TEAM CODE: 01R

9TH NLIU-JUSTICE R.K. TANKHA MEMORIAL INTERNATIONAL ARBITRATION MOOT, 2024

BEFORE THE ARBITRAL TRIBUNAL, INDIA

2024

PENGUIN ANTARCTIC ADVENTURES PVT. LTD.

(CLAIMANT)

V.

ZEUS LLC

(RESPONDENT)

MEMORIAL *FOR* RESPONDENT

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TABLE OF ABBREVIATIONS

ABBREVIATION	EXPANSION
%	Percentage
&	And
§	Section
¶	Paragraph
AAA	American Arbitration Association
A&C Act	Arbitration & Conciliation Act, 1996
AC	Advisory Council
AI	Artificial Intelligence
AIAJ	Asian International Arbitration Journal
AIR	All India Reports/All India Law Report
All ER (Comm)	All English Law Reports (Commercial)
Arb.	Arbitration
Art.	Article
BS	BranStark
CaLII	Canadian Legal Information Institute
Ch.	Chapter
CiArb	Chartered Institute of Arbitrators
CISG	The United Nations Convention on

	Contracts for the International Sale of Goods
CLAIMANT	Penguin Antarctic Adventures Pvt. Ltd.
Clause 16	Clause 16 of the Data Supply Agreement
Clause 18	Clause 18 of the Data Supply Agreement
Clause 45	Clause 45 of the Data Supply Agreement
CLOUT	Case Law on the United Nations Trade Commission on International Trade Law Texts
Co.	Company
Comm.	Commercial Court
Corp.	Corporation
Cir.	Circuit Court
Ct.	Court
Doc. No.	Document Number
DSA	Data Supply Agreement
Edn.	Edition
ESG	Environmental, Social and Governance
EWCA	England and Wales Court of Appeal
et al.	et alia (and others)
F. 2d	Federal Reporter, 2nd series
F. 3d	Federal Reporter, 3rd series

F. App'x	Federal Appendix
F. Supp	Federal Supplement
i.e.	That is
IBA	International Bar Association
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration
ICC	International Chamber of Commerce
ICCA	The International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
Id.	Idem
IEA	Indian Evidence Act, 1872
Inc.	Incorporation
Int'l	International
L.J.	Law Journal
LLP	Limited Liability Partnership
Ltd.	Limited
ML	Machine Learning
Model Law	The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration
No./Nos.	Number/Numbers

NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Ors.	Others
p.	Page Number
Parties	Penguin Antarctic Adventures Private Limited and Zeus LLC
PICC	The Principles of International Commercial Contracts, 2016
P.O.	Penguin One
P.O.1/P.O.2	Procedural Order 1/Procedural Order 2
Prague Rules	Rules on the Efficient Conduct of Proceedings in International Arbitration
Pvt.	Private
Q.	Question
RESPONDENT	Zeus LLC
SC	Supreme Court of India
SCC	Supreme Court Cases
SCC OnLine	Supreme Court Cases Online
SIAC	Singapore International Arbitration Centre
SIAC Rules	Singapore International Arbitration Centre Rules, 2016

S.D.N.Y	South District of New York
SVAMC	Silicon Valley Arbitration and Mediation Centre
Tribunal	The Arbitral Tribunal consisting of Ms. Hela Odinsdottir as the sole arbitrator
UKPC	United Kingdom Privy Council
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nation Conference on Trade and Development
UNIDROIT	International Institute for Unification of Private Law
US	United States of America
USD	United States Dollars
v.	versus
Vol	Volume
W.D.pa.	Western District of Pennsylvania
WL	West Law
YOLO	You Only Live Once

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Ltd., [1970] AC 583

DATA 21(Springer Open 2015)	
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STATEMENT OF FACTS

THE PARTIES

Penguin Antarctic Adventures Private Limited (*hereinafter* Claimant) is a startup based out of Bhopal, India, which plans to undertake commercial expeditions to Antarctica from India in 2024. They are represented by Dr. Chandrayan, a renowned retired explorer from Bharat Space Research Organisation (BSRO). Zeus LLC (*hereinafter* Respondent) is a company having its registered office in Delaware, who is in the business of supplying exclusive data about climate conditions, which help assess the optimum date and time for extreme tourism.

THE DATA SUPPLY AGREEMENT (DSA)

The parties entered into an agreement on 5th June 2022 wherein the Respondent would supply data to the Claimant which would be used to assess the ideal time and conditions for launching their first commercial expedition. A fee of USD 5 million was offered by the Respondent initially. Upon the Claimant's request, the Respondent provided a discount of 30%. The revised fee was $ 3.5 million, to be paid in instalments. Additionally, the Respondent was to provide a Report analysing this data to assess an ideal time for the expedition.

The parties mutually agreed to exclude 24/7 Data Integrity Assurance (*hereinafter* DIA) in order to provide the discounted fee. The Respondent provided a warranty that the data would be accurate as on the Delivery Date. Additionally, the parties also mutually agreed that any party initiating an arbitration would have to pay a pre-arbitral deposit of 7.5% of the arbitration claim as a security deposit. The Respondent explicitly asked for comments on the Dispute Resolution Clause of the agreement. The parties agreed the governing law of the arbitration to be Indian Law and seat to be India. Disputes were agreed to be settled in accordance with SIAC Arbitration Rules, 2016. The DSA also contained a confidentiality clause, which forbade the parties from disclosing any information or data exchanged between the parties.

ENSUING FACTS

The data was duly supplied and received on 27th December 2022. The Chief Engineer of the Claimant had enquired about self-destruction mechanisms and firewalls in the data during the first week of January. The Respondent duly informed them about its existence. In spite of this knowledge and confidentiality clause in the DSA, the Chief Engineer of the Claimant firm, displayed sheer negligence and tried to copy the data onto a pendrive on 10th of January. This caused the self-destruction mechanism to trigger, and cleared the data. The Claimant did not

raise this issue, until they checked the data a week later, subsequent to which it raised an accusation of the Respondent providing unreadable data. However, out of good faith, the Respondent resupplied the data.

The Claimant then sent the data to a Reinforcement Learning AI, BranStark (BS) to check the accuracy of the data, thus examining it almost an entire month after it was supplied. The experience of BS is limited to the fields of self-driving cars, traffic control and healthcare. BS generated a report which said that the data supplied by the Respondent was inaccurate such that the expedition would be unsuccessful.

The Claimant never informed the Respondent about this development, and sent a Notice for Arbitration to the Respondent around eight months after the BS Report was generated. Relying on the BS Report as an expert opinion, they claimed that data was defective and non-conforming. They also wanted to bypass the same pre-arbitral deposit requirement which was agreed upon by the parties. They thus wanted relief under the CISG.

The Respondent reached out to an Expert, Prof. Avid Attenborough who retired from the Committee on Antarctic Governance and Environmental Protection to analyse the data. Prof. Attenborough found the data to be accurate and reliable to plan and execute the expedition safely, dispelling the fears of the BS Report. The Respondent in its reply pointed out that CISG does not govern the DSA as data is not a 'good' and that their entire claim cannot be based on an AI report like the BS Report which is completely unreliable.

Additionally, they pointed out that the arbitration cannot proceed unless the pre-arbitral deposit is paid or the tribunal orders Security for Costs as an alternative. The Respondent in the same vein requested for dismissal of the claim with heavy costs in favour of the Respondent. The parties have now approached the Tribunal with their respective prayers.

ISSUES RAISED

ISSUE 1

DOES THE TRIBUNAL HAVE JURISDICTION TO PROCEED WITHOUT THE 7.5% PRE-ARBITRAL DEPOSIT? IF YES, SHOULD IT ORDER SECURITY FOR COSTS PURSUANT TO ITS POWERS UNDER RULE 27(J) OF THE SIAC RULES, 2016?

ISSUE 2

DOES THE BRANSTARK REPORT QUALIFY AS AN 'EXPERT REPORT'?

ISSUE 3

IS THE DATA SUPPLY AGREEMENT GOVERNED BY THE CISG?

ISSUE 4

IF YES, IS THE DATA SUPPLIED BY THE RESPONDENT DEFECTIVE AND NON-CONFORMING UNDER THE CISG?

SUMMARY OF ARGUMENTS

1. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO PROCEED WITHOUT THE 7.5% PRE-ARBITRAL DEPOSIT. ALTERNATIVELY, IT SHOULD ORDER SECURITY FOR COSTS PURSUANT TO ITS POWERS UNDER RULE 27(J) OF THE SIAC RULES, 2016

The Tribunal does not have the jurisdiction to proceed without the 7.5% pre-arbitral deposit because *firstly* pre-deposit clause is mandatory in nature because it is a "shall" clause and not granting the pre-arbitral deposit will violate the principle of party autonomy. *Secondly*, the pre-deposit clause is a valid and conscionable clause as it is devoid of procedural and substantive unconscionability. Additionally, the principle of unconscionability does not apply in commercial contracts. *Thirdly*, the past precedent striking down pre-arbitral deposits does not apply in the present case.

Alternatively, the Tribunal should order security for costs pursuant to its power under Rule 27(j) of the SIAC Rules, 2016 because firstly, the tribunal has the power to order security for costs. Secondly, the Respondent fulfils the reasonable standards required to be granted security for costs.

2. THE BRANSTARK REPORT DOES NOT QUALIFY AS AN EXPERT REPORT

The BranStark report does not qualify as an 'expert report' because *firstly*, AI reports cannot be adduced as experts. This is because AI is not wholly reliable and faces many limitations that make its reliability circumspect. Additionally, BranStark as a newly developed AI system does not have the requisite experience and qualification to offer reliable expertise. Moreover, the Claimant has failed to undertake the mandatory verification measures. *Secondly*, the Claimant has failed to produce relevant documents pertaining to the working mechanism of BranStark, mandating an adverse inference against the Claimant. *Lastly*, the Claimant cannot comply with the requirement of cross examination. Cross examination is an essential part of the adjudicatory process, and failure to facilitate it should lead to the expert evidence getting wholly disregarded.

3. THE DATA SUPPLY AGREEMENT IS NOT GOVERNED BY THE CISG.

The Data Supply Agreement is not governed by the CISG because the CISG is inapplicable to the present case. The parties are not Contracting States to the CISG and USA has given a declaration that it will not be bound by Article 1(1)(b) of the CISG. Conflict of law rules point to the application of Indian law. Further, the data supplied is not a 'good' under the CISG. The

criteria of tangibility and movability of goods is not fulfilled and the data supplied is a form of know-how. The essential criteria for a 'contract of sale' is not fulfilled in the present case as buyer and seller obligations are not fulfilled. In arguendo, Article 3 excludes the CISG from being applicable to the DSA because the preponderant part of the obligations of the party furnishing the goods constitute services and the CISG does not apply by virtue of Article 3(1).

4. THE DATA SUPPLIED BY THE RESPONDENT IS NEITHER DEFECTIVE NOR NON-CONFORMING UNDER THE CISG.

The data supplied by the Respondent is neither defective nor non-conforming under the CISG because the data is conforming under Article 35(1). Party obligations are limited to the DSA and are to be read with freedom of contract instead of good faith. The data conforms to the contractual quality requirements under Article 35(1). In arguendo, the data is also conforming under Article 35(2) as it is fit for the express purpose mentioned in the DSA and the reliance placed on the Respondent is unreasonable. The Respondent is not liable for the alleged non-conformity as the alleged defect happened after the risk was passed and accepted. The alleged defect happened outside of the period of guarantee provided. The Claimant had not examined goods within a short period and had failed to provide a notice of non-conformity.

ARGUMENTS ADVANCED

ISSUE I. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO PROCEED WITHOUT THE 7.5% PRE-ARBITRAL DEPOSIT CLAUSE. ALTERNATIVELY, THE TRIBUNAL SHOULD ORDER SECURITY FOR COSTS PURSUANT TO ITS POWERS UNDER RULE 27(J) OF THE SIAC RULES, 2016

[¶ 1.] The Respondent submits that firstly, the Tribunal does not have the jurisdiction to proceed without the 7.5% pre-arbitral deposit clause **[1.]**; secondly, the Tribunal should order security for costs pursuant to its power under Rule 27(j) of the SIAC Rules, 2016 **[2.]**.

1. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO PROCEED WITHOUT THE 7.5% PRE-ARBITRAL DEPOSIT CLAUSE.

[¶ 2.] The RESPONDENT submits that the Tribunal does not have the jurisdiction to proceed without the 7.5% pre-arbitral deposit clause because *firstly*, the pre-deposit clause is mandatory in nature [**A.**]; *secondly*, the pre-arbitral deposit clause is a valid and conscionable clause [**B.**]; and *thirdly*, the past precedent striking down the pre-arbitral clause does not apply in the present case [**C.**].

A. THE PRE-DEPOSIT CLAUSE IS MANDATORY IN NATURE.

[¶ 3.] The central importance of arbitration is to ensure that the private agreement to arbitrate is enforced according to its terms.[1] The Respondent submits that the nature of the pre-arbitral deposit clause is mandatory in nature because *firstly*, the word "shall" in clause 45.2 of the DSA shows mandatory intention to pay the pre-arbitral deposit **[i.]**; and *secondly*, not granting the pre-arbitral deposit will violate the principle of party autonomy **[ii.]**.

i. The word "shall" in Clause 45.2 of the DSA shows mandatory intention to pay the pre-arbitral deposit

[¶ 4.] The word "shall" clearly indicates the mandatory nature of the pre-arbitration proceedings.[2] Additionally, courts have observed that in order to have a binding arbitration agreement, "shall" or "must" are to be used.[3]

[1] Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp., 559 U.S. 662 (2010).
[2] ICC Case no. 9977;Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd, [2014] EWHC 2104 (Comm).
[3] Anzen Ltd & ors v. Hermes One Ltd, [2016] UKPC 1.

[¶ 5.] In the present case, Clause 45.2 of the DSA reads, "*the parties initiating the arbitration claim* ***shall*** *have to deposit…*".[4] This depicts the mandatory nature of the pre-arbitral deposit clause. Therefore, the Respondent submits that the word "shall" in clause 45.2 shows the mandatory nature of the pre-arbitral deposit clause.

ii. Not granting the 7.5% pre-arbitral deposit would violate the principle of party autonomy

[¶ 6.] Parties have the autonomy to enter into an agreement and create rights and duties by virtue of the principle of party autonomy, which is considered as the grundnorm[5] in determining the procedure to be followed in international arbitration.[6] In *Municipal Corporation, Jabalpur v. Rajesh Construction Co. Ltd.*[7], the court held that the parties to a contract are best judges of their contractual agreement and the court's duty is to comprehend the arbitration agreement in a manner to uphold the same.

[¶ 7.] In the present case, both parties mutually agreed to the 7.5% pre-arbitral deposit.[8] The Respondent submits that not adhering to such a clause will violate the principle of party autonomy, as the procedure consented to by the parties will not be implemented in such a case.

[¶ 8.] Therefore, the Respondent submits that not granting the pre-arbitral deposit clause will violate the principle of party autonomy.

B. THE PRE-ARBITRAL DEPOSIT CLAUSE IS A VALID AND CONSCIONABLE CLAUSE

[¶ 9.] Judicial precedents have held that unconscionability of a clause or contract is to be determined by proving its procedural and substantive aspects to be unconscionable.[9] The Respondent submits that *firstly*, the 7.5% pre-arbitral deposit clause is not procedurally unconscionable [**i.**]; *secondly*, the 7.5% pre-arbitral deposit clause is not substantively unconscionable [**ii.**] and *thirdly*, in any event, the concept of unconscionability does not apply to commercial contracts [**iii.**].

i. The 7.5% pre-arbitral deposit clause is not procedurally unconscionable.

[¶ 10.] Relevant considerations to consider procedural unconscionability are whether there was

[4] Case Record, Exhibit C-5, p. 18.
[5] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126.
[6] ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 353-414 (Oxford University Press 2015).
[7] Municipal Corpn. v. Rajesh Construction Co., (2007) 5 SCC 344.
[8] Case Record, Exhibit C-5, P.18.
[9] Ciago v. Ameriquest Mortgage Co., 295 F.Supp.2d 324; Leonard v. Del. N. Cos. Sport Serv., 861 F.3d 727 (8th Cir. 2017).

availability of meaningful choice to the Claimant when the contract was agreed upon; [10] whether the alleged unconscionable clause was offered on a *take it-or-leave it* basis;[11] whether the party claiming the unconscionable character of the contract or clauses had the ability and reasonable opportunity to understand the terms of the contract.[12]

[¶ 11.] In the present case, the Respondent explicitly asked for the Claimant's comments on Clause 45 of the DSA.[13] However, the Claimant agreed to the pre-arbitral clause and ordered the execution of the DSA.[14] The Respondent submits that a meaningful choice and the opportunity to negotiate was provided to the Claimant. Additionally, the clause is not offered on a *take it-or-leave it* basis as the Respondent has not restricted the Claimant to accept the DSA. Furthermore, the Claimant is a renowned explorer who retired from the BSRO and is the proprietor of a firm.[15] The Respondent submits that the Claimant had the ability to understand the terms of the contract.

[¶ 12.] Therefore, the Respondent submits that the 7.5% pre-arbitral deposit clause is not procedurally unconscionable.

ii. The 7.5% pre-arbitral deposit clause is not substantively unconscionable.

[¶ 13.] For substantive unconscionability[16], the tribunal must consider whether the clause in dispute is one-sided and has a negative effect on the disadvantaged party. The Supreme Court, in *S.K. Jain v. State of Haryana*[17], upheld the validity of a pre-arbitral deposit clause since it is dependent on the quantum involved. The SC also observed that such clauses are a balancing factor to prevent inflated and frivolous claims.

[¶ 14.] In the present case, the value of the 7.5% pre-arbitral deposit clause depends upon the quantum of claim.[18] The higher the claim, higher will be the pre-arbitral deposit. Had the Claimant not asked for an inflated claim i.e., USD 50 million for a contract valuing USD 3.5 million, the value of pre-arbitral deposit would have been much less. Furthermore, the pre-arbitral deposit is not discriminatory in nature, since it can be triggered on account of initiation

[10] Vistein v. American Registry of Radiologic Technologists, 342 F. App'x 113 (6th Cir. 2009); M.A. Mortenson Co. v. Saunders Concrete Co., Inc., 676 F.3d 1153, 1158 (8th Cir. 2012); Nayal v. HIP Network Servs. IPA, Inc., 620 F. Supp. 2d 566 (S.D.N.Y. 2009).
[11] Pendergast v. Sprint Nextel Corp., 592 F.3d 1119 (11th Cir. 2010).
[12] *Id.*
[13] Case Record, Exhibit C-4, p.17.
[14] Case Record, Response to Notice of Arbitration, p.25, ¶ 8.
[15] Case Record, Notice of Arbitration, p. 6, ¶ 3.
[16] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[17] S.K. Jain v. State of Haryana, (2009) 4 SCC 357.
[18] Case Record, Exhibit C-5, p.18.

of arbitration, which can be done by the Respondent also.

[¶ 15.] Therefore, the Respondent submits that the 7.5% pre-arbitral deposit clause is not substantively unconscionable.

iii. In any event, the concept of unconscionability does not apply in commercial contract

[¶ 16.] The principle of unconscionability does not apply in cases where both parties are engaged in a commercial transaction.[19] Commercial transactions need to be interpreted widely to cover matters arising from all relationships of a commercial nature, whether contractual or not.[20]

[¶ 17.] In the present case, both the Claimant and the Respondent are private parties engaged in the business of commercial expeditions[21] and supply of data for extreme tourism respectively.[22] The Claimant executed a DSA with the Respondent, which was of commercial nature, involving a consideration of USD 3.5 million.[23]

[¶ 18.] The Respondent submits that the DSA is a commercial contract entered into by two business doing parties. Therefore, in any event, the principle of unconscionability does not apply in commercial contracts.

C. PAST PRECEDENT STRIKING DOWN PRE-ARBITRAL DEPOSITS DOES NOT APPLY TO THE PRESENT CASE

[¶ 19.] In *S.K. Jain v. State of Haryana (S.K. Jain)*[24], the SC upheld the validity of pre-arbitral deposit clauses. However, in *ICOMM Tele Ltd. Vs. Punjab State Water Supply and Sewerage Board (ICOMM)*[25], the SC held that a pre-arbitral deposit clause was arbitrary in nature and violated Art. 14 of the Constitution. This was due to the pre-arbitral deposit therein not being fully refundable. The SC, in *ICOMM*, did not wholly strike down the validity of pre-arbitral deposit clauses distinguished *S.K. Jain* on facts.[26]

[¶ 20.] The Respondent submits that although *ICOMM* held that pre-arbitral deposits are arbitrary, the reasoning for the same was based on the non-refundability of the pre-arbitral deposit. In the present case, the pre-arbitral deposit is fully refundable to the successful

[19] Central Inland Water Transport Corpn. v. Brojo Nath Ganguly, (1986) 3 SCC 156.
[20] UNCITRAL Model Law, art. 1.
[21] Case Record, Notice of Arbitration, p. 6, ¶ 2.
[22] Case Record, Notice of Arbitration, p. 6, ¶ 3.
[23] Case Record, Notice of Arbitration, p. 7, ¶ 7.
[24] S.K. Jain v. State of Haryana, (2009) 4 SCC 357.
[25] ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board, (2019) 4 SCC 401.
[26] *Id.*

claimant.[27] Therefore, the ratio in *ICOMM* does not apply to the present case. Consequently, the ratio in S.K. Jain can be applied.

2. THE TRIBUNAL SHOULD ORDER SECURITY FOR COSTS PURSUANT TO ITS POWERS UNDER RULE 27(J) OF THE SIAC RULES, 2016.

[¶ 21.] When there is no question on maintainability of claim and a party initiates arbitration, then the opposite party has to be a party to the arbitral proceedings. The Respondent submits that, *firstly*, the Tribunal has the power to grant an order for security for costs **[A.]** and *secondly*, the Respondent fulfils the reasonable standards required for the grant of the security for costs **[B.]**.

A. THE TRIBUNAL HAS THE POWER TO ORDER THE CLAIMANT TO PROVIDE SECURITY FOR COSTS.

[¶ 22.] The power to grant security for costs is usually considered to be part of the power to grant interim measures in arbitration.[28] A tribunal can grant security for costs under a general clause for interim measures, if there are no explicit provisions to grant security for costs.[29] The Tribunal may also grant security for costs as part of its inherent powers to preserve the integrity of the proceedings.[30]

[¶ 23.] In the present case, general clauses of the Model Law allow the Tribunal to order security for costs.[31] Additionally, Rule 27(j) of the SIAC Rules 2016 gives additional power to the tribunal to direct parties to provide security for legal costs or other costs.[32] Therefore, the Claimant submits that the tribunal has the power to order the Claimant to provide security for costs.

B. THE RESPONDENT FULFILS THE REASONABLE STANDARDS REQUIRED TO BE GRANTED SECURITY FOR COSTS.

[¶ 24.] The Respondent submits that it fulfils the reasonable standards required to be granted security for costs because, *firstly*, the Respondent has reasonable possibility of success of

[27] Case Record, P.O.2, Q.43.
[28] AJAR RAB, INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE REVIEW OF THE INDIAN EXPERIENCE 273 (Kluwer Law International 2022).
[29] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2495 (Kluwer Law International 2021).
[30] LAURENCE CRAIG ET. AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 467 (Oceana TM 2000); ICSID Case No. ARB/09/17.
[31] UNCITRAL Model Law, art. 17(2)(c).
[32] SIAC Rules, Rule 27(j).

defense, *secondly*, real risk exists for the Claimant to not comply with the award for costs and *thirdly*, harm to the Respondent will relatively outweigh potential harm caused to the Claimant.

i. The Respondent has the reasonable possibility of success of defence

[¶ 25.] One of the pre-requisites for an application for security for costs is to establish that the applicant has a reasonable possibility of success of defense.[33] The tribunal must form only a preliminary view of the prospect of success of the party claiming security without delving into merits. [34] Only a prima-facie view is required to ascertain the reasonable possibilities of success of the claim.[35]

[¶ 26.] In the present case, the Claimant consensually opted out for the service of 24/7 data integrity assurance. According to Clause 18.1.2 of the DSA, the Respondent only had an obligation to maintain the accuracy of the data as on the Delivery Date, which was done. Moreover, the claim amount of USD 50 million is grossly inflated as compared to the value of the DSA, i.e. USD 3.5 million. Therefore, the Respondent submits that the Respondent has the reasonable possibility of the success of the defense.

ii. There is a real risk that the Claimant would not comply with an order for security for costs

[¶ 27.] There must be a material change in circumstances of the Claimant and such change must not be foreseeable[36]. The Respondent submits that a real risk exists for the Claimant to not comply with the award for costs because *firstly*, the Claimant's has undergone material change in circumstances; *secondly*, the Respondent could not have anticipated such change in circumstances.

a. The Claimant has undergone material change in circumstances

[¶ 28.] A party applying for security for costs has to show that the possibility of the Claimant honouring the potential cost award is seriously deteriorated.[37] The applicant has to depict specific instances that the other party has insufficient financial means to pay such security.[38] Interim measures such as security for costs may be ordered by means of Claimant's lack of

[33] CIArb Guidelines on Application for Security for Costs, 2016, art. 2.
[34] Alan Redfern & O'Leary, *Why it is time for international arbitration to embrace security for costs*, 32 Arb. Int.l 397, 410 (2016).
[35] Rab, *supra* note 28, 281.
[36] Rab, *supra* note 28, 282.
[37] *Id.*
[38] Jan Heiner Nedden & Inga Witte, *The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner's Perspective Overview Document text,* 4 Stockholm Arb. Y. Book 39, 42 (2022).

assets, impecuniosity or even insolvency[39].

[¶ 29.] In the present case, the Claimant has admitted that its future is jeopardized due to the alleged breach.[40] Additionally, the majority of the income of the Claimant is conditional on the successful launch or successful completion of the expedition. The value of such conditional income amounts to *30 million USD.*[41]

[¶ 30.] Since the arbitration proceedings commenced in November 2023, the expedition has been put to a halt. Since these incomes were based on the success and completion of the expedition, such incomes now become questionable. Additionally, the USD 5 million that was earned through the sale of tickets[42] is also likely to be refunded back, due to the expedition now being admittedly jeopardized. The Claimant also has additional payments to make, as shown in the Claimant's response to the application for security for costs. [43]

[¶ 31.] Therefore, the Respondent humbly submits that the Claimant has undergone fundamental change in circumstance.

b. In any event, the absence of material change in circumstance does not disallow an order for security for costs.

[¶ 32.] With arbitration agreement there also comes the possibility for costs.[44] Instead of using the authorities showcasing serious deterioration, the tribunal should focus on to what extent did the applicant could have assumed certain risk. In order to determine this, the Tribunal should pay heed to parties' obligations under the contract, their financial exposure to each other and consider whether the applicant could reasonably have anticipated the type and the size of the claim now brought against it[45].

[¶ 33.] In the present case, the obligation of the Respondent was limited to the extent of supply of data. The parties were not financially exposed to each other due to their only obligations being the supply of data. Therefore, the Respondent could not have reasonably anticipated a USD 50 million claim being brought against it.

iii. Harm to the Respondent will relatively outweigh potential harm caused to the

[39] KARL-HEINZ BÖCKSTIEGEL, LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY 346 (Carl Heymanns Verlag, Köln 2001).
[40] Case Record, Notice of Arbitration, p.12, ¶ 12.
[41] Case Record, P.O.2, Q.20
[42] Case Record, Notice of Arbitration, p.7, ¶ 8.
[43] *Id.*
[44] Nedden & Witte*, supra* note 38, 45.
[45] *Id.*

Claimant

[¶ 34.] As per Model Law[46], a party requesting interim measure needs to show that it would suffer irreparable harm such measure were not ordered and this harm would outweigh the potential harm caused to the opposite party by such measure. However, arbitral tribunals require a showing of "serious" or "substantial" harm, instead of "irreparable."[47]

[¶ 35.] In the present case, the Claimant has approached the Tribunal relying on an unverified AI system's report, which generally requires human verification.[48] Additionally, the Claimant does not have the financial strength to pay an award on costs as it has admitted to the project being jeopardized, leading to its investments and its future being compromised.[49] Additionally, the payments that were supposed to be contingent on the success of the expedition have also become questionable.[50] This creates a sufficient risk of harm to be suffered by the Respondent if security for costs is not granted.

[¶ 36.] Therefore, harm to the Respondent will relatively outweigh the potential harm caused to the Claimant.

ISSUE II. THE BRANSTARK REPORT DOES NOT QUALIFY AS AN 'EXPERT REPORT'.

[¶ 37.] The Respondent submits that BranStark report does not qualify as an 'expert report' because *firstly,* AI systems, like BranStark cannot be adduced as experts **[1.]**; *secondly,* the Claimant has failed to produce relevant and material documents **[2.]**; *lastly,* the procedural requirement of cross examination should be complied with **[3.].**

1. AI SYSTEMS, LIKE BRANSTARK, CANNOT BE ADDUCED AS EXPERTS

[¶ 38.] The Respondent submits that AI systems, like BS, cannot be adduced as experts as *firstly,* AI systems are not wholly reliable **[A.]**; *secondly,* BranStark does not have the requisite experience or qualifications to offer reliable results **[B.]**; *thirdly,* the BranStark report is incomplete **[C.]**; *lastly,* the Claimant has not undertaken required verification measures **[D.]**.

A. AI SYSTEMS ARE NOT WHOLLY RELIABLE

[¶ 39.] Most AI systems are based on Machine Learning models[51] and reinforcement learning

[46] UNCITRAL Model Law, art. 17.
[47] ICSID Case No. ARB/12/39.
[48] Case Record, P.O.2, Q.3.
[49] Case Record, Notice of Arbitration, p.8, ¶ 12.
[50] Case Record, P.O.2, Q.20.
[51] Sara Brown, *Machine Learning, Explained,* Massachusetts Institute of Technology Sloan School of

systems are one of the many subsets of ML systems.[52] All such deep learning systems can be classified as blackbox AI systems,[53] whose inputs and operations are not visible to any involved party.[54] Consequently, it arrives at conclusions without providing any explanation as to the mechanism employed to form such conclusions.[55] Moreover, AI tools also exhibit biases resulting from limitations in underlying datasets and training protocols.[56]

[¶ 40.] AI tools cannot be the basis of adjudication of legal or factual issues, and it raises concerns about the nature of query, training data and mechanism employed. It creates a risk of incorrect responses, fictional and imaginative data and cannot substitute the human element in the adjudicatory process.[57] Additionally, devices producing outputs that are adduced as evidence can suffer from infirmities that are due to the nature of the device, its design or other factors.[58] Concerns of credibility increase further when the probative value of the evidence presented derives completely from the AI employed[59] and work without any human involvement.[60]

[¶ 41.] In the present case, the Claimant has placed complete reliance on an AI generated report[61] ignoring all the pitfalls of relying on such technology. BranStark is a newly developed reinforcement learning system[62] and all the above-mentioned limitations would obstruct its admissibility as an expert.

[¶ 42.] Thus, it is submitted that, AI systems are not wholly reliable.

B. BRANSTARK DOES NOT HAVE THE REQUISITE EXPERIENCE OR QUALIFICATION TO OFFER RELIABLE RESULTS

[¶ 43.] Reinforcement learning systems learn on the basis of trial and error,[63] requiring

Management (April 21, 2021), https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained.
[52] *Id;* Yutaka Matuso et al., *Deep Learning, Reinforcement Learning and World Models*, 152 NEURAL NETWORKS 267 (2022).
[53] Sara Brown, *supra* note 51.
[54] SVAMC Guidelines on the use of Artificial Intelligence in Arbitration, Guideline 1.
[55] W. Nicholson Price II et al., *Clearing Opacity Through Machine Learning,* 106 IOWA L. REV. 775 (2021).
[56] SVAMC Guidelines on the use of Artificial Intelligence in Arbitration, Guideline 1; Müller, *Ethics of Artificial Intelligence and Robotics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr 30, 2020), https://plato.stanford.edu/entries/ethics-ai/; Schwartz et al., *Towards a Standard for Identifying and Managing Bias in Artificial Intelligence*, NIST U.S. Department of Commerce (August 28, 2022).
[57] Christian Louboutin Sas v. Shoe Boutique - Shutiq, 2023 SCC OnLine Del 5295.
[58] Andrea Roth, *Machine Testimony*, 126 The Yale Law Journal 1972, 2027 (2017).
[59] MASON et al., ELECTRONIC EVIDENCE AND ELECTRONIC SIGNATURE 35 (University of London Press 2021).
[60] Daniel Seng, *Computer Output as Evidence*, SINGAPORE JOURNAL OF LEGAL STUDIES (1997).
[61] Case Record, Reply to the Notice of Arbitration, p. 24, ¶ 5.
[62] Case Record, Notice of Arbitration, p. 8, ¶ 11.
[63] Yutaka Matuso et al., *Deep Learning, Reinforcement Learning and World Models*, 152 NEURAL NETWORKS 267 (2022).

extensive, high quality data and real world application,[64] before it can produce reliable result. Additionally, while parties are free to appoint experts,[65] they are required to disclose the qualifications, background and training of any experts relied on.[66]

[¶ 44.] In the present case, there is ample data available in the fields where BranStark excels,[67] which is not true for the data available in the novel industry of Indian commercial Antarctic expeditions.[68] Additionally, BS is a newly developed reinforcement learning system[69] that requires a lot of high quality data and experience to learn by trial and error. Such an opportunity was not present in the instant case, owing to the novel nature of the industry, making its reliability circumspect. In the absence of such supporting claims of experience, qualifications and training, the reliability of the AI report becomes circumspect.

[¶ 45.] Thus, BranStark does not have the requisite experience or qualification to offer reliable results.

C. THE BRANSTARK REPORT IS INCOMPLETE

[¶ 46.] AI systems only have access to publicly available information and to the specific information it is supplied with.[70] In the present case, the Respondent is in the business of supplying and generating 'exclusive' data[71] for which it also relies on non-public sources, which have not been shared with the Claimant.[72] Therefore, BranStark could not have access to such non-public sources, and is incapable of assessing accuracy in the absence of complete metrics and sources.

[¶ 47.] Thus, the BranStark report is incomplete.

D. THE CLAIMANT HAS NOT UNDERTAKEN REQUIRED VERIFICATION MEASURES

[¶ 48.] Expert testimony necessitates corroboration[73] and depending solely on such testimony without seeking independent and dependable confirmation is considered unreliable.[74]

[¶ 49.] In the present case, reports submitted by BranStark are not a hundred percent reliable

[64] Sara Brown, *supra* note 51.
[65] SIAC Rules, Rule 25.1; IBA Rules, art. 5.1.
[66] IBA Rules, art. 5.2(a).
[67] Case Record, P.O. 2, Q.3.
[68] Case Record, Notice of Arbitration, p. 7, ¶ 4; Case Record, Exhibit C-1, p. 10.
[69] Case Record, Notice of Arbitration, p. 8, ¶ 11.
[70] Christopher Eldridge, *Fusing Algorithms and analysts: open-source intelligence in the age of 'Big Data'*, 33 INTELLIGENCE AND NATIONAL SECURITY (2017).
[71] Case Record, Notice of Arbitration, p. 6, ¶ 3.
[72] Case Record, Exhibit R-2, p. 28.
[73] S. Gopal Reddy v. State of A.P., (1996) 4 SCC 596.
[74] Chennadi Jalapathi Reddy v. Baddam Pratapa Reddy, (2019) 14 SCC 220.

and have been found to be inaccurate after assessment by human experts. This is why companies procuring services from BranStark continue to rely on human opinions before making a final decision.[75] Additionally, the BS report recommends that the Claimant undertake "extensive data verification measures" to assure the accuracy of its report.[76] While the Claimant intended to be a "hundred percent certain"[77] about the accuracy of the data supplied by the Respondent, they failed to undertake such recommended data verification measures or human verification, as is standard industry practice.[78]

[¶ 50.] Had the Claimant undertaken "extensive data verification", as recommended by the BranStark report itself[79] or relied on a human expert for confirmation and introduction, this testimony could have been admissible.[80] However, the Claimant deliberately excluded such an integral process, and a claim based solely on an unreliable AI generated report does not find merit.

[¶ 51.] Thus, the Claimant has not undertaken required verification measures.

2. THE CLAIMANT HAS FAILED TO PRODUCE RELEVANT AND MATERIAL DOCUMENTS

[¶ 52.] The Respondent submits that the Claimant has failed to produce relevant and material documents as *firstly*, the mechanism employed and documents relied on by BranStark establish relevant facts and ought to be examined by the tribunal **[A.]**; *secondly,* failure to produce the requested document should lead to an adverse inference against the party to whom the request was made **[B.]**.

A. THE MECHANISM EMPLOYED AND DOCUMENTS RELIED ON BY BRANSTARK ESTABLISH RELEVANT AND MATERIAL FACTS, AND OUGHT TO BE EXAMINED BY THE TRIBUNAL

[¶ 53.] Whenever the opinion of an expert[81] is relevant, the grounds on which such opinion is based are also relevant.[82] Additionally, when the fact proposed is one of which evidence is admissible only upon the proving of some other fact, such last-mentioned fact must be proved

[75] Case Record, P.O. 2, Q.3.
[76] Case Record, Exhibit C-8, p. 22.
[77] Case Record, Notice of Arbitration, p. 8, ¶ 11.
[78] Case Record, P.O. 2, Q.3.
[79] Case Record, Exhibit C-8, p. 22.
[80] The Indian Evidence Act, 1872, § 65(g), No. 1, Acts of Parliament, 1872 (India); SVAMC Guidelines on the use of Artificial Intelligence in Arbitration, Guideline 4; S Gless, *AI in the Courtroom: A Comparative Analysis of Machine Evidence,* 51 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 195 (2020).
[81] IBA Rules, art. 5.2(a).
[82] The Indian Evidence Act, 1872, § 51, No. 1, Acts of Parliament, 1872 (India); The Indian Evidence Act, 1872, *Illustration* of § 51; The Indian Evidence Act, 1872, § 46, No. 1, Acts of Parliament, 1872 (India).

before evidence of the primary fact is given.[83]

[¶ 54.] Any expert report produced by parties should contain a statement of the facts on which it has relied to reach its conclusions[84] and a description of the methods, evidence, information and documents on which the expert has relied.[85] Additionally, parties to the arbitration possess the right to request any other party, for the production of any relevant and material document.[86]

[¶ 55.] In the present case, the accuracy of the data supplied by the Respondent is the primary fact in issue.[87] The opinions of the BS report constitute a relevant fact,[88] thereby making the grounds for such opinion relevant to the current dispute. Consequently, the mechanism and process employed by BranStark to reach its conclusion is a relevant fact and should be examined by the tribunal.[89]

[¶ 56.] Additionally, the Respondent can put forth a request for the production of documents pertaining to the working mechanism of BranStark and the grounds for the conclusions in its report. The tribunal, finding merit in the relevance and materiality of the requested document, reserves the right to order the requested party to produce all such documents.[90]

[¶ 57.] The admissibility of the BranStark report, as an expert report, can only be established after examining the mechanism involved therein. The tribunal can thus ask for the production of any such relevant and material documents to examine them[91] prior to admitting the evidence supplied by the Claimant. Moreover, the Claimant has failed to provide a statement addressing the materials, mechanisms, facts and documents utilised by BranStark, as required by the IBA rules.

[¶ 58.] Thus, the mechanism employed and documents relied on by BranStark establish relevant and material facts, and ought to be examined by the tribunal.

B. FAILURE TO PRODUCE THE REQUESTED DOCUMENT SHOULD LEAD TO AN ADVERSE INFERENCE AGAINST THE PARTY TO WHOM THE REQUEST WAS MADE

[¶ 59.] The IBA Rules on the Taking of Evidence in International Arbitrations establish best

[83] The Indian Evidence Act, 1872, § 136, No. 1, Acts of Parliament, 1872 (India).
[84] IBA Rules, art. 5.2(d).
[85] IBA Rules, art. 5.2(e).
[86] IBA Rules, art. 3.3.
[87] The Indian Evidence Act, 1872, § 3, No. 1, Acts of Parliament, 1872 (India).
[88] The Indian Evidence Act, 1872, § 9, No. 1, Acts of Parliament, 1872 (India).
[89] IBA Rules, art. 3.7.
[90] IBA Rules, art. 3.7; IBA Rules, art. 3.10; SIAC Rules, Rule 27(c); SIAC Rules, Rule 27(h).
[91] SIAC Rules, Rule 27(c); SIAC Rules, Rule 27(h).

practices.[92] If the requested party[93] fails to produce the documents even after an order by the tribunal,[94] the tribunal may infer that such evidence would be adverse to the interests of that party.[95]

[¶ 60.] While the tribunal has not yet made any order to produce the requested documents, it can issue such an order[96] in furtherance of the Respondent's request to produce the relevant and material documents.[97] When such an order is made, the Claimant will be unable to present the requisite documents for examination by the Respondent and the Tribunal, owing to the nature of expert.

[¶ 61.] The nature of reinforcement learning AI models, like BranStark, is that their working and operations are hidden in a 'blackbox'[98] such that it cannot be viewed or obtained by any interested party. To be admissible, the court must understand which factors led to the expert's findings and how the expert arrived at a particular outcome. Both of these are impossible to discern in the case of AI, since it is impossible explain its internal processes leading to decisions.[99]

[¶ 62.] The Claimant's inevitable failure to produce such a relevant document, arises out of their convenient choice of appointed expert. Such a failure could have been reasonably foreseen and prevented by employing a human expert to verify the conclusions of the BranStark report.[100]

[¶ 63.] Thus, failure to produce the requested document should lead to an adverse inference against the party to whom the request was made.

3. THE PROCEDURAL REQUIREMENT OF CROSS EXAMINATION SHOULD BE COMPLIED WITH

[¶ 64.] The Respondent submits that the procedural requirement of cross examination should be complied with as *firstly,* cross examination is an essential part of the adjudicatory process **[A.]**; *secondly,* the Respondent can request for BranStark to be presented for cross examination **[B.]**; *lastly,* failure to produce BranStark for cross examination has an unfavourable impact on

[92] Duncan Gorst et al., *2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration* (March 28, 2021), Kluwer Arbitration Blog; REDFERN *supra* note 66, ¶ 6.95.
[93] IBA Rules, art. 3.4.
[94] IBA Rules, art. 3.7.
[95] IBA Rules, art. 9.6.
[96] IBA Rules, art. 3.10; IBA Rules, art. 8.6.
[97] IBA Rules, art. 9.6.
[98] Sara Brown, *supra* note 51.
[99] Gless *supra* note 80.
[100] Gless *supra* note 80.

the Claimant's case **[C.]**.

A. CROSS EXAMINATION IS AN ESSENTIAL PART OF THE ADJUDICATORY PROCESS

[¶ 65.] While arbitration in India is not bound by the CPC or Evidence act, reference can be made to those to fill procedural grey areas.[101] The principle of cross examination is essential to test the veracity of any evidence[102] submitted and is essential for a just and fair award.[103] The purpose of cross examination is to demonstrate that the witnesses' testimony is not safe to rely on because they are not credible.[104] Tribunals place greater weight to the evidence of a witness that has been tested by cross-examination, or by an examination of the tribunal itself.[105]

[¶ 66.] The documentary opinion of an expert along with the data in support of his opinion is not sufficient. They must be cross-examined in the court because an expert like any other witness is fallible.[106] Without examination, expert evidence would be admissible, but no reliance can be placed on it.[107] Questions asked to experts should not only target the outcome of the expert report, but it should also be directed toward the methodology or process which the expert has adopted for preparing the report.[108] Additionally, questions of knowledge and negligence can be better illustrated by means of cross-examination.[109]

[¶ 67.] In the present case, BranStark has been presented as an expert by the Claimant, and complete reliance has been placed on this unverified report. Any subsequent testimony is not absolutely infallible and should be examined by the Respondent and the Tribunal. BranStark, like any other expert, if not more, is susceptible to relying on a faulty methodology, and the Respondent reserves the right to examine any submitted witness.

[¶ 68.] Thus, cross examination must mandatorily be conducted as it is an essential part of the adjudicatory process.

B. THE RESPONDENT CAN REQUEST FOR BRANSTARK TO BE PRESENTED FOR CROSS

[101] Maharashtra State Electricity Board v. Datar Switchgear Ltd., 2002 SCC OnLine Bom 983; ITI Ltd. v. Siemens Public Communications Network Ltd., (2002) 5 SCC 510; Sahyadri Earthmovers v. L and T Finance Ltd., 2011 SCC OnLine Bom 434.
[102] The Indian Evidence Act, 1872, § 146(1), No. 1, Acts of Parliament, 1872 (India).
[103] Rajesh P. Thakkar v. Kotak Mahindra Bank Ltd., 2011 SCC OnLine Bom 1284; Fiza Developers & Inter-Trade (P) Ltd. v. Amci (I) (P) Ltd., (2009) 17 SCC 796.
[104] RAGNER HARBAST, CHAPTER 8: CROSS-EXAMINATION, A COUNSEL'S GUIDE TO EXAMINING AND PREPARING WITNESSES IN INTERNATIONAL ARBITRATION 99 – 100 (Kluwer Law International 2015).
[105] REDFERN *supra* note 6, ¶ 6.129.
[106] Balkrishna Das Agarwal v. Radha Devi, 1988 SCC OnLine All 868.
[107] State of Maharashtra v. Damu, (2000) 6 SCC 269; Suraj Bhan v. Harchandgir, 1951 SCC OnLine Pepsu 13.
[108] Daubert et ux., Individually and as Guardians ad Litem for Daubert, et al v. Merrell Dow Pharmaceuticals, Inc., 1993 SCC OnLine US SC 104.
[109] Kaj Hobér, *Chapter 3: Cross-Examination in International Arbitration*, 1 Stockholm Arbitration Yearbook 41, 42 (2019).

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[¶ 69.] Parties to the proceedings reserve the right to inform the tribunal and other parties, of any witness and party-appointed expert whose appearance it requests.[110] Additionally, the tribunal reserves the right to request any person to give evidence on issues that are relevant to the case and material to its outcome.[111] All such witnesses and experts, whose presence has been requested by any party or the tribunal, must appear for testimony at the evidentiary hearing, and they can be questioned by any of the parties and the tribunal at any time.[112]

[¶ 70.] In the present case, the conclusion of the BS report is a relevant fact, making the grounds of such conclusion relevant as well. Determining whether the basis for such opinions has merit or is flawed, impacts the report's admissibility, thereby having a material impact on the outcome of the proceedings.

[¶ 71.] Thus, the Respondent can request for BranStark to be presented for cross examination.

C. FAILURE TO PRODUCE BRANSTARK FOR CROSS EXAMINATION HAS AN UNFAVOURABLE IMPACT ON THE CLAIMANT'S CASE

[¶ 72.] Failure to produce BS for cross examination has an unfavourable impact on the Claimant's case as *firstly*, the tribunal can disregard any expert who fails to appear at an evidentiary hearing **[i.]**; *secondly*, failure to provide relevant testimony shall lead to an adverse inference against the Claimant **[ii.]**.

i. The tribunal can disregard any expert who fails to appear at an evidentiary hearing

[¶ 73.] If a party-appointed expert whose presence has been lawfully requested fails to appear, the tribunal shall disregard any expert report submitted by such expert.[113]

[¶ 74.] While no order for the production of the witness has been made yet, the tribunal may issue such an order[114] in furtherance of the Respondent's request[115] for the same. When such order is made, the Claimant will be unable to present the expert witness for the evidentiary hearing. The nature of AI systems is such that it cannot be produced or deliberated with. The Claimant's eventual failure and inability to produce BranStark for examination before the

[110] IBA Rules, art. 8.1.
[111] IBA Rules, art. 8.6.
[112] IBA Rules, art. 8.4; The Indian Evidence Act, 1872, § 137, No. 1, Acts of Parliament, 1872 (India); SIAC Rules, Rule 25.3; SIAC Rules, Rule 25.2.
[113] IBA Rules, art. 5.5; AAA Commercial Arbitration Rules and Mediation Procedures, Rule 36(a).
[114] IBA Rules, art. 8.6; SIAC Rules, Rule 27(c); SIAC Rules, Rule 27(h).
[115] IBA Rules, art. 8.1.

parties and tribunal, makes it permissible for the expert report to be completely disregarded. [116]

[¶ 75.] Thus, the tribunal can disregard any expert who fails to appear at an evidentiary hearing.

ii. Failure to provide relevant testimony shall lead to adverse inference against the Claimant.

[¶ 76.] If a party fails to make available relevant evidence, including relevant testimony, sought by any other party or the tribunal, the tribunal may infer that such evidence would be adverse to the interests of that party[117]

[¶ 77.] While no order for the production of the witness has been made yet, the tribunal may issue such an order[118] in furtherance of the Respondent's request[119] for the same. When such order is made, the Claimant will be unable to present the expert witness for the evidentiary hearing. The nature of AI systems is such that it cannot be produced or deliberated with. The Claimant's failure to present the expert appointed by itself, should give rise to an adverse inference against the Claimant.

[¶ 78.] Thus, failure to provide relevant testimony shall lead to adverse inference against the Claimant.

ISSUE III. THE DATA SUPPLY AGREEMENT IS NOT GOVERNED BY THE CISG

[¶ 79.] The Respondent submits that the DSA is not governed by the CISG because *firstly*, the CISG is inapplicable to the present case [**1.**]; *secondly*, the data supplied is not a 'good' under the CISG [**2.**]; *thirdly*, the essential criteria for a 'contract of sale' is not fulfilled in the present case [**3.**]; *lastly*, in arguendo, Art. 3 excludes the CISG from being applicable to the DSA [**4.**].

1. THE CISG IS INAPPLICABLE TO THE PRESENT CASE

[¶ 80.] The Respondent submits that the CISG is inapplicable to the present case because *firstly*, Article 1(1)(a) is inapplicable because both parties are not Contracting States [**A.**]; *secondly*, Article 1(1)(b) is inapplicable [**B.**]; *thirdly*, conflict of law rules point to the application of Indian law [**C.**].

A. ART. 1(1)(A) IS INAPPLICABLE BECAUSE BOTH PARTIES ARE NOT CONTRACTING STATES

[¶ 81.] Art. 1(1)(a) of the CISG requires parties' places of business to be in different

[116] SIAC Rules, Rule 25.4.
[117] IBA Rules, art. 9.7.
[118] IBA Rules, art. 8.6; SIAC Rules, Rule 27(c); SIAC Rules, Rule 27(h).
[119] IBA Rules, art. 8.1.

Contracting States at the time of conclusion of the contract.[120] Any State which has implemented the CISG by ratification or accession under Art. 91(2)(3) and by its entry into force under Art. 99(2) and Art. 91(4) is a Contracting State.[121] USA is a Contracting State as it has ratified the Convention.[122] However, India has not implemented the CISG by ratification or accession, and is not a Contracting State.[123]

[¶ 82.] In the present case, the parties have their places of business in India and USA.[124] Since both parties do not have their place of business in different Contracting States at the time of conclusion of the contract, Art. 1(1)(a) is not applicable.

B. ART. 1(1)(B) IS INAPPLICABLE

[¶ 83.] Art. 1(1)(b) of the CISG applies when the rules of private international law leads to the application of the law of a Contracting State.[125] When USA ratified the CISG, it made the declaration that it will not be bound by subparagraph 1(b) of Article 1.[126] USA is only bound by the CISG when the transaction takes place between businesses in two Contracting States, and is not bound otherwise.[127]

[¶ 84.] In the present case, the parties to the DSA have their place of business in India and USA.[128] Since USA made such a declaration that it would not be bound by Art. 1(1)(b) of the CISG, it prohibits the application of Art. 1(1)(b). Therefore, Art. 1(1)(b) of the CISG is not applicable to the present case.

C. CONFLICT OF LAW RULES POINT TO THE APPLICATION OF INDIAN LAW

[¶ 85.] The Respondent submits that Indian courts have relied on *Dicey's Conflict of laws* to solve conflict of law problems.[129] While determining the applicable law to the contract which does not mention the same, arbitral tribunals consider the parties' tacit choice of law.[130]

[120] PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE CISG 218 (Oxford University Press 2016) (hereinafter '**SCHWENZER**'); United Nations Convention on Contracts for the International Sale of Goods 1988, ['hereinafter **CISG**'] art. 1(1)(a).
[121] SCHWENZER *supra* note 120 at 223; CISG, art. 91(2)(3); CISG, art. 99(2); CISG, art. 91(4).
[122] UNCITRAL, *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.
[123] *Id.*
[124] Case Record, Notice of Arbitration, p. 6, ¶2.
[125] CISG, art. 1(1)(b).
[126] UNCITRAL status, *supra* note 122; Peter Winship, *Should the United States withdraw its CISG Article 95 declarations*, 50 INT'L L. 217 (2017).
[127] CLOUT Case No. 616.
[128] Case Record, Notice of Arbitration, p. 6, ¶ 1, 2.
[129] NTPC v. Singer Co., (1992) 3 SCC 551; Sulamerica CIA Nacional De Seguros SA and others v. Enesa Engenharia SA and others [2012] EWHC 42 (Comm).
[130] REDFERN *supra* note 66, p. 219.

[¶ 86.] In the absence of an express choice of substantive law by the parties, parties' intent of the law of the contract and the law governing the arbitration can be treated to be the same.[131] Parties to a contract should be bound by the jurisdiction clause to which they have agreed.[132] Alternatively, tribunals may also apply the law 'most closely connected' to the contract.[133] Relevant factors for the same become the place where the contract was concluded,[134] object of the contract[135] and reference to the courts having jurisdiction.[136]

[¶ 87.] In the present case, the contract was concluded in India when the acceptance of the draft DSA was sent by the Claimant, who has its place of business in Bhopal.[137] The object of the contract was to supply the data to the Claimant for commercial expeditions being undertaken from India to Antarctica.[138] Further, the DSA stipulated the governing law of the arbitration agreement to be Indian law.[139] Therefore, it is submitted that the DSA is governed by Indian law.

[¶ 88.] Hence, the CISG is inapplicable to the present case.

2. DATA SUPPLIED IS NOT A 'GOOD' UNDER THE CISG

[¶ 89.] 'Goods' under the CISG should be tangible and moveable at the time of delivery.[140] The data supplied is not a 'good' under the CISG because *firstly*, the criterion of tangibility and movability of goods is not fulfilled [**A**]; *secondly*, uniform application of the CISG is threatened [**B**]; *thirdly*, data supplied is a form of know-how.

A. THE CRITERION OF TANGIBILITY AND MOVABILITY OF GOODS IS NOT FULFILLED

[¶ 90.] The CISG requires that the object of the sale at the moment of delivery be moveable.[141] 'Goods' governed by the CISG must be moveable and tangible things. Additionally, courts have

[131] Dicey & Morris: The Conflict of Laws, 11th Ed., Vol II, p. 1164; Vita Food Products Inc v. Unus Shipping Co Ltd (1939) AC 277.
[132] British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries, (1990) 3 SCC 481.
[133] STEFAN KRÖLL, COMMENTARY ON CISG 38 (Hart Publishing 2018); 1 DICEY AND MORRIS, THE CONFLICT OF LAWS 539 (Sweet & Maxwell 1987); Sulamerica CIA Nacional De Seguros SA and others v. Enesa Engenharia SA and others [2012] EWHC 42 (Comm).
[134] AVTAR SINGH, LAW OF CONTRACT & SPECIFIC RELIEF, 32 (Eastern Book Company 2019); Adams v. Lindsell [1818] 1 B&A 681; Household Fire & Accident Insurance Co v. Grant [1879] LR 4 Ex D (CA) 216.
[135] P. C. MARKANDA, LAW RELATING TO ARBITRATION & CONCILIATION 496 (Lexis Nexis Universal 2006); Jaffar Meher Ali v. Budge Budge Jute Mills Co., (1906) 33 Cal 702; Gas Authority of India Ltd. v. SPIE CAPAG S.A., AIR 1994 Del. 75.
[136] Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd., [1970] AC 583.
[137] Case Record, Notice of Arbitration, p. 6, ¶ 1.
[138] Case Record, Notice of Arbitration, p. 6, ¶ 2.
[139] Case Record, Exhibit C-5, p. 18.
[140] FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATION 123 (Martinus Nijhoff Publishers 2012).
[141] CLOUT Case No. 608.

ruled custom-made software is not tangible and not goods within the meaning of the CISG.[142]

[¶ 91.] In the present case, the object of the contract was data points compiled and generated, along with a Report to assess the ideal time of the expedition.[143] This does not form a tangible corporeal object, and cannot be transferred like any other good. Additionally, to preserve the intellectual work put in by the Respondent, there was a confidentiality clause which make the data immovable after downloading it from the SharePoint link.[144]

B. UNIFORM APPLICATION OF THE CISG IS THREATENED IF SUCH CRITERIA ARE NOT ADHERED TO

[¶ 92.] Article 7(1) of the CISG promotes uniform application of the CISG across all ratifying countries.[145] While the CISG provides for unrestricted terms such as 'reasonable' and 'practicable' to allow for flexibility of the convention, they should be interpreted narrowly using Article 7(2).[146]

[¶ 93.] When a definition has evolved multiple with caselaws, viewing tangibility and movability to be factors determining a 'good' and otherwise,[147] ignoring such factors under the garb of progressive interpretation of the CISG proves to be detrimental to its core purpose of uniformity.[148]

[¶ 94.] Therefore, uniform application of the CISG is threatened if such criteria are not adhered to.

C. DATA SUPPLIED IS A FORM OF 'KNOW-HOW'

[¶ 95.] The sale of know-how does not have a link with the concept of 'goods' and does not fall within the CISG.[149] The decisive factor is whether the object of the contract is intellectual work, and not the form in which it is presented.[150] Additionally, only moveable and tangible things form the object of a sales contract.[151] Moreover, a 'wide' interpretation of goods should

[142] CLOUT Case No. 122.
[143] Case Record, Exhibit C-1, p. 10.
[144] Case Record, P.O. 2 Q.8.
[145] CISG, art. 7(1).
[146] Olaf Meyer & André Janssen, '*Constructive Interpretation: Applying the CISG in the 21st Century*', CISG METHODOLOGY 345 (Sellier European Law Publishers 2009).
[147] Sarah Green, *Sales Law and Digitised Material*, RESEARCH HANDBOOK ON INT'L AND COMPARATIVE SALE OF GOODS LAW 164 (Edward Elgar Publishing 2019).
[148] Meyer *supra* note 146 at p. 319, 321.
[149] SCHWENZER *supra* note 120 at p. 221.
[150] *Id.*
[151] CLOUT Case No. 122.

not include intangible and immoveable goods under CISG.[152]

[¶ 96.] In the present case, the Claimant had approached the Respondent for compilation, analysis and generation of data for undertaking the commercial expedition to Antarctica.[153] The Respondent provided the Claimant with know-how through analysis, to assess the ideal date of the launch.[154] Such know-how is not a good, as the object of the DSA was the intellectual work provided by the Respondent. Hence, data supplied is not a 'good' under the CISG.

3. THE ESSENTIAL CRITERIA FOR A 'CONTRACT OF SALE' IS NOT FULFILLED IN THE PRESENT CASE

[¶ 97.] The CISG does not define the term "contract of sale". An autonomous definition lays down that contracts of sale are formed through fulfilment of the general obligations as under Art. 30 and Art. 53.[155] A seller's obligation under the CISG is to deliver the goods and transfer property in the goods as per the contract.[156] Similarly, the buyer is obliged to pay the price and take delivery of the goods.[157] Seller's obligations are fulfilled when the property in the goods is transferred to the buyer.[158]

[¶ 98.] In cases of software, the CISG can only apply if the intention of the parties is to transfer ownership in the software to the buyer and not merely grant a license on terms to use the software for a certain period of time.[159] The decisive criteria to discern if a contract qualifies as a sales contract is the level of discretion the user has in using the software.[160]

[¶ 99.] In the present case, any data exchanged between the parties was to remain confidential and could not be disclosed to any third parties.[161] Additionally, if the data were to be moved or copied, it would self-destruct and the only way to allow for the unrestricted use of it is with a decryption key available with the Respondent.[162]

[¶ 100.] Consequently, control over the data still vested with the Respondent, with the Claimant only being given the access to use the data.[163] The parties did not intend to treat the supply of

[152] CLOUT Case No. 281; FERRARI *supra* note 140.
[153] Case Record, Exhibit C-1, p. 10.
[154] Case Record, Notice of Arbitration, p. 7, ¶ 7.
[155] SCHWENZER, *supra* note 120 at p. 219.
[156] CISG, art. 30.
[157] CISG, art. 53.
[158] KRÖLL *supra* note 133 at p. 460; CISG, art. 30.
[159] PETER HUBER & ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 43 (European Law Publishers 2007).
[160] SCHWENZER *supra* note 120 at p. 221.
[161] Case Record, P.O. 2, Q.21.
[162] Case Record, P.O. 2, Q.8.
[163] Case Record, P.O. 2, Q.7.

data as a sales agreement which transfers the property to a buyer by limiting the amount of discretion the Claimant has. Since the obligations of the buyer and seller as under Art. 30 and 53 are not fulfilled, the DSA does not qualify as a sales contract. Hence, the essential criteria for a 'contract of sale' is not fulfilled in the present case.

4. IN ARGUENDO, ART. 3 EXCLUDES THE CISG FROM BEING APPLICABLE TO THE DSA

[¶ 101.] The Respondent submits that even if data were considered to be a good, Art. 3 excludes the CISG from being applicable to the DSA because *firstly*, the preponderant part of the obligations of the party furnishing the goods constitute services [**A.**]; *secondly*, the CISG does not apply by virtue of Art. 3(1) [**B.**].

A. THE PREPONDERANT PART OF THE OBLIGATIONS OF THE PARTY FURNISHING THE GOODS CONSTITUTE SERVICES

[¶ 102.] The CISG is not applicable to contracts in which the preponderant part of the obligations of the party furnishing the goods consists in the supply of services.[164] While the economic value test is normally used to determine the preponderant part it cannot be applied in cases where the different parts of the contracts are not quantified or valued according to their nature.[165] Courts have considered the weight the parties themselves have placed upon the various obligations as a primary determinative factor. [166]

[¶ 103.] In the present case, there existed obligations of collecting, analysing and generating data and generating the report containing the ideal time of the expedition.[167] The parties undertook the transaction with the purpose to ultimately provide the Claimant with a report, giving them an ideal time of the launch. The Claimant has placed most weight on this obligation as they asked the Respondent to undertake this due to their expertise, despite having the facilities to do so.[168] Additionally, there existed ancillary obligations of providing data security through firewalls[169] and providing external storage for the first 7 days on a SharePoint link.[170]

[¶ 104.] Therefore, services were the preponderant part of the obligations of the Respondent.

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[164] CISG, art. 3(2); Data Processing Services, Inc. v. Smith Oil Corp., 492 N.E.2d 314 (1986).
[165] CISG-AC Opinion No. 4: Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts, ¶ 3.4 (Oct. 24, 2004), http://www.cisgac.com/cisgac-opinion-no4/
[166] Hof van Beroep Gent [Court of Appeal] Case No. 1998/AR/2613 (24 November, 2004) (Belgium); Oberlandesgericht [Court of Appeal] Case No. 3 U 336/07 (11 June, 2007) (Germany); Landgericht Mainz [District Court Mainz] Case No. 12 HKO 70/97 (Germany) (26 November, 1998).
[167] Case Record, Exhibit C-1, p. 10; Case Record, P.O. 2, Q24.
[168] Case Record, Exhibit C-1, p. 10.
[169] Case Record, Exhibit R-2, p. 28.
[170] Case Record, P.O. 2, Q7.

B. IN ARGUENDO, THE CISG DOES NOT APPLY BY VIRTUE OF ARTICLE 3(1)

[¶ 105.] If the buyer provides substantial part of the materials necessary for the manufacture or production of goods, they are not contracts of sale under the CISG.[171] A level of flexibility is to be maintained in determining what is substantial in light of the circumstances of the case.[172] The threshold to meet is lower than 50%[173] and can be as much as 15%.[174] Additionally, a precedent suggests that diagrams and standards provided by the buyer, especially undertaken to be kept confidential, form a substantial part of the materials necessary for the production of goods.[175]

[¶ 106.] In the present case, the Claimant had provided the data types required to the Respondent to analyse the time and other conditions for the commercial expedition.[176] Further, any oral or written communication exchanged between the parties was confidential and was not to be disclosed to any third party.[177] Therefore, a substantial part of the materials necessary was supplied by the Claimant. Hence, the DSA could not be considered a contract of sale.

ISSUE IV. THE GOODS ARE NEITHER DEFECTIVE NOR NON-CONFORMING UNDER THE CISG

[¶ 107.] The RESPONDENT submits that the data supplied is neither defective nor non-conforming under the CISG because *firstly*, the data is conforming under Art. 35 (1) **[1.]**; *secondly*, in arguendo, the data is conforming under Art. 35(2) **[2.]**; *lastly,* the RESPONDENT is not liable for the alleged non-conformity **[3.]**.

1. THE DATA IS CONFORMING UNDER ART. 35 (1)

[¶ 108.] It is submitted that the data is conforming under Art. 35 (1) because *firstly*, the party obligations are limited to the DSA **[A.]**; *secondly*, party obligations are to be read with Freedom of Contract instead of Good Faith **[B.]**; *thirdly*, the data conforms to the contractual quality requirements under Art. 35(1) **[C.]**; *lastly*, Art. 35(1) excludes the operation of Art. 35(2) **[D.]**.

[171] CISG, art 3(1).
[172] KRÖLL, *supra* note 133 at p. 57.
[173] Franco Ferrari, *Specific topics of the CISG in the light of judicial application and scholarly writing*, 15 J.L. & COM., 1 (1995).
[174] JOHN O. HONNOLD. UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 53 (2d ed., Deventer 1991).
[175] CLOUT Case No. 157.
[176] Case Record, Exhibit C-1, p. 14.
[177] Case Record, P.O. 2, Q21.

A. PARTY OBLIGATIONS ARE LIMITED TO THE DSA

[¶ 109.] The intent of a parties is construed in a narrow sense. Article 8 primarily looks to overcome the differences between intent and communication.[178] To ascertain the intent of parties, the boundary of 'sufficient agreement' is upheld.[179] Additionally, under Article 8, the subsequent conduct of parties from signing of the contract is also a consideration in understanding the intent of the parties.[180]

[¶ 110.] In the present case, as per the email dated 7th April 2022 the Claimant had asked a fee quote specifically for the Data.[181] In the reply, the Respondent too provided the fee for the Data specified by the Claimant.[182] Additionally, the exclusion of the 24/7 DIA[183] and the Clause 18 of the DSA also indicate that parties intended to limit the Respondent's obligation to ensuring accuracy of data till the Delivery date.[184] Moreover, subsequent from signing the DSA, the Respondent has categorically specified that as per the DSA they "only had to supply the data".[185]

[¶ 111.] Therefore, the party obligations are limited to the DSA.

B. PARTY OBLIGATIONS ARE TO BE READ WITH FREEDOM OF CONTRACT INSTEAD OF GOOD FAITH

[¶ 112.] *Observance of good faith in international trade* deals with the interpretation of the CISG, and not individual contracts between parties.[186] Additionally, general principles cannot be used before Art. 8 to interpret the intention of parties[187] as party autonomy takes precedence over default systems such as good faith.[188]

[¶ 113.] In the present case, parties expressly agreed to the fee quote for the data,[189] indicating that there was no intention to extend the obligation to providing data which would remain accurate throughout. There is no duty of *good faith* on the Respondent to look out for the

[178] SCHWENZER *supra* note 120 at p. 358.
[179] SCHWENZER *supra* note 120 at p. 356.
[180] SCHWENZER *supra* note 120 at p. 369; Handelsgericht des Kantons Aargau (Commercial Court Canton Aargau) HOR.2005.82/ds (5 February 2008) (Switzerland); Schwenzer *supra* note _ at p. 358.
[181] Case Record, Exhibit C-1, p. 10.
[182] Case Record, Exhibit C-2, p. 15.
[183] Case Record, Exhibit C-4, p. 17.
[184] Case Record, Exhibit C-5, p. 18.
[185] Case Record, Exhibit C-7, p. 20.
[186] SCHWENZER *supra* note 120 at p. 330; CLOUT Case No. 941.
[187] CLOUT Case No. 337; CLOUT Case No. 445.
[188] SCHWENZER *supra* note 120 at p. 330; Hof van Beroep Antwerpen, (Belgium), Gunther Lothringer GmbH v. Fepco International NV, 24 April 2006.
[189] Case Record, Exhibit C-1, p. 10; Case Record, Exhibit C-2, p. 15.

Claimant. Additionally, the exclusion of the 24/7 DIA[190] and the Clause 18 of the DSA[191] reduces the obligation of the Claimant to providing a report for the ideal time and supplying data.[192]

[¶ 114.] Therefore, party obligations are defined by *freedom of contract* instead of *good faith.*

C. THE DATA CONFORMS TO THE CONTRACTUAL QUALITY REQUIREMENTS UNDER ART. 35(1)

[¶ 115.] The primary test under Art. 35(1) relates to conforming to the characteristics of the goods laid down by the contract by means of qualitative descriptions.[193] The existence of discrepancies that are usual in the particular trade concerned, is not to be regarded as constituting a lack of conformity.[194] Additionally, the qualitative requirements of the goods encompass the legal circumstances such as the law regulations of the good.[195]

[¶ 116.] In the present case, as per the Clause 18.1.2 of the DSA, the data had to be accurate as on delivery date.[196] Primarily the BS report cannot be relied upon to call the data inaccurate, as its examination did not follow the contractual requirement of "as on delivery date". The prompt entered into BS was to check accuracy in general.[197]

[¶ 117.] Additionally, the Report by Prof. Attenborough upheld that the data was sufficiently accurate for the expedition and minor discrepancies in data are a part of every dataset.[198] These inaccuracies are permitted in data analytics generally.[199] Furthermore, the data was also said to be conforming with the legal requirements of the ESG compliances by providing a scientifically meaningful expedition to Antarctica.[200]

[¶ 118.] Therefore, the Data confirms to the contractual quality requirements under Art. 35(1)

D. ART. 35(1) EXCLUDES THE OPERATION OF ART. 35(2)

[¶ 119.] The subsidiary definitions of conformity in Art. 35(2) CISG only apply where a contract contains insufficiently detailed requirements to be satisfied by the goods for the

[190] Case Record, Exhibit C-4, p. 17.
[191] Case Record, Exhibit C-5, p. 18.
[192] Case Record, Exhibit C-1, p. 10.
[193] SCHWENZER *supra* note 120 at p. 880.
[194] SCHWENZER *supra* note 120 at p. 881; KROLL *supra* note 133 at p. 491.
[195] KROLL *supra* note 133 at p. 493.
[196] Case Record, Exhibit C-5, p. 18.
[197] Case Record, P.O. 2, Q.5.
[198] Case Record, Exhibit R-1, p. 27.
[199] Hariri, Fredericks, & Bowers, *Uncertainity in big data analytics: survey, opportunities and challenges*, in JOURNAL OF BIG DATA 44 (Springer Open 2019); Tsai, Lai, Chao & Vasilakos, *Big data analytics: a survey* JOURNAL OF BIG DATA 21(Springer Open 2015).
[200] Case Record, Exhibit R-1, p. 27.

purposes of Art. 35(1) CISG.[201]

[¶ 120.] In the present case, the DSA provides a sufficient description of the goods required; i.e. it needs to be accurate as on the delivery date.[202] If the DSA explicitly provides a contractual description on the required quality in contention sufficiently, there is no scope for an "objective" or "reasonable" application of obligation under Article 35(2). Thus, conformity in the DSA would only deal with accuracy as on delivery date as specified, and not any other objective criteria.

[¶ 121.] Therefore, Art. 35(1) excludes the operation of Art. 35(2) for the DSA.

2. IN ARGUENDO, THE DATA IS CONFORMING UNDER ART. 35(2)(B)

[¶ 122.] It is submitted that the data supplied is conforming under the Art. 35(2)(b) because *firstly*, data is fit for the express purpose mentioned in the DSA **[A.]**; *secondly*, the reliance placed on the Respondent is unreasonable **[B.];** *thirdly,* Art. 35(3) exempts the Respondent from liability under Art. 35(2) **[C.]**.

A. DATA IS FIT FOR THE EXPRESS PURPOSE MENTIONED IN THE DSA

[¶ 123.] The seller must provide goods which are fit for the express purpose made known to him by the buyer at time of concluding the contract.[203]

[¶ 124.] The Claimant asked for the data to assess the ideal time and launch conditions for the Antarctic Expedition.[204] Primarily, this was done by the Respondent themselves,[205] the conclusion of which matched with the same assessment done by the Claimant using YOLO.[206] The Report provided by Prof. Avid Attenborough, who was an expert under the CAGEP,[207] upheld that the data was sufficiently accurate for the purpose provided.[208] He assented to the date for expedition analyzed by the Respondent to be safe. Additionally, he found the data to be reliable and held that it could be used for planning and executing a successful expedition, fulfilling the purpose of the contract.[209]

[¶ 125.] It is thus submitted that the Data is fit for the express purpose mentioned in the

[201] SCHWENZER, *supra* note 120 at p. 599; Supreme Court, Case No. 32 Odo 725/2004 (March 29, 2006) (Czech Republic).
[202] Case record, Exhibit C-5, p. 18.
[203] CISG art. 35(2)(b).
[204] Case Record, Exhibit C-1, p. 10.
[205] Case Record, Exhibit R-2, p. 28.
[206] Case Record, P.O. 2, Q.54.
[207] Case Record, P.O. 2, Q.51.
[208] Case Record, Exhibit R-1, p. 27.
[209] Case Record, Exhibit R-1, p. 27.

contract.

B. RELIANCE PLACED ON THE RESPONDENT, IF ANY, IS UNREASONABLE

[¶ 126.] The buyer can only place reliance on the Seller to provide goods fit for a particular purpose if purpose is made known to the seller at the time of concluding the contract.[210] There may not be any reliance placed if the buyer takes part in selection of goods, influences the manufacturing process or provides specifications.[211] Additionally, caselaw shows that if the buyer has a specialized department in relation to the good ordered, it has to be guided by its own criteria, and reliance placed would be unreasonable.[212]

[¶ 127.] In the present case, as per the email dated 7th April 2022 the Claimant had mentioned that they would be using the data supplied for launching their expedition to Antarctica.[213] The Claimant did not place any reliance on the Respondent to provide fit goods for the purpose of the DSA, as they had taken part in the negotiations and selection of the characteristics of the data.[214] The specifications decided influenced the manufacturing process of excluding the 24/7 DIA.[215]

[¶ 128.] Additionally, as the Claimant had an IT Team which was led by their Chief Engineer,[216] their decisions should have been guided by their own criteria. Moreover, Dr. Chandrayan, the Director of the Claimant company was a renowned explorer.[217] The Claimant and its IT Team should be assumed to be skilled enough to decide if it requires DIA or not, especially when it is running extreme tourism expeditions to Antarctica.

[¶ 129.] Therefore, the reliance placed on the Respondent, if any, is unreasonable.

A. Art. 35(3) exempts the Respondent from liability under Art. 35(2)

[¶ 130.] The Seller is not liable under Art 35(2) if the buyer 'could not have been unaware' of the defect which forms the basis of the claim at the conclusion of the contract.[218] The lack of conformity which should have been apparent to the buyer is to be determined by the buyer's position.[219]

[210] CISG art. 35(2)(b).
[211] SCHWENZER *supra* note 120 at p. 886.
[212] CLOUT Case No. 555.
[213] Case Record, Exhibit C-1, p. 10.
[214] Case Record, Exhibit C-4, p. 17; Case Record, Exhibit C-6, p. 19.
[215] Case Record, Exhibit C-7, p. 20.
[216] Case Record, Exhibit C-6, p. 19.
[217] Case Record, Notice of Arbitration, ¶ 2.
[218] SCHWENZER *supra* note 120 at p. 888; CISG art. 35(3).
[219] SCHWENZER *supra* note 120 at p. 889; CLOUT Case No. 219.

[¶ 131.] In the present case, the Clause 18 of the DSA explicitly limits the obligation for providing data accuracy till the Delivery Date.[220] Additionally, the Claimant opted out of the 24/7 DIA,[221] which fixes problems in data whenever they arise.[222] The Claimant company would be utilizing data for extreme tourism, has the software to analyze the data,[223] has a specialized IT team.[224] As the Claimant expressly has the facilities to be able to utilize such data, they then could not have been unaware of the importance of Integrity Assurance or acceptable margin of errors.

[¶ 132.] Therefore, Art. 35(3) exempts the Respondent from liability under Art. 35(2).

3. THE RESPONDENT IS NOT LIABLE FOR THE ALLEGED NON-CONFORMITY

[¶ 133.] It is submitted that the Respondent is not liable for the alleged non-conformity because *firstly*, the alleged defect happened after risk was passed and accepted **[A.]**; *secondly*, alleged defect happened outside the period of guarantee provided **[B.];** *thirdly,* the Claimant has not examined goods within as short a period as practicable **[C.],** and *lastly,* the CLAIMANT failed to provide a notice of non-conformity **[D.]**.

A. ALLEGED DEFECT HAPPENED AFTER RISK WAS PASSED AND ACCEPTED

[¶ 134.] For a buyer to claim that the good is non-conforming, the burden on proof rests on the buyer to prove that the good has been defective at the time of passing of risk.[225] Additionally, the seller is not liable if the goods deteriorated due to external influences, if it confirmed with the contract initially.[226]

[¶ 135.] In the present case, the Claimant failed to prove the inaccuracy of the data as it had been delivered, as the prompt checked the accuracy of data generally without specifying its Date of Delivery and accuracy requirement as on that date.[227] Additionally, the Claimant had accepted the data and the risk passed with it upon duly accepting and using it on 4th of January 2023 to announce the launch of PO on 6th January.[228] Furthermore, the Respondent is then not liable if the accuracy of data is affected due to external influences and fluctuations.

[220] Case Record, Exhibit C-5, p. 18.
[221] Case Record, Exhibit C-6, p. 19.
[222] Case Record, P.O.2, Q.13.
[223] Case Record, P.O.2, Q.54.
[224] Case Record, Exhibit C-6, p. 19.
[225]; OLG Saarbrücken, Case No. 4 Sch 3/10 (30 May 2011) (Germany); CLOUT Case No. 885.
[226] Kunsthaus Mathias Lempertz OHG v. Wilhelmina van der Geld, Arnhem District Court (17 July 1997) (Netherlands).
[227] Case Record, P.O.2, Q.5.
[228] Case Record, P.O.2, Q.9.

[¶ 136.] Therefore, the alleged defect happened after risk was passed.

B. ALLEGED DEFECT HAPPENED OUTSIDE PERIOD OF GUARANTEE PROVIDED

[¶ 137.] Sellers may limit his liability by way of express guarantee.[229] These guarantees should provide precise information regarding the characteristics and qualities for which the seller intends to accept liability.[230] Additionally, no implied guarantee can exist if the seller has validly disclaimed liability for lack of conformity under Article 35.[231] Seller's often use this to exclude wear and tear from the guarantee.[232]

[¶ 138.] In the present case the guarantee provided by the Respondent is precise with regards to its date of accuracy. In essence, the Respondent has limited their liability to providing accurate data on the date of delivery. There is thus no implied guarantee about the fluctuations of the data post the delivery, as under Article 35 the parties agreed for accurate data as on delivery and an ideal time for expedition based on this report. [233]

C. THE CLAIMANT HAS NOT EXAMINED GOODS WITHIN AS SHORT A TIME AS PRACTICABLE

[¶ 139.] For the buyer to rely on the lack of conformity of a good, they are required to examine the goods upon a time as short as practicable.[234] The Buyer loses its rights to object to a lack of conformity of good if they indicate acceptance of goods without complaining of defects it had discovered.[235] Additionally, if there is no involvement of carriage of goods of its redirection in transit, then the time for examination of goods runs when the good was sold.[236] Moreover, the time period of 'as short as practicable' is to be interpreted in a strict sense.[237] Furthermore examination must be done as a rule upon delivery or shortly thereafter, and only may exceptionally be done later.[238]

[¶ 140.] The Claimant received the data on 27th of December 2022[239] and did not send it for examination until 22nd of January 2023.[240] There is no reasonable ground for a delay of around

[229] JOACHIM AUE, MÄNGELGEWÄHRLEISTUNG IM UN-KAUFRECHT, p. 142 (P Lang 1989).
[230] SCHWENZER *supra* note 120 at p. 917.
[231] SCHWENZER *supra* note 120 at p. 918.
[232] FRITZ ENDERLEIN, DIETRICH MASKOW, INTERNATIONAL SALES LAW UN-CISG: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS, (Oceana Publications 1992).
[233] Case Record, Exhibit C-5, p. 18.
[234] CISG art. 38(1).
[235] CLOUT Case No 343; CLOUT Case No. 337.
[236] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 38, ¶12, 174.
[237] CLOUT Case No 634.
[238] CLOUT Case No 378.
[239] Case Record, Notice of Arbitration, p. 6, ¶ 22.
[240] Case Record, P.O.2, Q.44.

a month for mere sending of the good for examination. As there was no change in Claimant's ability to provide data for examination, there are no exceptional circumstances to delay examination. Additionally, the Claimant had used the data on 4th January to analyse the ideal date for launch before examining it, indicating clear acceptance.[241]

[¶ 141.] Therefore, the Claimant has not examined the goods 'within as short a period as practicable'.

D. THE CLAIMANT FAILED TO PROVIDE A NOTICE OF NON-CONFORMITY

[¶ 142.] The buyer loses the right to rely on the lack of conformity of the good if it does not provide a notice specifying the non-conformity in a reasonable time.[242] This notice must indicate the intention of the party to object,[243] and be precise with the lack of conformity.[244] Additionally, the notice must be given in a time which is reasonable, from the time when the buyer discovered or ought to have discovered the defect.[245] A delay of 7-8 months has been held to be unreasonable by courts.[246]

[¶ 143.] In the present case, since discovering the defect on 31st January 2023[247] there has been no communication, much less a notice delivered to them before filing a notice for arbitration against them in October 2023.[248] The notice for arbitration in itself is not precise with the lack of conformity, as it is convoluted between unreadable data or inaccurate data being the defect.[249]

[¶ 144.] Even if the Claimant were to say that the Notice for Arbitration qualifies as the notice under Article 39, it still has not been provided under a reasonable time. Finally, the notice of arbitration has been provided after a period of 7-8 months since the Claimant discovered the defect. The entire claim is an afterthought and a belated-claim.

[¶ 145.] Therefore, the Claimant failed to provide a notice of non-conformity in a reasonable time.

[241] Case Record, P.O.2, Q.9.
[242] CISG art. 39; CLOUT Case No. 219.
[243] CLOUT Case No. 721; CLOUT Case No. 1399.
[244] Oberlandesgericht Linz, Case No. (1 R 68/05h) (1 June 2005) (Austria); Landgericht Saarbrücken, Case No. 8 O 49/02 (July 2, 2002) (Germany).
[245] CLOUT Case No. 634; CLOUT Case No. 378; CLOUT Case No. 81; CLOUT Case No 482.
[246] CLOUT Case No. 256.
[247] Case Record, Exhibit C-8, p. 21.
[248] Case Record, Notice of Arbitration, p. 5.
[249] Case Record, Notice of Arbitration, p.7, ¶ 8.

PRAYER

In light of the facts stated, issues raised, authorities cited, and arguments advanced, the Counsel for the RESPONDENT respectfully requests the tribunal to **ADJUDGE** and **DECLARE** that,

1. The tribunal does not have jurisdiction to proceed without the 7.5% pre-arbitral deposit.
2. The BranStark report does not qualify as an expert report.
3. The Data Supply Agreement is not governed by the CISG.
4. The data supplied by the RESPONDENT is neither defective nor non-conforming under the CISG.

Furthermore, the tribunal should order:

5. That security for costs are to be paid by the CLAIMANT.
6. Any further or other relief as the Tribunal considers appropriate or necessary.

All of which is humbly prayed.

Date: 2nd March, 2024 Sd/-

Place: Bhopal Counsel for RESPONDENT