TWENTY SECOND ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

27 MARCH 2015 TO 2 APRIL 2015

NATIONAL LAW UNIVERSITY, JODHPUR

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
MEDITERRANEO MINING SOE	VULCAN COLTAN LTD.
[**RESPONDENT**]	[**CLAIMANT**]
	GLOBAL MINERALS
	[**ADDITIONAL PARTY**]

BHAVANA SUNDER ♦ GARGI BOHRA♦ NIKHIL VARIYAR ♦ SHIVESH AGGARWAL

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

&	and
§/§§	Section/Sections
¶/¶¶	Paragraph/Paragraphs
ADDITIONAL PARTY	Global Minerals Ltd.
Appln. for Em. Meas.	Application for Emergency Measures
Art./Arts.	Article/Articles
CIETAC	China International Economic & Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Ex.	Claimant's Exhibit
CI. Memo.	Memorandum of Claimant (Allaheh Tabataba'i, University of Tehran)
CLAIMANT	Vulcan Coltan Ltd.
Contract	Contract concluded on 28 March 2014
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
EA	Emergency Arbitrator
ed./eds.	Editor/Editors
edn.	Edition

e.g.	Exempli gratia (for example)
et. al.	and others
etc.	Et cetera (and so on)
Further Clari.	Two further clarifications issued on 10 November 2014
i.e	id est (that is)
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of International Chamber of Commerce
L/C	Letter of Credit
L/C-I	Letter of Credit dated 4 July 2014
L/C-II	Letter of Credit dated 8 July 2014
Ltd.	Limited
MST	Mediterraneo Standard Time
MT	Metric Tons
n.	Note
N/T	Notice of Transport
no.	Number
OLG	Oberlandesgericht, *i.e,* Appellate Court
Ord.	Order
Ord. of EA	Order of Emergency Arbitrator

p./pp.	Page/Pages
P.O.	Procedural Order
PECL	Principles of European Contract Law
Rep. to Co. Cl.	Reply to Counter Claim
Resp. Ex.	Respondent's Exhibit
RESPONDENT	Mediterraneo Mining SOE
RST	Ruritanian Standard Time
St. of Claim	Statement of Claim (Request for Arbitration)
St. of Def.	Statement of Defense (Answer to Request for Arbitration)
Trade Bank	RST Trade Bank Ltd.
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Principles	UNIDROIT Principles 2010
USD	United States Dollars
v.	*versus* (against)
Vol.	Volume

INDEX OF AUTHORITIES

TREATISES

UNIDROIT Principles of International Commercial Contracts
(2005)
CITED IN: ¶86
CITED AS: *Bonell-Contract Law*

The UNIDROIT Principles in Practice, Case law and Bibliography on the Principles of Commercial Contracts
(2006)
CITED IN: ¶99
CITED AS: *Bonell-UNIDROIT*

BORN, GARY B.

International Commercial Arbitration: Commentary and Materials
(2001)
CITED IN: ¶35
CITED AS: *Born*

BREKOULAKIS, STAVROS L.

Arbitration and Third Parties, Thesis for the Degree of Doctor of Philosophy
(2008)
CITED IN: ¶34
CITED AS: *Brekoulakis-Thesis*

Third Parties in International Commercial Arbitration
(2010)
CITED IN: ¶¶33, 34
CITED AS: *Brekoulakis-Parties*

BROOM, HERBERT	Broom's Legal Maxims (1882) CITED IN: ¶51 CITED AS: *Broom*
BROWNSWORD, R, ET. AL	Good Faith in Contract: Concept and Context (1999) CITED IN: ¶40 CITED AS: *Brownsword*
CHITTY, JOSEPH	Chitty on Contracts, Vol. I (2012) CITED IN: ¶92 CITED AS: *Chitty*
ENDERLEIN, FRITZ/ MASKOW, DIETRICH	International Sales Law (1992) CITED IN: ¶78 CITED AS: *Enderlein/Maskow*
ENDERLEIN, FRITZ / MASKOW, DIETRICH/ STROHBACH, HEINZ	Internationales Kaufrecht (1991) CITED IN: ¶78 CITED AS: *Enderlein/Maskow/Strohbach*
FOUCHARD, PHILLIPPE/ GAILLARD, EMMANUEL/ GOLDMAN, HOWARD	Fouchard, Gaillard, Goldman on International Arbitration (1999) CITED IN: ¶¶31, 34, 35, 53 CITED AS: *Fouchard/Gaillard/Goldman*

FRY, JASON / GREENBERG, SIMON/ MAZZA, FRANCESCA	The Secretariat's Guide to ICC Arbitration (2012) CITED IN: ¶49 CITED AS: *Fry/Greenberg/Mazza*
GOTANDA, JOHN	Using PICC to Fill Gaps in Contract Damages: Domestic and International Perspectives (D. Saidov & R. Cunnington eds., 2008) CITED IN: ¶89 CITED AS: *Gotanda*
GUTTERIDGE, H. C./ MEGRAH, M.	The Law of Bankers Commercial Credits (2001) CITED IN: ¶105 CITED AS: *Gutteridge/Megrah*
HANOTIAU, BERNARD	Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions (2006) CITED IN: ¶¶27, 32, 40 CITED AS: *Hanotiau-Complex Arbitrations*
	Non-signatories in International Arbitration: Lessons from thirty Years of Case Law, *in* International Arbitration 2006: back to basics? (2007) CITED IN: ¶37 CITED AS: *Hanotiau-Non-signatories*

HENRY, M.
The Contribution of Arbitral Case Law and National Laws, *in* Toward a Uniform International Arbitration Law?
(2005)
CITED IN: ¶40
CITED AS: *Henry*

HONNOLD, JOHN O.
Uniform Law for International Sales under the 1980 United Nations Convention
(Harry M. Flechtner ed., 2009)
CITED IN: ¶¶78, 91, 96, 109
CITED AS: *Honnold*

HUBER, PETER / MULLIS, ALASTAIR
The CISG: A New Textbook for Students and Practitioners
(2007)
CITED IN: ¶¶96, 101, 103, 107
CITED AS: *Huber/Mullis*

HUBER, ULRICH
Commentary on Article 48, *in* Peter Schlechtriem / Ingeborg Schwenzer eds., Commentary on the UN Convention on the International Sale of Goods
(2000)
CITED IN: ¶86
CITED AS: *Huber*

KRÖLL, STEFAN
UN Convention on Contracts for the International Sale of Goods
(Kroll eds. et al. 2011).
CITED IN: ¶¶69, 80, 81, 91, 94, 107
CITED AS: *Kröll*

LEISINGER, BENJAMIN K.
Fundamental Breach Considering Non-Conformity of the Goods
(2007)
CITED IN: ¶102
CITED AS: *Leisinger*

LEW, JULIAM /MISTELIS, LOUKAS/ KRÖLL, STEFAN
Comparative International Commercial Arbitration
(2003)
CITED IN: ¶54
CITED AS: *Lew/Mistelis/Kröll*

LOOKOFSKY, JOSEPH
Understanding the CISG
(2008)
CITED IN: ¶91
CITED AS: *Lookofsky*

LORENZON, FILIPPO
C.I.F. and F.O.B. Contracts
(2012)
CITED IN: ¶¶94, 101
CITED AS: *Lorenzon*

MULLIS, ALASTAIR
Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases, *in* Anglo-Swedish Studies in Law, Lustus Forlag
(Andreas & Jarborg eds., 1998)
CITED IN: ¶102
CITED AS: *Mullis*

REDFERN, ALAN/ HUNTER, MARTIN	Law and Practice of International Commercial Arbitration (2009) CITED IN: ¶¶28, 29, 37 CITED AS: *Redfern/Hunter*
ROACH, LEE	Card and James' Business Law (2014) CITED IN: ¶97 CITED AS: *Roach*
RODLER, IRMGARD, ANNA	When are Non-Signatories Bound by the Arbitration Agreement in International Commercial Arbitration? (2012) CITED IN: ¶42 CITED AS: *Rodler*
SAMUEL, ADAM	Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, English, French, Swedish, Swiss, US and West German Law (1989) CITED IN: ¶30 CITED AS: *Samuel*
SCHLECHTRIEM, PETER/ SCHWENZER, INGEBORG	Commentary on the UN Convention on the International Sale of Goods (2010) CITED IN: ¶¶74, 84, 89, 91, 95, 96, 98, 99, 101, 102, 109 CITED AS: *Schwenzer*

SCHWENZER, INGEBORG/ FOUNTOULAKIS, CHRISTIANA/ DIMSEY, CHRISTIANA	International Sales Law: A Guide to the CISG (2012) CITED IN: ¶97 CITED AS: *Schwenzer-Guide*
SCHWENZER, INGEBORG/ HACHEM, PASCAL/ KEE, CHRISTOPHER	Global Sales and Contract Law (2012) CITED IN: ¶99 CITED AS: *Schwenzer/Pascal/Kee*
STEINGRUBER, ANDREA M.	Consent in International Arbitration (2012) CITED IN: ¶24 CITED AS: *Steingruber*
UNCITRAL	Digest of Case law on the United Nations Convention on the International Sale of Goods (2012) CITED IN: ¶73 CITED AS: *Digest*
WITZ, WOLFGANG/ SALGER, HANNS-CHRISTIAN/ LORENZ, MANUEL	International Einheitliches Kaufrecht (2000) CITED IN: ¶¶69, 78 CITED AS: *Witz/Salger/Lorenz*
YESILIRMAK, ALI	Provisional Measures in International Commercial Arbitration (2005) CITED IN: ¶63 CITED AS: *Yesilirmak*

ARTICLES

BIJL, MAARTJE

Fundamental Breach in Documentary Sales Contracts: The Doctrine of Strict Compliance with the Underlying Sales Contract
1 European Journal of Commercial Contract Law 19 (1/2009)
CITED IN: ¶¶73, 108
CITED AS: *Bijl*

BABIAK, ANDREW

Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods
6 Temple International and Comparative Law Journal 113 (1992)
CITED IN: ¶104
CITED AS: *Babiak*

BAIGEL, BARUCH

The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis
31.1 Journal of International Arbitration 1 (2014)
CITED IN: ¶¶54, 57
CITED AS: *Baigel*

BE´DARD, JULIE/ NELSON, TIMOTHY G./ KALANTIRSKY, AMANDA

Arbitrating in Good Faith and Protecting The Integrity of The Arbitral Process
The Paris Journal of International Arbitration 737 (2010-3)
CITED IN: ¶40
CITED AS: *Be´Dard/Nelson/Kalantirsky*

BERGAMI, ROBERTO
What Can UCP 600 Do for You?
11 Vindobona Journal of International Commercial Law & Arbitration 1 (1/2007)
CITED IN: ¶108
CITED AS: *Bergami*

BLESSING, MARC
The Law Applicable to the Arbitration Clause
ICCA Congress Series No. 9, Paris (1999)
CITED IN: ¶42
CITED AS: *Blessing*

BONELL, MICHAEL JOACHIM
The UNIDROIT Principles Of International Commercial Contracts And CISG -- Alternatives Or Complementary Instruments?
26 Uniform Law Review 26 (1996)
CITED IN: ¶99
CITED AS: *M.J. Bonell*

BOOG, CHRISTOPHER
Commentary on the ICC Rules, Article 29 [Emergency arbitrator], *in* Arbitration in Switzerland: The Practitioner's Guide, 814 (2013)
CITED IN: ¶¶50, 57
CITED AS: *Boog-ICC*

BOUT, PATRICK X.
Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods
Pace essay submission (1998)
CITED IN: ¶69
CITED AS: *Bout*

BRIDGE, MICHAEL

A Law for International Sales
37 Hong Kong Law Journal 17 (2007)
CITED IN: ¶101
CITED AS: *Bridge-Sales*

Uniformity and Diversity in the Law of International Sale
15 Pace International Law Review 55 (2003)
CITED IN: ¶102
CITED AS: *Bridge-Uniformity*

CARON, DAVID D.

Interim Measures of Protection: Theory and Practice in Light of the Iran United States Claims Tribunal
46 Die ZeitschriftfürausländischesöffentlichesRecht und Völkerrecht 465 (1986)
CITED IN: ¶65
CITED AS: *Caron*

CLARKE, M.

Bankers' Commercial Credits Among the High Trees
Cambridge Law Journal 260 (1974)
CITED IN: ¶105
CITED AS: *Clarke*

DAVIDSON, ALAN

Commercial Laws in Conflict - An Application of the Autonomy Principle in Letters of Credit
6 International Trade & Business Law Annual 65 (2001)
CITED IN: ¶108
CITED AS: *Davidson*

EL-SAGHIR, HOSSAM

Fundamental breach: Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 25 CISG

Editorial Remarks (July 2000)

CITED IN: ¶104

CITED AS: *Hossam*

FARNSWORTH, ALLAN

Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code

30 University of Chicago Law Review 666 (1963)

CITED IN: ¶42

CITED AS: *Farnsworth*

FELEMEGAS, JOHN

Comparison between provisions of the CISG (Article 20) and the counterpart provisions of the Principles of European Contract Law

Editorial Remarks (Nov. 2002)

CITED IN: ¶91

CITED AS: *Felemegas*

FERRARIO, PIETRO

The Group of Companies Doctrine in International Commercial Arbitration: Is These any Reason for this Doctrine to Exist?

26.5 Journal of International Arbitration 647 (2009*)*

CITED IN: ¶31

CITED AS: *Ferrario*

FLECHTNER, HARRY

Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality
13 Pace International Law Review 295 (Fall 2001)
CITED IN: ¶42
CITED AS: *Flechtner*

FERRARI, FRANCO

Fundamental Breach of Contract Under the UN Sales Convention: 25 Years of Article 25 CISG
25 Journal of Law and Commerce 489 (Spring 2006)
CITED IN: ¶74
CITED AS: *Ferrari*

GABRIEL, HENRY DEEB

The Buyer's Performance Under the CISG: Articles 53-60 Trends in the Decisions
25 Journal of Law and Commerce 273 (2005-06)
CITED IN: ¶105
CITED AS: *Gabriel*

GAILLARD, E.

L' interdiction de se contredire au detriment d'autruicommeprincipe general du droit du commerce international: Ieprincipe de I'estoppeldansquelques sentences arbitralesrecentes
Review Arbitration 241 (1985)
CITED IN: ¶40
CITED AS: *Gaillard*

GRAFFI, LEONARDO

Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention

3 International Business Law Journal (Forum Europeén de la Communication) Paris 338 (2003)

CITED IN: ¶73

CITED AS: *Graffi*

HOLTHAUSEN, RÜDIGER

Die wesentliche Vertragsverletzung nach Art. 25 UN-Kaufrecht, Recht der Internationalen Wirtschaft 101 (1990)

CITED IN: ¶74

CITED AS: *Holthausen*

HOOLEY, RICHARD

Controlling contractual discretion

Cambridge Law Journal 65 (2013)

CITED IN: ¶107

CITED AS: *Hooley*

HOSKING, JAMES M.

The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent

4 Pepperdine Dispute Resolution Law Journal (2004)

CITED IN: ¶42

CITED AS: *Hosking*

KEE, CHRISTOPHER

Commentary on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 48 of the CISG
Editorial remarks, (July 2004)
CITED IN: ¶86
CITED AS: *Kee*

KILIAN, MONICA

CISG and the Problem with Common Law Jurisdictions
10:2 Journal of Transnational Law & Policy 229 (2001)
CITED IN: ¶91
CITED AS: *Kilian*

KOCH, ROBERT

The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods, *in* Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998 177 (Pace ed., 1999)
CITED IN: ¶104
CITED AS: *Koch*

LIU, CHENGWEI

The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and case law
(May 2005)
CITED IN: ¶73
CITED AS: *Liu*

MEYNIEL, ALEXANDRE

That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine

No. 1 The Arbitration Brief 3 18 (2013)

CITED IN: ¶36

CITED AS: *Meyniel*

PAMBOUKIS, CH.

The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods

25 Journal of Law and Commerce 107 (2005-06)

CITED IN: ¶109

CITED AS: *Pamboukis*

PLATTE, MARTIN

An Arbitrator's Duty to Render Enforceable Awards

20.3 Journal of International Arbitration 307 (2003)

CITED IN: ¶37

CITED AS: *Platte*

SANDROCK, OTTO S.

Extending the Scope of the Arbitration Agreement to Non-Signatories, *in* The Arbitration Agreement- Its Multifold Critical Aspects, ASA Special Series No. 8 (1999)

CITED IN: ¶23

CITED AS: *Sandrock*

SCHLOSSER, PETER

Appendix to ¶ 1061 § 47, in KommentarzurZivilprozessordnung, STEIN, FRIEDRICH/ JONAS, MARTIN

Bd. 2, Tübingen (2004)

CITED IN: ¶37

CITED AS: *Schlosser*

SCHWENZER, INGEBORG

The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents.
36 Victoria University of Wellington Law Review 795 (2005)
CITED IN: ¶¶73, 86
CITED AS: *Schwenzer-Avoidance*

The Right to Avoid the Contract Annals FLB – Belgrade Law Review, Year LX, No.3, 207 (2012)
CITED IN: ¶68
CITED AS: *Schwenzer-Right to Avoid*

SINGH, LACHMI/ LEISINGER, BENJAMIN

A Law for International Sale of Goods: A Reply to Michael Bridge
20 Pace International Law Review 161 (Spring 2008)
CITED IN: ¶105
CITED AS: *Singh/Leisinger*

SMITH, GEORGE B./ HALL, THOMAS J.

The Threatened Destruction Of a Business as Irreparable Harm
(248) 124 New York Law Journal (2013)
CITED IN: ¶62
CITED AS: *Smith/Hall*

SPAGNOLO, LISA

Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales

Contracts
6 Journal of Private International Law 417 (2010)
CITED IN: ¶73
CITED AS: *Spagnolo*

SPIEDEL, RICHARD E. International Commercial Arbitration: Implementing the New. York Convention, *in* Arbitration Law in America 185 (2006)
CITED IN: ¶37
CITED AS: *Spiedel*

STEINDL, BARBARA Party Autonomy under the 2012 ICC Rules, *in* Czech and Central European Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators (2012)
CITED IN: ¶¶24, 25
CITED AS: *Steindl*

STRONG, S.I. Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?
31 Vanderbilt Journal of Transnational Law 915 (1998)
CITED IN: ¶41
CITED AS: *Strong*

STRUB, M. GILBEY The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries
38 International Comparative Law Quarterly 475 (1989)

CITED IN: ¶84

CITED AS: *Strub*

THOMAS, AUBREY — Non-signatories in Arbitration: A Good Faith. Analysis
14.3 Lewis & Clark Law Review 953 (2010)
CITED IN: ¶¶41, 42
CITED AS: *Thomas*

VIDAL, DOMINIQUE — The Extension of Arbitration Agreements within Groups of Companies: The Alter Ego Doctrine in Arbitral and Court Decisions
16/No. 2 ICC International Commercial Arbitration Bulletin 63
CITED IN: ¶42
CITED AS: *Vidal*

VISCASILLAS, PILAR PERALES — The Contract for the International Sale of Goods (Vienna Convention 1980)
(2001)
CITED IN: ¶91
CITED AS: *Viscasillas-CISG*

Contract Conclusion under CISG
16 Journal of Law and Commerce 315 (1997)
CITED IN: ¶97
CITED AS: *Viscasillas-Contract Conclusion*

VOSER, NATHALIE

Overview of the Most Important Changes in the Revised ICC Arbitration Rules
29.4 ASA Bulletin (2011)
CITED IN: ¶51
CITED AS: *Voser*

WINSOR, KATRINA

The Applicability of the CISG to Govern Sales of Commodity Type Goods
14 Vindobona Journal of International Commercial Law and Arbitration 83 (1/2010)
CITED IN: ¶¶73, 102
CITED AS: *Winsor*

ZELLER, BRUNO

Commodity Sales and the CISG, *in* Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday
(Camilla B. Andersen & Ulrich G. Schroeter eds., 2008)
CITED IN: ¶73
CITED AS: *Zeller*

INDEX OF COURT CASES

AUSTRALIA

02.11.1917	High Court Cohen & Co. v. Ockerby & Co. Ltd. (1917) 24 C.L.R 288 CITED IN: ¶94 CITED AS: *Cohen v. Ockerby*
17.11.2000	Supreme Court of Queensland Downs Investments v. Perwaja Steel No. 10680 of 1996 CITED IN: ¶¶101, 105 CITED AS: *Downs v. Perwaja*
12.10.2001	Supreme Court of Queensland, Court of Appeal Downs Investments v. Perwaja Steel CISG-Online 955 (Pace). CITED IN: ¶84 CITED AS: *Downs v. Perwaja (2001)*

AUSTRIA

06.02.1996	Supreme Court 10 Ob 518/95 CITED IN: ¶¶78, 101, 109 CITED AS: *Propane case*
21.03.2000	Supreme Court 10 Ob 344/99g CITED IN: ¶69 CITED AS: *Wood case*

28.04.2000	Supreme Court 1 Ob 292/99v CITED IN: ¶83 CITED AS: *Jewelry case*
16.09.2002	Appellate Court Graz 2 R 62/02h CITED IN: ¶95 CITED AS: *Garments case*
01.02.2005	Appellate Court Innsbruck 1 R 253/04x CITED IN: ¶102 CITED AS: *Powdered case*
24.05.2005	Supreme Court 4 Ob 80/05a CITED IN: ¶95 CITED AS: *Grinding case*

BRAZIL

24. 05.2006	São Paulo State Court of Appeals Trelleborg v. Anel Appeal no. 267.450.4/6-00, 7th Chamber of Private Law CITED IN: ¶34 CITED AS: *Trelleborg v. Anel*

CANADA

2006	Superior Court of Justice, Ontario Xerox Canada Ltd. v. MPI Technologies Inc.

2006 OJ No.4895 153 A.C.W.S. (3d) 1029.

CITED IN: ¶29

CITED AS: *Xerox v. MPI*

03.05.2013 Superior Court of Justice, Ontario

Telestat Canada v. Juch-Tech, Inc.

11-29505

CITED IN: ¶53

CITED AS: *Telestat Canada v. Juch-Tech*

ENGLAND

1927 Equitable Trust Company of New York v. Dawson Partners

[1927] 27 Lloyd's Rep.49.

CITED IN: ¶73

CITED AS: *Equitable v. Dawson*

02.02.1933 House of Lords

Arcos Ltd. v. EA Ronaasen & Son

[1933] A.C. 470

CITED IN: ¶101

CITED AS: *Arcos v. Ronaasen*

28.03.1952 Court of Appeal

Trans Trust SPRL v. Danubian Trading Co. Ltd.

[1952] 1 All E.R. 970

CITED IN: ¶94

CITED AS: *Trans Trust v. Danubian Trading*

04.02.1966	Queen's Bench Division (Commercial Court) Soproma SpA v. Marine & Animal By-Products Corp. [1966] 1 Lloyd's Rep. 367 CITED IN: ¶105 CITED AS: *Soproma v. Marine*
14.01.1969	Queen's Bench Division (Commercial Court) Wahbe Tamari & Sons Ltd v. Sociedade Geral de Fibras Cafes e Productos Coloniais Lda (Colprogeca) [1969] 2 Lloyd's Rep. 18 CITED IN: ¶101 CITED AS: *Wahbe Tamari v. Sociedade*
03.02.1972	Court of Appeal (Civil Division) WJ Alan & Co. Ltd. v. El Nasr Export & Import Co. [1972] 2 All E.R. 127 CITED IN: ¶105 CITED AS: *Alan v. Nasr*
1980	In re Holiday Inns/Occidental Petroleum v. Government of Morocco Brit. Year. Int'l 155 (1980) CITED IN: ¶34 CITED AS: *In re Holiday Inns*

25.02.1981	House of Lords Bunge Corp v. Tradax Export SA [1981] 1 W.L.R. 711 CITED IN: ¶102 CITED AS: *Bunge v. Tradax*
18.06.1981	House of Lords Dodds v. Walker [1981] 2 All E.R. 609 CITED IN: ¶91 CITED AS: *Dodds v. Walker*
04.12.1992	Court of Appeal (Civil Division) Abu Dhabi National Tanker Co. v. Product Star Shipping (The Product Star) [1993] 1 Lloyd's Rep. 397 CITED IN: ¶107 CITED AS: *Abu Dhabi v. Product Star*
09.02.1995	Employment Appeal Tribunal Bevan Ashford v. Malin [1995] I.C.R. 453 CITED IN: ¶92 CITED AS: *Bevan v. Malin*
24.05.1995	Queen's Bench Division (Commercial Court) Mondial Shipping and Chartering BV v. Astarte Shi pping Ltd. [1995] C.L.C. 1011 CITED IN: ¶97 CITED AS: *Mondial v. Astarte*

21.10.1998	Court of Appeal (Civil Division) International Asset Control Limited v. Films Sans Frontieres Sarl [1999] E.M.L.R. 268 CITED IN: ¶101 CITED AS: *International Asset v. Films*
21.01.2000	Court of Appeal (Civil Division) Zoan v. Rouamba [2000] 2 All E.R. 620 CITED IN: ¶92 CITED AS: *Zoan v. Rouamba*
04.02.2004	Queen's Bench Division (Commercial Court) Peterson Farms Inc v C & M Farming Ltd. [2004] EWHC (Comm) 121 CITED IN: ¶¶57, 58 CITED AS: *Peterson*
13.11.2006	Court of Appeal (Civil Division) Svenska Petroleum Exploration AB v. Lithuania [2006] EWCA Civ 1529 CITED IN: ¶23 CITED AS: *Svenska Petroleum v. Lithuania*
18.11.2010	English Commercial Court Stellar Shipping Co LLC v Hudson Shipping Lines [2010] EWHC 2985 (Comm) CITED IN: ¶23 CITED AS: *Stellar Shipping v. Hudson Shipping*

EUROPEAN UNION

20.06.2000

Court of First Instance (Fifth Chamber)

Esedra Sprl v. Comm. of the EC

T-169/00R

CITED IN: ¶60

CITED AS: *Esedra v. CEC*

FINLAND

31.05.2004

Appellate Court Helsinki

Crudex Chemicals Oy v. Landmark Chemicals S.A.

S 01/269

CITED IN: ¶92

CITED AS: *Crudex v. Landmark*

FRANCE

26.11.1986

C.A.Pau

SociétéSponsor A.B. v. Ferdinand Louis Lestrade

1998 Rev. Arb. 153

CITED IN: ¶¶29, 36

CITED AS: *Société Sponsor A.B. v. Lestrade*

13.09.1995

Appellate Court Grenoble

M. Caiato Roger v. La Société française de factoring international factor France "S.F.F." (SA)

93/4126

CITED IN: ¶78

CITED AS: *Caiato v. SFF*

GERMANY

21.09.1995	District Court Kassel 11 O 4261/94 CITED IN: ¶81 CITED AS: *Wooden poles case*
26.03.1996	District Court Saarbrücken 7 IV 75/95 CITED IN: ¶107 CITED AS: *Ice-cream parlor case*
03.04.1996	Supreme Court VIII ZR 51/95 CITED IN: ¶73 CITED AS: *Cobalt case*
28.02.1997	Appellate Court Hamburg 1 U 167/95 CITED IN: ¶101 CITED AS: *Iron molybdenum case*
24.04.1997	Appellate Court Düsseldorf 6 U 87/96 CITED IN: ¶74 CITED AS: *Shoes case*
25.11.1998	Supreme Court VIII ZR 259/97 CITED IN: ¶107 CITED AS: *Surface protective film case*

09.05.2000	District Court Darmstadt 10 O 72/00 CITED IN: ¶107 CITED AS: *Video recorders case*
23.02.2005	The Federal Court of Justice VIII ZR 100/04 CITED IN: ¶86 CITED AS: *BGH 100/04*
19.10.2006	Appellate Court München 23 U 2421/05 CITED IN: ¶60 CITED AS: *Auto case*
10.11.2006	Appellate Court Dresden 9 U 0982/06 CITED IN: ¶96 CITED AS: *Meat case*

ITALY

24.11.1989	Court of First Instance Parma Foliopack AG v. Daniplast S.p.A No. 77/89 CITED IN: ¶87 CITED AS: *Foliopack v. Daniplast*

NETHERLANDS

26.02.1992	Appellate Court Hertogenbosch Melody BV v. Giuseppe Loffredo, h.o.d.n. Olympic 856/91 CITED IN: ¶107 CITED AS: *Melody v. Olympic*
05.10.1994	District Court Amsterdam Tuzzi Trend Tex Fashion v. Keijer-Somers H93.2900 CITED IN: ¶96 CITED AS: *Trend Tex v. Keijer-Somers*
17.03.2004	District Court Arnhem Sluiter Ellwood II et al. v. Blumenerdenwerk Stender GmbH 107309 /HA ZA 03-2099 CITED IN: ¶109 CITED AS: *Sluiter v. Blumenerdenwerk*

PHILIPPINES

22.11.2004	Supreme Court Transfield Philippines, Inc v. Luzon Hydro Corporation, Australia And New Zealand Banking Group Limited And Security Bank Corporation G.R. No. 146717, 2nd Division CITED IN: ¶27 CITED AS: *Transfield* v. *Luzon Hydro*

REPUBLIC OF KOREA

19.12.2008	Seoul Central District Court 2007Gahap97810 CITED IN: ¶101 CITED AS: *Crude oil case*
14.10.2010	Seoul High Court 2010Na29609 CITED IN: ¶73 CITED AS: *Cotton seed case*

SINGAPORE

1992	High Court United Bank Ltd v. Banque National de Paris [1992] 2 SLR 64 CITED IN: ¶108 CITED AS: *United Bank v. Banque*

SLOVAKIA

30.04.2008	Supreme Court 1 Obdo V 89/2007 CITED IN: ¶92 CITED AS: *Health products case*

SPAIN

26.05.2005	Supreme Court ITSA v. Satcan & BBVA CITED IN: ¶29 CITED AS: *ITSA v. Satcan*

SWITZERLAND

20.02.1997	District Court Saane T 171/95 CITED IN: ¶78 CITED AS: *Spirits case*
26.09.1997	Commercial Court Aargau OR.96.0-0013 CITED IN: ¶98 CITED AS: *Cutlery case*
15.09.2000	Supreme Court FCF S.A. v. Adriafil Commerciale S.r.l. 4P.75/2000 CITED IN: ¶103 CITED AS: *Egyptian cotton case*
18.12.2001	Federal Supreme Court 4P 126/2001 Swiss Arbitration Association (ASA) Bulletin 2002 CITED IN: ¶25 CITED AS: *Decision 4P 126/2001*
16.10.2003	Federal Tribunal Y.S.A.L. v. Z Sarl ATF 129 III *727* 727-4P.115 CITED IN: ¶42 CITED AS: *Y.S.A.L. v. Z Sarl*

12.12.2006	Canton Appellate Court Thurgau ZBR.2006.26 CITED IN: ¶92 CITED AS: *Building materials case*
07.04.2014	Supreme Court 4A_450/2013 CITED IN: ¶¶42, 43 CITED AS: *Decision 4A_450/2013*

UNITED STATES OF AMERICA

1931	Court of Appeals, Second Circuit. Greenough v. Munroe 53 F.2d 362 (2d Cir. 1931) CITED IN: ¶105 CITED AS: *Greenough v. Munroe*
19.02.1974	Supreme Court Sampson v. Murray 415 U.S. 61, (1974) CITED IN: ¶60 CITED AS: *Sampson v. Murray*
22.06.1988	Court of Appeals, Fourth Circuit J.J. Ryan & Sons v. Rhone Poulenc Textile 863 F.2d 315 CITED IN: ¶29 CITED AS: *J.J. Ryan v. Rhone Textile*

29.06.1998	Court of Appeals, Eleventh Circuit Marble Ceramic Center Inc. v. Cremica Nuoova D'Agostino S.p.A. 144. F.3d 1384 CITED IN: ¶107 CITED AS: *MCC v. Cremica*
1999	District Court, S.D. New York New Pacific Overseas Group (USA) Inc. v. Excel International Development Corp. 1999 WL 285493 CITED IN: ¶62 CITED AS: *New Pacific v. Excel*
28.05.1999	Court of Appeals, Eleventh Circuit MS Dealer Service Corp.v. Sharon D. Franklin 177 F.3d 942 CITED IN: ¶41 CITED AS: *MS Dealer Serv. Corp. v. Franklin*
14.03.2000	Court of Appeals, Fourth Circuit International Paper Co. v. SchwabedissenMaschinen&Analgen GmbH 206 F. 3d 411 CITED IN: ¶37 CITED AS: *International Paper Co. v. Schwabedissen*

16.11.2000	District Court, S.D. New York In re Arbitration Between Promotora de Navegacion, S.A. & Sea Containers, Ltd. 131 F. Supp. 2d 412 CITED IN: ¶37 CITED AS: *In re Arbitration Between Promotora & Sea Containers*
05.10.2001	Federal Circuit Court Kafka v. Hagener 176 F. Supp. 2d 1037 CITED IN: ¶60 CITED AS: *Kafka v. Hagener*
10.11.2003	District Court, C.D. California Doster v. Internet Corp. Case No. CV 03-5045-JFW (MANx) CITED IN: ¶60 CITED AS: *Doster v. Internet*
14.04.2005	Court of Appeals, Second Circuit Sarhank Group v. Oracle Corporation 404 F.3d 657 CITED IN: ¶37 CITED AS: *Sarhank Group* v. *Oracle Corporation*
21.04.2006	Court of Appeals, Fifth Circuit *Bridas SAPIC v. Government of Turkmenistan* 345 F. 3d 355-356 CITED IN: ¶24 CITED AS: *Bridas SAPIC v. Government of Turkmenistan*

09.03.2007	District Court, Connecticut Bahrain Telecom Co. v. Discovery Tel Inc. 476 F. Supp. 2d 176. CITED IN: ¶44 CITED AS: *Bahrain telecom v. Discovery Tel*
29.06.2007	Supreme Court, Massachusetts Correctional Medical Services v. Department of Corrections Case No. 98650 of 2007. 2007 Mass. Super. LEXIS 195. CITED IN: ¶80 CITED AS: *CMS v. Dept. of Corrections*
08.10.2008	Supreme Court Winter v. Natural Resources Defense Council 555 US 7 (2008) CITED IN: ¶55 CITED AS: *Winter v. NRDC*
17.07.2010	Court of Appeals, Ninth Circuit Toyo Tire Holdings of Americas, Inc. v. Continental Tire North America, Inc. 609 F .3d 975 (9th Cir. 2010) CITED IN: ¶55 CITED AS: *Toyo Tire v. Continental Tire*

INDEX OF ARBITRAL AWARDS

1982

Award No. 4131

110 J. Droit Int'l 899

CITED IN: ¶¶29, 32

CITED AS: *Dow Chemical v. Isover Saint Gobain*

1988

ICC Case No. 5103

115 J. Droit Int'l (Clunet) 1206

CITED IN: ¶34

CITED AS: *ICC Case No. 5103*

1991

Award No. 6519

J. Droit Int'l (Clunet) 1065 (1991)

CITED IN: ¶¶32, 34

CITED AS: *ICC Case No. 6519*

1992

Award No. 7585

The ICC International Court of Arbitration Bulletin Vol.6/N.2 60 (November, 1995)

CITED IN: ¶101

CITED AS: *ICC Case No. 7585*

1993

ICC Case No. 7155

ICC Collection of Arbitral Awards 1996-2000, 454 (2003)

CITED IN: ¶33

CITED AS: *ICC Case No. 7155*

1994

Award No. 8445

26 Yearbook Commercial Arbitration 167 (2001)

CITED IN: ¶61

CITED AS: *ICC Case No. 8445*

1995

Award No. 8385

J. Droit Int'l (Clunet) 1061(1995)

CITED IN: ¶29

CITED AS: *ICC Case No. 8385*

1995

Award No. 7604

J.-J. Arnaldez, Y. Derains, and D. Haschler, Collection of ICC Arbitral Awards 1996-2000, (2003) 510.

CITED IN: ¶31

CITED AS: *ICC Case No.7604*

1995

Award No. 7610

J.-J. Arnaldez, Y. Derains, and D. Haschler, Collection of ICC Arbitral Awards 1996-2000, (2003)

CITED IN: ¶¶31, 32

CITED AS: *ICC Case No. 7610*

1996

ICC Case No. 8365

Recueil des sentences arbitrales de la CCI 1996-2000490 (Uean-Jacques Arnaldez, Yves Derains, and Dominique Hascher eds., 2003)

CITED IN: ¶40

CITED AS: *ICC Case No. 8365*

1996

Award No. 7544

11.1 ICC International Court of Arbitration Bulletin 56 (2000)

CITED IN: ¶65

CITED AS: *ICC Case No. 7544*

1997

Award No. 8817

10.2 ICC International Court of Arbitration Bulletin 75 (Fall 1999)

CITED IN: ¶109

CITED AS: *ICC Case No. 8817*

1998

ICC Case No. 8910

ICC Collection of Arbitral Awards 1996-2000, 569 (2003)

CITED IN: ¶33

CITED AS: *ICC Case No. 8910*

2000

ICC Case No. 9517

16 (2005) 2 ICC Bull., p. 80

CITED IN: ¶36

CITED AS: *ICC Case No. 9517*

2000

Award No. 10758

J. Droit Int'l (Clunet) 1171 (2000)

CITED IN: ¶34

CITED AS: *ICC Case No. 10758*

2000

ICC Case No. 10510

Unpublished

CITED IN: ¶31

CITED AS: *ICC Case No. 10510*

2001

Award No. 11405

Unpublished

CITED IN: ¶29

CITED AS: *ICC Case No. 11405*

2010

X (Cyprus) v. Y (Luxembourg), Z (Luxembourg)

Award No. 17050/GZ

29.3 Association Suisse de l'Arbitrage (2011)

CITED IN: ¶61

CITED AS: *ICC Case No. 17050*

INTERNATIONALESSCHIEDSGERICHT DER BUNDESKAMMER DER GEWERBLICHENWIRTSCHAFT	15.06.1994 SCH-4318 CITED IN: ¶40 CITED AS: *SCH-4318 (Austria)*
	15.06.1994 SCH-4366 CITED IN: ¶40 CITED AS: *SCH-4366 (Austria)*
TRIBUNAL OF INTERNATIONAL COMMERCIAL ARBITRATION AT THE RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY	1995 123/1992 CITED IN: ¶105 CITED AS: *Award no. 123/1992*

INDEX OF LEGAL ACTS AND RULES

ICC, Uniform Customs and Practice for Documentary Credits of 1 July 2007

CITED IN: ¶73, 105, 108

CITED AS: UCP 600

NORDIC Contracts Act

CITED IN: ¶91

CITED AS: Nordic Act

Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980

CITED IN: ¶¶92, 94

CITED AS: Official Records

Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March - 11 April 1980 (Sales No. E.81.IV.3)

CITED IN: ¶87

CITED AS: Official Records-CISG

Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference

CITED IN: ¶25

CITED AS: DCFR

Principles of European Contract Law 2002

CITED IN: ¶¶25, 89, 90

CITED AS: PECL

Rules of Arbitration of the International Chamber of Commerce of 1 January 2012

CITED IN: *en passim*

CITED AS: ICC Rules

The Secretariat Commentary on Article 18 of the 1978 Draft [draft counterpart of CISG Article 20]

CITED IN: ¶91

CITED AS: Commentary, Art. 20

The Secretariat Commentary on Article 60 of the 1978 Draft [draft counterpart of CISG Article 64]

CITED IN: ¶105

CITED AS: Commentary, Art. 64

UNIDROIT Principles of International Commercial Contracts, 2010

CITED IN: ¶¶25, 39, 86, 90, 99

CITED AS: Principles

United Nations Conference on Trade and Development, Documentary Risk in Commodity Trade of 31 May 1998

CITED IN: ¶¶105, 108

CITED AS: UNCTAD

PARTIES TO ARBITRATION

1. Vulcan Coltan Ltd. ("**CLAIMANT**"), a broker of rare minerals (particularly Coltan) is established to enter the competitive Equatoriana market. Further, it only purchases conflict-free Coltan, which has a highly volatile and competitive market.
2. Mediterraneo Mining SOE ("**RESPONDENT**"), a state-owned enterprise based in Mediterraneo, is the second largest producer of conflict-free Coltan in the world. It operates all the mines in Mediterraneo, including the Coltan mines.
3. Global Minerals Ltd. ("**ADDITIONAL PARTY**"), the parent company of the CLAIMANT, is based in Ruritania. It is a regular purchaser of Coltan and other minerals from the RESPONDENT.

STATEMENT OF FACTS

March 2014

4. **23 March** - Mr. Storm, the Chief Operating Officer ("**COO**") of the ADDITIONAL PARTY, and Mr. Summer, COO of the CLAIMANT approached Mr. Winter, the General Sales Manager of the RESPONDENT to enquire about delivery of 100MT of Coltan. The RESPONDENT expressed its unwillingness to sell 100MT of Coltan.
5. **28 March** – The CLAIMANT and the RESPONDENT entered into the Coltan Purchase Contract ("**Contract**"), which was governed by the laws of Danubia and was 'endorsed' by the ADDITIONAL PARTY, for delivery of 30MT of Coltan. The Contract stipulated that all disputes shall be settled under the rules of arbitration of the International Chamber of Commerce ("**ICC Rules**") and the seat of arbitration shall be Vindobona, Danubia.

June 2014

6. **25 June** – The CLAIMANT received the Notice of Transport ("**N/T**") from the RESPONDENT.
7. **27 June** – Owing to the political turmoil in Xanadu, Mr. Storm's brother declared that the settlement between Government of Xanadu and the Deputy Prime Minister of Xanadu seemed unlikely. On the same day, Mr. Storm asked for delivery of 100MT of Coltan.
8. **29 June** – The Deputy Prime Minister of Xanadu announced that his party might leave the Government.

July 2014

9. **4 July** – The RESPONDENT received the first Letter of Credit ("**L/C-I**") issued by RST Trade Bank Ltd ("**Trade Bank**") by fax and courier, for USD 4.5 million and relating to 100MT of Coltan. Later that day, Mr. Winter informed Mr. Summer that the L/C-I did not conform to the Contract.
10. **5 July** – In response, Mr. Storm emailed Mr. Winter stating that the L/C-I conformed to the amended Contract, and asked for the delivery of 100MT of Coltan.
11. **7 July** – The RESPONDENT declared the Contract as avoided.
12. **8 July** – Trade Bank sent a second Letter of Credit ("**L/C-II**") issued for USD 1.35 million by courier. The fax was delivered at 22.42 Mediterraneo Standard Time ("**MST**").
13. **9 July** – Mr. Winter received the L/C-II through a courier at 00.05 MST. The RESPONDENT rejected the L/C-II as belated and non-conforming to the Contract, and avoided the Contract.
14. **11 July** – The CLAIMANT lodged 'Request for Arbitration' and 'Application for Emergency Measures' under Arts. 4 and 29 of ICC Rules claiming delivery of 100MT of Coltan.
15. **26 July** – The Emergency Arbitrator issued an order, preventing the RESPONDENT from selling 100MT of Coltan and to bear the costs of the Emergency Arbitrator proceedings.

August 2014

16. **8 August** – The RESPONDENT submitted the 'Answer to Request for Arbitration' and 'Request for Joinder of ADDITIONAL PARTY'.

September 2014

17. **8 September** – The CLAIMANT and the ADDITIONAL PARTY submitted their 'Reply to Counterclaim' and 'Answer to Request for Joinder', wherein the CLAIMANT reduced its claim to delivery of 30MT of Coltan.

October 2014

18. **3 October** – The present arbitral tribunal ("**Tribunal**") issued the procedural order 1.
19. **29 October –** The Tribunal issued the procedural order 2.

December 2014

20. **11 December** – The CLAIMANT submitted its memorandum.

ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION OVER GLOBAL MINERALS AS IT IS BOUND BY THE ARBITRATION AGREEMENT AS AN ADDITIONAL PARTY.

21. Art. 20 of the Contract contains an arbitration clause providing for arbitration under the ICC Rules with Vindobona, Danubia as the seat of the arbitration [*Cl. Ex. C1*]. Furthermore, the ICC Rules allow the joinder of additional parties to the arbitration [*Art. 7, ICC Rules*]. Contrary to the ADDITIONAL PARTY's assertion [*Cl. Memo., ¶62*], the RESPONDENT submits that the legal basis for the joinder of the ADDITIONAL PARTY exists as it is a party to the Contract as evidenced by its express and implied conduct [**A.**]. Furthermore, it is bound to the arbitration agreement by virtue of the group of companies doctrine [**B.**]. In any event, the ADDITIONAL PARTY is prevented from contesting the jurisdiction of the Tribunal based on the principle of good faith [**C.**].

A. The ADDITIONAL PARTY is a party to the Contract and its arbitration clause.

22. The parties agreed that the ADDITIONAL PARTY would sign the Contract and endorse it [*Resp. Ex. R1, ¶7*]. Contrary to the ADDITIONAL PARTY's assertion, the RESPONDENT submits that the ADDITIONAL PARTY consented to being a party by its "*endorsement*" of the Contract [**i.**] and its conduct [**ii.**]. Additionally, the ADDITIONAL PARTY's issuance of the L/C shows that it consented to being bound by the arbitration clause in the Contract [**iii.**].

i. The ADDITIONAL PARTY's endorsement of the Contract makes it a party to the arbitration agreement.

23. A *prima facie* consent to be bound by the arbitration clause can be evidenced from the signature of a party [*Sandrock, p.167*]. Contrary to the ADDITIONAL PARTY's assertion [*Cl. Memo., ¶ 65*], Art. 1 is not an exclusive list of the parties to the Contract. Even without being enlisted as a party, a signature by a third party, may bind such a party to the arbitration [*Svenska Petroleum v. Lithuania*]. Therefore, the signature of the ADDITIONAL PARTY in the form of an endorsement to the Contract constitutes its consent to be bound by the arbitration clause of the Contract. Further, despite the rejection of the proposal to include the ADDITIONAL PARTY as a named party to the Contract, its endorsement of the Contract makes it a party. In *Stellar Shipping v. Hudson Shipping*, the endorsement of a contract by the parent organization was held to bind the parent organization to the arbitration clause in the

contract. The Court, based on the exchanges between the parties, inferred that the endorsement was a means of ensuring that the parent would guarantee the performance of the subsidiary under the contract. This was despite the form of the contract of guarantee having changed wherein it was initially agreed that the parent would provide a separate guarantee letter, but it was later agreed that both the parent and the subsidiary would be parties to the contract and the parent would endorse the contract accordingly. Similarly, in the present dispute, from the very inception, the RESPONDENT was apprehensive of entering into a contract with the CLAIMANT alone [*St. of Def., ¶5*]. In a previous instance, the ADDITIONAL PARTY had put the subsidiary used into bankruptcy to avoid its payment obligations [*St. of Def., ¶5; Resp. Ex. R1, ¶4*]. Additionally, the RESPONDENT was also aware that the CLAIMANT was a newly formed subsidiary and had insubstantial assets [*St. of Def., ¶7; Resp. Ex. R1, ¶2; P.O.2, ¶9*]. Consequently, the RESPONDENT agreed to enter into the Contract only on a condition that the ADDITIONAL PARTY would "endorse" the Contract and also ensure payment by an L/C [*Resp. Ex. R1 ¶7*]. In addition, the suggestion of "endorsing" the Contract was made by the ADDITIONAL PARTY itself, subsequent to its initial rejection of becoming the sole contracting party [*P.O.2, ¶12*] and as an alternative to a parent guarantee [*P.O.2, ¶12*]. As the CLAIMANT concedes, the endorsement was for a security of payment to the RESPONDENT [*Cl. Memo., ¶68; Rep. to Co. Cl., ¶6*], in such a situation as pointed out in *Stellar Shipping*, an endorsement providing a guarantee or security of performance binds the ADDITIONAL PARTY to the arbitration clause.

ii. The ADDITIONAL PARTY, by its conduct, consented to being bound by the arbitration clause in the Contract.

24. Even if this Tribunal were to find that the "endorsement" of the Contract by the ADDITIONAL PARTY does not amount to an express stipulation, the RESPONDENT submits that the ADDITIONAL PARTY's conduct can imply its inclusion as a party to the Contract [*Steingruber, ¶15.34; Steindl, p.111; Bridas SAPIC v. Government of Turkmenistan*] in two ways.

25. *First*, the performance of the contract may be an evidence of conduct that amounts to implied consent [*Bärtsch/Schramm, p.21*]. The ADDITIONAL PARTY undertook the performance of the contract by issuing the L/C's required under Art. 4 of the Contract [*Cl. Ex. C5; Cl. Ex. C8*]. Furthermore, the performance of a contract by a third party can also be depicted by a declaration committing to make payments under the contract [*Decision 4P 126/2001*]. The ADDITIONAL PARTY undertook an obligation to issue an L/C by a first class bank of Ruritania. Even in the absence of contractual terms expressly stipulated by the parties, contracts may also include certain implied conditions and terms [*Art. 5.1.1, 5.1.2, Principles; Art. 6: 102, PECL; DCFR Book II: 9-101*]. These

implied terms indicate the true intention of the parties at the time of the conclusion of the contract [*Steindl, p.111*]. The RESPONDENT concedes that the Contract did not directly impose an obligation on the ADDITIONAL PARTY; however, such an obligation can be evidenced from the implied understanding between the parties [*P.O.2, ¶17*] and also in light of the negotiations [*Resp. Ex. R1, ¶7*]. In the negotiations, it was suggested by the ADDITIONAL PARTY that its standard bank, Trade Bank, would send the L/C directly to the RESPONDENT as it would "*facilitate the issuance of L/C*" [*P.O.2, ¶25*]. Such a statement shows an implied obligation of issuing the L/C undertaken by the ADDITIONAL PARTY.

26. *Second*, specifically in relation to the ratification of contracts by a third party at the time of conclusion of the contract or subsequently, such ratifications can be perceived as a manifestation of implied consent, if voluntarily provided, together with other evidence of involvement [*Ferrari/Kröll, p.152*]. Therefore, the "endorsement" of the Contract by the ADDITIONAL PARTY [*Cl. Ex. C1*] coupled with the understanding that it would provide the L/C [*P.O.2, ¶17; Resp. Ex. R1, ¶7*] and its subsequent performance [*Cl. Ex. C5; Cl. Ex. C8*] are indicative of an implied consent to be bound by the arbitration clause of the Contract.

iii. The ADDITIONAL PARTY's issuance of the L/C makes it a party to the arbitration agreement.

27. The ADDITIONAL PARTY asserts that the L/C required under Art. 4 of the Contract was autonomous and hence, it does not prove that it consented to being a "Party" to the Contract [*Cl. Memo., ¶67*]. However, the independent and autonomous nature of an L/C only makes the obligation under the L/C independent of the related and originating contract [*Transfield v. Luzon Hydro*]. This does not preclude the Tribunal from looking at the intention behind the issuance of an L/C by a third party. The RESPONDENT submits that, should the Tribunal find that the ADDITIONAL PARTY was not initially liable for the performance of the Contract, then by virtue of its extensive involvement in the performance of the Contract, the ADDITIONAL PARTY effectively assumed the CLAIMANT's contractual obligations. An arbitration clause can be extended to a third party that has taken over one part of the obligations of one of the original parties to the underlying agreement [*Hanotiau-Complex Arbitrations, p.20*]. Several tribunals have found that a non-signatory party, by virtue of its conduct, could be bound to a contract, including its arbitral clause [*SCC108/1997 (2000); Award No. 14/2008*]. It is therefore reasonable that the ADDITIONAL PARTY be bound to the arbitration, clause in the Contract as illustrated by a recent award by an arbitral tribunal in Russia. In *Award No. 14/2008*, the contract was entered into between two parties but a

third party made the payment, which was a group company. The tribunal concluded that there was a transfer of obligations to pay under the contract from the original party to the third party. Additionally, the third party also made several correspondences relating to the fulfillment of the Contract. In the present case, the ADDITIONAL PARTY involved itself in the performance of the Contract by issuing the L/C [*Cl. Ex C5; Cl. Ex. C8*]. This shows that the ADDITIONAL PARTY believed itself to be bound by the Contract and to make the necessary payments under it. Therefore, any argument that the ADDITIONAL PARTY cannot be held liable merely because it was not a party to the Contract ignores the reality of the ADDITIONAL PARTY's extensive involvement in the implementation of the Contract.

B. The ADDITIONAL PARTY is bound by virtue of the "group of companies" doctrine.

28. In the matter before the Tribunal, the ADDITIONAL PARTY is also bound to the arbitration agreement by virtue of the group of companies doctrine. Courts and tribunals have bound non-signatories to contracts by operation of the doctrine [**i.**] in which the benefits and obligations of an arbitral agreement are extended to other members of the same group of companies to which the signatory belongs [*Redfern/Hunter, p.99*]. The requirements for the application of the doctrine in the present dispute are met [**ii.**]. Furthermore, the application of the doctrine does not render the award unenforceable [**iii.**].

i. <u>The group of companies doctrine is a recognized principle in international arbitration.</u>

29. The group of companies doctrine was, for the first time, used to extend arbitration agreements to third parties in *Dow Chemical v. Isover Saint Gobain*. Contrary to the ADDITIONAL PARTY's assertion [*Cl. Memo.,* ¶*72*], thereafter, the group of companies doctrine has found expression in the decisions of tribunals and national courts in various jurisdictions [*Redfern/Hunter, p.101; Société Sponsor A.B. v. Lestrade*]. The doctrine has been recognized in France [*Société Sponsor A.B. v. Lestrade*]. Spanish [*ITSA v. Satcan*] and Canadian courts [*Xerox v. MPI,* ¶*51*] have upheld arbitral awards that have applied the group of companies doctrine. In the United States, the role of the non-signatories in the 'conclusion, performance or termination of the contract and the mutual intention of the parties' has been emphasized on to bind a non-signatory [*J.J. Ryan v. Rhone Textile; Park/Craig/Paulsson, p.76*]. Additionally, ICC tribunals have also favored the doctrine [*ICC Case No. 11405; ICC Case No. 8385*].

30. The rejection of the doctrine, in certain jurisdictions like Netherlands, Germany and Switzerland, is based on a traditional interpretation of a procedural and constitutional right for parties to seek justice from the courts [*Samuel p.92 n.100; Poudret (2002), p.233-4*]. Such view has become obsolete,

as arbitration is no longer an exception to a court's jurisdiction [*Samuel, p.95 n.104*]. Furthermore, the rejection of the doctrine by the English High Court in *Peterson*, is due to the reasoning of "denying indirect damages" than with the "group of companies" doctrine [*Park-Non-signatories, p.581*].

31. Furthermore, a closer reading of the ICC awards shows that the rationale underlying the extension of the arbitration agreement to non-signatories is closely associated with the requirement of consent [*ICC Case No. 7604; ICC Case No. 7610; ICC Case No. 10510*]. There have been no decisions in Danubia on the doctrine so far [*P.O.2, ¶46*]. The assertion of both the ADDITIONAL PARTY [*Cl. Memo., ¶72]* and the authors in Danubia are based on a speculation that the Danubian Courts will most likely not follow the doctrine as in their perception the doctrine is against the principle of consensual arbitration [*P.O.2, ¶46*]. However, the group of companies doctrine is not against the principles of consent. Instead, it only acts as a facilitator to assert the implied consent of the non-signatory parties [*Brekoulakis-Thesis, p.92; Fouchard/Gaillard/Goldman, p.501; Ferrario, p.651*] and can hence form a valid basis for the joinder of the ADDITIONAL PARTY.

ii. The requirements of the group of companies doctrine are met.

32. Since the *Dow Chemicals* decision, courts and arbitral tribunals have relied on the analysis in the case and additional factors to bind a third party to an arbitration agreement. If the companies in a group constituting a single economic entity [**a.**], implicate themselves in the conclusion, performance or termination of the contract [**b.**], and there exists a common intention of all the parties to consider the group to be bound by the arbitration agreement despite the unwillingness of the third party [**c.**], then they are presumed to have consented to the arbitration agreement [*Hanotiau-Complex Arbitrations, p.343-344; Dow Chemical v. Isover Saint Gobain; ICC Case No. 6519; ICC Case No. 7604; ICC Case No. 7610*].

a. The CLAIMANT and the ADDITIONAL PARTY constitute a single economic reality.

33. A parent and a subsidiary can be considered a single economic entity when there exists a tight group structure and strong organizational and financial links [*Brekoulakis-Parties, ¶5.15*]. Evidence of a tight group structure may be represented by sharing of assets, and financial and human resources [*ICC Case No. 8910; ICC Case No. 7155*]. Furthermore, where the funds of one company are used to financially support the other members of the group, the group can be considered a single economic reality [*Brekoulakis-Parties, ¶5.21*]. The CLAIMANT is a 100% subsidiary of the ADDITIONAL PARTY [*P.O.2, ¶7*]. The personnel employed by the CLAIMANT, in part, consist of former employees of the ADDITIONAL PARTY [*P.O.2, ¶7*]. Also, as is evident from the involvement of Mr. Storm, there exists a sharing of human resources between the CLAIMANT and the ADDITIONAL PARTY [*P.O.2, ¶7*]. The

CLAIMANT does not have substantial assets and is financially dependent on the line of credit guaranteed by the CLAIMANT [*P.O.2 ¶9*]. Contrary to the ADDITIONAL PARTY's assertion [*Cl. Memo., ¶74*], the financial, human resource and organizational dependence of the CLAIMANT on the ADDITIONAL PARTY, thus, clearly demonstrates that the two form a single economic reality.

b. The ADDITIONAL PARTY's participation in the negotiation, performance and conclusion of the Contract was substantial.

34. For the doctrine to apply, the third party must have played an active role in the negotiation, performance or the termination of the contract in which the arbitration agreement in question is included [*Brekoulakis-Thesis, p.94; ICC Case No. 5103*]. An active involvement at the negotiation stage is the most relevant factor [*Brekoulakis-Parties, ¶5.40; Trelleborg v. Anel*]. In *ICC Case No. 6519,* the tribunal allowed joinder of a third party on the basis that the third party had participated in the negotiations leading to the agreement and was at the heart of these negotiations. Similarly, in the present case, Mr. Storm, who was representing the ADDITIONAL PARTY made suggestions during the negotiations and his role was consequential in reaching the final terms of the Contract [*Resp. Ex. R1, ¶6*]. He was also responsible for the CLAIMANT as a part of his job profile as an employee of the ADDITIONAL PARTY and played a significant and active role in the negotiations of the Contract [*P.O.2, ¶7*]. Furthermore, the fact that the group of companies doctrine should be applied becomes even more apparent when the relationship of the parties is viewed, during the performance of the Contract. The involvement of a corporation in the performance of an agreement amounts to a tacit agreement to be bound by the arbitration agreement [*Fouchard/Gaillard/Goldman, pp.283-84*]. The L/Cs at both instances were issued by the ADDITIONAL PARTY, pointing towards its involvement in the performance of the Contract [*Cl. Ex C5; Cl. Ex. C8*]. Additionally, the RESPONDENT made all its communications related to the performance of the Contract to both the ADDITIONAL PARTY and the CLAIMANT [*Cl. Ex. C3*]. It is no surprise then, that when the non-compliance of the initial L/C was communicated, the ADDITIONAL PARTY responded [*Cl. Ex. C6*]. In *In re Holiday Inns*, the court approved the arbitral tribunal's finding that the fact that "*correspondence was addressed indistinctively to mother companies [and] to subsidiaries*" pointed to the existence of a group of companies. Similarly, in the present dispute, the Tribunal should infer that the cross communications also establishes a group relationship. A similar inference was drawn by an arbitral tribunal in *ICC Case No. 10758*, where the tribunal looked at the level of "*cooperation and communication*" between the parties to determine implication in performance.

c. The group of companies doctrine is applicable despite the ADDITIONAL PARTY's unwillingness to be bound by the arbitration agreement.

35. The joinder of parties may be allowed when a mutual intention to arbitrate exists. An implied intention may be inferred by the conduct and behavior of all the parties [*Brekoulakis-Parties, ¶5.47*]. The intention can be inferred where the activities of the group were conducted in a way that led the contracting party to a confusion or a misunderstanding as to who the true parties to the agreement were [*Fouchard/Gaillard/Goldman, p.284; Born, p.1177; ICC Case No. 572*]. At the very inception, the ADDITIONAL PARTY had approached the RESPONDENT for negotiating the Contract [*Resp. Ex. R1, ¶2*] At the conclusion of the negotiations, the implied understanding of the parties was that the ADDITIONAL PARTY was bound to provide the L/C [*Resp. Ex. R1, ¶7*]. The ADDITIONAL PARTY had also consented to this obligation as it applied for the L/C and the L/C was issued by the Trade Bank to facilitate the issuance, being the standard bank of the ADDITIONAL PARTY [*P.O.2, ¶25*]. This shows a general intention of the ADDITIONAL PARTY and a mutual intention of all the parties particularly to be bound by the Contract and consequently arbitrate the disputes arising out of it.

36. Furthermore, contrary to the ADDITIONAL PARTY's assertion [*Cl. Memo., ¶75*], no distinction should be drawn in cases where the non-signatory company invokes an arbitration clause, and where a signatory attempts to enforce an arbitration clause against a non-signatory [*ICC Case No. 9517*]. The group of companies doctrine has been applied equally to situations where the third party has resisted the arbitration [*Société Sponsor A.B. v. Lestrade*] and where the third party has attempted to enforce the arbitration agreement [*ICC Case No. 2375*]. Therefore, the ADDITIONAL PARTY's assertion is inconsistent with the prevailing arbitral practice [*Meyniel, p.26*].

iii. The application of the group of companies doctrine does not render the award unenforceable.

37. Judicial review of an arbitration award is "*quite limited.*" [*In re Arbitration Between Promotora & Sea Containers, p.416*] There is a pro-enforcement bias that has to be interpreted into Article V of the New York Convention [*Spiedel, p.286*]. Also, it has been held in a number of cases that binding non-signatories to an arbitration agreement does not constitute a ground on which enforcement can be denied under the New York Convention [*International Paper Co. v. Schwabedissen*]. Furthermore, the ADDITIONAL PARTY relies on the *Sarhank Group v. Oracle Corporation* case to show that an award granted against a non-signatory based on the group of companies doctrine is not enforceable under the New York Convention [*Cl. Memo., ¶77*]. However, this decision is criticized by various authors as being wrongly decided due to its erroneous interpretation of the term 'arbitrability' [*Hanotiau-Non-*

signatories p.356]. Also, as pointed out earlier [¶*31*], it is mere speculation that the Danubian Courts may not enforce an award based on the group of companies doctrine. Therefore, the application of the doctrine by the Tribunal does not render the award unenforceable. In fact, in determining the scope of an arbitration agreement, and deciding on the question of its extension to a third party, the national law of the potential third party is to be applied in order to protect that party from being subjected to a law that it did not consent to [*Schlosser, Appendix,* ¶*1061 §47*]. Furthermore, under the duty of an arbitrator to render an enforceable award, if the parties draw the tribunal's attention to a specific jurisdiction as a likely place of enforcement, the tribunal should consider the law of that place as well [*Redfern/Hunter, p.365; Platte, p.313*]. In light of the fact that courts in Ruritania have explicitly endorsed the group of companies doctrine [*Rep. to Co. Cl.,* ¶*7*], the Tribunal should take the doctrine into account. Furthermore, since the joinder of the ADDITIONAL PARTY is sought by the RESPONDENT so that the award may be enforced against it in Ruritania, the Tribunal should take into account the laws of Ruritania as well.

C. The ADDITIONAL PARTY is prevented from contesting the jurisdiction of the TRIBUNAL by considerations of good faith.

38. The RESPONDENT asserts that the principle of "*good faith*", which forms a part of Danubian Contract Law ("**DCL**") [**i.**], prevents the ADDITIONAL PARTY from contesting the jurisdiction of the Tribunal. In addition, based on arbitral practice, the doctrine of good faith may be used to justify extending the arbitration agreement to a third party [**ii.**] and the ADDITIONAL PARTY can be made a party to the arbitration, as it meets all the substantive requirements of the doctrine [**iii.**].

i. <u>The absence of a statutory provision regulating good faith does not signify its absence from the Danubian Contract Law.</u>

39. The DCL is a verbatim adoption of the UNIDROIT Principles 2010 ("**Principles**") with the exception of Art. 1 [*P.O.2,* ¶*43*]. The decision to not adopt Article 1 was not driven by substantive considerations and was solely because Danubian statutes do not set out the general principles on which they are based [*P.O.2,* ¶*43*]. Therefore, it is pertinent that the non-inclusion of Art. 1.7 of the Principles does not mean that Danubia does not recognize the implied covenant of good faith and fair dealing in a contract. The ADDITIONAL PARTY has erroneously suggested that the DCL does not have any reference to the doctrine [*Cl. Memo.,* ¶*79*]. Other than Art. 1, there are a number of provisions in the Principles which constitute a direct or indirect application of the principle of good faith and fair dealing and the same is considered to be one of the fundamentals underlying the Principles [*Art. 1.7, Comment, Principles*]. In fact, Art. 5.1.2 of the DCL specifically states that implied

obligations may stem from good faith and fair dealing. As the DCL is a verbatim adoption of the Principles [*P.O.2, ¶43*], in contracts governed by Danubian law an implied obligation to arbitrate may be imposed based on the principle of good faith.

ii. Arbitral practice favours the application of the principle of good faith to extend the arbitration agreement to a third party.

40. Alternatively, the law of the place of the arbitration is only one of the many sources from which a duty to arbitrate in good faith may arise. Amongst others, the obligation to arbitrate in good faith may flow from transnational principles of law that have gained broad recognition [B*e'Dard/Nelson/ Kalantirsky, p.744*]. *Lex mercatoria*, or transnational rules of contract and commercial law, includes the principle that contracts must be performed in good faith [*Henry, p.45; ICC Case No. 8365*]. The doctrine of "*good faith and fair dealing*" is recognized as one of the general principles of contract in many legal systems around the world [*Brownsword, p.1; Phoenix v. Czech Republic, p.107; Hanotiau-Complex Arbitrations, p.707*]. Additionally, the principle of estoppel is also a form of recognition of the duty to arbitrate in good faith. [*SCH-4318 (Austria); SCH-4366 (Austria)*]. The principle of estoppel in Anglo-American jurisprudence and the principle of *non concedit venire contra factum propium* in civil law jurisprudence, both prevent parties from taking any inconsistent positions that may prejudice another party [*Gaillard, pp.245-250*]. Therefore, the principle of good faith, being a transnational norm, can bind the ADDITIONAL PARTY to the arbitration.

41. Furthermore, the RESPONDENT concedes that arbitration is based on the concept that parties may decide to have their disputes settled in a manner to which they mutually agree [*MS Dealer Serv. Corp. v. Franklin, p.947*]. However, contrary to the ADDITIONAL PARTY's assertion [*Rep. to Co. Cl., ¶8*] such a concept of party autonomy is not absolute [*Strong, p.980*]. It should give way to principles of equity, allowing non-signatories to participate in arbitration whenever justice requires [*Strong, pp.986, 988; Thomas, p.981*]. Therefore, the ADDITIONAL PARTY cannot oppose its joinder to the arbitration as being contrary to the principles of party autonomy.

iii. The requirements for the application of the principle of "good faith" are met.

42. The RESPONDENT concedes that there does not exist a general definition of good faith. However, such absence of a definition has not deterred commentators and arbitral tribunals from protecting the reasonable expectations that parties had during negotiation [*Thomas p.987; Vidal, p.73*], which were induced by the behaviour of the other party [*Blessing, p.160; Hosking p.296; Park-Dilemma, ¶1.7*]. Contrary to the ADDITIONAL PARTY's assertion [*Cl. Memo., ¶80*], various jurisdictions have based their determination of extending the arbitration agreement on the principle of good faith [*Thomas,*

p.970]. Amongst others, Swiss courts have consistently applied the principle of good faith for the extension of an arbitration agreement to a third party [*Y.S.A.L. v. Z Sarl; Decision 4A_450/2013*]. According to these decisions, an additional party becomes bound by the principle of good faith where by its behavior a party creates a *bona fide* expectation that it considers itself bound by the arbitral clause [*Rodler, p.70*]. The principle of good faith and fair dealing is applied to prevent a party, on whose statement or conduct the other party has reasonably acted in reliance, from adopting an inconsistent position [*Flechtner, p.309; Farnsworth, p.678*].

43. The ADDITIONAL PARTY, by its participation in the negotiation, performance and conclusion of the Contract [¶*34*] created an impression that it would stand behind the Contract. It was only due to the ADDITIONAL PARTY's endorsement of the Contract [*Resp. Ex. R1,* ¶*7*] coupled with an obligation on the ADDITIONAL PARTY to provide an L/C from a Ruritanian Bank [*Resp. Ex. R1,* ¶*7*] that the contract was entered into in the first place. In *Decision 4A_450/2013* of the Supreme Court of Switzerland, where both the parent and the subsidiary corporation had behaved in such a way that the other party could have believed, in good faith, that it had a legal relationship with the parent corporation, the Court held that the parent corporation should be held bound by the terms of the contract. It was of particular importance to the Court that the parent and the subsidiary corporation were aware of the importance to the other party of a transfer of responsibilities away from the subsidiary. Additionally, it took decisive steps in the project that permitted the other party to infer otherwise, in good faith. Consequently, the ADDITIONAL PARTY cannot go back on such representations, as it would be against the principle of good faith.

44. Even if the requirements set out by the ADDITIONAL PARTY are considered [*Cl. Memo.,* ¶¶*81-82*], the ADDITIONAL PARTY, the requirements are clearly met. The fact that the ADDITIONAL PARTY acted in bad faith can be evidenced by usage of insider knowledge by the ADDITIONAL PARTY in relation to events in Xanadu [*Resp. Ex. R2,* ¶*3; Resp. Ex. R3*]. Further, the involvement of the ADDITIONAL PARTY in the management of the CLAIMANT is apparent by Mr. Storm's involvement in the negotiation of the Contract [*Resp. Ex. R1,* ¶¶*6,8, Cl. Ex. C6*].

CONCLUSION: The involvement of the ADDITIONAL PARTY in the contractual negotiations, its endorsement of the Contract and the obligation undertaken by it to issue the L/C's required under the Contract evidences a clear intent of all the parties to bind the ADDITIONAL PARTY to the Contract. Further, in light of the above facts, the joinder of the ADDITIONAL PARTY on the basis of the doctrine of group of companies and the principle of good faith is justified.

II. THE REMAINING PORTION OF THE ORDER OF THE EMERGENCY ARBITRATOR DATED 26 JULY 2014 SHOULD BE LIFTED.

45. Art. 20 of the Contract provides for arbitration in case of a dispute between the parties, to be instituted under the ICC Rules. Accordingly, the CLAIMANT instituted arbitration proceedings against the RESPONDENT by submission of a request for arbitration and an application for emergency measures dated 11 July 2014 pursuant to Arts. 4 & 29 of the ICC Rules. Subsequently, Ms. Chin Hu, the Emergency Arbitrator ("**EA**") passed an order directing the RESPONDENT to refrain from selling the 100MT of Coltan until further orders by the present Tribunal [*Ord. of EA, p.28*]. The CLAIMANT subsequently reduced the claim to 30MT of Coltan [*P.O.1, ¶2*].

46. The CLAIMANT has asserted that the EA had the requisite jurisdiction to pass the order of 26 July 2014 ("**Order**"), as the parties had not opted out of Art. 29 of the ICC Rules and that the substantive requirements to pass the Order were met. Contrary to the CLAIMANT's submissions, the RESPONDENT asserts that the Order is not valid and what remains of the Order should be lifted due to two reasons - that the EA did not have the requisite jurisdiction to pass the Order [**A.**] and that the substantive requirements for issuing the Order were not met [**B.**]

A. The Emergency Arbitrator did not have the requisite jurisdiction to pass the Order.

47. Art. 29(1) of the ICC Rules provide for an emergency interim mechanism for parties who require "*urgent interim or conservatory measures*". The CLAIMANT has asserted that the same is applicable in the instant case [*Cl. Memo., ¶47*]. However, the RESPONDENT submits that Art. 29 of the ICC Rules is not applicable as the EA's jurisdiction is excluded by Art. 21 of the Contract [**i.**] and the parties did not intend to include the EA provisions into the arbitration clause of the Contract [**ii.**].

i. The jurisdiction of the EA is excluded by Art. 21 of the Contract and Art. 29(6)(c) of the ICC Rules.

48. The CLAIMANT has submitted that Art. 21 merely specifies which state court would be competent to issue provisional measures, in event of a dispute [*Cl. Memo. ¶48*]. The CLAIMANT has further submitted that the exception under Art. 29(6)(c) of the ICC Rules is not attracted by the state courts. However, it the RESPONDENT asserts that no such exception exists, as state courts are an alternate pre-arbitral mechanisms [**a.**] and state courts have not been expressly excluded from the meaning of Art. 29(6)(c) of the ICC Rules [**b.**].

a. State courts are a pre-arbitral mechanism within the meaning of Art. 29(6)(c) of the ICC Rules.

49. Article 29(6)(c) reads, "*The Emergency Arbitrator Provisions shall not apply if:…the parties conclude to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.*" This provision provides for an implied opt out of the EA provisions if the parties agree to an alternate pre-arbitral mechanism for provisional measures [*Fry/Greenberg/Mazza, p.309*].

50. The RESPONDENT submits that, since state courts and the EA have concurrent jurisdiction [*Art. 29(7), ICC Rules; Boog-ICC, p.818*], the former are competent to issue pre-arbitral interim measures. Hence, Art 29(6)(c) becomes applicable to state courts as well. In the present case, Art. 21 of the Contract provides the state courts in the place of business of the party against whom the measures are requested, with exclusive jurisdiction to grant provisional measures. Thus, Art. 21 of the Contract constitutes an implied opt-out of the EA provisions of the ICC Rules.

b. The drafters of Art. 29(6)(c) of the ICC Rules did not intend to exclude state courts from its ambit.

51. The RESPONDENT further submits that even though, as the CLAIMANT has suggested that Art. 29(6)(c) of the ICC Rules was initially included to "*protect the interests of FIDIC contracts*" [*Cl. Memo. ¶47*], the same implied exception applies to all other pre-arbitral mechanisms as well [*Voser, p.813*]. This is due to the wording of Art. 29(6)(c) of the ICC Rules, which does not expressly exclude state courts from its ambit [*Voser, p.814*]. Furthermore, according to the longstanding principle of "*a verbis legis non est recedendum*", i.e., an interpretation contrary to the express letter of the law cannot be provided [*Broom, p.268*], any specific distinction between state courts and other pre-arbitral mechanisms cannot be read into Art. 29(6)(c) of the ICC Rules when it does not exist [*Broom, p.268*]. Thus, the RESPONDENT submits that the interpretation provided by the CLAIMANT to exclude state courts from the ambit of Art. 29(6)(c) should not be relied upon.

ii. The intention of the parties was to exclude the EA provisions of the ICC Rules.

52. Art. 4.1 of the DCL states that a contract shall be interpreted according to the common intention of the parties. At the point of time when Art. 21 was included in the Contract, the ICC Rules had not been amended and thus, any consideration regarding such provisions cannot be read into the Contract.

53. Furthermore, in any case, Art. 4.6 of the DCL states that by the principle of *contra proferentem*, in case a party supplies a term in a contract, which later on appears to be unclear or insufficient for the purpose of any situation that arises as a result of a conflict between the parties, should be interpreted

against the party which proposed it [*Fouchard/Gaillard/Goldman, p.258, Telestat Canada v. Juch-Tech*]. In the instant case, Art. 21 of the Contract should be interpreted in a manner that is detrimental to the CLAIMANT. The ADDITIONAL PARTY included Art. 21 in Contract [*P.O.2, ¶13*]. Hence, Art. 21 should be interpreted such that state courts are envisaged as bodies, which would fall within the category of 'pre-arbitral procedures' within the meaning of Art. 29(6)(c) of the ICC Rules.

54. When emergency provisions are automatically applicable, specifically opting for the assistance of judicial authorities implies an exclusion of emergency provisions [*Lew/Mistelis/Kröll, pp.586, 587*]. Consequently, accepting the exclusive jurisdiction of state courts to grant interim measures, even at the point of time when the 2012 ICC Rules were in force, implies an intention to exclude the jurisdiction of the EA [*Baigel, p.8*]. Therefore, the inclusion of Art. 21 in the Contract shows a clear intention of both the parties to exclude the jurisdiction of the EA.

B. The substantive requirements for granting the Order were not met.

55. The second requirement for granting an interim measure is that of establishing a *prima facie* case [*Winter v. NRDC; Toyo Tire v. Continental Tire*]. The RESPONDENT seeks to demonstrate that such a *prima facie* case did not exist, by first showing that Danubian Arbitration Law ("**DAL**") is not applicable to Art. 29 of the ICC Rules [**i.**] and second, in any case, the minimum requirements of granting the Order are not met [**ii.**].

i. The CLAIMANT cannot rely on Art. 17 of the DAL to prove the validity of the Order.

56. The CLAIMANT asserts that the substantive requirements for granting the Order were met, purely on the basis of the DAL [*Cl. Memo., ¶54*]. Contrary to the CLAIMANT's assertion, the RESPONDENT asserts that the DAL is not applicable to the EA because the EA is not an arbitrator within the meaning of the DAL [**a.**] and in any case, the urgency requirement of Art. 29(1) of the ICC Rules was not met [**b.**].

a. The EA is not an arbitrator in her own right.

57. Art. 17 of the DAL deals with interim measures granted by sole arbitrators and arbitral tribunals [*Art. 2, UNCITRAL Rules*]. However, the term 'arbitrator' implies that he/she is a body having judicial power [*Baigel, p.14*]. However, the EA is a body of contractual and not judicial nature [*Boog-ICC, p.818*] and the same has also been admitted by the CLAIMANT [*Cl. Memo., ¶53*]. Therefore, as a result of the contractual nature of the EA, the EA does not fall into the criterion set out in Art. 2 of the DAL and is thus not an arbitrator within the meaning of Art. 17 of the DAL [*Baigel, p.5*].

b. The urgency requirement under Art. 29(1) of the ICC Rules is not met.

58. The only criterion mentioned under the ICC Rules for the granting of an interim measure by the EA is that of urgency. The CLAIMANT has argued that such a situation existed when the Order was passed [*Cl. Memo.,* ¶*57*]. However, the RESPONDENT asserts that such a case did not exist. Provisional or interim measures are intended to protect against imminent harm that may form a threat to the existence of a company or cause irreparable harm [*Occidental v. Ecuador*]. In *Occidental v. Ecuador*, relief was denied on the basis that the proof provided was purely hypothetical and not concrete. In the present case, the CLAIMANT has relied on Ms. Masrov's and Mr. Winter's witness statements [*Cl. Memo.,* ¶*57*], while the former has merely stated that the RESPONDENT was excited about possible profits that might arise from the political situation in Xanadu [*Resp. Ex. R2*], the latter has stated that other clients had simply contacted the RESPONDENT about *possible* fallback scenarios [*Resp. Ex. R1*]. The RESPONDENT urges the Tribunal to find this claim to be unsubstantiated and irrelevant, as there remains no concrete proof that any negotiations for the sale of Coltan were being undertaken between the parties. Therefore, the granting of the Order was not 'urgent'.

ii. In any case, the minimum substantive requirements for granting the Order are not met.

59. The RESPONDENT asserts that even if the Tribunal considers Art. 17 of the DAL, relevant to the proceedings, the minimum substantive requirements for proving a *prima facie* case are not met. First, there is no probability of irreparable harm to the CLAIMANT [**a.**]. Second, the balance of convenience lies in favour of the RESPONDENT [**b.**]. Lastly, there is no reasonable chance that the CLAIMANT will succeed on the merits [**c.**].

a. There is no probability of irreparable harm to the CLAIMANT.

60. Contrary to the CLAIMANT'S assertion [*Cl. Memo.,* ¶*56*], the RESPONDENT submits that there did not exist any irreparable harm which was not adequately reparable with damages. In the absence of an essential threat to the existence of a company, no other situation needs to be treated as a situation of irreparable harm [*CMS v. Dept. of Corrections*]. A situation that merely threatens the reputation of the party does not constitute a situation of irreparable harm [*Esedra v. CEC; Doster v. Internet Corp.*]. Furthermore, courts have found that loss of reputation can adequately be compensated by monetary damages [*Kafka v. Hagener; Sampson v. Murray*]. In *Esedra v. CEC*, an application for the grant of interim measures was rejected as it was solely based on the grounds that there could be a subsequent fall in reputation. Due to the presence of other business enterprises of the applicant, the tribunal held that a fall in reputation would not be fatal to the future of the company. In the instant case, the

CLAIMANT is only one of the many subsidiaries of the ADDITIONAL PARTY. Furthermore, the CLAIMANT itself has entered into various other contracts with customers and suppliers [*P.O.2, ¶9*]. Therefore, there is no concrete proof that the CLAIMANT will suffer a sufficient loss in reputation or clients that would force it into liquidation.

61. Therefore, as the CLAIMANT's submissions are based on mere speculation, injunctive relief should be denied [*ICC Case No. 8445*]. In *ICC Case No. 8445*, the Tribunal refused interim relief, as the claim was made on the speculative basis of loss of reputation in the CLAIMANT's home market. The RESPONDENT submits that the CLAIMANT'S assertion is based on the speculation that it would sustain damage to its reputation and further face litigation that would cause it to face dissolution [*Cl. Memo., ¶57*]. The RESPONDENT cannot be held liable on the basis of such claims based on mere speculation of the acts of third parties [*ICC Case No. 17050*].

62. Contrary to the CLAIMANT's assertion [*Cl. Memo., ¶56*], the RESPONDENT contends that the CLAIMANT has not built up a sufficient reputation to suffer a significant loss of reputation. Injunctive relief has been denied by courts where the company has not been in the business long enough for it to build a sufficient reputation [*New Pacific v. Excel; Smith/Hall*]. The CLAIMANT was only established in the latter period of 2013 [*Resp. Ex. R1, ¶2*]. It is improbable that in such a short period of time it has garnered sufficient reputation. Therefore, the RESPONDENT urges the Tribunal to that any loss suffered by the CLAIMANT was adequately reparable by a claim for damages.

b. The balance of convenience lies in favour of the RESPONDENT.

63. Under Art. 17A(1)(a) of the DAL, the doctrine of proportionality requires that an enquiry into the immediate adverse effect of disrupting the *status quo* must be made while maintaining the balance between the parties' interests [*Yesilirmak, p.205; Biwataer Gauff v. Tanzania*]. The merits of a case are not to be looked into if the loss faced by the opposing party is greater than the loss caused due to the maintenance of *status quo* [*Cape Lambert v. Mt. Anketell*]. In the instant case, the RESPONDENT has submitted that it has merely entered into negotiations for the sale of the 100MT of Coltan [*St. of. Def., ¶38*].

64. If any, the CLAIMANT has a claim over only 30MT of Coltan, which is evidenced from its later retraction of the 100MT claim to a 30MT claim before this Tribunal. Furthermore, the reputation of the RESPONDENT is much better established, as it is a state-owned enterprise and any failure to meet contractual obligations will reflect in the Government and other state-owned enterprises' image and reputation [*Bahrain Telecom v. Discovery Tel*]. In *Bahrain Telecom v. Discovery Tel*, the Court opined that state owned companies like the applicant were in a more precarious position, as they were

representatives of their government. This implies that there is a possibility of far greater damage to the RESPONDENT if the Order is not lifted.

c. There is no reasonable chance that the CLAIMANT will succeed on the merits.

65. Under Art. 17A(1)(b) of the DAL, a party seeking emergency measures must prove that it has a reasonable chance of success at the final stage of the proceedings [*Caron, p.490*]. This is to demonstrate that the claim is not frivolous [*ICC Case No. 7544*]. As will be shown subsequently, there is a clear case of fundamental breach on part of the CLAIMANT by supplying the RESPONDENT with the L/C-I, which was not of the amount previously agreed upon [¶*66*]. Furthermore, the RESPONDENT validly issued a notice of avoidance to the CLAIMANT, after communicating to it that the L/C-I was unacceptable [*Resp. Ex. R2*]. Thus, there is no reasonable expectation that the CLAIMANT will succeed on the merits before this present Tribunal. The RESPONDENT urges the Tribunal to refer to *Argument III* of this written memorandum for further elaboration on this argument.

CONCLUSION: The Order of the EA should be lifted, as the EA did not have the jurisdiction to pass the Order as a result of the opt-out of the EA procedures in Article 21 of the Contract. Further, the lack of jurisdiction is evident as none of the parties to the Contract intended to submit to the EA under Art. 29 of the ICC Rules. The CLAIMANT'S reliance on the DAL, in order to prove that substantive requirements to satisfy the EA were fulfilled, is without basis, as the EA is not an arbitrator in his own right. Furthermore, the substantive requirements were not proved, as the CLAIMANT did not establish the existence of an irreparable harm and a reasonable probability to succeed on the merits. The application of the principle of balance of convenience also goes against the CLAIMANT.

III. THE RESPONDENT RIGHTFULLY AVOIDED THE CONTRACT AS THE CLAIMANT COMMITTED A FUNDAMENTAL BREACH OF THE CONTRACT

66. The RESPONDENT rightfully avoided the Contract by its declaration of avoidance on 7 July 2014 and 9 July 2014. The RESPONDENT will establish that the CLAIMANT breached the Contract as the L/C-I did not conform to the contractual requirements and this breach was fundamental in nature [**A.**]. Alternatively, the L/C-II was belated and non-conforming to the contractual requirements, which amounted to a fundamental breach of the Contract [**B.**].

A. The RESPONDENT rightfully avoided the Contract on 7 July 2014.

67. The CLAIMANT asserts that the L/C-I was in line with the contractual requirements and thus, the RESPONDENT was not entitled to avoid the contract on 7 July 2014 [*Cl. Memo., ¶9*]. However, contrary to the CLAIMANT's submission, the L/C-I, in fact, did not conform to the requirements under the Contract [**i.**]. Further, such non-conformity amounted to a fundamental breach [**ii.**]. Alternatively, the CLAIMANT failed to establish a conforming L/C within the additional time fixed by the RESPONDENT [**iii.**]. In any event, prior to the last date of performance of the Contract i.e., 8 July 2014, it was clear that the CLAIMANT would commit a fundamental breach of the Contract [**iv.**].

i. The LC-I did not conform to the requirements under the Contract.

68. A breach of contractual obligations is a pre-requisite for establishing a fundamental breach of contract [*Schwenzer-Right to Avoid, p.208; Achilles, p.64*]. In the present case, the Contract stipulated that the CLAIMANT establish an L/C consistent with the terms of the Contract and be acceptable in content to the RESPONDENT [*Cl. Ex. C1*]. However, neither was the L/C-I in accordance with the Contract nor was it acceptable in content to the RESPONDENT. Contrary to the CLAIMANT's assertion, the stipulations under the original Contract prevailed, as it was not amended on 27 June 2014 [**a.**]. Further, the L/C-I was issued for USD 4,500,000 and related to 100MT of Coltan [**b.**]. Additionally, the L/C-I contained a different delivery term than that required by the Contract [**c.**].

a. The Contract was not amended on 27 June 2014 and the original stipulations prevailed.

69. The CLAIMANT asserts that the Contract was amended on 27 June 2014 [*Cl. Memo., ¶12*] and thus, the L/C-I was in conformity with the amended Contract. However, the CLAIMANT itself has agreed to assume that the original Contract was not amended [*P.O.1, ¶2*]. Nevertheless, the original Contract was not amended to provide for a delivery of 100MT of Coltan, as the RESPONDENT did

not make an invitation to offer delivery of 100MT of Coltan. The RESPONDENT, in its e-mail, had merely stated that one of its major customers had defaulted on a purchase of Coltan [*Cl. Ex. C3*]. This statement was made to explain the early delivery of 30MT of Coltan, well before the date agreed in the Contract, i.e., 31 August 2014. Further, the CLAIMANT asserts that it had offered to purchase 100MT of Coltan on 27 June 2014 and since the RESPONDENT did not reply to the offer within a few days, it considered the offer as accepted [*Cl. Memo., ¶12*]. However, as per Art 18, CISG, silence by itself does not amount to acceptance. With the exception of one instance, the practice developed between the ADDITIONAL PARTY's group of companies and the RESPONDENT had been such that all requests for changes were accepted immediately or within two days [*St. of Claim, ¶9*]. Hence, the RESPONDENT's silence would not amount to an acceptance of the offer. Moreover, the exception mentioned above would not make the actions a practice between the parties [*Art. 9, ¶17, Witz/Salger/Lorenz*]. Contrary to the CLAIMANT'S assertion [*Cl. Memo., ¶13*], the volatility of the market for Coltan is not a ground to consider silence as an acceptance, as the only recognized exception to Art. 18, CISG is the existence of a practice between the parties [*Bout; Kröll, p.155; Wood case*], which is absent in the present case. In addition, Mr. Rüthli, who was internally responsible for the Contract on the CLAIMANT's side, was also informed about the rejection of the offer [*P.O.2, ¶26*]. This fact indicates that the rejection of the offer by the RESPONDENT had been communicated to the CLAIMANT [*P.O.2, ¶5*].

b. The L/C-I was issued for a higher quantity and price than required by the Contract.

70. Contrary to the CLAIMANT's assertion, the L/C-I was issued for USD 4,500,000 and related to 100MT of Coltan instead of 30MT of Coltan as required by the Contract [*Cl. Ex. C1; Cl. Ex. C5*]. This fact has been admitted by the CLAIMANT itself [*St. of Claim, ¶10; Cl. Ex. C6; Cl. Ex. C10*]. Further, after the rejection of the L/C-I, the CLAIMANT sent the L/C-II with an amended amount, i.e. USD 1,350,000 and indicated a new Packing List (30MT) [*Cl. Ex. C8*]. These observations show that L/C-I related to 100MT of Coltan and was issued for USD 4,500,000.

c. The L/C-I contained a different delivery term than the Contract.

71. As per the Contract, the CIF (Oceanside, Equatoriana) term was the required shipping term [*Art. 5, Cl. Ex. C1*]. Yet, the L/C-I provided the CIP (Vulcan Coltan, Equatoriana) as the shipping term [*Cl. Ex. C5*]. This was clearly in derogation from the Contract. Furthermore, the CLAIMANT alleges that the shipping term was modified at the instance of the RESPONDENT through the N/T [*Cl. Memo., ¶16*]. However, the RESPONDENT's employee had mistakenly ticked the wrong shipping term box [*P.O.2, ¶20*]. Even if the Tribunal finds that the RESPONDENT amended the shipping term, the L/C-

I still showed a different shipping term than the term discernable from the N/T i.e., CIP (Oceanside, Equatoriana) instead of CIP (Vulcan Coltan, Equatoriana). In addition, the CLAIMANT may contend that pursuant to Art. 80 CISG, the RESPONDENT cannot rely on the breach by the CLAIMANT as the RESPONDENT changed the shipping term from CIF to CIP. However, such an analysis will be erroneous as the application of Art. 80, CISG would only disentitle the RESPONDENT from relying on the incorrect shipping term (CIP). The RESPONDENT would still be allowed to rely on the wrong destination mentioned in the L/C i.e. Vulcan Coltan, 21 Magma Street, Oceanside, Equatoriana [*Cl. Ex. C5*] to prove that the L/C-I deviated from the Contract.

ii. The issuance of a non-conforming L/C-I amounted to a fundamental breach.

72. Pursuant to Art. 25, CISG, a breach of contract is fundamental if it results in substantial deprivation of the RESPONDENT's interests in the Contract and if that result would have been foreseeable to a reasonable party in the CLAIMANT's position. As per Art. 64(1)(a), CISG, the RESPONDENT is entitled to avoid the Contract if there exists a fundamental breach. In the present case, the issuance of the non-conforming L/C-I caused a fundamental breach of the Contract as the RESPONDENT was substantially deprived of its contractual expectations [**a.**]. Such deprivation was reasonably foreseeable by the CLAIMANT [**b.**]. Further, the RESPONDENT took all necessary steps required to mitigate the losses [**c.**].

a. The issuance of the non-conforming L/C-I substantially deprived the RESPONDENT.

73. If the RESPONDENT is deprived of the primary benefit of the Contract and loses its interest in receiving the performance, such breach by the CLAIMANT would lead to a substantial deprivation [*Digest, p.80; Cobalt case; Liu*] of the former's interests in the Contract. Economic loss also plays a key role in determination of a breach [*Graffi, p.345*]. Moreover, if a party in breach fails to open an L/C in a manner conforming to the contractual terms, the aggrieved party would be justified in avoiding the contract on grounds of fundamental breach [*Cotton seed case*]. Contrary to the CLAIMANT's assertion [*Cl. Memo., ¶¶11, 15*], the RESPONDENT was deprived of the payment for 30MT of Coltan as required under the Contract [*Art. 4, Cl. Ex. C1*]. As per the L/C-I, the RESPONDENT was to be paid when it presented a Transport Document (CIP Vulcan Coltan, Equatoriana) to the Trade Bank [*Cl. Ex. C5*]. But as per to the Contract, the RESPONDENT would only possess a Transport Document (CIF Oceanside, Equatoriana). This discrepancy in the L/C-I would deprive the RESPONDENT from payment under the Contract. The Contract [*Art. 4, Cl. Ex. C1*] and the L/C-I [*Cl. Ex. C5*] indicate that the L/C-I is subject to UCP 600. Hence, in order to claim payment, the presenter is required to present necessary documents in strict compliance of the L/C requirements

[*Art. 14(a), UCP 600; Equitable v. Dawson, p.52; Bijl, p.21*]. The RESPONDENT, following the Contract, would be unable to present a CIP transport document and thus, would be refused payment, harming its pecuniary interests. Even if the RESPONDENT procures a CIP transport document, it will still incur extra costs of USD 1000 [*P.O.2, ¶36*]. Transportation costs being a major concern for the RESPONDENT [*Resp. Ex. R1, ¶8*], would result in substantial detriment to the RESPONDENT, and not merely a *de minimis* detriment as contended by the CLAIMANT [*Cl. Memo., ¶19*]. Lastly, contrary to the CLAIMANT's assertion [*Cl. Memo., ¶16*], in trading commodities such as Coltan, any deviation from the contract results in a fundamental breach. In commodity markets, due to the rapid price fluctuations [*Schwenzer-Avoidance, p.806*] and supply-demand variations [*Winsor, p.91*], commodities contracts are interpreted strictly [*Winsor, p.93; Zeller, p.632; P.O.2, ¶18*]. Conforming documentary performance is always the essence of the commodities contract [*Schwenzer-Avoidance, p.806; Spagnolo*]. It is undisputed that at the time of the issuance of the L/C-I, the market for Coltan was highly volatile due to the impending political crisis in Xanadu [*Order of EA, ¶5*]. Also, as established above [*¶68*], the L/C-I was undoubtedly non-conforming. In such a situation, the non-conforming L/C substantially deprived the RESPONDENT of its interests under the Contract and thus, the CLAIMANT's acts amount to a fundamental breach of the Contract.

b. The CLAIMANT could have foreseen the substantial detriment to the RESPONDENT.

74. The CLAIMANT may contend that as it was anticipated that the Contract was amended during the alleged breach, it had issued the non-conforming L/C relating to 100MT of Coltan and never foresaw the substantial deprivation that may be caused to the RESPONDENT. On the contrary, in order to determine foreseeability by the CLAIMANT, the knowledge of the parties at the time of entering into the Contract is relevant [*Shoes case; Holthausen, p.105; Ferrari, p.500; Achilles, p.69; Schwenzer, p.415*]. At the time of entering into the Contract and during the negotiations, the RESPONDENT had clearly not accepted a delivery of 100MT of Coltan [*St. of Claim, ¶6*]. In any case, as shown above [*¶69*], the Contract was never validly amended to extend it to the delivery of 100MT and thus, the CLAIMANT could have foreseen the detriment that would be caused to the RESPONDENT. The CLAIMANT asserts that it was not aware of the deterioration of the political situation in Xanadu [*Cl. Memo., ¶24*]. However, Mr. Storm's brother, the Ambassador of Ruritania in Xanadu, had been informed about the crisis in Xanadu on 27 June 2014 [*Resp. Ex. R3*]. As the CLAIMANT had insider information about the political crisis, it was aware of the change in market conditions and the impending rise in the prices of Coltan. Thus, the CLAIMANT knew or ought to have known that the issuance of the L/C-I relating to 100MT of Coltan and containing the CIP

shipping term would deviate from the original Contract, and would thus lead to a substantial detriment to the RESPONDENT, giving the RESPONDENT a right to avoid the Contract.

c. The RESPONDENT had taken all necessary steps to mitigate the losses suffered by it.

75. Pursuant to Art. 77, CISG, the parties relying on a breach should take reasonable steps to mitigate their losses. The CLAIMANT asserts that the RESPONDENT had not taken all steps to mitigate the losses suffered by it [*Cl. Memo., ¶26*]. According to the CLAIMANT, the RESPONDENT set a deadline contrary to the parties' agreement [*Cl. Memo., ¶27*]. Any deviation from the contract in commodity trade amounts to a fundamental breach and entitles the aggrieved party to avoid the contract [*¶73*]. Hence, when the CLAIMANT opened the L/C-I, which clearly deviated from the Contract, the RESPONDENT was authorized to immediately avoid the Contract. However, instead of doing so, the RESPONDENT asked the CLAIMANT to provide a corrected L/C by 7 July 2014.

76. Further, the CLAIMANT asserts that the RESPONDENT did not give a proper non-conformity notice before declaring avoidance [*Cl. Memo., ¶28*]. However, the RESPONDENT, through a voicemail, had clearly indicated that the L/C-I was not in line with the Contract [*St. of Claim, ¶12*]. As the CLAIMANT's letter in response to this referred to the discrepancies in the delivery term and quantity of Coltan [*Cl. Ex. C6*], it can be reasonably presumed that the RESPONDENT had informed the CLAIMANT of the reasons for which L/C-I did not conform to the Contract. Therefore, the RESPONDENT had taken all steps to mitigate losses it suffered from the non-conforming L/C-I.

iii. <u>In any event, the CLAIMANT did not issue a conforming L/C within the additional period of time fixed by the RESPONDENT.</u>

77. Pursuant to Art. 64(1)(b), CISG, the RESPONDENT is entitled to avoid the contract if the CLAIMANT does not, within the additional period of time fixed by the RESPONDENT, perform its obligation to pay the price. In the present case, the CLAIMANT did not issue the L/C within the additional time period fixed by the RESPONDENT [**a.**]. Also, all other necessary conditions under Art 64(1)(b), CISG were fulfilled before the RESPONDENT's declaration of avoidance of Contract [**b.**].

a. The CLAIMANT did not issue the L/C within the additional period of time fixed by the RESPONDENT.

78. As per Art. 53, CISG, the buyer must pay the price for the goods as required by the contract and the CISG. The obligation to pay the price includes opening of a conforming L/C [*ICC Case No. 7197; Propane case; Enderlein/Maskow, p.205*]. Hence, a refusal to open the L/C or to honor the request for correction of L/C, despite being granted additional time to do so, authorizes the aggrieved party to avoid the contract [*Spirits case; Cotton seed case; Honnold, p.351*]. Furthermore, the aggrieved party is

entitled to set an additional period of time for performance before the due date if the time period set is of a reasonable length [*Art. 63, ¶7, Witz/Salger/Loren; Art. 63, n.2.3, Enderlein/Maskow/Strohbach*].

79. When the CLAIMANT issued the non-conforming L/C-I, the RESPONDENT rejected the same and demanded a correct L/C by 7 July 2014 [*P.O.2, ¶21*]. As the additional time granted to the CLAIMANT was reasonable [*¶81*], the RESPONDENT could set an additional period of time before the due date of 8 July 2014. However, the CLAIMANT refused to issue another L/C relating to 30MT of Coltan [*Cl. Ex. C6*]. The CLAIMANT's mere agreement to the CIF shipping term [*Cl. Ex. C6*] was not sufficient to rectify the inaccuracy in the L/C-I. Therefore, by refusing to correct the L/C-I, the CLAIMANT indicated an intention of non-performance.

b. The conditions under Art. 64(1)(b), CISG have been fulfilled by the RESPONDENT before its declaration of avoidance of the Contract.

80. *First*, the RESPONDENT, while issuing a notice for additional period of time was obliged to state that it requires the CLAIMANT to perform its obligations [*Auto case*]. It was also obligated to notify the CLAIMANT of the additional period of time [*Kröll, p.865*]. When the CLAIMANT issued the L/C-I, the RESPONDENT had explicitly instructed the CLAIMANT to '*provide a new conforming L/C at the latest by Monday morning*' i.e., by 7 July 2014 [*P.O.2, ¶21*], thus notifying the CLAIMANT of the obligation to be performed.

81. *Second*, the additional period of time granted must be of a reasonable length [*ICC Case No. 11849; Coal case*]. It must be technically possible to issue a correct L/C-I within the additional time [*Wooden poles case; Kröll, p.865*]. The RESPONDENT fulfilled the criterion of granting a time period of reasonable length. In fact, an L/C can be issued within a matter of hours [*ICC Case No. 11849*]. In the present case, the CLAIMANT was given a period of 3 days to open the L/C. Further, even after the avoidance on 7 July 2014, the CLAIMANT had issued the L/C-II within a single day [*St. of Claim, ¶14*]. Therefore, the RESPONDENT could have reasonably opened an L/C through the Trade Bank, which also worked on Saturdays, during the additional period of time [*P.O.2, ¶23*].

82. *Third*, there should be a breach of obligation during the additional period of time [*ICC Case No. 11849*]. As established earlier [*¶79*], the CLAIMANT, by reiterating its demand of 100MT of Coltan, implicitly refused to perform the obligation of rectifying the non-conforming L/C-I [*Cl. Ex. C6*].

83. *Lastly*, the termination of the Contract must occur after the expiry of the additional period of time [*ICC Case No. 11849*]. The language and content of the declaration should be understandable and clearly express the avoidance of the contract [*Jewelry case*]. The RESPONDENT, through its letter dated 7 July 2014, explicitly avoided the Contract with convincing reasons [*Cl. Ex. C7*]. Therefore, all the

conditions under Art. 64(1)(b), CISG were met before the declaration of avoidance by the RESPONDENT.

iv. It was clear that the CLAIMANT would commit a fundamental breach before the contractual deadline.

84. As per Art. 72(1), CISG, if prior to the date for performance of the contract it becomes clear that one of the parties will commit a fundamental breach, the other party can avoid the contract. Pursuant to Art 72(3), CISG, if a party declares that he will not perform his obligations, then the other party can make a declaration of avoidance even without providing a reasonable notice. In fact, the buyer's failure to open an L/C, followed by its attempt to renegotiate the contract has been held to evince the buyer's clear intention to not perform its obligations [*Downs v. Perwaja (2001)*]. Further, an implicit declaration may also constitute a clear refusal to perform the obligations [*Strub, p.499; Schwenzer, p.980*]. When the CLAIMANT issued the L/C-I, the RESPONDENT rejected the same and asked for a corrected L/C relating to 30MT of Coltan and stipulating the CIF shipping term [*St. of Claim, ¶12*]. However, instead of providing a correct L/C, the CLAIMANT tried to renegotiate the original Contract to deliver 100 MT of Coltan [*Cl. Ex. C6*]. This clearly indicated an intention not to perform the obligation of issuing an L/C conforming to the Contract. Therefore, the RESPONDENT was not obliged to send a notice to the CLAIMANT prior to avoiding the Contract on 7 July 2014.

B. Alternatively, the RESPONDENT rightfully avoided the Contract on 9 July 2014.

85. The RESPONDENT declared the second avoidance on 9 July 2014 after receipt of the L/C-II [*Resp. Ex. R4*] as a 'precautionary' measure as any attempted performance by the CLAIMANT after the first declaration of avoidance was timed out **[i.]**. Alternatively, even if the attempted performance was not timed out, the delivery of the L/C-II was belated, **[ii.]** which constituted a fundamental breach of the Contract **[iii.]**. Further, the requirement of an additional document of commercial invoice amounted to a fundamental breach **[iv.]**, thereby giving the RESPONDENT a right to avoid the Contract.

i. The issuance of the L/C-II by the CLAIMANT was timed out.

86. The CLAIMANT may argue that it had a right to cure the defect in the L/C-I by issuing a fresh L/C. However, under the CISG the benefit of a 'right to cure' a defect is given to the seller only [*Kee, p.1; Art. 48, CISG*]. The CISG, therefore, negates the buyer's right to cure a defect [*Art. 48, Huber; BGH 100/04*]. Further, the ability to cure defects in the documentation rarely extends to commodity markets [*Schwenzer-Avoidance, p.806*]. The CLAIMANT may further state that the right to cure may be exercised under the Principles [*Art. 7.1.4*]. To exercise this right, a valid notice of the cure should be

communicated to the other party [*Bonell-Contract Law, p.318*]. In the present case, the CLAIMANT did not give any notice of its intention to cure the L/C-I to the RESPONDENT. In fact, upon being notified about the discrepancies in the L/C-I, the CLAIMANT expressly stated that it believed that the L/C-I conformed to the Contract [*Cl. Ex. C6*].

87. Even in the event that the Tribunal finds that the CLAIMANT was entitled to a right to cure, the RESPONDENT asserts that the exercise of this right was timed out. The party entitled to avoid the contract need not wait to see if the other party will cure the defect, but may declare the contract avoided as soon as it suffers a fundamental breach [*Official Records-CISG, p.41; ICC Case No. 7531; Foliopack v. Daniplast*]. Here, the RESPONDENT rightfully avoided the Contract on 7 July 2014, whereas the L/C-II was issued only on 8 July 2014 [*Cl. Ex. C7 & C8*]. As the avoidance was declared prior to the exercise of the right to cure, the issuance of the L/C-II was timed out.

ii. Alternatively, the delivery of the L/C-II did not conform to the timelines under the Contract.

88. The CLAIMANT asserts that the deadline to establish the L/C-II expired on 9 July 2014 [*Cl. Memo., ¶31*]. However, the deadline to provide the L/C-II was, in fact, 8 July 2014 [**a.**]. In addition, the delivery of the L/C-II was belated as it is not the dispatch theory, but the receipt theory that determines when the communication takes effect [**b.**]. Further, it is the MST that should be applied in ascertaining the time of receipt of communication from the CLAIMANT [**c.**].

a. The time limit to provide the L/C under the Contract expired on 8 July 2014.

89. The CLAIMANT has calculated the time limit using the PECL [*Cl. Memo., ¶31*]. However, the PECL cannot be used to interpret the CISG, having regard to the international character of the CISG, as they are not principles on which the CISG is based [*Art. 7(2), CISG; Schwenzer, p.139; Gotanda, p.119*].

90. Moreover, in the case cited by the CLAIMANT to justify the use of the PECL [*ICC Case No. 9474*], though the ICC accepted the PECL as "the general standards and rules of international contracts", the parties in that case were not governed by the CISG. The Tribunal merely referred to the CISG, the Principles and the PECL collectively to settle the issue. In the present case, it is clear that the CISG, being the substantive law of the Contract, should be applied to the dispute [*P.O.2, ¶42*].

91. When a matter is governed by the CISG, it must be solved by turning to the text of the CISG itself, before resorting to external principles [*Honnold, p.109; Kilian, p.229; Lookofsky, p.38*]. Under the CISG, if the beginning of the time for calculating a deadline is not prescribed, then the rule of interpretation under Art. 20, CISG, needs to be applied [*Schwenzer, p.357*]. Even though the provision addresses the calculation of periods for acceptance, it contains general principles

underlying the CISG [*Art. 7(2), CISG*] and therefore, its content can also be applied to other periods of time [*Felemegas; Andersen, p.27; Viscasillas-CISG*]. Several legal systems follow this method of calculation of time limits [*Nordic Act §2(2); Dodds v. Walker*]. If a letter communicates the period of time, the time runs from the date shown on the letter [*Kröll pp.298-299; Commentary, Art. 20*]. Further, in Mediterraneo, in determining timelines, the day of the occurrence of a triggering event is counted [*P.O.2, ¶44*]. In the present case, the N/T was dated and faxed to the CLAIMANT on 25 June 2014 [*Cl. Ex. C2*]. This was also e-mailed to the CLAIMANT on the same day [*Further Clari., ¶1*]. Therefore, the time started to run immediately after the receipt of the fax and e-mail on 25 June 2014. Upon calculating 14 days from this date [*Cl. Ex. C1*], the deadline for establishing the L/C was 8 July 2014.

92. Besides, pursuant to Art. 8, CISG, the Contract is to be interpreted with reference to the conduct of the parties and the relevant circumstances of the case [*Building materials case; Official Records, p.18; Crudex v. Landmark*], using the standard of a reasonable man [*Health products case*]. Contrary to the CLAIMANT's assertion [*Cl. Memo., ¶31*], the principle of excluding the date of the triggering event to calculate deadlines, is not absolute, and the wording of the contract or the factual background may indicate a contrary construction [*Chitty, p.959; Bevan v. Malin; Zoan v. Rouamba*]. The CLAIMANT, through its conduct, made it evident that it considered the deadline to expire on 8 July 2014. The CLAIMANT sent the L/C-II on 8 July 2014 through a speedy 24-hour courier service and faxed a copy to the RESPONDENT "*to ensure the deadline was adhered to*" [*St. of Claim, ¶15; Cl. Ex. C8 & C9*]. This shows the urgency with which the CLAIMANT wanted to send the L/C-II and its intention to make it reach the RESPONDENT by 8 July 2014, indicating its acceptance of 8 July 2014 as the contractual deadline.

b. The delivery of the L/C-II was belated as it was effectively delivered on 9 July 2014.

93. Contrary to the CLAIMANT's submission that it was sufficient to establish and dispatch the L/C-II [*Cl. Memo., ¶¶32-33*], the RESPONDENT asserts that it was essential for the L/C-II to be actually received by the RESPONDENT before the contractual deadline [**1.**]. Further, it is the receipt theory that is applicable to the communication and not the dispatch theory. Since the L/C-II was received after the ordinary business hours of the RESPONDENT, it came into effect only on 9 July 2014, after the deadline under the Contract had elapsed [**2.**].

1. The CLAIMANT had an obligation to ensure that the RESPONDENT received the L/C-II before the contractual deadline.

94. Contrary to the CLAIMANT's submission that the L/C merely had to be issued/established [*Cl. Memo., ¶¶32*], the RESPONDENT asserts that it was essential that the L/C be actually received by the

RESPONDENT. The N/T stated that the L/C was required before shipping [*Cl. Ex. C2*]. The shipment was to be done within 60 days of *receipt* of the L/C [*Cl. Ex. C2*]. Therefore, the receipt of the L/C is a condition precedent to the obligation to deliver the goods [*Trans Trust v. Danubian Trading; Cohen v. Ockerby; Lorenzon, p.234*]. As it is the buyer's obligation to effect payment, the bank's confirmation of the L/C falls within his sphere of responsibility [*Kröll, p.805*]. In accordance with Art. 8, CISG, the contract is to be interpreted with reference to the conduct of the parties, before and after conclusion of the contract [*Official Records, p.18*]. It is evident that the CLAIMANT knew about the necessity of the actual receipt of the L/C by the RESPONDENT and not its mere issuance. In his communication after issuing the N/T, Mr. Willem Winter stated that he was "*looking forward to receiving the Letter of Credit...to authorize shipment*" [*Cl. Ex. C3*]. In the fax dated 27 June 2014, the COO of the ADDITIONAL PARTY, Mr. Storm stated that, "*You will receive Letter of Credit*" [*Cl. Ex. C4*]. Therefore, the mere establishment of the L/C-II was not sufficient; it had to be received by the RESPONDENT within the deadline under the Contract.

2. The L/C-II was received outside the ordinary business hours of the RESPONDENT.

95. The CLAIMANT asserts that the dispatch theory under Art. 27, CISG, is applicable to ascertain the time the communication takes effect [*Cl. Memo., ¶33*]. Under this principle, the declaring party has only to dispatch its communication by using appropriate means of communication [*Garments case*]. However, Art. 27, CISG, only applies in cases where there is a risk of loss, delay or error during the communication's transmission, [*Schwenzer, p.449; Grinding case*], which was absent in the instant case. Rather, as correctly highlighted by the CLAIMANT, the communication reached the RESPONDENT half an hour earlier than anticipated [*P.O.2, ¶27; Cl. Memo., ¶32*]. Therefore, in the present case, Art. 27, CISG, and the dispatch theory cannot be relied upon for determining the deadlines.

96. It is rather Art. 24, CISG, which embodies the receipt theory, which should be applied to these communications. Although the text of Art. 24 makes it applicable only to Part II of the CISG, there is no indication of intent by the drafters of the CISG to reject its approach in construing references to the 'receipt' of other communications as well [*Honnold, p.202; Trend Tex v. Keijer-Somers; Art. 24 ¶1, Achilles*]. According to this theory, a letter/courier reaches a person when he receives it [*Schwenzer, p.384*] and a fax reaches once it enters the recipient's fax system [*Huber/Mullis, p.79; Meat case*]. In the present case, the courier containing the LC-II reached the RESPONDENT at 00:05 MST (9 July 2014) and therefore, beyond the contractual deadline of 8 July 2014 [*Resp. Ex. R4*].

97. Moreover, the fax sent by the CLAIMANT reached the RESPONDENT at 22:42 MST and was seen by the RESPONDENT only on 9 July 2014 [*St. of Def., ¶23*]. The RESPONDENT's ordinary business hours last from 8:00 – 20:00 MST [*St. of Def., ¶23*]. Strikingly, both the courier containing the LC-II and the fax were delivered after the RESPONDENT's business hours. In case the communications are not received within the business hours of the recipient, the receipt will be considered to have occurred the following day when the working hours commence [*Schwenzer-Guide, Art. 24; Viscasillas-Contract Conclusion; Roach, p.144*]. In a similar case, Gatehouse J in *Mondial v. Astarte* found that a telex, which was received at 23:41 was effective only at the time of the opening of office hours on the next day, as it was received outside the business hours. Therefore, the RESPONDENT effectively received both the communications on 9 July 2014, which was beyond the contractual deadline.

98. Further, the CLAIMANT asserts that there is a regular practice between the parties of exchanging documents during working days and not working hours and in this regard the CLAIMANT relies upon the fact that the N/T sent by the RESPONDENT was received by the CLAIMANT at 03:45 RST [*Cl. Memo., ¶33*]. However, to establish a practice, a certain frequency and duration is necessary, more than the parties simply repeating a certain circumstance once [*Schwenzer, p.186; Cutlery case; Caiato v. SFF*]. The N/T referred to by the CLAIMANT was to be established only by 31 August 2014, and thus, an issue of adhering to deadlines never arose [*Cl. Ex. C1; P.O.2, ¶22*] and hence, could be sent by the RESPONDENT at any time prior to the stipulated date.

c. Mediterraneo Standard Time should be applied in ascertaining the time of receipt of communication.

99. Additionally, the CLAIMANT may argue that Ruritania Standard Time should be applied in order to determine the time of receipt of communications from the CLAIMANT. However, the RESPONDENT asserts that it is MST that should be considered. Pursuant to Art. 7(1), CISG, the Principles facilitate the CISG in the task of maintaining its international character and promoting uniformity [*M.J. Bonell, pp.26-39*]. In the present case, the Contract is governed by the law of Danubia [*Art. 20, Cl. Ex. C1*] and the DCL has adopted the Principles including Art. 1.12 [*P.O.2, ¶43*]. In light of these considerations, these Principles can be applied as "general principles" because of their adoption as the DCL [*Art. 7(2), CISG; Schwenzer, p.143*]. Art. 1.12(3) of the Principles states that the relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise. In the present case, it is not clear which party stipulated the deadline in the Contract [*P.O.2, ¶12*]. However, it is reasonable when interpreting contracts to consider the time zone at the place where delivery is to be performed [*Schwenzer/Pascal/Kee, p.347*]. In the present case, the

importance of the delivery/receipt of the L/C has already been established [¶*94*]. Further, Illustration 4 to Art. 1.12 indicates that when parties are located in different places, the time zone of the party that has to receive the communication is relevant [*Bonell-UNIDROIT, p.102*]. Moreover, the CLAIMANT was aware of the time difference between Equatoriana and Mediterraneo [*P.O.2,* ¶*23*]. Therefore, MST should be applied in determining the deadlines under the Contract.

iii. The delay in the receipt of the L/C-II constitutes a fundamental breach of the Contract.

100. The CLAIMANT contends that even if the L/C-II was issued after the deadline, it did not amount to a fundamental breach of the Contract as defined in Art. 25, CISG [*Cl. Memo.,* ¶*34*]. However, the RESPONDENT was entitled to avoid the Contract under Art. 64(1)(a), as timely receipt of the L/C-II was of essence to the Contract [**a.**] and a delay in receiving the same causes substantial detriment owing to the volatility in the prices of Coltan [**b.**]. Further, the CLAIMANT was aware of the fluctuation in prices and therefore, the detriment was foreseeable to it [**c.**]. Finally, the CLAIMANT cannot avail the defense under Art. 64(2), CISG, that the RESPONDENT had lost the right to avoid the Contract, as the CLAIMANT had not "*paid the price*" under the Contract [**d.**].

a. The timely receipt of the L/C was of essence to the Contract.

101. The last date for the receipt of the L/C was 8 July 2014. As discussed previously, the L/C-II was effectively delivered to the RESPONDENT only on 9 July 2014 [¶*97*]. Contrary to the CLAIMANT's assertion that a late performance does not constitute a fundamental breach, [*Cl. Memo.,* ¶*34*], the failure to open the L/C within the specified time is a failure to meet the "obligation to pay the price" of the goods in the meaning of Art. 54, CISG [*Crude oil case; Steel coil case; Canned oranges case; Lorenzon, p.237*]. The issuance of the L/C is a condition precedent to the performance of the seller's duties, such as shipping the goods [*ICC Case No. 7585; ICC Case No. 7197; Propane case*]. This is particularly important in CIF contracts, as the seller needs to be assured that on shipment, he will be paid [*Arcos v. Ronaasen; Huber/Mullis, p.226; Schwenzer, p.420; Iron molybdenum case*]. In the present case, shipment was to be done within 60 days of the receipt of the L/C [*Cl. Ex. C2*]; therefore, timely receipt of the L/C was of essence to the Contract. In the case of *Downs v. Perwaja*, the Supreme Court of Queensland held that the refusal to establish a timely L/C was clearly a fundamental breach within the meaning of Arts. 25 & 64(1)(a), CISG. A buyer who fails to issue a L/C within the stipulated period commits a fundamental breach of contract [*Wahbe Tamari v. Sociedade; Bridge-Sales, p.25; International Asset v. Films*]. Therefore, the CLAIMANT breached its obligation under the Contract by

failing to issue the L/C within the stipulated period of 14 days, giving the RESPONDENT a right to avoid the Contract under Art. 64(1)(a), CISG.

b. The delay in the receipt of the L/C caused substantial detriment owing to the volatile prices of Coltan.

102. Strict compliance with contractual provisions, including the deadline under Art. 4 of the Contract, is required in the trade of Coltan [*P.O.2, ¶18*]. A fundamental breach more readily occurs in a commodity trade due to the prevalence of considerable price fluctuations [*Bridge-Uniformity, pp.102-105; Bunge v. Tradax*], which are mostly seen in CIF contracts [*Winsor, p.100*]. Therefore, if the goods are subject to strong price fluctuations in volatile markets, it is extremely important to adhere strictly to timelines [*Mullis, p.329; Schwenzer, p.897*]. Contrary to the CLAIMANT's contention [*Cl. Memo., ¶34*], even a small delay would result in a fundamental breach of contract as commodity markets are subject to considerable day-to-day and even intra-day fluctuations [*Powdered case; Leisinger, p.119*].

103. In the present case, the market conditions for conflict-free Coltan are characterized by high volatility and instability [*St. of Claim, ¶4; St. of Def., ¶31*], as it is a sparse resource located in politically unstable areas [*Ord. of the EA, ¶3*]. There are rising political tensions in Xanadu, which may reflect in the prices of Coltan as it is very likely that proceeds from the Coltan trade would play a major role in financing the opposition party, creating a scarcity of conflict-free Coltan [*P.O.2, ¶29*]. Further, it is expected that the demand for Coltan would increase due to the development of a game console that would require Coltan as an element [*St. of Claim, ¶11*]. Owing to these factors, the price of Coltan is expected to fluctuate by USD 5/kg in the future [*P.O.2, ¶30*]. The prices may even double if the situation persists [*P.O.2, ¶30*]. At the time of entering into the Contract, the parties had agreed that 30MT would be priced at USD 45/KG, which amounted to USD 1,350,000. If the price increases by USD 5/KG, then the new price would bear a difference of USD 150,000. A fundamental breach of contract may exist where no loss has yet been suffered by the other party, but is expected to occur at some time in the future as well [*Huber/Mullis, p.215; Egyptian cotton case*]. As the prices are extremely volatile, a delay in opening the L/C by the CLAIMANT has caused substantial detriment to the RESPONDENT and thereby a fundamental breach of the Contract.

c. The substantial detriment was foreseeable to the CLAIMANT.

104. Whether a breach is fundamental depends not only on its consequences but also on the foreseeability of those consequences to the other party [*Koch, p.228; Hossam, p.2*]. This includes the knowledge of relevant market conditions [*Babiak, p.122*]. The CLAIMANT was aware of the volatile nature of the commodity as well as the launch of the new game console [*St. of Claim, ¶¶4, 11*]. In

light of this knowledge, the CLAIMANT can be reasonably expected to foresee that any delay would amount to a fundamental breach of the Contract.

d. The CLAIMANT cannot avail the defense under Art. 64(2), CISG.

105. The CLAIMANT states that by establishing the L/C, it had paid the purchase price and the RESPONDENT lost its right to avoid the Contract under Art. 64 [*Cl. Memo., ¶34*]. However, in order to attract Art. 64(2), CISG, the CLAIMANT should have "*paid the price*", i.e., the seller does not lose his right to avoid the contract until the *total* price has been paid [*Commentary, Art. 64*]. The opening of an L/C is a step towards the payment of price under Art. 54, CISG [*Downs v. Perwaja; ICC Case No. 11849; Gabriel, p.273*]. However, it is not an absolute guarantee of payment, but rather a payment mechanism, which makes the transaction more secure [*UNCTAD, p.6; Singh/Leisinger, p.183; Award no. 123/1992*]. Moreover, payment by an L/C is considered as a 'conditional payment' and not 'absolute payment' of the purchase price [*Alan v. Nasr; Gutteridge/Megrah, ¶3-26; Soproma v. Marine; Clarke, pp.269-270; Greenough v. Munroe*]. In the present case, Art. 4 of the Contract explicitly states, "*payment is due 30 days after presentation of the documents*". It is clear that the whole of the price will be paid only upon presentation of documents. Even the UCP 600 states that the bank honours the payment only after the presentation [*Art. 8, UCP 600*]. Therefore, although the issuance of an L/C is a part of the obligation to pay the price [*Art. 54*], it does not fall within the ambit of Art. 64(2), as the CLAIMANT has not "*paid the price*" in entirety by establishing the L/C.

iv. <u>The requirement of a commercial invoice constitutes a fundamental breach.</u>

106. The L/C-II required the presentation of an additional document of commercial invoice, which was not required earlier under the L/C-I [*Cl. Ex. C8*]. This addition to the L/C-II amounted to a fundamental breach of the Contract. The RESPONDENT will establish that the parties, through their conduct, had waived the requirement of a commercial invoice [**a.**]. Further, the RESPONDENT was substantially deprived of what it expected under the Contract as the commercial invoice increased the burden of documentary compliance on the RESPONDENT [**b.**]. Finally, there exists no established practice between the parties to provide a commercial invoice [**c.**].

a. The parties had waived the requirement of a commercial invoice.

107. The RESPONDENT asserts that the parties had waived the requirement of providing a commercial invoice. In terms of Art. 8, CISG, the intention of the parties may be gauged through their statements and conduct in the performance of the contract [*MCC v. Cremica*] and parties can waive their rights either expressly or impliedly [*Surface protective film case*]. In the present matter, the Contract did not require a commercial invoice to be presented by the RESPONDENT. Importantly, even the

L/C-I did not mention the requirement of a commercial invoice [*Cl. Ex. C5*]. Strict compliance with contractual provisions is required in the trade of Coltan [*P.O.2, ¶18*]. It can thereby be inferred from its conduct, that the CLAIMANT did not require a commercial invoice. Once an obligation is waived, the parties lose their right to seek enforcement of such obligation in subsequent conduct [*Video recorders case; Ice-cream parlor case; Melody v. Olympic*]. Furthermore, Art. 4 of the Contract states that the L/C should "*be acceptable in content to the seller*". This suggests that some contractual discretion was given to the RESPONDENT to determine the contents of the L/C. Thus, it is important for the seller to exercise this discretion and agree to the terms contained in the L/C [*Hooley, p.68; Abu Dhabi v. Product Star; Nickles/Mathhews, p.467*]. In a similiar case before an arbitral tribunal, the buyer had failed to issue a conforming L/C, therefore, as per the seller's request, the buyer had to make amendments. The buyer, without the consent of the seller, effected changes in the L/C and was held to have breached the contract [*Hot-dipped steel case*]. Here, the RESPONDENT clearly stated in its notice of avoidance for the L/C-I that in particular, only two discrepancies had to be resolved - that the L/C-I related to 100MT, and it contained different delivery terms [*Cl. Ex. C7*]. Although the L/C-II rectified these two defects, it required a commercial invoice, which was not agreed upon in the Contract or subsequent negotiations [*Cl. Ex. C8*]. Cumulative violations of various contractual obligations make the finding of a fundamental breach more probable [*Kröll, p.337; Huber/Mullis, p.214*]. Therefore, as the parties, through their conduct, had clearly waived this requirement, the inclusion of a commercial invoice in the L/C-II fundamentally breached the Contract.

b. The presentation of a commercial invoice increases the burden on the RESPONDENT.

108. A commercial invoice must contain a description of the goods that strictly conforms to the description in the L/C [*Art. 18(c), UCP 600; Bijl, pp.19-28; Hot-rolled plates case*]. If the commercial invoice does not comply with the L/C, the bank may reject the documents and refuse the payment [*Davidson, p.65*]. Documents that do not conform to the specifications in the L/C in commodity trade increase the risk of rejection and non-payment [*Bergami, p.8*]. Even minor discrepancies may entitle the bank to refuse payment [*Bulgrains v. Shinhan; United Bank v. Banque*]. In the present matter, the RESPONDENT is substantially deprived of its expectations under the Contract as any mistake or lack of information can lead to unnecessary extra costs and further delays [*UNCTAD, p.31*].

c. There is no established practice of providing a commercial invoice between the parties.

109. Additionally, the CLAIMANT asserts that the RESPONDENT should provide a commercial invoice on the basis of an established practice between the parties [*Cl. Memo., ¶37*]. Under Art. 9, CISG, it is necessary that both the parties accept the conduct as a practice [*Propane case*]. In the present case, the

practice of providing a commercial invoice only existed between the ADDITIONAL PARTY and the RESPONDENT [*P.O.2, ¶16*]. Additionally, it is possible to end a practice [*ICC Case No. 8817*], which can occur through a change in the original relationship [*Schwenzer, p.187; Pamboukis, p.112; Honnold, p.126*]. Where the parties have not concluded any previous contract, no practices can be established between them [*Sluiter v. Blumenerdenwerk*]. As this was the first contract of its kind between the three parties, an established practice cannot be inferred.

CONCLUSION: The CLAIMANT breached its obligations under the Contract by issuing a non-conforming L/C-I. This issuance amounted to fundamental breach of the Contract. Alternatively, the CLAIMANT did not issue a conforming L/C even within the additional period of time fixed by the RESPONDENT. In any case, it was clear to the RESPONDENT on 5 July 2014 that the CLAIMANT will commit a fundamental breach of the Contract. In light of the above reasons, the RESPONDENT rightfully avoided the Contract on 7 July 2014. Furthermore, the RESPONDENT rightfully avoided the Contract on 9 July 2014 as the issuance of the L/C-II by the CLAIMANT was timed out. Alternatively, the L/C-II could not be accepted, as it did not adhere to the timelines under the Contract. Further, the L/C-II required a commercial invoice, which was not a requirement under the L/C-I or the Contract. Thus, both the delay and the deviation amounted to a fundamental breach, giving the RESPONDENT a right to avoid the Contract.

REQUEST FOR RELIEF

In light of the above submissions, the RESPONDENT respectfully requests the Tribunal to find that:

(1) The Tribunal has jurisdiction over the ADDITIONAL PARTY;

(2) The order of the EA is invalid and should be lifted;

(3) The RESPONDENT has rightfully avoided the Contract.

For Mediterraneo

*signed*_____, 22 January 2015

ATTORNEYS

/s/ /s/

_____ _____

(Bhavana Sunder) (Gargi Bohra)

/s/ /s/

_____ _____

(Nikhil Variyar) (Shivesh Aggarwal)