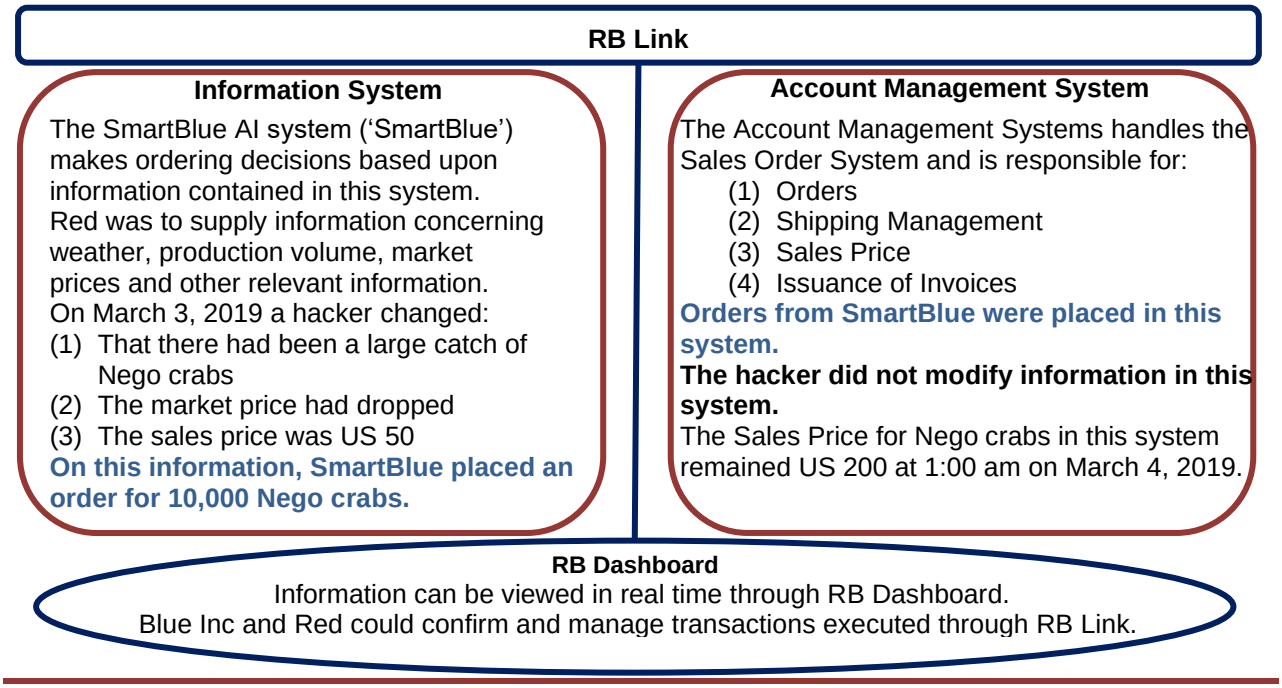
SUMMARY OF RED CORPORATION'S SUBMISSIONS

1. A contract was formed between Red Corporation ('Red') and Blue Incorporated ('Blue') for the sale of 10,000 Nego crabs.
2. Blue cannot avoid the contract for mistake.
3. Alternatively, if Blue can avoid the contract, Blue must provide restitution at USD 200 per crab.
4. Red's sale price per crab was USD 200; Blue is obliged to pay Red USD 2 million.
5. Blue was responsible for the sale of the crabs when Blue entered into the contract of sale with Green Corporation ('Green') because Blue owned the crabs.
6. Red is not bound by obligations arising from the contract between Blue and Green ('the Green contract') because Red was not a party to the Green contract.
7. Blue was not acting as Red's agent when Blue executed the Green contract.



1. A contract was formed between Red and Blue for the sale of 10,000 Nego crabs

Red submits that:

1.1 Blue submitted a valid order for 10,000 Nego crabs at 1:00 am March 4, 2019 through SmartBlue; Red accepted the offer through automated processing.

1.2 Red and Blue formed a valid contract.

1.3 Alternatively, Red accepted Blue's offer by conduct the moment the crabs left Red's warehouse.

1.1. Blue submitted a valid order for 10,000 Nego crabs at 1:00 am March 4, 2019 through SmartBlue; Red accepted the offer through automated processing

1. SmartBlue placed an order in the account management system for 10,000 Nego crabs on March 4, 2019 [¶14].

2. SmartBlue made the order on the basis of data in the information management system. Prior to the order, a hacker changed data contained in the information management system on March 3, 2019 [¶14].
3. The price of Nego crabs was listed as USD 200 per crab in the account management system. Although the hacker changed the price in the information management system, the hacker did not change the price on the account management system.

1.2. A valid contract was formed between Red and Blue

4. A contract forms through 'the acceptance of an offer or by conduct of the parties that is sufficient to show agreement' [*UNIDROIT Principles of International Commercial Contracts* ('UNIDROIT') Art 2.1.1]. This includes 'automated contracting', where parties agree to use an autonomous system to make decisions without involvement from a natural person [UNIDROIT Art 2.1.1 Off Cmt 3].

1.2.1. Blue made an offer

5. An offer is a proposal which is 'sufficiently definite and indicates the intention of the offeror to be bound' if acceptance occurs [UNIDROIT Art 2.1.2].
6. 'Sufficiently definite' does not mean that the offers require all essential terms such as the price or time of delivery [UNIDROIT Art 2.1.2 Off Cmt 1].
7. Each order placed by SmartBlue fulfils the definition of 'offer'. This is demonstrated by the communication process changing – from Red and Blue faxing all correspondence, to Red and Blue using RB Link for all correspondence [Ex. 6]. This change in process was valid, because the Memorandum of Understanding was made in writing by Red and Blue [Ex. 4 cl 6(4)]. Moreover, Blue used RB Link to place orders, and Red used RB Link to fulfil the orders between January 2019 and March 2019 [¶ 11, 13]. This shows that ordering through RB Link was a practice established between the parties [UNIDROIT Art 1.9].

1.2.2. Red accepted the offer

8. UNIDROIT defines acceptance as 'a statement or conduct of the offeree indicating assent to an offer' [Art 2.1.6 (1)]. Red automatically confirms orders placed by Blue and these are displayed in RB Dashboard [Ex. 6 cl (4)]. This automatic confirmation demonstrates assent to each offer placed by Blue and constitutes acceptance within the UNIDROIT definition.
9. Acceptance is effective once it reaches the offeror. [UNIDROIT Art 2.1.6 Off Cmt 4]. Acceptance by Red is effective once it reaches Blue. The receipt principle provides the time of receipt as when it is able to be retrieved by the addressee at its designated electronic address [UNIDROIT Art 1.10 Off Cmt 2]. Blue has indicated that RB Dashboard is the electronic address for order confirmation.
10. Blue received the order confirmation from Red at 1:00 am March 4, 2019 in RB Dashboard [¶15] and this order confirmation could have been retrieved by Blue immediately. As the confirmation was easily retrievable, it is irrelevant that March 4, 2019 was a national holiday in Arbitria.
11. Therefore, a valid contract was formed for 10,000 Negocrabs at 1:00 am March 4, 2019 [UNIDROIT Art 2.1.1].

1.3. Alternatively, Red accepted Blue's offer by conduct the moment the crabs left Red's warehouse

12. Red's acceptance of Blue's offer was effective from the moment the crabs left Red's warehouse to be shipped to Blue [UNIDROIT Art 2.1.6(3)].
13. Red and Blue established practices that meant shipping instructions for orders were automatically sent to the warehouse and the goods were to be shipped. The only exceptions were instances when Red was unable to complete the order. For example, when Red had insufficient inventory to complete Blue's order [Ex. 6(5)].
14. Red's conduct of shipping the goods to Blue according to the established practices of parties is acceptance by conduct from the moment that the crabs left Red's warehouse.

2. <u>Blue cannot avoid the contract for mistake</u>

Red submits that:
2.1 Blue cannot avoid the contract for mistake.
2.2 Blue assumed the risk of exposing itself to inaccurate information.
2.3 Alternatively, Blue should bear the losses resulting from the mistake, considering all the circumstances.

2.1. Blue cannot avoid the contract for mistake

15. A contract is avoidable for mistake [UNIDROIT Art 3.2.1 - 3.2.3]. UNIDROIT defines mistake as a wrong assumption relating to facts or law existing when the contract concludes [UNIDROIT Art 3.2.1].
16. Blue cannot avoid a contract if 'the mistake relates to a matter to which the risk of mistake was assumed, or having regard to the circumstances, should be borne by the mistaken party' [UNIDROIT Art 3.2.2 (2)(b)].

2.2. Blue assumed the risk of exposing itself to inaccurate information

17. Blue assumed the risk of relying on inaccurate information for the purpose of ordering.
18. Blue agrees that Red is not responsible for the accuracy of the information that it provides to Blue through RB Link for SmartBlue. Blue expressly stated 'We agree that *you are not responsible for the accuracy of the information'* [Ex. 7, email dated November 17, 2017].
19. Red also stated '*We would also like to confirm that Red Corp is not responsible for the accuracy of information provided by third parties*' [Ex. 7, email dated November 15, 2017]. At a minimum, this means that Red is exempt from liability for information provided by third parties.
20. A hacker should be considered a 'third party' as it was not an agent or employee of Red or Blue. What constitutes a third party has a broad scope. For example, a third party can be an 'external market research compan[y]' [¶12]. A hacker is an external information provider, so Blue has assumed the associated risk.
21. This means that regardless of why inaccurate information is present, Blue assumed this risk by agreeing that Red is not responsible for the accuracy of the information.
22. As Blue assumed the risk of receiving inaccurate information, it cannot avoid the contract for mistake.

2.3. Alternatively, Blue should bear the losses resulting from the mistake considering all the circumstances

23. SmartBlue made the decision to purchase 10,000 Nego crabs as a result of data contained in the information system, particularly information in items (i) – (iii) [¶14]. The data in the information system differed from the data in the account management system, including the price.
24. Red did not misrepresent the price of the Nego crabs to Blue. At all times, the price in the account management system set by Red remained at USD 200, even though the data in the information management system stated USD 50 [¶16)].
25. This demonstrates that Red did not intend for Blue to receive the wrong information. The hacker acted beyond the scope of Red's control and Red should not be held responsible for another party inputting incorrect data into the information management system.
26. Red is expected to supply data including: weather, production volumes and market prices of products [¶12]. Red was able to supply the 10,000 Nego crabs as requested, which indicates that there was no problem with the production volumes data supplied by Red. However, information such as weather and market prices are also beyond Red's control. Therefore, it would not make commercial sense for Red to be held responsible for the information relating to market prices.
27. The *Memorandum of Understanding* [Ex. 6] was designed to fulfil Blue's desire for getting products to customers of Global Kitchen quickly [¶10]. If Red did not follow the procedure of automatically confirming the order and sending instructions for shipping, Red would be in breach of the arrangement between the parties and the commercial necessity of quick product delivery would be undermined [Ex. 6 cl (2)].

3. Alternatively, if Blue can avoid the contract, it must provide restitution at USD 200 per crab

28. If avoidance is available, this happens retroactively [UNIDROIT Art 3.2.14]. Restitution means that either party may claim restitution of whatever the party has supplied under the part of the contract that has been avoided [UNIDROIT Art 3.2.15(1)]. For Red, this means that it is entitled to the return of the Nego crabs. This is known as restitution in kind.
29. However, restitution in kind is not possible as the Nego crabs were 'sold' to Green, so an allowance in money must be made [UNIDROIT Art 3.2.15(2)]. The allowance in money 'would entail the market value of that which cannot be returned' [Du Plessis in Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2015) ('Vogenauer'), p. 545]. The market price of Nego crab was USD 200 and Blue would be required to pay a total of USD 2 million.

4. Red's sales price per crab was USD 200; Blue is obliged to pay Red USD 2 million

Red submits that:

4.1 There is a difference between Negoland market prices for products and Red's sales price; the sales price remained at USD 200 per crab despite the market price being compromised by the hacker.

4.2 Alternatively, if the price discrepancy between the information system and the accounting system cannot be resolved, the price per Nego crab must be the price 'generally charged' at the time the contract was concluded.

4.1. There is a difference between Negoland market prices for products and Red's sales price; the sales price remained at USD 200 per crab despite the market price being compromised by the hacker

30. Red submits that there is a difference between the 'prices of agricultural and marine products in Negoland' ('Negoland market prices') [Ex 7. emails dated November 10 and November 15, 2017] and 'Red's Sales Price' [Ex 6. cl (2)]. There are no indications in the *Supply Agreement* [Ex. 4] or *Memorandum of Understanding* [Ex. 6] that Red's sales price had to be the same as the market price. This would undermine commercial reasonableness in terms of Red's discretion to set prices.
31. SmartBlue can access 'prices of agricultural and marine products in Negoland' through the information management system [¶12]. Red submits that the price displayed was general market information, not necessarily the price set by Red.
32. The fact there is a difference between Red's sales price and the Negoland market price is demonstrated by Red's ability to invoice Blue for the total price of the products that Red had sent to Blue in the previous week [Ex. 4 cl 2(3)]. This means that Red's sales price was USD 200, regardless of the Negoland market price. Further, the *Memorandum of Understanding* referred to Red developing a system to manage information concerning inventory, product due in dates, and 'Red's sales price' [Ex. 6].
33. Therefore, Red's sales price was unchanged. While the data in the information system may have been compromised by the hacker and the Negoland market price decreased, the sales price remained at USD 200 [¶15]. So, the price for the contract was USD 200. SmartBlue or an employee of Blue could have confirmed this price as it was displayed on both the account management system and the RB Dashboard [¶15].

4.2. Alternatively, if the price discrepancy between the information system and the accounting system cannot be resolved, the price must be the price 'generally charged' when the contract was concluded

34. Red and Blue did not agree on a price under circumstances where the prices in the information and accounting systems are inconsistent. Parties are not required to agree on price before formation [UNIDROIT Art 5.1.7].
35. As there is no clear mechanism for determining the price of the crabs, Red submits the price should be the price generally when the contract was concluded [UNIDROIT Art 5.1.7].
36. There is a presumption that the price paid at the contract conclusion will be the market price [Vogenauer, p. 637]. The market price at the time of the contract's conclusion was USD 200 per crab, so this is the price that Blue ought to pay [¶15].

5. <u>Blue was responsible for the sale of the crabs when Blue entered into the contract of sale with Green Corporation ('Green') because Blue owned the crabs</u>

37. Obligations due under the Green contract are Blue's responsibility because the Green contract was entered into after Blue had taken legal and physical possession of the crabs.
38. Red affirms that on receiving the Nego crabs March 5, 2019 that Blue became the proper owner of the Nego crabs [¶16, ¶17]. According to the INCOTERMS DDP framework that the parties agreed to use, the receiver takes ownership of the goods on delivery [Ex. 4 cl 2(1)].

6. Red is not bound by obligations arising from the contract between Blue and Green ('the Green contract') because Red was not a party to the Green contract

Red submits that:

6.1 Red is not a party to the Green contract because Red was not mentioned in the written contract; Red was only acting as an intermediary between Blue and Green.

6.2 Blue could not have made Red a party to the Green contract through a transfer of obligations or an assignment of rights and obligations.

6.1. Red is not a party to the Green contract because Red was not mentioned in the written contract; Red was only acting as an intermediary between Blue and Green

39. The Green contract identifies Blue as the 'Seller' and Green as the 'Buyer' [Ex. 8]. This means there is no explicit mention of Red in the contract text.
40. Red's only role in the Green contract was to act as an intermediary, as Blue asked Red to assist Blue in finding a purchaser for the crabs [¶17]. An intermediary is a party that is only involved in the pre-contractual negotiations for the purposes of bringing the contracting parties, Blue and Green, together [UNIDROIT Art 2.2.1 Off Cmt 2].
41. Red was not involved in any discussion on the specific terms of the contract. Red was also not involved in any other pre-contractual negotiations aside from discovering the price that Green was willing to pay for the Nego crabs.

6.2. Blue could not have made Red a party to the Green contract through a transfer of obligations or an assignment of rights and obligations

42. Blue cannot assert that Red is liable for costs under the Green contract through either transfer or assignment.
43. Blue would need to seek Red's consent to transfer Blue's obligations under the Green contract to Red [UNIDROIT Art 9.2.3]. Blue has not sought Red's consent to transfer Blue's obligations under the Green contract. Even if Blue had sought Red's consent, Red would not have given consent.
44. Blue must seek Red's consent to assign the Green contract to Red [UNIDROIT Art 9.3.3]. This was not sought by Blue and Red would not have given consent.

7. Blue was not acting as Red's agent when Blue executed the Green contract

Red submits that:

7.1 Blue was the owner of the Nego crabs at the time Blue entered into the sale contract with Green; Blue did not sell the crabs as Red's agent.

7.2 Alternatively, even if Red was the owner of the crabs at the time Blue entered into the sale contract with Green, Blue did not sell the crabs as Red's agent.

7.1. Blue was the owner of the Nego crabs at the time Blue entered into the sale contract with Green; Blue did not sell the crabs as Red's agent.

45. Blue was the owner of the crabs at the time Blue entered into the contract of sale with Green because Blue had legal and physical control over the crabs at the time of contracting [¶17].
46. Red transferred all legal rights to the crabs to Blue on delivery [Ex. 4 cl 2(1), ¶15]. If Blue acted as Red's agent, Red would have at least maintained an interest in the crabs similar to the interest of a beneficiary of a trust. Red did not maintain an interest of this kind.

7.2. Alternatively, even if Red was the owner of the crabs at the time Blue entered into the sale contract with Green, Blue did not sell the crabs as Red's agent.

47. The conduct of Blue and Red does not support the existence of an agency relationship [¶17].
48. There are no formalities required for agency to be established. Agency can be express or implied [UNIDROIT Art 2.2.2(1)].
49. Red accepts that oral agreement can be sufficient to establish an agency relationship as a form of implied agency [UNIDROIT Art 2.2.2 Off Cmt 1]. However, Red submits that the conversation between the 'persons in charge' of Blue and Red is not sufficient to establish an agency relationship [¶17]. This is because Blue did not make an offer to act as Red's agent and Red did not accept any such offer.
50. Moreover, if Blue had been acting as Red's agent, Blue would have communicated the increase in costs to Red. Rather, Blue unilaterally proceeded with the sale to Green [¶18].
51. An agreement must be entered into voluntarily for an agency agreement to be established [UNIDROIT Art 2.2.1 Off Cmt 4]. The 'persons in charge' of Red and Blue both agreed to discuss how to settle the matter of the Green contract between them at a later date:

    Blue: "...How about our company entering into an agreement with Green Corp. for now, and our company and your company discuss later about what to do between us regarding the cost and loss?"

    Red: "We agree" [¶17].
52. This agreement to settle the matter at a later date implies that Red and Blue did not consider an agreement between Red and Blue to have been finalised. Moreover, Blue did not expressly or impliedly state that Blue was entering into the Green contract on Red's behalf. This suggests that Blue did not intend to be Red's agent at the time of contracting [¶17].

BLUE HOT CASE

SUMMARY OF RED CORPORATION'S SUBMISSIONS

1. Blue breached its obligations under the Joint Venture Agreement with Red ('JVA') by selling the "Blue Hot" series to Brown Trading Corporation ('Brown').
2. Blue must pay USD 400,000 to Red to compensate for the losses Red suffered in 2018 as a result of Blue's breaches of the JVA.
3. Red should be granted an injunction to prevent Blue selling the "Blue Hot" series to Brown or any other party for on-selling in Negoland.

1. Blue breached its obligations under the JVA by selling the Blue Hot series to Brown

Red submits that:

1.1 Blue competed with the business of Yellow Corporation ('Yellow') by selling "Blue Hot" to Brown for on-selling in Negoland in breach of clause 14.3 of the JVA.

1.2 Blue withheld "Blue Hot" from the joint venture in breach of clause 14.2 of the JVA.

1.3 Blue did not act in good faith by selling the "Blue Hot" series to Brown for on-selling in Negoland, in breach of clause 14.1 of the JVA.

1.1. Blue competed with the business of the Yellow by selling "Blue Hot" to Brown for on-selling in Negoland, in breach of clause 14.3 of the JVA

53. Red and Blue are prohibited from carrying on or engaging 'in any business that competes with the business of Yellow during the period of [the JVA]' [Ex 10 cl 14.3].
54. Blue selling the "Blue Hot" series to Brown for on-selling in Negoland competes with the business of Yellow because:
    a) The "Blue Hot" series contains both flavours in the "Yellow Quick" series: beef stew and acqua pazza [¶21, ¶24];
    b) Blue sold the "Blue Hot" series to Brown knowing that it would be on-sold in Negoland. Blue did not attempt to prevent Brown from on-selling "Blue Hot" in Negoland [Ex. 13 email dated February 8, 2019];
    c) The success of the "Blue Hot" series caused a reduction in sales of the "Yellow Quick" series [Ex. 12]; and
    d) The JVA requires that Products of Yellow be sold to either Red or Blue [Ex. 10 cl 7.1].
55. The JVA must be interpreted according to the common intention of the parties [UNIDROIT Art 4.1(1)].
56. The 'business of Yellow' is to provide consumers with a broad range of food products that can be prepared with low effort and minimal preparation. The 'business of Yellow' is not limited to the "Blue Noodles" or the "Yellow Quick" series. Rather, the 'business of Yellow' is defined as the production and marketing of 'Products as determined from time to time by Red and Blue' [Ex. 10 cl 2.1]. 'Products' is defined as 'instant foods' [Ex. 10].
57. Red and Blue used the similar term 'ready-to-eat-foods' [¶20; Ex. 9 cl 1, 2(1) and 2(7)] in preliminary negotiations about the business of their joint venture [UNIDROIT Art 4.3(a)].
58. Preliminary negotiations noted 'frozen foods' as an example of 'ready-to-eat foods' [Ex. 9 cl 2(7)], and contemplated adding further Products to the 'business of Yellow' [Ex. 9, 2(7)].
59. Red rejects Blue's claim that 'the subject of our Joint Venture Agreement is basically "Blue Noodles"' [Ex. 11 email dated October 10, 2017]. This is supported by the practices established between Red and Blue and conduct by Red and Blue after the contract was concluded [UNIDROIT Art 4.3(b)-(c)], because:
    a) The parties continued to develop and introduce new Products to Yellow, such as Nego Noodles, beef stew and acqua pazza as part of the "Yellow Quick" series [¶21];
    b) New Products added to Yellow's business were not limited by the constraints of existing technology. Introducing Products required both parties to invest resources according to their roles in Yellow [Ex. 10 cl 1.2]; and
    c) The defining feature of all Products sold by Yellow is that they are ready-to-eat with only the most basic preparation [¶21]. They are also easy and quick to make [¶19].

1.2. Blue withheld the technologies, information, patents and know-how necessary to produce "Blue Hot" from Yellow in breach of clause 14.2 of the JVA

60. Blue breached its obligation under clause 14.2 JVA because it did not provide 'necessary technologies, information, patents and know-how to produce Products' [Ex. 10 cl 14.2].
61. Red must 'provide staff, equipment and facilities' and Blue must 'provide technology and staff' [Ex. 10 cl 1.2] to Yellow.

62. The parties intended the obligation in clause 14.2 to be a positive obligation to contribute technologies for new Products [UNIDROIT Art 4.1(1)] because:
    a) The development process for the "Yellow Quick" series required Red and Blue to make positive contributions of various resources; and
    b) Red and Blue's preliminary negotiations and post-contractual conduct demonstrate an ongoing intention for Blue to contribute new technologies in exchange for Red's contributions to the joint venture [Ex. 9 cl 6, ¶21].
63. Alternatively, even if the intentions of the parties are not sufficiently clear, then parties of the same kind as Red and Blue would have intended clause 14.2 to be a positive obligation to contribute technologies for new Products [UNIDROIT Art 4.1(2)] because:
    a) Red and Blue are large, commercially sophisticated companies;
    b) Large, commercially sophisticated companies would not agree to a joint venture on unequal terms; and
    c) If there is no positive obligation for Blue to contribute new technologies, the obligations of the parties under the JVA would be unequal. This is because Blue would have few ongoing obligations, compared with Red's onerous ongoing obligations.

1.3. Blue did not act in good faith by selling the "Blue Hot" series to Brown for on-selling in Negoland in breach of clause 14.1 of the JVA

64. Red and Blue must 'use their best efforts ... in good faith to make the business of Yellow to be successful' [Ex. 10 cl 14.1].
65. Blue can be expected to take all the steps that a reasonable person of the same kind in the circumstances would take to make the business of Yellow successful [UNIDROIT Art 5.14 Off Cmt 2, Illust 2].
66. Blue has not used its best efforts in good faith to make the business of Yellow successful because Blue's conduct fell short of the required standard in the following instances [UNIDROIT Art 5.14(2)]:
    a) Blue did not notify Red or Yellow that it was manufacturing the "Blue Hot" series in 2017. It also did not faithfully negotiate with Red for the inclusion of the "Blue Hot" series in Yellow's business [Ex. 9, cl 2(7)];
    b) Blue engaged in a business that competes with the 'business of Yellow';
    c) Blue withheld the technology necessary for the development of the "Blue Hot" series; and
    d) Blue told Red that it intended to only sell "Blue Hot" in Arbitria "for the time being" [Ex. 11, email dated October 10, 2017]. However, Blue stated that it began selling the "Blue Hot" series, a Product that competes with the "Yellow Quick" series, to one of Yellow's competitors (Brown) for on-selling in Negoland in January 2018 [Ex. 13, email dated February 8, 2019].
67. Additionally, the JVA requires Red and Blue to 'cooperate with each other in good faith to make the business of Yellow to be successful' [Ex. 10 cl 14.1].
68. UNIDROIT requires cooperation to 'the extent that such co-operation may reasonably be expected for the performance of their respective obligations' [UNIDROIT Art 5.1.3 Off Cmt 1].

69. Cooperation in good faith is especially vital to the ongoing commercial viability of a joint venture which is based on a long-term contract [UNIDROIT Art 5.1.3 Off Cmt 2].
70. Blue has undermined the success of Yellow by failing to cooperate with Red in good faith.

2. <u>Blue must pay USD 400,000 to Red to compensate for the losses Red suffered in 2018 as a result of Blue's breaches of the JVA</u>

71. Blue's non-performance of the JVA gives Red a right to damages, whether exclusively or in conjunction with any other remedies [UNIDROIT Art 7.4.1].
72. Blue's breaches of the JVA caused Yellow's profits to decrease by USD 1 million in 2018 [Ex. 12].
73. Red's losses in 2018 amount to USD 400,000. This is equivalent to 40% of Yellow's losses in 2018 [Ex. 10 cl 8.1; Ex. 14].

3. <u>Red should be granted an injunction to prevent Blue selling "Blue Hot" to Brown or any other party for on-selling in Negoland</u>

74. An injunction is necessary to prevent Blue from continuing to on-sell the "Blue Hot" series to Brown in breach of the JVA and causing Red to incur further losses.
75. Blue has refused to comply with the JVA and Red's reasonable requests to stop breaching the agreement to prevent further losses to Red [Ex. 11; Ex. 13].
76. Remedies can be cumulative if they are not inconsistent with each other [UNIDROIT Art 7.1.1, Off Cmt]. An injunction is required to prevent future breaches of the JVA. In addition, damages are required to compensate Red for the losses suffered due to Blue's past breaches.
77. Red may require performance of non-monetary obligations [UNIDROIT Art 7.2.2]. The Arbitral Tribunal can grant an injunction [Born, *International Commercial Arbitration* (2014), p. 3433; Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Arbitration* (2015), 9.59].
78. If no injunction is ordered, Yellow's business will continue to suffer the same losses 'in 2019 and subsequent years' as it suffered in 2018, due to the on-selling of the "Blue Hot" series in Negoland [Ex. 12].

THIRD PARTY FUNDING PETITION

SUMMARY OF RED CORPORATION'S SUBMISSIONS

1. The Arbitral Tribunal ('the Tribunal') should deny Blue's petition because the third-party funding agreement ('Funding Agreement') is not relevant to this arbitration and is immaterial to its outcome.
2. The Tribunal should deny Blue's petition on grounds of commercial or technical confidentiality.
3. The Tribunal should deny Blue's petition because the burden placed on Red to produce the Funding Agreement would be unreasonable and unfair.

1. The Tribunal should deny Blue's petition because the Funding Agreement is not relevant to this arbitration and is immaterial to its outcome

79. The Tribunal may conduct the arbitration in such manner as it considers appropriate [*UNCITRAL Arbitration Rules*, Art 17(1); 27(4); 27(3)]. The Tribunal also has discretion in determining the relevance of evidence to the arbitration, and in deciding whether to require parties to produce evidence.
80. The Tribunal should refer to the *IBA Rules on the Taking of Evidence in International Arbitration* ('IBA Rules'), and the *IBA Guidelines on Conflicts on Interests in International Arbitration* ('IBA Guidelines') to interpret the *UNCITRAL Arbitration Rules*. This is common practice in international arbitration and occurs in most arbitrations in Japan [*Report on the Reception of the IBA Arbitration Soft Law Products*, 11-12; 53], which is the seat of this arbitration [¶26].
81. The Funding Agreement is irrelevant and immaterial to the substantive matters in this arbitration [IBA Rules, Art 3(3); 9(2)(a); *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia*, *Procedural Order No. 7 on Document Production*, July 21, 2015 ('Bermuda Case Procedural Order'), p. 4].
82. The Funding Agreement is irrelevant and immaterial to the procedural matters in this arbitration [IBA Rules, Art 3.3; 9(2)(a)], because:
    a) The Funding Agreement is irrelevant and immaterial in establishing grounds to challenge an arbitrator, which arise where there are justifiable doubts as to arbitrator impartiality or independence [*UNCITRAL Arbitration Rules*, Art 12]. No such grounds can exist at present.
        i. The Tribunal Members have met their disclosure obligations [*UNCITRAL Arbitration Rules*, Art 11, 12*;* IBA Guidelines, General Standard 7(d)] by stating that they have no knowledge of the identity of the third-party fund [¶27]. Blue's claim that the Funding Agreement indicates justifiable doubts as to the impartiality or independence of an arbitrator is mere speculation [Ex 15].
        ii. Therefore, even if a member of the Tribunal does have a relationship with the third-party fund, there are no justifiable doubts as to impartiality or independence, because the arbitrator is unaware of the possibility of gaining an advantage or avoiding a loss in making their decision.
    b) Alternatively, the Funding Agreement does not indicate the existence of justifiable doubts as to arbitrator impartiality or independence and is therefore irrelevant and immaterial to the case.
        i. The parties are under an ongoing duty to disclose available information that might affect an arbitrator's impartiality or independence [IBA Guidelines, General Standard 7(c)].
        ii. Red does not have any information that might affect the arbitrator's impartiality or independence [Ex. 16].
        iii. Red has fulfilled its obligations and has not disclosed the Funding Agreement because the Funding Agreement does not contain information that might affect the arbitrator's impartiality or independence.
    c) Alternatively, Blue has not met its obligation to explain why the Funding Agreement is relevant and material to the procedural matters in this arbitration [IBA Rules, Art 3.3].

i. Blue is on a 'fishing expedition' to gain a competitive advantage over Red and the IBA Rules are designed to prevent such conduct [*Commentary on the Revised Text of the 2010 IBA Rules*, p. 9].
ii. Blue has not explained how information about the 'payment of arbitration costs' [Ex. 15] will determine the existence of grounds for a challenge to the arbitrator. Blue has also not explained how the Funding Agreement will demonstrate a 'relationship between the fund and the arbitrator' [Ex. 15] [Bermuda Case Procedural Order, p. 4].
iii. Blue has not explained why the entire Funding Agreement, instead of the identified parts ('arbitration costs' and 'fund and arbitrator' related information) of the Funding Agreement, is relevant and material [Bermuda Case Procedural Order, p. 4].

2. The Tribunal should deny Blue's petition on the grounds of commercial or technical confidentiality

83. Red should not be required to disclose the Funding Agreement because the terms of the Funding Agreement and the identity of the fund are confidential [IBA Rules, Art 9(2)(e)].
84. The Funding Agreement is evidence covered by 'commercial or technical confidentiality' [*Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration,* April 2018, p. 121; Bermuda Case Procedural Order, p. 3-4].

3. The Tribunal should deny Blue's petition because the burden placed on Red to produce the Funding Agreement would be unreasonable and unfair

85. Requiring disclosure of the Funding Agreement would be unreasonably burdensome and unfair [IBA Rules, Art 9(2)(c); 9(2)(g)] to Red.
86. If Red breaches the Funding Agreement by disclosing the identity of the fund it 'may entitle the funder to terminate the Funding Agreement (and, in some instances of serious breach, may allow the funder to seek recourse for the amount invested)' [*Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, April 2018, p. 28].
87. Requiring Red to breach the Funding Agreement could result in significant and unfair financial losses for Red.
88. If the Funding Agreement is disclosed, Blue could access commercially sensitive information and gain a competitive advantage over Red [Third Party Funding in Japan, https://www.kwm.com/en/jp/knowledge/insights/third-party-funding-in-japan-20181212].
89. If Red is required to disclose the Funding Agreement, this disclosure will unnecessarily de-stabilise the proceedings and compromise arbitration as a form of dispute resolution.
    a) The *UNCITRAL Arbitration Rules* do not contain compulsory disclosure requirements for third-party funding arrangements. Having agreed to be bound by the *UNICTRAL Arbitration Rules*, Blue must follow them as they are (*UNCITRAL Arbitration Rules*, Art 1).
    b) If the Tribunal requires Red to disclose the Funding Agreement, it will go beyond the scope and intention of the *UNCITRAL Arbitration Rules*. Even if reform of the *UNICTRAL Arbitration Rules* is desirable, these proceedings are not an appropriate forum for this change to take place.