

# Chapter 3

**IN THE MATTER OF AN ARBITRATION  
UNDER THE INTERNATIONAL CHAMBER OF COMMERCE  
RULES OF ARBITRATION IN FORCE AS FROM 01 JANUARY 2012  
ICC CASE NO. 22000/AC**

**BETWEEN**

**Vulcan Coltan Ltd (Equatoriana)**

**Claimant**

**Global Minerals Ltd (Ruritania)**

**Additional Party**

**– and –**

**Mediterraneo Mining SOE (Mediterraneo)**

**Respondent**

---

**PARTIAL AWARD**

---

**Arbitral Tribunal**

**Dr. Jonathan Vita, FCI Arb (Presiding Arbitrator)**

**Professor Janet Walker CM, C Arb (Co-Arbitrator)**

**Ms Olga Zalomiy, FCI Arb (Co-Arbitrator)**

**Date: 30 July 2015**

**Seat: Vindobona, Danubia**

---

## TABLE OF CONTENTS

<b>I</b>	<b>INTRODUCTION TO THE DISPUTE</b> .....	145
A)	The Parties .....	145
B)	Arbitration Agreement and Applicable Laws and Rules .....	145
C)	Factual Background, Relevant Contractual Provisions, Summary of the Dispute .....	146
<b>II</b>	<b>PROCEDURAL HISTORY</b> .....	150
A)	Commencement of the Arbitration and constitution of the Tribunal .....	150
B)	Emergency Arbitrator .....	150
C)	Procedural Order No. 1 .....	151
D)	Procedural Order No. 2 .....	152
E)	Request for relief by the Parties .....	152
F)	Hearing .....	153
<b>III</b>	<b>TRIBUNAL'S JURISDICTION OVER THE ADDITIONAL PARTY</b> ....	153
A)	Respondent's submissions .....	153
B)	Claimant's and Additional Party's submissions .....	155
C)	Tribunal's analysis and conclusions .....	156
<b>IV</b>	<b>AVOIDANCE OF THE CONTRACT BY RESPONDENT</b> .....	158
A)	Claimant's and Additional Party's submissions .....	158
1)	<i>On the Letter of Avoidance of 7 July 2014</i> .....	159
2)	<i>On the Letter of Avoidance of 9 July 2014</i> .....	161
B)	Respondent's submissions .....	162
1)	<i>On the Letter of Avoidance of 7 July 2014</i> .....	163
2)	<i>On the Letter of Avoidance of 9 July 2014</i> .....	165
C)	Tribunal's analysis and conclusions .....	167
<b>V</b>	<b>REQUEST TO TERMINATE THE ORDER OF THE EMERGENCY ARBITRATOR</b> .....	169
A)	Respondent's submissions .....	169
1)	<i>Jurisdiction of the Emergency Arbitrator</i> .....	169
2)	<i>Substantive requirements for obtaining provisional relief</i> .....	171
B)	Claimant's and Additional Party's submissions .....	172
1)	<i>Jurisdiction of the Emergency Arbitrator</i> .....	172
2)	<i>Substantive requirements for obtaining provisional relief</i> .....	173
C)	Tribunal's analysis and conclusions .....	174
<b>VI</b>	<b>SUMMARY OF CONCLUSIONS</b> .....	175
<b>VII</b>	<b>AWARD</b> .....	176

## I Introduction to the Dispute

### A) The Parties

1. Vulcan Coltan Ltd (“**Claimant**”) is a broker of coltan and other rare minerals, with offices located at 21 Magma Street, Ocean-side, Equatoriana. Claimant is a 100% subsidiary of Global Minerals Ltd (“**GM**”), a broker of rare minerals world-wide, with offices located at Excavation Place 5, Hansetown, Ruritania.
2. Counsel for Claimant and GM is Mr Horace Fasttrack, whose offices are located at 14 Capital Boulevard, Oceanside, Equatoriana.
3. Mediterraneo Mining SOE (“**Respondent**”) is a state-owned enterprise located at 5-6 Mineral Street, Capital City, Mediterraneo. Respondent operates all the mines in Mediterraneo including the only coltan mine. Respondent also extracts copper and gold.
4. Respondent’s counsel is Mr Joseph Langweiler, whose office is located at 75 Court Street, Capital City, Mediterraneo.

### B) Arbitration Agreement and Applicable Laws and Rules

5. Article 20 of the contract between Claimant and Respondent (“**Parties**”) signed on 28 March 2014 (“**Contract**”) provides for dispute resolution by arbitration as follows:

***Art 20: Arbitration***

*All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The seat of arbitration shall be Vindobona, Danubia, and the language of the arbitration will be English. The contract, including this Art, shall be governed by the law of Danubia.*

6. Danubia has adopted verbatim the text of the UNCITRAL Model Law on International Commercial Arbitration (1985), with

amendments as adopted in 2006. The applicable Rules are the 2012 Rules of Arbitration of the International Chamber of Commerce (“**ICC Rules**”).

7. The law governing the Contract is the law of Danubia, which is (for all parts which may be relevant for the case) a verbatim adoption of the text of the UNIDROIT Principles 2010 (“**UNIDROIT Principles**”), except that, of Article 1 of the UNIDROIT Principles, only Article 1.12 has been adopted.
8. Equatoriana, Mediterraneo, Ruritania, and Danubia are all Contracting States to the United Nations Convention on Contracts for the International Sale of Goods (1980) (“**CISG**”).
9. The language of the proceedings is English.

**C) Factual Background, Relevant Contractual Provisions, Summary of the Dispute**

10. For ten years, Claimant’s parent company, GM, has regularly purchased coltan from Respondent. Coltan is primarily used in electronic devices and the market for coltan is highly volatile.
11. On 23 March 2014, Mr Storm, the Chief Operating Officer of GM, and Mr Summer, the Chief Operating Officer of Claimant, approached Mr Winter, GM’s general sales manager, to enquire about a delivery of 100 metric tons of coltan to Claimant.
12. On 28 March 2014, Claimant and Respondent signed the Contract, under which Claimant (buyer) was to purchase 30 metric tons of coltan from Respondent (seller) at US \$45 per kilogram. Claimant was keen to buy the maximum amount possible. In light of Respondent’s previous experiences with an insolvent subsidiary of GM, Claimant’s lack of assets, and the difficult market in Equatoriana, Respondent agreed to sell Claimant only 30 metric tons of coltan. Ultimately, Claimant accepted this offer due to the

high quality of Respondent's coltan and the pressure to establish a business in Equatoriana. It was agreed that GM would provide payment by a Letter of Credit ("LC") and would sign the Contract to endorse it.

13. The Contract required Respondent to establish a Notice of Transport when the agreed quantity of coltan became available for transport and, in any event, no later than 31 August 2014.
14. Under the Contract, shipment was to be arranged on CIF Ocean-side terms not later than 60 days after receipt of the LC.
15. The LC was to be issued by Claimant in favour of Respondent on the following terms:

***Art 4: Payment & Letter of Credit***

*A Letter of Credit in the amount of US\$ 1,350,000 shall be established by the Buyer not later than fourteen days after the Buyer received the Notice of Transport in regard to shipment. The Letter of Credit shall be in favour of the Seller or its designee, be acceptable in content to Seller, be consistent with the terms of this Contract, be irrevocable, be issued by a first class Ruritanian bank and shall be valid until 15 December 2014. The Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce (UCP 600).*

*Payment is due 30 days after presentation of the documents under the Letter of Credit.*

16. Article 21 of the Contract ("**Art 21**") provided that the courts at the place of business of the party against which provisional measures are sought shall have exclusive jurisdiction.
17. On 25 June 2014, Respondent sent Claimant a Notice of Transport (*Ex.C2*) and informed Claimant in its covering email that one of its major customers had become bankrupt and had defaulted

on a purchase of 150 metric tons of coltan and 100 tons of copper, resulting in some surplus which Respondent was keen to dispose of as quickly as possible due to its limited storage capacity (*Ex.C3; Ans. Req. Arb* ¶11).

18. On 27 June 2014, Mr Storm of GM sent a fax to Mr Winter to extend Claimant's order from 30 to 100 metric tons of coltan (*Ex.C4*). Claimant's offer was made in accordance with the earlier offer Respondent made during negotiations on 23 March 2014 which did not materialize (*Ans. Req. Arb* ¶7). Previously, all requests for contractual changes by GM with Respondent were answered within two days. Due to the five-hour difference between Equatoriana time ('RST') and Mediterraneo time ('MST'), the fax arrived on Friday 27 June 2014 at 20:05 MST. Mr Winter had already left the office for the weekend.
19. On the same day, Mr Storm, the Ambassador of Ruritania (and brother of Mr Storm of GM) was informed that the Deputy Prime Minister of Xanadu would leave the Government if his proposal on the distribution of Xanadu's water resources was not accepted (*Ex. R3*). Xanadu is the world's biggest producer of conflict free coltan.
20. On 29 June 2014, Mr Winter read the fax from Mr Storm dated 27 June 2014. By this time, the Deputy Prime Minister of Xanadu publicly announced his party's departure from the Government of Xanadu and the Government subsequently collapsed (*Ex. R3*). The political deterioration of Xanadu affected the production of coltan, resulted in a global shortage and significantly increased its price (*Ex. R2, PO2* ¶30).
21. On 1 July 2014, Ms Masrov, Mr Winter's assistant, notified Mr Rütli, a sales manager at Claimant, that Respondent was unwilling to supply 100 metric tons to Claimant (*Ex. R2*).

22. On 4 July 2014, with no response from Respondent to GM's fax dated 27 June 2014, Claimant asked GM to instruct its bank in SM.
23. On the same day, the price of coltan increased by nearly 1US\$/kg as an increase in demand was expected from the manufacture of a new electronic game console largely based in Equatoria. Mr Winter, Respondent's general sales manager, left Mr Summer a voicemail rejecting this LC ("LC1") as it did not conform with the Contract dated 28 March 2014. Mr Winter asked for a corrected LC to be provided on 07 July 2014 or the Contract would be terminated. After being informed of the voicemail by Mr Summer, Mr Storm emailed Mr Winter that LC1 was in line with the changed Contract (*Ex.C6*).
24. On 7 July 2014, Claimant received Respondent's letter of avoidance of the Contract, in which the details of the non-conformity of LC1 were laid out, notably LC1 provided for 100 metric tons of coltan instead of 30 metric tons, and the delivery terms were different from those provided in the Contract (*Ex.C7*).
25. On 8 July 2014, Trade Bank sent a new LC ("LC2") of US\$1,350,000 (*Ex.C8*) in conformity with the Contract dated 28 March 2014 via courier (*Ex.C9*). On the same day, Mr Storm of GM sent a copy of LC2 to Respondent via fax and maintained Claimant's entitlement to delivery of 100 metric tons of coltan (*Ex.C10*).
26. On 9 July 2014, Respondent sent Claimant a letter that reiterated that the Contract had been terminated on 7 July 2014 and the Contract had been avoided. Respondent also rejected LC2 as the time limit for providing it had expired on 8 July 2014. Respondent received the courier on 9 July 2014 at 0:05 MST (*Ex. R4*). While GM's fax had arrived at 22:42 RST, it was outside its business hours (*Ex.R4*).

## **II Procedural History**

### **A) Commencement of the Arbitration and constitution of the Tribunal**

27. On 11 July 2014, Claimant submitted its Request for Arbitration to the ICC for the commencement of arbitral proceedings against Respondent. Claimant nominated Professor Janet Walker CM as an arbitrator and paid a provisional advance of US\$80,000. On the same day, Claimant requested the appointment of an Emergency Arbitrator (“EA”) and the granting of interim relief pursuant to Art 29 of the ICC Rules.
28. On 8 August 2014, Respondent submitted its Answer to Request for Arbitration, Counterclaims and Request for Joinder. Respondent nominated Olga Zalomiy as an arbitrator for the matter at hand. Respondent accepted that the ICC nominate the presiding arbitrator, with the suggestion that the presiding arbitrator should be a Danubian national.
29. On 8 September 2014, Claimant and GM submitted their Reply to Respondent’s Counterclaim, and objected to the Joinder.
30. On 15 September 2014, the ICC Secretariat sent to the Parties the Statements of Acceptance, Availability, Impartiality and Independence, as well as the Curriculum Vitae of the arbitrators appointed by the Parties.
31. On 18 September 2014, the ICC Court decided that the Tribunal should determine whether GM was a proper party, confirmed Professor Janet Walker CM and Ms Olga Zalomiy as Co-Arbitrators and appointed Dr Jonathan Vita as Presiding Arbitrator.

### **B) Emergency Arbitrator**

32. On 12 July 2014, the President of the ICC Court appointed Ms Chin Hu as EA in accordance with Article 2(1) of Appendix V to the Rules of ICC 2012.

33. Respondent contested the jurisdiction of the EA on the basis that it was precluded by Art 21 of the Contract; and objected to the interim measures requested.
34. On 26 July 2014, the EA determined that she had jurisdiction to order the interim measures sought by Claimant; and she issued an Order restraining Respondent from disposing of any of the 100 metric tons of coltan offered under the 27 June 2014 version of the Contract, and requiring Respondent to reimburse Claimant the amount of US\$40,000 being the cost of the EA proceedings.

### **C) Procedural Order No. 1**

35. On 2 October 2014, the Tribunal and the Parties held a Case Management Conference to discuss the procedure in the Arbitration and the Terms of Reference.
36. On 3 October 2014, Procedural Order No. 1 (“**PO1**”) was issued.
37. It is common ground between the Parties that:
  - a. The original Contract dated 28 March 2014 was not amended on 27 June 2014 but governed the Parties’ relationship when Claimant issued LC1 on 4 July 2014; and
  - b. The order of the EA is rescinded in so far as its orders Respondent not to dispose of a quantity of coltan beyond 30 metric tons.
38. The proceedings were agreed to be divided into two phases as follows:

Phase 01:

  - a. Whether the Arbitral Tribunal has jurisdiction over GM (Additional Party);
  - b. Whether Respondent validly avoided the Contract of 28 March 2014 by its declarations of avoidance on either 7 or 9 July 2014;
  - c. Whether the EA’s Order should be terminated.

Phase 02:

- a. Whether the Claimant is entitled to damages for breach of the Contract;
  - b. Whether the Respondent is entitled to damages for losses incurred by complying with EA's Order;
  - c. Costs of arbitration.
39. For the Parties' submissions, the following Timetable applies:
- a. Requests for Clarification: no later than 23 October 2014
  - b. Claimant's Submission: no later than 11 December 2014
  - c. Respondent's Submission: no later than 22 January 2015

#### **D) Procedural Order No. 2**

40. On 29 October 2014, following the Parties' submission of Requests for Clarification, Procedural Order No. 2 ("**PO2**") was issued.
41. An agreement was reached by the Parties for Claimant and GM to be represented jointly by Mr Fastrack and to make joint submissions. The Parties further agreed that this was not to be regarded as an admission that the Tribunal had jurisdiction over GM nor was it to be the basis for inferences in relation to formation of the Contract.

#### **E) Request for relief by the Parties**

42. Claimant requests that the Arbitral Tribunal:
  - a. Declare that it has no jurisdiction over GM;
  - b. Reject Respondent's Counterclaim;
  - c. Order Respondent to bear the costs of the Arbitration.
43. Respondent requests that the Arbitral Tribunal:
  - a. Reject all claims raised by Claimant;
  - b. Terminate the Order of the EA of 26 July 2014;
  - c. Declare that it has jurisdiction over GM;

- d. Order Claimant and/or GM to pay damages, presently unquantified but expected to exceed US\$1,000.000 resulting from the unjustified order of the EA;
- e. Order Claimant and GM to pay Respondent's costs incurred in the Arbitration including in the EA proceedings.

## **F) Hearing**

- 44. The oral hearing is to be held from 27 March to 2 April 2025 in Vindobona, Danubia. Details concerning the timing and venue will be provided in due course.

## **III Tribunal's Jurisdiction over the Additional Party**

### **A) Respondent's submissions**

- 45. Respondent contends that GM's consent to be bound by the arbitration agreement is demonstrated *first* by GM endorsing the Contract. GM's COO Mr Storm's signature on the Contract demonstrated the intent to be more than a mere financial guarantor (*Resp. Memo* ¶6; *Ex. C1*). As in *Stellar v Hudson*, the signature, indicated GM's intent to be subject to claims arising out of the arbitration agreement (*Resp. Memo* ¶¶6, 7; *Stellar v Hudson*). Additionally, Respondent argued that the payment guarantee was the result of extended negotiations between the Parties (*Resp. Memo* ¶¶10-11; *Ans. Req. Arb.* ¶¶5, 26) in which Respondent sought to insure itself against dealings with an insolvent subsidiary of GM as had previously occurred (*Resp. Memo* ¶¶10-11; *Ans. Req. Arb.* ¶¶7, 9, 26). Respondent cited precedents in which guarantors were held to be bound to arbitration agreements along with those that they had guaranteed (*Resp. Memo* ¶9; *Stellar v Hudson*; *JJ Ryan v Rhone Poulenc*; *Swiss Federal Supreme Court, 08/21/08*).
- 46. *Second*, Respondent contended that GM demonstrated consent to be bound by carrying out the obligations of the buyer. GM opened letters of credit (*Resp. Memo* ¶¶13-14; *Ex C1*; *Req. Arb.* ¶10), played

a considerable role in the negotiations of the Contract (*Req. Arb.* ¶6) and sought to amend the Contract (*Req. Arb.* ¶22; Ex C6). Respondent cited sources suggesting that active involvement in the performance of a contract indicates that a party consents to be bound by the arbitration agreement (*Resp. Memo* ¶¶13-14; *ICC Case No. 11160; Vidal* ¶28; *ICC Case No. 9517; Dallah v Ministry; Dow Chemical v Isover; Société Sponsor v Lestrade*).

47. In the alternative, Respondent relied upon the Group of Companies doctrine to argue that GM is a party to the arbitration agreement. *First*, Respondent argued in favour of applying the ‘one and the same economic reality test’ from *Dow Chemical* (*Resp. Memo* ¶19) and cited ICC, US and Swiss precedents acknowledging the Group of Companies doctrine at ¶¶20, 21. *Second*, Respondent argued that the doctrine has not been rejected by Danubia (*Resp. Memo* ¶23; *PO2* ¶46; cf. *Ans. Req. for Joinder* ¶7) and applying the doctrine created no risk to enforcement of the Award in Ruritania (*Resp. Memo* ¶24; *Ans. Req. for Joinder* ¶7). Respondent says that Claimant and GM are a group of companies because GM has control over Claimant (*Resp. Memo* ¶27; *Dow Chemical v Isover; KIS France v Société Générale; ICC No. 8385; Ferrario* p. 648), Claimant did not exert independent business authority (*Req. for Arb.* ¶1; *PO2* ¶9), and both Claimant and GM communicated with Respondent (*Resp. Memo* ¶28 citing *Occidental Petroleum v Government of Morocco*; cf. *Ex C3; Ex C6*).
48. Finally, Respondent argued GM is a party pursuant to the doctrine of good faith. Good faith is an internationally recognized principle (*Respondent Memo* ¶31; *ICC No. 9029*; cf. *Cremades* p. 779 et seq), is recognized by Danubian law (*Resp. Memo* ¶32; *Danubian Arbitration Law* Art 2A(1)), and known in Ruritania (*Resp. Memo* ¶33; *Ans. Req. for Joinder* ¶8; *PO2* ¶8). GM gave the impression that it was standing behind the Contract (*Resp. Memo* ¶35); used the Contract to shield itself from failure in the coltan market (*Resp. Memo* ¶36; *Ans. Req. Arb.* ¶26) and benefited from the Contract. Good faith requires that GM accept the Tribunal’s jurisdiction (*Resp. Memo* ¶37; *Born* p. 1473; *Tepper Realty v Mosaic Tile*).

## B) Claimant's and Additional Party's submissions

49. Claimant submits GM is not bound to the arbitration *first*, GM is not a party to the Contract. The Parties are listed exhaustively in Art 1 and GM is not mentioned at all in the Contract (*Cl. Memo* ¶¶11, 13; *PO2* ¶17). As in most sales contracts, the obligations are exclusively between the buyer and seller (*Cl. Memo* ¶12; *Mistelis* Art 1¶25). Respondent could not have been unaware that GM expressed no intention to become a party to the Contract (*Cl. Memo* ¶16; Arts 8(1), 8(3) *CISG*) as was indicated during the negotiations (*Ex R1* ¶¶6, 7; *PO2* ¶7; *Rep. to Counterclaim* ¶6), (*Cl. Memo* ¶¶15-18; *Rep. to Counterclaim* ¶5), and was confirmed when Respondent addressed only Claimant in the letters of avoidance (*Ex C7*; *Ex R4*).
50. *Second*, GM's endorsement did not bind it to the arbitration agreement. The LC guarantee of payment obviated the need for GM's endorsement (*Cl. Memo* ¶24; *Ex. R1* ¶7; *McCurdy* p. 543; cf *Wiele* p. 81; cf *Mann* p. 402); and the endorsement was only a comfort letter to support Claimant's creditworthiness and did not create legally binding obligations (*Cl. Memo* ¶¶26-29; *Rep. Counterclaim* ¶6). A reasonable businessperson would have understood that GM assumed no liability when it refused to be joined to the Contract as an additional buyer (¶¶30-31) and, even if the endorsement created legal obligations, these did not include the arbitration agreement as GM did not consent to it (*PO2* ¶12).
51. *Third*, Claimant contends that the Group of Companies does not apply in Danubia because Danubian courts have never applied the doctrine and are unlikely to do so (*Cl. Memo* ¶48; *PO2* ¶46); and because the *lex mercatoria* does not support the doctrine (*Cl. Memo* ¶51-53). Further, in spite of their corporate connection, Claimant and GM have different assets, bookkeeping, personnel, location (*Cl. Memo* ¶58; *PO2* ¶¶7, 9); GM was not sufficiently involved in the Contract (*Cl. Memo* ¶60-65); and the Parties did not intend GM to be bound (*Cl. Memo* ¶66-69).

52. *Finally*, concerning good faith, Claimant contends that preventing GM's right to contest jurisdiction prejudices its procedural rights and risks unenforceability (*Cl. Memo* ¶¶71, 72; Art 7(1) *ICC Rules 2012*; Art 18, *Danubian Arbitration Law*; Art V(1)(b) *New York Convention*) and Danubian law does not include good faith (*Cl. Memo* ¶75). Finally, GM always acted in good faith (*Cl. Memo* ¶76).

### **C) Tribunal's analysis and conclusions**

53. The Tribunal concludes by a majority that it has jurisdiction over GM as an Additional Party for the following reasons.
54. The negotiations between Claimant and Respondent relied upon a decade of similar past dealings between GM and Respondent (*Req. for Arb.* ¶5; *Ans. Req. Arb.* ¶4) and GM introduced Respondent to Claimant (*Rep. to Counterclaim* ¶6; *PO2* ¶7).
55. GM was actively engaged in various aspects of the relationship between Claimant and Respondent (*Resp. Memo* ¶¶13-14); and was extensively involved in the negotiation, formation, and performance of the Contract (*Cl. Memo* ¶¶17). Specifically, Mr Storm of GM proposed the initial deal of 100 tons of coltan (*Ex R1* ¶¶6, 7; *Req. Arb.* ¶6) and GM was involved in the negotiation over whether it would be party to the Contract (*Resp. Memo* ¶11). GM issued letters of credit (*Resp. Memo* ¶13), sometimes directly to Respondent without even copying Claimant (*Ex C10*) and thus actively participated in the Contract.
56. Additionally, subsequent attempts to adjust the Contract came directly from Mr Storm of GM, and not from Claimant (*Req. Arb.* ¶12), including when Mr Storm asked for an increase of the 30 tons of coltan to 100 tons (*Ex C4*) and when he asked Respondent to ship the 100 tons upon learning of Respondent's voicemail rejecting LC1. This was despite learning of this rejection from Mr Summer of Claimant (*Ex C6*).

57. As the sources put forward by Respondent correctly state, active involvement in the negotiation, performance and circumstances of a contract serve to bind a party to the arbitration agreement (*Resp. Memo* ¶¶13-14; *ICC Case No. 9517*; *ICC Case No. 11160*; *ICC Case No. 9517*; *Dallah v Ministry*; *Dow Chemical v Isover*; *Société Sponsor v Lestrade*; *Vidal* ¶28).
58. Furthermore, GM endorsed the Contract by signing it (*Resp. Memo* ¶¶6, 7; *Ex C5*); and the Parties did not specify a restricted scope of responsibilities for GM other than indicating that GM would serve as a financial guarantor (*Resp. Memo* ¶6; *Ex. C1*). The extent of these responsibilities should be understood in the context of the negotiations in which the endorsement was made. This included the basis for Respondent's insistence (*Resp. Memo* ¶¶10) in light of the fact that Claimant had been established for the purpose of shielding GM from liability if Claimant were unsuccessful in the coltan market (*Ans. Req. Arb.* ¶26) and Respondent and GM had once put a subsidiary into bankruptcy to avoid payment obligations (*Resp. Memo* ¶¶10-11, *Ans. Req. Arb.* ¶¶ 5, 7, 9, 26).
59. Although one member of the Tribunal viewed the endorsement as merely for 'moral support', the majority understood it as more than a comfort letter (*Cl. Memo* ¶27), obliging GM to provide a LC as well, as negotiated by the Parties (*PO2* ¶12).
60. Thus, we are not persuaded by Claimant's submission that a reasonable businessperson would have understood that GM had not assumed liability (*Cl. Memo* ¶30, 31) as they had assumed financial responsibility by signing the Contract and opening the LCs.
61. Additionally, numerous court decisions have held guarantors to be bound by the arbitration agreement (*Resp. Memo* ¶¶6-7 citing *Stellar v Hudson*; *Resp. Memo* ¶9 citing *Stellar v Hudson*; *JJ Ryan v Rhone Poulenc*; *Swiss Federal Supreme Court case of 08/21/2008*).

62. The Tribunal notes the arguments submitted by the Parties on the Group of Company doctrine and good faith (*Resp. Memo* ¶¶16-29, 30-37; *Cl. Memo* ¶¶43-69, 70-77), but for the purposes of determining whether GM may be party to the arbitration agreement, the Tribunal does not find it necessary to base its decision upon those two doctrines.
63. For the reasons outlined above, the Tribunal finds that GM is a party to the arbitration agreement.

#### **IV Avoidance of the Contract by Respondent**

64. Bearing in mind that there was no amendment of the Contract as per PO1 and the agreement by the Parties, the merits of the case concern whether Respondent was entitled to avoid the Contract on 7 2014 or on 9 July 2014 (*Ex.C7 and R4*) as it purported to do.
65. In the first letter of avoidance (*Ex.C7*), Respondent stated that the LC1 covered a higher amount of coltan and money to be received than stipulated in the Contract, and it deviated from the contractually agreed upon delivery terms. In its second letter of avoidance (*R4*), Respondent alleged that the fax transmission of LC2 arrived in the wrong part of its premises and not within its business hours, and that the physical version arrived by courier five minutes late and lacking a commercial invoice.
66. To consider these allegations, the position of the Parties will be subdivided into two parts each, reflecting the arguments laid out by both of them on the validity of each letter of avoidance.

#### **A) Claimant's and Additional Party's submissions**

67. Claimant's position is that both LCs – LC1 on 4 July 2014 (*Ex.C5*) and LC2 on 8 July 2014 (*Ex.C8*) – complied with the Contract, and as such, neither avoidance of the Contract was valid under the CISG.

68. The record shows that Claimant's actions were justifiable since it had already won bidding for the 30 metric tons of Coltan and was in negotiations for the remaining 70 metric tons of Coltan (as provided in its *Req. Arb* ¶21). Furthermore, in light of the political situation in Xanadu, which is a major producer of coltan, there is a real risk that insufficient quantities of conflict free coltan will be available on the market when Claimant has to fulfil its own contractual relationships.
69. There was news on the market that Respondent had started disposing the 30 metric tons reserved for the fulfilment of the Contract with Claimant to other parties, prompting the actions here described.

**1) On the Letter of Avoidance of 7 July 2014**

70. Claimant's position is that LC1 complied with Art 4 of the Contract, since it allows Respondent to claim the amount for the delivery of 30 metric tons or more and, since it states that each instalment up to 100 metric tons can be at least 30 metric tons.
71. Furthermore, LC1 allowed Respondent to draw down any amount up to the US\$ 4,500,000.00 threshold, relying on UCP 600 Arts 4 (a), 5, 14(a) and 15(a), since the release of the guaranteed funds would be subject only to the documents presented by Respondent, but not the underlying the Contract.
72. Regarding the inconsistency in the INCOTERMS 2010 used to describe the method of delivery, this was, in fact, a mistake made by Respondent in its Notice of Transport on 25 June 2014, since it had specified CIP as the method of delivery and, since, in Claimant's view, this mistake was favourable to Respondent.
73. In Claimant's view, shifting the point of delivery to an earlier stage of the transport process decreased the risks for the Seller, in this case, the Respondent, thereby favouring the Respondent.

74. In any case, the difference from CIF to CIP costs to be supported by Respondent would amount to no more than US\$ 1000 (*PO2* ¶36). These *de minimis* additional costs, which constituted 0.07% of the purchase price, could be reimbursed by Claimant.
75. Moreover, even if LC1 was invalid, Respondent was not entitled to avoid the Contract as it acted in bad faith, since the prerequisites for avoiding the Contract under the CISG were not met.
76. In its previous conduct with a sister company of Claimant, Iron Unlimited, Respondent stated that the delivery of a different kind of copper in itself did not amount to a fundamental breach and that Iron Unlimited was using this as a pretext to avoid that contract (*Ans. Req. Arb* ¶14).
77. Therefore, Respondent is prohibited from avoiding the Contract by relying on formal deviations, as such the purported avoidance constituted bad faith and contradicts its prior behaviour.
78. On the matter of the fundamental breach defined under Art 25 of CISG, the requirements for contract avoidance under Art 64(1) (a) CISG were not met. The fact that the Contract dealt with commodities is irrelevant to its application, since there were no string transactions in the case at hand.
79. Claimant's actions did not incur detriment resulting in substantial deprivation and, even if the Tribunal were to find that such detriment had occurred, it was not foreseeable, as no reasonable person could imagine that a LC of a higher amount could cause such detriment.
80. Moreover, the deadline for issuing the LC did not expire until 9 July and Claimant had provided for something that was greater than what the Contract provided for.
81. Finally, Claimant states that the prerequisites of avoidance of Art 72 CISG were also not met because Claimant never declared or

acted as if it was not going to perform its obligations, preventing the application of Art 72(3) CISG. Additionally, Claimant was not committing a fundamental breach of the Contract (Art 72(1) CISG).

**2) On the Letter of Avoidance of 9 July 2014**

82. Claimant's position on the second letter of avoidance is that LC2 was valid and delivered timely, and that its alleged defects and presumed inside information on Xanadu political situation are not grounds to allow Respondent to avoid the Contract.
83. Specifically, the Respondent contended in respect of its second letter of avoidance (*Ex.R4*), that LC2 was defective there was a requirement of a commercial invoice issued by Respondent in order to have the payment made.
84. It is undisputed that LC2 did not list this document as necessary for the payment of the Coltan purchase price. However, this does not prevent Claimant from making this request and changing the nature of LC2 if this neither impedes nor unduly burdens Respondent's receipt of the purchase price.
85. Additionally, it was a practice of both companies and the additional party to require a commercial invoice for the payment on an LC, bearing in mind that the commercial invoice must be prepared by Respondent (*PO2 ¶16*).
86. Claimant's position also relies on the fact that the LC2 was delivered on time, as the correct term for the Contract should be 9 July 2014 and not 8 July 2014. This is because Danubian (or even Equatoriana) law is the applicable law of the Contract, and Art 1.12 in particular (a verbatim adoption of UNIDROIT Principles of International Commercial Contracts) should be supplemented by Art 1:304(3) of the Principles of European Contract Law. Per Art 1:304(3), a contract with a period of time indicated in days shall start counting at 00:00 on the following day and end at 24:00 on the last day of the period, here being 26 June 2014 at 0:00 and 9 July 2014 at 24:00 respectively.

87. Alternatively, the time zone applicable to the Contract is Ruritanian Standard Time (RST), in accordance with Art 1.12(3) UPICC (noting that there was no contractual provision on the subject). Ruritania is where the LCs – the most important document under the circumstances – were issued. Therefore, the courier delivering LC2 arrived at 19.05 RST on 8 July 2014, which is within time.
88. Even if Mediterranean Standard Time (MST) were the relevant Time Zone, the Fax still arrived within time, at 22:42. It is irrelevant if the fax arrived outside business hours or even arrived in a different office within the same building and of the same business. A fax is considered to be delivered when it enters the machine, which can lead to the application by analogy of Art 24 CISG.
89. In any case, Art 64(2) CISG prevents Respondent from avoiding the Contract, since payment had already been made by virtue of the issuance of an LC. The LC was irrevocable, fully guaranteed, and did not require any other act of Claimant to effect payment.
90. Finally, the letter of avoidance alludes to a breach by Claimant through use of privileged information regarding the situation in Xanadu. However, this was neither proved by Respondent nor does it relate to the breach of the Contract. Furthermore, given the Parties sophistication, no asymmetry of information justified avoidance the Contract.

## **B) Respondent's submissions**

91. In summary, Respondent's position is that it validly avoided the Contract on 7 July 2014 and, alternatively, on 9 July 2014 as both letters of credit were not in conformity with the Contract. Respondent never proposed any modifications to it, always acted in good faith, and, therefore, the avoidance of the Contract was valid under the CISG. Additionally, Respondent was not prevented from declaring avoidance by Art 80 CISG.

92. Specifically, and alternatively to the validity of both avoidances, Respondent informing Claimant that it had new availability of Coltan due to the insolvency of one of its clients (*Ex.C4*) was not an offer to amend the Contract. Additionally, Claimant could not rely on Art 80 CISG to infer that this action of Respondent caused the problems pertaining to the LC and the avoidance of the Contract.
93. In any case, Respondent contended that Claimant's actions were motivated by the contemporaneous market developments. According to Respondent, Claimant attempted to take advantage of its insider information to profit from the political crises in Xanadu and the increased price of coltan.

**1) On the Letter of Avoidance of 7 July 2014**

94. Respondent was justified in avoiding the Contract because LC1 did not comply with Art 4 of the Contract and amounted to a fundamental breach under Art 64(1)(a) CISG. Thus, Claimant did not pay the purchase price or comply with the formalities as prescribed by Articles 53 and 54 CISG.
95. The three points of non-compliance in LC1 related to the requirements of the Contract of the delivery of 1) 30 metric tons of coltan, 2) for a price of US\$ 1,350,000,00, and 3) on the "CIF" terms.
96. *First*, LC1 stipulated CIP instead of CIF despite the Parties' agreement. This was inconsistent with the intention of the Parties and their negotiations. Any interpretation of the documents must follow Article 8(1) CISG, therefore precluding Claimant's proposed modification of the terms negotiated. Furthermore, this change to the delivery terms would cost Respondent up to US\$ 1,000.00 (*PO2* ¶36), require more effort, and the assumption of significant additional risk. In any case, Claimant should have given notice to Respondent clearly if this was Claimant's intent, acting in good faith and cooperating under Article 7 (1) CISG.

97. *Second*, the amount of Coltan was incorrect, providing for 100 metric tons and not 30 metric tons as specified in Art 2 of the Contract, using what is probably inside information regarding the situation in Xanadu.
98. *Third* and finally, the delivery date was wrong, since Art 5 of the Contract specified 60 days after the LC, which would be 4 of September. LC1 stipulated 15 November as the deadline for shipment.
99. Individually and cumulatively, these inconsistencies amounted to a fundamental breach of the Contract under Art 25 CISG, as Respondent was deprived of what it expected under the Contract. In commodities trade, any deviation from the Contract amounts to a fundamental breach, especially in string contracts and even more so in a volatile market such as the coltan market, the trade usages of which should be taken into account under Art 9(2) CISG.
100. This frustrated of Respondent's justified expectations and created the possibility that Respondent would suffer substantial losses by virtue of this breach, all of this which was foreseeable as a consequence of issuing a defective LC.
101. It is axiomatic that time is of the essence in trading commodities, particularly, in a volatile political situation such as in Xanadu at the time, and a volatile market such as emerged with the development of the new game console, both of which likely to affect the prices of coltan.
102. Alternatively, Respondent's avoidance was valid under the second part of Art 64(1)(b) CISG, as Respondent did not have to await the expiry of the additional period of time for performance, or "Nachfrist". This term was detailed by the voice message left by Mr Winter on behalf of Respondent to Mr Summer on 4 July 2014 (PO2, ¶21) and expired on 7 July 2014.

103. Moreover, Claimant refused to issue a conforming LC in its email of 5 July 2014 (*Ex.C6*), allowing Respondent to avoid the Contract.
104. Additionally, even if the email is not considered to be a refusal to issue a second LC, the reasonable term set for a Nachfrist of 7 July 2014 was not met, allowing avoidance of the Contract under Arts 64(1)(b) (first part of b) and 63(1) CISG.
105. During this time, Claimant could have modified LC1 according to Art 9 UCP 600, or it could have opened a fresh, conforming LC within a few hours as RST Trade Bank worked on Saturday mornings (*PO2*, p. 66 ¶23).
106. On a further final point on this topic, Respondent had grounds for avoidance under Art 72(1) CISG as it was obvious that Claimant would commit a fundamental breach per Claimant's explicit refusal to open a contractually required LC.
107. This refusal also constitutes a failure of Claimant to give adequate assurance of its performance in accordance with Art 72(2) CISG. While Claimant communicated with Respondent, Claimant never demonstrated any intent to issue a conforming LC, thus permitting Respondent to avoid the Contract.

## **2) On the Letter of Avoidance of 9 July 2014**

108. Although Respondent avoided the Contract via the first letter of 7 July 2014, as a precautionary measure, Respondent sent a second letter on 9 July 2014 stating that the time limit for performance of the Contract was 8 July 2014. LC2 arrived on 9 July 2014 at 00:05 MST, with the fax sent on 8 July 2014 22:42 MST arriving outside of work hours. LC2 was eventually delivered by hand only on the following day.
109. Respondent emphasizes that for commodities transactions, time is of the essence as prices fluctuate rapidly and, contrary to Claimant's position, the deadline for the LC ended on 4 July. Art 4

of the Contract stipulates that “a Letter of Credit shall be established by the buyer not later than fourteen days after the buyer received the Notice of Transport”, and Respondent had the right to determine the exact date of performance.

110. Therefore, as LC1 was opened on 4 July, any subsequent performance was out of time. In any case, LC2 arrived too late.
111. *First*, and in the alternative, the deadline is 8 July, and not 9 July as contended by Claimant, because the time zone applicable to the Contract was Respondent’s time zone. Article 1.12(3) UPICC and Mediterraneo rules state that the day of the triggering event is counted (PO2 ¶44) as the first day of the specified time period. As the triggering event was on 25 June (when Claimant received the Notice of Transport), the deadline was 8 July 2014. This is supported by Art 20(1) CISG, which states that the period of time starts to run with the triggering event.
112. *Second*, there is no dispute that the LC1 arrived at 00:05 on 9 July 2014, outside of the window of time for it to be received.
113. *Third*, Respondent’s position is that fax delivery occurs only when the declaration reaches the addressee of the document, not when the fax arrives at its place of business.
114. *Fourth* and finally, LC2 should have arrived within working hours, which is accepted not to have occurred (PO2 ¶23).
115. Additionally, LC2 did not comply with the terms of the Contract, since it wrongfully required a commercial invoice by Respondent. This was different from LC1 and not a minor deviation from what was previously sought by Respondent.
116. Such a requirement was not consistent with the intent of the Parties when drafting Art 4 of the Contract, and therefore Art 4 must be interpreted in accordance with Article 8(3) CISG. Art 8(3) CISG prevents Claimant from changing its conduct and deviating from

the requirements of LC1. It is irrelevant that Respondent usually prepared a commercial invoice in the past.

117. This also imposed an undue burden on Respondent, as in order to be paid, Respondent would have to comply with a condition that was not part of the Parties' agreement.
118. Therefore, the non-conforming second LC amounted to a fundamental breach under Art 25 CISG. Claimant did not provide a LC compliant with the Contract, and thereby denied Respondent what it was entitled to expect under the Contract, *viz* payment.
119. This was compounded by the delay in delivering LC2, as time is of the essence in commodity trade due to rapid exchanges and price fluctuations, justifying Respondent's avoidance of the Contract.

### **C) Tribunal's analysis and conclusions**

120. The Tribunal concludes that the avoidance of the Contract by Respondent was undue in both instances. There was no fundamental breach of the Contract under Art 25 CISG and Respondent was not deprived of what it was entitled to expect under the Contract. Therefore, the bases for avoidance of the Contract under Articles 63, 64 and 72 CISG were not met.
121. The following premises provide the necessary context for the Tribunal's reasons:
122. *First*, the Tribunal is of the view that the burden of showing the necessary conditions for avoidance in this case were not met by the Respondent.
123. *Second*, the Tribunal is not concerned in determining the issues of this Phase of the Arbitration with damages arising from the outcome of this Phase as this will be considered in the second phase of the Arbitration.

124. *Third*, the Tribunal is of the view that the facts of the case are the primary determinants of the outcome of the issues in this Partial Award and it is, therefore, unnecessary in this Partial Award to consider larger doctrinal theories or legal precedents, such as those relating to the applicability of CISG to commodities contracts.
125. Turning to the issues relevant to avoidance of the Contract, LC1 as issued would have permitted Respondent to receive payment. Since Respondent could draw down a portion of an LC issued for the whole 100 metric tons at an amount of US\$ 4,500,000.00, LC1 guaranteed payment for a smaller delivery of 30 metric tons for US\$ 1,350,000.00.
126. The oversight of Respondent's employee when checking the CIP box on the Notice of Transport was only rectified by Respondent when it sent the first letter of avoidance. Therefore, Claimant should not be held liable for relying on it in formulating the terms of LC1. Additionally, the issue could be remedied by a simple reimbursement, noting that the value of the difference between CIF and CIP was *de minimis* in relation to the total value of the Contract. Claimant could easily have reimbursed the US\$ 800 to US\$ 1,000 representing the difference from CIP to CIF. Individually, or cumulatively, these discrepancies did not amount to a fundamental breach of the contract justifying avoidance of the Contract.
127. Next, the provision of a delivery date for the goods of 15 November 2014 instead of 4 September 2014 did not prevent Respondent from performing on 4 September 2014. On the contrary, it was advantageous to Respondent and therefore could not be considered a breach the Contract.
128. Alternatively, with the issuance of LC2, more closely conforming to the Contract, specifically with the CIF INCOTERMS 2010, the compliance of LC1 with the Contract was rendered immaterial.
129. In this regard, the Tribunal does not accept the Respondent's contentions regarding the untimeliness of the establishment of LC2

under the terms of the Contract. Even accepting the Respondent's contention that the required date for the establishment of LC2 was 8 July 2014 MST, the Contract provides that by that date, the Claimant would *establish* the LC, not *deliver* it. Therefore, it is immaterial if the letter was delivered after 8 July 2014.

130. Furthermore, the added requirement of a commercial invoice so payment could be effected under the LC is within the scope of the Contract and adheres to usages of the Parties (*PO2* ¶16). A commercial invoice is needed for goods to be sent in international transactions – it is a mandatory document for Customs Authorities.
131. Ultimately, neither Letter of Avoidance validly avoided the Contract. LC2 may be used to pay for the release of the 30 metric tons of coltan from Respondent to Claimant.

## **V Request to Terminate the Order of the Emergency Arbitrator**

132. Respondent requests that the Tribunal terminate the remaining portion of the EA's order relating to the freezing of 30 metric tons of coltan (the "**Order**") based on two grounds: (1) the EA did not have the jurisdiction to issue the Order, and (2) even if the EA had jurisdiction, the substantive criteria for granting emergency measures were not satisfied. The Parties disagree on both grounds.

### **A) Respondent's submissions**

#### **1) Jurisdiction of the Emergency Arbitrator**

133. Respondent asserts three arguments to support its claim that the EA did not have jurisdiction to issue the order: (1) Art 21 of the Contract excludes the right to apply for emergency measures under the ICC Rules; (2) in the alternative, the Tribunal should apply the "contra proferentem rule", which states that

an ambiguous contract term should be interpreted against the drafter, for interpretation of Art 21; and (3) the Order is void because it was issued in the wrong location.

134. Respondent contends that the inclusion in the Contract of an arbitration agreement and an exclusive jurisdiction agreement that gives the courts jurisdiction over provisional measures means that Art 21 should be interpreted as excluding the jurisdiction of an EA to order provisional measures (*Ex. C1*, p. 7).
135. In Respondent's view, Claimant's interpretation of Art 21 undermines the purpose of Art 21 to guarantee the availability of effective interim relief without any dispute regarding the identity of a party that has the authority to issue such measures. (*PO2*, p. 65 ¶13). Respondent challenges Claimant's assertion that Claimant's application of emergency relief does not hinder the Parties' rights to pursue provisional measures in a court. According to Respondent, such an interpretation would give rise to disputes, which frustrates the intended purpose of Art 21 (*Cl. Memo* ¶75).
136. Further, Respondent disputes Claimant's allegation that the EA provisions of the ICC Rules apply to this proceeding on the basis that the Parties did not expressly opt out of such provisions as required by the ICC Rules (*Cl. Memo* ¶76). In Respondent's view, even though the Parties were aware of the changes in the ICC Rules when entering into the Contract, they deliberately chose not to amend Art 21, which Respondent contends provided for exclusive court jurisdiction over interim measures.
137. In the alternative, Respondent requests that the Tribunal apply the "contra proferentem rule" found in Art 4.6 of the UNIDROIT Principles for interpretation of Art 21. Respondent argues that the "contra proferentem rule" is applicable because of the ambiguous wording of Art 21. In Respondent's view, since GM, which is Claimant's parent company, supplied Art 21, any ambiguity in Art 21 should be interpreted against Claimant.

138. In addition, Respondent contends that the Tribunal should invalidate the EA Order under Art 34(2)(a)(iv) of the UNCITRAL Model Law, based on the EA's disregard of the Parties' explicit agreement. (cf. UNCITRAL, p. 156 ¶108 et seq.; p. 103 ¶5). In Respondent's view, by issuing the Order in Danubia, the seat of the Arbitration per Art 20 of the Contract instead of Mediterraneo, where provisional measures are required to be sought under Art 21, the EA disregarded the Parties' agreement.

## 2) **Substantive requirements for obtaining provisional relief**

139. Respondent alleges that even assuming the EA had jurisdiction to issue the Order, the Order was not justified as it did not meet the substantive requirements for granting interim relief under either the ICC Rules or the UNCITRAL Model Law.

140. Respondent contends that the substantive requirements for granting emergency measures contained in Art 29(1) of the ICC Rules were not met.

141. *First*, Claimant failed to prove that the requested measure was urgent, which is a condition for making an application for emergency measures. (Fry/Greenberg/Mazza, Art 29(1) ¶3-1061). By providing no arguments in support of the urgency of its condition, Claimant failed to meet its burden of proof. (*Cl. Memo*, ¶¶. 58 et. seq.). While the Order states that Respondent was in the process of negotiating the sale of coltan with other customers (*Ord. Emerg. Arb.*, p. 30 ¶32 10), there was no evidence that Respondent would not be able to meet its obligation to sell 30 metric tons under the Contract since it had 180 metric tons of coltan in storage.

142. *Second*, in Respondent's view, this was not relief that could not await the constitution of the Tribunal in September of 2014 (*Appoint. Arb.*, p. 56). The Tribunal was formed some two months after Claimant submitted its Request for Arbitration (*Req. Arb.*, pp. 2 et seq.), providing ample time for delivery of coltan scheduled for May 2015 (*PO2*, p. 68 ¶34).

143. Respondent contends that Claimant also did not satisfy the requirements of Art 17A(1)(a) of the UNCITRAL Model Law for granting interim measures by failing to demonstrate a likelihood of prevailing on the merits, given that Respondent validly avoided the Contract twice. Additionally, Respondent challenges Claimant's contention of irreparable harm due to failure to meet contractual obligations (*Cl. Memo*, ¶189), arguing that it is unclear how irreparable harm could occur when Respondent was obligated to deliver the coltan only in May 2015.
144. Respondent argues that any harm allegedly suffered by Claimant is significantly less in comparison with the harm suffered by Respondent in being restrained from disposing of coltan. (*Ord. Emerg. Arb.*, p. 31 ¶16 No 2). Respondent claims that it was unable to use its storage capacities for additional minerals (*Ans. Req. Arb.*, p. 39 ¶38); it could not sell 30 metric tons in a dynamic market despite having customer requests; and it is likely to sell the stocked coltan at a lower price due to changing market conditions (*Ans. Req. Arb.*, p. 39 ¶38). Respondent anticipates a loss of at least USD 1 million due to the unjustified measure. (*Ans. Req. Arb.*, p. 39 ¶38).

## **B) Claimant's and Additional Party's submissions**

### **1) Jurisdiction of the Emergency Arbitrator**

145. Claimant and the Additional Party contends that under Art 29 of the ICC Rules, the EA had authority to grant emergency relief. They contend that Art 21 of the Contract does not exclude the EA provisions outlined in Art 29 of the ICC Rules. To opt out of the EA Provisions under Art 29 of the ICC Rules, parties must explicitly indicate their intention not to apply these provisions. The ICC prescribes a standard provision for validly opting out of the EA provisions, which the Parties did not incorporate in their Contract. Had they intended to exclude the EA Provisions, they would have done so.

146. Moreover, Art 21 provides for the jurisdiction of a specific state court to grant interim measures to the exclusion of other state courts. It does not exclude the granting of interim relief in arbitration. Art 21 of the Contract is not intended to limit all interim relief to that available from state courts (*Ans. Req. Arb* ¶10). Rather, it stipulates merely which state court is competent to grant interim relief and does not affect the applicability of the ICC EA Provisions. Claimant states that GM included Art 21 in the Contract as a result of a previous dispute arising from uncertainty about which court had jurisdiction to provide another of GM's subsidiaries with interim relief. (*PO2* ¶13).

147. Claimant argues that even if the Tribunal interprets "exclusive jurisdiction" in Art 21 more broadly, it was intended to establish a deviation from Art 28 of the ICC Rules, specifically addressing interim relief sought after the Tribunal's constitution. According to Claimant, Art 21 was drafted with provisions akin to Art 28(1) from the previous version of the Rules in mind. Considering the absence of EA Provisions in the prior ICC Rules, the template for Art 21 could not have had any alternative interpretation (*PO2* ¶13). Finally, Claimant contends that since the Parties did not exclude the EA Provisions pursuant to Art 29(6)(b) and (c) of the ICC Rules, the EA had jurisdiction to render the Order.

## 2) **Substantive requirements for obtaining provisional relief**

148. Claimant asserts that the criteria for granting interim relief, as outlined in Art 17(A)(1) of Danubian Arbitration law were satisfied because: (1) in the absence of emergency measures, Claimant would have likely suffered irreparable harm; (2) the harm to Claimant significantly outweighed the potential harm to Respondent; and (3) Claimant is likely to succeed on the merits, since Respondent did not validly avoid the Contract.

149. Claimant argues that, absent the Order, it faced the risk of irreparable harm for three reasons. *First*, Respondent's past behaviour indicated a high likelihood of it selling the surplus coltan to others due to limited storage capacity and an increase in coltan

prices. (*Ex.C3*; cf. *Ans. Req. Arb* ¶ 5), (cf. *PO2* ¶¶ 29 et seq.). *Second*, meeting Claimant's existing contractual obligations would have been impossible if Respondent had sold coltan to other buyers, given the scarcity of conflict-free coltan. *Third*, as a new market entrant still building trust, Claimant would have suffered reputational harm, which would have been exacerbated by the highly competitive nature of the coltan market. Claimant concludes that the reputational harm it would suffer if it failed to fulfil its obligations would be beyond repair through any award of damages.

150. Claimant emphasizes that the reputational harm it would have incurred without the Order would be significantly greater than any potential harm to Respondent caused by the order. Claimant argues that Respondent could suffer harm only if the market price of coltan decreased between the rendering of the Order and its potential termination; and likelihood is that the coltan price will increase further, negating any loss of profit for Respondent.
151. Finally, Claimant contends that it is likely to succeed on the merits because Respondent was not entitled to avoid the Contract.

### **C) Tribunal's analysis and conclusions**

152. In deciding whether an interim order should have been granted, the Tribunal would need to consider any harm that may have arisen from granting the order in error.
153. However, in light of:
- a) Claimant's agreement to reduce the amount of coltan subject to the EA's Order to 30 metric tons,
  - b) the Tribunal's determination that Respondent was not entitled to avoid the Contract, and
  - c) the Tribunal's decision that Respondent must release 30 metric tons of Coltan to Claimant,

it is unnecessary determine whether the EA had jurisdiction to issue the Order and it is unnecessary to determine in Phase 01

whether the substantive requirements for the grant of emergency measures were met, particularly in light of the Tribunal's finding that Respondent was not justified in its attempt to avoid the Contract.

154. Accordingly, the questions of whether the Order was available and should have been issued are moot.
155. The question of whether Respondent suffered any damages and whether Claimant must pay for such damages remain for determination in Phase 02 of the Arbitration.
156. Accordingly, the Tribunal concludes that the EA's Order is terminated, and Respondent must deliver 30 metric tons of coltan to Claimant in performance of the Contract.

## **VI Summary of Conclusions**

157. Based on the foregoing reasons, the Tribunal concludes as follows:
  - a) The Tribunal has jurisdiction over GM, and GM is a party to the Arbitration,
  - b) Respondent did not validly avoid the Contract, either on 7 July 2014 or 9 July 2014,
  - c) Consequently,
    - i. the determination of the EA's jurisdiction and her compliance with substantive requirements of the ICC Rules for issuing emergency relief are moot,
    - ii. the EA's Order must, in any event, be terminated, and
    - iii. the Respondent must deliver 30 metric tons of coltan to Claimant within 30 days of this Award, and
  - d) Any claims for damages, and for costs shall be determined in Phase 02 of the Arbitration.

## VII Award

158. In light of the foregoing, the Tribunal:
- a) DECLARES that it has jurisdiction over Golden Minerals Ltd.;
  - b) DECLARES that Golden Minerals is a party to the Arbitration;
  - c) TERMINATES the Emergency Arbitrator's Order;
  - d) DISMISSES Respondent's claim for damages for losses incurred by complying with Emergency Arbitrator's Order
  - e) ORDERS Respondent to deliver to Claimant 30 metric tons of Coltan within 30 days from the date of the Award and,
  - f) RESERVES for determination in Phase 02:
    - i. Claimant's damages claim for Respondent's failure to perform the Contract;
    - ii. Any claims for damages arising from the failure to perform this Partial Award;
    - iii. Costs of the Arbitration including the EA proceedings.

This Partial Award is made on the 30th day of July 2015

Place of Arbitration: Vindobona.

Signed by the Presiding Arbitrator

**Dr Jonathan Vita**

Signed by Co-Arbitrator

**Professor Janet Walker CM**

Signed by Co-Arbitrator

**Ms Olga Zalomiy**

---

---

---