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ABBREVIATION	CITATION	CITED
International Commercial Arbitration	Gary B. Born International Commercial Arbitration Kluwer law international, 2rd ed., 2014	Chap. 23
Performance As A Remedy: Non-Monetary Relief in International Arbitration	Michael E. Schneider & Joachim Knoll Performance As A Remedy: Non-Monetary Relief in International Arbitration ASA Spec. Series No. 30, 2011	Chap. 3

TABLE OF CASES

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TABLE OF ABBREVIATION

Chap.	chapter
&	and
Art (s).	article (s)
UNCITRAL Rules	UNCITRAL Arbitration Rule (as revised in 2010)
Principles	UNIDROIT Principles of International Commercial Contracts 2016
Cl.	clause
Para.	paragraph
Problem	18th Intercollegiate Negotiation Competition Problem
“Blue Hot”	“Blue Hot” series
Agreement	Joint Venture Agreement
“Yellow Quick”	“Yellow Quick” series
§	section

STATEMENT OF FACTS

Red Corp.	A large Corporation in Negoland engaging in food and processed food businesses.
Blue, Inc.	A well-known corporation in Arbitria engaged in the import and sale of food products, and the manufacture and sale of processed foods and ready-to-eat foods.
Yellow Corp.	A joint venture by Red Corp. and Blue, Inc. engaged in manufacturing of ready-to-eat foods.

Crab Case

2012		Red Corp. and Blue, Inc. introduced a new account management system (RB Link) for the sales order process.
2018.01		At the request of Blue, Inc., Red Corp. created an information management system and put it into use. Blue, Inc. developed an AI system (Smart Blue), which could automatically place an order according to the forecast.
2019.03.03		Due to clicking on the email transmitted by Blue, Inc., hackers hacked into Red Corp.'s information management system and changed the price information of crabs from US$200 to US$50.
2019.03.04	Around 1:00 a.m.	Smart Blue placed an order for 10,000 Nego crabs. RB dashboard recorded the order at the price of US$200 each. Red Corp. sent out the delivery instruction to the warehouse promptly.
	5:00 a.m.	10,000 crabs were sent from the warehouse.
	8:00 a.m.	Red Corp.'s person in charge immediately took measures to shut off the unauthorized access and corrected the data.
2019.03.05		One staff of Blue, Inc. saw the information about the transaction of 10,000 Nego crabs. Blue, Inc., received the 10,000 Nego crabs.
2019.03.07		By looking for a buyer, Red Corp. told Blue, Inc. that Green Corp. was willing to buy the crabs at the price of US$100 each. Blue, Inc. and Green Corp. reached an agreement.
2019.03.10		Blue, Inc. shipped the crabs to Green Corp., and the freight and tariff cost US$500,000 in total, although the previous budget was US$200,000. Later, before the payment, Green Corp. went bankrupt.

Blue Hot Case

2014.12	Red Corp. and Blue, Inc. reached the Agreement of establishing Yellow Corp.
2015.01	Yellow Corp. started to operate and add "Nego Noodles" to its lineup.
2016	"Yellow Quick" was developed, including beef stew and aqua pazza.
2017	"Blue Hot" was developed by Blue, Inc. and sold in Arbitria.
2017.10	Red Corp. proposed to add "Blue Hot" to the Yellow Corp. but was rejected.
2018.01	With the addition of beef stew and aqua pazza, "Blue Hot" was sold in Negoland.
2018.12	Yellow Corp.'s profit decreased by US$1 million in 2018.

CRAB CASE

PART ONE: THE SALE AND PURCHASE AGREEMENT FOR 10,000 NEGO CRABS WAS EFFECTIVELY CONCLUDED.

I. Red Corp. and Blue, Inc. concluded the contract through an automated system.

1. The contract was concluded through automated contracting without the intervention of a natural person [*Comment 3 of Art. 2.1.1 of Principles*]. The parties agreed that Blue's AI "Smart Blue" automatically processed order through RB Link and Red's system would automatically give instructions to its warehouse after receiving the order without any person's operation. Consequently, an automated contract was concluded.

II. In the automated system, there was an offer and an acceptance.

2. Blue, Inc. informed a message "Blue, Inc. orders 10,000 Nego Crabs" via RB Link, indicating its requirement and intention to make a contract, which was an offer [*Art. 2.1.2 of Principles*]. The parties agreed that order forms and acknowledgment notices need not be exchanged if the order placed through RB Link [*Cl. 4 of Exhibit 6*]. Red Corp.'s system automatically processed shipment after receiving the order without acknowledgment notices, which was an acceptance [*Art. 2.1.6 of Principles*].
3. Acceptance is effective when the act is performed if the parties established the practice that the offeree may indicate assent by performing. Red Corp. shipped crabs at 5:00 am on March 4 [*Art. 2.1.6 of Principles*], which means it made an effective acceptance at 5:00 am on March 4.

PART TWO: IF AN AGREEMENT WAS EFFECTIVELY CONCLUDED, THE PRICE OF NEGO CRAB IS US$200 PER CRAB.

I. According to RB Dashboard, the price of Nego crab is US$200 per crab.

4. The price should be confirmed by the screen of the account management system of the RB Dashboard, which is US$200 per crab. The parties confirm transactions through RB Dashboard in real-time [*Cl. 6 of Exhibit 6*]. And there are two prices on the RB Dashboard, one is from the account management system, another is from the information management system. The functions of the two systems are different: account management system

handles the sales order process including the amount and the price of the transactions; and information management system manages the information concerning market etc. [*Exhibit 7A*]. Therefore, the price of the account management system is the dealing price.

II. <u>Even if there was no agreed price, the price of Nego crab is US$200 per crab according to the price which is generally charged on the market.</u>

5. If a contract does not fix or make provision for determining the price, the price is generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned [*Art. 5.1.7(1) of Principles*]. Nego crab is a luxury food which costs over US$200 per crab in general. When Blue, Inc. ordered the crab, there was no price fluctuation of the crab. So the market price is US$200 per crab as general at that time.
6. Therefore, if there was no agreed price, the price of Nego crab is still US$200 per crab according to the general charge.

PART THREE: BLUE, INC. CAN NOT CANCEL THE AGREEMENT.

7. In the contract, there is no situation of fraud, threat or gross disparity [*Art. 3.2.5, 3.2.6, 3.2.7 of Principles*]. The actual price of Nego crab is US$200 per crab while Blue, Inc. thought the Nego crab was US$50 per crab due to the wrong information, which is an erroneous assumption. Even though, Blue, Inc. cannot cancel the contract: the conditions of avoiding the agreement by the mistaken party or non-mistaken party canot be fulfilled [*Art. 3.2.2 of Principles*].

I. <u>The conditions of avoiding the agreement by the party other than mistaken party are not fulfilled.</u>

8. Red Corp. did not have the same erroneous assumptions [*Arts. 3.2.2 (1) (a) of Principles*]. The erroneous assumptions were not caused by Red Corp. for the information was correct, which is inputted by Red Corp. while the hacker changed the data. However, Red Corp. had installed the newest type of anti-virus system, and the virus causing of the hacking was in the mail sent by Blue [*Para. 15 of Problem*]. Red Corp. did not be aware of whether the orders are based on customers' order or on AI's prediction [*Para. 11 of Problem*]. Red Corp. had already shipped these Nego crabs, and it is reasonable to act in reliance of the contract

[*Art. 3.2.2 (1) (b) of Principles*].

II. <u>The conditions of avoiding the agreement by mistaken party are not fulfilled.</u>

9. If Blue, Inc. claims that Red Corp. did make the same mistake or caused the mistake, such petition still cannot be granted. Firstly, AI works 24 hours a day, 365 days a year, and thus information of transactions never stops coming up in RB Dashboard [*Exhibit 7*]. Blue, Inc. had the failure to monitor the transactions in real time, which is grossly negligent [*Art. 3.2.2 (2) (a) of Principles*]. Secondly, both parties have agreed that Red Corp. would not be responsible for the accuracy of the information provided by the information management system [*Exhibit 7*]. Such prior consent indicates that Blue, Inc. had noticed the risks on the accuracy of the information in advance.

PART FOUR: THERE IS NO FACTUAL OR LEGAL BASIS BASED ON WHICH THE AMOUNT TO BE PAID BY BLUE, INC. TO RED CORP. SHOULD BE REDUCED.

I. <u>Red Corp. did not result in any real harm of Blue, Inc.</u>

10. Red Corp. delivered 10,000 crabs promptly after receiving the order of Blue, Inc., which complied with the contract and Principles. The contract came into force at 5:00 a.m. on March 4 and cannot be cancelled. Blue, Inc. should perform the obligation to pay US$200 per crab according to the contract. All crabs arrived at Blue, Inc. on March 5. The behavior of Red Corp. did not affect Blue, Inc.'s payment obligation, nor did it cause any real harm to Blue, Inc.

II. <u>Red Corp. did not result in any loss of a chance of Blue, Inc.</u>

11. Loss of a chance is only compensated when obviously in proportion to the probability of its occurrence [*Comment 1 of Art. 7.4.3 of Principles*]. Even if Blue, Inc. had known the transaction information earlier, it would be uncertain whether it could find the trading partner before the crabs arrived. In fact, Blue, Inc. did not find a trading partner for quite a long time after the arrival of crabs, that is to say, the loss of a trading chance of Blue, Inc. was very uncertain, so Red Corp. did not cause loss of a chance of Blue, Inc., and there should be no compensation.

PART FIVE: RED CORP. DOES NOT HAVE THE OBLIGATION TO PAY US$500,000 TO BLUE, INC. FOR THE SALE OF NEGO CRABS TO GREEN CORP.

I. <u>Red Corp. was not bound by the contract between Blue Inc. and Green Corp.</u>

12. Red Corp. only introduced Green Corp. to Blue Inc. with a view to their concluding a contract as an intermediary who was not the principal or agent [*Comment 2 of Article 2.2.1 of Principles*]. Red Corp. was not responsible for the introduction of Green Corp, which did not grant the authority to Blue, Inc.

II. <u>Red Corp. was not responsible for the introduction of Green Corp.</u>

13. The conversation between Red Corp. and Blue, Inc. was not legally binding. The parties did not concluded a contract expressly or impliedly [*Article 2.1.1 of Principles*].
14. Red Corp. did not breach the good faith principle [*Article 1.7 of Principles*]. Blue, Inc. asked Red Corp.'s view of Green Corp. Red Corp. gave its view of Green Corp. basing on the past trade with it and did not exaggerate or cover anything. The bankruptcy of Green Corp. surprised the whole industry, Red Corp. could not have known or ought to have known the information in advance.

BLUE HOT CASE

PART ONE：SALES OF "BLUE HOT" CONSTITUTES A BREACH OF OBLIGATION BY BLUE, INC.

I. <u>The sales of "Blue Hot" in Negoland constitutes "engaging in business that competes with Yellow Corp."</u>

15. Neither party shall carry on nor be engaged in any business that competes with the business of Yellow during the period of this Agreement [*Cl. 14.3 of the Agreement*].
16. The business of Yellow is producing Products, which are instant food. So far, Yellow Corp.'s Products include "Blue Noodles" and "Yellow Quick". Behaviors that reduce the sales volume of these two products are regarded as the "business that competes with the business of Yellow".
17. "Blue Hot" is a kind of instant food, and beef stew and aqua pazza of "Yellow Quick" were added to "Blue Hot". The sales of "Blue Hot" greatly reduced the sales volume of "Yellow

Quick" [*Exhibit 12*]. As a result, the sales of "Blue Hot" in Negoland constitutes "engaging in business that competes with Yellow Corp."

II. <u>The behavior that Blue, Inc. sells products to Brown Trading Corp. is against "good faith".</u>

18. Both parties shall use their best efforts and shall cooperate with each other in good faith to make the business of Yellow to be successful [*Cl. 14.1 of the Agreement*].
19. Good faith is a fundamental idea [*Art. 1.7 of Principles*]. It is a mandatory term and Blue, Inc. must act in accordance with it through the life of the contract, including but not limited to the negotiation and implementation of the contract.
20. Red Corp. communicated with Blue, Inc. about whether "Blue Hot" was possible to be added as the joint venture Products in October of 2017. Blue, Inc. claimed that it would not sell "Blue Hot" in Negoland [*Exhibit 11*]. However, in January 2018, Blue, Inc. allowed Brown Trading Corp. to sell "Blue Hot" in Negoland. Blue, Inc. was not in line with its previous commitments totally, and thus, Blue, Inc.'s behavior is against "good faith".

PART TWO: THE TRIBUNAL SHOULD RENDER THE ARBITRAL AWARD.

I. <u>Blue, Inc. should perform its obligation.</u>

21. A party who owes an obligation other than one to pay money does not perform. The other party may require performance [*Art. 7.2.2 of Principles*].
22. The Agreement stipulates that neither party shall carry on nor be engaged in any business that competes with the business of Yellow during the period of this Agreement. Blue, Inc. should perform its obligation but in reality it breached it.

II. <u>The Tribunal has remedial authority to grant an injunctive relief.</u>

23. Arbitration is about consent and thus all arbitration ultimately relies on the parties' will to submit it [*Performance as A Remedy: Non-Monetary Relief in International Arbitration*]. Parties' will be the source of arbitrators' power, which can be interpreted by the agreement. Consequently, the agreement gives the remedial authority to grant an injunctive relief [*International Commercial Arbitration*].
24. The Agreement confirms the responsibility of Blue, Inc. which should not engage in business that competes in Yellow Corp. Therefore, the Tribunal has the remedial authority

to grant an injunctive relief.

III. <u>Tendency of international arbitration practice recommends the Tribunal to order injunctive relief.</u>

25. Some International arbitration conventions and national arbitration statutes stipulate that a tribunal can grant an injunctive relief.

26. The English Arbitration Act, 1996 provides that a tribunal has the power to grant declaratory and injunctive relief [*English Arbitration Act, 1996, §48(5)*]. Hong Kong Arbitration Ordinance grants that the tribunal has the same power as the Court to order specific performance of any contract [*Hong Kong Arbitration Ordinance, 2013, Art. 70*]. Although UNCITRAL Rules did not clearly give the tribunal the authority to order the injunctive relief, granting such relief in arbitration law is an acceptable practice which should not be ignored by the Tribunal.

PART THREE: BLUE, INC. OWES THE OBLIGATION TO PAY US$400,000 FOR DAMAGES TO RED CORP.

I. <u>The behavior of Blue, Inc. constitutes a non-performance and cannot be excused.</u>

27. Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the nonperformance is excused under these Principles [*Art. 7.4.1 of Principles*].

28. There was a breach of obligation on the part of Blue, Inc. in Issue ① and therefore, Red Corp., as the aggrieved party, has the right to damages. In addition, the non-performance of Blue, Inc. does not constitute force majeure or exemption clauses stipulated in Principle and cannot be excused.

29. Blue, Inc. knew that Brown Trading Corp. intended to sell “Blue Hot” in Negoland. However, there is no provision in the contract [*Exhibit 13*]. Blue, Inc.'s breach of obligation is not due to an impediment beyond its control, so the behavior of Blue, Inc. constitutes a non-performance and cannot be excused.

II. <u>US$400,000 is the gain which Red Corp. was deprived of.</u>

30. The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of

which it was deprived [*Art. 7.4.2 (1) of Principles*].

31. The aggrieved party is entitled to compensation not only of loss which it has suffered, but also of any gain of which it has been deprived as a consequence of the non-performance. Due to the sales of "Blue Hot" in Negoland, the profit loss Red Corp suffered was 400,000. If Blue, Inc. had not violated the obligation, US$400,000 would have been the benefit which would normally have accrued to Red Corp. Therefore, US$400,000 is the gain which Red Corp. was deprived of and should be fully compensated.

III. The probability of loss of a chance and the occurrence of harm is reasonably certain.

32. Compensation is due only for harm, including future harm, which is established with a reasonable degree of certainty [*Art. 7.4.3 (1) of Principles*]. Compensation may be due for the loss of a chance in proportion to the probability of its occurrence [*Art. 7.4.3 (2) of Principles*].

33. The loss of a chance of Red Corp. is in proportion to the probability of its occurrence. Both Red Corp. and Blue, Inc. agree on Mr. Bob Orange's reliability as an expert. The expert's opinion clearly shows that the total annual sales in FY 2018 were down by about US$10 million [*Exhibit 12*]. As a result, the probability of the loss of the chance and the occurrence of harm is reasonably certain.

THIRD PARTY FUND ISSUE

THE BLUE, INC.'S PETITION REGARDING THE DISCLOSURE OF THIRD PARTY FUND SHOULD BE REJECTED BY THE TRIBUNAL.

I. Blue, Inc.'s submission of the disclosure of the third party fund is inadmissible.

A. Blue, Inc.'s submission of disclosure of the third party fund lacked relevant factors and legal evidence.

34. The arbitrator has the power to refuse a petition regarding challenge of the arbitrator due to lack relevant factors.

35. In case Sehil dv. Turkmenistan, the Respondent has failed to show that third party funding is likely, or that it is relevant for the Tribunal's determination of the issues currently under

deliberation between the Tribunal members. Further, no reasons have been given as to why this information is relevant. In the present case, Blue, Inc. merely raised a petition regarding the challenge of arbitrators without relevant evidence.

36. Blue, Inc. could make further request for disclosure at a later stage in this arbitration if it has additional information.

B. The third funding party of Red Corp. will not influence the justice of the arbitration.

37. In the present case, all the arbitrators have made an additional disclosure statement. The arbitrators have no knowledge of who the third party fund provider to Red Corp. is. Red Corp. has no information on whether the fund has a vested interest in one of the arbitrators.

C. Blue, Inc. should submit the petition regarding the challenge in a good faith.

38. In the present case, Blue, Inc. submitted the petition just a few days before the hearing. The behavior of the claimant may show its intention to defer the procedure of the hearing. The deferring may cause unnecessary waste of time and fee.

II. The Red Corp. has no obligation to disclose the contents of the agreement regarding the fund.

A. It is the arbitrator's duty to disclose any circumstance likely to give rise to justifiable doubts.

39. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her in these circumstances [*Art. 11 UNCITRAL Rules*].

B. In the agreement, there are provisions prohibited the Red party from disclosing the information to any third party.

40. In case Guaracachi v. Bolivia, the UNCITRAL Tribunal ordered that there is no basis to order the disclosure of the agreement entered into with the founder.