ELEVENTH ANNUAL WILLEM C. (EAST) VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT COURT
2013-2014

--MEMORANDUM FOR RESPONDENT --

INNOVATIVE CANCER TREATMENT LIMITED	**HOPE HOSPITAL**
46 Commerce Road Capital City, Mediterraneao Tel. No.: (0) 4856201 Email: info@ict.me	1-3 Hospital Road Oceanside, Equatoriana Tel. No.: (0) 2388700 Email: office@hopehospital.eq
CLAIMANT	**RESPONDENT**

NALSAR UNIVERSITY OF LAW

Harshit Neotia ▪ Kartik Monga ▪ Anupam Misra ▪ Shailesh Singh

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INDEX OF ABBREVIATIONS

§	Section
Art./Arts.	Article/Articles
CEPANI	The Belgian Centre for Arbitration and Mediation
Claimant	Innovative Cancer Treatment Ltd.
Co.	Company
Dr.	Doctor
et. al.	and others
Ed.	Edition
FAA	Federal Arbitration Act, 1926
Fn.	Footnote
Framework and Sales Agreement	FSA
German Civil Code	BGB
ICC	International Chambers of Commerce
ICSID	International Centre of Settlement of Investment Disputes
lex arbitri	Law of the place where the arbitration is taking place
Ltd.	Limited
Mr.	Mister
Ms.	Misses
New Standard Terms	Innovative Cancer Treatment Ltd Standard Terms and Conditions of Sale (July 2011)
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
Old Standard Terms	Innovative Cancer Treatment Ltd Standard Terms and Conditions of Sale (July 2011)
p.	Page

pp.	pages
para.	paragraph
paras.	paragraphs
Respondent	Hope Hospital
SLA	Sales and Licensing agreement
USD	United States Dollars
CISG	United Nations Convention on the International Sale of Goods
UNICITRAL	United Nations Commission of International Trade Law
UNICITRAL ML	UNICITRAL Model Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus

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CZERWENKA	Rechtsanwendungsprobleme in internationalen Kaufrecht Berlin, 1988 (cited as: *CZERWENKA)* (cited at: para. 95)
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16 June 2000

In: *99 F.Supp.2d 874 (2000)*

(cited as: *BRATT ENTER., INC. V. NOBLE INT'L LTD*)

(cited at: para. 31)

Shroyer v. New Cingular Wireless Serc. Inc.

United States Court of Appeals Ninth Circuit

2007

In: 498 F.3d 976, 981-982

(cited as: *SHROYER V. NEW CINGULAR WIRELESS SERS. INC*)

(cited at: para. 27)

F. Iwen v. US West District

Supreme Court of Montana

1 April 1999

In: 977 P.2d 989 (Mont. 1999)

(cited as: *IWEN V. US WEST DISTRICT*)

(cited at: para. 27)

Murphy v. Check 'N Go

California Court of Appeal

2007

In: 2007 WL 3016414 (Cal. Ct. App. 2007)

(cited as: Murphy v. Check 'N Go of Cal., Inc.)

(cited at: para. 27)

American Biophysics v. Dunois marine Specialties

Federal District Court [Rhode Island]

30 January 2006

Available at: http://cisgw3.law.pace.edu/cases/060130u1.html

(cited as: **American Biophysics v. Dunois marine Specialties)**

(cited at: para. 86)

Pacific Vegetable Oil Corp. v. C.S.T. Ltd.

Supreme Court of California,

12 November 1946

Available at: http://scocal.stanford.edu/opinion/pacific-vegetable-oil-corp-v-c-s-t-ltd-29335

(cited as: *PACIFIC VEGETABLE OIL CORP. V. C.S.T. LTD.*)

(cited at: para. 42)

Vernor v. Autodesk

United States Court of Appeals Ninth Circuit

10 September 2010

Available at: http://www.ipinbrief.com/wp-content/uploads/2011/06/vernor-v-autodesk.pdf

(cited as: *VERNOR V. AUTODESK*)

(cited at: paras. 106, 107)

United States v. West

Supreme Court

25 June 11962

In: 370 U.S. 405

(cited as: *UNITED STATES V. WEST*)

(cited at: para. 107)

STATEMENT OF FACTS

1. Innovative Cancer Treatment Limited (hereinafter "**Claimant**") is a worldwide manufacturer of particle therapy equipment for treating cancer, specializing in proton therapy and market leader of facilities using passive scattering technique. Hope Hospital (hereinafter "**Respondent**") is a university teaching hospital and is also the national centre for cancer research and treatment in Equatoriana.

2. On **11 January, 2007**, Respondent approached the Claimant to discuss the purchase of proton therapy facility to optimise its range of available cancer treatment options [CLAIMANT EXHIBIT NO. 1, p. 9]. Lengthy and intensive negotiations took place between the parties. During one such negotiation, Respondent asked for a pre-budget analysis. Claimant informed the Respondent that such an analysis would require considerable amount of information such as the number of potential patients and the personnel and technical resources available. After the data was provided to the Claimant, it came to the conclusion that the facility should run on zero costs.

3. Finally, the parties concluded the Framework and Sales agreement (hereinafter "**FSA**") on **13 January, 2008** [CLAIMANT EXHIBIT NO. 2, p. 10]. FSA provided for sale a proton therapy facility comprising of a proton accelerator, two treatment rooms using the passive scattering beam technique. The FSA also provided that its provision will govern the future contracts concluded between the parties. Also, the dispute resolution clause of the FSA in Art. 23 had the provisions of appeal and review mechanism and vested the right with the Claimant to approach the courts of Mediterraneo for payment disputes only. The Seller's Standard Terms and Condition were applicable to the sale of the proton therapy facility. The consideration for the facility was 50 million US dollars (hereinafter "**USD**") out of which the initial payment of 10 million USD was due on **2 February 2008** [CLAIMANT EXHIBIT NO. 3, p. 14]. Further, 4 instalments of 7.5 million USD were due after the completion of the project and a final payment of 10 million USD was due before 240 days of final instalments. The facility was completed on **15th April, 2010**.

4. During the negotiations of FSA, the parties had discussed the idea of adding a third treatment room using a sophisticated active scanning technology. The Claimant was in the final stages of developing this technology and it was looking for a renowned cancer facility to verify the required data. This was important to develop, test and refine the necessary steering software for the accelerator and the proton beams used for treatment. However, due to the budget constraints, the contract was not concluded. The parties agreed to look at this issue again after the proton therapy facility had operated for a while.

5. During the previous discussions, the price of the treatment facility had been a major reason for the non conclusion of the contract. As the Claimant wanted to enter the market for this kind of technology, it reduced the price of the active scanning technology facility from 9 million US dollars to 3.5 million US dollars. In return, the Respondent agreed to provide the required data and it was further decided that the Claimant could later use the technology unrestricted from any Intellectual Property rights for worldwide sales [CLAIMANT EXHIBIT NO. 5, p. 17]. Sales and Licensing agreement (hereinafter "**SLA**") was concluded on **20 July 2011** [CLAIMANT EXHIBIT NO. 5, pp. 18-20].

6. On **5th July 2011**, Dr. Eric Vis had informed the Respondent that the Standard Terms and Conditions of sale of the Claimant had been overhauled and the new Standard Terms will apply to every contract after June, 2011 [CLAIMANT EXHIBIT NO. 5, p. 17]. Also, the dispute resolution clause of the SLA was modified in light of the Respondent contributing to the development of the active scanning technology software.

7. On **15th August 2012**, the Respondent informed that they would not make any payment, neither the final payment under FSA nor the outstanding payment of 1.5 million USD under SLA [CLAIMANT EXHIBIT NO. 7, p. 21]. The Respondent stated that Equatoriana's Auditor General had confirmed its finding that the proton therapy facility using passive scattering technique was running at 70 per cent its planned capacity. According to the Claimant, their analysis was a generic one and not specific to Equatoriana. It was further based on the belief that the information provided by the Respondent was correct. With regard to the SLA, all functions with the new technology ceased by May, 2012 because of the inaccuracy of the beam. The Respondent alleged that this was because of the fault in the software provided to it.

8. The Claimant after trying to resolve the dispute through negotiation and mediation, eventually referred the dispute to arbitration under CEPANI- Belgian Centre for Arbitration and Mediation. According to the Claimant, the Respondent is obliged to pay a total of 10.5 million USD consisting of 10 million outstanding price of proton purchase therapy and 1.5 million USD for the software used in the third treatment room. The Claimant believes that both the claims should be settled together in the same arbitration proceeding.

SUMMARY OF ARGUMENTS

FIRST ISSUE: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO DECIDE THE DISPUTE

1. The present Arbitral Tribunal does not have the requisite jurisdiction to settle the claims arising out of the FSA and the SLA. Contrary to what Claimant has argued, the heightened judicial review clause entailed in Article 23(4) of the FSA is inconsistent with the fundamental tenets of international commercial arbitration. Moreover, the appeal and review mechanism is inconsistent with the applicable law and institutional rules as well. Furthermore, the unilateral option clause contained in Article 23(6) of the FSA is void and unenforceable considering that recent trend in various national jurisdictions is against the validity of such hybrid clauses. Consequently, the invalidity of the judicial review clause and the unilateral option clause renders the entire arbitration agreement as invalid.

SECOND ISSUE: THE CLAIMS ARISING OUT OF THE FSA AND THE SLA SHOULD NOT BE HEARD TOGETHER

2. CEPANI Rules 2005 is the applicable institutional Rules as the new Rules cannot affect the substantive rights of the parties. Under the 2005 Rules, the claims cannot be heard in the same arbitration as it does not contain a provision for multi-contract arbitration. Furthermore, the consolidation of the claims is not permissible under the 2013 Rules as well, since the requirement laid down in Article 10 of the Rules is not met. Also, the parties never validly agreed for the consolidation of claims in their entire dealings. Consequently, if both the claims are heard together in the same transaction then it will frustrate the right of the Respondent to appoint an arbitrator of its own choice for the different claims based upon the requirement of the case.

THIRD ISSUE: THE NEW STANDARD TERMS WERE NEVER INCORPORATED IN THE SLA

3. Incorporation of Standard Terms in a sales contract is dealt with the provisions of CISG. The New Standard Terms never became part of the offer and therefore, they were never incorporated in SLA. First, mere reference to the New Standard Terms does not incorporate them in the sales contract. On the contrary, the Claimant has the onus to make available New Standard Terms to the Respondent. Second, New Standard Terms cannot be incorporated as they were only available in Mediterranean and Respondent cannot be reasonably expected to

understand Mediterranean. In any case, Section 22 was a 'surprise' clause and therefore, New Standard cannot be incorporated.

FOURTH ISSUE: EVEN IF THE NEW STANDARD TERMS APPLY TO THE SLA, THE 'CHOICE OF LAW' CLAUSE ENVISAGES THE APPLICABILITY OF DOMESTIC LAW OF MEDITERRANEO

4. Section 22 of the New Standard Terms envisages the applicability of non- harmonized law of Mediterraneo. First, CISG is implicitly excluded as an express 'choice of law' provision clearly shows parties intention to derogate from it. Further, effect of Section 22 was unclear to the parties because of which interpretation favouring the Respondent should be taken, keeping in mind the *contra proferentem* principle. Furthermore, a reasonable person in place of the Respondent would be under the impression that non-harmonised law of Mediterraneo was the governing law to the SLA

FIFTH ISSUE: THE SLA DOES NOT CONSTITUTE A 'SALE OF GOODS' UNDER THE CISG

5. The Respondent has argued that the SLA is governed by CISG but this argument is unsubstantiated. Art. 1 of CISG limits the sphere of its application to only contracts for *'sale of goods'*. The SLA is not covered under the ambit of CISG as it neither dealt with *'goods'* nor it was a *'sales'* transaction. The term *'goods'* only includes tangible objects and thus software being intangible is excluded from the ambit of CISG. The SLA involved development, testing and installation of the software, all these being services lead to the exclusion of SLA from CISG by Art. 3(2) also. The SLA also falls outside the scope of the term *'sale'* as it is a licensing agreement granting the Respondent with a right to use the software without transferring the intellectual property of the software. Therefore, the SLA does not constitute a *'sale of goods'* under CISG.

ARGUMENTS ADVANCED

FIRST ISSUE: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO SETTLE THE DISPUTE

1. The Respondent respectfully submits that the present Arbitral Tribunal does not have the requisite jurisdiction to settle the payment claims dispute raised by the Claimant. In an arbitration proceeding, the primary source of the Arbitral Tribunal's authority to decide the dispute is the arbitration agreement entered freely between the parties [*FOUCHARD/GAILLARD/GOLDMAN, p. 650*; *POUDRET/BESSON, p. 457*]. Going by the widely accepted principle of *'kompetenz-kompetenz'*, the Arbitral Tribunal has the requisite authority to decide on its own jurisdiction [*Art. 16, UNCITRAL ML; BORN, pp. 855-856; REDFERN/HUNTER, pp. 5-37*].

2. It is a well-accepted principle that without a valid arbitration agreement there can be no arbitration proceeding at all and such arbitral awards rendered pursuant to it cannot be enforced and can be set aside [*BORN, p. 564; KAUFMANN-KOHLER/STUCKI, pp. 15-20; HORN, p. 142*]. It is with the aforesaid principles that the Respondent submits that the comprehensive appeal and review mechanism is inconsistent with the principal features of the international commercial arbitration **[A]**. The one-sided dispute resolution clause is void and unenforceable **[B]**. The invalidity of the unilateral option clause and the judicial review clause renders the arbitration agreement as void **[C]**.

[A] THE JUDICIAL REVIEW MECHANISM GOES AGAINST THE CHARACTERISTIC FEATURE OF INTERNATIONAL COMMERCIAL ARBITRATION

3. The Claimant has argued that it is within the principle of party autonomy to decide the arbitral process as agreed between the parties [*CLAIMANT MEMORANDUM, paras. 10-16*]. The Respondent does not dispute this well-accepted principle, however, the parties do not have the autonomy to include terms and procedures in the arbitration agreement which are inconsistent with the fundamental features of arbitration [*RAGHAVAN, p. 127; HALL STREET ASSOCIATION LLC V. MATEL, INC., 2008*]. In other words, the principle of party autonomy cannot be stretched to such an extent that it becomes incompatible with the basic features of the arbitration. The arbitral award being final and binding is an inviolable feature of international commercial arbitration [*BORN, p. 1047; TRAIL SMELTER ARBITRATION, 11 March 1941; REISMAN, p. 5*].

4. Going by the aforesaid principles, the Respondent respectfully submits that Art. 23(4) of the FSA is void since it puts in place a heightened judicial review mechanism **(i)**. Claimant's argument of absence of good faith and competing claims of *fairness* and *finality* is not tenable in the present case **(ii)**. Also, the appeal and review clause is inconsistent with the applicable laws and Rules in the present dispute **(iii)**.

(i) Art. 23(4) of the FSA is void since it puts in place a heightened judicial review mechanism

5. The Claimant has argued that the purpose of the judicial review clause in Art. 23(4) of the FSA is *error correction* [*CLAIMANT MEMORANDUM, paras. 29-31*]. The Claimant has relied on the *Lapine Technology Corporation* case and the *Westerbeke Corp* case to substantiate the validity of the judicial review clause [*CLAIMANT MEMORANDUM, paras. 22, 32*]. Both the cases relate to the US jurisdiction which under FAA allows for the review of the arbitral awards on the ground of *manifest disregard of law* [*Section 10, FAA*]. The judicial review of the merits of arbitral award is not allowed in several jurisdictions, including those jurisdictions which allow for the review of the awards on the '*manifest disregard of law*' doctrine [*WILSKE/MACKAY, p. 216*]. In the context of international commercial arbitration, the judicial review of the merits of the arbitrator's decisions does precisely what the parties never wanted; replaces the award by the judges of the party's home jurisdiction [*GRAMLING V. FOOD MACH. & CHEM. CORP.*].

6. The inclusion of appeal and review mechanism in Art. 23 of the dispute resolution clause [*CLAIMANT EXHIBIT NO. 2, p. 11*] gives the right to both the Claimant and the Respondent to appeal against the award which is '*obviously wrong in fact or in law'*. The expression '*obviously wrong in fact or in law'* provides a heightened judicial review mechanism in the arbitration agreement. If there is a comprehensive appeal and review mechanism which entitles either of the parties to resort to the state courts if it feels that the Arbitral Tribunal has erred on its understanding of law or facts then under all likeliness the party which receives an unfavorable award will appeal against it. The entire case will be re-heard again in the applicable State Courts. The fundamental purpose why the parties resort to arbitration in international sales transactions is to avoid the two major problems associated with litigation; the possibility of unfair outcome in the courts of the opposite party jurisdictions and the time-consuming redressal mechanism [*STEIN/WOTMAN, pp. 1685, 1687; LEW/GRIER, pp. 1722-23*]. Both these perceived advantages of resorting to arbitration gets nullified and redundant if there is a heightened judicial review mechanism.

7. Therefore, such a right of heightened judicial review and appeal mechanism cannot be sustained by principle of party autonomy as the parties are not free to enter into arbitration agreements which go against the inviolable features of the international commercial arbitration.

(ii) Claimant's argument of absence of good faith and competing claims of *fairness* and *finality* is not tenable in the present case

8. The Claimant has contended that the Respondent's act of raising objection against the comprehensive appeal and review mechanism implies bad faith on the part of the Respondent [*CLAIMANT MEMORANDUM, para. 25*]. The appeal and review mechanism in Art. 23 of the FSA was included after discussions between Dr. Excell and Mr. Power [*CLAIMANT MEMORANDUM, p. 13*]. It is appropriate to presume that neither of them knew that such a clause would be void and unenforceable considering that they are not lawyers or arbitration specialists. The clause so agreed was included verbatim in the FSA after being reviewed by lawyers from both the sides [*PROCEDURAL ORDER 2, p. 58 para. 10*].

9. It is amply clear that *neither the Claimant nor the Respondent was aware of the problems* associated with the inclusion of Art. 23(4) in the arbitration agreement and especially the fact that such a clause will render the arbitration agreement invalid [*PROCEDURAL ORDER 2, p. 58 para. 10*]. Under these circumstances, it is not just and fair to hold that the Respondent acted in bad faith. Absence of good faith could have been implied if the Respondent knew of such a problem at the time of signing of the contract and still not brought to the notice of the Claimant. The Respondent in the present case has raised the objection in regard to the problems of the judicial review clause at the very first instance before the commencement of the arbitration and this does not contradict the principles of good faith.

10. Furthermore, the Claimant has argued that the two competing claims of *finality* and *fairness* are involved in the question of review of arbitral awards [*CLAIMANT MEMORANDUM, para. 24*]. The Claimant has certainly placed more reliance on the *fairness* aspect letting forego the final and binding nature of the award [*CLAIMANT MEMORANDUM, paras. 27-31]*. The Claimant's insistence for such reliance is that the financial risks are too high to risk *any final and binding decision on a single individual* [*CLAIMANT MEMORANDUM, para. 33*].

11. The Respondent intends to clarify that the present dispute is not to be decided by *one single individual* as the parties had agreed in the dispute resolution clause that "*the arbitration shall be conducted before three arbitrators"* [*CLAIMANT EXHIBIT NO. 1, p. 11 Art. 23(3)*]. Moreover, each of the parties has the right to appoint one arbitrator each in the Arbitral Tribunal comprising three arbitrators [*Art. 15(3), CEPANI ARBITRATION RULES, 2013; CLAIMANT EXHIBIT NO. 1, p. 11 Art. 23(3)*]. Such a procedure for the appointment of the arbitrators reduces the possibility of arbitrariness and unfairness as both the parties have a 'judge of its own choice' to settle the dispute [*REDFERN/HUNTER,* p. 250; *UNCITRAL REPORT ON SUMMARIES OF THE*

PRELIMINARY DRAFT]. The three-member Tribunal ensures that the 'quality of justice' is less likely to be compromised and is not left to the predispositions of a single individual [*CRAIG/PARK/PAULSSON, para. 13.02; CARON/CAPLAN/PELLONPAA, p. 172*].

12. Therefore, it is not correct to state that the fairness requirement of the arbitral award will be compromised in the absence of the judicial review clause, as the parties have already put in place an effective and fair procedure of dispute resolution. The Arbitral Tribunal comprising three arbitrators with each party appointing one arbitrator each ensures that there will be lesser scope of *obvious* error in fact or law or apparent unfairness. The Respondent does not imply that a three-member Arbitral Tribunal is infallible. However, there is an equal possibility, if not more, that the judicial courts may also err in settling the dispute when the consequent arbitral award is appealed.

13. The Respondent respectfully submits that the Arbitral Tribunal should find that the possibility of unfairness and injustice is more likely with the inclusion of heightened judicial review clause rather than without it.

(iii) The appeal and review clause is inconsistent with the applicable laws and Rules in the present dispute

14. When the parties to arbitration agree to arbitrate in accordance with a particular set of institutional rules, the parties are deemed to have consented to all provisions of these rules [*BORN, p. 1753; REDFERN/HUNTER, p. 588 para. 10.08; Himpurna California Energy v. PT Negara; Judgment of Societe, Philipp Brothers v. Societe Icco; Parsons Whittemore v. du Papier*]. The CEPANI Rules clearly stipulate that an arbitral award is final and is not subject to appeal [*Art. 24, CEPANI ARBITRATION RULES 2005; Art. 25, CEPANI ARBITRATION RULES 2013*]. Thus, consenting to resolve the dispute through the CEPANI Arbitration Rules inevitably means consenting to the provision of the final and binding nature of the arbitral award as envisaged in it.

15. Furthermore, in the present dispute the UNCITRAL ML is the law applicable to the procedural aspects of the arbitration agreement concluded by the parties [*PROCEDURAL ORDER 2, p. 59 para. 13*]. The UNCITRAL ML under its mandatory provisions provides that courts do not have the requisite power to intervene except provided by the ML itself [*Art. 5, UNCITRAL ML*]. Furthermore, the UNCITRAL ML also provides that such an arbitral award will be binding upon the parties in regards to its recognition and enforcement [*Art. 35(1), UNCITRAL ML; REPORT ON DRAFT TEXT OF ML, p. 104*]. The present Arbitral Tribunal should acknowledge and take into consideration the fact that the issue of the expansion of the scope of the judicial review was

affirmatively rejected during the drafting of the UNCITRAL ML [*HOLTZMANN/NEUHAUS, p. 239; EIGHTEENTH SESSION REPORT OF THE UNCITRAL*]**.**

16. Therefore, the Respondent respectfully submits that Art. 23(4) is not valid due to the heightened judicial review mechanism which makes it inconsistent with the applicable law and the procedural institutional Rules.

[B] THE UNILATERAL OPTION CLAUSE IS INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL ARBITRATION AGREEMENTS

17. One of the primary objectives of most international commercial arbitration is procedural neutrality [*BORN, p. 1742; DELL COMPUTER CORP V. UNION DES CONSOMMATUEURS*]. Though the parties to the arbitration have the autonomy to decide the procedure which will govern their arbitration, the basic equality of the parties forms a fundamental feature of the international commercial arbitration which is considered to be sacrosanct [*Art. 18, UNCITRAL ML; BALLENTINE BOOKS, INC. V. CAPITAL DISTRIBUTING CO.*]. Considering this, the Respondent respectfully submits that the Arbitral Tribunal should find that Art. 23(6) is inconsistent with the UNIDROIT Principles **(i)**. Furthermore, the Arbitral Tribunal should take note of the recent trend in various jurisdictions in regard to the validity of the unilateral option clause and the distinction in the authorities cited by the Claimant to support the validity of Art. 23(6) of the FSA **(ii).**

(i) The unilateral option clause is inconsistent with the UNIDROIT Principles

18. The Claimant has argued that the unilateral option clause as envisaged in Art. 23(6) of the FSA is valid as there is no such restriction under the applicable law [*CLAIMANT MEMORANDUM, para. 56*]. The national contract law of Danubia, Equatoriana & Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PROCEDURAL ORDER 2, p. 57 para. 4*]. Art. 3.2.7 of the UNIDROIT Principle vests the right to a party to the contract to avoid an individual term of the contract which unjustifiably gives the other party an excessive advantage [*UNIDROIT PRINCIPLES, Art. 3.2.7(1)*]. It is clear that the advantage must be one which leads to disequilibrium between the procedural and substantive rights of the parties to the contract [*UNIDROIT COMMENTARY, pp. 108-109*]. In order to figure out whether the balance of the rights of the parties have been altered due to the inclusion of such a term in the contract, consideration should be placed on the relevant circumstances of the case which led to the conclusion of the contract [*UNIDROIT PRINCIPLES, Art.. 3.2.7(1)(a), Art. 3.2.7(1)(b); UNIDROIT COMMENTARY, p. 109*].

19. The dispute resolution clause provided in Art. 23 of the FSA forms an integral part of the contract for the sale of proton therapy facility. The one-sided clause in Art. 23(6) of the FSA gives the unilateral right to the Claimant to approach the courts of its home jurisdiction for payment disputes. There is no valid justification for the vesting of such a right given the factual background of the case and it seemingly affects the procedural rights of the Respondent vis-à-vis the Claimant. Under these circumstances, the Respondent has the right to avoid the hybrid clause entailed in Art. 23(6) of the FSA going by the principle of gross disparity as envisaged in Art.. 3.2.7 of the UNIDROIT Principles.

(iii) The cases cited by the Claimant to support the validity of Art. 23(6) cannot be relied upon and the recent trend in various jurisdictions is not favor of the validity of the unilateral option clause

20. Valid unilateral option clause forms a part of the arbitration agreement in cases which involve loan transactions or financing agreements where the right of one party to refer a dispute of settlement is greater than the other party due to the nature of the transaction involved [*NESBITT/QUINLAN, p. 134*; *PMT PARTNERS V. AUSTRALIAN NATIONAL PARKS, 11 October 1995; NB THREE SHIPPING V. HAREBELL, 13 October 2004*]. The underlying reason for the inclusion of such a clause is to give effect to the negotiating power of the lender or the dominant party due to the ones-sided nature of the obligations in the agreement [*NESBITT/QUINLAN, p. 139; PITTALIS V. SHEREFETTIN, 1986; CORTE DI CASSAZIONE JUDGMENT NO. 2096, 22 October 1970*].

21. The *Law Debenture Trust* case and the *Mauritius Commercial Bank* as cited by the Claimant [*CLAIMANT MEMORANDUM, paras. 58-60*] in order to support the validity of the unilateral option clause involves money-lending and payment of money under bonds respectively as the subject-matter of the dispute. Such unilateral jurisdiction clause cases vests unequal procedural rights to one of the parties to protect its interests under the contract, which is peculiar to financing agreements or loan agreements and not essentially applicable to the facts of the instant case. Furthermore, the Claimant has cited several other cases from various jurisdictions to support the validity of one-sided dispute resolution clauses in the arbitration agreement [*CLAIMANT MEMORANDUM, paras. 58-63*]. The Respondent accepts the argument that there are a notable number of jurisdictions which have upheld the validity of the one-sided dispute resolution clauses. However, at the same time, there are number of countries which have held the unilateral option clauses to be invalid as it violates the principle of the balance of the parties' rights [*MS. X*

V. BANQUE PRIVEE EDMOND DE ROTHSCHILD; ZBP CASE; ARMENDARIZ V. FOUNDATION HEALTH PSYCHCARE SERVICES, INC.].

22. The highest courts of three different jurisdictions of Russia, France and Bulgaria in the last two years have held such unilateral option clauses to be unenforceable and not valid in letter and spirit [*Russian Telephone Company v. Sony Ericsson Mobile Communications Rus; Ms. X v. Banque Privee Edmond de Rothschild; Bulgarian Supreme Court of Cassation Case No. 1193/2010*]. The Russian case is more apt considering the similarity of the factual background as the party in this case which was vested with the benefit of the unilateral option clause had delivered mobile phones earlier and the one-sided dispute resolution clause was inserted for the recovery of the payments for the goods so delivered. The Presidium of the Supreme Arbitrazh Court of the Russian Federation held such a clause to be invalid despite the fact that the arbitration agreement, including the unilateral option clause, was entered into freely by the parties.

23. Under these circumstances, the Respondent contends that the Arbitral Tribunal should take cognizance of the recent trend of how the higher courts of various jurisdictions have dealt with the unilateral option clause and also look at the underlying facts of the instant case to see whether one-sided dispute resolution clause is a requisite or not.

24. Claimant has argued that without a unilateral option clause in Art. 23 of the FSA it would have been *virtually impossible* for it to recover the money for the goods already supplied [*CLAIMANT MEMORANDUM, para. 46*]. If this is assumed to be true then it will be indispensable for all cross-border transactions involving sale of goods to be have unilateral option clause in their arbitration agreement. However, this is not the correct position and considering that most jurisdictions have ruled against the validity of the unilateral option clause the argument of the Claimant that such a clause is necessary for recovery of payment does not stand ground. Also, the argument that such a clause was a necessity for the Claimant to recover the money is self-defeatist since the Claimant did not propose or include a similar clause for recovery of payments under the SLA which was drafted by the same lawyers who drafted the unilateral option clause of the FSA [*PROCEDURAL ORDER 2, p.58 para. 10*].

25. Therefore, the present Arbitral Tribunal should find and hold that Art. 23(6) is not valid as it is inconsistent with the UNIDROIT Principles and the authorities cited by the Claimant is not applicable to the instant case and the fact that the apex courts of several jurisdictions have recently ruled against such unilateral option clauses should be considered persuasive in the present dispute.

[C] INVALIDITY OF THE UNILATERAL OPTION CLAUSE AND THE JUDICIAL REVIEW CLAUSE RENDERS THE ARBITRATION AGREEMENT AS VOID

26. The consent to or the existence of the arbitration agreement can be challenged by either of the parties on substantive grounds that the impugned arbitration agreement is void and unenforceable [*Art. 8(2), UNCITRAL ML; Art. II(3), NY CONVENTION*]. The Respondent respectfully contends that the unconscionable unilateral option clause in Art. 23 render the entire arbitration agreement as asymmetrical and invalid **(i)**. Furthermore, the arbitration agreement is invalid due to the mistake of both the parties on the validity of the judicial review clause **(ii)**.

(i) The unilateral option clause in the FSA renders the entire arbitration agreement as asymmetrical and unconscionable

27. The unconscionability doctrine involves both procedural and substantive elements with the central focus on unequal bargaining power of the parties to invalidate the arbitration agreement [*SHROYER V. NEW CINGULAR WIRELESS SERS. INC.;BALDEO V. DARDEN RESTAURANTS INC.; IWEN V. U.S. WEST DIRECT*]. The entire arbitration agreement is rendered invalid if the unconscionable portions of the dispute resolution clause cannot be disentangled from the remainder of the agreement to arbitrate [*BORN, p. 732; MURPHY V. CHECK 'N GO OF CAL., INC.*].

28. Although not raised by this Claimant, a Claimant might have raised the point that the invalidity of the unilateral option clause will not render the entire arbitration agreement void. On the other hand, the Claimant in the present case has stressed on the necessity of the inclusion of such a clause by pointing out the indispensable nature of Art. 23(6) for the recovery of payments [*CLAIMANT MEMORANDUM, p. 46*]. Relying on the argument put forth by the Claimant, it is amply clear that the severability of the unconscionable clause from the arbitration agreement will not be agreeable to the Claimant. The fact that the Claimant has not argued on the severability of Art. 23(6) with the rest of the arbitration agreement goes on to imply that it does not want to disentangle unconscionable unilateral option clause with the rest of the Art. 23. Under such a situation, the Arbitral Tribunal is left with no other recourse but to render the entire arbitration agreement invalid.

(ii) The arbitration agreement is invalid due to the mistake of both the parties on the validity of the judicial review clause

29. Most of the developed legal regimes provide for one or both parties' mistake to be a ground for invalidation of an arbitration agreement [*HERBOTS, pp. 137-138, 71-76, 81-89, 53, 237, 239*]. Art.

3.2.2 of the UNIDROIT Principles gives the right to either of the parties to avoid the contract on the behest of *relevant mistake* if it satisfies the test of a reasonable person also avoiding the contract at the time of concluding it, had the true state of affairs been known. The Respondent does not dispute the fact that the Hope Hospital had insisted for the inclusion of the judicial review clause [*CLAIMANT EXHIBIT NO. 3, p. 14-15*].

30. The inclusion of such a clause was in pursuance of Circular No. 265 issued by the Auditor General [*PROCEDURAL ORDER 2, p. 58 para. 9*]. After the said Circular and the unpleasant previous experience of entering into an agreement without an appeal and review clause, Art. 23(4) of the FSA had become indispensable for the Hope Hospital in all ventures of international sales transactions [*PROCEDURAL ORDER 2, p. 58 para. 9*]. Also, the need for the appeal and review mechanism had become all the more significant considering that public money worth USD 50 million was involved in the FSA transaction for the purchase of the proton therapy facility [*REQUEST FOR ARBITRATION, p. 5 para. 5*].

31. Considering all the above factors, any reasonable person/entity put in the place of the Respondent would have insisted on the inclusion of the appeal and review mechanism in the FSA. While not argued by this Claimant, it might have been contended that the invalidity of the appeal and review mechanism will not render the entire arbitration agreement void and will only render Art. 23(4) of the FSA as unenforceable [*MASCO CORP V. ZURICH AM. INS. CO.; BRATT ENTER., INC. V. NOBLE INT'L LTD*]. However, such an argument does not hold ground as it is a settled position that mistakes in regard to the fundamental aspects of the arbitral procedures bears invalidity of the entire arbitration agreement [*URY V. GALERIES LAFAYETTE; JUDGMENT of 19 December 1968, BGHZ 51, 255, 262*].

32. It is fairly evident from the aforementioned points that the Respondent would not have consented to an arbitration agreement without the appeal and review mechanism as an integral part of the dispute resolution clause. Art. 23(4) cannot be severed from the rest of the arbitration agreement as the consent of the Respondent to the dispute resolution clause was primarily based on the fact that it should not be bound by erroneous decision of an Arbitral Tribunal and therefore there should be a mechanism for the review of the arbitral awards [*ANSWER TO REQUEST FOR ARBITRATION, p. 32 para. 8*].

33. Under such circumstances, if the Arbitral Tribunal goes on to hold that the judicial review clause entailed in Art. 23(4) of the FSA is invalid and the rest of the arbitration agreement is severable from it, then the very reason of consent of the Respondent to the arbitration agreement gets vitiated and the Respondent is left at an unconscionable and disadvantageous position.

34. **CONCLUSION:** The present Arbitral Tribunal does not have the requisite jurisdiction to decide the instant case due to invalidity of the judicial review clause and the unilateral option clause envisaged in Art. 23(4) and Art. 23(6) of the FSA respectively which renders the entire arbitration agreement as void.

SECOND ISSUE: THE CLAIMS ARISING OUT OF THE FSA AND THE SLA SHOULD NOT BE HEARD TOGETHER

35. If the Arbitral Tribunal finds that it has the requisite jurisdiction to settle the dispute, it is respectfully submitted that both the claims should not be heard in the same arbitration proceeding. It is a well-settled principle that consolidation of claims is permissible only if the parties have agreed to do so pursuant to the arbitration agreement [*BORN, p. 223; WHITESELL/ROMERO, pp. 14-18*]. Neither the courts nor the Arbitral Tribunals have the authority to rule in favor of the multi-contract arbitration if the parties have not agreed so and if it does not flow from the institutional rules either [*GALLIARD, p. 35; JEYDEL, p.24*].

36. Going by the aforementioned principles, the Respondent humbly submits that both the claims cannot be heard in the same arbitration proceeding as the applicable institutional rules in the instant case, CEPANI Rules 2005, does not authorize or contain a provision which allows for multi-contract arbitration **[A]**. In any case, if the Arbitral Tribunal finds that the CEPANI Rules 2013 are applicable in the instant case, the pre-requisites for multi-contract arbitration as per Art. 10 are not met **[B]**. Furthermore, the consolidation of the arbitration proceedings does not flow from the agreement between the parties either **[C]**. The argument of time and cost-efficient arbitration for hearing both the claims together is not tenable considering the applicable law **[D]**. In any case, the consolidation of claims will frustrate the right of the Respondent to appoint the arbitrator based on the expertise required for the case **[E]**.

[A] CEPANI RULES 2005 ARE THE APPLICABLE INSTITUTIONAL RULES IN THE PRESENT DISPUTE

37. The Claimant has requested the Arbitral Tribunal to consolidate the arbitrations arising from two different contracts [*REQUEST FOR ARBITRATION, p. 8 para. 22*]. Their request is based on the reliance of Art. 10 of CEPANI Rules 2013. Although not argued by this specific Claimant, a Claimant may argue that the 2005 CEPANI Rules are not applicable in instant case as the request for the commencement of arbitration was received after the coming of new Rules into force

[*REQUEST FOR ARBITRATION, p. 3*]. However, this argument does not hold ground and the Respondent requests the Arbitral Tribunal to apply the CEPANI 2005 Rules and not the 2013 Rules as the parties had consented to arbitration under CEPANI Rules when it did not contain any multi-contract arbitration provision, i.e. 2005 Rules **(i).** Art. 10 of the new CEPANI Rules indirectly affects the substantive rights of the Respondent **(ii)**.

(i) The intent of the parties was to be governed by the 2005 CEPANI Rules and not the new rules

38. The parties signed and concluded the FSA on 13th January, 2008 when the 2005 CEPANI Rules were in force [*REQUEST FOR ARBITRATION, p. 5 para. 4*]. The 2005 Rules did not contain any provision for consolidation of claims through the means of multi-contract arbitration [*CEPANI ARBITRATION RULES 2005*]. Though the 2013 Rules expressly provides for consolidation of claims arising out of the different contracts concerning the same related subject matter [*Art. 10, CEPANI ARBITRATION RULES 2013*], the parties in the present case did not consent to the 2013 Rules. The Framework and Sales Agreement was concluded on 13th January 2008, the SLA was concluded on 20th July 2011 [*CLAIMANT EXHIBIT NO. 6, p. 20*] and the refusal of payment was made on 15th August 2012 [*CLAIMANT EXHIBIT NO. 7, p. 21; REQUEST FOR ARBITRATION, p. 6*].

39. As it is evident from the above discussed timeline, neither the signing of the two agreements nor the cause of action for the present dispute arose when the new Rules had come into force. Both agreements were separately entered into by the parties at a time when the 2005 Rules were in force and there was no provision for consolidation of claims under multi-contract arbitration under the said Rules. If the parties in the instant case wanted the provision of multi-contract arbitration to be part of the arbitration agreement then they would have expressly included the same in the dispute resolution clause at the time of signing of either of the agreements. Since, neither the adopted institutional rules, 2005 CEPANI Rules, nor the two agreements concluded by the parties talk about the consolidation of the claims in the same arbitration proceeding, it cannot be said that the parties intended for the hearing of both the claims together.

(ii) The application of new CEPANI Rules to consolidate two different arbitrations contracts will affect the substantive rights of the Respondent

40. The Claimant may assert that the new Rules should be applied to the present arbitration as Art. 10 of the CEPANI Rules 2013 only affects the procedure of arbitration and not the substantive rights of the Respondent. However, in reality, the application of the new CEPANI Rules will affect the substantive rights of the Respondent in the instant case. Art. 10 of the CEPANI Rules

2013 on the face of it looks only a procedural rule but it indirectly takes away the substantive right of the Respondent to appoint an arbitrator of their choice which was vested on it by virtue of the dispute resolution clause [*CLAIMANT EXHIBIT NO. 2, p. 11 Art. 23(3)*]. If the present Arbitral Tribunal follows the new CEPANI Rules and consolidates the arbitrations under Art. 10 then the Respondent will lose its right to appoint an arbitrator based upon the expertise required for the claim arising out of the FSA or the SLA.

41. The right of each party to appoint an arbitrator of its own choice is an sacrosanct feature of international commercial arbitration which cannot be derogated from under any circumstances if the arbitration agreement provides for party-appointed arbitrators as the procedure for selection of the Tribunal [*HERRLIN, p. 131-135; DE BOISSESON, pp. 147, 150*]. It is a settled practice in the international commercial arbitration cases that the arbitrators are appointed in nexus with the expertise or the professional qualification required to deal with the case and this is considered a substantive right of the party [*REDFERN/HUNTER, p. 259*].

42. It is an accepted fact that the new institutional arbitration Rules cannot retrospectively introduce substantive duties or take away substantive rights of the parties to the arbitration [*BUNGE V. KRUSE, 1979; PACIFIC VEGETABLE OIL CORP. V. C.S.T. LTD., 1946*]. If the amended arbitration Rules introduce a new substantive duty, the rules in force at the time the arbitration agreement was entered by the parties will apply as far as that particular provision is concerned [*CARS & CARS PTE LTD V. VOLKSWAGEN AG*; *BLACK AND VEATCH SINGAPORE PTE LTD. V. JURONG ENGINEERING LTD.*], as the parties have not legitimately consented to the new rules [*DERAINS/SCHWARTZ, p. 75*].

43. Since, the 2013 CEPANI Rules affected the substantive right of the Respondent to appoint its own arbitrator in the three-member Arbitral Tribunal, the new Rules in so far as it pertains to multi-contract arbitration cannot be retroactively applied to the present arbitral proceeding. Enforcing the new substantive obligation on the parties would eventually mean not meeting the reasonable and legitimate expectations [*SHAUGHNESSY, p. 353*] of the Respondent. Therefore, the present Arbitral Tribunal should hold that the applicable institutional Rules in the present dispute are the CEPANI Rules 2005 as far as the specific provisions of the CEPANI Rules 2013 affect the substantive rights of the parties.

[B] THE PRE-REQUISITES FOR MULTI-CONTRACT ARBITRATION UNDER ART. 10 OF THE CEPANI RULES 2013 IS NOT MET IN THE INSTANT CASE

44. Art. 10 of the CEPANI Rules allow for the claims arising out of different contracts to be settled in the same arbitration only on the fulfillment of two conditions [*Art. 10(1), CEPANI*

ARBITRATION RULES 2013]. For first, the parties should have agreed to settle their dispute in accordance with the CEPANI Rules. For second, the parties have agreed to settle their claims in the same set of proceeding. The Claimant has argued that both these conditions have been fulfilled in the present dispute [*CLAIMANT MEMORANDUM, paras. 73-78*]. The Respondent contends that this claim of the Innovative Cancer Treatment Ltd. is not correct and the requirements are not met in the instant case.

45. For the first condition, Art. 23 of the FSA lays down that before the dispute is subject to arbitration under the CEPANI Rules, both the parties will resolve the dispute through negotiations, which if it fails, will be settled through mediation [*CLAIMANT EXHIBIT NO. 2, p. 11 Art. 23(1), Art. 23(2); PROCEDURAL ORDER 2, p. 58 para. 11*]. Therefore, it cannot be said that the parties validly agreed to the recourse of arbitration under the CEPANI Rules as the *first resort* and the recourse of arbitration is taken only when the pre-decided mechanism of negotiation and mediation has failed between the parties. Moreover, the dispute resolution clause of the SLA does not talk about the recourse to arbitration at all [*CLAIMANT EXHIBIT NO. 6, p. 19 Art. 23*]. The entire SLA does not deal with CEPANI Rules in any manner whatsoever. Thus, it is clear that the parties in both the agreements have not *validly* agreed to settle their dispute in accordance with the CEPANI Rules.

46. For the second condition, there is nothing to show from all the correspondences and the two agreements signed between the Hope Hospital and Innovative Cancer Treatment Ltd. that the parties *explicitly or implicitly* agreed to have their claims settled in the same arbitration. In other words, there is no pre-agreed consolidation of claims clause in both the FSA as well as the SLA. Moreover, the Claimant has also not put forth any substantives either to prove that the parties have agreed to settle their disputes in a single proceeding. Therefore, the Respondent had neither agreed at the time of concluding the two contracts nor has it agreed now to settle both the disputes in the same proceeding [*ANSWER TO REQUEST FOR ARBITRATION, p. 31 para. 3*]. The Claimant has argued that since the matters in both the disputes are related to one another it should be decided in a single set of proceeding [*CLAIMANT MEMORANDUM, para. 75*]. Such reasoning does not conform to the plain reading of Art. 10 of the CEPANI Rules. This would be true only when the two conditions laid down expressly in Art. 10(1) is replaced completely by Art. 10(3) of the CEPANI Rules.

47. Therefore, the present Arbitral Tribunal should hold that the consolidation of the claims arising out of the FSA and the SLA is not permissible as the requirements laid down in Art. 10 of the CEPANI Rules are not met in the instant case.

[C] CONSOLIDATION OF THE ARBITRATION PROCEEDINGS DO NOT FLOW FROM THE AGREEMENTS AND DEALINGS BETWEEN THE PARTIES

48. Although the Claimant has not argued in favor of implied consolidation of claims, a Claimant may contend that the claims arising out of the FSA and the SLA should be heard together based on the nature of the contracts entered by the parties. The Respondent respectfully submits that the claims arising out of the FSA and SLA deal with distinct questions of facts and law and does not contain any *inherently inseparable facts or law* for which it should be dealt in the same arbitration proceeding **(i)**. Furthermore, the claim for hearing both the disputes in a single arbitration proceeding does not flow from both the agreements **(ii)**.

(i) The claims arising out of FSA and SLA does not involve inherently inseparable facts which cannot be decided separately

49. It is a settled position that when the claims arise out of '*inherently inseparable facts or law*', then the arbitral tribunal should rule for consolidation as a mark of '*commercial practicality*' and so as to ensure that there is no denial of justice [*HANOTIAU, pp. 369, 371; SOCIETY OF MARITIME AWARD, 28 November 1989; JAGUAR CASE, 7 December 1994; WESTLAND AWARD, 5 March 1984*]. The same position is reiterated in the CEPANI Rules which states that arbitration agreements concerning matters which are not related to each other gives rise to the presumption that the claims arising out of it should not be heard together [Art. 10(3), *CEPANI ARBITRATION RULES 2013*].

50. The SLA concluded between the Innovative Cancer Treatment Ltd. and the Hope Hospital is a contract with its own terms and conditions along with its separate dispute resolution clause which can be enforced without placing reliance on the previously concluded contract, FSA. The Respondent accepts the fact that the Recital of the SLA lays reference to the FSA, however, none of the provisions of the FSA will be attracted if a separate arbitration is instituted to recover payment under the SLA. Even if the Arbitral Tribunal holds that the SLA does not contain *a specific provision to the contrary* the SLA does not contain any inseparable questions of fact or law by virtue of which the payment dispute related to the active scanning technology cannot be resolved.

(ii) The claim for hearing both the disputes in a single arbitration proceeding does not flow from both the agreements

51. The Claimant has contended that both the disputes should be decided together in accordance with Art. 45 of the FSA [*CLAIMANT MEMORANDUM, para. 69*]. Art. 45 of the FSA certainly envisages for the provisions of the FSA to be applicable to all future contracts entered between the Hope Hospital and Innovative Cancer Treatment Ltd in relation to the purchase of Proton Therapy Facility. However, the same Art. states that such provisions will be applicable only if *contracts do not contain a specific provision to the contrary* [*CLAIMANT EXHIBIT NO. 2, p. 12 Art. 45*]. The dispute resolution clause of the FSA and the SLA are markedly different. In fact, the dispute resolution clause of the SLA does not contain any provision for the referral of the dispute to arbitration at all [*CLAIMANT MEMORANDUM, p. 19*]. The Claimant has stated that both the agreements were signed by people who had the requisite authority to do so [*CLAIMANT MEMORANDUM,* para. 71]. The Respondent reaffirms this statement of the Claimant which further substantiates the point that the parties intended to provide a *specific provision to the contrary* in the SLA and more specifically in relation to the manner of dispute resolution.

52. It is a well-settled principle that when multiple contracts contain arbitration clauses which differ from each other then the argument of implied consolidation of claims does not hold ground [*LEBOULANGER, p. 46-53*; *LEW/MISTELIS/KRÖLL para.* 16-59; *OIAETI ET SOFIDIF V. COGEMA ET AL*]. Similarly, if one of the contracts refers the dispute to be settled by arbitration and the other related contract does not talk about arbitration as a mode of settlement of dispute at all then it cannot be contended that the parties agreed for consolidation of claims [*PRYLES/WAINCYMER, p. 445-455; HANOTIAU, p. 377; BORN, pp. 225, 226; DECISION OF BELGIAN COUR DE CASSATION PAS I, 9th May 1963*]. In the present case, the arbitration agreement of the FSA provides for settlement of the dispute through the recourse of arbitration under the institution of CEPANI [*CLAIMANT EXHIBIT NO. 2, p. 11 Art. 23(3)*]. On the other hand, the arbitration agreement of the SLA talks only about litigation as a mode of settlement of the dispute [*CLAIMANT EXHIBIT NO. 6, p. 19 Art. 23*]. Therefore, by the contrasting arbitration agreements in the FSA and the SLA it is clear that both the parties did not intend the disputes to be heard together even at the time of concluding the latter contract that is SLA.

[D] THE ARGUMENT OF TIME AND COST-EFFICIENT ARBITRATION FOR HEARING BOTH THE CLAIMS TOGETHER IS NOT TENABLE CONSIDERING THE APPLICABLE LAW

53. The Claimant has argued that if the claims arising out of the FSA and the SLA are heard together, the administrative and other expenses incurred by both the parties will be reduced to half [*CLAIMANT MEMORANDUM, paras. 79-81*]. The Respondent affirms the validity of such a statement [*HASCHER, pp. 127, 136; KING, p. 293; HANOTIAU, p. 179; CHIU, pp. 53, 55*]. It is,

however, important to acknowledge that any award which is rendered by this Arbitral Tribunal in pursuance of hearing both the claims together can be set aside and unenforceable [*Art. 34, UNCITRAL ML; Art. V, NY CONVENTION*].

54. Art. 34(2)(a)(iii) deals with the setting aside of the award if the dispute is beyond the scope of arbitration. The wordings of Art. 23 of the SLA certainly implies that the parties did not contemplate or intend both the disputes to be heard together, especially when there is a clause in the SLA which vests the right with the both parties to bring any claims in the courts of Mediterraneo and Equatoriana [*CLAIMANT EXHIBIT NO. 6, p. 19 Art. 23(2)*]. Also, the arbitral award rendered by this Arbitral Tribunal could be set aside under Art. 34(2)(a)(iv) for the arbitral procedure not being in accordance with the agreement of the parties as the parties never agreed to hearing of both the claims together.

55. Moreover, the UNCITRAL ML does not talk about the consolidation of the claims or multi-contract arbitration. In both the 1985 as well as the 2006 version of the UNCITRAL ML the drafter's had considered the inclusion of provisions of consolidation of claims but eventually it refused to do so [*UNCITRAL WORKING GROUP REPORT 1985, p. 287; UNCITRAL WORKING GROUP REPORT 2006*]. Under these circumstances, the Arbitral Tribunal should give effect and enforce the arbitration agreement as agreed between the parties [*Art. 8, UNCITRAL ML*]. Since, the arbitration agreement in the instant case does not mention the consolidation of the claims arising out of the FSA and the SLA, the present Arbitral Tribunal lacks the requisite power to hear both the claims together. Also, it will be inconsistent to the New York Convention to allow for consolidation of the claims by the Arbitral Tribunal when the parties have not agreed so in their arbitration agreement [*BORN, pp. 224, 225; Art. II, NY CONVENTION*].

56. Therefore, it is respectfully submitted that the claims of time and expense convenience for the parties is certainly outweighed and will be no longer tenable if the award is set aside. It will eventually mean re-hearing of the entire dispute again which will take a much longer time and it will be a much more costly affair for both the parties.

[E] IN ANY CASE, THE CONSOLIDATION OF CLAIMS WILL FRUSTRATE THE RIGHT OF THE RESPONDENT TO APPOINT THE ARBITRATOR BASED ON THE EXPERTISE REQUIRED FOR THE CASE

57. If the Arbitral Tribunal comes to the conclusion that CEPANI Rules 2005 are not applicable in the instant case and the consolidation of claims is permissible under Art. 10 of the CEPANI Rules, 2013, the Respondent requests the Arbitral Tribunal to acknowledge the fact such a

decision will not be in consonance with the right of the Hope Hospital to appoint an arbitrator of its own choice based upon the expertise required for the present case.

58. It is the paramount duty of the Arbitral Tribunal to pass an award which is enforceable and cannot be set aside [*BORN, p. 2537; GUNTHER, p. 135*]. An arbitral award will be unenforceable and can be set aside if the composition of the arbitral tribunal is not in consonance with the agreement of the parties [*Art. 34(2)(a)(iv), Art. V(1)(d), NY CONVENTION*]. The Claimant has argued that the right of the Respondent to appoint an arbitrator of its own choice is not affected if both the claims are heard together [*CLAIMANT MEMORANDUM, paras. 82-83*]. The Respondent, however, does not feel the same and respectfully submits that if both the claims are heard together then it will frustrate the right of the Respondent to appoint an arbitrator of their own choice based upon the expertise required for the case.

59. One of the perceived and principal disadvantages of settling both the claims together in the same arbitration proceeding relates to the appointment of the arbitrator and the composition of the Arbitral Tribunal [*BERNINI, pp. 161, 163; VEEDER, p. 310; PLATTE, pp. 67, 74-77*]. The right of each party to appoint an arbitrator of its own choice is an inviolable feature of international commercial arbitration which cannot be derogated from [*HERRLIN, pp. 131-135; DE BOISSESON, pp. 147, 150*]. Even if the Arbitral Tribunal comes to conclusion that the matters are interrelated to each other the Respondent submits that its right to appoint the arbitrators based on the expertise trumps the interrelation of the matters for the hearing of the disputes together.

60. The Respondent has nominated Professor Bianca Tintin as the arbitrator for the payment under the FSA [ANSWER TO *REQUEST FOR ARBITRATION, p. 31 para. 3*]. The Respondent had clarified that the nomination of Professor Bianca Tintin does not imply that it has consented to both the disputes to be decided in a single arbitration and for the sake of convenience it has nominated Ms Christina Arrango for the arbitration under the SLA [ANSWER TO *REQUEST FOR ARBITRATION, p. 31 para. 3*].

61. It is a settled practice in the international commercial arbitration cases that the arbitrators are appointed in nexus with the expertise required to deal with the case [*REDFERN/HUNTER, p. 259*]. In cases, where the parties have been vested with the right to appoint one arbitrator each as per the arbitration agreement, the parties have the right to appoint the arbitrator taking into consideration the expertise required for the case [*STIPANOWICH, pp. 831, 871; SEPPALA, p. 1*]. The Respondent is not implying that expertise and professional qualification is a pre-requisite necessity for the appointment of the arbitrator, however, the party has every right to appoint an arbitrator based upon its choice as suitable for the case [*BOND, pp. 1, 6; WEBSTER, p. 261*].

62. Professor Bianca Tintin is a lawyer and accountant by profession [*PROCEDURAL ORDER 2, p. 60 para. 19*]. The purpose of appointing Professor Bianca Tintin for the claim arising out of the FSA is that the primary issue in the dispute arising out of the FSA is in relation to the misrepresentation of the cost-benefit analysis and the viability of pre-sales Budgeting analysis provided by the Innovative Cancer Treatment Ltd to the Hope Hospital [*REQUEST FOR ARBITRATION, p. 7 paras. 16-18*]. The Respondent feels that Professor Bianca Tintin will be more appropriate and better suited to deal with the case as the dispute inevitably hinges around the question of *commercial viability* of the proton therapy facility [*CLAIMANT EXHIBIT NO. 7, p. 21 para. 2*].

63. On the other hand, Ms. Christina Arrango is a trained engineer [*PROCEDURAL ORDER 2, p. 60 para. 19*]. The primary issue in the dispute arising out of the SLA is in relation to the inability of the software of the active scanning technology to calculate accurate targets and cope with the respiratory movements of the patients due to which the active scanning technology has been rendered useless for multiple purposes [*CLAIMANT EXHIBIT NO. 7, p. 21 para. 3*]. The technical nature of the dispute involved will be better dealt by someone who has a prior knowledge in this regard and it is with this understanding the Respondent has appointed Ms. Christina Arrango as its arbitrator for the claims arising out the SLA. Therefore, it is amply clear that the Respondent's request for the appointment of two different arbitrators based upon the expertise and professional qualification is reasonable and legitimate considering the circumstances of the dispute.

64. **CONCLUSION**: The payment claims arising out of the FSA and the SLA should not be heard together in the same arbitration proceeding as the parties never explicitly or implicitly agreed for the consolidation of the claims in their dealings with each other. Also, hearing both the claims together is not permissible by the applicable CEPANI Rules and doing so will only mean taking away the right of the Respondent to appoint an arbitrator of their own choice.

THIRD ISSUE: THE NEW STANDARD TERMS WERE NEVER INCORPORATED IN THE SLA.

65. The CISG does not contain any special rules regarding the incorporation of Standard Terms in a contract but it is a settled position of law that when CISG is applicable to an international sales contract, it is also applicable to the effective inclusion of Standard Terms [*SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL 3rd Ed., Art. 8 paras. 55-56; MACHINERY CASE, 31 October 2001*]. At the time when the CISG was drafted, a proposal was made to expressly

regulate the incorporation of Standard Terms and Conditions in the CISG. This proposal was, however, rejected because it was held that the CISG already contained rules for inclusion of the Standard Terms [*SCHLECHTRIEM/SCHWENZER/SCHROETER 3rd Ed., Art. 14 para. 33*].

66. Incorporation of Standard Terms is governed by the provisions of contract formation under the CISG [*KRUISINGA, p. 71; KRÖLL/MISTELIS/PERALES, Art. 14 para. 38 TANTALUM POWDER CASE, 31 August 2005*]. A sales contract is concluded under CISG when an offer [*Art. 14, CISG*] by the offeror is accepted by the addressee [*Art. 18, CISG*]. Standard Terms are incorporated in a contract if they were made part of the 'offer' and were duly accepted by the addressee, which has to be interpreted in the light of Art. 8 of CISG [*FERRARI/FLECHTNER/BRAND, p. 188; MANKOWSKI, Art. 14 para. 21; MACHINERY CASE, 31 October 2001*].

67. The Claimant contends that the New Standard Terms were effectively incorporated in the SLA [*CLAIMANT MEMORANDUM, para. 119*]. This contention of the Claimant is false. Contrary to their claim, a mere reference for incorporation of Standard Terms is not sufficient **[A]**. Further, Respondent did not have reasonable opportunity to take notice of the content of the New Standard Terms **[B]**. In any case, the New Standard Terms failed to incorporate in the SLA due to '*surprising*' clauses **[C]**. Therefore, Respondent requests this Arbitral Tribunal to hold that the New Standard Terms were not validly incorporated to the SLA and therefore, Old Standard Terms validly apply.

[A] MERE REFERENCE FOR INCORPORATION OF STANDARD TERMS IS INSUFFICIENT

68. The standard set for the incorporation of Standard Terms is that they '*should be transmitted or made available in any other way*' [*MAGNUS, p. 320; MACHINERY CASE, 31 October 2001; BROADCASTER CASE, 24 July, 2009*]. The '*duty to transmit*' Standard Terms lies with the offeror and a reasonable attempt has to be made to make the other party aware of the incorporation [*SCHLECHTRIEM/SCHWENZER/SCHROETER 3rd Ed., Art. 14 paras. 56-57; KRÖLL/MISTELIS/PERALES, Art. 14 para. 39*]. The rationale of this stringent requirement is that the burden of informing the other party rests on the offeror [*MACHINERY CASE, 31 October 2001*].

69. Claimant asserts that a reference to the Claimant's website suffices for incorporation of New Standard Terms [*CLAIMANT MEMORANDUM, para. 130*]. On the contrary, a mere reference to the company's website, where the Standard Terms are to be found, does not suffice for the incorporation of such Standard Terms in an international sales contract [*HUBER*, p. 133; *KRUISINGA, p. 76; MAGNUS , p. 323*]. First, as stated above, onus to transmit Standard Terms lies with the Claimant. It is not reasonable for the Respondent to search for Standard Terms on the

Claimant's website. Second, if a Claimant modifies its Standard term, Respondent could never be sure which Standard Term it agreed to by returning to the website at a later stage [*KRUISINGA, p. 77*].

70. It is not disputed that Dr. Eric Vis only provided a web link to their website in the letter dated 5th July, 2011 [*CLAIMANT EXHIBIT NO. 5, p. 17*]. Claimant had 15 more days to provide the Respondent with the New Standard Terms but they completely failed to do so. It is also pertinent to mention here that the Claimant attached the draft SLA in the same letter, but failed to attach the New Standard Terms with the letter. Thus, Claimant's contention of making the New Standard Terms available to the Respondent is untenable as they failed to discharge the onus of transmitting the New Standard Terms to the Respondent.

71. Furthermore, according to Art. 9(1) the parties are bound by the practices that they have established between themselves [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM 2nd Ed., p. 97 para. 14*]. Claimant had wrongfully asserted that the Respondent was using Internet to enter into contracts. Claimant, as all the evidence is to the contrary [*CLAIMANT MEMORANDUM, para. 129*]. During the four year commercial relationship, the parties communicated through letters and couriers and never used electronic communication [*CLAIMANT EXHIBIT NO. 1, p. 9; CLAIMANT EXHIBIT NO. 3, p. 14; CLAIMANT EXHIBIT NO. 7, p. 21*]. Further, it is untenable to say that just because Respondent had an email address it was using internet. Thus, there was an established practice to negotiate through courier and using internet for delivery of New Standard Terms was against such established practice. Claimant had a duty to make available the New Standard Terms to the Respondent by courier if they wanted the New Standard Terms incorporated.

[B] RESPONDENT DID NOT HAVE REASONABLE OPPORTUNITY TO TAKE NOTICE OF STANDARD TERMS

72. Art. 8 has imposed additional conditions for the effective incorporation of the Standard Terms. First, there should be a clear intention of the offeror to include Standard Terms and it must be apparent to the offeree. In addition to this, recipient of the offer, which is supposed to incorporate the Standard Terms, must have the possibility to become aware of them in a reasonable manner [*BROADCASTERS CASE, 24 July 2009*].

73. Essentially, there is a general principle accepted that the Standard Terms should be made available to the other party, it is necessary that the Standard Terms must be in a language that the recipient could reasonably be expected to understand [*SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL 3rd Ed., Art. 8 paras. 60; MOBILE CAR PHONES CASE, 21 April 2004*]. Therefore, Standard terms that are in a different language will not be incorporated as it could not be reasonably

expected of the recipient to understand that foreign language [*SCHLECHTRIEM/SCHWENZER/SCHROETER 3rd Ed., Art. 14 paras. 56-57*]. This holds true even for international contracts as the parties to the contract come from different countries, having diverse culture, language.

74. During the negotiations, Dr. Eric Vis had promised to make the translated copy of the New Standard Terms available to the Respondent as the New Standard Terms were only available in Mediterranean [*CLAIMANT'S EXHIBIT NO. 5, p. 17*]. The English Translation of the Standard Terms was only uploaded after the contract was concluded between the parties on 21st July, 2011 [*PROCEDURAL ORDER 2, p. 63 para. 32*]. On 14th July, the Respondent made the effort to check the Standard Terms on the webpage provided by the Claimant but as they were in Mediterranean, Respondent failed to understand them [*PROCEDURAL ORDER 2, p. 63 para. 33*].

75. Claimant erroneously contends that the Respondent was aware of the contents of the New Standard Terms. Its belief is based on the fact the New Standard Terms and Old Standard Terms are similar in content and therefore, Respondent was aware of content of New Standard Terms [*CLAIMANT MEMORANDUM, para. 125*]. It is submitted that as the New Standard Terms were available only in Mediterranean, Respondent could not decipher its contents, let alone understand the similarities between the New Standard Terms and Old Standard Terms. Thus, Respondent was not aware of contents of New Standard Terms and they cannot be incorporated in SLA.

76. Further, it has been held that Standard Terms would be incorporated if they were understood by any employee of the offeree [*MOBILE CAR PHONES CASE, 21 April 2004*]. Claimant contends that an employee of the Respondent could speak Mediterranean and therefore, the Standard Terms stand included. This argument of the Claimant is untenable due to many reasons. First, this said person was only present at the first meeting between the parties negotiating SLA and did not attend any meeting after that, which were all conducted in English [*PROCEDURAL ORDER 2, p. 63 para. 35*]. Second, it is clear from the hospital records that he was on leave from 5th July, 2011 to 20th July, 2011 [*RESPONDENT EXHIBIT NO. 2, p. 37*]. Thus, no employee of the Respondent could comprehend the New Standard Terms written in Mediterranean till SLA was concluded.

[C] ALTERNATIVELY, NEW STANDARD TERMS WERE NOT INCORPORATED AS THEY CONTAIN '*SURPRISE*' CLAUSE

77. Where the Standard Terms of a party have been successfully incorporated into a contract according to the rules set out above, the other party is bound by those terms whether it has read them or not, or is aware of their contents or not. An important exception to this rule, however,

states that, notwithstanding the acceptance of Standard Terms, the offeree would not be bound by them as their content, language or presentation is of such character that it could not be expected by the offeree [*UNIDROIT PRINCIPLES, Art. 2.1.20; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL 3rd Ed., Art. 8 para. 63*]. Therefore, where the terms are of such a nature that the other party could not reasonably have expected them, such '*surprising terms*' should not form part of the consensus between the parties [*CISG-AC OPINION NO. 13, Rule 7*]. This provision reflects the principle of good faith and fair dealing required by Art. 1.7 of the UNIDROIT Principles [*NAUDE, pp. 330-331*].

(i) UNIDROIT Principles supplement CISG

78. According to Art. 7(1), international character of the CISG, uniformity of application and good faith should be the basis for interpretation of terms under the CISG [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM 2nd Ed., p. 96 para. 10*]. The directives in the Preamble of CISG articulate a unification of law to promote international trade and possible gaps shall be settled by application of UNIDROIT Principles [*BONELL, p. 318; ENDERLEIN/MASKOW, p. 20*].

(ii) Standard Terms are '*surprising*' due to content

79. A particular term contained in Standard Terms may come as a surprise to the adhering party first by reason of its content [*UNIDROIT PRINCIPLES, Art. 2.1.20*]. This is the case whenever the content of the term in question is such that a reasonable person of the same kind as the adhering party would not have expected it in the type of standard terms involved. In determining whether or not a term is unusual, regard must be had to the individual negotiations between the parties. Dr. Eric Vis in his letter dated 5th July, 2011 had informed the Respondent that the changes in the New Standard terms are '*minor in nature and hardly affect our relationship*' [*CLAIMANT EXHIBIT NO. 5, p. 17*]. The Respondent had no reason to doubt the veracity of Dr. Eric Vis statement. Respondent could never envisage that the Claimant had been planning to submit their contractual relationship with the Respondent to a whole different law. Therefore, Section 22 of the New Standard Terms being a surprising clause was never incorporated in the contract.

(iii) No express acceptance of '*surprising terms*' by the Respondent

80. The Standard Terms stand incorporated if the offeree knew about the '*surprising*' nature of the Standard Terms and expressly accepted it [*UNIDROIT PRINCIPLES, Art. 2.1.20*]. Therefore, when a party is aware of the unusual clause in the Standard Terms and agrees to it, interpretation

according to Art. 8 of CISG lead to its incorporation [*LAUTENSCHLAGER, p. 283*]. The Claimant was well aware about the changes in the New Standard Terms but failed to inform the Respondent. Furthermore, even when one member of Respondent's negotiation team explicitly asked Dr. Eric Vis about the change in liability regime, he stated that as far as he had understood, the major change was limitation of liability to double the price paid for the equipment [*PROCEDURAL ORDER 2, p. 62 para. 31*]. Dr. Vis made no mention of subjecting their contractual relationship to a whole new law. Additionally, Standard Terms written in a foreign language can be '*surprising*' to the offeree as they could not be reasonably expected to understand all their implications, especially in an international transaction [*UNIDROIT PRINCIPLES, Art. 2.1.20*]. As stated above, Respondent was never provided with the translated copy of New Standard Terms and therefore was never aware of the content of the New Standard Terms, let alone expressly accept the '*surprising*' clauses.

81. **CONCLUSION**: The New Standard Terms were never effectively incorporated in the SLA as the Claimant failed to make the New Standard Terms available to the Respondent. Further, the content of the New Standard was in Mediterranean which the Respondent cannot be reasonably be expected to understand. In any case, Section 22 of the New Standard Term was a '*surprising*' clause which was not effectively incorporated.

FOURTH ISSUE: IN ANY CASE, EVEN IF THE NEW STANDARD TERMS APPLY TO THE SLA, THE CHOICE OF LAW CLAUSE ENVISAGES THE APPLICABILITY OF DOMESTIC LAW OF MEDITERRANEO

82. The Claimant contends that the Section 22 of the New Standard Terms envisages the applicability of CISG but [*CLAIMANT MEMORANDUM, para. 144*], on the contrary, Respondent asserts that non-harmonized Mediterranean law governs SLA. Further, unclear terms of the New Standard Terms lead to an interpretation facilitating application of domestic law of Mediterraneo **[A]**. In any case, CISG has been impliedly excluded by the parties **[B].**

[A] UNCLEAR TERMS IN THE NEW STANDARD TERMS LEAD TO AN INTERPRETATION FAVOURING THE RESPONDENT, GIVING EFFECT TO *CONTRA PROFERENTEM* PRINCIPLE

83. *Contra Proferentem* is an internationally well known rule of interpretation and according to commentators it applies to CISG as well [*HONNOLD, para. 107.1; MAGNUS/STAUDINGER, Art. 8 para 18; TEST TUBES CASE, 31 March 1995*]. The rule states that if the contract terms provided by one party are unclear, then, an interpretation against that party will be adopted

[*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM 2nd Ed., p. 133 para. 47; CYSTEINE CASE, 7 January 2000; AUTOMOBILE CASE, 31 March 2008*]. Therefore, it places the burden on the party who prepared the communication or who drafted the contract, and he must bear the risk of its possible ambiguity [*SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL 3rd Ed., Art. 8 para. 63; HONNOLD, p. 107.1*]. This assumes particular importance in international contracts as parties belong to different cultures, languages and business backgrounds. It is an undisputed fact that the New Standard Terms were drafted by the Claimant and assumed to be applicable to the SLA [*CLAIMANT EXHIBIT NO. 9, p. 24*]. The Claimant failed to provide a translated copy of the New Standard Terms due to which Respondent never got informed of its contents. Further, the Claimant led the Respondent to believe that the governing law applicable to the SLA remained unchanged. Dr. Vis had assured the Respondent that the changes were minor and would hardly affect their relationship and Respondent had no reason to doubt the veracity of Dr. Vis's statement [*RESPONDENT EXHIBIT NO. 2, p. 37*].

84. Therefore, it is clear that the effect of Section 22 of the New Standard Terms was unclear in the mind of the parties. The Claimant requests the Arbitral Tribunal to give effect to the principle of *contra proferentem* by adopting the interpretation against the Claimant and declare domestic law of Mediterraneo as the governing law of the SLA.

[B] THERE IS AN IMPLICIT EXCLUSION OF CISG BY THE PARTIES

85. The most dominant theme of the CISG is its non-mandatory nature. Party autonomy is a principle enshrined under the CISG and the parties to a contract can choose to 'opt out' of CISG if they so desire [*FERRARI I, p. 86; PRINTING SYSTEM AND SOFTWARE CASE, 4 December 1996*]. The source of this autonomy is contained in Art. 6 of CISG which states that "*the parties may exclude the application of [the] Convention or, subject to Article 12, derogate from or vary the effects of any of its provisions.*" CISG can be excluded from a sales contract implicitly as well [*RHEINLAND VERSICHERUNGEN V. ATLAREX, 12 July 2000; LEATHER GOODS CASE, 9 July 1997*]. This becomes clear in the light of the Vienna Conference where majority of the delegation shot down the proposal according to which derogation from CISG could only happen "expressly" [*SECRETARIAT'S COMMENTARY, p. 85-86*].

(i) The 'Choice of law' clause envisages applicability of domestic law of Mediterraneo

86. It has been held that CISG governs sales contracts where the parties have places of business in different nations, the nations are CISG signatories, and '*the contract does not contain a choice of law provision*' [*AMCO UKRSERVICE V. AM. METER CO., 29 March 2004; AMERICAN BIOPHYSICS V.*

DUNOIS MARINE SPECIALITIES, 30 January 2006]. Thus, by electing a state law in the 'choice of law' clause, parties exercise their autonomy to implicitly exclude application of CISG from the sales contract. Therefore, Claimant's assertion that CISG would automatically get incorporated in the SLA is without merit [*CLAIMANT MEMORANDUM, para. 156*]. By choosing "*law of Mediterraneo*", Claimant made it clear that they did not want CISG to apply to SLA but envisaged application of non- harmonized law of Mediterraneo.

(ii) Alternatively, any 'reasonable person' in the shoes of the Respondent would have believed that governing law was the domestic law of Mediterraneo

87. Implicit derogation from the CISG has been decided on the touchstone of Article 8 of the CISG [*KROLL/MISTELIS/PERALES, Art. 8 paras. 1-2*] Art. 8 (2) lays down the test, according to which conduct of the Claimant is to be interpreted according to the understanding of a reasonable person in the shoes of the Respondent [*HONNOLD, para. 107.1*]. This '*reasonable person*' refers to a person with the same technical skills, linguistic background, and knowledge of prior dealings and past negotiations that took place between the parties [*FARNSWORTH, p. 98*]. It is an uncontested fact that the New Standard Terms were drafted by the Claimant and assumed to be applicable to the SLA [*CLAIMANT EXHIBIT NO. 9, p. 24*]. It is clear from the above arguments that the Respondent was never provided with the translation of the New Standard Terms, due to which, it never got informed of the contents of the New Standard Terms, including Section 22 [*RESPONDENT MEMORANDUM, p. 25 paras. 74, 75*].

88. Further, Art. 8 (3) provides that negotiations between the parties should be taken into account while interpreting the contract terms [*CISG-AC OPINION NO. 13, Rule 9*]. Claimant led the Respondent to believe that the governing law of the contract remained unchanged. First, never during the entire contractual relationship did Claimant ever mention about applicability of CISG. Second, Dr. Eric Vis had assured the Respondent that the changes were minor and would hardly affect their relationship and Respondent had no reason to doubt the veracity of Dr. Vis statement [*RESPONDENT EXHIBIT NO. 2, p. 37*]. Thus, a reasonable person in place of Respondent would be under the impression that non-harmonised law of Mediterraneo was the governing law to the SLA.

89. **CONCLUSION**: Respondent requests the Arbitral Tribunal to hold that Section 22 of the New Standard Terms envisages the applicability of non- harmonized law of Mediterraneo as CISG was implicitly excluded from application. Further, effect of Section 22 was unclear to the parties because of which interpretation favouring the Respondent should be taken, keeping in mind the *contra proferentem* principle.

FIFTH ISSUE: THE SLA DOES NOT CONSTITUTE A SALES OF GOODS CONTRACT UNDER CISG

90. The Claimant has asserted that the SLA concluded between the Innovative Cancer Treatment Ltd. and Hope Hospital regarding the transfer of Active Scanning Technology, for the equipment and the software, constitutes an agreement of '*sale of goods*' under CISG [*CLAIMANT MEMORANDUM, p. 15 para. 85*]. This assertion is wrong as the SLA does not satisfy the basic requirements for application of CISG under its Art. 1(1)(a).

91. The two basic requirements for the SLA to be governed under CISG is that the contract is for 'sale' and it deals with 'goods' [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM 2nd Ed., p. 26 para. 13*]. Though the Claimant has made assertions to the contrary, these two requirements of CISG are not fulfilled by the SLA. The Claimant has argued that the software supplied with the third treatment room constitute 'goods' under Art. 1 of CISG [*CLAIMANT MEMORANDUM, para. 85*]. It has also argued that the software delivered under the SLA was 'sold' to the Respondent and not licensed [*CLAIMANT MEMORANDUM, para. 112*]. Both these assertions are without any legal or factual basis.

92. Therefore, the Respondent requests the Arbitral Tribunal to declare that the things delivered (i.e. software and third treatment room) under the SLA do not constitute 'goods' as envisioned under Art. 1 of CISG **[A].** The SLA licensed the use of software to the Respondent and therefore cannot be constructed as sale under CISG **[B].**

[A] THE THINGS DELIVERED UNDER THE SLA DO NOT CONSTITUTE 'GOODS' AS REQUIRED UNDER ART. 1 OF CISG

93. The SLA was for the sale and purchase of third treatment room. It included the building, magnets and the required software [*CLAIMANT EXHIBIT NO. 6, p. 18 Art. 2*]. Out of the total value of the SLA, 40% was constituted by materials, 50% was development, testing and installation of software and the remaining 10% was represented by the training for personnel [*RESPONDENT EXHIBIT NO. 3, p. 39*].

94. The materials delivered under the SLA which may constitute 'goods' under Art. 1 of CISG only amounted to 40% of the value of the contract and not a preponderant part of the contract. Therefore, CISG will not be applicable to the SLA as the software being delivered is covered under the term 'goods' as envisaged under Art. 1 of CISG **(i)**. Even if the Arbitral Tribunal holds that software is covered under CISG, it will be excluded in this particular case by the virtue of Art. 3(2) as the preponderant part of the obligations under the SLA were services **(ii)**.

(i) The term 'goods' used in Art. 1 of CISG does not cover Software

95. The sphere of application of CISG is limited only to 'goods' by Art. 1. Though the CISG itself does not define the term 'goods', there is a consensus among the leading scholars and courts that CISG only applies to tangible, corporeal and moveable things [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM 2nd Ed., p. 28 para. 20; HANNOLD, p. 51; MARKET STUDY CASE, 26 August 1994*]. It is also reinforced by the fact that the term 'goods' in the English version of CISG and *marchandises* in the French version are imported from corresponding domestic laws where they again represent only tangible objects [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM 2nd Ed., p. 28 para. 20; CZERWENKA, p. 147*].

96. There are numerous provisions within CISG also which show that the 'goods' should be physical tangible objects [*HANNOLD, p. 52*]. Art. 35 puts obligations on the seller regarding packaging of the goods to be delivered, Art. 46 discusses replacement or repair of defective parts, Art. 67 to 69 talk about shipment and damage during transit and Art. 85 to 88 lay down requirements regarding preservation and warehousing to prevent loss or deterioration to goods.

97. Tangibility is defined as having physical form or being capable of being perceived by the senses [*BLACK'S LAW DICTIONARY*]. A software essentially is a set of '*intangible instructions or commands*' and not a tangible object [*ST ALBANS CITY AND DC V INTERNATIONAL COMPUTERS LTD, 1996*]. In addition to being intangible, software is generally also described as a service and intellectual property [*MOWBRAY, p. 123*]. Both services and intellectual property are also excluded from sphere of application of CISG [*MOWBRAY, p. 123; Art. 3(2), CISG*].

98. There have been instances where Courts have applied CISG to sales transactions involving software but only when it is embedded in physical tangible medium and then delivered to the buyer [*MOWBRAY, p. 126; COMPUTER CHIP CASE, 17 September 1993*]. This type of application of CISG to software embedded in physical medium is argued for by some scholars and courts by drawing an analogy to transfer of music on audio discs [*MOWBRAY, p. 126; FRASER, p. 212*]. The Claimant has relied on this distinction to argue that Software delivered under SLA is 'goods' within the provisions of CISG [*CLAIMANT MEMORANDUM, para. 102*] but this is clearly based on a wrong understanding of facts of the case. The Claimant has misrepresented facts by stating that *"software is custom made and* ***main part was preinstalled*** *at CLAIMANT'S manufacturing plant before delivery and installation at the treatment facility. Thus, they are physical and movable objects as required under CISG"* [*CLAIMANT MEMORANDUM, para. 103*]. This argument is without any merit as the facts clearly state that the main part of the software was downloaded by Claimant's engineers from their own server and computers [*PROCEDURAL ORDER 2, p. 61 para. 23*].

99. The Software in this case was transferred electronically in this case and not delivered on a disk or other physical medium. The Software is therefore, totally intangible and does not take any physical form. Though the Claimant has not argued that software transferred electronically should be covered within the ambit of CISG, there are sufficient provisions within CISG which are contrary to any such inclusion. The Software may be embedded in a tangible physical medium after its delivery but no 'tangible medium' containing the software was transferred in this case [*PROCEDURAL ORDER 2, p. 61 para. 23*]. CISG cannot be applied to such transactions as it only covers tangible goods and evidently contemplates transfer of tangible goods from the seller to the buyer as already established [*MOWBRAY, p. 126; RESPONDENT MEMORANDUM, p. 31 paras. 96*].

(ii) Even if CISG is applicable to Software, the facts of this particular case lead to its exclusion under Art. 3(2)

100. The Claimant has argued that any distinction between standard software and custom made software is unnecessary [*CLAIMANT MEMORANDUM, para. 105*]. They have also asserted that services provided for producing and manufacturing goods are irrelevant as they are covered under Art. 3(1) and not excluded by the virtue of Art. 3(2) [*CLAIMANT MEMORANDUM, paras. 91-94*].

101. Though CISG is applicable to contracts for 'goods' to be manufactured by application of Art. 3(1), it is clearly not applicable to contracts for supply of labour or other services when they constitute the preponderant part of the contract because of Art. 3(2). Most scholars, German Courts and the UNCITRAL Working Group support a complete exclusion of 'custom made software from the ambit of CISG under Art. 3(2) [*MOWBRAY, p. 127; FERRARI, p. 5; COX, p. 11; MARKET STUDY CASE, 26 August 1994*].

102. In some cases, a software to be manufactured may be covered under Art. 3(1) but when the delivery of software is accompanied by various support services like installation, testing, system support and training in addition to manufacture/production of software then the services will constitute a preponderant part of the contract [*GREEN/SAIDOV, p. 172; MOWBRAY, p. 127*]. In order to determine what constitutes a preponderant part of the seller's obligation, reference needs to be made to the comparative values of goods and the services [*SCHLECHTRIEM/BUTLER, p. 25, para. 27; MOWBRAY, p. 128; HONNOLD, p. 51*]

103. Under the SLA, the development, testing and installation of the software constituted 50% of the contract and the training of personnel constituted 10% of the contract. This 60% of the value of

contract is for the services and clearly constitutes the preponderant part of the contract. Therefore, the SLA is not covered under the ambit of CISG.

[B] THE CONTRACT WAS FOR A LICENSE TO USE THE SOFTWARE AND NOT FOR ITS SALE

104. The second basic requirement for inclusion of a contract under Art. 1 of the CISG is that it must be a 'contract for sale' and not a lease or license agreement. Claimant has asserted that the agreement was for the sale of software and not a license as the SLA gave the right for perpetual use [*CLAIMANT MEMORANDUM, para. 115*].

105. Though the term 'sale' itself is not defined anywhere in the CISG, provisions like Art. 30, 41 and 42(2)(a) shed some light on what constitutes a sale under CISG. Under Art. 30, the seller is required to transfer the property in goods, as required under CISG [*MOWBRAY, p. 123*]. If the copyright owner of the software, only grants the licensee the right to use the software, then it does not amount to sale under Art. 1 of CISG [*MOWBRAY, p. 123; SONOO, p. 521*]. In this licensing agreement, the seller retained all the intellectual property rights of the software and only granted a right to use the software [*CLAIMANT EXHIBIT NO. 6, p. 19 Art. 11*].

106. The question whether a transaction is a sale or license depends on the facts of the case and needs to be decided on a case to case basis [*LARSON, p. 480*]. Though there are no CISG specific precedents laying down any objective criteria to distinguish between a sale and license, the US judiciary has recently developed some conditions to segregate a sale from a license [*VERNOR V. AUTODESK, 7 JUNE 2010*]. Art. 7(2) of CISG which deals with gap filling allows a reference to the domestic law as a *ultima ratio* i.e. as a last resort [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM 2nd Ed., p. 109 para. 35; HERBER, Art. 7 para. 31*]. The reliance here is not being placed on the US domestic law but a general principle laid down by the court while dealing with the distinction between a sale and license.

107. In this case while dealing with a SLA similar to one under contention here, the court held that a transaction will be considered a license and not a sale if the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software [*VERNOR V. AUTODESK, 7 JUNE 2010; UNITED STATES V. WISE, 1977*]. Additionally, the court also held that only the right to use software indefinitely will not convert a license into a sale. In the case at hand, the agreement was clearly labeled as licensing agreement [*CLAIMANT EXHIBIT NO. 6, pp. 18-19*]. The Respondent's ability to transfer or sell the software was also completely restricted as the Claimant possessed all the intellectual property related to the software at all the time [*CLAIMANT EXHIBIT NO. 6, p. 19 Art. 11*]. Therefore, the transaction was a license for the use of software and not a sale.

108. CONCLUSION: Art. 1 of CISG limits the sphere of its application to only contracts for *'sale of goods'*. The SLA is not covered under the ambit of CISG as it neither dealt with *'goods'* nor it was a *'sales'* transaction. The term *'goods'* only includes tangible objects and thus software being intangible is excluded from the ambit of CISG. The SLA involved development, testing and installation of the software, all these being services lead to the exclusion of SLA from CISG by Art. 3(2) also. The SLA also falls outside the scope of the term *'sale'* as it is a licensing agreement granting the Respondent with a right to use the software without transferring the intellectual property of the software. Therefore, the SLA does not constitute a *'sale of goods'* under CISG.

REQUEST FOR RELIEF

In the light of the above submissions, the Counsels for Respondent respectfully request the Arbitral Tribunal:

1. To find and hold that it does not have jurisdiction to decide the dispute.
2. To find and hold that the claims arising out of the FSA and the SLA should not be heard together in the same arbitration proceeding.
3. To find and hold that the New Standard Terms have not been valid incorporated in the SLA.
4. To find and hold that the Section 22 of the New Standard Terms envisages applicability of domestic law of Mediterraneo to the exclusion of CISG.
5. To find and hold that the SLA does not constitute a 'sale of goods' under CISG.

Based on these findings, Respondent respectfully requests the Arbitral Tribunal:

1. To dismiss the Claimant's claims in their entirety for a lack of jurisdiction as well as being wholly unmeritorious.
2. To order the Claimant to pay the cost of the arbitration.

CERTIFICATE

We confirm that the following memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person who is not the member of this team.

23 January 2014

Anupam Misra

_____

Kartik Monga

_____

Harshit Neotia

_____

Shailesh Singh

_____