

TEAM CODE: TEAM TROY R

**XIII NATIONAL LAW SCHOOL-TRILEGAL INTERNATIONAL ARBITRATION
MOOT, 2020**

BEFORE THE ARBITRAL TRIBUNAL

Under Singapore International Arbitration Centre (SIAC) Rules, 2016 at Bengaluru, India

IN THE MATTER BETWEEN

ABC GMBH

(Claimant)

v.

NATIONAL POLICE PROCUREMENT CORPORATION

(Respondent)

MEMORANDUM FOR RESPONDENT

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TABLE OF ABBREVIATIONS

§	Section
¶/¶¶	Paragraph/Paragraphs
&	And
AIR	All India Reporter
Annx	Annexure
am	Ante Meridiem
Anr.	Another
Art.	Article
CC	Carbon Copy
CISG	The United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
Corp.	Corporation
GmbH	<i>Gesellschaft mit beschränkter Haftung</i> (Company with limited liability)
Hon'ble	Honourable
ICC	International Chamber of Commerce
Id	ibidem
i.e.	id est (that is)

IT	Information Technology
KB	King's Bench
Ltd.	Limited
NPPC	National Police Procurement Corporation
NYC	New York Convention
O365	Microsoft Office 365
Ors.	Others
PCA	Prevention of Corruption Act
PM	Particulate Matter
pm	Post meridiem
p./pp.	Page/Pages
Pvt.	Private
QB	Queen's Bench
SC	Supreme Court
SCC	Supreme Court Cases
SIAC	Singapore International Arbitration Centre
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
v	Versus
vol.	Volume

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STATEMENT OF JURISDICTION

National Police Procurement Corporation (NPPC), the Respondent in the present case, has the honour to submit the present dispute before this Tribunal pursuant to its obligations under Clause 15 of the Contract entered into by the Parties which is to be conducted in accordance with SIAC Rules 2016.

The seat of arbitration is London, England. However, the Respondent respectfully submits that the Tribunal does not have the requisite jurisdiction to decide the dispute before it.

STATEMENT OF FACTS

The parties to this Arbitration are ABC GmbH (“CLAIMANT”) and National Police Procurement Corporation or NPPC (“RESPONDENT”), which are collectively referred to as “THE PARTIES”.

The Claimant is a company incorporated in Fitzerland. It is a manufacturer of technological products and have an experience of supplying them to law enforcement agencies across Europe.

The Respondent is a Public Sector Undertaking, that procures goods and services for the government of Filandria.

The Republic of Filandria suffered an economic downfall. The growing discontentment among people, resulted in countrywide protests. Some protests turned violent, leading to widespread destruction of the public property. The police found it impossible to identify the perpetrators.

<i>Date</i>	<i>Event</i>
<i>20th Sept</i>	The government ordered the Claimant to immediately start the process of procuring the drones which shall be used to supplement the efforts of the police.
<i>Sept</i>	Due to the urgency and strong credentials, the Respondent approached the Claimant as they had the shortest turnaround time.
<i>1st Oct</i>	Officials of the Respondent visited the Claimant’s facility on their invitation. They entered into a contract for 2000 units of the TRC 2645. The Drone had facial recognition technology and extremely advanced AI algorithm capable of distinguishing violent act with peaceful protest and alert the authorities. It could also be integrated with biometric information database of Filandria.
<i>3rd Oct</i>	Initial advance payment of €20 mil. made via wire transfer and the receipt was acknowledged by the Claimant.

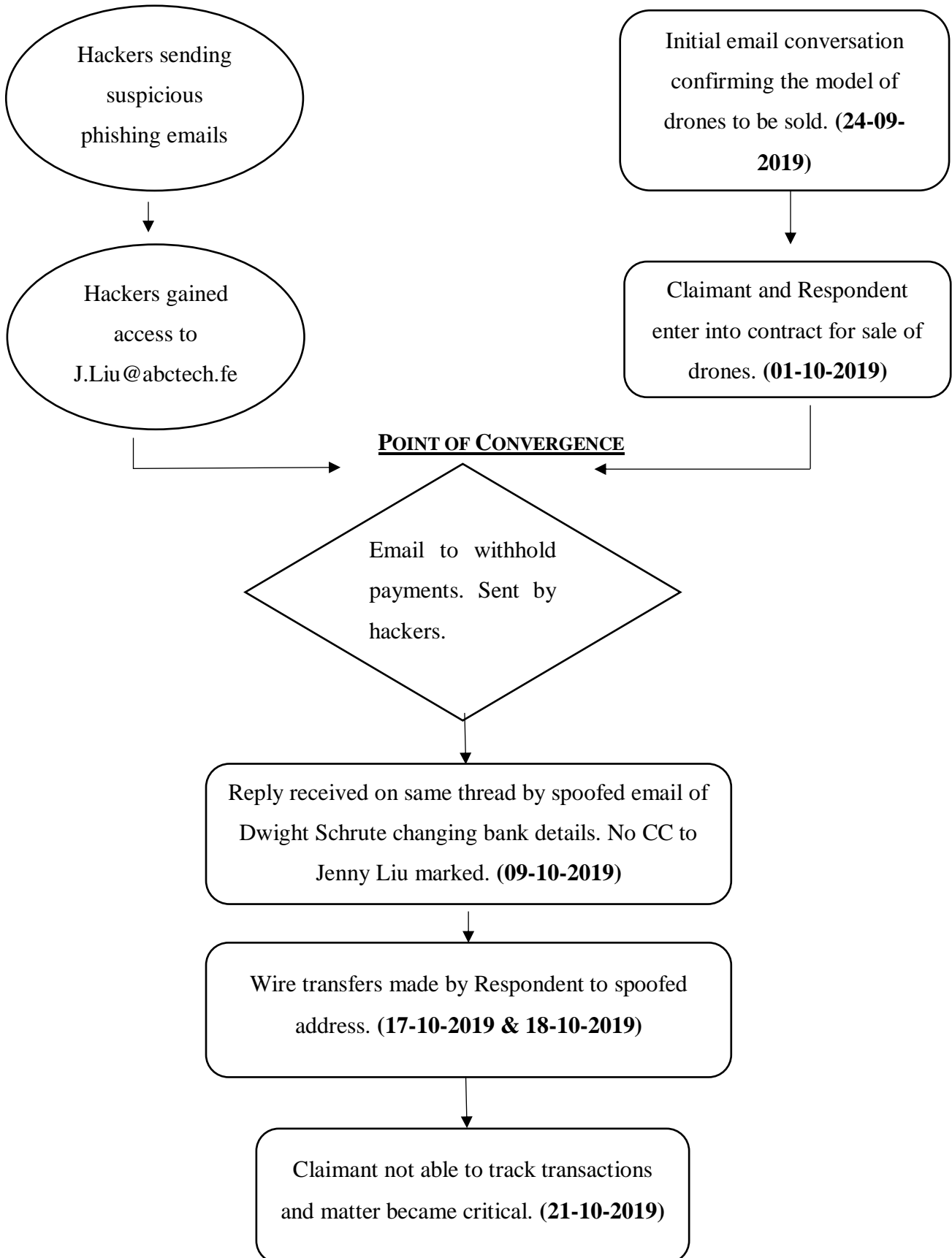
- 5th Oct* The first tranche of drones was personally delivered by the Claimant. They also hosted a dinner reception for the Respondent and other government dignitaries at the Fitzerland Consulate at Farare.
- 9th Oct* The Respondent received a series of emails informing that the Claimant was in the process of changing their banking arrangements and instructed the Respondent to transfer the amount to ABC Sdn Bhd, a subsidiary of ABC GmBh. The Respondent demanded a certificate by the local chamber of Commerce of Riberia, to confirm the relationship between the Claimant and ABC Sdn Bhd.
- 10th Oct* The second tranche of drones were dispatched. Email confirming the dispatch was sent which also contained the reminder to pay for the first tranche till 17th Oct.
- 12th Oct* The certificate was received by the Claimant in a courier addressed to Ms. Chakma. The bank details of ABC Sdn Bhd were also annexed.
- 17th Oct* Payment for the first tranche was made and confirmation mail was sent.
- 18th Oct* Payment for the second tranche was made and confirmation mail was sent.
- Third tranche dispatched according to the contract i.e. on or before 21st Oct.
- 21st Oct* Claimant realised that despite the confirmation mails, the bank account did not reflect credit. The Claimant asked for the payment details from the Respondent.
- 22nd Oct* The Respondent sent the details. The Claimant realised that the funds were transferred to a bank account in Riberia. The Claimant asked the Respondent to get the transaction reversed. The Respondent followed the instructions but the bank informed that the amount was not recoverable at that stage in any case.

- Oct* An internal inquiry revealed that emails received by the Respondent were spoofed and the certificate was forged. The news of the Phishing attack was over the headlines and the Government of Filandria started a detailed investigation.
- 22nd Oct* A protest in New Riley, suddenly turned violent. However, the Drones inexplicably malfunctioned and completely failed to identify the escalation. As a result, no alert was sent to the police forces and it caused a large-scale damage.
- Oct* The Claimant sent their technical team for evaluation. It was revealed that high PM 2.5 level was the reason that drones failed to function. The sensors could not capture the image of required resolution to power the AI engine. The Claimant informed it would take at least 6 months to make the drones capable of functioning in such conditions. Historically, the level of PM 2.5 in New Riley is high every year in the beginning of winter due to confluence of factors.
- 24th Oct* The Supreme Court of Filandria passed a stay order on the usage of any facial recognition technology, and all legal proceedings pertaining to its procurement.
- Meanwhile, the investigation noted that there might be applicable rules of public procurement and hinted corruption. Soon after, Ms. Chakma resigned.
- Oct* The Claimant demanded payment for all the three tranches but the Respondent said that they were under no obligation to make any further payments.
- 30th Oct* The Respondent cancelled all the remaining orders.
- 21st Nov* The Claimant commenced Arbitration after failed negotiations.

PHISHING ATTACK VIA EMAIL

3RD PARTY INTERVENTION

CONTRACT FORMATION



ISSUES RAISED

ISSUE:1

WHETHER THE ARBITRAL PROCEEDINGS SHOULD BE STAYED PURSUANT TO THE SUPREME COURT'S ORDER?

ISSUE:2

WHETHER PUBLIC DISCLOSURE OF THE PROCEEDINGS SHOULD BE ALLOWED?

ISSUE:3

WHETHER THE ISSUE OF VALIDITY OF CONTRACT IS NON-ARBITRABLE?

ISSUE:4

WHETHER NPPC IS IN BREACH OF ITS OBLIGATIONS UNDER CLAUSE 3(1)(B), 3(1)(C) AND 3(1)(D) OF THE AGREEMENT?

ISSUE:5

WHETHER ABC GMBH IS IN BREACH OF CLAUSE 1 OF THE AGREEMENT?

SUMMARY OF ARGUMENTS

PART ONE: COMPLIANCE WITH THE SC's ORDER AND PUBLIC DISCLOSURE

1. The Respondent submits that the Hon'ble Supreme Court exercised its plenary powers to put the proceedings in abeyance and hence was well within its jurisdiction to do so. The Arbitral Tribunal should respect the order of the Hon'ble Supreme Court in light of the principle of Judicial Comity which provides for the deference and respect to be maintained between two legal systems. Further, the Arbitral tribunal is vested with the duty to render an enforceable award and since the present dispute reserves the potential to affect the *in rem* rights of the Citizens of Filandria, any proceedings till the question over the constitutionality of alleged technology is not settled will prove to be vexatious and oppressive.
2. The Respondent submits that the present dispute involves instances of corruption thereby necessitates disclosure and falls within the exceptions of Rule 39 SIAC. Further, the dispute has public interest implications which is considered one of the exceptions to the duty of confidentiality and commercial sensitivity and hence outweighs both. Respondent submits that in the *interest of justice*, disclosure is of paramount importance so as to do the rightful assessment of the facts questioned before the Hon'ble Supreme Court in the ongoing legal proceedings in the Filandria. Therefore, all the documents pertaining to the present arbitration should be made public.

PART TWO: JURISDICTION AND ADMISSIBILITY

3. The Respondent submits that the issue of validity is contract is non-arbitrable and hence manifestly outside the jurisdiction of the Tribunal because the contract has been procured through bribing the officials of the Procurement agency by the Claimant and so is vitiated by egregious fraud which shakes the very foundation of the contract. Issues involving such serious allegation of fraud require immediate intervention by the court and are non-arbitrable in Filandria, which is the governing law of the arbitration agreement and the Contract. Further, internationally such issues of fraud, if not are directly considered beyond the tribunal's jurisdiction but still are considered inadmissible and hence not arbitrated upon. Moreover, arbitrating over this dispute will violate the national and international public policy as well as the internationally recognized principle of clean hands. Furthermore, the legitimacy of the object of the Contract, which forms a pre-

requisite for ascertaining the validity of the Contract, is still unclear and the matter pertaining to the validity of the contract at the present stage is non-arbitrable.

PART THREE: MERITS

4. The Respondent submits that it is not in breach of Clause 3(1)(b), (c) and (d). Firstly, all the payments that were due were made within the stipulated time. Moreover, since time was not of the essence of the payment and the liability of the Respondent was also limited to the purchase price of the drones, no additional payment could be demanded from the Respondents. Secondly, the third tranche was rejected due to the defect in the drones and the contract was frustrated because the legal impediment in the form of stay order of Supreme Court made it impossible for the Respondent to perform their part of the obligation. The unreasonable time required by the Claimant to fix the defect further defeated the object of the Contract. Lastly, the Respondent cannot be compelled to bear the amount lost in the Phishing attack as Claimant was in the best position to prevent the fraud. It was the negligence of the of the Claimant itself that resulted in the success of the attack.
5. The Respondent, further, submits that the Claimant was in breach of Clause 1 of the Contract. Firstly, the drones were not fit for the purpose for which they were purchased. There was an implied condition as to the quality of goods. The Respondent also communicated the purpose of purchase and relied on the skills and judgement of the seller while opting for the product. The purpose was to use the drones to supplement the efforts of police by alerting them as soon as the protest turned violent. However, the drones malfunctioned and no alert was sent to the police. Lastly, this breach of Clause 1 of the Contract caused a large-scale damage. The damage was also in contemplation of both the parties. Therefore, the Respondent is also entitled to claim the damages caused.

ARGUMENTS ADVANCED

**PART ONE: COMPLIANCE WITH THE SUPREME COURT'S ORDER AND
PUBLIC DISCLOSURE**

**I. THE ARBITRAL PROCEEDINGS SHOULD BE STAYED PURSUANT TO THE SUPREME
COURT'S ORDER**

¶ [1]. ABC GmbH [*hereinafter* 'the Claimant'] commenced arbitration¹ on account of termination² of the Contract, for procurement of drones³ with facial recognition technology,⁴ by NPPC [*hereinafter* 'the Respondent']. The Respondent, however, contends, that the Supreme Court of Filandria on 24th October 2019⁵ has passed an order staying the usage of such technology and legal proceedings pertaining to its procurement,⁶ until it finally determines the matter.⁷ Thus, it is submitted that the arbitral proceedings should be stayed in pursuance to the order because: *firstly*, the Supreme Court was well within its powers to stay the proceedings [A]; *secondly*, the Tribunal should the proceedings in abeyance in accordance with the principle of judicial comity [B]; *thirdly*, the Tribunal should not adjudicate this dispute since it violates '*Rights in rem*' [C]; and *lastly*, the Tribunal should render an enforceable award [D].

A. THE SUPREME COURT WAS WELL WITHIN ITS POWERS TO STAY THE PROCEEDINGS

¶ [2]. In International Commercial Arbitration, courts can exercise their general power to stay foreign seated arbitrations, when the proceedings have the potential to be proved as vexatious⁸, oppressive⁹, unconscionable or an abuse of the process of the court.¹⁰ Further, for passing such orders the Court need not be the natural forum for the dispute.¹¹ Additionally, when the relevant provisions of the Arbitration and Conciliation Act 1996 [*hereinafter* 'Arbitration Act'],¹² are read harmoniously with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [*hereinafter* 'New York Convention']¹³ and it can be inferred that the

¹ Case Study, Statement of Facts, ¶ 29.

² Case Study, Statement of Facts, ¶ 28.

³ Case Study, Statement of Facts, ¶ 8.

⁴ Case Study, Statement of Facts, ¶ 5.

⁵ Case Study, Statement of Facts, ¶ 26.

⁶ *Id.*

⁷ *Id.*

⁸ *Claxton Engineering Services*, ¶ 34.

⁹ *Id.*

¹⁰ *Internet FCZO*, ¶ 20; *Elektrim S.A.*, ¶ 43.

¹¹ *Sana Hussain Sabbagh*, ¶¶ 107,109; *South Carolina Insurance*, ¶¶ 24,40.

¹² ACA 1996.

¹³ NYC 1958.

Court is not prohibited to use its general power to stay the foreign seated arbitration then the Court is free to exercise the same whenever required.¹⁴

¶ [3]. The Supreme Court of Filandria under Article 142 of the Constitution of Filandria [hereinafter ‘Constitution’],¹⁵ has the power to pass any such order or decree as is necessary for delivering complete justice¹⁶ in any cause or matter pending before it. In *Ssangyong*¹⁷ and *Skipper Construction*¹⁸, the Supreme Court invoked the said Article and used its wide powers to render complete justice.

¶ [4]. In the present case, the Supreme Court of Filandria, using its plenary power, has passed an extremely wide¹⁹ order putting stay on legal proceedings, including arbitral proceedings,²⁰ pertaining to the procurement,²¹ in order to determine the constitutionality of the object of the contract and questions of significant Rights of the people.²² Hence, dispute resolution between parties, in a closed proceeding such as arbitration²³ until questions over the constitutionality of the object carrying significant public interest are not settled, would render the arbitration proceedings vexatious, oppressive and unconscionable. Therefore, it is submitted that the Supreme Court was well within its power to stay the proceedings.

**B. THE TRIBUNAL SHOULD PUT THE PROCEEDING IN ABEYANCE IN ACCORDANCE WITH
THE PRINCIPLE OF JUDICIAL COMITY**

¶ [5]. According to the established principle of Judicial Comity,²⁴ the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another out of deference and respect.²⁵ In *Shashoua*,²⁶ the Supreme Court upheld the English Court’s ruling and applied it as the binding precedent on the lower courts in furtherance of judicial comity. Further, in *Societe Generale*, the arbitral tribunal stayed the arbitral proceedings in light of the principle of comity.²⁷

¶ [6]. In the present case, the Supreme Court of Filandria passed an wide order staying usage of any facial recognition technology, and all legal proceedings pertaining to its procurement

¹⁴ *Weissfisch*, ¶¶ 17,25; *Albon*, ¶ 8.

¹⁵ Art. 142, COI 1950.

¹⁶ *Umadevi*, ¶ 35.

¹⁷ *Ssangyong Engineering*, ¶ 49.

¹⁸ *Skipper Construction*, ¶ 4.

¹⁹ Case Study, Statement of Facts, ¶ 26.

²⁰ *General Officer*, ¶ 12.

²¹ Case Study, Statement of Facts, ¶ 26.

²² Case Study, Statement of Facts, ¶ 26.

²³ Tackaberry & Marriott, pp. 4-5.

²⁴ Black’s Law Dictionary, p. 105.

²⁵ *World Sports Group*, ¶ 20.

²⁶ *Shashoua*, ¶ 38.

²⁷ *Societe Generale* quoted in Schultz & Ridi, p. 589.

till the matter is sub judice.²⁸ Henceforth, the arbitral proceedings initiated by the Claimant would be in manifest disregard to judicial comity between the two legal systems if not put in abeyance. Therefore, it is submitted that the arbitral proceedings should be stayed in pursuance to the order delivered by the Supreme Court of Filandria.

C. THE TRIBUNAL SHOULD NOT ADJUDICATE THIS DISPUTE SINCE IT VIOLATES ‘RIGHTS IN REM’

¶ [7]. The Respondent submits that the present dispute violates ‘Rights in rem’ of the citizens of Filandria and therefore should not be arbitrated because: *firstly*, the law governing the arbitration will be Filandrian Law (1); and *secondly*, the disputes affecting in rem Rights are non-arbitrable under Filandrian Law (2).

1. THE LAW GOVERNING THE ARBITRATION AGREEMENT WILL BE FILANDRIAN LAW

¶ [8]. In *Sulamérica*,²⁹ the English Court of Appeal opined that the law governing the substantive contract applies to the respective arbitration agreement, unless indicated otherwise. The Court established a presumption that the parties which had not expressly chosen the law governing the arbitration agreement intended the whole of their relationship to be governed by the same system of law³⁰ and this principle has been approved internationally by courts and arbitral tribunals.³¹

¶ [9]. In the present case as the Claimant and the Respondent collectively chose Laws of Filandria to govern the entire agreement,³² they thus intended to apply the same law to the Arbitration Clause. Hence, it is submitted that the law governing the substantive Contract governs the Arbitration Clause as well.

2. DISPUTES AFFECTING IN REM RIGHTS ARE NON-ARBITRABLE UNDER FILANDRIAN LAW

¶ [10]. In *Booz Allen*,³³ the Supreme Court upheld the exception of public policy in arbitration and propounded the test of ‘in rem and in personem’. The court in its assessment noted that Rights against a particular person (*in personem*) are arbitrable however those against the world at large (*in rem*) are not.³⁴

¶ [11]. In the present case, the Respondent had entered into the contract with the Claimant for the purchase of TRC 2645³⁵ drones which were inbuilt with AI and were designed to use facial

²⁸ Case Study, Statement of Facts, ¶ 26.

²⁹ *Sulamérica*, ¶ 61.

³⁰ *Id.*

³¹ *BCY*, ¶ 4; *Habas Sinai*, ¶ 101; *ICC 9987*, ¶ 32; *Kronke & Nacimiento*, p. 224.

³² Case Study, Annx 1, Clause 16.

³³ *Booz Allen*, ¶ 23.

³⁴ *Rab*, p. 163.

³⁵ Case Study, Statement of Facts, ¶ 8.

recognition software to trace the identity of persons by capturing their images.³⁶ Thus, it can be reasonably inferred that the object³⁷ of entering into the contract was the use of this technology.³⁸ The Supreme Court of Filandria is determining whether the aforesaid object of the disputed contract violates the Rights of the citizens at large. If the Supreme Court of Filandria answers this question in the affirmative, then that would categorise the dispute as non-arbitrable since it would directly affect Rights *in rem*.

¶ [12]. Moreover, the spoofed e-mails received by the Respondent due to the Claimant being subjected to the phishing attack³⁹ also compromised the Respondent's server by giving direct access to the hackers.⁴⁰ This invariably exposed the Respondent's server to a similar phishing attack having far-reaching consequences since the server contained sensitive information of the citizens of Filandria.⁴¹ The consequent outcome of such a phishing attack could have led to a situation where the biometric data of the Filandrian citizens would have been under threat and thus would infringe their privacy.⁴²

¶ [13]. Hence, it is submitted that the intervention of the Hon'ble Supreme Court is of paramount importance and until questions over the constitutionality of usage of such technology and the magnitude of the phishing attack on the Respondent's server are not examined. Therefore, the arbitral proceedings should be put in abeyance as the dispute reserves the potential to affect *Rights in rem*.

D. THE TRIBUNAL SHOULD RENDER AN ENFORCEABLE AWARD

¶ [14]. The foremost object of arbitration is to render an enforceable award⁴³ which makes 'enforceability' the *raison d'etre* of the arbitral process.⁴⁴ According to Singapore International Arbitration Centre [*hereinafter* 'SIAC'] Rule 41.2,⁴⁵ an arbitral tribunal is vested with a duty to render an enforceable award. This obligation is considered to be of quintessential nature⁴⁶ and if the tribunal renders an unenforceable award then it would be in derogation of the duty it has been vested with.⁴⁷

³⁶ Case Study, Statement of Facts, ¶ 7.

³⁷ Pollock & Mulla, p. 144; Cheshire, p. 640.

³⁸ Case Study, Statement of Facts, ¶ 5.

³⁹ Case Study, Statement of Facts, ¶ 20.

⁴⁰ Case Study, Statement of Facts, ¶ 21.

⁴¹ Case Study, Statement of Facts, ¶¶ 13, 23, 26.

⁴² *Puttaswamy*, ¶ 18.

⁴³ Berg, p. 114.

⁴⁴ Derains & Schwartz, p. 385.

⁴⁵ Rule 41.2, SIAC 2016.

⁴⁶ Waincymer, p. 97.

⁴⁷ *Id.*

¶ [15]. Further, a tribunal should not render an award which goes against the national and international public policy⁴⁸ and if it does so that will render the award unenforceable.⁴⁹ The principle of ‘*Ex abundante cautela*’, mandates that if the parties draw the tribunal's attention to a specific jurisdiction as a likely place of enforcement, the tribunal should consider the law and public policy of that place as well.⁵⁰

¶ [16]. In the present case, the constitutionality of the facial recognition technology software is yet to be determined by the Supreme Court.⁵¹ The Respondent has drawn the Tribunal's attention to Filandria being the likely place for enforcement, since the Respondent is a Public Sector Undertaking [*hereinafter* ‘PSU’]⁵² of Filandria and moreover, the cause of action has arisen in Filandria.

¶ [17]. Thus, the position of law with regard to the very object of the contract is unsettled in the State of Filandria⁵³ and as a corollary, if the proceedings are not put in abeyance then the Tribunal will render an award that would be unenforceable as being rendered in a legal proceeding stayed by the Supreme Court. Therefore, it is submitted that the tribunal should stay the proceedings and thus not contravene the fundamental principle of rendering an enforceable award.

¶ [18]. **CONCLUSION TO THE FIRST ISSUE:** In conclusion, it is submitted that this Tribunal should give due regard to the order of the Hon'ble Supreme Court and the recognised principle of judicial comity. Further, as the proceedings may culminate into an arbitral award which has the potential to affect *Rights in rem* and thus this Tribunal should not render a potentially unenforceable award. Therefore, the Arbitral proceedings should be stayed pursuant to the Supreme Court's order.

II. PUBLIC DISCLOSURE SHOULD BE ALLOWED

¶ [19]. The Claimant objects to the public disclosure of all the submissions, pleadings, hearings and evidence [*hereinafter* ‘documents’],⁵⁴ citing violation of Rule 39 of SIAC⁵⁵ and the commercial sensitive nature of these documents.⁵⁶ However, the Respondent submits that public disclosure should be allowed because: *firstly*, public disclosure of documents does

⁴⁸ Art. V(2)(b), NYC 1958; Art. 41, ICC 2017.

⁴⁹ *Id.*

⁵⁰ Redfern & Hunter, p. 365.

⁵¹ Case Study, Statement of Facts, ¶ 26.

⁵² Case Study, Statement of Facts, ¶ 5.

⁵³ Case Study, Statement of Facts, ¶ 26.

⁵⁴ Case Study, Annex 2.

⁵⁵ Rule 39, SIAC 2016.

⁵⁶ Case Study, Annex 2.

violate Rule 39 SIAC [A]; *secondly*, public disclosure of documents shall further the ongoing court proceedings in Filandria [B]; *thirdly*, public Interest Implications precede the duty of confidentiality [C]; and *lastly*, the defense of commercially sensitive information cannot be granted to the Claimant [D].

A. PUBLIC DISCLOSURE OF DOCUMENTS DOES NOT VIOLATE RULE 39 SIAC

¶ [20]. Rule 39 of SIAC,⁵⁷ enshrines an obligation of confidentiality upon the parties and the arbitrators to the dispute. However, the underlined rule,⁵⁸ is subject to exceptions mentioned under Rule 39.2 SIAC.⁵⁹ One of the exceptions under Rule 39 of SIAC,⁶⁰ provides that the parties or the arbitrators may disclose matters relating to arbitration “*in compliance with the provision of the laws of any state which are binding on the party making disclosure*”.⁶¹ Additionally, when a duty of disclosure is cast upon the tribunal members by virtue of a national legislation,⁶² such a duty would override any express or implied obligation of confidentiality.⁶³

¶ [21]. Further, as stipulated under General Financial Rules, 2017 [*hereinafter* ‘GFR’], every authority delegated with the financial power of procuring goods in public interest shall have the responsibility and accountability to bring efficiency, transparency and economy.⁶⁴ Additionally, Section 4(1) of the Whistle-blowers Act, 2011,⁶⁵ when read harmoniously with Section 3(b)(v)(C) of the Prevention of Corruption Act 1988,⁶⁶ requires the arbitrators and the parties not to bar the public disclosure of documents in cases where significant public interest is involved.

¶ [22]. In the present case, the Respondent submits that as significant public interest is involved in transactions which involve dealing with public goods such as drones, the authorities which engage in the same are publicly accountable for the dissemination of all such information pertaining to the transaction. Therefore, it is submitted that the public disclosure of the document should be allowed the present situation is covered within the exception as stated under Rule 39 SIAC.⁶⁷

⁵⁷ Rule 39.1, SIAC 2016.

⁵⁸ *Id.*

⁵⁹ Rule 39.2, SIAC 2016.

⁶⁰ Rule 39.2.d, SIAC 2016.

⁶¹ *Id.*

⁶² Cremades & Caims quoted in Karsten and Berkeley, pp. 68-70,77.

⁶³ ILAIAC Report, ¶ 11; Hwang & Chung, p. 622.

⁶⁴ Rule 144, GFR 2017.

⁶⁵ Art. 4(1), WBPA 2014.

⁶⁶ Art. 3(b)(v)(C), PCA 1988.

⁶⁷ Rule 39.2.d, SIAC 2016.

**B. PUBLIC DISCLOSURE OF DOCUMENTS SHALL FURTHER THE ONGOING COURT
PROCEEDINGS IN FILANDRIA**

¶ [23]. Even in cases where there is no statutory compulsion on an arbitrator to disclose corrupt activities, disclosure *on his or her own accord* to the relevant authorities may be done *in the interests of justice* or in light of *the larger public interest*, both of which outweigh to the duty of confidentiality.⁶⁸ Moreover, according to the principle of “*in the interests of justice*”⁶⁹, any judicial decision should be based on an accurate assessment of all the evidences relevant to the matter. Furthermore, to ensure that such an accurate assessment is undertaken by the Court the duty to maintain confidentiality between the parties can be done away with.⁷⁰

¶ [24]. In the present case, the court proceedings were initiated in the State of Filandria⁷¹ and for the purpose of an accurate assessment, the duty of confidentiality shall be outweighed by the exception of “*in the interests of justice*” and to materialize the larger public interest involved. Therefore, it is submitted that all the documents provided as part of the present arbitration should be made public in light of the ongoing Court proceedings in Filandria.

C. PUBLIC INTEREST IMPLICATIONS PRECEDE THE DUTY OF CONFIDENTIALITY

¶ [25]. The duty of confidentiality is not absolute and is subject to the exception of public interest.⁷² In the *Chartered Institute of Arbitrators Case*⁷³, the English Commercial Court held that where significant public interest is involved, public disclosure becomes necessary.⁷⁴ The judgment directs that arbitration is to be characterized not merely as a private and consensual dispute resolution mechanism, but as part of a civil justice system which the public has an interest in protecting.⁷⁵

¶ [26]. Courts and tribunals,⁷⁶ have considered that even if the institutional rules provides for a duty of confidentiality, public interest implications shall always take precedence and thus should always be fostered.⁷⁷ In *Esso*⁷⁸ and the *Cockyatoe Dockyard*⁷⁹, the Court reiterated this principle and opined that the exception of public interest shall prevail as against the duty of confidentiality.

⁶⁸ *Id.*

⁶⁹ *Ali Shipping Corp.* quoted in *Chartered Institute of Arbitrators*, ¶ 44.

⁷⁰ *City of Moscow*, ¶ 38.

⁷¹ Case Study, Statement of Facts, ¶ 26.

⁷² Hiber & Pavic, p. 464; Hwang & Chung, p. 612.

⁷³ *Chartered Institute of Arbitrators*, ¶ 41.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Panhandle Eastern* quoted in Lovinfosse, p. 22.

⁷⁷ Sauvart, p. 775.

⁷⁸ *Esso* quoted in Weixia, p. 8.

⁷⁹ *Dockyard* quoted in Weixia, p. 16.

¶ [27]. In the present case, the very fact that a state enterprise had been subjected to a phishing attack⁸⁰ raises a question of substantial public interest. Further, the technology in question reserves the potential to infringe the Right to Privacy of the citizens⁸¹ and the fact that the investigation conducted by State hints towards instances of corruption⁸² raises questions of significant public interest.

¶ [28]. All the above-mentioned factors combinedly constitute ‘*significant public interest*’ that mandate a reconsideration of the duty of confidentiality. Thus, the duty of confidentiality in the present dispute should not be maintained due to the far-reaching public interest concerns.

¶ [29]. Therefore, it is submitted that all the documents relevant to the arbitral proceedings should be made public.

D. THE DEFENSE OF COMMERCIALLY SENSITIVE INFORMATION CANNOT BE GRANTED TO THE CLAIMANT

¶ [30]. In International Commercial Arbitration, the duty to maintain confidentiality extends to three categories: *firstly*, documents that are inherently confidential including the proprietary information; *secondly*, documents which can be disclosed by the parties and would have the same level of protection as is available to similar documents in litigation⁸³ and *lastly*, the arbitral award. Nonetheless, if the dispute has public interest implications then the defence of commercial sensitivity shall not prevail.⁸⁴

¶ [31]. In *Esso*, the Supreme Court held that despite the commercially sensitive nature of the information the same has to be made public if significant public interest involved.⁸⁵ Further, in *Francome*,⁸⁶ the Court provided the basis for this exception and stated, “*whilst there is a public interest in maintaining confidence, there is also a countervailing public interest in exposing conduct which involves a breach of the law or which is anti-social.*”⁸⁷

¶ [32]. In the present case, the Respondent submits that there was no manifestation of requesting the inherently commercially sensitive information rather the request made was confined to the submissions, pleadings, hearings and evidences provided as part of the present arbitration⁸⁸ and thereby falls under the second category.⁸⁹ Regardless, even if the present

⁸⁰ Case Study, Statement of Facts, ¶ 21.

⁸¹ Case Study, Statement of Facts, ¶ 26.

⁸² Case Study, Statement of Facts, ¶ 27.

⁸³ *Riddick*, quoted in *Ang Yee*, ¶ 20.

⁸⁴ *Esso* quoted in *Weixia*, p. 8.

⁸⁵ *Id.*

⁸⁶ *Francome*, p. 411.

⁸⁷ *Id.*

⁸⁸ Case Study, Annx 2, ¶ 4.

⁸⁹ *Riddick*, quoted in *Ang Yee*, ¶ 20.

dispute involves commercially sensitive information, public interest exception shall outweigh the same.

¶ [33]. Additionally, there also exists a countervailing public interest,⁹⁰ that mandates the public disclosure of the documents. Instances of corruption in the instant matter qualify as⁹¹ anti-social⁹² and are also against the law.⁹³ Therefore it is submitted that under any circumstance, the Respondent is not barred from the Public Disclosure of the documents.

¶ [34]. **CONCLUSION TO THE SECOND ISSUE:** In conclusion, it is submitted that the present dispute involves significant public interests which outweighs the duty of confidentiality. Also, the ongoing court proceedings mandate such disclosure. Further, the Respondent did not breach either Rule 39 SIAC or the obligation attached with the commercially sensitive information. Therefore, the Respondent should be barred with the public disclosure of all the pleadings, submissions and evidences pertaining to the present arbitration.

PART TWO: JURISDICTION AND ADMISSIBILITY

III. THE ISSUE OF VALIDITY OF CONTRACT IS NON-ARBITRABLE

¶ [35]. The Claimant has initiated arbitral proceedings against the Respondent on the grounds of Clause 15 of the Contract.⁹⁴ However, the Respondent has challenged the validity of the Contract⁹⁵ and the jurisdiction of the Tribunal to determine its validity. Thus, it is submitted that the validity of contract is non-arbitrable because: *firstly*, the Tribunal does not have jurisdiction to arbitrate over the validity of the Contract [A]; *secondly*, if the Tribunal is of the opinion that it has jurisdiction, even then the claims are inadmissible and hence not arbitrable[B]; *thirdly*, arbitrating over this dispute will violate principles of public policy [C]; *fourthly*, arbitrating over this dispute will be against the doctrine of clean hands [D]; and *lastly*, the unsettled position of the object of the Contract in question prevents the Tribunal from arbitrating over the validity of the Contract [E].

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ARBITRATE OVER THE VALIDITY OF THE CONTRACT

¶ [36]. Irregularity, corruption and fraud which shakes the foundation of a transaction, makes for a fraud of egregious nature.⁹⁶ In *Ayyasamy*, the Supreme Court held that contracts vitiated

⁹⁰ *Francome*, p. 411.

⁹¹ Case Study, Statement of Facts, ¶ 27.

⁹² Raj Kumar, p. 568.

⁹³ Ch 3, PCA 1988.

⁹⁴ Case Study, Annx 1, Clause 15.

⁹⁵ Clarifications, q. 18.

⁹⁶ *Gujarat Maritime*, ¶ 11.

by egregious or serious allegations of fraud⁹⁷ are non-arbitrable⁹⁸ and beyond the jurisdiction of arbitral tribunals.⁹⁹ Additionally, non-compliance with the tender requirement by the government organisations shudders the public confidence, affects transparency, equality and healthy competition.¹⁰⁰ Such non-compliance allows space for irregularities, interference and corrupt practices by the authorities which disrupts the very foundation of the contract.¹⁰¹

¶ [37]. The Public Procurement Act of Filandria¹⁰² [*hereinafter* ‘the Procurement Act’] and the GFR 2017¹⁰³ mandates that no government agency shall procure goods except by inviting tenders for supply. The Procurement Act¹⁰⁴ and the GFR¹⁰⁵ provide exceptions to this general rule in four situations: firstly, in cases of natural disaster or emergency;¹⁰⁶ secondly, when goods are available from a single source;¹⁰⁷ thirdly, when the cost of goods does not exceed €50,000;¹⁰⁸ and fourthly when goods are procured for standardization and compatibility with existing goods.¹⁰⁹ The exceptional circumstances with respect to the emergency can only be used when an emergency has been declared by the government.¹¹⁰

¶ [38]. In the present case, there was no declaration of emergency by the government or any situation of natural disaster existed.¹¹¹ Further, the goods, were not being procured for compatibility with existing goods, were available from more than one sources¹¹² and costed much more than € 50,000.¹¹³ Therefore, the Contract for procurement of goods was not in compliance with the Procurement Act.

¶ [39]. Further, entering into the contract during a visit which was only for the purpose of exploration,¹¹⁴ unprecedented dinner parties between the Claimant and the officials of NPPC¹¹⁵ during the times of crisis in the country¹¹⁶ and resignation by the Chief Financial Officer of

⁹⁷ *Ayyasamy*, ¶ 14; *Radhakrishnani*, ¶ 21.

⁹⁸ *Ayyasamy*, ¶ 21; *Rrb Energy*, ¶ 55.

⁹⁹ *Himadri Chemicals*, ¶ 14.

¹⁰⁰ *Global Rescue*, ¶ 24.

¹⁰¹ *Ram & Shyam Co.*, ¶ 14.

¹⁰² Case Study, Annx 6, Clause 6.

¹⁰³ Rule 158, GFR 2017.

¹⁰⁴ Case Study, Annx 6, Clause 7.

¹⁰⁵ Rule 166, GFR 2017.

¹⁰⁶ Case Study, Annx 6, Clause 7 (a).

¹⁰⁷ Case Study, Annx 6, Clause 7 (b).

¹⁰⁸ Case Study, Annx 6, Clause 7 (c).

¹⁰⁹ Case Study, Annx 6, Clause 7 (d).

¹¹⁰ *Global Rescue*, ¶ 24; *Al Faheem*, ¶ 15.

¹¹¹ Case Study, Statement of Facts, ¶¶ 4,5.

¹¹² Case Study, Statement of Facts, ¶ 6.

¹¹³ Case Study, Statement of Facts, ¶ 11.

¹¹⁴ Case Study, Statement of Facts, ¶ 8.

¹¹⁵ Case Study, Statement of Facts, ¶ 12.

¹¹⁶ Case Study, Statement of Facts, ¶¶ 3,4.

NPPC just after the investigation hinted at issues of corruption,¹¹⁷ indicates that the very foundation of the Contract for procurement of drones was vitiated by egregious or serious allegations of fraud. Since the law governing the arbitration agreement is the law of Filandria¹¹⁸ and as the dispute involves such grave allegations of fraud, thus it is non-arbitrable. Therefore, it is submitted that the Tribunal does not have jurisdiction to arbitrate over the validity of the Contract.

B. IF THE TRIBUNAL IS OF THE OPINION THAT IT HAS JURISDICTION, EVEN THEN THE CLAIMS ARE INADMISSIBLE AND HENCE NOT ARBITRABLE

¶ [40]. Admissibility of a claim is an alternative to jurisdiction and it concerns the question whether in light of all the circumstances, a tribunal ought to examine a claim.¹¹⁹ The International Court of Justice applied the principle of *mutatis mutandis* in international arbitration and stated that objections to admissibility construe that even if the court has jurisdiction,¹²⁰ nonetheless there are reasons why the Court should not proceed to an examination of merits.¹²¹

¶ [41]. International tribunals recognize the principle of *nemo auditor propriam turpitudinem allegans*¹²²; i.e. no one can be heard who invokes his own guilt. The tribunals have held that claims with respect to contracts procured by bribery or corruption are void¹²³ or voidable¹²⁴ at the instance of the innocent party. Thereupon, when such claims are brought before the tribunal they shall be rendered inadmissible¹²⁵ and be dismissed.¹²⁶

¶ [42]. In the present case, the Claimant has procured the Contract by bribery of the officials,¹²⁷ thereby leading to Contract being void, or voidable at the instance of the Respondent. The Respondent, being the victim of the fraud, is thus an innocent party and since it pleads before this Tribunal for dismissing the claims of the Claimant, the Contract should ought to be declared void by the Tribunal. Therefore, it is submitted that if the Tribunal decides that it has jurisdiction over the dispute, it does not mean that it shall exercise it since these claims are inadmissible and hence not arbitrable.

¹¹⁷ Case Study, Statement of Facts, ¶ 27.

¹¹⁸ Refer ¶¶ [8]-[9], Memorandum for Respondent.

¹¹⁹ Baizeau & Kreindler, p. 19.

¹²⁰ *Islamic Republic of Iran*, ¶ 29.

¹²¹ Baizeau & Kreindler, p. 19.

¹²² Gaillard & Savage, p. 280; Goldman, p. 272; Böckstiegel, pp. 201-202.

¹²³ *ICC 3916* quoted in Jarvin & Derains, p. 507; *ICC 3913* quoted in Jarvin & Derains, p. 497; *ICC 2730* quoted in JDI, pp. 914-920; *ICC 5943* quoted in JDI, p. 1014.

¹²⁴ *Panama & South Pacific* quoted in *Tigris*, ¶ 142; *Armagas*, ¶ 9; *LogicRose* quoted in *Tigris*, ¶ 142.

¹²⁵ Sayed, p. 261; *World Duty Free*, ¶ 183.

¹²⁶ *Crescent Petroleum Company*, ¶ 43; *Honeywell*, ¶ 178; Born, p. 2183.

¹²⁷ Case Study, Statement of Facts, ¶ 27.

C. ARBITRATING OVER THIS DISPUTE WILL VIOLATE PRINCIPLES OF PUBLIC POLICY

¶ [43]. Public policy includes the most basic norms of morality and justice¹²⁸ of a State. The violation of public policy is injurious to public good and is wholly offensive to the ordinary reasonable members of the public.¹²⁹ In international commercial arbitrations, corruption is viewed as something that violates the international public policy.¹³⁰

¶ [44]. *Fraus omnia corrumpit i.e.* fraud invalidates all¹³¹ and thereby, tribunals oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption¹³² as arbitral process should not be abused to further corrupt ends.¹³³ In order to protect the general interest and public policy, the international commercial arbitral tribunals when dealing with contracts which are tainted by corruption, render them unenforceable.¹³⁴ Additionally, under Filandrian law, which is the governing law of both the arbitration agreement and the Contract, focus is on ensuring democratic values of transparency, justice and equality¹³⁵ thus all contracts involving corruption are considered to be violating public policy and fall under the category of non-arbitrable disputes.¹³⁶

¶ [45]. In the present case, the investigation initiated by the government of Filandria,¹³⁷ the conduct of the key officials of the NPPC,¹³⁸ unprecedented social gatherings between the parties,¹³⁹ and a significant entity of Filandria being subject to a phishing attack¹⁴⁰ indicates that the contract is tainted by fraud, corruption and bribery. Therefore, it is submitted that arbitrating over this dispute will violate the international as well as the public policy of Filandria.

D. ARBITRATING OVER THIS DISPUTE WILL BE AGAINST THE DOCTRINE OF CLEAN HANDS

¶ [46]. It is a widely recognised principle that ‘*he who comes into equity must come with clean hands*’ *i.e.* a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of dispute has been improper.¹⁴¹ In international arbitration, doctrine of clean hands acts

¹²⁸ *Parsons & Whittemore*, ¶ 9; *Loucks*, ¶ 11.

¹²⁹ *Deutsche Schachtba-und*, ¶ 25; *Richardson* quoted in WLR, p. 1035.

¹³⁰ *Sanders*, p. 258; *Gaillard & Pietro*, p. 787.

¹³¹ *Fellmeth & Harwitz*, p. 112.

¹³² *Himpurna California Energy*, ¶ 118; *Nayyar*, ¶ 92.

¹³³ *ICC 2730* quoted in JDI, pp. 914-920; *ICC 3913* quoted in *Jarvin & Derains*, p. 497; *ICC 3916* quoted in *Jarvin & Derains*, p. 507.

¹³⁴ *Gaillard & Savage*, p. 798.

¹³⁵ Case Study, Statement of Facts, ¶ 2.

¹³⁶ *Ayyasamy*, ¶ 21; *Malhotra* quoted in *Ayyasamy*, ¶ 14.

¹³⁷ Case Study, Statement of Facts, ¶ 21.

¹³⁸ Case Study, Statement of Facts, ¶¶ 8, 27.

¹³⁹ Case Study, Statement of Facts, ¶ 12.

¹⁴⁰ Case Study, Statement of Facts, ¶ 21.

¹⁴¹ *Halsbury's*, pp. 874-876.

as a jurisdictional bar¹⁴² since the tribunals do not grant assistance to a party that has engaged in a corrupt conduct.¹⁴³ The doctrine is applicable in commercial arbitration when laws applicable to the contract recognize this doctrine.¹⁴⁴ In both India and England, the laws applicable to the Contract, the doctrine of clean hands is a recognized principle.¹⁴⁵

¶ [47]. In the present case, the Claimant has committed a globally condemned offence of bribery and corruption¹⁴⁶ and subsequently, has approached the Tribunal with ‘*unclean hands*’. Therefore, it is submitted that the Tribunal should not address the claims of the Claimant and if it does so, it would be in derogation of the principle of clean hands.

E. THE UNSETTLED POSITION OF THE OBJECT OF THE CONTRACT IN QUESTION PREVENTS THE TRIBUNAL FROM ARBITRATING OVER THE VALIDITY OF THE CONTRACT

¶ [48]. The governing law of the Contract is the Filandrian law and contracts, the object of which is unlawful or opposed to public policy are void and hence unenforceable under the Filandrian law.¹⁴⁷ The object of the contract refers to the purpose¹⁴⁸ or design¹⁴⁹ for which the contract was entered into.¹⁵⁰ It is a settled principle of international arbitration that any claims based on void contracts shall be dismissed.¹⁵¹

¶ [49]. In the present case, the object of the Contract or the purpose for which the contract was entered into was the procurement and usage of such technology¹⁵² which can recognize the facial attributes of a person¹⁵³ and collate¹⁵⁴ it with biometric data of citizens.¹⁵⁵ However, the usage of such technology has been challenged by the citizens of Filandria,¹⁵⁶ as being violative of their Right to Privacy and the Supreme Court is yet to decide on its legitimacy.¹⁵⁷

¶ [50]. For the Tribunal to decide whether it can arbitrate over the validity of the present Contract it shall first ensure that the contract is not void. Therefore, it is submitted that since, the legal position with respect to the object of the Contract, which has a direct impact on the

¹⁴² *World Duty Free*, ¶ 157.

¹⁴³ *Gustav*, ¶ 123; *Hulley Enterprises*, ¶¶ 1351-1352.

¹⁴⁴ *ICC 6474* quoted in Berg, p. 278; JIA, p. 6.

¹⁴⁵ *Arunima*, ¶ 11; *London*, ¶ 222; *Blackmore*, ¶ 52.

¹⁴⁶ Case Study, Statement of Facts, ¶ 27.

¹⁴⁷ § 23, ICA 1872.

¹⁴⁸ *Jaffer*, ¶ 2.

¹⁴⁹ Pollock & Mulla, p. 144.

¹⁵⁰ § 23, ICA 1872.

¹⁵¹ *Bribery & Arbitrator's Task*, ¶ 10; *World Duty Free*, ¶ 164; *Swiss Timing*, ¶ 28.

¹⁵² Case Study, Statement of Facts, ¶¶ 5, 7.

¹⁵³ Case Study, Statement of Facts, ¶ 7.

¹⁵⁴ Case Study, Statement of Facts, ¶ 7.

¹⁵⁵ Case Study, Statement of Facts, ¶ 5.

¹⁵⁶ Case Study, Statement of Facts, ¶ 26.

¹⁵⁷ Case Study, Statement of Facts, ¶ 26.

voidability of the contract, is unclear, thus it prevents the Tribunal from arbitrating over the validity of the Contract.

¶ [51]. **CONCLUSION TO THE THIRD ISSUE:** In conclusion, it is submitted, that since fraud and justice never dwell together, thus the validity of the disputed contract is non-arbitrable. Additionally, the Tribunal is not competent to adjudicate since the legal position over the object of contract is unsettled. Moreover, the claims are inadmissible and arbitrating over it will violate principles of clean hands and public policy. Therefore, the issue is manifestly outside the tribunal's jurisdiction.

PART THREE: MERITS

IV. NPPC IS NOT IN BREACH OF ITS OBLIGATIONS UNDER CLAUSE 3(1)(B), 3(1)(C) AND 3(1)(D)

¶ [52]. The Claimant professes that the Respondent breached Clause 3 of the Contract. Though the due amount was paid, the Claimant still demands the payment of the first three tranches.¹⁵⁸ The Claimant aims to extract the amount that it lost to a Phishing attack from the Respondent. However, the Respondent submits that it is not bound to make any further payments because: *firstly*, all due payments were made to the Claimant in the stipulated time [A]; *secondly*, the third tranche of drones was rejected by the Respondent and the Contract was frustrated [B]; *lastly*, the Respondent is not liable to pay the amount lost in the Phishing attack [C].

A. ALL DUE PAYMENTS WERE MADE TO THE CLAIMANT IN THE STIPULATED TIME

¶ [53]. According to the Contract, 500 units were to be dispatched by the Claimant on or before 5th October 2019.¹⁵⁹ The Respondent had to pay within 12 days from the date of receipt of confirmation of dispatch.¹⁶⁰ Since the first tranche was delivered personally¹⁶¹, no such confirmation was received and the payment shall be made within 12 days from the delivery made on 5th October¹⁶² according to Clause 3(1)(b).

¶ [54]. Moreover, the Claimant itself specified that payment for the first tranche was due on 17th October 2019 in the mail for the dispatch of second assignment¹⁶³. Subsequently, the wire transfer was made on the due date i.e. 17th October 2019. The payment confirmation was also sent on the same day to the Claimant,¹⁶⁴ in accordance with Clause 3(1)(b).

¹⁵⁸ Case Study, Statement of Facts, ¶ 28.

¹⁵⁹ Case Study, Annx 1, Clause 2(1)(a).

¹⁶⁰ Case Study, Annx 1, Clause 3(1)(b).

¹⁶¹ Case Study, Statement of Facts, ¶ 12.

¹⁶² Case Study, Statement of Facts, ¶ 23.

¹⁶³ Case Study, Annx 3 (10th Oct, Dwight Schrute to Lakshmi Chakma @ 5:15:10 pm).

¹⁶⁴ Case Study, Annx 3 (17th Oct, Lakshmi Chakma to Dwight Schrute @ 5:15:20 pm).

¶ [55]. Further, the Respondent did not breach Clause 3(1)(c) of the Contract, whose terms of payment were same as that of Clause 3(1)(b), as the confirmation mail for dispatch of the second tranche was received on 10th October 2019¹⁶⁵ and the payment was made well before the due date on 18th October 2019.¹⁶⁶

¶ [56]. In arguendo, even if the payment is not made within the stipulated time the Sale of Goods Act, 1930 [*hereinafter* ‘SOGA’] provides that the stipulations as to time of payment are not deemed to be of the essence of a contract of sale, unless the contrary appears from the terms of the Contract.¹⁶⁷ Mere mention of the specified date of completion of the contract or insertion of a default clause specifying penalty does not itself constitute evidence of the intention of the parties to make it of the essence.¹⁶⁸ The intention of the parties to contract must appear from the terms of the contract as it was entered into and the subsequent conduct of the parties is not relevant.¹⁶⁹

¶ [57]. The use of the words “*this clause*” in Clause 2 of the agreement¹⁷⁰ suggests that time of performance is of the essence only for the delivery in Clause 2. No such condition is laid down in Clause 3. Additionally, the total liability of the Respondent is limited to the purchase price of the drones dispatched.¹⁷¹ Therefore, the Claimant is not entitled to compensation for delayed payments on the ground of time taken for the wire transfer to be completed.

B. THE THIRD TRANCHE OF DRONES WAS REJECTED BY THE RESPONDENT AND THE CONTRACT WAS FRUSTRATED

¶ [58]. A sale is not completed unless the purchaser accepts the goods without any reservation, only then he is bound by the contract of sale.¹⁷² The Respondent had not communicated acceptance of the third tranche according to the provisions¹⁷³ of the SOGA. Thus, it is submitted that the Respondent has not breached Clause 3(1)(d) of the agreement because: *firstly*, the Respondent rejected to the drones due to their defect (1); and *secondly*, the Contract was frustrated because the object of the Contract was defeated (2).

1. THE RESPONDENT REJECTED THE DRONES DUE TO THEIR DEFECT

¹⁶⁵ Case Study, Annx 3 (10th Oct, Dwight Schrote to Lakshmi Chakma @5:15:10 pm).

¹⁶⁶ Case Study, Statement of Facts, ¶ 17.

¹⁶⁷ §11, SOGA 1930.

¹⁶⁸ *Pakhar Singh*, ¶ 6; *Manglaram*, ¶ 8.

¹⁶⁹ *Hindustan Construction*, ¶ 15.

¹⁷⁰ Case Study, Annx 1, Clause 2.

¹⁷¹ Case Study, Annx 1, Clause 3(2).

¹⁷² *Minerals*, ¶ 13.

¹⁷³ § 42, SOGA 1930.

¶ [59]. When the goods are sent by the seller to the buyer in performance of the contract, it does not preclude the buyer from objecting to them, by virtue of receiving them. Receipt and delivery are two entirely different things and the receipt would become acceptance if the right of rejection is not exercised within reasonable time.¹⁷⁴

¶ [60]. The Respondent informed the Claimant about the malfunctioning of the drones,¹⁷⁵ within reasonable time by refusing to accept the delivery.¹⁷⁶ It was also acknowledged by the Claimant as they sent their team to evaluate the units.¹⁷⁷ Hence, it is submitted that the Respondent had rejected the drones and so is not bound to make the payment.

2. THE CONTRACT WAS FRUSTRATED BECAUSE THE OBJECT OF THE CONTRACT WAS DEFEATED

¶ [61]. The Supreme Court of Filandria passed a stay order on the usage of facial recognition technology, and all legal proceedings pertaining to its procurement.¹⁷⁸ Clause 10 of the Contract provides for exemption in case of *force majeure*. It is also envisaged in the provisions of The Indian Contract Act, 1872 [*hereinafter* 'ICA'].¹⁷⁹

¶ [62]. Moreover, the use of words “*such events include but are not limited to*”¹⁸⁰ in the Clause indicate that the list is inclusive and not exhaustive. The Tribunal should consider that the intention of the clause is to save the performing party from the consequences of anything over which it has no control.¹⁸¹

¶ [63]. The stay order is a legal impediment outside the control of the parties. It made the performance impossible for the Respondent. The word ‘impossible’ does not mean literal impossibility. The performance of the act may not be physically impossible but it may be impracticable from the point of view of the object which the parties had in the view and if any change in circumstance totally upsets the basis on which the parties rested their bargain, it can be said that the promisor found it impossible to do the act which he promised to do.¹⁸²

¶ [64]. In the present case, the purpose was to identify the perpetrators by using facial recognition technology integrated with the biometric data.¹⁸³ A stay of this nature makes the act of buying the drones illegal. This prevents the Respondent from using it for the object that they had in mind, which shakes the very foundation of the Contract.

¹⁷⁴ *Blanche*, ¶ 16.

¹⁷⁵ Case Study, Statement of Facts, ¶ 24.

¹⁷⁶ Clarifications, q. 45.

¹⁷⁷ *Id.*

¹⁷⁸ Case Study, Statement of Facts, ¶ 26.

¹⁷⁹ § 56, ICA 1872.

¹⁸⁰ Case Study, Annx 1, Clause 10(1).

¹⁸¹ *Dhanrajamal*, ¶ 19.

¹⁸² *Satyabrata Ghose*, ¶ 9.

¹⁸³ Case Study, Statement of Facts, ¶ 5.

¶ [65]. Additionally, it would take at least 6 month to rectify the defect in the Drones.¹⁸⁴ This adds to the impracticability, as the primary reason for the Respondent to enter into the contract with the Claimant was their ability to service the Contract expeditiously.¹⁸⁵ Hence, it is submitted that the Respondent's obligation falling due for performance after the frustrating event occurred should be discharged.¹⁸⁶

C. THE RESPONDENT IS NOT LIABLE TO PAY THE AMOUNT LOST IN THE PHISHING ATTACK

¶ [66]. The Respondent discharged its duty under the SOGA¹⁸⁷ by accepting and making payment for the first two tranches. It is submitted that the Respondent shall not bear the loss due to the phishing attack because: *firstly*, the fraud was committed by a third party (1); *secondly*, the Email account of Ms. Jenny Liu was compromised because of her own negligence (2); *thirdly*, there were security gaps in the IT system of the Claimant (3); *lastly*, the Respondent intended to make a successful transfer (4).

1. THE FRAUD WAS COMMITTED BY A THIRD PARTY

¶ [67]. The present dispute involves a case of Business Email Compromise [*hereinafter* 'BEC'], a variation of spear phishing, in which spoof or fraudulent emails are directed to a company personnel in an attempt to obtain sensitive information.¹⁸⁸ This technique, coupled with executive impersonation¹⁸⁹ by the perpetrator tricks businesses to fall prey to such frauds.

¶ [68]. Courts have held that when a fraudster assumes control of Victim A's email account and, impersonating Victim A, issues instructions to Victim B, who then transfers funds intended for Victim A to the fraudster's account, Victim A will be liable for the loss if there is a negligence on its part.¹⁹⁰ In disputes involving similar factual matrix,¹⁹¹ it was been held that the court has to consider which party was in a better position to prevent the fraud.¹⁹² Hence, it is submitted that the fraud was committed by a third and liability shall be determined by considering which party was in the best position to avoid fraud.

2. THE EMAIL ACCOUNT OF MS. JENNY LIU WAS COMPROMISED BECAUSE OF HER OWN NEGLIGENCE

¹⁸⁴ Case Study, ¶ 25.

¹⁸⁵ *Id.*

¹⁸⁶ Anson, p. 498.

¹⁸⁷ § 31, SOGA 1930.

¹⁸⁸ Zweighaft, p. 1.

¹⁸⁹ *Id.*

¹⁹⁰ *St. Lawrence*, ¶¶ 56, 57.

¹⁹¹ *Beau Townsend*, pp. 12, 17.

¹⁹² *Opus Consulting Group Ltd.*, ¶ 15.

¶ [69]. The credibility of the Forensic report of Meloitte Consulting is questionable as it is a private agency,¹⁹³ appointed by the Claimant itself,¹⁹⁴ however, the negligence of the Claimant can still be proved. Since the report suggests that the Firewall and encryption appliances were continuously maintained and kept up-to-date, the mails containing viruses, worms and other malware must have been discarded.¹⁹⁵

¶ [70]. However, the mails below the set threshold of spam level must have been quarantined and marked as ‘SPAM’.¹⁹⁶ The only possible way that the attacker got the access to the O365 account of Jenny Liu¹⁹⁷ was that, even after seeing the mail marked as spam, she acted upon the suspicious phishing e-mails¹⁹⁸ and filled up her ‘log in’ credentials herself. Hence, it is submitted that Jenny Liu’s account was hacked because of her own negligence.

3. THERE WERE SECURITY GAPS IN THE IT SYSTEM OF THE CLAIMANT

¶ [71]. The mail accounts were not validated.¹⁹⁹ Reverse Domain Name System [*hereinafter* ‘RDNS’] is a protocol used to translate the sending server IP address into its host name and ‘HELO’ is a command sent by an email server to identify itself when connecting to another email server to start the process of sending an email. Most spam mails do not have RDNS. Rejecting messages if sending server IP does not have a reverse DNS entry or if the reverse DNS entry does not match HELO host are two methods often used to eliminate spams.

¶ [72]. Further, Sender Policy Framework [*hereinafter* ‘SPF’]. SPF maintains a DNS record that helps to prevent spoofing and phishing by verifying the domain name from which the mails are sent. It helps validate the origin of the mail by checking the IP address and verifying whether that address is authorized to send mail from the user’s domain.²⁰⁰

¶ [73]. Some spoofing techniques can pass the SPF check. For this, Domain Keys Identified Mail [*hereinafter* ‘DKIM’] and Domain-based Message Authentication, Reporting and Conformance [*hereinafter* ‘DMARC’] can be used along with SPF. DKIM authorizes sender’s domain to sign its name to an email by using cryptographic authentication. Systems that receive email from sender’s domain can use this digital signature to help determine if the email that

¹⁹³ Clarifications, q. 17.

¹⁹⁴ Clarifications, q. 59.

¹⁹⁵ Case Study, Annx 5, IT systems and policies, ¶ 6.

¹⁹⁶ Case Study, Annx 5, IT systems and policies, ¶ 7.

¹⁹⁷ Case Study, Annx 5, Summary of Key Findings, ¶ 2.

¹⁹⁸ Case Study, Annx 5, Summary of Key Findings, ¶ 1.

¹⁹⁹ Case Study, Annx 5, IT systems and policies, ¶ 8.

²⁰⁰ SPF, ¶ 2.

they receive is legitimate.²⁰¹ DMARC further helps receiving mail systems determine what to do with messages sent from sender's domain that fail SPF or DKIM checks.²⁰²

¶ [74]. If the Claimant had used RDNS/HELO check, the Claimant's server would have been safe from spam messages. Further, SPF check could have identified the unauthorized mail from J. Liu to Ms. Chakma because the sender's IP address was not authorised to use Claimant's domain. Since the spoofed accounts were CC to the same mail, the Respondent did not suspect any further exchanges in the same thread.

4. THE RESPONDENT INTENDED TO MAKE A SUCCESSFUL TRANSFER

¶ [75]. The Respondent had the motive of effectuating a successful transfer. The Respondent asked for the changed bank account details at the earliest to make the payment on time.²⁰³ Further, an effort was made to verify the relationship between the Claimant and its subsidiary before making the payment, by asking for a letter from a local chamber of commerce.²⁰⁴ Additionally, the Respondent acted promptly on the request of the Claimant of trying to get the transaction reversed by the bank.²⁰⁵

¶ [76]. Thus, the Respondent acted in good faith at all the instances. However, the mutual obligation of effectuating a successful transfer was not fulfilled by the Claimant as they failed to acknowledge the receipts on time. Hence, it is submitted that the Respondent intended to make a successful transfer and due to the unprofessional attitude of the Claimant the fraud took place and money could not be recovered. Therefore, the Respondent is not liable to pay the lost amount.

¶ [77]. **CONCLUSION TO THE FOURTH ISSUE:** In conclusion, it is submitted, that the Respondent had already made the payments for the due amount. The third tranche was rejected and the contract was also frustrated. Further, the Phishing attack happened due to the negligence of the Claimant itself. Therefore, NPPC should not be liable for the breach of its obligations under Clause 3(1)(b), 3(1)(c) and 3(1)(d) of the contract.

V. ABC GMBH IS IN BREACH OF CLAUSE 1 OF THE AGREEMENT

¶ [78]. Each unit was tested prior to their dispatch²⁰⁶, still the Drones fell short of the quality which was required to use them for the intended purpose. Thus, the Respondent submits that the Claimant is liable for the breach of Clause 1 and for the damages caused, because: *firstly*,

²⁰¹ DKIM, ¶ 1.

²⁰² DMARC, ¶ 1.

²⁰³ Case Study, Annx 3 (09th Oct, Lakshmi Chakma to Jenny Liu @ 1:15:20 pm).

²⁰⁴ Case Study, Annx 4.

²⁰⁵ Case Study, Statement of Facts, ¶ 19.

²⁰⁶ Clarification, q. 21.

there was an implied condition as to the quality of goods as the Drones were sold on description (A); *secondly*, the Respondent is entitled to remedy under the SOGA 1930 and the defence of Clause 10 and 11 of the Contract is not available to the Claimant (B).

A. THERE WAS AN IMPLIED CONDITION AS TO THE QUALITY OF GOODS AS THE DRONES WERE SOLD ON DESCRIPTION

¶ [79]. The Contract provides for the specification of goods.²⁰⁷ It means that the description of the Drones was explicitly mentioned in the Contract and it was a sale of goods with description. It is submitted that the goods were not fit for purpose because: *firstly*, there was an implied condition as to the quality of goods (1); *secondly*, the purpose of purchasing the drones were communicated to the Claimant (2); and *lastly*, the Respondent relied on the skill and judgement of the Claimant (3).

1. THERE WAS AN IMPLIED CONDITION AS TO THE QUALITY OF THE GOODS

¶ [80]. When goods are sold with a description, there is an implied condition that the goods shall correspond with the description²⁰⁸ and failure to supply goods answering the description in the contract is a total failure to perform it,²⁰⁹ and not merely a breach of one term of it.²¹⁰

¶ [81]. In the present case, the Claimant described TRC 2645 as their latest product with the latest algorithm integrated that allows it to easily identify violent actions and alert the authorities.²¹¹ Thus, the Claimant's failure to supply the Drones answering the description, as the drones failed to identify the violent action, is not just a breach of warranty, but non-performance of the contract itself. Hence, it is submitted that there was implied condition as to the quality of goods which the Claimant did not fulfil.

2. THE PURPOSE FOR PURCHASING THE DRONES WAS COMMUNICATED TO THE CLAIMANT

¶ [82]. When the buyer makes known to the seller the purpose for which the goods are required so as to rely on the seller's skill or judgment and the goods described are in the course of seller's business, then the goods shall be reasonable fit for such purpose.²¹² The principle is also duly recognised in the Convention for the International Sale of Goods.²¹³

¶ [83]. In the present case, the Respondent set out their requirements when they approached the Claimant²¹⁴ and the mails mentioned that both the parties have had deliberations related to

²⁰⁷ Case Study, Annx 1, Clause 1.

²⁰⁸ §15, SOGA 1930.

²⁰⁹ *Chanter*, p. 404.

²¹⁰ *Sarabji* quoted in Mulla I, p. 151.

²¹¹ Case Study, Annx 3 (23rd Sept, Peter Shultman to O.M. Jagadish @ 4:38:30 pm).

²¹² § 16(1), SOGA 1930.

²¹³ Art. 35(2)(b), CISG 1980.

²¹⁴ Case Study, Statement of Facts, ¶ 7.

the requirements of the Respondent.²¹⁵ Hence, it is submitted that the purpose for which the Respondent intended to use the drones were known to Claimant.

3. THE RESPONDENT RELIED ON THE SKILL AND JUDGEMENT OF THE CLAIMANT

¶ [84]. When the particular purpose for which goods were purchased is made known to the seller,²¹⁶ then there is no distinction between whether the goods are *in esse* or not. It is immaterial whether the buyer had the opportunity of inspecting them, or he availed the opportunity or not.²¹⁷ However, to show that that reliance is placed on the expertise of the seller, the circumstances must be ascertained in each case individually.²¹⁸

¶ [85]. In the present case, the Claimant had a proven record of supplying Drones to law enforcement agencies across Europe²¹⁹ for surveillance purposes.²²⁰ The Claimant acknowledged the same in their correspondence²²¹ with the Respondent and suggested that its product TRC 2645 will be suited for Respondent's purpose.²²² The Respondent relying on the skill and judgement of the Claimant²²³ bought the product for the purpose of deploying the Drones with a facial recognition software to supplement the efforts of the police in identifying the perpetrators²²⁴ so that necessary counter measures can be taken when the protest turns violent. However, the Drones were not fit for this purpose as they inexplicably malfunctioned and completely failed to identify the escalations of the protest.²²⁵ It failed to send any alert to the police forces which caused large scale damage.²²⁶ Hence, it is submitted that the Respondent relied on skill and judgement of the Claimant in buying the drones and therefore, there was implied condition to the quality of goods.

B. THE RESPONDENT IS ENTITLED TO REMEDY UNDER THE SOGA 1930 AND THE DEFENCE OF CLAUSE 10 OR 11 OF THE CONTRACT IS NOT AVAILABLE TO THE CLAIMANT

¶ [86]. The Respondent submits that it should be compensated for the damages incurred because: *firstly*, the damage was the result of the breach of Clause 1 (1); *secondly*, the event that led to malfunctioning of Drones was reasonably foreseeable (2); and *lastly*, the resulting damages were not remote (3).

²¹⁵ Case Study, Annx 3, (23rd Sept, Peter Shultman to O.M. Jagadish @ 4:38:30 pm).

²¹⁶ *Eternit Everest*, ¶¶ 12, 13.

²¹⁷ *Cointat* quoted in Mulla I, p. 163.

²¹⁸ Bianca, p. 275.

²¹⁹ Case Study, ¶ 6.

²²⁰ Clarifications, q. 61.

²²¹ Case Study, Annx 3 (23rd Sept, Peter Shultman to O.M. Jagadish @ 4:38:30 pm).

²²² *Id.*

²²³ *Jones*, pp. 202, 203; *Spencer Trading Co.* quoted in Mulla I, p. 161.

²²⁴ Case Study, Statement of Facts, ¶ 5.

²²⁵ Case Study, Statement of Facts, ¶ 23.

²²⁶ *Id.*

1. THE DAMAGE WAS THE RESULT OF THE BREACH OF CLAUSE 1

¶ [87]. Where there is a breach of warranty²²⁷ that the goods should be fit for a particular purpose, the damages should be such, which naturally flow from the breach²²⁸ or are a natural consequence of such defect.²²⁹ Further, it is necessary that the buyer should rely on the warranty²³⁰ and act reasonably taking reasonable steps to minimise the damages.²³¹

¶ [88]. In the present case, the police was relying on the Drones to send alerts the moment the protest turned violent. Due to the failure of the Drones, the alert was not sent to the police deployed nearby and the situation went out of hand. Although, the police acted reasonably by firing tear gas shells and water cannons to control the crowd,²³² the damage could not be avoided. Hence, it is submitted that the damage was the result of breach of Clause 1 and so the amount can be recovered not just for the defected drones, but also for the damages for the loss to the property, as the damages were a natural consequence of such defect.

2. THE EVENT THAT LED TO THE MALFUNCTIONING OF DRONES WAS REASONABLY
FORESEEABLE

¶ [89]. The Courts allow *force majeure* exemption in unusual and extreme weather conditions which are not reasonably foreseeable.²³³ Unusual weather means adverse weather conditions which are unusual for the place or time in which it occurred.²³⁴ The historical pattern of weather is considered to decide if the condition is adverse and unusual.²³⁵ The Tribunal should consider the yearly pattern of PM 2.5 levels in New Riley. It is high every year during the beginning of winters due to a confluence of factors.²³⁶

¶ [90]. In the present case, it was communicated to the Claimant that there might be differences between Europe and Filandria²³⁷ and it was important to see how the product works in the “real world”. Although, October is not the official beginning of winters in Northern Hemisphere²³⁸, the situation was not abnormal and was reasonably foreseeable as October, being a post monsoon month, the temperature then usually drops low causing the cool air to trap the

²²⁷ § 59, SOGA 1930.

²²⁸ Mulla I, p. 429.

²²⁹ *Randall*, p. 102.

²³⁰ *Dobell & Co.* quoted in Mulla I, p. 431.

²³¹ Mulla I, p.431.

²³² Case Study, Statement of Facts, ¶ 23.

²³³ Knoll, pp. 7-8.

²³⁴ *Broome Construction*, pp. 829, 835; *Cape Ann*, pp. 71, 72.

²³⁵ Knoll, pp. 16, 17.

²³⁶ Case Study, Statement of Facts, ¶ 24.

²³⁷ Case Study, Annx 3 (24thSept 2019, O.M. Jagadish to Peter Shultman @ 12:15:20 pm).

²³⁸ Clarifications, q. 73.

pollutants in the lower atmosphere unlike the summer in which the warm air rises and takes the pollutants with it.

¶ [91]. This causes increase in PM 2.5 level and as the preliminary test revealed that the high PM 2.5 level was the reason that the sensors of the drones could not capture the image of required resolution²³⁹, itself proves that the failure could have been easily avoided by the Claimant by conducting even a basic research on geographical conditions of Filandria. Further, the drones were not bought with the idea of usage for only in the month of October, but with an obvious intention to use them for a long term. Hence, it is submitted that the seller cannot discharge its liability in any case.

3. THE RESULTING DAMAGES WERE NOT REMOTE

¶ [92]. The test established in *Hadley v. Baxendale*²⁴⁰ distinguishes direct and indirect losses under the heading of remoteness²⁴¹ and provides that those damages are recoverable which are fairly and reasonably arise naturally from the breach, or such which were contemplated by the parties as being probable result of the breach of the Contract.

¶ [93]. In the present case, the failure of the drones in New Riley caused a large-scale damage that could not be avoided.²⁴² The damage naturally flowed from the breach. The drones were supposed to process images and send information to the police within seconds to help the law enforcement to identify when the protests turn violent and take necessary counter-measures.²⁴³

¶ [94]. Additionally, rule also allows for the damages if the special circumstance under which the Contract was made was known to the party that breached the Contract.²⁴⁴ The part of the loss that was reasonably foreseeable at the time of the Contract can be recovered.²⁴⁵

¶ [95]. In the instant case, the Claimant knew about the special circumstances under which the contract was made. This has been already established while proving that the purpose for the purchase of drones was communicated to the Claimant.²⁴⁶ Further, parties acknowledged that the harm caused by failure of the Claimant to perform would be impossible to accurately estimate at the time of the Contract.²⁴⁷ Thus, it was in contemplation of the parties that additional harm may be caused and that the Claimant is responsible to compensate for that.²⁴⁸

²³⁹ Case Study, Statement of Facts, ¶ 24.

²⁴⁰ *Hadley* quoted in *Robertson*, ¶ 54.

²⁴¹ Schwenzer, p. 199.

²⁴² Case Study, ¶ 23.

²⁴³ Case Study, ¶ 7.

²⁴⁴ Anson, p. 544.

²⁴⁵ *Victoria Laundry*, p. 539.

²⁴⁶ Refer ¶¶ [82]-[83], Memorandum for Respondent.

²⁴⁷ Case Study, Annx 1, Clause 3(3).

²⁴⁸ Cheshire, p. 910.

¶ [96]. Hence, it is submitted that the resulting damages were not remote as the additional damages were reasonably foreseeable and in contemplation of the parties. Therefore, the Claimant shall be made liable to compensate for the damages.

¶ [97]. **CONCLUSION TO THE FIFTH ISSUE:** In conclusion, it is submitted, the goods were sold on description and the Respondent relied on the skill and judgement of the seller. The Drones were not fit for purpose because they malfunctioned. Further, the Respondent is entitled to recover the damages because the event was reasonably foreseeable and the damages were not remote. Therefore, the Claimant is in breach of Clause 1.

PRAYER

In light of the above submissions, counsel for Respondent respectfully requests that:

- I.** The Arbitral proceedings should be stayed pursuant to the Supreme Court's order;
- II.** The Tribunal should allow public disclosure of the proceedings;
- III.** The issue of validity of contract is non-arbitrable;
- IV.** The tribunal should hold that NPPC is not in breach of clause 3(1)(b), 3(1)(c) and 3(1)(d) of the agreement; and
- V.** The tribunal should hold that ABC GmbH is in breach of clause 1 of the agreement and grant appropriate damages.

PLACE: Bangalore

sd/-

DATE: 28/04/2020

COUNSEL FOR THE RESPONDENT