ELEVENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

MASARYK UNIVERSITY

On behalf of:		**Against**:
RESPONDENT		**CLAIMANT**
Hope Hospital		Innovative Cancer Treatment Ltd
1-3 Hospital Road		46 Commerce Road
Oceanside		Capital City
Equatoriana		Mediterraneo

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LIST OF ABBREVIATIONS

2000 Standard Terms	CLAIMANT's Standard Terms and Conditions for Sale of November 2000
2011 Standard Terms	CLAIMANT's Standard Terms and Conditions for Sale of July 2011
ARA	Answer to Request for Arbitration
Art./Arts.	Article/Articles
CE	CLAIMANT's Exhibit
CEPANI	Belgian Centre for Arbitration and Mediation
Circular	Circular No. 265 issued by the Auditor General of Equatoriana
CLAIMANT	Innovative Cancer Treatment Ltd.
Contracting State	Contracting state of the CISG
FSA	Framework and Sales Agreement concluded on 13 January 2008
MC	Memorandum for CLAIMANT (submitted by University of the Free State)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PARTIES	CLAIMANT and RESPONDENT
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
RA	Request for Arbitration
RE	RESPONDENT's Exhibit
RESPONDENT	Hope Hospital
Sec.	Section
SLA	Sale and Licensing Agreement concluded on 20 July 2011
Tribunal	The CEPANI Arbitral Tribunal, sitting in Vindobona, consisting of Mr. Presiding Arbitrator, Dr. Arbitrator One and Prof. Bianca Tintin

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SUMMARY OF FACTS

CLAIMANT	Innovative Cancer Treatment Ltd, the seller, is one of the few manufacturers world-wide of particle therapy equipment having its place of business in Mediterraneo.
RESPONDENT	Hope Hospital, the buyer, is a general hospital and the national center for cancer research and treatment in Equatoriana, also renowned abroad.
13 January 2008	PARTIES concluded FSA providing for purchase of a proton therapy facility consisting of one proton accelerator and two treatment rooms using a passive-beam scattering technique. At that time PARTIES also discussed the idea of adding a third treatment room using an active scanning technology.
15 April 2010	CLAIMANT delivered the facility under FSA.
May 2011	RESPONDENT approached CLAIMANT with regard to an additional third treatment room using the active scanning technology.
June-July 2011	During the negotiations on SLA, CLAIMANT mentioned the overhaul of its standard terms which were to be applicable to SLA. However, CLAIMANT failed to provide their English translation before the conclusion of SLA, despite its promise to do so.
20 July 2011	PARTIES concluded SLA. Under SLA CLAIMANT was obliged to develop the necessary software and to train RESPONDENT's personnel, construct the treatment room and to supply it with the necessary equipment. PARTIES agreed on a discount on the price to reflect RESPONDENT's obligation to provide medical data, its personnel and premises necessary for the development of the software.
13 January 2012	Third room using the active scanning technology became available. Subsequently, CLAIMANT started to conduct the necessary trials and to fine-tune the software using the data provided by RESPONDENT.
15 August 2012	RESPONDENT notified CLAIMANT that the facility in its set-up could not be operated. For this reason, RESPONDENT refused to pay the final installment under FSA as well as the remaining amount under SLA due to

	the inoperability of the proton therapy facility, including the active scanning technology.
6 June 2013	CLAIMANT submitted the Request for Arbitration to CEPANI in accordance with the arbitration clause in Art. 23 FSA. The clause is, however, void. Therefore, it cannot serve as a valid legal basis for arbitration.
10 June 2013	CLAIMANT's Request for Arbitration was received by CEPANI.
5 July 2013	RESPONDENT submitted its Answer to Request for Arbitration.
5 August 2013	Arbitral Tribunal was appointed.
2 October 2013	Terms of Reference were agreed and signed by the counsels of PARTIES and the arbitrators.
4 October 2013	Procedural Order No 1 was distributed to PARTIES.
31 October 2013	Procedural Order No 2 was distributed to PARTIES.

SUMMARY OF ARGUMENTS

A. I. THE TRIBUNAL MANIFESTLY LACKS JURISDICTION TO DEAL WITH THE CLAIMS ARISING OUT OF BOTH FSA AND SLA

Art. 23 FSA cannot serve as a legal basis for arbitral proceedings. This provision itself does not constitute an arbitration clause. Were there an arbitration clause, the appeal and review mechanism would render the entire clause invalid. Moreover, the unilateral nature of CLAIMANT's choice between arbitration and litigation would render the whole arbitration clause inoperable. Additionally, the arbitration clause in the 2000 Standard Terms does not grant jurisdiction to the present Tribunal either. Further, PARTIES have never validly agreed to arbitrate under SLA. First, neither the 2011 Standard Terms were validly incorporated into FSA, nor SLA itself provides a valid arbitration clause. Second, Art. 23 FSA may not be applied to arbitration under SLA. For these reasons, the Tribunal lacks jurisdiction over the disputes arising out of both FSA and SLA.

A. II. THE CLAIMS ARISING OUT OF BOTH FSA AND SLA MAY NOT BE HEARD IN A SINGLE SET OF PROCEEDIINGS

Assuming that there is a valid arbitration clause in both FSA and SLA, the claims arising therefrom may not be heard in a single set of proceedings. RESPONDENT has never expressly agreed to join the claims arising out of both FSA and SLA in a single set of proceedings under CEPANI Rules. Moreover, the presumption under Art. 10(3) CEPANI Rules as to the implied agreement on the joinder is refuted. The matters in dispute are largely separate and this very fact creates an obstacle for the joinder.

B. I. SLA DOES NOT CONSTIUTE A SALES CONTRACT UNDER THE CISG

The preponderant part of CLAIMANT's obligations under SLA consists in provision of services. CLAIMANT did not transfer the ownership to the software, but merely undertook to develop, install, test and fine-tune it and subsequently provided RESPONDENT with the right to use the software. Together with other services provided under SLA, the supply of services represents around 80% of the total value of CLAIMANT's obligations under SLA. Moreover, both PARTIES devoted particular attention to the services related to the software. Thus, both the free-market value of the services provided under SLA and the weight attributed thereto by PARTIES largely exceed the value of physical equipment as such, rendering SLA falling outside the scope of the CISG by virtue of its Art. 3(2).

B. II. THE 2011 STANDARD TERMS WERE NOT INCORPORATED INTO SLA

Had CLAIMANT intended to include the 2011 Standard Terms into SLA, it was obliged to make them available to RESPONDENT. Although CLAIMANT's representative promised to send the 2011 Standard Terms to RESPONDENT, the promise was never honored. The only way of getting familiar with the text of the 2011 Standard Terms was searching through the CLAIMANT's website. However, RESPONDENT was never provided with a direct link to the 2011 Standard Terms. Moreover, the text on the website was available only in Mediterranean, i.e. a language RESPONDENT could not have been reasonably expected to understand.

B. III. BY CHOOSING LAW OF MEDITERRANEO PARTIES EXCLUDED THE CISG

FSA, the previous contract between PARTIES governing their all further contracts, is governed by the national law of Mediterraneo, excluding the CISG. When asked about the changes in the CLAIMANT's 2011 Standard Terms in contrast to FSA, CLAIMANT's representative expressly assured RESPONDENT that any changes would be of a minor nature and would hardly affect the PARTIES' relationship. As there was no indication whatsoever regarding the modification of the legal regime of SLA in contrast to the law governing FSA, the choice-of-law clause in the 2011 Standard Terms must be interpreted as excluding the CISG. Also, the *contra proferentem* rule supports the interpretation in favor of RESPONDENT. Finally, there is a considerable line of arbitral awards and court decisions holding that a choice-of-law clause pointing only to a Contracting State's law entails the exclusion of the CISG.

A. ARGUMENTS WITH REGARDS TO THE PROCEDURE

1. RESPONDENT is a renowned public university hospital and a national center for cancer research and treatment in Equatoriana [*RA, p. 4, para. 2*]. In order to optimize its range of available cancer treatment options, RESPONDENT approached CLAIMANT to discuss a purchase of proton therapy facility in 2007 [*RA, p. 4, para. 3; CE 1, p. 9*].

2. After lengthy negotiations, PARTIES concluded FSA for a purchase of proton therapy facility in 2008 [*RA, p. 4, para. 4; CE 2, pp. 10-12*]. FSA was also deemed to serve as a framework agreement for future cooperation between PARTIES [*CE 2, p. 10*]. Due to the requirements of Equatorianean government for RESPONDENT, particularities in respect to dispute resolution mechanism were negotiated [*ARA, p. 31, para. 5*]. In 2011 PARTIES concluded SLA which provided additional advanced active scanning technology for the existing proton treatment facility [*RA, p. 6, para. 13; CE 6, pp. 18-20*]. Later, in 2012, problems regarding commercial viability of the proton therapy facility and problems with regard to the active scanning technology software arose [*ARA, pp. 34-35, paras. 22-24*].

3. CLAIMANT assumes that the Tribunal has jurisdiction to decide disputes arising out of both FSA and SLA as a valid arbitration agreement is present [*MC, p. 7, paras. 33, 37*]. Further, in CLAIMANT's opinion both claims shall be heard in a single set of proceedings as disputes are related to each other [*MC, p. 18, para. 76*].

4. These arguments are flawed. Neither FSA, nor SLA contains a valid arbitration clause which would grant the Tribunal jurisdiction to decide on the claims [**I.**]. Assuming that jurisdiction of the Tribunal was established, both claims shall be heard in two separate proceedings as requirements for joinder under CEPANI Rules are not met [**II.**].

I. THE TRIBUNAL MANIFESTLY LACKS JURISDICTION TO DECIDE ON CLAIMS ARISING OUT OF BOTH FSA AND SLA

5. It is solely the parties' arbitration agreement which is a foundation stone of any arbitration proceedings [*Redfern/Hunter, p. 84*] and establishes the tribunal's jurisdiction to decide the dispute [*Poudret/Besson, p. 120; Moses, p. 17*].

6. In the present case, jurisdiction of the Tribunal to decide the dispute arising out of FSA is not established, as FSA does not contain a valid and enforceable arbitration clause [**1.**]. Similarly, the dispute arising out of SLA cannot be heard in arbitral proceedings since SLA does not entail PARTIES' agreement to arbitrate [**2.**].

1. PARTIES NEVER VALIDLY AGREED TO ARBITRATE UNDER FSA

7. RESPONDENT requests the Tribunal to decline its jurisdiction concerning the claim arising out of FSA. Although CLAIMANT does not expressly address this issue, RESPONDENT in the first place argues that the dispute resolution clause in Art. 23 FSA does not constitute an arbitration clause [**1.1.**]. Even if the Tribunal found that Art. 23 FSA contained an arbitration clause, the unenforceability of an appeal and review mechanism under *lex arbitri* would render the entire arbitration clause invalid [**1.2.**]. Alternatively, CLAIMANT's unilateral choice between arbitration and court proceedings makes the arbitration clause inoperable in its entirety [**1.3.**]. Moreover, the Tribunal cannot assume its jurisdiction based on Sec. 21 of the 2000 Standard Terms either [**1.4.**].

1.1. The dispute resolution clause in Art. 23 FSA does not constitute an arbitration clause

8. Parties' consent to arbitrate is the prerequisite for the existence of an arbitration clause [*Poudret/Besson, p. 120; Redfern/Hunter, p. 18; Moses, p. 17*]. The decisive factor to determine the parties' consent to a particular dispute resolution mechanism as well as its true character is the substance of what the parties actually intended, not the label they gave to it [*Born, pp. 215-221*].

9. Besides its consensual, or contractual, nature, arbitration can be characterized as a private system of adjudication where parties agree to have their disputes resolved by arbitrators to the exclusion of the courts, i.e. outside of any judicial system [*Methanex Motunui case; Born, p. 216; Fouchard/Gaillard/Goldman, p. 8; Moses, p. 1; Poudret/Besson, pp. 1-2; Roebuck*]. Moreover, parties are bound to accept the decision once made, whether they find it correct or not [*Methanex Motunui case*]. One of the salient features of arbitration and one of the main reasons why parties prefer arbitration to litigation is the fact that arbitration results in a final and binding decision, only with a limited possibility of court appeal [*Huys/Keutgen, p. 21; Moses, p. 2*]. Even in situations where an appeal to state courts is available, it is restricted to the questions of law [*Born, p. 80; Rubino-Sammartano, p. 407; PO 2, pp. 59-60, paras. 13-14*]. If an appeal on questions of fact were allowed, an award would not be final and of precedential value. Such an approach would make the arbitration proceedings only one element, particularly the first instance, of the judicial hierarchy [*Fouchard/Gaillard/Goldman, p. 183*].

10. During negotiations on FSA, RESPONDENT made clear that the arbitration clause in the 2000 Standard Terms was unacceptable for it [*ARA, p. 32, para. 10*]. Therefore, PARTIES devoted

considerable effort to formulate a specific dispute resolution mechanism which would best correspond to their interests. This was later adopted as the multi-step dispute resolution clause in Art. 23 FSA [*CE 2, p. 11; ARA, p. 32, para. 5*]. Although Art. 23 para. 3 FSA seems to refer PARTIES to arbitration, Art. 23 FSA must be read and understood in its entirety. Particularly, Art. 23 para. 4 FSA provides PARTIES with the right to appeal to the state courts if any one of them considers the award to be *"obviously wrong in fact or in law"*. The applicable state courts shall then have jurisdiction to fully review the merits of the case and to render a completely new decision. It is clear that this provision undermines one of the essential features of international arbitration, i.e. the final and binding nature of an award.

11. What PARTIES in fact agreed upon is a specific dispute resolution mechanism which combines advantages of arbitration, such as expertise and speed, and advantages of court proceedings, such as right to appeal on questions both of facts and law. The appeal mechanism contravenes the true virtues of arbitration, as it inserts features characteristic to litigation into the procedure [*Knull/Rubins, p. 25; Rigaux, pp. 261, 274*]. The PARTIES' intention to gain the best of both arbitration and litigation resulted in a specific dispute resolution mechanism, which in any case cannot be described as arbitration.

12. **To conclude,** Art. 23 FSA shall be interpreted in its entirety. It introduces a specific dispute resolution mechanism which, however, lacks distinguishing elements of arbitration. Therefore, it cannot be understood as PARTIES' agreement to arbitration regarding the disputes arising out of FSA.

1.2. Even if the arbitration clause exists, the included appeal and review mechanism renders the whole clause invalid

13. RESPONDENT as a public hospital and government-funded entity must respect specific requirements while concluding contracts. Accordingly, the government of Equatoriana expects RESPONDENT to comply with the Circular which provides that: *"Government entities must not forego the right of review of manifestly erroneous decisions of courts or tribunals"* [*RE 1, p. 36*]. Although the Circular is not directly applicable to RESPONDENT, due to the extensive state funding, the government of Equatoriana expects it to comply with the Circular [*PO 2, p. 58, para. 9*].

14. As a previous experience demonstrated, departing from the Circular in submitting to arbitration with no appeal and review mechanism had sparked considerable negative public discussions [*PO 2, p. 58, para. 9*]. RESPONDENT, as a renowned hospital and national cancer research and treatment center that accounts to Equatoriana's tax payers, naturally aimed to avoid such discussions, in order to maintain appearance of responsible and well-respected national hospital.

15. Mainly for above mentioned reasons, RESPONDENT insisted on an appeal and review mechanism which would ensure its compliance with the Circular. RESPONDENT later found out about unenforceability of the appeal and review mechanism drafted by CLAIMANT's lawyers [*ARA, p. 32, para. 6*].

16. RESPONDENT holds that the unenforceability of the appeal and review mechanism provision [**a.**] invalidates whole arbitration clause. This assertion is derived from the fact that RESPONDENT would never agree to arbitration without the possibility of an appeal and review mechanism by court or tribunal as it was essential to its needs [**b.**].

a. Appeal and review mechanism is not permitted under *lex arbitri*

17. CLAIMANT does not directly address the issue that an appeal and review mechanism is not allowed under Danubian law as *lex arbitri* [*MC, p. 9 para. 44*]. Contrary to this approach, RESPONDENT argues that this is a crucial issue which requires closer inspection.

18. Danubia Arbitration Act is the law governing the arbitration procedure, i.e. *lex arbitri,* as the designated place of arbitration shall be in Vindobona, Danubia [*CE 2, p. 11; Art. 1(2) Danubia Arbitration Act; Fouchard/Gaillard/Goldman, p. 663; Moses, p. 64*]. Danubia Arbitration Act strictly limits grounds for judicial review of arbitral proceedings and of an arbitral award [*Art. 34 Danubia Arbitration Act; Moses, p.196*] and completely forbids any appeal and review based on facts or law in international arbitration [*PO 2, p. 60, para. 13; Born, p. 2638*]. Additionally, as the list of grounds for judicial review is exhaustive and of mandatory nature, it cannot be altered or amended by a contractual provision [*Mattel case; Born, p. 2562; Explanatory Note UNCITRAL, para. 44*]. CEPANI Rules as the applicable procedural rules chosen by PARTIES also exclude the possibility of an appeal against an award [*Art. 32(1) CEPANI Rules*].

19. CLAIMANT argues that appeal and review mechanism *"does not render arbitral proceedings void"* because national law of RESPONDENT allows appeal and review mechanism [*MC, p. 10 para. 47*]. Yet this is impossible because appeal and review is not allowed by Danubia Arbitration Act which is the applicable law decisive to determine admissibility of an appeal and review mechanism of an award [*Poudret/Besson, p.119; Moses, p. 50; PO 2, p. 60, para. 15*]. Moreover, CLAIMANT's argument that RESPONDENT's law on domestic arbitration allows appeal and review mechanism is incorrect [*MC, p. 10, para. 47*]. RESPONDENT derives this assertion from the fact that Equatorianean law does not allow review of facts at all, and review of law is limited to incorrect interpretation of the Equatorianean law [*PO 2, p. 59, para. 13*].

20. **As a result**, appeal and review mechanism provision is unenforceable as it clearly contravenes the rules of *lex arbitri*.

b. Appeal and review mechanism constitutes an essential term of the arbitration clause in FSA

21. Consent to arbitrate exists only where parties agreed to all essential elements of the arbitration agreement [*Fouchard/Gaillard/Goldman, para. 485; Várady, p. 475*]. In the present case, appeal and review mechanism constitutes an essential element, in other words *conditio sine qua non,* to the arbitration clause.

22. The term is essential to the whole arbitration agreement in circumstances where the party would not conclude the arbitration agreement without the contested provision. Therefore, it is crucial to establish what was the intent of the parties and whether consent to arbitrate would exist absent the appeal and review mechanism provision [*LaPine case; Fouchard/Gaillard/Goldman, p. 262, 269; Várady, p. 474; Zell*]. In cases where no such consent would exist arbitration agreement is invalid as it cannot survive nullity of such a provision [*Diseno case; LaPine case*].

23. Confidence of parties in the arbitration proceedings is based on the expectation that the terms of arbitration agreement will be enforced. No arbitration proceedings can be conducted where arbitration proceedings do not comply with the terms designated by the parties. Otherwise the confidence of the parties would be undermined if they knew that arbitration would proceed even if the essential terms of bargain would not be observed [*Várady, p. 474*].

24. CLAIMANT itself confirms that appeal and review mechanism was included into FSA on RESPONDENT's request [*MC, p. 9, para. 44*]. CLAIMANT also correctly points out that this mechanism was of fundamental importance to RESPONDENT and was included into FSA in order to accept arbitration [*MC, p. 9, para. 44; MC, p. 14, para. 63*]. CLAIMANT was well aware of the fact that RESPONDENT would never agree to dispute resolution clause which would not allow the review of obviously wrong awards without having the opportunity to appeal against it [*CE 3, p. 14*].

25. **As a result**, the appeal and review mechanism has to be considered one of the essential terms of the arbitration agreement. Therefore, RESPONDENT would never agree to arbitrate without any possibility of an appeal.

26. **To conclude**, unenforceability of the appeal and review mechanism as an essential term requested and insisted on by RESPONDENT, as well as fully accepted by CLAIMANT, renders the whole arbitration clause invalid.

1.3. The CLAIMANT's unilateral option to choose between litigation and arbitration is invalid and makes the entire Art. 23 inoperable

27. Pursuant to Art. 23 para. 6 FSA, it is the CLAIMANT's exclusive right to choose between arbitration and litigation regarding all payment related claims. Contrary to CLAIMANT's assertion [*MC, p. 19, para. 28*], RESPONDENT argues that provision of Art. 23 para. 6 FSA is invalid and thus makes the entire Art. 23 FSA inoperable.

28. RESPONDENT argues that it is necessary to apply the principles and logic of contract law to the Art. 23 para. 6 FSA as an offspring of the PARTIES' will [*Sony Ericsson case; West Suburban case*]. Art. 23 para. 6 FSA as any other contract provision is based upon the equilibrium of rights and obligations between PARTIES and thus should not be based on a mere hazard or speculation [*Ancel/Cuniberti*].

29. RESPONDENT submits that there are two reasons for the invalidity of Art. 23 para. 6 FSA. First, Art. 23 para. 6 FSA gives a unilateral option exclusively to CLAIMANT that it may on its own choice and anytime (ab)use the disproportion between PARTIES in its favor. Accordingly, Art. 23 para. 6 FSA should reflect a reasonable balance between rights and obligations of PARTIES. Otherwise, such a provision cannot be considered valid [*Bulgaria case; Choice Hotels case; Sony Ericsson case; Sunderland case*].

30. In order to restore the balance of contractual rights and obligations, the right to bring an action in the courts of Mediterraneo should be given not only to CLAIMANT, but also to RESPONDENT. As was recently intimated by the French *Cour de Cassation*, a contractual clause which has the *"caractère potestatif"* of the Art. 23 para. 6 FSA, i.e. it is solely one party who determines which forum will be competent to decide a dispute, should be seen as invalid [*Rothschild case; Ancel/Cuniberti*]. As a matter of fact, RESPONDENT has never rejected that it would be willing to go to national courts of Mediterraneo if there were an equal opportunity for both PARTIES to bring an action therein.

31. In addition, RESPONDENT asserts that Art. 23 para. 6 FSA is not a result of an equal bargaining between PARTIES. First, RESPONDENT as a public hospital is not a typical entrepreneur, as its primary purpose is to protect public health, not to generate profit indeed. Second, RESPONDENT was not in an equal position with CLAIMANT during contractual negotiations. Had RESPONDENT protested during negotiations against the inclusion of Art. 23 para. 6 FSA, it could not have obtained the newest technology to cure such a fatal disease as cancer. Additionally, there have been a limited number of companies that offer such technology as CLAIMANT did. In consequence, RESPONDENT had only a limited possibility to negotiate with other contracting

partners. In summary, the scarce nature of the performance offered by CLAIMANT, as well as the situation on the market, made RESPONDENT to accept contractual condition it would not otherwise agreed to.

32. Moreover, CLAIMANT argues that the choice provided for in Art. 23 para. 6 FSA *"cannot be seen as a right, but rather as a remedy"* [*MC, p. 11, para. 52*]. The given distinction between a "right" and a "remedy" made by CLAIMANT suffers from an excessive formalism. As a matter of fact, no matter which label may be given to a unilateral option to choose between arbitration and litigation, it does change nothing as regards the inherent unfairness of such unilateral provision in Art. 23 para. 6 FSA.

33. RESPONDENT argues that there is also the second reason for the invalidity of Art. 23 para. 6 FSA. This provision causes uncertainty as to the forum in which PARTIES should enforce their rights in case of a dispute arising out of FSA. As a consequence, it is not clear which type of dispute resolution PARTIES have in fact agreed upon [*ARA, p. 32, para. 7*].

34. As RESPONDENT demonstrated above, Art. 23 FSA should be viewed in its entirety as it embodies a genuine dispute resolution mechanism. It is a specific dispute resolution mechanism agreed on by PARTIES which is not arbitration, litigation or any other common dispute resolution mechanism in international commerce. This mechanism is composed of closely interrelated procedural steps expressed in the sections of Art. 23 FSA. Therefore, invalidity of any of its provisions would make the dispute resolution mechanism inoperable.

35. **To conclude**, the CLAIMANT's unilateral choice between arbitration and litigation pursuant to Art. 23 para. 6 FSA is invalid and makes the entire Art. 23 FSA inoperable.

1.4. The Tribunal's jurisdiction cannot be based on the arbitration clause in the 2000 Standard Terms either

36. An arbitration clause contained in a preexisting document, typically in standard terms and conditions, constitutes a valid arbitration agreement provided that the standard terms are made part of the PARTIES' contract [*Art. 7(6) Danubia Artbitration Act; Poudret/Besson, p. 170*].

37. There is no dispute between PARTIES that the CLAIMANT's 2000 Standard Terms were effectively incorporated into FSA by virtue of Art. 46 FSA [*CE 2, p. 12; RA, p. 8, para. 24; ARA, p. 33, para. 16*]. However, contrary to CLAIMANT's submission [*MC, p. 8, para. 41*], RESPONDENT holds that CLAIMANT cannot rely on the arbitration clause in Sec. 21 of the 2000 Standard Terms as a source of the Tribunal's jurisdiction regarding the claim arising out of FSA for the following reasons.

38. Firstly, during the negotiations on FSA, PARTIES intended the arbitration clause in the 2000 Standard Terms not to be applicable as it did not conform to RESPONDENT's requirements, acknowledged by CLAIMANT [*ARA, p. 32, para. 10*]. Particularly, Sec. 21 para. 4 of the 2000 Standard Terms completely excludes any right to appeal against an award [*CE 2, Annex 4, p. 13*]. Nevertheless, CLAIMANT clearly understood that the possibility of appeal mechanism constituted an essential condition for RESPONDENT to agree to arbitration [*MC, p. 14, para. 63*]. Therefore, PARTIES have never consented to apply the arbitration clause in the 2000 Standard Terms.

39. Secondly, the Tribunal cannot derive its jurisdiction from the arbitration clause in the 2000 Standard Terms since it refers to arbitration with the place in Capital City, Mediterraneo [*CE 2, Annex 4, p. 13*]. Parties in their commercial contracts, as well as national laws, including Danubia Arbitration Act, may use the expression "place of arbitration". This shall, however, be considered synonymous to and understood in the true meaning of the concept of "seat of arbitration" [*Poudret/Besson, p. 101; Redfern/Hunter, p. 270*].

40. The seat of arbitration plays a significant role, as it designates the law governing the arbitration, i.e. *lex arbitri* [*Art. 1(2) Danubia Arbitration Act*; *Cordero-Moss, p. 14; Moses, p. 43; Poudret/Besson, p. 115*]. It also determines the "nationality" of the arbitration proceedings and of the award [*Poudret/Besson, p. 103*], including the question which state courts or other authorities are competent to perform arbitration assistance and supervision functions [*Cordero-Moss, p. 16; Fouchard/Gaillard/Goldman, p. 771*]. By designating the seat of arbitration in Vindobona, Danubia, PARTIES chose Danubian law as *lex arbitri* and laid down a particular legal framework for the arbitration proceedings at hand. This legal framework would be different if the seat of arbitration were in Capital City, Mediterraneo.

41. Further, although the seat of arbitration is not an essential requirement for an arbitration clause to be valid, once chosen by the parties, such choice shall be respected [*Art. 20(1) Danubia Arbitration Act; Poudret/Besson, p. 111*]. The tribunal is generally not allowed to transfer the chosen seat during the proceedings without the parties' consent [*Jolidon, p. 96*]. In case the Tribunal, seated in Vindobona, Danubia, assumed its jurisdiction based on the arbitration clause in the 2000 Standard Terms, it would completely undermine the PARTIES' agreement. Were the arbitral proceedings not in accordance with the agreement of PARTIES, the award may later be set aside based on Art. 34(2)(a)(iv) Danubia Arbitration Act or the enforcement may be refused under Art. V(1)(d) NYC.

42. **To conclude**, the arbitration clause in Sec. 21 of the 2000 Standard Terms cannot serve as a basis of the Tribunal's jurisdiction as PARTIES never agreed to apply this clause. In any case,

the clause calls for arbitration in Capital City, Mediterraneo, and is thus not addressed to the present Tribunal. Should the Tribunal assume its jurisdiction based on Sec. 21 of the 2000 Standard Terms, the award may then be set aside or enforcement thereof may be refused.

43. **To sum up,** the Tribunal manifestly lacks jurisdiction over the dispute regarding FSA as Art. 23 FSA itself does not constitute a valid arbitration clause. Should the Tribunal find this provision entails an arbitration clause, the appeal and review mechanism would render the whole arbitration clause invalid. So would the CLAIMANT's unilateral choice between arbitration and court proceedings. In addition, neither the arbitration clause in the 2000 Standard Terms can serve as a basis for the Tribunal's jurisdiction.

2. PARTIES NEVER AGREED TO ARBITRATION UNDER SLA

44. To establish the Tribunal's jurisdiction to decide on the payment claim arising out of SLA, PARTIES have to agree to submit their disputes regarding SLA to arbitration [*Art. 7(1) Danubia Arbitration Act; Poudret/Besson, p. 120; Redfern/Hunter, p. 84; Moses, p. 17*]. An arbitration clause may be contained in parties' commercial contract or in any other document which is made part of the contract [*Art. 7(1), 7(6) Danubia Arbitration Act; Fouchard/Gaillard/Goldman, pp. 258-259, 271; Poudret/Besson, p. 170*].

45. CLAIMANT asserts that PARTIES validly agreed to arbitration regarding disputes arising out of SLA, as the arbitration clause in the 2011 Standard Terms is applicable to the dispute [*MC, p. 13, para. 60, p. 15, para. 65*]. Contrary to CLAIMANT's assertion, RESPONDENT will demonstrate that PARTIES never agreed on arbitration under SLA. Neither the 2011 Standard Terms, nor the text of SLA itself can serve as a basis for jurisdiction of the present Tribunal [**2.1.**]. Although CLAIMANT does not expressly address this issue, RESPONDENT further argues that Art. 23 FSA cannot establish the Tribunal's jurisdiction to decide the dispute arising out of SLA either [**2.2.**].

2.1. Neither the 2011 Standard Terms, nor SLA itself indicate PARTIES' intention to submit disputes arising out of SLA to the present Tribunal

46. Parties' agreement to arbitrate may be, and most frequently is, in a form of an arbitration clause in a contract between the parties [*Art. 7(1) Danubia Arbitration Act*]. An arbitration clause may also be contained in a preexisting document and constitutes an agreement to arbitrate provided that such a document is made part of the contract by reference to it [*Art. 7(6) Danubia Arbitration Act*].

47. On 20 July 2011, PARTIES concluded SLA for the purchase of a third treatment room using active scanning technology [*CE 6, pp. 18-20*]. Art. 23 SLA provided for a dispute resolution mechanism, including solely a forum selection clause (Art. 23 para. 2) and interim and provisional

measures clause (Art. 23 para.1), both establishing jurisdiction of the state courts of Equatoriana or Mediterraneo [*CE 6, p. 19*]. CLAIMANT alleges that the 2011 Standard Terms became part of SLA and that Sec. 21 thereof provides grounds for arbitration regarding disputes arising out of SLA [*MC, p. 13, para. 60*]. RESPONDENT does not contest that Sec. 21 of the 2011 Standard Terms contains an arbitration clause. However, contrary to CLAIMANT'S assertion, RESPONDENT submits that Sec. 21 of the 2011 Standard Terms does not establish jurisdiction of the present Tribunal to decide on the claim arising out of SLA for the following reasons.

48. Firstly, the arbitration clause in Sec. 21 of the 2011 Standard Terms does not apply to disputes regarding SLA since the 2011 Standard Terms could not have been effectively incorporated into SLA. As RESPONDENT will demonstrate below, this is because CLAIMANT never provided RESPONDENT with a copy or made the 2011 Standard Terms otherwise available to RESPONDENT [**B.II.**].

49. Secondly, even if the Tribunal found that the 2011 Standard Terms could have been validly incorporated into SLA, Art. 23 SLA would prevail over the conflicting provision of the 2011 Standard Terms [*Schlechtriem/Schwenzer, p. 189; CISG-AC Opinion No. 13, para. 8; Bonell, p. 154; Art. 2.1.21 UNIDROIT Principles*]. Art. 23 SLA does not, however, make a slightest mention of arbitration. That is to say that PARTIES' intention to submit to arbitration cannot be derived from Art. 23 SLA either.

50. In any event, Sec. 21 of the 2011 Standard Terms does not establish jurisdiction of the present Tribunal since it calls for arbitration under CEPANI Rules with the place of arbitration in Capital City, Mediterraneo. As it has already been established, reference to "the place of arbitration" in PARTIES' arbitration clause shall be understood synonymous to reference to the concept of "the seat of arbitration" [*Poudret/Besson, p. 101; Redfern/Hunter, p. 270*]. The seat of arbitration determines the applicable *lex arbitri* and once designated by PARTIES, it may not be transferred by the Tribunal without PARTIES' consent [*Jolines, p. 96*]. Since the seat of arbitration in the present case shall be in Vindobona, Danubia [*Mr. Fasttrack's Letter accompanying RA, p. 3; CE 2, p. 11*], the arbitration clause in the 2011 Standard Terms cannot in any case serve as a basis for the Tribunal's jurisdiction.

51. **To conclude,** neither the 2011 Standard Terms, nor any provision of SLA itself establish jurisdiction of the Tribunal as PARTIES' intention to submit the dispute arising out of SLA to arbitration cannot be derived from any of the two.

2.2. The alleged arbitration clause in FSA cannot serve as a basis for the Tribunal's jurisdiction regarding the dispute under SLA either

52. According to the preamble of SLA, the general relationship between PARTIES shall be governed by FSA, which constitutes a framework for SLA [*CE 6, p. 18*]. In line with this, Art. 45 FSA stipulates that its provisions shall also govern "*all future contracts between Parties in relation to the proton therapy facility where such contracts do not contain a specific provision to the contrary*" [*CE 2, p. 12*]. In its Request for Arbitration, CLAIMANT asserts that disputes regarding SLA may be submitted to arbitration based on the arbitration clause included in Art. 23 FSA [*RA, p. 8, para. 21*]. It must be noted, though, that CLAIMANT fails to elaborate on this issue in its Memorandum. However, RESPONDENT holds that this requires closer examination.

53. Besides in parties' contract, an arbitration clause may be contained in a separate and preexisting document, such as in a framework contract [*Art. 7(6) Danubia Arbitration Act*; *Fouchard/Gaillard/Goldman, p. 271; Poudret/Besson, p. 170*]. Such a clause can be effectively incorporated into a particular contract only where the contract itself provides a clear and express reference to the arbitration clause [*Rubino-Sammartano, p. 207*].

54. Firstly, RESPONDENT has already proved that FSA does not entail a valid arbitration clause, since PARTIES agreed to a specific dispute resolution mechanism, which lacks distinguishing elements of arbitration. Therefore, FSA cannot serve as a framework in this regard, since it provides no arbitration clause to be incorporated into SLA by reference [*CE 6, p. 18*].

55. Secondly, presuming that the Tribunal found FSA included a valid arbitration clause, this clause could not have been incorporated into SLA by reference. In order to effectively incorporate an arbitration clause in a preexisting document into a separate contract, the arbitration clause has to be expressly referred to in the contract which incorporates it [*Aughton case*; *Rubino-Sammartano, p. 204*]. In the present case, the only and very general reference to FSA, a contract allegedly containing an arbitration clause, can be found in the preamble of SLA [*CE 6, p. 18*]. However, the latter does not make the slightest mention of an arbitration clause or of arbitration in general. Therefore, PARTIES' intention to refer to the arbitration clause in FSA and to make the clause part of SLA cannot be inferred.

56. Thirdly, even if the Tribunal found that Art. 23 para. 3 FSA contained a valid arbitration clause and that the clause could have been incorporated into SLA by general reference in its preamble, the clause would be clearly replaced by Art. 23 SLA. RESPONDENT submits that Art. 23 SLA constitutes "*a specific provision contrary to Art. 23 FSA*" and thus introduces a completely new dispute resolution mechanism for SLA. Even CLAIMANT itself admits that Art. 23 SLA is

"a provision different from Art. 23 FSA" [*MC, p. 14, para. 63*]. CLAIMANT was well aware of RESPONDENT's insistence on the possibility of full appeal and review of an award by state courts [*MC, p. 14, para. 63*] and understood the importance thereof for RESPONDENT [*CE 3, p. 14*]. Under FSA, PARTIES established a specific dispute resolution mechanism which consisted of several inseparable steps, including PARTIES' right to appeal both on merits and questions of law against an award [*CE 2, p. 11*]. To the contrary, SLA contains solely a forum selection clause which grants jurisdiction to the state courts of Mediterraneo or Equatoriana [*CE 6, p. 19*]. Since national court systems encompass wide possibility of appellate review on questions of law as well as on the merits [*Born, pp. 80-81*], this provision corresponds to RESPONDENT's position and PARTIES' intention to include the possibility of appeal and review of erroneous decisions. Therefore, Art. 23 SLA completely substitutes the alleged arbitration clause in Art. 23 FSA.

57. **To conclude,** the Tribunal's jurisdiction regarding the payment claim under SLA cannot be based on the clause in Art. 23 FSA since it does not entail PARTIES agreement to arbitrate. Even if the Tribunal ruled in favor of arbitration regarding FSA, the arbitration clause therein was not incorporated into SLA. In any event, SLA introduced new dispute resolution clause which is contrary to the one in Art. 23 FSA and therefore prevails.

58. **To sum up**, RESPONDENT requests the Tribunal to find it has no jurisdiction as PARTIES never agreed to have their disputes arising out of SLA resolved by means of arbitration.

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59. **In conclusion**, RESPONDENT respectfully requests the Tribunal to find that it lacks jurisdiction over the disputes arising out of both FSA and SLA. Neither FSA, nor SLA entails PARTIES' agreement to submit disputes arising therefrom to the present Tribunal.

II. CLAIMS ARISING OUT OF FSA AND SLA CANNOT BE DECIDED IN A SINGLE SET OF PROCEEDINGS

60. Exclusively for the purposes of this part, it is assumed that both FSA and SLA contain a valid arbitration clause [*PO 1, p. 53, para. 3*]. Contrary to CLAIMANT's submission [*MC, p. 17, para. 72*], RESPONDENT insists that the claims arising out of FSA and SLA may not be heard in a single set of proceedings.

61. Art. 10 CEPANI Rules is the sole legal basis for considering whether the claims arising out of FSA and SLA are to be joined. Accordingly, the conditions set forth in this provision must be complied with. [**1.**] The condition as per Art. 10 alinea 2 b) CEPANI Rules is not met as RESPONDENT has never agreed to have the claims decided in a single set of proceedings [**2.**].

1. ART. 10 CEPANI RULES IS THE SOLE LEGAL BASIS AS TO THE JOINDER

62. There being an assumption that both FSA and SLA contain a valid arbitration clause in favor of CEPANI [*PO 1, p. 53, para. 3*], only CEPANI Rules provide whether the claims may be heard in a single set of proceedings. By the same token, there is no other source from which the competence of the Tribunal to decide on both claims in a single set of proceedings would be derived.

63. Conditions laid down in Art. 10 CEPANI Rules must be met in the situation where there are two arbitration clauses in each contract as well as one arbitration clause applicable to both contracts.

64. Art. 12 CEPANI Rules embodies the principle of "*competence-competence*". CLAIMANT asserts that Art. 12(1) CEPANI Rules provides the Tribunal with an inherent competence to ultimately decide, whether the claims at hand may be heard in a single set of proceedings [*MC, p. 17, para. 74*]. To the contrary, RESPONDENT holds that this provision alone does not invest the Tribunal with the competence to decide on both claims arising out of FSA and SLA in a single set of proceedings. Accordingly, Art. 10 CEPANI Rules sets forth the conditions for joinder of the claims in a single set of proceedings. Were it Art. 12 CEPANI Rules to enable the joinder of the claims in a single set of proceedings, as suggested by CLAIMANT, Art. 10 CEPANI Rules would be redundant.

65. There are two essential conditions to be fulfilled under Art. 10 CEPANI Rules for the claims to be joined in a single set of proceedings. First, PARTIES must have agreed to arbitration under CEPANI Rules. Second, PARTIES must have agreed to have their claims decided within a single set of proceedings. In consequence, the will of the PARTIES to go to arbitration under CEPANI Rules alone does not imply that they have agreed on a single set of proceedings.

66. Would the Tribunal overlook the fact that there is no agreement as to the joinder of both claims into a single set of proceedings, the potential award could not be recognized and enforced under Art. V(1)(c) NYC if "[t]*he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration"* [*Kronke, p. 259*]. Thus, an excessive extension of the scope of an arbitration agreement, leading to the joinder of the claims arising out of FSA and SLA, would amount to an excess of the Tribunal's authority, as well as to the disregarding of the PARTIES' consent.

67. **To sum up**, it is solely Art. 10 CEPANI Rules which lays down the conditions necessary for the joinder of claims under FSA and SLA. Nothing else allows the Tribunal to do so.

2. RESPONDENT HAS NEVER AGREED TO THE JOINDER OF CLAIMS IN THE SINGLE SET OF PROCEEDINGS

68. The claims arising out of FSA and SLA may not be joined into a single set of proceedings, as RESPONDENT has not expressly agreed to the joinder of the claims in a single set of proceedings [**2.1.**]. Moreover, the implied agreement on a single set of proceedings cannot be presumed, as the matters in dispute are unrelated [**2.2.**].

2.1. RESPONDENT has not expressly agreed on the joinder of the claims arising out of FSA and SLA

69. The Tribunal must respect the PARTIES' consent [*Fouchard/Gaillard/Goldmann, p. 261*] as an essential precondition for the joinder of the claims. Accordingly, Art. 10(1)(b) CEPANI Rules provides that "*all the parties to the arbitration have agreed to have their claims decided within a single set of proceedings*". This requirement is not met in the case at hand. RESPONDENT has never agreed to have the claims arising out of FSA and SLA decided in a single set of proceedings [*ARA, pp. 32-33, para. 12*].

70. **To conclude**, RESPONDENT has never consented to joining the claims arising out of FSA and SLA in a single set of proceedings.

2.2. It is to be presumed that PARTIES have not agreed to single proceedings as the matters in dispute are unrelated

71. Art. 10(3) CEPANI Rules reads that "[a]*rbitration agreements concerning matters that are not related to one another give rise to a presumption that the parties have not agreed to have their claims decided in a single set of proceedings".*

72. Contrary to CLAIMANT's assertions [*MC, p. 16-17, para. 76*], RESPONDENT submits that the matters in dispute are unrelated and as such cannot be decided together for the following reasons.

73. At the heart of the dispute arising out of FSA is the difference between the estimated costs in the budget analysis provided by CLAIMANT before the conclusion of FSA and the actual costs for running the proton therapy facility. As a consequence, running the proton therapy caused a loss of USD 12 million to RESPONDENT in the last financial year [*CE 7, p. 21*]. Hence, the matter in dispute is of economic nature and requires the corresponding expertise.

74. The claim arising out of SLA stems from the malfunction of the software necessary for the active scanning technology. The software calculated inaccurate targets and it was not able to cope with

the patients' respiratory movements [*CE 7, pp. 21-22*]. Hence, the matter in dispute is of technical nature and requires the appropriate expertise.

75. Accordingly, the fact that RESPONDENT has appointed arbitrators with different expertise to resolve each claim [*ARA, p. 31, paras. 2, 3; PO 2, p. 60, para. 19*] clearly demonstrates that it has required to have the claims decided separately. Therefore, since the PARTIES' consent to have their claims decided in a single set of proceedings lacks, the Tribunal has no competence to do so.

76. It is clear from the foregoing that the matters are unrelated. Therefore, CLAIMANT's submission that it is sufficient to refute the presumption by having one single *"economic relation"* [*MC, p. 18, para. 76*] is incorrect, as the matters have to be related. What matters is that the nature of the claims is completely different and accordingly requiring distinct expertise to decide a dispute arising out of each of them. Hence, such unrelated matters ought not to be heard in a single set of proceedings. Therefore, RESPONDENT showed that the matters are unrelated and thus cannot be decided in a single set of proceedings.

77. In case both claims were joined in a single set of proceedings without the consent of PARTIES, the Tribunal would undertake the risk that the award rendered by it would be unenforceable. Art. V(1)(d) NYC requires that the arbitral tribunal be constituted in accordance with the agreement of the parties. Thus, an arbitral award made in cases joined under *lex arbitri,* there being no agreement between the parties, may not be enforced in other jurisdictions [*Fouchard/Gaillard/Goldman, p. 478*].

78. **To conclude**, the presumption of consent laid down in Art. 10(3) CEPANI Rules has been refuted, since the matters in dispute are unrelated.

79. **To sum up**, PARTIES have neither expressly nor impliedly agreed on a single set of proceedings regarding the claims arising out of FSA and SLA.

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80. **In conclusion**, RESPONDENT respectfully requests the Tribunal to decide that the claims arising out of FSA and SLA may not be heard in a single set of proceedings

81. **In the light of the above mentioned**, RESPONDENT respectfully requests the Tribunal to hold it lacks jurisdiction to hear the disputes arising out of FSA and SLA, as neither of the two entail PARTIES' agreement to submit the disputes to arbitration. Moreover, Tribunal is also requested to hold that even if both FSA and SLA contained a valid arbitration clause, the claims arising therefrom cannot be heard in a single set of proceedings.

B. ARGUMENTS WITH REGARDS TO THE MERITS

82. RESPONDENT has established above that the Tribunal does not have jurisdiction over the claims arising out of both FSA and SLA. In accordance with the order of the Tribunal [*PO 1, p. 53, para. 3; PO 2, p. 57, para. 1*], though, RESPONDENT will address the issue of the law applicable to the claim under SLA. The order of the Tribunal explicitly states that no other substantive issues should be addressed [*PO 1, p. 53, para. 3; PO 2, p. 57, para. 1*]. Thus, RESPONDENT will not discuss these issues as raised by CLAIMANT [*MC, pp. 26 – 33, paras. 101 – 128*].

83. Following the order of CLAIMANT'S arguments, RESPONDENT will firstly discuss whether SLA constitutes a sales contract under the CISG. Second, the question of effective incorporation of the 2011 Standard Terms will be addressed. Finally, the effect of the choice-of-law clause contained in 2011 Standard Terms will be considered.

84. Contrary to CLAIMANT's assertions, RESPONDENT requests the Tribunal to hold that SLA is not a sales contract in the sense of Art. 3(2) CISG [**I.**]. Should the Tribunal find that SLA falls in the sphere of application of the CISG, the CISG is not applicable, nonetheless. The 2011 Standard Terms including their choice-of-law clause do not constitute part of SLA [**II.**]. Therefore, the national law of Mediterraneo is applicable as follows from the 2000 Standard Terms. Assuming that PARTIES validly incorporated the 2011 Standard Terms into SLA, the Tribunal should find that the choice-of-law clause pointing to the law of Mediterraneo leads to the exclusion of the CISG [**III.**]

I. SLA DOES NOT CONSTITUTE A SALES CONTRACT UNDER THE CISG

85. CLAIMANT itself points out that SLA is mainly concerned with the software [*MC, p. 19, para. 78*]. However, the only question CLAIMANT discusses is whether software constitutes goods in the sense of the CISG [*MC, pp. 19-21, paras. 79-88*]. It argues that because the software can be qualified as goods within the CISG, SLA as whole is the sales contract [*MC, p. 21, para. 88*]. However, CLAIMANT completely ignores other aspects of the material sphere of application of the CISG, i.e. whether SLA constitutes the sales contract in the sense of Arts. 30, 53 and especially in the sense of Art. 3 CISG [*MC, pp. 19-21, paras. 78-88*].

86. RESPONDENT concedes that software may be considered goods within the meaning of the CISG. However, particular circumstances of the case may cause that obligations related to software are considered services under the CISG [*Computer Software and Hardware case; Software Development case; Orintix v. Fabelta Ninove; Cox; Endler/Daub, p. 606*]. Under its Art. 3(2) CISG is not applicable

to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of services.

87. Pursuant to SLA, CLAIMANT was obliged to deliver a third treatment room using active scanning technology consisting of the equipment and the software necessary to use a magnet guided and modeled proton beam [*CE 6, p. 18*]. As there was no working modeling software developed at the moment of the conclusion of SLA [*PO 2, p. 62, para. 24*], CLAIMANT undertook to develop, install and subsequently test and fine-tune the software necessary for the operation of the facility [*CE 6, p. 19; PO 2, p. 62, para. 29*]. In addition, it was obliged to train RESPONDENT's personnel [*RE 3, p. 39*].

88. CLAIMANT seems to argue that it was only obliged to deliver the software as a part of the equipment [*MC, p. 21, para. 86*]. RESPONDENT rejects this conclusion. RESPONDENT will show that all CLAIMANT's obligations relating to software amount to services in the sense of Art. 3(2) CISG [**1.**]. Further, CLAIMANT will prove that all services rendered under SLA constitute the preponderant part of CLAIMANT's obligations as presupposed by Art. 3(2) CISG [**2.**], thus excluding the application of the CISG.

1. OBLIGATIONS REGARDING THE SOFTWARE AND TRAINING OF PERSONNEL CONSTITUTE SERVICES UNDER ART. 3(2) CISG

89. Art. 3(2) CISG does not provide an explicit definition of services. However, common features of services can be drawn from the pertaining case law. In contrast to a sale of goods, provision of services consists in an exercise of a particular activity which does not lead to a transfer of ownership to goods, but to a different corresponding benefit for the other party [*Brushes and Brooms case; Internet Website Development case; Machines, Devices and Replacement Parts case; Market Study Case; Saltwater Isolation Tank case*].

90. RESPONDENT will demonstrate that the development of the software [**1.1.**], installation, testing and fine-tuning of the software [**1.2.**] as well as training of RESPONDENT's personnel [**1.3.**] constitute services under Art. 3(2) CISG.

1.1. The development of the software constitutes service in the sense of Art. 3(2) CISG

91. CLAIMANT only seems to argue that software was delivered as a part of the equipment without giving any closer reasoning for this conclusion [*MC, p. 21, p. 86*]. CLAIMANT ignores [*MC, pp. 19-21, paras. 78-88*] the fact that there was no working modeling software developed at the moment of the conclusion of SLA [*PO 2, p. 62, para. 24*]. Neither does it discuss [*MC, pp. 19-21,*

paras. 78-88] that the software at hand was developed primarily for the needs of RESPONDENT [*PO 2, p. 61, para. 24*]. However, RESPONDENT suggests these facts are decisive for the qualification of CLAIMANT's obligation consisting in the development of the software.

92. As regards the development of the software, it has been established both in literature and case law that where the software is custom-made, or developed for a particular party and purpose, it is considered to be a service obligation [*Cox; Endler/Daub, p. 606; Sono, p. 521; Market Study case; Orintix v. Fabelta Ninove*]. In such a case, development of the software thus corresponds to the common features of services.

93. In the present case, no software was available at the time of conclusion of SLA. CLAIMANT was short of and needed the medical data and expertise to develop the software [*PO 2, p. 61, para. 24*]. Therefore under SLA CLAIMANT was responsible for the development of the software and RESPONDENT was obliged to provide CLAIMANT with the data and expertise [*CE 6, p. 19*]. Thus, the initial version of the software was developed based on the data provided by RESPONDENT and primarily for the needs of RESPONDENT [*PO 2, p. 61, para. 24*]. However, the development cannot be considered sale of goods as no transfer of ownership took place – RESPONDENT was granted only the right to use the software [*CE 6, p. 18*].

94. **To conclude**, development of the software in the present case complies with the common features of services.

1.2. Installation, testing and fine-tuning of the software at hospital constitute services

95. CLAIMANT completely leaves out the fact that it undertook also other obligations under SLA [*MC, pp. 19-21, paras. 78-88*]. Pursuant to SLA, CLAIMANT was obliged to install, test and fine-tune the software at hospital, i.e. RESPONDENT's place of business [*CE 6, p. 19; PO 2, p. 61, paras. 23, 25*]. In other words, CLAIMANT carried out activities the result of which did not consist in transfer of ownership to goods.

96. Moreover, it is well recognized that activities consisting in installation and testing in general, are to be considered a provision of services [*Hotel Materials case; Machines, Devices and Replacement Parts case; Merry-go-rounds case; Saltwater Isolation Tank case; CISG-AC Opinion No. 4, para. 3.1; Ferrari (2012), p. 117; Schlechtriem/Schwenzer, p. 68*]. More specifically, the same applies for installation of software [*Computer Software and Hardware case; Green/Saidov, p. 172*].

97. **To conclude**, the installing, testing and fine-tuning of the software at hospital constitute services.

1.3. The training provided under SLA constitutes services under 3(2) CISG

98. CLAIMANT ignores the fact that it also undertook to train RESPONDENT's personnel [*MC, pp. 19-21, paras. 78-88*]. Even though the training of RESPONDENT's personnel is left out from the text SLA, it is obvious that it was CLAIMANT's obligation under the contract. The omission was deliberate due to higher taxation of training services [*RE 3, p. 39, paras. 2, 5; PO 2, p. 62, para. 27*].

99. It is undisputed in both literature and case law that training of personnel in general constitutes services [*Packaging Machine case; Jazbinsek v. Piberplast; CISG-AC Opinion No. 4, para. 3.1; CISG Digest 2012*]. Similarly, it has also been held that training related to software is also to be regarded as provision of services [*Computer Software and Hardware case; Green/Saidov, p. 172*]. **To conclude**, the training of RESPONDENT's personnel constitutes services.

100. **To sum up**, the Tribunal should hold the development of the software, installation, testing and fine-tuning of the software as well as training of RESPONDENT's personnel constitute services under Art. 3(2) CISG.

2. THE PREPONDERANT PART OF CLAIMANT'S OBLIGATIONS UNDER SLA CONSISTS IN THE SUPPLY OF SERVICES

101. In order to determine the preponderant part of the obligations, economic values of the goods and services are to be compared. However, this criterion tends to be supplemented or even revised by the weight the parties themselves have attributed to each obligation [*Schlechtriem/Schwenzer, pp. 70-71*].

102. RESPONDENT submits that the value of the services rendered under SLA exceeds the value of goods provided by CLAIMANT [**2.1.**]. Moreover, the weight attributed by PARTIES to CLAIMANT's particular obligations show that PARTIES considered the services obligations as preponderant [**2.2.**].

2.1. The value of the services provided pursuant to SLA exceeds the value of goods delivered by CLAIMANT

103. Employing the economic criterion, the values of the goods and the services need to be compared [*CISG-AC Opinion No. 4, para. 3.3; Schlechtriem/Schwenzer, p. 70*]. The contract falls outside the scope of the CISG if the share of services excess 50% of the total value [*Window Production Plant case; Schroeter, p. 77; CISG-AC Opinion No. 4, para. 3.4*].

104. The services provided by CLAIMANT under SLA include the development (USD 3.5 million), the installation (USD 1.0 million) and the testing (USD 250.000) of the software. The value of these

three components constitutes 50% of the free-market value of whole treatment room [*PO 2, p. 62, para. 29*]. Furthermore, CLAIMANT provided the training of the personnel which represents 10% of value package, i.e. USD 950.000 [*RE 3, p. 39*].

105. The value of the physical equipment, i.e. the goods delivered under SLA, is not entirely clear. Although at one point CLAIMANT attributes 40% of the whole free-market value to the physical equipment [*RE 3, p. 39*], both PARTIES in their submissions rather suggest that the equipment delivered is worth around 20% of the value [*RA, p. 6, para. 13; ARA, p. 34, para. 19*]. Thus, one may assume that the difference between the mentioned figures is represented by the works consisting in the design and installation of the third treatment room itself. As a consequence, it appears that only 20% of the value of the whole package can be attributed to the goods delivered under SLA.

106. As a whole, the supply of services pursuant to SLA represents around 80% of the total value of CLAIMANT's obligations under SLA. In comparison, the value of magnets and other equipment amount to approximately 20% of the total value.

107. **To conclude**, the value of the services considerably exceeds 50% of the total value of the package, constituting the provision of services a preponderant part of CLAIMANT's obligations.

2.2. In addition, PARTIES themselves considered the provision of services as a preponderant part of SLA

108. Even though the economic criterion is persuasive on its own, it should be supplemented and revised by the weight the parties themselves attribute to the obligations [*Cylinder case*; *CISG-AC Opinion No. 4, para. 8; Huber/Mullis, pp. 46-47; Schlechtriem/Schwenzer, p. 71*].

109. CLAIMANT itself rightly points out that SLA is mainly concerned with the software [*MC, p. 19, para. 78*]. The negotiations and the wording of SLA alike show that PARTIES put the main emphasis on the cooperation on the software development. CLAIMANT had strong interest in concluding SLA as it needed RESPONDENT's facility in order to verify the required data and engage in clinical studies. Without such input it would be impossible for CLAIMANT to finalize the development of the software [*RA, p. 5, para, 9; PO 2, p. 62, para. 28*].

110. Accordingly, RESPONDENT approached CLAIMANT because it knew that it was CLAIMANT that was developing the software. This is the reason why the latest phase of the software development and the possibility of RESPONDENT's contribution thereto was the main issue discussed during the negotiations. On the contrary, the correspondence between PARTIES shows no particular discussion regarding the physical materials to be delivered [*CE 4, p.16; CE 5, p. 17*]. Moreover,

RESPONDENT itself offered to contribute to the development, fine-tuning and testing of the software, which was a process lasting for at least four months at RESPONDENT's premises employing its personnel [*CE 7, p. 21; PO 2, p. 61, paras. 25-26*]. It follows that both PARTIES attributed considerable weight to all services related to the software

111. **To sum up**, taking into account both the economic value of all services and the weight PARTIES attributed to them, the provision of services constitute the preponderant part of CLAIMANT's obligations under SLA.

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112. **In conclusion**, development, installation and fine-tuning of the software as well as training of RESPONDENT's personnel constitute services. These, in conjunction with the services relating to design and installation of the third treatment room, form the preponderant part of CLAIMANT's obligations under SLA. Therefore, SLA is not a sales contract in the sense of Art. 3(2) CISG.

II. THE 2011 STANDARD TERMS WERE NOT INCORPORATED INTO SLA

113. During the negotiations on SLA, Dr. Vis as a CLAIMANT's negotiator, informed RESPONDENT about the application of its new 2011 Standard Terms to SLA [*CE 5, p. 17*]. In doing so, Dr. Vis promised that he would send the copy of the text of the 2011 Standard Terms to RESPONDENT once it was translated to English [*RE 2, p. 37*]. Although he never did so [*RE 2, p. 38*], CLAIMANT now asserts that the 2011 Standard Terms were made part of SLA [*RA, p. 8, para. 25; MC, p. 12, para. 58*].

114. The CISG does not provide specific rules for the incorporation of standard terms. However, it is well established that the rules are to be derived from the provisions on the formation and interpretation of contracts [*Mobile Car Phones case; Propane case*]. Yet, the particular requirements for incorporation developed by the case law and doctrine vary. Although one position holds that a mere reference to standard terms suffices [*Tantalum Powder case; Propane case; Eiselen, p. 14*], the prevailing opinion requires the user of the standard terms to make them available to the other party [*Machinery case; Mobile Car Phones case; CISG-AC Opinion No. 13, para. 2.4; Schlechtriem/Schwenzer, p. 279; Huber, p. 133*]. In accordance with the majority view RESPONDENT will show that the 2011 Standard Terms were not made part of SLA as CLAIMANT had an obligation to make them available to RESPONDENT [**1.**], however it failed to do so [**2.**].

1. CLAIMANT WAS OBLIGED TO MAKE THE 2011 STANDARD TERMS AVAILABLE

115. The rationale behind the "making available" requirement is that it is the offeror's obligation to design its offer's content [*Art. 14 CISG*] and to make it understandable to a reasonable offeree [*Arts. 8(2), 8(3) CISG*]. It is the task of the user of the standard terms to make their text part of the offer [*Schlechtriem/Schwenzer, p. 280*]. Such a duty is additionally justified in international transactions where the offeree cannot foresee the terms given the differences between domestic laws and practices [*Magnus, p. 320; Schlechtriem/Schwenzer, p. 280*].

116. Although CLAIMANT asserts that it is the offeree's responsibility to enquire about the standard terms [*MC, p. 12, para. 56; MC, p. 22, para. 94*], it completely ignores the fact that CLAIMANT itself undertook to provide RESPONDENT with the text of the 2011 Standard Terms. Dr. Vis, CLAIMANT's leading negotiator, made a promise that he would send the 2011 Standard Terms to RESPONDENT once they would be available in English [*CE 5, p. 17*; *RE 2, p. 37*]. Thus, CLAIMANT itself made clear that it deemed necessary to make the 2011 Standard Terms available to RESPONDENT. Accordingly, RESPONDENT relied on the promise, having the confidence that had the 2011 Standard Terms not been made available, they would not have become part of SLA. RESPONDENT submits that the "making available" requirement must apply in cases where the user of the standard terms itself recognizes this duty.

117. **To sum up**, CLAIMANT was obliged to make the 2011 Standard terms available to RESPONDENT; otherwise these could not be included into SLA.

2. CLAIMANT FAILED TO MAKE THE 2011 STANDARD TERMS AVAILABLE

118. As first held in the leading *Machinery case* and confirmed by the case law [*Broadcasters case; Mobile Car Phones case; Sesame Seeds case; Synthetic Window Parts case*] as well as the commentators [*Schlechtriem/Schwenzer, p. 281; Magnus, p. 320*], the "making available" requirement is fulfilled if the user of the standard terms hands over the copy of their text to the other party or makes them available in another way. Moreover, in the case at hand CLAIMANT itself undertook to provide a copy of the 2011 Standard Terms [*CE 5, p. 17; RE 2, p. 37*]. As CLAIMANT opted for the stricter standard and did not fulfill it, the 2011 Standard Terms were not made available to RESPONDENT [**2.1.**]. Should the Tribunal consider it sufficient for CLAIMANT to make the 2011 Standard Terms available in another way, this requirement was not fulfilled either [**2.2.**].

2.1. CLAIMANT did not provide RESPONDENT with the copy of the 2011 Standard Terms

119. The text of the 2011 Standard Terms was never sent or handed over to RESPONDENT [*RE 2, p. 38*]. According to CLAIMANT, this fact does not hinder the incorporation of the 2011 Standard Terms [*MC, p. 12, para. 57*]. However, CLAIMANT itself acknowledged that the "making available" requirement is fulfilled only if it hands over the copy the 2011 Standard Terms to RESPONDENT [*CE 5, p. 17; RE 2, p. 37*]. **To conclude**, CLAIMANT did not make the 2011 Standard Terms available to RESPONDENT in the described way.

2.2. CLAIMANT failed to make the 2011 Standard Terms otherwise available

120. Should the Tribunal find that the requirement of transmitting the text of the standard terms is too strict, CLAIMANT still shall ensure that the offeree will have a reasonable opportunity to get familiar with the content of the standard terms. RESPONDENT submits that in the present case the publication of the 2011 Standard Terms on the Internet is not sufficient to ensure RESPONDENT's awareness thereof [**a.**]. Even if the Tribunal holds that the publication on the Internet is sufficient, the 2011 Standard Terms were not available in English at the time of contract formation. Thus, RESPONDENT did not have a reasonable opportunity to get familiar with their text [**b.**].

a. The publication of the 2011 Standard Terms on the Internet was not sufficient to ensure RESPONDENT's awareness thereof

121. The availability of the standard terms over the Internet is not sufficient in cases in which a contract is concluded orally or on paper [*Broadcasters case*]. In such cases, an offeree would be burdened with the task to actively find and retrieve the standard terms [*Schlechtriem/Schwenzer, p. 284*]. It is not reasonable for the offeree to search for standard terms somewhere on the offeror's website where a number of different standard terms for different transactions may be found [*CISG-AC Opinion No. 13, para. 3.4*]. Moreover, the risk that the standard terms can be unilaterally modified by the offeror should not be borne by the offeree [*Magnus, p. 323*; *Kruisinga*]. Otherwise the principle of good faith in international trade and the parties' general obligations to cooperate and to share information would be violated [*Broadcasters case; Solae v. Hershey*].

122. PARTIES communicated both in person and in writing. Although they never used electronic way of communication, the only way RESPONDENT could get familiar with the 2011 Standard Terms was via Internet. Furthermore, the only path to the text of the 2011 Standard Terms provided by CLAIMANT leads through a note written in a small print at the bottom of CLAIMANT's two

letters stating: "*Please note our new Standard Terms and Conditions of Sale on www.ictproton.com*" [*CE 3, p.14; CE 5, p.17*]. Thus, CLAIMANT did at no point provide RESPONDENT with the direct link to the text of the 2011 Standard Terms.

123. CLAIMANT seems to suggest that RESPONDENT had the obligation to enquire about the 2011 Standard Terms [*MC, p. 12, para. 58*]. However, CLAIMANT fails to take into account its obligation to cooperate [*Broadcasters case; Solae v. Hershey*]. RESPONDENT could not have been expected to actively seek the 2011 Standard Terms on the CLAIMANT's website. To the opposite, it was CLAIMANT's obligation to ensure that RESPONDENT will have the possibility to get familiar with the content of the 2011 Standard Terms.

124. **As a result**, in the present case the publication of the 2011 Standard Terms on the CLAIMANT's website was not sufficient to ensure RESPONDENT'S awareness thereof.

b. In any event, the 2011 Standard Terms were not in English at the time of the formation of SLA

125. The possibility of a party to become aware of the content of the standard terms undoubtedly depends on the standard terms' language [*Tantalum Powder case; Schlechtriem/Schwenzer, p. 289*]. Should the standard terms be made available to the other party, it is necessary that the standard terms be in a language that the recipient could reasonably be expected to understand [*Mobile Car Phones case; Schlechtriem/Schwenzer, p. 289*]. When the particular language version of the standard terms occurs after the conclusion of the contract, the standard terms cannot be incorporated into the contract [*Schlechtriem/Schwenzer, p. 289*].

126. A party is reasonably expected to understand the standard terms if they are the language of the contract, in the language of the negotiations or in the language used by the other party in other communications between the parties [*CISG-AC Opinion No. 13, para. 6; Schlechtriem/Schwenzer, pp. 289-290*]. It must me noted, though, that the language which is used only scarcely between parties is not to be taken into consideration [*Schlechtriem/Schwenzer, pp. 289*]. Even if the CEO speaks the language of the standard terms or is a native speaker, the language cannot be taken into consideration when the negotiations are mostly conducted in English [*Plastic Filter Plate case*].

127. The negotiations on SLA were held only in English [*CE 3, p.14; CE 4, p. 16; CE 5, p.17; CE 7, p.21; RE 3, p. 39*] and the language of SLA is also English [*CE 6, p. 18*]. The only occurrence of Mediterranean being spoken was the communication between the young doctor – the only person in Hope Hospital who speaks Mediterranean – and CLAIMANT's technicians [*PO 2, p. 63, para. 35*]. Not only these communications took place between the people who were not the

members of the negotiating teams, but also these discussions were held in relation to FSA [*PO 2, p. 63, para. 35*]. It must be stressed that there is no evidence that the Mediterranean was ever spoken at the meetings or negotiations pertaining to SLA [*PO 2, p. 63, para. 35*].

128. Hence, it is clear that the usage of the Mediterranean was indeed scarce and was in no way used between PARTIES during the negotiations on SLA. Thus, the only language RESPONDENT could have been reasonably expected to understand was English. Contrary to CLAIMANT's suggestion [*MC, p. 12, para. 58*], RESPONDENT had, however, no opportunity to get familiar with the English version as it was not made available on the website before conclusion of SLA [*PO 2, p. 63, para. 32; Schlechtriem/Schwenzer, p. 289*]. **As a result**, the 2011 Standard Terms were not made available to RESPONDENT in a language it could have been reasonably expected to understand.

129. **To sum up**, CLAIMANT neither handed over the copy of the 2011 Standard Terms nor made them available to RESPONDENT in any other way.

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130. **In conclusion**, had CLAIMANT intended to include the 2011 Standard Terms into SLA, it was obliged to make them available to RESPONDENT. As it failed to do so, the 2011 Standard Terms do not constitute part of SLA.

III. BY CHOOSING LAW OF MEDITERRANEO PARTIES EXCLUDED THE CISG

131. RESPONDENT has established that the subject matter of SLA falls outside the scope of the CISG and that PARTIES did not validly incorporate the 2011 Standard Terms including the choice-of-law clause. The Tribunal should therefore apply the national law of Mediterraneo pursuant to Sec. 22 the 2000 Standard Terms [**1.**]. Should the Tribunal find that the subject matter of SLA is covered by the CISG and that the 2011 Standard Terms were incorporated into SLA, RESPONDENT submits that PARTIES excluded the CISG by the choice of law of Mediterraneo in Sec. 22 of the 2011 Standard Terms [**2.**].

1. THE TRIBUNAL SHOULD APPLY THE NATIONAL LAW OF MEDITERRANEO AS IT FOLLOWS FROM THE 2000 STANDARD TERMS

132. Concerning the determination of the law applicable to the merits of a dispute, arbitral tribunals are primarily bound by the rules contained in the applicable arbitration rules or laws [*Mourre, pp. 43-44; Pavić/Djordjević, p. 15; Poudret/Besson, pp. 574-575; Schlechtriem/Schwentzer, p. 56*]. The arbitration proceedings at hand are governed by the CEPANI Rules, which are silent in this respect. Accordingly, the Tribunal should look into the *lex arbitri* [*Schmidt-Ahrendts, p. 214*]. Under

Art. 28(1) Danubia Arbitration Act the Tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties.

133. Concerning the choice of law, it is not necessary for the parties to choose the law expressly in the contract. The choice of law may also be demonstrated by other terms of the contract, e.g. by reference to another document [*Lando, pp. 306-313*]. The preamble to SLA states that the general relationship between PARTIES is governed by FSA. Pursuant to its Art. 45, FSA is the basic frame contract which is applicable to "*all further and future contracts concluded by the Parties in relation to the Proton Therapy Facility purchased where such contracts do not contain a specific provision to the contrary*" [*CE, p. 12*]. Assuming that the 2011 Standard Terms were not effectively incorporated, there is no choice-of-law clause in SLA. Thus, the only choice-of-law provision that may apply is Sec. 22 of the 2000 Standard Terms which constitute part of FSA [*RA, p. 8, para. 24*; *ARA, p. 33, para. 16*]. It is not disputed between PARTIES that Sec. 22 of the 2000 Standard Terms refers to the national law of Mediterraneo [*PO 2, p. 60, para. 20*].

134. **To sum up**, the Tribunal shall apply the national law of Mediterraneo to the claims arising out of SLA.

2. ALTERNATIVELY, THE CHOICE-OF-LAW CLAUSE CONTAINED IN THE 2011 STANDARD TERMS EXCLUDES THE APPLICATION OF THE CISG

135. Should the Tribunal find that the 2011 Standard Terms are applicable to SLA, due consideration must be given to their choice-of-law clause in Sec. 22. The CISG enables parties to exclude its application under its Art. 6. The case law and literature alike have been consistent in distinguishing two types of the CISG exclusion: express and implied [*Huber/Mullis, p. 62; Pavić/Djordjević, p. 9; Schmidt-Ahrendts, p. 215*].

136. Concerning the way of the CISG exclusion, CLAIMANT's argumentation seems to be inconsistent. On the one hand, CLAIMANT alleges that a choice-of-law clause must explicitly exclude the CISG. On the other hand, CLAIMANT alleges that the choice of the law of a particular state in most instances does not lead to the exclusion of the CISG [*MC, p. 24, para. 96*], which implies that in some instances such a choice excludes the application of the CISG. Therefore, CLAIMANT itself recognizes that the CISG can be excluded both expressly and impliedly.

137. In the case at hand, there is no express exclusion of the CISG, hence the only possibility left is the implied exclusion. As CLAIMANT itself in fact acknowledged [*MC, p. 24, para. 96*], one of the options to impliedly exclude the CISG is to include a choice-of-law clause pointing to a Contracting State's national law, or some of its provisions [*Huber/Mullis, p. 64; Pavić/Djordjević,*

p. 9]. Contrary to CLAIMANT's assertion [*MC, p. 24, para. 96*], if it is not certain whether the choice-of-law clause leads to the exclusion of the CISG, the interpretative rules of Art. 8 CISG are to be used, taking into consideration all specifics of the case [*Huber/Mullis, p. 63; Schlechtriem/Schwenzer, p. 146*].

138. It has been established that Art. 8 CISG applies not only to individual statements but to contracts as well [*Huber/Mullis, p. 12; Lookofsky/Hertz, p. 144; Schlechtriem/Schwenzer, p. 235*]. Art. 8(1) CISG is applicable where a common intent between parties exists. If there is none, Art. 8(2) CISG providing an objective approach applies instead [*Huber/Mullis, pp. 12-13, Lookofsky/Hertz, p. 144*]. In the present case, the choice-of-law clause's meaning is in dispute, triggering the application of Art. 8(2) CISG.

139. Under Art. 8(2) CISG, the standard of interpretation is the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Huber/Mullis, pp. 12-13*]. Furthermore, Art. 8(3) CISG provides elements which should be given due consideration in determining the meaning of the disputed provision*, e.g. negotiations between the parties*. Considering especially their negotiations, PARTIES effectively excluded the CISG from the application to SLA [**2.1.**]. Further, other relevant circumstances support the exclusion of the CISG [**2.2.**].

2.1. Considering especially the negotiations, PARTIES effectively excluded the CISG from the application to SLA

140. Surely, the choice-of-law clause would be considered as excluding the CISG if it pointed to the domestic or national law of Mediterraneo. However, this is not the case, but there still remain relevant circumstances suggesting that the Tribunal should find the choice-of-law clause excluding the CISG.

141. It is undisputed between PARTIES that FSA, a previous contract between PARTIES, is governed by the national law of Mediterraneo, excluding the CISG [*PO 2, p. 60, para. 20*]. During the negotiations, CLAIMANT's representatives not only mentioned nothing about the possible modifications of the choice-of-law clause, but they expressly assured RESPONDENT that any changes in the 2011 Standard Terms would be of a minor nature and would hardly affect PARTIES' relationship [*CE 5, p. 17*]. It must be noted that the application of the CISG instead of the national law of Mediterraneo, a verbatim adoption of the UNIDROIT Principles [*PO 2, p. 57, para. 4*], would considerably affect PARTIES' relationship.

142. First, it is undisputed that the CISG is the best basis for the CLAIMANT's case under SLA [*PO 2, p. 60, para. 21*]. It follows that were the claim under SLA considered under the national law of Mediterraneo, RESPONDENT would have a better case. CLAIMANT submits that a significant and certain advantage in the consideration of one's case indeed affects PARTIES' relationship.

143. Further, a marked improvement of the UNIDROIT Principles over the CISG is the duty to act in good faith [*Bonell, pp. 305-306; Hartkamp, p. 37*]. UNIDROIT Principles expressly impose upon the parties a duty to act in good faith throughout the life of the contract, including the negotiation process [*UNIDROIT Principles Art. 1.7; Bonell, p. 305*], while the CISG, in contrast, expressly refers to good faith only in the context and for the purpose of its interpretation [*Art. 7(1) CISG; Industrial Equipment case; Bonell, p. 306*]. Moreover, UNIDROIT Principles presuppose sanction for breaching the duty to act in good faith [*Commentary to UNIDROIT Principles, p. 60*]. Thus, it must be noted that RESPONDENT, relying on the duty to act in good faith stemming from the UNIDROIT Principles, could not rely on such duty were the CISG applied instead.

144. Even if the choice-of-law clause remains unclear, the Tribunal should interpret the clause using the *contra proferentem* rule. This rule states that doubts as to the meaning of a statement are to be resolved against the drafter [*Huber/Mullis, p. 15; Schlechtriem/Schwentzer, p. 170*]. The rule has its major field of application where standard terms are used [*Cysteine case; Huber/Mullis, p. 15; Schlechtriem/Schwentzer, p. 170*]. Although Art. 8 CISG does not expressly mention the *contra proferentem* rule, the interpretation of Art. 8 CISG leads to a similar result [*Cysteine case; Huber/Mullis, p. 15*]. As a consequence, the choice-of-law contained in CLAIMANT's 2011 Standard Terms is to be interpreted *in dubio* against CLAIMANT and in favor of RESPONDENT, *i.e.* as excluding the application of the CISG.

145. **To conclude**, a reasonable person in the shoes of RESPONDENT would understand the 2011 Standard Terms choice-of-law clause pointing to the law of Mediterraneo as excluding the CISG.

2.2. Further, it follows from the case law that the choice of a Contracting State's law may lead to the exclusion of the CISG

146. CLAIMANT alleges that the majority of arbitral tribunals and national courts around the world held that a choice-of-law clause pointing to a Contracting State's law does not exclude the application of the CISG. However, to support this conclusion, CLAIMANT cites only two decisions from the U.S. District Courts [*MC, p. 24, paras. 97-98*]. RESPONDENT suggests that such an argumentation is by no means persuasive. Besides, RESPONDENT points out that there is also another line of arbitration awards [*Engines case; Russia 12 April 2004; Russia 11 October 2002; Russia*

6 September 2002; Leather/Textile Wear case] and courts decisions [*Building Materials; Cobalt case; Nuova Fucinati v. Fondmetall International*] that interpret a reference to a national law as an implied exclusion of the CISG.

147. Moreover, it has been submitted that choice-of-law clauses between parties of two Contracting States pointing only to a Contracting State's law entails the exclusion of the CISG. The reason is that otherwise the choice-of-law clause would make no sense [*Leather/Textile Wear case; Ferrari (1995), p. 89*]. In this connection, RESPONDENT submits that had CLAIMANT intended to have the CISG govern SLA, it could have easily done so in its 2011 Standard Terms by altering the wording of the clause differently than "*The contract is governed by the law of Mediterraneo*" [*CE 9, p. 24, para. 22*].

148. **To conclude**, it follows from the case law that the choice-of-law clause contained in the 2011 Standard Terms may exclude the application of the CISG.

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149. **In conclusion**, assuming that PARTIES validly incorporated the 2011 Standard Terms into SLA, the Tribunal should find that the choice-of-law clause pointing to the law of Mediterraneo leads to the exclusion of the CISG.

150. **In the light of above mentioned**, SLA is not a sales contract in the sense of Art. 3(2) CISG, because the provision of services constitutes the preponderant part of CLAIMANT's obligations under SLA. Should the Tribunal find that SLA falls in the sphere of application of the CISG, the CISG is not applicable, nonetheless. The 2011 Standard Terms do not constitute part of SLA because CLAIMANT failed to make them available to RESPONDENT. Therefore, the national law of Mediterraneo is applicable as follows from the 2000 Standard Terms. Assuming that PARTIES validly incorporated the 2011 Standard Terms into SLA, the Tribunal should find that the choice-of-law clause pointing to the law of Mediterraneo leads to the exclusion of the CISG.

REQUEST FOR RELIEF

For the reasons stated above, Counsel for RESPONDENT respectfully requests the Tribunal to find that:

I. The Tribunal does not have jurisdiction over the claims arising out of either FSA or SLA.

II. Should the Tribunal have jurisdiction over the claims under both FSA and SLA, these cannot be heard in a single set of proceedings.

III. SLA does not constitute a sales contract in the sense of the CISG.

IV. The 2011 Standard Terms were not incorporated into SLA.

V. The choice-of-law clause contained in the 2011 Standard Terms leads to the exclusion of the CISG.

/s./	/s./	/s./	/s./
Boris Barabáš	Klára Bažantová	František Halfar	Jan Hlubuček

/s./	/s./	/s./
Martin Hostinský	Lukáš Kudláč	Iveta Rohová