SUMMARY OF RED'S SUBMISSIONS

TRANSPORTATION CASE

I. Red did not breach its obligation regarding the packing and shipping of Abu Propolis and Abu Watch.

II. Blue is not allowed to claim damages of the Abu Watch to Red

III. Even if Red breached its contractual obligation, Red is exempted from liability for damages for both goods

IV. Even if Red is not fully exempted from its liability, the amount of damages should be reduced

INFORMATION CASE

V. Blue failed to fulfill its obligation under the Site Development Agreement.

VI. Due to its breach of obligation of building a website conforming to the GDPA, Blue has the liability to pay 500,000 Nego-Lira to Red in accordance with UPICC 7.4.1-7.4.4.

VII. Blue failed to fulfill its obligation set forth in 4.4 of the System Development Agreement.

VIII. Blue must pay 6.5 million Nego-Lira (A.) in accordance with UPICC 7.4.1-7.4.4. due to its breach obligation stated in VII. and (B.) its breach of 6.1 and 6.2 of the System Development Agreement.

ARBITRATION PROCEDURE

IX. The arbitral tribunal has the authority to make a decision to conduct the examination of witnesses on-line, without the consent of both parties.

X. Conducting the examination of witnesses on-line is not only allowed, but also necessary.

TRANSPORTATION CASE

ISSUE 1

I. Red did not breach its obligation regarding the packaging and shipping of "Abu Propolis" and "Abu Watch", under the "Master Delivery and Transport Agreement" and the "MEMORANDUM for the Special Sales at Negoland".

Red submits:

A. Red performed all its obligations under the Memorandum

B. Even if there was a non-performance of the Memorandum, there is no breach

C. Red has performed all of its obligations under the Master Agreement

D. Even if there was Red's non-performance regarding the Master Agreement, there is no breach

1. In the Master Delivery and Transportation Agreement ('the Master Agreement'), Red and Blue mutually agreed that Red will provide "the transportation of goods with the airplanes owned by Red" and "the delivery of goods sold at… 'Blue Store Negoland'", whereas Blue "shall be responsible for the packing of parcels and shall pack parcels in a manner suitable for transport according to the character, weight, volume, etc. of the parcels" [*Exh. 4, 1.1.1-1.2.1*].

2. However, for a limited time during the BSN-Super 10th Anniversary Sale, Red agreed to "cooperate in packaging of parcels at the warehouse of Blue for air transportation from Arbitria to Negoland", as stated in the Memorandum for the Special Sales at Blue Store Negoland ('the Memorandum') [*Exh. 10 (3)-(4)*]. This was because Blue was suffering from a shortage of labor, as members of Blue's warehouse staff who "were dissatisfied with the working environment had been leaving" [*¶26*].
3. The Memorandum falls under 1.2.3 of the Master Agreement, which states that, "Red may agree to provide Blue with other transportation services as requested by Blue, such as packing..." [*Exh. 4, 1.2.3*]. Therefore, as a fundamental premise, whatever is not specified in the Memorandum is subject to the Master Agreement.

A. Red performed all of its obligations under the Memorandum.

4. Red 's obligation for this sale was to "*cooperate* in packaging of parcels" [*Exh. 10 (3)*]. Considering the term 'cooperate' [*UNIDROIT Principles of International Commercial Contracts ('UNIDROIT') 5.1.5(a)*] and the fact that Blue is the regular obligee of this service [*Exh 4 (1.2.1)*], this obligation of Red is the Duty of Best Efforts [*UPICC 5.1.4(2)*].
5. In addition, Article 4 of the Memorandum, which specifies the 'cooperation in packaging,' states two obligations: to "send two people... and procure cushioning material."
6. Regarding the first obligation, since the precise number of necessary people is declared in writing, it is natural to interpret that the obligation to send two people is the Duty to Achieve a Specific Result [*UPICC 5.1.6(1)*]. Red has performed this obligation on Sep. 17th [*¶27*].
7. Regarding the second obligation, because there were no provisions in Exh. 10 nor specified instructions from Blue, it remains as the Duty of Best Efforts. Therefore, Red was "bound to make efforts as would be made by a reasonable person of the same kind in the same circumstances" [*UPICC 5.1.4(2)*]. Red has performed this obligation for the following reasons;
    a. Red has procured enough cushioning materials by first procuring cushioning materials from Negoland, and after moving to Arbitria, by purchasing more from Blue [*¶28*].
    b. The cushioning materials purchased from Blue were insufficient in their quality. However, Red requested Blue to bring a cushioning material that suits the purpose of the Memorandum by concluding a "contract for the sale of goods between parties [from] different States," both of which are signatories to the U.N. Convention on Contracts for the International Sale of Goods (CISG) [*¶7, UPICC 2.1.1*]. According to Article 35 of CISG, which states the conformity of goods, Blue, as a seller, was liable to provide cushioning materials that fit the purpose of air transportation when this sales contract was held [*CISG 35 (1, 2(b))*].
    c. In addition, Red could not reasonably tell that the cushioning materials purchased from Blue were unsuitable for air transportation, because it was the same as the proper cushioning materials in its appearance and feel [*Exh. 11, Red(5)*].
    d. Taking into account the above factors and the fact that Blue had extensive experience in packing goods for international air transportation, it was reasonable for Red to rely on

Blue's procurement. Thus, Red has made its best effort in procuring the cushioning materials and Red has performed the obligation of procurement as well.

8. Therefore, Red performed both of its obligations set forth in Exh. 10, by sending two of its staff members to pack the parcels and making best efforts to procure the cushioning materials.

B. Even if there was a non-performance of the Memorandum, there is no breach.

9. "A party may not rely on the non-performance of the other party to the extent that such *non-performance was caused by the first party's act* or omission or by another event for which the party bears the risk" [*UPICC 7.1.2*].
10. Even if Red was subject to non-performance regarding the procurement of cushioning materials, Red's non-performance was caused by Blue bringing cushioning materials that were insufficient in its quality, despite Blue knowing that it was liable to provide a cushioning material suitable for air transportation.
11. Therefore, because it was in fact Blue's act that caused Red's non-performance, Blue cannot rely on Red's non-performance, and thus there is no contractual breach.

C. Red has performed all of its obligations under the Master Agreement.

12. In addition to fulfilling its extra obligations under the Memorandum, Red fulfilled its standard obligations under the Master Agreement: maintaining and operating its aircraft so that it is suitable for air transportation, which is undoubtedly the core duty of Red as a transportation company [*Exh. 4 1.1.1(1)*].
13. Red made sure that "the cargo room was constantly pressurized to about 0.8 atm during flight", and experts confirmed through the investigation that "there was no particular problem in operating the airplane, and there was no malfunction in the aircraft" [*¶31*].
14. Therefore, Red has fulfilled its usual obligation under the Master Agreement.

D. Even if there was Red's non-performance regarding the Master Agreement, there is no breach.

15. There is no dispute over the fact that the damage would not have occurred if the cushioning materials had been suitable for air transport [*¶31*].
16. Thus, even if there was Red's non-performance in transporting the goods, it was in fact Blue's act that caused Red's non-performance [*10 of this memodandum*]. Blue cannot rely on Red's non-performance, and therefore there would be no contractual breach regarding the Master Agreement [*UPICC 7.1.2*].

ISSUE 2

II. Blue is not allowed to claim damages of the Abu Watch to Red.

17. Regardless of whether or not Red breached its obligation, Blue is not allowed to claim compensation for damages to Abu Watch, because Blue's notification of damages relating to Abu Watch did not satisfy the conditions of the Excerpt of Conditions of Contract on Reverse Side of the Air Waybill [*Exh. 12*].
18. Article 7 of the Air Waybill states that, "No action shall be maintained in the case of loss or damage to Goods unless a complaint is made to Carrier in writing by the person entitled to delivery. Such complaint shall be made; within 14 days from the date of receipt of the goods".

19. After receiving the products on September 26th, Blue notified Red about complaints by customers on October 7th, and notified Red about the damages to Abu Watch on October 12th via email [¶*33*]. Considering that the first email did not explicitly mention damage, only the second email, which was sent after 14 days had passed, is equivalent to the notification of damage. As this notification does not satisfy the conditions of the Air Waybill, Blue does not have the right to claim compensation for damages to Abu Watch.

III. Even if Red breached its contractual obligation, Red is exempted from liability for damages for both goods.

Red submits:
A. Red is exempted from liability, pursuant to the Montreal Convention
B. Red is exempted from liability, pursuant to the Master Agreement
C. Even if there was a breach, the amount of the damages should be reduced.

A. Red is exempted from liability, pursuant to the Montreal Convention.

20. When the negligence of the person claiming the compensation caused or contributed to the damage, "*the carrier shall be wholly or 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" [*The Montreal Convention Article 20*].
21. Blue's staff did not check the quality of the additional cushioning materials, even though it was different from the usual materials Blue had been using, and it only cost half of the usual purchase price [*Exh. 11, Blue* ¶*6*]. Thus, Blue is considered to be negligent for not checking the quality of the additionally procured cushioning materials.
22. Red was not negligent for not checking the quality of the additional materials nor for not specifying the quality of the additional cushioning materials. As mentioned in ¶7(c) of this memorandum, Red could not reasonably detect the poor quality of the cushioning materials Blue acquired from its appearance and feel [*Exh. 11, Red*¶*5*]. Moreover, it is unreasonable to demand Red to realize that the purchase price of the additional cushioning materials was cheaper than the average price of cushioning materials for air transportation in Arbitria because Red does not know how much Blue usually purchases them for. Furthermore, Red was not required to explicitly indicate the quality of the additional cushioning materials to Blue as there was a mutual agreement that the products would be transported by aircraft. Since the damage was caused by the negligence of Blue, and Red was not negligent in procuring the additional cushioning materials from Blue, Red is exonerated from liability for damages under Article 20 of the Convention.
23. Even if Red was negligent in checking the quality of the cushioning materials, Red shall be partly exempted from liability for compensation as Blue was also negligent.

B. Red is exempted from liability, pursuant to the Master Agreement.

24. Alternatively, Red is exempted from liability based on the Master Agreement. Article 7.1 states that, "when the cause of Damage occurs during the transport; ... Red shall not be liable when Damage arises from one of the following circumstances, or when it is proved that Damage was *not caused by Red's willfulness or negligence*". The result of the investigation shows that the damage was caused by the vibration of the products which happened during the carriage of the cargo. There is no dispute between the parties that the leakage of air would not have happened if appropriate cushioning material had been used [*¶31*]. As explained in ¶15of the memorandum, the poor quality cushioning material, which Blue procured, was the cause of the damage. Since the damages were caused by "incompleteness or defect of package", and because the damages were not caused by Red's willfulness or negligence, Red is not liable for compensation [*Exh. 4 7.1.(2)*].

IV. Even if Red is not fully exempted from its liability, the amount of the damages should be reduced.

Red submits:
A. The liability of Red is limited to a sum of 22 SDRs per kilogram
B. The claimed amount of damages may not exceed the actual damage

A. The liability of Red is limited to a sum of 22 SDRs per kilogram.

25. Article 22.3 of the Montreal Convention states that, "in the carriage of cargo, the liability of the carrier is *limited to a sum of 22 SDRs per kilogramme* in the case of destruction, loss, damage or delay in relation to the carriage of cargo".
26. It is also stated in 7.3 of the Master Agreement, "Unless otherwise agreed by the parties in writing, Red's liability for the failure in the International Transportation Service or the Delivery Service shall be *limited to 22 SDR per kilogram* for such parcel".
27. SDRs (Special Drawing Rights) are supplementary foreign currency reserve assets defined and maintained by the IMF, for which the value is determined by the currency basket and could be exchanged to any free usable currency. The conversion of SDR into national currencies shall, in case of judicial proceedings, be made "according to the value of such currencies in terms of the Special Drawing Right *at the date of judgement*" [*Montreal Convention Article 23.1*]. Since 1 SDR is equivalent to 1.4 USD (caluculated by the current exchange rate), and 1 USD is equivalent to 1.1 Abu dollar [*Exh. 1*], 1 SDR is equivalent to 1.54 Abu dollars.
28. Because the damage occurred during the carriage of cargo and there was no special agreement regarding Red's liability [*¶31*], the damages should be limited to 22 SDR per kilogram. The total weight of the damaged Abu Propolis was 2800 kg (3,500kg × 40,000/50,000), and the total weight of the damaged Abu Watch was 300 kg (600kg × 5,000/10,000). Therefore, the total weight of the damaged products was 3100 kg (2800 kg + 300 kg) and Red's liability for damages should be reduced to 68,200 SDR, which is 105,000 Abu dollars.

B. The claimed amount of damages may not exceed the actual damage.

29. Master Agreement 7.3 further states that, "the claim amount for damages *may not exceed the actual damages* to the parcels, calculated based on either the *actual purchase price of the goods* or ordinary value of goods of the same sort and same quality". The damages should be determined by

using the basis of calculation which is more precise. In this case, the amount of damages should be calculated based on the actual purchase price as the price of each product is explicitly mentioned in ¶25 of the record.

30. The actual purchase price of Abu Propolis is 2 million Abu dollars (40×50,000 bottles), and the actual purchase price of Abu Watch is 4 million Abu dollars (400×10,000 watches) [*¶25*]. The *actual damage* of Abu Propolis is 1.6 million Abu dollars (2 million × 40,000/50,000), and the *actual damage* of Abu Watch is 2 million Abu dollars (2 million × 5,000/10,000). Therefore, although Blue is seeking 7.75 million Abu dollars, the upper limit of Red's liability for the damages is 3.6 million Abu dollars (1.6 million+ 2 million).

INFORMATION CASE

ISSUE 1

31. With the increase of tourists from foreign countries to Negoland, Red started the online tourist service Red Travel on January 15, 2019, and opened it within Blue's Blue Global Mall. Red requested Blue to undertake the development of a safe website for Red Travel. The agreement of the website development is concluded in the Site Development Agreement ('the Agreement') [*Exh. 8*].

V. Blue failed to fulfill its obligation under the Site Development Agreement.

Red submits: A. The GDPA applies to Red Travel, (i) in accordance with Article 3.2(a) of the GDPR (GDPA), and (ii) because it differs from the court case set forth in the record [*¶41*]. B. Because the GDPA applies to Red Travel, the method of obtaining consent was a breach.

32. Blue failed to fulfill its obligation under 8.3(3) of the Agreement; "Blue will perform all work called for by this Agreement *in compliance with applicable laws*" [*Exh. 8 8.3(3)*].

33. The General Data Protection Act of Arbitria ('GDPA') is one of the "applicable laws." (This Act is equivalent to the EU General Data Protection Regulation, hereafter GDPR, and quotes and citations below to the GDPR apply.) Blue had the liability to design and develop Red Travel's website under the GDPA, as (A) the GDPA applies to Red Travel. However, (B) the method Blue developed to obtain consent from customers of the site goes against the GDPA, and thus constitutes a breach of Blue's obligation for "compliance with applicable laws".

A. The GDPA applies to Red Travel, (i) in accordance with Article 3.2(a) of the GDPR (GDPA), and (ii) because it differs from the court case set forth in the record [*¶41*].

34. (i) The GDPR Article 3.2(a) states that, "[t]his Regulation applies to the processing of personal data of data subjects who are in the Union [here, Arbitria] by a controller or processor not established in the Union, where the processing activities are related to… the offering of goods or services… to such data subjects in the Union."

35. Red is a "controller not established in the Union [Arbitria]", as Red operates Red Travel and the server for it is located in Negoland [¶*23*]. In addition, Red Travel is a site that processes "personal data of data subjects who are in the Union" and the "processing activities are related to the offering of services to such data subjects in the Union."
36. Red Travel specifically targets customers in Arbitria because:
    a. Red planned to open Red Travel within Blue Global Mall from the very beginning of its service [¶*23*].
    b. Blue Global Mall (excluding the parts operated by stores) is operated exclusively in the Abu-language so it is likely that most people who access the site are Abu-speakers [¶*14*].
37. (ii) Red Travel does not fall under the court case stated in ¶41 of the problem, in which "the Arbitria Supreme Court decided that the GDPA does not apply to cases where the residents of Arbitria voluntarily accessed websites operated by foreign businesses that *do not target residents of Arbitria*". As explained above, since Red Travel *does indeed* target the residents of Arbitria, the court case is different from Red Travel, and therefore the GDPA applies to Red Travel regardless of the court rulings.

B. Because the GDPA applies to Red Travel, the method of obtaining consent was a breach.

38. When the GDPA applies, both parties do not dispute that the amount of penalties and sanctions imposed on Red would not be against the law [¶*41*]. Therefore, there is a breach of the GDPA regarding the method for obtaining consent [*Exh. 13*].
39. Considering all of the factors above, because the GDPA is one of the applicable laws, Blue breached its obligation under 8.3 of the Site Development Agreement by not developing the website in conformity with the GDPA.

VI. Due to its breach of obligation of building a website conforming to the GDPA, Blue has the liability to pay 500,000 Nego-Lira to Red in accordance with UPICC 7.4.1-7.4.4.

40. Red has a right to seek damages caused by Blue's non-performance stated in (37 and 38?) of this memorandum [*UPICC 7.4.1*].
41. The damages for this issue are 500,000 Abu dollars, the fine imposed by the Personal Information Protection Commission. The fine was imposed due to the non-performance, with a strong causal link, as the order stated that "[u]sing customers' personal information and data based on [the] consent that was not freely given is a violation of the General Data Protection Act." [*Exh.13*] As Red paid the fine, it is entitled to full compensation for harm sustained as a result of the non-performance [*UPICC 7.4.2 (1)*].
42. As GDPA applies to Red Travel, the harm was established with a reasonable degree of certainty as a result of the non-performance [*UPICC 7.4.3*].
43. Blue is fully liable for the harm because the damages were foreseeable at the time of the conclusion of the Site Development Agreement (May 1, 2018). The Personal Information Protection Commission declared that GDPA would be *strictly applied* for the protection of personal data when GDPA was enacted in May 2017 and came into force on January 1, 2019 [¶*6*]. Furthermore, Blue could foresee that it would be imposed on it if it violates GDPA. This is

because Article 83 of GDPR (GDPA) specifies conditions of imposition of administrative fines pursuant to the regulation. Therefore, Blue is responsible for the compensation [*UPICC 7.4.4*].

ISSUE 2

44. In order to renew its customer management system and database, Red outsourced the development of a new system called R-CMS (Red Customer Management System) [¶*21*]. This was conducted under the System Development Agreement [*Exh. 7*].

VII. Blue failed to fulfill its obligations set forth in 4.4 of the System Development Agreement.

45. Blue failed to fulfill its obligation under 4.4 of the System Development Agreement; "Blue warrants that all programming and other services shall 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 this Agreement."
46. Accordingly, Blue is obligated to implement a system that is not vulnerable to hacking and take reasonable measures to prevent hacking.
47. The basis for the obligation is as follows;

    (a) Red asked Blue to "pay *special attention* to hacking prevention and strict data management", and Blue has agreed to do so [¶*21*].

    (b) According to the nature and purpose of the contract [*UPICC 4.3(d)*], it is reasonable to interpret that Blue *does* hold a responsibility after the completion of development as "Red wishes to use the [sic] Blue to … implement" R-CMS [*Exh. 7*]. Considering the conduct of the parties subsequent to the conclusion of the contract [*UPICC 4.3(c)*], both parties had the same view on this point. This is shown from the fact that when Red requested Blue to fix several bugs on Jan. 15th, Blue fixed them in a day [*Exh. 14*].
48. Blue breached the obligation by failing to inspect R-CMS at an earlier point. On Jan. 18, Red asked Blue to check if there was any bug, because it found out that a company in its same industry experienced hacking. While waiting for Blue to respond, unauthorized access to R-CMS occurred multiple times. On Jan. 21, Red notified Blue of unauthorized access and requested Blue to "take necessary measures as soon as possible". On Jan. 23, Red notified Blue of another unauthorized access attempt and requested Blue to "respond immediately".
49. Despite these repeated requests, Blue did not even respond to Red until the 26th, just because the person in charge was absent for cold. Moreover, although Blue confirmed that it could have found bugs in three or four days with intensive checks, it ended up fixing the bug on Feb. 5th, which was more than 10 days after Red's reporting of hacking [*Exh. 14*].
50. Thus, from the fact that Blue did not take reasonable measures, it can be concluded that Blue failed to provide the service in the workmanlike manner and breached the agreement with Red.

VIII. Blue must pay 6.5 million Nego-Lira (A.) in accordance with UPICC 7.4.1-7.4.4. due to its breach obligation stated in VII. and (B.) its breach of 6.1 and 6.2 of the System Development Agreement [*Exh. 7*].

Red submits:

A. **Blue must pay 6.5 million Nego-Lira in accordance with UPICC 7.4.1-7.4.4. due to its breach obligation stated in VII.**

B. Blue is liable to compensate Red for 6.5 million Nego-Lira, based on Blue's breach of 6.1 and 6.2 of the System Development Agreement [*Exh. 7*].

A. **Blue must pay 6.5 million Nego-Lira in accordance with UPICC 7.4.1-7.4.4. due to its breach obligation stated in VII.**

51. Red has a right to seek damages caused by Blue's non-performance stated in 44-49? of this memorandum [*UPICC 7.4.1*].
52. The damages for this issue are 6.5 million Abu dollars, (i) the fine imposed by the Personal Information Protection Commission and (ii) solatium Red paid.
53. (i) The fine was imposed due to the non-performance, with a strong causal link, as the order stated that using a system which allowed hacking to take place violates Article 32 of the GDPA [*Exh.13*]. As Red paid the fine, it is entitled to full compensation for harm sustained as a result of the non-performance [*UPICC 7.4.2 (1)*].
54. As the GDPA applies to the case of R-CMS, the harm was established with a degree of certainty as a result of the non-performance [*UPICC 7.4.3*].
55. Blue is fully liable for the harm because the damages were foreseeable at the time of conclusion of System Development Agreement. Strict application of the GDPA for the protection of personal data was declared on the enactment and enforcement of the regulation [*¶6*]. Furthermore, Blue could foresee the imposition of the fine (Article 83). Therefore, Blue is responsible for the compensation [*UPICC 7.4.4*].
56. (ii) Solatium was the damage as a result of the non-performance because paying solatium was a necessary measure under the laws of Negoland [*¶39*]. As Red paid the solatium, it is entitled to full compensation for harm sustained as a result of the non-performance [*UPICC 7.4.2 (1)*].
57. As stated in paragraph 61of this memorandum, the harm was established with a degree of certainty as a result of the non-performance [*UPICC 7.4.3*].
58. Blue is fully liable for the harm because the damages were foreseeable at the time of the conclusion of the contract. This is because;
    a. In Arbitria, issues concerning the protection of personal information have been drawing increasing attention, and the GDPA was enacted in May 2017 [¶6]. Blue is an online retailer established since 1990, and has the responsibility as a company to be aware of the rise in personal information protection awareness.

b. Blue should have known from past incidents that in a case where customers' personal information gets leaked, regardless of the country in which it is established, companies are expected to pay solatium.

B. Blue is liable to compensate Red for 6.5 million Nego-Lira, based on Blue's breach of 6.1 and 6.2 of the System Development Agreement [*Exh. 7*].

59. Blue is liable to compensate for Red's loss due to the breach of Exh. 7.6.1, because the intention underlying the two Agreements is similar. Here, "other proprietary rights," as stipulated in Exh. 7.6.1, include "privacy," as specified in Exh. 8.8.2(4).

60. According to UPICC 4.4.1, "a contract shall be interpreted according to the common intention of the parties". In view of the fact that (a) R-CMS is a database for its courier and sightseeing business (including Red Travel) and is considered to be one of the "items reasonably necessary for the operation of Red's Web site (collectively the "Deliverables")" [*Exh. 8 2.3*], and (b) customers' data in use for both R-CMS and the Website is essentially the same, the intention behind the System Development Agreement [*Exh. 7*] and the Site Development Agreement [*Exh. 8*] is similar.

61. When comparing the two contracts, Exh. 7, which was made in March 2018, states that "Blue shall indemnify and hold Red harmless from any damage caused by and arising out of any infringement by any services by Blue upon patent, copyright, trade secret, or other *proprietary rights*" [*Exh. 7 6.1*]. Exh. 8, which was made in May 2018, states that "all Deliverables will not infringe any patents... or *other intellectual property rights, privacy,* or similar rights" [*Exh. 8 8.2(4)*]. In other words, Red and Blue used the rather broader term, "proprietary rights" in Exh. 7, whereas two months later, in Exh. 8, they focused their attention more to the importance of protecting privacy and personal information, and provided more concrete content to the broader term "proprietary rights" by deliberately including "privacy."

62. Furthermore, Blue is liable to compensate for Red's loss due to Exh. 7.6.2. Blue was negligent for the reasons mentioned in 47-48 of this memorandum and thus cannot be exempted from its obligations.

ARBITRATION PROCEDURE

ISSUE 1

63. As stated in ¶43, the on-line arbitration proceeding between Red and Blue was commenced pursuant to the 2013 version of the UNCITRAL Arbitration Rules-(hereafter, the Rules).

X. The arbitral tribunal has the authority to make a decision to conduct the examination of witnesses on-line, without the consent of both parties.

64. Article 28(2) states that, "*Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal*".

65. Consent of both parties is not stated above as one of the requirements for conducting examination of witnesses. Consent is not required because the examination of witnesses is vital for the arbitral tribunal to ensure that the judgement is fair and impartial. Thus, once the arbitral tribunal

determines it necessary, it may conduct an examination of witnesses without the consent of both parties.

66. Article 18(2) states that, "...the arbitral tribunal may also meet at *any location it considers appropriate* for any other purpose, *including hearings*".

67. In this case, online platforms such as Zoom would be deemed as an appropriate location for the examination of witnesses, considering that due to the novel coronavirus pandemic, it is difficult (for many, travel is strictly restricted or prohibited) and unsafe to have the witnesses travel to Japan from abroad or even within the country.

XI. Conducting the examination of witnesses on-line is not only allowed, but also necessary.

68. Article 17(1) states that, "The arbitral tribunal… shall conduct the proceedings so as to *avoid unnecessary delay and expense* and to *provide a fair and efficient process* for resolving the parties' dispute".

69. In the current situation with the global pandemic, if on-line examination of witnesses are conducted, numerous postponements and delays of hearings could be avoided. In addition, the arbitral tribunal has the obligation to ensure that both parties have a fair opportunity to participate in the hearing, and conducting the hearing remotely would satisfy that. The use of videoconferencing technology should be promoted to ensure a party's right to get effective access to justice and to be heard, so that judicial proceedings could be advanced efficiently, even in abnormal times.

70. Specifically, without the on-line examination of witnesses for Ruby and Crane regarding their e-mail exchanges, the arbitral tribunal may not be able to make the best and most accurate judgement for Red or Blue, due to lack of evidence.

ISSUE 2

Issue 2: The examination of witnesses using Zoom must be conducted so that both parties are "treated with equality", are "given a reasonable opportunity of presenting its case", and that the proceeding is "a fair and efficient process".

71. Article 17(1) states that, "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as *it considers appropriate,* provided that the parties are *treated with equality* and... *each party is given a reasonable opportunity of presenting its case*".

72. In order to appropriately conduct the examination of witnesses via Zoom, the following conditions must be met, at the least. When these conditions are met, problems of procedural fairness and due process, which attorneys of Blue were concerned about, would be prevented.

73. ① Participants must be limited to the members of the parties, witnesses, translators, paralegals, and legal representatives.

74. ② The Zoom meeting must be locked with a password to prevent unauthorized access, and that information must be kept confidential. The Host must control the Zoom meeting itself and any breakout rooms to ensure that no one else enters the room. Before starting the hearing, the arbitrator must check all participants' identification.

75. ③ All participants must have their video on at all times, showing 360 degrees of the room with an "owl camera". All participants must be connected to a secure and private internet source, so that people other than the participants cannot see or listen to the hearings. Unless otherwise agreed, the witnesses shall participate from either their home, the international arbitration institution of their residence, or their attorney's office. Participation from public places is not allowed to ensure the safety of the room.
76. ④ The waiting room function must be used, but the private chat function must be disabled to prevent any forbidden communications.
77. ⑤ During the examination of a witness, the Parties' legal representatives are not permitted to communicate with the witness. The testifying witness must be alone in the room where he/she testifies and does not make or receive communications of any sort during the course of his/her testimony.
78. ⑥ The testifying witness shall be fully visible to the examining counsel and to the Tribunal. The witness must have both hands visible to the camera, as well as keep eye contact with the camera at all times to prevent the witness from communicating with others or reading a script. In turn, the counsel shall be visible to the witness at all times during the examination. The witness shall not use any virtual background.
79. ⑦ The testifying witness shall not have access to any document other than an unmarked copy of his or her statement and shall turn off his or her phone and all other electronic communications device(s).
80. ⑧ All exhibits and documents used in the course of a witness examination will be made available to the witness via screen share. Display of the screen share of the exhibits and documents will be controlled by the Host.
81. ⑨ Both parties and all participants must agree on protocols regarding how to (a) handle technical difficulties, (b) provide access of equipment and technical support (for all types of devices), (c) set a minimum required wi-fi bandwidth, (d) handle the documents of evidences (hard copy, pdf copy, use of electronic platform such as screen share, etc.), (e) privacy and confidentiality issues, (f) set an agreeable start time and duration of the hearing so that it is most fair for all participants with consideration of time zones, etc. The parties may agree to use either the *ICCA or ACICA Protocols and Guidance on Cybersecurity in International Arbitration*.
82. ⑩ The Zoom hearing and examinations of witnesses must be recorded in its entirety. The recording must be shared with both parties immediately after the hearing, so that they can check the contents multiple times. However, the sharing of the recording is strictly prohibited to those other than the participants.
83. ⑪ If any participant finds any violations of the above protocols, they must promptly notify the arbitrators and both parties, before the hearing ends. Any notification must be presented with proof, such as the recording of the hearing.