# Transportation Case

## Issue 1

*Was there a breach of Red's contractual obligation in relation to the damage to the goods "Abu Propolis" and "Abu Watch"?*

**(1) Regarding Abu Propolis and Abu Watch, Red was obliged i. To transport 50,000 bottles of Abu Propolis and 10,000 cases of Abu Watch, ii. To send two people to facilitate Blue's packaging work for air transportation, and iii. To procure cushioning materials. Red fulfilled all these obligations, therefore, there was no breach of Red's contractual obligation in relation to the damage to Abu Propolis and Abu Watch.**

### A. The Master Delivery and Transportation Agreement (the 'Master Agreement') and the MEMORANDUM for the Special Sales at Blue Store Negoland (the 'MOU').

1. Red and Blue (the 'Parties') entered into the Master Agreement on February 14, 2009. The Master Agreement stipulated the Parties' obligation for the international transportation service between Arbitria and Negoland as Art. 1.1.1 stated. Art.1.2.3 of the Master Agreement stated Red may agree with other transportation services requested by Blue with extra payments. Due to the shortage of the labor force in Blue, Red agreed to cooperate with packaging work for air transportation as the additional obligations under this article. The detail of the additional obligations was laid out in the MOU on July 16, 2019.

### B. Red's obligation regarding Abu Propolis and Abu Watch in the MOU.

In relation to Abu Propolis and Abu Watch, Red was obliged to provide three services to Blue:

i. To transport 50,000 bottles of Abu Propolis and 10,000 cases of Abu Watch

2. Red was obliged to transport Abu Propolis and Abu Watch from Blue's warehouses in Arbitria to Blue's warehouses in Negoland in a proper way with the airplanes owned by Red under the Art. 1.1.1 of the Master Agreement.

ii. To send two people to facilitate Blue's packaging work for air transportation

3. Red was obliged to send two people to Blue. These two people sent by Red were obliged to package for air transportation with suitable cushioning materials according to the Art.4 of the MOU. As shown in the minutes of the meeting held on July 16, 2019, this article was established because Blue needed extra labor force from Red in order to facilitate the smooth packaging for air transportation.

iii. To procure cushioning materials

4. Red was obliged to procure the cushioning materials based on Art. 4 of the MOU. The packaging work, which two people from Red engaged in with people from Blue, was for the air transportation. Hence, the cushioning materials should have been suitable for the air transportation. Therefore, Red was obliged to procure the cushioning materials that are suitable for air transportation.

### C. Red fulfilled the obligations under the MOU and the Master agreement.

i. Obligation to transport 50.000 bottles of Abu Propolis and 10,000 cases of Abu Watch

5. On September 24, 2019, Abu Propolis and Abu Watch were delivered, and on September 26, 2019, they were transported to Blue's warehouse in the Negoland (¶29). It is clear from the experts' investigation that there were no particular problems with

the operation of the plane itself and that there were no malfunctions in the aircraft (¶31 ⑧).

ii. Obligation to send two people to facilitate Blue's packaging work for air transportation

6. On September 17, 2019, Red sent two of its staff members to perform the work requested by Blue (¶27) and they did the packaging work properly. As evidence by the statement of Blue's Management Department 1 Manager, Emerald, Red's staff packed the goods in accordance with Blue's instructions given to them through the tablets used in Blue's warehouse (Exhibit 11 Red's Statement ¶3, Blue's Statement ¶3), and there is no fact that Blue ever warned them about their packaging methods. Besides, Blue's written statement ¶3 stated. "[t]his work went very smoothly thanks to Red's two people" (Exhibit 11 Blue's Statement ¶3). Therefore, Red fulfilled the obligation of sending two people to facilitate Blue's packaging work for air transportation.

iii. Obligation to procure cushioning materials

7. Red's staff originally used the cushioning materials for packaging they brought from Negoland (Exhibit 11 Blue's statement ¶4). There were no particular problems in packaging work with using cushioning materials, which Red initially brought from Negoland.
8. When the cushioning material ran out because the number of products was more than initially expected, Red requested Blue to procure more cushioning materials urgently on September 22, 2019 (¶28 and Exhibit 11 Red's statement ¶4).
9. Blue accepted the order, and the consensus between the Parties that Blue was responsible for procuring the additional cushioning materials for air transportation was formed. To fulfil this responsibility, Blue had to procure the cushioning materials that were suitable for air transportation. This is because Blue knew or should have known that cushioning materials must be suitable for air transportation since Red's staff were engaging in packaging work for air transportation with Blue. Furthermore, Blue used to pack the product with cushioning material for air transportation (¶28). Therefore, Blue shall be responsible for the quality of the additional cushioning materials because of the consensus between the Parties that Blue has to procure the additional cushioning materials, which are suitable for air transportation and Red did not take the responsibility for that.
10. Furthermore, Red did not have to inspect the quality of cushioning materials when they received them from Blue since Red reasonably trusted Blue as a professional retail company with a great deal of experience in international air transportation. In addition to that, Red was not familiar with the cushioning materials often used in Arbitria including the quality and the average transaction price. Therefore, Red did not have to inspect the quality of cushioning materials when they received them from Blue.
11. Therefore, Red fulfilled its obligation of procuring the cushioning materials without any breach of contract.

**D. Red was not liable for using unsuitable cushioning materials for the packaging work of Abu Propolis and Abu Watch.**

12. The fact that Red did not use the suitable cushioning materials for packaging Abu Propolis and Abu Watch does not affect the fact that Red fulfilled the obligation for packaging air transportation with suitable cushioning materials. This is because the person who procured the cushioning materials should take the responsibility for the cushioning materials. The cushioning materials Red used for the packaging of Abu Propolis and Abu Watch were procured by Blue, therefore, Red is not responsible for

the quality of cushioning materials procured by Blue. Blue shall be liable to using unsuitable cushioning materials for packaging.

**(2) Even if there was a breach of Red's contractual obligation, Blue may not rely on the non-performance of Red under Art. 7.1.2 of UNIDROIT Principle 2016 ('UPICC'), since Red's non- performance was caused by Blue's interference.**

**A. Even if Red breached the obligations for air transportation of Abu Propolis and Abu Watch, Blue may not rely on the non-performance of Red under Art. 7.1.2 of UPICC.**

13. Art. 7.1.2 of UPICC stipulates "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 first party bears the risk."
14. When the cushioning materials for packaging work ran out, Red requested Blue to procure the cushioning materials in order to fulfill the obligation of packaging work for Abu Propolis and Abu Watch and Blue agreed to procure suitable cushioning material for air-transportation (See Above ¶8). However, the additional cushioning materials procured by Blue were not suitable for the air transportation. Red was not able to fulfill the obligation because of the unsuitable cushioning materials procured by Blue.
15. Therefore, Blue may not rely on Red's non-performance because Blue interfered with Red's performance by procuring cushioning materials, which were unsuitable for air transportation.

## Issue 2

*If there was a breach, then what is the amount of damages?*

**(1) Red is not liable to the damages since it does not meet the requirements for causal link, certainty of harm and foreseeability according to Arts. 7.4.2~7.4.4 of UPICC.**

**A. The Causal link between damage of both Abu Propolis and Abu Watch with non-performance is not satisfied.**

16. The Abu Propolis and Abu Watch were damaged by the aircraft's encounter with clear-air turbulence, which may occur only once every few years, and it shook very badly (¶31). Clear-air turbulence is the turbulent movement of air masses in the absence of any visual clues and clear-air turbulence cannot be detected in advance unless there is special equipment on board an ordinary aircraft, it is a phenomenon that occurs suddenly without any visual clues. Therefore, it was impossible for Red to foresee the possibility of occurrence of clear-air turbulence beforehand.
17. Furthermore, the fact that Abu Propolis and Abu Watches would not have vibrated in the cardboard boxes if no leakage of air from cushioning materials had occurred (¶31) does not affect this argument regarding the causal link of damage. This is because even if the air in the cushioning material had leaked, without the badly shook caused by the clear-air turbulence, the goods would not have crashed into each other in the cardboard boxes. Therefore, the damage to Abu Propolis and Abu Watch did not arise directly from Red's breach of obligation but was indirectly caused by the clear air turbulence.

**B. The Certainty of harm of the Abu Propolis is not reasonably certain.**

18. If 40,000 bottles of Abu propolis had not been broken and Blue had sold them at 150 Nego-Lira per bottle in the sale, it is not clear that all of them would have been sold. It cannot be said that the 40,000 bottles of Abu propolis could have been sold out.

19. Therefore, it was uncertain that loss profit caused by the damage of 40,000 bottles of Abu Propolis was 4.4 million Nego-Lira.

**C. It was not reasonable for Red to foresee the harm of Abu Propolis at the time the MOU was concluded.**

20. With regards to the lost profits of Abu Propolis, the loss of 150 Nego-Lira per bottle of Abu Propolis was not foreseeable to Red. At the time the MOU was concluded, there was not any sign that Red could reasonably anticipate the market price rise of Abu Propolis. Therefore, it was impossible for Red, as a transportation business operator, to foresee the market price rise of Abu Propolis. The price of Abu Propolis that Red was able to foresee was the price written on the Air Waybills, which is 40 Abu dollars per bottle, 2 million Abu dollars in total.

**D. There is no sufficient causal link between the loss of profits of Abu Watch and Red's non-performance.**

21. The direct cause of Blue's lost opportunity to sell Abu Watch at 500 Abu dollars per case was the fact that a watch of equal function and quality to Abu Watch began to be sold at 200 Nego-Lira per piece, which depressed the market price of Abu Watch. Red's non-performance did not diminish the value of Abu Watch in the market.

**E. The damage of Abu Watch was not foreseeable for Red at the time the MOU concluded.**

22. Regarding Abu Watch's loss profits, it was not foreseeable to the carrier, Red, that the market price would fluctuate so much during the repair period of the damaged goods that it would lose the opportunity to sell them at their original prices.
23. The damage of Abu Propolis and Abu Watch does not fulfill the requirement for claim compensation, therefore, Red is not liable for the 7.75 million Abu dollars. Even if the requirements of claim compensation had met, Red is liable for the repair cost of Abu Watch which is 250 thousand Abu dollars.

**(2) Even if Red is liable for damages, it is exempted under Art. 5 of Reverse Side of Air Waybill, Art. 20 of the Montreal Convention, and Art. 7.1 of the Master Agreement.**

**A. Reverse Side of the Air Waybill is applied to the Sale.**

24. Reverse Side of the Air Waybill is terms and condition of air transportation service from Red to Blue, which should be applied to all the air transportation related service between the parties. Red's obligation under the MOU Art.3 for packaging was added as a request from Blue to Red based on Art. 1.2.3 of the Master Agreement. The Master Agreement and the MOU are both under the effective range of the Reverse Side of the Air Waybill. Therefore, regarding the transportation of Abu Propolis and Abu Watch, the Parties should be bound by the Reverse Side of the Air Waybill.

**B. The exemption of the liability clauses under the Art. 5 of the Reverse Side of the Air Waybill, Montreal Convention and Art. 7.1 of the Master Agreement.**

25. Art. 5 of Reverse Side contract states "Contributory negligence on the part of the Shipper, Consignee or other claimants releases the Carrier of its liability to the extent provided by the Convention and applicable law." Thus, the Montreal Convention is the applicable law in this case.
26. Art. 20 of the Montreal Convention states "If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her

rights, 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."

27. Art. 7.1 of the Master Agreement stipulates "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", and (10) stated, "the negligence of Blue." Thus, Red shall not be liable for the Damage arising from Blue's negligence.

**C. Red should be exempted from liability since Blue's negligence contributed to the loss of 7.75 million Abu dollars.**

28. The unsuitable cushioning materials for air transportation were the cause of the damage, and the cushioning materials that are not suitable for air transportation were procured by Blue.
29. Blue shall have the knowledge about the purpose for the packaging is air transportation. Therefore, it is obvious that there was negligence in Blue's conduct providing unsuitable cushioning materials for air transportation to Red.
30. Thus, Red should be exempted from liability since Blue provided unsuitable cushioning materials for air transportation and this negligence contributed to the full damage, which is 7.75 million Abu dollars.

**(3) Even if Red's liability to the damage cannot be considered as full exemption, the amount of the damage should be limited to 22SDR per kilogram Abu dollars based on Art. 7.3 of the Master Agreement.**

31. According to the Art. 7.3 of the Master Agreement, the limit of Red's liability is 22 SDR per kilogram for such parcels. Therefore, Red's liability should be limited to 22SDR Abu dollars per kilogram.

## Information Case

### Issue1

*In relation to the first point regarding the order issued by the Personal Information Protection Commission, is Blue legally liable to pay 500,000 Nego-Lira to Red as compensation?*

**(1) Blue is obliged to design and develop the website for Red Travel (the 'Web Site') in compliance with the General Data Protection Act (the 'GDPA') under the SITE DEVELOPMENT AGREEMENT (Exhibit 8).**

**A. Blue is obliged to design and develop the Web Site in compliance with applicable laws under Art. 8.3(3) of the SITE DEVELOPMENT AGREEMENT.**

1. On May 1, 2018, the Parties entered into the SITE DEVELOPMENT AGREEMENT for the development of the Web Site.
2. Art. 8.3 of the SITE DEVELOPMENT AGREEMENT stipulates, "Blue represents and warrants that (...) (3) Blue will perform all work called for by this Agreement in compliance with applicable laws."
3. This article warrants that the Web Site complies with applicable laws. According to Art. 1.1 of the SITE DEVELOPMENT AGREEMENT, the term "all work called for by this agreement" refers to the design and development of the Web Site, so it is clear that the Web Site must comply with applicable laws. The term "applicable laws" refers to laws that may apply to the Web Site. Therefore, Blue is obligated to design and develop the Web Site so that the Web Site complies with applicable laws under Art. 8.3 (3) of the SITE DEVELOPMENT AGREEMENT.

**B. Blue is obliged to design and develop the Web Site in compliance with the GDPA.**

4. In May 2017, the GDPA was enacted in Arbitria (¶6).
5. Art. 3.2(a) of the GDPA stipulates, "This Regulation applies to the processing of personal data of data subjects who are in Arbitria by a controller or processor not established in Arbitria, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in Arbitria."
6. In this case, the Web Site was likely to be subject to the GDPA. This is because, from the beginning of the service, Red planned to open the Red Travel on Blue Global Mall (the "BGM"). BGM is an online shopping site operated by Blue, where most of the users are from Arbitria. Therefore, it was likely that the GDPA applied to the Web Site which had a store on BGM (¶¶14, 23).
7. In this case, for Blue to fulfill its obligation, there were two measures that Blue could have taken: First, before moving to the Red Travel from BGM, Blue could have clearly indicated that the Web Site is operated by a foreign entity in a manner that customers could easily understand. With this measure, GDPA would not have been applied. (Personal Information Protection Commission's (the "Commission") order indicates likewise. Exhibit 13); Second, if Blue didn't take the above measure, it should have developed the Web Site in compliance with the GDPA.

**(2) Blue breached its obligation to design and develop the Web Site in compliance with the GDPA.**

8. In this case, neither measures were taken by Blue (Exhibit 13).
9. First, Blue did not create the method of transition so that the GDPA does not apply to the Web Site.
10. Second, if the method of transition was not appropriate, the GDPA applied to the Web Site, so Blue needed to provide the method to obtain customer's consent according to the GDPA. However, in this case, customers who wish to use the service of the Red Travel had no choice but to agree to content, which was not "freely given" (Exhibit 13).
11. As a result, in October 2019, the Commission imposed the fine to Red claiming that the Web Site violated the GDPA.
12. Therefore, Blue breached its obligation to design and develop the Web Site in compliance with the GDPA.

**(3) Blue is legally liable to pay 500,000 Nego-Lira to Red as compensation.**

**A. Red is entitled to claim for damages under Arts.7.4.2~7.4.4 of UPICC because there is (a) causal link, (b) certainty of harm and (c) foreseeability.**

13. (a)Causal link (Art. 7.4.2 of UPICC)
    If Blue had provided a website that complied with the GDPA, Red would not have been fined by the Commission. Therefore, there is a causal link.
14. (b)Certainty of harm (Art. 7.4.3 of UPICC)
    A fine of 500,000 Abu dollars was imposed on Red by the Commission and Red paid it (¶40). On December 16, 2019, when Red paid the fine, the value of Abu dollar and Nego-Lira was 1:1 (Exhibit 1) so the loss of Red was 500,000 Nego-Lira. Therefore, Red's damages are 500,000 Nego-Lira.
15. (c)Foreseeability (Art. 7.4.4 of UPICC)
    The GDPA was enacted in Arbitria in May 2017 (¶6). Since the SITE DEVELOPMENT AGREEMENT was signed on May 1, 2018, the GDPA had already been enacted when the Parties signed the agreement. In addition, Art. 83 of the GDPA stipulates that fines will be

imposed for violations. Therefore, Blue could have reasonably foreseen that if the Web Site violates the GDPA, Red will be fined.

**B. Blue may not allege a breach of Red's obligation to mitigate harms under Art. 7.4.8 of UPICC.**

16. Art. 7.4.8 stipulates, "The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps."
17. In this case, it is not a reasonable step for Red to claim the excessive extraterritorial application of the GDPA. In a situation where a company is ordered to pay a fine by the foreign government, it would be reasonable for the company, by taking into account the company's reputation risk and future business, to make a decision to pay the fine promptly and not to fight against the government.
18. In addition, in this case, on October 10, 2019, when the fine was imposed by the Commission, the court of appeals judgement found that the application of the GDPA does not constitute excessive extraterritorial application in the similar case.
19. Furthermore, Red was not required to wait for the Supreme Court decision.
20. Hence, it was reasonable for Red to pay the fine promptly and not to fight against the Commission.
21. Thus, Blue may not claim the Red's breach of its obligation to mitigate damages and be exempted from the liability for damages.
22. Therefore, Blue is legally liable to pay 500,000 Nego-Lira to Red as compensation.

**Issue2**

*In relation to the second point regarding the order issued by the Personal Information Protection Commission, is Blue legally liable to pay 6,500,000 Nego-Lira to Red as compensation?*

**(1) Blue is obliged to provide Red with the customer management system which is capable of strict data management, and to inspect and fix bugs for the purpose of hacking prevention and strict data management.**

**A. Blue is obliged to provide Red with a customer management system which is capable of strict data management.**

23. On March 1, 2018, the Parties entered into the System Development Agreement (Exhibit 7) for Red's customer management system for its courier business and sightseeing business in Negoland (the 'R-CMS') (¶21).
24. Based on Art. 4.1 of the System Development Agreement, Blue is obliged to build and provide the R-CMS which is capable of strict data management to Red.
25. It is the Parties' intention that the R-CMS should be capable of strict data management, as evidenced by the purpose of the contract and the Parties' subsequent conduct (Arts.4.1, 4.3(c)(d) of UPICC). Firstly, the R-CMS is required to be a secure system since it is the system which manages the data of all Red's customers, including vast amounts of personal information. Secondly, the Parties confirm the common intention by the exchange after the System Development Agreement was signed. In this case, after the agreement was signed, Red informed Blue of the increased risk of hacking and data leakage and asked Blue to "pay special attention to hacking prevention and strict data management" (¶21). In response, Blue orally assured "Of course. We will check that point particularly carefully. I have never had such a case in the systems in which I've been involved. Please be assured" (¶21). This exchange shows that the Parties had the common intention that the R-CMS should be capable of strict data management.

26. Therefore, Blue is obliged to provide the R-CMS which is capable of strict data management.

**B. Blue is obliged to inspect and fix bugs in the R-CMS for the purpose of hacking prevention and strict data management.**

27. Blue had an implied obligation under the System Development Agreement to conduct necessary inspections and to fix bugs in the R-CMS. This agreement does not expressly provide for the inspection and correction of bugs. However, if Blue has no obligation to fix any bugs in the R-CMS, Red would not be able to use the R-CMS in a safe manner. The existence of this obligation is supported by the fact that Blue actually undertook and performed the inspection and the fix of bugs in the R-CMS (Exhibit 14 emails on January 15 and 16 2019). If Blue had no obligation to inspect and fix bugs in the R-CMS, Blue would not have agreed to Red's request. Therefore, Blue is obliged to conduct necessary inspections and fix bugs in the R-CMS.
28. Alternatively, Blue is obliged to inspect and fix bugs in the R-CMS for hacking prevention since an agreement was made between the Parties by email exchanges.
29. On January 18, 2019, Red requested Blue to inspect the R-CMS to check if there is any bug that could allow any hacking to take place. Blue agreed to Red by stating "We will take necessary measures as soon as we can" (Exhibit 14 emails on January 18 and 20, 2019). Due to this email exchange, the agreement was made between the Parties. To achieve the purpose of Red's request, to prevent hacking, the obligation to inspect the R-CMS includes the obligation to fix bugs when they are found.
30. Blue, as the system developer, was obligated to take "proper and workmanlike" action in accordance with Art. 4.4 of the System Development Agreement. For example, Blue was required to fix bugs in advance that would allow for hacking, and to take immediate action if a serious defect was exposed in the R-CMS.
31. Therefore, Blue is obliged to inspect and fix bugs in the R-CMS for the purpose of hacking prevention and strict data management.

**C. Art. 6.2 of the System Development Agreement does not deny Blue's obligation to inspect and fix bugs.**

32. Art. 6.2 of the System Development Agreement provides that uninterrupted or error-free system operation is not guaranteed. However, this article only provides that any bugs or defects in the R-CMS do not immediately cause Blue to be in breach of its obligation. If the R-CMS has bugs or defects, Blue will be exempted from liability for breach if it repairs such bugs or defects without delay or takes reasonable substitute measures to make the R-CMS usable. It does not deny that Blue has an obligation to check and fix any existing bugs. At the very least, in this case, if Blue knew of the existence of the bugs or defects and Red requested Blue to fix it or to take necessary action, Blue should not be allowed to exclude liability for breach of obligation on the basis of this article.

**D. Blue's statements made after contract formation are not precluded by Art. 6.3 of the System Development Agreement.**

33. Art. 6.3 of the System Development Agreement provides that "Except as expressly set forth herein, Blue makes no warranties, expressed or implied, including warranties of merchantability, or fitness for a particular purpose, in connection with this agreement and the transactions contemplated hereby." The reference time for the disclaimer of warranties under this article is at the time of contract execution.
34. On the other hand, in this case, it was only after the execution of the agreement that Blue stated "We will check that point particularly carefully. (...) Please be assured" (¶21).

Therefore, Blue's statements made after contract formation are not precluded by Art. 6.3 of the System Development Agreement.

**E. Blue is precluded by its conduct from asserting Art. 9 of the System Development Agreement.**

35. Art. 9 of the System Development Agreement is a 'no oral modification' clause, which stipulates "No amendment or modification of this Agreement or any provision of this Agreement shall be effective unless agreed by the parties in writing."
36. However, the Parties exchange regarding "hacking prevention and strict data management" (¶21) was neither an amendment nor a modification.
37. Even if the exchange was an amendment or a modification, there are exceptions from the enforcement of 'no oral modification' clauses. The proviso to Art. 2.1.18 of UPICC stipulates "a party may be precluded by its conduct from asserting such clause to the extent that the other party has reasonably acted in reliance on that conduct."
38. In this case, Red and Blue orally agreed that Blue would take particular care for hacking prevention and strict data management (¶21). Subsequently, when Red requested Blue to inspect bugs in the R-CMS to prevent hacking, Blue replied "We will take necessary measures as soon as we can" (Exhibit 14 email on January 20, 2019). Thus, it is reasonable for Red to have relied on the oral contract change.
39. Therefore, Blue is precluded by its conduct from asserting Art. 9 of the System Development Agreement.

**(2) Blue breached its obligations under the System Development Agreement.**

**A. Blue breached its obligation to provide Red with a customer management system which is capable of strict data management.**

40. The R-CMS was a system that had "bugs that allowed someone to steal the encryption needed to access part of the R-CMS customer data" (¶38). Such a system is not capable of strict data management. Therefore, Blue breached its obligation to provide a customer management system which is capable of strict data management.

**B. Blue breached its obligation to inspect and fix bugs for the purpose of hacking prevention and strict data management.**

41. On January 18, 2019, Red requested Blue to inspect the R-CMS again to ensure that no bugs existed that could allow any hacking to take place (Exhibit 14 email on January 18, 2019). Despite accepting the request, Blue procrastinated citing its busy schedule (Exhibit 14 email on January 20, 2019). Furthermore, according to two emails on January 21 and 23, 2019, Red requested Blue to immediately take necessary measures in order to prevent hacking since there was evidence of unauthorized access to the R-CMS customer database (Exhibit 14 emails on January 21 and 23, 2019). However, Blue did not respond or take any action until the day after the hacking incident and the personal information leakage occurred (Exhibit 14 emails on January 26, 2019). Therefore, Blue breached its obligation to inspect and fix bugs for the purpose of hacking prevention and strict data management.

**(3) Blue is legally liable to pay 6,500,000 Nego-Lira to Red as compensation.**

**A. Red is entitled to claim for damages under Arts.7.4.2~7.4.4 of UPICC because there is (a) causal link, (b) certainty of harm and (c) foreseeability.**

42. (a) Causal link (Art. 7.4.2 of UPICC)
If Blue had fulfilled its obligations, the leakage of information would not have occurred and Red would not have been forced to pay the fine and the solatium. Therefore, the causal link

between Blue's breach and Red's harm is sufficient. The amount of solatium paid by Red was reasonable because it was decided in line with lawyer's advice to prevent future lawsuits from customers and fines by the Consumer Protection Commission in Negoland (¶¶38, 39).

43. (b) Certainty of harm (Art. 7.4.3 of UPICC)
Red paid 1.5 million Abu dollars as the fine, and 5 million as the solatium (¶38). As with Red's argument on Issue 1, Blue should pay damages in Nego-Lira. Therefore, Red's total amount of harm was 6 million Nego-Liras, and this is certain.

44. (c) Foreseeability (Art. 7.4.4 of UPICC)
Art.7.4.4 of UPICC requires foreseeability of "nature or type of harm" at the time of the conclusion of the contract (Official Comment to Art.7.4.4, p271). In this case, Blue could reasonably have foreseen Red's harm as a likely result of Blue's breach when the Parties concluded the System Development Agreement. First, regarding the fine, as with Red's argument on Issue 1, the GDPA had already been enacted at the time of the conclusion of the System Development Agreement, on March 1, 2018. Second, regarding the solatium, when a company leaks customers' personal information, solatium is usually made to the customers. In addition, solatium was paid in Negoland and Arbitria at the same level of personal information leakage (¶38). Therefore, Blue could reasonably have foreseen that Red would be forced to pay the fine and the solatium if the R-CMS data leakage occurred.

**B. Art. 6.3 of the System Development Agreement does not exempt Blue from its liability to pay 6.5 million Nego-Liras because Red's damages are direct damages.**

45. Art. 6.3 of the System Development Agreement is an exemption clause excluding Blue's liability for certain damages: indirect, special and consequential damages, and lost profits. Indirect, special and consequential damages are losses that would ordinarily be unforeseeable, and losses which are too remote because of multiple causal links between the breach and the damage. On the other hand, Red's damages were ordinarily foreseeable as mentioned above, and not too remote as to satisfy the exemption clause. Hence, Red's damages do not correspond to indirect, special and consequential damages. Therefore, Art. 6.3 of the System Development Agreement does not exempt Blue from its liability to pay 6.5 million Nego-Liras.

## Arbitration Procedure

### Issue 1

*Does the arbitral tribunal have authority to make a decision to conduct the on-line examination of witnesses without the consent of both parties? Is it possible for the arbitral panel to make such a decision only if certain conditions are met?*

**(1) The arbitral tribunal has authority to make a decision to conduct the on-line examination of witnesses without the consent of both parties based on Art.18 (2) and Art. 28 (2), only if the conditions given in Art. 17 (1) of UNCITRAL Arbitration Rules are met.**

**A. The arbitral tribunal has authority to make a decision of on-line examination of witnesses based on Art.18 (2).**

1. Art. 18.2 of UNCITRAL Arbitration Rules states "The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings."
2. In this case, there is no other agreement between the parties regarding the hearing of witnesses.

3. The term, 'location' in Art. 18 (2) should include the on-line platforms. Hence, the term 'location' did not request the physical environment of the location, the on-line platform can also be the 'location' of the arbitration. Furthermore, under the situation of COVID-19 pandemic, it is unable for people to physically appear in the court, therefore, the online platform is suitable under current circumstances, while the examination of witnesses is required to be held expeditiously due to the nature of the witness's memory. Therefore, the arbitration tribunal has the authority to make a decision of on-line examination of witnesses based on Art.18 (2).

**B. The arbitral tribunal has authority to decide the location of the arbitral tribunal based on Art.28 (2) of UNCITRAL Arbitration Rules.**

4. Art.28 (2) states "Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal."
5. The witness hearing should be conducted under the rule set by the arbitral tribunal; therefore, arbitral tribunal have the authority make a decision to exam on-line examination of witnesses.

**C. The arbitral tribunal has authority to make a decision to conduct the on-line examination of witnesses without the consent of both parties only if the conditions given in Art. 17 (1) of UNCITRAL Arbitration Rules are met.**

6. Art.17(1) of UNCITRAL Arbitration Rules stipulates "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.
7. Therefore, the arbitration tribunal can make a decision without the consent of parties to conduct the on-line examination of witnesses in accordance with the condition stated in Art.17(1) which is "treat parties equally" and "at an appropriate stage of the proceeding each party is given a reasonable opportunity of presenting its case."
8. Therefore, the arbitral tribunal has authority to make a decision to conduct the on-line examination of witnesses without the consent of both parties on conditions that given in Art. 17 (1) of UNCITRAL Arbitration Rules are met.

**Issue2**

*If certain conditions need to be met, what specific conditions need to be met in the examination of witnesses using Zoom?*

**(1) <u>On-line examination of witnesses using Zoom needs to meet the conditions under Art.17 (1) of UNCITRAL Arbitration Rules, which is i. "equal treatment of both parties", and ii. "each party is given a reasonable opportunity to comment on the case at the appropriate stage of the proceedings." In addition, the arbitral tribunal should set the rule that could prevent of the third party invention with the conditions to iii. "ensure the qualitative accuracy of testimony in the examination of witnesses."</u>**

9. Considering the recent guidance from international arbitration institution such as International Chamber of Commerce, Australia Center of International Commerce Arbitration and HongKong International Arbitration Center, the following measures should be taken.

<u>i. Measures to meet the conditions for equal treatment of both parties.</u>

10. In order to treat both parties equally from different places in the on-line examination of witnesses, the following measure should be met.
    10.1. Arbitral Tribunal should consider the time difference of each party when deciding the time of the witness hearing.

10.2. During the arbitration, the Private Chat function of Zoom should be turned off in order to prevent private conversation between arbitrators and a party.

ii. Measures to meet the conditions that each party is given a reasonable opportunity in on-line examination of witnesses to comment on the case at the appropriate stage of the proceedings.

11. During the witness hearing, in order to provide reasonably equal opportunities for each party to comment caused by the IT literacy, the following measures should be met.
    11.1. Giving each party a period of preparation that will enable them to prepare for a stable internet connection.
    11.2. A training session should be held in advance to check Internet connections, glitches and the use of Zoom.

iii. Ensuring the qualitative accuracy of testimony in the examination of witnesses

12. The following means should be used to meet to prevent third party intervention from compromising the impartiality of witness interviews.
    12.1. In order to ensure that no one other than the witness is in the same room, two computers should be set up without using Virtual Background. While one showing the witness's face and the other showing the entire room.
    12.2. Prohibit the use of earphones and the Mute function during the examination of witnesses to prevent testifying under the direction of a third party.
    12.3. Witnesses should be in a position where their faces and expressions can be seen clearly.