IN2302-R

18TH LAWASIA INTERNATIONAL MOOT COMPETITION

ASIAN INTERNATIONAL ARBITRATION CENTRE

2023

BETWEEN

REPUBLIC OF COLTANA

(CLAIMANT)

AND

MAJESTIC KINGDOM OF RADOSTAN

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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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 an AI-powered arbitrator is capable of having a bias?

   ii. Whether the presence of two other arbitrators eliminate the possibility of bias?

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 presence in the ICC proceeding affect his availability for the arbitral process?

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D. Whether the termination of the CCTA by Coltana is valid?

   i. Whether the access to the confidential data is in tandem with the terms of the agreement?

   ii. Whether there was a failure of performance by Radostan?

   iii. Whether the termination is valid on the grounds of fundamental breach of contract?

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 and was also granted a limited access to Olaf. Olaf was dubbed as "trustworthy robot" by various international media and was engaged in representing multiple private and governmental in their disputes.

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 Kittisak ["**Anuwat**"], acting as a key-programmer of the OnionRing software highlighted 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. Afterwards, the DPP government suffered a major revenue shortfall and struggled to pass budgets in Parliament.
2 February 2022	CLAIMANT's Bitcoin Reserves, approximately valued at USD 300 million in the Coltana National Bank went missing overnight and were stolen.
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 informed the media that the OnionRing had detected significant amount of bitcoin expenditure within COLTANA involving the bank account of senior DPP politicians and the "the hacking incident" was a major corruption scandal. 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 wrongly stated 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. Olaf responded that "an AI has no emotions or

feeling towards anyone." Furthermore, RESPONDENT had requested for a stay of the AIAC proceedings, citing the reason for Anuwat's unavailability and necessary presence as he was the key-programmer and representative of Ini-Tech.

SUMMARY OF PLEADINGS

I. OLAF, AN AI-POWERED INTELLIGENT LAWYER, CANNOT BE REMOVED AS THE ARBITRATOR FOR LACK OF IMPARTIALITY.

1. The tribunal should not remove Olaf as an arbitrator for lack of impartiality as being an AI-powered arbitrator, it is distinguishable from a human arbitrator since it lacks emotions and relies on algorithms and therefore, cannot have a cognitive bias. There exists sufficient data to train Olaf and it has a successful track record in arbitration, due to which algorithm bias is refuted. Furthermore, even if there is a possibility of bias, it will be eliminated by the other two arbitrators, which will serve as checks and balances.

II. THE ARBITRAL TRIBUNAL SHOULD STAY THE PRESENT PROCEEDINGS UNTIL THE CONCLUSION OF ANUWAT'S TRIAL AT THE INTERNATIONAL CRIMINAL COURT.

2. The arbitral tribunal should stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court as Anuwat's status in the ICC proceeding affects his availability for the arbitral process due to the status and stage of the criminal proceeding and the extent to which the arbitral tribunal can reasonably determine the likely timing of the decision in the criminal proceedings. Further, the outcome of criminal investigation impacts the arbitration proceedings as the allegation of wrongdoing committed by Ini-tech is a significant issue in the arbitration proceedings, the unavailability of a key witness' testimony shall impact the arbitration proceedings and the absence of Anuwat affects the award's legitimacy negatively.

III. THE CCTA IS NOT VOID.

3. The CCTA is not void since the CCTA is not tainted with illegality since it is in consonance with statutory provisions and also furthers the national security interests. Additionally, the CCTA does not contravene public policy as it serves public good and interest and promotes natural justice. The CCTA is not forbidden by law as it complies with relevant legislative enactments. The object and consideration of the CCTA are lawful due to its alignment with statutory provisions and public policy. Therefore, the CCTA should not be void under Section 23 of the ICA.

IV. THE TERMINATION OF THE CCTA BY COLTANA IS NOT VALID.

4. The access to confidential data, as per the CCTA aligns with the treaty's object and purpose and thus, does not breach the terms of the agreement. There was no failure of performance of RADOSTAN as they complied with the essential terms of the agreement. Further, there was no fundamental breach of the CCTA as termination requires a breach that strikes at the contract's core, which did not occur in this instance. The termination lacks validity due to the absence of fundamental breach or failure of performance in accordance with the CCTA's terms.

PLEADINGS

I. OLAF, AN AI-POWERED INTELLIGENT LAWYER, CANNOT BE REMOVED AS THE ARBITRATOR FOR LACK OF IMPARTIALITY.

1. CLAIMANT'S reliance solely on the assertion that the circumstances indicate Olaf lacking independence and impartiality, is mistaken as Olaf is an AI bot, lacks emotions and feelings, and is programmed to decide cases only based on facts and law.[1]
2. The tribunal should not remove Olaf as an arbitrator for lack of impartiality as *first*, AI-powered arbitrators, distinguished from human arbitrators, cannot have bias **(A.)** and *second*, even if there is a possibility of bias, it will be eliminated by the other two arbitrators, which will serve as checks and balances **(B.)**.

A. AN AI-POWERED ARBITRATOR, AS DISTINGUISHED FROM A HUMAN ARBITRATOR, IS NOT CAPABLE OF HAVING A BIAS.

3. An AI-powered bot works on an algorithm on which it is developed, and it trains on the data fed into it.[2] Unlike humans, AI can assess all the information without undue influence of the evidence presented in advance.[3]

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[1] *Compromis* ¶11.

[2] Alpaydin, Ethem .*Machine Learning: The New AI*., The Mit Press, 2016.

[3] Cass R. Sunstein, Christine Jolls & Richard H. Thaler, "A Behavioral Approach to Law and Economics," 50 Stanford Law Review 1471 (1998); Tor, Avishalom. "The Methodology of the Behavioral Analysis of Law." , 11 July 2008. , 4Haifa .L Rev. 237 (2008). Rev. 456 (2003); Smith, Vernon L. "Constructivist and Ecological Rationality in Economics." *American Economic Review*, vol. 93, no. 3, May 2003, pp. 465–508, https://doi.org/10.1257/000282803322156954.

4. Considering the above, Olaf is AI-powered lawyer and incapable of bias on three grounds; *First*, AI, unlike humans, is not prone to bias **(*i.*),** *second*, there exists sufficient data to train Olaf **(*ii.*)** and *third*, Olaf passes the test of impartiality **(*iii.*)**.

i. AI, unlike Humans, is not prone to bias.

5. According to Rule 10 of AIAC, the appointment of an arbitrator can be challenged on the grounds of independence and impartiality.[4] An arbitrator will be appointed only if their impartiality is fully satisfied by the parties.[5]

6. Machine learning defines its own rules by trial and error. [6] Further, AI works like human black boxes which can be observed using inputs and outputs.[7] Data Input is filled inside and analysed using the algorithm, and output in the format of a decision is displayed. [8] Machine learning is capable of enhancing any accuracy and remove any data bias.[9]

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4 Rule 10.1 AIAC Rules.

5 AAA, Cannon 1, Code of Ethics for Arbitrators.

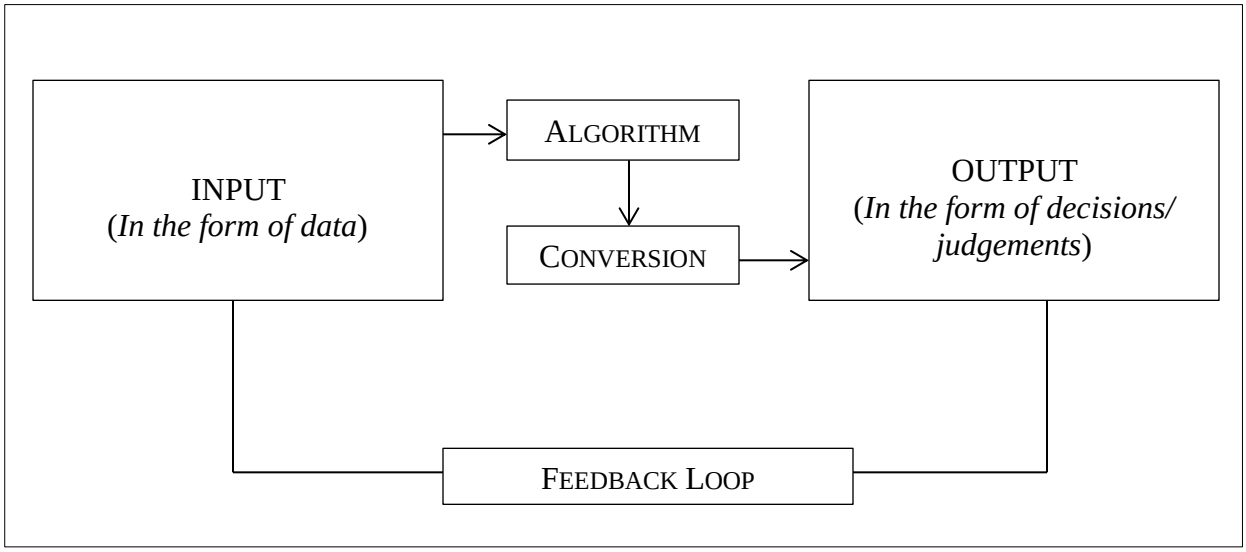
6 Implementation of Intelligence in Arbitration by University of Oslo. https://www.duo.uio.no/bitstream/handle/10852/92206/ICTLTHESIS---Master-Thesis.pdf?sequence=1.

7 Rudin, Cynthia, and Joanna Radin. "Why Are We Using Black Box Models in AI When We Don't Need To? A Lesson from an Explainable AI Competition." *Harvard Data Science Review*, vol. 1, no. 2, 1 Nov. 2019, https://doi.org/10.1162/99608f92.5a8a3a3d.

8 *Id.*

9 "AI Lawyer "Ross" Has Been Hired by Its First Official Law Firm." *Futurism*, futurism.com/artificially-intelligent-lawyer-ross-hired-first-official-law-firm; Vanderbilt University, Andrew Arruda: *Artificial Intelligence and the Law Conference at Vanderbilt Law School*, YOUTUBE at 12:30-12:38 (May 6, 2016), http://www.youtube.com/watch?v=LF08X5_T3Oc**;** Nunez, Catherine. "Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions." *Tulane Journal of Technology and Intellectual Property*, vol. 20, 1 Jan. 2017.

7. The following diagram depicts those mentioned above:



8. Further, a human arbitrator is prone to making cognitive mistakes due to their biases, which impacts the legitimacy of the arbitration process.[10] Many arbitrators form opinions of the entire trial from the first phase of arbitration,[11] even before the exposure to the victim or witness.[12] Judgements rendered by humans are strongly influenced by quick, emotional, intuitive and unconscious factors and passively by slower, more methodical, logical and time-intensive decision making, resulting in cognitive biases.[13]

[10] Eidenmueller, Horst G. M. "*Machine Performance and Human Failure: How Shall We Regulate Autonomous Machines*?", 15 J. Bus. & Tech. L. 109 (2019).

[11] Tversky, Amos, and Daniel Kahneman. "*Judgment under Uncertainty: Heuristics and Biases*." *Science*, vol. 185, no. 4157, 27 Sept. 1974, pp. 1124–1131, https://doi.org/10.1126/science.185.4157.1124; Tversky, Amos, and Daniel Kahneman. "Availability: A Heuristic for Judging Frequency and Probability." *Cognitive Psychology*, vol. 5, no. 2, Sept. 1973, pp. 207–232, www.sciencedirect.com/science/article/abs/pii/0010028573900339.

[12] *Id.* , Wim De Neys, *Bias and Conflict: A Case for Logical Intuitions*, 7(1) Persps Psychological Sci. 28 (2012);.

[13] Daniel Kahneman, Think Fast and Slow.

9. Presently, Olaf uses machine learning to arrive at a decision that uses input and output mechanisms.[14] In this case, unlike humans, there is no chance of cognitive bias. Further, Olaf's machine learning usage allows him to learn and improve over time continuously. By using this, Olaf, like Ross, can go behind the intent and filter websites along with the unreliable sources as trained by the delegation from COLTANA.[15] Further, Olaf has acted as an arbitrator in many cases in RADOSTAN.[16] Its unique ability to analyse situations based on pure fact and law makes it different from a human, who has inherent bias due to the capability of having emotions and feelings.[17] Further, the algorithm was trained by the delegation from COLTANA, containing CLAIMANT's Solicitor General, adding to the reliability of Olaf on its lack of bias.

ii. There exists sufficient data to train Olaf, eliminating any bias.

10. There is sufficient amount of data available for Olaf to train on, while respecting the confidentiality principle of arbitration for Olaf to deliver an unbiased output. The RESPONDENT submits that *first*, the confidentiality aspect of arbitration does not hinder the availability of data **(a)** and *second*, the algorithm bias can be eliminated **(b)**.

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14 *Compromis* ¶ 12.

15 *Corrections and Clarifications to the Moot Problem* ¶ 2.

16 *Compromis* ¶ 12.

17 *Compromis* ¶ 13.

a. *The Confidentiality aspect of arbitration does not hinder the availability of data.*

11. The confidentiality and privacy of arbitration is one of the significant advantages that it has over litigation.[18] Due to this, awards are seldom published.[19] However, there exists a sufficient amount of data as there are initiatives in place that regularly publicise commercial awards, usually in a redacted manner.

12. Further, data is subject to diminishing returns to scale. Consequently, as more observations are added to the training data, its impact decreases. [20] After the training data is fed, any further data is termed as validation data used for testing the model's accuracy. [21] Accordingly, a situation of "*known knowns*" arises, where there is abundant data, and the AI can predict the situation accurately. [22]

13. In this case, Olaf does not have a lack of data for training purposes as it was sufficiently trained by a delegation from COLTANA.[23] Additionally, abundant data is there for validation purposes; despite the confidentiality principle limiting the publication of the award, there is a large amount of data available to Olaf, upon which it can deliver an unbiased output. Vast amount of data was used to train Olaf by the Delegation from COLTANA, as the data is subject to

[18] Valery Denoix de Saint Marc, '*Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations*', Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2003, Volume 20, Issue 2), pp. 211 – 216.

[19] Bernardo M. Cremades & Rodrigo Cortes, *The Principle of Confidentiality in Arbitration: A Necessary Crisi*s, 23 J. ARB. STUD. 25, 27 (2013).

[20] Ajay Agrawal, Joshua Gans, & Avi Goldfarb, *Prediction Machines* 9–11 (HBR 2018).

[21] Marco Iansiti & Karim R. Lakhani, *Competing in the Age of AI* 110 (HBR 2020).

[22] Jeff Hawkins, *A Thousand Brains: A New Theory of Intelligence* 2–3 (Basic Books 2021).

[23] *Compromis* ¶ 11.

diminishing return to scale, the amount of data Olaf currently needs after being a counsel, an arbitrator and a mediator is considerably less.

14. Considering the above, the arbitral tribunal should find that Olaf should not be removed because of lack of impartiality.

b. *Algorithm bias can be eliminated.*

15. If an algorithm is used to analyse the case's circumstances initially and that algorithm afterwards serves as a machine arbitrator, giving rise to a concern about the algorithm being biased on account of it having examined the same facts and documents earlier, it can be eliminated by using a different software for prediction and decision-making.[24] An arbitrator's appointment shall only be accepted when it is fully justified that it will carry out its duty without bias.[25]

16. In this case, Olaf has commented in the past about the situation of COLTANA, implying that it has previously analysed the situation. Olaf's statements appeared to favour RADOSTAN and its allies, along with the comments made by Olaf regarding CLAIMANT's negligence. If the concern of the CLAIMANT pertains to the algorithm favouring RADOSTAN, it can be eliminated by using different software for prediction and decision-making.

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24 Pavlovskaya, V. (2020). *Machine arbitrators: Technology and ethics in international arbitration.*.

[25] AIAC, Code of Conduct for Arbitrators Cl 2.2.

17. Considering the above, the arbitral tribunal should not be removed as it is impartial and Olaf cannot be removed because of lack of impartiality.

iii. Olaf satisfies the test of impartiality.

18. An arbitrator must disclose any circumstances that may cast doubts over its impartiality.[26] The Green List includes such situations where there is no actual conflict of interest and the arbitrator is not required to make any disclosure.[27] Determination of impartiality and independence must be objective,[28] and must also address "*justifiable doubts*" from the perspective of a third party.[29] There is an objective standard for impartiality and independence.[30] Many arbitrators or courts have applied the "*objective observer reasonable*."[31]

19. As shown above, human arbitrators are prone to various cognitive biases[32]. These prejudices may affect how they make decisions because of various reasons such as different cultural

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[26] Part I, IBA Guideline Clause 2.

[27] International Bar Association, Green List.

[28] Article 12(2), UNCITRAL Rules; *'Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration'*, in Gary B. Born, International Commercial Arbitration (Third Edition).

[29] IBA Guideline on Conflict Interest Clause 2 (a).

[30] D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 213 (2d ed. 2013); IBA Rules of Ethics for International Arbitrators, Art. 3(1)

[31] LCIA Ref. No. 142862, ¶45, Nat'l Grid plc v. Argentina, LCIA Case No. UN 7949 ¶85; Gallo v. Canada, PCA Case No. 55798, ¶19, HRD Corp. (Marcus Oil & Chem. Div.) v. GAIL (India) Ltd, [2017] Civil Appeal No. 11126; Gascor v. Ellicott, [1997] 1 VR 332, 340.

[32] Edna Sussman, ' *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*' (Kluwer Arbitration, 2014)

backgrounds,[33] unconscious biases or preconceptions.[40.] An arbitrator must be unbiased and impartial to ensure fairness.[34] Moreover, lack of independence as a separate ground would only be justified if it covers situations where lack of independence doesn't lead to doubts about impartiality. Otherwise, it would serve no purpose as a separate ground.[35]

20. In this case, the data that Olaf will be using can be analysed to infer any bias if present.[36] Further, the output can be observed to assess whether there is a bias in the judgement of the AI bot. Unlike AI, in the case of a human arbitrator, it is impossible despite having a reason for the order.[37] Further, Olaf operates on an algorithm designed by engineers from both countries.**[38]** The earlier statements supportive of RADOSTAN's policies made by Olaf pertain to a weekend policy; promoting work life balance.**[39]** These statements from a third party perspective appears to be free from any bias in nature along with suggesting Olaf's unique ability to analyse situation purely on the basis of law and facts. Further, Olaf was trained by

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33 Malkom Wilkey, *The Practicalities of Cross-Cultural Arbitration, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION* 79, 80 .

34 *'Chapter 4: The Standard of Impartiality and Independence'*, in Alfonso Gomez-Acebo, Party-Appointed Arbitrators in International Commercial Arbitration, International Arbitration Law Library, Volume 34 (© Kluwer Law International; Kluwer Law International 2016), pp. 69 – 96.

35 U.K. Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* ¶¶102-04 (1996); *ICSID Case No. ARB/12/20 of 12 November 2013*, ¶58.

36 *Corrections and Clarifications to the Moot Problem* ¶ 2.

37 *Compromis* ¶14.

38 *Compromis* ¶ 23.

39 *Corrections and Clarifications to the Moot Problem* ¶ 6.

delegation from COLTANA containing the CLAIMANT's Solicitor General who has represented it in various international arbitration.[40]

21. Considering the above, Olaf passes the test of impartiality.

B. EVEN IF THERE IS SOME POSSIBILITY OF BIAS, IT CAN BE ELIMINATED BY THE PRESENCE OF THE OTHER TWO ARBITRATORS, WHICH WILL SERVE AS CHECKS AND BALANCES.

22. Arbitration is a party autonomy process.[41] For the award to be legitimatised, the CLAIMANT'S trust regarding the impartiality of Olaf is essential. An arbitral tribunal consists of 3 arbitrators.[42] If a machine arbitrator is biased, the decision of the machine arbitrator is already subject to checks and balances.[43]

23. In this case, there are two additional arbitrators on the panel. A human arbitrator's prejudices may be corrected using Olaf, and the impartiality could be double-checked by comparing the human arbitrator's conclusion to Olaf's decision. Further, an AI arbitrator will appoint an arbitrator that fulfils the criteria established under the *lex arbitri*.

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[40] *Corrections and Clarifications to the Moot Problem* ¶ 3.

[41] Okezie Chukwumerije, *'Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996'*, in William W. Park (ed), Arbitration International, (© The Author(s); Oxford University Press 1999, Volume 15, Issue 2), pp. 171 – 192.

[42] Rule 9.5**,** AIAC Rules

[43] *Compromis* ¶ 25.

24. Considering the above, even if there is a possibility of bias, it can serve as a check and balance mechanism for the bias. Therefore, the arbitral tribunal should rule that Olaf cannot be removed on the ground of impartiality.

II. THE ARBITRAL TRIBUNAL SHOULD STAY THE PRESENT PROCEEDINGS UNTIL THE CONCLUSION OF ANUWAT'S TRIAL AT THE INTERNATIONAL CRIMINAL COURT.

25. The arbitral tribunal holds a discretionary power to stay an arbitral proceeding in lieu of a criminal proceeding.[44] Furthermore, an Arbitral Tribunal possesses the power to decide on its jurisdiction,[45] including its power to rule on a plea demanding a stay of arbitration proceedings via the *lex arbitri* as well as the mandatory law.[46]

26. The arbitral tribunal should stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court as, *first*, Anuwat's status in the ICC proceeding affects his availability for the arbitral process **(A.)**. *Second*, the criminal investigation impacts the arbitration proceedings at hand **(B.)**.

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44 *Fund Ltd v. A . Group Ltd, Swiss Federal Tribunal,* Case No. 4P_168/2006, 19 February 2007.

45 Rule 20.1, AIAC Rules; Section 16 ,Arbitration and Conciliation Act, 1996.

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

A. ANUWAT'S UNAVAILABILITY FOR THE ARBITRAL PROCESS IS SHORT LIVED DUE TO HIS STATUS IN THE ICC PROCEEDING DUE TO WHICH, A STAY IS NECESSITATED.

27. Anuwat, the key witness's availability for the proceedings will depend on, *first*, the status and the stage of the criminal proceeding **(*i.*)**. *Second*, the extent to which the arbitral tribunal can reasonably determine the likely timing of the decision in the criminal proceedings **(*ii.*)**.

i. The status and the current stage of the criminal proceeding indicates that Anuwat's trial will conclude shortly.

28. The status and the stage of the criminal proceedings are essential objective criteria for determining whether a stay is necessitated.[47] The trial chamber is associated with rendering decisions,[48] and has to set a date of the trial chamber. [49] The Pre-Trial Chamber rules on any challenge before the confirmation of the charges and only after this, the Trial Chamber becomes competent.[50]
29. Presently, Anuwat is at the Trial chamber,[51] which is the last stage of the ICC proceeding where the judgment is delivered.

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

[48] Art. 73, Rome Statue.

[49] Rule 132, Rules of Procedure and Evidence Taking, ICC.

[50] The Procedure of the ICC: Status and Function of the Prosecutor, Volker Roben, https://www.mpil.de/files/pdf3/mpunyb_roeben_7.pdf.

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

30. Therefore, presently, the status and the stage of the criminal proceeding suggests that the trial shall terminate soon.

ii. The arbitral tribunal can reasonably determine the likely timing of the ICC's decision, making the trial certain and thereby leading to a fair arbitral process.

31. In cases of uncertainty about the timeline of criminal proceedings, the arbitral tribunal should not stay the arbitration process[52] otherwise, there would be a miscarriage of justice.[53] Further, arbitrators must consider the probable length of criminal investigations and the potential benefits of conducting such investigations.[54]
32. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[55] It is up to the parties involved, such as the prosecutor and the accused, to provide the necessary evidence to support their respective cases.[56]
33. Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights,[57] along with article 6(1) of the European Court of Human Rights and other human rights instruments

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52Final Award in ICC Case n° 11098 (2003), "Chronicle of arbitral jurisprudence of the ICC", (Les Cahiers de l'arbitrage, Gazette du Palais (2009-2), 17-18 July 2009.

53 *Id*.

54 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.

55 Art. 64 cl 2, Rome Statue.

56 Art. 74, Rome Statue.

57 Art. 9 cl 3 ICCPR.

mandate that criminal proceedings must be conducted in a just and speedy manner.[58] Trials must be conducted fairly and without unnecessary delay.[59] The Rome Statute must be interpreted in accordance with international human rights standards[60] and the accused can request an expedited trial.[61]

34. Presently, the trial will end soon, considering that it is in a Trial Chamber and the time-consuming tasks of investigation and evidence collecting is over. There is certainty about the ICC trial and if the tribunal grants a stay, it would lead to a fair arbitral process.

B. THE CRIMINAL INVESTIGATION IMPACTS THE ARBITRATION PROCEEDINGS AT HAND.

35. The outcome of criminal investigation impacts the arbitration proceedings as *first*, the allegation of wrongdoing committed by Ini-tech is a significant issue in the arbitration proceedings **(*i.*)**, *Second*, the unavailability of a key witness' testimony shall impact the arbitration proceedings **(*ii.*)** and *third*, the absence of Anuwat affects the award's legitimacy **(*iii.*).**

[58] Art. 6 cl 1, ECHR.

[59] Art. 64 cl 2, Rome Statue, Art. 67 cl 1 (C), Rome Statue.

[60] Art. 21 cl 3, Rome Statue.

[61] Art. 85 Rome Statue, Rule 173, Rules of Procedure and Evidence.

i. ***The allegation of wrongdoing committed by Ini-tech is a significant issue in the arbitration proceedings and cannot be determined in Anuwat's absence.***

36. The termination of the CCTA was due to an alleged *'illegality'*. This *'illegality'* is contended in pursuance of Ini-Tech accessing the confidential data pertaining to COLTANA through the OnionRing software.[62]

37. If in an instance, an arbitral tribunal is required to consider an important issue at hand, there would be a breach of natural justice if the arbitrator does not bring its mind to bear on an essential aspect of the dispute before the tribunal.[63]

38. The Singapore Court of Appeal expressly stated that a failure on the part of a tribunal to decide matters submitted to it was a failure to exercise authority that the parties had granted and would, therefore, be a breach of Article 34(2)(a)(iii).[64]

39. Presently, due to Anuwat's absence, the determination of the significant issue at hand, i.e., the termination of the CCTA (as a result of alleged wrongdoing by Ini-tech), shall not be determined clearly and comprehensively. Suppose the proceedings are conducted in the absence of Anuwat. In that case, it shall be against the principles of natural justice since a core part of the proceedings is not given an application of mind by the arbitrator with clarity.

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[62] *Compromis* ¶ 39

[63] *AKN v ALC* [2015] 3 SLR 488 ("AKN") at [46].

[64] *CRW Joint Operation v PT Perusahan Gas Negara (Persero)* TBK [2011] 4 SLR 305.

40. This results in making the arbitration award ineffective and liable to be challenged due to the mechanism needing to be complied with.

41. Therefore, the arbitral tribunal should stay the proceeding.

ii. ***The unavailability of a key witness' testimony shall negatively impact the arbitration proceedings.***

42. A 'witness statement' refers to a written testimony by a witness of fact.[65] In arbitration proceedings, witness statements enable the presentation of evidence before the arbitral tribunal.[66] Witness evidence is an imperative part of arbitration proceedings since the decision of an arbitral tribunal on the merits of the case will often turn (in varying degrees) on the witness evidence that has been presented. [67] Witness statements have certain correlated purposes in arbitration proceedings, as they help reduce the duration of the hearing by presenting pertinent points from the witness's oral testimony in advance. It is utilized to prove disputed facts, explain documents, provide context, '*tell the story'* and provide technical explanations.[68]

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65 IBA Guidelines on Evidence Taking.

66 "*Witness Statements in Domestic and International Arbitration*." , 16 June 2022, amlegals.com/witness-statements-in-domestic-and-international-arbitration/.

67 "*How Reliable Is Witness Testimony in International Arbitration? ICC Commission Publishes Report on "the Accuracy of Fact Witness Memory in International Arbitration and Provides Guidance on Best Practice for In-House Counsel and External Lawyers*." *Www.twobirds.com*, www.twobirds.com/en/insights/2021/global/how-reliable-is-witness-testimony-in-international-arbitration.

68 *ICC's Report accuracy fact witness Memory.*

43. A trial should be adjourned due to the unavailability of an important witness and the relevant test is whether refusing to grant an adjournment would lead to an unfair trial.[69]

44. According to Article 25 Clause 6 of the Model Law,[70] an arbitral tribunal holds the power to exercise its discretion in assessing the evidentiary weight to be accorded to witness evidence.[71] The authority of the tribunal to assess the importance and pertinence of evidence is explicitly addressed in Article 9.1 of the IBA Guidelines .[72] The tribunal holds the authority to eliminate evidence that lacks relevance and materiality and proactively search for evidence that meets those criteria.[73]

45. Witness testimony holds value in cases where witnesses can provide first-hand knowledge of the information they attest to. This is considered probative evidence and is often used in trials to help establish facts. The credibility and reliability of the witness may also be taken into account when determining the weight of their testimony.[74]Further, the witness may carry more value when he has a direct role in the dispute.

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[69] *Bilta (UK) Ltd & Ors v Tradition Financial Services Ltd* [2021] EWCA Civ 221.

[70] Art. 25 cl 6., UNCTRAL Rules.

[71] Blackaby, Nigel, et al. *Redfern and Hunter on International Arbitration*. 6th ed., Oxford, United Kingdom, Oxford University Press, 2015, "Conduct of Proceeding".

[72] International Bar Association Guideline Art. 9.1.

[73] '12. Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence]', in Roman Mikhailovich Khodykin, Carol Mulcahy, et al., A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, (© Oxford University Press; Oxford University Press 2019), pp. 407 – 510.

[74] *Id*.

46. The aspects considered before adjourning are; (i) whether the applicant is a witness or a party, (ii) whether being a witness, they are identified as crucial to the party calling her, (iii) they could not appear in court at the scheduled time due to circumstances beyond their control, (iv) they would be able to testify if the trials were to be postponed and (v) they are particularly keen to testify and refute allegations levelled against them, believing them to be baseless and unfounded.

47. Article 4.9 of the IBA Rules on Taking Evidence in International Arbitration states that a party can request the arbitral tribunal to obtain testimony from someone who won't appear voluntarily. The Tribunal decides and takes appropriate steps if the witness's testimony is relevant and material to the outcome.[75]

85. As established before, the allegation of wrongdoing committed by Ini-tech is a significant issue in the arbitration proceedings. By representing Ini-tech in the proceedings, Anuwat's witness testimony is highly relevant and impacts the outcome of the proceeding as Anuwat is the 'key programmer' of the OnionRing software and has been a significant representative of Ini-tech in other instances.[76] Anuwat's unavailability for the arbitration proceedings due to his trial at the ICC is detrimental to the outcome of the proceeding. Further, Anuwat is an important witness, and RADOSTAN is willing and making all efforts to present the witness.[77] However, his unavailability due to parallel proceedings is a *bona fide* reason for a stay of proceedings.

[75] Art 4.9, International Bar Association Rules on Evidence Taking.

[76] *Compromis* ¶¶¶ 23, 26, 33

[77] *Compromis*, ¶ 43.

86. Therefore, the arbitral tribunal should stay the present proceedings until the conclusion of Anuwat's trial at the ICC.

C. THE ABSENCE OF ANUWAT NEGATIVELY IMPACTS THE LEGITIMACY OF THE AWARD.

87. The failure to allow a key witness to testify results in the *vacatur* of the tribunal's decision.[78] Similarly, a tribunal's rejection of significant evidence is deemed to be a sufficient cause to deny enforcement of the award.[79]

88. The IBA Rules on Taking Evidence in International Arbitration aims to establish a streamlined and cost-effective procedure for evidence collection in global arbitration while upholding principles of fairness.[80]Article V(1) (b) of the New York Convention pertains to situations where a party is not given proper notice or the opportunity to be heard during the arbitral proceedings or experience other forms of significant procedural unfairness.[81]Additionally, pertinent and material evidence that has been refused to be heard or misconduct by arbitrators in refusing to postpone a hearing can lead to an award being set aside.[82]

89. As shown above, Anuwat's trial is at the last stage and will conclude shortly. If the tribunal denies a stay, it shall impact the award's legitimacy, functionality and practicality, making it conducive to being challenged, failing the arbitral mechanism and, importantly, an unfair trial without equal opportunity.

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[78] *Tempo Shain Corp. v. Bertek, Inc.,* 120 F.3d 16, 20-21 (2d Cir. 1997).

[79] *Iran Aircraft Industry v. Avco Corp.,* 980 F.2d 141 (2d Cir. 1992).

[80] Preamble, IBA Guidelines on Evidence Taking.

[81] Art. V (1) (b), New York Convention.

[82] Sec 10 (a) (3) U.S. FAA.

90. Therefore, the arbitral tribunal should stay the proceeding.

III. THE CCTA IS NOT VOID.

91. Section 23 of the Indian Contract Act ["ICA"], 1872 states that an agreement or a contract may be void on the ground of illegality if it arises by statute or statutory rules,[83] or in cases where the courts consider the enforcement of a contract immoral or against public policy.[84] Further, the burden to establish the legality of the agreement lies on the person or the party who impeached its validity.[85] Additionally, every argument of which the object or consideration is unlawful, is void.[86]

92. The RESPONDENT submits that the CCTA is not void as, first, the CCTA is not tainted by illegality **(A.)**, *second*, the CCTA is not against public policy **(B.)**, *third*, the CCTA is forbidden by law **(C.)**, and *fourth*, the consideration or object of the CCTA is unlawful **(D.)**.

93. The presumption of law is in favour of the legality of the contract; if the contract has two meanings or two modes of performance, one legal and the other not, the court will prefer the one which supports it and makes it operate, the burden lies who asserts illegality.

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[83] *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. *N.C. Sharma v 6th Addi District and Sessions Judge, Meerut* AIR 1983 ALL 116.

[84] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p 484.

[85] *Id*., *Dutt on Contract: Indian Contract Act 1972.* Edited by H. K. Saharay, 11th ed., Eastern Law House, p. 272.

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

A. THE CCTA IS NOT TAINTED WITH ILLEGALITY.

94. Illegality affects the agreement's performance, wherein the agreement *prima facie* is legal, but is performed illegally.[87] The illegality arises because both or one of the parties may intend to perform the agreement illegally or to affect some illegal purpose.[88]

95. 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.[89]

96. The Right to Privacy can be drawn from Articles 14, 19 and 21 of the Indian Constitution[90], however, it also allows the state to impose '*reasonable restrictions*' in cases concerning the protection of the nation-state against internal or external threats.[91] In addition, Section 5(2) of the Telegraph Act, 1885 permits the interception of messages in circumstances mentioned therein i.e., occurrence of any public emergency or in the interest of public safety.[92]

97. The Digital Personal Data Protection Act, 2023 ["DPDP, 2023"] states that the processing of data is carried out "*in the interests of preventing, detecting, or investigating any offence*," the majority of data protection requirements are waived off, if the collection of personal data is

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[87] *St John Shipping v. Joseph Rank Ltd [1957] 1 Q.B. 267*. 1957; *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 570.

[88] *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.

[89] *Howard v Shirlstar [1990] 1 WLR 1292*, 1990; *Anson's Law of Contract*. 31st ed., Oxford, United Kingdom, Oxford University Press, 2020, p. 409.

[90] Art. 21, Indian Constitution, 1950.

[91] *K.S. Puttaswamy v. Union of India, (2017) 10 SCC 641*; *Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.*

[92] Sec. 5(2) of the Telegraph Act, 1885.

required for research or is "*in the interests of national sovereignty*," wherein a complete exemption may be granted.[93]

98. In the present case, the CCTA is not tainted with '*illegality*' as the RESPONDENT's conduct of processing the *confidential data* through the OnionRing software[94] was carried out for prevention, detection, and investigation of offences against the interest of Coltana. Further, it is in tandem with the statutes and statutory provisions agreed by both the parties as the current matter is concerning the protection of the nation against internal or external threats, including for safeguarding the economy, sovereignty and security of COLTANA.[95] In addition, the CCTA emphasized on the need for co-operation between the two countries to combat terrorism and other transnational threats.[96] Thereby, access to the confidential data is not illegal as it is conforming to the above-mentioned statutory provisions and the legislative intent.

B. THE CCTA IS NOT AGAINST PUBLIC POLICY.

99. Public policy refers to the framework of political, economic, or social reasoning behind objections that fall outside the scope of morality.[97] This could relate to the execution of an action or the implementation of a promise.[98] It's possible for certain agreements to conflict with legal policy without necessarily being morally questionable or subject to explicit moral

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[93] Digital Personal Data Protection Act, 2023.

[94] *Compromis*, ¶ 39.

[95] *Compromis*, ¶ 23.

[96] *Compromis*, ¶ 24.

[97] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 520..

[98] *Id.*

censure.[99] Additionally, Section 23 of the ICA states that a contract opposed to public policy is unlawful.[100]

100. To establish a violation of public policy, the CLAIMANT must provide evidence that clearly demonstrates that the subject matter of the contract was contrary to public policy.[101] Furthermore, when the procedure requirement of the contract is followed, the freedom of contracts is, in practice, generally not interfered with by the court.[102] The burden of proof is on the person who asserts the illegality of the contract.[103] Furthermore, anything which is patent illegal and further against nature justice is against the public policy of India.[104]

101. The doctrine of public policy includes wide range of topics including imposing inconvenient or unreasonable restrictions in private life.[105] It should only be invoked in clear and incontestable cases of harm to the public or public interest.[106] Further, burden of proof is on who asserts[107] and the court should hold an agreement void only as an extreme reserve.

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99 Gherulal Parekh v. Mahadeodas Maiya *AIR 781 1959 SCR Supl. (2) 40; Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 524; Gulabchand v Kudilal *1966* SCR (3) 623; *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 525.

100 *Supra* 99.

101 *Supra* 99.

102 *Dutt on Contract: Indian Contract Act 1972,* Edited by H. K. Saharay, 11th ed., Eastern Law House, p. 248.

103 *Govind v Pacheco* 4 Bom LR 948.

104 *Cleaver v Mutual R.F. Life Association* (1892) I QB 137.

105 *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p. 528.

106 *Supra* 99.

107 *Subayyan v Ponnu* AIR 1941 Mad 727; *Dutt on Contract: Indian Contract Act 1972.* Edited by H. K. Saharay, 11th ed., Eastern Law House, p. 250.

102. Presently, the CCTA as shown above, was lawfully entered by the CLAIMANT and the RESPONDENT, and does not violate any statutory provision or the terms of the agreement with regards to the performance. Further, the contract was in furtherance of natural justice to promote the national interest of the CLAIMANT by countering terrorism.[108] The CCTA further supports the structure of the political, economic, or social framework of the CLAIMANT and is based on countering trans-national terrorism.[109]

103. Additionally, to substantiate the CCTA to be void due to public policy, the CLAIMANT has to pass a high threshold. Therefore, the CCTA is not void under Section 23 of the ICA and it does not qualify as being opposed to public policy as: (i) Its performance was not tainted with illegality, (ii) It is in tandem with the statutory provisions and national interest of the CLAIMANT, and (iii) the performance of the agreement does not affect but strengthens the citizen's rights and liberty.

104. Considering the above, the tribunal should rule that the contract is not void on the ground of public policy.

C. THE CCTA IS NOT FORBIDDEN BY LAW.

105. Pursuant to Section 23 of the ICA, agreements '*forbidden by law*' are void.[110] '*Forbidden by law*' includes any agreement against any legislative enactment[111] and against the order by a

[108] *Compromis* ¶ 26.

[109] *Compromis* ¶ 26.

[110] *Supra* 97, *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p.488.

[111] *Id*. ; *Neminath Appaya v. Jamboorao Satappa Kocheri*, AIR 1966 Mys 154.

competent authority.[112] The contract may be lawful according to its strict terms but may be performed by a party in the manner the statute prohibits.[113] The term '*law*' includes any enactment or rule of law for the time being in force.[114]

106. When the prohibition is not for the protection of the general public, the contract may not be void.[115] However, the DPDP, 2023 states that the data protection requirements are waived off if it is done in the *interests of national sovereignty*.[116] Similarly, as shown above, there are '*reasonable restrictions*' to the Right to Privacy drawn from Articles 14, 19 and 21 of the Indian Constitution.[117]

107. In the present case, the access to *confidential data* by the RESPONDENT using the OnionRing software is in tandem with the requirements of the legislative enactments and rule of law.

108. Considering the above, the tribunal should rule that the agreement is not forbidden by law.

D. THE CCTA DOES NOT HAVE ANY UNLAWFUL OBJECT.

109. Section 10 of the ICA states that an agreement is only enforceable when it has a lawful consideration and object.[118] The word '*object*' means the design or the purpose of the

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[112] *Id*.

[113] *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; *Dutt on Contract: Indian Contract Act 1972.* Edited by H. K. Saharay, 11th ed., Eastern Law House, p. 232.

[114] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p..488.

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

[116] Digital Personal Data Protection Act, 2023.

[117] Art. 21, Indian Constitution, 1950.

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

contract.[119] 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, an objective of the agreement must be considered.[120] It states that the agreement 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 and *third*, it is opposed to public policy.

110. Article 31 of the VCLT states that all the agreements shall be presumed to be entered in good faith.[121] Similarly, Article 26 of the VCLT, every treaty or an agreement in force is binding upon the parties and must be performed by them in good faith, *pacta sunt servanda*.[122]

111. Presently, as shown above, the contract is not unlawful as the purpose of the contract is to counter terrorism and to safeguard the above-mentioned interests of COLTANA. Furthermore, the RESPONDENT had not entered into the agreement with lawful object and good faith as shown above in a disjunctive manner. Furthermore, since the performance of the contract is in tandem with the statutes and statutory provisions of COLTANA, the consideration or object of the CCTA can be termed as lawful.

112. Considering the above, the tribunal should rule that the object or consideration of the CCTA is lawful and therefore, the CCTA is not void.

IV. THE TERMINATION OF THE CCTA BY COLTANA IS NOT VALID.

113. The RESPONDENT had entered into a valid agreement with the CLAIMANT, in conformity with the provisions of the ICA. The CLAIMANT has unilaterally terminated the contract with an

[119] *Nathusa v. Munir* AIR 1943 Nag 129; Kashi v. Bapu AIR 1940 Nag 305 (FB).

[120] *Supra* 99.

[121] Art. 31, Vienna Convention on the Law of Treaties, 1961

[122] Art. 26, Vienna Convention on the Law of Treaties, 1961

allegation of '*illegality'*, however, the CCTA does not affect the national interest and security of COLTANA. To determine whether there is a valid termination, the terms of the agreement, relating to the '*confidential data*' accessed through the OnionRing must be ascertained.

114. The RESPONDENT submits that, according to the terms of the agreement, *first,* the access to the confidential data is in tandem with the terms of the agreement **(A.)**. *Second,* there was no failure of performance by the RESPONDENT **(B.)**. *Third,* the termination of the CCTA is not valid as there was no fundamental breach of contract **(C.)**.

A. THE ACCESS TO THE CONFIDENTIAL DATA IS IN TANDEM WITH THE TERMS OF THE AGREEMENT.

115. According to Article 31 of the VCLT, a treaty or an agreement shall be presumed in good faith and in accordance with the ordinary meaning of the terms of the treaty or agreement,[123] in other words, a specific meaning will be established that is the common intention of the parties.[124] 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*).[125]

116. In any case, if the above-mentioned criteria lead to a sound and reasonable interpretation, then the supplementary (*complémentaire*) material shall not be taken into consideration.[126]

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

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

[125] Mark Eugen Villiger. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden ; Boston, Martinus Nijhoff Publishers, 2009, p. 428.

[126] Art. 32 ,Vienna Convention on the Law of Treaties, 1961

Moreover, the result arrived by the usage of primary means of Article 31 always prevails over solutions suggested by the supplementary means.[127]

117. Presently, the terms mentioned in the CCTA about Ini-Tech's responsibility "*for operation and maintenance*" of the OnionRing software[128] does not require confirmation from any supplementary means as for operating and maintaining the software, access to data coming from "*variety of devices, including smartphones, tablets and computers*"[129] and "*government's computer and internet system*"[130] ["***data***"] is necessary for completing the purpose or the object of the bilateral government-to-government agreement[131], i.e., to identify and neutralize potential cyber-attacks and terrorist threats in COLTANA.[132]

118. Thus, the RESPONDENT's access to *data* is in accordance with the CCTA's object and purpose.

B. THERE WAS NO FAILURE OF PERFORMANCE BY THE RESPONDENT.

119. There is no failure of performance as presently the terms of the agreement were followed. As shown above, the interpretation of the terms of the CCTA verifies that granting the

[127] Greig, D. W. *International Law*. Butterworths, 1976;Mark Eugen Villiger. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden ; Boston, Martinus Nijhoff Publishers, 2009, p. 447.

[128] *Compromis* ¶ 24

[129] *Compromis* ¶ 23.

[130] *Compromis* ¶ 26.

[131] Subudhi, Badri Narayan, et al. "Big Data Analytics for Video Surveillance." Multimedia Tools and Applications, vol. 78, no. 18, 5 June 2019, pp. 26129–26162, https://doi.org/10.1007/s11042-019-07793-w; "Life Cycle Costing / Life Cycle Phases / Operation & Maintenance." Integrated Asset Management Framework, swefc.unm.edu/iamf/life-cycle-costing-life-cycle-phases-operation-maintenance/.

[132] *Compromis* ¶ 23.

RESPONDENT access to the "*data*" was a fundamental requirement for fulfilling the terms of the agreement.

120. Failure of performance, whether total or partial, may in certain circumstances, entitles the other party to the contract to treat the contract as discharged.[133] Failure of performance is, thereby, 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.[134] This suggests that, in the event of a partial failure, it must be in a matter that goes to the root of the contract.[135]

121. Considering the above, the RESPONDENT was fulfilling the terms of the agreement by providing the services of the Onion-Ring through "*deploying, operating, and maintaining*" the software to the CLAIMANT. [136]

122. Both the parties to the CCTA had agreed that the RESPONDENT shall be operating and maintaining the said software for the purpose of "*combating terrorism and transnational threats*."[137] As shown above, the access to "*data*" is a pre-requisite for operation, management and maintenance of the said software and the CCTA emphasizes on "*the need for co-operation*

[133] *Id.*

[134] *Hongkong Fir shopping Co Ltd V Kawasaki* [1962] 2 QB 26 [1961] EWCA Civ 7

[135] *Id*.

[136] *Compromis* ¶ 26.

[137] *Compromis* ¶ 24.

between and Radostan."[138] Thereby, it is submitted that the access of the data is a requirement and is agreed by both the parties under the terms of the CCTA.

123. Therefore, the tribunal should rule that there was no failure of performance and that the RESPONDENT acted according to the terms of the CCTA.

C. THE TERMINATION OF CCTA IS NOT VALID AS THERE WAS NO FUNDAMENTAL BREACH OF CONTRACT.

124. A binding agreement requires adherence to binding obligations.[139] A breach of an agreement occurs when either of the parties to the agreement does not adhere to those binding obligations by failing to perform its obligation.[140] A breach of contract refers to any breach, whereas a fundamental breach refers to a breach that goes against the root of the contract.[141]

125. A fundamental breach of the contract is required for termination of the agreement.[142] This refers to a breach that goes against the root of the contract[143] and entitles the other party to treat such a breach as a right to terminate the whole agreement.[144] There are three circumstances that can lead to a discharge of contract. *First,* when a party renounces their liabilities under it;

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[138] *Compromis* ¶ 24.

[139] *Heymans v. Darwins* (1942) AC 356, 397; *Universal Cargo Carrier Corporation v. Citati* (1957) 2 QB 401 ¶ 436.

[140] *Chitty on Contracts*. Vol. 1, London, Sweet & Maxwell, 2018, para, 25-001.

[141] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p., 779.

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

[143] Federal Commerce and Navigation Ltd v. Molena Alpha Inc, *(1979) AC 757*.

[144] Effect of Limitation of Liability and Exclusion of Liability Clauses in the Event of Fundamental Breach of Contract, (2020) 5 SCC J-1.

second, when a party creates impossibility through their own act and *third*, when there is total or partial failure of performance.

126. For a termination to be valid under Section 39 of the ICA, the breach should be of fundamental in nature,[145] which goes against the essence or vital part of a contract or an agreement. Thereby, giving the innocent party a right to terminate.[146]

127. When one party breaches a contract and the other party accepts the breach, the agreement can be terminated.**[147]** This is known as a repudiatory breach, which makes the contract voidable.**[148]** Repudiation occurs when a party declares that they have no intention of fulfilling their contractual obligations.**[149]**

128. When it comes to 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*, the party's refusal to perform that term. This test is critical in determining whether repudiation has taken place.**[150]** The innocent party can rescind

[145] *Supra* 115.

[146] *Narain v. Sant Ram,* AIR 1952 Bilaspur 6*; V. Harihara Iyer v. Mathew George,* AIR 1965 Ker 187*; Zainab Begum Alias Varalakshmi v. Khursheed Begum,* AIR 1963 AP 370.

[147] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p.794.

[148] *Muralidhar Chatterjee v. International Film Co Ltd,* AIR 1943 PC 34, (1943) 70 IA 35; *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p.793.

[149] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p.781

[150] *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p.786.

the contract under Section 66 of the ICA, the recission must be communicated in the same manner as the communication of proposal.[151]

129. As shown above, there was no fundamental breach of the CCTA as not every breach gives discharge from liability,[152] let alone there was no breach of the agreement as there was no refusal to perform the terms of the CCTA by the RESPONDENT. and since the contract is still executory, the CLAIMANT should elect the CCTA to be continuing.[153] There has been no failure of performance by RESPONDENT as there was no deliberate breach[154] of the terms of the agreement.

130. Considering the above, the RESPONDENT has not committed even a breach, let alone a fundamental breach.[155] The arbitral tribunal should find that there has been no breach of contract and the RESPONDENT did intend to fulfil their contractual obligations. Henceforth, the threshold of invoking Section 39 of the ICA is not satisfied.

131. Considering the above, the arbitral tribunal should rule that the termination is not valid.

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[151] Sec. 66 Indian Contract Act; *Pollock & Mulla on Indian Contract and Specific Relief Acts*. 16th ed., LexisNexis, 1986, p.794.

[152] *Chitty on Contracts*. Vol. 1, London, Sweet & Maxwell, 2018, pp, 1537, para. 24-001.

[153] *Avery v. Bowden (1855) 5 E. & B. 714*; *Lakshmijit v. Sherani [1974] A.C. 605*; Vitol SA v. Norelf [1996] A.C. 800;*Chitty on Contracts*. Vol. 1, London, Sweet & Maxwell, 2018, pp,1538.

[154] *Chitty on Contracts*. Vol. 1, London, Sweet & Maxwell, 2018, para.24-042.

[155] *Id*.

PRAYER FOR RELIEF

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

I. Olaf, an AI-powered intelligent lawyer cannot be removed as the arbitrator for 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.

III. the CCTA is not void; and

IV. the termination of the CCTA by COLTANA is not valid.

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