MEMORANDUM FOR RESPONDENT

JOHANNES GUTENBERG-UNIVERSITÄT MAINZ

On behalf of
Hope Hospital
1-3 Hospital Road
Oceanside
Equatoriana

(Respondent)

Against
Innovative Cancer Treatment Ltd.
46 Commerce Road
Capital City
Mediterraneo

(Claimant)

Counsel

Nele Bienert · Julika Großmann · Marina Mertens
Katie Scott · Kerstin Warhaut
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<td>Allgemeine Geschäftsbedingungen (German for ‘standard terms’)</td>
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<td>Art.</td>
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<td>BGB</td>
<td>Bürgerliches Gesetzbuch (German Civil Code)</td>
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<td>CCI</td>
<td>Chamber of Commerce and Industry of the Russian Federation</td>
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<td>cf.</td>
<td>conferatur (Latin for ‘compare’)</td>
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<td>Cir.</td>
<td>Circuit</td>
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<td>CR</td>
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<td>e.g.</td>
<td>exempli gratia (Latin for ‘for example’)</td>
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<td>et al.</td>
<td>et alii (Latin for ‘and others’)</td>
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<td>et seq. / et seqq.</td>
<td>et sequens / et sequentia (Latin for ‘on the (next) page / pages’)</td>
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<td>fn.</td>
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<td>FS</td>
<td>Festschrift (liber amicorum)</td>
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<td>FSA</td>
<td>Framework and Sales Agreement</td>
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<td>HK Arbitration Ordinance</td>
<td>Arbitration Ordinance 2011, Hong Kong (Chapter 609 of the Law of Hong Kong)</td>
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<td>ICAC</td>
<td>International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>i.e.</td>
<td>id est (Latin for ‘that is’)</td>
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<td>SLA</td>
<td>Sales and Licensing Agreement</td>
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<td>ULIS</td>
<td>Uniform Law for the International Sale of Goods</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCITRAL</td>
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<td>U.S.</td>
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<td>USD</td>
<td>US-Dollar</td>
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<td>Vol.</td>
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<td>ZPO</td>
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# Table of Authorities

**Achilles, Wilhelm-Albrecht**  
*Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*  
1st Edition 2000, Luchterhand, Neuwied  
cited as: *ACHILLES, ART. , PARA.*  
para. 129

**Bamberger, Heinz-Georg**  
**Roth, Herbert**  
*Kommentar zum Bürgerlichen Gesetzbuch, Vol. 1*  
cited as: *AUTHOR IN BAMBERGER/ROTH, ART., PARA.*  
paras. 80, 82

**Bianca, C.M.**  
**Bonell, M.J.**  
*Commentary on the International Sales Law, The 1980 Vienna Sales Convention*  
1st Edition 1987, Giuffrè, Milan  
cited as: *AUTHOR IN BIANCA/BONELL, PARA.*  
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**Blackaby, Nigel**  
**Partasides, Constantine**  
**Redfern, Alan**  
**et al.**  
*Redfern and Hunter on International Arbitration*  
cited as: *REDFERN/HUNTER, PARA.*  
paras. 4, 45

**Böckstiegel, Karl-Heinz**  
**Kröll, Stefan Michael**  
**Nacimiento, Patricia**  
*Arbitration in Germany: The Model Law in Practice*  
cited as: *AUTHOR IN BÖCKSTIEGEL/KRÖLL/NACIMIENTO, §, PARA.*  
paras. 4, 15

**Born, Gary**  
*International Arbitration: Law and Practice*  
cited as: *BORN (2012), P.*  
paras. 7, 26

**Born, Gary**  
*International Commercial Arbitration*  
cited as: *BORN (2009), P.*  
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<td>Butler, Petra</td>
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<tr>
<td>Honsell, Heinrich</td>
<td>Kommentar zum UN-Kaufrecht</td>
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<td>Springer-Verlag, Heidelberg</td>
<td>AUTHOR IN HONSELL, ART., PARA.</td>
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<tr>
<td>Hußlein-Stich, Gabriele</td>
<td>Das UNCITRAL-Modellgesetz über die internationale Handelsfriedsgerichtsbarkeit, Vol. 8</td>
<td>1st Edition 1990, Heymanns, Munich</td>
<td>Heymanns, Munich</td>
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<td>Kröll, Stefan</td>
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</tr>
<tr>
<td>Lohmann, Arnd</td>
<td>Parteiautonomie und UN-Kaufrecht</td>
<td>1st Edition 2005</td>
<td>Mohr Siebeck, Tübingen</td>
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<td>McGuire, Mary-Rose</td>
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<tr>
<td><strong>Schlechtriem, Peter Schroeter, Ulrich</strong></td>
<td>Internationales UN-Kaufrecht 5th Edition 2013, Mohr Siebeck, Tübingen cited as: Schlechtriem/Schroeter, P., Para. paras. 103, 129</td>
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<tr>
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<tr>
<td>Schwenzer, Ingeborg</td>
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<td></td>
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<td>cited as: AUTHOR IN SCHLECHTRIEM/SCHWENZER, ART., PARA.</td>
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<tr>
<td>Schwenzer, Ingeborg</td>
<td>Old Habits Die Hard: Traditional Contract Formation in a Modern World</td>
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<td>Schlechtriem, Peter</td>
<td>Convention de Vienne sur les contrats de vente internationale de marchandises</td>
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<td></td>
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<tr>
<td>Witz, Claude</td>
<td>1st Edition 2008, Dalloz, Paris</td>
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<tr>
<td></td>
<td>cited as: SCHLECHTRIEM/WITZ, P., PARA.</td>
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<td>Sutton, David St. John</td>
<td>Russell on Arbitration</td>
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<td>Gearing, Matthew</td>
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*Supreme Court of Austria, 10 November 1994*

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Published in: [http://www.globalsaleslaw.org/content/api/cisg/urteile/954.pdf](http://www.globalsaleslaw.org/content/api/cisg/urteile/954.pdf)

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Published in: [http://cisgw3.law.pace.edu/cases/041124b1.html#cx](http://cisgw3.law.pace.edu/cases/041124b1.html#cx)

Cited as: *Court of Appeals Ghent, 24 November 2004*

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 cited as: HIGHER COURT OF APPEAL COLMAR, 24 OCTOBER 2000
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Higher Court of Appeal Grenoble, 21 October 1999
published in: http://cisgw3.law.pace.edu/cases/991021f1.html
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 cited as: COURT OF APPEAL PARIS, 6 NOVEMBER 2001
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published in:
http://www.kluwerarbitration.com/CommonUI/document.aspx?id=IPN15107&query=AND(content%3A%22societe%22,content%3A%22de%22,content%3A%22diseno%22,content%3A%22v%22,content%3A%22societe%22,content%3A%22mendes%22)
 cited as: COURT OF APPEAL PARIS, 27 OCTOBER 1994
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Germany

German Federal Court of Justice, 1 March 2007
published in: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=39275&pos=0&anz=1
 cited as: GERMANY FEDERAL COURT OF JUSTICE, 1 MARCH 2007
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German Federal Court of Justice, 31 October 2001
published in: http://cisgw3.law.pace.edu/cases/011031g1.html#cx
 cited as: GERMANY FEDERAL COURT OF JUSTICE, 31 OCTOBER 2001
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Higher Court of Appeal Celle, 24 July 2009
published in: http://cisgw3.law.pace.edu/cases/090724g1.html
cited as: Higher Court of Appeal Celle, 24 July 2009
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published in: http://cisgw3.law.pace.edu/cases/071220g1.html
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Higher Court of Appeal Düsseldorf, 21 April 2004
published in: http://www.globalsaleslaw.org/content/api/cisg/urteile/915.pdf
cited as: Higher Court of Appeal Düsseldorf, 21 April 2004
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Higher Court of Appeal Munich, 3 December 1999
published in: http://www.globalsaleslaw.org/content/api/cisg/urteile/585.htm
cited as: Higher Court of Appeal Munich, 3 December 1999
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Higher Court of Appeal Cologne, 26 August 1994
published in: http://cisgw3.law.pace.edu/cases/940826g1.html#cx
cited as: Higher Court of Appeal Cologne, 26 August 1994
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District Court Landshut, 12 June 2008
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District Court Neubrandenburg, 3 August 2005
published in: http://cisgw3.law.pace.edu/cases/050803g1.html
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Supreme Court of Italy, 9 June 1995;
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**STATEMENT OF FACTS**

<p>| CLAIMANT | Innovative Cancer Treatment Ltd [<em>hereafter</em> ‘CLAIMANT’], a manufacturer of particle therapy equipment, specializing in proton therapy. CLAIMANT is a corporation organized under the laws of Mediterraneo |
| RESPONDENT | Hope Hospital [<em>hereafter</em> ‘RESPONDENT’], a university teaching hospital. It is the national center for cancer research and treatment in Equatoriana. |
| 11 January 2007 | RESPONDENT approaches CLAIMANT regarding the purchase of a proton therapy facility. During the following negotiations, CLAIMANT presents RESPONDENT with a model calculation providing that the Proton Therapy Facility could run on zero costs. |
| 13 January 2008 | The parties conclude a FRAMEWORK AND SALES AGREEMENT [<em>hereafter</em> ‘FSA’] for the purchase of a fully-equipped proton therapy facility. The FSA also provides the legal framework for future contracts between the parties regarding the proton therapy facility. |
| 6 May 2011 | RESPONDENT intends to expand the Proton Therapy Facility by an additional treatment room and again approaches CLAIMANT. During the negotiations, the price was a major issue for RESPONDENT. In the end, CLAIMANT agreed to reduce the purchase price in exchange for hospital data necessary to develop the software required for the third treatment room. During the SLA’s negotiations, CLAIMANT informs RESPONDENT that it has overhauled its standard terms. Since the standard terms are only available on CLAIMANT’s website in a Mediterranean version, CLAIMANT promises to send an English copy of the standard terms. However, RESPONDENT never receives a translated copy of the standard terms. |</p>
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 July 2011</td>
<td>The parties conclude the <strong>SALES AND LICENSING AGREEMENT [HEREAFTER ‘SLA’]</strong> for the purchase of a third treatment room.</td>
</tr>
<tr>
<td>August 2012</td>
<td>RESPONDENT notices that the Proton Therapy does not function properly. RESPONDENT brings forward two claims. First, the commercial viability as presented in CLAIMANT’s model calculation proves to be far too optimistic. The operational costs of the Proton Therapy Facility are in fact much higher than originally estimated. Second, the software that is necessary to run the additional treatment room is defective because it does not ensure an accurate calibration of that treatment room.</td>
</tr>
<tr>
<td>15 August 2012</td>
<td>RESPONDENT informs CLAIMANT that it will not make any further payments under both contracts. CLAIMANT does not accept RESPONDENT’s decision to cease further payments and insists on the outstanding balance. Negotiation and mediation do not solve the parties’ dispute.</td>
</tr>
<tr>
<td>6 June 2013</td>
<td>CLAIMANT files a single request for arbitration to CEPANI.</td>
</tr>
<tr>
<td>5 July 2013</td>
<td>In its Answer to the Request for Arbitration, RESPONDENT contests the validity of the arbitration agreement. Additionally, RESPONDENT puts forward its request for two different arbitrators to deal with the claims separately.</td>
</tr>
<tr>
<td>5 August 2013</td>
<td>CEPANI appoints a single Tribunal.</td>
</tr>
</tbody>
</table>

In response to Procedural Order No. 1, para. 3 and with regard to the present facts, RESPONDENT respectfully requests the Tribunal to find that:

- the Arbitral Tribunal does not possess jurisdiction to deal with payment claims raised by CLAIMANT [First Issue];

- the claims should not be heard together in a single arbitration proceeding [Second Issue];

- the SLA is not governed by the CISG [Third Issue].
ARGUMENT ON THE PROCEDURAL ISSUES

FIRST ISSUE: THE TRIBUNAL LACKS JURISDICTION REGARDING BOTH CLAIMS

1. CLAIMANT’s claims are unfounded from a factual as well as from a legal perspective. Its shaky assertions are misplaced in the literal sense: they are brought forward in the wrong forum because the parties never validly agreed to settle their disputes by arbitration.

2. The question whether an arbitration agreement to establish jurisdiction exists, lies at the heart of every arbitration. In regard to every arbitration, the crucial question is whether the parties willingly forewent their constitutional right to have the case decided by a state court. The burden of proving that both parties validly waived this right and instead validly agreed to arbitration lies with CLAIMANT. It is not sufficient for CLAIMANT to simply allege such an agreement. It is also not sufficient to establish a prima facie arbitration agreement. Rather, CLAIMANT has to submit evidence and prove that such was the parties’ intention.

3. So far, CLAIMANT completely failed in this regard. However, this comes as no big surprise: Neither of the two contracts which CLAIMANT and RESPONDENT concluded to establish a proton therapy facility, the FSA and the SLA, contains a valid arbitration agreement. In the absence of such an agreement, CLAIMANT must not be allowed to drag RESPONDENT in front of a forum the parties never validly agreed on. As RESPONDENT will demonstrate in the following, the arbitration agreement in the FSA is invalid [1] and the SLA does not contain an arbitration agreement at all [2].

1. THE FSA IS NOT GOVERNED BY A VALID ARBITRATION AGREEMENT

4. The arbitration agreement in the FSA is a pathological clause because it contains an inherent and irresolvable contradiction. On the one hand, it provides for arbitration which is a method to finally and bindingly settle a dispute independent from the state courts [REDFERN/HUNTER, PARA. 1.02; LEW/MISTELIS/KRÖLL, PARAS. 1-7 ET SEQ; BORN (2009), P. 2880; KRÖLL/KRAFT IN BÖCKSTIEGEL/KRÖLL/NACIMIENTO, §1059, PARA. 1; POUDRET/BESSON, PARA. 3]. On the other hand, it provides for an ‘appeal and review mechanism’ before a state court which is clearly the opposite of a final and binding settlement. The attempt to achieve both goals in one clause is equivalent to an attempt to square a circle. This inherent contradiction renders the entire clause null and void [1.1].

MEMORANDUM FOR RESPONDENT | 3
Moreover, the clause is inappropriately drafted in CLAIMANT’s favor. Art. 23(6) FSA contains a unilateral access-to-court provision which was included at CLAIMANT’s wish [CLAIMANT’S EXHIBIT NO. 3, p. 14; PARA. 4]. This provision allows only CLAIMANT to choose between litigation and arbitration. RESPONDENT, in contrast, is bound to enforce its rights by way of arbitration. Such a unilateral access to court provision is void – and again renders the entire arbitration agreement invalid [1.2].

1.1 THE APPEAL AND REVIEW MECHANISM REMOVES THE ARBITRATION AGREEMENT CONTAINED IN THE FSA INVALID

Both the CEPANI Rules and the Danubian Arbitration Law, the applicable lex arbitri, preserve the above mentioned principle of finality. However, the appeal and review mechanism contained in Art. 23(4) FSA, violates this principle and results in non-binding awards. The appeal and review mechanism sits at odds with both Artt. 5 and 34 Danubian Arbitration Law [1.1.1]. Moreover, CLAIMANT may not attempt to enforce Art. 34A Danubian Domestic Arbitration to validate the appeal and review mechanism [1.1.2]. Finally, the appeal and review mechanism also jars with Art. 32 CEPANI Rules [1.1.3].

The remainder of the arbitration agreement – once the defective clause is excluded – remains applicable if the parties would have also agreed to arbitration without the defective clause [SUPREME COURT SWITZERLAND, 21 NOVEMBER 2003; BORN (2012), P. 72; LEW/MISTELIS/KRÖLL, PARA. 7-72; FOUCHEARD/GAILLARD/GOLDMAN, PARA. 484]. However, in the present dispute, the appeal and review mechanism renders the arbitration agreement invalid as a whole, as RESPONDENT would never have agreed to arbitration without such a mechanism [1.1.4].

1.1.1 THE APPEAL AND REVIEW MECHANISM CONFLICTS WITH THE LEX ARBITRI

The Danubian Arbitration Law, a verbatim adoption of the UNCITRAL Model Law [PROCEDURAL ORDER NO. 2, P. 59, PARA. 13], is the applicable lex arbitri in the present case because the seat of arbitration is in Vindobona, Danubia. The Danubian Arbitration Law occupies a stringent position regarding court intervention. Art. 5 Danubian Arbitration Law states that ‘no court shall intervene except where so provided in this Law’. Furthermore, Art. 34 Danubian Arbitration Law provides an exhaustive list of grounds for court intervention in terms of recourse of an award [UNCITRAL DIGEST, P. 134, PARA. 1; HÜBBLEIN-
The appeal and review mechanism contained in Art. 23(4) FSA is not listed as ground which warrants court intervention.

To determine the validity of this mechanism, one must investigate whether the respective arbitration provisions are mandatory or whether the parties may derogate from these provisions. CLAIMANT itself acknowledges [MEMORANDUM FOR CLAIMANT, PARA. 12] that a derogation from the applicable lex arbitri is only possible if the relevant provisions are non-mandatory [LEW/MISTELIS/KRÖLL, PARA. 21-14].

At hand, Artt. 5, 34 Danubian Arbitration Law are mandatory. Nevertheless, CLAIMANT pigeonholes Art. 5 and Art. 34 Danubian Arbitration Law as non-mandatory [MEMORANDUM FOR CLAIMANT, PARAS. 9, 12]. On this premise, CLAIMANT alleges that the parties could validly include the appeal and review mechanism in the FSA [MEMORANDUM FOR CLAIMANT, PARAS. 7 ET SEQ]. However, this argument is essentially flawed.

The mandatory nature of the respective provisions becomes apparent when taking a look at the wording. Art. 5 Danubian Arbitration Law states that 'no court shall intervene except where so provided in this Law' [EMPHASIS ADDED] and Art. 34 Danubian Arbitration Law that 'recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article' [EMPHASIS ADDED]. The words 'except where’ and ‘only’ illustrate the mandatory nature of the provisions all the more.

In addition, to ascertain this mandatory nature, one must reflect upon the provision’s drafting history. During the drafting sessions a proposal was made to permit parties to extend the scope of court intervention in the Danubian Arbitration Law in their arbitration agreement. Notably the Drafting Commission dismissed the motion [OFFICIAL RECORDS (DOC. A/40/17), P. 14, PARAS. 64 ET SEQ] and published the articles in their current form. Thus, the drafters considered the restriction of court intervention to be a mandatory feature of the Danubian Arbitration Law.

CLAIMANT calls upon a decision of the German Federal Court of Justice to support its argument that the finality of an award, as well as the inclusion of an appeal and review mechanism, is a reflection of party autonomy in the drafting of an arbitration agreement.
The German court held it to be permissible for parties, unsatisfied with an arbitral award, to subsequently commence proceedings in court [German Federal Court of Justice, 1 March 2007].

However, CLAIMANT conveniently fails to mention the lack of support for the decision amongst other courts. The German Federal Supreme Court is in fact the lost duck on the lone side of the pond. Courts in other jurisdictions all over the world recognize the exhaustiveness of set aside possibilities under the respective applicable law [U.S. Supreme Court, 25 March 2008; Court of Appeal New Zealand, 15 February 2013; Court of Appeal Paris, 27 October 1994]. In particular, the U.S. Supreme Court held that an expansion of specifically stated grounds would stretch basic interpretive principles [U.S. Supreme Court, 25 March 2008, p. 2]. Besides, international courts contesting the decision of the German Federal Supreme Court, the court even suffers opposing opinions ‘at home’. In German legal literature the law governing the point at which the competence of the arbitral tribunal and the state court intersects (at hand Artt. 5, 34 Danubian Arbitration Law) is regarded as constantly mandatory [Münch in Münchener Kommentar ZPO, §1029, para. 100]. For these reasons, the Tribunal should not follow the German Federal Supreme Court and find the parties may not deviate from Artt. 5, 34 Danubian Arbitration Law. Hence, the appeal and review mechanism included in Art. 23(4) FSA is not compatible with the lex arbitri and therefore void.

Alternatively, CLAIMANT argues that the appeal and review mechanism in Art. 23(4) FSA has to be interpreted as a review in accordance with Art. 34(2) Danubian Arbitration Law and that this also tallies with the parties’ intention [Memorandum for Claimant, paras. 14 et seq]. In its argument, CLAIMANT discounts the fact that the parties explicitly included an appeal and review mechanism providing for the recourse of both errors of law and fact in Art. 23(4) FSA. Such a review on facts is, however, not covered by any of the grounds in Art. 34 Danubian Arbitration Law [Kröll/Kraft in Böckstiegel/Kröll/Nacimiento, §1059, para. 2; Wilske/Market in Beckok ZPO, §1059, para. 1]. Consequently, such an interpretation of Art. 23(4) FSA does not conform to the parties’ intention.

Hence, the appeal and review mechanism included in Art. 23(4) FSA is not compatible with the lex arbitri and therefore void.
1.1.2 Art. 34A Danubian Domestic Arbitration Law Cannot Be Applied in the Present Case

In any event, Claimant cannot base its argument on Art. 34A Danubian Domestic Arbitration Law. While it is true that Art. 34A Danubian Domestic Arbitration Law in some cases allows for an appeal of an arbitral award to the Danubian High Court [*Procedural Order No. 2, pp. 59 et seq, paras. 13 et seq*], it cannot be applied to the case at hand for three reasons:

First, Art. 34A Danubian Domestic Arbitration Law is – as the wording already indicates – only applicable to *domestic* arbitration, whereas the arbitration at hand is of an international nature. Second, an application is only possible for proceedings concerned with Danubian law, as provided for in Art. 34A Danubian Domestic Arbitration Law. In the case at hand, however, both contracts are subject to Mediterranean law. Consequently, the possibility to review a question of Danubian law is worthless. Third, the appeal and review mechanism in Art. 23(4) FSA allows for questions of law *and fact* whereas the Danubian High Court is – on the basis of Art. 34A Danubian Domestic Arbitration – only concerned with questions of law.

All in all, it becomes obvious that Art. 34A Danubian Domestic Arbitration Law does not enable any further possibility to review the case at hand and does not contribute to the validity of the appeal and review mechanism of Art. 23(4) FSA.

1.1.3 The Appeal and Review Mechanism Is Not in Line with Art. 32 CEPANI Rules

In Art. 23(3) FSA, the parties agreed to settle disputes by institutional arbitration under the CEPANI Rules. In regard to judicial review of arbitral awards, the CEPANI Rules demonstrate equally as strict an approach as the lex arbitri. When parties submit their dispute to institutional arbitration, they incorporate the relevant arbitration rules and are therefore bound by such rules [*Born (2009), p. 1122*]. The relevant provision, Art. 32 CEPANI Rules, renounces the admissibility of an appeal and review mechanism. It stipulates that:

‘*The award is final and is not subject to appeal. [...]’*
In addition, the second paragraph of Art. 32 CEPANI Rules explicitly states that:

‘By submitting their dispute to arbitration under CEPANI Rules and except where an explicit waiver is required by law, the parties waive their right to any form of recourse insofar as such a waiver can validly be made.’

Yet again the pivotal question is whether the provision is mandatory, thereby either enabling or prohibiting the parties to derogate from the relevant provision.

CLAIMANT submits that the parties may derogate from the CEPANI Rules, provided there is no express rule prohibiting it [MEMORANDUM FOR CLAIMANT, PARA. 13]. This argument is spurious. In fact, the exact opposite is true. In each case that the CEPANI Rules permit a derogation, such a possibility is expressly stipulated in the relevant articles as demonstrated in Artt. 7(4), 8(4), 11(2), 15(3), 21(1)(2), 23(2), 25 and 38 CEPANI Rules. Therefore, it is logical that where such a derogation is not expressly provided for in the article, it is not permitted.

Art. 32 CEPANI Rules, which ensures the finality of arbitral awards, does not provide for such an exception. Consequently, the CEPANI deems Art. 32 CEPANI Rules mandatory and the appeal mechanism is rendered invalid.

1.1.4 THE APPEAL AND REVIEW MECHANISM RENDERS THE ENTIRE ARBITRATION AGREEMENT INVALID

CLAIMANT argues that despite the invalidity of the appeal and review mechanism, the remainder of the arbitration agreement is still in force. CLAIMANT alleges that the parties’ intention must be interpreted in such a manner as to allow for the effective operation of the arbitration agreement [MEMORANDUM FOR CLAIMANT, PARAS. 22 ET SEQ].

Crucially, CLAIMANT ignores the fact that the validity of the arbitration agreement centers on the parties’ intention to arbitrate. Only if the parties would have agreed to arbitration without the defective clause does the arbitration agreement remain valid [SUPREME COURT SWITZERLAND, 21 NOVEMBER 2003; BORN (2012), P. 72; LEW/MISTELIS/KRÖLL, PARA. 7-72;
Throughout negotiations, RESPONDENT predicated upon the importance of the appeal and review mechanism, insisting that the inclusion was paramount to secure its agreement to arbitration [Answer to Request for Arbitration, p. 31, para. 5; Procedural Order No. 2, p. 58, para. 9; Claimant’s Exhibit No. 3, p. 14, para. 5]. RESPONDENT provided an explanation as to its insistence on the appeal and review mechanism to CLAIMANT: It informed CLAIMANT about its previous bad experiences due to a public discussion following an unfavorable recent award, as no appeal or review was possible [Procedural Order No. 2, p. 58, para. 9]. RESPONDENT wished to avoid such a situation at all costs on this occasion. This illustrates just how important the appeal and review mechanism was for RESPONDENT. Hence, without the appeal and review mechanism, RESPONDENT would not have agreed to arbitration. Consequently, the invalidity of the appeal and review mechanism gives rise to the invalidity of the entire arbitration agreement.

1.2 THE UNILATERAL ACCESS TO COURT PROVISION ALSO LEADS TO THE INVALIDITY OF ART. 23 FSA

In Art. 23(6) FSA, CLAIMANT allocated itself the right to bring its claims to the courts of Mediterraneo, as an alternative to arbitration. This right is only afforded to CLAIMANT. In other words: CLAIMANT has the right to choose between arbitration and litigation, but RESPONDENT is limited to submitting its claims to arbitration.

Unilateral access to court provisions have been held pathological by several courts [Supreme Court of Arbitration of the Russian Federation, 19 June 2012; Bulgarian Supreme Court of Cassation, 2 September 2011; Cour de cassation, 26 September 2012]. The principle of equality of the parties, according to which parties to a proceeding must be granted the same procedural rights, was held to be a critical right and resulted in the overruling of such clauses [Supreme Court of Arbitration of the Russian Federation, 19 June 2012]. Since a unilateral access to court provision only grants one party the right to choose between arbitration and litigation, the provision violates the principle of party equality and is therefore invalid [Supreme Court of Arbitration of the Russian Federation, 19 June 2012;
Despite the obvious inequality associated with unilateral access to court provisions, CLAIMANT argues that such a provision is valid in the case at hand because it was the upshot of fair negotiations [MEMORANDUM FOR CLAIMANT, PARAS. 30 ET SEQ]. However, none of the aforementioned courts attached any weight to whether the negotiations were fair or not. Instead, the courts regarded the equality of the parties to be an indispensable procedural right. Therefore, it is not possible for one party to unilaterally waive such a right prior to the commencement of proceedings.

2. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO DEAL WITH THE CLAIM UNDER THE SLA

With regard to the second contract, the SLA, the Tribunal lacks jurisdiction to deal with the claims because the SLA does not contain any provision that could be understood as an arbitration agreement. In fact, Art. 23 SLA contains a dispute resolution clause providing for litigation. Consequently, the Tribunal lacks jurisdiction to deal with the claims under the SLA.

Nevertheless, CLAIMANT submits that the FSA’s arbitration agreement extends to the SLA [MEMORANDUM FOR CLAIMANT, PARA. 34]. CLAIMANT bases its argument on Art. 45 FSA, in which the parties agreed that the provisions of the FSA shall also govern further contracts ‘where such contracts do not contain a specific provision to the contrary’.

Aside from the fact that the arbitration agreement in Art. 23 FSA is invalid [SEE PARAS. 4 ET SEQ] and accordingly cannot extend to the SLA either, CLAIMANT’s allegation [MEMORANDUM FOR CLAIMANT, PARAS. 33 ET SEQ] is unfounded for the following reasons: First, the dispute resolution clause in Art. 23 SLA constitutes a ‘specific provision to the contrary’ within the meaning of Art. 45 FSA and therefore prevents the extension of Art. 23 FSA to the SLA [2.1]. Second, even if the arbitration agreement in Art. 23 FSA were valid and could be expanded to the SLA the resulting arbitration agreement in the SLA would remain invalid due to a bilateral access to court provision in Art. 23(2) SLA [2.2]. Third, CLAIMANT is also aware that Art. 23 FSA might not be extended to the SLA and tries to concoct an arbitration agreement from the arbitration clause of the standard terms
[Memorandum for Claimant, paras. 38 et seqq]. However, Claimant cannot rely on the standard terms because they are overridden due to the inclusion of the dispute resolution clause in Art. 23 SLA which provides for litigation [2.3].

2.1 The arbitration agreement of the FSA does not govern the SLA

Besides the FSA, the SLA also contains an independent dispute resolution clause in its Art. 23. In this clause, the parties agreed that:

‘(1) The parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo or Equatoriana as applicable.

(2) In addition, both parties shall have the right to bring any and all claims in the courts of Mediterraneo or Equatoriana to the jurisdiction of which they hereby submit.’

This dispute resolution clause does not refer to ‘arbitration’ at any point. Instead, it only refers to ‘courts’, demonstrating the parties’ disposition to submit their dispute to litigation. Since the clause only refers to litigation, it accordingly constitutes a ‘specific provision to the contrary’ to the arbitration agreement in Art. 23 FSA. The application of Art. 45 FSA is therefore precluded. Consequently, Claimant’s assertion that the application of the arbitration agreement contained in the FSA extends to the SLA [Memorandum for Claimant, paras. 33 et seqq] falters. The claim under the SLA is subject to litigation and not arbitration.

2.2 Even if the SLA contained an arbitration agreement, it would be invalid due to the bilateral access to court provision

Even if the arbitration agreement in Art. 23 FSA were valid and could be expanded to the SLA, the resulting arbitration agreement in the SLA would be invalid because of the bilateral access to court provision.

Following Claimant’s argumentation that Art. 23 SLA only substitutes Art. 23(5), (6) FSA leads to the consequence that – as Claimant itself submits – the option to arbitrate and to approach courts would exist simultaneously [Memorandum for Claimant, paras. 36 et seq].
Such a construction amounts to a bilateral access to court provision as both parties are granted the right to elect whether they submit their claims to arbitration or to the state courts. Such bilateral access to court provisions are pathological [Fouchard/Gaillard/Goldmann, para. 488, fn. 133; Lew/Mistelis/Kröll, para. 7-74; Russell, para. 2-026]. Both parties can choose between arbitration and litigation which creates the danger of having two proceedings dealing with the same claims simultaneously – an arbitration and a litigation proceeding. If this situation were to arise it would not only be impossible to define which proceeding, but also which result – award or court decision – would take precedence.

In cases with ‘normal’ arbitration clauses, such a situation cannot arise by reason of Art. 8(1) Danubian Arbitration Law. This provision prescribes a court from allowing a proceeding if the parties agreed to arbitrate their dispute. In this situation, the parties are simply prohibited from initiating court proceedings in contravention to the agreement to arbitrate in the contract. If, however, parties have agreed to a choice between ‘arbitration or litigation’, there is no contravention when actually going to the courts. Therefore, Art. 8(1) Danubian Arbitration Law cannot solve the dilemma at hand.

2.3 The arbitration clauses of either of the standard terms cannot be applied to the SLA

Claimant argues that in any event the arbitration clause contained in section 21 of either the old or the new standard terms applies to the SLA [Memorandum for Claimant, paras. 38 et seqq]. However, it is not possible for Claimant to base its request for arbitration on the arbitration clause contained in SLA’s standard terms because Claimant and Respondent explicitly agreed on a dispute resolution clause which provides for litigation in Art. 23 SLA [see paras. 34 et seqq]. Such an individual agreement overrules the respective provisions in the standard terms [cf. Cisg-Ac Opinion No. 13, Rule 8; Unidroit Principles 2010, Art. 2.1.21; Lohmann, p. 252]

Furthermore, the present arbitration de facto is not based on the arbitration clause in the standard terms: This arbitration is seated in Vindobona, Danubia [Memorandum for Claimant, para. 2; Claimant’s Exhibit No. 2, p. 11, Art. 23(4); Procedural Order No. 1, p. 54, para. 3; Fasttrack to Cepani, p. 3, para. 4]. Section 21 of the standard terms, in contrast, designates Capital City, Mediterraneo as the arbitral seat [Claimant’s Exhibit No. 2,
CONCLUSION ON THE FIRST ISSUE

Neither of the contracts contain a valid arbitration agreement. The arbitration agreement in the FSA is invalid, whereas the SLA does not contain any arbitration agreement at all. Therefore, the Tribunal does not have jurisdiction to decide the claims under both contracts.

SECON D ISSUE: THE CLAIMS SHOULD BE HEARD IN SEPARATE PROCEEDINGS

As set out above, this Tribunal does not have jurisdiction to decide on CLAIMANT’s claims, because they are not covered by a valid arbitration agreement. Moreover, even if the Tribunal had jurisdiction, it would nevertheless be unsuitably composed to hear the claim arising out of the SLA.

RESPONDENT nominated two different arbitrators to decide on each claim separately [ANSWER TO REQUEST FOR ARBITRATION, P. 31, PARAS. 2 ET SEQ]. It nominated Prof. Tintin as arbitrator for the first claim arising out of the FSA [ANSWER TO REQUEST FOR ARBITRATION, P. 31, PARA. 2] and Ms. Arrango as arbitrator for the second claim arising out of the SLA [ANSWER TO REQUEST FOR ARBITRATION, P. 31, PARA. 3]. However, CEPANI only confirmed Prof. Tintin’s nomination [LETTER FROM CEPANI TO PROFESSOR TINTIN, P. 41]. RESPONDENT’s party-appointed arbitrator was never empowered to decide on the second claim. Thus, the Tribunal is not suitably composed to decide on the second claim. [1].

Despite the lack of a certified arbitrator to hear the second claim, CLAIMANT tries to persuade the Tribunal to conduct a single arbitration [MEMORANDUM FOR CLAIMANT, PARA. 43]. Even if the Tribunal were to find that it is competent to hear both claims, hearing the claims together would only be possible with RESPONDENT’s consent. The relevant provision of the CEPANI Rules dealing with multi-contract arbitration, Art. 10 (1) CEPANI Rules, only authorizes a single proceeding if the parties have agreed to it. At hand, the parties never reached such an agreement and any consent is hereby – once again – firmly denied.

CLAIMANT’s request for a single set of proceedings against RESPONDENT’s will once again show CLAIMANT’s misunderstanding of fundamental arbitration principles. As already
illustrated in para. 3, CLAIMANT hopes that it can drag RESPONDENT to arbitration without its consent. Going even further, CLAIMANT seems to assume that its mere wish to deal with both claims in a single proceeding is sufficient to give authority to the Tribunal. CLAIMANT could not be further from the truth. Party consent is the cornerstone of arbitration [REDFERN/HUNTER, PARA. 1.02; LEW/MISTELIS/KRÖLL, PARA. 1-11]. Arbitration is binding because the parties have agreed that it should be, rather than because of the coercive power of any state [REDFERN/HUNTER, PARA. 1.02; TACKABERRY/MARRIOTT, PARA. 2-010]. Therefore, it is not permissible for the Tribunal to hear both claims together against the parties’ will [2].

Lastly, even if the prerequisites of Art. 10(1) CEPANI were met, the fulfillment of these prerequisites would not automatically generate a single proceeding. The decision of whether or not to conduct a single proceeding would still be at the Tribunal’s discretion. As the two claims between CLAIMANT and RESPONDENT concern different economic and technical problems, the Tribunal should use its discretion in favor of two separate proceedings [3].

1. THE TRIBUNAL IS NOT SUITABLY COMPOSED TO HEAR THE SECOND CLAIM

In its current composition, the Tribunal is not competent to hear both claims in a single proceeding. With regard to Professor Tintin, whom CEPANI confirmed as RESPONDENT’s party-appointed arbitrator [LETTER FROM CEPANI TO PROFESSOR TINTIN, P. 41], RESPONDENT emphasized that it nominated ‘Professor Bianca Tintin as arbitrator for the arbitration concerning the payment under the Framework and Sales Agreement’ [ANSWER TO REQUEST FOR ARBITRATION, P. 31, PARA. 2; EMPHASIS ADDED]. RESPONDENT empowered Professor Tintin to decide on the first claim only. Therefore, Professor Tintin, and as a result the entire Tribunal, is not capable of deciding on the second claim.

Even if CLAIMANT could prove that such a split nomination of arbitrators were invalid, this would not alter the Tribunal’s incompetency regarding the second claim. If a partial nomination were in fact invalid, both of RESPONDENT’s nominations would be void. As a consequence, Professor Tintin would not be nominated to deal with any claim at all. The Tribunal would be inaccurately composed and therefore not competent to decide on either claim.

RESPONDENT understands that, should a split nomination be regarded as impossible, RESPONDENT’s nominations may be overruled according to Art. 15(3) CEPANI Rules. In the
case at hand, however, the CEPANI did not come to such a conclusion. If a substitute arbitrator is to be appointed it is necessary that the parties to the arbitration are informed about this arrangement, or at the very minimum receive an indication that the Appointment Committee made such a decision. Despite these requirements, CEPANI only confirmed RESPONDENT’s party-appointed arbitrator [LETTER FROM CEPANI TO PROFESSOR TINTIN, p. 41].

2. THE PARTIES DID NOT AGREE TO HEAR THE CLAIMS IN A SINGLE SET OF PROCEEDINGS

Alternatively, hearing the claims in one set of proceedings is out of the question since the prerequisites of Art. 10(1) CEPANI Rules are not satisfied. Art. 10(1) CEPANI Rules only provides the Tribunal with the discretion to hear both claims together if the parties have agreed upon a single proceeding.

CLAIMANT argues that the parties have impliedly agreed to hear the claims together based on the assumption that there is a close connection between the claims [MEMORANDUM FOR CLAIMANT, PARA. 53]. CLAIMANT’s allegation already lacks a legal basis. The CEPANI Rules in Art. 10(3) CEPANI Rules clearly state:

‘Arbitration agreements concerning matters that are not related to one another give rise to the presumption that the parties have not agreed to have their claims decided in a single set of proceedings.’ [EMPHASIS ADDED]

Hence, the CEPANI Rules will only presume the parties not to have agreed on a single proceeding if the subject matters of the claims are unrelated. The Rules, however, do not presume the parties to have agreed to one proceeding if the claims are related. Rather, drawing an agreement, as CLAIMANT does, from a connection of the claims amounts to a distortion of Art. 10(3) CEPANI Rules.

THAT ASIDE, CLAIMANT’s argument also lacks merit as no close connection exists between the claims at hand. Each claim is concerned with a specific ambit of expertise, namely economics and statistics on the one hand and technology and software engineering on the other [CLAIMANT’S EXHIBIT NO. 7, P. 21, PARAS. 2 ET SEQ]. In particular, the FSA arbitration turns on the commercial value and efficiency of the proton treatment facility, whereas the SLA arbitration relates to the operability of the software for the active scanning technology.
Consequently, the assessment of the claims requires submissions from different fields of expertise.

The only ‘relation’ that CLAIMANT can invoke in the case at hand is the fact that both claims pertain to the proton treatment facility. Such relation is not of relevance for the question of combining two claims in a single proceeding. The motive behind the combination of claims must be to achieve efficiency by making use of synergy effects. Synergies in a proceeding, however, can only occur where the very subject matter of the claims in question overlap, so that e.g. expert witnesses may provide information on both claims. The common ‘origin’ of the claims provides no assistance in this regard.

Moreover, even CLAIMANT admits that the claims are not inextricably related, reasoning that the claims are legally different. CLAIMANT affirms that the claims are in fact governed by different laws, specifically the Mediterranean law for the FSA and the CISG for the SLA. [MEMORANDUM FOR CLAIMANT, paras. 59 et seqq; REQUEST FOR ARBITRATION, p. 8, paras. 24 et seq].

Thus, the claims are largely separate, which leads to the presumption that the parties did not want their claims to be decided in a single set of proceedings according to Art. 10(3) CEPANI Rules. Consequently, there is no implied agreement between the parties, which automatically excludes their being combined in a single arbitration.

3. **Even if the prerequisites of Art. 10(1) CEPANI Rules were met, the Tribunal should still refrain from conducting a single set of proceedings**

Art. 10(1) CEPANI Rules states that claims arising out of various contracts may be combined in a single arbitration. Accordingly, even if the perquisites of Art. 10(1) CEPANI Rules are fulfilled, a single proceeding is not automatically conducted in all circumstances. Rather, the Tribunal has the discretion to decide whether or not to consolidate the claims in one proceeding.

CLAIMANT argues that the Tribunal should decide in favor of a single arbitration, on the premise that hearing the claims in one go leads to greater efficiency [MEMORANDUM FOR CLAIMANT, para. 56]. However, a synergy effect will only be achieved in a single proceeding,
if both claims concern the same questions. As aforementioned, the claims at hand concern
diverse subject matters. Questions of economy and software engineering require experts and
witnesses in different areas of expertise. Therefore, CLAIMANT’s efficiency argument is
immaterial in the case at hand as the Tribunal undoubtedly will hear statements from various
witnesses and experts.

However, there is a great benefit to be obtained from separate arbitral proceedings: the
opportunity for two Tribunals composed of the relevant economic or engineering experts to
decide on the different claims. This process demonstrates the best allocation of resources and
avoids unnecessary witness hearings, minimizing time consumption. Also, if the experts are
in fact members of the Tribunal, they are in the most auspicious position to decide on the
claims. Overall, this leads to a better evaluation of the case.

Keeping these advantages in mind, the requirement for professionally qualified arbitrators to
decide on the claims is beyond doubt. CLAIMANT’s reliance on Art. 23(2) CEPANI Rules,
which gives the Tribunal the power to appoint experts [MEMORANDUM FOR CLAIMANT,
PARA. 56], may be seen as an attempt to undermine this necessity. The arbitrators are the ones
who ultimately decide on the claim and determine the final award. If the Tribunal does not
have sufficient knowledge in an area of expertise, the award will be made in complete
dependence on the evidence supplied by the expert witnesses. The Tribunal should be
composed of arbitrators with expert knowledge, since it is paramount for the parties that the
Tribunal renders an award based on accurate information.

Therefore, the Tribunal should use its discretion under Art. 10(1) CEPANI Rules in favor of
two separate proceedings.

**CONCLUSION ON THE SECOND ISSUE**

The claims should not be heard together, since the Tribunal is not suitably composed in
regard to the second claim and moreover, the conditions of Art. 10(1) CEPANI Rules are not
met.
ARGUMENT ON THE MERITS

THIRD ISSUE: THE CISG DOES NOT GOVERN THE CLAIM ARISING UNDER THE SLA

Both parties are in agreement that CLAIMANT’s old standard terms are applicable to the FSA and that they refer to the national Mediterranean law excluding the CISG. However, prior to the conclusion of the SLA, CLAIMANT updated its standard terms, in particular the choice of law clause in Section 22. This choice of law clause now states that ‘the contract is governed by the law of Mediterraneo’ [CLAIMANT’S EXHIBIT NO. 9, P. 24].

In reliance on this new choice of law clause, CLAIMANT argues that the CISG applies to the SLA [MEMORANDUM FOR CLAIMANT, PARA. 92]. However, this new choice of law clause does not lead to an application of the CISG for the following three reasons:

First, the new standard terms were not validly included in the SLA [1]. Second, even if the new standard terms were validly included they would still provide for an exclusion of the CISG [2]. Should the Tribunal find that these terms in general provided for the application of the CISG, the CISG’s application would nevertheless be excluded because its scope of application is not met [3].

1. THE NEW STANDARD TERMS WERE NOT INCLUDED IN THE SLA

Based on the general principle of party autonomy, parties can determine their own requirements for the incorporation of new standard terms. At hand, CLAIMANT promised:

‘I will send you [Respondent] an English translation within the next week.’

[CLAIMANT’S EXHIBIT NO.5, P. 17, PARA. 3, EMPHASIS ADDED].

Thus, it is these two requirements that are necessary for the terms to be validly included: First, sending over the standard term’s text to RESPONDENT. Second, providing RESPONDENT with an English version.

At hand, CLAIMANT failed to comply with these requirements: It did not send the new standard term’s text to RESPONDENT. Instead, it merely uploaded its new standard terms on
the internet and provided RESPONDENT with a link to its homepage [CLAIMANT’S EXHIBIT NO. 5, p. 17, PARA. 3].

Additionally, CLAIMANT failed to provide RESPONDENT with an English version. Rather, the terms were only available in the Mediterranean language [CLAIMANT’S EXHIBIT NO. 5, p. 17, PARA. 3]. Therefore, the new standard terms are inapplicable.

Besides, the CISG sets out the same requirements as the ones stemming from CLAIMANT’s promise: According to the predominant opinion amongst courts and scholars, the standard terms’ language must be understood by both parties [1.1]. In addition, a transmission of the new standard terms is required to secure their inclusion [1.2].

1.1 The Mediterranean Version is Insufficient

According to the CISG’s general principles, standard terms will only become part of the contract if the receiving party has a reasonable opportunity to take notice of the standard term’s content [DISTRICT COURT HERTOGENBOSCH, 16 OCTOBER 2002; GERMAN FEDERAL COURT OF JUSTICE, 31 OCTOBER 2001; HIGHER COURT OF APPEAL OLDENBURG, 20 DECEMBER 2007; DISTRICT COURT NEUBRANDENBURG, 3 AUGUST 2005; DISTRICT COURT LANDSHUT, 12 JUNE 2008; DISTRICT COURT UTRECHT, 21 JANUARY 2009; DISTRICT COURT ROTTERDAM, 25 FEBRUARY 2009; SCHROETER IN SChLECHTRIEM/SCHWENZER, ART. 14, PARA. 40].

It is generally recognized that the standard terms have to be made available in a language that the parties understand in order to provide the offeree with a reasonable opportunity to take notice of the standard terms’ content. This will be assumed if the terms are in the contracting language [HIGHER COURT OF APPEAL INNSBRUCK, 1 FEBRUARY 2005; HIGHER COURT OF APPEAL COLMAR, 24 OCTOBER 2000; SCHROETER IN SChLECHTRIEM/SCHWENZER, ART. 14, PARAS. 62 ET SEQ; MANKOWSKI IN FERRARI, INT. VERTRAGSR., INTRO. TO ART. 14, PARA. 42; GRUBER IN MÜNCHENER KOMMENTAR BGB, ART. 24, PARA. 19; SCHWENZER/MOHS, P. 241].

CLAIMANT’s standard terms are not provided in a language which is understood by RESPONDENT. At hand, the contracting language is English and not Mediterranean. Markedly, all previous communication between the parties, including all relevant negotiations and contracts were in English [PROCEDURAL ORDER NO. 2, P. 63, PARA. 35; CLAIMANT’S EXHIBIT NO. 5, P. 17, PARA. 3].
Moreover, Mediterranean is not a widely used language in international business. Respondent has its place of business in Equatoriana and therefore, it cannot be expected to understand Mediterranean. As a consequence, Claimant failed to provide Respondent with a reasonable opportunity to take notice of the standard terms’ content.

Claimant maintains that Respondent was expected to have understood the Mediterranean version of its new standard terms. It makes a feeble argument asserting that the Mediterranean version of its new standard terms was sufficient for their inclusion, as an assistant doctor of Respondent was able to comprehend the Mediterranean language.

It is true that a language other than the contracting language may suffice for the inclusion of the standard terms, if a staff member of the receiving party responsible for the conclusion of the contract is proficient in that language. Claimant clutches at straws with its suggestion that the assistant doctor was responsible for the conclusion of the SLA.

The assistant doctor is no CEO and was not even a member of the negotiation team. During the entire negotiation process he merely attended two meetings, due to the fact that in those two meetings the negotiation team discussed the operation of the proton therapy facility within his field of research. In other words: His presence was required only temporarily in regard to technical questions. On that basis, it is not logical to assume that the assistant doctor is responsible for the conclusion of the SLA.

Claimant further argues that as long as any staff member can speak Mediterranean, its ranking within the company does not matter. Such a blanket approach must not be followed. While it is true that the assistant doctor speaks Mediterranean, this does not overshadow the fact that he still does not possess the necessary knowledge and experience to understand the juridical questions arising out of the new standard terms. The doctor’s attendance would only be sufficient, if the doctor were fully
adept at understanding the content of what he is reading. This was certainly not the case. After all, we are talking about an assistant doctor but no assistant lawyer.

Moreover, the assistant doctor was absent during the timespan, in which the standard terms were available to RESPONDENT: RESPONDENT became aware of the new standard terms in a letter from 5 July 2011 [CLAIMANT’S EXHIBIT No. 5, p. 17, PARA. 3] and the SLA was concluded on 20 July 2011 [CLAIMANT’S EXHIBIT No. 6, p. 20]. However, the assistant doctor was on holiday from 5 July 2011 to 20 July 2011 [RESPONDENT’S EXHIBIT No. 2, p. 37, PARA. 5]. Therefore, he was neither present when RESPONDENT was informed of the new standard terms nor at the time of the SLA’s conclusion. Consequently, the Mediterranean version was not sufficient to incorporate the new standard terms.

1.2 THE ONLINE-AVAILABILITY IS INSUFFICIENT TO INCLUDE STANDARD TERMS INTO A CONTRACT

CLAIMANT alleges that RESPONDENT had a reasonable opportunity to take notice of the new standard terms because the terms were accessible online on CLAIMANT’s website [MEMORANDUM FOR CLAIMANT, PARA. 98]. However, CLAIMANT’s view is legally unfounded.

The mere online-availability of the standard terms will only suffice in the case that the contract is completely concluded via internet [SCHROETER IN SCHLECHTRIEM/SCHWENZER, ART. 14, PARA. 49]. However, if the contract is concluded ‘offline’ the mere online-availability of standard terms will not suffice [HIGHER COURT OF APPEAL CELLE, 24 JULY 2009; MANKOWSKI IN FERRARI, INT. VERTRAGS-R, Intro. to Art. 14, Para. 34; SCHROETER IN SCHLECHTRIEM/SCHWENZER, ART. 14, PARA. 50; MAGNUS IN STAUDINGER, ART. 14, PARA. 41A; DORNIS IN HONSELL, Intro. to ART. 14-24, PARA. 12; VENTSCH/KLUTH, p. 225; SAENGER IN BAMBERGER/ROTH, ART. 14, PARA. 7; PILTZ, NJW 2011, p. 2263; SCHWENZER/MOHS, p. 241].

At hand, the parties only communicated via letter or telephone [CLAIMANT’S EXHIBIT No. 5, P. 17; CLAIMANT’S EXHIBIT No. 6, p. 20; CLAIMANT’S EXHIBIT No. 7, p. 21]. Consequently, there is no basis for the application of the special rules for the cases of online-based contracts.

Because of the fact that the special rules do not apply, one has to take the general principles of the CISG into account. Under these general rules, a reasonable opportunity to take notice is only affirmed if the standard terms are transmitted or made available in another way [GERMAN
The term ‘making available in another way’, however, does not establish that it is sufficient to simply upload the standard terms to a homepage [Higher Court of Appeal Celle, 24 July 2009; Mankowski in Ferrari, Int. Vertragsr., Intro. to Artt. 14-24, para. 34; Magnus in Staudinger, Art. 14, para. 41a; Saenger in Bamberger/Roth, Art. 14, para. 7; Piltz, IHR, p. 134; Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 50]. Rather, ‘making available in another way’ signifies that the standard term’s text has to be sent to the other party in an email attachment [Mankowski in Ferrari, Int. Vertragsr., Intro. to Art. 14, para. 32; Schwenzer/Mohs, p. 241].

The rationale behind this understanding is that the offeree is not obliged to search for the standard terms of the offeror. Instead, the drafting party is responsible to inform the other party of the terms’ content, which it can only fulfill by transmitting the standard terms [Schwenzer/Mohs, p. 241; Piltz, IHR, p. 134; Ventsch/Kluth, p. 225]. Only then do the standard terms reach the offeree’s sphere of influence. As long as they do not enter into this sphere – e.g. because they are only available online on the offeror’s server – there is the possibility of serious problems which must not result in a detriment to the offeree [Schwenzer/Mohs, p. 241; Magnus in Staudinger, Art. 14, para. 41a; Mankowski in Ferrari, Int. Vertragsr., Intro. to Artt. 14-24, para. 34; Ferrari in Köll/Mistelis/Perales Viscasillas, Art. 14, para. 40]. The most obvious risk would be that the offeror simply changes the standard terms on the website subsequent to the contract’s conclusion. For the offeree, furnishing proof regarding which version of the standard terms was actually included would amount to a ‘diabolical proof’ [Mankowski in Ferrari, Int. Vertragsr., Intro. to Artt. 14-24, para. 34; C.F. Schwenzer/Mohs, p. 241].

For these reasons, a mere online-availability of standard terms is not sufficient for their incorporation into a contract. Therefore, Claimant’s standard terms are not validly included into the SLA.

2. The CISG is excluded by the new choice of law clause

Even if this Tribunal should find the new standard terms to be applicable, the new choice of law clause still provides for an exclusion of the CISG. At hand, the interpretation of the phrase ‘Mediterranean law’ in the new choice of law clause is an apple of discord between the
parties. Pursuant to Art. 8 CISG, to ensure an accurate interpretation of terms, one has to consider the intention behind the choice-of-law clause \([\textit{Schmidt-Kessel in Schlechtriem/Schwenzer}, \textit{Art. 8, para. 1}; \textit{Zuppi in Kröll/Mistelis/Perales Viscasillas}, \textit{Art. 8, para. 1}; \textit{Magnus in Staudinger}, \textit{Art. 8, para. 1}; \textit{Melis in Honsell}, \textit{Art. 8, para. 3}]\).

The term ‘Mediterranean Law’ could either have been intended to choose Mediterranean Law with or without the CISG. In the case at hand, only an exclusion of the CISG comes into question. Otherwise the choice of law clause would simply not be required.

86 If there were no choice of law clause at all, the seller’s law (i.e. Mediterranean Law \textit{plus} CISG) would govern the contract. \textit{Claimant} submits that the choice of law clause essentially brings about the same consequence \([\textit{Memorandum for Claimant}, \textit{para. 118}]\). In other words: \textit{Claimant} argues that the choice of law clause has no separate meaning. In contrast, \textit{Respondent}’s interpretation of the choice of law clause (i.e. Mediterranean Law \textit{excluding} the CISG) gives the clause a distinct meaning and thus is the only reasonable one.

87 \textit{Claimant} relies on seven court decisions to reinforce its argument \([\textit{Memorandum for Claimant}, \textit{para. 118}]\). However, \textit{Claimant} pays no heed to the different situation in each case. In four of the court decisions, the parties chose a law that would not have been applicable in the absence of a choice of law clause \([\textit{U.S District Court Minnesota}, 31 \textit{January 2007}; \textit{District Court Padova}, 25 \textit{February 2004}; \textit{Court of Appeal Paris}, 6 \textit{November 2001}; \textit{ICC Case No. 8324}, 1995]\). In these cases, the court’s conclusion to apply CISG is reasonable, because this interpretation does not render the choice of law clause meaningless. Indeed, the CISG applies in each case. However, there is a difference regarding the supplementary domestic law. Thus, these four court decisions cited by \textit{Claimant} are correct in their interpretation but do not support \textit{Claimant}’s opinion in the case at hand.

88 Only three out of seven cases cited by \textit{Claimant} relate to a situation similar to the case at hand \([\textit{U.S District Court Illinois}, 29 \textit{January 2003}; \textit{Arbitral Tribunal Vienna}, 15 \textit{June 1994}; \textit{Serbia SCC}, 6 \textit{May 2010}]\). However, the Tribunal should not follow the decisions. The courts denied the exclusion of the CISG, simply referring to an ambiguity in the choice of law clauses but did not consider whether the intention behind the clauses could have eliminated the ambiguities. This amounts to a disregard of the parties’ will.
Rather, the Tribunal should act in accordance with the parties’ intention and interpret the choice-of-law clause in the manner practiced by the majority of courts all over the globe [*U.S. District Court Rhode Island, 30 January 2006; Court of Appeal Colmar, 26 September 1995; ICAC Russian CCI, 12 April 2004; ICAC Russian CCI, 11 October 2002*]. The Tribunal should find that the choice of Mediterranean Law means ‘Mediterranean Domestic Law excluding the CISG’.

Additionally, CLAIMANT’s conduct exhibits that CLAIMANT itself previously interpreted the clause as an exclusion of the CISG: CLAIMANT assured RESPONDENT that ‘the changes [in the new standard terms] are, however, of a minor nature and hardly effect our relationship’ [*CLAIMANT’s Exhibit No. 5, p. 17, para. 3, emphasis added*]. However, a change in the applicable law has wide-ranging ramifications and thus cannot be characterized as a minor change. After all, the applicable law e.g. determines the obligations of the parties and outlines the remedies available to parties in case of a breach.

Furthermore, CLAIMANT had abundant opportunity to discuss the precise nature of the changes to the standard terms when RESPONDENT enquired exactly what changes were made in the new standard terms. Upon that question, CLAIMANT’s CEO told RESPONDENT that the changes only referred to ‘a limitation of liability to double the price paid for the equipment’ [*Procedural Order No. 2, p. 62, para. 31*]. The CEO failed to mention any change in the applicable law. Therefore, it is reasonable to assume that even CLAIMANT did not intend to change the applicable law by updating its standard terms.

Therefore, only one possible interpretation of the choice of law clause presides: The clause was intended to exclude the application of the CISG.

### 3. The SLA Falls Outside the CISG’s Scope of Application

Should the Tribunal nevertheless find that CLAIMANT’s new standard terms do apply and do not provide for an exclusion of the CISG, the CISG’s own provisions hinder its application.

First, the application of the CISG is excluded by Art. 3(2) CISG, because the preponderant part of CLAIMANT’s obligations under the SLA amounts to the supply of services rather than the delivery of goods [3.1]. This originates from the fact that software is not a good but a ‘service’ in the sense of Art. 3(2) CISG.
Second, should the Tribunal classify software as a ‘good’ within the meaning of the CISG, the application of the CISG would still be excluded pursuant to Art. 3(1) CISG, since RESPONDENT provided CLAIMANT with medical data which constituted a significant part of the materials necessary for fulfillment of the contract [3.2].

Third, the CISG is not applicable because RESPONDENT’s obligations under the SLA did not consist solely of the payment of a purchase price as stipulated by Art. 53 CISG. CLAIMANT’s primary task was to provide RESPONDENT with medical data. Therefore, its obligations do not correspond to a ‘sale’ of goods as required by the CISG [3.3].

3.1 Art. 3(2) CISG Excludes the Application of the CISG

CLAIMANT has numerous obligations under the SLA. In addition to its obligation to deliver equipment for a third treatment room, it is obliged to develop and supply the software necessary to operate this treatment room and to train RESPONDENT’s personnel. Consequently, the SLA is a mixed contract.

Art. 3(2) CISG, the relevant provision dealing with mixed contracts, provides that the CISG ‘does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services’. Art. 3(2) CISG classifies ‘other services’ as obligations which are not comparable to a seller’s obligations under a sales contract, in particular the delivery of goods and the transferring of the property [ICAC Russian CCI, 5 March 1998; Ferrari in Schlechtriem/Schwenzer, German Edition, Art. 3, Para. 12; Saenger in Ferrari Int. VertragsR, Art. 3, Para. 6]. If other services make up more than 50% of the entire value of all obligations, it is generally accepted that these other services form the preponderant part of the contract [Higher Court of Appeal Vienna, 1 June 2004; Huber in Huber/Mullis, p. 46; Khoo in Bianca/Bonell, p. 42; Magnus in Staudinger, Art. 3, Para. 22; Ferrari in Schlechtriem/Schwenzer, German Edition, Art. 3, Para. 15].

CLAIMANT itself admits that the materials encompass only 40% of the contract value of the SLA [Respondent’s Exhibit No. 3, p. 39, Para. 2]. 50% of the contract’s value is apportioned to the software and the remaining 10% to the training [Respondent’s Exhibit No. 3, p. 39, Para. 2].
The training element of the contract is undoubtedly an ‘other service’ in the sense of Art. 3(2) CISG. The software component is also another service, because software cannot be classified as a ‘good’ within the meaning of the CISG [3.1.1]. Furthermore, Art. 30 CISG requires that property has to be transferred in a sales contract. However, in the case at hand the software was licensed rather than sold [3.1.2].

Hence, a total of 60% of CLAIMANT’s obligations under the SLA (10% training plus 50% software) is made up of other services. Consequently, the preponderant part of CLAIMANT’s obligations are other services rather than the delivery of goods. Thus, in accordance with Art. 3(2) CISG, the application of the CISG is precluded.

### 3.1.1 Software is not a good within the meaning of the CISG

The term ‘good’ as required by the CISG comprises only objects which are tangible at the time of delivery [Higher Court of Appeal Cologne, 26 August 1994; District Court Rimini, 26 November 2002; Schwenzer/Hachem in Schlechtriem/Schwenzer, Art. 1, para. 16; Honnold, Art. 2, para. 56; Sieher in Honsell, Art. 2, para. 9].

This contention finds support in the wording of several provisions, which clearly denote only tangible objects [Sieher in Honsell, Art. 2, para. 9; Schlechtriem/Witz, p. 37, para. 49; Honnold, Art. 2, para. 56]. The provisions concerning the delivery of the goods [E.g. Artt. 31(a), 32(1) CISG] and those concerning the passing of the risk [E.g. Artt. 67, 68, 71(2) CISG] are premised upon the assumption that goods can be ‘handed over’. Notably, intangible objects cannot be handed over because they do not possess a physical form [Schlechtriem/Butler, para. 32a; Schlechtriem/Schroeter, para. 86]. Thus, a systematic interpretation of the CISG’s provisions indicates that the CISG only pertains to tangible goods.

Moreover, the drafting history of the CISG gives countenance to the tangibility requirement. The Uniform Law on the International Sale of Goods [Hereafter ‘ULIS’], on which the CISG is based, explicitly expressed in its French wording that it applies solely to the sale of ‘objets mobiliers corporels’, meaning movable and tangible goods. This scope of application was not intended to be altered when the CISG was drafted from the ULIS [Higher Court of Appeal Cologne, 26 August 1994; Ghestin, p. 6; Magnus in Staudinger, Art. 1, para. 43; Ferrari in Schlechtriem/Schwenzer, German Edition, Art. 1, para. 34; Schlechtriem in...
It is therefore evident that the CISG applies only to sales of tangible goods.

Software is not tangible and consequently cannot be labeled a good within the meaning of Art. 1(1) CISG. The term ‘tangible’ originates from the Latin expression ‘tangere’ which means ‘to touch’ [Oxford Dictionary, ‘Tangibility’]. Software itself – as opposed to the hardware in which it might be embodied – cannot be touched and therefore is intangible.

Despite the obvious intangible nature of software, Claimant argues the alternative – that software is in fact tangible [Memorandum for Claimant, paras. 60 et seq]. It submits that as long as software is embodied in a physical medium it will be tangible [Memorandum for Claimant, para. 62]. Admittedly, Claimant’s contention that software should be considered tangible when it is embodied in a physical medium at the time of delivery, does have a degree of legal support [Mowbray, p. 126]. However, the software developed under the SLA has no physical form. No CD or drive was handed over to Respondent [Procedural Order No. 2, p. 61, para. 23]. Instead, the chief part of the software was downloaded from Claimant’s server [Procedural Order No. 2, p. 61, para. 23]. Consequently, the software under the SLA is intangible and thus not a good in the sense of the CISG.

Moreover, Claimant could have differentiated between customized and standard software. While it is true that some scholars indeed state that standard software is a good within the meaning of the CISG [Diedrich, p.65], that differentiation does not alter the result at hand, because the software was customized. Customized software is generally held not to be a ‘good’ as required by the CISG [Higher Court of Appeal Cologne, 26 August 1994; Higher Court of Appeal Ghent, 24 November 2004; UNCITRAL Working Group (A/CN.9/WG.IV/WP.91), paras. 24 et seq; Magnus in Staudinger, Art. 1, para. 44; Ferrari in Schlechtriem/Schwenzer, German Edition, Art. 1, para. 38; Honsell, Art. 2, para. 4]. Software is customized when it is specifically developed or adapted for the needs of a particular customer [Mistelis/Raymond in Kröll/Mistelis/Perales Viscasillas, Art. 3, para. 24; Mowbray, p. 127].

Claimant explicitly stated that the software would be ‘developed particularly for your [Respondent’s] needs’ during the negotiations for the SLA [Claimant’s Exhibit No. 5, p. 17, para. 1]. It herewith already admitted that the software is customized. Moreover, Claimant
adapted the software entirely to Respondent’s facilities. It used solely Respondent’s medical data and expertise to develop an operable final version of the software [Request for Arbitration, p. 6, para. 12]. What is more, Claimant’s individual development made it possible for the software to smoothly interact with the already existing parts of Respondent’s proton therapy facility [Procedural Order No. 2, p. 61, para. 22]. These intensive and time consuming operations made the software unique and thus, customized. As a consequence, the software does not constitute a good in the meaning of the CISG.

3.1.2 The transfer of the software was not a sale but a license

In addition to the fact that software is not even a good, the supply of software has to be regarded as an ‘other service’ in the sense of Art. 3(2) CISG, because it does not match the seller’s obligation to transfer the property in the goods under Art. 30 CISG.

This is due to the fact that the software was not sold but licensed. The obligations of a licensor under a licensing agreement are at variance with the obligations of a seller under a sales contract [Saenger in Ferrari Int. VertragsR, Art. 1, para. 4; Westermann in Münchener Kommentar BGB, Intro. to Art. 1, para. 4; Diedrich, p. 75; Mowbray, p. 123]. Art. 30 CISG necessitates that the property of the object is transferred to the buyer in a sale of goods, whereas a license requires that the licensee acquires permission to use an object [McGuire, p. 31]. Therefore, in the case of a license, the licensee only attains limited rights, because the intellectual property rights remain with the licensor at all times [Mowbray, p. 123; Marly, para. 653].

In the present dispute, Art. 11 SLA stipulates that ‘all intellectual property rights in the active scanning technology vest in the Innovative Cancer Treatment Ltd. [i.e. Claimant] at all times’. Respondent only attained limited rights, namely the mere permission to use the software. Thus, the transaction is a license but no sale.

Furthermore, the contract’s name provides an obvious indication that the parties agreed to license the software. The title of the contract reads ‘Sales and Licensing Agreement’. This reveals that the contract consists of a sales and licensing component. As the sales part refers to the purchase of the hardware components, the licensing part can only relate to the software controlling the active scanning technology.
Lastly, CLAIMANT itself admitted that the software was licensed, stating that ‘*it was delighted to send [...] the draft contract for the third treatment room using active scanning technology including the license for the necessary software*’ [CLAIMANT’S EXHIBIT NO. 5, P. 17, PARA. 1; EMPHASIS ADDED].

Nevertheless, CLAIMANT argues that Art. 2 SLA, which grants RESPONDENT the right to the ‘*permanent use of the necessary software*’ [MEMORANDUM FOR CLAIMANT, PARAS. 89 ET SEQ] amounts to a sale and not a licensing of the software. It alleges that a license is only granted if the right to use is transferred for a limited period of time, whereas the transference of the permanent right to use constitutes a sale [MEMORANDUM FOR CLAIMANT, PARA. 89]. However, contrary to CLAIMANT’s allegation, regarding a license, it is of no consequence whether the permission to use an immaterial object is granted temporarily or permanently [MARLY, PARA. 653]. The critical issue is whether or not the intellectual property rights remain with the licensor [MARLY, PARA. 653]. At hand, the property in the software was never transferred to RESPONDENT. Instead, the intellectual property rights remained with CLAIMANT [CLAIMANT’S EXHIBIT NO. 6, P. 19, ART. 11 SLA]. Hence, the software was clearly licensed and not sold.

The supply of software by CLAIMANT is consequently neither the delivery of a good nor the transfer of property in the software. Therefore, the obligation to supply software does not draw a parallel with the obligations of a seller under Art. 30 CISG.

All in all, the supply of software is an ‘*other service*’ within the meaning of Art. 3(2) CISG. The software, in conjunction with the training, makes up 60% of the entire contract value. Thus, the supply of other services is the preponderant part of CLAIMANT’s obligations under the SLA. Consequently, in accordance with Art. 3(2) CISG, the CISG’s application is excluded.
3.2  **Even if the SLA were a contract for the sale of goods, the application of the CISG would be excluded pursuant to Art. 3(1) CISG**

117  Pursuant to Art. 3(1) CISG,

> contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production’. [Emphasis added]

118  **RESPONDENT** handed over the medical data, necessary for the development of the software for the active scanning technology, to **CLAIMANT** [REQUEST FOR ARBITRATION, P. 6, PARA. 12]. By virtue of this, **RESPONDENT** contributed ‘a substantial part of the materials necessary’ to produce a third treatment room using active scanning technology.

119  The relevant test to determine whether a contribution constitutes a ‘substantial part’ within the meaning of Art. 3(1) CISG is controversial. Some favor a qualitative, others a quantitative approach. **RESPONDENT**’s contribution of medical data constitutes a substantial part according to both tests.

120  First, the medical data constitutes a substantial part under a qualitative approach. In this regard, the decisive criterion to determine whether a contribution is substantial, is the importance of the buyer’s contribution to the end-product [SUPREME COURT OF ITALY, 9 JUNE 1995; ICC CASE 11256/ESR/MS (LOS ANGELES), 15 SEPTEMBER 2003; HIGHER COURT OF APPEAL MUNICH, 3 DECEMBER 1999; HIGHER COURT OF APPEAL GRENOBLE, 21 OCTOBER 1999; HUBER IN HUBER/MULLIS, PP. 44 ET SEQ; SCHWENZER/HACHEM IN SCHLECHTRIEM/SCHWENZER, ART. 3, PARA. 6]. This criterion finds its legal footing in the official French wording of Art. 3(1) CISG, which requires that the buyer contributes ‘une part essentielle’, i.e. an essential part. An essential part must be of importance for the object to be manufactured – e.g. because the part is indispensable for the object to function [HIGHER COURT OF APPEAL MUNICH, 3 DECEMBER 1999; FERRARI IN SCHLECHTRIEM/SCHWENZER, GERMAN EDITION, ART. 3, PARA. 8].

121  Contrary to **CLAIMANT**’s allegation [MEMORANDUM FOR CLAIMANT, PARAS. 73 ET SEQ] the data supplied by **RESPONDENT** was important for the treatment room to be manufactured. Without...
this data, CLAIMANT could not have completed the development of its software [PROCEDURAL ORDER NO. 2, P. 62, PARA. 28]. In the absence of an operable software the entire third treatment room would have been useless [PROCEDURAL ORDER NO. 2, P. 62, PARA. 22]. Thus, the data was indispensable to ensure the functioning of the third treatment room. Moreover, the data was crucial to guarantee the approval of the active scanning technology by the Medical Authorities [PROCEDURAL ORDER NO. 2, P. 62, PARA. 28]. Thus, the very possibility to sell the facility at all was dependent on the data. RESPONDENT’s contribution was extremely important for the end-product and, hence, ‘substantial’ in the sense of Art. 3(1) CISG.

Second, the medical data has to be qualified as a substantial part when adopting the quantitative approach as well. According to this approach, a contribution of material is substantial if its value exceeds 50% of the total value of the material used [HIGHER COURT OF APPEAL MUNICH, 3 DECEMBER 1999; ICAC RUSSIAN CCI, 30 MAY 2000; ARBITRATION COURT HUNGARIAN CCI, 5 DECEMBER 1995; MISTELIS/RAYMOND IN KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 3, PARA. 9; MAGNUS IN STAUDINGER, ART. 3, PARA 16; SIEHR IN HONSELL, ART. 3, PARA. 3].

In the case at hand, RESPONDENT contributed medical data, to which the parties had allocated a value of USD 6 million [CLAIMANT’S EXHIBIT NO. 6, P. 19, ART. 3 SLA]. The material contributed by CLAIMANT was agreed to be worth USD 3.5 million [RESPONDENT’S EXHIBIT NO. 3, P. 39, PARA. 5]. Therefore, the value of the material used amounts to a total of USD 9.5 million. Consequently, RESPONDENT’s contribution (USD 6 million) constituted approximately 63% of the total value of the materials used. Thus, under a quantitative test, the medical data provided was also a ‘substantial part’ in the sense of Art. 3(1) CISG.

Nevertheless, CLAIMANT argues that the medical data was not a substantial part under the value test [MEMORANDUM FOR CLAIMANT, PARA. 77]. It bases its argumentation on the assumption that in order to determine the substantial part, the market value of the material supplied have to be compared [MEMORANDUM FOR CLAIMANT, PARA. 77]. However, this assumption is incorrect. The market price of the materials should only be considered, if the parties have not stipulated the respective values of the materials contributed [CISG-AC OPINION NO. 4, RULE 2.6; SCHWENZER/HACHEM IN SCHLECHTRIEM/SCHWENZER, ART. 3, PARA. 19]. This results from the principle of party autonomy, which is one of the CISG’s core
principles [Schwenzer/Hachem in Schlechtriem/Schwenzer, Art. 3, para. 19; Janssen/Kiene, p. 271]. Accordingly, the parties are free to determine which part of the material they consider a substantial part by allocating a different weight to the contributions [Schwenzer/Hachem in Schlechtriem/Schwenzer, Art. 3, para. 19].

At hand, the parties allocated specific values to their contributions. In Art. 3(1) SLA they valued Respondent’s contribution at USD 6 million [Claimant’s Exhibit No. 6, p. 19, Art. 3(1) SLA]. USD 3.5 million was apportioned to the material contributed by Claimant [Respondent’s Exhibit No. 3, para. 39]. Consequentially and as previously mentioned Respondent’s contribution constitutes a ‘substantial part’ in the sense of Art. 3(1) CISG.

Moreover, Claimant cannot argue that the medical data does not constitute ‘material’ within the meaning of Art. 3(1) CISG. On the basis that software is classified as a ‘good’ within the meaning of the CISG, it is only reasonable to find that the components from which the software is made – the data – is ‘material’ in the sense of Art. 3(1) CISG as well [Schmitt, p. 153; Diedrich, p. 65]. Any other interpretation would demand that an intangible object is made from tangible material – which is certainly not possible. Therefore, the medical data supplied by Respondent is ‘material’ as required in Art. 3(1) CISG.

To conclude, Respondent’s contribution in the form of medical data comprises a substantial part of all the materials necessary to manufacture Respondent’s third treatment room. Thus, even if the software were to be regarded as a good, the application of the CISG would be excluded pursuant to Art. 3(1) CISG.

3.3 The counter-performance does not correspond with a sale of goods

The SLA is not a contract for the sale of goods, because Respondent’s obligations under the SLA do not correlate with the obligations a buyer has under a sales contract. In the present case, Respondent was required to provide data necessary to Claimant and to pay a purchase price of USD 3.5 million [Claimant’s Exhibit No. 6, p. 19, Art. 10 SLA]. Hence, Respondent’s counter-performance entails both a monetary and a non-monetary element. However, the CISG will only apply if the counter-performance solely consists of money.

Art. 53 CISG necessitates that ‘the buyer must pay the price for the good’. The term ‘price’ is understood in contemporary vernacular as ‘the amount of money given in payment for
something’ [Oxford Dictionary, ‘price’]. The CISG also recognizes the usual connotations of the term, so that ‘price’ within the meaning of Art. 53 CISG solely means money as well

[SUPREME COURT OF AUSTRIA, 10 NOVEMBER 1994; ICAC RUSSIAN CCI, 9 MARCH 2004; DISTRICT COURT ZUG, 21 OCTOBER 1999; ACHILLES, ART. 1, PARA. 2; MAGNUS IN STAUDINGER, ART. 1, PARA. 29; FERRARI IN SCHLECHTRIEM/SCHWENZER, GERMAN EDITION, ART. 1, PARA. 13; KAROLLUS, P. 24; SIEHR IN HONSELL, ART. 2, PARA. 2]. Art. 78 CISG adds further substance to this interpretation: It states that ‘if a party fails to pay the price [...] the other party is entitled interest on it [...]’ [EMPHASIS ADDED]. Interest, however, can only be charged on money [SCHLECHTRIEM/SCHROETER, PARA. 744; HUBER IN HUBER/MULLIS, P. 357]. Thus, ‘price’ within the meaning of the CISG refers to money. Accordingly, the buyer’s obligation must only consist of money for the CISG to apply. As RESPONDENT’s counter-performance does not solely consist of money, the CISG does not apply to the SLA.

**CONCLUSION ON THE THIRD ISSUE**

CLAIMANT’s new version of the standard terms has not been validly included into the SLA. Even if the new standard terms were validly included into the SLA, the standard terms would still include a choice of law clause which provides for an exclusion of the CISG. Should the Tribunal find that the choice of law clause did not exclude the CISG, the SLA would nevertheless not fall within its scope of application.
REQUEST FOR RELIEF

For the reasons stated above, and pursuant to Procedural Order No. 1, para. 3, RESPONDENT respectfully requests the Tribunal to find that:

- the Arbitral Tribunal does not possess jurisdiction to deal with payment claims raised by CLAIMANT [First Issue];
- the claims should not be heard together in a single arbitration proceeding [Second Issue];
- the SLA is not governed by the CISG [Third Issue].

Respectfully submitted on 23 January 2014 by

/s/ Nele Bienert

/s/ Julika Großmann

/s/ Marina Mertens

/s/ Katie Scott

/s/ Kerstin Warhaut