

**18<sup>th</sup> ANNUAL LAWASIA**

**INTERNATIONAL MOOT COMPETITION**

**24 NOVEMBER TO 27 NOVEMBER 2023**

**ASIAN INTERNATIONAL ARBITRATION CENTRE**

**MEMORANDUM FOR THE CLAIMANT**

**CLAIMANT**

**RESPONDENT**

**THE REPUBLIC OF COLTANA**

**V.**

**THE MAJESTIC KINGDOM OF  
RADOSTAN**

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<b>ENGLAND</b>	
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<i>JEB Fasteners v Marks Bloom</i>	<b>England and Wales High Court</b>  1983  <i>JEB Fasteners Ltd v. Marks Bloom &amp; Co</i>  [1983] 1 All ER 583

<p><i>M/S Ganesh v Anthony Bingham and Knowles</i></p>	<p><b>England and Wales High Court</b></p> <p>8 February 2016</p> <p><i>M/S Ganesh, Cofely Ltd v. Anthony Bingham and Knowles Ltd</i></p> <p>[2016] EWHC 240 (Comm)</p>
<p><i>Smith v Chadwick</i></p>	<p><b>England and Wales High Court</b></p> <p>18 Feb 1884</p> <p><i>Smith v. Chadwick</i></p> <p>(1884) 9 App Cas 187</p>
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<p><i>The Moorcock</i></p>	<p><b>England Court of Appeal</b></p> <p>1886-89</p> <p><i>The Moorcock</i></p> <p>[1886-89] All ER Rep 530</p>
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<i>Jagar Nath Singh And Ors. v. Lalta Prasad</i>	<b>Allahabad High Court</b>  13 August, 1908  <i>Jagar Nath Singh And Ors. v. Lalta Prasad</i>  1 Ind Cas 562
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<i>The Trustees of The Port of Calcutta v Bengal Corporation</i>	<b>Calcutta High Court</b> 20 June 1971 <i>The Board of Trustees of The Port Of Calcutta vs Bengal Corporation Pvt. Ltd.</i> A.F.O.D. Appeal No. 102 of 1971
<i>The State of Maharashtra v Dr. Praful B. Desai</i>	<b>Supreme Court of India</b> 1 April 2003 <i>The State of Maharashtra v. Dr. Praful B. Desai</i> (2003) 4 SCC 601
<i>RC Thakkar v The Bombay Housing Board</i>	<b>Gujarat High Court</b> 5 May, 1972 <i>RC Thakkar v The Bombay Housing Board</i> AIR 1973 Guj 34
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<b>Abbreviation</b>	<b>Citation</b>
<i>AIAC Rules</i>	Asian International Arbitration Centre  <i>Asian International Arbitration Centre Arbitration Rules 2021</i>
<i>IACA</i>	Indian Arbitration and Conciliation Act  <i>Indian Arbitration and Conciliation Act 1996</i>
<i>IEA</i>	Indian Evidence Act  <i>Indian Evidence Act 1872</i>
<i>SOGA</i>	Sales of Goods Act  Sale of Goods Act 1930



## **STATEMENT OF JURISDICTION**

The **Republic of Coltana** (“**Coltana**”) and the **Majestic Kingdom of Radostan** (“**Radostan**”) have agreed to submit the dispute in Bangalore, India in accordance with Rule 1.1(a) of the Asian International Arbitration Centre Arbitration Rules 2021 (“**AIAC Rules**”).

## QUESTIONS PRESENTED

- (a) Whether Olaf, an AI-powered intelligent lawyer can be removed as the arbitrator for lack of impartiality;
- (b) Whether the Arbitral Tribunal should stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court;
- (c) Whether the CCTA is void; and
- (d) If issue (c) is decided in the negative, whether the termination of the CCTA by Coltana is valid.

## STATEMENT OF FACTS

- 1 Coltana and Radostan (collectively, the “**Parties**”) are parties to this arbitration. **Coltana**, through substantial investments into its education and financial institutions, has a highly-skilled workforce. **Radostan**, led by Prime Minister Yodwicha Kenchana (“**Yodwicha**”), has a booming technology sector which leading technological and internet companies.
- 2 To compensate for the damage caused to both countries during World War II, the Parties signed the Coltana-Radostan Memorandum of Understanding (“**CRMOU**”). Through the CRMOU, the Parties collaborated on Project Olaf in 2015. This project aimed to create Olaf, the world’s first Artificial Intelligence (“**AI**”) lawyer and judge. It was spearheaded by Yodwicha and received substantial investments from the Radostan government. Olaf is owned by Oracle Corporation (“**Oracle**”), a private entity in Radostan on which Yodwicha serves as an independent non-executive director. Coltana sent a delegation of legal and technology scholars to assist in structuring Olaf, which includes designing the AI system and providing it legal training. After Olaf became fully operational, Coltana was only given limited access to Olaf’s software.
- 3 Olaf served as various entities’ legal representatives, and as arbitrator in complex arbitrations. Olaf’s self-learning abilities had also spurred Olaf to publish legal insights on its website and social media account. International media noticed that Olaf’s numerous publications were “overly supportive and defensive” of Radostan’s conduct and policies. While Oracle claimed that Olaf had also complimented the policies of other nations, a Radostani news portal remarked that they were Radostan’s allies.



- 4 In August 2021, Coltana experienced terrorist bombings and cyber-attacks by unidentified terrorists. The public criticised the Coltana government's inadequate response to these events. Olaf commented that proper investment in counter-terrorism measures could have prevented the incident.
- 5 Coltana's President and government officials attended a meeting with Yodwicha, his delegation, and Ini-Tech Inc's ("**Ini-Tech**") CEO, Anuwat Kittisak ("**Anuwat**"). Ini-Tech was controlled by Radostan's Ministry of Defence. While discussing the recent attacks, Coltana emphasised that national security and securing public support were crucial because of the upcoming general elections.
- 6 To address Coltana's concerns, Anuwat introduced the OnionRing software ("**OnionRing**"), which he claimed could neutralise potential terrorist threats. OnionRing is designed to extract data from a variety of devices in stealth mode. Anuwat advised involving government-affiliated companies to broaden OnionRing's coverage.
- 7 The Coltana-Radostan Counter Terrorism Agreement ("**CCTA**") was swiftly signed owing to urgent national security concerns. The CCTA incorporated the Parties' obligations and Ini-Tech's responsibility for the end-to-end process of OnionRing. Anuwat emphasised that all collected data is strictly confidential and accessible by Coltana's officials only. OnionRing had successfully prevented several terrorist plots.
- 8 In December 2021, Coltana's general elections were held. Despite securing a simple majority, this was the DPP's biggest defeat in history. Olaf opined that the result was due to DPP's poor governance over the years, although the results could have been explained by Sirius' Black's strong influence over Coltana's youth and the OBH's

campaign approach. Weeks after, a former-employee of Ini-Tech alleged on Twitter that OnionRing accessed thousands of Coltana electorates' personal data via Ini-Tech's database before promoting OBH to voters. Ini-Tech and OBH vehemently denied such allegations.

- 9 In February 2022, unidentified hackers stole Coltana's Bitcoin reserves, hampering Coltana's ability to fulfil its payment obligations. Parties began negotiating to alter the payment method for the services of OnionRing.
- 10 In March 2022, the Department of Justice of the United States of Kola Lumpo ("**DOJ**") announced that Anuwat has been arrested on the grounds of commissioning cyber war crimes in Ulavu as the key programmer of OnionRing, following a warrant of arrest by the International Criminal Court ("**ICC**"). Significantly, before his arrest, Anuwat claimed that OnionRing detected a significant amount of Bitcoin movement involving the bank account of DPP politicians.
- 11 The Ulavu Files released by the DOJ revealed that Ulavu's current Prime Minister, wins every election by a supermajority due to a software ("**Unidentified Software**") resembling OnionRing. The Crime and Corruption Reporting Project reports corroborates this with evidence that the Ulavu Intelligence Bureau had purchased a set of hardware equipment used to run OnionRing. The Unidentified Software was allegedly used to target civilians, and incorporated in various Autonomous Weapons Systems purchased from Radostan used to kill anti-establishment forces.
- 12 Following this release, Coltana ceased payment negotiations and terminated the OnionRing services. Coltana initiated arbitration proceedings against Radostan, in

which Radostan nominated Olaf as arbitrator. Coltana opposes a stay of the proceedings, as this tribunal has the jurisdiction and necessary documentation to find on the substantive pleadings, namely whether the CCTA is void or, alternatively, validly terminated.

## **SUMMARY OF PLEADINGS**

### **I. OLAF SHOULD BE REMOVED AS ARBITRATOR OF THE PRESENT PROCEEDINGS FOR LACK OF IMPARTIALITY**

13 Olaf should be removed as arbitrator under Rule 11.1 of the AIAC Rules. The circumstances surrounding Olaf's creation and output raise justifiable doubts as to its impartiality in the minds of reasonable third parties. First, Olaf had repeatedly complimented Radostan's policies and conduct, whereas it had consistently criticised the Coltana government. Second, Olaf was largely designed and trained by Radostan's scholars, with limited input from Coltana's scholars. Third, Project Olaf was spearheaded by Yodwicha and had received substantial investment from the Radostan government. The totality of these circumstances indicates Radostan's substantial association with Olaf, raising justifiable doubts as to Olaf's impartiality as arbitrator.

### **II. THE PRESENT PROCEEDINGS SHOULD NOT BE STAYED PENDING ANUWAT'S TRIAL AT THE ICC**

14 A stay of proceedings is an exceptional remedy and should not be granted here. First, the outcome of the ICC proceedings is not material to the present proceedings, as the issues before the ICC do not substantially overlap with the issues in these arbitral proceedings. Second, denying Radostan's request for a stay of proceedings does not deprive Radostan of a reasonable opportunity to present its case. Anuwat can present his testimony in written form or through means of virtual conferencing. Third, an unreasonable delay will be caused if a stay was granted until the conclusion of the ICC trial. This would severely undermine the duty of the tribunal to ensure the expeditious

resolution of the proceedings. Therefore, the balance of prejudice falls on the Coltana and militates against a stay of proceedings.

### **III. THE CCTA IS VOID FOR LACK OF FREE CONSENT**

15 The CCTA is void because Coltana's consent to the CCTA was induced by fraud. First, Radostan had a duty to disclose that Ini-Tech had unauthorised access to the data collected by OnionRing because such access was not within Coltana's means of discovery. Second, Radostan had full knowledge of the functions of OnionRing since it was created by the subsidiary of its Ministry of Defence. Even if an intention to deceive cannot be proved, Radostan's lack of disclosure would still amount to a misrepresentation.

### **IV. THE CCTA WAS VALIDLY TERMINATED BY COLTANA**

16 Alternatively, the CCTA was validly terminated by Coltana. First, Radostan breached an implied statutory condition of the CCTA that had been implied into the contract by the Sale of Goods Act ("SOGA"). This implied condition stipulates that OnionRing should be reasonably fit for the purpose for which it was bought. Second, Radostan breached an implied term of the CCTA to keep the data collected by OnionRing confidential. Third, Radostan breached Article 1(ii) of the CCTA for failing to uphold the right to privacy under international human rights law. Fourth, these breaches are sufficiently fundamental breaches to allow Coltana to validly terminate the CCTA. Last, these breaches were not waived by Coltana's decision to retain OnionRing for investigation purposes.

## PLEADINGS

### I. OLAF SHOULD BE REMOVED AS ARBITRATOR OF THE PRESENT PROCEEDINGS AS THERE ARE JUSTIFIABLE DOUBTS AS TO ITS IMPARTIALITY

17 The impartiality of an arbitrator is fundamental to ensure that parties have the opportunity to be heard fairly.<sup>1</sup> A party may challenge an arbitrator under Rule 11.1 of the AIAC Rules if there are existing circumstances that raise justifiable doubts regarding the arbitrator’s impartiality or independence.<sup>2</sup> Justifiable doubts arise when a reasonable third party in possession of the relevant information would perceive a real, and not speculative, likelihood of bias.<sup>3</sup> Olaf must be removed as arbitrator as there is reasonable suspicion that it is unable to adjudicate impartially.

18 Crucially, the twin requirements of independence and impartiality serve an important function of ensuring that justice is not just done, but *seen* to be done.<sup>4</sup> Therefore, Coltana does not need to show that Olaf has actual bias.<sup>5</sup> Rather, an appearance of bias from a reasonable and informed third person’s perspective is sufficient to raise justifiable doubts about Olaf’s independence or impartiality.<sup>6</sup> This guards against arbitrators being influenced by factors other than those related to the merits of the case.

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<sup>1</sup> *M/S. Ganesh Builders v Shri Nagorao s/o Motiram Kaware* ARBITRATION APPEALS NO. 14 OF 2017 (“*M/S Ganesh*”), at [13]-[14], *Cofely Ltd v (1) Anthony Bingham and (2) Knowles Ltd* [2016] EWHC 240 (Comm), at [73]; *Douala International Terminal (DIT) v. Port Autonome de Douala*, ICC Case No. 24211/DDA (“*Douala*”), [70].

<sup>2</sup> AIAC Rules, Rule 11.1.

<sup>3</sup> *Ranjit Thakur v. Union of India* 1937 SCC 611 (“*Ranjit*”), [6].

<sup>4</sup> *RSE Holdings AG and Republic of Latvia* PCA Case no. 2022-41, [36].

<sup>5</sup> *M/S Ganesh v Anthony Bingham and Knowles Ltd* [2016] EWHC 240 (Comm), [30]; *Ranjit v India*, [6].

<sup>6</sup> *Douala*, [70]; *Ranjit*, [6].

19 A reasonable and informed third party would have justifiable doubts regarding Olaf's impartiality for two reasons. First, Olaf's publications were consistently complimentary and defensive of Radostan government's policies and international conduct, but critical of the Coltana government's. Second, the close association between Radostan and Olaf is one that raises doubts as to Olaf's impartiality.

*A. Olaf consistently expressed opinions that raise justifiable doubts as to its partiality*

20 If prior opinions expressed by an arbitrator are sufficiently specific and clear that a reasonable and informed third party would find that the arbitrator would rely on such opinions without considering the facts, circumstances, and arguments presented by the parties, justifiable doubts would be raised as to the arbitrator's lack of impartiality.<sup>7</sup>

21 Olaf has expressed opinions defensive of Radostan's domestic and international conduct and overly critical of Coltana governments decisions:

- (a) Olaf's prior publications have been described as "overly supportive and defensive" of Radostan's policies and international conduct ("**Olaf's Publications**");<sup>8</sup>
- (b) Radostan Today, a Radostani news portal, expressed that Olaf only publishes supportive and complimentary opinions when it pertains to Radostan's government and its allies.<sup>9</sup>

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<sup>7</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* ICSID Case No. ARB/07/26 ("*Urbaser v Argentina*"), at [40].

<sup>8</sup> Record, at [13].

<sup>9</sup> Record, at [14].

- (c) International media identified and labelled Olaf's Publications as "seemingly unusual", which sparked a heated debate regarding Olaf's independence and Radostan's influence over it;<sup>10</sup>
- (d) Olaf's post that the DPP's defeat in Coltana's general elections was attributable to its "poor performance" over the years, despite many other possible reasons for the DPP's poor results.<sup>11</sup> For instance, Sirius Black's entry into Coltana's political scene has been locally reported to be detrimental to DOO's long-standing rule over the nation, since he has garnered a strong influence over the younger generation of Coltana.<sup>12</sup> Further, OBH's new campaign approach of using simple infographics that saw an increase in viewership on its official website and social media accounts also explained why OBH had obtained more support in the general elections.<sup>13</sup>
- (e) Olaf's attribution of the devastating cyber and terrorist attacks solely to DPP's failure to invest properly in counter-terrorism measures, although the terrorism attacks that occurred were unprecedented and were likely perpetrated by unexpected actors, namely the OBH party.<sup>14</sup>

22 In the context of the circumstances surrounding this dispute, these facts cumulatively indicate that Olaf had not only formed the opinion that Radostan government was highly capable, regardless of its conduct or policies, but also that it views the Coltana

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<sup>10</sup> Record, at [13].

<sup>11</sup> Record, at [29].

<sup>12</sup> Record, at [15].

<sup>13</sup> Record, at [29].

<sup>14</sup> Record, at [21].



government as grossly incompetent. Therefore, Olaf’s opinions on the governments of the Parties are sufficiently clear and specific to raise justifiable doubt that Olaf is partial towards Radostan. Since the appearance of such a bias raises justifiable doubts as to its ability to decide on facts and legal merits of the case, Olaf should be removed as arbitrator.

***B. The relationship between Radostan and the Olaf raises justifiable doubt as to the impartiality of Olaf***

23 Justifiable doubts about an arbitrator’s impartiality may arise if there is a close relationship between the arbitrator and one of the parties to the dispute. The Fifth<sup>15</sup> and Seventh<sup>16</sup> schedules of the Indian Arbitration and Conciliation Act (“IACA”) provide illustrations of the different relationships which form grounds for the removal of an arbitrator.<sup>17</sup> The applicability of the Seventh Schedule immediately renders a person ineligible to act as arbitrator while the applicability of the Fifth Schedule raises justifiable doubts as to the impartiality of an arbitrator.<sup>18</sup> Although the Fifth and Seventh Schedules were drafted with human arbitrators in mind, more recent policy plans indicate that even the incorporation of more advanced AI into arbitral proceedings must be guided by ethical principles that inform the IACA.<sup>19</sup>

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<sup>15</sup> Indian Arbitration and Conciliation Act 1996 (“IACA”) s12(1)(b).

<sup>16</sup> IACA, s12(5)

<sup>17</sup> IACA, Fifth Schedule.

<sup>18</sup> *HRD Corporation (Marcus Oil) v Gail (India) Limited (“HRD Corporation”)*, at [13]. *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd* (2017) 4 SCC 665, at 687-689.

<sup>19</sup> The NITI Aayog Expert Committee on ODR, “Designing the Future of Dispute Resolution” (October 2021) <<https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>> (accessed 21 August 2023).

(1) *Radostan's substantial financial interest in Olaf raises justifiable doubts as to Olaf's impartiality*

24 The Seventh Schedule provides that an arbitrator is ineligible to preside over a dispute if he “has a significant financial interest in one of the parties”. Project Olaf was a massive undertaking by Radostan which required a significant amount of time, resources, and expertise.<sup>20</sup> Radostan also had a heavy financial stake in Project Olaf, with its investment of billions.<sup>21</sup> Viewed objectively, Radostan has a vested interest in programming Olaf in a manner that is partial towards it.

25 At this juncture, it is noted that the relationships described in both Schedules pertain to an arbitrator having a significant financial interest in a party to the dispute, rather than a party to the dispute having a significant financial interest in the arbitrator. This is presumably because the IACA contemplates human and not AI arbitrators, since AI machines cannot have a financial interest in anything. However, since the underlying rationale of the Fifth and Seventh Schedules are to prohibit any sort of relationship that could engender influence from one party to another, the direction of the parties' financial stake appears to be a mere technicality. Further, since Olaf is an AI arbitrator which creation was controlled by Radostan, Radostan clearly asserts influence over Olaf that would be akin to the type of influence that the Fifth and Seventh Schedules are seeking to prohibit.

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<sup>20</sup> Record, [11].

<sup>21</sup> Record, [10].

(2) *Radostan's close association with the creation of Olaf raises justifiable doubts as to Olaf's impartiality*

26 The Fifth Schedule provides that the appointment of an “employee”, “consultant” or “advisor” of one of the parties as arbitrator to a dispute would give rise to justifiable doubt in the mind of a “reasonable and informed third person”.<sup>22</sup> This is due to the very close nature of the relationship that ties the arbitrator to one of the parties involved.<sup>23</sup> While the association between Radostan and Olaf does not fall squarely under this category, such an association would nonetheless be prohibited by the Fifth Schedule. This is because the rationale underlying this category of relationships is to prohibit any type of relationship between a party to the dispute and an arbitrator which would allow the former to influence the latter in its decisions.

27 Justifiable doubts regarding Olaf's impartiality arises because Radostan's heavy involvement in the creation of Olaf likens Radostan to an “advisor” of Olaf. First, Radostan had retained full, unparalleled access to Olaf before and after Project Olaf had been completed.<sup>24</sup> Contrastingly, Coltana's access to Olaf had been limited to only its technology scholars for the upkeep and maintenance of Olaf's programming after the completion of Project Olaf.<sup>25</sup> The deliberate exclusion of Coltana's legal scholars from the continuous training of Olaf, a machine that must continuously learn, indicates that Coltana had no influence over the legal training of Olaf and the datasets which input into Olaf's programming. This leaves open the possibility of the Radostan

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<sup>22</sup> IACA, Fifth Schedule.

<sup>23</sup> IACA, Fifth Schedule.

<sup>24</sup> Record, [11]-[12].

<sup>25</sup> Record, [12].

scholars training Olaf in a way that makes Olaf partial toward Radostan. In any event, Radostan clearly had more control over the datasets introduced into Olaf, which ultimately affects whether his output is biased.

28 Second, Radostan’s Prime Minister had a significant role to play in Project Olaf by virtue of his seat on the board of Oracle Corp, which controls Olaf.<sup>26</sup> While Radostan Yodwicha may not be involved in the daily operation of Oracle because of his role as an independent non-executive director, this role still allows him to participate in policymaking of Oracle<sup>27</sup> which may indirectly influence the way Olaf is created. These factors would lead a reasonable person to infer that there is a real likelihood of bias ingrained in Olaf.

29 Lastly, bias within an AI machine is possibly more insidious than that in a human due to the general perception of trust in a machine to remain unbiased and objective.<sup>28</sup> There is limited transparency regarding Olaf’s algorithm and operation systems, and the types of factors that Olaf considers in its decision-making process, making it akin to a “black box”.<sup>29</sup> This, in light of the aforementioned factors, would raise justifiable doubts as to Olaf’s competence to act impartially as an arbitrator.

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<sup>26</sup> Record, [12].

<sup>27</sup> Adam Barone, “Non-Executive Director Role and Responsibilities Defined” *Investopedia* (30 August 2023) <<https://www.investopedia.com/terms/n/non-executive-director.asp>>

<sup>28</sup> Kühl, N., Schemmer, M., Goutier, M. *et al.* “Artificial intelligence and machine learning” *Electron Markets* 32, 2235–2244 (2022) <<https://doi.org/10.1007/s12525-022-00598-0>>.

<sup>29</sup> Ghazal Bhootra & Ishan Purani, “ARBI(TRAITOR)?: A CASE AGAINST AI ARBITRATORS” (2022) at p37.

## II. THE PRESENT PROCEEDINGS SHOULD NOT BE STAYED UNTIL THE CONCLUSION OF ANUWAT'S TRIAL AT THE ICC

- 30 A party to an arbitration is entitled to have the proceedings continue at a normal pace,<sup>30</sup> and the party seeking to stay proceedings bears the burden of displacing this presumption by demonstrating that a stay would better serve the imperatives of efficiency and fairness.<sup>31</sup> This tribunal can exercise its discretionary powers to refuse a request of a stay of proceedings to avoid unreasonable delay and ensure a fair and efficient process for resolving the dispute,<sup>32</sup> and to ensure parties are provided a reasonable opportunity to present their case.<sup>33</sup>
- 31 Notably, a stay of arbitral proceedings pending the outcome of criminal proceedings is very rare.<sup>34</sup> In all awards or procedural orders previously published by the International Chamber of Commerce, a request for a stay of the arbitration pending the outcome of parallel criminal proceedings was rejected.<sup>35</sup> This general outcome coheres with the general trend in commercial and investment arbitration.
- 32 Radostan's request for a stay until the conclusion of these proceedings should be denied because there is no reasonable justification for the delay. First, the outcome of the ICC proceedings is immaterial to the present proceedings because the issues before the ICC are substantially different from the issues before the present proceedings. Second,

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<sup>30</sup> *S.D. Meyers Inc. v. Canada* Procedural Order No. 17 of 26 February 2011 ("**S.D. Myers**"), at [10].

<sup>31</sup> *Josias van Zyl* PCA CASE No. 2016-21 *Procedural Order No. 1* ("**Josias**"), [26]; *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* PCA Case No. 2016-7 ("**Cairn Energy**"), [108].

<sup>32</sup> AIAC Rules, Rule 13.1; *Cairn Energy*, [114].

<sup>33</sup> *Ibid*; *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("**China Machine**"), [97]; *CAI v CAJ and another* [2021] 5 SLR 1031 at [66].

<sup>34</sup> ICC Dispute Resolution Bulletin No. 3 of 2019.

<sup>35</sup> ICC awards: ICC Case 7986 (in French), JDI (Clunet), 2002, 1071, Collection of ICC Awards, Vol. V, p. 553; ICC cases 8459, 9899, 10983 and 11098.

Radostan will not be deprived of a reasonable opportunity to present its case if the present proceedings continue at a normal pace as Anuwat is able to testify via a written affidavit or virtually. Third, an unreasonable delay will be caused as a stay would be for an indefinite period. This is because ICC proceedings are often protracted, and the trial proceedings itself may take up to ten years or more to conclude.<sup>36</sup>

33 The prejudice likely to arise on Coltana’s part if the tribunal grants a stay of proceedings far outweighs the prejudice that Radostan would suffer if a stay was not granted (the “**balance of prejudice**” test)<sup>37</sup>. The balance of prejudice thus falls on Coltana and militates against finding a stay.

**A. *The outcome of the ICC proceedings is not material to the present proceeding***

34 A parallel proceeding is immaterial if it concerns matters which are not decisive for the outcome of the case before the tribunal.<sup>38</sup> While there are similar facts at issue in the present proceedings and the ICC trial, each proceeding refers to a separate and distinct dispute that concern starkly different disputes. The ICC proceedings concern allegations that Anuwat had assisted the Ulavu government in commissioning cyber war crimes using an Unidentified Software that is reportedly similar to OnionRing.<sup>39</sup> The ICC would need to determine whether the Unidentified Software had been used to manipulate Ulavu’s general elections and target the Ulavu government’s opposition. Whereas the present proceedings are concerned with whether the CCTA is rendered

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<sup>36</sup> Benjamin Gumpert & Yulia Nuzban, “Length of Proceedings at the International Criminal Court: Context, Latest Developments and Proposed Steps to Address the Issue” (2021). (“*Gumpert*”)

<sup>37</sup> *Cairn Energy*, [115]; *S.D. Meyers* [10].

<sup>38</sup> *Claimant 1 and Claimant 2 v. Respondent*, Procedural Order No. 9 of 2016, 3; L. Grosej, “Stay of Arbitration Proceedings: Some Examples from Arbitral Practice” 36 *ASA Bull.* 560 (2018) at p 560-61.

<sup>39</sup> Record, [35], [38].

void for misrepresentation or, alternatively, validly terminated. The tribunal is not concerned with whether the Unidentified Software had indeed been used to commission cyber war crimes.

35 Radostan may argue that the ICC’s findings are relevant because it may reveal whether the Unidentified Software is, in fact, OnionRing, which informs the tribunal on whether OnionRing possesses the capacity to manipulate elections. However, this fact is not at issue in the present proceedings. Coltana’s presently claim pertains to whether Radostan had misrepresented to Coltana important features of OnionRing, specifically the feature which grants Ini-Tech and Radostan backdoor access to the data collected by OnionRing.<sup>40</sup> Therefore, the fact that OnionRing may be able to interfere with elections does not shed light on this issue. Further, it will not reveal whether Radostan has used the data of the people of Coltana to influence the Coltana general elections. As such, the conclusion of the ICC’s inquiry would not be decisive for the outcome of the present proceedings. For the same reasons, there are no issues conflicting judgments because there is no “serious and irreparable risk of inconsistent decisions”.<sup>41</sup>

***A. Radostan is not deprived of the reasonable opportunity to present its case***

36 The tribunal has the duty to ensure that both parties are provided a reasonable opportunity to present their case.<sup>42</sup> In determining what amounts to a reasonable opportunity to present one’s case, the tribunal will have regard to the context of the specific facts and the circumstances of the case.<sup>43</sup> An example of being deprived of a

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<sup>40</sup> Pleadings, [47]

<sup>41</sup> *Cairn Energy*, [47].

<sup>42</sup> AIAC Rules, Rule 13.1.

<sup>43</sup> *China Machine*, [98]; *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [65].

reasonable opportunity to present one's case would be the lack of the opportunity for a party to review and respond orally to the other party's additional evidence and submissions.<sup>44</sup>

37 Radostan has asserted that Anuwat's presence, as the key programmer of Ini-Tech, is important because Ini-Tech has committed several wrongful acts which resulted in the termination of the CCTA.<sup>45</sup> However, as stated earlier, this Tribunal is concerned with whether Radostan had unauthorised access to the data of the people of Coltana and whether it had used such data to influence Coltana's general election. Any determinations made by the ICC have no bearing on the outcome of the present proceedings.

38 Radostan cannot argue that the only way to dispel these allegations is through Anuwat's evidence. Although Anuwat is the key programmer of OnionRing, it is unclear why only Anuwat can testify against such allegations as there are other programmers who can testify in the present proceedings.

39 Even if Anuwat's testimony was crucial to determine the issues before the tribunal, it would be unreasonable to grant a stay on the basis that his physical presence at the present proceedings is necessary because there are two viable alternatives for Anuwat to present his evidence. First, Anuwat can testify by way of a written statement.<sup>46</sup> The tribunal has the discretion to order for Anuwat's testimony to be submitted in the form

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<sup>44</sup> *Sai Wan Shipping Ltd v Landmark Line Co, Ltd* [2022] 4 SLR 1302 at [65]; *China Machine*, [78]-[79].

<sup>45</sup> Record, [43].

<sup>46</sup> AIAC Rules, Rules 27.3.



of a written statement.<sup>47</sup> Anuwat's written evidence would therefore be admissible despite his inability to be present at these proceedings.

40 Radostan may then contend that the mere admission of a written affidavit would prevent the cross-examination of Anuwat's evidence to determine its reliability. However, Anuwat can testify in the present proceedings virtually since this tribunal has the power to direct that Anuwat be examined virtually.<sup>48</sup>

41 Radostan may further argue that a virtual testimony of a key witness deprives them of a fair opportunity to present their case because a witness' body language and demeanour during cross-examination is not as easily observed through a video. This, however, is insufficient prejudice to justify a stay of proceedings. The provision of witness testimony through virtual means is comparable to physical means.<sup>49</sup> This serves the imperative of fairness and efficiency because Radostan is given the opportunity to cross-examine Anuwat to test the veracity of his evidence, and the proceedings can continue at a normal pace.

***B. An unreasonable delay will be caused if Radostan's request for a stay is granted***

42 Granting a stay until the conclusion of the ICC proceedings would result in an unreasonable delay. This contravenes the parties' right to an expeditious trial and the overall imperative of efficiency in arbitral proceedings, which stems from the arbitral tribunal's duty to ensure a fair, expeditious, economical and final resolution of the

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<sup>47</sup> Rule 27.3 AIAC Rules 2021

<sup>48</sup> AIAC Rules, Rules 28.7; *The State of Maharashtra vs Dr. Praful B. Desai* No. 6815 of 2001 ("*Maharashtra*"), [19].

<sup>49</sup> *Maharashtra*, [19].

dispute.<sup>50</sup> This is because the duration of ICC proceedings, from the first appearance in court to the conclusion of the proceedings, can take more than ten years to conclude.<sup>51</sup> This would mean that the present proceedings would be stayed for an indefinite period. This, coupled with the fact that this tribunal has sufficient evidence to make a finding, the immateriality of the outcome of the ICC proceedings,<sup>52</sup> and that Radostan has a reasonable opportunity to present its case, demonstrates that a stay would only compromise procedural fairness and efficiency.

### III. THE CCTA IS VOID FOR LACK OF CONSENT AND ILLEGALITY

43 As the governing law of the CCTA is Indian law, the validity of the CCTA will be determined by the Indian Contract Act ("ICA").<sup>53</sup> The ICA provides that a contract is validly formed when:

- (a) there is an offer which is duly accepted with valid consideration.<sup>54</sup>
- (b) it was entered into with the free consent of parties competent to contract,<sup>55</sup> and
- (c) the contract was for a lawful object and consideration.<sup>56</sup>

44 Only element (b) is disputed. The CCTA is void under sections 10 and 14 of the ICA because Coltana's free consent to enter into the CCTA had been vitiated by fraud and misrepresentation.

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<sup>50</sup> AIAC Rules, Rule 13.1.

<sup>51</sup> *Gumpert*, p17.

<sup>52</sup> Pleadings, [24].

<sup>53</sup> Record, [25.5].

<sup>54</sup> ICA, ss2(a), (b), (d).

<sup>55</sup> ICA, ss11, 14.

<sup>56</sup> ICA, s10.

**B. *Coltana’s consent to the CCTA was vitiated by fraud***

45 Coltana’s consent to the CCTA is not freely given because it had been vitiated by fraud under section 17 of the ICA,<sup>57</sup> which refers to fraudulent misrepresentation. This renders the CCTA void *ab initio* pursuant to sections 10 and 14 of the ICA.<sup>58</sup>

46 To establish fraud under section 17, there are five requirements to fulfil:

- (a) a party to the contract had made a representation on a material fact (“**the Representor**”);
- (b) the representation was false;
- (c) the Representor committed an act under section 17 of the ICA;
- (d) the Representor must have intended to deceive the other party or induce him to enter into the contract; and
- (e) the representation had induced the other party to enter into the contract.<sup>59</sup>

(3) *Radostan had made a representation on a material fact*

47 A representation can be made through statements, silence, or conduct.<sup>60</sup> The representation in this claim concerns Radostan’s obligation to maintain the confidentiality of data collected by OnionRing (“**the Collected Data**”), restricting its access only to Coltana’s officials (“**the Confidentiality Representation**”). By

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<sup>57</sup> ICA, ss17, 18.

<sup>58</sup> ICA, ss10, 14.

<sup>59</sup> *RC Thakkar v The Bombay Housing Board* AIR 1973 Guj 34, [37].

<sup>60</sup> Chen-Wishart, Mindy, KV Krishnaprasad, *Invalidity “Fraud, Misrepresentation, and Mistake in Indian Contract Law”* (Oxford University Press, 2022), p111.

maintaining silence as to the fact that OnionRing provides backdoor access to the Collected Data to Ini-Tech, Radostan had represented to Coltana that the Collected Data would indeed be kept confidential.

48 Next, the materiality of a representation is objectively<sup>61</sup> determined by whether it would positively affect the judgement of a reasonable person in deciding whether to enter the contract.<sup>62</sup> The Confidentiality Representation is material because the Collected Data consists of two important categories of data, namely information about potential terrorists and other transnational threats, and the personal information of Coltana citizens, including its politicians. The importance of these data would have affected Coltana's decision to enter into the CCTA.

49 Information about potential terrorists and transnational threats falls under the broad umbrella of national security matters, a widely adopted category of state secrets in almost all jurisdictions across the world,<sup>63</sup> and Coltana is unlikely an exception to the rule. While information on terrorists may not seem to fit in with the traditional understanding of national security matters which directly relate to the defence of the nation, such as military technologies and defence strategies, the increased sophistication of intelligence gathering methods and the diverse sources of national security threats make it such that even seemingly trivial and disparate pieces of information about a state's national security matters can be used by hostile intelligence

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<sup>61</sup> *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583, [20].

<sup>62</sup> *Smith v Chadwick* (1884) 9 App Cas 187, [42]; *Treitel on the Law of Contract*, at 367.

<sup>63</sup> Official Secrets Act 1972 (Malaysia) section 2. See also: Classified Information Protection Act 2002 (Bulgaria) art 25; Access to Public Administration Files Act 1985 (Denmark) art 13(1).

agencies to the detriment of a nation.<sup>64</sup> Therefore, it is crucial for the information about potential terrorist threats to be kept confidential and within the Coltana government only. It would therefore be inconceivable that Coltana would have agreed to enter into the CCTA, had Radostan revealed that OnionRing had a feature which provided Radostan backdoor access to the collected data.

(4) *The representation was false*

50 The falsity of Radostan’s representation is premised on two events. First, OnionRing had gained access to the personal data of thousands of electorates in Coltana through Ini-Tech’s database, which was then used to promote and direct advertisements that were supportive of the OBH party to the voters in Coltana.<sup>65</sup> This statement was made by a former data analyst at Ini-Tech (“**the Former Employee’s Allegation**”). As data analyst, he is likely privy to information about the data systems used in Ini-Tech, which lends credence to his assertion.

51 Second, Anuwat, the CEO of Ini-Tech, stated that OnionRing “had detected a significant amount of Bitcoin expenditure, transaction and/or movement within Coltana involving the bank accounts of senior DPP politicians” (“**Anuwat’s Allegation**”)<sup>66</sup> This implies that Ini-Tech had access to the Collected Data, which was meant to be kept confidential. Given his role as the highest-ranking employee in Ini-Tech and as the key

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<sup>64</sup> Hitoshi Nasu, “State Secrets Law and National Security”, *The International and Comparative Law Quarterly*, Vol. 64, No. 2 (April 2015) (“**State Secrets**”), p365-404.

<sup>65</sup> Record, [30].

<sup>66</sup> Record, [39].

programmer of OnionRing,<sup>67</sup> there is little doubt that Ini-Tech had programmed a backdoor access feature into OnionRing.

52 Radostan may assert that these two factual circumstances are insufficient to discharge Coltana's burden of proving the fact that OnionRing had granted to Ini-Tech and Radostan unauthorised access to the data. While the legal burden of proof shall always remain on Coltana to prove this fact, this must be distinguished from the onus of proof, which may shift from one party to the other once adequate evidence has been adduced by the former.<sup>68</sup> Since Coltana has proved a *prima facie* case that OnionRing had granted backdoor access to the Collected Data, contrary to the Confidentiality Representation, the onus of proof should shift to Radostan to show that this is not true. Notably, Ini-Tech had not disputed Anuwat's statement about Ini-Tech having access to the Collected Data, although it had vehemently disputed the allegation made by the former employee.<sup>69</sup> Further, Radostan and Ini-Tech had also deliberately brushed off any concerns raised by Coltana on the alleged hacking by Ini-Tech involving OBH,<sup>70</sup> indicating the presence of suspect activity.

(5) *An act under section 17 had been committed with the intention to deceive or induce entry into the contract*

53 Under section 17 of the ICA, any act fitted to deceive, committed with intent to deceive another party or to induce the other to enter into the contract, will be considered

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<sup>67</sup> Record, [38].

<sup>68</sup> Indian Evidence Act 1872, s102; *RVE Venkatachala Gounder vs. Arulmigu Viswesaraswami and VP Temple* AIR 2003 SC 4548, [14].

<sup>69</sup> Record, [30]-[31].

<sup>70</sup> Record, [31]; Clarification, 9.

fraudulent.<sup>71</sup> Presently, Radostan's silence amounting to a representation would be caught by this category. While the general rule is that mere silence will not amount to a misrepresentation, it is subject to exceptions such as:

(a) where 'silence is itself equivalent to speech';<sup>72</sup> or

(b) where the person keeping silent had a duty to speak.<sup>73</sup>

Radostan's silence amounts to a representation because it had a duty to speak about the backdoor access. This duty arises where one of the parties utterly lacks the means and resources to discover the truth and must depend on the good sense of the other party, who may have special knowledge of such material facts.<sup>74</sup> Presently, the production and development of OnionRing itself was solely under the control of Radostan's government by virtue of Ini-Tech being the wholly-owned subsidiary of the Ministry of Defence. Coltana had no access or control to the software prior to its purchase of the same. Therefore, Radostan has the duty to speak if OnionRing had clandestine features allowing Ini-Tech or Radostan government to access the data collected by it.

54 Radostan cannot rely on Coltana's failure to conduct a trial run of the software to mount a defence against a claim of fraud. Indeed, section 19 of the ICA states that the contract is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.<sup>75</sup> This exception, however, does not apply to cases

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<sup>71</sup> ICA, s17.

<sup>72</sup> ICA, s17, Explanation.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Jagar Nath Singh v Lalta Prasad* (1908) 31 All 21, [23].

<sup>75</sup> ICA, s19.

involving a fraudulent representation by silence which has been responsible for bringing about the contract between the parties,<sup>76</sup> such as the present one.

55 Even if the exception applies here, it is unlikely that Coltana’s trial run of a software or any other measure of due diligence would have been able to uncover OnionRing’s in-built feature of providing backdoor access to the Collected Data. First, the clandestine nature of the feature indicates that it would not have been discovered through ordinary usage of the software. Instead, it is only discoverable through external manifestations such as the allegations by the former employee of Ini-Tech and Anuwat.<sup>77</sup>

56 Second, the fact that Ini-Tech was “responsible for designing, developing, selling, delivering, deploying, operating and maintaining the OnionRing software to the government of Coltana” shows that the way OnionRing was run was largely under the control of Ini-Tech.<sup>78</sup> Therefore, Coltana has no means of conducting diligence on the characteristics of the software and is highly dependent on Radostan for information about how the software works. Therefore, Coltana had discharged its duty to conduct ordinary diligence in finding out as much about the software as possible, given the circumstances of numerous national security concerns.

57 Lastly, there was an intention to induce Coltana to enter into the contract because it had deliberately kept silent about OnionRing’s backdoor access feature, even though it had full knowledge of it.

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<sup>76</sup> *Niaz Ahmed Khan v. Parsottam Chandra* AIR 1931 All 154; *John Minas Apcar v. Louis Caird Malchus* AIR 1939 Cal 473.

<sup>77</sup> Record, [30], [39].

<sup>78</sup> Record, [24].



(6) *The representation had induced Coltana to enter into the contract*

58 Coltana's consent must have been caused by the fraud in question.<sup>79</sup> The causal standard has been set out in section 14 of the ICA, which provides that consent is said to be so caused when it would not have been given but for the existence of such fraud or misrepresentation.

59 But for the representation made by Radostan that the data is confidential and is only accessible by the Coltana government, Coltana would certainly not have entered into the contract. Given the grave concerns about terrorism and other internal threats within Coltana, it is unlikely that the Coltana government would have been amenable to letting a foreign government access personal sensitive information about its citizens, including financial information about its own politicians. This is because such information could be exploited for malicious purposes, such as to plan further terrorist attacks. Further, Coltana had immediately terminated the contract following Anuwat's allegations and its own internal investigations into the matter. This shows that the government will not tolerate potential data breaches by Radostan and Ini-Tech, and would therefore not have entered into the CCTA if it was aware that OnionRing could provide Radostan unauthorised access to the collected data. Therefore, inducement of entry into the contract would be made out.

60 Since all elements to establish fraud under section 17 of the ICA are fulfilled, the CCTA should be void for lack of free consent due to fraud.

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<sup>79</sup> ICA, s19, Explanation; *Invalidity*, p 115.

**C. *Coltana's consent to the CCTA was vitiated by misrepresentation***

61 Even if Coltana's consent was not vitiated by fraud, misrepresentation would still vitiate Coltana's consent to the contract. A contract is void *ab initio* if consent to enter into the contract is induced by misrepresentation.<sup>80</sup> Misrepresentation means:

- (a) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement ("**innocent misrepresentation**"); or
- (b) any breach of duty which brings an advantage to the person committing it by misleading another to their prejudice, albeit without an intent to deceive ("**negligent misrepresentation**").<sup>81</sup>

62 To establish a claim under section 18, there are four requirements to fulfil:

- (a) a party to the contract had made a representation on a material fact ("**the Representor**"),
- (b) the representation turned out to be false;
- (c) the Representor's actions falls under one of the categories under section 18 of the ICA; and
- (d) the representation had induced the other party to enter into the contract.<sup>82</sup>

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<sup>80</sup> ICA, at s18.

<sup>81</sup> *Invalidity*, p107.

<sup>82</sup> ICA, s18.

63 Claims in fraud and misrepresentation share elements (a) to (c). Therefore, the present analysis focuses on element (d). Radostan's actions falls under category (a) of Section 18, which is akin to an innocent misrepresentation.

64 Even if an intention to induce was not made out under section 17, Radostan's representation had still misled Coltana into believing that the Collected Data was kept confidential, when OnionRing had provided Radostan and Ini-Tech backdoor access to the data. Coltana only realised that there was such backdoor access when a former data analyst of Ini-Tech had revealed such knowledge on social media and when Anuwat had alleged corruption within the DPP itself, citing the data collected by OnionRing as evidence.<sup>83</sup> Since Radostan's representation had caused Coltana to make a mistake about the nature of OnionRing, an innocent misrepresentation was caused.

65 Since all four elements of misrepresentation are fulfilled, Coltana's free consent to enter into the contract is vitiated and the CCTA is void.<sup>84</sup>

#### **IV. COLTANA IS ENTITLED TO TERMINATE THE CCTA AS RADOSTAN HAS COMMITTED FUNDAMENTAL BREACHES OF ITS CONTRACTUAL OBLIGATIONS**

66 Radostan has breached:

- (a) the implied condition that OnionRing is reasonably fit for the particular purpose for which it was supplied;

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<sup>83</sup> Record, [31], [39].

<sup>84</sup> *Oriental Banking Corpn v John Fleming* ILR (1879) 3 Bom 242, [32].

- (b) the implied term in fact to maintain the confidentiality of Coltana’s data; and
- (c) express term to abide by the principles under Article 17 of the International Covenant for Civil and Political Rights (“**ICCPR**”).

**A. Radostan breached an implied condition in the CCTA as to OnionRing’s quality**

67 A term implied by law may arise from the nature, type, or class of contract in question.<sup>85</sup>

Presently, section 16 of the Sale of Goods Act 1930 (“**SOGA**”) implies a condition into the CCTA.<sup>86</sup> Section 16(1) states that where “the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgement, and the goods are of a description which it is in the course of the seller’s business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose”.<sup>87</sup>

68 A condition that OnionRing is reasonably fit for ensuring Coltana’s national security should be implied into the CCTA. There are two requirements to be satisfied before a condition that the goods shall be reasonably fit for such a purpose may be implied:

- (a) the buyer must, expressly or impliedly, make known to the seller the particular purpose for which the goods are required in order to show that the buyer relies on the seller’s skill or judgement; and

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<sup>85</sup> *Southern Foundries (1926) Ltd v Shirlaw MacKinnon LJ* [1940] AC 701 (“**Southern**”), 227.

<sup>86</sup> Sale of Goods Act 1930 (“**SOGA**”), s16.

<sup>87</sup> **SOGA**, s16(1).

(b) the goods are of a description which it is in the course of the seller's business to supply.<sup>88</sup>

69 The first requirement is satisfied because Coltana had made its purpose in acquiring OnionRing, to enhance the national security of Coltana, manifestly clear. This is evident from the high-level security meeting between the two states, during which Dolores Umbridge, Coltana's Minister of Defence and special intelligence and security Chief, highlighted that Coltana's "utmost priority" was to prevent any more terrorist attacks and cyber-attacks in Coltana, which is "especially necessary as terrorism is a threat to national security...".<sup>89</sup> Pertinently, it was in response to this particular concern that Anuwat had recommended OnionRing to the Coltana delegation, which sparked the interest of Coltana's leadership into entering into the CCTA.<sup>90</sup> The CCTA emphasises the need to combat terrorism and other transnational threats,<sup>91</sup> and protecting Coltana's national security is implicit in achieving this need. Clearly, Coltana's intentions in acquiring OnionRing's services was known to Radostan.

70 If goods are ordered for a particular purpose which was disclosed to the vendor, and the vendor accepts the contract and undertakes to supply goods which are suitable for the purpose required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgement.<sup>92</sup> Since Coltana had made clear its purpose

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<sup>88</sup> SOGA, s 16(1).

<sup>89</sup> Record, [22].

<sup>90</sup> Record, [23].

<sup>91</sup> Record, [24].

<sup>92</sup> Lord Buckmaster in *Manchester Liners Ltd. v. Rea Ltd.*, (1922) 2 AC 74 at p 79, cited in *The Board of Trustees of The Port Of Calcutta vs Bengal Corporation Pvt. Ltd* (1978) (43) ("**Port of Calcutta**").

for acquiring OnionRing, and Radostan had undertaken to provide the OnionRing services pursuant to this purpose, Coltana had relied on Radostan's skill and judgement.

71 The second requirement is satisfied. Ini-Tech is a subsidiary of Radostan's defence ministry and is in the business of developing software that contribute to a state's national defence. This can be discerned from Ini-Tech's description of OnionRing as a "a cyber intelligence solution" and an "anti-terrorism software" that could "identify and neutralise potential cyber-attacks and terrorist threats". Therefore, such a software is likely something in Ini-Tech's course of business to supply.<sup>93</sup>

72 As both requirements are satisfied, there should be an implied condition that OnionRing was of a reasonable fitness and quality to keep the data it collects confidential. Ensuring confidentiality of the data collected minimises the risk of sensitive personal information potentially being used against Coltana by foreign governments.

73 Radostan has breach the implied condition of OnionRing's reasonable fitness to its purpose. This is because unauthorised access was provided to a foreign government regarding sensitive information belonging to Coltana's citizens and senior politicians of Coltana's incumbent government.<sup>94</sup> This would evidently undermine Coltana's national security as such data could be used for malicious purposes, such as interfering in Coltana's internal affairs. Further, Radostan has a history of supporting OBH, the opposition party in the Coltana government behind the growing civic unrest in Coltana.<sup>95</sup> Naturally, Coltana would have deep concerns over its ability to protect itself

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<sup>93</sup> Record, [23].

<sup>94</sup> Record, [30], [39].

<sup>95</sup> Record, [18].

from threats because Radostan's access to confidential data would only introduce vulnerabilities to Coltana's national security.

**B. Radostan breached an implied term that the Collected Data must be kept confidential**

74 There should be a term implied in fact providing that all data collected by OnionRing is kept confidential and can only be accessed by the government of Coltana through appropriate procedures ("**the Implied Term**").

75 A term implied in fact usually arises to give effect to the presumed intention of contractual parties regarding a matter that they had not expressly mentioned but which presumably they would have agreed should be part of the contract.<sup>96</sup> To do so, the term must:

- (a) be reasonable and equitable;
- (b) be necessary to give business efficacy to the contract ("**Business Efficacy Test**");
- (c) be so obvious that "it goes without saying" ("**Officious Bystander Test**");
- (d) be capable of clear expression;
- (e) not contradict any express term of the contract.<sup>97</sup>

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<sup>96</sup> *The Moorcock* [1886-89] All ER Rep 530 (CA) ("**The Moorcock**"), 66.

<sup>97</sup> *Nabha Power Limited vs Punjab State Power Corporation Limited* Civil Appeal No. 179/ 2016 ("**Nabha Power Limited**"), [43]; *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266 ("**BP Refinery**"), 282-283.

76 The fourth and fifth conditions are fulfilled because it is possible to clearly express a term providing for the confidentiality of data collected by OnionRing and for Radostan not to use Coltana's data. Additionally, there is no issue of contradiction because there are no express terms in the CCTA providing that the data collected by OnionRing cannot be protected by confidentiality or reserving the right to Radostan to use the data collected by OnionRing.

(1) *It is reasonable and equitable to imply the Implied Term*

77 It is reasonable and equitable to imply the Implied Term. A primary condition to be fulfilled is that the Implied Term sought to be implied must be reasonable and equitable to both parties because an implication of a term rests on the presumed intention of the parties.<sup>98</sup>

78 Presently, it would be reasonable and equitable to imply such a term into the CCTA because of the highly sensitive nature of the data being collected by OnionRing. The OnionRing is able to extract "valuable intelligence" from a wide variety of devices and can be used to continuously track the movements of any person identified as a suspected terrorist, so long as the person is within the country.<sup>99</sup> As such data is highly personal and intrusive in nature, it would be reasonable and equitable to keep it confidential and restrict its access only to the government of Coltana, which uses the data only for national security purposes.

(2) *The Business Efficacy Test is fulfilled*

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<sup>98</sup> *Nabha Power Limited*, [34].

<sup>99</sup> Record, [23].



79 A term will be implied if it is necessary to give business efficacy to the transaction as must have been intended by both parties.<sup>100</sup> Whether this is so entails ascertaining the presumed intention of the parties.<sup>101</sup>

80 Presently, it is necessary to imply a term that only Coltana can access the confidential data. It can be inferred that the personal data being collected by OnionRing is sensitive in nature, even if the Record does not list down exhaustively the types of data that OnionRing collects. First, the Former Employee Allegation reveals that OnionRing had gained access to the personal data of Coltana citizens, obtaining data such as their names, addresses, phone numbers and email addresses.<sup>102</sup> Second, Anuwat's Allegation reveals that OnionRing "had detected a significant amount of Bitcoin expenditure, transaction and/or movement within Coltana involving the bank accounts of senior DPP politicians".<sup>103</sup> This implies that OnionRing's smart surveillance technology could access sensitive personal information, such as one's financial transactions, which are typically kept confidential. Third, OnionRing could track the movements of suspected terrorists through its access to all closed-circuit television. This indicates that it has facial recognition and tracking technology that can collect information about one's daily whereabouts. Given the highly sensitive nature of the data collected, confidentiality is of utmost importance in allowing the CCTA to function as intended.

81 Additionally, the main objective of entering into the CCTA was to aid Coltana in combating terrorism and other transnational threats. At the high-level meeting between

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<sup>100</sup> *Nabha Power Limited*, [35].

<sup>101</sup> *Nabha Power Limited*, [39].

<sup>102</sup> Record, [30].

<sup>103</sup> Record, [39].

the Parties, Coltana's delegation expressed concern to Yodwicha of avoiding public backlash because Coltana was holding a general election that year. Therefore, it would be inconceivable that Coltana would have allowed a foreign government or entity access to the personal data of Coltana's citizens. Granting such access could jeopardise Coltana by enabling foreign governments to misuse sensitive personal information to interfere in its internal affairs. Further, it would also have raised concerns amongst the Coltana's electorate about privacy. Therefore, for the CCTA to function effectively, the Collected Data must be accessible to Coltana only, and used only for the purposes that Coltana directs.

(3) *The Officious Bystander Test is fulfilled*

82 A term fulfils the Officious Bystander Test if, in a situation where an officious bystander had suggested adding such a term in the contract, the parties would have replied: "oh of course, that goes without saying!".<sup>104</sup> This test can be seen as an extension of the Business Efficacy test.<sup>105</sup> Therefore, for essentially the same reasons mentioned above under the analysis for the Business Efficacy Test,<sup>106</sup> the Officious Bystander Test would be fulfilled.

83 Additionally, the Parties' conduct at the ceremony in Legolas on 15th October 2021 show that the point on confidentiality would certainly have been agreed upon at the time of contracting had the Parties contemplated it. During the ceremony, Anuwat had represented that all information and data collected by OnionRing are kept

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<sup>104</sup> *Southern*, 227; *Belize v Belize Telecom Ltd* [2009] UKPC 10, 1995.

<sup>105</sup> *Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 592, [40].

<sup>106</sup> Pleadings, [79].

confidential.<sup>107</sup> Further, Anuwat assured Coltana that the data collected could only be accessed by the government of Coltana through appropriate procedures.<sup>108</sup> While this statement was made after the CCTA had been entered into, it shows that, had the Parties expressly contemplated this issue at the time of contracting, there would have been a common understanding that the data would be kept confidential.

84 With the five conditions fulfilled, the Term should be implied in fact into the CCTA. Ini-Tech's ability to gain unauthorised access to Collected Data therefore constitutes a breach of the CCTA.<sup>109</sup>

***C. Radostan's breaches are fundamental and entitle Coltana to terminate the CCTA***

*(1) Breaches of the implied conditions of the CCTA are fundamental*

85 A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.<sup>110</sup> The breaches of the implied conditions thereby entitles the party to discharge himself from the contract and sue for damages for loss of the contract.<sup>111</sup> Since Radostan had breached the two conditions implied into the CCTA by the SOGA, these breaches entitle Coltana to validly terminate the CCTA.

*(1) Breach of the Implied Term is fundamental*

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<sup>107</sup> Record, [26].

<sup>108</sup> Record, [26].

<sup>109</sup> Pleadings, [80].

<sup>110</sup> SOGA, s12(2).

<sup>111</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1867] 2 QB 447, 451.

86 Radostan's breach of the Implied Term is sufficiently serious to entitle Coltana to terminate the CCTA. An aggrieved party is entitled to terminate the contract when a fundamental breach arises — i.e., when the breach deprives the innocent party of substantially the whole benefit of the contract. The benefit must be based on the intention of the parties as was expressed in the contract.<sup>112</sup> In the present proceedings, the benefit of the contract was for Coltana to receive the services of OnionRing to combat terrorism and other transnational threats, such as cyber-attacks to bolster and safeguard the national security of Coltana.<sup>113</sup> Coltana is still able to receive the services of OnionRing, namely the *detection* of terrorism. It would, however, still be deprived of substantially the whole benefit of the contract because its national security is compromised.

87 OnionRing has been programmed in a manner that allows Ini-Tech and Radostan to gain unauthorised access to Coltana's citizens' data. This compromises Coltana's cyber security as OnionRing has been integrated into all of its government's systems. There is a real risk of the data collected by OnionRing being maliciously misused. This would be contrary to the objective of the CCTA because Coltana would be left more vulnerable to cyber-attacks, thus undermining its national security.

88 The real risk of Coltana's national security being undermined is supported by the damning allegations that Radostan has already attempted to compromise Coltana's national security. This is supported by the allegation made by Ini-Tech's former data analyst, that OnionRing had used the data of Coltana's citizens to direct advertisements

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<sup>112</sup> *Rural Road Development Authority v LG Chaudhary Engineers & Contractors* (2012) 3 SCC 495, 848.

<sup>113</sup> Record, [22], [24].

of the OBH party to Coltana's electorates, allegedly tampering with Coltana's general elections.<sup>114</sup> The credibility of this allegation is strengthened by the similar concerns raised in the report by the DOJ that Coltana's 2021 general elections have been tampered with.<sup>115</sup>

89 Coltana has good reason to believe that OnionRing's ability to provide unauthorised access to Radostan threatens Coltana's national security. This deprives Coltana of substantially the whole benefit it was intended to derive from the CCTA. As such, Radostan's breach is a fundamental one that entitles Coltana to validly terminate the contract.

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<sup>114</sup> Record, [29].

<sup>115</sup> Record, [37].