SUMMARY OF SUBMISSIONS

TRANSPORT CASE

I. Red is liable for the damage to the Abu Propolis and Abu Watch [Para 1, below].
II. Red cannot rely on the Master Delivery and Transportation Agreement to avoid liability [Para 11].
III. Blue is entitled to 7.75 million Nego-Lira ('NL') for loss caused by Red's non-performance [Para 26].

INFORMATION CASE

IV. Blue had no duty to comply with the *General Data Protection Act* ('GDPA') [Para 37].
V. Alternatively, if the GDPA does apply, Red's actions contributed to Red's loss and so Red's damages claim must be reduced [Para 44].
VI. Blue performed its duties under the System Development Agreement ('System DA') and did not warrant an 'error free' system [Para 48].
VII. Alternatively, Red's damages claim must be reduced because Blue is not obligated to compensate for consequential loss [Para 56].

ARBITRATION PROCEDURE

VIII. Blue objects to online witness examination because it is inconsistent with the parties' agreed procedure for their arbitration [Para 64].
IX. However, if the Tribunal considers that it has the authority to conduct online an witness examination, procedural fairness and due process require certain conditions [Para 70].

TRANSPORT CASE

I Red is liable for the damage to the Abu Propolis and Abu Watch

A Red and Blue created a contract ('Special Agreement') for the BSN Super 10th Anniversary Sale ('BSN Sale'). This is distinct from their existing Master Delivery and Transportation Agreement ('the Master Agreement').

1. The Special Agreement consists of the meeting minutes between Red and Blue representatives [Ex 9] and the Memorandum for the BSN Sale ('MOU') between Red and Blue dated 16 July 2019 [Ex 10]. The Special Agreement allocates packaging and transportation duties for the BSN Sale.
2. The meeting minutes [Ex 9, Arts 2(1), 3] and MOU [Ex 10] show Red and Blue's intention to create the Special Agreement [UNIDROIT Principles of International Commercial Contracts ('PICC'), Arts 1.2, 2.1.2].
3. The Special Agreement is sufficiently certain as a contract: it states the price, identifies the goods, and describes the nature of performance.
4. Red and Blue intended the Special Agreement to displace key provisions in the Master Agreement.
   4.1. In the Master Agreement Red and Blue are responsible for packaging goods at Blue's expense [Ex 4, Art 1.2.1]. However, the Special

Agreement makes Red responsible for packaging goods at Red's expense [Ex 10, Art 2].

4.2. Red and Blue formed an unambiguous intention for the Special Agreement to allocate packaging duties and risks to Red, departing from the Master Agreement [PICC, Art 4.2(2)]. The parties' preliminary negotiations [PICC, 4.3(a)] at the Red Head Office and the MOU indicate that Red and Blue intended to decide new terms for the BSN Sale. Blue and Red complied with the allocation of packaging duties agreed upon in the Special Agreement [PICC, art 4.3(b)].

5. The Special Agreement contains no governing law provision. The Master Agreement shows that the parties intended the PICC to be the governing law for the Special Agreement [Ex 4, Art 12.1].
6. Therefore, Red and Blue intended the Special Agreement to displace the Master Agreement's provisions on packaging duties.

B Red failed to perform its obligations under the Special Agreement.

7. Defective performance and late performance of any contractual obligation constitute non-performance [PICC, Art 7.1.1]. The Special Agreement obligated Red to perform 'smooth packaging' [Ex 10, Art 4] and 'smooth transportation' [Ex 9, Art 5] of Blue's goods.
   7.1. Red's performance of that duty was defective. Red failed to procure enough cushioning material of a quality 'dedicated for air transportation' and in time for performance [Para 31]. The investigation found the choice of material was a cause of the damage to Blue's goods [Para 31].
   7.2. Red's performance of the duty to 'smooth[ly] transport' was also defective. The MOU obligated Red to 'pay special attention' to the transportation of the goods [Ex 10, Art 5]. Red failed to guard against 'clear air turbulence', a cause of damage, which occurs 'once every few years' [Para 31]. Red could reasonably have foreseen this turbulence, given its 70 years of air transportation experience [Para 9].

C Blue did not cause Red's non-performance.

8. Blue's acts or omissions did not cause Red's non-performance [PICC, Art 7.1.2].
   8.1. But for Red's failure to arrange sufficient cushioning materials on time, Red would not have required the additional material Blue purchased.
   8.2. Red failed to inspect the material Blue found, despite Red's experience as an air transportation company and Red noticing the unusually low price [Ex 11 (Blue), Art 4]. But for Red's failure to confirm the material was 'suitable for air transportation', Blue would not have suffered the loss.
9. Blue fulfilled its duty to cooperate with Red by purchasing the additional material at Red's request [PICC, Art 5.1.3]. That cooperation does not excuse Red from Red's obligation to procure cushioning material and package the goods.
   9.1. A duty to cooperate does not mean Blue must perform Red's obligations; it is limited to what may reasonably be expected for the performance of Red's obligations [PICC, Art 5.1.3, Official Comment].
   9.2. Blue did what would be reasonably expected to assist Red to perform its obligations [Ex 11, Art 4]. With minimal instruction from Red, Blue

purchased the only available cushioning material at a day's notice [Para 29; Ex 11, Art 4]. Red has the contractual duty to procure cushioning materials. It was reasonable for Blue to defer to Red's expertise on the materials' suitability and to infer from Red's unqualified acceptance of the materials that Red was satisfied with them.

10. Therefore, Red's non-performance was caused by Red's own acts and omissions.

II Red cannot rely on the Master Agreement to avoid liability

A The Special Agreement displaces the Master Agreement's exemption clauses.

11. Although the Master Agreement contains exemption clauses, Red and Blue agreed to re-allocate packaging duties and risk under the Special Agreement.
12. The general obligations in the Master Agreement should be read in light of the specific clauses of the Special Agreement, consistent with the interpretation principle of *lex specialis derogati legi generali.*
13. The Special Agreement expressly shifts the packaging obligations to Red [Ex 9, 10].
14. Contractual terms must be interpreted 'according to the common intention of the parties' and to give effect to the agreement [PICC, Arts 4.1, 4.5].
15. It would be contrary to the parties' express agreement if Red could evade its contractual obligations by relying on an exemption clause in the Master Agreement.
16. This would in effect relieve Red of its core obligations under the Special Agreement, rendering part of the Special Agreement meaningless [MOU, Art 4].
17. Red cannot rely on the exemption for 'inherent defect' in respect of the cushioning material [Ex 10, Art 7.1(1)] because Red has a duty to properly pack the goods, including using suitable cushioning material.
18. Therefore, to give effect to the parties' intention in the Special Agreement, the Master Agreement's exemption clauses should not apply.

B Even if the exemption clauses apply to the Special Agreement, Red is still liable for Blue's loss.

19. The three relevant exemption clauses in Art 7.1 of the Master Agreement do not relieve Red of its liability for non-performance of its packaging and transportation duties for the BSN Sale.
20. Red cannot rely on the Master Agreement's exemption for 'Damage …not caused by Red's willfulness or negligence' [Ex 4, Art 7.1].
21. A party is negligent where it '[O]ught to have known of [an] error [which] is to be determined from the objective perspective of a reasonable person in the same situation...' [Vogenauer, 2015: 483].[1]
22. Red was negligent because, as an air transportation business, Red ought to have known that:
    22.1. Red required more cushioning materials;

[1] Stefan Vogenauer and Jan Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts* (OUP, 2nd ed, 2015)

22.2. The materials acquired were inadequate, particularly in light of the unusually low price [Ex 11 (Blue), Art 6]; and
22.3. Faulty cushioning material would likely lead to damage to the goods during transit.

23. Red cannot rely on the exemption for 'an inherent defect or natural wear and tear of the parcels' [Ex 4, Art 7.1(1)].
    23.1. The damage resulted from the use of cushioning material 'not dedicated for air transportation' [Para 31]. This was not an inherent defect in either the material or in the goods themselves, but a result of Red failing to procure adequate quantities of material of the appropriate quality.
24. Red cannot rely on the exemption for 'acts of god...or other disasters beyond control' [Ex 4, Art 7.1(6)].
    24.1. Acts of god are included in *force majeure* [Vogenauer, 869] which are 'impediment[s] beyond [the parties'] control' that they 'could not reasonably be expected to have taken…into account at the time of the conclusion of the contract' [PICC, Art 7.1.7(1)].
    24.2. The damage resulted from 'clear air turbulence so severe that it happens only once every few years' [Para 31]. Turbulence is a natural event. Given Red's 70 years of experience in air transportation, Red could reasonably anticipate and account for turbulence because it is a common occurrence in air transportation.
25. Therefore, Red cannot rely on any of the exemptions in Article 7.1 of the Master Agreement.

III Blue is entitled to 7.75 million Nego-Lira ('NL') for loss caused by Red's non-performance

A Blue is entitled to 7.75 million NL comprising of lost purchase costs, anticipated profits, and mitigation costs with respect to the damaged Abu Propolis and Abu Watches.

26. Blue's loss, as a result of Red's non-performance [PICC, Art 7.4.2], comprises: 1.6 million NL in lost purchase price and 4.4 million NL in lost profits from the unsaleable Abu Propolis; and 1.5 million NL lost profits and 250,000 NL repair costs from the damaged Abu Watches.
27. Loss sustained: 1.6 million NL lost purchase price of the 40,000 'unsaleable' bottles of Abu Propolis [Para 30].
28. Gain deprived: Lost anticipated profit of 4.4 million NL from 40,000 unsaleable Abu Propolis bottles and 1.5 million NL from the 5,000 damaged Abu Watches that had a 1-month delay to be sold.
    28.1. The lost anticipated profit is assessed at the time of non-performance [PICC, Art 7.4.2, Official Comment; Vogenauer, 984].
    28.2. The damage to the Abu Propolis occurred on 27 September 2019, on inspection of the packages at the warehouse in Negoland [Para 30]. The anticipated sale price on 27 September 2019 was 150 NL per bottle. Therefore, the lost anticipated profits are equal to:

$$\textit{Loss} = (150 \times 40{,}000) = 6 \textit{ million NL}$$

28.3. The damage to the Abu Watches occurred on 4 October 2019, the time Blue discovered the non-performance. On 4 October 2019 Blue received many customer complaints about damage to the Abu Watches, and demonstrated knowledge of the damage by notifying Red in email on 7 October 2019 [Para 33]. Blue's second email on 12 October 2019 confirmed to Red the extent of the damage [Para 33]. Therefore, the value of the watches on 7 October 2019, and lost anticipated profits are equal to:

$$\textit{Abu Watch value} = (500 \times 5{,}000) = 2.5 \textit{ million NL}$$

$$\textit{Loss} = (\textit{2.5 million} - (200 \times 5{,}000) = 1.5 \textit{ million NL}$$

29. Expenses reasonably incurred by Blue mitigating the harm: 250,000 NL Abu Watch repair costs. Blue is entitled to the unexpected cost of 250,000 NL incurred to mitigate its loss from the damaged Abu Watches [PICC, Art 7.4.8]. The repair costs were a reasonable means for Blue to mitigate its losses through re-selling the repaired watches [PICC, Art 7.4.8, Official Comment].
30. Therefore, Blue is entitled to 7.75 million NL for losses from the damaged goods. These losses are certain at the date of the arbitration [PICC, 7.4.3].

B Blue's losses were reasonably foreseeable to Red.

31. Red could reasonably foresee the harm claimed by Blue at the conclusion of the Special Agreement if it failed to perform its packaging and transportation duties [PICC 7.4.4].
    31.1. Red could reasonably foresee that its non-performance would likely result in loss to the purchased value of the Abu Propolis, particularly as Red knew the goods were not generic [Para 25]. Red knew it was transporting breakable products, to which it was instructed to pay special attention [Ex 9, Art 2(5)].
    31.2. Red could reasonably foresee that its non-performance would likely result in lost anticipated profits. Red knew the goods were for an immediate, time-limited sale event [Para 26; Ex 10], making it reasonably foreseeable that delays to sell the Abu Watches, or the lost opportunity to sell the Abu Propolis, would cause loss to Blue.
    31.3. Red could reasonably foresee that its non-performance would likely result in Blue taking steps to mitigate its loss. Blue's choice to repair the watches for resale was a reasonably foreseeable means of mitigation. This is because repair was a cheaper solution than re-purchasing the expensive product.
32. Red must be able to foresee the type or nature, but not necessarily the extent, of the harm [PICC, Art 7.4.4]. Therefore, Red did not have to foresee the monetary value Blue is claiming from this harm.

C Red's liability for damages is not limited or released by the Air Waybill.

33. Red issued an Air Waybill to Blue [Para 29]. It is a non-negotiable contract between a Shipper (or Consignee) and a Carrier, attached by the carrier and visible on the exterior packaging of the goods. It documents the value of the goods and allocates risk between the parties.

34. The Air Waybill only releases Red of its liability as a carrier for compensation claims resulting from damage to the goods when Red can show that it has taken all possible action to prevent the incident from occurring [Ex 12, Art 3]. Red did not take all reasonable steps to do so.
35. Article 5 of the Air Waybill attempts to limit Red's liability for damages to 19 NL per kilogram where Blue has been contributorily negligent [Ex 12, Art 5]. Blue did not contribute to the damage to the goods or resulting losses.
36. Article 6 of the Air Waybill limits Red's liability to 22 NL per kilogram. Red cannot rely on this exemption clause if it would be 'grossly unfair' to do so, having regard to the purpose of the contract [PICC, Art 7.1.6] and the parties' legitimate expectations regarding the performance of the contract [Vogenauer, 861].
    36.1. Article 6 would allow Red to limit its liability to $68,200, despite a stated cost-price value of $6 million on the face of the Air Waybill.
    36.2. The Air Waybill was affixed to the goods after the Special Agreement was formed and after the goods were packed. The Air Waybill attempts to limit Red's liability and Blue's compensation for Red's non-performance. The limit imposed is commercially unreasonable and 'substantially different' [PICC, 7.1.6] to what Blue expected, given the purpose of the Special Agreement.
    36.3. The gross unfairness is shown by the disparity between the losses suffered by Blue ($7.75 million) and the compensation limit of ($90,200) that Red seeks to impose.
    36.4. This limits Red's liability to 0.89% of the value of Blue's goods, which is a commercially unreasonable apportionment of risk that was not intended by the parties.

INFORMATION CASE

IV Blue had no duty to comply with the General Data Protection Act ('GDPA')

A The GDPA is not 'Applicable Law' in relation to the Site Development Agreement ('Site DA').

37. The Site DA provides that Red, as the website owner and operator, was responsible for the key decisions about its design and operation [PICC, Art 4.4].
    37.1. Blue designed the website to meet Red's specification [Ex 8, Art 2.1]. The website required final approval from Red [Ex 8, Art 2.3].
    37.2. Red could manage, monitor, and mitigate risks as the operator and owner of the website [Ex 8, Art 3.1].
    37.3. The website structure and operation, including legal requirements, were dependent on Red effectively providing material [PICC, Art 5.1.5(d)].
    37.4. It would be commercially unreasonable to impose an obligation of legal compliance on Blue, because it would alter the agreed balance of performance [Vogenauer, 616].

B The GDPA does not apply to the data breach. Blue need not compensate Red for a fine that Red did not need to pay.

38. The Site DA requires 'Blue [to] perform all work called for by [the] Agreement in compliance with applicable laws' [Ex 8, Art 8.3(3)].

39. The parties' mutual intention was for Negoland law to govern the website. The GDPA is not part of Negoland law.
40. The method of obtaining consent and the redirection process do not breach the laws of Negoland [paras. 37, 39]. Therefore, there was no breach of Articles 8.3(3) and 8.3(4) of the Site DA.
41. 'Applicable laws' are laws that are legally binding on the website.
    41.1. Subsequent to the conclusion of the Site DA, the parties performed as though the laws of Negoland applied [PICC, Art 4.3(c)]. The terms and conditions of the website state that the website and its transactions are governed by the laws of Negoland [Para 37]; the site server was located in Negoland [Para 23] and transactions and reservations occurred in Negoland [Para 23]. There was no instruction in the material provided under Article 2.1 of the Site DA for the website to be developed in accordance with Arbitrian regulations [Para 40].
    41.2. The purpose of the Site DA was to provide Red with a functioning website for Red Travel customers to access the Internet [Ex 8, Preamble; PICC, Art 4.3(d)].
    41.3. The parties did not intend for Article 8.3(3) of the Site DA to impose an ongoing duty on Blue to monitor or ensure the legal compliance of the website [PICC, Art 4.1].
42. A reasonable person with the parties' commercial experience would not interpret Article 8.3(3) of the Site DA as extending beyond the laws of Negoland [PICC, Art 4.1(2)].
    42.1. The Supreme Court of Arbitria's judgment makes clear the GDPA does not apply to Red Travel [Para 41]. Therefore, to imply the GDPA, which is not legally binding on the Red Travel website, into the Agreement would produce an unreasonable consequence.
    42.2. Such a broad interpretation would unreasonably oblige Blue to ensure the website complied with the domestic law of all foreign jurisdictions from which clients access Red Travel.
43. Given the allocation of obligations, Blue would not have foreseen it would be liable for a statutory fine that would be levied on Red [PICC, Art 7.4.4].

V Alternatively, if the GDPA does apply, Red's actions contributed to Red's loss and so Red's damages claim must be reduced

A Damages must be reduced to the extent that Red contributed to the harm.

44. Where the harm suffered is due in part to an act or omission by Red, the amount of damages must be reduced to the extent of Red's contribution [PICC, Art 7.4.7].
45. Blue prepared a website based on the materials provided to it by Red. Red cannot now complain that the website did not meet requirements that Red did not articulate at the time. It was Red's responsibility to specify which laws it wanted the website to comply with, so Red is responsible for any harm flowing from non-compliance.

B Damages must be reduced because Red failed to mitigate its loss.

46. Blue is not liable for harm suffered to the extent that Red could have reduced the harm by taking reasonable steps [PICC, Art 7.4.8].

47. It was not reasonable for Red to pay the fine before the Supreme Court made its decision.
    47.1. On 15 December 2019 the Supreme Court announced it would render a judgment in the case on 6 January 2020.
    47.2. Despite being aware of this development, Red paid the fine on 16 December 2019 [Para 40].
    47.3. Red would not have suffered any disadvantage if it had waited to pay the fine until after the judgment because the fine was not due until 10 January 2020 [Ex 13, Para 2], which is four days after the Court's judgment was expected.
    47.4. The reasonable course of action would have been to wait for the Supreme Court's ruling.

VI Blue performed its duties under the System Development Agreement ('System DA') and did not warrant a 'error free' system

A The System DA expressly 'does not warrant "error free" operation'.

48. As an operator of a digital sales platform, Red can reasonably be expected to have known that computer system and software development always involves the iterative discovery of 'bugs'. Bugs are an industry term for errors in coding that require subsequent 'fixes'.
49. Terms should be interpreted using the meaning given by reasonable persons in the same circumstances [PICC, Art 4.1(2)]. The meaning commonly given to terms within the relevant industry should be applied [PICC, Art 4.3(e); *Independent Music Publishers and Labels Association (Impala, International Association) v Commission* 2006 ECR (European Court Reports) II-02289: Case t-464/04 at 177].
50. 'Bugs' in reference to the R-CMS mean coding errors that affect the usability of the system (i.e. customer search functions), as demonstrated by the email exchanges in Exhibit 14. The word 'bugs' is not defined in the System DA. Therefore, due to its jointly accepted nature (stalling usability), bugs must fall under the umbrella of 'error' mentioned in Article 6.2.
51. The System DA between Blue and Red expressly states 'Blue does not warrant uninterrupted or error free operations' [Ex 7, Art 6.2]. As the bug that caused the data breach was an error, Blue did not warrant against the breach.
    51.1. This interpretation gives effect to the ordinary meaning of the words in Article 6.2. It is supported by Blue's industry knowledge in information technology, as a leading online retailer [Para 12], because Blue would know it is impossible to guarantee an error free system. The parties' preliminary negotiations [PICC, 4.3(a)] are consistent with this interpretation.
    51.2. The parties' subsequent conduct also supports this interpretation. The R-CMS was subject to Red's approval because Red held an irrevocable license over the system [Ex 7, Arts 5.1, 5.2]. When Red began use of the R-CMS, it assumed responsibility for the ongoing functioning of the system. This is because Blue contracted to build the computer system [Ex 7, Art 4]. Blue discharged its obligations when Red accepted delivery of the product [Ex 7, Arts 4, 5.2]. Red's email on 18 January demonstrated its responsibility to monitor the R-CMS. The subsequent request for checks to

safeguard against hacks fall outside the scope of the original System DA. There is no further obligation for Blue to act as a data governance consultant to Red.

52. There is no other contract related 'to the relationship between Red and Blue after the development' [Para 21]. Therefore, the parties intended Blue's obligations to end when the R-CMS was completed.
53. Blue was not negligent in fulfilling its obligations under the System DA. Irrespective of the presence of bugs, the system conformed to industry standards, because:
    53.1. The nature of this bug was such that it could not be detected by an experienced software developer [Para 21] using professional tools and knowledge. The bug was abnormal, requiring three to four days to identify.
    53.2. Blue appropriately responded to the bugs advising Red to suspend the operation of the system [Ex 14, 15 January 2019].
    53.3. Red held ultimate control over the R-CMS. Its completion was subject to Red's final approval and it maintained control of and access to the system at all times.
    53.4. Blue was not obliged to continuously update the system against bugs and cyber-attack risks. This is evidenced by the agreed fact that there is no other contract related 'to the relationship between Red and Blue after the development' [Para 21]. Red had no expectation that Blue would be continuously involved in the system.

B The Site DA is separate from, and its warranties do not apply to, the System DA.

54. Blue and Red executed two separate agreements, one relating to the development of a website [Ex 8], and one to the development of the R-CMS [Ex 7]. The parties intended for these to be separate agreements with separate operation.
    54.1. Both agreements contained 'Entire Agreement' clauses, [Ex 7, Art 13; Ex 8, Art 12.3] expressly excluding the application of provisions from one agreement to the other [PICC, Art 2.1.17]. Further, it is an agreed fact that there is 'no other contract related to the development of the system' [Para 21].
    54.2. Each agreement expressed the necessary warranties for the system and the site. The parties showed a clear intention to distinguish between the two products by creating separate agreements, and distinct warranties and obligations. To apply the warranties of the Site DA to the System DA would go beyond the obligations and warranties the parties intended to create.
    54.3. Therefore, warranties under the Site DA should not be applied to the system due to the 'Entire Agreement' clauses.
55. If the tribunal determines that the Site DA is applicable to the R-CMS system, the parties' fulfilled their contractual obligations.
    55.1. Read within the 'relevant circumstances' [PICC, Art. 4.3], the Site DA's warranties do not apply to Blue, because: The Site DA states 'Blue will repair any...defect [that] affects usability of Red's Web Site' within a reasonable time period. The repair will otherwise be 'within 24 hours' [Ex 8, Art 8.3] The warranties describe the website, not the R-CMS, and relate

to the customer usability rather than data security. The bug only affected the R-CMS and its data security.

55.2. Therefore, the Site DA's warranties do not apply to the circumstances that led to the data breach.

VII Alternatively, Red's damages claim must be reduced because Blue is not obligated to compensate for consequential loss

A The Information Commissioner's fine cannot be recovered by Red because Blue is not obligated to compensate this type of loss.

56. The parties expressly limited the type of loss Blue was liable for under the System DA. Article 6.3 expressly excludes Blue's liability for consequential loss for non-performance by Blue. Article 6.3 of the System DA was an intentional and permissible deviation from the PICC [PICC, Art 1.1].
57. The 'Entire Agreement' clause [Ex 7, Art 13] means that, when they are inconsistent with other laws or agreements, the terms of the contract are to be preferred.
58. The harm claimed by Red was a consequential loss; specifically, it was a consequence of third-party hacking. It is therefore a category of loss that Red is expressly excluded from claiming against Blue.
59. Blue is not liable to compensate Red for harm that was unforeseeable at the time the contract was concluded [PICC, Art 7.4.4].

    59.1. Blue could not have reasonably foreseen Red's response to the Information Commissioner's fine. The GDPA does not apply to Red, therefore Blue could not have foreseen that Red would pay a fine that it was not obliged to pay.

B Blue is not liable to compensate Red for the solatium.

60. Article 6.3 of the System DA states that '[I]n no event shall Blue be liable to Red for any indirect, special or consequential damages or lost profits' [Ex 7, Art 6.3]. The solatium paid by Red was a consequence of Red mitigating potential reputational losses and was a consequential loss. Therefore, Blue is not liable to compensate Red.
61. Blue is only liable to compensate Red for foreseeable harm. The value of the solatium was not foreseeable because it exceeded the industry standard rate of 10 to 50 NL. Red's payment of 100 NL was so far above the industry standard rate that Blue could not have foreseen the solatium costs. Accordingly, Blue is not liable to compensate.
62. Red contributed to Red's loss. Despite being aware of repeated hacking attempts, Red did not suspend the R-CMS. Red cannot hold Blue financially responsible for Red's failure to act. It further exacerbated its loss by paying at least double the industry standard.
63. If the Tribunal does not relieve Blue of liability for the entirety of the solatium, then Red's contribution to its own loss should be reflected in a reduced amount of damages.

ARBITRATION PROCEDURE

VIII Blue objects to online witness examination because it is inconsistent with the parties' agreed procedure for their arbitration

64. Arbitration procedure is determined by agreement of the parties. Failing such an agreement, as is the case here, it can be determined by the Tribunal [UNCITRAL Notes on Organising Arbitral Proceedings, 2016, Para 8].
65. Blue consented to an in-person, physical hearing at which witnesses could be examined.
66. The Tribunal has the discretion to conduct the arbitration in a manner and location it 'considers appropriate' [UNCITRAL Arbitration Rules 2010 ('UNCITRAL'), Arts 17(1), 18(2)], but in doing so must consider conditions set by Article 17(1) of the UNCITRAL Rules.
67. This discretion indicates that the arbitral tribunal can make the decision to conduct an online witness examination without Blue and Red's consent.
68. Although online arbitration was possible prior to COVID-19, there is no evidence that either Red or Blue turned their minds to it, and it was not what the parties agreed to. Neither party foresaw COVID-19 or contemplated an online arbitration procedure.
69. The foundation of arbitration is party consent. Blue has not consented to an online witness examination and so the tribunal should exercise caution and defer to the parties' expressed agreement under the Master Agreement and hold a physical witness examination.

IX However, if the Tribunal considers that it has the authority to conduct an online witness examination, procedural fairness and due process require certain conditions

70. The Tribunal has discretion to determine the conditions and manner in which a witness may be examined [UNCITRAL, Art 28(2)] and the tribunal must ensure these conditions 'provide a 'fair and efficient process' [UNCITRAL, Art 17(1)]. Procedural fairness and due process require that every party involved in the arbitration is 'given notice of the proceedings, treated equally and is given an opportunity to be heard and to answer the other party's case before a decision is made by the arbitral tribunal' [Fortese and Hemmi, 2015: 110].[2]
71. Procedural fairness and due process are critically important for resolving the substantive issue of compensation in the 'Information Case'.
72. Ruby and Crane's evidence will be pivotal in these proceedings. Their reliability and credibility must be tested.
73. Limiting witness examination to an online format challenges procedural fairness and due process, because it [Scherer, 2020: 20-23]:[3]

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[2] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' 3 *Groningen Journal of International Law* 110, 110 (2015)

[3] Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework" *Journal of International Arbitration* 2020, 37(4), 20-23; Michael Legg, "The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality", (2021) *Federal Law Review* (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681165)

73.1. Affects the ability to assess a witness's credibility, especially in relation to non-verbal cues;
73.2. Creates the risk that a witness may receive contact, coaching or correspondence whilst giving their statement;
73.3. Permits unregulated access to documents with which the witness could revive their memory, and so undermine their evidence;
73.4. Compromise the confidentiality of the witness examination;
73.5. Create vulnerability to cyber security breaches which can affect the integrity and confidentiality of the online witness examination; and
73.6. Affect the flow and intelligibility of the proceedings through transmission delays and connection issues that invite confusion, repetition and omission of both questions and testimony.

74. The UNCITRAL Rules outline conditions that seek to ensure procedural fairness and due process [UNCITRAL, Art 27(1)-(4), Art 28(1)].
75. Although the UNCITRAL Rules do not provide for online witness examination, guidelines published by leading arbitration institutions suggest that the following conditions should be met:
    75.1. A reasonable part of the room in which the witness is located should be shown on the screen, while retaining a clear depiction of the witness's face and upper body.
    75.2. The witness should give evidence sitting at an empty desk with a 360-degree view of the room that should be provided at the beginning of each session.
    75.3. The witness should not use a 'virtual background'.
    75.4. A hearing invigilator should attend the location from which the witness will give evidence to inspect and ensure the integrity of the premises. The witness should be required to affirm they are alone (not including the invigilator).
    75.5. To the extent possible, the parties shall ensure that there is a secure Wi-Fi network and technological set up. This includes making sure the internet, video and audio transmissions are clear among the parties, witness and tribunal and that there is backup technology in case an issue arises to avoid delay.
    75.6. The parties shall ensure that the witness is familiar with using Zoom.
    75.7. The online witness examination should be password-protected, and Zoom should be set to the highest security setting to safeguard the integrity, security and confidentiality of the online witness examination.[4]
76. Blue submits that that if the arbitral tribunal is to conduct online witness examination, the conditions described in paragraph 73 above must be met when examining Ruby and Crane.

[4] See e.g. Seoul Protocol on Video Conference in International Arbitration (18 March 2020) (http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024); Chartered Institute of Arbitrators Guidelines on Witness Conferencing in International Arbitration (https://www.ciarb.org/media/4595/guideline-13-witness-conferencing-april-2019pdf.pdf)