TRANSPORTATION CASE

I. RED had no liability to the damage to the goods "Abu Propolis" and "Abu Watch"

RED submits that:

1.1. BLUE cannot make any action against RED in the case of damage of Abu Watch
1.2 RED had no liability for both goods since RED was exempted from the liability

1.1 BLUE cannot take any action against red in the case of damage to Abu watch

BLUE has a responsibility specified in the airway bill ("AWB") to submit a written complaint in 14 days from the day of receipt in case of damage [*Ex. 12*]. RED submit that RED did not fulfill this responsibility due to **a)** the email on October 7, 2019 did not qualify as a complaint **b)** the email on October 10, 2019 was not made in the period which is specified in the contract.

a) The email on October 7, 2019, did not qualify as a complaint

The complaint will suffice only if this is accompanied by a letter setting out the nature of the complaint and the claim made against the carrier which included the formulation of a specific protest, accompanied by a claim for quantified damages to compensate the loss suffered. The document will not qualify as a complaint if it did not set out the detail of the loss and the claim [*Delpuech v DHL Express, February 19, 2013*].[1] The email From BLUE on October 7, 2019 stated only that BLUE had started to get complaints from BLUE's customers, however, the email did not set the nature of the amount of damage and how the damage related to the air transportation by RED. As a result, it is not a complaint.

b) The email on October 10, 2019, did not make in the period which is specified in the contract

Both parties have freedom of contract to laying down conditions that do not conflict with the provisions of the Montreal Convention ("MC") [Art. 27 MC]. Since the period to make a complaint in the AWB was the same as in the MC [Art. 31 (2)], therefore, the complaint need to be made at least 14 days from the date of receipt of goods. In this case, the day of receipt was on September 26, 2019 when the Abu propolis arrived at BLUE's warehouse [*Facts, para. 29*] and thus the email on October 10, 2019 exceeds 14 days from the date of receipt of goods which should be strictly interpreted [*Shimon Lahav v Brussels Airline*].[2] As a result, it cannot be qualified as a complaint since it is made later a period which is specified in the contract.

Since there is no valid complaint from BLUE to RED, BLUE cannot take any action against RED in the case of damage to Abu Watch.

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[1] Jean-Baptiste Charles, O. P. (2013, August 14). Cargo damage: providing timely notice of complaints. Retrieved from internationallawoffice: https://www.internationallawoffice.com/Newsletters/Aviation/France/Holman-Fenwick-Willan-LLP/Cargo-damage-providing-timely-notice-of-complaints

[2] Levitan Sharon & Co. (2018, February 28). Duty to file complaint for baggage delay within period set by Montreal Convention. Retrieved from lexology: https://www.lexology.com/library/detail.aspx?g=247252ae-bc7e-4aa2-a02f-358c78e76192

1.2 RED had no liability for both goods since RED was exempted from the liability

Since air transportation between both parties is governed under MC [*Ex.12*], RED submits that RED has no liability for both goods because: **(a)** RED is exempted from the liability due to the negligence from BLUE; and **(b)** alternatively, RED has no liability for both goods since RED is exempted from the defected package performed by BLUE.

a) RED has no liability for both goods since RED was exempted from the liability due to the negligence of BLUE

Under Art. 20 MC, RED can be exonerated from liability if the damage is caused by the negligence of the person claiming compensation. Negligence means the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. In other words, doing something which a prudent and reasonable man would not do [*Black law*].[3] The proving of negligence has a lower threshold than wilful misconduct [*DCCD Doc No. 25*].[4]

Although RED sent 2 staffs to help BLUE regarding packaging, BLUE still have to send staff to help RED since BLUE is responsible for the packing of the goods under the Master Delivery and Transportation Agreement ("Master Agreement") [*Ex.1*]. However, BLUE did not provide any staff to help RED's staffs since September 19, 2019 [*Ex.11*] and did not examine the packaging done by RED.

Moreover, due to BLUE's duty to pack the goods since 2009 [*Ex.1*], BLUE should have a knowledge of the quality of air cushioning materials. However, BLUE still provided air cushioning materials that were not suitable for air transportation and lacking in quality. In comparison with passenger liability case, a carrier can fully exempted from the passenger injury when passenger ignore the fasten seat belt sign [*Chutter v. KLM Royal Dutch Airlines*].[5] Since the damage was cause purely based on BLUE's negligence, RED shall be exempted from its liability under Art. 20 MC.

b) Alternatively, RED has no liability for both goods since RED was exempted from the defected package performed by BLUE

Under Art. 18(2)(b) MC, RED had a defense to be exempted from the liability caused by defected packaging of that cargo performed by a person other than the carrier or its servants or agents. Moreover, RED does not have the burden to prove that damage is "solely" due to this cause [*Pablo Mendes De Leon et al*].[6]

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[3] Negligence, Black's Law Dictionary (11th ed. 2019), available at Westlaw.

[4] McGill University Institute of Air & Space Law. (2009, April 23). COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES ARISING FROM ACTS OF UNLAWFUL INTERFERENCE OR FROM GENERAL RISKS. Retrieved from ICAO.

[5] Chutter v. KLM Royal Dutch Airlines 132 F. Supp. 611 (S.D.N.Y. 1955)

[6] Pablo Mendes De Leon et al., The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System, 66 J. Air L. & Com. 1155 (2001) https://scholar.smu.edu/jalc/vol66/iss3/4

Defected package means the package that cannot withstand the normal danger of normal transit of the kind contemplated by the particular contract of carriage [Clarke & Yates].[7] In fact, the air cushioning material provided by BLUE cannot even withstand normal cabin pressure at 0.8 atm. Both parties agree that there will be no damage to the goods if no leakage of air cushion occurs [*Facts, para. 31*]. Therefore, RED is exempted from its liability due to BLUE's defected packaging.

II. <u>Even if RED is liable for the damages, RED should not be liable for the full amount of 7,750,000 Abu dollars claimed by BLUE</u>

BLUE raised a claim against RED for the damage to Abu Propolis and Abu Watch occurred during the course of RED's international air transportation service. Accordingly, BLUE is seeking monetary compensation for (1) the damage equivalent to 40,000 bottles of Abu Propolis and (2) for the repair cost and lost profit of 5,000 Abu Watches.

In the First submission, RED argues that it is not liable for the damages altogether. However, should the arbitral tribunal find that Red is responsible, the amount claimed by BLUE shall be limited and thus less than 7,750,000 Abu dollars because:

2.1 The limit of liability under the Montreal Convention applies in this case;
2.2 RED should not be liable for the amount exceeding the value declared on the Air Waybill;
2.3 RED is not liable for any consequential loss; and
2.4 Contributory negligence on the part of BLUE partially releases RED from its liability.

2.1 RED's liability should not exceed the limit of liability set forth in the Montreal Convention

The air waybill is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein [Montreal Convention ("MC"), Art. 11(1)]. Thus, the arbitral tribunal is advised to turn to the Terms and Condition of Air Transportation ("T&C") printed on the back of the Air Waybill ("AWB") issued by RED. Particularly, Art. 6 T&C on the AWB expressly stipulates that *"Liability of Carrier shall not exceed the [Montreal] Convention limit."*

Art. 22(3) MC provides that in the carriage of cargo, the carrier's liability for the destruction, loss, damage or delay is limited to a sum of [22][8] Special Drawing Rights ("SDR") per kilogram. As the AWB indicated the total weight of Abu Propolis and Abu Watch at 3,500

[7] Clarke & Yates, Contracts of Carriage by Land and Air, LLP, 2004 para. 3.252

[8] 22 Special Drawing Rights is the revised limit of liability as of December 28, 2019 conducted by ICAO under Article 24 of the Montreal Convention. The current value of one SDR in US dollars is approximately $1.413190 as of October 29, 2020 (this figure is revised daily).

kilograms and 600 kilograms respectively [*Facts, para. 29*], RED's liability would be calculated as followed:

Abu Watch	*3,500 kg x 22 SDRs*	=	*77,000*	*SDRs*
Abu Propolis	*600 kg x 22 SDRS*	=	*13,200*	*SDRs*

2.2 In any event, RED should not be liable to pay a sum exceeding the total value declared on the AWB

Art. 22(3) MC further provides that if the consignor has made a special declaration in the AWB regarding the cargo's value and paid supplementary fees to the carrier, the carrier will be liable to pay the declared value and the limit of liability will no longer apply. The AWB indicated the value of both Abu Propolis and Abu Watch at 2,000,000 and 4,000,000 Abu dollars respectively, a total of 6,000,000 Abu dollars [*Facts, para. 29*]. Moreover, BLUE paid 50,000 Nego-Lira to RED in addition to the normal transportation cost [*Ex. 10*]. As a result, the arbitral tribunal may find that RED's limit of liability under MC should not be applied and that the declared value should be taken into account as well.

It is RED's submission that if the declared value on the AWB applies, RED will be liable for 6,000,000 Abu dollars at most. Even when the law governing the Master Agreement is the UNIDROIT Principles of International Commercial Contracts (2016 version) ("UNIDROIT") [*Ex. 4, Art. 12.1*], MC still concurrently governs the relationship between RED and BLUE. Since MC establishes a universal liability regime for international carriage by air, the financial limitation stipulated by MC in case of cargo is absolute, irrespective of the basis of the claim [*Ridley's Law of the Carriage of Goods by Land, Sea and Air, p. 354*]. BLUE's claim for an amount of 7,750,000 Abu dollars clearly exceeds 6,000,000 Abu dollars and therefore should not be granted to such extent.

2.3 RED is not responsible for the consequential losses suffered by BLUE

According to Art. 4 T&C on the AWB, Red is not liable in any event for any consequential loss or damage arising from the carriage of cargo, whether or not Red had knowledge that such loss or damage might be incurred. Even if the UNIDROIT might allow for such consequential loss claim [*UNIDROIT Commentary, Art.7.4.2, p. 272*], RED had already excluded its liability in case of consequential damage.

BLUE is requesting for the damages of Abu Propolis for 150 Nego-Lira per bottle [*Facts, para. 34*]. Notwithstanding that RED's liability is limited to 2,000,000 Abu dollars, such loss of profit is clearly a consequential loss for which RED cannot be held responsible under the T&C. Moreover, the declared value of 2,000,000 Abu dollars on the AWB implies that it was calculated based on the original purchase price of 40 Abu dollars (or 40 Nego-Lira) per bottle [*Facts, para. 25*]. It is only after the damages were discovered that BLUE changed the selling price to 150 Nego-Lira per bottle due to the increased demand for Abu Propolis [*Facts, para. 32*].

In case of Abu Watch, RED is exempted from the damage under Art. 4 T&C as well. While the damage for Abu Watch of 1,750,000 Abu dollars does not exceed the declared value of 4,000,000 Abu dollars, such loss of profit and repair cost are also consequential. It is irrelevant and unreasonable to impose more liability on RED for the decreased market price resulting from the launch of a similar product [*Facts, para. 33*].

2.4 RED is at least partly exempt for liability due to BLUE's contributory negligence

Art. 5 T&C in the AWB provides that contributory negligence on the part of the shipper, consignees or other claimants releases the carrier of its liability to the extent provided by the MC and applicable law. Particularly, the carrier must prove that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier is, if not wholly, partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage [*MC Art. 20*].

Turning to the UNIDROIT which is the law governing the Master Agreement, the aggrieved party's right to damages is limited to the extent that the aggrieved party has in part contributed to the harm [*UNIDROIT, Art. 7.4.7*]. It would be unjust for such a party to obtain full compensation for harm for which it has itself been partly responsible [*UNIDROIT Commentary, Art. 7.4.7, p. 280*]. In determining BLUE's contribution to the harm, Regard should be given to the respective behavior of the parties. The more serious a party's failing, the greater will be its contribution to the harm [*UNIDROIT Commentary, Art. 7.4.7, p. 281*].

In this present case, BLUE procured the cushioning materials for RED [*Facts, para. 29*] which were found unsuitable for air transportation and lacking in quality [*Facts, para. 31*]. Moreover, it had already been substantiated that such defects in the cushioning materials largely contributed to the damage of cargo [*Facts, para. 31*]. As a result, BLUE should bear the detriment on its part as well.

III. BLUE IS LEGALLY LIABLE TO PAY 500,000 NEGO-LIRA TO RED AS COMPENSATION

RED submits that:

3.1 BLUE failed to perform its obligation under the Site Development Agreement;

3.2 RED's payment of the fine to Personal Information Protection Commission is legitimate under Arbitria's General Data Protection Act; and

3.3 BLUE is obligated to pay 500,000 Nego-Lira to RED as compensation.

3.1 The insufficient method for obtaining consent used by Red Travel was due to BLUE's failure to perform its obligation under the Site Development Agreement.

According to Art. 8.2(4) of the Site Development Agreement ("SDA"), BLUE warrants that all Deliverables do not or will not infringe any privacy of any person or entity [*Ex. 8*]. Hence, the Website should comply with the law regarding data privacy which is Arbitria's General Data Protection Act ("GDPA").

Furthermore, under Art. 8.3 SDA, BLUE warrants that (1) all Deliverables shall be prepared in a workmanlike manner and with professional skill; and (3) BLUE will perform all work in compliance with applicable laws and that BLUE will repair any Deliverable that does not meet the warranty. However, BLUE did not perform its obligation under Art. 8.2(4), 8.3(1) and (3).

BLUE did not fulfill its obligations under the SDA, particularly the obligation to prepare the website in a workmanlike manner, with professional skill, and in compliance with applicable laws. Red Travel undertaken by BLUE violates the GDPA due to the insufficient method for obtaining consent, defined in Art. 4(11) GDPA, which infringe the privacy of the customers and the lack of sufficient measure to inform the customers about the redirection to Red Travel. As a result, the Personal Information Protection Commission of Arbitria ("PIPC") imposed a fine of 500,000 Abu Dollars on RED [*Ex. 13*]. However, RED's liability under GDPA is due to BLUE's non-performance under Art. 7.1.1 UNIDROIT as BLUE developed the website which is defective regarding the method for obtaining consent and the redirection process.

3.2 RED's payment of the fine to Personal Information Protection Commission is legitimate under Arbitria's General Data Protection Act.

In paying the fine to PIPC, RED has a reasonable reason to believe that it is subjected to such fine. That is the processing of personal data of Red Travel falls within the territorial scope of the GDPA Art. 3(2)(a).

Art. 3(2)(a) provides that *"the GDPA applies to the processing of personal data of data subjects who are in Arbitria by a controller or processor not established in Arbitria, where the processing activities are related to the offering of goods or services, irrespective of whether a*

payment of the data subject is required, to such data subjects in Arbitria." Accordingly, the application of the targeting criterion under Art. 3(2)(a) is met.

a) The processing of personal data is related to personal subjects who are in Arbitria

The requirement that the data subject be located in Arbitria must be assessed at the moment when the relevant trigger activity takes place, for example, at the moment of offering of goods or services regardless of the duration of the offer made or monitoring undertaken [*Guidelines on the territorial scope of the GDPA*]. In this case, Red Travel offers the reservation services to users from foreign countries, especially those located in Arbitria as Red Travel is opened on Blue Global Mall which facilitate customers in Arbitria. The fact that customers in Arbitria can access the website in Abu-language and pay in Abu-dollars substantiates that the services target individuals in Arbitria. [*Facts, para. 14*].

b) The processing is related to the offering of services

Under Recital 23 of the GDPA,[9] it should be ascertained whether it is apparent that the controller or processor offers services to data subjects in Arbitria [*CJEU case law based on Council Regulation 44/2001[10] in Pammer v. Schulter (C-585/08)*].[11] Factors such as the use of a language or a currency [*Guidelines on the territorial scope of the GDPA*] generally used in Arbitria with the possibility of ordering goods and services in other languages may make it apparent that the controller offers goods or services to data subjects in Arbitria.

Red Travel is opened on BLUE's Blue Global Mall offering reservations for tourists from foreign countries to Negoland. In Blue Global Mall, the language used in parts operated by BLUE is Abu-language. Despite the fact that the language of each store's website is set by the store owner, Blue Global Mall has an automatic translation function that can translate other languages into Abu-language. In addition, Blue Global Mall provides a function which allow customers to pay in Abu Dollar even though the currency of each store is determined by the store owner. Furthermore, according to the statistics in 2019, 30% of the tourists were those who traveled from Arbitria [*Facts, para. 23*]. Therefore, it can be implied that Red Travel intends to offer its services to individuals in Arbitria as RED opened Red Travel on Blue Global Mall in order to facilitate access to its site by customers in Arbitria. Consequently, the processing carried out by RED's website relates to the offering of services to data subjects in Arbitria and therefore falls within the scope of the GDPA.

[9] Recital 23, Applicable to Processors Not Established in the Union if Data Subjects Within the Union are Targeted

[10] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[11] Pammer v Reederei Karl Schlüter GmbH & Co and Hotel Alpenhof v Heller (Joined cases C-585/08 and C-144/09)

c) The processing activities carried out by a controller or processor not established in Arbitria

The processing activities by a controller or a processor shall be related to the targeting activities of the controller [*Guidelines on the territorial scope of the GDPA*]. As the collected personal information by Red Travel is processed by RED, established in Negoland, in order to use the personal information of the customers who visit the website, the processing activities carried out by RED is related to the services offered by RED.

3.3 BLUE is obligated to pay 500,000 Nego-Lira to RED as compensation.

Since RED had to pay the fine of 500,000 Abu Dollars to the PIPC due to the violation of the GDPA and the violation was due to BLUE's non-performance under Art. 7.1.1 UNIDROIT, RED is entitled to a right to damages under Art. 7.4.1 UNIDROIT. RED is entitled to full compensation for harm sustained as a result of BLUE's non-performance under Article 7.4.2 UNIDROIT. There is a clear link between Blue's non-performance under the SDA and Red's damage. The fine of 500,000 Abu-Dollars imposed on RED was due to BLUE's non-performance in undertaking the website, which is an insufficient method of obtaining consent from the customers.

Under Art. 7.4.3 and 7.4.4 UNIDROIT, compensation is due only for harm that is established with a reasonable degree of certainty and foreseeability.Red Travel is opened on Blue Global Mall and therefore is subjected to the GDPA. Since the consent obtaining method is inconsistent with the GDPA, it is certain and foreseeable that the PIPC would impose a fine on RED. RED and BLUE did not object to the amount of penalties and sanctions imposed on RED by the PIPC. Thus, since the GDPA does apply to Red Travel and the violation of the GDPA occurred because of Blue's non-performance, BLUE is obligated to pay 500,000 Nego-Lira to RED as compensation.[12]

IV. BLUE IS LIABLE TO PAY 6,500,000 NEGO-LIRA TO RED AS COMPENSATION

RED submits that:

1. Personal Information leakage from R-CMS was due to BLUE's non-performance under System Development Agreement;
2. No legal excuses could be raised to justify BLUE's non-performance; and
3. BLUE is obliged to pay RED 6,500,000 Nego-Lira in damages.

4.1 Personal Information leakage from R-CMS was due to BLUE's non-performance under System Development Agreement.

On January 25, 2019, RED's customer management system ("R-CMS") was hacked, and the personal information of 50,000 people who used Red Travel or BSN was leaked

[12] 1 Abu Dollar is equal to 1 Nego-Lira

("Incident") [*Facts, para. 38*]. Before the Incident, RED had told BLUE to inspect the system. However, BLUE rejected that request. As soon as RED found unauthorized access attempt to the R-CMS, RED immediately informed BLUE to take necessary measure twice, but BLUE did not reply both of them until the system was hacked [*Ex. 14*]. Therefore, RED, the system owner, had to pay as a solatium to each customer whose personal information was leaked [*Facts, para. 38*].

Pursuant to the System Development Agreement, BLUE has a legal obligation to warrant that all programming and other services should be provided in a proper and workmanlike manner and at all times in compliance with the standards and procedures for the like programming and services specified at the time of entering the agreement [*Ex. 7*]. Since BLUE did not provide essential services in the workmanlike manner, it must be considered as Non-Performance under Art. 7.1.1 UNIDROIT which is governing law of the agreement. Thus, BLUE must pay RED the same amount as the solatium RED paid each customer whose personal information was leaked [*UNIDROIT 7.4.1, 7.4.2*].

Furthermore, among customers whose personal information was leaked, 5,000 of them were from Arbitria, a country which incorporated GDPA. Under Art. 32 GDPA, RED as the system owner must provide an appropriate level of security to the customer information given to them. As the information leakage in the Incident occurred because of the bugs in R-CMS which is the system of RED, the breach of this provision occurred. Therefore, RED shall be liable to pay the fine imposed by PIPC [*Ex. 13*].

However, BLUE who is responsible for R-CMS development under System Development Agreement had an obligation to provide all programming and other services should in a proper and workmanlike manner [*Ex. 7*], but failed to do so [*Ex. 14*]. Thus, Blue must pay to RED the same amount as a fine paid by RED to PIPC [*UNIDROIT 7.4.1, 7.4.2*].

4.2. No legal excuses could be raised to justify Blue's non-performance

As stated in Art. 6 of System Development Agreement, the Warranties Clauses, BLUE is obliged to indemnify and hold RED harmless from and against any losses incurred by RED in specific cases; infringement of services performed by BLUE to RED [*Ex. 7*]. The clauses also stipulated exceptions to indemnify RED from any other cases. These clauses provide unclear terms to broadly exclude BLUE from its liability. For that reason, these provisions must be interpreted using *contra proferentem* rule; an interpretation against the preferred party [*UNIDROIT 4.6*]. Under such interpretation, BLUE's exemption in these clauses shall not include its non-performance of the contract.

Furthermore, BLUE did not immediately reply to RED's emails and then claimed that its late reply was due to the illness. The illness, however, did not completely prevent from replying to the emails and more importantly from inspected the system as formerly requested. Therefore, BLUE cannot justify its non-performance either under UNIDROIT Art. 7.1.7 or Art. 12 Force Majeure Clause [*Ex. 7*].

4.3. Blue is obliged to pay RED 6,500,000 Nego-Lira in damages.

The damages RED suffered from the Incident, consist of two parts; 5 million Nego-Lira solatium paid to the customers whose information was leaked and 1.5 million Abu dollars (equivalent to 1.5 million Nego-Lira) fine imposed by PIPC of Arbitria [*Facts para. 38*]. As both parties did not dispute the amount of penalties and sanctions imposed on RED by the PIPC stated in the order [*Ex. 13*, *Facts para. 41*], Blue could not argue on the matters regarding the amount of fine.

The condition for the liability of damages due to non-performance are as follows

a) RED is full of right to damages due to BLUE's non-performance

First, Blue did not perform according to the System Development Agreement. Blue did not provide necessary services in a proper workmanlike manner [*Ex. 14*] and thus breached its obligation stipulated in Section 4.4.4 of the System Development Agreement [*UNIDROIT 7.4.1*].

b) RED sustained harm as a result of the non-performance of the contract

There is a clear relationship between Blue's non-performance and RED's damages. The RED's customers' personal information leakage was the direct cause of Blue's negligence to properly perform its duties, inspecting the R-CMS as soon as it has been told, checking the email on a daily basis especially during a serious situation, and properly fixing the bug previously informed [*Ex. 14*, *UNIDROIT 7.4.2*].

c) The harm could be foreseen

According to a conversation between RED and BLUE representative in March 2018, the RED representative clearly mentioned to BLUE about this particular kind of harm. Moreover, the BLUE representative also assured to pay special attention to it. The harm, for that reason, could have been foreseen at the time BLUE had concluded the contract with RED [*Facts para. 21*, *UNIDROIT 7.4.4*].

d) RED fulfilled its duties to mitigate harm

After the Incident, RED promptly paid the solatium to customers whose personal information leaked as a 100 Nego-Lira per customer, 5 million Nego-Lira in total. As a result of this necessary action taken promptly by RED, RED avoided no additional fine from Negoland official and accusation from customers [*Facts para. 39*]. Even RED Action was taken without consultation with BLUE, it must be considered as harm mitigation and the best interest of both parties. Hence, BLUE shall reasonably compensate to RED in full [*UNIDROIT 7.4.8*]. Therefore, BLUE is obliged to pay RED 6,500,000 Nego-Lira in damages.

ARBITRATION PROCEDURE

I. The arbitral tribunal has the authority to order the conduct of an online witness examination absent the consent of both parties

RED submits that:

1.1 Party consent is not a requirement under Art. 28(4) UNCITRAL Arbitration Rules

1.2 The arbitral tribunal can require an online witness examination as long as the good administration of arbitral justice is maintained

1.1 Party consent is not compulsory under Art. 28(4) UNCITRAL Arbitration Rules

Art. 28(4) UNCITRAL Arbitration Rules ("UNCITRAL Rules") allows the arbitral tribunal to direct that "*witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference)*." The rule of Art. 28(4) does not require that the tribunal obtain party consent in deciding upon ordering an online witness examination. Therefore, even in absence of party consent, the tribunal is fundamentally equipped to require an online witness examination.

1.2 Good administration of arbitral justice can be ensured in requiring an online witness examination

Since Art. 28(4) UNCITRAL Rules is silent on what the arbitral tribunal should consider in requiring an online witness examination, this tribunal can exercise its discretion in ordering an online witness examination if the good administration of arbitral justice is preserved. This notion includes the requirements of due process, fairness and efficiency [*Filip De Ly, p.37*].[13]

Cost and time efficiency are very important features of international arbitration [*Born (n 1), p. 86*] not lesser than due process and fairness. Forcing a person to travel across the continent is unreasonable when his testimony can be secured by means which are equivalent to his presence in the hearing. Given the COVID-19 pandemic and the heighten travel and entry restrictions, it is in every party's interest to conduct the witness examination online.

II. There are specifics conditions required in using Zoom as a means of witness examination

Remote hearing technologies, if utilized appropriately, can facilitate the resolution of parties' disputes in a fair, expeditious and economical manner. The technology used should ensure sufficient quality of transmission and include a fall-back plan should the quality become insufficient. The ability to share exhibits between the witness and the hearing room is desirable.

[13] Filip De Ly, 'Paradigmatic Changes – Uniformity, Diversity, Due Process and Good Administration of Justice: The Next Thirty Years' in Stavros Brekoulakis and others (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016)

RED suggests that this tribunal adopt the *Singapore International Arbitration Centre* ("SIAC") *Guides – Taking Your Arbitration Remote* to identify the main considerations that could impact the adoption of remote hearing technologies. Furthermore, RED suggests this tribunal consider the utility of implementing a data protection protocol in order to ensure security in the sharing or exchange of arbitration documents, information and data. For instance, this tribunal may consider the adoption of the *2020 Protocol on Cybersecurity in International Arbitration* for this particular proceeding.