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WHEN AN ESTIMATE BECOMES A WARRANTY

CLIMATE DATA AND REVISION RISK UNDER THE CISG

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ABSTRACT

When a supplier revises an earlier greenhouse gas emissions estimate, the discrepancy may expose a breach of a contractual undertaking, reflect an evidentiary improvement upon a calculation that was properly performed, or capture upstream activities falling outside the scope of the original agreement. Allocating the resulting investigation and recalculation expenses raises foundational questions of contractual responsibility that mandatory climate-reporting regimes do not resolve on their own terms. Drawing upon a hypothetical cross-border sale of manufactured goods between a Singaporean seller and an Australian buyer, this doctrinal study examines how the United Nations Convention on Contracts for the International Sale of Goods governs the cost of investigating and correcting historical production data. The analysis separates the object of a contractual promise from its standard of performance, demonstrating that an undertaking to apply a prescribed calculation method may impose strict liability as to process without warranting the numerical accuracy of the resulting figure, whilst an accurate report may simultaneously reveal that the delivered goods exceed an agreed carbon ceiling. Competing scholarly accounts concerning obligations of effort and exemption from damages under article 79 are evaluated by tracing their consequences for the buyer's remaining non-damages remedies. The study further critiques the automatic extension of the goods-centric notice and cut-off periods under articles 38 and 39 to independently due reporting obligations, whilst acknowledging both the commercial rationale for the analogy and the risk of opportunistic pleading designed to revive lost conformity claims. By connecting the classification of primary obligations to post-delivery evidence and the recoverability of verification costs, the article demonstrates how targeted contractual mechanisms governing record access, timely correction, and reassessment funding can preserve effective legal recourse whilst distinguishing defective performance from subsequent improvements in emissions data.

Keywords: international sales law; climate disclosure; emissions estimates; contractual interpretation; revision risk; supply-chain accountability

1 INTRODUCTION

Suppose an Australian industrial manufacturer purchases steel pump housings from a supplier based in Singapore. Under their contract of sale, the supplier undertakes to compile designated foundry production records, apply an agreed emissions-accounting methodology, and set out the material limitations affecting its calculation of cradle-to-gate greenhouse gas emissions per housing. Following delivery of both the housings and the accompanying report, which states a figure of 80 kilograms of carbon-dioxide equivalent per unit for the relevant production year,[1] the supplier issues a revised figure of 112 kilograms. Having already incorporated the initial 80-kilogram figure into its statutory climate disclosures, the buyer commissions an independent technical investigation and seeks to recover the resulting expenditure from the supplier. Although simple arithmetic establishes a 40% upward revision from the original report, that numerical movement neither explains why the figure changed nor determines which party must bear the cost of verification and restatement.

Several distinct factual possibilities could account for the 112-kilogram figure while yielding markedly different legal outcomes. An audit might reveal that the supplier failed to collect a primary furnace energy record that it had expressly promised to obtain. Equally, the supplier might have complied with every data-collection and methodological step required by the contract, yet subsequent metering or refined emission factors might have generated more reliable evidence regarding the

[1] Carbon-dioxide equivalent expresses the radiative forcing and warming effects of different greenhouse gases in a single common metric: Australian Accounting Standards Board, *AASB S2 Climate-related Disclosures* (September 2024) app A (definition of 'CO2 equivalent') ('AASB S2'). The transaction and numerical figures used throughout this study are hypothetical.

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completed production year. A third possibility is that the revised calculation incorporates downstream transport or auxiliary processes that were excluded from the original contractual boundary. Because any of these three scenarios can produce the identical revised number, the supplier's unilateral characterisation of its update as a 'correction' or an 'improvement' cannot settle the question of contractual liability.

The buyer's remedial position depends just as heavily on the content of the seller's primary undertaking. Beyond requiring the supplier to follow a designated calculation protocol, the parties might stipulate that the reported figure will be accurate within a defined percentage tolerance, or they might require that the housings themselves be manufactured with production emissions not exceeding 100 kilograms of carbon-dioxide equivalent per unit on an agreed basis. Where both assurances have been given and the agreed accuracy tolerance is exceeded, reliable proof that actual production emissions reached 112 kilograms per unit operates on two distinct planes: it establishes both that the initial documentary report was inaccurate and that the physical goods failed to conform to their agreed environmental ceiling. Separating these promises explains why truthful reporting of high emissions may discharge a duty to provide accurate data whilst simultaneously exposing a breach of goods conformity, whereas delivering housings well below the 100-kilogram ceiling will not excuse a failure to supply calculation records independently required by the contract.

In a qualifying cross-border transaction between Singapore and Australia, these obligations fall to be analysed within the framework of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[2] Throughout this study, the term 'warranty' is employed in a descriptive sense to denote a contractually agreed assurance of numerical accuracy or a promised characteristic of the goods, rather than importing any domestic common-law division between conditions and warranties. Whether an emissions estimate carries that promissory force turns upon the interpretation of the parties' agreement under the Convention rather than the mere fact that a subsequent calculation produces a different number. The central doctrinal problem is how the precise content of the seller's promise governs the relevance and weight of post-performance evidence, the preservation of remedies through timely notice, and the recovery of investigation and correction expenses.

Recent scholarship has established the foundational distinction between contractual requirements defining the sustainable qualities of the goods themselves and collateral duties concerning supply-chain information, due diligence, or cooperation. Whilst Schwenzer's early work, together with her later collaboration with Muñoz, demonstrated that unethical or carbon-intensive production methods can render goods non-conforming under article 35 even where their physical utility is unimpaired, Atamer and Wittum have examined how additional sustainability undertakings operate outside the conformity regime, particularly where they take the form of obligations of effort.[3] The present study addresses a more specific evidentiary and remedial problem that arises after delivery: when information concerning completed manufacturing operations improves over time, the law must determine which contractual undertaking, if any, that subsequent evidence proves to have been broken. Resolving that question requires separating the object of a promise from its standard of performance, because an unqualified commitment to execute a named calculation method is strict as to process without necessarily guaranteeing the empirical accuracy of its numerical output.

To isolate these variables, the article proceeds doctrinally through successive variations of the pump-housing hypothetical, testing the text of the CISG, decided cases, scholarly commentary, and the persuasive opinions of the CISG Advisory Council against each variation. Mandatory Australian sustainability reporting rules provide the regulatory backdrop explaining why the buyer requires verifiable value-chain data, even though those domestic statutory duties do not automatically alter the bilateral terms of the supply contract. The analysis reflects the state of the law as at 9 November 2026 and assumes a prospective transaction involving an Australian corporate buyer whose transitional first-year relief for Scope 3 value-chain disclosures has expired, leaving standalone data-consultancy contracts, forward-looking emissions projections, and third-party investor litigation outside the scope of inquiry.

How sales law allocates revision risk carries practical significance well beyond the immediate balance sheet of the contracting parties. Corporate officers tasked with preparing mandatory sustainability disclosures rely routinely upon operational records held by upstream manufacturers, and cannot responsibly investigate an unexpected restatement without contractual rights of access, adequate time, and financial resources. Yet shifting the entire cost of every subsequent refinement onto the supplier would effectively treat the uncertainty inherent in emissions estimation as a contractual default, even where the parties expressly contracted for an approximation. The task for private law is therefore to show how commercial contracts can secure verifiable supply-chain data and a meaningful opportunity to test it, whilst maintaining a principled boundary between purchasing a specified calculation and transferring the risk that empirical knowledge may later improve.

2 CLIMATE REPORTING AND THE CONTRACTUAL DEMAND FOR INFORMATION

2.1 REPORTING RESPONSIBILITY AND CALCULATION BOUNDARIES

Under section 292A of the Corporations Act 2001 (Cth), corporate entities that meet prescribed statutory thresholds and are required to prepare annual financial reports under Chapter 2M must also prepare an annual sustainability report. Sections 296A, 296C, and 296D govern the substantive contents and climate-statement requirements of those reports, with phased mandatory commencement operating under section 1707B. Within that statutory architecture, Australian Accounting Standards Board standard AASB S2 mandates the disclosure of Scope 3 greenhouse gas emissions (defined as indirect greenhouse gas

[2] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 ('CISG'). Unless otherwise indicated, all article references in the text and footnotes are to the CISG.

[3] Yeşim M Atamer and Patrick Wittum, 'Sustainability Due Diligence in International Sales Contracts: Insights from the CISG' (2025) 30(3) *Uniform Law Review* 287, 300–02 <https://doi.org/10.1093/ulr/unaf038>; Ingeborg Schwenzer, 'Ethical Standards in CISG Contracts' (2017) 22(1) *Uniform Law Review* 122, 123–27 <https://doi.org/10.1093/ulr/unw061>; Ingeborg Schwenzer and Edgardo Muñoz, 'Sustainability in Global Supply Chains Under the CISG' (2021) 23(3) *European Journal of Law Reform* 300, 319–20, 327–33 <https://doi.org/10.5553/EJLR/138723702021023003002>.

emissions, other than Scope 2 emissions, that occur in the reporting entity's value chain), subject to materiality assessments and transitional reliefs. Although paragraph C4(b) of AASB S2 grants transitional relief from disclosing Scope 3 emissions during the first annual reporting period in which an entity applies the standard, the hypothetical examined here concerns a subsequent reporting period in which the buyer must account for its upstream purchased goods.[4]

In Regulatory Guide 280, the Australian Securities and Investments Commission (ASIC) acknowledges that reporting entities may need to request emissions data from value-chain counterparties and may rely upon reasonable estimates subject to AASB S2's reasonable-and-supportable-information requirement.[5] From a contractual perspective, however, engaging an upstream supplier to provide product-level carbon data neither delegates the buyer's statutory reporting responsibility nor implies an open-ended undertaking by the supplier to perform whatever supplementary recalculations the buyer may later find convenient. Because articles 8, 9, and 29 of the CISG anchor contractual obligations in the ascertainable agreement of the parties, the sales contract itself must define both the scope of the initial calculation work and the extent of any ongoing duty to assist with subsequent reporting cycles.

Fixing the technical boundary of that calculation is essential to determining whether a revised figure reflects a breach. Under the Greenhouse Gas Protocol's technical guidance for calculating Scope 3 emissions, Category 1 (purchased goods and services) captures upstream 'cradle-to-gate' emissions generated up to the point where the product leaves the supplier's facility, whereas transportation and distribution of the purchased product from the supplier to the reporting company's own facilities are accounted for separately under Category 4 when undertaken in vehicles and facilities not owned or controlled by the reporting company.[6] An emissions figure calculated by a component manufacturer may therefore provide a vital supplier-specific input for the buyer's Category 1 inventory without purporting to represent the buyer's complete Scope 3 footprint for those goods. Throughout the hypothetical variations analysed below, the figures of 80, 100, and 112 kilograms of carbon-dioxide equivalent per housing all refer to an identical cradle-to-gate manufacturing boundary unless a specific variation alters that scope. Consequently, a buyer's post-delivery demand to incorporate international shipping emissions between Singapore and Australia seeks an expansion of the contractual service, which must be distinguished from discovering that the supplier omitted an upstream heat-treatment process that fell squarely within the original manufacturing boundary.

Beyond fixing the upstream boundary of the calculation, the agreement must also be interpreted to establish how facility-wide emissions are allocated to individual units and the effect of any agreed threshold of error on contractual recourse. Raw meter readings from a multi-line foundry cannot yield a per-housing figure until an agreed allocation key (whether based on physical mass, machine hours, or economic value) partitions the plant's aggregate energy consumption across a defined production period and output volume. Any contractual tolerance or 'materiality' qualifier attached to that figure must likewise be construed autonomously under article 8 of the CISG rather than conflated with reporting materiality under AASB S2.[7] Whereas regulatory materiality under AASB S2 asks whether omitting, misstating, or obscuring information could reasonably be expected to influence decisions that primary users of general purpose financial reports make on the basis of those reports, a bilateral supply contract must be interpreted on its own terms. Even where a supplier's omission of a promised primary energy record produces only a minor ripple across the buyer's consolidated corporate inventory, that omission may nonetheless constitute a serious breach of an express documentary or informational obligation under the contract of sale.

2.2 REVISIONS, ERRORS AND CHANGING MEASUREMENT RULES

The accounting rules governing sustainability disclosures expressly anticipate that value-chain figures will evolve over time. AASB S2 permits a reporting entity to measure Scope 3 emissions using estimation approaches and requires it to use 'all reasonable and supportable information that is available to the entity at the reporting date without undue cost or effort' when choosing its approach, inputs and assumptions, whilst requiring disclosures regarding the characteristics of the inputs used and the resulting measurement uncertainty. Crucially, Appendix D of AASB S2 distinguishes between revised comparative amounts reflecting new evidence about a previously estimated metric, provided that it concerns circumstances existing in the preceding period (addressed in paragraphs B50 and B51, subject to impracticability relief) and the correction of prior-period reporting errors (addressed in paragraphs 83 to 85), which arise from a failure to use, or the misuse of, reliable information that was available when the earlier sustainability disclosures were authorised for issue and could reasonably have been expected to be obtained and considered.[8]

Because a reporting entity may be required to restate a comparative Scope 3 figure when superior empirical data becomes available, the mere existence of an accounting restatement does not establish that an upstream supplier breached its sales contract. Where the supplier undertook only to apply a specified secondary emission factor to its existing utility bills, the ordinary expense of upgrading to primary sub-metered data in a subsequent reporting year rests with the buyer, absent a separate undertaking to fund it. Conversely, how the buyer classifies an adjustment in its own financial and sustainability statements cannot insulate a defaulting supplier from contractual liability: an update presented externally as a routine comparative revision may in fact have been triggered by discovering that the supplier omitted a foundry dataset it had strictly

[4] Corporations Act 2001 (Cth) ss 292A, 296A, 296C, 296D, 1707B (Compilation No 149, 19 September 2026) vols 2 and 6; AASB S2 (n 1) para 29(a)(i)(3), app A (definitions of 'Scope 3 greenhouse gas emissions' and 'Scope 3 categories'), app C paras C4(b), C5.

[5] Australian Securities and Investments Commission, *Sustainability Reporting* (Regulatory Guide 280, 31 March 2025) RG 280.30 note, RG 280.103–280.107 ('RG 280'); CISG (n 2) arts 8–9, 29.

[6] World Resources Institute and World Business Council for Sustainable Development, *Technical Guidance for Calculating Scope 3 Emissions* (Version 1.0, 2013) ch 1, 21–22, box 1.1, 24–25, 27 ('Scope 3 Guidance') (distinguishing at 25 upstream transportation of inputs to the Tier 1 supplier from transportation of the purchased product to the reporting company); ch 4, 49–50, table 4.1; ch 9, 102.

[7] Scope 3 Guidance (n 6) 27; AASB S2 (n 1) app D paras 17–19; CISG (n 2) art 8.

[8] AASB S2 (n 1) para 29(a)(iii), app B paras B38–B42, app D paras 77–85, B50–B51 (with para B51 also addressing forward-looking metrics and the condition against hindsight when revising a forward-looking comparative metric).

promised to include. Accounting classifications and contractual breach answer different normative questions, requiring the legal analysis to return to the precise performance purchased under the contract of sale.

Regulatory amendments to measurement methodologies reinforce the need to separate physical manufacturing reality from reported metrics. Prior to the cut-off date of this study, the Australian Accounting Standards Board issued amending standard AASB S2025-1, which formally commences on 31 December 2026 and applies mandatorily to annual reporting periods beginning on or after 1 January 2027, subject to earlier voluntary adoption through a written directors' election under section 336A(3) of the Corporations Act 2001 (Cth).[9] Amongst other targeted adjustments, AASB S2025-1 extends jurisdictional relief concerning the use of alternative measurement methods and global warming potential values mandated by a relevant regulatory authority or listing exchange, provided the specified conditions hold for the relevant part of the reporting entity and only for as long as the relevant requirement applies to that part. Because an upstream supplier does not become part of its customer's consolidated reporting entity merely by sitting within its value chain, and because the hypothetical here applies the baseline September 2024 text of AASB S2, such regulatory changes illustrate a broader contractual point: identical physical production emissions can yield a different reported kilogram figure solely because global warming potential multipliers or calculation rules have been updated. Whether a supplier is obliged to recalculate historical production runs under newly promulgated methodologies depends entirely upon how the sales contract allocates the risk of methodological change.

3 IDENTIFYING THE PERFORMANCE PURCHASED

3.1 THE CONVENTION AND THE PARTIES' AGREEMENT

Because both Australia and Singapore are Contracting States to the CISG, a contract for the sale of manufactured pump housings between parties whose relevant places of business are situated in those jurisdictions falls directly within the autonomous applicability rule of article 1(1)(a). Although Singapore lodged a reservation under article 95 upon ratification, that declaration excludes only the indirect application of the Convention via rules of private international law under article 1(1)(b) and leaves direct application between Contracting States under article 1(1)(a) intact; sections 3 and 4 of Singapore's Sale of Goods (United Nations Convention) Act 1995 accordingly give the Convention the force of law with statutory priority over inconsistent domestic rules.[10] For the purposes of the hypothetical, it is assumed that the parties have not opted out of the Convention under article 6, that the Australian buyer does not supply a 'substantial part of the materials necessary for such manufacture or production' under article 3(1), and that the supplier's emissions-reporting duties do not constitute 'the preponderant part of the obligations of the party who furnishes the goods' so as to remove the transaction from the Convention under article 3(2). By contrast, a standalone consultancy agreement commissioned purely for carbon accounting would fall outside the CISG and require independent characterisation under domestic choice-of-law rules.

Where the contract of sale falls within the Convention, article 4 provides that the CISG governs 'the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract'. As Atamer and Wittum have shown, ancillary reporting or due-diligence obligations incorporated into an international sales contract are governed by the Convention's remedial framework even where they do not concern the physical conformity of the goods.[11] Whether a corporate supplier code of conduct, a technical carbon-accounting schedule, or a post-formation sustainability questionnaire forms part of the parties' agreement is determined by the formation provisions of articles 14 to 24 alongside the interpretive standards of articles 8 and 9. Under article 8(1), statements and conduct are interpreted according to the speaker's intent 'where the other party knew or could not have been unaware what that intent was', failing which article 8(2) looks to 'the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances', taking into account negotiations, established practices, usages, and subsequent conduct under article 8(3) and article 9.

Applying these formation and interpretation rules prevents unilateral reporting expectations from being treated as binding contractual promises. Merely posting a sustainability policy on a buyer's corporate procurement portal does not incorporate its terms into a supply contract; as CISG Advisory Council Opinion No 13 confirms, standard terms become part of the agreement only where the parties have expressly or impliedly agreed to their inclusion and the counterparty had a reasonable opportunity to take notice of their text.[12] Similarly, a detailed emissions questionnaire sent by the buyer after the contract has been concluded may either operationalise a reporting obligation already agreed at formation or constitute an offer to modify the contract under article 29(1), to which the supplier's mere silence or inactivity cannot amount to acceptance under article 18(1). Timing is equally decisive for disclaimers: whereas an express methodological caveat agreed at contract conclusion defines and limits the scope of the seller's initial promise, a unilateral liability disclaimer printed for the first time at the foot of a delivered emissions report cannot retroactively cut down a contractual assurance already purchased by the buyer, particularly where article 29(2) enforces an agreed no-oral-modification clause absent preclusive reliance.

Whilst the CISG governs whether an exclusion clause, liability cap, or cost-reimbursement formula has been validly incorporated and how its wording is to be construed, article 4(a) generally leaves 'the validity of the contract or of any of its provisions' to the applicable domestic law identified by private international law. In Opinion No 17, the CISG Advisory

[9] Australian Accounting Standards Board, *AASB S2025-1 Amendments to Greenhouse Gas Emissions Disclosures* (December 2025) 8 (amending paras B21–B22, B24), 11–12 (inserting paras C1B, C6(a) and commencement provision); Corporations Act 2001 (Cth) s 336A(3) (requiring a written directors' election for early application, with para C6(a) of AASB S2025-1 governing comparative adjustments upon adopting the amended relief).

[10] CISG (n 2) arts 1(1)(a), 3, 6, 95; Sale of Goods (United Nations Convention) Act 1995 (2020 Rev Ed, Singapore) ss 3–4; United Nations Treaty Collection, 'United Nations Convention on Contracts for the International Sale of Goods' (Status of Treaties, Chapter X.10, entries and declarations for Australia and Singapore).

[11] CISG (n 2) arts 4, 8–9, 14–24, 29, 45; Atamer and Wittum (n 3) 300–03.

[12] CISG Advisory Council, *Inclusion of Standard Terms under the CISG* (Opinion No 13, 20 January 2013, Rapporteur Sieg Eiselen) rules 2–4, 7–8 ('Opinion No 13'); CISG (n 2) arts 8, 18(1), 29.

Council underscores this jurisdictional boundary in relation to limitation and exclusion clauses.[13] The resulting two-step inquiry requires a tribunal first to determine the exact scope of the agreed risk allocation under articles 8 and 9 of the Convention before testing whether that clause offends mandatory domestic validity rules.

3.2 THE OBJECT OF A PROMISE AND ITS STANDARD OF PERFORMANCE

In analysing climate-data clauses, it is essential not to conflate the civil-law distinction between obligations of effort (obligations de moyens) and obligations of result (obligations de résultat) with the substantive distinction between a calculation duty and an accuracy warranty. A contract may require the supplier to use reasonable efforts to request primary emissions data from its sub-tier ingot suppliers, or it may impose an unqualified duty to obtain a specified utility dataset from its own foundry. Similarly, the supplier may undertake strictly to execute a prescribed carbon-accounting formula even though that formula incorporates industry-average emission factors. Both the unqualified data-collection duty and the formula-application duty concern the performance of a calculation process, yet only the sub-tier enquiry clause is limited to a standard of reasonable care. Where the supplier has strictly promised to apply a designated calculation protocol, a breach is established by proving that it deviated from the formula or omitted a required input, rather than by attempting to show that the resulting figure diverged from an unknowable exact physical total.

A warranty of numerical accuracy addresses a fundamentally different contractual object. To define an accuracy assurance with precision, the agreement should specify the metric warranted, the permissible margin of tolerance, and the reference methodology against which any alleged departure is to be measured. A bare stipulation that a reported product carbon footprint is 'accurate within plus or minus 10%' may leave uncertainty about the applicable system boundary, allocation rule, and verification benchmark. Rather than promising access to an unmediated ontological 'truth' about historical molecular emissions, commercial parties may anchor an accuracy warranty in the output that an independent verifier would reach when applying a named standard (such as ISO 14067 or the GHG Protocol Product Standard) to the plant's operational records. Construing the agreement under article 8 must respect these drafting choices: describing a reported figure as an 'estimate' neither immunises the supplier against liability where a specific tolerance has been warranted nor converts a basic process obligation into a guarantee of numerical precision.[14]

Contractual knowledge qualifications introduce a third analytical category that must be kept distinct from both process obligations and numerical tolerances. Where a supplier warrants that, to the best of its knowledge and belief after reasonable enquiry, the delivered emissions report contains no material misstatement, proving a breach requires examining the supplier's actual cognitive state and the diligence of its internal enquiries at the time of certification, without turning the statement into an insurer's guarantee that subsequent third-party audits will confirm the number. Moreover, sophisticated supply contracts may layer these mechanisms within a single transaction, combining a strict obligation to apply an agreed calculation tool for direct foundry operations, a reasonable-efforts undertaking to gather upstream raw-material data, and an objective ceiling on the embedded emissions of the delivered housings. Each undertaking must be interpreted and tested for breach on its own terms.

3.3 GOODS CONFORMITY AND DOCUMENTARY PERFORMANCE

Under article 35(1) of the CISG, the seller 'must deliver goods which are of the quantity, quality and description required by the contract'. As both the sustainability scholarship and CISG Advisory Council Opinion No 19 establish, intangible production characteristics and manufacturing history can form part of the agreed quality and description of the goods even where they leave the physical durability and mechanical operation of the product unaffected.[15] Where a sales contract expressly stipulates that the steel pump housings must be manufactured with cradle-to-gate emissions not exceeding 100 kilograms of carbon-dioxide equivalent per unit, that ceiling defines the conformity of the goods under article 35(1). It does not follow, however, that every contractual clause requiring the disclosure of product emissions implies a qualitative cap on the goods themselves: an industrial buyer compiling a transparent Scope 3 baseline may knowingly purchase carbon-intensive housings provided their actual footprint is accurately reported. Where the contract contains no express carbon ceiling under article 35(1), a buyer seeking to establish non-conformity under article 35(2)(a) or (b) must prove either that exceeding a particular emissions threshold renders the housings unfit for the purposes for which goods of the same description would ordinarily be used, or that the buyer expressly or impliedly made known a particular low-carbon purpose at contract conclusion, taking account of whether the buyer relied, and could reasonably rely, on the seller's skill and judgement.

Thus, if the buyer informs the supplier during negotiations that the housings are being acquired for integration into a certified low-carbon infrastructure project with fixed embodied-carbon limits, that communicated purpose may ground an obligation under article 35(2)(b). Absent such specific communication or an established trade usage under article 9, the general commercial importance of corporate climate reporting cannot by itself conjure an implied maximum carbon intensity across ordinary industrial sales. Furthermore, while article 35(3) excludes the seller's liability under article 35(2)(a)–(d) where 'at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity', that statutory exclusion does not automatically displace an express contractual warranty of quality agreed under article 35(1).[16]

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[13] CISG (n 2) arts 4(a), 6; CISG Advisory Council, *Limitation and Exclusion Clauses in CISG Contracts* (Opinion No 17, 16 October 2015, Rapporteur Lauro Gama Jr) rules 1–2, 4 ('Opinion No 17').

[14] CISG (n 2) art 8; Schwenzer and Muñoz (n 3) 327–30; Atamer and Wittum (n 3) 301–02. International Organization for Standardization, *ISO 14067:2018 Greenhouse gases: Carbon footprint of products: Requirements and guidelines for quantification* (August 2018) abstract; World Resources Institute and World Business Council for Sustainable Development, *Product Life Cycle Accounting and Reporting Standard* (2011) 5–6.

[15] CISG (n 2) art 35(1)–(2); Schwenzer, 'Ethical Standards' (n 3) 123–27; CISG Advisory Council, *Standards and Conformity of the Goods under Article 35 CISG* (Opinion No 19, 25 November 2018, Rapporteur Djakhongir Saidov) rules 3–4, comments 3.1–3.4, 4.5, 4.10–4.11 ('Opinion No 19').

[16] CISG (n 2) arts 9, 35(2)–(3); Opinion No 19 (n 15) comments 4.16–4.22 (noting that art 35(3) expressly qualifies liability under subparas (a)–(d) of art 35(2) rather than overriding an express quality stipulation under art 35(1)).

Documentary obligations require equally precise classification. Article 34 provides that where the seller 'is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract'. In Opinion No 11, the CISG Advisory Council confirms that 'documents relating to the goods' under article 34 are not confined to documents of title or transport documents controlling physical possession (such as bills of lading), but extend to certificates of origin, quality, weight, and technical compliance.[17] An emissions certificate required upon delivery to verify that the identified shipment of pump housings satisfies an agreed 100-kilogram ceiling falls squarely within that documentary category and remains intimately tied to the conformity of the goods. By contrast, an undertaking to provide an annual factory-wide emissions reconciliation, to preserve underlying calculation spreadsheets for five years, or to notify the buyer within thirty days of discovering a material methodological error serves an informational function that may extend well beyond the physical delivery of any single consignment. Chronology alone cannot resolve that classification: a compliance certificate tendered months after physical delivery may still relate directly to the conformity of the goods delivered, whereas an independent data-architecture duty may fall due even before the first shipment leaves the factory.

Because article 45(1) grants the buyer remedies whenever 'the seller fails to perform any of his obligations under the contract or this Convention', a supplier's breach of an ancillary reporting obligation can ground a claim for damages under article 74 even where the delivered housings comply fully with their 100-kilogram ceiling.[18] Recognising that independent remedial pathway does not mean, however, that every dispute involving an inaccurate emissions figure bypasses the examination and notice regime of articles 38 and 39. Where the alleged defect consists in an inaccurate certificate attesting to a warranted characteristic of the goods themselves, the claim remains tethered to the conformity regime regardless of whether the buyer pleads its case as defective reporting rather than defective goods. Navigating these overlapping obligations requires tracing how post-delivery evidence and notice rules apply to each distinct promise.

4 LATER EVIDENCE AND EXEMPTION FROM DAMAGES

4.1 WHAT THE REVISED NUMBER ESTABLISHES

Unless the parties have agreed to incorporate evolving regulatory methodologies dynamically over the life of the contract or subsequently modified their agreement under article 29, the benchmark governing the seller's performance is fixed at the time of contract conclusion. For claims concerning the conformity of the goods, article 36(1) renders the seller liable 'for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time', whilst article 36(2) governs subsequent non-conformities caused by a breach of obligation, including an express guarantee that the goods will retain specified qualities or characteristics for a defined period. In a transaction involving annual carbon accounting, four distinct temporal points must therefore be kept separate: the historical production period during which the housings were cast, the date on which risk passed to the buyer under articles 66 to 69, the contractual due date for delivering the emissions report, and the subsequent date on which an investigation uncovers a discrepancy. Delivering an annual emissions report sixty days after the close of a calendar year does not alter the historical period being measured or shift the moment at which the delivered housings had to conform under article 36(1).[19]

Applying these temporal and mathematical distinctions to the pump-housing hypothetical clarifies what is at stake in the numbers. If a verified post-delivery reconstruction establishes that the housings were manufactured with emissions of 112 kilograms of carbon-dioxide equivalent per unit, that figure exceeds the agreed 100-kilogram product ceiling by 12 kilograms, representing a 12% exceedance of the ceiling. By contrast, the 40% increase cited in the introduction measures the 32-kilogram gap between the originally reported estimate of 80 kilograms and the revised figure of 112 kilograms. The difference between those two denominators is legally decisive: the 40% movement measures the upward revision relative to the initial statement, whereas the 12% overrun measures the physical non-conformity of the goods. Whether an accuracy tolerance is exceeded depends on the denominator specified or ascertainable under the contract. Neither calculation can sustain legal liability if the subsequent study measures a different manufacturing batch, applies an unagreed allocation key, or expands the system boundary without reconciling those adjustments back to the contractual baseline. Moreover, because emissions figures remain subject to inherent measurement uncertainty, a single point estimate generated by a later consultant is not self-proving; the buyer's expert evidence must account for material measurement uncertainty, including any reported confidence intervals and demonstrate that the true figure under the contractually agreed method departed from the warranted tolerance or ceiling on the applicable standard of proof.

The decision of the United States Court of Appeals for the Seventh Circuit in *Chicago Prime Packers Inc v Northam Food Trading Co* illustrates the evidentiary discipline required when connecting post-delivery inspections to the relevant contractual point in time. Affirming the judgment below on conformity grounds without reaching the district court's alternative holdings on timeliness of notice under articles 38 and 39, Flaum CJ held that under the CISG the buyer bears the burden of proving that the delivered goods were non-conforming at the time risk passed, and upheld, on clear-error review, the finding that the buyer had failed to discharge that burden in respect of a shipment of pork back ribs.[20] Crucially, the buyer's evidentiary case collapsed because third-party processors had handled the meat in the interim, the inspected ribs could not be definitively matched to the seller's shipment, and the evidence failed to rule out post-transfer spoilage. Although embedded manufacturing emissions obviously do not spoil in cold storage after risk passes, an analogous evidentiary difficulty arises whenever a buyer

[17] CISG (n 2) art 34; CISG Advisory Council, *Issues Raised by Documents under the CISG Focusing on the Buyer's Payment Duty* (Opinion No 11, 3 August 2012, Rapporteur Martin Davies) rule 1, comments 1.1–1.2, 3.1–3.2 ('Opinion No 11').

[18] CISG (n 2) art 45(1); Atamer and Wittum (n 3) 300–03.

[19] CISG (n 2) arts 34, 36(1)–(2), 66–69; Opinion No 19 (n 15) rule 2, comments 2.1–2.2 (distinguishing the contract conclusion date used to identify applicable standards from the passage-of-risk date used to assess conformity under art 36(1)).

[20] *Chicago Prime Packers Inc v Northam Food Trading Co* 408 F 3d 894, 898–900 (7th Cir 2005) (affirming on burden-of-proof and conformity grounds under CISG art 36(1) without deciding the district court's alternative holdings on timeliness of examination and notice under arts 38–39).

seeks to impeach earlier deliveries using a subsequent factory-wide carbon audit: the study must establish traceably that its inputs relate to the specific production run delivered under the contract and justify any retrospective inference drawn from later operating conditions. Neither *Chicago Prime Packers* nor the supplier's voluntary issuance of a revised number relieves the buyer of the burden of proving that a specific contractual obligation was broken.

In practice, comparing the supplier's original and revised calculation spreadsheets will often establish a breach of a methodological duty far more directly than debating competing headline numbers. Discovering that the supplier applied a generic grid factor where the contract mandated a facility-specific power-purchase factor, or omitted a promised natural-gas ledger altogether, pinpoints an exact operational failure. Conversely, where a revision rests upon readings from sub-meters installed a year after the housings were manufactured, the buyer must establish why those new measurements prove a breach of the earlier obligation rather than a mere post-performance upgrade in factory instrumentation. Where the supplier undertook only to make reasonable enquiries of its upstream raw-material vendors, the subsequent surfacing of a third-party record must be evaluated against the scope of enquiries reasonably required when the report was compiled; its later emergence does not automatically prove that the original enquiries were negligent. For that reason, contractual clauses governing record retention and audit access directly shape a buyer's practical ability to discharge its burden of proof without formally reversing the legal incidence of that burden.

4.2 EFFORT, RESULT AND THE COMPETING ACCOUNTS OF ARTICLE 79

The most significant theoretical disagreement in the contemporary CISG sustainability literature concerns the boundary between defining the seller's primary obligation and excusing non-performance under article 79. Atamer and Wittum argue that obligations of reasonable effort must be located squarely within the definition of the seller's primary contractual duty under article 8: if a supplier has promised only to exercise due diligence or reasonable efforts in gathering supply-chain information and has exercised that care, it has fully performed its obligation and committed no breach.[21] On that analysis, the CISG's adherence to strict contractual liability simply means that once a breach of an agreed obligation (whether of effort or of result) is established, the buyer need not prove fault as an additional precondition to claiming damages under article 45(1)(b); it does not convert a promise to take reasonable steps into a guarantee of a successful outcome, nor does it require recourse to article 79 to excuse a diligent seller.

By contrast, Schwenzer and Muñoz explore how best-efforts commitments interact with article 79 where the contract maintains an objective sustainability requirement for the goods themselves. They suggest that contractual best-efforts or due-diligence provisions can operate via article 6 to modify the standard of exemption under article 79(1), recalibrating what counts as an impediment beyond the seller's sphere of control and what the seller can reasonably be expected to overcome when supervising remote supply-chain actors.[22] Under that construction, delivering goods that violate an agreed sustainability standard remains an objective breach of article 35, yet a seller who has complied with the agreed due-diligence protocol may be exempted from paying damages under article 79(1), whilst leaving the buyer's non-damages remedies intact by virtue of article 79(5). Properly understood, Schwenzer and Muñoz do not contend that exercising reasonable care automatically satisfies the unmodified text of article 79(1); rather, they rely upon party autonomy under article 6 to explain how a best-efforts clause can soften the financial consequences of strict conformity liability.

Each of these two doctrinal accounts captures a distinct commercial configuration. The exemption model advanced by Schwenzer and Muñoz is particularly persuasive where the parties intentionally combine an uncompromising goods specification with a negotiated shield against open-ended financial exposure. For example, our Australian buyer might insist upon an objective right to reject or reduce the price of pump housings whose manufacturing emissions exceed 100 kilograms per unit, whilst agreeing that the Singaporean supplier will not be liable in consequential damages if an upstream pig-iron smelter supplies falsified data despite the supplier having carried out an agreed verification audit. If a tribunal were to collapse the entire bargain into a pure obligation of effort at the primary stage, the buyer would be stripped of the very conformity remedies (such as price reduction under article 50 or avoidance under article 49) that the objective 100-kilogram ceiling was designed to secure. Treating the due-diligence clause as a contractual modification of article 79(1) preserves that bifurcated remedial allocation, provided always that interpretation under article 8 shows that the parties intended both an objective ceiling and a conditional damages exemption.

Conversely, the critique developed by Atamer and Wittum is compelling whenever the seller's sole undertaking from the outset was an obligation of conduct. If the supplier never warranted a numerical ceiling or an exact outcome, but promised only to use reasonable efforts to canvass sub-tier energy records, treating an incomplete dataset as a breach of contract and remitting the supplier to an article 79 defence would fabricate a primary result obligation that the supplier never agreed to sell. Moreover, because article 79(5) provides that '[n]othing in this article prevents either party from exercising any right other than to claim damages under this Convention', routing a fulfilled conduct obligation through article 79 would anomalously expose a compliant seller to claims for specific performance, price reduction, or avoidance for failing to achieve an unpromised result. Because article 79 cannot manufacture a primary obligation where none exists, the soundest analytical sequence is first to determine under article 8 whether each distinct clause imposes a duty of conduct or of result, and only then to inquire whether the parties have exercised their freedom under article 6 to modify the exemption threshold for any obligation found to have been breached.[23]

Applying that two-stage sequence to the pump-housing variations yields clear doctrinal answers. A supplier who promises only to make reasonable enquiries for sub-tier data and conducts those enquiries diligently commits no breach when better figures later emerge. Likewise, a supplier who strictly promises to execute an agreed calculation formula using designated factory records and performs that calculation without error discharges its obligation even if a subsequent

[21] Atamer and Wittum (n 3) 301–02, especially 302 n 138.

[22] Schwenzer and Muñoz (n 3) 331–33; CISG (n 2) arts 6, 79(5).

[23] CISG (n 2) arts 6, 8, 45, 79; Atamer and Wittum (n 3) 301–02; Schwenzer and Muñoz (n 3) 331–33.

methodological refinement produces a higher number. Where, however, the supplier has additionally warranted that the reported figure is accurate within 5% or that the housings themselves do not exceed 100 kilograms of carbon-dioxide equivalent per unit, proving that it took reasonable care in compiling its spreadsheet will not defeat a finding of breach. Although an express contractual clause may modify article 79's application to that warranty breach, a tribunal must identify the specific contractual wording and surrounding circumstances that justify that modification rather than relying on vague appeals to 'best efforts' or the inherent difficulty of carbon accounting.

Where the unmodified text of article 79(1) applies, a defaulting seller can escape liability for damages only if it proves that the failure to perform

> was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

Ordinary commercial friction in gathering factory utility bills, or the routine margin of error built into an estimation methodology that the seller voluntarily chose to warrant, will not satisfy those cumulative threshold requirements. Once the buyer discharges its initial burden of proving that a warranted accuracy tolerance or product ceiling was broken, the burden shifts squarely onto the supplier to establish each element of exemption under article 79(1), keeping in mind that whilst giving a numerical warranty strongly informs the contractual allocation of risk, it should not be described as ousting article 79 across every conceivable supervening catastrophe.[24]

4.3 DELEGATED REPORTING AND THE LIMITS OF EXEMPTION

Suppliers who lack in-house carbon-accounting expertise may retain external sustainability consultants or verification bodies to compile their product emissions reports. Delegating that work does not by itself discharge the supplier's contractual obligation to the buyer. Where an external consultant is engaged as an economically and functionally independent third person to perform the whole or part of the supplier's contractual reporting duty, article 79(2) imposes a double threshold for exemption: the supplier is exempt from damages only if '(a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him'. As CISG Advisory Council Opinion No 7 explains, article 79(2) distinguishes independent subcontractors entrusted with performing a portion of the contract itself from the seller's own employees as well as from ordinary upstream suppliers of raw materials or components, whose defaults generally remain within the seller's own sphere of risk under article 79(1).[25] Whether an upstream metal supplier who provides defective primary emissions data alongside raw steel ingots counts as an upstream procurement supplier under article 79(1) or a third person engaged to perform part of the reporting duty under article 79(2) turns on its functional role in the contractual arrangement; in neither case, however, can the seller obtain an exemption merely by showing that it exercised care in selecting a reputable specialist.

Even where a genuine supervening impediment satisfies article 79(1) or (2), its remedial shelter remains tightly circumscribed by paragraphs (3) to (5). Under article 79(3), the exemption operates only 'for the period during which the impediment exists', meaning that a temporary disruption to factory data systems does not permanently excuse delayed reporting once records can be reconstructed. Furthermore, article 79(4) requires the non-performing party to notify the buyer 'of the impediment and its effect on his ability to perform', rendering a silent supplier liable for damages resulting from the non-receipt of notice within a reasonable time after it knew or ought to have known of the obstacle. Finally, while article 79(5) preserves every remedy other than damages, each remaining remedy must still satisfy its own substantive preconditions under the Convention: avoidance under article 49(1)(a) requires a fundamental breach, and an order for specific performance under articles 46 and 28 cannot compel a supplier to produce historical meter readings that were physically destroyed in a fire.[26] Separating the absence of a breach from an exempted breach therefore carries direct practical consequences for the parties' surviving remedies without implying that every non-damages remedy will be available on the facts.

5 NOTICE AND THE PRESERVATION OF MEANINGFUL REMEDIES

5.1 GOODS AND DOCUMENTS CONNECTED WITH CONFORMITY

Whenever the buyer complains that the delivered housings exceed their agreed 100-kilogram emissions ceiling, its remedies are conditioned upon compliance with the examination and notice provisions of articles 38 and 39. Article 38(1) obliges the buyer to 'examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances', whilst article 39(1) provides that the buyer

> loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

[24] CISG (n 2) art 79(1) (where the contractual risk allocation informs whether an impediment could reasonably have been taken into account or overcome, whereas careful performance of an independent conduct obligation does not itself operate as an exemption for breaching a separate warranty).

[25] CISG (n 2) art 79(1)–(2); CISG Advisory Council, *Exemption of Liability for Damages under Article 79 of the CISG* (Opinion No 7, 12 October 2007, Rapporteur Alejandro M Garro) rules 2.1–2.3, comments 15–22, especially 18–19 ('Opinion No 7').

[26] CISG (n 2) arts 28, 46, 49, 79(3)–(5).

As CISG Advisory Council Opinion No 2 emphasises, the period for examining the goods under article 38 and the period for giving notice under article 39(1) are distinct sequential inquiries, and what constitutes a practicable examination depends upon the nature of the goods and the overt signs of any latent defect.[27] Because no physical inspection or metallurgical test of a finished steel pump housing can reveal the kilowatt-hours of electricity consumed during its casting in Singapore, embedded carbon emissions are quintessential non-observable characteristics. Yet the impossibility of detecting carbon intensity through visual inspection of the metal does not entitle a buyer to remain passive indefinitely if accompanying documentation, internal arithmetic contradictions in the supplier's report, or agreed audit rights put the buyer on inquiry.

Crucially, article 39(1) does not require the buyer to possess a fully quantified forensic reconstruction before giving notice. Where preliminary scrutiny reveals that a promised foundry furnace ledger has been omitted from the calculation pack, or that the supplier's stated energy totals contradict its production volumes, the buyer can and should notify the supplier of those specific irregularities and state that they cast doubt upon compliance with the agreed carbon ceiling. In Opinion No 2, the CISG Advisory Council confirms that where precise root-cause diagnosis is not yet practicable, a notice describing the observable symptoms or indicators of non-conformity can satisfy article 39(1), whereas an unspecific expression of general dissatisfaction will not suffice.[28] Delaying all communication until external consultants have finalised their fee invoices or until the buyer prepares its next annual statutory sustainability report risks forfeiting the claim altogether by depriving the supplier of a timely opportunity to inspect its records and cure the defect.

Alongside the relative notice period in paragraph (1), article 39(2) imposes an absolute cut-off:

> [i]n any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Because that two-year clock starts running upon the physical handover of the housings rather than upon the passage of risk under article 36 or the later delivery of an annual climate report, a substantial portion of the cut-off period may already have expired before the buyer receives the revised 112-kilogram figure. Moreover, an undertaking by the supplier to furnish annual emissions updates over a three-year supply relationship does not automatically amount to a three-year 'contractual period of guarantee' of the goods' conformity within the meaning of the article 39(2) proviso; as the UNCITRAL Digest of Case Law observes, tribunals distinguish true contractual guarantees of quality from clauses that merely describe expected product performance.[29]

Although a clause expressly requiring the supplier to stand behind the historical carbon intensity of delivered housings throughout a multi-year regulatory reconciliation window presents a stronger candidate for the article 39(2) guarantee proviso than a bare covenant to supply future data, leaving that question to judicial implication is commercially hazardous. Because extending a substantive guarantee does not automatically dispense with the requirement to give notice within a reasonable time after discovery under article 39(1), well-counselled parties should use their freedom under article 6 to vary both legs of article 39 expressly. Absent such drafting, a buyer whose conformity claim is otherwise time-barred must look to the statutory exceptions in articles 40 and 44. Under article 40, the seller is precluded from relying upon articles 38 and 39 'if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer', a threshold that will be met where the supplier knowingly suppressed a furnace dataset when issuing the 80-kilogram figure. Where the seller lacks such culpable knowledge, article 44 allows a buyer who has a 'reasonable excuse for his failure to give the required notice' under article 39(1) to reduce the price under article 50 or claim damages other than loss of profit, though article 44 confers no relief whatsoever once the absolute two-year cut-off in article 39(2) has expired.[30]

Nor can a buyer sidestep the notice discipline of articles 38 and 39 simply by framing its complaint around a defective emissions certificate under article 34. Both CISG Advisory Council Opinion No 21 (addressing repair and substitute delivery) and Opinion No 5 (addressing avoidance for non-conforming goods or documents) treat accompanying compliance documents as closely integrated with the conformity regime.[31] Where an emissions certificate is contracted for specifically to evidence that a delivered batch of pump housings complies with an agreed 100-kilogram ceiling, allowing the buyer to rebrand a time-barred conformity claim as an unnotified documentary breach would subvert the finality policy of article 39.

5.2 THE CASE FOR AND AGAINST EXTENDING NOTICE TO INDEPENDENT REPORTING

A far more intricate doctrinal question arises where the seller's breach concerns a genuinely independent informational obligation rather than a certificate of goods conformity. Suppose the pump housings comply comfortably with the 100-kilogram ceiling (or the contract contains no carbon ceiling at all), yet the supplier breaches a separate contractual undertaking to provide a factory-wide multi-year reconciliation report, to preserve primary calculation spreadsheets for audit, or to notify the buyer within thirty days of discovering a material change in an emission factor. Whilst Atamer and Wittum note that the applicability of article 39(1) to breaches of collateral sustainability obligations is contested, the scholarly debate extends well beyond

[27] CISG (n 2) arts 38–39; CISG Advisory Council, *Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39* (Opinion No 2, 7 June 2004, Rapporteur Eric E Bergsten) art 38 rules 1–3, art 39 rules 1–3 ('Opinion No 2'); Schwenzer, 'Ethical Standards' (n 3) 127.

[28] Opinion No 2 (n 27) art 39 rules 3–4; CISG (n 2) art 39(1).

[29] CISG (n 2) art 39(2); United Nations Commission on International Trade Law, UNCITRAL *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations 2016) art 39 paras 28–29 ('UNCITRAL Digest').

[30] CISG (n 2) arts 6, 8, 39–40, 44; UNCITRAL Digest (n 29) art 39 paras 9, 28–29.

[31] CISG Advisory Council, *Delivery of Substitute Goods and Repair under the CISG* (Opinion No 21, adopted following the meeting of 3–4 February 2020, Rapporteurs Ingeborg Schwenzer and Ilka H Beimel) n 2; CISG Advisory Council, *The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents* (Opinion No 5, 7 May 2005, Rapporteur Ingeborg Schwenzer) comments 4.7–4.9 ('Opinion No 5').

paragraph (1): Schlechtriem argued forcefully that where a sales contract governed by the CISG includes ancillary service or work obligations, articles 38, 39(1), and the absolute two-year cut-off in article 39(2) should all apply by analogy to defective performance of those services.[32]

The teleological case for Schlechtriem's analogy deserves serious weight. Whether a seller's defective performance lies in the physical fabrication of the goods or in ancillary installation, testing, or technical reporting duties incorporated into the same contract of sale, the seller has an identical commercial interest in receiving prompt specification of alleged defects, an opportunity to investigate and cure at minimal cost, and eventual repose from stale liabilities. Allowing a claimant to evade the Convention's prompt-notice discipline merely by characterising a closely bound technical service as an independent obligation under article 45 would invite artificial pleading and fragment the remedial administration of a single commercial bargain. Whenever a climate report serves as the agreed evidentiary vehicle for proving a warranted characteristic of the goods, those functional considerations strongly reinforce applying articles 38 and 39.

Extending that analogy automatically to an independent reporting obligation falling due years after delivery is, however, textually and practically problematic. By its express terms, article 39 governs the buyer's right 'to rely on a lack of conformity of the goods', and article 39(2) anchors its two-year outer limit specifically in 'the date on which the goods were actually handed over to the buyer'. If that handover date were mechanically imported into an obligation to deliver a multi-year Scope 3 reconciliation report thirty months after physical delivery of the housings, the buyer's remedies would be extinguished under article 39(2) six months before the reporting duty even fell due to be performed. Answering that anomaly by asserting that sophisticated commercial parties ought to contract out of article 39(2) begs the central interpretive question of whether the Convention imposes that default rule on non-goods obligations in the first place. An alternative judicial adaptation would be to apply article 39(2) by analogy whilst resetting the two-year clock to run from the date on which the independent report was handed over. Although commercially sensible, constructing a new limitation commencement date that appears nowhere in the text of article 39(2) must be justified rigorously as gap-filling under article 7(2) rather than treated as a straightforward application of the treaty text.

Under article 7(2), matters governed by the Convention that are not expressly settled in it must be resolved 'in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law'. Even if one accepts general principles of good faith, informational cooperation, and protection of the seller's right to cure within the Convention, those principles do not inevitably compel the drastic sanction of total remedial forfeiture (and an absolute two-year cut-off) for every ancillary obligation outside article 35. Where a buyer delays unreasonably in notifying the seller of an obvious omission in an independent data report, the mitigation duty under article 77 already bars recovery of any incremental losses that timely communication would have avoided, without extinguishing the underlying claim in its entirety.[33] Recognising the operation of article 77 does not negate the seller's legitimate interest in finality, but it demonstrates why general principles alone do not compel exporting the drastic forfeiture rule of article 39(2) to every obligation independent of goods conformity.

On balance, the sounder doctrinal view is to confine the handover-based two-year cut-off in article 39(2) to claims alleging non-conformity of the goods and documentary defects bound up with goods conformity, while declining to export it automatically to autonomous reporting or financial reimbursement undertakings. The case against analogous forfeiture is strongest where the informational obligation has its own post-delivery due date, addresses factory-wide or methodological verification distinct from the physical quality of the goods, and causes pure financial or compliance expenditure independently of any defect in the delivered housings. Even within that category, however, a tribunal persuaded by Schlechtriem's broader analogy may still require the buyer to give notice of an apparent reporting error within a reasonable time under article 39(1), making the boundary between articles 39 and 77 a live interpretive controversy rather than settled law.

The judgment of the Oberlandesgericht Düsseldorf in the *Television Sets* case illustrates how a carefully structured financial allocation can operate outside the articles 38 and 39 conformity regime. In that dispute, the seller had agreed to bear excess warranty and repair expenses once more than 5% of the delivered television sets required such work; the court construed that undertaking not as an ordinary claim for non-conformity of individual units subject to articles 38 and 39, but as an independent contractual cost-allocation guarantee triggered once the proportion of sets requiring warranty or service work crossed the agreed percentage.[34] Whilst that decision does not exempt ancillary services generally from notice requirements, it confirms that commercial parties may draft a self-standing reimbursement or reassessment payment trigger that operates independently of proving a defect in individual goods. To avoid the uncertainty of competing judicial analogies, parties drafting climate-data clauses should specify express notice periods measured from the receipt of the relevant report or revision notice and state clearly whether those periods operate as an article 6 derogation from article 39.

5.3 CORRECTION, PERFORMANCE AND AVOIDANCE

Where a reporting defect is identified early, the Convention's cure provisions distinguish sharply between documentary corrections and physical non-conformity. Under article 34, if the seller has handed over documents before the contractually required date, it may 'up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense', whilst article 48(1), subject to article 49, empowers the seller even after the delivery date to 'remedy at his own expense any failure to perform his obligations, if he can do so without

[32] Atamer and Wittum (n 3) 302 nn 141–42; Peter Schlechtriem, 'Interpretation, Gap-Filling and Further Development of the U.N. Sales Convention' (Martin Koehler tr, 2004) 16 *Pace International Law Review* 279, 294–97, especially 297 <https://doi.org/10.58948/2331-3536.1165> (expressly advocating the analogous application of both paras (1) and (2) of art 39 to defective service obligations governed by the CISG).

[33] CISG (n 2) art 7(2); Ingeborg Schwenzer, 'Interpretation and Gap-Filling under the CISG' in Ingeborg Schwenzer, Yeşim M Atamer and Petra Butler (eds), *Current Issues in the CISG and Arbitration* (Eleven International Publishing 2014) 109, 112, 115–16.

[34] Oberlandesgericht Düsseldorf, 28 May 2004, Case No I-17 U 20/02 (*Television Sets*), CISG-online 850, paras 37–39.

unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer'. Under both articles, the buyer retains its right to claim damages for any loss not eliminated by the cure. Crucially, however, re-running a spreadsheet calculation on retained foundry records can cure only a documentary or informational breach; it cannot retroactively extract greenhouse gases already emitted into the atmosphere when the steel housings were cast. Conflating documentary recalculation with physical 'repair' under article 46(3) obscures the fundamental difference between correcting an inaccurate report and curing a breach of an agreed 100-kilogram product ceiling, the consequences of which may be addressed by substitute delivery where article 46(2) permits it, or by contractually agreed offsets.[35]

A buyer seeking to compel the supplier to produce omitted records or deliver a compliant calculation invokes the general performance right in article 46(1), which entitles the buyer to 'require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement', subject always to the forum proviso in article 28 that a court is not bound to enter a judgment for specific performance unless it would do so under its own domestic law for similar sales contracts. By contrast, the heightened fundamental-breach requirement in article 46(2) and the reasonableness qualifier in article 46(3) govern only requests for substitute delivery or repair in cases of non-conformity of the goods. Where an independent reporting obligation is delayed, the buyer may fix an additional period of reasonable length (Nachfrist) under article 47(1), during which article 47(2) precludes resort to remedies for breach unless the buyer receives notice that the seller will not perform within that period, while preserving the buyer's claim for delay damages. Importantly, however, a seller's failure to comply with a Nachfrist notice fixing an additional deadline for an ancillary climate report does not entitle the buyer to avoid the entire sales contract automatically under article 49(1)(b), because that shortcut applies only to 'case of non-delivery' of the goods themselves; avoiding the contract for a reporting failure requires establishing a fundamental breach under articles 25 and 49(1)(a), subject to the time limits in article 49(2).[36]

Under article 25, a breach is fundamental only if it results in such detriment to the buyer

> as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Although a supplier's failure to deliver verified emissions data before a statutory reporting deadline may cause acute commercial difficulty, the regulatory importance of climate disclosure does not automatically render every reporting error a fundamental breach of a contract for the sale of industrial pump housings. If the housings themselves perform their mechanical function and the supplier delivers usable corrective figures in time for the buyer to meet its statutory filing window (or rely upon permitted estimation reliefs), those circumstances weigh against a finding that the buyer has been substantially deprived of its contractual expectation. Conversely, where primary foundry measurements were never taken during the production run and physical reconstruction is impossible, ordering specific performance under article 46(1) would be futile.[37] These remedial constraints explain why well-designed supply contracts prioritise ongoing audit access and structured interim correction procedures over relying upon contract avoidance or ex post damages litigation.

6 INVESTIGATION COSTS, REIMBURSEMENT AND STATUTORY PROTECTION

6.1 THE LOSS CAUSED BY THE PARTICULAR BREACH

Where a breach of a calculation duty, accuracy warranty, or conformity ceiling is established, the recoverability of the buyer's investigation and restatement expenditure is governed by articles 74 and 77. Article 74 defines damages as 'a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach', capped at

> the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract,

whilst article 77 requires the aggrieved party to take reasonable measures to mitigate its loss. Applying the but-for causal baseline of article 74 requires comparing the buyer's actual financial position with the position it would have occupied had the supplier performed the exact obligation promised in the contract. Because even spotless performance of a contractual calculation duty might still have left the buyer incurring routine internal verification costs or paying external assurance providers to audit its consolidated Scope 3 inventory, the buyer cannot recover an entire consultancy invoice merely by showing that it was incurred after the supplier issued the 112-kilogram revision. Instead, the buyer must isolate the specific incremental expenditure made necessary by the supplier's breach.[38]

Tracing causation across our hypothetical variations illustrates how the scope of recoverable loss shifts with the broken promise. If the supplier breached a strict obligation to obtain and include a primary foundry furnace ledger, the reasonable fees charged by an external engineer to reconstruct that missing energy dataset are a direct consequence of the reporting breach and remain recoverable under article 74 even if the reconstruction ultimately confirms that total emissions per housing stayed below the 100-kilogram product ceiling. Conversely, if the supplier provided every promised record and executed the agreed calculation formula accurately, the cost of a buyer-commissioned study that installs finer sub-metering to narrow the margin of estimation uncertainty purchases an informational upgrade beyond the contractual bargain and must be borne by the buyer. Where the supplier breached an express numerical accuracy warranty or the 100-kilogram product ceiling, the buyer must similarly disaggregate its consultant's invoice to separate recoverable forensic investigation and restatement costs caused by the breach from routine statutory assurance fees that the buyer would have incurred in any event.

[35] CISG (n 2) arts 6, 34, 46(2), 48–49; Opinion No 5 (n 31) comments 4.7–4.9.

[36] CISG (n 2) arts 25, 28, 46–49; Opinion No 5 (n 31) comment 4.10.

[37] CISG (n 2) arts 25, 46(2)–(3), 49; Schwenzer, 'Ethical Standards' (n 3) 127–28; Opinion No 5 (n 31) comments 4.1–4.9.

[38] CISG (n 2) arts 74, 77.

In Opinion No 6, the CISG Advisory Council recognises that reasonable expenses incurred by a buyer in ascertaining whether delivered goods conform to the contract are recoverable under article 74 where a lack of conformity is actually established and properly notified.[39] Extending that principle to proved breaches of contractual reporting obligations justifies awarding the reasonable cost of investigating a suspect emissions calculation, provided that the investigation confirms a breach of the seller's undertaking. It does not, however, entitle a buyer to commission speculative third-party audits at the supplier's expense whenever a revised estimate triggers commercial anxiety: if the audit reveals that the supplier complied fully with its contractual obligations, shifting the cost of that verification requires a contractual cost-sharing clause rather than a damages claim under article 74. Even where a breach is established, the reasonableness of the buyer's expenditure under articles 74 and 77 must be assessed at the time the costs were incurred, taking into account whether the supplier offered to cure the calculation free of charge under article 48 and how much time remained before the buyer's statutory filing deadline. Communicating the existence and timing of the buyer's mandatory AASB S2 reporting obligations at contract conclusion will readily place the foreseeable costs of an emergency recalculation within the supplier's contemplation under article 74.

Causal precision is equally vital where the supplier's sole breach consists in delayed notification. Suppose the supplier's initial 80-kilogram calculation complied fully with the contract, subsequent utility reconciliations revealed the 112-kilogram figure, and the supplier then breached an express contractual obligation to notify the buyer of any material revision within thirty days. Even if the supplier had given timely notice on day thirty, the buyer would still have had to update its Scope 3 inventory to reflect the 112-kilogram figure. Consequently, the loss caused by the notification breach is not the baseline cost of revising the disclosure, but only the incremental expense caused by the delay, such as overtime rush fees charged by the buyer's external auditors or the wasted cost of an interim report compiled in ignorance of the update. Furthermore, where the buyer exacerbates the reporting error by commingling incompatible datasets or stripping out methodological caveats that the supplier had expressly attached to the 80-kilogram figure, its recovery is curtailed by article 77 to the extent of a failure to mitigate consequential loss. Article 80 applies only where the buyer's conduct caused the supplier's failure to perform and provides that '[a] party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission'.[40]

To avoid the evidentiary friction of proving breach and causation after the event, commercial parties may incorporate an autonomous contractual reimbursement clause allocating the cost of reassessment upon specified objective triggers. For instance, the contract might stipulate that the supplier will reimburse up to a fixed sum of verification expenses whenever a revised report departs from the initial estimate by more than 25%, or whenever an agreed methodological departure is identified, or simply upon the joint commissioning of a third-party review. Under the first trigger, the 40% revision from 80 to 112 kilograms would activate the supplier's payment obligation even if the original calculation involved no breach of contract, whereas the second trigger would require proof of methodological error. As the *Television Sets* decision demonstrates, such autonomous cost-allocation clauses operate according to their agreed contractual conditions under articles 6 and 8 rather than the breach-and-damages rules of article 74, though their interaction with contractual liability caps and domestic validity doctrines under article 4(a) must still be examined.[41] Conversely, where verification costs are claimed as damages for breach under article 74, any quantifiable financial benefit that the buyer derives from the study (such as reusable production-line mapping that saves expenditure in future reporting years) must be brought into account under the principle against overcompensation articulated in CISG Advisory Council Opinion No 6, provided there is a sufficient causal nexus between the breach and the resulting advantage.[42]

6.2 THE AUSTRALIAN RESTRICTION ON PROCEEDINGS

Where the dispute is litigated in an Australian forum or subject to mandatory Australian statutory provisions, the contractual analysis must contend with a significant statutory bar on civil proceedings. Section 1707D of the Corporations Act 2001 (Cth) restricts the commencement or continuation of legal proceedings against a person in relation to defined 'protected statements', carving out exceptions only for criminal proceedings and proceedings brought by ASIC. Protected statements encompass, inter alia, statements concerning Scope 3 greenhouse gas emissions, scenario analysis, or transition plans made in a sustainability report for the purpose of complying with a sustainability standard, or in the corresponding auditor's report for the purpose of complying with the Act or auditing standards, for financial years commencing during the three-year transitional window beginning on 1 January 2025. The section also protects qualifying future-facing climate statements in reports for financial years commencing in 2025, and certain Commonwealth-law-required statements that repeat a protected statement or differ only through updates or corrections. Because those dates define the qualifying financial years rather than imposing a sunset date on the immunity itself, protection for statements made in those reports endures beyond 1 January 2028; moreover, sections 1707DA and 1707DB (inserted with effect from 5 December 2025 by the Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Act 2025 (Cth)) extend parallel protections to qualifying voluntary sustainability reports accompanied by the required directors' declaration and to statements in relief-condition reports specified by the relevant exemption order.[43]

At first glance, a private spreadsheet delivered by a Singaporean component manufacturer under a commercial supply contract does not itself constitute a statutory sustainability report prepared under Chapter 2M of the Corporations Act 2001

[39] CISG Advisory Council, *Calculation of Damages under CISG Article 74* (Opinion No 6, Spring 2006, Rapporteur John Y Gotanda) rule 4, comment 4.2 ('Opinion No 6').

[40] CISG (n 2) arts 74, 77, 80; Atamer and Wittum (n 3) 311–12 (noting that art 80 addresses buyer-caused failure of performance rather than mere contributory negligence in respect of consequential loss).

[41] *Television Sets* (n 34) paras 37–39; CISG (n 2) arts 4(a), 6, 8; Opinion No 17 (n 13) rules 1–2, 4.

[42] Opinion No 6 (n 39) rule 9, comments 9.1–9.3; CISG (n 2) art 74.

[43] Corporations Act 2001 (Cth) ss 1707, 1707D(1)–(4), 1707DA, 1707DB, as amended by the Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Act 2025 (Cth) s 2 table item 4, sch 4 pt 1 div 2 item 13 (commencing 5 December 2025); RG 280 (n 5) RG 280.63–280.69.

(Cth). Nevertheless, the sweeping statutory language barring proceedings 'against a person in relation to' a protected statement creates a genuine interpretive hazard for supply-chain litigation. A defending supplier could plausibly argue that where an Australian buyer sues to recover the costs of investigating and restating a Scope 3 figure published in the buyer's own qualifying sustainability report, the contractual action is a proceeding 'in relation to' that protected statement and is therefore barred by section 1707D. Conversely, the buyer's strongest counter-argument is that the statutory immunity should be construed as shielding reporting entities and their officers from third-party and investor suits over uncertain Scope 3 disclosures, without extinguishing bilateral contractual remedies against an upstream vendor who breached an independent commercial warranty or data-delivery covenant, particularly where the investigation costs were incurred to verify goods conformity or internal procurement compliance independently of the published statement.[44]

Because neither the text of section 1707D nor ASIC's commentary in Regulatory Guide 280 expressly addresses upstream B2B supply-contract claims, and no reported judicial decision resolving that boundary was identified in the authorities examined as at 9 November 2026, the maintainability of such an action turns upon how a court construes the required statutory nexus between the pleaded contractual breach, the loss claimed, and the protected disclosure. A claim framed carefully around the supplier's breach of a bilateral manufacturing ceiling or independent record-delivery covenant stands on firmer ground than a pleading that seeks direct indemnification for statutory restatement expenses.

7 EVIDENCE, COST AND RESPONSIBILITY IN THE SUPPLY CHAIN

Ultimately, how a sales contract allocates revision risk determines which commercial actor must invest the time, resources, and institutional transparency required to make supply-chain climate metrics answerable to empirical verification. A corporate buyer's sustainability team cannot explain a 40% jump in product emissions to its auditors or regulators without examining the underlying calculation architecture, yet those primary utility ledgers and allocation worksheets sit inside the supplier's premises, frequently commingled with confidential costings and production runs for competing customers. Purchasing an express warranty of numerical accuracy without securing contractual rights of audit and record access risks leaving the buyer holding a hollow substantive right that it cannot prove in litigation. Equally, subjecting an upstream manufacturer to unconstrained, open-ended demands for primary factory records imposes unpriced administrative burdens detached from the value of the goods sold. Maintaining the doctrinal distinction between the performance actually purchased and subsequent demands for improved data provides the blueprint for balanced contractual design.

A robust contractual regime begins by specifying exactly which primary operational records the supplier must retain, requiring the preservation of original baseline calculation files alongside any subsequent revisions, and confining audit access strictly to data necessary to verify compliance with the agreed contractual boundary. Where commercial sensitivity prevents direct inspection by the buyer's personnel, interposing an independent third-party verifier bound by confidentiality undertakings protects the supplier's trade secrets whilst allowing the calculation to be audited. Crucially, the contractual record-retention period must be synchronised with the limitation and notice periods governing substantive remedies: obliging a supplier to retain foundry records for three years while leaving the unmodified two-year handover cut-off in article 39(2) untouched risks preserving evidence for a claim that has already been extinguished at law.[45] Expressly coordinating an article 6 derogation from article 39 with the contractual reporting timetable and the applicable domestic limitation statute eliminates that trap.

Financial allocation for post-delivery audits requires equivalent contractual precision. Where a supplier has priced and given an express warranty of numerical accuracy or a strict 100-kilogram product ceiling, it has contractually accepted the risk of non-conformity within those boundaries; where it has promised only to execute an agreed estimation protocol, the buyer has purchased a more limited service. Because asymmetric bargaining power may leave one party controlling both the standard terms and the operational evidence, the normative justification for an express reassessment clause is that it renders the contractual undertaking practically testable without turning every routine data refinement into a full-scale breach dispute. Commercial parties can achieve this balance by establishing a provisional funding mechanism for a limited technical review, under which the buyer advances the initial verification fee and final liability for the cost shifts to the supplier only if the verifier finds a departure from the agreed methodology or a breach of the warranted tolerance.

Structuring reassessment funding in this manner may also reduce perverse incentives to conceal superior data. If every upward revision of an earlier estimate automatically exposed the supplier to damages liability regardless of fault or compliance with the agreed protocol, rational suppliers would face a strong disincentive against volunteering improved emissions measurements. Separating a compliant methodological revision from a breach of contract can reduce that penalty for transparency, whilst preserving liability for breach of a numerical warranty or suppression of promised primary records. Coupling that distinction with an independent covenant requiring the supplier to notify the buyer promptly upon discovering any material change in inputs can promote timely information flow, with damages for late notice confined strictly to the incremental losses caused by the delay. Where neither party has breached the contract, the cost of incorporating newly available empirical data can be shared according to an agreed contractual formula.

Where disputes turn upon technical recalculation under agreed accounting boundaries, referring the discrepancy to expert determination offers a swift alternative to litigation, provided the expert's mandate is carefully delineated. As V K Rajah J explained in the Singapore High Court decision of *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd*, the binding force of an expert determination rests upon 'the sanctity [the law] accords to contractual arrangements', with the result that commercial parties who appoint an expert for speed and finality remain bound even by an erroneous valuation unless they establish fraud, partiality, or a material departure from instructions.[46] Crucially, Rajah J observed that whereas an expert's remit may validly encompass legal as well as factual questions if drafted broadly, where the parties 'fail to stipulate or mandate in the

[44] Corporations Act 2001 (Cth) s 1707D(1)–(4); RG 280 (n 5) RG 280.63–280.69.

[45] CISG (n 2) arts 6, 8, 39(2); UNCITRAL Digest (n 29) art 39 paras 28–29.

[46] *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2005] SGHC 224, [2006] 1 SLR(R) 634 [34]–[37], [41], [44]–[47], especially [45] (V K Rajah J).

terms of reference for a "speaking" or "reasoned" award the court itself cannot, and indeed should not, insist' upon one. Although *Evergreat* Construction represents domestic Singaporean contract law rather than an autonomous CISG ruling, its drafting lessons apply directly to international supply contracts: parties who wish to assign technical carbon reconciliation to an emissions verifier while reserving questions of contractual interpretation and legal liability to an arbitral tribunal or court must define that jurisdictional boundary expressly, guarantee access to primary records, afford both sides an opportunity to make submissions, and mandate a fully reasoned written determination.

Finally, it must be recognised that these contractual mechanisms operate primarily between the commercial parties to the contract of sale. Because article 4 confines the CISG to 'the rights and obligations of the seller and the buyer arising from such a contract', the Convention's conformity rules and bilateral reporting covenants do not, by force of the Convention alone, confer enforceable third-party rights upon communities affected by industrial emissions or public stakeholders relying upon corporate sustainability disclosures.[47] Protecting those broader societal interests remains the province of public environmental regulation, mandatory disclosure statutes, tort law, and any applicable domestic rules on third-party contractual rights. Within its proper sphere, however, private sales law performs an indispensable institutional function: it links a reporting company's public climate statements to an enforceable bilateral duty requiring upstream manufacturers to produce, preserve, and correct the underlying empirical evidence. While empirical research must determine whether specific contractual clauses reduce industrial emissions in practice, rigorous doctrinal analysis shows how commercial parties can make climate assurances legally enforceable without penalising the honest improvement of scientific and operational knowledge.

8 CONCLUSION

A supplier's revision of a previously reported product emissions figure carries no single, predetermined legal meaning under the CISG. Its remedial consequences depend upon the precise object and standard of the performance purchased under the contract of sale and the underlying reason why the numerical estimate changed. A strict undertaking to apply a prescribed calculation methodology to designated factory records is discharged when that process is faithfully executed, even if the resulting estimate remains subject to uncertainty and is later refined; conversely, an express warranty of numerical accuracy within a defined tolerance or an objective product emissions ceiling under article 35(1) can be breached notwithstanding the supplier's utmost care in calculation. Post-delivery audit evidence must therefore be tied back rigorously to the agreed system boundary, historical production period, and allocation key, without treating measurement uncertainty itself as an unexpressed warranty.

Maintaining the doctrinal boundary between primary obligations of effort and modifications of the exemption regime under article 79 is essential because the two pathways yield materially different remedial outcomes. Where the seller promised only to exercise reasonable efforts in gathering upstream data and fulfilled that duty of conduct, no breach of contract arises to require excuse. Where, however, the contract pairs an objective conformity ceiling or accuracy warranty with a due-diligence limitation of liability under article 6 and article 79, a departure from the ceiling remains a breach that leaves the buyer's non-damages remedies intact under article 79(5), subject to their individual statutory preconditions. Construing the agreement under article 8 must establish which structure the parties actually adopted, recognising that taking reasonable care neither enlarges a primary duty of conduct into a guarantee of result nor satisfies the unmodified text of article 79(1) where a result was warranted.

The preservation of remedies through timely notice similarly follows the functional nature of the obligation breached. Whilst articles 38 and 39 govern claims that the delivered goods exceed an agreed carbon ceiling and extend coherently to accompanying compliance certificates integral to goods conformity, exporting the handover-based two-year cut-off in article 39(2) automatically to independent future reporting covenants lacks textual support and risks extinguishing rights before performance falls due. Just as a buyer should not be permitted to revive a time-barred conformity claim by relabelling it as a reporting error, a physical handover cut-off should not automatically defeat an autonomous post-delivery informational obligation. Express contractual drafting addressing notice triggers, retention horizons, and article 6 derogations provides far greater commercial certainty than relying upon contested gap-filling analogies.

Ultimately, damages under article 74 compensate only the incremental investigation and restatement expenses caused by the seller's specific breach within the limits of foreseeability, mitigation under article 77, and any applicable statutory bar on proceedings under section 1707D of the Corporations Act 2001 (Cth). Routine verification costs that the buyer would have incurred even upon full contractual performance require an autonomous cost-sharing agreement if they are to be shifted onto the supplier. By incorporating targeted clauses governing record retention, confidential audit access, timely revision notices, and provisional reassessment funding, commercial parties can render that doctrinal distinction workable in practice. Their broader significance lies in aligning the legal responsibilities of those who generate primary production data with those who must account for it publicly, ensuring that promised environmental assurances remain enforceable whilst leaving room for empirical knowledge to improve after performance is complete.

[47] CISG (n 2) art 4.

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EQUAL STANDING AND THE JUSTIFICATION OF SOCIAL POWER

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ABSTRACT

A right to care may be vindicated only after the recipient has endured an interruption and an unpaid caregiver has supplied the missing work. That interval raises a question about equal standing: how can institutional authority remain justified when the person contesting it cannot safely withdraw? Drawing on political philosophy and doctrinal analysis of English care and capacity law, this article develops a principle of continuing responsibility for the burdens of complaint and transition. Rawlsian representation is extended to include people permanently unable to exercise the moral powers assumed in his conception of the citizen. A bounded duty of material assistance is defended against Nozick's entitlement theory, with explicit limits on compulsory personal service. The legal analysis distinguishes statutory responsibility, fiduciary loyalty and authority to decide for another, and examines the Supreme Court's 2026 revision of the deprivation-of-liberty test. Existing complaint and advocacy duties provide a foundation, but do not settle every question of interim continuity. The proposed reforms place responsibility for replacement arrangements on the commissioning authority, preserve caregivers' independent claims and require scrutiny of the evidence used to justify intervention. A scarcity example tests those protections against an equally urgent competing claim. The contribution is an account of how institutions should allocate the work, risk and irrecoverable losses of securing care while dependence continues.

Keywords: equal standing; dependency; caregiving; mental capacity; institutional authority; administrative burden

1 CONTESTED AUTHORITY IN A CONTINUING RELATIONSHIP

A person who disputes a care decision may still need the provider's assistance that evening. Someone must administer medication, help with food or make communication possible before a complaint can be investigated. The recipient's relative may supply what the institution withholds, although doing so requires another missed shift at work or another night without sleep. By the time a decision is corrected, both people may have sustained losses that the eventual provision of a service cannot repair. The allocation of this interval is part of the exercise of social power.

Consider Maya, an adult who needs substantial daily assistance, and her sister Clara, who combines unpaid care with employment and responsibility for a child. A commissioned provider supplies the remaining support. Maya communicates everyday preferences, but a proposed move involving unfamiliar staff and accommodation presents a more difficult decision. Clara's knowledge may help Maya understand it. Clara also has interests of her own: she cannot safely absorb every interruption in commissioned care, and her willingness to help today supplies limited evidence about what she can undertake next month. Suppose that a shortage also affects Ben, whose need is equally urgent. Nothing in the example establishes that Maya should take priority merely because she already receives a service or because Clara can articulate the family's complaint. The question is how an institution can justify its decisions to all three while their needs and obligations continue.

Equal standing requires more than an entitlement eventually vindicated. A person must be able to question the terms on which essential assistance is delivered without making bodily security the price of doing so. That requirement also protects the caregiver. An institution cannot secure the recipient's formal entitlement by assuming that a relative will supply whatever labour remains unallocated. I defend a corresponding principle of continuing responsibility: an authority that administers essential care must account for the burdens of contestation and transition, including the work it expects others to perform while its decision remains unresolved. This principle concerns the organisation of responsibility. It does not promise that every claimant can immediately obtain their preferred arrangement.

The problem is neither hypothetical in its entirety nor established by this example alone. The Joint Committee on Human Rights received evidence that fear of eviction or poorer treatment could discourage complaints in care settings. Its recommendation for stronger independent investigation reflects the difficulty of asking a dependent resident to initiate and

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sustain enforcement. Such evidence identifies a credible institutional risk; it cannot establish how frequently retaliation occurs across all providers.[1]

The argument proceeds through two questions that are often separated. The first concerns the justification of assistance, including its limits when another person's labour is at stake. The second concerns the authority exercised through the institutions that provide it. Rawls and Nozick expose different difficulties in the first question. English care and capacity law supplies a concrete setting for the second, with Canadian fiduciary doctrine serving a limited comparative purpose. The resulting account gives particular attention to what happens before review succeeds: support may be interrupted, evidence may remain with the provider, and an unpaid caregiver may become the institution's default contingency arrangement.

2 EQUAL STANDING AND PERMANENT DEPENDENCE

2.1 DEPENDENCE, STATUS AND THE REPRESENTED PERSON

Dependence describes a relationship through which a person obtains something they cannot presently secure alone. Vulnerability is wider: embodied persons remain exposed to injury, changing capacity and unequal access to institutional resources. Fineman's account directs attention to the social organisation of resilience, including the institutions that distribute the means of coping with adversity. It does not by itself determine whether a particular relationship treats its participants as equals. A benevolent hierarchy may protect its subjects effectively and still deny them authority to question its terms.[2]

Kittay brings the distribution of dependency work into clearer view. The person who provides indispensable care may become dependent on others for income, respite and the conditions of an independent life. Her account of *doulia* assigns social responsibility for supporting the people who sustain dependants. Public support for caregivers is therefore an established argument, as is the objection to assessing their contributions solely through paid employment. The present concern arises within that argument: an institution may acknowledge care in its final budget yet leave the caregiver to finance the period of assessment, complaint or transition through uncompensated work.[3]

Equal standing supplies a reason for questioning this arrangement. The importance of Maya's pain or bodily security does not diminish because she cannot earn, bargain or reciprocate. Clara's future does not become institutionally disposable because she has responded to Maya's need. These claims concern the significance of each person's interests in the justification of power. They allow differences in assistance and decision-making arrangements where those differences answer relevant needs. They exclude an inference from reduced capacity to reduced importance. Nussbaum's rejection of rational agency as the sole measure of dignity helps identify the substantive interests at stake, although her own capability threshold leaves some profound conditions outside its scope. Waldron's treatment of dignity as status explains why treatment as a subordinate is a distinct injury. The claim defended here concerns the equal importance of a person's interests even when reciprocal agency is permanently unavailable; neither account by itself supplies its complete justification or an allocation rule for scarce care.[4]

Relational equality already gives this inquiry a substantial theoretical foundation. Anderson's democratic equality joins opposition to oppression with effective access to the conditions of freedom throughout a life. The argument here develops that concern within a continuing institutional relationship. A claimant's standing is tested when they object, when the assistance previously supplied by a relative becomes unavailable, and when the institution's answer will arrive too late to prevent a loss. Attention to those transitions makes the distribution of procedural work part of the assessment of the care arrangement itself.[5]

The entitlement to justification must also survive an inability to demand reasons personally. Forst's account makes the relation between power and justification central, but a care institution needs arrangements through which a person's interests can be represented without attributing the representative's judgement to them.[6] Familiarity is valuable evidence. It is also compatible with conflict, exhaustion or an understandable preference for an arrangement that eases the representative's burden. Clara should be heard about Maya's communication and history, while having a separate opportunity to explain the limits of her own undertaking. Where their interests diverge, requiring Clara to speak for both may silence one of them.

2.2 WHAT MUST CHANGE IN RAWLSIAN REPRESENTATION?

Lifelong dependence on assistance does not entail an absence of the two moral powers. A person may need extensive bodily care and remain fully capable of a sense of justice and a conception of the good. The harder problem concerns those permanently unable to develop or exercise the two moral powers assumed in the construction of the citizen. *Political Liberalism* describes the citizen as a 'fully cooperating member of society over a complete life'. *A Theory of Justice* treats moral personality as sufficient for equal justice, while leaving its necessity and permanent incapacity unresolved. Those

[1] Joint Committee on Human Rights, *Protecting Human Rights in Care Settings* (Fourth Report of Session 2022–23, HC 216, HL Paper 51) paras 94–102, 106–08.

[2] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 1, 11–12, 18–20 <https://openyls.law.yale.edu/bitstreams/f23fa6fb-d926-43dd-8627-d880c7337a8a/download>.

[3] Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (2nd edn, Routledge 2020) 2, 35–37; Eva Kittay, 'Love's Labor Revisited' (2002) 17(3) *Hypatia* 237, 242–44.

[4] Martha C Nussbaum, 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (President's Council on Bioethics 2008) 351, 362–64; Jeremy Waldron, 'Dignity, Rank, and Rights' (Tanner Lectures on Human Values, University of California, Berkeley, 21–23 April 2009) lecture I, paragraph beginning 'I am aware that nothing I say here will persuade Catholics or Kantians'.

[5] Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109(2) *Ethics* 287, 313–19 <https://doi.org/10.1086/233897>.

[6] Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Jeffrey Flynn tr, Columbia University Press 2012) 191–95.

formulations cannot be collapsed into a general claim that dependent people are outside justice.[7] Rawls also recognises natural duties of mutual aid and respect. In *Justice as Fairness* he explicitly accepts duties to human beings however severe their disabilities, leaving their relative weight and the extension of his theory for further consideration. His discussion of health care at the legislative stage addresses the restoration or maintenance of citizens' capacity to cooperate, while acknowledging a problem beyond that assumption.[8] The remaining difficulty is justificatory: how should the institutions exercising continuing authority over a person be chosen when the account used to justify them takes reciprocal cooperation as its central case? Care for someone who will never acquire the relevant capacities must have a basis that survives the failure of restoration.

The proposed amendment is to represent such persons directly as subjects of the basic structure, with interests in bodily security, attachment, communication and freedom from arbitrary interference. A representative performs the deliberative task; the interests being represented remain those of the person governed. This extends the constituency whose claims shape the initial justification, instead of postponing the hardest cases until institutions designed for cooperating citizens have been selected. The veil of ignorance would conceal whether a represented person needs lifelong support, can exercise the moral powers, provides unpaid care or contributes through taxation. It would not conceal the general facts of dependence or the possibility that some lives require sustained assistance without reciprocal productive participation.

A political liberal can reasonably object that this amendment imports a controversial theory of human worth. Rawlsian construction begins, however, with political conceptions of persons and society; it does not generate its justificatory premises from an empty procedure.[9] The proposed extension rests on the public fact that institutions already exercise coercive and distributive authority over people with profound impairments. Excluding their interests from the initial constituency would require a reason for treating that authority as answerable to others but not to them. Diverse religious and secular views can support inclusion without agreeing on the ultimate source of human value. This offers a possible political justification, although it changes Rawls's stipulated constituency and cannot simply be attributed to his original formulation.

Representation presents a further objection: an artificial party may supply the theorist's preferred answer under cover of speaking for someone who cannot contest it. The amendment therefore needs institutional consequences capable of testing the representative's claims. Evidence of communication, attachments and past choices must be distinguished from a judgement about welfare; conflicts must be disclosed; and another person must be able to challenge the proposed account. These safeguards cannot recover preferences that have never been formed or cannot be ascertained. Their purpose is to keep the exercise of protective authority open to scrutiny without pretending that every justified decision is the person's own choice.

Rawls's attention to the family and the basic structure remains indispensable. He treats the family as subject to principles of justice and recognises the unequal consequences of reproductive and caregiving work. His preferred institutional alternatives to welfare-state capitalism also concern the distribution of productive assets and political influence, going beyond relief after market outcomes have occurred.[10] Accordingly, a care policy should be assessed both for the support it supplies now and for the opportunities left to recipients, relatives and paid workers over time. A service that keeps Maya safe by permanently excluding Clara from employment has resolved one immediate shortage by creating another person's lasting disadvantage. That consequence belongs in the assessment of the institution, even when Clara initially agreed to help.

3 BOUNDED ASSISTANCE AND THE LIMITS OF ENTITLEMENT

3.1 THE OBJECTION FROM NOZICK

Nozick's historical theory asks whether holdings arose through just acquisition and transfer, subject to rectification and the Lockean proviso. Rights operate as side constraints on the pursuit of desirable outcomes. His objection to redistribution cannot therefore be answered by observing that the recipient's need is serious or that a transfer would increase welfare. Nor do unsolicited benefits establish a debt merely because they have been supplied. The force of the argument is sharpened by Nozick's formulation: 'Taxation of earnings from labor is on a par with forced labor.'[11]

Assume an entirely just history of acquisition and transfer. This removes rectification as an available shortcut. Suppose that a general contribution from available resources would protect Maya against grave injury, with every contributor retaining essential security and substantial control over their life. I defend the permissibility of such a contribution under a bounded principle of assistance. Its justification begins with the equal importance of persons' basic interests and asks what claims each may reasonably assert over resources within a common legal order. It treats the power to exclude others as qualified, from the outset, by fair contributions necessary to avert grave and otherwise avoidable harm. Nozick's strongest response is that this description has already displaced the entitlement that needs defending. A right is meant to protect its holder even when violating it would produce a valuable result. Describing an owner's remaining interest as marginal does not answer that objection, because it measures the strength of the claim through the very comparison that side constraints resist. The proposed assistance principle consequently offers a rival account of the scope of property rights. It is not a deduction from Nozick's premises. The disagreement concerns whether a title satisfying Nozick's proviso must nevertheless be qualified by a further duty of assistance.

There is a reason to qualify that power. Property law enables persons to plan and pursue projects within an organised system of enforcement. Its justification must account for the position of those whom exclusion exposes to the loss of bodily

[7] John Rawls, *Political Liberalism* (paperback edn with a new introduction, Columbia University Press 1996) 18–21; John Rawls, *A Theory of Justice* (rev edn, Belknap Press of Harvard University Press 1999) 442–46.

[8] Rawls, *A Theory of Justice* (n 7) 98–99, 297–98; John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Belknap Press of Harvard University Press 2001) 170–76, especially 176 n 59.

[9] Rawls, *Political Liberalism* (n 7) 103–07.

[10] Rawls, *Justice as Fairness* (n 8) 137–40, 162–68.

[11] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 28–34, 95, 150–53, 169–72, 174–82; quotation at 169.

security, including people who have never had a meaningful opportunity to acquire resources. A fair contribution can preserve the practical purposes of ownership while preventing its enforcement from making another person's basic protection depend entirely on the owner's discretion. This argument does not erase the contributor's separate life. It requires an assessment of the cumulative scheme, including taxation, caring commitments and other legally imposed burdens. A sequence of individually modest demands can consume the independence that each demand purports to respect.

The distinction between resources and compulsory service must withstand Nozick's objection about control of labour. A pooled material contribution generally leaves a person able to choose their occupation, associates and daily activities, and permits the burden to be discharged through fungible resources. Occupational conscription directs the person's activity itself. Compulsory bodily use places another's needs in authority over bodily integrity. Indefinite service gives the beneficiary or institution continuing control of the provider's future. These differences concern the kind and extent of authority conferred, not merely the amount of benefit obtained. A resource levy can nevertheless become excessive if its scale or sanctions destroy meaningful occupational choice or essential security. Calling it taxation cannot settle the matter.

The principle is thus bounded by retained agency, fair distribution and legitimate public authority. Contributions should be specified through publicly contestable rules, assessed across the whole burden and open to challenge for error or disproportion. Available voluntary arrangements and less burdensome means matter to necessity. Failure of those arrangements strengthens the case for material assistance where grave harm remains avoidable, but cannot authorise bodily invasion or the assignment of a particular person to continuing service. Kant's permission for compulsory public poor relief is an important antecedent for the compatibility of assistance and juridical freedom, although his account does not supply every limit defended here.[12]

3.2 INVENTION, UNDERTAKING AND THE FUTURE PERSON

Nozick already places internal limits on ownership in his sole-waterhole and castaway examples. His proviso does not protect every exercise of exclusion. The newly synthesised medicine example nevertheless distinguishes an inventor who creates an option from readily available materials without appropriating them so as to worsen others' position. Selling the resulting medicine on chosen terms does not, in his account, breach the proviso.[13] Assume also that the inventor has accepted no patient and promised no continuing supply. Urgent need then supplies no basis for pretending that a fiduciary office has been undertaken. Under the assistance principle, an already produced dose might nevertheless be subject to a compensated transfer if this were necessary to prevent grave harm at a fair and bounded cost. Such a proposal would have to account for production costs, investment and the prospective conditions of innovation. It would rest on general assistance, not on a fictitious promise by the inventor.

If rescue instead depends on the inventor's continuing intellectual work or personal bodily service, the conclusion changes. Public authorities may offer payment, organise alternative production or seek other willing assistance. Their inability to secure those arrangements leaves a serious unmet claim; it does not transfer ownership of the inventor's future activity. This is a difficult implication of bounded assistance. A theory that prohibits compulsory personal service must accept that some urgent needs will remain unmet when every available remedy would require it.

A voluntary undertaking creates additional reasons, particularly when another person has reasonably relied on it. Those reasons can justify compensation, practicable notice and a safe transfer of responsibility. They should not make unlimited personal service enforceable. Nozick's acceptance of voluntary self-enslavement exposes the disagreement.[14] A person's earlier consent cannot exhaust the claims of the person who must later live under the arrangement. The objection concerns the authority that others would acquire to direct that later life. Mill's rejection of enforceable voluntary slavery is relevant here; Kant's limits on personal-service contracts provide another, historically qualified antecedent.[15] In a care relationship, the consequence is an obligation to organise transition without converting reliance into an institution's right to indefinite unpaid labour.

4 UNDERTAKING, OFFICE AND THE LEGAL ALLOCATION OF RESPONSIBILITY

4.1 WHICH OBLIGATION, OWED BY WHOM?

Need, undertaking, wrongdoing and public office identify different routes to responsibility. A general duty of assistance does not select Clara as the person who must perform it. An undertaking may identify a provider and a defined service. Wrongdoing may require repair of a loss caused by breach. Public office places a decision-maker under the statutory and public-law duties governing the function. More than one route may apply, but each needs its own justification and legal basis. Otherwise an institution can move from the true proposition that Maya needs assistance to the unsupported conclusion that Clara must continue supplying it.

Hohfeld's distinctions clarify the allocation. Maya's claim to a specified service correlates with another's duty to provide it. Clara's liberty to decline additional unpaid work means that she owes no duty to accept that work; it does not itself require a public authority to fund a replacement. A legal power to initiate a complaint may trigger an investigative duty, whereas merely being free to express dissatisfaction changes no legal relation. An immunity against termination on a prohibited ground corresponds to the provider's disability to alter the entitlement on that ground. The opposites matter as well: an

[12] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1991) Ak 6:325–26 (Gregor 136–37).

[13] Nozick (n 11) 180–81.

[14] Nozick (n 11) 331.

[15] John Stuart Mill, 'On Liberty' in JM Robson (ed), *Collected Works of John Stuart Mill*, vol XVIII: *Essays on Politics and Society, Part I* (University of Toronto Press and Routledge & Kegan Paul 1977) 213, 299–301; Kant (n 12) Ak 6:283, 329–30. Kant permits penal bondage and some hired service of indefinite duration; his account is not a universal fixed-duration rule.

exposure to a valid power of termination is not an immunity, and a duty to perform an accepted obligation excludes a liberty simply to disregard it.[16] These relations must be established from the applicable law and agreement. The normative argument can explain why further protection is justified, but cannot supply an existing cause of action by redescribing it.

Formal relations also leave questions about effective power. A provider may lack lawful authority to suppress a complaint yet control the records and assistance needed to pursue it. Hale's analysis of legally supported exclusion explains why bargaining conditions cannot be understood independently of the rights through which access is controlled.[17] The relevant question here is concrete: can Maya obtain the evidence and communication support required to challenge the provider without first securing the provider's cooperation? If not, enforcement arrangements leave significant control with the party whose conduct is disputed.

4.2 THE CONTRIBUTION AND LIMITS OF FIDUCIARY REASONING

Miller explains fiduciary responsibility through a distinctive form of discretionary authority over another's practical interests. This is a theoretical account of why certain powers attract obligations, not a substitute for identifying the undertaking and interests required by the applicable law.[18] In *Alberta v Elder Advocates of Alberta Society*, the Supreme Court of Canada rejected a proposed fiduciary claim based on the government's role in setting and administering accommodation charges for elderly residents. The pleading required an undertaking of loyalty, an identifiable beneficiary or class subject to the fiduciary's control, and a legal or substantial practical interest liable to adverse effect. The Court's statement that 'vulnerability alone is insufficient' identifies an important limit to an otherwise tempting analogy.[19]

English law supplies a related warning. In *Bristol and West Building Society v Mothew*, Millett LJ identified loyalty as the fiduciary's distinguishing obligation, separating fiduciary breach from a failure of care. *Hopcraft v Close Brothers Ltd* confirms the importance of an objectively assessed undertaking of loyalty and rejected fiduciary status on the motor-finance facts before the Court. It also recognises that a fiduciary administering interests for several beneficiaries may have to act impartially among them.[20] A person entrusted with Maya's money for a defined purpose may therefore face a different set of obligations from a commissioner deciding how a public care budget should meet competing lawful claims. The commissioner cannot promise every applicant priority over all others.

Fox-Decent's fiduciary theory of public law seeks to explain the obligations of state authority towards those subject to it.[21] It illuminates the need to justify decisions, manage conflicts and preserve the purposes for which authority is held. Canadian doctrine does not, however, govern English commissioning, and neither exposure to public power nor serious need automatically establishes a private-law fiduciary claim. The comparative lesson is that the character of the entrusted interest and the authority assumed must be identified before assigning the duty. For Maya and Ben, impartial administration of public responsibilities may be the appropriate demand; for a representative controlling Maya's assets, loyalty to her entrusted interests may be central.

5 CARE, CAPACITY AND LAWFUL INTERVENTION IN ENGLAND

5.1 WHOSE CARE HAS BEEN PROMISED?

The Care Act 2014 gives the distinction between a recipient's need and a relative's undertaking practical legal significance. Section 1 requires attention to wellbeing in the exercise of Part 1 functions. A carer's assessment under section 10 must consider ability and willingness to provide care, including whether the carer is likely to remain able and willing. Employment, education and other activities enter that assessment. Section 18(7) excludes from the adult-needs duty 'such of the adult's needs as are being met by a carer'. Read with the assessment provisions and statutory guidance, this requires attention to the care actually available and its sustainability. It supplies no authority to compel Clara to maintain the arrangement. Section 20 separately governs duties to meet a carer's eligible needs.[22]

The adult's entitlement nevertheless depends on the statutory conditions. Section 18 addresses eligible needs, ordinary residence or presence in the specified circumstances, and the applicable financial, request or capacity conditions. Sections 24–26 govern planning and personal budgets. Section 18(4) concerns arranging care where an adult lacks capacity to arrange it and no person authorised under the Mental Capacity Act or otherwise in a position to arrange it can do so. It does not itself determine where the adult must live.[23] For Maya, the authority must establish which needs it is responsible for meeting and

[16] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 30, 32, 44, 55 <https://doi.org/10.2307/785533>.

[17] Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470, 471–74, 478 <https://doi.org/10.2307/2142367>.

[18] Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58(4) *McGill Law Journal* 969, 1011–15 <https://doi.org/10.7202/1019051ar>.

[19] *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 [28], [36], [42]–[53], [57]–[60].

[20] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 16–18; *Hopcraft v Close Brothers Ltd; Johnson v FirstRand Bank Ltd; Wrench v FirstRand Bank Ltd* [2025] UKSC 33 [89], [91], [93], [100]–[110], [276]–[289].

[21] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (OUP 2011) 27–30.

[22] Care Act 2014, ss 1, 10(1), (4)–(6), 18(7), 20; Department of Health and Social Care, *Care and Support Statutory Guidance* (updated 30 October 2026) paras 6.15, 6.18–6.19 <https://www.gov.uk/government/publications/care-act-2014-supporting-implementation/care-and-support-statutory-guidance>.

[23] Care Act 2014, ss 18(1)(a), (c), (2)–(4), (6)–(7), 24(1), 25(1), (3), (5), 26(1); Care Act 2014 (Commencement No 4) Order 2015, SI 2015/993, arts 3, 5(a). The request-based duty in s 18(3) is not commenced insofar as needs are met through care-home accommodation.

what services will meet them. It must also ascertain Clara's current undertaking. A budget calculated on the assumption that she will continue despite evidence to the contrary describes a service that may never be delivered.

If Clara becomes unable to continue safely, section 19(3) permits urgent provision before the usual assessments have been completed. The statutory guidance calls for an immediate response to urgent need, but identifies the subsection as a discretionary power.[24] This distinction matters to the reform proposed below. Existing law provides routes to urgent assistance and enforceable duties where their conditions are met. It does not already contain a general fixed deadline requiring every commissioner to replace all withdrawn family care at public expense. A new transition duty must specify its relationship to eligibility, ordinary residence, charging and the allocation of responsibility between public bodies.

Independent advocacy can assist with the existing statutory processes. Sections 67–68 require it in defined circumstances where substantial difficulty in involvement is not adequately addressed by an appropriate person. Regulation 4 makes further provision both for specified accommodation situations and for material disagreements where the authority and appropriate person agree that advocacy serves the individual's best interests. These are distinct routes. The regulations also address access to relevant records, challenges to decisions and conflicts between people who might otherwise share an advocate.[25] Clara's familiarity with Maya therefore need not make her the sole representative, particularly where the dispute concerns the amount of care Clara can provide. Advocacy outside the statutory conditions requires another legal, contractual or institutional basis.

5.2 SUPPORTING A DECISION AND AUTHORISING PROTECTION

The Mental Capacity Act 2005 begins with a presumption of capacity and requires practicable support before a person is treated as unable to decide. An unwise choice does not establish incapacity. The inquiry concerns the particular decision at the material time and the causal relationship between an impairment or disturbance and inability to understand, retain, use or weigh the relevant information, or communicate a decision.[26] Maya's difficulty evaluating a proposed move calls for adapted explanations and communication support. It cannot be resolved by assuming that a decision about residence belongs to Clara because she understands the care arrangement better.

Where a decision must lawfully be made for a person who lacks capacity, section 4 requires practicable support for participation and attention to wishes, feelings, beliefs and values. In *Aintree University Hospitals NHS Foundation Trust v James*, a dispute about withholding specified life-sustaining treatments, Lady Hale required welfare to be considered 'in the widest sense' and from the patient's point of view.[27] That approach gives the person's experience substantial weight within best interests. It does not make another person's account of those wishes conclusive, nor turn best interests into a general authority to restrain or move someone. The decision and any interference require the legal basis appropriate to them, including the Act's separate provisions governing care acts, restraint, court orders and deprivation of liberty.[28]

Article 12 of the Convention on the Rights of Persons with Disabilities requires equal recognition of legal capacity, support in its exercise and safeguards against abuse. The Committee's General Comment No 1 rejects substitute decision-making and requires the best interpretation of will and preferences where significant efforts cannot ascertain them. Its 2018 corrigendum replaced paragraph 27 so that the characteristics identifying substitute decision-making are connected disjunctively. A regime may therefore fall within the Committee's criticism without satisfying every listed characteristic.[29] The United Kingdom's treaty obligations and the Committee's interpretation must be taken seriously, but the Mental Capacity Act remains the operative domestic framework. Its best-interests standard is not identical to the Committee's position.

The difficulty is acute when supported communication and careful inquiry leave several plausible interpretations of Maya's preferences. The protective position defended here permits action in a narrowly specified case: incapacity for the decision has been established, grave harm cannot otherwise be averted, a lawful power exists, and the measure is proportionate and open to prompt review. A final Court of Protection decision under section 16 requires the statutory incapacity threshold; the distinct interim jurisdiction under section 48 cannot be treated as a finding that threshold has already been proved.[30] Uncertainty about preferences supplies no independent power of intervention.

This position departs from the Committee wherever protection, rather than the best interpretation of will and preferences, supplies the decisive justification. It should be defended in those terms. The decision-maker must identify the evidential gap, the support attempted, the competing interpretations and the reason immediate action is necessary. An institution should also examine whether its own failure to provide communication assistance created the uncertainty. That inquiry preserves a practical distinction between enabling Maya's decision, interpreting her preferences and exercising protective authority for which someone else must answer. A refusal made with capacity remains her decision, subject only to an independently applicable lawful ground of intervention.

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[24] Care Act 2014, s 19(3); Department of Health and Social Care, *Care and Support Statutory Guidance* (n 22) paras 5.26–5.27, 5.33, 6.26.

[25] Care Act 2014, ss 67–68; Care and Support (Independent Advocacy Support) (No 2) Regulations 2014, SI 2014/2889, regs 4(2)–(3), 5(5)–(8), 7. Regulation 4(2) concerns qualifying NHS-arranged hospital stays of at least 28 days or care-home stays of at least eight weeks, with the stipulated best-interests condition.

[26] Mental Capacity Act 2005, ss 1(2)–(4), 2(1)–(4), 3(1)–(4).

[27] Mental Capacity Act 2005, s 4(3)–(7); *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 [39]–[45].

[28] Mental Capacity Act 2005, ss 1(5)–(6), 4A–6, 16.

[29] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 12(2)–(4); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 (2014): Article 12: Equal Recognition before the Law' (19 May 2014) UN Doc CRPD/C/GC/1, paras 12–15, 21, 26–29; 'Corrigendum' (26 January 2018) UN Doc CRPD/C/GC/1/Corr.1, replacing para 27.

[30] Mental Capacity Act 2005, ss 2(4), 16(1)–(3), 48.

5.3 DEPRIVATION OF LIBERTY AFTER THE 2026 REFERENCE

The inquiry under Article 5 of the European Convention on Human Rights has changed significantly. In *P v Cheshire West and Chester Council*, the majority's acid test combined continuous supervision and control with lack of freedom to leave. Lady Hale's observation that 'a gilded cage is still a cage' rejected the assumption that a comfortable placement could not involve deprivation of liberty.[31] On 2 June 2026, seven justices unanimously overruled the acid test in *A Reference by the Attorney General for Northern Ireland*. Lord Sales and Lady Simler gave the joint judgment. The reference concerned the Northern Ireland Health Minister's competence to issue a revised code using a different approach to deprivation of liberty. The Court held that issue of the proposed code was within competence, although the draft required revision. It expressly reserved P's individual case, on which argument had not been heard.[32]

The governing inquiry is multifactorial, beginning with the individual's concrete situation and examining the type, duration, effects and implementation of restrictions. The acid-test factors remain relevant but are insufficient by themselves. Purpose, relative normality and the person's response can matter in context. Consent for Article 5 is autonomous from domestic legal capacity: someone unable to decide residence under the Mental Capacity Act may have sufficient awareness to understand their immediate circumstances, express a view and manifest acceptance. Mere compliance may be insufficient; where a person can express a view and serious doubt remains about their attitude, consent cannot be inferred.[33]

The Court's insistence that 'choices made by individuals with impaired understanding should be respected where possible' explains the autonomy claim behind the change. A binary domestic capacity finding may obscure that form of agency. Maya's contentment, distress or attempts to leave can affect the legal assessment even after she has been found unable to decide between the available care arrangements. The converse difficulty is institutional. Where the conclusion that there is no deprivation removes access to the corresponding Article 5 safeguards, the practical power exercised over her may remain extensive. A provider still controls assistance, daily routines and access to familiar people. The judgment's attention to individual experience therefore strengthens the case for accurate communication and independent scrutiny of the evidence used to infer acceptance. Apparent contentment should be examined in the circumstances in which it is expressed, especially where the same institution supplies both the care and the account of the person's response.[34]

The Department of Health and Social Care confirmed that the decision has immediate effect throughout the United Kingdom. It also confirmed the continued operation of the existing authorisation procedures in England.[35] Schedule A1 remains available for qualifying hospital and care-home arrangements, and Court of Protection authorisation is required in relevant cases outside that scheme; the court also has jurisdiction in hospital and care-home cases. Section 21A specifically concerns review of Schedule A1 authorisations. The replacement Liberty Protection Safeguards had not been brought into operation by the publication date.[36] A change in the substantive Article 5 test must therefore be distinguished from abolition of statutory authorisation and review. Even where Maya's arrangements fall below the deprivation threshold, care duties, capacity requirements and other applicable protections continue to govern the authority exercised over her.

6 CONTESTATION, CONTINUITY AND THE WORK OF ENFORCEMENT

6.1 WHAT A COMPLAINT REQUIRES OF THE CLAIMANT

An official with an excessive caseload must decide which facts to investigate, which categories to apply and which cases can wait. Lipsky's account of street-level bureaucracy explains how organisational pressures enter these apparently individual decisions.[37] The person encountering delay consequently faces more than the judgement of one official. Staffing, information systems and the allocation of investigative time can determine whether their claim is understood at all. An institution that adds duties without the capacity to perform them may transfer the practical work to the claimant or the nearest relative.

Herd and Moynihan distinguish learning, compliance and psychological costs in dealings with the state. These categories help expose what Clara must do to obtain a formally available service: locate the responsible body, recover documents, repeat Maya's history, respond within prescribed times and sustain the uncertainty of the process.[38] Some verification is necessary to allocate public resources fairly. Its necessity does not answer who should perform it. The authority should retrieve information already within its systems and explain why any further demand is relevant. Requiring Clara to

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[31] *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19 [45]–[50], especially [46] (Lady Hale).

[32] *A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2026] UKSC 16 (2 June 2026) [35]–[40], [203]–[209] ('2026 Reference').

[33] *2026 Reference* (n 32) [53(i)–(v)], [118], [135], [172], [184]–[191], [200]–[201].

[34] *2026 Reference* (n 32) [27]–[34], [135]–[141], [185], [188]–[192]; quotation at [135].

[35] Department of Health and Social Care, *UK Supreme Court 2026 Judgment on What Constitutes a Deprivation of Liberty* (updated 22 September 2026) sections 'The 2026 judgment', 'Who this applies to' and 'Existing DoLS authorisations' <https://www.gov.uk/government/publications/changes-to-the-definition-of-deprivation-of-liberty/uk-supreme-court-2026-judgment-on-what-constitutes-a-deprivation-of-liberty>.

[36] Mental Capacity Act 2005, ss 4A(2)–(5), 4B, 16(2)(a), 21A, sch A1 para 13; Department of Health and Social Care, *Deprivation of Liberty Safeguards (England), 2025 to 2026: Background, Quality and Methodology* (5 November 2026), 'Review and replacement of DoLS'. Schedule A1 applies to adults aged 18 or over; s 4B supplies a narrow route pending a court decision.

[37] Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (30th anniversary expanded edn, Russell Sage Foundation 2010) xi–xii.

[38] Pamela Herd and Donald P Moynihan, *Administrative Burden: Policymaking by Other Means* (Russell Sage Foundation 2018) 2–3; Donald Moynihan, Pamela Herd and Hope Harvey, 'Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions' (2015) 25(1) *Journal of Public Administration Research and Theory* 43, 45–46, 47 n 1 <https://doi.org/10.1093/jopart/muu009>.

reproduce an institutional record that the authority can assemble more reliably makes her unpaid labour an undeclared part of the administrative budget.

A provider's accumulated experience and access to records may also confer advantages of the kind Galanter identified in repeat players.[39] Those advantages do not establish that providers invariably prevail. They explain why adding a formal appeal may leave the distribution of effective power largely intact. In the Court of Protection, participation can require specialised communication and an understanding of the person that conventional written submissions cannot supply. Kong and colleagues' qualitative study, based on interviews conducted in 2019–20 with 44 legal practitioners and 12 retired judges, examines professional understandings and practices of participation. It did not observe hearings or interview the people whose capacity was in question. Its findings therefore support analysis of professional approaches and their reported difficulties, without establishing the prevalence or effectiveness of participation across the jurisdiction.[40]

Exit offers an incomplete answer. Anderson's discussion of private government distinguishes several responses to private authority, including exit, voice and substantive legal constraint.[41] In care, departure may mean losing a home, trusted staff and a workable means of communication. Staying may preserve those goods while exposing the resident to continued decisions they contest. A defensible complaint system must therefore make voice usable during dependence. The Joint Committee's evidence about fear of adverse treatment reinforces the need for scrutiny that does not depend entirely on a resident's willingness to confront the provider.[42]

6.2 EXISTING SAFEGUARDS AND THE ADDITIONAL OBLIGATION

English law already regulates complaints. Regulation 16 of the 2014 regulated-activities regulations requires effective arrangements and investigation with necessary and proportionate action. CQC guidance expressly addresses victimisation and adverse effects on care following a complaint. The 2009 local-authority and NHS complaints regulations require prompt acknowledgement, discussion of handling and response arrangements, efficient investigation and a reasoned response.[43] The proposal here builds on that baseline. The remaining question is what secures support when a disputed reduction or termination will take effect before the complaint produces an answer. Judicial review can provide a route to challenge unlawful public action, including an application for urgent interim relief. The procedural requirements themselves demand evidence, a clear account of urgency and a proposed order. The statutory complaint procedure supplies no general automatic suspension of the disputed decision, and the availability of a judicial application does not establish that a dependent person can obtain timely assistance to make it.[44] Nor does later correction necessarily restore missed work, lost contact or deterioration during the interval. Institutional design should reduce those risks before they arise instead of assuming that a successful final remedy will make the claimant whole.

For essential care, a complaint about a proposed reduction or termination should trigger prompt independent consideration of continuity. This is a proposed general safeguard, extending beyond the existing complaint requirements. The reviewer should be independent of the disputed decision and the immediate provider, and should identify the needs that would otherwise go unmet, the legal responsibility for meeting them and the practical alternatives. Essential support should continue pending that assessment unless a specific safety or legal reason requires immediate change. Where continuation by the same provider is unsafe or impossible, responsibility must pass to a named authority or provider through an arranged alternative. The responsible commissioning authority should organise and initially finance the gap, subject to lawful charges and later adjustment between the responsible bodies. Legislation would be needed where current powers and duties do not support that interim responsibility. This would not freeze every disputed service indefinitely. A reasoned interim decision could alter the arrangement after considering urgency, competing claims and the consequences of interruption.

The caregiver's position requires a corresponding transition duty. I propose an enforceable outer deadline for the responsible authority to arrange replacement support after receiving notice that an unpaid carer's contribution will end. The deadline would bind the authority. It would create no minimum period of compulsory unpaid service, and an earlier loss of ability or safety would require an earlier response. An appropriate statute would identify the triggering notice, the responsible body, the urgent route, review and enforcement, and the relationship to existing eligibility and charging rules. Where responsibility is disputed between bodies, an interim organising responsibility would prevent the dispute itself from leaving care unprovided. Public organisation need not mean that all replacement care is free of lawful charges.

No particular number of days can be justified from the evidence examined here. Setting the outer limit requires evidence about replacement capacity and the consequences of delay, together with provision for urgent cases. This leaves a task for legislative design, but the direction of the obligation is clear. Clara must not become the residual provider because the authority has failed to organise an alternative. Responsibilities arising from an assumed care role still matter, including practicable notification and safe handover. The Mental Capacity Act's offence of ill-treatment or wilful neglect is relevant where its

[39] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95, 97–103 <https://doi.org/10.2307/3053023>.

[40] Camillia Kong and others, 'Justifying and Practising Effective Participation in the Court of Protection: An Empirical Study' (2022) 49(4) *Journal of Law and Society* 703, ss 2, 3.2–3.3, 4 <https://doi.org/10.1111/jols.12398>.

[41] Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Stephen Macedo ed, Princeton University Press 2017) 65–70.

[42] Joint Committee on Human Rights (n 1) paras 94–102, 106–08.

[43] Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936, reg 16(1)–(2); Care Quality Commission, 'Regulation 16: Receiving and acting on complaints' (updated 16 May 2025), guidance on reg 16(1)–(2); Local Authority Social Services and National Health Service Complaints (England) Regulations 2009, SI 2009/309, regs 13–14.

[44] Civil Procedure Rules, rr 54.2–54.3, 54.6(1)(c), 54.10(2)(a); Practice Direction 54B, paras 1.2–1.3, 1.7–1.8, 2.1–2.4, 4.1; SI 2009/309 (n 43), regs 13–14.

conditions are satisfied.[45] It cannot be converted into an administrative entitlement to indefinite family labour. Any further care beyond Clara's undertaking should rest on fresh agreement, with remuneration and expenses addressed expressly where appropriate.

Continuity also requires access to evidence and to the person. Existing advocacy duties should be used fully. Beyond their scope, commissioning arrangements and, where necessary, legislation should secure independent assistance, timely disclosure of relevant records with appropriate privacy protection, and scrutiny of termination following a complaint. Public oversight must itself remain answerable. Pettit's concern with public domination applies to inspection and protective intervention as well as to private providers.[46] Residents should have a say in visits and communication arrangements, and regulators should explain intrusive measures. Investigation of recurrent patterns can reduce dependence on individual complaints, provided that responsibility for replacement care is established before enforcement disrupts a service.

7 SCARCITY, COMPETING CLAIMS AND IRRECOVERABLE LOSS

The proposed continuity protection faces a serious objection. Existing recipients may obtain an advantage over equally urgent applicants simply because an interrupted service is more visible than one never supplied. Ben's claim tests that possibility. If his need is as serious as Maya's, the institution must compare them on terms that do not reward Clara's persistence or penalise a person without an effective representative. The practical costs of moving Maya are relevant because they are consequences of the available options. Incumbency alone cannot decide the allocation.

Suppose now that Maya has been found unable to decide about residence after practicable support, and the evidence still leaves her preferred option uncertain. Clara cannot continue safely. No replacement home-care worker is available, and transferring Ben's equally urgent support would expose him to comparable harm. A temporary placement can secure Maya's physical care but will reduce privacy and familiar contact. The authority must investigate whether the shortage is genuine and whether less disruptive arrangements can be assembled. If the temporary placement remains the only lawful way to prevent grave harm without imposing comparable harm on another, its justification must address the losses it creates. Capacity, best interests and any deprivation of liberty require their respective legal determinations. Neither an asserted funding shortage nor the existence of an empty bed supplies authority to move her.[47]

This conclusion permits an outcome that falls short of everyone's legitimate interests. Clara may be unable to provide what would make Maya's preferred arrangement possible; Ben cannot be required to surrender equally necessary support; and a public authority cannot summon a willing workforce immediately. The bounded-assistance principle prohibits solving the shortage through compulsory personal service. A just response must therefore identify the least harmful lawful option, explain the competing claims and continue the search for a better arrangement. Maya's distress remains a reason to improve and shorten the placement even if it does not, by itself, establish that the initial decision was unlawful.

The comparison should attend to severity, reversibility, likely benefit, communication needs and the burdens that each option places on others. Productive worth and family influence supply no reason to discount a comparable claim. Where relevant reasons leave claims equally urgent, an impartial allocation procedure is required. These are proposed criteria for care decisions, not a formula that mechanically resolves every conflict or a restatement of Rawls's lexical ordering. Rawls's priority of basic liberties, fair equality of opportunity and the difference principle concerns the assessment of institutions under its own conditions.[48] It supports the further question whether the care system leaves disabled people, unpaid carers and paid workers with fair opportunities over a life, after immediate protection has been secured.

Responsibility should also be located at the time when action was possible. Reasonable frontline decisions during a shortage can coexist with an earlier failure to plan, commission or maintain capacity. Conversely, an unmet need does not prove that every official involved acted wrongfully. Review should identify who held the relevant power and resources, what could reasonably have been done and which obligations continue. Contact with familiar people, access to records, communication support and periodic reconsideration may remain practicable even when the preferred placement is unavailable. Those tasks should be assigned rather than left to whoever feels unable to refuse them.

The distributional assessment must recognise what support actually enables. A high care budget is not equivalent to a large disposable income: much of it may be required to obtain opportunities that others can exercise at little cost. Relevant evidence includes the support delivered, opportunities made usable, interruptions, time spent securing services and burdens transferred to unpaid carers. These are dimensions for institutional evaluation, not a validated composite index. Their measurement would require separate empirical work. They direct attention to a consequence that an expenditure total can conceal: a formally generous entitlement may leave Maya without reliable assistance and Clara without time she can call her own.

[45] Mental Capacity Act 2005, s 44(1)–(2); see also s 5(3). Section 44 concerns the specified care, attorney and deputy relationships; kinship alone is not the statutory test.

[46] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 3.

[47] Mental Capacity Act 2005, ss 1(5)–(6), 4, 4A, 16; *2026 Reference* (n 32) [53], [191], [201].

[48] Rawls, *Justice as Fairness* (n 8) 42–44, 57–59, 170–76; Rawls, *Political Liberalism* (n 7) 7.

8 CONCLUSION

Continuing care exposes a weakness in accounts of institutional justice that assess the allocation and the eventual remedy while leaving the interval between them unexamined. During that interval, authority remains operative. The recipient lives with the disputed arrangement, and someone bears the labour and risk of maintaining support. Equal standing requires those burdens to enter the justification of the institution's decision from the outset.

The argument extends established accounts of dependency and relational equality through a principle of continuing responsibility. Its philosophical commitments include direct representation of people unable to exercise the moral powers assumed in the Rawlsian conception of the citizen and bounded material assistance compatible with the separate lives of contributors. Its legal application distinguishes statutory care duties, personal undertakings, fiduciary loyalty and authority to decide for another. The 2026 deprivation-of-liberty judgment makes the distinction especially significant: a person's experience can carry legal weight despite a finding of incapacity, while substantial care power may persist outside Article 5 authorisation.

Existing English protections provide important foundations, but the proposed settlement goes further. Independent consideration of continuity during a complaint, a transition deadline directed at the responsible authority, and assistance with the work of enforcement would require specified legal and institutional arrangements. Their design must protect equally urgent claimants and preserve the caregiver's ability to withdraw from an unsustainable role. Some losses will remain unavoidable under scarcity. What an institution must explain is why those losses fall where they do, what it could have done earlier, and what responsibility it retains after the immediate decision. A right to care acquires practical force when the person can question its administration without having to finance the challenge through insecurity or another person's unbounded service.

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AUTHORITY TO SETTLE

PUBLIC LAW AND THE ENFORCEABILITY OF INVESTOR-STATE MEDIATED SETTLEMENTS

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ABSTRACT

Settlement of an investment dispute may require powers distributed among ministers, legislatures and regulators, leaving the negotiator dependent on other institutions for expenditure and the public acts promised in return for the investor's release. This article examines how a record of completed domestic approval can acquire evidential and legal significance in foreign proceedings. It reads the Singapore Convention on Mediation alongside institutional rules, international law on official conduct and public instruments from Peru, Viet Nam and Pakistan, while using India and Thailand to establish the limits of treating negotiated outcomes as mediated agreements. The proposed authority certificate would identify the approved text, competent institutions, fiscal powers and outstanding conditions. Domestic legislation would give that record presumptive evidential force and protect reliance against narrowly defined internal irregularities, subject to constitutional review and third-party rights. An investment treaty could reinforce the protection through a specific undertaking and remedy; contractual incorporation would depend on the law applied by the enforcing forum. A certificate-based reservation offers a defensible proposed classification of government settlements, although its consequences outside the reserving State remain unresolved. The argument specifies the risks that public institutions may lawfully allocate through certification and the evidence on which that allocation depends. Approval would consequently support a more durable compromise while leaving appropriation, regulatory competence and execution immunity to the legal rules governing each.

Keywords: investor-State mediation; settlement authority; Singapore Convention on Mediation; public accountability; sovereign immunity; investment treaties

1 INTRODUCTION

The Reko Diq settlement depended on powers distributed among institutions whose decisions governed different parts of the bargain. Pakistan faced an investment award of approximately US$5.9 billion, including interest and costs, together with further anticipated exposure in commercial arbitration. Negotiators sought to restructure the mining project and resolve the outstanding claims. Their agreement depended on federal and provincial approvals, constitutional scrutiny through a presidential reference and legislation supporting the promised investment protections. The Supreme Court's opinion expressly preserved statutory discretion and made its conclusions on the proposed investment legislation conditional on necessary provincial resolutions and enactment. Negotiated terms could take legal effect only through the decisions of the institutions competent to approve and implement them.[1]

That distribution of power presents a recurring difficulty for consensual dispute resolution. A State may consent to mediation and authorise officials to negotiate, yet retain separate rules governing compromise of public claims, expenditure, taxation and regulatory decisions. An investor contemplating a release needs to know which of those rules have been satisfied. People whose land, environment or public services are affected have a different interest in the same inquiry: they need assurance that negotiations have respected the procedures through which public power is lawfully exercised. A settlement that conceals an absent approval may disappoint the investor and bypass a safeguard intended to protect the public.

[1] *In the matter of Presidential Reference No 2 of 2022* (Supreme Court of Pakistan, Opinion, 9 December 2022) paras 3–6, 9(iii)–(vi), 10(ii), 13 https://www.italaw.com/sites/default/files/case-documents/italaw171044.pdf ('Reko Diq Opinion').

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These approval requirements already inform the institutional mediation instruments. The 2022 Mediation Rules of the International Centre for Settlement of Investment Disputes (ICSID) require the parties to identify who can negotiate and settle and explain how an agreement will be concluded and implemented. The United Nations Commission on International Trade Law (UNCITRAL) recommends early engagement with the institutions that must approve the result.[2] The information disclosed during mediation can identify the route to approval, but a later enforcement court must determine the legal consequences of the decisions actually taken. Where a successor administration challenges its predecessor's authority after the investor has released claims or performed its obligations, that inquiry determines whether the investor can obtain the promised remedy.

The proposed response is an authority certificate tied to an identified settlement text and supported by legislation. Legislation would have to define both the verification required before issuance and the consequences of the record in later proceedings. A certificate could consolidate approvals that would otherwise be scattered across ministries, explain the competence of each signatory, distinguish existing funding from a future appropriation and disclose conditions still affecting performance. Legislation could then allocate the burden of proving a certified defect and protect reasonable reliance against defined internal irregularities. Constitutional competence, mandatory procedures and the rights of non-parties would remain judicially examinable.

The resulting allocation of risk must remain coherent as the settlement moves from domestic approval to treaty protection and foreign enforcement. Earlier scholarship already identifies governmental authority, participation and confidence in implementation as obstacles to mediation. Kessedjian and her co-authors also place civil society's concerns within the design of the process.[3] The proposed contribution is to specify the approval record that accompanies the settlement and the objections which the State may lawfully undertake to forgo. Its justification depends on consequences beyond those already supplied by existing approval instruments, with constitutional competence remaining open to examination despite the certificate.

The analysis is doctrinal and functional. Peru and Viet Nam supply standing arrangements for resolving investment disputes; Pakistan supplies a settlement assembled through several constitutional institutions. India's statutory tax compromise and Thailand's termination of mining arbitration test the boundary between public accommodation and an enforceable mediated agreement. The comparison identifies possible institutional arrangements, subject to the limits of illustrative examples in establishing prevalence or comparative effectiveness. On the law as at 9 November 2026, it develops legislative and treaty provisions for adoption by States whose existing arrangements leave the identified risks unresolved.

2 SETTLEMENT AND LEGAL FORM

2.1 WHAT THE AVAILABLE EVIDENCE ESTABLISHES

ICSID reported that 37 per cent of arbitrations concluded in the fiscal year ending 30 June 2026 were settled or otherwise discontinued. Its separate mediation figures recorded a cumulative total of seven requests under the dedicated Mediation Rules as at 30 June 2026: one under rule 5, based on an existing agreement to mediate, and six under rule 6, where such an agreement had not yet been reached. The Centre administered the rule 5 mediation.[4] Because the figures concern different populations and periods, they cannot be read as competing measures of mediation's use. Discontinuance may follow withdrawal or other developments without a settlement, and privately negotiated or informally mediated resolutions extend beyond the recorded requests. The extent to which defective governmental authority explains the limited recorded use of the Mediation Rules therefore remains undetermined.

Officials' reported concerns provide a more direct, though still limited, basis for examining the approval problem. Chew, Reed and Thomas received 47 responses to a questionnaire sent to 97 experienced participants in investor-State dispute settlement. Respondents identified deferral of responsibility to an adjudicator, politicised media attention, public criticism and difficulties obtaining budgetary approval among the principal obstacles to settlement. The authors expressly qualified the survey's representativeness.[5] The findings justify examining how institutional incentives and approval procedures influence settlement, although the frequency of failure through absent legal power and the effect of certification on officials' decisions remain unanswered.

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[2] ICSID Mediation Rules (2022) r 20(4) https://icsid.worldbank.org/sites/default/files/ICSID_Mediation_Rules.pdf; UNCITRAL, *Guidelines on Mediation for International Investment Disputes* (United Nations 2024) para 26 https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/2401497e_mediation_guidelines_-ebook_eng.pdf ('Guidelines').

[3] Catherine Kessedjian and others, 'Mediation in Future Investor–State Dispute Settlement' (2023) 14 *Journal of International Dispute Settlement* 192, sections 4 and 5(A)–(C), especially 5(B) https://doi.org/10.1093/jnlids/idac015.

[4] ICSID, 'ICSID Releases Caseload Statistics for the 2026 Fiscal Year' (14 August 2026), 'Outcomes and Awards' and mediation figures https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-caseload-statistics-2026-fiscal-year; World Bank, *Annual Report 2026*, 'ICSID: Case Management and Dispute Resolution' https://www.worldbank.org/en/about/annual-report/icsid.

[5] Seraphina Chew, Lucy Reed and J Christopher Thomas QC, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes' (NUS Centre for International Law Working Paper 18/01, September 2018) 1–7, 28–29 https://law.nus.edu.sg/wp-content/uploads/2020/04/022_2018_CIL01.pdf.

2.2 THE PROCEDURAL INSTRUMENTS

The ICSID Mediation Rules apply to a dispute relating to an investment involving a State or regional economic integration organisation where the parties consent in writing. Rule 2 imposes no equivalent of the nationality conditions associated with Convention arbitration. Rules 5 and 6 distinguish initiation with and without a prior mediation agreement; a request under rule 6 alone supplies no consent by the recipient. The Rules also require relevant approval of agency consent and evidence of representative or internal filing authority, which remain distinct from authority to bind the State to the final settlement. At the first session, or within a period fixed by the mediator, rule 20(4) requires identification of the person or entity authorised to negotiate and settle and a description of the process for concluding and implementing an agreement.[6] A party may accordingly identify cabinet approval or another public act as an outstanding step in the disclosed process. Rule 20(4) makes that route visible within the mediation, leaving the source of constitutional power and completion of the required approvals to be established under the applicable law.

The UNCITRAL Guidelines, adopted in 2023 and published with the Model Provisions in 2024, expressly state their non-binding character. Paragraph 26 addresses settlement authority, including approval by one or several ministries or the cabinet. Paragraphs 36–39 recognise the public interest in transparency and the possibility of disclosure obligations, and paragraph 43 addresses domestic arrangements that can clarify responsibilities and reduce officials' exposure. Paragraph 45 directs attention to the Singapore Convention and relevant reservations.[7] A mandatory domestic approval procedure would require a binding legal basis, which a State may supply through legislation giving effect to these recommendations.

The accompanying Model Provisions organise access to mediation, its conduct, its relationship with other proceedings and the settlement agreement. They can help parties identify the necessary approvals early enough to obtain them. Their procedural commitments leave the source and extent of governmental competence to the applicable legal system.[8] Certification would follow this procedural preparation by recording the approvals actually obtained. Compliance with a mediator's request for information would leave that verification to be completed.

2.3 AWARDS ON AGREED TERMS

Where a competent arbitral tribunal is already constituted, the parties may seek an award embodying their agreement. Rule 55(2) of the ICSID Arbitration Rules provides for this route on submission of the complete signed settlement and the parties' request. An award attracts articles 53 and 54 of the ICSID Convention, including recognition of its binding character and enforcement of pecuniary obligations as if they formed part of a final domestic judgment. An order discontinuing the proceeding supplies no award to which those recognition and enforcement obligations can attach. Article 36 of the current UNCITRAL Arbitration Rules likewise permits an award on agreed terms where the parties request it and the tribunal accepts their request; recognition elsewhere then depends on the applicable award regime, including the New York Convention where its requirements are met.[9]

An award can consequently offer substantial procedural security for a monetary compromise. The ICSID route channels challenges through the Convention's own remedies, although article 55 preserves the enforcing State's law of execution immunity. Obtaining a consent award requires a tribunal with jurisdiction, beyond any authentication which a mediation institution could provide. Even with an award, a promised permit remains subject to the independent regulator's statutory powers.[10] A separate enforcement route remains valuable for settlements concluded before arbitration, or where proceedings end without an award recording the bargain.

3 THE SINGAPORE CONVENTION AND GOVERNMENTAL AUTHORITY

3.1 SCOPE AND PROOF

The Singapore Convention applies to a written settlement agreement which results from mediation, resolves a 'commercial dispute' and satisfies article 1's internationality requirements at the time of conclusion. Mediation under article 2(3) requires assistance by a third person without authority to impose a solution. Direct negotiations, however elaborate their governmental approval, do not meet that definition. Government participation is compatible with the Convention, as article 8's express reservation for public-party agreements confirms.[11] This establishes the possibility of coverage for investment settlements, without making every settlement of an investment claim commercial.

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6 ICSID Mediation Rules (n 2) rr 2(1)–(2), 3(3), 4, 5(3)(d), (f), 6(2)(a), 7 and 20(4).

7 UNCITRAL, *Guidelines* (n 2) paras 1, 26, 36–39, 43 and 45.

8 ibid annex, Model Provisions on Mediation for International Investment Disputes, provisions 1–5, especially 1(9) and 5.

9 ICSID Arbitration Rules (2022) r 55(2); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') arts 53–54; UNCITRAL Arbitration Rules (2021) art 36(1) https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, arts I, III–V.

10 ICSID Convention (n 9) arts 25, 48, 50–55 https://icsid.worldbank.org/rules-regulations/convention/icsid-convention/chapter-four; ICSID Arbitration Rules (n 9) r 55 (distinguishing an award from discontinuance).

11 United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 20 December 2018, entered into force 12 September 2020) UNGA Res 73/198, annex ('Singapore Convention') arts 1(1), 2(3) and 8(1)(a) https://treaties.un.org/doc/Treaties/2019/05/20190501%2004-11%20PM/Ch-XXII-4.pdf.

The dispute's relationship to an investment supports a broad commercial reading where the controversy concerns the economic operation of a project or compensation arising from it. A narrower reading remains plausible where the obligation invoked concerns taxation, land-use control or the exercise of statutory discretion. Article 1 leaves the enforcing authority to interpret the Convention in the relevant legal setting. A bilateral declaration that investment settlements are commercial cannot conclusively settle that interpretation in a third State. Even where the dispute is commercial, article 1(3)(a) excludes agreements approved by a court, or concluded in court proceedings, if they are enforceable as a judgment in that State. Article 1(3)(b) separately excludes settlements recorded and enforceable as arbitral awards.[12]

Drafting monetary obligations for independent performance may assist a court asked to enforce only that part of a hybrid settlement. The agreement must actually permit separation, and the chosen law and forum must recognise it. The Convention contains no express general right to sever regulatory terms, so payment language cannot automatically convert an otherwise excluded bargain into a commercial agreement. Article 5(1)(d), which permits refusal where relief would contradict the settlement's terms, is particularly relevant if the payment was expressly conditional on a permit or reciprocal release.[13] Escrow, conditional releases and separately specified consequences of regulatory refusal can reduce that difficulty without predetermining the court's characterisation.

Article 4 requires the signed agreement and evidence of its mediated origin. A mediator's signature or attestation, or an administering institution's attestation, can establish mediated origin. In the absence of those forms, other evidence acceptable to the competent authority may do so. Alongside that proof of mediated origin, a public authority certificate would document the powers exercised by the institutions responsible for the State's commitments. It may assist a request for necessary documents under article 4(4), with proof of mediation still required under article 4(1)(b). Its evidential use in a particular case supplies no basis for imposing certification as an additional treaty formality on every applicant.[14]

3.2 CAPACITY, REPRESENTATION AND VALIDITY

Article 5(1)(a) permits refusal where a party was 'under some incapacity'. Legal personality, capacity and representative authority must be distinguished before choosing the applicable law. A ministry may act as an organ of the State without separate personality; a separate public corporation may possess capacity to contract; and either may be represented by an official whose delegation excludes the proposed compromise. A fiscal or regulatory limitation can concern the substance of the commitment even where the correct signatory executed it. The enforcing court must accordingly identify whether the objection concerns the party's capacity, the representative's delegation or the legal limits of the particular commitment.

That classification matters because the Convention supplies no express connecting rule for incapacity, although article 5(1)(b)(i) directs the validity inquiry to the law to which the parties validly subjected the settlement, or, failing such a choice, to the law deemed applicable by the competent authority. The UNCITRAL Guide to the parallel Model Law provisions recognises the possibility of different applicable laws and the role of the forum's conflict rules.[15] A contractual choice may therefore govern ordinary validity and performance without controlling every question of public capacity, delegation or overriding legislation. The law selected for each question will consequently determine the weight and effect of certification under the host State's law.

Under article 5(1), the resisting party must furnish proof of the ground invoked. An authenticated record of actual approvals should make a successor government's unsupported denial difficult to sustain. The same record may reveal a defect: a certificate which identifies an unfulfilled appropriation cannot establish that payment is presently authorised. The court must then determine the consequence of any established defect. Absence of authority to incur the liability may affect formation or validity, although a later failure to fund an otherwise lawful debt may constitute non-performance under the law governing that obligation.[16]

Proof of authority also leaves the other article 5 grounds to be considered: an agreement may lack binding or final effect, have been subsequently modified, contain obligations already performed or unclear, or face a request for relief inconsistent with its terms. Specified serious mediator misconduct and non-disclosure provide further grounds. Article 5(2) permits refusal for the forum's public policy or subject matter incapable of settlement by mediation under its law.[17] The effect of an advance waiver of a particular article 5(1) objection therefore depends on the applicable law. In the absence of an express general power under the Convention to contract out of its safeguards, the State's covenant and certificate remain subject to mandatory review.

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[12] Singapore Convention (n 11) art 1(1), (3); UNCITRAL, *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018)* (United Nations 2022) Model Law art 1 n 1 https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf ('Guide') (illustrative commercial definition in the parallel Model Law).

[13] Singapore Convention (n 11) arts 1 and 5(1)(b)(ii), (c)–(d).

[14] ibid art 4(1)(a)–(b), (3)–(4), particularly art 4(1)(b)(iv).

[15] ibid art 5(1)(a) and (b)(i); UNCITRAL, *Guide* (n 12) paras 142, 144–145, 148–152 (explaining the parallel Model Law provisions).

[16] Singapore Convention (n 11) art 5(1); UNCITRAL, *Guide* (n 12) paras 148–152.

[17] Singapore Convention (n 11) art 5(1)(b)(ii)–(iii), (c)–(f) and (2).

3.3 PARTICIPATION AND RESERVATIONS AT THE CUT-OFF

The United Nations depositary record of deposits made by 9 November 2026 listed 60 signatories and 25 States with deposited instruments of ratification, acceptance, approval or accession. The Convention was in force for 22 of those States. Oman's accession of 10 March 2026 and Colombia's ratification of 12 March 2026 took effect that September. Mauritius, Uzbekistan and the United Arab Emirates had deposited instruments during 2026, with entry into force due on 17 February, 28 February and 8 April 2027 respectively.[18] For an enforcement application, the relevant distinction is between deposit of an instrument and the date on which the forum's Convention obligations became operative.

Seven States with deposited instruments had made article 8(1)(a) reservations: Belarus, Brazil, Georgia, Kazakhstan, Saudi Arabia, Uzbekistan and the United Arab Emirates. The last two had yet to reach entry into force. Pakistan had made a comparable reservation on signature without becoming a contracting State through ratification. Article 8 also permits a reservation conditioning application on the disputing parties' agreement.[19] Convention coverage must therefore be established for the particular forum, relevant declarations and settlement date before the legal effect of certification can be assessed.

4 PUBLIC AUTHORITY ACROSS LEGAL ORDERS

The State's responsibility for an official act and the validity of the resulting bargain are separate legal questions. Articles 26 and 27 of the Vienna Convention on the Law of Treaties govern performance of treaty obligations. Article 46 restricts reliance on violations of internal rules governing competence to conclude treaties, requiring a violation that is 'manifest' and concerns a rule of 'fundamental importance'. An investor-State settlement is ordinarily outside the treaty definition in article 2(1)(a).[20] Article 46 can inform a proposed allocation of risk between concealed irregularity and fundamental competence, but it does not itself validate the settlement or supply a defence to article 5 of the Singapore Convention.

Attribution of the official's conduct to the State raises a further question under the Articles on State Responsibility. Article 4 attributes conduct of State organs, and article 7 preserves attribution where an organ or empowered entity acts in an official capacity even if it 'exceeds its authority or contravenes instructions'. Attribution must still be connected to breach of an international obligation. Article 32 prevents reliance on internal law to avoid the consequences of responsibility once established.[21] International responsibility may consequently coexist with the absence of a valid contractual obligation under domestic law. The appropriation and contractual powers needed to perform the official's promise must still be established from their municipal legal sources.

The jurisdictional decision in *Kardassopoulos v Georgia* shows how international protection can survive alleged domestic illegality. Georgia argued that its enterprises had exceeded their powers in granting the investment rights. The tribunal read the treaty's legality condition in light of the investor's conduct and rejected an attempt to defeat jurisdiction through the State's own alleged illegality. Governmental assurances and years without objection also supported the investor's reliance.[22] The investor thus retained access to treaty adjudication despite possible invalidity under Georgian law. In *Southern Pacific Properties v Egypt*, governmental acts communicated to investors similarly remained capable of engaging international responsibility despite alleged nullity under municipal law. The tribunal's reasoning under article 42 of the ICSID Convention concerned the availability of an international remedy for reliance on official conduct.[23] These decisions support a distinction between international relief and contractual validity that must also govern certification. The proposed legislation or treaty must identify whether the record changes the evidence of approval, protects reliance on a commitment or supports a separately defined international remedy.

The converse limit appears in *World Duty Free v Kenya*. The tribunal rejected claims dependent on a contract procured through bribery, invoking transnational public policy and the applicable English and Kenyan law. Although Kenya relied on the corruption of its own former President, the tribunal held that the pleaded contractual claims could not be maintained.[24] The proposed protection accordingly depends on lawful competence and reasonable reliance, with challenges to corrupt procurement preserved at both domestic and international levels.

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[18] United Nations Treaty Collection, 'United Nations Convention on International Settlement Agreements Resulting from Mediation', ch XXII.4, participant table and dated deposit entries https://treaties.un.org/pages/ViewDetails.aspx?chapter=22&clang=_en&mtdsg_no=XXII-4&src=TREATY; Singapore Convention (n 11) art 14(2).

[19] UN Treaty Collection (n 18), declarations of Belarus, Brazil, Georgia, Kazakhstan, Saudi Arabia, Uzbekistan, the United Arab Emirates and Pakistan; Singapore Convention (n 11) art 8(1), (3).

[20] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') arts 1, 2(1)(a), 26–27 and 46 https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[21] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts', annex to UNGA Res 56/83 (12 December 2001), arts 2–4, 7 and 32 https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

[22] *Ioannis Kardassopoulos v Georgia* (Decision on Jurisdiction) ICSID Case No ARB/05/18 (6 July 2007) paras 179, 182–184, 190–194 https://energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-009dj.pdf.

[23] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (Award) ICSID Case No ARB/84/3 (20 May 1992) paras 81–85 https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C135/DC671_En.pdf.

[24] *World Duty Free Company Ltd v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) paras 157, 179–180 https://www.italaw.com/sites/default/files/case-documents/italaw15005.pdf.

5 COMPARATIVE PUBLIC LAW

5.1 PERU

Peru's Law No 28933 established the System for Coordination and Response of the State in International Investment Disputes, known as SICRECI. The Ministry of Economy and Finance coordinates the system, and the Special Commission represents the State through the relevant dispute process, including direct negotiation. Its institutional structure brings finance, foreign affairs, justice and investment promotion into the process, with participation by involved public entities.[25] A certifying body could therefore draw on an approval process already organised beyond the individual negotiator.

Article 13 of the implementing regulation allows the Commission to recommend a transaction, conciliation or amicable settlement during arbitration, conciliation or direct negotiations. The formula must be authorised by Supreme Resolution after a report to the Council of Ministers, with the prescribed ministerial countersignatures and, where applicable, that of the sector responsible for performance. Articles 17–20 protect specified deliberative and legal information.[26] The Spanish text distinguishes reporting to the Council from formal authorisation by Supreme Resolution. A separate requirement of Council approval would need its own basis in the applicable instruments.

Supreme Resolution No 013-2016-EF demonstrates the division of functions. The dispute with Aby Transmisión Sur concerned guarantees and possible penalties under an electricity transmission concession. Article 1 authorised the recommended settlement formula; article 2 authorised the Commission's President to sign the comprehensive agreement. A recital preserved action concerning administrative and functional responsibilities identified by the Comptroller General. Article 3 specified the countersigning ministers.[27] Approval and signature authority therefore coexisted with continued accountability for antecedent conduct. The public resolution does not disclose the full contractual bargain or establish that mediation, as defined by the Singapore Convention, occurred.

Approval of the compromise leaves the financing of performance to Law No 28933, article 14.3, which assigns payments arising from settlements and awards to the involved public entity within the budget-law framework.[28] The Supreme Resolution is strong evidence of authorisation, but the resolution alone cannot establish every necessary appropriation or regulatory power. A new certificate would add value only by assembling those separate decisions, identifying any conditions and giving the resulting record a defined evidential consequence. A certificate that merely repeats the resolution would leave a foreign court with the same unanswered questions about appropriation, regulatory competence and outstanding conditions.

5.2 VIET NAM

Resolution No 20/2026/QH16, adopted on 23 April 2026 and effective from 1 May, established coordination mechanisms and special policies for preventing and resolving international investment disputes. Decree No 323/2026/NĐ-CP of 17 August 2026 supplies implementing detail.[29] The relevant Vietnamese term, *hoà giải*, is rendered here as conciliation. Its domestic use does not establish that every resulting process involves the third-person assistance required by article 2(3) of the Singapore Convention.

Article 16 of the Resolution requires consideration of conciliation and preparation of a plan for approval by the Prime Minister or the interdisciplinary steering committee within the prescribed allocation of responsibility. Paragraph 3 permits independent advice where necessary. Paragraph 4 refers to lawyers and conciliators, if any, and requires the investor to relinquish all rights to bring claims arising from the dispute resolved by conciliation. The optional reference to a conciliator confirms the need to establish mediated origin separately in any Convention application.[30] The Convention applicant must establish the required third-person assistance even where the plan was approved and independent counsel advised on its terms.

Paragraph 6 provides protection for persons preparing and implementing a conciliation solution through the prescribed procedure, on independent advice and with competent approval, subject to the applicable civil-service framework and rules of competent authorities. The scope of personal protection consequently depends on those procedural and substantive conditions. Decree article 16 requires a plan addressing the dispute, legal basis, strengths and weaknesses, proposed solution, implementation responsibilities and recommendations.[31] The role of advice thus depends on the legal consequence claimed: paragraph 3 permits its procurement where necessary, while paragraph 6 makes it relevant to the conditions of personal protection.

The distinction between approval and officials' protection also defines the comparison with Peru. Viet Nam expressly addresses officials' protection within its conciliation framework; Peru's Aby resolution expressly preserves identified

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[25] Ley No 28933, Ley que establece el Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión (Peru, 2006), as amended by Ley No 29213, arts 2–8 https://www.mef.gob.pe/NORLEGAL/leyes/Ley_28933.pdf.

[26] Decreto Supremo No 125-2008-EF (Peru, signed 22 October 2008, published 23 October 2008), Reglamento de la Ley No 28933, arts 13, 17–20 https://www.mef.gob.pe/contenidos/inv_privada/normas/sicreci/DS_125_2008_EF.pdf.

[27] Resolución Suprema No 013-2016-EF (Peru, 5 July 2016), recitals and arts 1–3 https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/aby_transmision_sur_sicreci.pdf (preserving identified administrative and functional responsibilities in a recital).

[28] Ley No 28933 (n 25) arts 14.3 and 15.

[29] Resolution No 20/2026/QH16 on coordination mechanisms and special policies for preventing and resolving international investment disputes (Viet Nam, 23 April 2026) arts 16, 20(1) https://sonnmt.hochiminhcity.gov.vn/portal/document/2026/07/22043837/D13_NQ20_NQ%20TCDTQT.pdf; Decree No 323/2026/NĐ-CP (Viet Nam, 17 August 2026) https://datafiles.chinhphu.vn/cpp/files/vbpq/2026/8/323_2026_nd-cp_17082026-signed.signed.pdf (English descriptions paraphrased from the signed Vietnamese texts, without an authenticated English translation).

[30] Resolution No 20/2026/QH16 (n 29) art 16(1)–(4); Singapore Convention (n 11) art 2(3).

[31] Resolution No 20/2026/QH16 (n 29) art 16(3), (6); Decree No 323/2026/NĐ-CP (n 29) art 16(2)(a)–(đ).

administrative accountability. Both require examination of the relevant public instruments before their legal consequences can be asserted abroad. These instruments permit comparison of particular safeguards, without establishing that either system provides greater protection overall or gives its approval records conclusive effect internationally.

5.3 PAKISTAN

The Reko Diq process supplies a concentrated example of authority assembled for a particular transaction. The Supreme Court's 2022 opinion recounts the earlier invalidation of the mining agreement, the investment award and the negotiations undertaken with independent financial, technical and legal advice. It records Balochistan Cabinet approval, consideration through an Apex Committee and briefing of the Provincial Assembly.[32] The reported US$5.9 billion investment-award exposure included damages, interest and costs. The further commercial-arbitration exposure was anticipated on the advice presented to the Court, whose account supplies no separately verified final commercial award.

The opinion was given in the Court's advisory jurisdiction under article 186 of the Constitution. Its institutional contribution was constitutional scrutiny of the proposed arrangements and legislation. Paragraph 9(v) preserved the exercise of statutory discretion and the need to obtain lawful consents. Paragraphs 10(ii) and 13 made the conclusions on the proposed investment legislation conditional on the relevant provincial resolutions and passage of the Bill.[33] Whatever the broader legal effects of Pakistani advisory opinions, the conditions expressed in this one left enactment to the legislature and implementation of the bargain to the competent public bodies.

The Foreign Investment (Promotion and Protection) Act 2022 then supplied specified protections and implementation duties. Section 3(13) makes certain fiscal commitments actionable where the relevant federal or provincial Cabinet has reviewed and approved them. Sections 6 and 7 address implementation and supporting public acts, and the First Schedule identifies the Reko Diq project. The durability offered by the Act is qualified: sections 3(10), 3(12) and 14(1) preserve the possibility of express contrary legislation.[34] The assurance therefore rests on specified statutory commitments and implementation duties which remain open to express legislative alteration.

The dispute's scale, history and federal dimensions explain the involvement of several institutions and bespoke legislation, limiting its suitability as a routine settlement procedure. What can be transferred is the insistence that each required power must come from its competent source. A certificate could assemble that authority without attributing Parliament's legislative power, a regulator's discretion and the executive's contractual competence to the certifying body itself.

5.4 INDIA AND THAILAND

India's Taxation Laws (Amendment) Act 2021 created a statutory route to resolve specified retrospective indirect-transfer tax demands concerning transactions before 28 May 2012. Relief from existing demands depended on the prescribed withdrawal and waiver conditions, with collected amounts refundable without interest. Rules 11UE and 11UF specified undertakings and a sequence of certification, compliance and consequential orders.[35] Within that mechanism, Form 2 records acceptance of the taxpayer's undertaking. Its function differs from certification of a State representative's settlement authority: the power to grant tax relief derives from the legislation. A certificate therefore cannot supply a tax compromise that the existing regime does not permit. These instruments provide no evidence of a mediated settlement.

Thailand's Kingsgate episode illustrates another boundary. Kingsgate's interim report for the half-year ended 31 December 2025 states that both parties sought termination of the Thailand–Australia Free Trade Agreement arbitration without an award or settlement agreement, and that the tribunal issued its order on 29 December 2025. The company also reported the resumption of the mine's operations.[36] This is an issuer's account, rather than an independently inspected termination order. On that evidence, an administrative accommodation and the end of arbitration cannot be treated as an undisclosed mediated agreement capable of Convention enforcement.

Across the five examples, the form of public approval depends on the powers exercised, and some resolutions produce no settlement agreement. A transferable certification model would therefore collect the legal acts of the competent institutions, preserving the distinction between approval, mediated origin and an agreement capable of foreign enforcement. Its institutional form must accommodate those differences. The question for legislation is which matters the record proves and whose rights to challenge the bargain remain protected.

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[32] *Reko Diq Opinion* (n 1) paras 3–6, 9(iii)–(vi); *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* (Award) ICSID Case No ARB/12/1 (12 July 2019) para 1858(II)–(VIII) https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf (itemising principal, interest and costs).

[33] *Reko Diq Opinion* (n 1) title page and paras 9(v), 10(ii) and 13.

[34] Foreign Investment (Promotion and Protection) Act 2022 (Pakistan), Act XXXV of 2022, as amended in December 2022, ss 3(10), (12)–(13), 6–7, 14(1), First Schedule para 1 https://pakistancode.gov.pk/pdffiles/administrator07bf5c69a91f18474d286f256c2b7ff3.pdf.

[35] Taxation Laws (Amendment) Act 2021 (India), Act 34 of 2021, ss 2–3 https://judicialacademy.nic.in/sites/default/files/THE%20TAXATION%20LAWS%20%28AMENDMENT%29%20ACT%2C%202021.pdf; Income-tax (31st Amendment) Rules 2021, Notification No 118/2021, GSR 713(E) (1 October 2021), rr 11UE(1)–(3), 11UF(2)–(3), (7)–(8), Forms 1–4 https://www.incometaxindia.gov.in/documents/20117/6507196/Notification_No_118_2021.pdf/d6c056f1-b115-61ee-3d5d-fc804312942b?t=1763192870599.

[36] Kingsgate Consolidated Limited, *Appendix 4D and Half-Year Report for the Half-Year Ended 31 December 2025* (25 February 2026) 2 (PDF p 5) https://announcements.asx.com.au/asxpdf/20260225/pdf/06wrg9cgxzx7kj.pdf; see also *Annual Report 2026*, 5, 7, 25 https://www.kingsgate.com.au/annual-reports/ (company reports of termination and resumed operations).

6 A STATUTORY AUTHORITY CERTIFICATE

6.1 INSTITUTIONS AND LEGAL EFFECT

The most credible certificate would emerge from the State's ordinary approval machinery. An existing Supreme Resolution or comparable instrument should qualify where it contains the prescribed information and has the required legal effect. A new commission is justified only where no institution can perform the verification with adequate independence. Separation from the agency responsible for the disputed conduct is useful, although a finance or investment-promotion ministry may itself have an interest in securing the bargain. Published recusal rules, independent advice and reviewable reasons are therefore more important than the office's name.

The certificate should identify the precise text approved, the signatory's mandate, each necessary institutional decision and the distinction between authority to incur a liability and authority to pay it. The certifier must also distinguish an unconditional undertaking from a promise whose performance depends on a later legislative or regulatory act. Viet Nam's implementing decree provides a useful fiscal illustration: article 23 identifies expenditure on settlement implementation but retains allocated-budget limits and accounting, monitoring and audit requirements.[37] Certification of present authority to enter a conditional agreement must not represent that future appropriation as already available.

Domestic legislation should give this record presumptive evidential force while protecting reliance against immaterial internal irregularities. Where a certificate incorrectly records a parliamentary appropriation or an independent regulator's approval, the investor's ignorance cannot supply the missing power. Within an institution's lawful competence, however, legislation may preserve an otherwise valid decision despite a harmless organisational omission, provided that courts remain able to determine whether the specified conditions are satisfied. The distinction allows certification to carry a defined legal consequence without making an erroneous statement of substantive authority conclusive.

6.2 MODEL DOMESTIC PROVISIONS

MODEL A Certified investment settlements

(1) The legislation shall establish or designate a Settlement Authority, define its subject-matter and financial remit, and require published appointment, recusal and quorum rules. The Authority shall obtain legal advice independent of the negotiating team and of any agency whose conduct is materially in issue. An interested agency may supply evidence and assist implementation planning without controlling certification of its own conduct.

(2) Before the settlement is concluded, the Authority may certify an identified final text after verifying the authentic decisions of every institution whose approval is required for its conclusion and the legal basis of each promised act. The certificate shall identify the parties, authorised signatories, approving decisions, applicable legislation, payment authority, conditions of performance and any separately authorised immunity waiver. It shall distinguish authority to incur liability from authority to disburse funds and identify any later appropriation on which payment depends. A material amendment requires renewed certification.

(3) Certification supplies no missing constitutional or statutory power, appropriation or approval. An agreement requiring a later legislative or regulatory act shall identify that act and the consequences of its non-occurrence. The Authority may certify present competence to undertake the stated conditional obligations, without certifying the future act as accomplished or committing an independent decision-maker to an unlawful outcome.

(4) In proceedings governed by this legislation, an authentic certificate is rebuttable evidence that the identified decisions were made and the stated requirements examined. The State bears the burden of establishing a defect in a matter so recorded, without alteration of non-parties' procedural rights or burdens. A court shall not invalidate the settlement solely for an internal organisational irregularity where the legally competent institution actually approved its terms, the irregularity could not materially affect the decision or a mandatory safeguard, and the investor neither knew of it nor disregarded an objectively apparent defect. This rule applies insofar as the constitution permits that legislative consequence.

(5) Judicial review remains available, with the consequence of an immaterial organisational irregularity governed by subsection (4). Certification does not restrict review of substantive competence, fiscal legality, corruption, fraud, material deception, mandatory procedure or third-party rights. The investor shall receive notice and an opportunity to be heard in proceedings challenging the certificate. Interim suspension and final decisions shall be recorded promptly in the public register with their reasons and effect. A later administration may not revoke certification merely because it prefers different commercial terms.

(6) An official acting honestly, within lawful powers and prescribed procedure, after disclosing material information and considering competent independent advice, shall incur no personal civil, disciplinary or administrative liability solely because the settlement later appears financially disadvantageous. This protection excludes dishonesty, corruption, undisclosed benefit, deliberate concealment, gross negligence, reckless disregard of legal limits and serious procedural misconduct. Certification shall not prevent investigation or displace criminal liability otherwise established by law.

(7) The Authority shall publish the certificate, its legal basis and reasons sufficient to explain the public purpose, principal fiscal commitments and treatment of affected interests, subject to specific lawful redactions. It shall record completion of required consultation, participation and environmental or other assessment. Privileged advice and

[37] Decree No 323/2026/NĐ-CP (n 29) art 23(1)(e), (2).

confidential mediation exchanges may remain protected. Certification neither extinguishes non-parties' rights nor establishes an appropriation, licence or immunity waiver. An existing approval instrument satisfying these requirements may serve as the certificate.

Subsections (4) and (5) allow a court to examine whether the competent institution approved the terms and whether an omitted step protected participation or another mandatory interest, while limiting the consequences of a defect found to be immaterial. Omission of a legally required community hearing would therefore remain open to challenge even if officials characterised it as internal administration. Subsection (6) applies a corresponding distinction to official responsibility: honest judgement about an uncertain litigation outcome receives the specified protection, whereas corruption remains investigable and subject to the liability established by law.

7 TREATY PROTECTION AND FOREIGN ENFORCEMENT

Once relief is sought abroad, the enforcing court must select the law applicable to the disputed question, determine the significance of the certificate under that law and apply the Singapore Convention's conditions where relevant. Article 7 preserves more favourable rights available under the law or treaties of the State where relief is sought. An investor relying on a bilateral investment treaty must therefore establish any necessary direct effect, implementation, standing and jurisdiction even in a treaty party's courts, and cannot treat article 7 as extending that treaty's obligations to a third State.[38]

An investment treaty can address the respondent State's conduct by specifying the authority objections it undertakes not to advance. The proposed undertaking protects reliance on an actual approval against limited organisational defects, while preserving objections based on missing substantive powers. Its usefulness to the investor also depends on an express remedy for breach. Model B accordingly creates a confined claim that remains distinct from ordinary enforcement of the settlement and from the underlying dispute released by it.

MODEL B Certified settlement undertaking

(1) Each Party shall notify the other of the authority designated under its law to certify investment settlements, the legislation conferring competence and the authority's remit. The notification, subsequent changes and an authentication register shall be publicly available. A certificate must identify the final settlement text and the decisions certified.

(2) Where an investor of the other Party concludes a settlement with a Party in reasonable reliance on an authentic certificate issued within the notified authority's remit, that Party shall not resist the agreement solely by invoking an internal organisational irregularity in a certified approval which the legally competent institution actually gave. The undertaking applies where the irregularity could not materially affect the decision or a mandatory safeguard and the investor neither knew of it nor disregarded an objectively apparent defect. A subsequent administration's disagreement with the commercial merits shall not constitute an authority objection.

(3) Paragraph (2) does not preclude reliance on absence of substantive constitutional or statutory competence, legally necessary fiscal authority, fraud, corruption, material deception, material breach of mandatory procedure or non-parties' rights. It does not restrict an enforcing court's powers concerning public policy, subject-matter settleability or other mandatory requirements. A later domestic judgment shall be assessed by its grounds and through the law of the forum; its existence alone does not determine breach of paragraph (2).

(4) Each Party shall provide a domestic judicial remedy for breach of paragraph (2). An investor of the other Party may submit a claim alleging that breach to arbitration under the UNCITRAL Arbitration Rules after the respondent has received 90 days' written notice specifying the certificate, conduct and relief sought. Each Party consents to such arbitration; the investor accepts that offer by commencing arbitration in accordance with those Rules. Jurisdiction is confined to breach of paragraph (2). The tribunal may grant declaratory relief and compensation for proven loss caused by the breach, preventing double recovery. It shall not direct legislation, appropriation or a regulatory decision. Release of the underlying dispute does not extinguish this undertaking unless the release expressly identifies it.

(5) The settlement shall identify its governing law and may reproduce paragraph (2) as an express contractual covenant, whose effect remains subject to the applicable law. This Article creates no obligation for a third State and determines neither commercial character nor the effect of a Singapore Convention reservation. Certification itself waives no immunity from adjudication or measures against State property. The effects of paragraph (4)'s arbitration consent and any separately authorised consent or waiver are determined under the forum's law. Arbitration consent does not of itself authorise measures of constraint against State property.

Paragraph (4) confines the new arbitration to breach of the certified settlement undertaking. Under this arrangement, the parties can release the underlying dispute without preserving the original arbitration solely to obtain an award on agreed terms, although the State's prohibited objection may generate a further proceeding. Compensation remains confined to proven loss caused by that objection. Ordinary non-payment does not itself establish the distinct breach, and an error in certification does not by itself create an indemnity.

[38] Singapore Convention (n 11) art 7; VCLT (n 20) art 34.

Where the undertaking is reproduced as a contractual covenant, the investor must establish the validity of the settlement, the official's power to undertake the covenant, its legal reach and the remedy available in the chosen forum. A valid covenant may support an answer to repudiation or a claim for breach under its governing law, subject to the enforcing forum's mandatory rules. Article 5(1)'s allocation of the burden of proof provides no express treaty licence for blanket prospective waiver.[39]

8 A RESERVATION LINKED TO CERTIFICATION

Article 8(1)(a) permits a State to exclude agreements involving itself, its governmental agencies or persons acting on behalf of those agencies 'to the extent specified in the declaration'. That formulation plausibly permits a classification based on certification, although the deposited reservations examined supply no precedent establishing its acceptance. Defining the exception by authentic issuance for an identified settlement text would keep the threshold inquiry separate from substantive validity. If the exception instead depended on the certificate's legal correctness, the authority dispute would recur at the threshold of Convention application.[40]

MODEL C Proposed declaration under article 8(1)(a)

> Pursuant to article 8(1)(a), [State] declares that it shall not apply the Convention to settlement agreements to which [State], a governmental agency of [State], or a person acting on behalf of such an agency is a party, except agreements for which, at conclusion, an authentic authority certificate identifying the final settlement text has been issued by [named authority] under [identified enactment and version]. The certificate shall identify the parties, date and certified text. Its issuance shall be capable of public authentication. This exception concerns the existence and authenticity of certification; it determines neither substantive validity nor satisfaction of the Convention's other requirements or any immunity issue. Changes to this reservation take effect only in accordance with articles 8 and 9.

Before deposit, the State would have to complete the bracketed particulars and provide for public authentication of issuance. A temporary failure of the register's website should leave the agreement's coverage unaffected. An authentic but erroneous certificate would leave the agreement subject to article 5. An uncertified agreement would fall outside the defined exception even though its negotiators might possess full authority and the agreement might remain enforceable through another route.

The classification directly modifies the reserving State's undertaking to apply the Convention, while its consequences for proceedings elsewhere depend on interpretation of the Convention, applicable reservation law and the forum's implementation. Articles 20 and 21 of the Vienna Convention inform the assessment of any reciprocal effect. The United Kingdom's consultation response records concern over precisely that possibility.[41] The reservation remains an optional means of limiting coverage: a State willing to apply the Convention to all qualifying public settlements needs no such exclusion.

Under article 8, a reservation made after entry into force takes effect six months after deposit, and withdrawal has the same six-month period. A reservation made on signature requires confirmation upon ratification, acceptance or approval. Article 9 makes the relevant application prospective for settlement agreements concluded after entry into force of the Convention, reservation or withdrawal for the Party concerned.[42] Within the proposed model, the certificate must also exist when the settlement is concluded. Later authentication may prove that issuance occurred in time, but later issuance cannot satisfy the condition retrospectively; nor can a change in domestic designation rules silently alter the deposited category for earlier agreements.

9 IMMUNITY AND LAWFUL PERFORMANCE

Even after a settlement has been held valid, recovery against State property depends on the forum's separate rules on adjudication, pre-judgment constraint and post-judgment execution. Articles 7 and 18–21 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property reflect these distinctions, although the Convention had not entered into force by the cut-off so those immunity provisions were not operative treaty obligations.[43]

Domestic legislation gives the distinctions practical effect. Section 13 of the United Kingdom's State Immunity Act 1978 distinguishes consent to jurisdiction from consent to execution and preserves particular rules for commercial-use property, while section 14(4) separately protects central-bank property. In the United States, the Foreign Sovereign Immunities Act separates jurisdictional exceptions from the immunity of property under section 1609, with further conditions and protections

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39 Singapore Convention (n 11) art 5(1)–(2); UNCITRAL, *Guide* (n 12) paras 148–152.

40 Singapore Convention (n 11) art 8(1)(a), (2); UNCITRAL, 'Report of Working Group II on its sixty-eighth session' (19 February 2018) UN Doc A/CN.9/934, paras 72–79, 93 https://documents.un.org/api/symbol/access?l=en&s=A/CN.9/934&t=pdf; UN Treaty Collection (n 18), declarations.

41 VCLT (n 20) arts 20–21; Ministry of Justice, 'Government response to the consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation' (2 March 2023) paras 4.68, 6.8 https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation/outcome/government-response-to-the-consultation-on-the-united-nations-convention-on-international-settlement-agreements-resulting-from-mediation-new-york-20.

42 Singapore Convention (n 11) arts 8(3)–(5), 9 and 14.

43 United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not in force at the cut-off) UNGA Res 59/38, annex, arts 7, 18–21, 30 https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf; UN Treaty Collection, ch III.13, status https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?chapter=3&lang=en&mtdsg_no=III-13&src=UNTSONLINE&tabid=2.

specified in sections 1610 and 1611. Even where consent is express, the creditor must satisfy the remaining statutory requirements for attaching a particular asset.[44]

The International Court of Justice also distinguished execution immunity from jurisdictional immunity in *Jurisdictional Immunities of the State*. While declining to decide whether every aspect of article 19 of the 2004 Convention represented customary law, it identified minimum conditions relevant to measures against State property.[45] A certificate should accordingly identify any immunity waiver, its legal basis and the signatory's authority, leaving the availability of particular assets and the requirements for pre-judgment attachment to the applicable immunity rules. Valid arbitration consent, including under the proposed treaty clause, may engage statutory arbitration exceptions without a separately worded jurisdictional waiver, while execution requires its own inquiry.[46] Before the underlying claim is released, the parties should identify realistic payment arrangements and potentially available commercial assets. Where performance requires an independent regulatory decision, conditional release, staged payment or an agreed lawful monetary alternative can allocate the risk of refusal, given that an enforcement order cannot supply a power which the regulator lacks.

10 OPERATION AND PUBLIC ACCOUNTABILITY

The payment and performance arrangements considered above also require an account of the public power exercised in approving them. Certification should identify who approved the bargain, on what authority and for what public purpose, with reasons sufficient to explain its principal fiscal consequences. The UNCITRAL Guidelines recognise the interests in public scrutiny and in protecting privileged advice and mediation communications.[47] Although a government may represent the public in negotiations, its participation establishes neither that affected communities were heard nor that they surrendered their own rights. Publication, completion of required consultation and access to review therefore form part of the certificate's credibility. The comparative materials support the need to identify lawful public authority; the additional safeguards remain proposed institutional choices for adoption within the relevant legal system. The consequences become apparent as certified settlements are performed, challenged and enforced in the following seven situations.

Consider first a successor government that repudiates a lawfully approved monetary settlement after an election. The investor may invoke the certificate in contractual or Convention proceedings, subject to the applicable scope, jurisdiction and refusal grounds. The separate treaty claim turns on whether the State advances an authority objection prohibited by Model B. Ordinary non-payment does not itself establish that distinct breach.

The second situation, certification that incorrectly records a necessary appropriation, turns on the distinction between a prohibited objection and a missing substantive approval. Because Model A cannot supply the missing fiscal act, the applicable law must determine whether its absence affects the undertaking's validity or only present disbursement. Model B preserves the substantive fiscal objection. Any further contractual or treaty claim must rest on its own legal basis; certification supplies no automatic indemnity.

Third, even where a certificate's issuer and signature are authentic, bribery or material deception in its procurement remains subject to the domestic integrity exceptions and treaty carve-outs. Article 5 and the applicable law govern foreign relief. Authentication establishes the document's source, while the legality of its procurement and of the underlying bargain remains open to examination.

In the fourth situation, the competent institution genuinely approved the terms but an undisclosed organisational step was omitted. Under Model A, the court would examine the legal importance of that omission: a harmless internal irregularity may fall within the proposed rule, whereas a breach affecting a mandatory safeguard or third-party participation remains challengeable. Protection is also unavailable where the investor knew of the defect or disregarded an objectively apparent irregularity.

Fifth, if the investor seeks enforcement in a Convention State outside the investment treaty, the forum must determine the significance of the certificate and any contractual covenant under the law it selects. Article 7 gives the bilateral undertaking no automatic domestic effect there. A refusal of relief by that court would not by itself establish a breach of Model B by the respondent State.

The sixth situation arises when an independent regulator declines a promised permit on lawful statutory grounds. The settlement's conditions, retained claims and any lawfully authorised alternative determine the parties' positions, since certification cannot compel the permit's issue and the proposed treaty tribunal cannot require the regulator to exceed its powers. The terms governing that refusal consequently matter at the point when the investor agrees to release its claims.

Seventh, even after obtaining relief, an investor identifying only protected diplomatic or central-bank assets must satisfy the enforcing State's immunity rules concerning any consent and the property's legal character. Certification supplies no execution exception. Attention to payment arrangements before release remains necessary because the only identified assets may be unavailable despite an otherwise enforceable settlement.

Across these situations, the State makes its approval process ascertainable and accepts limited responsibility for opportunistic reliance on harmless internal defects. The investor receives a usable record and a defined undertaking, while retaining the risk that mandatory law or protected property restricts the remedy. People outside the bargain retain the

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[44] State Immunity Act 1978 (UK), ss 13(2)–(5), 14(4) https://www.legislation.gov.uk/ukpga/1978/33/section/13/data.html; Foreign Sovereign Immunities Act, 28 USC §§ 1609, 1610(a)(1), (c)–(d), 1611(b) https://uscode.house.gov/us/usc/t28/s1610/.

[45] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, paras 113–118, especially 117 https://api.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf.

[46] State Immunity Act 1978 (n 44) ss 9, 13(3); 28 USC § 1605(a)(1), (2), (6) https://uscode.house.gov/us/usc/119-136/t28/s1605/; ICSID Convention (n 9) art 55.

[47] UNCITRAL, *Guidelines* (n 2) paras 36–39; Kessedjian and others (n 3) section 5(B).

procedures and substantive rights which the mediating parties had no authority to surrender. Those retained rights are part of the proposed allocation of risk, including when their exercise prevents performance on the terms the investor expected.

11 CONCLUSION

Where settlement authority is distributed among ministers, legislatures and regulators, the investor's reliance depends on the legal effect of decisions made by each. Institutional mediation rules can bring that distribution of authority into the negotiations, and the Singapore Convention can assist enforcement of a qualifying agreement. The enforcing forum must nevertheless determine whether the requisite domestic authority existed and what consequences follow from any defect.

That inquiry defines the useful work of certification. An authenticated record should identify approvals and outstanding conditions, carry rebuttable evidential force in domestic proceedings and protect reliance against the specified class of immaterial internal irregularities. Treaty parties may reinforce that protection through an express undertaking and a remedy for its breach. Although contractual incorporation may assist enforcement elsewhere, its effect remains governed by the applicable law. The optional certificate-based reservation likewise remains an untested means of defining the excluded class of government settlements.

The assurance rests on powers actually exercised and conditions openly recorded. A certificate may document an existing appropriation or regulatory approval, or disclose that lawful performance awaits a further public act. Courts must remain able to examine constitutional competence, corruption and the rights of affected people. With those questions preserved, certification can make the approval history usable in enforcement proceedings and protect reliance against the defined internal defects, without committing public institutions to acts beyond their powers.

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INSURANCE UNDERWRITING AND SOCIAL PROTECTION IN ASEAN

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ABSTRACT

Governments that purchase or mandate insurance determine both the risks transferred to an insurer and the losses left with the people they intend to protect. This article examines responsibility for that retained exposure through a functional comparison of insurance and social protection law in Singapore, the Philippines, Malaysia and the Lao People's Democratic Republic. Residual loss is defined against a programme's protective purpose and distinguished from an unpaid contractual or statutory benefit. The distinction connects underwriting disputes to public decisions about coverage and the expenditure of sovereign insurance proceeds. Malaysian disclosure remedies and Philippine restrictions on discriminatory underwriting reveal different evidential demands: reconstructing the insurer's historical response to accurate information and establishing the grounds actually used to exclude an applicant. A constructed index-insurance model further demonstrates that equal expected payments can leave markedly different shortfalls during severe loss. These findings support a proposed duty requiring public authorities to justify foreseeable retained exposure when selecting or renewing insurance and allocating its proceeds. The duty combines preservation of the evidence supporting those choices with review by a body competent to reconsider them. Doing so renders public choices accountable after the insurer has performed, while preserving the distinct remedies through which beneficiaries enforce benefits already owed.

Keywords: insurance law; residual loss; social protection; comparative public law; basis risk; disaster finance

1 INTRODUCTION

In October 2026, the World Bank reported that roughly 65 per cent of a US$2 million sovereign disaster insurance payout received by the Lao People's Democratic Republic (Lao PDR) the preceding year had been disbursed, with payments made for 15 of 39 approved recovery activities.[1] A resident seeking assistance through one of the outstanding activities would have needed to challenge a public decision or seek faster action by the authority responsible for funding or implementation, although the money had originated in an insurance contract. The ministry receiving the payout, the committee choosing recovery projects and the body undertaking the work exercised different powers. Whether the resident could require further action depended on those powers and the domestic rules governing assistance, rather than simply on the fact that the insurer had paid.

Governments make similarly consequential choices before a loss occurs. Selecting a benefit ceiling or an index trigger determines which expenditure the insurer will meet and which expenditure households must finance elsewhere. Retention may be a defensible response to limited public funds, especially where another programme covers the remaining need or broader insurance commands a prohibitive premium. A household's immediate difficulty in paying for treatment or restoring a livelihood, however, may also result from unlawful exclusion or the withholding of a benefit already due. Although the financial consequences can resemble those of deliberately limited cover, a claimant alleging breach relies on a different legal obligation from one questioning the protection a public authority chose to purchase.

Legal and economic scholarship has long recognised that insurance influences conduct beyond the payment of claims. Ben-Shahar and Logue describe insurers' regulatory activity through classification, policy conditions and claims administration.[2] Clarke and Wren-Lewis examine how advance risk financing can mitigate problems of governmental commitment, and Clarke and Dercon develop the relationship between disaster planning and responsibility when agreed procedures fail.[3] For an intended beneficiary, these institutional effects raise a further question about the legal consequences of

[1] World Bank, *Lao PDR: Improved Access to Disaster Risk Financing (P505224), Implementation Status and Results Report*, seq 2, ISR08961 (1 October 2026) 1–2; compare the separate grant-disbursement table at 5 https://documents1.worldbank.org/curated/en/099093026222033260/pdf/P505224-1e32be86-d09e-4f55-bb6c-27f772c7f9b8.pdf.

[2] Omri Ben-Shahar and Kyle D Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) 111 *Michigan Law Review* 197, 199–201 https://home.uchicago.edu/omri/pdf/articles/Outsourcing_Regulation.pdf.

[3] Daniel J Clarke and Liam Wren-Lewis, 'Solving Commitment Problems in Disaster Risk Finance' (World Bank Policy Research Working Paper 7720, June 2016) 2–3, 8–11 and 19–22 https://documents1.worldbank.org/curated/en/396511468197075071/pdf/WPS7720.pdf; Daniel J Clarke and Stefan Dercon, *Dull Disasters? How Planning Ahead Will Make a Difference* (Oxford University Press 2016) 3 and 68–69 https://www.gfdrr.org/sites/default/files/publication/dull-disasters.pdf.

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successful risk transfer. The insurer may have met its obligation even though the public purpose for which insurance was purchased remains only partly fulfilled. The rights available at that point depend on how the unmet need arose, including decisions about the original coverage and the subsequent use of insurance proceeds.

Under the ASEAN Declaration on Strengthening Social Protection, governments accept responsibility for the quality and sustainability of social protection, subject to nationally determined conditions. The International Labour Organization's Social Protection Floors Recommendation connects nationally defined guarantees with legislation and accessible complaint procedures.[4] Domestic law determines the enforceable benefits and routes of review available to an intended beneficiary, together with the discretion afforded to the administering authority when reconciling protection with competing demands on public resources. The case for requiring reasons for a coverage decision is strongest where the authority has deliberately assigned a foreseeable loss to beneficiaries whose statutory protection it is responsible for administering, yet the terms of the insurance contract reveal little about that public choice.

The four jurisdictions considered here permit a comparison of these allocations of authority.[5] Singapore's statutory health scheme preserves membership despite exclusion from a private supplement, raising questions about the protection secured through each legal instrument. Philippine restrictions on exclusion because of human immunodeficiency virus (HIV) status and Malaysian remedies for misrepresentation both require scrutiny of underwriting evidence, although the statutes test different aspects of the insurer's conduct. Public financing introduces a further distinction within the Philippines, where the crop insurer's Board controls product design as well as an appeal stage in individual claims. Lao sovereign insurance separates the contractual recipient from the institutions authorising relief. Taken together, these examples show why an insurer's performance settles only the obligation it assumed. I argue for a public duty, enacted through legislation or binding programme rules, to justify foreseeable exposure retained in the design and administration of publicly supported insurance.

2 RESIDUAL LOSS AND THE ALLOCATION OF RESPONSIBILITY

2.1 THE PROTECTIVE PURPOSE AND THE FINANCIAL SHORTFALL

A claim that insurance has left a residual loss presupposes a standard of protection against which the beneficiary's unmet expenditure is measured. The sum payable under a policy measures performance of the insurer's promise, whereas a programme intended to secure medical treatment or enable replanting may be judged against the expenditure required to achieve that purpose. A policy can meet its terms despite leaving that expenditure partly unfunded. Equally, a sovereign policy purchased to provide immediate liquidity may fulfil its assigned role within a recovery plan financed through several sources. Assessing the adequacy of insurance therefore requires the programme's protective purpose to be specified, including the contribution expected from other resources. Otherwise, criticism of a policy ceiling risks assuming that the insurer was contracted to meet a need that the public purchaser intended to finance separately.

Residual loss is used here for the financial remainder, or the associated unmet recovery need, measured against that stated purpose at a stated time. Familiar insurance mechanisms explain much of it. An insured person may retain a deductible or expenditure above a benefit limit; an index may fail to trigger despite substantial damage. An applicant refused admission has no entitlement under the proposed contract, but may have a statutory claim concerning the ground of refusal. Once a covered benefit has accrued, failure to pay engages the existing obligation and its payment conditions. Grouping these circumstances under residual loss permits examination of the protection reaching the beneficiary while retaining the legal distinctions on which enforcement depends.

For a single period, let L represent realised financial loss and P the insurance payment received by the beneficiary or paid on the beneficiary's behalf. After separate public assistance A has been applied to that loss, positive uncovered loss is $\max(L - P - A, 0)$. This quantity differs from the signed balance $L - P - A$, which permits a payment in a no-loss state to offset a deficit in a loss state when averages are calculated. Equal or closely matched expected values $E[L]$ and $E[P]$ are consistent with very different protection during individual events because those expectations do not identify the joint distribution of loss and payment.

An accrued benefit requires a separate notation. If C is the sum legally due under the policy or statute, $\max(C - P, 0)$ identifies an unpaid entitlement once the payment date has passed. A claimant seeking that amount relies on the promise and satisfaction of its conditions, whereas a complaint that $\max(L - P - A, 0)$ remains too large depends on the standard of protection against which the programme is being assessed. Both complaints can arise from the same illness or flood. Reducing them to a single allegation of inadequate insurance would obscure the stronger claim to payment where the beneficiary has already fulfilled the contractual or statutory requirements.

These measures must be applied at the level at which the loss is borne. Crediting a sovereign payout against a household's loss before relief becomes available confuses public liquidity with private resources. Deducting both the treasury receipt and assistance financed from it counts the same funds twice. Where a programme provides treatment or agricultural services in kind, timely access may also be a more useful measure than a cash valuation: reimbursement after the treatment or planting deadline can leave the intended protective purpose unfulfilled. A household borrowing in the interim incurs interest

[4] ASEAN Declaration on Strengthening Social Protection (9 October 2013), introductory qualification and principles 4–5, 8 and 10, in ASEAN Secretariat, *ASEAN Documents Series 2013* (2014) 30–32, especially 31 https://asean.org/wp-content/uploads/2022/09/11.-November-2014-ASEAN-Documents-Series-2013.pdf; International Labour Organization, Social Protection Floors Recommendation, 2012 (No 202), paras 3, 7 and 9, in *Building Social Protection Systems: International Standards and Human Rights Instruments* (ILO 2021) 132–133 https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_protect/@soc_sec/documents/publication/wcms_651219.pdf.

[5] MediShield Life Scheme Act 2015 (Singapore) (2020 Rev Ed), s 3; Philippine HIV and AIDS Policy Act, Republic Act No 11166, ss 42 and 49(f); Presidential Decree No 1467 (Philippines), as amended by Republic Act No 8175; Financial Services Act 2013 (Malaysia) (Act 758), sch 9, paras 7 and 16; Law on Disaster Management No 71/NA (Lao PDR), arts 43 and 45–47.

and charges, whose recovery depends on the governing duty and rules of causation. Repayment of principal is not an additional loss, and the use of existing savings finances current expenditure by reducing reserves available for later needs.

2.2 RETAINED RISK AND ACCRUED RIGHTS

The legal consequences of a shortfall follow from the obligation allegedly left unperformed. If a farmer's damage exceeds the policy ceiling, accurate adjustment and timely payment may exhaust the insurer's undertaking even though the farmer lacks the funds to replant. A challenge to that ceiling concerns the statutory powers under which the product was selected and the conditions attached to its public financing. The public purchaser can reconsider the coverage it buys; increasing the private insurer's liability beyond the agreed limit requires a separate legal basis. By contrast, where a regional office has failed to release an approved indemnity, the farmer can pursue the accrued benefit through the claims procedure. A dispute about the design of future cover should not postpone enforcement of the payment already owed.

The difference also governs the evidence that a reviewing body needs. The farmer seeking payment must establish the approval and the sum outstanding. To contest a publicly chosen ceiling, the farmer needs access to the authority's powers and the basis for their exercise, including any statutory restriction on retained exposure. If existing law provides no right to reasons or reconsideration, a proposal to confer one must identify the decision to which it attaches and the body capable of granting effective relief.

Product selection must also be judged at the time of the decision. A government may reasonably purchase modest cover for a broad population when its budget cannot finance full recovery for everyone. The later occurrence of a severe loss is consistent with such a choice, provided the retained risk was within the authority's powers and had been assessed against feasible alternatives. Persisting with the same product after repeated operational failures raises a different issue. Contemporaneous design records allow a reviewer to distinguish a foreseeable tail loss from the collapse of an assumption on which the authority relied, and to examine whether renewal took proper account of the evidence that had since become available.

2.3 THE BASIS OF COMPARISON

The comparison turns on powers over exposure that are distributed differently across the schemes. In a retail contract, the insurer ordinarily determines admission and applies its policy terms within statutory constraints. A subsidised programme may give a public board control over both the product and claims administration, as PCIC illustrates. Under sovereign insurance, the treasury receives a payment whose use depends on a further set of public decisions. These differences make the identity of the beneficiary, premium payer and contractual recipient indispensable to an analysis of responsibility. They also explain why the review powers needed to correct an underwriting error may be inadequate to reconsider a public allocation.

The private-law examples identify the evidence through which policyholders can contest underwriting. Public purchasers exercise a different set of powers over programme design and financing, so the proposed obligation requires a domestic public-law foundation appropriate to those powers.

3 UNDERWRITING INFORMATION AND THE PROOF OF INSURANCE DECISIONS

3.1 ACTUARIAL CREDIBILITY AND THE PRICE OF INCLUSION

An insurer pricing cover for a previously excluded population must estimate claims that its existing portfolio has never recorded. Payments made under narrower policy terms reflect the exclusions and benefit limits then in force; extending those observations to broader cover requires assumptions about both the omitted expenditure and the newly admitted risks. For a public authority financing inclusion, the source of a high premium therefore affects the intervention it can sensibly adopt. Better information may reduce uncertainty about claims, whereas a subsidy addresses the affordability of the premium ultimately charged.

Actuarial credibility theory describes the dependence of an estimate on the reference population when individual experience is sparse.[6] In Bühlmann's model, observations conditional on a risk parameter Θ have common mean $\mu(\Theta)$, variance $v(\Theta)$ and zero conditional cross-covariances. With finite second moments, $m = E[\mu(\Theta)]$ denotes the collective mean, $v = E[v(\Theta)]$ expected process variance and $a = \mathrm{Var}[\mu(\Theta)]$ the variance of hypothetical means. For $a > 0$ and n equally exposed observations, the credibility weight is:

$$Z = \frac{n}{n + K}, \qquad K = \frac{v}{a}$$

The estimate combines the individual sample mean and m with weights Z and $1 - Z$. Bühlmann–Straub accommodates unequal exposures by weighting observations and adjusting their conditional variances. At a fixed positive K, more observations increase the weight Z. For a given individual sample mean, greater credibility raises the estimate if that mean exceeds m and lowers it if the mean falls below m. An applicant with little claims history is therefore rated principally against the collective to which the underwriter has assigned the risk.

[6] Hans Bühlmann, 'Experience Rating and Credibility' (1967) 4(3) *ASTIN Bulletin* 199, 204–207 https://www.casact.org/sites/default/files/database/astin_vol4no3_199.pdf; Hans Bühlmann and Erwin Straub, 'Glaubwürdigkeit für Schadensätze' (1970) 70 *Mitteilungen der Vereinigung Schweizerischer Versicherungsmathematiker* 111, 114, 116–118 and 123–125 https://doi.org/10.5169/seals-967024.

Bayesian prediction incorporates parameter uncertainty through the posterior distribution; in the normal–normal example discussed by Rachev and his co-authors, the posterior mean likewise combines prior and observed information.[7] Commercial pricing requires further provision for expenses and risk. Wang's distortion operator models the latter through a transformation of the loss distribution whose parameter determines the risk adjustment.[8] A public purchaser can therefore distinguish the estimate of expected claims from provision for expenses and the insurer's charge for bearing risk. Requiring those components to be identified permits scrutiny of what a subsidy finances and of the evidence used to exclude a population or restrict its cover.

3.2 HISTORICAL UNDERWRITING COUNTERFACTUALS IN MALAYSIAN LAW

Under Schedule 9 to Malaysia's Financial Services Act 2013, an insurer seeking a remedy for misrepresentation must establish a breach within the applicable statutory category. For an individual entering, varying or renewing insurance wholly outside trade, business or profession, paragraph 5 imposes reasonable care in responding to the insurer's questions, together with a qualified duty concerning other matters known to affect underwriting. The insurer's conduct in obtaining that information forms part of the inquiry: paragraph 6(1)(c) makes the clarity and specificity of its questions relevant to reasonable care, and paragraph 5(6) deems compliance waived where an unanswered, incomplete or irrelevant response is left unpursued. Paragraph 5(5) separately addresses failure to request the prescribed information or confirmation.[9] An allegation of deficient disclosure must therefore be tested against the application actually presented to the consumer, including the insurer's treatment of gaps in the response.

For consumer general insurance and consumer life policies in effect for two years or less, the remedies appear in Part 3, Division 2 of Schedule 9. Paragraph 7(2) requires both the specified breach and proof that accurate information would have caused the insurer to refuse entry, variation or renewal, or to agree only on different terms. An insurer proving deliberate or reckless misrepresentation on the balance of probability may avoid the contract and refuse all claims under paragraph 15. For careless or innocent misrepresentation, paragraph 16 links relief to the underwriting counterfactual: refusal on any terms permits avoidance with return of premiums; other terms may be applied to the contract, and a higher premium may justify proportionate reduction of a claim.[10] The insurer must reconstruct its own underwriting practice at the time of the disputed transaction. A justification devised using current actuarial assumptions may describe a defensible contemporary price without proving what that insurer would then have charged.

Historical underwriting manuals and model versions are therefore potentially decisive evidence, especially where the asserted rule allowed exceptions. Reprocessing an application through a subsequently revised model risks substituting a later risk appetite for the one governing the contract. More specific retention rules, coupled with confidential production where necessary, could help courts and supervisors test the insurer's reconstruction. For life policies in force for more than two years during the life insured's lifetime, paragraph 13 restricts avoidance on its listed pre-contractual grounds to material fraud, whether or not the policies are consumer contracts. The consumer definition also excludes cover bought for business purposes, including by a smallholder with limited bargaining power.[11]

Bank Negara Malaysia addresses some of that vulnerability through its March 2024 Fair Treatment of Financial Consumers policy, which includes micro and small businesses within its regulatory scope. The vulnerable-consumer provisions, effective from 1 April 2025, extend to natural persons running those businesses. Mandatory standards require firms to assess vulnerable consumers' needs, accommodate them in product design and communicate intelligibly, with non-binding guidance marked separately.[12] An authorised requirement to state adverse underwriting grounds and retain the supporting evidence could develop that supervisory framework. Public purchasers face a related evidential problem when they defend a restrictive coverage choice: preserving the original appraisal enables a reviewer to distinguish the reasons for selection from a rationale constructed after an uninsured loss.

4 ADMISSION, CONTINUITY AND THE LIMITS OF RISK SELECTION

4.1 STATUTORY HEALTH COVER AND PRIVATE RENEWAL RIGHTS IN SINGAPORE

Singapore's MediShield Life Scheme Act 2015 removes individual underwriting from the basic decision to admit citizens and permanent residents. Section 3 establishes their membership under a scheme administered by the Central Provident Fund (CPF) Board, so refusal of a private supplement leaves the statutory benefit intact. Admission nevertheless coexists with differentiated financing: section 4(1B) authorises distinctions between insured classes, and regulation 9 prescribes additional premiums for specified pre-existing conditions. Payment for claimable inpatient and outpatient treatment remains governed by the statutory benefit rules.[13]

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7 Svetlozar T Rachev, John S J Hsu, Biliana S Bagasheva and Frank J Fabozzi, *Bayesian Methods in Finance* (John Wiley & Sons 2008) 22–23, 35–37, especially eqs (3.20) and (3.23) https://doi.org/10.1002/9781119202141; Bühlmann (n 6) 204–207.

8 Shaun S Wang, 'A Class of Distortion Operators for Pricing Financial and Insurance Risks' (2000) 67(1) *Journal of Risk and Insurance* 15, 17–22, 28 and 32–33 https://doi.org/10.2307/253675; Bühlmann and Straub (n 6) 114.

9 Financial Services Act 2013, s 129 and sch 9, paras 2, 4, 5(1)–(9) and 6(1)–(3), Attorney General's Chambers updated text as at 2 January 2025, 276–278 https://lom.agc.gov.my/ilims/upload/portal/akta/outputaktap/3252974_BI/ACT%20758%20%20AS%20AT%202025.pdf.

10 Financial Services Act 2013, sch 9, paras 7(1)(b)–(8) and 14–16, especially paras 7(2)(b), 7(7) and 16(2)–(4).

11 Financial Services Act 2013, sch 9, paras 2, 7(1) and 13(1)–(3); on regulatory standard-setting powers, s 123(1)–(3).

12 Bank Negara Malaysia, *Fair Treatment of Financial Consumers* (BNM/RH/PD 028-103, 27 March 2024), paras 3.1–3.2, 4.1, 5.2 (including fn 4), 7.1, 16.2, 16.5 and 16.26 https://www.bnm.gov.my/documents/20124/938039/pd-ftfc-mar24.pdf.

13 MediShield Life Scheme Act 2015, ss 3(1)–(3) and 4(1A)–(1B) https://sso.agc.gov.sg/Act/MLSA2015; MediShield Life Scheme Regulations 2015, S 622/2015, rr 8–9 https://sso.agc.gov.sg/SL/MLSA2015-S622-2015.

Amendments in 2025 raised the aggregate claim limit from S$150,000 to S$200,000 for admissions on or after 1 April. For approved outpatient treatment received on or after 1 June 2026, the regulations also prescribe an insured contribution of S$500 in an insurance period. The defined category includes renal dialysis, cancer drug treatment and radiotherapy, post-transplant immunosuppression and specified home-based care.[14] Companion MediSave provisions permit additional withdrawals for an insured member or dependant receiving a Ninth Schedule treatment to which that contribution applies. For each paying member, withdrawals for that insured person in an insurance period are capped at the lowest of S$500, the applicable contribution and the member's MediSave credit balance.[15] Households with sufficient savings can use this permission to meet an immediate treatment bill, but the withdrawal reduces their reserves for future healthcare. Its protective effect depends on resources already accumulated by the household.

Private cover introduces contractual exclusions above this statutory floor. Great Eastern's *GREAT SupremeHealth* policy (version AC11/25) excludes pre-existing conditions under clause 4.2.1 unless declared and accepted without exclusion, applies the general exclusions through clause 4.2.2, and preserves the MediShield Life benefit through clause 4.2.3 where the statutory scheme covers a condition excluded privately.[16] A patient may therefore retain basic cover while bearing expenditure excluded by the supplementary contract.

The contract also makes continuity valuable. Subject to its termination and variation provisions, clause 6.2 guarantees renewal upon payment of the premium. Failure to pay within the 60-day grace period terminates cover from the renewal date. Clause 7.1 then makes reinstatement conditional on the insurer's receipt of acceptable evidence of insurability within one year of that date, reserving its discretion to refuse the application. If the insurer approves reinstatement and the required premium is paid, the insurance period runs from the renewal date, but the exclusion covers treatment, medical services and supplies begun before reinstatement, together with later follow-up for the condition treated before that date.[17] A temporary inability to finance premiums can thus expose a policyholder whose health has deteriorated to renewed assessment and exclusions affecting continuing care.

Pauly, Kunreuther and Hirth analyse how premium structures can finance guaranteed renewability against subsequent health reclassification; Cochrane's contingent-settlement model addresses the financing of continued insurance after health changes.[18] For a government considering temporary premium support, the loss of an existing renewal right is consequently part of the cost of lapse. Preserving it may prevent a lasting reduction in supplementary protection, although the authority must weigh that expenditure against the treatment available under MediShield Life and competing uses of the subsidy budget.

4.2 PROTECTED INFORMATION AND HIV-RELATED UNDERWRITING

Insurers may also face restrictions on information that would otherwise inform classification. Singapore's Amended and Restated Moratorium on Genetic Testing and Insurance, issued by the Ministry of Health and the Life Insurance Association (LIA) in June 2025, binds insurers through LIA membership. It prohibits requests for predictive genetic results and adverse use in health insurance and Integrated Shield Plans, permits beneficial use of a disclosed result, and allows adverse use for specified higher-value products only under cumulative product, threshold and approved-test conditions. Diagnostic information, research and national familial hypercholesterolaemia screening receive separate treatment.[19] Compliance depends on the evidence the underwriter actually used. Independently documented clinical findings must be distinguishable from protected predictive information relabelled as a medical condition.

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[14] MediShield Life Scheme (Amendment) Regulations 2025, S 231/2025, rr 1, 6(a)–(b) and 14 https://assets.egazette.gov.sg/2025/Legislative%20Supplements/Subsidiary%20Legislation%20Supplement/231.pdf; MediShield Life Scheme (Amendment) Regulations 2026, S 323/2026, rr 1, 2(a) and 8 (inserting Seventh Schedule pt 5) https://assets.egazette.gov.sg/2026/Legislative%20Supplements/Subsidiary%20Legislation%20Supplement/323.pdf; principal Regulations, r 2 (definition of 'approved outpatient treatment').

[15] Central Provident Fund (Medisave Account Withdrawals) (Amendment) Regulations 2026, S 324/2026, rr 1, 14 and 18, inserting r 21E and the Ninth Schedule https://assets.egazette.gov.sg/2026/Legislative%20Supplements/Subsidiary%20Legislation%20Supplement/324.pdf. Regulation 21E(1)–(4) defines the patient, treatment and contribution conditions and the additional withdrawal limit.

[16] Great Eastern Life Assurance Company Limited, *GREAT SupremeHealth* (sample policy, version AC11/25), cls 2.1 and 4.2.1–4.2.3, 31 and 38–39 https://isomer-user-content.by.gov.sg/3/36d94fb1-7525-4138-9622-580828721291/GREAT%20SupremeHealth_AC1125%20Policy%20Contract_v1.0_%28Sample%29.pdf.

[17] Great Eastern (n 16), cls 5.1, 6.1–6.6 and 7.1–7.3, 39–44, especially cls 6.3 and 7.1.1–7.1.3.

[18] Mark V Pauly, Howard Kunreuther and Richard Hirth, 'Guaranteed Renewability in Insurance' (1995) 10(2) *Journal of Risk and Uncertainty* 143, 144–148 and 150–153 https://doi.org/10.1007/BF01083557; John H Cochrane, 'Time-Consistent Health Insurance' (1995) 103(3) *Journal of Political Economy* 445, 447–451 and 460–461 https://www.johnhcochrane.com/s/Cochrane-time-consistent-health-insurance-JPE.pdf.

[19] Ministry of Health and Life Insurance Association Singapore, *Amended and Restated Moratorium on Genetic Testing and Insurance* (3 June 2025), introduction B–C, paras 2–11 and table 1 https://www.lia.org.sg/media/4588/amended-and-restated-moratorium-2025.pdf. Table 1 sets thresholds at the higher of the applicable 99th-percentile benefit threshold or the fixed floor: S$2 million for life and total permanent disability, S$3,000 monthly for each defined long-term-care category, S$500,000 for critical illness and S$10,000 monthly for disability income, subject to approved-test and aggregation conditions. Paragraph 6 permits beneficial use of a disclosed result; paragraph 10 makes compliance a condition of LIA membership.

The Philippine HIV and AIDS Policy Act imposes statutory restrictions. Section 42 protects private health maintenance organisation (HMO) coverage and private life insurance against denial or deprivation based on HIV status, and delegates implementation to the Insurance Commission. Section 49(f) prohibits exclusion from health, accident or life insurance and credit or loan services 'solely or partially' because of actual, perceived or suspected HIV status, subject to its proviso concerning concealment or misrepresentation upon application.[20] On the interpretation advanced here, an insurer that partly relies on HIV status cannot justify the resulting exclusion merely by identifying another medical concern. The statutory language requires examination of the grounds contributing to the refusal.

Paragraph 2 of Circular Letter No 2019-30 nevertheless permits an HMO to suspend acceptance of a newly diagnosed applicant for up to one year from the start of continuous antiretroviral therapy, to assess adherence and efficacy. Paragraph 7 permits suspension or denial for other impairments that warrant the same outcome irrespective of HIV status.[21] The strongest defence of paragraph 2 rests on the Commission's delegated responsibility to implement access in a market retaining medical underwriting: a clinician's assessment of present stability may require further evidence, and temporary deferral can allow that evidence to emerge. Its lawfulness should therefore depend on the medical ground and the duration imposed, rather than the description 'temporary suspension' alone.

An automatic waiting period triggered by recent diagnosis or treatment presents the harder case. The applicant remains outside the HMO cover sought throughout the postponement, and recent commencement of antiretroviral therapy becomes an operative reason for exclusion. An independently assessed impairment attracting the same deferral in a person without HIV fits paragraph 7's rationale. A fixed period imposed simply because treatment has begun instead engages the prohibition on partial status-based exclusion. Within paragraph 2's one-year maximum, the HMO should be required to support the chosen postponement with identified clinical findings and set a review date suited to those findings.

The Malaysian and Philippine provisions accordingly require different uses of an underwriting file. A Malaysian insurer invoking Schedule 9 must reconstruct the decision it would have made on accurate information, whereas an HMO challenged under section 49(f) must address the considerations on which it actually withheld cover. A hypothetical independent justification cannot resolve whether a prohibited ground contributed to that refusal. In *People v Tuyay*, when examining an additional tax-amnesty exclusion, the Philippine Supreme Court reaffirmed that implementing regulations cannot alter the statute they execute.[22] Applying that principle here depends on construing postponement within the Act's prohibition. The Commission should amend paragraph 2 to require individual clinical criteria applicable irrespective of HIV status, with reasons for the duration and prompt reconsideration as the evidence changes.

5 PUBLICLY SUBSIDISED CROP INSURANCE AND RETAINED AGRICULTURAL LOSSES

5.1 STATUTORY PRODUCT POWERS AND THE CONSEQUENCES OF CLAIMS DELAY

The Philippine Crop Insurance Corporation (PCIC) combines public powers over insurance design with responsibility for settling the farmer's claim. Under Presidential Decree No 1467, as amended by Republic Act No 8175, insurable production costs include agricultural inputs and the farmer's labour, and the Board may extend cover to a portion of expected yield. Section 5 entrusts premium rates and sharing to the Board, subject to Presidential approval and conditions governing support for subsistence farmers cultivating up to seven hectares; section 10.2 permits the Board to refuse or limit cover according to the risk.[23] Executive Order No 60 of 2024 restored the corporation's attachment to the Department of Agriculture for policy coordination.[24] A producer disputing the amount of protection available must therefore distinguish the Board's exercise of these statutory powers from the regional administration of an existing policy.

Government premium subsidies supplied 95.6 per cent of PCIC's premium income in 2021, according to the World Bank's 2023 review. In that year, the corporation issued approximately 2.49 million agricultural policies within a total of 3.36 million across all lines, covering 29 per cent of national rice hectarage and 19 per cent of corn hectarage.[25] These policy counts describe seasonal insurance activity, so they cannot be read as a count of distinct farming households. The review's findings on low sums insured and indemnity calculations varying by crop and cultivation stage are more directly relevant to the depth of

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[20] Philippine HIV and AIDS Policy Act, Republic Act No 11166 (20 December 2018), ss 3(h), 42 and 49(f) https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/87423.

[21] Insurance Commission, Circular Letter No 2019-30, *Guidelines in the HMO Underwriting of Applicants with Actual, Perceived, or Suspected Human Immunodeficiency Virus (HIV) Status* (21 June 2019), preamble and paras 2–7 https://site.insurance.gov.ph/wp-content/uploads/2022/09/CL2019_30.pdf; Executive Order No 192 (12 November 2015), s 4 https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/5/65785. Paragraph 6 requires prior Commission approval of specified modifications and retains the non-discrimination condition.

[22] *People v Tuyay*, GR No 206579 (1 December 2021) 917 Phil 10, 19–26, especially 25 https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68168.

[23] Presidential Decree No 1467 (11 June 1978), ss 3.1 and 10.1–10.2 https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/26/14939; ss 1 and 5 as substituted by Republic Act No 8175 (29 December 1995), ss 3 and 5 https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/4027.

[24] Executive Order No 60 (13 May 2024), ss 1–2 and 4 https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/5/97388.

[25] World Bank, *Reforming Agricultural Insurance in the Philippines: Review and Roadmap, Technical Report and Recommendations* (2023) 27–28, s 2.6 https://documents1.worldbank.org/curated/en/099011124112030709/pdf/P17115119c158d098191a211c1aee1e3515.pdf; World Bank, *Reforming Agricultural Insurance in the Philippines: Review and Roadmap, Policy Summary and Recommendations* (2023) 14 https://documents1.worldbank.org/curated/en/099011124112021299/pdf/P171151117b571003182b81b4c9d2d91025.pdf.

protection.[26] Where the government finances almost the entire premium, a dispute about how much recovery insurance can fund concerns the use of the subsidy as well as adjustment of the individual loss. A regional officer may calculate the contractual indemnity correctly even though the Board's chosen ceiling leaves the farmer unable to meet the cost that the public programme is intended to address.

Section 11-A of the amended charter gives the farmer recourse through the claims hierarchy. The regional manager or authorised delegate determines settlement, with regional reconsideration available within 30 days of receipt of the decision, followed by recourse to the PCIC President and appeal to the Board. The charter attaches its express 30-day filing period to the regional stage. It also prescribes a substantive consequence for administrative silence: under section 11-A.4, a claim 'shall be considered approved' if PCIC fails to act within 60 days after the submission of complete claim documents.[27] A claimant invoking this provision must establish the date of complete submission and the absence of action during the prescribed period. Clear acknowledgement of the documents received, together with prompt identification of any deficiency, is therefore necessary to make the statutory protection effective in practice.

Once those conditions are satisfied, the claimant can rely on statutory approval in place of an express favourable decision. The remaining interpretive difficulty is its effect on quantum. Section 11-A.4 does not specify whether silence approves the amount requested or establishes liability to be quantified under the policy, so a disputed amount requires the submitted claim, policy terms and legal effect of the approval to be considered together. Where PCIC has already determined a payable sum, the farmer seeks its release; where the corporation has applied a lawful coverage limit, the remaining complaint is about the product's adequacy. Combining those complaints would risk making an existing payment claim await reform of the coverage that public funds will purchase.

The Commission on Audit's report for 2020 recorded claims-processing overruns across PCIC regional offices against operational service standards, and the World Bank review examined delays and administrative weaknesses.[28] Those findings warrant examination through the charter's audit and reporting mechanisms, but the evidence required to invoke section 11-A.4 remains the completion of documents followed by 60 days of inaction. An internal service target may run from a different event. Records separating complete submission from the decision and eventual payment can therefore support both individual enforcement and supervision of recurring delay, particularly where a payment recorded as approved has yet to become available for the next planting season.

5.2 BASIS RISK AND THE DISTRIBUTION OF PROTECTION

Index insurance substitutes a predetermined indicator for assessment of each insured's loss, making the relationship between the trigger and household damage a question of product design. Jensen, Barrett and Mude's research on livestock insurance in northern Kenya examines the household risk that remains when cover responds to an aggregate index.[29] To isolate the consequence for public procurement, consider a constructed single-season example in which two contracts face identical probabilities of severe loss and payment. Premiums and complementary assistance are omitted, and resources cannot be transferred between seasons.

Table 1. Constructed joint probabilities of farm loss and index payment

Outcome	Farm loss L	Payment P	Contract X	Contract Y
Severe loss and trigger	100	80	0.20	0.10
Severe loss without trigger	100	0	0.05	0.15
Trigger without loss	0	80	0.05	0.15
No loss and no trigger	0	0	0.70	0.60

Both distributions sum to one, and each assigns probability 0.25 to severe loss and to payment. Consequently, E[L] = 25 and E[P] = 20 under either contract, with Var(L) = 1,875 and Var(P) = 1,200. Their association differs substantially: Cov(L, P) is 1,100 under X and 300 under Y, giving correlations of 11/15 (approximately 0.733) and 1/5 (0.200). From the variance identity, the net retained-loss variance is 875 under X and 2,475 under Y:[30]

$$Var(L - P) = Var(L) + Var(P) - 2Cov(L, P)$$

For a farmer suffering severe loss, the probability of receiving no payment is 20 per cent under X and 60 per cent under Y. Expected positive uncovered loss conditional on that event is 36 and 68 respectively, while the unconditional quantities E[max(L − P, 0)] are 9 and 17. The signed expectation E[L − P] nevertheless equals 5 under both contracts because, under Y,

[26] World Bank, *Technical Report* (n 25) 39–45, ss 3.4–3.5, especially table 5 at 45.

[27] Presidential Decree No 1467, s 11-A.1–11-A.4, inserted by Republic Act No 8175, s 13.

[28] Commission on Audit, *Annual Audit Report on the Philippine Crop Insurance Corporation for the Years Ended December 31, 2020 and 2019* (2021), pt II, observation 11, 92–95, especially paras 11.1–11.4 and tables 26–27 https://pcic.gov.ph/wp-content/uploads/2021/08/pcic_aar2020.pdf; World Bank, *Technical Report* (n 25) 60–68 and 87; Presidential Decree No 1467, s 12; Republic Act No 8175, s 17.

[29] Nathaniel D Jensen, Christopher B Barrett and Andrew G Mude, 'Index Insurance Quality and Basis Risk: Evidence from Northern Kenya' (2016) 98(5) *American Journal of Agricultural Economics* 1450 https://doi.org/10.1093/ajae/aaw046; authors' manuscript, 7–8 and 21–22 https://barrett.dyson.cornell.edu/files/papers/Basis%20Risk%20R%20and%20R%202016_2_26.pdf.

[30] The probabilities and monetary units in table 1 are stipulated. Cov(L, P) = E[LP] − E[L]E[P], and positive uncovered loss is max(L − P, 0). Correlation under X is exactly 11/15, rounded to three decimal places in the text.

more frequent payments in no-loss states offset more frequent failures to pay during loss. If the purchaser's objective is to finance recovery when severe damage occurs, equal expected payouts therefore conceal a substantial difference in protection. The conditional shortfall captures expenditure left unfunded in the very circumstances for which the programme was purchased.

That conclusion depends on the single-period assumptions. A farmer able to save a payment received in a benign season may carry it into a later disaster, and different premiums or access to credit may alter the attractiveness of either contract. Public purchasers must also consider how the alternative insurance is administered. Clarke and Wren-Lewis demonstrate how an objective index can help resolve commitment problems even though it introduces basis risk.[31] Accepting some mismatch may thus be defensible where timely, predictable payment improves on feasible indemnity or relief procedures. The purchaser must assess those alternatives against the recovery purpose and the means available to meet the remaining loss. Where a correctly calculated index leaves the trigger unmet, a challenge to the choice of trigger concerns the public decision to adopt the product, whereas a contractual claim remains available on its own terms if the insurer miscalculates the index or withholds a triggered payment.

6 SOVEREIGN INSURANCE AND THE GOVERNANCE OF EXPENDITURE

6.1 THE STATE'S INSURANCE CLAIM AND THE VICTIM'S RIGHT TO ASSISTANCE

A disaster victim in Lao PDR seeking emergency relief or help to restore a livelihood relies on article 43 of the Law on Disaster Management, which recognises rights to several forms of assistance and refers welfare provision to regulations. The content of a particular claim depends on the benefit sought and the rules governing its delivery; article 43 fixes neither a uniform monetary grant nor an individual share of the State's insurance receipts.[32] A household whose loss falls outside the sovereign policy's trigger may accordingly seek assistance under the domestic relief provisions. Conversely, payment under that policy puts money at the government's disposal without determining which households qualify for support or how competing recovery needs are to be prioritised.

Articles 45–47 establish disaster-management funds at central, provincial and district levels, with article 55(4) empowering the corresponding committees to authorise expenditure from their funds. The Ministry of Labour and Social Welfare administers and coordinates disaster-management functions under article 59, including the receipt and consideration of requests, within the law's reporting and inspection framework.[33] A challenge to expenditure from a statutory fund can therefore be directed to the committee exercising that fund-specific power. If insurance proceeds are held under separate project financing, the claimant needs the instrument governing that money and the delegation under which it is spent. The identity of the finance ministry as policyholder alone cannot resolve a dispute over another body's refusal to approve a recovery activity.

World Bank implementation records describe Lao PDR's cover through the Southeast Asia Disaster Risk Insurance Facility (SEADRIF) as running from 1 May 2025 to 30 April 2027, with an annual limit of US$8 million and maximum cover of US$16 million. The Bank recorded premium payment and policy activation on 30 July 2025. Following severe flooding, the Ministry of Finance received US$2 million on 1 September; SEADRIF reported initiating the payment within six business days of receiving the latest national impact data, which determine the payout through cumulative official counts of disaster-affected people.[34]

The World Bank's letter agreement makes withdrawals for premiums conditional on satisfactory updating of the government's contingency plan, requires the risk-transfer agreement to incorporate compliance with that plan, and provides for an accessible project grievance mechanism.[35] The Government consequently owes the Bank obligations extending beyond the purchase of cover. An affected person's claim for assistance, however, derives from domestic law or the conditions governing the benefit sought, so a complaint through the project mechanism must be connected to the power capable of securing relief. A procedure that receives a grievance can identify a stalled transfer or disputed allocation; whether its decision-maker can order payment or revise the allocation depends on the authority conferred on that office.

6.2 FROM TREASURY RECEIPT TO RECOVERY EXPENDITURE

By October 2026, the World Bank recorded approximately 65 per cent of the September 2025 payout as disbursed, with payments made for 15 of 39 approved activities across five provinces. Its report also recorded two further sovereign receipts of

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[31] Clarke and Wren-Lewis (n 3) 19–20.

[32] Law on Disaster Management No 71/NA (24 June 2019), art 43, original Lao text, 12 https://laoofficialgazette.gov.la/kcfinder/upload/files/71%E0%BA%AA%E0%BA%9E%E0%BA%8A2019.pdf; unofficial English translation (2020), 16 https://www.refworld.org/sites/default/files/2026-06/lao-dm-law-2020-eng-v2.pdf.

[33] Law on Disaster Management (n 32), arts 17, 45–47, 55(4), 55(11), 59(2), 59(6), 59(10)–(13), 59(15) and 63–65; unofficial translation 7, 17–18, 23–24, 27–28 and 31–32.

[34] SEADRIF Insurance Company, 'Lao PDR and SEADRIF Sign Sovereign Disaster Insurance with World First Reported Impact Trigger' (18 July 2025) https://seadrif.org/news/lao-pdr-and-seadrif-sign-sovereign-disaster-insurance-with-world-s-first-reported-impact-trigger/; SEADRIF, 'SEADRIF's New Policy Delivers US$2M Payout to Lao PDR in 6 Days, Using Official National Impact Data' (3 September 2025) https://seadrif.org/news/seadrif-insurance-company-makes-payout-of-us2-million-to-support-lao-pdr-government/; World Bank, *Lao PDR: Improved Access to Disaster Risk Financing (P505224), Implementation Status and Results Report*, seq 1, ISR05376 (7 October 2025) 1 https://documents1.worldbank.org/curated/en/099100725062515855/pdf/P505224-9cb635da-1ddd-47a0-855e-1609b65b91b9.pdf; World Bank, *Implementation Support Mission, 11–14 August 2026, Aide-Memoire*, para 3, 1.

[35] International Bank for Reconstruction and Development/International Development Association and Lao PDR, *Improved Access to Disaster Risk Financing Project, Letter Agreement* (1 July 2025), annex ss 1.02(h), 2.04(e), 3.02(b), 4.01(c) and 5.01, 4 and 7–9 https://documents1.worldbank.org/curated/en/099070125094519322/pdf/P505224-c28bf362-d32b-4f0d-8f5f-6a7a86daa942.pdf.

US$1 million each on 1 and 4 September 2026.[36] These figures concern the progress of expenditure against approved activities. Determining why a particular activity remained unpaid requires the approval and procurement records, together with the timetable under which implementing officials were working. The August implementation mission identified staffing shortages and procurement difficulties, recommended stronger reporting by disaster committees and observed that the Ministry of Finance did not select the activities financed by the payout.[37] A person contesting the choice of recovery projects therefore needs a response from the selecting committee, although the Ministry remains the appropriate institution to address when the disputed step is a transfer within its authority.

The Ministry's published contingency plan distinguishes these functions. In the stakeholder-consultation draft dated 18 June 2025, disaster-management committees select activities and approve expenditure, the Ministry of Finance undertakes transfer and accounting functions, and general complaints pass through Ministry of Labour and Social Welfare staff to the central committee's steering structure.[38] Since the published text remains a consultation draft, a challenge relying on its procedures requires confirmation against the accepted plan and the formal delegations governing the expenditure. Publication of those instruments would enable disaster victims to identify the office responsible for a refusal or delay, while allowing officials to distinguish a challenge to an approved priority from a request to carry out an authorisation already given.

The Philippine catastrophe-insurance pilot shows how a disagreement over allocation can obstruct the use of promptly paid insurance. After Typhoon Tembin, modelled losses triggered a payout exceeding observed damage in Davao del Sur, and officials disagreed over distribution, including possible use beyond the triggering province and towards future premiums. Their failure to complete the allocation report required for a Notice of Cash Allocation left the proceeds at the Bureau of the Treasury, although the insurer had met its contractual timetable. The second year of the pilot introduced revised allocation and reporting procedures.[39] Governments purchasing sovereign cover need to settle how such discrepancies are to be handled before they arise: a trigger may properly release money even though the geographical distribution of observed need differs from the model. The body authorised to resolve that discrepancy must be able to approve expenditure under the applicable budget rules if the purchased liquidity is to finance recovery promptly.

7 A PUBLIC DUTY TO JUSTIFY RETAINED EXPOSURE

7.1 PUBLIC POWER AND INSTITUTIONAL COMPETENCE

An authority that uses compulsory contributions, premium subsidies or sovereign finance to pursue a protective purpose also determines which losses must be met elsewhere. Beneficiaries may learn from a policy that a treatment is excluded or a rainfall threshold has not been crossed, yet the policy says little about the public choice to finance those terms, the alternatives rejected or the complementary assistance assumed to exist. That informational asymmetry is particularly pronounced when the State receives the insurance payment and several agencies control its expenditure. The beneficiary cannot assess the exercise of public power simply by establishing that the insurer has performed its promise.

The case for a duty of justification rests on that public responsibility. I propose an express domestic obligation requiring the authority responsible for selecting publicly financed or mandated protection, or allocating its proceeds, to justify the exposure left with intended beneficiaries. Legislation, or binding rules made under sufficient statutory authority, must identify the decisions covered and assign review to a body with jurisdiction over them. Existing procedures can carry the obligation where their powers suffice, but a claims officer authorised only to calculate an indemnity cannot reconsider the government's subsidy policy. The design of the remedy is therefore a question of institutional competence, involving both the authority that selected the protection and the reviewer empowered to require a fresh decision.

The authority's procurement file preserves the evidence available when it chose the coverage, allowing a reviewer to test the grounds offered after a loss against the appraisal that informed the original decision. At renewal, later evidence becomes part of the justification for continuing the product, as distinct from the reasons for purchasing it in the first place. Table 2 sets out the powers and entitlements through which the different complaints arise.

Table 2. Institutions controlling protection and the applicable legal tests

Setting	Finance and recipient	Controlling power or legal test
Singapore health cover	Statutory premiums and subsidies fund MediShield Life, and private premiums finance supplementary cover.	The CPF Board administers statutory membership and benefits; the supplementary contract governs private admission, renewal and reinstatement.

[36] World Bank, *Implementation Status and Results Report*, ISR08961 (n 1) 1–2 and 5.

[37] World Bank, *Lao PDR: Improved Access to Disaster Risk Financing (RETF, P505224), Implementation Support Mission, 11–14 August 2026, Aide-Memoire*, paras 4–5, 8 and 10–11, 2–3 https://documents1.worldbank.org/curated/en/099093026221524702/pdf/P505224-557bcece-1f62-41fd-bbdc-158513af5d4d.pdf.

[38] Lao PDR, *Contingency Plan for the Recipient-Executed Trust Fund, Improved Access to Disaster Risk Financing Project (P505224)* (draft for stakeholder consultation, 18 June 2025), ss 2.4, 2.8, 3.4 and 3.8.2(A), 23–25, 32–33 and 40–41 https://www.mof.gov.la/storage/document/1752221146_4_%E0%BB%81%E0%BA%9C%E0%BA%99%E0%BA%AA%E0%BA%B8%E0%BA%81%E0%BB%80%E0%BA%AA%E0%BA%B5%E0%BA%99%E0%BA%82%E0%BA%AD%E0%BA%87%20%E0%BA%AA%E0%BA%9B%E0%BA%9B%20%E0%BA%A5%E0%BA%B2%E0%BA%A7%20%28LCP%29.pdf.

[39] World Bank, *The Philippines Parametric Catastrophe Risk Insurance Program Pilot: Lessons Learned* (evaluation report, December 2020; published 2021) 37–40 and 75 https://documents1.worldbank.org/curated/en/600081624863743116/pdf/The-Philippines-Parametric-Catastrophe-Risk-Insurance-Program-Pilot-Lessons-Learned.pdf.

Setting	Finance and recipient	Controlling power or legal test
Philippine HMO underwriting	An individual or group applicant seeks privately financed health cover.	The HMO's grounds for postponement or refusal are subject to Republic Act No 11166 and Insurance Commission supervision.
PCIC crop insurance	Public premium support and applicable contributions finance indemnities to insured producers.	The Board exercises powers over products and premiums, subject to the charter's approval conditions. Regional claims decisions proceed through the statutory hierarchy, including deemed approval after 60 days of inaction following complete documentation.
Malaysian consumer insurance	Premium-paying policyholders claim contractual benefits.	Part 3, Division 2 of Schedule 9 to the Financial Services Act 2013 links remedies for qualifying consumer misrepresentation to historical underwriting. Paragraph 13 separately restricts avoidance of life policies in force for more than two years, subject to material fraud.
Lao sovereign disaster cover	Donor-supported premiums finance payments to the Ministry of Finance; victims claim domestic relief.	Committees select recovery activities, with Ministry transfers and expenditure governed by the applicable fund or project instruments. Article 43 provides the domestic basis for assistance claims.

7.2 REASONS, RECORDS AND REMEDIES

Under the proposed duty, the adopting authority publishes reasons connecting the main coverage boundaries to the programme's protective purpose and available funding. A ceiling chosen to keep premiums within a fixed budget warrants a different justification from an exclusion adopted because reliable claims data are unavailable. If officials assume that households can meet a deductible from savings, their reasons need evidence of that capacity; reliance on another assistance programme requires attention to its eligibility conditions and delivery timetable. For severe-loss protection, the authority's appraisal covers the likelihood and timing of payment during the events it intends to insure, including uncertainty in those estimates. This makes the decision open to scrutiny by a beneficiary whose objection is that the public purchaser has misunderstood how the retained expenditure can be financed. Domestic enactment gives practical effect to the International Labour Organization's recommendations on defined guarantees, complaint procedures and monitoring.[40]

An authority renewing a programme can use its existing reasons where performance continues to support them, provided it records changes affecting the original assessment. Repeated failures to reach the intended beneficiaries demand a fresh decision on the accumulated evidence. Individual refusals require reasons directed to the actual dispute: a farmer contesting the date of complete documentation needs the receipt record, whereas an applicant alleging prohibited discrimination may need supervisory examination of an underwriting file. Public authorities can secure the necessary records through programme rules and procurement terms, with confidential production to the reviewer when the evidence contains personal information or commercially sensitive models. Such safeguards permit scrutiny of the decisive grounds while limiting disclosure to what the dispute requires.

The enabling instrument also sets response periods, with urgent procedures where delay threatens treatment or livelihood recovery. Ordinarily, a failure to give adequate reasons warrants disclosure of the missing grounds or reconsideration by the authorised decision-maker. A reviewer returning a defective allocation to the disaster committee leaves the expenditure decision with the institution entrusted to make it; substitution of a different allocation requires a corresponding grant of remedial power. Payment orders rest on accrued benefits, and damages depend on the applicable substantive and remedial law. A claimant can thus enforce an unpaid indemnity while separately seeking reconsideration of a ceiling that leaves additional losses uncovered, with each request determined under the legal authority governing it.

7.3 ADMINISTRATIVE BURDEN, ADVERSE SELECTION AND OUTCOMES

Requiring elaborate reasons for every routine determination could consume the capacity needed to settle claims. Participating insurers may also recover the cost of additional retention and disclosure obligations through their premiums. The proposed duty should consequently use procurement files and actuarial assessments already generated at programme design, reserving individual investigation for contested grounds or departures from the published rules. During an emergency, officials need authority to release urgent assistance before completing the written reasons, subject to prompt recording afterwards. Without an accessible route to timely correction, officials could satisfy the reporting requirement while leaving a mistaken refusal undisturbed.

Rothschild and Stiglitz's analysis of adverse selection shows how an insurer competing for lower risks can undermine a pooling contract when information is asymmetric.[41] For a public authority maintaining broad admission at pooled rates, sustainable contributions and transfers form part of the coverage decision, together with the terms on which private insurers participate. Preserving a chronically ill policyholder's renewal rights through temporary premium assistance may avert a lasting loss of cover, but the subsidy consumes resources that could support other beneficiaries. Likewise, a crop programme offering modest insured amounts to many farmers accepts a greater shortfall for those suffering the most severe damage. The

[40] ILO Recommendation No 202 (n 4), paras 7–9 and 19–21, 133–134.

[41] Michael Rothschild and Joseph Stiglitz, 'Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information' (1976) 90(4) *Quarterly Journal of Economics* 629, 632–637 https://doi.org/10.2307/1885326.

distribution between those beneficiaries remains a public choice even when every claim is settled correctly, and the authority's budget and statutory purpose determine the grounds on which it can be defended.

In its report on disaster-risk financing, the ASEAN Secretariat documents differences in national instruments and administrative development that bear directly on the feasibility of insurance, reserves and contingent finance.[42] For the finance ministry, the cost of obtaining liquidity has to be considered together with its capacity to spend it. Buying a more responsive trigger achieves little for a recovery project held up by an unresolved allocation rule, just as a theoretically generous indemnity may be of limited use to a farmer who cannot finance planting before settlement.

Outcome monitoring should therefore follow the expenditure or service the programme was established to secure. Claims systems need to record when an approved sum was paid, so administrators can distinguish delay in determining liability from a failure to release money already due. For sovereign insurance, the ministry's transfer to an implementing agency remains an intermediate event, followed by procurement and delivery. If successive reports show that an approved recovery activity remains unfunded, the responsible officials need to identify whether the obstacle lies in allocation, transfer or implementation. Under the proposed duty, renewing the same programme then requires a reasoned response to that evidence, including reconsideration of the rule or procedure responsible for the repeated failure.

8 CONCLUSION

Publicly supported insurance distributes responsibility across decisions that confer different rights and permit different remedies. An insurer's payment may satisfy the policy even though a beneficiary still lacks the resources required for recovery; a lawful coverage limit may leave the public purchaser's choice open to challenge under the powers governing the programme. Where a benefit has already accrued, however, the claimant can pursue performance of that obligation. Residual loss provides a basis for connecting these inquiries because it keeps the beneficiary's unmet need in view as responsibility passes between private underwriting and public administration.

The proposed duty makes the authority answer for the exposure it has chosen to retain. Beneficiaries cannot reconstruct that choice from a policy exclusion or an announcement that the sovereign insurer has paid. They need access to the grounds on which public funds were committed and to the institution authorised to reconsider the disputed rule or allocation. The required evidence depends on the claim: a historical underwriting counterfactual, an allegation that a prohibited ground influenced refusal, and a challenge to public product selection each demand a different use of decision records. A carefully framed duty can support those inquiries while leaving payment and damages dependent on the substantive rights governing the dispute.

Equal expected insurance payments can conceal large differences in severe-loss exposure, and rapid sovereign payment can precede a lengthy domestic expenditure process. The proposed duty should therefore connect reasons and decision records to review of the protection actually delivered. Where delay threatens medical treatment or livelihood recovery, that review must be capable of securing timely reconsideration by the authority with power to act, alongside enforcement of benefits already due.

[42] ASEAN Secretariat, *Disaster Risk Financing and Insurance in Southeast Asia: Trends, Challenges, and Strategic Approaches* (ASEAN Socio-Cultural Community Trend Report No 12, 2025) viii, 9–11 and 18 https://asean.org/wp-content/uploads/2025/04/20240401_Trend-Report_DM-12-2025.pdf.

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TEACHING AND ASSESSING LEGAL REASONING WITH GENERATIVE AI IN THAI UNIVERSITIES

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ABSTRACT

An accurate legal memorandum prepared with generative artificial intelligence may conceal uncertainty about the proposition on which its advice depends. For a university awarding credit, the difficulty is to establish which legal judgements the student can defend when preparation has been assisted and questioning may itself supply part of the answer. This article combines a critical narrative review with doctrinal analysis of Thai law to develop an assessment sequence comprising a prepared memorandum, observed justification and controlled factual variation. Its central argument attaches independence to the intellectual operation being assessed. Finding a provision, interpreting a provision identified by an examiner and applying a supplied interpretation warrant different attributions of achievement. A fictional licensing problem, followed by Thai administrative provisions and a limited Singapore comparison, demonstrates how source selection, statutory language and evidence determine those attributions. Thai qualification standards and institutional policies provide the setting for examining the proposal's fairness, workload and treatment of student records. The article also distinguishes the evidence needed to mark present understanding from that needed to investigate misconduct, retention or an improvement caused by teaching. It proposes separate studies of assessment validity and educational effectiveness before wider adoption. By relating credit to the reasoning a student actually performs, the framework gives universities a more precise basis for certifying judgement in advice on which other people may rely.

Keywords: legal education; generative artificial intelligence; assessment validity; legal reasoning; evaluative judgement; Thai higher education

1 INTRODUCTION

A student advises a licensing authority to accept an application filed after the deadline because the official portal failed. The memorandum identifies an exception, cites the statute and reaches a plausible conclusion. Asked to justify the advice, however, the student treats proof of the outage as sufficient to compel acceptance. The examiner points to the word 'may' and explains that it confers a discretion, prompting the student to qualify the advice. At that point, the faculty has evidence of a legally significant correction, although the interpretation on which the correction depends has been supplied by the examiner. How should the mark recognise what the student has understood?

Permission to prepare the memorandum with generative artificial intelligence makes this question especially pressing. Faculties can properly reward the production of useful advice under conditions resembling professional work, but a qualification in law also certifies capabilities for which the finished document supplies incomplete evidence. Disclosure of the drafting assistance establishes how the work was prepared to the extent described; it leaves open whether the student can justify an adopted proposition, identify an omitted qualification or advise responsibly when the facts change. If those capabilities determine progression through a degree, the university must be able to defend the inference from the performance it observes to the competence it certifies. Kane's argument-based approach to validity provides the educational foundation for that defence.[1]

[1] Michael T Kane, 'Validating the Interpretations and Uses of Test Scores' (2013) 50 *Journal of Educational Measurement* 1, 1–3 https://doi.org/10.1111/jedm.12000.

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Faculties can already draw on assessment designs that combine explicit permissions with changes to the work examined, requiring candidates to justify decisions, explain source choices and respond to unfamiliar scenarios. The revised AI Assessment Scale, Corbin, Dawson and Liu's structural analysis, and the Defend component of Elkhodr and Gide's SAGE framework develop different aspects of this approach.[2] In applying such designs to law, the examiner must specify the legal operation for which credit is claimed. Identifying an overlooked provision assists source selection; describing that provision as discretionary also supplies part of its interpretation. A student may reason well from either intervention, but the resulting performances warrant different conclusions about independent legal understanding.

The proposal developed here makes those distinctions central to marking and moderation. It extends the account of answerability and the explanation protocol in the related *Answerable* manuscript by working through the statutory choices that confront a Thai legal examiner.[3] Students prepare advice, justify its legal and evidential premises under observation, and respond to a controlled factual variation. The examiner records enough of the exchange to identify which premises the student formed and which entered through questioning. A fictional licensing ordinance first makes the conditions of the problem explicit. Actual Thai provisions then require students to determine the legal source of a deadline, the meaning of electronic receipt and the conditions for relief, before a Singapore decision tests the reach of an apparently similar extension power. These applications support a disciplinary specification of established assessment methods and a design for investigating their validity.

The article combines a critical narrative review with doctrinal analysis. The educational literature is selected for its treatment of score interpretation, evaluative judgement and performance under technological assistance; empirical findings are examined by reference to the population, intervention, outcome and timing of each study. Thai legislation is read in its original language, with short quotations used where the wording controls the analysis and English renderings provided for that purpose. The proposed sequence is then evaluated against institutional requirements, the evidence an examiner can obtain and the practical costs of obtaining it.

2 WHAT A UNIVERSITY CAN INFER FROM ASSISTED WORK

2.1 THE ACHIEVEMENT REPRESENTED BY A MARK

If the rubric rewards independent identification, an examiner who discloses an overlooked statutory exception removes the opportunity to observe that operation. The student may nevertheless interpret and apply the provision persuasively, deserving substantial credit under criteria assessing those achievements. Independence attaches to a specified intellectual operation: receiving a citation can leave the student to interpret the provision independently. A moderator therefore needs to know both what the criterion rewards and which part of the reasoning the examiner supplied.

Even a carefully justified mark supports a limited inference beyond the encounter. A familiar problem, a helpful intervention or an unusually straightforward variant may account for performance that the student cannot reproduce elsewhere, so generalisation depends on the selection of problems and occasions as well as the consistency of marking. Moderators who agree numerically may share an erroneous statutory interpretation; reviewing their reasons and treatment of defensible alternative readings is therefore part of validating the score.

A candidate who interprets a supplied source pack has not thereby demonstrated an ability to find missing authority or discover through consultation what the client is trying to achieve. Those additional demands limit extrapolation to professional work even when the exercise uses authentic documents.

A course that permits a strong product mark to compensate for every weakness in the observed component may pass a student who has not demonstrated an essential capability. Conversely, an examiner who introduces an independent-reasoning threshold after submission changes the basis on which students undertook the work. Course teams should settle such minima prospectively, explaining which achievement the qualification certifies and where further assessment is needed. Kane's distinctions between scoring, generalisation, extrapolation and decision require a separate justification for each use of the same performance, including the educational consequences of treating a particular score as sufficient.[4]

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2 Mike Perkins, Jasper Roe and Leon Furze, 'Reimagining the Artificial Intelligence Assessment Scale (AIAS): A Refined Framework for Educational Assessment' (2025) 22(7) *Journal of University Teaching and Learning Practice*, 10–11, 19–20 https://doi.org/10.53761/rrm4y757; Thomas Corbin, Phillip Dawson and Danny Liu, 'Talk Is Cheap: Why Structural Assessment Changes Are Needed for a Time of GenAI' (2025) 50 *Assessment & Evaluation in Higher Education* 1087, 1091–1095 https://doi.org/10.1080/02602938.2025.2503964; Mahmoud Elkhodr and Ergun Gide, 'Assurance by Design: Embedding the SAGE Defend Step in AI-Integrated Higher Education Assessment' (2026) 11 *Frontiers in Education* 1872630, s 6.3, table 5 https://doi.org/10.3389/feduc.2026.1872630.

3 Albert Tan and Panupong Chalermsin, *Answerable: Teaching Law When the Machine Can Write* (unpublished manuscript, undated) 4–5, 300–301.

4 Kane (n 1) 25–29, 45–46.

Table 1. Assessment claims and the evidence appropriate to them

Claim	Evidence the task can provide	Additional warrant needed
Quality of the assisted memorandum	Accuracy, support and usefulness of the submitted advice, assessed under product criteria.	Individual understanding requires evidence of the student's judgement about that advice.
Understanding demonstrated now	Interpretation and application under recorded conditions of source access and assistance.	Generalisation requires further tasks and dependable scoring.
Independent source selection	The student's search, choice of authority and reasons for treating it as governing.	A supplied source pack permits assessment of selection within that pack and interpretation.
Retention and transfer	Later performance tests retention; unfamiliar problems test transfer.	Comparable resources, adequate task sampling and intervening learning must be considered.
Compliance with assessment rules	Evidence of conduct considered under the rule in force and the disciplinary procedure.	The memorandum and observed response do not by themselves establish how the student prepared the work.
Improvement attributable to teaching	Differences between credible instructional comparison groups.	Allocation, baseline differences, follow-up and competing explanations must support causal attribution.

2.2 ASSISTANCE, PERFORMANCE AND LEARNING

A faculty teaching efficient professional production has reason to value a tool that helps students complete useful legal work more quickly. In Choi, Monahan and Schwarcz's experiment, law students and recent graduates completed legal tasks substantially faster with GPT-4, although improvements in document quality were smaller and less consistent.[5] The investigators graded documents and measured completion time. A faculty using those findings to justify assisted drafting should therefore assess the productivity it wishes students to acquire, then obtain separate evidence if its qualification also certifies their ability to defend the resulting analysis.

The educational consequences of that assistance depend in part on how the system teaches. Among nearly a thousand pupils at one Turkish high school, Bastani and colleagues found that both AI conditions improved assisted mathematics practice, yet pupils using GPT Base subsequently performed worse than controls on unassisted tests within the same sessions. A tutor with safeguards mitigated that adverse effect, although its users gained no demonstrated unassisted advantage over controls. In undergraduate physics, Kestin and colleagues obtained stronger immediate post-lesson performance with a carefully designed tutor than with classroom active learning.[6] The differences in pedagogy and delivery preclude a single inference about generative assistance across these interventions. Their common focus on performance soon after instruction also leaves legal educators with the question identified by Soderstrom and Bjork: how much of an apparent gain persists after the conditions supporting acquisition have receded?[7]

A delayed legal problem can test whether the student retains the capability to interpret and apply a rule, and an unfamiliar statutory regime adds a demand for transfer. The conditions of follow-up must preserve that distinction. If the outcome concerns interpretation, the statutes can remain available after the interval; withdrawing them would add a test of recall to the investigation of retention. A student who successfully interprets an accessible source several weeks later has demonstrated something different from a student who reproduces yesterday's guided answer, even if the two documents receive identical product marks.

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5 Jonathan H Choi, Amy B Monahan and Daniel Schwarcz, 'Lawyering in the Age of Artificial Intelligence' (2024) 109 *Minnesota Law Review* 147, 147 https://doi.org/10.24926/265535.4225; author manuscript (revised 2024) 18–25, 36–39 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4626276.

6 Hamsa Bastani and others, 'Generative AI without Guardrails Can Harm Learning: Evidence from High School Mathematics' (2025) 122(26) *Proceedings of the National Academy of Sciences* e2422633122, 'Experimental Design', 'Main Results' and table 1 https://doi.org/10.1073/pnas.2422633122; Greg Kestin and others, 'AI Tutoring Outperforms In-Class Active Learning: An RCT Introducing a Novel Research-Based Design in an Authentic Educational Setting' (2025) 15 *Scientific Reports* 17458, 2–3, 7–8, fig 1 https://doi.org/10.1038/s41598-025-97652-6.

7 Nicholas C Soderstrom and Robert A Bjork, 'Learning Versus Performance: An Integrative Review' (2015) 10 *Perspectives on Psychological Science* 176, 176–177 https://doi.org/10.1177/1745691615569000.

3 LEGAL PREMISES, EVALUATIVE JUDGEMENT AND TEACHING

A legal adviser often has to establish the premise from which an apparently straightforward inference proceeds. A requirement that an application arrive by a fixed date may be qualified elsewhere by an extension power, allowing a student who reads only the deadline to reason consistently from an incomplete account of the law. Deductive validity establishes the relation between premises and conclusion; the soundness of the advice also depends on the premises the student has chosen. Haack's objection to treating law as an axiomatic system bears directly on this difficulty, because the apparently logical step may conceal contested interpretation or uncertain evidence.[8] Before awarding credit for a conclusion, the examiner must therefore examine how the student justified the rule and factual assumptions from which it follows.

Once the candidate has defended an interpretation, formalising its structure can expose a missing premise. If receipt within an additional period and official failure preventing timely filing are both necessary conditions, proof of only one does not establish a power to accept the application; even when the complete rule authorises acceptance, the official may retain discretion to refuse. A memorandum that converts permission into an obligation has changed the legal premise on which its conclusion depends.

The examiner should also distinguish the consequences of different objections. An applicant who began filing after the deadline, when the portal had functioned throughout, supplies a counterexample to an inference from lateness to official failure. The cause of another applicant's delay must still be established from evidence, including whether the timing and reach of an authenticated outage explain the failed attempt. Discovery of a statutory exception, by contrast, may require revision of the governing legal premise before either factual account can support a recommendation.

When students appraise the quality of their own or another person's work, they exercise what Tai and colleagues call evaluative judgement.[9] For a lawyer reviewing a generated memorandum, that judgement extends to the standard by which a proposition is accepted: an interpretation needs reasons grounded in the sources, factual assumptions require evidential support, and the recommendation must reflect uncertainty that remains. Bearman and colleagues' treatment of generated outputs and the processes producing them supports examining these decisions as part of the student's work.[10] A persuasive defence of sound advice may demonstrate judgement as clearly as the discovery of an error.

An unobserved written critique can itself be assisted. To examine the student's appraisal, an assessor can question it as it develops or require a supervised written analysis of the same sources and changed evidence. Dialogue allows clarification during the response, but a student interpreting an unfamiliar provision may need more time for reflection than a short oral encounter permits.

Students assessed on these decisions need opportunities to practise them, as Biggs's account of constructive alignment requires of the relationship between outcomes, teaching and assessment.[11] A teacher can reconstruct an argument with the class, examine competing readings and ask what evidence would alter the recommendation, then reduce support as students tackle further problems. Including sound arguments and legally immaterial variations prevents the exercise from becoming a search for the error the teacher has inevitably concealed. Once students record a provisional recommendation before receiving new evidence, the examiner can assess why they revise or defend it against a definite earlier judgement.

Reason-giving nevertheless captures only part of professional understanding. Eraut's distinction between implicit learning and tacit knowledge explains why people performing at similar levels may differ in their articulation.[12] A student may notice the significance of a changed fact before finding an adequate verbal formulation. Protected reading time, a written reconstruction or another problem can help an examiner distinguish that difficulty from a failure to understand the law. Where spoken advocacy is itself an outcome, its quality can be assessed explicitly. A statutory interpretation task requires particular care before speed or fluency of speech influences the judgement of legal understanding.

4 THE THAI INSTITUTIONAL SETTING

The Ministerial Regulation on Higher Education Qualification Standards B.E. 2565 identifies knowledge, skills, ethics and character as outcome domains. Clause 6 of the implementing notification requires institutions to take verifiable responsibility for their achievement through systems or methods supported by empirical evidence.[13] A faculty claiming that graduates can interpret legislation therefore needs performances from which it can reasonably infer that capability. A curriculum map showing interpretation in several modules does not answer that evidential question if the assessed work permits substantial drafting assistance.

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8 Susan Haack, 'On Logic in the Law: "Something, but not All"' (2007) 20 *Ratio Juris* 1, 15, 19, 24–25 https://doi.org/10.1111/j.1467-9337.2007.00330.x.

9 Joanna Tai and others, 'Developing Evaluative Judgement: Enabling Students to Make Decisions about the Quality of Work' (2018) 76 *Higher Education* 467, 471 https://doi.org/10.1007/s10734-017-0220-3.

10 Margaret Bearman and others, 'Developing Evaluative Judgement for a Time of Generative Artificial Intelligence' (2024) 49 *Assessment & Evaluation in Higher Education* 893–905, 'Defining Evaluative Judgement' and 'Intersections between Evaluative Judgement and Generative AI' https://doi.org/10.1080/02602938.2024.2335321.

11 John Biggs, 'Enhancing Teaching through Constructive Alignment' (1996) 32 *Higher Education* 347, 347, 350–353 https://doi.org/10.1007/BF00138871.

12 Michael Eraut, 'Non-formal Learning and Tacit Knowledge in Professional Work' (2000) 70 *British Journal of Educational Psychology* 113, 115–119 https://doi.org/10.1348/000709900158001.

13 Ministerial Regulation on Higher Education Qualification Standards B.E. 2565 (2022) (Thailand), cls 5, 7 and 9, *Royal Gazette* 139, Part 20 Kor (31 March 2022) 28 https://academic.uru.ac.th/document/07777.PDF; Higher Education Standards Committee, Notification on Details of Learning Outcomes under the Higher Education Qualification Standards B.E. 2565 (20 July 2022), cls 4 and 6, annex, bachelor-level skills, *Royal Gazette* 139, Special Part 212 Ngor (9 September 2022) 35 https://www.ops.go.th/th/content_page/download/1079/6940/16.

The ministry's notification of 9 October 2025 creates an additional curricular reason to address artificial intelligence. It directs institutions towards courses or integrated content amounting to at least six credits or two courses, with exceptions for specified information-technology, computer-science, computer-engineering and data-science programmes. The implementation circular of 16 October links this direction to knowledge of artificial intelligence, applications across subjects and ethics.[14] A law faculty can respond through statutory research, critical appraisal of generated advice and responsible handling of information.

Whether students may use a drafting system in a particular assessment still requires a course-design decision. Teaching them to evaluate generated interpretations need not entail permitting such assistance when they subsequently defend their own interpretation under supervised conditions with the statutes available.

At institutional level, the wording of the applicable policy affects how the prepared memorandum should be used. Chulalongkorn University's 2023 guidelines advise teachers to adapt assessment and, where assistance is permitted, to avoid directly assessing work that a system can answer. Under that approach, the memorandum can prepare the student for an assessed explanation. Prince of Songkla University's announcement of 17 February 2025 places stronger obligations on careful use, verification and disclosure, restricts the input of confidential or personal information, and assigns responsibilities for tools and training.[15] A course team working under either policy must tell students which component attracts marks and what work they are expected to perform themselves. The institutional differences also make a common national prescription for grading every assisted memorandum difficult to defend.

Faculties exercising this discretion must also attend to the conception of equality in section 17 of the Higher Education Act B.E. 2562. Alongside its prohibition of unfair discrimination, the provision recognises measures directed to removing barriers and facilitating learners' access to education on an equal basis with others (เพื่อขจัดอุปสรรค ส่งเสริม หรืออำนวยความสะดวกให้ผู้เรียนสามารถได้รับการศึกษาเช่นเดียวกับผู้อื่น). Identical examination conditions are therefore an inadequate starting point if they prevent a student from demonstrating the intended capability. A faculty that assesses Thai statutory interpretation through rapid English questioning needs to justify the linguistic demand in relation to that outcome. Academic freedom under section 14, with its accompanying respect for differing opinions, also gives reason to examine a defensible alternative reading on its merits when it departs from the examiner's preferred answer. These choices affect the preparation of graduates for the public-facing work reflected in section 12's provisions on academic service and community engagement.[16]

Thai teachers have already used legal problems to develop the capabilities at issue here. Srisawang's account of Tax Law II at Prince of Songkla University examines work from 2016–2019 and combines doctrinal instruction with cases, questioning and repeated assessment.[17] At Thammasat, Pongsapan and colleagues describe how professional examinations and differences between large compulsory courses and smaller electives shape opportunities for discussion and assessment.[18] These accounts favour adaptation within substantive modules. A licensing exercise can accompany administrative law, with later courses revisiting discretion and entitlement through different sources and facts. Programme committees can then distribute observations across the degree, deciding where assisted production serves the outcome and where independent source selection or interpretation needs to be demonstrated. The ASEAN University Network's programme-level quality guide supports scrutiny of alignment, validity, reliability and fairness within the institutions that apply it.[19]

5 AN ASSESSMENT SEQUENCE AND THE ATTRIBUTION OF CREDIT

5.1 PREPARATION, OBSERVATION AND REVISION

The course team begins by defining what the memorandum is for. It may attract a mark for the quality of the advice, or serve as formative preparation for the observed task where the institutional policy or learning outcome favours that use. In either case, students receive the assistance rules and criteria before starting. The memorandum identifies the governing provision, gives provisional advice and states the factual uncertainty on which the recommendation depends. A short disclosure records the assistance used and a consequential decision the student made about its output. Where access to commercial tools is unequal, the teacher can provide a common draft for appraisal, reserving independent tool selection for a course with the resources and criteria to assess that activity fairly.

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[14] Ministry of Higher Education, Science, Research and Innovation, Notification on Guidelines for Teaching Artificial Intelligence in Higher Education Curricula B.E. 2568 (9 October 2025), cls 3–7 https://www.ops.go.th/th/content_page/download/7221/13535/16?method=view; Office of the Permanent Secretary, Circular อว 0203.4/ว21128 (16 October 2025), item 4 https://www.ops.go.th/th/content_page/download/7218/13535/16.

[15] Chulalongkorn University, *Principles and Guidelines for Using AI Tools* (17 July 2023), guidelines 1–3 https://academic.chula.ac.th/storage/images/news/64b63eb35d104.pdf; Prince of Songkla University, Announcement on Guidelines for the Utilisation of Artificial Intelligence Technology B.E. 2568 (17 February 2025), cls 4.1, 4.2 and 5 https://medinfo.psu.ac.th/book/iso/book_009.php.

[16] Higher Education Act B.E. 2562 (2019) (Thailand), ss 12, 14 and 17, *Royal Gazette* 136, Part 57 Kor (1 May 2019) 54, 57–59 https://web.senate.go.th/bill/bk_data/490-6.pdf.

[17] Kritsarat Srisawang, 'Guidelines for Developing Analytical and Evaluation Skills in Tax Law II Curriculum' (2020) 4(2) *Law and Local Society Journal* 115, 118, 124–132 (in Thai) https://so04.tci-thaijo.org/index.php/llsj/article/download/242741/168699/870246.

[18] Munin Pongsapan, Junavit Chalidabhongse and Viravat Chantachote, 'Teaching Civil Law in Thailand: A Case Study of Thammasat University' in Keio Institute for Global Law and Development (ed), *How Civil Law Is Taught in Asian Universities* (Keio Institute for Global Law and Development 2019) 35, 39–42, 45–47, 50–51 https://keiglad.keio.ac.jp/wp/wp-content/uploads/2019/03/Asian-Global-Legal-Professions-Series-III-.pdf.

[19] ASEAN University Network, *Guide to AUN-QA Assessment at Programme Level* (version 4.0, 2020) 26–27, criterion 4 https://aunsec.org/application/files/2816/7290/3752/Guide_to_AUN-QA_Assessment_at_Programme_Level_Version_4.0_4.pdf.

During the observed component, the student has the agreed legal sources and access aids but receives no fresh generated analysis or outside substantive help. The examiner opens by asking for the basis of the advice and its strongest legal difficulty, allowing the student an initial account before directing attention to a particular provision. A factual variation follows, with protected reading time before the student decides whether to amend the recommendation. The proposed twelve-minute allocation gives four minutes to the original reasoning, two to reading, four to revision or defence, and two to unresolved questions and practical advice. This allocation derives from the explanation protocol in *Answerable* and provides a planning assumption for a narrow exercise.[20] A pilot must establish whether the sources can be read and the requested operations completed within it, especially where translation or an access adjustment increases the time needed.

An oral encounter gives an examiner opportunities to clarify an unexpected answer, at the cost of allowing the examiner's reactions to influence the performance. Joughin's analysis of oral assessment treats this interaction as a source of both educational value and potential distortion, and questions how readily performance under questioning can be extrapolated to professional work.[21] For a course assessing Thai statutory interpretation, a supervised written response to the same staged evidence may provide adequate observation with more time for reflection. An advocacy course has a stronger reason to retain oral questioning because responding in speech is itself part of the achievement being assessed.

5.2 WHAT EXAMINER INTERVENTION CHANGES

Whatever the format, the examiner can inadvertently perform a legal operation for which the student later receives credit. Pearce and Chiavaroli's taxonomy of presenting, repeating, clarifying, probing and leading makes the assessment purpose central to the permissibility of a prompt.[22] In a legal problem, that purpose must be read alongside the student's preceding answer. 'How does section 7 affect your advice?' identifies a potentially decisive source for a student who has overlooked the exception. Asked after the student has already discussed section 7, the same question may invite a fuller defence of an interpretation. A recording that begins with the examiner's question, omitting what preceded it, could lead a moderator to misclassify the assistance in either direction.

The intellectual effect of the intervention also varies. Once an examiner directs attention to an overlooked provision, the student may still have to interpret its conditions, reconcile it with the deadline and connect it to the evidence. Describing the provision as discretionary goes further, because the power–duty distinction is itself part of the legal interpretation. Even an explicit correction leaves room for capable application to fresh facts, provided the rubric recognises that achievement. A fixed deduction for every prompt would obscure these differences and could penalise linguistic clarification as heavily as the supply of the governing rule. Table 2 identifies the work that may remain open to assessment after different interventions; its classifications depend on the exchange in which the words occur.

Table 2. Examiner intervention and the legal work left to the student

Intervention	What the examiner may have supplied	Achievement still open to assessment
'Explain the basis of your advice.'	The examiner states the task without identifying a legal route.	The student identifies the governing issue and source, then justifies the premises.
'What do you mean by "invalid"?'	The examiner requests clarification of the student's own term.	The student distinguishes lateness from its asserted legal consequence.
'Please consider section 7.'	The examiner locates a potentially decisive provision.	The student interprets its conditions and reconciles it with the deadline.
'The authority has a discretion. What follows?'	The examiner supplies the distinction between power and duty.	The student applies that distinction and advises on the exercise of discretion.
The examiner gives the rule and explains the error.	The examiner supplies an interpretation and correction.	The student applies the supplied rule to fresh facts, where the criteria recognise that performance.

A useful record preserves the significant question, its place in the exchange and the reasoning that followed. 'Identified the causal condition before prompting' permits a different attribution of achievement from 'applied the causal condition after it was explained'. With that information, a moderator can examine whether the mark rewards the operation named in the rubric. The same record can protect a student whose valid answer was initially misunderstood: a dispute about the legal interpretation can be reconsidered against the source and the response, with less dependence on an examiner's later recollection of confidence or hesitation.

[20] Tan and Chalermsin (n 3) 300–301.

[21] Gordon Joughin, 'Dimensions of Oral Assessment' (1998) 23 *Assessment & Evaluation in Higher Education* 367, 370, 375 https://doi.org/10.1080/0260293980230404.

[22] Jacob Pearce and Neville Chiavaroli, 'Prompting Candidates in Oral Assessment Contexts: A Taxonomy and Guiding Principles' (2020) 7 *Journal of Medical Education and Curricular Development* 2382120520948881, 'A Taxonomy of Prompting' and 'Guiding Principles for Practice' https://doi.org/10.1177/2382120520948881.

5.3 CRITERIA AND DISCREPANT PERFORMANCES

The rubric needs enough resolution to distinguish finding an issue or source from interpreting a provision, evaluating evidence and drawing a conclusion. It should also recognise how the student handles uncertainty, justifies practical advice and responds to changed circumstances. These operations occur within one argument, so the criteria must specify the achievement rewarded under each heading to avoid counting the same insight repeatedly. For example, recognising that acceptance is discretionary may improve both the legal analysis and the recommendation, but two marks require two identifiable achievements, such as interpretation of the power and a justified proposal for its exercise.

Within each operation, a course can describe an unsupported response, partial reasoning, a substantially justified answer and an answer that also handles the strongest difficulty. Assistance is recorded alongside the quality judgement. If the examiner names an exception before the student identifies it, the encounter does not demonstrate independent identification. Where that is an essential outcome, the student needs another opportunity to demonstrate it. The student's subsequent interpretation can still attract the credit that its merits deserve. Published criteria should settle how reasoned correction contributes to the mark and whether progression requires a minimum level of independent achievement.

Disagreement between the memorandum and the observed response then directs the examiner to a particular educational question. A polished product followed by weak reasoning may reveal an interpretation the student has adopted inadequately, although the conditions of questioning must be examined before that conclusion is drawn. A defective memorandum followed by a persuasive correction can earn credit for revision if the task assesses it. Where both performances are strong, the examiner has more evidence of understanding under the specified conditions; where both are weak, the response can guide further teaching or reassessment. Any allegation about prohibited assistance concerns the student's earlier conduct and requires the separate procedure considered in section 8.

6 THE LICENSING PROBLEM AND THE GOVERNING SOURCE

6.1 A FICTIONAL ORDINANCE

The following ordinance and applicant are fictional. Section 4 requires a renewal application to be received by 30 June, and section 7 permits acceptance within the following seven days where failure of the authority's official portal prevented timely filing. Section 7 is stipulated to be the sole power to accept a late application. Receipt within seven days and official failure causing the inability to file on time are jointly necessary and sufficient for the existence of that power, although the authority retains discretion to refuse. All other application requirements are assumed satisfied. Stipulating the rule in this way allows the examiner to assess its application before introducing the source and interpretative difficulties of actual legislation.

The applicant attempts submission late on 30 June, receives an untimed error message and completes submission at 00.25 on 1 July. In a memorandum of up to 400 words, the student advises on the power to accept and the further information needed. The receipt proves lateness and establishes compliance with the seven-day outer limit. The screenshot has weaker evidential force because its time and provenance remain uncertain: an official outage, a local connection problem and an error by the applicant are all possible explanations. A careful recommendation therefore identifies the causal fact that must be established and preserves the authority's discretion after that condition has been met. Promising acceptance at this stage assumes both the cause of the delay and the outcome of a decision the ordinance leaves open.

The examiner then produces an official record showing an outage from 23.40 on 30 June until 00.20 on 1 July. This evidence confirms a system failure during a potentially decisive interval, but its effect on the advice depends on the applicant's attempt. An authenticated attempt during the outage strengthens the causal case. An attempt preceding it requires a different account, because the later failure could explain only an impeded retry before the deadline. A variant stipulating a functioning portal and a forgotten password does not satisfy the official-failure condition; a purely local internet failure has the same consequence under the fictional wording. Receipt beyond the seven-day period defeats the separate temporal condition even where an official outage caused the original delay.

The examiner can also leave the recommendation intact. A replacement receipt with a different colour and identical legally significant contents should elicit a reasoned decision to retain the advice. If students have been trained to change their answer whenever an examiner introduces a document, this variant tests whether they can identify the absence of a legal consequence. Its difficulty differs from reconstructing an attempted submission from competing technical records. Before comparing scores across variants, the course team must therefore examine whether each presents a comparable opportunity to demonstrate the operation being marked.

One further variant distinguishes an objection to an inference from evidence about the applicant. Consider the argument: 'If an official portal failure prevented timely filing, the application was late; this application was late; therefore an official portal failure prevented timely filing.' An applicant who began only after the deadline despite the portal functioning normally throughout is a counterexample to that inference, which affirms the consequent. The counterexample exposes the invalid route from lateness to official failure while leaving the cause of the applicant's actual delay open to proof. An authenticated outage record can establish part of that factual premise through independent evidence. A student who identifies the fallacy must still decide what advice the evidence warrants after the faulty inference has been discarded.

6.2 THAI RECEIPT, EXTENSION AND REASONS

Actual Thai law requires the student to establish a legal fact that the fictional ordinance has settled: when the application was received. Section 10 of the Act on Electronic Performance of Administrative Functions B.E. 2565 attaches receipt to communication through the agency's announced channel that has 'entered the electronic system' (ได้เข้าสู่ระบบอิเล็กทรอนิกส์) of the agency or official. An attempted transmission does not establish that entry. Even proof of entry at 23.59 requires examination of working hours, since the section treats entry outside working days or hours as receipt on the next working day and time. Section 11 governs subsequent electronic communication and related documents unless the applicant indicates otherwise.[23] An adviser therefore needs the agency's channel announcement and working hours alongside the technical record. With an outage near the end of a working day, those materials require the student to determine both statutory receipt and the cause of the failed filing.

Once receipt and lateness are established, the source of the deadline determines the route to relief under the Administrative Procedure Act B.E. 2539. Section 65 applies to a 'period fixed in an official's order' (ระยะเวลาที่กำหนดไว้ในคำสั่งของเจ้าหน้าที่) and permits retrospective extension where allowing expiry to stand would cause unfairness. That qualification governs the retrospective exercise of a power over an administratively fixed period; it does not make unfairness a general excuse for missing a deadline prescribed by legislation. For the latter, section 66 requires inability to act 'because of necessary circumstances that did not arise from that person's fault' (เพราะมีพฤติการณ์ที่จำเป็นอันมิได้เกิดขึ้นจากความผิดของผู้นั้น). The applicant must request relief within fifteen days after those circumstances cease, and the official may then extend the period and permit repetition of the earlier procedural step.[24] Although an official outage may establish an external impediment, the adviser must also determine how it prevented this applicant from acting and whether the circumstances arose through the applicant's fault. Proof that the portal failed does not compel an extension. The technical record bears on the duration of the impediment, the applicant's account of the failed attempt and the date from which the request period runs, each of which may change the advice about whether and when to seek relief.

The wording of section 66 also prevents mechanical transfer of the fictional exception. A local connection failure and a forgotten password were excluded from that exception because it specified failure of the official portal. Under the actual provision, the student must examine necessary circumstances and fault on the particular record. The source pack must also disclose any special licensing procedure, since section 3 qualifies the Act's relationship with special regimes by reference to fairness guarantees or administrative standards no lower than those in the Act, with separate treatment of statutory appeal or objection procedures and periods.[25] A candidate who assumes the general extension provision applies has skipped an antecedent source-selection question, even if the subsequent reading of section 66 is accurate.

The exercise can continue to a draft administrative decision. Section 37 requires reasons for written orders and written confirmations, subject to its scope and exceptions, addressing the material facts, governing provisions and considerations supporting the exercise of discretion. Section 38 permits specified exemptions through ministerial regulation.[26] Having identified a power to extend time, the student can be asked to formulate reasons for granting or refusing relief on the supplied facts. That task reveals whether the student can connect the discretion to a defensible decision and identify any further evidence needed before the authority acts. The resulting advice has a practical recipient: an applicant who needs to know what to prove and why the official may still refuse.

6.3 A LIMITED SINGAPORE COMPARISON

A student asked to use Singapore authority encounters a further source problem. In *Lee Pheng Lip Ian v Chen Fun Gee and others*, the Court of Appeal considered the Chairman of the Complaints Panel's power under section 42(2) of the then-applicable Medical Registration Act to extend a Complaints Committee inquiry. The Court applied section 53 of the Interpretation Act in upholding applications and grants after expiry, and upheld successive extensions within the statutory scheme.[27] The result depended on an extension power conferred by the Medical Registration Act. A licensing adviser invoking the decision must therefore identify a corresponding power in the legislation governing the licence before relying on the interpretative provision's treatment of expiry.

Across these exercises, the apparent problem of lateness requires progressively different legal work. The fictional ordinance stipulates the source and conditions of relief. The Thai problem adds the classification of a deadline, electronic receipt and the interaction of procedural statutes. The Singapore decision adds an interpretative rule operating upon an independently conferred power. A course can use that progression to investigate transfer after students have practised the additional source work. Its marking must then recognise that locating the applicable regime is an achievement beyond applying a rule already placed before the candidate.

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[23] Act on Electronic Performance of Administrative Functions B.E. 2565 (2022) (Thailand), ss 10–11, *Royal Gazette* 139, Part 63 Kor (12 October 2022) 1, 4 https://law.prd.go.th/th/file/get/file/2022112541b92aec2da04005f656bbb8ddeb7110114717.PDF.

[24] Administrative Procedure Act B.E. 2539 (1996) (Thailand), as amended, ss 65–66 (Council of State consolidated Thai text) 25 https://laws.md.go.th/laws-implement/home/viewfile/10-1-20230509531412N.pdf.

[25] Administrative Procedure Act (n 24) s 3.

[26] Administrative Procedure Act (n 24) ss 37–38.

[27] *Lee Pheng Lip Ian v Chen Fun Gee and others* [2020] SGCA 6, [18], [30], [42]–[45], [48] https://www.elitigation.sg/gd/s/2020_SGCA_6; Medical Registration Act (Cap 174, 2014 Rev Ed), s 42(2); Interpretation Act (Cap 1, 1999 Rev Ed), s 53, as cited at [42] (now Interpretation Act 1965 (2020 Rev Ed), s 53).

7 FAIRNESS AND THE ALLOCATION OF ASSESSMENT RESOURCES

Before attaching a progression decision to an oral response, a Thai law faculty needs to determine how much of the performance depends on demands that its course was designed to teach. An examiner may reasonably expect students in an advocacy course to formulate a spoken submission under pressure. That expectation takes a different form in a course concerned with interpreting Thai administrative legislation, where speed of English expression could obscure a defensible reading of the governing text. Section 17 of the Higher Education Act, with its prohibition of unfair discrimination and recognition of measures removing barriers to education, gives faculties grounds for examining how language, disability and economic circumstances affect the opportunity to demonstrate the assessed capability.[28] The course specification therefore needs to identify the linguistic work that attracts marks, as well as the law students are expected to understand.

With the outcome specified, the faculty can distinguish adjustments enabling access from interventions supplying a legal premise. Accessible statutory materials and protected reading time can allow a student to undertake the same interpretative work as other candidates, whereas a pointer to an overlooked exception changes the demand for independent source selection. Recording both simply as assistance risks penalising access provision through a rubric intended to measure independent judgement. Where oral expression is incidental, a supervised written response may allow the student to demonstrate the required reasoning more fully, with the same substantive criteria governing the mark.

Familiarity with the format helps, although preparation alone may leave students apprehensive, as Brogan, Gooding and Feld found in their study of law students' viva experiences.[29] Rehearsals and published examples should be accompanied by scrutiny of whether the procedure suppresses performance for reasons unrelated to the assessed law. When moderating a hesitant or incomplete answer, the examiner needs to identify where the student encountered difficulty and what opportunity was allowed for resolving it. A model answer that excludes a legally defensible alternative creates an avoidable obstacle even for a well-prepared and confident candidate.

Individual questioning also commits resources that could otherwise support teaching and feedback. At twelve minutes for the encounter and three for recording, a cohort of 120 requires thirty hours from one examiner, rising to sixty staff-hours if two examiners spend the full fifteen minutes on each student. Across the compulsory civil-law classes of 100–400 described by Pongsapan and colleagues in 2019, that allowance would consume twenty-five to one hundred single-examiner hours before preparation, moderation or reassessment.[30]

A faculty deciding whether to adopt the sequence needs its current enrolment and staffing figures, including accommodation and review costs. In a large compulsory course, those figures may favour supervised written variations, with dialogue reserved for outcomes requiring responsive questioning or spoken advocacy.

Joughin's treatment of interaction explains what is at stake in that choice: an examiner can explore an ambiguity, but the resulting performance also reflects the questions chosen and assistance given.[31] Programme committees can distribute observations across substantive courses, provided they coordinate criteria and retain records sufficient to review difficult cases. A shorter encounter may simply shift work to reassessment if the record does not disclose how the examiner arrived at a disputed mark.

8 ACADEMIC JUDGEMENT, DISCIPLINE AND STUDENT RECORDS

8.1 THE EVIDENCE REQUIRED FOR DIFFERENT DECISIONS

A discrepancy between the memorandum and the later response may disclose a teaching need long before it supports a finding about how the memorandum was produced. A student could have complied with every preparation rule and still misunderstand an exception; another could acquire understanding after obtaining prohibited help. The examining team should assess the legal work demonstrated under its published criteria. An allegation of misconduct calls for evidence connecting the student to prohibited conduct and an opportunity to answer that allegation through the university's disciplinary procedure.[32]

Text classification adds its own uncertainty. Weber-Wulff and colleagues documented limitations in the detection tools they evaluated, and Liang and colleagues found misclassification of non-native English writing in their samples.[33] Those findings give universities reason to scrutinise a detector's proposed use, especially where a linguistic feature attracting suspicion may also reflect the student's educational background. Before assigning weight to a classification score, a disciplinary committee needs an evidential justification fitted to the system and the writing, together with evidence of the conduct prohibited by its rules. Suspicion arising after submission cannot retrospectively turn an assessment of statutory interpretation into an unannounced test of English advocacy or impose a new requirement to surrender private conversation histories.

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[28] Higher Education Act (n 16) s 17.

[29] Michael Brogan, Bradley Gooding and Francine Feld, 'The Viva Voce: A Post-pandemic Assessment' (2024) 58 *The Law Teacher* 442, 447–454, 458, 462–463 https://doi.org/10.1080/03069400.2024.2359865.

[30] Pongsapan, Chalidabhongse and Chantachote (n 18) 50–51.

[31] Joughin (n 21) 370, 375.

[32] On differences between marking and formal misconduct reporting, see Leon Furze and others, 'The AI Assessment Scale (AIAS) in Action: A Pilot Implementation of GenAI-Supported Assessment' (2024) 40(4) *Australasian Journal of Educational Technology* 38 –55, publisher PDF 9–10, 12 https://doi.org/10.14742/ajet.9434. The Vietnamese pilot allowed some misuse to attract mark reductions outside formal misconduct reporting. Comparisons based on recorded disciplinary cases therefore require attention to which violations the institution records through that procedure.

[33] Debora Weber-Wulff and others, 'Testing of Detection Tools for AI-generated Text' (2023) 19 *International Journal for Educational Integrity* 26, 8–11, 25–27 https://doi.org/10.1007/s40979-023-00146-z; Weixin Liang and others, 'GPT Detectors Are Biased against Non-native English Writers' (2023) 4(7) *Patterns* 100779, fig 1 https://doi.org/10.1016/j.patter.2023.100779.

The marking record has a more immediate purpose. A student who challenges a score should be able to identify whether the dispute concerns what was said, the correctness of the legal interpretation or the credit permitted for a correction. That distinction gives the moderator a question capable of resolution through the response, the source and the criteria. It also allows a faculty to recognise learning during questioning without rewriting the mark awarded to the original memorandum.

8.2 RECORDS SUFFICIENT FOR REVIEW

As controller of assessment records, the university must first identify what it needs to collect and why. Under sections 22–24 of Thailand's Personal Data Protection Act, the necessity of the collection, notice to the student and an applicable legal basis require attention even where the educational purpose is legitimate. A contractual or public-interest ground must fit the processing undertaken; if the university relies on consent, section 19 governs its validity. A demand for complete AI conversation histories would also expose information about unrelated matters, potentially including health or disability information subject to section 26's additional conditions.[34] Collecting those histories merely because they exist would make the review of a legal judgement depend on access to much more of the student's life than the examiner needs.

For this assessment, the faculty needs a record from which a moderator can reconstruct the disputed intellectual operation. A note identifying the variant, a decisive prompt and the student's response may suffice in an uncomplicated case. Where the disagreement turns on the sequence or wording of an exchange, a fuller recording may preserve evidence that a summary loses. The faculty should decide in advance how these review needs justify collection and retention, with access restricted to the people performing the stated functions and deletion governed by section 37 and its exceptions.[35] An examiner implementing an approved adjustment does not ordinarily need the student's full medical history. Any request by the examiner for further medical information needs a specific justification connected to implementing the adjustment.

Where a faculty uses assessment records for research beyond the purposes notified at collection, section 21 requires notice and prior consent for the new purpose or authorisation under the Act or another law. The ordinary-data research ground in section 24(1) and the sensitive-data route in section 26(5)(d) carry distinct conditions, supplemented by the Personal Data Protection Committee's B.E. 2566 notification. Clause 6(1) expressly preserves informed consent to research participation (ความยินยอมในการเข้าร่วมการศึกษาวิจัย), subject to its stated exceptions, even where consent to processing is exempted. A secondary-use exception, qualifying impracticability or an ethical waiver therefore requires its own justification. Clause 5(4) additionally requires prior ethics approval or certification for the specified sensitive-data research route.[36] Resolving these conditions before assembling the research dataset allows the faculty to address participation separately from the legal basis for processing, including where a student has little practical choice about sitting the assessed exercise.

9 EVALUATING THE ADDITIONAL EVIDENCE

For a faculty considering adoption, the first empirical question is whether the further performance improves the grounds for an educational decision. Independent assessors could review either the memorandum alone or the memorandum together with the questioning record for the same cases, with allocation balanced across assessors. A separate team could then mark further legal tasks without knowing those initial judgements. Comparing the decisions against this independent sample of performance would permit examination of where the additional record resolved uncertainty about a student's reasoning and where it introduced a new source of error. The reference tasks would themselves need a defensible sample of legal work and specified conditions of assistance. Kane's approach to validity directs attention to these warrants for the use of evidence.[37]

Before recruitment, legal specialists should examine whether the variants demand comparable work and whether the proposed answers accommodate reasonable disagreement. Trial responses can reveal a question that discloses the decisive premise or a timetable that leaves too little opportunity to advise on uncertainty.

Independent marking of common responses, particularly those close to progression thresholds, can then distinguish disagreement about the law from disagreement about the rubric or the examiner's contribution. Numerical agreement does not establish doctrinal accuracy: two markers may reproduce the same mistake. Their reasons and the contextual record of assistance allow reviewers to determine which inference the student performed and which distinction the examiner supplied.

Whether teaching through the sequence improves learning requires a separate comparison. Tutorial groups could receive either the proposed sequence or an existing problem-based approach, with comparable teaching time, source access and feedback. Allocation across several groups and teachers can help distinguish the instructional treatment from a particular teacher's influence, and the analysis must accommodate group allocation and clustering. Baseline achievement and previous exposure to the doctrine also matter. Where random allocation is impracticable, the study must establish the grounds for comparing the groups and examine competing causes of any difference. A relationship between a student's questioning score and later achievement would support prediction, but it would not establish that teaching through the sequence caused the later achievement.

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[34] Personal Data Protection Act B.E. 2562 (2019) (Thailand), ss 6, 19, 21–24 and 26–27, *Royal Gazette* 136, Part 69 Kor (27 May 2019) 52 https://www.dol.go.th/media/81328015569807360 0/2026/01/yMq60uXFbWjH97JNrP3D1pnz.pdf.

[35] Personal Data Protection Act (n 34) ss 22–23 and 37.

[36] Personal Data Protection Act (n 34) ss 21, 24(1) and 26(5)(d); Personal Data Protection Committee, Notification on Appropriate Measures for Collection for Research or Statistics under s 24(1) and Scientific, Historical or Statistical Research or Other Public Interests under s 26(5)(d), B.E. 2566 (28 December 2023), cls 4–6, especially 5(4) and 6(1), *Royal Gazette* 141, Special Part 7 Ngor (8 January 2024) 21, 24–26 https://ratchakitcha.soc.go.th/documents/16521.pdf.

[37] Kane (n 1) 25–29, 45–46.

Follow-up can investigate the distinction between performance and learning developed by Soderstrom and Bjork.[38] A delayed task on the taught doctrine tests whether capability remains available, while a separate unfamiliar problem adds a demand for transfer. For example, a four-to-six-week interval could be selected and justified in relation to the course, with intervening teaching and permitted resources recorded. Including sound arguments and immaterial changes would test more than students' willingness to revise an answer. Researchers also need to account for students who do not return, since selective follow-up may distort the apparent success of either teaching condition.

The faculty's adoption decision should bring these findings together with evidence about access and cost. Students can identify confusing instructions or pressure to memorise a defence that marks alone may conceal. Examination records can reveal systematic differences in prompting across variants or groups, subject to safeguards against identifying small groups through research reporting. A supervised written version using the same legal issue and staged evidence offers a practical comparator. Its marking, moderation and appeal costs belong beside the staff time consumed by individual questioning. A successful local pilot can support continued use under the tested conditions, with broader claims assessed through further subjects, assessors and cohorts.

10 CONCLUSION

When a university permits generative assistance, it must determine what a finished memorandum demonstrates about the student’s legal judgement. Requiring a defence of the adopted premises and a response to changed evidence adds observations on which that decision can rest, but the examiner’s participation must remain visible within them. Attribution can then follow each operation, preserving credit for source selection already completed independently even when a later interpretative hint assists the application.

The licensing applications show how closely that attribution depends on doctrine. Understanding an outage leaves the student to establish the law of receipt, the source of an extension power and the conditions governing its exercise. Faculties can examine those operations through spoken dialogue or supervised writing, supplemented by further tasks where the qualification warrants a broader claim. Adoption should proceed through a pilot that tests scoring, access and workload, with delayed and unfamiliar problems used to investigate retention and transfer. A claim that teaching through the sequence improves learning requires the separate instructional comparison proposed above.

For a person relying on legal advice, the consequences of an error often emerge when circumstances change or an authority challenges the recommendation. A graduate must be able to examine the premises of that advice and defend, qualify or abandon them as the evidence requires, including when a drafting system helped produce the document. The university’s award of credit should identify the legal judgement the student exercised, with the examiner’s part in any correction recorded alongside it.

[38] Soderstrom and Bjork (n 7) 176–177.

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