



20TH LAWASIA INTERNATIONAL MOOT COURT COMPETITION 2025

ASIAN INTERNATIONAL ARBITRATION CENTRE

BETWEEN

CALYX DREAMBOT INC.....CLAIMANT

and

RIVUS MICROELECTRONICS GROUP.....RESPONDENT

MEMORIAL *for* RESPONDENT

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STATEMENT OF JURISDICTION

The CLAIMANT (RMG) has submitted the dispute to the Asian International Arbitration Centre (“AIAC”), pursuant to Clause 11 of the Joint Venture Agreement in accordance with the Rule 1.1(a) of Arbitration Rules, 2023 of the AIAC which states:

“1.1. Where the Parties have agreed in writing, by an arbitration agreement or otherwise, to refer their dispute to arbitration in accordance with the AIAC Arbitration Rules, then: (a) such dispute shall be settled or resolved by arbitration in accordance with the AIAC Arbitration Rules.”

The RESPONDENT contests the jurisdiction of this Tribunal, all of which is urged in detail in the written submission and is submitted most respectfully.

QUESTIONS PRESENTED

[ISSUE -1]

WHETHER RMG IS ENTITLED TO INVOKE SOVEREIGN IMMUNITY?

[ISSUE -2]

WHETHER CDI'S INITIATION OF ARBITRATION WAS PREMATURE?

[ISSUE -3]

WHETHER RMG BREACHED THE JVA IN RELATION TO THE ALLEGED LABOUR PARTIES?

[ISSUE -4]

WHETHER CDI'S TERMINATION OF THE JVA WAS LAWFUL?

STATEMENT OF FACTS

PARTIES

1. Calyx DreamBot Inc. (hereinafter “CDI” and **CLAIMANT**), a semiconductor company incorporated in Veridia, and Rivus Microelectronics Group (hereinafter “RMG” and **RESPONDENT**), an Aurion-incorporated entity are parties to this arbitration. Aurion is a rapidly developing Southeast Asian nation that has sought to position itself as a regional hub for semiconductor manufacturing.

THE AURION-VERIDIA BILATERAL INVESTMENT TREATY (“AV-BIT”) AND THE JOINT VENTURE AGREEMENT (“JVA”)

2. In 2022, President Davul Ho of Aurion sought to transform the nation into a semiconductor hub by courting Veridian technology firms. Through closed-door meetings with executives, he assured investors that RMG was a commercially autonomous vehicle. Subsequently, Aurion and Veridia signed the AV-BIT in October 2022, to boost the semiconductor sector. The BIT was hailed as a milestone in Aurion’s economic diplomacy, paving the way for high-profile investment.
3. Soon after, CDI and RMG entered into a JVA on 20 December 2022. Pursuant to the JVA, a special purpose vehicle, Aurion Semiconductor Inc. (hereinafter “ASI”), was incorporated on 3 January 2023, with CDI holding 51% and RMG holding 49%. The project aimed to establish a semiconductor manufacturing facility in Northern Aurion.

ENSUING EVENTS

4. The JVA required RMG to ensure full compliance with applicable labour and employment laws and for both parties to uphold fair labour practices. In 2023, CDI pressed for accelerated construction and cost control. Following budget overruns, CDI urged RMG

to engage a labour agency. RMG recommended Beta Workforce Solutions (hereinafter “BWS”), which CDI approved. On 2 October 2023, ASI entered into a Service Agreement with BWS for 1,200 workers.

5. By September 2024, reports emerged alleging exploitative practices at the ASI facility, including excessive working hours, poor living conditions, wage withholding, recruitment fees, and debt bondage. Seratious threatened an import ban unless Aurion investigated. Aurion established an Independent Investigative Committee (“IIC”), which found issues such as overcrowded dormitories, some coercion linked to overtime, passport withholding, and inaccurate workforce audits, though it did not conclusively find modern slavery.
6. On 2 October 2024, Aurion’s Ministry of Trade and Industry suspended ASI’s license until a revised audit was submitted. The license was restored on 23 October 2024, but the Ministry later uncovered underreporting of overtime hours and imposed a USD 500 million fine on ASI on 16 December 2024.

DISPUTE BETWEEN THE PARTIES

7. CDI claimed that RMG breached the JVA by failing to ensure compliance with labour laws and international standards. CDI further discovered that BWS was owned by a relative of President Ho’s son-in-law, a connection not disclosed by RMG. CDI subsequently terminated the JVA on account of fundamental breach and has initiated arbitration against RMG. CDI demanded that RMG bear responsibility for the USD 742.5 million fine comprising of direct financial losses, reputational harm, and long-term contractual penalties.
8. RMG asserted that as an entity controlled by the State of Aurion, it was entitled to sovereign immunity and had not waived such immunity nor consented to arbitration. Its

claim is based on the fact that reports indicated that its capital requirements were funded by Aurion's Government Treasury and its board of directors comprised Aurion Cabinet Ministers. Further, its decision-making often mirrored policies of the Ministry of Economy. Nevertheless, in his discussions with CDI, President Ho of Aurion represented RMG as a commercially autonomous vehicle.

9. Further, RMG objected to the jurisdiction of the tribunal on the basis that the arbitration is premature. Clause 10.1 of the JVA requires the parties to resolve the dispute by negotiations. Clause 10.2 of the JVA required that no proceedings be commenced before obtaining the consent of the Aurion Minister in charge of economic policy, foreign investments, and trade. CDI issued a Notice of Arbitration dated 6 January 2025 against RMG without first obtaining such ministerial consent. RMG objected that the arbitration was premature. On the other hand, CDI maintains that the tribunal is properly seized of jurisdiction.
10. The AIAC will address these issues and determine whether CDI is entitled to relief.

SUMMARY OF PLEADINGS

I. RMG IS ENTITLED TO INVOKE SOVEREIGN IMMUNITY.

RMG is entitled to invoke sovereign immunity because it engaged in sovereign functions. Sovereign act has to be determined with reference to whole context of the transaction, i.e. the nature and the purpose of the transaction, implying that RMG's functions under the JVA were purely governmental in nature. Secondly, RMG qualifies as an agency or instrumentality of Aurion because Aurion exercises day-to-day control over RMG.

II. CDI'S INITIATION OF ARBITRATION WAS PREMATURE.

CDI's initiation of arbitration is premature because firstly, Clause 10.1 is a jurisdictional issue, and in any case, it qualifies as a condition precedent. *In arguendo*, the claim is inadmissible because the negotiations are not futile in the present case. Secondly, Clause 10.2 is a jurisdictional issue and in any case, a condition precedent to arbitration. Further, commencing arbitration without negotiations increases costs for the parties.

III. RMG HAS NOT BREACHED THE JVA IN RELATION TO THE ALLEGED LABOUR PRACTICES.

RMG has complied with all the international and domestic labour laws as per the JVA. The workers were provided adequate wages, facilities and voluntarily engaged in overtime. The IIC found no evidence of modern slavery in the working units of ASI. Moreover, RMG ensured that they engage a domestic independent recruitment agency to ease compliance with the local labour laws. Therefore, RMG has not breached the JVA in relation to the labour practices.

IV. CDI'S TERMINATION OF THE JVA WAS UNLAWFUL.

The termination of the JVA by CDI was unlawful. Clause 8 of the JVA provided for a termination in the event of fundamental breach. RMG dispensed their obligations as per the JVA and complied with all the labour standards as required. The sudden suspension of license and the imposition of fine equally hampered with RMG's reputation. Therefore, CDI did not have any basis for terminating the JVA.

PLEADINGS

I. RMG IS NOT ENTITLED TO INVOKE SOVEREIGN IMMUNITY.

1. CLAIMANT and RESPONDENT entered into a JVA to establish a semiconductor manufacturing facility in Aurion. However, due to RMG's alleged failure to comply with local laws and ethical labour standards, CDI submitted a notice of arbitration.
2. RMG is entitled to invoke sovereign immunity because *first*, RMG engaged in sovereign acts [A] and *second*, RMG qualifies as an agency or instrumentality of Aurion [B].

A. RMG ENGAGED IN SOVEREIGN ACTS.

3. Sovereign immunity extends only to sovereign acts performed by the State.¹ The test of a sovereign act entails a contextual approach involving the nature of the transaction and its purpose.² Illustratively, in *Congreso del Partido*³, the Court of Appeal held that the nature and the purpose of the act are necessary to identify whether immunity should be granted.
4. Similarly, courts in Canada⁴, Australia⁵ and the United States⁶ have held that it is impossible to characterise an activity by entirely divorcing it from its purpose. Further, the nature of the act involves a determination of whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform.⁷

¹ Alfred Dunhill v. Republic of Cuba 425 US 682 (1976); Republic of Argentina v. Weltover, 504 U.S.C. 607 (1992); Saudi Arabia v. Nelson 507 U.S. 349 (1993); Department of the Army of the United States of America v. Gori Savellini ILR, 1956 (Milan); Heizer v. Kaiser Franz-Joseph-Bahn A.G. (1885) {Gesetz und Verordnungsblatt für das Königreich Bayern (Munich), vol. I (1885); Societe Transshipping v. Federation of Pakistan (1966) (ILR (London), vol. 47 (1974); The State Of Rajasthan v. Mst. Vidhyawati 1962 AIR 933; Balma y Bessolino v. Gobierno del Paraguay (1916) (Buenos Aires), Decision No. 123; Dollfus Mieg et Cie S.A. v. Bank of England (1950), London digest, vol. 16 (1955), case No. 36.

² Malcolm Shaw, International Law (Cambridge University Press, 7th edition).

³ Iº Congreso Del Partido [1983] AC 244, 267.

⁴ United States of America v. The Public Service Alliance of Canada and Others (Re Canada Labour Code) (1992) 91 DLR (4th) 449.

⁵ Reid v. Republic of Nauru 1993] 1 VR 251.

⁶ De Sanchez v. Banco Central de Nicaragua and Others 770 F.2d 1385, 1393 (1985); Braka v. Multibanco Comermex, S.A., 589 F. Supp. 802 (S.D.N.Y. 1984).

⁷ Kuwait Airways Corporation v. Iraqi Airways Co.,89 [1995] 1 WLR 1147, 1160.

5. Applying the contextual approach, it can be seen that the act of entering into the JVA by RMG is a sovereign act because the purpose and the nature of the act is governmental. The Aurion-Veridia BIT was signed with the objective of strengthening the semiconductor manufacturing industry in Aurion.⁸ The joint venture is a direct extension of the state's policy to prioritise semiconductor manufacturing as it is set up with the same objective.⁹ In this vein, President Ho has personally initiated negotiations on behalf of RMG by displaying it as a strategic partner in the semiconductor even before the BIT was signed.¹⁰ Additionally, RMG's functions as per Clause 4.2 of the JVA include procuring land through government channels and facilitating access to state-owned natural resources.¹¹ Further, RMG used its status as a state-linked entity to obtain expedited approvals.¹² These are governmental acts which a private citizen or an entity cannot perform.
6. Therefore, RMG engaged in sovereign acts and is entitled to invoke sovereign immunity.

B. RMG QUALIFIES AS AN AGENCY OR INSTRUMENTALITY OF AURION.

7. The entity claiming sovereign immunity has to form an apparatus of the state.¹³ The agencies and instrumentalities of a State are considered to form a part of it.¹⁴ In order to determine whether an entity is an agency or instrumentality, courts consider the control of the entity, the functions performed by the entity, the state's purposes in supporting the entity, the manner in which the entity conducts itself or its business,¹⁵ selection of board of directors by the foreign state.¹⁶ In this vein, common directors and centralized decision-

⁸ Moot Problem, Exhibit 1, Page 17.

⁹ Moot Problem, ¶21.

¹⁰ Moot Problem, ¶11.

¹¹ Moot Problem, Exhibit 4, Clause 4.2.

¹² Moot Problem, ¶21.

¹³ Article 5, UN Convention on Jurisdictional Immunities of the State and their Properties; *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*.

¹⁴ *Jurisdictional Immunities of the State, Germany v. Italy*, Judgment, ICGJ 434 (ICJ 2012); UN Convention on Jurisdictional Immunities of the State and their Properties (2004), Article 2(1)(b)(iii); *Krajina v. Tass Agency* [1949] 2 All Eng. L. R. 274; Foreign State Immunities Act, 1985, Section 3 (Australia); Foreign State Immunities Act, 1976 28 U.S.C. 97, Section 1603(b).

¹⁵ *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2011] FCAFC 52.

¹⁶ *FNC Bank v. Banco Para el Comercio*, 462 U.S. 611 (1983).

making between a state and its entity is considered highly probative of the entity's link to the state.¹⁷

8. Moreover, control is held to be construed as day-to-day control of the state over the entity.¹⁸

Illustratively, in *McKesson Corp*, it was noted that the Iranian government exercised day-to-day control over Pak dairy because it dictated the contractual commitments of the company and the ministers were involved in the decision-making process as per the corporate records.¹⁹

9. In the present case, the control criteria is satisfied because *first*, the directors of RMG consist of Cabinet Ministers from Aurion,²⁰ and *second*, the leadership structure and decision-making within RMG is heavily influenced and usually mirrors the internal policies laid down by the Ministry of Economy.²¹ President Ho has also expressly represented that RMG is a commercially autonomous vehicle under his influence²² and the JVA was a result of his closed door negotiations with Veridian investors.²³ Further, the capital requirements of RMG are funded from Aurion's treasury.²⁴ By corollary, Aurion exercised day-to-day control over RMG.

10. The functions of RMG are also clearly governmental in nature as established.²⁵ Aurion's objective to support RMG is evident from the fact that President Ho has represented RMG as his flagship project to advance the country's goal of enhancing the semiconductor industry.²⁶ It is further important to note that RMG leveraged its status as a state linked

¹⁷ *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.* 9 (S.D.N.Y. 1999) aff'd, 199 F.3d 94 (2d Cir. 1999)).

¹⁸ *Eldridge v. British Columbia* [1997] 3 SCR 624; *Seijas v. Republic of Argentina & Banco De La Nacion Argentina*, 2011 U.S. Dist. Lexis 31946 (S.D.N.Y. 2011); *NML Capital, Ltd. v. Republic of Argentina*, 2011 U.S. Dist. LEXIS 14795 (S.D.N.Y. 2011); *Czarnikow Ltd. v. Rolimpex* [1979] AC 351.

¹⁹ *McKesson Corp. v. Islamic Republic* 52 F.3d 346 (D.C. Cir. 1995).

²⁰ Moot Problem, ¶28.

²¹ Moot Problem, ¶28.

²² Moot Problem, ¶10.

²³ Moot Problem, ¶10.

²⁴ Moot Problem, ¶27.

²⁵ *Supra* Argument I(A).

²⁶ Moot Problem, ¶21.

entity to obtain the land alienation, regulatory approvals, and planning approvals in an expedited manner.²⁷

11. Therefore, cumulatively considering the above circumstances, RMG qualifies as an agency or instrumentality of Aurion and is hence, entitled to sovereign immunity.

II. CDI'S INVOCATION OF ARBITRATION IS PRE-MATURE.

12. The RESPONDENT objects to the jurisdiction of this Tribunal based on the non-compliance with the pre-arbitral steps under Clause 10 of the JVA. The Tribunal must reject the claim as *first*, the negotiation requirement under Clause 10.1 is a bar to the present proceedings [A] and *second*, the consent requirement under Clause 10.2 is also a bar to the present proceedings [B].

A. THE NEGOTIATION REQUIREMENT UNDER CLAUSE 10.1 IS A BAR TO THE PRESENT PROCEEDINGS.

13. Clause 10.1 of the JVA states that “*Parties agree to regulate their own affairs and resolve any dispute arising from or connected to this agreement amicably through negotiations which shall commence within 14 days*” from the serving of the notice of the dispute.²⁸ The RESPONDENT asserts that non-compliance with Clause 10.1 results in a premature arbitration affecting the jurisdiction of this Tribunal. It is submitted that *first*, the tribunal should dismiss this claim on the basis of jurisdiction [i] and alternatively, the tribunal should dismiss this claim on the basis of admissibility [ii].

i. The Tribunal should dismiss the claim on the basis of jurisdiction.

14. It is submitted that *first*, non-compliance with Clause 10.1 is a jurisdictional issue [a], and *second*, in any case, Clause 10.1 is a condition precedent to arbitration [b].

²⁷ Moot Problem, ¶30.

²⁸ Moot Problem, Exhibit 4, Page 7, Clause 10.1.

a. Non- Compliance with Clause 10.1 is a jurisdictional issue.

15. There exists a broad international consensus that the intention of the parties determines whether the non-compliance with pre-arbitral steps constitutes a jurisdictional challenge.²⁹

If it is evident that parties did not intend to begin arbitration until after pre-arbitral procedures have been satisfied, the requirements may be considered as ‘jurisdictional’.³⁰

16. In the present case, it is clear that the RESPONDENT’S consent to arbitrate was contingent on the compliance with Clause 10.1. The RESPONDENT stated that it would have undertaken steps to waive the fine on the joint venture,³¹ indicating that negotiations intended to take place before resorting to arbitration. In fact, the CLAIMANT unilaterally skipped the negotiation requirement by directly issuing the notice of arbitration. Therefore, non-compliance with Clause 10.1 is a jurisdictional issue.

b. In any case, Clause 10.1 is a condition precedent to initiating arbitration.

17. Pre-arbitration requirements constitute a condition precedent when the clause is sufficiently clear parties have expressed their intent to consider them as binding.³² The parties’ intent is reflected from wording of the clause.³³ For a clause to be binding, it must clearly specify

²⁹ Michael Pryles, Multi-tiered Dispute Resolution Clauses 18 *Journal of International Arbitration* 159 (2001); ICC Award 6276 (Partial Award); *National Boat Shows Ltd. and Anr v. Tameside Marine* [2001] ArbLR 43; *Hyundai Engineering and Construction Company Ltd. v. Vigour Ltd. (I)* HCCT 24/2008.

³⁰ Gary Born and Marija Šćekić, Pre-Arbitration Procedural Requirements, ‘A Dismal Swamp’ in David D. Caron, *Practising Virtue: Inside International Arbitration*, OXFORD UNIVERSITY PRESS (2015); ICC Award 8462 (Final Award); Zurich Court of Appeals, 11 September 2001, ZR 101 (2002) no. 21; Obergericht des Kantons Thurgau Court of Appeals Canton of Thurgau, 23 April 2001; C v. D. EWCA Civ 1282.

³¹ Moot Problem, Exhibit 11, Page 3.

³² *Wah v. Grant Thornton Int’l Ltd.* 2014 Ill. App. 1131808 (Ill. App. Ct. 2014); William Lawrence Craig et. al, *International Chamber of Commerce Arbitration*, BOSTON UNIVERSITY SCHOOL OF LAW (3rd ed. 2000); Dennis E. White v. Philip Kampner et al. 226 Conn. 909.

³³ D. Jiménez Figueres, *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration*, 14 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 1 (2003); Peter M. Wolrich, *Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules*, SPECIAL SUPPLEMENT TO ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN (2001); *Aiton Australia Pty Ltd. v. Transfield Pty Ltd* [1999] NSWSC 996; *Scott v. Avery* (1855) 5 HL Cas 811.

the steps to commence the process, the minimum obligations of the PARTIES, and a timeline of the process.³⁴

18. Moreover, it is a fairly common practice for Asian businesses to include good faith negotiation clauses in their agreements as non-adversarial dispute resolution is central to Asian traditions.³⁵

19. *In casu*, the parties deliberately entered into the JVA with an express clause opting for amicable negotiations as a first step, to be commenced within 14 days of a written notice of dispute, before arbitration under Clause 11. Further, Clause 10.1 of the JVA reflects a clear and deliberate agreement between the parties to resolve their disputes amicably through negotiations between appointed representatives, coupled with the specification of a 14-day window for initiating negotiations.³⁶ Therefore, Clause 10.1 is a condition precedent to arbitration.

ii. **The tribunal should dismiss the claim on the basis of admissibility.**

20. In the event that this tribunal views Clause 10.1 as an issue of admissibility and not jurisdiction, the present claim would be inadmissible as *first*, the pre-arbitral negotiations cannot be deemed futile [a]; and *second*, commencing arbitration would increase costs [b].

a. ***Pre-arbitral negotiations would not be futile.***

21. The CLAIMANT may submit that the parties' relationship had deteriorated to the extent that there was no scope of resolving the dispute by negotiations amicable. However, the Tribunal cannot allow the claim unless directing parties to mediation would be a 'completely hopeless exercise'.³⁷ In any case, negotiations should not be considered a futile

³⁴Wah v. Grant Thornton International Ltd [2012] EWHC 3198 (Ch); Alexander Jolles, Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement (2006) 72 Arbitration, 329-338; SCC Case 10/2005 Stockholm Chamber of Commerce, Interlocutory Order, 2006.

³⁵HSBC Institutional Trust Services (Singapore) Ltd. v. Toshin Development Singapore Pte Ltd [2012] SGCA 48.

³⁶Moot Problem, Exhibit 4, Page 7, Clause 10.1.

³⁷Cable & Wireless v. IBM United Kingdom Ltd. [2002] EWHC 2059 (Comm); Klaus Peter Berger, Law and Practice of Escalation Clauses 22 Arbitration International 17 (2022); ICC Award 8445.

exercise merely based on the fact that the parties express a non-interest in settlement or take an opposing stance.³⁸

22. Moreover, the bypassing of the pre-arbitral conditions would be contrary to the good faith principle of international arbitration, which requires parties to deal honestly and fairly with each other and to refrain from taking unfair advantage of each other.³⁹

23. In *casu*, the RESPONDENT has constantly showcased a conciliatory approach towards any differences arising amongst the parties. This is illustrated by President Ho's communication with CDI's CEO, wherein he suggested, "Contact my minister to resolve any issues."⁴⁰ Similarly, Mr. Suvan also attempted to resolve the dispute between the parties, stating, "Al, why did you panic? I'm speaking to Ho. You know who RMG is and that the fine can be waived, right?"⁴¹ Therefore, negotiations would not be futile in the present case and the claim is admissible.

b. Commencing arbitration would increase costs.

24. One of the primary objects of escalation clauses is to avoid what might otherwise be an expensive and time-consuming arbitration.⁴² Herein the parties shall be incurring at least about USD 10,97,300 under the present arbitration, including the filing fees and the administrative fees.⁴³ The AIAC considers the amount of the dispute, arbitration type and the number of arbitrators spent to calculate the fee.⁴⁴

25. On the other hand, in negotiation, parties would incur almost negligible costs due to its flexible nature and the lack of filing, arbitrator and administrative fees.

³⁸ Hooper Bailie Associated Ltd. v. Natcom Group PTY Ltd. [1990] AUConstrLawNlr 84.

³⁹ United Group Rail Services Ltd v. Rail Corporation New South Wales [2009] NSWCA 177.

⁴⁰ Moot Problem, ¶21

⁴¹ Moot Problem, Exhibit 11, Page 2.

⁴² Emirate Trading Agency LLC v. Prime Mineral Exports [2014] EWHC Case No. 2013.

⁴³ AIAC Cost Calculator, <https://www.aiac.world/fee-calculator>.

⁴⁴ *Id.*

Approximate Costs	Costs to be incurred in Arbitration Proceedings	Costs to be incurred in Negotiation Proceedings
Arbitrator's Fee	1,055,400	Almost Negligible
Administrative Fee	41,900	Almost Negligible

26. Further, beyond cost savings, negotiations would also preserve time, as the process is self-paced and unconstrained by procedural formalities. This would allow the parties to reach mutually beneficial solutions more swiftly, without the delays present in scheduling hearings, filing submissions, and awaiting tribunal orders. At the very least, an attempt at an amicable solution would further smoothen the process, as ancillary issues could be settled without necessitating contentious proceedings. Therefore, commencing arbitration directly would increase costs.

B. THE CONSENT OF THE MINISTER UNDER CLAUSE 10.2 BARS THE PRESENT PROCEEDINGS.

27. Clause 10.2 of the JVA provides that “*any proceedings, claims or suits[...] shall NOT be commenced before first obtaining the consent of the Minister in charge of economic policy, foreign investments and trade of Aurion*”.⁴⁵ The present clause poses a challenge to the arbitration as non-compliance with Clause 10.2 is a jurisdictional issue [i] and Clause 10.2 is a condition precedent to arbitration [ii].

i. Non-compliance with Clause 10.2 is a jurisdictional issue.

28. It is important to note that an issue of admissibility can be cured, whereas an objection to jurisdiction completely eliminates the claim from the arbitral process.⁴⁶ In *Joy Mining*

⁴⁵ Moot Problem, Exhibit 4, Page 7, Clause 10.2.

⁴⁶ Gary B. Born, Maria Šćekić, Pre-Arbitration Procedural Requirements: ‘A Dismal Swamp’, in Practising Virtue: Inside International Arbitration in David D. Caron, *Practising Virtue: Inside International Arbitration*, OXFORD UNIVERSITY PRESS (2015).

Machinery Ltd. v. Egypt, the tribunal considered a contractual clause that required the approval of Egypt’s Minister of Industry as part of the State’s consent to arbitration. It found that such approval was not a mere procedural formality but an integral component of the agreement to arbitrate, without which jurisdiction could not arise.⁴⁷

29. In *casu*, the absence of ministerial consent meant that there was no valid consent to arbitrate in the first place, thereby depriving the tribunal of jurisdiction.

ii. **Clause 10.2 is a condition precedent to arbitration.**

30. As established, pre-arbitral steps constitute condition precedents when the arbitration agreement contains explicit language establishing specific procedural requirements for the same.⁴⁸ The use of mandatory terms in contractual language, such as shall or must reflects the parties’ intentions to designate a condition precedent to arbitration.⁴⁹

31. Illustratively, courts have upheld clauses employing the use of mandatory language such as “shall” or “must” in drafting of pre-arbitral clauses.⁵⁰ Non-adherence to such clauses deprives the tribunal of its jurisdiction to adjudicate the claim.⁵¹ Further, as per Article 5.3.1 of the UNIDROIT principles (“UPICC”) , a condition must be fulfilled before a party is entitled to enforce rights depending upon it.⁵²

32. In *casu*, clause 10.1 of the JVA states that “*any dispute or controversy, arising out of or in connection with this agreement shall NOT be commenced before first obtaining the consent of the Minister incharge of economic policy...*”⁵³ The parties have consciously used and

⁴⁷ Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11.

⁴⁸ *Supra*, II(A)(i)(b).

⁴⁹ White v. Kampner, 641 A.2d 1381, 1382 (Conn. 1994); ICC Award 9984.

⁵⁰ White v. Kampner, 641 A.2d 1381, 1382 (Conn. 1994).

⁵¹ HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41, 42 (1st Cir. 2003); DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 335 (7th Cir. 1987); Bill Call Ford Inc. v. Ford Motor Co., 830 F. Supp. 1045, 1048, 1053 (N.D. Ohio 1993); Wah v. Grant Thornton International Ltd & Ors [2012] EWHC 3198 (Ch); Nirman Sindia v. Indal Electromelts Ltd. 2000 (1) ARBI LR 144; International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd. [2013] SGCA 55.

⁵² Art. 5.3.1, UNIDROIT Principles, 2016.

⁵³ Moot Problem, Exhibit 4, Page 7, Clause 10.2.

capitalised “shall NOT” to state the mandatory nature of Clause 10.2. Further, the requirement to obtain the Minister’s consent is sufficiently clear and unambiguous to warrant its mandatory interpretation. Therefore, Clause 10.2 is a mandatory precondition to arbitration and constitutes a bar to the present proceedings.

III. RMG HAS NOT BREACHED THE JVA IN RELATION TO THE ALLEGED LABOUR PRACTICES.

33. The RESPONDENT has not breached the JVA in relation to the alleged labour practices because *first*, the labour activities do not amount to forced labour [A]. Furthermore, the RESPONDENT has not engaged in modern slavery [B]. As a result, the RESPONDENT has complied with the obligations under the JVA [C].

A. THERE IS NO EVIDENCE OF FORCED LABOUR.

34. Art. 2(1) of the ILO Forced Labour Convention [“FLC”] defines forced labour as “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*”⁵⁴ The RESPONDENT’S activities do not amount to forced labour because *first*, the labourers are working voluntarily [i] and *second*, the current actions do not cause a menace of penalty [ii]. Moreover, the workforce audit report is inconclusive as evidence for modern slavery [iii].

i. The labourers are working voluntarily.

35. The labourers contributing must have given their consent to work.⁵⁵ The ILO further clarifies that poor working conditions do not *ipso facto* constitute forced labour unless accompanied by coercion or compulsion that removes choice.⁵⁶

⁵⁴ Art. 2(1), Forced Labour Convention, 1930 (No. 29), adopted 28 June 1930, entered into force 1 May 1932.

⁵⁵ *Id.*

⁵⁶ *Tool 9, Legal Framework and Indicators on Forced Labour*, FAIR LABOUR ASSOCIATION, <https://www.imvoconvenanten.nl/-/media/imvo/files/kleding/child-labour/9-framework-indicators-forced-labour.pdf> (June, 2021).

36. The term ‘not offered himself voluntarily’ refers to those workers who have not accorded their free and informed consent to enter into an employment.⁵⁷ Moreover, ‘involuntariness’ refers to when a worker lacks the ability to withdraw their consent to leave any job as per their discretion.⁵⁸ The lack of consent must be continuous such that the worker is working without their own personal will to continue the work.⁵⁹

37. *In casu*, the IIC report found that a significant number of workers chose to work overtime for bonuses.⁶⁰ Some workers did report implicit threats of wage cuts for not meeting KPIs, but the evidence was contradictory and not determinative.⁶¹ More importantly, the IIC concluded that there was insufficient evidence to categorically state that workers were forced to work against their will.⁶² Therefore, the presence of performance targets or wage-linked incentives does not constitute to involuntariness of the workers. Hence, there is no concrete evidence of forced labour.

ii. The employment setting does not cause a menace of penalty for the workers.

38. The second ingredient for establishing the existence of forced labour is the presence of a menace of penalty.⁶³ This ‘menace of penalty’ includes penal as well as wide range of means of coercion to compel an individual to perform some work or service that is against

⁵⁷ *Tool No. 2, Forced Labour and related concepts*, ILO TOOLKIT ON DEVELOPING NATIONAL ACTION PLANS ON FORCED LABOUR, https://www.dol.gov/sites/dolgov/files/Conrad.Shannon.D@dol.gov/TOOL_0~3.PDF, 2008.

⁵⁸ *Id.*

⁵⁹ Patricia Hynes, Human Trafficking and Outcomes, UK Contemporary Social Science, 115 – 132.

⁶⁰ Moot Problem, Exhibit 10, Page 2, ¶3.4.

⁶¹ Moot Problem, Exhibit 10, Page 2.

⁶² Moot Problem, ¶48.

⁶³ Art. 2(1), Forced Labour Convention, 1930 (No. 29), adopted 28 June 1930, entered into force 1 May 1932.

their free will.⁶⁴ Certain examples include the physical violence against a worker, or the imprisonment or restriction of movement, or even denunciation.⁶⁵

39. The coercion of a worker for proving menace of penalty requires a proper determination of the context for which such coercion was exerted.⁶⁶ As per the case of *Siliadin v. France*, to constitute menace of penalty, there must be a perceived seriousness of threat and extreme vulnerability for the workers.⁶⁷

40. *In casu*, the workers agreed to working overtime voluntarily, without being forced from the RESPONDENT.⁶⁸ Moreover, the withholding of passports was in line with the work and visa procedures, and did not provide for definitive evidence of modern slavery.⁶⁹ Hence, there was no threat or coercion from the RESPONDENT to the workers.⁷⁰ Further, RESPONDENT acted in accordance with the project's urgency and cost constraints, and at all times within the framework of domestic legal norms. Hence, the actions of the RESPONDENT do not account for construing menace of penalty.

iii. The workforce audit report is not conclusive evidence of forced labour.

41. In order to constitute forced labour, there must be involuntariness and a menace of penalty.⁷¹ Failure to comply with the procedural norms, without any evidence of deception, restriction of movement, physical violence, threats, and overtime does not constitute forced

⁶⁴ *Tool 9, Legal Framework and Indicators on Forced Labour*, FAIR LABOUR ASSOCIATION, <https://www.imvoconvenanten.nl/-/media/imvo/files/kleding/child-labour/9-framework-indicators-forced-labour.pdf> (June, 2021).

⁶⁵ *Id.*

⁶⁶ *Tool No. 2, Forced Labour and related concepts*, ILO TOOLKIT ON DEVELOPING NATIONAL ACTION PLANS ON FORCED LABOUR, https://www.dol.gov/sites/dolgov/files/Conrad.Shannon.D@dol.gov/TOOL_0~3.PDF, 2008.

⁶⁷ *Siliadin v. France*, Application No. 73316/01 (26 July 2005).

⁶⁸ Moot Problem, ¶47 (c).

⁶⁹ Moot Problem, ¶47 (e).

⁷⁰ Moot Problem, Exhibit 10, Page 2.

⁷¹ Art. 2(1), Forced Labour Convention, 1930 (No. 29), adopted 28 June 1930, entered into force 1 May 1932.

labour.⁷² Excessive overtime, as a standalone basis, is not considered as evidence of forced labour.⁷³ The ILO states that the crime of forced labour requires strict evidence of worker abuse.⁷⁴ Hence, mere non-compliance to a procedure does not constitute the crime of forced labour.⁷⁵

42. *In casu*, while the IIC identified significant issues with the workforce audits submitted, the same was a responsibility of ASI, and not just the RESPONDENT.⁷⁶ The issue with filing of the workforce audit was an administrative non-compliance, and not a substantive violation, as it does not fulfil any of the criteria of forced labour identified above.

43. Furthermore, the obligation of ensuring a proper monitoring of the overtime was on BWS as the recruitment agency, and RESPONDENT cannot be held liable for the same.⁷⁷ While the fine imposed could have been appealed in the court, the CLAIMANT chose to instead unilaterally terminate the contract and shift the burden on the RESPONDENT. Therefore, even the re-submission of workforce audit reports and the subsequent evidence of overtime cannot classify as forced labour practices done by the RESPONDENT. Hence, the RESPONDENT has not breached the JVA.

B. THE ACTIONS OF THE RESPONDENT DO NOT AMOUNT TO MODERN SLAVERY.

44. It is the submission of the RESPONDENT that there is no presence of modern slavery because *first* there is no accurate evidence of exploitation provided [i]; *second* there is no dominance

⁷² ILO Indicators of Forced Labour, Special Action Programme to Combat Forced Labour, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40declaration/documents/publication/wcms_203832.pdf

⁷³ Olivia Thomson, Understanding the indicators of forced labour, <https://www.sedex.com/blog/understanding-the-indicators-of-forced-labour/> (Aug 12, 2021).

⁷⁴ Guidance on Operational Practice & Indicators of Forced Labour, SEDEX, <https://respect.international/wp-content/uploads/2022/06/Guidance-on-Operational-Practice-Indicators-of-Forced-Labour.pdf>, (June, 2017).

⁷⁵ *Id.*

⁷⁶ Moot Problem, ¶47 (f).

⁷⁷ Moot Problem, ¶38.

exerted upon the workers [ii]; and *third*, the personal vulnerabilities of the workers are not being taken advantage of [iii].

i. There is no accurate evidence of exploitation being provided.

45. Modern slavery is defined as exploitation through coercion, deception, or abuse of power in such a way that one cannot refuse or leave the situation.⁷⁸ The legal meaning of exploitation involves the denial of fair compensation for labour and the reduction of an individual's autonomy over their work or body.⁷⁹ This exploitation must be continuous, systemic, and coupled with a lack of voluntariness.⁸⁰ Mere dissatisfaction with wages or working hours, or even substandard working conditions, do not automatically meet this threshold unless accompanied by coercion or control.⁸¹

46. *In the present case*, the IIC expressly stated that while certain worker conditions may have been suboptimal, no conclusive evidence of modern slavery was found. The workers were provided with basic essentials and temporary dormitories, and the living conditions were actively being improved. Furthermore, many of the workers voluntarily worked overtime to achieve performance bonuses. Therefore, there is no evidence of any systemic, involuntary exploitation.

ii. There is no dominance exerted upon the workers.

47. The second threshold for modern slavery requires dominance exerted on the workers.⁸² Dominance is defined as authority exercised over an individual in a manner that overrides their free will, as per *The Queen v. Tang*.⁸³ The legal test for proving dominance is “control

⁷⁸ R v. Rooney, (Martin Senior) EWCA Crim 681.

⁷⁹ *Id.*

⁸⁰ *Guidance Note on Wage Protection for Migrant Workers*, INTERNATIONAL LABOUR ORGANISATION, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_protect/@protrav/@migrant/documents/publication/wcms_878456.pdf (2023).

⁸¹ *Id.*

⁸² R. v. Rooney, (Martin Senior) EWCA Crim 681.

⁸³ *The Queen v. Tang*, [2008] HCA 39 [Australia].

tantamount to possession,” meaning a situation in which one person is dominated to the extent that their liberty is significantly deprived, comparable to ownership.⁸⁴

48. Moreover, the International Criminal Tribunal for the former Yugoslavia, in *Prosecutor v. Kunarac et al.*, held that contemporary slavery is about “the exercise of any or all of the powers attaching to the right of ownership” rejecting the narrow idea that only legal ownership suffices.⁸⁵ They specifically emphasized that the continuous presence of control and deprivation of liberty are critical factors for proving the existence of modern slavery.⁸⁶ The UK Court of Appeal in *R v. Rooney (Martin Senior)* established that for modern slavery to be present, there must be compulsion “beyond the usual terms of employment or legitimate administrative oversight.”⁸⁷ Situations involving performance-linked employment incentives or administrative oversight do not, in themselves, amount to the required level of control.⁸⁸

49. *In casu*, the IIC’s findings do not establish that workers were continuously subjected to a deprivation of their free will or liberty. Importantly, there was no finding of physical or psychological coercion.⁸⁹ Moreover, the withholding of passports was a visa and work-permit compliance practice, not a method of control.⁹⁰ The CLAIMANT had approved BWS’s appointment and delegated compliance oversight to ASI, which was independently managed. Thus, the legal standard of “control” required to constitute modern slavery has not been satisfied, therefore causing no evidence of modern slavery.

⁸⁴ Jean Allian, Chapter 2, *Contemporary Slavery and its definition in law*, UNIVERSITY OF BRITISH COLUMBIA PRESS.

⁸⁵ ICTY, *Prosecutor v. Kunarac et al.*, Case no. IT-96–23/1-A, 12 June 2002.

⁸⁶ *Id.*

⁸⁷ *R v. Rooney (Martin Senior)*, EWCA Crim 68.

⁸⁸ *Guidance Note on Wage Protection for Migrant Workers*, INTERNATIONAL LABOUR ORGANISATION, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_protect/@protrav/@migrant/documents/publication/wcms_878456.pdf (2023).

⁸⁹ Moot Problem, Exhibit 10.

⁹⁰ Moot Problem, ¶47 (e).

iii. There is no evidence of the personal vulnerabilities being taken advantage of.

- 50.** A vulnerable person is defined as a person who “*has no real and acceptable alternative but to submit to the abuse involved*”.⁹¹ The legal notion of personal vulnerability in the context of modern slavery refers to the exploitation of individuals due to their socio-economic, cultural, or legal fragility.⁹² As stated in the UNODC Guidance Note on ‘abuse of a position of vulnerability’, the abuse of a position of vulnerability takes place when an individual’s personal, situational or circumstantial vulnerability is intentionally used by another person.⁹³ It does not automatically render an employment relationship unlawful unless such vulnerability is knowingly used to extract labour under duress.⁹⁴
- 51.** The ECHR in the *Chowdhary & Ors v. Greece* held that vulnerability must be accompanied by manipulation, deception, or coercion to transform a legal work relationship into modern slavery.⁹⁵ Further, the French Court of Cassation dismissed the contention that ‘living and working conditions contravened human dignity’ as a basis for the existence of abuse of personal vulnerabilities of the workers.⁹⁶
- 52.** *In casu*, there is no evidence that RESPONDENT exploited worker vulnerabilities with the intent or effect of exercising control. The workers were recruited through an independent agency, and many voluntarily applied to work under promised salaries and performance

⁹¹ Preparatory Works of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, (2006).

⁹² *Issue Paper on Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, UNITED NATIONS, https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf (April, 2013).

⁹³ *Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf (2012).

⁹⁴ *Id.*

⁹⁵ *Chowdhary & Ors v. Greece*, Case No. 21884/15, March 30, 2017.

⁹⁶ Cour de cassation (France), troisième chambre, Case no. FR002-3.

bonuses.⁹⁷ The IIC found no evidence of debt bondage, and the recruitment fees, though arguably high, did not render the employment relationship coercive under international standards.⁹⁸ The workers were free to join as long as they were consenting to the terms that were informed prior to the work began for all.⁹⁹ Therefore, the exploitation of vulnerability necessary to amount to modern slavery is absent in both legal and factual terms.

C. THE RESPONDENT COMPLIED WITH THE OBLIGATIONS OF THE JVA.

53. Article 1.3 of the UPICC mentions the binding character of a contract entered into by the parties.¹⁰⁰ The binding character of a contractual agreement presupposes that an agreement has actually been concluded by the parties and that the agreement reached is not affected by any ground of invalidity.¹⁰¹ Further, Art. 6.1.1 (c) of the UPICC states that the party must perform its obligations within a reasonable time after the conclusion of the contract.¹⁰²

54. *In casu*, Clause 4.2 (f) of the JVA required RESPONDENT to ensure full compliance with all the applicable labour and employment laws.¹⁰³ The said compliance was adequately dispensed.¹⁰⁴ Moreover, the recruitment of a third-party labour agency with prime importance to minimising labour costs.¹⁰⁵ Therefore, the RESPONDENT duly complied with and dispensed their obligations as per the JVA. Hence, there is no breach of JVA by the RESPONDENT.

⁹⁷ Moot Problem, Exhibit 5, Page 10.

⁹⁸ Moot Problem, Exhibit, Page 10.

⁹⁹ Moot Problem, Exhibit 5, Page 9.

¹⁰⁰ Art 1.3, UNIDROIT Principles, 2016.

¹⁰¹ *Eckart Brödermann, UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary*, WOLTERS KLUWER.

¹⁰² Art 6.1.1 (c), UNIDROIT Principles, 2016.

¹⁰³ Moot Problem, Exhibit 4, Page 3, Clause 4.2.

¹⁰⁴ Moot Problem, ¶48.

¹⁰⁵ Moot Problem, Exhibit 6, ¶1, ¶3.

IV. CDI'S TERMINATION OF THE JVA WAS UNLAWFUL.

55. The termination of the JVA by the CLAIMANT is unlawful because there exists no proof of fundamental breach within the contract [A]; and the impediment that caused a delay in the deadlines was beyond the control of the RESPONDENT [B].

A. THERE IS NO PROOF OF FUNDAMENTAL BREACH, RENDERING THE TERMINATION UNLAWFUL.

56. Fundamental breach of contract refers to a particular breach by a party that goes to the very root of the contract, thereby entitling the other party to treat such breach as causing the contract to have irretrievably broken down.¹⁰⁶ To construe a breach as fundamental, it is important that there be a breach of contract [i]; such breach causes substantial deprivation from the standard benefits that the parties were entitled to while signing the contract [ii]; and the breach was unforeseeable by either party [iii].

i. There is no breach of contract.

57. As per the *George Mitchess v. Finney Locks Seeds* case, a breach is classified as fundamental when it goes to the very root of the contract.¹⁰⁷ While ascertaining a fundamental breach of contract, parties must first establish that a breach of contract has occurred.¹⁰⁸ Any ancillary impediment that impairs the parties from fulfilling the obligations of the contract will not amount to fundamental breach of contract.¹⁰⁹

58. Further, as per the case of *Photo Production v. Securicor Transport*, there exists no separate category of fundamental breach of contract,¹¹⁰ and a fundamental breach is considered as nothing more than a repudiatory breach.¹¹¹ Therefore, the general words of exemption will

¹⁰⁶ Art. 7.3.1, UNIDROIT Principles, 2016.

¹⁰⁷ *George Mitchell v. Finney Lock Seeds*, (1983) 1 All ER 108, 115.

¹⁰⁸ *OLG Hamburg (Germany)* 28 February 1997.

¹⁰⁹ *Id.*

¹¹⁰ *Photo production Ltd. v. Securicor Transport Ltd* [1980] All ER 556, 190 – 194.

¹¹¹ *Millichamp v. Jones* [1983] 1 All ER 267.

not as a rule be construed to cover the breach.¹¹² Whether a contract comes to an end even after a fundamental breach depends on the effect of the exemption clause as well.¹¹³

59. *In casu*, CLAIMANT had, in several personal discussions with BWS, indicated a preference for workers who were highly dedicated and capable of meeting the demanding production schedules, with the understanding that meeting tight deadlines was critical.¹¹⁴ Further, the IIC Report specifically mentioned that the overtime done by the workers was voluntary, and that they would only occasionally skip breaks as they understood the importance of working at a tight deadline.¹¹⁵ The report specifically did not find any definitive evidence that showed existence of modern slavery.¹¹⁶ Therefore, the RESPONDENT strictly adhered to the labour standards, thereby, not breaching the contract.

ii. **The CLAIMANT has not been devoid of any substantial benefit from the contract.**

60. In order to construe fundamental breach of the contract, the extent to which the party that has been injured and deprived of the benefits that they were reasonably expecting to receive must be checked.¹¹⁷ Further, the compensation for the part of the benefit and the conduct of the party with standards of good faith and fair dealing must be assessed.¹¹⁸ However, in case a breach is curable and can be treated within a reasonable period of time, then such a breach does not constitute substantial deprivation and will not be classified as fundamental breach.¹¹⁹

¹¹² *Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 432 – 434.

¹¹³ *Damon Cia Naviera SA v. Hapag – Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1982] 1 All ER 475.

¹¹⁴ Moot Problem, ¶38.

¹¹⁵ Moot Problem, ¶47 (c).

¹¹⁶ Moot Problem, ¶48.

¹¹⁷ *Aneta Spaic, Interpreting Fundamental Breach*, CAMBRIDGE UNIVERSITY PRESS (February, 2014).

¹¹⁸ *Id.*

¹¹⁹ Uniform Commercial Code § 2 – 508 (2002).

61. In the *Cobalt Sulphate Case*, the German Supreme Court asserted that the gravity of a breach must be derived from the contract as well as the surrounding circumstances.¹²⁰ They also noted that if the buyer had not availed itself the opportunity of specifying the obligations that they considered as essential, then any obligation subsequently will not be considered as essential.¹²¹ In order for a breach to be fundamental, the effects have to be weighed against the consequences of the breach as the importance is not given to the breach.¹²² Therefore, the prospects of cure should be considered in determining whether a breach is fundamental or not.¹²³

62. *In casu*, owing to the construction delays and cost overruns, Ms. AI Emret, CEO of CLAIMANT had urged the RESPONDENT to minimise the labour costs wherever feasible.¹²⁴ Further, the selection of BWS had been approved by the CLAIMANT.¹²⁵ The Official Memo, as sent by the CLAIMANT dated February 26, 2023 explicitly provided under Clause 3.2 to *implement extended work shifts and overtime as necessary*.¹²⁶ It further required RESPONDENT to expediate the regulatory approval processes, and maintain stringent cost controls to mitigate budget overruns.¹²⁷ Clause 3.8 required to identify and implement efficiency-driven cost saving measures, and Clause 4.1 provided for ‘cost-effectiveness’ as a key consideration while agency selection to mitigate the budget constraints.¹²⁸ This had been reiterated in the email shared on September 20, 2024 by Ms. AI Emret as minimising labour costs had been crucial.¹²⁹ Therefore, the RESPONDENT only adhered to the orders of

¹²⁰ OLG Düsseldorf (Germany) 24 April 1997.

¹²¹ *Id.*

¹²² Michael Bridge, Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods, *The International and Comparative Law Quarterly*, 59 (4), 911 – 940.

¹²³ OLG Koblenz (Germany) 31 January 1997.

¹²⁴ Moot Problem, ¶36.

¹²⁵ Moot Problem, ¶37.

¹²⁶ Moot Problem, Exhibit 5, Page 1, Clause 3.

¹²⁷ *Id.*

¹²⁸ Moot Problem, Exhibit 4, Page 2, Clause 4.1.

¹²⁹ Moot Problem, Exhibit 6.

the CLAIMANT as they employed the best possible options, hence complying with their contractual obligations. Thus, there has been no deviation of benefit.

iii. The breach was unforeseeable.

- 63.** Fundamental breach of contract requires that the default occurring must have been unforeseen. If the detriment was unforeseeable by the defaulting party, and by a reasonable person, then the breach is not fundamental.¹³⁰ In order to ascertain foreseeability, we employ the reasonable man's test, which requires that a person of the same kind, in the same circumstances, objectively will also have not foreseen the event owing to which the contract was breached.¹³¹
- 64.** Foreseeability of a contract has to be checked from the point when detriment is caused to the other party.¹³² Further, the burden of proof of proving the element of foreseeability is on the party that is alleging that a fundamental breach has occurred.¹³³ If there has been a situation that is not fundamentally different from what the parties could, as reasonable persons, have contemplated when the contract was being formed, then there will be no fundamental breach, and the parties will not be discharged from their obligations.¹³⁴ Moreover, Art 7.4.4 mentions that the non-performing party is liable only for the harm that it foresaw or could reasonably have foreseen at the time of the conclusion of the contract.¹³⁵
- 65.** *In casu*, the establishment of the IIC was owing to the rumours of workforce ill-treatment, which had questionable credibility.¹³⁶ Further, such report did not find any definitive evidence that categorised actions of the ASI as modern slavery.¹³⁷ In such a scenario, the

¹³⁰ Andrew Babiak, Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods, *Temple International and Comparative Law Journal*, 6, 122.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Ana Paula de Barros, Definition of Fundamental Breach under CISG's Art 25, *International Law & Practice Section of North Carolina Bar Association*, 26 (3).

¹³⁴ *Id.*

¹³⁵ Art 7.4.4, UNIDROIT Principles, 2016.

¹³⁶ Moot Problem, ¶43.

¹³⁷ Moot Problem, ¶48.

suspension of the operating license came as an equal shock to the RESPONDENT. Moreover, the imposition of the penalty was also an unexpected action that the RESPONDENT could not have fathomed at the conclusion of the contract. Hence, the breach of the contract was unforeseeable by the RESPONDENT.

B. THE IMPEDIMENT AMOUNTS TO A FORCE MAJEURE EVENT.

66. Art 6.2.2 of UPICC provides for the incidence of hardship, where the occurrence of events fundamentally alters the equilibrium of the contract owing to events or facts beyond the control of either of the parties.¹³⁸ The specific events occur or become known post the conclusion of the contract, could not have been taken into account prior to the conclusion, and such risks are not assumed by the disadvantaged party too.
67. Further, Art 6.2.3 of UPICC provides for the effects of such hardship, where there is scope for requesting renegotiations.¹³⁹ In case such renegotiations fail, then the party may terminate the contract, as per Art 6.2.3. (4)(a) of the UPICC.¹⁴⁰
68. Art 7.1.7 of UPICC specifies the mention of *force majeure* whereby the non-performance of any party is excused if the party is able to prove that the non-performance was due to an impediment beyond its control.¹⁴¹ The test of the impediment beyond control is “whether the obligor could reasonably have overcome the impediment or its effect”.¹⁴²
69. *In casu*, the imposition of penalty and the suspension of the license was an event that was unexpected by both the parties to the contract. Hence, the performance of the contract became impaired for both the parties, as nobody could dispense their obligations.
70. Moreover, per Clause 7.1 (c), no party shall be liable for any failure or delay in the performance of the contractual obligations if such a delay or failure is due to any

¹³⁸ Art 6.2.2, UNIDROIT Principles, 2016.

¹³⁹ Art. 6.2.3, UNIDROIT Principles, 2016.

¹⁴⁰ Art. 6.2.3. (4)(a), UNIDROIT Principles, 2016.

¹⁴¹ Art. 7.1.7, UNIDROIT Principles, 2016.

¹⁴² *Id.*

governmental actions, restrictions or economic sanctions.¹⁴³ Further, Clause 8.4 (c) of the JVA, the mechanism of sale of assets has been provided for, if the termination is due to force majeure.¹⁴⁴

71. Therefore, the termination of the JVA was wrongful as the actions of the government were beyond the control of the RESPONDENT, rendering them not liable for any breach.

¹⁴³ Moot Problem, Exhibit 4, Page 5, Clause 7.1.

¹⁴⁴ Moot Problem, Exhibit 4, Page 6, Clause 8.4.

PRAYER FOR RELIEF

In light of the submissions above, the RESPONDENT respectfully requests the Tribunal to declare that:

- I. The RESPONDENT is entitled to invoke sovereign immunity in this arbitration.
- II. This arbitration is premature and cannot commence since the pre-arbitration steps are not complied with.
- III. The RESPONDENT complied with the JVA in relation to the labour practices.
- IV. The termination of the JVA by the CLAIMANT is unlawful.
- V. The CLAIMANT is not entitled to direct financial losses and reputational harm & long term-impact amounting to USD 742.5 million.

*Respectfully submitted,
Counsels for Respondent*