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18th LAWASIA International Moot 2023

International Rounds

IN THE

INTERNATIONAL CENTRE OF ARBITRATION

AT THE BENGALURU CITY, INDIA 2023

THE CASE CONCERNING OnionRing SOFTWARE

THE REPUBLIC OF COLTANA

(*Claimant*)

And

THE MAJESTIC KINGDOM OF RADOSTAN

(*Respondent*)

MEMORIAL ON BEHALF OF CLAIMANT

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LIST OF ABBREVIATIONS

S. No.	Abbreviations	Full form
1.	&	And
2.	@	At
3.	AI	Artificial Intelligence
4.	AIAC	Asian International Arbitration Centre
5.	AIR	All India Reporter
6.	Anr.	Another
7.	Art.	Article
8.	Assoc.	Association
9.	CCTA	Coltana-Radostan Counter Terrorism Agreement
10.	CCTV	Closed Circuit Television
11.	Col.	Colonel
12.	Corp.	Corporation
13.	Dist.	District
14.	DPP	Democratic Progressive Party
15.	Ed.	Edition
16.	EWHC	England and Wales High Court
17.	H.C.	High Court
18.	Hon'ble	Honorable
19.	IBA	International Bar Association
20.	ICA	Indian Contract Act
21.	ICC	International Criminal Court

22.	ICJ	International Court of Justice
23.	ICCPR	International Covenant on Civil and Political Rights
24.	ICESR	International Covenant on Economic, Social and Cultural Rights
25.	ICSFT	International Convention for the Suppression of the Financing of Terrorism
26.	i.e.,	That is
27.	J	Justice
28.	Ltd.	Limited
29.	No.	Number
30.	NYC	New York Convention
31.	OBH	Order of the Black Hand
32.	Ors.	Others
33.	Para	Paragraph
34.	PCA	Permanent Court of Arbitration
35.	Pvt.	Private
36.	r/w	Read With
37.	S.C	Supreme Court
38.	SCC	Supreme Court Cases
39.	Sch.	Schedule
40.	Sec.	Section
41.	St.	State

42.	u/a	Under article
43.	UN	United Nations
44.	UNCITRAL	United Nations Commission on International Trade Law
45.	UK	United Kingdom
46.	US	United States
47.	VCLT	Vienna Convention on Law of Treaties

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STATEMENT OF JURISDICTION

The Claimant (Republic of Coltana) have submitted the dispute to the International Arbitration Centre, Bengaluru, India pursuant to Article 8(i) of Coltana-Radostan Counter Terrorism Agreement (CCTA) in accordance with the Rule 1.1 of Arbitration rules of Asian International Arbitration Centre (AIAC) which states:

"*1.1. Where the Parties have agreed to refer their dispute to the AIAC for arbitration, or to arbitration in accordance with the AIAC Arbitration Rules, then: (a) the arbitration shall be conducted and administered by the AIAC in accordance with the AIAC Arbitration Rules;*"

Therefore, the Republic of Coltana and Majestic Kingdom of Radostan have accepted the jurisdiction of the International Arbitration Centre and agreed to accept the award of the Arbitrator as final and binding.

QUESTIONS PRESENTED

1. WHETHER OLAF, AN AI-POWERED INTELLIGENT LAWYER CAN BE REMOVED AS THE ARBITRATOR FOR LACK OF IMPARTIALITY

1. 1. WHETHER OLAF, AN ARTIFICIAL BEING IS QUALIFIED TO BE AN ARBITRATOR

1.2. WHETHER OLAF IS IMPARTIAL

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

2.1 THE POWER TO GRANT STAY IS A DISCRETIONARY POWER

2.2 THERE ARE NO GROUNDS FOR AN INTERIM ORDER OF STAY

2.3 THE ARBITRATION PROCEEDINGS DOES NOT UNDERMINE THE ICC PROCEEDINGS AND ARE UNAFFECTED

3. WHETHER THE CCTA IS VOID

3.1 THE CONTRACT IS VOID UNDER PRINCIPLES OF CONTRACT LAW

3.2 THE CONTRACT IS IN DEROGATION WITH THE INTERNATIONAL OBLIGATION OF THE PARTIES

4. WHETHER THE TERMINATION OF THE CCTA BY COLTANA IS VALID

STATEMENT OF FACTS

1. **The Republic of Coltana** is a small, prosperous nation on the Indian Ocean coast known for its rich cultural and historical heritage. It is a former British colony with British common law in its legal system. Coltana experienced internal conflicts during WWII between right-wing and left-wing factions.
2. **The Majestic Kingdom of Radostan** is a diverse nation in South Asia known for technologically advanced ancient cities discovered under its capital, Aragorn. It has successfully resisted colonization and maintains a constitutional monarchy with British common law.
3. **The Battle of Borbana**: During WWII, Coltana was divided, with eastern and western territories controlled by conflicting rulers. The conflict between the right-wing Matic and left-wing Stefka factions escalated. The Battle of Borbana in 1944 resulted in significant casualties and Stefka's bombing of Radostan's Glass. Stefka emerged victorious, abolished the monarchy, and established Coltana as a unified republic with the DPP. OBH emerged as a right-wing nationalist party.
4. **Coltana-Radostan Memorandum of Understanding (CRMOU)**: Owing to great national and international pressure, President Stefka visited Radostan to make peace and to offer a public apology for the destruction caused to the Glass Palace. After Stefka's visit to Radostan, the CRMOU was signed.
5. **Project Olaf**: Project Olaf was launched in Radostan to create a super-intelligent AI lawyer and judge. Coltana's involvement in Project Olaf led to its successful development and deployment. Olaf gained fame as an independent AI lawyer and judge, though its pro-Radostan stance drew controversy.
6. **The Return of Dr. Sirius Black**: Dr. Sirius Black, a former mercenary with a military background, joined OBH and became its president. Dr. Black's election sparked violent

protests and clashes with the government. President Lalan condemned Dr. Black's press conference and promised to curb violence and conspiracies.

7. **The Sapura Bay Bombings**: Tensions escalated between OBH and the government, leading to sporadic disturbances. Dr. Black's arrest and detention in Sapura Bay preceded the bombings during the Sapura Bay Marathon. Pro-government supporters criticized the government for inadequate security measures. President Lalan suggested OBH's involvement in the attacks and vowed to bring the perpetrators to justice.
8. **Coltana-Radostan Counter-Terrorism Agreement (CCTA)**: President Lalan, Coltana's Minister of Defense, and special intelligence chief Dolores Umbridge held a high-level security meeting with Prime Minister Yodwicha and others, including Anuwat Kittisak, CEO of Ini-Tech Inc. Anuwat proposed the OnionRing, an anti-terrorism software capable of identifying and neutralizing cyber threats and terrorist plots. This resulted in the signing of the CCTA between Coltana and Radostan, allowing Ini-Tech Inc to provide OnionRing services to Coltana. Key CCTA clauses include general obligations to follow international laws and uphold human rights principles, payment of $25 million in Bitcoin quarterly by Coltana to Radostan, and dispute resolution through arbitration in Bangalore, India, governed by Indian law.
9. **The OnionRing's Success and General Elections**: OnionRing was successfully installed in Coltana, though concerns arose about privacy. Despite these concerns, it effectively detected and prevented cyberattacks and terrorist plots, enhancing national security. Dr. Black's acquittal allowed him to run for president in the general elections, causing controversy. The ruling DPP party nearly lost the elections but maintained a simple majority.
10. **The OnionRing Scandal and the Bitcoin Robbery**: A former Ini-Tech employee alleged that OnionRing accessed voter data and used it to promote OBH party propaganda, sparking

a nationwide debate on data privacy and ethics. Subsequently, Coltana's Bitcoin reserves, valued at approximately $300 million, were stolen overnight by highly skilled hackers.

11. **The Ulavu Files and Anuwat's Arrest**: The Ulavu Files revealed a connection between Anuwat and Ulavu's Prime Minister Dua Lupa, suggesting Ulavu used technology similar to OnionRing for electoral manipulation. Anuwat was arrested in the United States of Kola Lumpo on charges of cyber war crimes in Ulavu.
12. **The Crisis and Arbitration Proceedings**: President Lalan ceased negotiations with Radostan, citing the Ulavu Files as evidence of illegal interference in Coltana's 2021 general election. Coltana initiated arbitration proceedings under Article 8 of the CCTA. Radostan nominated Olaf as a Respondent-appointed arbitrator. Coltana sought Olaf's removal, alleging potential bias. Radostan requested a stay in the proceedings due to Anuwat's ICC testimony, while Coltana objected, asserting that existing documents were sufficient for arbitration.

SUMMARY OF PLEADINGS

1. Whether Olaf, An AI-Powered Intelligent Lawyer Can Be Removed as The Arbitrator for Lack of Impartiality

Olaf, an AI-powered intelligent lawyer, may be removed as an arbitrator as (i) international norms and standards emphasize human arbitrators, (ii) there are impartiality concerns in relation to the data used by Olaf and inherent biases present in it, (iii) Olaf fails to pass the 'test of apparent bias', and (iv) Olaf has conflict of interest with Prime Minister Yodwicha and resultantly, with Radostan. These factors may compromise the fairness and integrity of the arbitration proceedings.

2. Whether the Arbitral Tribunal Should Stay the Present Proceedings Until the Conclusion of Anuwat's Trial at The International Criminal Court

The Arbitral Tribunal should not grant a stay of the current proceedings until the conclusion of Anuwat's trial at the International Criminal Court (ICC) as (i) Anuwat is not a key witness in this dispute and his absence does not harm either party, (ii) delaying the arbitration would be inefficient and contrary to party autonomy, (iii) the grounds for seeking a stay have not been justified by the Respondent, and (iv) the arbitration proceedings do not undermine the ICC proceedings, as they involve different matters. Continuing the arbitration is in line with party intent for efficient resolution.

3. Whether the CCTA Is Void

The CCTA is void under Indian Contract Act, 1872, as (i) it has an unlawful object against public policy as it undermines public interests and rights, (ii) it is illegal due to its privacy violations and lack of transparency, potentially infringing on international and national privacy

and civil rights laws, (iii) the concealment of information by Radostan amounts to fraud under Section 17 of the ICA, rendering the contract void, and (iv) it was based on misrepresentation by Radostan. The CCTA is also in derogation of international obligations, as it raises concerns about privacy violations, interference in other states' affairs, and the promotion of propaganda.

4. Whether the Termination of The CCTA By Coltana Is Valid

Assuming the CCTA's validity, section 39 of the ICA allows contract termination when one party cannot fulfill their promises, as long as they haven't indicated a willingness to continue. In the context of the CCTA, Radostan breached their OnionRing service obligation once hackings in Ulavu were revealed to be linked to their software services. Coltana met its obligations, but negotiations ceased when Ulavu's actions were revealed. Given these facts, Coltana's termination of the CCTA seems legally valid under section 39 of the ICA.

PLEADINGS

1. Whether Olaf, An AI-Powered Intelligent Lawyer Can Be Removed as The Arbitrator for Lack of Impartiality

It is humbly submitted that Olaf, an AI-Powered intelligent lawyer, can be removed as the arbitrator for lack of impartiality. Olaf is not a natural being to be qualified to be an arbitrator. Arguendo, even if the Tribunal considers Olaf to be qualified to be an Arbitrator, it is not impartial. Olaf's impartiality is contingent on the data it receives and the subsequent algorithmic processes. Regrettably, in the current scenario, the data input into the system exhibits a pronounced bias favouring Radostan, thereby skewing its judgment in a predetermined manner.

1. 1 Whether Olaf, an artificial being is qualified to be an Arbitrator

An Arbitrator has been defined under Black's Law Dictionary as "A private, disinterested person, chosen by the parties to a disputed question, for the purpose of hearing their contention, and giving judgment between them; to whose decision (award) the litigants submit themselves either voluntarily, or, in some cases, compulsorily, by order of a court."[1] This interpretation finds consonance in international treaty law, exemplified by Art. 31 of the VCLT, which emphasizes interpreting treaty terms in good faith in accordance with their ordinary meaning in context and with respect to the treaty's object and purpose.[2]

1.1.1 The international arbitration standards upholds arbitrators to be human being

International arbitration standards, such as the ICC Arbitration Rules, emphasize the importance of the arbitrator's nationality, residence, and relationships with the countries of the

[1] Black's Law Dictionary (4th edn, 1968) para 135
[2] Vienna Convention on the Law of Treaties 1669, Art 31.

parties.[3] Since nationality is an attribute solely accorded to natural persons, this reinforces the international norm of appointing human arbitrators.[4]

Article 20 of the Peruvian Arbitration Act[5] states that "natural persons in full capacity to exercise their civil rights may act as arbitrators." Moreover, Article 19 of the Ecuadorian Arbitration Act[6] states that "persons that are not in the capacity to stand trial for themselves may not act as arbitrators." Furthermore, Article 145° of the French Code of Civil Procedure provides that "only a natural person having full capacity to exercise his or her rights may act as an arbitrator".[7] Furthermore, Art. 24(1)(c) of the UK Arbitration Act[8] states that "a party to arbitral proceedings may apply to the court to remove an arbitrator on the grounds that he is physically or mentally incapable of conducting the proceedings […]". All the abovementioned legislations directly or indirectly imply that an arbitrator must be human. The same grounds for requesting the removal of an arbitrator feature in Article 16(1)(a) of the Singaporean Arbitration Act.[9] In the light of AIAC objective which is to offer a "comparable and competitive product reflecting contemporary international standards and practices on the global stage", must align with international practices and uphold the universally recognized definition of an arbitrator as a natural person.

1.1.2 The text of AIAC aligns with the international norm of Human Arbitrators

Under Art. 31.2 of VCLT, the context of the treaty shall comprise the text, including its preamble and annexes.[10] The same alignment in interpretation has been seen in text of the AIAC Arbitration Rules. For instance, Rule 2.3 clarifies that all personal pronouns in the Rules

[3] ICC Arbitration Rules 2021 (International Chamber of Commerce), Art 13(1).
[4] OHCHR, 'Nationality and Statelessness' (United Nations, 12 June 2020) <https://www.ohchr.org/en/nationality-and-statelessness> accessed 12 September 2023
[5] Peruvian Arbitration Act 2008, Art 20.
[6] Law on Arbitration and Mediation 1990, Art 19.
[7] Code de procédure civile du 2008, Art 145.
[8] Arbitration Act 1996, Art 24(1)(c).
[9] Arbitration Act 2001, Art 16(1)(a).
[10] Vienna Convention on the Law of Treaties 1669, Art 31.2.

include all genders[11], which indirectly implies that arbitrators must be natural persons. Rule 10.5 underscores the relevance of an arbitrator's nationality in determining impartiality[12], which further indicates that arbitrators are natural beings. Notably, Sch. 2 of the AIAC Rules specifies arbitrator expenses, encompassing hotel accommodations, meals, laundry, city transportation, correspondence costs, and tips[13], all of which are expenses associated with human arbitrators. The AIAC's criteria for arbitrator application includes age (30-70 years), tertiary education, experience in the field of arbitration (10 years), accreditation and legal status – and Olaf does not meet the aforementioned criteria.

Therefore, considering international treaty interpretation principles under VCLT, existing domestic legislations, and international arbitration standards, it becomes evident that the term "arbitrator" inherently signifies a human being. Consequently, appointing an artificial being as an arbitrator would deviate from these long-established norms and practices and pose a grave departure from the integrity and consistency of arbitration processes.

1.2. Whether Olaf is impartial

It is humbly submitted that arguendo, even if an AI can be considered as an arbitrator, Olaf is not impartial. The algorithm and data that is used to design Olaf have a bias towards Radostan's policies. It also has expressed negative opinions on Coltana and is not an independent entity. An arbitrator is a "quasi-judicial officer" and therefore the court ruled that impartiality, independence and freedom from undue influence from the arbitrator must be protected.[14]

[11] AIAC Arbitration Rules 2021, Rule 2.3.
[12] AIAC Arbitration Rules 2021, Rule 10.5.
[13] AIAC Arbitration Rules 2021, Schedule 2, cl 1.2 (f).
[14] *Hoosac Tunnel Dock and Elevator Company v James W. O'Brian & another* [1884] 137 Mass. 424.

1.2.1. Olaf does not pass the "*Test of apparent bias*."

The test of apparent bias propounded in the case Porter v Magill[15] established that the correct test to check whether all of the circumstances of the case, as ascertained by the court, would lead a "fair minded and informed observer" to conclude that there was a "real possibility" of bias. It has been judicially affirmed that the presence of actual or apparent bias inherently entails substantial injustice, obviating the need for further proof in this regard.[16] This test essentially revolves around determining whether there is an "objective likelihood of there being a real risk that someone in the position of the arbitrator would not be able to bring an impartial mind to (all of) the questions to be determined.[17]

In essence, to satisfy the test for apparent bias, an impartial third party should be able to discern the potential for partiality. Impartiality relates to a state of mind, sometimes evidenced through conduct demonstrating that state of mind. An arbitrator is partial towards one party if he displays preference for, or partiality towards one party or against another, or whether a third person reasonably apprehends such partiality.[18]

1.2.1.1. Algorithms and data impacts neutrality of Olaf

Olaf, the AI system, operates under Oracle Corporation's ownership and management, relying exclusively on data provided by Oracle Corp. While Coltana was granted limited access to this software for research purposes, it is crucial to recognize that algorithms are not inherently neutral.

Machine Learning bias, also referred to as AI bias, is the result of algorithms reflecting human biases. It occurs when prejudiced assumptions are embedded during development or when the

[15] *Porter v Magill* [2001] UKHL 67.
[16] *Cofeley Ltd v Bingham* [2016] EWHC 240 (Comm).
[17] *Hancock v Hancock Prospecting Pty Ltd* [2022] NSWSC 724.
[18] Leela Kumar, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' (SSRN, 24 ApriL, 2014) <https://ssrn.com/abstract=2428632> accessed 12 September 2023

training data itself contains biases.[19] Various literary sources have pointed on AI bias based on the data fed to it[20]. AI arbitrators can be biased if the historical data is based on a pattern, for example, to be biased towards corporations instead of consumers or investors instead of host states.[21]

1.2.1.2 Olaf has been very critical of Coltana and overly supportive of Radostan

AI systems learn to make decisions based on training data, which can include biased human decisions or reflect historical or social inequities.[22] In the case of Olaf, these biases are evident as it exhibited a strong inclination towards supporting Radostan policies and its allies, a bias stemming from the data supplied by Oracle Corp. AI systems like Olaf can inadvertently perpetuate these biases when their decision-making processes are shaped by training data influenced by historical or social inequities.[23]

1.2.2. Olaf does not pass the standards of impartiality under IBA guidelines

Rule 10 of the AIAC Rules require the Arbitral Tribunal to remain impartial and independent at all times and to conduct itself in accordance with the AIAC Code of Conduct for Arbitrators.[24] The International Bar Association's (IBA) Guidelines on Conflict of Interest in International Arbitration will be a point of reference in determining the disclosure requirements and whether an Arbitrator is conflicted.[25] The IBA guidelines has also been used in various international cases as a standard.[26] The Swedish Supreme Court overturned the Svea Court of

[19] Cem Dilmegani, 'Bias in AI: What it is, Types, Examples & 6 Ways to Fix it in 2023' (AI Multiple, 11 September 2023) <https://research.aimultiple.com/ai-bias/> accessed 12 September 2023
[20] James Manyika, 'What Do We Do About the Biases in AI?'(Harvard Business Review, 25 October, 2019) <https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai> accessed 12 September 2023
[21] Gizem Halis Kasap, 'Can Artificial Intelligence ("AI") Replace Human Arbitrators? Technological Concerns and Legal Implications'[2021] J Disp Resol 2, 223
[22] James Manyika, n 20
[23] Moot Proposition, para 13, 14
[24] AIAC Arbitration Rules 2021, Rule 10.1.
[25] AIAC Code of Conduct for Arbitrators, Rule 2.1.
[26] *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] EWCA Civ 1341.

Appeals decision on 19 November 2007, relying on the IBA Guidelines.[27] The Federal Supreme Court held that the IBA guidelines are '*a valuable working tool to contribute to the uniformisation of standards in international arbitration in the area of conflicts of interests. As such this instrument should impact on the practice of the courts and the institutions administrating arbitration proceedings.*'[28]

Doubts are justifiable if a reasonable third party, aware of the facts, would conclude that the arbitrator might be influenced by factors other than the case's merits as presented by the parties when making a decision.[29]

The relationship of Olaf and Radostan comes under the Non-Waivable Red List. The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. Under IBA guidelines, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party.[30] The parties, therefore, cannot waive the conflict of interest arising in such a situation.[31] It is based on the objective Gough test laid down in R v Gough that *"the court must find that circumstances exist, and are not merely believed to exist ... [and] those circumstances must justify doubts as to impartiality*." The same has been reaffirmed in Laker Airways Inc v FLS Aerospace Ltd[32], which set out several of the key applicable principles, including: (1) the Gough test was objective and (2) it is unnecessary to prove actual bias. The real likelihood of bias is based on the depends on the impression which the court gets from the circumstances.[33]

[27] *Anders Jilkén v Ericsson AB* [2007] Stockholm Int'l Arb Rev 167.
[28] Swiss Federal Supreme Court [2008] Case No 4A_506/2007, *Mutu and Pechstein v Switzerland* [2010] Nos. 40575/10 and 67474/10.
[29] IBA Guidelines on conflict of interest in International Arbitration 2014, 2 (c).
[30] IBA Guidelines on conflict of interest in International Arbitration 2014, Part 2, 1.1.
[31] IBA Guidelines on conflict of interest in International Arbitration 2014, 2 (d).
[32] *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep. 45.
[33] *R v Barnsley Licensing* [1960] 2 QB 167.

1.2.2.1 Olaf has conflict of interest with Radostan

The conflict of interest is an indicator of bias. In precedent-setting cases, arbitrators have been removed due to their prior involvement as consultants, advising parties that were in adversarial positions to the applicants in related commercial disputes.[34] These instances were deemed to give rise to apparent bias. Moreover, there is a notable case where an arbitrator's conduct led to justifiable doubts about his impartiality, as he had become overly engrossed in the issues of impartiality and jurisdiction, consequently lacking the necessary objectivity to fairly determine the merits of the dispute.[35] Similarly, a decision in favour of a canal company was overturned because the presiding judge had a significant stake in that company.[36]

In the current scenario, the appointment of Olaf as an arbitrator raises a parallel concern. Prime Minister Yodwicha, the brain behind Olaf[37], also serves as a non-executive director of Oracle Corp[38], the entity responsible for owning and managing Olaf. This intrinsic connection between Olaf, the arbitrator, and one of the parties involved in this arbitration profoundly undermines Olaf's capacity for impartiality and independence in overseeing this case. Therefore, it is imperative to recognize and address this evident conflict of interest to ensure the fairness and integrity of these arbitration proceedings.

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

It is submitted that the Arbitral Tribunal should not grant stay of the current proceedings until the conclusion of Anuwat's trial at the ICC as he is not key witness in the instant dispute. Such a stay is unwarranted and would contravene the principles of arbitration efficiency and party

[34] *Sphere Drake Insurance v American Reliable Insurance Co* [2004] EWHC 796 (Comm).
[35] *Sierra Fishing Co v Farran* [2015] EWHC 140 (Comm).
[36] *Dimes v Grand Junction Canal* [1852] 3 HLC 579.
[37] Moot Proposition, para 11
[38] Corrections and clarifications to Moot Problem, para 4

autonomy. The ICC trial and the arbitration are distinct proceedings with separate purposes. Granting a stay would unduly delay the resolution of the contractual dispute at hand. The arbitration tribunal is well-equipped to adjudicate the contractual matters independently and efficiently without waiting for the conclusion of the ICC trial.

2.1 The power to grant stay is a discretionary power

Arbitrators are not under a mandatory or automatic duty to grant a stay in arbitral proceedings; it is a matter of discretion.[39] As there is no legal obligation to stay the present proceedings, the Tribunal has to decide on Respondent's request in exercising its discretionary powers.[40] Such discretion is conferred upon the by the mutually agreed AIAC Rules. Art 13.1 which provide that the Tribunal should conduct the proceedings in "such manner as it deems appropriate to ensure the fair, expeditious, economical and final resolution of the dispute, provided always that the Parties are treated with equality and are given a reasonable opportunity to present their case." When assessing a request for a stay, the Tribunal must carefully consider the potential harm to both the Claimant and the Respondent and maintain a balanced approach. This balance is vital to uphold the principle of equality between parties.[41]

The Tribunal has to consider their economic and procedural effects.[42] This is highlighted by 16.4 AIAC Rules and it follows that a tribunal may only stay a dispute if this would lead to significantly more efficient proceedings.[43] Therefore, in cases of uncertainty, it is preferable for the Tribunal to continue proceedings to avoid unjustified delays and the risk of denying

[39] *B. Fund Ltd v A. Group Ltd* [2007] Case No. 4P-168/2006.
[40] Sébastien Besson, 'Addressing Issues of Corruption in Commercial and Investment Arbitration – Institute Dossier XIII' (Kluwer Law International, 2015)
[41] *Cairn Energy Plc & Cairn UK Holdings Ltd. v. Government of India Permanent Court of Arbitration* [2017] PCA Case No. 2016-7
[42] *Philip Morris Asia Ltd v The Commonwealth of Australia* [2014] PCA Case No 2012–12; *Apotex Holdings Inc and Apotex Inc v United States of America* [2013] ICSID Case No ARB(AF)/12/1; *Glamis Gold Ltd v United States of America* [2005] UNCITRAL/NAFTA Procedural Order No 2 (Revised)
[43] *Eco Oro Minerals Corp v Republic of Colombia* [2018] ICSID Case No ARB/16/41; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v Democratic Republic of Timor-Leste* [2016] ICSID Case No ARB/15/2; *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic* [2010] CIRDI Case No ARB/03/19

justice.[44] It rightly follows that there exists "a bias in favour of continuing the arbitration", especially when mere investigations are pending.[45]

2.2 There are no grounds for an interim order of Stay

The grounds for seeking a stay of the arbitration proceedings are based on Rule 16.3 of the arbitration rules[46], which permit the Arbitral Tribunal or an Emergency Arbitrator to order interim measures. The grounds have not been proved by the Respondent in this instant case. The delay in the proceedings affect the effectiveness or the arbitration.

2.2.1 The Respondents have failed to justify the request of Stay order

To justify interim measures, the requesting party must demonstrate two key elements: firstly, that harm not adequately compensable by damages would likely result without the measure, and that this potential harm outweighs any harm to the opposing party if the measure is granted; and secondly, that there is a reasonable possibility of success on the merits of the underlying claim, although this should not affect the Tribunal's discretion in determining the merits later on.[47]

2.2.1.1 The order of stay does significant harm to the Claimant

The order of stay requested by the Respondent would inflict substantial harm upon the Claimant. A stay would effectively pause the ongoing arbitration proceedings, delaying the resolution of the dispute and potentially causing significant financial, operational, and reputational harm to the Claimant.

[44] *IPOC International Growth Fund Ltd v LV Finance Group Ltd* [2007] 4P.168/2006.
[45] Sébastien Besson, n 405
[46] AIAC Arbitration Rules 2021, Rule 16.3.
[47] AIAC Arbitration Rules 2021, Rule 16.4.

2.2.2.2.1 The request for stay does not meet the criteria in this case

The grounds for seeking a stay of the arbitration proceedings are based on Rule 16.3 of the AIAC, which permit the Arbitral Tribunal or an Emergency Arbitrator to order interim measures. These measures include maintaining or restoring the status quo pending the determination of the dispute, preventing actions likely to cause harm or prejudice to the arbitral process, preserving assets for potential future awards, or safeguarding relevant evidence[48].

- **The status quo remains unaffected by ICC proceedings**

Arbitral tribunals have the power to draw the private law consequences of criminal law provisions.[49] The principle of res judicata, which prevents a decided matter from being adjudicated for a second time, requires that the parties to, and the subject matter of the parallel proceedings be the same[50]. In the present instance, the ICC case against Mr. Anuwat is to assess his liability in cyber war crimes against Ulavu, while the arbitration proceeding is concerned with a commercial matter between Coltana and Radostan. Apart from that, all proceedings concerning cyber war crime in Ulavu are of criminal nature and have a fundamentally different scope and object than this arbitration[51]. In a similar setting, an arbitral tribunal rightly refused to stay the proceedings as the parties and the circumstances of the pending criminal investigations were entirely different.[52]

2.2.2.2.2 The Stay Order affects the Principle of Arbitration

The Tribunal's discretion in managing the proceedings is constrained by fundamental procedural principles, particularly the principles of equality between the parties and the right

[48] *C v D* [2021] QIC (F).
[49] *Fiona Trust & Holding Corp v Yuri Privalov* [2006] EWHC 2583.
[50] Zollie Steakley & Weldon U. Howell, Ruminations of Res Judicata, 28 SW L.J. 355 (1974) <https://scholar.smu.edu/smulr/vol28/iss1/15/> accessed 12 September 2023
[51] Théobald Naud, 40 under 40 International Arbitration (Dykinson S.L 2018)
[52] Stephanie Torkomyan, Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration Selected ICC Cases (ICC Dispute Resolution Bulletin Volume 3, 2019)

of each party to have their case heard.[53] The same has been laid down under AIAC rules.[54] These principles are also widely recognized in international conventions, such as Article V(1)(b) of the NYC[55], and in arbitration laws, including Section 33(1)(a) of the English Arbitration Act 1996[56].

Delaying the proceedings until the completion of criminal investigations in the ICC would only enhance procedural efficiency if the Tribunal could subsequently utilize the outcomes of these investigations or proceedings. However, the outcome of ICC hearing holds no bearing on Arbitral proceedings and hence, a stay order affects the effectiveness of arbitration process.

The right of the parties to be heard stands as a fundamental principle in international arbitration[57]. Consequently, it is incumbent upon a tribunal to afford the parties an opportunity to address all factual aspects of a dispute and deliberate upon the presented evidence[58]. However, in the case of the Claimant, they would not participate in any criminal proceedings against Anuwat in the ICC. Consequently, the Claimant would be unable to present their case in these proceedings.

As a result, the Tribunal's findings are not legally binding on this Tribunal[59]. Instead, in order to uphold the Claimant's right to be heard, the Tribunal must independently establish the facts of the case.

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[53] *Georg Gavrilovic and Gavrilovic doo v Republic of Croatia* [2015] Case No ARB/12/39 para 85; Peter Binder, International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions (4th ed, Kluwer Law International 2019)

[54] AIAC Arbitration Rules 2021, Rule 13.1.

[55] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York convention) 1959, art V(1)(b)

[56] Arbitration Act 1996, s 33.

[57] Klaus P. Berger, Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion (ICCA Congress Series No. 13, Montreal 2006)

[58] IPOC International Growth Fund Ltd v LV Finance Group Ltd [2007] 4P.168/2006; Philippe, International Commercial Arbitration (2nd ed Kluwer Law 1999)

[59] Ema V. Gojkovic, 'An Unlikely Tandem of Criminal Investigations and Arbitral Proceedings: A Case Study of the INA – MOL Oil & Gas Proceedings' (Kluwer Arbitration Blog 2017)

2.2.2.2.3 The stay of proceedings causes disproportionate harm to Claimants

In exercising its discretion, the Tribunal must respect the intent of the parties when concluding their arbitration agreement[60]. When submitting disputes to arbitration, reasonable parties intend to achieve time and cost-effective decision-making[61]. Hence, continuing the proceedings is in line with the Parties' intent of settling their dispute in the most time-efficient manner.

A stay would pose an increased threat to Claimant's national security in the form of potential cyberattacks and terrorist threats that would not be identified and neutralized by OnionRing, which is currently under investigation for hacking and interference with the elections. It also impacts the obligation of Coltana under the ICSFT, 1999 as it impairs its ability to combat terrorism.

2.2.2.2 The presence of Anuwat is not essential to proceedings

In this case, the nature of arbitration allows for flexibility in conducting proceedings, even in the absence of one of the witnesses. The Tribunal can still consider the evidence, arguments, and submissions presented by both parties, and make an impartial decision based on the merits of the case. Anuwat's absence does not inherently harm the proceedings, as the core principles of arbitration, such as equality of arms and the right to be heard, can still be upheld through remote participation and written communication.

Anuwat is the CEO of the company, however, it does not prove him to be a key-witness as the fact that He had introduced and gave presentation on features of OnionRing only signifies his role as CEO as the company, there is no proof of him having additional information that is not available in documents of Ini Tech. Moreover, staying the proceedings until the conclusion of

[60] Dolores Bentolila, 'Arbitrators as Lawmakers (International Arbitration Law Library)' (Kluwer Law International 2017) vol 43
[61] Gary B. Born, International Commercial Arbitration (3rd ed Kluwer Law International 2021)

his trial at the ICC could potentially lead to significant delays, undermining the efficiency and expeditious resolution of the dispute, which is a key objective in arbitration.

2.3 The Arbitration proceedings does not undermine the ICC proceedings and are unaffected

The Tribunal is competent to decide on the civil law aspects of the Parties' Contract on its own.[62] Rome Statute grants the Court jurisdiction over four groups of crimes, referring to them as the most serious crimes of concern to the international community as a whole: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[63] In the current case, it's important to distinguish between the ICC case involving Mr. Anuwat, which focuses on his alleged involvement in cyber war crimes against Ulavu, and the arbitration proceedings that revolve around a commercial dispute between Coltana and Radostan. More specifically, it has been held that parallel criminal proceedings do not take precedence over civil proceedings in the context of international arbitration proceedings.[64] Hence, the Arbitration proceedings neither undermines ICC proceedings nor are affected by it.

3. Whether The CCTA Is Void

It is submitted that CCTA is void as it is not a valid agreement under Indian Contract Act, 1872.[65] According to ICA, any agreement qualifies as a contract if it meets certain criteria: it must be formed through the voluntary agreement of competent parties, involve lawful consideration and objectives, and not be expressly invalidated.[66] It has an unlawful object as it is against the public policy. The treaty was concluded by misrepresentation of facts by Radostan

[62] *Fiona Trust & Holding Corp v Yuri Privalov* [2006] EWHC 2583; Alexis Mourre, Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator, vol 22 Issue 1 (2006); Redfern, Redfern and Hunter on International Arbitration (6 ed, Oxford University Press 2015)
[63] Rome Statute of the International Criminal Court 1998, Art. 5.
[64] SCAI Case [2015] No. 300273-2013; Groselj, 'Stay of arbitration proceedings – Some examples from arbitral practice (Kluwer Law International, 2018)
[65] Indian Contract Act 1872.
[66] Indian Contract Act 1872, s 23.

and hence, it becomes void. The agreement is also in derogation with the international obligations of states to protect the citizens privacy and the principle of non-interference.

3.1 The Contract is void under principles of Contract Law

An agreement's consideration or object is considered lawful unless it falls into specific categories: if it is prohibited by law, goes against any law's provisions, is fraudulent, implies harm to another person or property, or is deemed immoral or contrary to public policy by the court.[67] In this case, CCTA has an unlawful object on to grounds: (1) It is fraudulent (2) It is against public policy. Furthermore, it is also violative of right to privacy of citizens of Coltana.

3.1.1 The Contract has unlawful object

Section 23 of the ICA, the material part of which enacts that the "consideration or object" of an agreement is lawful, unless it is of such a nature that if permitted it would defeat the provisions of any law, or is opposed to public policy.[68]

3.1.1.1 The agreement is illegal.

Contracts closely related to illegal transactions are inherently void, as established by legal precedents.[69] In the case of Gherulal Parakh v Mahadeodas Maiya[70] the Supreme Court clarified that even if the main agreement is lawful, if it has an illegal collateral purpose, the entire contract becomes void due to the illegality of the collateral agreement. Similarly, in the case of Shri Lachoo Mal v Shri Radhey Shyam[71], the court set a crucial principle under Section 23 of the Contract Act: any agreement, otherwise lawful, becomes void if its execution necessitates an unlawful act. This means that illegality can be claimed when the agreement inherently leads to unlawful actions.

[67] Indian Contract Act 1872, s 23.
[68] J. Beatson, *Anson's Law of Contract* (22nd edn, Oxford)
[69] *Bigos v Boosted* [1951] 1 All ER 92.
[70] *Gherulal Parakh v Mahadeodas Maiya* [1959] SCR Supl. (2) 406.
[71] *Shri Lachoo Mal v Shri Radhey Shyam* [1971] 1 SCC 619.

Applying these legal principles, the CCTA can be deemed illegal due to its privacy violations and lack of transparency. By granting Coltana's government extensive surveillance powers, including access to CCTV cameras, without clear safeguards for citizens' privacy rights, the CCTA may infringe upon international human rights standards. This potential infringement, particularly if it results in unauthorized surveillance of citizens, renders the agreement illegal and contestable under international and national laws protecting privacy and civil rights.

3.1.1.2 The CCTA is against public policy

The CCTA unequivocally runs afoul of the principles of public policy. Contracts that are detrimental to the public interest, well-being, or are devised with fraudulent intent to undermine the rights of third parties are unequivocally void under Section 23 of the Contract Act.[72] The contracts which are against public policy are void.[73] In line with the ruling in Sasfin (Pty.) Ltd. v Beukes[74], contracts can be considered against public policy if they are "clearly detrimental to the community's interests, whether they violate the law or morality, or go against social or economic considerations." Moreover, Lord Atkin's stance in Fender v Mildmay[75] emphasized that the doctrine of public policy should only be invoked in clear cases where harm to the public is indisputable and not reliant on the subjective interpretations of a few judicial minds. The CCTA's surveillance and privacy infringements, particularly its access to closed-circuit television cameras and potential for unchecked monitoring, unquestionably raise concerns about privacy and infringe upon public interests and rights. This blatant disregard for privacy and civil liberties renders the CCTA unmistakably contrary to public policy principles.

Public policy does not align with the policy of a specific government but rather pertains to matters concerning the welfare and interests of the public at large. The principles guiding public

[72] Indian Contract Act 1872, s 23.
[73] *Swiss Timing Ltd. v Commonwealth Games 2010 Organising Committee* [2014] 6 SCC 677.
[74] *Sasfin (Pty.) Ltd. v Beukes* [1989] (1) SA 1 (A).
[75] *Fender v Mildmay* [1938] AC 1 (HL).

policy are subject to potential expansion or adjustment as necessary.[76] When a situation arises that isn't covered by an established public policy principle, the court, in accordance with societal ethics and the greater good, must declare practices contrary to public policy.[77]

In this case, it was disclosed that OnionRing utilized this information to endorse and guide political advertisements and endorsements favoring the OBH party to Coltana's voters. Consequently, advertising campaigns were launched to emphasize the achievements of the OBH party. These campaigns were financially supported and created by OBH themselves, strategically designed to regularly appear on the devices and social media accounts of the general public with the aim of undermining the reputation of the DPP party.[78] Free and fair election is the sine qua non of democracy[79] and affecting the democratic process affects the public policy.

3.1.2 The Validity of contract is undermined by concealment of information by Radostan

A true contract requires the agreement of the parties freely made with full knowledge and without any feeling of restraint.[80] Concealing a 'material fact' in its entirety constitutes 'Fraud,' in accordance with Section 17 of the ICA, 1872.[81] This principle is reinforced by the ruling of the Hon'ble Supreme Court in the case of Shrisht Dhwan (Smt) v M/s. Shaw Brothers.[82] The court's observation and judgment in this case elucidate that 'Fraud' in 'law' is an 'element' that obscures rational judgment, preventing the defrauded person from forming a reasoned assessment of the impact of the 'Transaction' on their interests. The essence of 'Fraud' lies in the intention to deceive another person, enticing them to enter into the 'contract' through the

[76] *Schroeder Music Publishing Co. Ltd. V Macaulay* (formerly Instone) [1974] 1 WLR 1308.
[77] *Kedar Nath Motani v Prahlad Rai* [1960] 1 SCR 861.
[78] Moot Proposition, para 30
[79] *Digvijay Mote v Union of India* [1993] 4 SCC 175.
[80] *Mayawati v Kushalya Devi* [1990] 3 SCC 1.
[81] Indian Contract Act 1872, s 17.
[82] *Shrisht Dhwan (Smt) v M/s. Shaw Brothers* AIR 1992 SC 1555.

presentation of false facts or the active concealment of facts by an individual with knowledge or belief in those facts. A fraudulent contract or a contract obtained by fraud is void.[83]

In this instant case, the purpose of the CCTA was cooperation between the two countries to combat terrorism and other transnational threats. At the time of the signing of the CCTA, Coltana was informed that OnionRing was an anti-terrorism software that could remotely and covertly extract valuable intelligence from a variety of devices to identify and neutralize threats in stealth mode.

However, after the Ulavu Files were declassified, information about the use of similar software to hack the devices of Ulavu citizens was made available. Owing to the similarity of the software and OnionRing, it was realized that OnionRing also had the capability to hack devices - which was not known at the time of signing of the CCTA. Thus, there was a link between the OnionRing and the statement released by the former Initech employee about its involvement in the 2021 General Elections which furthers the fraud committed by Radostan.

3.2 The Contract is in derogation with the International Obligation of the Parties

Coltana and Radostan, as parties to the International Convention for the Suppression of the Financing of Terrorism, are bound by its provisions.[84] This convention underscores the importance of combating terrorism and the financial support that sustains it. Art. 1 of this convention highlights their commitment to prevent and combat the financing of terrorism.[85]

Moreover, both countries are signatories to the ICCPR. Under ICCPR, Art. 17 recognizes the right to privacy and its protection by the law. This provision emphasizes the significance of safeguarding individuals' privacy rights.[86] Furthermore, Art. 20 of ICCPR mandates the

[83] *A.K. Lakshmipathy and Others v. Rai Sheb Pannalal Hirlala Lahoti Charitable Trust, Hyderabad and Others* [2005] (5) ALD 658.
[84] Moot Proposition, para 25.1
[85] International Convention for the Suppression of the Financing of Terrorism 1999, Art 1.
[86] International Covenant on Civil and Political Rights 1976, Art 17.

prohibition of propaganda advocating war or promoting hatred based on nationality, race, or religion.[87] This obligation aligns with the broader international goal of promoting peace and tolerance. Art. 25 of ICCPR enshrines the right to participate in the conduct of public affairs, including voting, eligibility for public service, and involvement in public decision-making processes. This highlights the importance of democratic principles and participation in government.[88]

In addition to these specific treaty obligations, the UN Charter, to which both Coltana and Radostan are parties[89] underscores the importance of maintaining international peace and security, promoting cooperation among nations, and respecting human rights.[90]

However, the CCTA appears to be in derogation of these international obligations. The extensive surveillance powers granted to the government of Coltana through the OnionRing software, including access to closed-circuit television (CCTV) cameras, raises concerns about violations of the right to privacy protected by Art. 17 of ICCPR.

As the International Court of Justice said in its 1986 judgment in the Nicaragua case[91] "the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference." Use of internet has eased the process of peddling propaganda[92] however international Human rights law promotes the right of peoples to determine freely without external interferences.[93] Coercive efforts to manipulate voting behaviour could also

[87] International Covenant on Civil and Political Rights 1976, Art 20.
[88] International Covenant on Civil and Political Rights 1976, Art 25.
[89] Moot Proposition, para 25.1
[90] Charter of the United Nations 1945, Art 1, 2.
[91] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ) [1984] ICJ Rep 392.
[92] New Knowledge, 'The Disinformation Report' (2018) https://www.yonder.co/articles/the-disinformation-report/
[93] K Jones, 'Online Disinformation and Political Discourse: Applying a Human Rights Framework' (2019) Royal Institute of International Affairs <https://www.chathamhouse.org/publication/online-disinformation-and-political-discourse-applying-human-rights-framework>

amount to intervention in another state's affairs[94] and harms self-determination of individuals. The use of OnionRing for propaganda or to promote certain political parties could run counter to the prohibition of propaganda advocating hatred under Art. 20 of ICCPR and is in derogation with the obligations under Art. 1 and 2 UN Charter.

4. Whether the Termination of the CCTA by Coltana is Valid

Arguendo, assuming the CCTA's validity, it is submitted that Coltana's termination of the CCTA was legally valid. Section 39 of the ICA,[95] provides a basis for contract termination when one party refuses or becomes unable to fulfill their promise entirely, unless they have indicated their willingness for the contract to continue. This legal principle was reaffirmed in the case of Air India Ltd. v Gati Ltd. [96], where the Supreme Court upheld the Arbitral Tribunal's findings. Furthermore, the case of Viacom 18 Media Pvt. Ltd. v MSM Discovery Pvt. Ltd. [97] emphasized that the promisee must ensure they have fulfilled their own contractual obligations before invoking Section 39.

In the context of the CCTA, Radostan's obligation to provide OnionRing services was breached when it was discovered that similar software had been sold to Ulavu, implicating OnionRing in hacking activities and unauthorized access to Coltana citizens' personal data. This revelation raised concerns about the true nature of OnionRing, extending beyond cyberattack prevention. Throughout the agreement, Coltana consistently fulfilled its contractual obligations, including timely payments. However, negotiations over payment terms ceased abruptly when the Ulavu Files were declassified. In light of these circumstances, Coltana's termination of the CCTA appears legally valid under Section 39 of the ICA.

[94] J Ohlin, 'Did Russian Cyber Interference in the 2016 Election Violate International Law?' (2016) Texas Law Review, 95(7)
[95] Indian Contract Act 1872, s 39.
[96] *Air India Ltd. v Gati Ltd.* [2015] SCC Online Del 10220.
[97] *Viacom 18 Media Pvt. Ltd. v MSM Discovery Pvt. Ltd.*

PRAYER FOR RELIEF

In light of the submissions above, counsel for **CLAIMANT** respectfully requests the Tribunal:

1. To **DECLARE** that Olaf should be removed as an Arbitrator in the present proceedings for lack of impartiality.
2. To **REJECT** the request for stay of proceedings.
3. To **DECLARE** that CCTA is void.

RESPECTFULLY SIGNED AND SUBMITTED BY COUNSEL ON 15 SEPTEMBER 2023