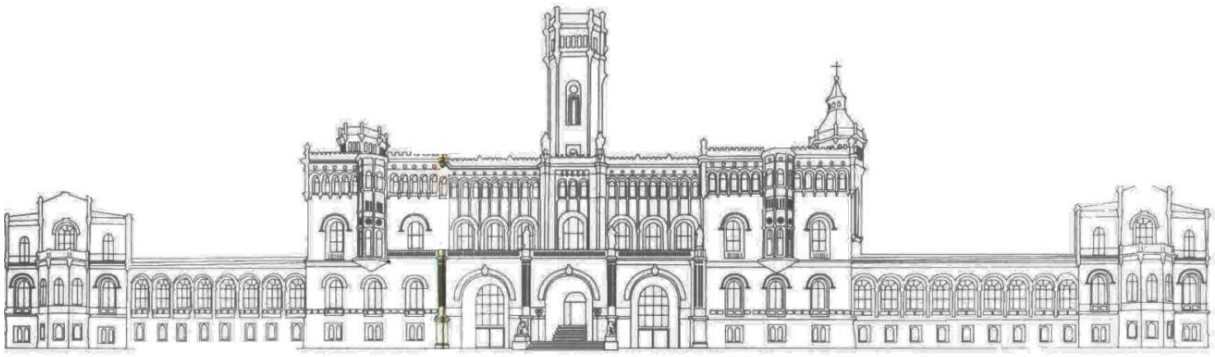
Twelfth Annual

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

15 – 22 March 2015, Hong Kong

MEMORANDUM FOR RESPONDENT



LEIBNIZ UNIVERSITY OF HANOVER

ON BEHALF OF:	AGAINST:
Mediterraneo Mining SOE 5-6 Mineral Street, Capital City Mediterraneo	Vulcan Coltan Ltd. 21 Magma Street, Oceanside Equatoriana and Global Minerals Ltd. Excavation Place 5, Hansetown Ruritania

COUNSEL

Liza Böttger • Greta Eriksen • Michelle Fiekens

Milena Heine • Niels Kurth • Konrad Thibaut

TABLE OF CONTENTS

List of Abbreviations

ABBREVIATION	WORD
Answ.	Answer
App.	Application
Appoint.	Appointment
Arb.	Arbitration
Art(t).	Article(s)
C	Claimant
CF	Confer (compare to)
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Costs, Insurance and Freight
CIP	Carriage and Insurance paid to
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claimant
COO	Chief Operating Officer
e.g.	exempli gratia (for example)
Ed.	Edition
Emerg.	Emergency
et seq.	Et sequens (and following)
Exh.	Exhibit
GER	German
GSM	General Sales Manager
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
INCOTERMS	International Commercial Terms
Join.	Joinder

Ltd.	Limited
m	Million
Memo	Memorandum
Mr	Mister
Ms	Miss
MST	Mediterraneo Standard Time
NJW	Neue Juristische Wochenschrift
No	Number(s)
Ord.	Order
p./pp.	Page/pages
Para(s).	Paragraph(s)
Proc.	Procedural
R	Respondent
Req.	Request
RST	Ruritanian Standard Time
SchiedsVZ	Zeitschrift für Schiedsverfahren
SOE	State-owned enterprise
U.K.	United Kingdom
UCP	Uniform Customs and Practice for Documentary Credits
UML	UNCITRAL Model Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut International pour L'Unification du droit
UPICC	UNIDROIT Principles of International Commercial Contracts
USA	United States of America
USD	United States Dollar
Vol.	Volume

TABLE OF AUTHORITIES

Treaties, Conventions and Laws

ABBREVIATION	TITLE
CISG	Convention on Contract for the International Sale of Goods, Vienna 1980
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1974
PICC	UNIDROIT Principles on International Commercial Contracts, 2004
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006

Rules

ABBREVIATION	TITLE
ICC Rules	ICC International Chamber of Commerce Arbitration Rules 2012

Commentary

AUTHOR/EDITOR	TITLE	CITED IN PARA.
Achilles, Wilhelm	Kommentar zum UN-Kaufrechtsübereinkommen (CISG), 2000 [cited as: *Achilles*]	78
Aschauer, Christian	Use of the ICC Emergency Arbitrator to Protect the Arbitral Proceedings, in ICC International Court of Arbitration Bulletin Vol. 23 No 2, 2012 [cited as: *Aschauer*]	104, 107
Badia, Albert	Piercing the Veil of State Enterprises in International Arbitration, International Arbitration Law Library, Volume 29 Kluwer Law International; Kluwer Law International 2014 [cited as: *Badia*]	16

Baigel, Baruch	The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis, in Journal of International Arbitration Kluwer Law International Volume 31, Issue 1, 2014 [cited as: *Baigel*]	104
Bamberger, Heinz Georg **Roth**, Herbert	Beck'scher Onlinekommentar Bürgerliches Gesetzbuch, München 2014 [cited as: *Bamberger/Roth/Author*]	78
Besson, Sébastian	Piercing the Corporate Veil: Back on the Right Track, Dossier of the ICC Institute of World Business Law: Multiparty Arbitration, 2010. [cited as: *Besson*]	21
Bianca, Cesare Massimo **Bonell**, Michael Joachim	Commentary on the International Sales Law- The 1980 Vienna Sales Convention, Milan 1987 [cited as: *Bianca/Bonell/Author*]	69
Bijl, Martje	Fundamental Breach in Documentary Sales Contracts The Doctrine of Strict Compliance with the Underlying Sales Contract, in European Journal of Commercial Contract Law, January 2009, pp. 19-28 [cited as: *Bijl*]	43, 56
Binder, Peter	International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction, Third Edition London, 2010 [cited as: *Binder*]	111
Blessing, Marc	Introduction to Arbitration – Swiss and International Perspective, Basel 1999 [cited as: *Blessing*]	110
Boog, Christopher	Commentary on the ICC Rules, Article 29, Emergency Arbitrator, Chapter 4, Part II, in Kluwer Law International, 2013 [cited as: *Boog*]	109
Borky, Ron	Understanding and Using Letters of Credit available at https://www.crfonline.org/orc/cro/cro-9-2.html [cited as: *Borky*]	43

Born, Gary B.	International Commercial Arbitration, 2nd Ed.**,** Kluwer Law International 2014 [cited as: *Born*]	37, 105, 110
Bose, Raja **Meredith**, Ian	Emergency Arbitration Procedure: A comparative Analysis, International Arbitration Law Review, Issue 5, 2005 [cited as: *Bose/Meredith*]	104, 107
Bridge, Michael	The International Sale of Goods, 3rd Ed., Oxford 2013 [cited as: *Bridge*]	67
Brunner, Christoph	UN-Kaufrecht – CISG – Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980, Bern 2004 [cited as: *Brunner*]	57, 68, 78
Caemmerer, Ernst **Schlechtriem**, Peter	Kommentar zum Einheitlichen UN-Kaufrecht, München 1995 [cited as: *Caemmerer/Schlechtriem*]	60
Conrad, Nicole **Münch,** Peter **Black-Branch,** Jonathan	International Commercial Arbitration, Standard Clauses and Forms, Basel, 2013 [cited as: *Conrad/Münch/Black-Branch/Author*]	104
Craig, Lawrence **Jaeger**, Laurent	The 2012 ICC Rules: Important Changes and Issues for Future Resolution, The Paris Journal of International Arbitration, 2012 [cited as: *Craig/Jaeger*]	107
Craig, William Laurence **Park**, William **Paulsson**, Jan	International Chamber of Commerce Arbitration, New York 2000 [cited as: *Craig/Park/Paulsson*]	19
Cremades, Bernado M.	Good Faith in International Arbitration [cited as: *Cremades*]	31
Dale, Ignario Corbera	Fundamental Breach of Contract under the CISG in Negotiating and Managing International Sales, Agency and Distributorship Contracts Ljubljana seminar [citedas: *Dale*]	61

Ferrari, Franco	Burden of Proof Under the CISG, Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International 2000-2001 [cited as: *Ferrari*]	27, 61
Ferrari, Franco **Flechtner**, Harry **Brand**, Ronald	The Draft UNCITRAL Digest and Beyond - Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, 2003 [cited as: *Ferrari/Flechtner/Brand/Author*]	85
Ferrario, Pietro	The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?, Journal of International Arbitration 26(5): 647–673 [cited as: *Ferrario*]	27
Fouchard, Phillippe **Gaillard**, Emmanuel **Goldman**, Howard	Fouchard, Gaillard, Goldman on International Arbitration, Dordrecht 1999 [cited as: *Fouchard/Gaillard/Goldman*]	6
Fry, Jason**Greenberg,** Simon **Mazza,** Francesca	The Secretariat's Guide to ICC Arbitration, A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration, France 2012 [cited as: *Fry/Greenberg/Mazza*]	105, 109
Graffi, Leonardo	Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention, in International Business Law Journal, Paris 2003, pp. 338-349 [cited as: *Graffi*]	56
Graffi, Leonardo	Overview of Recent Italian Court Decisions on the CISG, in The European Legal Forum, 2001 [cited as: *Graffi, Overview*]	61
Greenberg, Simon	The 2012 ICC Rules of Arbitration Trend-setting rules for the international business community, 18 Vindobona Journal 51, 2014 [cited as: *Greenberg*]	104

Hanotiau, Bernard	Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law, in Albert Jan van den Berg, International Arbitration 2006, pp. 341-358 [cited: *Hanotiau*]	17, 21
Herber, Rolf **Czerwenka**, Beate	Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf, 1991 [cited as: *Herber/Czerwenka*]	57
Hill,Charles W. L. **Jones,**Gareth R. **Schilling,** Melissa A.	Strategic Management: Theory: An Integrated Approach [cited as: *Hill/Jones/Schilling*]	27
Honsell, Heinrich	Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG), Heidelberg 2010 [cited as: *Honsell/Author*]	60, 68
Huber, Peter **Mullis**, Alastair	The CISG, Munich 2007 [cited as: *Huber/Mullis*]	56, 66, 68, 85, 87
Isik, Fatih	The New Emergency Procedure Under the ICC Rules, available at: http://www.mondaq.com/x/252012/Arbitration+Dispute+Resolution/The+New+Emergency+Arbitrator+Procedure+Under+The+ICC+2012+Rules [cited as: *Isik*]	104
Kröll, Stefan **Mistelis**, Loukas **Viscasillas**, Pilar Perales	UN Convention on the International Sale of Goods (CISG), Munich 2011 [cited as: *Kröll/Mistelis/Viscasillas/Author*]	48, 60, 87
Lamm, Carolyn B. **Aqua,** Jocelyn A.	Defining the Party – Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions In: George Washington International Law Review, Volume 34: 2003 [cited as: *Lamm/Aqua*]	6

Lew, Julian D.M. **Mistelis**, Loukas A. **Kröll**, Stefan Michael	Comparative International Commercial Arbitration, Kluwer Law International 2003 [cited as: *Lew/Mistelis/Kröll*]	6, 16
Lew, Julian M.D.	Commentary on Interim and Conservatory Measures, ICC Arbitration Cases, in ICC International Court of Arbitration Bulletin Vol. 11 No 1 [cited as: *Lew*]	110
Liu, Chengwei	Suspension or Avoidance due to Anticipatory Breach, Perspectives from Arts. 71/72 CISG, the UNIDROIT principles, PECL and Case Law [cited as: *Chengwei*]	69
Lookofsky, Joseph	Understanding the CISG, Copenhagen 2008, 3rd Ed. [citedas: *Lookofsky*]	66
Luig, Eva	Ein Vergleich von UN-Kaufrecht, UNIDROIT-Principles und Principles of European Contract Law, 2003 [cited as: *Luig*]	78
Magnus, Ulrich	The Remedy of Avoidance of Contract Under CISG, General Remarks and Special Cases in Journal of Law and Commerce, pp. 423-436, 2005 [cited as: *Magnus*]	57
Mullis, Alastair	Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases, in Andreas & Jarborg(eds.), Anglo-Swedish Studies in Law, Lustus Forlag, 1998, pp. 326-355 [cited as: *Mullis, Avoidance*]	56, 73
Mullis, Alastair	Termination for Breach of Contract in C.I.F Contracts Under the Vienna Convention and English Law; Is there a Substantial Difference? in Lomnicka, Eva; Morse, C. G. (eds.), Contemporary Issues in Commercial Law: Essays in Honor of Prof AG Guest, Sweet & Maxwell 1997 [cited as: *Mullis, Termination*]	56, 73

Nathan, Bruce	Letter of Credit beneficiary beats issuing bank based on conforming documents and untimely and improper dishonor, in Business Credit, National Association of Credit Management, 2003 [cited as: *Nathan*]	43
Nedden, Jan Heiner **Herzberg,** Axel Benjamin	ICC-SchO, DIS-SchO, Praxiskommentar zu den Schiedsgerichtsordnungen [cited as: *Nedden/Herzberger/Author*]	105
Neumayer, Karl Heinz	Offene Fragen zur Anwendung des Abkommens der Vereinten Nationen über den internationalen Warenkauf. *Recht der Internationalen Wirtschaft (RIW) 2 / 1994,* 99 [cited as: *Neumayer, RIW 1994*]	78
Piliounis, Peter	The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law, in Pace International Law Review Volume 12, Issue 1, April 2000 [citedas: *Piliounis*]	66
Piltz, Burghard	Neue Entwicklungen im UN-Kaufrecht, in NJW 2003, 2056, 2063 [cited as: *Piltz, NJW 2003*]	84
Piltz, Burghard	Neue Entwicklungen im UN-Kaufrecht, in NJW 2005, 2126, 2131 [cited as: *Piltz, NJW 2005*]	84
Redfern, Alan **Hunter,** J. Martin	in Alan Redfern , J. Martin Hunter , et al., Redfern and Hunter on International Arbitration [cited as: *Redfern/Hunter*]	6
Rodler, Irmgard Anna	When are non-signatories bound by the arbitration agreement in international commercial arbitration? University of Chile and University of Heidelberg, Master in International Law (LL.M.) - Investment, Trade and Arbitration [cited as: *Rodler*]	16

Säcker, Franz Jürgen **Rixecker**, Roland	Wiener Übereinkommen über Verträge über den internationalen Warenkauf (CISG), in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 3, 6th Ed., Munich 2012 [cited as: *Säcker/Rixecker/Author*]	66, 99
Schlechtriem, Peter **Butler**, Petra	UN Law on International Sales: The UN Convention on the International Sale of Goods, Berlin, Heidelberg 2009 [cited as: *Schlechtriem/Butler*]	67
Schlechtriem, Peter **Schwenzer**, Ingeborg	Commentary on the UN Convention of International Sale of Goods (CISG) [cited as: *Schlechtriem/Schwenzer/Author*]	48, 56, 76, 87
Schlechtriem, Peter **Schwenzer**, Ingeborg	Kommentar zum UN-Kaufrecht, Munich 2008 [cited as: *Schlechtriem/Schwenzer (GER)/Author*]	60, 84
Schwartz, Eric	The Practices and Experience of the ICC Court, ICC Conservatory and Provisional Measures in International Arbitration, ICC Publication No 519, 1993 [cited as: *Schwartz*]	111
Schwenzer, Ingeborg	The right to avoid the contract, in Annals FLB – Belgrade Law Review, Year LX 2012, No. 3 [cited as: *Schwenzer*]	85
Schwenzer, Ingeborg **Hachem**, Pascal **Kee**, Christopher	Global Sales and Contract Law, Oxford 2012 [cited as: *Schwenzer/Hachem/Kee*]	76
Seliazniova, Tatsiana	Prospective Non-Performance or Anticipatory Breach of Contract (Comparison of the Belarusian Approach to CISG Application and Foreign Legal Experience) in Journal of Law and Commerce, Volume 24: 2004 [cited as: *Seliazniova*]	69

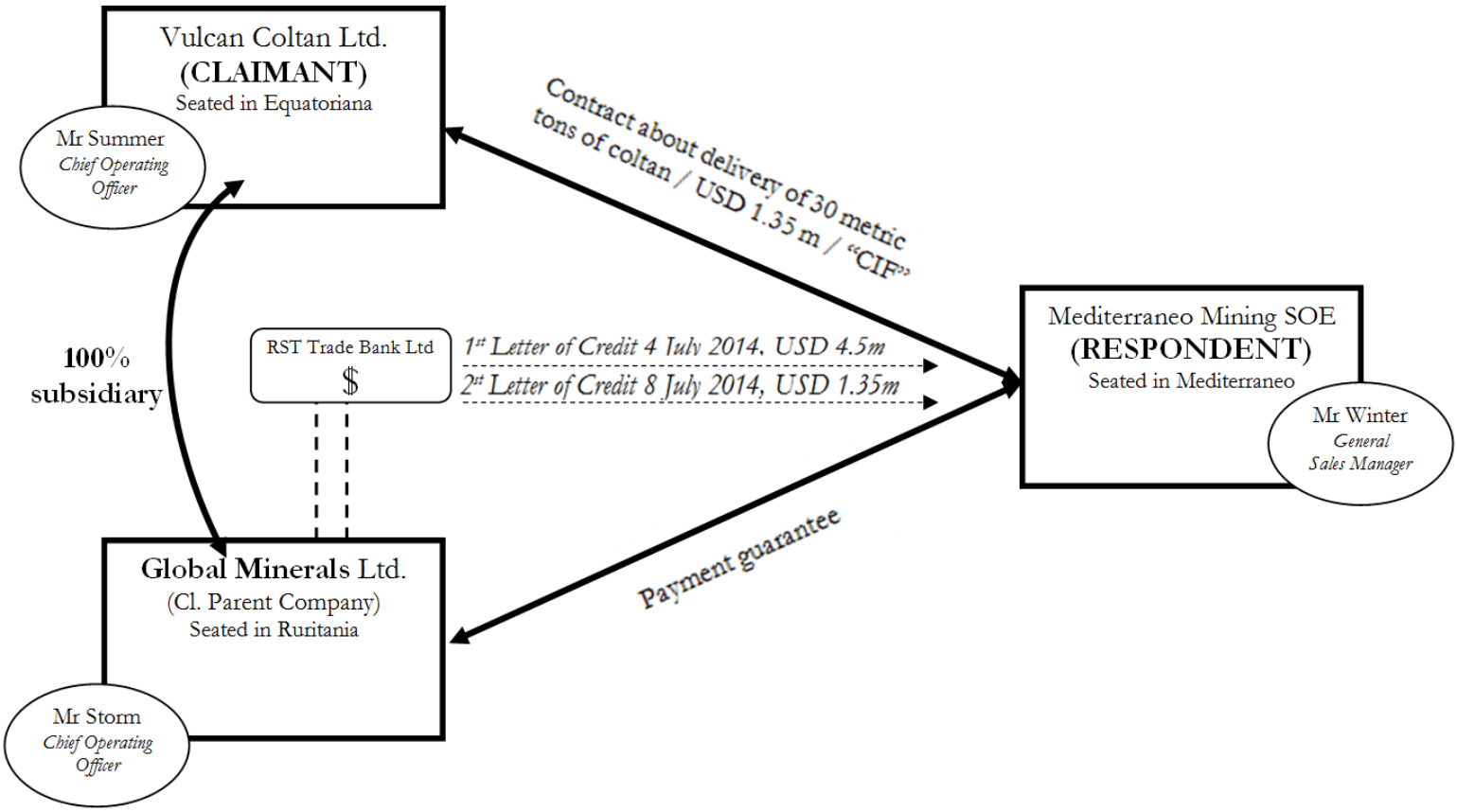
Singh, Lachmi	Caveat emptor: Are decisions more favorable to the seller on matters relating to letters of credit? in Nordic Journal of Commercial Law, 2006 Issue 2 [cited as: *Singh*]	43
Soergel, Hans Theodor	Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG), in Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Vol. 13, 13th Ed., Stuttgart 2000 [cited as: *Soergel/Author*]	78
Sorieul, Renaud	UNCITRAL's Current Work in the Field of International Commercial Arbitration, in Journal of International Arbitration 22(6), 2005 [cited as: *Sorieul*]	111
Staudinger, Julius v.	Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener UN-Kaufrecht (CISG), 3rd Ed., Berlin 2005 [cited as: *Staudinger/Author*]	68, 78, 87
Steingruber, Andrea Marco	Consent in International Arbitration Oxford University Press: 2012 [cited as: *Steingruber*]	6
Tang, Edward Ho Ming	Methods to Extend the Scope of an Arbitration Agreement to Third Party Non-Signatories, LW4635 Research Paper [cited as: *Tang*]	16, 19
Tucker, Lee Anna	Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty, in International Commercial Arbitration Brief 1, Issue 2, 2011 [cited as: *Tucker*]	104
UNCITRAL	Report of the Working Group on Arbitration on the work of its fortieth session, New York 2004 [cited as: *A/CN.9/547*]	111

Vidal, Dominique	The Extension of Arbitration Agreements within Groups of Companies: The Alter Ego Doctrine in Arbitral and Court Decisions, ICC International Court of Arbitration Bulletin Vol. 16 No. 2, 2005 [cited as: *Vidal*]	14
Vogenhauer, Stefan **Kleinheisterkamp**, Jan	Commentary on the Unidroit Principles of International Commercial Contracts (PICC), Oxford 2009 [citedas: *Vogenhauer/Kleinheisterkamp*]	76, 99
von Bernstorff, Christoph	Incoterms 2010 by the International Chamber of Commerce, Cologne 2012 [citedas: *von Bernstorff*]	47
Waincymer, Jeff	Procedureand Evidence in International Arbitration, Kluwer Law International 2012 [cited as: *Waincymer*]	6
Webster, Thomas H. **Buhler,** Michael Dr.	Handbook of ICC Arbitration: Commentary, Precedents, Materials, Third Edition, London 2014 [cited as *Webster/Buhler*]	104
Winsor, Katrina	The Applicability of the CISG to Govern Sales of Commodity Type Goods, in Vindobona Journal of International Commercial Law and Arbitration, 2010, pp. 83-116 [cited as: *Winsor*]	56
Yesilirmak, Ali	Provisional Measures in International Commercial Arbitration, Emergency Arbitral Provisional Measures, International Arbitration Law Library Series Set, Kluwer Law International, 2005 [cited as: *Yesilirmak*]	110
Youssef, Frida	Documentary Risk in Commodity Trade, in United Nations Conference on Trade and Development [cited as: *UNCTAD*]	49, 56, 66, 82
Zeller, Bruno	Damages Under the Convention on Contracts for the International Sale of Goods, 2nd Ed., Oxford 2009 [citedas: *Zeller*]	87

Index of Cases, ordered by countries

Awards

STATEMENT OF FACTS



The parties to this arbitration are Vulcan Coltan Ltd. (hereafter: CLAIMANT), GLOBAL MINERALS Ltd. as additional party and Mediterraneo Mining SOE (hereafter: RESPONDENT).

CLAIMANT is a broker of rare minerals, in particular coltan, based in Equatoriana. CLAIMANT is a 100% subsidiary of **GLOBAL MINERALS**. It was created to enter the market in Equatoriana. It purchases conflict free coltan only.

GLOBAL MINERALS brokers rare-minerals world-wide. It is based in Ruritania.

RESPONDENT is a state-owned enterprise based in Mediterraneo. It is the second largest producer of conflict-free coltan and operates all mines in Mediterraneo.

Coltan is a semi singular mineral composed of two elements, columbite and tantalite. It is a crucial element used for a number of devices in the electronic industry. The market conditions are highly volatile and instable. Price fluctuations are influenced by new electronic innovations as well as political crises.

23 March 2014 CLAIMANT and GLOBAL MINERALS approached RESPONDENT about the delivery of coltan. CLAIMANT intended to buy the goods at the same payment conditions as its parent company GLOBAL MINERALS (p. 34).

28 March 2014 A contract about 30 metric tons of coltan for USD 1.35 m and *"CIF"* delivery conditions was concluded. RESPONDENT insisted on a financial guarantee on the side of GLOBAL MINERALS. Therefore, GLOBAL MINERALS ensured payment by a letter of credit and also endorsed and signed the contract (p. 34). The contract contained an arbitration agreement (clause 20) as well as a jurisdiction clause (clause 21) regarding to interim measures. (p. 7).

25 June 2014 RESPONDENT sent the Notice of Transport to both CLAIMANT and GLOBAL MINERALS (p. 35).

27 June 2014 GLOBAL MINERALS sent a fax to RESPONDENT asking to extend the delivery amount to 100 metric tons of coltan (p. 35). RESPONDENT did not reply.

29 June 2014 The Deputy Prime Minister informed the press about a political crisis in Xanadu, the largest producer of conflict free coltan (p. 36).

04 July 2014 GLOBAL MINERALS issued a letter of credit relating to USD 4.5 m and 100 metric tons of coltan containing *"CIP"* delivery terms. RESPONDENT immediately complained about the letter of credit asking for a new one to be provided immediately (p. 36). At about the same time, news leaked out that the world's largest producer of game consoles had developed a new game console. The price of coltan increased immediately (p. 4).

05 July 2014 GLOBAL MINERALS sent an email to RESPONDENT stating that the letter of credit was in line with the contract (p. 12).

07 July 2014 RESPONDENT declared the contract avoided (p. 13).

09 July 2014 GLOBAL MINERALS provided a 2nd letter of credit relating to 30 metric tons of coltan and *"CIF"* delivery terms. (p. 37). RESPONDENT again declared avoidance as a precautionary measure (p. 44).

11 July 2014 CLAIMANT handed in an application for emergency arbitration and the request for arbitration to the ICC (p. 1).

26 July 2014 The order of the emergency arbitrator was submitted to the parties. In the order RESPONDENT is to refrain from disposing any of the coltan (p. 28).

ARGUMENT

1 CLAIMANT, as buyer, and RESPONDENT, as seller, concluded a sales contract about the purchase of 30 metric tons of conflict free coltan. GLOBAL MINERALS guaranteed CLAIMANT's payment obligation by signing and endorsing the contract. Even though RESPONDENT acted in accordance with the contract at all times, CLAIMANT and GLOBAL MINERALS failed to fulfill their payment obligation forcing RESPONDENT to declare avoidance. Instead of facing the consequences of the fundamental breach, CLAIMANT applied for emergency arbitration under the ICC Rules. The emergency arbitrator wrongfully ordered RESPONDENT to refrain from disposing of the coltan allegedly owed to CLAIMANT. CLAIMANT even argues that GLOBAL MINERALS is not bound by the arbitration agreement ignoring its signature and its role as active party in the negotiations, performance and termination of the contract. However, denying jurisdiction over GLOBAL MINERALS would render the payment guarantee useless.

2 Therefore, RESPONDENT respectfully requests the Tribunal to disregard CLAIMANT's and GLOBAL MINERALS' arguments as they are unsubstantial, unsupported by evidence and contrary to the facts of the case. **First**, the Tribunal has jurisdiction over GLOBAL MINERALS **(Issue 1)**. **Second**, RESPONDENT was entitled to avoid the contract as CLAIMANT and GLOBAL MINERALS failed to pay the purchase price **(Issue 2)**. **Third**, the Tribunal shall not accept CLAIMANT's allegations and lift the order of the emergency arbitrator **(Issue 3)**.

ISSUE I: THE TRIBUNAL HAS JURISDICTION OVER GLOBAL MINERALS

3 RESPONDENT requests the Tribunal to find that GLOBAL MINERALS is bound by the arbitration agreement. Joining GLOBAL MINERALS to the proceedings is necessary to prevent GLOBAL MINERALS from letting its subsidiary, CLAIMANT, become bankrupt as it had done in the past with other subsidiaries *[Answ. Req. Arb., p. 37, para. 26]*. Due to RESPONDENT's bad experiences with subsidiaries of the GLOBAL MINERALS Group, it insisted on a financial guarantee, which was provided by GLOBAL MINERALS. GLOBAL MINERALS and CLAIMANT fundamentally breached the sales contract resulting in significant losses to RESPONDENT. Until problems occurred, GLOBAL MINERALS relied on the contract and even issued payment, the core obligation of the buyer. Now, when it comes to compensation, GLOBAL MINERALS denies responsibility alleging that it never agreed to become a party to the contract or the arbitration agreement. However, RESPONDENT requests the Tribunal to find that GLOBAL MINERALS has to stand by its word in order to ensure that RESPOND-

ENT's claims are not frustrated due to the limited financial resources of CLAIMANT. **First**, GLOBAL MINERALS is a party to the arbitration as it signed the agreement and issued payment (**A.**); **second**, in the alternative, the Tribunal should adopt the Group of Companies Doctrine to bind GLOBAL MINERALS to the arbitration agreement (**B.**); and **third**, in any case, GLOBAL MINERALS created the impression of being a party to the contract and thus cannot contest the Tribunal's jurisdiction without acting against good faith (**C.**).

A. GLOBAL MINERALS IS BOUND BY THE ARBITRATION AGREEMENT AS IT CONSENTED TO BE BOUND

4 GLOBAL MINERALS is bound by the arbitration agreement as it consented to be bound by endorsing the contract and issuing payment. RESPONDENT requests the Tribunal not to allow GLOBAL MINERALS to escape liability alleging that it only agreed to become a financial guarantor *[Cl. Memo, para. 83]*. It will be demonstrated that: **First**, GLOBAL MINERALS consented to arbitration by endorsing the contract (**I.**); and **second**, GLOBAL MINERALS consented to arbitrate by carrying out the contractual obligations of the buyer (**II.**).

I. GLOBAL MINERALS CONSENTED TO ARBITRATE BY ENDORSING THE CONTRACT

5 GLOBAL MINERALS consented to be bound by the arbitration agreement as it endorsed the contract by providing a payment guarantee. This payment guarantee has to be subject to the present arbitration proceeding and therefore binds GLOBAL MINERALS. **First**, GLOBAL MINERALS signed the contract containing the arbitration agreement (**1.**); **second**, GLOBAL MINERALS' payment guarantee is closely connected to the arbitration agreement (**2.**); and **third**, not compelling GLOBAL MINERALS to the arbitration agreement would render its payment guarantee useless (**3.**).

1. GLOBAL MINERALS signed the contract

6 GLOBAL MINERALS expressed its consent to arbitrate by signing the contract. Clear evidence of parties' agreement to arbitrate is a written arbitration agreement or clause *[Fouchard/Gaillard/Goldmann, para. 500; Lamm/Aqua p. 712; Steingruber, p. 81; Waincymer, p. 52]*. The contract contains such arbitration agreement in clause 20 *[cf. Lew/Mistelis/Kröll, p. 101; Redfern/Hunter, p.117]*. CLAIMANT alleges that GLOBAL MINERALS is a *"non- signatory to the coltan purchase contract" [Cl. Memo, para. 84]*. However, Mr Storm on behalf of GLOBAL MINERALS signed the contract in a legal capacity *[Exh. C 1, p. 7]*. Therefore, CLAIMANT cannot argue that this signature has no legal impact *[cf. Cl. Memo, para. 84]*. By signing and

endorsing the contract, GLOBAL MINERALS was signing up to each of its terms and therefore is bound by the contained arbitration agreement. CLAIMANT states that *"by endorsing the [contract] all parties understood GLOBAL MINERALS to be financial guarantor and no more" [Cl. Memo, para. 84]*. However, for RESPONDENT and any reasonable businessman it was clear that GLOBAL MINERALS takes responsibility for all claims arising in connection with the contract. This view is supported by *Stellar v. Hudson*. In that case, Hudson Shipping applied for arbitration against Stellar Shipping. *Stellar* had guaranteed its subsidiary's performance under the contract and therefore endorsed the terms of the contract. Later, *Stellar* tried to challenge the tribunals' jurisdiction, but failed. In the view of the court it was *"clear that the mutual intention of the parties was that the guarantee agreement which was part of the same negotiation and was to be contained in the same document should similarly be subject to the same arbitration clause"*. On these grounds, the London High Court of Justice found that *"by endorsing the (contract) Stellar was endorsing and signing up to each of its terms. It was agreeing that if any obligation undertaken thereunder was not performed by (its subsidiary) then it would be performed by Stellar"*.

7 Here, CLAIMANT and GLOBAL MINERALS are wrongfully trying to challenge the Tribunal's jurisdiction alleging that *"no privity exists between GLOBAL MINERALS and RESPONDENT that would bind GLOBAL MINERALS to arbitration" [Cl. Memo, para. 84]*. However, CLAIMANT disregards the fact that GLOBAL MINERALS signed the contract. Hence, it is bound by the arbitration clause.

2. GLOBAL MINERALS' payment guarantee is closely connected to the arbitration agreement

8 GLOBAL MINERALS' payment guarantee is closely connected to the arbitration agreement. Whether a payment guarantee is closely connected to the arbitration agreement and binds the guarantor has to be determined on a case-by-case analysis. There are several comparable decisions of courts and arbitral tribunals extending the arbitration agreement to financial guarantors.

9 **First**, in *Stellar v. Hudson* the court found that *"(g)iven the close connection between the (contract) and the guarantee, and between the parties involved, one would expect them as rational businessmen to agree a common method of dispute resolution"*. **Second**, in *J.J. Ryan v. Rhone Poulenc* the tribunal held *"(w)hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement"*; and **third**, the Swiss Supreme Court confirmed jurisdiction over a third party on the basis that *"the company that formally acted as a guarantor was*

in fact a partner, enjoying all rights and bearing all obligations under the contract" [Swiss Federal Supreme Court, 08/21/2008].

10 In the case at hand, GLOBAL MINERALS' payment guarantee is closely connected to the contract and the arbitration agreement. This is especially proven by the fact that RESPONDENT would not have contracted with CLAIMANT without GLOBAL MINERALS' payment guarantee *[Answ. Req. Arb., p. 37 para. 26]*. Even if GLOBAL MINERALS formally only acted as guarantor, it was in fact a partner as it enjoyed all benefits under the contract. Therefore, GLOBAL MINERALS is bound to arbitration. Any other conclusion would allow GLOBAL MINERALS to escape responsibility and would make any kind of payment guarantee ineffective.

3. Not compelling GLOBAL MINERALS to the arbitration agreement would render its payment guarantee useless

11 GLOBAL MINERALS' guarantee would be without legal value if GLOBAL MINERALS was not bound by the arbitration proceedings. The endorsement of the contract can only have meaningful effect if it involves GLOBAL MINERALS' own agreement to arbitrate in respect of any dispute concerning its own obligations. RESPONDENT always insisted on the inclusion of GLOBAL MINERALS because of its prior bad experiences with the GLOBAL MINERALS Group *[Answ. Req. Arb., p. 37 para. 26]*. In the past, GLOBAL MINERALS put a subsidiary into bankruptcy to avoid the payment obligation. Only after lengthy negotiations it was willing to pay at least 90% of the price *[Answ. Req. Arb., p. 34 para. 5]*. Thus, RESPONDENT required a payment guarantee as condition for any kind of contractual relationship with CLAIMANT to make sure that possible claims would not be frustrated due to an insolvent counterparty *[Answ. Req. Arb., p. 34 para. 7]*. If the Tribunal allows GLOBAL MINERALS to avoid responsibility, RESPONDENT's claims would be frustrated as CLAIMANT has no assets and is only equipped with the minimum capital *[Proc. Ord. No 2, p. 64 para. 9]*. However, this would contradict the purpose of GLOBAL MINERALS' guarantee.

II. GLOBAL MINERALS CONSENTED TO ARBITRATE BY CARRYING OUT THE CONTRACTUAL OBLIGATIONS OF THE BUYER

12 GLOBAL MINERALS carried out the core obligations of the buyer under the sales contract and therefore cannot rely on its former statement that CLAIMANT would become the sole party under the contract *[Proc. Ord. No 2, p. 63 para. 7]*. It may be true that during the negotiations Mr Storm, COO of GLOBAL MINERALS, stated that GLOBAL MINERALS does not want to become a party to this proceedings *[Proc. Ord. No 2, p. 63 para. 7]*. However, actions

speak louder than words. GLOBAL MINERALS' statement has to be interpreted in light of its' actions and execution of the contract. **First**, GLOBAL MINERALS fulfilled the core obligation of the buyer by opening the letters of credit (**1.**); and **second**, GLOBAL MINERALS was directly involved in the negotiations, performance and termination of the contract (**2.**).

1. GLOBAL MINERALS fulfilled the core obligation of the buyer by opening the letters of credit

13 By opening the letters of credit GLOBAL MINERALS fulfilled the core obligation of the buyer under the contract and therefore has to be treated as a party. *"The active participation of (a third party) in the negotiation, preparation and execution of the Contract, and in some respects in the performance under it, determines that the intention of the parties can be reasonably inferred as to the extension of (…) the arbitration clause (…)" [ICC No 11160]*. CLAIMANT argues that GLOBAL MINERALS is explicitly not mentioned as a party in clause 1 of the contract *[Cl. Memo, para. 84]*. However, CLAIMANT's argument is contradictory. In clause 4 of the contract it was consented between the parties' that the *"(l)etter of credit (…) shall be established by the Buyer" [Exh. C 1, p. 7]*. Following CLAIMANT's argumentation it should have been CLAIMANT opening the letters of credit. Nonetheless, GLOBAL MINERALS implemented this core obligation. On these grounds, the wording of clause 1 does not hinder compelling GLOBAL MINERALS to the arbitration agreement.

2. GLOBAL MINERALS was directly involved in the negotiations, performance and termination of the contract

14 GLOBAL MINERALS was directly involved in the negotiations as well as in the performance of the contract and therefore has to be treated as a party. "*Arbitration clauses have also been extended (…) to a person that has played an active part in the negotiation or performance of a contract; and to a person with which the signatory was closely and inextricably connected." [Vidal, para. 28; see also, ICC No 9517; Dallah v. Ministry; Dow Chemical v. Isover; Société Sponsor v. Lestrade]*. CLAIMANT's assertions that GLOBAL MINERALS was *"participating to a minor degree in the negotiations and performance of the (contract)" [Cl. Memo, paras. 87, 103]*, are unsubstantiated and unsupported by the facts of the case. To the contrary, GLOBAL MINERALS was involved to major degree. It took part in the negotiations *[Req. Arb., p. 3 para. 6]*, provided the letters of credit *[Req. Arb., p. 4 para. 10]*, kept contact with RESPONDENT *[Exh. C 6, p. 12; Exh. C 10, p. 16]* and tried to amend the contract *[Req. Arb., p. 6 para. 22; Exh. C 6, p. 12]*. Furthermore, clause 20 of the contract was used between RESPONDENT and the GLOBAL MINERALS Group since 2010 *[Proc. Ord. No 2, p. 64 para. 10]*.

15 In conclusion, the Tribunal is requested to consider GLOBAL MINERALS' actions rather than its contradictory excuses. Because of its actual practices and essential part in the execution of the contract GLOBAL MINERALS effectively adapted the position of the buyer. Indeed, it is time for GLOBAL MINERALS to take responsibility and stand by its word. Therefore, GLOBAL MINERALS has to be treated as a party and has to be bound by the arbitration agreement.

B. IN THE ALTERNATIVE, THE TRIBUNAL SHOULD ADOPT THE GROUP OF COMPANIES DOCTRINE TO BIND GLOBAL MINERALS TO THE ARBITRATION AGREEMENT

16 Assuming but not conceding that GLOBAL MINERALS' signature and its involvement in the contract do not justify compelling it to the arbitration, RESPONDENT requests the Tribunal to use the Group of Companies Doctrine to bind GLOBAL MINERALS. It is common practice for companies to externalize their activities in order to insulate themselves from liability *[Badia, p. 63; Lew/Mistelis/Kröll, p. 146 para. 7-51; Rodler, pp. 20 et seq.; Tang, pp. 3 et seq.]*. Since GLOBAL MINERALS is a controlling member of the group of companies it should be responsible in case of CLAIMANT's insolvency to ensure that RESPONDENT's claims are not frustrated if CLAIMANT defaults. Thus, RESPONDENT requests the Tribunal to adopt the Group of Companies Doctrine. **First**, adopting the Group of Companies Doctrine is a recognized method to bind a third party to an arbitration agreement (**I.**); and **second**, CLAIMANT and GLOBAL MINERALS form a group of companies (**II.**).

I. ADOPTING THE GROUP OF COMPANIES DOCTRINE IS A RECOGNIZED METHOD TO BIND A THIRD PARTY TO AN ARBITRATION AGREEMENT

17 RESPONDENT requests the Tribunal to apply the Group of Companies Doctrine as recognized method of binding GLOBAL MINERALS to the arbitration agreement. CLAIMANT alleges that the Group of Companies Doctrine is inapplicable to the present arbitration *[Cl. Memo, para. 97]*. However, the Tribunal is free to decide whether or not to apply the Group of Companies Doctrine. If the companies of one group are aware of the arbitration agreement and implicate in the negotiation, performance and termination of the contract, they are presumed to have consented to the agreement *[ICC No 6519; ICC No 11209; Hanotiau, pp. 343 et seq.; cf. ICC No 9517; Dow Chemical v. Isover; Société Sponsor v. Lestrade]*.

18 Here, the Tribunal should use the Group of Companies Doctrine as **first**, the doctrine is used to extend arbitration agreements to third parties (**1.**); **second**, Danubia has not rejected the Group of Companies Doctrine (**2.**); and **third**, the enforceability of the award will not be at risk (**3.**).

1. The Group of Companies Doctrine is used to extend arbitration agreements to third parties

19 The Group of Companies Doctrine is internationally used to extend arbitration agreements to third parties. It was established in the ICC Case *Dow Chemical v. Isover*. In this case, a French tribunal bound a non-signatory party to an arbitration agreement due to its involvement in the purchase contract. The ICC tribunal found that non-signatories to an arbitration agreement could nonetheless arbitrate under the agreement because all of the companies involved constituted *"one and the same economic reality" [Dow Chemical v. Isover; see also, Craig/Park/Paulsson, para. 5.09; Tang, p. 4 para. 2.]*.

20 CLAIMANT alleges that the Group of Companies Doctrine is not widely followed on an international level *[Cl. Memo, para. 100]*. However, there are numerous decisions by courts and arbitral tribunals acknowledging the Group of Companies Doctrine *[ICC No 1021; ICC No 5103; ICC No 5721; ICC No 5730; ICC No 6673; ICC No 6769*; *ICC No 7604; ICC No 7610]*. For instance, the tribunal in *ICC No 6000* determined that *"it is largely admitted that by virtue of (…) international trade, where a contract, including an arbitration clause, is signed by a company which is a party to a group of companies, the other company (…) of the group which (is) involved in the execution, the performance and/or the termination of the contract (is) bound by the arbitration clause*".

21 Furthermore, CLAIMANT wrongfully argues that the Group of Companies Doctrine is *"completely"* disregarded by U.S. and Swiss courts *[Cl. Memo, para. 100]*. The Swiss Federal Court has considerably relaxed its jurisprudence regarding the Group of Companies Doctrine *[Besson, p. 150; Hanotiau, p. 350]*. In *ICC No 5721*, the Swiss arbitration tribunal accepted the validity of the Group of Companies Doctrine when the facts permit. Also the U.S. Courts extend the arbitration agreements to non-signatories due to comparable theories, as it is *"one of the most liberal jurisdictions with respect to the 'extension' of the arbitration clause to non-signatories" [Hanotiau, p. 350]*. There are numerous cases in the U.S. confirming this view *[cf. Fisser v. International Bank; Coastal States Trading v. Zenith Navigation; Farkar v. Hanson; Laborers' Local v. Interstate Curb; Federated Title Insurers v. Ward; Freeman v. Complex Computing Company]*.

22 Therefore, the Tribunal should use the Group of Companies Doctrine in order to extend the scope of the arbitration agreement to GLOBAL MINERALS.

2. Danubia has not rejected the Group of Companies Doctrine

23 Danubia as seat of the arbitration has not rejected the Group of Companies Doctrine. CLAIMANT argues that the Group of Companies Doctrine has not yet been recognized by the law of Danubia *[Cl. Memo, para. 99]*. However, it has not been rejected either. There have been no decisions by Danubian courts on the doctrine so far *[Proc. Ord. No 2, p. 69 para. 46]* thus giving this Tribunal ample discretion on this issue. Therefore, CLAIMANT's argument that the Group of Companies Doctrine is *"clearly not recognised by the law of Danubia" [Answ. Req. Join., p. 50 para. 7]*, is without merit.

3. The enforceability of the award will not be at risk if the Tribunal adopts the Group of Companies Doctrine

24 If the Tribunal uses the Group of Companies Doctrine, the enforceability of the award will not be at risk. CLAIMANT cannot argue that any award would not be enforceable due to public policy concerns. Art. V(2)(b) New York Convention states that *"recognition and enforcement of an arbitral award may be refused (…) if (it) would be contrary to the public policy of that country"*. RESPONDENT would most likely enforce the award in Ruritania, where GLOBAL MINERALS is seated and where its assets are located. A court in Ruritania had explicitly endorsed obiter dicta the Group of Companies Doctrine *[Answ. Req. Join., p. 50 para. 7]*.

25 In conclusion, the Tribunal should use the doctrine to bind GLOBAL MINERALS to the arbitration as it is a recognized method, it was endorsed obiter dicta by the High Court in Ruritania and is not rejected by the law of Danubia.

II. CLAIMANT AND GLOBAL MINERALS FORM A GROUP OF COMPANIES

26 The prerequisites of the Group of Companies Doctrine are met. Contrary to CLAIMANT's argument *[Cl. Memo, para. 102]*, CLAIMANT and GLOBAL MINERALS are members of a group of companies. Their participation in the purchase contract and within the arbitration agreement is effectively inseparable. **First**, GLOBAL MINERALS exercises substantial control over CLAIMANT (**1.**); and **second**, correspondence to CLAIMANT and GLOBAL MINERALS was intermingled (**2.**).

1. GLOBAL MINERALS exercises substantial control over CLAIMANT

27 GLOBAL MINERALS exerted control over CLAIMANT. To extend the scope of the arbitration agreement, the parent company must exercise substantial control over the subsidiary *[Dow Chemical v. Isover, KIS France v. Société Générale; ICC No 8385; Ferrario, p. 648]*. CLAIMANT argues that it exercised its independent business authority in entering into the contract with RESPONDENT *[Cl. Memo, para. 103]*. However, CLAIMANT's view is not in conformity with

the facts of the case. In fact, CLAIMANT had no independent business authority as it is substantially controlled by GLOBAL MINERALS. **First**, CLAIMANT is 100% owned by GLOBAL MINERALS *[Req. Arb., p. 2 para. 1]*. A "*wholly-owned subsidiary allow(s) the parent company to retain the greatest amount of control, but also leave the parent with all the costs and risks of full ownership.*" *[Wholly owned subsidiary, in Investopedia; see also, Hill/Jones/Schilling, p. 272]*. **Second**, CLAIMANT was only equipped with the minimum capital and is financially dependent on GLOBAL MINERALS *[Proc. Ord. No 2, p. 64 para. 9]*. This is also the reason why GLOBAL MINERALS and not CLAIMANT itself issued payment. **Third**, CLAIMANT's personnel even consist in part of former employees of GLOBAL MINERALS *[Proc. Ord. No 2, p. 63 para. 7]*.

2. Correspondence to CLAIMANT and GLOBAL MINERALS was intermingled

28 GLOBAL MINERALS and CLAIMANT indistinctively exchanged communication with RESPONDENT in regard to the contractual performance and the non-conforming letters of credit *[cf. Exh. C 3, p. 9; Exh. C 6, p. 12]*. CLAIMANT argues that this allegedly proves that RESPONDENT had knowledge that CLAIMANT and GLOBAL MINERALS had independent business authority *[Cl. Memo, para. 104]*. However, it rather shows that CLAIMANT and GLOBAL MINERALS act as one and the same economic entity. This is also confirmed by *Occidental Petroleum v. Government of Morocco*, where the court approved the arbitral tribunal's finding that the fact that *"correspondence was addressed indistinctively to mother companies (and) to subsidiaries"* pointed to the existence of a group of companies. Here, the fact that communication was exchanged between all parties involved also establishes a group relationship between CLAIMANT and GLOBAL MINERALS.

29 In conclusion, the facts of the case show that CLAIMANT and GLOBAL MINERALS form a group of companies as GLOBAL MINERALS exercises substantial control over CLAIMANT and they both essentially act in concert.

C. IN ANY CASE, GLOBAL MINERALS IS PREVENTED FROM CONTESTING THE TRIBUNAL'S JURISDICTION DUE TO CONSIDERATIONS OF GOOD FAITH

30 Due to its behavior and its involvement in the negotiations, performance and termination of the contract GLOBAL MINERALS created the impression of standing behind the contract *[Answ. Req. Arb., p. 37 para. 28]*. Therefore, it is bound to the arbitration agreement. CLAIMANT contests the Tribunal's jurisdiction alleging that it did not consent to arbitrate *[Cl. Memo, para. 82]*. However, CLAIMANT and GLOBAL MINERALS are prevented from contesting jurisdiction due to the principle of good faith. **First**, the Tribunal should consider

the doctrine of good faith as internationally recognized principle (**I.**); and **second**, GLOBAL MINERALS acted against good faith since it first created the impression of standing behind the contract and then contested the Tribunal's jurisdiction (**II.**).

I. THE TRIBUNAL SHOULD CONSIDER THE DOCTRINE OF GOOD FAITH AS INTERNATIONALLY RECOGNIZED PRINCIPLE

31 RESPONDENT requests the Tribunal to consider the doctrine of good faith as internationally recognized principle. The term good faith *"is always evaluated by reference not to the internal standards of various national legal systems but to the standards of international business practice" [ICC No 9029; cf. Cremades, pp. 779 et seq.]*. The application of good faith considerations is in accordance with the law governing the dispute as well as the lex arbitri, i.e. the Danubian arbitration law, which is a verbatim adoption of the UML with the 2006 amendment *[Proc. Ord. No 1, p. 61]*.

32 **First**, the doctrine of good faith is recognized by the law of Danubia. CLAIMANT argues that Danubia has not recognized the good faith doctrine *[Cl. Memo, para. 106]*. However, the arbitration law of Danubia expressly states in Art. 2 A(1) that *"(i)n the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."* Therefore, the Tribunal would act in accordance with the arbitration law of Danubia.

33 **Second,** the doctrine of good faith is also well known in Ruritania, where GLOBAL MINERALS is seated *[Answ Req. Join., p. 50 para. 8]*. The Ruritanian contract law contains a general reference to good faith *[Answ. Req. Join., p. 51 para. 8]*. CLAIMANT itself refers to the decisions of courts in Ruritania and Equatoriana *[Cl. Memo, para. 106]*. The courts held that the reproach of good faith has to be affirmed when separate entities had been set up with the only goal of shielding the parent company from the financial consequences of fraudulent behavior of its subsidiaries to the benefit of the parent company *[Proc. Ord. No 2, p. 64 para. 8]*. Thus, good faith has to be taken into account by the Tribunal.

II. CONTESTING THE TRIBUNAL'S JURISDICTION WOULD BE AGAINST GOOD FAITH

34 GLOBAL MINERALS is prevented to contest the Tribunal's jurisdiction as it violated the principle of good faith. CLAIMANT wrongly alleges that good faith is limited to fraudulent behavior *[Cl. Memo, para. 106]*. However, the principle of good faith *"is violated not only in the case of fraud, but also in that of simple negligence, thoughtlessness, and rashness" [ICC No 9029]*. GLOBAL MINERALS acted inconsistently and for its own account.

35 **First**, GLOBAL MINERALS created the impression of standing behind the contract. As demonstrated, GLOBAL MINERALS was heavily involved in the negotiations, performance and termination of the contract. Therefore, it cannot escape liability alleging that it has acted in good faith throughout the realization of the contract *[cf. Cl. Memo, para. 107]*.

36 **Second**, GLOBAL MINERALS acted against good faith as it only created CLAIMANT to shield itself from liability in case of not being successful on the coltan market *[Answ. Req. Arb., p. 37 para. 26]*. CLAIMANT alleges that it is able to satisfy any outstanding contractual obligations or fulfill any damage award that the Tribunal may issue due to its line of credit of USD 5m *[Cl. Memo, para. 107]*. However, not the line of credit but the assets are decisive. CLAIMANT is only equipped with the minimum capital of USD 20.000 *[Proc. Ord. No 2, p. 64 para. 9]*. Furthermore, up to the point of contracting CLAIMANT was already using its credit line *[Proc. Ord. No 2, p. 64 para. 9]*. Therefore, one cannot assume that CLAIMANT would be able to satisfy all of RESPONDENT'S claims without GLOBAL MINERALS' financial support.

37 **Third**, GLOBAL MINERALS directly benefitted from the contract with RESPONDENT. CLAIMANT alleges that GLOBAL MINERALS did not receive any discount as a result of the sales contract *[Cl. Memo, para. 95]*. However, GLOBAL MINERALS signed the contract in return for a price reduction of 0,5 % *[Exh. R 1, p. 41 para. 7]*. Since GLOBAL MINERALS issued payment by opening the letters of credit, it directly benefitted from this price reduction. In case a third party enjoys direct benefits or exercises rights like a party under a contract it is prevented from contesting the jurisdiction of a tribunal *[Born, p. 1473]*. This is confirmed by *Tepper Realty v. Mosaic Tile* where the judge found that the *"(claimant) cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage"*. Here, GLOBAL MINERALS derived direct benefit from the contract and thus has to bear responsibility for its behavior.

CONCLUSION ISSUE I

38 GLOBAL MINERALS is bound by the arbitration agreement as it consented to be bound by endorsing and signing the contract. Moreover, GLOBAL MINERALS was heavily involved in the negotiation, performance and termination of the contract. In the alternative, the Tribunal should use the Group of Companies Doctrine to bind GLOBAL MINERALS. In any case, due to considerations of good faith GLOBAL MINERALS is prevented from contesting the Tribunal's jurisdiction as it created the impression of being a party to the contract.

ISSUE II: RESPONDENT WAS ENTITLED TO AVOID THE CONTRACT

39 RESPONDENT was entitled to avoid the contract since CLAIMANT and GLOBAL MINERALS failed to comply with the payment modalities as stipulated in clause 4. Instead of facing the consequences for the fundamental breach of contract, CLAIMANT and GLOBAL MINERALS are trying to put the blame on RESPONDENT. CLAIMANT alleges that the letters of credit were established in accordance with the contract and the modifications allegedly proposed by RESPONDENT *[Cl. Memo, para. 16]*. However, RESPONDENT never proposed any modifications. The probably true reason for CLAIMANT's unsubstantial arguments may be find in the recent market developments. CLAIMANT attempted to take advantage of its insider information in order to profit from the political crises in Xanadu and the increased price of coltan. However, the Tribunal shall not accept CLAIMANT's unfounded motion. **First**, RESPONDENT validly avoided the contract on 7 July 2014 (**A.**); **second**, in the alternative, RESPONDENT validly avoided the contract on 9 July (**B.**); and **third**, RESPONDENT is not prevented from declaring avoidance according to Art. 80 CISG (**C.**).

A. RESPONDENT VALIDLY AVOIDED THE CONTRACT ON 7 JULY

40 CLAIMANT and GLOBAL MINERALS fundamentally breached the contract by providing a non-conforming letter of credit on 4 July 2014. Therefore, RESPONDENT was entitled to avoid the contract by declaration on 7 July. **First**, RESPONDENT was entitled to avoid the contract according to Art. 64(1)(a) CISG as CLAIMANT's and GLOBAL MINERALS' breach was fundamental (**I.**); **second**, in the alternative, RESPONDENT was entitled to avoid the contract according to Art. 64(1)(b) CISG as it set a reasonable *"Nachfrist"* and CLAIMANT and GLOBAL MINERALS failed to comply (**II.**), and **third**, in the alternative, RESPONDENT was entitled to avoid the contract according to Art. 72 CISG as GLOBAL MINERALS and CLAIMANT refused performance after RESPONDENT rejected the letter of credit (**III.**).

I. RESPONDENT WAS ENTITLED TO AVOID THE CONTRACT ACCORDING TO ART. 64(1)(A) CISG

41 CLAIMANT and GLOBAL MINERALS breached the contract fundamentally since they failed to comply with their core obligation. According to Art. 64(1)(a) CISG, *"(t)he seller may declare the contract avoided (…) if a failure of the buyer to perform any of his obligations under the contract (…) amounts to a fundamental breach of contract."* GLOBAL MINERALS issued a letter of credit that did not conform to the parties' agreement in clause 4 of the contract. Therefore, RESPONDENT was entitled to avoid the contract. **First**, GLOBAL MINERALS and CLAIMANT failed to pay

the purchase price and thus failed to perform their core obligation (**1.**); and **second**, this failure amounts to a fundamental breach according to Art. 25 CISG (**2.**).

1. CLAIMANT and GLOBAL MINERALS failed to pay the purchase price

42 Contrary to CLAIMANT's allegations *[Cl. Memo, para. 15]*, CLAIMANT and GLOBAL MINERALS failed to fulfill their payment obligation in compliance with the purchase contract. According to Art. 53 CISG, *"the buyer must pay the price for the goods"*. The 1st letter of credit provided was not in conformity with the purchase contract and therefore did not fulfill CLAIMANT's and GLOBAL MINERALS payment obligation.

43 As stated in Art. 54 CISG, *"the buyers' obligation to pay the price includes (…) complying with such formalities as may be required under the contract"*. RESPONDENT, CLAIMANT and GLOBAL MINERALS agreed on payment ensured by letter of credit in clause 4 of their contract *[Exh. C1, p. 7]*. Letters of credit are commonly used to reduce credit risks to sellers in international sales arrangements. The issuing bank acts at the request and on the instructions of a customer to make a payment to a third party against stipulated documents, provided that the terms and conditions of the credit are complied with *[Iron Ore Case; CIETAC, 12/18/1996; ICC No* 10074; *Bijl, p. 20; Borky; Guide to Letters of Credit, p. 3; Nathan, p. 1; Singh, pp. 3 et seq.]*. The parties agreed on 30 metric tons of coltan for a price of USD 1.35m and *"CIF"* as delivery term in their contract *[Exh. C 1, p. 7]*.

44 Clause 4 of the contract stipulates that the letter of credit needs to be consistent with the terms of the contract. However, CLAIMANT and GLOBAL MINERALS provided a non-conforming letter of credit. **First**, the letter of credit stipulated *"CIP"* instead of *"CIF"* delivery conditions (**a.**); **second**, the letter of credit related to a wrong amount of coltan (**b.**); and **third**, it contained the wrong period for the last shipment (**c.**).

a. The 1st letter of credit contained wrong delivery conditions

45 The 1st letter of credit was non-conforming concerning the delivery conditions as it contained *"CIP"* delivery terms instead of *"CIF"* as agreed in the contract *[Exh. C 1, p. 7]*. Contrary to what CLAIMANT argues, the Notice of Transport neither contained any consensual modification nor any offer to change the delivery terms *[Cl. Memo, paras. 24 et seq.]*. RESPONDENT acknowledges that the Notice of Transport contained *"CIP"* delivery terms. However, CLAIMANT and GLOBAL MINERALS were not entitled to adapt *"CIP"* in the letter of credit.

46 **First**, GLOBAL MINERALS and CLAIMANT knew that RESPONDENT would not accept a change to *"CIP"*. GLOBAL MINERALS on behalf of CLAIMANT itself states that it can only assume that RESPONDENT is not happy with the change to *"CIP" [Exh. C 6, p. 12]*. Conse-

quently, CLAIMANT and GLOBAL MINERALS knew that RESPONDENT did not agree to a change to *"CIP"*. Thus, by containing *"CIP"*, the letter of credit was not conforming.

47 **Second**, CLAIMANT and GLOBAL MINERALS were not entitled to adopt *"CIP"* as they must have known that RESPONDENT would never have agreed to *"CIP"*. CLAIMANT argues that it was evident that RESPONDENT changed the delivery terms *[Cl. Memo, para. 25]*. However, RESPONDENT's employee mistakenly ticked the wrong box in the Notice of Transport *[Proc. Ord. No 2, pp. 65 et seq., para. 20]*. An interpretation of RESPONDENT's declaration in accordance with Art. 8(1) CISG does not lead to a change in the delivery conditions. Art. 8(1) CISG states *"statements made by and other conduct of a party are to be interpreted according to his intent (...)"*. RESPONDENT rejected *"CIP"* as term for shipment during the negotiations *[Answ. Req. Arb., p. 34 para. 8]*. Therefore, the parties agreed on *"CIF"*. The difference is that under *"CIP"* the seller has to pay all costs and insure fees with the consequence that the buyer will not have to bear any damages during the transport *[von Bernstorff, pp. 108 et seq.]*. Contrary to what CLAIMANT argues, a change to *"CIP"* would not only amount to a *"minor"* difference *[Cl. Memo, para. 26]*. It would not only cost RESPONDENT up to USD 1000 *[Proc. Ord. No 2, p. 68 para. 36]* but would also mean much more effort and an additional assumption of significantly large risks. Thus, CLAIMANT and GLOBAL MINERALS could not have reasonably believed that RESPONDENT would intentionally change delivery conditions to *"CIP"*.

48 **Third**, in any case, CLAIMANT and GLOBAL MINERALS would have to make sure that RESPONDENT intentionally changed the delivery terms to *"CIP"*. It is in the interests of good faith in international trade, Art. 7(1) CISG, that parties cooperate if it seems clear that there is a disagreement as to the content of the contract *[Kröll/Mistelis/Viscasillas, Art. 7 para. 27; Schlechtriem/Schwenzer/Hachem, Art. 7 para. 19]*. Therefore, CLAIMANT merely needed to give notice about the changed delivery conditions. CLAIMANT's fax was not clear according to the change since it only adopts the mistakenly change to *"CIP"* without any further explanations or asking for clarification *[Exh. C 4, p. 10]*.

b. The 1st letter of credit related to a wrong amount of coltan

49 The 1st letter of credit was non-conforming as it was for a larger amount of coltan than agreed upon in the contract. It is undisputed that the parties agreed on a letter of credit relating to 30 metric tons of coltan for USD 1.35m and that this agreement was never validly amended *[Proc. Ord. No 1, p. 60 para. 2]*. "*All aspects of the Letter of credit must conform with the terms agreed upon (…) (especially) the amount to be paid*" *[UNCTAD, p. 8 para. 3]*.

50 CLAIMANT argues that the letter of credit was in conformity as it was issued for USD 4.5m and therefore included the agreed payment amount *[Cl. Memo, para. 20]*. However, this is not decisive as the parties' agreement as stipulated in the contract.

51 All relevant facts point out that CLAIMANT and GLOBAL MINERALS at no time were entitled to receive 100 metric tons of coltan. It seems likely that CLAIMANT and GLOBAL MINERALS tried to use insider information about the Xanadu crisis for their benefit by attempting to amend the contract on 27 June. The political situation in Xanadu, the world's largest producer of conflict free coltan is instable. The conflict limits the available conflict free coltan and prices have been rising considerably *[Answ. Req. Arb., p. 36 para. 15]*. The brother of Mr Storm, GLOBAL MINERALS' COO, is the local ambassador for Ruritania in Xanadu *[Exh. R 2, p. 42 para. 3]*. The ambassador had been informed on Friday 27 June by one of the junior ministers about the planned walk out from the Government of that minister's party while the news became public knowledge on 29 June *[Exh. R 3, p. 43]*. Therefore, CLAIMANT and GLOBAL MINERALS knew much earlier about the governmental instabilities and the consequently price increase of conflict free coltan. They tried to profit by purchasing more coltan and therefore wrongfully provided a letter of credit relating to a much higher amount than contractually agreed.

c. The 1st letter of credit contained the wrong last day of shipment

52 The letter of credit stipulates the wrong last day of shipment. According to clause 5 of the contract, shipment would have to be done *"60 days after the receipt of the Letter of credit" [Exh. C 1, p. 7]*. As the letter of credit was provided on 4 July, shipment would have to be done not later than 4 September. Nevertheless, the letter of credit stipulated 15 November as last day for shipment, which was not in conformity with clause 5 of the contract.

53 In conclusion, the letter of credit provided by GLOBAL MINERALS does not comply with clauses 3, 4 and 5 of the purchase contract and therefore constitutes a breach of contract.

2. CLAIMANT's and GLOBAL MINERALS' failure amounts to a fundamental breach according to Art. 25 CISG

54 RESPONDENT requests the Tribunal to find that CLAIMANT's and GLOBAL MINERALS' breach was fundamental according to Art. 25 CISG. Art. 25 CISG states that "*a breach (...) is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract"*. **First**, RESPONDENT was substantially impaired of its justified expectations under the contract (**a.**); and **second**, the consequences of the breach were foreseeable for CLAIMANT, GLOBAL MINERALS and a reasonable person (**b.**).

a. RESPONDENT was substantially deprived of what it was entitled to expect under the contract

55 RESPONDENT was substantially deprived of what it was entitled to expect under the contract. **First**, CLAIMANT's and GLOBAL MINERALS' breach was fundamental the particularities of commodity trade do not allow for another conclusion (**i.**); and **second**, in any case, RESPONDENT's expectations were frustrated as it did not receive payment (**ii.**).

i. In transactions involving commodities any deviation from the contract constitutes a substantial detriment

56 In light of the changing market situation of coltan every extension in performance leads to a substantial detriment. This is because commodities are typically traded *"in string"* and are often subject to price fluctuations *[cf.: Bijl, p. 26; Graffi, pp. 341 et seq.; Huber/Mullis, p. 217; Mullis, Avoidance, p. 329; Mullis, Termination, p. 139; UNCTAD, p. 7; Schlechtriem/Schwenzer/Schroeter, Art. 25 para. 65]*. Due to the fact that the coltan market is highly volatile prompt actions were necessary. Strict compliance with the contractual provisions is required *[Proc. Ord. No 2, p. 65 para. 18]*. According to Art. 9(2) CISG implied trade usages can be incorporated into the contract if the parties ought to have known of the usage and that the usage is known to contracts of the type involved in the particular commodity trade *[Winsor, p. 98]*. Contrary to CLAIMANT's allegations *[Cl. Memo, para. 28]*, the features of commodity trade are not precluded by the applicability of the CISG. *"A fundamental breach allowing termination under the CISG will more readily occur in a commodity trade than in any other trade." [Winsor, p. 101]*. As none of the letters of credit provided by GLOBAL MINERALS conformed to the contractual requirements, the breach of contract was fundamental.

ii. RESPONDENT's justified expectations were frustrated as it did not receive payment

57 Contrary to CLAIMANT's unfounded allegations *[Cl. Memo, paras. 17, 24, 45 et seq.]*, Respondent suffered a substantial detriment. A substantial detriment occurs due to incorrect performance of the contractual obligation that the aggrieved party has mainly lost its interest in the contract *[Cobalt Sulphate Case; Brunner, Art. 25 para. 8; Herber/Czerwenka, Art. 25 para. 8; Magnus, p. 425; Secretariats Commentary, Art. 25 para. 3]*.

58 RESPONDENT was entitled to expect payment by a conforming letter of credit. These expectations were frustrated as CLAIMANT and GLOBAL MINERALS failed to pay the purchase price. Therefore, they failed to fulfill their core obligation under the contract. Contrary to CLAIMANT's allegations, the failure to comply with the main obligation cannot be charac-

terized as *"minor issues with the letter of credit" [Cl. Memo, para. 32]*. Thus, RESPONDENT suffered a substantial detriment as it was left without payment.

59 Finally, taking into account the numerous deviations from the contractual agreement, the number of infringements also leads to a substantial deprivation. CLAIMANT and GLOBAL MINERALS breached clause 3, 4 and 5 of the contract *[see above para. 53]*. Therefore, they impaired RESPONDENT's justified expectations under the contract.

b. The consequences of the breach were foreseeable by CLAIMANT, GLOBAL MINERALS and a reasonable person in their position

60 Contrary to CLAIMANT's allegation *[Cl. Memo, paras. 28 et seq.]*, CLAIMANT, GLOBAL MINERALS as well as a reasonable person of the same kind were able to foresee the consequences of the breach. According to Art. 25 CISG a breach is fundamental *"(…) unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."* Foreseeability can be assumed, when a reasonable person could have foreseen that its breach would result in substantial loss *[Austrian Supreme Court, 02/14/2002; Regional Court Heidelberg, 12/20/1996; Caemmerer/Schlechtriem, Art. 74 paras. 4, 20; Honsell/Karollus, Art. 25, para. 6; Kröll/Mistelis/Viscasillas/Björklund, Art. 25 para. 20; Schlechtriem/Schwenzer (GER)/Schroeter, Art. 25 para. 11]*.

61 The burden of proof of the unforeseeability lies on the party in breach *[Cocoa Beans Case; Rheinland Versicherungen v. Atlarex; Commercial Court Zurich, 11/30/1998; Dale, p. 12; Ferrari, p. 665; Graffi, Overview, p. 240]*. CLAIMANT failed to prove unforeseeability as it only alleges that it did not have knowledge of the political situation in Xanadu and did not foresee the increased price of coltan *[Cl. Memo, para. 33]*. However, CLAIMANT and GLOBAL MINERALS were aware of the volatility of the coltan market and knew about the political situation in Xanadu. Furthermore, they knew about the development of the new game console *[Req. Arb., p. 4 para. 11],* which did also affect the price of coltan. CLAIMANT and GLOBAL MINERALS must have been aware of the importance of timely delivery as they should have known that time is of the essence in trading commodities *[cf. Higher Regional Court Hamburg, 02/28/1997]*. Therefore, CLAIMANT and GLOBAL MINERALS could have foreseen that RESPONDENT would suffer a substantial deprivation.

II. ALTERNATIVELY, RESPONDENT WAS ENTITLED TO AVOID THE CONTRACT UNDER ART. 64(1)(B) CISG

62 Even if the Tribunal comes to the conclusion that CLAIMANT's and Global Mineral's breach was not fundamental, RESPONDENT was entitled to avoid the contract under Art. 64(1)(b) CISG. Art. 64(1)(b) states that *"(t)he seller may declare the contract avoided: (…) if the buyer does not, within the additional period of time fixed by the seller (…) perform his obligation to pay the price (…), or if he declares that he will not do so within the period so fixed."* **First**, RESPONDENT did not have to await the expiry of the *"Nachfrist"* as CLAIMANT and GLOBAL MINERALS refused to issue a conforming letter of credit (**1.**); and **second**, in the alternative, RESPONDENT was entitled to avoid the contract as the *"Nachfrist"* had expired (**2.**).

1. RESPONDENT did not have to await the expiry of the *"Nachfrist"* as CLAIMANT and GLOBAL MINERALS refused to issue a conforming letter of credit

63 According to Art. 64(1)(b) Option 2, RESPONDENT must not have awaited the expiry of the *"Nachfrist"* before avoiding the contract as CLAIMANT and GLOBAL MINERALS refused to issue a conforming letter of credit after RESPONDENT had set the *"Nachfrist"*. After GLOBAL MINERALS and CLAIMANT issued a non-conforming letter of credit, RESPONDENT set a *"Nachfrist"* on 4 July 2014. Mr Winter on behalf of RESPONDENT immediately called Mr Summer on behalf of GLOBAL MINERALS and left a message stating that the *"(l)etter of Credit provided is clearly not in conformity with what we have agreed. Please provide a new conforming letter immediately, at the latest by Monday morning our time. Otherwise we will terminate the contract" [Proc. Ord. No 2, p. 66 para. 21]*.

64 Mr Storm, GLOBAL MINERALS' COO, then sent an email alleging that the letter of credit was in line with the contract and that they are awaiting delivery *[Exh. C 6, p. 12]*. This email could only be understood as refusal to provide a conforming letter of credit. Therefore, RESPONDENT did not have to await the expiry of the *"Nachfrist"* and was entitled to avoid the contract.

2. Alternatively, RESPONDENT was entitled to avoid the contract as the *"Nachfrist"* had expired

65 Even if the Tribunal does not interpret Mr Storm's email as refusal to provide a conforming letter of credit, RESPONDENT was entitled to avoid the contract under Artt. 64(1)(b) Option 1 and 63(1) CISG. Mr Winter on behalf of RESPONDENT set a reasonable *"Nachfrist"* on 4 July asking for a conforming letter of credit at the latest by Monday morn-

ing, 7 July *[Proc. Ord. No 2, p. 66 para. 21]*. CLAIMANT and GLOBAL MINERALS failed to comply with this *"Nachfrist"*.

66 CLAIMANT cannot argue that the *"Nachfrist"* was not of reasonable length. A seller is entitled to expect the buyer has taken some steps toward performance *[Huber/Mullis, p. 330; Säcker/Rixecker/Huber, Art. 63 para. 8; Piliounis, p. 20]*. RESPONDENT was aware that the RST Trade Bank worked also on Saturday morning *[Proc. Ord. No 2, p. 66 para. 23]*. CLAIMANT and GLOBAL MINERALS had two options; **first**, they were able to simply modify the already issued letter of credit according to Art. 9 UCP 600 *[cf.: UCP 600; UNCTAD, p. 8 para. 4]*. **Second**, they could open a new letter of credit as it can ordinarily be opened within a few hours *[ICC No 11849; Lookofsky, para. 6.24]*. However, they failed altogether to take any reasonable measure.

III. ALTERNATIVELY, RESPONDENT WAS ENTITLED TO AVOID THE CONTRACT UNDER ART. 72 CISG

67 Even if the Tribunal comes to the conclusion that CLAIMANT and GLOBAL MINERALS still had time to issue a conforming letter of credit, RESPONDENT was entitled to avoid the contract according to Art. 72 CISG. Art. 72(1) CISG states: *"If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided" [cf. Bridge, paras. 12.31 et seq.; Schlechtriem/Butler, Art. 72 para. 269]*.

68 **First**, it was clear that CLAIMANT and GLOBAL MINERALS would commit a fundamental breach. A definite refusal to open a contractually required letter of credit will usually amount to a fundamental breach *[Downs Investment v. Perwaja; Higher Regional Court Braunschweig, 10/28/1998; Honsell/Brunner/Hurni, Art. 72 para. 5; Huber/Mullis, p. 326; Schlechtriem/ Schwenzer/Hager, Art. 64 para. 5; Staudinger/Magnus, Art. 64 para. 13]*. As shown, CLAIMANT and GLOBAL MINERALS refused to open a conforming letter of credit and only acted after RESPONDENT already had declared the contract avoided.

69 **Second**, in the alternative, CLAIMANT failed to give adequate assurance of its performance in accordance with Art. 72(2) CISG. Art. 72(2) CISG states *"If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance". [cf. Bianca/Bonell/Benett, Art. 72 p. 522; Chengwei, para. 5.2; Seliazniova, p.132]*. CLAIMANT argues that it provided adequate assurance by consistently responding to RESPONDENT's communications and making efforts to assure its performance *[Cl. Memo, para. 35]*. However, as demonstrated, CLAIMANT and GLOBAL MINERALS

refused to issue a conforming letter of credit and therefore, failed to assure their performance as required under Art. 72(2) CISG.

70 In conclusion, RESPONDENT was entitled to avoid the contract under Art. 72 CISG as a fundamental breach was clear to be committed by CLAIMANT and GLOBAL MINERALS.

B. IN THE ALTERNATIVE, RESPONDENT VALIDLY AVOIDED THE CONTRACT ON 9 JULY

71 RESPONDENT validly avoided the contract again on 9 July. As the contract was already validly avoided on 7 July, this declaration was only a precautionary measure. Even though RESPONDENT offered CLAIMANT and GLOBAL MINERALS a second chance to fulfill their contractual promise, CLAIMANT and GLOBAL MINERALS refused to provide a conforming letter of credit. Therefore, RESPONDENT declared avoidance on 7 July. Surprisingly, CLAIMANT and GLOBAL MINERALS then provided a 2nd letter of credit. However, the 2nd letter of credit was not in conformity with the contract either. Therefore, RESPONDENT was entitled to avoid the contract under Art. 64(1)(a) CISG. **First**, the 2nd letter of credit provided by GLOBAL MINERALS did not fulfill CLAIMANT's and GLOBAL MINERALS' payment obligation and therefore constitutes a breach (**I.**); and **second**, this breach amounts to a fundamental breach under Art. 25 CISG (**II.**).

I. THE 2ND LETTER OF CREDIT DID NOT COMPLY WITH THE CONTRACTUAL AGREEMENT AND THUS CONSTITUTES A BREACH

72 CLAIMANT and GLOBAL MINERALS again failed to comply with the contractual agreement. **First**, the 2nd letter of credit did not arrive in time (**1.**); and **second**, it required an additional document for its drawing which the parties did not agree upon (**2.**).

1. The 2nd letter of credit did not arrive in time

73 The 2nd letter of credit arrived belated. Since commodity markets fluctuate rapidly, the contracts entered into are likely to require that time limits are placed on the tendering and passing on of the notices and documents *[Mullis, Termination, p. 140]*. Therefore, time limits must be strictly complied with *[Mullis, Avoidance, p. 329; Mullis, Termination, p. 140]*. Contrary to CLAIMANT's argument, CLAIMANT and GLOBAL MINERALS did not have time until 9 July to establish the letter of credit *[Cl. Memo, para. 37]*. **First**, CLAIMANT and GLOBAL MINERALS exercised their right to determine the exact date of performance by opening the 1st letter of credit on 4 July (**a.**). Thus, any subsequent performance was out of time. **Second**,

in the alternative, the time period for performance ended on 8 July and the 2nd letter of credit was only received on 9 July (**b.**).

a. CLAIMANT and GLOBAL MINERALS exercised their right to determine the exact date of performance by opening the 1st letter of credit on 4 July

74 CLAIMANT argues that it had until 9 July 2014 to establish the letter of credit *[Cl. Memo, p. 1 para. 17]*. However, by providing the 1st letter of credit on 4 July CLAIMANT and GLOBAL MINERALS had exercised their right to determine the exact date of performance within the period given. This is because clause 4 of the sales contracts stipulates that *"a letter of credit shall be established by the buyer not later than fourteen days after the buyer received the notice of transport" [Exh. C 1, p. 7]*. Consequently, CLAIMANT and GLOBAL MINERALS had the right to determine the exact date of performance within the period given by opening the 1st letter of credit. As the 1st letter of credit was opened on 4 July, any subsequent performance was out of time. Thus, the 2nd letter of credit arrived too late in any case.

b. Alternatively, the period for opening the 2nd letter of credit ended on 8 July and the 2nd letter of credit only arrived on 9 July

75 Even if the Tribunal does not follow RESPONDENT's approach that the period for performance ended on 4 July, the 2nd letter of credit arrived too late. This is because the period ended on 8 July and the letter of credit only arrived on 9 July. The parties stipulated in the contract that a letter of credit should be provided 14 days after the receipt of the Notice of Transport *[Exh. C 1, p. 7]*. As CLAIMANT received this on 25 June 2014, the letter of credit had to be provided until 8 July 2014.

76 **First**, the period for performance ended on 8 July. CLAIMANT drew the wrong legal consequences by assuming that the period of time would end on 9 July *[Cl. Memo, para. 38]*. CLAIMANT correctly stated that according to Art. 1.12(3) UPICC, the relevant time zone is the one of RESPONDENT since it is the party setting the time *[Cl. Memo, para. 39; cf.: Schwenzer/Hachem/Kee, p. 347 para. 29.56; Vogenhauer/Kleinheisterkamp, p. 214 para. 8]*. In fact, in Mediterraneo where RESPONDENT is seated, the day of the occurrence of a triggering event is counted in *[Proc. Ord. No 2, p. 69 para. 44]*. As the triggering event was on 25 June when CLAIMANT received the Notice of Transport, the period of time ended 14 days after the event on 8 July. Furthermore, Art. 20(1) CISG states that the period of time starts to run with the triggering event, i.e. 25 June *[cf. Schlechtriem/Schwenzer, p. 357 para. 3]*. Therefore, the period for opening the 2nd letter of credit ended on 8 July.

77 **Second**, the original letter of credit only arrived on 9 July. It was delivered by special courier on 0.05h. The night porter called Mr Winter to confirm receipt *[Answ. Req. Arb., p. 37 para. 24]*. CLAIMANT acknowledges that Mr Winter was at the office at an unusual time *[Cl. Memo, para. 40]*. Therefore, CLAIMANT and GLOBAL MINERALS could not have expected that RESPONDENT had the possibility to gain awareness of the letter of credit at 00:05h. Even if the receipt at 00.05h is considered to be valid, the letter of credit still arrived at 9 July and not as required on 8 July.

78 **Third**, RESPONDENT only became aware of the letter of credit on 9 July. Delivery occurs when the declaration arrives within the addressee's sphere of control allowing the recipient to have the opportunity to gain awareness of the fact of delivery *[Achilles, Art. 24 para. 4; Bamberger/Roth/Saenger, Art. 24 para. 4; Brunner, Art. 24 para. 2; Neumayer, RIW 1994; Luig, p. 98; Staudinger/Magnus, Art. 24 para. 15; Soergel/Lüderitz/Fenge, Art. 24 paras. 4 et seq.]*. The letter of credit issued via fax arrived at 22.42h, which was outside RESPONDENT's business hours. Although Mr Winter was still in the office he did not become aware of the arrival of the fax. It was only discovered the following morning, which was the 9 July *[Answ. Req. Arb., p. 37 para. 23]* and therefore out of time.

79 **Finally**, in any case, the letter of credit arrived outside RESPONDENT's business hours. Therefore it is irrelevant which time zone applies. CLAIMANT and GLOBAL MINERALS were aware of RESPONDENT's business hours *[Proc. Ord. No 2, p. 66 para. 23]*. However, the letters of credit arrived outside RESPONDENT's hours of business and therefore delayed.

2. CLAIMANT and GLOBAL MINERALS wrongfully required a commercial invoice for the drawing of the 2nd letter of credit

80 The 2nd letter of credit additionally required for its drawing the presentation of a commercial invoice which was not listed in the 1st letter of credit. According to Art. 14(d), (e), 18 UCP 600, a commercial invoice is a commercial document which is used in international trade transactions *[Commercial invoice, in: Black's Law Dictionary]*. Contrary to what CLAIMANT alleges, a change of the required documents is not a *"minor deviation" [Cl. Memo, para. 22]*.

81 **First**, a commercial invoice was not required under the contract. In clause 4 of the contract it is not expressly stipulated, which documents should be required for the drawing of the letter of credit *[Proc. Ord. No 2, p. 65 para. 16]*. Therefore, clause 4 of the contract has to be interpreted in accordance with Art. 8(3) CISG. Thus, the parties' intent is decisive. They never agreed on a commercial invoice. Contrary to what CLAIMANT argues, the fact that RESPONDENT usually prepared a commercial invoice in the past is irrelevant *[Cl. Memo, para. 42]*. According to Art. 9(1) CISG the parties are only bound to usages they agreed upon.

Furthermore, the 1st letter of credit only required two documents and no commercial invoice *[Exh. C 5, p. 11; Proc. Ord. No 2, p. 65 para. 16]*. Without any legal basis, CLAIMANT and GLOBAL MINERALS suddenly demanded a commercial invoice as third document in the 2nd letter of credit and thereby acted against their former conduct *[Exh. C 8, p. 14]*.

82 **Second,** RESPONDENT could not get paid without providing a commercial invoice. *"If any discrepancy or inconstancy occurs between the documents presented by the exporter and what is actually specified in the letter of credit, the bank can refuse payment" [UNCTAD, p. 10; see also: CISG Advisory Council Opinion No 11, p.5, para. 5.1]*. Therefore, RESPONDENT would have been forced to prepare a commercial invoice although the parties never agreed to it.

II. CLAIMANT'S AND GLOBAL MINERALS' FAILURE AMOUNTS TO A FUNDAMENTAL BREACH ACCORDING TO ART. 25 CISG

83 CLAIMANT's and GLOBAL MINERALS' failure to open a conforming letter of credit amounts to a fundamental breach according to Art. 25 CISG. RESPONDENT was substantially deprived of what it was entitled to expect under the contract. As CLAIMANT rightly states, RESPONDENT was entitled to expect *"that CLAIMANT would comply with its obligation under the contract to open a Letter of credit within the time frame provided" [Cl. Memo, paras. 18 et seq.]*. However, these expectations were frustrated as CLAIMANT and GLOBAL MINERALS failed to provide a conforming letter of credit within the stipulated period of time and thereby left RESPONDENT without payment.

84 Furthermore, the delay in providing the 2nd letter of credit in itself constitutes a substantial deprivation *[cf.: Australian Wool Raw Case; Downs Investments v. Perwaja; Foamed Board Machinery; Spirits Case; ICC No 7197; ICC No 1675; ICC No 6527; Higher Regional Court Düsseldorf, 02/14/1994; Regional Court Kassel, 09/21/1995; Piltz, NJW 2003, 2056, 2063; Piltz, NJW 2005, 2126, 2130; Schlechtriem/Schwenzer (GER)/Mohs, Art. 64 para. 9]*. In a similar case the arbitral tribunal held that *"failing to open the (letter of credit) within the stipulated time and in accordance with the contract"* and afterwards, failing to provide the letter of credit within an additional period of time entitled the aggrieved party to terminate the contract *[Styrene monomer case]*.

85 Taking into account the particularities of commodity trade, a fundamental breach is conceivable as time was of the essence due to the highly fluctuating exchange markets *[cf. Ferrari/Flechtner/Brand/Murray, p. 462; Huber/Mullis, p. 327; Schwenzer, p. 212 para 3.2]*.

86 In conclusion, CLAIMANT and GLOBAL MINERALS again failed to comply with the terms of the contract which led to a substantial deprivation of RESPONDENT.

C. RESPONDENT DID NOT CAUSE THE FAILURE BY CLAIMANT ACCORDING TO ART. 80 CISG

87 Contrary to CLAIMANT's allegations, RESPONDENT did not cause any failure under Art. 80 CISG *[Cl. Memo, para. 25]*. Art. 80 CISG states *"a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission"*. Art. 80 CISG has to be interpreted in the light of good faith *[Higher Regional Court Koblenz, 02/24/2011; Huber/Mullis, p.265; Kröll/Mistelis/Viscasillas/Atamer, Art. 80 para. 1; Schlechtriem/Schwenzer, p. 1088 para. 1; Staudinger/Magnus, Art. 80 para. 2; Zeller, p. 110]*.

88 RESPONDENT never acted against good faith as it never created the impression that the contract was modified. CLAIMANT and GLOBAL MINERALS must have known that RESPONDENT would never accept a change of the contractual terms as RESPONDENT explicitly rejected a delivery amount of 100 metric tons of coltan in connection with *"CIP"* as term for shipment *[Answ. Req. Arb., p. 34 para. 8]*. RESPONDENT had already problems in delivering the agreed 30 metric tons within the agreed time and asked for an unusual long window for the giving of the Notice of Transport *[Answ. Req. Arb., p. 34. para. 8]*. In its letter RESPONDENT merely informed CLAIMANT and GLOBAL MINERALS that it was able to deliver the coltan earlier than originally anticipated *[Answ. Req. Arb., p. 35 para. 12]*. However, this could not be understood as an offer to modify the contractual terms. Therefore, RESPONDENT did not cause any failure of CLAIMANT and GLOBAL MINERALS.

CONCLUSION ISSUE II

89 RESPONDENT validly avoided the contract twice. First, RESPONDENT was entitled to avoid the contract on 7 July since CLAIMANT and GLOBAL MINERALS failed to prove a conforming letter of credit. This constituted a fundamental breached entitling RESPONDENT to declare avoidance under Art. 64(1)(a) CISG. In the alternative, RESPONDENT could base the avoidance on Art. 64(1)(b) CISG and on Art. 72 CISG. Second, as a precautionary measure, RESPONDENT validly avoided the contract again on 9 July since CLAIMANT and GLOBAL MINERALS again failed to pay the purchase price. The provided letter of credit arrived too late and was not in conformity with the parties' agreement.

ISSUE III: THE TRIBUNAL SHALL LIFT THE ORDER OF THE EMERGENCY ARBITRATOR

90 RESPONDENT requests the Tribunal to lift the remaining part of the emergency arbitrator's order referring to 30 metric tons of coltan. The parties concluded in clause 21 of the contract that interim relief would only be available from state courts. Now, CLAIMANT wrongfully forced RESPONDENT into an unjustified emergency arbitration.

91 CLAIMANT used its insider knowledge about the Xanadu crisis in order to speculate on the market development. However, after its speculations turned against it, it tries to put the blame on RESPONDENT. The emergency arbitrator's order prevents RESPONDENT from disposing of the coltan presently stocked at its warehouse. This resulted in a huge loss of profit and storage costs for RESPONDENT, as it could not accept a single request of its long-term costumers. It will be demonstrated that CLAIMANT's motion is unsubstantial and should not be maintained by the Tribunal.

92 **First**, the emergency arbitrator lacked jurisdiction and was not empowered to issue an emergency order against RESPONDENT (**A.**); **second**, even if the Tribunal comes to the conclusion that the emergency arbitrator had jurisdiction, the substantive requirements for the granting of emergency measures are not met (**B.**).

A. THE EMERGENCY ARBITRATOR HAD NO JURISDICTION

93 Contrary to the emergency arbitrator's determination as well as CLAIMANT's assumption *[Cl. Memo, para. 58]*, clause 21 limits interim relief to that available from state courts. By not honoring the parties' intention, the emergency arbitrator made a mistake in her decision according to Art 6(2) Appendix V of the ICC Rules. This mistake can be cured by the Tribunal. According to Art. 29(3) ICC Rules, the Tribunal is able to *"modify, terminate or annul the order (…) made by the emergency arbitrator."* RESPONDENT requests the Tribunal to find that the emergency arbitrator did not exercise its competence-competence properly. This is for the following reasons: **First**, clause 21 of the contract excludes the right to apply for emergency measures under the ICC Rules (**I.**); **second**, in the alternative, the Tribunal should use the *"contra proferentem rule"* to interpret clause 21 of the contract (**II.**); and **third**, in any case, the order is null and void as it was rendered at the wrong place (**III.**).

I. CLAUSE 21 OF THE CONTRACT EXCLUDES EMERGENCY ARBITRATION UNDER THE ICC RULES

94 Clause 21 of the contract is meant to exclude the emergency arbitrator provisions. According to Art. 29(6)(b) ICC Rules "*the emergency arbitrator provisions shall not apply if the parties have agreed to opt them out*". CLAIMANT alleges that the parties did not elect to explicitly opt out of the emergency arbitrator provisions *[Cl. Memo, para. 76]*. However, clause 21 excludes emergency arbitration for the following reasons: **First**, the wording of the clause expressly allocates jurisdiction to state courts (**1.**); **second**, CLAIMANT's interpretation would frustrate the purpose of clause 21 (**2.**); and **third**, although the parties were aware of the changes in the ICC Rules when they entered into the contract, they intentionally did not modify clause 21 (**3.**).

1. The wording of clause 21 of the contract expressly allocates jurisdiction to state courts regarding interim relief

95 The wording of clause 21 of the contract expressly allocates jurisdiction to state courts in regard to interim relief. Clause 21 states that *"the courts at the place of business of the party against which provisional measures are sought shall have exclusive jurisdiction to grant such measures" [Exh. C 1, p. 7]*. The wording expressly only refers to *"courts"* and not to tribunals. The case at hand is comparable to *Fiona Trust v. Privalov* where the Tribunal held that the language of the contract is decisive stating that state courts shall have jurisdiction if *"the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction"*. In the case at hand, the language of clause 21 makes it clear that interim relief was intended to be excluded from the arbitrator's jurisdiction.

96 Furthermore, comparing the different wording in clause 20 and clause 21 it is evident that the parties aimed to allocate jurisdiction exclusively to state courts in regard to interim relief. Clause 20 only takes *"arbitration"* into account while clause 21 only names *"courts"*. *"All disputes arising out or in connection with the present contract"* shall be solved by arbitration under the ICC Rules *[Exh. C 1, p. 7]*. To the contrary, request for provisional measures shall be granted by state courts exclusively *[Exh. C 1, p. 7]*. This situation is comparable to *Josef Pietrasz v. Eminata Group and Vancouver Career College*. In that case the parties' contract contained two different clauses, one containing an arbitration agreement and one containing a jurisdiction clause, stating which court would have exclusive jurisdiction. The Supreme Court of British Columbia held that both clauses were not necessarily in conflict. To the contrary, they *"were intended to live together"*. Moreover, the court found that the jurisdiction clause *"embraces the specific Arbitration Clause"*. Therefore, in the case at hand, the wording of

clause 21 expressly excludes jurisdiction of emergency arbitrators and arbitral tribunals to issue provisional measures.

2. CLAIMANT's interpretation would frustrate the purpose of clause 21

97 The purpose of clause 21 is to ensure that effective interim relief can be obtained without any discussion about the jurisdiction of the competent judicial authority *[Proc. Ord. No 2, p. 65 para. 13]*. CLAIMANT's interpretation of clause 21 frustrates this purpose. In 2010 Precious Minerals, another company of the GLOBAL MINERALS Group, had failed to settle a dispute including means of interim relief due to a lack of clarity concerning the jurisdiction to issue such measures. Therefore, Precious Minerals adopted a clause that should ensure efficient interim relief without any discussions about the court's jurisdiction. CLAIMANT wrongfully argues that CLAIMANT's application of emergency measures does not infringe upon either parties' rights to pursue provisionary measures in court *[Cl. Memo, para. 75]*. However, if there was a choice between arbitral interim relief and interim relief in front of state courts, the purpose of clause 21 would be infringed as discussions regarding the jurisdiction would arise. Thus, clause 21 expressly limits interim relief to that available from the state courts.

3. The parties intentionally did not modify clause 21 although the ICC Rules were changed

98 The parties were aware of the changes in the ICC Rules when they entered into the contract but intentionally did not change clause 21. CLAIMANT argues that Art. 29(6)(a) ICC Rules applies leading to an application of the emergency arbitrator provisions *[Cl. Memo, para. 76]*. It is true that clause 21 was already part of former contracts before the new ICC emergency arbitrator provisions came into force in 2012. However, CLAIMANT wrongfully argues that the parties did not elect to explicitly opt out of the emergency arbitrator provisions *[Cl. Memo, para. 76]*. Even though the parties were aware of the changes in the new ICC Rules they did not modify clause 21. Therefore, clause 21 explicitly excludes emergency arbitrator provisions. Before emergency arbitration was available, the understanding of the clause was limited to interim relief in front of state courts. The purpose of clause 21 cannot change due to the possibility of emergency arbitration without modifying the contractual term. CLAIMANT and GLOBAL MINERALS simply provided the same clause as usual and thus RESPONDENT could reasonable assume that the procedure stayed the same as usual.

II. ALTERNATIVELY, THE TRIBUNAL SHOULD USE THE *"CONTRA PROFERENTEM RULE"* TO INTERPRET CLAUSE 21

99 RESPONDENT submits that clause 21 of the contract expressly excludes emergency arbitration. In contrast, CLAIMANT argues that the parties' did not exclude emergency arbitration *[Cl. Memo, para. 71]*. Therefore, RESPONDENT requests the Tribunal to use the *"contra proferentem rule"* in Art. 4.6 UPICC as the wording in clause 21 is at least not clear. Clause 20 of the parties' contract states *"the contract, (…) shall be governed by the law of Danubia" [Exh. C 1, p. 7]*. The contract law of Danubia is a verbatim adoption of the UPICC 2010 *[Proc. Ord. No 2, p. 69 para. 43]*. Art. 4.6 UPICC states *"If the contract terms supplied by one party are unclear, an interpretation against that party is preferred"*. The contra proferentem rule essentially means that if the term of a contract is not properly phrased, the party providing the wording of the term bears the risk arising from a lack of clarity in drafting and interpreting that term *[Ad hoc Arbitration, Buenos Aires; Ad hoc Arbitration, Uruguay; Aduanas v. Comercio Paraguayo; Appelate Court Grenoble, 24/01/1996; Deutsches Sportsschiedsgericht, 12/17/09; District Court Frankfurt aM, 12/15/11; Société Harper Robinson v. Société internationale; ICC No 8261; ICC No 11789; ICC No 11869; ICC Russia No 108.2011; Säcker/Rixecker/Busche, Art. 157 para. 8; Vogenhauer/Kleinheisterkamp, p. 527 para. 2]*.

100 As GLOBAL MINERALS, CLAIMANT's parent company, supplied clause 21 of the contract, the risk of its unclear phrasing lies on CLAIMANT's side. Therefore, the Tribunal should interpret clause 21 against CLAIMANT.

III. ALTERNATIVELY, THE ORDER IS NULL AND VOID AS IT WAS RENDERED AT THE WRONG PLACE

101 Even if the Tribunal comes to the conclusion that clause 21 of the contract does not exclude emergency arbitration, the emergency arbitrator disregarded the parties' agreement in regard to the place of arbitration. The emergency order was issued in Danubia instead of Mediterraneo. Indeed, in clause 20 of the contract the parties agreed on Vindobona, Danubia as seat of arbitration. Contrary to that, clause 21 states that the place for provisional measures is "*the place of business of the party against which provisional measures are sought",* i.e. RESPONDENT's place of business, Mediterraneo.

102 By locating the emergency arbitrator proceedings in Vindobona, Danubia, the explicit agreement of the parties was disregarded. Therefore, in the light of Art. 34(2)(a)(iv) UML this violation of the parties agreement must lead to the Tribunal's annulment of the order *[cf. UNCITRAL, p. 156 para. 108 et seq.; p. 103 para. 5]*.

B. EVEN IF THE EMERGENCY ARBITRATOR HAD JURISDICTION, THE ORDER WAS NOT JUSTIFIED

103 Even if the Tribunal finds that the emergency arbitrator had jurisdiction, the order was not justified since the substantive requirements to grant interim relief under the ICC Rules as well as under the UML were not met. RESPONDENT always acted in accordance with the contractual agreement. CLAIMANT and GLOBAL MINERALS, to the contrary, are trying to harm RESPONDENT's business by unjustly requesting emergency arbitration. Due to CLAIMANT's unfounded motion, RESPONDENT was forced to store 30 metric tons of coltan. This led to storage costs and prevented RESPONDENT from making ordinary business. It will be demonstrated that the order of the emergency arbitrator was not justified since **first**, the measure requested by CLAIMANT was not urgently needed as required in Art. 29(1) ICC Rules (**I.**); and **second**, the prerequisites of the internationally accepted principles of arbitral interim relief under the UML are not fulfilled either (**II.**).

I. THE SUBSTANTIVE REQUIREMENT OF ART. 29(1) ICC RULES IS NOT MET SINCE THE EMERGENCY MEASURE WAS NOT URGENT

104 The emergency measure requested by CLAIMANT was not urgent. Art. 29(1) ICC Rules requires the urgency of any interim or conservatory measures *[cf.: ICC No 8113; ICC No 8786; ICC No 10619; ICC No 12361; ICC No 13194; ICSID No ARB/05/22; ICSID No ARB/02/18; ICSID No ARB/98/08; Aschauer, p. 2; Baigel, p. 3; Bose/Meredith, p. 187; Conrad/Münch/Black-Branch/Lemaire/Raynouard, p. 134 4.42; Greenberg, p. 69 para. 4.6; Isik; Tucker, p. 19; Webster/Buhler, para. 29-82]*. The measure granted by the emergency arbitrator was not urgently needed. **First**, CLAIMANT failed to prove urgency (**1.**); and **second**, CLAIMANT was able to await the constitution of the Tribunal in September 2014 (**2.**).

1. CLAIMANT failed to prove that the requested measure was urgent

105 CLAIMANT failed to prove that the emergency measure was urgently needed. However, "*urgency is a condition for making an Application" [Fry/Greenberg/Mazza, Art. 29(1) para. 3-1061]*. The burden of proof regarding urgency lies with the party requesting the measure, i.e. CLAIMANT *[cf.: Born, p. 2474; Fry/Greenberg/Mazza, Art. 29(2) para. 3-1051; Nedden/Herzberg/Bassiri/ Haller, Art. 29 para. 25]*. By not even mentioning this condition *[Cl. Memo, paras. 58 et. seq.],* CLAIMANT failed to provide any proof.

106 The only argument for urgency that is brought forward by the emergency arbitrator is that RESPONDENT is in the process of negotiating with other customers and that one of the customers is looking for a delivery at the beginning of August *[Ord. Emerg. Arb., p. 30 para.*

10]. However, delivery to CLAIMANT was not at risk at any time. It is true that RESPONDENT started negotiating with other costumers after the contract was avoided. However, this is not unusual business. CLAIMANT especially failed to prove the exact amount upon which RESPONDENT was negotiating with other costumers. CLAIMANT cannot allege that RESPONDENT wanted to sell exactly the 30 metric tons allegedly owed to CLAIMANT. The emergency arbitrator did not consider that RESPONDENT had 150 additional metric tons of coltan available after one of its major customers declared bankruptcy *[Exh. C 3, p. 9]*. Thus, RESPONDENT had a total of 180 metric tons of coltan in storage. There is no evidence that RESPONDENT would not be able to deliver the relatively small amount of 30 metric tons. Therefore, RESPONDENT requests the Tribunal not to accept CLAIMANT's motion and to find that the measure was not urgent.

2. CLAIMANT could have awaited the constitution of the Tribunal in September 2014 as it owed delivery to its costumers only in May 2015

107 RESPONDENT requests the Tribunal to consider that CLAIMANT was able to await the constitution of the Tribunal in September 2014 as it owed delivery to its costumers only in May 2015. A measure is only urgent if a decision would come too late after the arbitral tribunal has been constituted *[ICC No 8894; ICC No 8113; Aschauer, p. 4; Bose/Meredith, p. 187; Craig/Jaeger]*.

108 In April and May 2014 CLAIMANT concluded contracts with its customers. The coltan was to be delivered in May 2015 *[Proc. Ord. No 2, p. 68 para. 34]*. On 11 July 2014 CLAIMANT applied for arbitration *[Req. Arb., pp. 2 et seq.]*, the Tribunal was constituted on 18 September 2014 *[Appoint. Arb., p. 56]*. As CLAIMANT only needed to deliver the coltan in May 2015 it would last if the Tribunal decides about its claims after the Tribunal's constitution in September 2014. RESPONDENT is the second largest producer of conflict free coltan *[Ord. Emerg. Arb., p. 29 para. 3]*. Even if RESPONDENT had already disposed the coltan owed to CLAIMANT, RESPONDENT would have mined new coltan until May 2015. Therefore, the facts of the case do not justify upholding the ruling of the emergency arbitrator.

II. THE REQUIREMENTS OF ART. 17 A UNCITRAL MODEL LAW ARE NOT MET EITHER

109 CLAIMANT did not provide sufficient evidence for seeking emergency measures in accordance with internationally accepted principles of arbitral interim relief under Art. 17 A UML. Since interim or conservatory measures are considered to be a matter of procedure, the law governing the arbitration is also applicable *[ICC No 7544; ICC No 14287; Boog, p. 424;*

Fry/Greenberg/Mazza, para. 3-1037]. As presented above, the parties agreed upon governing the contract as well as the included arbitration clause by the law of Danubia, i.e. the UML. Art. 17 A of the UML establishes two conditions for granting interim measures that are also upheld by several arbitral tribunals *[cf. ICC No 8113; ICC No 10619; ICC No 12361; ICC No 13194]*. **First**, the reasonable possibility of the applicant's success on the merits (**1.**); and **second**, the necessity of an irreparable harm if the order is not granted (**2.**).

1. CLAIMANT did not present a good arguable case on the merits

110 CLAIMANT did not present a good arguable case on the merits as required under Art. 17 A(1)(b) UML. Therefore, arbitrators generally demand that there is a chance of succeeding on the merits *[ICC No 11225 (see Blessing, p. 857); Born, pp. 2477f., 2480f.; Lew, p. 23 para. 30; Yesilirmak, p. 5 para. III]*. As already shown, CLAIMANT and Global Mineral fundamentally breached the contract. RESPONDENT was entitled to avoid the contract even twice. First, RESPONDENT validly avoided the contract on 7 July based on Art. 64(1)(a), 25, 64(1)(b) as well as on Art. 72 CISG and second, RESPONDENT validly avoided the contract again on 9 July as precautionary measure according to Art. 64(1)(a), 25 CISG *[see above para. 39 et seq.]*.

2. CLAIMANT would not have suffered irreparable harm if the measure had not been granted

111 If the emergency measure had not been granted, no irreparable harm on CLAIMANT would have occurred. A measure is justified under Art. 17 A(1)(a) UML, if a harm, not adequately reparable by an award for damages, is likely to occur. The sense of interim measures is the protection and avoidance of harm that cannot be compensated in monetary terms *[Safe Kids v. McNeill; A/CN.9/547, para. 88; Binder, p. 247 para. 4A-040; Schwartz, p. 61; Sorieul, p. 557]*. In addition, there must not be a disproportion between the harm occurring to the party requesting the measure and the harm to the party against which the measure is granted.

112 **First**, CLAIMANT failed to provide sufficient evidence of any alleged harm. CLAIMANT alleges that it would not be able to satisfy existing contractual obligations to its customers leading to a loss of reputation, which would be fatal to a young company like CLAIMANT *[Cl. Memo, para. 69]*. CLAIMANT did not even state how many contracts would be frustrated or any sum of money that it might have lost *[Answ. Req. Arb., p. 39 para. 38]*. However, it is not evident how irreparable harm could occur as CLAIMANT was obliged to deliver the coltan only in May 2015 *[see above para. 107]*. Therefore, if at all, irreparable harm could only result in May 2015 if CLAIMANT would not be able to deliver the coltan to its customers. Until than the Tribunal would already have been constituted and CLAIMANT could have awaited the Tribunal's decision.

113 **Second**, any harm that allegedly had occurred to CLAIMANT was disproportionately low compared to the harm that RESPONDENT suffers being refrained from disposing of the coltan *[Ord. Emerg. Arb., p. 31 para. 16 No 2]*. RESPONDENT is not able to use its storage capacities for stocking additionally mined minerals. In addition, it was not able to sell 30 metric tons on a very dynamic market, although it had numerous requests by long term customers *[Answ. Req. Arb., p. 39 para. 38]*. Furthermore, it is highly probable that RESPONDENT will only be able to sell the stocked coltan to a notably lower price, because of changed market conditions *[Answ. Req. Arb., p. 39 para. 38]*. RESPONDENT expects that the loss incurred by the unjustified measure will at least amount to USD 1m *[Answ. Req. Arb., p. 39 para. 38]*.

CONCLUSION ISSUE III

114 The emergency arbitrator's order should be lifted by the Tribunal as the emergency arbitrator had no jurisdiction. The parties explicitly opted out of emergency arbitration in the contract. In the alternative, the order is null and void as the parties' choice in regard to the place of the arbitration was disregarded. Even if the emergency arbitrator had jurisdiction, the requirements under the ICC Rules as well as under the UML were not met. The order was not urgently needed and CLAIMANT failed to prove that it would have suffered irreparable harm if the order had not been granted.

REQUEST FOR RELIEF

In consideration of the above submissions RESPONDENT respectfully requests the Tribunal

(1) **to declare that it has jurisdiction over GLOBAL MINERALS.**

- GLOBAL MINERALS consented to being a party to the arbitration agreement as it endorsed the contract and was heavily involved in the negotiations, performance and termination of the contract.
- In the alternative, the arbitration agreement is extended by virtue of the Group of Companies Doctrine and thus binds GLOBAL MINERALS to this proceeding.
- In any case, GLOBAL MINERALS is prevented from contesting the Tribunal's jurisdiction as it created the impression of standing behind the contract.

(2) **to find that RESPONDENT was entitled to avoid the contract.**

- CLAIMANT and GLOBAL MINERALS failed to fulfill their payment obligation and breached the contract fundamentally.

(3) **to lift the order of the emergency arbitrator.**

- The emergency arbitrator had no jurisdiction and the order was unjustified since the substantive requirements under the ICC Rules as well as under the UML were not met.
- In the alternative, the order is null and void as the parties' choice in regard to the place of arbitration was disregarded

Respectfully submitted on 22 January 2015

Liza Böttger | Greta Eriksen | Michelle Fiekens

Milena Heine | Niels Kurth | Konrad Thibaut