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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* CLAIMANT

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ABBREVIATION	EXPANSION
%	Percentage
&	And
§	Section
¶	Paragraph
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
Tribunal	The Arbitral Tribunal consisting of Ms. Hela Odinsdottir as the sole arbitrator
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

INDEX OF AUTHORITIES

INTERNATIONAL CONVENTIONS AND RULES	P. NO
CIArb Arbitration Rules, art. 17.1	10
CIArb Arbitration Rules, art. 17.1, 17.3	13
CIArb Arbitration Rules, art. 27.2	9
CiArb Guidelines on Application for Security for Costs, 2016, art. 3	6
CISG, art. 1(1)(a)	16
CISG, art. 11	22
CISG, art. 3(1)	20
CISG, art. 3(2)	20
CISG, art. 35	18
CISG, art. 35(1)	22
CISG, art. 35(2)(a)	19
CISG, art. 35(2)(b)	19, 25
CISG, art. 35(3)	26
CISG, art. 38(1)	28
CISG, art. 39	29
CISG, art. 7(1)	17, 25, 27
CISG, art. 8(1)	22

Règles sur la détermination de la loi qui doit régir les obligations contractuelles à titre de droit supplétif, art. 2, 1908	16
Regulation (EC) No 593/2008 of the European Parliament and of the Council art. 4, 2008	16
Rome Convention on the Law Applicable to Contractual Relations, §2D, 1980	16
SIAC Rules, Rule 19.1	12
SIAC Rules, Rule 25.1	9, 10
SIAC Rules, Rule 25.2	11
SIAC Rules, Rule 41.2	11, 12
The United Nations Convention on the Use of Electronic Communications in International Contracts, art. 9	22
UNCITRAL Arbitration Rules, 2021, art.27.2	10
UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 38, ¶ 13, 178	28
UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 38, ¶ 14, 178	28
UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 39, ¶ 5	29
UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 8 ch 1, pt. 5 54 (2016); Hof Van Beroep [Appellate Court] Case No. 2002/AR/2087 (April 24, 2006) (Belgium)	22
UNCITRAL Model Law, art. 18	10
UNCITRAL Model Law, art. 24.1	13
UNCITRAL Model Law, art. 26.2	9

STATUTES	P. NO
The Arbitration and Conciliation Act, 1996, § 19, No. 26, Acts of Parliament, 1996 (India)	12, 13
The Indian Contract Act, 1872, § 23, No. 9, Acts of Parliament, 1872 (India)	1
The Indian Evidence Act, 1872, § 118, No. 1, Acts of Parliament, 1872 (India)	9
The Indian Evidence Act, 1872, § 17, 18, No. 1, Acts of Parliament, 1872 (India)	14
The Indian Evidence Act, 1872, § 21, No. 1, Acts of Parliament, 1872 (India)	14
The Indian Evidence Act, 1872, § 45, No. 1, Acts of Parliament, 1872 (India)	9
The Indian Evidence Act, 1872, § 58, No. 1, Acts of Parliament, 1872 (India)	14
US CONST., art. VI, cl. 2	17

CASES	P. NO
Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826 (S.D.N.Y. 1996)	1
Bosinger v. Belden CDT, Inc., 358 F. App'x 812 (9th Cir. 2009)	2
British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew	16

CLOUT CASES	**P. NO**
CLOUT Case No. 1813	23
CLOUT Case No. 1884	20
CLOUT Case No. 192	28
CLOUT Case No. 2	20
CLOUT Case No. 237	23
CLOUT Case No. 2461	27
CLOUT Case No. 284	28
CLOUT Case No. 285	27
CLOUT Case No. 316	16
CLOUT Case No. 331	20
CLOUT Case No. 344	29

ONLINE SOURCES	P. NO
Ajar Rab, *Cross-examination in Commercial Arbitration in India: Creating 'Courtrooms of Choice'*, CENTRE FOR BUSINESS & COMMERCIAL LAW, NLIU BHOPAL (JAN. 15, 2020)	13
Camilo A. Rodriguez-Yong, *The Doctrines of Unconscionability and Abusive Clauses: A Common Point Between Civil and Common Law Legal Traditions,* Oxford University Comparative Law Forum	1
UNCITRAL, *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*	17

OTHER AUTHORITIES	P. NO
Ad Hoc Committee on Artificial Intelligence, Feasibility Study, p. 4	8
CISG-AC Opinion No. 4: Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts, ¶ 3.1 (Oct. 24, 2004)	20
ICCA-QUEEN MARY TASK FORCE, THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018)	5
Issues for Arbitrators to Consider Regarding Experts, 2 ICC Dispute	9

Resolution Bulletin, 63 (2021)	
UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 8 ch 1, pt. 5 54 (2016)	22

STATEMENT OF FACTS

THE PARTIES

Penguin Antarctic Adventures Pvt. Ltd. (*hereinafter* CLAIMANT) is a startup based in Bhopal, India, which plans to undertake commercial expeditions to Antarctica. Zeus LLC (*hereinafter* RESPONDENT), is a company based out of Delaware, USA and is in the business of supplying exclusive data about climate conditions, which help assess the optimum time for extreme tourism. Both the CLAIMANT and RESPONDENT are parties to the Data Supply Agreement (DSA).

BACKGROUND

The CLAIMANT firm led by its director, Dr. Chandrayan, initially faced complications in procuring investments and funding. Investors lacked confidence in the CLAIMANT's ability to successfully complete an Antarctic expedition due to the CLAIMANT being a startup, and the risk involved in such expeditions. However, this changed when the RESPONDENT agreed to provide data and support for the CLAIMANT's project. Owing to the RESPONDENT's renown, both Indian and foreign investors were willing to fund the project.

The CLAIMANT reached out to the RESPONDENT, communicating her requirements pertaining to the data. She informed the RESPONDENT about the representations and warranties made to one of the investors on being ESG compliant. The CLAIMANT categorically mentioned that they could not afford to go wrong with this expedition, as investors were also hesitant due to their lack of confidence in the CLAIMANT. A successful expedition was also essential to the RESPONDENT, since they had similar expeditions lined up in 2025 and good word in the market would prove beneficial for them.

The CLAIMANT placed reliance on the RESPONDENT's expertise in the field of data supply in extreme tourism, and asked for a report to gauge the ideal time of the expedition. The RESPONDENT expressed their willingness to work with the CLAIMANT and to provide their expertise in ensuring a successful expedition.

The CLAIMANT felt that the proposed fee of USD 5 million was too high and requested for a discount. The CLAIMANT also requested that the payment be made in instalments and proposed a payment plan. This was agreed to by the RESPONDENT, who offered a discount of 30% in exchange of withdrawing its 24/7 Data Integrity Assurance, without clarifying the scope of this

service. Additionally, the RESPONDENT did not specify any margin of error in the data to be provided by them.

THE AGREEMENT

The parties duly entered into the Data Supply Agreement (DSA) with the final consideration being USD 3.5 million. The DSA contained representations that the data supplied would be accurate. The DSA also contained a clause wherein a party initiating arbitration had to deposit 7.5% of the arbitration claim as security deposit.

THE DISPUTE

The data was duly supplied by the RESPONDENT. The CLAIMANT announced the dates of the expedition based on the data received. Few days before the first stage of PO testing, the data supplied by the RESPONDENT was rendered unreadable by the CLAIMANT's systems. This jeopardised the CLAIMANT's entire operations, with mounting pressure from investors. The RESPONDENT resupplied the data after an explanation was demanded from them.

This incident left the CLAIMANT wary of placing faith on the RESPONDENT. The CLAIMANT submitted the data to a Reinforcement Learning AI system 'BranStark' to verify the accuracy and readability of the data. BranStark excels in risk analysis and prediction and is considered an emerging industry standard with a 95% accuracy rate. The CLAIMANT prompted BranStark to check the accuracy of data and calculate the chances of success, providing the relevant details.

Much to the CLAIMANT's dismay, the BranStark report flagged inaccuracies in Sea Ice Data and Wildlife Data and predicted significant challenges that could jeopardise the safety and success of the expedition. It also stated that such inaccuracies would frustrate the CLAIMANT's research objectives and would breach the representations and warranties to its investors. Owing to the defective data supplied, the RESPONDENT breached the DSA and also caused damage to the CLAIMANT.

INITIATION OF ARBITRATION PROCEEDINGS

The CLAIMANT invoked the present proceedings in accordance with the provisions of Rule 3 of the SIAC Rules, 2016. The sole arbitrator, Ms. Hela Odinsdottir was appointed by the President of the SIAC Court of Arbitration pursuant to Rule 9.3 of the SIAC Rules, 2016. 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 HAS THE JURISDICTION TO PROCEED WITHOUT THE 7.5% PRE-ARBITRAL DEPOSIT. IT SHOULD NOT ORDER SECURITY FOR COSTS PURSUANT TO ITS POWERS UNDER RULE 27(J) OF THE SIAC RULES, 2016.

The Tribunal has the jurisdiction to proceed without the 7.5% pre-arbitral deposit because *firstly*, the pre-arbitral clause is violative of public policy, due to the clause being procedurally and substantively unconscionable in nature. The clause also restricts the right of the CLAIMANT to arbitrate. *Secondly*, the clause is unreasonable in nature due to its ambiguity. Additionally, the objective of the clause, i.e. to prevent frivolous claims, can be fulfilled by imposing exemplary costs under Section 31A of the A&C Act.

Further, the tribunal should not order security for costs because *firstly*, it does not have the power to do so. *Secondly*, security for costs is only ordered when there are exceptional circumstances. There exist no exceptional circumstances for the tribunal to order security for costs. The CLAIMANT has a reasonable prospect of succeeding in its claim, and there is no basis to pre-determine that the CLAIMANT would not pay an adverse cost award. *Lastly*, the balance of convenience lies in favour of the CLAIMANT.

2. THE BRANSTARK REPORT QUALIFIES AS AN 'EXPERT REPORT'.

The BranStark report qualifies as an 'expert report' because *firstly*, AI reports have evidentiary value as expert reports. Reinforcement learning models have been proven to produce reliable results. Additionally, AI reports fulfil the obligations of an 'expert'. *Secondly*, the BranStark report is admissible before the tribunal as parties have the right to produce evidence. Excluding such an AI report would render an arbitral award unenforceable. *Thirdly*, the tribunal should forego rigid procedural guidelines to exclude the production of BranStark's oral testimony and cross-examination. This is because such testimony would be irrelevant, immaterial and unreasonably burdensome to produce. *Lastly*, the report by Prof. Attenborough does not disprove the BranStark report because it concedes the presence of inaccuracies and relying on the report would endanger the safety and success of the expedition.

3. THE DATA SUPPLY AGREEMENT IS GOVERNED BY THE CISG.

The Data Supply Agreement is governed by the CISG because *firstly*, the CISG is applicable in the present case due to the DSA being an international contract, and the CISG applies as part

of the applicable foreign law. *Secondly*, the data supplied as per the DSA is a 'good' under the CISG. Data fulfils the decisive criteria of suitability to the rules of non-conformity required to form a 'good' under the CISG. Additionally, goods should be autonomously interpreted with regard to its international character. *Thirdly*, the DSA meets the criteria of a 'contract of sale' as the property in the data is permanently transferred to the RESPONDENT as against a monetary consideration. *Lastly*, the CISG also applies to the DSA under Article 3.

4. THE DATA SUPPLIED BY THE RESPONDENT IS DEFECTIVE AND NON-CONFORMING UNDER THE CISG.

The data supplied by the RESPONDENT is defective and non-conforming under the CISG because *firstly*, the RESPONDENT failed to deliver conforming goods under Article 35(1). The data supplied had to be highly accurate and also remain accurate till the end of the expedition, which the RESPONDENT failed to ensure. *Secondly*, the RESPONDENT failed to deliver conforming goods under Article 35(2), as the goods were not fit for the express purpose of the DSA. *Thirdly*, the RESPONDENT did not fulfil their duty of care to inform the CLAIMANT about the product features. *Lastly*, the CLAIMANT had complied with the requirements of Article 38 and 39, by examining the goods within a reasonable period of time and also sending a notice of non-conformity to that effect.

ARGUMENTS ADVANCED

ISSUE I: THE TRIBUNAL HAS THE JURISDICTION TO PROCEED WITHOUT THE 7.5% PRE-ARBITRAL DEPOSIT. ADDITIONALLY, IT SHOULD NOT ORDER SECURITY FOR COSTS PURSUANT TO RULE 27(J) OF THE SIAC RULES, 2016

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

1. THE TRIBUNAL HAS THE JURISDICTION TO PROCEED WITHOUT THE 7.5% PRE-ARBITRAL DEPOSIT CLAUSE

[¶ 2.] The CLAIMANT submits that the Tribunal has the jurisdiction to proceed without the 7.5% pre-arbitral deposit clause because *firstly*, the pre-arbitral clause is violative of public policy **[A]**; *secondly*, it is unreasonable in nature **[B]**.

A. THE PRE-ARBITRAL DEPOSIT CLAUSE IS VIOLATIVE OF PUBLIC POLICY

[¶ 3.] A contract which tends to injure public interest violates public policy and is void.[1] The CLAIMANT submits that the pre-arbitral deposit clause is void because, *firstly*, the pre-arbitral deposit clause is unconscionable in nature **[i]**; *secondly,* the 7.5% pre-arbitral deposit restricts the CLAIMANT's right to arbitrate and thereby discourages arbitration **[ii]**.

i. The pre-arbitral clause is unconscionable in nature

[¶ 4.] The courts have ruled the contractual terms between the private parties as unconscionable[2] and such agreement should be set aside.[3] Such unconscionability must be determined both procedurally and substantively.[4] In the present case, the CLAIMANT submits that the pre-arbitral clause is *firstly*, procedurally unconscionable **[a]**; *secondly,* substantively unconscionable **[b]**; *lastly,* in any event, the Tribunal should consider substantive unconscionability so as to consider the pre-arbitral deposit clause unconscionable **[c]**.

[1] Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67; The Indian Contract Act, 1872, § 23, No. 9, Acts of Parliament, 1872 (India).
[2] Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826 (S.D.N.Y. 1996); Ilan v. Shearson/American Express, Inc., 632 F. Supp. 886 (S.D.N.Y. 1985).
[3] Uber v. Heller, 2020 SCC 16.
[4] Camilo A. Rodriguez-Yong, *The Doctrines of Unconscionability and Abusive Clauses: A Common Point Between Civil and Common Law Legal Traditions,* Oxford University Comparative Law Forum, https://ouclf.law.ox.ac.uk/the-doctrines-of-unconscionability-and-abusive-clauses-a-common-point-between-civil-and-common-law-legal-traditions/#fn17sym.

a. The 7.5% pre-arbitral clause is procedurally unconscionable.

[¶ 5.] Procedural unconscionability refers to the process and the form by which an agreement is reached.[5] To establish the same, there must be a standard form of contract drafted by one party.[6] Standard form of contract creates inequalities in bargaining power,[7] which results in no real negotiation and absence of meaningful choice.[8]

[¶ 6.] In the present case, the RESPONDENT drafted the DSA.[9] There was no negotiation done between the RESPONDENT and the CLAIMANT regarding the pre-arbitral deposit clause. Additionally, there exists unfair bargaining power in the transaction because *firstly*, the CLAIMANT is in a financially weaker position as compared to the RESPONDENT. Its business model is very capital-intensive[10] and had to go through various complications to secure investment and funding[11]. *Secondly*, the CLAIMANT is a startup with no prior experience in commercial expeditions to Antarctica[12]. On the other hand, the RESPONDENT enjoys a strong reputation worldwide.[13] *Lastly*, the CLAIMANT did not have any meaningful choice but to do business with the RESPONDENT because doing so attracted investments which were difficult to procure initially[14].

[¶ 7.] Therefore, the CLAIMANT submits that the pre-arbitral deposit clause is a standard form of contract, and there exists an unequal bargaining power between the parties. Hence, the pre-arbitral deposit clause is procedurally unconscionable.

b. The 7.5% pre-arbitral deposit clause is substantively unconscionable.

[¶ 8.] For a clause in a contract to be substantively unconscionable, there must be a bargain which unduly disadvantages one party.[15] In *Uber v. Heller*, the court held the arbitration clause to be improvident since it required an unjust monetary condition to initiate the arbitration[16].

[¶ 9.] In the present case, the pre-arbitral clause stipulates that any party bringing a claim before the Tribunal must deposit 7.5% of the claim amount[17]. The arbitration claim amounts to

[5] Zimmer v. Cooperneff Advisors, 523 F.3d 224 (3d Cir. 2008).
[6] Vegter v. Forecast Financial Corporation, 2007 WL 4178947.
[7] Bosinger v. Belden CDT, Inc., 358 F. App'x 812 (9th Cir. 2009).
[8] *Id.*
[9] Case Record, Exhibit C-4, p.17.
[10] Case Record, Notice of Arbitration, p.7, ¶ 5.
[11] Case Record, Notice of Arbitration, p.6, ¶ 2.
[12] *Id.*
[13] Case Record, Response to Notice of Arbitration, p. 24, ¶ 2.
[14] Case Record, Notice of Arbitration, p.6, ¶ 2.
[15] Uber v. Heller, 2020 SCC 16.
[16] *Id.*
[17] Case Record, Exhibit C-5, p.18.

USD 50 million. Consequently, the value of the pre-arbitral deposit amounts to USD 3.75 million. The CLAIMANT submits that this value is higher than the value of the DSA i.e., USD 3.5 million. In light of the CLAIMANT's financial health, such a pre-condition is unreasonable as it restricts the CLAIMANT from initiating arbitration, thereby hindering the CLAIMANT from bringing in its rightful claim to arbitration.

[¶ 10.] Therefore, the CLAIMANT submits that the 7.5% pre-arbitral clause is substantively unconscionable.

c. In any event, the Tribunal should consider substantive unconscionability so as to consider the pre-arbitral deposit clause unconscionable

[¶ 11.] As per the concept of sliding-scale, the more substantively oppressive the contractual term, the lesser evidence of procedural unconscionability is required to conclude that the term is unenforceable, and vice versa.[18]

[¶ 12.] In the present case, the CLAIMANT submits that the pre-arbitral deposit clause is both procedurally as well the substantively unconscionable. However, the quantum of substantive unconscionability outweighs procedural unconscionability since the pre-arbitral deposit clause imposes an unreasonable burden on the party bringing a claim before the Tribunal. This dissuades rightful claims from being brought before an arbitral tribunal.

[¶ 13.] Therefore, the CLAIMANT submits that in any event, the Tribunal should consider substantive unconscionability so as to consider the pre-arbitral clause unconscionable. It is urged that the substantive unconscionability outweighs procedural unconscionability in light of the sliding scale approach.

ii. The 7.5% pre-arbitral clause restricts the CLAIMANT's right to arbitrate and thereby discourages arbitration

[¶ 14.] An unfair clause restricting the right of parties to arbitrate would be against public interest, as arbitration is an important ADR mechanism which is to be encouraged.[19] The objective behind pre-arbitral deposit clauses is to prevent frivolous claims.[20] However, it has been held that deterring arbitration to prevent frivolous claims is not justified.[21] Any harm to the public resulting from an unenforceable bargain by contracting parties is incontestable.[22]

[18] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1056 (Kluwer Law International 2021).
[19] Univabs Sleepers Pvt. Ltd. v. Ministry of Railway, 2021 SCC OnLine Del 3639.
[20] S.K. Jain v. State of Haryana, (2009) 4 SCC 357.
[21] Univabs Sleepers Pvt. Ltd. v. Ministry of Railway, 2021 SCC OnLine Del 3639.
[22] In Re Estate of Charles Millar, Deceased, 1937 CanLII 10 (SCC).

Further, such frivolous claims can be dismissed by imposing exemplary costs instead.[23]

[¶ 15.] In the present case, the value of the pre-arbitral deposit is higher than the value of the DSA. Such deposit discourages the CLAIMANT from being able to bring its rightful claim before the tribunal. The CLAIMANT submits that the quantum of the claim and its entitlement is a matter of substantive adjudication by this arbitral tribunal. However, the pre-arbitral deposit clause requires the party initiating the claim to deposit 7.5% of the arbitration claim amount[24], which becomes a disincentivizing factor in availing arbitration.

[¶ 16.] Therefore, it is submitted that the 7.5% pre-arbitral deposit restricts the CLAIMANT's right to arbitrate.

B. THE PRE-ARBITRAL DEPOSIT CLAUSE IS AMBIGUOUS IN NATURE

[¶ 17.] The CLAIMANT submits that the pre-arbitral deposit clause is ambiguous in nature. Courts have considered pre-arbitral clauses to be ambiguous in nature in two scenarios: (1) when the pre-arbitral deposit clause is silent on adjustment at the end of the proceedings[25] and (2) when the pre-arbitral deposit clause applies to all types of claims, frivolous or genuine.[26]

In the present case, Clause 45 of the DSA is silent on how the pre-deposited amount would be adjusted when the eventual award is more or less than the pre-deposited amount.[27] There is no objective criteria to determine whether the claim is frivolous or genuine, especially at pre-arbitration stage.

[¶ 18.] Therefore, the CLAIMANT submits that the pre-arbitral deposit is ambiguous in nature.

2. THE TRIBUNAL SHOULD NOT ORDER SECURITY FOR COSTS PURSUANT TO ITS POWERS UNDER RULE 27(J) OF THE SIAC RULES, 2016

[¶ 19.] The CLAIMANT submits that the Tribunal should not order security for costs pursuant to its powers under Rule 27(j) of the SIAC Rules, 2016 because *firstly,* the Tribunal does not have the power to order security for costs **[A]**; *secondly*, there exist no exceptional circumstances for the Tribunal to order such security for costs **[B]**

A. THE TRIBUNAL DOES NOT HAVE THE POWER TO ORDER SECURITY FOR COSTS

[¶ 20.] The power of the tribunal to grant an interim relief is governed by the law of the arbitral

[23] Dnyandeo Sabaji Naik v. Pradnya Prakash Khadekar, (2017) 5 SCC 496; ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board, (2019) 4 SCC 401.
[24] Case Record, Exhibit C-5, p.18.
[25] Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd., 2023 SCC OnLine SC 1422.
[26] ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board, (2019) 4 SCC 401.
[27] Case Record, Exhibit C-5, p.18.

seat or *lex arbitri*.[28] Article 17 of the Model Law lists down "means of preserving asset out of which a subsequent award may be satisfied" as one of the interim reliefs given to the party by the tribunal. Such phrase is wide enough to include security for costs.[29] However, Section 17 of the A&C Act can be distinguished from Section 17 as it only lists "securing the amount in dispute" as one of the interim reliefs to the parties and does not include security for costs under its scope.[30]

[¶ 21.] In the present case, the *lex arbitri* of the present arbitration is the A&C Act. As per Clause 45 of the DSA, the seat of the arbitration is India[31]. Therefore, relevant provisions of the A&C Act related to interim relief shall be adhered to while making an order for security for costs.

[¶ 22.] Therefore, the CLAIMANT submits that the Tribunal should not order security for costs since the *lex arbitri* does not provide the Tribunal with the power to do so.

B. THERE EXIST NO EXCEPTIONAL CIRCUMSTANCES TO ORDER SECURITY FOR COSTS

[¶ 23.] Courts and tribunals have held that applications for security of costs should be entertained only in the most extreme cases, i.e., when an essential interest of either party is in jeopardy of irreparable harm.[32] Since security for costs is not a regular payment mechanism in international arbitration, it is subject to a high threshold.[33] The CIArb Guidelines on Application for Security for Costs set out best practices in international commercial arbitration in relation to applications of security for costs.

[¶ 24.] In the present case, the CLAIMANT submits that there exist no exceptional circumstances for the Tribunal to order security for costs because *firstly*, the CLAIMANT has a reasonably good prospect of succeeding in its claim **[i]**; *secondly*, the RESPONDENT was cognizant of the risk of doing business with the CLAIMANT **[ii]**; *lastly*, the balance of convenience lies in favour of the CLAIMANT **[iii]**.

i. The CLAIMANT has a reasonably good prospect of succeeding in its claim

[¶ 25.] While assessing a request for security for costs, the Tribunal must *prima facie* assess

[28] GARY B. BORN, *supra* note 18, at 245.
[29] AJAR RAB, INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE REVIEW OF THE INDIAN EXPERIENCE 274 (Kluwer Law International 2022).
[30] *Id.*
[31] Case Record, Exhibit C-5, p.18.
[32] ICSID Case No ARB/09/17; ICSID Case No. 06/8 of 2008.
[33] ICCA-QUEEN MARY TASK FORCE, THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018).

the prospect of success of the claim.[34] The Tribunal need not delve into the merits of the case as it would lead to pre-judging of the merits.[35] It should only determine whether there is a real possibility of breach, or prejudice to the legal rights of the CLAIMANT and take a 'bird's-eye view'.[36]

[¶ 26.] In the present case, the CLAIMANT entered into a contract with the RESPONDENT for the supply of data for undertaking a commercial expedition to Antarctica. The RESPONDENT violated Clause 18 of the DSA by supplying inaccurate data[37]. Moreover, such inaccuracy jeopardized the planned commercial expedition and resulted in breach of the representations and warranties to the CLAIMANT's financial investors[38].

[¶ 27.] In light of the given facts, the CLAIMANT submits that they have a reasonably good prospect of succeeding in its claim.

ii. The RESPONDENT was cognizant of the risk of doing business with the CLAIMANT

[¶ 28.] A party that has agreed to arbitrate with an impecunious party or has considered business risk at the time of entering the contract should not be able to obtain security for costs.[39] Additionally, a material change in circumstances since the conclusion of the agreement between parties is one of the essential pre-requisites for security for costs.[40]

[¶ 29.] In the present case, it is clear from the emails that the RESPONDENT was aware that the CLAIMANT was a capital-intensive business and that it had gone through various difficulties to secure finance for the expedition[41]. The RESPONDENT was also made aware of representations and warranties to the CLAIMANT's financial investments and how they were contingent on the successful execution of DSA[42]. Moreover, the RESPONDENT acknowledged that they were apprehensive about the balance payment coming on time.[43]

[¶ 30.] Furthermore, there has been no material change of circumstances since the conclusion of the DSA. The financial implications of the expedition being jeopardised are not grave enough to cause a material change of circumstances. The CLAIMANT submits that such financial

[34] AJAR RAB, *supra* note 29, at 214.
[35] *Id.*
[36] AJAR RAB, *supra* note 29, at 216.
[37] Case Record, Notice of Arbitration, p.8, ¶ 11.
[38] Case Record, Notice of Arbitration, p.8, ¶ 12.
[39] ICC Case No. 15951 of 2009; CiArb Guidelines on Application for Security for Costs, 2016, art. 3.
[40] Alastair Henderson, *Security for Costs in Arbitration in Singapore,* 7 AIAJ 54, 69 (2011).
[41] Case Record, Exhibit C-3, p.16.
[42] Case Record, Exhibit C-1, p.10.
[43] Case Record, Exhibit R-2, p.28.

implications do not cause any danger to the enforceability of any future award on costs. The CLAIMANT has its assets available at its place of business[44] and also has an income generated of USD 25 million out of the expedition[45]. This shows that the CLAIMANT has the financial capability to satisfy an award on costs, even though it has incurred significant losses.

[¶ 31.] Moreover, as per the SIAC fee calculator, the CLAIMANT can pay majority of the heads under security for costs:

Particulars	Avg. amount (USD)	Max. amount (USD)
Case Filing Fee	1,488.18	1,488.18
Arbitrators' Fees	172,674	230,232
Administration Fees	46,698.2	62,264.3
Estimated Fees	**220860.38**	**293,984.48**
15% markup on Maximum Estimated Fees	-	44,085.31
Total		**337,987.36**

Note: The above calculations are as on 29th February 2024.

[¶ 32.] Therefore, the CLAIMANT submits that the RESPONDENT was aware of the risk of doing business with the CLAIMANT as there has been no fundamental change in circumstances of the CLAIMANT.

iii. The balance of convenience lies in favour of the CLAIMANT

[¶ 33.] Security for costs in international arbitration is first and foremost an issue about the conflict between the CLAIMANT's right to arbitral justice on one hand and the RESPONDENT's interest to have a reasonable chance of being able to enforce a future cost award issued in its favour on the other.[46]

[¶ 34.] In the present case, security for costs cannot be asked as an alternative to the pre-deposit clause since the former is calculated on various factors, as compared to the latter being asked on the claim amount. Such order for security of costs will stifle the CLAIMANT's genuine plea and restrict the right to arbitral justice. Additionally, no exceptional circumstances exist for the application for the security for costs to be accepted and the RESPONDENT would not suffer any

[44] Case Record, P.O. 2, Q28.
[45] Case Record, P.O. 2, Q20.
[46] ICC Case No. 15218.

irreparable harm if the security for costs is not granted. In any event, there is no serious risk to enforcement of award on costs as the assets of the CLAIMANT are readily available in Bhopal[47]. **[¶ 35.]** Therefore, it is submitted that the Balance of Convenience lies in favour of the CLAIMANT.

ISSUE 2: THE BRANSTARK REPORT QUALIFIES AS AN 'EXPERT REPORT'

[¶ 36.] The CLAIMANT submits that the BranStark report qualifies as an 'expert report' because *firstly*, AI reports have evidentiary value as expert reports **[1];** *secondly,* the BS report is admissible **[2];** *thirdly,* the tribunal can forego rigid procedural guidelines **[3];** *lastly,* the report by Prof. (Dr.) Avid Attenborough does not disprove the BS report **[4]**.

1. AI REPORTS HAVE EVIDENTIARY VALUE AS EXPERT REPORTS

[¶ 37.] The CLAIMANT submits that AI report have evidentiary value as experts as *firstly,* reinforcement learning AI models produce reliable results **[A];** *secondly,* AI reports satisfy the obligations of experts **[B]**.

A. REINFORCEMENT LEARNING MODELS PRODUCE RELIABLE RESULTS

[¶ 38.] Most AI systems are based on Machine Learning models that improve over time without human assistance.[48] These exhibit capabilities commonly associated with human intelligence to perform complex tasks at the human level.[49] Reinforcement Learning systems are one of the many subsets of ML systems[50] and are aimed at achieving particular goals and navigating complex environments.[51] It can analyse large amounts of data and offer insightful predictive analysis across risk management and compliance areas.[52]

[¶ 39.] BranStark is a Reinforcement Learning AI model that has proved to be very helpful in industries like healthcare, self-driving cars and traffic control.[53] These industries apply AI in the field of calculation, ascertainment and prediction of risk to successfully navigate complex

[47] Case Record, P.O. 2, Q28.
[48] Sara Brown, *Machine Learning, Explained,* Massachusetts Institute of Technology Sloan School of Management (April 21, 2021), https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained.
[49] *Id;* Ad Hoc Committee on Artificial Intelligence, Feasibility Study, p. 4, ¶ 8.
[50] Sara Brown, *supra* note 48.
[51] Yutaka Matuso et al., *Deep Learning, Reinforcement Learning and World Models*, 152 NEURAL NETWORKS 267 (2022).
[52] Bart Van Liebergen, *Machine Learning: A revolution in risk management and compliance?*, THE CAPCO INSTITUTE JOURNAL OF FINANCIAL TRANSFORMATION 60; Saqib Aziz et al., *AI and Machine Learning for Risk Management*, PALGRAVE (2018).
[53] Case Record, P.O. 2, Q.3.

environments and prevent unfavourable outcomes.[54]

[¶ 40.] In the present case, the CLAIMANT's reliance on BS has also been in the capacity of risk detection and prediction,[55] a field where it is considered an emerging industry standard.[56] AI can operate at par with the human mind if not beyond[57] and the tribunal cannot disqualify such evidence for being unreliable.

[¶ 41.] Therefore, BranStark's analysis of the data supplied by the RESPONDENT is reliable.

B. AI REPORTS SATISFY THE OBLIGATIONS OF EXPERTS

[¶ 42.] Experts are relied on to fill lacuna in the knowledge of tribunals[58] or establish facts relevant to the merits of the parties' dispute.[59] AI models possess ability to collect, evaluate and process data[60] offering reliable insights into various technical fields.[61] Parties are free to produce experts before the tribunal having established its relevance to the issues.[62]

[¶ 43.] The CLAIMANT submits that AI would be competent to provide evidence, as it is capable of computing information very accurately and providing rational answers.[63] In the present case, BranStark has been relied on by several industries and it assures high degrees of accuracy.[64]

Therefore, the BranStark satisfies the obligations of an expert report.

2. THE BRANSTARK REPORT IS ADMISSIBLE BEFORE THE TRIBUNAL

[¶ 44.] The CLAIMANT submits that the BranStark report is admissible because *firstly,* the CLAIMANT has the right to produce evidence **[A]**; *secondly,* excluding the BS report would render the award unenforceable **[B]**.

A. THE CLAIMANT HAS A RIGHT TO PRODUCE EVIDENCE

[54] ARJUN PANESAR, MACHINE LEARNING AND AI FOR HEALTHCARE 13, 54-58 (Apress 2019); Mohsen Soori et al., *Artificial Intelligence, machine learning and deep learning in advanced robotics*, 3 COGNITIVE ROBOTICS 54.
[55] Tringxiang Fan, *Distributed multi-robot collision avoidance via deep reinforcement learning for navigation in complex scenarios*, 39 The International Journal of Robotics Research (2020).
[56] Case Record, P.O. 2, Q.3.
[57] Erik Brynjolfsson et al., *The Business of Artificial Intelligence,* Harvard Business Review (July 18, 2017), https://hbr.org/2017/07/the-business-of-artificial-intelligence.
[58] The Indian Evidence Act, 1872, § 45, No. 1, Acts of Parliament, 1872 (India).
[59] *Issues for Arbitrators to Consider Regarding Experts*, 2 ICC Dispute Resolution Bulletin, 63 (2021).
[60] Andrea Roth, *Machine Testimony*, 126 The Yale Law Journal 1972, 2027 (2017).
[61] LEI XING ET AL., ARTIFICIAL INTELLIGENCE IN MEDICINE: TECHNICAL BASIS AND CLINICAL APPLICATIONS, (Academic Press Elsevier 2021); Rebecca Henderson, *The Impact of Artificial Intelligence on Innovation*, UNIVERSITY OF CHICAGO PRESS 115 (2019).
[62] SIAC Rules, Rule 25.1; IBA Rules, art. 5; ICC 2021 Arbitration Rules, art. 25.2; UNCITRAL Model Law, art. 26.2; CIArb Arbitration Rules, art. 27.2.
[63] The Indian Evidence Act, 1872, § 118, No. 1, Acts of Parliament, 1872 (India).
[64] Case Record, P.O. 2, Q.3.

[¶ 45.] Parties' right to present their case is a mandatory principle[65] that makes the tribunal subject to overarching rules of due process.[66] The right of parties to present their case includes the right to present any evidence[67] including the right to appoint experts.[68] Additionally, a fundamentally fair hearing requires that a party be able to present its case.[69] Each party must be given an equal and adequate opportunity to present its evidence and arguments.[70]

[¶ 46.] The CLAIMANT has relied on this indefeasible right to appoint BranStark as a party-appointed expert.[71] Were the BS report to be excluded, it would endanger procedural fairness and equality of parties to present their case.

Therefore, the CLAIMANT has the right to present expert evidence.

B. EXCLUDING THE BS REPORT WOULD RENDER AN AWARD UNENFORCEABLE

[¶ 47.] An award should be annulled[72] if the exclusion of relevant evidence actually deprives a party of a fair hearing.[73] This is contrary to the tribunal's duty to ensure any award is enforceable.[74] Additionally, inability to present its case and evidence[75] when critical arguments are being made is an extreme case of potential injustice.[76] An arbitral award would be denied if the party challenging it proves that it was not given a meaningful choice to be heard.[77]

[¶ 48.] In the present case, the BS report is integral to the CLAIMANT's case and is material to the outcome of the proceedings. Were BranStark to be excluded, the CLAIMANT would be forced to argue the merits of such a technical case without expert evidence, as the procedural and merits portions of the case are being heard on the same date.[78] The CLAIMANT would therefore not have any opportunity to adduce alternative expert evidence. The exclusion of BS

[65] UNCITRAL Model Law, art. 18; NY Convention, art. V(1)(b); CIArb Arbitration Rules, art. 17.1; ICC 2021 Arbitration Rules, art. 22.4.
[66] ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, ¶ 5.15 (6th edn., Oxford University Press 2015).
[67] Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas, 763 F.2d 34 (1st Cir. 1985).
[68] REDFERN *supra* note 66, ¶ 6.133 – 6.139; SIAC Rules, Rule 25.1; IBA Rules, art. 5; UNCITRAL Arbitration Rules, 2021, art.27.2.
[69] Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003); NY Convention, art. V(1)(b).
[70] Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas, 763 F.2d 34 (1st Cir. 1985).
[71] Case Record, Notice of Arbitration, p. 8, ¶ 11.
[72] ICC DISPUTE RESOLUTION BULLETIN *supra* note 59; Slaney v. International Amateur Athletic Foundation, 244 F.3d 580 (7th Cir. 2001); UNCITRAL Model Law, art. 34(2)(a)(ii); NY Convention, art. V(1)(b).
[73] Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003).
[74] REDFERN *supra* note 66, ¶ 9.14.
[75] Jorf Lasfar Energy Company v. AMCI Export Corporation, Civil Action No. 05-0423 (W.D. Pa. Dec. 22, 2005).
[76] Kanoria & Ors. v. Guinness, [2006] 2 All ER (Comm) 413/[2006] EWCA Civ 222.
[77] Generica Ltd. v. Pharmaceutical Basics, 125 F.3d 1123 (7th Cir. 1997).
[78] Case Record, P.O. 1, p. 29.

would result in a violation of basic principles of procedural fairness and would render any award granted unenforceable.

[¶ 49.] Therefore, excluding the BS report would render an award unenforceable.

3. THE TRIBUNAL SHOULD FOREGO RIGID PROCEDURAL GUIDELINES

[¶ 50.] The CLAIMANT submits that the Tribunal do away with rigid procedural guidelines to make the proceedings fair and efficient as *firstly,* the tribunal can exclude the production of BranStark's oral testimony **[A]**; *secondly,* the tribunal should eschew cross examination of BranStark **[B]**.

A. THE TRIBUNAL CAN EXCLUDE THE PRODUCTION OF BRANSTARK'S ORAL TESTIMONY

[¶ 51.] The IBA Rules on the Taking of Evidence in International Arbitrations establish best practices.[79] Under Art. 9.2 of the IBA Rules, the CLAIMANT can object to any request to produce a document or testimony.[80] Moreover, the tribunal has the power to allow, refuse or limit the appearance of witnesses to give oral evidence at any hearing[81] and exclude such testimony to satisfy the objectives of efficiency, effectiveness and fairness in arbitration.[82] The applicable objections are *firstly*, lack of relevancy and materiality of the requested testimony and *secondly,* production of such testimony would place an unreasonable burden on the CLAIMANT.

i. The requested testimony is not relevant to the case nor material to its outcome

[¶ 52.] Under 9.2(a) of the IBA Rules, if a requested testimony[83] lacks relevancy or is not material to the outcome, it can be excluded.[84]

[¶ 53.] In the present case, the conclusion of the BS report as to the inaccuracy of the data has been admittedly verified by Prof. Attenborough's report.[85] An admission of a fact by the RESPONDENT amounts to substantive evidence of the same.[86] Any additional testimony pertaining to this fact is irrelevant and can thus be excluded. Moreover, the requested testimony would fail to have any bearing on the outcome of the proceedings and therefore is not material

[79] 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.
[80] IBA Rules, art. 9.2.
[81] SIAC Rules, Rule 25.2; IBA Rules, art. 8.3.
[82] SIAC Rules, Rule 41.2.
[83] IBA Rules, art. 4.9.
[84] IBA Rules, art. 9.2(a).
[85] Case Record, Exhibit R-1, p. 27.
[86] Thiru John and Ors. v. Returning Officer and Ors., (1977) 3 SCC 540; Sushil Kumar v. Rakesh Kumar, (2003) 8 SCC 673.

to the case.

ii. It would be unreasonably burdensome to produce such testimony

[¶ 54.] Art. 9.2(c) of the IBA Rules provide that if the production of the requested testimony or document[87] creates an unreasonable burden and the tribunal can exclude such evidence.[88] Lack of specificity in requesting the testimony,[89] which is not relevant to the case or material to its outcome,[90] would create an unreasonable burden and can thus be excluded from production.[91] Additionally, the tribunal shall make every reasonable effort to ensure the fair and expeditious conclusion of arbitration.[92]

[¶ 55.] In the present case, requesting the CLAIMANT to produce such testimony, which cannot reasonably be produced, places an unreasonable burden and undermines fairness of the proceedings. Non-acceptance of the objections raised by the CLAIMANT under Art. 9.2 of the IBA rules, would not only compromise fairness and equality between parties, but would also be against the goals of efficient and expeditious conclusion.[93]

[¶ 56.] Therefore, the requested testimony is neither relevant nor material to the case and would be unreasonably burdensome to produce, and must be wholly excluded.

B. THE TRIBUNAL SHOULD ESCHEW CROSS EXAMINATION OF BRANSTARK

[¶ 57.] The purpose of arbitration is to reduce reliance on national laws with respect to procedure and rules of evidence.[94] Rigorous application of the rules of cross examination as a matter of routine would cause unnecessary delays and expenses, which are contrary to the arbitral goals of efficiency and speedy dispute resolution.[95] Cross examination in commercial disputes adds little except to confirm facts already stated in the pleadings[96] and simple reiteration as to the contents of documents is counter-productive.[97]

[¶ 58.] Subsequently, the factors to be considered by the Tribunal are the nature of dispute,

[87] IBA Rules, art. 3.3(a).
[88] IBA Rules, art. 9.2(c).
[89] IBA Rules, art. 4.9.
[90] IBA Rules, art. 8.3; ICC 2021 Arbitration Rules, Appendix IV(d)(iii).
[91] IBA Rules, art. 9.2.
[92] SIAC Rules, Rule 41.2; ICC 2021 Arbitration Rules, art. 22.1.
[93] ICC 2021 Arbitration Rules, Appendix IV(d)(ii).
[94] The Arbitration and Conciliation Act, 1996, § 19, No. 26, Acts of Parliament, 1996 (India).
[95] SIAC Rules, Rule 41.2; SIAC Rules, Rule 19.1; IBA Rules, Preamble ¶ 1.
[96] RAGNER HARBAST, CHAPTER 8: CROSS-EXAMINATION, A COUNSEL'S GUIDE TO EXAMINING AND PREPARING WITNESSES IN INTERNATIONAL ARBITRATION 99 – 100 (Kluwer Law International 2015).
[97] Kaj Hobér, *Chapter 3: Cross-Examination in International Arbitration*, 1 Stockholm Arbitration Yearbook 41, 42 (2019).

documents on record and whether cross-examination would actually aid in understanding the dispute to arrive at a fair decision.[98] Additionally, cross examination is undertaken to discern the areas of disagreement between opposing experts, enabling effective adjudication of such matters.[99]

[¶ 59.] There is ample scientific research on the working of reinforcement learning systems and the same should not be a point of contention between the parties. In the present case, BS is considered to be an emerging industry standard.[100] Moreover, the conclusion of the BS report as to the presence of the inaccuracies in the data is not contested and has been admitted to by the RESPONDENT.[101] Any further examination of such claims would accomplish little except reiterating the same conclusions already presented before the tribunal.

[¶ 60.] Any remaining disagreement pertains to whether such inaccuracies are permissible, which is a matter to be adjudged on the basis of the merits of the case, and requires no technical expertise or verification. Further cross examination would not aid the tribunal in adjudging the matter effectively, and would only cause delays and place an unreasonable burden on the CLAIMANT to present a live witness.[102]

[¶ 61.] The Tribunal should eschew BranStark's oral testimony due to a lack of relevancy and materiality, and to further procedural fairness between the parties. Mandatory cross examination would not aid the tribunal in arriving at a fair resolution. Therefore, the tribunal can forego rigid procedural guidelines[103] and decide that the proceedings be conducted on the basis of documents.[104]

4. THE REPORT BY PROF. (DR.) AVID ATTENBOROUGH DOES NOT DISPROVE THE BRANSTARK REPORT

[¶ 62.] The CLAIMANT submits that the expert report supplied by Prof. Attenborough does not disprove the conclusion of the BranStark report as, *firstly,* the report concedes the presence of inaccuracies **[A]**; *secondly,* relying on this report would endanger the safety and success of the

[98] Ajar Rab, *Cross-examination in Commercial Arbitration in India: Creating 'Courtrooms of Choice'*, CENTRE FOR BUSINESS & COMMERCIAL LAW, NLIU BHOPAL (JAN. 15, 2020), https://cbcl.nliu.ac.in/arbitration-law/cross-examination-in-commercial-arbitration-in-india-creating-courtrooms-of-choice/.
[99] IBA Rules, art. 5.4; ICC 2021 Arbitration Rules, Appendix IV(b); IBA Arb40 Subcommittee, Compendium of arbitration practice (October 2017), ¶ 6.2.
[100] Case Record, P.O. 2, Q.3.
[101] Case Record, Exhibit R-1, p. 27.
[102] Prague Rules, Art 5.5.
[103] The Arbitration and Conciliation Act, 1996, § 19, No. 26, Acts of Parliament, 1996 (India).
[104] UNCITRAL Model Law, art. 24.1; CIArb Arbitration Rules, art. 17.1, 17.3; ICC 2021 Arbitration Rules, art. 22.1; ICC 2021 Arbitration Rules, Appendix IV(c); Prague Rules, art. 8.1.

expedition **[B]**.

A. THE REPORT CONCEDES THE PRESENCE OF INACCURACIES

[¶ 63.] Facts which the parties have admitted to, need not be proved[105] against the party making the admission.[106] Any admission amounts to substantive evidence *proprio vigore*[107] and can by itself be the foundation of the rights of parties.[108]

[¶ 64.] In the present case, the report submitted by the RESPONDENT contains an admission[109] as to the data having 'minor inaccuracies'.[110] Such an admission corroborates the BranStark report as to the presence of inaccuracies in the data supplied.[111] The inaccuracy of the data does not need to be proved by the CLAIMANT after an admission to that effect has been made by the RESPONDENT.

[¶ 65.] Therefore, the report concedes the presence of inaccuracies, thereby validating the conclusion of the BS Report.

B. RELYING ON THIS REPORT WILL ENDANGER THE SAFETY AND SUCCESS OF THE EXPEDITION

[¶ 66.] The phrasing of Prof. Attenborough's report raises glaring concerns for the safety of the expedition. Usage of phrases like 'do not pose a significant threat',[112] and 'do not pose insurmountable challenges or threats',[113] indicates that there is a degree of risk present. The RESPONDENT's data is not absolutely reliable, and the report has relied on a large margin of error to validate its conclusion. Additionally, the BranStark report only flagged inaccuracies in two of the fourteen data fields supplied,[114] indicating that it is aware and has accounted for all permissible degrees of error.

[¶ 67.] Moreover, the RESPONDENT has dismissed the insignificant and surmountable challenges assuming it can be overcome by the CLAIMANT. Such reliance on the CLAIMANT's ability to successfully execute the expedition is unfounded, considering they are a novice in

[105] The Indian Evidence Act, 1872, § 58, No. 1, Acts of Parliament, 1872 (India).
[106] The Indian Evidence Act, 1872, § 21, No. 1, Acts of Parliament, 1872 (India).
[107] Thiru John and Ors. v. Returning Officer and Ors., (1977) 3 SCC 540; Sushil Kumar v. Rakesh Kumar, (2003) 8 SCC 673.
[108] Nagindas Ramdas v. Dalpatram Ichharam, (1974) 1 SCC 242.
[109] The Indian Evidence Act, 1872, § 17, 18, No. 1, Acts of Parliament, 1872 (India).
[110] Case Record, Exhibit R-1, p. 27.
[111] Case Record, Exhibit C-8, p. 21.
[112] Case Record, Exhibit R-1, p. 27.
[113] Case Record, Exhibit R-1, p. 27.
[114] Case Record, Exhibit C-1, p. 14.

the field.[115] Both the investors[116] and the CLAIMANT themselves were relying on the RESPONDENT's expertise to ensure a completely safe expedition,[117] and this high degree of reliance has not been upheld in the quality of data supplied.

[¶ 68.] Therefore, relying on Prof. Attenborough's report would endanger the safety and success of the expedition. Therefore, the tribunal should not rely on the report submitted by the RESPONDENT.

ISSUE 3: THE DSA IS GOVERNED BY THE CISG

[¶ 69.] The CLAIMANT submits that the DSA is governed by the CISG because *firstly*, the CISG is applicable to the present case **[1]**; *secondly*, data supplied as per the DSA is a "good" under the CISG **[2]**; *thirdly*, the DSA meets the criteria of a "contract of sale" **[3]**; *lastly*, the CISG also applies to the present case under Article 3 **[4]**.

1. THE CISG IS APPLICABLE TO THE PRESENT CASE

[¶ 70.] The CLAIMANT submits that CISG is applicable to the present case because *firstly*, the DSA is an international contract **[A]**; *secondly*, the CISG will apply as being part of the applicable foreign law **[B]**.

A. THE DSA IS AN INTERNATIONAL CONTRACT

[¶ 71.] Article 1(1) of the CISG applies to international sale of goods between parties.[118] Such internationality is shown when the parties' places of business are in different States at the time of conclusion of contract.[119] 'Place of business' is defined as the place from which a business activity is *de facto* carried out, requiring a certain amount of autonomy.[120]

[¶ 72.] In the present case, the DSA was entered into between two parties located in different States. The place of business[121] of the CLAIMANT and RESPONDENT are Bhopal, India[122] and Delaware, USA[123] respectively.

[115] Case Record, Notice of Arbitration, p.6, ¶ 2.
[116] *Id.*
[117] Case Record, Exhibit C-1, p. 10.
[118] United Nations Convention on Contracts for the International Sale of Goods 1988, ['hereinafter **CISG**'] art. 1(1).
[119] PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE CISG 223 (Oxford University Press 2016) (hereinafter 'SCHWENZER').
[120] STEFAN KRÖLL, COMMENTARY ON CISG 33 (2nd edn., Hart Publishing 2018); Oberlandesgericht [Court of Appeal] German Case No. 5 U 118/99 of 2000.
[121] Case Record, P.O. 2, Q53.
[122] Case Record, Notice of Arbitration, p.6., ¶ 1.
[123] Case Record, Notice of Arbitration, p.6., ¶ 2.

[¶ 73.] Therefore, the contract is international for the purposes of the CISG.

B. THE CISG WILL APPLY AS BEING PART OF THE APPLICABLE FOREIGN LAW

[¶ 74.] For Article 1(1)(a) of the CISG to apply, both parties are required to be Contracting States.[124] Additionally, since the forum is located in a non-Contracting State, there exists no obligation to apply Article 1(1)(b) of the CISG.[125] The CLAIMANT submits that although the parties are not located in Contracting States, they still attract the applicability of the CISG because *firstly*, conflict of law rules point to the application of US law **[i]**; *secondly*, the CISG is part of US law **[ii]**.

i. Conflict of law rules point to the application of US law

[¶ 75.] Conflict of law rules of a forum are considered to find out the applicable law.[126] Such rules allow for application of the CISG even when the forum is a non-Contracting State and conflict of law rules point towards the law of a Contracting State.[127] Additionally, when the intention of the parties is neither expressed nor to be inferred from the circumstances, the system of law with the 'closest and most real connection' is the proper law of the contract.[128]

[¶ 76.] Courts in India have reaffirmed their position on the concept of 'proper law of the contract' by applying the closest connection test.[129] Alternatively, general rules of conflict of laws state that the law is to be of the place of business of the seller at the time of conclusion of the contract, as it is the residence of the party who effects the characteristic performance of the contract.[130]

[¶ 77.] In the present case, the forum of arbitration is India.[131] The CLAIMANT submits that since the intention of the parties cannot be imputed from the DSA, the closest connection test applies to the present case. Since the currency used in the transactions and the place of performing the essential characteristic of the contract point towards the US, US law is the

[124] CISG, art. 1(1)(a).
[125] SCHWENZER, *supra* note 119, at 224.
[126] Jean Pierre Plantard, *Un nouveau droit uniforme de la vente inter nationale* 1, 321 JOURNAL DU DROIT INT'L (1988); CLOUT Case No. 316.
[127] Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1, 47 (1995).
[128] 2 DICEY AND MORRIS, THE CONFLICT OF LAWS 1161-1162 (Sweet & Maxwell 1987).
[129] NTPC v. Singer Co., (1992) 3 SCC 551; British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries, (1990) 3 SCC 481.
[130] Landgericht München I [District Court Munich I] Case No. 16 HKO 24030/96; Règles sur la détermination de la loi qui doit régir les obligations contractuelles à titre de droit supplétif, art. 2, 1908; Rome Convention on the Law Applicable to Contractual Relations, §2D, 1980; Regulation (EC) No 593/2008 of the European Parliament and of the Council art. 4, 2008.
[131] Case Record, Exhibit C-5, p.18.

applicable law to the DSA. Therefore, conflict of law rules point towards US law as the applicable law.

ii. The CISG is part of US law

[¶ 78.] USA is a Contracting State to the CISG and has ratified the same in 1988.[132] According to Art. 6(2) of the US Constitution, all treaties made under the authority of the United States shall be the supreme law of the land.[133] In cases where the application of CISG cannot be based on Art. 1(1)(b), it must be based on the CISG being a part of the applicable foreign law.[134] The effect of ratification of CISG by the US is that it becomes part of US law.

[¶ 79.] Therefore, CISG, being part of US law, is applicable to the present case.

2. DATA SUPPLIED AS PER THE DSA IS A 'GOOD' UNDER THE CISG

[¶ 80.] The CLAIMANT submits that data is a 'good' under the CISG because *firstly*, data is to be given an autonomous interpretation under Art. 7(1) **[A]**; *secondly*, data fulfils the decisive criterion of suitability to rules of non-conformity **[B]**.

A. DATA SHOULD BE AUTONOMOUSLY INTERPRETED UNDER ART. 7(1)

[¶ 81.] There is no definition of 'goods' under the CISG.[135] In order to determine the scope of 'goods', it has to be given an autonomous interpretation as under Art. 7(1).[136] The CISG must be interpreted with regard to its international character and the need to promote uniformity in its application.[137]

[¶ 82.] 'Goods' under the CISG include all tangibles and intangibles that might be the subject of an international sales contract.[138] Sale of software, even though intangible, qualifies as a contract of sale under the CISG.[139] Additionally, construing data to not be a good solely on the basis of intangibility and movability is an incomplete criterion.[140]

[¶ 83.] In the present case, the RESPONDENT claims that data is not a 'good' within the CISG

[132] 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.
[133] US CONST., art. VI, cl. 2.
[134] FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATION 96 (Martinus Nijhoff Publishers 2012).
[135] STEFAN KRÖLL, COMMENTARY ON CISG 31 (2nd edn., Hart Publishing 2018).
[136] SCHWENZER, *supra* note 119, 221.
[137] CISG, Preamble, p. 3; CISG, art. 7(1).
[138] Oberlandesgericht [Court of Appeal] Case No. 2 U 1230/91 (September 17, 1993) (Germany).
[139] KRÖLL, *supra* note 135, 60.
[140] Sarah Green, *Sales Law and Digitised Material*, RESEARCH HANDBOOK ON INT'L AND COMPARATIVE SALE OF GOODS LAW (Edward Elgar Publishing 2019).

and pursuant to this, reliefs prayed for by the CLAIMANT cannot be granted.[141] The CLAIMANT submits that data should be given an autonomous interpretation. Construing data to not be a 'good' would frustrate the CISG's purpose of uniformity and internationality, by going against its object as enshrined in the Preamble.

[¶ 84.] Therefore, data is to be autonomously interpreted as a 'good' under Art. 7(1).

B. DATA FULFILS THE DECISIVE CRITERION OF SUITABILITY TO RULES OF NON-CONFORMITY

[¶ 85.] The decisive criterion in determining whether a commodity is a 'good' is its suitability to the rules on non-conformity under the CISG.[142] Art. 35 of the CISG lays down when the goods are deemed to conform with the contract.[143] Data is suitable to be applied to the rules of non-conformity because *firstly*, it fulfils the suitability of contractual description under Art. 35(1) **[i]**; *secondly*, it fulfils the suitability for ordinary and particular purpose under Art. 35(2) **[ii]**.

i. Data is suitable to be applied to Art. 35(1) as it fulfils the suitability of contractual requirements

[¶ 86.] The primary test to check for conformity is the whether the requirements of the contract pertaining to quality, quantity and description of the goods are met.[144]

[¶ 87.] The CLAIMANT submits that the contractual requirements of data can be tested in the present case. *Firstly*, the CLAIMANT had requested for fourteen data points, which shows that the data could be quantified.[145] *Secondly*, Clause 18 of the DSA states that the data will be accurate as on the Delivery Date, which shows that there was assurance of quality.[146] *Thirdly*, the format in which the data was to be supplied was intimated by the CLAIMANT, which shows that the description of the data was specified.[147] Therefore, data is suitable to be applied to Art. 35(1) as it fulfils the suitability of contractual requirements.

ii. Data is suitable to be applied to Art. 35(2) as it fulfils the suitability for ordinary and particular purpose

[141] Case Record, Reply to Notice of Arbitration, p.25., ¶ 11.
[142] SCHWENZER, *supra* note 119, 221.
[143] CISG, art. 35.
[144] *Id.,* 880.
[145] Case Record, Exhibit C-1, p.14.
[146] Case Record, Exhibit C-5, p.18.
[147] Case Record, P.O. 2, Q7.

[¶ 88.] Under Art. 35(2), goods must be fit for the ordinary and particular purpose of the contract.[148] In the present case, the particular purpose of asking for the data was to ensure a successful expedition, while the ordinary purpose of data is usage for analysis. Data fulfils the suitability for ordinary and particular purpose under Art. 35(2), as it could be used to analyse the ideal date and time for the launch of the expedition. Therefore, data is suitable to be applied to Art. 35(2) as it fulfils the suitability of ordinary and particular purpose.

3. THE DSA MEETS THE CRITERIA OF A 'CONTRACT OF SALE'

[¶ 89.] The CLAIMANT submits that the DSA meets the criteria of a contract of sale. The CISG does not define a 'contract of sale'.[149] To determine whether a contract is a contract of sale, the CISG must be autonomously interpreted using Articles 30 and 53, which relate to buyer and seller obligations respectively.[150]

[¶ 90.] When property in the goods is permanently transferred to the other party as against a price, it is considered to be a contract of sale under the CISG.[151] Downloading of data constitutes a permanent transfer with respect to the device and constitutes a contract of sale.[152] Alternatively, even if a contract is not considered a contract of sale, the CISG applies if their overriding characteristics conform to that of a sales contract.[153]

[¶ 91.] In the present case, the data supplied by the RESPONDENT was downloaded by the CLAIMANT, indicating that there was a permanent transfer of the good.[154] Additionally, there was a monetary consideration of 3.5 million USD for the goods, out of which the CLAIMANT has already paid the required instalment amount as per the DSA. The CLAIMANT submits that there is permanent transfer of ownership of the goods as against a price.

[¶ 92.] Therefore, the DSA meets the criteria of a 'contract of sale'.

4. CISG ALSO APPLIES TO THE DSA UNDER ART. 3

[¶ 93.] The CLAIMANT submits that the CISG also applies to the DSA in the present case because *firstly*, the DSA is a contract of sale under art. 3(1) **[A]**; *secondly*, in arguendo, the

[148] CISG, art. 35(2)(a); CISG, art. 35(2)(b).
[149] SCHWENZER, *supra* note 119, 219.
[150] SO.M.AGRI s.a.s. v Erzeugerorganisation Marchfeldgemüse GmbH & Co KG, Case No. 40552 (25 February 2004) (Italy).
[151] SCHWENZER, *supra* note 119, 221.
[152] Benjamin Hayward, *To Boldly Go*, UNSW LAW JOURNAL 878, 907-910 (2019); PETER SCHLECHTRIEM ET. AL., KOMMENTAR ZUM UN-KAUFRECHT (CISG) 78 (CH Beck, 2019).
[153] Arthur Fakes, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to Computer, Software, and Database Transactions*, 3 SOFTWARE L.J. 559, 584 (1989-1990).
[154] Case Record, P.O. 2, Q7.

DSA is also a contract of sale under Art. 3(2) **[B]**

A. THE DSA IS A CONTRACT OF SALE UNDER ART. 3(1)

[¶ 94.] Contracts for supply of goods to be produced are sales contracts unless the party ordering it supplies a substantial part of the material necessary.[155] Specification of goods by the customer does not constitute 'substantial part' of materials necessary for producing goods.[156] Additionally, it is immaterial whether the goods are specific or customized.[157] The essential value test is used to determine whether the materials provided constitute a substantial part of the materials necessary, wherein the value of the proportion supplied and all the material used is compared.[158]

[¶ 95.] In the present case, the CLAIMANT had mentioned the specific data points required to be produced by the RESPONDENT by sharing an excel sheet.[159] Data specifications provided by the CLAIMANT do not constitute 'substantial part' of the data points produced.

[¶ 96.] Therefore, the CLAIMANT submits that specifying or giving instructions does not constitute 'substantial part' of the materials necessary for manufacturing goods, and constitutes contract of sale under the CISG.

B. IN ARGUENDO, THE DSA IS ALSO A CONTRACT OF SALE UNDER ART. 3(2)

[¶ 97.] The CISG does not apply to mixed contracts where the preponderant part of the obligations is the supply of labour and other services.[160] Ancillary services to the delivery do not alter the contractual relation of the parties under the sale agreement.[161] The threshold for the service being "preponderant" is higher than "substantial"[162] which in itself is held to be 50% of the value of the contract.[163]

Additionally, a contract can be severable, in a manner that the good is governed by CISG and the service is governed by domestic laws.[164] A good should not be excluded because it is a

[155] CISG, art. 3(1).
[156] CLOUT Case No. 1884.
[157] CLOUT Case No. 331; CLOUT Case No. 2.
[158] HONNOLD & HARRY M. FLETCHNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (4th ed. Kluwer Law International 2009).
[159] Case Record, Notice of Arbitration, Exhibit C-1, p.14.
[160] CISG, art. 3(2).
[161] CISG-AC Opinion No. 4: Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts, ¶ 3.1 (Oct. 24, 2004), http://www.cisgac.com/cisgac-opinion-no4/; Oberlandesgericht [Court of Appeal] Case No. 3 U 43/16 (September 28, 2016) (Germany).
[162] KRÖLL, *supra* note 135, 123.
[163] *Id*.; SCHWENZER *supra* note 119, 258.
[164] KRÖLL, *supra* note 135, 124.

product of intellectual efforts, whose value is higher than the medium in which is delivered.[165] The amount of work, value of creativity, technology put into making a good is immaterial under Art. 3.[166]

[¶ 98.] In the present case, the consideration was paid explicitly for the data points and not the report.[167] The service of providing 24/7 DIA by the RESPONDENT was specifically not availed in the DSA.[168] The ancillary services of providing firewalls and self-destruction mechanisms[169] are immaterial under Art. 3(2). Alternatively, the Report containing the ideal date of expedition would still not reach the preponderant threshold of over 50%, as it was a service which can be undertaken by a publicly available app, which reached the same conclusions as the RESPONDENT.[170]

[¶ 99.] Therefore, the DSA is a contract of sale under Art. 3(2).

ISSUE 4: THE DATA SUPPLIED IS DEFECTIVE AND NON-CONFORMING UNDER THE CISG

[¶ 100.] The CLAIMANT submits that the data supplied is defective and non-conforming under the CISG because *firstly*, the RESPONDENT failed to deliver conforming goods under Art. 35(1) **[A]**; *secondly*, the RESPONDENT failed to deliver conforming goods under Art. 35(2) **[B];** *thirdly,* the RESPONDENT did not fulfil its duty of care **[C],** and *lastly,* the CLAIMANT has complied with the Requirements of Art. 38 & 39 **[D]**.

A. THE RESPONDENT FAILED TO DELIVER CONFORMING GOODS UNDER ART. 35 (1)

[¶ 101.] The CLAIMANT submits that the RESPONDENT failed to deliver conforming goods under Art. 35(1) because *firstly,* the data had to be highly accurate and remain so till the maiden expedition **[i]**; *secondly,* the RESPONDENT failed to conform to the contractual standard for accurate data **[ii]**.

i. Data had to be highly accurate and remain so till the maiden expedition

[¶ 102.] To infer the scope of a contract, the intent of parties is looked at when there is lack of clarity in the contractual requirements.[171] Such intent is interpreted through the statements and

[165] *Id.*
[166] SCHWENZER, *supra* note 119.
[167] Case Record, Exhibit C-1, p.10; Case Record, Exhibit C-2, p.15.
[168] Case Record, Exhibit C-6, p.19.
[169] Case Record, Exhibit R-2, p.28.
[170] Case Record, P.O. 2, Q.54.
[171] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of

conduct of parties[172] during the formation of contracts[173], which create legal obligations.[174] Additionally, it supplements incomplete contracts where a party cannot prove the existence of certain terms.[175] Contracts need not be concluded in,[176] or be evidenced by writing.[177]

[¶ 103.] Parties being aware of the legal consequences of their statements is not the decisive factor in establishing the intent of parties.[178] Generally, intent requires a subjective meeting of minds, the threshold of which is lowered by the standard of "could not have been unaware".[179]

[¶ 104.] In the present case, the CLAIMANT was the first to undertake a commercial expedition to Antarctica from India. In their first email, they indicated that they could not afford to be wrong due to the high stakes and the shaky confidence of the investors.[180] Thus, the parties intended the data to be accurate to the highest degree possible. The extent of accuracy or permissible margin of error was not clarified in the DSA. Moreover, there was no clarity on whether the data was to remain accurate after delivery.[181]

[¶ 105.] Furthermore, the expedition was scheduled to be launched around 1.5 years after the delivery of data. Half of the payments were contingent on the successful launch and return of the P.O.[182] The RESPONDENT also required positive testimonials about the usage of data in extreme tourism.[183]

[¶ 106.] Therefore, the data had to be highly accurate and remain so till the maiden expedition concluded.

ii. THE RESPONDENT failed to conform to the contractual standard of accurate data

[¶ 107.] Goods sold must be of the quality required by the contract,[184] wherein *reasonable*

Goods, art. 8 ch 1, pt. 5 54 (2016); Hof Van Beroep [Appellate Court] Case No. 2002/AR/2087 (April 24, 2006) (Belgium).

[172] CISG, art. 8(1).

[173] CISG, art. 8(3).

[174] Landgericht [Regional Court] Case No. 22 O 38/06 (December 12, 2006) (Germany).

[175] Schwenzer *supra* note 119, 358; Oberlandesgericht [Court of Appeal] Case No. 16 U 5/07 (July 2, 2007) (Germany).

[176] CISG, art. 11.

[177] The United Nations Convention on the Use of Electronic Communications in International Contracts, art. 9; SCHWENZER *supra* note 119 , 446.

[178] SCHWENZER *supra* note 119, 357; Ulrich Magnus, *Das UN-Kaufrecht – aktuelle Entwicklungen und Rechtspechungs- praxis* ZEUP 523-530 (2002).

[179] HONNOLD/FLECHTNER, *supra* note 158, p. 106.

[180] Case Record, Exhibit C-1, p. 10.

[181] Case Record, Exhibit C-5, p. 18.

[182] Case Record, Exhibit C-5, p. 18.

[183] Case Record, Exhibit C-4, p. 17.

[184] CISG, art. 35(1); SCHWENZER *supra* note 119, p. 880.

quality is preferred over *average* or *merchantable quality*.[185] The quality of the goods must ascribe not only to positive guarantees in the contract, but also the general guarantees in the absence of clear contractual provisions on the required quality.[186] Additionally, contractual requirements, regarding the quality of goods can be created tacitly.[187]

[¶ 108.] In the present case, the report provided by the RESPONDENT indicated that the data had inaccuracies due to phrases used like "insurmountable challenges", "minor discrepancies", and "sufficiently accurate".[188] The data had to be in conformity with ESG compliances and high accuracy was required.[189] Moreover, there was no margin of error specified by either of the parties.[190] Therefore, the CLAIMANT submits that the data had to be highly accurate.

[¶ 109.] In the present case, the parties' intent points towards a high threshold of accuracy, which were incorporated by the RESPONDENT while accepting their offer.[191] ESG compliances such as research objectives were also compromised with, which did not reach the level of accuracy required.[192]

[¶ 110.] Therefore, the RESPONDENT has failed to conform to the contractual standard of accurate data.

B. THE RESPONDENT FAILED TO DELIVER CONFORMING GOODS UNDER ART. 35 (2)

[¶ 111.] The CLAIMANT submits that the RESPONDENT failed to deliver goods as per Art. 35(2) because *firstly,* the RESPONDENT failed to deliver goods under Art. 35(2)(b) **[i]**; *secondly,* the RESPONDENT failed to deliver goods under Art. 35(2)(a) **[ii]**; and *lastly,* the CLAIMANT was not aware of the defect **[iii]**.

i. THE RESPONDENT failed to deliver goods under Art. 35(2)(b)

[¶ 112.] The CLAIMANT submits that the RESPONDENT failed to deliver goods under Art. 35(2)(b) as *firstly,* the RESPONDENT knew the express purpose of the good **[a]**; *secondly,* the CLAIMANT placed reasonable reliance on the skill and judgement of the RESPONDENT **[b]**; *lastly,* the RESPONDENT failed to deliver goods fit for the express purpose **[c]**.

a. The RESPONDENT knew the purpose of good at the time of signing the DSA

[185] CLOUT Case No. 720.
[186] CLOUT Case No. 237.
[187] CLOUT Case No. 1813; SCHWENZER *supra* note 119, 880.
[188] Case Record, Exhibit R-1, p. 27.
[189] Case Record, Exhibit C-1, p. 10.
[190] Case Record, P.O. 2, Q2.
[191] Case Record, Notice of Arbitration, p. 7, ¶ 7.
[192] Case Record, Exhibit C-8, p. 21, 22.

[¶ 113.] The purpose of the good need not be specified to the seller in contractual terms[193] but should be informed, so that the seller gets an opportunity to decide if he wishes to take on the responsibility of selecting appropriate goods. More specific the purpose, higher will be the expectation to ensure compliance.[194]

[¶ 114.] In the present case, the email dated 7th April 2022 clearly specified that the data was required for commercial expeditions to Antarctica.[195] The RESPONDENT was explicitly informed of the requirement of high accuracy for this purpose, subsequent to which the RESPONDENT took on the responsibility to provide the appropriate data.[196] Therefore, the RESPONDENT knew the purpose of the good at the time of entering into the DSA.

b. THE CLAIMANT placed reasonable reliance on the skill and judgement of RESPONDENT

[¶ 115.] Implied reliance is placed upon parties possessing expertise in their fields. This occurs when there is a *technical gap*[197] between the parties, or if the seller claims to be an expert.[198]

[¶ 116.] In the present case, the CLAIMANT appreciated the RESPONDENT's work for being "imperative" in contemporary times. The CLAIMANT requested for a Report to be provided, thereby expressing their intention to rely on their skill and judgment, despite having systems capable of performing the same task.[199] The RESPONDENT was assured that the CLAIMANT was "more than impressed" by their work.[200] Via the email dated 8th April 2022, the RESPONDENT acknowledged being associated with the best extreme tourism businesses and their expertise in maintaining accuracy of data.[201] This indicated a clear technical gap in relation with data usage in extreme tourism and that the CLAIMANT had found the RESPONDENT to be reliable.

[¶ 117.] The RESPONDENT's association with the CLAIMANT prompted initially hesitant investors – both Indian and foreign, to contribute towards the expedition.[202] Therefore, the CLAIMANT placed reasonable reliance on the skill and judgement of the RESPONDENT.

c. RESPONDENT did not provide goods that were required to be fit for its express purpose

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[193] SCHWENZER, *supra* note 119, 885.
[194] *Id*; HUBER, P/MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 138 (München: Sellier 2007).
[195] Case Record, Exhibit C-1, p. 10.
[196] Case Record, Exhibit C-1, p. 10.
[197] Landgericht [Regional Court] Case No. 22 O 38/06 (December 12, 2006) (Germany).
[198] SCHWENZER *supra* note 119, 886; Tobias Krätzschmar-*Öffentlichrechtliche Beschaffenheitsvorgaben und Vertragsmäßigkeit der Ware im UN-Kaufrecht (CISG)* 58 (2008).
[199] Case Record, Exhibit C-1, p. 10.
[200] Case Record, Reply to Notice of Arbitration, p. 24, ¶ 2.
[201] *Id*.
[202] Case Record, Notice of Arbitration, p. 10, ¶ 2.

[¶ 118.] Goods provided have to be fit for its express purpose, explicitly made known to the seller, unless the buyer did not rely or it was unreasonable for them to rely on the seller's skill.[203]

[¶ 119.] In the present case, the RESPONDENT owed a significantly higher degree of care due to their knowledge of the purpose of the contract, and their skill and experience in this field. The RESPONDENT was aware of the importance of accuracy in extreme tourism.[204] The CLAIMANT submits that the Report produced by the RESPONDENT does not hold such high threshold of safety, making the inaccuracies unfit for the purpose of the expedition,[205] even more so for a newcomer in this field.[206]

[¶ 120.] Therefore, the RESPONDENT did not provide goods that were required to be fit for its express purpose.

ii. THE RESPONDENT failed to deliver goods under Art. 35(2)(a)

[¶ 121.] The CLAIMANT submits that the RESPONDENT failed to deliver goods fit for an ordinary purpose under Art. 35(2)(a) because *firstly,* the standards relate to the justifiable expectations of the buyer **[a]**; *secondly* the RESPONDENT failed to provide goods fit for its ordinary purpose **[b]**.

a. Standard relates to justifiable expectations of the buyer

[¶ 122.] The standard for fitness of goods focuses on the justifiable expectations of the buyer, having regard to relevant circumstances including the contract price.[207] This aligns with the international character of the CISG[208] and its *travaux préparatoires*, especially since average quality and merchantability standards are considered highly uncertain and often excluded.[209]

[¶ 123.] In the present case, the CLAIMANT paid a premium price for the data and placed high reliance on the RESPONDENT.[210] The RESPONDENT is a company renowned for its accuracy[211] and has multiple clients worldwide[212], some of which are pursuing similar expeditions in 2025.[213] This clearly indicates that reasonably, the CLAIMANT would have justifiable

[203] CISG, art. 35(2)(b).
[204] Case Record, Exhibit C-2, p. 15.
[205] Case Record, Exhibit R-1, p. 24.
[206] Case Record, Exhibit C-1, p. 10.
[207] Schwenzer *supra* note 119, 883; CLOUT Case No. 720.
[208] CISG, art. 7(1).
[209] CLOUT Case No. 720.
[210] Case Record, Exhibit C-4, p. 17.
[211] Case Record, Reply to Notice of Arbitration, p. 24, ¶ 2.
[212] Case Record, Exhibit C-2, p. 15.
[213] Case Record, Notice of Arbitration, p. 7, ¶ 4.

expectations from the RESPONDENT and could expect accurate data.

b. RESPONDENT failed to provide goods fit for its ordinary purpose

[¶ 124.] In order to fulfil its ordinary purpose, goods have to be fit as per reasonable expectations of the buyer and continuous operation without serious failure.[214] Additionally, the buyer can expect higher quality of products if the seller is a producer of premium products.[215]

[¶ 125.] In the present case, the CLAIMANT reasonably expected a higher accuracy of data from the RESPONDENT due to its high price and the RESPONDENT's reputation as a premium supplier of data.[216] The data supplied clearly failed to meet this expectation, as it portrayed a risky expedition to be 'safe'.[217] However, the data supplied to the CLAIMANT proved to be inaccurate within a month's period. Therefore, the RESPONDENT failed to provide goods fit for its ordinary purpose.

iii. The CLAIMANT was not aware of the defect

[¶ 126.] A seller is exempted from liability[218] if the buyer knew, or could not have been unaware, of the defects at the time of conclusion of the contract.[219] Alternatively, despite the buyer's knowledge of non-conformity, the seller is liable if the buyer still insisted on perfect goods.[220]

[¶ 127.] In the present case, the RESPONDENT had not clarified the scope of DIA.[221] The CLAIMANT was the only company with whom the RESPONDENT got into the arrangement of excluding the DIA.[222] In circumstances where DIA is provided, the RESPONDENT keeps the data on a SharePoint link and solves any defect which arises. It is unreasonable to expect the CLAIMANT to know that there was a defect resolvable by the RESPONDENT, as it was not provided with the DIA. Since the CLAIMANT did not know of the defect at the time of concluding the contract due to the DIA not being provided, the seller is not exempted from liability. Additionally, a warranty that the data will be accurate as on the delivery date[223] does not mean that the data would be inaccurate after it.

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[214] CLOUT Case No. 720.
[215] Kroll *supra* note 135, 505.
[216] Case Record, Reply to Notice of Arbitration, p. 24, ¶ 2.
[217] Case Record, Exhibit C-8, p. 21.
[218] Schwenzer *supra* note 119, 888.
[219] CISG, art. 35(3).
[220] Schwenzer *supra* note 119, 889.
[221] Case Record, Reply to Notice of Arbitration, p.25, ¶ 9.
[222] Case Record, P.O. 2, Q7.
[223] Case Record, Exhibit C-5, p18.

[¶ 128.] Therefore, the CLAIMANT was not aware of the defect.

C. RESPONDENT FAILED ITS DUTY OF CARE

[¶ 129.] The CLAIMANT submits that the RESPONDENT breached their duty of care as *firstly,* the RESPONDENT had a duty to inform the CLAIMANT about its product features **[i]**; *secondly,* the CLAIMANT had no duty to inquire about the RESPONDENT's Standard terms **[ii]**.

i. RESPONDENT failed its duty to inform the CLAIMANT about its product features

[¶ 130.] A seller must inform the buyer if goods are unfit for the particular purpose, regardless of an explicit inquiry[224], especially if there is a reliance placed upon the seller's judgement and skill.[225] Sellers have a well-recognized duty to inform the buyer about the non-conformity in goods. [226]

[¶ 131.] In the present case, the RESPONDENT knew the exact purpose for which the data would be used. Further, it had enough expertise to know if the good delivered would be unfit for the purpose of the contract.[227] Knowing the high level of accuracy required and the fluctuations which could happen over a period of 1.5 years[228], the RESPONDENT had a duty to inform the CLAIMANT that the lack of DIA could frustrate the purpose of the contract. Data as on 27th December 2022 would be obsolete in June 2024, especially in terms of sea-ice data, considering the rising temperature in the region.[229]

[¶ 132.] Therefore, the RESPONDENT failed its duty to inform the CLAIMANT about its product features.

ii. The CLAIMANT had no duty to inquire about RESPONDENT's General Terms

[¶ 133.] General terms and conditions in a contract only become a part of the offer, if it is attached or is at the disposal of the other party. Expecting the recipient to inquire delays the formation of the contract, thereby going against *good faith* in international trade[230] and parties' duty to cooperate is unreasonable.[231] Buyer can expect the goods to be fit for ordinary use with

[224] CLOUT Case No. 2461.
[225] KARL H. NEUMAYER, CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES, (1993).
[226] CLOUT Case No. 285; Landgericht [Regional Court] Case No. 39 O 75/09 KfH (November 11, 2009) (Germany).
[227] Case Record, Exhibit C-1, p.10.
[228] Case Record, Notice for Arbitration, p.7, ¶ 7.
[229] Case Record, Exhibit C-1, p.12.
[230] CISG, art. 7(1).
[231] CLOUT Case No. 445.

regard to qualities outside the contract.[232]

[¶ 134.] In the present case, Terms and Conditions of the DIA were not at the disposal of the CLAIMANT Consequently, no legal obligations pursuant to inquiry of the DIA can arise. The CLAIMANT can rightfully expect to receive data which would be fit for ordinary use despite not buying the DIA. Inaccurate data would lead to the frustration of any purpose. Additionally, the RESPONDENT cannot rely on an acceptable margin of error without furnishing the same at the time of conclusion of contract. Moreover, the RESPONDENT failed to inform the CLAIMANT of the Decryption Key and Self-Destruction Mechanism despite the CLAIMANT inquiring about the same. [233]

[¶ 135.] Therefore, the CLAIMANT had no duty to inquire about the RESPONDENT's general terms.

D. THE CLAIMANT HAS COMPLIED WITH THE REQUIREMENTS OF ART. 38 AND 39 CISG

[¶ 136.] The CLAIMANT submits that it had complied with the requirements of Art. 38 and 39 as *firstly,* the CLAIMANT has examined goods in a reasonable period of time **[i]**; *secondly,* the CLAIMANT has sent a notice of non-conformity **[ii]**.

i. CLAIMANT has examined the goods in a reasonable period of time

[¶ 137.] The buyer has to examine the goods within *as short a period of time as practicable*.[234] The circumstances of the case such as the buyer's business situation, the features of the good[235] and its complexities are determining factors.[236] Two-three weeks[237] or even a month fulfils the requirements set out.[238]

[¶ 138.] In the present case, the complexity of checking data accuracy has to be taken into consideration. The data being unreadable for 7 days was an additional impediment to examine

[232] RAPHAEL KOCH, VERTRAGSMÄSSIGKEIT DER WARE BEI DIVERGENZ ÖFFENTLICH-RECHTLICHER VORGABEN: EINE UNTERSUCHUNG UNTER BESONDERER BERÜCKSICHTIGUNG DER SYSTEMATIK DES ART. 35 CISG 233-235 (IHR 2009).
[233] Case Record, P.O. 2, Q.8.
[234] CISG, art. 38(1).
[235] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 38, ¶ 13, 178; CLOUT Case No. 192; Tribunale [District Court] Case No. 45/96 January 31, 1996; CLOUT Case No. 81.
[236] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 38, ¶ 14, 178; Chicago Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp.2d 702 (2004); CLOUT Case No. 892.
[237] CLOUT Case No. 894.
[238] CLOUT Case No. 284; CLOUT case No. 484.

the data.[239] The data was still examined in a period of around 3 weeks.[240]

[¶ 139.] Therefore, the CLAIMANT submits that it has examined the goods in a reasonable period of time.

ii. CLAIMANT has sent a notice of non-conformity

[¶ 140.] A notice of non-conformity of goods can be filed in the form of a claim, fulfilling the requirements of Art. 39 of CISG.[241] Such notice has to be provided within two years.[242] Additionally, it should be precise, [243] indicating both the nature and extent of the lack of conformity.[244]

[¶ 141.] In the present case, the claim in form of a Notice for Arbitration[245] serves as the notice for non-conformity of good. The notice specifies the extent of the inaccuracy being limited to two fields. The BS Report exhibited also provides the specification of the inaccuracy. This has been provided in less than two years.

[¶ 142.] Therefore, the CLAIMANT has sent a notice of non-conformity.

[239] Case Record, P.O. 2, Q.8.
[240] Case Record, P.O. 2, Q.44.
[241] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods, art. 39, ¶ 5.
[242] CISG, art. 39; Tribunal De Commerce [Commercial Court] Case No. 97 009265 (January 19, 1998) (France).
[243] Oberlandesgericht [Court of Appeal] Case No. 1 R 68/05h (June 1, 2005) (Austria); Oberlandesgericht [Court of Appeal] Case No. 1 R 68/05h (June 1, 2005) (Austria); Landgericht [Regional Court] Case No. 8 O 49/02 (July 2, 2022 (Germany).
[244] CLOUT Case No. 344; Oberlandesgericht [Court of Appeal] Case No. 1 U 486/07 38/06 (November 21, 2007) (Germany).
[245] Case Record, Notice of Arbitration, p.5.

PRAYER

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

1. The tribunal has jurisdiction to proceed without the 7.5% pre-arbitral deposit.
2. The BranStark report qualifies as an expert report.
3. The Data Supply Agreement is governed by the CISG.
4. The data supplied by the RESPONDENT is defective and non-conforming under the CISG.

Furthermore, the tribunal should order:

5. That no 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: 29th February, 2024 Sd/-

Place: Bhopal Counsel for CLAIMANT