THIRTY-FIRST ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
22 MARCH TO 28 MARCH 2024
VIENNA

MEMORANDUM FOR CLAIMANT

CLAIMANT		RESPONDENT
SENSORX, PLC		VISIONIC LTD
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APPENDIX
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DATE: 7 December 2023

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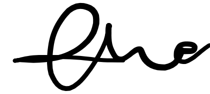

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¶/¶¶	Paragraph/paragraphs
Art.	Article
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Claimant	SensorX plc
Exh.C1	Claimant's Exhibit 1
Exh.C2	Claimant's Exhibit 2
Exh.C3	Claimant's Exhibit 3
Exh.C4	Claimant's Exhibit 4
Exh.C5	Claimant's Exhibit 5
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Exh.R1	Respondent's Exhibit 1
Exh.R2	Respondent's Exhibit 2
Exh.R3	Respondent's Exhibit 3
Exh.R4	Respondent's Exhibit 4
Exh.R5	Respondent's Exhibit 5
FA	Framework Agreement
ICC	International Chamber of Commerce
ICC Notification	ICC Notification for a Request for Arbitration dated 12 June 2023
LMAA	London Maritime Arbitrators Association
NYC	New York Convention
p./pp.	Page/pages
Parties	SensorX plc and Visionic Ltd
PO	Purchase order
PO-1	Procedural Order No. 1 dated 6 October 2023
PO-2	Procedural Order No. 2 dated 6 November 2023
PO-9601	Purchase Order No 9601 dated 17 January 2022
PO-A-15604	Purchase Order No A-15604 dated 4 January 2022
RA	Request for Arbitration dated 9 June 2023

RA-new	Request for Authorisation of New Claim dated 11 September 2023
Respondent	Visionic Ltd
ToR	Terms of Reference
RRA	Answer to Request for Arbitration dated 10 July 2023
RRR	Rejection of Request by Respondent dated 2 October 2023
SCMA	Singapore Chamber of Maritime Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus

STATEMENT OF FACTS

The Parties to this arbitration ("**Arbitration**") are SensorX plc ("**Claimant**") and Visionic Ltd ("**Respondent**") (collectively, the "**Parties**"). Claimant, with a subsidiary in Danubia (SensorDanube), is based in Mediterraneo and is a leading manufacturer of a wide variety of sensors used in the automotive industry. Respondent is based in Equatorania and is one of the largest producers of optical systems in the automotive industry with an overall turnover six times that of Claimant's.

On 7 June 2019, the Parties entered into a Framework Agreement ("**FA**") that governed the contractual terms of the individual PO made by Respondent. Pursuant to this FA, Respondent was entitled to make orders for the various sensors produced by Claimant through individual purchase orders. These individual purchase orders made by the Respondent would state the exact number of sensors purchased and the dates of delivery while its substantive terms would be governed by the FA. To date, 22 different purchase orders were made by Respondent pursuant to the FA. The present dispute arose out of PO-9601 because Respondent had allegedly made a payment to the wrong bank account instead of the ones stipulated in the FA. Before elaborating on the circumstances of the dispute, it would be pertinent to note the following provisions of the FA:

- Art. 40 requires Parties to agree in writing and in signature before any amendments to the FA are to be made (including Art. 40 itself);
- Art. 41(5) provides that this tribunal should consolidate proceedings if they raise the same questions of fact and law, and if separate proceedings could result in conflicting awards; and
- Art. 41(6) states that Danubian law governs the individual purchase orders arising from the FA (including the FA itself) and that the seat of arbitration is Danubia.

Cyberattack on Claimant and the phishing email

On 5 January 2022, Claimant, as one of the key players in the automotive industry, fell victim to a cyberattack. Although Claimant discovered and neutralised the cyberattack on 23 January 2022, the true extent of the attack was not known until much later because of the sophisticated nature of the malware that was placed by the hackers – one that managed to bypass Claimant's extensive cybersecurity measures. It was only through the combined efforts of Claimant and the Mediterraneo governmental security unit that Claimant realised, on 15 May 2022, that the hackers had managed to access information available on one of its email accounts. From then till 30 June 2022, Claimant with the help of Mediterraneo's

governmental security unit engaged in an exercise to sanitise and clean Claimant's internal planning and accounting systems.

The hackers managed to obtain, from the attack, information on the transaction between the Respondent and the Claimant from the Claimant's employee – Ms. Telsa Audi ("**Audi**"). Audi was Claimant's account manager responsible for Respondent's account and purchase orders. On 28 March 2022, the hackers impersonated Audi and sent a phishing email to Respondent. Instead of being sent from Claimant's domain of "sensorX.com", the email came from "semsorX.com". The email requested for Respondent to make payment to a different bank account from the one in the FA.

Upon receiving this email, Respondent's representative, Mr. Royce, attempted to call Audi to confirm the requested change in the bank account details. No one picked up. However, Audi left a voice message urging Mr. Royce to contact a colleague (Ms. Peugeotroen) for any urgent matters. Instead of contacting Ms. Peugeotroen as suggested, Mr. Royce chose to reply to the email asking for a confirmation of the demand to pay to a different bank account. Mr. Royce must have done this because he was aware of the form requirements pursuant to Art. 40 of the FA. The article requires a request for a change in the payment bank account to be evidenced in writing and in signature. Naturally, the hackers replied to Mr Royce's email confirming that "Claimant" would consider the exchange of emails to be sufficient to fulfil the requirements under Art. 40 of the FA. Alternatively, the hackers had also offered to prepare a written amendment pursuant to Art. 40 of the FA for the change in bank account. Rather than taking on the second offer, Respondent decided immediately authorise payment to the hackers' bank account. That, unfortunately, was the very reason why the monies owed under PO-9601 had been transferred to the wrong bank account and into the hackers' pockets. As a justification for proceeding with this alternative, Respondent cited that they "needed the shipment urgently". As a result, Claimant did not receive any of the payments due under PO-9601 and started the proceedings against Respondent.

Discovery of non-payment by Respondent for another purchase order

In addition to the claims under PO-9601, Claimant had discovered to its dismay that Respondent had failed to make payment under PO-15604 as well. Under PO-15604, Respondent made use of the Additional Order Facility under the FA to order L-1 sensors. The negotiations resulted in deviations from the normal payment process with the Claimant allowing the Respondent to make payment in two instalments. While the first tranche of the payment on 18 March 2022 was made, the second tranche of the payment which was due on 20 May 2022 was left outstanding. Respondent claimed that they sent an

email alleging that a considerable number of sensors delivered under PO-15604 were defective such that their obligation to pay under the second tranche had been discharged. But because of the cyberattack on Claimant, its employees' absences, as well as the shutdown of its IT system to properly disinfect and clean them, the outstanding payment was only discovered on 8 September 2023.

Claimant has therefore requested for an authorisation of a new claim to be added to the present proceedings concerning PO-9601. Alternatively, Claimant will proceed to start a new proceeding concerning PO-15604 with a view to consolidate the two claims. This power to consolidate the proceedings arises from Art. 41(5) of the FA which was included only upon the *insistence* of Respondent. With a view to streamline the dispute resolution process amidst the various disagreements, Claimant now relies on the mutually agreed upon terms in the FA to bring forth the present proceedings.

SUMMARY OF ARGUMENTS

PART I: THIS TRIBUNAL CAN AND SHOULD AUTHORISE THE ADDITION OF THE NEW CLAIM TO THE PENDING ARBITRATION

This Tribunal has the power under Art. 23(4) of the ICC Rules to authorise the addition of the new claim to the existing proceedings. Moreover, in signing the ToR, Parties expressly agreed that this Tribunal can authorise the addition of the new claim so long as the requirements for addition under Art. 23(4) have been met. Applying Art. 23(4), tribunals may authorise the addition of a new claim where this Tribunal determines that the addition would be appropriate, considering factors such as: (**1**) the nature of the new claim; (**2**) the stage of the arbitration proceedings in which the new claim has been raised; and (**3**) other relevant circumstances, such as whether the addition would save time and costs.

This Tribunal should authorise the addition of the new claim as the requirements for addition have been met. First, the new claim is closely connected in fact and in law with the existing claim. Second, the new claim had been raised seven months before proceedings are due to commence and Claimants, in fact, submitted the request for addition at the earliest possible instance. Third, the addition of the new claim to existing proceedings would result in substantial time and cost savings for Parties. Specifically, allowing for the addition would eliminate the time spent by Parties arbitrating the claims before separate tribunals, and would streamline proceedings by allowing this Tribunal to hear the related claims and decide on common questions of fact and law within one proceeding. Further, the addition is projected to cut Parties' costs by US$1million in institutional fees alone, not including extensive counsel and witness fees.

PART II: EVEN IF THE NEW CLAIM MUST BE RAISED IN A SEPARATE ARBITRATION, THIS TRIBUNAL CAN AND SHOULD CONSOLIDATE THE ARBITRAL PROCEEDINGS

Even if this Tribunal rules against the addition of the new claim to the present proceedings, this Tribunal can and should still consolidate the proceedings as they arise. Currently, Respondent claims that under the ICC Rules, the power to consolidate these proceedings lies not with this Tribunal but rather the ICC Court. However, while the ICC Rules confer on the ICC Court the power to consolidate proceedings, Parties have validly agreed to modify the rules such that consolidation powers have been transferred to this Tribunal. This modification is valid for the following reasons. First, ICC Rules on consolidation are not mandatory and can be modified within parties' arbitration agreements. Second, Parties' modification of the consolidation rules was valid as it did not fundamentally undermine ICC proceedings. Third, Parties' modification was justified Art. 41(5) requires the decision-making body to make substantive

determinations when deciding consolidation. Since the authority to make substantive determinations lies exclusively within this Tribunal and not the ICC Court, Parties were entitled to transfer consolidation powers from the ICC Court to this Tribunal. Fourth, even if consolidation powers ultimately rest in the ICC Court, this Tribunal can still step in to consolidate proceedings by exercising its inherent powers.

Further, not only does this Tribunal have the authority to consolidate these proceedings, but it ultimately should since the contractual and ICC Rule requirements for consolidation have been met. Moreover, this Tribunal should order consolidation as this would further protect the enforceability of the arbitral awards. Finally, ordering consolidation would not be prejudicial to either party.

PART III: CLAIMANT IS ENTITLED TO PAYMENTS UNDER PO-9601

Under Art. 62 of the CISG, Claimant is entitled to claim its rightful sums under the contract from Respondent. The transfer of monies into the wrong bank account does not discharge Respondent's obligation to pay Claimant. This is because the payment obligation is one that ultimately falls within Respondent's sphere of responsibility as the buyer in PO-9601. Respondent can only justify non-payment if it is able to invoke and establish a defence. In this respect, Claimant does not have a duty to inform Respondent of cyberattacks that it has been subjected to. Consequently, Respondent cannot rely on this breach in support of any defences it may raise to be exempted from its payment obligation.

Specifically, Respondent cannot rely on Art. 80 and Art. 77 of the CISG to exempt itself from payment. With respect to Art. 80 of the CISG, Respondent cannot show that there had been any breach by Claimant since Claimant owed no duty to inform Respondent of a cyberattack. The absence of a duty to inform Respondent of such breaches is fatal to Respondent's alleged defence under Art. 80 of the CISG. Additionally, even if Claimant had such a duty, there is no causal link between Claimant's non-performance and Respondent's non-performance. With respect to Art. 77 of the CISG, Respondent's reliance on it is misplaced since Claimant is bringing a claim for action for payment and not damages. In any event, Claimant continues to be owed at least parts of the amount under PO-9601. This is because Claimant's failure to inform Respondent of the cybersecurity attack has no bearing on whether Respondent can make payment into the appropriate bank account. Respondent remains the most proximate cause to the eventual non-payment. Furthermore, Claimant did not conduct itself unreasonably so as to be completely disentitled to anything under PO-9601.

ARGUMENTS

I. THIS TRIBUNAL CAN AND SHOULD AUTHORISE THE ADDITION OF THE NEW CLAIM TO THE PENDING ARBITRATION

1. Although Claimant submitted its original Request for Arbitration in June 2023, Claimant was only made aware of the new claim over a weekend in September 2023 [*Exh.C1, p.5; RA-new, p.46–47*, ¶*4*]. Upon learning this, Claimant immediately filed for a Request for Authorisation of the New Claim the following Monday, such that Respondent would have sufficient time to amend their pleadings [*RA-new, p.46*]. Despite this, Respondent opposes the addition of the new claim on the grounds that it is "*legally and factually unjustified*" [*RRR, p.54,* ¶*1*]. However, this is flawed for two reasons: (**A**) first, this Tribunal has the power to authorise the addition of new claims; (**B**) second, this Tribunal should authorise the addition of the new claim as the requirements for authorisation have been met.

A. This Tribunal can authorise the addition of new claims

2. Under the ICC Rules, Art. 23(4) provides that tribunals have the power to authorise the addition of new claims even if they fall outside the limits of the ToR [*ICC Rules, Art. 23(4); Yearbook (2022), p.39*; *Fry/Greenberg/Mazza,* ¶*3-890*]. Crucially, Art. 23(4) of the ICC Rules does not act as a prohibition against the admission of new claims [*Yearbook (2022), p.39*; *Fry/Greenberg/Mazza,* ¶*3-890*; *Webster/Bühler,* ¶*23–83*]. Rather, merely grants tribunals the "*broad discretion*" to admit new claims, wherever "*appropriate*" [*Yearbook (2022), p.41*; *Fry/Greenberg/Mazza,* ¶*3-890*; *Webster/Bühler,* ¶*23–83*; *Kull, p.2335*].

3. More importantly, in drafting the ToR, Parties had expressly provided for the possibility of adding new claims under Art. 23(4) in the ToR. Chiefly, the ToR clarified that the "*issues to be determined [were] not limited*" to Parties' positions when was signed [*RRR, p.55,* ¶*4*]. While the ToR identified the PO-9601 claim as one issue before this Tribunal, it also included that this Tribunal is not bound to consider "*only*" the issues listed [*RRR, p.55,* ¶*4*]. Instead, the issues identified under the ToR were made "*[s]ubject to any new claims [under] Art. 23(4) of the ICC Rules*" [*RRR, p.55,* ¶*4*]. Hence, the ToR cannot be read to this Tribunal from authorising any new claim. Rather, a proper reading of the ToR shows that not only did Parties intend to flexibly accommodate the addition of new claims where relevant, but Parties also specifically agreed that new claims can be added subject to 23(4) of the ICC Rules [*ICC Rules, 23(4)*; *RRR, p.55,* ¶*4*].

4. This interpretation aligns with the fact that parties are entitled to reserve their right to subsequently make new claims via the ToR [*Practical Guide, ¶189; SchiedsVZ, p.51*]. As "*masters of the proceedings*", parties can agree to allow new claims, and under the cornerstone principle of party autonomy in international arbitration, such agreements are binding upon the tribunal [*SchiedsVZ, p.51; Berger/Kellerhals, p.439,442, Verbist/Schäfer/Imhoos, p.133*].

5. For these reasons, Respondent's argument that the ToR has allegedly "*exhaustively defined the issues to be determined*" and presently bars this Tribunal from authorising any new claims is an unfair and inaccurate interpretation of the ToR [*RRR, p.54, ¶4*; *PO-1, p.58, ¶1*; *ICC Rules, Art. 23(4); Yearbook (2022), p.38–39*; *Petillion, p.258*]. Rather, under the ToR, this Tribunal may authorise the addition of the new claim so long as the requirements under Art. 23(4) of the ICC Rules are met.

B. This Tribunal should authorise the addition as the requirements for addition have been met

6. To determine whether authorising an addition would be "*appropriate*", tribunals will consider several factors, including the nature of the new claim, the stage of the arbitration proceedings, and other relevant circumstances, such as time and cost savings [*ICC Rules, Art. 23(4)*; *Yearbook (2022), pp.41–43*]. Crucially, at the heart of this assessment lies the balance that tribunals must strike between maximising the efficiency of proceedings and claimants' rights to be heard, against respondents' rights to fair and impartial proceedings [*SchiedsVZ, p.52–54; Poudret/Besson, p.495; Schlosser, pp.498–499; Born, p.3857; Webster/Bühler, p.371*]. On the present facts, this Tribunal should authorise Claimant's new claim since: (**1**) the original and new claims are closely connected in law and fact; (**2**) arbitral proceedings have yet to commence; and (**3**) the addition will likely result in substantial time and cost savings [*Yearbook (2022), p.39*; *Fry/Greenberg/Mazza, ¶3-890*].

(1) The new claim is closely connected to the original claim

7. Tribunals, in assessing the nature of the new claim, are most concerned with whether there exists a close legal and factual connection between the new and original claim [*Yearbook (2022), p.42; Fry/Greenberg/Mazza, ¶3-905; SchiedsVZ, p.52*]. Where new claims share a close factual and legal connection to existing claims, allowing the addition would be less prejudicial towards respondents as they prepare their defence [*Yearbook (2022), p41; Fry/Greenberg/Mazza, ¶3-904; Verbist/Schäfer/Imhoos,*

p.134]. Presently, the new claim should be added as it turns on similar legal and factual issues as the original claim.

(i) The new claim is closely connected in law to the original claim

8. Both claims turn on the same legal issues of: (1) whether Respondent could informally vary the terms of the FA; and (2) whether Claimant was bound by a duty to inform Respondent about the cyberattacks. On the first issue, both claims concern whether Respondent could informally vary terms in the FA despite Art. 40 of the FA requiring any amendments to the FA be written and signed by Parties [*Exh.C1, p.11, Art. 40*]. Since both claims arise from POs made under the same overarching FA, both claims are governed by near-identical contractual terms, including Art. 40 of the FA [*RRA-new, p.47, ¶5; Exh C7, p.48*]. [*Exh.C1, p.10, Art. 5*]. Following this, under the original claim, Respondent will likely argue that it should not be liable for sending payment to a different bank account from that specified in Art. 7 of the FA, even though this variation did not comply with the relevant procedures [*RRA, p.*31; *Exh.C1, p.10, Art. 7*]. Likewise, under the new claim, Respondent will likely argue that they were entitled to submit an informal notice of defects via e-mail as they were not required to adhere strictly to Art. 15 of the FA, which required Respondent to mail a hardcopy notice of defects form to Claimant [*Exh.C8, p.49; Exh.C1, p.11, Art. 15*]. In sum, under both claims, Respondent essentially argues that it was entitled to vary terms in the FA by means other than those specified in Art. 40.

9. Second, both claims invite tribunals to consider whether Claimant had a duty to inform Respondent that it was a victim of a cyberattack. Presently, Respondent's request that it should be absolved of its payment obligations rests chiefly on this Tribunal deciding that Claimant had a duty to inform Respondent of the cyberattack, and had they complied with such a duty, Respondent would not have mistakenly paid its fees to the hackers [*RRA, p.31, ¶9*]. Similarly, Respondent is likely to respond to Claimant's new claim by arguing that Respondent would not have sent its notice of defects via e-mail if it was informed that Claimant's e-mails were hacked. In both claims, determining whether a duty to inform even exists is a common and necessary question that would be faced by both tribunals.

(ii) The new claim is closely connected in fact with the original claim

10. Additionally, both claims rely on similar facts. First, both claims arise following the same cyberattack on Claimant, and will consequently invite parallel factual inquiries into the nature and extent of the

cyberattack on Claimant's operations and e-mails. Second, both claims require this Tribunal to assess whether Respondent can establish a consistent pattern of informal variations between Parties, such that they could validly vary the terms of the agreement despite Art. 40 of the FA requiring that amendments must be written and signed [*Exh.R4, p.36, ¶4*]. Third, both claims involve the same employees representing each party, and will thus rely on the same witness testimony and accompanying documentary evidence [*Exh.C8, p.49, ¶¶1–3; Exh.R4, p.36, ¶¶1–4; Exh.R5, p.56*]. As both claims are sufficiently similar, this Tribunal would still have to consider the facts relevant to the new claim in arbitrating the original claim to come to a comprehensive decision. Hence, this Tribunal should be amenable to authorising the addition of the new claim.

11. In sum, since the claims these numerous common questions in fact and law, this Tribunal should opt to efficiently address these common questions within one proceeding by authorising the addition of the new claim. Finally, as both claims rest on the interpretation of common documents, like the FA, and the testimony of the same witnesses, adding the new claim at this stage would not unfairly undermine Respondent's ability to mount their defence in any material respect [*see ¶¶13–14, 47*].

(2) The new claim was raised months before proceedings commenced

12. In assessing the stage at which parties have raised a new claim, two key considerations arise: (**i**) first, whether the Respondent has a reasonable and ample opportunity to establish and present their defence; and (**ii**) second, whether the reasons for claimant's delayed bringing of a new claim are sufficient to justify adding the claim after parties have signed the ToR [*Yearbook (2022), p.39–43; SchiedsVZ, p.52]*

(i) Respondent has a reasonable opportunity to present their defence

13. Art. 22(4) of the ICC Rules protects parties' rights to fair and impartial proceedings, wherein tribunals must ensure that parties have a reasonable opportunity to present their case [*ICC Rules, Art. 22(4)*; *Yearbook (2022), p.42; ICC Case No. 15634, ¶19–4; ICC Case No. 11195*]. While Respondent criticises the "*belated[ness]*" of the addition request, it was raised well before proceedings are due to commence [*RRR, p.54, ¶3*]. Previously, tribunals have found that even new claims brought two months before hearings commenced were raised at a sufficiently early stage of proceedings such that their additions may be authorized [*ICC Case No. 19581, ¶9; ICC Case No. 15634, ¶19*]. Notably, new claims raised even during arbitral proceedings have been allowed when the new claim is factually proximate enough to the original claim such that parties can advance similar arguments [*see Eurofinsa*]. Here, Claimant's request for the new claim was submitted seven months before the upcoming hearing

which, considering the legal and factual overlaps between the claims, definitively gives Respondent sufficient and reasonable time to formulate their defence [*RRA-new, p.48; see* ¶¶*7–11*].

14. Further, so long as new claims are filed at a point where respondents still have adequate time to prepare a response without seriously delaying parties' agreed timetable, tribunals should admit them [*Fry/Greenberg/Mazza,* ¶*3-906; Yearbook (2022), pp.42–43; ICC Case No. 11195,* ¶*4.1.3.A; ICC Case No. 15634,* ¶*19-4; ICC Case No. 5989*]. In this case, since the new claim was filed seven months before upcoming proceedings, Respondent has sufficient time to prepare its response without unduly disrupting Parties' agreed timetable [*RA-new, p.46*].

(ii) Claimant's delay in bringing the new claim was justified

15. Where new events transpire that give rise to the existence of a new but related claim, claimants are entitled to add such claims to existing proceedings [*Yearbook (2022), p.43; Verbist/Schäfer/Imhoos, p.134; ICC Case No. 19581,* ¶*7*]. Here, Claimant only became aware of the issue three days prior to the request for authorisation [*RA-new, p.46–47,* ¶*4*]. After which, Claimant took great care to submit the request at the earliest possible opportunity on the Monday immediately following the discovery over the weekend [*Exh.C1, p.5; RA-new, p.46–47,* ¶*4*].

16. Further, such delays are justified if parties were previously unable to advance new claims for reasons not attributable to it, "*in particular if the other party was the cause of the impediment*" [*SchiedsVZ, p.52; Herzberg, p.333; Sachs/Löcher, p.275*]. Crucially, Claimant was unable to identify, let alone raise, the new claim earlier for reasons outside its control. For one, the e-mails allegedly informing Claimant that Respondent had received "*defective*" sensors and would not be making further payment were lost during a cyberattack [*Exh.C8, p.49,* ¶*9; Exh.R5, p.56*]. Moreover, and in any case, under the FA, Respondent should not have informed Claimant of the purported defects and its non-payment via e-mail [*Exh.C8, p.49; Exh.C1, p.11, Art. 15*]. Had Respondent complied with the proper procedural requirements, which required Respondent to *mail a hardcopy notice of defects form* to Claimant, Claimant would have been immediately alerted to the new claim and could have raised this claim earlier alongside the initial claim under one arbitration [*Exh.C8, p.49; Exh.C1, p.11, Art. 15*].

17. Even if this Tribunal were to consider Respondent's argument that Claimant's delay was "*entirely due to internal problems*", the facts are still distinct from cases where parties intentionally delayed the introduction of new claims for "*purely tactical reasons*" [*RRR, pp.54-55; ICC Case No. 15634 (2009),* ¶*19-*

9]. Tribunals adopt a restrictive attitude against the relevant addition only where parties had strategically opted to exploit the addition process as a "*dilatory tactic to delay the arbitration*" or prejudice their opponents [*ICC Case No. 15634 (2009), ¶19-9*; *SchiedsVZ, p.52; Berger/Pfisterer, p.229*]. Thus, while Claimant's belated request is unfortunate, this did not amount to an abuse of arbitral process nor an attempt to prejudice Respondent. Hence, Claimant's delay in raising the new claim remains justified. Regardless, under the procedural timetable agreed by Parties, Parties did not agree on "*any specific cut-off date for the submission of new claims*" [*PO-2, p.65, ¶34*]. Therefore, even while Claimant's introduction of the new claim was delayed, this did not result in a breach of any agreed timeline between Parties.

(3) Authorising the addition of the new claim would save time and costs

18. Under Art. 22(1) of the ICC Rules, this Tribunal must conduct the arbitration in an expeditious and cost-effective manner [*ICC Rules, Art. 22(1)*]. Additionally, Parties further agreed under the ToR that new claims should only be added to existing proceedings if it would result in "*noticeable*" savings in time and costs [*RRR, p.54, ¶4*]. On this point, this Tribunal should authorise the addition of the new claim as it would allow for significant time and cost savings for both Parties.

(i) Authorising the addition would save time

19. By hearing the related claims together this Tribunal would minimise the time Parties' will spend on re-filing a similar dispute before another re-constituted tribunal. Since both claims rest on similar facts and would require this Tribunal to consider documents and witness testimony that are common across both claims, hearing the claims together at one instance will invariably be more efficient [*see ¶¶7–11*]. In contrast, if the claims were to be heard separately, this would greatly delay the resolution of Parties' disputes. For one, where parties file similar claims individually under different tribunals, the second tribunal will generally stay its proceedings until the first has concluded its decision [*Lew, p.404, ¶16–83*; *Chiu, p.55*]. Namely, the second tribunal will often postpone its decision until after it has had the opportunity to consider the decision made by the first tribunal to avoid issuing a conflicting award [*Chiu, p.55*]. Further, even when tribunals have chosen commence proceedings simultaneously, tribunals will still seek to prevent issuing conflicting awards [*Lew, p.404, ¶16–83*; *Chiu, p.55*]. This would require the second tribunal to be kept informed of all decisions made in the first, and both tribunals to expend efforts coordinating their findings on matters such as witness testimonies on common issues of law and fact [*Lew, p.404, ¶16–83*; *Chiu, p.55*]. In either case, the

second tribunal cannot operate independently from the first, which would invariably delay the advancements of proceedings and undermine Parties' interests in obtaining an expeditious resolution of the dispute.

(ii) Authorising the addition would save costs

20. Adding the new claim would result in significant cost savings as this Tribunal can hear both claims in one proceeding and Parties can avoid incurring extensive and duplicate fees. Specifically, should this Tribunal add the new claim to the existing proceedings, Parties stand to save at least US$1million in institutional costs alone [*ICC Notification, p.24*; *ICC Cost Calculator*; *RA, p.8, ¶30(1)*; *Exh.C7, p.48, ¶6*]. Presently, initiating separate proceedings would result in total costs of approximately US$39.5million; conversely, should this Tribunal authorise the addition of the new claim to the existing proceedings, the proceedings would cost closer to US$38.5million. This is above the numerous duplicate arbitrator, counsel, and expert witness fees that Parties would have to foot separately for both claims. It is for these reasons that generally, "*where claims arise from violations of the same contract… it is in fact more cost-effective to have the claim dealt with in the same proceeding*" [*Yearbook (2022), p.40*; *Webster/Bühler, pp.393–393, ¶23–88; Kull, p.2334*]. Here, although Respondent raises that the claims stem from separate POs, they ultimately arise from violations of the same overarching FA that governs both POs [*Exh.C1, pp.10–11, Arts. 7, 15, 40*].

II. EVEN IF THE NEW CLAIM MUST BE RAISED IN A SEPARATE ARBITRATION, THIS TRIBUNAL CAN AND SHOULD CONSOLIDATE THE PROCEEDINGS

21. At Respondent's initial proposal and "*insistence*", Parties agreed that a tribunal may order the consolidation of proceedings under Art. 41(5) of the FA [*PO-2, p.63, ¶19*]. Despite this, Respondent now seeks to nullify Art. 41(5) on grounds that the ICC Rules vests the power to consolidate proceedings exclusively in the ICC Court, and not this Tribunal [*Exh.C1, p.12, Art. 41(5)*; *RRR, p.55, ¶6*]. Nevertheless, this argument is not legally tenable as: (**A**) first, Parties can contractually modify the ICC Rules to grant this Tribunal powers to consolidate proceedings; (**B**) second, requirements for this Tribunal to consolidate proceedings have been met and there are no considerations militating against consolidation.

A. This Tribunal can consolidate proceedings

22. Under Art. 41(5) of the FA, Parties agreed that this Tribunal would be the appropriate body to determine when to consolidate arbitral proceedings [*Exh.C1, p.12, Art. 41(5)*]. While at first blush, this seemingly contradicts Art. 10 of the ICC Rules which explicitly confers powers of consolidation onto the ICC Court, rather than a tribunal, parties can contractually modify the ICC Rules in some circumstances [*ICC Rules, Art. 10*; *Webster/Bühler, p.33, ¶1-27*]. In this case, the transfer of consolidation powers was valid because: (**1**) Parties can modify Art. 10 of the ICC Rules as it is a non-mandatory provision; (**2**) Parties' modification was valid since it did not undermine any fundamental principles of ICC arbitrations; (**3**) Parties' modification was justified as Art. 41(5) of the FA requires the decision-making body to make substantive determinations in deciding consolidation, which is outside the ambit of the ICC Court; and (**4**) even if the power to consolidate proceedings ultimately rests in the ICC Court, this Tribunal can still exercise its inherent powers to streamline the arbitral process through consolidation.

(1) Parties can modify non-mandatory provisions of the ICC Rules, such as Art. 10

23. While the proceedings are procedurally governed by the ICC Rules, not all these rules are mandatory, parties are entitled to modify non-mandatory provisions through their arbitration agreements under the principle of party autonomy [*Smit, p.847; Schwartz, p.111; Pryles, p.328–329*]. Here, Parties could modify Art. 10 of the ICC Rules by agreeing to transfer consolidation powers from the ICC Court to this Tribunal under Art. 41(5) of the FA because Art. 10 is not a mandatory rule [*Smit, p.848–850*; *Webster/Bühler, p.191, ¶10-1*].

24. Historically, under the ICC Rules, articles on consolidation have been recognised as non-mandatory. Specifically, Art. 4(6) of the 1998 ICC Rules, which has been recognised as a narrower consolidation provision and contains wording similar to Art. 10 of the 2021 Rules, has been notably categorised as a non-mandatory provision [*1998 ICC Rules, Art. 4(6)*; *Smit, p.848–850*; *Webster/Bühler, p.191, ¶10-1*]. In any case, the mere fact that Art. 10 is only triggered "*at the request of a party*" illustrates that it cannot have been conceived as a mandatory provision by drafters [*ICC Rules, Art. 10*].

25. Finally, parties' right to modify non-mandatory provisions under the ICC Rules derives from party autonomy, a cornerstone principle and feature of ICC arbitrations [*Wachter, p.69*]. Hence, Parties' were entitled to modify Art. 10 of the ICC Rules and transfer consolidation powers to this Tribunal.

(2) Parties' modification of Art. 10 was valid

26. Not only were Parties entitled to modify Art. 10 of the ICC Rules in general, but Parties' specific modification of the rule was valid. Crucially, the ICC Rules merely provide a flexible framework of rules which Parties may choose to either adopt or amend when administering proceedings [*Webster/Bühler, p.14, ¶0-42*]. Consequently, Parties can validly amend the Rules in any manner, so long as the amendments: (1) would not render the arbitral award unenforceable; and (2) do not deviate from "*cornerstone*" rules to ICC proceedings [*Webster/Bühler, p.34, ¶1-31*]. Here, Parties' agreement through Art. 41(5) to depart from the ICC's rules on consolidation by granting consolidation powers to the tribunal rather than the ICC Court, was valid for two reasons [*Exh.C1, p.12, Art. 5*].

27. First, allowing this Tribunal to consolidate proceedings would not render the arbitral award unenforceable. Whether a modification results in an unenforceable award depends on whether it is contradictory to the NYC or national enforcement laws [*NYC, Art. V(1); Grierson/Van Hooft, p.121*]. Here, the NYC as well as Danubian arbitration law set out an exhaustive list for when arbitral awards will be rendered unenforceable, and this is limited to only where arbitration procedure was not adhered to [*NYC, Art. V(1)(d); ML, Art. 34–36*]. On this point, merely allowing this Tribunal to consolidate proceedings in place of the ICC Court would not result in the arbitral award being unenforceable.

28. Second, granting this Tribunal power to consolidate proceedings will not violate any cornerstone principles of ICC proceedings. Within the ICC, fundamental principles are limited to those that require the (1) establishment of a ToR; (2) fixing of Arbitrator's fees; and (3) scrutiny and approval of draft awards [*Webster/Bühler, p.35, ¶1-34*]. Therefore, to the extent that Parties' decision to amend the rules on consolidation does not vary the abovementioned fundamental principles in any respect, Parties were validly entitled to grant this Tribunal powers of consolidation.

(3) Parties' modification of Art. 10 was justified

29. Parties' agreement to transfer consolidation powers from the ICC Court to this Tribunal was justified as Parties' consolidation clause introduced substantive conditions for consolidation that can only be assessed by a tribunal, and not the ICC Court. Namely, under Art. 41(5) of the FA, proceedings can only be consolidated if they are "*related by common questions of law or fact*" and if multiple proceedings "*could result in conflicting awards or obligations*" [*Exh.C1, p.12, Art. 41(5)*]. This effectively imposes a duty on the relevant decision-making body to make substantive determinations as to the possibility of there

being conflicting awards, neither of which can be made by the ICC Court [*ICC Rules, Art. 1(2); Kirby, p.10*]. Under Art. 1(2) of the ICC Rules, the role of the ICC Court is confined to performing a procedural administrative function, rather than being a decision-maker on substantive issues [*Webster/Bühler, p.31, ¶1-17*; *Bulletin, p.5*; *ICC Rules, Art. 1(2)*; *Kirby, p.10*]. The ICC Court has the function of organising and supervising the arbitration, which is distinct from the "*judicial function*" exercisable *only* by tribunals [*ICC Rules, Art. 1(2); Webster/Bühler, p.31, ¶1-18; Cubic, ¶6*; *Kirby, p.10*; *Bulletin, p.5*]. Therefore, Parties were justified in appointing this Tribunal as the appropriate body to decide whether proceedings should be consolidated.

30. In fact, this approach is consistent with the decision in *PDV Sweeny* which dealt with a near-identical consolidation clause [*PDV Sweeny, p.8, ¶¶6–11(c)*]. Like Art. 41(5), the consolidation clause in *PDV Sweeny* stated that proceedings can be consolidated by the tribunal where multiple disputes involve "*common questions of law and fact and the independent resolution of each dispute could result in conflicting awards*" [*Exh.C1, p.12, Art. 41(5)*; *PDV Sweeny, p.8, ¶¶6–11(c)*]. There, the tribunal granted the parties' request for consolidation on grounds that where requirements for consolidation include avoiding conflicting awards, tribunals are the appropriate body to decide the matter [*PDV Sweeny, p.18, ¶59-60*]. Likewise, even in cases that have held that consolidation should be decided by the ICC Court, those cases were distinct from the present instance [*Travis Coal, p.16, ¶50*]. Rather, in *Travis Coal*, determining whether proceedings should be consolidated hinged purely on if the sole objective for consolidation was to *maximise procedural efficiency*, which was found to lie squarely within ambit of the ICC Court [*Travis Coal, p.11*]. Finally, allowing tribunals to decide when proceedings should be consolidated in cases where decision-making bodies are confronted with substantive determinations coheres with the approach taken by other arbitral institutions. Under the rules of the SCMA and LMAA, it is for tribunals, rather than institutional courts or boards, to determine whether consolidation should be ordered when claims "*appear to raise common issues of fact or law*" [*LMAA Terms, Rule 17(b); SCMA Rules, Rule 33.3*].

(4) In any case, this Tribunal can still exercise its inherent powers to streamline proceedings through consolidation

31. In ICC proceedings, tribunals have "*heightened duties to fashion procedures so as to deliver speedy and economical outcomes*" [*Inka, p.248*]. Specifically, Art. 22(1) of the ICC Rules requires arbitrators to "*make every effort to conduct the arbitration in an expeditious and cost-effective manner*" [*ICC Rules, Art. 22(1); Inka, p.249*]. Thus, tribunals possess broad discretionary powers to fill procedural gaps to streamline

proceedings, including by exercising powers to consolidate proceedings [*Inka, p.252; Wachter, p.67*]. This is especially since tribunals retain a "*supplementary discretionary power to control arbitral procedure*", in addition to any express conferrals of power [*Inka, p.252*]. Therefore, even if the ICC Court is still an appropriate body to decide on whether the claims should be consolidated, despite Parties' express agreement in the FA, this Tribunal can still step in to consolidate proceedings to ensure procedural efficiency.

B. This Tribunal should consolidate proceedings

32. Respondent argues that neither the contractually agreed upon requirements for consolidation, nor those under the ICC Rules have been met [*RRR, p.55, 6*]. However, this Tribunal should consolidate these proceedings because: (**1**) not only have the contractual requirements for consolidation have been met; but (**2**) the ICC requirements for consolidating proceedings have also been satisfied; further (**3**) ordering consolidation would protect the arbitral awards from being rendered unenforceable or set aside; and (**4**) consolidating such similar proceedings at this stage will not be prejudicial towards Parties.

(1) The requirements for consolidation have been met

33. Per Art. 10 of the ICC Rules, this Tribunal should consolidate proceedings as both the (**i**) contractual requirements for consolidation, as agreed by Parties under Art. 41(5) of the FA; and (**ii**) the ICC requirements for consolidation under Art. 10(c) of the ICC Rules have been met.

(i) Contractual requirements for consolidation have been met

34. Under Art. 10(a) of the ICC Rules, where parties have expressly agreed to consolidate proceedings, tribunals should honour the terms of parties' agreement [*ICC Rules, Art. 10(a)*; *Webster/Bühler, p.127, ¶6-42; ICC Rules, Art. 6(4); Tong, p.73*]. Here, Parties agreed to consolidate proceedings when Parties drafted and signed Art. 41(5) of the FA, [*Exh.C1, p.12, Art. 41(5)*]. Notably, Art. 41(5) of the FA was only included at the proposal and "*insistence*" of Respondent [*PO-2, p.63, ¶19*]. In this, Art. 41(5) provides that proceedings should be consolidated where they arise from common questions of fact and law, and where multiple proceedings could result in conflicting awards [*Exh.C1, p.12, Art. 41(5)*]. Presently, Claimant has already established in that these proceedings raise similar questions in fact and law [*see* ¶¶7–*11*]. More importantly, it is in view of these factual and legal overlaps that ordering

separate proceedings could result in different tribunals issuing conflicting awards [*Pierre Mayer, p.1, ¶6; Tong, p.94*].

35. Since both claims consider the same legal questions, there exists a substantial risk that separate and differently constituted tribunals could determine these issues differently and consequently order conflicting awards [*Verbist/Schäfer/Imhoos, p.134; Tong, p.73*]. For instance, both claims turn on whether Claimant was bound by a duty to inform Respondent about the cyberattacks. However, under the original claim, this Tribunal may determine that Claimant should have informed Respondent of the cyberattacks such that Respondent would have been more wary of receiving phishing e-mails. Conversely, a separate tribunal considering the new claim may determine that Claimant was not bound to inform Respondent of the cyberattacks insofar as Claimant could not have foreseen that Respondent would be sending an informal notice of defects via e-mail. In that instance, the awards would be plainly contradictory. In one proceeding, Claimant could be found in breach of a duty to inform, whilst in another, a tribunal may find that Claimant was never bound by such a duty in the first place.

36. Even where Respondent may argue that the risk is not substantial, the mere possibility of conflicting awards arising from these proceedings already satisfies the requirements for consolidation as agreed upon by Parties under Art. 41(5) of the FA [*Exh.C1, p.12, Art. 41(5)*]. Namely, Art. 41(5) of the FA merely states that this Tribunal may consolidate proceedings if multiple proceedings "***could** result in conflicting awards*" [*Exh.C1, p.12, Art. 41(5)]*. Accordingly, Claimant need not prove that multiple proceedings would *definitively* result in tribunals issuing conflicting awards, instead the mere possibility of conflicting awards arising is sufficient. Crucially, the consolidation clause guaranteeing Parties' rights to consolidate proceedings was insisted upon by Respondent in response to their own experience with conflicting awards arising out of unconsolidated proceedings [*PO-2, p.63, ¶19*]. Therefore, clearly, the risk of conflicting awards was of special concern for Respondent when drafting Art. 41(5) of the FA.

37. Taken together, this proves that in signing the FA, Parties must have intended that this Tribunal should consolidate proceedings whenever the mere risk of conflicting awards arises, and such risk need not meet any specific threshold. Hence, Respondent cannot argue that this Tribunal should not consolidate proceedings simply because the risk of conflicting awards is not sufficiently high.

(ii) ICC requirements for consolidation have been met

38. Following Art. 10(c), this Tribunal can also opt to consolidate proceedings when (1) the proceedings are between the same parties; (2) the parties are engaged in the same legal relationship; and (3) the arbitration agreements are compatible [*ICC Rules, Art. 10(c)*]. Clearly, both the claims concerning PO-9601 and PO-A-15604 are between the same Parties, engaged in the same legal relationship.In both instances, the claims concern both Claimant and Respondent, where Claimant is the seller while Respondent is the buyer [*Exh.C1, p.9*; *Exh.C2, p.13*; *Exh.C7, p.48*].

39. However, Respondent argues that this Tribunal is barred from consolidating the proceedings as the arbitration agreements in PO-9601 and PO-A-15604 are not completely identical [*RRR*, *p.55,* ¶*5*]. This is not legally justified. First, Art. 10(c) expressly provides that the claims need not be made under the same arbitration agreements [*ICC Rules, Art. 10(c)*]. Second, the arbitration agreements need not be identical to be considered compatible [*GUPC v ACP (IV),* ¶*26*]. Instead, compatibility turns more on whether the identified differences would "*likely render the clauses substantively incompatible such as to prevent [this Tribunal] from ordering consolidation*" [*GUPC v ACP (IV),* ¶*26*]. Here, while the arbitration agreements under PO-9601 and PO-A-15604 have three minor differences, they are substantively similar. Both agreements identify the same rules of arbitration, location for arbitration, and the substantive law to be applied by arbitrators [*Exh.C2, p.13,* ¶*7; Exh.C7, p.48,* ¶*7*]. In fact, the only differences here are that (1) PO-A-15604 does not include rules on Emergency Arbitration; (2) while PO-9601 expressly stipulates the need for "*three arbitrators*", PO-A-15604 only requires "*one or more arbitrators*"; and (3) although both agreements identify Danubia as the location of arbitration, PO-9601 specifically identifies the Danubian city of Vindabona [*Exh.C2, p.13,* ¶*7; Exh.C7, p.48,* ¶*7*].

40. These minor differences, however, do not rise to the level of rendering the arbitration agreements so substantively incompatible that these proceedings cannot be consolidated. First, the rules on Emergency Arbitration are irrelevant here as Parties are not seeking an emergency arbitration. Second, the number of arbitrators stipulated in both agreements is not substantively incompatible insofar as Parties can adhere to PO-9601's requirement for three arbitrators while simultaneously satisfying PO-A-15604's requirement for more than one arbitrator [*PO-9601, p.13,* ¶*7; PO-A-15604, p.48,* ¶*7*]. Third, even though PO-9601 specifically requires that arbitration take place in Vindabona in Danubia, this would not contradict PO-A-15604's requirement for a Danubia-seated arbitration [*PO-9601, p.13,* ¶*7; PO-A-15604, p.48,* ¶*7*]]. Crucially, this Tribunal effectively consists of three arbitrators and is seated in Vindabona, making it such that the structure of the present proceedings can already accommodate the inclusion of the new proceedings [*ICC Notification, p.23*].

(2) This Tribunal should consolidate proceedings to protect the enforceability of the awards

41. If separate tribunals decide differently on common facts or law and issue conflicting awards, separate proceedings could: (**1**) invite extensive enforcement challenges; or (**2**) cause the award to be set aside for public policy reasons [*W v AW, ¶56; Rivikin, p.278; Gallagher, p.329, ¶¶17.1–17.2*]. Accordingly, since consolidating proceedings would nullify the risk of different tribunals issuing conflicting awards, consolidation would likewise protect the enforceability of the awards [*see ¶¶34–37*].

42. Generally, whenever disputes arise concerning similar facts across multiple proceedings, parties will often challenge the enforcement of the awards [*CME Cases*]. For one, should the second tribunal fail to consider decisions made by the first tribunal, the losing party would be entitled challenge enforcement on *res judicata* grounds [*Rivikin, p.278*]. Further, the losing party could also challenge the award in multiple jurisdictions, frustrating the enforcement of a final and binding arbitral award [*Rivikin, p.278*].

43. Additionally, ordering separate proceedings may risk the awards being set aside. Even courts in well-established pro-arbitration jurisdictions have been willing to set aside conflicting awards [*Born, ¶25.03*; *W v AW, ¶56*]. In Hong Kong, the court set aside an award issued by the second tribunal on grounds that it was inconsistent with an earlier award issued by a previous tribunal involving the same parties and the same underlying framework agreement [*W v AW, ¶56*]. Here, the court held that where awards reveal inconsistent and contradictory findings on the same facts and issues, the second award should be set aside [*W v AW, ¶56*]. Similarly, under the ML and NYC, courts can set aside awards if they undermine public policy [*ML, Art. 34(2)(b)(ii)*; *NYC, Art. V(2)(b)*]. In the case of separate proceedings, courts may decide that if the second tribunal fails to stay its proceedings until after the first tribunal has made its determinations, this could violate public policy and thus cause any second award to be set aside [*Gallagher, p.339*].

44. Thus, where consolidating proceedings would prevent the risk of conflicting awards, consolidation would likewise protect the enforceability of awards by preventing the losing party from raising oppressive enforcement challenges and ensuring that the award cannot be set aside by enforcement courts.

(3) Ordering consolidation would not be prejudicial to Parties

45. Even if the relevant contractual or ICC requirements for consolidation are met, tribunals may still decide against ordering consolidation if doing so could prejudice parties during proceedings [*Lew, pp.405–406* ¶*16–87*; *Chiu, pp.56–62*]. In determining whether ordering consolidation could prejudice parties, tribunals will first consider if parties had previously consented to consolidation [*Tong p.70*]. Here, Parties' agreement to consolidate proceedings under Art. 41(5) of the FA suggests that ordering consolidation will not be prejudicial to parties. Since arbitration is founded on party consent, parties' earlier agreement to consolidation in the FA is paramount [*Tong p.73*]. If parties have willingly contemplated and drafted consolidation provisions in their arbitration agreements, this would generally negate the risk that consolidation could subject parties to substantial prejudice as parties are taken to have weighed the considerations arising from consolidation [*Tong, p.94; Karaha,* ¶¶*31–33; Hanotiau, pp.391–420*]. This is especially since Art. 41(5) was, in fact, included by Respondent, who themselves recognised and informed Claimant of the benefits of consolidating similar proceedings [*PO-2, p.63,* ¶*19*]

46. Otherwise, ordering consolidation is only prejudicial if: (1) doing so would undermine Respondent's ability to mount its defence; (2) losing the opportunity to re-appoint a new tribunal to arbitrate the new claim; or (3) granting the tribunal access to additional information would affect parties' positions [*Lew, pp.405–406,* ¶*16–87*; *Chiu, pp.53–76*]. First, since both proceedings involve identical parties and turn on common facts and legal issues, Claimant's request to consolidate proceedings seven months before proceedings are due to commence gives Respondent ample time to formulate its defence [*see* ¶¶*12–14*]

47. Second, even though consolidating the proceedings would mean that Parties will not be able to appoint a new tribunal to arbitrate the new PO-A-15604 claim, this would not be prejudicial towards Parties here. In nominating this Tribunal for the original proceedings, Parties each already appointed arbitrators with the industry experience and area expertise relevant to determining both claims. Specifically, Mr Chevy is an expert in sensor technology and Mr Klement has a background in data privacy and cybersecurity [*PO-2, pp.65–66,* ¶*36*]. Thus, both arbitrators are just as exceptionally well-placed to decide on PO-A-15604–namely, Mr Chevy's knowledge of sensor technology will be relevant when considering Respondent's claim that Claimant's sensors were defective, while Mr Klement's experience with cybersecurity would inform how the cyberattack impacted Claimant's ability to receive Respondent's notice of defects. Hence, Parties will not be prejudiced by the inability to appoint a new tribunal to determine the new claim.

48. Third, although consolidating the proceedings would allow this Tribunal to consider facts under one claim while deciding the other, this is unlikely to prejudice either party. Conversely, since both proceedings involve the same Parties, operating under the same legal relationship, and engaging in similar conduct, consolidating proceedings would instead allow this Tribunal to appreciate the full context of the claims and arrive at a more well-informed decision [*see* ¶¶*7–11*]. This also cannot be said to be prejudicial towards Respondent insofar as Respondent themselves rely on evincing a clear pattern of Parties' agreeing to informally amend the FA on numerous occasions [*RA, p.6,* ¶*11; RRR, p.54,* ¶*2, Exh.R4, p.36,* ¶*4*]. Hence, since consolidating proceedings would allow this Tribunal to consider two separate instances when Respondent informally amended the FA together, Respondent cannot argue that consolidation would be prejudicial towards them.

III. CLAIMANT IS ENTITLED TO PAYMENT UNDER PO-9601

49. PO-9601 is governed by the CISG [*Exh.C2, p.13*]. The CISG imposes a delivery obligation on the seller and a payment obligation on the buyer [*CISG, Arts. 30 and 53*]. Under PO-9601, Claimant's delivery obligation is to deliver 1,200,000 units of its S4-25899 Radar Sensor. Correspondingly, Respondent's payment obligation is to transfer USD 38,400,000 within 30 days of delivery to the Automotive Bank in Mediterraneo [*Exh.C2, p.13*, *Exh.C1, p.10, Art. 7*]. Although Claimant has fully performed its delivery obligation [*Exh. C3, p.14; RA, p.5,* ¶*10*], Respondent has failed to fulfil its payment obligation because it has not transferred payment to the correct bank account [*Exh.C3, p.14; RA, p.7,* ¶*25; RRA, p.31,* ¶*10*]. As part of the buyer's obligation to pay the price, the buyer must comply with the formalities required under the contract [*CISG, Art. 54*]. In addition, the buyer bears the risk that his payment does not arrive in full and in time at the place of payment [*Schlechtriem/Schwenzer, Art. 57, p1090,* ¶ *20; Kroll, Art. 57, p799,* ¶*15; Leather Goods Case, p7,* ¶*42; Digest-57, p.265*]. Consequently, Respondent *qua* buyer must shoulder the risk of loss and delay.

50. Ordinarily, Respondent is bound to make payment to one of the stipulated Mediterraneo bank accounts [*Exh.C1, p.10, Art. 7*]. No such payment was made. Furthermore, should either party seek to amend these payment terms, the amendment must be made in writing and signed by the parties [*Exh.C1, p.11, Art. 40*]. Respondent did not comply with this joint obligation. Instead, Respondent's employee, Mr Royce, only called Claimant's employee, Ms Audi, once before requesting email confirmation of the requested change in nominated bank account [E*xh.R4, p.36*]. As no signed and written amendment was produced to effect the proposed change to the payment terms, Art. 7 of the FA remains unamended and Respondent's error in payment to the wrong bank account does not fulfil

its payment obligation. By failing to comply with these formalities, Respondent accepted the risk of non-performance.

51. At this juncture, Respondent cannot argue that the requisite formalities under Art. 40 of the FA have been waived by Claimant. Art. 40 of the FA requires that any amendment to the FA must be done in writing and signed [*Exh.C1, p.11, Art 40*]. Respondent may argue, however, that on two prior occasions, the Parties had deviated from the FA without complying with Art. 40. We disagree. First, the Parties met and agreed for an annual determination of the price [*RA, p.6, ¶11*], amending Art. 6 of the FA which originally provided for a semi-annual determination [*Exh.C1, p.10, Art 6*]. During this meeting, all amendments were agreed upon orally, before the meeting minutes were circulated [*PO2, p.62, ¶8*]. While these minutes were not signed, Respondent clearly prepared them, and Claimant made no objection [*PO2, p.62, ¶8*]. This, in effect, is a written agreement ratified by both parties. Moreover, because Art. 6 requires the price to be determined "*in meetings*", any risk of miscommunication due to impersonation or fraud is much lower, justifying a relaxation of the formalities required by Art. 40 [*Exh.C1, p.10, Art 6*; *Exh.C1, p.11, Art 40*]. Second, while the Parties deviated from the payment terms in Art. 7 once before, this was done through a signed side letter [*PO2, p.63, ¶12*]. Therefore, while it is undisputed that parties have deviated from the FA [*Exh.C6, p.17, ¶3*], Claimant disagrees that the formalities under Art. 40 were not complied with [*Exh.R4, p.36, ¶6*]. Therefore, as Art. 7 of the FA remains unamended, the payment obligation is only discharged if payment is effected to either one of the two bank accounts stipulated therein.

52. Furthermore, Respondent's payment obligations remain unfulfilled since they complied with payment instructions from a dubious origin. The law states that a buyer's payment obligation remains unfulfilled if they make the payment pursuant to instructions from a suspicious source [*Schlechtriem/Schwenzer, Art. 57, p.1090, ¶20; Haaksbergen, p.7, ¶¶27–29*]. *Haaksbergen* illustrates this proposition. There, a fraudster impersonated the seller through a phishing attack, requesting for a transfer of monies through a different bank account from the original one stipulated [*Haaksbergen, p.7, ¶¶7–13*]. The buyer argued that because she had made the transfer in line with the instructions by the fraudster, the payment obligation would have been discharged. The court however, held that the buyer's payment obligation remained unfulfilled [*Haaksbergen, p.7, ¶¶7–13*], because a reasonable person in the buyer's shoes would have known it was a phishing email that could not have come from the true seller since the email domains between the seller and the fraudster were different [*Haaksbergen, p.7, ¶¶7–13*]. The phishing email also contained the subject line ""Re:RE:Delivery all" even though it was the first email in the entire email thread. Hence, the court held that the buyer

should not have reasonably relied on the contents of that email [*Haaksbergen, p.7, ¶¶7–13*]. In this same vein, several other courts have also held that the party who is best able to prevent the eventual harm but did not do so would bear the consequences for its inaction [*Lawrence, p.2, ¶¶8–20; Ostrich, p.3, ¶58; Bile, p.12, ¶¶101-102*].

53. These same considerations apply here. The hackers had a different email address from those of the Claimant. The fraudster's email was "telsa.audi@se<u>m</u>sorx.me" [*Exh.C5, p.16*]. Ms Audi's real email was "tesla.audi@se<u>n</u>sorx.me" [*Exh.R1, p.33*], highlighting that the Claimant's correct email domain is "@sensorx.me". The subject line of the email refers to a "Change of payment process for Order 9601", yet the model of the sensors referred to in the email was "S4-258<u>8</u>9" as opposed to "S4-258<u>9</u>9" [*Exh.C5, p.16*]. From the facts, it is undisputed that Respondent had placed orders for "S4-258<u>9</u>9" in accordance with PO-9601 [*Exh.C2, p.13; Exh.C3, p.14*]. While the difference may seem small and a reasonable person may pass this off as an honest typographical mistake, Respondent should not have. This is because Respondent is an entity that had ordered from Claimant a total of 22 times [*RA, pp.5–6; ¶10*]. Of these 22 orders, most of the orders were for the S4-8<u>9</u>9 sensor model except for three [*RA, pp.5–6; ¶10*]. This means that the specific sensor model number would be of special importance to Respondent, and it would be extra mindful of any changes in the digits. If not, Respondent may risk receiving a completely different type of sensor than the one ordered. Because the order was for PO-9601, Respondent should have been aware that the sensors placed under this particular order was for the "S4-258<u>9</u>9" model and not the "S4-258<u>8</u>9" model.

54. In other words, Respondent should not have reasonably relied on the contents of the email so liberally without following and complying with Art. 40 of the FA in the light of these errors. Their payment to a wrong bank account would not discharge their obligation to pay to the correct bank account. As a result, the obligation to pay remains. Accordingly, Claimant is entitled to:(**A**) full payment unless Respondent can successfully invoke a defence against this claim; or (**B**) partial payment of the sums due under PO-9601 in any event.

A. Claimant is entitled to full payment under PO-9601

55. As alluded to in the previous paragraph, Claimant's claim for payment remains valid and Respondent is under an obligation to make payment. The payment must be effected in full because: (**1**) Claimant owes no duty to inform Respondent of cyberattacks; (**2**) even if such a duty exists, Respondent cannot rely on the CISG to exculpate itself.

(1) Claimant owes no duty to inform Respondent of cyberattacks in any circumstance

56. Respondent alleges that Claimant had violated its duty to inform Respondent of the cyberattack that occurred upon itself. However, no such duty arises from the present facts either in: (**i**) contract; (**ii**) usage or trade practice; (**iii**) CISG itself; or (**iv**) domestic law. Accordingly, Respondent cannot rely on a violation of this duty in support of any other arguments or defences it may raise to exculpate itself from paying the sums due under PO-9601.

(i) No duty to inform arises out of the contracts between the Parties

57. Contracting parties are bound by the terms of their agreement. Under the FA, neither party has undertaken an obligation to inform the other party of a cyberattack [*Exh.C1, pp.9–12*]. No such obligation arises from PO-9601 either [*Exh.C2, p.13*]. The only contractual provision which remotely suggests an information duty lies in Art. 8 of the FA [*Exh.C1, p.11, Art. 8*]. In reliance of this article, Respondent could argue that because there had been a change in "*insurance circumstances*" (by virtue of the cyberattack on Claimant) there is a new need to obtain cyber-security insurance. As a result, Claimant would have been required to inform Respondent of this change in its overall risk profile. However, if we are to interpret Art. 8 of the FA in its full context, it becomes clear that the Parties did not intend to impose on Claimant a *general* duty to inform Respondent whenever a change in Claimant's risk profile occurs. This is because: (**a**) Respondent knew Claimant did not intend to be bound by a general duty to inform; and (**b**) such an intention would be unreasonable in these circumstances.

(a) Respondent knew claimant did not intend to be bound by a general duty to inform

58. While the express wording of Art. 8 only deals with the interpretation of individual statements, the provision also regulates the interpretation of contractual terms [*Schlechtriem/Schwenzer, Art. 8, p 162; Fruits II, p.8, ¶38; Fruits V, p.8, ¶6*]. Art. 8(1) of the CISG states that "statements made by, and other conduct of a party are to be interpreted according to his intent where the other party knew, or could not have been unaware, what that intent was". Applying Art. 8(1) of the CISG, the common intention of the parties was for Claimant to bear a narrow duty to inform in the context of insurance. This is evident from the scope of Art. 8 of FA, wherein Claimant only bore a duty to maintain liability insurance for operational risk in three clear categories and inform Respondent should the insurance

coverage change [*Exh.C1, p.11, Art. 8*]. Had the parties truly intended for Claimant to be bound by a broader information duty to inform Respondent of changes in operational risk levels, a term codifying such an obligation would have been made clear in the contract. This is especially since the Parties have applied their minds to the specific disclosure of various operational risks on the part of Claimant.

59. Furthermore, it would have been clear for Respondent that Claimant did not regard the procurement of cybersecurity insurance as part of its obligations. If a party had, for example, decided to undertake shipping insurance even though they had no contractual obligation to do so, they would be deemed to have assumed the risk of transportation [*Frozen Chicken Case; Schlechtriem/Schwenzer, Art. 8, p 189*]. Here, Claimant asked if Respondent owned cybersecurity insurance in response to Respondent's disclosure of the 2020 cyberattack it had been subject to. The exact phrase that was used by Claimant was "whether [Respondent] ha[s] any cybersecurity insurance that would also cover the potential losses of [its] *business partners*". If Claimant (as Respondent's business partner) did, in fact, possess a sufficient level of protection from cybersecurity threats of this nature, they would not have required such information from Respondent. A reasonable person, placed in the shoes of Respondent would have at least been alive to the likelihood that Claimant bears no such insurance of its own when faced with such lines of questioning.

60. Moreover, the fact that both parties had themselves procured the most basic form of insurance available is also telling of how neither of them expected Claimant to bear cybersecurity insurance on behalf of the Parties [*PO-2, p64, ¶23*]. The phrase "*insurance circumstances*" must therefore not be interpreted to include cybersecurity insurance. Claimant, would by virtue of this, not bear any information duty to Respondent.

(b) An intention to be bound by a general duty to inform under contract is unreasonable here

61. Art. 8(2) provides that "statements made by and other conduct of [Claimant] are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances". Here, the Parties had limited their insurance to only three categories: public liability; product liability; and car recall [*Exh.C1, p.11, Art.8*]. Any requirement to inform of a change in insurance circumstance outside these three categories would be unreasonable. Otherwise, the Parties would not have expressly laid out these three categories. The fact that they had applied their minds to limiting the insurance to only these situations suggests that outside these specific situations, no information duty exists. This applies regardless of whether the cybersecurity

risk (a risk not contemplated by the Parties in the FA) was a minor or major one. No reasonable person in the shoes of Respondent would have understood, in light of the full context of the FA, that there exists a general duty to inform Respondent of any changes to its risk profile. Such an arrangement is not commercially viable as it results in the informing party incurring unnecessary transaction costs. No company would voluntarily undertake to place such an onerous and burdensome obligation on itself, especially when the contract already specifies for three strict categories of insurance.

(ii) *No duty to inform arises out of usage or common practice*

62. Respondent is unable to show, under Art. 9 of the CISG, that there exists any: (**a**) agreed usage; (**b**) common practice; or (**c**) international trade usage, which gives rise to an obligation on the part of Claimant to inform Respondent of the cyberattack.

(a) Claimant is not bound by any agreed usage to inform Respondent of cyberattacks

63. Art. 9(1) of the CISG binds the parties to "*any usage to which they have agreed*". This means that Claimant must have *expressly* agreed to be bound by any usage cited by the Respondent before the usage applies [*Pamboukis, pp.*112–113; *Magnus, Art. 9,* ¶9]. There is no evidence of the Claimant agreeing to be bound by any such usage. The only document that Respondent may point to as a potential indication of an agreed usage would be Li Worry's email [*Exh.R2, p.34*]. But even then, this email merely expresses appreciation for Respondent's disclosure, and showcases Claimant's personal concern for cybersecurity-related risks. There is no indication of any agreed usage of the term "*insurance circumstances*" under Art. 8 of the FA to impose an obligation on Claimant to inform Respondent. The Parties have not made any agreement as to a specific interpretation of that term.

(b) Claimant is not bound by any common practice to inform Respondent of cyberattacks

64. Art. 9(1) of the CISG also binds the parties to "any practices which they have established between themselves". An established practice is one that creates a justified expectation that the parties will proceed correspondingly in future [*Schlechtriem/Schwenzer, Art. 9, p.205, ¶9; Pamboukis, p.113; Vine Wax Case, p.*7]. In this regard, cases have generally interpreted two occasions as being insufficient to constitute a practice [*Schlechtriem/Schwenzer, Art. 9, p.205, ¶10; Hachem et al, ¶27.13; Bulgarian White, p.6, ¶25; Pizza, p.3, ¶3(a)*]. This is because for there to be a practice, the specific circumstance must

have occurred with a certain frequency and during a certain period of time set by the parties [*Schlechtriem/Schwenzer, Art. 9, p.205,* ¶*10; Hachem et al,* ¶*27.12 Tantalum Powder II, p.5,* ¶*15*].

65. There is only one instance where the Respondent had chosen to inform Claimant of the cyberattack [*Exh.R2, p.34*]. No other instance of any similar conduct exists on our facts. There had not been a development of any practice to create a justified expectation that Claimant is expected to do the same for Respondent. In fact, the only reason Respondent had informed Claimant of the cyberattack on itself was because of a legal obligation [*Exh.R1, p.33*]. It did not arise out of an implied understanding between the parties nor any established practice. Respondent had admitted in their email correspondence that the reason for the disclosure was a legal one – that they were under an obligation pursuant to Art. 34 of the Data Protection Act of Equatoriana [*Exh.R1, p.33; RRA, p.30,* ¶*2*].

(c) Claimant is not bound by any international trade usage to inform of cyberattacks

66. Art. 9(2) of the CISG requires an international trade usage to be: (**1**) widely known to, and regularly observed by, parties to the contracts of the types involved; (**2**) internationally known and observed; and (3) knew or ought to have been known by the contracting parties [*Schlechtriem/Schwenzer, Art. 9, p.209,* ¶*19; Kroll, Art. 9, p.172,* ¶*25*]. Here, the first two requirements are absent.

67. First, the duty to inform is not widely known to, and regularly observed by, parties in the automotive industry. When there are different practices within the same industry, this would negate the possibility of trade usage insofar as no clear predominance is determinable [*Schlechtriem/Schwenzer, Art. 9, p 210,* ¶*20; Kroll, Art. 9,* ¶*26*]. On our facts, Mediterraneo and Danubia do not provide for any specific legal obligation on companies to inform the authorities of a cyberattack (let alone customers or suppliers the data of which may have been compromised) [*RA, p 7,* ¶*27; Exh. R3, p 35; PO1, p 59* ¶ *5*]. Claimant, which is based in Mediterraneo, should thus have the discretion to decide whether it discloses information on cyberattacks it has been subjected to.

68. Second, the duty to inform is not internationally known and observed as it is not enough for merely one party to have contact with the sphere of observance [*Schlechtriem/Schwenzer, Art. 9, p.211,* ¶*21; French Chocolate, p.2,* ¶*5*]. Only the Respondent is bound by the Data Protection Act of Equatoriana, a verbatim adoption of the GDPR [*PO1, p.59* ¶*5*]. Therefore, while the sphere of observance extends to cover those bound by the GDPR and its variants which include a similar duty under Art. 34, Claimant does not have contact with this sphere of observance.

(iii) No duty to inform arises out of the CISG

69. The CISG does not have any express provision which places an obligation on parties to cooperate with each other (unlike other statutes such as the Common European Sales Law) [*Twigg, pp.281-299; Loos, pp 37-38*]. It is doubtful whether the CISG places an obligation on parties to cooperate to even begin with [*Richardson, p.47*]. By extension, this means that the CISG cannot give rise to any duty to inform on the part of Claimant. However, Respondent may argue that Art. 80 of the CISG embodies the principle that parties have a duty to cooperate [*Neumann, pp.112-113, ¶5.1.1; SJSHC, ¶449*]. To this end, Respondent may rely on the PICC to interpret or supplement the interpretation of the CISG. But this is only possible to the extent that it is not contradictory to the underlying rationale of the convention [*Yesim M, p.30*].

70. Art. 5.1.3 of the PICC incorporates a duty to cooperate. The ambit of this duty, however, extends beyond anything expected under Art. 80. Art 5.1.3 of the PICC expands the scope of the duty to include specific obligations like the duty to disclose [*Vogenauer, p.623, ¶7*]. While this can be argued to be mere interpretation of Art. 80 itself, this must be viewed in the context of the legislative history and the divergence in the role of good faith within the PICC and the CISG. It must be recalled that Art. 80 does not itself expressly provide for a duty to cooperate.

71. Provisions in the PICC, albeit reflective of modern approaches, are undeniably influenced by civil law legal thinking [*Schwenzer, p 117, P 7.4*]. For example, French case law has shown conscientious imposition of a duty to disclose on the basis of a freestanding principle of good faith [*Rosher, p.302; Cass No. 09-68.989; Cass No. 09-13.575*]. However, it is well-known that the reference to good faith in Art. 7(1) of the CISG was a compromise between the civil and common law traditions [*UN Conference, ¶¶ 40-56; Janssen p. 261-263*]. Using an overriding general principle of good faith would exceed the scope of the contents of the articles in the CISG [*Walt, pp.47-49; Viscasillas, pp.133-134*]. It would also lead to a jeopardy of the uniform application, interpretation, and predictability under the CISG [*Yesim M, p.116, ¶7.3.3*].

72. Presently, though Art. 80 of the CISG and Art. 5.1.3 of the PICC discuss the underlying general principle of a duty to cooperate, this duty is interpreted differently due to a divergence in the role principles of good faith play in the CISG as compared to the PICC [*Honnold, pp 667-91; Gotanda, pp 17-18*]. Evidently, Art. 80 delineates a broader but shallower scope of the duty to cooperate.

Therefore, the narrower, more onerous scope as proscribed under Art. 5.1.3 conflicts with the underlying rationale and legislative history of the CISG due to the different role the general principle of good faith plays. Therefore, any more specific obligations that arise out of the duty to cooperate, such as the duty to inform, is inapplicable.

73. Notwithstanding the above, even if the duty exists as interpreted under the PICC, cooperation is ultimately limited by standards of reasonableness. Here, Claimant bore no duty to inform Respondent of the cyberattacks as it would be an unreasonable extension of the duty to cooperate. This is so for two reasons: (**a**) first, such a duty would require Claimant to bear unnecessarily high costs should Claimant be required to disclose each and every incident of breach; (**b**) second, there is no need to impose any information duty on Claimant since Respondent was well aware of the risks of cybersecurity attacks.

(a) Claimant would bear unreasonably high transaction costs if a duty to inform is imposed

74. The duty of cooperation may require a party to inform the other party of any circumstance which the other party needs to be aware of to perform its obligations under the contract [*Voganauer, p 624, ¶ 7; Perez Vargas*]. However, this duty is not without its limits. No party can be expected to engage in cooperation that results in the transaction no longer being financially viable [*Voganauer, p 624, ¶ 9*]. Here, Respondent may argue that the duty of cooperation does not require Claimant to bear any significant costs. But the reality is that the duty to inform, in the context of cybersecurity threats, requires Claimant to inform each and every one of its stakeholders (since there is always a possibility that *someone* may have their information stolen). This problem is further exacerbated by the fact that cyberattacks are generally not uncommon in the automotive industry and are generally neutralized fairly easily [*Exh.R3, p.35*]. In any case, Claimant had already relied on the leading cybersecurity firm in Mediterraneo (CyberSec) to address the cyberattack [*Exh.C6, p.17*, ¶6]. The fact that CyberSec had made a wrong categorization of the initial attack is beside the point [*PO-2, p.64, ¶25*]. Claimants should not be expected to go above and beyond to identify if the cyberattack was of a significant nature or not when they have already undertaken reasonable measures such as employing a professional for the situation.

75. Further, because of the nature of cybersecurity attacks, in that they seek to acquire and steal information, how fraudsters utilize that information is up to their own imagination and creativity. Should the duty of cooperation be extended to include this duty to inform, Claimant would then have

to communicate to each and every one of its partners that a breach has taken place. This was the exact reason why the government of Mediterraneo decided against imposing such information duties on companies within Mediterraneo. Claimant, as a company that deliberately chose to incorporate and operate in Mediterraneo should not be held to such an obligation.

(b) Respondent was as aware of the risk and dangers of cybersecurity attacks as Claimant

76. A factor to determine the reasonableness of imposing an information duty is whether there was any asymmetry of information between the parties [*Voganauer, p.624, ¶9; Twigg-Flesner, pp.282-284*]. The stronger the information asymmetry between the parties, the more reasonable it is to expect the co-operation of the party with superior knowledge [*Voganauer, p.624, ¶9; Twigg-Flesner, pp.282-284*]. Here, even though Respondent was unaware that Claimant had been subjected to a cyberattack, it did know that cyberattacks were a common phenomenon in the industry generally. In this regard, Respondent was certainly no babe in the woods. Respondent had themselves been subject to a cyberattack, and they must be taken to know that the risks of identity theft and impersonation in the industry was high. In this instance, the asymmetry of information between the parties is not as stark as initially thought. It would make no material difference whether Respondent was aware of Claimant's cyberattack since that would be but one incident in an ocean of cyberattacks. Accordingly, Respondent should have acted with prudence by following the proper procedures agreed to by the parties under Art. 40 of the FA.

(iv) No duty to inform arises out of domestic law

77. Claimant is not bound by any duty arising out of the Danubian Contract Act because recourse to domestic law is inapplicable. Art. 7(2) of the CISG provides for a two-step gap-filling procedure. [*Schwenzer/Hachem, Art. 7,* ¶27]. It must first be determined if the matter is one that is "governed by [the] Convention'. If it is, then it must be settled "in conformity with the general principles on which" the Convention is based. Recourse to domestic law is only appropriate as an absolute last resort if no such general principle can be discerned [*Schlechtriem/Schwenzer, Art. 7(2), p.141, ¶42; Clout Case No. 961, Clout Case No. 932*]. However, this clearly does not apply to our present facts. Taking Respondent's case at its highest, this is because Art. 80 of the CISG itself already embodies the principle for a duty to cooperate. Consequently, there are no gaps left to be remedied, and recourse to the Danubian Contract Act would be inappropriate.

(2) Even if there is an information duty, Respondent cannot rely on the CISG to exculpate itself

78. Having established that there is no information duty that Claimant could have breached, Respondent continues to owe the full amount payable under PO-9601. In this regard, Respondent cannot rely on either: (**i**) Art. 80; or (**ii**) Art. 77 of the CISG to exculpate itself from liability.

(i) Respondent cannot rely on Art. 80 of the CISG because Claimant did not cause the loss

79. To rely on Art. 80 to exculpate itself, Respondent must prove: (1) its non-performance; (2) the Claimant's act or omission; and (3) a causal link between its non-performance and Claimant's act or omission [*Neumann, p.179, ¶6.6; Schlechtriem/Schwenzer, Art. 80, pp.1398-1400, ¶3-5*]. As earlier argued, Claimant's decision not to inform Respondent of the prior cyberattack does not constitute an act or omission as it bore no duty to do so [*see* ¶¶56-77]. But even if Claimant's conduct satisfies the second element, it cannot satisfy the element on causation.

80. The promisee's conduct would only cause the promisor's non-performance if the relevant information was a precondition for the performance of the promisor's obligation [*Automobiles Case; Propane Case; Acrylic Blankets Case; Leather Goods Case; Shoes Case II; Equipment Case; Wooden Poles Case*]. In other words, Art. 80 is only applicable if it is clear that the promisee's contribution to causation outweighs the contribution by the promisor [*Schlechtriem/Schwenzer, Art. 80, p.1401, ¶7; Piltz, ¶4-224; Schmid, pp.113-115*]. For example, in the *Propane Case*, the seller similarly claimed that the buyer breached its obligation to pay. In response, the buyer argued that without the seller supplying the name of the loading port, it could not open the letter of credit required to complete its payment obligation. The court agreed, finding that the seller had a "primary duty to name the place of loading" before the buyer had an "obligation to issue the letter of credit".

81. The same cannot be said here. Respondent's payment obligation was only contingent on Claimant fulfilling its delivery obligation. Once Claimant made delivery of the sensors, nothing prevented Respondent from fulfilling its payment obligation. At best, Claimant's non-disclosure affected Respondent's ability to employ a heightened level of due diligence when dealing with Claimant's online personality. However, Claimant's non-disclosure would have had no effect on Respondent's willingness to abide by the procedures set out in Art. 40 of the FA. Had Respondent complied with the formalities under Art. 40 of the FA, it would have had to call one of Claimant's employees to

verify the amendment and draft the amendment agreement. At which point, the fraud would have been unraveled and avoided. Respondent's decision to send monies to a new bank account, in breach of these requirements were risks that it knowingly undertook. Respondent's obligation to abide by these mechanisms is not in any way contingent upon any disclosure of a cyberattack.

(ii) Respondent cannot rely on Art. 77 of the CISG because this is a claim for an action for payment

82. Under Art. 77 of the CISG, "a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach". However, Art. 77, only applies to claims in damages, and not an action for payment [*Schlechtriem/Schwenzwer, Art. 62, p.1141, ¶16; CISG Secretariat Commentary, Art. 73, p.61, ¶3; Schlechtriem/Butler, p.173, ¶236; Solea, p.7, ¶18*]. This is supported by the treaty interpretation rule under international law which requires treaties to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaties in their context and in light of [the treaties'] object and purpose" [*VCLT, Art. 31(1)*]. From the ordinary meaning of Art. 77, it is clear that it applies only to damages arising from a breach of contract. This is because Art. 77 operates to limit the damages recoverable if the injured party could have acted reasonably to avoid excessive damages after a breach [*Walt*, *p.54*; *Riznik, pp.268-269*; *Tankers*, *p.8*, ¶59-64]. Here, Claimant is bringing an action for payment as opposed to a claim for damages [*RA*, *p.8*, ¶29].

83. But even if the payment claim was characterized as damages, there were no other more reasonable mitigating steps that Claimant could have taken. The duty to mitigate arises when the loss has already occurred [*Schlechtriem/Schwenzwer, Art. 77, pp.1342-1343,* ¶*3*; *Schwenzer/Hachem pp.92-93*; *Munoz/Ament-Guemez, p.201*; *PVC*, *p.11* ¶67, *p.12* ¶¶70-71] or when loss is imminent [*Djakhogir, p.131*; *Schlechtriem/Schwenzer/Stoll*, *p.659*; *Chengwei/Newman*, ¶14.5.1; *Kroll/Mistelis*, *p.1035*; *Riznik*, *p.270*; *Diammonium phosphate Case*, *p 73*, ¶326]. This duty is limited only to reasonably *foreseeable* losses [*Ishida, p.259*; *Butler*; *Diammonium phosphate case*, *p.73*, ¶325]. Respondent's breach of contract could not have been foreseen by Claimant until it happened. Respondent owed Claimant two instalment payments pursuant to PO-9601 [*RA, p 6, ¶ 13; Exh. C 2, p.13,* ¶6]. The first payment was due on 3 May 2022 and the second was due on 30 June 2022 [*RA, p.6, ¶13*]. Claimant only discovered Respondent's failure to fulfil its payment obligations on 25 August 2022, two months after both breaches had been committed through no fault of its own [*RA, p.6, ¶15*]. There was no knowledge of the Respondent's breach of both of its payment obligations under PO-9601 at the material time [*RA, p.6, ¶14; Exh.C 6, p.18,* ¶10]. This was because the Claimant's internal systems were down and had

to be thoroughly investigated and analysed from 15 May until 30 June 2022 [*RA, p.6, ¶14*; *Exh.C 6, pp.17-18, ¶10*].

84. Further, due to the high rate of absentees and the replacement of Respondent's account manager [*RA, p 6, ¶ 15; Exh.C 6, pp.17-18, ¶10*], the non-payment was only discovered later. By that time, any mitigatory steps involving a need to disclose information on the cyberattack would have not made a material difference or change in outcome. Therefore, the sums owed by Respondent cannot be reduced under Art. 77 of the CISG and Claimant remains entitled to the full sum under PO-9601.

B. Alternatively, Claimant is entitled to payment of the partial amount under PO-9601

85. In any event, Claimant is still entitled to at least parts of the payments under PO-9601. This is because: (**1**) Respondent remains the most proximate cause to the eventual non-payment; and (**2**) Respondent cannot show that Claimant had acted so unreasonably so as to disentitle it to any payment.

(1) Respondent must bear the brunt of responsibility under Art. 80 of the CISG

86. While it has earlier been submitted that the test for causation under Art. 80 would be satisfied only if the promisee's contribution to causation outweighs the promisors' contribution to causation [*see ¶80*], some authorities have argued otherwise. Art. 80 may also be applicable to situations of shared responsibility, allowing tribunals to apportion liability on a pro-rata basis depending on the contribution each party had towards causation [*Neumann, p.28, ¶2.23; Schlechtriem/Schwenzwer, Art. 80, p.1403, ¶10; Czerwenka, Art. 80, ¶8*]. Relying on these authorities, Respondent may argue that Claimant's claim under PO-9601 should be reduced to the extent that it was causally liable for the loss. But even adopting such an approach, Respondent still bears a greater proportion of the loss.

87. When assessing the relative weight of the contribution to causation, the degree of probability of the party's conduct leading to the loss which was actually caused must be taken into account; at the same time, the degree of fault on either party and the severity of the breach may also be taken into consideration [*Neumann, p.28, ¶2.23; Schlechtriem/Schwenzwer, Art. 80, p.1403, ¶10; Czerwenka, Art. 80, ¶8*]. In this case, Respondent bears a greater degree of fault for four reasons. First, Respondent has demonstrated a pattern of negligence by its failure to comply with the formalities of PO-9601 and PO-15604 [*Exh.C8, p.49, ¶9; Exh.R4, p.36 ¶4*]. This habitual recklessness caused it to make payment to the wrong bank account under PO-9601. Second, the degree of probability of Claimant's conduct

leading to Respondent's non-performance is very low. Respondent has not tendered any evidence to prove it would have discovered the fraud if it was put on notice by Claimant. Respondent's allegation is merely based on hindsight. Third, Claimant's non-disclosure, even if it did constitute a breach of the duty to cooperate, contributed very little to Respondent's non-performance. This is because a heightened level of alertness was not required to comply with Art. 40 of the FA. Even if it was, Respondent should have been sufficiently alert given the pre-existing risk of cyberattack to the automotive industry [*Exh.R3, p.35*]. Fourth, the email sent by the hackers contained several discrepancies that should have put Respondent on notice, including the mismatch of domains and wrong sensor number [*See* ¶*53*]. Such negligence, and not any lack of disclosure, was the real reason for their eventual non-performance.

(2) Respondent cannot show that Claimant had acted so unreasonably as to be disentitled to any payment under PO-9601

88. Respondent had argued that the sums payable under PO-9601 should be reduced in the light of the principles underlying Art. 77 of the CISG [*RRA, p.32,* ¶*13*]. In this regard, it has been argued that Art. 77 embodies this principle of reasonableness [*Ishida, pp.257-258; Lookofsky, p 89; Butler; Oviedo-Albán, p 2*]. What constitutes reasonable conduct is determined from the conduct of a reasonable person in the same position and under the same circumstances as the aggrieved party [*Schlectriem/Schwenzwer, Art. 77, p.1344,* ¶*7; PVC, p.14,* ¶*4; Propane, p.13,* ¶*44*]. Even if the principle of reasonableness could be extended to reduce the sums payable to Claimant, the facts do not support such a conclusion.

89. Between the time when the cyberattacks occurred and Respondent's breach, which is the only period that loss could have been mitigated, what was reasonably expected of Claimant does not include informing Respondent of the cyberattack. Instead, it was critical in that period for Claimant to focus on its recovery efforts. To determine what constitutes reasonable conduct in the shoes of Claimant, regard must be had to the different social, and legal and regulatory backgrounds of the parties [*Luo/Guo, p 17; BVU,* ¶ *24-25, 83*]. Here, it would not be reasonable for Claimant to have informed Respondent of the cyberattacks. This is because Claimant's state, Mediterrnaneo, did not impose any law equivalent to the GDPR in Respondent's state, Equatorania [*PO1*, *p.59*, ¶5; *RA*, *p.8*, ¶28; *Exh.R3*, *p.35*]. As such, the absence of a legal duty to disclose any data breaches must be taken into account as part of Claimant's legal and regulatory background. A reasonable person in Claimant's shoes, in his position, and under the same circumstances, would not be alive to the need to disclose any data

breaches. The need to inform is not of paramount importance, if at all, and neither does it constitute a reasonable measure Claimant ought to have taken within the timeframe assessed.

90. In any event, Claimant had even taken precautionary measures to prevent/reduce future losses immediately after the cyberattacks. After the first cyberattack, Claimant had engaged CyberSec, the leading cybersecurity firm in Mediterraneo to identify the source of the cyberattack and subsequently removed the malware found [*Exh.C 6, ¶6*]. Its investigations revealed that the cyberattack was only of a minor relevance [*Exh.C 6, p.17, ¶6*]. After the second cyberattack, Claimant had, with the support of the governmental cybersecurity unit, engaged in a major and thorough security check of their systems [*Exh.C 6, p.18, ¶10*]. Claimant was still recovering from it and its internal systems were down. It had to divert its resources and attention towards investigating and analysing the hack, as well as restoring its systems from 15 May until 30 June 2022 [*RA, p.6, ¶14; Exh.C.6, pp.17-18, ¶10*]. This was its utmost priority as it was necessary to prevent further hacking and loss of data. Claimant cannot be faulted for not prioritising informing Respondent of the cyberattacks during that period. Accordingly, Respondent cannot show that Claimant had conducted itself in such an unreasonable manner such that it is no longer entitled to a single cent under PO-9601.

REQUEST FOR RELIEF

91. For the reasons above, Claimant respectfully requests this Tribunal to find that:

    a. this Tribunal can and should authorise the addition of the new claim to the pending arbitration proceedings; even if the new claim must be raised in a separate arbitration;

    b. this Tribunal can and should consolidate the arbitral proceedings; and

    c. Claimant is entitled to payment of the full amount, or in the alternative, parts of the amount due as payment under PO-9601 and that Respondent cannot rely on any defences to argue otherwise.

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