

**List of Abbreviation**

- “P.” : Page
  - “¶” : Paragraph
  - “Ex.” : Exhibit
  - “Art.” : Article
  - “UPICC” : Unidroit Principles of International Commercial Contract 2016
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**CRAB CASE**

Red hereby seeks the following arbitral awards:  
**Blue shall pay US\$2 million to Red and  
Blue's claim, insisting Red shall pay US\$500,000 to Blue,  
shall be dismissed**

Red submits that:

**Issue 1**

- A. Sale and purchase agreement for 10,000 Nego crabs was effectively concluded between Red and Blue;
- B. The price of Nego crab per crab is US\$200;
- C. Blue cannot cancel SUPPLY AGREEMENT[*Ex.4*] concluded between Red and Blue;

**Issue 2**

- D. There is no factual and legal basis based on which the amount to be paid by Blue to Red should be reduced, Blue is obligated to pay US\$2 million;

**Issue 3**

- E. Red is not obligated to pay US\$500,000 to Blue, for the sale of Nego crabs from Blue to Green.

**Issue 1**

Blue is obligated to pay US\$2 million for purchase of 10,000 Nego crabs under SUPPLY AGREEMENT concluded in December 1998[*Ex.4*]. Blue placed an order with Red through RB Link for crabs worth US\$2 million (10,000 Nego crabs per US\$200) under *Ex.4*[¶13]. However, Blue did not pay US\$2 million, by refusing payment based on the invoice which Red sent via e-mail. Therefore, Blue is obligated to pay US\$2 million to Red under UPICC 7.2.1.

**A. Sale and purchase agreement for 10,000 Nego crabs was effectively concluded between Red and Blue**

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement[*UPICC 2.1.1*]. However, Red and Blue agreed to change the way of offer and acceptance under *Ex.4* by Memorandum of Understanding[*Ex.6*].

Smart Blue automatically places order through the account management system of RB Link system[*Ex.6, Art.4 and Ex.7*]. The system automatically processes orders made by Blue and provides instructions for the shipment of relevant products[*Ex.4, Art.2(3) and Ex.6.2*]. In this case, Smart Blue's AI placed an order for 10,000 crabs with Red around 1:00 am on March 4, 2019[¶14]. In response to this order, the computer system of Red automatically processed shipment, and immediately after receiving the order, gave the instruction to Red's warehouse to ship 10,000 Nego crabs to Blue[¶14]. Important thing is that acceptance required under *Ex.4* (written as "acknowledgement" in Article 1(3)) is no more required under the new system of *Ex.6*. Therefore, sale and purchase agreement for 10,000 Nego crabs was effectively concluded between Red and Blue. In addition, Red and Blue agreed to use RB Link and Smart Blue's AI that is automated system "*capable of setting in motion self-executing electronic actions leading to the conclusion of a contract without the intervention of a natural person*"[*UPICC 2.1.1 COMMENT 3*] under *Ex.6* and *Ex.7*. Even though the offer and acceptance was conducted without the intervention of a natural person, sale and purchase agreement for 10,000 Nego crabs was effectively concluded between Red and Blue.

**B. The price of Nego crab per crab is US\$200**

The account management system of Red processed the order for 10,000 Nego crabs made by Blue based on the regular price of US\$200 per crab, and the screen of RB Dashboard that shows the information of the account management system also showed this after

1:00 am on March 4[¶15]. Staff of Blue could have been able to see the information at RB Dashboard, but none of them checked the information about the transaction of 10,000 Nego crabs[¶16]. Holiday at Arbiria is not an excuse because system is working 24 hours. Therefore, Blue has obligation to pay US\$2 million for 10,000 Nego crabs per US\$200 to Red.

**C. Blue cannot cancel SUPPLY AGREEMENT[Ex.4] concluded between Red and Blue**

**1) None of the items of UPICC 3.2.2(1)(a) applies**

Red did not make the same mistake as Blue because Red did not make incorrect assumption in light of the fact that the accounting system of Red processed the order for 10,000 Nego crabs made by Blue based on the regular price for Nego crab (a-1)[¶15]. Furthermore, there is no fact shown that Red caused Blue's mistake because the inaccurate information had been entered into the system by some outsider, not by Red[¶15]. In this connection, original cause that Red system was hacked and this inaccurate information was entered is that e-mail sent from Red to Blue was infected by a virus. This means that Blue by itself caused its mistake (a-2). In addition, Red did not know or ought not to have known of Blue's mistake (a-3). In this case, Red did not know the inaccurate information was entered when the contract was concluded between Red and Blue. Red could not have known of Blue's mistake because the inaccurate information was entered around 10:00 p.m. which is during non-business hour[¶14].

**2) Blue was grossly negligent in committing the mistake[UPICC 3.2.2(2)(a)]**

The screen of RB Dashboard that shows the information of the account management system showed the regular price for Nego crab, which was US\$200 per crab[¶15]. Staff of Blue could have been able to see the information at RB Dashboard, but none of them checked the information until 9:30 am on March 5[¶15]. In addition, since "Smart Blue" works 24 hours a day, 365 days a year[Ex.7], staff of Blue could have been checked RB Dashboard outside business hours. If staff of Blue checked the information when Blue placed an order, Blue could immediately cancel the order to Red for crabs worth US\$2 million. Therefore, Blue has grossly negligent in committing the mistake.

**3) Blue has assumed the risk of mistake[UPICC 3.2.2(2)(b)]**

Red and Blue agreed that Red is not responsible for the accuracy of information concerning weather, production volume and market prices of agricultural and marine products in Negoland, and other relevant information provided by third parties under the mail on November 15 and 17, 2017[Ex.7, UPICC 2.1.1]. This agreement was made in

order to allocate the responsibilities about the accuracy of the information entered into the RB Link by means of gathering information. The inaccurate information was related to production volume and market prices of marine products, which was provided by third parties. This is because it was entered by an unauthorized access by some outsider and not by Red[¶15]. The inaccurate information was entered into the system of RB Link as obtained by Red through its own research[¶14], but Red did not obtain the information by itself. In short, Red is not responsible for this. Therefore, Blue cannot avoid the contract as Blue has assumed the risk of mistake by the inaccurate information.

### **Issue 2**

#### **D. There is no factual and legal basis on which the amount to be paid by Blue to Red should be reduced, Blue is obligated to pay US\$2 million**

Red is obligated to provide the information concerning weather, production volume and prices of agricultural and marine products in Negoland and other relevant information stored in the Red's IT system, through RB Link[*Ex.7 and UPICC 3.1.2*]. In this case, the inaccurate information was provided by an unauthorized outsider[¶15]. In light of this fact, Red did not breach any obligation under the contract.

Red did not notify Blue that there had been an unauthorized access to its system and that the inaccurate information had been entered into the system at 8:00 am on March 4, 2019[¶15]. However, after 1:00 am on March 4, the screen of RB Dashboard that shows the information of the account management system also showed regular price for Nego crab, which was US\$200 per crab, and staff of Blue could have been able to see the information at RB Dashboard[¶15]. Blue could have cancelled immediately and withdrawn the order before the agreement was concluded.

In light of this fact, the harm is not due in part to an omission of Red, and US\$2million which Blue is obligated to pay to Red shall not be reduced[*UPICC 7.4.7*].

### **Issue 3**

#### **E. Red is not obligated to pay US\$500,000 to Blue, for the sale of Nego crabs from Blue to Green**

##### **1) Red is not the party of the Contract[*Ex.8*]**

The agreement was concluded between Blue and Green, Red is not the party of such agreement. It is clearly stipulated that the "Seller" is "Blue Inc." and "Cost: Transportation cost and custom duties shall be paid by Seller"[*Ex.8, Art.7*]. Based on this

provision, Red is not obligated to pay transportation cost and custom duties, whereas Blue is obligated to pay that costs.

**2) Red did not grant the agent's authority to Blue**

*"An authority is granted to an agent when an agent may be express or implied."*[UPICC 2.2.2(1)]. However, explicit authority was not granted to Blue, because there is no fact that Red expressly gave Blue a power of attorney, nor both parties entered into agency agreement.

In the conversation over telephone about the sale of Nego crab to Green on March 7[¶17], *both parties refused to be the party of an agreement with Green. However, Blue offered to Red that Blue will conclude an agreement between Blue and Green, and Blue and Red discuss what to do regarding the cost and loss later.* After that, Red responded that *"We agree"*, and accepted that Blue entered into an agreement with Green. From these facts, this conversation shows Blue is not representing Red when concluding the agreement with Green.

In addition, Blue did not recognize itself or act as an agent. Blue made a decision by itself and shipped 10,000 Nego crabs to Green, when it became clear that there was a sudden increase in the fare for air transportation of the Nego crabs to Meditoria, and a decision was made by the Meditrian customs which imposed additional customs duties on the import of the Nego crabs into Meditria[¶18]. Regarding these facts, it is apparent that Blue was not granted its agent's authority from Red. Therefore, there is no fact that Red expressly and impliedly gave Blue a power of attorney, nor both parties concluded agency agreement.

**3) Red did not ratify Blue's act**

*"An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority"*[UPICC 2.2.9(1)]. However, there is no fact that Red indicated its intention to ratify Blue's act. In addition, though Blue sent a copy of Ex.8 to Red, there is no provision to show that Blue is an agent of Red. After that, there was no particular comment from Red[¶18]. Therefore, it is clear that Red did not ratify Blue's act.

**4) Even if Blue was granted the authority, the acts of the agent shall affect only the relations between the agent and the third party**

**Red's preliminary Memorandum**

*“The acts of the agent shall affect only the relationship between the agent and the third party where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent”*[UPICC 2.2.4].

As mentioned above, there is no provision in Ex.8 to stipulate that Blue is an agent of Red. Considering this fact, Green did not know that Blue is an agent of Red.

In addition, Blue entered into Ex.8 with Green, even though Red could directly enter into an agreement with Green. Since Green is a purchaser which Red found, and Red had learned that Green was willing to purchase 10,000 Nego crabs for US\$100 per crab on March 3, 2019[¶17], Red could directly conclude the agreement with Green. In the circumstance that Red could enter into an agreement with Green, and there is no fact that Red would get benefit if Blue becomes Red's agent, Green may not think that Red asked Blue to be Red's agent. Therefore, it is clear that the acts of Blue shall affect only the relations between Blue and Green.

**BLUE HOT CASE**

Red hereby seeks the following arbitral awards:  
**Blue shall not supply “Blue Hot” series  
to any third party that sells them in Negoland  
and Blue shall pay US\$400,000 to Red.**

Red submits that:

**Issue 1**

- A. Sales of “Blue Hot” at the stores of Brown Trading Corp. (“Brown”) in Negoland constitute a breach of obligation by Blue under the Joint Venture Agreement[Ex.10];

**Issue 2**

- B. The Arbitral Tribunal should render an arbitral award that Blue shall not supply “Blue Hot” series to any third party that sells them in Negoland[UPICC 7.2.2];

**Issue 3**

- C. Blue shall pay US\$400,000 for damages to Red for the decrease of profit of Yellow in Negoland in 2018.

Issue 1

**A. Sales of “Blue Hot” at the stores of Brown Trading Corp. (“Brown”) in Negoland constitute a breach of obligation by Blue under the Joint Venture Agreement[Ex.10]**

**1) Blue breached the obligation not to engage in the business that competes with the business of Yellow[Ex.10, Art.14.3].**

**a) Blue breached its obligation[Ex.10, Art.14.3] by performing its business of “Blue Hot” in Negoland**

**i) The business of Yellow**

The objects of Yellow are “i) producing Products and ii) other business relating or incidental to the foregoing”[Ex.10, 2.1]. It shall be determined by Red and Blue through faithful negotiation of consideration of marketing[Ex.9, Art.2(7) and Ex.10, Art.7.1]. That means, “Yellow Quick” and “Blue Noodle” correspond to the objects of Yellow.

**ii) The purpose of the agreement[Ex.10]**

The purpose of the agreement[Ex.10] is to prevent Red and Blue from running competitive business of Yellow. This is because, Red and Blue may wish cooperating to gain the profit of Yellow. In 2014, before Yellow was established, Blue thought the demand for ready-to-eat foods would further grow and increase the sales in Negoland. At that time, Red was also considering to further diversify its business, and wished to start a new food business[¶20]. From this fact, it was clear that both parties wished to gain the profit of Yellow.

Therefore, Red and Blue have common intention that the obligation of both parties[Ex.10, Art.14.3] is not to carry on or be engaged in any business that competes with Yellow, by scrambling for consumers between “Yellow Quick” and “Blue Noodle” as mentioned above (a)i~ii[UPICC 4.1(1)].

**iii) Blue carried on or engaged in a business that competes with the business of Yellow**

Based on the above (i~ii), however, Blue started supplying “Blue Hot” series that competes with “Yellow Quick” series to Brown. Blue knew that Brown intended to sell it not only in Arbitria, but also in Negoland when Blue started the transaction with Brown in January 2018[Ex.13]. That act of Blue has the same effect as that Blue directly sells “Blue Hot” series in Negoland, and corresponds to “carry on nor be engaged in any

*business that competes the business of Yellow*”[Ex.10, Art.14.3]. As a result, sales of the “Yellow Quick” series from January to December 2018 decreased by half compared to 2017, amounting to US\$10 million. Expert, Mr. Bob Orange, who Red and Blue agree on his reliability as an expert, said “*Sales of “Blue Hot” in Negoland have been affecting sales on Yellow Quick in Negoland. Especially for beef stew and aqua pazza, it is evident that people tend to choose “Blue Hot”*”[Ex.12]. Therefore, it is clear that “Blue Hot” competes with “Yellow Quick” and in fact significant decrease of sales of “Yellow Quick” was caused by beginning supply of “Blue Hot”. From these reasons, Sales of “Blue Hot” at the stores of Brown in Negoland constitute a breach of obligation by Blue under the Joint Venture Agreement[Ex.10, Art.14.3].

Furthermore, Blue accessed to the market and made the situation of unnecessary competition even though Blue knew that “Yellow Quick” series were a big hit in Negoland, Arbitria and other foreign countries[¶21].

**b) Even if “Blue Hot” series was manufactured using Blue’s technology, such products also falls into the category of non-compete obligation**

Even if Blue manufactures “Blue Hot” series with Blue’s patent using a special technology, such products shall also correspond to its obligation not to compete with business of Yellow[Ex.10, Art.14.3]. This is because customers in Negoland would not compare and distinguish “Blue Hot” and “Yellow Quick” by those technology. Furthermore, there is no article that excludes the business developed by its own technology from the non-compete obligation[Ex.10, Art.14.3]. There is a foreseeability that Blue continues to build new technology by itself when Yellow was established because it stipulates that “*Although manufacturing of other ready-to-eat foods that are produced by Blue (for example, frozen foods) in the future is not excluded*”[Ex.9, Art.2(7)]. Both parties did not include such article as an exception to non-compete provision in the Joint Venture Agreement. It means that there is the common intention not to sell and supply in Negoland such ready-to-eat food developed by own technology.

**2) Blue did not perform the best effort for the business of Yellow under the Joint Venture Agreement[Ex.10, Art.14.1]**

Blue was obligated to use the best efforts and cooperate with each other in good faith to make the business of Yellow successful[Ex.10, Art.14.1]. However, Blue continued supplying the “Blue Hot” series to Brown even though Blue knew that Brown intended to sell in Negoland[Ex.13]. In light of this fact, Blue made it possible for Brown to sell



“Blue Hot” series that is competitive products with “Yellow Quick” in Negoland and accordingly the sales of “Yellow Quick” decreased[Ex.13]. Furthermore, during the meeting on May 15, 2014, Red and Blue decided that “*Although manufacturing of other ready-to-eat foods in the future is not excluded, it shall be determined by Red Corp. and Blue Corp. and Blue, Inc. through faithful negotiation in consideration of market trends, manufacturing technologies and other relevant factors*”[Ex.9, Art.2(7)]. Blue started to manufacture and sell “Blue Hot” series in Arbitria in 2017[¶22]. Red proposed to Blue to manufacture “Blue Hot” series by Yellow in Negoland[¶23]. However, Blue refused this proposal by e-mail[Ex.11]. In light of this fact, Blue did not do the faithful negotiation with Red. Therefore, Blue did not perform the best effort for the business of Yellow under the Joint Venture Agreement[Ex.10, Art.14.1].

## Issue 2

### **B. The Arbitral Tribunal should render an arbitral award that Blue shall not supply “Blue Hot” series to any third party that sells them in Negoland[UPICC 7.2.2]**

#### **1) Blue shall stop supplying “Blue Hot” series to Brown under UPICC 7.2.2**

Blue was obligated not to supply “Blue Hot” series to any third party that sells them competing with the business of Yellow.

*“The other party may require performance when a party who owes an obligation other than one to pay money does not perform”[UPICC 7.2.2].*

Blue was obligated to perform the duty of non-competition under the Joint Venture Agreement[Ex.10, Art.14.3]. However, Blue breached its obligation because Blue continues supplying “Blue Hot” series that competes with “Yellow Quick” series to Brown in Negoland(refer to A).

#### **2) There is no fact which corresponds to the exceptions to the right to require performance[UPICC 7.2.2(a)~(e)]**

##### **a) Performance or, where relevant, enforcement of Blue’s obligation is not unreasonably burdensome or expensive[UPICC 7.2.2(b)]**

Owing to the enforcement of performance, the party which Blue can supply “Blue Hot” series may be restricted and it may cause loss of profit. However, it does not correspond to UPICC 7.2.2(b). The party which Blue shall not supply “Blue Hot” series is the party which wants to sell “Blue Hot” series in Negoland. It is not prohibited that Blue supplies “Blue Hot” series to the third party which sells it to other countries than Negoland. Thus,

it is not unreasonably burdensome or expensive for Blue to stop selling “Blue Hot” to the party which in turn resells them in Negoland or enter into an supply agreement with such third party, prohibiting them to sell “Blue Hot” series in Negoland.

**b) Red claimed that Blue stop selling “Blue Hot” series within a reasonable time[UPICC 7.2.2(e)]**

On February 1, 2019, Red required Blue to stop selling the “Blue Hot” series that competes with “Yellow Quick” by the mail[*Ex.13*]. Therefore, Red claimed against Blue in February, 2019 within a reasonable time since the sales of “Yellow Quick” decreased after a few month of “Blue Hot” series being sold out.

**Issue 3**

**C. Blue shall pay US\$400,000 for damages to Red for the decrease of profit of Yellow in Negoland in 2018**

Blue shall pay US\$400,000 for damages to Red under UPICC7.4.1 ~UPICC7.4.4.

In this case, Blue had an obligation not to engage in the business that competes with the business of Yellow[*Ex.10, Art.14.3*]. However, Blue did the business which competes with the business of Yellow by supplying the “Blue Hot” series to Brown knowing that Brown resells them in Negoland. As a result, sales of the “Yellow Quick” series from January to December 2018 decreased by half compared to 2017, and Yellow accordingly lost US\$1million[¶24]. In each fiscal year, the net profit of Yellow shall be distributed to Red and Blue as dividends in accordance with the shareholdings ratio[*Ex.10, Art.8.1*]. The parties do not dispute that if Blue is legally liable for the decrease of profit of Yellow, Red’s damage is 40% (which is Red’s shareholding ratio) of Yellow’s reduced amount of revenue[*Ex.14*]. From these facts, Red suffered US\$400,000 out of US\$1million in sales decrease.

Therefore, Blue shall pay US\$400,000 for damages to Red on the ground that profit of Yellow in Negoland decreased in 2018.

**1) There is a causal relationship between the selling of “Blue Hot” series and the decline in sales of “Yellow Quick” series**

In the beginning of 2018, the “Blue Hot” series including beef stew and aqua pazza launched in Negoland and became a huge hit. On the other hand, sales of “Yellow Quick” series from January to December 2018 decreased by half compared to 2017[¶24].

**Red's preliminary Memorandum**

*There are quite a few people in Negoland who think that "Blue Hot" is better than "Yellow Quick" and tend to choose "Blue Hot", especially for stew and aqua pazza because it is easier and more quickly served. Mr. Bob Orange also testified that the sales of "Blue Hot" in Negoland have a great influence on the sales of "Yellow Quick" in Negoland[Ex.12 and ¶24]. From these facts, if Blue did not sell "Blue Hot" in Negoland, it was clear that sales of "Yellow Quick" did not drop significantly[UPICC 7.4.2 and 7.4.3 COMMENT 3].*

**2) There was a foreseeability that the sales of the "Yellow Quick" series would decline when the "Blue Hot" series started to be sold in Negoland**

It was foreseeable that sales of "Yellow Quick" series would decrease if these two competing products were sold in the same region. This is because "Blue Hot" and "Yellow Quick" are competitive products as mentioned in A(1). In addition to that, Bob Orange said *"in countries other than Negoland, the tendency of consumers to see "Blue Hot" as a product that competes with "Yellow Quick" appears to be not as high as that of Negoland"*[Ex.12]. In light of this fact, "Yellow Quick" and "Blue Hot" are recognized as a competitive business by consumers in Negoland. Therefore, there was a foreseeability that the sales of the "Yellow Quick" series would decline when the "Blue Hot" series started to be sold in Negoland[UPICC 7.4.4].

**Response to Blue's Request Regarding Third Party Funding**

**The Arbitral Tribunal should deny the petition by Blue**

Red admits that Red entered into an agreement concerning third party funding. However, because 1)"the Fund" is not a party to the arbitral proceedings, 2)Red has no obligation to disclose the contents of the agreement with the Fund and 3)under the third party funding agreement (the "Funding Agreement"), Red is prohibited from disclosing the identity of the other party and the contents of the agreement to any third party, Red requests that the Arbitral Tribunal deny the petition by Blue.

**1) This fund is not a party to the arbitral proceedings**

Arbitration proceedings shall not start without an arbitration agreement among the parties in dispute. This arbitral tribunal was established because Red and Blue agreed to refer the dispute to the arbitration proceeding[Ex.4, Art.6.7 and Ex.10, Art.20.2]. It is clear that the

parties to this arbitration are Red and Blue and that the Fund is not a party to the arbitration proceedings.

**2) Red has no obligation to disclose the contents of the agreement with the Fund**

The whole procedures and obligations of both parties as well as arbitrators are governed in accordance with UNCITRAL Arbitration Rules (“UNCITRAL Rules”) which is a governing rule of this arbitration. There is no provision obligating the party to the arbitration to disclose to any third party including arbitral tribunal the contents of the Funding Agreement it may have executed. It is the arbitrator’s obligation to disclose the circumstances that may cause the legitimate suspicion about the arbitrator’s unbiased independence[*UNCITRAL Rules Article 12 Paragraph 1*], but it is not Red’s obligation.

In addition, although it is not a governing law or rule in this case, Arbitration Act in Japan, which is a designated location of this arbitration procedure, has no provision obligating the party to disclose the Funding Agreement.

In case of the third party funding in an arbitration proceeding, it is totally a matter of the party to the arbitration whether or not it gets fund for arbitration from third party funder and what kind of conditions are set up for such funding. These are not at all related to counterpart or arbitral tribunal. Funding from a third party does not in itself cause the party’s unfairness or violate good faith and fair dealing in arbitration procedure. There is not a general doctrine that the party receiving funding must disclose facts about the funding to counterpart or arbitral tribunal.

In addition, Red has no information on whether the Fund has a vested interest in one of the arbitrators.

**3) Red is prohibited from disclosing the identity of the other party and the contents of the agreement to any third party**

Because there is an agreement between Red and the Fund that the parties must not disclose the agreement to the third parties, Red cannot disclose the fact about funding as a contractual obligation with the Fund. Furthermore, it is not appropriate for the arbitral tribunal to force Red by its order to violate the non-disclosure obligation of Red under the Funding Agreement.

Therefore, the Arbitral Tribunal should not order Red to disclose the contents of the Funding Agreement.

*End*