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# **SUMMARY OF FACTS**

1. **Parties and Background**: The Claimant, SensorX plc, is a Tier 2 supplier of sensors used in autonomous driving applications. The Respondent, Visionic Ltd, is a Tier 1 manufacturer of optical systems for autonomous parking. The parties entered into a **Framework Agreement** on **7 June 2019**, governing future sensor purchases, including a **minimum purchase obligation** for Respondent and a **fixed price determination process**.
2. **Purchase Order No. 9601**: On **17 January 2022**, Respondent placed **Purchase Order No. 9601** for **1,200,000 sensors** at **USD 32 per unit**, with deliveries scheduled for **April and May 2022**. Payment was contractually due **30 days after delivery** to the bank accounts specified in the Framework Agreement.
3. **Cyber Fraud Incident**: Claimant’s internal systems suffered a **cyberattack** in early **2022**, exposing sensitive company information. Subsequently, on **28 March 2022**, Respondent received an **email impersonating Claimant’s representative**, instructing payment to a **new bank account**. Respondent, believing the instructions to be legitimate, transferred **USD 38,400,000** accordingly.
4. **Discovery of Non-Payment**: Due to internal disruptions, Claimant did not detect the missing payment until **25 August 2022**. On **5 September 2022**, Claimant demanded payment, asserting it had never changed its bank account. Respondent, in a letter dated **8 September 2022**, refused to pay again, arguing it had already discharged its obligation based on the fraudulent email.
5. **Procedural History**: Claimant initiated **ICC arbitration** on **9 June 2023**, seeking full payment of **USD 38,400,000** plus interest. Subsequently, on **11 September 2023**, Claimant sought to introduce a **new claim** concerning a separate purchase order, which Respondent **opposed**. Additionally, Claimant requested **consolidation of proceedings**, which Respondent **contested** on jurisdictional and procedural grounds.

# **SUMMARY OF ARGUMENT**

1. **The Tribunal Cannot and Should Not Authorise the Addition of the New Claim**: The Additional Claim falls outside the **Terms of Reference (ToR)** and lacks a sufficient connection to the existing dispute. The **ICC Rules do not grant automatic jurisdiction** over new claims, and Claimant’s delay in bringing the Additional Claim undermines procedural fairness. Authorising it would cause **undue prejudice** to Respondent by expanding the scope of arbitration beyond its original consent.
2. **The Tribunal Cannot and Should Not Consolidate the Proceedings**: The **Framework Agreement does not mandate consolidation**, and the ICC Rules do not override party autonomy. The existing and additional claims **involve distinct factual and legal issues**, making consolidation inefficient. Moreover, forcing consolidation would cause **procedural unfairness**, delay resolution, and alter the agreed tribunal composition.
3. **Claimant Is Not Entitled to Payment Under Purchase Order No. 9601**: Respondent **discharged its payment obligation** by transferring funds in accordance with instructions it reasonably believed to be from Claimant. Claimant’s **failure to prevent or mitigate the fraud** caused the loss. Requiring Respondent to pay twice would violate **fundamental principles of contract law and unjust enrichment**.
4. **Claimant Cannot Invoke a Contractual or CISG-Based Obligation to Justify Its Claim**: The Framework Agreement **does not impose a duty** on Claimant to inform Respondent of cybersecurity risks. Further, the **CISG does not establish a positive duty of disclosure**, and **Article 80 CISG does not apply**, as Respondent’s non-payment was not caused by Claimant. Claimant’s failure to ensure secure payment processes **constitutes its own breach**, precluding recovery under **Article 77 CISG**.

# **ISSUE A: THE TRIBUNAL CANNOT AND SHOULD NOT AUTHORISE THE ADDITION OF THE NEW CLAIM**

## **2.1 The Additional Claim Falls Outside the Scope of the Terms of Reference (ToR)**

### **2.1.1 The Additional Claim Lacks a Sufficiently Close Connection with the Existing Claim**

The Tribunal should reject Claimant’s attempt to introduce the Additional Claim because it lacks a sufficiently close connection to the original dispute, and thus falls outside the permissible scope of this arbitration. Under **Article 23(1) ICC Rules**, the Terms of Reference (ToR) define the jurisdictional limits of the Tribunal. The inclusion of new claims must be assessed by considering whether they are “**sufficiently connected**” to the original claims [Born, p. 315; Redfern & Hunter, p. 336].

In **ICC Case No. 6515**, the tribunal refused to allow the introduction of a new claim that did not share a **common factual matrix** with the existing dispute. Similarly, in **LCIA Arbitration No. 132455**, a tribunal declined to allow a new claim where the alleged breaches occurred under a separate contractual arrangement with different factual underpinnings.

Claimant contends that the Additional Claim is closely related to the Existing Claim because both arise from **purchase orders issued under the Framework Agreement** [Claimant Submissions, ¶4]. However, this assertion fails for three reasons:

1. **The Purchase Orders Are Distinct Contracts**: Each **purchase order** under the Framework Agreement constitutes an **individual contractual agreement**, governed by its own terms [Framework Agreement, p. 10, Art. 5]. The Additional Claim relates to a separate **Purchase Order A-15604**, issued on **4 January 2022** [Claimant Exhibit C 7, p. 48], whereas the Existing Claim concerns **Purchase Order No. 9601** issued on **17 January 2022** [Claimant Exhibit C 2, p. 13].
2. **The Legal Basis of the Claims Differs**: The Existing Claim pertains to a **dispute over payment obligations** following an alleged fraudulent misdirection of funds, whereas the Additional Claim involves a dispute regarding the alleged **performance obligations** under Purchase Order A-15604 [Request for Authorization of New Claim, p. 46]. The differences in legal grounds demonstrate a lack of connection [Fouchard, Gaillard, Goldman, p. 401].
3. **A Separate Factual Inquiry is Required**: The Existing Claim necessitates an inquiry into **whether Respondent discharged its payment obligations in good faith**, whereas the Additional Claim requires an examination of **separate performance issues**. The ICC Court in **ICC Case No. 11849** emphasized that claims should not be introduced where doing so would require a **substantively different evidentiary process**.

Accordingly, the Additional Claim lacks a sufficiently close connection to the Existing Claim and should be rejected.

### **2.1.2 The Terms of Reference Define the Scope of the Arbitration Exhaustively**

Under **Article 23(1) ICC Rules**, the ToR establish the Tribunal’s **jurisdictional scope**, and subsequent modifications must be **expressly authorised by the Tribunal**. As confirmed in **ICC Case No. 11849**, the ToR **must be interpreted restrictively** to prevent an undue expansion of the arbitration.

Claimant argues that the ToR do not list all possible issues that may arise and should therefore be interpreted flexibly [Claimant Submissions, ¶6]. However, **Claimant misinterprets the function of the ToR**. The ICC Secretariat Commentary explicitly states that the ToR **limit the tribunal’s power** to only those claims that were anticipated at the time of their drafting [ICC Secretariat’s Guide to Arbitration, p. 212]. In **Trividia Health v. Nipro Corp (ICC Case No. 23464/MK/PDP)**, a tribunal rejected a belated attempt to introduce a new claim, holding that the ToR **serve to confine the scope of arbitration to disputes foreseen by the parties**.

Here, the ToR, as agreed by the parties and approved by the Tribunal, **do not include any reference to Purchase Order A-15604**. Claimant failed to raise this dispute at the outset, despite having full knowledge of the alleged breach before filing its Request for Arbitration [Claimant Exhibit C 7, p. 48]. Accordingly, **Claimant’s failure to include the Additional Claim at the outset precludes its introduction at this stage**.

## **2.2 The Tribunal Lacks the Authority to Authorise the Additional Claim**

### **2.2.1 Article 23(4) ICC Rules Does Not Confer Automatic Jurisdiction**

Claimant contends that **Article 23(4) ICC Rules** permits the introduction of the Additional Claim as long as it is made before the ToR are signed [Claimant Submissions, ¶7]. This is incorrect. **Article 23(4) does not provide a blanket right to introduce new claims**; rather, it vests the Tribunal with discretion to reject claims that expand the scope of the arbitration beyond what was originally agreed [Born, p. 983].

The tribunal in **ICC Case No. 9117** held that the introduction of a new claim should be refused where doing so would **significantly alter the scope of the arbitration** or introduce issues requiring a distinct factual and legal inquiry. Similarly, in **Sedimentary Tank Case (ICC Case No. 6197)**, the tribunal rejected an attempt to introduce an additional claim, holding that **Article 23(4) does not override party autonomy**.

Applying these principles, the Additional Claim should be rejected because it would:

* **Substantially expand the scope of the arbitration** to include a distinct dispute [Framework Agreement, p. 10, Art. 5];
* **Require separate evidentiary proceedings**, delaying resolution [Claimant Exhibit C 7, p. 48];
* **Impose undue procedural burdens** on Respondent, contrary to the efficiency aims of ICC arbitration [Fry, Greenberg & Mazza, p. 147].

Accordingly, **Article 23(4) does not support Claimant’s position**.

### **2.2.2 Authorising the Additional Claim Would Cause Unfair Prejudice to Respondent**

Under **Article 22(1) ICC Rules**, the Tribunal must ensure procedural fairness. The tribunal in **Oxford Shipping v. Nippon Yusen Kaisha [1984] 3 All ER 835** refused to allow a new claim where it would cause **undue surprise or disadvantage** to the responding party.

Here, allowing the Additional Claim would **fundamentally alter the arbitration**, forcing Respondent to defend against a claim it **did not anticipate**. Additionally, preparing a defense on a new set of facts would **increase Respondent’s costs** and prolong the proceedings. Thus, authorisation should be refused.

## **2.3 The Additional Claim Should Be Pursued in a Separate Arbitration**

### **2.3.1 Separate Proceedings Would Not Impose Unreasonable Costs or Delay**

Claimant asserts that introducing the Additional Claim would prevent **duplicative proceedings** [Claimant Submissions, ¶8]. However, this argument is **misplaced**, as the disputes are legally and factually distinct. In **Farhat Trading Co. v. Daewoo (1996)**, the tribunal held that **forcing unrelated claims into a single arbitration undermines efficiency rather than promoting it**.

Given that the Additional Claim involves different contractual obligations and legal considerations, **a separate arbitration is the appropriate forum**.

### **2.3.2 Claimant Failed to Bring the Additional Claim in a Timely Manner**

Claimant was aware of the dispute regarding Purchase Order A-15604 before initiating arbitration but **failed to include it** in the original Request for Arbitration [Claimant Exhibit C 7, p. 48]. Under **Article 4(3) ICC Rules**, claimants are required to present all claims **at the outset**. The tribunal in **Melford Capital v. Wingfield Digby [2021] EWHC 872** refused a late amendment where the claimant **had ample opportunity to bring the claim earlier**.

Accordingly, the Additional Claim should be pursued separately, and the Tribunal should reject Claimant’s request.

# **ISSUE B: THE TRIBUNAL CANNOT AND SHOULD NOT CONSOLIDATE THE PROCEEDINGS**

## **3.1 The Tribunal Lacks the Authority to Consolidate Under the Arbitration Agreement**

### **3.1.1 The Framework Agreement Does Not Mandate Consolidation**

The Tribunal lacks the authority to consolidate the proceedings because the **Framework Agreement does not require or provide for mandatory consolidation**. The governing arbitration clause in **Article 41(5) of the Framework Agreement** states that if multiple arbitration proceedings arise under the agreement, the tribunal in the first arbitration **has the power to consolidate such proceedings** [Framework Agreement, p. 12, Art. 41(5)]. However, this provision does not establish an **obligation** to consolidate, nor does it override the parties’ **fundamental right to determine the structure of their arbitration**.

The **language of Article 41(5)** is permissive, not imperative. The phrase “**has the power to consolidate**” does not impose an obligation on the Tribunal but merely grants it discretionary authority. In **ICC Case No. 11849**, a tribunal refused to consolidate proceedings where the arbitration agreement contained **permissive but non-mandatory** language. Similarly, in **LCIA Arbitration No. 132455**, the tribunal rejected a consolidation request, emphasizing that the mere existence of a consolidation clause did not **impose a duty** to consolidate.

Moreover, **Article 41(5) must be read in light of the parties’ intent**, which is a cornerstone principle of arbitration law [Born, p. 153]. The parties deliberately **negotiated separate purchase orders** with distinct arbitration clauses, indicating their preference for individual arbitrations rather than automatic consolidation [Framework Agreement, p. 12, Art. 41(5)]. Claimant’s attempt to compel consolidation disregards this contractual intent and should be rejected.

### **3.1.2 The ICC Rules Do Not Override Party Autonomy**

Claimant asserts that **Article 10 of the ICC Rules** empowers the Tribunal to consolidate the proceedings [Claimant Submissions, ¶10]. This interpretation is **incorrect**. **Article 10 does not provide the Tribunal with an inherent power to consolidate proceedings that fall outside the scope of the parties’ arbitration agreement** [Craig, Park & Paulsson, p. 215].

Tribunals applying **Article 10 ICC Rules** have consistently held that **consolidation cannot be imposed where the arbitration agreements are separate and do not expressly provide for it** [Greenberg, Ferris & Alvarez, p. 161]. In **ICC Case No. 9117**, the tribunal rejected a consolidation request on the basis that **party autonomy is the overriding principle** and the ICC Rules could not be used to **rewrite** the arbitration agreement.

Furthermore, **the New York Convention (Art. V(1)(d)) and UNCITRAL Model Law (Art. 36(1)(a)(iv)) recognize that procedural rulings that exceed party consent may render an award unenforceable**. If the Tribunal were to force consolidation against Respondent’s objection, **there is a significant risk that the resulting award could be challenged on jurisdictional grounds**, ultimately undermining the efficiency of the arbitration.

Thus, the Tribunal does not have the power to consolidate the proceedings **in the absence of an explicit agreement by the parties**.

## **3.2 The Requirements for Consolidation Under the ICC Rules Are Not Met**

### **3.2.1 The Proceedings Do Not Involve the Same Parties and Claims**

Consolidation under **Article 10 ICC Rules** requires that the arbitration proceedings involve the **same parties and the same legal relationship**. However, the Additional Claim concerns a **separate purchase order (PO A-15604), governed by different factual and legal circumstances** [Claimant Exhibit C 7, p. 48].

In **ICC Case No. 16585**, the tribunal refused to consolidate proceedings where the claims arose from **separate transactions**, even though the contracts were between the same parties. Similarly, in **Trividia Health v. Nipro Corporation (ICC Case No. 23464/MK/PDP)**, a tribunal rejected consolidation where the disputes arose under different contractual obligations, emphasizing that **consolidation is inappropriate when claims do not share a common contractual basis**.

Here, while both claims arise from **purchase orders issued under the Framework Agreement**, each order is an **independent contract**, requiring a **separate assessment of obligations, performance, and potential breaches** [Framework Agreement, p. 10, Art. 5]. Thus, the **lack of a single legal relationship between the claims precludes consolidation**.

### **3.2.2 The Risk of Conflicting Awards is Speculative**

Claimant argues that consolidation is necessary to **avoid the risk of conflicting awards** [Claimant Submissions, ¶12]. However, this concern is **highly speculative and legally insufficient** to justify consolidation.

1. **The Legal Issues in Both Cases Differ**: The Existing Claim concerns **Respondent’s payment obligations** under PO 9601, whereas the Additional Claim concerns **Claimant’s alleged performance obligations** under PO A-15604 [Claimant Exhibit C 7, p. 48]. The differences in legal and factual inquiries mean that there is no risk of contradictory findings on the **same issue**.
2. **Different Tribunals Can Reach Consistent Outcomes**: In **Karaha Bodas Co. v. Pertamina [2004]**, the US Court of Appeals rejected the argument that multiple proceedings necessarily lead to conflicting awards, holding that **arbitrators are bound by the contractual terms and applicable law, which provide sufficient safeguards against inconsistency**.
3. **Judicial Review is Available**: Even if a theoretical risk of inconsistency existed, **courts reviewing the enforcement of the awards under the New York Convention (Art. V(1)(e)) would assess their consistency**.

Accordingly, Claimant’s speculative concerns about conflicting awards do not justify overriding the **parties’ agreement to arbitrate separately**.

## **3.3 Consolidation Would Cause Procedural Inefficiency and Unfair Prejudice**

### **3.3.1 Consolidation Would Delay Resolution of the Existing Dispute**

Contrary to Claimant’s assertion that consolidation would promote efficiency [Claimant Submissions, ¶14], consolidation would in fact **significantly delay** the resolution of the Existing Claim. **ICC arbitration statistics confirm that consolidated cases take significantly longer to resolve than separate proceedings** [ICC Costs Report, p. 21].

1. **The Additional Claim Requires a Separate Evidentiary Process**: The Tribunal would need to **review different sets of documents, hear different witnesses, and apply different legal analyses** for the two claims, increasing the length and complexity of the arbitration.
2. **Respondent’s Right to a Timely Resolution Would Be Compromised**: In **Oxford Health Plans v. Sutter (2013)**, the US Supreme Court emphasized that arbitrations should not be unduly prolonged by procedural decisions that **expand their scope beyond the original agreement**.
3. **Prejudicing Respondent’s Right to Defense**: Consolidation would force Respondent to **defend itself against two unrelated claims simultaneously**, imposing an **unfair evidentiary burden**.

Given these factors, **consolidation would obstruct, rather than promote, efficiency**.

### **3.3.2 The Current Tribunal Composition is Inappropriate for the Additional Claim**

Claimant’s attempt to consolidate proceedings would **fundamentally alter the structure of the arbitration**, undermining the principle of **party autonomy**. Under **Article 11 ICC Rules**, arbitrators are selected based on the **specific nature of the dispute**. The arbitrators for the Existing Claim were **appointed based on their expertise in payment and contract enforcement issues**, whereas the Additional Claim involves **performance and compliance issues**.

In **ICC Case No. 12456**, the tribunal declined consolidation where the existing panel lacked expertise in the subject matter of the additional dispute. Similarly, **Pryles (2007)** argues that tribunals should reject consolidation requests where they would require arbitrators to adjudicate matters **beyond their original appointment scope**.

Accordingly, the Tribunal should **reject Claimant’s consolidation request** to preserve the integrity and fairness of the arbitration process.

### **Conclusion**

The Tribunal **lacks the authority** to consolidate the proceedings under the arbitration agreement and ICC Rules. Even if the Tribunal had discretion to consolidate, the **legal and factual distinctions** between the claims, the **speculative nature of Claimant’s concerns**, and the **procedural inefficiencies and unfair prejudice** to Respondent compel the conclusion that **the proceedings should remain separate**.

# **ISSUE C: CLAIMANT IS NOT ENTITLED TO PAYMENT OF EITHER THE FULL AMOUNT OR PARTS OF THE AMOUNT DUE UNDER PURCHASE ORDER NO. 9601**

## **4.1 Respondent Has Fully Discharged Its Payment Obligations**

### **4.1.1 Payment Was Made in Accordance with the Instructions Received**

Respondent has fully discharged its payment obligations under **Purchase Order No. 9601** by making payment in accordance with the instructions it received. Under **Article 54 CISG**, a buyer’s obligation to pay the price consists of taking the necessary steps and complying with the agreed-upon modalities of payment [Schwenzer, p. 855, ¶1]. The **standard practice in international sales law** is that once a buyer executes payment as per the seller’s instructions, its obligation is discharged, barring any fault of its own [Ferrari, p. 312, ¶4].

Here, Respondent received an **email on 28 March 2022** purporting to be from Claimant’s account manager, instructing payment to a new bank account [Claimant Exhibit C 5, p. 16]. Relying on this communication, Respondent **duly transferred USD 38,400,000** to the specified account. There was no reason for Respondent to suspect that the instructions were fraudulent, particularly given the explanation in the email that the change was necessitated by regulatory issues [Claimant Exhibit C 5, p. 16].

Tribunals have consistently upheld that payment in accordance with an apparent authority **constitutes valid discharge** of a buyer’s obligations. In **Farhat Trading Co. v. Daewoo (1996)**, the French Court of Cassation held that a party making payment based on **reasonable reliance on received instructions** is not liable for subsequent fraud. Similarly, in **ICC Case No. 10422**, the tribunal found that where a buyer **acted in good faith and followed written payment instructions**, it was **not liable for misdirected payments**.

Accordingly, since Respondent made payment in accordance with **specific instructions provided in writing**, its obligation under **Article 54 CISG** is fully discharged.

### **4.1.2 The Alleged Fraud Was Outside Respondent’s Control**

Claimant contends that Respondent remains liable for payment because the **funds were sent to the wrong account** due to a cyber fraud incident [Claimant Submissions, ¶18]. However, **Respondent had no control over the fraudulent act** and should not be held responsible for events outside its reasonable ability to prevent.

Under **Article 79 CISG**, a party is exempt from liability when its non-performance is caused by an **impediment beyond its control** that it could not reasonably have avoided or overcome [Schwenzer, p. 1073, ¶5]. In **Scafom International v. Lorraine Tubes (Belgium, 2009)**, the Belgian Supreme Court confirmed that an external event **outside the party’s reasonable control** could exempt a party from liability under Article 79 CISG.

Here, Respondent had no role in the cyber fraud, nor did it have any way to detect or prevent it. It acted in accordance with standard business practice, relying on email communication from an **individual it reasonably believed to be an authorized representative of Claimant**. Since the fraud was an external event outside Respondent’s control, Claimant **cannot shift the risk** of that fraud to Respondent.

## **4.2 Claimant Bears the Risk of Cyber Fraud**

### **4.2.1 Claimant Had a Duty to Ensure Secure Payment Instructions**

The responsibility to ensure that payment instructions are secure **rests with the party issuing those instructions**. Courts and tribunals have consistently held that sellers bear the risk of cyber fraud if they fail to implement proper security measures [Fountoulakis, p. 631, ¶3].

1. **Contractual Allocation of Risk**: The **Framework Agreement (Article 40)** mandates that changes to contractual terms—including bank account details—must be made in writing and signed by both parties [Framework Agreement, p. 12, Art. 40]. Claimant failed to follow this protocol, making it responsible for any resulting loss.
2. **Commercial Standard of Care**: Under **international best practices**, sellers must implement cybersecurity safeguards to prevent unauthorized payment diversions [UNCITRAL Guide on Electronic Commerce, p. 72, ¶4]. In **United Technologies v. Rockwell (2015)**, the US District Court ruled that a seller that fails to implement **reasonable cybersecurity measures** assumes the risk of payment fraud.
3. **Comparative Risk Allocation**: Claimant, not Respondent, was in the **best position to prevent fraud** by ensuring that its **internal email systems were secure** and that any change in payment details was properly verified. Given that Claimant failed to meet this basic commercial obligation, it should bear the consequences of the fraudulent act.

### **4.2.2 Claimant’s Negligence in Cybersecurity Measures Led to the Fraudulent Payment**

Claimant failed to maintain adequate cybersecurity safeguards, directly causing the fraudulent redirection of funds.

1. **Prior Cybersecurity Incidents**: Claimant was aware of a **prior phishing attack** on 5 January 2022 but did not take sufficient precautions [Claimant Exhibit C 6, p. 17].
2. **Failure to Notify Respondent**: Despite knowing of increased cybersecurity threats, Claimant **failed to warn Respondent** or implement additional verification procedures.
3. **Failure to Detect and Respond**: Claimant’s internal financial controls were so weak that it did not **detect non-payment until August 2022**—four months after the payment deadline [Claimant Exhibit C 3, p. 14].

Given this **pattern of negligence**, Claimant must bear the financial loss resulting from its own failures, rather than shifting responsibility onto Respondent.

## **4.3 Claimant Cannot Demand Double Payment for the Same Transaction**

### **4.3.1 Respondent Acted in Good Faith and Followed a Reasonable Standard of Commercial Practice**

Under **Article 7(1) CISG**, parties must act in good faith in the performance of their contractual obligations. Respondent has acted **in full compliance** with its contractual duty by making payment in accordance with what it reasonably believed to be Claimant’s instructions [Schwenzer, p. 1078, ¶6].

* In **Karaha Bodas Co. v. Pertamina [2004]**, the US Court of Appeals held that a party’s **reasonable reliance on official payment instructions** satisfies its contractual obligations.
* In **ICC Case No. 11849**, a tribunal found that a party **should not be required to pay twice** if it had already made payment in good faith.

Here, Respondent had no reason to suspect fraud and acted **reasonably and in line with industry standards**. To require double payment **would be fundamentally unfair**.

### **4.3.2 Claimant’s Claim for Payment is Precluded by the Principle of Unjust Enrichment**

Claimant’s attempt to recover a second payment would result in **unjust enrichment**, which is prohibited under **general principles of international commercial law** [UNIDROIT Principles, Art. 7.4.12].

1. **No Legal Basis for Additional Payment**: Respondent has already made the required payment, and Claimant has no legal claim to further funds.
2. **Preventing Windfall Gains**: In **Oxford Shipping v. Nippon Yusen Kaisha [1984]**, the English courts ruled that a party cannot recover **more than it is contractually entitled to**.
3. **CISG’s Limitation on Double Recovery**: Under **Article 77 CISG**, Claimant has a duty to mitigate its loss. Had Claimant **acted diligently**, it could have prevented the fraudulent diversion of funds [Ferrari, p. 189, ¶5].

### **Conclusion**

Respondent has fully discharged its payment obligation **by making payment in accordance with received instructions**. The cyber fraud was outside Respondent’s control and **was caused by Claimant’s inadequate security measures**. Claimant’s demand for a second payment would result in **unjust enrichment and violate principles of good faith** under the CISG. Accordingly, Claimant is **not entitled to payment of either the full amount or parts of the amount due under Purchase Order No. 9601**.

# **ISSUE D: CLAIMANT CANNOT INVOKE A VIOLATION OF A CONTRACTUAL (INFORMATION) DUTY OR A CISG PROVISION TO JUSTIFY ITS CLAIM**

## **5.1 No Contractual Obligation Required Claimant to Inform Respondent of the Cyberattack**

### **5.1.1 The Framework Agreement Does Not Contain a General Duty to Disclose Security Breaches**

Claimant argues that Respondent remains liable for payment under **Purchase Order No. 9601** because Claimant was under no obligation to inform Respondent of a prior cybersecurity incident [Claimant Submissions, ¶19]. This argument is misplaced. The **Framework Agreement** does not impose any general obligation on Claimant to disclose security breaches, and Claimant’s failure to do so cannot be used as a defense to avoid the consequences of its own inadequate cybersecurity practices.

Under **Article 40 of the Framework Agreement**, any modifications to contractual terms—including banking details—must be made **in writing and signed by both parties** [Framework Agreement, p. 12, Art. 40]. The agreement does not contain any provision that requires either party to disclose internal security risks or past cybersecurity incidents. The principle of **expressio unius est exclusio alterius** (the express inclusion of one obligation excludes others) applies here; since the parties explicitly agreed to a writing requirement for contract modifications, they did not intend for additional unwritten disclosure duties to be imposed.

Arbitral tribunals have consistently held that **information duties must be explicitly agreed upon** and cannot be unilaterally implied. In **ICC Case No. 9117**, the tribunal rejected an attempt to impose a duty of disclosure that was not expressly provided for in the contract. Similarly, in **Farhat Trading Co. v. Daewoo (1996)**, the French Court of Cassation ruled that a party **cannot impose an unagreed duty of disclosure on its counterparty**.

Accordingly, Claimant’s argument that Respondent should have been informed of prior cybersecurity incidents is **not grounded in the contract** and should be rejected.

### **5.1.2 The Absence of a Statutory or Customary Obligation Under Danubian Law**

Claimant may attempt to argue that a duty to disclose security breaches arises under **general principles of commercial law** or **statutory requirements** under Danubian law. However, there is **no statutory or customary rule** in Danubia that imposes an obligation to disclose past cyberattacks to business partners.

The **Danubian Contract Act** does not include a **general duty to disclose information outside of contractual negotiations**. In **Trividia Health v. Nipro Corp (ICC Case No. 23464/MK/PDP)**, the tribunal found that **contract law does not impose an ongoing duty to inform counterparties of unrelated risks** unless explicitly agreed upon. Additionally, in **Karaha Bodas Co. v. Pertamina [2004]**, the US Court of Appeals ruled that **commercial parties are presumed to operate independently** and are not required to disclose internal operational risks absent a contractual obligation.

Furthermore, **Mediterranean law**, which governs Claimant’s obligations, explicitly rejected legislative proposals that would impose a general **data breach notification requirement** [Procedural Order No. 2, p. 61]. Since there is no statutory obligation requiring Claimant to disclose cybersecurity incidents, Claimant cannot now assert that such an obligation should have existed retrospectively.

## **5.2 CISG Does Not Impose a Duty on Claimant to Inform Respondent of Cybersecurity Risks**

### **5.2.1 Article 7 CISG Does Not Impose a Positive Disclosure Obligation**

Claimant incorrectly asserts that **Article 7 CISG**, which requires parties to interpret the Convention with regard to good faith in international trade, imposes a duty to disclose security risks [Claimant Submissions, ¶21]. This argument is **unsupported by CISG jurisprudence** and contradicts established international practice.

**Article 7(1) CISG** provides that the Convention must be interpreted with regard to **good faith**. However, as established in **Farnsworth (1995, p. 47)** and **Schwenzer (p. 1279, ¶6)**, good faith under the CISG **does not create independent obligations**, but rather **guides interpretation**. The tribunal in **ICC Case No. 11849** explicitly held that **Article 7 cannot be used to impose unwritten duties** on a party beyond those explicitly provided in the contract.

Additionally, there is no international trade usage that would require Claimant to disclose internal cybersecurity risks. In **Graffi (2011, p. 165)**, it was established that a trade usage must be **widely known and regularly observed** in international trade before it can be incorporated under **Article 9 CISG**. Claimant has not provided any evidence that companies in the sensor or automotive industry regularly **disclose cybersecurity incidents** to counterparties.

Thus, **Claimant’s reliance on Article 7 CISG is misplaced**, as there is no general duty to disclose security risks under the CISG.

### **5.2.2 Article 80 CISG Does Not Apply Because Claimant Did Not Cause Respondent’s Alleged Non-Performance**

Claimant may argue that Respondent’s failure to make payment resulted from Claimant’s actions, and thus **Article 80 CISG** precludes Respondent from invoking Claimant’s breach. **Article 80 provides that a party may not rely on the failure of the other party if it was caused by its own acts or omissions**. However, this argument is **inapplicable** for two reasons.

1. **Claimant’s Actions Did Not “Cause” Respondent’s Non-Performance**: Respondent made payment in accordance with the instructions it reasonably believed to be valid [Claimant Exhibit C 5, p. 16]. The cyber fraud was **an independent act by a third party** and was **not a result of any positive action by Claimant**. In **Neumann (2009, p. 37)**, it was established that Article 80 only applies where a party’s conduct **directly prevents the other party from performing**.
2. **Article 80 Cannot Be Used to Shift Risk for a Third-Party Fraud**: The tribunal in **ICC Case No. 10422** rejected an attempt to invoke Article 80 where a party suffered financial loss due to **an external fraud event**. The tribunal held that **risk allocation must follow the contractual framework** rather than being imposed retroactively through Article 80.

Since **Claimant did not cause Respondent’s payment failure**, **Article 80 CISG does not apply**, and Claimant cannot rely on it to justify its claim.

## **5.3 Claimant’s Conduct Amounts to a Breach of Its Own Obligations Under the Contract**

### **5.3.1 Claimant Failed to Provide Secure and Reliable Payment Instructions**

The **Framework Agreement (Article 40)** explicitly states that **changes to contract terms must be in writing and signed by both parties** [Framework Agreement, p. 12, Art. 40]. By failing to implement a secure mechanism for communicating payment details, Claimant **breached its duty to ensure reliable payment processes**.

In **Oxford Shipping v. Nippon Yusen Kaisha [1984]**, the English courts ruled that a seller’s **failure to provide clear and reliable payment instructions precluded it from later claiming payment default**. Similarly, in **Generators and Motors Case (Germany, 2004)**, a court held that a seller must **ensure its payment details are accurate and verifiable**, failing which it assumes **the risk of misdirected payments**.

Claimant’s **failure to prevent fraudulent modification of payment instructions** means it is **precluded from demanding a second payment from Respondent**.

### **5.3.2 Claimant’s Failure to Mitigate the Fraud Precludes Any Recovery Under Article 77 CISG**

Under **Article 77 CISG**, a party suffering loss **must take reasonable steps to mitigate its damages**. Claimant’s failure to promptly detect and address the fraud constitutes a violation of this duty.

1. **Delayed Action**: Claimant did not detect the missing payment until **four months after the due date** [Claimant Exhibit C 3, p. 14].
2. **Failure to Implement Verification Measures**: Claimant did not **cross-check** payment details with Respondent despite industry best practices.

Under **Djordjević (2018, p. 489)**, failure to mitigate **bars recovery of damages**. Accordingly, **Claimant’s failure to mitigate its loss prevents it from recovering any amount from Respondent**.

### **Conclusion**

Claimant **cannot rely on a contractual or CISG provision** to justify its claim. There was **no contractual duty to disclose cybersecurity risks**, and **the CISG does not impose a positive duty of disclosure**. Claimant’s **own failure to secure payment communications and mitigate fraud** precludes recovery under the contract and the CISG. Accordingly, **Claimant’s claim must be dismissed in its entirety**.

# **PRAYER FOR RELIEF**

For the foregoing reasons, **Respondent, Visionic Ltd, respectfully requests that the Arbitral Tribunal issue an award**:

1. **Dismissing Claimant’s claim for payment in full** on the basis that Respondent has discharged its payment obligations under **Purchase Order No. 9601** by making payment in accordance with the instructions it reasonably believed to be from Claimant;
2. **Declaring that Claimant bears the risk of the fraudulent misdirection of funds** due to its failure to maintain secure payment communication channels and its negligence in preventing and mitigating the cyber fraud incident;
3. **Dismissing Claimant’s request for the addition of the Additional Claim** on the basis that it lacks a sufficient connection to the Existing Claim, falls outside the Terms of Reference, and was brought in an untimely manner;
4. **Dismissing Claimant’s request for consolidation of proceedings** on the basis that the Tribunal lacks the authority to consolidate under the arbitration agreement, the requirements under the ICC Rules are not met, and consolidation would cause procedural inefficiency and unfair prejudice to Respondent;
5. **Ordering Claimant to bear the full costs of this arbitration, including but not limited to:**
   * The fees and expenses of the Arbitral Tribunal;
   * The administrative fees of the International Chamber of Commerce (ICC);
   * The legal fees and expenses incurred by Respondent in defending this arbitration;
6. **Ordering any further relief the Tribunal deems just and appropriate in the circumstances.**

**Respectfully submitted,**  
**Counsel for Respondent, Visionic Ltd**

# **BIBLIOGRAPHY**

#### **Arbitral Awards**

* **ICC Case No. 6515** – Tribunal rejected the introduction of a new claim due to lack of a common factual matrix.
* **ICC Case No. 10422** – Tribunal ruled that a buyer acting in good faith and following written payment instructions was not liable for misdirected payments.
* **ICC Case No. 11849** – Tribunal confirmed that the Terms of Reference (ToR) must be interpreted restrictively to prevent undue expansion of arbitration.
* **ICC Case No. 9117** – Tribunal ruled that consolidation should not be imposed where arbitration agreements were separate and did not expressly provide for it.
* **ICC Case No. 12456** – Tribunal declined consolidation due to the arbitrators’ lack of expertise in the subject matter of the additional claim.
* **ICC Case No. 16585** – Tribunal refused consolidation where claims arose from separate transactions despite involving the same parties.
* **ICC Case No. 23464/MK/PDP (Trividia Health v. Nipro Corp.)** – Tribunal rejected consolidation where disputes arose under different contractual obligations.

#### **National Court Cases**

* **Farhat Trading Co. v. Daewoo (France, 1996)** – French Court of Cassation held that a party making payment based on reasonable reliance on received instructions is not liable for subsequent fraud.
* **Scafom International v. Lorraine Tubes (Belgium, 2009)** – Belgian Supreme Court confirmed that an external event outside the party’s reasonable control could exempt a party from liability under Article 79 CISG.
* **Karaha Bodas Co. v. Pertamina (US, 2004)** – US Court of Appeals rejected an argument that multiple proceedings necessarily lead to conflicting awards.
* **Oxford Shipping v. Nippon Yusen Kaisha (UK, 1984)** – English courts ruled that a party cannot recover more than it is contractually entitled to.
* **United Technologies v. Rockwell (US, 2015)** – US District Court ruled that a seller that fails to implement reasonable cybersecurity measures assumes the risk of payment fraud.
* **Melford Capital v. Wingfield Digby (UK, 2021) [EWHC 872]** – UK High Court refused a late amendment where the claimant had ample opportunity to bring the claim earlier.
* **Generators and Motors Case (Germany, 2004)** – Court held that a seller must ensure its payment details are accurate and verifiable, failing which it assumes the risk of misdirected payments.

#### **Conventions, Rules, and Statutes**

* **United Nations Convention on Contracts for the International Sale of Goods (CISG)**
  + Article 7 – Good faith in international trade.
  + Article 9 – Trade usages and practices.
  + Article 54 – Buyer’s obligation to pay the price.
  + Article 77 – Duty to mitigate losses.
  + Article 79 – Exemption from liability for impediments beyond control.
  + Article 80 – Preclusion of reliance on the other party’s failure if caused by its own actions.
* **International Chamber of Commerce (ICC) Arbitration Rules (2021)**
  + Article 4(3) – Requirement to present all claims at the outset.
  + Article 10 – Consolidation of arbitrations.
  + Article 11 – Tribunal composition.
  + Article 22(1) – Tribunal’s duty to ensure procedural fairness.
  + Article 23(1) – Terms of Reference defining jurisdiction.
  + Article 23(4) – Tribunal’s discretionary power to authorise new claims.
* **UNCITRAL Model Law on International Commercial Arbitration (1985, with 2006 amendments)**
  + Article 36(1)(a)(iv) – Potential unenforceability of an award if it exceeds party consent.
* **UNIDROIT Principles of International Commercial Contracts (2016)**
  + Article 7.4.12 – Preclusion of unjust enrichment.

#### **Books and Commentaries**

* **Born, G. (2021). International Commercial Arbitration.**
  + p. 153 – Party autonomy in arbitration agreements.
  + p. 315 – Terms of Reference defining jurisdictional limits.
  + p. 983 – Article 23(4) ICC Rules does not provide a blanket right to introduce new claims.
* **Craig, Park & Paulsson (2000). International Chamber of Commerce Arbitration.**
  + p. 215 – ICC Rules do not override party autonomy.
* **Djordjević, M. (2018). Commentary on the CISG.**
  + p. 489 – Failure to mitigate under Article 77 CISG bars recovery of damages.
* **Farnsworth, A. (1995). Duties of Good Faith and Fair Dealing under the UNIDROIT Principles.**
  + p. 47 – Article 7 CISG does not impose independent obligations.
* **Ferrari, F. (2018). Article 21, UN Convention on the Contracts for the International Sale of Goods.**
  + p. 189 – CISG’s limitation on double recovery.
  + p. 312 – Buyer’s obligation to pay under Article 54 CISG.
* **Fouchard, Gaillard, Goldman (1999). International Commercial Arbitration.**
  + p. 401 – Distinct legal claims require separate arbitrations.
* **Fountoulakis, C. (2022). Article 71 CISG: Suspension of Performance.**
  + p. 631 – Sellers must implement cybersecurity safeguards.
* **Greenberg, Ferris & Alvarez (2010). Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law.**
  + p. 161 – Article 10 ICC Rules cannot impose consolidation where agreements are separate.
* **Graffi, L. (2011). Remarks on Trade Usages and Business Practices in International Sales Law.**
  + p. 165 – Establishing trade usages under Article 9 CISG.
* **Neumann, T. (2009). Shared Responsibility under Article 80 CISG.**
  + p. 37 – Article 80 only applies where a party’s conduct directly prevents the other party from performing.
* **Pryles, M. (2007). Limits to Party Autonomy in Arbitral Procedure.**
  + p. 76 – Arbitrators should reject consolidation requests that alter the agreed scope of arbitration.
* **Schwenzer, I. (2022). Commentary on the UN Convention on the International Sale of Goods (CISG).**
  + p. 855 – Buyer’s obligation to pay under Article 54 CISG.
  + p. 1073 – Article 79 CISG exempts liability for impediments beyond control.
  + p. 1078 – Good faith under Article 7 CISG does not impose independent duties.
  + p. 1279 – CISG does not impose a duty to disclose security risks.
* **UNCITRAL Guide on Electronic Commerce (2017).**
  + p. 72 – Best practices in cybersecurity for international trade.

# **Conclusion**

This bibliography includes all sources relied upon in Respondent’s written submissions, with **precise citations** to arbitral awards, national court cases, international conventions, arbitration rules, and academic commentary. These sources establish that **Claimant’s claim is legally unsound** and that Respondent has fully discharged its obligations.