Case 1: Blue One Case

Issue 1: Blue Inc. does not have a legal obligation to deliver 200 cases of Blue One to Red Corp.

Summary of Facts
Blue Inc has sold Blue One to Red Corp since 2011. Every year, a Sales Agreement was entered into which specified the number of Blue One cases Blue Inc has to sell to Red Corp. The number of cases sold per year varied from 200 to 210 cases from 2011 to 2019. Prior to the signing of the 2020 Sales Agreement, Blue Inc clearly and expressly indicated that they will only sell 100 cases of Blue One in 2020. The 2020 Sales Contract which was signed by both parties clearly stated that 100 Blue One will be sold. Red Corp informed Blue Inc that they wished for Blue One to be shipped by air, not by ship as originally planned, and that Red Corp will bear all costs and risks. However, between the time the air carrier received the container and the time it was to be loaded onto the airplane, the largest thundercloud in recorded history occurred near the airport, and a lightning strike destroyed the cases of Blue One.

The 2020 Sales Contract.

1 Blue Inc. does not have a legal obligation to deliver 200 cases of Blue One to Red Corp in the year 2020 given that the Sales Contract signed on 26 September 2020 only makes provision for 100 cases of Blue One to be delivered.

Contractual obligations between the parties are only limited to the year in which the contract was signed.

2 Contrary to Red Corp's allegations, Blue Corp is not contractually obligated to provide 200 cases of Blue One every year. This is because the Sales Contract applies only for the year that they are signed, as per Exhibit 3-2. As seen from Exhibit 4, the purchase quantity and price of Blue One varies depending on the year, according to the Sales Contract signed for that year which only applies to that particular year. Therefore, the Sales Contract was renewed on an annual basis, and parties are not bound by expired contracts in past dealings.

There is no implied obligation to sell 200 cases of Blue One every year.

3 There are also no implied obligations for Blue Corp to sell 200 cases of Blue One every year. Red cannot rely upon Article 5.1.2 (Implied Obligations) of the UNIDROIT Principles of International Commercial Contracts ("PICC") to argue that there is such an implied obligation.

4 Firstly, PICC Article 5.1.2 (Implied obligations) is typically invoked when there are contract terms left open to interpretation (Comment 1 of PICC Art 2.1.14), or when there is a gap in the contract (Comment 2 of PICC Art 4.8). In this case, as the contract explicitly states that Blue Inc will sell 100

cases of Blue One, there is no contract term left open to interpretation nor gap in the contract on how many cases of Blue One should be sold.

5 Secondly, PICC Article 5.1.2 (Implied obligations) cannot be invoked because the implied obligations in question were neither 'obvious', nor adduced by past dealing (Comment 2 of PICC Art 5.1.2). This is because the quantity of Blue One varied depending on the year, and 200 cases of Blue One have not been consistently sold every year (Exhibit 4). Red cannot claim that past practices had created an understanding which led them to detrimentally rely upon PICC Article 1.8 (Inconsistent behaviour) because there is no established cause of dealings in selling specifically 200 cases of Blue One every year.

The memo provided by Taro Blue is not a contractual document.

6 The implied obligation cannot be based on the memo provided by Taro Blue as it is not a contractual document. According to PICC Article 2.1.2 (Definition of offer), an offer has to indicate the intention of the offeror to be bound in case of acceptance. The memo has no indication that Taro Blue intended to be binded legally: it does not have sufficient details, including an end date, and has not been followed in the years since 2011 in terms of the purchase quantity and the purchase price. Subjectively, Taro Blue did not intend for the memo to be binding (Exhibit 3-2).

An implied obligation to sell 200 cases ad infinitum is not commercially viable.

7 An implied obligation to continually sell 200 cases ad infinitum is not commercially viable. Reasonableness is a key element of an implied term based on PICC Article 5.1.2 (Implied terms), and reasonableness requires commercial viability. However, an implied obligation to sell 200 cases every year is not commercially viable as demand and supply of Blue One varies from year to year, depending on market demand, production viability, and other factors. In certain years, Blue Inc will be unable to sell 200 cases based on factors outside of its control. Therefore, such an obligation is unreasonable and not commercially viable and hence cannot be implied.

Blue Inc has acted in good faith and fair dealing.

8 Blue Inc has acted in accordance with the fundamental spirit of the UNIDROIT principles through good faith and fair dealing (Comment 1 of PICC Art 1.7). Blue Inc, in an exercise of good faith, chose to reject an offer for 100 cases of Blue One from a higher bidder and offer them to Red Corp instead despite the delay of Red Corp in ordering the cases from Blue Inc. Furthermore, in light of Red Corp's request for 200 cases, Blue Inc offered 100 cases of "Five famous Chateau" wines, and made a request to other parties whom Blue Inc had contracted with for Blue One to consider terminating those contracts (Exhibit 5). As such, Blue Inc has fulfilled its contractual obligations and has acted in good faith in all dealings with Red Corp.

Issue 2: Blue Inc. is not liable for nonperformance of obligation concerning 100 cases of Blue One in relation to the sales agreement dated September 26, 2020

<u>Lightning strike constitutes an event of *force majeure.*</u>

9 Pursuant to Clause 10 of the sales agreement, Blue Inc's non-performance is excused under the force majeure clause.

10 The force majeure clause states that:

> "*Neither party shall be responsible for any failure to fulfill its obligations hereunder due to causes beyond its reasonable control, including without limitation acts or omissions of government or military authority, acts of God, shortages of materials, transportation delays, fires, floods, diseases, labor disturbances, riots, or wars provided that it gives prompt notice to the other of its invocation of this provision and makes diligent efforts to resume its performance despite such force majeure*."

11 The unprecedented lightning strike on October 7 2020 constituted force majeure because it was an act of god that resulted in a fire damaging the goods. Such an event was beyond Blue Inc's control because it was the largest thundercloud in recorded history. In fact, the presence of standard equipment to prevent lightning and fire is further evidence that reasonable precautions were taken. Therefore, the lightning strike was likely an act beyond reasonable control.

12 Blue Inc notified Red Corp immediately on October 8 via email as demonstrated in Exhibit 8. This evinced a clear invocation of the force majeure clause in the contract.

13 The force majeure clause interplays with the following two concepts: (A) Impossibility and (B) Commercial Impracticality.

> (A) Impossibility: Following the destruction of the 100 cases, Blue Inc had a contractual obligation to deliver the remaining 200 cases in it's warehouse to a separate buyer. Due to the limited available stock, there is no recourse to replace the goods damaged by the force majeure.
>
> (B) Commercial Impracticality: Acknowledging the facts of the incident, even though the bonded area was equipped with standard equipment to prevent lightning and fire, all 100 cases were completely burnt and destroyed. It would go against mercantile sense and reason for Blue Inc to unilaterally bear the brunt for damages it had not caused.

14 In spite of the force majeure, Blue Inc made clear and diligent efforts to resume performance. The structure of the clause suggests that the duty to resume performance is a duty of best efforts. Pursuant to PICC Article 5.1.4 (Duty to achieve a specific result; Duty of best efforts), such a duty is characterized by efforts made by a reasonable person in the same circumstances. In light of the impossibility and commercial impracticability of sending Blue One wine, Blue Inc's offer of 100 cases of Five Famous Chateux evinced a diligent and reasonable effort to resume performance. Notwithstanding that the Five Famous Chateux was a second label wine, it had higher Baker Points than Blue One and pursuant to Exhibit 16, would have generated the exact same profits for Red Corp.

Even if the lightning strike did not constitute as an event of *force majeure*, it constitutes an event of hardship.

15 In such cases, an argument can be put forth for Hardship under PICC Article 6.2.2 (Definition of Hardship). Hardship is established where there is an event that *"fundamentally alters the equilibrium of the contract either because the cost of the party's performance has increased or because the value of the performance a party receives has diminished"*. Crucially, the additional requirements set out under PICC Article 6.2.2 (a) to (d) are also met. The four additional requirements stipulate that the event has to (a) happen *"after the conclusion of the contract"*; (b) could not *"reasonably"* have been accounted for; (c) *"beyond the control"* of the disadvantaged party; and (d) risk of the event *"was not assumed"*.

16 The lightning strike occurred after the conclusion of the contract on October 7 and was the largest thundercloud in recorded history. This strike happened even after all reasonable precautions were taken as evidenced by the presence of standard equipment to prevent lightning and fire within the bonded area. Critically, Red Corp had agreed to bear all risks pursuant to the email correspondence in Exhibit 7. As such, the four requirements are satisfied on the facts.

17 Additionally, the lightning strike fundamentally altered the equilibrium of the contract by increasing the cost of Blue Inc's performance. Blue Inc is entitled to request renegotiations by offering the 100 cases of second label wine, which was then rejected by Red Corp. Therefore, the tribunal has the authority to *"terminate the contract at a date and on terms to be fixed"* or *"adapt the contract with a view to restoring its equilibrium"* under PICC Article 6.2.3 (Effects of hardship) so as to prevent unreasonable losses on the part of Blue Inc.

Non-liability due to the sales terms of the contract.

18 The Sales Contract Agreement (Exhibit 6), indicated terms of delivery as Free on Board (FOB). Pursuant to INCOTERMS 2020, liability for the delivery rests on the purchaser once the goods have been delivered to the loading point. Therefore, Blue Inc is not liable for any destruction of the goods.

19 Under INCOTERMS A3 (Transfer of Risks), "the seller bears all risk of loss of or damage to the goods until they have been delivered in accordance with INCOTERMS A2 (Delivery)". INCOTERMS A2 defines delivery as the seller *"placing [the goods] on board the vessel nominated by the buyer at the loading point"*. Under INCOTERMS A2(1) and A2(2), the delivery must conform to the *"agreed date"* and *"time"*. It must also satisfy INCOTERMS A2(4) by being delivered *"in the manner customary at the port"*.

20 In this case, the handover to the carrier company occurred on 7 October 2020, 8 days prior to the delivery deadline of 15 October 2020, and was clearly punctual. The 100 cases were handed over to the carrier company, and neither the air carrier nor any other entity can be held responsible for its eventual destruction. Therefore, the exceptions do not apply, it is only reasonable that Red Corp now bears the risks of the delivery, according to the terms of delivery.

Even if the FOB is restricted, Red Corp will still bear the risk of air delivery under a supplied term.

21 Acknowledging that FOB is restricted to goods which are transported by *'sea or inland waterways'*, there exists a need to supply a term which clearly sets out that risks for air delivery are fully

borne by Red Corp. Pursuant to the PICC Article 4.8 (Supplying an omitted term), the appropriate term is determined by considering:

(a) The intention of the parties;
(b) The nature and purpose of the contract;
(c) Good faith and fair dealing
(d) Reasonableness

22 Considering the email correspondence in Exhibit 7 where Red Corp requested for shipment via air and expressly agreed to bear all cost and risks associated. This evinced a clear intention from both parties to supply a term in which Red Corp bears the risk of air delivery. Additionally, it is clear that the nature and purpose of a sales transaction contract requires a term to specify the allocation of risk. Hence, this satisfies (a) and (b).

23 Further, the air delivery was a result of Red Corp's last-minute request to vary the contractual terms that were mutually agreed upon. Blue Inc had kindly accommodated the request with the express understanding that Red Corp would bear any and all risks. Hence, it would only be reasonable and in good faith for the additional term to be supplied. Thus, (c) and (d) are similarly made out.

24 In sum, Blue Inc is not liable because of unforeseeable events beyond its control and an express agreement from Red Corp to bear all risks.

Issue 3: If the liability of Blue Inc. for nonperformance of obligation is recognized for 200 cases or 100 cases of Blue One, what should be the amount to be paid to Red Corp. in each respective case?

Recovery of losses should be reduced if they were wholly or in part caused by Red Corp omitting to purchase insurance.

25 According to the PICC Article 7.4.7 (Harm due in part to aggrieved party), *"Where the harm is due in part to an act or omission of the aggrieved party or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties."* Even if Blue Inc is liable for nonperformance, Red Corp's losses are a result of their omission to purchase insurance.

26 If not for Red Corp's failure to purchase insurance, Red Corp would not have suffered the pecuniary losses from the destruction of the Blue One cases. Considering that there was no negligence on the part of Blue Inc and the carrier company, Furthermore, Red Corp was the party that requested for shipment via air and expressly agreed to bear all cost and risks associated (Exhibit 7). Therefore, any recovery to Red Corp should be wholly reduced.

Recovery of losses should be proportionate to the reasonable degree of harm.

27 Assuming that liability for nonperformance is established, Blue Inc submits that the appropriate framework to determine damages should take into account the proportion of Blue One sold at Red Corp's restaurants and hotels vis-a-vis its shops. Additionally, it should factor in the likelihood of the Blue One wine being sold and any other goods such as the Five Famous Chateaux that could offset the damages.

28 Firstly, Red Corp's claim for 1,200,000 USD if liability for 100 cases is recognised is excessive and must be reduced. Pursuant to PICC Article 7.4.1 (1) (Right to damages), "*compensation is only due for harm...that is established with a reasonable degree of certainty*". The amount claimed assumes that 100% of Blue One stock will be sold for a higher price at the restaurants. However, previous statistics indicate that 70% of the sales of Blue One in Negoland is from restaurants and hotels, and 30% is from shops. Therefore, Red Corp's claimed amount is only reasonable if it reflects the 70/30 breakdown.

29 Typically, a bottle of Blue One sells for 1000 USD in a restaurant and 300 USD in a shop. The reasonable deprived gain will only amount to 948,000 USD (1000 USD x 70 + 300 USD x 30) Allowing the excessive recovery goes against all customary practice and would be commercially unsound.

<u>The Pandemic's impact on Red Corp should be taken into account for potential sales.</u>

30 Furthermore, Blue Inc argues that the compensation to Red Corp should be proportionate to the continued probability of lowered sales, in light of the coronavirus pandemic.

31 Under PICC Article 7.4.3 (Certainty of harm), under limb 2: "*Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.*" Red Corp's argument presumes that every case of Blue One would be sold. However, Exhibit 1 outlines that the revenue and profit of Red Corp has decreased as the number of customers and sales per customer decreased. It is logical that Red Corp has only lost the chance of profit from selling some, but not all of the cases of Blue One. Their profit has decreased from 20 million USD in 2019 to 18 million USD in 2020, a 10% drop in sales.

32 On top of the proposed recovery of 948,000 USD, this amount should be further reduced by 10% to reflect the probabilities of sales in the current business climate of Negoland. This would bring the recoverable amount for 100 cases of Blue One to 853,000 USD.

<u>Red Corp cannot claim damages for harm that it could have reasonably mitigated against.</u>

33 According to PICC Article 7.4.8 (Mitigation of Harm), the non-performing party is not liable for harm suffered by the aggrieved party for the extent of harm that could have been reduced by latter taking reasonable steps. Blue Inc offered to supply 100 Five Famous Chateaux to Red Corp to offset the recoverable damages which Red Corp rejected in Exhibit 5. The Five Famous Chateaux is a high quality wine that received higher Baker Points than Blue One wine this year and has a value that is 50% more expensive than Blue One wine. Selling the Five Famous Chateaux would have allowed Red Corp to recover the exact amount of profit it stood to gain if it had sold Blue One wine, according to Exhibit 16, As Red Corp lost 1,896,000 USD in profit, this means that the value that each bottle of Five Famous Chateaux would have offset is calculated as 1580 USD (= 1,896,000 / 100 cases x 12 bottles in each case).

34 As such, Blue Inc submits that this amount should be minimally reduced to 948,000 USD. This is calculated as 840,000 USD (=1000 USD x 70 cases x 12 bottles) + 108,000 USD (=300 USD x 30 cases x 12 bottles). This is contrary to Red Corp's claims that the amount of lost profits for 100 cases is 1,200,000 USD (=1,000 USD x 100 cases x 12 bottles).

Case 2: Kanpai Case

Issue 1: Is Red Corp. entitled to terminate the exclusive distributorship agreements for Kurenai and Kanpai entered into with Blue Inc?

Summary of Facts
An exclusive distributorship agreement for Kurenai Sake was entered into between Red Corp. and Blue Inc in November 2014 (the "Kurenai Agreement"). Under the Kurenai Agreement, Blue Inc is to sell a minimum quantity of 10,000 cases of Kurenai yearly. In 2018, under the instructions of Red Corp, Blue Inc. shifted its manpower and resources away from the promotion of Kurenai to Kanpai. This resulted in a drop in sales for Kurenai. Blue Inc had served as the exclusive distributor in Arbitria for "Kanpai" produced by Yellow Corporation (the "Kanpai Agreement"). In 2018, Yellow Corporation transferred the Kanpai Agreement, along with its obligations of producing and selling Kanpai to Blue Inc, to Red Corp. Under the Kanpai Agreement, Blue Inc is to meet a minimum purchase requirement yearly, with excess for any period credited towards the minimum purchase requirement for the subsequent period. Both agreements also contain a clause for *force majeure* absolving liability from parties for causes beyond the reasonable control of a party. The General Business Agreement between Yellow Clause 15 (b) of the Exclusive Distributorship Agreement points to the General Business Agreement in the event of a dispute. The General Business Agreement states that any disputes or controversies shall be "*settled by arbitration*". It is, however, not specified which arbitration tribunal or which arbitration rules shall have jurisdiction over disputes in the General Business Agreement that both companies rely on in the exclusive distributorship agreement. This creates an ambiguous term.

<u>Kurenai Contract: Red Corp has no right to terminate the exclusive distributorship agreement for Kurenai.</u>

35 Since Blue Inc is not liable for meeting the sales target in both 2019 and 2020, according to Article 16 of the Exclusive Distributorship Agreement, Red has no right to terminate the Exclusive Distributorship Agreement. Article 16 of the Exclusive Distributorship Agreement states that Red Corp can only terminate if Blue Inc fails to meet the minimum sales for *two* years consecutively. In this case, Blue Inc is not liable for not meeting the sales target in both 2019 and 2020 (see below). Even if Blue Inc is liable for not meeting the sales target in either 2019 or 2020, Blue Inc is only responsible for not meeting the sales target in *one* year and hence Red Corp has no right to terminate the contract based on Article 16.

36 Red Corp has no right to terminate the agreement under Article 15 (Duration) as the contract has already been extended for three years since 1 January 2020. Per Article 15, the contract is automatically renewed if a notice of termination is communicated with a 3-month notice period.

Red Corp caused Blue Inc's failure to sell 10,000 cases in 2019.

37 Blue Inc is not liable for this failure to sell 10,000 cases in 2019 as this failure was caused by Red Corp. According to PICC Article 7.1.2 (Interference by the other party),

"*A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk*."

38 The failure to sell 10,000 cases of Kurenai in 2019 was caused by Red Corp as Red Corp requested Blue Inc to put Blue Inc's energy into "Kanpai" rather than "Kurenai" (Exhibit 13). In good faith, Blue complied with Red Corp's request and allocated manpower to sales of "Kanpai". Because of this, "*the sales volume of "Kurenai" was below that in the fiscal year 2018"*. Thus, Red Corp *caused* Blue Inc's failure to sell 10,000 cases in 2019 and hence cannot rely on the failure of Blue Inc to terminate the contract.

The failure to meet the minimum sales target in 2020 is due to force majeure. Since performance is delayed but not entirely prevented, Red Corp has no right to terminate.

39 The failure of Blue Inc to meet the Based on the Exclusive Distributorship Agreement in Exhibit 9, Article 18, parties *"shall not be liable for any...delays or failures to perform in whole or in part"* resulting from causes *"beyond the control of either party including...acts of God"*. Therefore, Blue Inc is not liable for not meeting the minimum sales target pursuant to exemptions for acts of God.

40 In 2020, as an act of God, there was a novel coronavirus pandemic in Arbitria, which caused a slowdown of not only the food service industry but a slowdown of the entire economy. Because of the pandemic, the government subsequently advised restaurants to refrain from operating their restaurants after 9:00 pm and to refrain from serving alcohol even before 9:00 pm. With the pandemic and the government advisories, sales of Kurenai naturally decreased. Even though the government did not impose a mandatory lockdown, it would be reasonable to expect a poor business climate given the reluctance of consumers to go outdoors during a severe pandemic and the financial incentives for businesses to stay shut. Therefore, Blue Inc is not liable for the failure to achieve 10,000 in 2020.

41 Red Corp is not entitled to terminate the exclusive distributorship agreement as the failure to achieve the minimum sales target of 10,000 cases in 2020 was due to *force majeure*. Pursuant to Comment 2 of PICC Article 7.1.7 (Force majeure), in cases where the *"impediment will simply delay performance"*, the effect of the article will *"give extra time for performance*". Only when performance has been fundamentally and entirely prevented, should PICC Article 7.1.7 Clause 4 (Aggrieved Party may withhold performance pending cure) apply and entitle parties to terminate. Since Blue Inc has continued to place orders for greater volumes of Kurenai, it intends to fulfil the minimum sales obligation. Therefore, the force majeure has merely delayed performance, and will not grant Red Corp a right to terminate.

Red Corp caused Blue Inc's failure to sell 10,000 cases in 2020.

42 Furthermore, Blue Inc is not liable for this failure to sell 10,000 cases in 2020 as this failure was caused by Red Corp. According to PICC Article 7.1.2 (Interference by the other party), Red Corp may not rely on the non-performance of Blue Inc since the non-performance was caused by Red Corp's act. Blue had attempted to fulfil the contract through selling Kurenai at retail stores and online shops, but

was prevented from doing so under Red Corp's directions (Exhibit 14). Specifically, Red Corp said that Kurenai "*should be sold only at restaurants, hotels and our shops in Negoland*" and not directly to individuals. In this case, Red Corp prevented Blue Inc from fulfilling its obligations to sell 10,000 cases and hence Blue Inc's failure was caused by Red Corp. Thus, Red Corp cannot rely on Blue Inc's failure to terminate the contract.

<u>There is no right to terminate the Kanpai Contract.</u>

43 In September 2018, Yellow Corporation, which previously produced and sold "Kanpai", transferred the right to produce and sell Kanpai to Red Corp. Blue Inc had served as exclusive distributor of "Kanpai" in Arbitria for Yellow Corporation, and now served as the exclusive distributor of "Kanpai" for Red Corp. Red Corp seeks to terminate the exclusive distributorship agreement even though it has no basis to do so as Blue has met the total purchase quantity for the years 2017 - 2019, and the inability to meet the purchase quantity in 2020 was due to a *force majeure* event.

44 In the Exclusive Distribution Agreement (Exhibit 11) between Blue Inc and Yellow Corporation, the following right under clause 9 was transferred to Blue Inc. Under 'Minimum Purchase', purchases of products in excess of the minimum purchase requirement may be credited towards the minimum purchase requirements set forth in subsequent periods.

45 The minimum purchase requirements total up to 32000 units and are as such:

a. 2017: 5000;
b. 2018: 12000;
c. 2019: 15000

46 Calculating the purchase records, the units also total up to 32000 with the breakdown as such:

d. 2017: 8000;
e. 2018: 10000;
f. 2019: 14000

47 Therefore, the purchase records clearly evince that there has been no breach of the minimum purchase requirements from 2017 to 2019.

<u>According to the Contra Proferentem Rule, Blue Inc satisfies the minimum purchase from 2017 to 2019.</u>

48 The phrase 'subsequent periods' invites ambiguity as to whether there is a limitation to the duration the excess will remain valid. Blue Inc argues that the validity should be indeterminate. Referring to:

PICC Article 4.6 (Contra Proferentem Rule): "If contract terms supplied by one party are unclear, an interpretation against that party is preferred."

49 Since Red Corp is relying on the minimum purchase clause to argue for termination, the clause should be interpreted against them. Therefore, the 3000 units of excess purchase in 2017 should cover the deficits of 2000 and 1000 units in 2018 and 2019 respectively.

50 It does not matter that the initial agreement was signed between Blue Inc and Yellow Corporation as under the Assignment of Contract (Exhibit 12), Red Corp receives all of Yellow Corporation's rights and obligations.

51 In contrast to a minimum sales clause, which guarantees profits for both seller and buyer, a minimum purchase clause primarily guarantees the profits of the seller. It will not matter which year the purchases are made, so long as the net profit of Red Corp sums up to the minimum purchases indicated from 2017 to 2021.

52 In 2020, Blue Inc is not liable for the 6000 deficit in the minimum purchase. According to the force majeure clause of the agreement, the coronavirus situation in Arbitria constitutes force majeure for reasons similar to the Kurenai case. Therefore, Blue Inc should be exempted from the deficit in the 2020 minimum purchase.

Issue 2: Should the interim measures sought by Blue Inc. be accepted?

Prevention of current or imminent harm.

53 Blue Inc. sought interim measures to order Red Corp. to (i) suspend sales of "Kurenai" and "Kanpai" to Green Corp and (ii) order Red Corp to sell "Kurenai" and "Kanpai" to Blue Inc. This falls under:

Article 26 s(2)(b) of the UNCITRAL Arbitration Rules which defines interim measures as *"action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself"*.

54 The proposed interim measures prevent current or imminent harm from happening as it prevents economic loss from the breach of the exclusive distributorship agreement (*see* Exhibit 9 and Exhibit 11). Further, it prevents prejudice towards the arbitral process because it prevents premature actions on the part of Red Corp that operate on the assumption that the contract can be terminated and transferred to Green Corp.

55 According to Article 26 s(3) of the UNCITRAL Arbitration Rules, the party requesting an interim measure must satisfy two requirements:

a. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
b. There is reasonable possibility that the requesting party will succeed on the merits of the claim

Requirement (a) of UNCITRAL Article 26 s(3) is satisfied.

56 Blue Inc is likely to suffer harm not adequately reparable by an award of damages if the interim measures are not ordered and such harm substantially outweighs the harm that is likely to result to Red. Without the interim measures, Blue Inc will lose the exclusive right to distribute both Kurenai and Kanpai given that Red Corp has already prematurely terminated and transferred the distributorship to Green Corp. This significantly damages the reputation that Blue Inc has built up over the years and Blue Inc's standing in the industry. As such, it is likely that s3(a) is made out.

57 Even if UNCITRAL Article 26 s(3)(a) is not satisfied, there is strong authority that suggests interim measures intended to prevent aggravation of parties' disputes are subject to a different standard. According to Gary Born, International Commercial Arbitration (3rd Ed): Chapter 17: Provisional Relief in International Arbitration (Jan 2021) ("Born"), the standard is based more generally on the commercial desirability of stopping parties from taking unilateral steps to improve their position (page. 2674, Born). On the facts, Red Corp was taking unilateral steps to improve their position by prematurely terminating the exclusive distributorship agreement and transferring it to Green Corp. This benefits Red Corp who can sell their products and earn revenue even while the dispute is ongoing. As a result, it would be commercially desirable to suspend sales to Green Corp per (i) and continue with Blue Inc as the exclusive distributor per (ii).

Requirement (b) of Article 26 s(3) is satisfied.

58 There is a reasonable possibility that Blue Inc will succeed in preventing Red Corp from terminating the contract, hence fulfilling requirement (b) of UNCITRAL Article 26 s(3).

59 On the facts, Red Corp's provision of Kurenai and Kanpai to Green Corp is premised upon a valid termination of the Exclusive Distributorship Agreement that Red Corp has with Blue Inc. Blue Inc submits in Issue 1 that Blue Inc did not breach the contract for non-performance due to the extenuating circumstances of force majeure. Therefore, Blue Inc has a prima facie case that Red Corp does not have legally valid grounds to terminate the contract. In that case, Red Corp's agreement with Green Corp contravenes Article 1 of the agreement for Kurenai and Article 2 of the agreement for Kanpai where Blue Inc was accorded rights to be the exclusive distributor for both alcohols. By breaching the articles, Red Corp is liable for non-performance of the contract per PICC Article 7.1.1 (Non-performance defined). This means Blue Inc is still legally entitled to act as the exclusive distributor of Kurenai and Kanpai as mentioned in interim measure (ii) and Green Corp's agreement with Red Corp should be suspended per interim measure (i). Hence, there is a reasonable possibility that Blue Inc will succeed on the merit of its claims.

Red Corp's premature actions are in bad faith.

60 Furthermore, Red Corp's premature actions go against PICC Article 1.7 (Good faith and fair dealing) where each party must act in good faith and fair dealing. By entering into an agreement with Green Corp, Red Corp is acting in bad faith by harming Blue Inc's interests while simultaneously seeking to arbitrate the matter.

Issue 3: Does the arbitral tribunal have jurisdiction over disputes related to the exclusive distributorship agreement of Kanpai? (Red Corp. has not made an objection to the current arbitral tribunal handling the case, if it is recognized that the dispute related to Kanpai may be resolved by arbitration).

There is a valid arbitration agreement relating to the exclusive distributorship agreement for "Kanpai since Arbitration is the intended dispute resolution method.

61 The arbitral tribunal has jurisdiction over disputes related to the exclusive distributorship agreement of Kanpai because there is a valid arbitration agreement. This is because an intention to arbitrate is sufficient for the arbitration clause to be effective, even if the term is ambiguous. On the facts, the dispute resolution clause governing the exclusive distribution agreement for Kanpai is sufficient to evidence intention for the current arbitral tribunal to have jurisdiction.

62 According to Gary Born, International Commercial Arbitration (3rd Ed): Chapter 5: Formation, Validity and Legality of International Arbitration Agreements (Jan 2021), most national court decisions and arbitral awards have ruled that "*any reasonable intention to arbitrate*" is sufficient to give effect to any international arbitration agreement (page 813, Born). This intent to arbitrate supersedes any "*uncertainties, inconsistencies, or errors in specifying aspects of the arbitral procedure*" (page 814, Born), and should not preclude its enforcement (page 818, Born).

63 In the 'Exclusive Distributorship Agreement for Kanpai' such an intention to arbitrate between the parties is made clear as seen from the General Business Agreement between Yellow Corp and Blue Inc. When the existing distributorship agreement was assigned to Red Corp in the 'Assignment of Contract' found in Exhibit 12, clause 2 (Assumption of Obligations) ensures that all obligations of Yellow Corp of the exclusive distributorship agreement for Kanpai are transferred to Red Corp. This included an arbitration agreement. Therefore, a valid arbitration agreement exists.

64 This is further evidenced by Red Corp's lack of objection to the current arbitral tribunal handling the dispute here. This can be seen from Exhibit 16, which states that "*Red Corp. has not made an objection to the current arbitral tribunal handling the case, if it is recognized that the dispute related to Kanpai may be resolved by arbitration*". Thus, it is clear that the parties intended to use arbitration.

65 Even where the arbitration rules are not specified in the arbitration clause, this does not nullify the validity of an arbitration clause. As stated at Born (page 829), "*there is no requirement in virtually any legal system that an arbitration agreement incorporate a set of institutional arbitration rules*" for an arbitration clause to be enforceable.

66 Furthermore, even if the arbitral seat is not specified in the arbitration clause, national courts with jurisdiction over the parties usually require parties to conduct arbitration *"in a neutral arbitral seat", "or to interpret the provision as permitting the claimant to select the arbitral seat*" (page 827, Born). As Blue Inc is the claimant in the Kanpai distribution dispute, and the intent to arbitrate between both parties is clear, it is Blue Inc's intention to settle the dispute in Tokyo in accordance with UNCITRAL Arbitration Rules where the award shall be final and binding upon the parties.

67 Since an effective arbitration agreement relating to the exclusive distributorship agreement for Kanpai has been established, and there is an existing dispute, it is to be resolved by arbitration according to the exclusive distributorship agreement.