### **MEMORANDUM FOR CLAIMANT**



On behalf of

#### **Innovative Cancer Treatment Ltd**

46 Commerce Road Capital City, Mediterraneo Telephone: (0) 4856 201 Telefax: (0) 4856 201 01

'CLAIMANT'

Against

#### **Hope Hospital**

1 – 3 Hospital Road Oceanside, Equatoriana Telephone: (0) 238 8700 Telefax: (0) 238 87 01

'RESPONDENT'

### **GRIFFITH UNIVERSITY**

CHRISTIAAN VAN OEVEREN • DANIEL POPPLE • JACKSON DIXON-BEST • JESSICA MUSULIN KERROD GILES • LOUIS BAIGENT • MARCUS DYASON • TEGUN MIDDLETON



### TABLE OF CONTENTS

TAB	LE OF	CONTENTS2
IND	EX OF	ABBREVIATIONS5
IND	EX OF	AUTHORITIES7
IND	EX OF	CASES13
		STATUTES, RULES AND TREATIES21
		NT OF FACTS
SUM	IMAKY	OF ARGUMENTS25
ARG	GUMEN	NT ON THE PROCEEDINGS26
	-	HE ARBITRAL TRIBUNAL HAS JURSIDICTION TO DEAL WITH THE CLAIMS RAISED BY THE CLAIMANT26
I.	Tho	Parties Evinced A Clear Intention To Be Bound By Arbitration In The Event
1.		Dispute
	(A)	The Framework And Sales Agreement Clearly Shows That The Parties
	(A)	Intended To Be Bound Arbitration
	<b>(B)</b>	The Sales And License Agreement Exhibits A Clear Intention For The Parties
	( <b>D</b> )	To Be Bound By Arbitration
II.	The '	Tribunal Should Respect The Autonomy Of The Parties In Choosing
111.		tration
	(A)	The Core Principle Of Arbitration Is Party Autonomy28
	(A) (B)	The Parties Have Clearly Chosen An Arbitration Agreement That Features An
	<b>(B)</b>	Appeal And Review Mechanism
III.	An A	Appeal And Review Mechanism Is Not Inconsistent With Arbitration29
	<b>(A)</b>	International Arbitration Law Already Provides For Scenarios Where Arbitral
		Decisions Can Be Challenged In State Courts
	<b>(B)</b>	There Is An Abundance Of Case Law That Supports The Contention That An
		Appeal And Review Mechanism Is Not Inconsistent With Arbitration30
ISSU	J <b>E 2: B</b>	OTH CLAIMS SHOULD BE HEARD IN A SINGLE ARBITRATION31
I.	The	Will To Have The Claims Heard Within One Arbitration Is Evidenced By
	The	Interrelatedness Of The Agreements32
	<b>(A)</b>	The Language Of Both Agreements Demonstrates The Parties' Intention That
		Both Form Part Of A Single Transaction



		(1) The Framework And Sales Agreement Was Intend	
		Sales And Licensing Agreement.	
		(ii) Both Agreements Refer To One Another Unequive	ocally33
	<b>(B)</b>	The Commercial Reality Of The Agreements Demonstra	ntes A Clear Intention
		To Perform A Single Transaction	32
		(i) The Agreements Have A Common Origin	34
		(ii) The Agreements Fulfil A Common Goal	35
II.	Diffe	rences In The Dispute Resolution Clauses Do Not Indic	
	Have	Each Dispute Heard Within A Separate Arbitration	35
	(A)	The Parties Intended Art. 23 Of The Sales And Licensin	g Agreement Merely
	. ,	As A Modification Of The Original Art. 23 Under The F	
		Agreement	
	<b>(B)</b>	The Amended Art. 23 Does Not Confer Jurisdiction Enti	
	(2)	Courts	
	<b>(C)</b>	The Arbitration Clause Under The Original Art. 23 Is W	
	(C)	Jurisdiction Clause Under Art. 23 Of The Sales and Lice	
III.	T4 Ta		
111.		In The Interests Of Both Parties That The Dispute Be I	=
		tration.	
	<b>(A)</b>	Hearing Both Disputes Within A Single Arbitral Proceed	_
	( <del>-</del> )	Parties Are Given A Fair Trial	
	<b>(B)</b>	Hearing Both Disputes Within A Single Arbitral Proceed	_
		Good Administration Of Justice.	
		HE CISG IS APPLICABLE TO THE SALES AND LIC	
		HE CISG IS APPLICABLE TO THE SALES AND LIC	
AGR	EEME	NT	38
AGR	EEME The	NTCLAIMANT Incorporated The Revised Standard Tern	38  1s Under Art. 8
	The CISC	NTCLAIMANT Incorporated The Revised Standard Term	
AGR	EEME The	NTCLAIMANT Incorporated The Revised Standard Tern The Question Of The Incorporation Of The Revised Star	ns Under Art. 839 ndard Terms Into The
AGR	The CISC	CLAIMANT Incorporated The Revised Standard Term The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI	
AGR	The CISC	CLAIMANT Incorporated The Revised Standard Term The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In	
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing	
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unaway	ns Under Art. 8
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent.	
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent.  (ii) A Reasonable Person In The RESPONDENT'S Po	
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent	ns Under Art. 8
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent	
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent	
AGR	The CISC	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent.  (ii) A Reasonable Person In The RESPONDENT'S Posseen Aware Of The CLAIMANT'S Intent.  (iii) The RESPONDENT Was Capable Of Understanding Standard Terms.  (iv) The CLAIMANT Provided Sufficient Reference Terms.	ns Under Art. 8
AGR I.	The CISC (A)	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent	ns Under Art. 8
AGR	The CISC (A)  (B)	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent.  (ii) A Reasonable Person In The RESPONDENT'S Poseen Aware Of The CLAIMANT'S Intent.  (iii) The RESPONDENT Was Capable Of Understanding Standard Terms.  (iv) The CLAIMANT Provided Sufficient Reference To Incorporate Them Into The Sales And Licensin July 2011 Choice Of Law Clause Means The CISG Is A	
AGR I.	The CISC (A)	The Question Of The Incorporation Of The Revised Star Sales And Licensing Agreement Is Governed By The CI An Application Of Art. 8 Of The CISG Results In The In Revised Standard Terms Into The Sales And Licensing A (i) The RESPONDENT Could Not Have Been Unawa CLAIMANT'S Intent	



		(1) The Place Of Business Of Both Parties Is In Different States44
		(ii) The CISG Is Directly Applicable As Equatoriana And Mediterraneo Are
		Contracting States44
	<b>(B)</b>	The November 2000 Standard Terms Still Lead To The Application Of The
		CISG
		(i) The Choice of Law Clause Under The November 2000 Standard Terms
		Leads To The Application Of The CISG To Disputes Under The Sales
		And Licensing Agreement46
ICCII	F 1. T)	HE SALES AND LICENSING AGREEMENT IS A CONTRACT FOR THE
		GOODS UNDER THE CISG
SALI	Ur	OODS UNDER THE CISG47
I.	The 1	Inclusion Of Services In The Sales And Licensing Agreement Does Not
		ıde It From The Scope Of The CISG48
	(A)	The Sales And Licensing Agreement Is A Single And Unified
	. ,	Agreement
	<b>(B)</b>	The Preponderant Part Of The Seller's Obligations Under The Sales And
	, ,	Licensing Agreement Concerns The Sale Of Goods
II.	The S	Supply Of Goods To Be Manufactured Under The Sales And Licensing
	Agre	ement Falls Within The Scope Of The CISG51
	(A)	The Contract In Part Concerns The Supply Of Goods Which Must Be
		Manufactured Or Produced 51
	<b>(B)</b>	The RESPONDENT Is Not Responsible For The Supply Of The
		Materials Necessary For The Manufacture Or Production Of The
		Goods
	<b>(C)</b>	In Any Event, The RESPONDENT Is Not Responsible For The Supply Of
	• /	A Substantial Part of The Materials Necessary



#### **INDEX OF ABBREVIATIONS**

#### **Abbreviation**

Ed./Eds. Editor/Editors

Ans. Reg. Arb. Answer to Request for Arbitration

Art./Arts. Article/Articles

ASA Bull Swiss Arbitration Association Bulletin

Bulgarian Chamber of Commerce and Industry

CAM Chamber of National and International

Arbitration of Milan

CEPANI Belgian Centre for Mediation and Arbitration

CISG United Nations Convention on the International

Sale of Goods

Cl. Ex. Claimant's Exhibit

ed. Edition

et. Al. And others

ICC International Chamber of Commerce

ICSID International Centre for Settlement of

**Investment Disputes** 

J Droit Int'l Journal du Droit International

*No.* Number

NYC New York Convention

¶/¶¶ Paragraph / Paragraphs

*P/pp*. Page/Pages

PCA Polish Chamber of Commerce

*Proc. Ord.* Procedural order

Req. Arb. Request for Arbitration



Res. Ex. Respondent's Exhibit

Revue de l'arbitrage (France)

SMANY Society of Maritime Arbitrators New York

v. Versus

Vol. Volume

YB Com Arb Yearbook Commercial Arbitration



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	28 November (1980)	
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D 1: T1	T I I I'D' '	72
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#### STATEMENT OF FACTS

The Parties to the Arbitration are Innovative Cancer Treatment Ltd (the CLAIMANT) and Hope Hospital (the RESPONDENT). The CLAIMANT is a manufacturer of particle therapy equipment with its central place of business in Mediterraneo. The RESPONDENT is the purchasing entity and national centre for cancer research and treatment in Equatoriana.

2007

The RESPONDENT enters into negotiations with the CLAIMANT for the purchase of a proton therapy facility. The CLAIMANT agrees to provide the RESPONDENT with a pre-sale budget analysis, and concludes that the facility will at least run on zero costs.

13 January 2008

The CLAIMANT and the RESPONDENT create a Framework and Sales Agreement for the sale of the proton therapy facility, which includes two treatment rooms and a proton accelerator. The price of the contract is USD 50 million, to be paid in separate instalments.

The Framework and Sales Agreement provides the framework for further contracts concerning the use and extension of the facility. It stipulates that all disputes, where they cannot be resolved amicably, are to be settled by arbitration. The Framework and Sales Agreement also purports to be subject to the CLAIMANT's Standard Terms and Conditions for Sale.

15 April 2010

The proton therapy facility is successfully installed.

6 May 2011

The RESPONDENT approaches the CLAIMANT, expressing interest in purchasing a third treatment room using active scanning technology. The Parties subsequently enter into negotiations for a second Agreement.

2 June 2011

The Parties hold a final meeting, during which the CLAIMANT tells the RESPONDENT that its Standard Terms have been overhauled, but that this will not affect the Parties' liability regime.



1 July 2011- The CLAIMANT publishes an English translation of the revised

**4 July 2011** Standard Terms and Conditions for Sale on its website.

5 July 2011 The CLAIMANT sends a draft contract for the third treatment room to

the RESPONDENT, confirming that it will be governed by the revised

Standard Terms and Conditions for Sale.

20 July 2011 The Parties finalise a Sales and Licensing Agreement for the sale of the

third treatment room, inclusive of a software and training package. A

reduced price of USD 3.5 million is agreed upon, on the condition that

the RESPONDENT provides research data necessary for the further

development of the active scanning technology. This is to be paid in

two instalments.

The Sales and Licensing Agreement contains an amended dispute

resolution clause permitting both The RESPONDENT and the

CLAIMANT to submit all claims to the jurisdiction of ordinary courts

in either Mediterraneo or Equatoriana

21 July 2011 The CLAIMANT publishes a revised English translation of the

Standard Terms and Conditions for Sale on its website.

13 January 2012 The third treatment room becomes operational.

20 May 2012 The active scanning treatment is stopped due to doubts about the

accuracy of the proton beam and the software steering it.

10 July 2012 The Office of the Auditor-General of Equatoriana finds that the proton

therapy facility was operating at only 70% of its planned capacity

during the previous financial year.

15 August 2012 The RESPONDENT writes to the CLAIMANT explaining that it will

not be paying the outstanding USD 10 million final payment under the



Framework and Sales Agreement or the USD 1.5 million under the Sales and Licensing Agreement.

6 June 2013

The CLAIMANT submits a Request for Arbitration, claiming the total USD 11.5 million outstanding, plus interest and the costs of arbitration.



#### **SUMMARY OF ARGUMENTS**

The Arbitral Tribunal has jurisdiction to deal with the payment claims raised by the CLAIMANT (Issue 1). The CLAIMANT argues that the Parties evinced a clear intention to be bound by arbitration in the event of a dispute, which is demonstrated by their agreements and other communications. Furthermore, the Tribunal should respect the autonomy of the Parties in choosing an arbitration agreement that features an appeal and review mechanism, which is not inherently contradictory to arbitration and is consistent with public policy.

Both claims, which arise under different contracts, should be heard in a single arbitration (Issue 2). The CLAIMANT argues that the relationship between the agreements is an expression of the will of the Parties to have claims arising under both heard within one arbitration, and that differences in dispute resolution clauses do not indicate an intention to have each dispute heard separately. Furthermore, it is in the interests of both Parties that the disputes be heard together, to ensure a fair trial and the good administration of justice.

The CISG is applicable to the Sales and Licensing Agreement (Issue 3). The CLAIMANT argues that the revised Standard Terms were incorporated under Art. 8 (1) of the CISG, or in the alternative, that the requirements of Art. 8(2) have been met. Furthermore, the CLAIMANT argues the July 2011 Choice of Law clause provides that the CISG is applicable, falling within the scope of Art. 1, or in the alternative, that the November 2000 Standard Terms and Conditions would still lead to the application of the CISG under Art. 1.

The Sales and Licensing Agreement is a contract for the sale of goods under CISG (Issue 4). The CLAIMANT argues that the Tribunal should find that the Sales and Licensing Agreement is a contract for the sale of goods under Art. 3 of the CISG, as the supply of goods to be manufactured is considered a sale within the scope of the CISG and the inclusion of services in the agreement does not exclude it from the scope of the CISG.



### ARGUMENT ON THE PROCEEDINGS

# ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DEAL WITH THE PAYMENT CLAIMS RAISED BY THE CLAIMANT

- 1. In considering this argument, it is important to understand the two arbitration agreements that give rise to the Tribunal's jurisdiction in this matter. On 13 January 2008, the Parties concluded the Framework and Sales Agreement [Cl. Ex. No. 2, p. 10] that included a provision to refer disputes to arbitration. The Agreement also provided that its provisions would govern all future contracts relating to the Proton Therapy Facility. Following this, the Parties reached a second agreement called the Sales and Licensing Agreement [Cl. Ex. No. 6, p. 18] on 20 July 2013. This Agreement featured a dispute resolution provision that expanded upon the Parties' dispute resolution options, giving parties the ability to make applications to state courts. Both agreements included standard terms that referred disputes to be settled to arbitration.
- 2. Accordingly, it is the case that the Parties evinced a clear intention to be bound by arbitration in the event of a dispute, which is demonstrated by their agreements and other communications [I]. Furthermore, the Tribunal should respect the autonomy of the parties in choosing an arbitration Agreement that features an appeal and review mechanism [II], because an appeal and review mechanism is not inherently contradictory to arbitration [III].
  - I. The Parties Evinced A Clear Intention To Be Bound By Arbitration In The Event Of A Dispute, Which Is Demonstrated By Their Agreements And Other Communications.
  - A. The Framework And Sales Agreement Clearly Shows That The Parties Intended To Be Bound By Arbitration In The Event Of A Dispute.
- 3. The wording of the Framework and Sales Agreement clearly shows that the Parties intended to be bound by arbitration in the event of a dispute [Cl. Ex. No. 2, p. 11]. The Framework and Sales Agreement states, "...such dispute shall become subject to arbitration, to be finally settled under the CEPANI Rules of Arbitration before CEPANI" [Art. 23, Subsection 3].



- 4. The Parties' clear intention is also supported by the parties specifying that "The arbitration shall be conducted before three arbitrators, in the English language and shall be held in Vindobona, Danubia" [Cl. Ex. No. 2, p. 11]. This specificity highlights that the Parties clearly decided upon arbitration as their chosen method of dispute resolution.
- 5. This intention is further supported by the Standard Terms and Condition for Sale [*Annex 4, p. 13*], which is referred to in Art. 46 of the Framework and Sales Agreement [*Cl. Ex. No. 2, p. 12*]. It states, "Any dispute arising out of or in connection with this Agreement shall be finally settled under the Arbitration Rules of CEPANI..." [*Section 21, Subsection 1*].
- There is no inconsistency between the Framework and Sales Agreement and the Standard Terms and Condition for Sale regarding the number of arbitrators comprising the Tribunal. The Framework and Sales Agreement has specified three arbitrators [Cl. Ex. No. 2, p. 11], whilst the Standard Terms and Condition for Sale has specified one or more arbitrators [Annex 4, p. 13]. The Tribunal's composition satisfies both of these specifications.
- 7. The Parties' intention to be bound by arbitration is also supported by correspondence between the Parties, namely the email sent from the CLAIMANT to the RESPONDENT on 15 November 2007 [*Cl. Ex. No. 3, p. 14*]. This email specifically refers to the dispute resolution clause being "discussed and agreed on 4 November 2007".

### B. The Sales And License Agreement Exhibits A Clear Intention For The Parties To Be Bound By Arbitration In The Event Of A Dispute.

- 8. The Framework and Sales Agreement states that: "The provisions of this Agreement shall also govern all further and future contracts concluded by the Parties in relation to the Proton Therapy Facility purchased where such contracts do not contain a specific provision to the contrary" [Cl. Ex. No. 2, p. 12, Art. 45]. Therefore, the Framework and Sales Agreement evinced an intention to have all subsequent contracts bound by arbitration if disputes arise. This argument is further supported in Issue 2, Section (I) (A) (i).
- 9. The Sales and License Agreement does not specifically rule out arbitration as a method of dispute resolution. It states that: "...both Parties shall have the right to bring any and all claims in the courts of Mediterraneo or Equatoriania..." [Cl. Ex. No. 6, p. 19, Art. 23,



Subsection 2]. Therefore, bringing disputes to arbitration is still a valid option under this Agreement. This argument is further supported at Issue 2, Section (II) (A).

- 10. Furthermore, the Parties' intention to submit to arbitration is supported by the revised Standard Terms and Condition for Sale, which are referred to in Art. 46 of the Sales and License Agreement [Cl. Ex. No. 6, p. 20]. It states that: "Any dispute arising out of or in connection with this Agreement shall be finally settled under the CEPANI Rules of Arbitration..." [Cl. Ex. No. 9, p. 24, Section 21].
- 11. The witness statement from Dr. Excell does state that the RESPONDENT did not have the capacity to understand the revised Standard Terms due to them not being available in the Mediterranean language [Res. Ex. No. 2, p. 37]. However, as per our submissions at Issue 3, Section (I) (B), the RESPONDENT was subjectively aware of the CLAIMANT'S intent, was capable of understanding the revised Standard Terms and was provided sufficient reference to the revised Standard Terms thus supporting the application of the revised Standard Terms to the Sales and License Agreement.
  - II. The Tribunal Should Respect The Autonomy Of The Parties In Choosing An Arbitration Agreement That Features An Appeal And Review Mechanism.
  - A. The Core Principle Of Arbitration Is Party Autonomy.
- 12. Born states: "At its most basic level, arbitration is an expression of party autonomy. The means by which parties resolve disputes is a fundamentally important aspect of their underlying contractual (or other) relationship; it is no less important than the parties' decision to enter into a contractual relationship or the manner in which parties structure and conduct that relationship. ...If [those] disputes cannot be resolved in a way that is consistent with the parties' underlying relationship, then that relationship will itself be compromised. It is elementary that arbitration permits parties to agree upon virtually all aspects of dispute resolution." [Born, pp. 15-16].
- 13. The consent of parties is also a fundamental feature of any arbitration. Morrissey and Graves state: "Arbitration is primarily a matter of contract between the parties. The jurisdiction of an arbitral tribunal is grounded entirely in the consent of the parties." [Morrissey & Graves, p. 33].



## B. The Parties Have Clearly Chosen An Arbitration Agreement That Features An Appeal And Review Mechanism To Applicable State Courts.

- 14. The Parties have clearly chosen an arbitration Agreement that features an appeal and review mechanism to applicable state courts. This is demonstrated in Art. 23 of the Framework and Sales Agreement that states that each party has the right to: "...refer the case to the applicable state courts if it considers the award to be obviously wrong in fact or law" [Cl. Ex. No. 2, p. 11].
- 15. This understanding is further supported by correspondence between the Parties on 15 November 2007 [*Cl. Ex. No. 3, pp. 14-15*]. In this correspondence, Dr Eric Vis on behalf of the CLAIMANT discusses the appeal and review mechanism that was agreed between the Parties, and makes it clear that the CLAIMANT is supportive of this provision.
- 16. The fact that the appeal and review mechanism has not been drafted or revised by lawyers  $[Proc.\ Ord.\ 2,\ \P\ 10,\ p.\ 58]$  should not negate the clear agreement of the Parties, as the party autonomy rule is based on the assumption that parties to an arbitration are knowledgeable and informed  $[Chatterjee,\ p.\ 1-2]$ . In this case, both Parties had a clear understanding that the arbitration Agreement would feature an appeal and review mechanism, and decided to include it in their arbitration Agreement.

### III. An Appeal And Review Mechanism Is Not Inherently Inconsistent With Arbitration.

- A. International Arbitration Law Already Provides For Scenarios Where Arbitral Decisions Can Be Challenged In State Courts.
- 17. Art. 34 (2)(b)(ii) of the UNCITRAL Model Law stipulates that an arbitral award may be set aside by a court if it is in conflict with the public policy of that State. Similarly, the New York Convention contains a provision that contemplates awards being reviewed by domestic courts [NYC, Article V]. Article V highlights that if a domestic court reviews an arbitral award and makes a prescribed finding, the award is no longer enforceable under the Convention.
- **18.** Furthermore, the Danubian Arbitration Law for Domestic Arbitration contains a provision that is a variation to the UNCITRAL Model Law, and is nearly identical to Art. 34A of Equatoriana's Arbitration Law [*Proc. Ord. 2*, ¶ *13*, *p. 59*]. This provision is consistent with



the appeal and review mechanism contemplated by both Parties, which relates to an award that is manifestly wrong.

- 19. The Danubian Arbitration Law for domestic arbitration is also consistent with Circular No. 265, an internal administrative guideline that the RESPONDENT is expected to comply with [*Proc. Ord. 2*, ¶ 9, p. 58]. It states that: "Government entities must not forego the right of review of manifestly erroneous decisions of courts or tribunals" [*Res. Ex No. 1*, p. 36]. This supports the contention that the parties' appeal mechanism is supported by public policy, as contemplated by Art. 34 (2)(b)(ii) of the UNCITRAL Model Law.
  - B. There Is An Abundance Of Case Law That Supports The Contention That An Appeal And Review Mechanism Is Not Inconsistent With The Institution Of arbitration.
- **20.** The Appellate Court of Karlsruhe held that an award shall be set aside on the grounds it is contrary to public policy if it conflicts with fundamental notions of justice or fundamental national or economic values [Blackaby, Partasides, Redfern & Hunter, p. 614].
- 21. Similarly, a Canadian Superior Court of Justice held that an award could be set aside if it "fundamentally [offended] the most basic and explicit principles of justice and fairness in Ontario, or evidenced intolerable ignorance or corruption on the part of the Arbitral Tribunal" [United Mexican States v Marvin Roy Feldman Karpa]
- 22. Furthermore, a Singapore Appeals Court held that an award can be set aside if it is "clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public, or where it violated the forum's most basic notion of morality and justice" [PT AsuransiJasa Indonesia (Perseo) v Dexia Bank S.A. ¶ 59]. These decisions clearly show that courts are willing to review and set aside an arbitral award on the ground that it conflicts with the public policy of that nation.

#### **CONCLUSION OF ISSUE 1:**

23. Both agreements exhibit a clear intention for the Parties to be bound by arbitration in the event of a dispute, due to the language of the agreements and their surrounding communications. Furthermore, the Tribunal should respect the autonomy of the Parties in choosing an arbitration Agreement that features an appeal and review mechanism, as this was



clearly understood by both the CLAIMANT and the RESPONDENT. This mechanism is not inconsistent or incompatible with international arbitration law, which provides for scenarios where arbitral decisions can be challenged in state courts, particularly in cases of awards conflicting with public policy.

# ISSUE 2: BOTH CLAIMS SHOULD BE HEARD IN A SINGLE ARBITRATION

- 24. During negotiations for the Framework and Sales Agreement, both the CLAIMANT and the RESPONDENT agreed to consider adding a third treatment room using active scanning technology to the proton therapy facility at a later date [Req. Arb. p. 5-6 ¶¶ 9-10]. This third treatment room became the subject of the Sales and Licensing Agreement [Req. Arb. p. 6 ¶¶ 12-13]. The Parties expressly provided that the Framework and Licensing Agreement was to govern all future relations between them regarding the further development of the facility, and the Agreement makes specific reference to the potential implementation of active scanning technology [Cl. Ex. No. 2, Preamble]. Subject to the dispute resolution clause, the Parties agreed to have all disputes that became subject to arbitration settled under the CEPANI Rules of Arbitration [Cl. Ex. No. 2, p. 11, Art. 23(3)]. This clause also provides the CLAIMANT with an additional unilateral right to bring certain claims to the ordinary courts of Mediterraneo [Cl. Ex. No. 2, p. 11, Art. 23(6)].
- 25. The Sales and Licensing Agreement, signed three years later, expressly purports to be governed by the Framework and Sales Agreement [Cl. Ex. No. 6, p. 18, Preamble]. It does, however, contain a dispute resolution clause that permits both Parties to submit all claims to the jurisdiction of ordinary courts in either Mediterraneo or Equatoriana [Cl. Ex. No. 6, p. 19, Art. 23(2)]. This modification to the original clause under the Framework and Sales Agreement was made in recognition of the RESPONDENT's contribution to the development of the active scanning technology as provided under the Sales and Licensing Agreement [Req. Arb. p. 8 ¶ 21].
- 26. The Parties are in dispute as to whether the claims brought under the separate Agreements can be heard in a single arbitration [*Proc. Ord. 1, p. 53*  $\P$  3(1)(b)]. Pursuant to Art. 10 CEPANI



Rules, claims which arise out of multiple contracts may be heard within a single arbitration. Art. 10(1) provides that this is possible where the parties have agreed to have recourse to arbitration and have agreed to have their claims decided within a single proceeding [Art. 10(1)(a)-(b) CEPANI Rules].

- 27. It is not contested that both Agreements contain a valid arbitration clause. Pursuant to Issue 1, Sections (I)(A) and (B), the clauses under the Framework and Sales Agreement and Sales and Licensing Agreement are evidence of an intention by both Parties to be bound by arbitration. On these grounds, Art. 10(1)(a) is satisfied.
- 28. When addressing Art. 10(1)(b), it is essential that the Tribunal consider the will of the Parties at the conclusion of the Agreements [Chiu, p. 57; Leboulanger, p. 76; Hanotiau, p. 311]. The will of the Parties to have both disputes heard within a single arbitration can be established by reference to Art. 10(3): whether the Agreements are related; and Art. 10(2): whether the arbitration clauses are compatible [Meulemeester & Verbist, pp. 78-81]. It is also necessary to consider, having regard to the principles of international arbitration, whether it is in the interests of the Parties to have both disputes heard within one arbitral proceeding.
- 29. Both Agreements are so closely related as to give rise to an intention that the claims arising under them be heard within a single arbitration [I] regardless of the differences in the content of the dispute resolution clauses [II]. Further, hearing both disputes simultaneously is in the interests of both Parties [III].

## I. The Will Of The Parties To Have The Claims Heard Within One Arbitration Is Evidenced By The Interrelatedness Of The Agreements.

30. There is a presumption, under Art. 10(3) CEPANI Rules, that the Parties will not have intended for multiple claims to be heard within one arbitration if the Agreements under which they arise are not related. The provision is silent as to the extent to, and manner in which these claims must be 'related'. However, the consensus among tribunals is that two Agreements will be interrelated where they form part of a single transaction or indivisible whole, despite being formally separate [Hanotiau, p. 329; Craig et al. p. 96; ICC, 7929 of 1995; ICC, 8420 of 1996; BCCI, 60/1980; ICC, 5117 of 1986; PCA, 122/85; ICC, 6829 of 1992]. In determining whether the Framework and Sales Agreement and Sales and Licensing



Agreement form part of the one transaction, the Tribunal ought to have regard to both the language and commercial reality of the instruments [Leboulanger, p. 52-54].

## A. The Language Of The Agreements Demonstrates The Parties' Intention That Both Form Part Of A Single Transaction.

31. Where the later-in-time contract has its foundation in the earlier contract, or where the former seeks to implement the latter, each will constitute one part of a wholly indivisible transaction [Hanotiau, p. 311; ICC, 8420 of 1996; BCCI, 60/1980; Paris Court of Appeals, 29 November 1991; Court of Cassation, 5 March 1991]. Indications of this may be found in the general wording of the agreement [Leboulanger, p. 53]. Two aspects of the instruments are indicative of an intention on the part of both the CLAIMANT and the RESPONDENT to enter into indivisible agreements.

## (i) The Framework And Sales Agreement Was Intended To Govern The Sales And Licensing Agreement.

32. The Framework and Sales Agreement is tantamount to a head agreement under which all future relations between the parties were intended to be managed. The fact that the parties chose to use the phrase 'Framework' suggests as much [Sayag]. Its preamble also refers specifically to the "further cooperation of the Parties" with regard to the use and development of the proton therapy facility [Cl. Ex. No. 2, p. 10, Preamble]. This is echoed in its Art. 45, which provides that the Agreement is to govern all future contracts concerning the facility [Cl. Ex. No. 2, p. 12, Art. 45]. It demonstrates a clear intention by the Parties to give effect to their prior negotiations concerning the introduction of active scanning technology.

#### (ii) Both Agreements Refer To One Another Unequivocally.

33. Where Agreements refer to one another in an unequivocal and clear manner it will be more likely that they were intended to be interdependent [CAM, 1491]. The Framework and Sales Agreement does not make specific reference to the Sales and Licensing Agreement, however it expresses in its preamble the will of the parties to extend the facilities to include active scanning technology [Cl. Ex. No. 2, p. 10, Preamble]. This fact alone demonstrates that the latter agreement was considered at the signing of the first [ICC, 8420 of 1996; BCCI, 60/1980]. The Sales and Licensing Agreement refers specifically to the Framework and Sales Agreement in its preamble, and expressly purports to be governed by it [Cl. Ex. No. 6, p. 18, Preamble].



## B. The Commercial Reality Of The Agreements Demonstrates A Clear Intention To Perform A Single Transaction.

- 34. Where the obligations of the Parties arise under different contracts, it is important to consider the mutuality of those obligations "on an overall basis" [Kahn, p. 15-17; Moury, 255]. Where said obligations have a common starting point and an economic reciprocity, to the extent that they are undertaken for the fulfillment of a sole purpose, it is likely that they will possess a mutual dependence [Leboulanger, p. 53]. It is necessary, therefore, that the later-in-time contract amounts to an amendment, fulfillment, implementation or inevitable consequence of the principal contract. Where it gives rise to new duties, the later contract will remain separate and autonomous [ICC, 8420 of 1996].
- 35. Cases in this area have historically concerned head agreements that outline broad obligations facilitated in part or in full by secondary agreements [ICSID ARB/82/1; ICC, 8420 of 1996; ICC, 5989 of 1989; BCCI, 60/1980; ICC, 4367 of 1984]. The nature of the present dispute is uncommon, in the sense that the obligations of the Parties under the Framework and Sales Agreement were fulfilled in their entirety under that Agreement. Regardless, the link between those obligations and the obligations provided for within the Sales and Licensing Agreement is an indivisible one. There are two bases on which this argument is made.

### (i) The Agreements Have A Common Origin.

36. Both Agreements result from negotiations conducted in 2007 and 2008. Although intended primarily for the establishment of the Framework and Sales Agreement, these negotiations involved intensive discussions surrounding the addition of a third treatment room using the active scanning technology that would become the object of the Sales and Licensing Agreement [Req. Arb. p. 5 ¶ 9; Cl. Ex. 4, p. 16 ¶ 1; Res. Ex. 2, p. 37 ¶ 2]. Were it not for the budgetary constraints of the RESPONDENT at that time, and the infancy of the technology itself, the Parties would undoubtedly have included the third treatment room in the Framework and Sales Agreement [Cl. Ex. 4, p. 16 ¶ 1; Res. Ex. 2, p. 37 ¶ 3]. As such, the Sales and Licensing Agreement was intended to implement obligations that would otherwise have fallen within the Framework and Sales Agreement. This assertion is supported by Dr Mathieu Excell himself [Res. Ex. 2, p. 37 ¶¶ 2-3].



#### (ii) The Agreements Fulfil A Common Goal.

- 37. The purpose of both the Framework and Sales Agreement and Sales and Licensing Agreement is the development and delivery of proton therapy technology used in treating cancer. It is in the interests of both the CLAIMANT, a leading proponent of proton therapy, and the RESPONDENT, a leading centre for the treatment of cancer, that the proton therapy facility be developed to its fullest capacity. This is evident in the preamble to the Framework and Sales Agreement, in which the Parties expressed a desire not merely to install the proton therapy facility, but to extend its capabilities to the treatment of additional cancers [Cl. Ex. No. 2, p. 10, Preamble]. The introduction of the third treatment room was an unavoidable consequence of the Agreement to establish the first two, which on their own lacked the capacity to deliver such comprehensive treatment. The active scanning technology is, as such, an accessory and natural extension of the original facility. In this way, an inextricable link exists between the original Framework and Sales Agreement and the later-in-time Sales and Licensing Agreement. Together they comprise a single transaction intended to perfect a treatment which both Parties had an interest in developing.
- 38. It is apparent, when looking to the language and commercial reality of the Agreements, that they were intended to form two formally separate parts of a single economic transaction. This is evidence of a clear intention to have disputes arising under both Agreements heard within a single arbitration, in accordance with Art. 10(1) CEPANI Rules.

### II. Differences In The Dispute Resolution Clauses Do Not Indicate An Intention To Have Each Dispute Heard Within A Separate Arbitration.

- 39. Where formally separate agreements contain separate dispute resolution provisions, the general proposition is that the parties intended that disputes arising out of each be settled in different ways [Hanotiau, p. 329; Naon, p. 690; Born, p. 1114]. Particularly where the contents of these clauses are not identical or incompatible, tribunals have proven reluctant to extend their jurisdiction [ICC, 4392 of 1983; ICSID, ARB/81/2]. However, Art. 10(2) CEPANI Rules removes the presumption that clauses referring to different languages or rules of law are automatically incompatible.
- **40.** The dispute resolution clauses contained in Art. 23 of both the Framework and Sales Agreement and Sales and Licensing Agreement differ in their content. Regardless, the CLAIMANT submits that the Parties intended to submit disputes arising under both clauses to



a single arbitral tribunal. The simple inclusion of another clause is not an unequivocal indication of an intention to dismiss arbitration as specified under the Framework and Sales Agreement [*ICC*, 5989 of 1989]. There are three grounds for this argument.

## A. The Parties Intended Art. 23 Of The Sales and Licensing Agreement Merely As A Modification Of The Original Art. 23 Under The Framework And Sales Agreement.

41. It is for the Tribunal to determine, in accordance with the will of the parties, whether the later-in-time dispute resolution clause was intended as an implicit renewal of the original Art. 23, or whether it ought to be considered a separate agreement enjoying complete autonomy [Hanotiau, p. 319; Fouchard et al. p. 322]. Contrary to the claims of the RESPONDENT, the Parties did not demonstrate an intention to create an entirely new clause; the new Art. 23 merely replaced subsections (5) and (6) of the original Art. 23 under the Framework and Sales Agreement. These modifications were intended only as a means of non-monetary remuneration for the contributions made by the RESPONDENT to the development of the active scanning technology [Req. Arb. p. 8 ¶ 21]. They do not override the original arbitration provisions, but simply provide the RESPONDENT with an additional choice between arbitration and court proceedings

#### B. The Amended Art. 23 Does Not Confer Jurisdiction Entirely On Ordinary Courts.

42. Art. 45 of the Framework and Sales Agreement stipulates that the Agreement is to govern all further contracts where they "do not contain a specific provision to the contrary" [Cl. Ex. No. 2, p. 12, Art. 45]. Art. 23 of the Sales and Licensing Agreement is no such contrary provision. The clause confers upon both Parties a right to bring interim measures and substantive claims before the courts of either Mediterraneo or Equatoriania [Cl. Ex. No. 6, p. 20, Art. 23(1) and (2)] a right which existed unilaterally in favour of the CLAIMANT under the original Art. 23 [Cl. Ex. No.2, p. 11, Art. 23(5) and (6)]. Hence, while it gives the RESPONDENT a right which did not previously exist, it does not demand that claims be heard before ordinary courts. The core of the arbitration clause under the original Art. 23 remains intact, and therefore applies to disputes arising under the Sales and Licensing Agreement.

## C. The Arbitration Clause Under The Original Art. 23 Is Wider Than The Jurisdiction Clause Under Art. 23 of the Sales and Licensing Agreement.

**43.** The comparable scope of the clauses can amount to an expression of the common will of the Parties [*Distribution Chardonnet v. Fiat Auto France*]. The arbitration clause provided under



Art. 23 of the Framework and Sales Agreement vests the CEPANI Tribunal with the power to finally decide disputes. It is, therefore, far wider than the jurisdictional provisions under Art. 23 of the Sales and Licensing Agreement, which seek only to limit the ordinary courts to which disputes may competently be submitted.

44. As such, the modifications made to Art. 23 do not render the two dispute resolution clauses incompatible within the meaning of Art. 10(2) CEPANI Rules. Both disputes are still covered by the original clause subject to the modifications made in Art. 23 of the Sales and Licensing Agreement.

### III. It Is In The Interests Of Both Parties That The Disputes Be Heard In A Single Arbitration.

45. It is important that the Tribunal, in determining whether it is appropriate to hear both disputes together, upholds the fundamental principles of international arbitration, namely the right of the Parties to a fair trial and the good administration of justice [Leboulanger, pp. 54-55 and 90; Hanotiau, p. 278; SMANY, 1510; V 2000 v. Project XJ 220 ITD ("The Jaguar Case")].

## A. Hearing Both Disputes Within A Single Arbitral Proceeding Will Ensure That The Parties Are Given A Fair Trial.

46. The right of the Parties to a fair trial is universally recognised, and one of the foremost duties of the Tribunal is to give effect to this right [Fouchard, 256; European Convention on Human Rights, Art. 6]. The fact that these matters arise out of an indivisible economic transaction means that the fairness of the proceedings will be better served when presided over by a single tribunal. While the two disputes may appear factually separate, at least on a superficial level, hearing both disputes at the same time will provide context for each. In particular, the alleged defects in the active scanning technology which give rise to the second dispute may go to explaining the alleged inability of the facility as a whole to operate in the promised way, this being the subject of the first dispute. Where a Tribunal has knowledge of the whole merits of both disputes, the outcome of each is more likely to be fair and consistent.

## B. Hearing Both Disputes Within A Single Arbitral Proceeding Will Ensure The Good Administration Of Justice.

**47.** Where intrinsically linked matters are decided separately, there is a potential that contradictory or incompatible awards will be rendered. This can have severe repercussions



when a Party attempts to enforce the awards within its home country. As both states are signatories to the New York Convention, their national courts may find difficulties in reconciling any inconsistencies that arise as to reasoning or merits [NYC, Art. V]. The consolidation of proceedings will help to avoid risks associated with factual errors and to ensure the efficacy of the arbitration on the whole [Leboulanger, p. 55].

- 48. Having a single Tribunal decide both matters will also avoid unnecessary costs and delays. Given the pre-existing budgetary constraints of the RESPONDENT and the recent losses made by its proton therapy facility, it is in the interests of the RESPONDENT to avoid expenses associated with the constitution of additional tribunals and the presentation of evidence on multiple occasions [*Leboulanger*, p. 63]. It is also in the interests of the Parties, being corporations with a reputation for industry-leading innovation, to have the matters settled as expediently as is possible.
- **49.** The Tribunal, in giving effect to the will of the parties, shall effectively avoid the heightened costs, delays and risks of unfairness which are inevitable where disputes are severed. It is, therefore, in the interests of both parties that the disputes be heard simultaneously.

#### **CONCLUSION OF ISSUE 2:**

50. The Tribunal ought to hear both disputes within the one arbitral proceeding, as permitted under Art. 10(1) CEPANI Rules. The innate interrelation between the two Agreements and lack of incompatibility between dispute resolution clauses demonstrates a clear intention on the part of both the CLAIMANT and the RESPONDENT to have their disputes resolved in this manner. It is also in the Parties' best interests that their common intention be upheld.

# ISSUE 3: THE CISG IS APPLICABLE TO THE SALES AND LICENSING AGREEMENT

51. The Framework and Sales Agreement incorporated the CLAIMANT's November 2000 Standard Terms [Req. Arb., ¶ 4, p. 4]. Clause 22 of the Framework and Sales agreement stated "the contract shall be governed by the national law of Mediterraneo as set out in the statutes of Mediterraneo and developed by its courts" [Cl. Ex. No. 2, p. 13]. In 2011, the CLAIMANT



and the RESPONDENT contracted for the construction of a treatment room and the development of software for cancer treatment technology [Cl. Ex. No. 4, p. 4] forming the Sales and Licensing Agreement.

- 52. On 5 July 2011, the CLAIMANT informed the RESPONDENT that the revised version of the CLAIMANT's Standard Terms would be incorporated into the Sales and Licensing Agreement [Cl. Ex. No. 9, p. 24]. Clause 22 of the revised Standard Terms stated "the contract is governed by the law of Mediterraneo" [Cl. Ex. No. 9, p. 24]. The revised Standard Terms were published on the CLAIMANT'S website in the languages of Mediterranean and English [Cl. Ex. No. 5, p. 4; Cl. Ex. No. 4, ¶ 14, p. 4]. The English translation of the revised Standard Terms was available on the website from 1 − 4 July 2011. The English translation was then removed for purposes of retranslation and made available once again on 21 July 2011 [Proc. Ord. No. 2, ¶ 32, p. 63].
- 53. The CLAIMANT communicated its intent to incorporate the revised Standard Terms into the Sales and Licensing Agreement. This intent was communicated to the RESPONDENT through the CLAIMANT'S statements on 5 July 2011 [Cl. Ex. No. 5, p. 4]. Thus, the CLAIMANT effectively incorporated the revised Standard Terms into the Sales and Licensing Agreement under Art. 8 CISG [II] and these Standard Terms lead to an application of the CISG [II].

#### I. CLAIMANT Incorporated The Revised Standard Terms Under Art. 8 CISG.

54. The law governing the incorporation of Standard Terms is the CISG [A]. An application of Art. 8(1) or, in the alternative, Art. 8(2) CISG leads to the incorporation of the revised Standard Terms into the Sales and Licensing Agreement [B].

# A. The Question Of The Incorporation Of The Revised Standard Terms Into The Sales And Licensing Agreement Is Governed By The CISG.

55. In accordance with the direction of the Tribunal, the CISG is assumed to apply to the Sales and Licensing Agreement for the purposes of resolving the question of the incorporation of revised Standard Terms into the Sales and Licensing Agreement [*Proc. Ord. No. 2*,  $\P$  2, p. 57].



# B. An Application Of Art. 8 Of The CISG Results In The Incorporation Of The Revised Standard Terms Into The Sales And Licensing Agreement.

- Agreement must be determined by interpreting the CLAIMANT'S statements in accordance with Art. 8(1) CISG or, in the alternative, Art. 8(2) CISG [Bamberger et. al., Art. 8, ¶ 1; Huber, Art. 8, p. 31]. When determining the intent of the CLAIMANT under Art. 8(1) CISG or Art. 8(2) CISG, regard may be given to previous negotiations, practices and subsequent conduct of the parties in accordance with Art. 8(3) CISG [OLG Zweibrücken; Staudinger/Magnus, Art. 8].
- 57. Here, the RESPONDENT could not have been unaware of the intent of the CLAIMANT to incorporate the revised Standard Terms into the Sales and Licensing Agreement [i]. In the alternative, a reasonable person in the position of the RESPONDENT would have been aware of the CLAIMANT'S intent to incorporate the revised Standard Terms into the contract [ii]. The Standard Terms were published in languages capable of being understood by the RESPONDENT [iii]. Further, the CLAIMANT provided the RESPONDENT with the sufficient reference to effectively incorporate the Standard Terms into the Sales and Licensing Agreement in directing the RESPONDENT to its website [iv].

### (i) The RESPONDENT Could Not Have Been Unaware Of The CLAIMANT'S Intent.

- 58. According to Art. 8(1) CISG, the CLAIMANT'S statements on 5 July 2011 are to be construed according to their subjective intention [*HGer Aargau*, *p. 1740; Dokter, RabelsZ p. 68; BGet; LG Hamburg*]. Further, the RESPONDENT must know of the CLAIMANT'S intent [*Kroll et. al. p. 33*]. For the purposes of Art. 8(1) CISG, the RESPONDENT will have knowledge of the CLAIMANT'S intent if it "could not have been unaware" of it [*The Shoes Case; Honsell/Melis, Art. 8*, ¶ 6; *Honnold, Art. 8* ¶ 106].
- 59. The RESPONDENT was aware of the CLAIMANT'S intent to incorporate the revised Standard Terms. During negotiations, the CLAIMANT stated in its letter of 5 July 2011 that changes of a "minor nature" that would "hardly affect our relationship" had been made to the Standard Terms. Further, the CLAIMANT stated that the "new standard terms are applicable to all contracts concluded from the beginning of July" [Cl. Ex. No. 5, p. 17].



- The CLAIMANT, in stating that changes of a "minor nature" had been made to the Standard Terms, clearly indicated to the RESPONDENT that the Standard Terms had been modified. The statement by the CLAIMANT to the RESPONDENT that the modified Standard Terms would "hardly affect our [the parties] relationship" also clearly indicated the intention of the CLAIMANT that the parties' contractual relationship would be altered to an extent. Additionally, the CLAIMANT clearly expressed that the modified Standard Terms would govern the Sales and Licensing Agreement by stating "the new standard terms are applicable to all contracts concluded from the beginning of July" [Cl. Ex. No. 5, p. 17]. Pursuant to Art. 8(1) CISG, the CLAIMANT'S statements on 5 July 2011 clearly indicated to the RESPONDENT an intent to incorporate the revised Standard Terms into Sales and Licensing Agreement.
  - (ii) A Reasonable Person In The RESPONDENT's Position Would Have Been Aware Of The CLAIMANT'S Intent To Incorporate The Revised Standard Terms, Including The Choice of Law Clause, Into The Sales And Licensing Agreement.
- 61. Where the intent of the CLAIMANT's statements cannot be interpreted from a subjective evaluation under Art. 8(1) CISG, an alternative method of interpretation may be adopted under Art. 8(2) CISG. According to Art. 8(2) CISG, the CLAIMANT'S statements on 5 July 2011 must be interpreted from the perspective of a reasonable person in the RESPONDENT'S position [MCC-Marble Ceramic Center Inc v Ceramica Nuova D'Agnostino SPA, US Ct; Bianca et. al., Art. 8, note 2.4; OLG Düsseldorf]. Art. 8(2) CISG places the burden on the party making the statement to communicate clearly [Huber, Art. 8, p. 31; Staudinger/Magnus Art. 8 ¶ 28].
- 62. The statements made by the CLAIMANT on 5 July 2011 must be construed according to the understanding of a reasonable person. In view of the circumstances, the CLAIMANT'S statements would have, to a reasonable person in the position of the RESPONDENT, evidenced an intent to incorporate the revised Standard Terms. Further, the statements by the CLAIMANT that the revised Standard Terms were applicable to all contracts would make it clear to a reasonable person that the revised Standard Terms would apply to the Sales and Licensing Agreement [Claimant's Exhibit No. 5, p. 17]. Thus, a reasonable person would arrive at the same conclusion reached under the application of Art. 8(1) CISG as would be reached under an application of Art. 8(2) CISG.



- (iii) The RESPONDENT Was Capable of Understanding The Revised Standard Terms.
- 63. The CLAIMANT published the revised Standard Terms in a language capable of being understood by the RESPONDENT. The revised Standard Terms were published only in Mediterranean from 5 21 July 2011 [Cl. Ex. No. 5, p. 17; Res. Ex. No. 2, p. 38].
- 64. Incorporation of Standard Terms by the CLAIMANT will not be effective for the purposes of Art. 8 CISG where Standard Terms are formulated in a language not understood by the RESPONDENT [OLG Düsseldorf; AG Kehl]. If Standard Terms are to be to effectively incorporated into an agreement, the Standard Terms must be communicated in a manner that a reasonable person in the circumstances of the RESPONDENT would understand [OLG Zweibrücken; BGH, 31 October 2001].
- 65. The RESPONDENT will be considered capable of understanding Standard Terms formulated in a different language if an agent acting on behalf of the RESPONDENT is capable of understanding the language used [*Tantalum Powder Case*]. The RESPONDENT employed a doctor who was capable of conversing in Mediterranean on a technical level [*Proc. Ord. No. 2*, ¶ 35, p. 63,]. This doctor had also been involved in the negotiation of the Framework and Sales Agreement in 2008. Further, the RESPONDENT was aware of the doctor's ability to understand Mediterranean [*Res. Ex. No. 2*, p. 37].
- 66. Further, the RESPONDENT never requested an English translation of the Standard Terms and failed to make any further inquiries regarding the availability of an English translation [Cl. Ex. No. 5, p. 17; Res. Ex. No. 2, p. 38; Proc. Ord. No. 2, ¶ 32, p. 63]. A reasonable person in the position of the RESPONDENT could have understood the Standard Terms upon utilising existing staff or making reasonable requests. Thus, the Standard Terms were communicated in a manner that was sufficiently clear for the purposes of effecting incorporation pursuant to Art. 8 CISG.
  - (iv) The CLAIMANT Provided Sufficient Reference To The Standard Terms To Incorporate Them Into The Sales And Licensing Agreement.
- 67. The CLAIMANT provided sufficient reference to validly incorporate the Standard Terms into the Sales and Licensing Agreement. The CLAIMANT's letter of 5 July 2011 stated that the



revised Standard Terms were available on the CLAIMANT's webpage [Cl. Ex. No. 5, p. 17; Resp. Ex. No. 2, p. 38; LG Coburg; Stiegele/Halter, p. 169].

- 68. A reference to Standard Terms will be sufficient to incorporate the terms into an agreement governed by the CISG [OLG Zweibrücken; S. A. Gantry v Société de Droit Suisse, Research Consulting Marketing [R.C.M. AG]]. A reference must make it possible for the RESPONDENT, in a reasonable manner, to become aware of the Standard Terms [Bundesgerichtshof; Huber, Art. 8, p. 32].
- 69. The CLAIMANT referred the RESPONDENT to the webpage where the revised Standard Terms were published. The RESPONDENT was capable of understanding both English and Mediterranean translations of the Standard Terms [Res. Ex. No. 2, ¶5, p. 37,]. Alternatively, for the period in which an English translation of the Standard Terms was unavailable, the CLAIMANT provided a telephone number for the purpose of inquiries [Proc. Ord. No. 2, ¶32, p. 63,]. Thus, it was possible for the RESPONDENT to become aware of the content of the Standard Terms. The CLAIMANT provided the reference required to incorporate the revised Standard Terms into the Sales and Licensing agreement for the purposes of Art. 8 CISG [OLG Saarbrücken].

#### II. The July 2011 Choice of Law Clause Means The CISG Is Applicable.

**70.** The Revised Standard Terms and Conditions lead to the application of the CISG under Article 1 [A]. In any event, the November 2000 Standard Terms and Conditions would still lead to the application of the CISG under Article 1 [B].

#### A. The Choice of Law Clause Falls Within the Scope Of Article 1 Of The CISG.

71. On the basis that the CLAIMANT has established the Sales and Licensing Agreement is a contract for the sale of goods at ¶87 of this Memorandum, the CLAIMANT will demonstrate the contract was also an international contract between parties in different states under Article 1(1) of the CISG [i]. Further, both Equatoriana and Mediterraneo are contracting states to the CISG thus, leading to its direct application under Article 1(1)(a) [ii].



#### (i) The Place Of Business Of Both Parties Is In Different States.

- **72.** It is undisputed between the parties that the office of the CLAIMANT is situated in Capital City, Mediterraneo and the office of the RESPONDENT is situated in Oceanside, Equatoriana [CEPANI Terms of Reference p. 49].
- 73. The internationality requirement under Article 1(1) requires the parties to a contract for the sale of goods to have their respective place of business in different states. "Place of business" is not defined within the CISG however numerous cases have defined it as meaning "the place from which business activity is de facto carried out [...]; this requires a certain duration and stability as well as a certain amount of autonomy" [Kroll et. al. p. 33; Floor Tiles, 28 February 2000; Porcelain Tablewear, 26 November 2002; Chinchilla Furs, 10 November 1994].
- 74. Only one address has been provided for each of the parties, which indicates these addresses are the de facto premises where business activity is carried out. All correspondence between the parties, beginning 11 January 2007, was sent to these addresses indicating these premises were stable and reliable for conducting business between the parties for a period of more than five years [Cl. Ex. No. 1, p. 9] through to 15 August 2012 [Cl. Ex. No. 7, p. 19].
- 75. It is assumed the CLAIMANT manufactures the technology at these premises at the address in Capital City, Mediterraneo however; this is irrelevant as this address is used for all correspondence. The RESPONDENT carries out all of its business at the premises in Oceanside, Equatoriana as all treatment is provided on site and all communication between the parties was sent here. The business dealings of the parties at their respective addresses indicates a "genuine and effective link of the business with a place with at least regular business activity" thus satisfying the internationality requirement [Kroll et. al. p. 33].

## (ii) The CISG Is Directly Applicable As Equatoriana And Mediterraneo Are Contracting States.

76. The choice of law clause within the revised Standard Terms and Conditions states the contract is to be governed by the law of Mediterraneo [Cl. Ex. No. 9, p. 25]. The place of business of the CLAIMANT and the RESPONDENT are Equatoriana and Mediterraneo respectively; both of these states are contracting states to the CISG, with no reservations being declared by either state [Proc. Ord. No. 2,  $\P$  12, p. 63].



- 77. Where a contract is an international contract for the sale of goods between two parties and both parties belong to States which are signatories to the CISG, Article 1(1)(a) provides for the "automatic" or "direct" application of the convention [Kroll et. al. p. 35; Winship, p. 519; Building Materials, 11 July 2000; Spirits, 20 February 1997]. The Sales and Licensing Agreement between the CLAIMANT and the RESPONDENT satisfies the criteria under Article 1(1)(a), leading to a direct application of the CISG.
- 78. To exclude this application of the CISG, the choice of law clause must either implicitly or explicitly provide that the convention is inapplicable to the contract [Drago/Zoccolillo 2002; Johnson 2010; Ferrari 2001; Tribunale di Vigevano 12 July 2000]. The choice of law clause solely refers to the laws of Mediterraneo, with no reference being made to any other type of law. No intention to implicitly or explicitly exclude the application of the CISG is discernable from such wording, there was no specific reference to the idea of excluding the CISG throughout the course of business between the parties. The parties agreed to arbitration under the CEPANI rules in Danubia, a state that is also party to the CISG; which further evidences no intention to exclude the convention to the parties' agreement [Johnson 2010, p. 225].
- 79. Mediterraneo is a contracting state to the CISG therefore, the CISG forms part of its national law and will apply to appropriate contracts [Drago 2002; Johnson 2010; Ferrari 2001; Cheese Case 29 December 1998); Chinese Goods case, 21 March 1996]. Consequently, it is apparent that the choice of law clause does not implicitly or explicitly exclude the application of the convention, nor did the parties intend the clause to do so.

# B. In Any Event, The November 2000 Standard Terms And Conditions Lead To The Application Of The CISG Under Article 1.

**80.** The RESPONDENT contends that the July 2011 Standard Terms and Conditions were not incorporated into the Sales and Licensing Agreement and that therefore, the November 2000 version would be the applicable standard terms [*Ans. Req. Arb., p. 31*]. Even if this were the case, the CISG would still be applicable under November 2000 version [i].



- (i) The Choice Of Law Clause Under The November 2000 Standard Terms Still Leads
  To The Application Of The CISG To The Dispute Under The Sales And Licensing
  Agreement.
- 81. Equatoriana and Mediterraneo are both parties to the CISG as well as the *Vienna Convention* on the Law of Treaties of 1969 [Proc. Ord. No. 2, ¶12, p. 59,]. The choice of law clause contained in the November 2000 Standard Terms and Conditions stated that the contract "shall be governed by the national law of Mediterraneo as set out in the statutes of Mediterraneo and developed by its courts" [Cl. Ex. No. 2, p. 13].
- 82. Articles 11 and 18 of the *Vienna Convention on the Law of Treaties 1969* embodies the spirit and essence of international law, stating that if a State expresses consent to be bound by treaty, the State must accept the treaty in some form. Further, the state must not defeat the object and purpose of the treaty. Since both Equatoriana and Mediterraneo are signatories to the CISG, this means they are bound under international law to incorporate the CISG into their domestic laws [*Vienna Convention on the Law of Treaties 1969; OLG Linz 6R 160/05z 2006; Und Verfahrensrechts 256*]. Consequently, where a contract such as the Sales and Licensing Agreement arises in a state signatory to the CISG, the CISG will apply, barring any exclusion in the form of a choice of law clause.
- 83. Parties can exclude the application of the CISG either impliedly or expressly, but only through an "unequivocal declaration by both parties" [Honsell/Siehr, Art. 6, ¶ 6]. The choice of law clause contained in the November 2000 Standard Terms does not amount to either an implied or express exclusion of the CISG as it states, "the contract shall be governed by the national law of Mediterraneo," which would still lead to the CISG being applied.
- 84. The RESPONDENT might argue that the wording "as set out in the statutes of Mediterraneo and developed by its courts" amounts to an implicit exclusion however; this phrase could still indicate that the CISG is the applicable law as the CISG is not specifically excluded here. The CISG would be incorporated in the statutes of Mediterraneo and be part of the law developed by its courts [Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA (No 4); Johnson 2010, p 221]. The failure to nominate an express choice of an applicable domestic sales law to apply is further indicative there was no intention to exclude the CISG in the November 2000 choice of law clause; where this has been done, a tribunal is more likely to find the parties did intend to exclude the CISG [Ferrari 2012, p. 171; OLG Linz 6R 160/05z].



#### **CONCLUSION OF ISSUE 3**

Standard Terms. Further, the RESPONDENT understood the language in which the revised Standard Terms were drafted and was provided sufficient reference to the terms. Accordingly, the revised Standard Terms were incorporated into the Sales and Licensing Agreement in accordance with Art. 8 CISG. The choice of law clause in the revised Standard Terms means the CISG is the applicable law as no implied or express exclusions are discernible. In the alternative the Sales and Licensing Agreement is governed by the original Standard Terms, the effect of the choice of law clause remains the same.

# ISSUE 4: THE SALES AND LICENSING AGREEMENT IS A CONTRACT FOR THE SALE OF GOODS UNDER THE CISG

- 86. The Sales and Licensing Agreement stipulated that the CLAIMANT would provide and install a third treatment room using active scanning technology as well as the associated software and equipment for the total price of USD 3.5 million [Cl. Ex. No. 6, p. 18, Art. 3(1) & 10(1)]. The Agreement also stipulated that the CLAIMANT would conduct the training of personnel at Hope Hospital [Res. Ex. No. 3 ¶ 2, p. 14]. In exchange, the RESPONDENT was responsible for testing the software, contributing to its development by providing medical data and conducting necessary clinical trials for certification of the technology [Cl. Ex. No. 6, p. 18, Art. 10].
- 87. The services rendered and materials delivered under the Sales and Licensing Agreement were worth around USD 9.5 million on the free market [Res. Ex. No. 3, ¶ 2, p. 14]. Of this sum, approximately 40% represented materials used, 50% the development, testing and installation of the technology and the remaining 10% training personnel [Res. Ex. No. 3, ¶ 2, p. 14]. The CLAIMANT offered a discount on the contract price to USD 3.5 million [Res. Ex. No. 3, ¶ 5, p. 14].
- **88.** Certain transactions which would otherwise qualify as sales of goods may be excluded from application of the CISG under Art. 3. This Article excludes contracts for the supply of goods



in which the buyer contributes to the manufacture or production of the goods [Art. 3(1) CISG] or mixed contracts in which services form the majority of the seller's obligations [Art. 3(2) CISG].

89. The Sales and Licensing Agreement concerns the manufacture or production of the third treatment room and active scanning technology [Cl. Ex. No. 6, ¶ 2, p. 18]. The Agreement also concerns the supply of services to the RESPONDENT which are not linked to the production of the goods [Res. Ex. No. 3, ¶ 2, p. 39]. The CISG applies to the Sales and Licensing Agreement as [I] the express exclusion under Art. 3(2) is not applicable in the circumstances and [II] the Agreement is a contract for the sale of goods under Art. 3(1).

### I. The Inclusion Of Services In The Sales And Licensing Agreement Does Not Exclude It From The Scope of The CISG.

90. In order for a contract escape exclusion under Art. 3(2) CISG, the preponderant part of the seller's obligations must be in relation to the sale of goods, not services. The relevant test is first to consider whether or not the obligations are governed by a single unified agreement or two separate agreements [Schlechtriem & Schwenzer: Schwenzer, p. 68]. If governed by a single unified agreement, an economic value test is used to determine the preponderant part of the agreement [Schlechtriem & Schwenzer: Schwenzer, p. 70]. The Sales and Licensing Agreement falls within the scope of Art. 3(2) as [1] it is a single and unified agreement and [2] the preponderant part of the CLAIMANT's obligations under the contract relate to the sale of goods.

### A. The Sales And Licensing Agreement Is A Single And Unified Agreement.

91. The Sales and Licensing Agreement concerns both the sale of goods from the CLAIMANT to the RESPONDENT, as well as the rendering of installation and training services [Cl. Ex. 6 Art. 3(1)]. The Sales and Licensing Agreement is thus a mixed contract. Art. 3(2) CISG will only apply where there is a single, unified agreement which concerns obligations to furnish goods and services [Schlechtriem & Schwenzer: Schwenzer, p. 67; Huber & Mullis: Huber, p.46]. Whether there is a single, unified agreement is primarily a matter of interpretation of the contract [Huber & Mullis: Huber, p.46]. The contract should be interpreted by use of Article 8 CISG [Schlechtriem & Schwenzer: Schwenzer, p. 68]. Factors which indicate a unified agreement include the denomination and entire content of the contract, the structure of the price, and the weight given by the parties to the different obligations under the contract



[CISG Advisory Council Opinion No.4, p. 3; Schlechtriem & Schwenzer: Schwenzer, p. 69]. The timely connection of the performance of the supply of goods and the providing of services can buttress or weaken the interpretation of a series of obligations as a unitary contract [Schlechtriem & Schwenzer: Schwenzer, p. 69].

- 92. In the matter before the tribunal, all obligations, including both goods and services, were covered by the original contract price and included in only one document, that being the Sales and Licensing Agreement [Cl. Ex. No. 6, p. 18]. The services of installing and fine-tuning the technology and training personnel began within the same month of delivery of the goods, in January 2012 [Req. for Arb., ¶ 13, p. 6; Proc. Ord. 2, ¶ 26, p. 61]. The timely connection of such performance of the supply of goods and the rendering of services furthers the argument for the interpretation of these obligations as forming a unitary contract. From this, it appears quite clear that the parties intended all of these obligations to be governed by a single, unified contract, the Sales and Licensing Agreement.
- 93. Additionally, some obligations which might be regulated by two distinct contracts, can equally be governed by a single, unified agreement [Schlechtriem & Schwenzer: Schwenzer, p. 69]. For example, contracts to deliver and install an assembly line, to train the buyer's employees and to assist in the distribution of produce are all considered obligations that can be governed by a single, unified agreement [ICC 7660/1994; OLG München; Schlechtriem & Schwenzer: Schwenzer, p. 69].
- 94. Similarly, the Sales and Licensing Agreement shows that the obligations of the CLAIMANT were to deliver and install Active Scanning Technology in a third treatment room, as well as to train Hope Hospital's personnel in the operation of the facility [*Res. Ex. No. 3,* ¶ 2, p. 39]. These service obligations are similar to those mentioned above which form part of a single contract alongside obligations for the sale and supply of goods. Therefore, the obligations of the parties are governed by a single, unified contract, the Sales and Licensing Agreement.

## B. The Preponderant Part Of The Seller's Obligations Under The Sales And Licensing Agreement Concerns The Sale Of Goods.

**95.** The preponderant part of the CLAIMANT's obligations related to the supply of goods, being the materials and development relating to the third treatment room. The CISG does not apply to contracts where the preponderant part of the obligations of the party who furnishes the



goods, being the CLAIMANT, involves the supply of labour or other services [CISG Art. 3(2)]. As there is a unified contract [¶¶ 94 - 97] the prevailing test calls for a comparison between the economic value of the obligations relating to the supply of the labour and services, and the economic value of the obligations regarding the goods as if two separate contracts had been made [Schlechtriem & Schwenzer: Schwenzer, p. 70; Roofing Materials Case; Hotel Materials Case]. Upon completing this test, if the service component of the seller's obligations amounts to more than 50% then the supply of services will be a preponderant part of the contract [Schlechtriem & Schwenzer: Schwenzer, p. 71; Roofing Materials Case; Hotel Materials Case].

- 96. The Sales and Licensing Agreement is valued at USD 9.5 million on the free market [Res. Ex. No. 3, ¶ 2, p. 39]. Approximately 40% represents materials used, 50% the development, testing and installation of the room and software and the remaining 10% training personnel [Res. Ex. No. 3, ¶ 2, p. 39]. Therefore at a minimum 40% of the CLAIMANT's obligations relates to the supply of goods, being the materials used in the third treatment room. Of the USD 3.5 million or 50% relating to development costs, the majority of this amount was a fixed contribution to the original development of the software [Proc. Ord No. 2, ¶ 29, p. 61]. A majority equates to at least half of the total, and in this case the relevant total to consider is the cost of development. The original development of the active scanning technology is a supply of goods under Art. 3(1) as it is part of the manufacturing of the good [Part [II] of this submission]. As a result at a minimum the CLAIMANT's obligations relating to the supply of goods will amount to 65% of the contract value. This is made up of the 40% attributable to materials used plus half of the development costs, which is 25% of the contract value. The preponderant part of the CLAIMANT's obligations under the contract is therefore for the supply of goods, not services as, at a minimum 65% of the economic value of the CLAIMANT's obligations relates to the supply of goods.
- 97. The economic value test is however only the starting point and should be supplemented or revised by the weight the parties themselves have attributed to each obligation [Schlechtriem & Schwenzer: Schwenzer, p. 70-71]. The CLAIMANT agreed to offset the value for the development of the software and the training against the RESPONDENT's contribution [Res. Ex. No. 3, ¶ 5, p. 39]. The contract price of USD 3.5 million was therefore solely attributed to the materials used [Res. Ex. No. 3, ¶ 5, p. 39]. Although a separate value was not attributed to training services for tax purpose [Proc. Ord No.2, ¶ 27, p. 62], this does not affect that fact



that goods form the preponderant part of the contract. If a cost had been allocated to training services, given that they only amounted to 10% of the contract value [Res. Ex. No. 3, ¶ 2, p. 39], the preponderant part of the contract price would still have been attributed to the supply of goods. This demonstrates that it was clearly the intention of the parties that the preponderant part of the CLAIMANT's obligations related to the sale of goods, as this is consistent with the final contract price been solely attributed to the value of goods.

**98.** Therefore both the economic value and the intention of the parties clearly show that the preponderant part of the CLAIMANT's obligations concerns the sale of goods. The inclusion of services in the Sales and Licensing Agreement does not therefore exclude the applicability of the CISG to the contract and the claim of damages by the CLAIMANT.

# II. The Supply Of Goods To Be Manufactured Under The Sales and Licensing Agreement Is Considered A Sale Within The Scope Of The CISG.

99. A contract for the supply of goods that are manufactured or produced is only considered a sale in the sense of the CISG if the party who orders the goods does not supply a substantial part of the materials necessary for such manufacture [Art. 3(1) CISG]. The active scanning technology is a good that has been produced specifically to meet the needs of the RESPONDENT [Proc. Ord No.2, ¶ 24, p. 61] whose contribution to this development or production does not amount to a substantial part of such production.

### A. The Contract In Part Concerns The Supply Of Goods Which Must Be Manufactured Or Produced.

100. Software was not the type of good envisioned when the CISG was originally drafted. When the text of the Convention is ambiguous the common core of commercial wisdom, found in the domestic law of contracting states, will provide direction [Lookofsky, p. 275-276]. Most jurisdictions consider a sale of goods to have occurred when there is a transfer of a property right in a moveable thing [Lookofsky, p. 276]. Applying this test to the active scanning software, there is the transfer in a property right from the CLAIMANT to the RESPONDENT [Cl. Ex.6 Article 2] in the form of a right to permanent use of the software. Software is considered moveable as it can be transported via discs or electronic transfer [Lookofsky, p. 276]. The CLAIMANT physically transferred the active scanning technology to the RESPONDENT when the software was downloaded and installed at the RESPONDENT's facility [Proc. Ord. 2, ¶ 23, p. 61]. Software, like the active scanning technology, is therefore



- a good under the CISG as it involves the transfer of a property right in a moveable thing and it is in this way that it can be distinguished from an intangible, such as shares.
- **101.** Generally, the sale of custom-made goods is subject to the provisions of the CISG as much as the sale of ready-made goods [UNCITRAL Digest of Case Law, p.21; CISG Advisory Council Opinion No. 4, p. 3].
- 102. The CLAIMANT is responsible for the development of the active scanning technology [Cl. Ex. No. 6, p. 18, Art. 10(1)]. The first version of the basic software was developed primarily for the needs of the RESPONDENT [Proc. Ord. No. 2, ¶ 24, p. 61]. The majority of the development costs of USD 3.5 million was a fixed contribution to the original development of the software [Proc. Ord. No. 2, ¶ 29, p. 61]. As such, the subject matter of the contract is not simply a supply of goods already in existence. The contract relates to customised goods produced to satisfy the needs of the RESPONDENT. The contract therefore, concerns the supply of goods which must be manufactured or produced.

### B. The RESPONDENT Is Not Responsible For The Supply Of The Materials Necessary For The Manufacture Or Production Of The Goods.

- 103. Despite the fact that the required approval for the technology would not be possible without the RESPONDENT'S contribution of data and clinical trials, this does not equate to a supply of materials. The supply of immaterial contributions such as technical services and know-how are not materials for the purpose of Art. 3(1) [Schlechtriem & Schwenzer: Schwenzer, p. 66]. At the Vienna Conference when the CISG was formed a proposal to exclude agreements on the basis that the buyer supplied expert services to the seller was rejected [Honnold, p.66].
- trials for the CLAIMANT. The RESPONDENT furnished these services as the CLAIMANT needed the RESPONDENT's medical expertise and data in order to develop the Active Scanning Technology [*Proc. Ord. No. 2*, ¶ *24*, *p. 61*]. The medical expertise as a form of technical service is clearly an immaterial contribution for the purposes of Art 3(1) CISG. The data provided is also an intangible as it is merely a bundle of information and lacks the functionality that makes software, like the active scanning technology, a good [*Lookofsky*, *p. 276*]. The active scanning technology is akin to a machine in that it performs a function or task, even if it does so virtually, and it is this functional nature that distinguishes it from mere



data [Lookofsky, p. 276]. As both of the RESPONDENT's contributions are immaterial there has not been a supply of materials under Art. 3(1) CISG.

# C. In Any Event, The RESPONDENT Is Not Responsible For The Supply Of A Substantial Part of The Materials Necessary.

- 105. In determining what constitutes a substantial part of the materials necessary, an economic value test is the preferred starting point [Schlechtriem & Schwenzer: Schwenzer, p. 66; CISG Advisory Council Opinion No.4, p. 7]. This test compares the economic value of the materials provided by the buyer against those provided by the seller [CISG Advisory Council Opinion No.4, p. 7; Cylinder Case; Art Books Case; Windmill Drives Case].
- percentage required to constitute a substantial part is unsettled, however the general percentage regarded as substantial is 50% or more [CISG Advisory Council Opinion No., p. 7]. The market value of the RESPONDENT's contribution is USD 1.5 million [Res. Ex. No. 3, ¶ 5, p. 39]. This is less than 16% of the market value of the goods and services, USD 9.5 million [Res. Ex. No.3, ¶ 2, p. 39], delivered by the CLAIMANT. If we compare the RESPONDENT's contribution against only the value of the materials provided by the CLAIMANT, that being USD 3.5 million [Res. Ex. No.3, ¶ 5, p. 39], this is still at a maximum 42%. The RESPONDENT has therefore failed to supply a substantial part of the materials necessary.
- 107. Although this test should be complemented with an assessment of the importance of such materials for the functioning of the goods, this should only occur in exceptional cases [Schlechtriem & Schwenzer: Schwenzer, p.66]. Given that there is no uncertainty as to the value of each party's respective contributions there is no need to consider other relevant factors [Schlechtriem & Schwenzer: Schwenzer, p.65]. Furthermore, applying the economic value test alone is consistent with Art 7(1) CISG as it promotes a uniform application of the Convention [Schlechtriem & Schwenzer: Schwenzer, p.66]. On this basis, the RESPONDENT has clearly failed to supply a substantial part of the materials necessary and thus the agreement is considered a sale within the scope of the CISG.

#### **CONCLUSION OF ISSUE 4**

**108.** The Sales and Licensing Agreement is a contract for the sale of goods under Art. 3 of the CISG. Despite the mixed nature of the agreement, the preponderant part of the CLAIMANT's



obligations concerns the sale of goods. Additionally, the RESPONDENT did not supply the CLAIMANT with materials for the manufacture or production of the goods. In any event, the RESPONDENT is not responsible for the supply of a substantial part of the materials necessary.



### **REQUEST FOR RELIEF**

Counsel makes the submissions in this Memorandum on behalf of the CLAIMANT, in response to the Arbitral Tribunal's procedural orders. For the reasons outlined above Counsel respectfully requests that the Tribunal declare that:

- I. The Tribunal has jurisdiction to deal with the payment claims of the CLAIMANT.
- II. Both claims be heard in a single arbitration as the Tribunal has both the jurisdiction and the competence to do so.
- III. The choice of law clause in section 22 of the Standard Terms and Conditions of Sale is effective.
- IV. The Sales and Licensing Agreement constitutes a sales contract in the sense of the CISG.
- V. The RESPONDENT shall pay the CLAIMANT damages in the amount USD 11.5 million plus interest and the CLAIMANT's costs of arbitration.



### **CERTIFICATE**

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

Christiaan van Oeveren

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