

## **β CASE**

-Issue 1- Is Red under the obligation to provide the β-7 series?

**I . Red is obliged to provide the β-7 series to Blue.** .....page 1

-Issue 2- If Red is under the obligation to provide the β-7 series to Blue, should the arbitral tribunal order Red to provide the β-7 series to Blue?

**II . The arbitral tribunal should order Red to provide the β-7 series to Blue.** .....page 2

-Issue 3- If Red is obliged to pay US\$5 million as liquidated damages to Blue, is Red allowed to set off Blue's obligation of US\$3 million to Red against its obligation to pay liquidated damages?

**III . If Red is obliged to pay US\$5 million as liquidated damages, Red is not allowed to set off its obligation to pay liquidated damages against Blue's obligation of US\$3 million to Red.** .....page 4

## **EVENT CASE**

-Issue 1.1- Is Blue in breach of obligation under the Agreement between Red and Blue (Exhibit 9) by failing its promises of appearances of Bolt, Williams, and Hosszu to the Nego-Abu Cup?

**I . Blue is not in breach of the obligation of having Bolt, Williams, and Hosszu participate in the Nego-Abu Cup since Blue was not under the obligation.** .....page 6

**II . Even if Blue was under the obligation, Blue's non-performance is excused due to Red's interference and Force majeure.** .....page 8

-Issue 1.2- If Blue is in the breach, what is the amount of damages to be awarded?

**III . Even if Blue's arguments # I & II are not accepted, Blue is not under the obligation to pay the damages (US\$700,000) from refunding tickets, and Blue is not liable for the harm (US\$750,000) that could have been reduced by Red.** .....page 9

-Issue 2- Is Red obliged to share the profit of US\$1 million from internet streaming with Blue?

**IV . Red is obligated to pay US\$500,000 to Blue to share the profit from internet streaming based on Exhibit 9.** .....page 10

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## **β CASE**

-Issue 1-

**I . Red is obliged to provide the β-7 series to Blue.**

Blue and Red ('the Parties') entered into the Sales Agreement ('Exhibit 4') on May 15, 2011 and the Maintenance Agreement ('Exhibit 5') in December 15, 2011. Because Red planned to make frequent improvements on the α and β series, the Parties entered into Exhibit 5 for the purpose of allowing Blue to catch up on the frequent improvements through Red's upgrades of the α and β series. After one year, the Parties added the Memorandum of Understanding ('Exhibit 6') to the existing agreements. Based on Exhibit 6, Blue allows Red to collect the feedback and data at the Blue Village. In exchange, Red shall

provide the upgraded version to Blue for a one year period before the general release when Red upgrades  $\alpha$  or  $\beta$  series using the feedback and data. In this case, Red used the feedback and data collected at the Blue Village in order to develop the  $\beta$ -7 series. Consequently, Red is obliged to provide the  $\beta$ -7 series to Blue under Exhibit 6. Even if Red is not obligated to provide the  $\beta$ -7 series to Blue under Exhibit 6, Red is still obliged to provide the  $\beta$ -7 series to Blue under Exhibit 5.

**A. Red is obliged to provide the  $\beta$ -7 series to Blue under Exhibit 6.**

Art 4 of Exhibit 6 stipulates “When Red upgrades the  $\alpha$  and/or  $\beta$  series using the feedback and data collected at the Blue Village, Red will provide the new version as the test version to Blue for a one year period before Red will release them to other customers.”

In this case, Red used the feedback and data obtained at the Blue Village for upgrading from  $\beta$ -6 to  $\beta$ -7 series. Red collected the feedback and data at the Blue Village during the development of the  $\beta$ -7 series. With the feedback and data, Red resolved some bugs and improved the visibility of the display screen and created the  $\beta$ -7 series (¶33). Also, the  $\beta$ -7 series is the new version of  $\beta$  series. This is because “ $\beta$ -7 was built on the previous  $\beta$ -6 series” and “ $\beta$ -7 would not have been developed without the development of its predecessor,  $\beta$ -6” (¶33).

Red might argue that Red is not obliged to provide the  $\beta$ -7 series to Blue because Red used the feedback and data only for bug resolutions and improvements in visibility, and not for the upgrade from  $\beta$ -6 to  $\beta$ -7 series. However, such argument should be dismissed because bug resolutions and improvements in visibility partially contributed to the upgrade from  $\beta$ -6 to  $\beta$ -7. Therefore, Red has the obligation to provide the  $\beta$ -7 series under Exhibit 6.

**B. Red is obliged to provide the  $\beta$ -7 series to Blue under Exhibit 5.**

Even if the arbitral tribunal finds that Red is not obliged to provide the  $\beta$ -7 series to Blue under Exhibit 6, Red is still obliged to provide the  $\beta$ -7 series under Art 2, 6 and 10 of Exhibit 5.

- i. Art 2 of Exhibit 5 stipulates “For the fee set forth below, Red shall inspect on a regular basis, replace parts and offer program updates, and maintain in good operating condition, the equipment ...”
- ii. Art 6 additionally stipulates that Red has to provide services when the service requested by Blue is beyond the coverage of Art 2. The typical case is to provide “e. ... the new version of the equipment”, and “If Red determines that the service requested by Blue is excluded pursuant to the above, and Blue requests Red to perform such service, the service will be provided under section 10.”
- iii. Art 10 stipulates “Blue may from time to time request that Red provides other services not included in the fee set forth in Article 3” in the first sentence. And based on this Blue’s right, Red is obliged to provide under Art 6.

The service under Art 2 shall be performed within the maintenance fee, when the improvements can be covered by replacing parts or program updates for the improvements of  $\alpha$  and  $\beta$  series. In case the improvements exceed the coverage of Art 2, such part of the improvements shall be provided with extra charge under Art 6 and 10. Under these three articles, Red has to provide the  $\beta$ -7 series to Blue.

-Issue 2-

**II. The arbitral tribunal should order Red to provide the  $\beta$ -7 series to Blue.**

Red is in breach of its obligation to provide the  $\beta$ -7 series to Blue. Since Blue has the right to require Red’s performance under UNIDROIT Principles of International Commercial Contracts (‘UPICC’) 7.2.2, Blue

requests Red to provide the  $\beta$ -7 series. In this case, Red was asked by the Negoland Sports Agency to refrain from exporting the  $\beta$ -7 series. Further, there are the facts that the Ministry of External Trade will likely stop the export immediately and that there is a possibility that the relationship between Red and the Negoland Sports Agency would deteriorate if Red tries to export the  $\beta$ -7 series (§34). However, these facts do not exempt Red from performing its obligation to provide the  $\beta$ -7 series to Blue because Red's performance of its obligation is neither impossible in law or in fact nor unreasonably burdensome under UPICC 7.2.2 (a) and (b), and the facts regarding the instruction are not the impediment beyond its control ('Force majeure') under UPICC 7.1.7.

**A. Blue has the right to require Red's performance.**

UPICC 7.2.2 stipulates "Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance." In this case, since Red failed to perform its obligation (§34), Blue has the right to require Red's performance. Therefore, the arbitral tribunal should order Red to provide the  $\beta$ -7 series to Blue.

**B. The exceptions to the right to require performance do not apply.**

UPICC 7.2.2 sets some exceptions to the right to require performance by stipulating "the other party may require performance, unless (a) performance is impossible in law or in fact; (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive." Red might argue that the arbitral tribunal should not order Red's performance because the exceptions stipulated in UPICC 7.2.2 (a) and (b) apply. However, these exceptions do not apply.

**B-1. Red's performance is not impossible in law or in fact.**

The "performance is impossible ... in fact" under UPICC 7.2.2 (a) when an event has occurred, that makes the obligor impossible to perform the obligation. An example of such event is the refusal of public permission, as written in UPICC 7.2.2 Comment 3.a. Therefore, even if there is a possibility that such event will happen, the performance is still possible as long as such event has not occurred.

In this case, Red's performance is not impossible in fact because no event has occurred that makes Red impossible to export the  $\beta$ -7 series. Although there is the instruction from the Negoland Sports Agency, which refrains Red from exporting the  $\beta$ -7 series, the instruction remains to be only a possibility that Red might be prohibited to export the  $\beta$ -7 series in the future. Therefore, at this stage, Red is still able to export the  $\beta$ -7 series. Thus, UPICC 7.2.2 (a) does not apply, and Red shall provide the  $\beta$ -7 series.

**B-2. Red's performance is not unreasonably burdensome.**

The "performance is unreasonably burdensome" under UPICC 7.2.2 (b) "when there has been a drastic change of circumstances after the conclusion of a contract, performance, although still possible, may have become so onerous that it would run counter to the general principle of good faith and fair dealing to require it" according to UPICC 7.2.2 Comment 3.b.

In this case, Red's performance is not unreasonably burdensome because there is only the instruction from the Negoland Sports Agency, and no other events which make Red's performance unreasonably burdensome, have happened at this time as stated above.

Furthermore, even if Red exports the  $\beta$ -7 series, the damages Red would incur is only that Red can no longer export the  $\beta$ -7 series without permission and the relationship with the Negoland Sports

Agency deteriorates. Considering Red's business scale, such damages would be limited to a small part of its business, which does not threaten Red's entire business. Therefore, the performance of Red is not unreasonably burdensome. Thus, UPICC 7.2.2 (b) does not apply and Red shall provide the  $\beta$ -7 series.

### **C. The facts regarding the instruction do not constitute Force majeure.**

Red might argue that Red can be exempted from performing the obligation because the facts regarding the instruction of the Negoland Sports Agency constitute Force majeure (UPICC 7.1.7). However, the facts do not constitute Force majeure.

UPICC 7.1.7 (1) stipulates "Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

In this case, the instruction is not "an impediment beyond its control." As stated above, whether the performance of the obligation is exempted or not is considered by the existing events. Since the instruction itself is not the sanction or prohibition on the export of the  $\beta$ -7 series, Red can still perform its obligation. Also, the damages Red would incur does not make Red in a serious situation. Therefore, the facts regarding the instruction should not be considered to be "an impediment beyond its control."

### **III. If Red is obliged to pay US\$5 million as liquidated damages, Red is not allowed to set off its obligation to pay liquidated damages against Blue's obligation of US\$3 million to Red.**

Blue can claim US\$5 million as liquidated damages due to Red's non-performance since Exhibit 5 stipulates "Liquidated Damages." Red submits that Red can offset the debt of liquidated damages with the US\$3 million claim which Red obtained from Yellow ("the Claim"). However, such argument should be dismissed. This is because Red is not allowed to set off its debt with the Claim which is not within the scope of the arbitration agreement. Also, even if Red can set off its debt with the Claim, Blue's obligation to pay US\$3 million shall be extinguished by set-off with the claim for damages Blue suffered. Therefore, Red cannot set off its obligation to pay the liquidated damages against Blue's obligation of US\$3 million to Red.

### **A. Red is not allowed to set off its obligation with the Claim in the arbitration.**

#### **A-1. The Claim is not within the scope of the arbitration agreement.**

In this case, the Claim is not within the scope of the arbitration agreement because it arises from Exhibit 7 which does not contain the arbitration clause. When the Claim is not within the scope of the arbitration agreement, Red is not allowed to set off its obligation with the Claim in the arbitration<sup>1</sup>. There are two reasons. First, the basic policy of arbitration is where the Parties have agreed that the dispute between them shall be referred to arbitration, then such dispute shall be settled in arbitration. To allow the arbitral tribunal to decide the claim which is not within the scope of the arbitration agreement is contrary to the basic policy of arbitration. Second, if the arbitral tribunal gives the award on the Claim, Blue loses the opportunity to submit to the court in respect to the Claim. Therefore, Red is not allowed to set off its obligation with the Claim in the arbitration.

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<sup>1</sup> Nakamura, Tatsuya. *Issues of Arbitration Law (Chusai-ho No Ronten)*. Seibundo, 2017, 316.

### **A-2. This case is not in the exceptional circumstances in which set-off is allowed.**

Some scholars in Japan argue that even if the claim is not within the arbitration agreement, set-off should be allowed in the following exceptional circumstances<sup>2</sup>. However, this case is not in such circumstances.

- i. When there is no dispute over the existence or the content of the claim  
In this case, as stated below, Blue submits that its obligation to pay US\$3 million is extinguished while Red insists on set-off. In short, there is a dispute over the existence of the Claim. Therefore, set-off is not allowed in the arbitration.
- ii. When the claim arises from the same legal relationship as the claim which is submitted to arbitration by the claimant  
In this case, Blue's claim for liquidated damages arises from Exhibit 5 which was entered into between the Parties. On the other hand, the Claim arises from Exhibit 7 which was entered into between Blue and Yellow. In short, the Claim does not arise from the same legal relationship as the claim for damages Blue has against Red. Therefore, set-off is not allowed in the arbitration.

### **A-3. The arbitration agreement in the Maintenance Agreement ('Exhibit 8') does not expand to the Claim arising out of the Sales Agreement ('Exhibit 7').**

Red might argue that since Exhibit 7 and Exhibit 8 are closely related, the arbitration agreement under Exhibit 8 can be applied to the disputes arising out of Exhibit 7 (Art 12. b). However, Exhibit 7 contains a jurisdiction clause and not the arbitration clause because Blue and Yellow intended to settle the disputes arising out of Exhibit 7 by court. Considering the basic policy of arbitration, the arbitration agreement in Exhibit 8 shall not cover the Claim arising out of Exhibit 7.

### **B. Even if set-off is allowed in the arbitration, Red cannot set off its obligation to pay liquidated damages against Blue's obligation of US\$3 million to Red.**

#### **B-1. Blue may exercise against Red the right of set-off available to Blue against Yellow.**

Red might argue that Blue is not allowed to exercise the right of set-off because the right of set-off arose after Blue received the notice of assignment (UPICC 9.1.13 (2)). It is generally cruel for the assignee if the obligor exercises the right of set-off that arose after the time the notice of assignment was received. However, if the assignee obtained the claim while knowing that the claim may be extinguished by the set-off, the obligor should be able to exercise the right of set-off against the assignee. This is because the risk of the extinguishment was assumed by the assignee.

In this case, Red knew that Blue would set off its obligation of US\$3 million with the damages when Yellow failed to provide the maintenance service.

- i. Red was informed by Blue (¶30) that Yellow's product will quickly become in bad shape without a monthly maintenance and that Blue and Yellow entered into Exhibit 7 and Exhibit 8 as a set (¶29).
- ii. After Blue receiving the notice of the assignment from Yellow, Sapphire from Blue made a phone call to Swan from Red (¶31). Blue told Red "The new cameras and sensors need regular maintenance, ... We would have a serious trouble, if Yellow has some trouble and fails to perform a regular maintenance."

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<sup>2</sup> Kojima, Takeshi, ed. *Commentaries and Issues: Arbitration Law (Chushaku to Ronten Chusai-ho)*. Seirinshoin, 2007, 188-189.

Therefore, Red obtained the Claim knowing that the Claim may be extinguished by set-off and Blue should be able to exercise the right of set-off against Red.

**B-2. Blue has the right of set-off against Yellow.**

Blue has the claim for damages against Yellow. Yellow had stopped performing maintenance services since late November, and the performance of the product began to decline in the middle of December 2017 (¶32). Blue suffered US\$3 million loss due to lack of maintenance (¶34). Therefore, Blue acquired the claim for US\$3 million damages.

According to B-1. and B-2., Blue may exercise against Red the right of set-off available to Blue against Yellow, and as a result, the Claim shall be extinguished. Therefore, Red cannot set off its obligation to pay the liquidated damages with the Claim.

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**EVENT CASE**

-Issue 1-

**I. Blue was not obligated to have Bolt, Williams, and Hosszu participate in the Nego-Abu Cup.**

The Parties signed the Agreement ('Exhibit 9') to co-host the sports event ('the Nego-Abu Cup') on December 15, 2016. Red is arguing that based on Art 2 (8) and 3 (2) of Exhibit 9, Blue was obligated to have Carl Bolt ('Bolt'), Margaret Williams ('Williams'), and Sarah Hosszu ('Hosszu') participate in the Nego-Abu Cup but failed to perform its obligation. However, Blue did not have the obligation to have these athletes participate in the Nego-Abu Cup.

- A. Regarding Bolt, the Parties agreed to cancel the participation of Bolt for the Nego-Abu Cup.
- B. Regarding Williams, Blue's obligation does not take effect unless Red performs its obligation of arranging the suitable venue for the game. However, Red failed to perform its obligation.
- C. Regarding Hosszu, Blue did not promise Red to have Hosszu participate in the Nego-Abu Cup.

**<Bolt Case>**

**A. The Parties agreed to cancel the participation of Bolt in the Nego-Abu Cup.**

Art 3 (2) of Exhibit 9 stipulates "Blue is responsible for the participation of the teams and players specified in Art 2 (7) and (8) in good condition," and Art 2 (8) lists Bolt as one of the athletes. However, in a meeting (¶40) on May 7, 2018, two months before the Nego-Abu Cup, Blue and Red agreed not to have Bolt participate in the Nego-Abu Cup.

In the above meeting, Blue's representative strongly recommended Red to wait for the Arbitration Tribunal's decision since there was a high possibility of Bolt's suspension being reduced. However, Red's representative refused, saying "we should declare right away that we have canceled his appearance on account of his doping violation to show our resolute stand against doping." Blue's representative accepted Red's proposal by saying "we don't really agree with your opinion, but ... we respect your opinion on this." Therefore, the Parties agreed not to have Bolt participate and Blue is not obligated to have Bolt participate in the Nego-Abu Cup.

Red may argue that the above meeting was not an agreement on Bolt's cancellation but a meeting for resolving Blue's non-performance of having Bolt participate in the Nego-Abu Cup in good condition.

Their reasoning would be that at the time when Bolt received the suspension, Bolt would not be able to participate in good condition. However, the obligation stipulated in Art 3 (2) of Exhibit 9 is that Blue have athletes play with no difficulty in the Nego-Abu Cup. There is nothing in the Agreement that stipulates that having athletes found guilty of doping is a breach of the obligation.

In addition, Red might argue that it was clear that Blue was going to breach its obligation when Bolt was suspended for four years and terminated Blue's obligation of Bolt's appearance (Anticipatory non-performance). However, Red did not have the right to terminate Blue's obligation. According to UPICC 7.3.3 and 7.3.5 (2), Red is able to exercise its right to terminate only when it is clear that Blue would not be able to perform its obligation to have Bolt participate in good condition in the Nego-Abu Cup and although Blue's obligation was terminated, Blue is still liable for the non-performance of its obligation. However, contrary to their argument, there was a significant chance of Bolt's suspension being reduced since Bolt's violation was not due to gross error or negligence. In fact, Bolt's suspension was reduced. Therefore, Red's use of Art 3 (2) of Exhibit 9 to make the argument that Blue's obligation regarding Bolt was terminated should not be accepted.

#### **< Williams Case >**

#### **B. Blue was not under the obligation to have Williams participate, due to Red's non-performance of arranging a suitable venue.**

Blue's obligation stipulated in Art 3 (2) of Exhibit 9 takes effect once Red carries out its own obligation of arranging a suitable venue since Blue cannot have athletes participate in a game where a suitable venue is not arranged. Art 3 (3) of Exhibit 9 stipulates that the Parties shall be responsible to arrange the venue suitable for the games. In addition, Art 3 (1) of Exhibit 9 stipulated that Red is responsible for the management of venues in Negoland. The tennis game, in which Williams planned to participate, was held in Negoland. Therefore, Red had an obligation to arrange a suitable venue for the tennis game.

However, the Nego-Town Tennis Center that Red arranged was not a suitable venue. For example, the WBGT (Wet Bulb Globe Temperature) heat index, which is used around the world for heatstroke prevention, indicate that it is dangerous to participate in outdoor activities at temperatures of 35 degrees Celsius or higher since body heat cannot escape into the air at such high temperatures.<sup>3</sup> In this case, the Nego-Town Tennis Center was predicted to have a temperature of 40 degrees Celsius (94), which is 5 degrees higher than the temperature that start to pose health hazards to the athletes. It is clear that the arrangement of venue by Red was not suitable for the games. Therefore, Blue's obligation did not take effect because Red had not performed its obligation to arrange a suitable venue for the games.

Red might argue that the Nego-Town Tennis Center was a suitable venue since the average temperature was 35 degree Celsius, which was lower than the expected temperature on the days of the Nego-Abu Cup. However, 35 degree Celsius is still a dangerously high temperature according to WBGT, and sharing Williams' concern about the heat, two other players from Negoland did not participate in. Therefore, the Nego-Town Tennis Center was not a suitable venue. In addition, Red might argue that Blue agreed to hold the tennis game at the Nego-Town Tennis Center knowing that the temperature may be high on the days of the match. However, although Blue initially agreed to the venue, Red had the obligation to change Nego-Town Center to Negoland Coliseum based on Art 3 (3) of Exhibit 9.

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<sup>3</sup> *Heat Illness Prevention Information: About WBGT*, Ministry of the Environment, 2018, [www.wbgt.env.go.jp/en/wbgt.php](http://www.wbgt.env.go.jp/en/wbgt.php). Accessed on November 19, 2018.

< Hosszu Case >

**C. Hosszu was never included in Art 3 (2) of Exhibit 9, and Blue never had an obligation to Red to have Hosszu participate in the Nego-Abu Cup.**

Red may argue that because of the notice Blue sent to Red (Exhibit 10), Blue had an obligation to Red to have Hosszu participate in the Nego-Abu Cup. Although Exhibit 10 states that Blue “would like to add Sarah to the list of athletes (see Art 2 (8) of the Agreement) who will participate in the Nego-Abu Cup,” the notice was only to the Steering Committee not to Red.

Since the Steering Committee operates independently unless acting on a resolution passed by the Parties,<sup>4</sup> Blue’s promise to the steering committee is not the same as Blue’s promise to Red, and Red cannot argue that Blue was under the obligation to have Hosszu participate. The copy sent to Red was just a notice of Hosszu’s participation in the Nego-Abu Cup since Red has the responsibility of arranging for the game in which Hosszu was going to participate.

**II. Blue is not obligated to pay the damages from Williams’ and Hosszu’s non-appearance.**

Even if Blue was obligated to have all three athletes participate in the Nego-Abu Cup, Blue is not liable for Williams’ and Hosszu’s non-appearance since it was due to Red’s interference and Force majeure.

**A. The damages from Williams' non-appearance occurred since Red did not change the venue. Therefore, Red is responsible for the damages it caused.**

Blue made every effort to have Williams participate, and Blue’s efforts would have led to a successful outcome if not for Red’s refusal to arrange a suitable venue for the tennis game (¶40, 42). UPICC 7.1.2 stipulates “a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party’s act or omission or by another event as to which the first party bears the risk.” In this case, a suitable venue was needed to perform Blue’s obligation of having Williams participate in good condition, and it was Red’s obligation to arrange one. However, since Red did not arrange a suitable venue that allows for athletes’ participation in good condition, Blue was unable to perform its obligation of having Williams participate in good condition in the Nego-Abu Cup. Therefore, Red relied on Blue’s non-performance, and Blue cannot be held responsible for Red’s reliance.

**B. Even if Blue was obligated to have Hosszu participate in the Nego-Abu Cup, Hosszu’s absence and Blue’s non-performance are excused because they were due to Force majeure.**

Art 4 (1) of Exhibit 9 stipulates “in the event of any failure or delay in the performance of this Agreement due to ... natural disaster ..., the said party shall not be liable ...” Since a volcanic eruption is a

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<sup>4</sup> Red and the Steering Committee operate independently because:

- i. it is made up of representatives from Blue and Red for the Nego-Abu Cup. The Steering Committee members “work for the Steering Committee,” [Art 1 (1) of Exhibit 9] which means that their duty is to the Steering Committee alone; and
- ii. Blue and Red can exercise the authority relating to the management of the business and affairs of the Steering Committee only by passing a resolution [Art 1 (2) of Exhibit 9].

In fact, When Hosszu could not come to the Nego-Abu cup, the Steering Committee notified Red [¶44], which indicates a distinct separation between Red and the Steering Committee



type of natural disaster that is unforeseeable and unavoidable, Blue is not liable for the non-participation of Hosszu.

However, Red might argue that Blue's non-performance should not be excused since Hosszu's absence was caused by Blue's failure to book a first class ticket in the first attempt. The failure to book the first class ticket was due to a mistake made by Emerald who is a member of the Steering Committee. Even if Blue is held responsible for Emerald's action since Blue sent Emerald to the Steering Committee, Emerald did perform his obligation of booking a first class ticket that would have brought Hosszu to the Nego-Abu cup on time for the games. After his first mistake, Emerald booked a first class ticket for Hosszu to participate in the Nego-Abu Cup (¶44), and Hosszu would have arrived in time for the Nego-Abu Cup if the volcanic eruption had not occurred. Therefore, even if Blue is responsible for Emerald's mistake, Hosszu's absence was not due to Blue's mistake but to Force majeure.

**III. Even if Blue's arguments in I & II are not accepted, Blue is not obligated to pay the damages from refunding tickets, and Blue is not liable for the harm that could have been reduced by Red.**

Blue is not obligated to pay US\$700,000 for the damages from refund of tickets. In addition, Blue is not liable for the harm that could have been reduced if Red had decided to change the venue for the tennis game and to not cancel Bolt's participation.

**A. Blue is not obligated to pay the damages of US\$550,000 incurred from the refund tickets because the damages was caused by Red's decision to refund tickets.**

UPICC 7.4.2 requires a causal relationship between non-performance and the damages. UPICC 7.4.3 Comment 3 explains that "harm must be a direct consequence of non-performance as well as certain." In this case, the damages were caused by Red's decision and negligence, and the harm incurred from refunding the tickets in Negoland is not a direct consequence of Blue's non-performance. The reasons are as follows:

- i. Red should have sued or held consult with Blue. However, Red decided to refund customers' tickets after just listening to their attorneys' opinion that "we would have slim chances of winning a lawsuit if we go to court, though it would be wise to refund the tickets ..." (¶43). In this case, Red's own decision to refund the tickets cut the causal relationship between the Blue's non-performance and the damages from refunding the tickets.
- ii. Red should have put a notice on posters and/or tickets. According to the Customer Act of Negoland, the obligation to refund would not have arisen if there had been notes on the posters and/or tickets regarding the possibility of the absence of Bolt, Williams and Hosszu (¶45). In this case, Red was responsible for both the promotion and sales of tickets in Negoland (Art 3 (1) of Exhibit 9). However, Red did not have notes on the posters and/or tickets.

**B. Red is not responsible for the amount that Red could have reduced.**

Even if Blue breached its obligation of having Bolt participate in the Nego-Abu Cup, Blue is not liable for damages of US\$750,000 from Bolt's cancellation. This is because such damages would not have occurred if Red had waited until the Arbitration Tribunal's decision before cancelling Bolt's appearance.

UPICC 7.4.8 stipulates that the non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by taking reasonable steps. In this case,

the loss from non-appearance of Bolt suffered by Red could have been reduced, and Blue is not liable for the amount that could have been reduced by Red.

If Red had waited to hear the Arbitration Tribunal's decision before making the decision of cancellation of Bolt's appearance, the harm would have been reduced. However, because Red did not wait, the harm occurred. Therefore, the damages from non-appearance of Bolt should be reduced to the extent (US\$750,000) that Red could have reduced.

-Issue 2-

#### **IV. Red is obligated to pay US\$500,000 to Blue to share the profit from internet streaming.**

Red is obligated to share the profit of US\$1 million from internet streaming equally to Blue. This is because profit from Event telecasting must be shared equally between Red and Blue (Art 3 (8) of Exhibit 9), and Event telecasting includes internet streaming. Even if there was no agreement on how to split the profit from internet streaming, the profit from internet streaming must be shared equally between Red and Blue.

#### **A. According to Art 3 (8) of Exhibit 9, Red is obligated to share half of US\$1 million dollars to Blue which Red earned from internet streaming.**

Art 3 (8) of Exhibit 9 stipulates that the profit from Event telecasting shall be shared equally. This is because "telecasting" in Art 3 (8) includes internet streaming. The reasons are as follows:

- i. According to the Oxford's Dictionary, "*telecast*" is defined as 'a television broadcast', and the definition of "*television*" is 'a system for converting visual images (with sound) into electrical signals, transmitting them by radio or other means, and displaying them electronically on a screen'.<sup>56</sup> Internet streaming and television both share the characteristic of converting visual images into electrical signals. In addition, in this day and age, the boundary between television and internet streaming has been blurred to a point where TV can be streamed and streaming content show up on TV. Therefore, internet streaming must be included in the interpretation of "telecasting" in Art 3 (8).
- ii. Close examination of the agreement reveals that "telecasting" is not limited to "terrestrial TV networks." Art 3 (7) of Exhibit 9 contains the terms "terrestrial TV networks", "internet streaming", and "cable TV." Art 3 (8), which comes directly after Art 3 (7), stipulates that profits from Event telecasting is shared equally by Red and Blue. If Event telecasting was used to mean only terrestrial TV networks, Art 3 (8) should have repeated the same word. Therefore, Event telecasting and terrestrial TV networks have different meanings, and the term "Event telecasting" represents all three terms in Art 3 (7).
- iii. Red may argue that considering the fact that profit from ticket sales went to either Red or Blue depending on who organized and promoted the games, the profit from internet streaming should to only go to Red. However, Red's argument must be dismissed. This is because the profit from internet streaming was earned by using the videography or photography taken by both Parties. Under the agreement, the Parties have agreed to share equally the profit earned from work done by both Parties. For example, profit from selling broadcasting rights to terrestrial TV networks is shared by the Parties equally. Therefore, the profit from internet streaming must be shared equally by both Parties.

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<sup>5</sup> "Telecast | Definition of Telecast in English by Oxford Dictionaries." *Oxford Dictionaries | English*, Oxford Dictionaries, 2018, en.oxforddictionaries.com/definition/telecast. Accessed on November 19, 2018.

<sup>6</sup> "Television | Definition of Television in English by Oxford Dictionaries." *Oxford Dictionaries | English*, Oxford Dictionaries, 2018, en.oxforddictionaries.com/definition/television. Accessed on November 19, 2018.

Red might argue that since Blue did not share the profit it earned from broadcasting on cable TV, there was a common understanding between Red and Blue that neither internet streaming nor cable TV is included in telecasting. However, Blue's profit from cable TV should not be shared with Red. This is because the US\$100,000 Blue earned from cable TV is actually from new registrations for the cable TV membership. Since it is not a pay-per-view system and viewers can watch any channel in the network, it is unclear how much of the profit from registration of new members in July can be attributed to the Nego-Abu Cup.

**B. Even if there was no agreement on how to split the profit earned from internet streaming, the profit must be shared equally between Blue and Red.**

Because both internet streaming and terrestrial TV networks broadcast the content produced by Red and Blue together, even if internet streaming was not mentioned in the contract, the profit from internet streaming must be shared equally between Red and Blue.

UPICC 4.8 stipulates that an omitted term in a contract shall be supplied. When supplying a new clause, the nature of the contract is important (UPICC 4.8 (2)). In this case, the profit from ticket sales went to either Red or Blue depending on who organized and promoted the event. However, they agreed to share the profit that came from using contents that were produced together. Therefore, a new clause should be added in Exhibit 9 stipulating that profit from internet streaming should be shared equally between Red and Blue since internet streaming used videography taken by the Parties.

**C. Even if Red is allowed to keep the profit it made from replacing Blue's three absent athletes, Red still has the obligation to share with Blue half of US\$800,000, which is the amount of profit that would have occurred if Bolt, Williams, and Hosszu had participated in the Nego-Abu Cup.**

Red might argue that the great performance from Asuka and Erika is a result of Red's effort to minimize the effect of Blue's default. They may also argue that the profit from internet streaming should not be shared for the same reason, that it was due entirely to Red's effort. However, Red's argument should not be accepted since there is no article in Exhibit 9 that prevents sharing the profit which was earned from one party's effort. In addition, Red's internet streaming broadcasted sports events held in Arbitria, which have used video footages recorded and provided by Blue (¶48).

Even if Red successfully argues to keep its profit it earned from bringing Erika and Asuka, Red must share with Blue half of US\$800,000. This is because if Bolt, Williams, and Hosszu had participated in the Nego-Abu Cup, the profit from internet streaming would have been US\$800,000. Therefore, Red shall pay US\$400,000 to Blue, which is half of the profit Blue would have earned had Bolt, Williams, and Hosszu participated.