

TWENTY FIRST ANNUAL

**WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT**

Vienna, Austria
12 – 17 April 2014

Organized by:

**Association for the organisation and promotion of the
Willem C. Vis International Commercial Arbitration Moot**

and

ELEVENTH ANNUAL

**WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT**

Hong Kong
31 March – 6 April 2014

Organized by:

Vis East Moot Foundation Limited

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Horace Fasttrack

Advocate at the Court
75 Court Street
Capital City, Mediterraneo
Tel (0) 146-9845
Telefax (0) 146-9850
Fasttrack@lawyer.me

CEPANI - The Belgian Centre for Arbitration and Mediation
Rue des Sols/Stuiverstraat, 8
1000 Brussels
BELGIUM

6 June 2013

Dear Madam/Sir

On behalf of my client, Innovative Cancer Treatment Ltd, Mediterraneo, I hereby submit the enclosed Request for Arbitration pursuant to the CEPANI Rules of Arbitration, Art. 3(1). A copy of the Power of Attorney authorising me to represent Innovative Cancer Treatment Ltd in this arbitration is also enclosed.

The total amount claimed is USD 11,500,000.

The advance payment of 500 Euro for administrative expenses (Schedule 1: Scale of Costs for Arbitration, section 2) accompanies this Request for Arbitration.

The contract giving rise to this arbitration provides that the seat of arbitration shall be Vindobona, Danubia and that the arbitration will be in English. The arbitration agreement through its inclusion of the CEPANI Rules of Arbitration provides for three arbitrators, as the amount in disputes is above 1,000,000 Euro. Innovative Cancer Treatment Ltd hereby nominates Dr Arbitrator One as its arbitrator for appointment.

The required documents are attached to the Request for Arbitration.

A copy of the Request for Arbitration was sent to Hope Hospital, Equatoriana, as provided by Art. 3(2), and to Mr. Joseph Langweiler, counsel for Respondent.

Sincerely yours,

(Signed)

Horace Fasttrack

Attachments: Request for Arbitration with Exhibits
Power of Attorney
CV of Dr Arbitrator One

Request for Arbitration

Innovative Cancer Treatment Ltd, Claimant v Hope Hospital, Respondent

Claimant: Innovative Cancer Treatment Ltd
46 Commerce Road
Capital City, Mediterraneo
Tel (0) 4856201
Telefax (0) 4856201 01
info@ict.me

Represented by: Horace Fasttrack
75 Court Street, Capital City, Mediterraneo
Tel (0) 146-9845; Telefax (0) 146-9850; Fasttrack@lawyer.me

Respondent: Hope Hospital
1-3 Hospital Road
Oceanside, Equatoriana
Tel (0) 238 8700
Telefax (0) 238 87 01
office@hopehospital.eq

Represented by: Joseph Langweiler
14 Capital Boulevard
Oceanside, Equatoriana
Tel (0) 214 77 32
Telefax (0) 214 77 33
langweiler@host.eq

Facts

1. Innovative Cancer Treatment Ltd (“**ICT**” or “**Claimant**”) is one of the few manufacturers world-wide of particle therapy equipment. In particular ICT specialises in proton therapy and is the market leader for facilities using a passive beam scattering technique.
2. Hope Hospital (“**Hope Hospital**” or “**Respondent**”) is a university teaching hospital. Even though it is a general hospital, it is also the national centre for cancer research and treatment in Equatoriana. Hope Hospital is renowned outside Equatoriana for its treatment of localized tumours by the conventional methods of surgery and radiotherapy with X-rays.
3. In 2007 Hope Hospital approached ICT to discuss the purchase of a proton therapy facility in order to optimise its range of available cancer treatment options in regard to certain types of cancer (**Claimant’s Exhibit No. 1**). The basic idea of proton therapy is to aim energised protons at the target tumour and thereby damage the DNA of the tumour cells. This should ultimately cause death of the tumour cells or at least prevent their proliferation. In comparison to conventional

radiotherapy using X-rays, proton therapy has much higher target conformity. That leads to increased tumour control rates and reduces the side effects, in particular the danger that secondary tumours might be created by damage to other tissue cells.

4. On 13 January 2008, after lengthy and intensive negotiations, the Parties concluded a Framework and Sales Agreement (“**Framework and Sales Agreement**” – **Claimant’s Exhibit No. 2**). It provided for the purchase of a fully-equipped proton therapy facility consisting of one proton accelerator and two separate treatment rooms using a passive-beam scattering technique. The Framework and Sales Agreement laid down the framework for the Parties’ future cooperation in operating the facility. In particular, it was intended to govern future contracts between the Parties for the supply of protons and other consumables and for maintenance. At the same time the Framework and Sales Agreement was also intended to provide the framework for any further extension of the proton therapy facility.

5. The purchase price for the facility was USD 50 million and has been intensively discussed between the Parties (**Claimant’s Exhibit No. 3**). They finally agreed on the following payment schedule: An initial payment of USD 10 million was due on 1 February 2008 and a further four instalments of USD 7.5 million each were due following completion of the installation of the proton therapy facility; those payments were due on 30 June and 31 December of each of the two years following successful installation. A final payment of USD 10 million was due 240 days after the fourth and final semi-annual instalment.

6. During the negotiation about the price and the payment schedule, Hope Hospital had asked ICT to provide a pre-sales budgeting analysis. ICT made it clear that such an analysis would require a considerable amount of information concerning, inter alia, the number of potential patients and the personnel and technical resources available. Such information was eventually provided by Hope Hospital. Assuming the accuracy of this information, ICT came to the conclusion that the facility would at least run on zero costs, if the price charged for each treatment was in the range considered to be acceptable by Hope Hospital.

7. The Framework and Sales Agreement covered the construction of the necessary building structures as well as the delivery of a particle accelerator, the design and delivery of the two fully-equipped treatment rooms, the necessary software for the particle accelerator and the treatment rooms, the software interface with the general hospital software and the necessary staff training.

8. The facility was completed on 15 April 2010. Hope Hospital had already paid the initial payment of USD 10 million on 1st February 2008 and next paid the first semi-annual instalment of USD 7.5 million on 30 June 2010.

9. Even during the period of negotiating the Framework and Sales Agreement in 2007 and 2008, the Parties had intensively discussed the idea of adding a third treatment room using a more sophisticated active scanning technology. At the time ICT was in the final stages of developing this new technique for delivering the proton beam. It was therefore looking for a renowned cancer research facility serving a particular demographic to provide and verify the required data and engage in clinical studies. In particular, such input was crucial in developing, testing and refining the necessary steering software for the accelerator and the proton beams used for treatment. Consequently, ICT had a strong interest in co-operating

with Hope Hospital in this regard. With the verification of the anticipated advantages of the active scanning technology in clinical studies and the refinement of the existing know-how, ICT wanted to enter the market for this type of treatment facility. ICT's management considered the active scanning technology both to be an excellent enhancement of the equipment already being offered and to be an important element in consolidating ICT's position as a leading firm in the expanding field of cancer treatment.

10. Due to budget restraints and some hesitations from the management side of Hope Hospital, no contract for this third treatment room, using active scanning technology, was concluded in 2008. The Parties agreed, however, to take a further look at that issue once the main proton therapy facilities, with the two treatment rooms, had operated for a while.

11. In May 2011 Hope Hospital approached ICT with regard to an additional third treatment room and the development of the necessary software for the use of active scanning technology in that treatment room to improve cancer treatment (**Claimant's Exhibit No. 4**). ICT was still very much interested in the further development of the active scanning technology and in particular the necessary software for steering and modelling the proton beam.

12. During the previous discussions in 2007 and 2008, the price had been a major stumbling block that finally resulted in Hope Hospital temporarily giving up the project. Consequently, ICT was willing to give a considerable discount so long as it received the required data and could later use the technique unrestricted from any intellectual property rights for world-wide sales. In the end, in July 2011, it was agreed that Hope Hospital would buy the relevant components, the new software package and the training for a heavily reduced price (USD 3.5 million). In exchange, it was obliged to provide the trial data necessary for ICT to develop the software and hold the required number of clinical trials (**Claimant's Exhibit No. 5**).

13. The Sale and Licensing Agreement was concluded on 20 July 2011 (**Claimant's Exhibit No. 6**). The third treatment room, including the equipment and the software necessary for the active scanning technology, became available on 13 January 2012. As agreed in the Sale and Licensing Agreement, Hope Hospital had made the initial payment of USD 2 million on 2 February 2012, this being largely equivalent to the value of the physical equipment delivered on 13 January 2012.

14. During the negotiations of the Sale and Licensing Agreement, ICT informed Hope Hospital about the regular overhaul of its standard terms and that the Agreement would be governed by the new version of the standard terms (**Claimant's Exhibit No. 5**).

15. On 15 August 2012 Hope Hospital informed the Claimant that it would not make any further payments, neither the final payment under the Framework and Sales Agreement nor the outstanding payment under the Sale and Licensing Agreement (**Claimant's Exhibit No. 7**). In regard to the latter, it had paid only USD 2 million for the third treatment room and the software provided, leaving USD 1,500,000 open which should have been paid 180 days after delivery of the active scanning technology.

16. In its letter of 15 August 2012, the Respondent, stated that, on 10 July 2012, Equatoriana's Auditor-General¹ had questioned the general viability of the proton therapy facility. The Auditor-General had confirmed Hope Hospital's finding that the facility had operated only to 70% of its planned capacity in the 2011/2012 financial year.² All treatment with the new scanning technology had been ceased on 20 May 2012 because of concerns concerning the accuracy of the beam. In its letter, the Respondent claimed that the inaccuracy had been caused by a fault in the software. Hope Hospital contended in its letter that ICT had misrepresented the financial viability of the proton therapy facility for a country of the size of Equatoriana.

17. Between January 2012, when the active scanning technique became fully operational, and today the Claimant has sold the technique to two other proton therapy facilities. There has been no complaint from either of those facilities in regard to the software which both customers had seen in operation at Respondent's premises. On the contrary, the proton treatment facility in Hobbitown, Danubia, has congratulated ICT on the development of the software (**Claimant's Exhibit No. 8**). In both cases the package was largely comparable to that sold to Respondent. The parties in both cases entered into the price calculation with an amount of USD 9.5 million.

18. The Claimant notes, that at no point in time was the cost-benefit analysis presented to the Respondent as one specific to Equatoriana. The analysis was a generic one for a country of the size of Equatoriana and was based on the assumption that the information provided by Respondent was accurate. The Claimant is unaware of any circumstances in Equatoriana why the aim of the zero cost target was not reached.

19. The Parties have been in close contact since Respondent ceased the treatment in the third treatment room using the active scanning technology. During all the discussions the – contested - deficiencies of the active scanning technology alleged by Respondent in its letter of 15 August 2012 had never been an issue. There had, however, been a considerable deterioration in the climate of the discussions following the installation of Professor Szabo as the new Medical Director of Hope Hospital on 1 February 2012. He is a conventional radiotherapist and one of the most vocal critics of proton therapy. Claimant assumes that this is the true reason for the purported avoidance of the contract.

Legal analysis

20. The disputes should be decided by arbitration under the Arbitration Rules of CEPANI– The Belgian Centre for Arbitration and Mediation ("CEPANI Arbitration Rules"). The seat of the arbitration is Vindobona, Danubia. The Framework and Sales Agreement contains in Art. 23 an arbitration clause in favour of CEPANI Arbitration.

¹ According to section 32 of Equatoriana's State Services Act 1966 the Auditor-General's role is to hold the Government accountable for its stewardship of public funds. The Office of the Auditor-General audits departments and agencies, Government corporations, and other Government organisations, including public hospitals.

² Equatoriana's financial year is 1 July to 30 June.

Pursuant to Art. 45 of the Framework and Sales Agreement the Agreement also covers subsequent agreements by the Parties in relation to the Proton Therapy Facility.

21. Consequently, disputes arising under the Sale and Licensing Agreement are also covered by this arbitration agreement with the modifications made in Art. 23 thereof. The Claimant had agreed to those modifications of the original disputes resolution clause to acknowledge the important contribution by Hope Hospital in the development and testing of the active scanning technology.

22. Pursuant to Art. 10 of the CEPANI Arbitration Rules, both disputes can be heard together in a single arbitration.

23. Claimant has payment claims against Respondent in the combined amount of USD 11,500,000 arising from the two contracts concluded between the Parties.

24. The national law of Mediterraneo is applicable to the Framework and Sales Agreement of 13 January 2008 (section 22 of the Claimant's 2000 standard terms). Pursuant to sections 35 and 37 of the Mediterraneo Sale of Goods Act 2005 the Claimant is entitled to the outstanding USD 10 million.

25. Contrary to the Respondent's claim during the negotiations, the United Nations Convention on the International Sale of Goods 1980 ("CISG") is applicable to the Sales and Licensing Agreement dated 20 July 2011. The Claimant re-drafted its standard terms in June 2011 and the new standard terms were included in all contracts concluded after 30 June 2011. Claimant notified the Respondent of the amended standard terms in its letter of 5 July 2011 (**Claimant's Exhibit No. 5**) and the Sales and Licensing Agreement provided in Art. 46 for their application. Pursuant to section 22 of the new standard terms (**Claimant's Exhibit No. 9**) Mediterranean law is applicable to the Sales and Licensing Agreement. Mediterraneo is a CISG member state and the Sales and Licensing Agreement is a contract for the sale of goods in the sense of Article 1 CISG.

Pursuant to Articles 14, 53, 61, 62 CISG the Respondent is obliged to pay the outstanding purchase price of USD 1,500,000.

26. Therefore the total claimed by ICT is USD 11.5 million, consisting of

- USD 10 million outstanding purchase price for the proton therapy facility
- USD 1,500,000 for the prostate cancer treatment software.

ICT also claims interest and its costs of arbitration.

(Signed)
Horace Fasttrack
Counsel for Innovative Cancer Treatment Ltd
6 June 2013



Hope Hospital
1-3 Hospital Rd
Oceanside, Equatoriana
Tel (0) 238 8700
Telefax (0) 238 87 01
office@hopehospital.eq

11 January 2007

Dr Eric Vis
Innovative Cancer Treatment Ltd
46 Commerce Road
Capital City
Mediterraneo

By courier

Dear Dr Vis

Hope Hospital, which is part of the Medical School of the University of Equatoriana, is Equatoriana's national cancer research and treatment facility. We treat 90% of all Equatorianian cancer patients and our cancer research is world-renowned.

To optimise our treatment options in regard to a wide range of tumours, we are interested in purchasing or renting a proton treatment facility. We would appreciate it if we could meet to discuss the available options that best suit our demands and financial capabilities.

I am looking forward to hearing from you.

Yours sincerely

Professor Peter Account

Framework and Sales Agreement

Between

Innovative Cancer Treatment Ltd, 46 Commerce Road, Capital City, Mediterraneo
(Seller)

and

Hope Hospital, 1-3 Hospital Road, Oceanside, Equatoriana **(Buyer)**

Whereas the Seller is one of the leading producers of proton therapy facilities;

Whereas the Buyer is the leading centre for cancer research and treatment in the country of Equatoriana;

Whereas the Buyer wants to develop its cancer treatment facilities by including a proton therapy facility;

Whereas the Parties see the potential for further cooperation in extending the use of the facilities covered by this Agreement for the treatment of other types of cancer in particular through the use of active scanning technology;

Whereas the present Agreement is intended to cover the initial purchase of a Proton Therapy Facility as well as the further cooperation of the Parties in its use and further development.

Art. 1 Definitions

Agreement:

Framework and Sales Agreement concluded between the Parties

Installation:

Covers the works and services described in detail in Annex 2 to this Agreement necessary for installing the Proton Therapy Facility

Proton Therapy Facility:

The facilities necessary for the performance of proton therapy as described in detail in Annex 1 to this Agreement

Training:

Covers the 400 hours training provided by the Seller to the operating personnel of the Buyer and their supervision for the first month as described in detail in Annex 3 to this Agreement

Art. 2 Purchase

The Parties agree that the Seller will sell and the Buyer will purchase a Proton Therapy Facility as described in detail in Annex 1 including Installation and Training as described in detail in Annexes 2 and 3.

Art. 3 Price

- (1) The purchase price for the Proton Therapy Facility and the Installation and Training as described in Annexes 1 – 3 of this Agreement is USD 50,000,000 (fifty million USD).
- (2) The payment schedule is as follows:
 - (a) an initial payment of USD 10 million: 1 February 2008.
 - (b) 4 semi-annual instalments of USD 7.5 million each: 30 June and 31 December for the 2 years following completion of the installation of the facility.
 - (c) one final payment of USD 10 million: 240 days after the 4th instalment.

Art. 4

[...]

Art. 23 Dispute Resolution

- (1) All disputes arising from or in connection with this Agreement shall be settled, if possible, by negotiations between the Parties. For that purpose, either Party may, by giving written notice, cause any matter in, or alleged to be in, dispute to be referred to a meeting of appropriate representatives of management of the Parties. Such meeting shall be held within fifteen (15) days following the giving of said written notice. If the matter is not resolved within fifteen (15) days after the date of the notice referring the matter to appropriate management representatives, or such later date as may be mutually agreed upon, then the dispute must be submitted to mediation by a third person neutral.
- (2) For the mediation, either the Parties shall mutually agree to determine the date of commencement; or one Party may in writing invite the other Party to participate in mediation. In this latter case the mediation starts on the date unilaterally indicated by the Party taking the initiative to invite; but not earlier than fifteen (15) days from the date of receipt of such written invitation by the invited Party. This mediation shall be kept confidential. The mediator's fees and expenses shall be shared equally by the Parties and each Party will bear its own costs.
- (3) If the matter in dispute is not resolved through such mediation within thirty (30) days after the start of the mediation, then, but not before the expiry of the 30th day, such dispute shall become subject to arbitration, to be finally settled under the CEPANI Rules of Arbitration before CEPANI – *The Belgian Center for Arbitration and Mediation at Rue des Sols/Stuiverstraat Nr. 8, 1000 Brussels*. The arbitration shall be conducted before three arbitrators, in the English language and shall be held in Vindobona, Danubia.
- (4) The award shall be final and binding upon the Parties. Each Party has, however, the right within three months after it has received the award to refer the case to the applicable state courts if it considers the award to be obviously wrong in fact or in law. The state court shall then have jurisdiction to review the case and to decide the issue in accordance with the applicable law.
- (5) The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo.

(6) In addition, the Seller has the right to bring any and all claims relating to payments in the courts of Mediterraneo. The Buyer herewith submits to the jurisdiction of the courts of Mediterraneo.

Art. 24

[...]

Art. 45 Further Contracts

The provisions of this Agreement shall also govern all further and future contracts concluded by the Parties in relation to the Proton Therapy Facility purchased where such contracts do not contain a specific provision to the contrary.

Art. 46 Standard Terms

This Agreement is subject to the Seller's Standard Terms and Conditions for Sale as attached in Annex 4.

Signed

Dr Eric Vis

13 January 2008

Signed

Professor Peter Account

Annex 4
Innovative Cancer Treatment Ltd
Standard Terms and Conditions for Sale
(November 2000)

Section 1 Cooperation between Parties

The Parties undertake to conduct themselves and to fulfill their obligations in good faith.

Section 2

[...]

Section 21 Dispute Resolution

- (1) Any dispute arising out of or in connection with this Agreement shall be finally settled under the Arbitration Rules of CEPANI – The Belgian Centre for Arbitration and Mediation by one or more arbitrators appointed in accordance with the said Rules.
- (2) The place of the arbitration shall be Capital City, Mediterraneo.
- (3) The arbitration shall be conducted in English.
- (4) Any right of appeal shall be excluded.

Section 22 Choice of Law

The contract shall be governed by the national law of Mediterraneo as set out in the statutes of Mediterraneo and developed by its courts.

Section 23

[...]



Innovative Cancer Treatment
46 Commerce Road
Capital City Mediterraneo

Professor Peter Account
Hope Hospital
1-3 Hospital Road
Oceanside
Equatoriana

15 November 2007

By courier

Dear Professor Account

We were delighted that Hope Hospital is interested in acquiring a proton therapy facility. We are well aware of your reputation in cancer treatment and research. We are confident that our proton therapy facility will greatly enhance the options of cancer treatment for your patients.

As discussed during our meetings of 20, 27 October and 3, 4 November 2007, we will be able to supply a complete proton therapy facility to Hope Hospital at fairly short notice. Our offer also provides for the construction of the necessary buildings. We will build and provide one proton accelerator and two fully equipped treatment rooms and provide the necessary software, including the interface to the hospital system, and 400 man hours training. The whole facility will be designed and constructed in such a way that allows for the addition of up to two more treatment rooms in the future.

You will see from the draft contract attached that we agree to Hope Hospital paying the purchase price of USD 50 million in four semi-annual instalments of USD 7.5 million each after an initial payment of 10 million due on 1 February 2008. The four semi-annual instalments will be due on 30 June and 31 December for the two years following completion of the installation. A final payment of USD 10 million is due 240 days after the fourth semi-annual instalment.

In return we have included the option, as agreed by you, that Innovative Cancer Treatment Ltd has the right to initiate court proceedings in Mediterraneo in case of any dispute concerning payments.

Please note that Art. 23 of the contract contains the dispute resolution clause that was discussed and agreed on 4 November 2007 between Dr Matthieu Excell, the Chief Operating Officer of Hope Hospital, and Mr Karl Power, ICT's general manager. Art. 23 takes account of Hope Hospital's concern that as a public hospital it is accountable to Equatoriana's tax payers. We understand that in the present political climate, Hope Hospital would have to overcome considerable resistance to submit to

a dispute resolution clause according to which it could be bound by a decision of an arbitral tribunal that may be considered to be obviously wrong without having the opportunity to appeal against it.

We are looking forward to working with you.

Yours sincerely

Best wishes

Dr Eric Vis



Hope Hospital
1-3 Hospital Road
Oceanside, Equatoriana
Tel (0) 238 8700
Telefax (0) 238 87 01
office@hopehospital.eq

6 May 2011

Dr Eric Vis
Innovative Cancer Treatment
46 Commerce Road
Capital City
Mediterraneo

Inquiry: Purchase Active Scanning Technology

Dear Dr Vis

During our negotiations in regard to the purchase of our Proton Therapy Facility in 2007 we discussed the purchase of a third treatment room using the active scanning technology that you were developing. At the time, your development of active scanning technology was approaching its final stages but had not yet been completed. There had, therefore and also given our financial resources, been strong opposition in our institution to acquiring a technology not yet fully developed with all the risks associated with that.

The first results we had with our new Proton Therapy Facility with the two treatment rooms using the passive scattering technique are very promising. Therefore, we are extremely interested in extending our treatment option and would be interested in purchasing the active scanning technology.

If our information is correct the development of the active scanning technology has reached a stage where only the required clinical trials are standing in the way of its approval by the Medical Certification Authority.

Our budget is still very stretched so price is still a major issue. Therefore, we have to find for our mutual benefit innovative solutions concerning the schedule and forms of payment. Therefore, we would like to suggest that we provide you with the medical data you probably need to fine-tune the technology and to conduct the necessary trials. We will take responsibility for obtaining the necessary ethical approval. In addition, we would also assist you with obtaining approval for the active scanning technology from the Medical Certification Authority.

In return we expect that ICT will reduce the purchase price for the active scanning technology considerably.

We are looking forward to hearing from you at your convenience.

Yours sincerely

Professor Peter Account



Innovative Cancer Treatment
46 Commerce Road
Capital City Mediterraneo

Professor Peter Account
Hope Hospital
1-3 Hospital Road
Oceanside
Equatoriana

5 July 2011

By courier

Purchase Third Treatment Room

Dear Professor Account

We are delighted to send Hope Hospital the draft contract for the third treatment room using active scanning technology, including the licence for the necessary software. We are confident that you will find that the new technique, relying on the most advanced scanning software developed particularly for your needs, will produce exceptional results.

The draft takes into account your budget restraints and that the technology used is not yet finally approved for cancer treatment. We are delighted that Hope Hospital will contribute to the final stages of the developments of the active scanning technology (details set out in (draft) Art 10. of the Sales and Licensing Agreement). As already indicated, we are convinced that, through our joint efforts, it will be a straightforward matter to get the technology approved within a short time, leading to a breakthrough in the treatment of certain types of cancer.

In addition, I would like to mention to you that we have now overhauled our standard terms as already indicated at our last meeting in June. The new standard terms are applicable to all contracts concluded from the beginning of July. At the moment the new standard terms are available on our website only in Mediterranean, as the English translation still has to be finalized. I will send you an English translation within the next week. The changes are, however, of a minor nature and hardly affect our relationship.

Yours sincerely

Dr Eric Vis

Enclosure: Draft software purchase contract

Please note our new Standard Terms and Conditions of Sale on www.ictproton.com
46 Commerce Road Capital City Mediterraneo Tel (0) 4856201 Telefax (0) 4856201 01 info@ict.me

Sales and Licensing Agreement

Between

Innovative Cancer Treatment Ltd, 46 Commerce Road, Capital City, Mediterraneo
(Seller)

and

Hope Hospital, 1-3 Hospital Road, Oceanside, Equatoriana **(Buyer)**

Whereas the Buyer has previously purchased from the Seller a Proton Therapy Facility with two treatment rooms using a passive scattering technique;

Whereas the Buyer wants to acquire an additional third treatment room using active scanning technology;

Whereas the Seller has already largely developed the necessary equipment and software;

Whereas technology testing is a crucial issue for the final approval of the active scanning technology and the Buyer has access to the necessary data and facilities;

Whereas the general relationship between the Seller and the Buyer is governed by a Framework and Sales Agreement providing also the framework for the present contract.

Art. 1 Definitions

Agreement:

Sales and Licensing Agreement concluded between the Parties

Active Scanning Technology:

The equipment and software necessary to use a magnet guided and modeled proton beam for the treatment of cancer

Art. 2 Purchase

The Parties agree that the Seller will sell and the Buyer will purchase a third treatment room using active scanning technology for the existing Proton Treatment Facility.

The scope of delivery, as defined in detail in Annex 1 to the Agreement, includes in particular the building and the magnets as well as the right to the permanent use of the necessary software. No royalties are payable by the buyer in regard to the use of the software for the life cycle of the Proton Therapy Facility, approximately 30 years.

Art. 3 Purchase Price and Payment

- (1) The purchase price for the goods and services listed in Annex 1 is USD 3.5 million. It takes into account the Buyer's contribution in developing and testing the active scanning technology including the necessary software with a value of USD 6 million.
- (2) Hope Hospital undertakes to pay USD 2 million 14 working days after Innovative Cancer Treatment has made the third treatment room with the fully operational active scanning technology available to Hope Hospital. The payment of the remaining USD 1,500,000 is to be made 180 days after the first payment.
- (3) Payment has to be made to Innovative Cancer Treatment, Bank of Mediterraneo, Account No 345 456 322-01, IBAN ME162503700034545632201; BIC BOMMEMXXX

Art. 4

[...]

Art. 10 Development Cooperation

- (1) The Parties hereby undertake to co-operate in the development of the software necessary for the active scanning technology. The Seller is responsible for the development of the active scanning technology (additional parts and software). The Buyer is responsible for providing the Seller with the necessary medical data for the fine-tuning of the active scanning technology and for testing that technology.
- (2) The Buyer will conduct the necessary clinical trials as required by the Medical Certification Authority.
- (3) The Buyer is responsible for obtaining both (a) any ethical approvals required under the law of Equatoriana and (b) such patient consent as may be required by the law of Equatoriana.

Art. 11 Copyright and Distribution

- (1) All intellectual property rights in the active scanning technology vest in the Innovative Cancer Treatment Ltd. at all times.
- (2) Innovative Cancer Treatment Ltd. has the right to sell the active scanning technology, including the necessary software, under its name and for its own account.

Art. 12

[...]

Art. 23 Dispute Resolution

- (1) The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo or Equatoriana as applicable.
- (2) In addition, both Parties shall have the right to bring any and all claims in the courts of Mediterraneo or Equatoriana to the jurisdiction of which they hereby submit.

Art. 24

[...]

Art. 46 Standard Terms

This Agreement is subject to the Seller's Standard Terms and Conditions for Sale.

This contract is made in Equatoriana in two original copies

(Signed)
Dr Eric Vis
20 July 2011

(signed)
Professor Peter Account



Hope Hospital
1-3 Hospital Road
Oceanside, Equatoriana
Tel (0) 238 8700
Telefax (0) 238 87 01
office@hopehospital.eq

15 August 2012

Dr Eric Vis
Innovative Cancer Treatment Ltd
46 Commerce Road
Capital City
Mediterraneo

By courier

Proton Therapy Facility Hope Hospital

Dear Dr Vis

To pre-empt a reminder from your accountancy department, I hereby notify you that Hope Hospital will not pay the final instalment of USD 10 million of the purchase price for the proton treatment facility under the Framework and Sales Agreement.

The proton therapy facility you delivered cannot, in its present set-up, be operated in the promised way. We consider that failure to be a serious breach of contract which entitles us, as a minimum, to withhold further payments until the failure is remedied. During the contract negotiations you provided a cost-benefit analysis for the proton therapy facility. That cost-benefit analysis showed that for a country the size of Equatoriana, the facility built would run on zero costs, i.e. the degree of capacity utilisation would be sufficient. However, in the last financial year the facility made a loss of USD 12 million. Maintenance costs and maintenance downtime were higher than provided in the cost-benefit analysis. In its letter of 10 July 2012, the Auditor-General confirmed Hope Hospital's finding that the Facility had operated only to 70% of its planned capacity in the 2011/2012 financial year. The Hospital was put on notice by the Auditor-General to recoup the costs.

In addition, the active scanning technology software developed by your software engineers is obviously defective and incapable of performing its purpose. As a consequence, we had to abandon use of treatment room 3 which used the active scanning technology from 20 May 2012 onwards, since the software often calculated inaccurate targets. In particular is the software unable to cope with respiratory movement by the patients and that precludes its use for a number of the anticipated

cancers. As a consequence, we are also entitled under the Sales and Licensing Agreement to withhold payment of the outstanding USD 1,500,000 purchase price for the software until the defective software is rectified.

In the event that these problems cannot be solved we are seriously considering terminating both contracts and we hereby reserve all our rights in this regard.

Yours sincerely

Professor Cliff Szabo



Hobbitown Cancer Treatment
Gandulf Street 45
6033 Hobbitown
Danubia

13 March 2012

Dr Eric Vis
Innovative Cancer Treatment Ltd
46 Commerce Road
Capital City
Mediterraneo

Dear Dr Vis

On behalf of the team at Hobbitown Cancer Treatment I would like to thank you for having organized the visit to the Proton Therapy Facility at Hope Hospital, Equatoriana. Our doctors who took part in this one-week training were very impressed by the advantages of the active scanning technology used there for the first time.

We wish your team at Innovative Cancer Treatment all the best and are looking forward to more innovative developments from your engineers that will help us to combat a horrible illness.

I look forward to seeing you next week for the further discussing the purchase of an additional treatment room using active scanning technology.

Best wishes

Kind regards

Professor Dr Cieran Hyde

Innovative Cancer Treatment Ltd.
Standard Terms and Conditions for Sale
(July 2011)

Section 1 Cooperation between Parties

The Parties undertake to conduct themselves and to fulfill their obligations in good faith.

Section 2

[...]

Section 21 Dispute Resolution

Any dispute arising out of or in connection with this Agreement shall be finally settled under the CEPANI Rules of Arbitration by one or more arbitrators appointed in accordance with the said Rules.

The place of the arbitration shall be Capital City, Mediterraneo.

The arbitration shall be conducted in English.

Section 22 Choice of Law

The contract is governed by the law of Mediterraneo.

Section 23

[...]



To:
Horace Fasttrack, Esq
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

Brussels, 10 June 2013

Dear Mr. Fasttrack,

*Our Reference: CEPANI No. 22780 / Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file : Audrey Goessens,*

We acknowledge receipt of your Request for Arbitration dated 6 June 2013 in which you present to CEPANI the dispute between “Innovative Cancer Treatment Ltd”, with its corporate seat at Capital City, Mediterraneo and the Respondent “Hope Hospital” with its corporate seat in Oceanside, Equatoriana. We also acknowledge receipt of the registration fee for administrative expenses of 500 Euro required under Art. 2. of Schedule 1.1. attached to the CEPANI Arbitration Rules.

We note that you, as Counsel for Innovative Cancer Treatment Ltd, have sent your Request for Arbitration to Mr. Joseph Langweiler, the counsel of Respondent Hope Hospital on 6 June. Pursuant to Article 4 of the CEPANI Arbitration Rules, we have sent a letter to Respondent inviting it to send us its Answer to the Request for Arbitration as well as submit any counterclaim within one month of the date on which the Secretariat received the Request for Arbitration and the annexes thereto, as well as the payment of registration costs as mentioned in Article 2. of Annex 1.1. to the CEPANI Arbitration Rules, i.e. **no later than 10 July 2013**. We have sent the same letter to the Counsel for Respondent whom you have indicated.

Pursuant to Schedule I giving the Scale of the costs of arbitration annexed to our Rules, the advance on arbitration costs has been set at 226,373.69 Euros on the basis of the amount claimed by your client, i.e. 11,500,000 U.S. dollars, for which sum we have calculated the exchange rate to Euros on the today’s rate , 10th June (1 USD equals 0.75545 Euro), and taking into account the appointment of a tribunal of three arbitrators.

Your share of the advance is 112,686.84 Euros (after deduction of your prepaid administrative expenses of 500 Euros). We request that you ask your client to transfer this amount to CEPANI's bank account No. IBAN BE 45 2100 0760 8589 (BIC-code: GEBABEBB) **by 10 July 2013 at the latest**. Please find the relevant invoice enclosed.

Once the advance on arbitration costs has been paid in full, the CEPANI Appointments Committee or Chairman will appoint the Arbitral Tribunal (Art. 15 CEPANI Arbitration Rules).

Finally, we note that only one copy of the Request for Arbitration and the annexes thereto was forwarded to our Secretariat. We require four (4) copies: one is for the CEPANI Secretariat while the other copies are forwarded to the members of the Arbitral Tribunal upon their appointment. We therefore ask you to please send us the missing copies by return post or courier.

A copy of this letter has been sent to the Respondent and to Respondent's Counsel.

Yours sincerely,

(signed)

E. Van Campenhoudt, CEPANI Counsel
For the Secretary-General, Philippe Lambrecht

CEPANI – NON PROFIT ASSOCIATION

rue des Sols 8 – 1000 Brussels • Telephone: +32-2-515.08.35 • Fax: +32-2-515.08.75
E-mail: info@cepina-cepani.be • Site: <http://www.cepani.be>
BNP PARIBAS FORTIS BANQUE: 210-0076085-89 • KBC: 430-0169391-20 • ING: 310-0720414-81



To:
Mr. Joseph Langweiler, Esq
14 Capital Boulevard
Oceanside, Equatoriana

Respondent: Hope Hospital
1-3 Hospital Road
Oceanside, Equatoriana

Brussels, 10 June 2013

Dear Mr Langweiler,
Dear Sir, Madame,

*Our Reference: CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file : Audrey Goessens,*

We have received a Request for Arbitration dated 6 June 2013 from Mr. Horace Fastrack, Counsel for “Innovative Cancer Treatment Ltd”, with its corporate seat at Capital City, Mediterraneo.

According to the information we have received, you were notified of this Request for Arbitration on 6 June 2013 by Mr. H. Fastrack.

We received the Request for Arbitration on 10 June 2013 together with the registration fee for administrative expenses of 500 Euro required under Art. 2. of Schedule 1.1. attached to the CEPANI Arbitration Rules. Pursuant to Article 4 of the CEPANI Arbitration Rules, we ask you to send your Answer to the Request for Arbitration as well as any counterclaim you might have in quadruplicate within one month from the date on which the Secretariat has received the Request for Arbitration and the Annexes thereto, **i.e. no later than 10 July 2013.**

We also ask you to send us by the same date the particulars of the co-arbitrator you wish to nominate.

Lastly, pursuant to Schedule I annexed to our Rules, that gives the Scale of the costs of arbitration, the advance on arbitration costs has been set at 226,373.69 Euros on the basis of the amount claimed by Claimant, i.e. 11,500,000 U.S. dollars and taking into account the appointment of a tribunal of three arbitrators. We have calculated the exchange rate to Euro's on the rate of today, 10th June (1 USD equals 0.75545 Euro).

Your share of the advance is 113,186.85 Euros. We are asking you to transfer this amount to CEPANI's bank account No. IBAN BE 45 2100 0760 8589 (BIC-code: GEBABEBB) **by 10 July 2013 at the latest**. Please find the relevant invoice enclosed.

Once the advance on arbitration costs has been paid in full the CEPANI Appointments Committee will appoint the Arbitral Tribunal (Art. 15 CEPANI Arbitration Rules).

A copy of this letter has been sent to the Claimants' counsel.

Yours sincerely,

(signed)

E. Van Campenhoudt, CEPANI Counsel
For the Secretary-General, Philippe Lambrecht

CEPANI – NON PROFIT ASSOCIATION

rue des Sols 8 – 1000 Brussels • Telephone: +32-2-515.08.35 • Fax: +32-2-515.08.75
E-mail: info@cepina-cepani.be • Site: <http://www.cepani.be>
BNP PARIBAS FORTIS BANQUE: 210-0076085-89 • KBC: 430-0169391-20 • ING: 310-0720414-81



Dr. Arbitrator One
25 High Street
Capital City, Mediterraneo

Brussels, 10 June 2013

Dear Dr. Arbitrator One,

Our Reference: CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file : Audrey Goessens

You have been proposed by Claimant as a co-arbitrator for the Arbitral Tribunal that will decide upon the dispute referenced above.

Please find enclosed a summary of the dispute.

We would draw your attention to article 3 of the Rules of Good Conduct for CEPANI proceedings, in accordance with which you may only accept your nomination if you are independent of the parties and their respective counsel, Consequently, we would ask you to fill in and return to us the enclosed statement of availability, acceptance and independence by 17 June 2013 at the latest.

We would also ask you to ascertain whether you are in a position to devote the necessary time and effort to these proceedings in accordance with the CEPANI Arbitration Rules and within the time limit set out therein. We emphasize that the arbitrators are required to maintain strict confidentiality in respect of any case entrusted to them by CEPANI.

Once the advance towards arbitration costs has been settled in full, your nomination will be submitted to the CEPANI Appointments Committee for approval.

Lastly, we would ask you to fill in and return the enclosed curriculum vitae.

Yours sincerely,

(signed)
E. Van Campenhoudt, CEPANI Counsel
For the Secretary-General, Philippe Lambrecht

Enclosure : Declaration/[...]

CEPANI – NON PROFIT ASSOCIATION

rue des Sols 8 – 1000 Brussels • Telephone: +32-2-515.08.35 • Fax: +32-2-515.08.75
E-mail: info@cepina-cepani.be • Site: <http://www.cepani.be>
BNP PARIBAS FORTIS BANQUE: 210-0076085-89 • KBC: 430-0169391-20 • ING: 310-0720414-81

File : CEPANI No 22780

DECLARATION OF ACCEPTANCE , AVAILABILITY AND INDEPENDENCE
BY THE ARBITRATOR

I the undersigned,

Surname:First name:

1. ACCEPTANCE

- Accept the arbitral mission in accordance with the CEPANI Rules 2013.

2. AVAILABILITY

- Confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

3. INDEPENDENCE

- declare that I am fully independent of:
- the parties
 - their legal counsel
- draw CEPANI's attention to the following facts and circumstances that could lead any of the parties to doubt my independence (use a separate sheet if necessary).

* * *

- declare that I shall abide by the "Rules of good conduct for procedures requiring the intervention of CEPANI" enclosed as Annex II to the CEPANI Arbitration Rules.

Done at, on

Signature:

Tick the corresponding boxes.

Joseph Langweiler
14 Capital Boulevard
Oceanside, Equatoriana
Tel (0) 214 77 32
Telefax (0) 214 77 33
langweiler@host.eq

5 July 2013

To:
CEPANI - The Belgian Centre for Arbitration and
Mediation
Stuiversstraat/Rue des Sols, 8
1000 Brussels
BELGIUM

Answer to Request for Arbitration

1. In reply to Claimant's Request for Arbitration we contest the jurisdiction of the Arbitral Tribunal to be constituted.
2. We nominate Professor Bianca Tintin as our arbitrator for the arbitration concerning the payment under the Framework and Sales Agreement. This nomination shall in no way be construed as an acceptance of the Arbitral Tribunal's jurisdiction.
3. Equally, the nomination should not be construed as consent to have both claims dealt with in a single arbitration. We object to such a procedure for the reasons given below. In case two separate Arbitral Tribunals are formed we would nominate Ms Christina Arrango for appointment in the second arbitration concerning the payment claim under the Sales and Licensing Agreement.

Lack of Jurisdiction and Inadmissibility of Arbitration Proceedings

4. The arbitration proceedings initiated by Claimant are inadmissible since the Parties never validly agreed to arbitration under the CEPANI Rules, in particular not in relation to the claim arising from the Sales and Licensing Agreement concluded on 20 July 2011 by the Parties.
5. The dispute resolution clause contained in Art. 23 of the Framework and Sales Agreement is void for several reasons. When negotiating how possible disputes between the Parties would be resolved, the Respondent made clear that the Respondent, as a Government entity, could only agree to a dispute resolution clause that would allow for the review of blatantly wrong decisions (**Respondent's Exhibit**

No. 1). Consequently the Parties agreed on an appeal and review mechanism at their meeting on 4 November 2007.

6. The Respondent relied on the expertise of the Claimant in regard to drafting an appropriate clause, i.e. amending the clause agreed by Dr. Excell and Mr. Power at their meeting. The Respondent has since learned that Art. 23 of the Framework and Sales Agreement is void for several reasons.

7. First, it is not clear what type of dispute resolution the Parties have in fact agreed upon. It is a characteristic feature of arbitration that it results in a binding decision. In the present case the Parties, however, explicitly provided for a comprehensive appeal and review mechanism to the state courts which, in our view, is incompatible with the principles of arbitration. Thus, it is doubtful that the Parties ever wanted to agree on arbitration.

8. Second, even if the Parties had intended, in principle, to agree upon arbitration such agreement would be invalid. It is obvious that the parties cannot agree upon the appeal and review mechanism provided for in Art. 23 of the Framework and Sales Agreement. Without the appeal and review mechanism Respondent would never have agreed to arbitration. Thus, invalidity of the appeal and review mechanism would render the whole arbitration agreement invalid.

9. Third, the invalidity of the arbitration agreement follows also from the fact that it is completely one-sided, giving Claimant a unilateral choice between arbitration and court proceedings.

10. Claimant also cannot rely on the arbitration clause contained in its Standard Terms and Conditions of Sale. Respondent made clear during the negotiation that this clause was not acceptable to it and both Parties agreed to replace it by agreeing on the dispute resolution clause in Art 23 of the Framework and Sales Agreement.

11. In relation to the second claim raised, the dispute resolution clause in Art. 23 of the Framework and Sales Agreement was clearly replaced by the dispute resolution clause contained in Art. 23 of the Sale and Licensing Agreement. The Framework and Sales Agreement, pursuant to its Art. 45, governs all further contracts between the Parties arising from the purchase of the Proton Therapy Facility “where such contracts do not contain a specific regulation to the contrary”. The Sale and Licensing Agreement, in its Art. 23, clearly contains such a specific contrary provision. The Parties included a completely new dispute resolution clause which replaced the clause contained in Art. 23 of the Framework and Sales Agreement. Contrary to what Claimant seems to allege the Parties did not only replace certain paragraphs of the dispute resolution clause but the whole clause

12. Should the Arbitral Tribunal come to the conclusion that valid arbitration clauses exist for both contracts, the claims should not be heard together. Notwithstanding the fact that both claims concern the Proton Therapy Facility delivered by Claimant they are legally and factually largely separate and that excludes their being combined in a single arbitration. Even according to Claimant’s

own submission, both claims are governed by different laws and are subject to different arbitration clauses.

13. The factual and legal problems involved in the two separate disputes require a completely different expertise so that Respondent wishes to nominate two different arbitrators. The dispute arising from the Framework and Sales Agreement will largely turn on the question of the commercial viability of the proton treatment facility. By contrast, the second dispute relates to the suitability of the calibration software for the active scanning technology and that requires particular expertise in software engineering.

14. One of the reasons why Respondent agreed to arbitration at all was the possibility of selecting its own arbitrator on the basis of the expertise required for a case. That would be frustrated if both cases were heard in a single arbitration before the same Arbitral Tribunal.

Lack of merits

15. Claimant's claims also lack any merits. Contrary to Claimant's submission both contracts are governed by the law of Mediterraneo excluding the CISG.

16. The choice of law provision contained in Section 22 of the Claimant's standard terms dated November 2000, which are part of the Framework and Sales Agreement, clearly state that the Agreement is governed "by the national law of Mediterraneo as set out in the statutes of Mediterraneo and developed by its courts". That is obviously the national law of Mediterraneo and not the CISG as evidenced in Claimant's Request for Arbitration.

17. Contrary to Claimant's contention, these standard terms also govern the Sales and Licensing Agreement. The revised version of the standard terms, which no longer explicitly provide the reference to the "national law of Mediterraneo" never became part of the Sales and Licensing Agreement. During the negotiations of the Sales and Licensing Agreement Claimant informed Respondent that it had revised its standard terms and that the revised version would then be applicable to all contracts concluded from 1 July 2011 onwards. Dr Vis promised to send a copy of the terms once they had been translated into English but he never did (**Respondent's Exhibit No. 2**, witness statement Dr Matthieu Excell). If Claimant wanted its new standard terms to apply, the Claimant was required to make them available to Respondent. However, neither Dr Vis nor Ms Meier, the person replacing him during his sick leave, did so. There was no obligation on Respondent to inform itself about the content of Claimant's new standard terms.

18. Moreover, contrary to Claimant's submission, even the application of the July 2011 version of the standard terms would not have led to the application of the CISG. The substance of the choice of law clause remained unchanged and still provided for the application of the law of Mediterraneo. It has to be read in light of the clear exclusion of the CISG in the November 2000 version of the standard terms and Dr Vis' statement that there would be no "major change" in the new terms but that they would primarily constitute an "update of the previous terms in light of

some recent developments” (witness statement of Dr Matthieu Excell, **Respondent’s Exhibit No. 2**). Consequently, the choice of law clause in the July 2011 version was intended to provide for the application of the non-harmonized law of Mediterraneo to the exclusion of the CISG or at least that had to be understood by Respondent as an exclusion.

19. Even if Claimant was correct that its standard terms did not exclude the CISG, it would not be applicable to the Sales and Licensing Agreement. The Sales and Licensing Agreement concerned primarily the development of new software for the particular needs of Respondent and the grant of a license therefor. Consequently the contract falls outside the scope and sphere of application of the CISG which is concerned only with the sale of tangible goods. In the present case only 20% of the contract price can be attributed to the “hardware” as such, in particular the magnets to be delivered (**Respondent’s Exhibit No. 3**).

No claim under the law of Mediterraneo

20. Pursuant to the law of Mediterraneo, Respondent has several remedies in relation to the Framework and Sales Agreement due to the misrepresentations made by Claimant concerning the capacity of the equipment. In particular, Respondent is entitled to withhold any payment until the defects are cured and even to avoid the contract, if no cure can be achieved. Respondent hereby once more declares the termination of the contract.

21. In the negotiations leading to the conclusion of the Framework and Sales Agreement the treatment capacity was a major issue: it determined the commercial viability of the Proton Therapy Facility delivered. Claimant presented Respondent with a model calculation providing that the Proton Therapy Facility could run on zero costs.

22. However, as the Auditor General stated, such calculation was far too optimistic and did not reflect reality. The time necessary for calibration, maintenance and preparation made it impossible to treat more than 4 patients per day. Further, the imaging software broke down frequently which necessarily entailed a complete restart of the system each time. The energy necessary for that exceeded by far the amount calculated. Moreover, staff costs were higher than set out in the calculation: the administration of the treatment with the accelerator is strenuous and, since patient safety is of paramount concern to the Hospital staff, shifts were shortened to six hours. Therefore, more staff was needed to run the facility that had been envisaged.

23. The termination of the Framework and Sales Agreement also made the Sales and Licensing Agreement obsolete. Without the Proton Therapy Facility, the newly developed active scanning technology under the Sales and Licensing Agreement was completely useless. Under the law of Mediterraneo Respondent therefore had the right to also terminate the Sales and Licensing Agreement.

24. In addition, a right of termination was created by Claimant’s breach of the Sales and Licensing Agreement. Pursuant to the latter Claimant was obliged to develop

and licence to Respondent the software necessary to allow use of the new treatment room with active scanning technology. The software finally developed did not meet these requirements. It was impossible to use it to calibrate the third treatment room to hit the target accurately. Since that is a condition sine qua non for any type of advanced cancer treatment, the third treatment room could not be used at all.

Prayers for relief

25. In light of the above Respondent respectfully requests the Arbitral Tribunal

- 1) To dismiss the Claimant's claims in their entirety for a lack of jurisdiction as well as being wholly unmeritorious
- 2) To order Claimant to pay the costs of this arbitration.

(signed)

Joseph Langweiler

Respondent's Exhibit No. 1



Auditor-General
Government Buildings
Parliament Street 1-2
Oceanside
Equatoriana

23.10.2007

Circular No. 265

Budget- Government Entities

[...]

45. Government entities must not forego the right of review of manifestly erroneous decisions of courts or tribunals.

[...]

Witness Statement Dr Mathieu Excell

My name is Dr Matthieu Excell, born 28 June 1956. I am a doctor by training but have worked over the last ten years, first as administrative head of the cancer unit at Hope Hospital and then, since January 2011, as the COO for the entire hospital. In these functions I was in charge of the transactions surrounding the purchase and use of the Proton Therapy Facility.

From the beginning of our co-operation, it was our joint intention and understanding that the original purchase of the Proton Therapy Facility using the passive scattering technique was just a first step. Ultimately the Proton Therapy Facility was intended to be used in the treatment of all kinds of cancer with the most up-to-date proton therapy options available. We were, therefore, delighted to be part of the development of the active scanning technology.

However, the active scanning technology was in its infancy when we bought the Proton Therapy Facility in 2008 and Hope Hospital had budget constraints at the time. The Hospital had decided at that point not to purchase the active scanning technology. However, the treatment results of the Proton Therapy Facility were so outstanding that the Hospital management felt that adding a third treatment room using the active scanning technology would optimize its cancer treatment regime even further. It would also benefit the research conducted by some of its doctors and ultimately its reputation as a leading cancer treatment hospital.

On 2 June 2011 we had a final meeting with the doctors, software-engineers and the business teams of both parties. At the beginning of the meeting Dr Eric Vis pointed out that Claimant had revised its standard terms and was in the process of having them translated into English. He later, in a letter of 5 July 2011, told us that the version in Mediterranean language was already on their website but due to problems with the English translator there had been some delays in preparing the English version. Dr Vis promised that once the translation had been done he would send us an English version of the new standard terms that should in principle apply to all contracts concluded from 1 July 2011 onwards. He assured us, however, that the revision of the standard terms was minor and would not lead to important changes in the relationship between the Parties apart from the liability regime.

We could not verify that statement on that date since within Hope Hospital only one person, of whom I am aware, speaks Mediterranean. It is a young assistant doctor with a specialization in pediatric cancer. He had been present at some of the earlier meetings while we were discussing the usability of the Proton Therapy Facility to his field of research but he has not been a permanent member of our negotiation team. Moreover, he had been on holiday on 5 July 2011 and had only returned to work on 20 July 2011. There was no reason for us to have doubted the veracity of Dr Vis' statement. In particular, in light of the statement we could not have envisaged

that Claimant had been planning to submit all its contractual relationships, including the one with Respondent, to a different law.

Shortly after our meeting and the letter Dr Vis fell sick and was replaced for the final negotiations by the head of the Claimant's software team, Dr Lisa Meier. We never received the promised copy of the standard terms in English.

It seems that the English version of the standard terms had been online on Claimant's website for a short period from 1 July to 4 July 2011. From the 5th to the 21th July 2011 they were removed again due to the poor quality of the translation which was subsequently rectified.

(Signed)

Dr Matthieu Excell

1 July 2013



Innovative Cancer Treatment
46 Commerce Road
Capital City Mediterraneo

Dr Matthieu Excell
Hope Hospital
1-3 Hospital Road
Oceanside
Equatoriana

18 July 2011

Dear Dr Excell,

As discussed in our telephone call of today we can now offer you a final price of USD 3.5 million for the complete package to be provided under the Sales and Licensing Agreement.

As you know from our earlier correspondence the services rendered and the material delivered are worth around USD 9.5 million on the free market. Out of this approximately 40% represents materials used, in particular the magnets, 50% the development, testing and installation of the software, and the remaining 10% training personnel.

From the beginning we have been willing to give you a considerable discount on this price to reflect your input to the project and to show you how much we valued our cooperation.

To arrive at the amount of USD 3.2 million you requested was, however, impossible as we already indicated to you during the previous discussions. The above offer is the result of intensive discussions within the Management Board and with our Accounting Department.

The offer is composed as follows, primarily for tax purposes: starting from the original price of USD 9.5 million we would not charge you for the development of the software and the training but will offset that amount against your contribution to the testing and development of the software. To make that possible we propose to allocate a value of USD 6 million to it, despite its "market value" of USD 1.5 million. The remaining USD 3.5 million is then allocated solely to the materials.

As I have said, this different attribution of value is not intended to change the scope of the works and services to be provided, or the goods to be delivered, under the Sales and Licensing Agreement.

I hope that with this we have removed the last obstacle and the signing can take place as anticipated on 20 July 2011.

Yours

(signed)

Lisa Maier

(Director of IT)

Please note our new Standard Terms and Conditions for Sale on www.ictproton.com
46 Commerce Road, Capital City Mediterraneo Tel (0) 4856201 Telefax (0) 4856201 01 info@ict.me



Prof. Bianca Tintin
21 Seaside
Oceanside
Equatoriana

Brussels, 5 July 2013

Dear Professor Tintin,

*Our Reference: CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file : Audrey Goessens*

You have been proposed by Respondent as co-arbitrator for the Arbitral Tribunal that will decide upon the dispute referenced above.

Please find enclosed a summary of the dispute.

We would draw your attention to article 3 of the Rules of Good Conduct for CEPANI proceedings, in accordance with which you may only accept your nomination if you are independent of the parties and their respective counsel, Consequently, we would ask you to fill in and return to us the enclosed statement of availability, acceptance and independence by 17 June 2013 at the latest.

We would also ask you to ascertain whether you are in a position to devote the necessary time and effort to these proceedings in accordance with the CEPANI Arbitration Rules and within the time limit set out therein. We emphasize that the arbitrators are required to maintain strict confidentiality in respect of any case entrusted to them by CEPANI.

Once the advance towards arbitration costs has been settled in full, your nomination will be submitted to the CEPANI Appointments Committee for approval.

Lastly, we would ask you to fill in and return the enclosed curriculum vitae.
Yours sincerely,

signed
E. Van Campenhoudt, CEPANI Counsel
For the Secretary-General, Philippe Lambrecht

Encl.: Declaration/[...]

CEPANI – NON PROFIT ASSOCIATION

rue des Sols 8 – 1000 Brussels • Telephone: +32-2-515.08.35 • Fax: +32-2-515.08.75
E-mail: info@cepina-cepani.be • Site: <http://www.cepani.be>

**DECLARATION OF ACCEPTANCE , AVAILABILITY AND INDEPENDENCE
BY THE ARBITRATOR**

I the undersigned,

Surname:First name:

1. ACCEPTANCE

- Accept the arbitral mission in accordance with the CEPANI Rules 2013.

2. AVAILABILITY

- Confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

3. INDEPENDENCE

- declare that I am fully independent of:
- the parties
 - their legal counsel
- draw CEPANI's attention to the following facts and circumstances that could lead any of the parties to doubt my independence (use a separate sheet if necessary).

* * *

- declare that I shall abide by the "Rules of good conduct for procedures requiring the intervention of CEPANI" enclosed as Annex II to the CEPANI Arbitration Rules.

Done at, on

Signature:

Tick the corresponding boxes.



To:
Mr. Henry Haddock

Dr. Arbitrator One

Prof. Bianca Tintin

The Secretary – General

Brussels, 5 August 2013

Dear Sir / Madame,

*Our Reference: CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file : Audrey Goessens*

Pursuant to Article 15 of the CEPANI Arbitration Rules, I have the pleasure of informing you that the Appointments Committee has appointed Mr. Henry Haddock (residing at 40 Floral Road, Tudor, Ruritania) as President of the Arbitral Tribunal that will settle the aforementioned dispute.

The Appointments Committee confirmed Dr. Arbitrator One (residing at 25 High Street, Capital City, Mediterraneo) as co-arbitrator upon proposal of Claimant and Prof. Bianca Tintin (residing at 21 Seaside, Oceanside, Equatoriana) as co-arbitrator upon proposal of Respondent.

Please find enclosed the complete file as well as a copy of our letter to the parties' counsels.

Claimant is: Innovative Cancer Treatment Ltd with its corporate seat at 46 Commerce Road, Capital City, Mediterraneo

Claimant's counsel is:
Horace Fasttrack
Advocate at the Court
75 Court Street
Capital City, Mediterraneo

Respondent is: Hope Hospital with its corporate seat at 1-3 Hospital Road, Oceanside, Equatoriana.

Respondent's counsel is:
Joseph Langweiler
14 Capital Boulevard
Oceanside, Equatoriana

I have asked the Parties' Counsels to direct all further correspondence to you, with copies of all correspondence forwarded to the CEPANI Secretariat.

Pursuant to Article 22 of the CEPANI Arbitration Rules, your initial task is to draft the Terms of Reference within two months of the transmission of the file, i.e. **by 5 October 2013**. This time limit may be extended further to a reasoned request.

I would draw your attention to the provision of Article 22(3) pursuant to which, while drafting the Terms of Reference or at the earliest date possible, you shall also establish in a separate document the intended timetable of the proceedings after having consulted the parties. You shall forward said timetable to the secretariat of CEPANI.

Please ensure that the arbitration proceedings advance quickly, without needless extensions or excessive time taken to submit conclusions. The rapidity of CEPANI arbitration proceedings is a critical feature and must be guaranteed at all costs.

The language of the Arbitration is English. The seat of the Arbitration is Vindobona, Danubia.

I inform you that the provision for arbitration costs amounts to 226,373.69 Euros of which, 201,939.07 Euros constitutes the provision for the costs and fees of the arbitral tribunal.

For the record, I can also confirm that the parties have paid the advance on arbitration costs.

Please contact our Secretariat prior to making the award so that I can calculate the correct amount of the arbitration costs. I draw your attention to the note annexed to this letter regarding the arbitration costs incurred during the procedure.

Could you please let me know within a period of 8 days, i.e. by 13 August 2013 at the latest, whether you are VAT registered. If I do not receive this information - provided you are VAT registered - you will be personally responsible for collecting the VAT on your fees from the parties involved.

I have received your Declaration of Independence and note that you are independent of the Parties and their respective Counsel.

I would also like to take this opportunity to make a number of recommendations, and would ask you to adhere to them strictly in order to ensure that the procedure you pledged to support runs smoothly.

Finally, I inform you that once the arbitration process is over, the parties and their advisers will be asked to complete a questionnaire giving their assessment of it.

A copy of this letter has been sent to your co-arbitrators and to Parties' Counsel.

Thank you in advance for your cooperation.

Yours sincerely,

(signed)
Prof Philippe Lambrecht
Secretary-General

CEPANI – NON PROFIT ASSOCIATION

rue des Sols 8 – 1000 Brussels • Telephone: +32-2-515.08.35 • Fax: +32-2-515.08.75
E-mail: info@cepina-cepani.be • Site: <http://www.cepani.be>



Horace Fasttrack
Advocate at the Court
75 Court Street
Capital City, Mediterraneo

Joseph Langweiler
14 Capital Boulevard
Oceanside, Equatoriana

The Secretary – General

Brussels, 5 August 2013

Dear Sirs,

*Our Reference: CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file : Audrey Goessens*

Pursuant to Article 15 of the CEPANI Arbitration Rules, I inform you that the Appointments Committee has appointed the Arbitral Tribunal that will settle the above-mentioned dispute.

The Arbitral Tribunal shall be chaired by: Mr. Henry Haddock 40 Floral Road, Tudor, Ruritania

The co-arbitrators proposed by Claimant and Respondent have been accepted and appointed. Said co-arbitrators are:

Dr. Arbitrator One, 25 High Street, Capital City, Mediterraneo
Prof. Bianca Tintin 21 Seaside, Oceanside, Equatoriana

The file has been sent to the arbitrators. At the same time they were requested, pursuant to Article 22 of the CEPANI Arbitration Rules, to draft the Terms of Reference and the timetable for the proceedings.

I would ask you to henceforth correspond directly with the arbitrators and to send copies of all correspondence to the CEPANI secretariat.

Copy of this letter is sent to the arbitral tribunal.

Yours sincerely,

(signed)
Prof Philippe Lambrecht
Secretary-General

CEPANI – NON PROFIT ASSOCIATION

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E-mail: info@cepina-cepani.be • Site: <http://www.cepani.be>

From Mr. Henry Haddock
President of the Arbitral Tribunal
In the case CEPANI No 22780
40 Floral Road, Tudor, Ruritania

To:
Prof Philippe Lambrecht,
Secretary-General
CEPANI - The Belgian Centre for
Arbitration and Mediation
Stuiversstraat/Rue des Sols, 8
1000 Brussels
BELGIUM

Tudor, 2 October 2013

Dear Mr. Secretary-General Lambrecht,

*Your Reference: CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file :
Audrey Goessens*

Further to your letter of 5 August 2013, with which you transmitted the file to the Arbitral Tribunal in this matter and in accordance with the provisions of Article 22 of the CEPANI Arbitration Rules, I am pleased to send herewith to you the Terms of Reference signed by the Parties' respective Counsel and by the members of the Arbitral Tribunal on 2 October 2013.

After consulting the parties, the Arbitral Tribunal shall establish in accordance with Article 22(3) of the CEPANI Arbitration Rules a procedural timetable that it intends to follow for the conduct of the arbitration and shall communicate this to the parties as well as to the Secretariat.

Yours sincerely,

(signed)
Henry Haddock
President of the Arbitral Tribunal

Encl. : A signed original of the Terms of Reference

Cc.:

- Dr. Arbitrator One
- Prof. Bianca Tintin
- Mr. Horace Fasttrack
- Mr. Joseph Langweiler

CEPANI - Belgian Centre for Arbitration and Mediation

TERMS OF REFERENCE

In the Arbitration No 22780

Between
Innovative Cancer Treatment Ltd
Claimant

And
Hope Hospital
Respondent

1. The Terms of Reference agreed hereafter pursuant to the CEPANI Arbitration Rules, Article 22, have been established through intensive email exchanges between the arbitrators and the parties and were finalized and signed at the meeting between the counsels of the Parties and the arbitrators on 2 October 2013.

I. Parties

2. Claimant Innovative Cancer Treatment Ltd. (hereafter referred to as “ICT”) is a corporation organized under the laws of Mediterraneo. It has its principal office at 46 Commerce Road, Capital City, Mediterraneo. The telephone number is (0) 4856201, the fax number is (0) 4856201 01 and e-mail info@ict.me.

Claimant is represented in this arbitration by:

Mr Horace Fasttrack
Advocate at the Court
75 Court Street
Capital City, Mediterraneo

3. Respondent Hope Hospital is a university teaching hospital. It is the national centre for cancer research and treatment in Equatoriana. Hope Hospital is renowned for treatment of localized tumours by the conventional methods of surgery and radiotherapy with X-rays. Hope Hospital has its principal office at 1-3 Hospital Road, Oceanside, Equatoriana. The telephone number is (0) 238 8700, the fax number is (0) 238 8701 and e-mail office@hopehospital.eq.

Respondent is represented in this arbitration by:

Mr Joseph Langweiler
14 Capital Boulevard
Oceanside, Equatoriana

II. Succinct Recital of the Circumstances of the Case

(a) Statement of the Parties' claims on jurisdiction

4. Innovative Cancer Treatment requests that the disputes in this matter be decided under the CEPANI Arbitration Rules, based on the CEPANI arbitration clause contained in Article 23 of the Framework and Sales Agreement concluded on 13 January 2008 (Claimant's Exhibit No. 2). It argues

[...]

It requests that pursuant to Article 10 of the CEPANI Arbitration Rules both disputes be heard together in a single arbitration and that the arbitration be conducted in Vindobona, Danubia.

5. Hope Hospital contends that the dispute resolution clause contained in Article 23 of the Framework and Sales Agreement concluded on 13 January 2008 void for several reasons. It claims

[...]

6. Moreover, Hope Hospital contests the jurisdiction of the Arbitral Tribunal, in particular in regard to the claims arising from the Sales and Licensing Agreement concluded on 20 July 2011. It submits

[...]

7. Hope Hospital also contends that ICT cannot rely on the arbitration clause contained in the standard terms, since [...].

8. Hope Hospital contends that the claims, notwithstanding the fact that they both concern the Proton Therapy Facility delivered by ICT, should not be heard together in a single arbitration, since [...]

(b) Statement regarding the facts of the case and the Parties' claims on the merits

9. Facts [...].

10. It is common ground between the Parties that the third treatment room, including the equipment and the software necessary for the active scanning technology, was available on 13 January 2012 and that Hope Hospital paid its first instalment of USD 2 million on 2 February 2012. [...]

11. ICT contends that the national law of Mediterraneo is applicable to the Framework and Sales Agreement of 13 January 2008 in accordance with Article 22 of its 2000 Standard Terms (Annex 4 to the Agreement; Claimant's Exhibit No. 2) and that pursuant to Articles 35 and 37 of the Mediterraneo Sale of Goods Act 2005 ICT is entitled to the outstanding amount of USD 10 million under the Framework and Sales Agreement. [...]

12. ICT contends that, contrary to Hope Hospital's case, the United Nations Convention on the International Sales of Goods 1980 ("CISG") is applicable to the Sales and License Agreement of 20 July 2011 in accordance with Article 22 of its redrafted Standard Terms of June 2011 (Claimant's Exhibit No. 9) and, that pursuant to Articles 14, 53, 61 and 62

CISG Hope Hospital is obliged to pay the outstanding purchase price of USD 1.5 million under the Sales and Licensing Agreement.

13. ICT also claims interest and the costs of this arbitration including its own costs.

14. Hope Hospital contends that both contracts are governed by the law of Mediterraneo excluding the United Nations Convention on Contracts for the International Sale of Goods, and it further contends that ICT's claim lack any merits. [...]

15. Hope Hospital contends that, even if ICT was correct that its standard terms did not exclude the CISG, the CISG would not be applicable to the Sales and License Agreement, as this agreement primarily concerned the development of a new software and the grant of a license therefor. [...]

16. Hope Hospital contends that it avoided the Framework and Sales Agreement pursuant to the law of Mediterraneo, by reason of misrepresentations made by ICT concerning the capacity of the machinery. [...]

17. In addition, Hope Hospital contends that a right of termination was created by ICT's breach of the Sales and Licensing Agreement. It asserts that [...]

18. Hope Hospital requests the Arbitral Tribunal to dismiss ICT's claims in the entirety for a lack of jurisdiction, as well as for being completely unmeritorious, and to order ICT to pay the costs of this arbitration including its own costs.

III. Issues to be determined

19. The Arbitral Tribunal shall determine the different issues arising out of the submissions of the parties, within the limits laid down by Article 23 (8) CEPANI Arbitration Rules.

The issues to be determined shall include, however not exhaustively and not necessarily in this order, the following questions:

- 1°) Does the Arbitral Tribunal have jurisdiction to deal with the payment claims raised by Claimant?
- 2°) Assuming that both contracts contain a valid arbitration clause, should both claims be heard in a single arbitration or does the Arbitral Tribunal lack jurisdiction and/or competence to do so or should it refrain from doing so ?
- 3°) Which law governs the claims, in particular the claim in regard to the purchase price for the active scanning technology under the Sales and Licensing Agreement (if the latter is part of this arbitration)?
- 4°) Does Claimant have payment claims against Respondent in the combined amount of USD 11,500,000 arising from the two contracts concluded?
- 5°) Which of the parties shall bear the costs of the arbitration, or in what proportions shall the costs be borne by the parties?

IV. Particulars of the applicable procedural rules

20. The Framework and Sales Agreement concluded between Innovative Cancer Treatment Ltd. And Hope Hospital on 13 January 2008 (Claimant's Exhibit No. 2) stipulates:

Art. 23 Dispute Resolution

- (1) All disputes arising from or in connection with this Agreement shall be settled, if possible, by negotiations between the Parties. For that purpose, either Party may, by giving written notice, cause any matter in, or alleged to be in, dispute to be referred to a meeting of appropriate representatives of management of the Parties. Such meeting shall be held within fifteen (15) days following the giving of said written notice. If the matter is not resolved within fifteen (15) days after the date of the notice referring the matter to appropriate management representatives, or such later date as may be mutually agreed upon, then the dispute must be submitted to mediation by a third person neutral.
- (2) For the mediation, either the Parties shall mutually agree to determine the date of commencement; or one Party may in writing invite the other Party to participate in mediation. In this latter case the mediation starts on the date unilaterally indicated by the Party taking the initiative to invite; but not earlier than fifteen (15) days from the date of receipt of such written invitation by the invited Party. This mediation shall be kept confidential. The mediator's fees and expenses shall be shared equally by the Parties and each Party will bear its own costs.
- (3) If the matter in dispute is not resolved through such mediation within thirty (30) days after the start of the mediation, then, but not before the expiry of the 30th day, such dispute shall become subject to arbitration, to be finally settled under the CEPANI Rules of Arbitration before CEPANI – *The Belgian Center for Arbitration and Mediation at Rue des Sols/Stuiverstraat Nr. 8, 1000 Brussels*. The arbitration shall be conducted before three arbitrators, in the English language and shall be held in Vindobona, Danubia.
- (4) The award shall be final and binding upon the Parties. Each Party has, however, the right within three months after it has received the award to refer the case to the applicable state courts if it considers the award to be obviously wrong in fact or in law. The state court shall then have jurisdiction to review the case and to decide the issue in accordance with the applicable law.
- (5) The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo.
- (6) In addition, the Seller has the right to bring any and all claims relating to payments in the courts of Mediterraneo. The Buyer herewith submits to the jurisdiction of the courts of Mediterraneo.

19a. The Standard Terms and Conditions for Sale of Innovative Cancer Treatment Ltd of November 2000, Annex 4 of the Framework and Sales Agreement of 13 January 2009 (Claimant's Exhibit No. 2), stipulate:

Section 21 Dispute Resolution

1. Any dispute arising out of or in connection with this Agreement shall be finally settled under the Arbitration Rules of CEPANI – The Belgian Centre for Arbitration and Mediation by one or more arbitrators appointed in accordance with the said Rules.
2. The place of the arbitration shall be Capital City, Mediterraneo.
3. The arbitration shall be conducted in English.
4. Any right of appeal shall be excluded

20a. The Sales and License Agreement concluded between Innovative Cancer Treatment Ltd. And Hope Hospital on 20 July 2011 (Claimant's Exhibit No. 6) stipulates:

Art. 23 Dispute Resolution

1. The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo or Equatoriana as applicable.
2. In addition, both Parties shall have the right to bring any and all claims in the courts of Mediterraneo or Equatoriana to the jurisdiction of which they hereby submit.

21. The General Terms and Conditions for Sale of Innovative Cancer Treatment Ltd of July 2011 (Claimant's Exhibit No. 9), stipulate:

Section 21 Dispute Resolution

Any dispute arising out of or in connection with this Agreement shall be finally settled under the CEPANI Rules of Arbitration by one or more arbitrators appointed in accordance with the said Rules.

The place of the arbitration shall be Capital City, Mediterraneo.

The arbitration shall be conducted in English.

[...]

V. Particulars on the applicable rules of law on the merits:

22. The Standard Terms and Conditions for Sale of Innovative Cancer Treatment Ltd of November 2000, Annex 4 of the Framework and Sales Agreement of 13 January 2008 (Claimant's Exhibit No. 2), stipulate:

Section 22 Choice of Law

The contract shall be governed by the national law of Mediterraneo as set out in the statutes of Mediterraneo and developed by its courts.

23. The Standard Terms and Conditions for Sale of Innovative Cancer Treatment Ltd of July 2011, (Claimant's Exhibit No. 9), stipulate:

Section 22 Choice of Law

The contract is governed by the law of Mediterraneo.

VI. Names and Addresses of the Arbitrators

Henry Haddock, President of the Tribunal
40 Floral Road, Tudor, Ruritania

Dr. Arbitrator One
25 High Street, Capital City, Mediterraneo

Prof. Bianca Tintin
21 Seaside, Oceanside, Equatoriana

Signed in Vindobona, on 2 October 2013

(Signed_____)

Counsel for Claimant, Innovative Cancer Treatment, Ltd., Mr. Horace Fasttrack

(Signed_____)

Counsel for Respondent, Hope Hospital, Mr. Joseph Langweiler

(Signed_____)

Dr. Arbitrator One
Arbitrator

Prof. Bianca Tintin
Arbitrator

Mr. Henry Haddock
President

From Mr. Henry Haddock
President of the Arbitral Tribunal
In the case CEPANI No 22780
40 Floral Road, Tudor, Ruritania

To: Horace Fasttrack
75 Court Street
Capital City, Mediterraneo

Joseph Langweiler
14 Capital Boulevard
Oceanside, Equatoriana

Tudor, 4 October 2013

CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital

Dear Colleagues,

Please find enclosed Procedural Order No 1 in the above referenced arbitration proceedings.

Both Parties are requested to comply with the orders made and the Arbitral Tribunal reserves the right to draw negative inferences from any non-compliance with Procedural Order No 1.

Yours sincerely,

(signed)
Henry Haddock
President of the Arbitral Tribunal

Encl. : Procedural Order 1

CEPANI Arbitration No 22780
Procedural Order No 1

4 October 2013

1. After its constitution and receipt of the file from CEPANI the Arbitral Tribunal invited the Parties to attend a Terms of Reference Meeting on 2 October 2013. At that meeting the Arbitral Tribunal and the Parties discussed, agreed, and signed the Terms of Reference. Furthermore, they discussed the various options in structuring the arbitral proceedings in a cost and time-efficient manner, taking into account Respondent's objections to the jurisdiction of the Arbitral Tribunal in general and to the hearing of the two separate payment claims in a single arbitration. In light of this discussion the Arbitral Tribunal has decided to split the proceedings into several parts.

2. The first part will deal with the questions concerning the Arbitral Tribunal's jurisdiction as well as the question of the applicable law. Depending on the outcome of this first part, in particular concerning the jurisdictional issues, the second part will then address the remaining issues in dispute as defined in the Terms of Reference pursuant to Art. 22 (1)(e) CEPANI-Arbitration Rules. It will deal in particular with the questions of whether Claimant - under the law determined to be applicable in the first part - has a right to claim payment of the requested amount(s) under the contract(s) or whether the latter have been justifiably terminated or avoided by Respondent for the reasons given.

3. In light of these considerations the Arbitral Tribunal makes the following orders:

(1) In their next submissions and at the Oral Hearing in Danubia (Hong Kong) the Parties are required to address the following issues:

- a. Does the Arbitral Tribunal have jurisdiction to deal with the payment claims raised by Claimant?
- b. Assuming that both contracts contain a valid arbitration clause, should both claims be heard in a single arbitration or does the Arbitral Tribunal lack jurisdiction and/or competence to do so or should refrain from doing so?
- c. Does the CISG govern the claims arising under the Sales and Licensing Agreement of 20 July 2011? On the basis of the Parties' submissions this includes in particular the following questions:
 - i. Whether the Sales and Licensing Agreement constitutes a sales contract in the sense of the CISG?
 - ii. Whether the July 2011 version of Standard Terms and Conditions of Sale been validly included into the contract?
 - iii. What would be the effect of the choice of law clause contained in section 22 of these Standard Terms and Conditions of Sale provided they have been included?

No further questions going to the merits of the claims should be addressed.

(2) For their submissions the following Procedural Timetable applies:

- a. Claimant's Submission: not later than 12 December 2013
- b. Respondent's Submission: no later than 23 January 2014

(3) The submissions are to be made in accordance with the Rules of the Moot agreed upon at the Terms of Reference meeting. Consequently, concerning the jurisdictional issues in No. (1)(a) and (b), the Parties will base their submissions on the assumption that the place of arbitration for this arbitration - should the Arbitral Tribunal have jurisdiction - is in Vindobona, Danubia. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006-amendments. Furthermore, it is undisputed between the Parties that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG.

(4) In case the Parties need further information Requests for Clarification must be made not later than 24 October 2013 to **one** of the following e-mail accounts (clarifications@vismoot.org; stefan.kroell@law-school.de).

4. Both Parties are invited to attend the Oral Hearing Scheduled for 12 – 17 April 2014 in Vindobona, Danubia (Hong Kong 31 March – 6 April). The details concerning the timing and the venue will be provided in due course.

For the Arbitral Tribunal

Henry Haddock
President of the Tribunal



Mr Henry Haddock
President
40 Floral Road
Tudor, Ruritania

Mr Arbitrator One
25 High Street
Capital City, Mediterraneo

Prof Binca Tintin
21 Seaside
Oceanside, Equatoriana

Brussels, 4 October 2013

Dear Sir,

Our Reference: CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital
CEPANI Counsel: Emma Van Campenhoudt - Legal Attaché in charge of the file : Audrey Goessens

Thank you for your letter dated 2 October 2013 and copy of the Terms of Reference signed by yourself and the parties on 2 October 2013.

Pursuant to Article 28 of the CEPANI Arbitration Rules the Arbitral Tribunal shall make the award within six months of the signature of said Terms of Reference. The deadline may be extended at the reasoned request of the Arbitral Tribunal.

Pursuant to article 28.2 and in light of the contents of your Procedural Order No 1 of 4 October 2013, which lays down the Timetable for the proceedings, we hereby extend the deadline for the Arbitral Tribunal to make the award, until 15 May 2014 **at the latest.**

A copy of this letter has been sent to the Parties' respective Counsel, Messrs Fasttrack and Langweiler.

Yours sincerely,

(signed)

Emma Van Campenhoudt
For the Secretary-General, Philippe Lambrecht

CEPANI – NON PROFIT ASSOCIATION

rue des Sols 8 – 1000 Brussels • Telephone: +32-2-515.08.35 • Fax: +32-2-515.08.75
E-mail: info@cepina-cepani.be • Site: <http://www.cepani.be>

From Mr. Henry Haddock
President of the Arbitral Tribunal
In the case CEPANI No 22780
40 Floral Road, Tudor, Ruritania

To: Horace Fasttrack
75 Court Street
Capital City, Mediterraneo

Joseph Langweiler
14 Capital Boulevard
Oceanside, Equatoriana

Tudor, 31 October 2013

CEPANI No. 22780: Innovative Cancer Treatment Ltd. v/ Hope Hospital

Dear Colleagues,

Please find enclosed Procedural Order No 2 in the above referenced arbitration proceedings.

Both Parties are requested to comply with the orders made and the Arbitral Tribunal reserves the right to draw negative inferences from any non-compliance with Procedural Orders No 1 and 2.

Yours sincerely,

(signed)
Henry Haddock
President of the Arbitral Tribunal

Encl. : Procedural Order 2

Procedural Order No 2

31 October 2013

1. Following its Procedural Order No 1 the Arbitral Tribunal received numerous requests of clarifications. Taking into account those requests which were submitted in accordance with Procedural Order No 1 and the Rules of the Moot, the Arbitral Tribunal issues the following clarifications and corrections.

- (1) The Parties are reminded that notwithstanding the agreed upon Terms of Reference, which define the issues potentially to be treated in the arbitration proceedings should the Arbitral Tribunal assume jurisdiction, this **first phase** of the arbitration proceedings is limited to the issues as set out in Procedural Order No 1, which are jurisdiction and determination of the applicable law. The merits of the case, i.e. whether the seller has the rights claimed under the applicable law or whether the buyer has any defenses should not be treated in this phase of the arbitration, neither in the submissions nor in the oral hearings.
- (2) Question 1(c)(ii) should be answered on the assumption that the CISG is in principle applicable to the contract.
- (3) With its question 1 (c)(iii) the Arbitral Tribunal merely wants to know whether section 22 of the July 2011 version of Claimant's Standard Terms and Conditions – provided it is applicable – would have any effect on the law applicable to the Sales and Licensing Agreement.
- (4) Should the Parties consider it necessary to rely on the national contract law of either Danubia, Mediterraneo or Equatoriana, it can be assumed that the all of them are a verbatim adoption of the UNIDROIT Principles.

Where the contracts concluded and signed by persons who had authority to act for the Parties and had there been previous or subsequent dealings between the Parties.

- (5) The Framework and Sales Agreement as well as the Sales and Licensing Agreement were concluded and signed by persons who had the necessary authority to act for the Parties.
- (6) There have been no previous dealings between the Parties. Since the opening of the Proton Therapy Facility with the first two treatment rooms in April 2011 the Parties have entered into an additional contract under their framework agreement by which Claimant agreed to provide the necessary protons, other consumables and do the required maintenance works.

Why does Claimant consider Professor Szabo to be a critic of the proton therapy?

- (7) In several publications and interviews Professor Szabo has doubted whether proton therapy really has the positive effects attributed to it. In his view the

benefits in comparison to the conventional radiotherapy are marginal and do not justify the costs associated with the technology.

Is the third treatment room limited to the treatment of prostate cancer?

(8) Respondent had been interested in the third treatment room primarily to treat prostate cancer. That is the reason why Claimant in its Statement of Claim para. 26 refers to prostate cancer. The technique employed is, however, also suitable and used for other types of cancer.

What is the legal nature of Circular No 265 and how has it influenced the drafting of Art. 23 Framework and Sales Agreement?

(9) The Circular No. 265 issued by the Auditor General and in force upon its issuance is an internal administrative guideline for governmental entities, i.e. all entities which are either administrative subdivisions of the state or are state-owned. It is not directly applicable to Hope Hospital. Due to the extensive state funding the accounts of Hope Hospital are, however, reviewed by the Auditor General. At the same time the government expects Hope Hospital to comply with the guidelines issued by the Auditor General unless there are good grounds to the contrary. Hope Hospital had already deviated from the Circular No 265 in another case, where it had agreed to arbitration in a third country upon the insistence its counterparty without any appeal or review mechanism. After an unfavorable award, there had, however, been a considerable public discussion about that deviation, as no appeal or review was possible. As Hope Hospital wanted to avoid such a discussion in the present case it insisted on the appeal and review part in Art. 23 (4) 2nd sentence FSA. On a purely legal analysis it was not required by the law to do so. The Claimant had been vaguely informed about the background for Hope Hospital's insistence on the appeal and review mechanism but knew no details about it or the exact wording of the Circular.

Has the appeal and review mechanism in Art. 23 (4) been drafted or revised by lawyers and was Respondent aware of possible problems?

(10) The "appeal and review mechanism" in Art. 23 (4) 2nd sentence of the Framework and Sales Agreement for the arbitral was agreed at the meeting on 4 November 2007 where no lawyers were present. The clause was included verbatim into the draft prepared by Claimant's legal team and later reviewed by Respondent's lawyers. None of the lawyers involved in drafting the Framework and Sales Agreement was an arbitration specialist. Consequently neither Claimant nor Respondent was aware of problems which might be associated with such a mechanism. The drafting of the Sales and Licensing Agreement was done by the same lawyers.

Have the Parties complied with the other dispute settlement mechanisms under Art. 23?

(11) Before the initiation of the arbitration proceedings the Parties had tried to solve the dispute amicably under Art. 23 (1) and (2) Framework and Sales Agreement

Which International Conventions are applicable in the various countries?

(12) Danubia, Equatoriana and Mediterraneo are parties to the New York Convention of 1958 and the Vienna Convention on the Law of Treaties of 1969. They became Contracting States to the CISG before 2000 and none of them has declared any reservation. None are Member States of the European Union.

Do the arbitration laws in the various countries contain special provisions on appeals against awards?

(13) The arbitration laws of Mediterraneo and Danubia are a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments with the Option I of Art. 7. In Equatoriana the same “2006-version” of the UNCITRAL Model Law has been adopted with two closely related amendments. First, the scope of application of the law is not limited to international cases in the sense of Art. 1 (3) ML. Second, the following provision concerning appeal on the merits was included as Art. 34A:

34A Appeals on questions of Equatorianean law

(1) Notwithstanding the limitations in article 34 any party may appeal to the High Court on any question of Equatorianean law arising out of an award—

- (a) If the parties have so agreed before the making of that award; or
- (b) With the consent of every other party given after the making of that award; or
- (c) With the leave of the High Court.

(2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.

(3) On the determination of an appeal under this clause, the High Court may, by order,—

- (a) Confirm, vary, or set aside the award; or
- (b) Remit the award, together with the High Court's opinion on the question of law which was the subject of the appeal, to the arbitral tribunal for reconsideration or, where a new arbitral tribunal has been appointed, to that arbitral tribunal for consideration,—

and, where the award is remitted under paragraph (b) the arbitral tribunal shall, unless the order otherwise directs, make the award not later than 3 months after the date of the order.

(4) For the purposes of this clause, **question of Equatorianean law**—

(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but

(b) does not include any question as to whether—

- (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
- (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

(14) The Danubian Arbitration Law for domestic arbitration contains a provision which is nearly identical to Art. 34A of the Equatorianean law with the only difference that it refers to questions of Danubian law which may be appealed.

Is there any case law concerning agreements extending the control of the courts over arbitral awards?

(15) There is no case law in any of the countries involved whether the parties can agree to extended review or appeal clauses or can otherwise modify the extend the scope of post-award proceedings. There is also no case law on Art. 34 A of the Equatorianean Arbitration Law.

Are there any general restrictions under Equatorianean Law on the ability of governmental entities or of Hope Hospital to enter into arbitration agreements?

(16) Under Equatorianean Law there are no restrictions on Hope Hospital or governmental entities to enter into arbitration agreements. There are several governmental entities which have in the past entered into arbitration agreements. All of them provided for a place of arbitration in Equatoriana.

What is the “original dispute resolution clause” mentioned in para. 21 Statement of Claim?

(17) The Reference to the “original dispute resolution clause” in para. 21 of the statement of claim is to Art. 23 in the Framework and Sales Agreement.

Has Claimant initiated a further set of arbitration proceedings under the Sales and Licensing Agreement?

(18) Claimant has only initiated one set of arbitration proceedings.

What is background of the different arbitrators suggested by Respondent and are his statements true that different issues will play a role under both contracts?

(19) The two arbitrators suggested by Respondent have a different professional background. Prof. Bianca Tintin is a lawyer and accountant. Ms. Christina Arrango is an engineer. Apart from what is in the file, the Tribunal has no further information about whether the reasons given by Respondent for his nominations are correct or what will be relevant in the further conduct of the proceedings.

Is there any dispute as to the law governing the Framework and Sales Agreement?

(20) No. Both Parties are of the view that it is governed by the Mediterranean Sale of Goods Act.

Is the Mediterranean Law the best basis for the claim under the first contract and the CISG for the claim under the second contract?

(21) Yes. Consequently Claimant has an interest in having the CISG declared applicable to the contract.

What software is needed for the use of the third treatment room and could the software delivered under the Sales and Licensing Agreement operate the whole facility alone or was it necessary to also use the software delivered under the Framework and Sales Agreement.

(22) For the operation of the Particle Therapy Facility two different, but closely interrelated processes have to be controlled by the software. The first concerns the acceleration of the protons in the accelerator to energise them. The second concerns the modeling of the proton beam in the treatment room. The software developed and delivered under the Sales and Licensing Agreement primarily concerned the second process. In relation to the first process, the acceleration of protons, the Parties could largely rely on the software delivered for that process under the Framework and Sales Agreement. Some amendments to that software by Claimant were, however, necessary to ensure a smooth interaction of both sets of software.

How was the software delivered from Claimant to Respondent?

(23) The software was in part already installed in the equipment delivered by Claimant, i.e. computers, steering devices or monitors. The main part was downloaded by Claimant's engineers who installed the facility, in part from Claimant's server in part from their own computers. No CD or other data carrier was handed over to Respondent.

Was the software delivered a standard software or was it customized for Respondent? Where there any changes to the software after its delivery?

(24) Before the conclusion of the Sales and Licensing Agreement Claimant had not offered active scanning technology to customers. It had taken a number of steps to develop the technology but no working modeling software was available at the time of concluding the Sale and Licensing Agreement. As Claimant needed medical expertise and data to develop the software, it was willing to agree on such a favorable price for Respondent. The first version of the basic software was consequently developed primarily for the needs of Respondent. It was, however, clear that Claimant would try to use the software also for future customers, which was the reason for the inclusion of Art. 11 into the Sales and Licensing Agreement.

(25) After the basic software for the third treatment room had been installed Claimant started with the data provided by Respondent and in co-operation with Respondent's operating personnel to modify, improve and fine-tune the software.

(26) That was a continuing process which took place between January 2012 and the time when Respondent ceased treatment. In January 2012 Claimant with the help of Respondent had initiated the final approval process for the technique by the relevant authorities in Equatoriana and from that time onward had been engaged in the required clinical trial tests.

How did Claimant arrive at the figures for the offer made to Respondent?

(27) The figures did not represent the real value. They are due to the fact that Respondent at the time could not pay more than USD 3,5 million in cash. Moreover, Respondent's contribution via medical data and provision of services had the ordinary market value of USD 1,5 million, any other party

would have been willing to pay for it. As Claimant wanted the contract under all circumstances it was willing to value Respondent's contribution with USD 6 million. For tax purposes, as training services are higher taxed than the mere delivery of goods, no separate value was attributed to the training. Instead the USD 3,5 million were all allocated to the material delivered.

How crucial is the clinical data and support provided by Hope Hospital and could Innovative Cancer Treatment have gotten it elsewhere?

(28) Without the data supplied and the trials done it would have been impossible to finalize the development of the software and get the whole technology approved by the Medical Authorities. In principle, ICT could have received the data and the support from any cancer research clinic with some experience. Given the good reputation of Hope Hospital and the experience of its doctors and other personnel Hope Hospital was considered by ICT to be one of the most suitable partners for developing the initial version of the software which would form the basis for all further developments and customizations.

What is the value of the various parts of the software component which makes up for 50% of the price for a treatment room using active scanning technology?

(29) In its internal calculations Claimant attributes the following values to the various "component" of the software delivered:

- a. Development costs (the major part of which is a fixed contribution to original development of software): USD 3,5 million
- b. Installation at hospital (including providing the interface with existing computer system): USD 1 million
- c. Testing and fine tuning at premises: USD 250.000

Since it is a completely new technology and Claimant does not know whether the anticipated sales will be reached, which form the basis for the pro-rata allocation of the original development costs for the software the figures involve considerable guesswork.

Was Respondent provided with any updates to the software in the course of the duration of the Sales and Licensing Agreement?

(30) No.

Were there any discussion concerning changes in the new Standard Terms and Conditions at the meeting on 2 June 2011

(31) At the meeting on 2 June 2011 one of the members of Respondent's negotiation team had asked Dr. Vis what type of changes occurred in the liability regime regulated in the Standard Terms and Conditions. Dr. Vis had answered that he is not a lawyer but that according to what he had understood the major change was a limitation of liability to double the price paid for the equipment that had been included in the new Standard Terms. That answer was considered sufficient and the issue was not further discussed. Dr. Vis did not refer to the changed wording of the choice of law clause.

At what point in time were the Standard Terms 2011 available in good English language on the website?

(32) The information in Dr. Excell's witness statement is correct. The English version of the Standard Conditions had been on the website from 1 – 4 July 2011. It was then removed since certain parts of the translation were wrong or at least difficult to understand and a new and correct English translation had been made available on the website on 21 July 2011. Between these periods there had only been a banner, that an English Translation would be provided soon on the website and a phone number was given in case of questions.

Did Respondent ever ask for an English translation of the Standard Terms and Conditions before the Sales and Licensing Agreement was concluded or did it check the website?

(33) Respondent never asked for an English translation of the Standard Terms and Conditions before or after conclusion of the contract. In particular did Respondent never asked Ms. Maier who knew nothing about Dr. Vis promise. One of Respondent's negotiators, a doctor, had a look at Claimant's website on 14 July 2011 when the terms were only available in Mediterranean and once more on 30 July 2011 when they were available in English. He was only checking the changes in the liability regime mentioned by Dr. Vis at the final 2 June 2011 meeting.

What was the reasons for Dr. Vis' replacement?

(34) Dr. Vis had a stroke and he only started working again in 2012.

Did the young doctor who understands Mediterranean attend the final meeting on 2 June 2011.

(35) The young doctor did not attend the final 2 June 2011 meeting but only two meetings before the conclusion of the Framework and Sales Agreement and the first meeting for negotiating the Sales and Licensing Agreement. At these two meetings he had also communicated with Claimant's technicians in Mediterranean. Apart from that all other negotiations were conducted in English.

Is Mediterranean a widely used language in international business?

(36) No.

Should it be assumed that Respondent has paid the 2nd, 3rd and 4th semi-annual installment of USD 7.5 million according to the Framework and Sales Agreement even though it is nowhere explicitly stated?

(37) Yes.

When were the contracts with the further customers concluded and what was the contract price?

(38) The contract for the proton treatment facility in Hobbitown was concluded in December 2012. Construction is under way and it is expected that the

facility will be ready for use by the beginning of 2016. The contract with the second customer was concluded in April 2013. Due to delays in getting permission for the construction of the facility no opening date can yet be given.

- (39) In both cases a price of USD 9,5 million was charged per treatment room using active scanning technology and included into the overall price calculation of the contract.

Clarifications and Corrections by the Arbitral Tribunal³

- (40) The Framework and Sales Agreement was concluded on 13 January 2008.

The references to the 13 January 2009 in paras. 5, 11, 20, 22 of the Terms of Reference are typos.

- (41) In the Terms of Reference paragraphs 19 and 20 exist twice. Reference to the second paragraphs should be made as 19a and 20a.

- (42) The quote of Section 22 in paragraph 22 of the Term of Reference is not completely accurate.

- (43) In paragraph 23 reference should be made to “Standard Terms” instead of “General Terms”.

Corrections by the Claimant

- (44) In para. 16 of the Statement of Claim several typos have occurred when referencing Respondent’s letter of 15 August 2012. First, the reference – including the footnotes - should naturally be to the Auditor General of Equatoriana and not that of Mediterraneo as stated. Equally, the cost-benefit analysis referred to was made for Equatoriana and not Mediterraneo. Second, the Auditor General confirmed a finding that the facility had operated only to 70% of the planned capacity and not as stated of 80%.

Corrections by Respondent

- (45) The Respondent wishes to make the following corrections to his submissions:

- (46) On page 32, para. 11 the quote of Article 45 is not completely correct. Instead of “a specific regulation which prevails” it should state “a specific provision to the contrary”

³ The following corrections are already included in the file.