β-Case

ISSUE 1: IS RED UNDER OBLIGATION TO PROVIDE β-7 SERIES TO BLUE?

A. Red is obliged to provide the β-7 series to Blue because β-7 upgrade falls within Red's obligation to "replace parts and offer program updates" under Cl 2 of the Maintenance Agreement ("MA").

1. Red's stated reason for not providing the β-7 series to Blue is that the β-7 upgrade is so major that it is not covered by the complimentary upgrade clause of the MA. However the issue of which upgrades are covered by the MA and which are not has arisen before and a consideration of all relevant circumstances informs an interpretation of the MA that covers the β-7 upgrade.
2. Interpretation of terms is governed by Art 4, UNIDROIT, which prioritises the common intention of parties. Specifically, Art 4.3, UNIDROIT directs that this common intention is to be determined with regard to relevant circumstances such as preliminary negotiations and the subsequent conduct of parties. In this case both of these relevant circumstances point to the inclusion of β-7.

I. Subsequent conduct of Red in providing the β-5 and β-6 series indicate that the β-7 update is not so major as to be excluded from the MA.

3. Red's claim that the β-7 upgrade is so major as to be excluded from the MA must be analysed in light of the β-5 and β-6 upgrades which were previously provided under the MA. These were the two previous upgrades to the β series of equipment that are without dispute covered by the MA. Comparing the β-7 upgrade with both of these makes it clear the β-7 upgrade is not as major as these and must thus be covered by the MA.
4. The β-6 upgrade in particular added the completely new capability of AI driven analytics that enabled users to spot weaknesses and areas for improvement [27]. This was an improvement over the β-5 upgrade which similarly tracked Athlete movements and although had sophisticated software is not described as possessing Artificial Intelligence ("AI"). The research into AI is in today's context cutting edge technology and it is clear that the β-6 with its AI driven analytics is by any measure a major improvement over the previous version, the β-5.
5. In stark contrast to the addition of completely new AI technology with the β-6, the β-7 upgrade simply taps on β-6's AI analytics and extends it to the opposing team as well. While the ability to analyse the opponents as well as one's team is commendable, it is an upgrade which pales in comparison to the game changing introduction of AI to the β-6 series.
6. Red claims that the β-7 is too major an upgrade that it is not covered by the MA, but when compared to the β-6 upgrade, it becomes clear that "parts and program upgrades" under Cl 2 of the MA must include the β-7 as well.

II. Alternatively, preliminary negotiations between Red and Blue suggest β-7, as a "program update" should be included under the MA

7. The β series of sports analytic equipment comprises ultra-compact sensors along with analytic software that synthesises the sensor data into useful information about the athlete's state of mind to inform more targeted training. The two components to the β series are thus hardware and software, with the analytic component being the heart of the β series.
8. Even if the β-7 upgrade is found to be more major than the β-6 upgrade, the improvements of improved AI analytics are primarily software based and thus covered by Red's obligation to provide "parts and program updates in Cl 2 of the MA. The removal of the sensor component in β-7 simply underscores the software nature of the β-7 upgrade.
9. The dual nature of the β series of equipment gives rise to two types of upgrade- hardware upgrades involving the provision of new equipment for which Blue has to pay, and software upgrades improving the analytic component which are covered under the MA. This dichotomy of upgrades is made by Red's representative in preliminary negotiations at [22] of the Agreed Statement of Facts ("the Facts"), where Red's representative employs the term "*parts…and program upgrades*", in contradistinction to "*basic design changes and significant changes to the specifications of the equipment*". In this preliminary negotiation immediately preceding Blue's decision to enter into the Maintenance Agreement, Blue's representative asks her Red counterpart if Blue would need to pay for all subsequent improvements to the α and β equipment, to which Red's representative explains:

"Not every time. Some improvements are major improvements requiring significant changes to the specifications of the equipment, but many improvements only involve improvements on select parts or select sensor replacements or program updates"

The implication is that there are two sorts of upgrades: those which involve hardware redesign, and those which are primarily software upgrades; the latter category of upgrades need not be paid for.

10. The β-7 improvements remove the sensor component, and must include the brought by the β-7 upgrade are primarily software upgrades along with improvements to select parts of the equipment, rather than a fundamental re-design of the hardware. Red is thus obliged to provide β-7 under Cl 2 of the MA.

B. Alternatively, Red is obliged to provide β-7 to Blue on pursuant to Cl 10 of the MA.

11. Even if the β-7 upgrade is not covered by Cl 2 and requires provision of a "*new version of the equipment*" specifically excluded by Cl 6(e) of the MA, Blue can request the provision of the β-7 under Cl 10 of the MA, which obliges Red to "*use reasonable efforts to provide such service at 90% ... of its then current rates*". At issue then is whether the Sports Agency asking Red to avoid distributing the β-7 exempts Red from this obligation.
12. Reasonable efforts must be evaluated with respect to what a reasonable person should do in the situation of Red, taking into consideration all surrounding factors. In this case, Red is a large organisation with close ties to the Negoland's Sports Agency. Not only is this relationship a close and collaborative one, the commercial reality of Red's business making up 4% of Negoland's GDP suggests that Red does have some say in this relationship. It is thus eminently reasonable for Red to seek permission from the Sports Agency to enable Red to uphold its end of the contract (para [34] of the Facts).
13. It is crucial to note that the purpose of the Sports Agency directive to "*refrain from distribution the β-7 series*" ([34] of the Facts) was to prevent the β-7's opponent-analysing functions from being used against Negoland's teams in upcoming tournaments for three specific sports: Volleyball, Basketball and Badminton in 2018, and Red knows this. Not only would these competitions have already been over, even if Red restricted the use of β-7 for Basketball and Volleyball, Blue utilises the β series equipment in eight other locations, for which the provision of β-7 devices customised to those other sports would not conflict with Negoland's competitive interests. Even more pertinent, Blue's primary sports of Sprinting, Golf and Swimming are individual sports, whereas the β-7 's key capability is an analysis of opponents- a capability which would aid Blue greatly without infringing on Red's competitive interests. Obliging Red to work some arrangement to provide the β-7 to Blue is thus eminently reasonable.

ISSUE 2: IF RED IS UNDER OBLIGATION TO PROVIDE β-7 SERIES TO BLUE, SHOULD THE TRIBUNAL ORDER RED TO PROVIDE β-7 SERIES TO BLUE?

A. This Tribunal should make an order for Specific Performance to provide β-7 series to Blue.

I. There is no Legal Impediment on the performance of the contract because the Sports Agency's Directive was a mere request.

14. In accordance with the general principle that the contract is binding on the parties (Art 1.3 of UNIDROIT), Art 7.2.2 of UNIDROIT expressly provides that each party is entitled to require performance by the other party of non-monetary obligations under the contract, unless there is:
    (i) Impossibility of performance in law; or fact;
    (ii) Unreasonable burden of performance;
    (iii) Performance can be obtained from another source;
    (iv) Performance is of an exclusively personal character; and
    (v) Party entitled to performance does not require performance within a reasonable time.
15. In the present case, this tribunal should order Red to provide β-7 series to Blue because it is a mandatory remedy, in the absence of any of the exceptions above (Official Comment 2 to Art 7.2.2). The issue before this turbinal is whether the Sports Agency asking red to refrain from distributing the β-7 constitutes impossibility of performance in law, excusing Red from performance of its contractual obligation to provide β-7.

16. The threshold for impossibility of performance in law is high. This reflects the strict contractual liability favoured by the UNIDROIT principles (*Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, by Stefan Vogenauer and Jan Kleinheisterkamp, Oxford University Press, 2009 at page 864, Para 1 [*Vogenauer*]). *Vogenauer* at page 892, Para 22 further notes that a *Force Majeure* event might fall under Art 7.2.2(a). Hence, given the high standard for impossibility of performance, this tribunal should be slow to find that the Directive constitutes a legal impediment.
17. As illustration of the high threshold for legal impossibility, *Vogenauer* at page 871, Para 20 notes that a legal impossibility typically requires official trade embargoes or bans, neither of which is present here. Standing in stark contrast to the high standard expected of Legal Impossibility, all Red seeks to rely on is a Sports Agency to "asking" red to "refrain from distributing" the β-7 series failing which this agency will "pressure" the ministry of External Trade who will "most likely" stop the exports "without permission" ([34] of the Facts). It should be clear that this long chain of speculation does not satisfy the high standard of Legal Impossibility under UNIDROIT.
18. A distinction must be made between a request and an order. The former implies that the act to be done is not mandatory, while the latter implies that the act must be complied with strictly. Since Red has clearly noted that the Sports Directive only "issued a directive ***asking*** [Red] to refrain from distributing the β-7 series" (at [34] of the Facts) (emphasis added), it is quite clear that the Red would not have been bound by the Sports Agency's mere request and their non-performance warrants an order of specific performance.
19. Even if this tribunal empathises with Red's concern regarding their relationship with the Sports Agency (at [13] of the Facts), not only is this detriment purely speculative, it is patently absurd that such considerations can entitle Red to breach its contractual obligations, especially in light of UNIDROIT's strict contractual liability approach.
20. Art 6.2.1, UNIDROIT makes clear that given the binding nature of the contract, "performance must be rendered so long as it is possible and regardless of the burden it may impose on the performing party". As such, regardless of the deterioration of relationship with the Sports Agency, given that Red has already agreed to be bound to the contract, this tribunal should order specific performance.
21. If this tribunal were to find a legal impediment to performance as a result of *any* Government Agency issuing letters and directives purporting a ban on exports, it would promote uncertainty for International Commercial Contracts. This is because much speculation would arise as to the legal effect of such directives and would affect business between commercial entities.
22. Indeed, even if the Sports Agency could threaten to pressure the Ministry of External Trade to impose trade restrictions on the β-7 series, the actual imposition of the restriction is merely speculative on the facts, and this tribunal should not give any legal effect to the threats made by the Agency, given the inherent uncertainty.
23. Overall, this would go against the binding nature of contracts as a general principle under Art 1.3, UNIDROIT.

B. Alternatively, Red is obliged to pay liquidated damages because of the non-performance of supplying Blue with the β-7 series to Blue

24. Even if the Sports Agency's request constitutes Legal Impossibility, Red would still be liable for damages pursuant to Art 3.1.3 of UNIDROIT which provides that the contract still subsists despite impossibility of performance at the time of the contract. The official commentary to this article makes a distinction between the operation of law to prohibit performance of the contract or to invalidate the contract. In our case the Sports Agency's request only operates on performance, leaving the contract valid and subsisting. Furthermore, support for the contract subsisting is found in the official commentary to Art 7.2.2(a), UNIDROIT which states that impossibility of performance does not nullify the contract.
25. The contract in question is the MA found at Exhibit 5 of the Facts, which was most recently renewed in December 2017, 4 months after Red developed the β-7 series in August 2017. At this point Red must have known of the Sports Agency's request which was made "even during development" of the β-7 (at [34] of the Facts), and certainly by December 2017 when the MA was renewed. Since at the point of contracting Red knew of this "Legal Impossibility", Red is liable to Blue for liquidated damages under Cl 7 of the MA.

ISSUE 3: CAN RED SET-OFF BLUE'S OBLIGATION TO PAY US$3 MILLION AGAINST ITS OWN OBLIGATION TO PAY LIQUIDATED DAMAGES?

A. Red cannot do this as its $3 Million claim against Blue is itself set-off by the damages Blue has suffered.

26. It is important to first lay out the 3 claims which are relevant to this section:
    (i) Blue owes Yellow $3 Million for purchase of Underwater Equipment
    (ii) Yellow owes Blue $3 Million for the failure to maintain Underwater Equipment.
    (iii) Red owes Blue $5 Million in liquidated damages.
27. Red wishes to set-off its obligation (iii) against (i) which Red holds on assignment from Yellow. However, because Blue can first set-off (ii) with (i), Red has no claim with which to set off its obligation (iii) and must pay the full $5 Million in liquidated damages.
28. With regard to (i), which is an obligation owed by Blue to Yellow, Blue –the obligor– can exercise against Red –the obligee– any right of set-off Blue had against Yellow up to the point when notice of assignment was received (Art 9.1.13(2), UNIDROIT). The official comment to this article observes that the key requirement is that the right of set-off must arise under Art 8.1 *before* the notice of the assignment. Notice of assignment in this case was on 1 October 2017 made via a phone call from Red to Blue ([31] of the Facts). The issue is thus whether Blue had the right to set-off (ii) against (i) before the 1st of October 2017.
29. Blue's right to set-off arises the moment two conditions are satisfied: (1) Blue must be entitled to perform its obligation (Art 8.1(1)(a), UNIDROIT) and (2) the obligations of both parties arise from the same contract (Art 8.1(2), UNIDROIT). The first requirement is not in dispute as Blue is obliged to pay $3 Million for the contract price of the Underwater Equipment.
30. As regards to the second requirement, it is submitted that "the same contract" encompasses complex contracts. Complex contracts exist when "two or more contracts concluded separately are linked by the intention of the parties in such a way that they should be considered to be unified both economically and in law." (*Vogenauer* at page 1052, Para 44). To narrowly construe "the same contract" preclude parties involved in more complex relationships where dealings cannot be reduced to single contracts from the convenience of a set-off. Given that international dealings are often complex, the narrow interpretation robs Art 8.1(2), UNIDROIT of much of its utility.
31. The obligations of both Blue and Yellow arose from the same complex contract and this is seen in the plain text of the contract itself but also in the prior negotiations of parties. In the first place, the MA (Exhibit 8) is prefaced "Further to the Sales Agreement..." which it goes on to note, was also concluded on the same day. This is because the MA was entered into, *in addition* to the Sales Agreement and were intended to be understood together to encompass a single, albeit complex, deal. Furthermore, in prior negotiations, Orange (representing Yellow) stated at [29] of the Facts that "...maintenance is absolutely necessary... Please consider a maintenance contract as *attached* to the product purchase" [emphasis added]. Both contracts were linked by the intention of the parties to treat them as part of a *single dealing*, as evidenced by Sapphire's summary concluding the negotiation at [29] of the Facts.
32. Therefore, a right of set-off became available at the conclusion of the contracts, which was before October 1, 2017. Blue can therefore set-off its damages of US$3 million against Red's claim of US$3 million.

B. Alternatively, Red's inconsistent behaviour in failing to support Yellow's maintenance of Blue's underwater censors and cameras, ("Underwater Equipment") makes Red liable to Blue for US$3 million which sets off Red's own claim.

33. Inconsistent Dealing is proscribed by Art 1.8, UNIDROIT and is linked to the requirement to act in good faith. In order to raise inconsistent dealing, the following elements must be satisfied: (1) Red must have caused Blue to have an understanding, which (2) Blue acted reasonably in reliance upon, but (3) Red's subsequent behaviour inconsistent with this understanding (4) led to loss suffered by Blue.
34. The first requirement is satisfied when Red caused Blue to have the Understanding that Red would "give the best support possible to keep proper maintenance by Yellow" (at [31] of the Facts) of

Blue's Underwater Equipment. This was a representation made in response to Blue expressing concern that "[Blue] would have serious trouble, if Yellow … fails to perform a regular maintenance" [31]. The understanding Red caused Blue to have was that Red would at least take reasonable efforts to support Yellow's continued maintenance of Blue's Underwater Equipment, and that Blue "need not worry" [31] that they would suffer any consequences such the deterioration of the equipment from lack of maintenance.

35. Acting reasonably on this Understanding, Blue acknowledged the assignment of Yellow's claim to Red, did not seek further or definitive assurance from Red to guarantee Yellow's maintenance efforts, and finally did not take any action themselves to give whatever support Yellow might need to ensure continued maintenance of the Underwater Equipment. Blue lacks any place of business in Negoland [15] of the Facts and this reliance on the assurance of their trusted business partner Red is perfectly reasonable.
36. Yet despite having caused an Understanding in Blue upon which Blue has relied, Red proceeded to act inconsistently by refusing Yellow's request for emergency financial assistance, leading directly to Yellow's bankruptcy (at [32] of the Facts), thereby ensuring that Yellow's Maintenance duties would not be fulfilled.
37. Fourthly, this inconsistency has resulted in detriment to Blue given that Blue's underwater equipment has deteriorated to the point where the previous equipment performs better (at [32] of the Facts). Furthermore, in exercising the security interest, Red would be making Blue pay for equipment which is effectively less useful than the previous version of the equipment.
38. The Official comment 3 to Art 1.8, UNIDROIT states that the "responsibility imposed... is to avoid detriment being occasioned". Red is unable to give the remedy of maintaining the underwater censors and cameras, since it lacks the expertise Yellow has (at [28] of the Facts). Therefore, the only remedy available to Blue is damages of the same amount it incurred for the loss of maintenance, which is US$3 million.
39. Pursuant to Art 8.1 of UNIDROIT, Blue can set-off this amount against its own obligation to pay Red given that firstly, Blue is entitled to pay US$3 million to Red, and Red's obligation (to pay Blue US$3 million) is ascertained as to its existence and amount and performance is due.

Event Case

ISSUE 1: WHETHER BLUE IS IN BREACH OF ITS OBLIGATION UNDER THE AGREEMENT FOR FAILING ITS PROMISES OF APPEARANCES; AND IF BLUE IS IN BREACH, WHAT IS THE DAMAGES TO BE AWARDED?

C. Blue is not in breach of its obligations since it never undertook any such obligation in the first place.

40. There is nothing in the Agreement between Red and Blue (Exhibit 9) that stipulates an obligation on either party to ensure the participation of the athletes.
41. Cl 2(8) of the Agreement merely stipulates that Williams, Tiger and Bolt "will participate". There is no positive obligation on Blue to procure their participation.
42. Cl 3(2) of the Agreement stipulates that both parties are responsible that their athletes and teams will participate in good condition. This means that if the athletes and teams were to participate, then there is an obligation to ensure that they are in good condition. It imposes no obligation to ensure that they participate in the first place.
43. Nevertheless, without prejudice to the aforementioned, the subsequent analysis proceeds on the assumption that Blue is obliged to procure the appearances of the athletes.

D. Blue has not breached its obligation because Bolt's absence was a result of Red interfering by cancelling his appearance.

44. Red cannot rely on Blue's non-performance given that Red's decision to cancel Bolt's appearance interfered with Blue's performance of the Agreement, causing it to be completely impossible to perform (Art 7.1.2, UNIDROIT).

45. In this vein, Red cannot argue that the doping ban on Bolt imposed by the Sports Arbitration Tribunal of Arbitria caused, partially or otherwise, Bolt's absence, because the suspension period was not only reduced to one month but also backdated to commence from April 16, 2018 ([40] of the Facts). Bolt was thus entirely able to participate in the Nego-Abu Cup but for Red's interference.

46. In such a situation, Official Comment 1 to Art 7.1.2 states that the "relevant conduct … loses the quality of non-performance altogether". Since Bolt's non-appearance does not even constitute non-performance of the Agreement, Blue is not liable to pay any damages whatsoever.

E. Even if Blue were found to be in breach, Blue had taken steps to cure this breach such that Red may not seek any damages.

47. Art 7.1.4(1), UNIDROIT lays down 4 conjunctive requirements to cure a breach: (a) without undue delay, Blue gives notice indicating the proposed manner and timing of the cure; (b) cure is appropriate in the circumstances; (c) Red has no legitimate interest in refusing cure; and (4) cure is effected promptly. Official Comment 2 to Art 7.1.4 states that a notice of cure is considered "effective" when requirements (a)-(c) have been met.

48. Blue has satisfied the requirements under (a)-(c) ([40] of the Facts) since, within 21 days of Arbitria's Anti-Doping Organisation's test results being released, Blue proposed to Red at a meeting between their representatives that a "press conference" should be set up for Bolt to declare that "he made no mistake" and that "he will be extra cautious in the future". It is submitted that the 21 days does not constitute an undue delay because within these 21 days, Blue had requested emergency arbitration seeking an annulment or reduction of the suspension. Furthermore, Blue was confident that the suspension would be reduced to one month in which case, Bolt would be able to participate. However, even if the suspension were upheld at four years, Bolt would not be able to participate anyway. Therefore, 21 days in this context does not constitute an undue delay.

49. The press conference was undoubtedly appropriate in the circumstances because Red was concerned to ensure that participating athletes were not marred by doping allegations. Therefore, a press conference for Bolt to declare that he made no mistake and that he will be extra cautious in the future would be appropriate since it would send a signal to the public that the doping incident was a genuine mistake that would not happen again.

50. Regarding (c), while Red has given the reason for cancelling Bolt's appearance to be to "show [their] resolute stand against doping", it is submitted that this is not a legitimate interest in refusing the cure proposed (i.e. the press conference). Official Comment 4 to Art 7.1.4 contemplates that there would be a legitimate interest if there is a danger of damage to person or property. While these may not be exhaustive, it is submitted that a legitimate interest cannot encompass just any reason since this would effectively preclude the possibility of cure. There is no such danger to person or property in holding the conference; where the cure would effectively deal with the aggrieved party's concerns, there should be no legitimate interest in refusing the cure.

51. Since Blue's notice of cure is "effective", Red must cooperate with Blue pursuant to Art 5.1.3 and permit the cure to be carried out. Since Red has refused, it may not seek remedies for any breach by Blue (Official Comment 10 to Art 7.1.4, UNIDROIT).

52. Nevertheless, Art 7.1.4(5), UNIDROIT provides that notwithstanding cure, Red retains the right to claim damages for the delay as well as for any harm caused or not prevented by the cure. Notwithstanding this, Red should not be entitled to any damages. The cure offered by Blue (the press conference) would have caused no delay or harm to Red and would in fact have allowed Bolt to participate in the Nego-Abu Cup as planned without it being tainted by the findings of doping. The only reason for his non-participation is Red's unreasonable refusal of cure and Blue should not have to pay damages for this.

F. In respect of William's absence, Blue has not breached its contractual obligations because Red has failed to take reasonable steps to enable William's performance.

53. Blue argues that the non-performance of Williams at the Nego-Abu Cup was due to the lack of reasonable cooperation by Red (Art 5.1.3, UNIDROIT). This will result in Red being the non-performing party instead which absolves Blue of liability.

54. Red is under a positive duty [*Vogenauer* at page 622, para 5] to provide assistance that will enable Blue to perform its obligations satisfactorily insofar as it is reasonable for Red to do so. This is in

line with Official Comment 1 to Art 5.1.3 which states that Red is obliged to "take affirmative steps to enable the other party's performance".

55. On the facts, Negoland has been experiencing extremely warm weather the last five years, especially in the last two years with temperatures averaging more than 35°C for two-thirds of the month in every July since 2016 (Exhibit 1).With this recent history of warm weather coupled with the announcement one month prior to the tennis match that temperatures were set to hit 35°C for 10-15 days in a row in July with some days topping 40°C ([42] of the Facts), it would be considered dangerous and risky to the health of Williams if she were to participate. For her to do so would see her taking on an extra burden pursuant to the contract which would invariably upset the allocation of duties in favour of Red.

56. In order to balance this disproportionate allocation of duties, it would be entirely reasonable to expect Red to implement anti-heat measures such as using indoor venues notwithstanding the added costs in doing so. While it is acknowledged that Red has to bear the $50,000 cancellation fee coupled with the reduction in ticket sales, Red did in fact have the choice of either acting within its duty of cooperation or risk suffering greater losses by having athletes reasonably refusing to participate in the Nego-Abu Cup. Having selected the former, Red should be able to then blame Blue for Williams' absence and Blue should thus not be liable for any damages.

G. Even if Red's withholding of assistance is deemed reasonable, Blue is not liable as Red has breached the implied term of good faith and fair dealing.

57. If the Arbitral Tribunal is not satisfied that imposing a positive duty on Red under Art 5.1.3 of UNIDROIT is reasonable, Blue may still avail itself of Art 1.7 that imposes a duty of good faith throughout all phases of the contractual relationship (*Vogenauer* at page 209, para 8). The duty of good faith and fair dealing is a mandatory one which is implied in the Agreement (Exhibit 9) and Red has breached this implied obligation. A finding of a lack of good faith by Red will then render Cl 2(8) of the Agreement void, thus releasing Blue of any contractual obligation.

58. This implied obligation of good faith in the context of Art 5.1.2(c) can be defined to include the "protection of life, limb, and personal property" (*Vogenauer* at page 219, para 27). Red has failed to meet this standard of good faith as they have not taken adequate steps to counter the risk of athletes potentially suffering from heat injuries which can be life threatening owing to the recent warm weather in the months of July exceeding 35°C. If Williams and other athletes were to participate, they run the real risk of suffering from heat injuries given the prolonged period of time that tennis players are expected to play for with several sets in each game. Red's breach of this implied term is compounded by the fact that despite Blue having given Red two weeks prior notice that Williams will not be able to participate if no appropriate counter-measures are taken [para 43], Red has refused to make any concession.

59. As Red has not acted in good faith, Red will not be able to avail itself of remedies against Blue's non-performance because Cl 2(8) is rendered "non-applicable" where "such an application would result in a grossly inequitable outcome". (*Vogenauer* at page 223, para 40). Red will thus be unable to hold Blue liable for non-performance and as such Blue is not liable for damages.

H. If Blue is still liable for Williams' non-performance, the damages awarded to Red should be reduced to correspond to the extent that Red has contributed to William's non-performance

60. In any case, even if Blue were in breach, it is not liable to Red for full compensation for a breach of Cl 2(8) of the Agreement. Blue may rely on Art 7.4.7, UNIDROIT to reduce the amount of damages owed to Red to the extent that Red contributed to the very harm they suffered.

61. To satisfy Art 7.4.7, there first needs to be a causal link between the harm suffered by Red and their omission. Harm in this instance can be defined as the reduction in ticket sales and revenue from sale of broadcasting rights that Red suffered as a result of Williams' non-performance. This causal link need not constitute but-for causation [*Vogenauer* at page 1006, para 4] and would thus be fulfilled by Red as their unwillingness to change the venue of the Tennis match made it reasonable for Williams to walk away from participating. It is thus at least a contributory cause in the reduction of ticket sales.

62. The omission by Red to take reasonable steps to ensure William's health and safety could constitute as tortious conduct [*Vogenauer* at page 1006, para 5] as it would be considered negligent of Red to have no regard for the health and safety of Williams when she is playing on premises which is under Red's care and control.

63. While the UNIDROIT PICC do not provide much guidance on the apportionment of damages, it is clear that Red's failure to implement the anti-heat measures was a relatively significant cause for Williams' absence. Therefore, the damages owed by Blue to Red (if any) should be reduced by at least 50%.

I. In respect of Hosszu's absence, Blue had not breached its contractual obligations and in any case, Cl 4(1) of the Agreement provides a valid defence.

I. The Steering Committee, not Blue, is the party obliged to book Hosszu's first-class air tickets.

64. Red has no basis to sue Blue for Hosszu's absence because Blue was not obliged to ensure Hosszu's presence. This is because Emerald, a committee member, was responsible for booking her flight. Furthermore, the Steering Committee had told Hosszu that it had booked a first-class seat for her ([44] of the Facts). These facts clearly show that the obligation for booking Hosszu's flight fell on the Steering Committee, not on Blue.

65. Notwithstanding that Emerald, who had failed to book a first-class air ticket in the first instance, was a committee member seconded by Blue, it is submitted that the Steering Committee is a separate legal entity from Red and Blue. On this basis, since Emerald had booked the tickets in her capacity as a committee member and that she was acting under the authority of the Steering Committee, her acts should be considered an act of the Steering Committee and not of Blue.

66. The separate legal personality of Blue is evidenced through two main factors. Firstly, the Steering Committee has the capacity to pass resolutions to accept or reject any suggestion by Red or Blue for the Nego-Abu Cup, thus the requirement for Blue to write the memo (in Exhibit 10) to it. This shows that the Steering Committee is a vehicle to represent each parties' interests and that the actions of a member of the Steering Committee acting under the authority of the Steering Committee cannot be imputed to either Red or Blue.

67. Secondly, a contract was entered into between Blue and the Steering Committee ([44] of Facts). The Steering Committee's contracting capacity clearly shows that it is a separate legal entity and that the acts of its members should not be imputed to the parties who put them there in the first place (i.e. Red or Blue).

II. Even if Blue was obliged to book the first-class air tickets, it has fulfilled its contractual obligations to do so.

68. Nevertheless, even if Blue were the party obliged to book Hosszu's air tickets, it had fulfilled its contractual obligation to do so. The terms in Exhibit 10 clearly show that that the obligation created is only to book a first-class airplane ticket for Hosszu to appear immediately before the Nego-Abu Cup.

69. In this case, the first-class ticket booked would still have allowed Hosszu to arrive in Nego-Town in time for the event ([44] of the Facts). Therefore, the fact that the first-class ticket booked was a replacement ticket is of no relevance since there was no breach of contract in the first place.

III. Even if Blue were found to be in breach, Cl 4(1) of the Agreement provides a valid defence.

70. Cl 4(1) of the Agreement provides that "in the event of any failure or delay in the performance of this Agreement due to … natural disaster, or any other cause whatsoever beyond the reasonable control of a party so affected, the said party shall not be liable for such failure or delay or results thereof." In the present case, a volcanic eruption that caused a shutdown of the airport was a natural disaster or in any case, was a cause beyond the reasonable control of Blue. Therefore, Blue "shall not be liable for such failure".

IV. Red cannot claim damages for the lack of notice.

71. It is acknowledged that Blue had not provided notice to Red regarding the airport closure due to the volcanic eruptions as required by Cl 4(1) ([44] of Facts). However, this does not render the defence

under Cl 4(1) invalid. An interpretation of Cl 4(1) suggests that failure to give notice does not render the defence invalid since the non-liability is not in any way premised on the service of notice. The notice requirement merely provides the basis for both parties to meet and discuss the appropriate or necessary steps to take.

72. Even if the position under Art 7.1.7, UNIDROIT were considered, the same outcome will be arrived at. Vogenauer's Commentary on Art 7.1.7(3) states (at page 878, para 41) that an omission to give notice does not deprive the defaulting party of its exemption from damages based on force majeure. The only consequence of absence of notice is to make the defaulting party liable for any damage caused to the innocent party by the absence of notice. Therefore, the damages, in the form of reliance losses, claimed must have a causal link to the absence of notice. If the innocent party is already aware of the supervening event and its consequences on the ability of the defaulting party to perform its obligations, the former cannot wait and ask for damages in the case of delay. It has a duty to mitigate by taking precautionary measures.

73. In this case, Red has in fact taken the mitigatory steps of inviting Erica and Asuka to participate in the Nego-Abu Cup and had received $1m in internet streaming profits. As argued below, Blue is seeking an equal share of this profits. Therefore, the remaining profits retained by Red will exceed any damage caused by the lack of notice. By Art 7.4.8, UNIDROIT, Blue is not liable for harm suffered by Red to the extent that the harm could have been prevented by Red taking reasonable steps. In this case, since Red's mitigatory steps have allowed it to turn a profit, Blue should not have to pay any damages for the lack of notice.

ISSUE 2: IS RED OBLIGED TO SHARE THE PROFIT OF US$1 MILLION FROM INTERNET STREAMING WITH BLUE?

A. Red is obliged to share the profit of US$1 million from internet streaming equally with Blue pursuant Cl 3(8) of the Nego-Abu Cup Agreement (Exhibit 9), so that Blue is entitled to US$500,000.

I. Red must share the profits because "internet streaming" is encapsulated by Cl 3(8) of the Agreement (Exhibit 9) by the term "event telecasting", in light of both parties' common intention.

74. The first principle of contractual interpretation is that the contract shall be interpreted according to the common intention of the parties, pursuant to Art 4.1(1), UNIDROIT. The common intention of the parties in this situation should be established by reference to the contract as a whole (Art 4.4) and the meaning commonly given to terms and expressions in the media broadcasting industry (Art 4.3e))

75. According to Official Comment 1 to Art 4.4, "terms and expressions used by one or both parties are clearly not intended to operate in isolation but have to be seen as an integral part of their general context". The Nego-Abu Cup was held as a joint venture ([37] of the Facts). In this respect, collaboration between Red and Blue was one of the key elements in the organisation of the Nego-Abu Cup. It would be contrary to the nature of the agreement for any term in this joint venture agreement to be read in such a way as to place an onerous burden one party to benefit the other. Therefore, when considering this term in light of the contract as a whole, it can be deduced that it was the common intention of the parties that "event telecasting" is given a wide, rather than narrow interpretation to include profits derived from internet streaming. all broadcasted screenings, regardless of platform.

76. It is clear from Cl 3(7) that videos of the Nego-Abu Cup will be distributed in Negoland via Red's internet streaming programmes while Blue will do so by Blue's own cable TV channels and through the sale of broadcasting rights. If internet streaming profits were not intended come within the definition of "event telecasting", Blue will be the only party obliged to split profits while both Blue will also have to share in costs incurred by Red (according to Cl 3(6)). This would lead to a grossly unfair outcome for Blue. To find otherwise would be for the obligations of payment to be stacked strongly against Blue, an effect that could not have been the common intention of the parties at the time this joint venture agreement was entered into.

II. Event telecasting must be interpreted to include internet streaming because such an interpretation is the meaning commonly ascribed to event telecasting.

77. In any case, Cl 3(8) of Exhibit 9 must be interpreted to include profits from "internet streaming" because it is the current common usage to include "internet streaming" and "telecasting" together as broadcasting in general given the technological advances and the ubiquity of internet streaming when it comes to sports entertainment.
78. Given that internet streaming and telecasting both involve the transmission of audio and visual content to an audience, the industry has begun to treat both types of broadcasting similarly for legal purposes as they serve the same function in essence but merely differ in methodology.
79. Countries such as Germany have also responded in kind by amending their legislation, the Interstate Treaty on Broadcasting and Telemedia to treat internet streaming and telecasting as one and the same due to their functional similarity, thus subjecting them to the same regulations. This is also the case in Singapore with recent amendments to the Broadcasting Act to a similar effect. With this gradual acceptance and realization by the media entertainment industry and within several jurisdictions, Red and Blue should be following suit by giving effect to the term "event telecasting" as it has come to be recognized in this industry by adopting a broad interpretation that includes internet streaming.
80. The fact that Erica and Asuka were the main reason for the profits that Red generated is irrelevant. If internet streaming falls under "event telecasting", then the plain and ordinary meaning of the term, which is that profits are to be shared "equally", is beyond dispute. Blue is therefore entitled to US$500,000.