SUMMARY OF RED'S SUBMISSIONS

I. Red did not breach its obligations in providing New Year Lucky Bags to Blue.
II. Alternatively, the quantum of damages to be paid by Red must be discounted.
III. Red is not obligated to pay Blue $250,000 for Red's non-compliance with a purported obligation to deliver 10,000 Alpha Series shirts to Blue.
IV. Blue must pay Red $1,000,000 for breaching its obligation to return the d Series to Red.
V. Blue breached its obligations in relation to the Equipment Lease Agreement.
VI. Blue should pay Red $1,100,000 for its breach of the Equipment Lease Agreement.
VII. Red is not obligated to pay Blue $500,000 for loss of the Robots.

LUCKY BAG CASE

I. RED DID NOT BREACH ITS OBLIGATIONS IN PROVIDING NEW YEAR LUCKY BAGS TO BLUE

1. Red submits that:
   A. The parties are bound by the Vendor Contract ('Vendor Agreement') but have clearly agreed to create a separate contract ('the Wholesale Agreement') to govern the sale of the New Year Lucky Bags ('Lucky Bags');
   B. Red did not breach any express or incorporated terms of the agreement to sell Lucky Bags to Blue under the Wholesale Agreement;
   C. Red acted in good faith and did not behave inconsistently with any understanding formed in negotiations regarding the Wholesale Agreement; and
   D. Red did not breach any implied obligations under the Wholesale Agreement.

A. The Wholesale Agreement governs the sale of the Lucky Bags

2. The Wholesale Agreement provides for the sale and delivery by Red to Blue of 10,000 Lucky Bags [*Exhibit 6*] and must be interpreted according to the common intention of the parties [*UNIDROIT Principles of International Commercial Contracts ('UNIDROIT') Art 3.1.2*]. By expressly incorporating only one clause of the Vendor Agreement [*Cl 4(1), Exhibit 6*], the parties evidenced their intent to exclude the other provisions of the Vendor Agreement because:

   a) the transaction is wholesale [*Exhibits 5 & 6*], whereas the Vendor Agreement is on a consignment basis and does not provide for wholesale transactions [*Exhibit 4*]; and
   b) the arrangements for shipping under the Wholesale Agreement are general [*Cl 3, Exhibit 6*] while the Vendor Agreement arrangements are specific [*Cl 4, Exhibit 4*].

Accordingly, this transaction is governed by the Wholesale Agreement incorporating only clause 2.2 of the Vendor Agreement.

B. Red did not breach any express or incorporated terms of the Wholesale Agreement

3. Red satisfied the requirements of clause 1.2 of the Wholesale Agreement by providing Blue with an opportunity to inspect a sample on December 1 [*R ¶17*]. At the same time, Blue was put on notice that the Lucky Bags contained t-shirts embroidered with 'several other patterns of embroidery animals' [*R ¶17*]. Blue also knew that the sample provided was only one example of an embroidery animal and did not request to inspect other samples of the Lucky Bags containing alternative patterns.

4. Red satisfied the requirements of the Vendor Agreement incorporated by clause 4.1 of the Wholesale Agreement by:

a) communicating accurate information to Blue for shipping and delivery purposes [*Cl 2.2.2, Exhibit 4; R ¶18*]; and

b) providing true information regarding the Lucky Bags for storage in the Store Information System [*Cl 2.2.5, Exhibit 4*]. In addition to providing descriptive text containing true information regarding the items within the Lucky Bags, Red also provided the products for Blue's inspection prior to payment on two separate occasions [*R ¶17; ¶19*]. First, Blue inspected the Lucky Bags on December 1 [*R* ¶17]. Secondly, Red delivered all 10,000 Lucky Bags, including those with dragon embroidery, on December 15. Blue had access to all Lucky Bags and opened five for inspection [*R ¶19*].

C. Red did not behave inconsistently with any understanding formed in negotiations with Blue

5. Red has not acted inconsistently with pre-contractual discussions with Blue concerning the Lucky Bags [*UNIDROIT Art 1.8*]. Red is prohibited from causing detriment to Blue by acting inconsistently with any understanding which Red has caused Blue to have, and which Blue has acted upon in reasonable reliance. Whether the reliance is reasonable or not is a matter of fact in the circumstances, having regard to the communications and conduct of the parties [*UNIDROIT Art 1.8 Off Cmt 2*].

6. Blue may claim that Red behaved inconsistently by representing to Blue that Red would ask its Arbitrian branch about inauspicious images [R ¶15]. Red solicited advice from Blue on taboos and inauspicious images in Arbitria, for which their own branch's advice was not a substitute ('Though we are going to raise the same question with the staff in our Arbitrian branch … we appreciate your advice' [R ¶15]). Blue responded: 'I'll let you know if

I think of anything' [R ¶15], suggesting that no taboos or inauspicious images immediately came to mind. Accordingly, the understanding reached was that Red would receive advice from both its Arbitrian branch and Blue. It was not a reasonable reliance for Blue, as the buyer with superior market knowledge of Arbitria, to assume Red had knowledge of, or had adopted sole responsibility to research, Arbitrian taboos and inauspicious images. Blue was ultimately responsible for marketing and selling the Lucky Bags and for ensuring the goods were fit for sale in Arbitria.

D. Red did not breach any implied obligations under the Wholesale Agreement

7. Implied obligations stem from, among other sources, the nature and purpose of a contract and reasonableness [*UNIDROIT Art 5.1.2*]. Red did not have an implied obligation to provide products with designs that would sell in Arbitria. The nature and purpose of the Wholesale Agreement is for Red to provide Blue with the selected products to sell – the Lucky Bags. The risk of not selling the product, for reasons of popularity or customer demand, lies with Blue under the Wholesale Agreement. It would be neither commercially realistic nor reasonable for Red to bear the risk of the Lucky Bags being unsuccessful products for reasons of customer preference – this allocation of risk was clearly contemplated by the parties in their pre-contractual negotiation [*Exhibit 5*; *UNIDROIT Art 4.3(a)*].

II. ALTERNATIVELY, THE QUANTUM OF DAMAGES MUST BE DISCOUNTED

8. In the alternative, Red submits that damages must be reduced because:
   A. The harm was not foreseeable;
   B. Blue contributed to the harm suffered; and
   C. Blue failed to mitigate its loss.

A. Damages must be reduced because the harm was not foreseeable

9. Red is only liable for harm likely to result from its non-performance which it foresaw or could reasonably have foreseen at the time of making the contract [*UNIDROIT Art 7.4.4*]. Red could not have foreseen that Blue would offer its customers refunds of $100 per t-shirt [*Exhibit 8*]. Blue's refund policy specifies that the 'purchase price' of the product is refunded [*Exhibit 7*], which would suggest that a customer would receive $300 if they returned the entire Lucky Bag. As the t-shirt's retail price ($100) equates to 10% of the total retail price of the goods ($1,000), and the Lucky Bags were sold for $300, a reasonably foreseeable refund for the t-shirts would have been 10% of this sum: $30. The claimed damages of $420,000 must therefore be discounted by $70 per t-shirt ($280,000) to reflect the reasonably foreseeable harm.

10. Alternatively, a reasonably foreseeable refund price might be assessed as the average sale price of items in the Lucky Bag (5 items for $300 = $60 per item) [*R ¶17*], or the price

Red offered to pay for the returned t-shirts ($60) [*Exhibit 9*]. Regardless of which assessment is preferred, the damages must be reduced.

B. Damages must be reduced to the extent Blue contributed to the harm suffered

11. Where the harm suffered is due in part to an act or omission of Blue, the amount of damages must be reduced to the extent that Blue contributed to the harm [*UNIDROIT Art 7.4.7*]. Blue contributed to the harm suffered by offering a refund price that was higher than reasonable in the circumstances. As identified above, a reasonable refund price would have been $30 or $60. Blue contributed to its financial loss and – if argument A is not accepted – damages should be discounted accordingly.

12. Blue's initial failure to properly inspect the boxes and investigate the embroidered feature on the t-shirt was an omission that contributed to the harm suffered. Blue only inspected five out of 10,000 Lucky Bags [*R ¶19*]. Commercially it is usual to inspect a sample of the total quantity of goods being purchased. However, Blue did not ask if the inspected sample represented the full range of t-shirt designs and had not advised Red about any designs that would be unacceptable. The sale or otherwise of items received wholesale is a risk borne by Blue; Blue's failure to undertake due diligence in inspection of the items received – and thereby ensure the Lucky Bags would be successful with its customers in the Arbitria market – contributed to its loss. Damages must therefore be discounted.

C. Damages must be reduced because Blue failed to mitigate its loss

13. Red is not liable for harm suffered to the extent that Blue could have reduced the harm by taking reasonable steps [*UNIDROIT Art 7.4.8*]. Five days after being informed of the refunds, Red offered to take back the refunded t-shirts at $60 per unit ($240,000 in total) [*Exhibits 8 & 9*]. Blue donated the t-shirts to charity, failing to mitigate its financial loss [*Exhibit 10*]. Accordingly, damages must be discounted by $240,000.

ALPHA CASE

III. RED IS NOT OBLIGATED TO PAY BLUE $250,000 FOR RED'S NON-COMPLIANCE WITH A PURPORTED OBLIGATION TO DELIVER 10,000 ALPHA SERIES SHIRTS TO BLUE

14. Red submits that:
   - A. This dispute is governed by the Vendor Agreement and a partly oral, partly written ordering priority agreement (the 'Priority Agreement');
   - B. Red did not breach its obligations to Blue under the Vendor Agreement;
   - C. Red did not breach its obligations to Blue under the Priority Agreement by refusing to fulfil Blue's oral purchase order of May 1 (Negoland time); and

D. Alternatively, if Red did breach its obligations to Blue, damages must be reduced to reflect Blue's contribution to the harm suffered.

A. This dispute is governed by the Vendor Agreement and the Priority Agreement

15. The Priority Agreement between Red and Blue consists of oral undertakings given during various discussions between Orange, Eagle, Diamond and Swan [*R ¶25*], and terms agreed in writing in the March 15 Memorandum [*Exhibit 13*]. UNIDROIT permits partly oral, partly written contracts and does not require consideration [*UNIDROIT Art 3.1.2*].

16. The Priority Agreement is formed under, and is supplementary to, the Vendor Agreement already in place between Red and Blue. That the parties agreed to the supply of the Alpha Series occurring on a consignment basis – consistent with the Vendor Agreement – and failed to discuss terms necessary to otherwise give full effect to the ordering priority supports this characterisation [*R ¶25*].

B. Red did not breach its obligations to Blue under the Vendor Agreement

17. Red did not breach any obligation to Blue under the Vendor Agreement by refusing to accept the oral orders received on April 21 (Negoland time) [*R ¶26*] or May 1 (Negoland time) [*R ¶28*]. The Vendor Agreement requires that Blue issue a firm written purchase order for a Product before Red is obligated to deliver same [*Cl 4.1, Exhibit 4*]. Accordingly, Blue's oral orders had no contractual effect.

18. While Red may have previously accepted urgent orders via phone in limited circumstances [*R ¶26*], these occasional deviations from the Vendor Agreement are not sufficient, over the course of a contract operational for eight years, to sustain an inconsistent behaviour argument [*UNIDROIT Art 1.8*]. These few instances are also insufficiently frequent or consistent to evidence an established practice between the parties [*UNIDROIT Art 1.9*].

19. Red did not breach any obligation to Blue under the Vendor Agreement by delivering the d Series in response to the April 21 purchase order [*Exhibit 14*]. The purchase order was, on its face, an order for the d Series. Red is not liable for Blue's failure to accurately complete the purchase order form, or for failing to infer the true intentions of Blue's purchasing officer, as distinct from those in the written purchase order. That Blue had communicated a desire to order the Alpha Series via telephone [*R ¶26*] is immaterial in an ongoing commercial relationship between Blue and Red involving numerous orders on a rolling basis handled by multiple personnel. Under the express terms of the Vendor Agreement [*Cl 4.1, Exhibit 4*], Red is entitled to rely on the later written purchase order as confirmation of Blue's intent. Alternatively, if Blue's attempted telephone order was relevant, Red discharged any alleged duty to clarify Blue's intent by attempting to contact Blue on April 21 (Negoland time).

C. Red did not breach its obligations to Blue under the Priority Agreement by refusing to fulfil Blue's oral purchase order of May 1 (Negoland time)

20. Even if oral purchase orders are effective under the Vendor Agreement, Blue's oral order in this case was not received in time. The Priority Agreement should be interpreted as commencing on April 1 and expiring on April 31, meaning that Blue's order of May 1 was out of time. This interpretation is consistent with the terms of the Priority Agreement, which specified a period of the 'first one month' [*Exhibit 13*]. If the parties had intended for the priority period to persist until May 1, the Priority Agreement would have specified 30 days.

21. The time zone governing the Priority Agreement is Negoland (GMT+9) [*R ¶3*], as Negoland is Red's place of business, Red set the time by drafting the agreement [*Exhibit 13*] and the circumstances do not indicate otherwise [*UNIDROIT Art 1.12*]. Accordingly, Blue's argument that its May 1 (Negoland time) purchase order was effective because it was submitted on April 30 (Arbitria time) is inconsistent with the Priority Agreement.

22. It is irrelevant to the determination of the present question that Red did not permit Blue to commence selling the Alpha Series until 10am, April 1 (Arbitria time). The Priority Agreement deals with Blue's right to *order and purchase* the Alpha Series; it does not regulate when Blue can begin selling same.

D. Alternatively, if Red did breach its obligations to Blue, damages must be reduced to reflect Blue's contribution to the harm suffered

23. In the alternative to [17]–[22] above, Blue was partially responsible for the harm it suffered by submitting a defective purchase order and any award of damages must be discounted [*UNIDROIT Art 7.1.2*]. It would be unjust and commercially unreasonable for Blue to receive complete compensation from Red when Blue contributed to the loss.

IV. <u>BLUE MUST PAY RED $1,000,000 FOR BREACHING ITS OBLIGATION TO RETURN THE D SERIES TO RED</u>

24. Red submits that:

A. It was an express or implied obligation of the Vendor Agreement that Blue return any Products in good condition and Blue breached this obligation;

B. CPT Incoterms 2010 do not apply to the present dispute;

C. The principle of *force majeure* cannot excuse Blue's non-performance; and

D. The harm suffered by Red was reasonably foreseeable and damages should not be reduced.

A. It was an express or implied obligation of the Vendor Agreement that Blue return any Products in good condition and Blue breached this obligation

25. The Vendor Agreement requires that Blue maintain in good condition Products delivered by Red [*Cl 3.2.5, Exhibit 4*]. The Vendor Agreement permits Blue to return excess Products to Red provided that the Products are in good condition and may be commercially sold by Red [*Cl 3.1.5, Exhibit 4*]. Blue is therefore under an express contractual obligation to maintain Products in a good and commercially-saleable condition while the Products are in the possession of Blue or its agents. This obligation persists until the Products have been sold to a Buyer or returned to Red.

26. Alternatively, Blue is under an implied obligation to ensure any returned Products are in good condition [*UNIDROIT Art 5.1.2*]. Having regard to the nature of the contract, where Blue or its agents have complete control of Red's Products on a consignment basis until sold or returned, such an implied obligation is obvious and necessary to give commercial efficacy to the Vendor Agreement. A construction to the contrary would be unreasonable.

27. During carriage from Blue's headquarters to Arbitria Airport en route to Red's headquarters, an earthquake occurred and the entire load of 10,000 units of the d Series was destroyed [*R ¶29*]. The d Series load is evidently no longer in good or commercially-saleable condition. Blue is in breach of its obligation. Blue is therefore required to compensate Red for the harm suffered [*UNIDROIT Art 7.4.2*], totalling $1,000,000 [*Exhibit 17*].

B. CPT Incoterms 2010 do not apply to the present dispute

28. The Vendor Agreement provides that the trade terms of shipping shall be CPT (Contract Paid To) under the Incoterms 2010 Edition [*Cl 4.3, Exhibit 4*]. However, clause 4.3 is limited to deliveries from Red to Blue and does not apply to returns from Blue to Red. Clause 3.1.5 is silent on the terms applicable to the shipment of returns. In the absence of an express clause, the Vendor Agreement should be interpreted such that CPT does not apply to returns. Similarly, a term applying CPT to return shipments should not be implied. Such a term would have the effect of Red bearing liability for damage to goods in the possession of Blue or Blue's agent, which is inconsistent with the express terms of the Vendor Agreement.

29. This interpretation should be favoured as it is the 'commercially sensible construction' [*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, 771 (Lord Steyn)*], and thereby gives effect to the intention of the parties in this commercial relationship [*UNIDROIT Art 4.1*]. In an ordinary delivery, CPT trade terms place risk with Blue once Red has delivered Products to a carrier. Red is not required to insure the goods, however, on request it must provide Blue with information necessary for Blue to obtain insurance [*B3(b), CPT, Incoterms 2010 Edition*]. On the other hand, the Vendor Agreement provides no requirement for Blue to inform Red when returning Products. Accordingly, in the ordinary

course of dealings, the application of CPT to clause 3.1.5 would result in Red bearing risk for in-transit returned goods without having any opportunity to obtain insurance. Such an interpretation would be commercially unrealistic and unfairly burdensome to Red. That Red was aware of Blue's intention to return the d Series in this specific instance is irrelevant to the Vendor Agreement's construction according to the parties' common intention at the time of contracting [*UNIDROIT Art 4.1 Off Cmt 1*].

C. The principle of *force majeure* cannot excuse Blue's non-performance

30. The principle of *force majeure* will only excuse Blue if its non-performance was due to an impediment beyond its control *and* Blue could not reasonably be expected to have avoided or overcome the impediment or its consequences [*UNIDROIT Art 7.1.7*]. Red accepts that the earthquake was an impediment beyond Blue's control. However, Blue could have overcome the earthquake's consequences – the destruction of the d Series load and ensuing financial loss – by taking reasonable steps such as obtaining insurance that was easily and affordably available to Blue [*R ¶29*].

D. The harm suffered by Red was reasonably foreseeable and damages should not be reduced

31. Blue is only liable for harm which it foresaw or could reasonably have foreseen at the time of contracting as being likely to result from non-performance [*UNIDROIT Art 7.4.4*]. It was foreseeable that Products in Blue's possession by virtue of the Vendor Agreement could be damaged, which would in turn cause financial harm to Red. While the event causing harm in this instance may not have been actually foreseen, it was reasonably foreseeable that Products could be damaged during carriage: 'Foreseeability relates to the nature or type of the harm', rather than the exact harm-causing event [*UNIDROIT Art 7.4.4 Off Cmt 1*]. Accordingly, the quantum of damages payable by Blue should not be reduced.

ROBOT CASE

V. BLUE BREACHED ITS OBLIGATIONS IN RELATION TO THE EQUIPMENT LEASE AGREEMENT

32. Red submits that Blue breached the Equipment Lease Agreement by:
    A. Providing defective Robots to Red; and
    B. Failing to cure an error in the Robots upon Red's request.

A. Blue breached the Equipment Lease Agreement by providing defective Robots to Red

33. Under clause 4(1) of the Equipment Lease Agreement, Blue was obliged to provide to Red 10 Robots meeting the specifications within the instruction manual. These specifications state that the collision prevention sensor in the Robots will identify obstacles within one meter

[*Exhibit 19*]. At least Robots A and B did not meet this specification by respectively colliding with Turkey on September 9 and the rack on September 12 [*R ¶34–5*], both of which were within one meter of Robots A and B. Failure to meet this specification resulted in Blue's non-performance of its obligation pursuant to clause 4(1) [*UNIDROIT Art 7.1.1*].

34. Further or in the alternative, under clause 4(1) Blue was obliged to provide to Red 10 robots which were free from 'errors, flaws and/or deficiencies which would materially interrupt or disable Red's use of the' Robots. Robots A and B contained defective collision prevention sensors as demonstrated by the two collisions. This is a flaw that would materially interrupt and disable Red's use of the Robots for their intended warehouse inventory management purpose. The existence of this flaw in Robots A and B demonstrates Blue's non-performance of its obligation pursuant to clause 4(1) [*UNIDROIT Art 7.1.1*].

B. Blue breached the Equipment Lease Agreement by failing to cure an error in the Robots upon Red's request

35. Blue was obligated under clause 4(2) of the Equipment Lease Agreement to attend to and rectify any defects in the Robots upon Red's request made within one year from the Robots' delivery [*Cl 4(2), Exhibit 18*]. In the absence of a stipulated time for performance in clause 4(2), Blue must perform its obligations 'within a reasonable time' [*UNIDROIT Art 6.1.1(c)*].

36. Performance within a reasonable time in these circumstances would require almost immediate performance by Blue following notification from Red. Red was advised that the suspected defect was a malfunctioning collision prevention sensor [*R ¶35(2)–(3)*]. It was reasonably foreseeable that this could cause significant harm if not cured immediately. Red did not have technical capacity to cure the defect. Defects in the Robots would reasonably be expected to significantly impede Red's operations and Blue knew that Red depended on the Robots for its business operations.

37. On September 9, Robot A collided with a rack due to a defective collision prevention sensor [*R ¶35(2)*]. There is no suggestion on the evidence that Red caused the defective collision prevention sensor [*R ¶35(4)*]. Red promptly requested Blue to inspect and repair the defect, triggering Blue's obligation to cure the defect within a reasonable time. Blue failed to do so which amounted to non-performance of its obligation under clause 4(2).

VI. <u>BLUE SHOULD PAY RED $1,100,000</u>

38. Red submits that:
   - A. Blue must pay Red full compensation for its breach of warranties contained in clause 4(1) of the Equipment Lease Agreement;
   - B. Blue is contractually obliged to indemnify Red for losses which arose from Blue's breach; and

C. There should be no reduction in the amount of damages because the harm was not due to Red's act or omission.

A. Blue must pay Red full compensation for its breach of warranties contained in clause 4(1) of the Equipment Lease Agreement

39. Red suffered $1,100,000 loss as a direct result of Blue's breaches of the warranties contained in clause 4(1) of the Equipment Lease Agreement. Red is entitled to full compensation for Blue's breach [*UNIDROIT Art 7.4.2(1)*] where the harm was reasonably foreseeable at the time of contracting [*UNIDROIT Art 7.4.4*].

40. The $1,100,000 loss consists of lost merchandise and warehouse damage. Blue knew that the Robots would be used in a warehouse inventory capacity and even configured the management app specifically for this purpose [*R ¶32*]. It was reasonably foreseeable at the time of contracting that Blue's provision of defective Robots would lead to destroyed merchandise and warehouse damage. The value of the loss has been ascertained with certainty [*UNIDROIT Art 7.4.3(1)*]. Red is therefore entitled to the full value of its loss.

B. Blue is contractually obliged to indemnify Red for losses which arose from Blue's breach

41. Blue is obligated to indemnify Red for any and all losses arising from its breach of the Equipment Lease Agreement [*Cl 4(3), Exhibit 18*]. Repeating the substance of [39]–[40], Blue must indemnify Red's loss which is valued at $1,100,000.

C. There should be no reduction in the amount of damages because the harm was not due to Red's act or omission

42. Damages will be reduced to the extent that Red contributed to the harm, having regard to the conduct of each of the parties [*UNIDROIT Art 7.4.7*]. The temperature spike in the warehouse [*R ¶35(8)*] and the entering of new information into the management app [*R ¶34*] were not contributing factors to the harm suffered by Red.

43. As Robot A malfunctioned in normal temperatures [*R ¶35(2)*], it is unlikely that the brief temperature spike caused the malfunction in Robot B which caused the loss. There is no evidence that the temperature spike caused the sensors to fail.

44. Further, the data entry omitting the 30cm movement of the rack on September 10 [*R ¶34*] was not the cause of the collision, fire and Red's subsequent loss. The Robots were installed with collision prevention sensors to prevent all collisions, including the type which caused the fire. Had Robot B's collision prevention sensor functioned according to specifications, the collision would not have occurred. Therefore, the collision, fire and Red's subsequent loss was caused by the malfunctioning collision prevention sensor for which Red was not responsible

VII. RED IS NOT OBLIGATED TO PAY BLUE $500,000 FOR LOSS OF THE ROBOTS

45. Red submits that:

A. Blue cannot rely on clause 5(3) of the Equipment Lease Agreement because Blue caused the loss of the Robots; and

B. Clause 5(3) of the Equipment Lease Agreement does not apply in the circumstances because the harm was caused by Blue.

A. Blue cannot rely on clause 5(3) of the Equipment Lease Agreement because Blue caused the loss of the Robots

46. Blue may not rely on the fulfilment of a condition where that fulfilment is brought about by its own actions, contrary to the duty of good faith and fair dealing [*UNIDROIT Art 5.3.3(2)*]. Damage to the Robots fulfils the condition in clause 5(3) and enlivens the corresponding obligation for Red to pay Blue. Blue brought about loss of the Robots by providing defective Robots to Red and failing to cure that defect upon Red's request. Blue's failure to cure the defect, notwithstanding that it had capacity to do so [*R ¶35(2)*], is contrary to the duty of good faith and fair dealing. Blue's actions caused the loss of the Robots, therefore, Blue cannot rely on clause 5(3) to insist on payment from Red.

B. Clause 5(3) of the Equipment Lease Agreement does not apply in the circumstances because the harm was caused by Blue

47. Further or in the alternative, clause 5(3) does not account for circumstances where damage to the Robots is caused or contributed to by Blue. It would be an uncommercial interpretation of clause 5(3) to require Red to pay Blue a sum for damage caused by Blue. Clause 5(3) is silent on the issue and, therefore, should not apply where damage to the Robots is caused by Blue in breach of its own contractual obligations. Blue was responsible for the loss of the Robots by supplying defective Robots and failing to cure the defect upon Red's request. Therefore, Red is not obligated to pay Blue because clause 5(3) does not apply in these circumstances.