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THE 18TH LAWASIA INTERNATIONAL MOOT COMPETITION

IN BANGALORE, INDIA

2023

BETWEEN

THE REPUBLIC OF COLTANA

(CLAIMANT)

AND

THE MAJESTIC KINGDOM OF RADOSTAN

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

STATEMENT OF JURISDICTION

The Parties, the Republic of Coltana (the **'Claimant'**) and the Majestic Kingdom of Radostan (the **'Respondent'**) hereby mutually submit this dispute to arbitration in accordance with the Asian International Arbitration Centre Arbitration Rules 2021 (AIAC Rules 2021). The substance of this dispute will be governed by Indian law as agreed under **Article 10(i)** and interpreted under the **Vienna Convention on the Law of Treaties 1969 (VCLT)** as in **Article 10(ii) of the Coltana-Radostan Counter Terrorism Agreement (the 'CCTA')** entered by both parties on 31 September 2021. Any arbitration award made by the tribunal will be final and binding pursuant to **Rule 33.3 of the AIAC Rules 2021** and **Article 8(ii) of the CCTA**.

INDEX OF AUTHORITIES

LEGISLATION

CASES

OTHER DOCUMENTS

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ICRC position on autonomous weapon systems. (2021, May 12). International Committee of the Red Cross. https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems	25
Indian Supreme Court. Legal advisory, tax consulting, audit services and management and IT consulting. (2021, March). https://www.roedl.com/insights/india-software-payment-import-license-royalty-supreme-court	33
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Kaufmann-Kohler G., Schultz T. (2005). The Use of Information Technology in Arbitration https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf	13

Rao, Siddharth Prakash. (2014). Stuxnet , A new Cyber War weapon : Analysis from a technical point of view. 10.13140/2.1.1419.5205.	26
Roy, R., & Zanfir-Fortuna, G. (2023, August 15). *The Digital Personal Data Protection Act of India, explained*. Future of Privacy Forum. https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/	30
Singh, J. (2023, August 7). *India pushes ahead with data privacy bill despite pushback from critics*. TechCrunch.	19
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Treitel, G. H. (2014). *Frustration and force majeure / by Sir Guenter Treitel, Q.C., D.C.L., F.B.A.* (Third). Sweet & Maxwell.	27
What Are The Differences Between Executive And Non-Executive Directors? (n.d.). Cleartax. https://cleartax.in/s/differences-between-executive-and-non-executive-directors	5
Yosefi, A., & Noy, O. (2023a, August 16). *India enacted its new Digital Personal Data Protection act*. Lexology. https://www.lexology.com/library/detail.aspx?g=d2aed297-500e-4104-9a5b-3efbff08e0b1	20
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QUESTIONS PRESENTED

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

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

III. Whether the CCTA is void; and

IV. In the event, issue III is decided in the negative, whether the termination of the CCTA by Coltana is valid.

STATEMENT OF FACTS

INTRODUCTION

1. The present dispute centres around the Coltana-Radostan Counter Terrorism Agreement ("**CCTA"**), a government-to-government agreement signed between the Claimant, The Republic of Coltana ("**Coltana**"), and the Respondent, The Majestic Kingdom of Radostan ("**Radostan**"). The CCTA emphasises the importance of cooperation between these two nations in combating cyberterrorism and other transnational threats.

THE CREATION OF OLAF

2. Launched in 2015, Project Olaf was launched by Prime Minister Yodwicha of Radostan with the aim of developing the world's first super-intelligent and autonomous AI lawyer and judge. This groundbreaking endeavour received support and intellectual assistance from Coltana, formalised through the Coltana-Radostan Memorandum of Understanding ("**CRMOU"**).

3. Immediately after Olaf became fully operational, it rapidly gained global acclaim as the premier autonomous provider of legal services. It earned the esteemed title of a "trustworthy robot" in the eyes of the media. Olaf became the preferred representative for

numerous private and governmental entities, adeptly navigating diverse legal disputes and even taking roles as counsel or arbitrator in international and domestic arbitration cases. Even Coltana's Ministry of Technology acknowledged Olaf as an exceptionally intelligent entity integrated into an advanced robotic form.

4. Remarkably, Olaf's capabilities transcended the courtroom as it autonomously disseminated legal insights and updates on various social media platforms. However, the Claimant has sought Olaf's removal as an arbitrator of the current dispute, alleging a lack of impartiality due to two reasons. Firstly, Olaf's perceived support for Radostan's domestic and international policies. Secondly, Olaf's affiliation with the Respondent as Olaf is owned by Oracle Corp, a private entity in Radostan.

THE ENFORCEMENT OF CCTA

5. The Sapura Bay Bombings and cyberattacks on Coltana's government websites have tempted President Lalan to initiate a high-level security operation. Anuwat Kittisak, CEO of Ini-Tech Inc, proposed deploying Ini-Tech Inc's latest innovation, the OnionRing, that could effectively identify and neutralise cyberattacks and terrorist threats. This led to the formation of the **Coltana-Radostan Counter Terrorism Agreement (CCTA)**, highlighting the joint commitment to combat terrorism and various cross-border threats.

6. Anuwat described OnionRing as a “cyber intelligence solution” capable of extracting valuable intelligence remotely and covertly from various sources.

THE 2021 GENERAL ELECTIONS IN COLTANA

7. Subsequently, Coltana held general elections in which the DPP party narrowly avoided defeat. Speculations arose regarding OnionRing's access to electorates' personal data and its alleged assistance to the OBH party.

8. President Loli Lalan threatened legal action against OBH, Radostan, and Ini-Tech if interference in Coltana’s internal affairs were confirmed. President Lalan, however, refrained from disclosing the investigation’s outcomes due to confidentiality reasons.

THE BITCOIN ROBBERY

9. **Article 4(ii) of the CCTA** mandated Coltana's Bitcoin payments, a method agreed upon by both parties. However, Coltana's Bitcoin Reserve, held by the Coltana National Bank (**CNB**), vanished overnight, containing approximately USD 300 million.

10. Nevertheless, President Lalan expressed confidence that Coltana would find alternative means to finance the software, assuring that the robbery will not hinder the OnionRing

procurement and it's payment obligation. During negotiations, Coltana portrayed openness in amending the payment method.

THE ULAVU FILES

11. The Ulavu Files, declassified by the United States Department of Justice (**DOJ**), brought forth Anuwat's arrest on an International Criminal Court (**ICC**) warrant for alleged cyber war crimes in Ulavu. The fact that Dua Lupa, who went on to become the Ulavu's Prime Minister and is known to be an associate of Anuwat, was relied upon.

12. Previously leaked reports by the Crime and Corruption Reporting Project (**CCRP**) indicated Ulavu Intelligence Bureau's purchase of hardware resembling OnionRing's equipment. The CCRP is based in Denmark and comprises independent investigative journalists and media personnel.

THE AIAC PROCEEDINGS

13. After the Ulavu Files' release, Coltana ceased negotiations with Radostan to amend **Article 4(iii) of the CCTA** as they claimed illegality had tainted the agreement. President Lalan invoked **Article 8 of the CCTA**, commencing arbitration against Radostan.

14. The Respondent appointed Olaf, as one of the arbitrators to the proceedings. Later, Coltana requested Olaf's removal due to alleged bias. However, Radostan defends Olaf's impartiality, citing its nature being an Artificial Intelligence, having no emotions making the issues of biasness to not arise. Radostan is seeking a stay of the AIAC proceedings, citing necessity of Anuwat's presence who is currently testifying at the ICC for the Ulavu Files. However, Coltana opposed it as they asserted that the ICC trial's outcome would not impact the present arbitration.

15. Radostan further has alleged that Coltana's termination lacked good faith, citing financial issues is not an excuse to perform its payment obligation under the CCTA and Coltana's request to retain OnionRing contradicts the termination of the CCTA done by Coltana.

SUMMARY OF PLEADINGS

I. OLAF, AN AI-POWERED INTELLIGENT LAWYER, SHALL NOT BE REMOVED AS AN ARBITRATOR

Olaf shall not be removed as an arbitrator on the grounds of lack of impartiality as Olaf's conduct had not raised any justifiable doubts on his impartiality or independence. Relying on **Items 2, 8 and 15 of the Seventh Schedule of the Indian Arbitration and Conciliation Act 1996,** his conduct falls short of the test established. Moreover, as Olaf has no previous involvement in the very dispute, there are no valid grounds for his removal for lack of independence. Hence, Olaf is not biased and it is independent from the parties to the dispute which strengthens the point that Olaf shall not be removed as an arbitrator.

II. THE ARBITRAL TRIBUNAL SHOULD STAY THE PRESENT PROCEEDINGS PENDING THE CONCLUSION OF ANUWAT'S TRIAL AT THE ICC

The Arbitral Tribunal should stay the present proceedings as firstly, the outcome of the decision in the International Criminal Court (ICC) will sufficiently impact the instant arbitration, namely on the validity of the CCTA. Secondly, Anuwat's presence is essential because the Respondent has to comply with **Rule 27 of the AIAC Rules.** The Claimant is

alleging that the OnionRing software has obtained the personal data of the Coltana electorates and claims it to be illegal. Therefore, it is essential to call Anuwat, the key-programmer of the OnionRing software to assist the Tribunal in understanding the facts at hand.

III. THE CCTA IS NOT VOID

The CCTA is not void because firstly, the object and purpose of the CCTA is fulfilled. Secondly, there is no violation of public policy due to three reasons. Firstly, the evidence for infringement of privacy is not backed by authorities. Secondly, the evidence was uncorroborated and lastly Coltana consented for the OnionRing to access private information for national security purposes. The validity of the CCTA agreement is also unaffected by the Bitcoin Robbery incident. This point could be delineated into two limbs which are; that the CCTA is not void due to financial difficulties and that the CCTA is not void as it is only allowed for executory contracts. Fourthly, the CCTA is not void due to mere reliance as to what has transpired in Ulavu files.

IV. THE TERMINATION OF CCTA BY COLTANA IS INVALID

The Claimant's termination is not valid because firstly, there is no frustration by virtue of **Section 56 of Indian Contracts Act 1872** as the CCTA has been fully performed and is made in absolute terms. Secondly, there is no breach of privacy by OnionRing. This is because there is a security guarantee provided to Coltana, indicating no failure to protect

data privacy. Thirdly, termination is not done in good faith. The termination done by Coltana was dishonest and as a consequence, has misled Radostan to believe in the Claimant's financial ability to amend their payment obligations. Fourthly, Coltana's request for retention of OnionRing contradicts its claim for termination.

PLEADINGS

PRELIMINARY ISSUE: THE APPLICATION OF INDIAN LAW AS THE LEX ARBITRI

Both Parties agreed that the seat of the arbitration is in Bangalore, India.[1] The governing law of the **Coltana-Radostan Counter Terrorism Agreement (CCTA)** is also Indian law.[2] With the principle of party autonomy, the Tribunal has a duty to respect the choice-of-law clause that has been determined by the parties.[3] Hence, Indian law must be applied. The application of Indian law is to determine issues such as the impartiality and independence of an arbitrator, as well as the issue of voidness and termination of this agreement. The **Arbitration and Conciliation Act 1996 (the Act)** is the source of law that deals with arbitration held in India. The genesis of this Act is from the **IBA Guidelines on Conflicts of Interest in International Arbitration 2014** which is widely accepted within the international arbitration community. Meanwhile, the **Indian Contracts Act 1872** is applicable for the issues of voidness and termination of the CCTA.

[1] Article 8 of the CCTA.
[2] Article 10 of the CCTA.
[3] *The Leading Arbitrators' Guide to International Arbitration* (3rd ed.). (2014). Juris Publishing, Incorporated.

I. OLAF, AN AI-POWERED INTELLIGENT LAWYER, SHALL NOT BE REMOVED AS AN ARBITRATOR

A. Olaf is impartial

1. Impartiality is connected to a state of mind of the arbitrator that is evident through conduct.[4] For example, an arbitrator displays a preference for one party against another. The standard of impartiality and independence of an arbitrator is the justifiable doubt test. In **HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited,**[5] doubts are only justifiable if a reasonable third person having knowledge of the relevant facts concludes that the arbitrator may be influenced by factors other than the merits of the case in reaching the decision.

2. **Section 12(3) of the Indian Arbitration and Conciliation Act** provides grounds for challenging the appointment of an arbitrator. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. Grounds of justifiable doubts are stipulated in the **Fifth Schedule.** Meanwhile, the **Seventh Schedule** provides the circumstances where an arbitrator is ineligible to be appointed as an arbitrator. The list of Items are similar to each other.

[4] Kumar, L. (2014, January 1). The Independence and Impartiality of Arbitrators in International Commercial Arbitration. *Social Science Research Network*. https://doi.org/10.2139/ssrn.2428632.
[5] (2017) 8 MLJ 493 (SC)

3. **Item 2** provides that an arbitrator's impartiality or independence raises justifiable doubts when the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties. **Item 8** mentions regularly advising the appointing party even though not deriving significant financial income therefrom raises justifiable doubts. **Item 15** also provides that legal advice or providing an expert opinion on the dispute to a party or an affiliate of one of the parties by the arbitrator raises justifiable doubts. These items are equivalent to **Item 1.4 of the Non-Waivable Red List of the IBA Guidelines**. Therefore, Olaf can only be removed as an arbitrator should Olaf's impartiality or independence raises justifiable doubts as the aforementioned Items.

4. The launching of Project Olaf in 2015 as part of Prime Minister Yodwicha's plans to create the world's first super-intelligent and independent AI lawyer and judge does not render **Item 2** applicable. This is because Olaf was created to solely advance legal systems and improve access to justice. This fact is further strengthened when President Lalan of Coltana participated in this project through the CRMOU[6] which shows that Project Olaf is a collaboration of both parties to this dispute. Hence, the issue of Olaf representing the Respondent thus making it potentially biased does not arise.

[6] Page 6, Paragraph 11 of the Moot Problem.

5. Olaf's publications and postings supporting Radostan's domestic and international conduct and policies do not render **Item 8** and **Item 15** to apply. Olaf's statement does not concern the dispute in any way. In **HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited**, **Item 15** did not apply because the opinion has no concern with the present dispute, and the arbitrator was not disqualified. Similarly, Olaf should not be removed because these publications and postings are neither on the jurisdictional nor the merits issues of the dispute.

6. **Item 4.1.1 of the Green List of the IBA Guidelines** mentions that expressing opinions does not necessarily show bias, lack of independence, or possible conflict of interest. The Supreme Court in **HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited** ruled that merely providing a legal opinion in an unrelated matter will not attract **Items 1, 8, and 15 of the Seventh Schedule** regarding the challenge to the appointment of Justice K.K. Lahoti. Similarly, Olaf's publications and postings support Radostan's domestic and international conduct and policies is clearly an unrelated matter to the current arbitration which does not attract **Items 8 and 15 of the Seventh Schedule.**

B. Olaf is independent from the parties in this dispute

7. The Respondent stands firm in the stance that Olaf is proven to be impartial since **Items 2, 8 and 15** do not apply. There are no grounds for removal of Olaf as an arbitrator.

8. or the lack thereof are the litmus test for independence. An arbitrator's independence raises justifiable doubts when being professionally or personally related to one of the parties or by having a familial or business connection to or with that party.[7] Even though Olaf is under the ownership and management of Oracle Corporation (Oracle Corp), a private entity in Radostan, Olaf is not dependent on Radostan because Oracle Corp is a non-government affiliated company. Prime Minister Yodwicha is merely one of its Independent Non-Executive Directors (NED), which emphasises that the Respondent does not have control due to non-involvement in the company's operations.[8]

[7] Ibid at 4.

[8] *What Are The Differences Between Executive And Non-Executive Directors?* (n.d.). Cleartax. https://cleartax.in/s/differences-between-executive-and-non-executive-directors.

9. **Item 16** provides that the previous involvement of the arbitrator in the case also raises justifiable doubts about its impartiality and independence. Olaf's previous involvement with Coltana being its mediator in an investment dispute between two Coltana investment companies does not render **Item 16** to apply. In **HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited**, the arbitrator must have a previous involvement in the very dispute contained in the present arbitration in order to be disqualified as an arbitrator. Contrasting with Olaf's situation, the prior involvement is different altogether from the present arbitration because it is a different proceeding being a mediation and concerning a different subject matter as it is an investment dispute.

10. As Project Olaf was launched in 2015 by Prime Minister Yodwicha and was participated by President Lalan of Coltana through the CRMOU[9], this shows that Project Olaf is a collaboration of both parties to this dispute. Even though Olaf is owned by Oracle Corp, the delegation from Coltana assisted in many different stages of structuring Olaf including designing the architecture of the AI system, collecting, and analysing vast amounts of data as well as providing legal training to Olaf.[10] Hence, the involvement of both parties are equal, demonstrating Olaf's independence.

[9] Page 6, Paragraph 11 of the Moot Problem.
[10] Ibid.

11. The Respondent reiterates the stance that Olaf shall not be removed as an arbitrator as Olaf's impartiality and independence does not raise justifiable doubts. Olaf is proven to be impartial since Olaf does not represent or advise any of the parties, regularly advises the Respondent or provides legal advice or an expert opinion regarding the current arbitration dispute. Also, the involvement of both parties are equal, demonstrating Olaf's independence.

II. THE ARBITRAL TRIBUNAL SHOULD STAY THE PRESENT AIAC PROCEEDINGS

The Arbitral Tribunal should stay the present proceedings because the outcome of the decision in the ICC sufficiently impacts the present arbitration and Anuwat's presence is required because the Respondent has to comply with **Rule 27 of AIAC Rules.**

A. The outcome of the decision in the ICC sufficiently impacts the present arbitration

12. In International Chamber of Commerce **Case 13706**[11], it is stipulated that for a stay to be ordered, the reason is that the other proceedings sufficiently impact the arbitration proceedings, namely the potential to influence the final award. The Arbitral Tribunal dismissed the Respondent's request to stay the arbitration on the ground that the Tribunal did not consider the decision of the criminal judge to have an impact on the outcome of the arbitral proceedings. This is because there were no conflicts between the issues arising out of the criminal proceedings and the commercial issues before the Tribunal.

[11] ICC Case 13706, Final Award, ICC Dispute Resolution Bulletin 2019 No. 3, p. 61.

13. The Crime and Corruption Reporting Project (CCRP) reported that the Ulavu Intelligence Bureau purchased a set of hardware that matches the description of the equipment used to run the OnionRing software. The software was used to identify and target journalists, activists, and opposition parties. Various Autonomous Weapons Systems (AWS) that were purchased by Ulavu from Radostan have incorporated this software and were used in the 10 October 2019 armed conflict between the Ulavu forces and the anti-establishment forces.

14. Due to the close relationship between Anuwat and Dua Lupa and his frequent visits to Ulavu, Anuwat was arrested as the key programmer of the OnionRing on the grounds of supporting cyber war crimes in Ulavu. On 10 October, 2022, Anuwat will be testifying regarding the Ulavu scandal. Anuwat's trial is currently at the Trial Chambers where it is to determine whether Anuwat is innocent or guilty of the charges. Sentencing will be imposed when Anuwat is found guilty of the cyber war crime.

15. The outcome of the criminal trial against Anuwat will sufficiently impact the current arbitration, namely on the validity of the CCTA. This is because one of the issues in this arbitration is to determine the validity of the CCTA in which the OnionRing software is the subject matter. Anuwat, the key programmer of OnionRing is arrested due to his role in the creation of OnionRing which supported the cyber war crimes in Ulavu. Ulavu's AWS incorporated software that matches the description of the software that is used to run the OnionRing.

16. Anuwat is the key programmer of the OnionRing software, naturally he has the inherent expertise and knowledge on the making of the OnionRing software and its operation. The central issue at stake in the current proceedings revolves around the legality of the OnionRing software, Anuwat's pivotal role as the CEO of Ini-Tech and the key programmer of OnionRing carries immense significance.

17. Anuwat's absence in these proceedings significantly impedes the Respondent's ability to address the critical issues at hand as upon determining his guilt towards the alleged crimes, the software utilised in Ulavu's Autonomous Weapons Systems (AWS) that bears a striking resemblance to OnionRing would be deemed illegal and this would cast a shadow of illegitimacy over OnionRing itself. As the connection between the two cases could not be overlooked in the interest of a fair trial, Anuwat's presence is not only warranted but also essential.

B. Anuwat's presence is essential because the Respondent has to comply with Rule 27 of AIAC Rules

18. The Parties agree that the **AIAC Rules 2021** applies to this arbitration dispute. **Rule 27** governs the rule for Evidence. Under **Rule 27.1**, each Party shall have the burden of proving facts relied on to support its claim or defence. Further, **Rule 27.2** mentions that witnesses, who are presented by the Parties to testify on any issue of fact in the arbitral proceedings may be called.

19. The Claimant alleges that the Respondent has interfered with the Coltana General Elections 2021 by obtaining the Coltana electorates' personal data through Ini-Tech's database. This allegation is detrimental and injurious towards the Respondent, hence, this warrants the Respondent to produce facts in defence of such allegation as per **Rule 27 of the AIAC Rules.** In order to do this, the presence of Anuwat in the arbitration proceeding is crucial because he is the key programmer of the OnionRing software, making his testimony to be of utmost importance in the present arbitration.

20. It is acknowledged that documentary evidence may be procured to produce facts in defence.[12] However, documentary evidence is not sufficient as alleged by the Claimant.[13] This is because the current dispute involves subject matters such as software and data. It is fruitful to call Anuwat who is able to assist the Tribunal in understanding the facts at hand since he is the key-programmer of the OnionRing software. Therefore, Anuwat's presence is necessary to give evidence on behalf of the Respondent.

21. **Rule 28.4** provides that witnesses including expert witnesses may be heard and examined by the Arbitral Tribunal. Therefore, by being present in the arbitration proceeding, the Tribunal has the liberty to examine Anuwat on the statements made by him. Should this arbitration proceed with a document-only basis, the liberty to examine Anuwat that is enjoyed by the arbitrators is absent and they are only stuck with examining the written words in black ink on white paper. The Tribunal can also assess his demeanour in giving the testimony, which further increases or decreases the weightage of the evidence given.

[12] Rule 27.3 AIAC Rules 2021.
[13] Page 17, Paragraph 43 of the Moot Problem.

22. Nevertheless, **Rule 28.7** provides that the Arbitral Tribunal may direct that any witness, including an expert witness be examined virtually. This virtual proceeding is also known as video-conferencing. Should the Tribunal wish to consider online conferencing, the Respondent submits that physical examination of witnesses is better for the circumstances of this case.

23. The Respondent reiterates the stance that Anuwat should be examined in person during the arbitration proceeding. This is because video conferencing sessions could only be the second-best solution, compared to in-person proceedings.[14] Video-conferencing does not allow for proper eye contact to be made and it is more difficult to establish trust as well as direct attention.[15]

24. In contrast to virtual hearings, in-person hearings have an added value where there is the ability to examine the demeanour of the witness in giving testimony on the particular fact in question. Therefore, a clear communication can materialise which will be a tremendous assistance to the Tribunal in rendering an award for the parties.

[14] Kaufmann-Kohler G., Schultz T. (2005). The Use of Information Technology in Arbitration https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf

[15] Gibbons L. J, Kennedy R. M. , Gibbs J. M (2002, April 3). *Cyber-mediation: Computer-mediated Communications Medium Massaging the Message*, 32 N.M.L. Rev. 27 , p. 34.

25. Privacy is a hallmark attribute of arbitration. The use of a video conferencing application to conduct an arbitration over cyberspace poses security, privacy, and confidentiality reasons. Virtual hearings are unsafe since they provide an opportunity for third parties to attack, intercept, or hack the system and secretly record the proceedings with the intention of making them public. **Section 42A**[16] mandates the confidentiality of information where the arbitrator, the arbitral institution, and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings.

26. The Respondent reiterates the stance that the Arbitral Tribunal should stay the present proceedings because Anuwat is a crucial witness to the making of the OnionRing, a subject matter that is in dispute. In the current arbitration proceeding, the Claimant submits that the CCTA is void due to the OnionRing's illegality. Hence, it is key for Anuwat to be present in giving his testimony in-person in which this Tribunal has the benefit of assessing his credibility and examines his testimony in-person.

[16] Indian Arbitration and Conciliation Act 1872.

III. THE CCTA IS NOT VOID

The CCTA is not void because firstly, the object and purpose of the CCTA is fulfilled. Secondly, there is no violation of public policy. Thirdly, the Bitcoin Robbery incident does not void CCTA. Fourthly, the contract is not void due to what has transpired in Ulavu files.

A. The object and purpose of CCTA is fulfilled

27. The object and purpose of CCTA is to combat terrorism and other transnational threats.[17] This has been fulfilled and it is evident from reports of the government's security and intelligence department that OnionRing was able to identify and prevent several cyber-attacks and terrorist plots. This has contributed significantly to the country's overall security, subsequently proving that the object and purpose is achieved successfully.

B. There has been no violation of public policy

28. The CCTA is not void as there is no violation of public policy by virtue of **Section 23 of the Indian Contracts Act 1872.** This is because there is no infringement of privacy on three reasons; the evidence is not backed with authorities, it is uncorroborated, and it is consensual.

[17] Page 10, Paragraph 24 of the Moot Problem.

i. The evidence on infringement of privacy is not backed by any authorities

29. Privacy intervention is a serious allegation against another party. In **Manohar v India,**[18] the Court put high emphasis that evidence put forward must be backed with authorities. The petitioners in this case succeed to prove that India has used a surveillance software called "Pegasus" by three experts which are Citizen Lab, Amnesty International and The Minister of Law, Electronics and Information Technology of India.

30. Citizen Lab is a laboratory based out of the University of Toronto, Canada. In September 2018, it released a report detailing the software capabilities of a "spyware suite" called Pegasus that was being produced by an Israeli Technology firm, viz., the NSO Group. The report indicated that individuals from nearly 45 countries were suspected to have been affected.[19]

31. Amnesty International on the other hand collaborated with Citizen Lab on 15th June 2020 and uncovered another spyware campaign which allegedly targeted nine individuals in India, some of whom were already suspected targets in the first spyware attack.

[18] Manohar Lal Sharma vs Union Of India No. 314 OF 2021 on 27 October, 2021.
[19] Manohar v. Union of India. Global Freedom of Expression. (2022, February 7). https://globalfreedomofexpression.columbia.edu/cases/manohar-v-union-of-india/.

32. Meanwhile, The Minister of Law, Electronics and Information Technology of India has affirmed reports released from the global messaging giant WhatsApp Inc. that have identified a vulnerability in its software that enabled Pegasus spyware to infiltrate the devices of WhatsApp's users.[20] This news was followed by a disclosure that the devices of certain Indians were also affected, which fact was acknowledged by them in a statement made in the Parliament on 20th November 2019.

33. The Respondent contends that the Claimant's allegation on infringement of privacy is not backed by authorities, in contrast with **Manohar v India.** There were no expert reports submitted together with such a claim. In fact, the Claimant has based their argument on a Twitter statement made by a former-employee of Ini-Tech.[21] This is highly prejudicial and can be fabricated. Due to the absence of any expert reports or authorities, the Respondent submit that there is no violation of public policy because the Claimant's submission on infringement of privacy is not acceptable as it is not backed with authorities.

[20] May 2019.
[21] Page 13, Paragraph 30 of the Moot Problem.

ii. **The evidence on infringement of privacy is uncorroborated**

34. In **Daniel Corus BV vs. Steel Authority of India[22],** the Court added another element that evidence must also be corroborated. In the said case, the evidence was said to be corroborated as there were confessions made by the third party who received the private information who are considered as authorised persons by the Court.

35. Correlating this case to the present situation, the Respondent submits that the statement cited by Claimant is not corroborated with other direct or circumstantial evidence. Contrary to **Daniel Corus vs. Steel Authority of India,** there is no confession from Radostan or even OBH *(the party accused of using the private information for its political gains)*. In fact, there were strong denials by both parties where Radostan said that it is a "*completely dishonest and malicious allegation*".

[22] O.M.P. (I) (COMM)--189/2017.

iii. The access to private information was consented to by Coltana

36. **Section 7(h) of the Digital Personal Data Protection Act 2023 ("DPDP Act")[23]** reads "A Data Fiduciary can process personal data without seeking explicit consent for taking measures to **ensure public safety[24]** or provide assistance to any individual during any disaster, or **avoid breakdown of public order."[25]**

37. Thus, the access to personal data of Coltana's citizens are allowed as the state itself has consented to protect its nation's security.[26] Page 9, Paragraph 23 of the Moot Problem shows the initial stage when the parties entered into CCTA. It can clearly be seen in the said paragraph that Coltana has allowed the OnionRing software to be a cyber intelligence solution that enables Coltana to remotely and covertly extract valuable intelligence from a variety of devices, including smartphones, tablets and computers.

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[23] Goswami, A. G., Shroff, C., Prabhu, A., Mohapatra, A., Sengupta, A., & Soni, A. (2023, August 11). *Preparing for the DPDA*. India Corporate Law. https://corporate.cyrilamarchandblogs.com/2023/08/preparing-for-the-dpda/.

[24] Manwani, A. B. (2023, July 29). *The Digital Personal Data Protection bill 2022: Promising features and preliminary concerns.* NMIMS Law Review. https://lawreview.nmims.edu/the-digital-personal-data-protection-bill-2022-promising-features-and-preliminary-concerns/.

[25] A. (2022, November 28). *Personal data access only in exceptional cases: IT MoS*. The Times of India. https://timesofindia.indiatimes.com/india/personal-data-access-only-in-exceptional-cases-it-mos/articleshow/95812799.cms; Singh, J. (2023, August 7). *India pushes ahead with data privacy bill despite pushback from critics*. TechCrunch.

[26] Barik, S. (2023, August 23). *Personal data law: Safeguards to be brought when exemptions kick in*. The Indian Express.https://indianexpress.com/article/business/economy/personal-data-law-safeguards-to-be-brought-when-exemptions-kick-in-8904557/.

38. The reason for this consent is to preserve Coltana's security to combat terrorism and other transnational threats. As such, the Respondent submits that due to the **Digital Personal Data Protection Act,**[27] There is no infringement of privacy because it is legally allowed as Coltana itself has consented to its usage for the purpose of the nation's security.

39. All in all, the CCTA is not void under **Section 23 of the Indian Contracts Act because** there is no violation of public policy. There is no infringement of privacy as first, the sole evidence is not backed with authorities. Secondly, it is uncorroborated. Thirdly, the access to private information was done with the consent from Coltana to protect the security of its nation.

[27] Yosefi, A., & Noy, O. (2023a, August 16). *India enacted its new Digital Personal Data Protection act*. Lexology. https://www.lexology.com/library/detail.aspx?g=d2aed297-500e-4104-9a5b-3efbff08e0b1.

C. The Bitcoin Robbery incident does not void CCTA

40. The Bitcoin Robbery incident does not void the CCTA. This third point is further elaborated into two limbs which are; that the CCTA is not void due to financial difficulties and that the CCTA is not void as it is only allowed for executory contracts.

i. The CCTA is not void due to financial difficulties

41. In **S.Vasudeva Etc. Etc vs State Of Karnataka And Ors**[28], it concerns a sale of land between the Appellant and the Respondent where the latter requested the land to be sold to a third party due to incurring huge losses in their company. The Court held that financial difficulties can only be allowed if the hardship is undue and if there are no other ways to perform the contract.[29]

42. The CCTA is not void because of the financial difficulties caused by the Bitcoin Robbery based on the judgement ruled in **S.Vasudeva Etc. Etc vs State Of Karnataka And Ors.** This is because there are myriad other alternatives of payment besides Bitcoin. The Claimant can still buy more Bitcoin in the market with cash.

[28] 1994 AIR 923.

[29] Garg, R. (2022, April 23). *Termination of a contract and its remedies*. iPleaders. https://blog.ipleaders.in/termination-of-a-contract-and-its-remedies/.

43. **Article 4(iii) of the CCTA** mentions that the payment method can be altered and modified with the written consent of Radostan. President Loli Lalan has even expressed confidence that Coltana will find other means to sustain OnionRing after the revelation of the Bitcoin Robbery incident.[30] This indicates their acknowledgment that there are indeed other modes to perform their financing obligation.

44. There is no written consent from Radostan because Coltana has abruptly ceased negotiations to amend **Article 4(iii) of the CCTA**. This has limited Radostan's ability to assist Coltana in amending the method of payment. Moreover, the action of Coltana ceasing the negotiation unanticipatedly has also brought significant predicament to Radostan as their rights to settle the disputes by negotiation and their rights to justifications were denied.

45. If the tribunal decides in the favour of Claimant, Coltana will be exempted from paying OnionRing. The Claimant will be in an advantageous position against Radostan who will suffer the consequences of financial loss caused by Coltana's own ineffectiveness and poor management to deal with their country's financial affairs. Therefore, Coltana must be accountable for its incompetence and not finding a getaway to relinquish their obligations by claiming the contract to be void.

[30] Page 14, Paragraph 33 of the Moot Problem.

46. Therefore, the CCTA is not void due to Bitcoin Robbery since there are other alternatives for payment available.

ii. CCTA is not void as it is only allowed for executory contracts

47. In **Katras Jherriah Coal Co. Ltd. v Mercantile Bank[31],** the company pleaded that their contract with the bank is impossible to perform due to nationalisation. Hence, they are not required to pay the remaining loan amount. The Court held that the claim put forward to make the contract void is invalid because the loan has been taken and used by the company to carry on business, on which they derive profit from it. As such, it is considered to have been fully performed and not an executory contract.

48. At present, the Claimant is not allowed to submit that CCTA is void because CCTA has been fully executed. CCTA is considered to have been fully performed because Coltana has used OnionRing to combat terrorism and have derived benefit through OnionRing's success in securing the country's overall security. This indicates that Coltana has hugely benefited from OnionRing Software. Thus, the payment obligations owed by Coltana must still be performed.

[31] AIR 1981 Cal 418, 1981 (2) CHN 146, 86 CWN 1.

D. The contract is not void due to what has transpired in Ulavu files

49. The Claimant has the burden of proof to show that the Respondent has the knowledge and intention that the software it provides to Ulavu would be used to commit cyber war crimes. **Article 16 of the Draft Articles of State Responsibility** mentions that knowledge is the first element to fulfil when proving that a State is liable for aiding and abetting. In cases such as **Bosnian Genocide**[32] and **United States v Khalid Shaikh Mohammad**[33], the meaning of "knowledge" under Article 16 is considered as when a state knows that the participation would assist the commission of a crime.

50. Radostan does not have the knowledge as required under **Article 16 of the Draft Articles of State Responsibility** and defined in **Bosnian Genocide** and **United States v Khalid Shaikh Mohammad** because Radostan and Ini-Tech as the programmer do not have knowledge that the weapon system will be deployed in such a manner that would constitute a use of force.

[32] I.C.J. Reports 1996, p. 595.
[33] D.C. Cir. 2017.

51. This is because the software was incorporated in the autonomous weapons systems. Autonomous means the weapon system can learn or adapt their functioning in response to how they are deployed and operated.[34] The deployment and the activation stage of the weapon was done by Ulavu. This proves that Radostan is not involved in the commission of war crimes.

52. In point of fact, the Supreme Court of Ulavu could not confirm the source of hacking as all traces were removed.[35] As such, there is no credible evidence to link the Respondent and cyber war crime.

[34] *ICRC position on autonomous weapon systems*. (2021, May 12). International Committee of the Red Cross. https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems.
[35] Page 15, Paragraph 38 of the Moot Problem.

53. On top of that, the software that Radostan provides is not the relevant object that should be assessed at the material time, it is the wrongful act done by the state of Ulavu itself that should be analysed. This is supported by the judgement in the **Stuxnet worm cyber-attack case[36],** where it was found that the relevant "object" was not the Siemens software that operated in Iran,[37] but the people who operate it themselves,[38] which in this case, is the State of Ulavu.

54. All the points mentioned corroborates to the fact that Radostan is not a party to the cyberwar because Radostan does not have the knowledge or intention to assist Ulavu in its war crime. As a result, the CCTA is not void.

[36] CBS News. (2012, March 04). Stuxnet: Computer worm opens a new era of warfare. CBS News - https://www.youtube.com/watch?v=6WmaZYJwJng; Zetter, K. (2011, July 11). How Digital Detectives Deciphered Stuxnet, the Most Menacing Malware in History. Wired.com. Retrieved from https://www.wired.com/2011/07/how-digital-detectives-deciphered-stuxnet/.

[37] n.a. (n.d.).What is a DLL? Microsoft Support.com. Retrieved from https://support.microsoft.com/en-us/help/815065/what-is-a-dll; TED. (2011, March 29). Ralph Langner: Cracking Stuxnet, a 21st-century cyber weapon. TED - https://www.youtube.com/watch?v=CS01Hmjv1pQ.

[38] Rao, Siddharth Prakash. (2014). Stuxnet , A new Cyber War weapon: Analysis from a technical point of view. 10.13140/2.1.1419.5205; Stanford University. (2012, May 08). Dissecting Stuxnet. Stanford - https://www.youtube.com/watch?v=DDH4m6M-ZIU.

IV. IN THE EVENT THAT ISSUE III IS IN THE NEGATIVE, TERMINATION BY COLTANA IS INVALID

The termination by Coltana is invalid because firstly, there is no frustration by virtue of **Section 56 of Indian Contracts Act 1872.** Secondly, there is no breach of privacy by OnionRing. Thirdly, termination is not done in good faith. Fourthly, Coltana's request for retention of OnionRing contradicts its claim for termination.

A. Termination is invalid because CCTA is not frustrated by virtue of Section 56 of Indian Contracts Act 1872

55. A case reported in **50 Ind App 9 : (AIR 1923 PC 54 (2))** concerned an agreement by 'A' to deliver cotton goods to 'B' as and when the same may be received from the mills. The contract was found not to be frustrated if the mills fail to perform their contract with 'A'. It was further held that even the destruction of the mills could not invoke **Section 56 of Indian Contracts Act 1872** to frustrate the contract between 'A' and 'B' since firstly, the contract had been performed and secondly, the contract was in absolute terms.[39]

[39] Treitel, G. H. (2014). *Frustration and force majeure / by Sir Guenter Treitel, Q.C., D.C.L., F.B.A.* (Third). Sweet & Maxwell.

56. Connecting it to the present case, CCTA is not frustrated. This is because firstly, the CCTA has been fully performed. The state of Radostan had performed its part of the contract by providing the service of OnionRing to combat terrorism. Therefore, Coltana is obliged under the contract to pay for the software.

57. The Bitcoin Robbery is not an excuse for Coltana to free itself from its obligations. Even though by consequence of the incident it may be less advantageous for them now than anticipated before. Lord Denning says that "*the fact that it has become more onerous or more expensive for one party is not sufficient to bring about a frustration and that it must be more than merely more onerous or more expensive in order to invoke frustration of the adventure.*"[40] Such a situation however has not been established.[41] Therefore, since CCTA is fully performed, the contract is not frustrated. As a result, the termination is invalid.

58. Next, the CCTA is made in absolute terms. The Republic of Coltana and the Majestic Kingdom of Radostan did not incorporate any provisions in CCTA to allow any supervening event, change of circumstance, or any unanticipated incidents to disregard their duties, especially duty of Coltana to finance OnionRing.

[40] The Discipline of Law p. 45.
[41] Jajoo, A. (2020, May 4). A Closer Look At Force Majeure, Frustration Of Contract And Impossibility To Perform Contracts During The COVID-19 Pandemic - Litigation, Contracts and Force Majeure - India https://www.mondaq.com/india/litigation-contracts-and-force-majeure/928048/a-closer-look-at-force-majeure-frustration-of-contract-and-impossibility-to-perform-contracts-during-the-covid-19-pandemic, Pinsentmasons.com. 2020. [online] Available at: https://www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause.

59. There was nothing mentioned in the agreement for Coltana to perform beyond repayment. There is no provision in that regard that could allow them to implore exemption from payment of money for OnionRing. In lieu of the non-existent provisions, Coltana cannot claim that the contract is frustrated. This renders the termination to be invalid.

60. Alternatively, even if CCTA is declared to be frustrated, the adjustment of the rights between the parties taking the contract does not come to an end. The liability to repay the amount advanced to Radostan with the agreed total does not perish due to frustration. The said agreement to pay OnionRing still remains. This view is supported by the decision of the Supreme Court in the case of **Naihati Jute Mills Ltd. v. Khyaliram Jagannath**.[42] Coltana is still obliged to pay USD 25 million for each quarter of the year, for a total of four quarters per year, on the first day of each quarter to Radostan either directly or through intermediaries.

61. All in all, **CCTA is not frustrated by virtue of Section 56 of Indian Contracts Act 1872** because it has been fully performed and it is made in absolute terms. In the event the tribunal finds that the contract is frustrated, Coltana's obligation to pay OnionRing continues to exist.

[42] 1968 AIR 522, 1968 SCR (1) 821.

B. Termination is invalid because there is no breach of privacy by OnionRing

62. There is no breach of privacy because there is no failure to protect data as there is security guarantee[43] provided to Coltana. There are few security guarantees offered to the Claimant which are **a)** OnionRing is a highly sophisticated cyber-surveillance machinery, equipped with smart surveillance technology, **b)** information and data collected are kept confidential and **c)** information can only be accessed by the government of Coltana through appropriate procedures.[44] The Respondent put forward three points cited above as the security guarantees provided by Radostan and as such, there is no failure to protect their data.[45]

[43] Rai, D. (2020, October 17). *Judicial interpretation of data protection and privacy in India*. iPleaders. https://blog.ipleaders.in/judicial-interpretation-of-data-protection-and-privacy-in-india/

[44] Page 12, Paragraph 26 of the Moot Problem.

[45] Roy, R., & Zanfir-Fortuna, G. (2023, August 15). *The Digital Personal Data Protection Act of India, explained*. Future of Privacy Forum. https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/.

C. Termination is invalid because the termination is not done in good faith

63. The Respondent cites the case of **Callow Inc v Zollinger**[46] that was decided by the **Supreme Court decision in 2020.** In this case, the Plaintiff's company concluded a contract with some condo corporations. The company made a new contract with the condo corporations in 2012, which was supposed to last for two more winters. In 2012, Callow attended a meeting and it went well. This has led him to believe that his contract would be renewed for the winter season. He continued to work and completed extra work free of charge to solidify the renewal of his winter contract. However in September, the condo corporation terminated the contract.

64. The Court decided that the condo corporations had a duty to act honestly toward Callow, but they were dishonest in how they dealt with putting an end to the contract. They actively misled Callow to believe they were happy with his work and that the contract would not be ended early.

65. In short, the Supreme Court held that termination that was not done in good faith under two limbs.[47] First, it was done **dishonestly**. Second, it has **misled the counterparty.** It was elaborated that misleading can constitute a breach, even if it is done in silence.

[46] 2020 SCC 45.
[47] Francis, M., & Sorton, M. (2023, August 21). *Unilateral termination of a long-term IT contract: when is good cause not good enough?* Swiss Contract Law. https://swisscontract.law/18/.

66. At present, Coltana did not disclose the objections from their cabinet members to change the financing method,[48] albeit mentioning prior in confidence that the Claimant will find other means to sustain OnionRing. As ruled in **Callow Inc v Zollinger,** this action was not done in good faith because it was done dishonestly and has misled Radostan to believe Coltana's facade of financial abilities.

67. Albeit Coltana was being silent and not disclosing about the objections, it is sufficient to mislead our client. Therefore, the termination was not done in good faith.

[48] Page 14, Paragraph 34 of Moot Problem.

D. Termination is invalid because the retention of OnionRing contradicts Coltana's claim for termination

68. **The Software Licensing Agreement** in India laid out that termination of Agreement will put an end to business of parties.[49] The provider retains all rights on the software whilst the customer ceases all rights that were granted.[50] This is further substantiated under **Section 64** (voidable) **and Section 65** (void) **of Indian Contracts Act** that when a contract has ended, a person who has received advantage is bound to restore it to the person from whom he received it.[51] This means if termination is allowed, Coltana must return OnionRing back to Radostan.

69. In **Barrett v Morgan**[52], the Defendants argued that the termination by the Plaintiffs had no effect on the obligations under the lease, and they sought to continue using the leased property. The issue before the House of Lords was whether termination of the lease also released the obligations of the parties. It was held that the effect of termination will put an end to the period of using the subject property.

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[49] Banerjee, S. (2022, August 2). *Software licensing agreement in India : General overview*. iPleaders. https://blog.ipleaders.in/software-licensing-agreement-in-india-general-overview/.
[50] Bhandare, S., Gupte, R. V., Bishnoi, A., Shashishekar, T., Chand , A., & V. Singh, Y. (2022, April 1). *Terminating licences of IP Rights (India) | practical law*. https://ca.practicallaw.thomsonreuters.com/w-033-6833?contextData=%28sc.Default%29.
[51] *Indian Supreme Court.* Legal advisory, tax consulting, audit services and management and IT consulting. (2021, March). https://www.roedl.com/insights/india-software-payment-import-license-royalty-supreme-court.
[52] [2000] 2 AC 264.

70. In the present situation, Coltana has chosen to retain the OnionRing for the purpose of furthering their investigation.[53] Since the Claimant insisted, the Respondent assert that such a request has contradicted their own claim for termination. It is against **The Software Licensing Agreement** and **Indian Contracts Act.**

71. The effect of termination will put an end to the period of OnionRing service to Coltana, as decided in **Barrett v Morgan.** In essence, the retention is illegal. As a result, the termination claim is not valid.

72. Additionally, the Respondent refers to **paragraph 8 of the moot clarification.** It is mentioned that CCTA does not provide indefinite use of OnionRing. It is a subscription-based service that will expire in 2024. The facts stand on our side, and the tribunal shall consider that the termination is invalidated as it was done in breach of Indian Law.

73. All in all, if the third issue be decided in negative, in the alternative the Respondent submit that the termination of CCTA is invalid because it is not frustrated by virtue of **Section 56 of Indian Contracts Act 1872,** OnionRing does not breach any privacy, termination is not done in good faith and lastly, retention of OnionRing contradicts Coltana's claim for termination.

[53] Page 16, Paragraph 40 of the Moot Problem.

PRAYERS FOR RELIEF

For the foregoing reasons, the Respondent respectfully pleads for this Tribunal to adjudge and declare that:

I. Olaf, an AI-powered intelligent lawyer shall not be removed as the arbitrator as Olaf is impartial and independent;

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 not void; and

IV. Ultimately, the termination of the CCTA by Coltana is invalid.

Respectfully submitted,

THE MAJESTIC KINGDOM OF RADOSTAN, THE RESPONDENT

15 SEPTEMBER 2023