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THE 18TH LAWASIA INTERNATIONAL MOOT COMPETITION

ASIAN INTERNATIONAL ARBITRATION CENTRE

2023

BETWEEN

REPUBLIC OF COLTANA

(CLAIMANT)

AND

MAJESTIC KINGDOM OF RODOSTAN

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

The parties, COLTANA, the CLAIMANT and RADOSTAN, the RESPONDENT, have agreed to the following: (1) to submit any dispute arising from or in connection with Coltana-Radostan Counter Terrorism Agreement ["**CCTA**"] before an arbitral forum ["**arbitral tribunal**"] in Bangalore, India, (2) the law governing the procedure of the arbitration shall be Asian International Arbitration Centre Rules 2021 ["**AIAC rules**"], and (3) the substantive law of the CCTA shall be Indian Law.

QUESTIONS PRESENTED

A. Whether Olaf, an AI-powered intelligent lawyer can be removed as the arbitrator for lack of impartiality?
   i. Whether Olaf's functionality suggests a lack of impartiality?
   ii. Whether Olaf has a legitimate interest in the arbitration proceeding?

B. Whether the Arbitral Tribunal should stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court?
   i. Does Anuwat's status in the ICC proceeding affect his availability for the arbitral process?
   ii. Whether the criminal investigation impacts the arbitration proceedings?
   iii. Whether the stay affects the procedural efficiency of the arbitration proceedings?

C. . Whether the CCTA is void?
   i. Whether the performance of the CCTA is tainted with illegality?
   ii. Whether the CCTA is opposed to public policy?
   iii. Whether the CCTA is forbidden by Law?
   iv. Whether the object of the CCTA is lawful?

D. Whether the termination of the CCTA by Coltana is valid?
   i. Whether accessibility of the OnionRing is the essence of the CCTA?
   ii. Was there a failure of performance since the terms were not followed?
   iii. Whether failure of performance amounts to breach of contract?
   iv. Whether the termination followed the due course of law?

STATEMENT OF FACTS

- Republic of COLTANA [hereinafter "**CLAIMANT**"] and the Majestic Kingdom of RADOSTAN [hereinafter "**RESPONDENT**"] are the '**PARTIES'** to this arbitration.
- CLAIMANT is located on the coast of the Indian Ocean. It is home to some of the leading scholars, intellectuals, and experts in science, economics, literature, and law.
- RESPONDENT is located in the heart of South Asia. It is home to some of the leading tech and internet companies, making it the global leader in the field of technology and innovation. Currently, RESPONDENT's subsidiary Ini-Tech Inc ["**Ini-Tech**"] under the control of its Ministry of Defence provides services to CLAIMANT for the OnionRing software.
- The Coltana-Radostan Memorandum of Understanding ["**CRMOU**"] was signed between the CLAIMANT and the RESPONDENT as a consequence of the Battle of Borbana, to make peace between both the countries. Herein, the CLAIMANT provided assistance in rebuilding the Glass Palace and offered "intellectual collaboration" by connecting RADOSTAN with some of the brightest minds in COLTANA. In return, RESPONDENT would invest and sell arms to COLTANA.

July 2020 — Project Olaf, initiated in 2015 to create the world's first super-intelligent and independent AI lawyer and judge was completed. Olaf was under the ownership and management of Oracle Corporation ["**Oracle**"], a private entity in RADOSTAN. COLTANA had also assisted in designing the AI system, collecting, and legal training of Olaf through the CRMOU.

15 September 2021 — A devastating explosion occurred during the Annual Sapura Bay Marathon. Two homemade bombs detonated, killing 24 people

and injuring hundreds. CLAIMANT's government websites were also hacked, which took several weeks to restore to normalcy.

31 September 2021 A government-to-government agreement called the CCTA was signed between the CLAIMANT and the RESPONDENT. The CCTA emphasizes on the need for cooperation between the two countries to combat terrorism and other transnational threats.

14 October 2021 The OnionRing installation was completed, and the software commenced full operation.

15 October 2021 Anuwat, the CEO of Ini-Tech, acting as a key-programmer of the OnionRing software explained that all the information and the data collected by the software are kept confidential and can only be accessed by the government of COLTANA.

16 December 2021 After COLTANA's general elections, the Democratic Progressive Party ["**DPP**"] formed a simple majority government. A few weeks later, a former employee of Ini-Tech released a one-page statement claiming that OnionRing had gained access to the personal data of thousands of electorates in COLTANA through Ini-Tech's database, further used to promote and direct advertisements and recommendations supportive of the Order of the Black Hand ["**OBH**"] party to the voters.

2 February 2022 CLAIMANT's Bitcoin Reserves, approximately valued at USD 300 million in the Coltana National Bank were stolen by a group of highly intelligent and anonymous hackers.

7 March 2022	Department of Justice of the United States of Kola Lumpo ["**DOJ**"] announced that Anuwat, the key programmer of OnionRing, has been arrested in their territory following the issuance of a warrant of arrest by the International Criminal Court ["**ICC**"] for an alleged commission of cyber war crimes in Ulavu. Further, on his arrival at the ICC, he falsely informed the media that the OnionRing had detected significant amount of bitcoin expenditure within COLTANA involving the bank account of senior DPP politicians. CLAIMANT responded that Anuwat's statement was false and in any event illegal as data obtained from OnionRing can only be accessed by the CLAIMANT.

❖ **Termination of the CCTA.**

President Lalan of COLTANA, issued a statement stating that it will cease all negotiations with RADOSTAN to amend Article 4(iii) of the CCTA. He declared that CLAIMANT's obligation to make payment for the services under CCTA has ceased due to its illegality, and CLAIMANT will proceed to terminate the services of Ini-Tech but will retain the OnionRing for further investigation.

❖ **Initiation of AIAC Proceedings.**

Article 8 of the CCTA was invoked to initiate arbitration proceedings against Radostan. Olaf was nominated as the RESPONDENT-appointed arbitrator and the CLAIMANT-appointed arbitrator then proceeded to appoint the presiding arbitrator. After the Arbitral Tribunal constituted, CLAIMANT issued a notice under Rule 11 read together with Rules 10 and 12 of the AIAC Rules 2021 to request the removal of Olaf as a member of the Arbitral Tribunal on violating the requirements of independence and impartiality. Furthermore, RESPONDENT had

requested for a stay of the AIAC proceedings, citing the reason for Anuwat's unavailability, despite being sufficient documents available for the determination of issues at hand.

SUMMARY OF PLEADINGS

I. OLAF, AN AI-POWERED INTELLIGENT LAWYER, SHOULD BE REMOVED AS THE ARBITRATOR FOR LACK OF IMPARTIALITY.

1. Olaf, an AI-powered intelligent lawyer, should be removed as the arbitrator as Olaf's functionality suggests a lack of impartiality since it depends on data that can be biased, tampered or customized. Further, overall, Olaf does not meet both the high and low criteria for doubts over impartiality and does not satisfy the test of impartiality. Furthermore, in this case, Olaf exercises a legitimate interest in the arbitration proceeding and violates the principle of '*nemo judex in causa sua*' due to its financial interest in the arbitration through its creator.

II. THE ARBITRAL TRIBUNAL SHOULD NOT STAY THE PRESENT PROCEEDINGS UNTIL THE CONCLUSION OF ANUWAT'S TRIAL AT THE INTERNATIONAL CRIMINAL COURT.

2. The arbitral tribunal should not stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court primarily because in his absence, the documentary evidence is sufficient and a stay is thereby, not necessitated. In addition, the criminal investigation does not impact the arbitration proceedings because the proceedings have disparate facts, parties, causes of actions and preliminary procedural aspects are not contended. Further, a stay must not affect the procedural efficiency, thereby, giving rise to prioritising speedy proceedings in case of doubt.

III. THE CCTA IS VOID.

3. The CCTA is void since, the conditions produced by Section 23 of the ICA are satisfied, the conditions being, *first*, the performance of the CCTA is tainted with illegality (due to

violation of the statutory provisions, i.e., the Right to Privacy and the provisions of the Digital Personal Data Protection Act, 2023). *Second*, the CCTA is opposed to public policy. *Third*, the CCTA is forbidden by Law (due to violation of the aforementioned legislations) and; *Fourth*, the object of the CCTA is unlawful.

IV. EVEN IF THE CCTA IS NOT VOID, THE TERMINATION BY COLTANA IS VALID.

4. The termination of the agreement is valid as the accessibility of OnionRing software is the essence of the CCTA. Moreover, there was a failure of performance since the terms of the agreement were not followed, which goes against the root of the contract. The failure of performance amounts to a breach of the agreement and the termination followed the due course of law.

PLEADINGS

I. OLAF, AN AI-POWERED INTELLIGENT LAWYER, SHOULD BE REMOVED AS THE ARBITRATOR FOR LACK OF IMPARTIALITY.

5. Pursuant to Rule 11 (1) of the AIAC Rules, an arbitrator may be challenged if his impartiality is under scrutiny.[1]

6. In this case, Olaf, an AI-powered lawyer, is unsuitable for the role of an arbitrator due to concerns of impartiality. As an arbitrator, complete impartiality is required[2], and using data alone can raise doubts about Olaf's ability to be impartial.

7. The CLAIMANT submits that *first*, Olaf's functionality suggests a lack of impartiality **(A.)**, and *second*, Olaf has a legitimate interest in the arbitration proceeding **(B.)**.

A. OLAF'S FUNCTIONALITY SUGGESTS LACK OF IMPARTIALITY.

8. Olaf's FUNCTIONALITY gives reasons to doubt its impartiality on three grounds. *First*, Olaf depends on data that can be biased, tampered or customised ***(i.)***. *Second*, overall, the circumstances around Olaf meet both the high and the low criteria for doubts over impartiality ***(ii.)*** and *third*, Olaf does not satisfy the requirements of impartiality ***(iii.)***.

i. Olaf depends on data that can be biased, tampered or customised making it partial.

[1] Rule 11.1, AIAC Rules.

[2] Rule 10.1, AIAC Rules.

9. Arbitrators must maintain an impartial stance towards all parties involved and resist external influences such as public pressure, fear of criticism, or personal gain that may sway their decision. They should avoid any actions or comments suggesting favouritism towards or against any party.[3]

10. Machine learning requires data mining in three stages. The first stage has the aspect of defining the output variable and labelling its constituent class. During this stage, the programmer can define the output as ambiguous, *for instance,* how the output variable makes some groups "*advantageous*" [4], In the second stage, the collecting and labelling of the data has a risk of bias. In the third stage, selecting the input variable occurs, and as a consequence, a bias occurs when it involves intentionally picking some variable to favour one.[5] AI predictions can be unreliable due to unknown and unobserved factors involved in decision-making and past associations may influence these unknown factors.[6] In machine learning, issues arise due to problems in data which must be identified and rectified.[7] Moreover, AI algorithms can be biased based on the data used, even if not intentionally tampered with.[8] Potential data bias can result in a biased judgement such as, when utilising a robot arbitrator.[9]

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[3] AAA, Rule D, Cannon 1, Code Of Ethics For Arbitrators.

[4] Selbst, Solon, and Andrew D. Selbst. "Big Data's Disparate Impact, 104 CALIF. L. REV. 671, 677-87 (2016." *California Law Review*, vol. 104.

[5] *Id*.

[6] Cabrera Colorado, Orlando Federico . "The Future of International Arbitration in the Age of Artificial Intelligence." *In Maxi Scherer (Ed), Journal of International Arbitration*, vol. 40, no. 3, May 2023, pp. 301–342.

[7] "AI in Software Testing: Rule-Based Testing vs. Learning Systems." *Tricentis*, www.tricentis.com/learn/artificial-intelligence-software-testing/ai-approaches-rule-based-testing-vs-learning.

[8] Burgess, Matt. "UK Police Are Using AI to Inform Custodial Decisions – but It Could Be Discriminating against the Poor." *Wired UK*, 2018, www.wired.co.uk/article/police-ai-uk-durham-hart-checkpoint-algorithm-edit.

[9] Collins, Barry. "AI Handing out Rough Justice in the U.K." *Forbes*, 29 Mar. 2022, www.forbes.com/sites/barrycollins/2022/03/29/ai-handing-out-rough-justice-in-the-uk/.

11. Data bias is a bigger issue than human arbitrator bias as, *first*, Machine learning programs observe data and identify patterns, correlations, and rules. *Second*, the program judges its performance based on set objectives;[10] *third*, the judgments are crafted to justify the findings; [11]and *fourth*, human arbitrator bias can be inferred and challenged. [12] Moreover, Artificial Narrow Intelligence is limited because it can only perform the specific task it was designed for and cannot adapt to new tasks. In contrast, Artificial General Intelligence represents the future phase of artificial intelligence. It can possess human-like capabilities and differentiate between biased and unbiased data rather than simply analysing it and providing an output. [13]
12. Intellectual Corruption is already prevalent in Arbitration, where the arbitrator's opinion is tainted with prejudice; in the case of AI, biased data can be termed as intellectual corruption.[14] This aligns with Rule 10.2 of the AIAC rules, which requires disclosure of circumstances likely to raise justifiable doubts about impartiality or independence.[15]
13. Presently, in this case, Olaf, in the past, made statements and publications in favour of RADOSTAN and its ally countries. This suggests a form of bias in the algorithm or the

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[10] Alpaydin, Ethem . *Introduction to Machine Learning*. Cambridge, Massachusetts, The Mit Press, 2014; Lehr, David, and Paul Ohm. "Playing with the Data: What Legal Scholars Should Learn about Machine Learning." *University of California, Davis Law Review*, vol. 51, no. 653; David. *Learning, the Cambridge Handbook of Artificial Intelligence*. Cambridge, United Kingdom, Cambridge University Press, 2015.

[11] Scherer, Maxi. "Artificial Intelligence and Legal Decision-Making: The Wide Open?" *Journal of International Arbitration*, vol. 36, no. Issue 5, 1 Sept. 2019, pp. 539–573, https://doi.org/10.54648/joia2019028.

[12] *Id*.

[13] Ben, *Human-level artificial general intelligence and the possibility of a technological*, 171 (2007) 1161–1173; Remus, Dana, and Frank S. Levy. "Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law." *SSRN Electronic Journal*, 2015, papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092&rec=1&srcabs=2436937&alg=1&pos=10; Somers, Meredith. "Emotion AI, Explained | MIT Sloan." *MIT Sloan*, 8 Mar. 2019, mitsloan.mit.edu/ideas-made-to-matter/emotion-ai-explained.

[14] Karen Gordon, Speaker at The International Arbitration Conference: Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto, 11 INT'L COUNCIL COM. ARB. CONGRESS SERIES, 2003, at 288.

[15] Rule 10.2, AIAC Rules.

objective in favour of RADOSTAN, even if it is unintentional. This bias undermines the fundamental principle of impartiality of arbitrators and, therefore, should be avoided. Olaf used to train on the vast amount of data collected, analysing the data presented to it which has possibility of having bias.[16] Additionally, Olaf was made to create an independent AI lawyer and judge[17], suggesting that Olaf is an ANI.

14. Considering the above, the tribunal should find that Olaf must be removed as an arbitrator on the risk that its algorithm and data can be customised or attacked.

ii. Overall, the circumstances around Olaf meet both the high and low criteria for doubts over impartiality.

15. The standard of impartiality under Article 17 (3) of Model Law[18] is similar to Rule 11 (1) of the AIAC Rules.[19] Article 17(3) sets a high standard for arbitrator impartiality, allowing challenges not only in cases of blatant bias but also in situations where there are "*justifiable doubts*" about their independence.[20] This rule is more comprehensive than the "*appearance test*", as doubts can be justified without a blatant display of partiality or dependence.[21]The appearance rule mandates that arbitrators disclose any actions, affiliations, or relationships that could create a perception of bias, even if they are genuinely unbiased.[22]

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[16] *Compromis* ¶11.

[17] *Compromis* ¶11.

[18] Rule 17 Model Law; *Judgment of 19 December 2001*, 2003 SchiedsVZ 134, 136 (Oberlandesgericht Naumburg); *Aravali Power Co. Pvt Ltd v. MS Era Infra Eng'g Ltd*, [2017] Civil Appeal Nos. 12627-12628 of 2017, ¶19; *Rizhao Steel Holding Group Co. v. Koolan Iron Ore Pty Ltd*, [2012] 262 FLR 1, ¶186.

[19] *Supra* 1.

[20] *Supra* 1.

[21] *Supra* 3.

[22] Cameron, Heather . "Blind Justice and Just Arbitrators: Understanding the Federal Arbitration Act's Evident Partiality Standard,." *Fordham L. Rev.* , vol. 89, no. 5, 2021.

16. The reasonable apprehension of bias is a higher standard of impartiality than the appearance rule. It requires a fair-minded and informed observation, concluding the real possibility of bias.[23] It has been recognised and developed to include the circumstances should such an established relationship with the party.[24]

17. The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence, such as there being an identity between the party and the arbitrator or if an arbitrator is a legal representative etc.[25] Similarly, a person cannot be appointed as an arbitrator in a situation where the arbitrator advices or represents the party or its affiliate.[26] Before accepting the role of an arbitrator, *first*, arbitrators must disclose any financial or personal interests that could impact their impartiality, and *second*, any relationships with parties involved or witnesses. *Third*, prior knowledge of the dispute must also be disclosed.[27]

18. Presently, *first,* the arbitrator's relationship with the RESPONDENT would lead a fair-minded and informed observer to hold an objective perception that there was a real possibility and reasonable suspicion that the arbitrator could be biased towards the RESPONDENT. *Second*, it is undisputed that there is a pre-existing relationship between RESPONDENT and Olaf. In this case, there are three reasons that suggests the possibility of bias. *First*, Olaf has acted on numerous occasions as a counsel of several governmental entities in RADOSTAN.[28] *Second*, RADOSTAN's Prime Minister Yodwicha is one of the Independent Non-Executive

[23] *Porter v Magill* [2002] 1 All ER 465 ¶ 507; *Mennonite Board in East Africa v Simon Saili Malonza & Another* [2021] EKL.

[24] *Aroma Canada and Halva Investments v. Aroma Franchise, Aroma USA and Others* 2023 ONSC 1827.

[25] IBA Guidelines on Conflict of Interest, 1.1 Non-Waivable Red List.

[26] Schedule 7, Indian Arbitration and Conciliation Act, 1996.

[27] AAA, Code Of Ethics For Arbitrators, Art. 6

[28] *Compromis*, ¶ 12.

Directors of Oracle Corporation.[29] *Third*, the Yodwicha had a major involvement in the creation of Olaf.[30]

19. Considering the above, Olaf does not satisfy the lower threshold set by the Appearance Rule as well as the high threshold requirement produced by the AIAC rules.

20. Therefore, the tribunal should rule that Olaf should be removed for lack of impartiality.

iii. Olaf does not satisfy the criteria of impartiality.

21. Pursuant to Rule 11 (1), an arbitrator can be challenged if there are reasonable doubts over its impartiality.[31]According to the Code of Ethics of the IBA, dependence occurs when an arbitrator has a relationship with one of the parties involved in the arbitration proceedings or has a connection with someone closely associated with one of the parties.[32] Further, justifiable doubts must be present in the mind of any party to challenge the arbitrator's appointment.[33]

[29] *Corrections and Clarifications to the Moot Problem* ¶ 4.

[30] *Compromis* ¶ 11.

[31] *Supra* 1; *Sea Containers Ltd v. ICT Pty Ltd*, [2002] NSWCA 84, ¶11 (N.S.W. Ct. App.); *Gascor v. Ellicott*, [1997] 1 VR 332, 340 (Victoria Ct. App.); *Judgment of 30 June 2011*, *Sociedad de Valores, SA v. Banco Santander, SA*, Case No. 3/2009 (Madrid Audiencia Provincial).

[32] IBA Rules of Ethics for International Arbitrators, 1987.

[33] IBA Guidelines on Conflicts of Interest in International Arbitration part I(3)(a); LIAC Arbitration Rules, Art 5.4.

22. The test of impartiality [34] considers various factual circumstances in arbitration settings. By contrast, impartiality concerns the proceedings, and in arbitration, various events can lead to challenges of impartiality violations.[35]
23. In the present case, Olaf is not impartial and has a pre-defined relationship with the RESPONDENT, as shown above, which generates justifiable doubt over its impartiality.
24. Considering the above, it does not satisfy the criteria of impartiality laid in Rule 11(1) of the AIAC Rules.
25. Therefore, Olaf can be removed on the ground of impartiality.

B. OLAF HAS A LEGITIMATE INTEREST IN THE ARBITRATION PROCEEDING AND VIOLATES NEMO JUDEX IN CAUSA SUA.

26. IBA Non-Waivable Red List Clause 1.3 includes an arbitrator having significant financial or personal interest. The list also includes '*nemo judex in causa sua*'. An arbitrator who does not qualify the criteria can only sit on the panel if the parties agree to the same.[36]
27. '*Nemo judex in causa sua*' denotes that one cannot hear a cause, they have a vested interest in.[37] It is a principle of natural justice[38] and is also widely accepted in the process of

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[34] Tay, Yu-Jin. *Reflections on the Selection of Arbitrators in International Arbitration: THE COMING of a NEW AGE?; Mallett, Daisy* . "Party Instigated Arbitrator Challenges: A Practical Guide." *Michael O'Reilly (Ed),: The International Journal of Arbitration, Mediation and Dispute Management Sweet & Maxwell 2011,* vol. 77, no. 1; Brekoulakis, Stavros,. *"Chapter 14: Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making.";* Cole, Tony Cole. *The Roles of Psychology in International Arbitration. 2017.*

[35] Eidenmueller, Horst G. M., and Faidon Varesis. "What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator." *SSRN Electronic Journal*, 2020, https://doi.org/10.2139/ssrn.3629145.

[36] IBA Guidelines on Conflict of Interest, 1.3, Non- Waivable Red List.

[37] Chauhan, V.S. "Reasoned Decision: A Principle of Natural Justice." *JOURNAL of the INDIAN LAW INSTITUTE* , vol. 37, no. 1, pp. 92–104.

[38] Chatterji, A. "NATURAL JUSTICE and REASONED DECISIONS." *JOURNAL of the INDIAN LAW INSTITUTE* , vol. 10, no. 2, pp. 241–258.

Arbitration.[39] Further, this maxim applies when arbitrators have a financial or legitimate interest in the proceeding.[40]

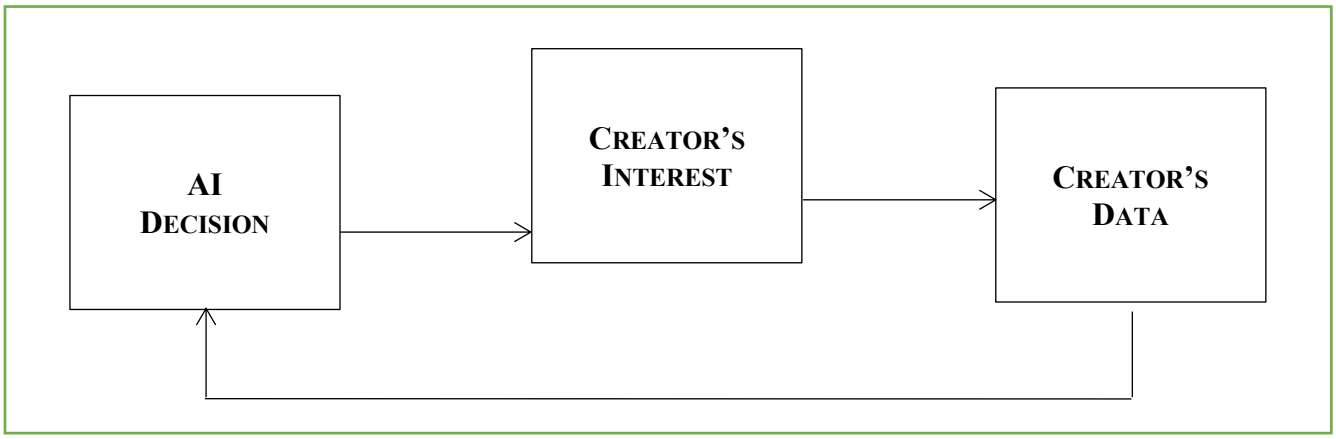
28. *First*, as shown above, AI bots are controlled by its creator. Here, the creator is a private entity from RADOSTAN, whose Prime Minister is an independent non-executive director, showing the involvement of the RESPONDENT in Oracle Corporation.[41] Therefore, Olaf can potentially, through its creator, have an interest in the matter, violating the principle of '*nemo judex in causa sua*'. Further, it does not possess an affectional component as it was created and is controlled by humans. Any action or decision it makes, results from the underlying programming and data they were trained on.
29. *Second*, using Olaf as an arbitrator presents a potential danger as it grants excessive power to the programmers who create the algorithms upon which the program bases its decisions. Essentially, the individual who determines the algorithms also determines the case's outcome. To phrase it differently, the possibility of human control over the computer would pose significant concerns regarding impartiality.[42]
30. *Third*, As shown above, the relationship between the RESPONDENT and the entity controlling Olaf along with control that COLTANA possesses with regards to Olaf suggests that RESPONDENT'S financial interest in the form of payment can be said to be of Olaf as it has no consciousness of his own.
31. The following graphic illustrates the connection between Olaf and the entity controlling Olaf:

[39] Hess, and Robert Uwe. "Nemo Iudex in Sua Causa and the Challenge Procedure under the Model Law." *New York University Journal of International Law and Politics*, vol. 50.

[40] *Id.*

[41] *Corrections and Clarifications to the Moot Problem* ¶ 4.

[42] Ahdab , Jalal El , and Miranda Mako. "Arbitrage International versus Intelligence Artificielle." *Revue Droit & Affaires* , 2018.



Therefore, Olaf should be removed due to lack of impartiality.

II. THE ARBITRAL TRIBUNAL SHOULD NOT STAY THE PRESENT PROCEEDINGS UNTIL THE CONCLUSION OF ANUWAT'S TRIAL AT THE INTERNATIONAL CRIMINAL COURT.

32. The arbitral tribunal holds a discretionary power to stay an arbitral proceeding in lieu of a criminal proceeding.[43] Furthermore, Rule 20.1 of the AIAC rules, the *lex arbitri*, states that an Arbitral Tribunal possesses the power to decide on its jurisdiction,[44] including its power to rule on a plea demanding a stay of arbitration proceedings.[45] Similarly, Section 16 of the Arbitration and Conciliation Act, 1996, the mandatory law, gives the power to the arbitral tribunal to decide on its jurisdiction.[46]

33. Also, it may be noted that an arbitral tribunal does not have an *ex officio* duty to stay the arbitration proceedings, and the supremacy of parties' will and agreement is intrinsic to the

[43] *Fund Ltd v. a . Group Ltd, Swiss Federal Tribunal*, Case No. 4P_168/2006, 19 February 2007.

[44] Rule 20.1, AIAC Rules.

[45] Alessandra Maria, Corona Henriques , and Tan Charis. "Wiki Note: Stay of Proceedings." *Jusmundi.com*, jusmundi.com/en/document/publication/en-stay-of-proceedings. .

[46] Section 16, Arbitration and Conciliation Act, 1996.

functioning of arbitration.[47] Further, there exists a presumption against the grant of stay,[48] the arbitral tribunal has the power to stay proceedings if it deems it necessary to uphold the principle of expedition and to ensure an enforceable award. This discretionary power extends to procedural matters and is subject to the agreement of the parties involved.[49]

34. The CLAIMANT submits that the arbitral tribunal should not stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court primarily because *first*, in the absence of Anuwat in the arbitral process, due to his status in the ICC proceeding, the documentary evidence is sufficient and a stay is thereby not necessitated **(A.)**, *second*, the criminal investigation does not impact the arbitration proceedings due to which a stay is not required **(B.)**, and *third*, a stay must not affect the procedural efficiency, thereby giving rise to prioritising speedy proceedings in case of doubt **(C.)**.

A. IN THE ABSENCE OF ANUWAT IN THE ARBITRAL PROCESS DUE TO HIS STATUS IN THE ICC PROCEEDING, THE DOCUMENTARY EVIDENCE IS SUFFICIENT AND A STAY IS THEREBY, NOT NECESSITATED.

35. Anuwat is a key witness in the arbitral proceedings.[50] The CLAIMANT submits that his availability for the proceedings will depend on, first, the status and the stage of the criminal proceeding, which suggests that Anuwat's trial will not conclude shortly, making him unavailable ***(i.)***. *Second*, the extent to which the arbitral tribunal can reasonably determine the likely timing of the decision in the criminal proceedings due to uncertainty about the

[47] Söderlund, Christer. "*Lis Pendens, Res Judicata* and the Issue of Parallel Judicial Proceedings." *Journal of International Arbitration*, vol. 22, no. Issue 4, 1 Aug. 2005, pp. 301–322, https://doi.org/10.54648/joia2005017.

[48] *The London Steamship Owners Mutual Insurance Association Ltd V.The Kingdom of Spain and the French State* (2015) EWCA Civ 333, Para. 81.

[49] Renato Nazzini, 'Chapter 25: Parallel Proceedings before the Tribunal and the Courts/Competition Authorities', in Gordon Blanke and Phillip Landolt (eds), EU and US Antitrust Arbitration: A Handbook for Practitioners, (© Kluwer Law International; Kluwer Law International 2011), pp. 881 – 916.

[50] *Compromis* ¶ 43.

timing **(*ii.*)**. *Third*, Anuwat does not impact the legitimacy of the arbitration proceedings **(*iii.*)**.

i. The status and the current stage of the criminal proceeding suggests that Anuwat's trial will not conclude shortly, making him unavailable.

36. The status and the stage of the criminal proceedings are essential objective criteria for determining whether a stay is necessitated.[51]

37. Pursuant to Article 58 of the Rome Statue, the arrest warrant is issued when the pre-trial chamber is satisfied that there is reasonable ground to believe that the crime done by the accused falls within the jurisdiction of the court.[52] Further, the warrant is an assurance of a person's appearance at trial since arrest if necessary to ensure presence at trial.[53] Additionally, it ensures that the person does not endanger the investigation.[54]

38. Further, according to Article 63 of the Rome Statue, the accused must be present during the trial.[55] Additionally, as per Article 62 of the Rome Statue, the place of the trial is the seat of the court, that is, Hague, Netherlands.[56] Moreover, the accused is given public hearing.[57]

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[51] Naud, Théobald. *'International Commercial Arbitration and Parallel Criminal Proceedings in Carlos González-Bueno (Ed), 40 under 40 International Arbitration.* 2018.

[52] Art. 58, Rome Statue.

[53] *Id*.

[54] *Supra* 52.

[55] Art. 63, Rome Statue.

[56] Art. 62, Rome Statue.

[57] Art. 67, Rome Statue.

39. Presently, Anuwat is arrested following the issuance of a warrant and is at the trial chamber.[58] The trial will take place at the Hague in form of a public hearing, for which his presence is needed. There was reasonable ground for his arrest as the pretrial chamber was satisfied, along with the grave nature of the alleged crime.[59]

40. Considering the above, the status and proceeding stage requires his presence at the Hague.

ii. The arbitral tribunal cannot reasonably determine the likely timing of the decision due to uncertainty about the timing.

41. In cases of uncertainty about the timeline of criminal proceedings, the arbitral tribunal should not stay the arbitration process.[60] If, despite uncertainty, the stay is granted, there would be a miscarriage of justice.[61] Further, arbitrators must consider the probable length of criminal investigations and the potential benefits of conducting such investigations.[62]

42. ICC trials may prolong due to unforeseeable circumstances, *for instance,* armed conflict or a hostile political environment.[63] *For instance*, In *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, due to Mali's security situation, there was a postponement of the confirmation hearing from September 2018 to July 2021.[64]

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[58] *Corrections and Clarifications to the Moot Problem* ¶ 12.

[59] *Id*.

[60] *Final Award in ICC Case N° 11098 (2003), "Chronique de Jurisprudence Arbitrale de La CCI", (Les Cahiers de l'Arbitrage, Gazette Du Palais* (2009-2),July 2009.

[61] *Supra* 45.

[62] Besson, Sébastien Besson. *Chapter 6: Corruption and Arbitration', in Domitille Baizeau and Richard Kreindler (Eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 13*. (© Kluwer Law International; International Chamber of Commerce (ICC), 2015, pp. 103–113.

[63] Gumpert, Benjamin. "Part I: What Can Be Done about the Length of Proceedings at the ICC?" EJIL: Talk!, 15 Nov. 2019, www.ejiltalk.org/part-i-what-can-be-done-about-the-length-of-proceedings-at-the-icc/#:~:text=Another%20reason%20why%20proceedings%20at.

[64] *The Prosecutor v. al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud N° ICC-01/12-01/18.*

43. The Rome Statute provides a comprehensive safeguard for the accused's procedural rights. Article 67 of the Statute outlines a robust system of protection that enables accused individuals to investigate their case and challenge the prosecution's case effectively.[65] It is common for the accused persons to request extensions or postponements of time limits in the proceedings. *For instance*, the significant amount of disclosure received in the *Prosecutor v. Bosco Ntaganda* just before the three-month deadline led to the Trial Chamber granting the defence's request for a three-month delay at the start of the trial.[66]

44. Presently, there is a politically hostile environment, which can further be aggravated.[67] Accordingly, the trial at ICC can be delayed, and there can be problems in gathering of evidence due to the hostile environment. Moreover, aside from the factors mentioned above, there can be additional factors contributing to delays in ICC trials. Considering the above, there is no certainty about the ICC trial if the tribunal grants a stay, which would lead to a miscarriage of justice.

45. Therefore, the arbitral tribunal should not stay the arbitral proceeding until the conclusion of ICC proceedings.

iii. The absence of Anuwat does not impact the legitimacy of arbitration, due to which his unavailability suffices.

46. An arbitral tribunal holds the power to exercise its discretion in assessing the evidentiary weight to be accorded to witness evidence.[68] Further, arbitral tribunals generally tend to give less weight to witness testimony than to evidence contained in contemporary

[65] Art. 67 Rome Statue.

[66] *The Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06.

[67] *Compromis*, ¶ 33.

[68] Art. 25 cl 6. UNCTRAL Rules.

documents.[69]According to the best evidence rule, contemporary documents are preferred and have more weight.[70] In case a witness is unavailable, the tribunal should make an effort; however, in case of failure, the tribunal should rely on other evidence available.[71] The Party who wants to present the witness has to ensure the presence of the same, the arbitral tribunal has no duty for the same.[72] Contrary to the RESPONDENT, if the trial is going to conclude shortly, the arbitral tribunal can admit evidence at any point of time.[73]

47. Presently, there are contemporary documents in the form of evidence available.[74] This evidence has higher acceptability than a witness due to Anuwat being unavailable due to his trial. The tribunal should proceed that there is sufficient evidence available in the form of documents for determining the proceedings and Anuwat's presence is not necessary. If the RESPONDENT contends that the trial is going to conclude shortly, it may present the witness at any point in time, there is no need to stay the arbitral proceeding.

48. Therefore, the arbitral tribunal should not stay the arbitral proceeding.

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[69] Blackaby, Nigel, et al. *Redfern and Hunter on International Arbitration*. 6th ed., Oxford, United Kingdom, Oxford University Press, 2015, p. 404.

[70] Turlington, Edgar, and Durward V. Sandifer. "Evidence before International Tribunals." *Harvard Law Review*, vol. 53, no. 1, Nov. 1939, p. 160, https://doi.org/10.2307/1334172; Blackaby, Nigel, et al. *Redfern and Hunter on International Arbitration*. 6th ed., Oxford, United Kingdom, Oxford University Press, 2015, p. 386.

[71] Born, Gary. *Reference: 'Chapter 15: Procedures in International Commercial Arbitration*. Alphen Aan Den Rijn, The Netherlands, Kluwer Law International, 2014.

[72] Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 640–71.

[73] *'*Chapter *3: The Arbitral Tribunal and Fact-Finding: A Promise Fulfilled?',* in Emmanuel O. Igbokwe, Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not to Probe, International Arbitration Law Library, Volume 65 (© Kluwer Law International; Kluwer Law International 2022), pp. 69 – 100; Art. 25(5) ICC Rules (2012); Art. 24.3 Swiss Rules; Art. 22.1(v) LCIA 2014; Art. 24(g) SIAC Rules; Art. 41.1 CIETAC Rules 2012.

[74] *Compromis*, ¶ 43.

B. THE CRIMINAL INVESTIGATION DOES NOT IMPACT THE ARBITRATION PROCEEDINGS DUE TO WHICH A STAY IS NOT REQUIRED.

49. It is imperative to note in this regard that the outcome of the criminal investigation does not impact the arbitration proceedings primarily because *first***,** the proceedings have disparate causes of action, facts and parties, indicating an absence of impact on arbitration proceedings **(*i.*)**, and *second*, the preliminary procedural aspects are not contended, indicating an absence of impact on arbitration proceedings **(*ii.*)**.

i. The proceedings have disparate causes of action, facts and parties indicating an absence of impact on arbitration proceedings.

50. The ILA recommendations discuss that a stay of proceeding may happen if a tribunal may have (i) concurrent jurisdiction of a dispute arising out of the same facts. In such an instance, (ii) the cause of action or (iii) the parties, may be similar.[75]
51. The aforementioned conditions have not been satisfied in the present matter since, *first*, the ICC proceedings involve Anuwat's alleged cyber war crimes in Ulavu and in contrast, the arbitration proceeding concerns a dispute between RADOSTAN and COLTANA over the interpretation of the CCTA. *Second*, the parties involved differ in each case, suggesting that the two proceedings are distinct and separable. *Third*, herein, the ICC's jurisdiction pertains to cyber war crimes, whereas the arbitral tribunal's jurisdiction deals with the dispute submitted by the parties.
52. Therefore, a stay is not necessitated herein, since the criminal investigation does not impact the arbitration proceedings because the facts, parties, causes of action and the jurisdictions differ.

[75] International Law Association Report on *lis pendens.*

ii. The preliminary procedural aspects are not contended indicating an absence of impact on the arbitration proceedings.

53. Anuwat's conviction or acquittal does not substantially impact the proceedings of the Arbitral Tribunal, and preliminary procedural aspects, including jurisdiction and authority of the parties, are not the disputed affairs.

54. A foreign court's substantive decision is irrelevant to an arbitral tribunal since it does not owe any allegiance to any foreign court, and only procedural aspects, such as the rightful or wrongful assertion of jurisdiction, may be contended by an arbitral tribunal.[76]Arbitrators must examine the dispute solely based on the agreement without taking under consideration any parallel court proceedings.[77]

55. In one instance, the sole arbitrator denied the CLAIMANT s' request for stay of proceedings, holding that nothing in the prosecutor's order touched upon the validity or termination of the agreement, which fell within the jurisdiction of the sole arbitrator.[78] An arbitral tribunal may deny a request for a stay upon failure to demonstrate the criminal investigation's impact on the arbitration and if no preliminary issues are to be resolved.[79]

56. At present, *first*, the matter at hand does not involve questions as to the competence/authority of the arbitrators. *Second*, even if such preliminary & primal questions were to exist, the arbitral tribunal is expected to assess the same independently without consideration of parallel court proceedings.

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[76] *Supra* 60.

[77] *Supra* 60.

[78] *Supra* 43.

[79] *Procedural Order No. 3 of 16 November 2016 (UNCITRAL Arbitration Rules)*, ASA Bull. 3/2018, p. 642.

57. Therefore, the tribunal should not stay the proceeding in the absence of any contention revolving preliminary procedural aspects.

C. A STAY MUST NOT AFFECT THE PROCEDURAL EFFICIENCY, THEREBY GIVING RISE TO PRIORITISING SPEEDY PROCEEDINGS IN CASE OF DOUBT.

58. The tribunal should seek to avoid inconsistent decisions. On the other hand, it is mandated to decide the dispute referred to it without unnecessary delay, and a CLAIMANT has a right to have its claims determined.[80]

59. According to Recommendation 2 of the ILA Report, arbitral efficiency and avoiding costly duplication are essential policy objectives. Taking these objectives under consideration, the tribunals can pause proceedings when appropriate.[81]

60. The sole arbitrator considered that a stay could only be granted in *exceptional circumstances* and that, in any event, the conflicting interests of the parties had to be balanced against each other; in case of doubt, the sole arbitrator should give priority to expeditious conduct of the proceedings. [82]

61. Further, the overlap between criminal and arbitration proceedings is not a mandatory ground for stay.[83] A stay is only justified in specific cases or *exceptional circumstances,* such as the legal standing or capacity of one of the parties, as well as factual or legal

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[80] *Supra* 60.

[81] International Law Association Report, *Recommendation 2.*

[82] *Procedural Order No. 15 of 10 July 2015 (Swiss Rules)*, ASA Bull. 3/2018, p. 637.

[83] *Swiss Federal Supreme Court, Decision* ATF 119 II 386.

circumstances that directly impact the arbitration.[84] A stay must not endanger the parties' rights and, therefore, be used sparingly in *exceptional circumstances* only.[85]

62. In the present matter, the unavailability of Anuwat as a "*key witness*" to the arbitration proceeding is what is contended to be the reason behind the demand for a stay of the proceeding, which does not constitute an '*exceptional circumstance'* as neither the legal standing or capacity of the parties or directly impacting factual or legal circumstances are contended. The speedy conduct of the proceedings, which is necessary to ensure payment discrepancies and smooth functioning of the OnionRing software is avoided, if such demand is allowed. Furthermore, a delay to ensure mere convenience for a party to present a witness, despite the documentary evidence being sufficient, provides the RESPONDENT with an undue advantage, which must not be allowed.

III. THE CCTA IS VOID.

63. Section 23 of the Indian Contract Act ["**ICA**"], 1872[86] states that an agreement or a contract may be void on the ground of illegality if it arises by statute or statutory rules,[87] or in cases where the courts consider the enforcement of a contract immoral or against public policy.[88] Further, the burden to establish the agreement's legality lies on the person or the

[84] *Swiss Federal Supreme Court, Decision* ATF 133 ILL 139.

[85] *Procedural Order No. 3 of 31 March 2017 in Cairn Energy PLC, Cairn UK Holdings Limited v. The Republic of India.*

[86] Section 23, Indian Contract Act, 1872.

[87] *Yango Pastoral Company v First Chiacho Australia* [1978] HCA 42 - 139 CLR 410, 1978; *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 490.

[88] *Id*.

party who impeached its validity.[89] Additionally, every agreement of which the object or consideration is unlawful, is void.[90]

64. The CLAIMANT submits that the CCTA is void since, the conditions produced by Section 23 of the ICA are satisfied, the conditions being, *first*, the performance of the CCTA is tainted with illegality **(A.)**; *Second*, the CCTA is opposed to public policy **(B.)**; *Third*, the CCTA is forbidden by Law **(C.)** and; *Fourth*, the consideration or object of the CCTA is unlawful **(D.).**

A. THE CCTA IS TAINTED WITH ILLEGALITY.

65. Illegality affects the agreement's performance, wherein the agreement *prima facie* is legal, but is performed illegally.[91] The illegality arises because both or one of the parties may intend to perform the agreement illegally or to affect some illegal purpose.[92] The effects and nature of illegality are not uniform, and the seriousness of illegality varies considerably; it ranges from those tainted with gross moral turpitude to those tainted with small turpitude.[93] As stated before, a contract can be declared void on the ground of illegality if such illegality arises by violating a statute or statutory rules.[94]

66. The Right to Privacy is drawn from Articles 14, 19 and 21 of the Indian Constitution.[95] An imperative aspect of the Right to Privacy is informational privacy and the right to control

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[89] *Dutt on Contract: Indian Contract Act 1972.* Edited by H. K. Saharay, 11th ed., Eastern Law House, p. 272; *Supra* 87, p. 484. .

[90] *Supra* 86.

[91] *St John Shipping v. Joseph Rank Ltd* [1957] 1 Q.B. 267. 1957; *Supra* 87, p. 570.

[92] *Chitty on Contracts*. Vol. 1, London, Sweet & Maxwell, 2018, pp. 1095, 16-009; *Anson's Law of Contract*. 31st ed., Oxford, United Kingdom, Oxford University Press, 2020, p. 439.

[93] *Howard v Shirlstar* [1990] 1 WLR 1292, 1990; *Ibid,* p. 409.

[94] *Supra* 86.

[95] Art. 21, Indian Constitution, 1950; *K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 641.

the dissemination of personal information. The Digital Personal Data Protection Act, 2023 ["**DPDP, 2023**"] provides reasonable security safeguarding the citizens' personal data.[96]

67. In the present case, the CCTA is tainted with illegality as the RESPONDENT's conduct of accessing the *confidential data* through the OnionRing software [97] is against the statutes and statutory provisions as agreed to by both the parties. Additionally, the RESPONDENT evinced an intention to perform the agreement in an illegal manner or with an illegal purpose as the conduct of the RESPONDENT contravened the national security and interest of Coltana. Furthermore, the illegal performance was exclusively known to the RESPONDENT and the CLAIMANT had no knowledge of the same.
68. Considering the above, the CCTA is said to be tainted with gross moral turpitude, making it tainted with Illegality.

B. THE CCTA IS OPPOSED TO PUBLIC POLICY.

69. Public policy refers to the framework of political, economic, or social reasoning behind objections that fall outside the scope of morality, which could also relate to the execution of an action or the implementation of a promise. Certain agreements can conflict with legal policy without necessarily being morally questionable or subject to explicit moral censure.[98]
70. Public policy connotes some matter which concerns the public good and interest, which is affecting large sections of the public and is harmful and injurious to the public interest as

[96] Section 8(5), Digital Personal Data Protection Act, 2023.

[97] *Compromis*, ¶39.

[98] *Supra* 87, p. 520.

it creates a sense of insecurity in the minds of those on whom it is applied.[99] The concept of public policy is not immutable and varies with the changing needs of the society.[100]

71. Public policy doctrine includes a wide range of topics, such as imposing inconvenient or unreasonable restrictions on private life.[101] The doctrine of public policy should only be invoked in clear and incontestable cases of harm to the public.[102] Further, the burden of proof is on who asserts[103] and a legal agreement performed illegally and opposed to public policy cannot be enforced[104].

72. Presently, the CCTA is void under Section 23 of the ICA as the CCTA is opposed to public policy and thereby being void as its performance is tainted with illegality due to the RESPONDENT violating the Right to Privacy of the citizens of COLTANA which is against the statutory provisions and national interest, including the provisions of DPDP, 2023 and judicial pronouncements. Such performance of the agreement affects public good, rights and welfare.

[99] *Maninder Singh v. Mr. Abhinav Vashisht O.M.P.* (COMM) 450/2018 & I.A. 14911/2018, 2023.

[100] *Supra* 86, p. 521, 522, 525; *Bhagwant Genuji Grime v. Gangabisan Ramgopal* (1940) 42 BOMLR 750, 1940; *Rattan Chand Hira Chand vs Askar Nawaz Jung* 1991 SCR (1) 327, 1991; *Nagle v Fieldon [1966] 2 QB 633 (CA)*, 1966.

[101] *Supra* 87, p. 528.

[102] *Supra* 87, p. 524, 525; *Gherulal Parekh v. Mahadeodas Maiya* 1959 AIR 781 1959 SCR Supl. (2) 406; *Gulabchand v Kudilal* 1966 SCR (3) 623.

[103] *Subayyan v Ponnu* AIR 1941 Mad 727; *Supra* 89, p. 250.

[104] *Supra* 87, p. 140, 570; *Narayana Rao v Ramachandra Rao* AIR 1959 AP 370.

C. THE AGREEMENT IS FORBIDDEN BY LAW.

73. Pursuant to Section 23 of the ICA, agreements '*forbidden by law*' are void.[105] '*Forbidden by law*' includes any agreement against any legislative enactment[106] and against the order by a competent authority.[107] The term 'law' includes any enactment or rule of law for the time being in force.[108] The contract may be lawful according to its strict terms but may be performed by a party in the manner the statute prohibits.

74. When the prohibition is not for the protection of the general public, the contract may not be void.[109] The DPDP, 2023 prohibits such unlawful access to data and infringement of citizen's privacy.[110] The Right to Privacy is a fundamental right in India. The objective of the judgement regarding the Right to Privacy and the DPDP, 2023 is for the welfare of the general public.[111]

75. Presently, the unlawful access of the *confidential data* by the RESPONDENT using the OnionRing software had infringed the privacy of the citizens of Coltana.

76. Considering the above, the tribunal should rule that the agreement is void as it is forbidden by law.

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[105] *Supra* 86; *Supra* 87, p. 488.

[106] *Id*. *Neminath Appaya Hanamannanavur v. Jambooroa Satappa Kocheri* AIR 1966 Mys 154.

[107] *Id*.

[108] *Supra* 106.

[109] *Pollock's Principles of Contract*. Vol. 13, 1950, p. 276; *Teegula Babiah v. Mohammad Abuds Siobhan Khan* AIR 1954 Hyb 156 (FB).

[110] Digital Personal Data Protection Act, 2023.

[111] *Supra* 95.

D. THE CONSIDERATION OR OBJECT OF THE CCTA IS UNLAWFUL.

77. Section 10 of the ICA states that an agreement is only enforceable when it has a lawful consideration and object.[112] When the contract that can be performed lawfully is performed unlawfully, the consideration of that contract becomes unlawful. In accordance with Section 23 of the ICA, the object of the agreement has to be considered.[113] The word 'object' means the design or the purpose of the contract.[114] It states that the object shall be presumed to be lawful unless*, first, it* is forbidden by law, or *second*, if permitted, the nature would defeat any provision of law or *third*, it is opposed to public policy.
78. As established before, in a disjunctive manner, the RESPONDENT had entered the agreement with an unlawful object. Furthermore, the enforceability of the contract is affected, which renders the particular conduct unlawful.
79. Considering the above, the tribunal should rule that the object or consideration of the agreement is unlawful.

IV. EVEN IF THE CCTA IS NOT VOID, THE TERMINATION BY COLTANA IS VALID.

80. In the event of a party's failure to perform a condition of the contract, it amounts to a breach of contract. In such circumstances, the innocent party has the right to consider themselves as relieved from any existing or further liabilities arising from the contract.[115]

[112] Section 10, Indian Contract Act, 1872.

[113] *Supra* 86.

[114] *Supra* 89, p. 231.

[115] Section 39, Indian Contract Act, 1872.

81. Accordingly, the CLAIMANT submits that the termination of the agreement is valid for the following reasons. *First*, the accessibility of OnionRing software is the essence of the CCTA **(A.)**; *Second*, Moreover, there was a failure of performance since the terms of the agreement were not followed **(B.)**; *Third*, the failure of performance amounts to a breach of the agreement **(C.)** and; *Fourth*, the termination followed the due course of law **(D.).**

A. ACCESSIBILITY OF THE ONIONRING IS THE ESSENCE OF THE CCTA.

82. To determine the validity of the termination, the terms of the agreement must be ascertained. According to Article 31 of the VCLT, all the agreements shall be presumed to be in good faith and within the text's ordinary meaning,[116] in other words, a particular meaning will be established that is the common intention of the parties.[117] Furthermore, the consideration of the object and the purpose together with good faith ensures the effectiveness of its terms (*ut res magis valeat quam pereat, the effet utile*).[118]
83. Any relevant rules of international law applicable in relations between the parties shall also be considered.[119] In order to confirm the meaning resulting from the application of Article 31, supplementary (*complémentaire*) means of interpretation, including the preparatory

[116] Sixth report on the Law of Treaties, by Sir Humphrey Waldock, Year Book of International Law Commission Report 1966 II 94, paras. 2 f.

[117] Year Book of International Law Commission Report 1964; Year Book of International Law Commission Report 1966 II 220, para. 11.

[118] Art.31, Vienna Convention on the Law of Treaties, 1969

[119] Art. 31.3 (C), Vienna Convention on the Law of Treaties, 1969

work, the circumstances of its conclusion can be used as a recourse[120] and the interpretative declarations made by treaty parties which do not qualify as reservations.[121]

84. Presently, the terms mentioned in the CCTA about Ini-Tech's responsibility *"for designing, developing, selling, operating, and maintaining"* the OnionRing software requires supplementary means of interpretation in order to confirm the meaning on its object or purpose.[122] Additionally, the presentation in the ceremony dated 14.10.2021 shall be taken into consideration for confirming the meaning of the terms of the agreement. Anuwat, acting as the official representative of Ini-Tech, explained the essential functions of the OnionRing software, emphasizing that all information and data collected are kept confidential and can only be accessed by the government of Coltana.[123]

85. Anuwat's explanation dated 14.10.2021 is an integral component of the agreement for interpreting the terms of the CCTA as it describes the software's essential functioning and is the interpretative declaration of the terms of CCTA from the RESPONDENT's side. Furthermore, the circumstances around the conclusion, which includes Anuwat's explanation involves the security of COLTANA and its citizens.

86. Therefore, the stipulation that OnionRing's collected data must remain confidential and accessible only to the government of COLTANA shall be considered as an intrinsic part of the CCTA.

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[120] Art. 32 Vienna Convention on the Law of Treaties; TORRES BERNARDEZ, *Liber Amicorum* SEIDL-HOHENVELDERN 726 f; Third report on the Law of Treaties, by Sir Humphrey Waldock, Year Book of International Law Commission Report II 59, para. 22; Yasseen, RC 151 (1976 III) 92, para. 11; Serbia and Montenegro v. Belgium, ICJ Reports 2004 318, para. 100.

[121] Year Book of International Law Commission Report 1964 vol. 1;Year Book of International Law Commission Report 1964 vol. II; Revue générale de droit international public. 70 (1966) 632 ff.

[122] *Compromis* ¶24.

[123] *Compromis* ¶26.

B. THERE WAS A FAILURE OF PERFORMANCE SINCE THE TERMS OF THE AGREEMENT WERE NOT FOLLOWED.

87. Failure of performance, whether total or partial, may, in certain circumstances, entitles the other party to treat the contract as discharged.[124] Failure of performance is an act or omission or conduct of the other party by which he fails to adhere to the terms of the agreement and perform his contractual obligations; or violate such conditions or terms of the agreement which may be the essence or root of such agreement which suggests that, in the event of a partial failure, it must be in a matter that goes to the root of the contract.[125]

88. Presently, there has been a failure of performance by the RESPONDENT as they have failed to adhere to the terms of the agreement, especially the '*confidentiality and accessibility*' term, which is the foundation of the contract, along with other instances of violation, such as gaining access to the personal data of COLTANA's electorates through Ini-Tech's database.[126]

89. Therefore, there was a failure of performance since the terms of the agreement were not followed within the due course of the agreement, which goes against the root of the contract.

C. THE FAILURE OF PERFORMANCE OF THE TERMS OF THE AGREEMENT AMOUNTS TO BREACH OF CONTRACT.

90. When a party fails to perform a condition of a contract, it constitutes a breach of contract. The innocent party is entitled to consider themselves discharged from further liability under

[124] *Supra* 92 , para. 24-034.

[125] *Hongkong Fir Shopping Co Ltd v Kawasaki* [1962] 2 QB 26 [1961] EWCA Civ 7.

[126] *Compromis* ¶30.

the contract in such circumstances.[127] Three circumstances can lead to a discharge of contract; *First*, when a party renounces their liabilities under it. *Second*, when a party creates impossibility through their act and *third*, when there is total or partial failure of performance.[128]

91. In addition, the kind of refusal to perform any part of a contract contemplated in Section 39 of ICA, 1872[129] affects the contract's core and prevents the promise from getting, in substance, what he bargained for.

92. Presently, there was a "*deliberate breach*"[130] of the agreement by the RESPONDENT as they accessed the data despite Ini-tech acknowledging that the data access was exclusive to the CLAIMANT. As shown above, there was a failure of performance of the essential terms of the agreement since the conduct of the RESPONDENT has had a detrimental impact on the CLAIMANT due to it accessing the data that was exclusive to the CLAIMANT, which became a threat to its security.[131]

93. Considering the above, the CLAIMANT had not only contravened the fundamental domestic and international laws[132] but also, the conduct not adhering to essential terms of the agreement which resulted in failure of performance and consequentially, leading to a breach of the CCTA.

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[127] *Supra* 92, para.12-02.

[128] *Hymen v. Darwins Ltd* [1942] AC 356.

[129] Section 39, Indian Contract Act, 1872.

[130] *Supra* 92, para. 24-04.

[131] *Id*.

[132] Art. 1, United Nation Charter; Art. 2 United Nation Charter; Preamble, International Covenant on Economic, Social and Cultural; Art 1 of the International Covenant on Economic, Social and Cultural Rights.

D. THE TERMINATION OF THE AGREEMENT WAS VALID AND FOLLOWED THE DUE COURSE OF LAW.

94. The agreement can be terminated when one party breaches a contract, and the other party accepts the breach.[133] This is a repudiatory breach, making the contract voidable.[134] Repudiation refers to declaring one's choice not to fulfil or perform the obligations outlined in a contract. [135]

95. Regarding repudiation, the key question is whether the party in question has demonstrated through their actions that they do not intend to fulfil their contractual obligations. This is typically evaluated based on two factors: *first*, whether the term being violated is considered fundamental, and *second*, whether the party has explicitly refused to uphold that term. This test is critical in determining whether repudiation has taken place.[136]

96. Presently, as shown above, the RESPONDENT had evinced an intention by conduct, by accessing the *confidential data* coming from "*variety of devices, including smartphones, tablets and computers*" [137] and "*government's computer and internet system*" [138] to repudiate the agreement through failing to adhere to the terms of *"confidentiality and accessibility"* of the agreement, leading to a breach of the agreement. Following this, it can

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[133] *Vitol SA v Norelf Ltd [1996] AC 800*; *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 794.

[134] *Muralidhar Chatterjee v. International Film Co. Ltd., AIR 1943 PC 34, (1943) 70 IA 35.*

[135] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p.785.

[136] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 786; *Universal Cargo Carriers v Citati [1957] 2 QB 401.*

[137] *Compromis* ¶23.

[138] Supra 131.

be reasonably concluded that the respondent did not intent on fulfilling the agreement mentioned above.

97. Furthermore, after the RESPONDENT initiates the repudiatory breach, the CLAIMANT was left with two options, either to treat the agreement as continuing (affirmation of the contract) or to bring an end (acceptance of the repudiation). [139]

98. Considering the above, the option of acceptance of repudiation was chosen, and the CCTA was terminated as per the due course of law by the RESPONDENT. Therefore, the termination of the CCTA is valid.

[139] *Bentson v Taylor, Motor Oil Hellas v Shipping Corp of India [1990] 1 Lloyd's Rep 391*; *Supra* 92, para. 24-002.

PRAYER FOR RELIEF

In light of the submission above, counsel for the CLAIMANT respectfully invites the Tribunal to declare that:

I. Olaf, an AI-powered intelligent lawyer can be removed as the arbitrator for lack of impartiality.

II. The Arbitral Tribunal should stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court.

III. the CCTA is void; and

IV. the termination of the CCTA by COLTANA is valid.

In addition, counsel for CLAIMANT respectfully invites the Tribunal to order the RESPONDENT to bear the costs of the Arbitration and cover the CLAIMANT's legal fees.