Twenty-Second Annual

Willem C. Vis International Commercial Arbitration Moot

27 March to 2 April 2015, Vienna

Memorandum for Respondent

University of St.Gallen

On Behalf of:

Mediterraneo Mining SOE
5-6 Mineral Street
Capital City, Mediterraneo

Respondent

Against:

Vulcan Coltan Ltd
21 Magma Street
Oceanside, Equatoriana
&
Global Minerals
Excavation Place 5
Hansetown, Ruritania

Claimant/Global Minerals

ICC Case: No. 22000/AC

Aina Cordero Rothen • Ilona Gremminger

Kerim Tbaishat • David Wohlgemuth

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LIST OF ABBREVIATIONS

§(§)	Paragraph(s)
&	and
AfEM	Application for Emergency Measures
ARfA	Answer to Request for Arbitration
Art.	Article
AtCJ	Answer to Counterclaim and Joinder
BGH	Bundesgerichtshof (Federal Supreme Court, Germany)
CA	Cour d'appel (Court of appeals, France)
cf.	confer
Chap.	Chapter
CIF	Cost Insurance Freight
CIP	Carriage and Insurance Paid to
CISG AC Op. No.	CISG Advisory Council Opinion Number
Cl. Ex. No.	CLAIMANT's Exhibit Number
CoA	Court of Appeals
Corp.	Corporation
Dist. Ct.	District Court
EA	Emergency Arbitrator
e.g.	exempli gratia (for example)
ed.	Edition
Ed(s).	Editor(s)
et al.	et alii (and others)
et seq.	et sequence
et seqq.	et sequences
High Ct.	High Court
i.e.	id est (that means)
ICC	International Chamber of Commerce
kg	kilogram
Mr.	Mister
No.	Number(s)
OEA	Order of Emergency Arbitrator

OGH	Oberster Gerichtshof (Federal Supreme Court, Austria)
OLG	Oberlandesgericht (Court of Appeals, Germany)
p(p).	page(s)
PO No.	Procedural Order Number
Re. Ex. No.	RESPONDENT's Exhibit Number
RfA	Request for Arbitration
SCC	Stockholm Chamber of Commerce
Sup. Ct.	Supreme Court
Super. Trial Ct.	Superior Trial Court
t	Metric Ton(s)
U.S.	United States
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
USD	United States Dollar(s)
v.	versus
Vol.	Volume

STATEMENT OF FACTS

1 Mediterraneo Mining SOE ("RESPONDENT") is a state-owned enterprise that operates all coltan mines located in Mediterraneo, where it is based *(RfA, § 2)*.

2 Vulcan Coltan Ltd ("CLAIMANT") is domiciled in Equatoriana and is specialized in trading conflict free coltan *(RfA, §§ 1, 4)*. Its parent company Global Minerals ("GLOBAL MINERALS"), a broker of rare minerals located in Ruritania, is a long-lasting business partner of RESPONDENT *(RfA, § 1)*.

3 On **23 March 2014**, Mr. Storm, GLOBAL MINERALS' Chief Operating Officer, approached RESPONDENT to negotiate a large delivery of conflict free coltan *(Re. Ex. No. 1, § 2)*.

4 On **28 March 2014**, after reaching an agreement, CLAIMANT, RESPONDENT and GLOBAL MINERALS ("Parties") signed a purchase contract ("Contract") over 30 t of coltan for the price of USD 45/kg, amounting a total of USD 1,350,000 *(Cl. Ex. No. 1)*. Under this Contract, CLAIMANT was to secure payment by having a letter of credit established within fourteen days of receiving the notice of transport ("Notice of Transport") sent by RESPONDENT *(Cl. Ex. No. 1, Art. 4)*.

5 On **25 June 2014**, RESPONDENT provided CLAIMANT with the Notice of Transport *(Cl. Ex. No. 2)*. In the email to which the Notice of Transport was attached, RESPONDENT informed CLAIMANT that it was ready to deliver the coltan earlier than anticipated since one of its major customers had defaulted on its purchase of more than 100 t of coltan *(Cl. Ex. No. 3)*. Attempting to take advantage of this information, CLAIMANT tried unilaterally to amend the Contract from 30 t to 100 t of coltan *(RfA, § 19)*.

6 By the **end of June 2014**, the political situation in Xanadu, the world's main producer of conflict free coltan, temporarily destabilized with the withdrawal of the leading party from the government *(Re. Ex. No. 3; OEA, § 5)*. At about the same time, news leaked that a new game console had been developed *(RfA, § 11)*. As a consequence of these two events, the price of conflict free coltan immediately rose *(PO No. 2, § 30)*.

7 On **4 July 2014**, GLOBAL MINERALS issued a letter of credit ("First Letter of Credit"). This Letter of Credit did not honor the content of the Contract as it referred to 100 t of coltan, thus exceeding the contractually agreed amount by 70 t. Further, the First Letter of Credit stipulated delivery terms that had not been agreed upon by the Parties *(Cl. Ex. No. 5)*.

8 On **6 July 2014**, the launch of the game console was postponed to not earlier than summer 2015. In addition, information suggested that, due to new technology, the amount of coltan needed to produce the console would be much smaller than anticipated *(PO No. 2, § 30)*.

9 On **7 July 2014**, based on the non-compliance of the First Letter of Credit *(ARfA, § 19)*, RESPONDENT declared the Contract avoided for fundamental breach *(Cl. Ex. No. 7)*. As

CLAIMANT had insisted on the delivery of 100 t of coltan, RESPONDENT was entitled to avoid the Contract for anticipatory breach *(Cl. Ex. No. 6)*.

10 On **8 July 2014**, after RESPONDENT's rightful declaration of avoidance, GLOBAL MINERALS established a second letter of credit ("Second Letter of Credit") with the objective to cure the mistakes contained in the First Letter of Credit *(Cl. Ex. No. 8, 9, 10)*. However, even if CLAIMANT had been entitled to cure these mistakes, the Second Letter of Credit would have been belated; it only reached RESPONDENT on 9 July 2014, i.e. one day after the deadline had lapsed *(Cl. Ex. No. 9; Re. Ex. No. 4)*. Moreover, GLOBAL MINERALS indicated it still insisted on the delivery of 100 t of coltan to CLAIMANT. On 8 July 2014, it had sent an advance copy of the Second Letter of Credit and threatened in the cover fax that it would enforce its rights by arbitration if RESPONDENT were not willing to deliver 100 t of coltan *(Cl. Ex. No. 10)*.

11 On **9 July 2014**, upon the belated receipt of the Second Letter of Credit and given the threat communicated in the fax, RESPONDENT rejected the Second Letter of Credit. As a precautionary measure, RESPONDENT again declared the Contract avoided for fundamental breach as well as for anticipatory breach of contract *(Re. Ex. No. 4)*.

12 On **11 July 2014,** CLAIMANT filed a Request for Arbitration on the basis of Art. 20 of the Contract ("Arbitration Agreement") *(Cl. Ex. No. 1, Art. 20)*. Simultaneously, CLAIMANT applied for emergency arbitrator measures in order to refrain RESPONDENT from disposing of the 100 t of coltan *(OEA, § 6)*. Subsequently, the emergency arbitrator ("Emergency Arbitrator") granted interim measures and ordered RESPONDENT to refrain from disposing of the 100 t of coltan *(AfEM, § 22)*.

13 On **8 August 2014**, RESPONDENT filed its Answer to the Request for Arbitration. It requested that CLAIMANT's claims be dismissed, that GLOBAL MINERALS be jointed to this Arbitration and that the order of the Emergency Arbitrator be lifted.

14 On **8 September 2014**, CLAIMANT raised the plea of lack of jurisdiction *(AtCJ, § 1)*.

SUMMARY OF ARGUMENTS

15 RESPONDENT, in its memorandum, will elaborate on the following three issues *(cf. PO No. 1, § 3)* if the Arbitral Tribunal has jurisdiction over GLOBAL MINERALS **(I)**, if the order of the Emergency Arbitrator should be lifted **(II)**, and if RESPONDENT rightfully avoided the Contract **(III)**.

16 First, GLOBAL MINERALS endorsed the Contract in order to provide financial security and, thereby, explicitly consented to the contractual terms including the broad scope of the Arbitration Agreement. Moreover, the GLOBAL MINERALS implicitly consented, under considerations of good faith, by virtue of its behavior since it was heavily involved in the conclusion, performance, and termination of the Contract. In any case, GLOBAL MINERALS is bound as the guarantor to the Contract. Alternatively, the Arbitration Agreement binds GLOBAL MINERALS by virtue of the group of companies doctrine.

17 Second, the Arbitral Tribunal should lift the Emergency Arbitrator's order as she did not have jurisdiction to order emergency measures. The Parties expressly opted out of the emergency arbitrator provisions giving state courts exclusive jurisdiction to grant interim relief. Furthermore, the Parties were not obliged to copy the ICC Standard Clause for a valid opt out of the emergency arbitrator provisions. However, even if the Emergency Arbitrator had had jurisdiction, the requirements for rendering interim relief would not have been met for the following reasons: First, there was no urgency to grant interim relief. Second, CLAIMANT could avoid any irreparable and serious harm by complying with its duty to mitigate damages. Third, the harm that the order causes to RESPONDENT substantially outweighs the advantage CLAIMANT submits it derives from the order. Lastly, CLAIMANT has no good and arguable case on the merits.

18 Third, RESPONDENT rightfully avoided the Contract. CLAIMANT issued two letters of credit that fundamentally breached the Contract: The First Letter of Credit contained the wrong terms of transportation and was issued for the wrong amount of coltan while the Second Letter of Credit was delayed. The mistakes contained in the First Letter of Credit as well as the delay of the Second Letter of Credit constitute fundamental breaches. RESPONDENT was, therefore, allowed to avoid the Contract by its declaration of avoidance of 7 July 2014 and alternatively by its declaration of avoidance of 9 July 2014. In any case, RESPONDENT was entitled to avoid the Contract for anticipatory breach on 7 July 2014 and alternatively on 9 July 2014.

I) GLOBAL MINERALS IS BOUND BY THE ARBITRATION AGREEMENT

19 The Arbitration Agreement in Art. 20 of the Contract *(Cl. Ex. No. 1, Art. 20)* is binding upon both GLOBAL MINERALS and CLAIMANT. RESPONDENT, therefore, requests the Arbitral Tribunal to declare it holds jurisdiction over GLOBAL MINERALS. Doing so is imperative as a matter of law and it is also appropriate. This is to ensure that RESPONDENT's counterclaim and its claim for costs will not be frustrated in case of bankruptcy of CLAIMANT. Indeed, CLAIMANT has no substantial assets and GLOBAL MINERALS has a history of putting its subsidiaries into bankruptcy: In 2010, a contract originally concluded between GLOBAL MINERALS and RESPONDENT was transferred to one of GLOBAL MINERALS' subsidiaries upon GLOBAL MINERALS' request. Two months later, GLOBAL MINERALS let the subsidiary become insolvent *(Re. Ex. No. 1, § 5; PO No. 2, § 19)*. To avoid this from happening again, RESPONDENT insisted on including GLOBAL MINERALS into the Contract between CLAIMANT and RESPONDENT *(ARfA, §§ 5, 26; Re. Ex. No. 1, § 4)*. Indeed, GLOBAL MINERALS consented to the Contract and the Arbitration Agreement; it is, therefore, bound by it. Every argument to the contrary is incorrect for the following reasons:

20 First, GLOBAL MINERALS explicitly consented to the Arbitration Agreement **(A)**. Second, GLOBAL MINERALS, under considerations of good faith, impliedly consented to the Arbitration Agreement **(B)**. Third, the Arbitration Agreement is binding on GLOBAL MINERALS as the guarantor **(C)**. Fourth and in the alternative, GLOBAL MINERALS is bound to the Arbitration Agreement by virtue of the group of companies doctrine **(D)**.

A. GLOBAL MINERALS EXPLICITLY CONSENTED TO THE ARBITRATION AGREEMENT

21 Contrary to CLAIMANT's and GLOBAL MINERALS' argument, GLOBAL MINERALS became a party to the Arbitration Agreement by means of its explicit consent *(cf. MfC, §§ 1, 3 et seq.)*. This is because the nature of arbitration is contractual, i.e. it binds all consenting parties *(BREKOULAKIS 2009, p. 1166; POUDRET/BESSON, § 264; cf. FERRARIO, p. 651; HANOTIAU 2001, p. 256; Silica Investors v. Tomolugen Holdins (High Ct. Singapore, 2014); Volt Sciences v. Stanford University (Sup. Ct. USA, 1989); O.I.A.E.T.I v. SOFIDIF (CA France, 1986))*. In the present case, this includes GLOBAL MINERALS. The argument, under which GLOBAL MINERALS' consent to the Arbitration Agreement was not established, is incorrect *(MfC, § 3)*.

22 First, GLOBAL MINERALS, when signing the Contract, was fully aware of the Arbitration Agreement's existence. The title of the arbitration clause was "Arbitration" and was printed in bold letters just a few lines above where the Parties signed the Contract *(Cl. Ex. No. 1)*. Moreover, GLOBAL MINERALS was also fully aware of the broad nature of the scope of the

Arbitration Agreement which stipulates that it applies "to all disputes arising out of or in connection with the present [C]ontract" *(Cl. Ex. No. 1, Art. 20)*.

23 Second, GLOBAL MINERALS signed the Contract in order to express its explicit consent to the content of the Contract and to provide the required financial guarantee for RESPONDENT *(Cl. Ex. No. 1; cf. MfC, § 7)*. This guarantee between GLOBAL MINERALS and RESPONDENT is one of the two legal relationships at hand. The other one, the seller-buyer relationship, was established between CLAIMANT and RESPONDENT, whereby a tripartite relationship among the three Parties evolved. In fact, the Arbitration Agreement exactly applies on this tripartite relationship; its broad scope encompasses both the buyer-seller-relationship and the financial guarantee, which is linked to the first relationship *(cf. MfC, §§ 7 et seq.)*. Therefore, GLOBAL MINERALS explicitly consented to an Arbitration Agreement encompassing both the seller-buyer relationship as well as its guarantee obligations under the endorsement.

24 Third, CLAIMANT unfoundedly argues that since Mr. Storm "has no official function to represent [CLAIMANT], nor any authority to act for [CLAIMANT], his signing of the contract can therefore in no way be regarded as *specific consent* to the arbitration agreement" *(MfC, § 9; emphasis added)*. This is misleading. The crucial issue is the authority that Mr. Storm has to represent GLOBAL MINERALS and not his purportedly lacking authority to represent CLAIMANT. Of course, Mr. Storm, as the COO of GLOBAL MINERALS, was authorized to act on behalf of GLOBAL MINERALS. Consequently, even following CLAIMANT's argumentation, the signature can very well be regarded as GLOBAL MINERALS' *specific consent* to the Arbitration Agreement *(cf. MfC, § 9)*.

25 Hence, GLOBAL MINERALS explicitly consented to the Arbitration Agreement.

B. GLOBAL MINERALS IMPLICITLY CONSENTED TO THE ARBITRATION AGREEMENT UNDER CONSIDERATIONS OF GOOD FAITH

26 GLOBAL MINERALS not only explicitly consented *(cf. §§ 21 et seqq.)*, but also impliedly consented to the Arbitration Agreement. The theory of implied consent is widely recognized and entails that an entity may become a party to an arbitration agreement by its mere behavior *(BORN, p. 1427; ICC Case No. 5721/1990)*. In particular, the involvement in the negotiation, performance, or termination of a contract can bind a party to the arbitration clause *(ICC Case No. 9771/2001, 6000/1988; E. Holding v. Z Ltd., Mr. G. (UNCITRAL Tribunal, 2011))*. GLOBAL MINERALS was heavily involved during all stages of the contractual relationship between the Parties. Therefore, GLOBAL MINERALS cannot retrospectively insist on the fact that its statements and behavior did not constitute implied consent *(cf. Motorola v. Uzan (CoA USA, 2004))*.

27 First, the principle of binding third parties based on good faith is applicable in the present case **(1)**. Second, GLOBAL MINERALS' interference in the contractual relationship between the Parties shows its implied consent to the Arbitration Agreement **(2)**.

1. The Principle of Good Faith Is Applicable When Determining Whether a Party Is Bound by an Arbitration Agreement

28 The principle of good faith is a key concept in most jurisdictions and entails the general duty of a party to act as reasonably as it would expect its counterparty to act *(MACKAAY, p 2; ZACCARIA, p. 102)*. This principle also applies when assessing whether a party, by virtue of its behavior, is bound by an arbitration agreement *(cf. BLESSING, § 503)*. Conversely, CLAIMANT erroneously claims that the good faith principle is not applicable in the present case *(MfC, § 40)*. This is incorrect for the following reasons:

29 First, determining the parties to an arbitration agreement is often an inquiry of the parties' genuine intentions in the light of good faith *(ZUBERBÜHLER, p. 33; BLESSING, § 503; BORN, p. 1415)*. Indeed, in an American case applying Swiss law, the court held that a party creating the impression of being a party to the contract could not later insist that the perceptions it had created had not been in line with its true intentions *(KELLERHALS/BERGER, § 521; MRÁZ, p. 58; Motorola v. Uzan (CoA USA, 2004))*.

30 Second, a party that participated in the conclusion, execution, and termination of the contract is bound to an arbitration agreement based on the good faith principle under most national laws *(BLESSING in Blessing, p. 162 et seq.)*. Contrary to CLAIMANT's position, the same is true for Danubia and is not contradicted by the fact that Danubia does not have an express provision on the principle of good faith *(cf. MfC, § 42)*; rather, the only reason why Danubian national law does not expressly mention good faith is because of its legislative tradition not to set out the general principles on which the statutes are based *(PO No. 2, § 43)*. This is corroborated by the fact that Danubian courts have repeatedly relied on good faith arguments *(PO No 2, § 47)*. Thus, good faith considerations must be taken into account when deciding whether GLOBAL MINERALS became a party to the Arbitration Agreement.

2. GLOBAL MINERALS' Behavior Shows Its Implied Consent under Considerations of Good Faith

31 GLOBAL MINERALS impliedly consented to the Arbitration Agreement. As stated, implied consent can, inter alia, be deduced from a party's behavior under considerations of good faith. CLAIMANT alleges that GLOBAL MINERALS' behavior does not signify any consent to the Arbitration Agreement *(MfC, § 4)*. CLAIMANT is mistaken. GLOBAL MINERALS was involved in

the conclusion **(a)**, the performance **(b)** as well as in the stage of the termination of the Contract **(c)**.

a) GLOBAL MINERALS Was Involved in the Conclusion of the Contract

32 GLOBAL MINERALS was the leading party on the buyer's side in the conclusion of the Contract *(cf. MfC, § 4)*. Mr. Storm, the COO of GLOBAL MINERALS, first approached RESPONDENT to discuss a new coltan deal aiming for a closer cooperation for the benefit of "all parties involved", i.e. CLAIMANT, RESPONDENT, and GLOBAL MINERALS *(Re. Ex. No. 1, §§ 2 et seq.)*.

33 Moreover, RESPONDENT only entered into the Contract after GLOBAL MINERALS had agreed to be part of it; GLOBAL MINERALS, therefore, was not only to ensure payment, but also signed the Contract *(ARfA, § 7)*. This was different from previous transactions between RESPONDENT and parties of the Global Minerals Group: Formerly, GLOBAL MINERALS would only provide financial security if the counterparty insisted on those *(PO No. 2, § 7)*. However, in the present case, GLOBAL MINERALS did not only provide financial security for CLAIMANT but even suggested to sign the Contract *(PO No. 2, § 12)*.

34 Hence, GLOBAL MINERALS approached RESPONDENT, negotiated and signed the Contract and, therefore, was not only involved but the driving force in the conclusion of the Contract.

b) GLOBAL MINERALS Was Involved in the Performance of the Contract

35 GLOBAL MINERALS was essentially involved in the performance of the Contract. In particular, it had the two letters of credit established *(Cl. Ex. No. 5, 8)*. This is crucial. Certain case law and doctrine hold that a parent company may *supervise or assist* its subsidiaries during performance of its contractual duties without becoming party to the Contract *(ICC Case No. 10758/2000; cf. BREKOULAKIS 2010, p. 182)*. This is essentially what CLAIMANT argues when it submits that GLOBAL MINERALS was "only marginally involved" and "merely assisting" CLAIMANT *(MfC, § 14)*. Yet, GLOBAL MINERALS' role was much more important. By establishing a letter of credit, it performed one of the buyer's main duties *(cf. Cl. Ex. No. 1, Art. 4)*. This clearly does not lay within the scope of merely *supervising or assisting* its subsidiaries and must, therefore, be considered as an intense involvement.

36 Moreover, CLAIMANT's Mr. Storm was the main contact person on the buyer's side *(Cl. Ex. No. 3, 4, 6, 10)*. On several occasions, he even addressed RESPONDENT directly without putting CLAIMANT in copy *(Cl. Ex. No. 3, 10)*. Mr. Storm, obviously, acted as the main contact person for RESPONDENT and, therefore, played an indispensible part during the performance of the Contract. He was the *spiritus rector*.

37 In addition, GLOBAL MINERALS' role was clear from the beginning and it did not create any confusion *(cf. MfC, § 45)*. This is evidenced in GLOBAL MINERALS' correspondence. Not only was

GLOBAL MINERALS always involved in the subject matter, it further used phrases like "we extend the order" or "we are looking forward to receiving", showing that it considered itself as a an active party to the Contract *(Cl. Ex. No. 4, 6)*.

38 Lastly, even if there had been any confusion that was caused by GLOBAL MINERALS' role, then GLOBAL MINERALS could of course not rely on the confusion that it itself had created. Any such argument would be contrary to good faith and fair dealing *(cf. ICC Case No. 5721/1990)*.

39 Conclusively, GLOBAL MINERALS was heavily involved in the performance of the Contract and must, therefore, be regarded as a party to the Arbitration Agreement governing all disputes in connection with the Contract.

c) GLOBAL MINERALS Was Involved in the Termination of the Contract

40 RESPONDENT validly avoided the Contract on 7 July 2014 *(Cl. Ex. No. 7; cf. §§ 106 et seqq.)*. Thereafter, the only person reacting was Mr. Storm with his fax of 8 July 2014. This was when he attached a copy of the Second Letter of Credit and threatened that GLOBAL MINERALS would enforce its rights in arbitration; additionally, he asked RESPONDENT for an assurance that it would refrain from any actions such as disposing sufficient quantities of coltan *(Cl. Ex. No. 10; PO No. 2, § 7)*.

41 Mr. Storm's threat to enforce its rights in arbitration clearly demonstrates that GLOBAL MINERALS considered itself to be entitled to sue RESPONDENT under the Arbitration Agreement. Conversely, it so acknowledged that it is bound by this agreement.

42 Thus, CLAIMANT's allegation that "GLOBAL MINERALS never presented itself in a way that suggested it had implicitly consented to being a party to the Arbitration Agreement" is wrong *(MfC, § 15)*. GLOBAL MINERALS was involved in the conclusion, performance, and termination of the Contract. Therefore and taking into account principles of good faith, GLOBAL MINERALS' conduct shall be regarded as implied consent to the Arbitration Agreement.

C. IN ANY CASE, THE ARBITRATION AGREEMENT BINDS GLOBAL MINERALS AS THE GUARANTOR

43 Even if this honorable Arbitral Tribunal were to deny GLOBAL MINERALS' party status to the Arbitration Agreement and refuse the existence of a tripartite agreement, the Arbitration Agreement still binds GLOBAL MINERALS under its endorsement. Part of GLOBAL MINERALS' endorsement stands for the financial guarantee it provided in order to secure RESPONDENT's payment claim.

44 Case law confirms that "a guarantor who endorses a contract is generally bound by the arbitration agreement in the contract" *(Stellar v. Hudson (High Ct. UK, 2010))*. Also, a guarantor is bound by the arbitration agreement when it signed the main contract *(Bank of Philippines v.*

Chemtex Fibers (Dist. Ct. USA, 1985)). A U.S. court ruled similarly in case where a guarantor signed a guarantee agreement, which formed part of the underlying contract. The court held that if an arbitration agreement is broad enough to encompass the guarantee agreement, then the guarantors are subject to arbitration based on the arbitration agreement governing the underlying contract *(Bettis Group v. Transatlantic Petroleum (CoA USA, 2002))*. Furthermore, another U.S. court ruled that if the guarantor itself fulfills contractual obligations, the guarantor falls within the scope of the arbitration agreement *(Kvaerner v. Bank of Tokyo (CoA USA, 2000))*.

45 All requirements of the above case law are satisfied in the case at hand. GLOBAL MINERALS' endorsement was made by Mr. Storm signing the Contract in order to provide a financial guarantee *(MfC, § 9)*; therefore, the Arbitration Agreement binds GLOBAL MINERALS *(cf. Stellar v. Hudson (High Ct. UK, 2010); Bank of Philippines v. Chemtex Fibers (Dist. Ct. USA, 1985))*. Moreover, the endorsement formed part of the underlying Contract between the Parties and the scope of the Arbitration Agreement is broad enough to encompass the financial guarantee *(cf. Bettis Group v. Transatlantic Petroleum (CoA USA, 2002); §§ 22 et seqq.)*. Furthermore and as demonstrated, GLOBAL MINERALS fulfilled at least one of the buyer's contractual obligations by establishing the letter of credit *(cf. Kvaerner v. Bank of Tokyo (CoA USA, 2000))*.

46 In addition, according to the UK Supreme Court, it must be assumed that rational businessmen, having two contractual relationships connected to each other, would intend to have disputes arising out of either contract decided by the *same* tribunal and through a common dispute resolution mechanism *(Fiona Trust v. Privalov (Sup. Ct. UK, 2007); cf. Stellar v. Hudson (High Ct. UK, 2010))*. This is also true in the present case as it would make no sense to have disputes in connection with the endorsement decided by another forum than disputes arising out of the main contract obligations.

47 Lastly, applying the same dispute resolution method is reasonable under considerations of efficiency, expediency and costs. Hence, all the requirements necessary to have a guarantor bound by an arbitration agreement covering the underlying contract set out by case law are met and, therefore, the Arbitration Agreement is binding upon the guarantor, i.e. GLOBAL MINERALS.

D. ALTERNATIVELY, GLOBAL MINERALS IS BOUND TO THE ARBITRATION AGREEMENT BY VIRTUE OF THE GROUP OF COMPANIES DOCTRINE

48 RESPONDENT has demonstrated that GLOBAL MINERALS is a genuine party to the Arbitration Agreement *(cf. §§ 21 et seqq.)*. However, even if this Arbitral Tribunal were to conclude that GLOBAL MINERALS is not a party to the Arbitration Agreement, it is bound by virtue of the group of companies doctrine. This doctrine provides for an extension of an arbitration agreement to other members of the same group of companies to which the signatory belongs if

both parties form one and the same economic reality *(REDFERN et al., pp. 148 et seqq.; ICC Case No. 4131/1982)*.

49 In the present case, the group of companies doctrine is applicable as a transnational principle **(1)** and, in addition, GLOBAL MINERALS and CLAIMANT form one and the same economic reality **(2)**.

1. The Group of Companies Doctrine Is Applicable

50 The group of companies doctrine, a legal doctrine governing the question whether to extend the arbitration agreement to a third party *(BURN, p. 1)*, is applicable in the present case.

51 The doctrine was specifically developed in the context of arbitration and is generally treated as a rule of transnational law *(BORN, pp. 1445, 1487; ICC Case No. 4131/1982, 8385/2003)*. It therefore, irrespective of the applicable *lex arbitri*, applies as a "usage of international commerce" *(ICC Case No. 4131/1982)*. Hence, as Art. 21 ICC 2012 Rules states that "the Arbitral Tribunal shall take account of [...] any relevant trade usages", the ICC 2012 Rules, thus, expressly require the Arbitral Tribunal to apply the group of companies doctrine.

52 Conversely, CLAIMANT argues that the group of companies doctrine is not applicable since the Danubian Contract Law ("DCL"), which is a verbatim adoption of the UNIDROIT Principles 2010 *(PO No. 2, § 43)*, does not recognize it *(MfC, §§ 17 et seqq.)*. This is incorrect for the above-explained reasons. Moreover, CLAIMANT solely bases its argument on the fact that some authors have commented the Dow Chemical case and claimed that "Danubian courts will most likely not follow the doctrine" *(PO No. 2, § 46; MfC, § 19)*. This is speculative as Danubian courts have never rejected the group of companies doctrine *(PO No. 2, § 46)*. Moreover, these comments, which are more than 20 years old, are outdated *(cf. PO No. 2, § 46)*. Circumstances have changed essentially: globalization has increased, and holding structures and multinational corporations have developed. It is, therefore, not reasonable to rely on these outdated comments.

53 Furthermore, national law is not to be applied in the context of the group of companies doctrine as the application thereof has been rejected by numerous arbitral awards *(ICC Case No. 8385/2003, 5721/1990)*. As JARVIN confirms,"[t]he existence of an intention to be bound to an arbitration agreement is demonstrated without reference to a particular law" *(pp. 196 et seq.)*.

54 Conclusively, the Arbitral Tribunal shall dismiss CLAIMANT's claim not to apply the group of companies doctrine as its application is a matter of transnational law. The group of companies doctrine, therefore, applies on the issue whether to bind GLOBAL MINERALS to the Arbitration Agreement or not.

2. Global Minerals and Claimant Form One and the Same Economic Reality

55 GLOBAL MINERALS and CLAIMANT form one and the same economic reality, which leads to the application of the group of companies doctrine and the extension of the Arbitration Agreement to GLOBAL MINERALS.

56 A group of companies form one and the same economic reality where the separate legal entities belong to the same group and where the circumstances of the conclusion, performance, and termination of the contract as well as the extent of influence amongst members of the group justify an interference in the legal independence of the individual members. Moreover, in order to apply the doctrine, the parties must have mutually intended to include the third party into the arbitration agreement *(ICC Case No. 4131/1982).*

57 This is the case at hand: First, GLOBAL MINERALS and CLAIMANT form a group of companies **(a)**. Second, GLOBAL MINERALS was involved in the conclusion, participation and termination of the Contract **(b)**. Last, the Parties mutually intended GLOBAL MINERALS to be bound by the Arbitration Agreement **(c)**.

a) GLOBAL MINERALS and CLAIMANT Form a Group of Companies

58 GLOBAL MINERALS as the parent and CLAIMANT as its subsidiary are members of the same group of companies and its relation to the Contract is effectively inseparable. CLAIMANT submits that the "relationship between CLAIMANT and GLOBAL MINERALS does not justify the application of the doctrine" *(MfC, § 27).* However, the only thing that the doctrine requires is that the parties form a group of companies *(ICC Case No. 4131/1982).* This is given in the case at hand.

59 CLAIMANT alleges that, additionally, a tight group structure is needed, which is only assumed under strict conditions *(MfC, § 27).* However, there is no such condition according to case law *(ICC Case No. 4131/1982).* Rather, the threshold to be applied is fairly low; the third party must merely be a member of the same company structure to make the doctrine applicable *(ICC Case No. 4131/1982, 5103/1988, 10758/2000).* Yet, in any event, any condition of a tight relationship would be met: There is hardly any tighter group structure than that between a parent company and its 100 percent subsidiary, like CLAIMANT *(PO No. 2, § 7).*

60 Hence, GLOBAL MINERALS and CLAIMANT form a group of companies.

b) GLOBAL MINERALS Was Involved in the Conclusion, Performance and Termination of the Contract

61 CLAIMANT contends that it "follows from case law and literature that an *active role* by a third party in the conclusion, performance or termination of the sales contract is required" *(MfC, § 32; emphasis added).* RESPONDENT contests that an active role is indeed required. The only actual requirement for the doctrine to be applicable is some sort of *involvement* of the third party in the

conclusion, performance *or* termination of the contract *(HANOTIAU 2005, pp. 48 et seq.; cf. ICC Case No. 4131/1982, 9517/2000; Orri v. Société des Lubrifiants Elf Aquitaine (CA France, 1990); Sponsor A.B. v. Lestrade (CA France, 1986))*. However, GLOBAL MINERALS did not only fulfill one of these alternative requirements but all of them.

62 GLOBAL MINERALS was, as established *(cf. §§ 31 et seqq.)*, *even actively* involved in the stage of the conclusion, performance *and* termination of the Contract.

c) The Parties Mutually Intended GLOBAL MINERALS to Be Bound by the Arbitration Agreement

63 The Parties mutually intended to include GLOBAL MINERALS into the Arbitration Agreement. According to the group of companies doctrine, the key question is whether the group made its counterparty believe that the third party intended to be bound by the contract and the thereto related arbitration agreement *(SANDROCK in Böckstiegel et al., p. 98; WILSKE/SHORE, p. 157; ICC Case No. 4131/ 1982, 5103/1988, 10758/2000)*. This requirement is met in the present case *(cf. MfC, § 36)*.

64 GLOBAL MINERALS was fully involved in the contractual relationship from the beginning, e.g. it negotiated the Contract with the arbitration clause and proposed a model on which the Contract was finally drafted *(PO No. 2, § 10; cf. §§ 32 et seqq.)*. Then, GLOBAL MINERALS signed the Contract and provided the financial security *(Cl. Ex. No. 1; cf. §§ 43 et seqq.)*. Moreover, it was GLOBAL MINERALS' Mr. Storm who contacted RESPONDENT when RESPONDENT avoided the Contract *(cf. §§ 40 et seq.)*. Above all, GLOBAL MINERALS itself stated to be determined to enforce *its* right in *arbitration (Cl. Ex. No. 10)*.

65 Hence and following from the above, the Parties mutually intended GLOBAL MINERALS to be bound by the Arbitration Agreement.

II) THE ARBITRAL TRIBUNAL SHOULD LIFT THE EMERGENCY ARBITRATOR'S ORDER

66 The Emergency Arbitrator ordered RESPONDENT to refrain from disposing of any of the 100 t of coltan, although there were no grounds for issuing any interim measure *(ARfA, § 37)*. The order of the Emergency Arbitrator must, therefore, be lifted. First, the Emergency Arbitrator lacked jurisdiction **(A)**. Second, the Arbitral Tribunal is entitled to lift the Emergency Arbitrator's order **(B)**. Third and alternatively, the requirements for granting interim relief were not met **(C)**.

A. THE EMERGENCY ARBITRATOR DID NOT HAVE JURISDICTION TO ORDER EMERGENCY MEASURES

67 The Emergency Arbitrator did not have jurisdiction to order any interim relief since the Parties expressly opted out of the emergency arbitrator provisions in Art. 21 of the Contract *(Cl. Ex. No. 1, Art. 21)*. This is possible according to Art. 29(6)(b) ICC 2012 Rules, which provides for an opt out mechanism *(VOSER/BOOG, p. 82; VOSER 2011, pp. 812 et seq.; EHLE in Müller/Rigozzi, pp. 91 et seq.)*. The parties may do so under that provision by expressly agreeing that the emergency arbitrator provisions shall not apply *(WEBSTER/BÜHLER, p. 448; FRY et al., § 3-1101)*.

68 This is exactly what the Parties did in the present case by incorporating Art. 21 into the Contract **(1).** Further and contrary to CLAIMANT's submission, the Parties were not obliged to use the ICC Standard Clause to validly opt out of the emergency arbitrator provisions **(2)**.

1. The Parties Expressly Opted Out of the Emergency Arbitrator Provisions in Art. 21 of the Contract

69 The Parties expressly opted out of the emergency arbitrator provisions under Art. 29(6)(b) ICC 2012 Rules. Art. 21 of the Contract states that "the courts at the place of business of the party against which provisional measures are sought shall have *exclusive* jurisdiction" *(Cl. Ex. No. 1, Art. 21, emphasis added)*. Conversely, CLAIMANT alleges that Art. 21 solely is a specification of the jurisdiction of the state courts and not an exclusion of the ICC Emergency Arbitration *(MfC, § 71)*. CLAIMANT is wrong for numerous reasons:

70 First, unpublished ICC case law suggests that a declaration such as Art. 21 constitutes an express opt out of the emergency arbitrator provisions *(CARLEVARIS/FERIS, p. 34)*. In a recent ICC emergency arbitrator case, a jurisdictional challenge was based on a clause stipulating that the parties accepted the jurisdiction of two state courts for the purpose of provisional and conservatory measures *(CARLEVARIS/FERIS, p. 34)*. In the following emergency arbitration proceeding, one party raised the plea of lack of jurisdiction; the emergency arbitrator dismissed the plea and explained that the parties failed to attribute *exclusive jurisdiction* to the state courts

(CARLEVARIS/FERIS, p. 34). This decision is in line with the standards set in practice *(GAILLARD/SAVAGE, p. 718).* As GAILLARD/SAVAGE explain: "Parties often stipulate [in order to exclude concurrent jurisdiction] […] that the courts will have exclusive jurisdiction to [grant interim relief]" *(p. 718).*

71 In other words, excluding the concurrent jurisdiction of the emergency arbitrator requires that the parties agree that state courts shall have exclusive jurisdiction to render interim relief. In the present case, the Parties did so in Art. 21 of the Contract. They explicitly attributed *exclusive jurisdiction* to the state courts and, thereby, validly excluded the jurisdiction of the emergency arbitrator *(Cl. Ex. No. 1, Art. 21).*

72 Second, as FRY et al. state: "any […] clear language […] suffice[s]" for a valid opt out of the emergency arbitration provisions *(§ 3-1101).* Art. 21 of the Contract provides for such clear language. It unambiguously attributes *exclusive* jurisdiction to the state courts for rendering interim relief *(Cl. Ex. No. 1, Art. 21).* Therefore, Art. 21 is an express opt out of the emergency arbitrator provisions, as the term *exclusive/exclusively* is defined as: "appertaining to the subject alone, shutting out, to the exclusion of all others" *(GARNER, p. 506).*

73 Third, the Parties were aware of the amendments of the ICC 2012 Rules, i.e. they knew about the possibility of obtaining interim relief by an emergency arbitrator *(PO No. 2, § 14).* Nevertheless, the Parties incorporated Art. 21 into their Contract and, thereby, clearly expressed that they only wanted interim relief from state courts *(cf. Cl. Ex. No. 1, Art. 21).* Conversely, CLAIMANT's line of argumentation is far-fetched; if the Parties had wanted Art. 21 to be a specification of which state court is competent to issue interim relief, they would have relied on a different wording *(cf. MfC, § 71).*

74 Fourth, CLAIMANT cites SEXTON arguing that it would be illogical to assume that parties resolving disputes by arbitration would exclude interim relief from the jurisdiction of private bodies *(p. 37; MfC, § 71).* SEXTON, however, was referring to a situation where parties only have an arbitration agreement and do not regulate the process of obtaining interim relief any further *(cf. SEXTON, p. 37).* The situation is different in the case at hand *(cf. Cl. Ex. No. 1, Art. 21).*

75 Lastly, contrary to CLAIMANT's assertion, it does not undermine party autonomy to grant state courts unlimited power to order interim relief *(cf. MfC, § 78).* Such an exclusion agreement rather corroborates party autonomy *(BORN, p. 2455; SABHARWAL/ZAMAN, p. 705).* The Parties are free to exclude the Emergency Arbitrator from rendering interim relief, since the principle of concurrent jurisdiction of state courts and arbitral tribunals lies within the contractual nature of arbitration *(cf. EHLE in Alibekova/Carrow, p. 166; GAILLARD/SAVAGE, p. 718; YESILIRMAK, p. 110).*

76 In conclusion, the Emergency Arbitrator did not have jurisdiction to order interim relief as Art. 21 of the Contract contains sufficient, express wording for opting out of the emergency arbitrator provisions. Therefore, the Arbitral Tribunal should draw the necessary consequences and lift the order.

2. The Parties Are Not Obliged to Use the ICC Standard Clause for a Valid Opt Out

77 As CLAIMANT correctly puts forth *(MfC, § 67)*, parties can opt out of the emergency arbitrator provisions by including the clause "the emergency arbitrator provisions shall not apply" in their arbitration agreement *(FRY et al., § 3-1101; WEBSTER/BÜHLER, p. 449)*. CLAIMANT, however, fails to see that this standard clause is a mere suggestion by the ICC and not mandatory at all for a valid opt out *(FRY et al., §§ 3-1101, 5-7; WEBSTER/BÜHLER, p. 449)*. Hence, CLAIMANT's conclusion that the Parties did not expressly opt out only because they did not incorporate the suggested standard clause, is wrong *(MfC, §§ 67, 69)*.

78 Besides, CLAIMANT alleges that the Parties wished the emergency arbitrator provisions to apply; otherwise they would have used the ICC standard clause *(MfC, § 68)*. This would be true if the Parties did not provide sufficient, clear language for a valid opt out elsewhere *(FRY et al., § 3-1101; WEBSTER/BÜHLER, p. 449)*. In the present case, however, the Parties did provide sufficient, clear language for a valid opt out by incorporating Art. 21 into the Contract *(cf. §§ 69 et seqq.)*. Therefore, it is irrelevant that the Parties knew about the standard clause for ICC arbitration without emergency arbitrator *(cf. MfC, § 68)*.

79 In conclusion, the Parties were not obliged to use the standard clause without emergency arbitrator for a valid opt out since the Parties opted out of the emergency arbitrator provisions by Art. 21 of the Contract.

B. *THE ARBITRAL TRIBUNAL IS ENTITLED TO LIFT THE EMERGENCY ARBITRATOR'S ORDER*

80 This honorable Arbitral Tribunal is entitled to lift the order of the Emergency Arbitrator even though the Parties referred the issue of *granting* interim measures to state courts *(cf. Cl. Ex. No. 1, Art. 21)*. Art. 21 of the Contract does not hinder the Arbitral Tribunal itself to decide on the lifting of the Emergency Arbitrator's order.

81 Following the principle of competence-competence, the Arbitral Tribunal is competent to rule on the question whether it has the right to lift the Emergency Arbitrator's order *(cf. BERGER/KELLERHALS, §§ 607 et seq.)*. In addition, the Arbitral Tribunal is, based on Art. 29(3) ICC 2012 Rules, not bound to the order of the Emergency Arbitrator; rather, it is entitled to

annul the order in case the Emergency Arbitrator lacked jurisdiction at its own discretion *(cf. BAIGEL, p. 12)*.

82 Furthermore, the Arbitral Tribunal should lift the order to ensure an efficient dispute resolution between the Parties and in order to take into account the Parties' actual motives. In Art. 21 of the Contract, the Parties indeed agreed to refer exclusive jurisdiction to state courts. However, this clause was included into the Contract only because one of GLOBAL MINERALS' former subsidiaries, Precious Minerals, faced difficulties when seeking interim relief due to jurisdictional discussions; this unclear matter of jurisdiction eventually resulted in Precious Minerals' bankruptcy *(PO No. 2, § 13)*. The purpose of Art. 21 of the Contract, therefore, is to ensure that it is clear from the beginning, which forum has competence to *grant* interim relief. It does, however, not affect the question whether this Arbitral Tribunal shall be competent to *lift* the interim measure.

83 Consequently, the Arbitral Tribunal should honor the Parties' genuine intentions and accept its competence to lift the order of the Emergency Arbitrator. This does also make sense under considerations of efficiency as tedious disputes about which forum is to lift the Emergency Arbitrator's order would hinder the Parties' settling their dispute within a reasonable period of time.

C. IN ANY EVENT, THE REQUIREMENTS FOR GRANTING INTERIM RELIEF WERE NOT MET

84 The Emergency Arbitrator wrongfully assumed that interim relief, as requested by CLAIMANT, was justified *(cf. OEA, Order No. 1, 2)*. RESPONDENT will establish that none of the cumulative prerequisites for granting interim relief were met.

85 The preconditions an emergency arbitrator needs to examine are the same standards an arbitral tribunal needs to consider when deciding whether to grant interim relief *(BOOG in Arroyo, p. 819)*. In the present case, the standards are those set forth by Art. 29(1) ICC 2012 Rules and Art. 17A(a)-(b) DAL, and none of these cumulative requirements were fulfilled *(cf. CARON/ CAPLAN, p. 520)*: First, the Emergency Arbitrator's order was not urgent **(1)**. Second, CLAIMANT could avoid any irreparable and serious harm by realizing its duty to mitigate harm **(2)**. Third, RESPONDENT's harm from the Emergency Arbitrator's order is out of proportion with the advantage CLAIMANT hopes to derive from the order **(3)**. Fourth, CLAIMANT has no arguable case on the merits **(4)**.

1. The Emergency Arbitrator's Order Was Not Urgent

86 RESPONDENT strongly contests that interim relief was urgent *(cf. MfC, § 82)*. Interim relief is considered urgent in situations where immediate action is required *(VOSER 2011, p. 815)*. No immediate action is required where the frustration of the claim is speculative and there is no actual or impending danger of serious or irreparable harm *(SCHWARZ/KONRAD, p. 563; cf. SCHWARTZ, p. 60)*. In the present case, CLAIMANT purports that ordering interim relief was urgent since RESPONDENT could sell the coltan in dispute causing irreversible consequences, i.e. that CLAIMANT would not be able to fulfill its contractual obligations to its customers in May 2015 and that it would, therefore, suffer severe financial and reputational harm, possibly leading to bankruptcy *(MfC, §§ 82, 84)*. CLAIMANT, however, is mistaken. The emergency measure was not urgent since CLAIMANT could contract for alternative supply of coltan **(a)**. Moreover, the Emergency Arbitrator applied an unreasonably low threshold when determining whether interim relief was urgent **(b)**. Even if the worst-case scenario were to materialize, there would be no urgency **(c)**.

a) CLAIMANT Is Able to Contract for Alternative Supply of Coltan

87 RESPONDENT submits that CLAIMANT's claims are not frustrated and no immediate action is required as there is alternative supply *(Cl. Ex. No. 6; PO No. 2, § 34)*. Further, CLAIMANT does not have to fulfill its contractual obligations until May 2015, which leaves CLAIMANT with sufficient time to enter into new contracts *(PO No. 2, § 34)*. This is different from SCC EA 010/2012, where the purchase contract was terminated by the seller nine days before the buyer should have delivered the goods to its customers. The emergency arbitrator, therein, decided that the request was urgent since no alternative supply was available to the buyer and, due to the buyer's close deadline for the delivery of the goods under the agreement with its customer *(SCC EA 010/2012)*.

88 In the present case, the Arbitral Tribunal should lift the emergency measure because interim relief was not urgent: RESPONDENT rightfully avoided the Contract in July 2014, more than nine months before CLAIMANT has to deliver the coltan to its customer. Therefore, CLAIMANT had and still has sufficient time to contract for alternative supply for the 30 t of coltan. Indeed, CLAIMANT itself stated that it had the possibility to buy the necessary coltan elsewhere *(Cl. Ex. No. 6)*. Even if CLAIMANT might have to pay a higher price than contracted with RESPONDENT, this should not hinder CLAIMANT to do so as RESPONDENT would have to pay the price difference in the unlikely event that CLAIMANT should succeed on the merits *(cf. TANIGUCHI, p. 79; KOMAROV, p. 40; PO No. 2, § 34)*.

89 In conclusion, CLAIMANT's claims are not frustrated as CLAIMANT has been and still is able to contract for alternative supply and, therefore, no immediate action is required.

b) The Emergency Arbitrator Applied an Unreasonably Low Threshold When Determining Whether Interim Relief Was Urgent

90 The Emergency Arbitrator considered that CLAIMANT demonstrated sufficient urgency to satisfy the threshold for ordering interim relief *(OEA, § 10)*. Thereby, it applied an unreasonably low threshold. RESPONDENT submits that the Emergency Arbitrator assumed the worst-case scenario in Xanadu to be the most likely to happen *(cf. OEA, §§ 5, 13)*. Moreover, she did not take all relevant factors into account when determining whether the emergency measure was urgent *(cf. PO No. 2, § 30)*.

91 It is correct that the unstable political situation in Xanadu caused an uncertainty in the market *(PO No. 2, § 30)*. Moreover, if the situation deteriorates, Xanadu might no longer be able to deliver any coltan; in that case, it is assumed that there would not be sufficient coltan in the market to fulfill all contracts incurred by traders *(PO No. 2, §§ 30, 34)*. However, this remains unlikely. Although the month of July 2014 was marked with negative events, the situation calmed down afterwards and Xanadu is still delivering coltan *(PO No. 2, § 30)*. Hence, the assumption that Xanadu's production collapses characterizes the worst-case scenario *(PO No. 2, § 34)* and the Emergency Arbitrator based its judgment on the assumption that the situation in Xanadu is more likely to deteriorate than improve *(cf. OEA, §§ 5, 13)*. However, this assumption is unfounded.

92 Conversely, the Emergency Arbitrator did not consider the potential impact on the demand of coltan resulting from the information of a game console producer released on 6 July 2014 *(PO No. 2, § 30)*. In the past, major electronic innovations, such as the release of a new game console, have had a huge impact on the demand of coltan, i.e. creating a shortage of coltan *(RfA, § 4)*. In early summer of 2014, news leaked that a large producer of electronic devices has developed a new game console, which led to an increase in the demand for coltan *(RfA, § 11; PO No. 2, § 30)*. Thereafter, on 6 July 2014, the producer announced that the commercial launch of the console would not happen earlier than in summer 2015 *(PO No. 2, § 30)*. Furthermore, it is likely that due to a new innovative technique, the increase in the demand for coltan will be much smaller than anticipated *(PO No. 2, § 30)*. Conclusively, the assessment of the future demand of coltan in May 2015 by the Emergency Arbitrator was not only too pessimistic but also inaccurate. Hence, her assessment of the urgency of the matter was incorrect.

c) *Even If the Worst-Case-Scenario Materializes, There Would Be No Urgency*

93 The Emergency Arbitrator argues that if Xanadu breaks down, CLAIMANT could not fulfill its contractual obligations without the coltan from RESPONDENT *(OEA, § 13)*. RESPONDENT disagrees for the following reasons:

94 As mentioned above, it is likely that the demand for conflict free coltan in May 2015 will be much smaller than anticipated *(cf. § 92)*. Furthermore, Xanadu might be the biggest producer of conflict free coltan in the world but it is not the only one *(AfEM, § 20)*. Even if Xanadu's production collapses, this would only mean that conflict-free coltan would cost more, which is a purely monetary issue *(cf. PO No. 2, § 34; cf. § 88)*. Subsequently, it would not be impossible at all for CLAIMANT to contract for alternative supply even if the worst-case scenario materializes.

95 In conclusion, ordering interim relief was not urgent as CLAIMANT had and still has enough time to contract for alternative supply. Further, the Emergency Arbitrator based her ruling on facts only considering the worst-case scenario and, even if this unlikely worst-case scenario occurs, CLAIMANT would still have the possibility to buy the necessary coltan elsewhere.

2. CLAIMANT Could Avoid Any Irreparable and Serious Harm

96 RESPONDENT does not contest that the bankruptcy of CLAIMANT, which CLAIMANT submits may occur in case it is not able to fulfill its contractual obligations in May 2015, would amount to irreparable harm *(OEA, § 13; MfC, § 84)*. RESPONDENT, however, strongly contests that this irreparable harm would be in direct causal connection with RESPONDENT *(cf. MfC, §§ 85 et seq.)*. If CLAIMANT fulfilled its duty to mitigate its damage and contracted for alternative supply, there would be no reputational damages and CLAIMANT would not face any damage claims, i.e. CLAIMANT's existence would not be on the line *(cf. MfC, §§ 85 et seq.; OEA, § 13)*.

97 The duty to mitigate damages is part of the Danubian Contract Law. In Art. 7.4.8(1) DCL, the law imposes a duty of the aggrieved party to mitigate its damage. This duty is not complied with if the buyer, in case of non-delivery by the seller, simply waits to see his damages increase *(TANIGUCHI, p. 79)*. Indeed, the buyer must undertake all reasonable actions to avoid any damage *(cf. ICC Case No. 9594/1999; 8574/1996; KOMAROV, p 37)*. This would entail measures such as purchasing substitute goods in the market if it is appropriate under the circumstances *(TANIGUCHI, p. 79; TREITEL in Peel, § 20-099; Award of 1993 (SCC Arbitration))*. Conversely, if CLAIMANT refuses to take any reasonable action, the resulting harm would be self-inflicted and, therefore, should not be considered as irreparable harm *(cf. Salt Lake Tribune v. AT&T Corp. (CoA USA, 2003); Vantico v. Apollo (Dist. Ct. USA, 2003); Lee v. Christian Coalition (Dist. Ct. USA, 2001))*. Only in cases in which CLAIMANT would have no possibilities to adequately substitute the

coltan in dispute, CLAIMANT would not be responsible for its loss *(cf. KOMAROV, p. 40; Stuller v. Steak N Shake Enterprises et al. (CoA USA, 2012); Second City v. City of Chicago (CoA USA, 2003)).*

98 In the present case, CLAIMANT has the possibility to adequately substitute the coltan in dispute *(cf. §§ 87 et seqq.).* Nevertheless, CLAIMANT did not make any attempt in this respect and did not show any will to mitigate its damage *(cf. Cl. Ex. No. 6; AfEM, §§ 21 et seq.).* CLAIMANT could, by entering into an alternative supply contract, secure the fulfillment of its contractual obligations in May 2015. Thereby, CLAIMANT could avoid all reputational damages and damage claims of its customers *(cf. MfC, § 82).* As CLAIMANT states itself in an email dated 5 July 2014 it "did have the opportunity to buy 50 [t] […] from another supplier" *(Cl. Ex. No. 6).*

99 RESPONDENT, thereby, wants to emphasize that any alleged irreparable harm is avoidable. Hence, the Emergency Arbitrator's order is not justified and should be lifted.

3. The Damages Caused to RESPONDENT by the Emergency Arbitrator's Order Is Out of Proportion with the Advantage CLAIMANT Hopes to Derive From It

100 When deciding on a request for interim relief, an arbitral tribunal is required to balance the hypothetical harms of the parties *(cf. BINDER, p. 248).* In other words, the Arbitral Tribunal would have to lift the order if the possible injury caused by the requested interim measure would be out of proportion with the advantage CLAIMANT hopes to derive from it *(cf. EHLE in Müller/Rigozzi, p. 96; BERGER, p. 337).*

101 Contrary to CLAIMANT's statement, RESPONDENT is the only party involved in this dispute that has already suffered damages *(cf. MfC, § 87).* The Emergency Arbitrator's order refrains RESPONDENT from disposing its coltan *(OEA, Order No. 2).* Therefore, RESPONDENT could not react to any price fluctuations and also had to turn down every inquiry by other major customers *(ARfA, § 38; PO No. 2, §§ 30 et seq.).* Repeatedly turning down customers can seriously impact a company's reputation since reliability is crucial in business relationships *(cf. ARfA, § 38).* Moreover, RESPONDENT has to store the coltan in its warehouse, causing higher costs due to RESPONDENT's limited storage capacity and missing liquidity *(ARfA, § 38; Cl. Ex. No. 3, 6).*

102 In contrast, CLAIMANT is able to avoid all substantial damages by taking appropriate measures, i.e. it can avoid reputational damage and bankruptcy *(cf. MfC, § 84; cf. §§ 96 et seqq.).* CLAIMANT only needs to enter into an alternative supply contract, which it is in any event required to do under its duty to mitigate damage *(cf. §§ 96 et seqq.).* Furthermore, it is likely that CLAIMANT will not derive any advantage from the interim measure it requested. CLAIMANT has to fulfill its contractual obligations until May 2015 whereas the time limit for rendering the final award has been set to 31 July 2015 *(ICC Letter of 9 October 2014).* Considering the fact that all arbitrators are involved in seven to nine other arbitrations *(ICC Statement Mr. One, p. 54; ICC Statement Mr. Dos,*

p. 55; ICC Statement Mr. Haddock, p. 58), it is highly possible that no final award will be rendered until the end of May 2015. Therefore, CLAIMANT will likely need to buy the 30 t of coltan elsewhere in any event in order to ensure delivery to its customers until May 2015.

103 In conclusion, when comparing the hardships posed on CLAIMANT and RESPONDENT, RESPONDENT's harm inflicted by the Emergency Arbitrator's order is out of proportion compared to the advantage CLAIMANT hopes to derive from it. Therefore, the Arbitral Tribunal should lift the order.

4. CLAIMANT Has No Arguable Case on the Merits

104 RESPONDENT puts forth that CLAIMANT does not have an arguable case on the merits since its case lacks of any basis *(cf. §§ 106 et seqq.)*. The applicant must establish that it has a reasonable possibility to succeed on the merits *(VOSER 2007, p. 177; ICC Case No. 10596/2000)*. Where the applicant fails on a prima facie view to advance any plausible basis for its claims, provisional measures must be denied *(BORN, p. 2481)*.

105 RESPONDENT does not contest that the Parties entered into a valid agreement for the sale of 30 t of coltan on 28 March 2014 *(MfC, § 89)*. Yet, this is of no relevance since RESPONDENT validly avoided the Contract *(cf. §§ 106 et seqq.)*. CLAIMANT, therefore, has no arguable case on the merits as RESPONDENT validly avoided the Contract and the Arbitral Tribunal should lift the order of the Emergency Arbitrator.

III) RESPONDENT RIGHTFULLY AVOIDED THE CONTRACT FROM 28 MARCH 2014

106 The Parties concluded the Contract on 28 March 2014 *(Cl. Ex. No. 1)*. On 25 June 2014, RESPONDENT, acting in accordance with the Contract, sent CLAIMANT the Notice of Transport that triggered CLAIMANT's obligation to issue a letter of credit within 14 days *(Cl. Ex. No. 2)*. The Notice of Transport was attached to an email in which RESPONDENT informed CLAIMANT that one of its major customers had defaulted on its purchase of coltan leaving it with a coltan surplus, and that RESPONDENT was ready to deliver CLAIMANT's 30 t of coltan earlier than anticipated *(ARfA, § 11; Cl. Ex. No. 3)*. CLAIMANT, aiming to take advantage of the bankruptcy of one of RESPONDENT's customers, tried to extend the contracted amount to 100 t of coltan *(Cl. Ex. No. 4)*. Although RESPONDENT did not agree with this offer *(Re. Ex. No. 1, § 9)*, CLAIMANT attempted to unilaterally enforce the extension by issuing the First Letter of Credit for USD 4,500,000 instead of USD 1,350,000 *(RfA, § 8; Cl. Ex. No. 3)*. In addition, the First Letter of Credit contained the wrong terms of transportation *(Cl. Ex. No. 5)*. The issuance of such erroneous letter of credit amounts to a fundamental breach of contract allowing

RESPONDENT to avoid the Contract on 7 July 2014 **(A)**. In the alternative and solely for the sake of procedural caution, RESPONDENT submits that CLAIMANT also fundamentally breached the Contract by issuing the Second Letter of Credit belatedly. The second breach was fundamental as well, entitling RESPONDENT to avoid the Contract again on 9 July 2014 **(B)**. In any case, CLAIMANT, throughout the whole proceedings, insisted on the delivery of 100 t of coltan, thus showing that it was not willing to comply with the Contract. RESPONDENT was, therefore, entitled to avoid the Contract for anticipatory breach according to Art. 72 CISG **(C)**.

A. THE MISTAKES CONTAINED IN THE FIRST LETTER OF CREDIT AMOUNT TO A FUNDAMENTAL BREACH

107 On 25 June 2014, RESPONDENT provided CLAIMANT with the Notice of Transport that confirmed that the coltan was ready to be delivered *(Cl. Ex. No. 1, Art. 4; Cl. Ex. No. 2)*. The Notice of Transport triggered CLAIMANT's obligation to issue a letter of credit that would enable RESPONDENT to receive the agreed amount of USD 1,350,000 once the 30 t of coltan had been delivered *(Cl. Ex. No. 1)*. However, CLAIMANT issued the First Letter of Credit over USD 4,500,000 aiming to extend the Contract to 100 t of coltan *(Cl. Ex. No. 5)*. CLAIMANT likely did so in order to profit from the low price of coltan fixed in the Contract of March 2014 and from the fact that the price, in the meantime, had risen considerably due to the political tensions in Xanadu and the announcement of a new game console *(PO No. 2, § 30)*.

108 Furthermore, CLAIMANT unilaterally changed the terms of transportation and the delivery destination of the coltan *(Cl. Ex. No. 4, 5)*. For these reasons, CLAIMANT failed to issue a letter of credit that was in compliance with the contractual requirements **(1)** and this breach of contract was fundamental **(2)**.

1. The First Letter of Credit Did Not Comply With the Contract

109 According to the Contract, CLAIMANT had to send a letter of credit to RESPONDENT as payment security not later than fourteen days after receiving the Notice of Transport *(Cl. Ex. No. 1, Art. 4)*. CLAIMANT submits that the First Letter of Credit, sent to RESPONDENT on 4 July 2014, was correct and that CLAIMANT consequentially complied with the Contract *(MfC, §§ 97 et seqq.)*. This is erroneous. Contrary to CLAIMANT's assertion, it did not fulfill its obligations since the Contract provided for payment by documentary credit, which implies that the documents have to be clean in every respect *(cf. SCHWENZER, p. 806; BIJL, p. 23)*. CLAIMANT did not issue clean documents: CLAIMANT issued the First Letter of Credit that held terms of transportation that had not been agreed upon **(a)**. Further, the First Letter of Credit referred to a larger amount of

coltan than stipulated under the Contract **(b)**. Last, CLAIMANT is responsible for all the discrepancies contained in the First Letter of Credit **(c)**.

a) The First Letter of Credit Contained the Wrong Terms of Transportation

110 In the Contract, the Parties agreed on the terms of transportation to be "CIF Incoterms 2010, Oceanside Equatoriana" *(Cl. Ex. No. 1, Art. 5)*. GLOBAL MINERALS, by issuing the First Letter of Credit containing the transportation clause "CIP Vulcan Coltan, 21 Magma Street, Oceanside, Equatoriana" diverged from the contractual terms *(Cl. Ex. No. 5)*.

111 The three-letter trade terms referred above, CIF and CIP, are transportation modes and rules governed and defined by the Incoterms 2010. The Incoterms 2010 are primarily intended to clarify the tasks, costs, and risks associated with the transportation and delivery of goods *(GRAF VON BERNSTORFF, § 25)*. Each letter has a particular meaning; hence, a change in one of the letters has substantial legal consequences.

112 Under the Incoterm rules, no party is obliged to accept documents that are not consistent with the contract *(Incoterms 2010, Art. B8; LEISINGER, p. 128)*. Here, GLOBAL MINERLAS in its First Letter of Credit changed the CIF term to CIP. The Letter of Credit did, therefore, not comply with the Contract and RESPONDENT was free to reject it.

113 Further, GLOBAL MINERALS also unilaterally changed the delivery location. The destination of the coltan was, as agreed per the Contract, "Oceanside, Equatoriana" *(Cl. Ex. No. 1, Art. 5; Cl. Ex. No. 2)*. GLOBAL MINERALS, without conferring with RESPONDENT, changed the destination of the goods to be "21 Magma Street", CLAIMANT's seat of business in Oceanside *(Cl. Ex. No. 4, 5)*. The new place of destination to where the coltan should have been delivered was no longer the port; that means that the coltan would have had to be reloaded from the ship on trucks in order to bring it to its final destination *(PO No. 2, § 36)*. This is clearly a deviation from the Contract.

114 In conclusion, the First Letter of Credit held different terms of transportation than the ones stipulated in the Contract. This resulted in a non-compliant First Letter of Credit that RESPONDENT was, by no means, obliged to accept.

b) In Addition, the First Letter of Credit Was Issued for 100 t Instead of 30 t of Coltan

115 The Parties agreed on the delivery of 30 t of coltan at a price of USD 45 per kilogram, adding up to a sum of USD 1,350,000. That was the amount that should have been secured by the First Letter of Credit in order to comply with the contractual agreement *(Cl. Ex. No. 1, Art. 4)*. However, the First Letter of Credit secured USD 4,500,000, referring to 100 t of coltan *(Cl. Ex. No. 4, 5; MfC, § 99)*. This amendment of the First Letter of Credit is to be considered as a new

offer by CLAIMANT. RESPONDENT, therefore, was entitled to reject it **(i)**. Furthermore, the First Letter of Credit did refer to the purchase price in the Contract **(ii)**.

(i) The Amendment in the First Letter of Credit Is to Be Considered an Offer That RESPONDENT Had to Reject

116 CLAIMANT submits that it fulfilled its obligations to have a correct First Letter of Credit established and, thus, its obligation to arrange the documents necessary to enable payment *(MfC, §§ 99 et seqq.)*. CLAIMANT is wrong. It could not fulfill its obligation by issuing a letter of credit that differs from the contractual terms.

117 A letter of credit cannot be issued differing from its underlying contract without the consent of the beneficiary *(KURKELA, pp. 24, 42 et seq.)*. If it contains clauses that diverge from the contractual agreement, if at all, the letter of credit is to be considered as an offer *(SAIDOV in Schwenzer/Spagnolo, p. 65; Nam Bee Pte v. Tay Ninh (CoA Vietnam, 2006))*.

118 In the present case, the First Letter of Credit was expected to provide security needed for the payment regarding 30 t of coltan. By securing the price for 100 t of coltan, the First Letter of Credit constituted an offer that RESPONDENT never wanted to accept.

119 In consequence, RESPONDENT was forced to reject the First Letter of Credit. Had it not rejected it, RESPONDENT would have been bound to a contract it never wanted to enter.

(ii) The First Letter of Credit Failed to Precisely State the Purchase Price

120 Moreover, the First Letter of Credit, by referring to USD 4,500,000 instead of USD 1,350,000, failed to precisely state the amount of money to be paid *(Cl. Ex. No. 5)*.

121 A letter of credit contains the instructions for the issuing bank and must, thus, state the precise amount of money that has to be paid *(CORDERO-MOSS in Weiler/Baetens, p. 48)*. Hence, an inaccurate document may be rejected by the beneficiary *(cf. CIF B8 Incoterms 2010; High Ct. 14 October 2010 (Republic of Korea))*.

122 Here, the price stated in the First Letter of Credit implies a purchase of 100 t of coltan and does not reflect the actual price of the goods sold, i.e. the 30 t of coltan. Thus, the amount stated in the First Letter of Credit results in the First Letter of Credit to be discrepant. This discrepancy also forced RESPONDENT to reject the First Letter of Credit.

c) The Non-Compliance of the First Letter of Credit Lies Within CLAIMANT's Responsibility

123 Contrary to CLAIMANT's view, the responsibility for the errors contained in the First Letter of Credit lies on CLAIMANT's side and RESPONDENT is, thus, not to be blamed for them. CLAIMANT caused the inconsistency in the terms of transportation **(i)** and is also responsible for the discrepancy in the amount secured **(ii)**.

(i) CLAIMANT Is Responsible for the Inconsistency in the Terms of Transportation

124 CLAIMANT argues that the inconsistency in the terms of transportation was RESPONDENT's fault since it had changed the Incoterms itself by marking CIP instead of CIF in the Notice of Transport *(MfC, § 115)*. However, as the Notice of Transportation shows, although RESPONDENT had crossed the CIP box instead of the CIF box, it had left the aimed destination of the coltan unchanged *(Cl. Ex. No. 2)*.

125 The mere fact that RESPONDENT ticked the CIP box did not allow CLAIMANT to understand that RESPONDENT aimed to change the destination of the coltan *(cf. Cl. Ex. No. 2)*. As contractually agreed and clearly defined in the Notice of Transport, the named place of destination stated was the port of "Oceanside, Equatoriana", and not the address of CLAIMANT's seat in the city of Oceania, which would have been "Vulcan Coltan, 21 Magma Street, Oceanside, Equatoriana" *(Cl. Ex. No. 2, 3)*. Thus, contrary to CLAIMANT's submission, there was no offer to amend the terms of transportation by RESPONDENT *(cf. MfC, § 115; Cl. Ex. No. 4)*. What CLAIMANT titles as "carefully taking RESPONDENT's considerations into account" *(MfC, § 115)* solely was an opportunistic attempt to enforce a destination not agreed upon by the Parties that was more favorable to CLAIMANT.

126 CLAIMANT further submits that, according to Art. 80 CISG "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission" *(MfC, §§ 115 et seqq.)*. According to Art. 80 CISG, if the seller omitted to provide the buyer with the necessary information to establish the correct letter of credit the fault is on the seller's side *(MOHS in Schlechtriem/Schwenzer, Art. 54, § 8; SCHWEIZER in Schlechtriem/Schwenzer, Art. 80, § 3)*. In such a case the establishment of a discrepant letter of credit may be justified *(cf. MOHS in Schlechtriem/Schwenzer, Art. 61, § 15; ICC Case No. 11849/2003)*. However, in the case at hand, it was CLAIMANT that opted to extend RESPONDENT's obligation to deliver to CLAIMANT's seat of business *(cf. Cl. Ex. No. 2, 5)*.

127 In conclusion, the fact that the First Letter of Credit and the Contract provided for different delivery terms is not attributable to RESPONDENT.

(ii) CLAIMANT Is Responsible for the Inconsistency Regarding the Amount Secured by the First Letter of Credit

128 CLAIMANT could be exculpated of having issued a wrong First Letter of Credit only if its mistaken performance had been caused by RESPONDENT *(ARfA, § 29; cf. MAGNUS in Honsell, Art. 80, § 4; SCHWENZER in Schlechtriem/Schwenzer, Art. 80, § 1)*.

129 CLAIMANT may argue that RESPONDENT had offered to sell more coltan than initially agreed upon and that CLAIMANT, in response, issued the First Letter of Credit to cover the payment of 100 t of coltan. However, this submission would be unfounded.

130 The Notice of Transport states that *the* agreed 30 t coltan were ready to be delivered *(Cl. Ex. No. 3)*. Further, in the email to which the Notice of Transport was attached, RESPONDENT announced that it was capable of delivering *the* 30 t of coltan earlier than anticipated as another customer had defaulted on its order *(Cl. Ex. No. 3)*. However, no allusion to an offer relating to a larger amount of coltan was made. Even CLAIMANT itself realized that an offer to extend was never implied and withdrew its request for interim relief for the quantities exceeding 30 t of coltan *(cf. AtCJ, § 4)*.

131 Conclusively, RESPONDENT merely gave an explanation of why it was able to deliver sooner than planned. CLAIMANT opportunistically used that information to accept an extension that was never implied, trying to profit from the events that had led to an increase in the price of coltan *(PO No. 2, § 30)*: it intended to buy more conflict free coltan at the former, more attractive price.

2. The Breaches Contained in the First Letter of Credit Amount to Be Fundamental and Entitled RESPONDENT to Avoid the Contract

132 CLAIMANT holds that the errors in the First Letter of Credit did not amount to be fundamental breaches and did not entitle RESPONDENT to avoid the Contract *(MfC, §§ 102 et seqq.)*. CLAIMANT correctly states that only fundamental breaches justify the termination of a contract *(Art. 64(1)(a) CISG cum Art. 25 CISG)*. Under Art. 25 CISG, "[a] breach of contract […] is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract". Its gravity is to be determined with a view to the particular circumstances and the obligations under the particular contract *(SCHROETER in Schlechtriem/Schwenzer, Art. 25, § 8; KOCH, p. 214; SCHLECHTRIEM/SCHROETER, § 318)*. In this case, the Parties agreed to include the UCP 600 into the Contract and, thus, the strict criteria of these rules are applicable in the present case **(a)**. Furthermore, the breaches are fundamental under the applicable special standards in commodity trading in volatile markets **(b)**.

a) The First Letter of Credit Fundamentally Breached the Contract under the Strict Rules of UCP 600

133 CLAIMANT submits that the breaches committed by issuing a defective First Letter of Credit do not amount to be fundamental *(MfC, §§ 102 et seqq.)*. CLAIMANT is wrong. The Parties had explicitly agreed on the inclusion of the UCP 600 into the Contract *(Re. Ex. No. 1, Art. 4)* and, thus, the particularities of these rules are applicable in the present case *(cf. Art. 9 CISG; JUNGE in von Caemmerer/Schlechtriem, Art. 9, § 8)*.

134 The UCP 600 govern the issuance and use of letters of credit and provide that documents presented in a documentary transaction must be in strict compliance with the contract *(BIJL, p. 27; BUCKLEY/GAO p 664; GRAFFI, p. 118; FERRERO, p. 1)*. According to Art. 14(a) UCP 600, documents must be compliant, i.e. must not conflict with the contract or any other stipulated document *(cf. BIJL, p. 26; SCHWENZER, p. 806; UCP 600 DRAFTING GROUP, p. 62)*. By including the UCP 600, the Parties agreed that strict adherence to the Contract was essential; CLAIMANT failed to comply with this agreement *(cf. RAMBERG, p. 206; BIJL, p. 27; BGH 3 April 1996 (Germany))*.

135 Besides, if the submitted documents do not comply with the letter of credit, the bank, for its own sake, will refuse the drawing of the money *(cf. Art. 16(a) UCP 600; CHE HASHIM, p. 13; GRAFFI, p. 118)*. As a corollary, the delivery of non-conforming documents may amount to a fundamental breach, if the breach leads to the bank refusing to release the money for the goods; therefore, the First Letter of Credit fundamentally breached of Contract *(cf. GRAFFI, p. 118)*.

136 As explained above, the First Letter of Credit was not compliant with the contractual requirements *(cf. §§ 109 et seqq.)*. The compliance test und the UCP 600 is strict: any discrepancy can lead to dishonor "regardless of its substance or significance" *(KURKELA, p. 120)*. Hence, Tradebank would not have accepted the documents tendered by RESPONDENT and thus, the non-compliant First Letter of Credit would have led RESPONDENT to face the bank's refusal to pay. RESPONDENT was put into the same situation as if no letter of credit existed.

137 Consequently and contrary to CLAIMANT's submission, receiving the non-compliant First Letter of Credit leads to a major detriment to RESPONDENT depriving it of the purchase price, which is to be considered a fundamental breach under the CISG.

b) The First Letter of Credit Fundamentally Breached the Contract under the Strict Conditions Applicable in Commodity Trading

138 In the context of commodities traded in a volatile market, special standards have to be applied in determining whether a fundamental breach has occurred *(SCHWENZER, p. 806; LEISINGER, p. 122)*. A fundamental breach allowing termination under the CISG will more readily occur than in any other market *(WINSOR, p. 101; cf. SINGH/LEISINGER, p. 173)*. Thus, the regular fundamentality threshold based on Art. 25 CISG that CLAIMANT refers to *(cf. MfC, § 102)*, does not apply in transactions such as the one between CLAIMANT and RESPONDENT.

139 Further, in commodity trading handing over clean documents is always of the essence (*CISG-AC Op. No. 5, § 4.13; WINSOR, p. 101; SCHWENZER, p. 806)*. In this specific trade branch, the solution provided by the CISG is comparable to that under the perfect tender rule in common law jurisdictions: The perfect tender rule is a hair-triggered right to avoid contracts based on the

tendering of defective documents *(SCHWENZER, p. 800; BRIDGE 2003, p. 69)*. As a result of this strict requirement, the right to cure will not arise in the context of commodity trading *(CISG-AC Op. No. 5, § 4.17; SCHWENZER, p. 806)*.

140 In the case at hand, CLAIMANT handed in an unclean First Letter of Credit that contained errors and, thereby, fundamentally breached the Contract. Since CLAIMANT did not have any right to cure the mistakes, RESPONDENT was entitled to immediately avoid the Contract.

B. ALTERNATIVELY, THE SECOND LETTER OF CREDIT WAS DELAYED WHICH AMOUNTS TO A FUNDAMENTAL BREACH OF CONTRACT

141 Even if the Arbitral Tribunal were to conclude that CLAIMANT did not fundamentally breach the Contract by its issuance of the defective First Letter of Credit, and RESPONDENT did not have the right to avoid the Contract based on the First Letter of Credit, CLAIMANT did fundamentally breach the Contract by issuing the Second Letter of Credit belatedly. The Second Letter of Credit arrived at RESPONDENT's on 9 July 2014, on the day after the expiration of the contractual deadline **(1)**. The timely delivery of the original Second Letter of Credit was essential and any delay constituted a fundamental breach that allowed RESPONDENT to avoid the Contract **(2)**.

1. The Second Letter of Credit Was Delayed

142 The Second Letter of Credit sent by Claimant was delayed and is, therefore, not to be considered for the following reasons: First, in order to be effective, the *original* letter of credit had to arrive at RESPONDENT's on time and the fax, therefore, cannot be regarded as a valid means to fulfill its obligation **(a)**. Second, according to the Contract, the fourteen-days deadline, counted from the receipt of the Notice of Transport on 25 June 2014, expired on 8 July 2014 at 24:00 MST **(b)**. Third, an interpretation of the relevant CISG provision leads to the same conclusion **(c)**. Fourth, the courier delivering the Second Letter of Credit arrived only on 9 July 2014 and was, therefore, late **(d)**. Last and in the alternative, should the Arbitral Tribunal consider the fax containing a copy of the Second Letter of Credit to be sufficient, it arrived outside of RESPONDENT's business hours and is, therefore, to be regarded as having arrived the next morning on 9 July 2014, i.e. after the expiration of the deadline **(e)**.

a) The Original Letter of Credit Had to Arrive at RESPONDENT's on Time

143 In order to meet the deadline, CLAIMANT had to provide RESPONDENT with the Second Letter of Credit in due time. CLAIMANT submits that it did so by sending a fax containing a copy of the Second Letter of Credit that arrived at RESPONDENT's at 22:42 MST on 8 July 2014 *(ARfA, § 23)*. However, a copy of a letter of credit delivered by fax is not a valid letter of credit. Contrary

to what CLAIMANT argues *(MfC, § 128)*, the original Second Letter of Credit had to physically arrive at RESPONDENT's on time.

144 This is because a copy of the Second Letter of Credit would not have allowed RESPONDENT to draw payment from Tradebank for the following reason: The law governing letters of credit is "black and white"; the documents to be presented to the bank must exactly conform to those specified in the letter of credit in order to get payment *(KURKELA, p. 26)*. Here, the Second Letter of Credit stipulates that "[t]he original irrevocable letter of credit must be presented with any drawing so that drawing can be endorsed on the reverse thereof" *(Cl. Ex. No. 8)*. Under these strict conditions, RESPONDENT would not have been able to draw any money from Tradebank only with a copy of the Second Letter of Credit *(Cl. Ex. No. 10; BRIDGE 2013, § 6.59)*. The same is true under Art. 17 UCP 600.

145 In consequence, the fax containing a copy of the Second Letter of Credit did not provide RESPONDENT with a valid letter of credit because it failed to give RESPONDENT any security with regard to the payment. The fax that arrived at 22:42 MST of 8 July 2014 was, therefore, not apt to meet the deadline. The only valid document to get payment from the bank was the *original* Second Letter of Credit that was delivered by courier on 9 July 2014.

b) According to the Parties' Understanding the Deadline Set in the Contract Expired on 8 July 2014 at 24:00 MST

146 In the Contract, the three Parties agreed that the Letter of Credit had to be issued within fourteen days, counted from the receipt of the Notice of Transport by CLAIMANT *(Cl. Ex. No. 1, Art. 4)*. According to the UNIDROIT principles, a worldwide collection of the basic principles of contract law that can be used as an aid to interpret contract provisions *(LEISINGER, p. 36; ICC Case No. 9117/1998)*, the relevant time zone was that of the party setting the time *(Art. 1.12 UNIDROIT Principles)*, i.e. that of RESPONDENT, which set the time when it dispatched the Notice of Transport *(Cl. Ex. No. 2)*. CLAIMANT does not further dispute this issue *(MfC, § 130)*.

147 CLAIMANT received the Notice of Transport on 25 June 2014 *(Cl. Ex. No. 2; RfA, § 8)*. According to the Parties' understanding as well as the national law of Mediterraneo, the day of 25 June 2014 was the first day of the deadline since the day of the triggering event is to be counted in *(cf. PO No. 2. § 44)*. Thus, the fourteen-days deadline expired on 8 July 2014 at 24:00 MST. RESPONDENT made clear that it was in this way that it understood the Contract *(ARfA, §§ 23 et seq., § 34; Re. Ex. No. 4)* and CLAIMANT's behavior suggests it understood the Contract in the same way. CLAIMANT's reactions, such as the delivery of the Second Letter of Credit by *fast courier* in the night from 8 to 9 July 2014, only support this reasoning as a normal courier would have been fast enough to arrive on 9 July 2014 *(cf. RfA, § 15, 20; Cl. Ex. No. 9)*.

148 CLAIMANT relies on Art. 8 CISG and states that "the contract has to be interpreted according to statements made by and the conduct of the parties" *(MfC, § 124)*. Furthermore, "the parties' intention is decisive where the other party knew or could have been aware what the intent was *(MfC, § 124)*. However, also under considerations of Art. 8 CISG, CLAIMANT is mistaken: CLAIMANT's behavior demonstrated that it meant the deadline to end on 8 July 2014 and this behavior had to be understood accordingly. Only during the discussion of the Terms of Reference on 2 October 2014, it claimed that according to its appreciation, the deadline ended on 9 July 2014 *(PO No. 1, § 1)*. Finally, it submitted that the deadline ended on 10 July *(MfC, § 126)*.

149 RESPONDENT therefore submits that it was the Parties' common understanding that the deadline ended on 8 July 2014 at 24:00 MST as CLAIMANT's genuine intent should be considered and not the view it took retrospectively in order to bend the deadline it had missed.

c) *Alternatively, According to Art. 20 CISG the Contractual Deadline Expired on 8 July 2014 at 24:00 MST*

150 In order to calculate the contractual deadline, CLAIMANT refers to Art. 20(1) CISG *(MfC, § 126)*. This is erroneous, Art. 20 CISG does not apply to the present case. It is only applicable to time periods, for which no specific form of calculation is provided *(SCHROETER in Schlechtriem/Schwenzer, Art. 20, § 7; DORNIS in Honsell, Art. 20, § 27)*. Art. 20 CISG is a mere aid of interpretation to determine the beginning of a deadline where no clear triggering event is given by construing the parties' intentions *(cf. MULLIS in Huber/Mullis, pp. 96 et seq)*. From this follows that Art. 20 CISG is not applicable where the contract defines when the deadline begins to run.

151 Here, the Contract provides for a triggering event; the deadline begins to run with the receipt of the Notice of Transport *(Cl. Ex. No. 1, Art. 4)*. If CLAIMANT was right and the Contract "unambiguously indicated" the day on which the deadline begins to run *(MfC, § 126)*, Art. 20 CISG was undoubtedly inapplicable and the argumentation should be based on the Contract only *(cf. §§ 146 et seqq.)*.

152 Even if the Arbitral Tribunal concluded that the Contract was ambiguous and that, following the rules of interpretation under Art. 8 CISG, no clear intention by the parties could be detected, Art. 20 CISG would not support CLAIMANT's position *(cf. DORNIS in Honsell, Art. 20, § 27; MULLIS in Huber/Mullis, pp. 96 et. seq)*.

153 According to Art. 20 CISG, the deadline starts to run from the moment an instantaneous mean of communication, such as the fax containing the Notice of Transport, reaches the offeree *(cf. SCHROETER in Schlechtriem/Schwenzer, Art. 20, § 3)*.

154 The fax was sent on 25 June 2014 at 08:45 MST and thus reached CLAIMANT on 25 June 2014 at 03:45 RST *(PO No. 2, § 24)*. The Notice of Transport cannot have reached CLAIMANT later than

at the opening of its business on 25 June 2014 *(cf. RfA, § 9)*. Hence, the deadline, according to Art. 20 CISG, started to run on 25 June 2014 when the "instantaneous mean of communication", i.e. the fax containing the Notice of Transport, "reached the offeree", i.e. CLAIMANT.

155 In conclusion, under Art. 20 CISG the deadline started to run on 25 June 2014 and expired fourteen days later, i.e. on 8 July 2014 at 24:00 MST.

d) The Second Letter of Credit Arrived Belatedly

156 Contrary to what CLAIMANT argues *(MfC, § 132),* the time of arrival of the courier is an established fact *(Re. Ex. No. 1, § 10; Cl. Ex No. 9)*. The courier who delivered the Second Letter of Credit arrived at RESPONDENT on 9 July 2014 at 00:05 MST *(Re. Ex. No. 1, § 10)*. This is clearly outside the deadline, which expired on 8 July 2014 *(§§ 146 et seqq.)*.

157 CLAIMANT further argues that the Second Letter of Credit is to be considered as arrived the moment it had been dispatched *(MfC, § 129)*. This is not true; the Second Letter of Credit not only arrived too late but was also sent off too late *(PO No. 2, § 27)*.

158 CLAIMANT correctly submits that the relevant provision applicable in this case is Art. 27 CISG *(MfC, § 128)*. The second and relevant part of the provision reads as follows: "if any notice, request or other communication is given or made by a party […] by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication". A communication made by "means appropriate in the circumstance" has to be dispatched at a moment it can be expected under a normal course of events to reach the other party on time *(SCHROETER in Schlechtriem/Schwenzer, Art. 27, §§ 7, 11; BODENHEIMER in Brunner, Art. 27, § 2; GSELL in Honsell, Art. 27, § 14; Dist. Ct. 12 October 2000 (Germany); OGH 24 May 2005 (Austria))*.

159 CLAIMANT sent the Second Letter of Credit by fast courier at 09:00 RST on 8 July 2014, which then arrived at RESPONDENT on 00:05 MST of 9 July *(Cl. Ex. No. 9; ARfA, § 24)*. There was no unforeseen delay in the delivery; on the contrary, the courier had been half an hour faster than anticipated *(PO No. 2, § 27)*.

160 In consequence, the Second Letter of Credit arrived too late and the delay was caused by CLAIMANT's tardive dispatch.

e) In the Alternative, the Fax Containing the Copy of the Second Letter of Credit Was Delayed

161 In the alternative, should the Arbitral Tribunal find that the arrival of the fax containing a copy of the Second Letter of Credit was sufficient, the fax arrived only at 22:42 MST of 8 July 2014, i.e. outside of RESPONDENt's business hours that last from 08:00 till 20:00 MST *(Cl. Ex. No. 10;*

ARfA, § 34). The time of arrival of the fax is a given fact and, contrary to what CLAIMANT attempted, cannot be questioned *(cf. MfC, § 132)*.

162 CLAIMANT's submission that business hours were not relevant for reasons of legal certainty is incorrect *(MfC, § 130)*. The relevant doctrine clearly distinguishes between situations in which the parties know each other's business hours and situations in which the parties do not know each other's business hours *(SCHROETER in Schlechtriem/Schwenzer, Art. 24, § 33; MULLIS in Huber/Mullis, p. 79; ENDERLEIN et al., Art. 24, § 4)*. If a party is aware of its counterparty's business hours, a delivery outside thereof is to be regarded has having reached the other party at the opening of the next business day *(WEY, § 803)*. In this context, FARNSWORTH makes an explicit reference to the good faith principle under Art. 7(1) CISG *(FARNSWORTH in Bianca/Bonell, Art. 24, § 3.2)*.

163 In the case at hand, it is established that CLAIMANT knew about RESPONDENT's business hours *(PO No. 2, § 23)*; CLAIMANT's proposition to ignore them for the sake of legal certainty is not acceptable. Rather, the fax that arrived outside of RESPONDENT's business hours at 22:42 MST of 8 July 2014 should be regarded as having reached RESPONDENT at the opening of business of 9 July 2014; the moment RESPONDENT noted the fax *(ARfA, § 23)*. Indeed, in a situation like the present, CLAIMANT's argument to ignore the business hours may be considered contrary to the good faith principle under Art. 7(1) CISG.

164 In conclusion, RESPONDENT'S business hours are relevant. The fax containing a copy of the Second Letter of Credit arrived outside RESPONDENT's business hours. It reached RESPONDENT in the morning of 9 July 2014, one day after the expiration of the contractual deadline.

2. The Timely Delivery of a Letter of Credit Was Essential and Any Delay Constitutes a Fundamental Breach Allowing RESPONDENT to Avoid the Contract

165 As established, the Second Letter of Credit was sent belatedly and this delay constitutes a fundamental breach of contract allowing RESPONDENT to declare the Contract avoided.

166 CLAIMANT submits that the timely issuance of a letter of credit should not be considered as an essential element in this case because deadlines never became relevant in previous contracts between the Global Minerals Group and RESPONDENT *(MfC, § 125)*. This argument is far-fetched. The fact that time never became relevant between the parties simply means that none of the parties had so far been late in fulfilling a contractual obligation. It cannot be deduced from this fact that the timely issuance of a letter of credit is not important in the present situation.

167 On the contrary, the question whether time is of the essence primarily depends on two aspects: first, the terms of the contract and second, the respective trade sector the parties are in *(SCHWENZER, p. 210)*.

168 Here, the Parties contractually agreed on the CIF delivery term *(Cl. Ex. No 1, Art. 5)*. It follows from Art. 9 CISG that the reference to the CIF Incoterm in the contract leads to the applicability of all relevant trade usages in connection with CIF *(GRAFFI, p. 112; SCHWENZER et al., § 47.126; MOHS in Büchler/Müller-Chen, p. 1296; China North Chemical Industries Corporation v. Beston Chemical Corporation (Dist. Ct. USA, 2006))*. In CIF contracts time is of the essence by definition *(OLG 28 February 1997 (Germany))*.

169 Furthermore, in commodity trading, in particular in volatile markets, time is always an essential element of the parties' agreement *(SCHWENZER, p. 806; RAMBERG, p. 206)*. Any non-performance or breach entitles the injured party to terminate the contract *(RAMBERG, p. 206; BOTOSH, p. 367)*. The Parties in the case at hand have repeatedly stressed that coltan is a mineral subject to a highly volatile price and thus, trading such a commodity requires strict compliance with the Contract *(PO No. 2, § 18; ARfA, § 31; RfA, § 4)*.

170 In conclusion, time was an essential element to the Contract due to both its explicit reference to the CIF delivery terms and the fact that the Parties are trading coltan, a commodity subject to highly fluctuating market prices. Hence, any delay in CLAIMANT providing the Second Letter of Credit amounted to a fundamental breach, allowing RESPONDENT to avoid the Contract. RESPONDENT did so by unambiguously avoiding the Contract on 9 July 2014.

C. IN ANY CASE, RESPONDENT WAS ENTITLED TO AVOID THE CONTRACT FOR ANTICIPATORY BREACH

171 Should the Arbitral Tribunal come to the conclusion that neither the errors contained in the First Letter of Credit nor the delay of the Second Letter of Credit amounted to a fundamental breach, RESPONDENT rightfully anticipated CLAIMANT's fundamental breach of contract. First, RESPONDENT rightfully anticipated a fundamental breach of Contract on 7 July 2014 as a result of CLAIMANT's incapacity to promptly amend the First Letter of Credit **(1).** Second and in the alternative, RESPONDENT was forced to avoid the Contract for anticipatory breach on 9 July 2014 **(2)**.

1. RESPONDENT Rightfully Anticipated a Future Breach of Contract on 7 July 2014

172 RESPONDENT rightfully avoided the Contract for anticipatory breach on 7 July 2014. According to Art. 72(1) CISG, a party may declare the contract avoided "if prior to the date of performance of the contract it is clear that [the other party] will commit a fundamental breach of contract".

173 The date for performance is when the obligation becomes due *(CORVAGLIA, p. 108; BGH 15 February 1995 (Germany); OLG 18 November 1993 (Germany))*. Here, the opening of a compliant letter of credit was outstanding and, thus, the first condition of Art. 72(1) CISG was fulfilled.

174 Further, in order to avoid the contract under Art. 72(1) CISG, there must be objective circumstances indicating that a future fundamental breach of contract will occur *(FOUNTOULAKIS in Schlechtriem/Schwenzer, Art. 72, § 12; SCHLECHTRIEM/SCHROETER, § 613; HONNOLD, p. 437)*. A future breach may be clear if the buyer fails to amend a non-compliant letter of credit *(FOUNTOULAKIS in Schlechtriem/Schwenzer, Art. 72, § 12a)*.

175 This is the case in the matter at hand: CLAIMANT had Tradebank issue an erroneous First Letter of Credit aiming to force RESPONDENT into an agreement over 100 t of coltan. Upon receipt, RESPONDENT immediately left a voice message on CLAIMANT's phone informing CLAIMANT that the First Letter of Credit was not in conformity with the Contract and to give CLAIMANT the opportunity to amend it *(PO No. 2, § 21; ARfA, § 19)*. GLOBAL MINERALS' Mr. Storm sent an email on the next day, claiming that the Parties had amended the Contract and insisting on the delivery of 100 t of coltan *(Cl. Ex. No. 6, ARfA, § 19)*. CLAIMANT's behavior clearly demonstrated that it was not willing to perform in accordance with the Contract of 28 March 2014 that provided for the delivery of 30 t of coltan *(Cl. Ex. No. 1, Art. 3)*. CLAIMANT's conduct made RESPONDENT reasonably believe that CLAIMANT would not attend its duties in the future and RESPONDENT, therefore, anticipated a future breach of contract.

176 In addition, the anticipated breach amounts to be fundamental. As demonstrated *(§§ 132 et seqq.)*, in commodity trading, every breach of contract is to be considered fundamental.

177 Article 72 CISG further states that the party intending to avoid the contract must give notice of its intent, thus enabling the other party to provide adequate assurance that the latter will perform *(LIU, Chap. 5.2; CORVAGLIA, p. 108)*. However, such notice is not necessary where the other party declares that it will not perform the contract or predicates the fulfillment of the contract on conditions not agreed on in the contract *(SCHWENZER et al., § 47.146; FOUNTOULAKIS in Schlechtriem/Schwenzer, Art. 72, § 35; Magellan International Corporation v. Salzgitter Handel GmbH (Dist. Ct. 1999, USA))*. As already established above *(cf. § 175)*, upon RESPONDENT's request for an amendment of the First Letter of Credit, Mr. Storm simply answered: "We are looking forward to receiving the 100 t of coltan" *(Cl. Ex. No. 6)*. This answer should be regarded as a declaration sufficiently clear to inform RESPONDENT of CLAIMANT's unwillingness to comply with the Parties' agreement.

178 In consequence, CLAIMANt's demonstration and declaration of unwillingness to perform as contractually agreed entitled RESPONDENT to avoid the Contract in accordance with Art. 72 CISG. RESPONDENT thereinafter rightfully declared the Contract avoided by its declaration of avoidance of 7 July 2014.

2. In the Alternative, RESPONDENT Was Forced to Avoid the Contract on 9 July 2014 Based on CLAIMANT's Persistent Misdemeanor

179 Even after RESPONDENT had clearly communicated that it would not, under any circumstances, accept the demand for the delivery of 100 t of coltan *(cf. Cl. Ex. No. 7)*, CLAIMANT did not cease insisting: it did so in its fax to which the copy of the Second Letter of Credit was attached *(Cl. Ex. No. 10)* as well as in its Request for Arbitration *(RfA, § 22)*. It only changed its request for the delivery of 100 t of coltan in its Reply to the Counterclaim on 8 September 2014 when it realized that such claims were groundless *(AtCJ, § 4)*. In addition, CLAIMANT kept the First Letter of Credit open in order to demonstrate its will to get the 100 t of coltan *(Cl. Ex. No. 10)*. This, notwithstanding the numerous and clear rejections of the offer made by RESPONDENT *(PO No. 2, § 21; Cl. Ex. No. 7; Re. Ex. No. 4)*.

180 In accordance with Art. 72(1) CISG the innocent party may avoid the Contract if it is clear that the other party will commit a fundamental breach *(cf. §§ 172 et seqq.)*. If the breaching party declares that it will not perform its obligation, the other party may avoid the contract without preceding notice *(Art. 72(2), (3))*. Such a declaration does not need to be an explicit statement; clear behavior is sufficient *(FOUNTOULAKIS in Schlechtriem/Schwenzer, Art. 72, § 35)*.

181 In light of CLAIMANT's actions, it was evident that CLAIMANT was not willing and would not be willing to perform its obligations according to the Contract. On the contrary, Mr. Storm insisted on an alleged "new contract" and even threatened to enforce it in arbitration *(Cl. Ex. No. 10)*. CLAIMANT's behavior, therefore, constitutes a declaration of non-performance under Art. 72(2) and 72(3) CISG. Moreover, CLAIMANT's unwillingness to perform according to the Parties' agreement put RESPONDENT in a dead-end situation where, unfortunately, its only way out was to avoid the Contract.

182 In consequence, CLAIMANT, with its conduct, forced RESPONDENT to declare the Contract avoided for anticipatory breach of contract under Art. 72 CISG, which RESPONDENT rightfully did by its declaration of avoidance of 9 July 2014.

REQUEST FOR RELIEF

183 In the light of the above RESPONDENT respectfully requests the Arbitral Tribunal to find that:

a. The Arbitral Tribunal has jurisdiction over GLOBAL MINERALS;

b. The order of the Emergency Arbitrator is lifted;

c. RESPONDENT rightfully avoided the Contract with its declaration of avoidance of 7 July 2014 or, in the alternative, with its declaration of avoidance of 9 July 2014;

d. RESPONDENT is not bound to deliver 30 t of coltan;

e. CLAIMANT bears the costs of the emergency arbitration and/or the arbitration.