The Lucky Bag Issue

Summary of Facts

In September 2015, Blue was planning New Year Sales, a huge event in Arbitria, when it identified Red's Lucky Bags as a core feature of its 2016 New Year Sales. Red's Lucky Bags were attractive for their popularity amongst consumers in Negoland, who regarded the purchase of a Lucky Bag as an auspicious way to start a new year. Blue's representative, Ruby, agreed with Red's representative, Hawk, to sell Lucky Bags through Blue Village, and that there should be no taboo items in a Lucky Bag. By an agreement dated October 27, 2015, Blue agreed to purchase 10,000 lucky bags at USD$270 each from Red (Exhibit 6).

On December 1, Ruby visited Red Inc. to examine a sample of the Lucky Bag. She was shown a sample with clothing depicting bears. Inspection of 5 samples of the 10,000 Lucky Bags upon delivery showed embroidery of bears and rabbits. Red did not inform Blue of other animals used in the embroidery for the Lucky Bags. All Lucky Bags were sealed, preventing further inspection by Blue.

The Lucky Bags were sold out in one day. Two days after the sales were concluded, Blue was swamped with complaints from customers. It was only then that Blue discovered that 4,000 Lucky Bags contained embroidery of a dragon, an Arbitrian taboo. Moreover, the boxes were sealed such that there was no way for the customers to open them before the purchase.

Pursuant to its published return policy, Blue has accepted returns of 4,000 dragon t-shirts at a loss of USD$100 refund per shirt, and USD$5 per shirt in administrative fees.

I. Red has breached the Lucky Bag Agreement (Exhibit 6)

1. In the interpretation of the contract, it is clear that a Lucky Bag must contain only auspicious items. Even if Red's duty to provide only auspicious items in the Lucky Bag is not clear from the contract alone, a term of "auspiciousness" can be implied from the dealings between Red and Blue. Consequently, Red is liable to compensate Blue for the loss it suffered in refunding customers for the dragon t-shirts. Blue's donation of the dragon t-shirts was not a failure to mitigate damages as it was unreasonable to expect them to do so.

A. By delivering Lucky Bags containing dragon t-shirts, Red has breached a fundamental term of the contract which was to supply Lucky Bags

2. Pursuant to U4.1(1), a contract shall be interpreted according to the common intention of the parties. The determination of the common intention in U4.1 is described as a "subjective test" in U4.3, meaning the courts shall determine, from the parties' subjective point of view, whether there was a common intention in the contract. The commentary by Dr Stephen Vogenhauer affirms the idea that the relevant evidence to establish "common intention" determines the parties' "state of mind at the conclusion of the contract". Read with U4.3, this common intention may be determined with reference to "preliminary negotiations between the parties", "the nature and purpose of the contract" and "the meaning commonly given to terms and expressions in the trade concerned".

3. The common understanding of parties with regard to the term 'Lucky Bag' used in the Agreement (Exhibit 6) is that Red was to supply Lucky Bags containing only goods that were not taboo to Blue. The true meaning of term "Lucky Bag" in the Agreement of Exhibit 6, can be ascertained from the preliminary negotiations between parties. Clear reference to "taboos" by Hawk indicates Red's awareness that all items in the Lucky Bag must be auspicious (Statement of Facts, [15]). On Blue's part, Ruby's acknowledgement of that concern also evinces Blue's understanding that the items in the bag should be auspicious in nature.

4. Closer examination of the nature and purpose of the contract also affirms the notion that both parties intended for a lucky bag to be auspicious. Both parties were aware that a key

reason for the successful sales of the Lucky Bag in Arbitria, is how people think it is "auspicious" (Statement of Facts, [14]) to buy a Lucky Bag at "the beginning of the year" (Statement of Facts, [14]). By deliberately choosing to sell it as part of the New Year Sale, there was a common intention to replicate the success of Negoland's lucky bag into Arbitria. According to "the meaning commonly given to terms and expressions in the trade concerned" (U4.3), "*Lucky* Bags" delivered to Blue should also carry an implied obligation to be auspicious, an element which is of utmost importance in New Year celebrations.

5. In conclusion, there was a common understanding that Red would deliver a Lucky Bag containing items that were not taboo. Red's failure to deliver a Lucky Bag containing only auspicious items was therefore a breach of the contract.

B. Even if the meaning of the term Lucky bag was not clear from plain interpretation of the contract, Red has breached an implied term in relation to the auspicious nature of the Lucky Bags.

6. A term of "auspiciousness" can be implied under U4.8 (1), which allows for a term which is appropriate in the circumstances (to) be supplied". This is when such a term had not been agreed on at contract formation, but was nevertheless important to determine the parties' rights and duties. U4.8 (2) stipulates that in determining an appropriate omitted term, regard must first be had to the "common intention of the parties."

7. Similarly, the parties' *intentions* for the Lucky Bags to boost Blue's reputation and sales are so clear that a term of 'auspiciousness' should be implied. Under A(3), both parties knew that the Lucky Bags were to rely on the auspiciousness and festivity to not just boost sales but also to usher in a new season for Blue's business. The fact that the parties retained the name, "Lucky Bags" in Arbitria, which denotes auspiciousness, supports this. Hence, in accordance with the common intention of both parties, an appropriate implied term would be that Red must supply auspicious lucky bags.

8. In terms of "*the nature and purpose of the contract*" (U4.8 (2)), Blue intends to sell the New Year Lucky Bags as a "core product"(Exhibit 6) of their "New Year Sale". Blue' employee Ruby emphasizes the importance of the New Year Sale to its image (Statement of Facts, [15]). Reputational gain is a key purpose of the contract. An implied term that the products in the Lucky Bags should not be taboo to protect Blue's reputation is hence appropriate.

C. As Red has breached the contract, Blue is entitled to damages for its loss.

9. U7.4.2 stipulates that "the aggrieved party is entitled to full compensation for harm", where harm may be "loss which it suffered" or "gain of which it is deprived". Blue claims for administrative fees of collecting back the dragon t-shirts, and the cost of shirts refunded because the refunds for the t-shirts came from the revenue from sale of Lucky Bags. The administrative costs are at USD$5 per shirt while refunds cost Blue USD$100 per shirt. The total losses suffered are USD$420,000.

10. U7.4.4 further sets out a remoteness requirement for the offending party to follow. It is foreseeable that if Red breached the implied term which required them to provide lucky items in the Lucky Bag, Blue would suffer losses from having to refund and collect the taboo items. Hence Red is liable for the losses Blue suffered in the course of returning the dragon t-shirts.

D. Red's liability to pay damages cannot be excused by the fact that they provided samples to Blue, as they have breached an implied obligation.

11. Under U5.1.2, an obligation on a contracting party can be implied into the contract if it fulfils a test of "reasonableness". U5.1.2 provides that "the implied obligations may... have been so obvious...that the parties felt that the obligations "went without saying".

12. Both parties saw the provision of a comprehensive sample as crucial to their dealings. Under Article 1(2) of Exhibit 6, the Seller is obligated to "give the Buyer an opportunity to check the sample of the Goods" upon Blue's request. In addition, under Article 4 of Exhibit 6, the Seller is obligated to "send the descriptive text for the Goods and provide the Buyer with necessary information as required in accordance with the Vendor Contract." The acts of checking sample and reading detailed descriptive text indicate how important it is for the parties to know the exact nature of the goods. Hence it is obvious and thus reasonable to imply an obligation of providing a comprehensive sample to allow Blue such knowledge of the goods.

13. Taking into account the nature of the Lucky Bags that are mysterious grab bags, it is thus reasonable to imply an obligation on Red's part to provide Blue with samples of *all* items in the Lucky Bag. There are two key facts to support this. First, the items in the lucky bags are concealed within Red's packaging; second, there are three different t-shirt designs. As the items are concealed, the t-shirt designs are not apparent to Blue's personnel when they arrive at Blue. It would be impractical to expect Blue to open and check all of the 10,000 bags. Second, had Red provided a sample with dragon t-shirts in them, Blue would have been able to request for different shirt designs. Thus, it is "reasonable" if Red is obligated to provide a comprehensive sample of the lucky bags to Blue. Red however, breached this obligation and is thus liable for the damages incurred by Blue.

E. <u>Blue's choice to donate the shirts to a charity was not a failure to mitigate damages</u>

14. Blue is entitled to the full extent of its loss as Blue's subsequent actions in donating the shirts do not constitute a failure to mitigate. The commentary of U7.4.8 states that "a party who has already suffered the consequences of non-performance of the contract cannot be required in addition to take time-consuming and costly measures". It follows that if the obligation to mitigate harm is time-consuming and costly for the innocent party, it would be unreasonable to impose such an obligation.

15. Blue's returning the shirts to Red was an unreasonable step for mitigation under U7.4.8 as it was onerous for Blue. Blue, as the aggrieved party, could not be expected to keep the dragon t-shirts at their own cost and risk till Red ordered it to be delivered to them. Keeping the dragon t-shirts would require storage space that Blue lacks.

16. Furthermore, Blue would have to pay for all the shipping and delivery costs with no guarantee of Red's reimbursement. Article 4.3 of the Vendor Contract (Exhibit 4), which is considered a usage agreed to and thus binds both parties under U1.9(1), Carriage Paid To(CPT) (Incoterms 2010 Edition) is adopted as the trade terms. Under CPT, the seller that delivers the goods is obligated to pay for the shipping and delivery costs. The shipping cost would be non-negligible given the great distance between the two countries.

17. Given Blue's limited choices, its decision to donate the goods is the most cost-effective manner of dealing with the losses. According to Article 4(2) of the Lucky Bag Contract (Exhibit 6), Blue should not resell the goods in other countries, leaving donation its only alternative.

The Alpha Series Issue

<u>Summary of Facts</u>

The Alpha Series, distinguished by the Greek symbol "α" emblazoned on the shirts, is an extremely popular line of polo shirts. Sensing that the Alpha Series would be a bestseller, Blue approached Red for an agreement for the consignment sale of Alpha series shirts.
This agreement was part-oral, part-written, comprising a memo (Exhibit 13) and an oral conversation between Red and Blue in paragraph 25. Blue was given priority to order 30,000 shirts within a one-month period starting from 1 April when the Alpha Series was released to the public.
Following standard practice, Blue placed an order through phone on 21 April, ordering 10,000 Alpha shirts. However, Red requested for Blue to place an order in writing, and in the process, one of Red's subordinate staff members saw the letter 'α' as '∂'. "∂" stood for the Delta-Series, a jacket embroidered with a dragon. Blue thus claims damages for Red's breach in failing to deliver the Alpha shirts.
Subsequently, Red requested for Blue to return the Delta-series jackets, who proceeded to ship the shirts back to Red. However, an earthquake occurred, and the goods were severely damaged. Red thus claims damages for the goods destroyed.

Issue II: Red has breached the Alpha Series Contract

F. Red has breached the expressed terms of the Alpha contract

18. Red has breached the contract by failing to deliver the Alpha shirts when Blue placed an order for them on April 21. An ambiguous term such as 'α' should be interpreted by the tests of the common intentions of the parties and reasonable man stipulated in U4.1 of the UNIDROIT. The relevant circumstances under U4.3(a) from which the common intentions of the parties can be inferred showed that Red and Blue could only have intended to contract for the Alpha series when the order was made. Even if Red argues that the common intentions of the parties are not sufficiently clear, applying the test of the reasonable man under U4.1.2, would support that the symbol should be interpreted as 'α', representing the Alpha-Series.

19. Even if it may be argued that there was a mistake in Red's interpretation of 'α', such a mistake should not be regarded as a relevant mistake that would allow Red to avoid its obligations to supply the Alpha-Series after the mistake has been made known.

20. Even where there was indeed a relevant mistake, Red's refusal to respond to Blue's order made on 30 April was a breach of its obligation to give Blue priority to order the Alpha Series within the one-month period.

G. Red has breached the expressed terms of the Alpha contract by failing to deliver Alpha shirts when an order for it was placed by Blue on April 21.

21. Key to whether Red had breached its obligation to supply Blue with its order of the Alpha-series is whether the symbol written in Exhibit 14 under 'product' can be interpreted as representing the Alpha-Series. If the symbol was interpreted according to the common intention of the parties as inferred from the relevant circumstances, the symbol would definitely be the Greek 'α'. Hence, Red's failure to deliver the Alpha-Series when contracted for then would constitute a breach of its obligations.
22. Terms in a contract are interpreted by two tests under UNIDROIT. The main test is that of the common intentions of the parties under U4.1(1). Official commentary provides that the test of the parties' common intentions should prevail over all other evidence which points to the contrary, such as the 'literal meaning' of the word used, or the meaning a 'reasonable man' would attribute to the term. Only when the common intentions of the parties are unclear should the second test under U4.1(2) of what a reasonable man in the position of the parties would have concluded at contract formation be used. UNIDROIT lays out the relevant circumstances in which the common intentions of the parties may be inferred in U4.3.

23. Preliminary negotiations between Red and Blue, acknowledged under U4.3(a) as a relevant circumstance to infer the common intentions of the parties, showed that there was a common intention of the parties to contract for the Alpha-series. The oral conversation Blue had with Red just right before the order form was sent in indicates that the form was for the order initially made on the phone for "10,000 shirts of the Alpha series"(Statement of Facts, [26]).

24. By the established practice of Red and Blue, which is a relevant circumstance under U4.3(b), it is also clear that Blue contracted to purchase the Alpha series. Given that they had two previous contracts for the Alpha series on the same material terms stated in this order form, it is unlikely for Blue to have contracted for a whole new product on these same terms. Furthermore, through past dealings in the Lucky Bag dispute, Red knows that Blue is unlikely to contract for any products embroidered with dragons.

25. These relevant circumstances show that the parties did in fact intend to contract for the Alpha Series. As their common intention is clear, they should interpret the symbol to represent the Greek 'α'. This should take precedence over the reasonable person's point of view, even if he would interpret the handwriting on the order form as a '*∂*'. The underlying intent of the UNIDROIT to prioritise the parties' intentions rather than an overly strict interpretation of the terms of their written contract.(U4.1 Official Comment 1) Furthermore, past dealings between Red and Blue have indicated that the parties' common understandings, confirmed verbally, is not often written down in a black-letter contract. This can be seen from how the two orders prior to these have been taken down via an informal telephone conversation between Blue and Red.

26. Even if it is unclear that the order form referred to the Alpha contract, by the test of a reasonable man under U4.1.2. of UNIDROIT would show that the Alpha series was the only reasonable order Red would have made with such urgency. Official commentary in UNIDROIT states that the reasonable man is a person with the same linguistic knowledge, technical skill and business experience as both parties here.

27. Having sold the Alpha series for such a long time, and knowing about its success, a reasonable man in the position of Red would have known that Blue's urgent contract for orders, especially during the one-month period can only be reasonably for the Alpha series.

H. <u>Even if Red had made an error in interpreting the 'α' symbol, it is not a relevant mistake and would not allow Red to avoid its obligation to provide the Alpha Series based on U3.2.2.</u>

28. A relevant mistake is made at the time of contracting, and has to be serious enough to allow the contract to be voided. The Commentary of U3.2.2 stipulates that the importance of a mistake is to be assessed by reference to the test of what "a reasonable person in the same situation as the party in error" would have done if it had known the true circumstances "at the time of the conclusion of the contract". A mistake is only considered serious if the party would "not have contracted at all, or would have done so only on materially different terms".
29. The erroneous interpretation of the order form happened *after* the contract was concluded. The Alpha contract was concluded on 15 March 2016. It is a contract with terms deliberately left open, as per U2.1.14. Under U.2.1.14, if the parties intended to conclude a contract, the fact that they intentionally left a term to be agreed upon in further negotiations, does not prevent the contract from coming into existence. This article applies to when parties intentionally leave a term open because they are 'unable or unwilling to determine them at the time of the conclusion of the contract' (U2.1.14 Official Comment 1). These open terms do not impede a contract from being concluded if they are 'non-essential', the agreement is sufficiently 'definite', the agreement 'has already been partially executed', and that these terms 'by their nature can only be determined at a later stage' (U2.1.14 Official Comment 2).

30. Exhibit 13 and Paragraph 25 of the Statement of Facts laid out the terms of the Alpha contract that can be determined at that time and are 'sufficiently definite'. This is as they included material terms including the product, price and time period of Red's offer to Blue to give them priority. While the exact quantity of the order was not decided on, this is as the parties were 'unable to determine them at the time of the conclusion of the contract'. Both parties agreed to leave such a term open, seen from the memorandum where they agreed to a ceiling quantity of 30,000 priority orders, implicitly suggesting that exact quantities can be agreed on in the one-month of this contract. As per the UNIDROIT commentary, the Alpha contract concluded on 15 March 2016 was sufficiently definite, had already been partially executed at the time the order form was sent on 21 April 2016, and hence, should be considered a concluded contract.

31. In this light, the order form submitted by Blue on April 21 is merely an execution of the original Alpha contract. There was no material mistake about the common intentions of the party to contract for the Alpha series in the Alpha contract. Hence, any misunderstanding of the order on the order form is merely the result of a misinterpretation by Red's staff.

32. The one instance of erroneous interpretation of the order form alone was not sufficiently serious to be a relevant mistake that voids the contract. It is unlikely that Blue would have refused to contract at all or would have changed the terms of the alpha series contract because of a misunderstanding of an order form. Given Red and Blue's long working relationship, and the goodwill that has led Red to grant priority to Blue for the Alpha Series, it is likely that Red would have delivered the Alpha series under the *same material terms* agreed.

33. Even if the order form is to be taken as a separate contract that is not under the main Alpha contract, the terms are clear, and are subject to the same interpretation above. Red has the same legal obligations to deliver the Alpha series, which they breached by non-performance.

I. <u>Even if Red had not breached its obligation in its non-delivery of the Alpha Series to the order made on April 21, it had breached its obligation in not delivering the Alpha Series when Blue requested for it on April 30.</u>

34. Red breached its obligation to place Blue's orders of the Alpha Series on top priority by refusing to do so when Blue made an order on April 30 for the Alpha Series, which is within the one-month period agreed on by both parties. In Exhibit 13, the memo states that the one-month period began from the 'release' of the Alpha-series. Red requested for Blue to release the Alpha-series later than Red (Statement of Facts, [26]). The 'release' in Exhibit 13 should refer to Blue's release of the Alpha series, which is 14 hours behind Negoland's release. Hence, while Blue had placed the order on April 30 Negoland time, its one-month privilege, based on Arbitria time, had not ended yet.

J. <u>Red is therefore liable for Blue's damages for the loss of profits suffered by Blue.</u>

35. Since the Alpha contract is silent on remedies for breach of contractual terms, U7.4.1 gives Blue the right to claim damages against Red for Red's non-performance. Under U7.4.2, Blue is entitled to full compensation of $250,000, its deprived gains owing to Red's non-performance. Had Red performed its obligation, Blue would have sold the 10,000 shirts it had ordered and earned 25% commission from the $1,000,000 earnings from the sale, which amounts to $250,000.

36. Such damages will serve to compensate and not unfairly enrich Blue under U7.4.3.1. There is reasonable certainty of Blue's ability to sell out the shirts, hence Blue did in fact suffer a real and substantial loss owing to Red's breach. In fact, Blue had ordered 10,000

shirts precisely because the shirts were selling out quickly, and had sold out on two occasions already.

Issue III: Blue's inability to return the delta series arose because of a force majeure

K. Blue did breach its obligation in relation to the return of the d series to Red but this breach may be excused owing to the doctrine of Force Majeure under U7.1.7 of the UNIDROIT.

37. The agreement between Red and Blue to return the d Series was made verballybetween Orange and Eagle. Blue's primary obligations were to 'return the d Series' to Red 'as soon as possible', and in the process, 'arrange the transportation' for the return delivery. (Statement of Facts, [28]). The agreement was silent on which party was liable to take up insurance for this delivery. Hence, based on relevant past dealings, in which both parties had incorporated the CPT (Incoterms 2010 Edition) (Exhibit 4), we submit that the same is done for this agreement.

38. U7.1.7 stipulates that non-performance is excused if (1) it was due to an impediment beyond that non-performing party's control and (2) the non-performing party could not 'reasonably be expected to have taken the impediment into account', and (3) the non-performing party could not have 'avoided' or 'overcome' it or its consequences at the time the agreement was made.

39. Blue had complied with its other obligations of the agreement, which were to respond as soon as possible, and to make arrangements for transportation. The earthquake that damaged all the D-Series jackets was a natural phenomenon that Blue could not possibly have any control over.

40. Blue also could not have avoided the earthquake or its consequences. Avoidance would require a certain knowledge or foreseeability of the event, which was plainly impossible. Furthermore, the earthquake struck Blue's truck which was delivering the d-Series from Blue's headquarters to the Arbitria airport. Any other reasonable means of carriage for this service would also have been affected by the earthquake. Hence, the choice of carriage, which was the only factor Blue had control over, would not have prevented the earthquake from destroying the d-series jackets.

41. Furthermore, when Red gave Blue the discretion to make arrangements for transportation, they assumed the risks that would naturally be involved in Blue's arrangements. Blue's chosen mode of transportation for the d-Series was reasonable. As a small company, there was no other more efficient way Blue would have gone about delivering the D-Series back to Negoland which is far away from Arbitria. Regardless of what was within Blue's capacity, Blue would still have had to charter a land vehicle to get d-Series to the airport in order to make use of the plane - the fastest possible mode of transport to Negoland.

42. Furthermore, Blue gave reasonable notice to Red on the force majeure event explaining its non-performance under Exhibit 16. Therefore, it has not breached its secondary obligations stipulated under U7.1.7.3 to give notice within a 'reasonable time'. Blue's slight delay in sending over the notice was due to the need to cope with its own on-the-ground operations that were affected by the unforeseen earthquake.

L. Even if Blue did breach its obligation in not delivering the d-series, it is excused from liability in damages based on UNIDROIT and Incoterms

43. Given that Blue's breach in not delivering the d-Series is excused under U 7.1.7, as per U7.1.7.2, Blue may be excused from liability in damages. U7.4.1. also excludes non-performing parties whose non-performance are excused under UNIDROIT.

44. Furthermore, while Red had lost its D-Series, it was never Blue's responsibility to be held liable for the D-Series when returning it to Red. This is under A3 and B3 of CPT Incoterms

where both Blue and Red had no obligation to take up insurance for the carriage of the goods.

45. Under U 7.4.8.1, Blue is not liable for harm suffered by Red if Red could have taken reasonable steps to reduce its own losses. Under A3 of Incoterms, both parties do not have the obligation to take up insurance. Red was required to take the initiative to raise the need for insurance, if it saw fit, as provided for under A10 of Incoterms. Blue's only obligation under Incoterms was to provide information when such request was made. No such request was made by Red, which negated the need for Blue to furnish any such information. This reflected Red's own failure to mitigate its losses, which Blue should not be liable for.

The Robot Issue

Summary of Facts

Blue signed an Equipment Lease Agreement (Exhibit 18) with Red to loan 10 robots for "inventory management, stock handling and shipping operations" (Statement of Facts [30]) in Red's warehouse. On July 15 2016, as Red took delivery of ten robots, Blue provided an instruction sheet that foregrounded the most *important* instructions to Red's staff (Exhibit 19):

1. The robots have a deep learning function that allows them to explore optimal paths in transporting items in the warehouse.
2. Every change in location must be entered into the management app.

On 9 September, Robot A was discovered to have a collision prevention sensor malfunction. Red informed Blue about the malfunction. Blue's chief engineer Sapphire was occupied but promised Red to fix the error on 14 September. Meanwhile, Blue told Red that they could turn on the deep learning function so that the robots would find an optimal path.

Three days after Robot A's malfunction, on 12 September, one of the storage shelves in the warehouse was moved 30cm from its original position. Red's staff forgot to enter this into the robot management app. Robot B collided into that shelf while its deep learning was switched on. The shelf fell onto Robot B, starting a fire that ruined 1.1 million worth of goods in the warehouse. Red claims for the damage to the warehouse caused by Blue's breach of contractual obligations, while Blue counterclaims for the loss of robots.

Issue IV: Blue did not breach its obligations under the Equipment Lease Agreement (ELA, Exhibit 18)

M. Blue is not liable for the damages incurred to Red

46. Blue did not breach the contractual agreement, as the error in Robot B did not amount to a material disruption on its own. In the ordinary course of a collision prevention sensor malfunction, the robot could still carry out its tasks based on the programmed default path. It was Red's negligence in forgetting to key in the new locations that resulted in the eventual disruption. Secondly, even if Blue did breach its obligations, Blue is not responsible for the loss because the damages were too remote. The events leading to the fire were so extraordinary that it could not be within Blue's reasonable contemplation.

N. Blue did not breach its obligation under Article 4(1) of the Equipment Lease Agreement (Exhibit 18)

47. There was no breach of Article 4(1). For Blue to have breached Article 4(1), there have to be "errors, flaws and/or deficiencies", and such errors must "materially interrupt or disable Red's use of the equipment".

48. The collision sensor malfunction does not amount to a material disruption. Under U4.1, the terms of the contract should be first interpreted according to the common intention of

the parties. If such an intention cannot be established, the reasonable-man test would apply. By agreeing to the specific wording of Article 4(1)-- "materially disrupt", it cannot be within parties' intention that any errors, regardless of their degrees of seriousness, would breach 4(1), since the word "material" conveys the notion of seriousness and significance. The material disruption must be so significant and substantial that it prevents Red from running its operations effectively. In the present case, there was no material disruption caused by the collision sensor malfunction, and there would not have been any disruption if not for Red's failure to key in the new rack location. Here, the collision sensor was merely a secondary function, and the performance of this function does not prevent the robots from performing their primary function of inventory management.

49. Hence, if not for the fact that Red's staff failed to key in the locations of the rack, the collision resulting in the fire would not have happened and Blue's robots could have functioned well. Blue has not breached its contractual obligation.

O. Blue did not breach its obligation under Article 4(2) of the ELA

50. Red cannot hold Blue liable for not responding to the errors of the robot in time to prevent the accident. Article 4(2) does not impose an obligation on Blue to respond within a specified time. Even if we were to imply an obligation under U5.1.2, the UNIDROIT principle mandates that an obligation can only be implied when it seems so obvious that the obligations "went without saying" (Official Commentary). It also needs to satisfy the idea of reasonableness under U5.1.2(d). The test of reasonableness is laid down in U4.1(2) is an objective understanding "which could reasonably be expected of persons" (Official Commentary 4.1 Art 4.1 p.138).

51. There can be no dispute that Blue's response time was reasonable. When Turkey raised concerns on September 9th about the collision prevention sensor (Statement of Facts, [35]), Sapphire informed Turkey although they were "very busy", they would commit to attending to the robots after September 14th. 5 days can be said to be a reasonable response time, especially when considering the manpower constraints. Expecting Blue to respond immediately or by the time of the accident is thus unreasonable, since there was no express obligation for Blue to do so.

52. Arguing that Blue has breached the obligation by delivering Red faulty robots might imply that Blue could have done something to prevent it. However, Blue has done all that it could in the given circumstances such as by conducting lengthy trial runs that spanned half a month before the robots were in operation. Furthermore, it is unreasonable to assert that Blue has breached its obligation when Blue had acted in good faith to prevent such errors.

P. Even if there was a breach of Article 4(1), Blue should not be liable for the damages Red suffered

53. Red claims damages for loss it has suffered from Robot B's collision with the shelf that resulted in a fire. However, assuming that there was a breach in the contract, Blue would still not be liable for the extensive damage Red has suffered, as the damage was too remote and unforeseeable at the time of the contract.

54. To prove that Blue's robots are responsible for the loss incurred to Red, there has to be a direct causal link under U7.4.3. While there is no concern over the certainty for harm, for the fire has taken place, the law is that harm must be a direct consequence of non-performance (Official Commentary Art 7.4.3 p.271); the idea of causation is also implicit in U7.4.2 that the compensation for loss must be "as a result of the non-performance". Hence the law is unambiguous that if a direct causal link cannot be proven on a balance of probabilities, there can be no loss payable to the aggrieved party.

55. Blue's robots did not directly cause the loss. The malfunction alone would not have caused such a disaster if not for the negligence of Red's staff (Turkey) who, despite Blue's instructions, forgot to enter the new locations of the rack. Even though the deep learning function was turned on at the time of the collision, the fact that the shelf robot B collided into was the shelf that was moved 30cm away from its original location showed that Red's negligence was truly fatal in causing this incident. If the information was correct on the management app, the robot would not have collided into the shelf at all, even if it was exploring an optimal path. The robot would have registered an obstruction, and circumvented it. As unfortunate as Red's losses are, Blue is not liable for losses which Blue did not cause. Indirect harm that is uncertain may also be unforeseeable, which falls within the ambit of U7.4.4.

56. Under U7.4.4, the non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non- performance. The test of foreseeability involves three main elements (Official Comment to Art 7.4.5 p.272).
    1. "Could reasonably have foreseen"
    2. "Likely to result in the ordinary course of non-performance"
    3. "At the time of the conclusion of the contract"The test is based on the foresight of the reasonable person in the position of the non-performing party (Official Comment to Art 7.4.4 p. 271). Foreseeability refers to the "nature or type of the harm" (Official Comment to Art 7.4.4 p 271) and does not ordinarily require the foresight of the extent of the harm.

57. Based on the nature and type of harm which is the collision that started a fire, Blue can foresee that in the ordinary course of events when a robot's sensor malfunctions, the robot might damage the goods it collides into. However, the fire that ensued was a totally different type of harm. The objective test of what a normally diligent person could reasonably have foreseen as the consequences of non-performance in the ordinary course of things (Off Commentary) should be applied. It would take a leap of logic to argue that at the time when the Lease Agreement (Exhibit 18) was concluded that parties have foreseen the defect in one of Blue's robots would result in a fire in the warehouse. Furthermore, the collision itself could not have been anticipated, as the collision sensor malfunction was a defect potentially due to wear and tear-- something that parties could not have discovered earlier.

58. Even if the collision sensor malfunction was foreseeable, there were other contingencies Blue could not have anticipated. Given the instruction sheet and other forms of assistance Blue has rendered Red, Blue could not have expected that Red's staff would be negligent in keying in the locations. As much as Blue knows some information about Red's warehouse, Blue could not have foreseen that a fire could ensue even if such a collision occurs. The fire caused by a column of rack collapsing on top of the robot was such a culmination of an extraordinary series of events that Blue cannot foresee and ought not to be fixed with this degree of foresight.

59. Hence, pursuant to U7.4.4, Blue should not be liable for the loss of the merchandise and the repair of the factory. At the time when the contract was concluded, Blue could not reasonably expect that
    1. a robot would collide into a shelf, as the collision malfunction was proven to be a latent defect,
    2. Such collision would result in a fire
    3. The fire would cause a damage of 1.1 million

Q. Even if there was a breach, Blue should not be liable for the full amount of Red's damages as Red was contributorily negligent.

60. The causation rule in U7.4.2 stipulates that compensation is due only for harm that is "a result of non-performance". This is further supported by Comment 3 of U7.4.3. The causal link between the non-performance and resulting damages needs to be proven. Assuming Blue has failed to perform its obligation which amounted to a non-performance, the harm that ensued cannot be said to be a direct consequence of the failure to repair the collision prevention sensor in time. The collision between the shelf and robot resulted from many factors, including Red's negligence.

61. According to 1(5), Red should follow all instructions from Blue related to maintenance and usage of the robots. A copy of the instruction sheet was given to Red prior to the operation of the robot - Blue has given them sufficient time to resolve their queries, yet Red seemed perfectly clear about the operation of the robots. With reference to the instruction sheet (Exhibit 19), Red's staff has failed to enter accurate information regarding the change in the layout of the warehouse. This was identified as one of the contributing factors to the collision. Blue may have been liable for the damaged goods to the shelf it collided into, but it cannot be said that Blue is responsible for the fire since Red's negligence was an intervening act that broke the chain of causation.

62. In conclusion, Blue should not be liable for the full amount of Red's damages as Blue has not breached its obligations under the Equipment Lease Agreement. Even if there was a breach of warranty, the loss ensued was too remote and thus unforeseen to a reasonable man in the position of Blue.

Issue V: Red is liable to pay Blue damages for the loss of robots

R. Red's failure to maintain the robots in the same condition as at the time of delivery was a clear breach of the agreement

63. On the instruction sheet delivered to Red, it was stated that "prior to use, enter accurate information about the shape of the warehouse using the management app". Red's staff has failed to follow such instruction which culminated into a collision on 12 September; this amounts to a breach of Red's obligations according to Article 1(5). As a result of the said breach under Article 1(5), Red has breached Article 1(4) as the robots were lost in the fire primarily caused by Red's negligence in handling the robots. It is highly unlikely that such a collision would have taken place had Red's staff followed the said instruction presented on Exhibit 19.

S. The termination clause is operative, enabling Blue to claim for damages for the robots lost

64. Article 5(3) of the Equipment Lease Agreement requires Red to "return the Robot in a condition functionally equivalent to when it was delivered to Red", failing which "Red shall pay to Blue Fifty Thousand United States dollars per each such Robot". Pursuant to U4.1 read with U4.3, the common intention of parties is paramount in contractual interpretation. The fact that the parties read and signed the ELA indicates their explicit approval of this Article in its current form. This clause is hence enforceable.

65. Article 5(3) is unambiguous. From the plain meaning of the duly signed contract, as long as the robot is lost or damaged, the termination clause would operate. Under U5.3.1, it is a condition if it is premised upon an uncertain future event. A resolutive condition is a term that ends the contract should a future event take place. In the Equipment Lease Agreement, the contract comes to an end if 5(2)(iv) takes place, which is when "the Robot be lost or damaged to the extent it cannot be restored to a state equivalent to when it was delivered to Red". The robots have been damaged in the fire while it was in Red's warehouse. The condition has been satisfied, which enables Blue to terminate the contract and claim for damages for the robots lost pursuant to 5(3).