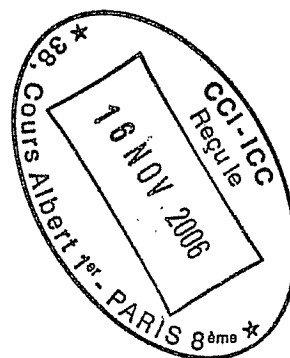


INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

ICC Case No: 14320 / FM



SUSE LINUX GmbH

(Germany)

Claimant

– and –

THE SCO GROUP, INC.

(USA)

Respondent

TERMS OF REFERENCE

The Arbitral Tribunal:

Roberto Dallafior

Yves Derains

Toby Landau (Chairman)

TERMS OF REFERENCE

Pursuant to Article 18 of the Rules
of the International Court of Arbitration of
the International Chamber of Commerce,
effective as of 1st January 1998: "The ICC Rules"

I - THE FULL NAMES AND DESCRIPTIONS OF THE PARTIES [Article 18(1)(a)]

1. **Claimant:** The Claimant is SUSE LINUX GmbH ("SUSE"), a company incorporated and existing under the laws of Germany, and specialising in the Linux operating system business. It is the legal successor of SuSE Linux AG, and (since January 2004) a 100% indirectly owned subsidiary of Novell, Inc. ("Novell"), a Delaware corporation headquartered in Massachusetts, USA. SUSE's registered office and contact details are as follows:

SUSE LINUX GmbH, Maxfeldstrasse 5, 90409 Nürnberg, Germany

Attention: Felix Imendörffer
Telephone: (+ 49) 911 740 53 151
Fax: (+ 49) 911 740 53 476

2. **Respondent:** The Respondent is The SCO Group, Inc. ("SCO"), a company incorporated and existing under the laws of Delaware. It is a provider of software technology to businesses, and is the legal successor to Caldera International, Inc.. Its registered office and contact details are as follows:

The SCO Group, Inc., 355 South 520 West, Suite 100, Lindon, Utah 84082, USA

Attention: Mr Andy Nagle / Mr Darl McBride
Telephone: (+ 1) 801 765 4999
Fax: (+ 1) 801 765 1313

3. **Terminology:** The Claimant and Respondent are each referred to in these Terms of Reference as a "Party", and collectively as "the Parties".

II - THE ADDRESSES OF THE PARTIES TO WHICH NOTIFICATIONS OR COMMUNICATIONS ARISING IN THE COURSE OF THE ARBITRATION MAY BE MADE [Article 18(1)(b)]

4. **Claimant:** In this arbitration, SUSE is represented, under Powers of Attorney dated 6 April 2006 and 7 April 2006, by:

(1) Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105-2482, USA.

Attention: Michael A. Jacobs, Grant L. Kim, Kenneth W. Brakebill
Telephone: (+ 1) 415 268 7000
Fax: (+ 1) 415 268 7522
Email: mjacobs@mofo.com
gkim@mofo.com
kbrakebill@mofo.com

(2) Homburger Rechtsanwälte, Weinbergstrasse 56 / 58, Postfach 338, 8006 Zürich, Switzerland.

Attention: Georg Rauber, Felix Dasser, David Rosenthal
Telephone: (+ 41) 43 222 1000
Fax: (+ 41) 43 222 1500
Email: georg.rauber@homburger.ch
felix.dasser@homburger.ch
david.rosenthal@homburger.ch

5. **Respondent:** In this arbitration, SCO is represented, under Powers of Attorney dated 17 October 2006, by:

(1) Boies Schiller & Flexner LLP, 5301 Wisconsin Avenue N.W., Suite 800, Washington D.C., 20015-2015, USA

Attention: Jonathan D. Schiller, William A. Isaacson
Telephone: (+ 1) 202 237 2727
Fax: (+ 1) 202 237 6131
Email: jschiller@bsflp.com
wisaacson@bsflp.com

- (2) Boies Schiller & Flexner LLP, 401 East Las Olas Blvd., Suite 1200, Fort Lauderdale, Florida 33301, USA

Attention: Stuart H. Singer, William T. Dzurilla
Telephone: (+ 1) 954 356 0011
Fax: (+ 1) 954 356 0022
Email: ssinger@bsflp.com
wdzurilla@bsflp.com

- (3) Lenz & Staehelin, Route de Chêne 30, 1208 Geneva – Switzerland

Attention: Dr. Paolo Michele Patocchi
Telephone: (+ 41) 22 318.70.00
Fax : (+ 41) 22 318.70.01
Email : PaoloMichele.Patocchi@LenzStaehelin.com

6. *Communications:* Notifications or communications arising in the course of this arbitration are to be made to the above representatives.

7. Communications between the Parties and the Arbitral Tribunal shall be by email to all of the above, and confirmed in hard copy by fax or courier to the following:

- (1) Grant L. Kim of Morrison & Foerster LLP;
- (2) David Rosenthal of Homburger Rechtsanwälte;
- (3) William T. Dzurilla of Boies Schiller & Flexner LLP;
- (4) Dr. Paolo Michele Patocchi of Lenz & Staehelin.

8. Communications shall be deemed to be timely if sent by email by the due date at the place of sending, with a confirming copy sent by fax or courier by the following day.
9. Copies of all communications between the Parties and the Arbitral Tribunal shall be copied to the Secretariat of the ICC International Court of Arbitration.

III - THE ARBITRATORS' FULL NAMES, DESCRIPTIONS AND ADDRESSES

[Article 18(1)(e)]

10. The Arbitral Tribunal comprises:

- (1) **Dr Roberto Dallafior**, nominated by SUSE and confirmed as arbitrator by Secretary General of the ICC International Court of Arbitration pursuant to Article 9(2) of the ICC Rules on 19 June 2006, and whose address is:

Nater Dallafior Rechtsanwälte
Hottingerstrasse 21
Postfach 674
8024 Zürich
Switzerland

Telephone: (+ 41) 44 250 45 40
Fax: (+ 41) 44 250 45 00
Email: dallafior@naterdallafior.ch

- (2) **Yves Derains**, nominated by SCO and confirmed as arbitrator by the Secretary General of the ICC International Court of Arbitration pursuant to Article 9(2) of the ICC Rules on 19 June 2006, and whose address is:

SCP Derains & Associés
167 bis, avenue Victor Hugo
75116 Paris
France

Telephone: (+ 33) 1 45 53 38 38

Fax: (+ 33) 1 45 53 63 48
Email: yderains@derains.com

- (3) **Toby Landau**, jointly nominated by the two arbitrators and confirmed as Chairman by the Secretary General of the ICC International Court of Arbitration pursuant to Article 9(2) of the ICC Rules on 28 August 2006, and whose address is:

Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Telephone: (+ 44) 207 813 8000
Fax: (+ 44) 207 813 8080
Email: ttlandau@aol.com
tlandau@essexcourt.net

IV - SUMMARY OF THE PARTIES' RESPECTIVE CASES AND RELIEF SOUGHT

[Article 18(1)(c)]

11. A summary of the Parties' respective claims and defences is set out below in order to satisfy the requirements of Article 18(1)(c) of the ICC Rules. Sections IV(1) and IV(2) below have been prepared and drafted by each party unilaterally, and do not reflect or contain any expression of acquiescence on the part of the other party or the members of the Arbitral Tribunal.
12. This summary is subject to further submissions, and to Article 19 of the ICC Rules. As such, it is not intended as an exhaustive or definitive statement, and nor is it to be taken as foreclosing the making of arguments or the introduction of evidence not expressly referred to therein.
13. Subject to the ICC Rules and the rules of procedure applicable to the arbitration, the Arbitral Tribunal shall have power, on application by any party, to allow amendments to

the pleadings and written memorials on such terms, if any, as the Arbitral Tribunal may deem appropriate.

(1) Claimant's Summary

14. The Claimant summarises its claims and the relief it seeks as follows:

i. Jurisdiction

15. Article 9 of the Master Transaction Agreement ("MTA") and Article 12 of the Joint Development Contract ("JDC") require "[a]ny differences or disputes arising from" the MTA or JDC, or "from contracts regarding its performance," to be resolved by ICC arbitration. SUSE seeks to enforce its rights under the MTA and JDC and to obtain relief from SCO's breach of these contracts. SUSE's claims arise from the MTA and the JDC.

16. Therefore, the Arbitral Tribunal has jurisdiction to adjudicate these claims.

17. In contrast, there is no jurisdiction over SCO's counterclaims relating to the Asset Purchase Agreement and Technical License Agreement, because these contracts do not include arbitration clauses and were not even signed by SUSE.

ii. Claims

18. In May 2002, in order to promote the widespread adoption of the Linux computer operating system as a standard for the information technology industry, SUSE, SCO (then Caldera) and two other Linux vendors (Conectiva, Inc. and Turbolinux, Inc.) agreed to develop a standard version of Linux called "UnitedLinux." To this end, they entered into the JDC and the MTA (together, "the UnitedLinux Contracts"), which form the basis of these proceedings.

19. A fundamental premise of the UnitedLinux project was that SCO, SUSE and the other UnitedLinux members would have the right to commercialize the technology in the UnitedLinux Software independently, free from claims that other members had any proprietary rights to such technology that could threaten the common project. This agreement was reflected in the following key provisions of the UnitedLinux Contracts:

- (1) All intellectual property rights in the UnitedLinux Software shall be assigned to the UnitedLinux LLC, except for "Pre-Existing Technology" and "Enhancements."
- (2) Each member shall have a royalty-free license to commercialize the technology in UnitedLinux, granted by the other members directly (for "Pre-Existing Technology" and "Enhancements") or through the UnitedLinux LLC (for all other technology).
- (3) All UnitedLinux technology already subject to an "open-source license" shall remain subject to such license as well. As SCO knew, the Linux "kernel" was subject to the General Public License ("GPL"), which required the Linux kernel and any published modifications thereto to be made freely available to the public. Thus, SCO agreed that any portions of UnitedLinux based on the Linux kernel would be released subject to the GPL as freely available, open source code.

20. Thus, all of the UnitedLinux Software was available to all UnitedLinux members by license from the UnitedLinux LLC, direct license from the members, and/or under the terms of the open source licenses that the members agreed to apply.

21. Initially, SCO (then Caldera) strongly supported UnitedLinux, proclaiming that:

"Caldera sees the formation of UnitedLinux as a tremendous benefit to the industry, to our customers, to our 16,000-member reseller channel, and to our IHV and ISV partners. Linux and Open Source have already changed the way software is developed in the new online world. UnitedLinux now offers a viable business model and creates a unified

environment that will attract many more global business solutions to Linux enabling far greater adoption and use. Caldera plans to make Linux not just an alternative OS, but the dominant choice for businesses worldwide who are wanting to take advantage of the benefits of online services.”

22. In November 2002, SCO proudly announced the release of SCO Linux 4.0, “powered by UnitedLinux.” However, SCO later changed its position, asserting that it owned copyrights in UNIX that were infringed by *all* Linux products, including SUSE Linux, and that its UnitedLinux partners were not licensed to use such alleged copyrights despite the UnitedLinux contracts.
23. In line with its new position, SCO began filing and threatening lawsuits against Linux users, asserting that they were infringing on SCO’s copyrights and demanding that they partake in a licensing program that SCO had set up. SCO also asserted that SUSE’s licenses under the JDC and MTA Agreements provided no protection to its customers, suggesting that they were thus equally susceptible to lawsuits. These statements and lawsuits directly threatened SUSE and its Linux-based business. Moreover, in proceedings pending in Utah against Novell – SUSE’s parent company and licensee to SUSE’s intellectual property rights – SCO alleged that Novell’s distribution of SUSE Linux pursuant to its license from SUSE infringes on SCO’s alleged copyrights.
24. SCO’s actions constitute a clear breach of the plain language and purpose of the UnitedLinux Contracts. In particular, SCO’s assertion of copyright infringement claims against SUSE Linux is contrary to the clear terms of the UnitedLinux Contracts, which conferred upon the UnitedLinux members the right to use “all” intellectual property in the UnitedLinux “Software.” Moreover, SCO’s public attacks on the Linux operating system and withdrawal of support from the UnitedLinux project have impeded the purpose of the common UnitedLinux project and caused damage to SUSE and its business.
25. Accordingly, SUSE has filed this arbitration to obtain (1) a declaratory judgment by the Arbitral Tribunal; (2) an order preventing SCO from further directly or indirectly interfering in SUSE’s business; and (3) compensation for the damages and costs incurred.

26. SCO's summary of its position in the Terms of Reference purports to assert what are effectively counterclaims against SUSE for alleged breach of two agreements signed in 1995 by the Santa Cruz Operation and Novell. Yet SUSE did not sign either agreement, which do not include arbitration clauses in any event. Further, SCO did not include these counterclaims in its Reply to the Request for Arbitration, as required by Article 5 of the ICC Rules. SCO's counterclaims are defective and should be dismissed.

iii. Relief Sought

27. Claimant SuSE requests that the Arbitral Tribunal award the following relief:

- (1) Declare that SCO is precluded under the MTA and the JDC from asserting any copyright infringement claims related to SUSE Linux;
- (2) Declare, in particular, that the MTA and JDC divest SCO of ownership of any alleged intellectual property rights in any part of software included in the UnitedLinux Software (other than Pre-Existing Technology and Enhancements);
- (3) Order SCO to refrain from alleging publicly or against third parties that the use and distribution of SUSE Linux infringes upon SCO's copyrights, as precluded by the MTA and JDC;
- (4) Order SCO to pay damages in an amount to be determined for breach of the MTA and JDC by improperly asserting claims against SUSE and its licensees, and by attacking and withdrawing support for the UnitedLinux project;
- (5) Dismiss SCO's counterclaims relating to the Asset Purchase Agreement and Technical License Agreement;

- (6) Order SCO to bear all costs of the arbitration proceeding, including the costs and expenses of the ICC and of the arbitrators, as well as attorneys' fees, cost of lost executive time and expert's costs, if any; and
- (7) Award any further relief that the Arbitral Tribunal deems necessary to effectuate the relief requested above.

(2) Respondent's Summary

28. The Respondent incorporates by reference its "Reply to SuSE Linux GmbH Request for Arbitration" of 27 June 2006 and summarises its claims and the relief it seeks as follows:

i. Jurisdiction

29. SCO contends that SUSE's claims and requests for relief are non-arbitrable. The disputes herein are over defenses to and relief from claims made by SCO against nonparties to this arbitration in US litigation, which in any event are not "disputes arising from" the JDC or MTA or "from contracts regarding its performance."
30. The Tribunal has jurisdiction to hear SCO's counterclaim under the doctrines of implied consent and set-off.

ii. Defences / Claims

31. The UNIX operating system, developed by AT&T's Bell Laboratories in the mid-1980s, is one of the principal operating systems for businesses throughout the world. Ownership of the intellectual property in the UNIX Operating system, including specifically UNIX System V, is now held by SCO. SCO holds not only certain intellectual property rights to UNIX source-code, but it also markets UNIX products, such as OpenServer and

UNIXWARE. In the late 1990s, SCO UNIX products had a market share of approximately 80 percent of the so-called UNIX-on-Intel market, that is, computers using Intel chips and a UNIX operating system.

32. Linux is a "free" or "open source" operating system that has become a major competitor of UNIX. Prior to 2003, when SCO discovered that some of its proprietary UNIX technology had been misappropriated into Linux, SCO (formerly known as Caldera International, Inc.) had distributed Linux and participated in Linux development efforts, as reflected by its participation in UnitedLinux. SCO, however, never agreed to allow UnitedLinux to make use of SCO's UNIX technology, on which SCO depended for 95% of its revenue.
33. In November 2003, Novell announced its acquisition of SUSE. Novell at all times thereafter has had 100% control of SUSE. SCO is involved in litigation against Novell and others over the misappropriation of UNIX technology into Linux.
34. Each of the members of the UnitedLinux LLC (the "LLC") agreed in the JDC to (1) contribute certain, clearly specified pre-existing technology to the project, (2) develop certain new technology for purposes of the project, and (3) integrate the foregoing technologies with existing, open-sourced Linux technology.
35. The JDC provided that certain specified Pre-Existing Technology (defined to include only the pre-existing technology listed in Exhibit C) was to be licensed by each Member to the others and to the LLC. (JDC art. 8.1.) The contributed, pre-existing technology listed in Exhibit C does not include the technology over which SCO has asserted claims against Novell and others. SUSE is improperly asserting claims and seeking relief with respect to intellectual property never contributed to the LLC.
36. In addition, any new, jointly developed technology (as opposed to pre-existing technology such as UNIX) was to be assigned to the LLC. (JDC art. 8.2.) However, no Member made any actual assignments of jointly developed technology to the LLC, and the LLC never made any assignments to the Members.

37. The intellectual property at issue was not jointly developed. Thus, SUSE is improperly asserting claims and seeking relief with respect to intellectual property that was not jointly developed by the LLC.
38. During the negotiation of the UnitedLinux contracts, SCO discussed with the other United Linux members the possibility that at some point in the future SCO might be in a position to contribute some unspecified UNIX technology to the United Linux project. However, it was made clear that, if the parties were to agree on any contribution of UNIX technology to the project, it would need to be the subject of a subsequent agreement. No such agreement was ever reached.
39. In addition, when the UnitedLinux agreements were signed in May 2002, SCO was unaware that its proprietary UNIX technology had been misappropriated into Linux. The agreements should not be interpreted as working an unknowing, implied waiver or forfeiture of rights.
40. Based on the above, SUSE Claims must be denied because the LLC never purported to license SCO's UNIX technology to the Members, as SUSE contends it did.
41. After the date of its acquisition by Novell, SUSE has continued to distribute Linux in competition with SCO. This violates the Technology Licensing Agreement ("TLA") and the Asset Purchase Agreement ("APA") in effect between Novell and SCO.
42. In connection with the acquisition of UNIX technology from Novell, Novell and SCO's predecessor in interest, Santa Cruz, entered into the TLA and APA. The TLA licensed back to Novell the UNIX technology included in the transferred assets for certain purposes, but both the TLA and the APA contained express non-compete provisions, whereby Novell covenanted not to distribute the licensed back technology in (a) any operating system in competition with SCO's core server products or (b) in any product in which the technology constitutes a primary portion of the value of the product.

43. SUSE has continued to distribute Linux in violation of these provisions of the TLA and APA. SUSE has induced Novell to breach these provisions, interfered with SCO's rights under these contracts, aided and abetted, conspired, and acted in concert with Novell in breaching the non-competition covenants and related torts. SUSE has also taken actions contrary to the interests of its joint venture partner SCO, in violation of its duty of good faith.
44. Further, SUSE has no right to enforce the UnitedLinux Agreements because it abandoned and repudiated them, or abandoned the UnitedLinux project, or both.
45. In addition to misinterpreting the relevant contracts, SUSE's requests for relief are grossly overbroad. SUSE, based on a dispute between Novell and SCO, improperly seeks a declaratory judgment and other relief from the Arbitral Tribunal that would in effect approve the use and distribution of an operating system that includes misappropriated technologies and is the subject of multiple pending federal lawsuits on that precise subject.

iii. Relief Sought

46. SCO requests that the Arbitral Tribunal find that the claims asserted by SUSE are non-arbitrable as they constitute defenses to pending US litigation claims and are not "claims" arising from the MTA or JDC.
47. In the alternative, if SUSE's claims are deemed arbitrable, SCO requests that the Arbitral Tribunal:
 - (1) deny all relief requested by SUSE;
 - (2) declare that SUSE's activities violate the non-competition provisions of the TLA and APA;

(3) award damages to SCO, and

(4) grant SCO all costs of this proceeding and any further relief that the Arbitral Tribunal deems appropriate.

(3) Amount in Dispute

48. The amount in dispute between the Parties is, as yet, unquantified, but currently estimated by SUSE (pursuant to Article 18(c) of the ICC Rules) as between US\$ 50 million and US\$ 100 million. SCO's counterclaim damages are estimated to be at least US\$ 10 million.

V - LIST OF PRINCIPAL ISSUES TO BE DETERMINED [Article 18(1)(d)]

49. The issues to be determined by the Arbitral Tribunal shall be those resulting from the Parties' submissions, including forthcoming submissions, and which are relevant to the adjudication of the Parties' respective claims and defences.

50. Pending full written submissions from each party, and taking into account Article 18(1)(d) of the ICC Rules, it is inappropriate for a list of principal issues to be drawn up at this stage of the proceedings.

VI - THE PLACE OF THE ARBITRATION [Article 18(1)(f)]

51. As provided for in Clause 9.4 of the MTA and Clause 12.4 of the JDC, the legal place or seat of this arbitration is Zürich, Switzerland.

52. The Parties agree that all awards (whether final, interim or partial) and all procedural orders, directions and instructions, wherever signed, shall be deemed as having been made in Zürich, Switzerland.

53. It is agreed that, after consultation with the Parties, and pursuant to Article 14(2) of the ICC Rules, the Arbitral Tribunal may conduct any meeting, hearing or examination in such other location as it may consider appropriate, unless otherwise agreed by the Parties.

VII - PARTICULARS OF THE APPLICABLE PROCEDURAL RULES AND OTHER MATTERS [Article 18(1)(g)]

54. *Arbitration Agreements:* These proceedings have been commenced pursuant to the following contractual provisions, which are in near identical terms:

- (1) Clause 9 of the Master Transaction Agreement (MTA), dated 29 May 2002, by and between SUSE (then known as SuSE Linux AG); SCO (then known as Caldera International, Inc.); Conectiva Inc.; and Turbolinux, Inc. This provides as follows:

“9. Governing Law; Dispute Resolution

- 9.1 This MTA shall be governed by and construed in accordance with the laws of Switzerland. The United Nations Convention on the International Sale of Goods shall not apply to this MTA.
- 9.2 Any differences or disputes arising from this MTA or from contracts regarding its performance shall be settled by an amicable effort on the part of the Parties. An attempt to arrive at a settlement shall be deemed to have failed as soon as one of the Parties so notifies the other Party in writing.
- 9.3 If any attempt of settlement has failed, the disputes shall be finally and exclusively settled under the Rules of Arbitration of the International Chamber of Commerce then in force (Rules) by three arbitrators appointed in accordance with said Rules.
- 9.4 The place of arbitration shall be Zurich. The procedural law of this place shall apply when the Rules are silent.
- 9.5 The arbitral award shall be substantiated in writing. The arbitral tribunal shall decide on the matter of costs of the arbitration.

9.6 The arbitration language shall be English.”

- (2) Clause 12 of the UnitedLinux Joint Development Contract (JDC), dated 29 May 2002, by and between SUSE (then known as SuSE Linux AG); SCO (then known as Caldera International, Inc.); Conectiva Inc.; Turbolinux, Inc.; and UnitedLinux, LLC. This provides as follows:

**“ARTICLE 12
GOVERNING LAW; DISPUTE RESOLUTION**

- 12.1 Governing Law.** This JDC shall be governed by and construed in accordance with the laws of Switzerland. The United Nations Convention on the International Sale of Goods shall not apply to this JDC.
- 12.2** Any differences or disputes arising from this JDC or from contracts regarding its performance shall be settled by an amicable effort on the part of the Parties. An attempt to arrive at a settlement shall be deemed to have failed as soon as one of the Parties so notifies the other Party in writing.
- 12.3** If any attempt of settlement has failed, the disputes shall be finally and exclusively settled under the Rules of Arbitration of the International Chamber of Commerce then in force (Rules) by three arbitrators appointed in accordance with said Rules.
- 12.4** The place of arbitration shall be Zurich. The procedural law of this place shall apply when the Rules are silent.
- 12.5** The arbitral award shall be substantiated in writing. The arbitral tribunal shall decide on the matter of costs of the arbitration.
- 12.6** The arbitration language shall be English.”

55. Notwithstanding the existence of two arbitration clauses, the Parties agree that in these arbitration proceedings there shall be a single arbitral tribunal comprising three members.
56. *Standing of the Arbitral Tribunal:* For the purpose of these arbitration proceedings, and without prejudice to any jurisdictional objections based on the scope of the relevant

arbitration agreements or the arbitrability or nature of SUSE's claims, and any arguments on stay, waiver or abandonment, the Parties agree that the arbitrators have been properly and validly appointed, and each Party hereby confirms that it is not aware of any ground to challenge the appointment of the Arbitral Tribunal or any of its members.

57. *Awards, Orders, etc:* Subject to the ICC Rules and these Terms of Reference, the Arbitral Tribunal is authorised to issue such partial awards, interim awards, procedural orders and other procedural directions or instructions as it may deem appropriate.
58. *Powers of the Chairman:* Procedural orders or other directions or instructions may be signed by the Chairman alone, on behalf of the Arbitral Tribunal, after consultation with the other members of the Arbitral Tribunal. In case of urgency, the Chairman acting alone may extend or modify any procedural time limit.
59. *Language of the Proceedings:* As provided in Clause 9.6 of the MTA and Clause 12.6 of the JDC, the language of the proceedings (Article 16 of the ICC Rules) is English. Documents submitted in any other language shall be accompanied by a translation into English. Any witness may give oral evidence in the witness's mother tongue, provided that arrangements for interpretation to the satisfaction of the Arbitral Tribunal are made by the party calling that witness.
60. *Applicable Substantive Law:* The relevant contracts contain the following express provisions as to applicable law:

(1) Clause 9.1 of the MTA:

"9.1 This MTA shall be governed by and construed in accordance with the laws of Switzerland. The United Nations Convention on the International Sale of Goods shall not apply to this MTA."

(2) Clause 12.1 of the JDC:

"12.1 Governing Law. This JDC shall be governed by and construed in accordance with the laws of Switzerland. The United Nations Convention on the International Sale of Goods shall not apply to this JDC."

61. *Applicable Procedural Rules:* Clause 9.4 of the MTA and Clause 12.4 of the JDC both contain the following provision:

"The place of arbitration shall be Zurich. The procedural law of this place shall apply when the Rules are silent."

62. Article 15(1) of the ICC Rules provides as follows:

"The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

63. Article 35 of the ICC Rules provides as follows:

"In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."

64. Given that Clause 9 of the MTA and Clause 12 of the JDC both incorporate the ICC Rules, and that Articles 15(1) and 35 of the ICC Rules themselves cater for any "silences" in the Rules, it is agreed that, subject to any mandatory provisions of Swiss law relating to an international arbitration with a seat in Zürich, the procedure to be followed shall be governed by the ICC Rules and where these rules are silent, as may be determined by the Arbitral Tribunal in its discretion.

65. *Article 17(3):* The Arbitral Tribunal shall not have authority to act as *amiable compositeur* or to decide *ex aequo et bono* in accordance with Article 17(3) of the ICC

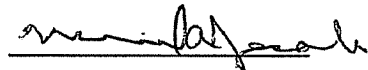
Rules.

66. *Appointment of Experts:* The Arbitral Tribunal reserves the right, after consultation with the Parties, to appoint such expert(s) as it may deem advisable to assist the Arbitral Tribunal, in addition to any experts which the Parties may choose to present.
67. *Changes in Details:* The Parties, counsel and Arbitrators shall notify all Parties, all signatories of these Terms of Reference and the ICC Secretariat of any change of name, description, address, telephone or fax number. In the absence of any such notification, communications sent in accordance with these Terms of Reference shall be valid.
68. *Extensions of Time:* The Parties hereby agree and give consent, in so far as necessary, that the Arbitral Tribunal may apply to the ICC International Court of Arbitration for an extension of the time within which their award must be rendered. Any extension of time granted by the ICC Court shall be deemed to have the consent of the Parties to the extent the consent of the Parties may be required under any applicable law.

VIII - VAT ON ARBITRATORS' FEES

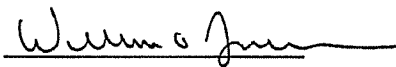
69. In light of Article 2(9) of Appendix III of the ICC Rules, it is agreed that if and to the extent that any of the arbitrators is required to collect VAT from one or all of the Parties, such Party or Parties, as determined by the Arbitral Tribunal, shall pay the amount of such VAT to the arbitrator in addition to any fees due to him. Each party further undertakes, if and when required by the Arbitral Tribunal, to pay to the ICC its share of an advance on VAT as determined by the Arbitral Tribunal.

These Terms of Reference have been agreed and duly signed and executed as follows:

(1) On behalf of the Claimant: 

Printed Name: Michael A. Jacobs

Signed on 30 October 2006

(2) On behalf of the Respondent: 

Printed Name: William A. Isaacson

Signed on 31 October 2006

(3) Roberto Dallafior, Co-Arbitrator: 

Signed on 15 November ~~October~~ 2006

(4) Yves Derains, Co-Arbitrator: 

Signed on 24 October 2006

(5) Toby Landau, Chairman: 

Signed on 21 October 2006

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