(BLUE) ISSUE 1: ARBITRATION PROCEDURE

Summary of Facts
Under Cl 11 of the System Development Agreement, Cl 12.6 of the Site Development Agreement, and Cl. 12.6 of the Master Delivery Agreement, parties agreed to resolve their dispute by arbitration in Japan, before 3 arbitrators, governed by the UNCITRAL Arbitration Rules (2013 version). At the time of contracting, neither party contemplated that the evidentiary hearing should be held entirely online. Indeed at such time, the default rule was that oral hearings should be held in person, subject to a Procedural Order issued by the Tribunal, and the consent of both parties. During the scheduling of witnesses, Red insists that the examination of all witnesses should be conducted online. Blue has refused.

(1) Tribunal has no authority to make the decision that examination of witnesses be conducted online, without the prior consent of both parties

A. An online evidentiary hearing would be beyond the scope of the Arbitration Clause in the MDTA

1. An online hearing would be contrary to the parties' intentions in contracting for arbitration in Japan. At the time of contracting, both parties intended that any oral evidentiary hearing would be conducted in person.

2. The default rule of both international arbitration as well as most common-law jurisdictions around the world is that oral evidence must be taken in person rather than via contemporaneous methods of communications. (For example, Art 8(1) of the IBA Rules on the Taking of Evidence in International Arbitration states that "each witness shall appear in person")

3. The parties intentionally contracted to hold the arbitration in Japan to ensure neutrality and fairness in the proceedings. This would prejudice Blue as part of the decision on the choice of the seat of arbitration are the mandatory provisions of the Japanese Arbitration Law. For instance, due to the contested nature of the factual matters at issue, Blue would have in this circumstance, filed an application under Art 35 of the Law to have the evidence taken by the Japanese judicial system, in such manner prescribed by the Japanese Code of Civil Procedure.

B. Tribunal is under a duty to provide Blue with a "reasonable opportunity" to present its case

4. Unless Blue so waives their right to examine and cross-examine witnesses in person, the Tribunal may not order the evidence to be taken over videoconference.

5. An evidential hearing held online would derogate from Blue's right to request an "oral" hearing under Art 32(1) of the Japanese Arbitration Law. The relevant Article states, "where a party makes an application for holding oral hearings...tribunal shall hold such oral hearings at an appropriate stage of the arbitral proceedings". Learned authors have articulated that "oral" within the meaning of mandatory provisions in the seat of arbitration, must mean in-person as opposed to over video-conference. The principle of orality and the principle of immediacy means that parties are entitled to an oral, in-person hearing as opposed to one conducted over videoconference. (Stefan Lindskog, Skiljeförfarande: En kommentar (Eng.: Arbitration: A Commentary) 653 (2d ed., Norstedts Juridik 2012); Joachim Münch, Münchner Kommentar zur ZPO § 1047, ¶ 9 (2017); Hans-Joachim Musielak & Wolfgang Voit, ZPO, § 1047, ¶ 2 (2019).

6. As such, in light of the importation of the principle of orality and immediacy within the mandatory provisions of the Japanese Arbitration Law, the Tribunal has no authority to grant the order sought by Red.

C. Blue would be prejudiced by the risk of witness coaching

7. Blue would be denied their "reasonable opportunity" to present their case. Videoconferencing raises the spectre of witness coaching. If a witness is coached, Blue loses their ability to rigorously test the evidence submitted by Red. The recent decision of *United States v Shabazz* 52 MJ 588 at 585, in which part of a criminal conviction had to be set aside due to a witness being coached over video-conference, is a salutary reminder to all tribunals that the spectre of witness coaching is far from fanciful.

8. Given that a number of Red's witnesses are employees of Red itself, there is a strong temptation for witness coaching, or the tailoring of the evidence to suit the parties' needs rather than recitation of the truth. This would only be amplified over video conference, as the parties may not be isolated within a witness booth. Moreover, presence in court has been observed by both the English courts (England and Wales Practice Direction 32) and Rule 43 of the US Federal Code on Civil Procedure, that a witness' presence in court is in and of itself, a potent factor in influencing the witness to tell the truth.

9. As such, should the Tribunal rule on the procedural issue without the consent of Blue to videoconferencing, the Tribunal will be acting *ultra vires.* Blue may challenge the enforcement of the award under Art V of the New York Convention in order to vindicate its rights.

Appropriate safeguards for the use of videoconferencing evidence

10. Given the outstanding risks of COVID-19, Blue is amenable to the use of videoconferencing evidence, provided that relevant safeguards are first put into place to ensure that the proceedings

are not prejudiced against either party.

11. It is submitted that due to the complexity of the issue, the Tribunal should issue a Procedural Order in respect of the protocol in such a manner proposed. For ease of reference, the site from which witnesses will give evidence is the "**remote site",** and the party proposing videoconferencing is referred to as the "**VCF party".**

(2) Below are the specific conditions that need to be met in the examination of witnesses using Zoom

Pertaining to the remote site

12. The remote site should provide the following:

a. Computer and conferencing equipment that meets the recommended system requirements as set out by Zoom Corporation (Zoom Corporation, *System Requirements for Windows, macOS and Linux.* (2020))
b. Multiple video cameras that are controllable from the local site, and by the Tribunal themselves. This is for the Tribunal to satisfy themselves as to the appropriateness of the seating arrangement prescribed by the Tribunal, as well as any other considerations that may arise for the Tribunal's consideration pertaining to matters at the remote site
c. Appropriate and qualified staff to help resolve any technical issues that may arise with respect to the equipment at the remote site
d. Appropriate security measures at the remote site to prevent unwanted intrusion into confidential proceedings at the remote site
e. Costs of obtaining the remote site should be borne by the VCF party, as per Practice Direction 32 Annex 3 of the England and Wales Rules of Civil Procedure Practice Directions.

Pertaining to documents, exhibits, and other documentary evidence

a. Sharing of documentary evidence should be shared using Zoom's "*screen share"* feature.
b. All relevant documents and other object evidence should be provided to the Tribunal and all parties in the form prescribed under P12-P14 of the International Chamber of Commerce Operating Standards for Using IT in International Arbitration ("**ICC Standards"**), and by such time as the Tribunal deems fit.
c. A secondary camera should be on hand at the remote site for live video to be taken of the relevant object evidence as necessary for the courts to determine its veracity.

Pertaining to IT-related disruptions

a. The tribunal shall not allow IT-related difficulty to disrupt proceedings, insofar as it is possible. The tribunal may incorporate G11 and V4 of the ICC Standards, which in effect imposes a duty

of cooperation and good faith on the parties to attempt to resolve the issue, and allows for flexible compromises to be made in response to the exigencies of the situation

Pertaining to the conduct of the hearing

a. To ensure the safety of the evidence, this Tribunal is urged to adopt the rules under V2 of the ICC Standards, which include *inter alia,* for the Tribunal to make the relevant directions as to the persons to be within the room at the time that the witness gives his evidence. This is on all fours with the requirement set out by other judicial authorities including *inter alia* the Ontario Courts of Justice, and the Singapore Supreme Court.
b. To preserve some semblance of the human dynamics of the situation, the Tribunal should issue such Direction or Order to the effect that the witnesses are to look directly towards the relevant camera while speaking. This is for counsel or the Court to determine the character of the witness. This is recommended in both the Singapore State Courts, as well as by international arbitrators (David Roney, "Cross-Examination in International Arbitration", in *Take the Witness: Cross-Examination in International Arbitration.* (2nd ed, 2019) KluwerArbitration)

(BLUE) ISSUE 2: TRANSPORTATION CASE

Summary of Facts
In this case, the Claimant is Blue and the Respondent is Red. Under a Master Delivery and Transport Agreement dated February 14, 2009 ("Master Delivery Agreement") (Exhibit 4), Red agreed, *inter alia,* to carry goods between Arbitria and Negoland for reward. The "carriage by air" was within the meaning of the Montreal Convention. On July 16, 2019, both parties voluntarily agreed to a variation of the Master Delivery Agreement regarding the following Consignment of goods, namely 50,000 units of Abu Propolis ("AP") and Abu Watch ("AW"). Under a contract evidenced by Red's Air Waybill issued on September 24, 2019, Blue was named as Consignor and Blue Negoland named as Recipient. Under the Memorandum, Red voluntarily undertook to, *inter alia,* (i) package; (ii) procure cushioning materials and (iii) pay special attention to the smooth transportation of said products (Exhibit 9) for the valuable consideration of 50,000 Nego-Lira. Upon inspection of the goods on September 27, 2019 at [30], Blue discovered that 40,000 bottles of AP were damaged upon delivery. Blue gave written notice regarding the damage to the Consignment immediately on the same day. Subsequently, on October 12, 2019 at [33], it was established that 5,000 units of AW were damaged during the Delivery. The damage was caused by: a) Red's breach of its contractual obligations to supply cushioning materials; b) Red's reckless use of substitute cushioning materials known by its agents to be inadequate; and c) The violent shaking of Red's aircraft during carriage Blue seeks relief in the form of damages, based on the value of the products on September 27, 2019 at [30], amounting to: a) 6 million Nego-Lira regarding the AP, at 150 Nego-Lira per bottle; b) 250,000 Nego-Lira regarding the repairs to 5,000 units of AW; and

c) Loss of profit from subsequent price Reductions of AW subsequent to September 27, 2019 at [30], amounting to 1,500,000 Nego-Lira.

(1) There is a breach of Red's contractual obligation in relation to the damage to the goods "Abu Propolis" and "Abu Watch".

A. Red is in default of its obligation of "international carriage" within the meaning of Art 1.1 of the Montreal Convention

1. Red should be liable for the damage sustained to Blue's cargo, given that the event causing the damage, *viz,* the shaking of the aircraft, took place during the carriage of the goods at [31]. The Montreal Convention governs this transaction, as both Negoland and Arbitria are signatories of the Montreal Convention and Airway Bill incorporates the Montreal Convention at [35]. The Art 18.1 of the Montreal Convention imposes strict liability on carriers for damage to cargo, so long as the event causing the damage to cargo was sustained during the carriage of the cargo. Art 1.1. of the Convention applies its scope to "all carriage of … cargo performed by aircraft for reward" between signatories of said Convention. The proximate cause of the damage to the cargo was the "violent vibra[tion]" of the cargo in the aircraft.

(2) The amount of damages Red shall pay is 7,750,000 Abu dollars to Blue.

B. Red is liable for consequential losses emerging from the changes in price to AP and AW.

B(1) The relevant law

2. Per Art 7.4.1 of the PICC, aggrieved parties to a contract can recover the expectation loss resulting from the breach, subject to proving that their damage was both foreseeable and certain. (Art 7.4.3.; John Gotanda, *Recovering Lost Profits in International Disputes*, 36 Geo. J. Int'l L. 61). With respect to foreseeability, the appropriate test is a subjective-objective test: what a reasonable person in the performing party's shoes at the time of the conclusion of the contract could have reasonably foreseen as the consequence of non- performance in the ordinary course of things. Regard must be had to "the particular circumstances of the contract, such as the information supplied by the parties" (Official Comment to Art 7.4.4. of the PICC).

3. With respect to certainty, Blue must establish that it was "likely" that the consequential loss would flow from their breach. Both requirements operate in tandem – as explained in the Official Comment, "it must have been foreseeable that harm will with certainty (is likely to) flow from such a breach". If Blue cannot establish the amount of damage with sufficient certainty, Art 7.4.3(2) confers the tribunal the discretion to set the amount, as well as determine the appropriate recovery for loss of chances of profit, with respect to the probability of its occurrence.

B(2) Red's exclusion of all consequential losses is ineffective

4. Insofar as any clauses within the Master Delivery Agreement, the Memorandum, or the contract evidenced by the Air Waybill purports to relieve Red of its liabilities, consequential or otherwise,

it is in breach of Art 26 the Montreal Conventions, which state that "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void".

5. Furthermore, any exemption clause will be ineffective under Art 7.1.6 of the PICC where it is "grossly unfair" to one of the parties. In determining gross unfairness, reference must be taken to *inter alia,* the legitimate expectations of the parties, and the purpose of the transaction.

6. Both contracting parties were aware that the purpose of the Consignment was for sale at Blue Store Negoland's 10th Anniversary Sale. As such, it would be grossly unfair for Red to rely on an exemption clause that allows them to deny recovery in respect of lost profits, from the goods rendered unsalable by the gross negligence of Red or its agents.

B(3) The consequential losses from damage to AP was foreseeable and certain

7. It was reasonably foreseeable that the price of AP would increase over time. At the time of the contract variation, July 16, 2019, Blue had not set a fixed price for the sale of the AP yet. Red was aware that Blue reserved the right to hike the price based on prevailing market conditions at the time, and yet insisted on no provision to cover this eventuality.

8. As such, Red voluntarily took on the risk that its liabilities under the variation might increase as a result of Blue's pricing decisions, and accepted this risk for the reward of 50,000 Nego-Lira.

B(4) The consequential losses from damage to AW were foreseeable and certain

9. It was foreseeable at the time of contracting that if there were delays to the sale of AW, there was a high chance that a competitor would emerge, reducing the price of AW thereby occasioning consequential loss. Negoland was a hub for electronic goods, being home to several leading industries in technology. It was entirely foreseeable that a leading technology company residing in Negoland would launch another product to compete with AW.

10. Secondly, as seen from the Negotown Smart City initiative at [3], wearable electronics are a growth industry in countries which seek greater integration of IT in their cities. It is therefore even more foreseeable that companies in Negoland would follow the trend and develop wearable technology products to compete with AW.

11. Parties were aware that the goods were meant for sale — this was the very purpose of their entire course of dealing. If the goods were rendered unsalable during the carriage by air, consequential losses would be occasioned by failure to sell these goods.

C. The limitation of liability is ineffective as the consignor had made a special declaration of interest in delivery and paid the requisite supplemental sums thereunder.

12. Under the Terms and Conditions on the Reverse Face of the Defendant's Air Waybill dated September 24, 2019, as well as Art 22.3 of the Montreal Convention, limitations on Red's liability are ineffective as long as Blue has made a special declaration of interest in delivery, as well as paid the prerequisite supplementary sum in consideration. Blue as Consignor did make such declaration and payment on July 16, 2019, as evidenced by the contemporaneous record of the July 16 meeting. Blue requested, *inter alia,* that the special featured products, AP and AW be

smoothly transported and paid the sum of 50,000 Nego-Lira in consideration of this request. (Exhibit 5; Exhibit 6)

13. The 50,000 Nego-Lira was paid by Blue as valuable consideration for Red to assume an increased risk for the transportation of the signature products. It would have been vastly disproportionate to pay 50,000 Nego-Lira for mere packaging materials and labour, especially as Blue's own employees estimate the cost of packaging material at 2,000 Abu dollars. The only reasonable conclusion that the parties could possibly have intended is that the 50,000 Nego-Lira was the supplementary sum envisaged to be the consideration for Red taking on the additional risk of carrying low-weight but high-value items.

D. The complaint on the damage to the Abu Propolis was made to Red in timely fashion

14. The notice that 40,000 bottles of AP had been damaged is sufficient to bring the entire claim within the time bar prescribed under the Montreal Convention. Blue made a written representation dated September 27, 2019 to the Carrier, one day after receipt of the Consignment, that 40,000 bottles of Abu Propolis were damaged and unsalable (at [31]). A purposive interpretation of Art 31(2) of the Montreal Convention suggests that "damage" for the purposes of recovery does not oblige the Consignor to delineate the entire extent of the damage, but merely that part or all of the Consignment has been lost within the meaning of Art 18(1).

15. The purpose of Art 31(2) is to (1) enable the Carrier to ascertain how the damage was incurred by preserving all relevant evidence, including the necessary AWBs and flight documentation; and (2) to assess its liability or make provision in its accounts, if necessary, to claim on their insurers (*Fothergill v Monarch Airlines* [1981] AC 251 at 272).

16. Therefore, upon an appropriate construction, the rule should be that the parties need not inform Red of the entire extent of the damage to the Consignment, but only that damage has occurred. This gives sufficient notice for the parties to preserve the relevant documents and make the necessary preparations and inquiries required in civil proceedings. As to the spectre of liability for an indeterminate time, it is submitted that time requirements for the Statement of Claim under Art 20 of the UNCITRAL Arbitration Rules are themselves an effective time bar. If the damage was not pleaded, it is unrecoverable.

(BLUE) ISSUE 3: INFORMATION CASE

Summary of Facts
Blue was commissioned by Red: (1) To develop a website for Red Travel under the Site Development Agreement (Exhibit 8); and (2) To complete renewal works for Red's customer management system and database under the System Development Agreement (Exhibit 7)

The Information Case is two-fold:

(a) In October 2019 at [36], Arbitria's Personal Information Protection Commission ("PIPC") imposed a fine on Red Travel's website (Exhibit 13) for allegedly breaching the General Data Protection Act ("GDPA"). Red claims that Blue is liable for the fine as Blue was tasked to create the website under the Site Development Agreement (Exhibit 8).

(b) On January 15, 2019 at [22], Red discovered bugs in their customer management system; promptly fixed by Blue the subsequent day (Exhibit 14). Red also made requests for Blue to conduct checks on system bugs while Blue's staff were overstretched. On January 26, 2019, 50,000 of Red's customers had their personal information leaked. Blue swiftly dispatched staff to rectify the unprecedented bug and advised Red to temporarily suspend their system. As a result of third-party hacking, Red paid solatium to affected customers amounting to 5,000,000 Nego-Lira and a fine of 1,500,000 Abu dollars paid to the PIPC.

Red is seeking 500,000 Nego-Lira in compensation for Issue (a) and 6,500,000 Nego-Lira for Issue (b).

(1) Blue is not legally liable to pay Red compensation

A. Blue has fulfilled its contractual obligations

1. Blue is not liable for the losses suffered by Red under the Site Development Agreement (Exhibit 8) ("the Contract"). Per Cl 12.1 of the Contract, all conditions therein are governed by the rules of the PICC.

2. Neither party intended for Blue to be contractually liable for potential breaches of international law. Art 4.1(1) of the PICC states that a contract must be interpreted in light of the common intention of both parties. Even if Red had meant for Blue to be contractually liable for such breaches of the GDPA, there was no such contractual provision in any part of the contract.

3. Moreover, at the time of contracting, Blue was unaware of any such intentions. Per Art 5.1.1, any contractual obligations between both parties must be either expressed or implied. As there are no such provisions in the Contract, Blue's liability for Red's losses in the present case does not exist.

B. Further or in the alternative, Blue's design of the Red Travel website is GDPA compliant

4. The Red Travel website does not contravene the GDPA. Per Art 7.2 of the GDPA, a "request for consent shall be presented in a manner which is *clearly distinguishable* from the other matters." Referring to the facts, it is clear that the Red Travel website:

    (1) Requires customers to <u>click on a statement</u> stipulating "I have read and agreed to the terms and conditions" after scrolling through the terms and conditions at [37]. No contract is made otherwise

    (2) Obtains consent for the use of data when customers <u>click on a button</u> on their website saying, "I enter into transactions with Red upon consenting to Red's policy on the use of

personal information" at [37].

5. There are thus *two distinct features* to establish consent for (1) data use and (2) the acceptance of Red's terms and agreement; the website design complies with GDPA requirements.

C. The GDPA should not be enforced on the Red Travel website

6. The GDPA should not be enforced on Red Travel. Per Art 3.1 of the GDPA, the regulation applies to entities that:

    (1) Process personal data in the context of the activities of an establishment of a controller or a processor in Arbitria ("Establishment Criterion"); where
    (2) Such processing activities ("Targeting Criterion") mean that the entity:
        a. Provides goods and services to data subjects; or
        b. Monitors of the behavior of data subjects within Arbitria.

7. The *Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)* ("Guidelines") are instructive on the meaning behind Art 3.1. First, an "establishment" refers to "a natural or legal person, public authority, Adopted agency or other body" (Page 6, Guidelines) conducting the "real exercise of activities through stable arrangements" (Recital 22, GDPA) in Arbitria, where "the presence of one single employee or agent ... may be sufficient to constitute a stable arrangement" (Page 6, Guidelines). Second, the test for the Targeting Criterion is whether an entity "intentionally, rather than inadvertently or incidentally, target individuals" (Page 15, Guidelines) in Arbitria.

8. Red Travel does not meet the two criteria. The Establishment Criterion fails because Red Travel has no "stable arrangement" in Arbitria. The website server and, by extension, any employees, are located in Negoland at [15]). Red Travel also does not "intentionally … target individuals" in Arbitria per the Targeting Criterion. Red Travel's website is written in English and located within Blue Global Mall ("BGM") to attract international travellers (at [23]) rather than individuals specifically residing in Arbitria. The GDPA in the Guidelines (Page 15) specifically excludes a factual scenario whereby "the processing relates to a service that is only offered to individuals outside [Arbitria] but the service is not withdrawn when such individuals enter [Arbitria]". This is analogous to the present case, where Red Travel's service is offered to the world but is not withdrawn for Arbitria's residents who voluntarily access the website. Thus, it should not be subject to the GDPA.

9. Moreover, the Arbitria Supreme Court recently affirmed that the GDPA will not apply where residents of Arbitria voluntarily access websites operated by foreign businesses at [41]. This voluntariness can be established in the present case, as customers entering Red Travel through BGM encounter the message: "From now, you will be redirected to Red's website" at [23].

10. Consequently, Red's claim must be dismissed. Blue is not contractually liable for Red's losses nor did Blue fail to design the website according to GDPA guidelines. Furthermore, there is no legal basis for the GDPA to be enforced on the Red Travel website.

(2) Blue is not contractually liable to pay 6,500,000 Nego-Lira in damages to Red

A. Blue was not negligent in building the system under the System Development Agreement ("SDA")

11. Blue is not liable to indemnify Red under the SDA's warranty (Exhibit 7). In Cl 6.2, Blue had not warranted "error free" operations of the Computer System service not arising from its negligence. Negligence must be "interpreted in the light of the whole contract or statement in which they appear" (Art 4.4 of the PICC). Hence, reading Cl 4.4 with Cl 6.2 evinces that Blue would be negligent if they do not provide services "in a proper and workmanlike manner".

12. Pursuant to Art 5.1.4, Comment 1 of the PICC, Cl 4.4 does not guarantee that Blue will build a system that achieves the specific result of hacking prevention, but only promises a duty of best efforts. Pursuant to Art 5.1.4(2), Blue is bound only to such efforts as would be made by a reasonable workman in Blue's circumstances. Such a workman cannot guarantee building an impenetrable system due to the fast-evolving nature of attempted hacking. Hence, Blue fulfilled their duty to deliver a system "in a proper and workmanlike manner" because the system meets industry-standard security levels by guarding against two unauthorised breaches on January 21 and 23 (Exhibit 14). Blue is bound to guard against hacking to the best efforts of a proper workman, but not to ensure that *zero* bugs penetrate the system, especially since Red's website is widely-used and likely a target of hacking. An unprecedented bug such as that on January 26 might still slip through industry-standard security.

13. Thus, the hacking incident is beyond Blue's liability under the warranty. The interpretation of "error free" operations must be construed according to the "meaning commonly given to terms and expressions in the trade concerned" pursuant to Art 4.3, sub-paragraph (e) of the PICC. Contracting parties in Blue's position, equipped with the same technical knowledge, would reasonably understand that the system bug is an "error" that Cl 6.2 covers, as Internet systems are susceptible to periodic glitching.

B. Even if Blue's warranty against providing "error free" operations is ambiguous, Blue cannot be liable for the hacking incident to avoid indeterminate liability.

14. Should the warranty against "error free" operations in Cl 6.2 of the SDA be deemed ambiguous, the tribunal must not rule that the hacking incident is an error outside the warranty. To impose liability for the hacking incident when Blue had expressly contracted against "error free" operations would contravene contractual good faith as per Art 1.8 of the PICC. Red, in expressing no objection to Cl 6.2 and concluding the contract, brought Blue to a reasonable understanding that they did not warrant "error free" operations in entering the contract. Hence, Red's claim for damages against Blue for the hacking incident is inconsistent behaviour considering their prior assent to Cl 6.2. Blue suffers detriment by way of the present lawsuit because Blue had done all that a reasonable person would do in the circumstances.

15. Moreover, good faith is important in "light of the special conditions of international trade" at PICC Art 1.7, Comment 3. To allow Red's claim for damages would cast doubt on the binding nature of warranty clauses in international business contracts and obstruct actual performance. The tribunal's interpretation should promote the economic success of international trade, which was intended through Cl 6.2 to prevent an onerous duty of assuring "error free" operations.

C. Blue was not negligent in responding to Red's request for bug fixes and the hacking incident.

16. Blue fulfilled their duty of best efforts in system repair. Blue promptly rectified system bugs a day after Red made their first request on January 15, 2019 (Exhibit 14). As for the two unauthorised system access attempts on January 21 and 23, Blue's response was aligned with the anticipated lead time to troubleshoot the unprecedented bug before making fixes. Since a third hacking attempt materialised just three days after the second unsuccessful attempt, the short lead time constrained Blue from making the appropriate fix.

17. For Red to expect immediate rectification of the bug is an "unreasonable burden" within the meaning of Art 7.2.2(b) of the PICC. Repairs made by a proper workman must account for the fast-evolving nature of Internet bugs which might slip through a system considered robust by industry-standards. It is an unreasonable burden for a workman to devise an immediate solution to an unprecedented bug which requires more time and effort to troubleshoot. Even with intensive checks, the bug could only be discovered in four days (Exhibit 14), all the more with normal checks by a reasonable workman, notwithstanding the time it would take to fix the unprecedented bug. Moreover, Blue maintained their professionalism to perform in a "proper and workmanlike manner" despite staff resources being spread thin.

18. Blue fulfilled their duty of best efforts on the day of hacking on January 26, 2019 (Exhibit 14) by immediately dispatching staff members to Red. Blue managed to limit Red's damages to only 50,000 customers by advising Red to suspend the system (Exhibit 14). This number is a trifling fraction of Red's estimated 200,000 annual users of Red Travel (at [23]) and many more international customers on Red's larger database. Blue's rapid and effective intervention prevented the whole database from being compromised, averting the large-scale crisis of sites such as eBay whose 145 million user base was hacked entirely in 2014 (CNBC, *Hackers raid eBay in historic breach, access 145M records*. (2014)), or the Japanese pension system hacking where 1.25 million individuals' personal data was leaked in 2015 (The Japan Times, *1.25 million affected by Japan Pension Service hack*. (2015)).

19. In any event, Red should not conflate Blue's obligation to respond to bug fixes in a timely manner with the harm that materialised from the hacking incident. No correlation exists between the delay in fixing the bugs and the third-party hacking that transpired. As per Art 7.4.4 of the PICC, damages are awarded where harm is a "direct consequence of non-performance as well as certain". Even if Blue were liable for a delayed response to Red's requests for bug fixes, the damages Blue should pay must be nominal because consequential losses from the hacking did not arise purely from Blue's delayed performance but from a third-party breach.

D. Red's statement of reliance is non-binding because it was made outside the contract.

20. Red's statement of reliance on Blue to prevent hacking at [21] is not a term of the contract under Cl 13 which stipulates that the SDA supersedes all other understandings. The clause must be given effect under the principle of *pacta sunt servanda* at Art 1.3, Comment 1 of the PICC. Red's company representative, Crane, requested Blue's representative, Ruby, to "pay special attention to hacking prevention and strict data management". However, Red cannot unilaterally modify the contract to include hacking prevention as a term under Art 1.3, Comment 2 of the PICC after the SDA's conclusion without Blue's consent. Moreover, Blue has not acted in such manner to induce Red's reasonable reliance – Blue simply assured Red that they will pay attention to hacking prevention, reiterating their duty of best effort as set out in Cl 4.4.

21. Should the non-binding nature of Red's expression of reliance be contentious, the tribunal must establish the understanding of reasonable persons as per Art 4.3 of the PICC. The intention behind Red's representation of reliance at [21] is read as fostering corporate partnership, given that the statement was made *after* concluding the contract. A system developer in Blue's position would not understand that Red intends for Blue to prevent *all* instances of hacking. Blue simply reiterated their promise to "do [their] best" to pay attention to hacking as a professional gesture.

E. In the alternative, if Blue were liable for damages flowing from the hacking incident, they should be drastically reduced because Red failed to mitigate their own losses.

22. Ultimately, Red as system owner should have limited its damages as soon as they suspected hacking. Pursuant to Art 7.4.7 of the PICC, damages payable are reduced to the extent that "harm is due in part to an act or omission of the aggrieved party". Since ownership rights of the R-CMS was transferred to Red under Cl 5 of the SDA, Red had final say over system management where Blue was unable to rectify the bugs immediately. Interpreting the license ownership with the general context in Art 4.5 indicates that Red has final say over emergency decisions pertaining to the system even if Blue is the system developer.

23. It would be unjust to hold Blue wholly liable for damages flowing from the hacking incident when Red contributed to harm by failing to conduct damage control. Red, as system owner, was alive to the risk of hacking due to repeated unauthorised attempts. Where Red knew their website had high customer traffic and was the target of persistent hacking, Red should have taken additional precautions to mitigate a foreseeable materialised hacking event, beyond simply contacting Blue's company representative. If not for Blue's suggestion to suspend the system on January 26, 2019 (Exhibit 14), much more than 50,000 customers would be impacted. As the database owner with sole responsibility over customer privacy, Red is largely liable for damages arising from these failures. Hence, damages payable by Blue should be significantly reduced.