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INTERNATIONAL MOOT COMPETITION

11 OCTOBER TO 13 OCTOBER 2025

ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORANDUM FOR THE CLAIMANT

CLAIMANT
CALYX DREAMBOT
INC

V.

RESPONDENT
RIVUS
MICROELECTRONICS
GROUP

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41.	<i>Forced Labour Convention</i>	<i>C029 - Forced Labour Convention, 1930 (No. 29)</i>	20, 35, 36, 37
42.	<i>Resolution on Arbitration Between States, State Enterprises or State</i>	<i>Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign</i>	23

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43.	<i>PICC</i>	<i>UNIDROIT Principles of International Commercial Contracts (2016)</i>	35, 36, 42, 43, 44, 45, 46, 47, 48, 49
44.	UNCIS	<i>United Nations Convention on Jurisdictional Immunities of States and Their Property 2004</i>	23, 24, 26, 28

STATEMENT OF JURISDICTION

Calyx Dreambox Inc (“**CDI**”) and **Rivus Microelectronics Group** (“**RDI**”) have agreed, pursuant to Article 12 of the Joint Venture Agreement (“**JVA**”) signed between them, to submit any dispute arising between the investors to arbitration administered in Kuala Lumpur, Malaysia in accordance with the Asian International Arbitration Centre Rules 2021 (“**AIAC Rules**”).

QUESTIONS PRESENTED

- a) Whether RMG is entitled to invoke sovereign immunity;
- b) Whether CDI's initiation of arbitration was premature;
- c) Whether RMG breached the JVA in relation to the alleged labour practices; and
- d) Whether CDI's termination of the JVA was lawful.

STATEMENT OF FACTS

- 1 Control over semiconductor supply chains has become a critical global priority as high-performance chips are now essential for artificial intelligence, quantum computing, and defense applications.¹ In light of this, Seratious has imposed strict trade controls and sanctions on Veridia and Verdian semiconductor firms.² Consequently, Veridia has actively encouraged the relocation of its technology sector to Aurion, a developing nation, to retain influence over its supply chain.³
- 2 Mr Davul Ho, the President of Aurion, (“**Mr Ho**”) has sought to develop Aurion’s semiconductor industry since he took office in January 2022.⁴ Eventually, Mr Ho’s efforts culminated in the signing of the Aurion-Veridia Bilateral Investment Treaty (“**BIT**”) in October 2022.⁵
- 3 The Claimant (Calyx DreamBot Inc (“**CDI**”)) is the largest semiconductor firm in Veridia.⁶ Mr Ho engaged in a series of meetings with Ms Al Emret (“**Ms Emret**”) (CEO of CDI), during which he made representations that the Respondent (Rivus Microelectronics Group (“**RMG**”)) was independent of Aurion’s government.⁷ Relying on these assurances, the Claimant formalised the Joint Venture Agreement (“**JVA**”) with the Respondent in December 2022.⁸ The JVA provided for the incorporation of

¹ The Facts at [1].

² The Facts at [4].

³ The Facts at [3].

⁴ The Facts at [9].

⁵ The Facts at [12].

⁶ The Facts at [13].

⁷ The Facts at [25].

⁸ The Facts at [17].

the special purpose vehicle – Aurion Semiconductor Inc (“**ASI**”). The Claimant holds 51% of ASI’s shares and the Respondent holds the remaining 49%.⁹

4 On 3rd January 2023, ASI was incorporated and works began for the construction of the semiconductor manufacturing facility.¹⁰ While industry norms dictated a 24 – 36-month construction period, market demands and contractual obligations necessitated an accelerated timeline of 15 months, by 26th of May 2024.¹¹ The Claimant conveyed this information to the Respondent through a Project Acceleration Memo dated 26th of February 2023.¹² The 15-month target became the new deadline under the supervision of the joint project management team (“**JPMT**”).¹³

5 Subsequently, due to budget overruns and increasing concerns over delays, Ms Emret wrote to the JPMT and urged the Respondent to engage a third-party labour agency.¹⁴ Accordingly, the Respondent proposed a shortlist of labour agencies among which was Beta Workforce Solutions (“**BWS**”).¹⁵ However, the Respondent failed to disclose that it had personal ties with BWS to the Claimant.¹⁶ BWS was eventually selected based on the Respondent’s recommendation with no objections.¹⁷

6 On 2nd of October 2023, ASI entered into a service agreement with BWS for the supply and management of an initial workforce of 1,200 workers (“**Service Agreement**”).¹⁸

⁹ Exhibit 4.

¹⁰ The Facts at [30].

¹¹ The Facts at [32].

¹² The Facts at [32].

¹³ The Facts at [32].

¹⁴ The Facts at [36].

¹⁵ The Facts at [37].

¹⁶ The Facts at [54].

¹⁷ The Facts at [37].

¹⁸ The Facts at [38].

The agreement included a 12-month transition for ASI to take over workforce duties, with collaboration between ASI and BWS required for compliance and oversight.¹⁹

7 By 20th of May 2024, construction of the semiconductor facility was completed, and production had begun.²⁰ ASI experienced great success and used its dependable supply chain to expand contracts and bypass the Seratious-Veridia trade ban.²¹ By September 2024, ASI surpassed order forecasts by 35%, with projected revenues expected to exceed USD 5 billion by early 2026.²²

8 However, as operations scaled, on 13th of September 2024, an investigative report alleging exploitative labour practices at newly established Veridian-linked facility in Aurion was published.²³ Despite the questionable credibility of the report, there was significant public outcry urging Seratious to prohibit Aurion imports.²⁴ This resulted in the Seratious government issuing a formal statement warning a complete import ban to Aurion if the Aurion government failed to address the allegations of forced labour.²⁵

9 Consequently, the Aurion government established an Independent Investigative Committee (“IIC”) to address the allegations.²⁶ On 30th of September 2024, the IIC published its findings in which it stated that there was no conclusive evidence of modern slavery.²⁷ However, the IIC’s impartiality was questioned for possible conflict

¹⁹ The Facts at [38].

²⁰ The Facts at [40].

²¹ The Facts at [41].

²² The Facts at [42].

²³ The Facts at [43].

²⁴ The Facts at [44].

²⁵ The Facts at [45].

²⁶ The Facts at [46].

²⁷ The Facts at [47].

of interest.²⁸ Therefore, Seratious once again demanded ASI's workforce audit for transparency, threatening a full import ban from Aurion if not provided.²⁹

10 In response, the Ministry of Trade and Industry of Aurion (“**Ministry**”) suspended ASI's license on 2nd of October 2024, requiring a revised workforce audit for compliance.³⁰ The suspension was lifted on 23rd of October 2024 after ASI submitted the revised report.³¹ The three-week suspension severely disrupted ASI's operations, leading to missed deliveries and contractual penalties.³² Investors and analysts downgraded ASI's outlook due to increased scrutiny and reputational risks.³³

11 Following a further review of ASI's revised workforce audit, the Ministry discovered unreported overtime hours totalling approximately 10,000 hours.³⁴ This was cited as evidence of modern slavery and ASI was fined USD 500 million on 16th of December 2024.³⁵ To appease Seratious, the Ministry shared the revised audit and related documents, resulting in favourable diplomatic relations.³⁶ However, ASI's request for transparency on the source of the timesheets was denied and it was not given the opportunity to dispute the evidence.³⁷

12 On 24th of December 2024, the Claimant terminated the JVA citing breaches of labour laws and for the Respondent to pay the USD 500 million fine.³⁸ However, the

²⁸ The Facts at [49].

²⁹ The Facts at [49].

³⁰ The Facts at [50].

³¹ The Facts at [50].

³² The Facts at [51].

³³ The Facts at [51].

³⁴ The Facts at [56].

³⁵ The Facts at [56].

³⁶ The Facts at [58].

³⁷ The Facts at [57].

³⁸ The Facts at [59].

Respondent's CEO brushed off this request and refused to engage with the Claimant.

³⁹ This prompted the Claimant to initiate arbitration proceedings on 28th of December.⁴⁰

³⁹ The Facts at [60].

⁴⁰ The Facts at [60].

SUMMARY OF PLEADINGS**I. THE RESPONENT IS NOT ENTITLED TO INVOKE SOVEREIGN IMMUNITY**

1 Sovereign immunity is predicated on the notion that no state should have the power to preside over another state in a dispute without its consent. As such, the doctrine is irrelevant to an arbitral tribunal. Even if sovereign immunity was relevant, the Respondent is not an agency of Aurion nor was it exercising sovereign authority. Alternatively, the Respondent has waived its right to invoke sovereign immunity by entering into an arbitration agreement.

II. THE CLAIMANT'S INITIATION OF ARBITRATION PROCEEDINGS WAS NOT PREMATURE

2 The Respondent asserts that the Claimant initiated the process prematurely and as such claims that this tribunal is not seized with jurisdiction. However, the non-compliance with pre-arbitration steps goes to the admissibility of the claim and not the tribunal's jurisdiction. Furthermore, the pre-arbitration steps which the Respondent touts are not a condition precedent to the initiation of arbitration. Even if they were, the pre-arbitration steps should not be enforced as they are uncertain and ultimately futile.

III. THE RESPONENT BREACHED THE JOINT VENTURE AGREEMENT

3 The Respondent obligation is to ensure ASI's full compliance with local labour laws. These labour laws include compliance with the ILO Forced Labour Convention, 1930 (No. 29) ("*Forced Labour Convention*"). The Respondent has breached this convention by **(1)** imposing overtime hours in excess of Resolution No 4./2020, **(2)** threatening

wage deductions, (3) withholding passports, and (4) providing poor working conditions.

Furthermore, the Claimant did not contribute to the Respondent's breach.

IV. THE CLAIMANT'S TERMINATION OF THE JOINT VENTURE AGREEMENT WAS LAWFUL

4 The Respondent's breach of the JVA amounts to a fundamental non-performance, which entitles the Claimant to validly terminate the Contract. Further, this termination was not done in bad faith. Alternatively, if the Respondent is not responsible for the fines, then the imposition of the fine is a Force Majeure event, entitling CDI to terminate the contract.

PLEADINGS

I. THE RESPONENT IS NOT ENTITLED TO INVOKE SOVEREIGN IMMUNITY

1 Presently, the Respondent is attempting to invoke the doctrine of sovereign immunity to prevent arbitration proceedings. However, this position is legally untenable. The doctrine of sovereign immunity bears no relevance to arbitration proceedings which is premised on the mutual agreement of parties. Even if it was relevant to arbitration, the doctrine is not applicable to the Respondent as it is not an agency of Aurion. Alternatively, the Respondent has waived its right to invoke sovereign immunity.

A. *Sovereign immunity is inapplicable to arbitration proceedings*

2 Sovereign immunity only prohibits the subjection of one State to the jurisdiction of the courts of another State.⁴¹ This principle is justified on the notion that all sovereign nations are equals. Consequently, no State should have the authority to adjudicate disputes involving other another without its consent. Doing so otherwise “would be derogatory to the former’s dignity and independence.”⁴²

3 However, unlike the courts, an arbitral tribunal *does not* exercise sovereign powers. Instead, the arbitral tribunal derives its power *from* the arbitration agreement.⁴³ This view was endorsed in the 1924 House of Lords case of *Duff Development Co. Ltd. v. Government of Kelantan* where the court held that, “[a]n arbitrator is not a Court and therefore, by appearing before the arbitrator the [sovereign] did not submit himself to

⁴¹ Chamlongrasdr, D. (2007). *Foreign state immunity and arbitration*. Cameron May (“*Foreign State Immunity and Arbitration*”) at [3.4].

⁴² *Foreign State Immunity and Arbitration* at [2.4].

⁴³ *Foreign State Immunity and Arbitration* at [3.4].

the jurisdiction of the Courts.”⁴⁴ Furthermore, in the 1974 ICC Award of *Solel Boneh Intl Ltd v The Republic of Uganda*, the arbitrator in deciding whether the respondent’s claim of immunity should be accepted, held that the question was moot as the doctrine had no relevance to the arbitration proceedings.⁴⁵

4 This view has also been widely accepted as seen in the *1989 Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises* (“**Resolution**”) adopted by the Institute of International Law. Article 9 of the Resolution states that a tribunal’s jurisdiction cannot be denied based on a State’s sovereign status in an arbitration between a State or a State entity and a foreign enterprise. Thus, sovereign immunity is inapplicable to arbitration.

B. Even if sovereign immunity was relevant, it does not apply to the Respondent

5 Preliminarily, the relevant law in determining whether sovereign immunity is applicable to a party is the United Nations Convention on Jurisdictional Immunities of State and their Property (“**UNCIS**”). The UNCIS reflects aspects of customary international law regarding sovereign immunity,⁴⁶ and has been ratified by Aurion, the seat of arbitration. Accordingly, this tribunal should apply the UNCIS to determine whether sovereign immunity is applicable to the Respondent.

6 The protection of sovereign immunity is only afforded to foreign States “in respect of itself and its property” pursuant to the UNCIS.⁴⁷ However, the Respondent being a

⁴⁴ *Duff Development Co. Ltd. v. Government of Kelantan* [1924] A.C. 797.

⁴⁵ *Solel Boneh Intl Ltd (Israel) and Water Resources Development Intl (Israel) v The Republic of Uganda and National Housing and Construction Corp of Uganda* ICC Award No 2321 (4 July 1974) (“**Solel Boneh**”).

⁴⁶ Dixon, M. (2013). *Textbook on international law* (7th ed.). Oxford University Press. at pg 216.

⁴⁷ United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (“**UNCIS**”), Article 5.

separate legal entity, is distinct from the State of Aurion and was not exercising sovereign authority. Therefore, the doctrine is inapplicable to the Respondent.

(1) *The Respondent is not an agency of the State of Aurion*

7 Presently, the Respondent does not fall within the definition of ‘State’ under Article 2 of the UNCIS, which defines a State as “‘agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.’”. From this definition, two elements must be fulfilled for the Respondent to invoke sovereign immunity – it must be (1) an agency of the State and (2) exercising sovereign authority.

8 When a State forms a separate legal entity for commercial or industrial purposes, a strong presumption arises that the entity is legally distinct from the State itself.⁴⁸ Furthermore, State-owned enterprises are not automatically entitled to sovereign immunity.⁴⁹ To determine whether an entity is separate from the State, “the court has to conduct an investigation into the entity’s incorporation, separate personality, status and its relationship with the State.”⁵⁰

9 This was applied in the 2008 English High Court case of *Ministry of Trade of the Republic of Iraq v. Tsavliris Salvage (“Tsavliris”)*, where the Court had to determine whether the Grain Board of Iraq (“GBI”) was a legally distinct entity or functioned as a department within the Iraqi Ministry of Trade (“MOT”). If the latter, GBI would be entitled to sovereign immunity, and the arbitral award could not be enforced. The Court

⁴⁸ *La Generale des Carrieres et des Mines v. F G Hemisphere Associates LLC* [2012] UKPC 27 (“*La Generale*”).

⁴⁹ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529.

⁵⁰ Yang, X. (2012). *State immunity in international law*. Cambridge University Press. (“*State immunity in international law*”) at pg235.

concluded that GBI was independent from the government despite being “State established, capitalised and owned and although its employees were hired in accordance with the law governing the civil service.”⁵¹ The decision turned on GBI’s separate legal identity together with its financial and administrative independence from the government.⁵²

10 Presently, there are reports that the Respondent’s capital requirements were financed by Aurion’s public treasury.⁵³ However, the reliability of this claim is questionable, as it originates from “an individual with a leadership role in the opposition party.”⁵⁴ Furthermore, the Respondent’s internal policies and practices are said to mirror those of the Ministry of Economy.⁵⁵ Even if these statements are true, it does not show that the Respondent was under government direction or control. It only indicates that the Respondent chose to align its practices with the Ministry – something which any private entity can choose to do as well.

11 President Ho has also repeatedly emphasised that the Respondent is a “commercially autonomous vehicle”.⁵⁶ The Respondent has also been described as President Ho’s “pet project.”⁵⁷ Accordingly, President Ho was acting in his personal capacity and not in his presidential position. Therefore, like GBI in *Tsavliris*, the Respondent is independent from the government of Aurion and it should not be considered an agency of Aurion.

(2) *The Respondent was not exercising sovereign authority*

⁵¹ *State immunity in international law* at pgs 235-236.

⁵² *Ministry of Trade of the Republic of Iraq v. Tsavliris Salvage (International) Ltd* [2008] 2 Lloyd’s Rep. 90 (QB) (“*Tsavliris*”).

⁵³ The Facts at [27].

⁵⁴ Clarification no. 12.

⁵⁵ The Facts at [28].

⁵⁶ The Facts at [10].

⁵⁷ The Facts at [27].

- 12 An act cannot concurrently possess the attributes of sovereign authority and commercial character. Its legal classification must fall distinctly into one category or the other.⁵⁸ The general principle is that an act is a sovereign act if it can only be carried out by a State.⁵⁹ Furthermore, the UNCIS provides that when assessing whether a contract or transaction is commercial transaction, reference should be primarily made to the nature of the contract.⁶⁰
- 13 On the contrary, immunity does not apply where the conduct is inherently commercial and mirrors those of private market players.⁶¹ This was applied in the 1982 US District Court case of *Gibbons & Beiseigel v. Udaras na Gaeltachta* (“**Gibbons**”), where two U.S. investors entered into a joint venture with Udaras na Gaeltachta (“**UG**”) and Ireland’s Industrial Development Authority (“**IDA**”) to establish a company in Ireland to manufacture metallized plastic containers.⁶² On the issue of whether the joint venture was a commercial transaction, the court held that even if the purpose of the IDA was to advance Ireland’s economic policy, the nature of the activities it carried out were indistinguishable from what a private entity could do. Accordingly, sovereign immunity did not apply in that case.
- 14 Similarly, in the 1984 French Court of Cassation case of *Société Eurodif S.A. v République Islamique d’Iran* (“**Eurodif**”), enriched uranium was to be supplied by Eurodif (a French company) to an Iranian agency.⁶³ On breaching the contract, the

⁵⁸ Hazel Fox & Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd Ed, 2013) at pgs 194–195.

⁵⁹ Reece Thomas, K. (2024). *The commercial activity exception to state immunity: An introduction*. Edward Elgar Publishing (“**The commercial activity exception to state immunity**”) at pg 112.

⁶⁰ UNCIS, Article 2.

⁶¹ *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2017] HCA 21.

⁶² *Gibbons & Beiseigel v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) (“**Gibbons**”).

⁶³ *Société Eurodif S.A. v République Islamique d’Iran* Judgment of Mar. 14, 1984, Cass. civ., 1984 Juris-Classeur périodique [JCP] II 20,205, 23 ILM 1062 (1984) (“**Eurodif**”).

Iranian agency sought to argue that the transaction was a governmental act and therefore had sovereign immunity. The court rejected the argument and held that the basic features of the transaction did not differ from similar ventures regarding large and complex industrial projects. This was notwithstanding the identity of the participants and their motivations – Iran’s national nuclear program (a sovereign purpose).

15 Presently, the nature of the JVA is purely commercial on the facts. The parties entered the JVA for the construction of a semiconductor factory and the subsequent production and export of semiconductors. Similar to *Gibbons* and *Eurodif*, the nature of the JVA is no different from an industrial contract which is indistinguishable from what private entities can do.

16 The Respondent may argue that it was exercising sovereign authority as its decision to enter the JVA is connected to the Aurion government’s broader economic reform. However, as highlighted by the cases above, this is an irrelevant factor towards the characterisation of the act itself which is inherently commercial. Therefore, the Respondent was not exercising sovereign authority in relation to the JVA.

C. Alternatively, the Respondent has waived its sovereign immunity

17 Sovereign immunity comprises of immunity from jurisdiction (“IOJ”) and immunity from execution (“IOE”). IOJ means that a sovereign State cannot be compelled to submit to the jurisdiction of another State. On the other hand, IOE refers to the immunity that a State enjoys from being subject to any measures of constraint by a

national court.⁶⁴ Presently, by entering into the arbitration agreement, the Respondent has waived both IOJ and IOE.

(1) *The Respondent has waived its immunity to jurisdiction*

18 Even if sovereign immunity is relevant and applicable to arbitration, the act of entering into an arbitration agreement amounts to an implied waiver of IOJ. In the 1984 ICC Award of *Westland Helicopters Ltd v Arab Organisation for Industrialisation*,⁶⁵ the arbitral tribunal applied the legal principles of the seat to decide on the issue of sovereign immunity. There, under Swiss law, the foreign State could not enjoy the protection of IOJ as submission to arbitration amounted to an implied waiver.

19 Currently, Clause 11 of the JVA is an agreement to arbitrate disputes between parties. Furthermore, the UNCIS, which Aurion as the seat of arbitration has ratified, also takes a similar view towards the effect of arbitration agreements on IOJ.⁶⁶ Hence, the arbitration agreement should be construed as a waiver of IOJ by the Respondent.

(2) *The Respondent has waived its immunity to execution*

20 A waiver of IOE is required to be express and distinct from a waiver of IOJ.⁶⁷ This requirement can be satisfied if the arbitration agreement incorporates institutional rules that contains provisions amounting to a waiver of IOE. This was applied in the 2000 French Court of Cassation case of *Creighton Ltd v. Qatar*,⁶⁸ the court held that an

⁶⁴ Meng, Zixin. *State Immunity and International Investment Law*. Singapore: Springer, 2022 at p 60.

⁶⁵ *Westland Helicopters Ltd v Arab Organisation for Industrialisation* ICC Award No. 3879, 23 I.L.M. 1071, 1089 (1984).

⁶⁶ UNCIS, Article 17.

⁶⁷ UNCIS, Article 20.

⁶⁸ *Creighton Ltd v. Qatar (2000)*. Decision of 6 July 2000. *Yearbook Commercial Arbitration*, XXV, 458–460. (“*Creighton*”).

agreement to arbitrate under the ICC Rules, which required parties to carry out the award without delay was an implicit waiver of IOE.

21 Presently the Respondent has submitted to resolve disputes by arbitration pursuant to AIAC Rules in Clause 11(a) of the JVA.⁶⁹ In doing so, the Respondent has committed to abiding by the AIAC Rules which specifies that “the Parties undertake to carry out the Award immediately and without delay, and *irrevocably waive* their rights to any form of appeal, review or recourse to any court.”⁷⁰ Accordingly, this rule should be interpreted as an waiver of IOE by the Respondent.

II. THE CLAIMANT’S INITIATION OF ARBITRATION PROCEEDINGS WAS NOT PREMATURE

22 The Respondent asserts that the Claimant initiated the process prematurely and as such claims that this tribunal is not seized with jurisdiction. However, the non-compliance with pre-arbitration steps goes to the admissibility of the claim and not the tribunal’s jurisdiction.

23 Furthermore, the pre-arbitration steps which the Respondent touts are not a condition precedent to the initiation of arbitration. Even if they were, the pre-arbitration steps should not be enforced as they are uncertain and ultimately futile.

A. The non-compliance of pre-arbitration steps goes to the admissibility of the claim

24 As a preliminary point, the tribunal is seized with jurisdiction and may choose to proceed with the arbitration regardless of non-compliance with the pre-arbitration steps.

⁶⁹ Moot Problem, Exhibit 4.

⁷⁰ *AIAC Arbitration Rules 2023*, Rule 17.

The issue of non-compliance of pre-arbitration steps goes to whether the claim should be heard by the tribunal and not whether the claim can even be brought before the tribunal.⁷¹ Therefore, the tribunal is seized with jurisdiction despite the Respondent's contention to the contrary.

25 Although the orthodox position considers the non-compliance with pre-arbitration steps as directly affecting the jurisdiction of the tribunal,⁷² this position has shifted in the recent years. Countries such as England and Hong Kong have departed from the orthodox position in favour of pro-arbitration views. This can be seen in cases such as 2021 English High Court case of *Republic of Sierra Leone v SL Mining Ltd*⁷³ and the 2022 Hong Kong Court of Appeal case of *C v D*⁷⁴.

26 In those cases, the non-compliance of pre-arbitration steps did not affect the jurisdiction of the arbitral tribunal but rather concerned the admissibility of the claim. This was justified on the basis that the common intention of parties in entering an arbitration agreement is to seek swift and final determination of disputes. Accordingly, courts should avoid enforcing any contrary construction to this intention. Likewise, this tribunal should find that the non-compliance of pre-arbitration steps goes to the admissibility of the claim.

B. The pre-arbitration steps are not a condition precedent to the initiation of arbitration

(1) *Clause 10.1 is not a condition precedent as it is unclear*

⁷¹ *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) at [21].

⁷² *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) at [12].

⁷³ *The Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286.

⁷⁴ *C v D* [2022] HKCA 729.

27 Generally, clear words are necessary to create a condition precedent to arbitration. This area of the law is settled and can be seen from a line of authorities which are consistent in this matter.⁷⁵ The rationale behind this requirement is to promote the efficacy of arbitration proceedings without parties having to contest whether a Clause is a condition precedent in addition to the substantive disputes submitted to arbitration.⁷⁶

28 The pre-arbitration steps in Clause 10.1 of the JVA do not contain such express words which are necessary to create a condition precedent to arbitration.⁷⁷ In the 2014 English High Court case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*, the court found that the clauses required parties to *first* seek to resolve disputes through friendly discussions *before* initiating arbitration. However, the negotiation requirement in Clause 10.1 (“**negotiation-step**”) does not contain such phrasing.⁷⁸ Nothing in Clause 10.1 requires negotiations before a party can initiate arbitration proceedings. Therefore, it is still open for parties to attempt other forms of dispute resolution without first attempting negotiations.

(2) *Clause 10.2 is not a condition precedent as it does not meet the standard of Fair and Equitable under the BIT*

29 The joint venture agreement was part of the bilateral investment treaty between the different states. The bilateral investment treaty was described as a platform to ensure

⁷⁵ *Halifax Financial Services Limited v Intuitive Systems Limited* [1999] 1 All ER (Comm) 303 at 307; *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 (“**Lufthansa (HC)**”) at [100] and endorsed in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 (“**Lufthansa (CA)**”) at [54]; *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (“**Emirates**”); *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC) (“**Ohpen**”).

⁷⁶ *CZQ v CZS* [2023] SGHC 16.

⁷⁷ Moot Problem, Exhibit 4.

⁷⁸ Exhibit 10, Clause 10.

“fair and equitable” treatment.⁷⁹ According to the UN Conference on Trade and Development (“UNCTAD”), the term “fair and equitable” connotes certain obligations. One obligation is the “prohibition of denial of justice and due process”.⁸⁰ The UNCTAD held that a court’s lack of independence from the legislative and executive branches of the state constitutes a denial of justice and due process. In the 2003 SCC Award of *Petrobart v. Kyrgyz Republic*,⁸¹ the tribunal held that the Kyrgyz Republic’s executive interference – through requesting a stay of enforcement – undermined the judicial process, breaching the fair and equitable treatment standard.⁸² Similarly, the ministerial consent effectively allows the executive to unilaterally obstruct access to justice. This undermines procedural fairness as it conditions a party’s access to dispute resolution on the arbitrary will of a government official.

C. In any event, the negotiation step is too vague to be enforced

30 Even if the pre-arbitration steps in Clause 10 are found to be conditions precedent to arbitration, they should not be enforced. The pre-arbitration steps should not be enforced for lack of certainty. Even if they are certain, compliance should not be mandated as adherence would ultimately be futile.

(1) Clause 10.1 is uncertain

31 Pre-arbitration clauses are only enforceable if they are “sufficiently certain” such that there is no need for further agreement at any stage before matters can proceed.⁸³ The clause must be certain enough for a court to objectively determine, from the clause itself,

⁷⁹ Exhibit 1.

⁸⁰ United Nations Conference on Trade and Development. (2012). Fair and equitable treatment: A sequel (UNCTAD/DIAE/IA/2011/5, p. 80).

⁸¹ *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003.

⁸² *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003 at pg 28.

⁸³ *Holloway v Chancery Mead* [2008] 1 All ER (Comm) 653 at [81].

what minimum actions need to be taken to fulfil the requirements. Presently, whilst Clause 10.1 outlines the methods by which negotiation is to begin, it does not specify when such negotiations are deemed satisfactory.

32 In the 1982 US District Court case of *Candid Productions v. International Skating Union* (“**Candid Productions**”), a clause requiring “[negotiation] in good faith” was found to be unenforceable. It held that it would not be able to conclude definitively when a party’s request was contrary to “good faith negotiations”. Further, the court could not imply requirements of good faith that were not stated in the contract, such as “[making] offers and counteroffers” and “[continuing] negotiations for a sufficient minimum period of time” as doing so would be to “impermissively make a contract for the parties”.⁸⁴

33 Conversely, in cases where negotiation steps were deemed to be valid, the terms were far more detailed. For example, the dispute resolution clause in *Fluor Enters v Solutia* provided for multiple stages of negotiations, where each stage required the efforts of different levels of management for a specified time before the next resolution effort could begin.⁸⁵ In *White v Kampner*, a clause to negotiate was upheld as the dispute resolution clause specified that at minimum two negotiation sessions were needed as a precondition to arbitration.⁸⁶

34 Although the negotiation step in the present case has more detail regarding the commencement of negotiations than the clause in *Candid Productions*, it does not outline the specific requirements that must be hit before commencing arbitration unlike

⁸⁴ *Candid Productions v. International Skating Union* (“**Candid Productions**”), 530 F. Supp. 1330 (S.D.N.Y.1982) at note 1333.

⁸⁵ *Fluor Enters v Solutia Inc.*, 147 F. Supp. 2d 648 at note 1.

⁸⁶ *White v Kampner*, 641 A2d 1381, 1382 (Conn 1994).

the clause in *White v Kampner*. As such, the certainty of Clause 10.1 is closer to *Candid Productions* than *White v Kampner*. Accordingly, Clause 10.1 should not be enforced as it is too uncertain.

(2) *Alternatively, negotiations would be futile*

35 Even if pre-arbitration steps are enforceable, they should not be enforced in the event of futility.⁸⁷ In *Kompozit v Moldova*, the cooling-off period provided for in the treaty was not enforced due to futility, as evidenced by Moldova's repeated refusal to engage in discussions, despite Kompozit sending a notice of dispute in compliance with their dispute resolution clause.

36 Similarly, in the present case even if parties were to commence negotiations there would be no chance of a successful resolution. This is evinced by the Respondent's CEO explicitly asking the Claimant to "Piss off" and that "[the claimant's] demand is nonsense". Further, Respondent's CEO had told the Claimant to "Fly kites and go back to your country". Here, the Respondent's CEO's statements are not merely dismissive, they are hostile and derogatory, demonstrating a complete breakdown of the relationship and an absence of any intention to pursue resolution through negotiation.

37 Requiring the Claimant to nevertheless initiate negotiations under such circumstances serves no practical purpose and would only delay the claimant's access to justice. Accordingly, the pre-arbitration steps should not be enforced due to futility.

⁸⁷ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ("Tienver v Argentina") ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) at [126]-[129]; *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction (18 July 2013) at [364]; *Kompozit LLC v. Republic of Moldova*, ("Kompozit v Moldova") SCC Emergency Arbitration No. EA (2016/095) & SCC Case No. 2016/113, Emergency Award on Interim Measures (14 June 2016) at [55].

III. THE RESPONDENT BREACHED THE JVA

38 Under the JVA, the Respondent must ensure full compliance with local labour laws. This includes compliance with the ILO Forced Labour Convention, 1930 (No. 29) (“*Forced Labour Convention*”). The Respondent breached this convention by failing to ensure ASI’s full compliance with local labour laws. Furthermore, the Respondent cannot argue that the Claimant contributed to the Respondent’s breach.

A. *The Respondent’s obligation is to ensure ASI’s full compliance with local labour laws*

39 Following Article 4.4 of the UNIDROIT Principles of International Commercial Contracts (2016) (“**the PICC**”), the terms of a contract shall be interpreted in the light of the whole contract that they appear in. The various obligations under Clause 4.2 of the JVA, which range from managing the recruitment of the local labour force to securing all operational permits, show how the Respondent was meant to have full ownership over operational tasks in Aurion.

40 Furthermore, the obligations in Clause 4.1 of the JVA showcase how the Claimant was meant to focus on providing support to ensure the commercial viability of ASI. The Claimant was only responsible for providing initial capital investments and technological expertise to ASI, not for handling operational tasks in Aurion. Therefore, it was the Respondent’s obligation to ensure ASI’s full compliance with local labour laws.

B. *The JVA incorporates the Forced Labour Convention*

41 The labour and employment laws in the JVA refer to the Forced Labour Convention. Following Clause 4.2(f) of the JVA, “RMG shall be responsible for ensuring the full compliance with all applicable labour and employment laws”.⁸⁸ Clause 4.2(f) can be interpreted using Article 4.1(2) of the UNIDROIT Principles of International Commercial Contracts (2016) (“PICC”). Article 4.1(2) discusses the reasonable person test which refers to how the “average honest and diligent business person” would interpret the meaning of a contract.⁸⁹

42 A reasonable person would interpret Clause 4.2(f) as being inclusive of forced labour convention laws. The news article highlighted how it is public knowledge that Aurion has ratified the forced labour convention.⁹⁰ Furthermore, the Aurion Labour Code 1994 declares the application of the forced labour convention without modification.⁹¹ Considering such context, a reasonable person would likely interpret Clause 4.2(f) as being inclusive of the forced labour convention, especially given how the Respondent was incorporated under Aurion corporation laws.

C. The Respondent has failed to ensure that ASI has complied with the Force Labour Convention

43 According to Article (2)(1) of the Forced Labour Convention, there are three elements of forced labour:⁹²

- (a) work;

⁸⁸ Exhibit 4, page 4.

⁸⁹ *Europe v The Canadian Affiliate of a Chinese Group, Zurich Chamber of Commerce*, Preliminary Award on Jurisdiction, 25 November 1994.

⁹⁰ Exhibit 2.

⁹¹ Correction and additional clarifications to the moot problem, page 1.

⁹² International Labour Organization. (1930). *Forced Labour Convention (No. 29)*, Article 2(1).

(b) menace of penalty; and

(c) involuntary offer.

44 The Respondent breached Clause 4.2(f) of the Joint Venture Agreement as they failed to ensure that ASI complied with the Forced Labour Convention. The Respondent has breached this convention by (1) imposing overtime hours in excess of Resolution No 4./2020, (2) threatening wage deductions, (3) withholding passports, and (4) providing poor working conditions.

(1) *The Respondent breached Resolution No 4./2020*

45 The ILO's Committee of Experts indicated that doing overtime above the limits set by national legislation might constitute a forced labour breach.⁹³ Under Resolution No 4./2020, the legal working hour limit is 8 hours per day or 48 hours per week. Overtime is permissible only by mutual agreement and must not exceed 300 hours per week. In the 2008 Criminal Court Rio de Janeiro case of *Public Federal Ministry v Jose Gomes dos Santos Neto*, the Brazilian court found employers guilty of debt servitude when workers worked 16-hour days from 7am-11pm which totalled to 112 hours.⁹⁴ This case was cited by the ILO as an example of how overtime hours amount to forced labour.

46 The Respondent had breached Resolution No 4/2020 by failing to ensure ASI's compliance with the resolution. The actual overtime hours were 10,000 hours higher than initially reported.⁹⁵ Although the precise overtime hours per workers were

⁹³ International Labour Office. (2007). General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) (Report III, Part 1B, p. 71). Geneva: International Labour Organization.

⁹⁴ *Public Federal Ministry v. José Gomes dos Santos Neto*, Judgment N°2007.5101.811659-4 (Criminal Court Rio de Janeiro, 22 April 2008) (“*Neto*”).

⁹⁵ The Facts at [56].

unknown, the unexplained excess of 10,000 hours points to a likelihood that workers were subjected to working hours far beyond the permissible limits. Just as the excessive working hours in *Neto* constituted compelling evidence of forced labour, the sheer scale of underreporting here indicates not only a breach of labour regulations, but also systematic concealment of violations. Such underreporting serves as an implicit admission that the working hours were unlawful, further reinforcing the gravity of the breach.

(2) *The Respondent threatened their workers with wage deductions*

47 The threat of deduction of wages in the IIC report indicates forced labour.⁹⁶ According to the ILO's indicators of forced labour, systematic withholding of wages to compel work constitutes forced labour.⁹⁷ This is supported by the CEACR (Committee of Experts on the Application of Conventions and Recommendations) Individual Observation Concerning Convention No 29 (Guatemala) which notes the vulnerability of workers who *in theory* have the choice of not working beyond normal working hours, but for whom *in practice* the choice is not a real one in view of their need to earn at least the minimum wage.⁹⁸ Here, according to the IIC report, about 54% of workers indicated that overtime was imposed to meet KPIs under the threat of the deduction of wages.⁹⁹ The large percentage of workers who made this claim indicates that the threat of the deduction of wages was frequent enough for the workers to make such claim. This points to potential systematic and deliberate withholding of wages.

⁹⁶ Exhibit 10, Clause 3.4.

⁹⁷ International Labour Office. (2012). ILO indicators of forced labour (p. 19). Geneva: International Labour Organization.

⁹⁸ CEACR: Individual Observation Concerning Convention No. 29 (Guatemala) (2004).

⁹⁹ Exhibit 10, Clause 3.4.

48 The Respondent might try to dispute this claim by highlighting how the remaining 46% workers emphasised that the overtime was voluntary and not forced.¹⁰⁰ While some workers might claim that this overtime work was “voluntary”, the facts suggest otherwise. As the IIC acknowledges, the workers skipped breaks and meals. The frequency of the workers having to skip breaks and meals showcases that the work given to the workers was excessive and they had to cut down their rest to hit key KPIs. While these workers may outwardly claim that the work was voluntary, the behaviour of skipping meals showcase how they might have internalised pressures to comply.

49 Secondly, it is notable that approximately 92% of the local workforce originated from Northern Aurion,¹⁰¹ a region historically less economically developed than Southern Aurion.¹⁰² This suggests that the workers were more likely to be economically vulnerable. Although the overtime pay was nominally characterised as “voluntary”, the structural realities faced by these workers, who were incentivised to work longer hours in pursuit of bonuses, point to a system that leverages economic pressure to secure compliance. This supports the inference that the remuneration scheme was intentionally structured to induce extended working hours, not through explicit coercion, but through financial necessity.

50 Even if the credibility of the whistleblower’s timesheet is disputed, the initial IIC report indicates that there was menace of penalty as workers were threatened to work excessively long hours. Though some workers seemingly agreed to these conditions, their status as members of a vulnerable group demonstrates how the Respondent

¹⁰⁰ Exhibit 10, Clause 3.4.

¹⁰¹ Clarifications and Additional Clarifications to the Moot Problem, pg 2.

¹⁰² The Facts at [6].

exploited their economic insecurity to coerce them into working extra hours. Forced labour is made out as the workers did not freely give their consent.

(3) *The Respondent withheld the passports of the workers*

51 According to the ILO's indicators of forced labour, the retention of identity documents constitutes an element of forced labour “if workers are unable to access these items on demand”.¹⁰³ In the 2005 European Court of Human Rights case of *Siliadin v France*,¹⁰⁴ the plaintiff Siliadin arrived from Togo and had her passport confiscated. Although she was led to believe her immigration status would be regularised, her passport was not returned for 2 years.¹⁰⁵ The retention of passports constitutes an involuntary offer as workers are unable to “obtain other jobs or access essential services”.¹⁰⁶

52 Similarly, the workers were given assurances that their immigration status would be regularised, and their passports would be returned to them. However, no specific timeline was provided, and crucially, no passports were ever returned.¹⁰⁷ The lack of a definite timeframe weakens the credibility of the Respondent’s explanation and casts doubt on the legitimacy of its processes. More importantly, the workers’ inability to access their identity documents on demand squarely satisfies the ILO’s criteria for document retention as an indicator of forced labour. Without their identity documents,

¹⁰³ International Labour Office. (2012). *ILO indicators of forced labour* (p. 17). Geneva: International Labour Organization.

¹⁰⁴ *Siliadin v. France*, Application No. 73316/01 (26 July 2005).

¹⁰⁵ *Siliadin v. France*, Application No. 73316/01 (26 July 2005) at [14] – [17].

¹⁰⁶ International Labour Office. (2012). *ILO indicators of forced labour* (p. 17). Geneva: International Labour Organization.

¹⁰⁷ Clarifications and Additional Clarifications to the Moot Problem, pg 1.

the workers would be pressured to work involuntarily as they are unable to obtain other jobs or access essential services.¹⁰⁸

(4) *The Respondent failed to ensure adequate living conditions*

53 According to the ILO's indicators of forced labour, one indication of forced labour is when labourers are "subjected to substandard living conditions, made to live in overcrowded and unhealthy conditions without any privacy".¹⁰⁹ Although substandard living conditions alone do not amount to forced labour, the ILO has stated that such conditions represent an "alert" to the potential existence of forced labour.¹¹⁰ In the 2007 Court of Appeal of Liège case of *Public Ministry v Wang Li Kang, Wang Qi et al.*,¹¹¹ the court found forced labour existed where workers were living in unsanitary conditions, with only mattresses on the construction site for sleeping. The IIC Committee's Report reveals that workers in Aurion were housed in congested conditions, with six workers confined to 185-square-foot rooms.¹¹² While sleeping in a construction site and housing in congested conditions might differ in form, these substandard living conditions are similar in that they likely compromised the workers' health and well-being.

54 The Respondent may attempt to justify these substandard living conditions by characterising them as "temporary", and the workers would be moved into better accommodation. However, these assurances are undermined by the great vagueness in

¹⁰⁸ International Labour Office. (2012). *ILO indicators of forced labour* (p. 17). Geneva: International Labour Organization.

¹⁰⁹ International Labour Office. (2012). *ILO indicators of forced labour* (p. 23). Geneva: International Labour Organization.

¹¹⁰ International Labour Office. (2012). *ILO indicators of forced labour* (p. 23). Geneva: International Labour Organization.

¹¹¹ *Public Ministry v. Wang Li Kang, Wang Qi et al.*, Court of Appeal of Liège, Decision No. 2007/245 (24 January 2007).

¹¹² Exhibit 10, Clause 3.5.

the term “temporary condition”.¹¹³ No clear timeline was given to the workers as to when they would be moved into a better accommodation. This lack of transparency and follow-through gives rise to the inference that the Respondent cannot be relied upon to honour its commitments.

55 Ultimately, the breach of Resolution No 4/2020, the threat of wage deductions, the withholding of passports, and the poor living conditions point to forced labour. Workers were subjected to exploitative conditions such as financial threats and mobility restrictions that forced them to work without free and informed consent. These exploitative practices eliminated any meaningful choice leading to a breach of Clause 4.2(f).

D. The Respondent cannot argue that the Claimant contributed to the Respondent’s breach

56 Following Article 7.1.2 of PICC, a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party’s act or omission or by another event that the first party bears the risk.¹¹⁴ The Respondent might argue that the Claimant’s commercial pressure, such as requesting shortened timeline and lower labour costs, led the Respondent to fail in their obligations regarding forced labour. However, this argument is flawed.

57 The Respondent cannot argue that the Claimant’s commercial pressure led the Respondent to fail in their labour obligations as it does not fall within the scope of Article 7.1.2. According to the UNIDROIT Principles of International Commercial

¹¹³ Exhibit 10, Clause 3.5.

¹¹⁴ UNIDROIT. (2016). *UNIDROIT Principles of International Commercial Contracts* (Art. 7.1.2). International Institute for the Unification of Private Law.

Contracts 2016 commentary to Article 7.1.2, actions that are fall under the scope of Article 7.1.2 are those that were made impossible or were partially impeded by the counterparty. The illustration to Article 7.1.2 indicates that if A agrees to begin construction on B's land on 1 February, but B locks the gate and denies A access, B cannot subsequently claim that A failed to perform. This illustration sets the context for the impossibility of performance.¹¹⁵

58 Here, the Claimant's actions do not amount to impossibility of performance. The Claimant has merely made business requests such as a shortened timeline and lower labour costs. These are ordinary features of commercial negotiations and do not in themselves prevent the Respondent from discharging its independent obligations to comply with the applicable labour laws. The threshold for Article 7.1.2 is when the obligee's conduct renders the performance impossible and not merely more burdensome or commercially less attractive.¹¹⁶ The Respondent retained full responsibility for managing its labour processes such as recruitment practices and subcontractor oversight. No evidence suggests that the Claimant obstructed or coerced the Respondent in any way that would have made legal compliance unattainable. Thus, the Claimant's actions do not amount to creating an impossibility of performance.

59 The Claimant's actions do not fit within the criteria of the partial impediment. The test for this is "if the contribution of the obligor" to the amount of damages substantially "outweighs" the contribution of the obligee.¹¹⁷ The contribution of the Claimant does

¹¹⁵ UNIDROIT. (2016). *UNIDROIT Principles of International Commercial Contracts* (pp. 228–229). Rome: International Institute for the Unification of Private Law.

¹¹⁶ Brödermann, E. (2023). *UNIDROIT Principles of International Commercial Contracts: An article-by-article commentary* (2nd ed., p. 4). Kluwer Law International.

¹¹⁷ Brödermann, E. (2023). *UNIDROIT Principles of International Commercial Contracts: An article-by-article commentary* (2nd ed., p. 4). Kluwer Law International.

not substantially outweigh the contribution of the Respondent. There were no punitive consequences placed on the Respondent for not meeting the timeline. The Respondent was under no contractual compulsion to respond to these expectations through unlawful means. If the Respondent chose to breach labour and employment obligations, that decision lies squarely within the Respondent's sphere of responsibility under Article 4.2(f) of the UNIDROIT principles.

60 Although the Respondent might claim that the Claimant did not raise any objections against the engagement with BWS, the Respondent cannot rely on this. At the outset, BWS had no reputation for labour violations. The Claimant had no reason at the time to raise objections against the selection of BWS as an agency. Therefore, the court should not find that the Respondent has availed itself of Article 7.1.2 of the UNIDROIT principles and non-performance should remain as such.

IV. THE CLAIMANT'S TERMINATION OF THE JOINT VENTURE AGREEMENT WAS LAWFUL

61 Clause 8.1 of the JVA mandates that for the Claimant to terminate the contract, there must be a "fundamental non-performance" of the contract. A "fundamental non-performance" is a material breach that substantially deprives the aggrieved party of its legitimate expectations under the contract.¹¹⁸ The Respondent has materially breached Clause 4.2(f).¹¹⁹ Accordingly, The Claimant is entitled to terminate the contract.¹²⁰

¹¹⁸ UNIDROIT, Principles of International Commercial Contracts (2016).

¹¹⁹ Exhibit 4 Clause 4.2.

¹²⁰ Exhibit 4 Clause 8.1.

62 Alternatively, if the Respondent did not breach Clause 4.2(f), then the imposition of the fine would amount to a Force Majeure event.¹²¹ Clause 8.3 of the JVA provides that in the event of a Force Majeure event, either party is entitled to terminate the contract.¹²² Accordingly, the Claimant's termination of the JVA was lawful.

A. Respondent's breach amounts to a fundamental "non-performance".

63 Clause 8.1 of the JVA permits termination where there is a "fundamental non-performance". Under Article 7.3.1(2) of the UNIDROIT Principles, the following factors must be considered when determining whether "non-performance" rises to the level of a fundamental "non-performance".¹²³

- (a) The non-performance substantially deprives the aggrieved party of what it is entitled to expect under the contract;
- (b) Strict compliance with the obligation, which has not been performed, is of the essence;
- (c) The non-performance is intentional or reckless;
- (d) The non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; and
- (e) The non-performing party will suffer disproportionate loss as a result of the termination.

¹²¹ Exhibit 4 Clause 8.3.

¹²² Exhibit 4 Clause 8.3.

¹²³ UNIDROIT, Principles of International Commercial Contracts (2016).

64 Presently, factors (a), (d) and (e) are resolved in favour of the Claimant, while there is insufficient evidence to conclude on factors (b) and (c).

65 The Claimant entered the JVA with the expectation that ASI would operate in full compliance with local regulations, thereby ensuring sustained production and long-term credibility in the Aurion market. However, the Respondent's breach led to the suspension of operations, contractual penalties, and reputational harm.¹²⁴ Several cornerstone clients began reassessing their commitments, with some issuing formal notices of intent to terminate.¹²⁵ Accordingly, the Claimant's expectations were substantially deprived.

66 The wording of the clause and the broader context suggests that Clause 4.2(f) was one of strict compliance. Since obligation 4.2(f) was to ensure local compliance, without which the project would face numerous regulatory hurdles, it is likely that it is meant to be understood as an obligation of strict compliance.

67 The contravention of labour laws had been an ongoing matter for nearly the entirety of the project. The extent and duration of the breaches prevents the Claimant from relying on the Respondent's performance.

68 The only loss incurred by the Respondent is from the fine which the Claimant refuses to pay. Since the fine was a direct consequence of the Respondent's own actions, the losses incurred are a proportionate consequence.

69 Taken together, the factors in Article 7.3.1 of the PICC weigh in favour of the Claimant. The Respondent's breach deprived the Claimant of its core expectations and

¹²⁴ The Facts at [51].

¹²⁵ The Facts at [51].

demonstrated a sustained inability to perform contractual obligations. The obligation required of the Respondent was one of strict adherence and the Claimant's termination does not impose a disproportionate loss on the Respondent. Accordingly, the Respondent's breach rises to the level of a fundamental non-performance, thereby justifying the Claimant's termination.

B. *CDI's termination was in good faith*

70 Article 1.7 of the UNIDROIT Principles imposes a general duty on parties to act in good faith and observe fair dealing in international trade.¹²⁶ The Claimant's decision to terminate the JVA was consistent with this obligation. The Respondent alleges that the termination was motivated by the Claimant's desire to avoid liability for the USD 500 million fine.¹²⁷ This assertion is untenable. The decision to terminate was taken only after the Aurion Ministry of Labour publicly confirmed that ASI had engaged in "modern-day slavery," a finding that definitively confirmed that the Respondent had breached Clause 4.2(f) of the JVA.¹²⁸

C. *Alternatively, the imposition of fine is a force majeure event, entitling CDI to terminate the contract.*

71 If the Tribunal finds that the Respondent did not fundamentally breach the JVA, then the imposition of the USD 500 million fine by the Aurion government constitutes a force majeure event. Clause 8.3 provides that a party may terminate the agreement if it is "unable to perform its obligations due to an event of Force Majeure."¹²⁹ Although

¹²⁶ UNIDROIT, Principles of International Commercial Contracts (2016).

¹²⁷ The Facts at [64].

¹²⁸ The Facts at [57].

¹²⁹ Exhibit 4 Clause 8.3.

the JVA does not define “force majeure,” Article 7.1.7, of the UNIDROIT Principles defines it as an impediment that (a) is beyond the party’s control, (b) could not reasonably have been foreseen at the time of contracting, and (c) could not be avoided or overcome.¹³⁰

(1) Beyond the party’s control

72 The imposition of the fine was an external governmental act outside the Claimant’s control.¹³¹ The Ministry of Labour imposed the penalty directly on ASI.¹³² The Claimant had no operational control over day-to-day matters, nor did it initiate or condone the conduct that triggered regulatory action. If the Respondent did not breach the obligation to ensure compliance, then the imposition of the fine would be rendered completely arbitrary. Accordingly, this event was completely outside the control of either party.

(2) Could not reasonably have been foreseen

73 The fine was not foreseeable at the time of contracting. While regulatory enforcement is a general business risk, the specific finding of “modern-day slavery,” and the consequent financial damage, went beyond what a reasonable party could have anticipated or planned for when entering into the JVA. Assuming neither party was at fault for the imposition of the fine, then it would not be possible for either party to have reasonably foreseen an arbitrary fine.

¹³⁰ UNIDROIT, Principles of International Commercial Contracts (2016); Brödermann, E. (2023). *UNIDROIT Principles of International Commercial Contracts: An article-by-article commentary* (2nd ed., p. 4). Kluwer Law International.

¹³¹ The Facts at [56].

¹³² The Facts at [56].

(3) *Could not be avoided or overcome*

74 The effects of the fine could not be overcome. The joint venture was rendered financially and commercially unviable. The entire paid-up capital of ASI was 1.2 billion, and fines and the loss of contracts amount to 700 million.¹³³ As such, a significant portion of the joint venture's capital is lost. In light of these facts, the fine meets all the elements of a force majeure event under Article 7.1.7 of the PICC and Clause 8.3. The claimant was therefore entitled to terminate the JVA on this independent basis.

75 If the fine and suspension were the Respondent's fault then the Respondent has fundamentally breached Clause 4.2(f) of the JVA, entitling the Claimant to terminate the JVA under Clause 8.1.

76 However, if the Respondent is not at fault and the fine was the result of circumstances beyond its control, then the imposition of the fine qualifies as a force majeure event under Clause 8.3 and Article 7.1.7 of the PICC. Both possibilities result in the same consequence. The Claimant would have been entitled to terminate the JVA. Accordingly, the Claimant's termination of the JVA was lawful.

¹³³ The Facts at [62].