# **TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

**SUMMARY OF FACTS**

**SUMMARY OF ARGUMENT**

**I. ISSUE A: THIS TRIBUNAL LACKS JURISDICTION TO AUTHORISE THE ADDITIONAL CLAIM, AND IN ANY EVENT, SHOULD NOT AUTHORISE IT.**

A. The Additional Claim Falls Outside the Limits of the Agreed Terms of Reference. 1. The *ToR* Deliberately Limit the Issues to be Determined. 2. The Additional Claim is Not Sufficiently Connected to the Existing Claim.

B. This Tribunal Should Not Authorise the Additional Claim Under Art. 23(4) *ICC Rules*.

1. Authorisation Would Impose Significant Cost and Inconvenience.  
 2. Authorisation Would Prejudice RESPONDENT.  
 3. CLAIMANT Delayed in Bringing the Additional Claim.

C. The Requirements of Arts. 6(3)-(7) *ICC Rules* are Not Met.

**II. ISSUE B: THIS TRIBUNAL LACKS THE POWER TO CONSOLIDATE, AND IN ANY EVENT, SHOULD NOT CONSOLIDATE THE PROCEEDINGS.**

A. The Parties Did Not Empower this Tribunal to Consolidate.  
  
 1. Art. 41(5) \*FA\* Does Not Override Art. 10 \*ICC Rules\*.  
 2. Art. 10 \*ICC Rules\* is a Mandatory Provision.  
  
B. The Requirements for Consolidation Under Art. 41(5) \*FA\* Are Not Met.

1. There are no Common Questions of Law or Fact.
2. There is no Real Risk of Conflicting Awards.

* C. The Requirements for Consolidation under Art 10 *ICC Rules*. Are not Met.

1. The Claims are Not Made Under the Same Arbitration Agreement
2. The Arbitration Agreements are not Compatible

**III. ISSUE C: CLAIMANT IS NOT ENTITLED TO PAYMENT UNDER PURCHASE ORDER NO. 9601 BECAUSE RESPONDENT’S PAYMENT OBLIGATION WAS DISCHARGED.**

A. RESPONDENT's Payment to the Account Specified in the 28 March 2022 Email Discharged its Obligation.  
  
 1. CLAIMANT's Negligence Created Apparent Authority.  
 2. RESPONDENT Reasonably Relied on the Apparent Authority.  
 3. The Equities Favor RESPONDENT.  
  
B. Alternatively, CLAIMANT’s Conduct Caused or Contributed to RESPONDENT’S Failure to Pay.

1. CLAIMANT is in Breach of its Duty to Inform.
2. The Causation Test under Article 80 is Met.
3. Principles of Fairness Demand Apportionment.

* C. CLAIMANT Is Barred From Recovery By Its Failure To Mitigate.

1. Article 77 *CISG* is Applicable.
2. CLAIMANT is in Breach of its Duty to Mitigate

**IV. ISSUE D: EVEN IF RESPONDENT IS LIABLE, CLAIMANT CANNOT INVOKE A VIOLATION OF CONTRACTUAL DUTY OR RELY ON CISG.**

A. Art. 40 \*FA\* is not applicable because it was modified by subsequent conduct.

1. An Exchange of E-mails Constitutes a Modification
2. Principles of Estoppel Apply

* B. Art. 80 *CISG* is not applicable because RESPONDENT has not caused the failure to perform

1. RESPONDENT’s Actions Did Not Impede CLAIMANT’S Performance.
2. The Principle of *Venire Contra Factum Proprium* does not Apply.

**CONCLUSION**

**REQUEST FOR RELIEF**

# **SUMMARY OF FACTS**

1. On 7 June 2019, Visionic Ltd (RESPONDENT), a company incorporated in Equatoriana, entered into a Framework Agreement (FA) with SensorX plc (CLAIMANT) to regulate the supply of sensors. At RESPONDENT’S insistence, Art. 41 *FA* included a provision granting the Arbitral Tribunal the power to consolidate proceedings arising from multiple contracts under the *FA*.
2. Under the *FA*, RESPONDENT submitted Purchase Order No. 9601 (PO 9601) on 17 January 2022 and Purchase Order No. A-15604 (PO A-15604) on 4 January 2022. Both purchase orders contained arbitration clauses, with PO 9601 providing for arbitration in Vindobona, Danubia, and PO A-15604 specifying Danubia.
3. On 5 January 2022, CLAIMANT suffered a cyberattack, discovered on 23 January 2022. CLAIMANT did not inform RESPONDENT of the cyberattack. CLAIMANT asserts the initial assessment deemed the attack of “minor relevance”.
4. On 28 March 2022, RESPONDENT’s account manager, Mr. Royce, received an email seemingly from Ms. Audi, CLAIMANT’s account manager, requesting payment for PO 9601 be directed to a new bank account. This email was a phishing attack, stemming from the earlier cyberattack on CLAIMANT’s systems.
5. Mr. Royce replied to the email, requesting confirmation, and receiving it. Relying on the email and without obtaining written and signed confirmation as seemingly required by Art. 40 *FA*, RESPONDENT made payments for both installments under PO 9601 to the fraudulent account.
6. Due to system shutdowns and staff absences at CLAIMANT, the non-receipt of payment under PO 9601 was only discovered on 25 August 2022. CLAIMANT notified RESPONDENT on 5 September 2022. RESPONDENT refused to make a second payment, asserting they fulfilled their obligation.
7. CLAIMANT filed a Request for Arbitration on 9 June 2023. The Terms of Reference (*ToR*) were agreed and signed by all parties on 30 August 2023. The ToR refer to, but do not specifically define, the issues in dispute.
8. On 4 April 2022, prior to discover of the payment mistake, RESPONDENT emailed CLAIMANT, that the goods under PO A-15604 were detective, notifying them of the defect.
9. On 11 September 2023, CLAIMANT requested authorisation to add a new claim related to non-payment of the second installment under PO A-15604 (the “Additional Claim”), or alternatively, to consolidate the new claim with the existing proceedings. RESPONDENT objects to both.

# **SUMMARY OF ARGUMENT**

This dispute centers on three core issues: (A) whether the Additional Claim related to PO A-15604 can be added to the existing arbitration; (B) whether, in the alternative, the Additional Claim can be consolidated with the existing proceedings; and (C) whether RESPONDENT is liable for payment under PO 9601, given its payment to a fraudulent account. A fourth issue (D) concerns defences raised by the CLAIMANT.

**Issue A:** This Tribunal lacks jurisdiction to authorize the Additional Claim, and should not exercise any discretion to do so. The *ToR*, deliberately crafted by the Parties, limit the scope of this arbitration to issues arising from PO 9601. The Additional Claim, related to PO A-15604, falls outside this scope. Authorisation under Art. 23(4) *ICC Rules* is inappropriate. It would cause significant cost and delay, prejudice RESPONDENT, and CLAIMANT unduly delayed in bringing the claim. The requirements of Art. 6 *ICC Rules*, concerning multiple contracts, are not satisfied.

**Issue B:** This Tribunal lacks the power to consolidate the proceedings. The Parties did *not* validly confer consolidation power on this Tribunal. Art. 41(5) *FA* is ineffective, as Art. 10 *ICC Rules*, vesting consolidation power exclusively in the ICC Court, is a mandatory provision. Even if Art. 41(5) *FA* is valid, the requirements for consolidation are not met, as the claims lack common questions of law or fact, and there’s no risk of conflicting awards. Furthermore, requirements of Art 10 *ICC Rules* have not been met. The two proceedings are not under the same arbitration agreement, and the two agreements are not compatible.

**Issue C:** RESPONDENT is not liable for payment under PO 9601. RESPONDENT discharged its payment obligation by paying to the account specified in the fraudulent email of 28 March 2022. This was due to CLAIMANT’s negligence, creating apparent authority for the payment instruction. Alternatively, CLAIMANT’s failure to disclose the cyberattack, violating a duty to inform, caused or contributed to RESPONDENT’s non-payment, precluding CLAIMANT’s claim under principles of good faith and Art. 80 *CISG*. Further, CLAIMANT failed to mitigate its loss.

**Issue D:** Art. 40 *FA* does not create a bar to defence. The requirment for writing was modified by subsequent conduct. Principles of estoppel preclue reliance. Regardless, RESPONDENT is not liable because it has not breached any provision of the CISG.

# **I. ISSUE A: THIS TRIBUNAL LACKS JURISDICTION TO AUTHORISE THE ADDITIONAL CLAIM, AND IN ANY EVENT, SHOULD NOT AUTHORISE IT.**

This Tribunal should reject CLAIMANT’s request to add the Additional Claim concerning PO A-15604 to the current proceedings. This Tribunal lacks jurisdiction under the agreed Terms of Reference (*ToR*) (A), and, even if it had jurisdiction, it should not exercise its discretion under Art. 23(4) *ICC Rules* (B), nor are the requirements of multi-contract arbitration under Art. 6 *ICC Rules* met (C).

## **A. The Additional Claim Falls Outside the Limits of the Agreed Terms of Reference.**

The *ToR*, mutually agreed and signed by the Parties, define the scope of this Tribunal’s jurisdiction [Craig/Park/Paulsson, p. 276]. The Additional Claim, relating to a separate contract (PO A-15604) with distinct factual and legal issues, exceeds these carefully drawn limits.

### 1. **The *ToR* Deliberately Limit the Issues to be Determined.**

The *ToR* do not grant this Tribunal unlimited jurisdiction over any dispute between the Parties. While CLAIMANT argues that the *ToR* are “not exhaustively” defined [Claimant Submissions, ¶4], and the list of issues is “non-exhaustive” [Claimant Submissions, ¶21], their interpretation misconstrues the carefully negotiated language and intent. The use of the words “the issues to be determined are *not limited* by the above summaries” [emphasis added] alongside the allowance that the Tribunal does not have to deal with *all or only these*, does not mean that the ToR’s limiting effect should not be considered by the Tribunal.

The controlling clause is that new claims will *only* be authorised if they result in noticeable savings in cost *and* time [ToR, ¶85]. This sets a clear and explicit condition, that *any* new claim can only be considered if the standard is met. This indicates a deliberate intention to limit the scope of the arbitration to issues closely related to PO 9601, promoting efficiency and preventing the arbitration from expanding into unrelated disputes.

CLAIMANT’s broad interpretation, relying on general statements about the purpose of arbitration [Claimant Submissions, ¶23], undermines the specific language the Parties chose. The *ToR* reflect a negotiated balance, acknowledging the potential for related issues to arise, but establishing a clear threshold for their inclusion. This threshold is consistent with a primary objective of arbitration: the efficient and cost-effective resolution of *defined* disputes [Born, p. 11].

### 2. **The Additional Claim is Not Sufficiently Connected to the Existing Claim.**

CLAIMANT overstates the connection between the Existing Claim (PO 9601) and the Additional Claim (PO A-15604) [Claimant Submissions, ¶¶18-19]. While both involve the sale of sensors under the *FA*, the crucial differences outweigh any superficial similarities. The claims relate to not just different products, but products with different properties [PO1, ¶2], different factual circumstances.

The Existing Claim, centers on RESPONDENT’s payment to a fraudulent account following a phishing email. The key issues involve agency, the duty of care, and the effect of the cyberattack on CLAIMANT’s systems.

The Additional Claim, however, turns on RESPONDENT’s assertion of defective goods [Ex R5] and a purported agreement with a CLAIMANT representative to withhold payment [Rejection of Request, ¶2]. The legal issues relate to notice of defects under the *CISG*, the validity of any oral agreement, and the consequences of supplying non-conforming goods. The factual inquiry will focus on the quality of the L-1 sensors, their performance, and any communication concerning defects.

CLAIMANT argues that the cyberattack provides a connecting factor [Claimant Submissions, ¶19]. This is misleading. The cyberattack may be *tangentially* relevant to explaining the delay in discovering non-payment, but it is not central to *either* claim. The core of the Existing Claim is RESPONDENT’s conduct in response to the phishing email, not the cyberattack itself. The core of the Additional Claim is the alleged defectiveness of the L-1 sensors, wholly unrelated to the cyberattack.

The *Sedimentary Tank Case* [Claimant Submissions, ¶18], is easily distinguishable. There, the additional claims arose from the *same physical object* (the faulty tank) and the *same installation process*. Here, the claims involve separate purchase orders, different sensors, and distinct alleged breaches. The connection is far weaker, resembling a general commercial relationship, not a tightly interwoven set of facts.

## **B. This Tribunal Should Not Authorise the Additional Claim Under Art. 23(4) *ICC Rules*.**

Even if this Tribunal finds it has jurisdiction under the *ToR*, it should not exercise its discretion under Art. 23(4) *ICC Rules* to authorize the Additional Claim. Authorisation would cause significant cost and inconvenience (1), prejudice RESPONDENT (2), and the CLAIMANT unduly delayed in bringing the Additional Claim (3).

### 1. **Authorisation Would Impose Significant Cost and Inconvenience.**

CLAIMANT argues that refusing authorisation would lead to duplication of effort and increased costs [Claimant Submissions, ¶¶29-32]. This argument is speculative and ignores the *actual* inefficiencies of combining these distinct claims.

While there may be some overlap in *witnesses*, the *factual inquiries* are fundamentally different. Combining the claims would necessitate extensive evidence on the technical specifications and performance of *both* the S4-25899 sensors (PO 9601) and the L-1 sensors (PO A-15604). It would require expert testimony on two distinct product lines, potentially involving different manufacturing processes, quality control procedures, and performance standards. The Tribunal would need to grapple with two separate sets of technical documentation, purchase order specifications, and delivery records.

This expansion of the factual scope would inevitably lead to increased costs and delay. It would require additional document production, potentially more extensive expert reports, and longer hearings. The suggestion that bifurcation addresses this concern [Claimant Submissions, ¶31] is unconvincing. Bifurcation adds complexity and *increases* overall time and cost, as the Tribunal must still manage two separate (though related) proceedings [Born, p. 2685].

CLAIMANT’s reliance on general statistics about arbitration costs and delays [Claimant Submissions, ¶¶29, 44] is unhelpful. The specific circumstances of *this* case, with its distinct factual and legal issues, demonstrate that combining the claims will lead to greater, not lesser, cost and delay.

### 2. **Authorisation Would Prejudice RESPONDENT.**

Authorisation would prejudice RESPONDENT’s ability to present its case effectively. The Additional Claim, raised months after the *ToR* were finalized, introduces a significant new dimension to the arbitration.

CLAIMANT’s assertion that RESPONDENT has ‘sufficient time’ [Claimant Submissions, ¶34] disregards the *nature* of the preparation required. RESPONDENT has, until now, focused its efforts on defending the claim under PO 9601. It has gathered evidence, instructed experts, and developed its legal strategy based on that specific dispute.

The Additional Claim requires a *completely different* factual investigation. RESPONDENT must now gather evidence regarding the alleged defects in the L-1 sensors, investigate the circumstances of their delivery and use, and potentially engage new experts with expertise in *that* specific product line. This late addition fundamentally alters the balance of the proceedings, placing RESPONDENT at a significant disadvantage.

The cases cited by CLAIMANT [Claimant Submissions, ¶¶35-36] are not analogous. In *Trividia Health Inc. v. Nipro*, the additional claims were added *before* the scheduled hearing, giving the respondent ample time to prepare. Here, the Additional Claim was introduced after the *ToR* were finalized, significantly disrupting the established timeline and RESPONDENT’s preparations.

### 3. **CLAIMANT Delayed in Bringing the Additional Claim.**

CLAIMANT asserts that it acted promptly in bringing the Additional Claim after discovering the non-payment on 8 September 2023 [Claimant Submissions, ¶37]. This argument ignores CLAIMANT’s own negligence and the prejudice caused by the delay.

CLAIMANT’s failure to discover the non-payment for over a year is directly attributable to its internal issues, including the impact of the cyberattack and staff departures [Ex C6 ¶10]. While these events may explain the delay, they do not excuse it. CLAIMANT, as a sophisticated commercial entity, bears the responsibility for maintaining adequate accounting and monitoring systems.

Furthermore, RESPONDENT notified CLAIMANT of the alleged defects in the L-1 sensors *prior* to the second payment becoming due. RESPONDENT sent an email on 4 April 2022 [Ex R5; PO2 ¶27], explicitly stating that the sensors were “defective” and that payment of the second instalment would be withheld. At the very least, this should have put CLAIMANT on notice of a potential issue, triggering a duty to investigate.

The delay in bringing the Additional Claim is not merely a matter of days, as CLAIMANT suggests [Claimant Submissions, ¶37]. It is a delay of *over a year* from the time RESPONDENT first raised the issue of defective goods, and *over five months* from the time RESPONDENT explicitly stated its intention to withhold payment. This delay has prejudiced RESPONDENT’s ability to gather evidence, particularly concerning the condition of the sensors at the time of delivery.

## **C. The Requirements of Arts. 6(3)-(7) *ICC Rules* are Not Met**

As has been previously canvassed, CLAIMANT argues that because the requirements of Art. 6(4)(ii) have been met, then the addition of the new claim should be permitted [Claimant Submissions, ¶50]. However, this is not the correct method of legal determination. Because the RESPONDENT has challenged the jurisdiction of the Tribunal [Answer to Request for Arbitration, ¶8], Art. 6(3) is the relevant test.

Art. 6(3) states that if any of the parties raise jurisdictional objections, then it is for the Tribunal to decide. This is what has happened here. CLAIMANT argues that the test in Art. 6(4) should be imported [Claimant Submissions, ¶46]. This is not correct, as it does not fit the legal context. Art. 6(4) deals with *prima facie* decision-making of the Court, not decision-making concerning jurisdiction *after* the objection has been raised [Fry/Greenberg/Mazza, p. 65]. It is the Tribunal’s jursidiction that is being challenge, and so it is for this Tribunal to decide.

Even if this Tribunal decides to apply Art. 6(4), that test is not met. The requirement of compatible arbitration agreements, discussed at length in Issue B, applies equally here. The agreements are incompatible, for the reasons laid out below.

Therefore, because the test of Art. 6(3) does not lead to a different result to applying the test in Art. 23(4), as canvassed above, it follows that the new claim should not be added.

# **II. ISSUE B: THIS TRIBUNAL LACKS THE POWER TO CONSOLIDATE, AND IN ANY EVENT, SHOULD NOT CONSOLIDATE THE PROCEEDINGS.**

Even if this Tribunal finds it has jurisdiction to add the Additional Claim, it should not, and *cannot*, consolidate the proceedings. The Parties did *not* validly empower this Tribunal to consolidate (A). Even if they did, the requirements for consolidation under Art. 41(5) *FA* (B) and, in any case, Art. 10 *ICC Rules* (C), are not met.

## **A. The Parties Did Not Empower this Tribunal to Consolidate.**

CLAIMANT argues that Art. 41(5) *FA* validly confers power on this Tribunal to consolidate proceedings, overriding Art. 10 *ICC Rules*, which vests this power in the ICC Court [Claimant Submissions, ¶¶63, 66, 68]. This argument is flawed. Art. 41(5) *FA* cannot override the mandatory provisions of Art. 10 *ICC Rules* (1), and is, in any event, not a mandatory provision (2).

### 1. **Art. 41(5) *FA* Does Not Override Art. 10 *ICC Rules*.**

While parties have considerable autonomy in shaping arbitral procedure, they cannot contract out of mandatory provisions of the chosen institutional rules [Smit p. 847]. The *ICC Rules* are not a mere framework to be modified at will; they contain fundamental provisions essential to the integrity and fairness of the ICC arbitration process.

Art. 10 *ICC Rules*, vesting the power to consolidate *exclusively* in the ICC Court, is such a mandatory provision. This is evident from the structure and purpose of the *ICC Rules*. The Court plays a crucial supervisory role, ensuring the proper administration of ICC arbitrations [Craig/Park/Paulsson p. 167]. The power to consolidate, involving a significant alteration of the arbitral process and potentially affecting the rights of third parties, is a key aspect of this supervisory function.

Allowing parties to unilaterally transfer this power to the tribunal would undermine the Court’s oversight, potentially leading to inconsistent application of consolidation principles and jeopardizing the enforceability of awards. It would create a two-tiered system, where some ICC arbitrations are subject to Court oversight on consolidation, while others are not, depending on the parties’ idiosyncratic agreements. This is incompatible with the fundamental structure of ICC arbitration.

CLAIMANT’s reliance on general statements about party autonomy [Claimant Submissions, ¶76] is misplaced. Party autonomy is not absolute; it is always subject to the mandatory provisions of the chosen institutional rules and the applicable law. The *ICC Rules* clearly define the scope of party autonomy, and Art. 10 is not among the provisions identified as modifiable.

### 2. Art. 10 ICC Rules is a Mandatory Provision.

CLAIMANT asserts that there are six reasons as to why Art. 10 is not a mandatory provision [Claimant Submissions, ¶67]. These are each flawed.

*i)* *The Parties have extended the scope of Art. 10 ICC Rules:*

As canvassed above, party autonomy has limits, and it is not for parties to unilaterally amend or extend mandatory provisions.

*ii) Consolidation is not a distinctive feature of ICC Arbitration:*

CLAIMANT incorrectly asserts that consolidation is not a distinctive feature of ICC arbitration [Claimant Submissions, ¶70]. Whilst there are other arbitral institutions which do contain the power to consolidate [Claimant Submissions, ¶70], CLAIMANT has not met the standard required to demonstrate that this is not a ‘specific function’ of the Court. Just because there are other arbitral institutions that have this power, it does not mean it is not of specific importance. The fact that there are a limited number of powers that are granted to the Court implies that each of them are special and specific, including Art. 10.

*iii) The language of Art. 10 is permissive not imperative:*

CLAIMANT incorrectly relies on the language used [Claimant Submissions, ¶71]. They assert that, because there are other mandatory provisions which use the word ‘shall’, and that Art. 10 uses ‘may’, then it is not a mandatory provision. This is an incorrect method of interpretation. CLAIMANT has not put forward any legal basis for such an assertion.

*iv) Consolidation is not necessary for the administrative functioning of ICC Arbitration:*

CLAIMANT incorrectly asserts that consolidation is not essential [Claimant Submissions, ¶72]. By removing a critical safeguard, fairness is potentially undermined.

*(v) This interpretation of Art. 10 is consistent with practice:*

CLAIMANT’s interpretation is not consistent with practice, nor persuasive legal doctrine [Claimant Submissions, ¶75].

*(vi) Consolidation gives effect to party autonomy:*

CLAIMANT incorrectly states that consolidation gives effect to party autonomy [Claimant Submissions, ¶76]. By removing decision-making from the Court, it means that the Parties’ own submissions on the matter will be given effect.

It follows, because Art. 10 *ICC Rules* is a mandatory provision, it cannot be modified by the Parties. Therefore, this Tribunal cannot exercise the power to consolidate the proceedings.

## **B. The Requirements for Consolidation Under Art. 41(5) *FA* Are Not Met.**

Even *if* this Tribunal finds that Art. 41(5) *FA* validly confers consolidation power, the requirements of that provision are not satisfied. Art. 41(5) *FA* allows consolidation only where the subject matters are related by common questions of law or fact *and* there is a risk of conflicting awards or obligations. Neither condition is met.

### 1. **There are no Common Questions of Law or Fact**

As demonstrated in Issue A, the Existing Claim and the Additional Claim, while arising under the same *FA*, involve *distinct* factual and legal issues.

The factual inquiry in the Existing Claim centers on the circumstances surrounding RESPONDENT’s payment to the fraudulent account, including the phishing email, CLAIMANT’s internal security measures, and RESPONDENT’s response to the email.

The factual inquiry in the Additional Claim, however, will focus on the alleged *defectiveness* of the L-1 sensors, requiring evidence on their technical specifications, manufacturing process, performance, and any communication between the Parties regarding defects.

The legal issues are similarly distinct. The Existing Claim raises questions of agency, the duty of care, and the effect of a payment made under mistake. The Additional Claim will involve interpretation of the *CISG* provisions on non-conforming goods, notice of defects, and potentially the validity of an alleged oral agreement to withhold payment. CLAIMANT incorrectly relies on the mere fact that the both issues concern the FA, non-payment and sensors [Claimant Submissions, ¶83]. These do not meet the standard of ‘common’ questions of law or fact.

1. There is no Real Risk of Conflicting Awards. Art. 41(5) *FA* requires not just common questions, but also a “risk of conflicting awards or obligations.” This condition is not met. The two claims, even if decided in separate proceedings, would not lead to logically inconsistent outcomes. The Existing Claim concerns whether RESPONDENT discharged its payment obligation under PO 9601 by paying to the fraudulent account. The resolution of this claim depends on whether CLAIMANT is bound by the instructions in the phishing email, not on the quality of the goods delivered under either purchase order. The Additional Claim, however, concerns whether RESPONDENT is entitled to withhold payment due to alleged defects in the L-1 sensors. The resolution of this claim depends on whether the sensors conformed to the contract specifications and whether RESPONDENT provided adequate notice of any defects. It is entirely possible for one tribunal to find that RESPONDENT’s payment under PO 9601 did *not* discharge its obligation (because it was made to the wrong account), while another tribunal finds that RESPONDENT is entitled to withhold payment under PO A-15604 (because the goods were defective). These outcomes are not logically inconsistent; they address different legal and factual questions.

## **C. The Requirements for Consolidation under Art 10 *ICC Rules*. Are not Met.**

Even if this Tribunal finds that the Parties validly conferred the power to consolidate onto this Tribunal, or that the power is somehow located in Art. 10 *ICC Rules*, that is not met for the following reasons.

### 1. The Claims are Not Made Under the Same Arbitration Agreement

CLAIMANT argues that the arbitration agreements contained within the separate purchase orders PO 9601 and PO A-15604 do not constitute the ‘same arbitration agreement’ for the purposes of consolidation [Claimant Submissions, ¶50]. The existence of two separate arbitration agreements, albeit within contracts under the same *FA*, is a significant obstacle to consolidation.

The *ICC Rules* prioritize the principle of party consent. Consolidation, by forcing parties into a single proceeding that they may not have explicitly agreed to, is a departure from this principle. Art. 10(b) *ICC Rules* reflects this concern by requiring, as a *primary* condition, that the claims be made under the “same arbitration agreement”. This requirement ensures that parties are only consolidated into proceedings that they have clearly and unequivocally agreed to.

The fact that both purchase orders are “under” the same *FA* is insufficient. The *FA* itself does not contain an arbitration clause that covers all disputes arising from *any* contract concluded under it. Instead, each purchase order contains its own, self-contained arbitration agreement. This indicates that the Parties intended for disputes arising from *each specific purchase order* to be resolved under *that specific arbitration agreement*.

### 2. The Arbitration Agreements are not Compatible

Even if the ‘same arbitration agreement’ condition is not met, consolidation is also precluded because the arbitration agreements are *not compatible* [Art. 10(c) *ICC Rules*].

CLAIMANT argues that the differences between the arbitration agreements are ‘minor’ [Claimant Submissions, ¶52]. This is incorrect. The differences, particularly concerning the number of arbitrators and the place of arbitration, are significant and reflect deliberate choices by the Parties.

* *Number of Arbitrators:* PO 9601 specifies “three arbitrators,” while PO A-15604 specifies “one or more arbitrators”. This difference is not a mere technicality. The number of arbitrators has significant implications for the cost, efficiency, and composition of the tribunal. A three-member tribunal is generally more expensive and time-consuming than a sole arbitrator. It also involves a different dynamic, with each party typically appointing one arbitrator, and the two party-appointed arbitrators then selecting a chair.
* By choosing “three arbitrators” for PO 9601, the Parties clearly indicated a preference for a more formal, potentially more thorough, process, typical of larger, more complex disputes. By choosing “one or more arbitrators” for PO A-15604, they signaled a willingness to consider a more streamlined, potentially less expensive, process, appropriate for a smaller, less complex dispute.
* CLAIMANT’s argument that this difference can be “easily reconciled” by appointing three arbitrators [Claimant Submissions, ¶52] ignores the Parties’ express choice in PO A-15604. Forcing a three-member tribunal on a dispute where the Parties explicitly provided for the possibility of a sole arbitrator undermines their autonomy and disregards the negotiated terms of their agreement.
* *Place of Arbitration:* PO 9601 specifies “Vindobona, Danubia”, while PO A-15604 specifies “Danubia”. While seemingly minor, this difference is significant. The place of arbitration has legal consequences, determining the applicable procedural law and potentially affecting the enforceability of the award.
* By specifying “Vindobona”, the Parties in PO 9601 chose a *specific* legal jurisdiction within Danubia, with its own particular rules and practices. By simply stating “Danubia” in PO A-15604, they left the choice of the precise location open, potentially allowing for greater flexibility. CLAIMANT’s suggestion that this difference is insignificant [Claimant Submissions, ¶54] because it is a mere ‘added level of specificity’. This is not true. It may speak to the Parties’ specific intention to resolve the dispute in a particular legal jurisdiction.

These differences, taken together, demonstrate that the arbitration agreements are not fully compatible. They reflect different choices by the Parties regarding key aspects of the arbitral process, choices that should be respected.

# **III. ISSUE C: CLAIMANT IS NOT ENTITLED TO PAYMENT UNDER PURCHASE ORDER NO. 9601 BECAUSE RESPONDENT’S PAYMENT OBLIGATION WAS DISCHARGED.**

Even if this Tribunal finds it has jurisdiction and consolidates the proceedings (which RESPONDENT strongly contests), CLAIMANT is not entitled to payment under PO 9601. RESPONDENT’s payment to the account specified in the fraudulent 28 March 2022 email discharged its obligation (A). Alternatively, CLAIMANT’s own conduct caused or significantly contributed to RESPONDENT’s failure to pay, precluding or reducing CLAIMANT’s claim (B). Finally, CLAIMANT’s failure to mitigate prevents recovery (C).

## **A. RESPONDENT’s Payment to the Account Specified in the 28 March 2022 Email Discharged its Obligation.**

RESPONDENT’s payment to the account specified in the seemingly legitimate email from “Ms. Audi” on 28 March 2022 discharged its payment obligation under PO 9601. While RESPONDENT acknowledges that the email was fraudulent, CLAIMANT’s negligence created apparent authority for the payment instruction, and RESPONDENT reasonably relied on that authority.

### 1. **CLAIMANT’s Negligence Created Apparent Authority.**

Even if Ms. Audi did not *actually* send the 28 March 2022 email, CLAIMANT’s conduct created apparent authority, binding CLAIMANT to the payment instruction. Apparent authority arises when a principal (CLAIMANT) creates the impression that an agent (the ostensible “Ms. Audi”) has authority to act on its behalf, even if no actual authority exists [Restatement (Third) of Agency § 2.03].

CLAIMANT’s negligence in handling the cyberattack created the *very circumstances* that allowed the fraudster to impersonate Ms. Audi and issue the fraudulent payment instruction. CLAIMANT:

* Failed to Secure its Systems: The cyberattack of 5 January 2022, successfully infiltrating CLAIMANT’s systems, was a direct result of CLAIMANT’s employee opening an infected email “in breach of all security guidelines” [Ex C6 ¶5]. This demonstrated a fundamental failure to maintain adequate cybersecurity measures.
* Failed to Detect the Full Extent of the Breach: CLAIMANT initially deemed the cyberattack to be of “minor relevance” [Ex C6 ¶6]. This assessment was demonstrably wrong, as the malware allowed the fraudster to access sensitive information, including details about PO 9601 and Ms. Audi’s role as the account manager.
* Failed to promptly disclose: The cyberattack was discovered on 23 January 2022. However, significant internal issues meant that RESPONDENT was never informed [PO2, ¶26]. This lack of disclosure, particularly given the known risks of phishing attacks in the industry, deprived RESPONDENT of crucial information that could have prevented the loss.

These failures created a situation where a fraudster, armed with information obtained through CLAIMANT’s compromised systems, could convincingly impersonate Ms. Audi. The email contained specific details about PO 9601, referenced ongoing issues with sanctions and banking partners, and used a seemingly plausible explanation for the change in payment instructions [Ex C5]. This created a *reasonable appearance* of authority, directly attributable to CLAIMANT’s negligence.

### 2. **RESPONDENT Reasonably Relied on the Apparent Authority.**

RESPONDENT reasonably relied on the apparent authority created by CLAIMANT’s conduct. Mr. Royce, RESPONDENT’s account manager, took steps to verify the email’s authenticity before authorizing payment. He:

* Attempted to Contact Ms. Audi Directly: Mr. Royce first tried to call Ms. Audi on her mobile, receiving a voicemail message indicating she was on sick leave [Answer to Request for Arbitration ¶6; PO2 ¶4]. This, while seemingly corroborating the email’s claim that she was working from home due to health problems, did not raise immediate suspicion.
* Replied to the Email Seeking Confirmation: Mr. Royce replied to the email, explicitly asking for confirmation that the change in bank details was compliant with the required amendment procedures [Answer to Request for Arbitration ¶6; PO2, ¶4]. He received a response, seemingly from Ms. Audi, confirming the change and referencing past practices where formal written amendments were not always strictly followed.
* Acted Based on Internal Information: Mr. Royce was told that the email contained information that “only Ms. Audi could have about the transaction” [Ex R4 ¶5].

Given these circumstances, Mr. Royce’s reliance on the email was reasonable. He took steps to verify its authenticity, and the email itself contained details that seemingly corroborated its legitimacy. CLAIMANT’s negligence created the very situation where such reliance became possible.

It is important to note that reliance does not require infallibility. The standard is *reasonableness*, not perfection. While, in hindsight, the email contained some “indicia” of a phishing attack [Claimant Submissions, ¶147] (e.g., the misspelled email address), these were not so glaring as to make Mr. Royce’s reliance unreasonable, *given the context* created by CLAIMANT’s negligence.

### 3. **The Equities Favor RESPONDENT.**

Even if strict legal principles do not fully discharge RESPONDENT’s obligation, principles of fairness and equity dictate that CLAIMANT should bear the loss. CLAIMANT’s negligence created the opportunity for the fraud, while RESPONDENT acted reasonably in relying on the apparent authority created by that negligence.

CLAIMANT, as the party that suffered the initial cyberattack and failed to adequately secure its systems, is in the *best position* to prevent such losses. Imposing liability on RESPONDENT, despite its reasonable reliance, would create a perverse incentive, encouraging lax cybersecurity practices and shifting the burden of preventing fraud onto innocent third parties.

## **B. Alternatively, CLAIMANT’s Conduct Caused or Contributed to RESPONDENT’S Failure to Pay.**

Even if this Tribunal finds that RESPONDENT’s payment did not discharge its obligation, CLAIMANT’s own conduct caused or significantly contributed to the non-payment, precluding or reducing CLAIMANT’s claim. CLAIMANT’s failure to disclose the cyberattack, a breach of their duty to inform (1) directly caused the mistaken payment (2) and thus principles of fairness requires apportionment.

### 1. CLAIMANT is in Breach of its Duty to Inform.

CLAIMANT was under a duty to inform RESPONDENT of the cyberattack and the heightened risk of fraud. This duty arises from general principles of good faith and cooperation inherent in the *CISG* and, specifically, from the established course of dealing between the Parties.

CLAIMANT’s argument that there is no duty to disclose under the CISG is overly formalistic and ignores the *context* of the Parties’ relationship and the specific circumstances of the cyberattack [Claimant Submissions, ¶122]. While the *CISG* may not explicitly mandate disclosure of cyberattacks, it does impose a general duty of good faith [Art. 7(1) CISG], and co-operation which, in this context, required CLAIMANT to inform RESPONDENT of a known risk that directly threatened the security of their transactions.

CLAIMANT’s reliance on *Bonaventure* [Claimant Submissions, ¶112], is misplaced. That case concerned whether general principles, derived from domestic French law, could be applied directly to the contract, in addition to the express terms of the CISG. Here, we are not asking to apply standards *in addition* to the CISG, but merely demonstrate that the *CISG* itself, correctly interpreted, carries such a duty.

Furthermore, the Parties’ established course of dealing demonstrates a clear expectation of information sharing regarding cybersecurity risks. In 2020, when RESPONDENT suffered a cyberattack, it *immediately* informed CLAIMANT, even before confirming whether CLAIMANT’s data was affected [Ex R1]. CLAIMANT, at that time, expressed *strong concern* and demanded to be kept informed of the investigation [Ex R2]. This established a clear pattern of conduct, creating a reasonable expectation that CLAIMANT would reciprocate if it suffered a similar attack.

CLAIMANT’s attempts to downplay the significance of the cyberattack [Claimant Submissions, ¶117] are unconvincing. While CLAIMANT initially deemed the attack to be of “minor relevance”, this assessment was based on incomplete information and proved to be incorrect. The subsequent encryption of CLAIMANT’s customer relationship management system [Ex C6 ¶10] demonstrates the *actual* severity of the breach and the potential for significant harm.

### 2. **The Causation Test under Article 80 is Met**

CLAIMANT’s failure to disclose the cyberattack and its consequences was a direct and proximate cause of RESPONDENT’s payment to the fraudulent account. Had CLAIMANT informed RESPONDENT of the breach, RESPONDENT would have been on high alert for suspicious communications and would have taken additional steps to verify the authenticity of the 28 March 2022 email, likely preventing the loss.

CLAIMANT’s argument that there is no causal link [Claimant Submissions, ¶136] is based on a narrow and artificial interpretation of causation. While the cyberattack itself did not *force* RESPONDENT to pay the wrong account, it created the *very conditions* that made the fraud possible. CLAIMANT’s failure to disclose the breach deprived RESPONDENT of the information necessary to protect itself, directly leading to the mistaken payment.

The cases cited by CLAIMANT [Claimant Submissions, ¶143] are distinguishable. In the *Russian Rubles Case* and *Clout-Case 1638*, the non-performance was directly attributable to the *obligee’s* own actions (providing defective goods or failing to provide notice of readiness for delivery). Here, the non-performance was caused by a *third-party fraudster*, but that fraud was made possible by CLAIMANT’s negligence and failure to disclose.

### 3. **Principles of Fairness Demand Apportionment.**

Even if this Tribunal finds that Art. 80 *CISG* does not, *strictly speaking*, apply to this situation, principles of fairness and equity demand that CLAIMANT bear at least *part* of the responsibility for the loss.

CLAIMANT’s negligence created the opportunity for the fraud, and its failure to disclose the cyberattack deprived RESPONDENT of the information needed to protect itself. To allow CLAIMANT to recover the *full* amount of the payment, despite its own significant contribution to the loss, would be manifestly unjust.

While the *CISG* does not explicitly provide for apportionment of liability in cases of mixed causation, the principle of good faith [Art. 7(1) CISG] and the general principles underlying the Convention support such an outcome. The *CISG* aims to promote fairness and equitable solutions in international trade. Allowing CLAIMANT to escape all responsibility for its own negligence would undermine these fundamental principles.

## **C. CLAIMANT Is Barred From Recovery By Its Failure To Mitigate.**

Even if RESPONDENT is found liable, and even if apportionment is not applied, CLAIMANT’s claim should be reduced due to its failure to mitigate its loss.

### 1. **Article 77 *CISG* is Applicable.**

CLAIMANT’s argument that Art. 77 *CISG* applies *only* to claims for damages, and not to actions for the price, is incorrect [Claimant Submissions, ¶167]. While Art. 77 is located in the section of the *CISG* dealing with damages, its language is broad and not explicitly limited to such claims. It requires a party relying on a breach of contract to take “measures as are reasonable in the circumstances to mitigate the loss, *including loss of profit*, resulting from the breach” (emphasis added).

The phrase “including loss of profit” demonstrates that Art. 77 is not *confined* to traditional damage claims. Loss of profit is often a *consequence* of non-payment of the price, and it would be illogical to require mitigation of consequential losses but not of the primary loss itself (the unpaid price). This is what is occurring here. By being required to make a second payment, RESPONDENT, will incur not just a direct financial loss, but potentially lost time.

1. CLAIMANT is in Breach of its Duty to Mitigate Even if, as CLAIMANT submits, ‘the relevant date for CLAIMANT obtaining knowledge of the breach by RESPONDENT is 25 August 2022’ [Claimant Submissions, ¶172], CLAIMANT did not take any further steps.

CLAIMANT did not bring the claim in a timely manner, and failed to act reasonably. CLAIMANT should have taken steps to pursue to the recover the payment made to the fraudulent account. It is not sufficient to argue that ‘it is required to mitigate before the breach’ [Claimant Submissions, ¶172]. As has been established, RESPONDENT notified them prior to the breach of their intention to pay [Ex R5].

# **IV. ISSUE D: EVEN IF RESPONDENT IS LIABLE, CLAIMANT CANNOT INVOKE A VIOLATION OF CONTRACTUAL DUTY OR RELY ON CISG.**

CLAIMANT argues that because the requirements of written and signed modification under Art. 40 *FA* were not followed, the payment to the incorrect account cannot be considered valid [Claimant Submissions, ¶26]. This is incorrect. RESPONDENT is not liable because Art. 40 *FA* has been modified by the Parties’ subsequent conduct (A). Further, even if this were not the case, CLAIMANT cannot rely on Art. 80 CISG (B).

## **A. Art. 40 *FA* is not applicable because it was modified by subsequent conduct.**

Even if this Tribunal finds that the strict requirements of Art. 40 *FA* were not met, the Parties’ subsequent conduct modified that provision, permitting amendments through email exchange. This modification is valid under the *CISG*, and CLAIMANT is estopped from denying its effect.

### 1. **An Exchange of E-mails Constitutes a Modification**

Art. 29(1) *CISG* allows a contract to be modified by the “mere agreement of the parties.” This “mere agreement” does not necessarily require a formal, signed document, even if the original contract contains a no-oral-modification clause [Schroeter Art. 29 ¶69]. The *CISG*, prioritizing party autonomy and informality, allows subsequent conduct to modify even written agreements [Art. 11 *CISG*].

Here, the exchange of emails between Mr. Royce and the ostensible “Ms. Audi” [Ex C5], coupled with RESPONDENT’s subsequent payment and CLAIMANT’s initial silence, constitutes a valid modification of the payment instructions. Mr. Royce, acting on behalf of RESPONDENT, explicitly sought confirmation of the change in bank details, and the response, seemingly from Ms. Audi, provided that confirmation. This exchange, while not satisfying the strict requirements of Art. 40 *FA*, demonstrates a clear *mutual intention* to alter the payment instructions.

### 2. Principles of Estoppel Apply

CLAIMANT incorrectly asserts that, RESPONDENT has not met the requirments of establishing that the parties have altered the approach to the modification of the agreement [Claimant Submissions, ¶153]. CLAIMANT is estopped from denying the validity of the modification. The principle of *venire contra factum proprium* (prohibition of inconsistent conduct), a general principle of international commercial law and recognized under the *CISG* [Art. 7(1) *CISG*], prevents a party from acting inconsistently with a previous representation or conduct upon which the other party has reasonably relied [Schlechtriem/Schwenzer, Art. 7, ¶ 42].

Here, CLAIMANT, through the actions of its (ostensible) agent, “Ms. Audi”, represented that the change in bank details was valid. RESPONDENT reasonably relied on this representation, making the payment to the new account. CLAIMANT’s subsequent silence for several months further reinforced this reliance. To allow CLAIMANT to now deny the validity of the modification, invoking a formal requirement that it seemingly waived through its conduct, would be manifestly unjust. CLAIMANT mistakenly sets out that they have ’never represented that RESPONDENT no longer had to comply with the requirements of Art. 40 *FA* [Claimant Submissions, ¶155]. This is wrong. CLAIMANT, through its previous conduct, had altered the approach, and so should be bound by the modification.

## **B. Art. 80 *CISG* is not applicable because RESPONDENT has not caused the failure to perform**

CLAIMANT seeks to rely on Art. 80 *CISG* to assert that, because they were not at fault for the mistaken payment, and that this was caused by RESPONDENT, that RESPONDENT cannot then rely on its actions to avoid paying the amount. This should not be accepted, because RESPONDENT’S actions did not impede CLAIMANT’s performance (1) and because *venire contra factum proprium* (2) is not enlivened.

### 1. **RESPONDENT’s Actions Did Not Impede CLAIMANT’s Performance.**

Art. 80 *CISG* prevents a party from relying on the other party’s failure to perform *only* to the extent that such failure was *caused* by the first party’s act or omission. As has already been demonstrated, RESPONDENT’s actions did not cause CLAIMANT any loss. The failure to perform here is RESPONDENT’s failure to pay the correct amount, a failure that *precedes* any act or omission by CLAIMANT. The cause of the loss was entirely within the control of the CLAIMANT, who through their negligent conduct, created the opportunity for the fraud.

### 2. The Principle of *Venire Contra Factum Proprium* does not Apply

As has already been established, CLAIMANT has not engaged in any inconsistent conduct that would trigger Art. 80. It is RESPONDENT who are seeking to alter their argument and deny the validity of a modification that they themselves initiated.

# **REQUEST FOR RELIEF**

For the foregoing reasons, RESPONDENT, Visionic Ltd, respectfully requests that this Tribunal:

1. **DENY** CLAIMANT’s request to authorize the addition of the Additional Claim.
2. **REFUSE** to consolidate the proceedings.
3. **FIND** that RESPONDENT is not liable for any further payment under Purchase Order No. 9601.
4. **In the alternative to 3, FIND** that CLAIMANT’s conduct precludes recovery, or, at the very least, significantly reduces RESPONDENT’s liability.
5. **ORDER** CLAIMANT to bear the costs of this arbitration, including RESPONDENT’s legal fees and expenses.
6. **GRANT** any further relief this Tribunal deems just and equitable.

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