

## I. PART ONE – TERMS OF THE CONTRACT

### ***First Submission***

It is a term of the contract for the supply of beef in the context of the general business relationship contract that products supplied by Red Co. (**Red**) to Blue Inc. (**Blue**) would be of a type that satisfies the preferences of Blue's customers in Arbitria, and therefore the beef would not have been administered growth hormones.

### ***The Memorandum is a binding contract***

It is submitted that the Memorandum executed between Blue and Red is a binding contract between the parties. UNIDROIT **Art. 2.1** permits a broad application of notions of offer and acceptance, stating that a contract need only be concluded 'by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement'. The offer was sufficiently definite (**Art. 2.2**), having regard to:

- (i) the clear intention of the parties to be bound; and
- (ii) the fact that any missing terms could be determined by interpreting the agreement (per **Art 4.1** et seq.) or supplied by **Art 4.8** or **Art 5.2**.

Furthermore, mere agreement between the parties is sufficient to establish a valid contract.<sup>1</sup>

### ***Terms of the contract***

It is submitted that the relevant term is that Red acknowledged the substance of this Memorandum that it would seek to satisfy the preferences of the customers of Blue in Arbitria. This is an express term, and provides the background under which all future contracts would operate. This was clearly the mutually beneficial environment in which the specific soybean contract operated, and the terms of this contract would also applied to contract of beef.

The terms of the contract have been affirmed on several occasions.

- (i) Meeting of the Presidents in 2000 where the President of Red promised to provide Blue with 'high quality products *that can satisfy the customers in Arbitria as in the past*' in return for financial support from Blue.
- (ii) Meeting of the Presidents in 2006 extended 'high quality products that can satisfy the customers in Arbitria as in the past' to mean products not fed with growth hormones.

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<sup>1</sup> UNIDROIT Art. 3.2.

Terms of Contract Number 123 ('specific beef contract')

The specific beef contract executed on 15 March 2007 was for the supply of beef. There is a term as to quality and while that does not specify the particular requirement, it must be read in light of the terms of the Memorandum as a general contract for formation.

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**Second Submission**

In the alternative, even if it were not an express term of the contract at the time of contract formation that the products supplied by Red to Blue would be of a type that satisfies the preferences of Blue's customers in Arbitria, and therefore would not be fed with growth hormones, then the contract was altered by several documents to include that term.

Mr. Orange's e-mail is an offer to modify the specific beef contract

It is submitted that Mr. Orange's e-mail is an offer to modify the specific beef contract. The offer was sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance,<sup>2</sup> having regard to the intention of the parties to enter a binding agreement, and that missing terms can be supplied to the agreement in accordance with **Arts. 4.1 et seq.**<sup>3</sup>

Mr. Grape's e-mail is a modified acceptance of Mr. Orange's e-mail

It is submitted that Mr. Grape's reply to Mr. Orange's e-mail is a modified acceptance. Although a reply to an offer which purports to be an acceptance but contains modifications is a rejection of the offer and constitutes a counter-offer,<sup>4</sup> if the reply contains additional or different terms which do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy.<sup>5</sup>

It is clear that Mr. Grape's e-mail indicates agreement to the use of beef from Sambo Farm, but contains an additional limitation that beef raised with feed containing growth hormones should not be used.<sup>6</sup> This limitation, however, is not a material alteration of the terms of the offer because it only related to the quality of the beef, and not

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<sup>2</sup> UNIDROIT Art. 2.2.

<sup>3</sup> UNIDROIT Official Comment Art. 2.2 [1].

<sup>4</sup> UNIDROIT Art. 2.11(1).

<sup>5</sup> UNIDROIT Art. 2.11(2).

<sup>6</sup> Agreed Facts, Attachment 11.

Mr. Grape's modified acceptance 'reached' Mr. Orange

**Art. 1.9** defines the circumstances in which a notice 'reaches' a person. A notice 'reaches' a person when delivered at that person's place of business or mailing address.<sup>7</sup> It is critical to note that it is sufficient that the communication is placed in the addressee's mailbox, or received by the addressee's computer.<sup>8</sup>

It is submitted that Mr. Grape's e-mail reached Mr. Orange because it was delivered to Mr. Orange's e-mail. Although the e-mail was automatically sorted into the folder for junk e-mail, the e-mail nevertheless reached Mr. Orange for the purposes of **Art. 1.3**. Therefore the contract was modified to the extent that beef not fed with growth hormones should be used in this transaction.

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### Third Submission

In the alternative, if not an express term of the agreement, then it was an implied obligation that the products supplied by Red to Blue would be of a type that satisfies the preferences of Blue's customers in Arbitria, and therefore would be free from growth hormones.

Implied obligations can arise under **Art. 5.2**, stemming from:

- (i) Nature and purpose of the contract – Even if the tribunal were to find that the memorandum is not a *binding contract*, it still provides *evidence* of the nature and purpose of the contract.
- (ii) Practices and usage – Established practice between Red and Blue indicates that Red has never sold to Blue beef produced on a farm other than Otto Farm. A sample transaction of beef was from Otto Farm, and previous transactions between 2002 and 2007 have only involved beef from Otto Farm.<sup>9</sup> Red is therefore bound by this usage established between Red and Blue.
- (iii) Good faith and fair dealing – Even if the tribunal were to find that at the time of contract formation the parties did not intend that the beef supplied would not be administered growth hormones, through Red's practise of supplying exclusively from Otto Farm, this became an implied term which dictated both parties' practise. It would therefore be unconscionable for Red to resile from that position without further negotiation with Blue just because it had some difficulties with its other supplies to Red Trading, taking particular note that

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<sup>7</sup> UNIDROIT Article 1.9

<sup>8</sup> UNIDROIT Official Comments, Art. 1.9 [4].

<sup>9</sup> Agreed Facts, Paragraph 25.

the possibility of using Sambo Farm beef was never discussed,<sup>10</sup> and also that Red Trading did not request beef not to be fed with growth hormones.<sup>11</sup>

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#### **Fourth Submission**

In the alternative, if the parties are found not to have agreed with respect to whether the products would be free of growth hormones, it was an omitted term that they would not have been administered growth hormones.

**Art. 4.8** provides that an appropriate term shall be supplied into the contract, having regard to;

- (a) the intention of the parties;
- (b) the nature and purpose of the contract;
- (c) good faith and fair dealing; and
- (d) reasonableness.

In determining the intention of the parties, prior negotiations and any conduct subsequent to the conclusion of the contract are admissible under comment 3 :

#### *Prior negotiations clearly indicate an intention to use beef not fed with growth hormones*

This is something the contracting parties did not foresee as an issue. In the context of their existing business relationship it was unnecessary to make express the term that Red would make the utmost effort to supply products that satisfied the preferences of Blue's customers, and in this case, that meant supplying beef that was free of growth hormones. This is supported by the fact that the contracting parties never talked about the possibility of using beef from Sambo Farm,<sup>12</sup> and that the negotiations were premised upon the trading the beef produced by Otto Farm.<sup>13</sup>

#### *Conduct subsequent to contract formation*

It is submitted that Blue took steps to ensure that Red was informed of the enactment of the ordinance prohibiting importation into Arbitria of beef fed with growth hormone. Blue also informed **Yellow Co.** ('Yellow') of this enactment and requested Yellow to investigate whether it would affect its business. These clearly indicate the intention of the contracting parties that beef procured to Blue would be growth hormone free.

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<sup>10</sup> Agreed Facts, Paragraph 17.

<sup>11</sup> The Collection of Questions and Answers ('Q&A')

<sup>12</sup> Q&A 8.

<sup>13</sup> Agreed Facts, Paragraph 17.

## NON-PERFORMANCE OF CONTRACT

### **Fifth Submission**

If the tribunal were to find that the contract did require Red to provide beef not fed with growth hormones, then Red's failure to deliver beef not fed with growth hormones amounted to non-performance.

Non-performance is defined as to include all forms of defective performance.<sup>14</sup> Red's failure to deliver beef not fed with growth hormones to Blue clearly falls within the scope of this definition.

It is submitted that Blue did not cause the non-performance of Red.<sup>15</sup> As discussed in the Second Submission, Blue had given notice to Red that it would require growth hormone free beef.

### Invocation of Exemption clause is grossly unfair

Exemption clauses may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.<sup>16</sup> It is submitted that clause 11 of the specific beef contract limits Red's liability for defects in beef. However, it would be grossly unfair to invoke this clause having regard to:<sup>17</sup>

- (i) the purpose of the contract: as outlined in the Memorandum and from exchanges between representatives of Blue and Red on previous occasions, that Red is to deliver products to satisfy the preferences of the customers of Blue.
- (ii) what Blue could legitimately have expected from the performance of the contract: Blue could legitimately have expected Red to supply beef not fed with growth hormones.

### Force majeure

It is submitted that Red's non-performance is not excused by the enactment of the ordinance prohibiting importation of beef that has been administered growth hormones into Arbitria by reason of force majeure.<sup>18</sup>

Although the enactment of the ordinance is beyond Red's control, it would not be open to Red to argue force majeure to excuse its non-performance. Red could reasonably have expected to take the impediment into account at the time of the conclusion of the contract because Blue had informed it in the meeting of the

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<sup>14</sup> UNIDROIT Official Comments, Art. 7.1.1.

<sup>15</sup> UNIDROIT Art. 7.1.2.

<sup>16</sup> UNIDROIT Art. 7.1.6.

<sup>17</sup> UNIDROIT Official Comments, Art. 7.1.6 [5].

<sup>18</sup> UNIDROIT Art. 7.1.7.

Presidents of the two companies in 2006 that some lawmakers in Arbitria are pushing for a law to prohibit the importation of beef fed with growth hormones.

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## II. PART TWO – DAMAGES AND PURCHASE PRICE

If the tribunal accepts that the Red is liable for the non-performance of obligations specified above, the Blue submits that the Red is obliged to pay damages for the harm incurred in providing a 30 percent discount to **Purple Co** ('Purple')<sup>19</sup>. In support of this submission, the Blue relies on **Art. 7.4** and the provisions therein.

### Sixth Submission

Red is liable for the damage incurred by the imposition of the discount.

Blue submits that the Red is prima facie liable for damages for non-performance unless the non-performance is excused under the Principles.<sup>20</sup> A discount is a 'loss' because 'the notion of loss must be understood in a wide sense.'<sup>21</sup> Alternatively, the 30 percent discount is a 'gain of which [Blue] was deprived'<sup>22</sup> because such a gain would have normally accrued to the Blue had the contract been properly performed<sup>23</sup>.

Blue submits that there is a sufficient causal relationship between the non-performance and harm. But for Red's delivery of prohibited beef, the discount to Purple would not have needed to be given. Therefore, there is direct causal relationship between the non-performance and harm.

Moreover, Blue submits that the harm was reasonably certain.<sup>24</sup> The discount had already been given to Purple on June 12<sup>25</sup>. In addition, Blue submits that the extent of the harm is certain. It has been quantified to be a 30 percent discount.<sup>26</sup> This is not the case where there is 'loss of a chance'<sup>27</sup> or where the amount of damages cannot be established.<sup>28</sup>

It is Blue's submission that the harm was either foreseeable by Red or could have reasonably have been foreseen at the conclusion of the contract.<sup>29</sup> What is foreseeable is to be determined at the conclusion of the contract.<sup>30</sup> Red would have known of the type or kind of harm (viz pecuniary harm) as a result of non-performance. The extent of the harm is not such to transform the harm into a different kind of harm.<sup>31</sup> Reasonable foreseeability in **Article 7.4.4** should be

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<sup>19</sup> Agreed facts, para. 28

<sup>20</sup> UNIDROIT, Art. 7.4.1

<sup>21</sup> UNIDROIT, Official Comments, Art. 7.4.2 [2].

<sup>22</sup> UNIDROIT, Art. 7.4.2.

<sup>23</sup> UNIDROIT, Official Comments, Art. 7.4.2 [2].

<sup>24</sup> UNIDROIT, Art. 7.4.3(1).

<sup>25</sup> Since Mr Grape only found out about the confiscation on June 12 and had said in his telephone conversation with Mr Orange on June 12 that he has already informed Purple Co: Agreed facts Para 28

<sup>26</sup> Agreed facts, para. 28.

<sup>27</sup> UNIDROIT, Art. 7.4.3(2).

<sup>28</sup> UNIDROIT, Art. 7.4.3(3).

<sup>29</sup> UNIDROIT, Art. 7.4.4.

<sup>30</sup> UNIDROIT, Official Comments, Art. 7.4.4.

<sup>31</sup> UNIDROIT, Official Comments, Art. 7.4.4.

construed as what a reasonable party of the same kind as Red would have foreseen in the circumstances at the conclusion of the contract.<sup>32</sup> Even if Red could not have foreseen pecuniary loss to Blue as a result of Red's non-performance, Blue submits that a reasonable party would have foreseen such loss in the circumstances.

Blue submits that it did not contribute to the harm<sup>33</sup> since it took all steps to notify Red about the prohibition of GM beef.

Furthermore, Blue submits that it took 'reasonable steps' to mitigate the harm.<sup>34</sup> Reasonable steps should be construed as steps which would have been taken by a reasonable person of the same kind as Blue in the circumstances.<sup>35</sup> The purpose of the Article is to avoid the aggrieved party from doing nothing and waiting for compensation for harm which it could have reasonably avoided or lessened.<sup>36</sup> Blue submits that, as soon as it knew of the damage on June 12, it immediately took steps to mitigate by offering the 30 percent discount to Purple, rather than being subject to the full extent of a contractual claim.<sup>37</sup>

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### **Seventh Submission**

Red is liable for the damage incurred due to the higher cost of the replacement transaction.

As a result of Red's non-performance, Blue purchased alternative beef from Sakura Farm on June 14.<sup>38</sup> This resulted in the payment of an additional US\$300,000 for the same quantity of beef.

As stated above, Blue submits that Red's non-performance gives right to Blue to claim damages.<sup>39</sup> Blue is again entitled to full compensation for the harm suffered,<sup>40</sup> being a loss which Blue suffered as a result of the additional cost of beef. It is clear that the harm, the additional cost of the replacement transaction, was the result of non-performance. The harm suffered is sufficiently certain,<sup>41</sup> being harm that has already come into existence on June 14<sup>42</sup> and its extent is quantifiable.

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<sup>32</sup> UNIDROIT, Art. 4.1; UNIDROIT, Official Comments, Art. 4.1 [2].

<sup>33</sup> UNIDROIT, Art. 7.4.7.

<sup>34</sup> UNIDROIT, Art. 7.4.8.

<sup>35</sup> UNIDROIT, Art. 4.2.

<sup>36</sup> UNIDROIT, Official Comments, Art. 7.4.8 [1].

<sup>37</sup> Agreed facts, para. 28

<sup>38</sup> Agreed facts, para. 29.

<sup>39</sup> UNIDROIT, Art. 7.4.1.

<sup>40</sup> UNIDROIT, Art. 7.4.2.

<sup>41</sup> UNIDROIT, Art. 7.4.3

<sup>42</sup> The date of Blue's contract with Sakura Farm.

As to the foreseeability of the harm,<sup>43</sup> following the principles stated above, Red foresaw, or could have reasonably foreseen that non-performance would result in a replacement transaction being entered into and that harm would arise if the cost of this transaction exceeds the cost of the original transaction. The replacement transaction was made in a reasonable time and a reasonable manner after Blue's valid termination of the contract.<sup>44</sup> The right to terminate arose because Red's non-performance was fundamental,<sup>45</sup> in that Blue was substantially deprived to what it was entitled to under the contract<sup>46</sup> and the obligation to deliver non-GM beef was of essence.<sup>47</sup> Notice to terminate<sup>48</sup> was given in the telephone conversation on June 12, where Mr Grape stated Blue's intention to look for replacements.<sup>49</sup>

The existence of replacements is inconsistent with the continued existence of the original contract; thus, the notice to terminate had been given. Should the tribunal decide that valid notice had not been given on June 12, Blue submits that Article 7.4.5 should not be read as limiting claims due to replacement transactions only in the situations provided for in the Article. The replacement transaction was made in a reasonable time and manner after termination.<sup>50</sup> The replacement transaction was made within a reasonable time, 2 days after Blue became aware of non-performance.<sup>51</sup> There is nothing to suggest the manner in which Blue entered into the replacement transaction was malicious or caused prejudice to Red.

Blue further submits that there was no reasonable steps it could take to mitigate the harm caused by the replacement transaction.<sup>52</sup> Even if Blue had been aware of the harm on May 31, the price for beef from Sakura Farm would have been the same.<sup>53</sup> Worldwide prices had increased between April to June.<sup>54</sup> There would have been no action that Blue could reasonably undertake to mitigate the harm caused by the replacement transaction.

Therefore, in light of the above reasons, Red is liable for damages due to the higher cost of Blue's replacement transaction with Sakura Farm.

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## **Eighth Submission**

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<sup>43</sup> UNIDROIT, Art. 7.4.4.

<sup>44</sup> UNIDROIT, Art 7.4.5.

<sup>45</sup> UNIDROIT, Art. 7.3.1(1).

<sup>46</sup> UNIDROIT, Art. 7.3.1 (2)(a).

<sup>47</sup> UNIDROIT, Art. 7.3.1 (2)(b).

<sup>48</sup> UNIDROIT, Art. 7.3.2(1).

<sup>49</sup> Agreed facts, para. 28.

<sup>50</sup> UNIDROIT, Art. 7.4.5.

<sup>51</sup> The contract with Sakura Farm was entered into on June 14

<sup>52</sup> UNIDROIT, Art. 7.4.8.

<sup>53</sup> Agreed facts, para. 28.

<sup>54</sup> Agreed facts, para. 28.

A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance<sup>55</sup>, and they have given notice to the other party<sup>56</sup>. On termination, either party can claim restitution or whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received<sup>57</sup>.

It is submitted that Blue validly terminated contract 123. Firstly, the beef shipped by Red failed to clear customs due to administration of growth hormones, and this substantially deprive Blue of what it was entitled to expect under the contract<sup>58</sup>. In particular, Blue could not deliver beef to Purple Co, an Arbitria company, and instead, the beef was stored in a bonded customs warehouse. Secondly, Blue also gave notice of the termination<sup>59</sup> within a “reasonable time”<sup>60</sup>, given the circumstances where both sides recognised that liability would be discussed later.

It follows that on termination, Blue can claim restitution for the purchase price already paid by the L/C. However, Blue will not need to make restitution for the beef that was shipped by Red, since the beef never cleared customs and was stored in a bonded warehouse. In any case, Red made a contract for the delivery of the beef stored in the bonded warehouse to Green. Therefore, Blue never received the beef and does not need to make restitution for the beef delivered by Red and latter destroyed by the fire.

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<sup>55</sup> UNIDROIT, Art. 7.3.1,

<sup>56</sup> UNIDROIT Art. 7.3.2.

<sup>57</sup> UNIDROIT Art. 7.3.6.

<sup>58</sup> UNIDROIT Art. 7.3.1.

<sup>59</sup> Attachment 14

<sup>60</sup> UNIDROIT Art. 7.3.2 (2).

## **PART THREE – BLUE’S LIABILITY FOR THE CONTRACT BETWEEN RED AND GREEN**

### **Ninth Submission**

The UNIDROIT Principles do not apply to this claim.

#### *Terms of the contract do not contain an arbitration clause*

On the assumption that Blue and Red entered into a contract;

- (i) for Red to enter into a contract with Green Co (‘Green’); and
- (ii) Blue to ship the beef to Green, Blue submits that the arbitral tribunal has no jurisdiction over this agreement. Alternatively, the UNIDROIT Principles do not apply to this agreement.

The contract does not contain an arbitration clause. Therefore, it is not clear whether the parties intended that disputes under this contract are to be submitted to arbitration.

Alternatively, even if the parties intended to refer disputes to arbitration, the contract did not refer to the application of the Principles. Here, the parties did not agree that the Principles govern this contract.<sup>61</sup> In any case, it is submitted that the applicable law should be determined by the application of conflict of laws rules.

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### **Tenth Submission**

In the alternative, if the tribunal were to find basis for jurisdiction and that the UNIDROIT Principles do apply to this contract, Blue is not liable to Red for the US\$500,000 that Red paid to Green.

#### *The lightning strike was a force majeure event which excuses*

Even assuming that the contract between Red and Blue was that Blue ships the beef on July 5,<sup>62</sup> Blue submits that its non-performance is excused because of the lightning strike. The lightning strike is ‘an impediment beyond [Blue’s] control’. Blue could not have reasonably be expected to have taken lightning strike at the time of the conclusion of the contract, there was no custom in Arbitria to insure goods stored in a bonded warehouse.<sup>63</sup> Alternatively, because the actions that Blue could take with respect to the beef are limited (viz, scrap the goods, ship elsewhere or temporary storage),<sup>64</sup> there was no possibility that Blue could take other measures (such as securing the beef in its own facility) to avoid or overcome the consequences.<sup>65</sup>

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<sup>61</sup> UNIDROIT, Official Comments, Preamble.

<sup>62</sup> Agreed Facts, Paragraph 31.

<sup>63</sup> Q&A 36.

<sup>64</sup> Q&A 30.

<sup>65</sup> UNIDROIT Art. 7.1.7(1).