonomy but was drafted carefully to prevent courts and tribunals from excluding the CISG on insufficient grounds [*CISG Secr. Comm. Art. 6*]. Given the lack of clear language and intent, which is imperative to exclude the CISG [*See supra ¶¶ 97-99*], this Tribunal should find that the effect of Sec. 22 of the 2011 Standard Terms compels it to apply the CISG as the governing law of the SLA, as intended by the Parties.

C. The SLA Constitutes a Sales Contract Within the Scope of the CISG

105. The SLA concerns the purchase of a third treatment room using active scanning technology [*Cl. Ex. 6, p. 18*]. This constitutes a sale of goods within the scope of the CISG [*Art. 3 CISG; Art. 1(1) CISG; Scaffold Fittings Case (ICC)*] for two reasons. First, the preponderant part of CLAIMANT'S obligations under the SLA concerns a sale of goods (hardware and software) rather than services (installation and personnel training), which under Art. 3(2) CISG brings the SLA within the scope of the CISG [**1**]. Second, CLAIMANT has provided all the manufacturing materials under Art. 3(1) CISG [**2**]. In applying Art. 3 CISG there is a "pro Convention principle" [*CISG-AC Op. 4, ¶ 2.10, ¶ 4.4*]. The burden of proof is on RESPONDENT to displace the prima facie application of the CISG under the exceptional provisions of Arts. 3(1) and 3(2) because "in both subparagraphs the applicability of the Convention is presumed" [*Schlechtriem/Schwenzer, ¶ 23, pp. 72-73*]. RESPONDENT has failed to meet that burden and so the CISG applies to the SLA.

1. *The preponderant part of CLAIMANT'S obligations concerns a sale of goods*

106. The SLA encompasses both sales and services. This Tribunal, pursuant to the principles set forth in the CISG, should find that the preponderant part of the SLA is constituted by a sale of goods. Art. 3(2) CISG excludes the CISG's application to contracts "in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services" [*Art. 3(2) CISG; Hotel Materials Case (ICC)*]. Here, CLAIMANT'S obligations comprise four main elements: the sale of hardware, including magnets, computers, steering devices and monitors; the sale of software; installation of the third treatment room; and personnel training [*Res. Ex. 3, p. 40-41; Proc. Ord. 2, ¶ 23, p. 61*]. There is no dispute that the USD 2 million worth of delivered hardware (including magnets, computers, steering devices, and monitors) comes within the CISG's meaning of 'goods' [*Proc. Ord. 2, ¶ 23, p. 61; Ans. ¶ 19, p. 34*]. Moreover, even though CLAIMANT agrees that the installation and personnel training aspects of CLAIMANT'S performance are 'services', the software aspect of 'materials' is a sale of a 'good' pursuant to Art. 1(1) CISG [**i**]. Its value includes the software's development and testing costs [**ii**]. Accordingly CISG applies, because selling 'goods' is the preponderant part of CLAIMANT'S obligations [**iii**].

i. CLAIMANT's sale of the active scanning software is a sale of a 'good' pursuant to Art. 1(1) CISG

107. The software sold under the SLA primarily concerns the modeling of the proton beam, in conjunction with USD 2 million worth of physical equipment that was delivered to RESPONDENT [*Proc. Ord. 2, ¶ 22, p. 61*]. According to Commentators Schlechtriem and Schwenzer, the CISG

"allows for a broad understanding of the notion of 'goods' so as to cover all objects . . . which form the subject-matter of commercial sales and those which the drafters of the Convention could not have foreseen" [*Schlechtriem/Schwenzer, ¶ 16, p. 34*]. Furthermore, it is emphasized that the permanent transfer of software, even with the reservation of intellectual property rights "is comparable to the sale of a machine" and so comes within the meaning of 'goods' [*Id. at ¶ 18, p. 35*].

108. The Tribunal should therefore consider that the term 'goods' "is to be interpreted widely, it comprises all objects, that can be subject of a commercial sale, *also computer software*" (emphasis added) [*Computer Chip Case (Ger.), ¶ 1*]. Characterizing software as a good is appropriate because all software has a "corporeal body" that "takes the form of massive strings of 'bits,'" which means there is no fundamental distinction with physical chattels for the purpose of interpreting 'goods' under the CISG [*Green/Saidov, pp. 164-166*]. On CD ROM disks this physical form is the presence and absence of microscopic pits on the disk's surface, while on computer hard disks this is in the form of magnetic "I" and "O" switches [*Id. at p. 165*]. Software is therefore tangible whether it is stored on a physical medium such as a CD ROM or more temporarily on a hard disk. This is consistent with the holding that "the purchase of software, *as well as* the joint purchase of software and hardware, constitutes a sale of goods that falls within the ambit of the CISG" (emphasis added) [*Computer Software and Hardware Case (Switz.), ¶ 4(b)(c)*]. Because software has a corporeal form, the active scanning software has all of the essential features of physically manifested goods. Such goods: (i) can be "alienated and possessed"; (ii) can be "controlled"; and (iii) are "movable" [*Green/Saidov, p. 165*].

109. Under the SLA, the software is "possessed" by RESPONDENT because it is physically manifested on RESPONDENT'S hardware [*Proc. Ord. 2, ¶ 23, p. 61*]. The sale of systems where software and hardware interact comes within the purview of the CISG [*Printing System and Software Case (Ger.); Computer Software and Hardware Case (Switz.)*]. This is consistent with the SLA license, which confers on RESPONDENT a right to the permanent use of the software, with no payment of royalties for the life cycle of the facility [*Cl. Ex. 6, Art. 2, p. 18*]. Commentators affirm that the CISG applies to software sales where licenses, like the SLA license, confer rights to the indefinite use of software [*Schlechtriem/Schwenzer, ¶ 18, p. 35; Schlechtriem/Butler, ¶ 32b, p. 31*]. This is because the CISG's meaning of 'good' does not require "[c]omplete, indefeasible property in the good" [*Schlechtriem/Butler, ¶ 32b, p. 31*]. Although there is a duty to transfer property in goods under Art. 30 CISG [*Glass Chaton Case (Slovk.)*], which occurs under the SLA with the duty to deliver the hardware

and install the software, the CISG is unconcerned with the "effect which the contract may have on the property in the goods sold" [*Art. 4(b) CISG; Stolen Automobile Case (Ger.), ¶ 2a; Roder (Austl.), ¶ 20*]. The CISG operates to "the exclusion of all property questions" [*Schlechtriem 2005, pp. 787-88*].

110. Moreover, the software can be "controlled" by RESPONDENT by virtue of possession of the software, including the exclusion of others from using it. It is also "movable" because the "essential distinction between those things that are movable and those that are not is the possibility of deleting them from their source" [*Green/Saidov, pp. 166-67*]. Choses in action, for example, unlike the software, cannot be deleted from their source and so are not movable, which is why they are not 'goods' [*Id.*]. The active scanning software can be copied like other chattels, which is why CLAIMANT reserved intellectual property rights under the SLA, just as sellers regularly do for book sales [*Cl. Ex. 6, Art. 11, p. 19; Sono, pp. 516-17; Green/Saidov, p. 174*]. Given that the software's essential features are consistent with physical chattels, it ought to be construed as a tangible good.

111. In the alternative, while there is not a qualitative difference between the software sold under the SLA and other goods, software should be included within the meaning of 'goods' *even if* software were considered to be intangible. The CISG "does not require the goods to be corporeal 'movables'" [*Schlechtriem/Butler, ¶ 32a, p. 30*]. There is neither an express tangibility requirement nor an express exclusion of nontangible goods in the CISG [*Diedrich, p. 57*]. For political reasons that do not concern software, Art. 2. CISG excludes sales of just one arguably nontangible good (electricity) and does not exclude nontangible goods *per se* [*Id.; Fairlie, p. 42*].

112. Under the SLA, it is clear that the portion of the software that was already installed on hardware before delivery is considered part of a 'good' under the CISG [*Proc. Ord. 2, ¶ 23, p. 61; Computer Chip Case (Ger.); Software Case (Austria)*]. This should not be distinguished from the part of the software that was installed by CLAIMANT'S engineers from their own server and computers [*Proc. Ord. 2, ¶ 23, p. 61*] because, as Commentators Schlechtriem and Schwenzer state, the "mode in which software is delivered (e.g. via disk or electronically via the internet) is irrelevant" [*Schlechtriem/Schwenzer, ¶ 18, p. 35*]. Parties to software sales "would be surprised to learn that their chosen medium of delivery could have significant consequences for their legal rights" given that the good itself is unchanged by the mode of delivery [*Green/Saidov, p. 165*].

ii. The value of the development and testing of the software is part of the value of the 'goods' sold

113. The USD 3.5 million towards software development and USD 250,000 towards testing to refine the product [*Proc. Ord. 2, ¶ 29, p. 62; Res. Ex. 3, p. 39-40*] should be considered part of the

value of the goods sold. Most of the development costs that amount to USD 3.5 million were already incurred before the signing of the SLA because the active scanning technology was largely developed [*Cl. Ex. 4, p. 16; Cl. Ex. 5, p. 17; Cl. Ex. 6, p. 18; Proc. Ord. 2, ¶ 29(a), p. 62*]. Given that "it would be wrong to apply Article 3(2)… to analyse whether the manufacturing itself constitutes the preponderant part of the goods" [*Schlechtriem/Schwenzer, ¶ 3, p. 63*], these sunk development costs are part of the value of manufactured commercial goods, rather than services for RESPONDENT.

114. The remaining part of the development costs and testing costs for the refinement of the first version of the software was incurred after the Parties signed the SLA [*Proc. Ord. 2, ¶ 24, p. 61*]. These costs are also part of the value of the good sold because the CISG's applicability is unaffected by whether software is adjusted or fully customized [*Schlechtriem/Schwenzer, ¶ 18, p. 35*]. Indeed, Art. 3(1) envisages contracts under the CISG in which goods are "manufactured or produced" after the signing of the contract, which are only excluded from the CISG if the buyer provides a "substantial" part of the materials necessary for such manufacture or production. As supported by the CISG Advisory Council, and academic commentary [*CISG-AC Op. 4, ¶ 4.2; Sono, p. 521; Diedrich, p. 59; Lookofsky, ¶ 61, p. 39*], courts have recognized that manufacturing and development costs are not relevant considerations for Art. 3(2), and such contracts are to be considered ordinary sales of good contracts [*Aluminium and Light Industries Company (Fr.), ¶ II(1)*; *Printing System and Software Case (Ger.), ¶ 2(a)*; *Shoes Case 1991 (Ger.)*]. Even where a "major engineering effort" is contemplated by a contract this "contribute[s] to the production and delivery of the unit, [and] determine[s] its value" and so is a part of the value of the 'goods' under the CISG [*Cylinder Case (Ger.), ¶ A(I)*].

iii. Selling goods is the preponderant part of CLAIMANT'S obligations

115. The meaning of "preponderant" in Art. 3(2) is considered primarily with reference to an "economic value" criterion, which compares the relative value of the 'goods' and 'services' obligations provided by a seller [*CISG-AC Op. 4, ¶ 3.3*]. If a particular percentage of value were the only criterion, then, as Commentators Schlechtriem and Schwenzer argue, it should "'significantly' exceed 50%" [*Schlechtriem/Schwenzer, ¶ 20, p. 71*]. This approach is supported in the case law [*Waste Recycling Plant Case (ICC), ¶ 38(ii); Stove Case (Switz.) ¶ 2; Roofing Materials Case (Switz.), ¶ 1.2.1*].

116. The SLA does not distinguish at all between the value of goods and services, since the purchase price is a single amount (USD 3.5 million) that covers "the goods and services listed in Annex 1" [*Cl. Ex. 6, Art. 3(1), p. 19*]. In the *Cylinder Case*, where the contract did not distinguish between the values of the various aspects of contractual performance, the German court held that

"both the contractual documents and the circumstances of the formation of the contract have to be taken into account" [*Cylinder Case (Ger.)*]. Accordingly, it is necessary to consider the Parties' correspondence before signing the SLA in order to ascertain the values of the 'goods' and 'services' components.

117. Here, the total gross value of CLAIMANT'S performance is USD 9.5 million [*Cl. Ex. 6*, *Art. 3(1), p. 19*]. The value of 'goods' has been shown to include: physical hardware; the software; development costs of the software; and testing costs of the software [*See supra* ¶¶ *107-14*]. Physical hardware and software comprise 40% of the USD 9.5 million of value [*Res. Ex. 3, p. 39*]. Development costs are USD 3.5 million, and the testing costs are USD 250,000 [*Proc. Ord. 2, ¶ 29, p. 62*]. This totals USD 7.55 million. By contrast, the services aspects are merely the training, which is 10% of USD 9.5 million, and installation costs, which are USD 1 million [*Res. Ex. 3, p. 39; Proc. Ord. 2, ¶ 29, p. 62*]. This totals USD 1.95 million. The USD 7.55 million 'goods' elements thus comprise 80% of the value of CLAIMANT'S obligations. The CISG therefore applies because 'services' do not significantly exceed 50% of the value.

'Goods' Elements		**'Services' Elements**	
1) Materials: hardware and software 2) Development of the software 3) Testing of the software	3.8m 3.5m 250,000	1) Installation 2) Training	1m 950,000
Total (USD) **Percentage of total value**	7.55m **80%**	Total (USD) **Percentage of total value**	1.95m **20%**

118. Notably, service aspects are of even lower value in the SLA than in the *Computer Software and Hardware Case* where the CISG was held to apply. The latter concerned a contract where software was adapted to buyer's needs, installed by seller, and buyer's employees were trained. The contract price consisted of the procurement of user rights to standard software including installation (45%), staff training (20%), and developing the individual software from the standard software (35%) [*Computer Software and Hardware Case (Switz.), ¶ 4(1)(c)*], meaning that the service elements (training and installation) made up *more than* 20% of the contract's value. Similarly, the CISG has been held to apply where services comprise 25% of the contract value [*Marques Roque Joachim (Fr.)*]

119. While the foregoing should be sufficient to dismiss RESPONDENT'S objections to the application of the CISG under Art. 3(2), the economic value comparison is a "starting point" that can be "supplemented or even revised by the weight the parties themselves have attributed to each obligation" [*Schlechtriem/Schwenzer, ¶ 18, pp. 70-71*]. An "overall assessment" of the "intention of the

parties as expressed in the documents and the formation of the contract" is therefore an aspect of 'preponderance' [*CISG-AC Op. 4, ¶ 3.4*]. Relevant considerations include the denomination and content of the contract, the structure of the price, and the weight given by the Parties to different elements [*Id.*].

120. The intentions of the Parties also show that the goods aspects are preponderant. The SLA's preamble does not mention any services, and the only obligation of CLAIMANT'S that is mentioned is that "Buyer wants to acquire an additional third treatment room using active scanning technology" [*Cl. Ex. 6, p. 18*]. Similarly, that RESPONDENT wrote to CLAIMANT to enquire into the "purchase of a third treatment room using the active scanning technology" [*Cl. Ex. 4, p. 16*] shows the "particular interest" that RESPONDENT placed on acquiring the goods aspects of the contract, or, put another way, that the "essential aim of the contract" in acquiring the goods is preponderant [*Window Production Plant Case (Ger.); Alfred Dunhill (It.), ¶ 4.3*].

121. By contrast, training is not mentioned in the SLA at all, indicating that the Parties did not regard it to be a primary aspect of RESPONDENT's performance [*Cl. Ex. 6, pp. 18-20*]. It might be objected that this occurred for tax accounting purposes [*Proc. Ord. 2, ¶ 27, pp. 61-62*]. However, if CLAIMANT considered training to be as important a part of RESPONDENT's performance as the deliverance of the hardware and software for the third treatment room, they would not have agreed for tax accounting reasons not to mention training as part of the scope of RESPONDENT's performance. Commentators Schlechtriem and Schwenzer list the other service aspect, installation, as an obligation "of minor importance" [*Schlechtriem/Schwenzer, ¶ 13, p.* 68]. Indeed, installation is only required of CLAIMANT because the primary intention of the Parties is a sale of goods, and courts consistently hold that installation is qualitatively ancillary and secondary to the sale of the primary good [*Hotel Materials Case (ICC); Merry-go-rounds Case (It.); Saltwater Isolation Tank Case (Switz.), ¶ 1(b); Sliding Doors Case (Switz.), ¶ 2(I)(c); Windows Production Plant Case (Ger.), ¶ 1(b)*].

2. CLAIMANT has provided all the manufacturing materials

122. While the SLA obliged RESPONDENT to supply medical data for fine-tuning of the software, and to perform clinical trials [*Cl. Ex. 6, Art. 10(2)-(3), p. 19*], this does not displace the conclusion that the SLA falls within the scope of the CISG. RESPONDENT has not provided any "materials necessary for the manufacture or production" of the active scanning treatment room, which would exclude the CISG's applicability if such contributions were a "substantial part" of the necessary materials [*Art. 3(1) CISG; Windmill Drives Case (Switz.)*]

123. As Commentator Sono maintains, Art. 3(1) "does not apply [to preclude the CISG] . . . where the buyer provides data" [*Sono, p. 521*]. The prevalent jurisprudence has held the same: transactions where buyers have provided sellers with specifications for the manufacture of particular goods are not excluded by the CISG [*Art Books Case (Switz.), ¶ 1(b)*; *Shoes Case 1991 (Ger.); Waste Recycling Plant Case (ICC), ¶ 37-39*]. In particular, it has been held that the CISG applied to a faulty system of software "to be manufactured or produced" for a hospital [*Silicon Biomedical Instruments (Neth.)*].

124. It is generally accepted that "the seller is not seen as a service provider where the buyer provides plans or know-how, even if they are very valuable. The rule only relates to material necessary to manufacture or produce the goods" [*Schlechtriem/Butler, ¶ 26, p. 24*]. This is consistent with the legislative history of the CISG. The U.K. withdrew a proposal after it faced opposition to include alongside "a substantial part of the materials" the phrase "or b) the information or expertise necessary for such manufacture or production" [*CISG-AC Op. 4., ¶ 2.13*]. Commentator Schlechtriem writes that this was rejected in part "because quite a number of contracts would thereby be removed from the scope of the Convention" [*Schlechtriem 1986, p. 31*]. Furthermore, Art. 42(2)(b) CISG envisages sales contracts in which a seller complies "with technical drawings, designs, formulae or other specifications furnished by the buyer," and so where substantial knowhow is exchanged. This indicates that the CISG requires the Tribunal to interpret "materials" under Art. 3(1) without considering any exchanges of know-how under the SLA.

125. The data provision is akin to plans, specifications, and know-how in that data is pure information concerning what is to be done with "materials," rather than "materials" *per se*. Similarly, the clinical trials are not materials for the purposes of Art. 3(1), but services performed by RESPONDENT that are not a relevant consideration in either Art. 3(1) or Art. 3(2). Therefore, under the SLA, CLAIMANT supplies all the materials for the good that was sold to RESPONDENT.

126. Moreover, Art. 3(1) would require any contributions by RESPONDENT to be "necessary" for the treatment room's "manufacture or production." This essential link is not present. The data was merely used to refine an already largely developed product, and the clinical trials could have been acquired from any other cancer research clinic with some experience [*Cl. Ex. 4, p. 16; Cl. Ex. 5, p. 17; Cl. Ex. 6, p. 18; Proc. Ord. 2, ¶¶ 28-29, p. 62*]. Accordingly, the CISG applies to the SLA.

REQUEST FOR RELIEF

On the basis of the foregoing submissions, CLAIMANT respectfully requests that the Tribunal:

(1) Find it has jurisdiction over the payment claims submitted by CLAIMANT;

(2) Declare all claims admissible to be heard in a single arbitration;

(3) Find the CISG governs all claims arising out of the SLA;

(4) Reject RESPONDENT's arguments as meritless;

(4) Award CLAIMANT any costs, including legal fees, for this stage of the arbitration, which will be calculated after the evidentiary hearing;

(6) Award CLAIMANT any other relief to which it may be entitled;

(7) Reserve its jurisdiction over the merits and proceed with the arbitration according to the Procedural Order the Tribunal will issue after the issuing of the Partial Final Award.

Vindobona, Danubia 12 December 2013

Respectfully submitted,

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